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* DINAH BEAR, ROBERT GLICKSMAN, OLIVER HOUCK, DANIEL MANDELKER, THOMAS MCGARITY, ROBERT PERCIVAL, ZYGMUNT PLATER, NICHOLAS ROBINSON, AND GARY WIDMAN IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici seek to ensure equity remains a viable enforcement tool for courts to fulfill the statutory purposes embodied in the National Environmental Policy Act (NEPA) and other environmental laws. If Petitioners' view prevails, *amici* fear courts will foreclose injunctive relief unless environmental harms are proven more likely than not to occur, an unmerited departure from equity's traditional role. For these reasons, two former General Counsels to the Council on Environmental Quality (CEQ) and seven law professors submit this *amicus curiae* brief in support of Respondents Geertson Seed Farms, et al.

Amici Dinah Bear and Gary Widman are former General Counsels to CEQ in the Executive Office of the President whose service extends throughout much of the lifetime of NEPA.[2] Their combined experience interpreting and implementing NEPA spans five presidential administrations. Ms. Bear and Mr. Widman remain strongly committed to promoting NEPA's faithful enforcement.

Amici Robert Glicksman, Oliver Houck, Daniel Mandelker, Thomas McGarity, Robert Percival, Zygmunt Plater, and Nicholas Robinson are law

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[1] Pursuant to Supreme Court Rule 37.3, the parties have consented to the filing of this brief, and letters of consent have been filed with the Clerk of this Court. Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for any party in this case authored this brief in whole or in part, and no person or entity other than *amici* and their counsel has made a monetary contribution to the preparation and submission of this brief.

[2] More detailed biographies of *amici* former General Counsels to CEQ are included in Appendix A.

professors from across the United States, each of whom has taught environmental, natural resources, and administrative law in excess of twenty years—in one case for over fifty years.[3] Their vast scholarship includes over two hundred law review articles, six casebooks, and the leading treatise on NEPA law. Although law professors often write about what law should be established, here they write to defend law that is already well-established.

SUMMARY OF ARGUMENT

District courts have broad discretion to tailor remedies to the circumstances of the case, and appellate courts should not, and historically have not, lightly cast aside the reasoned judgment made by the judge who has weighed the facts and balanced the equities first hand. Petitioners have not shown that the district court's findings of fact, taken largely from the administrative record, were clearly erroneous. Releasing Roundup Ready alfalfa into the environment without completing an environmental analysis would have exposed Respondents to a real and immediate threat of biological contamination, an environmental injury that is irreparable. Equitable relief does not require plaintiffs to show a near-certainty of irreparable harm, which amounts to a virtually impossible standard for future injuries. Indeed, courts have traditionally exercised their discretion to issue injunctions that avoid future harm where there is a real and immediate *threat* of harm.

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[3] More detailed biographies of *amici* law professors are included in Appendix A.

By enforcing the statutory procedures of the National Environmental Policy Act (NEPA), the district court respected the deliberately expressed judgment of Congress. As this Court recognized in *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), while equity courts enjoy broad discretion, that discretion does not extend so far as to give district courts authority to ignore a statute's principal objectives. Although the district court did not have an absolute duty to issue the injunction, the district court did not abuse its discretion by declining to issue the injunction proposed by the Animal and Plant Health Inspection Service (APHIS). After balancing the four equity factors, the remedy chosen by the district court preserved the opportunity for APHIS to comply with NEPA's twin aims of informed decisionmaking and public participation. Moreover, APHIS's proposed injunction would have undermined these two objectives by allowing APHIS to implement a decision first and then analyze it later.

ARGUMENT

Monsanto Company's petition to deregulate Roundup Ready alfalfa has not satisfied the procedural requirements Congress imposed before a potential "plant pest" can be released into the environment. In this case, the Plant Protection Act (PPA) defines the status quo: regulated plants, including genetically modified plants, cannot be released into the environment without a permit. 7 U.S.C. § 7712; 7 C.F.R. § 340.0(a)(2) n.1. Genetically modified plants can be deregulated, but a decision to deregulate must include an environmental analysis in compliance with NEPA, which requires agencies to disclose and analyze the full range of reasonably foreseeable environmental

impacts before implementing a decision that irreversibly or irretrievably commits resources to a course of action. 42 U.S.C. § 4332(2)(C); 7 C.F.R. § 372.5(b)(4). To comply with NEPA, APHIS's regulations require "early and adequate consideration of environmental factors in [APHIS's] planning and decisionmaking." 7 C.F.R. § 372.1.

Past examples of ecological devastation wrought by the unwitting introduction of plant and animal pests into the environment illustrate the wisdom of prohibiting the commercial sale and widespread distribution of genetically modified plants until APHIS finishes its NEPA analysis and concludes that the newly created plants are not "plant pests." *See* 7 U.S.C. § 7711(a); 7 C.F.R. § 340.0(a)(2) n.1. "There are reasons for believing [the experience with the introduction of non-native species] is pertinent to the assessment of risks associated with the deliberate release of organisms that have been modified by engineering." William H. Rodgers, Jr., *Rodgers' Environmental Law* § 6:12 (A) (Supp. 2009). Yet, Monsanto Company and its licensee Forage Genetics (collectively "Monsanto"), argue that the district court abused its discretion by rejecting a proposed injunction that would allow Roundup Ready alfalfa to be released into the environment on a commercial scale before APHIS finishes its NEPA analysis. However, APHIS's flawed NEPA analysis failed to analyze specific, threatened environmental harms, like biological contamination and the development of glyphosate-resistant weeds. Therefore, the district court's decision to preserve the status quo while APHIS corrected its errors was not an abuse of discretion.

