No. 09-475

In the Supreme Court of the United States

MONSANTO CO., ET AL.,
Petitioners,
v.

GEERTSON SEED FARMS, ET AL.,
Respondents.

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

BRIEF OF AMICI CURIAE AMERICAN SUGARBEET GROWERS ASSOCIATION, U.S. BEET SUGAR ASSOCIATION, AND NATIONAL CORN GROWERS ASSOCIATION IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICI CURIAE[1]

The issues in this case have immense practical consequences for all segments of the economy related to agriculture. Because of their experience in the very aspects of agricultural regulation most relevant to this case, amici are uniquely well suited to address concerns that should inform this Court's analysis. Amici include representatives from a broad cross-section of two major agricultural crops that, for many years, have operated successfully within the regulatory framework that will be affected by the Court's resolution of the issues in this case. Collectively, amici include virtually all of the family farms that grow this nation's commercial sugarbeet crop, grower-owned cooperatives and processors that convert the vast majority of the sugarbeet crop into sugar, and hundreds of thousands of farmers involved in the nation's corn crop.

The American Sugarbeet Growers Association ("ASGA") is an organization of 10,000 sugarbeet growers, primarily family farmers, in all eleven sugarbeet-growing states: California, Colorado, Idaho, Michigan, Minnesota, Montana, Nebraska, North Dakota, Oregon, Washington, and Wyoming. ASGA's members grow all of the commercially

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[1] Letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amici,* their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

planted and harvested sugarbeets in the United States.

The U.S. Beet Sugar Association ("USBSA") is an organization of eight member companies that operate 22 processing factories in nine states. These firms produce refined sugar from sugarbeets grown by about 10,000 family farmers on approximately 1.3 million acres in the eleven sugarbeet-growing states. ASGA and USBSA have participated as amici in prior cases that affect the vital economic interests of their members.

The National Corn Growers Association ("NCGA") represents 35,000 dues-paying corn farmers nationwide and the interests of more than 300,000 growers who contribute through corn checkoff programs in their states. NCGA and its 48 affiliated state associations and checkoff organizations work together to create and increase opportunities for their members and their industry.

Based upon their extensive practical experience with the technology and regulatory regimen at issue in this case, amici are in a position to address the important agricultural, economic, and environmental issues presented. Amici's interest in these issues is not hypothetical or theoretical. A group of plaintiffs in ongoing litigation is currently seeking to extend the erroneous standards in the decision below to the national sugarbeet crop. *See Center for Food Safety v. Conner,* No. 3:08-cv-00484-JSW (N.D. Cal.). In ruling on summary judgment in that case, the district court cited the Ninth Circuit's decision below in *Geertson* extensively on every

significant point in its analysis. Accordingly, the issues in this case have already have had an impact on other key segments of the agricultural industry.

This Court's decision will reverberate throughout the economy, affecting a panoply of crops and industries. Considerations of the real-world impact of the issues in this case should materially assist the Court's analysis.

BACKGROUND OF FEDERAL REGULATION OF MODIFIED CROPS

A. Agricultural Background

Alfalfa is but one of some 75 genetically-modified crops that the United States Department of Agriculture ("USDA") has de-regulated over the past two decades. *See* U.S. Department of Agriculture, APHIS, Petitions of Nonregulated Status Granted or Pending by APHIS as of February 2, 2010, http://www.aphis.usda.gov/brs/not_reg.html (last visited Feb. 23, 2010). In each instance, the USDA's Animal and Plant Health Inspection Service ("APHIS") concluded its analysis by issuing an Environmental Assessment ("EA"). *Id.* Based on its intimate familiarity with the underlying science and agronomics, USDA has consistently applied the appropriate standards to its analysis.

With respect to Roundup Ready sugarbeets, USDA specifically addressed all pertinent questions relating to gene flow concerns for seed production of this important crop in the United States. About 50-55% of all domestic sugar production is derived from

sugarbeets. *See* http://cropwatch.unl.edu/web/sugarbeets/sugarbeet_history (last visited 2-18-10).

In the eleven states that produce sugarbeets, weed control poses one of the most pressing, time-consuming, and expensive difficulties in harvesting the crops. *See* Abram, *Roundup Ready Crops Prove to Be a Hit in USA,* FARMERS WEEKLY (Feb. 7, 2009), at 61. Prior to recent technological developments, a typical planting season required about 15 separate passes with a tractor, including as many as six passes to spray a variety of weed killers, capped with a final pass by farmworkers to hand-hoe the fields. *See* Jenkins, *Biotech Beet-Down,* HIGH COUNTRY NEWS at 6 (Oct. 12, 2009) ("In the old days . . . it was just a real fight to get the beets out of the weeds"). Even when applied properly, traditional chemicals could damage sugarbeet plants and reduce crop yield. Additional environmental benefits exist with Roundup Ready sugarbeets as opposed to conventional ones, in that no post-planting tillage is required with Roundup Ready sugarbeets, which limits the potential for sediment runoff to streams and other water bodies.

