No.

In the Supreme Court of the United States

MONSANTO CO., ET AL.,
PETITIONERS,

v.

GEERTSON SEED FARMS, ET AL.,
RESPONDENTS.

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

PETITION FOR A WRIT OF CERTIORARI

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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.

LIST OF PARTIES AND RULE 29.6 STATEMENT

The petitioners are Monsanto Company ("Monsanto"), Forage Genetics International, LLC ("FGI"), Daniel Mederos, and Mark Watte.

Monsanto Company is a publicly traded company and has no parent corporations. Only one owner holds more than a 10% stake in Monsanto: FMR Corporation. FMR Corporation is not a publicly traded company.

On December 18, 2007, then intervenor-appellant Forage Genetics, Inc. converted from a C corporation to a domestic limited liability company called Forage Genetics International, LLC. Pursuant to Minn. Stat. §302.A.691, Forage Genetics International, LLC is for all purposes the same organization as Forage Genetics, Inc. Forage Genetics International, LLC is a wholly owned subsidiary of Land O'Lakes, Inc. No other corporation owns any stock or other interest in Forage Genetics International, LLC.

Monsanto and FGI are the owner and licensee, respectively, of the relevant patents for Roundup Ready alfalfa. Daniel Mederos and Mark Watte are farmers who made substantial investments in and grew Roundup Ready alfalfa.

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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. That order forbade any additional petitions for rehearing. *Id.* Justice Kennedy extended the time to file this petition until October 22, 2009. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The appendix reproduces the relevant constitutional amendment, statutes, and regulations.

STATEMENT OF THE CASE

This Court has emphasized that an injunction is "extraordinary and drastic remedy" that is "never awarded as of right." *Munaf v. Geren*, 128 S. Ct. 2207, 2219 (2008) (quotation marks omitted). Last Term, in *Winter v. NRDC*, 129 S. Ct. 365, 374-76 (2008), this Court held squarely that a NEPA plaintiff must establish that it is *likely* to be irreparably harmed to justify the extraordinary remedy of injunctive relief. Yet, the Ninth Circuit nonetheless persists in its view that NEPA plaintiffs are specially exempt from that requirement.

The Ninth Circuit upheld a nationwide injunction in this case by holding that the parties' dispute over the

potential for irreparable harm under a narrower, more limited injunction was immaterial at this stage of the proceedings—and did not warrant an evidentiary hearing—because the government would be focusing on the measures necessary to avert potential harm later when it prepared its environmental impact statement. Freed from the discipline imposed by the traditional likelihood-of-harm standard, the court of appeals approved an injunction that is so broad that it prohibits beneficial activities that pose no risk of harm whatsoever. If not reversed, the Ninth Circuit's holding threatens to make blanket injunctions all but automatic in NEPA cases arising in that circuit. As Judge Smith noted in dissent, "[t]here aren't many environmental cases that don't fit into the majority's newly-created exemption." Pet.App.26a (Smith, J., dissenting). Review by this Court is warranted.

BACKGROUND

The possibility of cross-pollination among nearby fields planted with different varieties of the same crop is an issue as old as agriculture, which farmers have always managed with locally-negotiated stewardship measures such as isolation distances. Pet.App.255a-64a, 212a-13a. Cross-pollination can occur only if both fields produce flowers simultaneously and pollen is transferred between them. When it does occur, cross-pollination affects only the fertilized flower, not the whole plant, and can be meaningful only where the flower is allowed to develop into a seed, and the seed is then harvested and sold. Pet.App.386a, 280a-83a, 178a-80a, 129a-30a. Where farmers purchasing seed are sensitive to varietal purity, cross-pollination can reduce the price of the seed.

This case is about a potential risk of cross-pollination among alfalfa fields. Alfalfa is a perennial crop with a three to five-year lifespan. Pet.App.126a. Each year, over 22 million acres of alfalfa are grown in the U.S. Pet.App.330a. Ninety-nine percent of that alfalfa is grown to produce hay, primarily used as feed for dairy operations. Pet.App.126a, 321a-22a, 330a. Alfalfa hay farmers have strong financial incentives to harvest their alfalfa before blooming, because flowering significantly decreases the nutritional (and hence financial) value of a crop. Pet.App.128a-29a. They do not introduce bees or other pollinators, and alfalfa does not shed pollen to the wind. Pet.App.129a-30a.

Less than 1% of alfalfa acreage is devoted to seed production, in just a handful of geographic areas. Pet.App.313a, 322a. Alfalfa seed farmers produce different varieties of conventional alfalfa seed. *See* Pet.App.148a, 216a. As with other crops, alfalfa seed farmers successfully utilize stewardship measures—including isolation distances between fields—when they wish to maintain varietal purity. *See* Pet.App.216a-17a, 212a-13a.

This case involves a particular variety of alfalfa created to address the problems caused by weeds in alfalfa fields, which substantially reduce the economic value of the crop to farmers and the nutritional value of feed for livestock. 126a-27a, 133a-34a. This alfalfa has been genetically engineered to be resistant to Roundup, a broad-spectrum agricultural herbicide that controls nearly every weed species in alfalfa crops. Pet.App.127a. Roundup's active ingredient is glyphosate, which the Environmental Protection Agency ("EPA") has found to be one of the most environmentally responsible herbicides available

commercially. Pet.App.195a-205a. The gene for glyphosate resistance occurs naturally, but not in alfalfa. Pet.App.43a. The alfalfa variety into which this gene has been introduced is known as Roundup Ready alfalfa ("RRA"). RRA is not harmed by Roundup, which kills weeds without affecting the crop. Pet.App.127a, 133a-34a. This is good for the farmer and the environment, because without RRA farmers use more toxic and expensive herbicides that must be applied more frequently. Pet.App. 121a-22a, 135a-36a, 239a. RRA is otherwise identical to conventional alfalfa. Pet.App.43a. It is undisputed that RRA is safe for food and animal feed. *Id.*

Since 1986, regulatory oversight for genetically-engineered crops has been governed by a "Coordinated Framework" involving three federal agencies: the Food and Drug Administration ("FDA"), EPA, and the U.S. Department of Agriculture ("USDA"). 51 Fed. Reg. 23,302, 23,302-09 (June 26, 1986). FDA is responsible for reviewing the safety of food/feed for humans and animals, and 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.* In addition, the Animal and Plant Health Inspection Service ("APHIS"), a division of USDA, 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).

