No. 17-35038

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CASCADIA WILDLANDS; et al.,

Plaintiffs-Appellees,

v.

SCOTT TIMBER CO. and
ROSEBURG FOREST PRODUCTS CO.,

Defendants-Appellants.

On Appeal from the United States District Court
District of Oregon, Eugene
Honorable Ann L. Aiken, District Judge

BRIEF AMICUS CURIAE OF OREGONIANS IN ACTION LEGAL CENTER, OREGON HOME BUILDERS ASSOCIATION, OREGON CATTLEMEN'S ASSOCIATION, AND PACIFIC LEGAL FOUNDATION IN SUPPORT OF DEFENDANTS-APPELLANTS AND IN SUPPORT OF REVERSAL

DAMIEN M. SCHIFF
JOHANNA B. TALCOTT
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Counsel for Amici Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Amici Curiae Oregonians in Action Legal Center, Oregon Home Builders Association, Oregon Cattlemen's Association, and Pacific Legal Foundation hereby state that they have no parent corporations and that no publicly held company owns 10% or more of the stock of any of them.

TABLE OF CONTENTS

Page

CORPORATE DISCLOSURE STATEMENT i

TABLE OF AUTHORITIES iii

INTERESTS AND IDENTITIES OF AMICI CURIAE 1

INTRODUCTION AND SUMMARY OF THE ARGUMENT 4

ARGUMENT 8

I. THE "SLIDING SCALE" APPROACH TO PRELIMINARY INJUNCTIONS SHOULD NOT APPLY TO MATTERS ARISING UNDER THE ENDANGERED SPECIES ACT 8

A. Preliminary Injunction Legal Standards 8

B. The District Court's Preliminary Injunction Analysis 13

1. The Lower Court's Sliding Scale Analysis Contravenes *Winter* 13

2. The Lower Court's Irreparable Harm Analysis Violates *Winter* 16

II. THE STANDARD FOR PRELIMINARY INJUNCTIVE RELIEF UNDER THE ENDANGERED SPECIES ACT SHOULD BE MORE DEMANDING WHEN RELIEF IS SOUGHT AGAINST PRIVATE PARTIES 18

CONCLUSION 22

CERTIFICATE OF COMPLIANCE WITH RULE 32(a) 23

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Page

Cases

All. for the Wild Rockies v. Cottrell,
632 F.3d 1127 (9th Cir. 2011) 5, 11, 14

Amoco Prod. Co. v. Vill. of Gambell,
480 U.S. 531 (1987) 8-9

Biodiversity Legal Foundation v. Badgley,
309 F.3d 1166 (9th Cir. 2002) 15

Bldg. Indus. Ass'n – Bay Area v. U.S. Dep't of Commerce,
792 F.3d 1027 (9th Cir. 2015) 3

Cassim v. Bowen, 824 F.2d 791 (9th Cir. 1987) 9

Cottonwood Envtl. L. Ctr. v. U.S. Forest Service,
789 F.3d 1075 (9th Cir. 2015) 6-7, 11-12, 18

Diné Citizens Against Ruining Our Env't v. Jewell,
839 F.3d 1276 (10th Cir. 2016) 10

Dolan v. City of Tigard, 512 U.S. 374 (1994) 1

Friends of the Earth v. U.S. Navy, 841 F.2d 927 (9th Cir. 1988) 13

Home Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv.,
616 F.3d 983 (9th Cir. 2010) 3-4

Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139 (2010) 7

Munaf v. Geren, 553 U.S. 674 (2008) 9

Page

Nat'l Ass'n of Home Builders v. Defs. of Wildlife,
551 U.S. 644 (2007) 2, 19-20

Nat'l Wildlife Fed'n v. Burlington N. R.R.,
23 F.3d 1508 (9th Cir. 1994) 16, 19

Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.,
422 F.3d 782 (9th Cir. 2005) 15-16, 19

Pac. Coast Fed'n of Fishermen's Ass'ns v. U.S. Bureau of Reclamation, 426 F.3d 1082 (9th Cir. 2005) 4

Paramount Land Co. LP v. Cal. Pistachio Comm'n,
491 F.3d 1003 (9th Cir. 2007) 9, 15

Real Truth About Obama, Inc. v. Fed. Election Comm'n,
575 F.3d 342 (4th Cir. 2009) 10