I. THE DISTRICT COURT'S INJUNCTION BALANCED THE INTERESTS OF THE PARTIES WHILE ENFORCING THE PROCEDURAL REQUIREMENTS OF NEPA AND PPA.

The characteristics of flexibility and practicality allow courts in equity to tailor remedies to the circumstances of the individual case. *See Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944) ("Flexibility rather than rigidity" distinguishes equity jurisdiction.). Appellate courts do not lightly cast aside the factual findings or the equitable balances reached by district courts. They reject factual findings only where they are clearly erroneous and upset the balance struck by the district court only where there has been an abuse of discretion. *eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006); *see Found. on Econ. Trends v. Heckler*, 756 F.2d 143, 151-52 (D.C. Cir. 1985). These standards of review are fundamental, and yet they are conspicuously absent from Petitioners' brief. Petitioners attempt to dodge these highly deferential standards by attacking the district court's decision on novel legal grounds, asserting error in the standard for irreparable harm and in the evidentiary procedures used by the district court. Though Petitioners disagree with the balance struck by the district court, they have not shown that the findings of fact, taken largely from the administrative record, were clearly erroneous. Nor have they shown that the balance reached, after the court carefully applied the traditional four-factor test and weighed the equities between the parties, was an abuse of discretion.

A. The risk of cross-contamination caused by releasing Roundup Ready alfalfa created a likelihood of irreparable harm that justified injunctive relief.

Injunctive relief, by definition, is forward-looking. *Douglas v. City of Jeanette*, 319 U.S. 157, 165 (1943). Thus, equity has traditionally sheltered plaintiffs from real threats of future wrongs that imperiled the plaintiffs' interests. *See, e.g.*, *United Steelworkers of Am. v. United States*, 361 U.S. 39, 40-42 (1959) (enjoining strike because, if the strike continued, it would create further delay in steel production, and delay would imperil national health and safety); 42 Am. Jur. 2d *Injunctions* § 2 (Supp. 2010) ("Injunctive relief is designed to meet a real threat of a future wrong or a contemporary wrong of a nature likely to continue or recur."); *see also O'Shea v. Littleton*, 414 U.S. 488, 496 (1974) ("[P]ast wrongs are evidence bearing on whether there is a real and immediate threat . . . .").

Though equity sometimes remedies present harm, its principal remedial effect is prospective, guarding against future harm despite the future's inherent uncertainty. *See United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953) ("The purpose of an injunction is to prevent future violations . . . ."); *United States v. Or. State Med. Soc'y*, 343 U.S. 326, 333 (1952) ("The sole function of an action for injunction is to forestall future violations."). Equitable relief has guarded a village against dam failure, obtained treatment for orphans at risk for neurological illness, and even ensured that the Seattle Supersonics had their star basketball player, Spencer Haywood, for the

upcoming NBA playoffs. *See Warm Springs Dam Task Force v. Gribble*, 417 U.S. 1301 (Douglas, Circuit Justice 1974); *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 746 F.2d 816 (D.C. Cir. 1984); *Haywood v. NBA*, 401 U.S. 1204 (Douglas, Circuit Justice 1971), respectively.

The extent to which the threat of future harm imperils the plaintiff's interest, i.e., the significance of the risk, has always been a question for the trial court's equitable discretion. For example, commentators agree that a lower probability of an extremely grave irreparable harm may entitle a plaintiff to injunctive relief where the same probability of a more minor irreparable harm would not. *See* 11A Charles Allen Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2948 (2d ed. 1982) (courts should consider "the *significance* of the threat of irreparable harm" (emphasis added)); *see generally* Restatement (Second) of Torts § 933(1) (1979), cmt. b ("The more serious the impending harm, the less justification there is for taking the chances that are involved in pronouncing the harm too remote."); Cass R. Sunstein, *Irreversible and Catastrophic*, 91 Cornell L. Rev. 841, 870 (2006) (noting that a one-in-a-million chance that 200 million people will die and a fifty-fifty chance that 400 people will die both create an expected cost of 200 lives).

Risk is not harmless simply because the threat of harm is not certain. *See United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (establishing B<PL test for negligence liability that considered the probability of future harm, i.e., risk). This Court noted over one hundred years ago that federal courts can use their equitable powers to "prevent nuisances that are threatened, and before

irreparable mischief ensues . . . and, by perpetual injunction, protect the public against them in the future." *Mugler v. Kansas*, 123 U.S. 623, 673 (1887). The law of anticipatory nuisance, for instance, offers relief from prospective harm caused by a future nuisance, even in the absence of past or present injury. Plaintiffs need not prove they have already been harmed, because "even threatened harm is actionable under the federal common law of nuisance." *Connecticut v. Am. Elec. Power*, 582 F.3d 309, 357 (2d Cir. 2009).