About ten years ago, Monsanto developed sugarbeets that were genetically modified to be compatible with the herbicide glyphosate (*i.e.*, Monsanto's "Roundup" weed killer product). *See id.* Because these "Roundup Ready" sugarbeets provided such enormous benefits for farmers, they rapidly became the industry standard. Farmers no longer had to make four or five applications of conventional herbicides, resulting in significant savings on fuel, water, and labor. Furthermore, Roundup was

indisputably less toxic than some conventional herbicides previously used by sugarbeet farmers. *See* Lydersen*, Monsanto Beets Down Opposition*, IN THESE TIMES (Nov. 21, 2008) (quoting attorney for plaintiff Center for Food Safety as acknowledging that "Roundup is a less toxic alternative than a lot of the herbicides").

Production of these genetically modified sugarbeets was initially regulated pending further study. *See* Jenkins, *Biotech Beet-Down,* HIGH COUNTRY NEWS at 6. Following comprehensive experiments, testing, evaluation, and review of a 4,816-page administrative record, USDA and APHIS concluded in early 2005 to deregulate Roundup Ready sugarbeets as a crop. As set forth in an EA, the government found that they were "just as safe" as conventional sugarbeets, and would have "no significant impact on the human environment."[2] The EA further noted that Roundup Ready sugarbeets are "unlikely to have any adverse impact on agricultural practices on raw or processed agricultural commodities in the U.S.," and "will not have significant adverse impacts on organisms beneficial to plants or agriculture, other non-target organisms, or threatened or endangered species." Based upon a full assessment of the scientific record, the EA concluded that preparation of an Environmental Impact Statement ("EIS") was not necessary.

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[2] The USDA/APHIS's February 2005 EA may be accessed at: http://www.aphis.usda.gov/brs/aphisdocs2/03_32301p_com.pdf.

The USDA/APHIS's 2005 decision effectively cleared Roundup Ready sugarbeets for commercial planning. *See* Abram, *Roundup Ready Crops Prove to Be a Hit in USA,* FARMERS WEEKLY, at 60. Roundup Ready sugarbeets were first planted commercially in 2006. In 2008, approximately half the domestic sugarbeets were Roundup Ready. *See* Jenkins, *Biotech Beet-Down,* HIGH COUNTRY NEWS at 7. By the end of 2009, the number was 95%. *Id.* This should not be surprising, since sugar from Roundup Ready beets is identical to sugar from other sugarbeets and from sugar cane.

Even before USDA's deregulatory decisions with respect to sugarbeets in 2005 and alfalfa later the same year, farmers of many other crops had experienced similar success with the introduction of Roundup Ready seeds. Accordingly, USDA and APHIS had the benefit of extensive data regarding the safety and environmental history of glyphosate tolerant seeds. For example, Roundup Ready corn has been commercially available since 1998. Pet. App. 168a. Today, more than half of our domestic corn production is derived from Roundup Ready corn. *See id.* at 258a-59a. The first genetically modified seeds—soybeans—were approved for deregulation in 1994. *See* http://www.aphis.usda.gov/brs/aphisdocs2/93_25801p_com.pdf.

B. Regulatory and Litigation Background

Subsequent to USDA deregulation, Roundup Ready seeds for a multitude of crops have proven the wisdom of the regulatory decisions. But, following the decisions below in this case, litigants tried to

bootstrap the rulings on alfalfa in *Geertson* to enjoin the planting of other crops with no evidence of environmental harm. Sugarbeet farmers and processors have been victimized by this pernicious trend. Following several successful planting seasons in which growers, processors, and consumers enjoyed the environmental and economic benefits of Roundup Ready sugarbeets, a group of plaintiffs filed suit to challenge USDA's issuance of an EA rather than an EIS. That procedural challenge did not commence until after the district court in the alfalfa case had granted an injunction.

The Ninth Circuit's later affirmance in *Geertson* had a pivotal, deleterious impact on the sugarbeet litigation. In September 2009, summary judgment in the sugarbeet case was granted on the question whether the USDA complied with the National Environmental Policy Act ("NEPA"). *See Ctr. for Food Safety v. Vilsack*, 2009 U.S. Dist. LEXIS 86343 (N.D. Cal. Sept. 21, 2009). In finding a procedural violation of NEPA in APHIS's conclusion that preparation of an EIS was unnecessary, the district court in the sugarbeet case was influenced heavily by both the district court and Ninth Circuit opinions from the alfalfa case, and cited both alfalfa opinions extensively. *See id.* at *6, **25-30.