San Luis & Delta-Mendota Water Auth. v. Salazar,
638 F.3d 1163 (9th Cir. 2011) 3

Sierra Club v. Marsh, 816 F.2d 1376 (9th Cir. 1987) 11, 13, 15, 18

Strahan v. Coxe, 127 F.3d 155 (1st Cir. 1997) 18

Tennessee Valley Auth. v. Hill, 437 U.S. 153 (1978) 12

Trout Unlimited v. Lohn, 559 F.3d 946 (9th Cir. 2009) 4

Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982) 9

Winter v. Nat. Res. Def. Council, Inc.,
555 U.S. 7 (2008) 5, 7-9, 11, 15-16

Page

Constitution

U.S. Const. amend. V 21

Rule

Fed. R. App. P. 29 1

Miscellaneous

Adler, Jonathan, *Money or Nothing: The Adverse Environmental Consequences of Uncompensated Land Use Controls*, 49 B.C. L. Rev. 301 (2008) 20-21

Bates, Bethany M., *Reconciliation After* Winter*: The Standard for Preliminary Injunctions in Federal Courts*, 111 Colum. L. Rev. 1522 (2011) 10

Meltz, Robert, *Where the Wild Things Are: The Endangered Species Act and Private Property*, 24 Envtl. L. 369 (2004) 20

Middleton, Brandon M.*, Restoring Tradition: The Inapplicability of* TVA v. Hill*'s Endangered Species Act Injunctive Relief Standard to Preliminary Injunctive Relief of Non-Federal Actors*, 17 Mo. Envtl. L. & Pol'y Rev. 318 (2010) 4, 7, 19, 21

Oregonians in Action Legal Center, Oregon Homebuilders Association, Oregon Cattlemen's Association, and Pacific Legal Foundation (PLF) respectfully submit this brief amicus curiae in support of Appellants Scott Timber Company and Roseburg Forest Products Company and in support of reversal.

INTERESTS AND IDENTITIES OF AMICI CURIAE

Oregonians in Action Legal Center is a non-partisan, non-profit public interest law center focused on litigation to protect the constitutional rights of Oregon's landowners from excessive and increasingly burdensome federal, state, and local regulations.[1] The Center successfully represented the Petitioner in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), which holds that the mitigation demanded by conditions on land-use permits must be roughly proportional to the quantity and quality of the proposed development's impacts. The Center has filed other petitions for certiorari and has appeared as amicus curiae in many significant Takings Clause

[1] Pursuant to Federal Rule of Appellate Procedure 29, Amici Curiae hereby state that no party's counsel authored the brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than the Amici Curiae, their members, or their counsel—contributed money that was intended to fund preparing or submitting the brief.

decisions in state and federal courts in the last two decades. The Center is concerned that the lenient standard for injunctive relief in Endangered Species Act cases employed by the district court below threatens the private property rights of many Oregonians who have endangered species or their habitat on their property.

The Oregon Home Builders Association is the unified voice for the state's home building industry and housing consumers, providing the resources, education and leadership required to ensure members' success and to protect the right of all Oregonians to own a home of their own. The Home Builders represent nearly 3,000 builders and contractors throughout Oregon, who provide nearly 200,000 Oregon jobs that are directly affected by environmental regulations. The Home Builders and its national partner, the National Association of Home Builders, have appeared in numerous cases involving the Endangered Species Act and other environmental issues. *See, e.g.*, *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644 (2007).

The mission of the Oregon Cattlemen's Association is to advance the economic, political, and social interests of the Oregon cattle industry. As that industry's voice in Oregon, the Association promotes environmentally

and socially sound industry practices, as well as a positive, contemporary image of the industry, while strengthening the economics of the industry and assuring a strong political presence in all areas affecting the industry. The Association believes that these efforts ultimately enhance the private property rights of its members and all Oregonians. Like other Amici, the Association is concerned that a lenient standard for injunctive relief under the Endangered Species Act will undercut property rights, especially the rights of the Association's members who regularly are presented with the challenge of accommodating the Act's burdensome regulatory regime.

