

No. 09-475

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**In the Supreme Court of the United States**

MONSANTO CO., ET AL.,

*Petitioners,*

v.

GEERTSON SEED FARMS, ET AL.,

*Respondents.*

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

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**BRIEF OF AMERICAN FARM BUREAU  
FEDERATION, BIOTECHNOLOGY INDUSTRY  
ORGANIZATION, NATIONAL ALFALFA AND  
FORAGE ALLIANCE, AMERICAN SEED TRADE  
ASSOCIATION, NATIONAL COTTON COUNCIL,  
NATIONAL POTATO COUNCIL, AMERICAN  
SOYBEAN ASSOCIATION, AND NATIONAL  
ASSOCIATION OF WHEAT GROWERS AS *AMICI  
CURIAE* IN SUPPORT OF PETITIONERS**

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## INTEREST OF *AMICI CURIAE*

The American Farm Bureau Federation (“Farm Bureau”) is a general farm organization representing over 6.2 million member families.<sup>1</sup> Farm Bureau was established in 1919 to protect, promote, and represent the business, economic, social, and educational interests of American farmers and ranchers. Farm Bureau policy, which is developed through a member-controlled, grassroots process, supports the use of agricultural biotechnology, as well as conventional and organic farming.

The Biotechnology Industry Organization (“BIO”), created in 1993, is the world’s largest biotechnology trade association. Its mission is to champion biotechnology on behalf of its 1,200 members—a wide range of entities that are involved in the research and development of numerous innovative biotechnologies. Through its Food and Agriculture Section, BIO has taken the lead in promoting the safety and benefits of genetically engineered crops developed through agricultural biotechnology. BIO advocates for scientific regulatory approaches for these crops both domestically and abroad, while also supporting the concurrent cultivation of conventional and organic crops.

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<sup>1</sup> Pursuant to Supreme Court Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3, the parties’ letters consenting to the filing of this brief have been filed with the Clerk’s office.

The National Alfalfa and Forage Alliance (“NAFA”) is dedicated to ensuring that all segments of the alfalfa and forage industry can compete effectively and profitably, domestically and abroad. NAFA’s objective is to be a forum for consensus building among various stakeholders, and to be an effective advocate on behalf of the alfalfa and forage industry. NAFA strongly supports the availability and continued use of agricultural biotechnology, and believes that science-based stewardship management practices allow for the coexistence of different markets and methodologies in production agriculture.

The American Seed Trade Association (“ASTA”) is a voluntary, nonprofit national trade association representing approximately 740 members involved in seed production and distribution, plant breeding, and related industries in North America. ASTA’s mission is to enhance the development and movement of quality seed worldwide. Many ASTA members are research-intensive companies engaged in the discovery, development, and marketing of enhanced seed—*i.e.*, seed that has been modified to manifest certain beneficial or desirable traits.

The National Cotton Council (“NCC”) is the central organization of the U.S. cotton industry, representing producers, ginners, oilseed crushers, merchants, cooperatives, textile manufacturers, and cottonseed handlers and merchandisers in 18 States stretching from California to the Carolinas. Annual cotton production, averaging approximately 20 million 480-pound bales, is valued at more than \$5 billion at the farm gate. In addition to the cotton fiber, cottonseed products are used for livestock feed and cottonseed oil is used for food products ranging from margarine to salad dressing. Collectively, the an-

nual economic activity generated by cotton and its products in the U.S. economy is estimated to be in excess of \$120 billion.

The National Potato Council (“NPC”) is a non-profit trade association representing more than 90 percent of U.S. potato production. NPC growers produce both seed potatoes and potatoes for consumption in a variety of forms, within all 34 States where commercial production occurs. NPC’s mission is to provide a unified voice for the U.S. potato industry on national legislative, regulatory, environmental, and trade issues, and to promote increased profitability for growers and greater consumption of potatoes.

The American Soybean Association (“ASA”) is the national, not-for-profit trade association that represents U.S. soybean farmers on domestic and international issues of importance to the soybean industry. ASA’s advocacy and representational efforts are made possible through the voluntary membership in ASA of over 22,500 farmers in 31 States where soybeans are grown. ASA also develops domestic and foreign markets for U.S. soybeans and soy products.

