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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 WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

Amici curiae address only the following questions:

(i) Did the Ninth Circuit err 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 about the likelihood of irreparable harm?

(ii) Did the Ninth Circuit err when it affirmed a blanket, nationwide injunction to remedy a purely procedural violation based only on a remote possibility of irreparable harm?

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BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF PETITIONERS

INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a non-profit, public interest law and policy center with supporters in all 50 states.[1] WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, and a limited and accountable government. WLF regularly publishes monographs and other publications on these and related topics. In particular, WLF has regularly appeared before this and numerous other federal and state courts to urge adherence to traditional restraints on the granting of injunctive relief, including the requirement that an injunction should not issue unless the party seeking it can prove a likelihood of irreparable harm in its absence. *See, e.g., Winter v. NRDC*, 129 S. Ct. 365 (2008); *Nat'l Audobon Soc'y v. Dep't of Navy*, 422 F.3d 174 (4th Cir. 2005).

Allied Educational Foundation (AEF) is a non-profit, charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study and has appeared as *amicus curiae* in this Court on a number of occasions.

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief.

Amici agree with Petitioners that the appeals court's decision below, if allowed to stand, threatens to make nationwide injunctions in NEPA cases virtually automatic in the Ninth Circuit, despite the absence of any language in NEPA suggesting that Congress has excused federal courts from complying with the traditional safeguards for equitable relief. *Amici* believe that injunctive relief is especially inappropriate where, as here, the trial court refuses to conduct an evidentiary hearing to resolve highly contested issues of material fact as to the likelihood of irreparable harm.

Amici have no direct interest, financial or otherwise, in the outcome of this case. *Amici* submit this brief solely to further the public interest in safeguarding the longstanding rule that an injunction is a matter of equitable discretion that does not result automatically from success on the merits. All parties have consented to the filing of this brief, and letters of consent have been lodged with the Court.

STATEMENT OF THE CASE

This case raises important issues about the Ninth Circuit's standard for granting an injunction as a remedy under the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370, given that circuit's affirmance of the district court's virtual presumption of irreparable harm requiring an injunction in all "run of the mill" NEPA cases.

Petitioner Monsanto Co. (Monsanto) is a leading agricultural company that manufactures the world's best-selling herbicide, Roundup. Monsanto also develops and licenses leading seed brands for large-acre and small-

acre crops, including alfalfa. In the 1990s, Monsanto began developing "Roundup Ready alfalfa," a genetically modified variety of alfalfa that is resistant to Roundup. Petitioner Forage Genetics International (FGI) is the sole Monsanto-licensed producer of Roundup Ready alfalfa seed.

Monsanto and FGI petitioned the United States Department of Agriculture (USDA) to deregulate Roundup Ready alfalfa. After 297 field trials conducted over eight years of testing, the USDA, acting through the Animal and Plant Health Inspection Service (APHIS), determined that Roundup Ready alfalfa did not pose a plant pest risk. Pursuant to NEPA, APHIS prepared an Environmental Assessment (EA) and received hundreds of public comments on the deregulation petition. Having determined that deregulation would not significantly impact the environment, APHIS issued a Finding of No Significant Impact (FONSI) and approved the deregulation of Roundup Ready alfalfa, thereby allowing it to be sold and planted commercially.

Eight months later, Respondents Geertson Seed Farms and Trask Family Seeds, together with various environmental groups, sued the USDA to challenge its decision to deregulate, contending that APHIS violated NEPA by failing to take the necessary "hard look" at environmental consequences. Concluding that APHIS had failed to explain adequately why the possibility of cross-pollination of conventional and organic alfalfa by Roundup Ready alfalfa was not a significantly harmful environmental impact, the U.S. District Court for the Northern District of California granted Respondents' motion for summary judgment on their NEPA claim. Pet. App. 35a-45a, 51a-52a. The district court's holding

emphasized the need to prevent cross-pollination of conventional and organic alfalfa by imposing geographic isolation distances for Roundup Ready alfalfa seed crops. *Id.* at 36a, 52a.

