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

REPLY BRIEF FOR PETITIONERS

B. ANDREW BROWN
DORSEY & WHITNEY LLP
50 South Sixth Street
Suite 1500
Minneapolis, MN 55402
(612) 340-5612
Counsel for Forage Genetics International, LLC, Daniel Mederos, and Mark Watte

GREGORY G. GARRE
Counsel of Record
MAUREEN E. MAHONEY
RICHARD P. BRESS
PHILIP J. PERRY
J. SCOTT BALLENGER
DREW C. ENSIGN
LATHAM & WATKINS LLP
555 11th Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2207
gregory.garre@lw.com
Counsel for Monsanto Co.

Additional Counsel Listed on Inside Cover

CHARLES B. VON FELDT
FORAGE GENETICS
INTERNATIONAL, LLC
1080 West County Road F
Shoreview, MN 55126

Counsel for Forage Genetics International, LLC

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES—Continued

STATUTES AND REGULATIONS

TABLE OF AUTHORITIES—Continued

Page(s)

OTHER AUTHORITY

ARGUMENT

The Ninth Circuit's decision in this case affirms a nationwide injunction on the use of Roundup Ready alfalfa ("RRA") that is fatally flawed in numerous respects and profoundly out of step with this Court's precedents. Respondents do not seriously defend the fundamental errors of law that drove the Ninth Circuit's decision and occasioned this Court's review. Instead, respondents focus their efforts on avoiding review of the Ninth Circuit's decision altogether and in recharacterizing the Ninth Circuit's ruling. Those efforts should be rejected.

Respondents' standing argument—which they did not make in their brief in opposition to certiorari—is misguided. This Court's decisions endorse the common-sense principle that an injunction imposes a distinct legal injury on those subject to it, thus conferring standing to challenge it. The injunction in this case is no different. And that injunction is part and parcel of the vacatur order on which respondents now focus—and, indeed, is part of the same *judgment* that is on appeal in this case. Pet.App.108a-10a. The injunction defines the scope of the vacatur. That is underscored by the fact that the injunction allows the continued use of RRA planted before March 30, 2007, even though the use of any RRA would be unlawful if the vacatur order had the effect now hypothesized by respondents to avoid review here. Contrary to respondents' view, petitioners' appeal of the judgment validly challenged the scope of the vacatur as well.

Respondents' attempt to avoid scrutiny of the Ninth Circuit's actual approach by recasting the decisions below as routine applications of the familiar four-factor test fares no better. No matter how loudly

respondents proclaim that the lower courts "did not even *suggest*" (Resp.Br.25) that NEPA cases are different, they cannot account for what those courts actually said and did. The district court declined to engage in any serious inquiry into the likelihood of irreparable harm because the court believed that it was not "[its] job" (Pet.App.417a) to undertake such an inquiry in a NEPA case in which the agency was going to conduct an EIS anyway. And in affirming the injunction the Ninth Circuit expressly followed its own prior holdings that courts considering injunctive relief in the NEPA context should avoid "duplicat[ing]" the efforts that an agency may undertake in conducting an EIS and that injunctions are appropriate for NEPA violations except in "unusual" cases. Pet.App.12a, 18a-19a. In other words, just as in *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 393 (2006), it is immaterial whether the courts below correctly "recited the traditional four-factor test," because they rested their decisions on "expansive principles" that would change the ground rules for injunctions in a category of cases—here, NEPA cases.

Finally, respondents' psychological *fear* that RRA will lead to the extinction of all non-RRA alfalfa cannot override the record evidence—and science on which it is based—establishing that this will not happen. As we have explained, the risk of *any* harm from RRA cross-pollination is exceedingly small. Even in the unlikely event that cross-pollination does occur, it will not change the constitution of *any* existing alfalfa plant. Pet.App.147a. The risk is only that a cross-pollinated plant will produce seeds that could grow into RRA plants. But those seeds, if unwanted, can be identified through inexpensive testing and destroyed. The

suggestion that RRA will spread like wildfire and eliminate varieties of conventional alfalfa is entirely unfounded. Pet.App.320a, 385a-87a, 409a-10a.

Once these arguments are put aside, respondents have little to say about the legal issues that are actually presented. For example:

- Respondents do not defend the Ninth Circuit's erroneous view that a court may enjoin the underlying activity when a NEPA violation exists without finding likely irreparable injury because the agency might be analyzing potential environmental harms in its EIS process.
- Respondents do not dispute that the chances of any RRA cross-pollination in alfalfa that is grown for hay—which accounts for 99% of alfalfa acreage—is 400,000-to-one and that there is no record evidence it has ever occurred.
- Respondents do not dispute that, with use of APHIS's proposed isolation distances, material cross-pollination from RRA seed crops is unlikely, and that cross-pollination from RRA seed crops has never resulted in any actual commercial harm or loss of organic certification.
- And respondents do not defend the district court's refusal to consider alternative isolation distances or disavow their prior concession that "five mile" or "several" mile isolation distances would provide a "zero tolerance" approach.

