No. 09-475

IN THE

Supreme Court of the United States

MONSANTO COMPANY, ET AL.,

Petitioners,

v.

GEERTSON SEED FARMS, ET AL.,

Respondents.

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

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

1. Whether petitioners lack standing because the injunction they are challenging on appeal causes them no injury independent of that caused by the trial court's unchallenged decision to vacate the federal agency's order deregulating Roundup Ready Alfalfa.

2. Whether, under all the facts and circumstances of this case, the district court abused its discretion in issuing the permanent injunction.

3. Whether, under all the facts and circumstances of this case, the district court abused its discretion in declining to hold a trial-type evidentiary hearing.

RULE 14.1(B) STATEMENT

The plaintiffs-appellees in the United States Court of Appeals for the Ninth Circuit, who are respondents here, are Geertson Seed Farms (now known as Geertson Farms, Inc.), Trask Family Seeds, the Center for Food Safety, Beyond Pesticides, the Cornucopia Institute, the Dakota Resource Council, the National Family Farm Coalition, the Sierra Club, and the Western Organization of Resource Councils.

The defendants-appellants in the Ninth Circuit were Mike Johanns (in his official capacity as Secretary of the U.S. Department 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, U.S. Department of Agriculture).

The intervenors-defendants-appellants, who are petitioners here, were Monsanto Company, Forage Genetics International, LLC, Daniel Mederos, and Mark Watte. John Grover was an intervenor-defendant-appellant in the Ninth Circuit but is not a party to this appeal.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rules 24.1 and 29.6, there is no change to the corporate disclosure statement previously filed by respondents.

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STATEMENT

A. Regulatory Background

Congress enacted the Plant Protection Act ("PPA"), 7 U.S.C. § 7701 *et seq.*, to detect, control, eradicate, and suppress plant pests and noxious weeds. *Id.* § 7701(1). The PPA provides that "no person shall import, enter, export, or move in interstate commerce any plant pest," and it delegates to the Secretary of Agriculture authority to issue regulations to prevent the introduction and dissemination of plant pests. *Id.* §§ 7702(16), 7711(a) . The Secretary has delegated this authority to the Animal and Plant Health Inspection Service ("APHIS"). 7 C.F.R. §§ 2.22(a), 2.80(a)(36).

APHIS regulations govern "organisms and products altered or produced through genetic engineering that are plant pests or are believed to be plant pests." 7 C.F.R. §§ 340.0(a)(2) n.1, 340.6. The agency retains strict control over these "regulated article[s]," prescribing how they may be "introduce[d]" into the environment and forbidding their "release" or "move[ment in] interstate [commerce]" absent explicit approval. *Id.* § 340.1.

A person may obtain such agency approval in several ways. First, if an applicant complies with performance standards intended to limit the risk of unintentional dissemination, it may secure permission to conduct field trials of the regulated article. *Id.* § 340.3(e). Second, after submitting more detailed information, the applicant may receive a permit. *Id.* §§ 340.3(e)(5), 340.4. Finally, a person may petition APHIS for a determination that an item does not present a plant pest risk and therefore should not be

regulated at all. 7 U.S.C. § 7711(c)(2); 7 C.F.R. § 340.6. Before deciding whether to approve a deregulation petition, APHIS must publish notice and solicit public comments. 7 C.F.R. § 340.6(d)(2)-(3).

If deregulation would constitute a "major [f]ederal action[] significantly affecting the quality of the human environment," the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. § 4321 *et seq*., requires APHIS to consider and document the potential environmental effects in an environmental impact statement ("EIS"). *Id.* § 4332(2)(C). The agency may forego an EIS only if it "determines – based on a shorter environmental assessment (EA) – that the proposed action will not have a significant impact on the environment." *Winter* v. *NRDC*, 129 S. Ct. 365, 372 (2008).

APHIS must comply with regulations promulgated by the Council on Environmental Quality ("CEQ"), the agency responsible for overseeing implementation of NEPA. 40 C.F.R. § 1515.2. Those regulations provide, in relevant part, that the EIS "shall serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made." *Id.* § 1502.2(g). Pending completion of an EIS, APHIS must refrain from taking any action that would harm the environment, preclude alternative courses of action, or otherwise diminish the practical significance of the EIS. *Id.* § 1506.1(a); see also *id.* §§ 1500.1(b), 1501.2, 1502.2(f), 1502.5.

B. The Petition To Deregulate RRA

This case concerns the efforts of petitioners, Monsanto Company and Forage Genetics International,

LLC ("FGI"), to secure the deregulation of Roundup Ready Alfalfa ("RRA"). By virtue of genetic modification, RRA can survive application of glyphosate, a powerful non-selective herbicide that kills or severely damages most plant species, including conventional alfalfa. Pet.App.28a.

In 2004, petitioners asked APHIS to grant RRA non-regulated status. Pet.App.5a. APHIS prepared, and solicited public comments on, a draft EA. More than 663 comments were received, including 520 that opposed the deregulation. Pet.App.6a; 69 Fed. Reg. 68,300 (Nov. 24, 2004). Alfalfa farmers, exporters, and others objected that APHIS had not adequately considered the environmental effects of deregulation. See, *e.g.*, JA 111-50. Commenters also objected that, without appropriate safeguards, RRA's genetically engineered trait would spread to conventional and organic alfalfa. *E.g.*, JA 111-49.[1] Further, they noted that widespread adoption of RRA would exacerbate the increase in herbicide use caused by the growing of other Roundup Ready crops (such as corn, rice, and soybeans). JA 114-43; see also JA 239-44. This, in turn, would accelerate the proliferation of glyphosate-tolerant weeds, thereby driving farmers in a vicious cycle to apply *even more* glyphosate or to employ

[1] Growers explained that alfalfa contaminated with the RRA gene cannot be marketed and sold as "conventional" or "organic." Many foreign nations – including Japan, the largest importer of alfalfa hay, and Saudi Arabia, the largest alfalfa seed importer – generally do not accept genetically engineered crops. JA 123-24, 130, 149-50, 450-54, 623-24. Organic dairy farms, cattle operations, and horse breeders also objected to deregulation because of the effects of a diminished supply of organic alfalfa hay. *E.g.*, JA 122-26; see also JA 420-23, 449, 454, 638, 646-50, 987-89.

other, more toxic herbicides. JA 114-26, 131-43; see JA 239-44, 678-83, 707-19.

APHIS nevertheless concluded that deregulation of RRA would not have significant environmental effects. Pet.App.7a. In June 2005, without preparing an EIS, the agency unconditionally deregulated RRA. *Ibid.*; JA 151-231.

C. The District Court Proceedings

In early 2006, Geertson Seed Farms and Trask Family Farms, which are conventional alfalfa seed farms in Oregon and South Dakota, together with the Center for Food Safety and other environmental groups, initiated this litigation against the Administrator of APHIS and two other federal officials. See page ii, *supra*. Among other things, plaintiffs (respondents here) challenged APHIS's deregulation decision under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, alleging that the agency's failure to prepare an EIS violated NEPA.[2]

1. Summary judgment proceedings and the preliminary injunction

On cross motions for summary judgment, and after lengthy arguments conducted on January 19, 2007, JA 245-55 (excerpts), the district court granted partial summary judgment, holding that APHIS had violated NEPA by failing to prepare an EIS before deregulating RRA. Pet.App.27a-53a. The court determined that increased distribution of RRA likely

[2] The federal defendants below are also respondents in this case and will be referred to as "the federal respondents." "Respondents" will refer to the plaintiffs below.

would cause genetic contamination of conventional and organic alfalfa, and it found that the agency had failed to evaluate the effects of such contamination. Pet.App.35a, 38a-45a. The district court also held that APHIS had failed to assess the environmental significance of the anticipated proliferation of glyphosate-tolerant weeds (from RRA alone and cumulatively, because of other genetically modified crops) – a side-effect of deregulation that APHIS did not dispute. Pet.App.45a-47a. The court requested proposed judgments from the parties; in response, APHIS submitted an order that would have (i) vacated the deregulation decision but simultaneously (ii) allowed dissemination of RRA subject to certain conditions. JA 376-78.

Monsanto and FGI then moved to intervene. See JA 39-40. In their intervention pleadings, they asserted that they would be injured by *either* a vacatur of APHIS's deregulation decision *or* an injunction prohibiting distribution of RRA. Mot. to Intervene filed by Monsanto (Dkt. 86, filed Mar. 2, 2007), at 13 ("[r]escission of the USDA deregulation decision * * * could effectively bar further sales or planting of" RRA); Mot. to Intervene filed by Forage Genetics, Inc. (Dkt. 88, filed Mar. 2, 2007), at 8. The district court granted intervention, JA 548, and scheduled an additional hearing to ensure that intervenors (petitioners here) could be heard on the scope of the remedy, JA 413-17. The court encouraged all parties to submit any evidence that might guide the decision on preliminary relief and offered to "listen to * * * anybody that you suggest that I should hear on the subject." JA 551; see also JA 413-18.

Following a lengthy hearing on March 8, 2007, the district court issued an order (i) vacating APHIS's deregulation decision, (ii) directing that RRA "is once again a regulated article," and (iii) entering a preliminary injunction that "maintains the status quo" by "prohibiting future plantings" pending the ruling on permanent injunctive relief. Pet.App.54a-59a, 63a; see also 72 Fed. Reg. 13,735-36 (Mar. 23, 2007). To allow growers who had already purchased RRA seed to plant it, the court postponed the effective date of that order by several weeks. Pet.App.58a. The court again encouraged the parties to submit "whatever additional evidence [they] wish to provide" prior to the hearing on permanent relief. Pet.App.58a-59a.

2. The permanent injunction proceedings

The parties thereafter filed scores of written declarations and other evidence. The "voluminous" (Pet.App.64a) record before the district court included extensive evidence of likely and irreparable environmental harm. We catalogue that evidence below.

a. *The preexisting contractual obligations.* Both before and after APHIS's June 2005 deregulation decision, the growth and harvesting of RRA was governed by petitioners' contracts with growers, which imposed mandatory isolation distances and required specific harvesting, cleaning, processing, labeling, and storage procedures. JA 610-15, 624-25; see generally JA 258-344. For example, the contracts required that RRA seed production fields be located certain minimum distances from existing conventional alfalfa seed fields, depending on whether pollen flow was mediated by leafcutter bees (900 feet), alkali bees (one mile), or honey bees (three miles). JA

263, 280-81, 615. For their part, growers of alfalfa hay were required to harvest their crop at or before 10 percent bloom. JA 260-61, 334, 624. And all growers of both seeds and hay were obligated to thoroughly clean tractors, combines, and other equipment used to harvest and process RRA products "both prior to and subsequent to" their use. JA 329; see also JA 271, 283-84, 287-88, 325, 349. All growers were also required to separate RRA seed from conventional seed and to store the former in specially marked containers. JA 268, 283-84, 329, 360.

b. *The evidence of past contamination in four states*. The evidence showed that, despite the foregoing contractual requirements, conventional alfalfa seed producers experienced contamination by RRA in at least four different states. In 2006, Dairyland Seed Company, a large family-owned farm, suffered contamination by the RRA gene in at least 11 of its conventional alfalfa seed lots. JA 1008-10, 1013-14, 1017-19, 1022-24; see also JA 630, 663-64, 666. The compromised lots were in Montana, Wyoming, and Idaho, where growers stock leafcutter bees to pollinate their seed fields, JA 358, and thus where RRA growers would have been contractually bound to 900-foot isolation distances. JA 263. The contamination of Dairyland's seeds occurred well beyond that distance; indeed, meaningful levels of contamination were detected at up to 1.5 miles from the RRA source. JA 1018.

