No. 09-475

In the Supreme Court of the United States

MONSANTO COMPANY, ET AL., PETITIONERS

v.

GEERTSON SEED FARMS, ET AL.

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

REPLY BRIEF FOR THE FEDERAL RESPONDENTS SUPPORTING PETITIONERS

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As the government's opening brief explains, the district court erred in fashioning the permanent injunction in this case. Even when a federal agency is found to have violated the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, an injunction is appropriate only to the extent that the plaintiff would otherwise suffer irreparable harm. See Gov't Br. 18-22. In this case, the Animal and Plant Health Inspection Service (APHIS) identified various protective measures that, taken together, would have prevented such injury from occurring while APHIS was preparing an environmental impact statement (EIS). The district court nevertheless enjoined all new planting of Roundup Ready Alfalfa (RRA) until the EIS is completed, without meaningfully considering whether that broad relief was nec-

essary to prevent irreparable injury to respondents or whether APHIS's proposed protective measures would have sufficed. The district court erred in refusing to defer to APHIS's scientific expertise, and the court of appeals likewise erred in upholding the district court's overly broad injunction.

I. PETITIONERS HAVE STANDING TO CHALLENGE THE DISTRICT COURT'S INJUNCTION

Respondents argue (Br. 17, 19-24) for the first time that petitioners lack standing to challenge the district court's injunction because petitioners did not appeal the portion of the district court's order vacating APHIS's decision to deregulate RRA. Respondents contend that, because vacatur of the deregulation decision would independently prohibit any new sale or distribution of RRA, the injunction has no practical effect on petitioners. Respondents are mistaken.

A. Respondents contend that, because the district court's judgment vacated APHIS's June 14, 2005, deregulation decision, see Pet. App. 108a, all new sale or distribution of RRA would be unlawful (until APHIS completes its EIS) even if no injunction had been entered. As respondents acknowledge (Br. 20 n.11), however, the same judgment expressly *permitted* the harvesting and distribution of already-planted RRA subject to certain conditions intended "to minimize the risk of gene flow from the already-planted genetically engineered alfalfa to organic and conventional alfalfa." Pet. App. 76a-77a; *id.* at 109a-110a. If, as respondents contend (Br. 20), the district court's vacatur of the deregulation decision "restored RRA to its status as a regulated article, the distribution of which is unlawful under the PPA and APHIS regulations," then the distribution of RRA that

is authorized in the same judgment would likewise be illegal. There is no sound reason to construe the district court's judgment as mandating that self-defeating result. Cf. *Western Air Lines, Inc.* v. *Board of Equalization*, 480 U.S. 123, 133 (1987) (noting, in the statutory interpretation context, that "illogical results" resulting from a proffered interpretation "argue strongly against the conclusion that Congress intended" such a meaning). Rather, the provisions of the judgment are best harmonized by construing it to nullify APHIS's deregulation decision except to the extent that the judgment permits the distribution and sale of RRA grown and harvested pursuant to the conditions enumerated by the district court.

That understanding of the district court's judgment, and of the scope of the controversy that the parties presented to the court of appeals, is reinforced by the events that preceded the judgment. In response to the district court's request, the government submitted a proposed judgment stating that APHIS's deregulation decision "is hereby vacated and replaced by the terms of this judgment." Pet. App. 184a. The government's proposed judgment would have permitted the continued planting of RRA subject to enumerated protective measures. *Id.* at 185a-187a. That proposed judgment, under which the specified restrictions would have "replaced" APHIS's deregulation decision, plainly contemplated that continued planting, harvesting, and sale of RRA would be lawful so long as those restrictions were obeyed, notwithstanding the vacatur of the deregulation decision.

APHIS's subsequent statements that it did not challenge the district court's vacatur of the deregulation order simply reflect the government's decision not to

contest on appeal the district court's requirement that APHIS prepare an EIS. Similarly, the government did not seek on appeal to reinstate the complete deregulation of RRA before completing the EIS. But the government and petitioners did appeal the district court's judgment, and the thrust of the appeal was that the district court should have adopted the government's proposed judgment instead. Because that alternative judgment would have given petitioners significantly greater opportunities to sell RRA than did the district court's blanket prohibition of new planting during APHIS's preparation of an EIS, petitioners have been injured by the district court's choice of remedies and by the court of appeals' decision affirming that choice.

