

STATE OF WISCONSIN

CIRCUIT COURT

WAUKESHA COUNTY

WISCONSIN MANUFACTURERS AND COMMERCE, et al.
Plaintiffs,

Case No. 20-CV-1389

v.

TONY EVERS, et al.,
Defendants,

&

MILWAUKEE JOURNAL SENTINEL,
Intervenor-Defendant.

**AMICUS CURIAE BRIEF BY NATIONAL FEDERATION OF INDEPENDENT
BUSINESS, WISCONSIN RESTAURANT ASSOCIATION, AND RESTAURANT
LAW CENTER**

QUESTION PRESENTED

May a Governor ignore privacy laws and release the confidential health information of an employer's employees under the guise of that information being subject to open records requests?

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INTEREST OF AMICUS CURIAE¹

The National Federation of Independent Business Small Business Legal Center (NFIB SBLC) is a nonprofit, public interest law firm, established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. NFIB is the nation's leading small business association, representing members in Washington D.C. and all fifty state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. To fulfill its role as the voice for small business, the NFIB SBLC frequently files amicus briefs in cases that affect small businesses.

The Wisconsin Restaurant Association (WRA) is one of the largest trade associations in the state with over 7,000 member locations throughout Wisconsin. The WRA's mission is dedicated to the success of the Foodservice and Hospitality Industry. The Association advocates on behalf of the restaurant industry, including filing amicus briefs such as this one, to provide a voice for the Wisconsin restaurant industry in the courts to highlight the real world implications of important cases on our industry. WRA membership includes a wide range of foodservice businesses representing virtually every size and style of restaurant in the state.

The Restaurant Law Center (Law Center) is a 501(c)(6) legal entity launched in 2015 by industry leaders with the expressed purpose of promoting laws and regulations that allow restaurants to continue growing, creating jobs and contributing to a robust American economy. The restaurant and foodservice industry employs approximately 10 percent of the U.S. workforce. Restaurants are job creators and the nation's second-largest private sector employer. Thus, the Law

¹ Counsel for *amicus* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amicus*, their members, and their counsel has made a monetary contribution intended to fund the preparation or submission of this brief.

Center’s goal is to protect and advance the restaurant industry and to ensure that the views of America’s restaurants are taken in consideration by giving them a stronger voice in the regulatory process and in the courtroom, including through the filing of amicus briefs in cases such as this.

SUMMARY OF ARGUMENT

After flip-flopping on his authority to release the names of businesses that have had employees test positive for COVID-19 and the number of employees who have tested positive, Governor Evers now plans to publish this information in response to public records requests.² Wisconsin Stat. § 813.02(1)(a) provides that state courts may grant a temporary injunction when “the commission or continuance of [some act] which during the litigation would injure the party[.]” Wis. Stat. § 813.02(1)(a). To obtain a temporary injunction, the movant need only show “(1) the movant is likely to suffer irreparable harm if a temporary injunction is not issued; (2) the movant has no other adequate remedy at law; (3) a temporary injunction is necessary to preserve the status quo; and (4) the movant has a reasonable probability of success on the merits.” *Service Employees International Union, Local 1 v. Vos*, 2020 WI 67, ¶93, 393 Wis. 2d 38, 946 N.W.2d 35 (quoting *Milwaukee Deputy Sheriffs’ Ass’n v. Milwaukee Cty.*, 2016 WI App 56, ¶20, 370 Wis. 2d 644, 883 N.W.2d 154). “[A]t the temporary injunction stage the requirement of irreparable injury is met by showing that, without it to preserve the status quo pendente lite, the permanent injunction sought would be rendered futile.” *Werner v. A. L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 520, 259 N.W.2d 310 (Wis. 1977) (footnote omitted).

² In July, the Administration backtracked on prior plans to publicly list names of businesses with multiple positive COVID-19 cases. On September 9th, Governor Evers confirmed this backtracking due to some “privacy things going on there” and “we need to keep [this information] in a way that . . . protects the businesses.” Mitchell Schmidt, *WMC Files Lawsuit to Block State Plans to Reveal Businesses with Multiple COVID-19 Cases*, THE JOURNAL TIMES (Oct. 2, 2020), https://journaltimes.com/news/state-and-regional/govt-and-politics/wmc-files-lawsuit-to-block-state-plans-to-reveal-businesses-with-multiple-covid-19-cases/article_f1f35fab-b5b1-5661-9eed-62aa980f320e.html.

Amici focus this brief on the “irreparable harm” and necessity to “preserve the status quo,” not only for Plaintiffs and their members, but also restaurants and small businesses across Wisconsin. Recent surveys of restaurants and small businesses, plus consumer activity analyses, demonstrate that COVID-19 is taking a monumental toll on the financial health of businesses and their ability to survive these disastrous times. While Wisconsin is experiencing a “surge” in COVID-19 cases,³ Governor Evers’s decision to publish the names of businesses with COVID-19 cases from as far back as months ago will do nothing to stop the current spread of the virus. Instead, it will simply instill fear in consumers and cause them to second-guess or forego patronizing these establishments linked with COVID-19. As empirical survey evidence demonstrates, this further loss in revenue will detrimentally and permanently harm the Wisconsin business community.

Due to this lost revenue, combined with stigma and reputational damage, the harm from not issuing a temporary injunction is immense and irreversible. Businesses will close, hundreds or thousands would lose their jobs, and citizens will have difficulty providing food and shelter for their families. Therefore, the NFIB SBLC, the WRA, and the Law Center urge this court to issue an immediate temporary injunction to “preserve the status quo.”

ARGUMENT

I. Allowing Wisconsin’s Governor to bypass privacy laws will detrimentally and permanently impact restaurants and small businesses throughout the State of Wisconsin.

To reiterate, the issuance of a temporary injunction requires a showing of “irreparable harm” and a necessity to “preserve the status quo.” *Service Employees International Union, Local 1*, 2020 WI 67, ¶93 (quoted source omitted); *see also Winter v. Natural Resources Defense*

³ *Wisconsin Reports 18 More COVID-19 Deaths as Cases Surge*, WISCONSIN STATE JOURNAL, (Oct. 11, 2020), https://madison.com/wsj/news/local/health-med-fit/wisconsin-reports-18-more-covid-19-deaths-as-cases-surge/article_f1c21192-19c6-5eb1-9ec9-38b99821b520.html.

Council, Inc., 555 U.S. 7, 21 (2008) (affirming a likelihood of irreparable harm for a preliminary injunction). A showing of “irreparable harm” simply means that a permanent injunction issued post-merits proceedings, cannot remedy the actions taken during litigation. *See Werner*, 80 Wis. 2d at 520. This showing is easily satisfied here due to the immediate detrimental impact the Governor’s proposed action will have on the business community.

The loss of business revenue, or business operation altogether, can demonstrate an “irreparable harm.” “Where a defendant’s wrong threatens a plaintiff with the loss of business and the amount of the plaintiff’s future damages are difficult or impossible to ascertain, this court has held that a plaintiff’s remedy at law would be inadequate and that an injunction is an appropriate remedy.” *American Mut. Liability Ins. Co. v. Fisher*, 58 Wis. 2d 299, 306, 206 N.W.2d 152 (Wis. 1973) (cited sources omitted). Indeed, the United States Court of Appeals for the Second Circuit has noted that “[m]ajor disruption of a business can be as harmful as termination, and a ‘threat to the continued existence of a business can constitute irreparable injury.’” *Nemer Jeep-Eagle, Inc. v. Jeep-Eagle Sales Corp.*, 992 F.2d 430, 435 (2d Cir. 1993) (quoting *John B. Hull, Inc., v. Waterbury Petroleum Prods. Inc.*, 588 F.2d 24, 28-29 (2d Cir. 1978)).

In *John B. Hull, Inc.*, the Second Circuit reviewed the district court’s grant of a preliminary injunction in a price discrimination antitrust suit. 588 F.2d at 26. The district court found Defendants’ pricing practices put one of the Plaintiffs in “danger of losing many customers” and “if it lost those customers, it would probably be forced out of the heating oil business.” *Id.* at 28. Relying on this threat of business existence, the Second Court affirmed and held this loss of customers and threat to the business’s existence constituted an irreparable injury. *Id.* at 29. Similarly, the Seventh Circuit reversed the denial of a preliminary injunction in a case where law

enforcement actions negatively affected a business's financial health. *See Backpage.com, LLC v. Dart*, 807 F.3d 229, 230, 237-38 (7th Cir. 2015).

In this case, the Governor seeks to combat the spread of COVID-19 by releasing the names of businesses with employees who tested positive and the number of employees who tested positive. Bauer Aff. ¶¶ 4,7,9. The business community appreciates that Wisconsin is a growing hotspot for COVID-19,⁴ and supports the goal of reversing this spread. However, the Administration's plan to release the names of businesses who had employees test positive over twenty-eight days ago,⁵ will not slow this spread. *See generally* Alex Bell, *How Long Does it Take for Symptoms of COVID-19 to Appear?*, MEDICAL NEWS TODAY (June 17, 2020), <https://www.medicalnewstoday.com/articles/how-long-does-it-take-for-covid-19-symptoms-to-appear> (noting that the typical incubation period is between two and fourteen days, but the mean is just over five days); *When You Can Be Around Others*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Sept. 10, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/if-you-are-sick/end-home-isolation.html> (discussing the time period when spreading the virus is no longer a concern as ten days after symptoms appear for possible, mild, or asymptomatic cases, and typically less than twenty days for serious cases).

It does not take a mathematician to conclude the contagion period for most positive cases will pass before the twenty-eight-day period of non-release. Releasing old data will not only cause irreparable harm to businesses, it could jeopardize effective public health response by disincentivizing public cooperation with contact tracing efforts. Individuals who are concerned

⁴ *See* David Mills, *Here are the States Where COVID-19 is Increasing*, HEALTHLINE (Oct. 8, 2020), <https://www.healthline.com/health-news/here-are-the-states-where-covid-19-is-increasing> (discussing states with the highest number of new cases, hospitalizations, and deaths).

⁵ Bauer Aff. ¶ 5.

that naming a business could result in public blacklisting might be reluctant to cooperate with tracing.

Even if the Governor were to change course and release the names of businesses with positive employee tests within the preceding twenty-eight-day window, this would not slow the spread of COVID-19. Publishing the numbers of recent positive tests at a certain business would not inform the public of important contextual information, such as:

- (1) Did the employee contract the virus inside or outside of the workplace;
- (2) If outside, did the employee bring the virus into the workplace;
- (3) If the employee never brought the virus into the workplace, did any other employee or owner have contact with the infected employee and return to the workplace;
- (4) If the employee brought the virus into the workplace, was there ever a point when he or she was not wearing a mask or social distancing while at work; and
- (5) In the case of a restaurant, did the employee engage in food preparation or delivery?

Without this information, members of the public have no way of knowing whether the business was even exposed to the virus, whether they were exposed to the virus and must self-quarantine, or whether they would be exposed to the virus if visiting the business. Releasing names of businesses with positive employee tests in the preceding twenty-eight-day period, without more information, simply brands the restaurant or small business with a COVID-19 badge of infamy.

Many restaurants and small businesses could not survive a public shaming that would inevitably deter customers and clients as the economy remains perilous for many businesses. Studies show the ravaging effect COVID-19 has taken on businesses. *See* Mitchell Schmidt, *COVID-19 Edges Out Workforce Shortage as Biggest Concern among Wisconsin Businesses, Survey Finds*, WISCONSIN STATE JOURNAL (July 12, 2020), <https://madison.com/business/covid->

[19-edges-out-workforce-shortage-as-biggest-concern-among-wisconsin-businesses-survey-finds/article_fe649fa2-92bc-58fc-aae2-443d022517a0.html](https://www.wisconsinbusiness.com/19-edges-out-workforce-shortage-as-biggest-concern-among-wisconsin-businesses-survey-finds/article_fe649fa2-92bc-58fc-aae2-443d022517a0.html). Of those responding, 75 percent indicated COVID-19 has negatively impacted their business, with 23 percent predicting they will end the year in the red. *Id.*

Businesses are also concerned about the economic effect of government measures taken in the name of public health. In fact, in July, Wisconsin business owners ranked government response measures as the most important public policy issue in the state. *Id.* The NFIB Research Center has consistently collected information from small businesses about the financial struggles that COVID-19 and the government responses thereto, are imposing on their businesses. In a recent survey of over 20,000 member businesses was conducted at the end of September. Almost half of all responders indicated that their businesses were struggling so much that they would need further government financial support to stay in business. NFIB RESEARCH CENTER, COVID-19 SMALL BUSINESS SURVEY (12) 6 (Sep. 2020), <https://assets.nfib.com/nfibcom/Covid-19-12-Questionnaire-and-Write-up-FINAL-web-version.pdf>.

Also in this same survey, 22 percent of responses expressed that business sales are still below 50 percent of their pre-crisis levels, or the business closed altogether; almost 50 percent of responses indicated sales are still up to 75 percent less than pre-crisis levels. *Id.* Ignoring any possible further government regulation and economic downturn, over 20 percent of business respondents already indicate they will be laying off employees in the next 6 months. *Id.* Wisconsin small businesses have a dire COVID-19-related financial prognosis, as demonstrated by the state ranking in the top ten for early-summer SBA approved loan funding. Chris Hubbuch, *Wisconsin Businesses Still Waiting on Help as Federal Program Runs Dry*, WISCONSIN STATE JOURNAL (Apr.

17, 2020), https://madison.com/wsj/business/wisconsin-businesses-still-waiting-on-help-as-federal-program-runs-dry/article_d73cda6a-af0d-594f-9075-dce3de7947f2.html.

For the Wisconsin restaurant industry in particular, COVID-19 has had a devastating impact. A recently completed nationwide survey of restaurant owners and operators provide a shocking data-driven update on the dire state of the restaurant industry in Wisconsin. Consumer spending in restaurants remained well below normal levels in August. Of Wisconsin restaurant operators surveyed, 85 percent say their total dollar sales volume in August decreased compared to August 2019. Samara Kalk Derby, *Survey Finds 33% of Wisconsin Restaurants Could Close Within 6 Months if COVID-19 Measures Continue*, WISCONSIN STATE JOURNAL (Sept. 22, 2020), https://madison.com/wsj/entertainment/dining/restaurants/survey-finds-33-of-wisconsin-restaurants-could-close-within-6-months-if-covid-19-measures/article_ae15cd99-5bb1-530d-b687-d9d28e583706.html. Overall, sales were down 36 percent on average. *Id.*

Even though sales were significantly lower for most restaurants, it does not mean their costs also fell proportionally. Total operational costs (as a percent of sales) are higher than they were prior to the COVID-19 outbreak for 53 percent of Wisconsin restaurants. *Id.* Furthermore, 33 percent say it is unlikely their restaurant will still be in business 6 months from now, if business conditions continue at current levels. *Id.*

Although many restaurants added back employees as restrictions were partially lifted in recent months, overall staffing levels remain well below normal. On average, Wisconsin restaurant operators say their current staffing levels are only 71 percent of what they would typically be in the absence of COVID-19. *Id.* Overall, 44 percent of Wisconsin restaurant operators do not expect their staffing levels to return to pre-coronavirus levels within the next six months. *Id.* Also, in Wisconsin specifically, businesses in general are still experiencing a double-digit decrease in

patronage relative to this time last year. See Jennifer Valentino-DeVries, et al., *Virus Alters Where People Open Their Wallets, Hinting at a Halting Recovery*, N.Y. TIMES (Aug. 18, 2020), <https://www.nytimes.com/interactive/2020/08/18/business/economy/coronavirus-economic-recovery-states.html>.