Similarly, Cal/West, a California-based seed cooperative, experienced two contamination episodes in 2005. JA 670-75. First, the company discovered that, less than 200 feet away from one of its seed produc-

tion fields in Wyoming, a neighbor had planted a field of RRA. JA 673. Although Cal/West and the neighbor apparently had planted without knowledge of the other's actions, the unsafe proximity was not discovered until well after each field was established. When tested, the Cal/West field showed significant levels of RRA contamination. *Ibid.*

Cal/West also discovered the presence of the RRA gene in one of its conventional seed lots in California. JA 672. The company then tested seed produced in Washington from plants that were grown using the California-based seed. *Ibid.* Two of the sampled Washington seed lots tested positive for the RRA gene. *Ibid.* Because the company did not have any access to RRA seed at the time, it attributed the contamination to external sources. *Ibid.*

Petitioners blamed the first Cal/West contamination on human error and the second on "unintentional mixtures between transgenic and conventional seed and/or plants." Pet.App.405a-406a. But whatever the cause, the evidence demonstrated multiple examples of contamination, even when RRA was grown on a small scale.

c. *The mere duplication of preexisting contractual obligations in APHIS's proposed injunction requirements.* APHIS's proposed injunction incorporated provisions that were virtually identical to those in petitioners' contracts. See Pet.App.184a-187a; JA 376-78, 1062. For example, APHIS proposed that RRA grown for seed production be planted either 1500 feet or three miles from conventional alfalfa seed fields when leafcutter bees or honey bees, respectively, were used to pollinate the RRA. Pet.App.186a.

APHIS further proposed that the injunction require "pre-bloom" harvest of any RRA hay field within 165 feet of a conventional alfalfa seed field, and harvest "at or before 10% bloom" of any RRA field "located between 165 and 500 feet from any alfalfa field grown for seed production." *Ibid.* APHIS's measures replicated contractual requirements for RRA storage and equipment cleaning, as well. Pet.App.187a.[3]

Given that APHIS's proposed requirements for the injunction mirrored contractual obligations that had proven ineffective in preventing contamination, it is hardly surprising that the evidence also refuted the notion that APHIS's proposed measures would have averted the documented contamination events at Dairyland and Cal/West. For example, APHIS's injunction would have mandated only a 1500-foot isolation distance around the RRA fields adjacent to the Dairyland seed fields, Pet.App.186a, yet contamination was detected up to 1.5 miles away. JA 1018.[4]

d. *The evidence of APHIS's limited enforcement ability.* The record also established that there were severe constraints on APHIS's enforcement capabilities. The agency's own inspector general noted deficiencies in both the notification and permitting

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[3] APHIS's proposed injunction also provided that "RRA shall not be used for livestock grazing purposes" and that "all RRA seed producers and hay growers must be under contract with Monsanto or [FGI]," where those contracts "require compliance with [APHIS's] conditions." Pet.App.187a.

[4] APHIS's prescribed isolation distance for leafcutter bee-mediated pollination (1500 feet) was far smaller than the flight ranges of wild honey bees or bumble bees, which can fly (and transport pollen) many miles. See, *e.g.*, JA 155, 383, 541.

processes and concluded that both failed to provide adequate oversight. *OIG Audit Report: Animal and Plant Health Inspection Service Controls Over Issuance of Genetically Engineered Organism Release Permits* (Dec. 2005) (Dkt. 95, Exh. A).[5] For example, the agency was often unaware of planting locations, *id.* at 14; field inspections, necessary to "ensure that planted GE crops do not persist in the environment," were grossly inadequate, *id.* at 27; and field test progress reports, necessary to track environmental impacts, were insufficient, *id.* at 35.[6]

Neil Hoffman, the Director of the Environmental Risk Analysis Division for APHIS, confirmed that resource constraints would continue to hamstring the agency's enforcement efforts. He admitted that it "would pose unusual challenges to [the agency's] current regulatory structure and significantly drain [agency] resources" to inspect even the 220,000 acres of already-planted RRA, let alone the projected fivefold increase in acreage predicted by petitioners in the two years required to prepare an EIS. JA 362, 437; see also JA 609-10, 621 (petitioners estimated that nearly 900,000 additional acres of RRA would be planted in 2007 and 2008).

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[5] This report was submitted to the district court with the declaration included at JA 395.

[6] In response to APHIS's repeated failures in containing genetically engineered crops, Congress enacted legislation in 2008 requiring APHIS to improve its oversight and take corrective measures to remedy past errors. See Pub. L. No. 110-234, Tit. X § 10204, 122 Stat. 923, 1343-44 (2008); Pub. L. No. 110-246, Tit. X § 10204, 122 Stat. 1651, 2105 (2008).

e. *The evidence concerning the effects of unpredictable weather, human error, inadequate equipment cleaning, inexact harvesting practices, and "wild" alfalfa and pollinators*. In many other ways, the evidence also called into question the efficacy of APHIS's proposed injunction conditions. For example, although APHIS proposed to require that all RRA hay fields be harvested before bloom, Pet.App.186a, both APHIS and petitioners candidly acknowledged that unpredictable weather – notably, summer thunderstorms – often precludes compliance with this critical requirement, JA 251, 553-54, 630. And allowing RRA hay fields to bloom substantially increases the probability of hay-to-hay or hay-to-seed gene transmission. See, *e.g.*, Pet.App.344a-345a, 355a.[7]

The record also showed that human error could cause inadvertent contamination. Seeds may spill during transport, causing patches of genetically modified alfalfa (not subject to isolation distances) to appear along roadsides, in ditches, or even among conventional or organic crops. *E.g.*, JA 458, 1007; see also JA 850-52. Or, as noted by FGI's president, accidental seed mixing easily can occur within a seed processing facility, notwithstanding efforts to properly segregate organic and genetically altered seed. Pet.App.405a; JA 407-08; see also JA 693-94.

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[7] The record also established that other uncontrollable events increased the likelihood of contamination. For example, flooding – either weather-related, or due to other causes – may cause newly planted RRA seed to be distributed across nearby properties, including fields of conventional or organic alfalfa. *E.g.*, JA 1002.

Several declarants noted that inadequate equipment cleaning also may cause contamination, because the typical "once overs" given to farm equipment by busy operators cannot remove every seed left in the machines. See JA 236-37, 1007. And growers are unlikely to employ the only cleaning procedures that could entirely eliminate the possibility of contamination: completely dismantling all harvesting equipment, a time-consuming and expensive proposition in the middle of harvest season. JA 642-43.

Declarants stated as well that common hay harvesting practices may lead to contamination. Although RRA growers may intend to harvest their entire field prior to bloom, tractors frequently miss plants at the edges of fields and may be unable to cut hay growing in wet spots, center pivots, or corners. JA 407, 1003, 1006, 1024. Moreover, growers may determine that it is not worth the time and resources to harvest the last cutting, which in turn may allow these plants to go to seed. JA 700, 1003.

In addition, many growers cannot afford to purchase their own harvesting equipment, so they hire "custom cutters" to harvest their crop. *E.g.*, JA 236-37, 629, 641-43. But these individuals are in high demand and may not be able to cut all of the fields before the plants begin to bloom, especially with inclement weather approaching. JA 641-43, 1006-07. If the custom cutters work in both RRA and conventional fields and, again, fail to completely clean their machines between uses – a likely scenario, as discussed above – it is extraordinarily likely that RRA pollen or seeds will be transferred to subsequently cut conventional fields. JA 1006-07; see also JA 642.

Evidence also indicated that APHIS's proposed conditions would not protect against contamination via "wild" or feral alfalfa, which is frequently found in abandoned fields or planted along roadsides. JA 108-09, 215.[8] Wild pollinators, including wild honey bees and bumble bees (which petitioners' own studies documented in large numbers alongside "stocked" bees in alfalfa fields) create a further risk of cross-pollination. *E.g.*, JA 383, 387, 534-35; see also JA 144-45, 635, 697-98, 1002-03. Indeed, one of the studies cited by petitioners noted that native honey bees and bumble bees (which may range up to five miles) were abundant in seed production fields. JA 389-90, 463-64, 534-35; see JA 635, 698.

f. *The evidence of contamination of other crops.* The record also documented contamination involving other genetically modified crops and grasses, including corn, canola, rice, soybeans, and bentgrass. *E.g.*, JA 139, 693-97, 741-45, 859-66, 884-971. Experiences with these other crops demonstrated the relative futility of containment initiatives and highlighted the potential for human error or other unknown factors to cause unintentional, widespread dissemination of new genetic material. *E.g.*, JA 693-97, 741-45, 859-66, 884-86, 965-71; see also JA 139.

g. *The district court's decision.* After conducting another lengthy hearing on April 27, 2007, the district court entered a permanent injunction. Pet.App.60a-79a. The court noted that "an injunction

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[8] Petitioners and their experts acknowledged that feral alfalfa may significantly contribute to cross-contamination. JA 458, 528, 574, 1056-57; Pet.App.237a-239a.

does not automatically issue" based on "a finding of a NEPA violation"; rather, because "injunctive relief is an equitable remedy," a court must "engage in the traditional balance of harms analysis." Pet.App.65a. The court observed that in a "run of the mill NEPA case," the "balance of harms" often "favor[s the] issuance of an injunction," because environmental injury "can seldom be adequately remedied by money damages and is often permanent or at least of long duration." Pet.App.65a-66a. The court also explained, however, that in certain circumstances an injunction may not be warranted. Pet.App.66a.

Next, "[a]fter carefully reviewing [the] voluminous evidence," Pet.App.67a, the court found that "plaintiffs have sufficiently established irreparable injury and that the balance of the equities weighs in favor of maintenance of the status quo," which (given the Court's prior invalidation of APHIS's deregulation decision) included the prohibition on further planting of RRA, Pet.App.71a; see also *id.* at 75a ("after balancing all of the equities, the Court in its discretion finds that an injunction maintaining the status quo * * * is appropriate"). Critical to the court's finding of a likelihood of irreparable injury was (1) the uncontested evidence that contamination *had already occurred*, notwithstanding petitioners' contractual requirements, and (2) APHIS's acknowledgement that it lacked the resources to enforce the usage conditions it had proposed, even if planting did not increase as dramatically as petitioners projected. Pet.App.69a-71a.