Pacific Legal Foundation is a nonprofit, tax-exempt foundation incorporated under the laws of California, organized for the purpose of litigating important matters of public interest. Founded in 1973, PLF supports the principles of limited government and free enterprise, as well as a balanced approach to environmental protection. To that end, PLF attorneys have served as counsel of record in a number of Endangered Species Act cases in this Court. *See, e.g.*, *Bldg. Indus. Ass'n – Bay Area v. U.S. Dep't of Commerce*, 792 F.3d 1027 (9th Cir. 2015); *San Luis & Delta-Mendota Water Auth. v. Salazar*, 638 F.3d 1163 (9th Cir. 2011); *Home Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv.*, 616 F.3d 983

(9th Cir. 2010); *Trout Unlimited v. Lohn*, 559 F.3d 946 (9th Cir. 2009); *Pac. Coast Fed'n of Fishermen's Ass'ns v. U.S. Bureau of Reclamation*, 426 F.3d 1082 (9th Cir. 2005). As with other Amici, PLF is very concerned about the adoption of an unjustifiably lenient standard for injunctive relief under the Endangered Species Act because of the harmful effects such a standard's implementation would have on private property rights. *Cf.* Brandon M. Middleton, *Restoring Tradition: The Inapplicability of* TVA v. Hill*'s Endangered Species Act Injunctive Relief Standard to Preliminary Injunctive Relief of Non-Federal Actors*, 17 Mo. Envtl. L. & Pol'y Rev. 318, 353 (2010) (the Act's broad prohibition on the "take" of listed species "can often pose a significant hurdle in landowners' ability to make beneficial use of their property").

INTRODUCTION AND SUMMARY OF THE ARGUMENT

In 2013, the Appellants purchased two tracts of timberland—called the Benson Ridge parcel—in the Elliott State Forest. They planned to harvest timber from 49 acres. In 2016, a coalition of environmentalists commenced a citizen's suit against Appellants, alleging that the land was occupied by the marbled murrelet, a bird listed as threatened under the Endangered Species Act. The environmentalists based their suit on a

survey of the parcel, which yielded an observation of a single pair of murrelets. Appellants hired a consulting firm to conduct a study on the purchased tracts, which determined that the land could be harvested without harming marbled murrelets because the parcel was not used for murrelet nesting. *See* 1 ER 2-3.

The environmentalists moved for a preliminary injunction, which the district court granted. In deciding whether to enjoin the timber harvest, the district court did not apply the traditional preliminary injunction test, which requires the movant to show a likelihood of success on the merits, a likelihood of irreparable harm, that the balance of hardships tips in favor of the movant, and that the public interest favors the injunction. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Instead, the court used an amalgam of two alternative formulations. One was drawn from this Court's general preliminary injunction jurisprudence, which recognizes a "sliding scale" approach in which a weak showing on one factor can be offset by a stronger showing on another factor. *See, e.g.*, *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131-35 (9th Cir. 2011). The other was taken from this Court's Endangered Species Act jurisprudence, and provides that the third and fourth factors of the traditional test

always be presumed to favor species-protecting injunctions. *See Cottonwood Envtl. L. Ctr. v. U.S. Forest Service*, 789 F.3d 1075, 1091 (9th Cir. 2015).

As the result of combining these two lenient standards, the environmentalists won the injunction based largely on their showing that they had raised "serious questions" going to the merits, rather than a likelihood of success on the merits. Because the district court applied the presumptions that the balance of hardships and public interest favored the injunction, and because it found that the irreparable harm element was satisfied by the showing of serious questions, the injunction was granted on a relatively weak showing on only one of the required elements.

The district court's test is incorrect. The sliding scale standard must function as a slide: a weaker showing on one end of the scale is balanced by a stronger showing on the other side. By allowing the serious questions side of the scale to be offset by merely a presumption that the balance of hardships tips in the favor of the plaintiffs, the district court's amalgam of standards resulted in a sliding scale that does not slide. Moreover, the district court permitted the weaker serious questions showing to satisfy the more stringent standard of a likelihood of irreparable harm—a result

patently foreclosed by Supreme Court and Ninth Circuit precedent. *See Winter*, 555 U.S. at 22; *Cottonwood Envtl. L. Ctr.*, 789 F.3d at 1091.

The net result of the lower court's errors is a preliminary injunction standard that makes injunctive relief the rule rather than the exception. This outcome cannot be squared with recent decisions of the Supreme Court. *See Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 158 (2010) ("It is not enough for a court considering a request for injunctive relief to ask whether there is a good reason why an injunction should not issue; rather a court must determine that an injunction should issue under the traditional four-factor test . . . ."); *see also Winter*, 555 U.S. at 22 (Injunctive relief is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief."). Additionally, whatever reason otherwise supports an easing of the standard for injunctive relief against *public* actors under the Endangered Species Act, a relaxed standard cannot be justified when such relief is sought, as here, against *private landowners*. *See generally* Middleton, *supra*, at 343-55.