Instead of preventing the spread of COVID-19 and helping businesses through these hard times, Defendants' proposed activity will further alienate consumers and irreparably damage the outlook for businesses branded as COVID-19 positive businesses. Whether intentionally or unintentionally, the Governor's plan to release the names of businesses with employees who test positive for COVID-19 will place an irreparable stigma on the businesses and result in lost revenue. In the minds of the community, this plan will label these establishments as uncompliant, unsafe, or more likely to transmit COVID-19. This stigma is not speculative, and one need only look to the CDC for the strength of COVID-19-related stigma and harm thereof:

“Stigma is associated with a lack of knowledge about how COVID-19 spreads, a *need to blame someone* Fear and anxiety about a disease can lead to social stigma, which is negative attitudes and beliefs towards people, *places*, or things. Stigma can lead to labeling, stereotyping, discrimination, and *other negative behaviors* towards others. For example, stigma and discrimination can occur when *people link a disease, such as COVID-19, with a population, community, or nationality*. . . . Stigma hurts everyone by creating more fear or anger toward ordinary people instead of focusing on the disease that is causing the problem. . . . **Community leaders and public health officials can prevent stigma by:** Maintaining the privacy and confidentiality of those seeking healthcare and those who may be part of any contact investigation.”⁶

Defendants might try to minimize or downplay this stigma and the resulting loss in revenue as speculative. But just as federal courts recognize in other areas, it is entirely impossible to

⁶*Coronavirus Disease Reducing Stigma*, CENTERS FOR DISEASE CONTROL AND PREVENTION (June 11, 2020), https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/reducing-stigma.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fsymptoms-testing%2Freducing-stigma.html (some emphasis added).

quantify the business loss of revenue in certain contexts, which is also true when being linked with a COVID-19 danger. *See Abbott Laboratories v. Mead Johnson & Co.*, 971 F.2d 6, 16 (7th Cir. 1992) (applying a presumption of irreparable harm because it “is virtually impossible to ascertain the precise economic consequences of intangible harms, such as damage to reputation and loss of goodwill”); *see also American Mut. Liability Ins. Co.*, 58 Wis. 2d at 306 (“Where a defendant’s wrong threatens a plaintiff with the loss of business and the amount of the plaintiff’s future damages are difficult or impossible to ascertain, this court has held that a plaintiff’s remedy at law would be inadequate and that an injunction is an appropriate remedy.”).

Businesses are “fight[ing] to survive.”⁷ Not only will releasing business names with employees who test positive place a stigma on those businesses and lead to further loss of revenue in an already disastrous business climate, but public disclosure could ultimately force many businesses to shut their doors altogether. This threat to their continued existence is enough to find “irreparable harm” and a necessity to preserve the status quo. *See Nemer Jeep-Eagle, Inc.*, 992 F.2d at 435; *John B. Hull, Inc.*, 588 F.2d at 28-29.

The release of business names will permanently and irreparably harm businesses in Wisconsin and their reputation by brandishing what amounts to a scarlet letter on businesses. This COVID-19 stigma will inevitably lead to a loss of revenue. This too, is enough to find irreparable harm. *See American Mut. Liability Ins. Co.*, 58 Wis. 2d at 306. A future permanent injunction cannot eliminate the public stigma and lost revenue that would result in businesses whose names might be released imminently. Therefore, a temporary injunction is necessary.

⁷ *See* Jennifer Valentino-DeVries, et al., *Virus Alters Where People Open Their Wallets, Hinting at a Halting Recovery*, N.Y. TIMES (Aug. 18, 2020), <https://www.nytimes.com/interactive/2020/08/18/business/economy/coronavirus-economic-recovery-states.html>.

CONCLUSION

Amicus curiae respectfully request that this Court grant Plaintiffs' motion for a Temporary Injunction prohibiting the Administration from revealing the names of businesses that have employees who test positive for COVID-19.

DATED this 4th day of November 2020.

Respectfully submitted,
GREAT LAKES LEGAL FOUNDATION

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**Non-Wisconsin Authorities Cited in the Brief
(Civil Local Rule 3.3)**



KeyCite Yellow Flag - Negative Treatment

Called into Doubt by [Illinois Tamale Co. v. El-Greg, Inc.](#), N.D.Ill., September 13, 2019

971 F.2d 6

United States Court of Appeals,
Seventh Circuit.ABBOTT LABORATORIES,
Plaintiff–Appellant,

v.

MEAD JOHNSON & COMPANY,
Defendant–Appellee.

No. 91–3492.

|
Argued April 9, 1992.|
Decided July 23, 1992.**Synopsis**

Manufacturer of oral electrolyte maintenance solution filed Lanham Act false advertising and trade dress infringement claim against manufacturer of rival product. The United States District Court for the Southern District of Indiana, William E. Steckler, J., denied plaintiff's motion for preliminary injunction, and it appealed. The Court of Appeals, [Flaum](#), Circuit Judge, held that: (1) district court properly ruled that plaintiff established likelihood of success on the merits; (2) district court abused its discretion in concluding plaintiff would not suffer any irreparable harm if preliminary relief were denied and by assuming that any injunction would significantly harm defendant by purging its product from the market, rather than considering less drastic preliminary injunctive measures; and (3) conclusion that overall trade dress of infringed product was functional was not adequately based on consideration of all issues essential to comprehensive examination of functionality.

Vacated and remanded with directions.

West Headnotes (14)

[1] **Injunction** ⚙️ Grounds in general; multiple factors

Movant seeking a preliminary injunction must show some likelihood of succeeding on the merits and that it has no adequate remedy at law and will suffer irreparable harm if preliminary relief is denied; if those prerequisites are satisfied, court must consider irreparable harm nonmovant would suffer if preliminary relief is granted, balancing that harm against irreparable harm to moving party if relief is denied, and the consequences to nonparties of granting or denying the injunction.

[428 Cases that cite this headnote](#)

[2] **Injunction** ⚙️ Balancing or weighing factors; sliding scale

Under the “sliding scale” approach to consideration of preliminary injunction requests, the more likely it is the movant will succeed on the merits, the less the balance of irreparable harms need weigh toward its side; the less likely it is the movant will succeed, the more the balanced need weigh toward its side.

[279 Cases that cite this headnote](#)

[3] **Injunction** ⚙️ Public interest considerations

Although the public interest is one factor courts must consider in weighing the equities of granting a preliminary injunction, it is not the dispositive factor.

[66 Cases that cite this headnote](#)

[4] **Antitrust and Trade Regulation** ⚙️ Particular cases
Trademarks ⚙️ Grounds and Subjects of Relief

Rival manufacturer was likely to succeed on allegations that claims by manufacturer of oral electrolyte maintenance solution that its product was “rice based,” when in fact it contained rice syrup solids, falsely represented that the product had certain qualities that it did not actually have and thus were literally false in violation of the Lanham Act; phrase “rice-based” and product name “Ricelyte” conveyed false message that the product contained rice or

rice carbohydrates. Lanham Trade-Mark Act, § 43(a)(2), 15 U.S.C.A. § 1125(a)(2); Fed.Rules Civ.Proc.Rule 52(a), 28 U.S.C.A.

[19 Cases that cite this headnote](#)

- [5] **Antitrust and Trade Regulation**  Proceedings to impose; evidence

Plaintiff in Lanham Act false advertising suit was not required to conduct full blown consumer surveys to prove actual consumer confusion in order to establish it was likely to succeed on claims that product advertising was false or misleading for purposes of preliminary injunctive relief. Lanham Trade-Mark Act, § 1 et seq., 15 U.S.C.A. § 1051 et seq.

[73 Cases that cite this headnote](#)

- [6] **Antitrust and Trade Regulation**  Proceedings to impose; evidence

In Lanham Act false advertising case, findings that manufacturer of oral electrolyte maintenance solution established likelihood of success on the merits of its claim that a competitor's description of its product, as having lower osmolality was misleading due to lack of therapeutic significance and that its claimed superiority in terms of fluid absorption and stool output did not have firm scientific grounding, were not clearly erroneous and thus would not be disturbed on appeal from grant of preliminary injunction. Lanham Trade-Mark Act, § 43(a)(2), 15 U.S.C.A. § 1125(a)(2).

[20 Cases that cite this headnote](#)

- [7] **Injunction**  Balancing or weighing factors; sliding scale

When faced with a motion for a preliminary injunction, a district court must remain flexible and weigh the equities as to each element of preliminary relief.

[15 Cases that cite this headnote](#)

- [8] **Antitrust and Trade Regulation**  Proceedings to impose; evidence

District court's failure to address possible intermediate forms of relief in false advertising case involving oral electrolyte maintenance solution was legal error in case in which potential parameters of permanent injunction would influence equities governing propriety of preliminary injunction; order prohibiting manufacturer from purveying false "rice claims" and directing it to issue corrective advertisement and brochure would have less drastic consequences than order requiring it to recall the product, change its label, and immediately cease use of the allegedly misleading name of the product, remedies which posed a risk of eliminating product from the market. Lanham Trade-Mark Act, § 1 et seq., 15 U.S.C.A. § 1051 et seq.

[16 Cases that cite this headnote](#)

- [9] **Antitrust and Trade Regulation**  Particular cases

Under sliding scale approach to request for preliminary injunctive relief, district court's conclusion that exclusion of safe and effective product from the market would disserve the public welfare was correct, but did not necessarily imply that granting competing manufacturer's request for preliminary injunctive relief would necessarily mean the demise of product which was subject of false advertising suit. Lanham Trade-Mark Act, § 1 et seq., 15 U.S.C.A. § 1051 et seq.

[24 Cases that cite this headnote](#)

- [10] **Trademarks**  Trade dress

The "functionality" of trade dress is an affirmative defense for which defendant in trade dress infringement action has the burden of proof. Lanham Trade-Mark Act, § 43(a)(1), 15 U.S.C.A. § 1125(a)(1).

[14 Cases that cite this headnote](#)

[11] Trademarks 🔑 [Distinctiveness; secondary meaning](#)

In order for manufacturer of oral electrolyte maintenance solution to establish that design of the square bottles used for its product was functional for purposes of trade dress infringement, manufacturer had to show that the cost of marketing the product in a nonsquare bottle would raise the cost of producing and marketing the product and thereby drive its price above that of square-bottled oral electrolyte maintenance solution products or that consumers or retailers so preferred square bottles that no other shape would do. Lanham Trade-Mark Act, § 43(a)(1), [15 U.S.C.A. § 1125\(a\)\(1\)](#).

[17 Cases that cite this headnote](#)

[12] Trademarks 🔑 [Functionality](#)

Determining that a particular feature is advantageous or concluding that the feature makes it easier to do certain things did not necessarily render the feature “functional” for purposes of trade dress infringement. Lanham Trade-Mark Act, § 43(a)(1), [15 U.S.C.A. § 1125\(a\)\(1\)](#).

[8 Cases that cite this headnote](#)

[13] Trademarks 🔑 [Functionality](#)

Analysis of functionality of trade dress for oral electrolyte maintenance solutions had to take into account the many features the labels for the products had in common, as well as the shape of the product container. Lanham Trade-Mark Act, § 43(a)(1), [15 U.S.C.A. § 1125\(a\)\(1\)](#).

[5 Cases that cite this headnote](#)

[14] Federal Courts 🔑 [Reversal or Vacation of Judgment in General](#)

In case in which Court of Appeals found district court's grant of preliminary injunctive relief was improper, Court of Appeals could vacate denial of plaintiff's request for preliminary injunction and remand with directions to commence a full trial on the merits within 60 days, where parties

indicated at argument that they were virtually ready for full trial on the merits and needed only limited time for additional discovery, and in light of district court's greater familiarity with the underlying facts and better position to weigh equities and fashion a proper remedy.

[10 Cases that cite this headnote](#)

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Before [FLAUM](#), [EASTERBROOK](#) and [KANNE](#), Circuit Judges.

Opinion

[FLAUM](#), Circuit Judge.

Abbott Laboratories (Abbott) filed this interlocutory appeal, [28 U.S.C. § 1292\(a\)\(1\)](#), after the district court denied its motion for a preliminary injunction against Mead Johnson & Company (Mead). Abbott seeks relief under § 43(a) of the Lanham Act (the Act), [15 U.S.C. § 1125\(a\)](#), to halt Mead's alleged false advertising and trade dress infringement practices in the oral electrolyte maintenance solution (OES) market. We vacate the district court's denial of preliminary relief, and remand with directions to promptly commence a full trial on the merits.

I.

Oral electrolyte maintenance solutions are over-the-counter medical products used to prevent dehydration in infants suffering from [acute diarrhea](#) or vomiting. They are clear liquids, comprised almost exclusively of water, electrolytes

and dissolved carbohydrates, and are ingested orally. While OES products do not actually cure diarrhea or nausea, they maintain the fluid balance of infants inflicted with these maladies by facilitating the body's absorption of fluids and electrolytes. The OES market is a small (approximately \$45 million in annual sales) but important one; dehydration is an especially dangerous medical problem for infants, and as many as ten percent of preventable postnatal infant deaths result from the collateral effects, such as dehydration, of diarrhea. John D. Snyder, *Use and Misuse of Oral Therapy for Diarrhea: Comparison of U.S. Practices with American Academy of Pediatrics Recommendations*, Pediatrics, Jan. 1991, at 28. Despite their medical significance, OES products may be purchased without a prescription at food and drug stores.

Abbott and Mead are, for all practical purposes, the only two competitors in the United States OES market. Abbott's product is called "Pedialyte," while Mead's is called "Ricelyte". Competition in this market is of surprisingly recent vintage, as Pedialyte enjoyed a virtual monopoly until Mead introduced Ricelyte in 1990. The two products are virtually identical; only their carbohydrate components differ. This difference is crucial to understanding the dispute in this case, so we briefly provide some background.

Pedialyte is known as a "glucose-based solution" because its carbohydrate component is glucose. Glucose is a monomer. Monomers are the simplest carbohydrate molecules, and serve as the building blocks for larger carbohydrates, known as oligomers or polymers. Commonly known larger carbohydrates include sucrose (*i.e.*, table sugar), comprised of two glucose molecules bonded together, and starch, comprised of thousands of monomers bonded together. When a person ingests complex carbohydrates like starch, the body's digestive system breaks them down, by a process called hydrolysis, into monomers for absorption into the bloodstream via the small intestine.

Ricelyte, unlike Pedialyte, is not a glucose-based solution, for it is manufactured with carbohydrates known as "rice syrup solids." When producing Ricelyte, Mead takes whole rice kernels and separates out the two carbohydrates, amylose and amylopectin, found naturally in rice. Amylose and amylopectin, like starch, are complex carbohydrates comprised of thousands of monomers bonded together. Mead then hydrolyzes the rice carbohydrates—biochemists have long known how to replicate natural hydrolysis in the laboratory—into rice syrup solids, which are much shorter

polymer chains, but still more complex than the monomer glucose. It is important for our purposes to emphasize that rice syrup solids, while hydrolytically *derived* from rice carbohydrates, are not actually "rice carbohydrates" as the term is used in the scientific and medical communities. The difference is analogous to that between an automobile engine and a vat of molten *10 steel. One may produce molten steel from an engine by melting it down, but the two are completely different things, both physically and functionally.

The OES market, unlike typical consumer product markets, is "professionally driven," meaning that Abbott and Mead do not promote their product directly to consumers, but rather to physicians and nurses, who in turn recommend them to consumers. As is standard practice in the medical products field, both companies send sales representatives to visit physicians, primarily pediatricians, to tout the superiority of their respective products. Both companies also distribute brochures to physicians and place most of their print advertising in medical journals rather than in more broadly based media venues. The plan, apparently, is to convince physicians and nurses to suggest one product rather than the other when approached by parents whose infants are suffering from diarrhea or nausea. This initial recommendation is crucial because parents usually accept their physician's initial recommendation, and furthermore tend to stick with the same product should the problem recur.