In light of this precedent, it was hardly novel, much less an abuse of discretion, for the district court to issue an injunction guarding against the future irreparable harm of biological contamination where the record established that the risk was "sufficiently likely." *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987). Indeed, the facts before the district court showed that this standard had been surpassed because biological contamination had already occurred. Pet.App. 13a, 61a. As the district court explained, biological contamination from cross-pollination between Roundup Ready alfalfa and organic alfalfa is irreparable because "[t]he contamination cannot be undone; it will destroy the crops of those farmers who do not sell genetically engineered alfalfa. Moreover, it is not a one season loss; alfalfa is a perennial crop and once removed cannot be replanted for two to four years." Pet.App. 71a. Once a conventional alfalfa farmer's seed crop is contaminated, "there is no way for the farmer to remove the gene from the crop or control its further spread." Pet.App. 36a. Therefore, Judge Breyer's conclusion that irreversible genetic

contamination of conventional alfalfa crops was irreparable harm was not clearly erroneous.

In addition to confirming irreparable harm, the record amply supports Judge Breyer's finding that biological contamination could occur, establishing a "likelihood" of irreparable injury. It is undisputed that cross-contamination could occur, and has occurred. Pet.App. 61a ("APHIS acknowledged that gene transmission could and had occurred with Roundup Ready alfalfa."). APHIS's environmental assessment acknowledged this risk and even analyzed the possibility that gene transmission could eradicate all other strains of alfalfa. Pet.App. 42a-43a.[4] It is also undisputed that glyphosate-resistant weeds could develop. Pet.App. 45a-46a. Finally, it is undisputed that Roundup Ready alfalfa has been made commercially available and that, absent an injunction, its use would increase. *See* Pet.App. 64a. In addition to these undisputed facts, the district court made further factual findings. "[G]ene transmission is *especially likely* in this context given the geographic concentration of alfalfa seed production." Pet.App. 35a-36a (emphasis added). Thus, the district court's

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[4] Petitioners take issue with the district court's "suggestion that continued planting of [Roundup Ready alfalfa] could eliminate the availability of conventional alfalfa." Pet. Br. 34. This "suggestion," however, came from APHIS, not from the district court. The possibility that gene transmission could eliminate the ability to grow non-genetically engineered alfalfa is the reason that APHIS analyzed the economic impacts that elimination of organic or conventional alfalfa crops would have on farmers. Pet.App. 44a-45a. Additionally, an internal APHIS email acknowledged that "it may be hard to guarantee that seeds or sprouts are GE free." Pet.App. 38a.

conclusion that cross-contamination was sufficiently likely was not clearly erroneous.

Though the record demonstrates that the district court found a likelihood, not just a possibility, of irreparable harm, Petitioners attack the court's legal standard for irreparable harm by distorting the language of the court's order. Throughout their brief, Petitioners suggest that the district court's use of the phrase "sufficiently likely" indicates that the court applied an inappropriate "mere 'possibility'" standard. Pet. Br. 19, 21, 41, 44. Yet "sufficiently likely" is neither a lenient standard imposed by the Ninth Circuit nor a radical invention of the district court: it was this Court's own description of the proper standard for the issuance of an injunction. *See Amoco,* 480 U.S. at 545 ("If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment."). Nowhere did the district court suggest that the mere possibility of cross-pollination entitled the plaintiffs to an injunction. If the court had applied a possibility standard, it would not have needed a ten-page memorandum to explain the justification for its permanent injunction; a short order citing to APHIS's environmental assessment—record evidence that acknowledges (at a minimum) the *possibility* of gene transmission—would have sufficed. Pet.App. 45a. Instead, the district court went much further, weighing the facts and concluding that, in light of the close geographic distribution of alfalfa crops and the fact that gene transmission had already occurred, biological contamination was sufficiently likely to occur under APHIS's proposed injunction. *See, e.g.*, Pet.App. 61a, 70a, 71a; Pet.App. 10a, 13a.

The Petitioners' misguided articulation of the "likelihood" of irreparable harm standard stems from their misreading of this Court's opinion in *Winter v. Natural Resources Defense Council*, 129 S. Ct. 365 (2008), which they claim requires a near-certainty of irreparable harm—a standard that would make a forward-looking injunction nearly impossible. This Court has never countenanced such a standard. Indeed, although this Court has characterized the likelihood standard slightly differently over the years, the standard itself has never changed; it remains part of the same equitable balancing test "historically employed by courts of equity." *eBay*, 547 U.S. at 390. *Compare Winter*, 129 S. Ct. at 375 ("*likely*"), *with Amoco*, 480 U.S. at 545 ("sufficiently likely"), *with City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983) ("likelihood"), *and O'Shea*, 414 U.S. at 502 (same), *with W. T. Grant*, 345 U.S. at 633 ("cognizable danger . . . something more than the mere possibility").

Equity has never required a showing that irreparable harm is more likely than not, and Petitioners cite no case establishing such a bright line. Several federal courts of appeals have interpreted this Court's various descriptions of "likelihood" to mean "significant risk," but there is no fixed line separating significant risks from speculative ones. *See Greater Yellowstone Coal. v. Flowers*, 321 F.3d 1250, 1258 (10th Cir. 2003) ("[A]n injury is not speculative simply because it is not certain to occur."); *Adams v. Freedom Forge Corp.*, 204 F.3d 475, 484-85 (3d Cir. 2000) ("The irreparable harm requirement is met if a plaintiff demonstrates a significant risk that he or she will experience harm that cannot adequately be compensated after the fact by monetary damages.");

Assoc. Gen. Contractors of Cal., Inc. v. Coal. for Econ. Equity, 950 F.2d 1401, 1410 (9th Cir. 1991) ("[T]he party seeking the injunction must demonstrate that it will be exposed to some significant risk of irreparable injury.").

