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## Teaching Preliminary Injunctions After Winter

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## TEACHING PRELIMINARY INJUNCTIONS AFTER *WINTER*

JEAN C. LOVE\*

### INTRODUCTION

When I teach Remedies, I begin with injunctions because it is the one topic in my Remedies course with which my students are the least familiar, and the one that best enables me to introduce them to the differences between legal and equitable relief. I start with an overview of the standards and procedures for determining whether to grant provisional injunctions and permanent injunctions.<sup>1</sup> I then move into an in-depth study of each of the three types of injunctive relief: temporary restraining orders; preliminary injunctions; and permanent injunctions.<sup>2</sup> Although in my course I examine both the procedures and the standards for determining whether to grant or deny each of the three types of injunctive relief, in this piece my focus will be primarily on the standards for determining whether to grant preliminary injunctions. I have chosen to focus on this topic because I want to consider how the United States Supreme Court's opinion in *Winter v. Natural Resources Defense Council, Inc.*<sup>3</sup> has influenced the way in which I teach the standards for granting or denying preliminary injunctions. In particular, I want to talk about how I have approached the question of whether *Winter* mandates the adoption of the "traditional" test for preliminary injunctions to the exclusion of any "sliding scale" test, or whether it leaves open the possibility of applying an alternative "sliding scale" test as well.

### I. OVERVIEW OF STANDARDS AND PROCEDURES FOR ISSUING INJUNCTIVE RELIEF

I begin my classroom conversation about injunctions with an overview of the standards and procedures for determining whether to grant injunctive relief

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1. See CANDACE S. KOVACIC-FLEISCHER, JEAN C. LOVE & GRANT S. NELSON, *EQUITABLE REMEDIES, RESTITUTION AND DAMAGES: CASES AND MATERIALS* 13–36 (8th ed. 2011).

2. See *id.* at 36–86, 111–28.

3. 555 U.S. 7 (2008).

because, by the end of the first day of class, I want my students to understand the differences between the three types of injunctive relief and their relationship to each other. I assign three cases on the same theory of liability: Did the defendant (a state actor) deny equal recreational opportunities to the plaintiff (a young girl who wants to engage in contact sports such as football or wrestling or boxing) in a setting where the defendant provides only young boys with such recreational opportunities? In the first case, the plaintiff requests a temporary restraining order;<sup>4</sup> in the second case, the plaintiff requests a preliminary injunction;<sup>5</sup> and in the third case, the plaintiff requests a permanent injunction.<sup>6</sup>

By focusing on these three cases, I am able to introduce my students to the procedural differences between temporary restraining orders and preliminary injunctions. I am also able to introduce them to the procedural differences between provisional injunctions and permanent injunctions. My hope is that they will leave the classroom with a basic understanding of how a case ought to move through the three potential procedural tiers of injunctive relief.

By focusing on these three cases, I am also able to introduce my students to the differences and the similarities regarding the standards for determining whether to issue injunctive relief. I assign them the first two cases that apply the following “traditional” test for determining whether to grant a provisional injunction: 1) likelihood of success on the merits; 2) irreparable harm (which encompasses proof of the inadequacy of the legal remedy as well as proof that the plaintiff urgently needs pre-trial injunctive relief); 3) whether the balance of hardships tips in the plaintiff’s favor; and 4) whether the requested injunction would serve the public interest.<sup>7</sup> Then I assign them the third case that applies the “traditional” test for determining whether to grant a permanent injunction: 1) actual success on the merits; 2) inadequacy of the legal remedy; 3) whether the balance of hardships tips in the plaintiff’s favor; and 4) whether the requested injunction would serve the public interest.<sup>8</sup> I call my students’

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4. *Clinton v. Nagy*, 411 F. Supp. 1396 (N.D. Ohio 1974), as reprinted in KOVACIC-FLEISCHER, LOVE & NELSON, *supra* note 1, at 18–21.

5. *Adams v. Baker*, 919 F. Supp. 1496 (D. Kan. 1996), as reprinted in KOVACIC-FLEISCHER, LOVE & NELSON, *supra* note 1, at 22–27.

6. *Force v. Pierce City R-VI Sch. Dist.*, 570 F. Supp. 1020 (W.D. Mo. 1983), as reprinted in KOVACIC-FLEISCHER, LOVE & NELSON, *supra* note 1, at 28–35.

7. See *Adams*, 919 F. Supp. at 1503–05, as reprinted in KOVACIC-FLEISCHER, LOVE & NELSON, *supra* note 1, at 25–27; *Clinton*, 411 F. Supp. at 1399, as reprinted in KOVACIC-FLEISCHER, LOVE & NELSON, *supra* note 1, at 20.

8. KOVACIC-FLEISCHER, LOVE & NELSON, *supra* note 1, at 28. For an application of this test, see *Force*, 570 F. Supp. at 1021–31, as reprinted in KOVACIC-FLEISCHER, LOVE & NELSON, *supra* note 1, at 28–35. In 2006, the United States Supreme Court handed down an opinion in a patent case that said: “Ordinarily, a federal court considering whether to award permanent injunctive relief to a prevailing plaintiff applies the four-factor test historically employed by courts of equity.” *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 390 (2006). I call this the

attention to the fact that the first prong of the “traditional” permanent injunction test is different from the first prong of the “traditional” provisional injunction test because a permanent injunction cannot issue until the plaintiff has proven actual success on the merits, whereas a plaintiff who is seeking provisional injunctive relief can do no more than show a “likelihood of success on the merits.” I then call their attention to the fact that the second prong of the “traditional” permanent injunction test is different from the second prong of the “traditional” provisional injunction test because the plaintiff at the permanent injunction stage of the proceedings is no longer seeking urgent, interim, pre-trial injunctive relief; rather, such a plaintiff is seeking a final equitable decree, and consequently, the plaintiff needs only to demonstrate the inadequacy of the legal remedy.<sup>9</sup>

## II. TEACHING PRELIMINARY INJUNCTIONS PRIOR TO *WINTER*

Prior to *Winter*, I used to begin my in-depth consideration of the standards for determining whether to issue a provisional injunction with a temporary restraining order case from the Eleventh Circuit that set out the “traditional” test for provisional injunctive relief.<sup>10</sup> The point of this exercise was simply to

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“historical” test for permanent injunctive relief, as opposed to the “traditional” test for permanent injunctive relief. The *eBay* Court said that the “historical” four-factor test required the plaintiff to 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 391.

Remedies scholars immediately said that they had never heard of the “historical” test. *See* Doug Rendleman, *The Trial Judge’s Equitable Discretion Following eBay v. MercExchange*, 27 REV. LITIG. 63, 76 n.71 (2007). I tell my students that the irreparable injury requirement does not appear in the “traditional” test and that the lower courts have had difficulty applying it under the “historical” test. In fact, the trial court judge on remand in *eBay* made a point of saying that “the requisite analysis for the second factor . . . inevitably overlaps with that of the first.” *MercExchange, L.L.C. v. eBay, Inc.*, 500 F. Supp. 2d 556, 582 (E.D. Va. 2007). Nevertheless, the “historical” test has become the law of the federal court system, not only in patent cases, but also in other types of cases, such as environmental law cases. *See, e.g., Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2756 (2010). For an excellent recent discussion of the *eBay* case, see Mark P. Gergen, John M. Golden & Henry E. Smith, *The Supreme Court’s Accidental Revolution? The Test for Permanent Injunctions*, 112 COLUM. L. REV. 203 (2012).

9. *See Walgreen Co. v. Sara Creek Prop. Co.*, 966 F.2d 273, 275 (7th Cir. 1992), as reprinted in KOVACIC-FLEISCHER, LOVE & NELSON, *supra* note 1, at 113.

