No. 09-475

In the Supreme Court of the United States

MONSANTO CO., ET AL.,
Petitioners,
v.
GEERTSON SEED FARMS, ET AL.,
Respondents.

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

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

In this case, after finding a violation of the National Environmental Policy Act ("NEPA"), the district court imposed, and the Ninth Circuit affirmed, a permanent nationwide injunction against any further planting of a valuable genetically engineered crop, despite overwhelming evidence that less restrictive measures proposed by an expert federal agency would eliminate any non-trivial risk of harm. The questions presented are:

1. Whether the Ninth Circuit erred in holding that NEPA plaintiffs are specially exempt from the requirement of showing a likelihood of irreparable harm to obtain an injunction.

2. Whether the Ninth Circuit erred in holding that a district court may enter an injunction sought to remedy a NEPA violation without conducting an evidentiary hearing sought by a party to resolve genuinely disputed facts directly relevant to the appropriate scope of the requested injunction.

3. Whether the Ninth Circuit erred when it affirmed a nationwide injunction entered prior to this Court's decision in *Winter v. NRDC*, 129 S. Ct. 365 (2008), which sought to remedy a NEPA violation based on only a remote possibility of reparable harm.

PARTIES TO THE PROCEEDING

In the United States Court of Appeals for the Ninth Circuit, the plaintiff-appellees were Geertson Seed Farms, Trask Family Seeds, Center for Food Safety, Beyond Pesticides, Cornucopia Institute, Dakota Resource Council, National Family Farm Coalition, Sierra Club, and Western Organization of Resource Councils. The defendant-appellants were Mike Johanns (in his official capacity as Secretary of the U.S. Department of Agriculture), Ron Dehaven (in his official capacity as Administrator of the Animal Plant Health and Inspection Service, U.S. Department of Agriculture) and Steve Johnson (in his official capacity as Administrator of the U.S. Environmental Protection Agency). The intervenor-defendant-appellants were Monsanto Company, Forage Genetics International, LLC, John Grover, Daniel Mederos, and Mark Watte. John Grover is not a party to this appeal.

Pursuant to Supreme Court Rules 24.1 and 29.6, there is no change to the corporate disclosure statement previously filed by petitioners.

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OPINIONS BELOW

The district court's opinion is unpublished and reproduced at Pet.App.60a-79a. The Ninth Circuit's original and amended opinions are reported at 541 F.3d 938, and 570 F.3d 1130, and reproduced at Pet.App.80a-103a and Pet.App.1a-26a, respectively.

JURISDICTION

The Ninth Circuit vacated its original opinion, entered an amended judgment, and denied a petition for rehearing and rehearing en banc on June 24, 2009. Pet.App.104a-07a. After Justice Kennedy extended the time for filing petitions for certiorari, petitioners filed a timely petition on October 22, 2009. This Court granted certiorari on January 15, 2010. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent constitutional, statutory, and regulatory provisions are reproduced in the addendum and at Pet.App.115a-19a.

STATEMENT OF THE CASE

Since the dawn of agriculture, mankind has grown different varieties of the same crops and maintained their varietal purity. A stroll down the aisles of any supermarket in America illustrates that today's farmers are capable of growing an array of distinct crop varieties despite the potential for cross-pollination among different types. Farmers successfully grow sweet corn despite its ability to cross-pollinate with field corn and popcorn, green cabbage despite its compatibility with red cabbage, and different compatible varieties of onions, radishes, chard, beets, and so on. The ability to grow distinct varieties while

maintaining varietal purity is accomplished by well-established stewardship techniques, including isolation distances between crops.

In recent decades, genetically engineered crops have become a mainstay of American agriculture because of their enormous benefits, including higher yields, disease and insect resistance, their compatibility with less toxic pesticides, lower operating costs, and increased farm income. As of 2009, farmers had planted genetically engineered varieties on 91% of soybean, 85% of corn, 88% of cotton, and over 90% of sugarbeet acres grown in the United States.[1] Just like growers of conventional varieties, farmers of genetically engineered crops have used isolation distances and other traditional stewardship measures successfully to address cross-pollination with conventional and organic crops.[2]

In this case, respondents successfully challenged under the National Environmental Policy Act ("NEPA") the procedures the federal government followed when it approved the planting and sale of a genetically engineered alfalfa variety known as Roundup Ready alfalfa ("RRA"). Before the district court's judgment, farmers had planted RRA for 21 months without *any* judicially or governmentally imposed restrictions—and demonstrated that they knew how to be good stewards. It is undisputed that

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1 Pet.App.258a-59a; ERS, USDA, Data Sets, *Adoption of Genetically Engineered Crop in the U.S.: Extent of Adoption*, http://www.ers.usda.gov/Data/BiotechCrops/adoption.htm.

2 "Cross-pollination" is used synonymously in this brief with cross-fertilization or "gene flow," to indicate not just that pollen is exchanged, but that the exchange results in viable seed or new plants.

this variety of alfalfa is perfectly safe for human and animal consumption. Pet.App.43a. There is no evidence that there was *any* cross-pollination between RRA and conventional or organic varieties in the 22 million acres of alfalfa grown for hay (which account for 99% of alfalfa acreage in the United States). There is no evidence that *any* farmer lost *even a single* sale of conventional or organic hay or seed because of "contamination" with genetically engineered alfalfa. And even respondents[3] conceded that sufficiently protective isolation distances would prevent any cross-pollination between RRA and organic or conventional alfalfa. Cert. Opp. at 9 n.6.

Nevertheless, seizing on science fiction-like scenarios that RRA would cause the extinction of *all* non-RRA alfalfa crops, respondents sought to enjoin the planting of all RRA in the United States. After finding that the government violated NEPA's procedural requirements, the district court entered a nationwide injunction banning the new planting of genetically engineered alfalfa regardless of its proximity to other crops. The court rejected out of hand the tailored injunction proposed by the expert federal agency charged with overseeing genetically engineered crops, which would have mandated isolation distances and other stewardship measures to avoid cross-pollination. Indeed, the court refused to engage in any serious inquiry into the likelihood of RRA causing irreparable harm in the absence of a blanket injunction—and thus refused to conduct an evidentiary hearing on that issue at all. Instead, the court stood on its view that an injunction is warranted "'[i]n the run of

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[3] As used herein, "respondents" refers to plaintiffs below, and not to the governmental respondents supporting petitioners.

the mill NEPA case ... until the NEPA violation is cured.'" Pet.App.55a, 65a-66a (citation omitted).

The Ninth Circuit affirmed the blanket nationwide injunction in all respects. In so ruling, the court disregarded this Court's teachings—reiterated just last Term in *Winter v. NRDC*, 129 S. Ct. 365 (2008)—that an injunction is an "extraordinary remedy" that may be granted only when necessary to prevent likely irreparable harm. *Id.* at 376. And the Ninth Circuit compounded that error by affirming the district court's rejection of petitioners' request for an evidentiary hearing on the potential for irreparable harm—in conflict with centuries of common law, basic concepts of due process, the Federal Rules of Civil Procedure, and the vast weight of precedent. The judgment of the Ninth Circuit should be reversed.

BACKGROUND

1. Conventional Alfalfa

Alfalfa—known as the "Queen of the Forages"—is one of the oldest cultivated plants in recorded history and is today the most cultivated legume in the world. It is a perennial crop with a three- to five-year productive lifespan. Pet.App.126a. Each year, over 22 million acres of alfalfa are grown in the United States—making alfalfa the fourth most widely grown crop in the nation (behind corn, wheat, and soybeans). Pet.App.27a, 330a. Ninety-nine percent of alfalfa is grown to produce hay, which is used primarily as feed for livestock. Pet.App.126a, 321a-22a, 330a.

Alfalfa varieties cannot cross-pollinate unless pollen moves from one variety of an alfalfa plant to another variety while both fields are flowering. Hay crops are harvested by mowing the alfalfa fields at regular intervals, however, before the flowers open and

produce the pollen necessary for cross-pollination. Pet.App.126a, 225a.

The remaining 1% of alfalfa acreage is devoted to seed production and is concentrated largely in eight western states. Pet.App.313a, 322a, 380a. Unlike hay crops, seed crops are deliberately permitted to complete alfalfa's life-cycle—*i.e.*, the plants are permitted to flower to create the pollen that can be carried to another flowering plant to generate new seeds. Because alfalfa does not shed pollen to the wind, Pet.App.129a, 230a, seed farmers must stock their fields with hives of pollinating bees to produce a seed crop. Pet.App.150a, 313a. As with other crops, however, alfalfa seed farmers use traditional stewardship measures, including isolation distances, to maintain varietal purity. *See* Pet.App.216a-17a, 212a-13a. According to the Association of Official Seed Certifying Agencies ("AOSCA"), isolation distances of 165, 450, and 900 feet between alfalfa seed fields are sufficient to ensure 99%, 99.75%, and 99.90% varietal purity, respectively. Pet.App.163a.

2. Roundup Ready Alfalfa

This case involves a variety of alfalfa created with the aid of modern biotechnology to address persistent problems caused by weeds in alfalfa fields. Weeds inhibit the growth of young alfalfa, Pet.App.126a-27a, and substantially reduce the nutritional (and thus economic) value of the mature crop, *id.*; Pet.App.133a-34a.

Herbicides can be used to combat the growth of weeds in alfalfa fields. The herbicides typically used are quite toxic, and federally mandated directions for their use require such measures as 24 hours' notice, on-site inspections to prevent "water contamination or drift into residential areas," and the use of "special

equipment (respirators, protective clothing and the like)." Pet.App.122a; *accord* JA-601-02 Many farmers would prefer to use Roundup agricultural herbicides, which control nearly every weed species in alfalfa crops, "dissipate[] rapidly in the soil" without residue, can be bought at any local hardware store, and can be used without any specialized safety equipment. Pet.App.122a. The Environmental Protection Agency ("EPA") has found the active ingredient in Roundup—glyphosate—to be one of the most environmentally responsible herbicides available commercially.[4] But applying Roundup to kill the weeds in conventional alfalfa fields would also destroy the alfalfa. Pet.App.305a-06a.

RRA was created to solve that problem. It is identical to conventional varieties in all respects but one—the insertion of a gene for glyphosate resistance that is found naturally in soil bacteria. Pet.App.43a, 127a; JA-172. Applying Roundup to RRA fields therefore kills the weeds without affecting the crop. Pet.App.127a, 133a-34a. This breakthrough permits farmers planting RRA to use a less toxic herbicide, less frequently, and at a lower cost. *See, e.g.*, JA-588-89, JA-596; Pet.App.122a. As one RRA farmer explained: "We normally apply four separate herbicides, plus cultivate three times, and still end up with a dirtier field than when we are able to just spray a low dose of RoundUp twice." JA-593. It is undisputed, moreover, that RRA is safe for human consumption and animal feed. Pet.App.43a, 286a.

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[4] Pet.App.195a-205a ("Glyphosate … has favorable human health, ecological, and environmental fate profiles …."); *accord* 67 Fed. Reg. 60,934, 60,935 (Sept. 27, 2002) (Glyphosate is "toxic to all green plants and essentially nontoxic to other living organisms.").