Since Pedialyte is the incumbent and Ricelyte the challenger, Mead launched a promotional campaign designed to convince physicians and nurses to recommend Ricelyte over Pedialyte. The campaign does so by emphasizing that Ricelyte's carbohydrate components (*i.e.*, rice syrup solids) come from rice, while Pedialyte's carbohydrate component is glucose. Mead focuses on rice for a fairly simple reason. Over the past decade, medical researchers worldwide, many sponsored by the World Health Organization (WHO), have studied the effectiveness of OES products made with powdered whole grains of rice, which are known as "rice-based," or whole grain, solutions. These studies have found that rice-based solutions have significant advantages over glucose-based solutions, like Pedialyte, when it comes to combatting the dehydrative effects of diarrhea. Despite their medical superiority, however, rice-based solutions face two obstacles to commercial viability. First, rice grain powder, unlike glucose and rice syrup solids, cannot be completely dissolved in water, making rice-based solutions cloudy and susceptible to separation, and less palatable to consumers as a result.¹

Second, rice-based solutions are subject to early spoilage, and hence have too brief a shelf life for commercial distribution.

Ricelyte, according to Mead, fashions a compromise between the marketability and appearance of glucose-based solutions and the medical effectiveness of whole grain solutions. Its rice syrup solids are derived from rice, but are soluble and do not spoil, making Ricelyte more marketable than whole grain solutions. There remain, however, significant differences between Ricelyte and rice-based solutions. As noted, the carbohydrate components of rice-based solutions are actual rice carbohydrates (*i.e.*, amylose and amylopectin), *not* the less complex rice syrup solids used in Ricelyte. Moreover, rice-based solutions, unlike Ricelyte, also contain the non-carbohydrate components of rice, including proteins, fats, fiber and other organic materials.

Nonetheless, Mead's promotional campaign plays up Ricelyte's association with rice. First, it forges a direct link between Ricelyte and rice. To take an obvious example, the name "Ricelyte" conveys the message that the product contains or is made from rice. Further, some of Mead's advertisements describe Ricelyte as a "rice-based oral electrolyte solution," while others claim that Ricelyte contains "rice carbohydrate molecules." The visual background of many advertisements consists of an illustration of rice grains cascading into a clear liquid pool. Second, Mead's campaign implies, and at times directly states, that Ricelyte's link to rice makes it superior to Pedialyte. Some advertisements proclaim *11 that "worldwide results confirm the benefits of rice" and that rice "has been used for centuries to help manage diarrhea." The statement "Rice Makes A Difference" appears in nearly all Ricelyte advertisements, in most instances as a subtitle to "New Ricelyte." In addition, a number of ads tout certain (alleged) specific benefits of Ricelyte vis-a-vis Pedialyte, including lower osmolality, better fluid absorption, and reduced stool output—all the consequence of Ricelyte's link to rice.

Abbott did not take kindly to Mead's promotional and advertising campaign. It filed suit, alleging that the campaign, up to and including the "Ricelyte" name, was false and misleading in violation of § 43(a)(2) of the Act. Abbott also alleged that Ricelyte's bottle, label and overall packaging infringed upon Pedialyte's trade dress in violation of § 43(a)(1) of the Act. Abbott asked for a preliminary injunction, seeking a wide variety of relief, ranging in severity from a product recall to modifications in Mead's advertising and promotional materials. The district court approved an

expedited discovery schedule submitted by the parties, held a ten-day evidentiary hearing, and heard one day of oral argument. Shortly thereafter it issued an order, accompanied by a lengthy and thorough memorandum opinion, denying Abbott's preliminary injunction motion in full. *Abbott Laboratories v. Mead Johnson & Co.*, No. IP 91–202C (S.D.Ind. Oct. 10, 1991) (hereinafter "Dist. Op.").

The court's analysis followed the venerable four-part preliminary injunction standard, *see, e.g., Lawson Prods., Inc. v. Avnet, Inc.*, 782 F.2d 1429, 1433 (7th Cir.1986), about which we speak at greater length in the following section. With regard to the false advertising claim under § 43(a)(2), the court ruled that Abbott had established a likelihood of success on the merits. It found certain of Mead's advertisements, including those claiming that Ricelyte is "rice-based", to be literally false, and others, including those maintaining that Ricelyte has a lower osmolality than Pedialyte, to be literally true but misleading. Nonetheless, the court declined to enjoin Mead's promotional campaign pending a full trial because the other three preliminary injunction factors tipped the equities in Mead's favor: (1) if Abbott were to prevail on the merits, any harm it would suffer prior to final judgment could be adequately compensated with money damages and would not be irreparable; (2) the balance of hardships favored Mead; and (3) the public interest would be disserved by a preliminary injunction. With regard to the trade dress claim under § 43(a)(1), the court held that Abbott had not established a likelihood of success on the merits because Pedialyte's trade dress was "functional," and therefore did not order Mead to modify Pedialyte's packaging. Abbott appealed.

II.

Despite our recent efforts to clarify the law of preliminary injunctions, *see, e.g., Lawson Prods., Inc. v. Avnet, Inc., supra; American Hosp. Supply Corp. v. Hospital Prods. Ltd.*, 780 F.2d 589 (7th Cir.1986); *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380 (7th Cir.1984), confusion persists, as demonstrated by the contrasting spins both parties place upon the four-part preliminary injunction standard. To guide our analysis, as well as assist litigants in future cases, we briefly outline the following precepts, and note the parties' deviation therefrom in the margin.

[1] As a threshold matter, a party seeking a preliminary injunction must demonstrate (1) some likelihood of succeeding on the merits, and (2) that it has "no adequate

remedy at law” and will suffer “irreparable harm” if preliminary relief is denied. *Lawson Prods.*, 782 F.2d at 1433; *Roland Mach.*, 749 F.2d at 386–87. If the moving party cannot establish either of these prerequisites, a court's inquiry is over and the injunction must be denied. If, however, the moving party clears both thresholds, the court must then consider: (3) the irreparable harm the non-moving party will suffer if preliminary relief is granted, balancing that harm against the irreparable harm to the moving party if relief is denied; and (4) the public interest, meaning *12 the consequences of granting or denying the injunction to non-parties. *Lawson Prods.*, 782 F.2d at 1433; *Roland Mach.*, 749 F.2d at 387–88.

[2] [3] The court, sitting as would a chancellor in equity, then “weighs” all four factors in deciding whether to grant the injunction, seeking at all times to “minimize the costs of being mistaken.” *American Hosp. Supply*, 780 F.2d at 593. We call this process the “sliding scale” approach: the more likely it is the plaintiff will succeed on the merits, the less the balance of irreparable harms need weigh towards its side; the less likely it is the plaintiff will succeed, the more the balance need weigh towards its side. *Dignet, Inc. v. Western Union ATS, Inc.*, 958 F.2d 1388, 1393 (7th Cir.1992); *Roland Mach.*, 749 F.2d at 387.² This weighing process, as noted, also takes into consideration the consequences to the public interest of granting or denying preliminary relief. *Ping v. National Educ. Ass'n*, 870 F.2d 1369, 1371–72 (7th Cir.1989); *American Hosp. Supply*, 780 F.2d at 594, 601.³ While we have at times framed the sliding scale approach in mathematical terms, see *American Hosp. Supply*, 780 F.2d at 593–94, it is more properly characterized as subjective and intuitive, one which permits district courts to “weigh the competing considerations and mold appropriate relief.” *Lawson Prods.*, 782 F.2d at 1436.

We review a district court's decision to grant or deny a preliminary injunction under the abuse of discretion standard.

*13 *Id.* at 1436–37. With regard to analysis of each of the four factors, a court abuses its discretion when it commits a clear error of fact or an error of law. *Lawson Prods.*, 782 F.2d at 1437; *Roland Mach.*, 749 F.2d at 392. Absent any such error, the district court's ultimate weighing of all four factors is entitled to great deference; while our review is more searching than an examination of whether the district court weighed those factors “irrationally or fancifully,” we may not “substitute our judgment” for that of the district court. *Roland Mach.*, 749 F.2d at 390; see also *Lawson Prods.*, 782 F.2d at 1437. With this standard in mind, we proceed to the case at hand.

III.

The district court, as noted, denied Abbott's request to enter a preliminary injunction under § 43(a)(2) of the Act to halt Ricelyte's allegedly false and misleading promotional campaign. The court found that Abbott had demonstrated a likelihood of succeeding on the merits, but determined that the remaining three preliminary injunction factors favored Mead. We find that the court misconstrued the legal principles underlying each of those three factors, and hence that it abused its discretion in completely denying preliminary relief.

A.

Section 43(a)(2) of the Act prohibits the use of false or misleading statements or representations of fact in commercial advertising, and establishes a private remedy for any violation thereof. The provision applies with equal force to (1) statements which are literally false and (2) statements which, while literally true or ambiguous, convey a false impression or are misleading in context, as demonstrated by actual consumer confusion. *Sandoz Pharmaceuticals Corp. v. Richardson-Vicks, Inc.*, 902 F.2d 222, 228–29 (3d Cir.1990); *Avis Rent A Car System, Inc. v. Hertz Corp.*, 782 F.2d 381, 386 (2d Cir.1986); *Vidal Sassoon, Inc. v. Bristol-Myers, Co.*, 661 F.2d 272, 277 (2d Cir.1981); *Guardsmark, Inc. v. Pinkerton's Inc.*, 739 F.Supp. 173, 175 (S.D.N.Y.), *aff'd without opinion*, 923 F.2d 845 (2d Cir.1990); *cert. denied*, 501 U.S. 1252, 111 S.Ct. 2893, 115 L.Ed.2d 1058 (1991). The district court determined that Abbott had established a likelihood of prevailing at trial on the merits. Mead, advancing an alternative ground for affirmance, contends otherwise. We consider separate aspects of Mead's promotional campaign in turn, keeping in mind throughout that to pass this threshold Abbott need only demonstrate some likelihood of prevailing on the merits, *Lawson Prods.*, 782 F.2d at 1433, not that it will definitely prevail.

[4] *The “Rice Claims”*. First we examine what the district court referred to as Mead's “rice claims,” *i.e.*, Mead's description of Ricelyte as a “rice-based oral electrolyte solution” and assertion that Ricelyte contains “rice carbohydrate molecules.” The court concluded that the rice claims were literally false; we regard this conclusion as a finding of fact, *Johnson & Johnson v. GAC Int'l Inc.*, 862 F.2d 975, 979 (2d Cir.1988), entitled to deference under the

clearly erroneous standard. [Fed.R.Civ.P. 52\(a\)](#); *see generally Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 855–56, 102 S.Ct. 2182, 2189–90, 72 L.Ed.2d 606 (1982). The court's conclusion was not erroneous, let alone clearly so. As discussed in detail above, “rice-based” is a term of art used to describe oral electrolyte solutions made from rice grain powder, solutions which have proven superior to glucose-based solutions such as Pedialyte. The problem with Mead's rice claims is that Ricelyte does *not* contain powdered whole rice and is *not* a whole grain solution; consequently, Mead cannot truthfully characterize Ricelyte as a “rice-based” solution or claim that Ricelyte has the inherent health benefits thereof. Nor does Ricelyte contain rice carbohydrates (*i.e.*, amylose and amylopectin); it contains rice syrup solids, which are a completely different animal than, and yield few if any of the benefits of, non-hydrolyzed rice carbohydrates. Even WHO warned Mead that “the generally accepted meaning of ‘rice- *14 based’ cannot reasonably be applied to Ricelyte.” Accordingly, we agree with the district court that Mead's rice claims falsely represent that Ricelyte has certain qualities that it in fact does not actually have, and hence are literally false in violation of § 43(a)(2). *See PPX Enters., Inc. v. Audiofidelity Enters., Inc.*, 818 F.2d 266, 272 (2d Cir.1987) (record album cover falsely represents that enclosed record includes musical performances by Jimi Hendrix).

The “Ricelyte” Name. Mead also challenges the court's finding that Mead's use of the name “Ricelyte” is literally false because it expressly conveys the false message that the product contains rice. While Mead's brief on this point is somewhat murky, we perceive two, maybe three, lines of attack. The first implicitly concedes that the name “Ricelyte” delivers the express message that Ricelyte contains rice and rice carbohydrates, but contends that the message is true. As we just discussed, however, Ricelyte contains rice syrup solids, not rice or rice carbohydrates. Mead appears to have had some difficulty grasping this distinction, as most vividly illustrated by its comparison of Ricelyte to chicken soup:

[Just as Ricelyte does not contain whole rice,] chicken soup does not contain whole chickens. No one can dispute that the feathers are important to the chicken, but no consumer is mislead, and no competitor has the temerity to argue that Campbell's should rename its soup because it only uses part of the chicken.

Def.'s Br. at 36 n. 14. This analogy misfires. Chicken soup is made from chicken meat and chicken fat, the business end of the chicken. Most consumers, we presume, expect that Campbell will not make its chicken soup with feathers. Mead, in contrast to Campbell, takes the business end of

rice (*i.e.*, rice carbohydrates) and chemically breaks it down into rice syrup solids, which are not a “part” of rice or rice carbohydrates, but rather a completely different carbohydrate, both structurally and functionally. The expectations of consumers receiving the message that Ricelyte contains rice carbohydrates are not fulfilled. Mead's analogy might float if Campbell chemically broke down chicken meat and fat into their constituent amino acids and fatty acids, dissolved the acids into a broth, and marketed the concoction as “chicken soup.” Campbell does not do this, of course, because such a broth would not contain chicken and hence would bear virtually no relation to chicken soup. But that is just about what Mead does when it claims that Ricelyte contains rice or rice carbohydrates.

Mead's second line of attack shifts gears. It contends that the name “Ricelyte” does not relate a literally false message because the only literal, or express, message delivered is that Mead uses rice in manufacturing Ricelyte, which is true. The (allegedly) false message—that Ricelyte contains rice and rice carbohydrates—is not expressly conveyed, but only *implied*, by the “Ricelyte” name. Other circuits have recognized a difference between false literal statements and misleading or impliedly false statements under § 43(a)—a court may find on its own that a statement is literally false, but, absent a literal falsehood, may find that a statement is impliedly misleading only if presented with evidence of actual consumer deception, [Sandoz Pharmaceuticals](#), 902 F.2d at 228–29; [Avis Rent A Car](#), 782 F.2d at 386—and Abbott presents no reason to hold otherwise. Since Abbott offered no credible evidence demonstrating that the name “Ricelyte” actually misleads consumers or pediatricians into believing Ricelyte contains rice and rice carbohydrates, Mead continues, Abbott cannot prevail.

We reject this argument. First, the district court's preliminary finding that “Ricelyte” imparts the express message that Ricelyte contains rice and rice carbohydrates is a finding of fact, entitled to deference unless clearly erroneous. While reasonable minds might differ as to the nature (express or implied) of this message, we hesitate to conclude that the court's reading was clearly erroneous. Accordingly, Abbott need not present evidence of actual confusion to prevail on the merits. [PPX Enterprises](#), 818 F.2d at 272.

[5] *15 Moreover, even were we to conclude that the court clearly erred in finding that “Ricelyte” expressly conveys the forbidden message, Abbott presented sufficient evidence at this stage to demonstrate that it impliedly conveys that

message to consumers and physicians. Much of this evidence, in fact, comes from Mead's own files. For example, Mead, prior to entering the OES market, presented to a survey audience a variety of potential names before settling on "Ricelyte". Many of those who chose "Ricelyte" did so because they believed that any product with that name would contain rice. In addition, a scientist employed by Mead commented that the use of the word "rice" in the name "tells me it has rice in it." Abbott presented anecdotal accounts of physicians and consumers who were led to believe that Ricelyte contains rice carbohydrates and has the health benefits of rice-based solutions. The fact that Abbott did not conduct any full-blown consumer surveys to prove actual consumer confusion does not help Mead, for such proofs are not required at the preliminary injunction stage. See *Vaughan Mfg. Co. v. Brikam Int'l, Inc.*, 814 F.2d 346, 349 (7th Cir.1987); *A.J. Canfield Co. v. Vess Beverages, Inc.*, 796 F.2d 903, 908 (7th Cir.1986).

