

# Hazy Shades of *Winter*: Resolving the Circuit Split over Preliminary Injunctions

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\* Cf. SIMON & GARFUNKEL, *A Hazy Shade of Winter*, on BOOKENDS (Columbia Records 1968).

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## I. INTRODUCTION

The preliminary injunction is an extraordinarily powerful remedy. After only an initial hearing, a court can command the nonmovant to perform—or to refrain from performing—an action, enforceable by criminal contempt.<sup>1</sup> This supposedly temporary form of relief is often, in practical terms, dispositive of the case because the preliminary injunction remains in effect unless and until a subsequent decision vacates it.<sup>2</sup>

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1. FED. R. CIV. P. 65(a); Morton Denlow, *The Motion for a Preliminary Injunction: Time for a Uniform Federal Standard*, 22 REV. LITIG. 495, 498–99 (2003).

2. See John Castles III, *Interlocutory Injunctions in Flux: A Plea for Uniformity*, 34 BUS. LAW. 1359, 1359 (1979) (explaining that the power to enjoin a corporate transaction temporarily is effectively a final decision); Denlow, *supra* note 1, at 532 (arguing that a case may essentially be over once a preliminary injunction issues because the parties may not be able to afford two rounds of trials or the event at issue may be resolved before a trial on the merits can be held); Lea B. Vaughn, *A Need for Clarity: Toward a New Standard for Preliminary Injunctions*, 68 OR. L. REV. 839, 852 (1989) (arguing that the backlog of federal civil cases encourages parties to use the preliminary injunction as a way to obtain a hearing on their case quickly); Arthur D. Wolf, *Preliminary Injunctions: The Varying Standards*, 7 W. NEW ENG. L. REV. 173, 231–32 (1984) (arguing that in evaluating the likelihood of success on the merits, appellate courts often discuss

A few examples illustrate the power of the preliminary injunction. Two recent, high-profile preliminary injunctions involved controversial state legislation addressing the issue of illegal immigration. In April 2010, the Arizona legislature passed, and Governor Jan Brewer signed, Senate Bill 1070 (“S.B. 1070”), the Support Our Law Enforcement and Safe Neighborhoods Act.<sup>3</sup> The federal government sought a preliminary injunction to restrain Arizona from enforcing portions of S.B. 1070, on the grounds that federal immigration law preempted S.B. 1070.<sup>4</sup> Judge Susan Bolton of the U.S. District Court for the District of Arizona granted in part and denied in part the motion for a preliminary injunction.<sup>5</sup> She issued a preliminary injunction enjoining portions of sections 2, 3, 5, and 6 of S.B. 1070, which: require police officers to make reasonable attempts to determine a person’s immigration status when the officers have a reasonable suspicion that the person they stopped, detained, or arrested is unlawfully in the United States; make it a crime for an immigrant to fail to apply for or carry alien registration papers; make it a crime for an unauthorized alien to solicit, apply for, or perform work; and authorize police officers to make warrantless arrests where they have probable cause to believe that the person has committed an offense that makes the person removable from the United States.<sup>6</sup> The U.S. Court of Appeals for the Ninth Circuit affirmed the District Court’s decision.<sup>7</sup> The Supreme Court granted certiorari on December 12, 2011; the preliminary injunction will remain in effect until the Supreme Court issues a decision.<sup>8</sup>

Similarly, in June 2011, the Alabama legislature passed, and Governor Robert Bentley signed, House Bill 56 (“H.B. 56”), the Beason-Hammon Alabama Taxpayer and Citizen Protection Act, which also seeks to discourage illegal immigration.<sup>9</sup> The majority of its provisions were scheduled to become effective on September 1, 2011, but Judge Sharon Blackburn of the U.S. District Court for the

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the merits so thoroughly that it is unlikely that on remand the trial court would decide the merits differently than the appellate court).

3. United States v. Arizona, 703 F. Supp. 2d 980, 985 (D. Ariz. 2011).

4. *Id.* at 986.

5. *Id.* at 987.

6. *Id.*

7. United States v. Arizona, 641 F.3d 339, 344 (9th Cir. 2011), *cert. granted*, No. 11–182, 2011 WL 3556224, at \*1 (Dec. 12, 2011).

8. Arizona v. United States, No. 11–182, 2011 WL 3556224, at \*1 (Dec. 12, 2011) (order granting petition for writ of certiorari).

9. United States v. State, No. 2:11–CV–2746–SLB, 2011 WL 4469941, at \*1 (N.D. Ala. Sept. 28, 2011).

Northern District of Alabama temporarily restrained their enforcement until September 29, 2011.<sup>10</sup> On September 28, 2011, Judge Blackburn granted in part and denied in part the United States' and the private plaintiffs' motion for a preliminary injunction seeking to enjoin the enforcement of portions of H.B. 56 on the basis of federal preemption.<sup>11</sup> Judge Blackburn issued a preliminary injunction preventing sections 11(a), 13, 16, and 17 from taking effect.<sup>12</sup> These sections make it a crime for an unauthorized alien to apply for, solicit, or perform work; make it a crime to harbor or transport an unauthorized alien or encourage an unauthorized alien to come to Alabama; forbid employers from claiming as tax deductions any wages paid to unauthorized aliens; and establish a civil cause of action against an employer who fails to hire or discharges a U.S. citizen or a legal alien while hiring or retaining an unauthorized alien.<sup>13</sup>

Preliminary injunctions are by no means used only to enjoin enforcement of legislation, however. Movants seek preliminary injunctions in a wide variety of areas, including trademark,<sup>14</sup> patent,<sup>15</sup> securities,<sup>16</sup> and environmental law.<sup>17</sup> Yet federal courts wield this formidable remedy without a uniform set of standards. The federal courts generally agree that they should consider four factors when ruling on a preliminary injunction: (1) the threat of irreparable harm to the movant if the court denies the preliminary injunction; (2) the balance between this irreparable harm and the harm the court would inflict on the nonmovant by granting the injunction; (3) the probability that the movant will succeed on the merits; and (4) the effect of the

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10. *Id.*

11. *Id.* at \*2.

12. *Id.*

13. *Id.* at \*1–2. The United States and private plaintiffs also sought an injunction pending appeal of the six sections of H.B. 56 not enjoined by the district court. *United States v. Alabama*, No. 11–14532–CC, 2011 WL 4863957, at \*1 (11th Cir. Oct. 14, 2011). The Eleventh Circuit granted in part and denied in part the motion, and enjoined Alabama from enforcing Sections 10 and 28 of H.B. 56. *Id.* at \*6.

14. *Corr. Officers' Benevolent Ass'n v. Palmieri*, No. 11 Civ. 7664(LAK), 2012 WL 279484, at \*3 (S.D.N.Y. Jan. 30, 2012).

15. *See, e.g., Jack Guttman, Inc. v. KopyKake Enters., Inc.*, 302 F.3d 1352, 1362–63 (Fed. Cir. 2002) (vacating the district court's denial of a preliminary injunction and remanding the case for consideration of irreparable harm and balance of the hardships).

16. *Dynamics Corp. of Am. v. CTS Corp.*, 637 F. Supp. 406, 419 (N.D. Ill. 1986), *rev'd sub nom.* *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 75 (1987).

17. *Lands Council v. McNair*, 494 F.3d 771, 780 (9th Cir. 2008) (reversing district court's denial of preliminary injunction and remanding for entry of preliminary injunction), *vacated on reh'g en banc*, 537 F.3d 981 (9th Cir. 2008).

court's decision on the public interest.<sup>18</sup> Although courts usually examine these four traditional factors, they differ in how they characterize and apply the factors.<sup>19</sup> Some federal circuits require a movant to establish each of the four factors independently using a “sequential” test.<sup>20</sup> Other circuits examine all four factors, but evaluate them using an overall “balancing” test.<sup>21</sup> Still other circuits use a hybrid of these two approaches, requiring a movant to establish one or two of the factors and then balancing the remaining factors under a “threshold” test.<sup>22</sup> In this Note, the term “sliding scale” encompasses both balancing and threshold tests.

The Supreme Court has had numerous opportunities to enunciate a uniform federal standard for preliminary injunctions but has repeatedly declined to do so, instead addressing only the factor at stake in the case.<sup>23</sup> While this approach may exemplify judicial restraint, it has also left the lower federal courts to develop their own diverging tests. The circuit courts' differing standards likely lead to inconsistent judgments<sup>24</sup>—raising fundamental fairness issues—and may also encourage forum-shopping.<sup>25</sup>

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18. 11A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2948 (2d ed. 1987).

19. See Denlow, *supra* note 1, at 509 (explaining that not all circuits require the independent establishment of all four factors).

20. The Fourth, Fifth, Eleventh, and sometimes the Third, Ninth, and Tenth Circuits take this approach.

21. The Sixth, Eighth, D.C., and sometimes the Tenth Circuits take this approach.

22. The First, Second, Seventh, and sometimes the Third and Ninth Circuits take this approach.

23. *E.g.*, Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 332–33 (1999) (declining to weigh arguments in favor or against issuing a preliminary injunction in this context and finding that because the remedy at issue was historically unavailable in equity, the district court lacked authority to issue the preliminary injunction); Hecht Co. v. Bowles, 321 U.S. 321, 328–31 (1944) (stressing the flexibility of courts' equity powers while finding that the statute did not mandate issuance of an injunction and remanding to the circuit court to determine whether the district court abused its discretion in dismissing the complaint).

24. See Vaughn, *supra* note 2, at 840 (arguing that courts' use of different standards affects the outcome of cases, leading to inconsistency and confusion).

25. For instance, in *Center for Biological Diversity v. Rural Utilities Service*, No. C-08-1240 MMC, 2008 WL 2622868, at \*1 (N.D. Cal. June 27, 2008), the district court granted defendants' motion to transfer the case from the Northern District of California to the Eastern District of Kentucky, where the operative facts actually occurred. The judge commented, “Significantly, plaintiffs cite no public factor that weighs in favor of retention of the action in this District.” *Id.* This suggests that one reason, and perhaps the only reason, the plaintiffs filed in California was the Ninth Circuit's more permissive preliminary injunction standard, although they could not assert that as a legitimate reason for keeping the case in California. The liberal venue provisions governing federal suits allow a plaintiff considerable latitude to bring a case in a jurisdiction with a more plaintiff-friendly preliminary injunction standard. See 28 U.S.C. § 1391 (2011).

Three recent Supreme Court decisions provide new clues as to which preliminary injunction test the Court prefers and have opened a split in the circuit courts regarding whether these decisions foreclose sliding-scale preliminary injunction tests. In *Winter v. Natural Resources Defense Council, Inc.*, the Court struck down part of the Ninth Circuit's preliminary injunction test, which had allowed the movant the chance to prevail by showing only a "possibility" of irreparable harm if he also demonstrated a strong likelihood of prevailing on the merits.<sup>26</sup> The Supreme Court held that a plaintiff seeking a preliminary injunction must always show that irreparable harm is "likely," not merely "possible."<sup>27</sup> It enunciated the preliminary injunction test as follows: "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest."<sup>28</sup> The Supreme Court briefly addressed the success-on-the-merits factor in two other recent cases, *Munaf v. Geren* and *Nken v. Holder*, which are discussed at length in Part III.

The circuits have split regarding how to interpret *Winter*, *Munaf*, and *Nken*. These cases are most significant for those circuits that used balancing or threshold tests prior to *Winter*, because *Winter*'s plain language points to a sequential test. The Fourth Circuit has held that *Winter* invalidated its longstanding threshold test and instead required that a movant establish each of the four traditional factors (that is, a sequential test).<sup>29</sup> The Second and Seventh Circuits, however, have held that their own sliding-scale tests remain viable after *Winter*. In *Citigroup Global Markets, Inc. v. VCG Special Opportunities Master Fund, Ltd.*, the Second Circuit noted that *Munaf*, *Winter*, and *Nken* "have not undermined [the Supreme Court's] approval of the more flexible approach" and that "[n]one of the three cases comments at all, much less negatively, upon the application of a preliminary injunction standard that softens a strict 'likelihood' [of success] requirement in cases that warrant it."<sup>30</sup> In *Judge v. Quinn*, after reciting *Winter*'s test, the Seventh Circuit commented, "These considerations are interdependent: the greater the

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26. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 21–22 (2008).

27. *Id.*

28. *Id.* at 20.

29. *Real Truth About Obama, Inc. v. FEC*, 575 F.3d 342, 346–47 (4th Cir. 2009), *vacated on other grounds*, 130 S. Ct. 2371 (2010).

30. *Citigroup Global Mkts, Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 37 (2d Cir. 2010).

likelihood of success on the merits, the less net harm the injunction must prevent in order for preliminary relief to be warranted.”<sup>31</sup>

The Ninth Circuit, whose irreparable-harm formulation *Winter* overruled, has developed an intracircuit split over whether *Winter* requires a sequential test or leaves room for a modified sliding-scale test. In *DISH Network Corp. v. Federal Communications Commission*, the Ninth Circuit held that *Winter* requires a movant to “demonstrate that it meets all four of the elements of the preliminary injunction test.”<sup>32</sup> But in *Alliance for the Wild Rockies v. Cottrell*, a different Ninth Circuit panel held that a movant could prevail by showing only “serious questions going to the merits,” rather than a likelihood of prevailing on the merits, so long as he also showed irreparable harm, that the injunction was in the public interest, and that the balance of the hardships tipped *sharply* toward him.<sup>33</sup>

This Note discusses whether sliding-scale preliminary injunction tests can—and should—survive *Winter*, *Munaf*, and *Nken*. Part II provides a brief history of preliminary injunctions, including their origin in the English Courts of Chancery and their development in the United States. Part III supplies additional context for the *Winter*, *Munaf*, and *Nken* decisions. Part IV examines the circuit courts’ differing interpretations of these cases’ effect on their sliding-scale tests. Part V proposes that the Supreme Court adopt in clear terms the sequential test it stated in *Winter*, but allow courts to use the Ninth Circuit’s *Alliance* serious-questions test in a few narrow, compelling circumstances.

## II. A BRIEF HISTORY OF PRELIMINARY INJUNCTIONS

An injunction is a court order that commands the nonmovant to do or to refrain from doing a particular action.<sup>34</sup> Federal courts issue three basic types of injunctions: temporary restraining orders (“TROs”), preliminary injunctions, and permanent injunctions.<sup>35</sup> A TRO is usually sought and granted on an ex parte basis and operates to prevent immediate irreparable harm until the court can hold a

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31. *Judge v. Quinn*, 612 F.3d 537, 546 (7th Cir. 2010).

