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 AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

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

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

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

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

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Under Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of Petitioner Monsanto Co.

PLF was founded over 35 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide. PLF advocates for limited government, individual rights, free enterprise, and a balanced approach to environmental regulation. PLF has participated in a number of this Court's cases dealing with the availability of injunctive relief for violations of federal environmental laws. *See, e.g.*, *Winter v. Natural Res. Def. Council*, 129 S. Ct. 365 (2008); *Amoco Prod. Co. v. Village of Gambell, Alaska*, 480 U.S. 531 (1987).

PLF's analysis of the law of injunctions and their availability will provide a valuable, additional viewpoint to assist the Court in resolving the case.

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

As tribunals of limited jurisdiction, federal courts are restricted not just in the types of actions that they may hear, but also in the remedies they may afford. Federal courts' power to issue injunctions is a function of their equity jurisdiction, *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311 (1982), which derives ultimately from Article III of the United States Constitution, and mediately from Section 11 of the Judiciary Act of 1789, 1 Stat. 73, 78 (Sept. 24, 1789). *See Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 (1999). The traditional requirements for entitlement to permanent injunctive relief—likelihood of irreparable harm, favorable balance of equities, and consideration of the public interest, *see Romero-Barcelo*, 456 U.S. at 312-13—generally circumscribe federal courts' power to issue an injunction in all types of cases, including those arising, as here, under the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321, *et seq*. *See Winter*, 129 S. Ct. at 376-78.

The Ninth Circuit Court of Appeals' affirmance of a district court's nationwide injunction preventing the use of Roundup Ready Alfalfa, based on a NEPA violation, conflicts in two important respects with these basic limitations on federal courts' ability to issue injunctive relief. First, the nationwide injunction was issued on the grounds of the possibility of irreparable harm occurring if the relief were not ordered, rather than under the traditional, and more stringent, standard of likelihood of irreparable injury. Second, the injunction was issued without the district court having conducted an evidentiary hearing, even

though facts essential to the propriety of the injunction—including whether irreparable harm would result without an injunction—were vigorously disputed by the parties. And contrary to the Ninth Circuit's conclusion, none of these departures from the traditional standards for granting equitable relief can be excused because the injunction arises from a NEPA claim.

ARGUMENT

I

A PARTY SEEKING AN INJUNCTION MUST ESTABLISH THAT, ABSENT THE INJUNCTION, IT IS LIKELY THAT THE PARTY WILL SUFFER IRREPARABLE HARM

One of the traditional elements of injunctive relief is establishing a likelihood of irreparable harm. *E.g.*, *Winter*, 129 S. Ct. at 375. The Ninth Circuit below held that the district court had correctly found that, absent an injunction barring use of modified alfalfa, irreparable harm through genetic contamination was "sufficiently likely to occur so as to warrant broad injunctive relief." Petitioner's Appendix (Pet. App.) at 13a (*Geertson Seed Farms v. Johanns*, 570 F.3d 1130, 1137 (9th Cir. 2009)). But the district court issued its injunction in May, 2007, *see* Pet. App. at 79a, before *Winter* was decided, and thus necessarily applied the Ninth Circuit's then-regnant "possibility of irreparable harm" standard. *Cf. Earth Island Inst. v. U.S. Forest Serv.*, 442 F.3d 1147, 1177 (9th Cir. 2006) ("Because Earth Island has shown 'a strong likelihood of success on the merits,' it need only show 'the possibility of irreparable injury' if preliminary relief is not

granted . . . ."). That relaxed standard is flatly inconsistent with the traditional standard for injunctive relief, and cannot be reconciled with federal courts' equity jurisdiction under the 1789 Judiciary Act and Article III.

The injunctive power of federal courts is coextensive with that enjoyed by the English High Court of Chancery at the time of separation between Great Britain and this country. *See Grupo Mexicano*, 527 U.S. at 318. Absent authorization from Congress, the federal judiciary may not provide an equitable remedy that, in 1789, would have been unknown to the English Chancery. *See id*. at 327, 332-33. *See also Baker v. Biddle*, 2 F. Cas. 439, 447-48, No. 764 (C.C.E.D. Pa. 1831) (Baldwin, C.J.) ("It follows that new rules subversive of established principles and practice [of equity] are excluded.").