The presence of this implied message is even more pronounced when viewed in the context of Mead's entire promotional campaign. That campaign, as noted, directs much, if not all, of its fire towards identifying Ricelyte as a rice-based solution and attributing to Ricelyte the health benefits of those solutions. The product's label places the name "Ricelyte" directly above the phrase "Rice-Based Oral Electrolyte Maintenance Solution." The references, both verbal and pictorial, to rice in Mead's print advertisements and brochures are extensive, to say the very least. The main message of Mead's promotional campaign is summed up in its 1990 Marketing Plan:

Ricelyte's benefits ... are possible because it contains rice. If there is one thing we want doctors to remember, it is that this product is better because it contains rice.... Therefore, the positioning statement to be used with physicians and nurses will be: "Ricelyte. Because Rice makes a difference."

In this context, the name "Ricelyte" implies more than the permissible message that Ricelyte is produced from rice or contains rice syrup solids derived from rice carbohydrates. It also implies that Ricelyte actually contains rice and rice carbohydrates—or at least we can say that Abbott has established a strong likelihood of so proving at trial. Cf. *Sandoz Pharmaceuticals*, 902 F.2d at 229–30.

This brings us to what we take to be Mead's third line of attack, which proceeds as follows: Because rice syrup solids, which are extracted from rice, are the principal non-water ingredients in Ricelyte, "[n]o other word in the English

language more aptly describes the product than 'rice.' " Def.'s Br. at 35. This may be true in the abstract, but, again, the district court's preliminary finding that the name "Ricelyte" expressly imparts the false message that the product contains rice carbohydrates renders Mead's argument moot. In the event the court, on remand, determines that "Ricelyte" only implies that message, Mead might have a point—and we emphasize might—but only if it purges its promotional campaign of the false representations discussed above. Depending upon the ultimate course of proceedings on remand, the parties may find it profitable to address the issue of whether the "Ricelyte" name, in and of itself, impliedly conveys the same impermissible messages.

[6] *The Comparison Claims.* The district court made two other significant findings: (1) Mead's statement that Ricelyte has a lower osmolality than Pedialyte, while literally true, is misleading because the difference in osmolality has no therapeutic significance; and (2) Mead's claim that Ricelyte is superior to Pedialyte in terms of fluid absorption and stool output does not have a firm scientific grounding, and hence is false. Mead takes issue with these findings, citing an array of evidence to refute them. While remaining neutral as to the merits, we believe that Abbott has established the requisite likelihood of proving its case at trial, particularly in light of *16 the deference we owe the meticulous and carefully reasoned findings entered by the district court. See *Inwood Laboratories*, 456 U.S. at 855–56, 102 S.Ct. at 2189–90. At argument the parties informed us that they soon anticipate the release of another study bearing upon the fluid absorption and water output issue; this study should help resolve whether Mead's claims are false or misleading. See *Sandoz Pharmaceuticals*, 902 F.2d at 227–28. Also, we expect that the parties will present evidence of consumer and physician reaction to the lower osmolality claim, for only if the claim, which is literally true, actually misleads does it violate the Lanham Act.

In sum, we agree with the district court's determination that Abbott has established a likelihood of succeeding on the merits of its § 43(a)(2) cause of action.

B.

The second preliminary injunction threshold requires Abbott to establish that it will be irreparably harmed if it does not receive preliminary relief, and that money damages and/or an injunction ordered at final judgment would not rectify

that harm. The district court determined that Abbott did not clear this threshold. In so holding, the court acknowledged the well-established presumption that injuries arising from Lanham Act violations are irreparable, even absent a showing of business loss. *See, e.g., International Kennel Club Inc. v. Mighty Star, Inc.*, 846 F.2d 1079, 1091 (7th Cir.1988) (trademark infringement); *Processed Plastic Co. v. Warner Communications, Inc.*, 675 F.2d 852, 858 (7th Cir.1982) (same); *James Burrough Ltd. v. Sign of the Beefeater, Inc.*, 540 F.2d 266, 276 (7th Cir.1976) (same); *McNeilab, Inc. v. American Home Prods. Corp.*, 848 F.2d 34, 38 (2d Cir.1988) (false advertising); *cf. Milton Handler, Unfair Competition*, 21 Iowa L.Rev. 175, 193 (1936) (“The competition of a liar is always dangerous even though the exact injury may not be susceptible of precise proof.”). This presumption, it appears, is based upon the judgment that it is virtually impossible to ascertain the precise economic consequences of intangible harms, such as damage to reputation and loss of goodwill, caused by such violations. *See Roland Mach.*, 749 F.2d at 386.

There can be no doubt that Mead's Ricelyte campaign, which attempts to convince consumers that Pedialyte is an inferior OES product, has dented Abbott's reputation. *See McNeilab*, 848 F.2d at 38 (comparative advertising “necessarily diminishes [the competing product's] value in the minds of the consumer”).⁴ The district court nonetheless found the presumption of irreparable harm rebutted owing to the unusual structure of the OES market. It reasoned as follows: Pedialyte enjoyed a virtual monopoly prior to Ricelyte's entry into the market. Any injunction, entered after a full trial, would remove Ricelyte from the market, thereby restoring Pedialyte's monopoly and lost market share. Under these circumstances, one could easily measure the sales Abbott lost while waiting for final judgment. As far as the future is concerned, Abbott's reputational damage will have no tangible economic impact because Pedialyte will have regained its monopoly, leaving those who need OES products with no other choice. It appears, then, that we are faced with a rare situation—any harm to Abbott's reputation and goodwill wreaked by Mead's promotional campaign between now and final judgment will be fully compensable in money damages, and therefore cannot be considered irreparable. Put another way, the fact that injunctive relief in Abbott's favor at final judgment would boot Ricelyte from the market renders compensable any injuries Abbott will have suffered in the interim.

The district court's conclusion rests upon two assumptions. First, the court assumed that if final judgment forced

Mead to withdraw Ricelyte, Abbott's losses would be *17 limited to past lost sales in the OES market. In our view, this assumption overlooks the fact that Mead's promotional campaign will probably have lingering, incalculable economic consequences even if final relief on the merits drives Ricelyte from the market. Any monopoly Abbott regains is unlikely to last very long. (We of course do not mean to imply that Abbott deserves a monopoly, or that a monopoly would benefit the OES market, but only that Abbott's damages would be difficult to calculate in the event it could not sustain a monopoly.) It is almost certain that Mead will re-enter, or some other company will enter, the OES market shortly after Ricelyte departs; the market has a proven potential for growth, see Dist.Op. at 80, and the dominant player has proven potentially vulnerable. Pedialyte's loss of goodwill will have tangible economic consequences once competition reemerges, because doubts planted by the Ricelyte campaign will linger in the minds of consumers and physicians, who may avail themselves of an alternative to Pedialyte if given the choice. Moreover, any shifts in the OES market between now and final judgment will affect the closely related competition between Abbott and Mead in the immense infant formula market, which accounts for more than \$1.5 billion in annual sales. Mead acknowledged as much in its 1991 Marketing Plan, which opined that “[t]he more market share Ricelyte takes from Pedialyte, the more opportunities Ricelyte creates to” shift infant formula sales from Abbott to Mead. Any suggestion that forcing Ricelyte from the market after a full trial would completely reverse this shift is simply implausible.

The loss of market share Abbott will likely suffer in both the OES market (once competition reemerges) and the infant formula market was not considered by the district court. As an original matter, one could have concluded that Abbott would suffer these harms were preliminary relief denied, and that the difficulty, indeed practical impossibility, of quantifying them would render monetary relief inadequate, and hence Abbott's injuries irreparable. *American Hosp. Supply*, 780 F.2d at 597. It is more difficult, however, to determine whether the court's decision not to consider these harms constitutes an abuse of discretion.

We need not resolve that issue here, for the district court erred by assuming in the first instance that granting final injunctive relief to Abbott would necessarily mean the end of Ricelyte. Granted, some of the relief sought by Abbott—*e.g.*, an order requiring Mead to recall Ricelyte, change its label, and immediately cease use of the “Ricelyte”

name—would eliminate Ricelyte from the market at least temporarily, and perhaps permanently. But other relief—*e.g.*, an order prohibiting Mead from purveying the false “rice claims” and directing it to issue corrective advertisements and brochures—would not have such drastic consequences. These less severe remedies would leave Ricelyte a viable, albeit somewhat discredited, competitor with at least part of its current market share.

[7] [8] The district court did not address the possibility of ordering these intermediate forms of relief after a full trial on the merits. *See* Dist.Op. at 78, 101–02; *see also id.* at 79 (enjoining use of current Ricelyte bottle and label), 102–03 (enjoining further use of the name “Ricelyte”).⁵ This, we believe, constitutes an error of law. It is axiomatic that injunctions, preliminary as well as permanent, have their basis in equity. *Hecht Co. v. Bowles*, 321 U.S. 321, 329, 64 S.Ct. 587, 591–90, 88 L.Ed. 754 (1944). When faced with a motion for a preliminary injunction, a district court must remain flexible, and weigh the equities as to each element of preliminary relief sought by the plaintiff. *Lawson Prods.*, 782 F.2d at 1435–36. The same applies to final relief *18 if, as here, the potential parameters of a permanent injunction will influence the equities that govern the propriety of issuing a preliminary injunction. The importance of flexibility is enhanced where those equities depend in great measure upon which preliminary and permanent remedies are ordered. *See id.* at 1435 (“[a]s the type of relief varies the parameters of the injunction equation will also change”). We therefore find that the district court abused its discretion by restricting its focus to those final remedies, to the exclusion of all others, that would eliminate Ricelyte from the market.

If on remand the district court should revisit the topic of preliminary relief, *see* pp. 31–32 *infra*, it should explicitly consider whether Abbott's injuries between now and final judgment would be irreparable if some intermediate form of relief were eventually ordered after a full trial. We take no formal stand on this issue, but offer the following observations. Any inquiry must start with the well-established, and in this case unchallenged, presumption that Lanham Act injuries are irreparable. *See International Kennel Club*, 846 F.2d at 1091; *McNeilab*, 848 F.2d at 38. While the district court found this presumption rebutted, we have concluded that an assumption underlying the court's rebuttal was erroneous as a matter of law. Absent any considerations we have not had occasion to address, we can see no reason why the presumption should not stand here. Less severe relief, as we just observed, would leave Ricelyte a viable competitor

in the OES market, making it extremely difficult to measure Abbott's damages. Some consumers, particularly new parents, would choose Ricelyte for reasons unrelated to Mead's promotional campaign. Other consumers would inevitably choose Ricelyte on the basis of impressions formed during that campaign; this group includes, for example, consumers who accepted their physicians' initial recommendation to purchase Ricelyte but who were not subsequently informed that the recommendation rested upon false premises. In theory, one could differentiate between the two groups of consumers, and thus calculate the damages arising from Mead's campaign. In practice, however, it would “be very difficult to distinguish the effect of the [campaign] from the effect of other [factors causing consumers to purchase Ricelyte], and to project that effect into the distant future.” *Roland Mach.*, 749 F.2d at 386. This difficulty would appear to render monetary relief inadequate, and hence Abbott's injury irreparable. *American Hosp. Supply*, 780 F.2d at 597.

Again, by offering these thoughts we do not intend to foreclose the possibility that Mead could rebut, in some other way, the presumption of irreparable harm. We certainly do not intend to suggest that the court must enter the forms of final relief, if any, that would render Abbott's interim injuries irreparable. Finding that, given certain assumptions regarding the potential scope of final relief, Abbott's injuries are irreparable only would mean that it has cleared the second preliminary injunction threshold; the wisdom of granting preliminary relief would then depend upon the discretionary weighing of all four preliminary injunction factors. *Id.* at 593. We conclude only that the district court's analysis of the second preliminary injunction threshold was erroneous as a matter of law.

C.

[9] We next consider the public interest. The district court concluded that granting Abbott's request for a preliminary injunction would disserve the public interest. Ricelyte, the court reasoned, is a safe and effective product whose presence in the market has promoted the public welfare by focusing attention upon OES products and increasing their use. The court also believed that forcing Ricelyte from the market would restore Abbott's former virtual monopoly, dousing competitive incentives to invest in additional research and develop more effective OES products.

We agree with the district court that forcing Ricelyte from the market would harm the public interest. It is a rare case where purging a safe and effective product serves broad societal interests. This is particularly *19 so when the purged product is one of only two in a given market; monopolies, as a general rule, carry substantial social costs, including higher prices, lower output, and a reduced incentive to engage in product innovation beneficial to consumers. Phillip Areeda & Donald F. Turner, II *Antitrust Law* ¶ 403, at 271–72 (1978). The costs are even higher when, as here, important health concerns are involved. *See* p. 9 *supra*.

But we decline to accept the court's implicit assumption that granting Abbott preliminary relief would necessarily mean the demise of Ricelyte, for the same reasons we just rejected that assumption with regard to final injunctive relief. As noted, some forms of intermediate relief, such as ordering Mead to purge the false aspects of its promotional campaign and issue corrective advertising, would leave Ricelyte a viable competitor. In fact, such relief would serve, rather than disserve, the public interest in truthful advertising, an interest that lies at the heart of the Lanham Act. *Wojnarowicz v. American Family Ass'n*, 745 F.Supp. 130, 141 (S.D.N.Y.1990). The court therefore committed an error of law by not addressing less severe remedies that would have addressed the allegedly false and misleading aspects of Ricelyte's campaign without eliminating it from the market.

D.

The district court also determined that the balance of hardships tilted in Mead's favor—in other words, that the irreparable harm to Mead of granting preliminary relief would outweigh the irreparable harm to Abbott of denying such relief.⁶ It based this ruling upon a finding that the relief requested by Abbott, most notably an injunction prohibiting Mead's further use of the name Ricelyte, would drive Ricelyte from the market for some period of time, and hence might be “fatal” to the product's survival. This, the court stated, would work a “significant” irreparable harm to Mead, a harm which would far outweigh the “possible damage” to Abbott of denying preliminary relief. Dist.Op. at 78. We believe that the court's analysis contains two legal errors which led it to understate the harm to Abbott of denying an injunction and to overstate the harm to Mead of granting an injunction.

The first error we have already discussed: the court abused its discretion in concluding that Abbott would not suffer any

irreparable harm if preliminary relief were denied. The second we have discussed as well. The district court's assessment that Mead would be significantly harmed by a preliminary injunction purging Ricelyte from the market rests on the supposition that any injunction entered would do just that. This supposition is unfounded, for imposing a less severe remedy would most likely wound, but not kill, Ricelyte. Consequently, the sting of a preliminary injunction would depend upon its scope, and could have been less injurious to Mead than the court surmised. *See* § III.C *supra*. These two errors of law, we believe, distorted the district court's assessment of the balance of irreparable harms.

Having found that the district court (1) overstated the irreparable harm to Mead and the public interest of granting a preliminary injunction, and (2) possibly overlooked the irreparable harm to Abbott of denying an injunction, we cannot accept its conclusion that the equities weigh in Mead's favor as to Abbott's false advertising claim under § 43(a)(2).

*20 IV.

The district court also denied Abbott's request under § 43(a)(1) of the Act to enter a preliminary injunction to halt Mead's alleged infringement of Pedialyte's trade dress. The court concluded that Pedialyte's trade dress is “functional,” and therefore that Abbott had failed to establish that it was likely to prevail on the merits under § 43(a)(1), thus sinking its chances for preliminary relief at the outset. *Lawson Prods.*, 782 F.2d at 1433. We disagree with the court's conclusion, and therefore proceed to briefly examine the other three preliminary injunction factors.

A.