When the district court enjoined any further planting of RRA, approximately 220,000 acres of RRA had been planted in the United States, accounting for approximately 1% of total alfalfa acreage. Pet.App.64a, 330a.

3. Regulatory Approval of RRA

Since 1986, genetically engineered crops have been regulated under a "Coordinated Framework" by three different federal agencies: the Food and Drug Administration ("FDA"), EPA, and USDA. 51 Fed. Reg. 23,302, 23,302-09 (June 26, 1986). FDA is responsible for reviewing the safety of food and feed for humans and animals. *Id.*; 21 U.S.C. §§301 *et seq.* EPA examines potential health and environmental impacts of associated pesticide use under the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§136 *et seq.* And USDA—through its Animal and Plant Health Inspection Service ("APHIS")—examines whether the crop presents a "plant pest" risk under the Plant Protection Act ("PPA"), 7 U.S.C. §§7701 *et seq.*; 7 C.F.R. §340.6(d)(3). RRA satisfactorily completed the review by all three federal agencies under this regulatory framework. FDA's conclusion that RRA is safe for humans and livestock is unchallenged, Pet.App.43a, and the district court dismissed respondents' action against EPA, JA-20 (docket entry 27). This case therefore concerns only APHIS's determination that RRA is not a plant pest.

Under USDA regulations, genetically engineered plants are presumed to be "plant pests"—and therefore "regulated articles" under the PPA—until APHIS determines otherwise. 7 C.F.R. §340.0(a)(2) n.1. After eight years of field testing, and following notice and public comment, APHIS concluded that RRA did not exhibit any "plant pest" characteristics and granted the

petition of Monsanto Company ("Monsanto") and Forage Genetics, Inc. ("FGI") (the owner and licensee of the relevant intellectual property, respectively) to provide RRA "Nonregulated Status." JA-151-231. That action—commonly referred to as "deregulation"—allowed RRA to be planted and sold commercially. Most alfalfa farmers and academic professionals supported the deregulation of RRA. JA-153. RRA was the 67th petition APHIS has granted since 1995 to deregulate a genetically engineered crop, and the 11th petition granted specifically for a glyphosate-resistant crop; other approved glyphosate-resistant crops include soy (1994), cotton (1995), corn (1997), canola (1999) and sugarbeets (2004).[5]

APHIS conducted its decision-making process subject to NEPA. NEPA is a procedural statute that does not mandate "particular results," *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350, 353 (1989), but rather requires federal agencies to prepare an environmental impact statement ("EIS") for every "major Federal action[] significantly affecting the quality of the human environment." 42 U.S.C. §4332(2)(C). An agency is not required by NEPA to prepare a full EIS if it determines, based on an environmental assessment ("EA"), that the proposed action will not have a significant impact on the environment. 40 C.F.R. §§1508.9(a), 1508.13; *see also DOT v. Public Citizen*, 541 U.S. 752, 757 (2004). In 2005, after receiving and reviewing some 663 comments, APHIS issued an EA and Finding of No Significant Impact ("FONSI") for RRA. JA-151-231.

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5 *See* APHIS, EPA, *Petitions of Non-Regulated Status Granted or Pending by APHIS as of February 2, 2010*, http://www.aphis.usda.gov/brs/not_reg.html.

The FONSI obviated the need for APHIS to conduct an EIS. Pet.App.6a-7a.

PROCEEDINGS BELOW

Eight months after APHIS issued its EA and FONSI, respondents—a coalition of environmental organizations and individuals led by the Center for Food Safety—brought this action challenging APHIS's decision to deregulate the planting and sale of RRA. Among other things, respondents claimed that APHIS's action violated NEPA on the ground that a full-blown EIS was required. Pet.App.7a-8a. The district court granted summary judgment for respondents on their NEPA claim and entered a preliminary and then permanent nationwide injunction against the planting of any RRA until an EIS is completed. The Ninth Circuit affirmed.

1. District Court Proceedings

a. NEPA merits determination. In February 2007, the district court granted respondents' motion for summary judgment on their NEPA-based claim, and that decision is not challenged here. The court believed that the NEPA issue presented a "close question of first impression," but concluded that the possibility of cross-pollination from RRA to conventional and organic alfalfa would be a significant harmful impact on the human environment, and on that basis it ordered APHIS to prepare a full EIS. Pet.App.27a, 35a-45a, 51a-52a. In so holding, the district court emphasized that APHIS had deregulated RRA without imposing any mandatory isolation distances for RRA seed crops or other stewardship measures to prevent cross-pollination, and that RRA planting could occur "without any geographic restrictions." Pet.App.35a-45a, 52a.

b. APHIS's proposed tailoring measures. After the district court's ruling—and a full 21 months after APHIS's deregulation order—respondents for the first time moved for injunctive relief, insisting that the court prohibit all further planting and sales of RRA nationwide. In response, APHIS proposed a more tailored form of injunctive relief designed to eliminate any non-trivial likelihood of cross-pollination during the agency's preparation of its EIS. APHIS's proposal would have imposed precisely the sorts of traditional stewardship measures the district court had suggested. Among other things, it would have required:

(1) Specific isolation distances between RRA and non-RRA alfalfa seed production fields:
   - 1500 feet for alfalfa crops pollinated by leafcutter bees, and
   - 3 miles for crops pollinated by honey bees. Pet.App.161a-63a;

(2) Specific harvesting procedures for RRA hay alfalfa fields, including a requirement that the hay be harvested prior to bloom or 10% bloom if it is within 165 or 500 feet, respectively, of other alfalfa seed fields, Pet.App.163a-64a;

(3) Cleaning of planting and harvesting equipment after contact with RRA prior to its use on non-RRA, Pet.App.164a-65a;

(4) Identification and handling requirements for RRA seed before and after harvest, Pet.App.165a-66a; and

(5) Contracts between RRA growers and Monsanto and/or FGI that would require compliance with the four preceding conditions and other stewardship measures for the entire life of the RRA stand, Pet.App.166a.

APHIS explained that its proposal was based on its "many years of experience" regulating RRA, including 297 field trials over an 8-year period, as well as its experience with Roundup Ready corn, cotton, soybean, canola and sugarbeet crops. Pet.App.139a-40a. The 1500-foot to 3-mile isolation distances that APHIS proposed were significantly greater than the 900-foot isolation distance that RRA seed farmers had previously observed as a matter of contract, Pet.App.226a-27a, and that is judged sufficient by AOSCA for conventional seed farmers to achieve the 99.9% varietal purity necessary for "foundation seed," Pet.App.163a.

c. Evidence concerning the efficacy of APHIS's proposed measures. APHIS and petitioners—who intervened in support of the government at the remedial stage of the proceedings, Pet.App.8a—proffered substantial written evidence in support of APHIS's proposed tailored injunction.

The record showed that, if alfalfa is not harvested, the plants' stems will develop flower buds 25-30 days after they break ground and reach mid-bloom about 15-20 days after that. JA-625; Pet.App.347a. The flowers produce pollen that can be carried by bees. Pet.App.129a-30a. If a bee successfully pollinates another alfalfa flower, an ovule (immature seed) is formed that can develop into a mature seed over the course of more than a month. Pet.App.347a; *accord* Pet.App.281a. Harvesting during this period will destroy any developing seeds. Pet.App.130a, 231a, 282a, 409a-10a. If a mature seed does form and is permitted to germinate, it may develop into a new alfalfa plant. Pet.App.130a, 232a; JA-157, 457. However, if the seed falls and germinates near the existing crop—which it usually will, because alfalfa

seeds are too heavy to be carried far by the wind, Pet.App.232a—germination will likely be suppressed by a natural phenomena called autotoxicity whereby existing alfalfa plants prevent competition from new alfalfa plants by releasing natural toxins, Pet.App.130a, 232a, 279a.

Cross-pollination is not possible without pollen. And the evidence showed that alfalfa hay farmers have strong financial incentives to harvest their crops before they begin to bloom—much less produce any pollen—because flowering substantially decreases the nutritional (and hence financial) value of the crop. Pet.App.128a-29a; *accord* Pet.App.359a (protein content of alfalfa "highest just prior to flowering"). Failing to mow the hay even five to seven days after optimal harvesting time can result in a 30% loss of a crop's value. JA-625. For this reason, farmers will generally harvest alfalfa early, rather than risk significant blooming. Pet.App.128a. The diminution in value—and thus the incentive to harvest early—is even greater for organic hay. Pet.App.147a.

Dr. Neil Hoffman, Director of the Risk Analysis Division for the USDA Biotechnology Regulatory Services Division, explained that, because alfalfa grown for hay is harvested so early in its life cycle, with APHIS's proposed isolation distances and other stewardship measures in place, "no measurable GE contamination should occur" in organic or conventional hay crops from cross-pollination with RRA hay crops. Pet.App.147a-48a. Dr. Daniel H. Putnam, a world-renowned expert on alfalfa, stated that the possibility of cross-pollination from an RRA hay field to an adjacent non-RRA hay field would be approximately 2.5 in one million (0.00025%). Pet.App.280a-81a; *accord* Pet.App.160a (such cross-pollination will be

"negligible"), 229a-35a ("virtually non-existent"), 378-80a ("near zero probability").[6]

For many of the same reasons, the evidence showed that cross-pollination from RRA hay fields to conventional or organic *seed* fields is also highly unlikely. Dr. Larry Teuber, another highly regarded expert on alfalfa, explained that such cross-pollination was "rarely detected (0.00 to 0.05%)" at distances of greater than 350 feet even if honey bees were used as pollinators, the hay field were at 20% bloom, and the seed crop were simultaneously at 100% bloom. JA-579-82, 484-90. And Dr. Hoffman similarly concluded that, with APHIS's measures in place, cross-pollination from RRA hay crops to non-RRA seed crops would range from "below 0.1%" to "essentially zero." Pet.App.164a; *accord* Pet.App.148a-50a, 161a-62a, 278a-79a.

Since field testing began in 1998, and in the twenty-one months RRA was deregulated before the district court's injunction, there was *no* evidence of *any* cross-pollination from the 200,000 acres of RRA hay fields to any other alfalfa crop—hay or seed. Pet.App.64a, 277a-78a, 408a-09a. And even respondents' own declarant admitted that hay crops do not present "any substantial risk of gene flow." Pet.App.359a.

The government's and petitioners' experts further explained that the possibility of cross-pollination from

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[6] In response to a question posed by the district court at the oral argument on the preliminary injunction, FGI President Mark McCaslin, stated that, because weather conditions can sometimes delay the harvest, it would be a "disaster" to require farmers to harvest before bloom in all cases. JA-552-54. McCaslin made clear, however, that even if rain delayed harvesting for multiple days until after first bloom, there would still be "nil opportunity for pollen flow from hay to hay." JA-552-54.

RRA seed fields to other alfalfa seed fields would also be "extremely low" or "de minimis" with APHIS's proposed measures in place. Pet.App.227a-29a, 234a-35a, Pet.App.256a-57a; JA-575-78. Under the proposed stewardship measures, Dr. Hoffman estimated that seed-to-seed transmission levels would be at or below 0.1% for seed fields stocked with leafcutter bees and less than 0.03% for seed fields stocked with honey bees, if it occurred at all. Pet.App.162a-63a, 178a; *accord* Pet.App.227a-29a.

