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

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BRIEF OF *AMICI CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AMERICAN PETROLEUM INSTITUTE, NATIONAL ASSOCIATION OF HOME BUILDERS, AND CROPLIFE AMERICA IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

Amici are trade associations that represent companies affected by the National Environmental Policy Act ("NEPA").[1] In particular, *Amici*'s members often depend on federal action to implement private initiatives ranging from building houses to oil exploration and production to selling fertilizers and other products. But the predicate federal action—and any resulting private initiative—cannot go forward until the environmental review required by NEPA is complete. In addition, as this case evidences, NEPA litigation often further delays (and sometimes effectively kills) important federal action and related private initiatives. Accordingly, *Amici* have a vital interest in the development of policy and law related to NEPA.

Amicus the Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents an underlying membership of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interest of its members in matters before Congress, the Executive Branch,

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[1] Counsel of record for Petitioners filed a blanket consent to the participation of *amici curiae* with the Court. Respondents, through their counsel of record, consented to the filing of this brief, and their consent has been filed with the Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* made a monetary contribution to its preparation or submission.

and the courts. To that end, the Chamber regularly files *amicus* briefs in cases that raise issues of vital concern to the nation's business community.

The Chamber has been active in shaping NEPA law and policy. The Chamber currently is promoting changes that would modernize NEPA by streamlining the environmental review process. The Chamber also recently championed a provision in the American Recovery and Reinvestment Act of 2009 ("ARRA") requiring that "[a]dequate resources" be devoted to ensuring NEPA environmental reviews of stimulus projects are completed on an "expeditious basis" and that "the shortest existing applicable process" under NEPA is utilized. Title XVI, § 1609(b). Finally, the Chamber has raised public awareness of the costs associated with NEPA litigation. For example, the Chamber maintains a website (http://pnp.uschamber.com) that tells the story of how hundreds of energy projects—and "green jobs" that go with them—have been stalled or killed through litigation under NEPA and other environmental statutes.

Amicus the American Petroleum Institute ("API") is a nationwide trade association headquartered in Washington, D.C., that represents over 400 members engaged in all aspects of the petroleum and natural gas industry, including exploration, production, transportation, refining, and marketing. API's members are affected by NEPA when, for example, their oil exploration and production activities occur on federal land or require federal action under statutes such as the Endangered Species Act ("ESA") and the Marine Mammal Protection Act.

Amicus the National Association of Home Builders ("NAHB") represents over 175,000 builder and associate members throughout the United States, including individuals and firms that construct and supply single-family homes, as well as apartment, condominium, multi-family, commercial and industrial builders, land developers, and remodelers. As part of the construction and development process, NAHB's members are affected by NEPA when they obtain federal approvals under statutes such as the Clean Water Act ("CWA") and the ESA. NAHB frequently participates as a party litigant and *amicus curiae* to safeguard the rights and interests of its members. For example, NAHB was a petitioner in a CWA case, *NAHB v. Defenders of Wildlife*, 127 S. Ct. 2518 (2007), and participated as *amicus curiae* in the Court's most recent NEPA case, *Winter v. Natural Resources Defense Council*, 129 S. Ct. 365 (2008).

Amicus CropLife America ("CLA"), which was organized in 1933, is the nationwide not-for-profit trade organization representing the major manufacturers, formulators, and distributors of crop protection and pest control products. CLA is headquartered in Washington, D.C. Its member companies produce, sell, and distribute most of the active compounds used in crop protection products registered for use in the United States. CLA represents its members' interests by, *inter alia*, monitoring federal agency regulations and agency actions and related litigation to identify issues of concern to the crop protection and pest control industry, and participating in such actions when appropriate. CLA participated as *amicus curiae* in *Winter*.

Amici file this brief to respectfully urge the Court to reject the holding below that, in NEPA cases in which further environmental review is ordered, it is not the district court's "job" to determine likely irreparable harm before granting an injunction. *Amici* urge the Court to reaffirm yet again that a district court must find, *inter alia*, likely irreparable harm before granting injunctive relief in every case, including a case brought under NEPA.

SUMMARY OF ARGUMENT

This Court repeatedly has admonished that granting injunctive relief is an extraordinary exercise of judicial power that is only justified when necessary to avoid likely irreparable harm. Nevertheless, lower courts—like the district court and Ninth Circuit here—continue to create exceptions to this command. In this case, the Court should make clear once and for all that a court must find likely irreparable harm before issuing an injunction.

NEPA cases are not excepted from this Court's requirements or equity's strict demands regarding injunctive relief. To the contrary, requiring a threshold showing of likely irreparable harm before granting injunctive relief is particularly important in NEPA cases. Although NEPA is a procedural statute that mandates no "particular results," NEPA nevertheless has enormous substantive implications on federal and private projects and thus the economy. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350, 353 n.16 (1989). The requisite environmental review under NEPA often takes years (sometimes more than a decade) to

complete, only to be followed by a lawsuit second-guessing the agency's compliance with NEPA. In almost half of NEPA cases, the courts find that the agency somehow tripped over NEPA's notoriously vague commands and thus order yet further environmental review.

Contrary to the decisions below, once a district court perceives an error under NEPA, it is precisely the district court's "job" to weigh the evidence and determine whether there likely will be irreparable harm to the environment absent the injunction. By instead punting that inquiry, the decisions below make injunctive relief a foregone conclusion—not an extraordinary remedy—in NEPA cases. The end result is that important federal actions and related private initiatives will be *further* delayed pending completion of environmental reviews, regardless of whether the underlying federal actions pose any likelihood of irreparable harm to the environment. This turns the equitable principles governing injunctive relief on their head and transforms a procedural statute into a mechanism for paralysis of substantive federal and private action.

