No. 06-797

In The
Supreme Court of the United States

UNITED STATES FOREST SERVICE, ET AL.,

Petitioners,

v.

EARTH ISLAND INSTITUTE, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Should this Court further review the Ninth Circuit's issuance of a preliminary injunction, when that court properly relied on the administrative record to determine Respondent's probable success on the merits, and appropriately used extra-record declarations (which had been admitted in evidence in the discretion of the district court) only to assist in determining whether Petitioners (Forest Service) considered all relevant factors in their NEPA analysis—a use permitted under legal principles widely accepted by the circuits?

2. Should this Court review the Ninth Circuit's holding that "possibility of irreparable harm" is the correct standard for the "irreparable harm" prong of the well-established four-part test for granting a preliminary injunction, when that standard is used by *all* the other circuits and does not mean "speculative" harm but rather something less than certainty of harm?

3. Should this Court review the Ninth Circuit's holding that, on the unique confluence of facts of this particular case, the balance of hardships and public interest supported issuance of a preliminary injunction, when the competing interests were properly taken into consideration pursuant to the court's equity jurisdiction, when the supposed public interest benefits claimed by Petitioners, except the absolute maximization of profit, would not be foreclosed by issuance of the injunction, and when the district court's balancing of the equities was tainted by its abuses of discretion with regard to the standard for issuance of a preliminary injunction and the merits of Respondent's claims?

PARTIES TO THE PROCEEDINGS

Respondent Earth Island Institute concurs in the statement of the Parties to the Proceedings in the Petition.

RULE 29.6 STATEMENT

Respondents' Earth Island Institute and Center for Biological Diversity have no parent companies, subsidiaries, or affiliates that have issued shares to the public in the United States or abroad.

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SUMMARY OF REASONS TO DENY THE PETITION

This case presents the unexceptional and intensely fact-bound question of whether the Ninth Circuit correctly held that two post-fire logging projects in the Eldorado National Forest should be preliminarily enjoined because Respondent showed a possibility of irreparable harm and a high likelihood of success on their National Environmental Policy Act (NEPA) and National Forest Management Act (NFMA) claims.

Petitioners'[1] assertion that the Ninth Circuit erred in considering extra-record evidence overlooks that the circuits, and this Court itself, agree that in some cases such evidence may be considered to help determine whether an agency considered all relevant factors and adequately explained its decision. Petitioners' claim of a conflict among the circuits over whether a "possibility" of irreparable injury can justify preliminary injunctive relief in cases where the plaintiff shows a probability of success on the merits is similarly misguided. The circuits broadly agree that a nonspeculative possibility of irreparable injury suffices, and the language the government extracts from the case law to suggest a conflict is either taken out of context or addresses other issues. Finally, Petitioners' claim that the Ninth Circuit failed to take into account the full range of public interests in considering the appropriateness of preliminary relief is incorrect, and, even if true, would only suggest that the court erred in applying law to the facts, which would not justify a grant of certiorari. Sup. Ct. R. 10. Petitioners' assertion that the public interest in logging overrides the interest in preserving habitat critical to sensitive and management indicator species is particularly implausible

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[1] For the purposes of this brief "Petitioners" refers to both the Forest Service, *et. al*, and Respondent Sierra Pacific Industries (SPI). Earth Island, et al shall be referred to as "Respondent." Citations to the Forest Service's Petition shall be "Pet.," and citation to Respondent SPI's brief shall hereinafter be "SPI Br.".

here given that, because the district court failed to grant the preliminary injunction, most of the logging has already occurred. The Ninth Circuit's ruling is well within the bounds of extant law, and its decision to preliminarily enjoin two timber sales is not of such substantial importance as to warrant review by this Court.

STATEMENT OF THE CASE

Factual Background

In October 2004, the Power and Freds fires burned parts of the Eldorado National Forest in the Sierra Nevada. The fires burned in a mosaic pattern, creating varying degrees of burn across the landscape. Within two months of the fires, the Forest Service proposed to log these areas intensively, including logging within ten sites occupied by California spotted owls.[2] Pet. App. 41a-43a. Project analyses and required public involvement were conducted over the winter, before completion of owl surveys. Much of the proposed logging included removal of live, green, old-growth forests, with no tree diameter limit, within the spotted owls' core foraging grounds using post-fire conifer mortality guidelines to predict when a tree is likely to die from its fire related injuries. Pet. App. 39a-43a. The Ninth Circuit found that the Forest Service dramatically misrepresented, and overstated, the probability that burned trees would die and failed to inform the public of the likelihood that many, if not a majority, of the trees selected for logging would otherwise survive. Pet. App. 18a-33a, 44a-45a. The use of these guidelines resulted in many occupied owl sites being erroneously classified as "unsuitable" for owls and thus scheduled for logging without

[2] The Forest Service lists the spotted owl as a "species at risk" in the Sierra Nevada, Pet. App. 37a, and as a "sensitive species," *Earth Island Institute v. United States Forest Service*, 351 F.3d 1291, 1296 n. 4 (9th Cir. 2003), meaning that the viability of the overall population is of concern. Forest Service Manual 2670.5.

analysis of adverse impacts to habitat from removing live old-growth trees. *Id*.

In areas where the fires actually killed most or all trees, the Forest Service proposed to log the vast majority of this newly created habitat, which certain Management Indicator Species (MIS)[3] such as the Black-backed Woodpecker and Hairy Woodpecker need to survive,. Pet. App. 46a-54a. According to the scientific literature, heavily burned forest is a highly biodiverse habitat supporting dozens of bird species. Administrative Record Volume ("AR") 9, p. 4799. One of these birds, the rare and seriously imperiled Black-backed Woodpecker, is "vulnerable to local and regional *extinction* as fire-suppression programs and post-fire salvage logging increase," and the habitat it relies on is either not created or cut down before it can use it. AR 10:5259 (*emphasis added*). The Power and Freds projects authorized logging the majority of the habitat created for these woodpeckers before the collection of the required population data under the forest plan and applicable NFMA regulations.[4] Pet. App. 46a-54a. The Final Environmental Impact Statements (FEISs) for these projects were filed on July 1, 2005; the first timber sale was advertised on July 18, 2005 and awarded on August 1,

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[3] MISs are "bellwether" species that represent an entire class of similar species. Pet. App. 46a; 36 C.F.R. § 219.19(a)(1) (1982). If an MIS is imperiled by habitat destruction, the entire class of species it represents could also be imperiled. Without gathering the essential population and/or habitat data required by the forest plan, there is no way to know the level of risk an MIS species faces. Pet. App. at 51a-54a.

[4] The Freds FEIS states that, out of 3,025 acres of heavily burned forest, AR 4:1817, less than 6% will be retained and not logged. AR 4:1816. Likewise, the Power FEIS states that, out of 6,282 acres of this habitat, only 21% will be retained and not logged, AR 5:2203 (Table 3-77), and that zero snags (dead trees) per acre would be retained on 5,734 of those acres. AR 5:2199 (Table 3-74). In addition, adjacent burned private lands were also extensively logged and thus offer no refuge for these species.

2005; and the Records of Decision (RODs) were issued on August 1, 2005. To maximize its revenue from logging, the Forest Service exempted itself from the normal stay period pending administrative appeal, thereby allowing implementation of logging immediately upon issuing project decisions, and logging began on August 5, 2005. AR 8:4075-4076.

