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IN THE SUPREME COURT OF THE UNITED STATES

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MONSANTO COMPANY, ET AL., :

Petitioners : No. 09-475

v. :

GEERTSON SEED FARMS, ET AL. :

- - - - - x

Washington, D.C.

Tuesday, April 27, 2010

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:09 a.m.

APPEARANCES:

GREGORY G. GARRE, ESQ., Washington, D.C.; on behalf of Petitioners.

MALCOLM L. STEWART, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; for Federal Respondents, supporting Petitioners.

LAWRENCE S. ROBBINS, ESQ., Washington, D.C.; on behalf of Respondents.

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P R O C E E D I N G S

(10:09 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument this morning in Case 09-475, Monsanto Company v. Geertson Seed Farms, et al.

Mr. Garre.

ORAL ARGUMENT OF GREGORY G. GARRE

ON BEHALF OF THE PETITIONERS

MR. GARRE: Thank you, Mr. Chief Justice, and may it please the Court:

Biotech crops have produced enormous benefits for the nation's farmers and consumers. The district court in this case issued a broad-based injunction against the planting of a highly beneficial, genetically engineered alfalfa crop. In entering and sustaining that injunction, the courts below erred in two fundamental respects.

First, they short-circuited the requisite inquiry into the likelihood of reparable -- irreparable harm, because they reasoned that the agency was going to get into this anyway in the course of preparing its environmental impact statement. And --

JUSTICE ALITO: Mr. Garre, the Respondents argue that we should dismiss the writ here as improvidently granted, and I wonder if you could explain

1 why that isn't the preferred course of conduct. They
2 contend that when this was before the Ninth Circuit,
3 your firm could have but did not contest the -- the
4 vacatur of the APHIS deregulation order. It's argued
5 that an environmental impact statement is likely to be
6 issued very soon, or fairly soon. Maybe the Solicitor
7 General could give us an estimate.

8 If we agree with your argument that the
9 Ninth Circuit applied the wrong preliminary injunction
10 standard and remand for them to apply the right
11 preliminary injunction standard, the case may be moot by
12 the time they do that. And the alternative is for us to
13 plow into the extremely fact-bound question whether
14 applying what you contend to be the correct preliminary
15 injunction standard of relief would be warranted on this
16 record.

17 In light of all that, why shouldn't we take
18 their suggestion?

19 MR. GARRE: The Court shouldn't, Justice
20 Alito. First as to the vacatur, we appealed the
21 judgment that contains the vacatur and the injunction.
22 And our notice of appeal, which is on page 59 and 61 of
23 the excerpts of record in the Ninth Circuit, makes clear
24 that we explicitly appealed the vacatur as well.

25 And let me explain that a little bit more,

1 but first I want to say as to the environmental impact
2 statement, the government can address that more, but my
3 understanding is that we're probably about a year away
4 from the environmental impact statement. This case
5 presents important legal issues concerning the entry of
6 injunctive relief.

7 We think the Court properly granted
8 certiorari and should decide those issues. We think
9 that, although the record is large, that this Court can
10 decide, as it did in Winter, that as a matter of law
11 this record does not support a finding of irreparable
12 harm.

13 JUSTICE GINSBURG: But Winter didn't involve
14 something -- as I understand, the -- the decision
15 vacated the deregulation order. You are not challenging
16 that. Well, it seems to me if there's no deregulation
17 decision in place, then we're back to the Plant
18 Protection Act, and there's no authorization for the
19 planting of these crops. So as long as you haven't
20 challenged the vacation of the deregulation decision, I
21 don't see how there's anything for us to deal with.

22 MR. GARRE: We did appeal the vacatur as
23 well as the injunction which is contained as part of the
24 same judgment. We know that the district --

25 JUSTICE SOTOMAYOR: However, you haven't in

1 your brief. Didn't you say you weren't challenging the
2 vacating order? You keep saying -- I know you appealed
3 it originally, but the point is that you didn't seek
4 certiorari on that ground.

5 MR. GARRE: Well, we -- our argument all
6 along, Justice Sotomayor has been that the court, the
7 district court, erred in not adopting the government's
8 proposed judgment. If you look on page 184 of the
9 petition appendix, that proposed judgment makes clear
10 that it's intended to replace the district court's
11 judgment, including the vacatur. So all along the whole
12 argument about --

13 CHIEF JUSTICE ROBERTS: You agree that those
14 are two different things, then, right? The vacatur is
15 one thing and the injunction is another, right?

16 MR. GARRE: They are part and parcel of the
17 same judgment. It's true, a vacatur is different than
18 an injunction. But here --

19 CHIEF JUSTICE ROBERTS: And under the
20 vacatur, the normal APA remedy is a remand to the agency.
21 In fact, there are some courts that say you can't get
22 anything else. But whether you can or can't, it's clear
23 that the burden is on you to get something short of
24 complete remand. The burden is on your friends to
25 get -- establish the injunction.

1 The problem with combining the two, it seems
2 to me, is that you are imposing on them the burden to
3 meet the injunction standard simply to get a remand to
4 which they are entitled under the APA.

5 MR. GARRE: Well, the district court could
6 have vacated the order in its entirety and send it back
7 to the agency. It didn't do that. It not only went
8 ahead and enjoined the planting of RRA, Roundup Ready
9 alfalfa, but --

10 CHIEF JUSTICE ROBERTS: But the vacatur does
11 that. You can't plant once the deregulation order is
12 vacated.

13 MR. GARRE: The vacatur was in part. We
14 know that because the district court's judgment allowed
15 the continued planting and harvesting of Roundup Ready
16 alfalfa, the planting before 2007. But --

17 CHIEF JUSTICE ROBERTS: So you would say
18 that the injunction is limited only to a decision the
19 agency might make to allow partial planting?

20 MR. GARRE: Well -- and importantly, the district
21 court's judgment -- and it's on page 108 of the petition
22 appendix --

23 CHIEF JUSTICE ROBERTS: Right.

24 MR. GARRE: -- not only enjoined the planting
25 of Roundup Ready alfalfa, it enjoined the agency from taking

1 interim measures. It --

2 CHIEF JUSTICE ROBERTS: Right.

3 MR. GARRE: We --

4 CHIEF JUSTICE ROBERTS: Right. Why
5 did it do that? I mean, the way the APA works, this is
6 sent back to the agency. If the agency wants to
7 partially deregulate, it can do it. And then you can
8 challenge it under the normal APA procedures.

9 MR. GARRE: And that --

10 CHIEF JUSTICE ROBERTS: It's very odd to get
11 an injunction to an agency telling them they can't do
12 something under the APA.

13 MR. GARRE: Well, I'm not going to disagree
14 with you on that. It is important that they enjoined
15 the agency from implementing the very proposed measures
16 that we're now finding -- fighting --

17 JUSTICE GINSBURG: I'm looking at --

18 MR. GARRE: -- in the context of an
19 injunction.

20 JUSTICE GINSBURG: I'm looking at page 58a.
21 Maybe that -- you referred to what as the district
22 court's --

23 MR. GARRE: 108a. It's 108a of the petition
24 appendix.

25 JUSTICE GINSBURG: Because I thought that

1 the only purpose of this injunctive provision was to
2 spare the people who had already purchased seeds,
3 allowing those to be planted until March 30, 2007.

4 MR. GARRE: Planting was allowed until
5 March 30, 2007, and then that alfalfa could be continued
6 to be harvested; seeds would be harvested and maintained
7 separately.

8 JUSTICE KENNEDY: And is it your position that
9 that gives you the hook, the entry point, for saying,
10 well, now the district judge didn't just replicate in
11 all respects the universe without the regulation; it had
12 some specific injunctive relief, and it didn't go far
13 enough? That's --

14 MR. GARRE: Absolutely. That in combination
15 with the fact that it actually enjoined the agency from
16 what it could have done, otherwise done, under --

17 JUSTICE SOTOMAYOR: But whose --

18 CHIEF JUSTICE ROBERTS: What authority do
19 you have for the proposition that when a court vacates
20 an administrative order, it has the authority to tailor
21 an injunction rather than simply remand the matter to
22 the agency?