The evidence showed that seed-to-hay cross-pollination is even less likely, because hay crops are generally harvested before any significant bloom, and weeks or months before any developing seed in a hay crop could mature. JA-574; Pet.App.231a-32a; *supra* at 11-13. Dr. Hoffman explained that no measurable gene contamination should occur in non-RRA hay crops, from either RRA hay or seed crops. Pet.App.148a. Indeed, there has never been a single reported incident of cross-pollination from RRA seed fields to the approximately 22 million acres of conventional and organic alfalfa hay crops grown domestically. Pet.App.408a-09a.

Respondents reacted to this scientific evidence mostly with second-hand anecdotal accounts of supposed cross-pollination. Petitioners objected to all of that evidence as inadmissible hearsay, JA-47, 59, 69, 70-71 (docket entries 117, 160, 184, 187), but the district court never ruled on their objections and never permitted petitioners to subject the statements to cross-examination, Pet.App.60a-79a. In any event, even if taken at face value none of the respondents' submissions suggested that cross-pollination would be likely with APHIS's proposed mitigation measures in place. *See infra* at 46-47.

d. Evidence concerning the balance of harms. Petitioners demonstrated that respondents' alternative to APHIS's tailored remedy—a nationwide blanket injunction against any further planting of RRA—would inflict substantial and completely unnecessary financial harm on approximately 3,000 RRA farmers located in 48 states. Pet.App.142a-47a. Dr. Nantell, an economist, estimated that farmers who have planted or would plant RRA would lose more than $200 million in just the first two years of such an injunction. Pet.App.267a-69a; JA-1026-54. In addition, seed companies, seed distributors, and dealers would lose another estimated $20 million, Pet.App.268a-69a, and Monsanto would suffer roughly $27 million in lost technology royalties. JA-584-85.

In contrast, there was no evidence that any respondents had ever experienced *any* cross-pollination from RRA crops to their conventional or organic crops. There was also no evidence that, because of RRA, any organic alfalfa farmers had ever been unable to sell their hay or seed crops as organic, lost certification as an organic grower, or lost any export sales. To the contrary, the record showed that organic alfalfa farmers were unlikely to lose any foreign sales. Lacking evidence of any actual or imminent commercial injury, and any non-hearsay evidence of cross-pollination, respondents submitted declarations of farmers who subjectively feared that cross-pollination could occur in the future and offered their unsupported beliefs that such cross-pollination was inevitable. *See, e.g.*, JA-666 ("While I have not been contaminated yet, I believe it is only a matter of time.").

e. Entry of injunctive relief. The district court nonetheless rejected APHIS's tailored approach, both

in its preliminary and permanent injunction decisions. In its preliminary injunction order, the court did not identify any likelihood of irreparable harm with or without APHIS's proposed stewardship measures in place, and indeed did not bother to analyze the traditional equitable factors for issuance of injunctive relief at all. Pet.App.54a-59a. Instead, following Ninth Circuit precedent, the court operated from the premise that, "[i]n the run of the mill NEPA case, the contemplated project ... is simply delayed until the NEPA violation is cured" and that, "absent unusual circumstances, an injunction is the appropriate remedy for a violation of NEPA's procedural requirements." Pet.App.55a (internal quotation marks and citations omitted). Accordingly, the court issued a nationwide injunction against "all future planting" or sales of RRA seed after March 30, 2007. Pet.App.56a-58a.[7]

The district court relied on the same basic understanding when assessing the appropriateness of permanent injunctive relief. The court refused petitioners' request for an evidentiary hearing to demonstrate the unlikelihood of cross-pollination with APHIS's stewardship measures in place, and refused to rule on petitioners' evidentiary objections to respondents' submissions. *See* JA-46-47, 59, 69 (docket entries 116, 117, 160, 184); Pet.App.67a-68a. Instead of holding an evidentiary hearing, the court held an "oral

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[7] The court permitted the growing, harvesting, and selling of RRA hay already planted before March 30, 2007, subject to certain of APHIS's (otherwise rejected) stewardship measures imposed to "minimize the risk of gene flow." Pet.App.75a-78a. Because alfalfa is a perennial crop that generally lasts three to five years, Pet.App.126a, harvesting of already-planted RRA is still ongoing, subject to those stewardship measures.

argument" on respondents' request for a permanent injunction. Pet.App.58a-59a.

At that argument, the court made plain its belief that it did not need to resolve the parties' dispute over the likelihood of irreparable harm:

> So I'm not an environmental agency. I'm not the person who has to look and analyze and try to figure out, does this have an environmental impact or doesn't it …. It just seems to me that ... I could be like a super environmental agency engaged in balancing all these different factors and coming to particular conclusions, which I feel particularly ill suited to do, number one. And number two, it isn't my job …. I should stop things in its place until the Government has discharged its duty given to it by the right of Congress of the United States.

Pet.App.417a.

The district court reaffirmed that position in its permanent injunction order. The court acknowledged that "intervenors have requested an evidentiary hearing, apparently so the Court can assess the viability of its witnesses' opinions regarding the risk of contamination if APHIS's proposed conditions are imposed." Pet.App.67a. But it denied that request, reiterating its refusal "to engage in precisely the same inquiry it concluded APHIS failed to do and must do in an EIS." Pet.App.68a. The court also reiterated its understanding that injunctive relief should issue "[i]n the run of the mill NEPA case" and that "'more liberal standards for granting an injunction'" apply in NEPA cases. Pet.App.55a, 65a-66a (citations omitted).

The district court simply refused to consider tailoring its injunction based on the unrefuted efficacy

of the isolation distances and other stewardship measures proposed by APHIS or, for that matter, the possibility of mandating even greater isolation distances. Pet.App.68a-70a, Pet.App.192a ("I am not going to get into isolation distances."). It entered a blanket nationwide injunction against any further planting of RRA without ever finding that irreparable harm would be "likely" with the government's proposed mitigation measures in place. Pet.App.60a-79a.

To the extent the district court adverted to the traditional equitable factors for the issuance of injunctive relief, it did so only cursorily. Pet.App.71a-72a, 75a. Without making any effort to analyze the government's and petitioners' expert declarations about how remote the possibility of harm would be under APHIS's proposed stewardship measures, or allowing any cross examination of respondents' contrary declarants, the district court stated that "plaintiffs h[ad] *sufficiently* established irreparable injury." Pet.App.71a (emphasis added). At that time, the Ninth Circuit considered proof of "a 'possibility' of irreparable harm" sufficient to enter an injunction. *Winter*, 129 S. Ct. at 374-76; *accord Or. Natural Res. Council Fund v. Goodman*, 505 F.3d 884, 898 (9th Cir. 2007).

The district court grounded its conclusion that respondents established a "sufficient likelihood" of irreparable injury on (1) respondents' hearsay allegations that some "contamination has occurred" in certain seed crops under conditions "similar to" those proposed by APHIS, (2) the theoretical possibility that extreme weather conditions—such as months of continuous rain—might so delay a harvest as to permit hay-to-hay cross-pollination, and (3) skepticism that

APHIS would have sufficient resources to ensure compliance with its proposed stewardship measures. Pet.App.69a-71a.

In addition to enjoining APHIS from permitting any further planting of RRA nationwide, the district court went even further, and prohibited APHIS on remand from adopting any interim solution that would allow commercial planting before an EIS was completed. Pet.App.108a.

2. Ninth Circuit Proceedings

a. Original opinion. Like the district court's judgment, the Ninth Circuit's original opinion was issued before this Court's decision in *Winter*, when Ninth Circuit law counted a mere "possibility" of irreparable harm sufficient to support injunctive relief. 129 S. Ct. 374-76. Under that standard, the Ninth Circuit affirmed the district court's judgment in all respects. The court concluded that the district court had properly applied the traditional equitable factors before issuing an injunction, including likelihood of irreparable harm. Pet.App.90a-92a. Despite the absence of an evidentiary hearing, the Ninth Circuit reviewed the "factual findings" of the district court only for clear error, and found the district court's conclusion that irreparable harm was "sufficiently likely" not clearly erroneous. Pet.App.91a-92a.

Although the court acknowledged that "[t]he parties' experts disagreed over virtually every factual issue" relating to possible environmental harm, Pet.App.87a (quotation marks omitted), it also affirmed the denial of an evidentiary hearing. The court explained that petitioners "had [not] established any *material* issues of fact" necessitating an evidentiary hearing, because "the disputed matters [were] issues more properly addressed by the agency in the

preparation of an EIS" and there was no reason for the district court to "duplicate the [agency's] efforts." Pet.App.95a-96a. The court further observed that a NEPA-based injunction "has a more limited purpose and duration" and thus is "not a typical permanent injunction, which is of indefinite duration." *Id.*

Judge Smith dissented. He explained that the absence of an evidentiary hearing was a "critical failure ... [that] deprived the parties of important procedural rights," Pet.App.100a, and that the exception would apply broadly: "There aren't many environmental cases that don't fit into the majority's newly-created exemption." Pet.App.102a. "Based on [the] record," moreover, Judge Smith had "serious concerns about the scope of the injunction entered by the district court." Pet.App.101a-02a. He found no basis for the district court's "nationwide injunction on the planting of Roundup Ready alfalfa while APHIS completes an EIS," an injunction which had "severe economic consequences." *Id.*

b. Amended opinion. In response to petitioners' rehearing petition and supplemental filings, which highlighted this Court's intervening decision in *Winter*, the Ninth Circuit vacated its original opinion and issued an amended opinion on denial of rehearing. Pet.App.107a. That amended opinion suggested—for the first time—that the district court actually *did* hold an evidentiary hearing because it permitted Mark McCaslin, president of petitioner FGI, to address the court with unsworn statements from counsel's table at the oral argument on respondents' preliminary injunction motion. Pet.App.23a. But the amended opinion also adhered to the court of appeals' original statements that the "district court here correctly denied a hearing," and that "[w]hat the district court

did not do was to hold an additional evidentiary hearing to resolve the very disputes over the risk of environmental harm that APHIS would have to consider in the EIS." Pet.App.19a-20a.

The amended opinion did not discuss *Winter*'s holding that the traditional equitable standards, including a finding of likely irreparable harm, must all be satisfied to justify injunctive relief for a NEPA violation. Instead, the Ninth Circuit merely added a cite to *Winter* as support for a *preexisting* sentence approving the district court's conclusion that irreparable harm was "sufficiently likely" to warrant an injunction. *Compare* Pet.App.13a *with* Pet.App.91a.

3. Ongoing EIS Proceedings

APHIS released a draft EIS on December 18, 2009, recommending that RRA again be deregulated. 74 Fed. Reg. 67,206 (Dec. 18, 2009). Comments on that draft EIS were initially due on February 16, 2010, *id.*, but the comment period has been extended to March 3, 2010.[8] APHIS has not set a schedule for releasing a final EIS. Meantime, the district court's blanket injunction remains in effect.