Especially in light of these important omissions, sustaining the injunction at issue would represent a stark departure from the principles that this Court reaffirmed just last Term in *Winter v. NRDC*, 129 S. Ct. 365 (2008). The judgment below should be

reversed, and the case remanded with instructions to enter APHIS's proposed remedy.

I. PETITIONERS HAVE STANDING TO APPEAL THE INJUNCTION

Respondents contend that petitioners, though parties subject to the injunction, have no standing to challenge it. That argument is flawed on several levels.

First, the district court's vacatur order is inextricably tied to the scope of the injunction and, indeed, is part of the same *judgment*. Pet.App.108a-10a. The terms of the injunction modify—and limit—the terms of the vacatur. If the district court had vacated the deregulation order in its entirety, that would have made it unlawful not only to plant new RRA but also to cultivate and sell RRA that had previously been planted. 7 C.F.R. §340.0. But by its terms, the judgment explicitly *allowed* the continued use of "alfalfa planted before March 30, 2007." Pet.App.108a-09a. Thus, the district court's judgment necessarily effects a *partial* deregulation in which the scope of the vacatur is coextensive with, but no broader than, the scope of the injunction. When petitioners appealed the judgment and argued that the injunction was invalid, they therefore appealed and challenged the scope of the vacatur as well.[1]

---

[1] The government's interim injunctive measures were expressly framed as a limitation on the scope of the vacatur. *See* Pet.App.184a ("Pursuant to the Order, [APHIS's nonregulation order] is hereby vacated *and replaced by the terms of this judgment*.") (emphasis added). Petitioners have consistently argued that the district court erred in not adopting those measures. And, in response to respondents' contention on appeal that the district court could not adopt the government's proposed measures, petitioners likewise argued both that the district court

Second, even if the judgment had effected a *complete* vacatur, the injunction is broader, and inflicts independent harm on petitioners. The injunction additionally prohibits APHIS from deregulating RRA "even in part" without preparing an EIS (or taking other regulatory action to permit commercial RRA planting). Pet.App.108a; *see* Pet.App.75a. But for this additional component of the injunction, APHIS could have implemented an interim solution allowing continued planting. Pet.App.184a-87a. APHIS's declarations make that crystal clear. Pet.App.158a-67a; *see also* U.S.Br.9-10, 36-37. Whatever else is true about the scope of the vacatur, the district court's preclusion of that additional option caused petitioners an independent and concrete harm.

Third, and in any event, it is black letter law that the entry of an injunction prohibiting the same conduct imposes an independent judicial constraint—and thus inflicts an independent legal injury—that petitioners have standing to challenge on appeal. *See Horne v. Flores*, 129 S. Ct. 2579, 2592 (2009) (named defendant, found liable and enjoined, "[f]or these reasons alone, … has alleged a sufficiently 'personal stake in the outcome of the controversy' to support standing" to challenge the injunction) (citation omitted); *id.* (citing and quoting with approval *United States v. Sweeney*, 914 F.2d 1260, 1263 (9th Cir. 1990) (rejecting as "frivolous" the argument that a party does not have "standing to object to orders specifically directing it to take or refrain from taking action")). That is why a court must *always* apply the four-factor test before entering the

---

did not "simply vacate[] the deregulation decision" and that APHIS's proposed measures operated to modify the deregulation order. Docket No. 50 at 15-16 (9th Cir. Mar. 27, 2008).

"extraordinary and drastic remedy" of an injunction absent explicit statutory direction otherwise. *Munaf v. Geren*, 128 S. Ct. 2207, 2219 (2008); *see also* 28 U.S.C. §1292(a) (appeal of injunction is matter of right).

This Court's cases illustrate this principle. In *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982), for instance, it was not disputed on appeal that the Navy's training exercises involved "discharge[s] of pollutants," and that the Clean Water Act ("CWA") prohibited those discharges without a permit. *Id.* at 308-09. But even though the CWA thus prohibited the Navy's further training exercises of its own legal force, this Court entertained the Navy's challenge to the propriety of an injunction addressed to the same conduct, and reversed the First Circuit's decision mandating that injunction, without suggesting that the question was moot or that the government lacked standing to appeal. *Id.* at 311-19.