By removing the discipline of finding irreparable harm before issuing an injunction, the decisions below also grant district judges extraordinary power to halt federal and private projects with which they disagree as a matter of policy. At the same time, they leave no room for deference to the agency on whether something short of complete injunctive relief is sufficient to prevent irreparable harm. Such deference is particularly appropriate where, as in this case, the question of irreparable harm is within the scientific expertise of the agency and the agency

has extensive experience relevant to that question. The Ninth Circuit's decision, which deferred to the district court and not the agency, should be reversed.

BACKGROUND

To understand the far-reaching and dangerous implications of the decisions below, it is important to understand how NEPA operates and the practical implications it has for federal and private actions.

I. AGENCY REVIEW UNDER NEPA

NEPA's core mandate requires federal agencies to prepare an environmental impact statement ("EIS") for "every . . . major Federal action[ ] significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). To comply with this mandate, federal agencies generally take one of three actions. First, an agency may make a "categorical exclusion" ("CE") determination if (1) the action falls within a category that has been determined, based on prior experience and analysis, to not cause a significant impact and (2) no extraordinary circumstances exist that might cause a significant impact in the specific case. In the case of a CE, the agency documents the CE determination, but does not prepare an environmental assessment ("EA") or EIS. 40 C.F.R. § 1508.4.

Second, absent a CE determination, the agency prepares an EA, which is a "concise public document" that provides "sufficient evidence and analysis for determining" whether to prepare an EIS. 40 C.F.R. § 1508.9(a)(1). "If the EA leads the agency to conclude that the proposed action will not significantly affect

the environment, the agency may issue a finding of no significant impact ('FONSI') and forego the further step of preparing an EIS." *Greater Yellowstone Coal. v. Flowers*, 359 F.3d 1257, 1274 (10th Cir. 2004). But "[i]f *any* 'significant' environmental impacts might result from the proposed agency action," then the agency must take the third type of action contemplated under NEPA: "an EIS must be prepared *before* agency action is taken." *Grand Canyon Trust v. Fed. Aviation Admin.*, 290 F.3d 339, 340 (D.C. Cir. 2002) (internal quotation marks and citation omitted).

Complying with NEPA is not a mechanical process. This in part is due to NEPA's vague statutory language. As Justice Marshall said: "[T]his vaguely worded statute seems designed to serve as no more than a catalyst for development of a 'common law' of NEPA." *Kleppe v. Sierra Club*, 427 U.S. 390, 421 (1976) (Marshall, J., concurring in part and dissenting in part). Moreover, even with the interpretive regulations and case law applying NEPA, agencies must make difficult judgments as to how NEPA's mandates apply to the facts at hand—*e.g.,* whether any environmental impacts are "significant" and therefore require an EIS.[2]

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[2] *See* Michael C. Blumm & Stephen R. Brown, *Pluralism and the Environment*, 14 Harv. Envtl. L. Rev. 277, 279 (1990) (explaining NEPA's "process-laden approach to environmental policymaking has both critics and defenders, but both seem to agree that what reviewing courts think NEPA requires of agencies is not predictable"); *see also River Road Alliance v. U.S. Army Corps of Eng'rs*, 764 F.2d 445, 450 (7th Cir. 1985) ("So varied are the federal actions that affect the environment—so varied are the environmental effects of those

NEPA review is lengthy and cumbersome. According to various studies, on average it takes approximately five years to complete an EIS, with many EISs taking well over a decade to complete. One study also estimated that it takes on average 18 months to complete an EA and six months to complete a CE determination.[3]

II. NEPA'S APPLICABILITY

"Federal action[]," the trigger for review under NEPA, is pervasive in our society. 42 U.S.C. § 4332(2)(C). According to Council on Environmental Quality ("CEQ") regulations, "Federal actions" under NEPA are actions "potentially subject to Federal control and responsibility." 40 C.F.R. § 1508.18(b).

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actions—that the decided cases compose a distinctly disordered array . . . .").

[3] *See* Fed. Highway Admin. ("FHWA"), *Evaluating the Performance of Environmental Streamlining: Phase II* § 3.1.1 (2002) (concluding the "NEPATIME median value" was "4.7 years for the 1995-2001 Phase II study period"); FHWA, *Evaluating the Performance of Environmental Streamlining: Development of a NEPA Baseline for Measuring Continuous Performance* § 2.0 (2001) (noting a previous FHWA study concluding that the average time to complete an EIS was approximately five years and that 13% of the projects in the study "took 10 or more years to complete NEPA" and a second study finding that it took 18 months to complete an EA/FONSI and six months to complete a CE); U.S. Gen. Accounting Office, *Agencies Are Attempting to Expedite Environmental Reviews, but Barriers Remain*, at 4 (1994) (discussing study of FHWA projects in which the time required to complete NEPA review ranged from two years to over 12 years); NEPA Task Force, *Report to the Council on Environmental Quality: Modernizing NEPA Implementation*, at 66 (Sept. 2003) ("EISs typically . . . [r]equire from 1 to more than 6 years to complete . . . .").