SUMMARY OF ARGUMENT

I. This Court has repeatedly emphasized that injunctive relief is an "extraordinary remedy" that is "never awarded as of right" and instead is only available after a careful consideration of the traditional equitable factors. *Winter v. NRDC*, 129 S. Ct. 365, 374-

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[8] APHIS, USDA, News Release, *USDA Extends Comment Period on Draft Environmental Impact Statement for Genetically Engineered Alfalfa*, http://www.aphis.usda.gov/newsroom/content/2010/02/alfalext.shtml.

77 (2008). In upholding the injunction at issue, the Ninth Circuit deviated from that critical restraint on the exercise of judicial authority in several fundamental respects.

First, the injunction is predicated on the misguided view that injunctive relief is invariably warranted in the case of a NEPA violation pending the outcome of an EIS. This Court has emphatically rejected the notion that the procedural violation of a statute requiring environmental review justifies an injunction against the underlying conduct until that assessment is completed. *See, e.g.*, *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531 (1987). In entering the injunction at issue, however, the district court declined to engage in any serious inquiry into the likelihood of irreparable harm on the ground that the agency was going to "conduct[] … the very same scientific inquiry" in conducting an EIS. Pet.App.68a. And the Ninth Circuit similarly deemed the entire issue of likelihood of irreparable harm to be *immaterial* on the ground that the EIS would serve as a substitute for the analysis of alleged environmental harm that the district court refused to conduct. In other words, the courts below effectively resurrected the very type of presumption of irreparable harm in environmental cases that this Court has condemned. *Amoco*, 480 U.S. at 544-45.

Second, the court erred in failing to insist on the requisite showing of "irreparable injury" that "is *likely* in the absence of an injunction." *Winter*, 129 S. Ct. at 375. *Winter* establishes that this requirement applies with full force to NEPA cases and that the "*possibility* of irreparable harm" is insufficient to support the entry of injunctive relief. *Id.* at 375-76 (emphasis added). As in *Winter*, however, the record here conclusively

precludes a finding of the requisite *likelihood* of irreparable harm when viewed in light of APHIS's tailored injunction (to which petitioners do not object).

In entering the injunction, the district court relied on the "potential," Pet.App.72a, of two harms that it believed could flow from the use of RRA—(1) the total extinction of conventional alfalfa, and (2) cross-pollination with conventional alfalfa in individual farmers' fields. By definition, a "potential" harm is not sufficient under *Winter*. But in any event the first of these alleged harms is simply fanciful, and the second is neither likely nor cognizable as irreparable harm to the environmental interests that NEPA was enacted to protect. The Ninth Circuit's holding that "genetic contamination was sufficiently likely to occur so as to warrant broad injunctive relief," Pet.App.13a, is belied by the record evidence, and ultimately is a product of the court's mistaken legal view that the agency's impending EIS process is an appropriate *substitute* for the Judiciary's own responsibility to ensure that the requirements for injunctive relief—including the likelihood of irreparable harm—are met before an injunction is entered.

Third, the injunction is grossly overbroad because the district court dismissed out of hand the tailored injunction proposed by the expert federal agency charged with overseeing genetically engineered crops. This Court has made clear that an injunction must be "no more burdensome to the defendant than necessary." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). The isolation distances and stewardship measures proposed by APHIS were more than sufficient to prevent any conceivable irreparable harm through cross-pollination. Both the district court and Ninth Circuit nevertheless refused to "get into the

isolation distances" and the like, Pet.App.192a, because they simply assumed that a blanket injunction was required pending the agency's completion of an EIS and, worse, assumed that the government could not competently enforce such measures anyway. The Ninth Circuit's refusal to treat the injunction as anything other than an all-or-nothing proposition is flatly inconsistent with this Court's teachings and alone necessitates reversal of the decision below.

II. Even setting to one side the Ninth Circuit's flawed conception of the equitable factors governing the entry of injunctive relief, the judgment below must still be reversed because petitioners were improperly denied an evidentiary hearing on the likelihood of irreparable harm.

The right to an evidentiary hearing with live witnesses and the opportunity for cross-examination is a fundamental and time-honored component of our judicial system. The Federal Rules of Civil Procedure and due process require an evidentiary hearing upon request whenever there are genuine disputes of material fact. At a bare minimum, there was at least a material issue of fact as to whether any irreparable harm was likely. In reaching its contrary decision, the Ninth Circuit reasoned that disputes as to the likelihood of irreparable harm in NEPA cases are categorically *immaterial* and that evidentiary hearings are not warranted with respect to NEPA-based injunctions because such injunctions are uniquely temporary. Both rationales ultimately stem from the Ninth Circuit's misguided view that requiring a plaintiff to show a likelihood of irreparable harm is somehow unduly "duplicat[ive]" of the agency's efforts—and therefore unnecessary—in NEPA cases. Pet.App.19a. And neither rationale finds any support

in the text of NEPA, the Federal Rules of Civil Procedure, or, for that matter, any other authority.

ARGUMENT

I. EQUITABLE PRINCIPLES REQUIRE THE ENTRY OF USDA'S NARROWLY TAILORED INJUNCTION

An injunction is an "extraordinary and drastic remedy" that is "never awarded as of right." *Munaf v. Geren*, 128 S. Ct. 2207, 2219 (2008) (quotation marks omitted). As this Court reiterated last Term, a plaintiff seeking an injunction must satisfy the traditional equitable test, demonstrating that (1) "he is likely to suffer irreparable harm," (2) "remedies available at law, such as monetary damages, are inadequate to compensate for that injury," (3) "the balance of equities tips in his favor," and (4) "an injunction is in the public interest." *Winter*, 129 S. Ct. at 374; *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006). That required showing by plaintiffs is *in addition to* the threshold demonstration that the defendant's conduct is unlawful, unless the statute provides otherwise "in so many words, or by a necessary and inescapable inference." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982). The injunction entered by the district court and upheld by the Ninth Circuit in this case departs from those settled principles in several fundamental respects.[9]

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[9] To be clear, petitioners have not challenged the tailored injunction proposed by APHIS. Pet.App.184a-87a. Their objection is to the *blanket* injunction entered by the district court against all planting of RRA. Accordingly, if this Court agrees with petitioners that the blanket injunction is unfounded, it may remand with instructions to enter the tailored injunction. *Cf. Winter*, 129 S. Ct. at 376, 382 (Navy challenged only two aspects of

A. The Injunction Is Predicated On The Mistaken View That NEPA Cases Warrant A Special Rule For Injunctive Relief

1. This Court has repeatedly rejected the proposition that the procedural violation of a statute—like NEPA—requiring environmental review as a precondition to government action justifies the entry of an injunction against the underlying conduct until the assessment is completed or warrants dispensing with the requirement of showing a likelihood of irreparable harm if an injunction is not entered.

In *Weinberger*, for example, this Court reversed the First Circuit's holding that federal courts had an "'absolute statutory obligation'" to issue an injunction after finding a procedural violation of the Clean Water Act ("CWA"). 456 U.S. at 311 (citation omitted). The Court observed "that a major departure from the long tradition of equity practice should not be lightly implied." *Id.* at 320. And the Court found no evidence in the CWA that "Congress intended to deny courts their traditional equitable discretion" in determining whether an injunction was warranted, *id.* at 319, including proof of a likelihood of actual irreparable harm to the underlying environmental interests. *See id.* at 312 ("[T]he basis for injunctive relief in the federal courts has always been irreparable injury and the inadequacy of legal remedies ….") (citing numerous cases).

Five years later, in *Amoco Production Co.*, this Court expressly rejected the proposition that a procedural violation of an environmental statute (there,

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preliminary injunction at issue and Court vacated injunction only "to the extent it has been challenged by the Navy").

the Alaska National Interest Lands Conservation Act) created a presumption of irreparable harm to the environment. 480 U.S. at 542-45. The Court explained that such a "presumption is contrary to traditional equitable principles." *Id.* at 545. And after reviewing the evidentiary record in the case the Court concluded that—notwithstanding the government's failure to perform the requisite environmental evaluation—irreparable harm was actually "not at all probable," and on that basis vacated the injunction. *Id.* at 545-47.

Last Term in *Winter*, this Court removed any doubt that these principles—and the traditional equitable factors—apply equally to injunctions sought to remedy NEPA violations. 129 S. Ct. at 374. The procedural violation in *Winter* was the same as that here: the agency had erroneously concluded that an EIS was not required in approving the action at issue. The Court criticized the Ninth Circuit's then-prevailing "'possibility' [of harm]" standard as "too lenient," *id.* at 375, emphasized that the Court's "frequently reiterated standard requires plaintiffs seeking [injunctive] relief to demonstrate that irreparable injury is *likely* in the absence of an injunction," and held unequivocally that a district court may not enter an injunction for a NEPA violation broader than necessary to prevent a "likelihood" of irreparable harm pending the government's preparation of an EIS, *id.* at 374-76.

2. Contrary to the holdings of *Weinberger*, *Amoco*, and *Winter*, the injunction upheld in this case is predicated on the notion that a procedural violation of NEPA itself warrants a blanket injunction against the underlying conduct, and the lower courts thus dispensed with any serious examination of whether substantive environmental harm would occur in the absence of a blanket injunction. The district court was

forthright in that view. The court candidly observed that it "isn't my job" to assess the "environmental impact" of allowing the challenged action to proceed, explaining that "I'm not the person who has to look and analyze and try to figure out, does this have an environmental impact or doesn't it." Pet.App.417a. And on that basis, the district court refused to "conduct ... the very same scientific inquiry [it had] ordered APHIS to do." Pet.App.68a, 417a; *accord supra* at 17-18. Instead, the district court concluded that in the "'run of the mill NEPA case,'" an injunction is appropriate "'until the NEPA violation is cured.'" Pet.App.55a (quoting *Idaho Watersheds Project v. Hahn*, 307 F.3d 815, 833 (9th Cir. 2002)).

Moreover, because it erroneously believed that, as a matter of principle, conduct authorized without full NEPA compliance must be enjoined pending the completion of an EIS, the district court "reject[ed]" out of hand the notion that interim measures allowing continued planting of RRA could ever be appropriate as a NEPA remedy, regardless of the likely effectiveness of accompanying stewardship requirements. In the court's words, APHIS should not be permitted to "skip the EIS process and decide without any public comment that deregulation with certain conditions [*i.e.*, the proposed interim measures] is appropriate." Pet.App.69a.

For its part, the Ninth Circuit articulated the showings that must be made under the traditional equitable test, and acknowledged that the test applies in environmental cases. Pet.App.11a-12a. But when the rubber met the road, the court agreed with the district court that there was no need for the Judiciary to sort out whether irreparable harm could be prevented by APHIS's proposed stewardship

measures, since APHIS would be addressing the potential harms from RRA in any event when preparing the EIS, and that it was appropriate simply to ban all new planting nationwide for the time being. Pet.App.16a, 18a-20a. As a result, while it recites the traditional equitable factors, the Ninth Circuit's decision effectively sanctions the same presumption of irreparable harm and injunctive relief for NEPA cases adopted by the district court.

