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 OF THE NAVY LEAGUE OF THE UNITED STATES – HONOLULU COUNCIL, ADMIRAL THOMAS B. HAYWARD, ADMIRAL RONALD J. HAYS, ADMIRAL R.J. "ZAP" ZLATOPER, VICE ADMIRAL PETER M. HEKMAN, VICE ADMIRAL ROBERT K.U. KIHUNE, REAR ADMIRAL RICHARD C. MACKE, REAR ADMIRAL LLOYD "JOE" VASEY, REAR ADMIRAL GEORGE HUCHTING, REAR ADMIRAL STEPHEN R. PIETROPAOLI, THE NAVY LEAGUE OF THE UNITED STATES, MILITARY AFFAIRS COUNCIL OF THE CHAMBER OF COMMERCE OF HAWAII, SOUTHWEST DEFENSE ALLIANCE, SAN DIEGO REGIONAL CHAMBER OF COMMERCE, AND THE SAN DIEGO MILITARY ADVISORY COUNCIL AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONERS

THEODORE G. MEEKER
707 Richards Street,
Suite 700
Honolulu, Hawaii 96813

MICHAEL A. LILLY
NING LILLY & JONES
707 Richards Street,
Suite 700
Honolulu, Hawaii 96813

ROBERT H. THOMAS
MARK M. MURAKAMI*
CHRISTI-ANNE H. KUDO CHOCK
DAMON KEY LEONG
KUPCHAK HASTERT
1003 Bishop Street
1600 Pauahi Tower
Honolulu, Hawaii 96813
(808) 531-8031
www.hawaiilawyer.com
**Counsel of Record*

Counsel for Amici Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Because Congress, the Secretaries of Defense, Commerce and the Interior, and the Navy carefully balanced the Navy's need to train realistically, against the putative harm to marine mammals under the national defense exemption to the Marine Mammal Protection Act of 1972, 16 U.S.C. § 1361 *et seq*. (MMPA), did the courts below properly enjoin training exercises until those same issues were addressed under the purely procedural requirements of the National Environmental Policy Act of 1969, 42 U.S.C. § 4321, *et seq*. (NEPA)?

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

STATUTES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

INTEREST OF *AMICI CURIAE*

Admiral Thomas B. Hayward, Admiral Ronald J. Hays, Admiral R.J. "Zap" Zlatoper, Vice Admiral Peter M. Hekman, Vice Admiral Robert K.U. Kihune, Rear Admiral Richard C. Macke, Admiral Lloyd "Joe" Vasey, Rear Admiral George Huchting, and Rear Admiral Stephen R. Pietropaoli are retired flag-rank naval officers.[1] They understand that "no government interest is more compelling than the security of the Nation." *Haig v. Agee*, 453 U.S. 280, 307 (1981) (citing *Aptheker v. Sec'y of State*, 378 U.S. 500, 509 (1964)). Their collective 319 years of experience on watch defending the Nation at sea has given them unique and valuable insights into the issues in this case and the dangers posed by the Ninth Circuit's decision to the Navy's ability to train realistically with mid-frequency active (MFA) sonar. "Unlike courts, it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise," *United States* ex rel. *Toth v. Quarles*, 350 U.S. 11, 17 (1955), and these naval warfare experts have served at every

[1] *Amici* The Navy League of the United States – Honolulu Council, The Navy League of the United States, Military Affairs Council of the Chamber of Commerce of Hawaii, Southwest Defense Alliance, San Diego Regional Chamber of Commerce, and the San Diego Military Advisory Council are organizations supporting the men and women of the naval services and their families. All counsel of record consented to the filing of this brief, and received notice of *amici*'s intention to file this brief at least ten days before it was due. This brief was not authored in any part by counsel for either party, and no person or entity other than *amici* made a monetary contribution toward the preparation or submission of this brief.

level of command, including the very highest positions of responsibility in the Navy under diverse civilian authorities. Congress gave the executive – not the judiciary – the discretion to determine when the defense of the Nation would take precedence over avoiding what has been in this case only the mere *possibility* of harm to marine mammals. *Amici* submit this brief to confirm that the decisions by the President, the Navy, the Secretaries of Defense, Commerce and Interior, the Council for Environmental Quality, and the National Marine Fisheries Service were necessary, and consistent with the sound judgment of naval warfare professionals whose only concern is insuring that the Sailors and Marines tasked with the Nation's seaborne defense are able to train realistically. Under the Ninth Circuit's restrictions, however, the first time a sonar operator can fully use his or her equipment is when it counts and there is no margin for error.

Threats to national security must be evaluated "by those with the necessary expertise." *Dep't of the Navy v. Egan*, 484 U.S. 518, 529 (1988). MFA sonar has been used by the U.S. and other navies for over five decades, and the record in this case, the Ninth Circuit noted, contains "no evidence that marine mammals have been harmed by the use of MFA sonar in the Southern California Operating Area." *Natural Res. Def. Council, Inc. v. Winter*, 518 F.3d 658, 696 (9th Cir. 2008). Those with the "necessary expertise" evaluated the threat and exempted the Navy's use of MFA sonar, but the Ninth Circuit rejected that

expertise and substituted its own judgment for that of experienced naval warfare professionals in how to best train to hunt sophisticated enemy submarines designed to avoid detection.

Guided by decades of command experience, and informed by lifetimes of preparing for and fighting anti-submarine warfare, *amici* urge the Court to understand that the Navy must train as it may fight, and that the decision by the Ninth Circuit unnecessarily puts Sailors, and the Nation they defend, at risk.

I. ADMIRALS AND NAVAL WARFARE PROFESSIONALS

Amici's service includes assignments as Chief of Naval Operations, the senior military officer of the Department of the Navy and a member of the Joint Chiefs of Staff; Commander of the U.S. Pacific Fleet, the world's largest naval force which encompasses half the Earth's surface and includes more than 190 ships, 1,600 aircraft, and 200,000 personnel; Commander of the Pacific Command, a joint services command of all U.S. military forces in the Pacific Theater; Commander of the Seventh Fleet, which is responsible for the Asia-Pacific and the Indian Ocean areas; and command of battle groups and surface ships.