Seeking to expand their success in *Geertson* to other agricultural crops, the plaintiffs in the sugarbeet litigation then moved for a preliminary injunction to prohibit the planting of Roundup Ready sugarbeets while the USDA completes a full EIS. In belatedly seeking such relief (four years after Roundup Ready sugarbeets entered the market), the

plaintiffs in the sugarbeet litigation are relying on a presumption of irreparable harm, even though there is no evidence of actual adverse environmental impact. *See Center for Food Safety,* No. 3:08-cv-00484-JSW, Plaintiffs' Memorandum in Support of Motion for Preliminary Injunction, D.E. 194-1 at 10-12, (filed 1/19/10). Moreover, they contend that an evidentiary hearing is not necessary for airing and resolution of disputed facts. *See id.,* Supplemental Joint Case Management Statement, D.E. 173 at 7-8 (filed 11/25/09). These positions are asserted under the purported authority of the Ninth Circuit's decision in *Geertson.*

If an injunction were to issue, then sugarbeet growers would have to scramble for whatever alternative seed supplies remain in stock (which will not be much). *See* Abram, *Roundup Ready Crops Prove to Be a Hit in USA,* FARMERS WEEKLY, at 60 ("Losing [Roundup Ready] beet would be devastating to growers"). They would have to return to other herbicides and try to find work crews to hoe their fields again, a practice countless growers sensibly abandoned after switching to Roundup Ready sugarbeet seed. Moreover, an injunction would wreak havoc on domestic sugar supply and price, "thereby decimating the entire sugar beet industry and almost half of the nation's domestic sugar supply for multiple years." *See Center for Food Safety,* No. 3:08-cv-00484-JSW, Federal Defendant's Opposition to Plaintiffs' Motion for a Preliminary Injunction, D.E. 272 at 1, (filed 2/12/10).

SUMMARY OF ARGUMENT

Unless it is reversed, the decision below threatens great mischief in the application of settled legal principles to critically important segments of the economy. There is no merit to the proposition that sound decisions by expert regulatory agencies – which have withstood the test of time in actual practice – should be swept aside on the basis of a presumption of irreparable harm. It is even worse that farmers and processors whose livelihoods will be victimized by that presumption should be denied an evidentiary hearing.

The circumstances of this case and the follow-on sugarbeet litigation now pending in the Northern District of California illustrate precisely why the Ninth Circuit's presumption of irreparable harm is altogether misplaced. Neither precedent nor principle supports the decision below. It is, moreover, bad economic and environmental policy.

Rather than apply the traditional four-factor analysis for injunctive relief, the Ninth Circuit has persisted in employing a presumption of irreparable harm that cannot be reconciled with this Court's decisions. *Winter v. NRDC,* 129 S.Ct. 365 (2008) is the most recent example in a long line of consistent cases that make the Ninth Circuit's outlier approach wholly untenable.

Indeed, when the stated pedigree of the Ninth Circuit's view is examined, it turns out to be based on a misperception of prior authorities. Some 35

years ago, the D. C. Circuit, in *Jones v. D.C. Redevelopment Land Agency,* 499 F.2d 502 (D.C. Cir. 1974) mistakenly expanded on an earlier Ninth Circuit opinion to expound the proposition that harm necessarily flowed from statutory violations. The earlier Ninth Circuit case, which turned entirely on its unique facts, had not created any such broad, inflexible rule. But, armed with *Jones*, the Ninth Circuit picked up the ball and ran with it. And it has been running in the wrong direction ever since.

Where, as in this case, important legal issues intersect with vital economic and environmental interests of the United States, this Court should ensure that the traditional limitation of injunctions to extraordinary cases should be strictly enforced. If well reasoned agency proposals for remedying a NEPA vioaltion are to be nullified, it should only be where the challenging party has satisfied its heavy burden through the presentation of sufficient evidence. A presumption of irreparable harm is no substitute for evidence. The ongoing sugarbeet litigation offers a compelling example of how the Ninth Circuit's presumption has enormous potential for deleterious application. In contrast to the wholly conjectural harm that plaintiffs seek to cloak in a presumption, the harm of a threatened injunction to the farmers and processors of sugarbeets is palpable, concrete and massive. That scenario should not be repeated for the many other crops that have benefited for years from modified seeds without producing any of the hypothetical harm alleged in this case and in the sugarbeet litigation.

Equally as disturbing as the presumption of irreparable harm is the Ninth Circuit's error in permitting an injunction to issue without an evidentiary hearing. Hearings at which evidence is subjected to the truth-distilling cauldron of cross-examination form the cornerstone of our legal system. To unleash the economic chaos of an injunction in the circumstances presented here – without affording an opportunity to confront, rebut and demolish the baseless challenge at an evidentiary hearing – should be unthinkable.

