

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.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

REPLY BRIEF FOR PETITIONERS

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The Ninth Circuit has affirmed a preliminary injunction that jeopardizes the Navy’s ability to conduct critical training for strike-group personnel deploying overseas during ongoing hostilities. The President determined that the injunction unacceptably undermines naval training exercises in the Southern California Operating Area (SOCAL) that are in the “paramount interest of the United States” and “necessary to ensure * * * combat effectiveness” in operations “essential to national security.” App. 232a. The Navy has conducted mid-frequency active (MFA) sonar training in SOCAL for over 40 years, and the Ninth Circuit acknowledged that “the record contains no evidence that marine mammals have been harmed” by such training. App. 76a. As explained in the petition, the Ninth Circuit fundamen-

tally erred in concluding that a preliminary injunction was proper in those circumstances.

The Ninth Circuit's decision conflicts with the judgment of Congress, the President, the Nation's top naval officers, the relevant agencies charged with protecting marine mammals (the National Marine Fisheries Service) and for interpreting the National Environmental Policy Act (NEPA) (the Council on Environmental Quality (CEQ)). It also conflicts with decisions of this Court and other courts of appeals. Respondents' submission that this Court should nevertheless deny review is unavailing.

A. CEQ Permissibly Construed Its Own Regulation In Determining That "Emergency" Circumstances Are Present

CEQ's determination that the need to carry out essential military training presents "emergency" circumstances under 40 C.F.R. 1506.11 is manifestly reasonable and therefore subject to controlling weight. Pet. 16-22. Yet, rather than accord such deference, the Ninth Circuit deferred to the *district court's* contrary reading—and did so under an abuse-of-discretion standard, thereby abdicating its own responsibility to review that legal issue de novo. That approach is plainly erroneous and conflicts with the decisions of this Court and other circuits. *Ibid.*

1. Respondents, like the district court, assert (at 30-31) that the "plain meaning" of "emergency" is limited to "an 'unexpected' or 'unforeseen' occurrence," but they provide no meaningful response to the numerous dictionaries and appellate decisions demonstrating that the term encompasses circumstances that demand urgent action, even if they may have been foreseen. Pet. 18-19

& n.2; cf. *MCI Telecomms. Corp. v. AT&T*, 512 U.S. 218, 227 (1994) (“accepted alternative meaning[.]” is reflected in multiple dictionaries). Respondents object (at 34-35) that those authorities do not address the “specific regulatory provision at issue,” but that obviously misses the point: Those sources speak to the *plain meaning* of “emergency” and demonstrate that the district court’s interpretation, sustained by the Ninth Circuit (44a-46a), is inconsistent with the understanding of “emergency” in other courts of appeals.

As those dictionary definitions and appellate decisions attest, a predicable “emergency” is not an oxymoron. For instance, if a cardiac patient fails to take his medicine, the resulting medical crisis is no less an emergency requiring immediate attention simply because it was foreseeable or the patient may have contributed to its cause. Simply put, an “emergency” exists if an immediate response is needed to avert a significant impending harm. “An assessment of blame regarding [the cause of] the predicament” is “irrelevant to a determination of whether [the government] is faced with an ‘emergency situation.’” *Yonkers Racing Corp. v. City of Yonkers*, 858 F.2d 855, 866 (2d Cir. 1988) (finding emergency caused by city’s “own intransigence”), cert. denied, 489 U.S. 1077 (1989).¹

¹ Respondents incorrectly assert (at 1) that the Navy has been intransigent regarding the need to prepare an EIS for the SOCAL exercises at issue here after a temporary restraining order (not preliminary injunction) was entered in earlier litigation concerning a 2006 naval exercise in Hawaii. NRDC brought suit nine days before the sonar component of that single exercise was to commence; a TRO entered after five days; the government appealed; and NRDC promptly settled the case, agreeing that the Navy did not concede the merits of any claims or that MFA sonar adversely affected marine mammals. Dist. Ct. Docket Entry No. 64, Ex. 3 para. 2.