Admiral Thomas B. Hayward, U.S. Navy (Ret.) served as the twenty-first Chief of Naval Operations and a member of the Joint Chiefs of Staff from 1978

to 1982. In his almost 40 years of active duty he also served as the Commander in Chief of the U.S. Pacific Fleet, the Commander of the U.S. Seventh Fleet, deputy chief of Naval Operations-Navy Program Planning, Commandant of the 14th Naval District (Pearl Harbor), Commander of Fleet Air Hawaii, and Commander of the Apollo Space Recovery Forces.

Admiral Ronald J. Hays, U.S. Navy (Ret.) served as the Vice Chief of Naval Operations from 1983 to 1985, and as Commander in Chief of the Pacific Command. A naval surface warfare expert, his 38 years of military service included tours on destroyers, aircraft carriers and sea-going staffs responsible for task force protection.

Admiral R.J. "Zap" Zlatoper, U.S. Navy (Ret.), is also a former Commander in Chief, U.S. Pacific Fleet. A combat-experienced naval aviator with over 4,000 flying hours and 1,000 carrier landings, in addition to numerous operational assignments in his 33 years of service, he also served as the Chief of Naval Personnel, a Battle Group Commander in DESERT STORM and DESERT SHIELD, the Military Assistant to the Secretary of Defense, and the Chief of Staff for the U.S. Seventh Fleet.

Vice Admiral Peter M. Hekman, U.S. Navy (Ret.) is a naval surface warfare expert. In his 40 years of service, Admiral Hekman commanded several surface ships and the Naval Sea Systems Command, the unit responsible for equipping and maintaining naval vessels. He also served as Deputy Director for

Operations, National Military Command Center, Office of the Joint Chiefs of Staff; Commander, Task Force Seventy-Five, U.S. Pacific Fleet; Commander, Cruiser-Destroyer Group One; Deputy Director for Research, Development, Test and Evaluation on the Staff of the Chief of Naval Operations; Deputy Commander for Surface Ship Programs, Naval Sea Systems Command; and as Commander, Naval Sea Systems Command.

Vice Admiral Robert K.U. Kihune, U.S. Navy (Ret.) is the former Commander of the Naval Surface Forces of the U.S. Pacific Fleet and Assistant Chief of Naval Operations for Surface Warfare. In his 35 years of service, Admiral Kihune also commanded two aircraft carrier battle groups – the USS KITTY HAWK and USS NIMITZ – as well as the USS NEW JERSEY battleship group. Among his other significant military assignments were the support for the capture of the terrorists involved in the ACHILLE LAURO hijacking, and Chief of Naval Education and Training responsible for all technical training in the U.S. Navy, including flight training and recruit training.

Rear Admiral Richard C. Macke, U.S. Navy (Ret.) served for more than 35 years, including assignments as Commander in Chief of the Pacific Command, and commander of the aircraft carrier USS DWIGHT D. EISENHOWER, Carrier Group Two, and Carrier Group Four.

Rear Admiral Lloyd "Joe" Vasey, U.S. Navy (Ret.) is an expert on geopolitical strategy and U.S. political-security relations in the Asia-Pacific region, including the security strategy of the People's Republic of China. Admiral Vasey's 36 years of active duty include assignments as chief of strategic plans and policies at U.S. Pacific Command Headquarters, secretary to the U.S. Joint Chiefs of Staff; deputy director of the U.S. National Military Command Center in the Pentagon; and chief of staff for Commander U.S. Seventh Fleet. He founded the Pacific Forum at the Center for Strategic and International Studies in the mid-1970s and served as CEO until 1990. He is the author of several published articles and studies on Asia-Pacific security issues. He presently focuses on assessing the impact of China's defense and foreign policies on regional security.

Rear Admiral George Huchting, U.S. Navy (Ret.) served for more than 36 years as a Surface Warfare Officer commanding both a guided missile destroyer and cruiser. During his last 11 years in the Navy, he served as an Acquisition Professional and as the Program Executive Officer for Aegis Shipbuilding and Combat Systems as well as for all Surface Combatants.

Rear Admiral Stephen R. Pietropaoli, U.S. Navy (Ret.) was the Navy's Chief of Information from 2000 to 2003. His 26 years of naval service included a variety of assignments including the special assistant for public affairs to Army General Hugh Shelton, then chairman of the Joint Chiefs of Staff, head of the Navy's national news desk in the Pentagon, and as

the media relations officer for the Commander of the Atlantic Fleet and the U.S. Atlantic Command. Admiral Pietropaoli began his naval career as a surface warfare officer in the Atlantic Fleet. Currently he is the Executive Director of the Navy League of the United States.

II. MILITARY SUPPORT ORGANIZATIONS

The Navy League of the United States is the leading civilian non-governmental organization whose mission is to support the men and women of the United States sea services, and to ensure they have the equipment and training they need to defend the Nation. The Navy League was founded in 1902 with the encouragement of President Theodore Roosevelt, and membership today stands at over 65,000 nationwide.

The Honolulu Council is a non-profit Hawaii corporation, and operates as a chartered council of the Navy League of the United States. It was incorporated in 1957 and has over 3,500 members, making it the largest council in the world. The Honolulu Council is participating as *amicus curiae* in the pending Ninth Circuit appeal of *Ocean Mammal Inst. v. Gates*, 546 F. Supp. 2d 960 (D. Haw. 2008), a case in which the district court preliminarily enjoined the Navy's use of sonar in Undersea Warfare Exercises around the Hawaiian Islands.

The Military Affairs Council (MAC) of the Chamber of Commerce of Hawaii is a chartered subsidiary

of the Chamber of Commerce of Hawaii, a Hawaii non-profit corporation. In 1985, MAC was established as an unencumbered affiliate of the Chamber to serve as the official liaison for the State of Hawaii in matters relating to the military. Over the years, the Chamber has assumed the role of being the advocate for the military and providing oversight for the multi-billion dollar defense industry that has grown to become the second major source of revenues to Hawaii. The MAC is comprised of representatives from the Chamber and State of Hawaii and City and County of Honolulu administrations, and retired senior military officers.