23 MR. GARRE: Well, I think this Court's
24 decision in *Weinberger* involved at least an analogous
25 situation, where the court found a statutory violation

1 of the Clean Water Act. It doesn't involve the vacatur
2 of a decision, but the court then went on to add an
3 injunction on top of that. So you had the statutory
4 violation that arguably prohibited the conduct.

5 CHIEF JUSTICE ROBERTS: I guess --
6 Weinberger, of course, involved a statute. I mean, the
7 concern is that the authority to determine how far to go
8 in deregulating or partial deregulating is for the
9 agency to make. And once there has been a violation of
10 the APA, it goes back to the agency. What the district
11 court did here was assume that responsibility itself.

12 MR. GARRE: And we at the outset at the
13 district court stage, if the -- if the district court had
14 done that, that would have been fine. It could have gone
15 back. The agency could have adopted the very proposed
16 measures that we're now talking about in the context of
17 an injunction. The district court did not do that. It
18 entered the injunction not only as to the sale of RRA,
19 but as to the agency taking --

20 JUSTICE GINSBURG: Well, then --

21 MR. GARRE: -- those interim steps.

22 JUSTICE GINSBURG: Mr. Garre, I'm looking at
23 the injunction, and it says that the deregulation decision
24 is vacated and Roundup Ready alfalfa is once again a
25 regulated article. We could simply say as far as it goes,

1 that's all right; anything else is surplusage. We take it
2 to be the judgment that Roundup Ready alfalfa is once again
3 a regulated article, period.

4 MR. GARRE: And we know the district court
5 didn't mean that literally, because its own judgment
6 allows the continued planting and harvesting of RRA
7 planted before --

8 JUSTICE GINSBURG: Well, but I thought --

9 MR. GARRE: -- March 2007.

10 JUSTICE GINSBURG: I thought that was just a
11 dispensation to people who had already bought the seeds.
12 That was recognizing that they had incurred an expense,
13 that they were all ready to plant. That -- that was the
14 only exception. It goes back to the status of a regulated
15 article with this one exception.

16 MR. GARRE: Well, if it's a regulated
17 article, then there's no use of it allowed at all unless
18 the agency is granting exceptions. So the district
19 court's grant of that exception was an exercise of
20 its equitable authority in the context of considering
21 Respondents' injunction.

22 Respondents have litigated this all along as
23 though the injunction provided something in addition to
24 the vacatur, and this Court's cases establish that the
25 injunction is an extraordinary and drastic remedy that

1 does. It allows people to go into court to enforce it.
2 It provides an opportunity for contempt sanctions.

3 If I could just -- if I could address the
4 issue of irreparable harm, there are two key things the
5 Court -- we hope the Court will understand in
6 adjudicating the question of irreparable harm.

7 First is you need to separate out hay
8 production and seed production. There's absolutely no
9 evidence in this record whatsoever of any
10 cross-pollination from RRA hay fields to another hay
11 field. So the district court's injunction applies
12 broad-based to hay production and seed production. But
13 at a minimum, we think you have to take seed production
14 out.

15 The next thing is that, when it comes to the
16 risk of harm --

17 JUSTICE SCALIA: Hay production out.

18 MR. GARRE: When alfalfa is grown for hay, for
19 forage, as opposed to grown for seeds which can then be
20 planted.

21 The next thing to know is what we're talking
22 about here is the risk that -- and Roundup Ready alfalfa
23 will appear in a conventional or organic alfalfa field.
24 We're not talking about transforming a single alfalfa
25 plant in the country. It's the risk that an existing

1 alfalfa plant will produce a seed, which will then
2 produce another alfalfa plant which would be a Roundup
3 Ready alfalfa plant. So not a single alfalfa plant
4 in this country is going to be harmed by the addition of
5 Roundup Ready alfalfa.

6 The district court found, on page 43 of the
7 petition appendix, that Roundup Ready alfalfa provides no
8 harm the --

9 JUSTICE SOTOMAYOR: Could you tell me what's
10 the legal error? You started by identifying the first
11 one, which was short-circuiting the irreparable harm.
12 This seems more like factual correction which you're
13 getting into. Put it into a legal box for me. What are
14 your legal claims?

15 MR. GARRE: Sure. There's three legal
16 arguments we have, Justice Sotomayor. The first is the
17 district court short-circuited the whole analysis by
18 assuming up front that, since this was going to go to
19 environmental impact statement, it didn't have to
20 seriously get into the likelihood of irreparable harm.
21 And we think that that's clear error under this Court's
22 Amoco decision. And, in fact, if you look at --

23 JUSTICE GINSBURG: Would you explain,
24 Mr. Garre, why that's so, because I thought that the
25 Federal law is before the agency engages in an action

1 that requires an EIS, it has to do the EIS? So this
2 unit of the Department of Agriculture violated Federal
3 law by deregulating prior to the completion of an EIS.

4 MR. GARRE: Federal law and the regulation
5 at 40 C.F.R. 1506.1(a) allows action to go forward where
6 there's not an adverse environmental impact. The
7 agency has explained in great detail in declarations
8 that allowing the very limited use of RRA under the
9 restricted conditions of the proposed injunctions would
10 not result in any environmental impact.

11 If I could reserve the remainder of my time
12 for rebuttal.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 Mr. Garre.

15 Mr. Stewart.

16 ORAL ARGUMENT OF MALCOLM L. STEWART,
17 ON BEHALF OF THE FEDERAL RESPONDENTS,
18 SUPPORTING PETITIONERS

19 MR. STEWART: Mr. Chief Justice, and may it
20 please the Court:

21 I'd like first to address briefly
22 Justice Alito's question about the length of time that
23 the agency anticipates the EIS will take. The agency
24 now anticipates that its best estimate is that the EIS
25 will be ready approximately a year from now. A draft

1 EIS has been submitted for public comment. The public
2 comment period was extended until early March of 2010.
3 The agency has received on the order of 145,000 public
4 comments.

5 And, so, in addition to parsing through
6 those and seeing which of them need to be responded to,
7 the agency wants to consult with other Federal agencies.
8 And, so this process is going to take longer than APHIS
9 had anticipated at the outset.

10 Now, we said in our brief in opposition that
11 the fact that the EIS process was ongoing was a reason
12 for this Court to deny certiorari. I think regardless
13 of how good an argument that was at the cert stage, the
14 Court has granted cert, and we think that the Court
15 should decide the case. There's no realistic prospect
16 that the case will become moot before this Court's
17 decision is rendered.

18 JUSTICE SOTOMAYOR: Could you go to the
19 second part of Justice Alito's question, which was the
20 issue of standing, both yours and the Petitioners'.
21 What is it exactly that we're being asked to review?
22 Obviously, you're going ahead with the EIS. You
23 haven't sought a stay of that.

24 MR. STEWART: That's correct.

25 JUSTICE SOTOMAYOR: All right. So what's the

1 basis of the challenge to the injunction?

2 MR. STEWART: When the district court issued
3 its summary judgment ruling, it asked the parties to
4 propose their own forms of a judgment. And APHIS might
5 have done what the Chief Justice suggested ought to have
6 been done; that is, it might have indicated that the
7 court -- that either it should simply issue a
8 declaratory judgment or that it should vacate the
9 deregulation order, and the matter would have been
10 remanded to the agency to decide what to do next.

11 And if that had happened, the agency could
12 then have issued an administrative order that embodied
13 the same proposed conditions that were embodied in the
14 injunction. Presumably, the plaintiffs would have
15 challenged that, and we would have had a new lawsuit.