Ultimately, respondents' attempt to insulate the Ninth Circuit's decision from review altogether by attacking petitioners' standing to appeal suggests they had a different observation from their favorite "legal philosopher" (Resp.Br.23) in mind: "There must be some kind of way out of here." Bob Dylan, *All Along The Watchtower* (Columbia 1967). Alas for respondents, their standing argument gets them nowhere.

II. THE INJUNCTION IS FATALLY FLAWED

Respondents insist that this case involves merely a fact-bound disagreement over a district court's routine application of the four-factor test for injunctive relief. That suggestion is no more convincing now than it was in their brief in opposition to certiorari.

A. The Lower Courts Abdicated Their Duty To Adjudicate The Likelihood Of Irreparable Environmental Harm

Respondents argue that, because the lower courts recited the four-factor test, they must have applied it faithfully. *See generally* Resp.Br.25-35. The same argument was rejected in both *eBay* and *Winter*. *eBay*, 547 U.S. at 393-94; *Winter*, 129 S. Ct. at 374-82. And the argument likewise fails here.

The courts below proceeded on the premise that no serious inquiry into likelihood of irreparable harm is necessary to justify an injunction in a NEPA case pending the agency's preparation of an EIS. The district court stated that it was "not the person who has to look and analyze and try to figure out, does this have an environmental impact or doesn't it," and that such an inquiry "isn't [its] job." Pet.App.417a. The court then confirmed in its permanent injunction order that it would not "conduct ... the very same scientific inquiry it [had] ordered APHIS to do," Pet.App.68a; *see also* Pet.App.417a, and that an injunction is warranted in "'the run of the mill NEPA case,'" Pet.App.65a (citation omitted). The latter remark was not, as respondents suggest (Resp.Br.27), an "empirical observation"; it was the second sentence of a section of the court's opinion entitled "**LEGAL STANDARD**." Pet.App.65a. Further, the court's order relied explicitly on the Ninth Circuit's teaching in *Idaho Watersheds Project v. Hahn*, 307 F.3d 815 (9th Cir. 2002), that it would be "'odd'" to "'to conduct an extensive inquiry … while the [government] conducts studies in order to make the very same scientific determinations.'" Pet.App.68a (quoting *Idaho Watersheds*, 307 F.3d at 831) (alteration in original).

The Ninth Circuit expressly adopted the same analytical framework. Although the court acknowledged that "[t]he parties' experts disagreed over virtually every factual issue relating to possible environmental harm," Pet.App.9a, it affirmed the district court's holding that petitioners "had [not] established any material issues of fact" necessitating a hearing *because* "the disputed matters [were] issues more properly addressed by the agency in the preparation of an EIS," Pet.App.17a-18a. And, like the district court, the Ninth Circuit invoked *Idaho Watersheds*' holding that, in a NEPA case, requiring such analysis by federal courts would improperly "duplicate the [agency's] efforts." Pet.App.18a-19a.[2]

Respondents suggest that, because this reasoning is contained in the part of the decision holding that petitioners could be deprived of an evidentiary hearing, it does not reflect how the court of appeals approached its injunctive relief analysis. Resp.Br.33. Not so. The Ninth Circuit's view that a district court need not trouble itself with resolving material disputes over the likelihood of irreparable harm before entering a

---

[2] Following the Ninth Circuit's lead in this case, district courts under its supervision continue to believe that stand-still injunctions should reflexively issue in NEPA cases while additional environmental review is conducted. *See*, *e.g.*, *Center for Food Safety v. Schaffer ("CFS")*, No. C 08-00484 JSW, Order at 7 (N.D. Cal. Mar. 16, 2010) (stating its initial inclination "while the environmental review is pending … to order the Intervenor-Defendants to take all efforts, going forward, to use conventional seed" in a case involving Roundup Ready sugarbeets); *id.* at 4-5 (reasoning that *Geertson* calls for injunctive relief in any "typical NEPA case"); *see also* American Sugarbeet Growers Ass'n Br.7-8 (explaining that "*Geertson* had a pivotal, deleterious impact on the sugarbeet litigation").

NEPA-based injunction infected its entire analysis—and it explains why the panel majority was perfectly comfortable with the district court's express refusal to engage on that issue. Pet.App.1a-20a. Moreover, in reviewing the "Scope of the Permanent Injunction," Pet.App.10a (heading), the Ninth Circuit explicitly invoked its precedent holding that an injunction should issue in a NEPA case absent "unusual circumstances." Pet.App.12a; Pet.Br.30 n.10.