Procedural Background

On August 11, 2005, Respondent Earth Island Institute et al. filed its complaint[5] and request for a temporary restraining order (TRO) and preliminary injunction in the U.S. District Court for the Eastern District of California, challenging the Forest Service's decision to implement the Power and Freds logging projects. The district court granted Respondent's motion for a TRO, then denied its motion for preliminary injunction. Pet. App. 78a. Logging, which had begun before issuance of the TRO, resumed and continued until the Ninth Circuit granted an injunction pending appeal on January 11, 2006. *Id*. at 59a-60a. On March 24, 2006 the Ninth Circuit unanimously reversed the district court and remanded the

[5] Although it is not one of their questions presented, Petitioners implicitly question Respondent's standing to bring suit. Respondent's complaint properly alleged standing, and Petitioners did not challenge Respondent's standing during the TRO or preliminary injunction phases of this litigation (which lasted from August 16, 2005 through August 24, 2005), nor during the expedited appeal (merits briefs filed simultaneously on October 11, 2005). Petitioners first raised the issue of standing in their petition for rehearing *en banc*, to which Respondent was not invited to respond. Since remand to the district court (July 31, 2006), Petitioners agreed to a stipulation entering the preliminary injunction and have filed no motion for summary judgment or motion to dismiss, nor any other challenge to Respondent's standing in the district court. Respondent is prepared to provide further evidence supporting its standing when the issue is properly presented in the district court proceedings. Respondent has, over the past five years, filed three similar lawsuits and has never been found to lack standing to bring such suits. Standing is an issue that can easily be dispensed with at the district court level and does not warrant review by this Court.

case for issuance of a preliminary injunction. *Id.* at 1a-58a. Petitioners requested panel rehearing and rehearing *en banc*, but all three panel judges voted to deny both requests and no other judge requested rehearing *en banc*. *Id*. at 146a-147a.

REASONS FOR DENYING THE WRIT

Contrary to Petitioners' assertions, the Ninth Circuit utilized the correct legal standards in its review and reversal of the district court's denial of a preliminary injunction. In addition, there is no conflict between the legal standards used by the Ninth Circuit and the precedents of other courts of appeals or this Court. Finally, given the unique circumstances of this case, review by this Court would not provide meaningful guidance for future litigation. Consequently, the petition for a writ of certiorari should be denied.

I. The Ninth Circuit Did Not Err in Considering Declarations Provided by Respondent.

Although Petitioners are correct in asserting that this Court has ruled that the "focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court," *FPC v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 331 (1976) (quoting *Camp v. Pitts*, 411 U.S. 138, 142 (1973)), this principle does not absolutely bar extra-record evidence.[6] Accordingly, the Ninth Circuit has recognized that there are limited circumstances in which extra-record evidence, such as the declarations submitted in this matter, can be utilized in

[6] Here, the circumstances are very different from both *FPC* and *Camp*. In both *FPC* and *Camp*, the Court excluded extra-record evidence because the courts of appeals had overstepped their authority in conducting a factual investigation (in *FPC*) and in ordering the district court to conduct a *de novo* trial (in *Camp*). *FPC*, 423 U.S. at 334; *Camp*, 411 U.S. at 142. The case at hand, by contrast, simply involves consideration by the court of appeals of declarations admitted into evidence by the district court. Pet. App. 22a, 70a, 75a.

judicial review of agency action.[7] At the same time, the Ninth Circuit has made clear that allowing extra-record materials is not automatic, but is a case specific question of fact for the court. *Southwest Center for Biological Diversity v. U.S. Forest Service*, 100 F.3d 1443, 1450 (9th Cir. 1996).

Contrary to Petitioners' assertion (Pet. App. 14-19), the Ninth Circuit is not alone in allowing such limited evidence. Courts of appeals, particularly in NEPA cases, have consistently recognized that "it may sometimes be appropriate to resort to extra-record information to enable judicial review to become effective." *Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989)[8]; *see also Valley Citizens for a Safe Environment v. Aldridge*, 886 F.2d 458, 460 (1st Cir. 1989) ("[A] reviewing court might want additional testimony by experts, simply to help it understand matters in the agency record.")[9]; *National Audubon Socy. v. Hoffman*, 132 F.3d 7, 15 (2d Cir. 1997) (the court may need a plaintiff's aid in calling the omission of technical scientific information to its attention, and "the consideration of extra-record evidence may be appropriate in the NEPA context to enable a reviewing court to determine that the information available to the decisionmaker included a complete discussion of environmental effects and

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[7] *See e.g. Friends of the Earth v. Hintz*, 800 F.2d 822 (9th Cir. 1986) (citing *Asarco, Inc. v. EPA*, 616 F.2d 1153, 1159 (9th Cir. 1980)); *Animal Defense Council v. Hodel*, 840 F.2d 1432, 1436 (9th Cir. 1988), *modified*, 867 F.2d 1244 (9th Cir. 1989); *Thompson v. U.S. Dept. of Labor*, 885 F.2d 551, 555 (9th Cir. 1989); and *National Audubon Socy. v. U.S. Forest Service*, 46 F.3d 1437, 1447 (9th Cir. 1993) (citing *Hodel*, 840 F.2d at 1436, applying *County of Suffolk v. Secretary of the Interior*, 562 F.2d 1368, 1384-85 (2d Cir. 1977)).

[8] *See also James Madison Ltd. v. Ludwig*, 82 F.3d 1085, 1095 (D.C. Cir. 1981) (quoting *Environmental Defense Fund, Inc. v. Costle*, 657 F.2d 275, 285 (D.C. Cir. 1981)); *accord AT&T Information Systems v. General Services Admin.*, 810 F.2d 1233, 1236 (D.C. Cir. 1987).

[9] *See also Murphy v. Commissioner of Internal Revenue*, 469 F.3d 27, 31 (1st Cir. 2006).

alternatives."); *Greene/Guilford Environmental Assn. v. Wykle*, 94 Fed. Appx. 876, 878-879 (3d Cir. 2004) (extra-record evidence can facilitate judicial review by providing added explanation of the reasons for decision); *National Audubon Socy. v. Department of Navy*, 422 F.3d 174, 188 n. 4 (4th Cir. 2005) (citing *Fort Sumter Tours Inc. v. Babbitt*, 66 F.3d 1324, 1336 (4th Cir. 1995) (explaining that while review of an agency decision is usually confined to the record, "there may be circumstances to justify expanding the record or permitting discovery")); *Sabine River Authority v. U.S. Dept. of Interior*, 951 F.2d 669, 678 (5th Cir. 1992) (a reviewing court "is to review the administrative record as well as other evidence to determine whether the agency adequately considered the values set forth in NEPA and the potential environmental effects of the project . . .")[10]; *United States v. Akzo Coatings of Am.*, 949 F.2d 1409, 1427 (6th Cir. 1991) (a "reviewing court may consider materials supplementing the administrative record in order to determine the adequacy of the government agency's decision . . ."); *Sierra Club v. U.S. Army Corps of Engineers*, 771 F.2d 409, 413 (8th Cir. 1985) (an administrative record may be supplemented by affidavits, depositions, or other proof of an explanatory nature); *Lee v. U.S. Air Force*, 354 F.3d 1229, 1242 (10th Cir. 2004)[11] (extra-record evidence may aid the court in determining whether the agency "ignored relevant factors it should have considered or considered factors left out of the

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[10] *See also Coliseum Square Assn., Inc. v. Jackson*, 465 F.3d 215, 247 (5th Cir. 2006); *Davis Mountains Trans-Pecos Heritage Assn. v. Federal Aviation Admin.*, 116 Fed. Appx. 3, 12 (5th Cir. 2004); *Sierra Club v. Peterson*, 185 F.3d 349, 369-370 (5th Cir. 1999).