B. Respondents' own litigation conduct assumes that the district court's entry of a broad injunction, rather than the more narrowly-tailored order proposed by the government, would have meaningful practical consequences. If the court's vacatur of APHIS's deregulation decision "independently prevents petitioners' sale or distribution of RRA," as respondents contend (Br. 17, 19-22), there would have been no need for respondents to seek an injunction. Respondents sought such relief, however, and they have vigorously defended the injunction that the district court entered. Indeed, respondents' claim (*id.* at 35-43) that the broad injunction entered by the district court was necessary to prevent irreparable harm to themselves is premised on the understanding that increased planting of RRA would have occurred if the court had instead entered the order that the government proposed. That argument cannot be squared with respondents' belated contention that the injunction is superfluous.

C. Respondents' standing argument is also at odds with decisions of this Court—such as *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305 (1982)—dealing with the prerequisites to entry of injunctive relief. In *Romero-Barcelo*, the district court found that the United States Navy was violating the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. 1251 *et seq.*, by discharging pollutants (munitions) into the waters surrounding Vieques, Puerto Rico during training operations without first obtaining a permit. 456 U.S. at 307-308. Although the district court declared the Navy's actions to be in violation of the FWPCA and ordered the Navy to take the steps necessary to comply with that law, it declined to issue an injunction prohibiting the Navy from continuing its training operations pending procurement of the necessary permit. *Id.* at 309-310. The court of appeals vacated the district court's order and remanded with instructions to enter such an injunction, *id.* at 310-311; but this Court reversed the court of appeals. The Court observed that "a federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law." *Id*. at 313. The Court's opinion (see *id*. at 311-320) made clear both that the decision whether to grant an injunction is discretionary and that the decision has important practical consequences. Respondents' standing argument, which treats a district court injunction as adding nothing of substance to a preexisting statutory prohibition, cannot be reconciled with that analysis.

II. THE DISTRICT COURT ERRED IN ENTERING AN OVERLY BROAD PERMANENT INJUNCTION

The district court held that APHIS had violated NEPA by failing adequately to assess whether deregula-

tion of RRA would "significantly affect[] the quality of the human environment," 42 U.S.C. 4322(2)(C), through allowing RRA genetic material to cross-pollinate with non-RRA alfalfa. Pet. App. 35a-45a.[1] In entering a broad permanent injunction against new planting of RRA, however, the court failed meaningfully to consider whether the interim protective measures proposed by the government would suffice to prevent irreparable harm to respondents. Respondents' attempts to defend the purported legal and factual bases for the district court's broad injunction are unavailing.

A. The district court acknowledged that, in NEPA cases, a plaintiff's request for an injunction "requir[es] the court to engage in the traditional balance of harms analysis." Pet. App. 65a (quoting *Forest Conservation Council* v. *United States Forest Serv.*, 66 F.3d 1489, 1496 (9th Cir. 1995)). Respondents contend (Br. 30-31) that the district court then faithfully applied the factors in that analysis to the record in this case. In fact, however, the court specifically declined to assess whether the protective measures proposed by APHIS would adequately safeguard against cross-pollination. The court stated that it could not appropriately conduct such an inquiry because "[t]o make the findings requested by [the government] would require [the district court] to engage in precisely the same inquiry it concluded APHIS failed to do and must do in an EIS." Pet. App. 68a; see *id.* at 67a-69a; see also *id.* at 192a ("I am not

[1] The district court also determined that APHIS had failed to consider whether the deregulation of RRA would lead to the development of glyphosate-resistant weeds. Pet. App. 45a-47a. But in rejecting APHIS's proposed interim measures in favor of broader injunctive relief, the court focused on the potential for cross-pollination with non-RRA alfalfa. *Id.* at 67a-71a.

going to get into the isolation distances."); *id.* at 417a ("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.").