The National Association of Wheat Growers (“NAWG”) is a federation of 21 state wheat grower associations that works to represent the needs and interests of wheat producers before Congress and federal agencies. Based in Washington, D.C., NAWG is grower-governed and grower-funded, and recognizes the benefits and value that could be created within the wheat chain through the prudent application of biotechnology.

Farm Bureau, BIO, NAFA, ASTA, NCC, NPC, ASA, and NAWG support the continued application of advances in agricultural biotechnology like the genetically engineered alfalfa at issue in this case. Sustained progress in this important field requires a firm commitment to science-based regulations and policies. When the judiciary has occasion to review the regulation of agricultural biotechnology, its decisions likewise must be based on scientific evidence, not anecdotes and speculation. Because the courts below did not weigh the equities using the best available evidence, *amici* have a compelling interest in this Court's determination of whether the lower courts' injunction was proper.

#### **INTRODUCTION AND SUMMARY OF ARGUMENT**

Although the context of its decisions has varied over the decades—ranging from wartime price-control laws to internet auction houses—this Court has consistently held that an award of injunctive relief requires application of the well-established balancing test historically employed by courts of equity. The same rule should apply in the context now before the Court—the practical application of agricultural biotechnology.

The specific crop at issue in this case, a genetically engineered variety of alfalfa known as “Roundup Ready®,” is the product of extensive research and testing conducted over the course of many years. Like any other agricultural biotechnology product, Roundup Ready® alfalfa was subject to a thorough, science-based regulatory review and approval process by multiple federal agencies before it went into commercial use. The district court concluded, however, that the U.S. Department of Agriculture

(“USDA”) failed to adequately study the potential environmental impacts of its decision to deregulate Roundup Ready alfalfa, and without further analysis the court issued a nationwide ban on the planting and sale of that alfalfa.

Despite this Court’s consistent and important line of decisions emphasizing the “extraordinary” nature of injunctive remedies, the district court did not fulfill its obligation to balance harms and reconcile conflicting interests before issuing its injunction. Rather than conducting the sort of evidentiary hearing needed to examine the copious scientific evidence relevant to the plaintiffs’ alleged irreparable injuries, the district court blithely accepted the plaintiffs’ anecdotal assertions of harm. Nor did the court make any real effort to fashion an injunction that would take into account the interests of the many innocent farmers who were relying on the availability of genetically engineered alfalfa, or adjust for the impact of an expansive injunction on the entire agricultural biotechnology industry.

The district court, and later the court of appeals, justified these shortcuts by asserting that the balance of harms would be dealt with when the government prepared a new environmental study. This rationale effectively creates a special exception to the traditional test for injunctive relief in cases arising under the National Environmental Policy Act (“NEPA”). Nothing in either court’s decision reflects a recognition that this Court has repeatedly rejected these sorts of special exceptions to the traditional equitable balancing test. Indeed, using the environmental-review process as a substitute for historical injunctive standards is particularly inappropriate when dealing with agricultural biotechnology—a

field where reams of relevant scientific data are readily available to the court.

To protect the farmers who choose to grow genetically engineered crops, as well as the public benefits that agricultural biotechnology brings to producers and consumers around the world, this Court should reverse the lower courts' injunction.

### ARGUMENT

#### I. THE LOWER COURTS FAILED TO BALANCE PUBLIC INTEREST AND PRIVATE NEEDS BEFORE APPROVING AN EXPANSIVE INJUNCTION.

The first commercial plantings of genetically engineered crops occurred in 1996. By 2009, 14 million farmers had planted more than 330 million acres in 25 different countries. See Clive James, *Global Status of Commercialized Biotech/GM Crops: 2009* (Feb. 2010), <http://www.isaaa.org/resources/publications/briefs/41/executivesummary/default.asp>. The rapid development and delivery of benefits from agricultural biotechnology into the commercial marketplace have been incredible. The USDA now estimates that 91% of soybeans, 88% of cotton, and 85% of corn in the United States are the product of biotechnology. Pet. App. 258a-259a. The injunction in this case threatens that progress. By abruptly halting the planting and sale of a genetically engineered crop, without accounting for harms to farmers or the public interest, the lower courts have acted contrary to this Court's precedent and created uncertainty for almost every stakeholder in the agricultural biotechnology industry.