16 Now, what APHIS tried to do, in essence, was
17 to streamline the process by combining into one steps
18 that could otherwise have been taken separately. And it
19 proposed an injunction that said the deregulation
20 decision is vacated and replaced by the following
21 protective conditions.

22 CHIEF JUSTICE ROBERTS: You have the burden
23 to establish your entitlement to those conditions that
24 are short of a remand, correct?

25 MR. STEWART: I don't think it would have

1 been our burden; that is, if the -- if the order had
2 simply been -- the deregulation order had simply been
3 vacated and remanded to the agency, and the agency had
4 then performed the analysis that's reflected in the
5 Hoffman declarations and said we are putting in place a
6 complete deregulation --

7 CHIEF JUSTICE ROBERTS: Sure, sure.
8 Agencies can do that.

9 MR. STEWART: Agencies can do that. And it --
10 on review of that, it would not have been our burden to
11 establish that those --

12 CHIEF JUSTICE ROBERTS: Well, sure, because
13 -- but here the question is whether the court can do
14 that. The court is stepping into the shoes of the
15 agency. And I would say it's -- I mean, there's
16 authority that you can't do that at all, but certainly
17 you'd have the burden to establish that those
18 reliefs short of remand, that you are entitled to that.

19 MR. STEWART: I think in the ordinary
20 course, you're absolutely correct. And in the usual
21 case, it's an important principle to us that the court
22 should not usurp the agency's role.

23 Here I think, in fairness to the district
24 court, if the court had issued the injunction we
25 proposed with the protective measures that were

1 reflected in the government's proposed judgment, the
2 court would not have been usurping the agency's role,
3 because it would have been adopting the very protective
4 measures that the agency identified as appropriate. So
5 we think that the district --

6 CHIEF JUSTICE ROBERTS: Well, you're
7 short-circuiting notice and comment or whatever else is
8 required, the reason we send this to an agency, because
9 they are expert and all that. The agency is acting
10 without the benefit of any input on the partial
11 deregulation.

12 MR. STEWART: Well, it is certainly acting
13 with the benefit of whatever information it received in
14 the form of public comment in its original environmental
15 assessment for the complete deregulation. And in
16 addition, the district court, in deciding whether the
17 agency's proposed conditions would have been appropriate
18 could have entertained comments from obviously the
19 Respondents and from anyone else who wanted to
20 intervene.

21 But to go back to Justice Sotomayor's --

22 JUSTICE SOTOMAYOR: Could you have -- let's
23 just -- if this had -- if the order had vacated the
24 deregulation and sent it back to you, what would you
25 have -- the agency have had to do to issue temporary

1 regulations consistent with the ones you proposed to the
2 district court?

3 MR. STEWART: Our view is that, first, that
4 we would not have had to go through public notice and
5 comment, because, under 5 U.S.C. 553(b)(2), there is an
6 exception for good cause, and here the relatively
7 limited timeframe that we were talking about in our view
8 would have constituted good cause. Obviously, the
9 plaintiffs might have challenged that.

10 Now, we would have had to perform some sort
11 of environmental analysis to comply with our NEPA
12 obligations in order to feel sufficient confident --
13 confidence that implementation of our proposed measures
14 would not cause significant environmental impacts. It
15 wouldn't have had to be an EIS; that is, NEPA provides,
16 in appropriate circumstances --

17 JUSTICE GINSBURG: Can -- when you -- can
18 you stop right there, because I thought the law was,
19 government agency, before you engage on a major
20 activity, EIS first, and then you can have a
21 deregulation order?

22 MR. STEWART: I think that's -- it is
23 correct to say that, as a matter of the statute and the
24 regulations, an agency cannot decide to prepare an EIS on
25 a particular act, decision, and then implement that very

1 decision during the pendency of the EIS.

2 JUSTICE GINSBURG: Yes, that's what I
3 thought.

4 MR. STEWART: But our -- our core point here
5 is that what we were proposing for the interim, that is
6 allowing continued planting subject to various
7 protective measures, was fundamentally different from
8 the action on which the EIS was being prepared. That
9 is --

10 JUSTICE GINSBURG: But as far as the court
11 is concerned, it's conceded that NEPA was violated, an
12 EIS was required. And then the district court vacates
13 the deregulation decision. I thought that, under the APA,
14 at that point, the court is obliged to say, well, the
15 agency engaged in conduct that was not in accord with
16 law, and so we send it back.

17 MR. STEWART: You are correct. And we are
18 not asserting the right to implement the deregulation
19 decision; that is, the decision removing all Federal
20 constraints from the planting and harvesting of RRA.
21 We're not asserting the right to do that during the
22 pendency of the EIS process.

23 The CEQ regulations speak to this question,
24 and they don't say while an EIS is ongoing, no activity
25 related to the action for which the EIS is being

1 prepared may go forward. They say in the interim the
2 agency can't do things that will have an adverse
3 environmental impact or will foreclose reasonable
4 alternatives.

5 So, what the agency might have done at the
6 outset was say: We need to do an EIS before implementing
7 a complete deregulation decision. The effects of doing
8 that are at least potentially sufficiently great that an
9 EIS is being prepared. However, we feel confident that
10 interim planting during this limited period, subject to
11 these proposed protective measures, will not have
12 adverse environmental impact --

13 CHIEF JUSTICE ROBERTS: Do you -- do you
14 agree that when you're talking about the elements of
15 the injunction that are short of remand to the agency,
16 that the Respondents do not have the obligation to meet
17 the injunction standards with respect to those? In
18 other words, it's part of the judgment. It's not an
19 injunction, and you have the burden if you want the
20 court to do anything other than send it back.

21 MR. STEWART: I hope I didn't misunderstand
22 the question. If you're referring to the types of
23 activities that would have been prohibited even under
24 our proposed injunction; that --

25 CHIEF JUSTICE ROBERTS: No, I'm talking to

1 the -- about the types of activities that would be
2 prohibited if the court just remanded it back, vacated
3 it, which is everything -- you can't plant.

4 MR. STEWART: No, I think in order for
5 the -- the plaintiffs to get an injunction against
6 those, they would have had to meet --

7 CHIEF JUSTICE ROBERTS: I guess my point is
8 they don't need an injunction. The thing that's
9 bothering me is you've got two different things, the
10 vacatur and the injunction. And it seems to me by melding
11 them together, you're trying to impose the burden on
12 the plaintiffs to meet the injunction standard to get
13 the benefit of the vacatur.

14 MR. STEWART: Well, I think if this had
15 happened through the alternative events -- course of
16 events that I discussed previously; that is, if the
17 matter had been remanded back to the agency and the
18 agency had issued an administrative order that embodied
19 these proposed protective conditions, then the
20 plaintiffs would presumably have either filed a new
21 lawsuit or challenged this within the confines of this
22 suit. The burden would have been on them to show both
23 that those protective measures were --

24 JUSTICE SOTOMAYOR: But you short-circuited
25 that. Isn't this more akin to you seeking a stay of the

1 vacating order?

2 MR. STEWART: Well, I think --

3 JUSTICE SOTOMAYOR: The district court
4 vacated the deregulation. No one can plant. You and
5 the Petitioners go into court and say to the court:
6 Stay that deregulation with respect to this kind of
7 planting. Aren't you the one seeking the stay? And if
8 so, isn't it your burden to show that you're entitled to
9 whatever it is you seek?

10 MR. STEWART: Well, all that the court had
11 decided up to the point when we submitted our proposed
12 judgment was that an EIS was needed before the agency
13 could implement complete deregulation. And I think in
14 this respect the case is similar to Winter; that is, in
15 Winter in the district court -- the district court
16 initially imposed six restrictive measures on the Navy,
17 and the Navy elected not to challenge four of them but
18 challenged the other two. I suppose that the Navy could
19 have asked for, in a sense, vacatur of its proposed
20 action and then announced a new action that consisted of
21 compliance with the four unchallenged restrictive
22 measures and noncompliance with the other two.