At the remedies phase, the district court ordered APHIS to prepare an Environmental Impact Statement (EIS). Respondents sought a preliminary and permanent injunctive relief, but APHIS submitted a proposed order designed to prevent any significant likelihood of cross-pollination during the agency's preparation of its EIS. *Id.* at 185a-86a. Petitioners Monsanto and FGI intervened to support APHIS's proposed measures, which were far more stringent than the voluntary stewardship practices previously observed by farmers during field testing. *Id.* at 140a, 162a-63a. Claiming irreparable harm in the absence of injunctive relief, Respondents rejected APHIS's proposal and demanded a nationwide injunction that would completely ban any further use of Roundup Ready alfalfa pending APHIS's completion of the EIS. *Id.* at 13a, 64a. In its March 12, 2007 preliminary injunction order, the district court held that "absent unusual circumstances," an injunction should automatically issue following a violation of NEPA's procedural requirements. *Id.* at 55a. Because "[n]either the intervenors nor the government h[ad] identified any 'unusual circumstances,'" the court issued a nationwide injunction against all planting of Roundup Ready alfalfa from March 31, 2007 until the completion of the EIS. *Id.* at 56a-58a. In doing so, the district court failed to apply the traditional four-factor test required for an injunction, and failed to identify any likelihood of irreparable harm associated with Roundup Ready alfalfa.

On the issue of permanent injunctive relief, the

district court invited the government and Petitioners to "submit additional evidence or a further memorandum" and allowed Respondents to respond to those submissions. *Id.* at 58a. In their evidentiary submissions, the parties disputed nearly every factual issue relevant to whether irreparable harm to Respondents would result from the continued use of Roundup Ready alfalfa. Desiring to cross examine Respondents' experts on the scientific basis for their conclusions (and to afford their own experts an opportunity to testify), Petitioners requested a full evidentiary hearing to resolve all disputed issues of fact. The district court refused, stating that "it isn't my job" to "look and analyze and try to figure out, does this have an environmental impact or doesn't it." *Id.* at 68a, 417a. Without analyzing Petitioners' proposed expert testimony or allowing any cross-examination of Respondents' contrary assertions, the district court summarily concluded that "I should stop things in place until the Government has discharged its duty given to it by the right of Congress of the United States." *Id.* at 417a.

In its permanent injunction order, the district court acknowledged that "intervenors have requested an evidentiary hearing, apparently so the Court can assess the viability of its witnesses' opinions regarding the risk of contamination if APHIS's proposed conditions are imposed," but reiterated its refusal to "engage in precisely the same inquiry" that "APHIS failed to do and must do in an EIS." *Id.* at 67a-68a. Announcing that "more liberal standards for granting an injunction" apply in "run of the mill" NEPA cases, the district court entered a blanket nationwide injunction against any further planting of Roundup Ready alfalfa, but failed to

determine whether irreparable harm would be likely under the government's proposed mitigation measures. *Id.* at 60a-79a.

APHIS and Petitioners appealed. A divided panel of the U.S. Court of Appeals for the Ninth Circuit affirmed the district court's permanent injunction order. In an amended opinion, the appeals court never discussed this Court's holding in *Winter v. NRDC*, 129 S. Ct. 365, 375 (2008), which requires a showing of likely irreparable harm before an injunction can issue in a NEPA action. Rather, the appeals court effectively endorsed the district court's presumption of harm in all "run of the mill" NEPA cases. *Id.* at 13a.

While acknowledging that "generally, a district court should hold an evidentiary hearing" absent waiver by the adverse party, the Ninth Circuit did not require the district court to adjudicate the disputed issues of material fact on the likelihood of irreparable harm. The appeals court conceded that "[t]he parties' experts disagreed over virtually every factual issue relating to possible environmental harm, including the likelihood of genetic contamination," *id.* at 9a, but, curiously, agreed with the district court's finding that Petitioners "had [not] established any material issues of fact" requiring a hearing. The panel agreed with the district court's decision "to avoid the catch-22 situation where an evidentiary hearing would require it to perform the same type of extensive inquiry into environmental effects that the ordered EIS will require the government agency to perform." *Id.* at 17a-18a.

Judge Smith dissented on whether Petitioners were entitled to an evidentiary hearing before the district

court could enter a permanent injunction. *Id.* at 20a-26a. He explained that, under Federal Rule of Civil Procedure 65, a district court must hold an evidentiary hearing before issuing an injunction unless the material facts are undisputed or the adverse party waives its right to a hearing. *Id.* at 20a-21a (citing *Charlton v. Estate of Charlton*, 841 F.2d 988, 989 (9th Cir. 1988)). Because neither exception applied in this case, Judge Smith would have held that the district court erred in refusing Petitioners' request for an evidentiary hearing. *Id.* at 21a-22a.

