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 AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether CEQ permissibly construed its own regulation in finding "emergency circumstances."

2. Whether, in any event, the preliminary injunction, based on a preliminary finding that the Navy had not satisfied NEPA's procedural requirements, is inconsistent with established equitable principles limiting discretionary injunctive relief.

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of Petitioners Donald C. Winter, Secretary of the Navy, et al.[1]

PLF was founded over thirty years ago and widely is recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide, advocating limited government, individual rights, and free enterprise. PLF attorneys have litigated numerous cases addressing the need for a balanced approach to environmental regulation, and were counsel of record in this Court in *Rapanos v. United States*, 547 U.S. 715 (2006). PLF attorneys participated as amicus curiae in this Court, regarding the scope of the Endangered Species Act (ESA), in *National Ass'n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518 (2007), and *Bennett v. Spear*, 520 U.S. 154 (1997), and have authored amicus briefs in dozens of ESA cases in federal courts across the nation. *See, e.g.*, *GDF Realty Investments, Ltd. v. Norton*, 362 F.3d 286 (5th Cir. 2004).

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any 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 person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

PLF participated as amicus curiae in the Ninth Circuit in a case nearly identical to the one before this Court, dealing with an injunction of Navy sonar training exercises owing to ESA concerns. *Natural Res. Def. Council v. Gutierrez*, 457 F.3d 904 (9th Cir. 2006). PLF's analysis of the need for a proper balance between provisions of the ESA and the public's interest in a strong national defense, among other interests, will provide a valuable and necessary viewpoint to assist the Court in resolving this case.

SUMMARY OF ARGUMENT

Too often, federal courts subordinate equitable rules and statutory mandates to provisions of the Endangered Species Act. Much of this deference owes to courts' misapplication of this Court's "species above all else" language in *TVA v. Hill*, 437 U.S. 153, 188 (1978). By failing to recognize this Court's limitation of that language elsewhere in that opinion, and in subsequent cases, these courts functionally have turned the ESA into an overarching legal mandate to be read into all other decisions of the judiciary. This improper interpretation of the ESA erroneously obviates not just competing statutory mandates as established by Congress, but also traditional principles governing courts sitting in equity and weighing injunctive relief. This case is an unfortunate illustration of this judicial approach, as the Ninth Circuit has relegated to the status of afterthought, in the name of protecting listed species, the public interest in national defense and military readiness.

This approach has tangible real world effects for the public's interest in matters ranging from a strong national defense to a productive economy to protection against natural disasters. This Court should reaffirm

Congress's directive that the Endangered Species Act is not a predominant super-statute, nor a first among equals, but a law to be read and applied in concert with others and with the rules governing equitable relief.

ARGUMENT

I

CONGRESS DID NOT INTEND THE ESA TO SUBSUME TRADITIONAL EQUITABLE PRINCIPLES AND COMPETING STATUTORY MANDATES

For years, courts considering injunctive relief in the ESA context erroneously have dispensed with traditional principles of equity that govern injunctions. *See Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) (setting forth factors weighed in considering injunctive relief, including a comparison of the hardships of the parties and accounting for the public's interest). This phenomenon is most pronounced in the Ninth Circuit Court of Appeals, and the district courts under its ambit, where such procedure has become a controlling rule. *See Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 422 F.3d 782, 793-94 (9th Cir. 2005) ("The traditional preliminary injunction analysis does not apply to injunctions issued pursuant to the ESA."). The Ninth Circuit's putative source for this rule is a conglomeration of other of its own opinions asserting that "[i]n cases involving the ESA, Congress removed from the courts their traditional equitable discretion in injunction proceedings of balancing the parties' competing interests." *Id.* (quoting *Nat'l Wildlife Fed'n v. Burlington N. R.R., Inc.*, 23 F.3d 1508, 1511 (9th Cir. 1994) (citing *Friends of the Earth*

v. United States Navy, 841 F.2d 927, 933 (9th Cir. 1988)).

But Congress has done no such thing, as a reading of the ESA's text demonstrates. This Court long has held that a federal court's equitable powers may be limited by statute, but that courts sitting in equity have discretion unless "a statute clearly provides otherwise," and such traditional equitable powers may be "displaced only by a 'clear and valid legislative command.'" *United States v. Oakland Cannabis Buyers' Co-Op*, 532 U.S. 483, 496 (2001) (citations omitted). That federal courts such as the Ninth Circuit must cobble together authority for the proposition that Congress has taken these steps in the ESA is fair proof that Congress did not "clearly provide" for the displacement of equitable principles in the text of the ESA itself.