The regulations list "categories" that "Federal actions" "tend to fall within." *Id.* These categories encompass a wide range of federal activity, ranging from adoption of federal rules and regulations to adoption of treaties and international agreements to "[a]pproval of specific projects, such as construction or management activities," "permit[ting]," and other "federal and federally assisted activities." *Id.* § 1508.18(b)(1)-(4).

As these categories demonstrate, NEPA covers many *types* of federal actions. It also covers a large and growing *number* of federal actions. According to CEQ data, for example, 500 draft and final EISs are prepared annually. Moreover, "approximately 100 EAs are prepared for each EIS," with the estimated number of EAs prepared each year ranging from 30,000-50,000.[4] These numbers do not include the NEPA reviews that conclude with a CE, which historically have not been systematically tracked but which well exceed the number of EAs prepared annually.

The ARRA, moreover, has resulted in many thousands of new federal actions and thus an unprecedented increase in the number of NEPA reviews since the beginning of last year. As of December 31, 2009, there had been over 161,000 NEPA reviews of just stimulus projects, with thousands more still pending. CEQ, *The Fourth*

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[4] *See* CEQ Data, *at* http://ceq.hss.doe.gov/nepa/nepanet.htm ("Number of EISs Filed 1970 to 2007"); Charles H. Eccleston, *Effective Environmental Assessments*, at "Introduction" (2001); *see also* Elisabeth A. Blaug, *Use of the Environmental Assessment by Federal Agencies in NEPA Implementation*, 15 Envtl. Prof. 57, 61 (1993).

Report on the National Environmental Policy Act Status and Progress for American Recovery and Reinvestment Act of 2009 Activities and Projects, at 2 (Feb. 1, 2010).

Although the "actions" subject to NEPA are "Federal," in many cases the actors are *private*. *See, e.g.,* Daniel R. Mandelker, *NEPA Law and Litigation* § 8:19, at 8-46 (2009) (explaining NEPA applies when an agency enables "a nonfederal entity to undertake an activity or a project"). For example, the following are federal actions subject to NEPA that enable important private economic activity: federal permits, such as Clean Water Act § 404 permits needed for development projects[5]; leases or easements on federal land, such as Department of Interior easements needed for construction activity[6]; and federal loans and loan guarantees that enable a wide variety of private initiatives.[7] Under NEPA, these predicate federal actions—as well as the private activity keyed off of these federal actions—must await NEPA review before proceeding. 40 C.F.R. § 1506.1.

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[5] 33 C.F.R. pt. 325, Appendix B.

[6] 73 Fed. Reg. 61,315 (Oct. 15, 2008) (to be codified at 43 C.F.R. pt. 46) (see § 46.30 for definition of "proposed action").

[7] 7 C.F.R. pt. 1794 (Rural Utilities Service financial assistance); 10 C.F.R. § 1021.216 (Department of Energy financial assistance).

III. NEPA LITIGATION

"NEPA does not authorize a judicial review, and its legislative history does not indicate whether judicial enforcement of NEPA was contemplated." Mandelker, *supra*, § 1:5, at 1-9. Nevertheless, courts have held that NEPA's mandates are judicially enforceable. *See, e.g., Scientists' Inst. for Pub. Info., Inc. v. Atomic Energy Comm'n*, 481 F.2d 1079, 1088-89 (D.C. Cir. 1973). As a result, opponents of federal and related private actions regularly use litigation over NEPA's "procedural" mandates to paralyze the actions.

On average, well over 100 NEPA suits are filed each year according to CEQ data covering 2001 to 2008.[8] This is an increase over the 1990s, when less than 100 NEPA suits were filed on average per year. *See* Jay E. Austin et al., *Judging NEPA: A "Hard Look" at Judicial Decision Making Under the National Environmental Policy Act*, Envtl. L. Inst., at 6 (2004). Moreover, with the many thousands of new federal projects and thus additional NEPA reviews conducted pursuant to the federal stimulus program, the number of NEPA lawsuits likely will grow in the near future.

The vast majority of NEPA suits are brought by plaintiffs aiming to halt federal action due to non-compliance with NEPA's "procedural" demands. *See, e.g.,* Austin et al., *supra*, at 8. Moreover, although NEPA suits are styled as against the relevant federal agency, the target of the injunctive relief often is the

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[8] *See* CEQ Data, *at* http://ceq.hss.doe.gov/nepa/nepanet.htm (2001 to 2008 Litigation Surveys).

private activity authorized, funded, or otherwise enabled by the federal action. In other words, the goal of the NEPA suit is to halt—and thereby, as a practical matter, oftentimes kill—private activity that is enabled by federal action.[9]

In part due to NEPA's vague mandates, federal judges have substantial discretion to grant these plaintiffs relief and to find an error under NEPA—even when applying a deferential standard of review. As a leading treatise on NEPA explains, the case law "can provide guidance on legal questions" but "less guidance on mixed factual and legal questions, such as whether an agency action has a significant impact on the quality of the human environment." Mandelker, *supra*, § 8:1, at 8-4.

