No. 07-1239

In The
Supreme Court of the United States

DONALD C. WINTER,
Secretary of the Navy, *et al.*,

Petitioners,

v.

NATURAL RESOURCES
DEFENSE COUNCIL, INC., *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR *AMICI CURIAE* DEFENDERS OF WILDLIFE, HUMANE SOCIETY OF THE UNITED STATES, CENTER FOR BIOLOGICAL DIVERSITY, OCEANA, INC., SIERRA CLUB, THE WILDERNESS SOCIETY, ANIMAL LEGAL DEFENSE FUND, AND GREENPEACE, INC. IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICI CURIAE*[1]

Amici are non-profit conservation and animal protection organizations with longstanding interests in the effective implementation of the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. §§ 4321-4370(f), particularly with regard to ensuring that federal agencies adequately consider the actual and potential effects of their actions on wildlife.

Defenders of Wildlife ("Defenders") is a non-profit organization with over one million members and supporters across the country. Defenders is dedicated to the protection and restoration of all native wild animals and plants in their natural communities.

The Humane Society of the United States ("HSUS") is a non-profit organization dedicated to the protection of animals. HSUS has over 10.5 million members and constituents nationwide, including nearly 1.25 million members and constituents in California, many of whom observe, study, and photograph marine mammals along the California coast.

The Center for Biological Diversity Plaintiff ("CBD") is a non-profit membership organization with its headquarters in Tucson, Arizona. Striving to

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than *amici curiae,* their members, or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

secure a future for animals and plants hovering on the brink of extinction and for the wilderness they need to survive, on behalf of its more than 180,000 members and supporters, CBD is actively involved in species and habitat protection advocacy throughout the United States.

Oceana, Inc., is a non-profit international advocacy organization dedicated to protecting and restoring the world's oceans through policy, advocacy, science, law, and education. Oceana has over 37,000 members around the world. Among other objectives, Oceana campaigns to protect marine habitat from destructive fishing practices; to conserve and restore the populations of at-risk marine species; and to protect ocean ecosystems from the damaging effects of global climate change.

The Sierra Club was founded in 1892 and is the nation's oldest grassroots environmental organization, with more than 725,000 members nationwide. The Sierra Club's organizational mission is to explore, enjoy, and protect the wild places of the earth; to practice and promote the responsible use of the earth's ecosystems and resources; and to educate and enlist humanity to protect and restore the quality of the natural and human environments.

The Wilderness Society is a nonprofit organization with over 300,000 members and supporters across the country. The Wilderness Society's mission is to protect wilderness and inspire Americans to care for our wild places.

The Animal Legal Defense Fund ("ALDF") is a national non-profit organization with over thirty years of experience litigating cases and analyzing legal issues concerning animals. On behalf of its more than 110,000 members throughout the country, ALDF has litigated numerous cases addressing endangered species, marine mammals, and other wildlife issues.

Greenpeace, Inc. is a non-profit environmental organization incorporated in California. The mission of Greenpeace, which currently has approximately 250,000 members in the United States, is to raise public awareness of environmental problems, including such problems that adversely affect marine mammals.

All *amici* seek to protect and restore wildlife through participation in administrative proceedings before government agencies, litigation in federal court, and public education activities. In carrying out these activities, *amici* and their members participate extensively in NEPA processes pertaining to federal agency actions that may significantly affect wildlife, including by commenting on Environmental Impact Statements ("EISs") and Environmental Assessments ("EAs") that address wildlife effects of federal actions. In addition, when the NEPA process is not implemented sufficiently to consider an adequate range of alternatives or to otherwise take a hard look at environmental impacts, *amici* rely on litigation to ensure that NEPA's purposes are fulfilled. The position advanced by the government here would, if adopted by the Court, greatly impede the ability of

amici to rely on NEPA to ensure a meaningful consideration by federal agencies of the impacts of their actions on wildlife.

SUMMARY OF ARGUMENT

1. The government's contention that respondents failed to establish injury sufficient for preliminary injunctive relief not only improperly discounts the lower courts' factual findings of "almost certain" irreparable harm to many thousands of marine mammals, App. 87a, but it also confuses the nature of irreparable injury in a NEPA case. Because NEPA's fundamental function is to ensure that environmental concerns are "integrated into the very process of agency decisionmaking," *Andrus v. Sierra Club*, 442 U.S. 347, 350 (1979), when, as here, an agency fails to produce an EIS addressing potentially significant effects *before* the agency action is implemented, the very premise underlying NEPA is that "real environmental harm will occur through inadequate foresight and deliberation" by agency decisionmakers. *Sierra Club v. Marsh*, 872 F.2d 497, 502, 504 (1st Cir. 1989).

In this case, that premise is fully borne out by respondents' detailed expert declarations and other record evidence pinpointing important impacts and alternatives never addressed by the Navy, and predicting consequences far more severe than those which the government acknowledges. This is clearly

sufficient to satisfy respondents' threshold burden of establishing irreparable injury, especially where the *denial* of preliminary injunctive relief would be tantamount to depriving respondents of *any* effective judicial remedy for the Navy's failure to prepare an EIS before embarking on an environmentally harmful course of action.

2. The government's contention that respondents could establish irreparable injury only by proving "long-lasting harm to a species as a whole," Pet. Br. at 19-20, is groundless. Because respondents and their members make routine use of the marine resources off the coast of southern California to observe, photograph, and otherwise enjoy marine life in the specific geographical areas being impacted by the Navy's operations, respondents' demonstration of a significant threat to *their* concrete interests by virtue of the Navy's failure to prepare an EIS should be sufficient to establish irreparable injury irrespective of any potential species-wide effect from the training exercises. *Cf. Lujan v. Defenders of Wildlife,* 504 U.S. 555, 572 (1992) (plaintiffs may "seek[ ] to enforce a procedural requirement the disregard of which could impair a separate concrete interest of theirs (e.g. . . . the procedural requirement for an [EIS] before a federal facility is constructed next door to them)").