2. Respondents defend (at 31, 35-36) the Ninth Circuit's decision not to "adjudicate" the definition of "emergency" by asserting that court applied the same de novo review of legal issues "applied * * * by all other circuits." The Ninth Circuit's approach, however, bears no resemblance to the de novo standard in other circuits. Rather than provide "substantial deference" to *CEQ's* interpretation of Section 1506.11, the court deferred to the *district court's* view. The court reasoned that, whether or not the district court was correct, it invoked the right general "legal principles" and did not make improper discretionary judgments. See App. 42a, 45a n.41; Pet. 19-20. That approach squarely conflicts with that of other courts of appeals, which properly determine afresh whether an agency's interpretations are entitled to deference. See, e.g., *Hoult v. Hoult*, 373 F.3d 47, 53-55 (1st Cir.) (applying de novo review of "pure issues of law," including statutory construction under *Chevron*), cert. denied, 543 U.S. 1002 (2004); *Serono Labs., Inc. v. Shalala*, 158 F.3d 1313, 1318-1322 (D.C. Cir. 1998) (reversing preliminary injunction based on de novo review of "statutory and regulatory interpretation" that failed to defer to agency under *Chevron*).

Ashcroft v. ACLU, 542 U.S. 656 (2004) (see Pet. 31), is not to the contrary. There, the Court affirmed a preliminary injunction against enforcement of the Child Online Protection Act without construing several statutory terms because the district court itself rested its injunction on a preliminary *factual* determination that did not implicate those terms. *Id.* at 660, 665-669. Here, the district court's injunction was based on a pure issue of law.

3. Rather than defend the Ninth Circuit's judgment on its own terms, respondents retreat to arguments that

the Ninth Circuit did not address or disavowed as a basis for its decision.

a. Respondents argue (at 26-29) that CEQ's interpretation of its regulation was "*ultra vires*" and contrary to NEPA. But, while the Ninth Circuit noted that the district court applied the relevant "legal rules" in concluding that NEPA would prohibit CEQ's alternative arrangements "in the absence of a legitimate 'emergency,'" App. 50a, 54a, the court did "not reach" the government's argument that CEQ's application of Section 1506.11 actually "comports with NEPA." App. 54a n.46; cf. Gov't C.A. Br. 34-40. The court found reaching that issue unnecessary because it concluded that the "district court did not abuse its discretion in determining that no *emergency* existed" under Section 1506.11 and that therefore CEQ lacked "authority to issue its order." App. 54a n.46 (emphasis added).

In any event, CEQ's "emergency" regulation is fully consistent with NEPA, which, like the Constitution, is not a suicide pact. Consistent with the "rule of reason" "inherent in NEPA and its implementing regulations," *Department of Transp. v. Public Citizen*, 541 U.S. 752, 767 (2004), NEPA directs federal agencies to prepare a detailed statement of environmental impacts "to the fullest extent possible," but "consistent with other essential considerations of national policy," 42 U.S.C. 4331(b), 4332(2)(C). The imperative to proceed with military training necessary for national defense before completion of an EIS is "possible" clearly is based on "essential considerations of national policy" and satisfies any conception of a "rule of reason."²

² Neither court below adopted respondents' view (at 27-28) that CEQ may authorize alternative arrangements for NEPA compliance only

b. Respondents assert (at 31-32) that CEQ, for its part, did not actually construe its own regulation. CEQ clearly concluded, however, that the “urgent national security” restrictions imposed by the district court’s injunction, and the Navy’s inability to complete an EIS before essential exercises must proceed, constitute “emergency circumstances” under Section 1506.11, App. 239a-240a, as the Ninth Circuit recognized. *E.g.*, App. 41a-44a (repeatedly discussing “CEQ’s interpretation”).

c. The canon of constitutional avoidance (Br. in Opp. 32-33) was not invoked by the courts below, App. 56a n.47, and does not apply here. Even if the canon applied to an agency’s interpretation of its *own* regulation—as opposed to questions of “congressional intent,” *Clark v. Martinez*, 543 U.S. 371, 381-382 (2005)—the word “emergency” in Section 1506.11 does not itself create constitutional doubt. And it is well-settled that no constitutional question arises where the ongoing vitality of prospective equitable relief is altered by changes in the underlying law, as occurred here when the Navy and CEQ invoked the “emergency circumstances” regulation. *Miller v. French*, 530 U.S. 327, 344-346 (2000); *Robertson v. Seattle Audubon Soc’y*, 503 U.S. 429, 437-441 (1992); cf. *Weinberger v. Romero-Barcelo*, 456 U.S.

where a different statute creates an “irreconcilable and fundamental conflict” making it “impossible” to complete the normal EIS process. The district court recognized that “unforeseen events * * * implicating national security” could properly qualify as “emergenc[ies]” justifying alternative arrangements and illustrated that rule by citing cases that did *not* involve an irreconcilable and fundamental conflict between NEPA and another statutory mandate. App. 113a-115a, 120a n.15. That decision, like that of the court of appeals, reflects the fact that respondents elected *not* to argue below that Section 1506.11 violates NEPA or that “NEPA disallows exceptions for emergencies.” App. 42a, 111a; see Pet. 16-17.