[11] *See also Custer County Action Assn. v. Garvey*, 256 F.3d 1024, 1027 n. 1 (10th Cir. 2001) (citing *American Mining Cong. v. Thomas*, 772 F.2d 617, 626 (10th Cir. 1985), *cert. denied*, 476 U.S. 1158 (1986)); *High Country Citizens Alliance v. U.S. Forest Service*, 203 F.3d 835 (Table), 2000 WL 147381, *5 (10th Cir. 2000) (quoting *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1575 (10th Cir.1994)).

formal record."); and *North Buckhead Civic Assn. v. Skinner*, 903 F.2d 1533, 1539, 1543 (11th Cir. 1990).

Consistent with this weight of authority, the Ninth Circuit in this case correctly noted that extra-record materials may be allowed if needed to " 'determine whether the agency has considered all relevant factors and has explained its decision.' " Pet. App. 22a (quoting *Southwest Center for Biological Diversity v. U.S. Forest Service*, 100 F.3d 1443, 1450 (9th Cir. 1996)). Use of this exception was particularly appropriate because the court was proceeding on a shortened timeline, before the filing of the administrative record, and because the chosen tree mortality guidelines and the study ("Hood et al.") upon which they were based were not made public until the FEISs were issued. Respondent therefore never had an opportunity to comment on the guidelines or their scientific basis.[12] The "Hood et al." report on post-fire conifer mortality probabilities was never even referenced nor

[12] The Forest Service mistakenly argues that Respondent should have submitted the Royce and Bond expert declarations "during the comment period on the FEISs," Pet. 7, but there was no comment period on the FEISs because applicable regulations require comments only on draft EISs, 40 C.F.R. §§ 1503.1(a), 1506.10(b). The Forest Service did not invite comments on either FEIS. 40 C.F.R. §1503.1(b); see AR Index; *see also* AR 3:1534; AR 4:1954; AR 5:2523-2524; AR5:2539-2540. *Dept. of Transportation v. Public Citizen*, 41 U.S. 752 (2004), is easily reconciled with the exceptions to the record rule espoused in this section and applied in this case. *Public Citizen* did not concern whether an agency record could be supplemented with evidence not presented during agency comment periods, but whether a party had an obligation to make its general position known during the comment period. *Id*. at 764-65. Declarants Royce and Bond did submit comments on the problems associated with tree mortality guidelines and the impact on resident spotted owls during the public comment period, but could not specifically comment on the particular guidelines chosen by the Forest Service and whether the guidelines actually reflected the data upon which they were based for the simple reason that this information was not made known to the public until the public comment period was closed. AR 1:0112-0137, 0291-0293, 0308-0321; AR 4:1860; AR 5:2377.

provided to the public during the comment period on the draft EISs, even though it became the sole basis for determining which trees would be cut in the project areas. AR 1-3:389-1137; AR 4:1610-1613; 2033-2036.

That this critical study and its results were not even included within the FEISs required Respondent itself to submit the document to the district court and provide some explanation of the discrepancy between the highly technical document itself and the decision and analysis in the FEISs. But for Respondent's submission of the study and explanatory statements by Dr. Royce, the court would not have been informed on this topic, the very cornerstone of the agency decision, and judicial review would have been frustrated.[13]

Petitioners incorrectly claim that the Ninth Circuit based its decision regarding the post-fire conifer mortality guidelines on a "side-by-side" comparison of Respondent's expert declarations and the Forest Service's expert declarations, and assert that the Ninth Circuit's determinations that the Forest Service's decisions were arbitrary and capricious were not based on the administrative record. Pet. 13, 16.[14] While the Ninth Circuit did discuss the declarations at length, a review of the opinion reveals that the Ninth Circuit properly utilized the declarations for background and technical information and to determine whether the agency considered all relevant

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[13] Given the Forest Service's implementation of the "emergency exemption" with regard to theses projects, Respondent was also unable to vet the discrepancies between the study and the agency's action with the agency through the administrative appeals process and was therefore forced to address this argument for the first time in the district court.

[14] Petitioners complain that the Ninth Circuit conducted an "essentially" *de novo* review. Pet. 11; SPI Br. 19. Actually, the Ninth Circuit properly explained that it reviewed the district court's findings of fact for clear error and its conclusions of law *de novo*. Pet. App. 10a. To the extent Petitioners allege that the Ninth Circuit misapplied these undisputedly correct standards of review, such an allegation would of course not support a petition for certiorari even if it were correct. S. Ct. Rule 10.

factors and explained its decision. As is plain from the opinion, the Ninth Circuit based its findings that the Forest Service abused its discretion on the record itself. Pet. App. 18a-33a, 37a-45a.[15] Specifically, with regard to the mortality guidelines, the Court determined that the Forest Service had failed to consider or disclose the relevant factor of how many trees scheduled to be logged under the chosen mortality guidelines would otherwise survive their fire related injuries. *Id.* 29a-33a. Throughout the discussion of the declarations regarding tree mortality, the Court assumed that the Forest Service's statements were correct, but in the end it was unable to reconcile Forest Service statements with the content of the FEISs and supporting documents and the requirements of NEPA, resulting in the finding that the Forest Service abused its discretion. *Id.* 18a-33a. The Court based its finding upon the administrative record and the deficiencies therein, not on the testimony of Dr. Royce.

As with the declarations of Dr. Royce and Sheri Smith, the declarations of Ms. Bond and Mr. Loffland similarly helped to focus the Court's attention on relevant portions of the administrative record. As a result, upon review of the discussion within the FEISs, the Ninth Circuit found that the Forest Service had rendered a decision that was not in accordance with the law (i.e., NEPA) because: (a) its failure to

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[15] The cases cited by Petitioners (Pet. 17) pertain to circumstances wherein plaintiffs submitted documentary evidence in court which was not available to the agency when it made its decision. *American Coke and Coal Chems. Inst. v. EPA*, 452 F.3d 930, 945 (D.C. Cir. 2006) (court excluded data that was not before the EPA at the time of its rule-making); *Newton County Wildlife Assn. v. Rogers*, 141 F.3d 803, 808 (8th Cir. 1998) (excluded evidence that was not available to the Forest Service when it prepared the EA). Here by contrast documents referenced within the declarations submitted by Respondent were in front of the agency at the time it made its decision. AR 11: 5969-5993 (Hood et al); AR 9: 4407-4413; AR 3: 1219-1223, 1227-1240; AR5:2259-2260 (reference list citing studies); and Admin Record Index p. 13 (stating that scientific literature cited in FEIS is part of the administrative record).

adequately analyze probable tree mortality was likely to result in the removal of suitable owl habitat, an impact that was never discussed, (b) there was no explanation of how the Forest Service determined which areas were "unsuitable" for owls, and (c) the Forest Service had failed to respond to evidence that owls utilize burned forests for foraging. *Id.* at 37a-45a. Once again, these findings were all based upon the record itself and not on the declaration of Ms. Bond.

The Ninth Circuit panel found, through a searching review of the record, that Respondent had a "strong likelihood of success on the merits" of most of their claims.[16] *Id.* at 54a. Petitioners' disagreement with that conclusion rests on misinterpretations of case law, pertinent regulations, and the particular and unique facts of this case. The Ninth Circuit's use of declarations to supplement its review of the administrative record in light of the particular facts of this case was proper, and review by this Court is thus unwarranted.