The Ninth Circuit couched its rule in terms of whether petitioners had identified a "material" dispute over the risk of environmental harm. As the court put it, the parties' disagreement over the likelihood of irreparable harm under APHIS's more tailored proposal was not "material" because "the disputed matters [were] issues more properly addressed by the agency in the preparation of an EIS" and there was no reason for the district court to "'duplicate the [agency's] efforts'" and "'divert [its] resources.'" Pet.App.17a-19a. (quoting *Idaho Watersheds*, 307 F.3d at 831). The Ninth Circuit thus viewed the agency's impending EIS process as a *substitute* for judicial weighing of the traditional equitable standards for injunctive relief, observing that the district court need only "'allow for a[n] [EIS] process to take place which will determine permanent measures.'" Pet.App.18a-19a (citation omitted)

To be sure, the Ninth Circuit, Pet.App.13a, did disclaim the presumption of irreparable environmental harm that this Court squarely rejected in *Amoco*, 480 U.S. at 544-45. But allowing district courts to issue injunctions in NEPA cases without adjudicating the likelihood of irreparable harm—in the name of avoiding any "duplicat[ion]" of the agency's efforts in completing the EIS, Pet.App.19a—amounts to the same thing.

And a court may not circumvent this Court's precedents by engaging in the two-step of simply referencing the applicable rule and then disregarding it.[10]

Indeed, *Weinberger*, *Amoco*, and *Winter* all involved the same potential "duplication" of efforts on which the Ninth Circuit relied here. The agencies in each of those cases were ordered to conduct additional environmental analyses just as APHIS was in this case. *See Winter*, 129 S. Ct. at 376, 381 & n.5 (Navy conducting ongoing EIS); *Amoco*, 480 U.S. at 538-39 (noting that the "Secretary prepared a postsale [environmental] evaluation" "[i]n compliance with the Court of Appeals' decision"); *Weinberger*, 456 U.S. at 315 n.9 (Navy application for CWA permit under consideration by EPA). But, in each instance, this Court nonetheless required a judicial determination of the traditional equitable factors before any injunction could issue. The same should hold true here.

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[10] The Ninth Circuit has similarly observed that "injunctive relief is the appropriate remedy for a violation of an environmental statute absent rare or unusual circumstances." *Owner-Operator Indep. Drivers Ass'n v. Swift Transp. Co.*, 367 F.3d 1108, 1114, 1423 (9th Cir. 2004) (quoting *People of Gambell v. Hodel*, 774 F.2d 1414, 1423 (9th Cir. 1985), *rev'd*, 480 U.S. 531 (1986); *see* Pet.App.12a (referencing "unusual circumstances" test). That standard is not only directly at odds with this Court's repudiation of a presumption in favor of injunctive relief in environmental cases in *Amoco*, 480 U.S. at 544-45, but it is nearly identical to the standard for injunctive relief that this Court invalidated in *eBay*, 547 U.S. 388. *See id.* at 392-94 (unanimously rejecting the Federal Circuit's standard that an injunction should issue except in an "'unusual' case," "under 'exceptional circumstances,'" or "'in rare instances'" as contrary to traditional equitable principles) (citation omitted).

3. Because the finding of a NEPA violation almost always leads to a court order requiring the defendant agency to perform additional environmental analysis, the Ninth Circuit's holding in this case creates a special NEPA exception to the rule that an injunction will not issue except as necessary to prevent a likelihood of irreparable harm. And that exception would by its logic extend equally to other statutes requiring environmental analyses as a precondition to agency action. As Judge Smith rightly observed in dissent, "[t]here aren't many environmental cases that don't fit into the majority's newly-created exemption." Pet.App.102a. This exception conflicts squarely with this Court's holdings in *Weinberger*, *Amoco*, and *Winter* that the traditional equitable standards for an injunction apply with full force in this statutory context. *Winter*, 129 S. Ct. at 374-76; *Amoco*, 480 U.S. at 542-45; *Weinberger*, 456 U.S. at 310-13.

The Ninth Circuit rule also is at odds with this Court's "well settled" holding that "NEPA itself does not mandate particular results." *Robertson*, 490 U.S. at 350 (collecting cases); *Winter*, 129 S. Ct. at 376 ("NEPA imposes only procedural requirements ...."). Congress did not even provide a cause of action for NEPA claims, let alone carve out a special exemption from the traditional factors governing the entry of the "extraordinary and drastic remedy"[11] of an injunction in NEPA cases. *See, e.g.*, *Tulare County v. Bush*, 306 F.3d 1138, 1143 (D.C. Cir. 2002), *cert. denied*, 540 U.S. 813 (2003); *see also Weinberger*, 456 U.S. at 313 (holding that the traditional prerequisites for injunctive relief apply unless a statute "in so many words, or by a necessary and inescapable inference"

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[11] *Munaf*, 128 S. Ct. at 2219.

provides otherwise). Nor is an exception from the traditional equitable standards—including likelihood of irreparable harm—remotely necessary to address NEPA violations. As this Court explained in *Winter*, courts have "many remedial tools at [their] disposal, including declaratory relief or an injunction tailored to the preparation of an EIS rather than the [complete ban of the challenged government activity] in the interim." 129 S. Ct. at 381.

The Ninth Circuit's NEPA exception is also fundamentally misguided as a matter of jurisprudence. This exception is seemingly based on the belief that proof of a likelihood of irreparable harm is immaterial because, albeit "permanent," an injunction pending release of an EIS is as a practical matter "temporary." But that rationale runs headlong into this Court's precedents recognizing that even a preliminary injunction—which by definition is a temporary measure—is an "extraordinary remedy" that requires (among other things) proof of a likelihood of irreparable harm. *See*, *e.g.*, *id.* at 374-76; *Munaf*, 128 S. Ct. at 2219; *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam). Indeed, as this Court has observed, "[t]he standard for a preliminary injunction is essentially the same as for a permanent injunction." *Amoco*, 480 U.S. at 546 n.12.

Finally, to the extent the Ninth Circuit views its exception in NEPA cases to the requirement of showing a likelihood of irreparable harm as an appropriate reluctance to prejudge issues that would be addressed by APHIS in the course of its EIS, it is a uniquely non-deferential form of judicial abstention. Indeed, as Judge Smith observed, "[b]y picking and choosing when to afford deference, the court's deference is tantamount to no deference at all."

Pet.App.23a. Instead of deferring to the agency's expert view of the protections necessary to avoid meaningful cross-pollination from RRA during its preparation of an EIS, the court of appeals affirmed a nationwide injunction that the agency considers to be—and that is—fatally overbroad and entirely unnecessary. And ultimately it is the *court's* duty—not an agency's—to determine whether the traditional equitable factors governing injunctive relief are met.

B. The Injunction Is Not Supported By The Requisite Showing Of A Likelihood Of Irreparable Harm

Regardless of whether the Ninth Circuit has effectively resurrected the same kind of presumption invalidated in *Amoco*, the courts below erred in failing to insist on the requisite showing of "irreparable injury" that "is *likely* in the absence of an injunction." *Winter*, 129 S. Ct. at 375. *Winter* removes any doubt that this requirement applies with full force to NEPA cases and explains that "[i]ssuing [an] injunction based only on a *possibility* of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Id.* at 375-76 (emphasis added). Yet, to the extent that the district court even addressed the issue of irreparable harm, it based its injunction on the *possibility* of two harms it believed could flow from the use of RRA: the (1) total extinction of conventional alfalfa, and (2) cross-pollination with conventional alfalfa in individual farmers' fields.[12] The first of these

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[12] *Compare* Pet.App.92a (referencing "potential[]" of RRA to "eliminate the availability of non-genetically engineered alfalfa")

possible harms is inconceivable, and the second is neither likely nor cognizable as irreparable harm to the environment—the protection of which is the sole purpose of NEPA.

1. There is no likelihood that RRA will eliminate conventional alfalfa.

The district court's suggestion that continued planting of RRA could eliminate the availability of conventional alfalfa is bad science fiction with no support in the record. The record makes clear that the likelihood of RRA displacing all non-RRA alfalfa—particularly in the time period while an EIS is being prepared—is *zero*.

To begin with, RRA is not "contagious." Cross-pollination from RRA does not alter the genetic composition of the recipient alfalfa plants. Only the *seed* produced from that rare cross-pollination would have the RRA gene. Pet.App.147a, 386a-87a, 409a-10a. If that seed then matured, germinated, and developed into a new alfalfa plant—which is highly unlikely in the ordinary course—the plant would have the selective advantage of glyphosate resistance. Pet.App.398a. But as most alfalfa farmers do not use glyphosate (Pet.App.122a, 240a) and no organic farmers do so (Pet.App.263a-64a, 401a), that selective advantage does not give RRA any evolutionary edge in most farmers' fields. The notion that cross-pollination from RRA threatens to eliminate all conventional varieties of

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and Pet.App.75a (analyzing "potential of eliminating the availability of a non-genetically engineered crop"), *with* Pet.App.13a (relying on individual instances of "genetic contamination" that "had already occurred") *and* Pet.App.71a (reasoning "contamination of organic and conventional alfalfa crops … is irreparable environmental harm").

alfalfa ignores those basic principles of biology. Pet.App.387a-88a, 397a-98a, 413a.

The extinction rationale is particularly unsound given that RRA was grown without any governmental restrictions for 21 months prior to the district court's injunction with no sign that any disappearance of conventional alfalfa was in the offing. RRA currently constitutes but 1% of total alfalfa planted in the United States, and it was projected that RRA's market share would have grown only to 2-3% during the pendency of the EIS process. JA-621.

2. Individual instances of cross-pollination at particular farms could not constitute irreparable environmental harm.

As discussed below, with APHIS's proposed stewardship measures in place, the probabilities of cross-pollination from RRA hay or seed fields to other farmers' conventional or organic crops are exceedingly remote. *Infra* at 41-47. But even aside from those exceptionally low probabilities, the idea that low-level cross-pollination affecting individual farms qualifies as irreparable environmental harm is itself fundamentally flawed.

The remote possibility of sporadic cross-pollination of conventional crops with neighboring RRA, however unwanted by the conventional or organic farmer, is not a cognizable environmental harm under NEPA and therefore not an appropriate cause for an injunction to remedy a NEPA violation. It is axiomatic that an injunction to remedy a statutory violation may not extend beyond the interests of the underlying

statute.[13] NEPA was enacted to "protect[] and promot[e] *environmental* quality." *Robertson*, 490 U.S. at 348 (emphasis added). Moreover, injunctions are necessarily limited to "remedy[ing] the specific harm shown"—here a failure to adequately consider potential *environmental* impacts. *Neb. HHS v. HHS*, 435 F.3d 326, 330 (D.C. Cir. 2006) (quotations omitted); *accord Kentuckians for the Commonwealth, Inc. v. Rivenburgh*, 317 F.3d 425, 436 (4th Cir. 2003) (holding that injunctions may not "go beyond the extent of the established violation") (quotations omitted)). The possibility of low levels of cross-pollination in a small number of individual farms is simply not harm to the "human environment" in any meaningful sense.