ARGUMENT

I

THE "SLIDING SCALE" APPROACH TO PRELIMINARY INJUNCTIONS SHOULD NOT APPLY TO MATTERS ARISING UNDER THE ENDANGERED SPECIES ACT

The standard employed by the district court in this case cannot be reconciled with prevailing Supreme Court precedent, which stresses the extraordinary nature of injunctive relief. Combining a sliding scale approach with this Court's plaintiff-favoring presumption for two of the preliminary injunction factors creates a standard under which preliminary injunctions become the rule rather than the exception. This Court should reverse the lower court's holding and uphold the principle that courts must consider and balance the traditional equitable factors in determining whether to grant preliminary injunctive relief, even in ESA cases.

A. Preliminary Injunction Legal Standards

The traditional legal standard for injunctive relief requires a plaintiff to demonstrate that (1) he is likely to succeed on the merits, (2) he is likely to suffer irreparable harm in the absence of relief, (3) the balance of equities tips in his favor, and (4) an injunction is in the public interest. *Winter*, 555 U.S. at 20; *see also Amoco Prod. Co. v. Vill. of Gambell*, 480

U.S. 531, 542 (1987); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311-12 (1982). "A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter*, 555 U.S. at 24 (citing *Munaf v. Geren*, 553 U.S. 674, 689-90 (2008)). In every case, a court "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Amoco Prod. Co.*, 480 U.S. at 542.

Prior to the Supreme Court's 2008 *Winter* opinion, this Court utilized two "alternative" variants of the traditional standard, according to which a party's burden to obtain a preliminary injunction operates on a sliding scale. *See Cassim v. Bowen*, 824 F.2d 791, 795 (9th Cir. 1987). Under this approach, a plaintiff is permitted to show: "either (1) a likelihood of success on the merits and the possibility of irreparable injury; or (2) serious questions going to the merits and a balance of hardships strongly favoring [the movant]." *Paramount Land Co. LP v. Cal. Pistachio Comm'n*, 491 F.3d 1003, 1008 (9th Cir. 2007).

Winter explicitly rejected the first formulation of the alternative standard, holding that a *possibility* of irreparable injury—rather than a *likelihood*—is "too lenient." 555 U.S. at 22. Since *Winter*, lower courts have

grappled with how exactly the decision affects the more flexible standards that had been previously employed in most circuits. *See* Bethany M. Bates, *Reconciliation After* Winter*: The Standard for Preliminary Injunctions in Federal Courts*, 111 Colum. L. Rev. 1522, 1537-46 (2011). Most circuits have determined that *Winter* did not preclude more flexible approaches to preliminary injunctions. *See id.* The Fourth and Tenth Circuits, however, have held that a flexible standard stands in "fatal tension" with *Winter*. *Real Truth About Obama, Inc. v. Fed. Election Comm'n*, 575 F.3d 342, 346 (4th Cir. 2009); *see also Diné Citizens Against Ruining Our Env't v. Jewell*, 839 F.3d 1276, 1282 (10th Cir. 2016). The Fourth Circuit perceived the *Winter* standard as requiring the four elements, "each of which must be satisfied as articulated," rather than allowing them to be "conditionally redefined as other requirements are more fully satisfied." *Real Truth About Obama*, 575 F.3d at 347; *see also Diné Citizens Against Ruining Our Env't*, 839 F.3d at 1282 ("Under *Winter*'s rationale, any modified test which relaxes one of the prongs for preliminary relief and thus deviates from the standard test is impermissible.").

In *Alliance for the Wild Rockies v. Cottrell*, this Court considered the post-*Winter* viability of the second alternative to the preliminary injunction standard—the "serious questions" approach. 632 F.3d at 1131-35. It too found that the *Winter* opinion did not explicitly forbid a sliding scale standard, emphasizing the statements from Justice Ginsburg's dissent that "[f]lexibility is a hallmark of equity jurisdiction" and "[t]his Court has never rejected [the sliding scale] formulation, and I do not believe it does so today." *Winter*, 555 U.S. at 51. This Court agreed with the circuits that held *Winter* not to preclude flexible preliminary injunction standards like the sliding scale approach. *See All. for the Wild Rockies*, 632 F.3d at 1132-35. Ultimately, this Court determined that the serious questions approach is permissible, so long as the plaintiff also demonstrates a sharply tipping balance of hardships and a likelihood of irreparable injury, as well as that the injunction is in the public interest. *Id*. at 1135.

