DEC 23 2009

No. 09-475

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

PETITIONERS' REPLY BRIEF

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ARGUMENT

The government agrees with petitioners that the Ninth Circuit upheld what amounts to "a presumption in favor of a nationwide injunction" in NEPA cases. Brief of Federal Respondents ("U.S. Br.") 12. As the government has explained, that rule—which the Ninth Circuit embraced as the "correct legal standard"—"turn[s] the appropriate analysis on its head by assuming that ... an injunction is warranted halting the activity in question 'until the NEPA violation is cured.'" U.S. Br.12-13 (quoting Pet.App.55a). That rule can have potentially devastating consequences for private parties and the government alike. Indeed, the government recognizes that it resulted here in an injunction "requir[ing] APHIS to re-regulate RRA nationwide, notwithstanding APHIS's determination that RRA did not pose a plant pest risk and should no longer be regulated." U.S. Br.12 n.1. If allowed to stand, the Ninth Circuit's decision threatens to fundamentally upset the standards governing the entry of injunctive relief in essentially *any* NEPA case filed in that circuit. Especially given the Ninth Circuit's prior track record on this exceptionally important question (*i.e.*, the standards governing the entry of injunctive relief), *see Winter v. NRDC*, 129 S. Ct. 365 (2008), there is no reason for the Court to allow this profoundly misguided decision to take root. The Court should grant certiorari or, at a minimum, summarily reverse.

1. The government acknowledges (at 11-13) that the Ninth Circuit's decision in this case sustains a nationwide injunction that cannot be reconciled with this Court's precedents. Indeed, neither respondents nor the government makes any effort to defend the

Ninth Circuit's holding that the likelihood of irreparable harm is immaterial in NEPA cases whenever an agency will conduct additional environmental review that may bear on the issue. Pet.18-23.

Nor have they provided any good reason to leave this fundamentally flawed decision in place. That includes the suggestion of potential future mootness based on the publication of a final environmental impact statement ("EIS") at some point. To begin with, notwithstanding the government's rosy predictions, past practice strongly suggests that it is exceedingly unlikely that APHIS will publish a final EIS before this Court completes its Term in June. Comments on the draft EIS are not due until February 16, 2010, and that date may be extended. APHIS took four months to address comments on the earlier environmental assessment ("EA"), Pet.App.141a-42a—which was a far simpler document that drew much less attention (as one of dozens of similar deregulations, rather than a crucial part of the most prominent litigation of its kind[1]). And, of course, there is no possibility of mootness if this Court were simply summarily to reverse the decision below.

Respondents never really dispute that assessment. Their most optimistic prediction is that the final EIS will be released "likely in the spring, summer or fall of 2010," Brief of Geertson Seed Farms, *et al.* ("Opp.") 13—the latter two being after this Term ends. And the government notably makes no commitment to conclude

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[1] Respondents have urged "all concerned parties" to submit comments. *See* http://truefoodnow.org/2009/12/15/usda-again-aims-to-allow-unlimited-planting-of-genetically-engineered-alfalfa/ (last visited Dec. 29, 2009).

the EIS before the Term ends—nor does it even suggest that it could do so. *See* U.S. Br.10-11.

Even if APHIS were to release the EIS before June, though, this controversy would fall squarely within the "capable of repetition, yet evading review" exception to mootness. *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 462 (2007). Indeed, such repetition *has already occurred* in the same district court in a case with substantially similar claims led by a respondent here challenging APHIS's deregulation of genetically-engineered sugarbeets. *See Ctr. for Food Safety v. Vilsack*, No. 08-00484, 2009 WL 3047227 (N.D. Cal. Sept. 21, 2009). In that case, the district court also concluded that the government violated NEPA, ordered APHIS to prepare an EIS, and is now considering the very same remedial issues raised here, *see id.* at *9—with the plaintiffs relying heavily on the decision below to justify a nationwide injunction and oppose an evidentiary hearing. *See* Supplemental Joint Case Management Statement ("SJCMS"), *Vilsack*, at 7-15 (Nov. 23, 2009). The plaintiffs there seek to enjoin all planting of genetically-engineered sugarbeets, which constitute approximately 95% of all sugarbeets planted in the U.S. and *half* of the domestic sugar supply, without the district court conducting an evidentiary hearing. *Id.* at 5. As here, Monsanto intervened in those remedial proceedings, as the owner of the relevant intellectual property. *Id.* at 13. The issues presented here are therefore already repeating themselves in another case involving similar issues and similar parties, and more are in the offing as the Center for Food Safety has publicly committed "to halt the approval, commercialization or release of any new genetically engineered crops ... [and] advocat[e] the containment and reduction of existing genetically

engineered crops."[2] This amply satisfies the capable-of-repetition test, which requires only "a reasonable expectation that the same controversy involving the same party will recur." *See FEC*, 551 U.S. at 464.