Chancery was considered to have two bases of jurisdiction, one ordinary and one extraordinary. 4 Lord Edward Coke, *Institutes of the Laws of England* 79 (1986 reprint) (1797 ed. London); *see also* 3 William Blackstone, Commentaries *47. The latter, from which arises the injunctive power, was firmly established long before the Revolution of 1689. *See* 1 Joseph Story, *Commentaries on Equity Jurisprudence as Administered in England and America* 37-39 (13th ed. 1886) (1835). The purpose of the equity power, as traditionally understood, was to make right and just (*ex aequo et bono*) those instances where the general

law was lacking. *Id.* at 3-4[2]; *see also* 1 Story, *supra*, at 4 n.2 ("'Properly and particularly, however, equity is the power of will, its corrector, by which the law on account of its universality is lacking.'") (quoting Grotius, De Aequitate, Ch. 1, § 2). As a technical matter, of course, equitable remedies followed upon legal remedies, and the Chancellor was as bound by rules as the courts of law. *See* 1 Story, *supra*, at 17-19. *Cf.* 4 Blackstone, Commentaries *50 ("In these early times the chief judicial employment of the chancellor must have been in devising new writs, directed to the courts of common law, to give remedy in cases where none was before administered."). But the undeniably expansive power of equity brought with it a responsibility to exercise discretion as well as a freedom to craft a well-tailored remedy. *See* 1 Story, *supra*, at 21 ("[O]ne of the most striking and distinctive features of Courts of Equity is that they can adapt their decrees to all the varieties of circumstances which may arise, and adjust them to all the peculiar rights of all the parties in interest . . . ."); 2 Story, *supra*, at 183, 262. It is no surprise that the Chancellor's discretion came to be carefully circumscribed by rules limiting the availability of injunctive relief.[3]

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[2] Citing, *inter alia*, Nicomachean Ethics Bk. 5, ch. 10, ll. 27-28 (W.D. Ross trans., 1941) ("And this is the nature of the equitable, a correction of law where it is defective owing to its universality.").

[3] In fact, Mr. Justice Story strongly cautioned against the abuse of the equity power.

> The jurisdiction of these courts thus operating by way of special injunction is manifestly indispensable for the purposes of social justice in a great variety of cases, and therefore should be fostered and upheld by a steady

(continued...)

Among these rules were the requirements for entitlement to injunctive relief, whether preliminary or permanent.[4] From equity's earliest days, likelihood of irreparable harm had to be shown before any type of injunction would issue. *See* John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 Harv. L. Rev. 525, 527, 531 (1978). Traditionally, injunctive relief was available from the equity courts to, among other things, protect rights at law. *Id*. at 528-29. In such cases, litigants would seek recourse in equity because the available legal remedies were inadequate; without equity's intervention the litigants would be irreparably harmed. *Id*. at 529. *Cf*. 4 Co. Inst. 84 ("Never recourse to extraordinary [jurisdiction] except where ordinary [jurisdiction] is deficient."); 1 Story, *supra*, at 40; 2 Story, *supra*, at 184.

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[3] (...continued)

> confidence. At the same time it must be admitted that the exercise of it is attended with no small danger both from its summary nature and its liability to abuse. It ought therefore to be guarded with extreme caution and applied only in very clear cases; otherwise instead of becoming an instrument to promote the public as well as private welfare, it may become a means of extensive and perhaps of irreparable injustice.

See 2 Story, *supra*, at 264.

[4] As this Court has noted, the standard for preliminary injunction, with respect to the necessity of irreparable harm, is identical to that for permanent injunction. *Winter*, 129 S. Ct. at 381; *Amoco*, 480 U.S. at 546 n.12.

"Irreparable injury thus became a source of equity jurisdiction in preliminary as well as final adjudications."[5] Several leading early equity cases confirm that observation. *See, e.g.*, *Mogg v. Mogg*, 21 Eng. Rep. 432, 433 (Ch. 1786) (noting that, "until such [disputed] right [at law] was determined, it was very proper to stay [the defendants] from doing an act, which if it turned out they had no right to do, would be irreparable"); *Ryder v. Bentham*, 27 Eng. Rep. 1194, 1194-95 (Ch. 1750) (granting an injunction to remove light-blocking scaffolding because equity would not order the removal of a building, and because, if the defendant continued to construct during the pendency of the action but the plaintiff should prove successful in the action, the latter's lights would be permanently blocked and he would be irreparably harmed); *Johnson v. Goldswaine*, 145 Eng. Rep. 1027, 1028 (Ex. 1796)[6] (denying injunction on the grounds that "this was not a case of irreparable injury, which is the only ground of this summary interposition of Courts of Equity"). *See also* 2 Story, *supra*, at 229 (discussing availability

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[5] Leubsdorf, *supra*, at 530. By the eighteenth century, Chancery was authorized to grant provisional relief either through a "common order," used (among other reasons) to constrain actions in the law courts, or through a "special order," used to protect rights at law during the pendency of a suit in equity. Note, *Probability of Ultimate Success Held Unnecessary for Grant of Interlocutory Injunction*, 71 Colum. L. Rev. 165, 166 (1971); *see* 2 Story, *supra*, at 201. These special orders, which are the closest analogue to the injunction at issue here, were issued only after the movant had "demonstrate[d] a strong probability of immediate irreparable damage to his property." 71 Colum L. Rev. at 166. *See* 2 Story, *supra*, at 229, 234.