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[16] In discussing the merits of Respondent's NFMA claim, Petitioner Forest Service argue that it "interprets" the forest plan provisions requiring annual population monitoring for MIS as discretionary and dependent upon funding. Pet. 18. Petitioner Forest Service cites to *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 72 (2004) ("*SUWA*"), where, in the context of a challenge to a BLM plan under the Federal Land Policy and Management Act, this Court held that plaintiffs could not bring a broad "programmatic" challenge to affirmatively force the agency to comply with general duties in the plan pursuant to 5 U.S.C. § 706(1). Here, by contrast, Respondent challenges a specific agency action under NFMA for failing to comply with the applicable forest plan, pursuant to 5 U.S.C. § 706(2)(A). NFMA requires projects to be consistent with the applicable forest plan, including the monitoring obligations at issue in this case. 16 U.S.C. § 1604(i); *Ohio Forestry Assn. v. Sierra Club*, 523 U.S. 726, 729-30 (1998). The forest plan provisions at issue here are mandatory and contain no exemption in the event the agency chooses not to fund MIS monitoring. Pet. App. 46a-54a; *see also Sierra Club v. Eubanks*, 335 F. Supp. 2d 1070, 1081-82 (E.D. Cal. 2004) ("the Framework [forest plan] expressly requires annual population monitoring for MIS"). Further, the Ninth Circuit was enforcing the 1982 NFMA regulations, which were not at issue in *SUWA*. Pet. App. 47a-48a.

II. The Ninth Circuit Correctly Identified and Applied the Irreparable Harm Standard.

A. The Ninth Circuit Has Consistently Used a Possibility of Irreparable Harm Standard and Correctly Applied It in This Case.

Petitioners make much of the Ninth Circuit's articulation of a "mere possibility of irreparable harm" standard for preliminary injunctions, Pet. App. 15a, attempting to characterize this test as being in significant conflict with previous decisions of this Court and the other circuits. Pet. 13, 19-26. Petitioners' focus on the word "mere" in an attempt to imply that the Ninth Circuit allows claims of the smallest, most speculative injury to satisfy the "possibility of irreparable harm" standard. This is not the case. *See e.g.*, *Goldie's Bookstore, Inc. v. Superior Court of the State of California*, 739 F.2d 466, 472 (9th Cir. 1984) ("Speculative injury does not constitute irreparable injury"). The Ninth Circuit used the word "mere" to underscore, in the context of recently correcting the same district court on this same issue, that the standard is *solely* the "possibility of irreparable harm" and that no additional hurdles should be placed in front of plaintiffs with regard to this portion of the preliminary injunction test.[17]

The Ninth Circuit correctly identified and applied the irreparable harm factor of the preliminary injunction standard as being one of establishing "a possibility of irreparable harm." *Id.* This has been and continues to be the standard in the Ninth Circuit. The Ninth Circuit employs a sliding scale

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[17] The district court asserted that Respondent must prove a "significant threat of irreparable injury by clear and convincing evidence" *regardless* of the showing of likelihood of success on the merits. Pet. App. 15a. Given the Ninth Circuit's sliding scale approach, this is not correct. *Benda v. Grand Lodge of International Association of Machinists*, 584 F.2d 308, 315 (9th Cir. 1978). The district court also completely failed to make a finding with regard to plaintiffs showing of harm and the spotted owl. Pet. App. 13a.

approach such that the requisite possibility of injury may increase as the likelihood of success on the merits decreases, with a possibility of harm sufficing when success on the merits is probable, but a greater likelihood of harm necessary when the plaintiff only shows the existence of a substantial question on the merits. *Benda v. Grand Lodge of International Association of Machinists*, 584 F.2d 308, 315 (9th Cir. 1978), *cert. dismissed*, 441 U.S. 937 (1979). Petitioners' claim of a split within the Ninth Circuit, with one line of cases requiring a greater showing of irreparable injury than another, is misleading. The cases Petitioners cite clearly identify the standard as requiring the moving party to show the *possibility* of irreparable injury when there is a probability of success. *Oakland Tribune v. The Chronicle Publishing Co.*, 762 F.2d 1374, 1376 (9th Cir. 1985);[18] *Associated General Contractors of California v. Coalition for Economic Equity*, 950 F.2d 1401, 1410, 1412 (9th Cir. 1991).[19]

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[18] The Ninth Circuit distinguished *Oakland Tribune* on the ground that the significant threat standard was utilized in that case because plaintiffs had shown only a very low likelihood of success on the merits; thus, the court applied the sliding scale approach articulated in *Benda*, 584 F.2d at 315. Pet. App. 15a-16a.

[19] The other case cited by Petitioners, *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716 (9th Cir. 1999), recites the standard as follows: "A preliminary injunction may only be granted when the moving party has demonstrated a significant threat of irreparable injury, irrespective of the magnitude of the injury." *Id.* at 725 (citing *Big Country Foods, Inc. v. Board of Education*, 868 F.2d 1085, 1088 (9th Cir. 1989). It is clear from these cases that this sentence is focused on the *irreparability* of the harm and does not imply an elevated showing of likelihood of harm. In *Simula*, the plaintiffs' claim of harm was not found to be "irreparable" because provisional relief was available from the Swiss Arbitral Tribunal. *Id.* at 725-726. Likewise in *Big Country Foods*, plaintiffs' only claim of injury was loss of a contract, which was not found to be irreparable. *Big Country Foods*, 868 F.2d at 1088. Thus these cases also fail to support the claim that two standards for preliminary injunction exist in the Ninth Circuit.

The sentence on which Petitioners rely ("Under either formulation, the moving party must demonstrate a *significant threat* of irreparable injury") to imply this split is taken out of context from *Oakland Tribune*. *Oakland Tribune*, 762 F.2d at 1376. The sentence stems from *America Passage Media Corp. v. Cass Communications*, 750 F.2d 1470, 1473 (9th Cir. 1984), which in turn relies on *Flynt Distributing Co. v. Harvey*, 734 F.2d 1389, 1394 (9th Cir. 1984), establishing that "[r]egardless of how the test for preliminary injunction is phrased, the moving party must demonstrate *irreparable* harm." *Id.* (emphasis added). In both *American Passage* and *Flynt Distributing Co.* the issuance of the preliminary injunction was denied because the threatened injuries were not *irreparable*. *America Passage Media Corp. v. Cass Communications*, 750 F.2d at 1473 (monetary damages are not irreparable because plaintiffs will be entitled to treble damages if they prevail on the merits), and *Flynt Distributing Co*, 734 F.2d at 1395 ("Monetary injury is not normally considered irreparable.") (citation omitted). Indeed, *American Passage* makes clear that a "[r]easonable apprehension of threatened injury will suffice" so long as the injury is *irreparable*. *American Passage*, 750 F.2d at 1473. Contrary to Petitioners' claims, this does not equate to a threshold showing for irreparable harm which is more than a mere "possibility," and thus there is no conflict within the Ninth Circuit.

The district court's ruling in this case demonstrated a fundamental misunderstanding of what constitutes an "irreparable" injury and when a "possibility" of such an injury has been established. An injury is "irreparable" where it cannot be adequately remedied by money damages or other legal remedies, where such injury is "permanent or at least of long duration," *Amoco Production Co., v. Village of Gambell*, 480 U.S. 531, 545 (1987), and where failure to enter the injunction would essentially render final judgment useless. *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975). To demonstrate that the threatened injury is possible, it must be shown to be

imminent, *Caribbean Marine Services Co., Inc. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988), and its occurrence cannot be speculative or remote. *Goldie's Bookstore*, 739 F.2d at 472.[20]

In this case, Respondent demonstrated that mature and old-growth trees (both living and dead), which provide habitat for rare MIS and resident sensitive species, would be logged, resulting in wholesale removal of large tracts of continuous forest, had the injunction not been issued. Logging and habitat removal had already commenced before issuance of the TRO, and would resume absent a preliminary injunction. The injury was imminent and in no way remote or speculative. Once these large old trees were removed they could not be put back on the landscape, habitat for the species of concern could not be restored for a century or more, and final judgment on the legal issues would be meaningless for Respondent's members. Respondent therefore had clearly met its burden of establishing the possibility of irreparable harm. The district court was unable to perceive this because it was focused on the *magnitude* of the harm, rather than the possibility that it would occur. The district court essentially ignored the "possibility" standard and effectively ruled that unless plaintiffs demonstrated that a particular (logging) project is likely to cause an immediate threat to the viability of, or lead to the extinction of, MIS or sensitive species, they could never establish harm sufficient to obtain a preliminary injunction.[21] Pet. App. 74a, 77a. This court has recently ruled

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[20] Finally, Plaintiffs may satisfy both the fact that the injury is irreparable and possible, but still not be entitled to a preliminary injunction because the practical effect of the irreparable harm, should it occur, would be "trifling." *Caribbean Marine Services*, 844 F.2d at 676 (recognizing that the violation of a constitutional right could be irreparable, but in this circumstance it would merely create an inconvenience, and "mere inconvenience" is not sufficient to support issuance of an injunction).