If this petition is dismissed for fear of mootness, those future controversies are also likely to evade this Court's review. Petitioners successfully obtained expedited review in the Ninth Circuit—and yet it still has taken them 2½ years to get the case before this Court. Respondents do not suggest any other steps petitioners could have taken to hasten this litigation, and without expedited review injunctions in future cases are far more likely to expire before their legality can be tested. *See Davis v. FEC*, 128 S. Ct. 2759, 2669-70 (2008) (mootness exception applied because "despite the statute's command that the case be expedited ... claims could not reasonably be resolved before the election concluded") (quotations, alterations and citation omitted).

Respondents protest that the mootness exception cannot apply because the "government controls the timing of the EIS's preparation," citing *Winter* and *DOT v. Public Citizen*, 541 U.S. 752 (2004). Opp.15 n.10. But that fact is logically irrelevant—the government could not legitimately stall the EIS process to avoid mootness—and neither cited case even addresses mootness. Indeed, this Court granted review in *Winter* even though the agency was similarly in the midst of preparing an EIS. 129 S. Ct. at 386 (Breyer, J., concurring in part) (observing EIS would likely be completed two months later). There is no

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[2] *See* http://truefoodnow.org/campaigns/genetically-*engineered*-foods/ (last visited Dec. 29, 2009).

more reason here than in *Winter* to permit the Ninth Circuit's dangerous errors to evade review.

2. Respondents and the government argue that certiorari is unnecessary because the Ninth Circuit recited the proper four-factor injunctive relief standard. *See* Opp.16-18, U.S. Br.13; Pet.App.11a. But that court recited the right words in *Winter* as well, *NRDC v. Winter*, 518 F.3d 658, 677 (9th Cir. 2008), and as the government recognized in *Winter* that recitation provided little comfort, for *Winter* nonetheless fundamentally watered down the requirements for obtaining injunctive relief. The same goes here. As the government recognizes, the Ninth Circuit upheld the district court's application of a "presum[ption] [of] irreparable harm from the fact of APHIS's NEPA violation" rather than requiring the court to adjudicate the disputed material facts, U.S. Br.11-12—in direct contravention of this Court's precedents. U.S. Br.13.

Contrary to the government's suggestion (at 13), the Ninth Circuit's recidivism cannot be dismissed as a one-off mistake or inadvertent failure to appreciate that the district court had strayed from the governing law. In affirming the district court, the Ninth Circuit was reaffirming and extending its own prior holding in *Idaho Watersheds Project v. Hahn*, 307 F.3d 815, 831-32 (9th Cir. 2002). In that case, the court's refusal to require an adjudication of the likelihood of irreparable harm might be defended as appropriate deference to the views of an expert federal agency. Here, however, the district court rejected the expert agency's proposed stewardship measures and granted a blanket injunction that the agency believes is entirely unnecessary. As applied in this case, *Idaho Watersheds* stands broadly for the proposition that district courts may issue blanket injunctions in NEPA

cases without resolving genuine disputes over the likelihood of irreparable harm under more tailored prescriptions.

The Ninth Circuit's opinion is straightforward and unapologetic in its view that factual disputes as to irreparable harm are simply immaterial to the propriety of injunctions in NEPA cases, where an agency will consider those issues in preparing its EIS. The Ninth Circuit cited approvingly the district court's conclusion that there were no "material" factual disputes meriting an evidentiary hearing (Pet.App.17a)—despite the court of appeals' general adherence to the rule that "a district court must hold an evidentiary hearing ... unless ... the facts are undisputed," *id.*, its acknowledgement that "[t]he parties' experts disagreed over virtually every factual issue," Pet.App.9a, and its recognition that petitioners sought a hearing to "'assess the viability of [petitioners'] witnesses' opinions ... [and] resolve [petitioners'] disputes with plaintiffs' witnesses,'" Pet.App.16a-17a (citation omitted). The Ninth Circuit's square holding is thus that the factual disputes it acknowledged existed were legally "immaterial" under *Idaho Watersheds* because they overlapped with the issues the agency would be considering in its EIS. It ruled that examination of the likelihood of irreparable harm under appropriate stewardship measures was "more properly addressed by the agency in the preparation of an EIS." Pet.App.17a-18a. The Ninth Circuit thereby unmistakably set forth an *exception* to the traditional four-factor test for injunctive relief, rather than merely misapplying it, and there is no reason to doubt its determination to apply that exception in future cases.