**A. An Injunction Is A Tool For Reconciling Competing Interests, Not An Automatic Award To The Prevailing Party.**

The lower courts accurately recited the basic four-factor test for issuance of a permanent injunction. A plaintiff seeking such relief must establish “(1) that it has suffered an irreparable injury; (2) that remedies available at law \* \* \* are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.” *eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006); see Pet. App. 11a.<sup>1</sup> But paying lip service to the established standard is a far cry from applying it appropriately, and in a manner that reflects a full understanding and acceptance of this Court’s precedent.

The mere fact that federal courts have the power to “ensure compliance with a statute” does not mean that judges are “mechanically obligated to grant an injunction for every violation of law.” *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 542 (1987) (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982)). Rather, as the traditional four-factor test itself indicates, an injunction is “the instrument for nice adjustment and reconciliation be-

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<sup>1</sup> “The standard for a preliminary injunction is essentially the same as for a permanent injunction, with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success.” *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 546 n.12 (1987). Accordingly, cases discussing preliminary-injunction standards are generally applicable in the context of the permanent injunction at issue here.

tween the public interest and private needs as well as between competing private claims.” *Hecht Co. v. Bowles*, 321 U.S. 321, 329-330 (1944). This means that courts “must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.” *Winter v. Natural Res. Def. Council, Inc.*, 129 S.Ct. 365, 376 (2008) (quoting *Amoco*, 480 U.S. at 542). Courts “should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.” *Id.* at 376-77 (quoting *Romero-Barcelo*, 456 U.S. at 312).

The question in this case is not whether the lower courts superficially acknowledged the four factors that must be addressed before an injunction may issue. They did. The real question is whether the courts’ reasoning demonstrates that they actually applied a test quite different from the one approved by this Court. Because it would have been impossible for the lower courts to apply this Court’s test without a fuller consideration of the available scientific evidence and the public importance of agricultural biotechnology, the answer to this question could not be more plain.

**B. The Lower Courts Effectively Presumed Irreparable Harm To The Plaintiffs By Ignoring Key Data And Established Farming Practices.**

- 1. Deciding whether irreparable injury is likely requires consideration of the best available evidence.**

In *Winter*, this Court reiterated that a plaintiff seeking to enjoin allegedly harmful activities must “demonstrate that irreparable injury is *likely* in the

absence of an injunction.” 129 S.Ct. at 375. Whether a plaintiff can make this showing depends in large measure on the type of evidence that is available in a given case. If a plaintiff were to claim, for example, that building a new shopping mall in the midst of his favorite recreational area would permanently impair his use and enjoyment of the land, a signed affidavit to that effect might be sufficient to prove irreparable injury. In a case like this one, however, the injunction affects a genetically engineered product that has undergone thorough review by federal agencies, is supported by extensive scientific testing, and is in widespread use throughout the United States. The alleged harms occur, moreover, at a genetic level not readily observable by an affiant. The type of anecdotal injury reports proffered by the plaintiffs accordingly cannot and should not be the sole basis of a nationwide injunction.

No one disputes that the district court had before it substantial scientific evidence addressing the likelihood that the continued use of Roundup Ready alfalfa would *not* irreparably harm the plaintiffs. This evidence includes a number of field studies that have measured the gene flow between Roundup Ready alfalfa and conventional alfalfa using various “isolation distances” between plantings.<sup>2</sup> These studies, which were conducted under worst-case-scenario conditions that allowed for more gene flow than would occur in the more likely real-world conditions, demonstrate

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<sup>2</sup> To maintain the status quo while it conducted the environmental review ordered by the district court, the government proposed certain “stewardship measures,” including minimum isolation distances between plantings, that were designed to prevent Roundup Ready alfalfa from coming into contact with conventional and organic alfalfa. Pet. App. 64a-65a.

that the risk of cross-pollination feared by the plaintiffs is negligible. See, *e.g.*, Pet. App. 228a-229a. More specifically, the studies show that gene flow was less than 0.1% for alfalfa being grown for seed and approximately 2.5 in a million (or 0.00025%) for alfalfa being grown for hay. See, *e.g.*, *id.* at 168a-183a, 280a-281a.<sup>3</sup>