Respondents' effort to side-step *Amoco*, *Winter*, and *Weinberger* is also unavailing. It is irrelevant that *Amoco* and *Weinberger* involved an "appellate court [that] had overturned a district court" that refused to issue an injunction. Resp.Br.34. The courts erred in those cases not because they failed to respect the district courts' discretion, but because they directed injunctions without proof of irreparable injury. Thus, when this Court in *Winter* reversed the Ninth Circuit's *affirmance* of the district court's injunction, it found *Weinberger* and *Amoco* fully applicable. *Winter*, 129 S. Ct. at 374-82. The very same legal error pervades the lower courts' decisions in this case. By refusing to examine the likelihood of irreparable harm *themselves*—and instead punting that critical issue to APHIS's EIS process—the courts below improperly equated a procedural violation of NEPA with a finding of irreparable substantive harm. Pet.Br.27-33.

While respondents seem incredulous that anyone could interpret the decisions below as short-circuiting the requisite inquiry into likelihood of irreparable harm based on the finding of a NEPA violation, they urged the lower courts to do just that. Respondents told the district court that "'fail[ure] to evaluate the environmental impact' … *by definition* constitutes

'irreparable injury,'" Docket No. 119 at 7 (N.D. Cal. Mar. 7, 2007) (emphasis added) (citations omitted), and they contended on appeal that "[i]n the NEPA context, procedural injury suffices to establish irreparable injury." Docket No. 38, at 38 (9th Cir. Feb. 25, 2008). That worked in the Ninth Circuit. But this Court has squarely rejected the notion that a procedural violation of NEPA or similar statutes creates a presumption of irreparable environmental harm, much less that such a procedural violation itself constitutes a harm justifying injunctive relief. *See* Pet.Br.26-27.[3]

B. The Injunction Is Not Based On A Requisite Injury To The Environment

Respondents do not answer petitioners' argument that respondents failed to demonstrate that *they* would be likely to suffer irreparable harm from continued planting of RRA—other than to admit that it is "common ground" that they were required to make that showing. Resp.Br.26. That showing is not only a traditional requirement for equitable relief, *see*, *e.g.*, *Winter*, 129 S. Ct. at 374, but also a prerequisite for standing to seek that relief. Pet.Br.40-41; *Lewis v. Casey*, 518 U.S. 343, 357-58 (1996). Because respondents undeniably failed to "establish[] that at least one identified [plaintiff] had suffered or would suffer harm," they lack standing to pursue equitable relief and the injunction must be vacated for that

---

[3] Even in this Court respondents eventually slip into old habits and suggest that the "particular type of case" (here, NEPA) should make a difference in deciding whether injunctive relief is appropriate. Resp.Br.28 n.14. This Court has repeatedly rejected that argument in the very context in which this case arises.

reason alone. *Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1151 (2009).

Even if respondents could show that *they* had been harmed in some way, however, the injunction would still be invalid because the potential injuries they posit are not harms *to the environment*. Respondents do not dispute the FDA's conclusion that RRA is safe for humans and livestock. They do not contend that RRA cross-pollination (if it occurred) would injure any existing conventional alfalfa plant. And they recognize that occasional propagation from such cross-pollination (if that occurred) would not be a cognizable injury to the plant species, since "*isolated injuries to individual members* of an established species" are not, without more, environmental harm. Resp.Br.39.

Respondents insist that, because of cross-pollination with RRA, individual organic farmers may sometimes be unable to sell their produce *at an organic premium*. They have not shown that any organic farmers are likely to suffer meaningful levels of RRA cross-pollination or that the trace presence of RRA in organic crops has ever actually affected its market value. *See infra* at 15-16. But even if respondents could substantiate their fears, the diminution in the *price* that a seller's goods can fetch in the marketplace is a commercial harm, not an injury to the environment cognizable under NEPA.

Respondents protest that, although "NEPA is not intended to address 'economic or social effects * * * *by themselves*,'" where "those effects 'are interrelated' with 'natural or physical environmental effects,' agencies must consider them in an EIS." Resp.Br.40. But to fall within NEPA's scope, the economic or social effects must derive from an underlying harm to the

physical environment. In *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 777-78 (1983), for example, continued operation of the Three Mile Island facility was "an event in the physical environment," but this Court refused to permit a NEPA challenge to it because that physical event was connected to alleged harm only through psychology. The same is true here. The interspersion of a trace of RRA in an organic farmer's fields would cause the *environment* no injury whatsoever, and the financial harm to the farmer, if any, would derive from the psychological preferences of organic consumers. The commercial protection of organic farmers is not an interest that NEPA was enacted to address (and such commercial harm would not be irreparable anyway).