Indeed, respondents and the government both *admit* that the Ninth Circuit applied a special rule here because APHIS's EIS process was ongoing. *See* Opp.28 (refusal to adjudicate issue was proper because "whole point of NEPA is to require the *agency* to resolve those issues *in the first instance* through the preparation of an EIS" (second emphasis added)); U.S. Br.9 (exception applied "because the injunction will be in effect only until APHIS completes an EIS"). Since additional agency analysis is virtually *always* part of the remedy for a NEPA violation, the Ninth Circuit's exception to the irreparable harm requirement threatens to apply in virtually all NEPA cases arising in that circuit. Judge Smith shrewdly noted as much. Pet.App.26a (Smith, J., dissenting) ("There aren't many environmental cases that don't fit into the majority's newly-created exemption."). There is accordingly no reason to allow further percolation as the government suggests. U.S. Br.13. Absent this Court's review, the only question is *how often*, not *whether*, the Ninth Circuit will refuse to apply the controlling law.

3. Respondents argue that certiorari is unwarranted because the lower courts' opinions can be read narrowly to hold merely that a hearing was unnecessary on these facts because "uncontested evidence" proved that cross-pollination had already occurred despite farmers' voluntary use of isolation distances "similar" to those proposed by APHIS. Opp.10; *accord* Opp.18 (stating district court's order "rested in large part" on that "fact"), 19-20, 27-28. The lower courts' reliance on *Idaho Watersheds* belies that fact-bound characterization. Indeed, in the follow-on sugarbeets litigation, respondents themselves advocate a far broader reading of the Ninth Circuit's decision here. *See* SJCMS at 7 (arguing that the "Ninth Circuit

has held repeatedly that an evidentiary hearing is not required before issuing an injunction")]]

A brief review of the record belies respondents' characterization and highlights the Ninth Circuit's fundamental departure from this Courts' precedents.

First, respondents' repeated insistence that cross-pollination has occurred with "equivalent" isolation distances does not make those claims "undisputed" or a "fact." As the court of appeals recognized, petitioners vehemently disputed respondents' anecdotal accounts of supposed "contamination," moved to strike respondents' evidence on hearsay grounds (which the district court never ruled upon), demonstrated that APHIS's proposed stewardship measures were in fact far more protective than the previous, voluntary measures, and sought an evidentiary hearing specifically to subject respondents' evidence to cross-examination. Pet.8-9, 31-33.

Second, respondents' emphasis on the "finding" that "contamination has occurred," Opp.2, 7-9, 18-19, illustrates just how far the Ninth Circuit has strayed from *Winter*. The district court's "finding" related only to *seed* crops, which constitute less than 1% of alfalfa acreage. *See* Pet.3. The district court *never* found that cross-pollination had or was likely to occur *from or to hay crops*, Pet.30-31, and even today respondents never meaningfully contest petitioners' evidence that the risk of hay-to-hay cross-pollination is roughly 2.5 in one million. *See* Pet.30. The blanket injunction affirmed by the Ninth Circuit is thus unsupported by *any* findings of likely irreparable harm for 99% of its breadth.

The injunction is grossly overbroad as to seed crops as well. APHIS proposed (and petitioners supported) increasing the customary isolation distances for those

crops from 900 feet to as much as three miles—a full 1660% increase (thoroughly belying respondents' repeated suggestion that the measures were "equivalent" or "substantially similar" to existing measures, Opp.8-9, 15, 18). Respondents conceded—as they concede now (Opp.9 n.6)—that a "five-mile isolation distance" or distances of "several miles" would be effective to prevent cross-pollination (a self-described "*zero* tolerance" approach) and thus *any* chance of irreparable harm. These three-mile and "five-mile"/"several miles" distances thus represented the endpoints of the spectrum of even *conceivably acceptable* injunctions. The district court was obligated to evaluate all available stewardship measures—including isolation distances—and narrowly tailor its injunction. But it rejected the use of isolation distances out of hand and instead enjoined *all* RRA planting—whether seed or hay—even on farms that are more than 100 miles from any conventional or organic alfalfa. Pet.App.108a. The court of appeals' affirmance of that decision is flatly inconsistent with this Court's holding in *Winter*.