The traditional four-factor test demands consideration of the *likelihood* of irreparable injury. Such likelihood is best assessed when objective, measurable data are available. Although in some cases concrete numeric or probabilistic data may be hard to come by, the years of federally regulated research and testing that led up to the deregulation of Roundup Ready alfalfa provided the courts below with precisely that sort of information. Thus, notwithstanding the plaintiffs' assertion that "genetic contamination" had already taken place (Pet. App. 13a), the lower courts were not free to ignore field-testing data showing that the harms feared by the plaintiffs were in fact a long way from "likely." When a court has failed to review the best available evidence presented by both sides, as the district court did here, it has not made a genuine effort to balance the equities before issuing an injunction.

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<sup>3</sup> The studies presented to the district court also ruled out any realistic possibility that glyphosate-resistant weeds would develop during the period of the injunction (JA 568-570)—a claim that the lower courts did not cite in support of their decisions, but that the plaintiffs have sought to revive in this Court (Br. in Opp. 5).

**2. Cross-pollination with genetically engineered crops does not constitute irreparable injury.**

In addition to addressing the best evidence concerning the likelihood of harm, courts must ask whether the evidence supports the plaintiffs' claims that their alleged injuries would truly be irreparable. As this Court observed in *Amoco*, harm is not irreparable unless it is "permanent, or at least of long duration," and not redressable through payment of monetary damages. 480 U.S. at 545. Here, the court of appeals opined that "contamination was irreparable harm because [it] cannot be reversed and farmers cannot replant alfalfa for two to four years." Pet. App. 13a. This conclusion ignores basic facts and scientific evidence concerning agricultural biotechnology.

The plaintiffs' "contamination" claim boils down to an assertion that anything less than 100% varietal purity constitutes *per se* irreparable harm to organic and conventional alfalfa farmers. Pet. App. 71a. This argument, which both the district court and the court of appeals accepted unquestioningly, misunderstands some fundamental truths about agriculture. Farming practices are not designed to achieve total genetic purity, whether the crop is genetically engineered or not. Indeed, the USDA's National Organic Program does not require genetic purity for organic certification. *Id.* at 263a-264a, 283a-284a. Add to that the fact that Roundup Ready alfalfa does not have any adverse health or environmental effects (*id.* at 43a), and it becomes clear that minute levels of cross-pollination do not meet any reasonable definition of "harm."

Even if the loss of purity were harmful in some meaningful sense, moreover, there would be no reason to consider such an injury “irreparable.” Workable methods exist for reversing the effects of a loss of purity within one growing season. *Id.* at 410a-411a. And any economic harm that might accrue to farmers who receive premium prices for specialty products that claim to be free from agricultural biotechnology could be recovered through money damages. The lower courts thus acted on the unsupported assumption that any type of genetic “contamination” would qualify as an irreparable injury, when in fact such cross-pollination, to the extent it qualifies as harm at all, can be fully addressed by measures far less extreme than the nationwide injunction issued by the district court.

**3. A finding of irreparable injury should not be based on a presumption that alleged harms cannot be mitigated.**

The district court based its irreparable-harm finding at least in part on the belief that the government’s proposed “stewardship requirements” were unenforceable. Pet. App. 69a-70a. The court of appeals explicitly endorsed that finding. *Id.* at 13a. Like other aspects of the injury determination below, this conclusion stems from mistaken assumptions rather than actual evidence. In reality, neighboring farmers have been successfully cultivating reproductively compatible crops with different genetic traits since long before the advent of agricultural biotechnology. The implementation of these “coexistence” practices demonstrates the likely success of the USDA’s proposed stewardship requirements for Roundup Ready alfalfa.