32. *DISH Network Corp. v. FCC*, 653 F.3d 771, 776 (9th Cir. 2011).

33. *Alliance for the Wild Rockies v. Cottrell*, 622 F.3d 1045, 1053 (9th Cir. 2010), *reh’g denied*, 632 F.3d 1127 (9th Cir. 2011) (withdrawing and replacing prior opinion on denial of rehearing en banc).

34. WILLIAM WILLIAMSON KERR, A TREATISE ON THE LAW AND PRACTICE OF INJUNCTIONS IN EQUITY 11 (1871).

35. WRIGHT & MILLER, *supra* note 18, § 2941.

preliminary injunction hearing.<sup>36</sup> It is available for a maximum of fourteen days, although a court may, for good cause, extend it for another fourteen days.<sup>37</sup> In contrast, courts issue a preliminary injunction following notice to the nonmoving party and after a hearing and argument, and it is effective until superseded by a decision on the merits.<sup>38</sup> Appellate courts review the grant or denial of a preliminary injunction for abuse of discretion.<sup>39</sup> Although courts and commentators have offered several rationales, the basic purpose of a preliminary injunction is to protect the movant from irreparable injury that would occur before a full trial took place, absent the injunction.<sup>40</sup> In other words, a preliminary injunction attempts to protect the court's ability to render a meaningful decision on the merits following a full trial.<sup>41</sup> Courts issue a permanent injunction only after a full trial on the merits.<sup>42</sup> This Note focuses exclusively on preliminary injunctions. This Part briefly examines the historical development of preliminary injunctions from eighteenth-century England to the present day.

### A. *From England to America*

The creature we now recognize as a preliminary injunction evolved, like so much of American jurisprudence, from English origins. A preliminary injunction is an equitable remedy derived from the system of remedies administered by the English Court of Chancery at the time the United States gained its independence.<sup>43</sup> The Court of Chancery developed in England as the chancellor, a high minister of the king, regularized the procedure for evaluating petitions for the king's personal justice.<sup>44</sup> Chancery could provide plaintiffs with remedies not available in the common law courts, which were limited to providing damages.<sup>45</sup> Yet, there were objections to chancery;

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36. FED. R. CIV. P. 65(b); WRIGHT & MILLER, *supra* note 18, § 2941.

37. FED. R. CIV. P. 65(b)(2).

38. *Id.* at 65(a)(1); WRIGHT & MILLER, *supra* note 18, § 2941.

39. *Brown v. Chote*, 411 U.S. 452, 457 (1973).

40. WRIGHT & MILLER, *supra* note 18, § 2947.

41. *Id.*

42. *Id.* at § 2941.

43. *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 (1999).

44. DOUGLAS LAYCOCK, *THE DEATH OF THE IRREPARABLE INJURY RULE* 19 (1991) (citing historical sources); see Kevin C. Kennedy, *Equitable Remedies and Principled Discretion: The Michigan Experience*, 74 U. DET. MERCY L. REV. 609, 610–11 (1997) (discussing the origins of the equity system and the role of chancery courts).

45. *Denlow*, *supra* note 1, at 500.

common law judges wanted to preserve their authority, and individuals doubted a court system tied to the power of the king.<sup>46</sup> Consequently, chancery developed a rule whereby a movant could obtain equitable relief only if he could show he had no adequate remedy at law (called the “adequacy doctrine”).<sup>47</sup>

Uniform standards for preliminary injunctions across different areas of the law did not develop in England until the nineteenth century.<sup>48</sup> These standards were a response to the rising demand for injunctions, the need to maintain consistency among the chancery judges, the trend toward systematizing legal rules, and the continuing desire to cabin equity’s discretion.<sup>49</sup> As part of this growing systematization, chancery became increasingly open to granting preliminary injunctions to movants whose legal rights were not absolutely clear after an initial hearing.<sup>50</sup> This greater receptivity to granting interim relief was largely due to chancery’s reluctance to reach a final decision on the merits without a full trial, although it also had its origins in chancery’s historic unwillingness to rule on common law rights.<sup>51</sup> As Francis Hilliard stated in his 1865 treatise, “The object of a preliminary injunction is to prevent some threatening irreparable mischief, until an opportunity for a full and deliberate investigation.”<sup>52</sup> Chancery therefore began to predict the likelihood that the movant would eventually succeed on the merits, rather than assessing the merits at the initial hearing.<sup>53</sup> As William Kerr noted in his 1867 treatise on equity:

In interfering by interlocutory injunction, the Court does not in general profess to anticipate the determination of the right, but merely gives it as its opinion that there is a substantial question to be tried . . . . It is enough if he [the movant] can show that he has a fair question to raise as to the existence of the right which he alleges, and can

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46. LAYCOCK, *supra* note 44, at 19–20.

47. FRANCIS HILLIARD, *THE LAW OF INJUNCTIONS* § 23, at 15–17 (Philadelphia, Kay & Bros. 1865); KERR, *supra* note 34, at 3; 1 THOMAS CARL SPELLING, *A TREATISE ON EXTRAORDINARY RELIEF IN EQUITY AND AT LAW* § 4, at 4 (Boston, Little, Brown & Co. 1893).

48. See John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525, 527, 532 (1978) (“The idea that there should be a single standard for all preliminary injunction cases emerged in nineteenth-century England.”).

49. *Id.* at 532.

50. *Id.*

51. See *id.* at 533 (“The rationale for predicting the strength of the plaintiff’s case rather than adjudicating it on the spot showed signs of shifting from a reluctance to pass on common law rights to an unwillingness to reach the merits without a full hearing.”).

52. HILLIARD, *supra* note 47, § 9, at 7.

53. Leubsdorf, *supra* note 48, at 532–33.

satisfy the Court that the property should be preserved in its present actual condition, until such question can be disposed of.<sup>54</sup>

The notion of irreparable injury also began to take hold, and when invoking it in the context of preliminary injunctions, judges started to define it in a way that distinguished preliminary injunctions from permanent injunctions.<sup>55</sup> This is an important modern-day distinction as well: in order to obtain a preliminary injunction, the movant must show that he would suffer an injury prior to obtaining a permanent injunction that a permanent injunction would be insufficient to remedy.<sup>56</sup>

American colonial courts adopted the English system of common law and chancery courts, as well as English equity principles.<sup>57</sup> The Judiciary Act of 1789 gave American federal courts jurisdiction over all suits in equity,<sup>58</sup> and the Supreme Court has held that this jurisdiction is equivalent to “the jurisdiction in equity exercised by the High Court of Chancery in England at the time of the adoption of the Constitution and the enactment of the original Judiciary Act.”<sup>59</sup> During the nineteenth century, the Supreme Court also held that courts should look to English equity law when no American precedent existed on a particular subject.<sup>60</sup> Wary of the equitable powers of the federal courts, Congress has since passed numerous statutes prohibiting courts from issuing certain types of

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54. KERR, *supra* note 34, at 12.

55. Leubsdorf, *supra* note 48, at 533–34.

56. LAYCOCK, *supra* note 44, at 113 (“[T]he only injury that counts is injury that cannot be prevented after a more complete hearing at the next state of the litigation.”). For instance, in *Bragg v. Robertson*, 54 F. Supp. 2d 635, 639 (S.D. W. Va. 1999), the movants argued that “without preliminary injunctive relief, mining at Spruce Fork will bury a living stream and a forested hollow, permanently destroying the indigenous wildlife and flora as well as the unique topography of this portion of southern West Virginia.” A permanent injunction would come too late to prevent this harm.

57. LAYCOCK, *supra* note 44, at 21; Leubsdorf, *supra* note 48, at 538 (“Lacking both coherent native analysis and the stream of diverse cases that fostered the evolution of the law in England, many authorities sought to follow the English precedents and treatises.”).

58. The Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 78.

59. *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 (1999) (quoting ARMISTEAD M. DOBIE, *HANDBOOK OF FEDERAL JURISDICTION AND PROCEDURE* 660 (1928)).

60. *Cf. Russell v. Farley*, 105 U.S. 433, 437 (1881) (stating that U.S. Courts of Appeals are governed by federal rules of equity, and “when these are silent, by the practice of the High Court of Chancery in England prevailing when the equity rules were adopted, so far as the same may reasonably be applied”); 21 WRIGHT & GRAHAM, *FEDERAL PRACTICE & PROCEDURE: EVIDENCE* § 5002 (2d ed. 1995) (stating that Equity Rule 33 provided that for those matters not covered by the equity rules promulgated by the Supreme Court in 1822, the circuit courts shall be regulated by the practice of the High Court of Chancery in England).

injunctions.<sup>61</sup> For instance, the Anti-Injunction Act of 1793 bars federal courts from issuing injunctions to stay proceedings in state courts “except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.”<sup>62</sup>

In 1938, with the adoption of the Federal Rules of Civil Procedure, the dual American systems of law and equity merged.<sup>63</sup> Although Federal Rule of Civil Procedure 65 specifies the procedural mechanisms for obtaining injunctive relief, it does not provide any substantive criteria for federal courts to apply in evaluating a movant’s request for injunctive relief.<sup>64</sup> Therefore, federal courts continue to apply the principles adopted from English chancery and developed in American courts when exercising their equitable discretion.<sup>65</sup> These principles have coalesced into the four traditional factors mentioned in Part I: (1) likelihood of irreparable harm, (2) likelihood of success on the merits, (3) balance of the hardships, and (4) public interest.<sup>66</sup> Although nearly all federal courts examine these factors, the courts differ in the way they describe the factors and in the weight they give each factor.<sup>67</sup>

### *B. Equitable Principles*

Judges frequently invoke equitable principles to explain their decisions to grant or deny a preliminary injunction. The first principle, stated in nearly every case involving a preliminary injunction, is that an injunction is an “extraordinary” remedy,<sup>68</sup> “not a remedy which

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61. KIRSTEN STOLL-DEBELL ET AL., *INJUNCTIVE RELIEF: TEMPORARY RESTRAINING ORDERS AND PRELIMINARY INJUNCTIONS* 5 (2009). Other examples of anti-injunction statutes include the Tax Anti-Injunction Act of 1867 (current version at 26 U.S.C. § 7421(a) (2006)), the Tax Injunction Act of 1937 (current version at 28 U.S.C. § 1341 (2006)), the Norris-LaGuardia Act of 1932 (29 U.S.C. § 101 (2006)), and the Johnson Act of 1934 (current version at 28 U.S.C. § 1342 (2008)).

62. 28 U.S.C. § 2283 (2006).

63. STOLL-DEBELL ET AL., *supra* note 61, at 5.

64. *Id.*; *see also* FED. R. CIV. P. 65 (stating procedures for obtaining injunctions and restraining orders). Prior to the issuance of a preliminary injunction, the court must give notice to the nonmoving party, and the moving party must post bond. *Id.* at 65(a)(1), 65(c).

65. *Cf.* Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 322 (1999) (reversing the district court for providing a type of injunctive relief that was not historically available in equity).

66. STOLL-DEBELL ET AL., *supra* note 61, at 5–6.

67. *Id.*

68. *See* WRIGHT & MILLER, *supra* note 18, § 2942 (“[A]n injunction is regarded as an extraordinary remedy.”); *City of Harrisonville v. W.S. Dickey Clay Mfg. Co.*, 289 U.S. 334, 338 (1933) (discussing how a court may deny equitable relief even when it has found that one party

issues as of course.”<sup>69</sup> This notion is derived from equity’s origins as an alternative to the common law courts and from the guiding principle that equity could only be invoked if a plaintiff had no adequate remedy at law.<sup>70</sup> Now that law and equity have merged, the grant of a preliminary injunction is “less dependent on a showing that the legal remedy is inadequate,” but courts continue to repeat this phrase.<sup>71</sup> The notion of an injunction as an extraordinary remedy still serves to emphasize the idea that movants must make a strong showing on the four traditional factors in order for the court to grant a preliminary injunction. It also alludes to the notion that the successful movant must show that his injury cannot be remedied by a permanent injunction—because otherwise, there would be no need for a preliminary injunction.<sup>72</sup> Finally, a preliminary injunction is extraordinary because the court can alter the relative positions of the parties, sometimes dramatically, without the movant clearly establishing his entitlement to prevail on the merits.

Another equitable maxim is that courts issue preliminary injunctions to preserve the status quo.<sup>73</sup> Courts and commentators began to identify the preservation of the status quo as one purpose of a preliminary injunction during the nineteenth century.<sup>74</sup> Many modern commentators view the early use of the notion of preserving the status quo as merely describing the effect, not the purpose, of a preliminary

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has committed a tort upon the other); *see also* *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) (“A preliminary injunction is an extraordinary remedy never awarded as of right.”).

69. *City of Harrisonville*, 289 U.S. at 337–38; *accord Winter*, 555 U.S. at 32 (“An injunction is a matter of equitable discretion; it does not follow from success on the merits as a matter of course.” (citing *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982))); *Romero-Barcelo*, 456 U.S. at 311 (quoting *City of Harrisonville*, 289 U.S. at 337–38); *see also* *Munaf v. Geren*, 553 U.S. 674, 689–90 (2008) (stating that a preliminary injunction is an “extraordinary and drastic remedy” and that “it is never awarded as of right” (citing multiple sources)); *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (“It frequently is observed that a preliminary injunction is an extraordinary and drastic remedy . . . .” (quoting *WRIGHT & MILLER*, *supra* note 18, § 2942)); *HILLIARD*, *supra* note 47, § 16, at 10 (“[P]laintiffs are bound to make out a case showing a clear necessity for its exercise.” (citing *Auburn & Cato Plank Rd. Co. v. Douglass*, 12 Barb. 553, 555 (1850), *rev’d*, 9 N.Y. 444 (1854))).

70. *See supra* note 47 and accompanying text.

71. *WRIGHT & MILLER*, *supra* note 18, § 2941.

72. *LAYCOCK*, *supra* note 44, at 113.

73. *Cf.* Thomas R. Lee, *Preliminary Injunctions and the Status Quo*, 58 WASH. & LEE L. REV. 109, 110 (2001) (“One set of circuits says that the traditional role of such relief is the preservation of the ‘status quo,’ . . . . Another set of circuits rejects this view.”).