That analysis is flawed in three fundamental respects. First, the court erred in equating the scientific inquiry involved in APHIS's preparation of an EIS with the inquiry needed to determine the proper scope of injunctive relief. Whereas the final EIS will analyze the potential environmental effects that complete deregulation of RRA would entail, the question for the district court at the remedial phase of this case was whether continued planting and harvesting of RRA subject to APHIS's proposed protective measures would likely cause irreparable harm to respondents during the limited interval in which the EIS is being prepared. See pp. 8-13, *infra*; cf. *National Audubon Soc'y* v. *Department of the Navy*, 422 F.3d 174, 201 (4th Cir. 2005) (A "NEPA injunction predicated on preventing environmental harm can be overbroad if it restricts nonharmful actions—even ones that are precursors to other actions that are potentially harmful."). Second, even if the overlap between the two inquiries were more substantial, the burden would still have been on respondents to demonstrate that the more narrowly-tailored injunction proposed by APHIS would not protect them from irreparable harm. Cf. *Amoco Prod. Co.* v. *Village of Gambell*, 480 U.S. 531, 544-545 (1987) (rejecting the court of appeals' conclusion in that case that "[i]rreparable damage is *presumed* when an agency fails to evaluate thoroughly the environmental impact of a proposed action," and stating that such a presumption "is contrary to traditional equitable principles" and is not necessary to "fully protect[]" the environment) (first set of brackets in orig-

inal). Third, the district court should have treated its own acknowledged lack of specialized expertise in environmental analysis as a reason to defer to the responsible federal agency, not as a ground for issuing a broader injunction. See pp. 13-17, *infra*.

B. If the district court had found that APHIS's proposed protective measures were insufficient to prevent irreparable harm to respondents, and that a broad injunction prohibiting the further planting of RRA was necessary to prevent such injury, that finding would have been clearly erroneous. The evidence before the court established that cross-pollination between RRA and conventional or organic alfalfa would have been unlikely if the court had issued the more limited injunction that the government proposed.

In explaining its decision to enter a broad permanent injunction against new planting of RRA, the district court stated that "contamination of organic and conventional alfalfa crops with the genetically engineered gene ha[d] occurred" in the past. Pet. App. 71a. Respondents defend the court's remedial action on the same basis. See Br. 7-8, 36. But the *only* evidence of actual gene transfer found in the record involved cross-pollination of conventional or organic alfalfa plants grown to produce seed. Those plants represent a tiny percentage of the alfalfa market. More than 99.5% of the alfalfa grown in this country is grown for hay rather than for seed. Pet. App. 321a. In order for genetic material to transfer from an RRA hay field to a hay field of conventional or organic alfalfa, a series of independently unlikely events would have to occur seriatim. See Gov't Br. 25-26; Pet. Br. 43-45.

Thus, as petitioners explained in the district court, Pet. App. 278a, 379a, the likelihood of hay-to-hay cross-

pollination is essentially zero. Indeed, respondents do not contend either that such cross-pollination is likely to occur or that it has ever previously occurred. At the very least, the injunction is thus substantially overbroad in preventing any planting and harvesting of RRA grown for hay, and it is out of step with this Court's instruction that a district court entering an injunction must "mould each decree to the necessities of the particular case." *Romero-Barcelo*, 456 U.S. at 312 (quoting *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329 (1944)).

Although the risk of cross-pollination is greater with respect to the 0.5% of alfalfa plants that are grown for seed, the measures the government urged the district court to incorporate into an injunction would have responded to that heightened risk. The Association of Official Seed Certifying Agencies permits a maximum percentage of 1% of seeds of other varieties in a batch of certified alfalfa seeds. Certified seed is the highest quality seed that farmers plant to raise alfalfa for hay. Pet. App. 163a. The isolation distances APHIS proposed between RRA fields grown for seed and non-RRA alfalfa fields grown for seed were designed to limit cross-pollination to 0.1%. *Id.* at 162a-163a. APHIS's proposed isolation distances were thus intended to limit cross-pollination to a level that is ten times more stringent than the industry standard (*i.e.*, one in 1000 seeds may be of a different variety rather than one in 100).