SUMMARY OF THE ARGUMENT

This Court has long recognized that "[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970). Because it is such an extraordinary form of relief, an injunction requires an evidentiary hearing unless the facts are undisputed or the adverse party has waived its right to a hearing. Here, the district court refused Petitioners' request for an evidentiary hearing, concluding that holding a hearing on the question of irreparable harm would require it to engage in precisely the same inquiry that APHIS would perform in its EIS.

Contrary to the district court's reasoning, an agency's evaluation of environmental harm under NEPA is *never* the same inquiry as a court's determination of irreparable harm to the party seeking an injunction. The traditional standard for granting an injunction requires a plaintiff to show that he, not the environment, will suffer irreparable injury. In other words, the district

court improperly conflated the purpose of an EIS under NEPA with the purpose of an evidentiary hearing before the issuance of an injunction. Simply put, a judge cannot avoid the venerable procedural safeguards of equity merely because an administrative agency may later engage in a slightly similar analysis. And a district court may not issue a blanket, nationwide injunction without first resolving genuine disputes over the likelihood of irreparable harm under narrower, more tailored protective measures.

Despite acknowledging the general rule that a district court must hold an evidentiary hearing before issuing a permanent injunction, the Ninth Circuit affirmed the district court's denial of Petitioners' request for an evidentiary hearing. In doing so, the appeals court purported to excuse the requirement for an evidentiary hearing because Petitioners failed to establish any disputed issues of material fact. But in the same opinion, the appeals court conceded that "[t]he parties' experts disagreed over virtually every factual issue relating to possible [irreparable] harm." Pet. App. at 9a. To the extent that the appeals court considers factual disputes over the likelihood of irreparable harm in the "run of the mill" NEPA case immaterial to the propriety of an injunction, such a conclusion has no legal basis. Contrary to the Ninth Circuit's view, a court contemplating an injunction under NEPA must always determine whether irreparable harm will follow in the absence of the injunction.

The appeals court also attempted to justify depriving Petitioners an evidentiary hearing because a permanent injunction under NEPA is temporary, lasting only until the agency concludes its preparation of an EIS.

But the right to an evidentiary hearing before an injunction can issue has *never* been linked to the expected duration of the injunction. Regardless of duration, every injunction is an "extraordinary and drastic remedy" that cannot be awarded as of right. Indeed, the right to a hearing attaches with equal force to both preliminary and permanent injunctions, and this Court has refused to recognize different standards of equity based on an injunction's expected duration.

Finally, this Court has repeatedly rejected the suggestion that a mere procedural violation of a statute requiring environmental review justifies an injunction against the underlying conduct until that environmental review is completed. Rather, in evaluating the appropriateness of granting an injunctive remedy for a statutory violation, this Court has consistently looked to the statute's substantive scheme and purpose. NEPA, the statute at issue here, is purely procedural and imposes no substantive environmental obligations on a federal agency's decision-making. Because any NEPA deficiency is being cured by APHIS's completion of an EIS, NEPA's narrow procedural purpose does not warrant a substantive injunction in this case.

ARGUMENT

I. PETITIONERS WERE ENTITLED TO AN EVIDENTIARY HEARING ON THE LIKELIHOOD OF IRREPARABLE HARM

A. An Agency's Evaluation of Environmental Harm Under NEPA Is Not The Same Inquiry as a Court's Determination of Irreparable Harm

It has long been "a cardinal principle of our system of justice that factual disputes must be heard in open court and resolved through trial-like evidentiary proceedings. Any other course would be contrary 'to the spirit which imbues our judicial tribunals prohibiting decision without hearing.'" *United States v. Microsoft Corp.*, 253 F.3d 34, 101 (D.C. Cir. 2001) (quoting *Sims v. Greene*, 161 F.2d 87, 88 (3d Cir. 1947)), *cert denied*, 534 U.S. 952 (2001). As this Court has acknowledged, "[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970).

