No. 09-475

IN THE

Supreme Court of the United States

MONSANTO CO., ET AL.,

Petitioners,

v.

GEERTSON SEED FARMS, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS GEERTSON SEED FARMS, ET AL.

SCOTT L. NELSON
ALLISON M. ZIEVE
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

GEORGE A. KIMBRELL
Counsel of Record
KEVIN S. GOLDEN
CENTER FOR FOOD SAFETY
2601 Mission Street
Suite 803
San Francisco, CA 94110
(415) 826-2770

Attorneys for Respondents

December 2009

QUESTIONS PRESENTED

For reasons set forth in the body of this brief in opposition, none of the three questions framed by the petitioners is properly presented in this case. The issues actually presented by the petition for certiorari are:

1. Whether the court of appeals correctly applied the substantive and procedural standards for granting a permanent injunction to the particular facts of this case when it affirmed the district court's issuance of a permanent injunction to remedy the undisputed violation of the National Environmental Policy Act ("NEPA") at issue in the case.

2. Whether the court of appeals correctly held that respondents had made a sufficient showing of likelihood of irreparable injury to justify the scope of the injunction.

3. Whether the court of appeals correctly held that an evidentiary hearing was unnecessary because the facts petitioners purported to dispute were not material to the proper scope of the injunction.

PARTIES TO THE PROCEEDINGS

Because the petition for certiorari omits the complete listing of the parties to the proceedings in the court below required by Rule 14.1(b), respondents supplement the statement in the petition as follows:

(1) The plaintiffs/appellees in the court below, who are respondents here, were the Center for Food Safety, Beyond Pesticides, the Cornucopia Institute, the Dakota Resource Council, Geertson Seed Farms (now known as Geertson Farms, Inc.), the National Family Farm Coalition, the Sierra Club, and the Western Organization of Resource Councils.

(2) In addition to the petitioners, the other defendants/appellants in the court below (who are respondents in this Court) were Mike Johanns, in his official capacity as Secretary of Agriculture; Steve Johnson, in his official capacity as Administrator of the U.S. Environmental Protection Agency; and Ron Dehaven, in his official capacity as Administrator of the Animal Plant Health and Inspection Service (APHIS) of the U.S. Department of Agriculture. Those officials have now been replaced as parties by their successors in office, Secretary of Agriculture Thomas Vilsack, EPA Administrator Lisa Jackson, and APHIS Administrator Cindy Smith.

RULE 29.6 STATEMENT

Respondents Center for Food Safety, Beyond Pesticides, Cornucopia Institute, Dakota Resource Council, National Family Farm Coalition, Sierra Club, and Western Organization of Resource Councils are nonprofit corporations. They have no parent

or subsidiary corporations, and no stock that is owned by any other corporations.

Respondent Geertson Seed Farms was incorporated on August 16, 2007, as Geertson Farms, Inc. It has no parent or subsidiary corporations, and no other corporation owns any of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes and Rules:

Administrative Materials:

INTRODUCTION

In this case, the court of appeals applied conventional equitable standards to affirm the district court's issuance of an injunction to remedy the government's violation of the National Environmental Policy Act (NEPA) in failing to prepare an Environmental Impact Statement (EIS) before permitting unrestricted use of genetically engineered (GE) alfalfa—a violation that is not disputed in this Court and was not disputed in the court of appeals. Indeed, the propriety of issuing some form of injunctive relief to remedy that violation was not even contested below; the only issue was its proper scope. On that question, the principal defendants—the federal officials whose actions are at issue—have *not* sought review in this Court and will soon have carried out the steps the injunction requires, upon which it will expire by its own terms.

The district court's injunction, which has now been in place for more than two-and-a-half years, prohibits the planting of GE alfalfa only until the government has completed an EIS and the Department of Agriculture has issued a new decision on whether to deregulate GE alfalfa based on the EIS. The draft EIS is now published, and the agency will very likely have finalized it and issued a new decision on deregulation of GE alfalfa before this Court would be able to hear and decide the case. Those developments would moot the issue of the propriety of the injunction. Moreover, even if the case does not become moot before the Court could decide it, the relatively short time left before the injunction will have been fully carried out vitiates any need for review by this Court.

Nonetheless, the private parties who intervened below, led by Monsanto Co., the owner of the patents on GE alfalfa, have sought review.[1] According to Monsanto, the case presents the questions whether NEPA plaintiffs are "specially exempt" from showing likely irreparable injury to obtain an injunction; whether a district court may dispense with an evidentiary hearing to resolve "genuinely disputed facts directly relevant to the appropriate scope of [a] requested injunction"; and whether an injunction may be issued "to remedy a NEPA violation based on only a remote possibility of reparable harm." Pet. i.

None of these three questions is properly presented, because the correctness of the decision below does not depend on resolution of any of them. The court of appeals did *not* hold that NEPA plaintiffs are "specially exempt" from showing a likelihood of irreparable injury, nor did it affirm the injunction based only on the existence of a "remote possibility" of "reparable" harm. Rather, the court expressly held that the traditional test for issuance of injunctive relief—including the requirement of irreparable injury—was fully applicable to environmental cases. *See* Pet. App. 11a-12a. Based on its review of the extensive record, it affirmed the district court's finding that respondents had demonstrated a sufficient *likelihood* of *irreparable* injury (in the form of genetic contamination of conventional and organic alfalfa crops) to justify permanent injunctive relief. Pet. App. 13a.

---

[1] For convenience, we refer to the petitioners collectively as "Monsanto."

Moreover, the court of appeals did not hold that a district court may forgo an evidentiary hearing when there are genuine evidentiary disputes that are "directly relevant" to the scope of injunctive relief. Rather, it held that the issues Monsanto claimed required additional presentation of evidence were *not* material to the scope of relief in the particular circumstances of this case, and that the procedures employed by the district court (which included multiple hearings as well as extensive review of documentary evidence and declarations) were adequate to support its determination that the scope of the injunction was necessary to prevent irreparable injury. Pet. App. 17a.