23 From our perspective, rather than
24 short-circuiting the process, as I say, we were trying
25 to streamline it; that is, the court could have sent it

1 back to us, we could have told it what protective
2 measures were appropriate, and then some months later we
3 would have been back in court to review the adequacy of
4 those, particularly because we thought of the -- any
5 injunction as being something that would stay in effect
6 only for the relatively limited period of time while the
7 EIS was being prepared.

8 We tried to speed up the process by telling
9 the court in advance these are the protective measures
10 we think are appropriate without the need for a remand.
11 And the court's fundamental error was in equating what
12 we had proposed with the complete deregulation that was
13 the subject of the lawsuit. I think that the -- the
14 agency's declarations explained why the protective
15 measures that were embodied in the government's proposed
16 injunction would have been fully sufficient to prevent
17 irreparable harm to the plaintiffs during the pendency
18 of the EIS.

19 JUSTICE SOTOMAYOR: So that's the legal
20 error you identify?

21 MR. STEWART: That's the legal error we
22 identify. We also think that the district court did,
23 without quite using these words, announce a presumption
24 in favor of injunctive relief; that is, the district
25 court said, wrongly in our view, that it couldn't assess

1 the adequacy of the proposed protective measures because
2 that would duplicate the analysis that was going on in
3 the EIS. We think that was --

4 JUSTICE GINSBURG: Do you agree -- would
5 you agree that if the district court had just said the
6 deregulating decision is vacated and Roundup Ready
7 alfalfa is once again a regulated article, period, that
8 would be okay? And you would have no basis to prevent
9 this from going straight back to the agency?

10 MR. STEWART: I think the district court
11 could have done that and, as I say, if -- if the --

12 JUSTICE GINSBURG: And all, it seems to me,
13 that the district court did do in addition to that is to
14 say that alfalfa seeds may be planted -- alfalfa seeds
15 that are -- that have already been purchased may be
16 planted prior to March 30, 2007.

17 MR. STEWART: If it --

18 JUSTICE GINSBURG: It's the only exception.

19 MR. STEWART: It didn't just say that. In
20 its judgment, which I believe is at page 108a of the
21 petition appendix -- and Mr. Garre referred to this
22 previously -- it said in addition that the agency is
23 enjoined from deregulating even in part genetically
24 engineered alfalfa.

25 So the district court didn't simply vacate

1 the -- the deregulation order and send it back to the
2 agency to decide whether some interim protective
3 measures would be appropriate. It said the agency can't
4 do anything while the EIS is being prepared to allow the
5 planting or harvesting of RRA except to the limited
6 extent that the district court was authorizing with
7 respect to already planted alfalfa.

8 JUSTICE KENNEDY: And in your view the
9 correctness of that ruling has been preserved in the
10 questions presented to this Court?

11 MR. STEWART: Yes, I think -- yes, I think
12 absolutely. Because the fundamental controversy both in
13 the court of appeals and in this Court has been not
14 whether an injunction should have been entered at all.
15 For better or for worse, I think both the Petitioners
16 and the government have acquiesced in the entry of some
17 form of injunction. The controversy has been, should
18 the district court have entered the government's proposed
19 injunction instead of the one that it actually entered?
20 And clearly if the proposed injunction had been entered
21 instead, the Petitioners would have been better off
22 because there would have been a continued market for
23 their seed to planters who wanted to grow RRA in
24 compliance with the proposed protective measures.

25 JUSTICE SOTOMAYOR: That's a little

1 different than answering Justice Kennedy's question,
2 which is: Did you preserve the issue that the district
3 court exceeded its jurisdiction in stopping you from
4 further deregulation? That's a different question than
5 whether or not it should have granted your further
6 injunction which is, according to you, a further
7 deregulation. But it's a different question.

8 MR. STEWART: I'm not sure to what extent
9 the Petitioners or -- or the government, frankly, have
10 focused precisely on that particular language of the
11 district court's judgment. But it has certainly been
12 kind of the fundamental basis for our appeal to the
13 court of appeals and for Petitioners' appeal and
14 certiorari petition that what they are complaining about
15 was the fact that a complete injunction was put in
16 place, instead of an injunction that embodied the
17 government's proposed protective measures, and we were
18 focusing on the choice between two injunctions.

19 We didn't focus specifically on the
20 alternative course of action in which the matter might
21 have been sent back to the agency and the agency would
22 then have embodied those proposed protective measures in
23 an administrative order. But I think the issue whether
24 those protective measures would have been sufficient to
25 prevent irreparable harm to the plaintiffs has been

1 preserved throughout.

2 Just to say one more thing about the CEQ
3 regulations, this Court has held in the past that those
4 are entitled to deference, and, again, they don't preclude
5 all action during the pendency of the EIS.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 Mr. Stewart.

8 Mr. Robbins.

9 ORAL ARGUMENT OF LAWRENCE S. ROBBINS

10 ON BEHALF OF THE RESPONDENTS

11 MR. ROBBINS: Thank you, Mr. Chief Justice,
12 and may it please the Court:

13 In our view, Petitioners lack standing to
14 bring this case to this Court. By failing to challenge
15 the lawfulness of the deregulation vacatur either in the
16 Ninth Circuit or in this Court, Petitioners have an
17 insurmountable redressability problem. They cannot get
18 the practical relief they seek even in the event that
19 this Court vacates or narrows the injunction, and that
20 is because the vacatur about which they said not one
21 single sentence in the Ninth Circuit or in their opening
22 brief or in their questions presented -- that is because
23 the vacatur, which they never have challenged, had the
24 unambiguous effect of reregulating RRA.

25 CHIEF JUSTICE ROBERTS: So if the injunction

1 doesn't do anything, why are you bothering to defend it?

2 MR. ROBBINS: Well, we're -- we're
3 defending it on the alternative ground,
4 Mr. Chief Justice, that we have not persuaded you on our
5 threshold question that there -- that there is a lack of
6 standing. If, for -- I mean, they've made various
7 arguments as to why they have standing, and I'm going to
8 address them in a minute. But, you know, there's always
9 a chance we're going to lose on that question --

10 (Laughter.)

11 MR. ROBBINS: -- and -- and although I don't
12 think we ought to, we thought it would be prudent to say
13 something about the merits.

14 JUSTICE SCALIA: Mr. Robbins, can I ask you
15 about your clients' standing? What individual plaintiff
16 here stood to be harmed by what the agency had done? Which
17 one of them was -- was within, what, 5 miles of any --
18 any field of the genetically engineered alfalfa?

19 MR. ROBBINS: Well, the answer is that there
20 are a great many plaintiffs who put in declarations,
21 litigated this issue, and prevailed, and there was no
22 appeal from it. For example, in the courtroom today,
23 Mr. Pat Trask from western South Dakota, a hay and -- a
24 conventional hay and seed farmer, who alleged, put in
25 proof, that he stood -- if the deregulation went forward

1 without any injunction, he stood to -- a risk of
2 cross-pollination and contamination.

3 JUSTICE SCALIA: What? From what? From
4 what? From --

5 MR. ROBBINS: From --

6 JUSTICE SCALIA: From somebody within 5
7 miles, 10 miles, 20 miles?

8 MR. ROBBINS: Well, we have to be clear,
9 Your Honor. What -- what -- what was enjoined was the
10 future proliferation of this product, where the
11 president of the company told the district court: If
12 you let us continue to "introduce," in the words of the
13 statute, this product, we're already at 220,000 acres;
14 we will become a million acres, a fivefold increase. And
15 that was on the assumption that the EIS would take only
16 2 years. It's since been 3 years, and now I hear it's
17 going to be a fourth year.