In addition to the alternative approach, this Court also employs a unique standard for preliminary injunctions under the Endangered Species Act. *See Cottonwood Envtl. L. Ctr.*, 789 F.3d at 1091; *Sierra Club v. Marsh*, 816 F.2d 1376, 1382-83 (9th Cir. 1987). Under this standard,

movants seeking a preliminary injunction benefit from a presumption of two of the four elements: the balance of the hardships and the public interest. *See, e.g.*, *Cottonwood Envtl. L. Ctr.*, 789 F.3d at 1091 ("[W]hen evaluating a request for injunctive relief to remedy an ESA procedural violation, the equities and public interest factors *always* tip in favor of the protected species.") (emphasis added).

This approach to preliminary injunctions under the ESA derives from *Tennessee Valley Auth. (TVA) v. Hill*, 437 U.S. 153 (1978). In *TVA*, the plaintiffs sought to enjoin the final stages of construction of a federal dam project in order to prevent the potential eradication of a nearly-extinct species of fish. To determine whether the injunction was required, the Court looked to the language of Section 7 of the ESA, which requires that federal departments and agencies must "insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of . . . endangered species." The Court found that the language and purpose of Section 7 compelled the injunction, while further opining that "[t]he plain intent of Congress in enacting [the ESA] was to halt and reverse the trend towards species extinction, whatever the cost." *Id.* at 184. Lower courts have broadly interpreted these statements from *TVA* to

mean that the courts' traditional equitable discretion is greatly diminished in injunction proceedings under the ESA. *See, e.g.*, *Friends of the Earth v. U.S. Navy*, 841 F.2d 927, 932 (9th Cir. 1988); *Sierra Club*, 816 F.2d at 1382-83.

B. The District Court's Preliminary Injunction Analysis

In evaluating the plaintiffs' request for the preliminary injunction, the court below utilized the serious questions test, and applied the ESA presumptions. *See* 1 ER 10-12. This analysis failed to comport with Supreme Court precedent in two significant ways. First, the resulting extremely lenient standard subverts the Supreme Court's instruction that injunctive relief should be a rare remedy that operates as the exception rather than the rule. And second, in tying the irreparable harm inquiry to the lessened serious questions inquiry, the district court impermissibly lowered the standard from a *likelihood* of irreparable harm to a *possibility* of irreparable harm. Both approaches conflict with *Winter*.

1. The Lower Court's Sliding Scale Analysis Contravenes *Winter*

The district court first held that there were "serious questions going to the merits" because both parties presented scientifically plausible positions regarding the presence or absence of murrelets on the Benson

Ridge parcel. *See* 1 ER 12. Because these competing positions would ultimately determine whether the proposed timber harvest would result in a violation of the ESA, and could not be resolved at the preliminary injunction stage, the court held that the serious questions element had been satisfied. *Id.*

When it considered the other side of the sliding scale from "serious questions"—the balance of the hardships—the lower court applied the Ninth Circuit's ESA presumption in favor of the plaintiffs. *See* 1 ER 14-15. This was a misapplication of the serious questions sliding scale. This Court has recognized in other contexts of environmental law that the sliding scale approach must effectively operate as a slide. In other words, the weaker showing on one element must be balanced by a stronger showing on the other element. *See All. for the Wild Rockies*, 632 F.3d at 1135. In the serious questions test, the plaintiff's burden is lowered from demonstrating a likelihood of success on the merits to showing serious questions going to the merits. *Id.* at 1131. This lower burden is offset by requiring a higher burden at the other end of the scale: rather than showing only that the balance of hardships "tips" in his favor, the plaintiff

must show that the balance of hardships "strongly favors" him. *See Paramount Land Co. LP*, 491 F.3d at 1008.

