AMICUS BRIEF

BRIEF FOR NATURAL RESOURCES DEFENSE COUNCIL AS AMICI CURIAE SUPPORTING RESPONDENT, MONSANTO CO. V. GEERTSON SEED FARMS, NO. 09-475 (U.S. APR. 5, 2010).

BY

CRAIG JOHNSTON*

Monsanto Co. v. Geertson Seed Farms *is a case in which the Supreme Court is considering the propriety of an injunction the Ninth Circuit affirmed which precludes Monsanto from selling a form of genetically-modified alfalfa (known as Roundup Ready alfalfa or RRA) until the United States Department of Agriculture (USDA) complies with the National Environmental Policy Act (NEPA). The district court determined that the USDA, through its Animal and Plant Health Inspection Service (APHIS), had violated NEPA by failing to complete an environmental impact statement (EIS) before deregulating RRA. Neither Monsanto nor the United States appealed this aspect of the district court's opinion.*

Instead, the only element of the case that is still at issue is the propriety of the district court's injunction. In seeking to overturn that injunction, Monsanto argues at the Supreme Court level, for the first time, that the "sufficient likelihood of irreparable injury" requirement dictates that a threatened harm, no matter how serious, must be preponderantly likely to occur before a court has the equitable power to enjoin conduct giving rise to that threat. It is this issue that Professor Johnston addresses in this brief for the Natural Resources Defense Council.

* Professor of Law, Lewis & Clark Law School; B.A., 1978 University of Rochester; J.D., magna cum laude, 1985 Lewis & Clark Law School. Because Professor Johnston is not currently an active member of the Oregon bar, he could not be the counsel of record on this brief. While Ms. LaPlante reviewed the brief before it was filed, Professor Johnston was its author. The author would like to thank Brett Hartl, Ben Luckett, Amy van Saun, Nate Hausman, and Elizabeth Zultoski for their terrific research assistance. Additionally, he would like to thank Niel Lawrence, Nancy Marks, and Professors Allison LaPlante, Tomás Gómez-Arostegui, and Bill Funk for their outstanding comments on prior drafts.

No. 09-475

IN THE SUPREME COURT OF THE UNITED STATES

MONSANTO COMPANY, ET AL., PETITIONER

v.

GEERTSON SEED FARMS, ET AL., RESPONDENT

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR *AMICI CURIAE* NATURAL RESOURCES DEFENSE COUNCIL, PROF. CRAIG N. JOHNSTON, PROF. MICHAEL C. BLUMM, PROF. DAVID W. CASE, PROF. JAMISON E. COLBURN, PROF. WILLIAM F. FUNK, PROF. DAVID K. MEARS, PROF. PATRICK A. PARENTEAU, PROF. JOHN T. PARRY, PROF. MELISSA A. POWERS, AND PROF. MARY C. WOOD, IN SUPPORT OF RESPONDENTS

Allison M. LaPlante
Counsel of Record
Pacific Environmental
Advocacy Center
10015 S.W. Terwilliger
Boulevard
Portland, OR 97219
503-768-6894
laplante@lclark.edu

Nathaniel S.W. Lawrence
Natural Resources
Defense Council
3723 Holiday Drive S.E.
Olympia, WA 98501
360-534-9900

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

OTHER AUTHORITIES

INTEREST OF THE *AMICI CURIAE* [1]

Amici curiae are a national environmental organization and ten law professors. The Natural Resources Defense Council, which has 1.2 million members and supporters, uses law and science to secure a safe and healthy environment for all living things. The *amici* law professors are teachers and students of environmental law, and have a longstanding interest in how the principles of equitable relief are applied in environmental cases.

The *amici* believe this is a case where respondents have readily met the traditional "likelihood of irreparable injury" requirement. The district court and court of appeals both expressly applied that test and found that irreparable injury was likely to occur. No good cause exists for this Court to revisit that factbound ruling. Petitioners, however, seek in their brief to inject a new legal issue, not raised below, by suggesting that the "likelihood" standard requires a rigid application of a "more likely than not" test for the probability of harm, irrespective of its potential magnitude. This case does not provide the appropriate vehicle to consider the validity of this newly-proffered test, not passed on by the courts below. In any event, the proposed standard is without merit. Should the Court decide to address the issue, it should therefore squarely reject the proffered standard. The sole purpose of this *amicus* submission is to address this issue in case the Court decides to consider it.

A further description of the *amici* is set forth in an Appendix to this brief.

SUMMARY OF THE ARGUMENT

It is hornbook law that courts may issue injunctions only where there is a likelihood of irreparable injury. *See, e.g.*, *Winter v. Natural Res. Def. Council*, 129

[1] The Government's written consent to the filing of this brief is on file with the Clerk of this Court. The other parties' written consents are being submitted with this brief. Pursuant to S. Ct. R. 37.6, *amici* affirm that this brief was not authored in whole or in part by counsel for a party, and that no monetary contribution to the preparation or submission of this brief was made by any person other than *amici* or their counsel.

S. Ct. 365, 375 (2008) (*dicta*), and *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983) (requiring a "sufficient likelihood" of such injury). Monsanto Co. ("Monsanto") argues that this formulation denies courts the power to issue injunctions in response to threatened harms, no matter how serious their potential consequences, unless those harms are more than 50% likely to materialize. Brief for Monsanto ("Petr.'s Br.") 33, 41-47. This argument wrongly assumes that the term "likelihood" connotes "more likely than not" in this context. It also ignores the basic principle that whether a threatened harm is "sufficiently likely" turns on both the *probability* of its occurrence and the *severity* of its consequences should it occur.

Monsanto's reading of the traditional equitable test is both illogical and ahistorical. Under its approach, for example, courts would be unable to enjoin the maintenance of severe fire hazards in residential areas if the risks of conflagration were "only" 40%. Similarly, a court would be powerless even where a simple injunctive order might be all that is required to preclude a 50% chance that a lethal virus would be introduced to New York City's water supply.