“Trade dress” refers to a product's overall image, including its “size, shape, color, graphics, packaging, and label,” *Vaughan Mfg.*, 814 F.2d at 348 n. 2, and receives protection against infringement under § 43(a)(1). *Blau Plumbing, Inc. v. S.O.S. Fix-It, Inc.*, 781 F.2d 604, 608 (7th Cir.1986); J. Gilson, *Trademark Protection and Practice* § 2.13, at p. 2–178 (1991). Abbott contends that Ricelyte's overall packaging mimics Pedialyte's. Both products are marketed in translucent, square, quart-sized plastic bottles approximately eight inches high. (These bottles have traditionally been used by hospitals, nursing homes and other health care providers to contain sterile solutions, particularly irrigation solutions,

and were adapted by Abbott and Mead for use in the OES market.) Both bottles have “ribs,” or deep indentations, that run above and below the label, and the size and placement of the labels are virtually identical. Both the “Ricelyte” and “Pedialyte” trademarks run horizontally across the top of their respective labels, are slightly different shades of blue, have similar typefaces, similar lengths, and share the same “lyte” suffix.

[10] To prove trade dress infringement, Abbott must demonstrate that (1) Pedialyte's overall image is inherently distinctive or has acquired distinctiveness through secondary meaning, (2) consumers will likely be confused by the resemblance of Ricelyte to Pedialyte, and (3) Pedialyte's trade dress is not “functional.” *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, —, 112 S.Ct. 2753, 2756, 120 L.Ed.2d 615 (1992); *Schwinn Bicycle Co. v. Ross Bicycles, Inc.*, 870 F.2d 1176, 1182–83 (7th Cir.1989). The third element, functionality, is actually an affirmative defense as to which Mead bears the burden of proof. *W.T. Rogers Co. v. Keene*, 778 F.2d 334, 338 (7th Cir.1985). Here, the district court determined that Abbott had demonstrated the first two trade dress factors, but concluded that Mead had proven that Pedialyte's packaging was functional.

A particular trade dress is “functional” under § 43(a)(1) if “it is something that other producers of the product in question would have to have as part of the product in order to be able to compete effectively in the market.” *Id.* at 346; see also *Inwood Laboratories*, 456 U.S. at 850 n. 10, 102 S.Ct. at 2187 n. 10 (dicta); *Schwinn Bicycle*, 870 F.2d at 1188, 1191; *Vaughan Mfg.*, 814 F.2d 349–50. Put another way, a feature is functional “if it is one that is costly to design around or do without, rather than one that is costly to have.” *Schwinn Bicycle*, 870 F.2d at 1189. By “costly,” we do not mean costly in some *de minimis* sense; nor do we mean fatally costly. Rather we mean costly in a way that will adversely affect a competitor's ability to produce and market a product of comparable price and quality. For example, a football's oval shape is functional because “it would be found in all or most brands of the product even if no producer had any desire to have his brand mistaken for that of another producer.” *W.T. Rogers*, 778 F.2d at 339. In contrast, an automobile hood ornament in the shape of the Greek god Mercury is not functional because automobiles do not need such an ornament in order to function or compete effectively. *Id.* Most product features, of course, will fall somewhere in between these two extremes.

In examining Pedialyte's packaging, the district court found that the “clear, plastic, one-quart or one-liter bottle is functional in the OES market.” *Dist.Op.* at 75–76. The court also found that the bottle's square shape “has functional aspects” because *21 square bottles are easier to handle, package and ship. *Id.* at 75. As such, it concluded that Pedialyte's overall trade dress is functional, and therefore that Abbott had not established a likelihood of succeeding on the merits of its § 43(a)(1) claim. We believe that the district court's conclusion constitutes an abuse of discretion because the court did not address all of the issues essential to a comprehensive examination of functionality. *Cf. United States v. Fordice*, 505 U.S. 717, —, 112 S.Ct. 2727, 2737, 120 L.Ed.2d 575 (1992) (remanding case because district court's analysis did not undertake the proper inquiries).

[11] Abbott concedes that the Pedialyte bottle's size (one liter or quart), clarity and constituent material (plastic) are functional, but contends that its other features are not. Consider first the bottle's square shape. The district court found that squareness is functional in the OES market because square bottles have three benefits: they are “easier” to ship and package, take up “less space on a shelf than a comparable rectangular container,” and are more “easi[ly]” handled by consumers. *Dist.Op.* at 75. We agree that square bottles have the first two benefits, and remain somewhat dubious as to the third. But even assuming that square bottles have all three benefits, our cases require something more to support a finding of functionality. Mead must not only point to certain advantages, but also demonstrate that depriving Ricelyte of these advantages will have a materially adverse impact upon its ability to compete effectively in the OES market. *Vaughan Mfg.*, 814 F.2d at 349–50; *W.T. Rogers*, 778 F.2d at 346. In other words, Mead must show that the cost of marketing Ricelyte in a non-square bottle will raise the cost of producing and marketing Ricelyte, and thereby drive its price above that of square-bottled OES products. See *Schwinn Bicycle*, 870 F.2d at 1191; *W.T. Rogers*, 778 F.2d at 342–43. Or, assuming no material price differential, it can show that consumers or retailers so prefer square bottles that no other shape will do. See *Service Ideas, Inc. v. Traex Corp.*, 846 F.2d 1118, 1123 (7th Cir.1988).

[12] The district court did not conduct these inquiries. It did not examine the extent to which the shipping and packaging advantages of square bottles impact the retail price of OES products; determine whether retailers would hesitate to display Ricelyte if it were packaged in, say, a cylindrical bottle; or consider whether consumers so prefer square bottles

that they would eschew OES products packaged in cylindrical bottles. These are all open questions, and by raising them we do not mean to prejudge the merits or imply that Mead cannot demonstrate that square bottles are functional in the OES market. Our point, rather, is that determining that a particular feature is advantageous, or concluding that the feature makes it “easier” to do certain things, does not necessarily render it “functional” as the term is employed under § 43(a)(1). The district court erred as a matter of law by presuming otherwise.

[13] The court also erred by leaving unaddressed the question of whether certain aspects of Pedialyte's label—such as its size and placement, and the placement, size and color of the “Pedialyte” trademark imprinted thereon—are functional. Labels, too, are part of a product's trade dress, *Blau Plumbing*, 781 F.2d at 608, and the court, in a different section of its opinion, found Ricelyte's and Pedialyte's labels to be markedly similar. Granted, there are some differences between the two; for example, Pedialyte's label has only two colors, while Ricelyte's is multicolored and adorned with a Beatrix Potter cartoon character. See Appendix. Nonetheless, any decision regarding the functionality of Pedialyte's trade dress must also take into account the many features the two labels have in common. *Vaughan Mfg.*, 814 F.2d at 350 (inquiry must consider a product's “overall trade dress”).

In sum, the district court committed two errors of law in concluding that Abbott had not cleared the merits threshold of its trade dress claim.⁷ However, given the posture *22 of this case—the district court is the principal factfinder and most familiar with the particulars of the underlying dispute—we cannot gauge how likely Abbott's success actually is. We therefore leave it to the experienced district judge to apply the proper legal standards to those particulars. In addition to the issues discussed above, the court, on remand, will likely confront Mead's contention that the only plastic, translucent one-liter bottles commercially available at the time it launched Ricelyte were square bottles manufactured by Baxter Laboratories, Inc. (Baxter). This fact, if indeed true, is relevant, but hardly dispositive of the functionality issue; its weight depends in part on whether Mead's limited options were the result of its own failure to timely develop or seek out reasonable alternatives. Also relevant are the costs Mead would incur, and the effect upon retail price, were it compelled to jettison the square Baxter bottle, either immediately or at some point in the future. See *Schwinn Bicycle*, 870 F.2d at 1191.

B.

We proceed to the second threshold inquiry: whether Abbott has an adequate remedy at law and whether it will suffer an irreparable harm if it does not obtain preliminary relief on its trade dress claim. Our prior discussion of the irreparable harm issue, see § III.B *supra*, although made in the context of Abbott's false advertising claim, applies with equal, if not greater, force here. See *Wesley–Jessen Div. of Schering Corp. v. Bausch & Lomb, Inc.*, 698 F.2d 862, 867 (7th Cir.1983); *Processed Plastic*, 675 F.2d at 858. We observe (again) only that enjoining Mead's alleged infringement of Pedialyte's trade dress after a full trial would not necessarily force Ricelyte from the market. For example, the court could permit Mead to continue using Ricelyte's current packaging, but order it to print new labels and/or develop a non-square bottle as soon as commercially feasible. See *Ideal Indus., Inc. v. Gardner–Bender, Inc.*, 612 F.2d 1018, 1026–27 (7th Cir.1979), *cert. denied*, 447 U.S. 924, 100 S.Ct. 3016, 65 L.Ed.2d 1116 (1980); *Ideassociates, Inc. v. Ideatech, Inc.*, 704 F.Supp. 294, 295–96 (D.D.C.1989).

Our prior discussion of the public interest factor in § III.C, *supra*, also applies with equal force here, see *Two Pesos*, 505 U.S. at —, 112 S.Ct. at 2763, as does our discussion of the balance of hardships in § III.D, *supra*. For the foregoing reasons, we cannot accept the district court's conclusion that Abbott was not entitled to preliminary relief on its § 43(a)(1) trade dress infringement claim.

* * * * *

[14] In cases such as this, we traditionally have done one of two things: reverse and direct the district court to order the preliminary relief we deem appropriate, or vacate and remand for renewed consideration under the proper legal standards. We decline to do the former because the district court, owing to its superior familiarity with the underlying facts of this case, is in a far better position than we to weigh the equities and fashion a proper remedy. We also decline to do the latter in the interests of expediency and judicial economy; the parties indicated at argument that they are virtually ready for a full trial on the merits and need only limited time for additional discovery. We therefore vacate the district court's denial of Abbott's request for a preliminary injunction, and remand with directions to commence a full trial on the merits within 60 days. If, contrary to our assumptions, there is no prospect for a trial within that time, we remand with directions to

fashion appropriate preliminary relief, if any, in accordance with this opinion.

One final note. As we have emphasized throughout, the district court's analysis suffered from its near exclusive focus upon the most drastic remedies requested by Abbott (e.g., product recall) to the exclusion of *23 less severe remedies (e.g., corrective advertising). This focus, we learned at argument, resulted from the district court's decision to adopt, nearly verbatim, the proposed findings of fact and conclusions of law submitted by the parties; obviously, the court selected some of Abbott's proposals and some of Mead's. Each party, it appears, tried to hit a home run, Abbott by submitting conclusions of law granting it all the relief it sought, and Mead by submitting conclusions of law granting Abbott nothing. Neither offered alternative conclusions that steered a reasonable middle ground. So, when it came time for the court to assess the impact upon the parties and the public of granting or denying preliminary relief, the court considered only the impact of either granting the most severe relief or shutting Abbott out altogether.

Of course there is nothing wrong and everything right with zealous advocacy. But counsel, when drafting proposed conclusions of law for the district court, should bear in mind a crucial observation to which we alluded above: courts retain a great deal of flexibility when fashioning preliminary relief, and the equities weighed under the four-part preliminary injunction standard can shift as the nature of that relief varies. *Lawson Prods.*, 782 F.2d at 1435–36; see also *Ideal Indus.*, 612 F.2d at 1026–27. Nor do we cast aspersions upon the widespread practice in the busy district courts of adopting many or most of the parties' proposed findings of fact and conclusions of law, particularly if skillfully and wisely drafted. Nonetheless, district judges also should bear in mind our observations regarding the nature of preliminary relief, and, when presented with proposed findings and conclusions that hug the extremes, consider developing alternatives of their own.

Vacated and Remanded, With Directions.

*24 APPENDIX



*25



All Citations

971 F.2d 6, 23 U.S.P.Q.2d 1663

Footnotes

1 Calling rice-based or whole-grain solutions “solutions” is somewhat of a misnomer. As chemists use the term, “solutions,” such as Tang, are clear and do not separate out into their solid and liquid components. Rice-based solutions are actually “suspensions,” which, like fresh-squeezed orange juice, must be mixed or shaken to evenly distribute the non-liquid component, and even then remain cloudy.

2 Mead, pointing to an isolated dictum in *Maxim's Ltd. v. Badonsky*, 772 F.2d 388, 391 (7th Cir.1985), states that if the balance of irreparable harms (factor number 3 in the text) tips toward the defendant, the preliminary injunction must be denied regardless of the strength of plaintiff’s case on the merits. This statement is erroneous. It is the balance of harms *discounted* by the parties’ relative chances of succeeding on the merits (and taking account of the public interest), not the *undiscounted* balance of harms, that must weigh in plaintiff’s favor for a preliminary injunction to issue. *Id.* at 392; see also *Diginet*, 958 F.2d at 1393; *Ping v. National Educ. Ass’n*, 870 F.2d 1369, 1371–72 (7th Cir.1989); *American Hosp. Supply*, 780 F.2d at 598; *Roland Mach.*, 749 F.2d at 392 (“when there is no clear balance of hardships in favor of the injunction, [plaintiff] must show that it is more likely than not to win” on the merits).

To buttress its position, Mead also relies upon a passage in *Diginet*, 958 F.2d at 1394, which reads: “Given the exceptionally one-sided balance of harms [in defendant’s favor], it is plain that the injunction should not have been issued, regardless of the likely merits of the [plaintiff’s] claim.” When read in context, however, this passage does not support Mead’s position. We characterized the balance of harms as “exceptionally one sided” because the plaintiff in *Diginet* failed to demonstrate that it would suffer *any* irreparable harm in the event preliminary relief were denied; in fact, we found that the plaintiff would *benefit* from a denial. *Id.* As such, the plaintiff could not clear the second preliminary injunction threshold (factor number 2 in the text), and hence was doomed to lose regardless of its chances of succeeding on the merits.

To illustrate our point, consider the following. Plaintiff X seeks a preliminary injunction against defendant Y. Suppose that the (undiscounted) balance of irreparable harms tips slightly toward Y—in other words, that X will be irreparably harmed 9x if the court denies preliminary relief, while Y will be harmed 10x if the court grants it. Suppose further that X has a 99 percent chance of succeeding on the merits, Y a one percent chance, and that the public interest is not implicated

by the case. The proper course in this instance—recognizing, of course, that quantifying the factors to this degree of precision is likely impossible—would be to grant preliminary relief, for that is the course that would minimize the cost of error. Weighing the equities as a *whole* favors X, making preliminary relief appropriate, even though the undiscounted balance of harms favors Y.

- 3 Both parties state that a plaintiff, to obtain a preliminary injunction, must show that the injunction would not harm the public interest. This, in effect, adds a third threshold to our preliminary injunction standard by making the public interest factor dispositive. Although the statement finds support from a dictum in *Brunswick Corp. v. Jones*, 784 F.2d 271, 274 n. 1 (7th Cir.1986) (as a prerequisite, plaintiff must establish that “an injunction would not harm the public interest”), we question whether it accurately characterizes the law of the circuit. The public interest is one factor courts must consider in weighing the equities; it is not dispositive. *Ping*, 870 F.2d at 1371–72; *American Hosp. Supply*, 780 F.2d at 601–02. Suppose, to take a simple example, that the balance of harms tips significantly in plaintiff’s favor, that plaintiff has an overwhelming chance of succeeding on the merits, but that granting the injunction would ever so slightly impair the public interest (e.g., by removing one of ten products from a given product market). In this instance, preliminary relief would be proper even though it might harm the public interest.
- 4 In holding that Abbott did not demonstrate any injury to its reputation, the district court focused exclusively upon, and dismissed as “hyperbole,” Abbott’s assertion that Mead’s campaign had shaken Abbott’s “reputation for innovation.” Dist.Op. at 76–77. The court did not address the reputational harm that attends a charge of product inferiority.
- 5 Mead argues that the district court did not have to consider the effects of more mild remedies because “Abbott did not request any relief ... less draconian” than ordering Mead to recall Ricelyte, stop using the name “Ricelyte,” or change its label. This is simply not true. Abbott explicitly requested the district court to enjoin Mead from advancing false claims in its promotional materials, Pl.’s Compl. at 21–22 (Feb. 21, 1991), relief certainly less draconian than that mentioned by Mead.
- 6 We emphasize that the relevant harms are only those that accrue between a court’s ruling upon the preliminary injunction motion and the entry of final judgment, *Roland Mach.*, 749 F.2d at 391, and even then only those harms that could not be fully rectified by money damages or injunctive relief at final judgment or, as to the defendant, could not be fully covered by a Rule 65(c) injunction bond. *Id.* at 386, 387. Given its finding that Abbott failed to demonstrate any irreparable injury, the court technically did not have to balance the hardships; demonstrating irreparable injury is a threshold matter, the failure of which dooms a plaintiff’s case and renders moot any further inquiry. *Lawson Prods.*, 782 F.2d at 1433. Nonetheless, a court under these circumstances is well advised to consider the irreparable harm that would attend a preliminary injunction, for it gives us something to work with if, as here, we rule that the plaintiff has cleared the irreparable harm threshold.
- 7 As an alternative argument for affirmance, Mead argues that Abbott has not established the second element of its trade dress claim: that consumers would likely be confused by the resemblance of Ricelyte to Pedialyte. This argument is without merit. The bottles, as the district court observed, are “virtually identical,” see Appendix, and Abbott need not present compelling evidence of actual consumer confusion at the preliminary injunction stage. *Vaughan Mfg.*, 814 F.2d at 349.