The court of appeals' application of the standards for issuance of injunctive relief does not conflict with decisions of this Court or any other court of appeals, nor has any court held that an evidentiary hearing is required in circumstances comparable to those here. The correctness of the decision below is thus no more than a factbound question involving a distinctive set of circumstances set forth in an extensive record that has already been thoroughly reviewed by two courts, both of which reached the same conclusions. Review of such a fact-specific decision is particularly unwarranted given the ephemeral nature of the dispute in this case.

STATEMENT

1. Background of the Lawsuit

This case originated as a challenge to a decision of the Department of Agriculture's Animal and Plant Health Inspection Service (APHIS) to deregulate the

use of GE alfalfa—a decision reached without the benefit of an EIS.

Alfalfa, the fourth most widely grown crop in the U.S., is open-pollinated by wild and farm-raised bees, which can carry alfalfa pollen from one plant to another over long distances. Pet. App. 6a, 35a. A perennial crop, alfalfa is only replanted every three to four years. Alfalfa is considered the best available animal feed for ruminants and consequently the dairy and beef cattle, sheep, chicken and turkey livestock sectors rely on alfalfa as feed. About 7% of alfalfa seed is eaten by people in the form of sprouts. Organic and most conventional alfalfa "is grown without the use of any herbicides." Pet. App. 74a-75a.

Monsanto's GE alfalfa differs from all previously existing conventional alfalfa varieties in that its genome contains a "genetic construct" composed of DNA derived from three foreign plants (the petunia, the pea, and *Arabidopsis thaliana*), two bacteria (the plant pathogen *Agrobacterium* and *E. coli*), and a virus (the plant pathogen figwort mosaic virus). The genetic construct allows GE alfalfa to survive indiscriminate dousing of glyphosate, or "Roundup," a powerful non-selective herbicide that kills or severely damages most species of plants, including natural alfalfa. Pet. App. 28a. Unlike conventional plant breeding, the transformation is a "permanent modification of a plant's genetic makeup through genetic engineering." Pet. App. 45a.

Prior to APHIS's unrestricted nationwide deregulation, alfalfa farmers, exporters, experts, and others expressed a variety of concerns that commercialization of GE alfalfa would spread its genetic material

to conventional and organic alfalfa, threatening farmers' choice to grow and sell alfalfa free of unwanted transgenic contamination. Pet. App. 29a-30a; *see e.g.* ER 712, SER 127-28, 134, 142-45, 148, 156-58, 167-68. [2]

Such contamination would have significant and novel impacts. Conventional alfalfa exporters raised concerns of contamination, since two-thirds of the world requires that GE crops and foods be labeled and important alfalfa export markets ban GE crops. Pet. App. 30a, 40a; *see also* Pet. App. 172a; ER 403; SER 34-35, 38. Organic alfalfa farmers and organic dairies that rely on organic alfalfa as their main source of forage raised concerns because the organic standard prohibits, and organic consumers reject, genetic engineering. Pet. App. 38a, 40a; SER 100-02, 113, 117. Comments also expressed concerns regarding the unstudied environmental impacts of the development of glyphosate-resistant weeds. Pet. App. 30a; *see e.g.*, SER 139, 149, 150-51, 156-66. Since the introduction of "Roundup Ready" GE crops, glyphosate use has increased five-fold, leading to increased resistance to it among weeds. SER 135. Finally, comments raised concerns about impacts based on the increased use of glyphosate on protected species and the environment. Despite these concerns, APHIS found that deregulation of GE alfalfa would have no significant environmental impacts and thus

---

[2] Citations to the large portions of the record below that are omitted from the evidentiary materials in the appendix to Monsanto's petition are to the Excerpts of Record (ER) and Supplemental Excerpts of Record (SER) filed in the Ninth Circuit.

unconditionally deregulated it without preparing an EIS.

2. The Summary Judgment Ruling

Respondents sued to set aside the deregulation of GE alfalfa, contending that the finding that GE alfalfa would have no significant environmental impact was arbitrary and capricious and hence that the failure to conduct an EIS violated NEPA. Although the administrative record documented cross-pollination at distances of several miles, Pet. App. 29a, 6a, the government took the position that respondents' concerns about genetic contamination of conventional and organic alfalfa crops were irrelevant under NEPA. Indeed, according to the government, genetic contamination would not amount to an impact requiring analysis *even if it completely wiped out all organic and other non-GE alfalfa*. Pet. App. 42a.[3] Consequently the government argued that APHIS had correctly declined to study potential impacts stemming from contamination or potential measures to contain it. Pet. App. 39a, 61a, ER 673.

---

[3] The government made its position painfully clear during argument on motions for summary judgment:

> The Court: So they are positing a case in which they believe that the introduction of the organic—I mean, of the genetically engineered alfalfa will actually eliminate organic alfalfa. And you're coming back and saying, without saying whether it will happen or not, if it did happen, that would not qualify. So what. I mean, too bad. That's the way life is. And so what. Because that still doesn't result in an environmental, a significant environmental impact, the elimination of all organic alfalfa.
>
> [APHIS counsel]: Yes, your honor."

Transcript, Jan. 19, 2007, at 52-53.

The district court granted summary judgment in favor of respondents. The court found that respondents had shown a likelihood that use of GE alfalfa would result in contamination of conventional and organic alfalfa either through cross-pollination or mixing of seed. Pet. App. 35a. Indeed, APHIS had conceded that such effects could occur (*e.g.*, Pet. App. 36a, 38a, 45a), and the court found that the agency's efforts to disregard the impacts of such contamination were unfounded and did not reflect the "hard look" at environmental consequences required by NEPA. Pet. App. 38a-41a.

The court held that "the contamination of conventional and organic alfalfa with the Roundup Ready gene is itself an impact that is harmful to the human environment." Pet. App. 61a; *see also id.* at 44a-45a. The court found that genetic contamination would have severe negative effects on growers of conventional and organic alfalfa, and it rejected APHIS's legal argument that such effects were not impacts within the meaning of NEPA. Pet. App. 41a-45a.[4] Accordingly, the district court held that APHIS had violated NEPA by deregulating GE alfalfa without first conducting an EIS. Pet. App. 52a. No party challenged that ruling on appeal.