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[9] *See, e.g., White Tanks Concerned Citizens, Inc. v. Strock*, 563 F.3d 1033 (9th Cir. 2009) (NEPA challenge to issuance of Clean Water Act § 404 permit authorizing housing development)*; Ctr. for Biological Diversity v. Kempthorne*, 588 F.3d 701 (9th Cir. 2009) (NEPA challenge to federal regulations authorizing for five-year period the non-lethal "take" of polar bears and Pacific walrus by oil and gas activities in and along the Beaufort Sea); *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683 (10th Cir. 2009) (NEPA challenge to BLM decision to open publicly-owned desert grassland to oil and gas exploration and development); *County of Tooele v. U.S. Dep't of Agric.,* No. 99-15332, 2000 U.S. App. LEXIS 413 (9th Cir. Jan. 7, 2000) (unpublished) (NEPA challenge to loan guarantee by the Department of Agriculture to a bank that financed development of a mobile home park); *City of Davis v. Coleman***,** 521 F.2d 661 (9th Cir. 1975) (NEPA challenge to highway construction funded by the FHWA); *Fla. Wildlife Fed'n v. U.S. Army Corps of Eng'rs***,** 401 F. Supp. 2d 1298 (S.D. Fla. 2005) (NEPA challenge to issuance of § 404 permit authorizing joint development project between county and private research institute).

In fact, according to studies of NEPA cases at the district court level, the success rate of NEPA plaintiffs is approximately 45%. *See* Austin et al., *supra*, at 8 (2001 to 2004 study showing 44% success rate); Paul G. Kent & John A. Pendergrass, *Has NEPA Become a Dead Issue?*, 5 Temp. Envtl. L. & Tech. J. 11, 15 (Summer 1986) (1969 to 1984 study showing 45.7% success rate). The CEQ data referenced above show that, just from 2001 to 2008, the Government lost 333 NEPA cases, which resulted in an injunction or remand.

When the district court perceives a NEPA violation, the court typically orders further environmental review—*e.g.,* preparation of an EIS or supplemental EIS—as a remedy. *See, e.g.,* Pet.App.52a (district court here ordering EIS); *Ilio'Ulaokalani Coal. v. Rumsfeld*, 464 F.3d 1083, 1087 (9th Cir. 2006) (requiring Army to prepare supplemental impact statement). The question then becomes the matter at issue here: Should the federal action—and all private activity triggered by that federal action—be further halted pending completion of the further environmental review?

IV. THE DECISIONS BELOW

This case exemplifies the NEPA process, and pitfalls, described above. Six years ago, in 2004, Petitioners asked the U.S. Department of Agriculture's Animal and Plant Health Inspection Service ("APHIS") to deregulate Roundup Ready alfalfa ("RRA") under the Plant Protection Act. 7 U.S.C. § 7701; 7 C.F.R. §§ 340.0(a)(2) n.1, 340.6. In response, APHIS did an environmental study, prepared an EA, and, in June 2005, issued a FONSI.

70 Fed. Reg. 36,917-36,919 (June 27, 2005). Based on its environmental review and applying the statutory standards governing deregulation petitions under the PPA, APHIS also issued a determination in June 2005 deregulating RRA on the grounds that the environmental risks contemplated by the PPA were small. *Id.* "[I]n reliance on the . . . June 2005 deregulation decision," growers, seed distributors, and others made investments in RRA. Pet.App.55a, 64a. Growers also planted significant quantities of RRA without any harm to anyone. *Id.*

Respondents—led by an environmental group opposed to the proliferation of genetically modified products—filed suit in February 2006 alleging in relevant part that APHIS violated NEPA by deregulating RRA without first preparing an EIS. In February 2007, the district court issued an order recognizing that this case presents a "close question of first impression" but nevertheless holding that APHIS violated NEPA. Pet.App.27a. The court found, *inter alia*, that the possibility of cross-pollination of conventional and organic alfalfa with RRA posed "significant" environmental risks requiring preparation of an EIS. Pet.App.52a. Because the court concluded that the agency did not adequately comply with NEPA's procedural mandate, it stated that it did not need to address the underlying substantive agency decision deregulating RRA. *Id.*

After this ruling—and 21 months after APHIS's deregulation order—Respondents for the first time moved for injunctive relief that would prevent all future planting and sales of RRA nationwide. Pet.App.55a, 58a. APHIS countered with a proposed

injunctive order that reflected its substantive analyses and findings and its lengthy experience with genetically modified products, and that quite reasonably balanced the competing interests. Pet.App.161a-67a. Specifically, the proposed injunction would have allowed planting of RRA but only pursuant to stewardship measures to even further diminish any risk of cross-pollination pending completion of the EIS. APHIS explained that, based on its "many years of experience" and analysis of relevant scientific studies, these stewardship measures would reduce the risk of cross-pollination to virtually zero. Pet.App.137a-57a.

The district court, however, refused to credit APHIS's technical expertise or scientific findings, to hold an evidentiary hearing, or even to consider the critical evidence on irreparable harm. In the court's view, this is what "APHIS . . . must do in an EIS"—it "isn't my job." Pet.App.68a-69a, 417a. Having refused to engage on the question of likely irreparable harm, the court rejected out of hand APHIS's proposal. Pet.App.67a. Instead, the court entered an injunction prohibiting all future planting of RRA nationwide pending completion of the EIS. Pet.App.79a.[10]

The Ninth Circuit affirmed. The majority specifically agreed that the district court did not need to "resolve the very disputes over the risk of environmental harm that APHIS would have to

[10] The Court entered a preliminary injunction in March 2007 (Pet.App.54a-59a) and a permanent injunction in April 2007 (Pet.App.60a-79a). The injunction prohibits all planting of RRA from March 30, 2007 through completion of an EIS. Pet.App. 79a.

consider in the EIS" and thus "duplicate the [agency's] efforts." Pet.App.19a-20a, 95a-96a. The majority also held that the district court was justified in ignoring APHIS's experience, analyses, and findings relevant to its substantive decision to deregulate, as well as its remedial proposal. Pet.App.15a-16a, 93a-94a. The Ninth Circuit thus sanctioned the district court's own nationwide injunction that halts APHIS's deregulation decision—and important economic activity keyed off of that decision—throughout the entire country to this very day.