KeyCite Yellow Flag - Negative Treatment

Distinguished by [Speech First, Inc. v. Killeen](#), 7th Cir.(Ill.), July 28, 2020

807 F.3d 229

United States Court of Appeals,
Seventh Circuit.**BACKPAGE.COM, LLC,**

Plaintiff–Appellant,

v.

Thomas J. DART, Sheriff of Cook
County, Illinois, Defendant–Appellee.

No. 15–3047.

|
Argued Nov. 13, 2015.|
Decided Nov. 30, 2015.**Synopsis**

Background: Operator of classified advertising website brought action alleging that county sheriff imposed informal prior restraint on speech by sending letters to credit card companies requesting that they stop processing payments to website. The United States District Court for the Northern District of Illinois, [John J. Tharp, Jr., J., — F.Supp.3d —, 2015 WL 5174008](#), denied operator's motion for preliminary injunction, and it appealed.

[Holding:] The Court of Appeals, [Posner](#), Circuit Judge, held that operator was entitled to preliminary injunction.

Reversed and remanded.

West Headnotes (7)

[1] Constitutional Law 🔑 Freedom of Speech, Expression, and Press

Public official who tries to shut down avenue of expression of ideas and opinions through actual or threatened imposition of government power or sanction is violating First Amendment. [U.S.C.A. Const.Amend. 1.](#)

[2 Cases that cite this headnote](#)**[2] Civil Rights** 🔑 Preliminary Injunction

Operator of classified advertising website was likely to prevail on merits of its claim that county sheriff imposed informal prior restraint on speech, in violation of First Amendment, by sending letters to credit card companies requesting that they stop processing payments to its website, and thus was entitled to preliminary injunction, where not all of operator's advertisements were for illegal sex, sheriff sent letter on his official stationery in his official capacity, letter intimated that companies could be prosecuted for processing payments made by purchasers of ads that promote unlawful sexual activity, companies perceived letters as threats and complied with sheriff's request within two days of receipt, and companies' compliance was likely to cause operator to cease business. [U.S.C.A. Const.Amend. 1.](#)

[6 Cases that cite this headnote](#)**[3] Civil Rights** 🔑 Injunction**Constitutional Law** 🔑 Threats

Public official's threat to stifle protected speech is actionable under First Amendment, and thus can be enjoined, even if it turns out to be empty. [U.S.C.A. Const.Amend. 1.](#)

[4 Cases that cite this headnote](#)**[4] Constitutional Law** 🔑 Threats

First Amendment forbids public official to attempt to suppress protected speech of private persons by threatening that legal sanctions will at his urging be imposed unless there is compliance with his demands. [U.S.C.A. Const.Amend. 1.](#)

[4 Cases that cite this headnote](#)**[5] Constitutional Law** 🔑 Government-sponsored speech

Government entity is entitled to say what it wants to say, but only within limits; it is not permitted to

employ threats to squelch free speech of private citizens. [U.S.C.A. Const.Amend. 1.](#)

[1 Cases that cite this headnote](#)

[6] Constitutional Law 🔑 **Prior Restraints**

Threatening penalties for future speech goes by name of “prior restraint,” and prior restraint is quintessential First Amendment violation. [U.S.C.A. Const.Amend. 1.](#)

[2 Cases that cite this headnote](#)

[7] Civil Rights 🔑 **Injunction**

Loss of First Amendment freedoms, for even minimal periods of time, constitutes irreparable injury. [U.S.C.A. Const.Amend. 1.](#)

[1 Cases that cite this headnote](#)

Attorneys and Law Firms

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[Jill V. Ferrara](#), Attorney, [Daniel Francis Gallagher](#), Attorney, Office of the Cook County State's Attorney, [Hariklia Karis](#), Attorney, Kirkland & Ellis LLP, Chicago, IL, for Defendant–Appellee.

Before [POSNER](#), [RIPPLE](#), and [SYKES](#), Circuit Judges.

Opinion

[POSNER](#), Circuit Judge.

Backpage.com (we'll call it just Backpage) provides an online forum for classified ads sectioned by subject matter, such as rentals, real estate, jobs, and, among still others, “adult.” The adult section in turn is subdivided into escorts, body rubs, strippers and strip clubs, dom[ination] and fetish, ts (transsexual escorts), male escorts, phone [sex], and adult jobs (jobs related to services offered in other adult categories, whether or not the jobs are sexual—not every employee of a brothel is a sex worker).

The Sheriff of Cook County, Tom Dart, has embarked on a campaign intended to crush Backpage's adult section—crush Backpage, period, it seems—by demanding that firms such as Visa and MasterCard prohibit the use of their credit cards to purchase any ads on Backpage, since the ads might be for illegal sex-related products or services, such as prostitution. Visa and MasterCard bowed to pressure from Sheriff Dart and others by refusing to process transactions in which their credit cards are used to purchase *any* ads on Backpage, even those that advertise indisputably legal activities.

[1] [2] Backpage sought a preliminary injunction to stop the sheriff's campaign of starving the company by pressuring credit card companies to cut ties with its website. The district court denied the injunction and Backpage has appealed, contending that the sheriff is curtailing freedom of expression, in violation of the First Amendment. The sheriff ripostes that he's not using his office to organize a boycott of Backpage by threatening legal sanctions, but merely expressing his disgust with Backpage's sex-related ads and the illegal activities that they facilitate. That's not true, and while he has a First Amendment right to express his views about Backpage, a public official who tries to shut down an avenue of expression of ideas and opinions through “actual or threatened imposition of government power or sanction” is violating the First Amendment. [American Family Association, Inc. v. City & County of San Francisco](#), 277 F.3d 1114, 1125 (9th Cir.2002).

[3] The difference between government expression and intimidation—the first permitted by the First Amendment, the latter forbidden by it—is well explained in [Okwedy v. Molinari](#), 333 F.3d 339, 344 (2d Cir.2003) (per curiam): “the fact that a public-official defendant lacks direct regulatory or decisionmaking authority over a plaintiff, or a third party that is publishing or otherwise disseminating the plaintiff's message, is not necessarily dispositive.... What matters is the distinction between attempts to convince and attempts to coerce. A public-official defendant who threatens to employ coercive state power to stifle protected speech ***231** violates a plaintiff's First Amendment rights, regardless of whether the threatened punishment comes in the form of the use (or, misuse) of the defendant's direct regulatory or decisionmaking authority over the plaintiff, or in some less-direct form.” Notice that such a threat is actionable and thus can be enjoined even if it turns out to be empty—the victim ignores it, and the threatener folds his tent. But the victims in this case yielded to the threat.

It may seem odd, though it certainly does not exonerate Sheriff Dart, that he should be going after the credit-card companies rather than after Backpage itself. If Backpage is violating the law by accepting classified ads for “adult” services, which may include illegal services, such as prostitution, you’d think the sheriff would sue Backpage. But no; he tried that against Craigslist, a classified-ads website that had an adult section similar to Backpage’s, and he failed. District Judge Grady, in a thorough opinion, threw out the sheriff’s case. *Dart v. Craigslist, Inc.*, 665 F.Supp.2d 961 (N.D.Ill.2009). Craigslist, perhaps anticipating Dart’s campaign against Backpage, shut down its adult section the following year, though adult ads can be found elsewhere on its website.

[4] The suit against Craigslist having failed, the sheriff decided to proceed against Backpage not by litigation but instead by suffocation, depriving the company of ad revenues by scaring off its payments-service providers. The analogy is to killing a person by cutting off his oxygen supply rather than by shooting him. Still, if all the sheriff were doing to crush Backpage was done in his capacity as a private citizen rather than as a government official (and a powerful government official at that), he would be within his rights. But he is using the power of his office to threaten legal sanctions against the credit-card companies for facilitating future speech, and by doing so he is violating the First Amendment unless there is *no* constitutionally protected speech in the ads on Backpage’s website—and no one is claiming that. The First Amendment forbids a public official to attempt to suppress the protected speech of private persons by threatening that legal sanctions will at his urging be imposed unless there is compliance with his demands. E.g., *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 64–72, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963); *Okwedy v. Molinari*, *supra*, 333 F.3d at 342–44; *American Family Association, Inc. v. City & County of San Francisco*, *supra*, 277 F.3d at 1125.

Central to Backpage’s case is a letter of June 29 of this year that Sheriff Dart sent both to MasterCard’s CEO and Board of Directors and to the corresponding personnel of Visa. The letter is on stationery captioned “Office of the Sheriff,” and begins: “As the Sheriff of Cook County, a father and a caring citizen, I write to request that your institution immediately cease and desist from allowing your credit cards to be used to place ads on websites like Backpage.com.” Notice that he is sheriff first, father and citizen second; notice his use of the legal term “cease and desist”; notice that he calls MasterCard “your institution,” implying that the same letter

is going to other “institutions”—namely other credit card companies—in other words that he is organizing a boycott. And notice that he doesn’t demand that “your institution” refuse to allow “your credit cards” to be used to pay *just* for ads on Backpage’s website that promote illegal products or services—he demands that “your institution” cease and desist from placing *any* ads “on websites like Backpage.com” (and *a fortiori* on Backpage’s own website) even though “adult” ads are only one of eleven types of *232 classified ad published on the website. Visa and MasterCard got the message and cut *all* their ties to Backpage.

The letter goes on to state that “it has become increasingly indefensible for any corporation to continue to willfully play a central role in an industry that reaps its cash from the victimization of women and girls across the world.” The implication, given whom the letter is addressed to, is that credit card companies, such as MasterCard and Visa, “willfully play a *central* role” in a criminal activity (emphases added)—so they had better stop! Indeed, the letter goes on to say, those companies are “key” to the “growth” of sex trafficking in the United States. (Actually, as explained in an amicus curiae brief filed by the Cato Institute, Reason Foundation, and DKT Liberty Project, citing voluminous governmental and academic studies, there are no reliable statistics on which Sheriff Dart could base a judgment that sex trafficking has been increasing in the United States.) He is intimating that two of the world’s largest credit card companies may be criminal accomplices.

“Financial institutions,” the letter continues, “have the legal duty to file ‘Suspicious Activity Reports’ to authorities in cases of human trafficking and sexual exploitation of minors.” The letter cites the federal money-laundering statute, 18 U.S.C. § 1956, thereby intimating that the credit card companies could be prosecuted for processing payments made by purchasers of the ads on Backpage that promote unlawful sexual activity, such as prostitution. And “make no mistake,” the letter thunders: “Your [credit] cards have and will continue to be used to buy ads that sell children for sex on sites like Backpage.com.... The use of credit cards in this violent industry implies an undeserved credibility and sense of normalcy to such illicit transactions and only serves to increase demand.”

And here’s the kicker: “Within the next week, please provide me with contact information for an individual within your organization that I can work with [harass, pester] on this issue.” The “I” is Sheriff Dart, not private citizen Dart—the

letter was signed by “Thomas Dart, Cook County Sheriff.” And the letter was not merely an expression of Sheriff Dart’s opinion. It was designed to compel the credit card companies to act by inserting Dart into the discussion; he’ll be chatting them up. Further insight into the purpose and likely effect of such a letter is provided by a strategy memo written by a member of the sheriff’s staff in advance of the letter. The memo suggested approaching the credit card companies (whether by phone, mail, email, or a visit in person) with threats in the form of “reminders” of “their own potential liability for allowing suspected illegal transactions to continue to take place” and their potential susceptibility to “money laundering prosecutions ... and/or hefty fines.” Allusion to that “susceptibility” was the culminating and most ominous threat in the letter.

Upon receipt of the letter MasterCard forthwith stopped allowing its credit cards to be used to purchase ads anywhere on Backpage’s website. Visa followed suit. So the threats had worked. And so just two days after Dart’s letter was sent, the Cook County Sheriff’s Office was able to (and did) issue a triumphant press release captioned “Sheriff Dart’s Demand to Defund Sex Trafficking Compels Visa and MasterCard to Sever Ties with Backpage.com.” Notice “demand,” not request; notice “compels,” not persuades; notice “sever ties,” not “refuse to make payments for ads in the adult section of the Backpage website.”

***233** Imagine a letter that was similar to Sheriff Dart’s but more temperate (no “demand,” no “compels,” no “sever [all] ties”) and sent to a credit card company by a person who was not a law-enforcement officer. The letter would be more likely to be discarded or filed away than to be acted on. For there is evidence that the credit card companies had received such complaints from private citizens, yet it was Dart’s letter that spurred them to take immediate action to cut off Backpage. For that was a letter from a government official containing legal threats and demands for quick action and insisting that an employee of the recipient be designated to answer phone calls or respond to other communications from the sheriff. It was within days of receiving the letter that the credit card companies broke with Backpage. The causality is obvious.

It’s true that Visa filed an affidavit stating that “at no point did Visa perceive Sheriff Dart to be threatening Visa.” But what would one expect an executive of Visa to say? “I am afraid of the guy?” “He is in effect calling me an accomplice of a criminal organization (Backpage), and I’m afraid he might pull strings to get me investigated and even

prosecuted by any one of several federal or state agencies?” More significant than Visa’s denial of having succumbed to Sheriff Dart’s pressure tactics is the statement in the affidavit that the withdrawal of credit card services from Backpage “follow[ed] communication with Sheriff Dart’s staff” and with “Visa Legal Department” personnel. The reference was to those follow-up communications from the sheriff’s office promised (which is to say threatened) in the letters to Visa and MasterCard. The promise/threat was honored. The day after Dart sent the letter, his Director of Communications emailed Visa that he “wanted to give fair warning that we will be having a press conference tomorrow morning.... Obviously the tone of the press conference will change considerably if your executives see fit to sever ties with Backpage and its imitators. Of course we would need to know tonight if that is the case so that we can ensure the Sheriff’s messaging celebrates Visa’s change in direction *as opposed to pointing out its ties to sex trafficking*” (emphasis added). In an ensuing exchange of messages between two Visa employees, one said: “Yes, love the subtle messages they’ve been sending us that could easily be taken for blackmail.” To which the other replied that he’d told the boss of the Director of Communications “that he needs to tone down the threatening language ... all of his emails as a public employee are, of course, discoverable and public, if anyone asks for them.... Sigh.” Visa understood that Sheriff Dart’s letter and the follow-up by his Director of Communications were serious threats and therefore had to be taken seriously.