As will be shown below, the courts of equity long have used both public and private nuisance principles to halt conduct and address conditions posing serious threats to the public weal, regardless of whether the feared harm was more likely than not to come to fruition. While at first there were not many cases, their numbers have increased over the years. Where the threats have been sufficiently serious, the courts have simply deemed the circumstances giving rise to them to be nuisances, which in turn has enabled them to issue injunctive relief where necessary to achieve equity. In case after case, the courts have applied these dynamics without requiring that the harm be preponderantly likely to occur. In effect, where faced with sufficiently serious threats of irreparable harm, courts have recognized that the threats themselves constitute a likely and enjoinable injury, under bedrock principles of equity jurisdiction.

That courts show an increasing tendency to focus on the overall significance of the relevant threats, rather than solely on the likelihood that the feared consequences will come to pass, is fully consistent with the Restatement (Second) of Torts. It also comports with both modern principles of risk assessment and the analysis that this Court and others have applied in related contexts. And finally, it closely tracks an analogous development in environmental law, the advent of the so-called "imminent hazard" provisions that Congress patterned on public nuisance principles.

In the face of this longstanding history and legal evolution, Monsanto reads this Court's opinion in *Winter* as mandating a significant reworking of the basic principles of equitable jurisdiction. Petr.'s Br. 41-47. *Winter*, however, is far too slender a reed to support such a major change. Indeed, *Winter* not only fails to signal any such change, it expressly embraces traditional principles. Moreover, it contains no holding at all regarding the irreparable injury requirement.

We of course recognize that judicial enforcement of the statute at issue in this case, the National Environmental Policy Act, 42 U.S.C. § 4321, *et seq.* ("NEPA"), focuses on the procedures it prescribes. This does not mean, however, that this Court should discount its congressionally-articulated substantive goals when

considering the presence of irreparable injury. Congress intended for NEPA to influence governmental decision-making profoundly. To effectuate this goal, Congress required agencies to undertake extensive analysis whenever their actions may "significantly affect" the environment, *see* 42 U.S.C. § 4332(2)(C) and 40 C.F.R. § 1501.4. That the potential for such effects was intended to trigger action only serves to emphasize why the "likelihood of irreparable injury" requirement should not be deemed to require a more-likely-than-not standard. This Court should honor Congress's intent that potentially significant environmental risks be examined by ensuring that federal courts have the broad equitable discretion to determine, in appropriate cases, that an agency's failure to comply with NEPA poses a sufficient threat of harm to constitute a likelihood of irreparable injury, even if that harm is not preponderantly likely to occur.

ARGUMENT

I. THE COURTS OF EQUITY LONG HAVE HAD THE AUTHORITY TO ISSUE INJUNCTIONS IN THE FACE OF SIGNIFICANT THREATS.

a. The history of the common law fully supports the idea that courts may address situations that pose unreasonable harm of injury, and that they may issue injunctions in response to those threats.

Under the common law, courts long have had the power to issue injunctions in the face of significant threats, regardless of whether the threatened harms were at least 51% likely to come to fruition. In these cases, all plaintiffs have been required to show is that the conduct poses a significant threat to the public health, safety, or welfare. They have not been required to show a preponderant likelihood that the threat will result in the feared consequences. The circumstances themselves, if sufficiently threatening, constitute a nuisance and give rise to a claim for injunctive relief.

This power may be most apparent in the realm of public nuisance law. This Court traced the history of the equitable power to address these nuisances in *Mugler v. State of Kansas*, 123 U.S. 623 (1887):

> "In regard to public nuisances," Mr. Justice Story says, "the jurisdiction of courts of equity seems to be of very ancient date, and has been distinctly traced back to the reign of Queen Elizabeth. The jurisdiction is applicable, not only to public nuisances, strictly so called, but also to purprestures upon public rights and properties. . . . In case of public nuisances, properly so called, an indictment lies to abate them, and to punish the offenders. But an information also lies in equity to redress the grievance by way of injunction." 2 Story, Eq. Jur. §§ 921, 922. The ground of this jurisdiction in cases on purpresture, as well as of public nuisances, is the ability of courts of equity to give a more speedy, effectual, and permanent remedy than can be had at law. They can not only prevent nuisances that are threatened, and before irreparable mischief ensues, but arrest or abate those in progress, and, by perpetual injunction, protect the public against them in the future; whereas courts of law can only reach existing nuisances, leaving future acts to be the subject of new prosecutions or proceedings. *This is salutary jurisdiction, especially where a nuisance affects the health, morals or safety*

> *of the community. Though not frequently exercised, the power undoubtedly exists in courts of equity to protect the public against injury.* [Citations omitted].

Id. at 672–73 (emphasis added); *see also United Steelworkers of Am. v. United States*, 361 U.S. 39, 60 (1959) (citing English public nuisance cases involving injunctions as far back as 1587). Additionally, this Court long has recognized that public nuisance doctrine embraces both health and other environmental protection concerns. *Georgia v. Tenn. Copper Co.*, 206 U.S. 230 (1907) (deeming air pollution a public nuisance because of its impacts on both forests and public health in a neighboring state); *see also Ariz. Copper Co. v. Gillespie*, 230 U.S. 46, 56–57 (1913) (water pollution deemed a public nuisance), and *New Jersey v. City of New York*, 283 U.S. 473 (1931) (same).