ARGUMENT

I. THE OPINION BELOW ERRONEOUSLY RELAXED THE STANDARD FOR INJUNCTIVE RELIEF IN NEPA CASES

A. Injunctions Should Issue in Only Most Extraordinary Cases

As this Court held last Term, an "injunction is an extraordinary remedy never awarded as of right." *Winter,* 129 S.Ct. at 376 (quoting *Munaf v. Geren,* 128 S.Ct. 2207, 2219 (2008)). Generally, an injunction should issue only when the party seeking equitable relief satisfies the traditional four-part test with evidence—not presumptions. *See, e.g., eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). These factors are "(1) that [plaintiff] has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, 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." *Id.* The four traditional factors have been consistently applied in the environmental context. *See* 61B AM JUR. 2D *Pollution Control* §139 (2001) (citing numerous lower court decisions).

In further recognition that presumptions have no place in the injunction calculus in cases involving statutory violations, this Court has long viewed the authority to grant equitable remedies as a power that should be exercised on a case-by-case basis as the facts warrant. *See, e.g., Hecht Co. v. Bowles,* 321 U.S. 321, 329 (1944). Courts "mould each decree to the necessities of the particular case" (*id.*), balancing "the conveniences of the parties and possible injuries to them according as they may be affected by the granting or withholding of the injunction." *Yakus v. United States,* 321 U.S. 414, 440 (1944).

B. Irreparable Harm Cannot Be Presumed Upon a Showing of a Procedural Violation of a Statute

"[T]he basis for injunctive relief in the federal courts has always been irreparable injury and the inadequacy of legal remedies." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) (citing several precedents); *see also Samuels v. Mackell,* 401 U.S. 66, 68-69 (1971) (federal injunction to enjoin state prosecution requires that irreparable injury be "show[n] in the record," rather than "alleged"). In contrast to this Court's clear directives, the Ninth Circuit held in this case that irreparable harm can be presumed in NEPA cases upon the showing of a

procedural NEPA violation.[3] In the court of appeals' view, the irreparable harm results not from actual injury to the environment, but from the supposed failure to comply with NEPA's procedural requirements. Such a position cannot be reconciled with this Court's precedents.

This Court has never presumed irreparable injury from statutory violations.[4] If the Ninth

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[3] In opposing the petition for certiorari, respondents disputed that the Ninth Circuit presumed irreparable harm. *See* Geertson Seed Farms, *et al.,* Opp. Cert. at 16-18. That is an insupportably strained reading of the decision below. But even if this particular opinion could be parsed that way, the Ninth Circuit has in the past expressly presumed irreparable harm upon a finding of noncompliance with NEPA. *See, e.g., Sierra Club v. Bosworth,* 510 F.3d 1016, 1034 (9th Cir. 2007) ("in the NEPA context, irreparable injury flows from the failure to evaluate the environmental impact of a major federal action; quoting *High Sierra Hikers Ass'n v. Blackwell,* 390 F.3d 630, 642 (9th Cir. 2004)); *Nat. Parks & Conservation Ass'n v. Babbitt,* 241 F.3d 722, 737-38 & n.18 (9th Cir. 2001) (similar). The sugarbeet plaintiffs are currently asserting this very argument and relying on these Ninth Circuit decisions in their attempt to leverage precisely this presumption into an industry-crippling injunction. *See Center for Food Safety,* No. 3:08-cv-00484-JSW, Plaintiffs' Memorandum in Support of Motion for Preliminary Injunction, D.E. 194-1 at 10-12, (filed 1/19/10) ("The Ninth Circuit has emphasized that harm occurs whenever actions are allowed to proceed before the NEPA process is completed, in addition to the specific harm to the environment"). Moreover, in their initial papers requesting an injunction, the sugarbeet plaintiffs relied heavily on the Ninth Circuit's decision in Geertson without mentioning that certiorari had already been granted. *See id.* at 4, 16, 18.

[4] Some of this Court's opinions suggest that a presumption of irreparable harm may be appropriate in the context of

Circuit's view were accepted, then "the courts would presume irreparable harm in deciding every preliminary injunction motion made in cases brought under federal statutes. [But that] is certainly not the law." *King v. Pine Plains Cent. Sch. Dist.*, 923 F. Supp. 541, 546 (S.D.N.Y. 1996).