3. Contrary to the government's contention, the Navy's preparation of an EA did not eliminate either the legal need for, or the practical value of, an EIS. The courts have rejected identical arguments because

the central legal function of an EA is to determine *whether* an EIS is even required and, moreover, EISs are subject to far more stringent requirements which were not followed here. In any case, the lower courts made specific findings that the EA did not even *address* important impacts and alternatives, let alone "fulfill the purposes" of an EIS. Pet. Br. at 49.

ARGUMENT

I. INTRODUCTION

Amici do not address in this brief the first question on which the Court has granted review; nor do *amici* discuss whether the balance of equities in this particular case supported the issuance of a preliminary injunction. Both of those issues are thoroughly addressed in the Brief of Respondents.

Rather, the focus of this brief is on several legal arguments advanced by the government concerning the test that should be applied in order for preliminary injunctive relief to be granted in NEPA cases, particularly in cases involving potentially significant effects on wildlife. As a practical matter, the government's position would, if adopted, make it virtually impossible for district courts to issue preliminary injunctive relief for even blatant violations of NEPA and, indeed, it would lead to the counterintuitive result that the lower courts must, as a general rule, allow an environmentally destructive action to proceed regardless of whether the action should have

been preceded by preparation of an EIS. To appreciate why this is so, it is necessary to first briefly summarize the government's approach to the preliminary injunction standard in this case.

The government argues that there is "considerable scientific uncertainty" surrounding the potential effect of the Navy's training exercises on marine mammals that inhabit the biologically rich waters off the coast of southern California. Brief for the Petitioners ("Pet. Br.") at 19; *id*. at 39. Importantly, however, that "uncertainty" does not concern *whether* marine mammals will be adversely affected by the training exercises, because even the Navy's own EA concluded that *tens of thousands* of marine mammals will suffer some form of impairment of their behavior or physical well-being. *Id*. at 9-10; *see also* Pet. App. ("App.") at 75a ("The EA estimates that the use of MFA sonar in the SOCAL exercises will result in 564 instances of physical injury including permanent hearing loss [ ] and nearly 170,000 behavioral disturbances").

In fact, while the government focuses much of its brief on whether the "mere possibility" of environmental injury is sufficient to support a preliminary injunction, Pet. Br. at 39, the lower courts *actually* made factual findings – based on detailed declarations submitted by leading marine mammal experts, and other extensive record evidence – that "irreparable harm to marine mammals *will almost certainly result* should the Navy be permitted to conduct its remaining exercises," App. 87a (emphasis added);

that "NRDC had established 'to a *near certainty*' that use of MFA sonar in the SOCAL exercises will cause irreparable harm to the environment," App. 75a (emphasis added); and that there is "overwhelming" evidence that mid-frequency sonar of the type employed by the Navy here is associated with "mass stranding" events and other serious injuries to various species of marine mammals. App. 14a.[2]

In short, the record leaves no doubt that the Navy's action *will* indeed cause substantial environmental harm – which the lower courts held should have been examined further in an EIS – and the only "uncertainty" is how wide-ranging that harm will be, with regard to both the individual animals affected and the marine mammal populations residing off the coast of California. However, the government does not argue only that the *balance of harms* in this particular case was sufficient to deny preliminary injunctive relief. Rather, it advances the far more extreme proposition that, even assuming the lower courts

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[2] *See also* J.A. 470-71 (declaration by a contracting scientist for the National Marine Fisheries Service ("NMFS") that the "Navy's 14 major exercises individually and collectively present a significant risk to the marine mammals off California"); *id.* at 475 ("Even apart from strandings and other acute responses, the cumulative effects of 14 major exercises . . . may be highly significant for some California populations."); *id.* at 582 (declaration by cetacean researcher and member of the Scientific Committee of the International Whaling Commission that "[b]ased on our research, I believe that there is significant potential for population-level effects, particularly if the displacement coincides with seasonal breeding or foraging").

were correct that there *was* a likely NEPA violation because the Navy should have prepared an EIS to address potentially significant effects on the marine environment, *and* that thousands of marine mammals in the vicinity of the training exercises are being adversely affected by them, that would still be inadequate to support a preliminary injunction *irrespective* of any equitable factors militating against such relief in this particular case.

Indeed, the Navy goes so far as to argue that the presence of "scientific uncertainty" as to the extent of environmental harm that an action will cause is sufficient to preclude a finding of *any* irreparable injury, even before an agency has undertaken a legally mandated EIS for the precise purpose of evaluating such impacts and alternatives that may avoid or mitigate environmental threats. Pet. Br. at 19, 39. Even further, in the case of wildlife effects in particular, the government maintains that to establish any "irreparable harm" at all the "organizational respondents would have to *show permanent or long-lasting harm to a species as a whole. . . .*" Pet. Br. at 19-20 (emphasis added).

As discussed below, however, these aspects of the government's argument – which extend far beyond that which is necessary for the Court to resolve the case at hand – are based on a misapprehension of NEPA's core purpose, as it has been articulated by this Court in many precedents, and how it should factor into a preliminary injunction analysis. Those precedents dictate the conclusion that, when there is

a likely NEPA violation – and particularly a failure to prepare an EIS – a significant risk of harm to the environment occasioned by the violation is ordinarily sufficient to constitute "irreparable injury" warranting issuance of a preliminary injunction. In addition, the government's approach is predicated on a fundamental misunderstanding of how adverse impacts to wildlife may – as in this case – threaten irreparable injury in a particular geographical area regardless of whether the action will have impacts on a wildlife "species as whole." Pet. Br. at 44. Finally, the Navy's notion that its preparation of an EA somehow rendered its failure to prepare an EIS harmless error, *see* Pet. Br. at 49, conflates the legally distinct roles these documents play in the statutory scheme, and also disregards the lower courts' factual findings that, notwithstanding its length, the Navy's EA gave short shrift to several important issues.

II. IN LIGHT OF NEPA'S OVERRIDING PURPOSE TO INJECT ENVIRONMENTAL CONSIDERATIONS INTO AGENCY DECISION MAKING, THERE IS IRREPARABLE INJURY WHEN AGENCIES FAIL TO CONSIDER SERIOUS RISKS OF ENVIRONMENTAL HARM IN AN EIS BEFORE TAKING ACTION.