ARGUMENT

I. THIS COURT SHOULD REAFFIRM THAT LIKELY IRREPARABLE HARM IS A PREREQUISITE TO INJUNCTIVE RELIEF

An injunction is an "extraordinary remedy" that does not issue "as of course." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311-12 (1982). Thus, according to "well-established principles of equity," a plaintiff must show four factors before a permanent injunction will issue: (1) he is "likely to suffer irreparable harm," (2) "remedies available at law, such as monetary damages, are inadequate to compensate for that injury," (3) "the balance of equities tips in his favor," and (4) "an injunction is in the public interest." *Winter v. Natural Res. Def. Council,* 129 S. Ct. 365, 374 (2008); *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006).

Although this Court repeatedly has applied this four-part test, and never has suggested that its

elements can be relaxed, courts continue to grant injunctions without a threshold finding of likely irreparable harm. For example, in this case, the courts below held that, because the irreparable harm inquiry overlapped with the agency's further environmental review, it was not the district court's "job" to determine irreparable harm because the agency could once again address issues related to environmental risk on remand. Thus, as described *infra*, the lower courts effectively carved out a subject-matter exception that alleviates the need to show irreparable harm in NEPA cases.

Moreover, in the context of preliminary injunctions—where the plaintiff must additionally show a likelihood of success on the merits—some courts relax the likely irreparable harm requirement through use of the so-called "sliding scale" standard.[11] Under this standard, a strong showing of likelihood of success on the merits alleviates the need to show a likelihood of irreparable harm (and vice versa). *See, e.g., Vaqueria Tres Monjitas, Inc. v. Irizarry*, 587 F.3d 464, 485 (1st Cir. 2009) (explaining "the measure of irreparable harm is not a rigid one; it has been referred to as a sliding scale, working in conjunction with a moving party's likelihood of success on the merits"). Specifically, the First Circuit and Federal Circuit continue to use the sliding scale standard. *See id.*; *Qingdao Taifa Group Co., Ltd. v. United States*, 581 F.3d 1375, 1378-79

[11] "The standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits." *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 546 n.12 (1987).

(Fed. Cir. 2009). The D.C. Circuit has recognized its tension with *Winter* but reserved judgment on its validity. *See Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1292 (D.C. Cir. 2009). The Ninth Circuit has cases both applying and rejecting the standard in light of *Winter*.[12]

But any approach that eliminates the need to show likely irreparable harm as a prerequisite to injunctive relief cannot be squared with this Court's cases. This Court consistently has stated that each equitable factor—including likely irreparable harm—must be met before injunctive relief is appropriate. *See supra* at 16. In fact, contrary to the lower court decisions in this case, the Court has required a showing of likely irreparable harm even in the face of ongoing agency review. *See, e.g., Winter*, 129 S. Ct. at 376, 381 & n.5 (Navy conducting ongoing EIS); *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 538-39 (1987) (noting the Secretary's "postsale" evaluation); *Weinberger*, 456 U.S. at 315 n.9 (Navy application for permit under consideration by the Environmental Protection Agency). And, contrary to

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[12] *Compare Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009) (stating that, after *Winter*, a court has to find likelihood of irreparable injury); *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1138 (9th Cir. 2009) (same); *Fisher Sand & Gravel Co. v. Clark County*, No. 2:09-cv-01372-RCJ-GWF, 2010 WL 99218, *4 (D. Nev. Jan. 6, 2010) (same; explicitly stating the sliding scale approach is invalid after *Winter*), *with Greater Yellowstone Coal. v. Timchak*, 323 Fed. Appx. 512, 514 n.1 (9th Cir. 2009) (unpublished) (explaining *Winter* "did not reject the sliding scale approach we employ in the alternative"); *Veterans for Peace Greater Seattle, Chapter 92 v. City of Seattle,* No. C09-1032-RSM, 2009 WL 2243796, at *3 (W.D. Wash. July 24, 2009) (same).

the decisions applying the sliding scale approach, the Court has required a showing of likely irreparable harm regardless of the likelihood of success on the merits. *See, e.g., Winter*, 129 S. Ct. at 381 n.5 ("[W]e find the injunctive relief granted in this case an abuse of discretion, even if plaintiffs are correct on the underlying merits.").

Just within the last two Terms, the Court has *emphasized* the importance of finding each element of the equitable test and specifically the threshold element of likely irreparable harm. Last Term, *Winter* specifically rejected that injunctive relief can be granted without a showing of likely (as opposed to possible) irreparable harm. *Id.* at 375-76. As the Court explained, "[i]ssuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Id.*

More recently, in *Nken v. Holder*, 129 S. Ct. 1749 (2009), the Court addressed the related standard for a stay and emphasized that the "first two factors"—strong likelihood of success and likelihood of irreparable harm—"are the most critical." *Id.* at 1761. Only after "an applicant satisfies [these] factors," the Court held, does "the traditional stay inquiry call[] for assessing the harm to the opposing party and weighing the public interest." *Id.* at 1762. Justice Kennedy was even more pointed in his concurrence: "When considering success on the merits and irreparable harm, courts cannot dispense with the required showing of one simply because there is a strong likelihood of the other." *Id.* at 1763;

see also Munaf v. Geren, 128 S. Ct. 2207, 2219 (2008) (explaining the "basics," including that "[a] preliminary injunction is an extraordinary and drastic remedy; it is never awarded as of right. Rather, a party seeking a preliminary injunction must demonstrate, among other things, a likelihood of success on the merits.").