Perhaps because potential effects on a farmer's sales price are so patently a commercial rather than environmental concern, respondents also invoke potential effects on the farmer's ability to grow the crops of his choosing. They adopt the district court's pronouncement that "'[f]or those farmers who choose to grow non-genetically engineered alfalfa, the possibility that their crops will be infected with the engineered gene is tantamount to the elimination of all alfalfa; they cannot grow their chosen crop.'" Resp.Br.41 (quoting Pet.App.44a) (alteration in original). That argument is unavailing.

First, a mere "possibility" that a harm could occur is *not* "tantamount" to that harm occurring. *See Metropolitan Edison Co.*, 460 U.S. at 775 ("A risk is, by definition, unrealized in the physical world."). *Second*, individual instances of cross-pollination are not "tantamount" to the elimination of all conventional alfalfa. *Third*, to the extent it affects any interest that

is not wholly commercial, the disappointment of an organic farmer's desire to grow 100% RRA-free alfalfa would not inflict any injury *on the environment*.

NEPA injunctions are not available for intangible injuries that are purely ideological or based on policy objections to federal action, no matter how intensely held. *Weinberger*, 456 U.S. at 311-12; *Metropolitan Edison Co.*, 460 U.S. at 777. And although respondents sought the injunction because they "fear" that RRA could "caus[e] conventional alfalfa to disappear," Pet.App.4a, even respondents now acknowledge that "plaintiffs' *fear* of an environmental impact" is "non-cognizable" under NEPA. Resp.Br.41 n.20.

C. Respondents Have Not Established A Likelihood Of Irreparable Harm

Respondents insist that the injunction is grounded on a finding of the requisite "likely" irreparable harm.[4] But respondents do not deny that when the district court found a "*sufficient[]* likel[ihood]" of irreparable harm (before *Winter*), Ninth Circuit law deemed a mere "possibility" of such harm sufficient. Pet.Br.41-42

---

[4] Respondents claim that "likely" cannot possibly mean "'more likely than not.'" Resp.Br.36 n.18. *Webster's* begs to differ. *Webster's Third New International Dictionary* 1310 (1993) (defining "likely" as "having a better chance of existing or occurring than not" (definition 2b)); *see also Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987) (stating alleged irreparable harm must be "probable"). Indeed, just one month before they filed this brief, two respondents conceded that "'[l]ikely' means 'having a better chance of existing or occurring than not.'" *CFS*, Reply in Support of Mot. for Prelim. Inj. at 17 n.28 (N.D. Cal. Feb. 19, 2010) (citation omitted). At any rate, the harm alleged here is at best "possible" and exceedingly *unlikely*. That is plainly insufficient under *Winter*. 129 S. Ct. at 374-75.

(emphasis added). Respondents also do not deny that the district court consistently used language connoting mere possibility, describing "potential" harms that "could" occur. Pet.Br.41-42, 44-45. Respondents slip and use the same language when describing their arguments and evidence.[5]

Most important, respondents do not account for the overwhelming record evidence that any cognizable harm from the continued use of RRA is extremely *un*likely. Respondents do not dispute the scientific evidence that cross-pollination from RRA grown for hay—accounting for more than 90% of RRA—is "virtually non-existent" (Pet.App.229a) or "essentially zero" (Pet.App.164a). Pet.Br.42-45. Nor do respondents contend that cross-pollination from RRA hay crops has *ever* occurred or that it is at all likely to occur. Respondents do suggest that "unpredictable weather" might prevent harvesting before bloom and "increase[] the probability" of cross-pollination. Resp.Br.11. But to be clear, to risk any cross-pollination from hay one would have to hypothesize several *weeks* if not *months* of rain—enough to prevent the mowing of both hay fields before flowering *and* further to prevent the mowing of the conventional field while a seed was maturing (which itself takes months). That is why the experts testified that the possibility of cross-pollination from hay with APHIS's measures in place is virtually zero. Pet.Br.43-45.

---

[5] *See*, *e.g.*, Resp.Br.11 ("human error could cause inadvertent contamination"); Resp.Br.12 ("may cause contamination"); *id.* ("may not be able to cut"); Resp.Br.13 ("potential for human error"); Resp.Br.29 ("other circumstances that could impair the effectiveness of APHIS's proposed conditions"); Resp.Br.41 ("potential economic injury").