A. The Court's Approach To The Irreparable Injury Issue Must Consider Whether NEPA's Purpose Can Be Met Without Injunctive Relief.

1. It is well established that, in evaluating whether to craft injunctive relief to remedy a particular statutory violation, a reviewing court must consider the extent to which such relief is appropriate in light of the "purpose and language of the statute under consideration. . . ." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 314 (1982). Although the government pays lip service to that principle, *see* Pet. Br. at 49, its argument actually runs roughshod over the "purpose and language" of NEPA, and it also fails to come to grips with why the Court's analysis in *Weinberger* and the other precedents cited in the government's brief actually compel the conclusion that serious irreparable injury ordinarily *does* exist when an agency implements an environmentally risky action in the absence of a legally mandated EIS.

In *Weinberger*, the Court upheld the district court's discretion to determine that a particular violation of the Federal Water Pollution Control Act

("FWPCA"), 33 U.S.C. §§ 1251-1387 – which involved the Navy's discharge of ordnance into the ocean – did not need to be remedied by an immediate injunction against such discharges because the "purpose" of the FWPCA, to protect the "integrity of the Nation's waters," could be achieved through relief *other than an injunction*, namely, an order directing the Navy to apply for a permit. 456 U.S. at 315; *id.* at 314-15 ("The integrity of the Nation's waters, however, not the permit process, is the purpose of the FWPCA . . . [T]he discharge of ordnance *had not polluted the waters*, and, although the District Court declined to enjoin the discharges, *it neither ignored the statutory violation nor undercut the purpose and function of the permit system*.") (emphasis added).

Likewise, in *Amoco Prod. Co. v. Vill. of Gambell, Alaska*, the Court held that a finding of a likely violation of the Alaska National Interest Lands Conservation Act ("ANILCA"), 16 U.S.C. § 3120, did not necessitate the issuance of preliminary injunctive relief because the "underlying substantive policy the [ANILCA] process was designed to effect – preservation of subsistence resources" for Alaskan natives – could be served without enjoining the oil and gas exploration activities at issue. 480 U.S. 531, 544 (1987). While observing that generally "[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable," and that "[i]f such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction

to protect the environment," in that case, the district court had made the factual determination that the "exploration activities would not significantly restrict subsistence uses," and hence preliminary injunctive relief was not needed to accomplish the "underlying substantive policy" embodied in ANILCA. *Id.* at 544-45.

As these and other precedents instruct, therefore, a court's injunction analysis cannot occur in either a factual or a legal vacuum; rather, a district court has broad discretion to determine whether injunctive relief is appropriate under the particular facts of the case, but the court must also assess whether the statutory purpose can meaningfully be furthered by relief other than an injunction. Indeed, this Court has stressed that a "court sitting in equity cannot 'ignore the judgment of Congress deliberately expressed in legislation,'" and hence it is the court's role to assess whether the "selection of an injunction *over other enforcement mechanisms*" is appropriate to effectuate the scheme adopted by Congress. *United States v. Oakland Cannabis Buyers' Cooperative,* 532 U.S. 483, 497-98 (2001) (emphasis added; internal citation omitted); *cf. Weinberger,* 456 U.S. at 314 (explaining that, in *Tenn. Valley Auth. v. Hill*, 437 U.S. 153 (1978), the Court had determined that the "purpose and language of the [Endangered Species Act ("ESA")] limited the remedies available to the District Court").

B. Given NEPA's Purpose and Procedural Function, Irreparable Injury Exists When Significant Environmental Risks Are Not Addressed In A Legally Required EIS Before The Agency's Action Is Implemented.

1. When the foregoing analysis is applied to NEPA, it dictates the conclusion that plaintiffs in NEPA cases certainly satisfy the irreparable injury element of the test for injunctive relief when they establish that an agency has failed to prepare an EIS that is likely required by law, and that the statutory violation, as in this case, poses a "significant risk" of harm to the environment and to the plaintiffs' concrete interests in the affected resources. *Greater Yellowstone Coalition v. Flowers*, 321 F.3d 1250, 1261 (10th Cir. 2003). Indeed, given NEPA's unique "purpose and language," *Weinberger*, 456 U.S. at 314, in most cases it is simply impossible for the statutory scheme to be carried out in the manner intended by Congress unless the *status quo* is maintained *while* a legally mandated EIS is being prepared.

As this Court has recently reaffirmed, NEPA is "intended to reduce or eliminate environmental damage and to promote 'the understanding of the ecological systems and natural resources important to' the United States." *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 756 (2004) (quoting 42 U.S.C. § 4321). However, in contrast to substantive statutes like the FWPCA, ANILCA, and the ESA, "'NEPA itself does not mandate particular results' in order to accomplish'" its

goal of increased environmental protection. *Pub. Citizen*, 541 U.S. at 756 (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989)). Instead, the "NEPA EIS requirement" is designed to inject environmental considerations "in the agency decisionmaking process itself," and to "'help public officials *make decisions that are based on understanding of environmental consequences*, and take actions that protect, restore, and enhance the environment.'" *Id.* at 768-69 (emphasis added) (quoting 40 C.F.R. § 1500.1(c)).[3]

Because "NEPA's core focus [is] on improving agency decisionmaking," *Pub. Citizen*, 541 U.S. at 769 n.2, and specifically on ensuring that agencies take a "hard look" at potential environmental impacts and environmentally enhancing alternatives "as part of the agency's process of deciding whether to pursue a particular federal action," *Baltimore Gas and Elec. Co. v. Nat. Res. Def. Council*, 462 U.S. 87, 100 (1983), the "moment at which an agency must have a final statement ready 'is the time at which it makes a recommendation or report on a *proposal* for federal

[3] *See also Robertson*, 490 U.S. at 349 (The EIS requirement "ensures that the agency, in reaching its decision, will have available, *and will carefully consider*, detailed information concerning significant environmental impacts") (emphasis added); 40 C.F.R. § 1502.1 ("The primary purpose of an environmental impact statement is to serve as an action-forcing device to insure that the policies and goals defined in the Act are infused into the ongoing programs and actions of the Federal Government.").