10. *See Morgan Stanley DW, Inc. v. Frisby*, 163 F. Supp. 2d 1371 (N.D. Ga. 2001), as reprinted in ROBERT N. LEAVELL, JEAN C. LOVE, GRANT S. NELSON & CANDACE S. KOVACIC-FLEISCHER, CASES AND MATERIALS ON EQUITABLE REMEDIES, RESTITUTION AND DAMAGES 45–50 (7th ed. 2005).

reinforce the lessons of the first day of class.<sup>11</sup> Then I moved into a rather detailed consideration of alternative “sliding scale” tests for provisional injunctive relief by focusing on several preliminary injunction cases from a variety of federal circuits.<sup>12</sup> The point of this exercise was to introduce my students to the dizzying array of alternative “sliding scale” standards that had been adopted by various federal circuits.<sup>13</sup> Of course, there was always one student question that I could not answer: What does the United States Supreme Court think about the viability of any of these alternative “sliding scale” tests? Therefore, I was often known to wish aloud that we had an opinion from the United States Supreme Court that would provide us with an answer. Perhaps I should have remembered the old adage: Watch what you wish for!

### III. TEACHING PRELIMINARY INJUNCTIONS AFTER *WINTER*

The Supreme Court handed down its opinion in *Winter* on November 12, 2008.<sup>14</sup> In a nutshell, a majority of the Court rejected the Ninth Circuit’s application of an expansive “sliding scale” test that permitted the issuance of a preliminary injunction upon proof of a probability of success on the merits, coupled with proof of no more than a “possibility” of irreparable harm.<sup>15</sup> The Court announced that a plaintiff seeking a preliminary injunction must prove that he or she is “likely” to succeed on the merits, and that he or she is “likely” to suffer irreparable harm.<sup>16</sup> In addition, the Court announced that a plaintiff seeking a preliminary injunction must prove that the balance of equities tips in his or her favor, and that an injunction is in the public interest.<sup>17</sup> The Court’s stated rationale was that “[i]ssuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.”<sup>18</sup>

Now that I am teaching preliminary injunctions post-*Winter*, there are those who would tell me that the Supreme Court has given me the answer to my students’ question.<sup>19</sup> And they would tell me that the answer is that the

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11. See *supra* text accompanying notes 4–9.

12. See LEAVELL, LOVE, NELSON & KOVACIC-FLEISCHER, *supra* note 10, at 56–69.

13. See *id.*

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

15. *Id.* at 20–23.

16. *Id.* at 20.

17. *Id.*

18. *Id.* at 22.

19. See, e.g., Eric J. Murdock & Andrew J. Turner, *How “Extraordinary” Is Injunctive Relief in Environmental Litigation? A Practitioner’s Perspective*, 42 ENVTL. L. REP. NEWS & ANALYSIS 10,464, 10,465 (2012) (“The Supreme Court’s landmark 2008 decision in *Winter* reaffirmed in plain terms the requirement that federal courts must strictly apply the traditional legal standard for preliminary injunctive relief, even in cases involving claims of environmental

Court has chosen to adopt the “traditional” test for determining whether to grant provisional injunctive relief to the exclusion of any alternative “sliding scale” test.<sup>20</sup> At first, I wondered whether this was the only plausible interpretation of *Winter*. Put another way, I wondered whether, going forward, *Winter* was the only case that I should assign to my students regarding the standards for issuing preliminary injunctive relief. But then I began to think about *Winter* more carefully, and I realized that *Winter* might not preclude the application of all “sliding scale” tests.<sup>21</sup> Instead, it might permit the continued development of certain types of “sliding scale” tests, at least within certain constraints.<sup>22</sup>

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harm.”); Rachel A. Weisshaar, Note, *Hazy Shades of Winter: Resolving the Circuit Split over Preliminary Injunctions*, 65 VAND. L. REV. 1011, 1048 (2012) (“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.”).

20. See *Real Truth About Obama, Inc. v. FEC*, 575 F.3d 342, 347 (4th Cir. 2009) (“Because of its differences with the *Winter* test, the *Blackwelder* balance-of-hardship test may no longer be applied in granting or denying preliminary injunctions in the Fourth Circuit, as the standard articulated in *Winter* governs the issuance of preliminary injunctions not only in the Fourth Circuit but in all federal courts.”), *vacated*, 130 S. Ct. 2371 (2010), *legal standard for preliminary injunction reinstated*, 607 F.3d 355 (4th Cir. 2010); *Am. Trucking Ass’n, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009) (quoting the four-prong *Winter* test for preliminary injunctions and then stating “[t]o the extent that our cases have suggested a lesser standard, they are no longer controlling, or even viable”). The *American Trucking* case was later distinguished by the Ninth Circuit on the ground that: “[In *American Trucking*,] [w]e discussed the holding of *Winter* that a preliminary injunction requires a showing of likely irreparable injury, but we did not discuss whether some version of the sliding scale test survived.” *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1132 (9th Cir. 2011) (denying petitions for rehearing and rehearing en banc of *Alliance for the Wild Rockies v. Cottrell*, 622 F.3d 1045 (9th Cir. 2010) and withdrawing and replacing that opinion with this opinion). The Department of Justice had petitioned for a rehearing of the original *Alliance for the Wild Rockies* decision on the ground that “the [Ninth Circuit’s] holding that the serious questions test survives *Winter* conflicts with *Winter*.” Bethany M. Bates, Note, *Reconciliation After Winter: The Standard for Preliminary Injunctions in Federal Courts*, 111 COLUM. L. REV. 1522, 1542 n.118 (2011).

21. See, e.g., *Alliance for the Wild Rockies*, 632 F.3d at 1134 (“[W]e join the Seventh and the Second Circuits in concluding that the ‘serious questions’ version of the sliding scale test for preliminary injunctions remains viable after the Supreme Court’s decision in *Winter*.”).

22. See *id.* at 1134–35 (“A preliminary injunction is appropriate when a plaintiff demonstrates . . . that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff’s favor . . . . Of course, plaintiffs must also satisfy the other *Winter* factors.”); see also Bethany M. Bates, Note, *Reconciliation After Winter: The Standard*

IV. TEACHING *WINTER*A. *The Ninth Circuit's Tests for Determining Whether to Grant a Preliminary Injunction*

*Winter* arose out of the Ninth Circuit, which initially applied only the “traditional” test for determining whether to grant preliminary injunctive relief. The Ninth Circuit required proof of 1) a “strong likelihood” of success on the merits or a “reasonable certainty” that the plaintiff will prevail on the merits; and 2) irreparable harm.<sup>23</sup> It also required proof that “(3) in balancing the equities, the defendant[] will not be harmed more than [the] plaintiff is helped by the injunction, and 4) granting the injunction is in the public interest.”<sup>24</sup> The Ninth Circuit first applied an alternative “sliding scale” test in 1972, when it affirmed a preliminary injunction in an antitrust case on the basis that there were serious questions going to the merits and that the balance of hardships tipped decidedly toward the moving party.<sup>25</sup> In that 1972 case, the Ninth Circuit’s “sliding scale” test was patterned after a “sliding scale” test that had been developed by the Second Circuit in an earlier antitrust action.<sup>26</sup>

In 1975, the Ninth Circuit once again turned to the Second Circuit for help in developing its “sliding scale” test. In *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, the trial court had denied a preliminary injunction to the plaintiff in an antitrust case under the “traditional” standard because the plaintiff had failed to prove a “probability of success” on the merits.<sup>27</sup> The appellate court agreed with the trial court that the plaintiff had failed to prove a “probability of success” on the merits, but it ruled that the trial court had made an error of law: “There is . . . an alternative test that the district court did not apply.”<sup>28</sup> Since the Ninth Circuit had adopted a “sliding scale” test in 1972, it reversed and remanded *William Inglis* so that the district court could apply the appellate court’s “sliding scale” test in the first instance.<sup>29</sup> Then the appellate

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*for Preliminary Injunctions in Federal Courts*, 111 COLUM. L. REV. 1522, 1556 (2011) (arguing that federal courts after *Winter* should be able to balance the four factors in the *Winter* test, and that they should be able to adopt a “serious questions” test that would suffice for the “likelihood of success” prong of the *Winter* test).