By holding that the presumption applied with regard to the balance of hardships, the lower court relieved the plaintiffs of their obligation to meet the more demanding burden on the hardships element in exchange for the lessened burden on the merits element. This undermines the purpose and effectiveness of the sliding scale, which is designed to balance the elements of the preliminary injunction test. The result is a sliding scale that does not slide and a standard that is much easier for movants to meet. This is entirely inconsistent with the nature of preliminary injunctions as extraordinary remedies. *See Winter*, 555 U.S. at 24.[2]

---

[2] That conclusion is consistent even with this Court's pre-*Winter* ESA case law. Although several decisions had observed that the balance of hardships and public interest factors presumptively "tip heavily" in favor of issuing preliminary injunctions under the ESA, no decision of which Amici are aware ever held, as did the district court below, that an ESA plaintiff need only show serious questions on the merits without any heightened showing on any other injunction factor. For example, in *Biodiversity Legal Foundation v. Badgley*, 309 F.3d 1166, 1177 (9th Cir. 2002), and *Sierra Club v. Marsh*, 816 F.2d at 1386 & n.13, the Court—after stating the "tips heavily" rule—went on to hold that the ESA actually had been violated (or likely had been), thus obviating the need for a sliding scale approach to reduce the showing required on the merits factor of the injunction test. *Cf. Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 422 F.3d 782, 795 (9th Cir. 2005) (articulating the "serious questions" standard but nevertheless upholding a preliminary injunction that was "premised on [the district

(continued...)

2. The Lower Court's Irreparable Harm Analysis Violates *Winter*

By holding that the likelihood of irreparable harm was satisfied by a showing of serious questions going to the merits, the lower court impermissibly lowered the standard for irreparable harm, which is expressly prohibited by *Winter*. 555 U.S. at 24. In *Winter*, the Supreme Court dictated that a mere possibility of irreparable harm was too lenient a standard and that a showing of a likelihood of irreparable harm is necessary to justify a preliminary injunction. *Id.*

Here, the lower court determined that the merits element was "inextricably intertwined" with the irreparable harm element and that the plaintiffs provided a sufficient showing of the likelihood of irreparable harm by demonstrating that serious questions exist as to the merits. In evaluating whether serious questions existed, the court looked to the competing scientific analyses as to whether marbled murrelets actually nest in the Benson Ridge parcel. Relying on the standard that "serious

---

[2] (...continued)
court's] finding that the agencies had violated [the] ESA"). And in *Nat'l Wildlife Fed'n v. Burlington N. R.R.*, 23 F.3d 1508, 1510-11 & n.4 (9th Cir. 1994), the Court held only that an ESA plaintiff still must demonstrate a likelihood of irreparable harm, a showing that the plaintiffs had failed to make and which failure made unnecessary any discussion of the other injunction factors.

questions refers to questions which cannot be resolved one way or another at the hearing on the injunction," the court found that serious questions existed because "[b]oth parties' occupancy conclusions rest on plausible scientific [sic] backed by qualified experts." 1 ER 12.

The lower court's analysis suggests that it viewed the questions on the merits issue as equipoise—either party could ultimately prevail. The court stated that "the likelihood of irreparable injury . . . depends on which scientific method to follow in determining occupancy." 1 ER 13. By binding the irreparable harm inquiry with this serious questions conclusion, the court effectively required the plaintiffs to show merely a possibility of irreparable harm, rather than the requisite likelihood. This stands in direct conflict with *Winter*'s requirement that a movant must always establish a likelihood of irreparable harm.

In sum, by combining the sliding scale analysis with the ESA presumptions for preliminary injunctions, and by tying together the merits and irreparable harm elements, the lower court provided injunctive relief only on a relatively weak showing of serious questions going to the merits. A standard this lenient directly contravenes the Supreme Court's mandate

that injunctive relief is an extraordinary remedy that is the exception rather than the rule.

II

THE STANDARD FOR PRELIMINARY INJUNCTIVE RELIEF UNDER THE ENDANGERED SPECIES ACT SHOULD BE MORE DEMANDING WHEN RELIEF IS SOUGHT AGAINST PRIVATE PARTIES

Even if a relaxed preliminary injunction standard is appropriate in some Endangered Species Act cases, there is no justification to support a relaxed standard when such relief is sought against private landowners. A more stringent standard for preliminary injunctions should be utilized in ESA cases against non-federal actors because it better reflects the complex interplay between statutory protections for endangered species and constitutional protections for property rights.