B. A new and unanalyzed activity can create a sufficient likelihood of irreparable harm.

The district court did not abuse its discretion by rejecting an injunction that would have radically altered the status quo before APHIS completed the environmental analysis. APHIS's proposed injunctive relief would have authorized exponential expansion of Roundup Ready alfalfa production nationwide, increasing the number of acres planted by five-fold in less than a year. Pet.App. 64a. The district court properly refused to endorse such dramatic growth of a new and unanalyzed activity, especially when it found biological contamination had already occurred under planting conditions similar to those proposed in APHIS's injunction. Pet.App. 70a. Neither information gathered through analysis nor experience supports APHIS's assertion that its injunctive measures would avoid biological contamination.

A court is well within its equitable discretion to enjoin an unprecedented activity from proceeding until after a proper environmental analysis, required by statute, has been conducted. *See Found. on Econ. Trends*, 756 F.2d at 157. In *Sierra Club v. Marsh*, then-Judge, now-Justice, Breyer noted that the "added *risk* to the environment that takes place when governmental decisionmakers make up their minds without having before them an analysis (with prior

public comment) of the likely effects of their decision upon the environment" can create irreparable harm. 872 F.2d 497, 500 (1st Cir. 1989); *see also Massachusetts v. Watt*, 716 F.2d 946, 952 (1st Cir. 1983) (Breyer, J.).

In *Foundation on Economic Trends*, the D.C. Circuit upheld an injunction stopping the National Institute of Health (NIH) from releasing new genetically engineered bacteria into the environment until after it completed an adequate NEPA analysis. 756 F.2d at 150. With reasoning remarkably similar to that advanced by Petitioners in this case, NIH acknowledged that the engineered bacteria could multiply and disperse throughout the environment, but argued that the likelihood of dispersion was low and, therefore, did not analyze whether dispersion would cause environmental injury. *Id.* at 153. Due to NIH's "complete failure to address a major environmental concern" before authorizing an unprecedented activity that threatened environmental harm, *id.* at 154, the D.C. Circuit upheld the injunction delaying the proposed experiment.[5] In contrast, in *Winter*,

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[5] The district court actually enjoined two activities: (1) a specific approval of the deliberate release of genetically modified organisms; and (2) a policy change authorizing direct release experiments. The D.C. Circuit upheld the injunction regarding the first activity, but concluded that the second injunction was "overly broad" in part because the regulations did not make direct release "an imminent possibility." *Found. on Econ. Trends*, 756 F.2d at 158. This result reflects the power of equity courts to shape a remedy that can fulfill the objectives of NEPA without adversely affecting society by issuing an overly broad injunction. *See Wisconsin v. Weinberger*, 745 F.2d 412, 426 (7th Cir. 1984) (where NEPA violation was uncertain, and the only threatened

experience weighed against the issuance of an injunction where the Navy had not yet done a NEPA analysis for training exercises that had been "taking place in SOCAL for the last 40 years." *See Winter*, 129 S. Ct. at 376. In declining to issue an injunction, this Court found it "pertinent" that the Navy was not "conducting a new type of activity with completely unknown effects on the environment." *Id.*

In this case, Petitioners cannot rely on either analysis or experience to demonstrate that APHIS's proposed injunction would truly guard against irreparable biological contamination. Pet.App. 69a-70a ("[Defendants] have not submitted any evidence that suggests whether, and to what extent, the proposed interim conditions will be followed, even though such conditions are similar to those already imposed by Forage Genetics in its contracts with Roundup Ready seed growers and contamination has occurred despite these conditions.").

This is not a case where the lack of information is an injury that is suffered by all and so actionable by none. *Cf. Allen v. Wright*, 468 U.S. 737, 751, 760 (1984) (summarizing prior line of cases as representing the principle that "absent an allegation of a specific threat of being subject to the challenged practices, plaintiffs had no standing to ask for an injunction"). To the contrary, traditional seed farmers need the information missing from the environmental assessment to protect their crops from biological contamination—even if Roundup Ready alfalfa is only partially deregulated. APHIS summarily concluded that biological

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injury was agency preference for a particular course of action, an injunction was unwarranted).

contamination was "highly unlikely" if growers used "quality control," but the agency did not explain or identify any quality control measures that would prevent gene transmission between neighboring seed farms, nor did it analyze the burden that such measures would impose on farmers of conventional alfalfa. Pet.App. 31a, 41a. The informational injury here is particularized and consequential, and it created a sufficient likelihood of irreparable harm. Therefore, the district court did not abuse its discretion by delaying APHIS's foray into "uncharted territory," Pet.App. 45a, by requiring APHIS to finish a meaningful NEPA analysis before deregulating Roundup Ready alfalfa.

C. The district court thoroughly balanced the equities in accordance with the traditional four-part test for injunctive relief.

Petitioners' assertion that the district court applied a "special rule" for NEPA cases instead of balancing the four traditional factors is not supported by the court's decision. As discussed thoroughly above, Judge Breyer concluded that the risk of biological contamination caused by increasing the amount of Roundup Ready alfalfa in the environment created a sufficiently likely threat of irreparable harm. Judge Breyer found that the balance of hardships favored issuing an injunction because any harm to Monsanto would be purely economic and would "not outweigh the potential irreparable damage to the environment." Pet.App. 72a (internal citation omitted). Additionally, in light of NEPA's statutory purpose, Judge Breyer found it "in the public interest to delay the further

introduction of Roundup Ready alfalfa into the environment while APHIS studies the environmental consequences of such action." Pet.App. 75a. Finally, he explicitly concluded that "plaintiffs have sufficiently established irreparable injury and that the balance of the equities weighs in favor of maintenance of the status quo and against allowing the continued expansion" of Roundup Ready alfalfa during completion of the EIS. Pet.App. 71a.