23. *Sierra Club v. Hickel*, 433 F.2d 24, 33 (9th Cir. 1970), *aff’d*, 405 U.S. 727 (1972).

24. *William Inglis & Sons Baking Co. v. ITT Cont’l Baking Co.*, 526 F.2d 86, 87 (9th Cir. 1975).

25. *See Costandi v. AAMCO Automatic Transmissions, Inc.*, 456 F.2d 941, 943 (9th Cir. 1972).

26. *See id.* (citing *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 740 (2d Cir. 1953) (applying a sliding scale test that permitted a moving party to obtain a temporary injunction upon proof of serious questions going to the merits and a balance of hardships that tipped “decidedly” toward the moving party)).

27. *William Inglis*, 526 F.2d at 87–88.

28. *Id.* at 88.

29. *Id.*

court gave the trial court specific guidance regarding the proper wording of the Ninth Circuit's "sliding scale" test by quoting from *Charlie's Girls, Inc. v. Revlon, Inc.*,<sup>30</sup> a Second Circuit case that had been handed down in 1973: "One moving for a preliminary injunction assumes the burden of demonstrating *either* a combination of probable success and the possibility of irreparable harm *or* that serious questions are raised and the balance of hardships tips sharply in his favor."<sup>31</sup>

The primary problem with the two-part, two-prong "sliding scale" test that had been adopted by both the Second Circuit and the Ninth Circuit as of 1975 was that it did not refer to all of the elements of the four-prong "traditional" test. It made it very clear that a movant could qualify for a preliminary injunction upon proof of either "probable success" on the merits (under the first prong of the first part), or "serious questions" regarding the merits (under the first prong of the second part). But it referred to "irreparable harm" only in the second prong of the first part, where it required proof of no more than a "possibility of irreparable harm." And it referred to the "balance of hardships" only in the second prong of the second part, where it required proof that "the balance of hardships tips sharply in [the movant's] favor." Finally, it made no reference in either part to the question of whether the requested preliminary injunction would be in the "public interest."<sup>32</sup>

The Second Circuit soon realized that there were gaps in its statement of its "sliding scale" test, and it began to fill them in. First of all, in a 1976 antitrust case, the Second Circuit considered the question of whether the movant had to prove irreparable harm under the second part of its "sliding scale" test, concluding that the answer was yes because proof of "irreparable harm" is a "fundamental and traditional requirement of all preliminary injunctive relief."<sup>33</sup> The court articulated the policy behind its holding as follows: "If the element of irreparable damage is prerequisite for relief where the plaintiff must show probable success on the merits, then *a fortiori* where the plaintiff establishes something less than probable success as to the merits, need for proof of the threat of irreparable damage is even more pronounced."<sup>34</sup> Second, in 1979, in *Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc.*,<sup>35</sup> the Second Circuit officially revised its two-part, two-prong "sliding scale" test, turning it into a two-part, three-prong "sliding scale" test, which says that a party who wants preliminary

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30. 483 F.2d 953 (2d Cir. 1973).

31. *William Inglis*, 526 F.2d at 88 (quoting *Charlie's Girls*, 483 F.2d at 954).

32. For the text of the "traditional" test and the text of the two-part, two-prong "sliding scale" test, the two tests that are compared in this paragraph, see *supra* text accompanying notes 23–31.

33. *Triebwasser & Katz v. Am. Tel. & Tel. Co.*, 535 F.2d 1356, 1359 (2d Cir. 1976).

34. *Id.*

35. 596 F.2d 70 (2d Cir. 1979).

injunctive relief must show: “(a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief.”<sup>36</sup> The *Jackson Dairy* “sliding scale” test thus eliminated the *Charlie’s Girls* test’s reference to a “possibility of irreparable harm” as a permissible basis for obtaining preliminary injunctive relief.<sup>37</sup> Finally, in 1982, the Second Circuit held that it would also take into account the public interest in applying its *Jackson Dairy* “sliding scale” test because the Second Circuit had long held that it could “go much further both to give or to withhold relief in furtherance of the public interest than where only private interests are involved.”<sup>38</sup> I point out to my students that the *Jackson Dairy* test comes much closer to comports with the *Winter* test<sup>39</sup> than does the *Charlie’s Girls* test.<sup>40</sup> Indeed, I tell them that in 2010, the Second Circuit held that it would continue to apply its *Jackson Dairy* “sliding scale” test post-*Winter* because it saw no conflict between the two tests.<sup>41</sup>

The Ninth Circuit did not adopt the Second Circuit’s *Jackson Dairy* “sliding scale” test. Instead, the Ninth Circuit developed the notion, under its two-part, two-prong “sliding scale” test, “that there are not really two entirely separate tests, but . . . merely extremes of a single continuum.”<sup>42</sup> The Ninth Circuit announced that the critical element in determining which part of its “sliding scale” test ought to be applied in any given case is the relative hardship to the parties: “If the balance of harm tips decidedly toward the plaintiff, then the plaintiff need not show as robust a likelihood of success on the merits as when the balance tips less decidedly.”<sup>43</sup> And the Ninth Circuit further announced that, in the process of balancing the hardships, the trial court must first find that the plaintiff will suffer “irreparable harm” in the absence of

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36. *Id.* at 72.

37. For a statement of the *Charlie’s Girls* test, see *supra* text accompanying note 31.

38. *Standard & Poor’s Corp. v. Commodity Exch., Inc.*, 683 F.2d 704, 711 (2d Cir. 1982) (quoting *Brown & Williamson Tobacco Corp. v. Engman*, 527 F.2d 1115, 1121 (2d Cir. 1975)).

39. For a statement of the *Winter* test, see *supra* text accompanying notes 15–17.

40. For a statement of the *Charlie’s Girls* test, see *supra* text accompanying note 31.

41. *Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 35–38 (2d Cir. 2010). *Citigroup* specifically rejected the notion that a preliminary injunction may issue only upon proof that “ultimate success on the merits is more likely than not” because “[l]imiting the preliminary injunction to cases that do not present significant difficulties would deprive the remedy of much of its utility.” *Id.* at 35–36. The Seventh Circuit has also held that there is no conflict between the *Winter* test and its pre-*Winter* “sliding scale test.” See *Hoosier Energy Rural Elec. Coop., Inc. v. John Hancock Life Ins. Co.*, 582 F.3d 721, 725 (7th Cir. 2009).

42. *Benda v. Grand Lodge of Int’l Ass’n of Machinists & Aerospace Workers*, 584 F.2d 308, 315 (9th Cir. 1978).