The process of judicial construction of statutes begins and generally ends with the text of the statute, where that text is clear; the "starting point must be the language employed by Congress." *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982) (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979)). "Thus, '[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.'" *Id.* (quoting *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). Furthermore, "[u]nless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning." *BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 127 S. Ct. 638, 643 (2006). To flesh out the meaning of any given text, and as part of the plain meaning analysis, courts may rely upon canons of interpretation. *See Chickasaw Nation*

v. United States, 534 U.S. 84, 85 (2001) (canons assist in determining legislative intent). With respect to the ESA, there is nothing on the face of the statute, nor is there any interpretable ambiguity, that would purport to affect the kind of clear displacement necessary for courts of equity to ignore their traditional rules.

Lower courts are quick to cite this Court's opinion in *TVA*, 437 U.S. 153, to support the issuing of even the most drastic injunctive measures in ESA cases without analyzing traditional equitable factors such as the balance of harms and the public interest. *Nat'l Wildlife Fed'n*, 422 F.3d at 794. These courts thus narrowly rely on one aspect of a fact-specific decision to rewrite a law to mean something it does not. *TVA*'s renowned "species above all else" language, 437 U.S. at 188, must be considered in light of the factual setting before this Court in that matter (the assured extinction of a listed species) and must not be applied, without discretion, to other, distinct settings.

This common-sense approach has been recognized by the more than two dozen federal courts–including this Court–that have declined to apply *TVA*'s fact-specific holding to the very different cases before them. *See, e.g., Amoco Prod. Co. v. Village of Gambell, Alaska*, 480 U.S. 531, 543 n.9 (1987) (addressing need to distinguish between distinct factual settings and the unique situation at issue in *TVA*); *Water Keeper Alliance v. United States Dep't of Def.*, 271 F.3d 21 (1st Cir. 2001) (declining to find that the ESA overrides all other competing interests); *Defenders of Wildlife v. Norton*, 257 F. Supp. 2d 53 (D.D.C. 2003) (declining to follow *TVA* because this Court in *TVA* was confronted with a unique set of facts). In sum, *TVA*, and the statute it interprets, deserve respect in applicable

settings, but do not change the way American courts discharge their constitutional duties.

This Court has recognized the error committed by lower courts that transform the ESA and *TVA* into a controlling meta-rule that governs all of American law. In *Amoco Production Co.*, this Court, while addressing *TVA*, still held that "a court must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." 480 U.S. at 542. So, even in ESA cases, the traditional balance of harms analysis must be employed, and where parties seeking an injunction have failed to meet their burden with respect to the traditional test, courts must deny injunctive relief. To this end, this Court held only four years after *TVA* that "[t]he grant of jurisdiction to ensure compliance with a statute hardly suggests an absolute duty to do so under any and all circumstances, and a federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law." *Weinberger*, 456 U.S. at 313.

At least as egregious as courts' use of the ESA to abrogate the traditional rules governing injunctive relief is their elevation of the ESA into a super-statute that effectively amends and controls all other statutory mandates under American law. This Court recently overturned a Ninth Circuit decision to this effect in *National Ass'n of Home Builders*, 127 S. Ct. 2518, 2532-33 (declining to read ESA provisions as superseding Clean Water Act rules). In numerous cases, including the recent example of *Florida Key Deer v. Paulison*, 522 F.3d 1133 (11th Cir. 2008), *see* Part II below, courts erroneously have read into other statutes the requirements of the ESA. That is, courts have

taken the fact-specific "species above all else" language from *TVA* to mean not just that environmental protection must take precedence over all other concerns when considering injunctive relief under the ESA, but also that this protection must be paramount even when the interpretations of other government or private actions are at issue. Such a rule implicitly amends every federal organic statute, amplifies all existing government authority, institutes a de facto national land use regime, and, to that extent, repeals all other contrary directives and guarantees.