As the arbiter who placed the weights upon the scales, Judge Breyer was best positioned to eye the balance. His judgment was not an abuse of discretion, and is, therefore, entitled to deference. *See eBay*, 547 U.S. at 391.

II. THE DISTRICT COURT'S INJUNCTION RESPECTED THE WILL OF CONGRESS BY ENFORCING NEPA'S STATUTORY PROCEDURES AND POLICIES.

Although courts in equity have broad discretion to fashion a remedy, their discretion is not so broad that they can refuse to enforce a statutory scheme. The choice before courts sitting in equity is "whether a particular means of enforcing the statute should be chosen over another permissible means; their choice is not whether enforcement is preferable to no enforcement at all." *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 497-98 (2001). "[A] court sitting in equity cannot 'ignore the judgment of Congress, deliberately expressed in legislation.'" *Id.* at 497 (quoting *Virginian Ry. Co. v. Sys. Fed'n No. 40*, 300 U.S. 515, 551 (1937)). Although district courts enjoy "sound discretion" to tailor injunctive relief to the "necessities of the public interest," in the statutory

context, Congress defines the public interest. *Hecht Co. v. Bowles*, 321 U.S. 321, 329-31 (1944).[6] These principles do not change when applied to NEPA.

With NEPA, Congress prioritized foresight, planning, and analysis as antidotes to "new and expanding technological advances" that could profoundly affect the environment. 42 U.S.C. § 4331(a). "Once Congress . . . has decided the order of priorities in a given area, it is for the Executive to administer the

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[6] To be sure, there are cases in which this Court has concluded that a statutory violation did not require an injunction. *See, e.g.*, *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531 (1987); *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982); *Hecht Co. v. Bowles*, 321 U.S. 321 (1944). However, these cases illustrate, rather than undermine, the strength of the principle that courts exercise their equitable discretion in light of the large objectives of the statutory scheme and do not have discretion to authorize behavior that Congress intended to prohibit. *See generally* Zygmunt B. Plater, *Statutory Violations and Equitable Discretion*, 70 Cal. L. Rev. 524, *passim* (1982). In *Amoco*, the large objectives of the statute were designed to protect subsistence resources, and the district court expressly found that exploration activities would not significantly restrict subsistence uses. 480 U.S. at 544. Therefore, an injunction requiring statutory compliance was not required. Similarly, in *Weinberger*, this Court concluded that the Navy's training sessions off the coast of Puerto Rico, resulting in "accidental bombings of the navigable waters," did not undermine the statutory purpose of the Clean Water Act because "the discharge of ordnance had not polluted the waters." 456 U.S. at 307, 315. Therefore, "[a]n injunction [was] not the only means of ensuring compliance" with the large objectives of the Clean Water Act. *Id.* at 314. Finally, in *Hecht*, this Court concluded that an injunction was not mandatory because statutory compliance was already assured. 321 U.S. at 326. In this case, however, as explained more thoroughly in this section, the district court could not have entered APHIS's proposed injunction and still have fulfilled the statutory objectives of NEPA: informed decisionmaking and public participation.

laws and for courts to enforce them when enforcement is sought." *TVA v. Hill*, 437 U.S. 153, 194 (1978). APHIS's proposed injunction would have overridden the procedural safeguards that Congress imposed through NEPA against rash decisions that could have significant environmental impacts. *See* 42 U.S.C. § 4332(2)(C). Therefore, the district court did not abuse its discretion when it rejected APHIS's proposal and chose to enforce NEPA's procedures.[7]

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[7] Petitioners argue that NEPA's statutory objectives only protect "the environment" and "absent species-level harm there is no meaningful change in the environment." Pet. Br. 36-37. This argument is fundamentally flawed. Congress specifically referenced localized harms by requiring environmental impact statements to include "the relationship between *local short-term uses* of man's environment and the maintenance and enhancement of long-term productivity." 42 U.S.C. § 4332(2)(C)(iv) (emphasis added). Petitioners' argument also ignores the fact that NEPA contextualizes the significance of environmental impacts. 40 C.F.R. § 1508.27(a) ("[T]he significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality.").

Petitioners are also wrong to suggest that NEPA's statutory objectives only protect the environment, not individuals or people. Prior to the final passage of NEPA, Senator Jackson, one of NEPA's chief sponsors, articulated the relationship between humans and the environment from the Senate floor. "An environmental policy is a policy for people. Its primary concern is with man and his future." 115 Cong. Rec. 40,416 (1969). Congress's declaration of national environmental policy supports Senator Jackson's statement. *See, e.g.*, 42 U.S.C. § 4331(c) (declaring that "*each person* should enjoy a healthful environment" (emphasis added)); *id.* § 4331(b)(4) (stating that NEPA protects "an environment which supports diversity and variety of *individual* choice" (emphasis added)).