It is "the duty of a court of equity granting injunctive relief to do so upon conditions that will protect all . . . whose interests the injunction may affect." *Inland Steel Co. v. United States*, 306 U.S. 153, 157 (1939). Most relevant here, "[a] party has the right to judicial resolution of disputed facts not just as to the liability phase, but also as to *appropriate relief*." *Microsoft Corp.,* 253 F.3d at 101 (emphasis added). All evidentiary conflicts "must be resolved by oral testimony since only by hearing the witnesses and observing their

demeanor on the stand can the trier of fact determine the veracity of the allegations . . . made by the respective parties." *Sims*, 161 F.2d at 88; *see Dopp v. Franklin Nat'l Bank*, 461 F.2d 873, 878-79 (2d Cir. 1972) (vacating injunction below because "a judge should not resolve a factual dispute on affidavits or depositions").

Indeed, the Ninth Circuit has itself recognized that "the entry or continuation of an injunction requires a hearing. Only when the facts are not in dispute, or when the adverse party has waived its right to a hearing, can that significant procedural step be eliminated." *Charlton v. Estate of Charlton*, 841 F.2d 988, 989 (9th Cir. 1988) (quoting *Prof'l Plan Exam'rs of New Jersey, Inc. v. Lefante*, 750 F.2d 282, 288 (3d Cir. 1984)). Other circuits agree. *See, e.g., McDonald's Corp. v. Robertson*, 147 F.3d 1301, 1311-12 (11th Cir. 1998) ("Where the injunction turns on the resolution of bitterly disputed facts . . . an evidentiary hearing is normally required to decide credibility issues.") (quoting *All Care Nursing Serv. v. Bethesda Mem'l Hosp., Inc.*, 887 F.2d 1535, 1538 (11th Cir. 1989)); *Huntington v. March*, 884 F.2d 648, 654 (2d. Cir. 1989) (holding that the district court erred by failing to hold an evidentiary hearing prior to granting an injunction); *United States v. McGee*, 714 F.2d 607, 613 (6th Cir. 1983) ("Normally, an evidentiary hearing is required before an injunction may be granted.").

The need for an evidentiary hearing is especially acute where, as here, "[t]he parties' experts disagreed over virtually every factual issue." Pet. App. at 9a. But rather than carefully sift through the parties' contrary evidence, rule on Petitioners' evidentiary objections, or assess the viability of the parties' expert witness testimony, the district court refused to conduct an

evidentiary hearing even though it admitted it was "a close question of first impression" whether the alleged harms were even cognizable under NEPA. *Id.* at 27a. Instead, the court heard "oral argument" on Respondents' request for a permanent injunction. *Id.* at 58a-59a. At that argument, the court announced its view that it was under no obligation to resolve the parties' evidentiary dispute over the likelihood of irreparable harm:

> So I'm not an environmental agency. I'm not the person who has to look and analyze and try to figure out, does this have an environmental impact or doesn't it. . . . It just seems to me that . . . I could be like a super environmental agency engaged in balancing all these different factors and coming to particular conclusions, which I feel particularly ill suited to do, number one. And number two, it isn't my job. . . . I should stop things in place until the Government has discharged its duty given to it by the right of Congress of the United States.

Id. at 417a.

In its permanent injunction order, the district court acknowledged that "intervenors have requested an evidentiary hearing, apparently so the Court can assess the viability of its witnesses' opinions regarding the risk of contamination if APHIS's proposed conditions are imposed." *Id.* at 67a. Nevertheless, the court reinforced the view it announced at oral argument, explaining that it "did not need to conduct an extensive inquiry,

involving scientific determinations, to determine what interim measures are necessary to protect the environment 'while the [government] conducts studies in order to make the very same scientific determinations.'" *Id.* at 17a. Ultimately, the district court concluded that holding an evidentiary hearing would require it "to engage in precisely the same inquiry [that] APHIS failed to do and must do in an EIS." *Id.*

But an agency's evaluation of environmental harm under NEPA is *never* the same inquiry as a court's determination of irreparable harm to the party seeking an injunction. Indeed, the traditional standard for granting an injunction "requires the plaintiff to show that in the absence of its issuance, *he will suffer* irreparable injury." *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975) (emphasis added). Thus, to obtain an injunction, plaintiffs must demonstrate that *they*--not the environment--will suffer irreparable harm. *See, e.g., Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000) (emphasizing that Article III remedies must redress an "injury to the plaintiff" rather than an "injury to the environment"); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 563 (1992) (holding that a plaintiff challenging a federal action must prove that she is "'directly' affected apart from [her] 'special interest' in th[e] subject").