As noted in the previous section, this Court and other circuits have cited *Tennessee Valley Authority v. Hill* as the justification for abandoning traditional equitable principles in matters arising under the ESA. *See, e.g.*, *Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075 (9th Cir. 2015); *Sierra Club v. Marsh*, 816 F.2d 1376 (9th Cir. 1987); *Strahan v. Coxe*, 127 F.3d 155 (1st Cir. 1997). The Court has extended this broad ESA

injunctive relief standard to non-federal actors. *See Nat'l Wildlife Fed'n v. Burlington N. R.R.*, 23 F.3d 1508 (9th Cir. 1994); *see also Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 422 F.3d 782, 793 (9th Cir. 2005). This extension to private actors is misplaced for several reasons.[3]

Although courts continue to read it quite broadly, *TVA* should be narrowly construed based on its facts and subsequent Supreme Court decisions. *TVA* evaluated an undisputed violation of Section 7, which applies only to federal actors. The Court's analysis focused primarily on the plain language of Section 7, not the overarching policy considerations of the ESA as a whole. Subsequent Supreme Court opinions support the narrow application of *TVA* to federal actors and the facts of the case, and emphasize equitable balancing in the issuance of preliminary injunctions. *See* Middleton, *supra* at 345-48. For example, in *National Association of Home Builders v. Defenders of Wildlife*, the Court declined to require the EPA to comply with Section 7 consultation requirements when the agency performed non-discretionary actions under the Clean Water Act. 551 U.S. at 673. The Court limited *TVA's* holding to discretionary actions.

[3] Amici recognize that this Court is bound by circuit precedent, but nevertheless we believe that the concerns raised in this brief are sufficient grounds for en banc review of the legal issues discussed herein.

Id. at 670-71. If *TVA* were to be read as broadly as many lower courts have suggested, the decision would have gone the other way—the objective of protecting endangered species would have trumped all other considerations, including the statutory mandates of the EPA. *See* Middleton, *supra* at 346.

Finally, there are important policy reasons for prohibiting a lenient standard for preliminary injunctions against private citizens. *See* Middleton, *supra* at 353. The ESA poses significant concerns for property owners. *See generally* Robert Meltz, *Where the Wild Things Are: The Endangered Species Act and Private Property*, 24 Envtl. L. 369, 372-85 (2004). The broad prohibition against the "take" of listed species can place high hurdles in the way of making productive use of private property. A heavy-handed application of the ESA on private landowners disincentivizes species conservation while imposing tremendous economic costs. *See* Jonathan Adler, *Money or Nothing: The Adverse Environmental Consequences of Uncompensated Land Use Controls*, 49 B.C. L. Rev. 301, 332 (2008). Requiring landowners to bear the costs and burdens of species conservation actually discourages people from taking steps to conserve

species on their own land. *Id.* ("The threat of land use regulation under statutes like the ESA . . . discourages private landowners from disclosing information and cooperating with scientific research on their land, further compromising species conservation efforts.").

Following *TVA*, many courts accept arguments that economic costs are irrelevant to preliminary injunction inquiries, including those involving private landowners. *See* Middleton, *supra*, at 354. Whatever the propriety of this perspective as it applies to federal agencies and departments, there is no justification for applying it to private actors. Given the constitutional property protections afforded to individuals, it is critical to consider the economic impacts that preliminary or permanent injunctions may have on private property owners. *See* U.S. Const. amend. V. (prohibiting, inter alia, the taking of private property for public use without just compensation). Extremely lenient standards and presumptions in favor of preliminary injunction movants give such constitutional protections short shrift.

CONCLUSION

The decision below should be reversed.

DATED: March 14, 2017.

Respectfully submitted,

DAMIEN M. SCHIFF
JOHANNA B. TALCOTT

By s/ Johanna B. Talcott
JOHANNA B. TALCOTT

Counsel for Amici Curiae

CERTIFICATE OF
COMPLIANCE WITH RULE 32(a)

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS.

1. This amicus brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

   X It contains 4,290 words excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(b)(iii), or

   ___ It uses a monospaced typeface and contains _____ lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This amicus brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

   X It has been prepared in a proportionally spaced typeface using WordPerfect X7 in font style Times New Roman and font size 14, or

   ___ It has been prepared in a monospaced typeface using WordPerfect X7 with ____ characters per inch and type style _____.

DATED: March 14, 2017.

s/ Johanna B. Talcott
JOHANNA B. TALCOTT
Attorney for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on March 14, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Johanna B. Talcott
JOHANNA B. TALCOTT