74. *Id.* at 127–33.

injunction<sup>75</sup> and criticize the calcification of this notion into a rule.<sup>76</sup> The Supreme Court has restated preservation of the status quo as “preserv[ing] the relative positions of the parties until a trial on the merits can be held.”<sup>77</sup>

Courts sometimes use the notion of preserving the status quo to distinguish between mandatory and prohibitory injunctions. When courts differentiate between these two types of injunctions, they typically do so in the course of stating that mandatory injunctions are more difficult to obtain because they alter, rather than preserve, the status quo.<sup>78</sup> Yet mandatory injunctions are not always more disruptive than prohibitory ones.<sup>79</sup> As the D.C. Circuit pointed out in *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, whether a mandatory or prohibitory injunction will preserve or alter the status quo depends on whether the status quo is a “condition of action” or a “condition of rest.”<sup>80</sup> Another way of saying this is that it all depends on the point in time at which the court measures the status quo. For example, if the action challenged is the granting of a federal permit and if the status quo is measured prior to the granting of the permit, then preserving the status quo favors the movant. If the status quo is measured after the granting of the permit, however, then preserving the status quo (that is, the right to engage in the permitted action) favors the nonmovant.

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75. *Id.* at 129–30 (noting that Kerr’s treatise stated that interlocutory injunctions have the effect and object of preserving the status quo, but arguing that “[t]here is no reason to infer that Kerr meant to ascribe doctrinal significance to the status quo”).

76. Leubsdorf, *supra* note 48, at 546 (“Emphasis on preserving the status quo is a habit without a reason. To freeze the existing situation may inflict irreparable injury on a plaintiff deprived of his rights or a defendant denied the right to innovate. The status quo shibboleth cannot be justified as a way to limit interlocutory judicial meddling, because a court interferes just as much when it orders the status quo preserved as when it changes it. The test is not even easy to apply, since it eddies off into conundrums about what status is decisive.” (citations omitted)).

77. *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981).

78. *See* *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1209 (10th Cir. 2009) (recognizing that “mandatory preliminary injunctions are traditionally disfavored” (citing *Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1258–59 (10th Cir. 2005)); Leubsdorf, *supra* note 48, at 535 (“Related to concern with the status quo was the tendency . . . to avoid preliminary injunctions that were ‘mandatory’ rather than ‘prohibitory.’”).

79. Leubsdorf, *supra* note 48, at 535 (“Courts resisted mandatory relief when it would force a defendant to make innovations. Talk about mandatory and prohibitory injunctions thus reflected, however waveringly, the same reluctance to decree burdensome relief without a full hearing that was pervading judicial thought on interlocutory remedies.” (citations omitted)).

80. 746 F.2d 816, 830 n.21 (D.C. Cir. 1984).

Courts and legislatures<sup>81</sup> have sometimes tipped the scales in favor of preliminary injunctions—for instance, when courts presume irreparable harm. Some circuits presume irreparable harm when the movant can demonstrate a likelihood of success on a claim alleging violation of constitutional rights.<sup>82</sup> Commentators criticize court-formulated presumptions of irreparable harm as depriving the nonmovant of his rights based only on a generalized assumption about an entire category of cases.<sup>83</sup> Recently, the Supreme Court appeared receptive to these arguments. In *Monsanto Co. v. Geertson Seed Farms*, the Court overturned the presumption of irreparable injury whenever there is a violation of the National Environmental Policy Act.<sup>84</sup> Many courts used to automatically presume irreparable harm in patent, trademark, and copyright infringement cases if the movant showed a likelihood of success on the merits of his claim.<sup>85</sup> However, in *eBay, Inc. v. MercExchange, L.L.C.*, the Supreme Court held that this presumption was invalid in the context of permanent injunctions.<sup>86</sup> Several U.S. Courts of Appeals have applied *eBay* to preliminary injunctions, holding that a finding of likely success on the merits in a patent, trademark, or copyright infringement case does not give rise to a presumption of likely irreparable harm.<sup>87</sup> Congress and state legislatures can also tip the scales by enacting statutes that empower or require courts to enter injunctive relief in certain circumstances.<sup>88</sup>

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81. See, e.g., FLA. STAT. § 542.33 (2007) (“[U]se of specific trade secrets, customer lists, or direct solicitation of existing customers shall be presumed to be an irreparable injury and may be specifically enjoined.”).

82. E.g., *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d. Cir. 1996); see also *Paulsen v. Cnty. of Nassau*, 925 F.2d 65, 68 (2d Cir. 1991) (noting that the loss of First Amendment rights “unquestionably constitutes irreparable injury” (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976))).

83. Cf. *Leubsdorf*, *supra* note 48, at 561–63 (“To enjoin on the basis of an irrebuttable presumption of irreparable injury, without a full hearing or a decision that immediate relief is actually essential, may forever deprive a defendant of rights Congress meant to leave him. It may also violate the due process clause. . . . The statutory scheme can help identify and weigh irreparable injuries. Sometimes, a rebuttable presumption of injury is appropriate.”).

84. 130 S. Ct. 2743, 2757 (2010).

85. STOLL-DEBELL ET AL., *supra* note 61, at 6.

86. 547 U.S. 388, 391–93 (2006) (“[T]his Court has consistently rejected invitations to replace traditional equitable considerations with a rule that an injunction automatically follows a determination that a copyright has been infringed.”).

87. E.g., *Flexible Lifeline Sys., Inc. v. Precision Lift, Inc.*, 654 F.3d 989, 995 (9th Cir. 2011); *Salinger v. Colting*, 607 F.3d 68, 79 (2d Cir. 2010).

88. For instance, the Petroleum Marketing Practices Act provides that a court “shall grant a preliminary injunction” if: (1) a franchisee shows his franchise has been terminated or not renewed, (2) “there exist sufficiently serious questions going to the merits to make such questions a fair ground for litigation,” and (3) the court finds that the harm to the franchisor

In these instances, traditional equitable factors have less weight, and the court must grant the injunction if the movant satisfies the statutory requirements, which often include some of the traditional equitable factors.<sup>89</sup>

On the other hand, courts sometimes require movants to make a heightened showing in order to obtain certain kinds of preliminary injunctions. As noted previously, some circuits require a movant seeking a mandatory injunction, or an injunction the court believes alters the status quo, to make a higher showing of the four traditional factors.<sup>90</sup> Other circuits have rejected this bifurcated standard.<sup>91</sup>

### C. *The Supreme Court's Hazy Holdings*

The Supreme Court has never articulated a clear preliminary injunction test, preferring to address only the factor at issue in a particular case, rather than how the factors fit together.<sup>92</sup> The Court has emphasized the importance of each of the four traditional factors at some point and has endorsed a flexible approach in some cases<sup>93</sup> and a stricter approach<sup>94</sup> in others, so the panoply of federal standards is an understandable result. Each circuit can find ample Supreme Court text—often dicta—supporting its own preliminary injunction test, simply because the precedent is so varied.

For example, in *Ohio Oil Co. v. Conway*, the Court appeared to endorse a more generous, flexible standard:

Where the questions presented by an application for an interlocutory injunction are grave, and the injury to the moving party will be certain and irreparable, if the application be denied and the final decree be in his favor, while if the injunction be granted the injury to the opposing party, even if the final decree be in his favor, will be

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would be less than that to the franchisee if the preliminary injunction is granted. 15 U.S.C. § 2805(b)(2).

89. STOLL-DEBELL ET AL., *supra* note 61, at 9.

90. *Id.* at 8 (“[T]he Second, Ninth, and Tenth Circuits adjust the odds against mandatory injunctions, which require a party to act or alter the status quo, by requiring a movant to make a heightened showing of the factors that govern the grant of injunctive relief.”); *see, e.g.*, SCFC ILC, Inc. v. Visa USA, Inc., 936 F.2d 1096, 1098–99 (10th Cir. 1991) (requiring a movant seeking a mandatory injunction to establish that the traditional factors weigh “heavily and compellingly” in his favor).

91. *See, e.g.*, United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth., 163 F.3d 341, 348 (6th Cir. 1998) (rejecting a heightened standard for injunctions that alter the status quo in favor of a consistent focus on preventing injury).

92. *See infra* notes 96–104 and accompanying text.

93. *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944).

94. *See Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (“[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion.” (quoting WRIGHT & MILLER, *supra* note 18, § 2948)).

inconsiderable, or may be adequately indemnified by a bond, the injunction usually will be granted.<sup>95</sup>

*Ohio Oil* suggests that if the movant can show he will likely suffer irreparable harm in the absence of a preliminary injunction and that the preliminary injunction will cause only “inconsiderable” harm to the nonmovant, then the injunction should be granted, even if the movant can show only “grave” questions on the merits, rather than likely success on the merits. The Second Circuit has interpreted *Ohio Oil* as an implicit endorsement of a serious-questions test.<sup>96</sup> The Supreme Court also emphasized the importance of flexibility to equity in *Hecht Co. v. Bowles*: “The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it.”<sup>97</sup> *Hecht Co.*, however, addresses the Court’s flexibility in shaping the injunction to fit the circumstances of the case, not flexibility in deciding whether to grant the injunction in the first instance.

Circuit courts with stricter preliminary injunction tests can also cite ample Supreme Court precedent supporting their approaches. In *Yakus v. United States*, the Court indicated that irreparable injury was necessary, but not sufficient, to obtain a preliminary injunction, stating, “The award of an interlocutory injunction by courts of equity has never been regarded as strictly a matter of right, even though irreparable injury may otherwise result to the plaintiff.”<sup>98</sup> In *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund*, however, the Court held that the equitable powers conferred by the Judiciary Act of 1789 did not include the power to create remedies unknown to equity jurisprudence at the time of the Act; the Court appeared to endorse a more demanding conception of preliminary injunctions: “We do not question the proposition that equity is flexible; but in the federal system, at least, that flexibility is confined within the broad boundaries of traditional equitable relief.”<sup>99</sup> In *Mazurek v. Armstrong*, the Court also emphasized the movant’s high burden, particularly with respect to showing likely success on the merits, quoting approvingly from a Wright and Miller treatise: “[A] preliminary

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95. *Ohio Oil Co. v. Conway*, 279 U.S. 813, 814 (1929).

96. *Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund, Ltd.*, 598 F.3d 30, 36–37 (2d Cir. 2010); *see supra* notes 30–31 and accompanying text.

97. *Hecht Co.*, 321 U.S. at 329.

98. *Yakus v. United States*, 321 U.S. 414, 440 (1944).

99. *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 322 (1999).

injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion.”<sup>100</sup>

As stated above, the Supreme Court has also emphasized the significance of each of the four traditional factors. In *Doran v. Salem Inn, Inc.*, the Court stressed that the movant must show “he will suffer irreparable injury and also that he is likely to prevail on the merits.”<sup>101</sup> A few years later, in *Weinberger v. Romero-Barcelo*, the Court dropped its emphasis on success on the merits from its articulation, stating, “[T]he basis for injunctive relief in the federal courts has always been irreparable injury and the inadequacy of legal remedies.”<sup>102</sup> *Weinberger* also emphasized the public interest: “In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.”<sup>103</sup> These varied past decisions opened the door to additional clarification from the Supreme Court, whose recent cases on preliminary injunctions have been only moderately illuminating.

### III. WINTER, MUNAF, AND NKEN: WHAT THEY HELD AND WHAT THEY LEFT UNRESOLVED

#### A. Winter v. Natural Resources Defense Council, Inc.: *A Likelihood, Not a Possibility, of Irreparable Harm*

Among the trio of recent Supreme Court cases this Note discusses, *Winter* is the case with the most significant implications for sliding-scale preliminary injunction tests. In *Winter*, environmental groups sought to enjoin the U.S. Navy from using midfrequency active sonar in training exercises off the coast of southern California, claiming that the sonar was injuring marine mammals.<sup>104</sup> The district

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100. *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (quoting *WRIGHT & MILLER*, *supra* note 18, § 2948).

101. *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975).

102. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) (citing *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506–07 (1959)).

103. *Id.* at 312.

104. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 12–14 (2008). This Note will not discuss *Winter*'s complex environmental law issues and convoluted procedural history. For more information, see Lisa Lightbody, Case Comment, *Winter v. Natural Resources Defense Council*, 33 HARV. ENVTL. L. REV. 593 (2009). See also Benjamin I. Narodick, Legal Update, *Winter v. Natural Resources Defense Council: Going into the Belly of the Whale of Preliminary Injunctions and Environmental Law*, 15 B.U. J. SCI. & TECH. L. 332 (2009).

court issued a preliminary injunction, which the Ninth Circuit upheld.<sup>105</sup> According to the Ninth Circuit, because the movants had demonstrated a strong likelihood of succeeding on the merits, they needed to show only a *possibility* of irreparable injury in the absence of the preliminary injunction.<sup>106</sup> The Supreme Court disagreed, holding that a movant must always demonstrate a *likelihood* of irreparable injury, not a mere *possibility*, regardless of the strength of the other factors.<sup>107</sup> The Court emphasized that even if the movants had shown a likelihood of irreparable injury and a likelihood of success on the merits, the public's national security interest and the Navy's interest "in effective, realistic training of its sailors" outweighed the movants' ecological, scientific, and recreational interests.<sup>108</sup> The fact that the movants' failure to prevail on the public-interest factor was sufficient, by itself, to doom their quest for a preliminary injunction suggests that the *Winter* court was performing a sequential test.<sup>109</sup> The Court stated the preliminary injunction test as follows: "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest."<sup>110</sup>

*Winter* holds that a movant must establish likely irreparable injury. While it states that a plaintiff must establish that he is "likely to succeed on the merits," it does not directly address the continuing viability of sliding-scale (that is, balancing and threshold) preliminary injunction tests. In her dissenting opinion, Justice Ginsburg stated her belief that the majority opinion did not foreclose sliding-scale tests:

Flexibility is a hallmark of equity jurisdiction. . . . Consistent with equity's character, courts do not insist that litigants uniformly show a particular, predetermined quantum of probable success or injury before awarding equitable relief. Instead, courts have evaluated claims for equitable relief on a "sliding scale," sometimes awarding relief based on a lower likelihood of harm when the likelihood of success is very high. This Court has never rejected that formulation, and I do not believe it does so today.<sup>111</sup>

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105. *Natural Res. Def. Council, Inc. v. Winter*, 527 F. Supp. 2d 1216, 1219 (C.D. Cal. 2008), *aff'd*, 518 F.3d 658, 696 (9th Cir. 2008).

106. *Natural Res. Def. Council, Inc. v. Winter*, 518 F.3d 658, 696 (9th Cir. 2008).

107. *Winter*, 555 U.S. at 22.

108. *Id.* at 23–24.

109. *Id.*

110. *Id.* at 20.

111. *Id.* at 51 (Ginsburg, J., dissenting).