After eight years of field testing, APHIS granted the petition of Monsanto and FGI (the owner and licensee of the relevant intellectual property) to grant RRA Nonregulated Status—an action commonly referred to as "deregulation"—allowing RRA to be

planted and sold commercially.[1] APHIS conducted its decision-making process subject to NEPA, which 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 to prepare a full EIS if it determines—based on a shorter 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. When APHIS deregulated RRA, it simultaneously issued an EA and Finding of No Significant Impact ("FONSI").

Eight months later, a coalition of environmental organizations and individuals led by the Center for Food Safety brought suit challenging APHIS's decision.

PROCEEDINGS BELOW

1. *NEPA Merits Proceedings*

On February 13, 2007, the district court granted plaintiffs' motion for summary judgment on their NEPA-based claim that APHIS's EA was inadequate. The district court conceded that the case presented a "close question of first impression," but it ultimately concluded that APHIS had failed adequately to explain why the possibility of cross-pollination of conventional and organic alfalfa with RRA was not itself a significant harmful impact on the human environment,

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[1] This was the 67th petition APHIS has granted since 1995 to "deregulate" a genetically-engineered crop, and the 11th petition specifically for a glyphosate-resistant crop. *See* http://www.aphis.usda.gov/brs/not_reg.html.

and on that basis it ordered APHIS to prepare a full EIS. Pet.App.35a-45a, 51a-52a.

The district court's holding rested largely on the absence of any mandatory isolation distances for RRA seed crops or other stewardship measures to prevent cross-pollination in APHIS's unconditional grant of Nonregulated Status.[2] The district court emphasized that "once [RRA] is deregulated the government will not be able to impose isolation distances" and RRA planting will occur "without any geographic restrictions." Pet.App.36a, 52a.

2. *Remedial Proceedings*

APHIS submitted a proposed injunctive order that would have mandated precisely those sorts of stewardship measures, designed to prevent any non-trivial likelihood of cross-pollination during the agency's preparation of its EIS. These measures included isolation distances for RRA seed crops (1500 feet or 3 miles, depending on the type of bees used as pollinators) and hay crops (165 feet from any non-RRA alfalfa); a ban on adding pollinators to RRA hay crops; and requirements that all RRA hay crops be harvested before seed set, and harvested prior to 10% bloom if they are within 500 feet of non-RRA alfalfa. Pet.App.185a-86a. These measures were more stringent than the voluntary stewardship practices that RRA farmers had previously observed. For example, they would have increased isolation distances from 900 feet to 1500 feet when leafcutter bees are used as pollinators for seed crops (a 67% increase), and

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[2] The district court also concluded that APHIS did not take a "hard look" at the possibility that weeds might develop resistance to glyphosate, but the court did not rely on this rationale in fashioning injunctive relief. Pet.App.60a-79a.

to 3 miles when honey bees are used (a 1660% increase). Pet.App.140a, 162a-63a, 186a, 226a-28a.

APHIS explained that this 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. APHIS's expert declared that, with the agency's proposed stewardship measures in place, any potential for cross-pollination would be "minimal," "negligible"—and "under 0.1%." Pet.App.148a-50a, 162a-63a. APHIS also emphasized that the alternative—plaintiffs' proposed nationwide injunction on any further planting of RRA—would inflict unnecessary and substantial financial harm on approximately 3,000 RRA farmers located in 48 states. Pet.App.142a-47a.

The district court nonetheless rejected APHIS's measured approach. In its preliminary injunction order, issued on March 12, 2007, the court did not identify any likelihood of irreparable harm associated with RRA, and indeed did not analyze the traditional equitable factors for issuance of injunctive relief. Pet.App.54a-59a. Instead, the court applied the Ninth Circuit's "unusual circumstances" test: "In the run of the mill NEPA case, the contemplated project ... is simply delayed until the NEPA violation is cured.... [A]bsent unusual circumstances, an injunction is the appropriate remedy for a violation of NEPA's procedural requirements." Pet.App.55a (quotation marks and citations omitted). Because "[n]either the intervenors nor the government h[ad] identified any 'unusual circumstances,'" the court issued a nationwide injunction against all RRA planting after March 30, 2007. Pet.App.56a-58a.

Before entering permanent injunctive relief, the district court allowed the government and petitioners (which had intervened in the remedial proceedings) to "submit additional evidence or a further memorandum" and allowed plaintiffs to file a response to those submissions. Pet.App.58a. Petitioners proffered substantial additional evidence, including proposed testimony from four leading academic experts on alfalfa cultivation. Those experts explained that, with the government's proposed interim measures in place, the possibility of cross-pollination among hay crops—which account for 99% of alfalfa acreage—would be "negligible"; indeed, the risk was estimated at approximately 2.5 in one million (0.00025%). Pet.App.160a, 229a-35a, 280a-81a, 378-80a.[3] Even plaintiffs' own expert declarant admitted that hay crops do not present "any substantial risk of gene flow." Pet.App.359a. Petitioners' experts further explained that the possibility of cross-pollination from RRA to other alfalfa seed fields would be "extremely low"—*i.e.*, at or below 0.1% for seed fields stocked with leafcutter bees and less than 0.03% for those stocked

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[3] Several unlikely events would have to occur *seriatim* to permit hay-to-hay cross-pollination: (1) *both* the RRA and the conventional or organic hay field must be allowed to flower and go to seed, (2) the flowering of both fields must occur simultaneously, (3) bees must be present and actually pollinate the alfalfa crop, (4) any resulting seed must be permitted to mature, and (5) the seed must successfully germinate in the already established field. Pet.App.128a-30a, 178a-80a, 280a-83a. The chance of all of these events happening seriatim is infinitesimal. Pet.App.280a-83a. 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 an RRA hay field to a conventional or organic hay field. Pet.App.29a, 408a-09a.

with honey bees. Pet.App.227a-29a, 234a-35a, 256a-57a.