[21] In the case at hand, the district court acknowledged that the MIS in question depend upon heavily burned forest, that none of the required

(*Footnote continued*)

that such decisions "suggesting that injunctive relief could not issue in a broad swath of cases," are not compatible with traditional equitable principles. *e-Bay, Inc. v. MercExchange*, 126 S. Ct. 1837, 1840; 164 L. Ed. 2d 641; 2006 U.S. LEXIS 3872 (2006). The Ninth Circuit recognized this abuse of dis-

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population trend monitoring had been conducted, and that most of their habitat would be eliminated in the project areas, but nevertheless concluded that this "does not *necessarily* mean that any immediate and irreparable injury *will* occur . . . Plaintiffs have not demonstrated irreparable harm." Pet. App. 74a (emphasis added).

Petitioners' argument that a preliminary injunction should never issue unless plaintiffs prove that species extinction will otherwise result, Pet. 24-26, rests on a single cursory per curium opinion denying a temporary restraining order from 1975. *See Fund for Animals v. Frizzell*, 530 F.2d 982 (D.C. Cir. 1975). This case has recently been distinguished in a case similar to the one at issue here—a case Petitioners cite favorably: *Greater Yellowstone Coalition v. Flowers*, 321 F.3d 1250 (10th Cir. 2003). *See* Pet. 22. In *Greater Yellowstone*, the Tenth Circuit reversed the district court's denial of a preliminary injunction against the building of a golf course in violation of NEPA and the Clean Water Act. 321 F.3d at 1251. The Tenth Circuit rejected the idea, accepted by the district court there, and argued by Petitioners here, that the plaintiff had to show harm to a species as a whole to establish the possibility of irreparable harm. *Id.* at 1257. The court approvingly cited *Sierra Club v. Martin*, which, like the case at hand, dealt with logging projects that would "destroy" habitat for sensitive and management indicator species, and found harm enough to support a preliminary injunction on that basis alone. 71 F. Supp. 2d 1268, 1327 (N.D. Ga 1996). In fact, the courts have been clear that in cases involving logging, the logging itself constitutes irreparable harm since the trees cannot be put back. *State of N.Y. v. Nuclear Regulatory Commn.*, 550 F.2d 745, 755 (2d Cir. 1977) ("When trees are felled . . . it is beyond question that irreparable ecological damage has occurred."); *Portland Audubon Socy. v. Lujan*, 795 F. Supp. 1489, 1509 (D. Or. 1992) ("Courts in this circuit have recognized that timber cutting causes irreparable damage and have enjoined cutting when it occurs without proper observance of NEPA procedures and other environmental laws."), *affd.*, 998 F.2d 705 (9th Cir. 1993).

cretion and appropriately reversed the district court denial of preliminary injunction.[22]

B. The Ninth Circuit's Irreparable Harm Standard Does Not Conflict with This Court's Decisions.

Contrary to Petitioners' claims (Pet. 20-21), the Ninth Circuit's preliminary injunction standard is consistent with decisions of this Court. In *Brown, Secretary of State of California v. Chote*, 411 U.S. 452, 456 (1973), Chief Justice Burger, expressing the unanimous views of the Court, determined that in issuing the requested preliminary injunction the district court had "properly addressed itself to two relevant factors: first, the appellee's possibilities of success on the merits, and second, the *possibility* that irreparable injury would have resulted, absent interlocutory relief." *Id.* (emphasis added). *Brown* has not been superseded or overturned, and a review of the actual circumstances of the cases cited by Petitioners, Pet. 20-21 and SPI Br. 7, confirms that the equitable principles governing issuance of a preliminary injunction require that irreparable injury be possible, rather than certain.

In *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975), the case upon which Petitioners rely to support their assertion that this Court requires plaintiffs to show that they *will suffer* irreparable injury, the use of the phrase "will suffer" did not occur in a discussion of the degree of likelihood of irreparable harm that must be shown, but rather in a general listing of the elements of a preliminary injunction showing. *Id.* at 931. The phrase was not intended to set forth a standard of the required likelihood of irreparable injury, let alone the standard the Petitioners appear to extract from it, *i.e.*, that the plaintiff must show to a certainty that he *will* suffer the injury. *Id.* The

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[22] Indeed, even if the proper formulation of the standard were, as the district court believed, that a "significant risk" of harm is necessary, such a risk existed on the facts here.

actual basis articulated in *Doran* for finding that the requisite showing of irreparable harm had been met was the mere allegation by respondents of the possibility of bankruptcy should the challenged ordinance not be enjoined. *Id.* at 932. *Doran* is consistent with the Court's ruling in *Brown* and is not inapposite to the Ninth Circuits' threshold for irreparable injury as articulated in the case at hand.

Other cases cited by Petitioners further confirm that the Ninth Circuit's threshold is not contrary to the law of this Court. In *Ashcroft v. ACLU*, 542 U.S. 656 (2004), this Court dealt with the constitutionality of internet content restrictions and never actually addressed irreparable harm because the correctness of the district court's conclusion that a likelihood of irreparable injury had been established was undisputed. *Id.* at 666. The harm discerned by the district court in that case centered on the claims by adult plaintiffs that their fear of prosecution under the challenged act would lead them to self-censor their online materials. These fears were found to be reasonable given the breadth of the statute, and because the self-censorship "*could* result in the censoring of constitutionally protected speech," the threshold for irreparable harm was met. *ACLU v. Janet Reno*, 31 F. Supp. 2d 473, 497 (E.D. Pa. 1999) (emphasis added). Once again the threshold was found to be one of possibility (*i.e.* "could"), not certainty, and thus *Ashcroft* is fully consistent with the Ninth Circuit's holding.[23]

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[23] Other cases cited by Petitioners also fail to prove their point. The dissent in *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 340 (1999), simply reiterates the standard as articulated in *Doran*, and asserts only that "speculative injury" is insufficient, while *Sampson*, *Beacon Theatres, Inc*. and *Romero-Blanco* are simply cited for the basic premise that the basis for injunctive relief is irreparable harm and inadequacy of legal remedies. *Sampson v. Murray*, 415 U.S. 61, 88 (1974); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506-507 (1959); *Weinberger v. Romero-Blanco*, 456 U.S. 305, 312 (1982). The Ninth Circuit echoes both of these premises. *See e.g. Goldie's Bookstore*, (*Footnote continued*)

Petitioners' citations to *Amoco Prod. Co.*, 480 U.S. 531 (1987), and *eBay, Inc.*, 126 S. Ct. 1837 (2006), also fail to demonstrate a rift between Ninth Circuit law and the law of this Court. Pet. 21, SPI Br. 7. *Amoco* corrected the Ninth Circuit when it overstepped equitable principles by establishing a *presumption* of irreparable injury once a violation of an environmental statute was found to have occurred. *Amoco*, 480 U.S. at 542-545. *Amoco*, however, went on to recognize that "the environment can be fully protected without this presumption. Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable." *Id.* at 545. Thus, so long as environmental injury is "*sufficiently likely*, the balance of harms will usually favor the issuance of an injunction to protect the environment." *Id.* (emphasis added). Once again, this Court identified the standard as the possibility rather than the actuality or certainty of irreparable harm, so long as the likelihood of harm is not remote.