In most nuisance cases, both public and private, the relevant conduct or conditions already have given rise to harm, and thus it is often easy for courts to find a sufficient threat of future harm. That was certainly true in *Tennessee Copper*, *Arizona Copper*, and *City of New York.* In other cases, however, the threat is present but has not yet given rise to harm. Where the courts have deemed such threats sufficiently serious, however, they have not hesitated to find that the conduct or condition constitutes a nuisance, without inquiring into whether the threatened harms were more likely than not to materialize. As early as 1799, for example, upon finding that certain houses in which the defendant was storing sugar were structurally unsound, the chancellor in *London v. Bolt*, 5 Ves. Jun. 129, 31 Eng. Rep. 507 (Ch. 1799), relied on public nuisance doctrine to issue an injunction preventing the defendant from adding any additional sugar. Similarly, in *R. v. Vantandillo*, 4 M. & S. 73, 105 Eng. Rep. 762 (K.B. 1815), the court determined that carrying a child with smallpox along a public highway constituted a public nuisance, without any finding regarding the likelihood that this conduct would cause harm to anyone else.[2]

In this country, the earliest cases recognizing that a significant risk could in itself constitute a nuisance arose in the context of private nuisance law. In *Tyner v. People's Gas Co.*, 132 Ind. 408, 31 N.E. 61 (1892), for example, the Indiana Supreme Court overruled a demurrer where the defendant was intending to use nitroglycerin to "shoot" a well on its property, which the plaintiff alleged would pose a serious, but unquantified, risk of explosion, thus endangering both the plaintiff and his family. The court stated that:

> It is settled by our own decisions that the erection or the maintaining of anything that is injurious to health . . . , so as essentially to interfere with the comfortable enjoyment of life or property, constitutes a private nuisance. To live in constant apprehension of death from the explosion of nitroglycerin is certainly an interference with the comfortable enjoyment of life. Injunction is the proper remedy for an injury of this kind.

[2] This was a criminal case brought in the King's Bench, a court which in 1815 could not grant injunctions. We cite it here as an example of another early decision deeming conduct threatening to the public weal to constitute a public nuisance, without either quantifying the risk or concluding that the threatened harm was likely to materialize.

31 N.E. at 62. Similarly, in *Ferry v. City of Seattle*, 116 Wash. 648, 303 P. 40 (1922), the Washington Supreme Court affirmed a lower court injunction prohibiting the construction of a dam where it would pose an unacceptable risk to neighboring property owners. Here also, neither the plaintiff nor the court quantified the risk. In its analysis, though, the court explicitly factored in the magnitude of the consequences when discussing their probability:

> The test as to whether a structure of the proposed character is to be declared a nuisance turns on whether the complaining property owners are under a reasonable apprehension of danger, and the question of the reasonableness of the apprehension turns again, not only on the probable breaking of the reservoir, but the realization of the extent of the injury which would certainly ensue; that is to say the court will look to consequences in determining whether the fear existing is reasonable. For instance, if the reservoir were being built in some place where, should it break, the resultant damage would be merely to property which could adequately be recompensed, the court would be more apt to hesitate in declaring it a nuisance than where, should a break occur, not only property of immense value would be destroyed, but many lives would be lost as well.

Id. at 662.

Early treatises also recognized the need to apply a sliding scale regarding the likelihood of the harm in situations in which the consequences may be severe. As early as in 1919, Pomeroy's Treatise on Equitable Remedies provided that:

> . . . On the one hand, a mere possibility of a future nuisance will not support an injunction; it must be probable. On the other hand, the plaintiff . . . does not need to establish this probability by proof amounting to a virtual certainty that the nuisance will occur, nor even proof which establishes it beyond a reasonable doubt; *it is sufficient if he show that the risk of its happening is greater than a reasonable man would incur. And the balance between these two rules will be affected by the seriousness of the nuisance feared, the strength required for the plaintiff's proof diminishing somewhat as the greatness of the apprehended damage increases.*

Pomeroy, A Treatise on Equity Jurisprudence and Equitable Remedies, Vol. 5, § 523, p. 4398 (1919) (emphasis added).

By the middle of the 20th century, courts were applying this logic in the public nuisance context. In *Harris Stanley Coal & Land Co. v. Chesapeake & Ohio Railway Co.*, 154 F.2d 450 (6th Cir. 1946), *cert. denied*, 329 U.S. 761 (1946), a railroad appealed the district court's denial of an injunction through which the railroad sought to preclude a mining company from removing pillars of coal that were designed to support the surface of the land. *Id.* at 452. The lower court had found that there was a "possibility or even probability that the mountain side would slip or subside," but nonetheless denied the injunction. *Id.* The Sixth Circuit reversed, emphasizing the seriousness of the potential consequences:

> If the threatened injury to the railroad right-of-way be envisioned merely as the sliding of some of the surface material of the mountain upon the railroad right-of-way necessitating some expense in its removal and in the repair of the roadbed, we might

> well say that recovery of damages in a suit at law provides adequate remedy. We have here, however, a railroad over which pass trains bearing passengers and freight. Their daily number is not disclosed by the record, and being but a branch line it may be assumed that the traffic is not heavy. Nevertheless, traffic there is, and the effect of a substantial mountain slide upon a passing train might well be catastrophic. It may be that such disaster could occur only upon a concatenation of circumstances of not too great probability, and that the odds are against it. It is common experience, however, that catastrophies occur at unexpected times and in unforeseen places.. . . A court of equity will not gamble with human life, at whatever odds, and for loss of life there is no remedy at law.

Id. at 453; *see also County of San Diego v. C.W. Carlstrom*, 196 Cal. App. 2d 485, 16 Cal. Rptr. 667 (1961) (finding a fire hazard to be a public nuisance without any quantification regarding the likelihood of a fire).

More recently, the courts have applied this kind of risk-based logic in a broader array of equitable contexts, finding nuisances and authorizing injunctive relief in situations where it has been far from certain that the relevant threat, while significant, was likely to give rise to the feared consequences. Perhaps most tellingly, this Court in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), implicitly assumed that risk analysis can play a role in determining what constitutes a nuisance. There, in exploring the relationship between takings law and nuisance principles, the Court insisted that "the corporate owner of a nuclear generating plant" could not successfully raise a takings claim "when it is directed to remove all improvements from its land upon discovery that the plant sits astride an earthquake fault." *Id.* at 1029. The mere existence of a fault in such a situation would not, of course, make an earthquake more likely than not, let alone create a likelihood of radioactive release. As the Court appeared to recognize, it is the severity of the potential consequences that would make the threat abatable as a public or private nuisance, and hence undermine a takings claim.