In order to cause the sort of irreparable environmental injury that could justify a nationwide injunction, a plaintiff must demonstrate "irretrievabl[e] damage [to] the species." *Fund for Animals v. Frizzell*, 530 F.2d 982, 987 (D.C. Cir. 1975) (refusing to "equate the death of a small percentage of a reasonably abundant game species with *irreparable* injury"); *accord Water Keeper Alliance v. U.S. DoD*, 271 F.3d 21, 34 (1st Cir. 2001) (holding death of a "'single

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[13] *See, e.g.*, *Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 292 (1960) (injunctions provide "relief in light of the statutory purposes"); *Amoco*, 480 U.S. at 544 (equitable relief not justified by harm to the "statutory procedure" but rather only by likely harm to the "underlying substantive policy the process was designed to effect"); *Weinberger*, 456 U.S. at 314 (restricting injunctive relief to the "purpose of the [Clean Water Act]", *i.e.*, "[t]he integrity of the Nation's waters"); *Hecht Co. v. Bowles*, 321 U.S. 321, 331 (1944) (holding equitable discretion "must be exercised in light of the large objectives of the Act"), *United States v. Mass. Water Res. Auth.*, 256 F.3d 36, 48 (1st Cir. 2001) (injunctions "must be cabined by the purposes for which the statute was created").

member of an endangered species'" was "insufficient" absent showing of how "probable deaths ... may impact the species" (citation omitted)). That makes perfect sense, because absent species-level harm there is no meaningful change in the environment, let alone irreparable environmental injury. *Id.* And the *sole* alleged "environmental" harm advanced by respondents here is the possibility of a diffuse change in the composition of alfalfa plants based on the relative frequency of a single gene, which is irrelevant (and confers no selective advantage) in the natural environment, where glyphosate is not applied. Pet.App.122a, 240a, 398a.

Whether an individual farmer plants an orange orchard rather than a corn field is a much greater change in the environment than whether a particular farmer has 99.9% instead of 99.99% varietal purity in his crops. But neither makes any meaningful difference to the environment as a whole. This Court has cautioned against "seiz[ing] the word 'environmental' out of its context and giv[ing] it the broadest possible definition," which would result in NEPA "embrac[ing] virtually any consequence of a governmental action that someone thought 'adverse.'" *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 772 (1983). This is precisely what respondents have done here—attempting to dress up what amounts to a disagreement about agricultural policy into an alleged environmental impact. *But see id.* at 777 ("The political process, and not NEPA, provides the appropriate forum in which to air policy disagreements.").[14]

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[14] Respondents oppose the government's approval of *any* genetically engineered crops as a matter of policy. The express

The principal harm alleged by respondents is, actually, purely economic—*i.e.*, the diminished value of a crop "contaminated" with RRA in the market for organic alfalfa. That is not an environmental harm by any stretch. And remedying such an economic harm is simply not one of NEPA's purposes. *See, e.g.*, *Rosebud Sioux Tribe v. McDivitt*, 286 F.3d 1031, 1038 (8th Cir. 2002) ("'The purpose of NEPA is to protect the environment, not the economic interests of those adversely affected by agency decisions.'" (citation omitted)), *cert. denied*, 537 U.S. 1188 (2003). Accordingly, protection of organic farmers' economic interest would not support any injunction at all.

Moreover, these postulated economic harms have not been shown either to be *likely* or in any sense *irreparable*. Contrary to the district court's presumption that cross-pollination with RRA would "destroy the crops of those farmers who do not sell genetically engineered alfalfa," Pet.App.71a, the record makes clear that, regardless of any inadvertent cross-pollination, organic growers may market their crop as organic as long as they have taken the precautions required by the National Organic Program. Pet.App.263-64a, 413a-14a, 283a-84a, 262a-64a. And if meaningful cross-pollination occurs, it can be corrected

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goal of respondent Center for Food Safety is to "halt the approval, commercialization or release of any new genetically engineered crops until they have been thoroughly tested and found safe for human health and the environment," and "advocate [for] the containment and reduction of existing genetically engineered crops." *See* The Center for Food Safety, *GE Food*, http://truefoodnow.org/campaigns/genetically-engineered-foods/ (last visited Feb. 24, 2010). Respondents are certainly entitled to their opinion, but NEPA does not provide a forum for litigating policy disagreements.

within a single growing season using simple and well-established techniques. Pet.App.410a-11a. Moreover, there is no evidence that a single organic grower has ever lost organic certification or been unable to sell his crop as organic because of any cross-pollination with RRA. Similarly, there is no evidence in the record that any grower ever lost a single export sale due to cross-pollination with RRA.

Even if an organic farmer could not sell alfalfa with a small percentage of RRA as organic to a particular "zero tolerance" organic buyer, he still could sell the crop to other organic buyers or as conventional alfalfa to the 95% or more of the market that is not sensitive to the presence of genetically engineered traits. Pet.App.176a; *see also* Pet.App.383-84a (explaining diminished varietal purity meant only that seed crop could be sold as certified, rather than foundation seed). That might result in a loss of the premium value paid by certain organic buyers, but such a harm would be purely economic. Moreover, farmers have traditionally addressed such harms from neighboring crops at the local level, through grower organizations or through state law. There is no basis for concluding that the same system of practical and legal remedies would be inadequate to remedy any economic injury caused by cross-pollination between RRA and other alfalfa. And in the absence of such a showing, no injunction can issue. *See, e.g.*, *eBay*, 547 U.S. at 391; *Weinberger*, 456 U.S. at 312.

The district court's opinion may also be read to suggest that the mere risk of RRA "contamination" could cause adjacent farmers a cognizable harm. It stated, for example, that "[f]or those farmers who choose to grow non-genetically engineered alfalfa, the *possibility* that their crops will be infected with the

engineered gene is tantamount to the elimination of all alfalfa." Pet.App.44a (emphasis added). Respondents' declarations likewise overwhelmingly relied upon the *fear* of cross-pollination, JA-380, 400-02, 404-05, 409-10, and the Ninth Circuit itself stated that respondents' request for injunctive relief was based on the "*fear* [of] cross-pollination of the new variety with other alfalfa." Pet.App.4a (emphasis added). But this Court has squarely held that the *risk* of harm is not itself a cognizable harm under NEPA. *See Metro. Edison Co.*, 460 U.S. at 775 ("*[R]isk* of an accident is not an effect on the physical environment. A risk is, by definition, unrealized in the physical world."); *id.* at 776 ("[C]ontentions of psychological health damage caused by risk [are not] cognizable under NEPA.").

Finally, even if they had alleged a cognizable irreparable harm, respondents never demonstrated that *they* were likely to suffer it. To obtain injunctive relief, a "plaintiff … must establish … that *he* is likely to suffer irreparable harm." *Winter*, 129 S. Ct. at 374 (emphasis added); *accord eBay*, 547 U.S. at 391 ("plaintiff must demonstrate … that *it has suffered* an irreparable injury …." (emphasis added)). That requirement is jurisdictional. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) ("[A] plaintiff must demonstrate standing for each claim he seeks to press … [and] 'for each form of relief that is sought.'") (citation omitted). Respondents are neither a class of all alfalfa farmers, nor are they vested by law with authority to represent the interests of alfalfa itself, as the Lorax speaks for the trees. *See generally* Dr. Seuss, *The Lorax* (1971). They are only empowered to seek relief for irreparable injuries they themselves are likely to suffer, and they therefore cannot prevail by demonstrating that some farmer somewhere might be

forced to endure a low level of RRA in his fields. Pet.App.13a-14a, 71a.

3. The Ninth Circuit erred in affirming the injunction given the absence of record evidence of likely irreparable harm.

To the extent that the Ninth Circuit addressed the question of irreparable harm on the merits, it simply affirmed the injunction entered while the flawed *possibility*-of-harm test that this Court repudiated in *Winter* was still circuit precedent. The district court never required respondents to prove that irreparable harm was *likely*. *See* Pet.App.60a-79a. Indeed, the district court repeatedly relied upon the mere "*potential*" for irreparable harm. Pet.App.72a (emphasis added); *see also* Pet.App.75a. It never found a "likelihood" or "certainty" of such harm, only "potential"—*i.e.*, *possible*—harm. In fairness, the district court had no reason to go further because at the time Ninth Circuit law required only a possibility of harm. *Winter*, 129 S. Ct. at 374-75.

Winter was decided and brought to the Ninth Circuit's attention while this case was pending on rehearing. The Ninth Circuit's only response was to add a citation to *Winter* to a sentence—that it had *already written* before the Court's decision in *Winter*—affirming the district court's finding that irreparable harm was "sufficiently likely" to justify its injunction in this case. *Compare* Pet.App.13a *with* Pet.App.91a. But what was "sufficiently likely" before and after *Winter* in the Ninth Circuit are two very different things—hence this Court's grant of certiorari and reversal in *Winter* on that precise point. *Winter*, 129 S. Ct. at 375-76. The difference is dispositive here as well.

Indeed, the Ninth Circuit's error in affirming the injunction in this case was if anything more egregious than in *Winter*.

Far from establishing a *likelihood* of irreparable harm if the blanket injunction were not entered, the record evidence in this case is uncontradicted that the chances of any meaningful cross-pollination from RRA crops under APHIS's proposed stewardship measures would be exceedingly remote. Accordingly, under the standard reiterated in *Winter*—which limits injunctive relief to measures truly necessary to avoid likely irreparable harm, 129 S. Ct. at 375-76—the record compels the conclusion that the district court should have rejected respondents' request for a blanket injunction and entered an order adopting APHIS's proposed tailoring measures. Indeed, the record confirms that cross-pollination from either RRA hay or seed crops is exceedingly *un*likely.

a. Cross-pollination from the vast majority of RRA, grown for hay, is exceptionally unlikely, and there was no evidence that it has ever happened. Much like the injunction in *Winter*, the district court's injunction against RRA hay crops is supported by "no documented case of … injury." 129 S. Ct. at 375. RRA was planted on 220,000 acres without any governmental restrictions for 21 months prior to the district court's injunction. Pet.App.408a-09a. Nearly all of that RRA was grown for hay, Pet.App.330a, and there is no evidence in the record of any cross-pollination from those RRA hay crops at any level to any conventional or organic crop in any location during that almost two-year period. Pet.App.277a-78a, 408a-09a. The absence of any such cross-pollination is fully consistent with declarations of experts in this case that, with APHIS's proposed interim measures in place, the

possibility of cross-pollination among adjacent hay crops would be approximately 2.5 in one million (0.00025%). Pet.App.160a, 229a-35a, 280a-81a, 378-80a.