These cases are based on equity's recognition that granting injunctive relief is "an exercise of a very far-reaching power, never to be indulged in except in a case clearly demanding it." *Warner Bros. Pictures, Inc. v. Gittone*, 110 F.2d 292, 293 (3d Cir. 1940) (per curiam). Without the likelihood of irreparable harm, the exercise of this far-reaching power simply is not justified. In this case, this Court should make clear once and for all that, without exception, an injunction can only issue where there is a likelihood of irreparable harm.

II. THE THRESHOLD REQUIREMENT OF LIKELY IRREPARABLE HARM PLAYS A CRITICAL ROLE IN NEPA CASES

Instead of requiring a likelihood of irreparable harm as a prerequisite to injunctive relief, the courts below effectively carved out a NEPA-based exception: Whenever a court orders further environmental review to cure a statutory or regulatory violation, then it is not the court's "job" to engage on the question of likely irreparable harm because that question will later be addressed by the agency. Regardless of what the agency had said, the lower courts reasoned, the question of likely irreparable harm could be addressed (again) by the agency.

This Court, however, has rejected that environmental cases—or any other types of cases—are exempted from equity's stringent limitations on injunctive relief. *See, e.g., Winter,* 129 S. Ct. at 374-75; *Weinberger,* 456 U.S. at 311 (rejecting "absolute statutory obligation" to enjoin violations of environmental statutes (internal quotation marks and citation omitted)); *Amoco Prod. Co.*, 480 U.S. at 542-45 (rejecting presumption of irreparable harm in environmental cases); *see also eBay*, 547 U.S. at 391-94 (rejecting automatic injunction following patent violation).

Nor should the Court adopt an exception in this case. The likely irreparable harm requirement serves a critical role in NEPA cases. Specifically, it ensures that the substantial costs imposed by further delay of federal and private action is warranted by the countervailing justification that only through such delay can likely irreparable harm be prevented. Without that countervailing justification, imposing these costs on the federal agency and private actors depending on the agency action is inequitable.

The costs imposed by an injunction in a NEPA case are well demonstrated here. Petitioners submitted their petition to deregulate RRA under the PPA in 2004, approximately six years ago. In June 2005, almost five years ago, APHIS found that the petition met the requirements for deregulation. In early 2007, however, and without ever having reached the merits of the final decision to deregulate, the district court here issued a nationwide injunction halting the deregulation decision and preventing any further growing of RRA. Today—almost five years after APHIS determined that the statutory

standards for deregulating RRA were satisfied, and three years after the district court entered its injunction—the deregulation of RRA is still delayed nationwide while the agency complies with NEPA's "procedural" command.

The monetary costs of this delay are enormous. One agricultural economist estimated that the cost of Respondents' proposed nationwide injunctive relief would cause growers who had planted or would plant RRA to lose more than $200 million in the first two years of the injunction and that seeds companies, distributors, and dealers would lose approximately $20 million. Pet.App.267a-69a. A Monsanto officer estimated that Monsanto would lose approximately $27 million in revenue from technology premiums as well. J.A.584-85.

There also are many costs that cannot be reduced to monetary terms. For example, trading partners that have approved RRA, and that seek to import that product from the U.S., will be deprived of a major source of RRA as a result of the injunction halting the deregulation decision. Pet.App.146a (noting Japan approves RRA and that 75% of the alfalfa exported from the U.S. in 2006 went to Japan). Moreover, as an APHIS official observed, "[t]he uncertainty of the status of RRA will likely create general confusion and a lack of confidence among trading partners regarding past and future determinations of nonregulated status of [genetically engineered] plants by" the agency, which could cause trading partners to reconsider accepting genetically engineered plants from the U.S. or impose expensive testing requirements. Pet.App.146a-47a.

This case, moreover, is just one of dozens of NEPA cases that the Government loses each year, each of which will present the question of whether it is equitable to stall federal and private action—and thus impose enormous costs like those described above—pending further and potentially lengthy environmental review. In some cases, injunctive relief will impose costs even higher than those described above—including effectively ending the federal and private action. As one court said regarding the type of further environmental review ordered here, preparation of an EIS "is very costly and time-consuming . . . and has been the kiss of death to many a federal project." *City of Dallas v. Hall*, 562 F.3d 712, 717 (5th Cir. 2009) (internal quotation marks and citation omitted).

This issue will become even more stark in light of the Government's stimulus effort. The whole point of the stimulus is to create jobs quickly and to inject money into the economy by immediately starting "shovel ready" projects. Yet these projects have to go through NEPA review and, after that review, plaintiffs will file NEPA suits seeking to delay some of these projects.[13] Courts should not halt these stimulus projects—and thus defeat their very purpose—unless a plaintiff can show, in addition to convincing one judge of a technical error under

[13] *See* Steven Jones, *What's Ahead? The Year Ahead in Energy and Environmental Law* (Jan. 14, 2010), *available at* http://www.martenlaw.com/news/?20100114-environmental-review-2010 (noting that "dozens" of stimulus projects have been "tied up in litigation" and that "[w]e anticipate many more stimulus projects to be subject to challenge in 2010 as project opponents gain familiarity with using climate change as a basis to force more environmental review and alternatives analysis").