Finally, in *eBay, Inc.*, the degree of likelihood of irreparable harm was not at issue, and the Court held only that injunctions in patent cases are subject to the same four-factor equitable standard as injunctions in other cases. In reciting that standard, the Court imprecisely stated the test as whether "[a] plaintiff … *has suffered* an irreparable injury," 126 S. Ct. at 1839 (emphasis added), but even Petitioners do not suggest that a showing of *past* irreparable injury is required.[24]

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739 F.2d at 472; *Los Angeles Memorial Coliseum v. National Football League*, 634 F.2d 1197, 1202 (9th Cir. 1980).

[24] Indeed, an injunction would not be appropriate where the only irreparable injury has already occurred, because it would not provide redress. The very purpose of an injunction is to *prevent* injury that would otherwise be irreparable, which is impossible if an irreparable injury has already occurred. *See Ellett Bros., Inc. v. U.S. Fidelity & Guar. Co.*, 275 F.3d 384, 391 (4th Cir. 2001) ("An injunction … is forward looking relief to prevent future harm, not relief to redress past harm.") (Michael, J., concurring); *see also Steel Co. v. Citizens for a Better Environment*, 523

(*Footnote continued*)

Moreover, the recitation of equitable principles in the *e-Bay, Inc.* case relies upon *Weinberger v. Romero-Barcelo* and *Amoco Prod. Co.*, neither of which requires such a showing. *Weinberger*, 456 U.S. 305, 310-320 (1982); *Amoco*, 480 U.S. at 545 (must show irreparable harm is sufficiently likely). No other Supreme Court case recites the well established four factor test as requiring the establishment of past harm as a prerequisite for injunctive relief. *e-Bay, Inc.* cannot be read as fundamentally altering the law of this Court or conflicting with the threshold established in the Ninth Circuit.

C. There Is No Split Among the Circuits Regarding the Threshold Necessary to Establish Irreparable Injury.

Contrary to Petitioners' assertions (Pet. 22-23), there is no split among the courts of appeal over the threshold necessary to establish irreparable injury. **All** circuit courts employ the "possibility" of irreparable harm standard consistent with the Ninth Circuits usage in this case, and most circuits allow some type of sliding scale analysis.

In *Matos ex rel. Matos v. Clinton Sch. Dist.*, Pet 22, the First Circuit did not disavow the use of a "possibility" of irreparable harm threshold, but simply held that "[i]nasmuch as the plaintiff failed to demonstrate a *realistic prospect* of irreparable harm, she has not crossed that threshold." 367 F.3d 68, 73 (1st Cir. 2004) (emphasis added). The court explained that plaintiff could not show any real danger that defendants would tamper with her computer hard drive; thus, there was "no plausible basis for speculating that such tampering will occur before the case is tried." *Id.* This standard is not in conflict with the Ninth Circuit's possibility standard

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U.S. 83, 108 (1998) (injunction cannot remedy completed harm, but only continuing or future injury).

because the Ninth Circuit also rejects speculative and implausible possibilities, as explained above.[25]

Similarly, the Second Circuit does not reject the "possibility" standard, but holds that the *remote* possibility of an injury is insufficient. *Carey v. Klutznick*, 637 F.2d 834, 837 (2d Cir. 1980) ("[E]very irreparable injury is merely a possibility until it is actual and can no longer be averted. Real and imminent, not *remote*, irreparable harm is what must be demonstrated . . . .") (emphasis added) (citing *State of N. Y. v. NRC*, 550 F.2d 745, 754-55 (2d Cir. 1977) (infinitesimal chance of irreparable injury insufficient; opinion contrasted its facts with harm flowing from logging and land alteration).

When the phrase "possibility of irreparable harm" is searched in Westlaw in the Second Circuit, seven of the eight cases retrieved approve of this language. *See*, in addition to two cases cited above, *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 427 (2d Cir. 2004) (citing *Danielson v. Local 275, Laborers Intl Union of North America*, 479 F.2d 1033, 1037 (2d Cir.1973)); *Paco Rabanne Parfums, S.A. v. Norco Enterprises, Inc.*, 680 F.2d 891, 892 (2d Cir. 1982); *Sperry Intl. Trade, Inc. v. Government of Israel*, 670 F.2d 8, 15 (2d Cir. 1982); *Sanders v. Air Line Pilots Assn, Intl.*, 473 F.2d 244, 248 (2d Cir. 1972). The one Second Circuit case cited by the Petitioners, *Borey v. National Union Fire Ins. Co.*, 934 F.2d 30 (2d Cir. 1991), fails to provide any citation for its dictum that "a mere possibility of irreparable harm is insufficient." Pet. at 22. *Borey*, like Petitioners, simply appears to misconstrue the meaning of the word "possibility" in this context, by mis-explaining its proper holding that the alleged harm was not irreparable because plaintiffs could be made whole with monetary relief. *See Borey*, 934 F.2d at 34. Accordingly, the

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[25] *Rushia v. Town of Ashburnham*, 701 F.2d 7, 9 (1st Cir. 1983) does not address the degree of likelihood of injury, but rather whether the injury could be considered "irreparable" as a matter of law.

Ninth Circuit's "possibility" threshold for showing irreparable injury is in accord with the law of the Second Circuit.[26]

Although the Third Circuit uses a slightly different formulation from the Ninth Circuit, it is substantively the same. The Third Circuit recognizes that "the grant or denial of a preliminary injunction is almost always based on an abbreviated set of facts, requiring a delicate balancing of the probabilities of ultimate success at final hearing with the consequences of immediate irreparable injury which could *possibly flow from the denial of preliminary relief*." *U. S. Steel Corp. v. Fraternal Assn. of Steelhaulers*, 431 F.2d 1046, 1048 (3d Cir. 1970) (emphasis added); *accord Industrial Electronics Corp. v. Cline*, 330 F.2d 480, 483 (3d Cir. 1964) (holding that a showing that irreparable injury would "*possibly result pendente lite if relief is denied*" is necessary to obtain a preliminary injunction) (emphasis added).

In essence, the courts in the Fifth and Eleventh Circuits have adopted the same language used in the Third Circuit. *See Gray Line Motor Tours v. City of New Orleans*, 498 F.2d 293, 296 (5th Cir. 1974) (the grant or denial of a preliminary injunction requires "a delicate balancing of the probabilities of ultimate success at final hearing with the consequences of immediate irreparable injury which could *possibly flow* from the denial of preliminary relief." (emphasis added) (*quoting U.S. Steel Corp. v. Fraternal Assn. of Steelhaulers*, 431 F.2d 1046, 1048 (3d Cir. 1970)). The Fifth Circuit went on to hold that "[u]nderlying the grant of such [preliminary injunctive] relief must, of course, be an evaluation of the equitable considerations involved: the plaintiffs' likelihood of prevailing on the merits, *the possibility of irreparable harm* to the plain-

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[26] *Forest City Daly Housing, Inc. v. Town of N. Hempstead*, 175 F.3d 144 (2d Cir. 1999), does not even address the requisite showing of irreparable injury and merely establishes that a preliminary injunction will not issue in agency review cases if a plaintiff fails to establish a strong likelihood of success on the merits (which Respondent established here).

tiffs, the counterbalancing risk of harm to the defendants, and the public interest." *Martinez v. Mathews*, 544 F.2d 1233, 1243-44 (5th Cir. 1976) (now serving as the Eleventh Circuit) (emphasis added). The recent Eleventh Circuit case, *Siegel v. LePore*, which did not allow a "wholly speculative" injury to support issuance of an injunction, is also fully consistent with Ninth Circuit precedent. 234 F.3d 1163, 1177 (11th Cir. 2000) (en banc).