The Southwest Defense Alliance (SWDA) is a non-profit, non-partisan 501(c)(3) California corporation founded in 1997 to advocate sustaining the critical national security assets in the southwest United States. Elected officials, civic leaders, defense and military experts and others from Arizona, California, New Mexico, Nevada, Texas and Utah voluntarily team to preclude or mitigate encroachment of the irreplaceable land, sea, and air ranges and facilities within and adjacent to the six-state region. The hundreds of civilian participants and volunteers of the SWDA live and work in Arizona, California, New Mexico, Nevada, Texas and Utah. SWDA's members have diverse backgrounds and interests, but share one vision: to sustain a vibrant and supportive environment where the critical defense missions of research, testing and training can be conducted far into the future. To help assure this vision, SWDA

engages in education and advocacy. SWDA is governed by an 18-member board of directors: three directors from each of the six member states, and is managed by a retained executive director.

The San Diego Regional Chamber of Commerce is a 501(c)(6), non-profit California corporation. It notes that a large percentage of the Navy's active surface, air and submarine fleet as well as its Anti-Submarine Warfare and Mine Warfare Commands are located in San Diego and have a huge impact on the region's economy. The Chamber believes it is important for the Navy to continue using active sonar in order to provide effective training to our men and women in uniform. The Chamber further understands that the Navy already undertakes extensive measures to protect marine mammals.

The San Diego Military Advisory Council (SDMAC) is a 501(c)(6) non-profit mutual benefit corporation incorporated under the laws of the state of California. SDMAC currently has over 75 corporate members and 350 individual members in the San Diego region. The SDMAC mission is to help San Diego's military defend the nation. To that end, SDMAC champions the issues that are identified by the military as critical to national defense, the military/industrial team, and to the quality of life of military personnel in the San Diego area. The U.S. Navy's ability to use MFA sonar to adequately train its crews prior to extended deployment in defense of our country is one such issue. SDMAC considers it vital to the defense of our nation that the United

States Navy continue to train its deploying Strike Groups in the use of MFA Sonar. The Navy has consistently demonstrated over a long period of time, their willingness to undertake extensive measures to protect marine mammals and the environment whenever possible. The consequences of sending our young men and women in harm's way without the necessary training to prepare themselves for any eventuality, far outweighs any potential harm to the marine mammal population or the environment.

STATEMENT OF THE CASE

I. THE DIESEL ELECTRIC SUBMARINE THREAT

Submariners use a single term for all surface vessels of any type whether they be naval surface combatants, aircraft carriers, supply ships, merchant marine, or passenger liners: "target."[2] A few submarines can wreak extraordinary damage upon men, material, and international commerce. The threat to Allied supply lines by U-Boats in the Atlantic during World War II – and the damage caused to the enemy by our own submarines in the Pacific – graphically

[2] "Surface combatants" denotes a subset of naval fighting ships. Generally speaking, they are ships built to fight other ships, submarines, or aircraft. Surface combatants include cruisers, destroyers, and frigates, among others. They do not include aircraft carriers, amphibious assault ships, or mine hunters.

brought home the terrifying reality of submarine warfare.

The world's naval forces employ two types of sonar to detect submerged submarines: passive sonar listens for emitted sounds, while active sonar transmits sound and listens for a reflection from the target. Unclassified Declaration of David Yoshihara in Support of Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction (Yoshihara Dec.) at 5, ¶¶ 9, 10, *Ocean Mammal Inst. v. Gates*, Civ. No. 07-cv-00254-DAE-LEK (D. Haw., Sep. 27, 2007).[3]

---

[3] *Available at* http://www.hawaiioceanlaw.com/files/yoshihara dec.pdf. Captain David Yoshihara, U.S. Navy (Ret.) is an expert in anti-submarine warfare (ASW) and currently the Director, Fleet ASW for the Commander, U.S. Pacific Fleet. He was the Director, Task Force ASW on the staff of the Chief of Naval Operations, and was the principal drafter of *Anti-Submarine Warfare Concept of Operations for the 21st Century*, the Navy's vision for how ASW will be conducted in the future, including an examination of the advanced technologies necessary to swiftly defeat the submarine threat wherever it may be found and an examination of the skills Navy personnel will need to effectively conduct ASW. Yoshihara Dec. at 3, ¶ 4.

On May 16, 2007, the Ocean Mammal Institute filed a complaint against the Navy in the district court for the district of Hawaii, seeking declarative and injunctive relief to stop the use of MFA sonar in undersea warfare exercises off the coast of Hawaii. *See Ocean Mammal Inst. v. Gates*, 546 F. Supp. 2d 960, 966 (D. Haw. 2008). The plaintiffs alleged violation of NEPA, the Endangered Species Act of 1973 (ESA), 16 U.S.C. § 1531, *et seq*., the Coastal Zone Management Act of 1972 (CZMA), 16 U.S.C. § 1451, *et seq*., and the National Marine Sanctuaries Act (NMSA), 16 U.S.C. § 1431, *et seq*. The district court determined that the Navy violated NEPA and the CZMA, and limited the

(Continued on following page)

Active sonar developed during World War II helped turn the tide against U-Boats and win the war, but still at a terrible cost in ships and personnel.