Field corn and popcorn provide a good example of how farmers growing different crops have learned to coexist. Although these two corn varieties are capable of cross-pollinating, each has unique genetic traits that would damage the other crop's value if they were permitted to commingle. Yet farmers commonly plant field corn and popcorn in the same geographic regions. To prevent unwanted gene flow, field corn and popcorn farmers cooperate in employing management techniques that have long allowed them to coexist and prosper. See, e.g., B. Rosie Lerner & Michael N. Dana, *Growing Sweet Corn* (May 2001), <http://www.hort.purdue.edu/ext/HO-98.pdf>. The same sorts of techniques, including the types of stewardship requirements proposed by the USDA in this case, also have allowed conventional, organic, and genetically engineered crops to coexist. Published studies confirm that such coexistence need not cause economic or commercial hardship for farmers. See, e.g., Graham Brookes & Peter Barfoot, *Co-Existence in North American Agriculture: Can GM Crops be Grown with Conventional and Organic Crops?* (June 2004), <http://www.pgeconomics.co.uk/pdf/CoexistencereportNAmericafinalJune2004.pdf>.

The lower courts made no effort to grasp the implications of these longstanding farming practices, to digest the relevant studies, or to review any other evidence concerning coexistence. Instead, their finding of irreparable harm rested on the implicit assumption that farmers are incapable of complying with mandatory stewardship measures and the explicit determination that the government could never enforce such requirements. This reliance on severely flawed assumptions, rather than available evidence, is yet another way in which the district court and

court of appeals departed from this Court's clear standards for injunctive relief.

**C. The Lower Courts' Injunction Did Not Adequately Account For The Severe Hardships Borne By Innocent Alfalfa Farmers.**

More than 20 million acres of alfalfa are grown in the United States each year, making it the fourth largest crop in the country. Pet. App. 330a. When the district court enjoined the planting and sale of Roundup Ready alfalfa, many alfalfa growers had already made irreversible investment decisions based on the reviews completed by federal government agencies and the ready availability of that product—purchasing new equipment (often with borrowed funds), cancelling crop insurance, and entering into long-term alfalfa supply contracts. The court's injunction threw these plans into disarray, causing both concrete economic dislocations and incalculable hardship and distress for alfalfa farmers and their families.

To the extent that it considered these hardships at all, the district court brushed them aside as stemming from the “desire of some farmers to plant *more* Roundup Ready alfalfa or to *switch to* Roundup Ready alfalfa.” *Id.* at 72a. But farming is not undertaken on a whim; the farmers affected by the injunction had made plans and investments far in advance of the district court's adverse rulings, in reliance on the government's decision to deregulate Roundup Ready alfalfa. The upshot is that innocent alfalfa farmers—people who were simply buying genetically engineered seed that had been reviewed and deregulated by the USDA—were penalized by the district court's expansive injunction.

The problem with this outcome is not merely that the district court failed to properly weigh the hardship innocent alfalfa farmers would suffer as a result of the injunction. The deeper flaw is the lower courts' failure to take seriously their responsibility to balance "competing claims of injury" (*Winter*, 129 S.Ct. at 376), especially injuries to parties not responsible for the statutory violation at issue. "The historic injunctive process was designed to deter, not to punish." *Romero-Barcelo*, 456 U.S. at 310 (quoting *Hecht*, 321 U.S. at 329-330). Because NEPA is a procedural statute that does not mandate "particular results" (*Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350, 353 n.16 (1989)), the district court's conclusion that the government must prepare an Environmental Impact Statement ("EIS") for Roundup Ready alfalfa addressed the government's procedural failures. Pet. App. 51a-52a. The extra step of prohibiting the planting and sale of Roundup Ready alfalfa punished innocent parties, and did nothing to deter future procedural violations by the government. See *Romero-Barcelo*, 456 U.S. at 312-314.

The district court's reflexive grant of broad injunctive relief is an all too common phenomenon. Especially in NEPA disputes, courts often have considered injunctive relief to be virtually automatic in the "run of the mill" case. Pet. App. 55a. But that attitude is inconsistent with this Court's precedent—even when it is camouflaged by citations to *Winter* and *eBay*. Courts adjudicating NEPA suits must strive to erase any bias in favor of issuing whatever injunction may be requested by the prevailing party, which has no *right* to that extraordinary remedy. *Winter*, 129 S.Ct. at 376. The basic statutory violation in a NEPA case can be cured by ordering the of-

fending government agency to prepare a new environmental study. The court's job in fashioning an injunction while that study takes place is "to arrive at a nice adjustment and reconciliation between the competing claims" of the affected parties. *Romero-Barcelo*, 456 U.S. at 312 (internal quotation marks omitted); see *Winter*, 129 S.Ct. at 376-377.