In other words, the district court improperly conflated the purpose of an EIS under NEPA with the purpose of an evidentiary hearing before issuing an injunction. Under NEPA, "the purpose of an environmental impact statement is to provide full and fair discussion of significant environmental impacts and to inform decision makers and the public of reasonable

alternatives that would minimize adverse environmental impacts." *California ex rel. Lockyer v. USDA*, 575 F.3d 999, 1012 (9th Cir. 2009). In contrast, the goal of an evidentiary hearing before granting injunctive relief is to arrive at a "'nice adjustment and reconciliation' between the [parties'] competing claims" of injury resulting from "the granting or withholding of the injunction," by "balanc[ing] the conveniences of the parties and possible injuries to them" and "mould[ing] each decree to the necessities of the particular case." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) (citations omitted). By itself, an agency's failure to conduct the "hard look" required by NEPA before undertaking a particular action does not constitute irreparable injury to the plaintiff. *See Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1151 (2009) (holding that "depravation of a procedural right" is "insufficient"). And the mere fact that a government agency has been directed to conduct an independent review of environmental harm under NEPA provides no justification for ignoring this Court's holding that "an injunction should issue only where the intervention of a court of equity is essential in order effectually to protect property rights against injuries otherwise irremediable." *Romero-Barcelo*, 456 U.S. at 312.

Neither APHIS nor the USDA is a court of equity, and an administrative agency's subsequent analysis of environmental impacts under NEPA can never substitute for an evidentiary hearing to establish the grounds for injunctive relief in the first place.[2] In every

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[2] Devoid of any analysis of the Federal Rules or the history of equitable practice, the government's brief ignores this fundamental distinction, suggesting that an evidentiary hearing is unnecessary because the likelihood of success in an APA challenge

NEPA case, determining whether an injunctive remedy is appropriate requires a careful judicial balancing of the relative harm to the parties. *See, e.g., Lands Council v. McNair*, 537 F.3d 981, 1005 (9th Cir. 2008) (en banc) ("Our law does not . . . allow us to abandon a balance of harms analysis just because a potential environmental injury is at issue."). Likewise, as Petitioners rightly point out, a court's injunctive relief analysis is subject to a substantive narrow tailoring requirement, which simply does not apply for an agency performing an EIS under NEPA. *See* Pet. Br. at 47-48. Simply put, a judge cannot avoid the venerable procedural safeguards of equity merely because an administrative agency may later engage in a slightly similar analysis. And a district court may not issue a blanket, nationwide injunction without first resolving genuine disputes over the likelihood of irreparable harm under narrower, more tailored protective measures.

Here, the district court refused to allow Petitioners to confront and cross examine Respondents' expert witnesses. Likewise, the district court failed to analyze APHIS's and Petitioners' expert testimony as to the unlikelihood of any harm to Respondents under the government's proposed stewardship measures. Without the benefit of such an evidentiary hearing, the district court simply preferred Respondents' papers to those of

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is typically based solely on the administrative record. *See* U.S. Br. at 38-43. But the likelihood of success was no longer in dispute at the remedies stage, where the district court's adjudication of the parties' dispute over the appropriate remedy could be resolved only by reference to materials outside the administrative record. And "[a] hearing on the merits . . . does not substitute for a relief-specific evidentiary hearing." *Microsoft Corp.*, 253 F.3d at 101.

Petitioners. *See Sims*, 161 F.2d at 88 ("If witnesses are not heard, the trial court will be left in the position of preferring one piece of paper to another."). In so doing, the district court violated "the cardinal principle of our system of justice that factual disputes must be heard in open court and resolved through trial-like evidentiary proceedings." *Microsoft Corp.*, 253 F.3d at 101.