This framework is wrong. First, it violates the well-established canon that implied amendments of organic statutes are disfavored. *Nat'l Ass'n of Home Builders,* 127 S. Ct. at 2532; *see United States v. Welden*, 377 U.S. 95, 103 n.12 (1964). "Outside [ ] limited circumstances, 'a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum.'" *Nat'l Ass'n of Home Builders*, 127 S. Ct. at 2532 (quoting *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976)). It also ignores the complete absence of any expressed congressional intent that the ESA cabins or amends all conflicting or contrary federal obligations. Presumably, Congress easily could have achieved that end through one of two means. Congress could have provided that, "notwithstanding any law to the contrary, federal agencies shall insure that none of their actions jeopardizes a listed species." Or, Congress could have dropped the reference to "insure" (implying a measure of control over the effects of activities) and could have directed that "no federal agency shall jeopardize a listed species." Instead of these options, Congress chose to condition the protections of the ESA by imposing their controls

within the existing framework of federal duties. Congress intended the ESA to be part of that vast regulatory machine, not the engine driving it.

This case represents a confluence of the "ESA trumps rules of equity" and "ESA as super-statute" approaches to judicial decision making. It is of note that the court below in this case ignored its own rule for ESA cases, and actually did undertake at least a cursory balancing of harms. *Natural Res. Def. Council v. Winter*, 518 F.3d 658, 702 (9th Cir. 2008) Still, the substantive thrust of the controlling rule is in evidence throughout the opinion, where potential harm to species is afforded predominance over any and all competing concerns.[2] The lower court was wrong to do this, for Congress itself mandated the opposite result—national security concerns trumping potential harm to species—when it amended the Marine Mammal Protection Act to exempt the sonar training at issue from the MMPA's requirements. 16 U.S.C. § 1371(f). The lower court thus has found statutory predominance where there is none (in the ESA) and ignored it where Congress has spelled it out explicitly. This Court should reverse the lower court's judgment and clarify the weight to be accorded the ESA in balancing competing statutory mandates and in the traditional judicial exercise of equitable discretion.

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[2] The lower court's formulation of merely potential harm as sufficient for enjoining the Navy's exercises is itself a deviation from traditional equitable rules that require a significant threat of harm amounting to irreparable injury. This reworking was necessary because there appears to be no evidence that the Navy's sonar training actually ever has harmed a protected species. *See* Petition for Certiorari at 26-29.

II

IMPROPER JUDICIAL DEFERENCE TO THE ESA CAN RESULT IN HARM TO THE AMERICAN PUBLIC

For this Court to reaffirm the ESA's place within the whole of American law is no mere academic exercise. A legal system that views the ESA as a super-statute dominating all other laws too often results in tangible harm to the American public. While examples are legion wherein the ESA has been misapplied to thwart socially beneficial actions both governmental and private, three case studies in particular illustrate the need for a return to a proper judicial balance between environmental protection and other public interests.

A. The ESA and Hurricane Katrina

In the immediate aftermath of Hurricane Katrina in 2005, observers wondered why the region was not more physically ready for a disaster that was not unforeseen. Soon, journalists and commentators alike began to identify deference to the Endangered Species Act as a contributor to the area's lack of preparation.

Mere days after Katrina, Ralph Vartabedian and Peter Pae of the *Los Angeles Times* reported on a hurricane barrier effort thwarted via ESA injunction:

> In the wake of Hurricane Betsy 40 years ago, Congress approved a massive hurricane barrier to protect New Orleans from storm surges that could inundate the city. But the project, signed into law by President Johnson, was derailed in 1977 by an environmental lawsuit. Now the question is:

> Could that barrier have protected New Orleans from the damage wrought by Hurricane Katrina?

Ralph Vartabedian & Peter Pae, *A Barrier That Could Have Been*, Los Angeles Times, Sept. 9, 2005, at A10.

The *Times* article quotes several authorities who answer that question in the affirmative. "'If we had built the barriers, New Orleans would not be flooded,' said Joseph Towers, the retired chief counsel for the Army Corps of Engineers New Orleans district." *Id.* Former Democratic Senator J. Bennett Johnston of Louisiana concurred: "It would have prevented the huge storm tide that came into Lake Pontchartrain." *Id.* Most definitively:

> Johannes Westerink, a professor of civil engineering at the University of Notre Dame who co-developed [a hurricane computer simulation program], said that based on the latest simulation, the system proposed after Betsy would have been an "effective barrier" against the surge from Hurricane Katrina. "It would have stopped that," he said.

Id.

The Lake Pontchartrain Hurricane Protection Project was designed to construct barriers to guard against just the type of levee overflow that resulted in Hurricane Katrina's destruction:

> The barrier would have run from a point near the Mississippi state line, known as Apple Pie Ridge, southwest across the marshlands all the way to the main levees of the Mississippi River, roughly 25 miles.

> Most of the barrier would have consisted of levees, roughly 9 feet to 14 feet high. In addition, two massive control structures were to be placed on the inlets to Lake Pontchartrain.