After World War II, the development of deep diving, indefinitely submerging, and very fast nuclear submarines which could run below the various deep ocean layers hampered active sonar ranging detection of such vessels. Accordingly, the Navy developed a variety of "passive" systems, both shipboard and at the bottom of the sea (the Sound Surveillance System, SOSUS), to detect such vessels by the noise they made in their operation, both from internal machinery and from the cavitation sounds made by their propellers. For every measure, however, there is a countermeasure, and presently, most of the submarines deployed by the world's navies use diesel engines for propulsion while surfaced, and battery-powered electric motors while submerged. Yoshihara Dec. at 4, ¶¶ 6, 7. Diesel electric submarines are uniquely effective in avoiding detection by passive

---

Navy's use of MFA sonar. The district court imposed several mitigation measures intended to limit the impact of sonar use on marine mammals, while allowing the Navy to continue training with MFA sonar under narrower circumstances. Many of these mitigation measures are similar to those imposed by the district court and the Ninth Circuit in the case at bar. "The district court's restrictions caused one ship of five in a carrier strike group to deploy to the Far East untrained." Patricia Kime, *Environmental Stewards*, Seapower, July 2008, *available at* http://www.seapower-digital.com/seapower/200807/?pg=39.

sonar: "Modern diesel-electric submarines are designed to suppress emitted noise levels specifically to counter and defeat the best available passive SONAR technology." *Id.* at 5, ¶ 9. "Until at very close ranges, a diesel-electric submarine operating on battery power is nearly undetectable to U.S. and allied naval forces using passive SONAR alone." *Id.* Consequently, diesel electric submarines pose the "primary threat to the U.S. Navy's ability to perform a number of critically necessary missions." *Id.* at 4, ¶ 6.

The threat that these submarines present to the young men and women who man our surface combatants and other ships is not in any sense idle. A single conventional explosive device (torpedo or otherwise) can sink an aircraft carrier with over 4,000 sailors aboard. As for the tactical or strategic nuclear devices these vessels can carry, the definition of "target" expands dramatically from just vessels to entire cities and their surroundings. The only effective countermeasure to such silent threats is the considerably more sophisticated active sonar which the Navy is now developing and putting into effect. The People's Republic of China, North Korea, and Iran have developed or obtained extraordinarily quiet diesel electric submarines which make their detection by passive sonar difficult and, in many cases impossible. *Id.* at 4, ¶ 7 (more than 300 diesel electric submarines are owned by potential adversary nations). *See also* David Lague, *Chinese Submarine Fleet is Growing, Analysts Say*, N.Y. Times, Feb. 25, 2008, *available at* http://www.nytimes.com/2008/02/25/world/asia/25submarine.html

(military analysts report China will surpass the United States in numbers of submarines by the end of the decade and included in those acquisitions are two nuclear powered ballistic missile submarines). China may currently have as many as twelve diesel electric, 636 KILO-class submarines purchased from Russia. *See Kilo-class submarine – People's Liberation Army Navy*, Globalsecurity.org, *available at* http://www.globalsecurity.org/military/world/china/kilo.htm. *See also* Eric Wertheim, *World Navies in Review*, U.S. Naval Institute Proceedings, Mar. 2008, at 15 (China received ten improved KILO-class submarines from Russia and has completed domestic production of SONG class submarines). Iran purchased several 877 KILO-class submarines, an older version of the 636, from Russia in the past and, despite a June 1995 pledge not to enter any new arms contracts with Iran, it is reported that the two countries were engaged in discussions regarding the modernization of the diesel electric submarines operated by the Iranian Army as recently as 2005. *See Project 877 Graney – Project 636 Varshavyanka/Paltus – Kilo class Diesel-Electric Torpedo Submarine*, Globalsecurity.org, *available at* http://www.globalsecurity.org/military/world/russia/877.htm.

The threats from these submarines to the Navy's surface fleet is real. In late 2006 near Okinawa, for example, a SONG-class diesel electric attack submarine of China's People's Liberation Army Navy was not detected by the Kitty Hawk Carrier Strike Group until it surfaced within torpedo range of the aircraft

carrier USS KITTY HAWK. *See U.S. Presses China on Armed Submarine Encounter*, Wash. Times, Jan. 10, 2007, *available at* http://www.washtimes.com/news/2007/jan/10/20070110-112623-9814r/. In November 2007, the Kitty Hawk battle group was "shadowed" by a Chinese submarine and destroyer in the Taiwan Strait prompting a confrontational standoff for twenty-eight hours. *See Report: Chinese Ships Confronted Kitty Hawk*, Navy Times, Jan. 17, 2008 *available at* http://www.navytimes.com/news/2008/01/kyo_china_080115/.

II. TRAINING TO DETECT AND COUNTER THE THREAT

To counter the threat, the Navy has refocused on anti-submarine warfare which is the Pacific Fleet's "#1 warfighting priority." Yoshihara Dec. at 3, ¶ 3. *See also* Otto Kreisher, *As Underwater Threat Re-emerges, Navy Renews Emphasis on ASW*, Seapower, Oct. 2004, *available at* http://www.military.com/NewContent/0,13190,NL_ASW_100404-P1,00.html ("After a decade in the shadows, the Navy has put antisubmarine warfare (ASW) back at the top of its warfighting priorities, injecting new leadership and increased funding into the fight against a re-emerging undersea threat.").

The primary sonar in use by the Navy is MFA sonar, which "yields the greatest probability of detection capability across the spectrum of environments

expected." Yoshihara Dec. at 6, ¶ 10.[4] Use of MFA sonar has "greater potential in assuring more valid and accurate acoustic contacts of a submarine at greater distances than use of passive SONAR alone." *Id.* ¶ 11. Detecting and holding the track of a submarine with MFA sonar is a "very complex task." *Id.* at 6-7, ¶ 12. Navy sonar operators must contend with "water density changes based on temperature, salinity, currents, weather conditions, and the varying profile of the ocean bottom, all of which affect the manner in which sound propagates through water." *Id.* at 7, ¶ 7. Computer simulations cannot substitute for the infinite details and adjustments to the sonar equipment that the dynamic, real-world environment requires of Navy operators. Furthermore, coastal waters are noisier than open ocean waters, making the likelihood of detection with passive sonar alone more difficult. Training in coastal waters, therefore, is vital because interpreting a sonar display is as much art as science, requiring users to distinguish between "echoes" and "reverberation" and between "targets" and "clutter" and "lines" and "blobs." *Id.* at 8, ¶ 16.