305, 319 (1982) (noting that executive action may authorize conduct previously declared unlawful).

d. Respondents assert (at 24-26) that the Ninth Circuit “correctly questioned” whether CEQ relied upon an adequate agency record in evaluating the injunction’s impact on essential strike-group training. The court, however, was careful only to “note” its view that respondents raised “serious question[s]” in this regard, App. 54a-55a, perhaps because respondents’ brief did not contend that the administrative record rendered CEQ’s determination arbitrary and capricious, Resp. C.A. Br. 31, and the district court did not address the issue. The district court’s interpretive ruling turned only upon the meaning of “emergency” in Section 1506.11, not the impact that its injunction would have on Navy training. App. 108a-124a.

B. The Preliminary Injunction Is Fundamentally Inconsistent With Established Equitable Principles

Even if the district court were correct that the Navy’s and CEQ’s emergency actions were invalid, preliminary injunctive relief was still inappropriate. Such relief disregards the equitable balance that Congress itself has struck between military readiness and marine mammal protection, is improperly based on the mere “possibility” of harm, and wholly fails to address the relative magnitude of harms where the national security and safety of the men and women of the armed forces are at stake. Pet. 22-32.

1. Respondents contend (at 10-12) that while Congress has authorized the Secretary of Defense to exempt the very military readiness activities at issue here from the MMPA’s substantive protections for marine mammals, “Congress has granted no similar exemption from

NEPA requirements.” That argument is correct as far as it goes. That issue, however, is distinct from whether a court, after finding a NEPA violation, may enjoin those essential military readiness activities based on its own assessment of military needs and appropriate substantive protections for marine mammals. As we have explained (Pet. 22-25), the courts’ equitable power is constrained by Congress’s “order[ing] of priorities in [this] given area.” *United States v. Oakland Cannabis Buyers’ Coop.*, 532 U.S. 483, 497 (2001).

Respondents do not dispute that, by exempting military readiness activities from the MMPA’s prohibitions when the Secretary of Defense finds it “necessary for national defense,” 16 U.S.C. 1371(f) (Supp. V 2005), the governing statute reflects Congress’s judgment about how to “properly balance[] the equities associated with military readiness and marine species protection.” H.R. Conf. Rep. No. 354, 108th Cong., 1st Sess. 669 (2003). Accordingly, when a court must determine whether and to what extent an injunction is appropriate, and the competing equities before it involve potential harm to marine mammals from training covered by Section 1371(f), the court lacks discretion to reject the equitable “balance that Congress has struck.” *Oakland Cannabis*, 532 U.S. at 497.

Respondents likewise misapprehend (at 12-14) the significance of the assumption (Pet. 24-25) that a court might appropriately order completion of an EIS. While other cases might warrant broader relief, the district court here lacked discretion to enjoin essential training based on its assessment of potential harm to marine mammals, so the most it could do was to order completion of an EIS. See *Romero-Barcelo*, 456 U.S. at 314-319 (affirming injunction allowing ongoing bombing ex-

ercises while requiring that Navy seek Clean Water Act permit).

2. Respondents contend (at 14-15) that while the Ninth Circuit ruled that the “mere possibility” of irreparable harm can warrant an injunction (App. 36a, 76a-77a), that ruling is “irrelevant” because the court affirmed a finding of a “near certainty” of harm. But the notion that “irreparable harm to *marine mammals* will almost certainly result,” App. 87a (emphasis added), cannot be squared with the court of appeals’ acknowledgment that the record contains “no evidence” that marine mammals have been harmed during the 40 years of MFA sonar training in SOCAL. Nor does it satisfy respondents’ burden of establishing irreparable harm to *their members*. Pet. 27. Accordingly, to tie the supposed environmental effects to aesthetic injury derivatively claimed by respondents, the Ninth Circuit rested its judgment on finding a “*possibility* of irreparable injury at the species or stock-level.” App. 77a (emphasis added); see Pet. 27-28. Given the 40-year history of MFA sonar training in SOCAL and the absence of *any evidence* of resulting harm, App. 76a, the mere “possibility” of harm is the most the court could have found. See Pet. 6-8, 28-29 & n.3. The court’s heavy (and misplaced) reliance on the Navy’s own Environmental Assessment (EA) reinforces that conclusion: The EA, which itself is entitled to substantial deference under the arbitrary-and-capricious standard of review, predicts only eight injuries to common dolphins, which the Navy would likely avoid with its mitigation measures, and does not pre-

dict *any* injuries for other species, including beaked whales. Pet. 6-7, 28 n.3.³