As Dr. Putnam explained, the following independently unlikely events would *all* have to occur to permit successful hay-to-hay cross-pollination:

(1) *Both* the RRA and the conventional hay field must be allowed to flower—which is unlikely because hay farmers have strong financial incentives to harvest prior to significant flowering. JA-257, 347, 355-56, 483, 565; Pet.App.122a-23a, 128a, 280a-82a;

(2) The flowering of both fields must occur simultaneously—which is unlikely because different alfalfa varieties flower at different times and crops are often on different cutting/regrowth cycles. Pet.App.148a, 230a;

(3) In order to transfer pollen between fields, a sufficient number of bees must be present—which is unlikely because hay fields are not stocked with bees and feral bees are not generally attracted to hay fields because of the minimal flowering. Pet.App.129a-30a, 279a; JA-356, 483-84;

(4) The bees must actually move the pollen between the fields—which is unlikely because bees prefer other crops and rarely travel long distances between fields. Pet.App. 227a-28a, 231a, 279a;

(5) Any resulting seed must be permitted to mature—which is exceptionally unlikely because hay farmers routinely harvest prior to 10% bloom, which occurs *months* before seed maturation, and harvesting destroys maturing seed. Pet.App.130a, 280a-81a, 347a;

(6) The seed must successfully germinate—which is unlikely because mature alfalfa seeds are too heavy to be carried far by wind and autotoxicity will kill any seed that germinates near existing plants. Pet.App.130a, 279a.[15]

The only support that the district court offered for concluding that hay-to-hay cross-pollination was "sufficiently likely" to warrant its injunction was a concern that weather conditions "*could* prevent farmers from harvesting hay before 10% bloom." Pet.App.14a (emphasis added). But that concern is misplaced. A late harvest of RRA hay cannot lead to cross-pollination with other farmers' crops at any level (much less at a level causing them harm) unless the other unlikely events necessary for successful cross-pollination all occur *seriatim* thereafter. *Supra* at 43-44. The record demonstrates, moreover, that if an RRA farmer were to wait until after bloom to harvest his crop, adjoining conventional and organic hay growers could easily avoid any risk of cross-pollination by harvesting *their* crops in the remaining months prior to seed maturation (Pet.App.281a, 347a)—which is in their economic interest anyway because their hay also loses substantial economic value the longer it is permitted to grow after bloom. *Supra* at 12, 43.

Even assuming, however, that extraordinary weather conditions of Biblical dimensions, such as consecutive months of continuous rain, "could" so delay RRA and conventional farmers' harvests to permit meaningful levels of cross-pollination from RRA hay crops, neither the district court nor the Ninth Circuit ever purported to find that circumstance "likely," as

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15 *See* Pet.App.280a-83a; *see also* Pet.App.128a-30a, 178a-80a.

Winter requires. 129 S. Ct. at 375-76. Nor could they. The record compels the opposite conclusion.

Cross-pollination from RRA hay crops to conventional seed crops is also highly unlikely, for many of the same reasons. In a study conducted under conditions deliberately engineered to facilitate cross-pollination, Dr. Larry Teuber found that hay-to-seed cross-pollination of alfalfa varieties would "rarely [be] detected (0.00-0.05%)" with isolation distances of 350 feet, and "was very low (0.2%) at 150-300 ft." JA-484-90, 580-83; *see also* Pet.App.149a-50a, 278a-79a; *supra* at 13. No actual incidence of RRA hay-to-seed cross-pollination has ever been documented—even during the 21 months RRA was planted without any governmentally imposed restrictions. Pet.App.277a-78a, 408a-09a.

For these reasons, at a bare minimum, the blanket injunction must be vacated in so far as it prevents the planting of RRA hay crops.

b. Cross-pollination from the tiny percentage of RRA grown for seed is also unlikely. There was similarly no evidence to suggest that cross-pollination would be at all likely from the small percentage of RRA grown as seed crops under APHIS's stewardship measures. To the contrary, the government's and petitioners' experts attested that the probability would be "extremely low" or "de minimis." Pet.App.227a-30a, 234a-35a; *accord* Pet.App.226a-27a; JA-575-78; *see also* Pet.App.162a-63a, (seed-to-seed transmission would be no greater than 0.1% for seed fields stocked with leafcutter bees); Pet.App.178a (less than 0.03% for seed fields stocked with honey bees).

Those opinions are borne out by experience. Growers of different varieties of alfalfa seeds have

successfully used far shorter isolation distances to coexist for decades. Pet.App.382a-83a (noting certified seed growers use 165-330 feet isolation distances between varieties), Pet.App.216a; *see also Winter*, 129 S. Ct. at 376 ("find[ing] it pertinent that this is not a case in which the defendant is conducting a new type of activity with completely unknown effects on the environment"). And the evidence showed that seed-to-hay cross-pollination would be even less likely, since hay crops are generally harvested before any significant bloom, and weeks or months before any developing seed in a hay crop could mature. Pet.App.231a-32a, 281a, 347a, *supra* at 11-14. Indeed, there has never been a single reported incident of cross-pollination from RRA seed fields to the approximately 22 million acres of conventional and organic alfalfa hay crops grown domestically. Pet.App.408a-09a.

To the extent the district court addressed the likelihood of irreparable harm from RRA seed crops, it credited respondents' submissions that some "contamination has occurred" in certain seed crops under conditions "similar to" the stewardship measures proposed by APHIS. Pet.App.13a, 70a-71a. All of respondents' anecdotes about these supposed instances of "contamination" should have been excluded as inadmissible hearsay. *See supra* at 14-15. But in any event, none showed meaningful levels of cross-pollination under conditions remotely "similar to" APHIS's proposed stewardship measures. Only one of the instances of purported cross-pollination exceeded the contractually contemplated 1% tolerance level. JA-672-73; Pet.App.403a-07a. The other allegedly contaminated crops were sufficiently "pure" to be sold for full value under the contracts at issue—thus

precluding any harm to the (non-plaintiff) alfalfa grower. Pet.App.403a-07a. And the single instance where cross-pollination exceeded 1% involved a grower that planted a mere 200 feet away from another seed crop, Pet.App.406a; JA-673—*far* less separation than the 1500-feet to 3-mile isolation distances APHIS proposed for RRA seed crops, and indeed less separation than is recommended for the maintenance of conventional varieties, Pet.162a-63a.

Because respondents failed to prove any instances of meaningful cross-pollination from RRA seed crops under conditions similar to APHIS's proposed stewardship measures, and the record establishes that the potential for such cross-pollination is remote, the district court's blanket nationwide injunction must be vacated insofar as it bans the planting of RRA seed crops as well.

C. The Injunction Is Fatally Overbroad

The injunction is also fatally overbroad insofar as APHIS's proposed tailored relief—to which petitioners have not objected, *see* note 9, *supra*—would have eliminated any conceivable risk of harm. This Court has long held that a district court must narrowly tailor relief and that injunctions must be "no more burdensome to the defendant than necessary." *Califano*, 442 U.S. at 702; *see also Lewis v. Casey*, 518 U.S. 343, 357 (1996) ("The remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established."); *Neb. HHS*, 435 F.3d at 330 ("We have long held that 'an injunction must be narrowly tailored to remedy the specific harm shown.'" (citation omitted)). Indeed, the goal of equitable analysis is to "arrive at a 'nice adjustment and reconciliation' between the competing claims."

Weinberger, 456 U.S. at 312 (quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944)).

Nevertheless, the district court refused seriously to consider whether APHIS's proposed isolation distances and other stewardship measures would have sufficed to prevent irreparable harm. Indeed, the court was quite explicit about its refusal, stating "I am not going to get into the isolation distances." Pet.App.192a. Likewise, the Ninth Circuit utterly failed to engage on this issue: The court of appeals did not even mention what APHIS's proposed isolation distances were, let alone analyze their likely efficacy. *See* Pet.App.1a-20a. Both courts also failed to analyze meaningfully the differences between RRA hay and seed crops for cross-pollination purposes, even though the record shows that cross-pollination from the former is "orders of magnitude" less likely, Pet.App.279a, and the injunction against planting hay crops inflicted far more injury.

The lower courts' failure to consider APHIS's proposed mitigation measures was largely a product of their misguided notion that a blanket injunction was required pending completion of the EIS. But the lower courts also suggested that the proposed measures were beside the point because the government would not be able to enforce them (due to a lack of resources). *See* Pet.App.13a, 69a-70a. That reasoning turns the presumption of regularity on its head by assuming that governmental action will be *ineffective*. *See, e.g.*, *U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 10 (2001) ("[A] presumption of regularity attaches to the actions of government agencies ...."). Worse still, the district court's presumption of governmental incompetence was not focused on or limited to this particular agency or circumstance, but instead based on a broader

conception of the supposed futility of federal enforcement efforts: "[H]aving the authority and effectively using the authority are two different matters: the government has the authority to enforce the immigration laws, but unlawful entry into the United States still occurs." Pet.App.70a. The Ninth Circuit cited that misguided rationale with approval. Pet.App.13a.

Properly viewed, APHIS's proposed stewardship measures were more than sufficient to avert any likelihood of cross-pollination. Although respondents disagree with that, and argue that APHIS's proposed isolation distances of up to three miles would be insufficient, even they effectively concede that *some* isolation distance would prevent any possibility of cross-pollination. Indeed, their own submissions suggested that "5-mile" or "several miles" isolation distances would establish a "zero tolerance" standard. *See* Cert. Opp. at 9 n.6. Imposing "5-mile"/"several miles" isolation distances was therefore the limit of even *conceivably justifiable* injunctive relief.

The district court nevertheless rejected the use of isolation distances of any length and instead enjoined *all* RRA planting anywhere—whether seed or hay—even on farms that are *hundreds of miles* from any conventional or organic alfalfa. The blanket injunction it entered gratuitously harms farmers whose crops pose no conceivable risk. *See, e.g.*, Pet.App.221a ("[W]e are completely isolated from any conventional or organic seed production—the closest conventional seed operation is more than 300 miles away …."); *see also* Pet.App.208a ("[T]here are only nine growers of organic hay in the entire state [of Nevada] and they are all in isolated areas ...."). And the Ninth Circuit's approval of this all-or-nothing approach is flatly

inconsistent with this Court's precedents and the extraordinary nature of injunctive relief.

II. PETITIONERS WERE ENTITLED TO AN EVIDENTIARY HEARING ON THE LIKELIHOOD OF IRREPARABLE HARM

Because the record does not support the finding of a likelihood of irreparable injury to any cognizable interest under APHIS's tailored injunction proposal, the district court was required to adopt APHIS's measures and reject respondents' request for a broad nationwide planting ban. The judgment of the Ninth Circuit should be reversed on those grounds and the case remanded with instructions to vacate the present injunction in favor of APHIS's more tailored proposal. To the extent that the record establishes any genuine dispute about the facts material to the issuance or breadth of the injunction to be entered, however, the courts below erred in denying petitioners an evidentiary hearing on those issues.[16]

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[16] The Court need not reach this issue if it concludes that the record does not support a finding of likely irreparable harm if APHIS's tailored injunction is imposed. However, because this issue is vitally important and recurring in entertaining requests for injunctive relief, the Court should make clear in its decision that a court may not disregard the traditional requirements for conducting an evidentiary hearing when it comes to considering a request for injunctive relief. *Cf. Winter*, 129 S. Ct. at 375-76 (addressing Ninth Circuit's "'possibility' standard" even though it was "not clear that articulating the incorrect standard affected the Ninth Circuit's analysis of irreparable harm").