Petitioners also submitted sample declarations of 17 farmers discussing the substantial losses they would suffer from a ban on RRA planting, and the report of an agricultural economist estimating those losses at more than $200 million. Pet.App.267a-69a. Plaintiffs' responsive submissions consisted largely of hearsay anecdotes of supposed cross-pollination.[4]

The district court refused petitioners' request for an evidentiary hearing and refused to rule on their evidentiary objections to plaintiffs' submissions. It merely held an "oral argument" on permanent relief. Pet.App.58a-59a. At that argument, the court made crystal clear its belief that it did not need to address the parties' dispute over the likelihood of irreparable harm:

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[4] For example, plaintiffs proffered the declarations of Jim Briggs and Ernest Johnson stating that they had heard representatives of Dairyland Seed Co. say that they had detected cross-pollination in Dairyland's seed fields. Pet.App.364a-67a, 372a. Plaintiffs also submitted a declaration from their counsel attaching a letter from the President of Cal/West to APHIS describing purported cross-pollination in its fields. Notably, even if there were any truth to that account—something petitioners were not permitted to test through cross-examination—those purported instances of cross-pollination involved exclusively seed-to-seed transmissions, appeared to have affected only 2-4% of the seed fields in the relevant geographic location, and in all but one case fell within a contractually contemplated 1% "tolerance" levels. Moreover, this alleged cross-pollination arose from planting conducted under stewardship techniques far less rigorous than APHIS's proposed mitigation measures. Pet.App.404a-07a. Indeed, the only cited instance of cross-pollination above the contractual 1% tolerance level involved a crop planted only 200 feet from an adjacent RRA seed field. *Id.*

> 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 place until the Government has discharged its duty given to it by the right of Congress of the United States.

Pet.App.422a.

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 the court 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 "in 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 refused to consider isolation distances of any length or any other stewardship measures proposed by APHIS. 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. Indeed, the court "reject[ed]" out of hand the notion that interim measures allowing continued planting could be appropriate as a NEPA remedy, because 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; *see also* Pet.App.72a (concluding that, under Ninth Circuit law, "[a]llowing an expansion of the Roundup Ready alfalfa market pending the preparation of the EIS would be unprecedented").

To the extent the district court addressed the traditional equitable factors for the issuance of injunctive relief, it did so only cursorily and with an extraordinarily expansive concept of what constitutes irreparable harm. Without analyzing defendants' or intervenors' proposed expert testimony or allowing any cross examination of plaintiffs' contrary assertions, the district court held that any cross-pollination between RRA and organic or conventional alfalfa would constitute "irreparable harm" because "[t]he contamination cannot be undone; it will destroy the crops of those farmers who do not sell genetically engineered alfalfa." Pet.App.71a.[5] And, based on (i) plaintiffs' allegations that some "contamination has occurred" in certain seed crops under conditions "similar to" those proposed by APHIS, (ii) the remote, theoretical possibility that extreme weather conditions—such as months of continuous rain—might

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5 *But see* Pet.App.181a-83a, 285a-87a, 410a-11a (explaining that the purported "contamination" could be avoided through inexpensive genetic tests and could be remedied with commonly used agricultural methods for ensuring varietal purity of seed crops).

permit hay-to-hay cross-pollination, and (iii) skepticism that APHIS has sufficient resources to ensure compliance with its proposed stewardship measures, the district court concluded that "plaintiffs h[ad] *sufficiently* established irreparable injury." Pet.App.71a (emphasis added).[6] At that time, the Ninth Circuit required only proof of "a 'possibility' [rather than a likelihood] of irreparable harm." *Winter*, 129 S. Ct. at 374-76; *accord Or. Natural Res. Council Fund v. Goodman*, 505 F.3d 884, 898 (9th Cir. 2007).

3. *Ninth Circuit Opinion—as originally issued*

The Ninth Circuit affirmed the district court's judgment. It recognized that the district court did not conduct an evidentiary hearing, and that "generally, a district court must hold an evidentiary hearing" when material facts are in dispute. Pet.App.95a. The court also acknowledged that "[t]he parties' experts disagreed over virtually every factual issue relating to possible environmental harm, including the likelihood of genetic contamination." Pet.App.87a (quotation marks omitted). But it nonetheless approved the district court's holding that petitioners "had [not] established any material issues of fact" necessitating a 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. (citing *Idaho Watersheds Project v. Hahn*, 307 F.3d 815, 831 (9th Cir. 2002)). The court also

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[6] The district court derided the government's representation that it would enforce its proposed stewardship measures: "[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.

rationalized 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." Pet.App.95a-96a.

Despite the lack 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. Like the district court's opinion, the Ninth Circuit's original opinion was issued before *Winter*, when Ninth Circuit law counted a "mere possibility" of irreparable harm sufficient to support injunctive relief.