The injunction issued by the district court in this case, and approved by the court of appeals, instead stems from an improper predisposition to grant injunctive relief. Regardless of the cases they cited, the lower courts did not make a serious effort to tailor an injunction that would account for hardships to the many farmers who planned to grow Roundup Ready alfalfa.

**D. The Lower Courts Improperly Downplayed The Strong Public Interest In Broader Application Of Agricultural Biotechnology.**

In addition to balancing competing private interests, courts faced with a request for an injunction must show "particular regard for the public consequences" that employing such an "extraordinary remedy" will have. *Winter*, 129 S.Ct. at 376-377. The lower courts in this case gave no such special attention to the consequences of an injunction that could discourage the broader application of important advances in agricultural biotechnology.

**1. Agricultural biotechnology creates numerous benefits for producers, consumers, and the environment.**

As an initial matter, the lower courts seem to have ignored the public benefits of Roundup Ready alfalfa. Unlike conventional alfalfa, Roundup Ready alfalfa is genetically engineered to survive the appli-

cation of glyphosate, the active ingredient in the herbicide commercially known as Roundup® agricultural herbicide. As a consequence, a farmer who plants Roundup Ready alfalfa can use glyphosate to control weeds, in lieu of a more expensive, and possibly less effective, combination of other herbicides. See, *e.g.*, Pet. App. 122a; JA 596. By producing more alfalfa while spending less on chemicals for weed control, the Roundup Ready alfalfa farmer can realize potentially greater profits and yields. Not surprisingly, large numbers of alfalfa farmers were adopting the Roundup Ready variety when the district court issued its injunction.

Livestock farmers—the primary purchasers of alfalfa hay—also benefit from Roundup Ready alfalfa. The presence of weeds reduces the nutritional value of alfalfa hay. Pet. App. 126a-127a, 133a-134a. Thus, when farmers plant Roundup Ready alfalfa, they increase not only the quantity, but also the quality, of alfalfa hay available for purchase. In short, Roundup Ready alfalfa allows the production of more hay with fewer weeds—exactly what alfalfa hay consumers want.

In addition to providing benefits to alfalfa farmers and consumers, genetically engineered crops like Roundup Ready alfalfa provide significant benefits to the environment. As already mentioned, farmers who plant Roundup Ready alfalfa control weeds with glyphosate, as opposed to a variety of other herbicides. According to the US Environmental Protection Agency, glyphosate “has favorable human health, ecological and environmental fate properties.” Pet. App. 195a-205a. So using glyphosate with Roundup Ready alfalfa can be especially beneficial when compared with some alternative plant and

herbicide combinations that farmers might otherwise have to use to control weeds in their fields.

The multiple benefits of Roundup Ready crops are just a few of the examples of agricultural biotechnology's potential. A 2004 study by the National Center for Food and Agricultural Policy found that genetically engineered crops increased annual yields by more than 5 billion pounds and increased annual farm incomes by \$2 billion. See Sujatha Sankula & Edward Blumenthal, *Impacts on US Agriculture of Biotechnology-Derived Crops Planted in 2003—An Update of Eleven Case Studies* 92 (Oct. 2004), <http://www.ncfap.org/documents/2004finalreport.pdf>. At the same time, global pesticide applications fell 6 percent between 1996 and 2004, due in significant part to the development of pest-resistant biotechnology in plants. See Graham Brookes & Peter Barfoot, *GM Crops: The Global Socioeconomic and Environmental Impact—The First Nine Years 1996-2004* 10, PG Economics, Ltd., (2005), <http://www.pgeconomics.co.uk/pdf/globalimpactstudyfinal.pdf>. Herbicide-resistant crops have helped reduce the application of weed-controlling chemicals and facilitate the adoption of “no-till” farming methods that improve soil health and reduce erosion.

Astounding as these advances are, they amount to no more than a glimpse of what is possible. Agricultural biotechnology offers a way to help feed the world's population through safe, sustainable farming techniques that could raise the standard of living in rural communities around the globe. Beyond the benefits to the food supply and food suppliers, moreover, agricultural biotechnology can lead to the development of traits that facilitate the conversion of crops to biofuels or that may assist in delivering im-

portant health benefits. In short, agricultural biotechnology, and the crops derived from it, can provide real solutions to help feed, fuel, and heal the world.