Other courts have applied a similar calculus to nuisance cases involving hazardous waste contamination[3] and threats to the public safety from the possibility of gang violence,[4] over-aggressive protesters,[5] and potentially violent demonstrations.[6] In none of these cases did the courts feel the need to quantify the

---

[3] *See, e.g., Village of Wilsonville v. SCA Servs., Inc.*, 77 Ill. App. 3d 618, 635–636, 396 N.E.2d 552, 564 (4th Dist. 1979), *aff'd*, 86 Ill. 2d 1, 426 N.E.2d 824 (1981) ("The trial court could have determined from the evidence that the harm that would impend because of the danger that hazardous substances might escape was so serious that no justification existed to deny the injunction even though the feared harm was uncertain as to occurrence and, in any event, unlikely to occur until the distant future."); *Wood v. Picillo*, 443 A.2d 1244, 1247 (1982) ("According to experts, the chemicals present on defendant's property and in the marsh, left unchecked, would eventually threaten wildlife and humans well downstream from the dump site.").

[4] *People ex rel. Gallo v. Acuna*, 14 Cal. 4th 1090, 929 P.2d 596, 60 Cal. Rptr. 2d 277 (1997).

[5] *See N.Y. State Nat'l Org. for Women v. Terry*, 886 F.2d 1339, 1362 (2d Cir.), *cert. denied*, 495 U.S. 1339 (1989) ("We have no doubt that-absent the requested relief-the health and security of a considerable number of persons was and would be endangered by the demonstrations. Accordingly, the district court correctly found that defendants' activities constituted a public nuisance, and properly granted the City summary judgment on this claim."); *Hirsh v. City of Atlanta*, 261 Ga. 22, 401 S.E.2d 530 (1991).

[6] *Wilkinson v. Forst*, 832 F.2d 1330 (2d Cir. 1987), *cert. denied sub nom. Kelly v. Wilkinson*, 485 U.S. 1034 (1988) (authorizing magnetometer searches); *but see Christian Knights of the Ku Klux Klan*

likelihood that the threatened harms would come to pass. After identifying a significant threat to the public weal, they simply found nuisances to exist and issued injunctions designed to abate them.

b. The Restatement (Second) of Torts is fully in accord with these cases.

The Restatement (Second) of Torts ("Restatement") expressly contemplates that conduct and conditions giving rise to unreasonable risks of harm are actionable under principles of both public and private nuisance. It further contemplates that courts may enjoin these injuries without first finding a preponderant likelihood that the relevant harm will materialize.

Turning first to public nuisances, the Restatement defines such a nuisance as "an unreasonable interference with a right common to the general public." Restatement (Second) of Torts § 821B (1977). It further provides that "[c]ircumstances that may sustain a holding that an interference with a public right is unreasonable include [situations in which] the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience." *Id.* Comment b to that section lists "the maintenance of a pond breeding malarial mosquitoes" as an example of an interference with the public health, and "bad odors, dust and smoke" as examples of interferences with the public comfort. *Id.* § 821B, cmt. b, p. 88. Elsewhere, the Restatement cites pollution leading to a beach closure as yet another example of a public nuisance. *Id.* § 832, cmt. b, p. 143.

Under the Restatement, an "unreasonable" or "significant" interference with the public health, safety, peace, comfort, or convenience is all that is required. Nothing in the Restatement suggests that public-nuisance plaintiffs must show a preponderant likelihood that someone will actually get sick or suffer a physical injury or some other clear manifestation of harm, either as part of their prima facie case or to establish an entitlement to equitable relief. In the beach closure context, for example, it is presumed that a health threat warranting beach closure is actionable, without any required showing that would-be swimmers face at least a 51% likelihood of becoming ill.

The provisions of the Restatement pertaining to private nuisances apply similar logic. Section 821D defines a private nuisance as a "nontrespassory invasion of another's interest in the private use or enjoyment of land." *Id.* § 821D. Sections 821F and 822 note that the harm must be both "significant" and either "intentional and unreasonable" or "unintentional and otherwise actionable" under either negligence standards or principles of strict liability. *Id.* §§ 821F and 822, respectively.[7]

It is in the Comments to § 822 that the Restatement makes clear that a significant risk of harm constitutes a cognizable injury under this formulation.

Invisible Empire, Inc. v. Dist. of Columbia, 972 F.2d 365 (D.C. Cir. 1992) (identifying First Amendment constraints that might limit injunctions such as those allowed to stand in *Wilkinson*).

[7] A comment to the former provision indicates that "significant" means "harm of importance, involving more than slight inconvenience or petty annoyance." Restatement, *supra*, § 821F, cmt. c, p. 105.

Comment g, addressing the unreasonableness requirement in the context of intentional invasions, provides that:

> . . . The very existence of organized society depends upon the principle of "give and take, live and let live," and therefore the law of torts does not attempt to impose liability or shift the loss in every case in which one person's conduct has some detrimental effect on another. Liability for damages[8] is imposed in those cases in which the harm *or risk* to one is greater than he ought to be required to bear under the circumstances, at least without compensation.[9]

Id. § 822, cmt. g, p. 112 (emphasis added).

Chapter 48 of the Restatement, which deals specifically with the appropriateness of tort-related injunctions, further illuminates the role that risk plays in both public and private nuisance doctrine. First, § 933(1) indicates that injunctions are available for both committed and threatened torts, depending upon the appropriateness of such issuance as determined by the factors listed in § 936. *Id.* § 933(1). In turn, § 936(1) contemplates a "comparative appraisal of all of the factors in the case," including:

> (a) the nature of the interest to be protected,
>
> (b) the relative adequacy to the plaintiff of injunction and other remedies,
>
> (c) any unreasonable delay by the plaintiff in bringing suit,
>
> (d) any related misconduct on the part of the plaintiff,
>
> (e) the relative hardship likely to result to defendant if an injunction is granted and to plaintiff if it is denied,
>
> (f) the interests of third persons and of the public, and
>
> (g) the practicability of framing or enforcing the order or judgment.

Id. § 936(1).