"A court must exercise this [equitable discretion] 'in light of the large objectives of the Act.'" *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416 (1975) (quoting *Hecht*, 321 U.S. at 331). This Court has described NEPA's large objectives as the twin aims of informed decisionmaking and public participation. *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 768 (2004); *Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983). Neither of these objectives would be satisfied by APHIS's proposed injunction, which would have timed the NEPA analysis to postdate the release of Roundup Ready alfalfa, authorized an uninformed agency decision, and substituted an evidentiary hearing for NEPA's public process. Had the district court allowed APHIS to shunt NEPA's procedures to the side, to be accomplished in the aftermath of a decision made—and implemented—it would have abused its discretion by adopting a remedy that undermined the procedural scheme Congress adopted to achieve NEPA's large objectives and would have substituted the "chancellor's clumsy foot for the rule of law." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 335 (1982) (Stevens, J., dissenting).

A. To inform decisionmaking, a NEPA analysis must be conducted before the decision is implemented.

The difference between the injunction that the district court adopted and the injunction APHIS proposed was timing: and timing is critical to enforcing NEPA's large objectives. The district court's injunction insured that the agency's NEPA analysis would *precede* the widespread, commercial dissemination of Roundup Ready alfalfa; while under APHIS's injunction, the

analysis would have *postdated* the release. The difference in timing between these two injunctions is the difference between enforcing and not enforcing NEPA's objectives, where the unanalyzed activity threatened environmental injury. APHIS's proposed injunction would have allowed the "continued and dramatic growth of the Roundup Ready alfalfa market." Pet.App. 64a. It could have authorized a five-fold increase in acreage planted before APHIS had gathered the missing information about how (and whether) biological contamination could be avoided. Pet.App. 64a. In other words, APHIS's injunction would have allowed the agency to implement a decision and analyze it later.

Because this approach stands NEPA on its head, the district court was well within its discretion to issue an injunction. Under NEPA, agencies must include a "detailed statement" on the environmental impacts of every *proposed* (not implemented) action significantly affecting the quality of the human environment and compile a description of adverse environmental impacts that cannot be avoided *if* the proposal is implemented. 42 U.S.C. § 4332(2)(C); *see* 40 C.F.R. § 1500.1(b). NEPA is not about data gathering for the sake of gathering data; rather, it should inform a proposed agency action. Environmental impact statements should be useful analytic documents that promote informed decisionmaking, not tomes filled with information, gathering dust on a shelf. *See* 40 C.F.R. § 1502.2(a) ("Environmental impact statements shall be analytic rather than encyclopedic."). NEPA is all

about informed decisionmaking. To accomplish this purpose, the process must precede the decision.[8]

The district court's injunction also preserved APHIS's ability to choose among reasonable alternatives prior to taking action on Monsanto's request for deregulation. 40 C.F.R. § 1502.14 (agencies should "[r]igorously explore and objectively evaluate" all reasonable alternatives including a "no action" alternative). In contrast, like squeezing a tube of toothpaste, APHIS's injunction would have foreclosed the "no action" alternative by releasing Roundup Ready alfalfa into the environment without a viable means of re-containing it. If the court had authorized APHIS's approach, it would have foreclosed the critical "no action" alternative of not deregulating at all, thereby allowing the agency to commit resources to a course of action before it completed its NEPA analysis. *See* 40 C.F.R. § 1502.2(f) ("Agencies shall not commit resources prejudicing selection of alternatives before

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[8] Of course, that does not mean that an injunction must issue in every NEPA case in which there is an analytical flaw. "The grant of jurisdiction to ensure compliance with a statute hardly suggests an absolute duty to do so under any and all circumstances, and a federal judge sitting as a chancellor is not mechanically obligated to grant an injunction for every violation of law." *Weinberger*, 456 U.S. at 313. Whether the agency can still make an informed decision despite a NEPA violation is a fact-specific inquiry better suited to individual cases rather than broad generalizations. NEPA's procedural requirements "'ensur[e] that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts.'" *Winter*, 129 S. Ct. at 376 (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989)).

making a final decision."); *see also id.* § 1506.1(a)(2) ("Until an agency issues a record of decision . . . no action concerning the proposal shall be taken which would . . . [l]imit the choice of reasonable alternatives.").

The bottom line is this: NEPA documents should not justify decisions already made. *Id.* § 1502.2(g). But that is precisely what APHIS's EIS would have done if the district court had adopted an injunction allowing further release of Roundup Ready alfalfa into the environment before the EIS was completed.

By rejecting APHIS's injunction, and prohibiting further Roundup Ready alfalfa plantings or sales, the district court preserved the opportunity for APHIS to comply with NEPA, and thereby required APHIS to "abide by the limitations prescribed by the Legislature." *Wilderness Soc'y v. Morton*, 479 F.2d 842, 892 (D.C. Cir. 1973).

B. APHIS's proposed injunction would have undermined NEPA's requirement that environmental analyses inform agency decisions.

The complete deregulation of Roundup Ready alfalfa will destroy the livelihoods of conventional and organic alfalfa farmers and generate Roundup-resistant superweeds. *See* JA 109, 111, 135 (comments submitted to APHIS); *see* JA 678-79 (declaration).

The complete deregulation of Roundup Ready alfalfa will create a negligible risk of cross-pollination and will have no significant impact on the emergence of Roundup-resistant superweeds. *See* Pet.App. 160a, 401a (declarations).

The respective accuracy of each of these over-simplified positions (and all possibilities in between) is unknown because APHIS's NEPA analysis failed to take a hard look at these and other potentially irreversible environmental impacts *prior* to deregulating Roundup Ready alfalfa. Without understanding the environmental impacts that threatened environmental harm, APHIS could not make an informed decision about releasing Roundup Ready alfalfa.