---

[4] Similarly, the court held arbitrary and capricious APHIS's failure to analyze the development of Roundup-resistant weeds, the cumulative impacts of GE alfalfa's deregulation with those of other GE crops, and the concomitant increased use of glyphosate, and ordered these impacts be studied in the EIS. Pet. App. 46a-48a.

3. The Remedy Phase

Following its summary judgment ruling, the district court spent nearly three months considering the appropriate remedy. Respondents sought not only an order setting aside APHIS's deregulation of GE alfalfa and requiring the preparation of an EIS, but also injunctive relief that would prevent the unrestricted use of GE alfalfa pending completion of an EIS and a new decision by the agency. APHIS, by contrast, proposed that the use of GE alfalfa continue pending the EIS under conditions similar to those Monsanto had previously imposed on its use by contract, which would result in a five-fold increase in planting of GE alfalfa. Pet. App. 64a. Monsanto intervened to support APHIS's proposals.

In support of their requested injunction, respondents submitted evidence (in addition to the administrative record evidence) that genetic contamination was likely under the conditions proposed by APHIS and, indeed, that contamination had *already occurred* when GE alfalfa was planted under conditions substantially similar to those proposed by APHIS. Pet. App. 13a, 70a-71a. Respondents' submissions documented contamination in alfalfa fields in the western United States. SER 16-19, 20-21, 23-26, 27, 29-32, 45, 65, 71; ER 115, 117, 118, 135, 138.[5] More-

---

[5] For example, the seed fields of Dairyland Seed Company, Inc., a major alfalfa seed producer, were contaminated at eleven to sixteen sites at distances up to 1.5 miles from GE alfalfa plantings; this contamination occurred despite isolation distances required by Monsanto. SER 19-21, 27, 29-30, 31-32. Similarly, fields of Cal/West Seeds, a farmer-owned cooperative and major alfalfa seed exporter, were contaminated in California and Wyoming. SER 44-46.

over, respondents' evidence demonstrated that contamination risks were not limited to bee-mediated cross-pollination; rather, contamination can and does occur in many other ways, including through seed mixing and spillage, dormant hard seed, forces of nature (such as storms), irrigation ditches, substandard stewardship practices, and human error. SER 18-19, 32, 60-61, 82, 95-97, 106, 121.

Respondents' evidence of actual contamination was not contested by the government. Pet. App. 71a. Monsanto, for its part, contested *how* the contamination had occurred, but not *that* it had occurred. *See* Pet. App. 405a-06a, 408a. Indeed, Monsanto itself submitted an expert study that found high rates of contamination at a distance of nearly two miles from GE alfalfa plantings. ER 424-29; SER 18, 23-26, 65.[6]

The district court held two hearings on the issue of permanent injunctive relief, and at one of them permitted the president of petitioner Forage Genetics to address the court with respect to factual matters. Significantly, that statement undermined Monsanto's contention that forage alfalfa poses no threat of bee-mediated cross-pollination because it is harvested before it flowers: The witness acknowledged that farmers often could not harvest before flowering

---

[6] The same scientist who conducted this study also stated his opinion "that in order for there to be *zero* tolerance of any gene flow between a Roundup Ready alfalfa seed field and a conventional seed field, those fields would have to have a five-mile isolation distance between them." ER 113 (original emphasis). Respondents also introduced evidence that wild bees in the natural environment, such as bumblebees, feral honeybees, and other pollinators, travel and cross-pollinate at distances of several miles. SER 25, 62, 64-65, 67, 74, 97, 123-24, 169-70.

because of weather conditions. *See* Pet. App. 70a-71a, 62a.

4. The Permanent Injunction

Monsanto, but not APHIS, requested a full-blown evidentiary hearing on the environmental effects of GE alfalfa before the court ruled on the scope of its remedy. Declining to conduct a hearing that would replicate the scientific inquiry required of the agency in conducting the EIS, *see* Pet. App. 68a, the district court found, upon consideration of the arguments and statements made at the hearings together with the voluminous evidentiary materials submitted by all parties, that respondents had shown a sufficient likelihood of irreparable injury to warrant an injunction against further planting of GE alfalfa, as opposed to the narrower injunction advocated by APHIS and Monsanto. Critical to the court's finding was the uncontested evidence that genetic contamination had already occurred under conditions of planting equivalent to those advocated by Monsanto and APHIS. Pet. App. 70a-71a. The court also stressed that APHIS's proposal would greatly increase the likelihood of additional contamination because it would increase the usage of GE alfalfa *fivefold*, and that APHIS acknowledged that it would lack the resources to enforce the usage conditions it advocated even if planting remained at its current levels. Pet. App. 70a.

Nonetheless, the court declined to issue a blanket injunction. Although respondents sought to enjoin the harvesting of any seed from alfalfa already planted as well as any future planting, the court carefully balanced the equities and chose a middle course that maintained the status quo. The injunc-

tion barred the future planting of GE alfalfa but permitted the continued growing and harvesting of GE alfalfa already in the ground under conditions proposed by APHIS and adopted by the court. Pet. App. 76a-77a, 10a.[7]

With regard to future planting, however, the court held that "the harm to farmers and consumers who do not want to purchase genetically engineered alfalfa or animals fed with such alfalfa outweighs the economic harm to [petitioners] and those farmers wishing to switch to [GE alfalfa]." Pet. App. 71a. With respect to harm to Monsanto, the court emphasized that GE alfalfa accounted for little of its revenue and that, because alfalfa seed can be stored for years, Monsanto would be able to sell existing supplies in the future if APHIS ultimately approved its use. Pet. App. 72a. The court also found that the public interest supported delaying the further introduction of genetically altered alfalfa until APHIS studied its impacts. Pet. App. 75a.