The district court therefore "(1) vacat[ed] the June 2005 deregulation decision; (2) order[ed] the govern-

ment to prepare an EIS before it [made] a decision on [the RRA] deregulation petition; [and] (3) enjoin[ed] the planting of any [additional RRA] in the United States * * * pending the government's completion of the EIS and decision on the deregulation petition." Pet.App.79a, 108a-110a.[9] By its own terms, the injunction will terminate when the EIS issues. Pet.App.108a. That will occur imminently; the period for comments on the draft EIS closed on March 3, 2010. 75 Fed. Reg. 8,299-8,300 (Feb. 24, 2010).

D. The Court Of Appeals Proceedings

APHIS and the intervenors appealed the permanent injunction. Neither, however, challenged the finding of a NEPA violation or the vacatur of the deregulation decision. C.A. Pet. Br. 1-2; C.A. U.S. Br. 2 (stating that the injunction was the "sole issue on appeal").

The Ninth Circuit affirmed, Pet.App.80a-103a, and after petitioners alone sought rehearing *en banc*, the Ninth Circuit affirmed in an amended opinion, Pet.App.1a-26a. The court stated that the district court had properly "applied the traditional four-factor test, required by *eBay* [v. *MercExchange, L.L.C.*, 547 U.S. 388 (2006)]" (Pet.App.13a) – a test, the appeals court noted, that "applies in the environmental context," as in any other, Pet.App.11a. In particular, the district court had *not* "presume[d] that irreparable harm was likely to occur only on the basis of the

[9] At the same time, the court allowed previously planted RRA to be harvested under conditions proposed by APHIS and expressly authorized APHIS's process for issuing permits governing regulated articles. Pet.App.76a-78a, 108a.

NEPA violation"; rather, the district court had found "that genetic contamination was sufficiently likely to occur so as to warrant broad injunctive relief." Pet.App.13a. After reviewing the record evidence, the court of appeals determined that the lower court's finding concerning the likelihood of irreparable injury "was not clearly erroneous." Pet.App.14a. Finally, the Ninth Circuit held that the district court had not abused its discretion in declining to conduct a trial-type evidentiary hearing. Pet.App.18a-19a.[10]

INTRODUCTION AND SUMMARY OF ARGUMENT

This is an extraordinary case, but not because the courts below departed from well-settled legal principles. They didn't. Petitioners start with the faulty premise that a recalcitrant court of appeals created a special exemption for plaintiffs in environmental cases, under which an injunction may issue even if irreparable harm is unlikely. There was no such holding by the courts below, and respondents neither seek nor rely on any such exemption. Petitioners briefly do battle with this straw man, then devote most of their brief to their request that this Court reweigh hundreds, if not thousands, of discrete facts and second-guess the district court under an abuse of discretion standard. And, remarkably enough, petitioners do all this in the service of a claim – that the injunction should be vacated or narrowed – that would avail them nothing even if successful.

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[10] On this last point only, Judge Smith dissented. Pet.App.20a-26a.

Indeed, if anyone is seeking to plow new legal ground, it is petitioners. They contend, for example, that only *species-level* effects are cognizable under NEPA, and thus there cannot be irreparable harm in this case. Elsewhere, they assert that contamination of alfalfa does not affect the "human environment," and, for that reason as well, the proven harms in this case cannot give rise to a NEPA injunction. Of course, these claims (and others) are hard to square with petitioners' acknowledgement that *some* form of injunction – in particular, the version they like – should be entered. More fundamentally, however, these contentions would, if accepted, eviscerate the purposes of NEPA and contravene its implementing regulations. There is no good reason to go down that path, and every good reason not to.

I. First things first: This Court should dismiss the case because petitioners lack standing to pursue this appeal. Petitioners have chosen to challenge *only* the district court's injunction, not its vacatur of APHIS's deregulation decision. But the vacatur had the undisputed effect of restoring RRA's status as a regulated article under the PPA. Standing alone, the vacatur remedy – which was proposed by the government and never contested by any party – independently prevents petitioners' sale or distribution of RRA. The injunction challenged in this Court therefore causes no independent injury to petitioners' legally cognizable interests, nor would a favorable ruling from this Court provide petitioners with any redress. The Court should decline petitioners' request to decide an abstract question that has no real-world consequences for them. Even if the Court concludes that the standing issue is debatable, it should

dismiss the petition as improvidently granted given the at best insubstantial effect on petitioners of the challenged injunction, which in any event will expire by its own terms in the very near future once an EIS is issued. With so little truly at stake, this Court's scarce resources could be directed to better uses than deciding whether the district court abused its discretion in resolving the highly fact-specific and record-dependent issues that are actually presented in this case.

II. If it reaches the merits, this Court should affirm the injunction issued by the district court. Neither petitioners nor the federal respondents have identified a genuine legal error committed by the courts below. Petitioners' claim, in substance, is that the lower courts *must* have committed legal error somewhere, because how else could they have lost? In support of that audacious claim, the best petitioners can do is to insist that isolated statements by the district court, ripped from context, reflect the application of an improper legal presumption or a "special NEPA exception" to the traditional injunction standards. Petitioners are simply mistaken about the nature of the district court's decision.

When all is said and done, what petitioners, the federal respondents, and their *amici* are asking this Court to do is to reweigh the "voluminous evidence" (Pet.App.67a) and enter a more limited remedy (though the remedy they seek also would include vacatur of the deregulation decision, a ruling petitioners have not challenged). But this request should be denied, as well, because the evidence amply supports the district court's conclusion that the harm in ques-

tion – genetic contamination of conventional and organic alfalfa – was both likely and irreparable. Moreover, petitioners' argument that the district court should have imposed APHIS's proposed injunction fails for multiple reasons, not least of which is that doing so would have violated binding federal regulations. Finally, if, contrary to our submission, the Court determines that the Ninth Circuit relied on a flawed legal analysis, the proper remedy would be to correct that error and remand to the court of appeals to redo its abuse-of-discretion review.

III. This Court should not strip district courts of their traditional discretion regarding the nature and content of injunctive hearings. The ironclad rule sought by petitioners – which would mandate trial-type proceedings before an injunction could be imposed – would do just that. It is unsupported by precedent, strays from the historical practices in equity, and would be particularly inappropriate in a case such as this, where the district court conducted multiple hearings and gave the complaining litigants every opportunity to present unlimited evidence in written form. At a minimum, if the Court finds that petitioners have a right to present live testimony and conduct cross-examination, the appropriate remedy is to remand for additional proceedings, not simply enter the injunction petitioners prefer.

ARGUMENT

I. PETITIONERS LACK STANDING TO PURSUE THIS APPEAL

This case should be dismissed at the threshold, because petitioners do not have standing. After concluding that APHIS violated NEPA, the district court

entered a judgment (1) vacating APHIS's deregulation decision, and (2) enjoining the planting of RRA pending completion of an EIS. But petitioners appealed from, and now challenge, only the propriety of the *injunction*, not the vacatur. As a consequence, even were this Court to vacate or narrow the injunction, petitioners would be in precisely the same position they are in today. Their distribution of RRA would still be unlawful because the vacatur restored RRA to its status as a regulated article, the distribution of which is unlawful under the PPA and APHIS regulations.[11]

The "irreducible constitutional minimum of standing" requires (1) a concrete and particularized injury in fact, in the form of an "invasion of a legally protected interest"; (2) a "causal connection between the injury and the conduct" of which a litigant complains, such that the alleged injury is "fairly * * * trace[able] to the challenged action"; and (3) a demonstration that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992) (citation omitted). Petitioners fail to satisfy any of these requirements.[12]

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[11] The district court carved out from the injunction a narrow protection for farmers who had already begun planting or had purchased seed intending to plant. Pet.App.58a. Respondents opposed that exception, see Pl.'s Proposed Judgment (Dkt. 93, Att. 2, filed Mar. 2, 2007), but elected not to challenge the issue on appeal.

[12] A party must satisfy standing requirements to pursue an appeal. *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 64 (1997) ("The standing Article III requires must be met by

Because petitioners do not challenge the vacatur of the deregulation decision, the injunction, standing alone, cannot impair petitioners' interest in distributing RRA without a permit. When the deregulation decision was vacated, RRA reverted to its status as a "regulated article." Pet.App.58a. Petitioners and the government acknowledge that it is unlawful to distribute such "regulated articles" (unless either for field testing or pursuant to a permit issued by APHIS, both of which are *authorized* under the district court's judgment). Pet. Br. 7-8; U.S. Br. 1-3. Indeed, petitioners sought intervention in the district

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persons seeking appellate review, just as it must be met by persons appearing in courts of first instance."). In addition, petitioners as intervenors are required to show that they have standing at this stage of the proceeding because they are the only parties that sought this Court's review of the Ninth Circuit's decision. See *Diamond* v. *Charles*, 476 U.S. 54, 68 (1986) (intervenors who invoked this Court's appellate jurisdiction must demonstrate Article III standing where the defendant State, although a party in the court of appeals, did not take its own appeal but merely filed a letter in this Court stating it wished to receive the same relief as the intervenor). For these reasons, there is no need for this Court to decide whether the federal respondents had standing to take an appeal of the district court's injunction. There is, however, significant reason to doubt that such standing exists. To the extent that the government asserts harm arising from the injunction against expanded distribution of RRA, it is in the same boat as petitioners; given the unchallenged vacatur order, the injunction causes no injury to a legally protected interest of APHIS that could be redressed by a favorable decision. And to the extent that the injunction contains provisions that impose special requirements or prohibitions on the government (such as that APHIS promulgate an administrative order to regulate previously planted and harvested RRA), those provisions were *proposed by the government itself*. JA 376; Pet.App.184a.

court in part because "[r]escission of the USDA deregulation decision * * * could effectively bar further sales" of RRA. Mot. To Intervene filed by Monsanto Co. at 13 (Dkt. 86, filed Mar. 2, 2007).

Thus, rather than asserting harm to a "legally protected interest," petitioners assert only an interest that has already been determined to be legally *unprotected* – indeed, an interest in engaging in activity that is unlawful under the PPA. Moreover, that determination is not subject to review by this Court. Petitioners did not object to the vacatur remedy in the district court (even after acknowledging, in seeking intervention, that rescission of the deregulation decision would make it unlawful to distribute RRA); did not appeal that portion of the remedy; did not describe it in their Questions Presented; and do not contest the vacatur in their merits brief.