NEPA requires informed decisionmaking. Agencies must, "to the fullest extent possible," systematically integrate the natural and social sciences in planning and in decisionmaking. 42 U.S.C. § 4332(2)(A). However, here, numerous aspects of APHIS's environmental assessment revealed foreseeable, but unanalyzed, impacts that threatened environmental harm. For example, APHIS never analyzed the cumulative impact caused by a dramatic increase in the use of glyphosate as a fertilizer and the consequent possibility that Roundup-resistant weeds could develop. Pet.App. 47a. As the district court noted, other Roundup Ready crops, including corn and soybeans, have already been deregulated and more deregulation petitions are pending. Pet.App. 47a. Alfalfa is the fourth largest crop in the United States, the first large-scale perennial Roundup Ready crop, and the first crop in which APHIS acknowledged on the record that there is a chance of gene transmission. Pet.App. 27a, 45a, 47a. Adding it to the mix may have significant consequences for the quality of the human environment. Pet.App. 45a. Failure to investigate these cumulative impacts violated Congress's mandate that "all agencies of the Federal Government shall . . .

[identify] the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity." 42 U.S.C. § 4332(2)(C)(iv).

APHIS also failed to analyze impacts on organic farmers, on export markets, and on the availability of non-genetically modified alfalfa. NEPA protects "historic, cultural and natural aspects of our national heritage," as well as "an environment which supports diversity and variety of individual choice." 42 U.S.C. § 4331(b)(4). A federal action "that eliminates a farmer's choice to grow non-genetically engineered crops, or a consumer's choice to eat non-genetically engineered food," Pet.App. 44a, should have been thoroughly analyzed, particularly where it threatens environmental injury. In furtherance of Congress's policies set out in NEPA, APHIS must analyze these impacts before authorizing the planting of one million acres of Roundup Ready alfalfa.

Reviewing courts should base their decisions on the administrative record and should not substitute their judgment for that of the agency. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). Where the administrative record is silent, district courts properly remand, rather than conduct fact-finding procedures in the first instance. As Chief Judge Friendly once noted, "preservation of the integrity of NEPA necessitates that the [agency] be required to follow the steps set forth in § 102 [42 U.S.C. § 4332], even if it now seems likely that those steps will lead it to adhere to the present result." *City of New York v. United States*, 337 F. Supp. 150, 160 (E.D.N.Y. 1972). To do otherwise would shortcut the process that Congress committed in the first instance to the

responsible federal agency. *Jones v. Lynn*, 477 F.2d 885, 891-92 (1st Cir. 1973).

The district court properly recognized this principle when it refused to render an independent judgment about whether APHIS's proposed conditions, not analyzed in the environmental assessment, eliminated the likelihood of environmental injury caused by cross-contamination. Pet.App. 67a. "To make the findings requested by defendants would require this Court to engage in precisely the same inquiry it concluded APHIS failed to do . . . without the benefit of all the relevant data and, importantly, without the opportunity for and consideration of public comment." Pet.App. 68a. Far from violating due process, Pet. Br. 51, this approach respected Congress's unequivocal dictate that "the policies, regulations, and public laws of the United States *shall* be interpreted and administered in accordance with policies set forth in this chapter." 42 U.S.C. § 4332 (emphasis added).

Where, as here, the agency has failed to make an informed decision pursuant to NEPA's procedures, district courts cannot make up for the lapse by conducting an evidentiary hearing, as requested by Petitioners, and by deciding in the first instance the desirability of the proposed action. Far from an abuse of discretion, the judicial restraint exercised by the district court protected "the integrity of the fact-finding process mandated by Congress in 42 U.S.C. § 4332(2)(C)." *Jones*, 477 F.2d at 892.

C. Conducting an evidentiary hearing to decide whether Roundup Ready alfalfa should be released without a NEPA analysis would have undermined NEPA's aim of public participation.

The affidavits of experts proffered by APHIS and Monsanto on the effectiveness of APHIS's proposed injunctive measures cannot remedy APHIS's failure to analyze whether biological contamination was avoidable, as NEPA requires. *See* Pet.App. 66a-67a. "NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken." 40 C.F.R. § 1500.1(b); *see also id.* § 1501.1(a); *Dep't of Transp.*, 541 U.S. at 768 (Agencies must "have available, and . . . carefully consider, detailed information concerning significant environmental impacts" *prior* to taking any major federal action.). Monsanto and APHIS gathered the expert affidavits after APHIS made its deregulation decision, so they were divorced from the other features of a NEPA analysis, like the requirement to "study, develop, and describe appropriate alternatives . . . in any proposal which involves unresolved conflicts." 40 C.F.R. § 1501.2(c).

The restrictions in APHIS's proposed injunction, based on expert affidavits, were not made available to the public. 40 C.F.R. § 1500.1(b). Because the experts' affidavits were no substitute for the NEPA process, the district court properly rejected Monsanto's argument that these affidavits could change the balance of equities. Where Congress has established the public interest, as articulated in a statute's large objectives, courts should enforce that judgment, "[f]or the

standards of the public interest not the requirements of private litigation measure the propriety and need for injunctive relief." *See Hecht*, 321 U.S. at 331.