43. *Id.*

a preliminary injunction.<sup>44</sup> The Ninth Circuit also explained that “[n]o chance of success at all . . . will not suffice” under its “sliding scale” test.<sup>45</sup> Rather, the “irreducible minimum” is a “fair chance of success on the merits” or questions “serious enough to require litigation.”<sup>46</sup> Finally, in 1983, the Ninth Circuit held that the Supreme Court’s decision in *Weinberger v. Romero-Barcelo*<sup>47</sup> mandated the consideration of “the public interest” in “any injunctive action in which the public interest is affected,” including any action for a preliminary injunction.<sup>48</sup>

In short, by 1983, both the Second Circuit and the Ninth Circuit were applying a “sliding scale” test, but the Second Circuit’s two-part, three-prong test was stated much more clearly and completely than the Ninth Circuit’s two-part, two-prong test. And, although the Second Circuit in *Jackson Dairy* had collapsed its “traditional” test into its alternative two-part, three-prong (sometimes four-prong) “sliding scale” test, the Ninth Circuit purported to have retained its “traditional” test even after it had adopted its alternative two-part, two-prong (or three-prong, or sometimes four-prong) “sliding scale” test.<sup>49</sup> The confusion in the Ninth Circuit came to a head in *Regents of the University of California v. American Broadcasting Companies, Inc.*,<sup>50</sup> an antitrust case in which the trial court had granted a preliminary injunction. The Ninth Circuit upheld the injunction, finding that the trial court had granted the injunction under the “traditional” test.<sup>51</sup> But the Ninth Circuit took the occasion to observe that “[t]his circuit has formulated different descriptions, some simple and some ornate, of the correct legal standard for the issuance of a preliminary injunction.”<sup>52</sup> The court went on to say: “Long or short, old or new, these tests are not separate tests but [rather] the outer reaches of a single continuum.”<sup>53</sup> The court then made a very astute observation about the relationship between the Ninth Circuit’s “traditional” test and its alternative “sliding scale” test. It said: “[T]he district court utilized the middle standard in

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44. *Am. Passage Media Corp. v. Cass Commc’ns, Inc.*, 750 F.2d 1470, 1473 (9th Cir. 1985).

45. *Benda*, 584 F.2d at 315.

46. *Id.*

47. 456 U.S. 305 (1982) (action for permanent injunction).

48. *Am. Motorcyclist Ass’n v. Watt*, 714 F.2d 962, 967 (9th Cir. 1983) (action for preliminary injunction).

49. For the development of the “sliding scale” test in both the Second Circuit and the Ninth Circuit, see *supra* text accompanying notes 27–48.

50. 747 F.2d 511 (9th Cir. 1984).

51. *Id.* at 515.

52. *Id.*

53. *Id.* (quoting *L.A. Mem’l Coliseum Comm’n v. Nat’l Football League*, 634 F.2d 1197, 1201 (9th Cir. 1980)) (internal quotation marks omitted).

the ‘continuum,’ which has been described as the ‘traditional’ standard in this circuit.”<sup>54</sup>

I find that my students are best able to understand the pre-*Winter* relationship between the Ninth Circuit’s “traditional” test and its “sliding scale” test if I use the language of the *Regents* case and describe the two tests as being part of “a single continuum.” In the middle of the continuum is the “traditional” test, which requires proof of (1) a “strong likelihood of success on the merits” and (2) irreparable harm.<sup>55</sup> It also requires proof that (3) the balance of the hardships tips to the plaintiff and (4) the public interest favors the issuance of the injunction.<sup>56</sup> On one far end of the continuum is the first part of the “sliding scale” test. It requires proof of (1) “probable success on the merits” and (2) “the possibility of irreparable injury.”<sup>57</sup> It may also require proof that (3) the balance of hardships tips to the plaintiff and (4) the public interest favors the issuance of the injunction.<sup>58</sup> At the other far end of the continuum is the second part of the “sliding scale” test. It requires proof that (1) “serious questions are raised” as to the merits<sup>59</sup> and (2) the plaintiff has suffered “irreparable harm.”<sup>60</sup> It also requires proof that (3) the balance of hardships “tips sharply” in favor of the plaintiff;<sup>61</sup> and it may require proof that (4) the public interest favors the issuance of the injunction.<sup>62</sup>

*B. Winter v. Natural Resources Defense Council, Inc. Rejects the Ninth Circuit’s “Possibility of Irreparable Harm” Test for Preliminary Injunctions*

1. *Winter* in the Lower Federal Courts

After studying the Ninth Circuit’s development of both its “traditional” test and its “sliding scale” test, my students are ready to consider the application of that body of law to the facts in the *Winter* case. The plaintiffs in *Winter* were the National Resources Defense Council, Jean-Michael Cousteau (an environmental enthusiast and filmmaker), and several other groups devoted to the protection of marine mammals.<sup>63</sup> One of the defendants was the Navy,

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54. *Regents*, 747 F.2d at 515.

55. *Id.*

56. *Id.*

57. *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1120 (9th Cir. 2005) (quoting *Johnson v. Cal. State Bd. of Accountancy*, 72 F.3d 1427, 1430 (9th Cir. 1995)).

58. *See Am. Motorcyclist Ass’n v. Watt*, 714 F.2d 962, 966–67 (9th Cir. 1983).

59. *Save Our Sonoran*, 408 F.3d at 1120.

60. *Id.* at 1124.

61. *Id.* at 1120.

62. *See Am. Motorcyclist Ass’n*, 714 F.2d at 966–67.

63. *Natural Res. Def. Council, Inc. v. Winter*, 530 F. Supp. 2d 1110, 1113 (C.D. Cal.), *aff’d*, 518 F.3d 658 (9th Cir.), *rev’d*, 555 U.S. 7 (2008).

which prepares for war by conducting training exercises at sea.<sup>64</sup> In this case, the Navy planned to use modern sonar during training exercises to detect and track submarines in the waters off the coast of Southern California (“SOCAL”).<sup>65</sup>

The plaintiffs complained that the Navy’s sonar training exercises would cause serious harm to various species of marine mammals (including dolphins and whales), and by extension, to themselves.<sup>66</sup> In particular, the plaintiffs claimed that the Navy’s training exercises would cause much more serious injuries to marine mammals than the Navy acknowledged, including permanent hearing loss, decompression sickness, and major behavioral disruptions.<sup>67</sup> The plaintiffs claimed that the Navy had violated the National Environmental Policy Act (“NEPA”) by finding no significant environmental impact after conducting an inadequate Environmental Assessment (“EA”), and by failing to prepare an Environmental Impact Statement (“EIS”) prior to conducting its sonar training exercises.<sup>68</sup> The plaintiffs requested a preliminary injunction that would enjoin the Navy from conducting its remaining SOCAL sonar training exercises.<sup>69</sup>

The Navy asserted that there was insufficient evidence that its SOCAL sonar training exercises would cause irreparable harm to marine mammals because the Navy had been conducting SOCAL sonar training exercises for the past forty years, and there was no evidence that marine mammals had been harmed during that entire period of time.<sup>70</sup> The plaintiffs responded by citing to the Navy’s own EA, which had documented the future threat of harm to the environment (including threats of harm to marine mammals) that would be caused by the planned SOCAL sonar training exercises.<sup>71</sup>

The district court judge, Florence-Marie Cooper, in the phase of the case that went to the United States Supreme Court, applied the first part of the Ninth Circuit’s “sliding scale” test. She found that the plaintiffs had proven a “probability of success” on the merits and at least a “possibility of irreparable harm.”<sup>72</sup> In point of fact, she found (based on the Navy’s own EA) that the plaintiffs had established a “near certainty” of irreparable harm to the

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64. *Id.*

65. *Id.* at 1112.

66. *Id.* at 1118.

67. *Id.* at 1119.

68. *Winter*, 530 F. Supp. 2d at 1113–14.

69. *Id.* at 1113.

70. *Natural Res. Def. Council, Inc. v. Winter*, 518 F.3d 658, 692 (9th Cir.), *rev’d*, 555 U.S. 7 (2008).

71. *Id.* at 691–92.