In Comment b to Section 933, the Restatement more thoroughly addresses the need to enjoin improbable but serious harms, when it discusses "threatened torts." There, it speaks in the following terms:

> The expression "threatened tort," as used in Subsection (1) of this Section, contemplates, as a condition for the grant of an injunction, a threat of sufficient seriousness and imminence to justify coercive relief. The seriousness and imminence of the threat are in a sense independent of each other, since a serious harm may be only remotely likely to materialize and a trivial harm may be quite imminent. Yet the

---

[8] Although this provision speaks explicitly only to liability for damages, the Restatement makes clear that injunctive relief is available in appropriate cases for private nuisances. *See, infra*, pp. 18–19. It is perhaps for this reason that the authors of Prosser and Keaton on Torts edited out the words "for damages" when they quoted this passage in their treatise. Prosser and Keaton on Torts, 5th Ed., p. 629 (1984).

[9] Comment k, dealing with unintentional invasions, also focuses on risk. Because that note addresses liability based on negligence theories, however, it emphasizes that "it is the risk of harm that makes the conduct unreasonable." Restatement, *supra*, § 822, cmt. k, p. 114.

> two elements must be considered together in the decision of any given case. *The more serious the impending harm, the less justification there is for taking the chances that are involved in pronouncing the harm too remote.*

Id. § 933, cmt. b, p. 561 (emphasis added). A comment to § 821F both emphasizes this point and makes it specifically applicable to both public and private nuisances:

> . . . [E]ither a public or private nuisance may be enjoined because harm is threatened that would be significant if it occurred, and that would make the nuisance actionable under the rule here stated, although no harm has yet resulted.

Id. § 821F, cmt. b, p. 105.

In short, the Restatement contemplates that the significance of the risk can be considered in determining both whether a nuisance exists and whether injunctive relief is an appropriate remedy. In neither context is it necessary that there be a preponderant likelihood that the threatened harm will come to pass; if the potential harm is particularly serious, the Restatement contemplates that courts will be prepared to guard against even a low likelihood of its occurring.

Finally, once a nuisance has been established, the Restatement does not require a separate showing regarding the likelihood of irreparable injury. Section 936(1) includes the other traditional equitable factors, but not that one. Although this goes unexplained in the Restatement, the only logical conclusion is that the nuisance finding equates to a finding that there is a sufficient likelihood of irreparable injury.[10] This interpretation draws support from § 7 of the Restatement, which distinguishes the concept of "injury" from that of "harm." The word "injury," it makes clear, denotes "the invasion of any legally protected interest of another," as distinct from "harm," which is used to mean an actual loss or detriment. *Id.* § 7 (1965). Thus, under the Restatement one can be irreparably injured without having actually been harmed.

c. The tendency of courts to issue injunctions in the face of significant threats comports with sound risk analysis and the approaches that this Court and others have taken in analogous contexts.

If there is one unifying principle in the modern regulatory world, it is that analyzing risk requires an understanding not only of the likelihood of a particular outcome, but also of the severity of its potential effects. Nat'l Research Council, Science and Judgment in Risk Assessment 4 (1994); *School Bd. of Nassau County, Fla. v. Arline*, 480 U.S. 273, 287–88 (1987) ("*Arline*").

---

10 The only reference to anything like an irreparable harm requirement is in Comment b, which includes a statement that:

. . . Other factors, not here listed, may be considered, as for example, that of the sufficiency of the seriousness and imminence of the threat of tort, discussed in § 933(1), Comment b.

Restatement, *supra*, § 936(1), cmt. b, p.567. This of course, though, merely replicates the analysis necessary in the first place to determine whether there is a qualifying tort.

Ever since Judge Hand first analyzed negligence issues in terms of whether the burden of the relevant precautions was less than the probability of an accident, multiplied by the gravity of the resulting injury, *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947), courts have increasingly embraced modern risk analysis. This Court expressly embraced the fundamental principles of risk assessment in *Arline.* As the Court later summarized in *Bragdon v. Abbott*, 524 U.S. 624 (1998), *Arline* dealt with the

> . . . importance of prohibiting discrimination against individuals with disabilities while protecting others from significant health and safety risks, resulting, for instance, from a contagious disease. In *Arline*, the Court reconciled these objectives by construing the [relevant statute] not to require the hiring of a person who posed a significant risk of communicating an infectious disease to others.

Id. at 649 (quotation omitted). In *Arline*, the Court determined that the "significance" inquiry should include:

> "[findings of] facts, based on reasonable medical judgments given the state of medical knowledge, about (a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties) and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm."

Arline, 480 U.S. at 288 (quoting from a brief filed by the American Medical Association).

This Court also squarely embraced a "significant threats" approach in *Helling v. McKinney*, 509 U.S. 25 (1993). There, the Court determined that the Eighth Amendment's "cruel and unusual punishment" standard forbids not only prison conditions that are likely to make a particular inmate ill, but also those that pose "an unreasonable risk of serious damage to [a prisoner's] future health." *Id.* at 35.

The lower courts have applied similar logic in related contexts. Most significantly, they have adopted risk-based ideas in applying the "likelihood of prevailing on the merits" standard that governs the issuance of preliminary injunctions. In *American Hospital Supply Corp. v. Hospital Products Ltd.*, 780 F.2d 589 (7th Cir. 1986), for example, Judge Posner wrote that:

> A district judge asked to decide whether to grant or deny a preliminary injunction must choose the course of action that will minimize the costs of being mistaken. Because he is forced to act on an incomplete record, the danger of a mistake is substantial. And a mistake can be costly. If the judge grants the preliminary injunction to a plaintiff who it later turns out is not entitled to any judicial relief – whose legal rights have not been violated – the judge commits a mistake whose gravity is measured by the irreparable harm, if any, that the injunction causes to the defendant while it is in effect. If the judge denies the preliminary injunction to a plaintiff who it later turns out is entitled to judicial relief, the judge commits a mistake whose gravity is measured by the irreparable harm, if any, that the denial of the preliminary injunction does to the plaintiff.