**2. The lower courts' injunction threatens to undermine important advances in agricultural biotechnology.**

Experience has shown that, in spite of its numerous, proven benefits and long track record of safety, agricultural biotechnology is not well understood by the public at large. Notwithstanding consistent findings of safety from a variety of European scientific bodies, the European Union went twelve years without approving a genetically engineered crop for commercial planting. Six European countries, moreover, have effectively banned genetically engineered crops. See Paul Voosen, *Ghost of 'Frankenfood' Haunts Europe*, *Greenwire* (Oct. 21, 2009), <http://www.nytimes.com/gwire/2009/10/21/21greenwire-ghost-of-frankenfood-haunts-europe-55309.html>.

By approving an injunction without conducting the requisite balancing of harms, or considering available, relevant scientific evidence, the lower courts in this case may be charting a similar course for agricultural biotechnology in the United States. Already, another judge in the Northern District of California has ruled that the government's environmental review of genetically engineered Roundup Ready® sugar beets is insufficient. See *Center for Food Safety v. Vilsack*, No. C 08-00484, 2009 WL 3047227 (N.D. Cal. Sept. 21, 2009). That court now faces a request from the plaintiffs, including some of the same groups that are plaintiffs in this case, to enjoin the planting and sale of Roundup Ready sugar beets. To make matters worse, more than 90% of

sugar beet farmers have already switched to the genetically engineered variety, which was commercialized four years ago. An injunction like the one issued against the use of Roundup Ready alfalfa thus would cause a massive disruption for the overwhelming majority of sugar beet farmers, as well as for sugar processors and the communities in which they reside.

The ripple effect of the injunction here also could spread far beyond genetically engineered sugar beets. The government already has deregulated several other genetically engineered crops, including varieties of corn, cotton, papaya, and soy. And dozens of other products are currently going through the regulatory field-testing process. Decisions like the injunction against Roundup Ready alfalfa dramatically increase the degree of uncertainty surrounding the availability of these genetically engineered crops and can greatly slow the government's deregulation process.

The ongoing experience in Europe—more than a decade with little progress for genetically engineered crops—shows that, for an industry as young as agricultural biotechnology, the potential for setbacks is real. The United States has put in place a regulatory regime that for many years has been effectively reviewing and regulating genetically engineered crops, clearing 67 such crops for commercialization and allowing farmers and consumers in this country to reap the amazing benefits that they offer.<sup>4</sup> Now low-

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<sup>4</sup> The petition to deregulate Roundup Ready alfalfa is the 67th petition to deregulate a genetically engineered crop approved by the USDA since 1994, and the 11th petition granted specifically for a crop tolerant to the herbicide glyphosate, including soy

er courts have issued an injunction that threatens to undermine this successful system, without any serious consideration of the tremendous public benefits that could be lost. This is much more than a misapplication of the traditional four-factor equitable balancing test; it reflects a complete failure to comprehend the value of the relatively young, but vitally important, agricultural biotechnology industry.

## **II. ORDERING A NEW NEPA STUDY DOES NOT EXCUSE A COURT FROM WEIGHING EVIDENCE BEFORE ISSUING AN INJUNCTION.**

Despite ostensibly finding that the plaintiffs would suffer irreparable injury without an injunction, and that the balance of hardships favored one, the district court did not hold an evidentiary hearing before enjoining the future planting and harvesting of Roundup Ready alfalfa. Pet. App. 67a-69a. As a result, “voluminous documentary submissions from both sides disputing, among other things, the likelihood of genetic contamination of non-Roundup Ready alfalfa fields” were never subject to cross-examination in open court. *Id.* at 17a. The rationale for not carefully considering this disputed evidence, as the court of appeals explained it, was that “an evidentiary hearing would require \* \* \* the same type of extensive inquiry into environmental effects that the ordered EIS will require the government agency to perform.” *Id.* at 18a. This line of reasoning effectively created a NEPA-specific rule under which relevant evidence can be disregarded when adjudicating a request for injunctive relief. Such a ca-

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(1994), cotton (1995), corn (1997), canola (1999), and sugar beet (2004). See [http://www.aphis.usda.gov/brs/not\\_reg.html](http://www.aphis.usda.gov/brs/not_reg.html).

tegorical rule is inconsistent with this Court's precedent on multiple levels.