The business of war is never a pleasant one. For those charged with the defense of their country, the need to do that job very well – with maximum

[4] There are three types of active sonar: low frequency, mid-frequency and high frequency. Low frequency equipment is bulky, and high frequency sonar is only effective over a short distance. *Id.* at 5, ¶ 10.

efficiency and effectiveness – is critical not only to ensure victory, but also to do so with the minimum loss of our own Sailors and Marines in a way that, whenever practicable, minimizes damage to the environment. To meet that goal, there is one absolutely critical element every servicemember understands and values above all, and that is training. Discipline is always present in one form or another in a military environment, but without training, that discipline is useless. Sailors and Marines may be ordered into combat and discipline may make them go, but if they have not first been trained to use their equipment effectively, their leaders have breached their duty. Realistic training in the Southern California Operating Area (SOCAL) range and the Hawaii Range Complex (subject of the *Ocean Mammal Institute v. Gates* litigation) with MFA sonar is absolutely necessary. SOCAL has the advantage of sharing the unusual topographical and acoustical conditions found in probable conflict areas, and is close to the home ports of the surface ships undergoing the training. The Hawaii Range Complex is within range of a fleet of submarines which can act as opposing forces.[5]

Training becomes even more critical when utilizing sophisticated systems such as sonar and other

[5] The December 7, 1941 attack was launched from these very waters. For the *amici* Admirals who served in the Pacific Fleet and at Pearl Harbor, the USS ARIZONA and USS UTAH, both of which remain at rest there, were daily reminders of the need for eternal vigilance and training.

related weapons systems and countermeasures on modern warships and their support vessels. These are not systems which the operator simply switches on like a flashlight in the night. Rather, they are vastly complicated and interdependent systems run by highly intelligent men and women who have spent years preparing to use them and who should not be precluded from training in conditions as close as possible to the real thing.

The limitations imposed by the district court and the Ninth Circuit in the case at bar, and the measures imposed by the court in *Ocean Mammal Institute v. Gates*, contrasted with the Navy's mitigation measures under the MMPA, subjects the Navy's MFA sonar operators to a patchwork of restrictions instead of consistent fleet-wide standards. Piecemeal restrictions which change from operating area to operating area pose too great a risk to the Navy's preparedness to conduct anti-submarine warfare. Military readiness requires constant training and assessment and repetitive hands-on use of equipment to ingrain procedures into very young and often times inexperienced personnel. *Amici*'s best professional judgment is that the Navy's mitigation measures are effective: they are uniform, applicable fleet-wide, well considered, and in keeping with the careful balance between putative harms to marine mammals and the need to train Navy sonar operators.

III. THE NINTH CIRCUIT ENJOINED THE NAVY'S USE OF MFA SONAR DESPITE THE FINDING OF NO SIGNIFICANT ENVIRONMENTAL IMPACT AND NO RECORD OF INJURY OR HARM TO ANY MARINE MAMMAL IN SOCAL

There is no evidence in the record that MFA sonar has caused any physical harm to a marine mammal. *Natural Res. Def. Council, Inc. v. Winter*, 518 F.3d 658, 696 (9th Cir. 2008). Other actual causes of marine mammal mortality eclipse the potential mortality imputed to sonar. *See generally Atlantic Fleet Active Sonar Training Environmental Impact Statement*, at Appendix E, Feb. 2008, *available at* http://afasteis.gcsaic.com/docs/Draft%20AFAST%20EIS_Appendix%20E,%20Cetacean%20Stranding%20Report.pdf. After an Environmental Assessment (EA), and backed by comprehensive studies and the input of the Department of Defense, the Department of Commerce, and the National Marine Fisheries Service, the Navy concluded that the use of MFA sonar with certain self-imposed mitigation measures would not have a significant impact on the environment. Consequently, NEPA did not require the preparation of an Environmental Impact Statement (EIS) for the proposed training exercises in SOCAL. This conclusion was consistent with the 40-year history of the Navy's use of MFA sonar of the same frequency and intensity in SOCAL, which has not resulted in a single documented case of injury, harm, or death to marine mammals.

In March 2007, respondents filed suit in the Central District of California, seeking a declaration that the Navy's SOCAL exercises violated NEPA, the ESA, and the CZMA. Respondents allege that the Navy's use of MFA sonar in SOCAL, even with the mitigation measures, would have a significant effect on the environment and consequently that the Navy should have prepared an EIS. The district court rejected the ESA claim, agreed with respondents on their NEPA and CZMA claims, and enjoined all use of MFA sonar during the Navy's SOCAL exercises. The district court found that respondents demonstrated probable success on the merits of their claim that the Navy violated NEPA by failing to prepare an EIS; that the Navy violated the CZMA because it submitted a consistency determination to the California Coastal Commission that did not take into account the planned use of MFA sonar; and the Navy violated the CZMA by failing to adopt the mitigation measures the CCC determined were necessary for the SOCAL exercises to be consistent with the California Coastal Management Program.

The Ninth Circuit rejected the district court's total ban, holding that it had not considered the public interest in having a trained and effective Navy and had not explained why a total prohibition on the SOCAL exercises was more appropriate than permitting the exercises to be conducted with mitigation measures. *Natural Res. Def. Council, Inc. v. Winter*, 502 F.3d 859 (9th Cir. 2007). The Ninth Circuit

remanded the case to the district court to modify the injunction and permit the exercises with mitigation measures. *Natural Res. Def. Council, Inc. v. Winter*, 508 F.3d 885 (9th Cir. 2007). On remand, the district court issued a new preliminary injunction allowing the Navy to complete the SOCAL exercises provided it complied with mitigation measures established by the court.

Shortly thereafter, the Council on Environmental Quality (CEQ), pursuant to its responsibilities under 40 C.F.R. § 1506.11, determined that emergency circumstances were presented, and permitted the Navy to continue its exercises without first completing an EIS. That regulation permits CEQ to exempt an agency from NEPA's EIS requirement:

> Where emergency circumstances make it necessary to take an action with significant environmental impact without observing the provisions of these regulations, the Federal agency taking the action should consult with the Council about alternative arrangements. Agencies and the Council will limit such arrangements to actions necessary to control the immediate impacts of the emergency. Other actions remain subject to NEPA review.