> These mistakes can be compared, and the one likely to be less costly can be selected, with the help of a simple formula: grant the preliminary injunction if but only if P x H_p > (1 - P) x H_d, or, in words, only if the harm to the plaintiff if the injunction is denied, multiplied by the probability that the denial would be an error (that the plaintiff, in other words, will win at trial), exceeds the harm to the defendant if the injunction is granted, multiplied by the probability that granting the injunction would be an error. That probability is simply one minus the probability that the plaintiff will win at trial; for if the plaintiff has, say, a 40 percent chance of winning, the defendant must have a 60 percent chance of winning (1.00 - .40 = .60). The left-hand side of the formula is simply the probability of an erroneous denial weighted by the cost of denial to the plaintiff, and the right-hand side simply the probability of an erroneous grant weighted by the cost of grant to the defendant.

Id. at 593; *see also FoodCom Int'l v. Barry*, 328 F.3d 300, 303 (7th Cir. 2003). Similarly, the Second Circuit has applied a sliding-scale approach in the same context, requiring "either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief." *Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc.*, 596 F.2d 70, 72 (2d Cir. 1979).[11]

d. Congress has recognized the importance of risk analysis in injunctive settings when it codified public nuisance principles in various environmental laws. Courts have done the same in applying those provisions.

In the environmental realm, risk assessment principles manifest themselves in various ways.[12] The place where Congress has made most apparent its embrace of

---

[11] Black's Law Dictionary has gone even further in relaxing the likelihood standard, defining the likelihood-of-success-on-the-merits test as requiring only "a reasonable probability of success in the litigation or appeal." Black's Law Dictionary 947 (8th ed. 2004); *see also AlliedSignal, Inc. v. B.F. Goodrich Co.*, 183 F.3d 568, 576 (7th Cir. 1999) (applying an unquantified "substantial likelihood of irreparable harm" test in an antitrust case).

[12] Under some environmental statutes, certain harms are seen as being so serious that our laws speak in absolute terms. The most famous example of this is the Endangered Species Act, under which, as this Court has recognized, in barring harm to endangered species or their critical habitat, "Congress has spoken in the plainest of terms, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978) (applying 16 U.S.C. § 1536(a)). In other contexts, Congress and/or the agencies that implement the relevant statutes have set substantive standards according to what they deem to be acceptable risk ranges given the perceived severity of the potential adverse effects. Under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601, *et seq.*, for example, the Environmental Protection Agency must clean up sites to a degree that reduces the cancer threat to those living nearby to a risk range of between one-in-ten-thousand ($1x10^{-4}$) and one-in-a-million ($1x10^{-6}$), with the latter standard serving as the "point of departure." 40 C.F.R. § 300.430(e)(2)(i)(A)(2); *see also* 42 U.S.C. § 9621(b)(1). In the nuclear context, the Nuclear Regulatory Commission's design requirements for nuclear power plants contemplate that siting decisions control for "design basis events." These requirements generally ensure that these facilities will not release significant radiation levels during events (such as aircraft accidents) that are found to have more than a one-in-ten-million chance of occurring. *See, e.g.*, 10 C.F.R. §§ 52.17, 52.79, 100.10, 100.20, 100.21; NUREG-0800, Standard Review Plan for the Review of Safety Analysis Reports for Nuclear Power Plants (SRP), Section 3.5.1.6, "Aircraft Hazards" (Rev. 4, Mar. 2010) (ML070510639), at 3.5.1.6-4 (providing that Part 52 and Part

risk assessment principles specifically in the injunctive relief context is in the so-called "imminent hazard" provisions in several pollution control statutes. *See, e.g.*, 42 U.S.C. §§ 6973, 9606. Congress expressly patterned these provisions on public nuisance principles. *See, e.g.*, S. Rep. No. 96-172., 1st Sess., at 5, *as reprinted in* (1980) U.S.C.C.A.N. 5019, 5023; *see also United States v. Waste Indus., Inc.*, 734 F.2d 159 (4th Cir. 1984).

Sections 7002(a)(1)(B) and 7003 of the Resource Conservation and Recovery Act, 42 U.S.C. § 6972(a)(1)(B) and 6973, are typical of these provisions. Under these provisions, Congress empowered the courts to issue injunctions, at either citizens' or the Government's behest (respectively), whenever the handling or disposal of any solid or hazardous waste "may present an imminent and substantial endangerment to health or the environment." In keeping with this language, courts have found that Congress authorized relief whenever there is a "reasonable cause for concern that someone or something may be exposed to a risk of harm by a release or a threatened release of a hazardous substance if remedial action is not taken." *Interfaith Comty. Org. v. Honeywell Int'l., Inc.*, 399 F.3d 248, 259 (3d Cir. 2005) (upholding injunction in a citizen suit).[13] In *Reserve Mining Co. v. Environmental Protection Agency*, 514 F.2d 492 (8th Cir. 1975), the Eighth Circuit elaborated on this idea in a case involving a predecessor to the Clean Water Act's current "imminent hazard" provision:

> These concepts of potential harm, whether they be assessed as "probabilities and consequences" or "risk and harm," necessarily must apply in a determination of whether any relief should be given in cases of this kind in which proof with certainty is impossible. The district court, although not following a precise probabilities-consequences analysis, did consider the medical and scientific evidence bearing on both the probability of harm and the consequences should the hypothesis advanced by the plaintiffs prove to be valid.
>
> In assessing probabilities in this case, it cannot be said that the probability of harm is more likely than not. Moreover, the level of probability does not readily convert into a prediction of consequences. On this record it cannot be forecast that the rates of cancer will increase from drinking Lake Superior water or breathing Silver Bay air. The best that can be said is that the existence of this asbestos contaminant in air and water gives rise to a reasonable medical concern for the public health. The public's exposure to asbestos fibers in air and water creates some health risk. Such a contaminant should be removed.

Id. at 520.

---

100 regulations are satisfied "if the probability of aircraft accidents resulting in radiological consequences greater than the 10 [C.F.R.] Part 100 exposure guidelines is less than order of magnitude of 10^{-7} [one in ten million] per year").