18 JUSTICE SCALIA: So you want the Court to
19 assume that somebody is going to be planting a field of
20 the genetically engineered alfalfa within, what, 5 miles
21 of --

22 MR. ROBBINS: Well --

23 JUSTICE SCALIA: -- one of your named
24 plaintiffs?

25 MR. ROBBINS: Well --

1 JUSTICE SCALIA: The fact is there isn't a
2 single named plaintiff who -- who has -- has any claim
3 that within the utmost limits of -- of risk, he is at
4 risk currently.

5 MR. ROBBINS: Well, let me be clear. We
6 have organizational clients who have -- whose members --

7 JUSTICE SCALIA: I understand that. But you
8 have to bring in a member from that organization --

9 MR. ROBBINS: That's correct.

10 JUSTICE SCALIA: -- who is concretely
11 harmed.

12 MR. ROBBINS: And we've put in declarations
13 in the district court, multiple declarations from those
14 members and from Mr. Geertson, the seed -- conventional
15 seed farmer from Idaho, and Mr. Trask from South Dakota.
16 But, Your Honor, let me -- let me, without begging the
17 question -- I actually think -- I'm sorry.

18 JUSTICE SOTOMAYOR: Am I factually correct
19 that the harm is that from some seed-grown alfalfa, a bee
20 or the wind is going to take the pollen and put it into
21 a conventional field?

22 MR. ROBBINS: That is one of the risks. But
23 what makes this case --

24 JUSTICE SOTOMAYOR: But is that -- am I
25 right?

1 MR. ROBBINS: Yes. One of the risks is
2 cross-pollination.

3 JUSTICE SOTOMAYOR: How many States grow
4 alfalfa to seed as opposed to letting it just grow into
5 hay?

6 MR. ROBBINS: Most of the seed production is
7 in the -- is in the Pacific Northwest and the West.
8 There's a handful of States.

9 JUSTICE SOTOMAYOR: So that handful of
10 States --

11 MR. ROBBINS: Yes.

12 JUSTICE SOTOMAYOR: -- is that where the
13 risk exists?

14 MR. ROBBINS: No. Oh, no, no. The risk
15 was demonstrated at different levels and to different
16 degrees both in the hay-producing States and in the
17 seed-producing States.

18 JUSTICE SOTOMAYOR: You just said the word
19 "different levels and different degrees," but this is an
20 all-size-fit injunction.

21 MR. ROBBINS: Yes. Because, as I --

22 JUSTICE SOTOMAYOR: So how is that
23 reasonable when the risk is different depending on the
24 place and type of growth?

25 MR. ROBBINS: Well, there are different

1 kinds of risks. And I am happy to turn to the
2 irreparable harm point, Your Honor, of the proposition
3 that the risk must be sufficiently likely, which by the
4 way, does not mean more likely than not, a suggestion
5 made in the reply brief. No court has ever said so.
6 "Sufficiently likely" talks in terms of the nature of
7 the harm.

8 Here, whether you are growing hay or whether
9 you are growing alfalfa for seed, there is a
10 sufficiently likely risk not only of cross-pollination
11 or all the other ways that contamination happens --
12 through dropping seeds, through seed mixing, through
13 custom cutting, through missing ends of fields --

14 JUSTICE SOTOMAYOR: Could I ask you
15 something? Is that because your farmers -- I understood
16 farmers of hay had huge tracts of land. Do they rent
17 equipment from someone else to do it?

18 MR. ROBBINS: They often do. There's
19 custom cutting where you can't -- you know, you don't
20 own the equipment. You hire a custom cutter who may be
21 cutting an RRA field today and your field tomorrow. And
22 the -- the risk -- and this is all in the record -- the
23 risk of a seed contaminating another seed or getting
24 into a hay field is easily sufficiently likely to not
25 constitute an abuse of discretion.

1 JUSTICE SCALIA: You -- you don't think the
2 free market would produce companies that advertise: We
3 only cut natural seed fields?

4 MR. ROBBINS: Well --

5 JUSTICE SCALIA: You don't think that
6 would happen? I am sure it would happen.

7 MR. ROBBINS: Well, the -- well, the record,
8 Justice Scalia, before the district court does not tell
9 us one way or the other, but the --

10 JUSTICE GINSBURG: Mr. Robbins, is it -- is
11 it relevant to that, that in the case of other
12 genetically engineered crops -- sugar beets, for
13 example, soybeans -- that the plantings became
14 overwhelmingly the genetically engineered, rather than
15 the organic or natural?

16 MR. ROBBINS: Well, I think it's relevant to
17 one of the categories of harms that we think is
18 cognizable for purposes of an injunction, and that is
19 the effect on consumer choice and producer choice to be
20 in a non-GMO business. And --

21 JUSTICE GINSBURG: I mean, in response to
22 Justice Scalia's point of how many now, how many at this
23 moment? But you projected that there would be an
24 enormous increase, and that was not just pulled out of
25 thin air. I assume it had something to do with what

1 happened to other crops.

2 MR. ROBBINS: Oh, it's -- it's -- not only,
3 Justice Ginsburg, is it not pulled out of thin air, we're
4 taking their word for it. Their president, FGI's
5 president, said: We anticipate a fivefold increase from
6 220,000 acres to a million. And that was on the premise
7 that the EIS was --

8 CHIEF JUSTICE ROBERTS: Just -- I'm sorry to
9 interrupt. Just from the seeds blowing in the wind?

10 MR. ROBBINS: No, from a range of
11 contaminating sources. It's --

12 JUSTICE SCALIA: I am really losing you now.
13 I thought he was referring to the number of farmers who
14 would be planting and harvesting genetically engineered
15 alfalfa. Isn't that -- farmers who wanted to do it. He
16 was saying: We now have 200,000; we are going to have a
17 million.

18 MR. ROBBINS: Well, no; I'm talking about
19 acreage, Justice Scalia.

20 JUSTICE SCALIA: All right. Acreage, whatever.
21 He's talking about acreage of farmers who plant and want to
22 plant --

23 MR. ROBBINS: Yes.

24 JUSTICE SCALIA: -- genetically engineered seed.

25 MR. ROBBINS: Correct.

1 JUSTICE SCALIA: He's not talking about how
2 many unwilling farmers are going to have infected
3 fields.

4 MR. ROBBINS: No, I -- I understand.

5 JUSTICE SCALIA: Okay.

6 MR. ROBBINS: But the -- but the --

7 JUSTICE SCALIA: Well, I'm not sure
8 we understood.

9 (Laughter.)

10 MR. ROBBINS: But I took -- I took
11 Justice Ginsburg's question to be asking: What was
12 the -- the relevant risk that the district court had to
13 consider for purposes of irreparable harm? And
14 certainly one factor which powerfully distinguishes this
15 case from the Court's decision in Winter is that,
16 whereas the Navy had been running these exercises for
17 some 40 years and there was a well-developed track
18 record as a consequence, here this is a new technology
19 that was about to spread at least fivefold over 2 years.

20 But I -- I do want to get back to the -- to
21 what I think is the insurmountable problem that the --
22 that the Petitioners have on the issue of standing, because
23 I heard Mr. Garre say this morning in answer to one of the
24 Court's questions that the -- that the notice of appeal
25 recited the vacatur as part of the notice of appeal.

1 That is true. That is because the notice of appeal,
2 like most notices of appeal that lawyers file, simply
3 quoted the judgment.

4 But when you get to the papers -- the
5 briefs, the questions presented, the argument, the oral
6 argument, the questions presented in this Court, the
7 opening brief, there is not a single word saying that
8 the vacatur was wrong. And that's important because,
9 as I believe the Chief Justice was adverting before, the
10 vacatur does not -- is not governed by the same
11 injunctive standards.