B. The Court of Appeals Erred In Affirming the Denial of an Evidentiary Hearing

Despite acknowledging that "generally, a district court must hold an evidentiary hearing before issuing a permanent injunction unless the adverse party has waived its right to a hearing or the facts are undisputed," Pet. App. at 17a, the appeals court purported to review the district court's factual "findings" and explicitly endorsed the district court's deprivation of Petitioners' right to an evidentiary hearing. *Id.* at 14a. In doing so, the Ninth Circuit offered two independent reasons why Petitioners were not entitled to a full evidentiary hearing before the injunction could issue. Both contentions are unavailing.

First, the court of appeals did not believe Petitioners "had established any material issues of fact that were in dispute in the case before the court." *Id.* at 17a. Yet even a cursory review of the record below belies this suggestion. In response to Respondents' request for a blanket, nationwide injunction, Petitioners offered voluminous evidence demonstrating that, under APHIS's proposed stewardship measures, the possibility of cross-pollination from Roundup Ready alfalfa seed fields to conventional alfalfa seed fields would be "extremely low"

and "de minimus." *Id.* at 227a-229a, 234a-235a. Specifically, Petitioners' experts estimated that the level of seed-to-seed transmission would be somewhere between 0.01% and 0.03%, if it occurred at all. *Id.* at 162a-163a. Petitioners' evidence also established that seed-to-hay cross-pollination was even less likely, since there has never been a single reported incident of cross-pollination from Roundup Ready alfalfa seed fields to conventional alfalfa hay crops. *Id.* at 408a-409a.

For their part, Respondents offered various second-hand anecdotal accounts of alleged cross-pollination, including declarations from farmers who subjectively feared that cross-pollination would occur. Even if accepted as true, however, Respondents' evidence suggested only that cross-pollination was possible, not that it would be likely under APHIS's proposed mitigation measures. *Id.* at 403a-407a. Petitioners objected to much of Respondents' evidence as inadmissible hearsay, but the district court never ruled on those objections and summarily denied Petitioners' request to cross-examine Respondents' experts. *Id.* at 60a-79a.

As the record makes clear, the parties sharply disputed whether and to what extent Respondents would be irreparably harmed in the absence of a blanket injunction. Indeed, in the same opinion in which it announced that there were no unresolved issues of material fact, the appeals court conceded that "[t]he parties' experts disagreed over virtually every factual issue relating to possible [irreparable] harm, including the likelihood of genetic contamination." *Id.* at 9a. Because the Ninth Circuit explicitly recognized that the parties disagreed over virtually every fact related to the

likelihood of irreparable harm, the only logical interpretation of its ruling is that the appeals court considers factual disputes over the likelihood of irreparable harm in the "run of the mill" NEPA case immaterial to the propriety of an injunction. Such a conclusion has no basis in the law.

Indeed, this Court has repeatedly articulated the burden a plaintiff must satisfy to obtain a district court's entry of a permanent injunction. "According to well-established principles of equity," a plaintiff seeking a permanent injunction must demonstrate, among other things, that "it has suffered an irreparable injury" and "that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted." *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006); *see also Romero-Barcelo*, 456 U.S. at 312 ("The Court has repeatedly held that the basis for injunctive relief in the federal courts has always been irreparable injury and the inadequacy of legal remedies.").

Nor is the need to establish a likelihood of irreparable harm somehow obviated in the NEPA context. Rather, in every NEPA case (as in every other case), a plaintiff must demonstrate that he is likely to suffer irreparable injury before an injunction can obtain. *See Winter*, 129 S. Ct. at 375 ("Our frequently reiterated standard requires plaintiffs seeking [injunctive] relief to demonstrate that irreparable injury is likely in the absence of an injunction."). The appeals court's opinion is inconsistent with this Court's understanding of injunctive relief as "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Id.* at 376 (citing *Mazurek v.*

Armstrong, 520 U.S. 968, 972 (1997) (per curiam)). As *Winter* confirms, a court contemplating an injunction under NEPA must always determine whether irreparable harm will follow in the absence of an injunction. Thus, contrary to the appeals court's view, disputed facts as to whether such harm is irreparable are always material.

Second, the appeals court held that a NEPA case differs from the "normal injunctive setting" because, unlike a "typical" injunction of "indefinite duration," an injunction under NEPA is temporary, lasting only until the agency concludes its preparation of an EIS. Pet. App. 17a-18a. But the right to an evidentiary hearing before an injunction can issue has *never* been linked to the expected duration of the injunction. Regardless of duration, every injunction is an "extraordinary and drastic remedy" that is "never awarded as of right." *Munaf v. Geren*, 128 S. Ct. 2207, 2219 (2008); *Microsoft Corp.,* 253 F.3d at 101 ("Other than a temporary restraining order, no injunctive relief may be entered without a hearing.") (citing Fed. R. Civ. P. 65).