In *Winter,* this Court recently considered a request for an injunction in a NEPA case, and applied the traditional test for injunctive relief. In that case, the U.S. Navy had prepared an EA, but not an EIS, concerning the effects of "mid-frequency active" sonar on marine mammals. 129 S.Ct. at 370. This Court reversed the Ninth Circuit's holding that a preliminary injunction may be granted where the plaintiff had shown only the "possibility" of irreparable injury. *Id.* at 375. Such a standard was too lenient. Accordingly, this Court held that in the context of a preliminary injunction, a plaintiff must establish that irreparable injury is not just a "possibility," but is "likely." *Id.*

Winter thus erased any doubt whether a "NEPA exception" applies to the traditional four-part test for injunctive relief. It does not.[5]

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injunctive relief for *constitutional* violations. *See, e.g., Elrod v. Burns,* 427 U.S. 347, 373 (1976) (plurality opinion); *Dombrowski v. Pfister,* 380 U.S. 479, 486-87 (1965). But there is neither precedent nor rational support for a presumption in any other context.

[5] *See also San Luis Valley Ecosystem Council v. United States Fish and Wildlife Serv.* 657 F. Supp.2d 1233, 1240 (D. Colo. 2009) (*Winter* held "that a presumption of irreparable environmental harm is not appropriate" in NEPA cases); *Sierra*

Moreover, *Winter* is well-grounded in this Court's precedents. Previously, this Court had rejected the proposition that violation of a federal procedural mandate is sufficient to bypass the traditional need to show irreparable harm. *See Sampson v. Murray,* 415 U.S. 61 (1974). *Sampson* involved a claim for an injunction precluding the firing of a probationary government employee whose only substantive claim was that her employer had violated federal procedural Civil Service regulations in effecting her discharge. The district court had granted a preliminary injunction. But this Court reversed, holding that the grant of injunctive relief was erroneous without a conclusion by the district court that irreparable injury existed. *Id.* at 88.[6]

The same standard applies in the environmental context. For example, *Weinberger* involved an attempt by the governor of Puerto Rico

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Club v. U.S. Forest Serv., 593 F. Supp. 2d 1306, 1323 (N.D. Ga. 2008) ("there is no presumption entitling plaintiffs to automatic injunctive relief merely because there has been a NEPA violation"; citing *Winter*); Mandelker, NEPA LAW AND LITIGATION §4:56.1 at 4-180 (2009) (*Winter* "will make it harder for environmental plaintiffs to secure preliminary injunctive relief" in NEPA cases).

[6] After *Sampson,* lower courts that had previously presumed irreparable harm to parties seeking injunctions in federal employment cases reversed themselves and required a showing of irreparable harm. *Compare, e.g., United States v. Hayes Int'l Corp.,* 415 F.2d 1038, 1045 (5th Cir. 1969) (presuming irreparable harm in Title VII cases); *with Parks v. Dunlop,* 517 F.2d 785, 786-87 (5th Cir. 1975) (requiring a showing of irreparable harm).

to enjoin the U.S. Navy from using weapons training off the coast of Puerto Rico, arguing that such activities violated the Federal Water Pollution Control Act because the Navy had not obtained the relevant permits. *See* 456 U.S. at 310-11. The First Circuit held that there was an "absolute statutory obligation" to stop the activities until the permit was "granted." *See id.*

This Court reversed in an opinion emphasizing that the traditional balancing factors "applicable to cases in which injunctions are sought in the federal courts reflect a practice with a background of several hundred years of history, a practice of which Congress is assuredly well aware." *Id.* at 313 (quotation omitted). As this Court concluded, "unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *Id.* at 305 (citation omitted).

Five years later, a similar situation arose when Alaskan native villages sought to enjoin the Secretary of the Interior's sale of oil and gas leases for federally-owned lands in the outer continental shelf of Alaska. *See Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531 (1987). Plaintiffs alleged a failure to comply with the federal Alaska National Interest Lands Conservation Act, because the Secretary "did not have the policy precepts [of the act] in mind at the time of the evaluation." *Id.* at 540.

Much as it did in the instant case, the Ninth Circuit held that "[i]rreparable damage is presumed when an agency fails to evaluate thoroughly the environmental impact of a proposed action . . . injunctive relief is the appropriate remedy for a violation of an environmental statute absent rare or unusual circumstances." *Id.* at 541 (quoting Ninth Circuit decision). This Court again reversed, holding that all four factors (including irreparable harm) must be demonstrated before an injunction could issue. *See id.* at 544-45; *see also Del. Dep't of Natural Res. & Envtl. Control v. United States Army Corps of Engineers*, 2010 U.S. Dist. LEXIS 6398, at *40 (D. Del. Jan. 21, 2010) ("environmental harm must be substantiated, as it would be contrary to traditional equitable principles to presume irreparable injury from an agency's alleged failure to evaluate thoroughly the environmental impact of a proposed action"; quoting *Amoco*).