The district court credited respondents' evidence that some fields of conventional or organic alfalfa grown for seed had been cross-pollinated by RRA. Pet. App. 71a. But respondents are incorrect in asserting (Br. 44) that the conditions under which RRA was grown during the more than 20 months after APHIS's deregulation decision are "virtually identical to those proposed by

APHIS" in the remedial phase of this case. The contracts between petitioners and RRA growers required that RRA hay fields be harvested at or before ten percent bloom in areas in which non-RRA alfalfa plants were grown for seed. J.A. 260. The agreements also required that RRA fields grown for seed be separated from non-RRA alfalfa seed fields by 900 feet when leaf cutter bees are used for pollination and by three miles when honey bees are used. *Id.* at 280.

The protective measures included in the government's proposed injunction would have been more stringent in a number of respects. First, they would have prohibited the introduction of pollinators in RRA hay fields. Pet. App. 185a. Second, whereas petitioners did not require any isolation distances between RRA hay fields and non-RRA alfalfa fields used for certified seed production, the government's proposed injunction would have imposed harvest restrictions on hay fields located within 500 feet of any alfalfa fields used for certified or common seed. *Id.* at 185a-186a; J.A. 439.[2]

Third, APHIS's protective measures would have increased the required isolation distances between RRA fields grown for seed and non-RRA alfalfa seed fields from 900 feet to 1500 feet when leaf cutter bees are used as pollinators. Pet. App. 186a. Fourth, the proposed injunction would have introduced a requirement that all equipment that comes into contact with RRA be cleaned

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[2] APHIS would have required that growers of RRA identify and keep records of all alfalfa crops grown within 500 feet of their fields. Pet. App. 185a. Under the government's proposed injunction, any RRA field within 165 feet of a certified or common alfalfa seed field would have had to be harvested before flowering, and any RRA field between 165-500 feet of a seed field would have had to be harvested at or before ten percent bloom. *Id.* at 186a.

pursuant to approved techniques before leaving the farm on which the RRA is grown. *Id.* at 186a-187a. Finally, APHIS would have prohibited the use of RRA for livestock grazing purposes or in mixed-grass pastures, *id.* at 187a, both of which were permitted under petitioners' contracts.[3]

Respondents fail to refute APHIS's conclusion that the stringent protective measures set forth in the government's proposed injunction would have significantly diminished, if not eliminated, the risk of cross-pollination even between seed plants. More importantly, the district court refused to consider whether the measures APHIS proposed would have mitigated the potential for any irreparable harm the district court thought possible. Cf. *Winter* v. *NRDC*, 129 S. Ct. 365, 376 (2008) (characterizing as "significant" the district court's failure, after the government challenged only two of the six restrictions initially imposed by the court, to determine whether the four unchallenged restrictions would be sufficient to prevent irreparable harm).

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[3] APHIS carefully designed those measures to prevent cross-pollination in the small segment of the alfalfa market grown for seed from rising above the levels permitted by industry standards. Respondents apparently are not satisfied with the industry standards, preferring instead to operate in an alfalfa market with zero tolerance for genetically modified traits. See Br. 40. But there is no sound basis for concluding that the district court's broad injunction is necessary even for that purpose. Ample evidence shows, for example, that alfalfa growers have cooperated to take voluntary steps to bring the risk of cross-pollination down to zero by creating "GE free" zones in which no genetically engineered crops are grown. See, *e.g.*, National Alfalfa & Forage Alliance, *Coexistence for Organic Alfalfa Seed & Hay Markets* 3 (June 2008); National Alfalfa & Forage Alliance, *Coexistence for Alfalfa Seed Export Markets* 2 (June 2008).

Even if some cross-pollination of conventional or organic alfalfa plants by RRA were likely to occur with APHIS's proposed restrictions in place, the evidence before the court established that any such cross-pollination does not constitute irreparable injury. The only evidence of cross-pollination presented to the district court involved a handful of specific alfalfa crops grown for seed. See Resp. Br. 7-8. But the unwanted cross-pollination of a single field or a handful of fields is not irreparable harm—either to the farmer involved or to the environment.