Indeed, the right to a hearing attaches with equal force to *preliminary* injunctions, which by definition are temporary in nature. *See, e.g., Fengler v. Numismatic Americana, Inc.*, 832 F.2d 745, 747 (2d Cir. 1987) (holding that a hearing is required for a preliminary injunction if essential facts are in dispute); *Medeco Security Lock, Inc. v. Swiderek*, 680 F.2d 37, 38 (7th Cir. 1982) ("It is well established that, in general, a motion for a preliminary injunction should not be resolved on the basis of affidavits alone. Normally, an evidentiary hearing is required to decide credibility issues."); *Dopp,* 461 F.2d at 878-79 (vacating preliminary injunction because "the judge, without holding an evidentiary

hearing, resolve[d] the bitterly disputed facts in favor of the party who ha[d] the burden of establishing his right to preliminary relief"); *Sims*, 161 F.2d at 88 ("The issuance of a preliminary injunction under such circumstances is contrary not only to the Rules of Civil Procedure but also to the spirit which imbues our judicial tribunals prohibiting decision without hearing.").

Further, a permanent injunction is inherently "temporary" in that it will expire once the violation is remedied or the controversy is mooted. As this Court has recently held, once a violation has been remedied, "continued enforcement of the order is not only unnecessary, but *improper*." *Horne v. Flores*, 129 S. Ct. 2579, 2595-96 (2009) (emphasis added). Even when issued for grave constitutional violations, permanent injunctions "are not intended to operate in perpetuity." *Bd. of Educ. of Okla. City Pub. Schs. v. Dowell*, 498 U.S. 237, 248 (1991); *see also McGee*, 714 F.2d at 613 (recognizing that an evidentiary hearing is required for a permanent injunction unless there are no triable issues of fact).

Accordingly, the Ninth Circuit's strained attempt to conjure up different standards of equity for permanent versus preliminary injunctions--a distinction without a difference--fails as a matter of law and logic. *See Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 546 n.12 (1987) ("We fail to grasp the significance of this distinction. 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.").

II. NEPA'S PURPOSE DOES NOT MANDATE A SUBSTANTIVE INJUNCTION FOR A CURABLE PROCEDURAL DEFAULT

The appeals court affirmed the district court's ruling on the assumption that a NEPA violation should typically result in an injunction against an ongoing federal project until the agency has fully complied with NEPA. Under the appeals court's reasoning, since the finding of a NEPA violation almost always results in a requirement that the defendant agency conduct an additional environmental review, an injunction should issue "absent unusual circumstances" in the "run of the mill NEPA case." Pet. App. 12a, 55a-56a. As Judge Smith accurately noted in his dissent, "[t]here aren't many environmental cases that don't fit into the majority's newly created" rule for injunctions. *Id.* at 102a.

As explained above, however, this Court has unanimously rejected the notion that an injunction should issue except in an "unusual case," under "exceptional circumstances," or "in rare instances," as contrary to traditional principles of equity. *eBay Inc.*, 547 U.S. at 392-94 ("[This] Court has consistently rejected invitations to replace traditional equitable considerations with a rule that an injunction automatically follows [a statutory violation]"). More importantly, this Court has repeatedly rejected the notion that a mere procedural violation of an environmental statute automatically justifies an injunction of the underlying conduct pending further environmental review.

Rather, in evaluating the appropriateness of granting an injunctive remedy for a statutory violation, this Court has consistently looked to the statute's substantive scheme and purpose. The Court first announced this approach in *Weinberger v. Romero-Barcelo*, which involved an injunction issued to remedy a violation of the Clean Water Act (CWA), 33 U.S.C. §§ 1251-1376. *See* 456 U.S. at 305. In that case, the First Circuit reversed the district court's denial of an injunction to remedy the Navy's failure to obtain a national pollution discharge elimination system (NPDES) permit before conducting weapons training on an island off the coast of Puerto Rico. *Id.* at 310-11. Consulting the "substantive scheme and purpose" of the CWA, the Court emphasized that an injunction was not necessary to accomplish the statute's purpose, which the Navy could fulfill by simply complying with the permit requirement. *Id.* at 314-15. Thus, the Court agreed with the district court, which had ordered the Navy to apply for a permit but allowed the Navy to continue its activities without a permit. *Id.*