Respondents also fail to rebut the scientific evidence that, with use of APHIS's proposed stewardship measures, meaningful cross-pollination from RRA seed crops is distinctly *im*probable. Pet.Br.45-47.[6] Respondents point to third-hand anecdotal accounts involving two growers, Dairyland and Cal/West. Those accounts went untested because petitioners never were afforded an evidentiary hearing and opportunity to cross-examine the witnesses who repeated them. But even if they were credited, the accounts at most demonstrate only that some non-organic farms experienced low levels of RRA cross-pollination. Dairyland, for example, allegedly detected RRA cross-pollination at levels ranging only from "trace" to 0.9%. JA-1018, 1024. This cross-pollination affected only 11-16 of Dairyland's roughly *thousand or more* fields. Pet.App.398a-400a, 408a. Because Dairyland's contracts and internal standards permitted levels of "adventitious presence" of up to 1%, this

---

[6] Respondents argue that, under the CEQ regulations, even immaterial adverse impacts on the environment categorically require an injunction whenever a procedural violation of NEPA is shown. Resp.Br.49-50. But there is no reason to read the regulations' reference to "an adverse environmental impact" (40 C.F.R. §1506.1(a)(1)) to include *immaterial* impacts. And this Court's precedents make clear that they cannot be given that absurd reading. Indeed, in *Winter* this Court held that the injunction at issue was not required pending the completion of an EIS even though the Navy's own EA estimated that the training exercises at issue would "result in 564 instances of physical injury including hearing loss … and nearly 170,000 behavioral disturbances." *Winter*, 129 S. Ct. at 392 (Ginsburg, J., joined by Souter, J., dissenting); *see id.* at 372; *see also Weinberger*, 456 U.S. at 311 (the extraordinary remedy of injunction is not available for injuries that are "'merely trifling'") (citation omitted).

cross-pollination was immaterial and caused no harm. Pet.App.407a. Nor do respondents contend otherwise.

The Cal/West allegations involve only two alleged instances of cross-pollination, neither of which caused any harm. The first instance was similarly at immaterial levels (0.1-0.3%). Pet.App.405a. And the second only exceeded 1% (0.5-1.5%) because the crop was inadvertently planted a mere *200 feet* from an RRA seed field—far closer than allowed under APHIS's proposed isolation distances of 1500 feet and three miles. Pet.App.161a, 406a; JA-673. And even that experience caused no actual harm. Pet.App.406a. Cal/West specifically consented to leaving the fields in place for the 2005 growing season precisely because—far from representing a dire threat—it neither caused nor threatened any harm. *Id.*

Ultimately, respondents do not contest that "[t]here is no evidence that *any* farmer lost *even a single* sale" or that no grower has "ever lost organic certification." Pet.Br.3, 39. Indeed, they admit that, even though RRA was planted for 21 months without any government restrictions, tangible harm from cross-pollination has "yet to occur." Resp.Br.41. It is difficult to think of more probative evidence of the *absence* of a likelihood of irreparable harm while an EIS is prepared under APHIS's proposed restrictions.

Lacking any evidence of likely irreparable harm, respondents hypothesize various scenarios whereby cross-"contamination" of non-RRA alfalfa stocks *could* occur, such as by "flooding," seed spillage during transport, "accidental seed mixing … within a seed processing facility," "inadequate equipment cleaning," from "feral alfalfa," or by the actions of "[w]ild pollinators." Resp.Br.11-13 & n.7. Even the Ninth

Circuit and district court in this case placed no weight on these possibilities, since none are likely to have much impact. Pet.App.235a-39a, 397a-98a, 413a.[7] The mere enumeration of potential risks does not satisfy respondents' burden to prove likely irreparable harm.

While respondents continue to suggest that the use of RRA could "irreversibly alter[]" alfalfa (Resp.Br.38) and, indeed, even lead to the "elimination of all alfalfa" (Resp.Br.41), they provide no evidence to support this science fiction-like hypothesis. And respondents certainly point to no evidence that such an extinction event is "likely." *See* Pet.Br.34-35. Nor could they. Even the district court recognized that RRA's market presence was expected to increase at most to 5% while the EIS was being prepared. Pet.App.64a; JA-621. RRA's only selective advantage is glyphosate resistance, Pet.App.398a, which is no advantage at all in the fields of organic farmers who do not use glyphosate. Pet.App.263a-64a, 401a. And farmers who want to prevent intermixing of RRA with their conventional or organic crops can easily and inexpensively test for RRA presence and take measures to eliminate any RRA from their stocks. Pet.App.181a-83a, 262a, 277a, 410a-11a; JA-623-24.