72. *Winter*, 530 F. Supp. 2d at 1115, 1118.

environment.<sup>73</sup> She then concluded her opinion with one final sentence regarding the balance of hardships and the public interest. She said:

The Court is also satisfied that the balance of hardships tips in favor of granting an injunction, as the harm to the environment, Plaintiffs, and public interest outweighs the harm that Defendants would incur (or the public interest would suffer) if Defendants were prevented from using MFA sonar, absent the use of effective mitigation measures, during a subset of their regular activities in one part of one state for a limited period.<sup>74</sup>

The district court judge entered a preliminary injunction that allowed the Navy to conduct the remaining SOCAL exercises, provided it employed certain measures intended to mitigate the impact of the Navy's use of MFA sonar on the environment.<sup>75</sup>

The Ninth Circuit, in an opinion written by Judge Betty B. Fletcher, approved the district court's application of the Ninth Circuit's "sliding scale" test and affirmed the preliminary injunction.<sup>76</sup> Judge Fletcher acknowledged that the Navy had argued that "no sonar-inflicted injuries have been observed in the Southern California Operating Area in almost forty years of MFA sonar use by the Navy,"<sup>77</sup> but she explained "that fact has limited probative value in establishing whether marine mammals will in fact be harmed by the Navy's use of MFA sonar."<sup>78</sup> Furthermore, she affirmed the district court's conclusion that the plaintiffs had established a "near certainty" of irreparable harm in the future based on the Navy's own EA.<sup>79</sup>

In support of its application of the first part of the "sliding scale" test, the district court cited an earlier environmental law case, *Earth Island Institute v. United States Forest Service* ("*Earth Island II*").<sup>80</sup> In *Earth Island II*, the plaintiffs had brought an action to enjoin post-fire restoration projects for logging in national forests in an effort to protect the natural habitat of the California spotted owl.<sup>81</sup> The Ninth Circuit, in an opinion written by Judge William A. Fletcher, reversed the denial of a preliminary injunction by the district court on the ground that the district court had misconstrued the Ninth Circuit's "sliding scale" test.<sup>82</sup>

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73. *Id.* at 1118.

74. *Id.*

75. *Id.* at 1118–21.

76. *Winter*, 518 F.3d at 703.

77. *Id.* at 692.

78. *Id.*

79. *Id.* at 696.

80. *See Winter*, 530 F. Supp. 2d at 1118.

81. *Earth Island Inst. v. U.S. Forest Serv.*, 442 F.3d 1147, 1152 (9th Cir. 2006) [hereinafter *Earth Island II*].

82. *Id.* at 1158–59.

At the outset of *Earth Island II*, the trial court judge had correctly stated the Ninth Circuit's "sliding scale" test:

[I]n order to prevail on a motion for a preliminary injunction, a party must demonstrate either (1) a combination of probable success on the merits and the possibility of irreparable harm; or (2) that serious questions are raised and the balance of hardships tips sharply in favor of granting the requested injunction.<sup>83</sup>

However, the district court judge had then stated that, under either part of the "sliding scale" test, the plaintiff was required to show a "significant threat of irreparable injury."<sup>84</sup> During the preliminary injunction hearing, the trial court judge had said: "[E]ven if there is shown to be a probability of success on the merits by the plaintiffs, the plaintiffs have not shown at this time that there is a significant threat of irreparable injury by clear and convincing evidence, which is the standard."<sup>85</sup> The defendant argued on appeal that the trial court judge had properly applied the "significant threat of irreparable injury" standard as set forth in one of the Ninth Circuit's earlier cases, *Oakland Tribune, Inc. v. Chronicle Publishing Co.*<sup>86</sup> The defendant further contended that "the words 'significant threat of irreparable injury' are not the equivalent of the 'concrete probability of irreparable harm' standard" that had been used erroneously by the same trial court judge in *Earth Island I*,<sup>87</sup> an earlier environmental law case involving the same parties.<sup>88</sup> The Ninth Circuit in *Earth Island II* responded: "While it is true that 'significant threat' and 'concrete probability' are different words, what matters is that both standards impose a higher burden of proof on Earth Island by going beyond the 'mere possibility of irreparable harm' standard."<sup>89</sup> The Ninth Circuit in *Earth Island II* then went on to distinguish the *Oakland Tribune* case on the ground that the antitrust plaintiff in that case had shown "a very low likelihood on the success of the merits of its claim, thereby justifying the higher standard of harm."<sup>90</sup> In *Earth Island II*, by contrast, the Ninth Circuit found that the trial court judge had erroneously applied the higher standard of harm from the outset without first determining the likelihood of Earth Island's success on the merits.<sup>91</sup>

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83. *Id.* (internal quotation marks omitted).

84. *Id.* at 1159 (internal quotation marks omitted).

85. *Id.* (internal quotation marks omitted).

86. *Earth Island II*, 442 F.3d at 1159.

87. *Earth Island Inst. v. U.S. Forest Serv.*, 351 F.3d 1291 (9th Cir. 2003).

88. *Earth Island II*, 442 F.3d at 1158–59.

89. *Id.* at 1159.

90. *Id.*

91. *Id.*

## 2. The Parties' Briefs to the Supreme Court in *Winter*

When the Navy in *Winter* appealed the Ninth Circuit's ruling to the United States Supreme Court, it focused much of its attention on the *Earth Island II* case. The relevant heading in the Navy's Brief for the Petitioners said: "The 'Mere Possibility' Of Irreparable Harm Cannot Support The Preliminary Injunction."<sup>92</sup> The first paragraph of the Navy's brief under that heading said: "The Ninth Circuit [in *Winter*] further erred in holding that respondents need only show a 'mere possibility' of irreparable harm to justify such relief, rejecting the proposition that a 'significant threat of irreparable injury' must be shown."<sup>93</sup> The Navy's brief asserted that "[t]he Ninth Circuit's 'mere possibility' standard expands the courts' equitable powers well beyond their traditional moorings and cannot be reconciled with the 'stringent' standard this Court has laid down for preliminary injunctive relief."<sup>94</sup> The Navy took the position that the *Winter* plaintiffs should be required to prove "a likelihood of irreparable injury," and not just the "mere possibility of irreparable injury," citing to a Second Circuit case that required proof of a "likelihood," rather than a "possibility," of irreparable injury because "[l]ikelihood sets, of course, a higher standard than possibility."<sup>95</sup> The Navy complained that the Ninth Circuit's "mere possibility" standard "effectively" shifted the burden of proof to the Navy to prove that "irreparable injury would *not* occur in the absence of injunctive relief," and the Navy asserted that it could not meet that burden of proof when "there is considerable scientific uncertainty" about a particular type of environmental harm, such as the alleged harm to the marine mammals in *Winter*.<sup>96</sup> Finally, the Navy described a preliminary injunction as an "extraordinary and drastic remedy" because it applies "equitable power before a court fully adjudicates a case," and then the Navy argued that the "party requesting [a preliminary injunction] must therefore proffer substantial proof and make a clear showing that such extraordinary relief is necessary."<sup>97</sup>

The Brief for the Respondents in *Winter* did little to rebut the Navy's objections to the Ninth Circuit's "mere possibility" test for irreparable harm, simply stating in a heading: "The Courts Below Applied Traditional Equitable Principles In Granting Tailored Preliminary Relief."<sup>98</sup> The brief cited only one

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92. Brief for the Petitioners at 38, *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008) (No. 07-1239).

93. *Id.*

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

95. Brief for the Petitioners, *supra* note 92, at 39 (quoting *JSG Trading Corp. v. Tray-Wrap, Inc.*, 917 F.2d 75, 79 (2d Cir. 1990)) (internal quotation marks omitted).

96. Brief for the Petitioners, *supra* note 92, at 39.

97. *Id.* (quoting *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997)) (internal quotation marks omitted).