NEPA, that extraordinary injunctive relief is necessary to prevent likely irreparable harm to the environment.

Finally, the implications of the rationale employed below extend beyond NEPA cases. Courts routinely order further environmental review to cure violations of various environmental statutes. *See, e.g., Amoco Prod. Co.*, 480 U.S. at 544 (reversing preliminary injunction in case where Ninth Circuit ordered further review to comply with the Alaska National Interest Lands Conservation Act, which in relevant part requires "a procedure" through which actions that "would adversely affect subsistence resources" must be considered and undertaken only if "they are necessary and if the adverse effects are minimized"). As Judge Smith said in his dissent, "[t]here aren't many environmental cases that don't fit into the majority's newly-created exception." Pet.App.26a, 102a-03a.

This Court has cautioned against courts using NEPA to "unjustifiably intrud[e] into the administrative process." *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 556 (1978). By sanctioning nationwide injunctive relief without a finding of likely irreparable harm, the Ninth Circuit endorsed just such an unwarranted intrusion here.

III. THE INJUNCTION STANDARD ADOPTED BELOW LEAVES TOO MUCH ROOM FOR JUDICIAL ACTIVISM AND NO ROOM FOR AGENCY DEFERENCE

The rationale of the decisions below—that a court need not engage on irreparable harm when further environmental review is to come—also upsets the proper relationship between the courts and agencies. Specifically, eliminating the need to find likely irreparable harm before issuing an injunction (1) removes a critical check on judicial overreaching under the auspices of NEPA, and (2) forecloses deference to any agency's expert conclusion that measures short of a broad injunction are sufficient to mitigate any risk of harm during further environmental review.

Allowing courts to grant injunctive relief in NEPA cases against federal or private action without finding irreparable harm places immense and unconstrained power in the hands of federal judges. This is especially true given the nature of the NEPA merits inquiry. NEPA's standards are vague and, as a consequence, judicial review under NEPA is pliable.[14]

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[14] *See* Austin et al., *supra,* at 8-9 (study finding federal district court judges appointed by a Democratic president ruled in favor of environmental plaintiffs just under 60% of the time, while judges appointed by a Republican president ruled in their favor approximately 28% of the time and even more "striking patterns" in the three-judge panels of federal circuit courts); *see also* Jamison E. Colburn, *The Indignity of Federal Wildlife Habitat Law*, 57 Ala. L. Rev. 417, 488 n.280 (2005) (noting NEPA has "tended to be especially sensitive to shifts within the judiciary and, in particular, the composition of courts hearing NEPA cases"); Blumm & Brown, *supra*, at 280 (arguing the

Thus, by affirming that it is not a district court's "job" to determine irreparable harm in NEPA cases before granting an injunction, the Ninth Circuit has removed a critical check on the exercise of judicial power under NEPA. Without the irreparable harm requirement, a NEPA case is transformed into a right to veto—at least for a substantial period, if not forever—federal projects with which the judge may politically disagree.

At the same time, the standard adopted below leaves no room for deference to the agency on the appropriate remedy in a NEPA case. Specifically, by holding that a district court's "job" does not include weighing the question of harm before issuing injunctive relief, the decision below renders the agency's view as to whether there will be any environmental harm without an injunction—or whether lesser measures than broad injunctive relief will prevent any harm—irrelevant.

"notion that NEPA cases may be a function of judicial whim is unfortunate for several reasons"); Christopher Cumings, Comment, *Judicial Iron Triangles: The Roadless Rule to Nowhere—And What Can Be Done to Free the Forest Service's Rulemaking Process*, 61 Okla. L. Rev. 801, 815 (2008) (surveying the NEPA "roadless rule" cases and explaining "the most common and accurate indicator of how a judge would rule in" these cases "was the political party of the president who nominated him or her"); Jeannette MacMillan, Note, *An International Dispute Reveals Weaknesses in Domestic Environmental Law: NAFTA, NEPA, and the Case of Mexican Trucks (Department of Transportation v. Public Citizen),* 32 Ecology L.Q. 491, 523 (2005) ("NEPA's pliability makes it particularly susceptible to reflecting a judge's ideology.").

Deference to an agency's views on the risk of irreparable harm—and how any harm can be mitigated short of a broad injunction—is particularly appropriate in a case where the agency has scientific expertise and extensive experience that it can bring to bear. *See, e.g., Utah Envtl. Congress v. Bosworth*, 443 F.3d 732, 739 (10th Cir. 2006) ("Deference to the agency is especially strong where the challenged decisions involve technical or scientific matters within the agency's area of expertise."); *see also EarthLink, Inc. v. FCC*, 462 F.3d 1, 12 (D.C. Cir. 2006) (explaining the court should be "particularly deferential" to an "agency's predictive judgments about areas that are within the agency's field of discretion and expertise . . . as long as they are reasonable").