Finally, respondents err in suggesting that petitioners' willingness to accept APHIS's proposed injunction means that petitioners have conceded that RRA poses "at least some degree of irreparable harm." Resp.Br.31 n.15, 37-38. In *Winter*, the Navy similarly

---

[7] The lower courts also rightly ignored respondents' anecdotal stories of cross-pollination involving other genetically engineered crops and grasses, *e.g.*, Resp.Br.13, 39, because those crops have different biologies, methods of pollination, and customary stewardship measures. Pet.App.380a-85a.

focused its argument on the absence of likely irreparable harm with certain uncontested protective measures in place. 129 S. Ct. at 376. As in *Winter*, petitioners' decision to accept a *tailored* injunction does not concede the existence of likely irreparable harm in the absence of an injunction, much less the validity of the blanket injunction at issue.[8]

D. The Injunction Is Vastly Overbroad

Respondents do not dispute that the district court had an obligation to narrowly tailor relief. Pet.Br.47-50. This duty required the court to consider APHIS's proposed measures, including isolation distances. *Id.* Respondents do not contest that "*some* isolation distance would prevent any possibility of cross-pollination." Pet.Br.49. To the contrary, they have expressly acknowledged in recent EIS Comments that "*[r]easonable alternatives* may exist for mitigating these risks [of cross-pollination], *such as isolation distances* and geographic restrictions." USDA-APHIS, Docket No. APHIS-2007-0044, Comments of Center for Food Safety at 8 (Mar. 3, 2010) (emphasis added). And earlier in this litigation respondents conceded "'5-mile' or 'several miles' isolation distances

---

[8] Some of respondents' *amici* suggest, as an alternative rationale for the injunction, that further RRA planting may hasten the development of weeds resistant to glyphosate. The district court did not so find, and even respondents do not advance that argument here. For good reason. There is no evidence that the predicted expansion of RRA to a 5% market share during the period before an EIS is issued would in and of itself have any appreciable effect on the development of glyphosate-resistant weeds, and there are time-honored means of protecting against the risk of the development of weed resistance in any event. Pet.App.401a; JA567-70.

would establish a 'zero tolerance' standard." Pet.Br.49 (citation omitted). Yet, after rejecting APHIS's proposal, the district court categorically refused to "get into … isolation distances" (Pet.App.192a) and enjoined all cultivation of RRA—anywhere—even where it is hundreds of miles away from any conventional or organic crop. Pet.Br.49.

Respondents suggest that the court was justified in rejecting APHIS's particular proposal because no deference is owed an agency's expert judgment outside the context of an administrative rule or order. Resp.Br.46-48. The better view is that the expert agency's proposed measures were entitled to deference. US.Br.35-38; *see Winter*, 129 S. Ct. at 377-78 (relying on expert affidavits from Navy officers). But in any event, the district court erred in failing to consider APHIS's proposed measures because a district court *always* has a duty to consider whether a narrower injunction would be sufficient and there was no evidence that irreparable harm was likely with APHIS's proposed measures in place. *Supra* at 13-18.

E. This Court Should Remand With Instructions To Enter APHIS's Proposed Remedy

Because the record fails to establish a likelihood of irreparable environmental harm under APHIS's proposed injunction, this Court should reverse and order the court of appeals to direct the district court to enter those terms on remand. Such specific instructions would not intrude on the "equitable discretion [of a] district court[]," Resp.Br.50, because district courts have no discretion to impose injunctive relief unnecessary to prevent likely irreparable harm. *Winter*, 129 S. Ct. at 374-75. This Court thus had no

difficulty in *Winter* expressly vacating the injunction "to the extent it has been challenged by the Navy." *Id.* at 382. The same result should obtain here. Indeed, the Ninth Circuit has already refused to heed this Court's decision in *Winter*. Pet.Br.21, 41. And the ill-conceived injunction at issue has already been in place for *three years*. There is no reason to send this case back to the Ninth Circuit for more delay.

III. AN EVIDENTIARY HEARING WAS REQUIRED IN THIS CASE

The government and respondents have no response to petitioners' demonstration that the Federal Rules of Civil Procedure required an evidentiary hearing before the district court could resolve any genuine factual dispute over the likelihood of irreparable harm. Pet.Br.24-25, 51-57. Indeed, they avoid even mentioning or citing the Federal Rules. Resp.Br.51-59; U.S.Br.39-42. The absence of any response concedes what the text makes clear: absent waiver the Federal Rules require district courts to resolve genuine disputes of material fact through evidentiary hearings. *See* Fed. R. Civ. P. 56. Because Congress clearly has the authority to require the courts to provide procedural safeguards above the constitutional floor, there is no need to determine whether petitioners were also entitled to a hearing as a matter of due process. *Cf. Northwest Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504, 2513 (2009).

In any event, an evidentiary hearing was required as a matter of due process as well. The government acknowledges that trial-based adversarial proceedings are generally required whenever there are genuine disputes over material issues of fact and that this requirement applies with full force to remedial

proceedings. U.S. Br.39. But the government and respondents ask the Court simply to carve-out a categorical exception for suits filed under the APA. That argument should be rejected.