Id.

But in 1977, in response to a lawsuit brought by Save Our Wetlands, the federal district court for the Eastern District of Louisiana halted the project, finding that it would alter the quality of the area's water and therefore harm marine life. *Save Our Wetlands, Inc. v. Rush*, No. 75-3710 (E.D. La.) (Dec. 30, 1977). A year before *TVA*, a court thus disregarded the public's need to be protected from the kind of disaster that already had happened, instead blocking the project in the name of "shellfish and other aquatic life." *Los Angeles Times* at A10.

The court's decision issuing the injunction contains no discussion whatsoever of any interests other than those of protecting marine life. A traditional balance of harms analysis, or an examination of the public's interest in protection against large scale natural disaster, are not touched upon. The *Times* article quotes Joseph Towers, the former Corps chief counsel, for his assessment of the balancing the court declined to undertake: "'My feeling was that saving human lives was more important than saving a percentage of shrimp and crab in Lake Pontchartrain,' Towers said. 'I told my staff at the time that this judge had condemned the city. Some people said I was being a little dramatic.'" *Id.*

The *Save our Wetlands* suit was not sui generis. Writing a week after Katrina for *National Review*

Online, John Berlau of the Competitive Enterprise Institute recounted several more recent environmental lawsuits that hampered projects aimed at protecting the New Orleans area from catastrophic flooding. One such suit, brought by the Sierra Club and other groups, delayed improvements to 303 miles of levees across the region needed to protect against levee "failure [that] could wreak catastrophic consequences on Louisiana and Mississippi" according to an Army Corps spokesman. John Berlau, *Greens vs. Levees*, National Review Online, Sept. 8, 2005.[3] The suit claimed that the levee project potentially might harm "bottomland hardwood forests" that served as habitat for the Louisiana black bear and "all birds breeding in the lower Mississippi River valley." *Id.*

B. *Florida Key Deer v. Paulison*

The American public's understandable and simple desire for a nice place to call home is in large part the cause of the present credit crisis that, in turn, has helped slow the growth of the entire American economy. The dearth of affordable housing, particularly in high population areas such as South Florida, stems in some degree from the vast swaths of land off-limits to development because of environmental laws and the judicial decisions interpreting them.

One such decision is that of *Florida Key Deer v. Paulison*, 522 F.3d 1133 (11th Cir. 2008). This case centered on environmentalist concerns that the federal government's administration of the National Flood Insurance Program made flood insurance more accessible and thus encouraged development in the

[3] *Available at* www.nationalreview.com.

Florida Keys, and that this development put at risk endangered and threatened species including the Florida Key Deer. 522 F.3d at 1139-42. The district court enjoined the government from administering the Flood Insurance Program in areas that are habitat to the listed species. *Florida Key Deer v. Brown,* 386 F. Supp. 2d 1281 (S.D. Fla. 2005), and the Eleventh Circuit Court of Appeals upheld the injunction. *Key Deer*, 522 F.3d at 1148.

Like the present case, the *Key Deer* courts' improper reading of the ESA obviated both traditional equitable rules and the public interest promoted by competing federal statutes. Ignoring cases such as *Amoco Production Co.*, the district court cited *TVA* a half-dozen times to dispense with a bona fide examination of whether an injunction would harm the public's interest in affordable housing. *Brown*, 386 F. Supp. 2d at 1287-89. Having improperly established from the outset that *TVA* "forecloses" consideration of whether issuing the injunction would "disserve the public interest," *id.* at 1284, the district court proceeded to, in "an abundance of caution," undertake a mechanical analysis anyway. *Id.* at 1285. Not surprisingly, considering the context—and in a manner similar to that of the lower court in the present case—all interests other than the protection of listed species were dismissed as subordinate. *Id.* at 1287-89. The Eleventh Circuit affirmed this analysis without even cursorily addressing the public interest. *Key Deer*, 522 F.3d at 1147-48.

The courts in *Key Deer* essentially rewrote the National Flood Insurance Act to incorporate provisions of the ESA. Congress enacted the flood insurance program with the very limited purpose of offering flood

insurance policies to the public. FEMA, the agency responsible for administering the program, has no control over a private landowners' actions once the policy is sold, nor can the agency even condition the offer of a policy on ESA compliance prior to sale. *See generally* 522 F.3d at 1136-38. Nevertheless, the *Key Deer* courts ignored Congress's narrow legislative command in the name of *TVA*, writing that the ESA took precedence because "statutes written in broad, sweeping language should be given broad, sweeping application." *Brown*, 386 F. Supp. 2d at 1289 n.7.