Although neither *Weinberger* nor *Amoco* arose under NEPA, numerous lower courts have correctly interpreted those precedents as fully applicable to NEPA cases.[7] Moreover, any possible argument that

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[7] *See, e.g., Huntington v. Marsh,* 884 F.2d 648, 651-53 (2d Cir. 1989) (holding in NEPA case that "injunctive relief does not follow automatically upon a finding of statutory violations, including environmental violations;" citing *Weinberger* and *Amoco*); *Wisconsin v. Weinberger,* 745 F.2d 412, 425 (7th Cir. 1984) (holding in NEPA case that an injunction "is not a remedy which issues as of course;" citing *Weinberger*); *Sierra Club,* 593 F. Supp. 2d at 1324 & n.25 (noting that several courts have applied *Weinberger* and *Amoco* in NEPA context); *County of Los Alamos v. U.S. DOE*, 2006 U.S. Dist. LEXIS 27262, at *22 (D.N.M. Jan. 13, 2006) ("invocation of an environmental

Weinberger and *Amoco* are inapplicable to NEPA cases cannot be reconciled with *Winter*.

Nor can the Ninth Circuit's view be reconciled with the standard articulated in denying an application for a stay in a NEPA case:

> [The protections of NEPA] *should not lead courts to exercise equitable powers loosely or casually whenever a claim of "environmental damage" is asserted*. The world must go on and new environmental legislation must be carefully meshed with more traditional patterns of federal regulation.

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statute such as NEPA does not alter these traditional rules for injunctive relief, and there is no presumption that an injunction automatically follows if there is any violation of an environmental statute;" citing *Weinberger* and *Amoco*); *Montrose Parkway Alternatives Coalition v. U.S. Army Corps of Engineers*, 405 F. Supp.2d 587, 599 (D. Md. 2005) ("presuming irreparable harm in all environmental cases would contravene traditional equitable principles;" citing *Amoco*); *Sierra Club v. U.S. Fish and Wildlife Serv.,* 235 F. Supp.2d 1109, 1139 (D. Colo. 2002) ("Irreparable environmental injury may not be presumed from an agency's failure to appropriately evaluate environmental impacts in an EIS;" citing *Amoco*); *Hirt v. Richardson,* 127 F. Supp.2d 833, 845 (W.D. Mich. 1999) ("While [plaintiffs] logically imply that the violation of NEPA inherently creates an irreparable injury, because the inadequately informed decision has already been made, the United States Supreme Court has made it clear that violations of procedural environmental statutes do not mandate the issuance of an injunction, and that plaintiffs must still show some tangible irreparable environmental injury").

Aberdeen & Rockfish R. Co. v. SCRAP, 409 U.S. 1207, 1217-18 (1972) (Burger, C.J., in chambers) (emphasis added). As this Court's decisions consistently explain, there is no justification for bypassing traditional equitable principles merely because the statute at issue involves the environment. The cornerstone of justifiable injunctive relief is a solid evidentiary basis to support the extraordinary remedy.

C. The Presumption of Irreparable Harm for NEPA Violations is Premised Upon Faulty Legal Foundations

In any event, the principle that irreparable harm may be presumed upon a showing of NEPA violations rests upon an especially weak foundation. Upon examination, it is evident that the Ninth Circuit's view is built on layers of misperceptions of prior cases. The first time a Ninth Circuit panel employed a presumption of irreparable harm was in *Friends of the Earth, Inc. v. Coleman,* 518 F.2d 323, 330 (9th Cir. 1975). For this novel view, *Friends of the Earth* cited the D.C. Circuit's opinion in *Jones v. D.C. Redevelopment Land Agency,* 499 F.2d 502, 512 (D.C. Cir. 1974), and an unpublished district court decision that also cited *Jones*. *See* 518 F.2d at 330 (citing *Jones* and *City of Boston v. Brinegar*, 6 E.R.C. 1961, 1965 (D. Mass. 1974)).

But *Jones* did not cite any statutory language or legislative history for its conclusion that harm may necessarily flow from a failure to comply with NEPA. Rather, it referred—quite mistakenly—to an earlier Ninth Circuit opinion for its determination

that a procedural NEPA infraction automatically results in harm. *See* 499 F.2d at 512 (citing *Lathan v. Volpe,* 455 F.2d 1111 (9th Cir. 1971)).

In that citation, *Jones* was incorrect. *Lathan* never enunciated a rule that harm, much less irreparable harm, is always presumed following a NEPA violation. The plaintiffs in *Lathan* were property owners who sought an injunction against further acquisitions of property by highway officials pending, *inter alia*, the preparation of an EIS in accordance with NEPA. The *Lathan* plaintiffs contended—and the government conceded—that absent an injunction, the plaintiffs would be unable to sell their property to anyone other than the government. *See* 455 F.2d at 1116. The Ninth Circuit declined to require the plaintiffs to prove the usual elements for an injunction because the irreparable harm to the plaintiffs was obvious in these circumstances. *See id.* ("The longer the delay in applying NEPA, the more the neighborhood will have deteriorated and the less will be the chance to protect the city and its people from the environmentally detrimental effects of this project"). But the Ninth Circuit emphasized that the circumstances of the case were "exceptional " and the case was "one of those comparatively rare cases in which, unless the plaintiffs receive *now* whatever relief they are entitled to, there is danger that it will be of little or no value to them or to anyone else when finally obtained." *Id.* (emphasis in original).

