No. 09-475

IN THE

Supreme Court of the United States

MONSANTO CO., *et al.*,
Petitioners,

v.

GEERTSON SEED FARMS, *et al.*,
Respondents.

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

AMICUS CURIAE BRIEF OF WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 states.[1] WLF devotes a substantial portion of its resources to defending free-enterprise, individual rights, and a limited and accountable government.

To that end, WLF has appeared before this Court as well as other federal and state courts to urge them to abide by traditional restraints on the grant of injunctive relief, including refraining from granting an injunction unless the plaintiffs can demonstrate that it is necessary to prevent irreparable harm. *See, e.g., Winter v. Natural Resources Defense Counsel, Inc.*, 129 S. Ct. 365 (2008); *National Audubon Society v. Dep't of Navy*, 422 F.3d 174 (4th Cir. 2005).

The Court's decision in *Winter* strongly reaffirmed those traditional limitations on the courts' equitable powers. *Winter* made clear that the grant of jurisdiction to ensure compliance with a statute does not suggest that a federal court must grant any and all remedies designed to force compliance, and courts should not lightly assume that Congress – when adopting such statutes – intended to depart from established principles regarding equitable relief.

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than the *amicus* and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. More than ten days prior to the due date, counsel for *amicus* provided counsel for Respondents with notice of intent to file. All parties have consented to this filing; letters of consent have been lodged with the Court.

WLF is concerned that the decision below, if allowed to stand, will effectively limit *Winter* to cases raising NEPA issues in a national security context.[2] It threatens to make nationwide injunctions virtually automatic in NEPA cases arising in all other contexts, despite the absence of any language in NEPA suggesting that Congress has directed federal courts to depart from traditional limitations on equitable relief whenever they find a NEPA violation. Although *Winter* arose in a national security context (the plaintiff sought to enjoin a program designed to detect the presence of enemy submarines), WLF does not believe that anything in the *Winter* decision suggests that the Court intended its interpretation of NEPA to apply only in that context. WLF believes that injunctive relief is particularly inappropriate when, as here, the trial court has not conducted an evidentiary hearing for the purpose of gathering evidence regarding the balance of harms.

STATEMENT OF THE CASE

WLF adopts and incorporates Petitioners' statement of the case.

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[2] NEPA (the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 *et seq.*) requires preparation of an environmental impact statement (EIS) in connection with every "major federal action significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). The Ninth Circuit held that: (1) the Animal and Plant Health Inspection Service (APHIS) undertook such a "major federal action" when it granted a petition to afford Nonregulated Status to a variety of alfalfa known as Roundup Ready alfalfa (RRA); (2) APHIS violated NEPA by failing to prepare an EIS before granting the petition; and (3) the district court properly enjoined the planting of RRA until an EIS could be prepared. Pet. App. 1a-26a, 80a-103a.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit has improperly conflated the role of federal courts in deciding the propriety of injunctive relief in environmental cases with the role of administrative agencies in evaluating the environmental impacts of their actions under federal law. Determining when injunctive remedies are appropriate in any case requires a judicial balancing of relative harms to the parties and the public interest. That determination must be made by a court on the basis of an evidentiary hearing. It cannot be deferred to a future administrative process undertaken by a government agency for entirely different statutory purposes.

This Court has consistently held, most recently in *Winter v. National Resources Defense Council, Inc.*, 129 S. Ct. 365 (2008), that lower courts must conduct their own equitable balancing of harm when granting injunctive relief. In this case, however, the Ninth Circuit approved a determination by the district court to avoid this requirement in light of its separate determination that an EIS must be prepared to satisfy the separate statutory requirements of NEPA. In doing so, the Ninth Circuit effectively adopted an exception to the judicial balancing requirement that has never before been recognized.

The purpose of an EIS is to provide a full and fair discussion of the significant environmental impacts of government action and to inform decision makers and the public of reasonable alternatives that address those impacts. In contrast, the judicial balancing of harm based on an evidentiary hearing protects "...the cardinal

principle of our system of justice that factual disputes must be heard in open court and resolved through trial-like evidentiary proceedings." *United States v. Microsoft Corp.*, 253 F.3d 34, 101 (D.C. Cir. 2001).

The need for an administrative agency to prepare an EIS under NEPA cannot relieve a court of its duty to conduct an evidentiary hearing as the basis of an equitable analysis of harm. The Ninth Circuit disregarded that important rule by approving the decision of the district court in this case.