The record evidence demonstrated that the cross-pollination of a conventional or organic alfalfa field by RRA genetic material can be eliminated within one growing cycle. C.A. E.R. 70-71 (¶ 18), 104; Pet App. 397a, 409a-410a. Such a readily eliminated effect is not "irreparable" under any normal understanding of that word. Although the measures necessary to eliminate unwanted cross-pollination entail monetary costs, such compensable economic harm (even if not speculative) is not the type of harm federal injunctions are intended to prevent. See, *e.g.*, *Romero-Barcelo*, 456 U.S. at 312 ("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.'") (quoting *Cavanaugh* v. *Looney*, 248 U.S. 453, 456 (1919)); Gov't Br. 28 (explaining that harm caused by unwanted cross-pollination may be remediable through money damages from the responsible private party). And such potential economic harm is not the sort of environmental harm that is the principal focus of NEPA.

Respondents suggest (Br. 31 n.15, 38) that petitioners (and presumably the government) have conceded that respondents satisfied the irreparable-harm stan-

dard for at least some form of injunctive relief. That is incorrect. When the district court granted summary judgment to respondents on their claim that APHIS had violated NEPA by failing to prepare an EIS, the court ordered the parties to "confer and submit a proposed Judgment to the Court." Pet. App. 53a; see *id.* at 54a. In response to that directive, the government proposed an injunction that would have allowed continued planting and harvesting of RRA if done in compliance with specified protective measures devised by APHIS. See *id.* at 184a-187a. Petitioners have indicated (see Br. 25 & n.9) that they do not object to entry of that form of relief.

The parties' litigation conduct narrowed the range of issues that the courts below were required to resolve, but it did not reflect a concession that respondents would suffer irreparable harm in the absence of an injunction. In this respect, this case is analogous to *Winter*, in which the Navy challenged only two of the six restrictions imposed by the district court, see 129 S. Ct. at 373, 376, but did not thereby concede that the other restrictions were proper. The Court in *Winter* squarely rejected the suggestion that either the Navy's prior efforts to mitigate environmental harms potentially caused by its training exercises or the Navy's decision not to challenge four of the six restrictions imposed by the district court was inconsistent with the government's representations as to the disruptive effect of the two challenged restrictions. See *id.* at 380 ("Apparently no good deed goes unpunished.").

C. In determining the appropriate scope of injunctive relief, the district court erred in refusing to defer to APHIS's judgment that the protective measures it proposed were adequate to avoid environmental harm while

an EIS was being prepared. As the government's opening brief explains (Br. 35-38), courts reviewing agency action should defer to the conclusions of agency officials that are based on their particular expertise and on scientific evidence. *E.g.*, *Marsh* v. *Oregon Natural Res. Council*, 490 U.S. 360, 376-377 (1989); *BG&E* v. *NRDC*, 462 U.S. 87, 103 (1983). Respondents argue (Br. 46-47) that deference is inappropriate in this case because the government's judgment about the appropriate scope of an injunction was "adopted in litigation" rather than "record-based agency decision-making." In support of its proposed judgment, however, the government submitted declarations prepared by the responsible APHIS official setting forth his reasons for concluding that the proposed restrictions would prevent cross-pollination between RRA and conventional or organic alfalfa while APHIS was preparing the EIS. See Pet. App. 137a-167a. In reaching that conclusion, the APHIS declarant drew on his own scientific expertise and on the agency's broader experience in administering the PPA, including authorizing and monitoring field trials of RRA during the period before deregulation. See *id.* at 140a-141a.