13 *See also United States v. Conservation Chem. Co.*, 619 F. Supp. 162, 194 (W.D. Mo. 1985) (applying the same standard under § 106 of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9606).

II. *WINTER* DID NOT ALTER THE TRADITIONAL EQUITABLE REQUIREMENTS FOR AN INJUNCTION.

In *Winter*, this Court indicated that the Ninth Circuit had erred in determining that any "possibility" of irreparable injury was sufficient to satisfy the irreparable injury threshold in NEPA cases. 129 S. Ct. at 375 (citing, *inter alia*, *Faith Center Church Evangelistic Ministries v. Glover*, 480 F.3d 891, 906 (9th Cir. 2007)). Significantly, however, the Court did not articulate the circumstances in which an actual threat of significant harm can constitute a sufficient likelihood of irreparable injury. Nor did it indicate that it was altering the traditional principles of equitable relief in any way; to the contrary, the Court's entire discussion is framed as an application of those basic principles. *Id.* at 374–82.

Moreover, specifically with regard to the "likelihood of irreparable injury" standard, the *Winter* Court declined to make any finding regarding whether the plaintiff had met the equitable test. Instead, despite the Navy's contention that there had been no documented harm to marine mammals during 40 years of similar training in the relevant area, the Court specifically rested its holding on other grounds, concluding that "even if plaintiffs have shown irreparable injury from the Navy's training exercises, any such injury is outweighed by the public interest and the Navy's interest in effective, realistic training of its sailors." *Id.* at 376.

Monsanto's argument in this case is wholly premised on the idea that *Winter* altered the traditional equitable test regarding the likelihood of irreparable injury. *See* Petr.'s Br. 41–47. *Winter*, however, did no such thing. The Court's "irreparable injury" discussion in *Winter* simply cannot bear the weight Monsanto puts on it.

III. THAT NEPA IMPOSES ONLY PROCEDURAL MANDATES SHOULD NOT UNDERMINE THE ABILITY OF THE COURTS TO ENJOIN ACTIONS THAT WILL LIKELY LEAD TO IRREPARABLE INJURY.

Most environmental statutes contain enforceable substantive mandates. *See, e.g.*, 33 U.S.C. § 1311(b) (Clean Water Act). In that context, it may be that violations of those standards should constitute irreparable harm as a matter of law. This conclusion would seem consistent with *United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483 (2001) ("*Oakland Cannabis*"). In that case, this Court held that:

> . . . [A] court sitting in equity cannot ignore the judgment of Congress, deliberately expressed in legislation. A district court cannot, for example, override Congress' policy choice, articulated in a statute, as to what behavior should be prohibited. Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is . . . for the courts to enforce them when enforcement is sought. Courts of equity cannot, in their discretion, reject the balance that Congress has struck in a statute. Their choice (unless there is statutory language to the contrary) is simply 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. Consequently, when a court of equity exercises its discretion, it may not consider the advantages and disadvantages of nonenforcement of the statute, but only the advantages and disadvantages of employing the extraordinary remedy of

> injunction over other available methods of enforcement. To the extent the district court considers the public interest and the conveniences of the parties, the court is limited to evaluating how such interest and conveniences are affected by the selection of an injunction over other enforcement mechanisms.

Oakland Cannabis, 532 U.S. at 497–498 (internal quotations and footnotes omitted).[14]

While this Court has determined that NEPA "imposes on agencies duties that are essentially procedural," *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227 (1980), it also has recognized that the statute has broad substantive goals. *Id.; see also Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350–51 (1989). Among its other objectives, Congress sought through NEPA to "assure for all Americans safe, healthful, productive, and esthetically pleasing surroundings." 42 U.S.C. § 4331(b)(2). That Congress sought to achieve these goals through procedural means does not undermine the seriousness of the goals themselves. As this Court noted:

> The sweeping policy goals announced in § 101 of NEPA are [to be] realized through a set of action-forcing procedures that require that agencies take a hard look at environmental consequences, and that provide for broad dissemination of relevant environmental information. . . .

Methow Valley, 490 U.S. at 350 (internal quotations omitted). The *Methow Valley* Court also noted that "these procedures are almost certain to affect the agency's substantive decision." *Id.*

The plaintiffs in this case have a legal injury and cannot be adequately compensated by monetary damages.[15] Additionally, the real-world threats here at issue are serious and have not been adequately studied, as required by Congress. In situations where, as here, there is a reasonable prospect of significant harm, lower courts should have the discretion to determine whether an agency's failure to

---

[14] *See also Tenn. Valley Auth. v. Hill*, 437 U.S. 153 (1978), and *United States v. Mass. Water Res. Auth.*, 256 F.3d 36, 51 n.15 (1st Cir. 2001). *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982), is not to the contrary. Indeed, a careful reading of it supports this position. In *Romero-Barcelo*, this Court upheld the district court's decision not to enjoin the relevant discharges under § 309(b) of the Clean Water Act, 33 U.S.C. § 1319(b). It did so under the equitable-balancing prong of the injunctive-relief calculus, and in a context in which the relevant violation was procedural—the failure to obtain a permit—not substantive. *Id.* at 312–19. The Court concluded that "the integrity of the Nation's waters, . . . not the permit process, is the purpose of the [Clean Water Act]." *Id.* at 314. The Court did not, however, find an absence of irreparable harm, even though it emphasized the lower court's finding that that the relevant discharges were not causing any measureable harm to the waters. *Id.* at 310. The Court underscored the limited nature of its pronouncement in its penultimate paragraph:

> . . . The District Court did not face a situation in which a permit would very likely not issue, and the requirements and objective of the statute could therefore not be vindicated if discharges were permitted to continue. *Should it become clear that no permit will be issued and that compliance with [the Act] will not be forthcoming, the statutory scheme and purpose would require the court to reconsider the balance it has struck.*

Id. at 320 (emphasis added).

[15] *See Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987) ("[E]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable.").

comply with the law entails a sufficient likelihood of irreparable injury to support equitable relief. This is particularly true in the context of a statute such as NEPA, where Congress has expressly recognized "the critical importance of . . . maintaining environmental quality," 42 U.S.C. § 4331(a), and "direct[ed] that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with [NEPA's] policies. . . ." 42 U.S.C. § 4332.