I. THE NINTH CIRCUIT'S DECISION DIRECTLY CONFLICTS WITH THIS COURT'S CONSISTENT APPROACH TOWARD THE APPLICATION OF INJUNCTIVE REMEDIES

In approving the decision of the district court in this case, the Ninth Circuit purported to apply the traditional four-factor test for the issuance of a permanent injunction, as required by *eBay v. MercExchange, L.L.C.*, 547 U.S. 388 (2006). Pet. App. 10a. The Ninth Circuit recognized that this test requires a plaintiff to show "'(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of the hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.'" Pet. App. 11a (citing *N. Cheyenne Tribe v. Norton*, 503 F.3d 836, 843 (9th Cir. 2007) (quoting *eBay*, 547 U.S. at 391)). The Ninth

Circuit also acknowledged that issuance of permanent injunctive relief "in the environmental context" requires a balancing of the harms identified in these four factors, citing *Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1496 (9th Cir. 1995); *Lands Council v. McNair*, 537 F.3d 981, 1005 (9th Cir. 2008) (en banc) ("Our law does not ... allow us to abandon a balance of harms analysis just because a potential environmental injury is at issue...."). *Id.*

While acknowledging the need to balance harms under the four-factor test as a general matter, the Ninth Circuit nevertheless declined to require it in this case. Instead, it choose to allow a broad permanent injunction against the future use of RRA until APHIS could prepare a full environmental impact report. Pet. App. 15a. In granting the injunction, the district court ignored expert evidence submitted by APHIS to show that a broad injunction was not necessary to address the harms for which the injunction was sought. *Id.* The Ninth Circuit nevertheless upheld the district court's decision, finding that the "district court did not abuse its discretion in choosing to reject APHIS's proposed mitigation measures in favor of a broader injunction to prevent more irreparable harm from occurring." Pet. App. 16a. In doing so, the Ninth Circuit effectively abdicated its responsibility for conducting the kind of judicial balancing of harms that this Court consistently has required as the basis for awarding injunctive relief. The Ninth Circuit's ruling flatly contradicts this Court's long-standing requirement that courts fully and independently assess the potential for harm when approving injunctive remedies in environmental cases. *See Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311–12

(1982) (rejecting "'absolute statutory obligation'" to enjoin violations of environmental statutes) (citation omitted); *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 542-45 (1987) (reversing Ninth Circuit presumption of irreparable harm in environmental cases).

This Court recently affirmed the requirement that courts conduct their own equitable balancing of harm when allowing injunctive relief with its decision last Term in *Winter v. National Resources Defense Council, Inc.*, 129 S. Ct. 365 (2008). In *Winter*, the Court rejected the view adopted by the district court and the Ninth Circuit that when a plaintiff demonstrates a strong likelihood of prevailing on the merits, a preliminary injunction may be entered based only on a "possibility" of irreparable harm. *Id.* at 375. Instead, the Court made clear that "[o]ur frequently reiterated standard" requires that plaintiffs seeking injunctive relief must "demonstrate that irreparable injury is *likely* in the absence of an injunction." *Id.* (citing *Los Angeles v. Lyons*, 461 U.S. 488, 502 (1974); *Granny Goose Foods, Inc. v. Teamsters*, 415 U.S. 423, 441 (1974); *O'Shea v. Littleton*, 414 U.S. 488, 502 (1974)); *see also* 11A C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* § 2948.1, p. 139 (2d ed. 1995) (applicant must demonstrate that in the absence of a preliminary injunction "the applicant is likely to suffer irreparable harm before a decision on the merits can be rendered"); *id.* at 155 ("a preliminary injunction will not be issued simply to prevent the possibility of some remote future injury").

As in the present case, the lower courts in *Winter*

sustained the imposition of broad injunctive relief without considering whether lesser restrictions would be sufficient to protect against the harm the injunction was intended to address. At issue in *Winter* was the propriety of restrictions on the use by the U.S. Navy of active underwater sonar in certain naval training exercises. *Winter*, 129 S. Ct. at 370. Originally, a total of six such restrictions were imposed by the district court; however, by the time of the district court's final decision, the Navy was challenging only two of the original six restrictions. *Id.* at 373. The district court declined to reconsider the likelihood of irreparable harm in light of the four restrictions not challenged by the Navy. *Id.* at 374. Nevertheless, the Ninth Circuit affirmed the district court's conclusion that plaintiffs had established a "near certainty" of irreparable harm in the absence of broad injunctive relief. *Id.*

The Ninth Circuit's "presumption" that a broad injunctive remedy was necessary to prevent irreparable harm in the *Winter* case is analogous to its "presumption" in the present case that a broad injunction is necessary pending completion of an environmental impact analysis by APHIS of its approved use of RRA. In neither case is the application of the presumption consistent with this Court's required use of the four-factor equitable balancing test in determining when injunctive relief is appropriate in any case. Under the Ninth Circuit's decision, a court can avoid the necessary, though perhaps difficult, task in environmental cases of equitably balancing relative harm to the parties. The court can mandate broad injunctive relief with the hope that a government agency will perform the same task in preparing an EIS at some

indeterminate later date.