12 CHIEF JUSTICE ROBERTS: But that -- there's
13 a flip side of that that is not so good for you, because
14 one of the things you want from the injunction is a
15 prohibition on the agency partially deregulating. Well,
16 you're not entitled to that, because the vacatur sends
17 it -- should send it back to the agency and they can
18 decide. And if they decide to partially deregulate, you
19 have the APA challenges available to you.

20 MR. ROBBINS: I -- I think,
21 Mr. Chief Justice, there is some considerable force to
22 the point that the injunction in that respect exceeded
23 the scope of the vacatur. And it may be -- it may be
24 that they have standing only to challenge so much of the
25 injunction as exceeds the scope of the vacatur, but

1 that's not what they want. What they want is to do all
2 the planting that the vacatur says they may not.

3 And so I --

4 CHIEF JUSTICE ROBERTS: So your argument is
5 that the district court judge made a mistake in mixing
6 up the vacatur and the injunction?

7 MR. ROBBINS: I would put it slightly
8 differently.

9 (Laughter.)

10 MR. ROBBINS: I would say that the mistake
11 that was made was in not appreciating, though it was
12 called to his attention by the lawyers I -- by the party
13 I represent, that the vacatur did have this effect.

14 I do think that the injunction was sort of
15 allowed to be litigated. There were many reasons why
16 they litigated the injunction. We, for example, wanted
17 a more demanding injunction --

18 JUSTICE KENNEDY: But isn't one of the
19 reasons that they litigated the injunction was that by
20 its terms and because of its issuance the agency on
21 remand could not have adopted some partial measures to
22 allow controlled planting?

23 MR. ROBBINS: Yes. That is a reason why my
24 clients sought the injunction. They sought -- they
25 sought other things in the injunction as well, but --

1 JUSTICE KENNEDY: But -- no, but isn't
2 that -- isn't that the reason that the manufacturers,
3 Monsanto, contested the injunction? They said --
4 because once the injunction is issued, as the
5 government has told us today, they cannot issue some
6 partial regulatory scheme with -- with safeguards.

7 MR. ROBBINS: There is -- that's doubtless
8 one reason why they litigated the injunction, but it is
9 not a reason, Justice Kennedy, that they have standing,
10 because vacating the current injunction will give them
11 nothing that they -- that they -- that isn't already
12 prohibited by the vacatur, except -- and I grant you
13 this -- it will allow them to go back to the agency,
14 seek a partial deregulation, which Mr. Stewart told --

15 JUSTICE KENNEDY: But that -- but that is
16 substantial. It takes time, and the district court
17 injunction that's now in effect prohibits that. And
18 they have standing to challenge that.

19 MR. ROBBINS: Well, I'm not --

20 JUSTICE KENNEDY: Or at least that's their
21 argument.

22 MR. ROBBINS: That is their argument, but it
23 isn't right, and here's why: One of the standing
24 requirements is imminence, that it must be an actual
25 harm or an imminent harm. Now, here are the things that

1 would have to happen for that scenario to come to pass:
2 It would have to be remanded to the agency. Mr. Stewart
3 told us this morning there would have to be at least an
4 environmental -- an EA prepared, that may or may not
5 come out in favor of a partial deregulation. There
6 would then be --

7 CHIEF JUSTICE ROBERTS: I don't mean to
8 interrupt your answer, but they've already done an EA
9 in support of total deregulation, presumably, and they
10 found no adverse -- presumably, that would be a fortiori
11 for partial.

12 MR. ROBBINS: Well, we don't know. I heard
13 Mr. Stewart, who speaks for the government, tell us that
14 it would require additional steps. But this Court's
15 imminence cases, you know, can't -- do not accommodate
16 this many if's.

17 JUSTICE SCALIA: It seems to me pretty
18 doggone imminent if the agency has come before the court
19 and said: This kind of partial deregulation ought to be
20 allowed, and we're in favor of it. I mean, you are not
21 sending it back to an agency that's a blank slate. You
22 know that the agency favors this degree of deregulation.

23 MR. ROBBINS: Right.

24 JUSTICE SCALIA: I mean -- I'd -- you
25 know, I -- boy, I'd take a remand to the agency any

1 day.

2 MR. ROBBINS: Well, I can -- I can tell you,
3 Your Honor, maybe the best authority I could give you on
4 how imminent this is, how -- whether it really meets this
5 Court's standings tests, here's what Petitioners said
6 about this exact scenario when they were in the court of
7 appeals: They said that the prospect of a future grant
8 of partial deregulation is, quote, "a hypothetical NEPA
9 controversy," end quote, that, quote, "rests upon
10 contingent future events that may not occur as
11 anticipated or, indeed, may not occur at all."

12 I take that to be the very definition of
13 what is not imminent for purposes of this Court's
14 standing cases.

15 CHIEF JUSTICE ROBERTS: Could I go back to
16 something you said a while ago, that "likely" does not
17 mean more likely than not?

18 MR. ROBBINS: Yes.

19 CHIEF JUSTICE ROBERTS: It's -- I thought
20 that would be obvious. If I say your friends are likely
21 to win, that means they are more likely than you.

22 MR. ROBBINS: Well, I -- I -- you know, I
23 think the -- the answer is contextual, but in this
24 context, "likely" for purposes of an injunction,
25 Mr. Chief Justice, has I think never been understood to

1 mean more likely than not.

2 CHIEF JUSTICE ROBERTS: Do you have -- I --
3 I was surprised that this apparently hasn't been decided
4 over the however many years we've had this standard.
5 Is there a case that says "likely" does not mean more
6 likely than not?

7 MR. ROBBINS: No. But there are cases -- I
8 mean, the issue has not been addressed by this Court one
9 way or the other. I would say *City of Los Angeles v.*
10 *Lyons* and the *Amoco* case both used the phrase
11 "sufficiently likely," and the lower courts have
12 understood that to mean sufficiently likely in light of
13 the nature of the harm.

14 Consider, if we were talking about the
15 probability of the contamination of the water supply of
16 New York City, would anybody suppose that the -- if the
17 probability were 10 percent rather than 50.9 percent,
18 that no one could go into court and get an injunction?
19 Neither the private litigants -- you know, put them to
20 one side. The government's own authority to obtain
21 injunctive relief would be critically hampered if such
22 an order came about, and --

23 JUSTICE SCALIA: This isn't contamination of
24 the New York City water supply. It's the creation of
25 plants of -- of genetically engineered alfalfa which

1 spring up that otherwise wouldn't exist. It doesn't
2 even destroy the current plantings of non-genetically
3 engineered alfalfa. This is not the end of the world.
4 It really isn't.

5 The most it does is make it difficult for
6 those farmers who want to cater to the European market,
7 which will not accept genetically engineered alfalfa.
8 It makes it more difficult for them to have a field of
9 100 percent non-genetically engineered. But that's not
10 the end of the world, Mr. Robbins.

11 MR. ROBBINS: I don't think we bore the
12 burden, an end-of-the-world burden, Justice Scalia.

13 (Laughter.)

14 MR. ROBBINS: We bore the burden to show
15 sufficient evidence of irreparable harm such that, on an
16 abuse of discretion standard, it was appropriate. But
17 let me --

18 JUSTICE SCALIA: I thought you were
19 comparing it to New York City dying --

20 MR. ROBBINS: No. No, I was --

21 JUSTICE SCALIA: -- from poisoned water?

22 (Laughter.)

23 MR. ROBBINS: I -- I thought -- I -- it had
24 been my -- my -- it had been my purpose to simply try to
25 suggest that it does not make sense to adopt a "more

1 likely than not" standard for likelihood of success or
2 likelihood of irreparable harm.

3 But I do -- if I could come to Your Honor's
4 question about what the harm really is, there are three
5 types of harms. There is the contamination of products,
6 and we've talked about that. But there are two things
7 we've not talked about. One of them is the choice to be
8 in a line of business that farmers and businessmen across
9 this country have chosen to be in. Some of them are in
10 this courtroom today. They have chosen organics or
11 conventional farming that is GMO-free. They have chosen
12 to sell natural beef. And they have chosen this in a
13 rapidly growing, large business with dollars -- billions
14 of dollars at stake.