40 C.F.R. § 1506.11. Facing exercises it considered critical for deployment of the USS ABRAHAM LINCOLN Strike Group, the Navy also asked the President to exercise his authority under 16 U.S.C. § 1456(c)(1)(B) (2000). The President determined that the use of MFA

sonar is "essential to national security" and is in the "paramount interest of the United States," and exempted the Navy's use of MFA sonar in the SOCAL exercises from the requirements of the CZMA. The Navy subsequently adopted the mitigation measures recommended by the CEQ. *See Decision Memorandum Accepting Alternative Arrangements for the U.S. Navy's Southern California Operating Area Composite Training Unit Exercises and Joint Task Force Exercises Scheduled To Occur Between Today and January 2009*, 73 Fed. Reg. 4189 (2008).

Notwithstanding these exemptions, the district court upheld its injunction. It concluded CEQ's action was invalid because there were, in the district court's opinion, no "emergency circumstances" justifying an exemption from NEPA. The district court also found that Respondents had adequately demonstrated a possibility of irreparable harm. *Natural Res. Def. Council, Inc. v. Winter*, 527 F. Supp. 2d 1216, 1226-32 (C.D. Cal. 2008). The Ninth Circuit upheld the injunction, but *sua sponte* modified the district court's mitigation measures and imposed its own:

> the importance of the Navy's mission to provide for the national defense and the representation by the Chief of Naval Operations that the district court's preliminary injunction in its current form will "unacceptably risk" effective training and strike group certification and thereby interfere with his statutory responsibility under 10 U.S.C. § 5062 to "organiz[e], train[], and equip[] the Navy," we *sua sponte* partially

> and temporarily stay the preliminary injunction as adopted by the district court to the extent provided herein.

Natural Res. Def. Council, Inc. v. Winter, 518 F.3d 704, 705 (9th Cir. 2008). The modified mitigation measures established by the Ninth Circuit require the Navy:

> [T]o suspend its use of MFA sonar if a marine mammal is detected within 2,200 yards of the sonar source, except when MFA sonar is being used at a "critical point in the exercise," in which case the Navy shall reduce the MFA sonar level by 6 decibels when a marine mammal is detected within 1,000 meters from the sonar source, reduce the MFA sonar level by 10 decibels when a marine mammal is detected within 500 meters of the sonar source and suspend its use of MFA sonar when a marine mammal is detected within 200 meters of the sonar source. A "critical point in the exercise" is a point when, in the discretion of the Admiral overseeing the exercise or the commander of the sonar-emitting vessel, continued use of MFA sonar is critical to the certification of a strike group or the effective training of its personnel. For example, the responsible officer, in his discretion, might determine that a shutdown would fundamentally undermine effective training or certification because the particular exercise underway is at a stage that would be seriously compromised by a shutdown.
>
> . . .

> The second mitigation measure is modified to require the Navy, when significant surface ducting conditions are detected, to reduce the MFA sonar level by 6 decibels where a marine mammal is detected within 2,000 meters of the sonar source, reduce the MFA sonar level by 10 decibels where a marine mammal is detected within 1,000 meters of the sonar source, and suspend its use of MFA sonar where a marine mammal is detected within 500 meters of the sonar source.

Id. at 705-06. The Ninth Circuit affirmed the district court's injunction the same day in a separate opinion. *Natural Res. Def. Council, Inc. v. Winters*, 518 F.3d 658, 703 (9th Cir. 2008). The Ninth Circuit noted that the record contained "no evidence that marine mammals have been harmed by the use of MFA sonar in the Southern California Operating Area." *Id.* at 696. Despite that fact, the district court determined respondents had established "to a near certainty" that the Navy's use of MFA sonar would irreparably harm the environment and marine mammals. Both the court in the case at bar and in *Ocean Mammal Institute v. Gates* rejected the judgment of military professionals and the legislative and executive branches that harm to marine mammals was unlikely to occur, and even if it did, the need to prepare the Nation's naval forces was, on balance, more important.

———♦———

SUMMARY OF ARGUMENT

Neither the district court, the Ninth Circuit, nor respondents disputed the present and growing threats posed by quiet, diesel electric submarines, and the need for the Navy to train realistically with MFA sonar to detect and neutralize those threats. The Ninth Circuit, however, overruled the judgment of those with the "necessary expertise" – naval warfare professionals and their civilian leaders – and prohibited the Navy from training effectively because of the mere *possibility* that marine mammals may be harmed, even though the court acknowledged the record was devoid of any evidence that any marine mammal had been injured by the Navy's use of MFA in SOCAL.

The courts below could not have concluded that the Navy's use of MFA sonar might result in irreparable injury to marine mammals since the Navy already had been exempted from the substantive limitations in the MMPA, the statute protecting marine mammals from harm. Congress, the Secretaries of Defense, Commerce and the Interior, and the Navy carefully balanced the Navy's need to train realistically, and mitigated putative harm to marine mammals under the national defense exemption to the MMPA.

———♦———

ARGUMENT

I. IN THE 2004 MMPA AMENDMENT, CONGRESS ALLOWED THE SECRETARY OF DEFENSE TO EXEMPT THE NAVY'S ACTIVITIES IN THE INTEREST OF NATIONAL DEFENSE

The United States arguably has done more than any other country to provide for the protection of marine mammals, and to utilize its resources in their rejuvenation. *See* 16 U.S.C. § 1372(a)(1) (2000 & Supp. V 2005) (making it unlawful to "take" marine mammals, meaning to "harass, hunt, capture, or kill, or attempt to harass, hunt, capture or kill" them). The MMPA represents an explicit finding by Congress that these animals ought to be protected because they move through, or are instrumentalities of, interstate and international commerce. *See* 16 U.S.C. § 1361(5) (2000 & Supp. V 2005) (finding that marine mammals move in interstate commerce "and that the protection and conservation of marine mammals and their habitats is therefore necessary to insure the continuing availability of those products which move in interstate commerce"). The MMPA is the principal regulatory regime governing interaction with marine mammals. *See*, *e.g.*, 16 U.S.C. § 1543 (2000) ("no provision of [the Endangered Species Act] shall take precedence over any more restrictive conflicting provision of the Marine Mammal Protection Act of 1972").