Respondents err in dismissing (at 16-18) the division of authority over whether a mere “possibility” of irreparable harm is sufficient as mere “linguistic” differences. The D.C. Circuit, for instance, holds that a movant must show “that irreparable injury is ‘likely’ to occur,” *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (1985) (per curiam), and has “emphasized the stringency of th[is] requirement,” *Reynolds Metals Co. v. FERC*, 777 F.2d 760, 763 (1985) (Scalia, J., joined by R.B. Ginsburg, J.), as a “high standard for irreparable injury.” *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (2006). Other courts have likewise concluded that the “mere possibility” of irreparable harm is insufficient. Pet. 26-27. The Ninth Circuit, by contrast, holds that its “‘mere possibility of irreparable harm’ standard” is satisfied without any “significant threat” of harm. App. 76a-77a.

3. Respondents make no attempt to portray the possible environmental harm to individual marine mammals as comparable to harm to the national security or to the thousands of Sailors and Marines whose safety overseas depends on the skilled deployment of MFA sonar. Instead, respondents contend (at 18-22) that the preliminary injunction will not hinder the Navy’s ability to “successfully train” its strike groups for deployment.

In defending the injunction’s 2200-yard MFA sonar “shut-down” zone (App. 139a), for instance, respondents incorrectly assert (at 19) that the Navy has repeatedly utilized similar “safety zones.” Although the Navy has

³ Indeed, while respondents claim that beaked whales would most likely be injured by MFA sonar, respondents have never contended that any of their members have seen or will attempt to see beaked whales.

required reduced power in (smaller) safety zones, it has never required that MFA sonar *shut down* at that range. App. 85a n.68, 225a-226a. The Ninth Circuit (and now respondents) instead rely on the fact that the Navy has used a 2200-yard shut-down zone for a specific *low-frequency active* (LFA) sonar system as justifying that restriction for MFA sonar. App. 85a. But LFA sonar is utilized for the *long-range* detection of submarines (including at ranges exceeding 100 miles), *NRDC v. Evans*, 279 F. Supp. 2d 1129, 1161 (N.D. Cal. 2003); C.A. Supp. E.R. 220, and it is self-evident that the tactical impact of a 2200-yard (1.25-mile) shut-down zone for LFA sonar involves entirely different considerations from those pertinent here. C.A. E.R. 1135; App. 277-285. The Ninth Circuit's willingness to strike out on its own in this complicated military and scientific context underscores the degree to which it has failed to defer to the professional military judgment of the Nation's most senior naval officers.

The court similarly discounted, and respondents label as "speculation" (at 19-20), the professional assessment of the Chief of Naval Operations (App. 345a) and the Commander of the Pacific Fleet (App. 353a-356a) that a 2200-yard shutdown zone would greatly risk the success of critical exercises. Seizing upon instances where individual commanders have *voluntarily* shut down sonar beyond 200 yards when tactical circumstances permitted, App. 83a-84a, the court disregarded the Navy's explanation that such voluntary actions cannot justify a *mandatory* 2200-yard shutdown zone regardless of tactical considerations. App. 354a-356a.

Respondents also contend (at 20) that the injunction's restrictions in significant surface ducting do not harm training because in SOCAL (unlike other loca-

tions) such conditions do not frequently occur. Not only does the infrequent prevalence of significant surface ducting in SOCAL cut against any notion of irreparable harm requiring relief; but also, when surface ducting *does* occur during ongoing exercises, the Navy must be able to train effectively in such conditions, which submariners exploit to conceal themselves. Pet. 32; App. 299a-300a, 333a. The injunction's 75%-power-reduction requirement—even when no marine mammal is present—renders realistic training impossible. *Ibid.*

The Ninth Circuit itself was sufficiently concerned about these impacts of the injunction that it took the extraordinary course of staying them sua sponte pending this Court's disposition of this case. App. 93a-95a. Accordingly—and in light of the Ninth Circuit's serious legal errors and the conflicts they create with decisions of this Court and other courts of appeals—review by this court is warranted.

* * * * *

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 2008