5. The Appeal

Monsanto and the federal defendants appealed the scope of the permanent injunction, but not the finding of a NEPA violation. A panel of the Ninth Circuit affirmed, Pet. App. 80a-103a, and, after Monsanto (but not the federal defendants) sought rehearing or rehearing en banc, reissued its opinion with minor modifications. Pet. App. 1a-26a.

---

[7] The court had already, in granting preliminary injunctive relief, allowed farmers who had purchased seed a window of opportunity to plant it before the court issued its permanent injunction. Pet. App. 58a.

The court, applying the traditional four-part test for the issuance of permanent injunctive relief, held that respondents had shown a sufficient likelihood of irreparable injury to warrant the relief granted. Pet. App. 11a-13a. The court of appeals rejected the government's and Monsanto's argument that the district court had improperly presumed the existence of irreparable injury and held that the district court's finding of irreparable injury was supported by the evidence that genetic contamination was not only likely under the conditions advocated by Monsanto, but had already occurred. Pet. App. 13a. The court further rejected Monsanto's claim—which was not supported by the government—that the district court should have held an evidentiary hearing. Acknowledging that an evidentiary hearing is normally required when there are material issues of fact going to the propriety of injunctive relief, Pet. App. 17a, the court held that the facts Monsanto desired to dispute were not material to the question of likely irreparable injury, but rather went to the merits of the scientific issues the agency was required to consider in the EIS. Pet. App. 18a.

6. The Ongoing Agency Proceedings

Although the government joined Monsanto in appealing the scope of the injunction, it did not, as noted above, appeal the holding that an EIS was required. Instead, it began preparing the EIS, the first it has ever done for any GE crop. APHIS released a draft EIS on December 14, 2009,[8] and published for-

---

[8] *See* www.aphis.usda.gov/newsroom/content/2009/12/alfalfa.shtml.

mal notice of it in the Federal Register four days later. 74 Fed. Reg. 67206 (Dec. 18, 2009) (EIS No. 20090435). The comment period on the draft EIS will close on February 16, 2010, after which the agency will finalize the EIS and issue a new "record of decision" on whether to deregulate GE alfalfa. At that point, the injunction will dissolve.

REASONS FOR DENYING THE WRIT

I. Review Is Unwarranted in Light of the Impending Completion of the EIS.

The injunction in this case was a "permanent" one, as distinct from a "preliminary" or "interlocutory" one, in that it was the relief granted to implement a final, merits disposition of the claims in the case. Although permanent in that sense, it is at the same time ephemeral in that it neither requires nor prohibits anything further once the government completes its EIS and issues a new decision on the deregulation of GE alfalfa. In particular, the injunction's prohibitions on planting alfalfa operate only "[u]ntil the federal defendants prepare the EIS and decide the deregulation petition." Pet. App. 108a. Thus, the challenged provisions of the injunction expire by their own terms once the government takes the required actions.

The agency has now completed the draft EIS and is proceeding to finalize it and issue a new decision. When that process is completed—likely in the spring, summer or fall of 2010—the permanent injunction will impose no further requirements or limitations on anyone, and whether (or under what circumstances) it will be permissible to plant GE alfalfa will depend

not on the scope of the injunction, but on the agency's new decision about the crop's regulatory status.

At that time, the issues Monsanto raises will be moot. An injunction's propriety is a moot question once "'the terms of the injunction ... have been fully and irrevocably carried out.'" *Honig v. Students of Cal. Sch. for the Blind*, 471 U.S. 148, 149 (1985) (quoting *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 398 (1981)). Although *Honig* and *Camenisch* involved preliminary injunctions, the same principle holds where compliance with a court's permanent injunction has "completely cured" the violation of law that gave rise to the plaintiffs' claim. *County of Los Angeles v. Davis*, 440 U.S. 625, 633 (1979).

Thus, lower federal courts have held that a federal agency's compliance with an injunction ordering preparation of an EIS or similar action moots the question of the injunction's propriety. In *Village of False Pass v. Clark*, 733 F.2d 605, 612 (9th Cir. 1984), the court held that an agency's preparation of a Supplemental EIS mooted its cross-appeal of the injunction requiring the Supplemental EIS, and in *Romero-Barcelo v. Brown*, 643 F.2d 835 (1st Cir. 1981), the court held that the completion of an EIS mooted issues relating to the scope of the district court's order requiring the EIS.[9] Similarly, in *Sierra Club v. Glickman*, 156 F.3d 606, 619 (5th Cir. 1998), the court held that an agency's compliance with a

---

[9] This Court reversed a separate part of the First Circuit's decision in *Romero-Barcelo* but left intact the lower court's holding that the preparation of the EIS mooted issues about permanent injunctive relief for the claimed NEPA violation. *See Weinberger v. Romero-Barcelo*, 456 U.S. 305, 308 n.2 (1982).

court order requiring it to submit a Biological Opinion to the Fish & Wildlife Service under the Endangered Species Act mooted its appeal of that order. *See also Jersey Cent. Power & Light Co. v. New Jersey*, 772 F.2d 35, 40 (3d Cir. 1985) (state's compliance with an order preventing it from interfering with rail shipments of nuclear material mooted its appeal of the order); *Sannon v. United States*, 631 F.2d 1247, 1251 (5th Cir. 1980) (government's compliance with a permanent injunction requiring it to inform asylum seekers of rights for a six-month period mooted its appeal of the injunction).

In short, by the time this case could be heard and decided on the merits by this Court, the issue of the scope of the permanent injunction would very likely be mooted by the government's completion of its no-longer-contested obligation to prepare an EIS before deciding the status of GE alfalfa.[10] Even if it were not moot, the question by that point would most likely have been reduced to whether the prohibition on planting would continue for a few more weeks or months—an issue of minor importance at best and not worthy of this Court's review.