Judge Smith dissented. He objected that, "[i]nstead of giving deference to the agency's expertise, the majority gives deference to the district court, despite its wholesale rejection of the agency's proposal for an injunction and its failure to hold an evidentiary hearing." Pet.App.102a. He viewed the absence of an evidentiary hearing as a "critical failure ... [that] deprived the parties of important procedural right[]," Pet.App.100a, and threatens the rights of others in future cases: "There aren't many environmental cases that don't fit into the majority's newly-created exemption." Pet.App.102a. "Based on [the] record" in this case, moreover, Judge Smith had "serious concerns about the scope of the injunction entered by the district court." Pet.App.102a-03a. "At best," he believed "the record reflect[ed] sparse evidence of hay-to-hay gene transmission of RRA alfalfa in some areas of the country under certain planting conditions," and he saw "no good evidence of hay-to-seed or seed-to-seed gene transmission" and thus no basis for the district court's "nationwide injunction on the planting of Roundup

Ready alfalfa while APHIS completes an EIS," which had "severe economic consequences." *Id.*

4. *Amended Opinion*

In response to the intervenors' 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 added as a new rationale a contention 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 plaintiffs' preliminary injunction motion. Pet.App.23a. But the amended opinion contradicts itself on that score, as it adheres 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. Judge Smith observed in dissent that "the record does not confirm [the majority's revisionist] description," as the oral arguments on which the majority relied "f[ell] far short of the standards we have articulated for [an evidentiary] hearing...." Pet.App.23a.

The amended opinion does not discuss *Winter*'s holding that the traditional equitable standards, including a finding of likely irreparable harm, must 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" in this case. *Compare* Pet.App.13a *with* Pet.App.91a.

Although the district court ordered APHIS to prepare an EIS 32 months ago, APHIS has not yet published a draft EIS, the district court's nationwide injunction against any planting of RRA, *even for hay*, remains in place, and the harm to alfalfa growers continues.

REASONS FOR GRANTING THE WRIT

This Court has held time and again that federal courts considering injunctive relief to remedy violations of environmental statutes must apply the traditional four-factor equitable test, absent clear contrary direction from Congress. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311 (1982) (rejecting "'absolute statutory obligation'" to enjoin violations of environmental statutes) (citation omitted); *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 542-45 (1987) (reversing Ninth Circuit presumption of irreparable harm in environmental cases). Last Term, in *Winter*, this Court made clear that the traditional four-factor test applies equally to injunctions sought in the NEPA context, and held specifically 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. *Winter*, 129 S. Ct. at 374-76.

Despite those on-point holdings, the Ninth Circuit has now invented a new special rule that will effectively permit district courts once again to *presume* irreparable harm in NEPA cases. The Ninth Circuit affirmed the district court's blanket nationwide injunction against planting RRA despite a federal agency's expert view that a more limited injunction

would suffice to prevent any significant cross-pollination—and, indeed, affirmed the district court's denial of petitioners' request for an evidentiary hearing on that issue—because it agreed with the district court that the likelihood of irreparable harm is simply immaterial in the NEPA context. In the Ninth Circuit's view, it is a waste of judicial resources to spend time determining whether a more limited injunction would suffice to prevent irreparable harm, when the agency will eventually have to analyze appropriate risk-avoidance measures in the course of its EIS process anyway. That reasoning cannot be reconciled with this Court's precedents and impermissibly enlarges both the equitable power of federal courts and the scope of NEPA.

The Ninth Circuit also rationalized that it could refuse petitioners' request for an evidentiary hearing because a permanent injunction in the NEPA context is really just an "interim measure[]," lasting only until the new EIS issues. Pet.App.17a-20a. But a *preliminary* injunction is also by definition "interim" in nature, and *Winter* (like prior decisions of this Court) admonishes that a "preliminary injunction is an extraordinary remedy never awarded as of right," and that district courts must make factual findings under the traditional four-factor test even for *preliminary* injunctions. 129 S. Ct. at 374-76. Moreover, the deprivation of an evidentiary hearing in the face of genuine disputes over material facts conflicts with centuries of common law and the holdings of numerous other courts of appeals.

To be sure, the Ninth Circuit also affirmed the district court's "conclu[sion] that plaintiffs had established that genetic contamination was *sufficiently likely* to occur so as to warrant broad injunctive relief."

Pet.App.13a (emphasis added). But far from rescuing the court of appeals' opinion, if that is viewed as an alternative holding it introduces distinct and equally fundamental errors. At the time of the district court's ruling, Ninth Circuit case law deemed *sufficient* a showing that irreparable harm was "possible." *Winter*, 129 S. Ct. at 374-75; *Goodman*, 505 F.3d at 898. After this Court repudiated that formulation in *Winter*, the Ninth Circuit at a minimum should have vacated the district court's judgment in this case and instructed the court on remand to determine the breadth of injunction necessary to prevent *likely* irreparable harm. The Ninth Circuit refused to do that. Its affirmation of an injunction that was based on the district court's concern over the mere possibility of cross-pollination with some conventional or organic crops—a monetary injury that is manifestly reparable in any event—cannot be reconciled with *Winter*'s holding that irreparable harm must be likely. 129 S. Ct. at 374-75. For at least the 99% of alfalfa that is planted for hay, cross-pollination is almost a scientific impossibility. And for the remaining 1% that is planted for seed, it would still be highly *un*likely with the APHIS's stewardship measures in place.

If permitted to stand, the Ninth Circuit's decision threatens to effectively nullify this Court's holdings in *Winter*, *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006), and *Amoco*, make broad injunctive relief all but automatic (*i.e.*, "as of right") whenever a district court finds a NEPA violation in the Ninth Circuit, and impermissibly expand the scope of NEPA. Unjustified nationwide injunctions blessed by the courts in that circuit will pose a significant threat to important government programs and will inflict enormous financial losses on private businesses and individuals

that have reasonably relied on the government's regulatory approvals. This Court's review is warranted.