In short, *Lathan* was an extraordinary case involving extraordinary facts. By citing *Lathan* as supporting a generalized proposition for NEPA cases,

the D.C. Circuit in *Jones* erroneously turned *Lathan*'s fact-based conclusion into an ironclad rule of law. Later cases such as *Friends of the Earth* amplified and perpetuated *Jones'* mistake.[8]

At the end of the day, the Ninth Circuit's view lacks doctrinal and precedential support. This Court should put this erroneous proposition to rest. *See Amoco,* 480 U.S. at 544-45.

D. Plaintiffs Who Seek Injunctions in NEPA Cases Must Satisfy the Traditional Four-Part Test

This Court's precedents make clear that, absent constitutional violations, the usual standard for showing "likely" irreparable harm is required for injunctions. *See Winter,* 129 S. Ct. at 375-76. Moreover, the "likely" irreparable harm should be tangible, or at least imminent. *See, e.g., Weinberger,* 456 U.S. at 310 (citing *TVA v. Hill,* 437 U.S. 153 (1978)); *see also Samuels,* 401 U.S. at 68-69 (irreparable injury must be "show[n] on the record," rather than "alleged"); *N.Y. v. Nuclear Regulatory Com.*, 550 F.2d 745, 754 (2d Cir. 1977) (denying NEPA injunction when federal action was not "certain to produce the cataclysmic consequences appellant fears will ensue"). And the harm must be

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[8] In contrast, other courts have refused to read *Lathan* as obviating the need to show irreparable harm, correctly noting that it was an "exceptional" case. *See, e.g., Essex Cty. Preservation Ass'n v. Cambell,* 536 F.2d 956, 962 (1st Cir. 1986); *King,* 923 F. Supp. at 546-47; *Alaska Conservation Society v. Brinegar,* 3 Envtl. L. Rep. 20744, 20744 (D. Alaska 1973).

to the environment directly, rather than a vague and amorphous harm to the public for failure to comply with NEPA's procedural requirements. *See Amoco,* 480 U.S. at 543.

As this Court held last Term, the traditional test of balancing equities is mandatory in NEPA cases. *See Winter,* 129 S.Ct. at 376-81 (even assuming irreparable harm, district court erred in not balancing equities in NEPA case when it issued injunction); c*f. Strycker's Bay Neighborhood Council, Inc. v. Karlen,* 444 U.S. 223, 228 n.2 (1980) (NEPA does not require agency "to elevate environmental concerns over other, admittedly legitimate, considerations").

The sugarbeet litigation illustrates the necessity of applying the traditional balancing test in NEPA cases. Plaintiffs in the sugarbeet litigation are seeking an injunction that would have far-reaching consequences in rural communities in 11 states where sugarbeets are grown. In just four years, domestic commercial plantings of Roundup Ready sugarbeets have come to comprise 95% of the United States crop in 2009. This has been by far the fastest adoption of biotech of any crop in agricultural history. *See* Abram, *Roundup Ready Crops Prove to Be a Hit in USA,* FARMERS WEEKLY, at 61. Utilization of Roundup Ready beets greatly improves weed control. Fuel, water, and labor costs are reduced because fewer applications of harsh herbicides are needed. *See* pages 4-5, *supra.*

A ban on Roundup Ready sugarbeets would result in severe seed shortages in some areas and

billions of dollars in losses—lost crops, lost jobs, lost sales of new farm equipment, lost value of existing specialized sugarbeet farm equipment that would be obsolete because its only use is for sugarbeet crops, lost tax revenue, and the closures of grower-owned processing plants that would never re-open. If beet farmers were forced to switch to other crops (such as potatoes or onions), that dislocation would, in turn, depress prices in states that already service those crops, leading to additional adverse ripple effects (more job losses, etc.) to the farming economy. And needless to say, halting cultivation of 95% of all sugarbeets would result in a severe domestic sugar shortage and a staggering increase of domestic sugar prices at the grocery store and throughout the food producing industry. *See Center for Food Safety,* No. 3:08-cv-00484-JSW, Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction, D.E. 272 at 17-20 (filed 2/12/10) (citing declaration of USDA's Daniel Colacicco at ¶¶ 15-28).