Petitioners also flunk the second requirement for standing: the prevailing restrictions on their sale and distribution of RRA are not "fairly traceable" to the district court's injunction. *Allen* v. *Wright*, 468 U.S. 737, 751 (1984). On the contrary, those restrictions are traceable to the unchallenged vacatur order. Put differently, the *challenged* injunction adds nothing to the restrictions on petitioners that flow independently from the *unchallenged* vacatur decision. Where the line of causation is too attenuated, *i.e.*, "the injury [to the complaining party] is highly indirect," standing is absent. *Id.* at 757 (citing *Simon* v. *E. Ky. Welfare Rights Org.*, 426 U.S. 26, 42 (1976)). Here the causal connection is not only "weak" (*id.* at 759) but nonexistent.

Finally, petitioners must show that they will "benefit in a tangible way from the court's intervention." *Steel Co.* v. *Citizens for a Better Env't,* 523 U.S. 83, 103 n.5 (1998) (citation omitted). Where a party does not "stand to profit in some personal interest," *Simon*, 426 U.S. at 39, or where it is "speculative" whether the judgment will result in relief, *id.* at 42-43, that party lacks "such a personal stake in the outcome of the controversy as to warrant [its] invocation of federal court jurisdiction and to justify exercise of the court's remedial powers on [its] behalf," *id.* at 38. That principle applies with full force where, as here, a party challenges one prohibition on its conduct, but does not challenge a second independent prohibition that bars the same conduct. See, *e.g.*, *Renne* v. *Geary*, 501 U.S. 312, 319 (1991) (doubtful that injury is redressable when challenged conduct is prohibited by separate, unchallenged statute); *Covenant Media of S.C., LLC* v. *City of N. Charleston*, 493 F.3d 421, 430 (4th Cir. 2007), *cert. denied*, 552 U.S. 1100 (2008) (plaintiff lacked standing to challenge constitutionality of regulation because separate, unchallenged regulation prohibited the same conduct); cf. *Coleman* v. *Thompson*, 501 U.S. 722, 729 (1991) (Court will not review question of federal law decided by a state court when judgment below is supported by an adequate and independent state law ground).

Quoting a prominent legal philosopher, the Chief Justice succinctly summarized standing principles: "When you got nothing, you got nothing to lose." *Sprint Commc'ns* v. *APCC Servs., Inc.*, 128 S. Ct. 2531, 2550 (2008) (Roberts, C.J., dissenting). The converse is also true. If "you got nothing to lose" from

the entry of an injunction, and nothing to gain if the injunction is vacated, "you got nothing."[13]

For these reasons, the Court should dismiss the case for want of standing. But even if the Court concludes that standing is debatable, it should dismiss the petition as improvidently granted. At best, the injunction has a negligible real-world effect on petitioners – and it is poised to expire in the immediate future when APHIS issues its EIS, which could happen any day. These circumstances certainly do not warrant this Court's fact-intensive re-examination of the record to decide issues that, as we explain below, are not the clear-cut legal questions framed in the petition but rather are highly case-specific issues subject to the trial court's broad equitable discretion and reviewable on appeal only for abuse of discretion.

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[13] For obvious reasons, petitioners have never suggested that they intend to defy the injunction by taking actions that would also violate federal law (the PPA and APHIS regulations) and trigger criminal penalties and other administrative sanctions. See 7 U.S.C. § 7734 (criminal and civil penalties under the PPA); 7 C.F.R. § 340.0(b) n.2 (remedial powers of APHIS). Nor could petitioners, by declaring such an implausible intent, create a basis for their own standing by conjuring up the specter of contempt. See *Lujan*, 504 U.S. at 560 (standing requires an injury that is "concrete and particularized," "actual or imminent," and not merely "conjectural or hypothetical"). In any event, such an assertion by petitioners of an intent to flout the injunction would be powerful evidence of unclean hands and thus would provide an independent ground for affirming the equitable remedy entered below.

II. THE COURT OF APPEALS CORRECTLY HELD THAT THE CHALLENGED INJUNCTION WAS NOT AN ABUSE OF DISCRETION

Petitioners assert that this case presents the following questions: (1) whether "NEPA plaintiffs are specially exempt from the requirement of showing a likelihood of irreparable harm to obtain an injunction," and (2) whether an injunction may be affirmed if "based on only a remote possibility of reparable harm." Pet. Br. i. They further contend that, in order to affirm the judgment of the district court, the court of appeals necessarily disregarded or created a new exception to the traditional four-part test for injunctive relief.

These arguments are utterly lacking in merit. The lower courts did not even *suggest* that NEPA plaintiffs fall within a special "exception" to the traditional test for injunctive relief or that a "presumption" of harm arises in NEPA cases. Nor did either court give *any* indication that, in its view, the harm in question was merely "possible," but not "likely." And certainly neither court stated that an injunction premised on such a finding would be permissible under this Court's precedent. In fact, both courts below articulated and faithfully applied the correct legal standards.

Once petitioners' imagined legal errors are set to one side, it is clear that the Ninth Circuit correctly concluded that the district court did not abuse its discretion in entering the injunction. The district court's findings concerning irreparable harm were amply supported in the record and not clearly erroneous. Its

careful weighing of the traditional equitable factors was beyond reproach, and certainly not an abuse of discretion. And its decision not to impose the conditions proposed by APHIS was supported by good reasons that petitioners and the federal respondents simply ignore.

A. The Lower Courts Applied The Correct Legal Standards

1. Both courts below acknowledged and applied the traditional, four-factor test for determining the propriety of injunctive relief

It is common ground that a plaintiff seeking a permanent injunction must satisfy the traditional, four-part equitable test by showing that (1) "he is likely to suffer irreparable harm," *Winter*, 129 S. Ct. at 374, (2) "remedies available at law, such as monetary damages, are inadequate to compensate for [the] injury," *eBay*, 547 U.S. at 391, (3) "the balance of equities tips in his favor," *Winter*, 129 S. Ct. at 374, and (4) "an injunction is in the public interest," *ibid.* In affirming the district court, the Ninth Circuit expressly acknowledged this governing test, Pet.App.11a, and unambiguously concluded that the district court had applied it, Pet.App.13a. That conclusion is unassailable. The district court expressly referred to the "traditional balance of harms analysis" and discussed each of the four factors in turn. See Pet.App.65a, 71a-72a (examining "irreparable injury," "irreparable environmental harm," "balance of the equities," and "harm to" certain farmers and consumers that "outweighs the economic harm to Monsanto"), 74a-75a (examining the "public interest"),

75a (deciding "after balancing all of the equities" that injunctive relief was warranted).

Although petitioners concede that "the Ninth Circuit articulated the showings that must be made under the traditional equitable test, and acknowledged that the test applies in environmental cases," they claim that "when the rubber met the road," the court of appeals in fact dispensed entirely with the first factor – likelihood of irreparable harm – by applying a "presumption of irreparable harm * * * [in] NEPA cases." Pet. Br. 28-29. As for the district court, petitioners fault it for "advert[ing] to the traditional equitable factors * * * only cursorily" and for concluding that respondents had "'*sufficiently* established irreparable injury'" (a phrase that petitioners interpret as adopting an impermissible "possibility of irreparable harm" standard instead of the traditional "likelihood of irreparable harm" standard). Pet. Br. 18 (quoting Pet.App.71a).

Petitioners' principal evidence for this claim is the district court's statement that "'[i]n the run of the mill NEPA case, the contemplated project * * * is simply delayed until the NEPA violation is cured,' that is, the balance of harms favor[s] issuance of an injunction." Pet.App.65a (quoting *Idaho Watersheds Project* v. *Hahn*, 307 F.3d 815, 833 (9th Cir. 2002)). But that observation hardly reflects a "presumption of irreparable harm." Pet. Br. 22. It is, instead, an accurate empirical observation about the circumstances that frequently warrant injunctive relief. Indeed, petitioners' own attorney told the trial court that in "the run of the mill NEPA case, * * * environmental injury" is "likely." Tr. of April 27, 2007

Hearing at 17. And the federal respondents have made the very same observation in this case, pointing out that, "[a]s a matter of practical experience, cases involving claims of significant harm to the environment may result in injunctive relief more often than private litigation involving economic or other interests." U.S. Br. 20.[14]

Moreover, the remainder of the district court's opinion reflects careful analysis of each element of the traditional test for injunctive relief and belies any suggestion that the court applied an incorrect legal standard. First, the court noted the many reasons why cross-contamination was likely to recur absent an injunction. Pet.App.69a-71a; see also pages 11-13, *supra*. It found the interim conditions proposed by

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[14] Petitioners and the federal respondents complain as well about the district court's comment that "in unusual circumstances an injunction may be withheld, or, more likely, limited in scope." Pet.App.66a (quoting *Nat'l Parks & Conservation Ass'n* v. *Babbitt*, 241 F.3d 722, 737 n.18 (9th Cir. 2001) (quotation omitted); see Pet. Br. 16; U.S. Br. 21. Once again, however, this passage is simply an empirical account of the frequency of injunctive relief in environmental cases. And Members of this Court recently have emphasized that a "historical practice" of granting injunctive relief in a particular type of case should be accorded some weight. *eBay*, 547 U.S. at 395 (Roberts, C.J., concurring); *id.* at 395-96 (Kennedy, J., concurring) ("The Chief Justice is * * * correct that history may be instructive in applying th[e] test [for injunctive relief]."). Courts deciding whether to issue injunctive relief are not "writing on an entirely clean slate" and should be mindful of "the basic principle of justice that like cases should be decided alike. When it comes to discerning and applying [legal standards governing equitable discretion], * * * a page of history is worth a volume of logic." *Id.* at 395 (Roberts, C.J.) (internal citations omitted).

APHIS "similar to those already imposed" by contract, and observed that "contamination has occurred" in four states "despite those conditions." Pet.App.70a; see also pages 7-8, *supra*. It rejected the contention that APHIS's conditions might be more effective than the contractual requirements in preventing contamination, given that APHIS had acknowledged that it lacked "the resources to inspect the 220,000 acres currently planted with [RRA] hay," let alone "the more than one million acres of [RRA] hay" and the "concomitant increase in seed acreage" that petitioners "estimate will be planted" absent an injunction. Pet.App.70a; see also pages 9-10, *supra*. In addition, the court cited concessions from the president of FGI that uncontrollable factors, such as weather, can prevent farmers from harvesting alfalfa forage crop before seeds mature. Pet.App.71a; see also page 11, *supra*. The court also considered other circumstances that could impair the effectiveness of APHIS's proposed conditions, including human error, inadequate equipment cleaning, inexact harvesting practices, and "wild" alfalfa and pollinators. See pages 11-13, *supra*. Finally, the court observed that the injury caused by genetic contamination was irreparable, in part because "contamination cannot be undone" once it occurs. Pet.App.71a.