I. THE NINTH CIRCUIT'S DENIAL OF AN EVIDENTIARY HEARING ON THE GROUND THAT THE LIKELIHOOD OF IRREPARABLE HARM IS IMMATERIAL TO THE ISSUANCE OF A NEPA INJUNCTION WARRANTS THIS COURT'S REVIEW

The district court believed that it was not required to grapple with the likelihood of irreparable harm before entering a nationwide injunction against any further planting of RRA. Judge Breyer insisted "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" and refused to "conduct ... the very same scientific inquiry [he had] ordered APHIS to do." Pet.App.68a, 422a; *accord supra* at 9-11. As the United States observed below, "the court refused to make any findings regarding gene flow." Opening Brief of Federal Defendants-Appellants ("U.S. Br."), *Geertson*, at 27.

The Ninth Circuit approved of the district court's approach and adopted its holding. It acknowledged that, "generally, a district court must hold an evidentiary hearing before issuing a permanent injunction unless the adverse party has waived its right to a hearing or the facts are undisputed." Pet.App.17a. There was no waiver here, and the court of appeals recognized that the parties' experts disagreed vehemently over the likelihood of irreparable harm. Pet.App.9a. Yet the court of appeals affirmed the district court's denial of an

evidentiary hearing on the ground that no "material issues of fact ... were in dispute." Pet.App.17a-18a. In other words, according to the Ninth Circuit, the parties' disagreement over the likelihood of irreparable harm was not material to whether the injunction was justified.

Like the district court, the Ninth Circuit reasoned that judicial analysis of the relevant likelihoods would unnecessarily "duplicate APHIS's efforts" and "divert [APHIS's] resources." Pet.App.18a-19a. Indeed, the court of appeals characterized the necessity of engaging on the likelihood of irreparable harm—a quintessential precondition to issuing *any* injunction under traditional standards—as "the catch-22 situation." Pet.App.18a. The Ninth Circuit's approach views the agency's later EIS process as a *substitute* for application of the traditional equitable factors for injunctive relief by federal courts, reasoning that the district court need only "allow for a[n] [EIS] process to take place which will determine permanent measures." *Id.*

The Ninth Circuit drew that reasoning from its prior decision in *Idaho Watersheds*. *Id.* In that case, however, the court justified the denial of an evidentiary hearing on irreparable harm in part based on the district court's appropriate deference to the form of injunctive relief proposed by the government. *See Idaho Watersheds*, 307 F.3d at 830-31 (noting the circuit's historic "deference for factual and technical determinations implicating substantial agency expertise"). Whatever the merits of that decision, it does not justify a district court's refusal to engage on the likelihood of irreparable harm when it is *rejecting* the government's measured approach in favor of a nationwide blanket injunction. In this circumstance,

the Ninth Circuit's holding promotes a uniquely non-deferential form of judicial abstention, under which a federal court may, in supposed deference to an expert agency's future decision-making processes, issue an injunction that the agency considers to be overbroad and unnecessary.

The Ninth Circuit's approach conflicts directly with this Court's decisions in *Winter*, *eBay*, and *Amoco*. Those decisions make clear that courts should not carve out subject-matter exceptions to the "traditional four-factor framework that governs the award of injunctive relief," *eBay*, 547 U.S. at 394, and that the likelihood of irreparable harm—like all of the traditional equitable factors—must be analyzed by courts *before* injunctions issue. *See, e.g.*, *Winter*, 129 S. Ct. at 374-75; *eBay*, 547 U.S. at 391-94; *Amoco*, 480 U.S. at 542. In *Winter* and *Amoco*—as here—the defendant federal agency was proceeding to conduct additional, court-ordered environmental studies. *Winter*, 129 S. Ct. at 376, 381-82 & n.5; *Amoco*, 480 U.S. at 538-39. Despite those ongoing agency processes, this Court nonetheless examined the likelihood of irreparable harm *itself* without any suggestion that the upcoming agency processes rendered that issue immaterial. *Winter*, 129 S. Ct. at 375-76; *Amoco*, 480 U.S. at 544-45, (concluding such harm was "not at all probable").

By allowing a district court to order broad injunctive relief without first finding the requisite irreparable harm, the Ninth Circuit has effectively resurrected the presumption of irreparable harm that this Court repudiated in *Amoco*. 480 U.S. at 544-45; *see also* U.S. Br. at 4 ("The district court issued this blanket injunction by presuming irreparable harm ...."). Although the Ninth Circuit disclaims endorsing any such presumption, Pet.App.13a, allowing district

courts to issue injunctions without adjudicating the likelihood of irreparable harm amounts to the same thing. *See* Reply Brief of Federal Defendants-Appellants, *Geertson*, at 14 (noting that the "presumption of irreparable harm applied by the district court [and affirmed by the Ninth Circuit] is problematic because it caused the court to issue an overbroad injunction").

The Ninth Circuit's approach also conflicts squarely with that of the Second Circuit, which reversed a district court's refusal to convene an evidentiary hearing to adjudicate the issue of irreparable harm in a NEPA case. *See Huntington v. Marsh*, 884 F.2d 648, 654 (2d Cir. 1989) (observing that "no consideration was given" by the district court as to "whether plaintiff has met its burden to establish some actual or threatened injury"), *cert. denied*, 494 U.S. 1004 (1990). Even though—as in this case—the agency was in the process of preparing an EIS, the Second Circuit reversed and remanded so that the *district court* would adjudicate the likelihood of irreparable harm at an evidentiary hearing. *Id.* at 651, 653-54. In contrast to the Ninth Circuit, the Second Circuit held that "a threat of irreparable injury *must be proved, not assumed*, and *may not be postulated eo ipso* on the basis of procedural violations of NEPA." *Id.* at 653 (emphasis added).