Unsurprisingly, the circuits have split as to whether *Winter* forecloses sliding-scale tests, with the Fourth Circuit holding that *Winter* requires a movant to establish each of the four traditional factors independently<sup>112</sup> and the Second and Seventh Circuits, and certain panels of the Ninth Circuit, holding that some type of sliding-scale test survives *Winter*.<sup>113</sup>

*B. Munaf v. Geren: Likely Success on the Merits, Not Likely Jurisdiction*

Before delving into the circuit split over *Winter*, it is worth discussing two other recent Supreme Court cases involving preliminary injunctions, *Munaf v. Geren* and *Nken v. Holder*, to establish the limited nature of their holdings. In *Munaf v. Geren*, two habeas petitioners, Mohammad Munaf and Shawqi Omar, sought to enjoin their transfer from a detainee camp operated by the Multinational Force-Iraq to the custody of the Central Criminal Court of Iraq.<sup>114</sup> Omar had successfully obtained a preliminary injunction; Munaf had not.<sup>115</sup> The lower courts held that Omar satisfied the success-on-the-merits prong because the jurisdictional issues presented questions “so serious, substantial, difficult and doubtful, as to make them fair ground for litigation and thus for more deliberative investigation.”<sup>116</sup> The Supreme Court reversed the lower courts on this issue because serious *jurisdictional* questions are insufficient grounds for a preliminary injunction: “A difficult question as to jurisdiction is, of course, no reason to grant a preliminary injunction. . . . Indeed, if all a ‘likelihood of success on the merits’ meant was that the district court likely had jurisdiction, then preliminary injunctions would be the rule, not the exception.”<sup>117</sup>

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112. *Real Truth About Obama, Inc. v. FEC*, 575 F.3d 342, 346–47 (4th Cir. 2009), *cert. granted*, 130 S. Ct. 2371 (2010) (*vacating and remanding for further consideration in light of Citizens United v. FEC*, 130 S. Ct. 876 (2010)).

113. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134–35 (9th Cir. 2011) (holding that *Winter* does not foreclose all sliding-scale approaches toward granting a preliminary injunction); *Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund, Ltd.*, 598 F.3d 30, 35 (2d Cir. 2010) (identifying “flexibility” as the value of the Second Circuit’s approach); *Judge v. Quinn*, 612 F.3d 537, 546 (7th Cir. 2010) (describing the four *Winter* factors as “interdependent”).

114. *Munaf v. Geren*, 553 U.S. 674, 679–80 (2008).

115. *Id.* 681–85.

116. *Omar v. Harvey*, 416 F. Supp. 2d 19, 28 (D.D.C. 2006), *aff’d* 479 F.3d 1, 11 (D.C. Cir. 2007), *cert. granted sub nom. Geren v. Omar*, 552 U.S. 1074 (2007), and *vacated sub nom. Munaf v. Geren*, 553 U.S. 674 (2008).

117. *Munaf*, 553 U.S. at 690.

The Supreme Court stated that “a party seeking a preliminary injunction must demonstrate, among other things, ‘a likelihood of success on the *merits*.’ ”<sup>118</sup> This statement does not require a movant to demonstrate anything beyond what *Winter* already requires.<sup>119</sup> *Munaf* and *Winter* described the factor in a similar manner—as a likelihood, rather than a substantial likelihood, as some lower courts have described it—and portrayed it as one required factor among several. It does, however, appear to be a mandatory factor, as indicated by “must demonstrate.”<sup>120</sup>

On the other hand, the specific version of the success-on-the-merits factor the Supreme Court addressed in *Munaf* was the D.C. Circuit’s more relaxed serious-questions test. In contrast to its treatment of the Ninth Circuit’s possibility-of-irreparable-harm test in *Winter*, the Supreme Court in *Munaf* declined to overrule the D.C. Circuit’s serious-questions test.<sup>121</sup> This implies the acceptability of a more lenient version of the success-on-the-merits factor—in other words, the movant can demonstrate either a likelihood of success on the merits or serious questions going to the merits. It is possible, however, that the Supreme Court simply declined to rule on the validity of the D.C. Circuit’s serious-questions test because it did not need to do so to decide the case. This approach would be consistent with the Court’s historically minimalist manner of addressing injunctions.

C. *Nken v. Holder: Better-than-Negligible Chance of Success on the Merits*

The issue in *Nken* was which standard a judge should apply when considering whether to stay an alien’s removal, pending a ruling on the alien’s petition for review of the removal order.<sup>122</sup> The Court held that the traditional four-factor test for stays still governed, rejecting the Government’s argument that the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 made it more difficult to obtain a stay.<sup>123</sup> The traditional test for stays closely

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118. *Id.* (emphasis added).

119. *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (laying out four-factor test, including that movant is “likely to succeed on the merits”).

120. *Munaf*, 553 U.S. at 690.

121. *See id.* at 690–91 (holding that the district court abused its discretion when it granted a preliminary injunction “without even considering the merits of the underlying habeas petition”).

122. *Nken v. Holder*, 129 S. Ct. 1749, 1754–55 (2009).

123. *Id.* at 1756.

resembles the traditional test for preliminary injunctions.<sup>124</sup> In describing the traditional test for stays, the Supreme Court stated,

The first two factors [i.e., success on the merits and irreparable injury] of the traditional standard are the most critical. It is not enough that the chance of success on the merits be “better than negligible” . . . . Even petitioner acknowledges that “[m]ore than a mere ‘possibility’ of relief is required.” By the same token, simply showing some “possibility of irreparable injury” fails to satisfy the second factor. As the Court pointed out earlier this Term, the “‘possibility’ standard is too lenient.”<sup>125</sup>

The key question is whether the above paragraph applies only to stays of removal orders or also to preliminary injunctions. On the one hand, the paragraph is in the middle of a discussion of the traditional test for stays, which suggests that the Court was only describing stays.<sup>126</sup> In addition, only a few circuit courts have considered whether *Nken* has a substantive impact on preliminary injunctions, suggesting that most circuit courts do not believe *Nken*’s language is applicable to preliminary injunctions.<sup>127</sup> Furthermore, when the Supreme Court has cited *Nken*, it has done so in the context of stays, not preliminary injunctions.<sup>128</sup>

On the other hand, the Court in *Nken* quoted *Winter*, which suggests that perhaps it was describing both stays and preliminary injunctions in the quoted paragraph.<sup>129</sup> In any event, it seems that the “likely” in *Winter* requires a movant to show a higher level of potential success on the merits than “better than negligible,” so *Nken* may not have much impact in the preliminary injunction context. It is also important to remember that *Nken*’s test for stays requires the applicant to make a “strong showing that he is likely to succeed on the

124. *Id.* at 1761. The test is:

(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

*Id.* (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)).

125. *Id.* (citations omitted).

126. *Id.*

127. *See* *Respect Me. PAC v. McKee*, 622 F.3d 13, 15 (1st Cir. 2010) (citing the four considerations outlined in *Nken* for granting a stay); *Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund, Ltd.*, 598 F.3d 30, 34–38 (2d Cir. 2010) (including an extended discussion of *Nken* in the context of preliminary injunctions); *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1295 (D.C. Cir. 2009) (Kavanaugh, J., concurring) (discussing *Winter*, *Nken*, and *Munaf* as strongly suggesting invalidity of sliding-scale preliminary injunction tests).

128. When the Supreme Court has cited *Nken*, it has done so in the context of immigration. *See* *Kucana v. Holder*, 130 S. Ct. 827, 838 (2010); *United States v. Denedo*, 129 S. Ct. 2213, 2224 (2009); *Tesfagaber v. Holder*, 129 S. Ct. 2074 (2009).

129. *Nken*, 129 S. Ct. at 1761.

merits,”<sup>130</sup> which is just as high of a standard as, if not higher than, *Winter*’s “likely to succeed on the merits.”<sup>131</sup>

In his concurring opinion in *Nken*, Justice Kennedy more clearly rejected a balancing test: “When considering success on the merits and irreparable harm, courts cannot dispense with the required showing of one simply because there is a strong likelihood of the other. This is evident in the decisions of Justices of the Court applying the traditional factors.”<sup>132</sup> Again, it is not clear whether he was speaking only about stays or also about preliminary and permanent injunctions.

Given the ambiguity in the Supreme Court’s recent decisions, it is unsurprising that lower courts have developed diverging interpretations of these cases. The next Part examines this split, with a special focus on *Winter*.

#### IV. THE CIRCUITS SPLIT

Four circuit courts have weighed in on whether *Winter* forecloses sliding-scale preliminary injunction tests. The Fourth Circuit has held that *Winter* mandates a sequential preliminary injunction test and that therefore its longstanding threshold test is invalid. In contrast, the Seventh and Second Circuits have held that certain types of sliding-scale tests are compatible with *Winter*. The Ninth Circuit has split, with some panels holding that *Winter* requires a sequential test and others holding that a modified sliding-scale test is still viable. The Tenth and D.C. Circuits have refrained from deciding this question. The remaining circuits have not yet addressed it.<sup>133</sup>

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130. *Id.*

131. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

132. *Nken*, 129 S. Ct. at 1763 (Kennedy, J., concurring); DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 445 (4th ed. 2010).

133. The Courts of Appeals that used sequential preliminary injunction tests prior to *Winter* are not greatly affected by it, because their tests are equivalent to *Winter*’s strictest reading—that each factor must be independently established. *See, e.g.*, *Minard Run Oil Co. v. U.S. Forest Serv.*, 670 F.3d 236, 249–50 (3d Cir. 2011) (applying sequential test). Some circuits have more stringent tests than the one outlined in *Winter*, requiring the movant to show a “substantial” likelihood of irreparable harm or success on the merits. *See, e.g.*, *Walgreen Co. v. Hood*, 275 F.3d 475, 477 (5th Cir. 2001) (requiring movant to show “substantial” likelihood of prevailing on merits and “substantial” threat of irreparable injury in the absence of a preliminary injunction); *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (requiring movant to show “substantial” likelihood of success on the merits, in addition to the other three traditional factors). The circuits with tests that are stricter than *Winter* have tended to cite *Winter* in support of their existing sequential tests, but do not analyze it. *See, e.g.*, *Am. Signature, Inc. v. United States*, 598 F.3d 816, 823 (Fed. Cir. 2010). The Eighth Circuit, which used a balancing test prior to *Winter*, has so

*A. Fourth Circuit: Winter Forecloses Sliding-Scale Tests*

Before *Winter*, the Fourth Circuit used a threshold preliminary injunction test based on *Blackwelder Furniture Co.*<sup>134</sup> The Fourth Circuit test focused heavily on the balance of the hardships and minimized the importance of the likelihood of success on the merits—a focus the Fourth Circuit acknowledged might be out of step with Supreme Court precedent, even prior to *Winter*.<sup>135</sup> A movant first had to demonstrate a likelihood of irreparable harm in the absence of a preliminary injunction.<sup>136</sup> If he made this threshold showing, the court proceeded to balance the likelihood of harm to the movant against the likelihood of harm to the nonmovant.<sup>137</sup> If the balance of the hardships tipped decidedly in favor of the movant, then he needed only to raise “questions going to the merits so serious, substantial, difficult and doubtful, as to make them fair ground for litigation and thus for more deliberate investigation.”<sup>138</sup> If, on the other hand, the balance of the hardships was substantially equal, then “the probability of success begins to assume real significance, and interim relief is more likely to require a clear showing of a likelihood of success.”<sup>139</sup> The court also considered the public interest.<sup>140</sup>

In *Real Truth About Obama, Inc. v. FEC*, the Fourth Circuit held that *Winter* invalidated its *Blackwelder* test.<sup>141</sup> After repeating *Winter*’s version of the traditional four-factor test, the Fourth Circuit added that “all four requirements must be satisfied.”<sup>142</sup> The Fourth

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far avoided deciding whether that test remains valid. *Sierra Club v. U.S. Army Corps of Eng’rs*, 645 F.3d 978, 993–94 (8th Cir. 2011).

134. *Scotts Co. v. United Indus. Corp.*, 315 F.3d 264, 271 (4th Cir. 2002); *Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189, 194–96 (4th Cir. 1977), *overruled by* *Real Truth About Obama, Inc. v. FEC*, 575 F.3d 342 (4th Cir. 2009), *vacated on other grounds* 130 S. Ct. 2371 (2010).

135. *Safety-Kleen, Inc. (Pinewood) v. Wyche*, 274 F.3d 846, 868–71 (4th Cir. 2001) (Luttig, J., concurring).

136. *Scotts Co.*, 315 F.3d at 271; *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 812 (4th Cir. 1992); *Rum Creek Coal Sales, Inc. v. Caperton*, 926 F.2d 353, 360 (4th Cir. 1991).

137. *Scotts Co.*, 315 F.3d at 271.

138. *Blackwelder*, 550 F.2d at 195 (internal quotation marks omitted).

139. *Direx Israel, Ltd.*, 952 F.2d at 808 (internal quotation marks omitted).

140. *Blackwelder*, 550 F.2d at 196.

141. *Real Truth About Obama, Inc. v. FEC*, 575 F.3d 342, 347 (4th Cir. 2009), *vacated on other grounds*, 130 S. Ct. 2371 (2010), *reissued in part* 607 F.3d 355 (4th Cir. 2010) (reissuing Parts I and II of the Fourth Circuit’s earlier opinion concerning preliminary injunctions). *Real Truth About Obama, Inc.* did not address either *Munaf* or *Nken*, although both cases were decided prior to it.

142. *Real Truth About Obama, Inc.*, 575 F.3d at 346.

Circuit went on to describe four ways in which its *Blackwelder* standard was in “fatal tension” with *Winter*.<sup>143</sup> First, according to the Fourth Circuit, *Blackwelder* and progeny required a movant to demonstrate only serious questions going to the merits, if they examined the success-on-the-merits factor at all.<sup>144</sup> In contrast, *Winter* always requires a movant to demonstrate that he is “likely to succeed on the merits.”<sup>145</sup> Second, the Fourth Circuit noted that *Blackwelder* directs the court to balance the irreparable harm to the movant with the harm to the nonmovant, requiring only that the former outweigh the latter.<sup>146</sup> *Blackwelder* also states that if a movant makes a strong showing of likely success on the merits, he need only show possible irreparable injury.<sup>147</sup> *Winter* explicitly rejected the Ninth Circuit’s possibility-of-irreparable-injury standard, holding that a movant needed to demonstrate a likelihood of irreparable injury.<sup>148</sup> Third, the Supreme Court emphasized the public-interest factor in *Winter*, noting that it weighed far more heavily in favor of the Navy, the nonmovant.<sup>149</sup> In *Blackwelder* and progeny, however, the public-interest factor is often an afterthought.<sup>150</sup> Finally, the Fourth Circuit interpreted *Winter* as requiring a movant to make a sufficient showing on each of the four traditional factors (in other words, a sequential test).<sup>151</sup> In contrast, *Blackwelder* explicitly allowed a “flexible interplay”<sup>152</sup> among the four factors.<sup>153</sup> The Fourth Circuit has repeatedly affirmed its interpretation of *Winter* as requiring a sequential test.<sup>154</sup>

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143. *Id.* at 346–47.