---

[10] The issue would not be "capable of repetition, yet evading review." Issues about injunctive relief in NEPA cases do not, as a general matter, evade appellate (or Supreme Court) review, because the government controls the timing of the EIS's preparation and can proceed at a pace that allows it to fully exhaust appellate review. *See, e.g., Winter v. NRDC*, 129 S. Ct. 365 (2008); *Dep't of Transp. v. Public Citizen*, 541 U.S. 752 (2004). An injunction in a NEPA case thus is not "the sort of action which, by reason of the inherently short duration of the opportunity for remedy, is likely forever to 'evad[e] review.'" *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 481 (1990).

II. The Court of Appeals Correctly Applied the Standard for Issuance of Permanent Injunctive Relief, and Its Decision Does Not Conflict with Decisions of This Court or Other Courts of Appeals.

Monsanto contends that the court of appeals held that NEPA cases are "specially exempt" from the requirement that injunctive relief issue upon a showing of likelihood of irreparable injury (Pet. i) and accuses the Ninth Circuit of "outright defiance" of this Court's recent holding in *Winter v. NRDC*, 129 S. Ct. 365. Pet. 34. Monsanto's argument rests on a distortion of the court of appeals' decision and the jurisprudence of the Ninth Circuit more generally.

A. The Lower Courts Applied the Correct Standard in this Case.

Far from holding NEPA cases exempt from the ordinary standards for issuance of injunctive relief, the court of appeals stated straightforwardly that:

> To obtain permanent injunctive relief, a plaintiff must show "'(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.'"

Pet. App. 11a (quoting *N. Cheyenne Tribe v. Norton*, 503 F.3d 836, 843 (9th Cir. 2007) (quoting *eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006))).

The court emphasized that "[t]his traditional balancing of harms applies in the environmental con-

text," Pet App. 11a, and it cited previous Ninth Circuit opinions (predating *Winter*) holding that claimed environmental injuries in NEPA cases do not always justify injunctive relief. *See, e.g., Lands Council v. McNair*, 537 F.3d 981, 1005 (9th Cir. 2008) (en banc). Moreover, while noting that this Court has held that injunctions are usually appropriate in environmental cases "*if injury is found to be sufficiently likely*," Pet. App. 11a (emphasis added) (citing *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987)), the Court also recognized that "courts cannot grant or deny injunctive relief categorically in place of applying the four-factor test." Pet App. 12a (citing *eBay*, 547 U.S. at 394). At no point did the court even suggest that injunctive relief could be granted based on the "mere possibility of injury" standard rejected in *Winter*.[11]

Significantly, the court's recognition of the applicability of the traditional standard, including the likelihood of irreparable injury, was no mere afterthought thrown into its amended opinion following Monsanto's petition for rehearing and this Court's decision in *Winter*. Exactly the same description of

---

[11] The court's statement that it is "unusual" to deny injunctive relief in a case where a NEPA violation has been found, Pet. App. 12a, reflects not the application of a different standard, but the court's empirical view that in most such cases the traditional standard will be satisfied because there will be a likelihood of irreparable environmental harm. *Cf. eBay*, 547 U.S. at 396 (Kennedy, J., concurring) ("To the extent earlier cases establish a pattern of granting an injunction … almost as a matter of course, this pattern simply illustrates the result of the four-factor test in the contexts then prevalent. The lesson of the historical practice, therefore, is most helpful and instructive when the circumstances of a case bear substantial parallels to litigation the courts have confronted before.").

the governing standard appeared in the court's original opinion two months before *Winter*. Pet. App. 89a.

Having stated the correct standard, the court of appeals did not then proceed, as Monsanto suggests, to ignore it. Rather, its affirmance of the district court's decision with respect to the scope of the injunction rested on its determination that the district court had properly found that irreparable injury would be likely under the narrower injunction advocated by Monsanto—a finding that rested in large part on the fact that genetic contamination had already occurred when GE alfalfa was used under substantially the same conditions proposed by APHIS and Monsanto:

> With respect to harm, the court found that genetic contamination of organic and conventional alfalfa had already occurred, and it had occurred while Monsanto and Forage Genetics had contractual obligations in place that were similar to their proposed mitigation measures. It held that such contamination was irreparable environmental harm because contamination cannot be reversed and farmers cannot replant alfalfa for two to four years after contaminated alfalfa has been removed. The court also reasoned that appellants would be unable to enforce compliance with any proposed mitigation measures, given the government's admitted lack of resources. The court therefore did not presume that irreparable harm was likely to occur only on the basis of the NEPA violation; it concluded that plaintiffs had established that genetic contamination was sufficiently likely to occur so as to warrant broad injunctive relief,

> though narrower than the blanket injunction sought by plaintiffs.

Pet. App. 13a.

As this passage makes clear, and contrary to Monsanto's assertion, the court did not ignore *Winter* by failing to "evaluate whether there would be a likelihood of irreparable harm" under a more narrowly tailored injunction "with APHIS's proposed stewardship measures in place." Pet. 29-30. Rather, the court specifically concluded that irreparable injury was likely under the conditions proposed by the government and Monsanto *because it had already occurred under those conditions*.

That the court of appeals acted properly in affirming the district court's order is underscored by the district court's own correct analysis and application of the legal standards governing issuance of injunctive relief. Like the court of appeals, the district court recognized that "[u]pon a finding of a NEPA violation an injunction does not automatically issue." Pet. App. 65a. Rather, the court must "engage in the traditional balance of harms analysis, even in the context of environmental litigation." Pet. App. 65a (quoting *Forest Conservation Council v. U.S. Forest Service*, 66 F.3d 1489, 1496 (9th Cir. 1995)). Although the court noted that where environmental harm is present an injunction is generally appropriate because such harm is typically irreparable, *see id.*, it did not suggest that an injunction could be granted in the absence of such injury, nor did it even allude to the "mere possibility" standard.