This Court confronted a closely analogous situation in *Winter*, in which the government submitted declarations of Navy officials that explained why the restrictions imposed by the district court would impede the Navy's training exercises. 129 S. Ct. at 377. The Court held that the district court was required to defer to the expert judgments set forth in those declarations. *Ibid.* The same is true in this case, in which APHIS officials utilized their scientific and professional expertise, and their experience in administering the PPA, including authorizing and monitoring field trials of RRA prior to deregulation, in crafting a remedy that would eliminate

the risk of cross-pollination for over 99% of the alfalfa in this country (*i.e.*, alfalfa grown for hay) and significantly restrict that risk in the remaining crop. By its own admission (see pp. 6-7, *supra*), the district court was not in a position to make a better scientific assessment of the agricultural principles bearing on its choice of remedy. The district court therefore should have deferred to the judgment of APHIS rather than substituting its own. See *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 744 (1985); *Camp* v. *Pitts*, 411 U.S. 138, 143 (1973) (per curiam); see also 33 Charles Alan Wright & Charles H. Koch, Jr., *Federal Practice and Procedure: Judicial Review of Administrative Action* § 8313, at 97 (2006) ("Even legislative facts found in adjudication should be left to the agency."); *id.* § 8375, at 307.[4]

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[4] Respondents' reliance on decisions holding that courts should not defer to an agency's "*post hoc* rationalizations" of a challenged agency action, Br. 47 (quoting *Motor Vehicle Mfrs. Ass'n of the United States* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983)), is similarly misplaced. Those decisions caution against reliance on an agency's rationalization in litigation for the agency action being challenged in the case. See *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 419-420 (1971); *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 168-169 (1962). In this case, however, neither the APHIS declarations nor the government's proposed injunction reflected an effort to defend the agency action under review (*i.e.*, the deregulation of RRA without preparation of an EIS). The proposed injunction took as a given the district court's prior holding that the deregulation decision violated NEPA; indeed, the government's proposed injunction would have directed APHIS to prepare an EIS. See Pet. App. 184a. The agency declarations (which were executed after the district court had granted respondents' motion for summary judgment on the merits of their NEPA claim) likewise did not attempt to defend the prior deregulation decision or to assess the environmental consequences of complete deregulation, but instead explained why APHIS's proposed interim protective measures were sufficient to prevent any likelihood of irreparable

If APHIS had determined at the outset that it would prepare an EIS before deciding whether to deregulate RRA, the PPA would have allowed the agency to devise a set of protective measures that would govern the planting of RRA while the EIS was in preparation. See Gov't Br. 36-37. If the agency had taken that approach and had made a Finding of No Significant Impact (FONSI) with respect to interim planting under those protective measures, and if a plaintiff had challenged the agency's FONSI, the reviewing court would have been required to apply a deferential standard reflecting appropriate respect for the agency's scientific expertise. Under this Court's decision in *Winter*, 129 S. Ct. at 377, APHIS's judgment as to the adequacy of specified protective measures should receive comparable deference when expressed in agency declarations rather than a pre-litigation FONSI.

Respondents further suggest (Br. 47) that APHIS's declarations should be viewed with skepticism because the agency submitted those declarations shortly after it informed the court that it would need years to complete the EIS. But that suggestion is based on the erroneous contention (*ibid.*) that the declarations addressed the "very same impacts" that the EIS would analyze. Whereas the EIS would address the potential environmental consequences of complete deregulation of RRA, the declarations address the potential environmental consequences of planting RRA (a) during the limited period pending completion of the EIS and (b) subject to the extensive protective measures reflected in the pro-

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harm while the EIS was being prepared. There is consequently no reason to doubt that the declarant's conclusions as to the adequacy of the proposed restrictions pending preparation of the EIS represented the agency's best expert judgment.

posed judgment. In proposing a tailored injunction, APHIS was exercising its scientific expertise and drawing upon its regulatory experience, not short-circuiting the EIS process.

D. Respondents are also incorrect in contending (Br. 48-49) that NEPA regulations promulgated by the Council on Environmental Quality (CEQ) barred the district court from adopting APHIS's proposed protective measures. The CEQ regulations do not require all related agency actions to cease while an EIS is being prepared. Rather, they specify that, during the preparation of an EIS (when one is required), an agency may not take any action in connection with the implicated activity that would "[h]ave an adverse environmental impact" or would "[l]imit the choice of reasonable alternatives." 40 C.F.R. 1506.1(a). In this case, APHIS's proposed injunction would have imposed conditions on the continued planting of RRA that were reasonably designed to prevent cross-pollination between RRA and conventional or organic alfalfa. Continued planting and harvesting of RRA under those protective measures while the EIS was being prepared therefore would not "[h]ave an adverse environmental impact" within the meaning of Section 1506.1(a).