98. Brief for the Respondents at 38, *Winter*, 555 U.S. 7 (No. 07-1239).

case from the Fourth Circuit that clearly supported the issuance of a preliminary injunction upon proof of a possibility of irreparable harm (and then only upon further proof of a probability of success on the merits).<sup>99</sup> Therefore, the Brief for the Respondents in *Winter* focused primarily on the trial court's findings of fact: "Despite the Navy's claims to the contrary, the lower courts' irreparable harm analysis did not rest on a finding of 'mere possibility.'"<sup>100</sup> Rather, "[t]he district court held (and the Ninth Circuit specifically affirmed) that Respondents had established 'to a near certainty' irreparable harm 'to the environment.'"<sup>101</sup> The Brief for the Respondents asserted that, without question, the district court's finding of a "near certainty" of irreparable harm had to be affirmed "absent clear error."<sup>102</sup> And the trial court judge had made no such error because she had based her finding on "extensive scientific evidence showing the MFA sonar causes serious, debilitating, and even lethal injuries as well as 'profound' and widespread behavioral disruptions in marine mammals."<sup>103</sup> "Because the district court's finding of a 'near certainty' of irreparable harm [was] plainly supported by the record," the Brief for the Respondents took the position that *Winter* was "not a proper case to decide whether, and under what circumstances, injunctive relief may issue on a showing of a 'possibility' of irreparable harm."<sup>104</sup> Nonetheless, if the Court were to reach the issue, the Brief for the Respondents asserted that 1) "the Ninth Circuit's sliding-scale irreparable harm standard is entirely consistent with this Court's precedents and with the rule in other circuits;"<sup>105</sup> and 2) there is a "broad consensus in favor of a sliding-scale approach [which] is especially sensible in the context of NEPA," a statute that is designed to protect the environment.<sup>106</sup>

The Navy's Reply Brief for the Petitioners chastised the Respondents for their "half-hearted" defense of the Ninth Circuit's allegedly erroneous "mere possibility" of irreparable harm standard for preliminary injunctive relief.<sup>107</sup> The Reply Brief criticized the fact that the Respondents had tried to dodge the Navy's objections to the Ninth Circuit's "mere possibility" standard by focusing on the trial court's factual finding of a near certainty of irreparable harm.<sup>108</sup> The Navy also asserted that the record did not support the trial court's

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99. *Id.* at 49 (citing *Blackwelder Furniture Co. v. Selig Mfg. Co.*, 550 F.2d 189, 196 (4th Cir. 1977), *overruled by* *Real Truth About Obama, Inc. v. FEC*, 575 F.3d 342 (4th Cir. 2009)).

100. Brief for the Respondents, *supra* note 98, at 41 (citation omitted).

101. *Id.*

102. *Id.*

103. *Id.* at 42.

104. *Id.* at 48.

105. Brief for the Respondents, *supra* note 98, at 49.

106. *Id.* at 50.

107. Reply Brief for the Petitioners at 17, *Winter*, 555 U.S. 7 (No. 07-1239).

108. *Id.* at 18.

factual finding because the intermediate appellate court had acknowledged that the record contains “‘no evidence’ that marine mammals have been harmed during the 40 years of MFA sonar training in SOCAL.”<sup>109</sup> Finally, the Navy conceded that the Respondents had invoked a “sliding scale” test that “some courts use in evaluating a likelihood of irreparable injury.”<sup>110</sup> But then the Navy said: “Even assuming that the requisite showing of injury may vary somewhat, . . . the Ninth Circuit’s ‘mere possibility’ standard, which expressly rejects the need for any ‘significant threat’ of injury, establishes a threshold that cannot be squared with the extraordinary nature of preliminary relief.”<sup>111</sup> Indeed, the Navy concluded, the “mere possibility” standard “renders the likelihood-of-irreparable-injury test virtually meaningless.”<sup>112</sup>

I tell my students about the parties’ briefs to the United States Supreme Court in *Winter*. Then I ask my students whether the Navy in *Winter* was arguing for the complete abolition of all federal circuit court sliding scale tests, or whether the Navy was only asking the Supreme Court to overrule the “mere possibility” of irreparable harm standard which had been reaffirmed by the Ninth Circuit in *Earth Island II* and which later had been applied by the district court in *Winter*.

3. The United States Supreme Court’s Majority and Dissenting Opinions in *Winter*

- a. Chief Justice Roberts’s Majority Opinion

Chief Justice Roberts opened his opinion for a majority of the Court in *Winter* with an observation that the Ninth Circuit had upheld the trial court’s preliminary injunction imposing mitigation measures on the Navy’s SOCAL sonar training, even though the Ninth Circuit had “acknowledged that ‘the record contains no evidence that marine mammals have been harmed’ by the Navy’s exercises,” and even though the Navy had been doing SOCAL sonar training exercises “for the past 40 years.”<sup>113</sup> He then announced: “The Court of Appeals was wrong, and its decision is reversed.”<sup>114</sup>

I ask my students: “On what basis did the Supreme Court actually reverse the Ninth Circuit’s decision in *Winter*?” I point out to them that Chief Justice Roberts’s opinion announced at the outset: “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

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109. *Id.*

110. *Id.*

111. *Id.* (citation omitted).

112. Reply Brief for the Petitioners, *supra* note 107, at 18.

113. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 12 (2008).

114. *Id.*

balance of equities tips in his favor, and that an injunction is in the public interest.”<sup>115</sup> I make the observation that the *Winter* test for preliminary injunctive relief is somewhat akin to the Ninth Circuit’s “traditional” test for determining whether to grant preliminary injunctive relief,<sup>116</sup> and therefore one might be tempted to think that *Winter* rejects the Ninth Circuit’s “sliding scale” test<sup>117</sup> outright. But then I remind my students that the Supreme Court in *Winter* was reviewing a Ninth Circuit decision that had applied the first part of the Ninth Circuit’s “sliding scale” test to uphold the trial court’s preliminary injunction, and therefore perhaps one ought to interpret the Court’s decision in *Winter* as a modification of the first part of the Ninth Circuit’s pre-*Winter* “sliding scale” test.

In reviewing the Ninth Circuit’s decision to uphold the preliminary injunction in *Winter* under *Earth Island II*’s “mere possibility of irreparable harm” standard, Chief Justice Roberts said: “We agree with the Navy that the Ninth Circuit’s ‘possibility’ standard is too lenient.”<sup>118</sup> He went on to say that the Court would instead adopt a standard that requires plaintiffs seeking a preliminary injunction to demonstrate that “irreparable injury is *likely* in the absence of an injunction.”<sup>119</sup> As a matter of policy, he said that granting a preliminary injunction on the basis of no more than a “possibility of irreparable harm” was inconsistent with the Court’s characterization of injunctive relief as an “extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.”<sup>120</sup> But having rejected *Earth Island II*’s “possibility” standard, Chief Justice Roberts backed away from holding that he was reversing the Ninth Circuit’s ruling on the ground that the trial court had failed to find that the plaintiff was likely to suffer irreparable harm.<sup>121</sup> After all, the Ninth Circuit had affirmed the trial court’s factual finding that there was a “near certainty” of irreparable harm.<sup>122</sup> Instead, he said: “It is not clear that articulating the incorrect standard affected the Ninth Circuit’s analysis of irreparable harm.”<sup>123</sup> In other words, the Ninth Circuit’s error in articulating the “possibility” standard might have been a harmless error because the Ninth Circuit had “affirmed the District Court’s conclusion that plaintiffs had established a ‘near certainty’ of irreparable harm.”<sup>124</sup>

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115. *Id.* at 20.

116. *See supra* text accompanying notes 23–24.

117. *See supra* text accompanying note 31.

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

119. *Id.*

120. *Id.*

121. *See id.*

122. *Id.*

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

124. *Id.*

Chief Justice Roberts then shifted from the second prong of the *Winter* test to the third and fourth prongs. He said that “even if plaintiffs have shown irreparable injury from the Navy’s training exercises, any such injury is outweighed by the public interest and the Navy’s interest in effective, realistic training of its sailors.”<sup>125</sup> He emphasized that a “proper consideration of [those] factors alone requires denial of the requested injunctive relief.”<sup>126</sup> He then added that, for the same reason, it would not be necessary for the Court to address the lower courts’ holding that the “plaintiffs have also established a likelihood of success on the merits.”<sup>127</sup> Chief Justice Roberts ended his opinion by observing that national security and military interests do not always trump other considerations when determining whether to grant a preliminary injunction.<sup>128</sup> However, he said that in *Winter* “the proper determination of where the public interest lies does not strike us as a close question.”<sup>129</sup>

The issue on the table for my students after reading Chief Justice Robert’s opinion in *Winter* is whether he has foreclosed access to the “sliding scale” test in the federal court system, or whether he has simply revised the first part of the Ninth Circuit’s “sliding scale” test. At first, my students are inclined to think that Chief Justice Roberts has foreclosed access to the “sliding scale” test in the federal court system. But then, when they read the dissenting opinion by Justice Ruth Bader Ginsburg, they realize that they might just be wrong about that.