And, as the Ninth Circuit stated, the district court found a likelihood of irreparable injury based on (1) the fact that damage to conventional and or-

ganic alfalfa had already occurred despite the measures Monsanto urged the court to adopt instead of preserving the status quo, and (2) the failure of Monsanto's proffered evidence to provide a basis for concluding that such damage would not continue to occur, especially given the five-fold expansion in the use of GE alfalfa that was expected if planting were allowed to continue. *See* Pet. App. 64a, 66a-67a, 69a-71a. As the court concluded:

> Such contamination is irreparable environmental harm. The contamination cannot be undone; it will destroy the crops of those farmers who do not sell genetically engineered alfalfa. Moreover, it is not a one season loss; alfalfa is a perennial crop and once removed cannot be replanted for two to four years.

Pet. App. 71a.

Monsanto's real complaint is not with the legal standard applied below but with the courts' *application* of the standard to find irreparable injury in this case. But even if Monsanto's arguments that the lower courts erred in evaluating the record and finding a likelihood of irreparable injury were convincing, such a factbound issue would be inappropriate for review by this Court. "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." S. Ct. R. 10. In any event, Monsanto's claim of error is unconvincing: The contention that irreparable injury was not *likely* when it had *already occurred* under the same conditions of use that Monsanto wanted to have included in the injunction is, to say the least, not one that merits plenary consideration by this Court.

B. The Finding of Injury in this Case Does Not Conflict with Decisions of Other Circuits.

Monsanto attempts to conjure up a conflict between the lower courts' finding of irreparable injury in this case and a handful of decisions of other courts that have declined to find irreparable injury in certain cases involving claims of injury to wildlife populations. Specifically, Monsanto contends that the determination that genetic contamination affecting crops raised by conventional and organic alfalfa farmers constituted irreparable injury conflicts with statements by some courts that in ESA cases or other cases where the claimed environmental harm is a threat to a wildlife population, injury to individual members of a species is not irreparable injury unless it threatens the survival of the species itself. Pet. 33 (citing *Fund for Animals v. Frizzell*, 530 F.2d 982, 987 (D.C. Cir. 1975), and *Water Keeper Alliance v. U.S. Dep't of Defense*, 271 F.3d 21, 34 (1st Cir. 2001)).

Whatever the merits of the decisions Monsanto cites may be, they do not even remotely conflict with the decision in this case. The notion that "species-level" injury must be shown to obtain an injunction in an ESA case or one making similar claims of harm, though not fully explained in the few cases that so hold, apparently rests on two premises: (1) the ESA is concerned with species preservation, and thus harms to individual animals that have no impact on the species are not a significant injury in a case brought under the ESA; and (2) the plaintiffs in such cases are not members of the endangered species, but human beings who seek to view or study them, and deaths of individual animals that have no

impact on the abundance of the species are unlikely to injure the plaintiffs' opportunity to view or study the species.

Both of these rationales, even if correct, are specific to ESA cases and other cases involving claims resting on an alleged injury to a population of animals or plants and have no application here. Nothing in the decisions Monsanto cites suggests that the injury suffered by *farmers* who grow conventional or organic alfalfa when their crops are genetically contaminated does not "count" unless the injury threatens alfalfa at a species-wide level. Unlike someone who wishes to view wildlife, and may be unaffected by the death of a single member of an abundant species, a farmer whose crop is ruined suffers an injury regardless of whether *alfalfa* has suffered at a "species level." It is therefore not surprising that Monsanto is able to cite *no* decisions from any court applying the species-level harm rationale to facts comparable to those here. *Cf. Greater Yellowstone Coalition v. Flowers*, 321 F.3d 1250, 1256-58 (10th Cir. 2003) (declining to require species-level injury in a case involving non-ESA claims). Moreover, Monsano's observation that the United States identified a "circuit split" over the requirement of species-level harm as among the reasons it sought review in *Winter* (see Pet. 33-34) is no reason for granting certiorari in a case where the issue is not implicated.

In any event, the lower courts' holding that the harm here is irreparable is well-supported by this Court's teachings. *Amoco*, 480 U.S. at 545 ("Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irrepara-

ble."). The harm is irreparable because it cannot be adequately remedied by money damages and is permanent: The district court found that "[o]nce the gene transmission occurs and a farmer's seed crop is contaminated with the Roundup Ready gene, there is no way for the farmer to remove the gene from the crop or control its further spread." Pet. App. 36a. Contamination permanently alters the genetic makeup of the crop, eliminating the farmers' ability to choose the crop he wishes to sow: "[I]t cannot be undone; it will destroy the crops of those farmers who do not sell genetically engineered alfalfa." Pet. App. 71a. Moreover, the injury is not a one-season loss; once removed, alfalfa cannot be replanted for two to four years. *Id*.

C. The Ninth Circuit Has Not Engaged in a "Brazen" Campaign of "Defiance" of *Winter v. NRDC*.

Citing two other Ninth Circuit decisions that it says misapplied *Winter*, Monsanto accuses the Ninth Circuit of "brazen" acts of "outright defiance" of *Winter* and urges the Court to grant certiorari or summarily reverse to punish the lower court. Pet. 34. But whatever the Ninth Circuit may have done in other cases, it did not apply the "mere possibility" standard or otherwise refuse to follow *Winter* in *this* case. Its rulings in other cases cannot justify reversal in this one.

Moreover, the Ninth Circuit's case law since *Winter* shows that Monsanto's depiction of a circuit in open revolt against this Court's rulings is not just hyperbolic but outright false. Between the time *Winter* was decided and this writing, the Ninth Circuit has cited *Winter* in more than twice as many cases as

the other 12 circuits combined. The court has squarely acknowledged that *Winter* significantly changes the standard applicable to claims for injunctive relief in the Ninth Circuit:

> [W]e must follow the Supreme Court's recent expatiation on the proper standard for granting or denying [injunctive] relief. *See Winter v. Natural Res. Def. Council, Inc.*, __ U.S. __, 129 S. Ct. 365 (2008). In *Winter*, the Court reversed one of our decisions, which, it determined, upheld a grant of a preliminary injunction by use of a standard that was much too lenient. *Id*. at __, 129 S. Ct. at 370. As the Court explained, an injunction cannot issue merely because it is possible that there will be an irreparable injury to the plaintiff; it must be likely that there will be. *Id*. at __, 129 S.Ct. at 375. … To the extent that our cases have suggested a lesser standard, they are no longer controlling, or even viable.