CEQ's "adverse environmental impact" standard is not triggered simply by speculation as to the possibility of interim harm. Nor, contrary to respondents' contention (Br. 49), does it encompass interim actions that are likely to have trivial environmental consequences. An agency is required to prepare an EIS only if the proposed federal action would "significantly affect[] the quality of the human environment," 42 U.S.C. 4332(2)(C); a more abbreviated analysis is appropriate if the agency determines that the action's environmental

impact is not "significant." 40 C.F.R. 1501.4(e). Under respondents' approach, however, the CEQ regulations would prohibit a federal action having trivial (but non-zero) environmental effects if that action concerns a larger proposed action for which the relevant agency is preparing an EIS. That construction of the CEQ regulations would impose unreasonably severe limits on agency conduct, and it is unnecessary to fulfill NEPA's objectives of informed decisionmaking and public participation. See *Department of Transp.* v. *Public Citizen*, 541 U.S. 752, 768 (2004); *National Audubon Soc'y*, 422 F.3d at 203 ("CEQ regulations and our own caselaw make clear that agency action prior to completing a sufficient environmental study violates NEPA only when it actually damages the environment or 'limit[s] the choice of reasonable alternatives.'") (brackets in original) (quoting 40 C.F.R. 1506.1(a)(2)).

Because interim planting under APHIS's proposed conditions would not "[h]ave an adverse environmental impact" within the meaning of Section 1506.1(a), it is permissible under the CEQ regulations as long as it does not limit the agency's choice of reasonable alternatives. Respondents do not contend that the planting of RRA subject to APHIS's proposed conditions would have limited the options available to APHIS upon completion of the EIS. And because any cross-pollination that might occur under the conditions APHIS proposed (a remote possibility in any event) could be readily reversed (see p. 12, *supra*), adoption of the government's proposed injunction would have left all reasonable alternatives open to the agency. The remedy that APHIS proposed was thus fully consistent with the CEQ regulations, and with NEPA's purpose of "ensur[ing] that important effects will not be overlooked or underestimated

only to be discovered after resources have been committed or the die otherwise cast." *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

III. A DISTRICT COURT IS NOT REQUIRED IN EVERY CASE TO HOLD A FULL TRIAL-LIKE HEARING BEFORE ENTERING AN INJUNCTION

Petitioners argue (Br. 50-57) that the district court erred in entering an injunction without first holding a trial-like evidentiary hearing with live-witness testimony and cross-examination. As the government's opening brief explains (at 38), the Court can readily decide this case without determining whether petitioner's contention is correct. The disputed question before the district court was whether the protective measures proposed by APHIS were sufficient to prevent a likelihood of irreparable harm to respondents, or whether a broader injunction was needed to accomplish that objective. The district court's fundamental error lay in its refusal to decide that question at all, not in its use of deficient fact-finding procedures to resolve it. In light of that error, this Court need not determine what procedures the district court should have utilized and what forms of evidence it should have considered in deciding that essential issue.

If the Court does address the question, however, it should hold that a full-blown oral evidentiary hearing is not required in every case in which the propriety of injunctive relief turns in part on the resolution of factual disputes. That is particularly so given the administrative-law context of this case. The type of process required in the administrative context varies with the type of determination an agency is called upon to make, and a trial-like evidentiary hearing "is neither a

required, nor even the most effective, method of decisionmaking in all circumstances." *Mathews* v. *Eldridge*, 424 U.S. 319, 348 (1976).