144. *Blackwelder*, 550 F.2d at 195.

145. *Real Truth About Obama, Inc.*, 575 F.3d at 346 (citing *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)).

146. *Id.* at 347 (citing *Blackwelder*, 550 F.2d at 196).

147. *Id.* (citing *Blackwelder*, 550 F.2d at 195).

148. *Winter*, 55 U.S. at 22.

149. *Id.* at 24–26.

150. *Real Truth About Obama, Inc.*, 575 F.3d at 347.

151. *Id.*

152. *Blackwelder*, 550 F.2d at 196 (quoting *Packard Instrument Co. v. ANS, Inc.*, 416 F.2d 943, 945 (2d Cir. 1969)).

153. *Id.*

154. *E.g.*, *Dewhurst v. Century Aluminum Co.*, 649 F.3d 287, 290 (4th Cir. 2011); *Scott v. Bierman*, 429 F. App’x 225, 228–29 (4th Cir. 2011); *WV Ass’n of Club Owners & Fraternal Servs., Inc. v. Musgrave*, 553 F.3d 292, 298 (4th Cir. 2009).

*B. Seventh and Second Circuits: Sliding Scale Survives Winter*

Two circuit courts—the Seventh and Second—have held that *Winter* does not foreclose all sliding-scale preliminary injunction tests.

## 1. Seventh Circuit

Prior to *Winter*, the Seventh Circuit had developed a threshold preliminary injunction test. A movant had to demonstrate that he would be irreparably harmed in the absence of a preliminary injunction, that he had no adequate remedy at law, and that he was somewhat likely to succeed on the merits.<sup>155</sup> If a movant made these showings, a court would then “balance the nature and degree of the plaintiff’s injury, the likelihood of prevailing at trial, the possible injury to the defendant if the injunction is granted, and the wild card that is the ‘public interest.’”<sup>156</sup> The Seventh Circuit occasionally stated its preliminary injunction test in such a way that the test sounded closer to a balancing test than a threshold test.<sup>157</sup> The court consistently emphasized flexibility and interplay among the factors, however. For instance, in *Roland Machinery Co.*, the court stated, “The more likely the plaintiff is to win, the less heavily need the balance of harms weigh in his favor; the less likely he is to win, the more need it weigh in his favor. This is a most important principle, and one well supported by cases in this and other circuits, and by scholarly commentary.”<sup>158</sup>

In *Hoosier Energy Rural Electric Cooperative, Inc. v. John Hancock Life Insurance Co.*, the plaintiff and defendants had engaged in a complex financial transaction that the district court described as combining “the sometimes toxic intricacies of credit default swaps and investment derivatives with a blatantly abusive tax shelter.”<sup>159</sup> The transaction was on shaky ground because credit-rating agencies had

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155. *Lawson Prods., Inc. v. Avnet, Inc.*, 782 F.2d 1429, 1433 (7th Cir. 1986); *Roland Mach. Co. v. Dresser Indus.*, 749 F.2d 380, 386–87 (7th Cir. 1984).

156. *Lawson Prods., Inc.*, 782 F.2d at 1433.

157. *See, e.g.*, *Am. Hosp. Supply Corp. v. Hosp. Prods. Ltd.*, 780 F.2d 589, 593–94 (7th Cir. 1986) (“The court asks whether the plaintiff will be irreparably harmed if the preliminary injunction is denied (sometimes also whether the plaintiff has an adequate remedy at law), whether the harm to the plaintiff if the preliminary injunction is denied will exceed the harm to the defendant if it is granted, whether the plaintiff is reasonably likely to prevail at trial, and whether the public interest will be affected by granting or denying the injunction.”).

158. *Roland Mach. Co.*, 749 F.2d at 387–88.

159. *Hoosier Energy Rural Elec. Coop., Inc. v. John Hancock Life Ins. Co.*, 588 F. Supp. 2d 919, 921 (S.D. Ind. 2008), *aff’d*, 582 F.3d 721 (7th Cir. 2009).

downgraded defendant-surety Ambac's rating.<sup>160</sup> The plaintiff Hoosier Energy sought and obtained a preliminary injunction enjoining the defendants from asserting that a default had occurred and from making any demand or payment pursuant to such an assertion.<sup>161</sup> The district court found that each of the four traditional factors had been met, but in affirming the district court's decision, the Seventh Circuit implicitly held that its sliding-scale test—or at least some variety of sliding-scale test—remained valid in the wake of *Winter*:

Irreparable injury is not enough to support equitable relief. There also must be a plausible claim on the merits, and the injunction must do more good than harm (which is to say that the "balance of the equities" favors the plaintiff). How strong a claim on the merits is enough depends on the balance of harms: the more net harm an injunction can prevent, the weaker the plaintiff's claim on the merits can be while still supporting some preliminary relief.<sup>162</sup>

Instead of quoting *Winter*'s test verbatim, like the Fourth Circuit,<sup>163</sup> the court restated it and slightly rephrased the success-on-the-merits factor. *Winter* stated that a movant must demonstrate he is "likely to succeed on the merits,"<sup>164</sup> and the Seventh Circuit interpreted this as equivalent to "a plausible claim on the merits."<sup>165</sup> "Plausible" sounds more lenient than "likely," however. The Seventh Circuit also stated that the greater the potential harm to the movant, the weaker his claim on the merits could be and still support a preliminary injunction.<sup>166</sup>

The Seventh Circuit affirmed *Hoosier Energy*'s interpretation of *Winter* in *Judge v. Quinn*. In *Judge*, the court restated *Winter*'s four-factor test, essentially word for word, and then added, "These considerations are interdependent: the greater the likelihood of success on the merits, the less net harm the injunction must prevent in order for preliminary relief to be warranted."<sup>167</sup>

A more recent Seventh Circuit case also affirms the circuit's continued embrace of a threshold test. In *Michigan v. U.S. Army Corps of Engineers*, the U.S. District Court for the Eastern District of

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160. *Id.*

161. *Id.*

162. *Hoosier Energy Rural Elec. Coop., Inc. v. John Hancock Life Ins. Co.*, 582 F.3d 721, 725 (7th Cir. 2009) (citations omitted).

163. *Real Truth About Obama, Inc. v. FEC*, 575 F.3d 342, 346 (4th Cir. 2009), *vacated on other grounds*, 130 S. Ct. 2371 (2010).

164. *Winter v. Natural Res. Def. Council*, 55 U.S. 7, 20 (2008).

165. *Hoosier Energy*, 582 F.3d at 725.

166. *Id.*

167. *Judge v. Quinn*, 612 F.3d 537, 546 (7th Cir. 2010) (citing *Hoosier Energy*, 582 F.3d at 725).

Illinois denied a preliminary injunction sought by several states attempting to prevent invasive, non-native carp from entering the Great Lakes.<sup>168</sup> The Seventh Circuit disagreed with the District Court's finding that the plaintiff-states failed to establish that they were likely to succeed on the merits.<sup>169</sup> The Seventh Circuit also held that the states had demonstrated that they were likely to suffer irreparable harm in the absence of a preliminary injunction.<sup>170</sup> Nevertheless, because the balance of the harms favored the defendants, the Seventh Circuit affirmed the District Court's decision not to grant the preliminary injunction.<sup>171</sup> The court referred to success on the merits and irreparable harm as the "threshold requirement[s]" for preliminary injunctions and to the balancing of the harms and the consideration of the public interest as the "balancing process."<sup>172</sup> This language, combined with the court's analytical process, clearly indicates the court's use of a threshold test.

Although none of the Seventh Circuit cases provides much analysis of why *Winter* permits sliding-scale tests, the Seventh Circuit believes it does not need to make any major changes to its pre-*Winter* threshold test. Perhaps the Seventh Circuit is able to justify upholding its pre-*Winter* test because in several pre-*Winter* cases, it stated that the movant must demonstrate that he will suffer irreparable harm in the absence of a preliminary injunction.<sup>173</sup> Thus, the Seventh Circuit's pre-*Winter* test was already consistent with *Winter*'s narrow holding. In contrast, the Fourth Circuit's pre-*Winter* test allowed the irreparable-harm factor to slide; under *Blackwelder*, if a movant made a strong showing of likely success on the merits, he only needed to show *possible* irreparable harm.<sup>174</sup> *Winter* explicitly held only that showing likely irreparable harm was necessary, not that a likelihood of success on the merits was the required interpretation of the success-on-the-merits prong.<sup>175</sup>

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168. *Michigan v. U.S. Army Corps of Eng'rs*, No. 10-3891, 2011 WL 3836457, at \*1 (7th Cir. Aug. 24, 2011).

169. *Id.* at \*19.

170. *Id.* at \*22.

171. *Id.* at \*23.

172. *Id.* at \*20, \*23.

173. *E.g.*, *Promatek Indus. Ltd. v. Equitrac Corp.*, 300 F.3d 808, 811 (7th Cir. 2002); *Roland Mach. Co. v. Dressers Indus.*, 749 F.2d 380, 386 (7th Cir. 1984).

174. *Real Truth About Obama, Inc. v. FEC*, 575 F.3d 342, 347 (4th Cir. 2009) (citing *Blackwelder Furniture Co. of Statesville v. Seilig Mfg. Co.*, 550 F.2d 189, 195 (4th Cir. 1977)).

175. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. at 22–24 (2008).

## 2. Second Circuit

Prior to *Winter*, the Second Circuit had developed a threshold preliminary injunction test. A movant had to show: “(1) irreparable harm in the absence of the injunction and (2) either (a) a likelihood of success on the merits or (b) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in the movant’s favor.”<sup>176</sup> Under this test, a court only considers the hardship a preliminary injunction would impose on the nonmovant if the movant fails to show likely success on the merits.<sup>177</sup> Also somewhat unusually, this test does not explicitly include the public interest.

In *Citigroup Global Markets, Inc.*, Citigroup sought and obtained a preliminary injunction enjoining VCG Special Opportunities Master Fund Ltd. from proceeding with arbitration.<sup>178</sup> The district court applied the Second Circuit’s threshold test, finding that Citigroup had demonstrated a likelihood of irreparable harm and serious questions going to the merits.<sup>179</sup> The Second Circuit affirmed the district court’s decision and, in so doing, confirmed the continuing vitality of its threshold test.<sup>180</sup> According to the Second Circuit, earlier Supreme Court precedent supports its threshold test, which always requires irreparable injury but allows the success-on-the-merits factor to slide.<sup>181</sup> In *Ohio Oil*, the Supreme Court stated, “Where the questions presented by an application for an interlocutory injunction are grave, and the injury to the moving party [in the absence of such an injunction] will be certain and irreparable . . . the injunction usually will be granted.”<sup>182</sup> In addition, in *Mazurek v. Armstrong*, while holding that the movant had not demonstrated a fair chance of success on the merits, the Supreme Court recognized that courts would apply the “fair chance” standard in future cases.<sup>183</sup> According to the Second Circuit, these cases reveal the Supreme Court’s acknowledgement that it can be difficult to discern at the preliminary

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176. *Random House, Inc. v. Rosetta Books LLC*, 283 F.3d 490, 491 (2d Cir. 2002); *accord* *Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc.*, 596 F.2d 70, 72 (2d Cir. 1979).

177. *Random House*, 283 F.3d at 491–92.

178. *Citigroup Global Mkts. Inc. v. VCG Special Opportunities Master Fund Ltd.*, No. 08-CV-5520 (BSJ), 2008 WL 4891229, at \*1 (S.D.N.Y. Nov. 12, 2008), *aff’d*, 598 F.3d 30 (2d Cir. 2010).

179. *Id.* at \*2, \*5.

180. *Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 32–34 (2d Cir. 2010).

181. *Id.* at 36–38.

182. *Ohio Oil Co. v. Conway*, 279 U.S. 813, 814 (1929).

183. *Citigroup*, 598 F.3d at 36 (quoting *Mazurek v. Armstrong*, 520 U.S. 968, 975–76 (1997)).

injunction stage whether the movant is more likely than not to succeed on the merits.<sup>184</sup>

The Second Circuit also thought the Supreme Court's failure to explicitly overrule sliding-scale tests was significant: "If the Supreme Court had meant for *Munaf*, *Winter*, or *Nken* to abrogate the more flexible standard for a preliminary injunction, one would expect some reference to the considerable history of the flexible standards applied in this circuit, seven of our sister circuits, and in the Supreme Court itself."<sup>185</sup> As the Second Circuit noted, *Munaf* did not explain how likely a "likelihood of success on the merits" needed to be; it merely stated that a court had to consider the underlying merits, not simply the jurisdictional issues.<sup>186</sup> The Second Circuit read *Winter* narrowly, as addressing only the irreparable-harm factor: "While *Winter* rejected the Ninth Circuit's conceptually separate 'possibility of irreparable harm' standard, it expressly withheld any consideration of the merits of the parties' underlying claims. Rather, the Court decided the case upon the balance of the equities and the public interest."<sup>187</sup> Regarding *Nken*, the Second Circuit noted that the Supreme Court restated the "likely to succeed on the merits" phrasing, but the Court did not explain the content of this factor.<sup>188</sup> *Nken* contrasted a likelihood of success on the merits—an acceptable showing—with a chance of success that is only "better than negligible"—an unacceptably low showing. According to the Second Circuit, because "serious questions going to the merits" necessarily indicate a chance of success that is better than negligible, its serious-questions test is not in conflict with *Nken*.<sup>189</sup>

The Second Circuit maintained that its preliminary injunction test is useful because the "serious questions going to the merits" option "permits a district court to grant a preliminary injunction in situations where it cannot determine with certainty that the moving party is more likely than not to prevail on the merits of the underlying claims, but where the costs outweigh the benefits of not granting the injunction."<sup>190</sup> The Second Circuit's approach seems to be that until the Supreme Court directly addresses the success-on-the-merits prong and enunciates a clear standard, it will continue to apply the

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184. *Id.* at 36–38.

185. *Id.* at 38.

186. *Id.* at 37; *Munaf v. Geren*, 553 U.S. 674, 690 (2008).

187. *Citigroup*, 598 F.3d at 37 (citations omitted).

188. *Id.*

189. *Nken v. Holder*, 129 S. Ct. 1749, 1761 (2009); *Citigroup*, 598 F.3d at 37 n.7.