Visa and MasterCard were victims of government coercion aimed at shutting up or shutting down Backpage’s adult section (more likely aimed at bankrupting Backpage—lest the ads that the sheriff doesn’t like simply migrate to other sections of the website), when it is unclear that Backpage is engaged in illegal activity, and if it is not then the credit card companies cannot be accomplices and should not be threatened as accomplices by the sheriff and his staff. Section 230(c) of the Communications Decency Act of 1996 states, as Judge Grady had noted in the *Craigslist* case, that “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” 47 U.S.C. § 230(c)(1); see *Dart v. Craigslist, Inc., supra*, 665 F.Supp.2d at 965–69. As our court has explained, interpreting section 230(c), “an intermediary ... normally ***234** is indifferent to the content of what it transmits. Even entities that know the information’s content do not become liable for the sponsor’s deeds. Does a newspaper that carries an advertisement for ‘escort services’ or ‘massage parlors’ aid and abet the crime

of prostitution, if it turns out that some (or many) of the advertisers make money from that activity?” *Doe v. GTE Corp.*, 347 F.3d 655, 659 (7th Cir.2003); see also *Chicago Lawyers' Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 670 (7th Cir.2008). Sounds like our case. Backpage is an intermediary between the advertisers of adult services and visitors to Backpage's website. The credit card companies are more remote intermediaries.

It's true that the Communications Decency Act does not immunize the credit card companies or Backpage from federal criminal liability, 47 U.S.C. § 230(e)(1), and remember that in the June letter Dart made ominous reference to the federal money-laundering statute. It's unlikely that credit card companies would be prosecuted as aiders and abettors of Backpage, any more than the landlord of premises occupied by Backpage would be; but obviously credit card companies don't like being threatened by a law-enforcement official that he will sic the feds on them, even if the threat may be empty. At oral argument Dart's attorney reminded us that “nowhere in Sheriff Dart's letter does it say that he thought that they [the credit card companies] were accomplices to a crime.” But the letter implies that they are—and it was the letter that prompted the credit card companies to abandon Backpage. They are unlikely to reconsider on the basis of a lawyer's statement at oral argument, months after the initial threat.

Nor is Sheriff Dart on solid ground in suggesting that *everything* in the adult section of Backpage's website is criminal, violent, or exploitive. *Fetishism?* Phone sex? Performances by striptease artists? (Vulgar is not violent.) One ad in the category “dom & fetish” is for the services of a “professional dominatrix”—a woman who is paid to whip or otherwise humiliate a customer in order to arouse him sexually. See *What It's Actually Like Being A Dominatrix (According To One Dominatrix)*, www.xojane.com/sex/what-its-actually-like-being-a-dominatrix-according-to-one-dominatrix (visited November 27, 2015) (“I make a living as a professional dominatrix.... I make a living by hitting, humiliating, [dressing](#) up, verbally attacking and otherwise fulfilling men's weird fantasies about being dominated.”); see also *Wikipedia*, “Dominatrix,” <https://en.wikipedia.org/wiki/Dominatrix> (visited the same day). It's not obvious that such conduct endangers women or children or violates any laws, including laws against prostitution.

The district judge remarked “that the majority of the advertisements [in Backpage's adult section] are for sex”—

but a majority is not all, and not all advertisements for sex are advertisements for illegal sex. There is no estimate of how many ads in Backpage's adult section promote illegal activity; we just gave examples of some that do not.

[5] As a citizen or father, or in any other private capacity, Sheriff Dart can denounce Backpage to his heart's content. He is in good company; many people are disturbed or revolted by the kind of sex ads found on Backpage's website. And even in his official capacity the sheriff can express his distaste for Backpage and its look-alikes; that is, he can exercise what is called “[freedom of] government speech.” See *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, — U.S. —, 135 S.Ct. 2239, 192 L.Ed.2d 274 (2015); *235 *Pleasant Grove City v. Summum*, 555 U.S. 460, 129 S.Ct. 1125, 172 L.Ed.2d 853 (2009); *Johanns v. Livestock Marketing Association*, 544 U.S. 550, 125 S.Ct. 2055, 161 L.Ed.2d 896 (2005); *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819, 833–34, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995); *Freedom From Religion Foundation, Inc. v. Obama*, 641 F.3d 803 (7th Cir.2011). A government entity, including therefore the Cook County Sheriff's Office, is entitled to say what it wants to say—but only within limits. It is not permitted to employ threats to squelch the free speech of private citizens. “[A] government's ability to express itself is [not] without restriction.... [T]he Free Speech Clause itself may constrain the government's speech.” *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, *supra*, 135 S.Ct. at 2246; see also *Rosenberger v. Rector & Visitors of the University of Virginia*, *supra*, 515 U.S. at 833–34, 115 S.Ct. 2510.

In his public capacity as a sheriff of a major county (Cook County has a population of more than 5.2 million), Sheriff Dart is not permitted to issue and publicize dire threats against credit card companies that process payments made through Backpage's website, including threats of prosecution (albeit not by him, but by other enforcement agencies that he urges to proceed against them), in an effort to throttle Backpage. See *Bantam Books, Inc. v. Sullivan*, *supra*, 372 U.S. at 67, 83 S.Ct. 631. For where would such official bullying end, were it permitted to begin? Some public officials doubtless disapprove of bars, or pets and therefore pet supplies, or yard sales, or lawyers, or “plug the band” (a listing of music performances that includes such dubious offerings as “SUPERCELL Rocks Halloween at The Matchbox Bar & Grill”), or men dating men or women dating women—but ads for all these things can be found in non-adult sections of Backpage and it would be a clear abuse of power for public

officials to try to eliminate them not by expressing an opinion but by threatening credit card companies or other suppliers of payment services utilized by customers of Backpage, or other third parties, with legal or other coercive governmental action.

[6] With very limited exceptions, none applicable to this case, censorship—“an effort by administrative methods to prevent the dissemination of ideas or opinions thought dangerous or offensive,” *Blue Canary Corp. v. City of Milwaukee*, 251 F.3d 1121, 1123 (7th Cir.2001), as distinct from punishing such dissemination (if it falls into one of the categories of punishable speech, such as defamation or threats) after it has occurred—is prohibited by the First Amendment as it has been understood by the courts. “Threatening penalties for future speech goes by the name of ‘prior restraint,’ and a prior restraint is the quintessential first-amendment violation.” *Fairley v. Andrews*, 578 F.3d 518, 525 (7th Cir.2009). The Supreme Court, in enjoining a state commission from sending threatening letters to distributors of books that the commission deemed obscene, found that the “notices, phrased virtually as orders, reasonably understood to be such by the distributor, invariably followed up by police visitations, in fact stopped the circulation of the listed publications.” *Bantam Books, Inc. v. Sullivan*, *supra*, 372 U.S. at 68, 83 S.Ct. 631. The court held the state’s “system of informal censorship” unconstitutional, pointing out that “though the Commission is limited to informal sanctions—the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation—the record amply demonstrates that the Commission deliberately set about to achieve the suppression of publications deemed ‘objectionable’ and succeeded in its aim.” *236 *Id.* at 67, 83 S.Ct. 631. The distributor of the plaintiffs’ books, corresponding to the credit card companies in this case, received first from the Commission a written request for “cooperation” and then “follow up” visits from police, corresponding to the follow-up calls promised in Sheriff Dart’s letter. *Id.* at 63, 68, 83 S.Ct. 631. The distributor bowed to the Commission’s demand “rather than face the possibility of some sort of a court action against ourselves, as well as the people that we supply.” *Id.* at 63, 83 S.Ct. 631. That is like this case, yet the district court denied Backpage’s motion for a preliminary injunction that would have required Sheriff Dart to desist from attempting to intimidate, by threatening legal action against, companies that provide payment services to customers of Backpage.

It might seem that large companies such as Visa and MasterCard would not knuckle under to a sheriff, even the

sheriff of a very populous county. That might be true if they derived a very large part of their income from the company that he wanted them to boycott. But they don’t. Backpage’s monthly revenue from “adult” ads was recently estimated at \$9 million and its total revenue in 2014 at \$135 million, whereas the combined net revenue of MasterCard and Visa in that year exceeded \$22 billion. The revenue they derived from Backpage’s adult ads must have been a small fraction of their overall revenue, especially since not all of Backpage’s ad customers pay for their ads with a MasterCard or Visa credit card. Yet the potential cost to the credit card companies of criminal or civil liability and of negative press had the companies ignored Sheriff Dart’s threats may well have been very high, which would explain their knuckling under to the threats with such alacrity.

The district court’s opinion denying the relief sought by Backpage contains a number of errors. It states, for example, that the Supreme Court in the *Bantam Books* case “was careful to note [at 372 U.S. at 71–72, 83 S.Ct. 631 that] its ruling does not require law enforcement officials to ‘renounce all informal contacts with persons suspected of violating valid laws prohibiting obscenity.’” This doesn’t help Dart’s case; he didn’t just make informal contacts with credit card companies; Backpage is complaining about the formal contacts that he initiated with those companies in an effort to frighten them into severing their contracts with Backpage.

In tension with his holding, Judge Tharp’s opinion contains a lucid, indeed compelling, explanation of why Sheriff Dart’s letter to MasterCard *did* constitute a threat:

Dart’s letter to the credit card companies could reasonably be interpreted as an implied threat to take, or cause to be taken, some official action against the companies if they declined his “request” to stop providing a method to pay for advertising on Backpage.com. Dart did not directly threaten the companies with an investigation or prosecution, and he admits that his department had no authority to take any official action with respect to Visa and MasterCard. But by writing in his official capacity, requesting a “cease and desist,” invoking the legal obligations of financial institutions to cooperate with law enforcement, and requiring ongoing contact with the companies, among other things, Dart could reasonably be seen as implying that the companies would face some government sanction—specifically, investigation and prosecution—if they did not comply with his “request.” This is true even if the companies understood the jurisdictional constraints on Dart’s ability to proceed

against them directly. As Dart admitted in the preliminary injunction *237 hearing, his department often coordinates with other local law enforcement agencies and sometimes with other states and the federal government. There is no reason that he could not refer the credit card companies to the appropriate authority to investigate their suspected role in facilitating human trafficking.... And further, in this very case, Dart contacted the Inspector General of the United States Postal Service and the FBI, urging them to investigate the lawfulness of alternative payment methods for Backpage's sex ads.

Furthermore, Dart's pre- and post-letter statements are consistent with (though not conclusive proof of) an attempt at official coercion. The strategy memorandum expressly recommended appealing to the credit card companies' interest in avoiding liability and it cannot be credibly argued that the references to the federal money laundering statute and other regulations defining duties of financial institutions were not intended to suggest that the companies could face civil or criminal liability for facilitating payments for unlawful ads placed on Backpage.com.... And after the letters were sent, Dart's office was happy to take credit for "compelling" the companies' actions. Dart referred to his letter not as a "request" but as a "demand." A "demand" is consistent with his role as sheriff, but not [with his role as] "a father and a caring citizen." Finally, the urgency of the sheriff's department's follow-up communications imposed another layer of coercion due to its strong suggestion that the companies could not simply ignore Dart.

Yet having thus shown that Sheriff Dart had indeed used his office as sheriff to intimidate the credit card companies, Judge Tharp said that "a threat alone is not a prior restraint.... [T]he threat must produce some 'consequence.' ... And while the Court [that is, Judge Tharp] does not quarrel with the premise that the *letter* precipitated the companies' actions ... it is far from clear that any *threat* the letter may have contained caused the companies' action" (emphases in original). Maybe, the judge suggested, the letter and other threatening actions taken by Sheriff Dart and his underlings merely reminded the credit card companies that they "simply did not want to do business with a website where advertisers peddle flesh." And therefore, the judge concluded, Backpage has a "small likelihood of success on the merits" of its suit against the sheriff.

Had the companies not known that "advertisers peddle flesh" on Backpage, the judge's point would have been well taken.

But of course they knew about the nature of the advertising on Backpage—everyone does—without having to be told by Sheriff Dart. He didn't educate them about the nature and possible consequences of advertising for sex; he told them to desist or else. If Judge Tharp had been correct in crediting the companies with "ceas[ing] doing business with Backpage.com because they did not want their products to be associated with the content posted there," they would have ceased doing business with it years before. Backpage's content was not a discovery of Sheriff Dart's. If as the judge said the credit card companies cut off Backpage "for independent business reasons," why hadn't they done that years earlier? The internal email exchanges of both Visa and MasterCard support our doubts on this point; recall for example the use of the term "blackmail" in the exchange between Visa employees.

Unwittingly the judge was suggesting a formula for permitting unauthorized, unregulated, foolproof, lawless government coercion. The formula consists of coupling threats with denunciations of the activity *238 that the official wants stamped out, for the target of the denunciation will be reluctant to acknowledge that he is submitting to threats but will instead ascribe his abandonment of the activity to his having discovered that it offends his moral principles. The judge was giving official coercion a free pass because it came clothed in what in the absence of any threatening language would have been a permissible attempt at mere persuasion. See, e.g., *Bantam Books, Inc. v. Sullivan*, *supra*, 372 U.S. at 66–67, 83 S.Ct. 631; *American Civil Liberties Union v. City of Pittsburgh*, 586 F.Supp. 417, 421–23 (W.D.Pa.1984).

The judge was further mistaken when he said that "the Sheriff's own First Amendment rights are at stake in this case and the Court must therefore also consider the risk that erroneously entering an injunction would chill Dart's own right to speak out on issues of public concern. Sheriff Dart has a First Amendment right to publicly criticize the credit card companies for any connection to illegal activity, *as long as he stops short of threats*" (emphasis added). But the judge himself, in the passages we quoted earlier, had been emphatic that Dart had *not* stopped short of threats. Those threats were not protected by the First Amendment; they were violations of the First Amendment.

And when, finally, the judge denied that there was evidence that Backpage had been irreparably harmed by its abandonment by the credit card companies, he again

contradicted himself, having noted that in response to that abandonment “Backpage made its ads free ... and no company can expect to continue to operate without a source of revenue.” The judge had no basis for conjecturing as he did that Backpage could avoid that fate by offsetting the loss of the credit card companies by arranging payments by its customers through Bitcoin, checks, money orders, or cash. It was a weak conjecture, as he quickly acknowledged, saying that “whether the financial losses that Backpage sustains while grappling with the withdrawal of credit card processors will result in Backpage's demise has not yet been established”—but immediately adding: “that may well be the result”!

Indeed it may. But even short of that, Sheriff Dart's campaign of suffocation would be bound to cause irreparable injury to Backpage, and irreparable injury is the essential condition of preliminary relief, *Roland Machinery Co. v. Dresser Industries, Inc.*, 749 F.2d 380, 386–87 (7th Cir.1984), which is all that is at stake in this appeal. It was Sheriff Dart's intention to harm Backpage irreparably; in an email to members of the press his Director of Communications stated that Backpage had made its adult ads free in response to the credit card companies' decision not to allow their credit cards to be used to pay for ads on Backpage's website, but continued: “We were ready for this and not concerned. It's unsustainable for them to maintain all of their lobbying, legal battles and all the money it takes for their server space without any revenue coming in.” In other words, Backpage is doomed. That sounds like irreparable harm to us; nor is there an offsetting harm of a kind cognizable by the courts from enjoining the sheriff from violating the First Amendment.

[7] Turning finally to the issue of remedy: Had Sheriff Dart sued Backpage seeking to enjoin its publication of sex-related ads, the company's remedy would have been to seek a judgment dismissing the suit. But Backpage is the plaintiff, and its only remedy is an injunction against the sheriff's violating its First Amendment rights. As in

Elrod v. Burns, 427 U.S. 347, 373–74, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976), “it is clear ... that First Amendment interests were either threatened or in fact being impaired at the *239 time relief was sought. The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury. Since such injury was both threatened and occurring at the time of respondents' motion and since respondents sufficiently demonstrated a probability of success on the merits, the Court of Appeals might properly have held that the District Court abused its discretion in denying preliminary injunctive relief.” And so it is here; given the strength of Backpage's case, the district judge erred in denying its motion for a preliminary injunction, and we therefore reverse the judge's ruling with directions that he issue the following injunction (which supersedes the temporary injunction, pending decision of the appeal, issued by this court on November 16):

Sheriff Dart, his office, and all employees, agents, or others who are acting or have acted for or on behalf of him, shall take no actions, formal or informal, to coerce or threaten credit card companies, processors, financial institutions, or other third parties with sanctions intended to ban credit card or other financial services from being provided to Backpage.com.