Next, the district court found that "[t]he harm to these farmers and consumers who do not want to purchase genetically engineered alfalfa or animals fed with such alfalfa outweighs the economic harm to Monsanto, Forage Genetics and those farmers who desire to switch to Roundup Ready alfalfa." Pet.App.71a. In particular, it observed that any RRA seed would survive in storage, unharmed, until

APHIS completed the EIS. Pet.App.72a. Moreover, it found that any lost revenue to petitioners did "not outweigh the potential irreparable damage to the environment." *Ibid.* Nor did "[t]he desire of some farmers to plant *more* [RRA] or to *switch* to [RRA] * * * outweigh the potential for irreparable harm." *Ibid.* Finally, the court noted that petitioners' proposed "expansion of the [RRA] market pending the preparation of the EIS" was "unprecedented" and was not in the public interest. Pet.App.72a-75a.

In short, the district court demonstrated that it understood and correctly applied the traditional test for injunctive relief, including the requirement of likely irreparable harm. Petitioners' attempts to transmute that court's reasoned analysis into legal error – by suggesting an interpretation of its opinion that the court itself clearly did not intend – are entirely unavailing.

2. The lower courts did not create a "NEPA exception" to the traditional legal standard for injunctive relief

According to petitioners, the district court created – and the court of appeals affirmed – "a special NEPA exception to the rule that an injunction will not issue except as necessary to prevent a likelihood of irreparable harm." Pet. Br. 31. These arguments again misrepresent the analysis employed by the lower courts.

As discussed above, the district court painstakingly explained why contamination was likely to occur in the future absent an injunction. In doing so, it did not rely on its prior holding on the merits of the NEPA claim. Rather, the court simply stated that, in

its previous opinion, it had found (just as it had a mere page before in its order on injunctive relief) that "contamination * * * has occurred and defendants acknowledge as much." Pet.App.71a. Then, in the remainder of its order, the court independently stated (1) why contamination was likely to recur absent an injunction; (2) why contamination constituted irreparable injury; and (3) why the other traditional factors counseled in favor of injunctive relief. Pet.App.69a-75a.[15] None of this analysis, of course, would have been necessary if the court had adopted the "NEPA exception" claimed by petitioners. From the face of the district court's opinion, then, it is plain that the court understood its obligation to consider all of the equitable factors and did *not* conclude that irreparable harm was likely to occur solely on the basis of the NEPA violation.[16]

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[15] To the extent petitioners' and the federal respondents' argument is premised on the notion that past contamination events did not constitute irreparable injury, their own briefs refute that claim. Both acknowledge that *some* measure of injunctive relief is warranted, and petitioners specifically request that this Court enter "the tailored *injunction* proposed by APHIS." Pet. Br. 25 & n.9, 57 (emphasis added); U.S. Br. 32-33. That relief presupposes that there is at least some degree of irreparable harm.

[16] Although cast as a distinct claim, petitioners' assertion that the courts below erred in requiring a showing only of a "possibility" of harm merely repeats the same arguments they employed in suggesting that the courts improperly presumed harm or created a "NEPA exception" to the traditional injunctive standard. See Pet. Br. i, 33. This case simply does not present the same legal error that arose in *Winter*, 129 S. Ct. 365.

3. The court of appeals applied the correct legal standards in upholding the injunction

Petitioners and the federal respondents concede that the court of appeals "set forth the correct legal standard." U.S. Br. In Opp. 10, 13; Pet. Br. 28. Indeed, the Ninth Circuit could hardly have been clearer in explaining the traditional four-part test for injunctive relief, and it expressly recognized that the test applies in NEPA cases. Pet.App.11a-12a (citing *Amoco Prod. Co.* v. *Village of Gambell*, 480 U.S. 531, 545 (1987)). The court of appeals also correctly observed that "an injunction does not automatically issue when a NEPA violation is found." Pet.App.13a. Citing this Court's recent decision in *Winter*, the court recognized that plaintiffs must demonstrate a *likelihood*, not a mere possibility, of irreparable harm to obtain an injunction. *Ibid.* The Ninth Circuit's analysis is based upon sound legal principles.[17]

In an effort to locate a viable criticism, petitioners are reduced to invoking snippets of language in the court of appeals' opinion that have nothing to do with whether the traditional equitable factors were satisfied. Thus, they fault the Ninth Circuit for stating

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[17] Not surprisingly, petitioners' *amici* have trouble articulating the court of appeals' legal error, as well. One *amicus* acknowledges, for example, that "[t]he lower courts accurately recited the basic four-factor test for issuance of a permanent injunction," but insists that they were only "paying lip service to the established standard," Br. of Am. Farm Bureau *et al.* 7, in an effort to "camouflage[]" their defiant "attitude," *id.* at 15. Absent *actual* legal error, however, improper "attitude" does not justify reversal.

that the district court "did not believe defendants had established any [disputed] material issues of fact" and "viewed the disputed matters to be issues more properly addressed by the agency." Pet.App.17a-18a; Pet. Br. 29. These statements, petitioners claim, demonstrate that the court of appeals (1) believed that the district court issued an injunction "without adjudicating the likelihood of irreparable harm," and (2) affirmed that decision because, like the district court, it considered "the agency's impending EIS process as a substitute for judicial weighing of the traditional equitable standards for injunctive relief." Pet. Br. 29.

The cited passages, however, have *nothing* to do with the appellate court's assessment of the traditional equitable factors. In fact, in the pages *preceding* these quotes, the court had *already* explicitly held that the district court's weighing of those factors – including, in particular, its consideration of irreparable harm – did not reflect an abuse of discretion. Pet.App.13a-16a. The quoted statements, by contrast, are located in the section of the court's opinion addressing whether petitioners were entitled to an evidentiary hearing. Pet.App.16a-20a. They justified an entirely distinct holding that in no way establishes a rule allowing district courts ever to forego consideration of any of the equitable factors.

Petitioners go through similar analytical somersaults in insisting that the court of appeals (despite what it clearly said) intended to create a "NEPA exception" to the irreparable harm requirement. Pet. Br. 32. In that connection, they point to the Ninth Circuit's observation that an "injunction to ensure

compliance with NEPA has a more limited purpose and duration" than one issued under other circumstances, and the lower court's conclusion that, because of the limited temporal nature of the relief here, an evidentiary hearing was not necessary, even if different circumstances might demand otherwise. Pet.App.18a-19a. Once again, this error is completely contrived; as before, the cited passages addressed whether an evidentiary hearing was required, *not* whether the injunctive factors had been satisfied.

Equally unfounded are petitioners' efforts to suggest legal errors similar to those corrected in *Amoco, Winter*, and *Romero-Barcelo*. In both *Amoco* and *Romero-Barcelo*, the appellate court had overturned a district court finding that an agency action had no significant environmental effect. In doing so, the court of appeals committed legal error by either presuming irreparable injury, *Amoco*, 480 U.S. at 544-45, or concluding that an injunction issues automatically upon a finding of a procedural violation, *Weinberger* v. *Romero-Barcelo,* 456 U.S. 305, 311-23 (1982). Here, by contrast, the court of appeals made no legal error and merely *affirmed* the district court's fact-intensive analysis under a deferential abuse-of-discretion standard of review. And, unlike in *Amoco*, in particular, here there was no EIS from which the district court could have fairly concluded that the adverse environmental impacts in question were not likely or irreparable. See 480 U.S. at 544.

This case is also very different from *Winter*. The error in *Winter* was the application of an incorrect legal standard – the requirement of a mere "possibility" of harm. 129 S. Ct. at 375. Here, by contrast, there

was no misstatement of applicable law. But this, presumably, is why petitioners must go to such lengths to conjure one up. Without an erroneous "presumption" or "exception" to attack, the underlying premise of two of the three questions presented proves utterly unfounded. As Gertrude Stein famously said about Oakland, "there's no 'there' there." GERTRUDE STEIN, EVERYBODY'S AUTOBIOGRAPHY 289 (1937).

B. The District Court's Findings Concerning Irreparable Harm Were Well Grounded In The Record, And Its Decision Issuing Injunctive Relief Was Not An Abuse Of Discretion

Once petitioners' claims of legal error are properly disregarded, it is clear that their real complaints are merely challenges to the district court's findings, weighing of the evidence, and balancing of the equities. Indeed, petitioners themselves seem to concede as much, given the entirely new arguments that have appeared in their merits brief – arguments that one must squint to discern in the questions presented. For example, they now complain that the district court's true error was not in entering *an* injunction but in failing to enter the one *they* wanted. Thus, they ask this Court to remand with instructions to enter a brand new remedy that, they contend, better accounts for the weight of the evidence and the balance of equitable factors.

This request flouts the fundamental premise of abuse-of-discretion review. The reason appellate courts review equitable decisions under a deferential standard is to allow *district courts* to weigh the evidence and determine the remedy that is best suited to

the case. See *Gen. Elec. Co.* v. *Joiner*, 522 U.S. 136, 143 (1997) ("[D]eference * * * is the hallmark of abuse-of-discretion review."). Even if this Court were to accept petitioners' invitation to assume the role of the district court for itself, petitioners' argument should be rejected because the district court's decision reflected an entirely appropriate exercise of discretion.

1. The record confirms that injury arising from genetic contamination had occurred and was likely to recur absent an injunction

The record contains ample support for the district court's conclusion on the likelihood of irreparable harm. The evidence showed numerous instances of contamination of conventional alfalfa, even when RRA was planted on a small scale and subject to contractual requirements similar to those APHIS proposed for inclusion in the injunction. It showed, as well, that APHIS, by its own admission, was incapable of enforcing the conditions it proposed to prevent contamination. This evidence, which is summarized above (at pages 6-13, *supra*), will not be repeated here. The court of appeals correctly held that none of the district court's findings was clearly erroneous.[18]

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[18] The record demonstrates that contamination was more likely than not, but irreparable harm may be sufficiently "likely" without, of course, being "more likely than not." Especially in a case in which the agency has failed to prepare a required EIS, it would be passing strange to require private plaintiffs – bereft of the agency's findings – to make a "more likely than not" showing in order to preserve the status quo. Such a requirement also would conflict with this Court's precedent stating that parties

2. The district court properly concluded that genetic contamination constitutes irreparable environmental harm

Petitioners and the federal respondents both assert that contamination, even if likely, would not constitute "irreparable environmental harm." Pet. Br. 35-40; U.S. Br. 27-29. For many reasons, they are wrong.

a. Petitioners begin by asserting that genetic contamination of alfalfa is not a harm to the "human environment." Pet. Br. 35-37. That claim is not only implausible on its face but also an impermissible backdoor effort to relitigate the district court's unchallenged ruling on the merits of respondents' NEPA claim. The *environmental* nature of the injury is precisely the reason the district court found the EIS necessary in the first place.