The Ninth Circuit's decision also impermissibly enlarges the scope of NEPA. NEPA is, of course, a procedural statute, which mandates no "particular results." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350, 353 n.16 (1989). Moreover, an agency's compliance with NEPA is reviewed under the APA, which does not mandate injunctive relief when a violation is found. *See* 5 U.S.C. §703 (providing

that either declaratory or injunctive relief may be appropriate); *see also Winter*, 129 S. Ct. at 381 (observing that federal courts have "many remedial tools at [their] disposal, including declaratory relief or an injunction tailored to the preparation of an EIS rather than the [challenged government activity] in the interim"). The Ninth Circuit's decision nevertheless permits a NEPA plaintiff to obtain an injunction—indeed, as in this case, a *permanent* injunction—against agency action without even satisfying the traditional elements of injunctive relief.

Beyond the conflicts it has created with decisions of this Court and the Second Circuit, the Ninth Circuit's decision warrants review for practical reasons. As the United States has recognized, "the proper standard for evaluating requests for injunctive relief in connection with violations of [NEPA] involves an important question of federal law." Federal Opposition to Certiorari, *Huntington* (No. 89-781), *available at* http://www.usdoj.gov/osg/briefs/1989/sg890315.txt. The government lost 288 NEPA cases from 2006 to 2008 alone,[7] and as the remedy for a NEPA violation almost invariably involves additional environmental study by the agency, the Ninth Circuit's revitalized presumption of irreparable harm threatens to apply in virtually all of the NEPA cases arising in that circuit. *See* Pet.App.26a (Smith, J., dissenting) ("There aren't many environmental cases that don't fit into the majority's newly-created exemption."). The Ninth Circuit's effective revival of its *pre-Amoco*

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[7] *See* NEPA Litigation Surveys, *available at* http://ceq.hss.doe.gov/nepa/NEPA2006LitigationSurvey.pdf; http://ceq.hss.doe.gov/nepa/NEPA2007LitigationSurvey.pdf; http://ceq.hss.doe.gov/nepa/NEPA2008LitigationSurvey.pdf.

presumption thus once again "presents a serious and continuing problem for countless federal projects and programs...." Federal Petition for Certiorari, *Amoco* (No. 85-1406), *available at* http://www.usdoj.gov/osg/briefs/1985/sg850057.txt. It similarly threatens to inflict billions of dollars of unjustified economic injury—indeed more than $200 million in this case alone—on businesses and individuals who have made substantial investments in reliance on the government's regulatory approvals. *See also* U.S. Br. at 41 ("RRA growers had made substantial investments in RRA by the time Geertson finally sought injunctive relief ....").

II. THE NINTH CIRCUIT'S DENIAL OF AN EVIDENTIARY HEARING ON THE GROUND THAT NEPA INJUNCTIONS ARE MERELY "TEMPORARY" WARRANTS THIS COURT'S REVIEW

In addition to its view that the likelihood of irreparable harm is immaterial to injunctions issued in NEPA cases, the Ninth Circuit indicated that an evidentiary hearing was unnecessary here because a permanent injunction entered pending the preparation of an EIS is inherently "temporary." If the Ninth Circuit meant that proof of a likelihood of irreparable harm is immaterial where the proposed injunction is merely temporary, its decision runs headlong into this Court's precedents (including *Winter*) recognizing that a preliminary injunction is itself an "extraordinary remedy" that requires (among other things) proof of a likelihood of irreparable harm before it may be issued. 129 S. Ct. at 374-76. If the Ninth Circuit instead meant that district courts may deny evidentiary hearings when faced with genuine disputes over facts material

to the issuance of permanent injunctions, its decision runs headlong into centuries of common law, basic concepts of due process, and the Federal Rules of Civil Procedure—and conflicts with the decisions of virtually every court of appeals that has addressed the issue.[8]

For nearly a millennium, Anglo-American jurisprudence has resolved material factual disputes in the same manner: trial-based, adversarial proceedings. *See, e.g.*, 3 William Blackstone, *Commentaries on the Laws of England* 349 (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"); *Greene v. McElroy*, 360 U.S. 474, 496-97 & n.25 (1959) (observing that "[c]ertain principles," such as live testimony and cross examination, "have remained relatively immutable in our jurisprudence" and tracing protections back "more than two thousand years" to Roman law).

The ancient principle that material factual disputes must be resolved through trial is, indeed, core to our notions of due process. This Court has observed that, "[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);

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[8] Beyond refusing an evidentiary hearing, the district court's review of the parties' paper submissions lacked any semblance of procedural integrity. Among other things, the court relied on plaintiffs' anecdotal tales of alleged RRA "contamination" without pausing to consider petitioners' motion to strike that material on hearsay and other evidentiary grounds, much less subjecting those accounts to the crucible of cross-examination. *See supra* at 9.

see also Ingraham v. Wright, 430 U.S. 651, 672-73 (1977) ("[T]he Fifth Amendment ... was intended to give Americans at least the protection against governmental power that they had enjoyed as Englishmen against the power of the Crown."); *Hamdi v. Rumsfeld*, 542 U.S. 507, 556 (2004) (Scalia, J., dissenting) ("The gist of the Due Process Clause, as understood at the founding and since, was to force the Government to follow those common-law procedures traditionally deemed necessary ....").

The need to convene evidentiary hearings to resolve material factual disputes is also implicit in the Federal Rules of Civil Procedure, which provide only two mechanisms by which a full trial to verdict can be avoided and judgment nevertheless entered—directed verdicts and summary judgments. *See* Fed. R. Civ. P. 50, 56. The standard for both procedures is the same: there must "be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 250 (1986). Outside of these two procedures, district courts must resolve factual disputes the way common law courts always have, through live adversarial proceedings.