15 You mention, for example, Justice Scalia,
16 the European market. That is just the tip of the
17 iceberg. The Japanese will not take -- which take, by
18 the way, 75 percent of our alfalfa exports -- will not --
19 despite their formal government policy, will not take
20 GMO products.

21 JUSTICE GINSBURG: Mr. Robbins, but if, as
22 is likely -- I think the government told us that the EIS
23 is about a year away, but that the EIS is going to say
24 deregulate --

25 MR. ROBBINS: Yes.

1 JUSTICE GINSBURG: -- is going to recommend
2 a deregulation decision. So we're talking about the --
3 whatever the farmers of organic or conventional --
4 they're only a year away from, so they will have to
5 accept that there are other planters who want to do the
6 genetically engineered crop.

7 MR. ROBBINS: Well, I think history remains
8 to be written about what will happen in response to that
9 draft EIS that's a year away. We'll see how it comes
10 out. But --

11 JUSTICE GINSBURG: But I think you yourself
12 told us how it came out with other crops, that the
13 genetically engineered crop was very popular and took
14 over.

15 MR. ROBBINS: Yes, it's very popular, but
16 it's also -- you know, past is prologue. We've seen what
17 happened with genetically engineered corn. You can ask
18 Taco Bell --

19 CHIEF JUSTICE ROBERTS: And that's a
20 decision for the government to decide, APHIS, and their
21 lawyer, Mr. Stewart, who is in the courtroom told us
22 what the APHIS view is.

23 MR. ROBBINS: Yes. I understand.

24 JUSTICE SOTOMAYOR: Excuse me, could you tell
25 me, just to clarify one factual matter, the popularity

1 of corn and the other genetically engineered crops, is
2 that from contamination or is it just from -- from
3 consumer choice; i.e., that that's what farmers like
4 because it's easy to grow?

5 JUSTICE SCALIA: And what happened with corn?
6 You -- you -- you said -- gee, I was unaware -- I've
7 been eating corn all this time.

8 (Laughter.)

9 MR. ROBBINS: Well, there's -- there was
10 the so-called --

11 JUSTICE SCALIA: What happened with it?

12 MR. ROBBINS: There was the so-called
13 StarLink controversy in which there was genetic
14 contamination of corn. There was genetic contamination
15 of organic soybeans and organic canola in Canada. There
16 was .06 percent contamination of -- of -- of rice from
17 genetically engineered rice that nearly -- that -- that
18 cost the rice industry, as the rice growers' brief makes
19 clear -- the amicus brief makes clear.

20 The fact is the judge had before him
21 all of this evidence, and he said it is sufficiently
22 likely to -- to constitute irreparable harm.

23 Now, Justice Ginsburg, it is correct that
24 the draft EIS says this is coming. So, in a year,
25 6 months, whenever it is, people may have to get ready

1 for a brave -- for a -- for a different world if not a
2 brave new world. But it's worth looking at that draft
3 EIS, because it is very candid about how different the
4 world will look.

5 It tells us we know this is going to shut
6 down the -- the export market. We know that the
7 Japanese and the Koreans and the Europeans won't buy your
8 products. We know this will hasten the consolidation of
9 farming. We know it will hasten the -- it will
10 hasten the demise of organic farming, a rapidly
11 developing business in this country --

12 CHIEF JUSTICE ROBERTS: All arguments you
13 can make before HP -- APHIS and which presumably were
14 made before APHIS --

15 MR. ROBBINS: Yes.

16 CHIEF JUSTICE ROBERTS: -- and can be made
17 before APHIS if this is remanded.

18 MR. ROBBINS: Indeed --

19 CHIEF JUSTICE ROBERTS: It doesn't entitle
20 you to an order saying APHIS can't do anything in the
21 meantime.

22 MR. ROBBINS: I -- I agree that there is a
23 respect in which the injunction goes beyond the vacatur,
24 and I think, you know, there are arguments why the
25 district court took that additional measure.

1 But I -- I think the upshot is that if that
2 is the only respect that the injunction exceeds the
3 limit of the vacatur, I don't understand how the
4 Petitioners can possibly have standing to argue all the
5 things that they argue, which is: We want to plant
6 tomorrow. We want to plant the next day. We don't want
7 to have to go back before the agency and let them do
8 another EA. We don't want to have more litigation over a
9 partial deregulation. We want to plant now. That's
10 their argument before this Court.

11 And that is precisely what the vacatur tells
12 them independently they may not do, and they didn't
13 challenge that. They didn't and they haven't. They
14 didn't say a word until we brought it up in our
15 bottom-side brief. Then we heard about it.

16 And, Justice Kennedy, this is precisely the
17 situation that was before this Court in *Renne v.* -- the
18 California constitutional provision --

19 JUSTICE KENNEDY: Yes.

20 MR. ROBBINS: -- in which Your Honor
21 wrote the opinion for the Court. Where there are
22 overlapping provisions, or for -- you know, two pieces
23 of law that have overlapping effect, and you challenge
24 one but not the other, you have a fatal redressability
25 problem. That's where we are today.

1 And I have not heard -- I mean, I understand
2 that the vacatur was perhaps only in part because the
3 judge in his discretion grandfathered certain
4 pre-March 30 growers -- fine. Maybe it was there for a
5 partial vacatur. But whatever form of the vacatur it
6 was, they didn't challenge it.

7 CHIEF JUSTICE ROBERTS: Well, it's kind of
8 artificial to separate the two out. I mean, it's one
9 judgment, and they say they're intertwined. The
10 injunction is based on the vacatur. And so if they
11 challenge the injunction, you can't say, well, they're
12 not challenging the vacatur.

13 MR. ROBBINS: Well, I -- I'm not sure that
14 it's fair to say that the injunction is based on the
15 vacatur. But I do want to -- I do think, though, Mr.
16 Chief Justice, that every appeal is from a judgment. I
17 mean, that's more or less -- excepting unusual
18 circumstances, that's the only thing you can appeal.

19 But if I were, for example, appealing a
20 criminal conviction, a judgment of conviction entered and
21 sentence, and I raised only evidentiary arguments, and I
22 fail to raise the sufficiency of the evidence, I -- I
23 can't get a dismissal in the court of appeals, because I
24 have -- I've failed to raise an issue. And it will not avail
25 me one whit to tell the court of appeals, well, gosh, I

1 appealed the judgment, and the sufficiency of the
2 evidence is embedded in the judgment.

3 No. The way we appeal things in this
4 country is we write sentences in our briefs about -- we
5 write questions presented; we present questions to this
6 Court. And I will say that, although all manner of
7 arguments have been smuggled under the tent through the
8 camel's nose in this case, when I look at the questions
9 presented in this case, you've got to really squint to
10 find even some of the arguments they have made, much
11 less this one, which they have not made.

12 CHIEF JUSTICE ROBERTS: Well, but we have to
13 decide -- for you to prevail on that, we have to decide
14 that the injunction does no more than the vacatur.

15 MR. ROBBINS: No. I think what we -- I
16 think the question is whether the relief that they are
17 seeking is separately prohibited by the vacatur and
18 whether that excess, which may arguably go beyond the
19 vacatur, is sufficiently imminent to meet this Court's
20 standing cases.

21 CHIEF JUSTICE ROBERTS: So -- so the
22 district judge was wrong. He should have -- if you say
23 the injunction adds nothing to the vacatur, he should
24 have ended by saying it's vacated.

25 MR. ROBBINS: I think that was an available

1 option. I think the reason he didn't is that, among
2 other things, the -- the parties were arguing about
3 whether the -- the injunction should be broader than the
4 vacatur. And, of course, he had the authority, as the
5 government has told us in its brief, to decline to
6 vacate at all.