Petitioners' argument is also flatly inconsistent with their own request that this Court "remand with instructions to enter [APHIS's] tailored *injunction*." Pet. Br. 25 n.9 (emphasis added); see also *id.* 47-50.

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need only demonstrate a "*sufficient* likelihood" of irreparable injury for an injunction to issue. *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 111 (1983) (emphasis added); *Amoco*, 480 U.S. at 545 (environmental injury must be "*sufficiently* likely" for "the balance of harms" to "favor the issuance of an injunction to protect the environment" (emphasis added)). "Sufficient" hardly connotes "51 percent." What is more, whether injury is "sufficient" is clearly the appropriate standard, given the highly contextual inquiry necessary to issue equitable relief. A contrary standard would fundamentally change the nature of equitable proceedings and would undermine the ability of parties to obtain injunctive relief.

If petitioners concede – as they most certainly do – that *some* form of injunctive relief is required "to prevent irreparable harm," Pet. Br. 48, then they cannot seriously dispute that (1) some amount of harm is sufficiently likely absent an injunction, and (2) such harm is precisely the sort that NEPA addresses.

Furthermore, NEPA's implementing regulations emphasize that the phrase "[h]uman environment shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment." 40 C.F.R. § 1508.14. The harm identified here is unquestionably one that affects "the natural and physical environment," as well as "the relationship of people" – alfalfa growers – "with that environment." See *ibid.* If alfalfa plants themselves are irreversibly altered, and thus alfalfa growers are unable to derive benefit and profit from those plants, such injury certainly qualifies for relief.

b. Perhaps recognizing the futility of this first argument, petitioners try a second: even if environmental harm is likely, NEPA, they claim, recognizes only *species-level* effects. Pet. Br. 36; U.S. Br. 28-29. For numerous reasons, this argument falls short. To begin with, petitioners failed to raise it below. See C.A. Pet. Br. 49-59. It would be inappropriate for this Court to consider this argument when the lower courts were not afforded the opportunity to do so.

Moreover, even if it had been properly preserved, this argument is baseless. It defies common sense to suggest that *no* environmental harm has occurred unless a species is at risk of extinction. The argument also conflicts with NEPA regulations, which

specifically recognize that an action may require an EIS even if it has only *local* effects on the human environment. 40 C.F.R. § 1508.27(a) ("Significance varies with the setting of the proposed action. For instance, *in the case of a site-specific action, significance would usually depend upon the effects in the locale* rather than in the world as a whole." (emphasis added)).

Given the inconsistency with NEPA of petitioners' newfound "species-level harm" argument, it should come as no surprise that petitioners and the federal respondents together can muster only two cases that supposedly support it. See Pet. Br. 36-37 (citing *Fund for Animals* v. *Frizzell*, 530 F.2d 982 (D.C. Cir. 1975), and *Water Keeper Alliance* v. *Dep't of Defense*, 271 F.3d 21 (1st Cir. 2001)); U.S. Br. 28 (same). Both cases offer little legal support and are distinguishable for numerous factual reasons, most importantly because they address *isolated injuries* to *individual members* of an established species, not the dangers inherent in introducing a novel genetic trait into the ecosystem on a significant scale. The proven contamination incidents involving corn, canola, rice, and soybeans, all of which are well documented in the record, provide proof that once a plant species is infiltrated by unwanted genetic material, it is extraordinarily difficult to halt, let alone reverse, that effect. See, *e.g.*, JA 835-39, 870-73.

c. Petitioners next attempt to minimize the harm in question by characterizing it as "purely economic" and contending that "remedying such an economic harm is simply not one of NEPA's purposes." Pet. Br. 38. But the statute, as well as its governing regula-

tions, are quite clear that NEPA *is* concerned with "ecological * * * aesthetic, historic, cultural, *economic*, social, [and] health" effects, "whether direct, indirect, or cumulative." 40 C.F.R. § 1508.8 (emphasis added); 42 U.S.C. § 4331. To be sure, NEPA is not intended to address "economic or social effects * * * *by themselves*," but where, as here, those effects "are interrelated" with "natural or physical environmental effects," agencies must consider them in an EIS. 40 C.F.R. § 1508.14 (emphasis added).

Here, the economic effects are hardly speculative, as petitioners and the federal respondents now suggest. The record contains abundant evidence about the injuries that would befall conventional and organic alfalfa growers, dairy farmers, and livestock owners, if alfalfa crops were contaminated. JA 631, 636, 639-40, 643, 646-50, 652-54, 658-61, 664, 666-67, 974-98. The organic market demands "100% GE-free" products; organic consumers are likely to refuse to purchase products that contain even trace amounts of genetically engineered material. JA 103-04, 110, 124, 139, 449, 454, 638. Because the alfalfa export market can be equally demanding, contamination also threatens growers' international sales. Pet.App.262a; JA 127-30, 149-50, 409-11, 420-23, 623-24, 1070-71.[19]

These economic harms are also quite significant. As both petitioners and the federal respondents are constrained to acknowledge, those injured stand to

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[19] For example, when rice grown in the United States became contaminated with genetically engineered material, international demand for the product plummeted, costing many U.S. farmers their livelihood. See JA 696-97, 884-86.

lose the entire "organic premium" their product would otherwise command. Pet. Br. 38-39; U.S. Br. 27 & n.6. That loss alone would threaten the viability of their businesses, which depend on that premium to compensate for production costs that far exceed those associated with conventional methods. See, *e.g.*, JA 988-89. Even if such losses have yet to occur, courts routinely recognize that devastating *potential* economic injury warrants injunctive relief. See, *e.g.*, *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 932 (1975); *Organized Village of Kake* v. *Egan*, 80 S. Ct. 33, 38 (1959) (Brennan, J., granting application for equitable relief in his capacity as circuit justice); *Gateway E. Ry. Co.* v. *Terminal R.R. Ass'n of St. Louis*, 35 F.3d 1134, 1140 (7th Cir. 1994).[20]

d. In any event, the harm to growers and livestock owners is not "purely" economic. As the district court observed, "[f]or those farmers who choose to grow non-genetically engineered alfalfa, the possibility that their crops will be infected with the engineered gene is tantamount to the elimination of all alfalfa; they cannot grow their chosen crop." Pet.App.44a. NEPA specifically seeks to "maintain

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[20] Petitioners' contrary argument relies heavily on their apparent misunderstanding of *Metropolitan Edison Co.* v. *People Against Nuclear Energy (PANE)*, 460 U.S. 766 (1983), which they say establishes that "the *risk* of harm is not" cognizable under NEPA. Pet. Br. 37, 40. But the claims of mental health effects in *PANE* were non-cognizable because they were caused by the plaintiffs' *fear* of an environmental impact. *PANE,* 460 U.S. at 777-78. The Court made clear that NEPA is concerned with the *risks* of environmental impacts, *id.* at 775 & n.9, even if the *fear* of such risk is not cognizable. Here, the court found (and no party disputed) a classic *environmental* impact.

* * * an environment which supports diversity and variety of individual choice," 42 U.S.C. § 4331(b)(4), and it would contravene that important purpose to allow an agency's actions to eliminate or impair "a farmer's choice to grow non-genetically engineered crops, or a consumer's choice to eat non-genetically engineered food," Pet.App.44a.

e. Finally, petitioners and the federal respondents err in suggesting that the injuries in question are "reparable." Pet. Br. 38-39; U.S. Br. 27-28. A novel genotype that causes an *irreversible* effect on a plant species is hardly unprecedented. As previously explained, such effects have followed the introduction of numerous genetically engineered plant species. See JA 720-842, 855-83, 884-86, 965-73. Nor is it "bad science fiction," Pet. Br. 34, to believe that the introduction of a new plant or animal for beneficial purposes can backfire and lead to irreparable harm. Cf. Renewed Mot. for Prelim. Inj., Nos. 1, 2, and 3, Original, *Wisconsin* v. *Illinois* (U.S. filed Feb. 4, 2010) (requesting a preliminary injunction to require certain measures to protect Lake Michigan from Asian Carp, an invasive species first introduced for beneficial purposes, but which now poses a significant threat to critical waterways, as illustrated in http://www.youtube.com/watch?v=2ChwJiKKBdA&NR=1).

The injuries to growers and farmers also are irreparable. There is no remedy to farmers for their loss of choice to grow (or feed to their livestock) non-genetically engineered crops. And to the extent they suffer economic damages, it is doubtful, at best, that farmers will have adequate legal remedies. Federal

crop insurance regulations specifically disallow coverage for "[c]ontamination by application or drift of prohibited substances onto land on which crops are grown using organic farming practices * * *." 7 C.F.R. § 457.8 (provision 37(f)); see also JA 398-99, 654. And private lawsuits are likely to be stymied by the difficulty of locating the proper defendant, as well as the interposition of causation defenses ("it was the honey bees' fault").

3. The district court did not abuse its discretion in weighing the traditional equitable factors and other case-specific factors

Like any other proceeding in equity, an inquiry regarding the proper remedy for a NEPA violation is expressly committed to the district court's discretion. That decision, moreover, must account for an array of case-specific factors, all of which, in this case, strongly justified the district court's injunction – and confirm the inappropriateness of petitioners' request that this Court rebalance these considerations *de novo*.

First, this case arises in uncharted territory. No EIS has ever been completed on a genetically modified product. Agency counsel acknowledged that RRA is the first herbicide-resistant crop for which there is a risk of gene transmission to conventional crops. Pet.App.45a. Even among other genetically engineered crops, RRA is the first genetically engineered herbaceous perennial slated to be grown nationwide

in crop fields. JA 132, 140, 147.[21] Thus, this case stands in sharp contrast to *Winter*, in which plaintiffs sought "to enjoin – or substantially restrict – training exercises that have been taking place * * * *for the last 40 years*." 129 S. Ct. at 376 (emphasis added). There, the risks and effects of the Navy's activities were well known and documented in "a detailed, 293-page EA." *Ibid.* Here, by contrast, APHIS's meager, 41-page EA on the effects of deregulating RRA, JA 151-231, failed to provide the requisite "hard look at environmental consequences," *Kleppe* v. *Sierra Club*, 427 U.S. 390, 410 n.21 (1976) (quotation marks omitted), necessary to allow dramatic expansion of a new activity.

Second, as explained above, distribution of RRA had already caused undisputed incidents of contamination under conditions virtually identical to those proposed by APHIS. See Pet.App.404a-409a; see also pages 6-8, *supra*. Those contamination events occurred when just "one percent of the total alfalfa acreage in the United States" was devoted to RRA. JA 350. Given that petitioners projected a five-fold increase in RRA sales before the EIS was complete, it is all the more likely that their product would cause even greater injury to conventional and organic al-

[21] Perennials increase the risk of contamination, because they live for several years and are hardier (*i.e.*, survive winters), making it more likely that feral plants could serve as contamination "bridges" between RRA and conventional plants. See, *e.g.*, JA 458. APHIS has approved one other perennial, a genetically modified papaya tree, JA 175, but that is not a row crop, is grown only in Hawaii, and does not present the same feral risks that alfalfa does.

falfa growers during that time. See JA 609-10, 621; see also page 10, *supra*.