First, respondents are mistaken in suggesting that the right to an evidentiary hearing in equitable proceedings lacks sufficient historical pedigree. Respondents admit that this right was originally codified in the Judiciary Act of 1789 and that, while a statute passed in 1802 permitted equity courts to revert to decision on written depositions for the first half of the nineteenth century, "[t]estimony in open court" was "introduced with … rigor in equity trials" in "1848, with the merger of law and equity under the Field Code." Resp.Br.53-55. These developments led Congress in 1912 to restore the federal statutory right to hearings in equity—a right that has been recognized continuously for an unbroken 98-year period. Neil Fox, Note, *Telephonic Hearings in Welfare Appeals: How Much Process is Due?*, 1984 U. Ill. L. Rev. 445, 452 (1984). And the lower courts have widely recognized that the "cardinal principle" that material factual disputes must be resolved through evidentiary proceedings applies to material disputes bearing on injunctive relief as well. *E.g.*, *United States v. Microsoft Corp.*, 253 F.3d 34, 101 (D.C. Cir.) (en banc), *cert. denied*, 534 U.S. 952 (2001).[9]

---

[9] Respondents' effort (Resp.Br.56) to distinguish *Microsoft* is unavailing. The en banc D.C. Circuit's recognition that parties are entitled to an evidentiary hearing to resolve material issues of disputed fact bearing on the entry of injunctive relief was not even arguably limited to the facts of that case or the impact of the proposed relief there. *See Microsoft*, 253 F.3d at 101 (noting exception only for TROs).

Second, the government and respondents improperly ignore fundamental constitutional distinctions between Article III courts and administrative agencies when they insist that due process requires no more in a case challenging agency action than in the underlying administrative proceedings. This Court has approached due process constraints on *agency* action by asking what "*judicial-type procedures* must be imposed upon *administrative action* to assure fairness." *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976) (emphasis added); *see also Goldberg v. Kelly*, 397 U.S. 254 (1970) (extending judicial requirement of evidentiary hearings and cross-examination to administrative welfare proceedings). But the Court has never suggested that whatever is sufficient for an agency is good for the *courts* too.

Third, the government's distinction between disputes involving "scientific" and "economic" facts, and those involving "assessments of the credibility" or "accuracy of fact witnesses to historical events," U.S.Br.40-42, cannot withstand scrutiny. Federal courts routinely deny summary judgment and require trial-based, adversarial proceedings to resolve scientific disputes between experts. And this Court has forcefully rejected the "overly pessimistic [view] about the capabilities … of the adversary system" to address scientific and technical issues and made clear that "[v]igorous cross-examination" is key to resolving disputes between experts. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 596 (1993).

If this Court concludes that there are any material issues of disputed fact that would stand in the way of remanding with instructions to enter APHIS's proposed injunction, an evidentiary hearing is

necessary to resolve those issues. For example, such a hearing would allow each side to cross-examine the other's experts and also allow petitioners to cross-examine the lay witnesses who provided hearsay anecdotal accounts of isolated incidents of cross-pollination. Because the district court refused to conduct an evidentiary hearing before entering its injunction, petitioners were never able to test those allegations through the rigors of cross-examination.

Ultimately, the government betrays its true concern as not legal but practical—the purportedly "significant costs on the government" that evidentiary hearings impose. U.S.Br.42 n.15. But a party's due process rights cannot be sacrificed for another party's desire to avoid the inconveniences or burdens of the adversary process. *See, e.g.*, *Stanley v. Illinois*, 405 U.S. 645, 656 (1972). And neither the government nor respondents has provided any principled basis for depriving litigants of their right to an evidentiary hearing to resolve disputed issues of material fact bearing on whether an injunction is appropriate.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case remanded with instructions to vacate the district court's injunction and enter APHIS's proposed remedy in its place.

Respectfully submitted,

B. ANDREW BROWN
DORSEY & WHITNEY LLP
50 South Sixth Street
Suite 1500
Minneapolis, MN 55402
(612) 340-5612
Counsel for Forage Genetics International, LLC, Daniel Mederos, and Mark Watte

GREGORY G. GARRE
Counsel of Record
MAUREEN E. MAHONEY
RICHARD P. BRESS
PHILIP J. PERRY
J. SCOTT BALLENGER
DREW C. ENSIGN
LATHAM & WATKINS LLP
555 11th Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2207
gregory.garre@lw.com
Counsel for Monsanto Co.

CHARLES B. VON FELDT
FORAGE GENETICS
INTERNATIONAL, LLC
1080 West County Road F
Shoreview, MN 55126
Counsel for Forage Genetics International, LLC