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 34, 101 (D.C. Cir.), *cert. denied*, 534 U.S. 952 (2001). The D.C. Circuit 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)). The D.C. Circuit recognized, moreover, that "[a] party has the right to judicial resolution of disputed facts not just as to the liability phase, but also as to appropriate relief." *Id.* 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). The only exception it acknowledged was for temporary restraining orders, which generally are limited to no more than 10 days. *Id.* (citing Fed. R. Civ. P. 65).

Consistent with *Microsoft*, it is settled law in virtually every circuit that has considered this issue that a district court considering entry of an injunction must conduct an evidentiary hearing upon request if there are any material facts in dispute. *See 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).

The Ninth Circuit also "generally" adheres to this rule. Pet.App.17a; *see also, e.g., Charlton v. Estate of Charlton*, 841 F.2d 988, 989 (9th Cir. 1988). But it distinguishes cases arising under NEPA from the "'normal injunctive setting'" because, in contrast to "typical" injunctions of "indefinite duration," NEPA-based injunctions are temporary. Pet.App.18a. Contrary to the Ninth Circuit's reasoning, a party's common law and due process right to an evidentiary hearing on the propriety and scope of injunctive relief does not depend on the projected duration of the

injunction. A preliminary injunction is by its nature "temporary." Yet courts have recognized the right to an evidentiary hearing equally in the context of preliminary injunctions. *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)). Moreover, all permanent injunctions are inherently "temporary" in the sense that they will expire when either the violation is remedied or the controversy is mooted. *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 often *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*") (citation omitted) (emphasis added)). It is thus hardly exceptional that NEPA-based "permanent injunctions" are likely—and supposed—to expire at some point.

By nonetheless inventing a special NEPA-only exception to the general evidentiary hearing

requirement, the Ninth Circuit 's decision directly and specifically conflicts with the Second Circuit's decisions in *Huntingon*, which vacated *NEPA-based* injunctions issued without evidentiary hearings on irreparable harm and mandated such hearings on remand. *Huntington*, 884 F.2d at 649, 653-54. More generally, the Ninth Circuit's holding splits it from the D.C. Circuit, which excepts only TROs from the evidentiary hearing requirement, and conflicts with the views of many other courts of appeals, which have long recognized the right to evidentiary hearings without concern for the likely duration of the injunction. *See supra* at 26-27; 11A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* §2949 (2d ed. 1995 & Supp. 2009) ("Although the Ninth Circuit permits the trial court to exercise discretion to decline to hear testimony even when the facts are controverted, most courts hold that when the written evidence reveals a factual dispute, an evidentiary hearing must be provided to any party who requests one." (footnotes omitted)).

The Ninth Circuit's refusal in NEPA cases to enforce such a basic hallmark of due process, in conflict with centuries of common law and the decisions of numerous other courts of appeals, warrants this Court's review.

III. THE NINTH CIRCUIT'S AFFIRMANCE OF AN INJUNCTION BASED ON THE MERE POSSIBILITY OF REPARABLE HARM WARRANTS THIS COURT'S REVIEW

To the extent that the Ninth Circuit addressed the question of irreparable harm on the merits, it affirmed the injunction despite the district court's application of

the flawed *possibility*-of-harm test that this Court repudiated in *Winter* and despite the absence of any showing that the feared harm would be irreparable. The Ninth Circuit's decision thus flunks both components of *Winter*'s holding that a "plaintiff ... must establish ... that he is *likely* to suffer *irreparable* harm." 129 S. Ct. at 374 (emphasis added). Although petitioners believe that the Ninth Circuit's broad holdings merit plenary review, its specific errors in this case are also sufficiently egregious to warrant summary reversal.

Applying the Ninth Circuit's then-prevailing test, the district court never required plaintiffs to prove that irreparable harm was *likely*. *See* Pet.App.60a-79a. Indeed, the district court twice relied upon the mere "*potential*" for irreparable harm, holding, for example, that the financial harm to farmers did "not outweigh the *potential* for irreparable harm." Pet.App.72a (emphasis added); *see also* Pet.App.75a. But it never found a "likelihood" or "certainty" of such harm, only "potential"—*i.e. possible*—harm. The district court had no reason to go farther, because at the time the Ninth Circuit 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 should, at a minimum, have vacated the district court's judgment in light of *Winter* and remanded this case with directions for the district court to assess whether plaintiffs proved that irreparable harm was likely. In particular, it should have required the district court to engage in the sort of narrow tailoring that *Winter* demands and to evaluate whether there would be a likelihood of irreparable harm with APHIS's proposed stewardship measures in

place. *See Winter*, 129 S. Ct. at 376 (faulting district court's failure to evaluate "the likelihood of irreparable harm in light of the four restrictions not challenged by the Navy," including a "12-mile exclusion zone" roughly akin to an agricultural isolation distance). It refused to do that. The Ninth Circuit's only response to this argument on rehearing was disingenuous: it simply added *Winter* as a citation to a sentence it had *already written pre-Winter* that irreparable harm was "sufficiently likely." *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 on that precise point. *Winter*, 129 S. Ct. at 375-76. [9]

The difference was dispositive here, and the Ninth Circuit's error if anything is even more egregious than in *Winter*. There was no evidence at all, admissible or inadmissible, that there has ever been *any* cross-pollination from RRA within this country's more than 22 million acres of hay crops, and the uncontradicted evidence shows that, with use of APHIS's stewardship measures, that risk would be around 2.5 in one million. Pet.App.277a-81a, 408a-09a. Ninety-nine percent of alfalfa grown in this country is grown for hay. The court of appeals repeated the district court's

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[9] It is clear from the record in this case that the district court's injunction could not have been justified under the likelihood-of-irreparable harm standard that this Court articulated in *Winter*. But even if there were any doubt about that, the Ninth Circuit still plainly erred in not remanding the case to the district court to apply the proper standard. *See Winter*, 129 S. Ct. at 376 (vacating injunction even though "[i]t is not clear that articulating the incorrect standard affected the Ninth Circuit's analysis of irreparable harm").

speculation that "weather conditions *could* [cause cross-pollination from hay crops by] prevent[ing] farmers from harvesting hay before 10% bloom," Pet.App.14a (emphasis added). But hypothesizing what "could" occur is plainly the wrong inquiry under *Winter*.