action.'" *Kleppe v. Sierra Club*, 427 U.S. 390, 406 (1976) (emphasis in original) (quoting *Aberdeen & Rockfish R. Co. v. Students Challenging Regulatory Agency Procedures*, 422 U.S. 289, 320 (1975)); *see also* 42 U.S.C. § 4332(C). This requirement is designed to "place[ ] upon an agency the obligation to consider every significant aspect of the environmental impact" at a stage when such impacts can most meaningfully influence the agency's deliberations, *i.e.,* after the agency has settled on a concrete "proposed action," but *before* the decision and its environmental effects are a *fait accompli*. *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council*, 435 U.S. 519, 553 (1978).[4]

2. This Court's longstanding recognition of NEPA's fundamental "action-forcing" function of ensuring that "environmental concerns are . . . interwoven into the fabric of agency planning," *Andrus*, 442 U.S. at 351, has enormous implications for how NEPA violations ordinarily should be remedied. Contrary to the government's suggestion that a NEPA

[4] *See also Andrus*, 442 U.S. at 351 (the CEQ regulations "require federal agencies to 'integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values'") (quoting 40 C.F.R. § 1501.2); *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n of Okla.*, 426 U.S. 776, 787 (1976) ("NEPA's instruction that all federal agencies comply with the impact statement requirement and with all the other requirements of § 102 'to the fullest extent possible,' 42 U.S.C. § 4332, is neither accidental nor hyperbolic. Rather, the phrase is a deliberate command that the duty NEPA imposes upon the agencies to consider environmental factors not be shunted aside in the bureaucratic shuffle.").

violation may effectively be rectified without injunctive relief addressing the effects of the challenged action *before* they occur, *see* Pet. Br. at 37 (suggesting that "even where relief is warranted" for a NEPA violation, only "declaratory" relief may be appropriate), that approach clearly converts NEPA compliance into a make-work exercise and, indeed, "makes a mockery of the EIS process, converting it from analysis to rationalization." Leslye A. Herrmann, *Injunctions for NEPA Violations: Balancing the Equities*, 59 U. Chi. L. Rev. 1263, 1289 (1992). As this Court has stressed time and again, that is precisely what Congress did *not* intend when it imposed the EIS obligation on all federal agencies. *See Pub. Citizen*, 541 U.S. at 768-69 (rejecting the concept of NEPA compliance that can have "no effect" on agency decisionmaking because "'*NEPA's purpose is not to generate paperwork – even excellent paperwork – but to foster excellent action*'") (quoting 40 C.F.R. § 1500.1(c) (emphasis added); *see also Andrus*, 442 U.S. at 351 n.3 (an EIS must be "prepared early enough so that it can serve practically as an important contribution to the decisionmaking process and *will not be used to rationalize or justify decisions already made*.") (emphasis added).

Indeed, while noting that declaratory relief is authorized by the Administrative Procedure Act ("APA"), *see* Pet. Br. at 37, the government never explains *how* declaratory relief alone could in any meaningful way remedy an agency's failure to prepare an EIS before embarking on an action with potentially significant environmental effects. As this case illustrates, such

"relief" – *i.e.*, declaring the Navy's training exercises to be in contravention of NEPA *while the agency is implementing them* with no further restrictions – would not only be hollow, but would result in precisely the sort of "abstract exercise" that Congress sought to avoid. *Baltimore Gas and Electric Co.,* 462 U.S. at 100 ("Congress did not enact NEPA, of course, so that an agency would contemplate the environmental impact of an action as an abstract exercise.").[5]

For these reasons, it is commonplace for federal courts to issue injunctions pending agencies' compliance with NEPA, particularly when allowing the agency action to go forward will foreclose alternative courses of action that may entail less environmental damage and that the agency might elect to adopt based on its "hard look" in an EIS. *See* Daniel R. Mandelker, *NEPA Law and Litigation, 2d,* at § 4:61 (2008) ("In the usual case in which the court grants a preliminary injunction, it enjoins all further work until an adequate impact statement has been prepared or NEPA responsibilities have been met . . . .")

[5] It is also noteworthy that the APA itself provides that reviewing courts "*shall* . . . set aside" agency action found to be arbitrary, capricious, or "otherwise not in accordance with law" or that was adopted "without observance of procedure required by law." 5 U.S.C. §§ 706(2)(A), (D) (emphasis added); *see also FCC v. NextWave Personal Commc'ns*, 537 U.S. 293, 300 (2003) ("The [APA] requires federal courts to set aside federal agency action that is 'not in accordance with law,' which means, of course, *any* law, and not merely those laws that the agency itself is charged with administering.") (emphasis in original) (internal citation omitted).

(citing cases from the Second, Fourth, Eighth, and Ninth Circuits); *see also* William Rodgers, *Environmental Law* § 7.7 at 767 (1977) ("[NEPA's] purpose is to require consideration of environmental factors *before project momentum is irresistible, before options are closed, and before agency commitments are set in concrete*.") (emphasis added); 42 U.S.C. § 4332(C)(iii) (requiring that EISs address "alternatives to the proposed action").

3. The common-sense rationale for preliminary injunctive relief in NEPA cases was fully articulated by the First Circuit in two seminal NEPA decisions – *Massachusetts v. Watt*, 716 F.2d 946 (1st Cir. 1983) (Breyer, J.) and *Sierra Club v. Marsh,* 872 F.2d 497 (1st Cir. 1989) (Breyer, J.). In both those rulings, the court employed the

> traditional balancing test for issuing injunctions for NEPA violations. *However, the Circuit analyzes the factors in light of the statute's purpose*. In two opinions by [then] Judge Breyer, the First Circuit developed a test that accounts both for NEPA's lack of substantive requirements and for NEPA's goal of making government officials consider environmental factors in decisionmaking. Specifically, the court held in these cases that an increased risk that environmental harm will result from poorly informed decisionmaking can constitute irreparable injury.

Herrmann, 59 U. Chi. L. Rev. at 1285 (emphasis added) (footnotes omitted).