Six years later, in *Amoco Production Co. v. Village of Gambell*, this Court revisited the question of injunctive relief in the environmental context. In that case, the Ninth Circuit reversed the district court's denial of an injunction for a violation of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. §§ 1602-1784. Even though the agency had likely violated ANILCA by issuing oil and gas leases without first conducting environmental studies required by ANILCA, this Court reversed the Ninth Circuit, holding that "the Ninth Circuit erroneously focused on the statutory procedure rather than the underlying substantive policy the process was designed to effect."

Amoco Prod. Co., 480 U.S. at 544. Analyzing ANILCA's substantive requirements, the Court ruled that the Ninth Circuit's requirement of an injunction was improper because "compliance [with ANILCA] could be obtained through the simple means of an order to the responsible federal officer to comply," rather than by enjoining all activity until compliance had been achieved. *Id.* at 543 n.8.

This Court has long recognized that NEPA is a purely procedural statute that imposes no substantive environmental obligations on a federal agency's decision-making. *See, e.g., Winter*, 129 S. Ct. at 376 ("NEPA imposes only procedural requirements"); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) ("[I]t is now well settled that NEPA itself does not mandate particular results."). While "[o]ther statutes may impose substantive environmental obligations on federal agencies," NEPA merely "prohibits uninformed--rather than unwise--agency action." *Id.* Indeed, "[w]hether the federal agency ends up taking the 'major federal action' at issue has nothing to do with NEPA compliance; NEPA only requires that the agency follow a certain process in deciding whether to take the action." *Sierra Club v. Van Antwerp*, 526 F.3d 1353, 1361 (11th Cir. 2008).

Because NEPA is concerned solely with ensuring an agency's fidelity to procedure, "[s]ubstantive issues like whether to grant the permits and what mitigation conditions to adopt are *irrelevant* to NEPA compliance." *Id.* at 1362 (emphasis added). So long as the proper procedure is followed, then, an agency is simply not constrained by NEPA, regardless of the alleged severity of environmental harm. *See, e.g., Robertson,* 490 U.S. at

350 ("[I]t would not have violated NEPA if the Forest Service, after complying with the Act's procedural prerequisites, had decided that the benefits to be derived from downhill skiing at Sandy Butte justified the issuance of a special use permit, notwithstanding the loss of 15 percent, 50 percent, or even 100 percent of the mule deer herd."); *Van Antwerp*, 526 F.3d at 1361-62 ("In this case, it would not violate NEPA if the EIS noted that granting the permits would result in the permanent, irreversible destruction of the entire Florida Everglades.").

At most, NEPA requires only that a federal agency prepare an EIS for every "major Federal action[] significantly affecting the human environment." 42 U.S.C. § 4332(2)(C). Beyond forcing an agency to take a "hard look" at environmental impacts, a court acting pursuant to NEPA "cannot 'inject itself within the area of discretion of the executive as to the choice of action to be taken.'" *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227-28 (1980) (per curiam) (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976)); *see also Earth Island Inst.*, 129 S. Ct. at 1151 (holding that mere "depravation of a procedural right" is "insufficient" to establish harm to plaintiff).

In light of NEPA's explicitly narrow procedural purpose, nothing in the text of NEPA mandates an injunction against all work on a federal project until the federal agency has taken NEPA's "hard look" at environmental impacts. If a federal agency fails to take NEPA's mandated "hard look" at environmental impacts, the most appropriate remedy is to require the agency to take that "hard look." Here, the purpose of NEPA is being achieved through APHIS's extensive

environmental assessment during the completion of an EIS. In the interim, NEPA's purpose does not justify a blanket, nationwide injunction against all further use of Roundup Ready alfalfa. And because any NEPA deficiency is being cured by APHIS's completion of an EIS, the procedural purpose of NEPA does not warrant a substantive permanent injunction against the further use of Roundup Ready alfalfa.

CONCLUSION

Amici curiae request that the Court reverse the judgment below.

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