Congress has not provided any indication that it intended such disruption. There is, accordingly, no basis for courts in NEPA cases to bypass any of the traditional rules for injunctions. *Cf. Weinberger*, 456 U.S. at 313.

II. THE COURT OF APPEALS ERRED IN AFFIRMING THE LOWER COURT'S REFUSAL TO CONDUCT AN EVIDENTIARY HEARING

The court of appeals compounded its error by upholding the district court's refusal to conduct an evidentiary hearing justifying the injunction.

Effectively, the Ninth Circuit endorsed a rule that 1) presumed irreparable harm upon a showing of a statutory procedural violation and 2) denied petitioners an effective opportunity to rebut and/or disprove the presumption through an evidentiary hearing. This Court should reverse.

For two centuries, this Court has decreed that injunctions may not issue without giving all parties an opportunity to be heard. *See Marshall v. Beverly,* 18 U.S. 313, 316 (1820). Lower courts assiduously apply the "cardinal principle of our system of justice that factual disputes must be heard in open court and resolved through trial-like evidentiary proceedings," because "[a]ny other course would be contrary 'to the spirit which imbues our judicial tribunals prohibiting decision without a hearing.'" *United States v. Microsoft,* 253 F.3d 34, 101 (D.C. Cir. 2001) (en banc) (quoting *Sims v. Greene*, 161 F.2d 87, 88 (3d Cir. 1947)); *see also In re Rationis Enterprises, Inc. of Panama,* 261 F.3d 264, 269 (2d Cir. 2001) (same and citing numerous authorities). As the leading commentators of federal procedure explain, where pivotal facts are disputed in an injunction proceeding, "[t]he court should insist, as it did here, on the presentation of oral testimony which may be subjected to the test of cross-examination." 11A Wright, Miller & Kane, FEDERAL PRACTICE AND PROCEDURE *Civil* (2d) §2949 at 224 (1995) (quoting *Industrial Electronics Corp. v. Cline,* 330 F.2d 480, 483 (3d Cir. 1964)).

NEPA cases are not exempt from this "cardinal principle." *Cf. Aberdeen & Rockfish,* 409 U.S. at 1217-18 (Burger, C.J., in chambers) (courts

should not depart from traditional equitable standards in environmental cases). Indeed, "[t]he use of evidentiary trials and hearings, expert witnesses, and expert affidavits and other evidentiary documents challenging agencies' environmental reviews has become commonplace in NEPA cases[.]" French, *Judicial Review of the Administrative Record in NEPA Litigation*, 81 CALIF. L. REV. 929, 950-53 (1993) (citing statistics and cases).

The follow-on sugarbeet litigation offers a clear perspective on the need for evidentiary hearings in such cases. Brought in the same court, by some of the same plaintiffs, and the same trial counsel as the present case, the sugarbeet plaintiffs' claims of irreparable injury are largely based upon the theoretical possibility that Roundup Ready sugarbeets would result in "cross-pollination" to other nearby crops in the Willamette (Oregon) Valley. But Roundup Ready sugarbeets have been grown for seed in the Willamette Valley for years without any such cross-pollination whatsoever. Discovery in that litigation has further revealed that even if any such conjectural cross-pollination were to occur, it would be of a very limited nature and fully reparable. Given the profound impact that an injunction would necessarily entail (*see supra* at 8), it is of paramount importance that an evidentiary hearing be conducted in the sugarbeet case, as in the alfalfa case, so that the plaintiffs' allegations of injury can be fully debunked.

The sugarbeet plaintiffs also cite alleged cross-pollination in Europe, where conditions for growing

sugarbeets are altogether different. An evidentiary hearing would provide the needed opportunity to thoroughly refute the unfounded charges of cross-pollination.

If any further justification for an evidentiary hearing were required, the record in *Geertson* more than suffices. In particular, one of the district court's stated rationales for denying an evidentiary hearing should set off alarm bells. The district court below suggested that the subject matter was too complex for an evidentiary hearing: "I feel particularly ill suited to" engage "in the balancing of all these different factors and coming to particular conclusions." Pet. App. 417a.

Federal judges preside over cases involving all types of "arcane matters in such areas as patent, admiralty, tax, antitrust, and bankruptcy law, on a daily basis." *Parisi v. Davidson,* 405 U.S. 34, 53 (1972) (Douglas, J., concurring). Where a subject matter is complex or where a federal judge feels "particularly ill-suited" to making a decision on the merits, there is all the more reason for a full evidentiary hearing. Especially in these circumstances, to enjoin an expert agency's determination on the basis of presumptions and evidence untested by cross-examination is dangerous folly. This Court should reject the Ninth Circuit's approach and restore sound policy and law in this critical area.

CONCLUSION

The judgment should be reversed.

Respectfully submitted.

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