In *Massachusetts v. Watt*, the court rejected the government's argument that there would be no irreparable injury if certain oil lease sales were allowed to proceed in violation of NEPA. The court explained that NEPA's "aim is to make government officials notice environmental considerations and take them into account," and

> [t]hus, when a decision to which NEPA obligations attach is made without the informed consideration that NEPA requires, the harm that NEPA intends to prevent has been suffered . . . NEPA in this sense differs from substantive environmental statutes, such as the [FWPCA]. The [FWPCA] focuses upon the 'integrity of the Nation's Waters, not the permit process.' *Weinberger v. Romero-Barcelo*, 456 U.S. at 314. NEPA does the converse.

716 F.2d at 952. The court further reasoned that "[o]nce large bureaucracies are committed to a course of action, it is difficult to change that course – even if new, or more thorough, NEPA statements are prepared and the agency is told to 'redecide,'" and for that reason it is "appropriate for the courts to recognize this type of injury in a NEPA case, for it reflects the very theory upon which NEPA is based – a theory aimed at presenting governmental decision-makers with relevant environmental data *before* they commit themselves to a course of action." *Id.* at 952-53 (emphasis in original).

In *Sierra Club v. Marsh* – decided after *Village of Gambell* – the First Circuit elaborated on its understanding that the "harm at stake" in a NEPA violation

> consists of the added *risk* to the environment . . . of uninformed choice, a risk that arises in part from the practical fact that bureaucratic decisionmakers (when the law permits) are less likely to tear down a nearly completed project than a barely started project.

872 F.2d at 500-01 (emphasis in original). The court further reasoned that "the kinds of 'harms' that are relevant, and that may be 'irreparable,'" at the preliminary injunction stage, "will be different according to each statute's structure and purpose." *Id.* at 502-03 (citing *Village of Gambell*, 480 U.S. at 543 n.9).

Hence, given that NEPA accomplishes its objectives solely by injecting environmental considerations into the decisionmaking calculus, when an agency is permitted by a court to implement its action without first preparing a legally required EIS, the specific injury that Congress enacted NEPA to prevent – *i.e.*, "the risk . . . that real environmental harm will occur through inadequate foresight and deliberation" by agency decisionmakers – is, as both a practical and a legal matter, rendered "irreparable" because there is unlikely to be *any other effective relief* that the court may issue at the conclusion of the case. *Sierra Club v. Marsh*, 872 F.2d at 502, 504. Accordingly, the "courts should take account of this harm and its potentially 'irreparable' nature" in determining whether to issue

a preliminary injunction, *id.*, although "[t]his is not to say that a likely NEPA violation automatically calls for an injunction; the *balance* of harms may point the other way." *Massachusetts*, 716 F.2d at 953 (emphasis in original).

4. The First Circuit's analysis is consistent with this Court's rulings in *Weinberger*, *Village of Gambell*, and other cases holding that the "choice" ordinarily available to courts sitting in equity is "whether a particular means of enforcing the statute should be chosen over another permissible means; *their choice is not whether enforcement is preferable to no enforcement all*." *Oakland Cannabis Buyers' Coop.*, 532 U.S. at 497-98 (emphasis added). Consequently, when an injunction is the *only* discernible "means of meaningfully complying with the statute" – as is generally the case when a court finds that an agency is pursuing an environmentally harmful action *before* preparing a legally mandated EIS – that should, at the very least, weigh heavily in the traditional injunction analysis because, otherwise, the court is in effect "ignor[ing] the judgment of Congress, deliberately expressed in" NEPA itself. *Id.* at n.9 (internal quotation omitted); *see also American Hosp. Supply Corp. v. Hosp. Products, Ltd.*, 780 F.2d 589, 594 (7th Cir. 1986) (because the "premise of the preliminary injunction is that the remedy available at the end of trial will not make the plaintiff whole," it follows that the "more limited that remedy, the stronger the argument for a preliminary injunction").

C. The Record Here Reflects, At Minimum, A Significant Risk Of Environmental Harm, And Hence Irreparable Injury, From The Navy's Implementation Of The Training Exercises Before Preparation Of A Legally Mandated EIS.

1. If the First Circuit's approach is applied here – as *amici* advocate – it is clear that, assuming that the Navy did violate NEPA by failing to prepare an EIS, respondents certainly demonstrated to the lower courts a sufficient risk of environmental harm stemming from that violation to establish irreparable injury "at the *threshold*" of the preliminary injunction analysis. *Massachusetts*, 716 F.2d at 952 (emphasis in original). Even aside from the fact that the government's position would leave respondents with no meaningful "means of enforcing" NEPA at all, *Oakland Cannabis Buyers' Coop.*, 532 U.S. at 498, even the Navy acknowledges that tens of thousands of marine mammals will in fact be adversely affected in some fashion by the training exercises at issue. *See* App. 75a; *see also* Resp. Br. at 6, 42-43. Moreover, the district court found that there was extensive record evidence – including detailed declarations from recognized marine mammal experts – establishing that the training exercises "*will cause widespread harm* to nearly thirty species of marine mammals,"

including some with extremely small populations. App. 77a (emphasis added).[6]

Although the Navy evidently disagrees with these experts – some of whom have conducted extensive research on sonar impacts on marine life – it has yet to prepare an EIS addressing their specific concerns and, once again, even the government maintains that there is, at the very least, "considerable scientific uncertainty" regarding the actual effects of the training exercises, Pet. Br. at 39 (internal quotation omitted), especially because mid-frequency sonar "has been 'implicated as a contributing factor' in a number of mass stranding events in other locations. . . ." Pet. Br. at 41. Accordingly, where leading marine biologists have predicted far graver impacts than the government has acknowledged, and even the Navy implicitly concedes that it may prove to be wrong about the effects associated with the training exercises, this would appear to be the paradigmatic situation in which the serious "*risk* implied by a violation of NEPA is that real environmental harm will occur through inadequate foresight and deliberation,"

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[6] *See, e.g.,* J.A. 471-72 (the training exercises "present a significant risk to marine mammals off California" and "could seriously impact marine mammals over very considerable distances, and at exposure levels that the Navy's analysis does not account for"); J.A. 475 (the "cumulative effects of 14 major exercises . . . may be highly significant for some California populations"); J.A. 602 ("mid-frequency active sonar in the Southern California operations area . . . poses a clear risk of severe injury and strandings" for various whale species).

and hence where the "irreparable injury" element of the traditional preliminary injunction analysis is easily satisfied. *Sierra Club v. Marsh*, 872 F.2d at 504 (emphasis added).