When an agency is called upon to make a predictive judgment about matters not unique to a particular case, it is generally not required to hear live oral testimony or permit cross-examination of witnesses. See *Mobil Oil Exploration & Producing Se., Inc.* v. *United Distrib. Cos.*, 498 U.S. 211, 228 (1991); *United States* v. *Florida E. Coast Ry.*, 410 U.S. 224, 239-240 (1973); see also Henry J. Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267, 1302-1303, 1307 (1975) (Friendly). In particular, such a hearing is not mandated when an agency's decision is based on scientific evidence or other judgments predicated on professional expertise. *Matthews*, 424 U.S. at 344-346; Friendly 1284-1285 (noting that, in cases dealing with "recondite scientific or economic subjects[,] * * * the main effect of cross-examination is delay"). Such determinations are legislative or regulatory rather than adjudicative in nature. Thus, if APHIS had proposed to adopt a regulation imposing the same restrictions on RRA planting and harvesting that were contained in the government's proposed injunction, neither regulated parties nor members of the public would have had a right to an oral hearing before the agency to express their views on the proposal. See Gov't Br. 41-42 & n.14.

There is no sound reason to accord petitioners a greater right to present live testimony or cross-examine witnesses with respect to the district court's choice of an equitable remedy than they would have had in analogous agency proceedings. In the NEPA context, the propriety of equitable relief is likely to turn on the weighing of scientific or economic evidence rather than the credibil-

ity of particular fact witnesses. Indeed, this Court has admonished that courts reviewing agency action should not "probe the mental processes" of the agency's decisionmaker. *United States* v. *Morgan*, 313 U.S. 409, 422 (1941) (citation omitted); see *National Audubon Soc'y*, 422 F.3d at 203 ("[I]nquiries into an agency's subjective intent and the necessity of its substantive decision exceed the permissible scope of judicial review in a NEPA case."). That prohibition is consistent with the general rule that a reviewing court should defer to an agency's resolution of questions within its scientific or technical expertise and may not substitute its own judgment for that of the agency. See pp. 13-17, *supra*. Moreover, the routine use of such testimony risks monopolizing the time of agency officials. *In re United States (Kessler)*, 985 F.2d 510, 512 (11th Cir. 1993) (per curiam).

Petitioners identify no provision of law that requires an opportunity for live testimony and cross-examination as a predicate to entry of an injunction. Even assuming that entry of the injunction in this case "deprived" petitioners of "property" and thus implicated the protections of the Due Process Clause, U.S. Const. Amend. V, the opportunity to present live testimony is not in all circumstances an essential attribute of fair process. To be sure, Federal Rule of Civil Procedure 65 assumes that the district court will conduct a "hearing" before issuing an injunction. But that simply means that a court may not enter an injunction ex parte (cf. Fed. R. Civ. P. 65(b)(1), dealing with temporary restraining orders) and that the defendant must be given an adequate opportunity to present evidence and argument. Cf. *Florida E. Coast Ry.*, 410 U.S. at 239-242 (statutes requiring Interstate Commerce Commission to conduct a "hearing" as a predicate to ratemaking did not give in-

terested parties a right to present oral testimony or cross-examine witnesses). The Rule does not specify the form in which the court must receive that evidence, and in particular does not demand a full-blown oral evidentiary hearing.[5]

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For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed, and the case should be remanded with instructions to vacate the permanent injunction entered by the district court.

Respectfully submitted.

ELENA KAGAN
Solicitor General

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[5] As respondents note (Br. 53-55), the early English courts at equity "did not take testimony in open court, but relied on documents." Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. Pa. L. Rev. 909, 919 (1987). Such courts relied primarily on sworn pleadings and written depositions taken by a court officer in private after receiving written interrogatories rather than on oral testimony taken before the factfinder and subject to cross-examination. Fleming James, Jr., *Right to a Jury Trial in Civil Actions*, 72 Yale L.J. 655, 661-662 (1963); Geo. Tucker Bispham, *The Principles of Equity: A Treatise on the System of Justice Administered in the Courts of Chancery* 13 (Joseph D. McCoy ed., 11th ed. 1931); accord Daniel D. Blinka, *Jefferson and Juries: The Problem of Law, Reason, and Politics in the New Republic*, 47 Am. J. Legal Hist. 35, 83 (2005).