Marine mammals such as whales, dolphins, and seals range throughout the oceans of the world in

every conceivable salt waterway, and MFA sonar training or its tactical use in any area could potentially affect them. By 2004, Congress had come to recognize that military exercises might sometimes result in harm to protected marine mammals, and the MMPA was amended to allow the Secretary of Defense, in consultation with the Secretaries of Commerce and Interior, to exempt actions of the Department of Defense from the MMPA:

> The Secretary of Defense, after conferring with the Secretary of Commerce, the Secretary of the Interior, or both, as appropriate, may exempt any action or category of actions undertaken by the Department of Defense or its components from compliance with any requirement of this Act, if the Secretary determines that it is necessary for the national defense.

16 U.S.C. § 1371(f)(1) (Supp. V 2005). The statutory exemption was adopted in the wake of *Natural Res. Def. Council, Inc. v. Evans*, 364 F. Supp. 2d 1083 (N.D. Cal. 2003), a case which limited the Navy's use of low frequency active sonar. *See* National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, 117 Stat. 1391, 1433-35 (2004). The exemption was not without limitation, since the amendment provides that any such exemption is valid only for two years, after which time the Secretary of Defense must confer with the Secretary of Commerce and make a new determination of the necessity of the additional exemption. 16 U.S.C. § 1371(f)(2)(B) (Supp. V 2005).

The exemption allowing the Navy to "take" marine mammals was Congress' determination that military commanders and their civilian leaders could exercise their best professional judgment about the training needs of the fleet even if it might mean "harassing, hunting, capturing, or killing" marine mammals otherwise protected by the MMPA. *See* 16 U.S.C. § 1371(f)(2)(B) (Supp. V 2005) (authorizing Secretary of Defense to exempt the Department from the MMPA). Put another way, the statutory protection provided by Congress for marine mammals was always subject to revocation or modification, and Congress did so. Congress permitted those most qualified to decide when critical training needs must take precedence over a perceived threat to marine mammals, echoing this Court's statement in *Dep't of the Navy v. Egan*, 484 U.S. 518 (1988), that threats to national defense must be evaluated by those "with the necessary expertise." *Id.* at 529. An exemption to permit the Navy to train to defend against submarine threats makes sense when the statute is based on Congress' commerce power, *see* 16 U.S.C. § 1361(5) (2000 & Supp. V 2005), since it would plainly affect interstate and international maritime commerce if the United States Navy was anything less than fully prepared to utilize MFA sonar to detect silent running submarines.

On January 23, 2007, the Deputy Secretary of Defense exempted all the Navy's military readiness activities employing MFA sonar for the duration of

the exercises in SOCAL from the requirements of the MMPA. The exemption determined:

> it is necessary for the national defense to exempt all military readiness exercises that employ mid-frequency active sonar or Improved Extended Echo Ranging sonobuoys (IEER), either during major training exercises, or within established Department of Defense maritime ranges or established operating areas, from compliance with the requirements of the Marine Mammal Protection Act, Title 16, Sections 1361 1421h, of the United States Code.

Memorandum for the Secretary of the Navy, Subject: *National Defense Exemption from Requirements of the Marine Mammal Protection Act for Certain DoD Military Readiness Activities That Employ Mid-Frequency Active Sonar or Improved Extended Echo Ranging Sonobuoys*, Jan. 23, 2007, *available at* http://www.hawaiioceanlaw.com/files/England_Memo_1_23_07.pdf.

Moreover, even with the full exemption granted by section 1371(f), the Navy had gone to extraordinary lengths to minimize as much as possible the effects on marine mammals. *See Ocean Mammal Inst.*, 546 F. Supp. 2d at 985-91 (reviewing mitigation measures from the exemption and the case at bar). It adopted a number of measures which had been standard operating procedure in the Navy's ASW exercises since 2004. These measures included extra visual lookouts with enhanced searching procedures,

limitations on transmission levels when within 1,000 yards of marine mammals, additional powering down of sonar when mammals are inside 500 yards from the sonar equipment, and exercise planners must account for bathymetry and sound conditions. These mitigation measures are practically advantageous for several reasons. First, they are in place fleet-wide and training and operation of sonar equipment is standardized and universal. Second, these mitigation measures were developed in consultation with the Department of Commerce allowing the officials who enforce the MMPA to collaborate with the military and protect the marine mammal resources in a global fashion. Finally, because the Navy itself designed the mitigation measures, those measures necessarily take into account the staffing, equipment issues, and practical obstacles to protection of the mammals, while minimizing any negative impact to national defense.

The enactment of the exemption by Congress long after the original legislation and after NEPA's procedural requirements, reflects that it was not simply an afterthought, but was designed to address specific shortcomings in the original legislation, and refutes the claim that the administration manipulated the exemption power to impermissibly overrule the courts. The administration was simply exercising the discretion granted by Congress, by following the best advice of naval warfare professionals.

II. NEPA IS INAPPLICABLE BECAUSE THE NAVY BALANCED AND MITIGATED PUTATIVE HARMS TO MARINE MAMMALS UNDER THE SUBSTANTIVE PROVISIONS OF THE MMPA

Because Congress, the Secretaries of Defense, Commerce and the Interior, and the Navy carefully balanced the need to train realistically with MFA sonar, and mitigated putative marine mammal harm under the substantive provisions of the MMPA, it was illogical for the courts below to enjoin training exercises until those same issues were addressed under the purely procedural requirements of NEPA.[6] Since this possible harm had already been accounted for and deemed acceptable, information gathering under NEPA was unnecessary.