190. *Citigroup*, 598 F.3d at 35.

“venerable” standard it has used for the past several decades.<sup>191</sup> The Second Circuit has since repeatedly affirmed and applied the test it articulated in *Citigroup*.<sup>192</sup>

### C. Ninth Circuit: Intracircuit Split

The Ninth Circuit used a balancing approach before *Winter*'s rejection of the irreparable-injury component of that test. The Ninth Circuit stated in *Lands Council v. McNair*, “A preliminary injunction is appropriate when a plaintiff demonstrates either: (1) a likelihood of success on the merits and the possibility of irreparable injury; or (2) that serious questions going to the merits were raised and the balance of hardships tips sharply in [the plaintiff's] favor.”<sup>193</sup> *Winter* overruled the “possibility of irreparable injury” language in the first part of the test, holding that “likely” irreparable injury was required.<sup>194</sup> The Ninth Circuit has split as to whether *Winter* permits any version of the Ninth Circuit's pre-*Winter* sliding-scale test.

#### 1. Sliding-Scale Test

*Alliance for the Wild Rockies v. Cottrell* is the Ninth Circuit case that most thoroughly addresses whether some version of a sliding-scale test might survive the Supreme Court's rebuke in *Winter*.<sup>195</sup> In *Alliance*, the Alliance for the Wild Rockies sought a preliminary injunction that would stop a timber salvage sale proposed by the U.S. Forest Service.<sup>196</sup> The U.S. District Court for the District of Montana declined to issue the injunction, holding that the Alliance failed to demonstrate the requisite likelihood of irreparable injury and success on the merits.<sup>197</sup> The Ninth Circuit held that the District Court committed an error of law by failing to apply the serious-

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191. *Id.* at 38.

192. *E.g.*, *UBS Fin. Servs., Inc. v. W. Va. Univ. Hosps., Inc.*, 660 F.3d 643, 648 (2d Cir. 2011); *Oneida Nation of N.Y. v. Cuomo*, 645 F.3d 154, 164 (2d Cir. 2011); *Metro. Taxicab Bd. of Trade v. City of New York*, 615 F.3d 152, 156 (2d Cir. 2010); *Monserrate v. N.Y. State Senate*, 599 F.3d 148, 154 (2d Cir. 2010).

193. *Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008) (internal quotation marks omitted).

194. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20–22 (2008).

195. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127 (9th Cir. 2011). According to the *Alliance* court, previous Ninth Circuit cases discussing *Winter* addressed only the irreparable-harm component. *Id.* at 1132 (citing *Am. Trucking Ass'ns, Inc. v. City of L.A.*, 559 F.3d 1046 (9th Cir. 2009); *Nat'l Meat Ass'n v. Brown*, 599 F.3d 1093 (9th Cir. 2010)).

196. *Id.* at 1128–29.

197. *Id.* at 1130.

questions test and ordered it to issue the injunction.<sup>198</sup> After reviewing the reasoning of the Second, Fourth, and Seventh Circuits in the cases discussed above, the Ninth Circuit held that a somewhat stricter version of its pre-*Winter* sliding-scale test was consistent with *Winter*: “[S]erious questions going to the merits’ and a balance of hardships that tips sharply towards the plaintiff can support issuance of an injunction, so long as the plaintiff also shows a likelihood of irreparable injury and that the injunction is in the public interest.”<sup>199</sup>

The *Alliance* court interpreted *Winter* as requiring a movant to make a showing on all four factors to obtain a preliminary injunction.<sup>200</sup> It described the irreparable-injury and public-interest factors in almost identical language as *Winter*—“likelihood of irreparable injury” (similar to “likely to suffer irreparable harm” in *Winter*) and the “injunction is in the public interest” (identical to *Winter*).<sup>201</sup> However, the *Alliance* court phrased the other two factors slightly differently than the Supreme Court did in *Winter*. It said that a movant can still prevail by showing only “serious questions” going to the merits (rather than *Winter*’s “likely to succeed on the merits”), as long as the movant also shows that the balance of the hardships tips sharply in his favor.<sup>202</sup> In other words, in order to proceed under the serious-questions-on-the-merits test, the movant must make a higher showing with respect to the balance of the hardships.

The Ninth Circuit supported its decision to uphold a sliding-scale test in *Alliance* with similar reasons as the Second Circuit: the importance of judicial flexibility in the face of disputed facts and unresolved legal issues and the Supreme Court’s silence on the issue of sliding-scale tests.<sup>203</sup> The Ninth Circuit also quoted approvingly from District Judge William Alsup’s reading of *Winter*:

It would be most unfortunate if the Supreme Court or the Ninth Circuit had eliminated the longstanding discretion of a district judge to preserve the *status quo* with provisional relief until the merits could be sorted out in cases where clear irreparable injury would otherwise result and at least “serious questions” going to the merits are raised . . . This would be such a dramatic reversal in the law that it should be very clearly indicated by appellate courts before a district court concludes that it has no such power.<sup>204</sup>

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198. *Id.* at 1128, 1135.

199. *Id.* at 1135.

200. *Id.*

201. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (“likely to suffer irreparable harm”); *Alliance*, 632 F.3d at 1135 (“likelihood of irreparable injury”).

202. *Winter*, 555 U.S. at 20; *Alliance*, 632 F.3d at 1135.

203. *Alliance*, 632 F.3d at 1133–34.

204. *Id.* at 1134 (quoting *Save Strawberry Canyon v. Dep’t of Energy*, No. C 08-03494, 2009 WL 1098888, at \*2–3 (N.D. Cal. Apr. 22, 2009)).

Therefore, like the Second Circuit, the Ninth Circuit in *Alliance* believed that in the absence of explicit Supreme Court language overruling sliding-scale tests, these tests survive.<sup>205</sup>

## 2. Sequential Test

*Alliance* was not the Ninth Circuit's only word on preliminary injunctions, however. In *DISH Network Corp. v. Federal Communications Commission*, DISH sought to preliminarily enjoin § 207 of the Satellite Television Extension and Localism Act of 2010, which accelerated the timetable under which satellite providers that carry local stations in high definition must also carry "qualified noncommercial educational television stations" in high definition, arguing that § 207 violated the First Amendment.<sup>206</sup> The Ninth Circuit upheld the district court's denial of DISH's motion for a preliminary injunction, holding that because DISH had failed to demonstrate it was likely to succeed on the merits of its claim, it was not entitled to a preliminary injunction.<sup>207</sup> The Ninth Circuit held that to obtain a preliminary injunction, DISH had to "demonstrate that it meets all four of the elements of the preliminary injunction test established in *Winter*."<sup>208</sup> According to the Ninth Circuit, DISH's failure to demonstrate likely success on the merits was sufficient grounds for denying a preliminary injunction—in other words, a sequential test.<sup>209</sup> The *DISH* court did not address whether DISH could have succeeded under the serious-questions test articulated by the *Alliance* court.

Several other Ninth Circuit cases join *DISH* in reading *Winter* as requiring a sequential test. In *Klein v. City of San Clemente*, a private citizen sought to preliminarily enjoin the enforcement of a city

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205. Several subsequent Ninth Circuit decisions have approvingly cited *Alliance*'s version of the serious-questions test. See, e.g., *M.R. v. Dreyfus*, 663 F.3d 1100, 1108 (9th Cir. 2011); *Franklin v. HTH Corp.*, 650 F.3d 1334, 1355 (9th Cir. 2011); *Vanguard Outdoor, LLC v. City of L.A.*, 648 F.3d 737, 739–40 (9th Cir. 2011).

206. *DISH Network Corp. v. FCC*, 653 F.3d 771, 774 (9th Cir. 2011), *amending and superseding*, on *denial of reh'g en banc*, *DISH Network Corp. v. FCC*, 636 F.3d 1139 (9th Cir. 2011).

207. *Id.*

208. *Id.* at 776.

209. See *id.* at 776–77 ("Therefore, even if we were to determine that DISH is likely to succeed on the merits, we would still need to consider whether it satisfied the remaining elements of the preliminary injunction test. However, because we agree with the district court that DISH has failed to satisfy its burden of demonstrating it has met the first element, we need not consider the remaining three.").

ordinance prohibiting the leafleting of unoccupied vehicles.<sup>210</sup> The Ninth Circuit reversed the district court's denial of Klein's motion for a preliminary injunction.<sup>211</sup> The Ninth Circuit held that a movant had to demonstrate each of the four traditional factors in order to obtain a preliminary injunction and that Klein had successfully done so.<sup>212</sup> The Ninth Circuit therefore reversed and remanded for further proceedings, including the issuance of a preliminary injunction.<sup>213</sup>

In *American Trucking Ass'ns v. City of Los Angeles*, American Trucking Associations sought to preliminarily enjoin the implementation of mandatory concession agreements for short-term trucking services at the ports of Los Angeles and Long Beach.<sup>214</sup> Applying the Ninth Circuit's pre-*Winter* test, because *Winter* had not yet been decided, the district court denied the motion for a preliminary injunction.<sup>215</sup> The Ninth Circuit reversed based on a de novo review of the applicable substantive law. The Ninth Circuit held that American Trucking Associations was likely to succeed on the merits, was likely to suffer irreparable harm, and that the balance of the hardships and the public interest weighed in favor of granting the preliminary injunction.<sup>216</sup> The Ninth Circuit's analysis of all four factors, combined with its statement that "[t]o the extent that our cases have suggested a lesser standard [than *Winter*], they are no longer controlling, or even viable," suggests that the court used a sequential test in this case.<sup>217</sup>

In *Stormans, Inc. v. Selecky*, the district court applied the Ninth Circuit's pre-*Winter* test, as *Winter* had not yet been decided, and granted an injunction preliminarily enjoining the enforcement of new rules promulgated by the Washington State Board of Pharmacy, which prohibited pharmacists from refusing to fill lawful prescriptions because of their personal religious or moral objections.<sup>218</sup> The district court held that Stormans had demonstrated likely success on the merits of its Free Exercise Clause claim and the possibility of

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210. Klein v. City of San Clemente, 584 F.3d 1196, 1199 (9th Cir. 2009).

211. *Id.*

212. *Id.* at 1207 ("Klein has thus demonstrated a likelihood of success on the merits of his claim . . . . To warrant injunctive relief, however, Klein must also demonstrate that he is likely to suffer irreparable injury in the absence of a preliminary injunction, and that the balance of equities and the public interest tip in his favor.").

213. *Id.* at 1208.

214. Am. Trucking Ass'ns, Inc. v. City of L.A., 559 F.3d 1046, 1048 (9th Cir. 2009).

215. Am. Trucking Ass'ns, Inc. v. City of L.A., 577 F. Supp. 2d 1110, 1128 (C.D. Cal. 2008).

216. *Am. Trucking*, 559 F.3d at 1057, 1059–60.

217. *Id.* at 1052.

218. Stormans, Inc. v. Selecky, 524 F. Supp. 2d 1245, 1266 (W.D. Wash. 2007).

irreparable harm.<sup>219</sup> The Ninth Circuit reversed and remanded, holding that the district court erred in its substantive legal analysis of the merits of the movant's claim.<sup>220</sup> The Ninth Circuit also held that the district court erred in failing to fully analyze the balance of the hardships and the public interest, an analysis required by *Winter*.<sup>221</sup> The Ninth Circuit's analysis in *Stormans* and its order requiring the district court to examine all four factors of the preliminary injunction test point strongly to the court's adoption of a sequential test.<sup>222</sup>

In *National Meat Ass'n v. Brown*, the district court, applying the Ninth Circuit's pre-*Winter* standard, had granted the National Meat Association's motion for a preliminary injunction enjoining the enforcement of the amendments to section 599f of the California Penal Code, which requires humane treatment of nonambulatory animals and bans their slaughter and receipt.<sup>223</sup> The Ninth Circuit vacated the injunction.<sup>224</sup> The Ninth Circuit noted that even though the district court applied the Ninth Circuit's pre-*Winter* sliding-scale test, the district court "found that NMA is likely to succeed and faces a significant threat of irreparable injury, and that the balance of the equities and the public interest favors NMA"; the Ninth Circuit stated that "[t]hese findings enable us to review the injunction under *Winter* without remanding for application of the new standard."<sup>225</sup> The Ninth Circuit noted, however, that in some instances, the fact that a lower court applied the pre-*Winter* test "may require remand for application of the *Winter* standard."<sup>226</sup> This analysis suggests the court's belief that sliding-scale tests are incompatible with *Winter*.

These cases, all of which were decided prior to *Alliance*, cast doubt on the *Alliance* court's assertion that "[o]ur circuit has not yet directly discussed in a published opinion the post-*Winter* viability of the sliding scale approach."<sup>227</sup> The *Alliance* court may be technically correct that none of these cases specifically discussed whether or not a sliding-scale test remained valid. But after examining *Winter*, these panels all chose to apply a sequential test instead of a sliding-scale

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219. *Id.*

220. *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1127 (9th Cir. 2009).

221. *Id.* at 1138–40.

222. *Id.* at 1127–40.

223. *Nat'l Meat Ass'n v. Brown*, 599 F.3d 1093, 1096 (9th Cir. 2010), *rev'd on other grounds sub nom.* *Nat'l Meat Ass'n v. Harris*, No. 10–224, 132 S. Ct. 965 (2012).

224. *Id.* at 1102.

225. *Id.* at 1097 n.3.

226. *Id.*

227. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1132 (9th Cir. 2011).

test, indicating their belief that the sequential test represented the correct approach. Several Ninth Circuit cases decided after *Alliance* also chose the *Stormans* approach.<sup>228</sup>

In *Quiroga v. Chen*, Judge Gloria Navarro of the U.S. District Court for the District of Nevada noted the tension between the Ninth Circuit's two lines of cases and attempted to resolve it.<sup>229</sup> Judge Navarro first stated that to the extent the *Alliance* interpretation of *Winter* is inconsistent with the *Stormans* interpretation of *Winter*, *Stormans* controls under Ninth Circuit precedent.<sup>230</sup> According to Judge Navarro, *Winter* clearly requires a movant to demonstrate likely success on the merits<sup>231</sup>: "To the extent the *Cottrell* court meant to imply that its 'serious questions' standard was a lesser standard than 'likely,' it is inconsistent with *Winter* and [*Stormans*]." <sup>232</sup> Judge Navarro reasoned that the Ninth Circuit could reconcile *Alliance* with *Winter* and *Stormans* by interpreting *Alliance*'s "serious questions" standard as essentially equivalent to *Winter*'s and *Stormans*'s "likely" standard:

The movant must therefore show that there are serious questions as to the merits of the case such that success on the merits is likely. A claim can be weaker on the merits if it raises "serious questions" and the amount of harm the injunction will prevent is very great, but the chance of success on the merits cannot be weaker than "likely."<sup>233</sup>

It is not clear whether the *Alliance* court would agree with Judge Navarro's interpretation of its decision.<sup>234</sup> The *Alliance* court did not disturb the district court's finding that the movant had not shown a likelihood of success on the merits, but the *Alliance* court reversed the district court and ordered it to issue the injunction, holding that the movant had shown serious questions going to the merits and that this was a sufficient showing on the merits.<sup>235</sup> This

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228. *E.g.*, *Diaz v. Brewer*, 656 F.3d 1008, 1012 (9th Cir. 2011) (citing sequential test in *Stormans*); *Perfect 10, Inc. v. Google, Inc.*, 653 F.3d 976, 979 (9th Cir. 2011) (suggesting that all four factors are required); *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1115 (9th Cir. 2011) (citing *Stormans*).