2. As the foregoing discussion suggests, the government's notion that the "considerable scientific uncertainty" surrounding the long-term environmental effects of the training exercises somehow cuts *against* the maintenance of the *status quo* while a legally mandated EIS is being prepared, Pet. Br. at 39, also runs counter to NEPA's fundamental purpose to ensure that federal agencies inform themselves to the "fullest extent possible," 42 U.S.C. § 4332, *before* taking action with potentially irreversible environmental impacts. Indeed, in keeping with NEPA's overarching design to ensure that the "agency will not act on incomplete information, *only to regret its decision after it is too late to correct*," *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 371 (1989) (emphasis added), the NEPA implementing regulations specifically provide that two of the factors *supporting* the need for an EIS are the "degree to which the possible effects on the quality of the human environment are *highly uncertain or involve unique or unknown risks*," and the "degree to which the effects on the quality of the human environment are *likely to be highly controversial*." 40 C.F.R. §§ 1508.27(b)(4), (5) (emphasis added).

Plainly, however, if "highly uncertain" and "highly controversial" environmental risks support preparation of an EIS before an action is implemented,

it makes no legal or logical sense for the very same factors to counsel *against* maintaining the *status quo* before the EIS can even be brought to bear on agency decisionmaking. Indeed, the NEPA implementing regulations contradict any such notion, by providing unequivocally that, until an agency *completes* the EIS process through issuance of a formal Record of Decision, "*no action concerning the proposal shall be taken* which would . . . [h]ave an adverse environmental impact." 40 C.F.R. § 1506.1(a)(1) (emphasis added); *see also* 40 C.F.R. § 1508.18 (defining a "major federal action" that necessitates preparation of an EIS as an action "with effects that *may be major* . . . Major reinforces but does not have a meaning independent of significantly.") (emphasis added); *cf. Nat'l Audubon Soc'y v. Hoffman*, 132 F.3d 7, 13 (2d Cir. 1997) ("When the determination that a significant impact will or will not result from the proposed action is a close call, an EIS should be prepared."); *Fritiofson v. Alexander*, 772 F.2d 1225, 1238-39 (5th Cir. 1985) (an EIS should be prepared when "the evidence before the court demonstrates that . . . the project *may* have a significant impact on the environment") (emphasis in original).[7]

[7] The NEPA regulations further provide that if there is "incomplete information" that is "essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement." 40 C.F.R. § 1502.22(a). Accordingly, the NEPA scheme contemplates not only that the lack of scientific certainty is *not* a basis on which the EIS

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III. TO OBTAIN AN INJUNCTION FOR A NEPA VIOLATION IMPLICATING WILDLIFE IMPACTS, RESPONDENTS NEED NOT DEMONSTRATE SPECIES-LEVEL EFFECTS.

In arguing that respondents were not entitled to injunctive relief, the government also contends that they were required to explain how an injunction would "redress an 'injury to [respondents]' rather than an 'injury to the environment.'" Pet. Br. at 43 (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.,* 528 U.S. 167, 180-81 (2000)). While that proposition is unassailable, the remainder of the government's syllogism – that respondents could only establish injury to themselves or their members by demonstrating a "likelihood of a harm to the *species as a whole*," Pet. Br. at 44 (emphasis added) – is impossible to reconcile with this Court's precedents, NEPA itself, or the record compiled below.

The government does not and cannot dispute that the "desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purposes" of both injury in fact and irreparable injury analysis. *Lujan*, 504 U.S. at 562. Plainly, however, an individual's interest in "us[ing] or observ[ing] an animal species" may be gravely impaired *through adverse impacts on wildlife in a specific area frequented by the individual* regardless of whether the

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process should be avoided but, to the contrary, that the EIS *itself* may be used to fill crucial data gaps that impede informed decisionmaking.

"species as a whole" will be driven to extinction by the action under review. Indeed, respondents' declarations here aver not only that they derive substantial recreational and other benefits from marine mammals off the coast of southern California *in particular*, but that the training exercises at issue imperil those interests in ways that do not necessitate a showing of species-level effects, although respondents *did* make that showing as well. *See* Resp. Br. at 48.

To begin with, the organizational respondents have submitted numerous declarations from their members attesting that they reside in coastal southern California and that they routinely endeavor to "use or observe" or otherwise enjoy marine mammals and other marine life in and near the specific locations where the training exercises are occurring. *See, e.g.,* J.A. 387 ¶ 11 (the Navy is "using mid-frequency active sonar systems in and near waters where I dive, boat, and photograph, and in and near waters that provide habitat for the species of fish and marine mammals that I observe and enjoy"); J.A. 398-99 ¶¶ 14-15 ("I regularly dive, work, and recreate in the waters off the coast of Southern California, particularly around the Channel Islands. I regularly enjoy seeing whales, dolphins, and fish in these waters."); J.A. 418 ¶ 7 ("I have made numerous whale-watching trips off southern California and have observed Blue and Gray whales, dolphins, and other species in the Santa Barbara Channel and in other southern California waters."). Accordingly, respondents' members are precisely the persons who "would obviously be

concretely affected" by sonar use that *does* threaten the region's marine life in ways that should be analyzed in an EIS. *Lujan*, 504 U.S. at 573 n.8; *cf. id.* at 572 n.7 ("under our case law, one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement").