The MMPA is the principal substantive protection for marine mammals. By contrast, NEPA is an informational and procedural statute, which unlike the MMPA, provides no substantive protection for marine mammals. NEPA does not mandate any

[6] NEPA also has built-in recognition that the statute's requirements may be avoided in emergency situations. *See* 40 C.F.R. § 1506.11. Similarly, regarding the CZMA, the President may "exempt from compliance those elements of the Federal agency activity that are found by the Federal court to be inconsistent with an approved State program, if the President determines that the activity is in the paramount interest of the United States." 16 U.S.C. § 1456(c)(1)(B) (2000). Both of these exemptions have been invoked, reinforcing the conclusion that the harms have already been considered.

particular outcome, only that information be gathered and disseminated:

> The sweeping policy goals announced in § 101 of NEPA are thus realized through a set of "action-forcing" procedures that require that agencies take a "'hard look' at environmental consequences," . . . and that provide for broad dissemination of relevant environmental information. Although these procedures are almost certain to affect the agency's substantive decision, it is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process.

Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989) (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976)). Consequently, NEPA does not dictate results, but rather provides guidelines requiring federal agencies to assess any major federal action that may have a significant impact on the environment. *See Dep't of Trans. v. Public Citizen*, 541 U.S. 752, 756-57 (2004) (citing *Robertson*, 490 U.S. at 349-50). "If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs." *Robertson*, 490 U.S. at 350 (citations omitted). Since NEPA itself is a procedural statute, the only role for a reviewing court in a NEPA challenge is to determine whether the agency has considered the environmental consequences of the proposed action; the court "cannot interject itself within the

area of discretion of the executive as to the choice of the action to be taken." *Stryker's Bay Neighborhood Council v. Karlen*, 444 U.S. 223, 227 (1980) (quoting *Kleppe*, 427 U.S. at 410 n.21).

Congress, recognizing the inherent limitations of the legislative process in environmental regulation, set up a framework to handle the multitude of environmental issues that could arise within the United States and its territories. In so doing, it never precluded itself from enacting subsequent specific environmental legislation to regulate the treatment of a particular species or genus, nor did it preclude itself from exempting areas of the environment or species or both from the dictates of NEPA or other environmental or species protection acts. The Navy's MMPA exemption and the mitigation measures it undertook pursuant thereto rendered NEPA (and the CZMA to which the same analysis applies throughout) inapplicable to this action.

Under the displacement doctrine, NEPA does not apply when procedures under another statute displace or make superfluous the procedures under NEPA, or provide the "functional equivalent" of those procedures. "Displacement" means that Congress has enacted a statutory scheme whereby NEPA's procedures are supplanted. "Functional equivalence" means that the procedures of the statute in question are the functional equivalent of NEPA. Here, the MMPA comprehensively provides for orderly consideration of alleged harms by MFA sonar to marine mammals. *Cf. Merrell v. Thomas*, 807 F.2d 776, 780

(9th Cir. 1986) (registration process under the Federal Insecticide, Fungicide, and Rodenticide Act was the functional equivalent of NEPA and made compliance with NEPA "superfluous"); *Western Nebraska Res. Council v. Envt'l Protection Agency*, 943 F.2d 867, 871-72 (8th Cir. 1991) (many circuits hold that the EPA does not need to comply with the formal requirements of NEPA in performing its environmental protection functions because "organic legislation" mandates specific procedures for considering the environment that are functional equivalents of the NEPA process) (citing *Alabama* ex rel. *Siegelman v. Envt'l Protection Agency*, 911 F.2d 499, 504 (11th Cir. 1990)). The MMPA is the functional equivalent of NEPA because the substantive protections provided in the MMPA provide *more* protection to marine mammals that the informational NEPA, and the provisions of the MMPA, including the exemption, displaced any procedural requirements of NEPA.

Consequently, the Ninth Circuit should not have ignored the MMPA exemption which expressly addressed any purported harm to marine mammals. Under the MMPA, the Navy is allowed to "take" them. *See* 16 U.S.C. § 1371(f)(2)(B) (Supp. V 2005). *Speculative* harm cannot qualify as irreparable injury under NEPA, when the potential harms have already been considered by the authority delegated by Congress to make such determinations, and the risk has been deemed acceptable.

In areas of national security and defense of the Nation, the judiciary's role is at its nadir. *See, e.g.,*

Rostker v. Goldberg, 453 U.S. 57, 71 (1981) ("The responsibility for determining how best our Armed Forces shall attend to that business rests with Congress . . . and with the President"). Indeed, courts have repeatedly recognized that national defense exigencies can override even technical violations of environmental laws. In *Concerned about Trident v. Rumsfeld*, 555 F.2d 817 (D.C. Cir. 1977), as here, the Navy attempted to act as a good steward of the environment while at the same time fulfilling its national security duties:

> As the Navy has taken no arbitrary or capricious action here but has attempted to comply in good faith with the mandates of NEPA, failing in only two instances, we do not believe that the issuance of an injunction pending the Navy's revision of the Final EIS is necessary, especially since we have found that the Navy gave proper weight to environmental considerations in deciding to proceed with this strategically important project.

Id. at 830. *See also Weinberg v. Romero-Barcelo*, 456 U.S. 305, 310-11 (1982) (refusing to enjoin Navy's use of training island despite "technical violations").

Here, the Navy, having balanced and mitigated any putative harm to marine mammals under the substantive provisions of the MMPA in favor of national security, is exempt from the procedural requirements of NEPA.

———♦———

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

AUGUST 2008.

THEODORE G. MEEKER
707 Richards Street,
Suite 700
Honolulu, Hawaii 96813

MICHAEL A. LILLY
NING LILLY & JONES
707 Richards Street,
Suite 700
Honolulu, Hawaii 96813

ROBERT H. THOMAS
MARK M. MURAKAMI*
CHRISTI-ANNE H. KUDO CHOCK
DAMON KEY LEONG
KUPCHAK HASTERT
1003 Bishop Street
1600 Pauahi Tower
Honolulu, Hawaii 96813
(808) 531-8031
www.hawaiilawyer.com
**Counsel of Record*

Counsel for Amici Curiae