229. *Quiroga v. Chen*, 735 F. Supp. 2d 1226, 1228–29 (D. Nev. 2010).

230. *Id.* at 1229 (citing *Miller v. Gammie*, 335 F.3d 889, 899 (9th Cir. 2003) (en banc) (holding that, in the absence of an intervening Supreme Court decision, only the en banc court may overrule a decision by a three-judge panel)).

231. *Id.*

232. *Id.*

233. *Id.*

234. *See generally* Paul W. Conable & Frank J. Weiss, *Surviving Winter: The Ninth Circuit Reaffirms the "Serious Questions" Test for Injunctive Relief*, OR. ST. B. LITIG. J., Fall 2011, at 15, 18–19, available at <http://www.osblitigation.com/lj2011-fall.pdf> (discussing the points of potential divergence between the two opinions).

235. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1137 (9th Cir. 2011).

suggests that, contrary to Judge Navarro's attempt to reconcile the two standards, a serious question sufficient to require issuance of a preliminary injunction can exist even when it is not likely that the movant will prevail on the merits.<sup>236</sup>

#### *D. Tenth and D.C. Circuits: Undecided*

The Tenth and D.C. Circuits have not yet offered definitive interpretations of *Winter*.

##### 1. Tenth Circuit

The Tenth Circuit's pre-*Winter* preliminary injunction test had two tracks: If the movant was trying to obtain one of the types of injunctions the Tenth Circuit had identified as "disfavored" (that is, mandatory, altering the status quo, or giving him all the relief he sought), he had to demonstrate a "substantial likelihood" of success on the merits, as well as heightened showings on the other three traditional factors.<sup>237</sup> If, on the other hand, the injunction was not one of the disfavored types, then the movant needed to show only "questions going to the merits so serious, substantial, difficult and doubtful, as to make the issues ripe for litigation and deserving of more deliberate investigation," in addition to satisfying the other three factors.<sup>238</sup>

The two cases in which the Tenth Circuit discussed *Winter* both involved mandatory preliminary injunctions subject to the heightened "substantial likelihood" standard, and therefore the Tenth Circuit has not yet had reason to address whether its "serious questions" standard remains viable.<sup>239</sup> In both of these cases, the Tenth Circuit repeated *Winter*'s articulation of the preliminary injunction test without analyzing it.<sup>240</sup> Nevertheless, the fact that the Tenth Circuit has prefaced its quotation of the *Winter* test with the statement that in

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236. *Id.* at 1134–37; Conable & Weiss, *supra* note 234, at 19.

237. *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1208 n.3 (10th Cir. 2009); *see also* *O Centro Espirita Beneficente Uniao do Vegetal v. Ashcroft*, 389 F.3d 973, 980 (10th Cir. 2004) (holding that in order to obtain a preliminary injunction that alters the status quo, the movant "should always have to demonstrate a substantial likelihood of success on the merits"), *aff'd sub nom.* *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006).

238. *RoDa Drilling Co.*, 552 F.3d at 1208 n.3 (quoting *Walmer v. U.S. Dep't of Def.*, 52 F.3d 851, 854 (10th Cir. 1995)); *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1188–89 (10th Cir. 2003) (quoting *Resolution Trust Corp. v. Cruce*, 972 F.2d 1195, 1198 (10th Cir. 1992)).

239. *Attorney Gen. of Okla. v. Tyson Foods, Inc.*, 565 F.3d 769, 775 (10th Cir. 2009); *RoDa Drilling Co.*, 552 F.3d at 1208–09.

240. *Tyson Foods, Inc.*, 565 F.3d at 776 (10th Cir. 2009); *RoDa Drilling Co.*, 552 F.3d at 1208.

order to “obtain a preliminary injunction, the moving party must demonstrate four factors” suggests that it may be leaning toward adopting a sequential test.<sup>241</sup>

## 2. D.C. Circuit

Before *Winter*, the D.C. Circuit used a balancing test based on the four traditional factors.<sup>242</sup> In *Serono Laboratories, Inc. v. Shalala*, the court explained, “These factors interrelate on a sliding scale and must be balanced against each other. ‘If the arguments for one factor are particularly strong, an injunction may issue even if the arguments in other areas are rather weak.’”<sup>243</sup>

In *Davis v. Pension Benefit Guaranty Corp.*, a post-*Winter* case, the D.C. Circuit affirmed the district court’s denial of a preliminary injunction.<sup>244</sup> The court noted that *Winter* “could be read to create a more demanding burden, although the decision does not squarely discuss whether the four factors are to be balanced on a sliding scale.”<sup>245</sup> It then declined to decide whether *Winter* requires a stricter preliminary injunction test, because it found the movant would not be able to satisfy even its less-demanding sliding-scale test.<sup>246</sup> It did, however, cite Justice Ginsburg’s statement in her dissent that *Winter* does not overrule sliding-scale tests.<sup>247</sup> Declining to decide the question, in conjunction with quoting Justice Ginsburg’s dissent, may indicate that the D.C. Circuit hopes to find a way to preserve its balancing test in some form.

The D.C. Circuit again addressed *Winter*, and again declined to adopt a decisive reading of the decision, in *Sherley v. Sebelius*.<sup>248</sup> After acknowledging the ongoing circuit split regarding how to read *Winter*, the court remarked, “We need not wade into this circuit split today because, as in *Davis*, as detailed below, in this case a preliminary injunction is not appropriate even under the less demanding sliding-scale analysis.”<sup>249</sup> Nevertheless, the court noted that “we read *Winter* at least to suggest if not to hold ‘that a likelihood of

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241. *RoDa Drilling Co.*, 552 F.3d at 1208.

242. *Serono Labs., Inc. v. Shalala*, 158 F.3d 1313, 1317–18 (D.C. Cir. 1998).

243. *Id.* at 1318 (quoting *CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 746 (D.C. Cir. 1995)).

244. *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1291 (D.C. Cir. 2009).

245. *Id.* at 1292.

246. *Id.*

247. *Id.*

248. *Sherley v. Sebelius*, 644 F.3d 388, 392–93 (D.C. Cir. 2011).

249. *Id.* at 393.

success is an independent, free-standing requirement for a preliminary injunction.’<sup>250</sup>

#### V. THE SUPREME COURT SHOULD ADOPT A SEQUENTIAL TEST WITH A SERIOUS-QUESTIONS TEST AVAILABLE IN NARROW CIRCUMSTANCES

The absence of a single federal preliminary injunction standard has led the circuit courts to develop a profusion of conflicting standards. The circuit courts’ differing standards are problematic because they likely lead to inconsistent judgments<sup>251</sup> and may therefore encourage litigants to forum-shop.<sup>252</sup>

##### A. *The Supreme Court Should Adopt a Clearly Stated Sequential Test*

The Supreme Court should adopt a sequential preliminary injunction test. Arguably, it already did in *Winter*, for the following reasons: (1) the most natural reading of *Winter* is that it stated a sequential test; (2) the Supreme Court in other decisions has cited *Winter* as supporting a sequential test; (3) *Munaf*, *Nken*, and earlier Supreme Court decisions support the notion that likely success on the merits is a required element of the preliminary injunction test; (4) the likely-success-on-the-merits test is easier for judges to apply consistently than the serious-questions test; and (5) in most instances, federal judges have the institutional expertise to predict the merits of a case at the preliminary injunction stage, so a serious-questions test that relaxes and confuses this inquiry is unnecessary.

The Court should fashion a narrow exception to the sequential test, however, and account for the views of the circuits that believe the sequential test does not provide sufficient flexibility. A movant should be able to obtain a preliminary injunction by showing serious questions going to the merits and by showing a balance of the hardships that tips sharply in his favor in certain limited circumstances where the exigencies make it difficult for the court to determine the likelihood of success with much confidence. These circumstances might include: (1) with respect to factual matters, when the district court finds that it needs substantial additional factual development to understand the merits claims, even after litigants have filed papers and received a hearing, if there is one; or (2) with

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250. *Id.*

251. Vaughn, *supra* note 2, at 840.

252. *See supra* note 25 (providing an example of forum-shopping due to differing standards).

respect to legal issues, when the question is one of first impression in the circuit and there is no controlling Supreme Court precedent.

### 1. The Plain Language of *Winter* Denotes a Sequential Test

The most natural reading of *Winter* is that it requires a sequential test, with likely success on the merits constituting one of the four required elements. *Winter*'s articulation of the traditional preliminary injunction test contains four factors, joined by semicolons and the conjunction "and."<sup>253</sup> Typically, this sort of formulation indicates a list where all of the elements are required. The Second and Seventh Circuits attempt to skirt this natural reading by suggesting that because the Supreme Court did not explicitly mention or overrule sliding-scale tests, they remain viable.<sup>254</sup> These courts emphasize that they require an unequivocal overruling from the Supreme Court before doing away with their longstanding sliding-scale tests. Yet, the Fourth Circuit found that the Supreme Court "articulated clearly" a sequential test in *Winter*,<sup>255</sup> and numerous Ninth Circuit panels reached the same conclusion.<sup>256</sup> The Second and Seventh Circuits ignore the plain meaning of *Winter*'s text and instead invoke the "venerab[ility]" of their sliding-scale tests in order to justify their conclusions.<sup>257</sup>

The Ninth Circuit in *Alliance* acknowledges that *Winter* requires a showing of each of the four elements,<sup>258</sup> but argues that it may substitute "serious questions" for "likely success on the merits," so long as the movant also shows that the balance of the hardships tips sharply in his favor. Yet, there is simply no indication in the text of *Winter* that the serious-questions standard, which is easier to satisfy than the likely-success-on-the-merits standard, is an acceptable general alternative.<sup>259</sup> The natural reading of *Winter* is that

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253. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

254. *Citigroup Global Mkts, Inc. v. VCG Special Opportunities Master Fund, Ltd.*, 598 F.3d 30, 38 (2d Cir. 2010); *Hoosier Energy Rural Elec. Coop., Inc. v. John Hancock Life Ins. Co.*, 582 F.3d 721, 725 (7th Cir. 2009).

255. *Real Truth About Obama, Inc. v. FEC*, 575 F.3d 342, 346 (4th Cir. 2009), *vacated on other grounds*, 130 S. Ct. 2371 (2010).

256. *Nat'l Meat Ass'n v. Brown*, 599 F.3d 1093, 1097 & n.3 (9th Cir. 2010), *cert granted*, 131 S. Ct. 3083 (2011); *DISH Network Corp. v. FEC*, 636 F.3d 1139, 1144 (9th Cir. 2011); *Klein v. City of San Clemente*, 584 F.3d 1196, 1207 (9th Cir. 2009); *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1127–40 (9th Cir. 2009).

257. *Citigroup*, 598 F.3d at 38; *Judge v. Quinn*, 612 F.3d 537, 546 (7th Cir. 2010).

258. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011).

259. Justice Ginsburg, who dissented in *Winter*, might disagree. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 51–52 (2008) (Ginsburg, J., dissenting).

it requires a movant to independently demonstrate each of the four traditional factors.

## 2. Recent Supreme Court Decisions Support a Sequential Test

The Supreme Court's own subsequent interpretation of *Winter* also supports reading *Winter* as requiring a sequential test. In *Monsanto Co. v. Geertson Seed Farms*, the Court held that a movant seeking a permanent injunction to remedy a National Environmental Policy Act violation had to establish each of the four traditional factors separately and cited *Winter* for this proposition.<sup>260</sup> Although the permanent injunction test necessarily comprises slightly different factors than the preliminary injunction test,<sup>261</sup> the Supreme Court's citation of *Winter* to bolster the proposition that all of these factors are required in the permanent injunction context supports reading *Winter* as enunciating a sequential test.

*Munaf*, *Nken*, and other Supreme Court cases also favor a sequential test. *Munaf* affirmed that "a party seeking a preliminary injunction must demonstrate, among other things, 'a likelihood of success on the merits.'" <sup>262</sup> This language clearly characterizes the success-on-the-merits prong as mandatory and lends credence to a similar reading of *Winter*, which used almost identical language to describe the success-on-the-merits prong.

*Nken* does not strictly apply to preliminary injunctions, but it may nevertheless shed some light on the Supreme Court's position after *Winter*.<sup>263</sup> At the very least, *Nken* does not undermine reading *Winter* as requiring a sequential test because the test the Court sets out in *Nken* parallels the test in *Winter* in form and content.<sup>264</sup> If

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260. *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2756 (2010).

261. In order to obtain a permanent injunction, a movant must demonstrate:

(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

*Id.* at 2748 (quoting *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006)).

262. *Munaf v. Geren*, 553 U.S. 674, 690 (2008).

263. *Nken v. Holder*, 129 S. Ct. 1749, 1761 (2009).

264. The *Nken* test is:

(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of a stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

*Id.* at 1761 (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)).

*Winter* states a sequential test, then so does *Nken*. If *Winter* does not foreclose sliding-scale tests, then neither does *Nken*.

Justice Kennedy's concurring opinion in *Nken*, which Justice Scalia joined, might signify the direction the Court will take in the future, particularly because Justice Kennedy is so often the deciding vote on close questions. Although the majority was content to state that the traditional four-factor test still applied to stays and that a movant had to demonstrate more than a possibility of irreparable harm and more than a possibility of success on the merits (echoing its holding in *Winter*), Justice Kennedy more clearly rejected any sort of sliding-scale test: "When considering success on the merits and irreparable harm, courts cannot dispense with the required showing of one simply because there is a strong likelihood of the other. This is evident in the decisions of Justices of the Court applying the traditional factors."<sup>265</sup> If a future case required the Court to rule directly on the validity of sliding-scale tests, the rationale in Justice Kennedy's concurring opinion might well command a majority of the Justices.