The need to account for such case-specific factors is precisely why district courts have long exercised broad equitable discretion. See, *e.g.*, *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329 (1944) ("The essence of equity jurisdiction has been the power of the Chancellor to do equity and mould each decree to the necessities of the particular case."); *Seymour* v. *Freer*, 75 U.S. (8 Wall.) 202, 218 (1869) ("[A] court of equity ha[s] unquestionable authority to apply its flexible and comprehensive jurisdiction in such manner as might be necessary to the right administration of justice between the parties."). Here, the district court's injunctive relief addressed "the necessities of the particular case," *Hecht*, 321 U.S. at 329, within the correct legal framework.

Ignoring these sound legal underpinnings and the unique elements of this case, petitioners effectively ask this Court to step into the district court's shoes and reweigh the equitable factors and other relevant considerations for the purpose of ordering petitioners' desired result: the ability to distribute RRA before APHIS completes an EIS. This Court should not substitute its foot for the Chancellor's. It is simply not the province of an appellate court to engage in such second-guessing of equitable decisions that are properly committed to the discretion of the district court. But even if this Court were inclined to conduct such an intensely fact-bound analysis, the law and the evidence amply support the district court's decision to impose – and the court of the appeals' decision to affirm – the existing injunction.

C. The District Court's Refusal To Impose APHIS's Conditions Was Not An Abuse Of Discretion And Is Justified By Controlling Regulatory Authority

Petitioners also insist that this Court must direct the entry of a more "tailored" injunction. U.S. Br. 29-38; Pet. Br. 25, 47-49. But not just *any* injunction will do – petitioners ask the Court to remand with instructions to enter *APHIS's* proposed judgment. Even if this Court were inclined to reweigh the evidence and assess the merits of that proposal, it should not accede to this particular request. The district court was well within its discretion to decline to impose APHIS's proposed measures, and, in any event, controlling CEQ regulations would have precluded the district court from adopting them.

1. The district court was not required to defer to APHIS's proposed judgment

In arguing that the district court was obligated to enter more limited injunctive relief, the federal respondents and petitioners maintain that Judge Breyer should have deferred to *APHIS* on the scope of the remedy. Pet. Br. 23, 33; U.S. Br. 32-38. That argument, however, improperly equates the standards of judicial review that apply to (a) record-based agency decision-making and (b) an agency's position in civil litigation regarding appropriate redress of its own statutory violation. The former, of course, is entitled to judicial deference. But that standard of review is premised on the notion that, because the agency has followed certain prescribed administrative procedures – including those designed to allow interested parties to comment upon and inform its final decision – the agency is best poised to make the ex-

pert judgment in question. See *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43-51 (1983); *Baltimore Gas & Elec. Co.* v. *NRDC*, 462 U.S. 87, 103 (1983). By contrast, no such deference is owed to agency positions adopted in the course of litigation proceedings. *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 419-20 (1971) ("'post hoc' rationalizations" in "litigation affidavits" are "an inadequate basis for review" and "clearly do not constitute the 'whole record' compiled by the agency"); cf. *State Farm*, 463 U.S. at 50 ("[C]ourts may not accept * * * counsel's *post hoc* rationalizations for agency action."); *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 168 (1962) (same).

In this case, the question is *not* whether the court should have deferred to an agency decision promulgated under the APA's rulemaking procedures. Rather, the agency's position here was adopted in litigation. Moreover, APHIS advanced claims about the environmental impact of its proposal immediately after the district court had concluded that the agency had failed adequately to consider those very same impacts. Indeed, APHIS submitted its proposed judgment just *weeks* after insisting that a proper study of the environmental effects of RRA *would take years*, JA 254, implausibly asserting that its new proposal reflected the consideration necessary to mitigate any harms that might arise from continued – and dramatically increased – use of RRA, JA 362-63. Then, to support that position, it offered just *two* declarations from the head of the program responsible for making deregulation decisions. JA 345-63, 436-45. Not surprisingly, the district court viewed

APHIS's assurances with skepticism and was "not persuaded." Pet.App.67a.

Such abbreviated analysis is miles distant from the detailed findings that typically support agency rulemaking. And that is particularly problematic here, given that APHIS has never before conducted an EIS on a genetically modified product and has been found to have violated NEPA multiple times in connection with its oversight of genetically engineered crops. *Int'l Center for Tech. Assessment* v. *Johanns*, 473 F. Supp. 2d 9, 28-30 (D.D.C. 2007); *Center for Food Safety* v. *Johanns*, 451 F. Supp. 2d 1165, 1183-86 (D. Haw. 2006); *Center for Food Safety* v. *Vilsack*, 2009 WL 3047227, *7-9 (N.D. Cal. Sept. 21, 2009). Under these circumstances, the district court had no obligation to give APHIS's proposal the same deference that would have been owed a record-based decision.

2. Imposition of APHIS's proposed judgment would have violated controlling CEQ regulations

As federal respondents recognize, the scope of an injunction issued to redress a NEPA violation should account for the CEQ regulations that expressly limit the actions available to an agency during the NEPA process. U.S. Br. 31; see also *Marsh* v. *Oregon Nat'l Res. Council*, 490 U.S. 360, 372 (1989) (CEQ regulations "are entitled to substantial deference"); *Andrus* v. *Sierra Club*, 442 U.S. 347, 358 (1979) (same). Those regulations provide, in relevant part, that during the preparation of an EIS, "no action concerning the [agency's] proposal shall be taken which would * * * [h]ave an adverse environmental impact" or

"[l]imit the choice of reasonable alternatives." 40 C.F.R. § 1506.1(a).

The federal respondents suggest that this provision poses no bar to adoption of APHIS's proposed injunction, because only those agency actions that "*materially* harm the environment" are prohibited pending the EIS, and, here, no "material" harms would have occurred had APHIS's proposed conditions been adopted. U.S. Br. 31 (emphasis added). That is wrong for two reasons.

First, the regulation expressly forbids "adverse environmental impact[s]," not just "material harm[s]." Nor can an implied materiality requirement be read into Section 1506.1(a). Elsewhere in the regulations, CEQ is explicit when it intends to limit certain requirements to those items that are "material." See 40 C.F.R. § 1504.3(c)(2)(i) (a referral to the Council shall "[i]dentify any material facts in controversy"). The regulations are also replete with other qualifying words, such as "significant," "major," and "substantial," which direct administrators to focus their attention on particular types of information, impacts, or activities. *E.g.*, *id.* §§ 1500.1(b), 1501.1(d), 1501.6(b)(5), 1501.7, 1502.2(b), 1502.9(a), 1502.9(c)(1), 1502.12, 1502.17, 1502.22, 1505.1(b), 1506.6(c)(1), 1508.17, 1508.18. Had CEQ intended section 1506.1(a) to contain a materiality requirement, as many other provisions do, it would have used language to that effect. Instead, that provision establishes a blanket rule that, until a required EIS is completed, "*no action* concerning the proposal shall be taken which would * * * [h]ave an adverse envi-

ronmental impact * * *." *Id.* § 1506.1(a) (emphasis added).

Second, the argument that environmental effects under the APHIS injunction would have been immaterial is merely an effort to relitigate the district court's summary judgment holding that an EIS was required, precisely for the reason that deregulation would "significantly" affect the environment. 42 U.S.C. § 4332(2)(C). The APHIS injunction mirrored the contractual requirements that would have governed RRA planting under deregulation; the unappealed judgment that such RRA distribution would "significantly" affect the environment forecloses the government's contention that the APHIS injunction would permit only immaterial effects. Therefore, in this context, the CEQ regulation operates as an independent reason why APHIS's proposal should not have been implemented, and the district court correctly declined to do so.

D. If This Court Concludes That The Lower Courts Applied An Incorrect Legal Standard, It Should Remand With Instructions To Reconsider The Injunction Under The Appropriate Standard

For the reasons set forth above, petitioners' request that this Court remand "with instructions to vacate the district court's injunction and enter APHIS's proposed remedy in its place," Pet. Br. 57, countermands centuries of precedent conferring equitable discretion upon district courts and is entirely unjustified on this record. Moreover, petitioners' contention that the lower courts "disregarded this Court's teachings," Pet. Br. 4, *itself* disregards the lower courts' opinions, as well as the substantial evi-

dence supporting their decisions. If, however, this Court determines that the courts below did err in applying the legal standards for injunctive relief, the appropriate disposition would be to remand with instructions that the Ninth Circuit reconsider whether, under the correct legal standards, the district court abused its discretion in granting the injunction – not simply, as petitioners suggest, to remand with instructions to order the entry of petitioners' preferred remedy.

III. THE COURT OF APPEALS CORRECTLY HELD THAT THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY DECLINING TO CONDUCT TRIAL-TYPE PROCEEDINGS

On two separate occasions, the district court invited the parties to submit "whatever additional evidence [you] wish to provide," Pet.App.58a-59a; JA 551, and in response the parties submitted hundreds of pages of evidence, including declarations, counter-declarations, and rebuttal materials. In this setting, and on this record, the Solicitor General's conclusion is plainly correct: "[T]he district court did not err in declining to conduct a trial-type hearing." U.S. Br. 39.

A. District Courts Enjoy Broad Discretion In Conducting Injunction Hearings, And There Is No General Right To Trial-Type Procedures

Just as a district court has "substantial discretion to determine whether an injunction should issue," *Huntington* v. *Marsh*, 884 F.2d 648, 653 (2d Cir.

1989), *cert. denied*, 494 U.S. 1004 (1990), so too does it have wide-ranging discretion over the form and content of injunction hearings. *Winter*, 129 S. Ct. at 371-73, 376-78 (considering the proper scope of injunctive relief based upon written submissions); *Califano* v. *Yamasaki*, 442 U.S. 682, 696 (1979) (fact disputes may be resolved on written submissions); see also U.S. Br. 40 n.12 (noting that "courts of appeals routinely dispose of requests for stays in immigration cases based on written submissions, without holding an evidentiary hearing"). Although the nonmoving party must be granted "notice and an opportunity to present its opposition," *Four Seasons Hotels & Resorts, B.V.* v. *Consorcio Barr, S.A.*, 320 F.3d 1205, 1210 (11th Cir. 2003); see *Mathews* v. *Eldridge*, 424 U.S. 319, 348 (1976), the content of such "notice and opportunity" rests with the judge's discretion, *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965) (due process demands an opportunity to be heard "at a meaningful time and in a meaningful manner"). And when there is sufficient evidence before the court to render a just and equitable determination on the written record, courts plainly are not required to order an evidentiary hearing. *Mathews*, 424 U.S. at 348 (live witness testimony with cross examination is "neither a required, nor even the most effective, method of decisionmaking"); see, *e.g., FDIC* v. *Morley,* 915 F.2d 1517, 1522 (11th Cir. 1990) ("Parties entitled to such process cannot * * * choose the precise process they desire. * * * Procedures providing less than a full evidentiary hearing have often satisfied due process.").