American Trucking Assns. v. City of Los Angeles, 559 F.3d 1046, 1052 (9th Cir. 2009); *accord, e.g., Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1126-27 (9th Cir. 2009); *Johnson v. Couturier*, 572 F.3d 1067, 1081 (9th Cir. 2009).

The Ninth Circuit's decisions show that it is not merely paying lip-service to *Winter*. In *Stormans*, for example, the court reversed and remanded a preliminary injunction because the lower court's balancing of the equities had rested on the "mere possibility" standard. *See* 586 F.3d at 1138. The court has also relied on *Winter* to uphold the denial of relief in environmental cases. *See Humane Soc'y of U.S. v. Gutierrez*, 558 F.3d 896 (9th Cir. 2009); *Tongass Conservation Soc'y v. Cole*, 2009 WL 2750725 (9th

Cir. Aug. 31, 2009). And in *Sierra Forest Legacy v. Rey*, 577 F.3d 1015 (9th Cir. 2009), a NEPA case, the court made clear that it did not view the grant of injunctive relief in a meritorious NEPA case as automatic, but remanded to the district court for an analysis of the likelihood of irreparable injury and the balance of equities in light of the proposed narrow tailoring of injunctive relief, consistent with *Winter*. *See id.* at 1022-24.

Monsanto offers only two examples of the Ninth Circuit's supposed defiance: *Nelson v. NASA*, 568 F.3d 1028 (9th Cir. 2009), and the unpublished decision in *Greater Yellowstone Coalition v. Timchak*, 323 Fed. Appx. 512 (9th Cir. 2009). As to *Nelson*, Monsanto cites the statement of a dissenting judge that the panel did not consider the public interest in holding that a preliminary injunction was required. *See* 568 F.3d at 1050 (Kleinfeld, J., dissenting from denial of rehearing en banc). But Monsanto does not claim that the lower courts did not consider the public interest in *this* case (or, indeed, that this factor is generally overlooked in the Ninth Circuit), so the claimed error in *Nelson* hardly provides support for review (let alone summary reversal) here. In any event, as the judges concurring in the denial of rehearing in *Nelson* pointed out, the panel's decision *did* consider the public interest in balancing the equities. *See id*. at 1030 (Wardlaw, J., concurring). Moreover, although the United States has filed a petition for certiorari in *Nelson*, it does not contend that the Ninth Circuit failed to follow *Winter*, but only that the court erred in finding a likelihood of merit in the constitutional claims in that case. *See*

Pet. for Cert., *NASA v. Nelson*, No. 09-530 (filed Nov. 2, 2009).

Monsanto's citation of *Timchak* is equally unpersuasive. Monsanto quotes a snippet of that nonprecedential opinion out of context, but does *not* quote the key passage in which the court expressly acknowledged that "*Winter* held that it is not sufficient for a plaintiff to show a mere possibility of irreparable harm in order to prevail on his request for preliminary injunctive relief." 323 Fed. Appx. at 514 n.1. *Timchak* granted a temporary stay and remanded for further consideration only because the district court had erroneously refused to consider some of the irreparable injuries the plaintiffs claimed would necessarily be caused by the mining activities they sought to enjoin.

III. The Court of Appeals' Holding That the District Court Was Not Required to Hold an Evidentiary Hearing in the Specific Circumstances of this Case Does Not Merit Review.

Monsanto devotes much of its petition to arguing that the Ninth Circuit's affirmance of the district court's decision not to receive oral testimonial evidence on the scope of the permanent injunction presents an issue that requires this Court's review. Monsanto contends that this issue is of substantial importance to the United States because of the large numbers of NEPA cases the government loses. Pet. 22. The government, apparently, sees it differently, as it did not argue at *any* point in the proceedings that the district court should hold (or should have held) an evidentiary hearing, and the government

has chosen not to seek review in this Court on that ground or any other.

Monsanto, moreover, offers no reason for the Court to review the factbound question whether an evidentiary hearing was necessary under the specific circumstances of this case. Strikingly, Monsanto cites no decision from any other court that disagrees with the Ninth Circuit's statement that a court in a NEPA case need not hold an evidentiary hearing to replicate the scientific analysis that the agency will conduct in carrying out its EIS; indeed, Monsanto cites no decisions that even address that question.

Instead, Monsanto attempts to suggest that not holding an evidentiary hearing in this case amounts to creating a "presumption" of irreparable injury or an "automatic" right to an injunction in NEPA cases, in violation of this Court's teachings in such cases as *Winter*, *eBay*, *Romero-Barcelo*, and *Amoco*. Monsanto's argument, however, conflates the question whether a finding of likely irreparable injury is necessary—the issue addressed in those four cases and faithfully followed by the courts below—with the question of the procedures necessary to make that finding in a particular case, which the cited cases do not address.

The lower courts' holding on that procedural issue was not, as Monsanto suggests, a shocking departure from principles ordinarily applied by other federal appellate and trial courts. Rather, the opinions of the Ninth Circuit and the district court show that their review of the record disclosed no genuine dispute of fact over the material issue of *whether* irreparable injury was likely, given, among other things: the undisputed NEPA violation; the government's failure to

provide analysis regarding the efficacy of its proposed mitigation measures; the uncontested record of decision evidence that bees cross-pollinate at distances of several miles (Pet. App. 29a, 35a), further than the isolation distances proposed by APHIS; the acknowledged lack of agency resources to enforce the proposed remedial measures at current levels of planting, let alone the five-fold increase contemplated by the government's proposal; and the undisputed evidence of genetic contamination that had already occurred under the conditions of use proposed by the government and Monsanto.

The district court merely declined to hold a full-blown trial to resolve further scientific issues concerning the degree of environmental impact of GE alfalfa—a trial that both the court of appeals and the district court considered particularly unwarranted because the whole point of NEPA is to require the *agency* to resolve those issues in the first instance through the preparation of an EIS, and because the injunctive relief ordered would last only until that analysis had been carried out. *See* Pet. App. 16a-20a, 67a-68a; *see also Idaho Watersheds Project v. Hahn*, 307 F.3d 815, 831 (9th Cir. 2002); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989) (NEPA "ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts.").