The harm to the public resulting from the *Key Deer* injunction has yet to be fully realized, but its contours are emerging. Thousands of individual property owners are covered by the injunction, though their property never has been designated as habitat for the listed species. They must pay a fee to the environmentalists' law firm to petition the court to be removed from the injunction's ambit, as individual property owners are forbidden from petitioning the court themselves. Rob Busweiler, *'FEMA List is Holding Me Hostage,' Says Keys Resident*, Key West Citizen, Aug. 3, 2008.[4] Owners seeking to build affordable housing—or who began construction before the injunction and now are unable to complete it——complain of being "held hostage" by the injunction. *Id*.

The National Association of Home Builders, in its role as amicus curiae in the Eleventh Circuit, noted the State of Florida's opinion that "[t]here is an affordable housing crisis in the Florida Keys." Brief Amicus

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[4] *Available at* http://www.keysnews.com/51018435197620.bsp.htm.

Curiae of the Nat'l Ass'n of Home Builders, *Florida Key Deer v. Paulison*, 522 F.3d 1133, at 24-25.[5] This crunch only will worsen as lenders tighten their credit requirements in response to the current mortgage situation. The most simple solution to this affordable housing crisis is to open up more private land for development, thus increasing the supply of available housing. It is an option foreclosed, in part, by the *Key Deer* injunction.

C. Improper Deference to the ESA Endangers Firefighters and Frustrates Their Work

In his recent book *Green Gone Wild—Elevating Nature Above Human Rights*, M. David Stirling writes of several instances of environmental lawsuits complicating firefighters' efforts to battle forest fires. M. David Stirling, *Green Gone Wild—Elevating Nature Above Human Rights* 189-97 (2008). Stirling recounts restrictions on tools such as scooping water from lakes—for fear of harming fish in the lakes—that quite probably have led directly to firefighters' deaths. *Id*. at 192. Most relevant to this case, though, is a recent Montana case where a district court effectively prohibited firefighters' emergency use of fire retardant unless government officials first conduct a regulatory consultation under the Endangered Species Act:

> In October, 2003, during what would be the most devastating fire season in California history, a preservationist group known as Forest Service Employees for Environmental Ethics (FSEEE) filed the "first-ever lawsuit challenging the Forest Service's firefighting

[5] *Available at* 2006 WL 4127917.

> mission and practices." . . . Claiming, among other things, that chemical fire retardants and bulldozers kill and destroy the habitat of ESA-listed fish and other species, FSEEE asked the federal court to stop the Forest Service and its firefighters from using aerially applied chemical retardants and bulldozers.

Id. at 195-96. Stirling reports that the Forest Service had adopted environmental guidelines to protect against the careless spreading of the essential retardant, and asserted that a fire-by-fire regulatory consultation was not feasible for a task that is the essence of emergency. *Id.*

The federal district court for the District of Montana disagreed. Amounting to an injunction against the use of the retardant (the court, in fact, denied the plaintiffs' request for an injunction as moot due to the substantive thrust of the decision), the court denied the firefighters the ability to use the fire retardant without first conducting the laborious consultation. *Forest Serv. Employees for Envtl. Ethics v. U.S. Forest Serv.*, 397 F. Supp. 2d 1241, 1256-57 (D. Mont. 2005). The court afforded no deference to the life-and-death needs of the firefighters battling the fires, nor to the people they protect, instead mandating a rote compliance with ESA strictures regardless of circumstances and owing to an express concern for "aquatic environments," "forest resources," and "fish kills." *Id.* at 1244, 1254-55. So too did the court repeatedly dismiss the Forest Service's common-sense argument that regulatory consultation is not conducive to fighting wildfires that can spark and rage in an

instant, *see id*. at 1253, holding that the ESA allows for no exceptions.

These three cases, like the case before this Court, evidence a fundamental imbalance in current judicial interpretations of environmental law. It is too common for courts to enjoin socially beneficial activity without paying even lip service to the public interest served by that activity, instead foregoing traditional equitable rules and subordinating competing statutory mandates in favor of deference to the Endangered Species Act. This Court should correct this imbalance and reaffirm Congress's intent that the ESA is but one law among many, serving, not subsuming, the public interest.

CONCLUSION

For the reasons stated above, the judgment of the Ninth Circuit should be reversed.

DATED: August 12, 2008.

Respectfully submitted,

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