As the federal respondents correctly point out, trial-type hearings ordinarily are inappropriate in

APA proceedings. U.S. Br. 39-42. "The APA provides for an agency hearing with presentation of live testimony in rulemaking or adjudicatory proceedings *only when required by another statute*," U.S. Br. 40 (emphasis added), and the PPA contains no such requirement, *ibid.* And trial-type proceedings are particularly ill-suited where, as here, the findings in question are prospective or predictive in nature (as with legislative or regulatory determinations), and where the district court's decision is likely to hinge on scientific data rather than determinations about the credibility of fact witnesses. *Id.* at 41. In this setting, a right to present and cross-examine witnesses would not enhance the quality of judicial decisionmaking; it would impose substantial new burdens on the crowded calendars of district courts and on governmental officials. See U.S. Br. 42 n.15; *United States ex rel. Touhy* v. *Ragen*, 340 U.S. 462 (1951).[22]

Nor is it true, as petitioners contend, that "ancient" principles of equity jurisdiction establish a litigant's right to present live testimony and cross examination. To the contrary, at equity, "almost all testimony [was] positively required * * * to be by written deposition; the admission of viva voce evidence at the hearing being limited to a very few cases, such as proving a deed or a voucher referred to in the case." JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE 855 (13th ed. 1988); 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS

[22] These costs are especially unwarranted in the NEPA context, where trial-type proceedings might result in findings that bind the agency in its EIS process or, at a minimum, prejudge the objectivity of that process. See 40 C.F.R. § 1506.1(a).

OF ENGLAND 438 (1768) (in equity courts, trial is taken "by interrogatories administered to the witnesses, upon which their depositions are taken in writing, wherever they happen to reside"). The rules in legal proceedings were different. "At law the testimony is taken *viva voce*, and publicly at the trial of the cause; in equity, according to the ancient practice, the evidence was elicited by interrogatories and cross-interrogatories." GEO. TUCKER BISPHAM, THE PRINCIPLES OF EQUITY: A TREATISE ON THE SYSTEM OF JUSTICE ADMINISTERED IN COURTS OF CHANCERY 17 (10th ed. 1923); accord JOHN ADAMS, JUN., ESQ., THE DOCTRINE OF EQUITY 716 (1873) ("The manner of taking evidence is different in equity and at law. It is taken at law *viva voca*, and publicly; in equity it is written and secret."); 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) (same); 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) (same); Fleming James, Jr., *Right to a Jury Trial in Civil Actions*, 72 YALE L.J. 655, 661-62 (1963) (same); HENRY L. MCCLINTOCK, HANDBOOK OF THE PRINCIPLES OF EQUITY 29 (2d ed. 1948) (same).[23]

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[23] See also, *e.g., Lee* v. *State Bank & Trust Co.*, 38 F.2d 45, 49 (2d Cir. 1930) ("Originally, in equity, no oral evidence was taken at the hearing, but testimony was taken by deposition in answer to formal written interrogatories."); *Continental Trust Co. of N.Y.* v. *Toledo, St. L. & K.C.R. Co.*, 99 F. 177, 179 (N.D. Ohio Cir. 1900) (same); *Robinson* v. *Bailey*, 26 F. 219, 221 (N.D. Iowa Cir. 1885) (same); *Walker* v. *Parker*, 29 F. Cas. 43, 44 (C.C. D.C. 1840) (same).

Testimony in open court was not introduced with any rigor in equity trials until 1848, with the merger of law and equity under the Field Code. Subrin, 135 U. PA. L. REV. at 936-38.[24] And it was only in the 20th Century that Rule 46 of the Equity Rules, the "most radical of all changes in the new rules," provided for the oral testimony of witnesses. Wallace R. Lane, *One Year Under the New Federal Equity Rules*, 27 HARV. L. REV. 629, 639-40 (1914). But even after this change, courts continued to receive evidence in writing. *Ibid.*

The cases petitioners cite (Br. 53-57) are not to the contrary. In *Professional Plan Examiners of N.J.* v. *Lefante*, 750 F.2d 282 (3d Cir. 1984), for example, the district court had enjoined an agency from enforcing the New Jersey Uniform Construction Code Act for a period of more than four years without holding *any* hearings and without making *any* findings of fact or conclusions of law. *Id.* at 288-89. The Third Circuit faulted the district court's *failure to make findings*, not the lack of a hearing, and noted that a "finding of irreparable harm, supported as it is by the affidavits,

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[24] As petitioners observe (Br. 51-52), the Judiciary Act of 1789 merged the modes of proof in federal cases. *Lee*, 38 F.2d at 49. This merger was short-lived, however. The Act of 1802 reinstated equity procedures, providing that "in all suits in equity the court might, in its discretion, upon the request of either party, order evidence to be taken by [written] deposition." *Ibid.* The first Equity Rules, adopted in 1822, maintained "the practice which had grown up by that time of taking testimony by deposition," as did the Equity Rules of 1842. *Ibid.* Throughout the first half of the 19th century, "oral testimony in court was allowable only when the judge in his discretion deemed it advisable." *Ibid.*

would suffice." *Id.* at 289. In *Four Seasons Hotels & Resorts*, the Eleventh Circuit took issue with the way the district court had conducted a hearing because evidence was presented by only one side, thereby depriving appellants of "a fair and meaningful opportunity to oppose appellees' motion." 320 F.3d at 1211. And in *In re Rationis Enterprises., Inc. of Panama*, 261 F.3d 264 (2d. Cir. 2001), the district court had made *no findings* with regard to minimum contacts despite the assertion of a jurisdictional defense. *Id.* at 269.

This case is also a far cry from the *Microsoft* case on which petitioners rely. See *United States* v. *Microsoft*, 253 F.3d 34 (D.C. Cir. 2001). The defendant in *Microsoft* was not given "an opportunity to present its opposition." *Four Seasons Hotels & Resorts,* 320 F.3d at 1210. The judge in *Microsoft* considered the evidence submitted by plaintiffs but refused to give the same consideration to Microsoft, which was able to submit only a summary response to plaintiffs' proposed judgment. 253 F.3d at 103. And the proposed relief in *Microsoft* was the permanent dismemberment of the company, *id.* at 98 – a remedy vastly different in scope and impact from the temporary bar on the unpermitted sale of RRA, designed to maintain the status quo. Neither *Microsoft* nor the other cases cited by petitioners support the proposition that parties have a right to present and cross-examine live witnesses in injunction proceedings.[25]

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[25] Moreover, as the court of appeals explained, because the temporal scope of this injunction is quite limited, the inquiry here parallels most closely that of a preliminary injunction,

B. The Ninth Circuit Correctly Ruled That The District Court Did Not Abuse Its Discretion In Denying Intervenors' Request For Trial-Type Proceedings

Before issuing the permanent injunction, the district court held a hearing on the summary judgment motion, followed by two lengthy hearings on the injunction. See JA 245-55, 412-419, 548-61. The district court considered live testimony (including testimony by the president of FGI), JA 552-54, and offered to "listen to anybody who's – you know, anybody that you suggest that I should hear on the subject." JA 551. The district court later repeated its invitation to consider any evidence the parties wished to submit. Pet.App.58a-59a. In the end, the district court concluded that there simply was no dispute regarding *material* facts – *i.e.*, facts sufficient to overturn the court's conclusion that irreparable harm was "sufficiently likely." Pet.App.13a; see *Amoco*, 480 U.S. at 545**.**

Significantly, petitioners did not dispute the evidence of actual contamination on which the judge relied, nor did they dispute that the genetic contamination occurred under planting conditions equivalent to those advocated by petitioners and APHIS. Likewise, there were no disputes over the NEPA violation, the government's failure to do the requisite analysis, the prospect of cross-pollination by bees over distances of several miles, the insufficiency of the isolation distances proposed by APHIS in curbing genetic contamination, the duplication of APHIS's

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where courts need not conduct formal evidentiary hearings at all, much less permit trial-type procedures. See Pet.App.18a.

proposed conditions with conditions already imposed by contract (but ineffective in preventing past contamination), or the acknowledged lack of agency resources to enforce any remedial measures. See pages 9-10, *supra*. Those concessions, coupled with the various submissions and counter-submissions of the parties, were more than sufficient to sustain the district court's conclusion that the injunction was warranted.[26]

C. If This Court Concludes That The District Court Had A Duty To Permit Trial-Type Proceedings, It Should Remand For Such A Hearing

Petitioners ask this Court to hold that "*no injunctive relief* may be entered without a hearing," Pet. Br. 53, but they simultaneously seek entry of the injunc-

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[26] Petitioners fault the district court for permitting hearsay evidence to affect its judgment, Pet. Br. 54 n.17, a complaint they raised to the court of appeals only in passing. It is questionable whether the Federal Rules of Evidence even apply in this type of proceeding, see *Heideman* v. *South Salt Lake City*, 348 F.3d 1182, 1188 (10th Cir. 2003), and to the extent declarations submitted by respondents properly are characterized as hearsay, so too are the declarations submitted by petitioners. Even assuming the applicability of the Federal Rules of Evidence, however, the district court considered sufficient non-hearsay evidence, including admissions by petitioners' representatives that instances of contamination had occurred. *E.g.*, Pet.App.404a-409a, JA 1009; see Fed. R. Evid. 801(d)(2). In any event, a district court has leeway to consider otherwise hearsay materials in fashioning temporary equitable relief. See, *e.g.*, *Sierra Club, Lone Star Chapter* v. *FDIC*, 992 F.2d 545, 551 (5th Cir. 1993) (courts at preliminary injunction stage "may rely on otherwise inadmissible evidence, including hearsay"); *Asseo* v. *Pan Am. Grain Co.*, 805 F.2d 23, 26 (1st Cir. 1986) ("Affidavits and other hearsay materials are often received in preliminary injunction proceedings.").

tion they prefer without any further proceedings, Pet. Br. 50. Both propositions *cannot* be right. If petitioners have a right to present live testimony and conduct cross-examination concerning material facts that are in dispute, then surely respondents have the same right. For the reasons previously explained, petitioners have no such right. But if the Court rules to the contrary, it should remand for an appropriate hearing, rather than simply enter the injunction petitioners prefer.

CONCLUSION

For the foregoing reasons, the Court should dismiss this case because petitioners lack standing or dismiss the petition as improvidently granted. If the Court proceeds to the merits, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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