Similarly, the Fourth Circuit specifically approves the "possibility of irreparable harm" standard. *Universal Furniture Intl., Inc. v. Collezione Europa USA, Inc.*, 196 Fed. Appx. 166, 169 (4th Cir. 2006) (courts should consider "*the possibility of irreparable harm* to the plaintiff if preliminary relief is denied") (emphasis added) (citing *Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189, 196 (4th Cir. 1977) ("The importance of probability of success increases as the probability of irreparable injury diminishes, . . . and where the latter may be characterized as simply 'possible,' the former can be decisive."); *accord*, *Magnussen Furniture, Inc. v. Collezione Europa USA, Inc.*, 116 F.3d 472 (Table), 1997 WL 337465 at *1 (4th Cir. 1997); *Ulmet v. U.S.*, 888 F.2d 1028, 1034 (4th Cir. 1989). *Blackwelder*, which expressly embraces issuance of injunctions to prevent "possible" harm when success on the merits is probable, has been repeatedly cited as the standard in the Fourth Circuit for thirty years. Petitioners' citation of *Rum Creek Coal Sales, Inc. v. Caperton*, 926 F.2d 353, 360 (4th Cir. 1991), is not to the contrary. *See* Pet. 22-23. *Rum Creek* explicitly applies the *Blackwelder* standard, and holds, consistent with the Ninth Circuit's standard, that while a greater showing of irreparable injury and balance of hardships is demanded where the plaintiff merely shows a "substantial question" on the merits, a lesser showing is required where the plaintiff, as here, shows

a greater likelihood of success. *Rum Creek*, 926 F.2d at 359-360.[27]

Petitioners ignore the Sixth, Eighth and D.C. Circuits, most likely because these circuits also approve standards in accord with the Ninth Circuit. *See, e.g., Golden v. Kelsey-Hayes Co.*, 73 F.3d 648, 653-54 (6th Cir. 1996) (district courts are to consider four factors including "whether the plaintiffs *could* suffer irreparable harm without the injunction . . . . None of these factors, standing alone, is a prerequisite to relief; the court should balance them.… [P]roving irreparable harm is not an absolute prerequisite to obtaining a preliminary injunction.") (emphasis added); *Sandison v. Michigan High School Athletic Assn.*, 64 F.3d 1026, 1030 (6th Cir. 1995); *Dataphase Systems, Inc. v. C.L. Systems, Inc.*, 640 F.2d 109, 114 (8th Cir. 1981) (en banc) (clarifying that the appropriate factors for the district courts to consider include "(1) the *threat* of irreparable harm to the movant," and emphasizing that "[i]n balancing the equities no single factor is determinative") (emphasis added); *Safety-Kleen Systems v. Hennkens*, 301 F.3d 931, 935 (8th Cir. 2002); *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 845 (D.C. Cir. 1977) (adopting "possibility of irreparable injury" standard); *Fund for Animals v. Norton*, 281 F. Supp. 2d 209, 219 (D.D.C. 2003) (sliding scale approach).

Similarly, the Seventh Circuit considers four factors, one asking "whether the *threatened* injury to the plaintiff outweighs the threatened harm the injunction may inflict on the defendant." *O'Conner v. Board of Education of School Dist. No.* 23, 645 F.2d 578, 580 (7th Cir. 1981) (emphasis added).

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[27] Similarly, *Globe Nuclear Servs. & Supply GNSS, Ltd. v. AO Techsnabexport*, 376 F.3d 282, 287 (4th Cir. 2004), does not support Petitioners' assertions, because the preliminary injunction issue was not even before the court, and the court did not rule on the degree of likelihood of harm required for a preliminary injunction.

As under the sliding scale test of the Ninth Circuit, "the more likely the plaintiff will succeed on the merits, the less the balance of irreparable harms need favor the plaintiff's position." *Ty, Inc. v. Jones Group, Inc.*, 237 F.3d 891, 895 (7th Cir. 2001). Similarly, *AlliedSignal, Inc. v. B.F. Goodrich Co.*, endorsed the "sliding scale" approach and held that despite doubts about whether the claimed injury would occur, the plaintiff had shown a "sufficient likelihood" of injury in view of its showing of "some likelihood" of success. 183 F.3d 568, 576-577 (7th Cir. 1999).

Finally, the Tenth Circuit is no different from the other Circuits in approving the "possibility of irreparable harm" standard. *See e.g. Utah Envtl. Congress v. BLM*, 119 Fed. Appx. 218, 220 (10th Cir. 2004) (using "possibility of irreparable harm" standard); *Tri-State Generation and Transmission Assn., Inc. v. Shoshone River Power, Inc.*, 805 F.2d 351, 356 (10th Cir. 1986) ("possibility of going out of business is irreparable harm") (citing *John B. Hull, Inc. v. Waterbury Petroleum Products, Inc.*, 588 F.2d 24, 28-29 (2d Cir. 1978), *cert. denied*, 440 U.S. 960 (1979)); *Mesa Petroleum Co. v. Cities Service Co.*, 715 F.2d 1425, 1432 (10th Cir. 1983); and *Continental Oil Co. v. Frontier Refining Co.*, 338 F.2d 780, 781 (10th Cir. 1964). No cases in the Tenth Circuit disapprove its use.[28]

In sum, the Ninth Circuit's decision below is consistent in substance with the jurisprudence of all of the other circuits, and the issue raised by Petitioners is at best semantic and at worst nonexistent. Because there is no circuit conflict with regard to the threshold necessary to establish irreparable harm, the issue does not require Supreme Court review.

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[28] *Greater Yellowstone Coal*, 321 F.3d at 1258, 1261-62, is not to the contrary. *See* Pet. 22-23. The Court stated that while "purely speculative harm does not amount to irreparable injury[,] an injury is not speculative simply because it is not certain to occur," 321 F.3d at 1258 (citations omitted), and that a "significant risk" suffices to establish that a possibility of harm is not speculative.

III. The Ninth Circuit Properly Balanced the Harms and Adequately Analyzed the Public Interest.

The Ninth Circuit properly and adequately conducted a review of the hardships faced by the parties and took into account the public interest. Pet. App. 54a. The errors of the district court with regard to the legal standard for preliminary injunction, its clearly erroneous findings with regard to Respondent's likelihood of succeeding on the merits of their NEPA claims, and its legal error with regard to Respondent's NFMA claims, necessarily led to an abuse of discretion by the district court in the balancing of the equities. Pet App. 13a-16a, 18a-33a, 37a-45a, 47a-54a. Thus, no deference to the district court's determination was required.[29]

Given the exigencies of the circumstances and the little that remained of the status quo (most of the logging having been completed), coupled with the appellate court's power to "remand the cause and direct the entry of such appropriate judgment . . . as may be just under the circumstances" (28 U.S.C. § 2106), the Ninth Circuit properly balanced the equities and reviewed the public interest before remanding the case to the district court for entry of a preliminary injunction. In balancing the equities, the Ninth Circuit weighed the possibility of irreparable harm which Respondent demonstrated, including the wholesale removal of forest within an area where Respondent's members recreate, bird-watch and perform scientific research on burned forests, against some