Further, expert declarations and other record evidence point to several ways in which respondents' members' interests are threatened with serious irreparable injury regardless of whether the training exercises harm an entire species. First, scientists who have conducted empirical research on marine mammal abundance in various locations where mid-frequency sonar has been used in the past have observed "dramatic and statistically significant declines" in marine mammal presence in those areas. J.A. 591; *see also* J.A. 582 ("Based on my research, I am also concerned that the Navy's major exercises could cause wide-scale displacement of some species of cetaceans off the coasts of California and Mexico."); J.A. 583 ("Based on our research, I believe that there is significant potential for population-level effects, particularly if the displacement coincides with seasonal breeding or foraging."); J.A. 656 ("None of the Cuvier's beaked whales that we have documented in our nine-year study have returned since the March 15 naval exercise[.]").

Although, once again, the government disputes these experts' predictions that the training exercises

risk "population-level effects on marine mammal species off the coasts of California and Mexico," J.A. 591, even the Navy's EA estimates that many tens of thousands of marine mammals could suffer "behavioral harassment," J.A. 183, which, among other effects, entails a "*reluctance . . . to return to the site of a previous intense sound exposure*." J.A. 167 (emphasis added). But even such *displacement* of a large number of marine mammals from their traditional habitats along the coast of Southern California – with no assurance that they will ever return – threatens the ability of respondents' members to continue to observe and otherwise enjoy these animals in the future.

Such a "significant risk of irreparable harm" to respondents' longstanding recreational interests in wildlife observation is sufficient to support preliminary injunctive relief regardless of whether any species is in fact driven to extinction. *Greater Yellowstone Coal.,* 321 F.3d at 1261; *id*. at 1256 (threats to the "primary breeding area for bald eagles in the Greater Yellowstone area" qualified as irreparable injury to plaintiffs' interests even if plaintiffs did not "establish harm to the species as a whole"); *cf. Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230 n.4 (1986) (conservation organizations "undoubtedly have alleged a sufficient 'injury in fact' in that the *whale watching and studying of their members* will be adversely affected by continued whale harvesting") (emphasis added); *Adams v. Freedom Forge Corp.,* 204 F.3d 475, 484-85 (3d Cir.

2000) (the "irreparable harm requirement is met if a plaintiff demonstrates a significant risk that he or she will experience harm that cannot be compensated after the fact by monetary damages").

In addition to the risk that the training exercises will at the very least displace marine mammals and other wildlife from locations where respondents' members have enjoyed them for many years, respondents' members must also confront the prospect that they will observe an animal that has been killed, injured, or otherwise harmed by the Navy's use of mid-frequency sonar. *See, e.g.*, J.A. 446 ("This year, I have noticed an increase in the number of rescues of younger sea lions not yet weaned from their mothers. It appears to me that younger sea lions are dying off in higher numbers than they have in the past."); *id.* at 448 ("Harm to dolphins, whales, seals, sea lions, and other marine mammals in these areas . . . will reduce my chances of observing healthy marine mammals and increase my chances of encountering dead or lethally injured marine mammals"). Once again, therefore, because of the potentially significant *local* effects of the use of mid-frequency sonar, respondents' members – who regularly "use the affected area" – are surely "persons 'for whom the aesthetic and recreational values of the area will be lessened'

by the challenged activity." *Laidlaw*, 528 U.S. at 183 (internal citation omitted).[8]

The government's notion that respondents' showing of irreparable injury is dependent on definitive proof of species-level impacts is also impossible to reconcile with NEPA itself. Indeed, the NEPA implementing regulations recognize that an action may warrant consideration in an EIS solely because it has *locally or regionally* significant effects on the human environment. *See* 40 C.F.R. § 1508.27(a) ("Significance varies with the setting of the proposed action. For instance, *in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole.*") (emphasis added).

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[8] *See also Ala. Wildlife Alliance v. Jensen,* 108 F.3d 1065, 1068 (9th Cir. 1997) (plaintiffs challenging an agency decision to allow commercial fishing in Glacier Bay National Park suffered serious "aesthetic and recreational harm" by seeing "sea lions in the bay with huge trolling lures hanging from their mouths"); *Humane Soc'y of the United States v. Hodel*, 840 F.2d 45, 52 (D.C. Cir. 1988) (organizations' members were injured by federal actions that resulted in their witnessing "animal corpses and environmental degradation" at federal wildlife refuges); *Fund for Animals v. Clark*, 27 F. Supp. 2d 8, 14-15 (D.D.C. 1998) (the combination of the injury suffered by plaintiffs due to federal defendants' procedural failure to comply with NEPA and "the aesthetic injury the individual plaintiffs would suffer from seeing" bison being killed in a federally authorized hunt met plaintiffs' "burden of demonstrating the presence of an irreparable injury" in the absence of a preliminary injunction).

Accordingly, as the Court of Appeals correctly found, "[a]n agency action can have 'significant effects' on the environment" – and particularly on the wildlife resources enjoyed by respondents' members – "short of threatened extinction." App. 66a; *see also Anderson v. Evans*, 371 F.3d 475, 490 (9th Cir. 2004) ("Even if the eastern Pacific gray whales overall . . . are not significantly impacted by the Makah Tribe's whaling, the summer whale population in the *local* Washington area may be significantly affected. Such local effects are a basis for a finding that there will be a significant impact from the Tribe's hunts.") (emphasis in original) (citing 40 C.F.R. § 1508.27(a)); *Fund for Animals v. Norton*, 281 F. Supp. 2d 209, 232-34 (D.D.C. 2003) ("[T]he impact of a proposed action on a local population of a species, even where all parties acknowledge that the action will have little or no effect on [a] broader population is a basis for finding that there will be a significant effect" that should be studied in an EIS) (internal quotation omitted). It surely makes no sense to hold that a level of environmental injury that is sufficient to trigger the EIS requirement – as is indisputably the case for locally or regionally significant wildlife impacts – is, at the very same time, legally incapable of supporting an injunction while that EIS is being prepared.[9]

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[9] Although it has no discernible relevance to this case, it is unclear what the government means when it argues that respondents lack a "*legally* cognizable interest in *individual members* of a species" that may be affected by the action under

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IV. THE NAVY'S PREPARATION OF AN ENVIRONMENTAL ASSESSMENT DOES NOT NEGATE THE NEED FOR AN EIS.