In other contexts this Court has not hesitated to invoke its equitable powers to address procedural violations in the absence of any affirmative demonstration of a preponderant likelihood of substantive irreparable harm. In *Clark v. Roemer*, 500 U.S. 646 (1991), for example, the Court dealt with a violation of the "preclearance" provisions in § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c. In that case, the district court had allowed both an election to go forward and the winners to assume their offices (at least provisionally), despite violations of § 5. A unanimous Court reversed, holding that the district court was required to enjoin the illegal election. *Id.* at 654. The Court did this without any inquiry into whether the plaintiffs had shown that the procedural violation—the State's failure to obtain preclearance—had led or was likely to lead to any irreparable harm.[16] Instead, the Court announced a nearly automatic rule that injunctions should issue in these contexts:

> We need not decide today whether there are cases in which a district court may deny a § 5 plaintiff's motion for injunction and allow an election for an unprecleared seat to go forward. An extreme circumstance might be present if a seat's unprecleared status is not drawn to the attention of the State until the eve of the election and there are equitable principles that justify allowing the election to proceed. No such exigency exists here.

Id. at 654–655; *see also Branch v. Smith*, 538 U.S. 254 (2003).

Of course, NEPA is not the Voting Rights Act. However, NEPA plaintiffs such as Geertson Seed Farms stand to suffer substantive and legally cognizable injuries, which may be avoided if the required procedures are followed. And, as in this case, the real world harms at stake in NEPA cases can be quite significant.[17]

---

16 In a later case, the Court made clear that the presence or absence of harm is not an issue in preclearance cases:

> Nor does it matter for the preclearance requirement whether the change works in favor of, works against, or is neutral in its impact upon the ability of minorities to vote. . . . [P]reclearance is a process aimed at preserving the status quo until the Attorney General or the courts have an opportunity to evaluate a proposed change.

Young v. Fordice, 520 U.S. 273, 285 (1993) (internal citations omitted).

17 *See also Sierra Club v. U.S. Army Corps of Eng'rs.*, 701 F.2d 1011 (2d Cir. 1983) (Corps was poised to fill in a "highly significant and productive habitat" for striped bass in the Hudson River, which was the second most important contributor of those fish in the Atlantic Coast fishery), *Found. on Econ. Trends v. Weinberger*, 610 F. Supp. 829 (D.D.C. 1985) (finding that the Army had failed to consider "serious and farreaching" risks relating to the use of pathogenic agents and toxins at a test laboratory), and *Sierra Club v. Coleman*, 405 F. Supp. 53, 55 (D.D.C. 1975) (finding that the Federal Highway Administration failed to adequately address the risks of aftosa, which the record revealed could have resulted in the destruction of 25% of North American livestock if not adequately contained).

Moreover, the NEPA process can and often does make a substantive difference. Again, in *Methow Valley* this Court deemed that prospect "almost certain." 490 U.S. at 350. Indeed, as this Court noted in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 n.7 (1992), it is that very possibility that gives those who live near proposed federal projects redressability for Article III purposes.

Courts have always construed the elements required for equitable relief in a flexible fashion, with due deference to trial court judges. As seen above, the "likelihood of irreparable injury" standard is perfectly well suited to averting substantial risks of significant harm, even absent a preponderant likelihood that the harm will come to pass. In the NEPA context, there may certainly be some cases where the threat of significant harm is so minor that the legal injury any potential plaintiffs could suffer should not, by itself, be deemed to meet the irreparable injury requirement. This case, however, is not one of them.

Respectfully submitted,

Allison M. LaPlante
Counsel of Record
Pacific Environmental
Advocacy Center
10015 S.W. Terwilliger
Boulevard
Portland, OR 97219
503-768-6894
laplante@lclark.edu

Nathaniel S.W. Lawrence
Natural Resources
Defense Council
3723 Holiday Drive S.E.
Olympia, WA 98501
360-534-9900

APPENDIX

Description of *Amici Curiae*

The Natural Resources Defense Council is one of the nation's leading environmental organizations, with 1.2 million members and supporters. Its mission is to safeguard the Earth: its people, its plants and animals and the natural systems on which all life depends.

Craig N. Johnston is a professor of law at Lewis & Clark Law School, where he teaches courses in environmental law and environmental enforcement, among other courses. Prof. Johnston also has coauthored casebooks in both environmental law and hazardous waste law.

Michael C. Blumm is a professor of law at Lewis & Clark Law School, where he teaches property, legal history and other courses. Professor Blumm has written widely on environmental issues.

David W. Case is an associate professor of law at the University of Mississippi, where he teaches civil procedure, contracts, and environmental law. He has also written extensively in the field of environmental law.

Jamison E. Colburn is a professor of law at Pennsylvania State University, where he teaches constitutional law, administrative law, and environmental law. He has written widely on administrative and environmental issues.

William F. Funk is a professor of law at Lewis & Clark Law School, where he teaches environmental law and other courses. Prof. Funk has coauthored casebooks in constitutional law, environmental law and administrative law.

David K. Mears is an associate professor of law at Vermont Law School, where he teaches property and environmental law. Professor Mears also directs the law school's Environmental and Natural Resources Law Clinic.

Patrick A. Parenteau is a professor of law at Vermont Law School, where he is senior counsel to the school's Environment and Natural Resources Law Clinic. Prof. Parenteau also teaches many courses, including one on environmental litigation.

John T. Parry is a professor of law at Lewis & Clark Law School, where he teaches criminal law, civil procedure, and other courses. Professor Parry has also written several books on the law of torture.

Melissa A. Powers is an assistant professor of law at Lewis & Clark Law School. Professor Powers teaches torts and energy law, among other courses. She has coauthored a casebook on climate change and the law.

Mary C. Wood is the Phillip H. Knight Professor at the University of Oregon School of law. Prof. Wood teaches and publishes in the fields of property, environmental, and Indian law.