Even as to the rare 1% of alfalfa that is planted for seed, the evidence showed that, with use of APHIS's stewardship measures, the probability of cross-pollination would be less than 0.1%—very far from a likelihood. *Supra* at 7-9. Moreover, 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").

Beyond rejecting the government's proposal, the district court made no effort itself to narrowly tailor the injunction. It enjoined *all* planting of RRA, for hay or seed, even in locations where there is no organic or conventional alfalfa for hundreds of miles. *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 ...."); 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 ...."). Had the court made any effort at narrow tailoring, it would have found that there are isolation distances at which the risk of cross-pollination is no longer even theoretically possible—let alone "likely."

The court of appeals' affirmance that the feared harm from cross-pollination would be "irreparable" is also completely divorced from record. As an initial matter, it is unclear what harm the lower courts relied upon. The Ninth Circuit's opinion notes the district court's reference to the "potential[]" of RRA to "eliminate the availability of non-genetically engineered alfalfa" in discussing the public interest. Pet.App.14a-15a. And the district court does seem to have relied in part upon "the potential of eliminating the availability of a non-genetically engineered crop." Pet.App.75a. That concern is preposterous and has no support in the record. The likelihood of such a science-fiction scenario unfolding—and that such hegemony could be established while APHIS is preparing the EIS—is *zero*. Since the dawn of agriculture, hundreds of different varieties of common crops have been cultivated without any one of them displacing all the others. Moreover, the Roundup Ready gene confers no selective advantage other than glyphosate resistance. Pet.App.398a. Because most farmers do not use glyphosate (Pet.App.122a, 240a) and no organic farmers do so (Pet.App.263a-64a, 401a), the suggestion that cross-pollination from RRA may eliminate the availability of all other varieties of alfalfa is entirely fanciful. Pet.App.387a-88a, 397a-98a, 413a.

The lower courts' opinions also indicate that *any* cross-pollination will inflict irreparable harm on affected conventional or organic farmers. The district court, for example, stated that cross-pollination from RRA constitutes "irreparable harm" because "[t]he contamination cannot be undone; it will destroy the crops of those farmers who do not sell genetically engineered alfalfa." Pet.App.71a; *see also* Pet.App.44a ("For 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 ...."). The Ninth Circuit similarly relied upon hearsay evidence that individual instances of "genetic contamination" "had already occurred" and were "sufficiently likely to occur so as to warrant broad injunctive relief." Pet.App.13a.

The notion that *any* cross-pollination within *any* individual farmer's crops would constitute irreparable harm exemplifies precisely the same zero-tolerance approach the Ninth Circuit took in *Winter*, only to be reversed by this Court. *See NRDC v. Winter*, 518 F.3d 658, 697 (9th Cir.) (rejecting Navy's argument that "NRDC was required to demonstrate the possibility of irreparable injury at the *species* or *stock*-level" (emphasis added)), *rev'd*, 129 S. Ct. 365 (2008). And it creates a direct split with the D.C. and First Circuits, which have held that "the loss of only one [animal] is [not] sufficient injury to warrant [injunctive relief]" and a plaintiff instead 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 member of an endangered species'" was "insufficient" absent showing of how "probable deaths ... may impact the species" (citation omitted)). Isolated instances of cross-pollination would not constitute irreparable harm to alfalfa as a species, and the D.C. and First Circuits thus would have reversed the injunction entered below. The United States identified these same circuit splits as necessitating this Court's

review in *Winter*. *See* Petition for Certiorari, *Winter* (No. 07-1239), at 27-28. Moreover, to the extent the Ninth Circuit was concerned for the welfare of organic farmers, all existing standards for organic certification, here and abroad, permit crops to be sold as "organic" despite low levels of cross-pollination. Pet.App.182a-83a, 263a-64a. And even if those standards were violated, the resulting harm would be economic and, to the extent permitted by state law, reparable—not, as the Ninth Circuit seemed to believe, a catastrophic existential threat.

The Ninth Circuit's brazen refusal to apply *Winter* in this case unfortunately is not unique. *See, e.g.*, *Nelson v. NASA*, 568 F.3d 1028, 1050 (9th Cir. 2009) (Kleinfeld, J., dissenting) ("The panel's injunction failed to consider this public interest factor, contrary to the Supreme Court's recent admonition [in *Winter*]."); *Greater Yellowstone Coal. v. Timchak*, 323 Fed. Appx. 512, 513-14 & n.1 (9th Cir. 2009) (despite *Winter*, granting temporary stay of activity because of "possibility that the district court may conclude on remand that irreparable harm *might* occur" (emphasis added)). Such outright defiance of this Court's precedent calls for a prompt response by this Court. *See, e.g., Nelson v. United States*, 129 S. Ct. 890, 891-92 (2009) (per curiam) (reversing where court of appeals failed to give effect to Court's "recent precedents"); *Spears v. United States*, 129 S. Ct. 840, 842-46 (2009) (per curiam) (same); *Allen v. Siebert*, 128 S. Ct. 2, 3-5 (2007) (per curiam) (same). Indeed, the Ninth Circuit's track record on this issue coupled with the important and recurring nature of the question underscore the need for the Court's review.

CONCLUSION

The petition for certiorari should be granted, and the case should be heard on the merits or summarily reversed.

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OCTOBER 22, 2009

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