7 So it's not as if the remedy phase had no
8 point. It had a point. It's was all up for grabs. But
9 in the end he issued a judgment with multiple parts,
10 only a subset of which Petitioners elected to appeal.
11 That was their choice. But now having made that choice,
12 it seems to me surpassingly odd to draw this Court into
13 a close reading -- and this goes back to one of the
14 first questions of this morning, from Justice Alito --
15 the question about digging into this, what the district
16 court appropriately called the voluminous record of --
17 of -- of declarations and evidence. That's an --
18 just a -- I think a passingly -- a passing strange use
19 of this Court's resources, to dig into those materials,
20 when in point of fact --

21 JUSTICE SCALIA: We -- we don't necessarily
22 have to do that. We just have to decide whether the
23 lower courts did it.

24 MR. ROBBINS: Well --

25 JUSTICE SCALIA: I mean, if we concluded

1 that they didn't do it, that would -- that would be enough,
2 wouldn't it? We wouldn't have to do it ourselves.

3 MR. ROBBINS: Respectfully, Justice Scalia,
4 I think the only way you can say they didn't do it is
5 by doing it yourself; because they said they did it. You
6 look at pages --

7 JUSTICE SCALIA: They also said stuff which
8 suggests that they didn't do it.

9 MR. ROBBINS: Well, I -- I won't -- and I am
10 not here defending every particular line in some of the
11 opinions, but there is no question that at 69a through
12 71a of the petition appendix, the district court
13 articulated the standard four-part injunction test. The
14 court of appeals articulated it as well, said that the
15 evidence was sufficient. And, indeed, in this record,
16 there is sufficient evidence to warrant a finding of a
17 likelihood of irreparable harm, reviewable under an
18 abuse of discretion standard. Your --

19 CHIEF JUSTICE ROBERTS: If you're -- if you
20 are right that the injunction does nothing, they don't
21 have standing because of that, we should throw the
22 injunction out.

23 MR. ROBBINS: Well, I -- I -- I think, given
24 that standing is a threshold question, I don't see how
25 the Court could do that. I think the Court could say:

1 We conclude that the vacatur prohibits exactly the same
2 things as the Petitioners are demanding from this Court.
3 They didn't challenge it; they have a redressability
4 problem, case dismissed --

5 CHIEF JUSTICE ROBERTS: We don't have to
6 worry --

7 MR. ROBBINS: -- or dismissed as improvidently
8 granted.

9 CHIEF JUSTICE ROBERTS: The government doesn't
10 have to worry about standing, does it?

11 MR. ROBBINS: Well, the government -- well,
12 the government I think has the same vacatur problem, but
13 I don't think that's a burden I have to meet, because
14 under -- I think it's *Diamond v. Charles*, the -- the
15 standing has to be by the party that called upon this
16 Court's jurisdiction.

17 JUSTICE KENNEDY: In deciding irreparable
18 harm, what weight if any should be given to the
19 proposition that there was an environmental impact
20 regulation violation, as opposed to just a regular suit
21 between, say, two farmers over a nuisance? What weight
22 do we give to the fact that -- let's assume -- there's a --
23 a violation of the rule requiring an environmental
24 impact statement?

25 MR. ROBBINS: Well, it -- it --

1 JUSTICE KENNEDY: That is not alone a
2 sufficient harm to justify an injunction, is it?

3 MR. ROBBINS: No. And no -- no one is
4 claiming that an EIS violation standing alone gives
5 rise to an injunction, but it carries some important
6 weight. And if I could just answer the question
7 notwithstanding the red light, the answer to the
8 question is the fact that they violated the EIS
9 requirement tells us at a minimum that this was a
10 significant -- a major Federal program that had a
11 significant impact on the environment.

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.

13 MR. ROBBINS: Thank you.

14 CHIEF JUSTICE ROBERTS: Mr. Garre, you have
15 3 minutes.

16 REBUTTAL ARGUMENT OF GREGORY G. GARRE

17 ON BEHALF OF THE PETITIONERS

18 MR. GARRE: Thank you, Mr. Chief Justice.

19 Justice Kennedy, to answer your question,
20 this Court in Amoco held that you don't give special
21 weight to that; that you apply the traditional equitable
22 factors.

23 Your Honors, we absolutely did challenge the
24 vacatur below. That's spelled out in note 1 of our
25 reply brief. The whole fight in this case going forward

1 since the district court has been over whether or not
2 the court erred in not adopting the government's
3 proposed measures. On page 184 of the petition appendix,
4 it makes clear that the government's opposed measures
5 were intended to replace the deregulation order. So the
6 vacatur and the proposed measures are one and the same.

7 JUSTICE SOTOMAYOR: I have a real problem if
8 the whole appeal is over whether or not the district
9 court should have accepted the agency's views. The
10 agency has told us that it has side-stepped going
11 through all of the regular -- all of the administrative
12 steps it was required to. It may not have needed to
13 give notice, but it needed to do some form of an EA and
14 get comments and do other things. And it didn't do
15 that.

16 MR. GARRE: Well, it --

17 JUSTICE SOTOMAYOR: So how can we say that
18 the district court acted improperly, when it's the
19 government who is asking the district court to forgive
20 it from doing something it's legally required to do?

21 MR. GARRE: The district court at least
22 acted improperly in enjoining the agency from doing that
23 on remand. And if that's all the Court thinks it did
24 improperly --

25 JUSTICE SOTOMAYOR: No, no. My problem is I

1 don't see that argument either in your brief or theirs.

2 MR. GARRE: Well, it's part --

3 JUSTICE SOTOMAYOR: I see only the argument
4 that it erred by not accepting something that the
5 government had no power to do outside of the regulatory
6 scheme.

7 MR. GARRE: It's -- our view is it's part
8 and parcel of the vacatur order. The district court
9 looked at this in the context of the injunction and
10 posed those traditional factors in examining the scope
11 of relief.

12 JUSTICE ALITO: How do you answer
13 Mr. Robbins's --

14 MR. GARRE: I mean, it's important for this
15 Court to put aside --

16 JUSTICE ALITO: I'm sorry to interrupt. How
17 do you answer Mr. Robbins's imminence argument?

18 MR. GARRE: In terms of going back for the
19 imminence, we're operating under this injunction which is
20 unlawful. It's preventing -- it's causing real harm to
21 the nation's farmers today. There couldn't be more
22 imminence in terms of the harm that we suffer because of
23 this erroneous injunction. With respect, it's -- it's
24 the farmers that are challenging this --

25 JUSTICE GINSBURG: But wouldn't it be the

1 same problem for the farmers if we had only the
2 deregulation decision vacated? They can't do anything
3 until the agency then gives them permission to do
4 something.

5 MR. GARRE: If you go back, the agency
6 could allow those measures to be implemented and that
7 would solve --

8 JUSTICE GINSBURG: And that's going to take
9 time.

10 MR. GARRE: -- our problem.

11 JUSTICE GINSBURG: I mean, it's going to take
12 time, and you have the EIS on track within a year. So are
13 you going to do this other operation in 6 months?

14 MR. GARRE: Not necessarily,
15 Justice Ginsburg, but, with respect, we've been
16 operating under this erroneous injunction for 3 years.
17 This Court should say it's erroneous. There are
18 other cases that are repeating this pattern. It's
19 important for the Court to correct this error.

20 And briefly on the question of harm: There
21 are no instances in this record of any cross-pollination
22 with hay, only a couple of -- a few isolated with
23 respect to seed, and their harm really boils down to the
24 question of their psychological objection to genetically
25 engineered alfalfa. That harm is not cognizable under

1 Metropolitan Edison or anything else.

2 Thank you, Your Honor.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.

4 The case is submitted.

5 (Whereupon, at 11:11 a.m., the case in the
6 above-entitled matter was submitted.)

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