The court of appeals' affirmance of the district court does not, as Monsanto contends, conflict with decisions calling for evidentiary hearings where the issuance of a permanent injunction requires resolution of disputed issues of material fact that turn on

conflicting testimony. Indeed, the court of appeals made clear that it was in full agreement with the holding of *United States v. Microsoft*, 253 F.3d 34, 101 (D.C. Cir.), *cert. denied*, 534 U.S. 952 (2001), which Monsanto acknowledges is "the leading modern case." Pet. 25; *see* Pet. App. 17a (citing *Microsoft*). The court of appeals merely held, sensibly enough, that what facts are material to the issuance of injunctive relief in a NEPA case depends in part on the nature of the claim and the scope and duration of the relief requested. *See id.* ("The district court did not believe defendants had established any material issues of fact that were in dispute in the case before the court. Rather, it viewed the disputed matters to be issues more properly addressed by the agency in the preparation of an EIS.").

Nor was this a case where a party was denied the chance to be heard. The district court held two hearings on the scope of relief, and received an extensive oral statement from petitioner Forage Genetics' president. Transcript, March 8, 2007, at 14-29, 55-57. At the first hearing the judge told the intervenors: "I will listen to anybody who's—you know, anybody you suggest that I should hear on the subject, I will be glad to hear them." Transcript, March 8, 2007, at 13. The court noted that it had "carefully reviewed" all of the voluminous evidentiary submissions and detailed written direct testimony submissions from the intervenors. Pet. App. 9a, 67a. The judge stated:

> I've read the Declarations. I appreciate that this could have been the subject of live testimony, but I thought the declarations were certainly

> comprehensive in stating the facts as the declarant knew them to be.

Transcript, April 27, 2007, at 9.

Still further afield is Monsanto's suggestion that the court of appeals' decision creates a conflict among the circuits over the circumstances under which an evidentiary hearing is necessary before issuance of a *preliminary* injunction. *See* Pet. 27, 28. That issue was not before the Ninth Circuit, and it did not purport to opine on it. The court's reference to the anticipated duration of the injunction in this NEPA case was not intended to suggest that the procedures for issuing it should mirror those for a preliminary injunction, but was a part of the court's rationale for concluding that, given the finding of a likelihood of irreparable injury, further details as to the scope of environmental harm threatened by GE alfalfa that would shortly be resolved by the agency itself did not require resolution before issuance of final injunctive relief. The logic of this rationale is now apparent, as APHIS has released the draft EIS, and all interested parties will now have extensive input into the future of GE alfalfa in the NEPA process, based on a new administrative record in which the agency has, for the first time, assessed the crop's potential significant impacts. Once that process is complete, the injunction will be dissolved.

In short, the precedents cited by Monsanto concerning the general subject of procedures for issuing permanent and temporary injunctions fall far short of evincing a conflict among the circuits over whether an evidentiary hearing is required on the scope of permanent injunctive relief in a NEPA case presenting circumstances analogous to those here. Monsanto

proffers only a single decision in an attempt to demonstrate the existence of such a conflict: the twenty-year-old opinion of the Second Circuit in *Town of Huntington v. Marsh*, 884 F.2d 648 (2d Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990). The Second Circuit's reasons for requiring an evidentiary hearing in *Huntington*, however, are inapplicable here.

Unlike this case, where the government did not contradict respondents' evidence that the practices the district court enjoined had actually resulted in environmental harm, *Huntington* was a case where the government offered substantial evidence that the activities the plaintiffs sought to enjoin had *not* caused harm to the environment. *See id.* at 653. Indeed, counsel for the *Huntington* plaintiffs conceded at oral argument before the Second Circuit that he did not contest the government's evidence. *Id*. The court held that the district court had erred in concluding "that the establishment of a statutory violation, without more, warranted an injunction" and in issuing an injunction in the face of the government's substantial evidence that the challenged actions had caused no injury. *Id*. at 654. But because the plaintiffs had introduced some evidence below suggesting a possibility of injury, the Second Circuit did not hold the plaintiffs to their attorney's concession that he did not contest the government's evidence, but ruled that they should be permitted an opportunity to overcome the government's evidence on remand in an evidentiary hearing.[12] *Id*. at 654.

---

[12] The court did not specify whether the "evidentiary hearing" it referred to would require the introduction of oral testi-

(*Footnote continued*)

The decision below is fully consistent with *Huntington*. *Huntington* required an evidentiary hearing only because there was a genuine dispute over facts material to the existence of irreparable injury, which the courts below found not to be true in this case on the very different record before them. Nothing in *Huntington* remotely suggests that in a case such as this one, where the record establishes the existence of irreparable injury, the district court must nonetheless hold an evidentiary hearing replicating the inquiry into the environmental consequences of the agency's action that the EIS is supposed to encompass.

Once Monsanto's exaggerated claims of conflict are set aside, its assertion that an evidentiary hearing was necessary in this case stands revealed for what it is: a challenge to a highly fact-specific and eminently practical decision about the appropriate procedures for a particular case, turning on the specifics of the evidence of injury, the nature of the claim, and the scope and anticipated duration of the injunction. Particularly in light of the government's failure even to seek an evidentiary hearing in the case, let alone seek review by this Court of the failure to provide one, Monsanto's assertion that the issue is one of national importance requiring resolution by this Court rings hollow.

---

mony or whether the district court could rule upon submissions of written evidence, as the district court did in this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

GEORGE A. KIMBRELL
Counsel of Record
KEVIN S. GOLDEN
CENTER FOR FOOD SAFETY
2601 Mission Street
Suite 803
San Francisco, CA 94110
415-826-2770

SCOTT L. NELSON
ALLISON M. ZIEVE
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000

Attorneys for Respondents

Date: December 2009