#### b. Justice Ginsburg’s Dissenting Opinion

Justice Ginsburg opened her dissenting opinion with a criticism of the Navy: “If the Navy had completed the EIS before taking action, as NEPA instructs, the parties and the public could have benefited from the environmental analysis—and the Navy’s training could have proceeded without interruption.”<sup>130</sup> Instead, she said, the Navy acted first, and only later agreed to complete the EIS at some point in time in the future.<sup>131</sup> As a result, she announced that she would hold that, by imposing appropriate measures to mitigate harm until the completion of the EIS, the District Court had correctly balanced the equities and did not abuse its discretion.<sup>132</sup>

Next, Justice Ginsburg took up the question of whether Chief Justice Roberts had rejected the “sliding scale” test for preliminary injunctions in the

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125. *Id.* at 23.

126. *Id.*

127. *Id.* at 23–24.

128. *Winter*, 555 U.S. at 26.

129. *Id.*

130. *Id.* at 43 (Ginsburg, J., dissenting).

131. *Id.*

132. *Id.* at 43–44.

federal court system. She began by emphasizing that the hallmark of equity jurisdiction is flexibility and the exercise of equitable discretion.<sup>133</sup> She then noted that equity courts “do not insist that litigants uniformly show a particular, predetermined quantum of probable success or injury before awarding equitable relief.”<sup>134</sup> More to the point, she observed that the lower federal 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” (as in *Winter*).<sup>135</sup> She emphasized that, in a NEPA case, because the EIS is a “tool for *uncovering* environmental harm, environmental plaintiffs may often rely more heavily on their probability of success than on the likelihood of harm.”<sup>136</sup> She also emphasized that, while Chief Justice Roberts was correct that preliminary injunctive relief “is not warranted ‘simply to prevent the possibility of some remote future injury,’” nevertheless the injury need not already have been inflicted when the plaintiff seeks a preliminary injunction.<sup>137</sup> Nor need it be certain to occur in the future because “a strong threat of irreparable injury before trial is an adequate basis” for an award of preliminary injunctive relief.<sup>138</sup> Specifically, Justice Ginsburg would have held:

In light of the likely, substantial harm to the environment, NRDC’s almost inevitable success on the merits of its claim that NEPA required the Navy to prepare an EIS, the history of this litigation, and the public interest, I cannot agree that the mitigation measures the District Court imposed signal an abuse of discretion.<sup>139</sup>

She also made the following observation about the “sliding scale” test: “This Court has never rejected that formulation, and I do not believe it does so today.”<sup>140</sup>

I suggest to my students that it is highly significant that Chief Justice Roberts chose not to respond to Justice Ginsburg’s observation regarding the viability of the “sliding scale” test, especially since he devoted a lengthy footnote to setting forth his responses to both the concurring and dissenting opinions in *Winter*.<sup>141</sup> By not responding, I suggest to my students he may have left the door open for the United States Supreme Court to approve a federal

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133. *Winter*, 555 U.S. at 51 (Ginsburg, J., dissenting).

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* at 51–52.

138. *Winter*, 555 U.S. at 52 (Ginsburg, J., dissenting) (quoting 11A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2948.1 (2d ed. 1995)).

139. *Winter*, 555 U.S. at 53–54 (Ginsburg, J., dissenting).

140. *Id.* at 51.

141. *See id.* at 31–32 n.5 (majority opinion).

circuit court's "sliding scale" test for preliminary injunctions that does not include the mere possibility of irreparable harm standard. Put another way, the Supreme Court might be willing to approve a "sliding scale" test which requires proof that the plaintiff is likely to suffer irreparable harm in the absence of preliminary injunctive relief, but which does not require proof that the plaintiff is likely to succeed on the merits. For example, such a hypothetical "sliding scale" test might require proof of serious questions on the merits coupled with proof that the plaintiff is likely to suffer irreparable harm in the absence of preliminary injunctive relief, plus proof that the balance of hardships tips sharply to the plaintiff and proof that the injunction is in the public interest.

#### V. CRAFTING A NEW "SLIDING SCALE" TEST AFTER *WINTER*

Somewhat ironically, the task of crafting a new Ninth Circuit "sliding scale" test after *Winter* fell to Judge William A. Fletcher, the author of *Earth Island II*.<sup>142</sup> He wrote the opinion for the court in *Alliance for the Wild Rockies v. Cottrell*,<sup>143</sup> a case in which an environmental organization sought to enjoin a post-fire timber salvage sale by the United States Forest Service ("USFS") in order to protect "its members' ability to 'view, experience, and utilize' the areas" at issue in their undisturbed state.<sup>144</sup> Citing *Winter*, the district court had denied Alliance for the Wild Rockies's ("AWR's") motion for a preliminary injunction on the ground that the plaintiff "had not shown the requisite likelihood of irreparable injury and success on the merits."<sup>145</sup> The Ninth Circuit reversed, directing the district court to issue a preliminary injunction under the Ninth Circuit's new, post-*Winter* "sliding scale" test.<sup>146</sup> I assign the *Alliance for the Wild Rockies* case to my students so that we can have a conversation about the process by which the Ninth Circuit crafted its post-*Winter* "sliding scale" test.

Judge Fletcher opened his opinion in *Alliance for the Wild Rockies* with a statement of the facts, explaining that, in the fall of 2007, the Rat Creek Wildfire had burned about 27,000 acres of land in the Beaverhead-Deerlodge National Forest in Montana.<sup>147</sup> On July 1, 2009, the Chief Forester of the USFS made an Emergency Situation Determination for the Rat Creek Salvage Project ("the Project"), permitting "the immediate commencement of the Project's logging without any of the delays that might have resulted from the

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142. See *supra* text accompanying note 82.

143. 632 F.3d 1127 (9th Cir. 2011).

144. *Id.* at 1129, 1135.

145. *Id.* at 1128.

146. See *id.* at 1139.

147. *Id.* at 1129.

Forest Service's administrative appeals process."<sup>148</sup> The Project permitted the salvage logging of trees on 1652 of the 27,000 acres of land that had burned.<sup>149</sup> The purposes of the Project were to salvage the timber that was dead or dying and to reforest the harvested areas with healthy trees.<sup>150</sup> In April of 2009, the USFS released an Environmental Assessment ("EA") of the Project for public comment.<sup>151</sup> On July 22, 2009, the USFS issued the final EA, which concluded that the Project would have no significant environmental impact, and therefore an Environmental Impact Statement ("EIS") would not be required under NEPA.<sup>152</sup> The USFS then initiated a bidding process, and on July 30, 2009, Barry Smith Logging was declared the highest bidder.<sup>153</sup> On August 14, 2009, the district court denied AWR's request for a preliminary injunction.<sup>154</sup> Barry Smith Logging began work on the Project in August, 2009, and approximately 49% of the planned logging was completed in the fall of 2009 before the winter conditions halted the operations.<sup>155</sup>

Judge Fletcher began his analysis of the plaintiff's request for a preliminary injunction with the following observation: "In *Winter*, the Supreme Court disagreed with one aspect of this circuit's approach to preliminary injunctions. We had held that the 'possibility' of irreparable harm was sufficient, in some circumstances, to justify a preliminary injunction. *Winter* explicitly rejected that approach."<sup>156</sup> Judge Fletcher went on to explain that, under *Winter*, plaintiffs must prove that "irreparable harm is *likely*, not just possible."<sup>157</sup> At the same time, he emphasized the fact that the majority opinion in *Winter* "did not, however, explicitly discuss the continuing validity of the 'sliding scale' approach to preliminary injunctions employed by this circuit and others."<sup>158</sup> Under the "sliding scale" approach, he explained, "the elements of the preliminary injunction test are balanced, so that a stronger showing of one element may offset a weaker showing of another."<sup>159</sup> Finally, Judge Fletcher observed that Justice Ginsburg had "explicitly noted" in her

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148. *Alliance for the Wild Rockies*, 632 F.3d at 1129.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* at 1130.