By prohibiting further sale and distribution of Roundup Ready alfalfa, the district court followed Congress's directive that the "policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with [NEPA]." 42 U.S.C. § 4332. This decision, far from an abuse of discretion, respected the priorities expressed by Congress in NEPA. *See TVA*, 437 U.S. at 194.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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April, 2010

Appendix A

FORMER GENERAL COUNSELS TO THE COUNCIL ON ENVIRONMENTAL QUALITY

Dinah Bear is an attorney based in Washington, D.C. After briefly serving as deputy General Counsel, she served for twenty-three years as the General Counsel to the Council on Environmental Quality (CEQ), the environmental agency in the Executive Office of the President. CEQ's responsibilities include advising the President on environmental matters, overseeing federal agencies' implementation of NEPA, and coordinating interagency implementation of environmental law and policy. She has taught, and continues to teach, NEPA courses for numerous federal agencies, the American Law Institute, the American Bar Association, and the Nicholas School of the Environment at Duke University. She has chaired the American Bar Association's Standing Committee on Environmental Law and the District of Columbia Bar Association's Section on Environment and Natural Resources.

Gary Widman served as the General Counsel to the CEQ in the administrations of Presidents Nixon and Ford, from 1974 through 1976. Before and after his time at CEQ, he was a Professor of Law at the University of California, Hastings College of the Law. He also served as Associate Solicitor for Conservation and Wildlife in the Department of the Interior during the Carter administration, as counsel to the Washington, D.C. office of the Fulbright & Jaworski law firm, as Director of the Office of Staff Attorneys for the U.S. Court of Appeals for the Ninth Circuit from

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Robert Glicksman is the J.B. & Maurice C. Shapiro Professor of Environmental Law at George Washington University Law School, teaching in the fields of administrative, environmental, natural resources, and property law. He is an accomplished environmental and natural resources law scholar with over sixty book chapters and articles to his credit. He co-authored an environmental law casebook, *Environmental Protection: Law and Policy*; the casebook *Administrative Law: Agency Action in Context*; a treatise, *Public Natural Resources Law*; a monograph, *Risk Regulation at Risk: A Pragmatic Approach*; and *Modern Public Land Law in a Nutshell*.

Oliver Houck is Director of the Environmental Law Program and Professor of Law at Tulane University Law School. He teaches in the fields of environmental, natural resources, and criminal law. He previously served as General Counsel to and Vice-President of the National Wildlife Federation. He has published widely on environmental, administrative, and constitutional law, including over forty book chapters and articles, and he is co-editor of a popular book on the history of environmental law, *Environmental Law Stories*. He remains an active participant in litigation involving biological diversity and consults with foreign governments on the development of their environmental laws.

Daniel Mandelker is the Howard A. Stamper Professor of Law at the Washington University in St. Louis School of Law, teaching in the fields of land use, environmental, and state and local government law. He has published numerous books, monographs, chapters, and articles on these and related fields of law. He is the author of the leading treatise on NEPA law, *NEPA Law and Litigation*; the co-author of a popular law school casebook, *Planning and Control of Land Development*; the author of the comprehensive treatise *Land Use Law*; co-author of a property law casebook, *Federal Land Use Law and Property Law and the Public Interest*; and a co-author of a casebook on state and local government, *State and Local Government in a Federal System*.

Thomas McGarity is the Joe R. and Teresa Lozano Long Endowed Chair in Administrative Law at the University of Texas at Austin School of Law, teaching in the fields of administrative law, environmental law, food safety law, and torts. In these and related fields, he has published over seventy articles and authored or co-authored eight books, including *Bending Science: How Special Interests Corrupt Public Health Research* (co-author); *The Law of Environmental Protection* (co-author); and *Reinventing Rationality: The Role of Regulatory Analysis in the Federal Bureaucracy*.

Robert Percival is the Robert F. Stanton Professor of Law and Director of the Environmental Law Program at the University of Maryland School of Law. He teaches in the fields of administrative, constitutional, environmental, and comparative environmental law. He is principal author of the most commonly used environmental law casebook in the

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Zygmunt Plater is a Professor of Law at Boston College Law School. He teaches in the fields of administrative, environmental, property, and land use law. He has litigated, and consulted on, a number of important cases involving administrative and environmental law, and has taught on seven law faculties in this country and abroad. He is lead author of a casebook on environmental law, *Environmental Law and Policy: Nature, Law, and Society*, and has published widely on environmental law issues, equitable discretion, administrative law, private and public rights in land and resources, and related fields.

Nicholas Robinson is the Pace University Professor on the Environment and the Gilbert and Sarah Kerlin Distinguished Professor of Environmental Law at Pace University School of Law as well as Co-Director for that law school's Center for Environmental Legal Studies. He teaches in the fields of environmental and historic preservation law. He participated in the development of NEPA regulations as a Member of the Legal Advisory Committee to the President's Council on Environmental Quality from 1970 to 1972, advising CEQ on the implementation of NEPA, after it was first adopted. He has published numerous books, chapters, and scholarly articles on environmental, energy, international, and land use law, including *Climate Change Law: Mitigation and*

Adaptation (co-author) and *New York Environmental Law: A Legal Treatise*. He has advised and represented governments and drafted treaties and laws on environmental issues at the international, state, and municipal levels. From 1983 to 1985, he served as Deputy Commissioner and General Counsel to the New York State Department of Environmental Conservation, advising New York on its compliance with NEPA and revising the regulations for New York's Environmental Quality Review Act (New York's "Little NEPA").