Here, for example, APHIS and two other agencies—the Environmental Protection Agency and Food and Drug Administration—have been in charge of the evaluation and deregulation of genetically modified crops for more than 15 years. 51 Fed. Reg. 23,302, 23,302-09 (June 26, 1986); *see also* Pet.App.195a-202a (discussing role of EPA); Attachment to EA/FONSI, Response to Comments, APHIS No. 04-110-01, at 4 ("FDA has completed their consultation and had no further questions about the food or feed safety of alfalfa derived from events J101 or J163"). Prior to granting the present deregulation petition, APHIS had granted 66 other petitions to deregulate a genetically engineered crop. Ten of these concerned a glyphosate-resistant crop like RRA, including corn, cotton, soy, canola, and

sugarbeets.[15] With respect to RRA, APHIS authorized the field testing of RRA in 1998, "and has authorized a total of 297 such field trials over a period of approximately eight years." Pet.App.140a.

APHIS also is well-versed on the issue of cross-pollination. Putting aside APHIS's experience with respect to other genetically engineered crops, APHIS specifically addressed cross-pollination with respect to RRA in response to comments in the EA/FONSI and in the interim period after the district court ordered further environmental review but before the court entered its final order on the appropriate remedy. *See* Attachment to EA/FONSI, Response to Comments, APHIS No. 04-110-01, at 2; Pet.App.158a-67a (APHIS official's declaration discussing proposed stewardship measures with reference to relevant studies); *see also* Appendix D to EA/FONSI, Determination of Non-regulated Status for Round-up Ready Alfalfa Events J101 and J163 (June 14, 2005) (determining "gene introgression" is "extremely unlikely").

Based on its expertise and experience, APHIS not only decided to deregulate RRA (a decision the courts never reached), but after the finding of a NEPA error, it proposed more tailored injunctive relief that included stewardship measures to ensure that any risk of harm from cross-pollination pending completion of the EIS would be virtually zero. Pet.App.161a-67a. But instead of giving any deference to the expert agency and its scientific

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[15] *See* APHIS, EPA, *Petitions of Non-Regulated Status Granted or Pending by APHIS as of February 2, 2010, at* http://www.aphis.usda.gov/brs/not_reg.html; Pet.App.140a.

findings, the district court gave APHIS's view no weight at all.[16] Pet.App.67a. The Ninth Circuit then compounded that error by deferring *to the district court* and not APHIS. Pet.App.26a, 102a (Smith, J., dissenting) ("Instead of giving deference to the agency's expertise, the majority gives deference to the district court, despite its wholesale rejection of the agency's proposal for an injunction and its failure to hold an evidentiary hearing."). The result is that, throughout the entire country, planting of RRA remains prohibited—even in places where there is literally no risk of cross-pollination at all. This absurd result should be corrected.

Finally, in addition to foreclosing deference to the expert agency, the Ninth Circuit's decision will result in private entities whose interests are critically affected by a NEPA suit being foreclosed from meaningful participation in that suit. As previously described, although NEPA actions are styled as against the federal agency, it is the private actors and action that NEPA suits often aim to halt. Thus, private actors have important interests—sometimes the viability of their businesses—at stake in NEPA litigation.

Nevertheless, the Ninth Circuit categorically prohibits mandatory intervention under Federal Rule of Civil Procedure 24(a) by private actors at the

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[16] Of course, had the court reached APHIS's decision to deregulate, it would have had to defer to that agency's findings. *See, e.g., Cactus Corner, LLC v. U.S. Dep't of Agric.*, 450 F.3d 428, 433 (9th Cir. 2006). That the court disposed of this case based on a technical NEPA violation without reaching the decision to deregulate does not mean that APHIS's views are entitled to any less weight.

merits stage of a NEPA suit. *See, e.g., Wetlands Action Network v. U.S. Army Corps of Eng'rs*, 222 F.3d 1105, 1114 (9th Cir. 2000). The Ninth Circuit reasons that only the relevant federal agency can comply with NEPA and therefore only that agency can defend compliance with NEPA on the merits. *Id.*

Moreover, courts generally deny private actors *permissive* intervention under Rule 24(b) at the merits stage of NEPA actions as well. For example, in an ongoing NEPA and PPA challenge to deregulation of Roundup Ready sugarbeets, the district court recently denied permissive intervention at the merits stage to owners of the intellectual property related to Roundup Ready sugarbeets, growers of sugarbeets, and others with important private interests in the outcome of the suit. *See Ctr. for Food Safety v. Connor*, No. C 08-00484 JSW, 2008 U.S. Dist. Lexis 65867 (N.D. Cal. Aug. 15, 2008). The court reasoned that "no common issues of law or fact exist during the merits phase of this action because the only issue in this phase is whether the federal government complied with NEPA and the PPA." *Id.* at *9-*10; *see also W. Watersheds Projects v. U.S. Forest Serv.*, No. C 08-1460 PJH, 2008 WL 2952837, at *6-*7 (N.D. Cal. July 30, 2008) (denying permissive intervention in NEPA suit). Under this reasoning, permissive intervention by private actors is effectively barred at the merits stage of a NEPA suit.

The courts do allow intervention by private actors at the *remedies* stage of NEPA litigation. *See, e.g., Wetlands Action Network,* 222 F.3d at 1114; *Ctr. for Food Safety*, 2008 U.S. Dist. Lexis 65867, at *10. But participation at the remedies stage is futile if, as

the courts below effectively held, injunctive relief flows from the mere fact of a NEPA violation. Thus, the net effect of limiting intervention to the remedies stage and making injunctive relief flow from the mere fact of a NEPA violation is that many private entities will be denied *any* due process related to NEPA suits that affect their interests.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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