153. *Alliance for the Wild Rockies*, 632 F.3d at 1130.

154. *Id.*

155. *Id.* at 1131.

156. *Id.*

157. *Id.*

158. *Alliance for the Wild Rockies*, 632 F.3d at 1131.

159. *Id.*

dissent in *Winter* that the “Court has never rejected [the sliding scale] formulation, and I do not believe it does so today.”<sup>160</sup>

Based on his analysis of *Winter*, Judge Fletcher plunged into the task of reformulating the Ninth Circuit’s “sliding scale” test so that it could continue to exist while comports with the requirements of Chief Justice Roberts’s majority opinion. He looked at the second part of the Ninth Circuit’s pre-*Winter* sliding scale test, which permitted a court to grant a preliminary injunction upon proof that “serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff’s favor.”<sup>161</sup> He decided that the second part of the Ninth Circuit’s pre-*Winter* “sliding scale” test could be salvaged post-*Winter*, provided the Ninth Circuit reframed it so that it complied with the spirit of *Winter*’s four-prong test.<sup>162</sup> He called the reframed test the “serious questions” approach.<sup>163</sup> He also announced: “[W]e join the Seventh and the Second Circuits in concluding that the ‘serious questions’ version of the sliding scale test for preliminary injunctions remains viable after the Supreme Court’s decision in *Winter*.”<sup>164</sup> More specifically, he held that proof of “serious questions going to the merits and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest.”<sup>165</sup>

Applying the Ninth Circuit’s post-*Winter* “serious questions sliding scale test” to the facts of the case before him, Judge Fletcher held that the plaintiff was entitled to preliminary injunctive relief.<sup>166</sup> He found that the plaintiff had proven “serious questions” going to the merits because the USFS had not followed proper administrative procedures when it had granted the Emergency Situation Determination.<sup>167</sup> Then Judge Fletcher found that the plaintiff had proven a likelihood of irreparable harm because it had proven that its members used the partially burned-out forest at issue for “work and recreational purposes, such as hunting, fishing, hiking, horseback riding, and cross-country skiing.”<sup>168</sup> Next, he concluded that the “balance of hardships between the parties tips sharply in favor of AWR” because “[o]nce [the acres at issue] are logged, the work and recreational opportunities that would otherwise be

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160. *Id.* at 1132 (quoting *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 51 (2008) (Ginsburg, J., dissenting)).

161. *Alliance for the Wild Rockies*, 632 F.3d at 1134–35 (quoting *Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008)).

162. *See Alliance for the Wild Rockies*, 632 F.3d at 1135.

163. *Id.*

164. *Id.* at 1134.

165. *Id.* at 1135 (internal quotation marks omitted).

166. *Id.*

167. *Alliance for the Wild Rockies*, 632 F.3d at 1137.

168. *Id.* at 1135.

available on that land are irreparably lost,” whereas the hardship to the USFS was only “an estimated potential foregone revenue of ‘as much as \$16,000.’”<sup>169</sup> Finally, he found that the injunction would be in the public interest because he found that the public interest “in preserving nature and avoiding irreparable environmental injury” far outweighed the competing public interest in creating “18 to 26 temporary jobs” that would have had only “indirect beneficial effects on other aspects of the local economy” for a period of one year.<sup>170</sup>

There were three judges on the Ninth Circuit panel in the *Alliance for the Wild Rockies* case—Circuit Judge Fletcher, Circuit Judge Rawlinson, and District Judge Mosman from the District of Oregon, sitting by designation.<sup>171</sup> Judge Mosman wrote a concurring opinion that I assign to my students because it gives them a trial court judge’s perspective on the importance of preserving the “serious questions” sliding scale test for determining whether to grant preliminary injunctive relief. Judge Mosman began his concurring opinion with a plea for preserving the flexibility that is the “hallmark of relief in equity.”<sup>172</sup> He then observed that the task of presiding over a preliminary injunction hearing is often a “delicate and difficult balancing act” because the trial court judge is faced with “complex factual scenarios teed up on an expedited basis” and the parties can conduct only limited discovery.<sup>173</sup> He emphasized the fact that a district court judge at the preliminary injunction stage is in a “much better position to predict the likelihood of harm than the likelihood of success.”<sup>174</sup> In the *Alliance for the Wild Rockies* case, for example, he noted that the parties could easily agree that more than 1600 acres would be logged if no preliminary injunction were issued.<sup>175</sup> He acknowledged that the parties had their disagreements about the implications of the logging—“such as the extent of the environmental impact or the value of natural recovery”—but he kept his focus on the fact that the amount of acreage that would be logged was undisputed.<sup>176</sup>

By contrast, he said that “predicting the likelihood of success is another matter entirely.”<sup>177</sup> He reemphasized the accelerated schedule of preliminary injunction hearings, and then said: “The parties are often mostly guessing about important factual points that go, for example, to whether a statute has been violated, whether a noncompetition agreement is even valid, or whether a

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169. *Id.* at 1137–38.

170. *Id.* at 1138–39.

171. *Id.* at 1128.

172. *Alliance for the Wild Rockies*, 632 F.3d at 1139 (Mosman, J., concurring).

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Alliance for the Wild Rockies*, 632 F.3d at 1139 (Mosman, J., concurring).

patent is enforceable.”<sup>178</sup> He observed that the legal arguments regarding the likelihood of success, “while not exactly half-baked, do not have the clarity and development that will come later” during the trial of the case.<sup>179</sup> In this setting, he suggested that it can seem “almost inimical to good judging to hazard a prediction about which side is likely to succeed” (using the language of the *Winter* test).<sup>180</sup> For that reason, he suggested that in many, if not most, cases “the *better* question to ask is whether there are serious questions going to the merits.”<sup>181</sup> In his opinion, “[t]hat question has a legitimate answer,” whereas the question of whether the plaintiffs are “likely to prevail often does not.”<sup>182</sup>

#### CONCLUSION

After teaching the *Alliance for the Wild Rockies* case to my students, I suggest to them that its articulation of a “serious questions” sliding scale test is a godsend to those of us who live and practice law in the Ninth Circuit. It finally clarifies the Ninth Circuit’s law regarding the issuance of preliminary injunctive relief post-*Winter*. Of course, the longevity of the “serious questions” sliding scale test depends upon whether the United States Supreme Court will uphold it. My best guess is that, in the future, the Court will decide to uphold it. After all, Justice Ruth Bader Ginsburg asserted in her dissenting opinion in *Winter*: “This Court has never rejected [the sliding scale] formulation, and I do not believe it does so today.”<sup>183</sup> And Chief Justice Roberts offered no response to Justice Ginsburg’s bold assertion. Therefore, when I teach Remedies, I assume that Justice Ginsburg has predicted correctly that the United States Supreme Court will ultimately uphold the “serious questions” version of the Ninth Circuit’s “sliding scale” test. Consequently, unless and until she and I are both proven wrong, that is how I teach the law of preliminary injunctions after *Winter*.

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178. *Id.* at 1139–40.

179. *Id.* at 1140.

180. *Id.*

181. *Id.*

182. *Alliance for the Wild Rockies*, 632 F.3d at 1140.

183. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 51 (2008) (Ginsburg, J., dissenting).