[6] The Court of Exchequer developed prior to the eighteenth century an equity jurisdiction similar to that of Chancery in which proceedings were begun by "English Bill."

of the writ of injunction for private nuisances) ("So a mere diminution in the value of property by the nuisance without irreparable mischief will not furnish any foundation for equitable relief."). *Cf id*. at 234 ("For if the trespass be fugitive and temporary, and adequate compensation can be obtained in an action at law, there is no ground to justify the interposition of Courts of Equity.").[7]

The foregoing underscores that an essential element to entitlement to injunctive relief is the establishment of irreparable harm in the absence of such relief. The power of a federal court is no more, no less, than that of the Chancellor at Westminister at the time of separation. *See Grupo Mexicano*, 527 U.S. at 318. A review of the authorities nearest in time to that crucial point makes plain that the pre-*Winter* standard used by the Ninth Circuit to uphold a permanent injunction barring use of Roundup Ready Alfalfa is irreconcilable with those authorities. This Court should affirm its prior holdings, and the centuries-old common law tradition, and confirm that a NEPA injunction cannot issue without adequate and competent proof of likelihood of irreparable harm.

[7] *Accord* John Adams, Jr., *The Doctrine of Equity* 185-86 (1850).

II

DISPUTED ISSUES OF FACT MATERIAL TO THE ELEMENTS OF INJUNCTIVE RELIEF MUST BE RESOLVED THROUGH AN EVIDENTIARY HEARING

A centerpiece of Anglo-American common law procedural protections is the right to the resolution of essential factual issues by a trier of fact following adversarial presentation of evidence, including live testimony. *United States v. Microsoft*, 253 F.3d 34, 101 (D.C. Cir. 2001) (en banc) ("It is a cardinal principle of our system of justice that factual disputes must be heard in open court and resolved through trial-like evidentiary proceedings."). *See Sims v. Greene*, 161 F.2d 87, 88 (3d Cir. 1947) (disputed issues of fact pertinent to a preliminary injunction "must be resolved by oral testimony," otherwise the trial court "will be left in the position of preferring one piece of paper to another"). *See also SEC v. Frank*, 388 F.2d 486, 491 (2d Cir. 1968) (Friendly, J.) ("[W]here everything turns on what happened and that is in sharp dispute[,] . . . the inappropriateness of proceeding on affidavits attains its maximum . . . ."). *Cf. Southern Ry. Co. v. Commonwealth of Virginia ex rel. Shirley*, 290 U.S. 190, 195, 199 (1933) (statute giving administrative officer "power to make final determination in respect of facts . . . without notice, without hearing, without evidence" held violative of due process); *Ohio Bell Tel. Co. v. Pub. Utils. Comm'n of Ohio*, 301 U.S. 292, 304-05 (1937) (noting that "the 'inexorable safeguard' of a fair and open hearing . . . is one of 'the rudiments of fair play'" for which "[t]here can be no compromise on the footing of convenience or expediency, or because of a

natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored" (citations omitted)).

This ancient common law tradition, maintained through the Court's precedents, is also consistent with the Federal Rules of Civil Procedure, which require that preliminary injunctions be preceded by a hearing, Fed. R. Civ. P. 65(a)(2), (b)(3), and mandate that every injunction be accompanied by findings, *see id*. 52(a)(1)-(2). *See also Fengler v. Numismatic Americana, Inc.*, 832 F.2d 745, 747 (2d Cir. 1987) ("On a motion for preliminary injunction, 'where essential facts are in dispute, there must be a hearing . . . and appropriate findings of fact must be made.") (quoting *Visual Sciences, Inc. v. Integrated Commc'ns, Inc.*, 660 F.2d 56, 58 (2d Cir. 1981)); 11A Fed. Prac. & Proc. Civ. § 2949 (2d ed. 1995) ("When the outcome of a Rule 65(a) application depends on resolving a factual conflict by assessing the credibility of opposing witnesses, it seems desirable to require that the determination be made on the basis of their demeanor during direct and cross-examination, rather than on the respective plausibility of their affidavits."). *Cf. Morgan v. United States*, 304 U.S. 1, 20 (1938) ("The requirements of fairness are not exhausted in the taking or consideration of evidence, but extend to the concluding parts of the procedure as well as to the beginning and intermediate steps."); *Carter v. Kubler*, 320 U.S. 243, 247 (1943) (holding that "a full and fair hearing" includes the right "to examine, explain or rebut" all evidence).