Contrary to the government's contention, the Navy's preparation of an extensive EA does not mean that the Navy should proceed with its training exercises in the absence of a legally mandated EIS. *See* Pet. Br. at 49. Indeed, the CEQ has instructed that "[i]n most cases . . . a lengthy EA *indicates that an EIS is needed*" because it reflects that, at minimum, "it is extremely difficult to determine whether the proposal could have significant environmental effects." *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations*, 46 Fed. Reg. 18026, 18037 (1981); *see also Sierra Club v. Marsh*, 769 F.2d 868, 874 (1st Cir. 1985) (Breyer, J.) ("To announce that these documents – despite their

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review. Pet. Br. at 43 (emphasis added). Since *Association of Data Processing Serv. Organizations v. Camp,* 397 U.S. 150 (1970), it has been well established that to demonstrate Article III standing a plaintiff need not establish an injury to a "legal right" or a "legal interest," but, rather, must simply document an "injury in fact" that is fairly traceable to the challenged action or omission. *Id.* at 153; *see also Simon v. Eastern Ky. Welfare Org.*, 426 U.S. 26, 39-40 (1976). In any event, this Court has clearly held that a "*person who observes or works with a particular animal* threatened by a federal decision is facing perceptible harm, since the very subject of his interest will no longer exist." *Lujan*, 504 U.S. at 560-61 (emphasis added). Accordingly, although in this case respondents have apparently not relied on an injury pertaining to their relationship with any "particular animal," it is *not* the law that either standing or irreparable injury may never be based on such a harm.

length and complexity – demonstrate no need for an EIS is rather like the mathematics teacher who, after filling three blackboards with equations, announces to the class, 'You see, it is obvious.' ").

More important, contrary to the government's contention that the central purpose of NEPA is "fully served" through preparation of an EA, Pet. Br. at 49, the reality is that "an EA and an EIS serve very different purposes" in the NEPA statutory scheme. *Sierra Club,* 769 F.2d at 875. Consequently, the courts have held that "under NEPA and its implementing regulations" an EA cannot be accepted "as a *substitute* for an EIS" regardless of the "time, effort, and analysis that went into [the EA's] production." *Id.* at 875 (emphasis in original); *id.* at 874 (finding that an EA "consisting of at least seven documents containing 350 pages of text, plus numerous pages of diagrams, maps, and technical drawings" did not render an EIS superfluous); *see also Anderson*, 371 F.3d at 494.

An EA is a device created by the CEQ regulations for the principal purpose of providing agency decisionmakers with " 'sufficient evidence and analysis for *determining whether to prepare an [EIS].*' " *Public Citizen*, 541 U.S. at 757 (emphasis added) (quoting 40 C.F.R. § 1508.9(a)); *see also Weinberger v. Catholic Action of Hawaii/Peace Education Project*, 454 U.S. 139, 141 n.1 (1981) (An EA "is a document prepared by a federal agency in order to determine whether a formal [EIS] should be prepared."). Accordingly, when, as here, the agency concludes an EA with a determination that the agency's proposed action "*will not have a significant*

impact or cause significant harm to the environment, and as a result, an [EIS] need not be prepared," J.A. 226 (emphasis added), the clear message to agency decisionmakers is that no *further* steps need be taken to reduce environmental effects or to consider less environmentally destructive alternatives.

In contrast, when an agency does prepare an EIS in accordance with section 102(C) of NEPA, the agency is recognizing that there *are* potentially significant environmental impacts that should at least be carefully weighed in the decisionmaking process. Simply put, therefore, "[t]o treat an EA as if it were an EIS would confuse these different roles, to the point where neither the agency nor those outside it could be certain that the government fully recognized and took proper account of environmental effects in making a decision with a likely significant impact on the environment." *Sierra Club*, 769 F.2d at 875.

Further, consistent with the different legal functions served by the documents, the CEQ regulations impose far more stringent requirements on the preparation of EISs, including an obligation by the agency to engage in an "early and open process for determining the scope of issues to be addressed," 40 C.F.R. § 1501.7, as well as other opportunities for the affected public and federal and state natural resource agencies to weigh in on the agency's proposed course of action. *Sierra Club*, 769 F.2d at 875 (citing 40 C.F.R. §§ 1503.1, 1506.6).

EISs also must "[r]igorously explore and objectively evaluate all reasonable alternatives" to the agency's

preferred action. 40 C.F.R. § 1502.14. Yet although that obligation lies at the "heart of the [EIS]" process, *id.*, it surely was not satisfied by the Navy's EA, which did not even meaningfully address alternative safeguards that the Navy *itself* has incorporated into other training exercises. *See* Resp. Br. at 8, 43 n.13. In short, as this case illustrates and as the courts have consistently held, it is simply not the case that an EA serves the same legal or practical "purpose," Pet. Br. at 49, as a legally mandated EIS. *See also Anderson*, 371 F.3d at 494 ("[A]n EIS serves different purposes from an EA. An EA simply assesses whether there will be a significant impact on the environment . . . Preparation of an EIS [ ] ensures that decision-makers know that there is a risk of significant environmental impact and take that impact into consideration."); *Senville v. Peters*, 327 F. Supp. 2d 335, 369 (D. Vt. 2004).[10]

[10] For similar reasons, the government's suggestion (at 49) that *non*-NEPA documents prepared by NMFS could replicate the function of an EIS is baseless. Indeed, none of these documents was ever exposed to prior public comment or scrutiny by non-federal scientists, let alone prepared in accordance with the rigorous requirements that apply to EISs. Moreover, as NMFS has itself recently recognized, its analysis of "cumulative effects" for purposes of ESA compliance is "narrower than the NEPA definition of cumulative impacts." 73 Fed. Reg. 47869 (2008). That discrepancy is especially important here, where the "cumulative effects of 14 major exercises – *particularly when considered alongside future events and other naval exercises in the same areas* – may be highly significant for some California populations" of marine mammals. J.A. 475 (emphasis added).

CONCLUSION

For the foregoing reasons, the Court should reject the government's argument that respondents did not demonstrate sufficient irreparable harm to support issuance of a preliminary injunction.

Respectfully submitted,

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