[29] Petitioners imply that the Courts should be bound by the agency's balancing and should give deference to its determination, but this argument runs afoul of the well established precedent that, "[u]nless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *Amoco*, 480 U.S. at 541-542 (citing *Weinberger*, 456 U.S. at 313 (quoting *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946)). Neither NEPA nor NFMA so restrict the Courts equity jurisdiction, and thus the courts are not bound by the agency's balancing.

claimed economic losses.[30] Given that economic losses are not typically irreparable, the court's determination that the balance tips in favor of Respondent was correct. See e.g. *Sampson v. Murray*, 415 U.S. 61, 90 (1974), *Portland Audubon Socy. v. Lujan*, 795 F. Supp. 1489, 1509 (D. Or. 1992), *affd.*, *Portland Audubon Socy. v. Babbitt*, 998 F.2d 705 (9th Cir. 1993); *State of California v. Bergland*, 483 F. Supp. 465, 499 n. 43 (E.D. Cal 1980).[31]

The Ninth Circuit's discussion of the Petitioners' economic losses reflected the emphasis that Petitioners themselves placed on these alleged harms, as well as the Court's review of Respondent's likelihood of success on the merits. The primary harm asserted by Petitioners was economic, and they tied their secondary claims of fire risk reduction, human health and safety and erosion mitigation to proceeds from the maximum possible revenue of the salvage sale. *See* FS Appeal Br. 32-33; SPI Appeal Br. 24-27; Earth Island Appeal Br. 48-52. In addition, all of the claimed benefits of the pro-

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[30] The claimed "losses" are in fact not losses at all, but merely additional profits that would not be realized (or whose realization might be delayed). Delays in implementation might simply result in some reduction in value of the timber from deterioration. Salvage logging projects are often sold two years after a fire, and logging contracts run from two to four years in duration. A considerable sum of money would be made even if the project were temporarily enjoined to provide for a review on the merits of Respondent's claims. In addition, these "losses" only apply to trees that have actually died from their fire-related injuries. Given that the mortality guidelines overestimated mortality, much of the claimed loss was speculative at best, which is probably why SPI is, three years after the fire, still claiming that there is $4 million worth of timber available to harvest. SPI. Br. 5.

[31] Petitioners also object to the Ninth Circuit's mention of the Forest Service's financial interest in the Power and Freds timber sales (Pet Br. 28 n. 13; SPI. Br. 19-23), even though this interest was repeatedly stressed by Petitioners themselves. This complaint references pure *dictum* in the Ninth Circuit opinion, is not among the Questions Presented, and thus also does not warrant Supreme Court review.

ject depended on the trees in question being dead and thus were predicated on the assertion that the majority of the trees scheduled for logging under the mortality guidelines would in fact die. The Ninth Circuit determined that this conclusion was not supported by the record and represented an abuse of discretion. Pet. App. 32a-33a, 44a-45a. Moreover, contrary to Petitioners' claims that the Ninth Circuit disregarded some of the Petitioners' stated purposes for these logging projects (Pet. 26-28), the panel specifically discussed these assertions earlier in the opinion (Pet. App. 6a-8a), and all parties briefed these matters fully. Even if the Ninth Circuit had misperceived or ignored the government's arguments, which it did not, that would not be a matter appropriate for exercise of the Court's certiorari jurisdiction.

Moreover, in taking into account the public interest, the Ninth Circuit reviewed the statutory scheme of NEPA and NFMA and correctly determined that "[t]he preservation of our environment, as required by NEPA and the NFMA, is clearly in the public interest." App. 55a. When Congress enacted NEPA it declared "a national policy . . . to promote efforts which will prevent or eliminate damage to the environment." 42 U.S.C. § 4321. "The purpose of NEPA is to protect the environment, not the economic interests of those adversely affected by agency decisions." *Portland Audubon Socy. v. Hodel*, 866 F.2d 302, 309 (9th Cir. 1989), *cert. denied*, 492 U.S. 911 (1989). Most importantly, "NEPA's requirements are specifically designed to counter the inevitable agency bias in favor of a proposal or project that it has recommended . . . and to effectuate substantive changes in the agency decision making process." *McDowell v. Schlesinger*, 404 F. Supp. 221, 241 (D. Mo. 1974) (citing *Minnesota Public Interest Research Group v. Butz*, 498 F.2d 1314, 1320 (8th Cir. 1974) (en banc)).

Similarly, in enacting NFMA, Congress declared that it was the policy of the United States to ensure that "forests and rangeland, in all ownerships, should be managed. . . *in an*

environmentally sound manner . . . ." NFMA, Pub. L. No. 96-514, Title III, Sec. 310 (Dec. 12, 1980) (emphasis added); *see Ohio Forestry Assn. v. Sierra Club*, 523 U.S. 726, 726 (1998) (noting that before the Forest Service can permit logging, the NFMA and applicable regulations require it to meet a number of procedural and substantive requirements). Contrary to the Petitioners' assertions, Pet. 28 n. 12, NFMA does not "encourage" salvage logging but only permits it, and only after the Forest Service has ensured that logging (1) does not irreversibly damage soil or watershed conditions, (2) protects streams, streambanks, shorelines, lakes, wetlands, and (3) is consistent with protection of soil, watershed, fish, wildlife, recreation, and esthetic resources, and regeneration of the timber resource. 16 U.S.C. § 1604(g)(3). There is no federal mandate that the Forest Service conduct logging, including salvage logging. *Sierra Club v. U.S. Dept. of Agric.*, 116 F.3d 1482 (table), 1997 WL 295308, **21 (7th Cir. 1997).

Absent an injunction here, the projects would have been logged to completion and the public interest in preserving the environment and ensuring that logging projects proceed in an environmentally sound manner would be completely frustrated. In contrast, the public interest served by the claimed benefits of the project could still be realized after final judgment in the (unlikely) event that Respondent did not prevail on the merits. The threat of future severe fire depends upon myriad circumstances, is governed by small diameter fuels not large trees (*Sierra Club v. Eubanks*, 335 F. Supp. 2d 1070, 1077-78 (E.D. Cal. 2004)) and does not begin until significant numbers of trees start to fall, which takes from several years to over a decade to occur. AR 4:2046-2054. Thus, a temporary delay while the merits of the case were adjudicated would not inhibit the attainment of this goal. In addition, conifer regeneration is already occurring naturally in the project areas. Replanting, if necessary, can also take place at any time. With regard to erosion mitigation, the great majority of erosion occurred in the first year after the fire,

AR 4:2084-2086, and prior to logging or the request for injunction. In addition, the logging of large trees is not necessary to create down woody debris or ground cover to mitigate any further erosion while the merits of the case were decided, and felling of small trees for erosion control was not opposed by Respondent.[32]

Finally, regarding the public interest in promoting public safety, Respondent has never objected to the removal of actual hazard trees along roads maintained for public use, and the injunction currently in place with regard to these two timber sales allows for such activity. Thus, accommodations to ensure public health and safety have been made even with issuance of an injunction. Given the totality of the circumstances and the dubious nature of the claimed "benefits" articulated by Petitioners, the Ninth Circuit properly considered the public interest and found that issuance of an injunction was in that interest. This Court need not review that quintessentially fact-bound question.

CONCLUSION

The petition for a writ of certiorari should be denied.

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[32] It should also be noted that, as was brought to the lower courts' attention, the "model" used by the Forest Service to reach its conclusion that its post-fire logging projects would somehow mitigate erosion "probably underestimate[s]" the erosion caused by the chosen alternatives due to the fact that "all of the ground-disturbing activities of logging – such as skid trails, landings, temporary roads . . . are *not* included" in the model. AR 4:2107 (emphasis added). Thus it is entirely unclear what beneficial impact, if any, logging would have on erosion and sediment.

Respectfully submitted,

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