These ancient, hoary precepts of the common law and due process forbid an injunction to issue without those persons enjoined having been given an

opportunity to examine their opponents in open court and to question them on the evidence supposedly supporting the injunction . The injunction approved by the Ninth Circuit below is inconsistent with these protections. The Court should therefore affirm these common law protections by overturning the injunction.

III

THE TRADITIONAL REQUIREMENTS FOR INJUNCTIVE RELIEF CANNOT BE RELAXED MERELY BECAUSE THE UNDERLYING LEGAL CLAIM ARISES UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT

This Court has frequently observed that the traditional requirements for injunctive relief presumptively apply to all types of cases, *see Amoco*, 480 U.S. at 542; *Romero-Barcelo*, 456 U.S. at 313, including NEPA cases, *see Winter*, 129 S. Ct. at 376-78. The Ninth Circuit approved the district court's dramatic departure from the traditional elements of entitlement to injunctive relief, on the grounds that NEPA injunctions are different in kind and quality from other types of injunctions, a difference that purportedly authorizes a relaxation of these traditional requirements. *See* Pet. App. at 18a-19a (*Geertson Seed Farms*, 570 F.3d at 1139-40). This Court should therefore affirm its precedents to state, once again, that NEPA does not authorize a relaxation of the traditional elements of injunctive relief, for the following reasons.

First, that NEPA injunctions are limited in time and expire once the agency has completed the necessary environmental impact analysis justifies nothing. Permanent injunctions are frequently not *sine fine*, instead ending once the complained of injury has been remedied or the underlying case otherwise becomes moot.[8] *See, e.g.*, *Sweeton v. Brown*, 27 F.3d 1162, 1166 (6th Cir. 1994) (en banc) ("Ongoing injunctions should be dissolved when they no longer meet the requirements of equity."); *Western Union Tel. Co. v. Intn'l Bhd. of Elec. Workers, Local No. 134*, 133 F.2d 955, 957 (7th Cir. 1943) ("[An injunction] is executory and continuing as to the purpose or object to be acquired, and operates until vacated, modified, or dissolved . . . ."). Moreover, that NEPA injunctions may be shorter in duration than other injunctions was no obstacle to this Court ruling in *Winter* that the traditional elements of entitlement to injunctive relief must be proved up as much in the NEPA context as in others. *Cf. Winter,* 129 S. Ct. at 375-78.

Second, it is irrelevant that the environmental impact analysis that the agency would conduct on remand may parallel the analysis that the district court would conduct in an evidentiary hearing to determine irreparable harm. As Judge Smith noted in dissent below, "the district court did not need to

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[8] *Cf.* Fed. R. Civ. P. 60(b)(5) (authorizing relief from final order or decree if it "has been satisfied, released or discharged . . . or applying it prospectively is no longer equitable"); *Agostini v. Felton,* 521 U.S. 203, 215 (1997) ("A court errs when it refuses to modify an injunction or consent decree in light of . . . changes" "in factual conditions or in law."); *Poor v. Carleton*, 19 F. Cas. 1013, 1014, No. 11,272 (C.C. Mass. 1837) (Story, J.) (common injunction [as opposed to special injunction] should be dissolved once defendant has made appearance by way of answer).

resolve the very disputes over the risk of environmental harm" because the court "only needed to decide, listening and observing the witnesses, what it would do in the mean time." Pet. App. at 24a (*Geertson Seed Co.*, 570 F.3d at 1143 (Smith, J., dissenting)). In other words, an evidentiary hearing would only require the district court to determine whether irreparable harm would be likely to befall the plaintiffs pending preparation of an environmental impact statement; the court would not need to determine whether or to what extent the proposed project would produce significant effects on some aspect of the human environment. And as this Court observed in *Winter*, the district courts retain jurisdiction to craft NEPA remedies, "including declaratory relief or an injunction tailored to the preparation of an [environmental impact statement]." *Winter*, 129 S. Ct. at 381.

Hence, by overturning the injunction, this Court can confirm NEPA does not allow for a weakening of the standard requirements for entitlement to injunctive relief.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

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Respectfully submitted,

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