**A. The Propriety Of Injunctive Relief Is A Separate Question From The Issues Addressed In A NEPA Study.**

Precisely because the issuance of an injunction requires an equitable determination that entails a balancing of multiple competing interests, categorical rules are anathema to the process. As this Court has put it, "traditional equitable principles" exclude the use of "broad classifications" requiring or prohibiting injunctive relief. *eBay*, 547 U.S. at 392-393. In a NEPA case, as in any other, a court must impartially weigh the equities before issuing an injunction. See *Winter*, 129 S.Ct. at 376-377. By using the NEPA environmental-review process as an excuse to avoid scrutinizing evidence directly relevant to the equities, the decisions below would permit entry of an injunction in virtually every case in which NEPA is found to have been violated. That is precisely the kind of categorical rule that this Court rejected in *eBay*, and that the courts below should have eschewed.

Using NEPA review as a proxy for a finding of irreparable harm, as the lower courts did here, is both over-inclusive and under-inclusive. The potentially significant environmental impacts that an agency must catalogue pursuant to NEPA are readily segregable from the irreparable harms that factor into a court's injunctive-relief decision. Significant environmental impacts under NEPA can include anything from permanent alterations to the natural environment to smaller changes that can be completely mitigated in the ordinary course. The harm needed to invoke a court's injunctive powers, by contrast,

must be irremediable without an injunction. At the same time, while the proof sufficient for a finding of irreparable harm in an equitable setting varies depending on the purposes of the statute at issue, an EIS undertaken pursuant to NEPA is focused on harms to the environment and need only “indicate” those non-environmental factors that “are likely to be relevant and important to a decision.” 40 C.F.R. § 1502.23.

More to the point, an agency’s NEPA review is not an effort to make a decision based on a balance of hardships. The government’s statutory responsibility in preparing an EIS is to document the potential environmental impacts of a proposed action, as well as of alternatives to that action. 42 U.S.C. § 4332(C). The EIS need not address the action’s public or private benefits. If an agency conducting a NEPA review accurately reports the environmental effects, it may move ahead with its proposal, whether or not the proposal’s benefits “outweigh” the environmental harms. Thus, when the courts below used the EIS that the agency would undertake pursuant to NEPA as a reason for not performing the traditional equitable balancing test, they ensured that the balancing test would never be performed. The result is an overbroad injunction that unfairly hurts the numerous innocent farmers who planned to grow Roundup Ready alfalfa, as well as the agricultural biotechnology industry and the public at large.

**B. The Draft EIS Prepared By The Agency Is Not A Substitute For The Four-Factor Balancing Test.**

When this case is argued, the district court’s injunction against planting or selling Roundup Ready alfalfa will be more than three years old. The USDA

did not complete the Draft EIS ordered by the district court until November 2009. Public comments on the Draft EIS were due by March 3, 2010. When those comments are collected and reviewed, the USDA presumably will prepare a Final EIS and a Record of Decision concerning the petition to deregulate Roundup Ready alfalfa. That process is likely to take many months, particularly in light of the USDA's obligation to respond to what will almost certainly be a high volume of public comments. 40 C.F.R. § 1503.4(a). Ultimately, therefore, what the court of appeals described as an "interim" injunction intended to prevent duplication of the USDA's efforts (Pet. App. 18a) could remain in place for close to four years.

During the period in which alfalfa farmers and consumers have had to suffer from the effects of the overbroad injunction, the USDA has been doing much more work than the district court would have had to do if it had properly applied the traditional four-factor balancing test. Including appendices, the Draft EIS is more than 1,400 pages long, and it addresses numerous issues completely unrelated to the four factors. It is the height of inequity to issue an injunction far broader than what might otherwise be necessary on the ground that, over the next several years, the government planned to conduct a study that would address some of the same issues (along with many others that are completely irrelevant to the requisite balancing of interests). A district court is fully capable of weighing the sort of scientific evidence available in this case, or in any case that might involve an injunction against the use of agricultural biotechnology, and this Court's precedent on injunctions obliges it to do so.

**CONCLUSION**

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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MARCH 2010