If allowed to stand, the Ninth Circuit's decision will undermine the fundamental framework established by the federal courts to determine whether and when the remedy of permanent injunctive relief should be available. This court should therefore grant review of the Ninth Circuit's decision consistent with its decision in *Winter* and the long line of cases that preceded it.

II. THE NINTH CIRCUIT'S DENIAL OF AN EVIDENTIARY HEARING WHEN AWARDING INJUNCTIVE RELIEF IN NEPA CASES WARRANTS THIS COURT'S REVIEW

Separate and apart from its failure to correctly apply the traditional test of balancing harm to determine when permanent injunctive remedies are appropriate, the Ninth Circuit also failed to allow the parties a sufficient opportunity to present evidence concerning whether such remedies were appropriate *at all* in this case.

Rather than basing its decision on an evidentiary hearing, which would allow it to assess the viability of witness opinions and resolve disputes between the parties' witnesses, the district court held that such a hearing "'would require this Court to engage in precisely the same inquiry it concluded APHIS failed to do and must do in an EIS.'" Pet. App. 17a. Citing *Idaho Watersheds Project v. Hahn*, 307 F.3d 815, 831 (9th Cir. 2002), the district court concluded that it "did not need to conduct an extensive inquiry, involving scientific

determinations, to determine what interim measures are necessary to protect the environment 'while the [government] conducts studies in order to make the very same scientific determinations.'" *Id.* On that basis, the district court determined that it need not conduct an evidentiary hearing before granting permanent injunctive relief, and the Ninth Circuit upheld the district court's determination. Pet. App. 20a.

The Ninth Circuit acknowledged that "generally, a district court must hold an evidentiary hearing before issuing a permanent injunction unless the adverse party has waived its right to a hearing or the facts are undisputed." Pet. App. 17a (citing *United States v. Microsoft*, 253 F.3d at 101–03; *Charlton v. Estate of Charlton*, 841 F.2d 988, 989 (9th Cir. 1988)). "The fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). This basic notion of due process underpins the evidentiary hearing requirement. *SEC v. Smyth,* 420 F.3d 1225, 1232 (11th Cir. 2005). Yet the Ninth Circuit's decision would carve out a significant exception to this requirement in cases brought under NEPA.

A. Analysis of Environmental Impacts Under NEPA Cannot Substitute for an Evidentiary Hearing to Establish Grounds for Injunctive Relief

The Ninth Circuit upheld the district court's decision not to conduct an evidentiary hearing because it "would require [the court] to perform the same type of extensive inquiry into environmental effects that the

ordered EIS will require the government agency to perform." Pet. App. 18a. The district court concluded that it should not have to conduct an evidentiary hearing because the analysis involved complex technical issues more within the scope of the government's expertise.[3] This conclusion ignores the fundamental distinction between the government's obligation to comply with the administrative requirements of NEPA and the court's separate obligation to respect the parties' procedural due process rights in a judicial context – as the courts have elsewhere acknowledged, "[a] hearing on the merits . . . does not substitute for a relief-specific evidentiary hearing . . . ." *United States v. Microsoft*, 253 F.3d at 101.

The analysis of the lower courts on this point is wrong as a matter of law. "The purpose of an environmental impact statement [under NEPA] is to provide full and fair discussion of significant environmental impacts and to inform decision makers and the public of reasonable alternatives that would minimize adverse environmental impacts." *California ex rel. Lockyer v. U.S. Dept. of Agriculture*, 575 F.3d 999, 1012 (9th Cir. 2009). In contrast, an evidentiary hearing protects "the cardinal principle of our system of justice that factual disputes must be heard in open court and resolved through trial-like evidentiary proceedings." *United*

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[3] The district court's response to the parties' respective evidentiary submissions highlights the court's failure to conduct the necessary analysis and balancing of harms: "Essentially is [sic] the argument that I could be like a super environmental agency engaged in balancing all of these different factors and coming to particular conclusions, which I feel particularly ill suited to do, number one. And, number two, it isn't my job." Pet. App. 417a.