Without benefit of *Winter*, moreover, the district court had employed the Ninth Circuit's then-controlling mere "possibility of irreparable harm" standard. *See* Pet.28-29. The district court expressly based its injunction on a finding of a mere "potential" for irreparable harm, *see* Pet.29; Pet.App.72a, 75a. But despite petitioners' invocation of *Winter*, the Ninth Circuit refused on rehearing to remand this case for application of the correct standard.

4. The government suggests that disputes over injunctive relief in APA cases like this may not warrant evidentiary hearings because the lawfulness of an agency's action is ordinarily judged based on the

administrative record and the agency should have the opportunity on remand to fashion appropriate relief. U.S. Br.16. The first point is a red herring and the second further highlights the necessity for certiorari.

Although the likelihood of success in an APA challenge is ordinarily adjudicated based solely on the administrative record, that issue had already been decided in respondents' favor on summary judgment and it was therefore no longer a matter of dispute at the remedies stage. Then, the parties' dispute focused on the likelihood of irreparable harm and the balance of harms under APHIS's proposed stewardship measures, issues that had never been litigated before the agency. In contrast to the district court's review of the merits of this NEPA case, its adjudication of the parties' dispute over the appropriate remedy could only be resolved by reference to materials outside of the administrative record. Petitioners and the government thus adduced substantial new evidence before the district court supporting the efficacy of APHIS's proposed stewardship measures. An evidentiary hearing to adjudicate those issues would have shown far *more* respect for the government's expert views than the district court's summary rejection of those views on a paper record.

After it rejected APHIS's proposed injunction, the district court then compounded its legal errors by flatly prohibiting the agency, in advance, from adopting any measured interim response during the pendency of the EIS process. *See* Pet.App.108a ("Before granting Monsanto's deregulation petition, even in part, the federal defendants shall prepare an [EIS]."). The court justified that extraordinary prohibition for the same erroneous reason that it refused to enforce the traditional prerequisites to injunctive relief—that

NEPA always requires an injunction to preserve the status quo until the EIS is complete. Pet.App.69a (rejecting less severe measures as a "cramped reading of this Court's Order and NEPA"), 75a. *But see Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 544-45 (1987) (reversing Ninth Circuit's "erroneous[] focus[] on the statutory procedure rather than on the underlying substantive policy").

5. Finally, contrary to respondents' and the government's assertions, the Ninth Circuit's decision in this case conflicts squarely with the decisions of other courts of appeals. To begin with, the government concedes that nearly every circuit has adopted a general rule requiring an evidentiary hearing to resolve genuine and material factual disputes. U.S. Br.14-15. And the government admits the parties here disputed the likelihood of irreparable harm under APHIS's proposed stewardship measures. U.S. Br.7-8, 11-12. The government says that the Ninth Circuit's refusal nonetheless to afford petitioners an evidentiary hearing is consistent with the precedents of those other circuits, but it does not even try to defend that position. U.S. Br.14-15.

As respondents recognize (at 3), the Ninth Circuit's reasoning is grounded in the "ephemeral nature" of NEPA-based injunctions. That approach is directly contrary to the categorical rule adopted by the D.C. Circuit in *Microsoft*, which excepts *only* temporary restraining orders, which generally last no more than *10 days*. *See* Pet.26-27. Neither respondents nor the government dispute either (1) that the vast majority of circuits follow *Microsoft*'s standard or (2) that *no other circuit* has ever adopted the Ninth Circuit's NEPA-based exception, despite their adjudication of hundreds of NEPA cases. Pet.26-28.

The Ninth Circuit's decision also conflicts squarely with the Second Circuit's decision in *Huntington v. Marsh*, 884 F.2d 648 (2d Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990). *Huntington* rejects the notion that an agency's ongoing EIS process negates the need for an evidentiary hearing. Pet.21. Contrary to the government's suggestion (at 14 n.2), the Second Circuit not only held that the district court improperly "assumed irreparable harm," but also decided how that disputed issue must be adjudicated: it specifically remanded for an *evidentiary hearing*. 884 F.2d at 651, 653-54.

Respectfully submitted,

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DECEMBER 30, 2009