A. The Evidentiary Hearing Is A Fundamental And Time-Honored Component Of Our Judicial System

The right to an evidentiary hearing with live witnesses and the opportunity for cross-examination is deeply rooted in our judicial system. For nearly a millennium, Anglo-American jurisprudence has resolved material factual disputes in the same way: trial-based, adversarial proceedings. *See, e.g.*, 3 William Blackstone, *Commentaries on the Laws of England* 349 (1st ed. 1768) (tracing trials back "so early as the laws of king Ethelred [king of England from 978-1016]" and observing "trial[s] … ha[ve] been used time out of mind in this nation, and seem[] to have been co-eval with the first civil government thereof"). As this Court has observed, "[c]ertain principles," such as "confrontation and cross-examination," "have ancient roots" and "have remained relatively immutable in our jurisprudence." *Greene v. McElroy*, 360 U.S. 474, 496-97 & n.25 (1959) (tracing protections back "more than two thousand years" to Roman law); *see also* 5 *Wigmore on Evidence* §1367 (3d ed. 1940) ("For two centuries past, the policy of the Anglo-American system of evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law."). Accordingly, "[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970).

The time-honored right to an evidentiary hearing extends equally to proceedings concerning requests for equitable relief. The Judiciary Act of 1789 expressly provided that "the mode of proof by oral testimony and examination of witnesses in open court shall be the

same ... in the trial of causes in equity ... as of actions at common law." Act of Sept. 24, 1789, ch. 20, §30, 1 Stat. 73, 88. And in 1912 Congress reaffirmed in the Federal Rules of Equity the necessity for common law trial procedures in equity suits. *See* Fed. Eq. R. 46 (1912); *accord* Neil Fox, Note, *Telephonic Hearings in Welfare Appeals: How Much Process Is Due?*, 1984 U. Ill. L. Rev. 445, 451 (1984). These trial-based requirements were preserved for all lawsuits with the merger of law and equity in the Federal Rules of Civil Procedural ("Federal Rules") in 1938.

The Federal Rules provide only a single mechanism for avoiding trial-based proceedings if the complaint states a basis for jurisdiction and a claim for which relief can be granted: summary judgment under Rule 56. *See* Fed. R. Civ. P. 56. And summary judgment may preempt the need for an evidentiary hearing only if there is "no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 250 (1986). That standard unquestionably applies equally to disputed issues of fact in the remedial phase of a proceeding, as Rule 56 provides that, where appropriate, summary judgment can be "rendered on liability alone." Fed. R. Civ. P. 56(d)(2); *see also United States v. Microsoft Corp.*, 253 F.3d 34, 101 (D.C. Cir.) (en banc) ("A party has the right to judicial resolution of disputed facts not just as to the liability phase, but also as to appropriate relief."), *cert. denied*, 534 U.S. 952 (2001). Thus, absent waiver, district courts today must resolve factual disputes in all phases of a civil action the way common law courts always have, through live adversarial proceedings.

The overwhelming majority of federal circuits that have considered the issue have reached the same conclusion and held squarely that genuine disputes

about facts material to the entry or breadth of injunctive relief must be resolved through evidentiary hearings upon request. *See, e.g.*, *Four Seasons Hotels & Resorts, B.V. v. Consorcio Barr, S.A.*, 320 F.3d 1205, 1211 (11th Cir. 2003); *In re Rationis Enters., Inc. of Panama*, 261 F.3d 264, 269 (2d Cir. 2001); *Microsoft*, 253 F.3d at 101-02; *Prof'l Plan Examiners of N.J., Inc. v. Lefante*, 750 F.2d 282, 288 (3d Cir. 1984); *United States v. McGee*, 714 F.2d 607, 613 (6th Cir. 1983).

In the leading modern case, *United States v. Microsoft*, the D.C. Circuit, sitting *en banc*, unanimously reversed a district court's imposition of an injunction without an evidentiary hearing. 253 F.3d at 101. The court grounded its analysis on the "cardinal principle of our system of justice that factual disputes must be heard in open court and resolved through trial-like evidentiary proceedings," and its recognition that "[a]ny other course would be contrary 'to the spirit which imbues our judicial tribunals prohibiting decision without hearing.'" *Id.* (quoting *Sims v. Greene*, 161 F.2d 87, 88 (3d Cir. 1947)). Following the Federal Rules and the common law's well-established procedures, the court held that "[o]ther than a temporary restraining order, *no injunctive relief may be entered without a hearing*." *Id.* (emphasis added).

B. The Ninth Circuit Erred In Holding That Petitioners Could Be Deprived Of An Evidentiary Hearing Here

The Ninth Circuit "generally" agrees with the other courts of appeals on the necessity for an evidentiary hearing on the availability of injunctive relief where there are disputed issues of material fact. *See Charlton v. Estate of Charlton*, 841 F.2d 988, 989 (9th Cir. 1988) ("Generally the entry or continuation of an

injunction requires a hearing. Only when the facts are not in dispute, or when the adverse party has waived its right to a hearing, can that significant procedural step be eliminated." (quotations omitted)). And it purported to reaffirm that position in this case. *See* Pet.App.17a. But the court nonetheless held that an evidentiary hearing was not required here for two reasons: (1) there were no "material issues of fact" in dispute and (2) cases arising under NEPA differ from the "'normal injunctive setting'" because, in contrast to "typical" injunctions of "indefinite duration," NEPA-based injunctions are temporary. Pet.App.17a-18a. Neither of those justifications withstands scrutiny.[17]

The first rationale—the purported absence of "material issues of fact"—is inextricably tied to the Ninth Circuit's erroneous view that an injunction can

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[17] In its amended opinion, the Ninth Circuit suggested for the first time that an "evidentiary hearing" may be deemed to have taken place because FGI's President, Mark McCaslin, was permitted to address the court with unsworn statements from counsel's table. Pet.App.19a-20a; *supra* at 13 n.6. But the Ninth Circuit nevertheless also retained its—correct—statement from its original opinion that "[w]hat the district court did *not* do was to hold an additional evidentiary hearing to resolve the very disputes over the risk of environmental harm that APHIS would have to consider in the EIS." Pet.App.20a (emphasis added). And the suggestion that a few questions directed to a party at counsel's table during an argument on a dispositive motion qualifies as an evidentiary hearing is profoundly misguided. Indeed, as Judge Smith observed in dissent, the oral argument to which the majority pointed "f[ell] far short of the standards we have articulated for [an evidentiary] hearing." Pet.App.23a. No witnesses were sworn in, petitioners were not permitted to call their own witnesses or cross-examine any adverse witnesses/declarants, the court did not rule on petitioners' evidentiary objections, and the only questions asked of McCaslin were tendered by the district court, not counsel. JA-552-54.

issue for a NEPA violation without proof of a likelihood of irreparable harm. The Ninth Circuit appreciated that the parties disagreed about the likelihood of irreparable harm under APHIS's proposed injunction, Pet.App.9a, but it did not believe that factual disputes needed to be resolved to affirm the district court's injunction. In other words, it did not believe that the question of the likelihood of irreparable harm under a narrower injunction was *legally* material to the propriety of the blanket injunction entered by the district court. As explained above, that aspect of the Ninth Circuit's reasoning is directly at odds with this Court's holdings in *Winter*, *Amoco*, and *Weinberger*.

The Ninth Circuit's second reason for approving the district court's denial of an evidentiary hearing—the "temporary" nature of NEPA-based injunctions—is equally untenable. The limited tenure of the permanent injunction in this case is hardly exceptional. All injunctions are by their nature temporary. *See, e.g.*, *Bd. of Educ. of Okla. City Pub. Schs. v. Dowell*, 498 U.S. 237, 248 (1991) (holding that injunctions, even for constitutional violations, "are not intended to operate in perpetuity"). Indeed, federal courts are *supposed to facilitate* the expiration of their injunctions—despite their styling as being "permanent." *See, e.g.*, *Horne v. Flores*, 129 S. Ct. 2579, 2595-96 (2009) (holding that federal courts have an obligation to see that authority is "'returned *promptly* to the State and its officials,'" and that once a violation has been remedied, "continued enforcement of the order is not only unnecessary, *but improper*") (emphasis added) (citation omitted)).

More fundamentally, the right to a hearing no more hinges on the expected duration of an injunction than it does on the expected amount of legal damages. Indeed, the vast majority of courts of appeals recognize that

the right to a hearing extends equally to disputes over *preliminary* injunctions, which are by definition temporary. *See Four Seasons Hotels*, 320 F.3d at 1211; *In re Rationis Enters.*, 261 F.3d at 269; *Microsoft*, 253 F.3d at 101-02; *Lefante*, 750 F.2d at 288; *see also* 13 James Wm. Moore, *Moore's Federal Practice* §65.21[4] (3d ed. 2009) ("A hearing on the merits of the preliminary injunction is thus usually required only when a dispute exists between the parties as to the material facts."). *But see Campbell Soup Co. v. Giles*, 47 F.3d 467, 470 (1st Cir. 1995) (rejecting "'categorical rules'" of other circuits and instead "'balancing between speed and practicality versus accuracy and fairness'" (citation omitted)).

Regardless of its expected duration, an injunction is an "extraordinary and drastic remedy." *Munaf*, 128 S. Ct. at 2219 (quotation omitted). Even short-term injunctions can impose great costs. Indeed, the nationwide injunction issued in this case was predicted to cause roughly one quarter of a billion dollars in damages in the first two years alone. Due to the "drastic" nature of injunctions, this Court has long insisted that courts carefully adhere to the time-honored standards governing the entry of such relief. *See, e.g.*, *Winter*, 129 S. Ct. at 374-75; *eBay, Inc.*, 547 U.S. at 391-392; *Amoco*, 480 U.S. at 542; *Weinberger*, 456 U.S. at 311-12. And faithful adherence to the ages-old requirement of an evidentiary hearing to resolve disputed issues of material fact is no less important in determining whether injunctive relief is warranted. In upholding the injunction at issue, the Ninth Circuit fundamentally disregarded both the traditional requirements for equitable relief and the necessity of

an evidentiary hearing to resolve disputed issues of material fact bearing on those requirements.[18]

CONCLUSION

The judgment of the court of appeals should be reversed, and the case remanded with instructions to vacate the district court's injunction and enter APHIS's proposed remedy in its place.

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[18] The government did not request an evidentiary hearing and, in opposing certiorari, stated that it "does not believe one was necessary." Fed.Opp.14. But the government has not argued that there were no disputed issues of material fact—the customary trigger for an evidentiary hearing. Instead, it advances the general notion that "the granting of injunctive relief in a suit challenging agency action under the Administrative Procedure Act (APA) presents different considerations than the granting of relief in private litigation." Fed.Opp.16. The government may well be right that resolution of disputed factual issues implicating an administrative record raises additional considerations. But the government by no means has a monopoly on deciding when an evidentiary hearing is warranted. In this case, the facts relevant to the likelihood of irreparable harm were developed after and outside of the administrative record, which focused only on the need for an EIS. And petitioners—who are parties to this litigation after having successfully intervened to defend the agency's proposed remedy—properly requested and were entitled to an evidentiary hearing before the injunction at issue was entered.

Respectfully submitted,

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