States v. Microsoft, 253 F.3d at 101. APHIS' execution of its duty to prepare an EIS did not and could not relieve the court of its duty to conduct an evidentiary hearing as the basis of an equitable analysis of harm. The court cannot escape its legal responsibility merely because an administrative agency may engage in a similar task.[4]

In order for the court to balance the harms, a court must assess not only the alleged harm to the environment, but also the harm to the parties in the action. *See Ocean Advocates v. U.S. Army Corps of Engineers*, 402 F.3d 846, 875 (9th Cir. 2005) (instructing the district court to conduct an evidentiary hearing to consider the effect a pier extension would have on the environment and the harms the proposed builder would suffer under an injunction). As this Court has recognized, "it is the duty of a court of equity granting injunctive relief to do so upon conditions that will protect all . . . whose interests the injunction may affect." *Inland Steel Co. v. United States*, 306 U.S. 153, 157 (1939); *Sharum v. Whitehead Coal Mining Co.*, 223 F. 282, 291 (8th Cir. 1915) ("There is no question about the right and duty of a court in issuing injunctions to take into consideration the comparative injury of the different parties to the suit.").

In the present case, the district court granted

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[4] But the district court in this case assumed as much: "So I'm not an environmental agency. I'm not the person who has to look and analyze and try to figure out, does this have an environmental impact or doesn't it, you know, all the measures and so forth. We allow the government in the first instance to do that." Pet. App. 417a.

injunctive relief based solely on its merits opinion that APHIS must prepare an EIS to evaluate the environmental impacts of it approving the use of RRA. That alone is not enough to meet the standards set by this Court.

B. There Is No Exception to the Requirement for an Evidentiary Hearing in NEPA Cases

It is well established that an evidentiary hearing is required before injunctive relief can be granted. *Charlton*, 841 F.2d at 989 ("Generally 'the entry of continuation of an injunction requires a hearing.'") (quoting *Professional Plan Examiners of New Jersey, Inc. v. Lefante*, 750 F.2d 282, 288 (3d Cir. 1984)); *McDonald's Corp. v. Robertson*, 147 F.3d 1301, 1311–12 (11th Cir. 1998) ("'Where the injunction turns on the resolution of bitterly disputed facts, ... an evidentiary hearing is normally required to decide credibility issues.'") (quoting *All Care Nursing Service v. Bethesda Memorial Hospital, Inc.*, 887 F.2d 1535, 1538 (11th Cir. 1989)); *Huntington v. Marsh*, 884 F.2d 648, 654 (2d Cir. 1989) (concluding the district court erred by failing to hold an evidentiary hearing prior to granting an injunction); *United States v. McGee*, 714 F.2d 607, 613 (6th Cir. 1983) ("Normally, an evidentiary hearing is required before an injunction may be granted."); *United States v. Production Plated Plastics, Inc.*, 762 F. Supp. 722, 728 (W.D. Mich. 1991) ("[A]n evidentiary hearing is normally required before injunctive relief may be granted.").

Courts have recognized only two narrow

exceptions to the general rule requiring an evidentiary hearing: (1) when there are no material facts in dispute, and (2) when an adverse party has waived its right to a hearing. *Charlton*, 841 F.2d at 989. Neither of these exceptions applies in the present case. *See* Pet. App. 21a (Smith, J. dissenting) (explaining that factual disputes exist and that petitioners did not waive their rights to a hearing). The fact that a government agency has been directed to conduct its own separate fact-finding process, pursuant to a separate statutory authority (in this case, NEPA) and subject to separate substantive and procedural requirements, provides no justification for any departure from the general rule.

The lower court's decision not to require an evidentiary hearing before granting a permanent injunction in this case reflects a failure to distinguish between the finding that the government had violated NEPA and the court's independent duty to make an evidentiary determination of irreparable harm. The Second Circuit addressed the same mistake in *Huntington v. Marsh*, 884 F.2d 648, 654 (2d Cir. 1989), where the district court also refused to hold an evidentiary hearing sought by the defendant to determine whether an injunction was appropriate. The Second Circuit noted that "the district court appears to have ruled that the establishment of a statutory violation, without more, warranted an injunction." *Id.* The Second Circuit made clear that the lower court had improperly failed to give necessary consideration "to the question of whether plaintiff had met its burden to establish some actual or threatened injury," an inquiry which should have occurred at an evidentiary hearing. *Id.* The Second Circuit's conclusion in the *Huntington*

case applies equally in NEPA cases, where statutory violations are procedural in nature. *See Winter*, 129 S. Ct. at 381 (2008) ("[T]he ultimate legal claim is that the Navy must prepare an EIS, not that it must cease sonar training.").

The Ninth Circuit should have reversed the district court in the absence of an evidentiary hearing on harm to the parties. It did not do so, and its error warrants review by this Court.

CONCLUSION

For these reasons, *amicus curiae* WLF urges the Court to grant the Petition for Writ of Certiorari in this action and reverse the judgment below.

Respectfully submitted,

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