Earlier Supreme Court cases on preliminary injunctions also support reading *Winter* as enunciating a sequential test, with likely success on the merits as one of the required factors. In *Doran*, the Court stated that the movant must show "he will suffer irreparable injury and also that he is likely to prevail on the merits."<sup>266</sup> In *Yakus*, the Court indicated that irreparable injury was necessary, but not sufficient, to obtain a preliminary injunction.<sup>267</sup> The Court in *Mazurek* emphasized the movant's high burden, particularly with respect to showing likely success on the merits.<sup>268</sup> In *Grupo Mexicano*, the Court noted that judicial flexibility is not limitless: "We do not question the proposition that equity is flexible; but in the federal system, at least, that flexibility is confined within the broad boundaries of traditional

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265. *Id.* at 1763 (Kennedy, J., concurring); LAYCOCK, *supra* note 132, at 445. Justice Kennedy's concurrence in *Nken* can be read as a response to Justice Ginsburg's dissent in *Winter*, which suggested that sliding-scale tests remain viable. *Nken*, 129 S. Ct. at 1763 (Kennedy, J., concurring); *Winter*, 555 U.S. 7, 51–52 (Ginsburg, J., dissenting).

266. *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975).

267. *Yakus v. United States*, 321 U.S. 414, 440 (1944) ("[T]he award of an interlocutory injunction by courts of equity has never been regarded as strictly a matter of right, even though irreparable injury may otherwise result to the plaintiff.").

268. *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) ("[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion.") (quoting WRIGHT & MILLER, *supra* note 18, § 2948)).

equitable relief.”<sup>269</sup> In contrast, the cases that the Second Circuit cited in support of its sliding-scale test were several decades older,<sup>270</sup> and these cases emphasized judges’ flexibility to shape the remedy, not their flexibility to decide whether to grant the preliminary injunction in the first instance.<sup>271</sup>

### 3. A Sequential Test Is Fairer than a Balancing Test Requiring Only Serious Questions

Although sliding-scale tests have the apparent advantage of greater flexibility, the Supreme Court should affirm a sequential test because it contains sufficient flexibility and is easier to apply consistently and impartially. It is true that it is sometimes difficult for a judge to predict a movant’s chances of succeeding on the merits at the preliminary injunction stage.<sup>272</sup> The serious-questions test (or, alternatively, the Seventh Circuit’s analogous “plausible claim on the merits” test)<sup>273</sup> is appealing because it enables a judge who thinks the movant is perhaps forty percent likely to succeed on the merits to hold that the merits prong is satisfied, even if the judge is not comfortable saying that the movant is likely (that is, more than fifty percent likely) to succeed on the merits of his claim.<sup>274</sup>

Yet, the disadvantages of sliding-scale tests outweigh the advantage of flexibility. First, a movant with little chance of ultimately prevailing on his claim should not be able to obtain a preliminary injunction; this takes up valuable court and litigant time and imposes a heavy cost on the nonmovant, who suffers from an injunction when the nonmovant will ultimately prevail on the merits.<sup>275</sup>

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269. *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 322 (1999).

270. *E.g.*, *Ohio Oil Co. v. Conway*, 279 U.S. 813, 813–14 (1929).

271. *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944).

272. *Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund, Ltd.*, 598 F.3d 30, 35 (2d Cir. 2010).

273. *Hoosier Energy Rural Elec. Coop., Inc. v. John Hancock Life Ins. Co.*, 582 F.3d 721, 725 (7th Cir. 2009).

274. *See, e.g.*, *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1137 (9th Cir. 2011) (holding that the Alliance “has, at a minimum, raised ‘serious questions’ on the merits of its claim regarding the validity of the Chief Forester’s Emergency Situation Determination”).

275. *See Denlow, supra* note 1, at 538 (arguing that sliding-scale tests should not be used because they allow parties with little chance of ultimately prevailing on the merits to obtain preliminary injunctions, manipulating the judicial process and “wast[ing] valuable and limited court time”).

Second, it is unclear how serious of a question the serious-questions test requires. None of the circuits that use it has articulated a definition, other than Second Circuit Judge Jerome Frank's original statement, which was itself rather vague.<sup>276</sup> The serious-questions test could encompass a broad range of merits probabilities, from just above "fairly negligible" to just below, or even including, "likely to succeed." This broad range means that the likelihood of obtaining a preliminary injunction under the serious-questions test could vary considerably from judge to judge, even within the same circuit. The serious-questions test is therefore more difficult for judges to apply consistently than the likely-success-on-the-merits test, which naturally seems to parallel the preponderance of the evidence standard used in civil litigation—that is, more likely than not or just over a fifty percent chance.<sup>277</sup> Moreover, because the serious-questions test allows the balance of the hardships to override difficulties in the movant's merits claims, this test may encourage the granting of injunctions to sympathetic plaintiffs whose legal cases may not be terribly strong. A court should not be able to alter the relative positions of the parties, sometimes dramatically, without the movant first establishing that he is at least likely to prevail on the merits. The serious-questions test is therefore in tension with the traditional characterization of preliminary injunctions as rare, extraordinary remedies.<sup>278</sup> Furthermore, because the serious-questions test is less clear than the sequential test, it is less likely to be applied uniformly by judges and more likely to lead to unfair outcomes and forum-shopping.

Third, it is not clear that the serious-questions test necessarily requires a movant to make a merits showing much higher than what is required to survive a motion to dismiss under Federal Rule of Civil

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276. *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 740 (2d Cir. 1953) ("[I]t will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation.").

277. BLACK'S LAW DICTIONARY 1301 (9th ed. 2009) ("This is the burden of proof in most civil trials, in which the jury is instructed to find for the party that, on the whole, has the stronger evidence, however slight the edge may be."). Most commentators assume that "likely" means more likely than not. *See, e.g.*, Denlow, *supra* note 1, at 532–34 (arguing that a party seeking a preliminary injunction should be required to prove at least a fifty-percent chance of prevailing on the merits). Precise quantification of probabilities in any given case is difficult, of course, but this should not prevent the Supreme Court from enunciating a clear standard.

278. *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (quoting *WRIGHT & MILLER*, *supra* note 18, § 2948) ("[A] preliminary injunction is an extraordinary and drastic remedy.").

Procedure 12(b)(6), particularly after *Ashcroft v. Iqbal*<sup>279</sup> and *Bell Atlantic Corp. v. Twombly*,<sup>280</sup> which require the plaintiff to plead sufficient facts to state a “plausible” claim.<sup>281</sup> But the history of preliminary injunctions, as well as Supreme Court precedent, shows that preliminary injunctions have always been an “extraordinary” remedy, because they impose significant burdens on the nonmovant without the benefit of a full trial.<sup>282</sup> It would be anomalous, to say the least, if the standard for obtaining a preliminary injunction, traditionally an exceptional remedy, were not substantially higher than the standard for surviving a motion to dismiss, the first and lowest hurdle a civil claim must clear. It seems doubtful that the Court would endorse a test that could be read to relax the preliminary injunction standard to such a degree.

The Second and Seventh Circuits, and some members of the Ninth Circuit, attempt to balance the relaxed merits showing of the serious-questions test and plausible-claim test by also requiring the movant to make a heightened hardship showing. Yet, these are two analytically distinct inquiries. No matter how much harm the movant may suffer, that does not logically overcome a low chance that he will ultimately succeed on his claim.

#### 4. Federal Judges Have the Expertise to Predict Likely Success on the Merits

The major justification for sliding-scale tests is the difficulty of predicting success on the merits at the preliminary injunction stage. It is too difficult, the argument goes, for movants to demonstrate and for judges to determine likelihood of success on the merits at such an early stage of litigation.<sup>283</sup> Yet, this argument ignores some of the practicalities of litigation, particularly in federal courts. Federal judges are experienced at deciding issues of federal law and, in most

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279. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (“The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.”).

280. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (“Factual allegations must be enough to raise a right to relief above the speculative level . . .”).

281. In fact, in *Hoosier Energy*, the Seventh Circuit characterized the movant’s required showing as only a “plausible claim on the merits,” which sounds quite similar to the showing required to survive a 12(b)(6) motion to dismiss following *Twombly* and *Iqbal*. *Hoosier Energy Elec. Coop., Inc. v. John Hancock Life Ins. Co.*, 582 F.3d 721, 725 (7th Cir. 2009).

282. See *supra* Part II (providing a brief history of preliminary injunctions).

283. See, e.g., Bethany M. Bates, *Reconciliation After Winter: The Standard for Preliminary Injunctions in Federal Courts*, 111 COLUM. L. REV. 1522, 1554–55 (2011) (discussing the advantages of the sliding-scale approach).

instances, are well equipped to predict whether a movant is more likely than not to succeed on the merits of his claim.<sup>284</sup> In addition, when seeking a preliminary injunction, the movants typically focus on their strongest, clearest, and most compelling arguments, so it seems reasonable to expect the movants to be able to demonstrate that these carefully selected arguments are likely to succeed on the merits.

*B. The Supreme Court Should Require a Movant to Show Likely Success on the Merits, but There May Be Compelling Circumstances Where the Movant Need Only Show Serious Questions*

*Winter* and most other recent Supreme Court precedents quite clearly support a sequential test that requires the movant to demonstrate likely success on the merits. In order to allow judges and litigants appropriate flexibility, however, the Supreme Court should carve out an exception where the serious-questions test, in combination with an elevated hardship showing (in other words, the Ninth Circuit's *Alliance* test), can suffice. A movant should only have access to this relaxed merits showing when there is some particularly compelling reason why the movant would have difficulty showing, or the judge would have difficulty evaluating, the movant's likelihood of success on the merits. Some situations that might permit the judge the discretion to use the serious-questions test could include the following: (1) with respect to factual matters, when the district judge finds that substantial additional factual development is needed; or (2) with respect to legal issues, when the question is one of first impression. These two examples are illustrative of the types of circumstances that could enable a judge to use the serious-questions test; they are not intended to constitute a comprehensive list. It is important that these exceptions remain extremely narrow, however, or they will swallow the sequential test.

These examples attempt to address some of the factual and legal circumstances in which the judge may need additional flexibility because it would be exceptionally difficult to predict the movant's likelihood of ultimately prevailing on the merits. If, in certain extremely compelling circumstances, the judge finds that significant additional factual development is needed, even after the filing of the papers and the hearing, the judge should be able to use the serious-questions standard. Due to factual uncertainties, it may be difficult to

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284. This argument may be less true when courts are exercising diversity jurisdiction, so I have provided for an exception in Part V.B that encompasses diversity suits.

determine whether the movant is more likely than not to succeed on the merits, but the judge may still be able to determine that the movant has raised serious questions going to the merits that justify further factual development.

Uncertainty about prevailing on the merits may arise not only from exceptionally complex facts but also from novel questions of law. For instance, if there is a legal question of first impression that is central to the preliminary injunction, then the judge should also be able to use the serious-questions standard if he so chooses. If the question has not yet been raised in the judge's circuit, then it is even more difficult for him to predict how the question will be resolved, and a relaxed merits prong may therefore be appropriate. This approach confines the use of the serious-questions test to instances where the legal questions truly are uncommonly difficult. This factor may arise more frequently when a court is sitting in diversity, because a federal court may be less likely to have addressed the issue.

If the Supreme Court acknowledged a serious-questions exception to an overall sequential test, a district judge would need to make certain findings to justify his use of the serious-questions test. For instance, if the judge opted to use the serious-questions test because he was confronting a novel legal issue, then he would have to explain why the issue was novel in his circuit. Or, if he found that he needed significant additional factual development, he would need to describe why the particular factual complexity of the case made him unable to resolve the merits prong under the sequential test. Appellate courts review preliminary injunctions under an abuse of discretion standard, so it is likely that those courts would also review these findings for abuse of discretion. This gives the district judge even more discretion, because it will be quite difficult to overturn his choice to use the serious-questions test. This narrow serious-questions exception would allow for flexibility where movants and courts truly need it, but would not suffer from the potential weaknesses of the Second and Seventh Circuits' serious-questions approaches: inconsistent application among judges and the granting of unwarranted preliminary injunctions.

## VI. CONCLUSION

The Supreme Court's recent decisions in *Winter*, *Munaf*, and *Nken* have not eased the divisions among the federal circuit courts regarding the proper preliminary injunction standard. The Fourth

Circuit has held that *Winter* requires a sequential test and that *Winter* overrules the circuit's own longstanding threshold test.<sup>285</sup> In contrast, the Second and Seventh Circuits, and some members of the Ninth Circuit, have held that their sliding-scale tests survive *Winter* in some form.<sup>286</sup>

The Supreme Court should enunciate a uniform federal preliminary injunction standard in order to minimize discrepancies between the circuits and to discourage forum-shopping. In a case squarely presenting the continued viability of sliding-scale tests, the Court is likely to affirm the test stated in *Winter*. In order to obtain a preliminary injunction under *Winter*, a movant must demonstrate each of the following four factors: (1) likely irreparable injury, (2) likely success on the merits, (3) the balance of the harms tips in the movant's favor, and (4) the public interest favors a preliminary injunction. Yet, to give effect to the need for flexibility expressed by a number of circuit courts, courts should slightly relax this test in exceptional circumstances. Where additional flexibility is truly required, the movant should be required to demonstrate only serious questions going to the merits, combined with a balance of the hardships that tips sharply in his favor. Courts could determine these exceptional circumstances by evaluating whether: (1) substantial additional factual development is needed before the district judge can confidently determine that the movant is likely to succeed on the merits; or (2) the district judge faces an important legal question of first impression.

This sequential test, with a narrowly circumscribed exception, will promote uniformity and impartiality among federal judges and should therefore discourage forum-shopping among litigants. This test is faithful to the history of preliminary injunctions and the Supreme Court's recent decisions in *Winter*, *Munaf*, and *Nken*. A movant will not be able to manipulate the judicial process to obtain a preliminary injunction when he has little chance of ultimately prevailing on the merits of his claim. Yet, this test also offers federal judges some additional flexibility in extraordinary circumstances, so long as they make the requisite findings to justify this use of their discretion. A sequential test with a narrow serious-questions exception provides the

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285. *Real Truth About Obama, Inc. v. FEC*, 575 F.3d 342, 346–47 (4th Cir. 2009), *vacated on other grounds*, 130 S. Ct. 2371 (2010).

286. See *supra* Part III.B (discussing the Second, Seventh, and Ninth Circuits' treatment of their sliding-scale tests after *Winter*).

best combination of flexibility and stability and offers the best chance of consistent, and therefore fair, decisions.

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