Sheriff Dart shall immediately upon receipt of this order transmit a copy electronically to Visa and MasterCard and all other recipients of his June 29, 2015, letter (including therefore the directors of and investors in Visa and MasterCard), as well as to the Chief Inspector of the United States Postal Service.

Backpage.com shall not be required to post a security bond.

Reversed and Remanded, with Directions

All Citations

807 F.3d 229, 44 Media L. Rep. 1104



KeyCite Yellow Flag - Negative Treatment

Distinguished by [Optivision, Inc. v. Syracuse Shopping Center, Associates](#), N.D.N.Y., May 31, 1979

588 F.2d 24

United States Court of Appeals,
Second Circuit.JOHN B. HULL, INC., The Sandmeyer
Oil Company, Community Petroleum
Products, Inc., and Dutchess
Auto Co., Plaintiffs-Appellees,

v.

WATERBURY PETROLEUM
PRODUCTS, INC., Defendant-Appellant.

No. 21, Docket 78-7136.

|
Argued Oct. 18, 1978.|
Decided Nov. 30, 1978.**Synopsis**

Defendant in a civil antitrust action appealed from the order of the United States District Court for the District of Connecticut, T. Emmet Clarie, Chief Judge, in granting a preliminary injunction requiring it to establish a single price for sales of heating oil. The Court of Appeals, J. Joseph Smith, Circuit Judge, held that the scope of the trial court's order was somewhat broader than was justified, and that the order should therefore be modified.

Affirmed as modified.

West Headnotes (8)

[1] Federal Courts **Organization and jurisdiction of lower court; venue**

Contention that district court lacked jurisdiction of subject matter of antitrust suit because there was no proof of injury to competition would be considered on appeal even though it was not raised in trial court. [Fed.Rules Civ.Proc. rule 12\(h\)\(3\)](#), 28 U.S.C.A.

28 Cases that cite this headnote

[2] Antitrust and Trade**Regulation** **Commerce requirement**

Proof of injury to competition is not jurisdictional prerequisite to suit under Robinson-Patman Act, but instead is part of plaintiff's substantive burden in demonstrating violation of Act. Clayton Act, § 2(a) as amended by Robinson-Patman Price Discrimination Act, 15 U.S.C.A. § 13(a).

8 Cases that cite this headnote

[3] Antitrust and Trade**Regulation** **Preliminary**

Trial court applied proper standard for issuance of preliminary injunction in suit under Robinson-Patman Act when it required plaintiffs to demonstrate either probable success on merits and possible irreparable injury or sufficiently serious questions going to merits to make them fair ground for litigation and a balance of hardships tipping decidedly toward party requesting preliminary relief. Clayton Act, § 2(a) as amended by Robinson-Patman Price Discrimination Act, 15 U.S.C.A. § 13(a).

15 Cases that cite this headnote

[4] Antitrust and Trade**Regulation** **Injunction**

Trial court in suit under Robinson-Patman Act acted within its discretion in finding probability that plaintiffs ultimately would succeed on merits of their claim that defendant's fuel oil pricing policy constituted unlawful price discrimination having anticompetitive effect. Clayton Act, § 2(a) as amended by Robinson-Patman Price Discrimination Act, 15 U.S.C.A. § 13(a).

1 Cases that cite this headnote

[5] Antitrust and Trade Regulation **Pricing**

In suit under Robinson-Patman Act for unlawful price discrimination, showing of anticompetitive effect was not negated by fact that defendant

controlled only two percent of market and was not powerful nationwide corporation, while plaintiffs had much larger share of such market. Clayton Act, § 2(a) as amended by Robinson-Patman Price Discrimination Act, 15 U.S.C.A. § 13(a).

[1 Cases that cite this headnote](#)

[6] **Antitrust and Trade Regulation** 🔑 **Injunction**

In suit under Robinson-Patman Act for alleged illegal price discrimination, record supported trial court's finding of irreparable injury based on showing that plaintiff was in danger of losing many customers to whom it had given discounts in attempt to match defendant's prices and that, if it lost such customers, it would probably be forced out of heating oil business. Clayton Act, § 2(a) as amended by Robinson-Patman Price Discrimination Act, 15 U.S.C.A. § 13(a).

[22 Cases that cite this headnote](#)

[7] **Federal Civil Procedure** 🔑 **Statements as to facts, comments and arguments in general**

Defendant in price discrimination suit under Robinson-Patman Act waived argument that irreparable harm could not be shown through proof of loss of goodwill and reputation where it failed specifically to identify such legal basis for objecting to magistrate's findings. Clayton Act, § 2(a) as amended by Robinson-Patman Price Discrimination Act, 15 U.S.C.A. § 13(a); 28 U.S.C.A. § 636(b)(1); U.S. Dist. Ct. Rules, D.Conn., Magistrate Rule 2.

[34 Cases that cite this headnote](#)

[8] **Antitrust and Trade Regulation** 🔑 **Preliminary Federal Courts** 🔑 **Modification**

Preliminary injunction entered in Robinson-Patman Act price discrimination suit in favor of heating oil dealer was too broad, and would be modified, to extent that it imposed restrictions which exceeded relief requested by plaintiff. Clayton Act, § 2(a) as amended by Robinson-

Patman Price Discrimination Act, 15 U.S.C.A. § 13(a).

[1 Cases that cite this headnote](#)

Attorneys and Law Firms

*25 Michael F. Dowley, Middletown, Conn. (Dzialo, Pickett & Allen, P. C., Middletown, Conn.), for appellant.

James R. Hawkins, II, Stamford, Conn. (Cummings & Lockwood, Stamford, Conn.), for appellee.

Before SMITH, TIMBERS and VAN GRAAFEILAND, Circuit Judges.

Opinion

J. JOSEPH SMITH, Circuit Judge:

This is an appeal from an order in a civil antitrust action granting a preliminary injunction *26 against defendant's pricing practices for heating oil, entered in the United States District Court for the District of Connecticut, T. Emmet Clarie, Chief Judge. We find the scope of the order somewhat broader than justified, modify the order and, as modified, affirm.

This controversy involves five companies engaged in the sale of heating oil (also known as "fuel oil Number 2") to homes, schools and some businesses in an area referred to as the Northwest Corner, which encompasses parts of northwest Connecticut, southwest Massachusetts and the adjacent area of New York.¹ On one side of the controversy are John B. Hull, Inc., The Sandmeyer Oil Company, Community Petroleum Products, Inc., and Dutchess Auto Company ("the plaintiffs"). Together they account for a substantial portion of the sales of heating oil in the Northwest Corner.² On the other side is Waterbury Petroleum Products, Inc. ("WPP"), which has about 2% Of the market in the Northwest Corner.

WPP originally operated exclusively in Waterbury, Connecticut, outside of the Northwest Corner. In 1975, it purchased the assets of the Canaan Oil Company, located in Canaan, Connecticut, and thereby expanded its business into the Northwest Corner. For reasons unrelated to this action, all three former employees of the Canaan Oil Company subsequently left WPP and began working for one of its competitors. As a result, WPP started to lose customers in the

Northwest Corner. At about the same time, WPP lost the use of its Canaan storage facility in a dispute over the ownership of the property.

In September 1976, WPP sought to reverse its declining fortunes in the Northwest Corner by lowering the price of heating oil there to 35.9 cents per gallon. WPP continued to sell its heating oil in the Waterbury area at a price of 40.9 cents per gallon. Over the next four months, increases in the cost of obtaining oil caused WPP to raise the price charged to Waterbury customers to 48.9 cents per gallon. During the same period, WPP only increased its price in the Northwest Corner to 39.9 cents per gallon.

WPP's new pricing policy proved successful in recapturing old customers and acquiring new ones, some of whom previously purchased oil from the plaintiffs. As might be expected, the plaintiffs were not pleased with the loss of customers that WPP's pricing policy produced. Thus they commenced this action against WPP, alleging that its pricing policy constituted unlawful price discrimination in violation of s 2(a) of the Clayton Act as amended by the Robinson-Patman Act, 15 U.S.C. s 13(a). The plaintiffs sought preliminary and permanent injunctive relief against WPP's pricing policy, as well as trebled damages for the losses which they sustained as a result of that policy.

The district court, pursuant to 28 U.S.C. s 636, referred the matter to a magistrate, who conducted an evidentiary hearing to determine whether a preliminary injunction should be issued. The hearing lasted five days, after which the magistrate submitted his recommended ruling, including specific findings of fact. The district court "adopted, ratified and confirmed" the recommended ruling and issued an order granting the preliminary injunction.

WPP appeals from that order, arguing that the district court lacked subject matter jurisdiction, that there was manifest error in the issuance of the injunction, and that the injunction as issued is too broad and *27 should be modified. We find no merit in appellant's first two contentions, but agree that the relief granted was too broad and therefore modify the preliminary injunction and, as modified, affirm.

[1] WPP contends that the district court lacked jurisdiction of the subject matter of this action because there was no proof of injury to competition. We of course must consider this argument although it was not raised below, *Woodward v. D. H. Overmyer Co.*, 428 F.2d 880, 882 (2d Cir. 1970), Cert. denied, 400 U.S. 993, 91 S.Ct. 460, 27 L.Ed.2d 441 (1971), as jurisdiction over the subject matter provides the basis for

the court's power to act, and an action must be dismissed whenever it appears that the court lacks such jurisdiction. *Fed.R.Civ.P. 12(h)(3)*.

WPP cites several cases from the Fifth Circuit for the proposition that proof of injury to competition is a jurisdictional requirement under the Robinson-Patman Act. This element was explicitly described as a prerequisite to jurisdiction in *Hampton v. Graff Vending Co.*, 516 F.2d 100, 101-02 (5th Cir. 1975), which relied on *Cliff Food Stores, Inc. v. Kroger, Inc.*, 417 F.2d 203, 208 (5th Cir. 1969). In neither case, however, was the existence of an adverse effect on competition in issue. Moreover, the court in *Cliff Food Stores* did not speak in terms of jurisdiction, but rather in terms of the proof necessary to "maintain an action."³

[2] We know of no other court which has adopted the position taken in *Hampton*. Commentators have concluded that proof of injury to competition is not a jurisdictional requirement. See, e. g., 16B J. Von Kalinowski, *Business Organizations: Antitrust Laws and Trade Regulation*, ch. 23; Rowe, *Discriminatory Sales of Commodities in Commerce: Jurisdictional Criteria Under the Robinson-Patman Act*, 67 *Yale L.J.* 1155, 1156 (1958). We respectfully decline to follow the Fifth Circuit's dictum. Proof of injury to competition is not a jurisdictional prerequisite, but instead is part of a Robinson-Patman plaintiff's substantive burden in demonstrating a violation of the Act.⁴

[3] The district court applied the proper standard for the issuance of a preliminary injunction, requiring the plaintiffs to demonstrate "either (1) probable success on the merits And possible irreparable injury, 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." *Sonesta International Hotels Corp. v. Wellington Associates*, 483 F.2d 247, 250 (2d Cir. 1973). (Emphasis in original.) The court determined that the plaintiffs had satisfied both prongs of this test. Our review is limited to a consideration of whether there was an abuse of discretion, *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931-32, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975), or a clear mistake of law, *414 Theater Corp. v. Murphy*, 499 F.2d 1155, 1159 (2d Cir. 1974), in the district court's application of the *Sonesta* test.

[4] 15 U.S.C. s 13(a) requires a plaintiff to show that a defendant, (1) who was engaged in commerce, (2) has discriminated in price between purchasers of commodities

(3) of like grade and quality, (4) where the effect may be substantially to lessen competition. WPP admitted that it was engaged in commerce and that the sales in question took place in commerce. The district court adopted the magistrate's findings of fact that the other three elements were also *28 satisfied. We conclude that the district court acted well within its discretion in finding a probability that the plaintiffs ultimately will succeed on the merits of their claim.

Price discrimination, for the purposes of the Robinson-Patman Act, is "merely a price difference." *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536, 549, 80 S.Ct. 1267, 4 L.Ed.2d 1385 (1960). WPP concededly charged different prices to different customers at the same time. The district court found that WPP was selling a commodity of like grade and quality in Waterbury and the Northwest Corner. In so finding, the court rejected as factually unsupported WPP's contention that the products sold in the two areas were different in that the price charged in Waterbury purportedly included 24-hour burner service and easier credit terms, not offered in the Northwest Corner. The court also rejected WPP's defense that the price difference was justified by a difference in the costs of providing heating oil to the two areas. The court characterized the testimony of WPP's expert as "beyond the realm of believability" and concluded that WPP was operating at a loss in the Northwest Corner as a result of its lowered price. While we offer no opinion as to the eventual resolution of these issues, we find the district court's conclusions to be not clearly erroneous on the basis of the existing record.

The district court's conclusion on the issue of anticompetitive effect also is supported by the record. In this circuit, proof of price discrimination satisfies a plaintiff's initial burden of showing injury to competition and shifts to the defendant the burden of proving that its acts did not substantially lessen competition. *Samuel H. Moss, Inc. v. FTC*, 148 F.2d 378, 379 (2d Cir.), Cert. denied, 326 U.S. 734, 66 S.Ct. 44, 90 L.Ed. 438 (1945). WPP did not discharge this burden. Injury to competition may also be shown by proof of predatory intent, *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685, 696-98, 702, 87 S.Ct. 1326, 18 L.Ed.2d 406 (1967), which can be inferred from proof of sales below cost. *Id.*, at 696 n. 12. The district court's finding that WPP sold below cost was justifiable.

[5] WPP argues that because it has only 2% Of the Northwest Corner market and is not a powerful nationwide corporation, while the plaintiffs hold a much larger share of the market, there can be no anti-competitive effect of the kind contemplated by the Robinson-Patman Act. This contention

runs counter to the language of *Utah Pie*, 386 U.S. at 702-03 n. 14, 87 S.Ct. at 1336, where the Supreme Court said: Nor does the fact that a local competitor has a major share of the market make him fair game for discriminatory price cutting free of Robinson-Patman Act proscriptions. "The Clayton Act proscription as to discrimination in price is not nullified merely because of a showing that the existing competition in a particular market had a major share of the sales of the product involved." (Citation omitted.)

[6] We next consider whether the plaintiffs demonstrated the possibility that irreparable injury would result if temporary injunctive relief were not granted. The district court found two elements of irreparable harm: (1) the "extreme likelihood" that Dutchess Auto Company ("Dutchess") would go out of business, and (2) the loss to "the goodwill and reputations" of the plaintiffs. Although we are not sure that we would have come to the same conclusion as did the district court, that is not the standard by which its determination must be judged. We cannot say that we have a "definite and firm conviction that a mistake has been committed." *United States v. U. S. Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948). We conclude that the finding of irreparable injury finds support in the record and relief based upon it did not constitute abuse of the court's discretion.

The district court determined that Dutchess was in danger of losing many customers to whom it had given discounts in an attempt to match WPP's price, and that, if it lost those customers, it would probably be forced out of the heating oil business. A threat to the continued existence of a business *29 can constitute irreparable injury. *Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197, 1205 (2d Cir. 1970). Although Dutchess might have done a more thorough job of proving the possibility that it would go out of business, we cannot say that the court's finding was without some evidentiary support.

[7] The finding of irreparable harm through loss of goodwill and reputation raises a more difficult issue. WPP concedes that loss of goodwill in certain circumstances can constitute irreparable injury, as in *Interphoto Corp. v. Minolta Corp.*, 417 F.2d 621, 622 (2d Cir. 1969), and *Supermarket Services, Inc. v. Hartz Mountain Corp.*, 382 F.Supp. 1248 (S.D.N.Y.1974). However, it contends on appeal that the loss of goodwill claimed here amounts to nothing more than a claim that the plaintiffs are losing customers to WPP's lower price. WPP argues that to issue a preliminary injunction on that basis would mandate a preliminary injunction in every

price discrimination case, thereby destroying the preliminary injunction's status as an extraordinary remedy.

WPP's argument has considerable force. Those cases in which loss of goodwill previously has been held to constitute irreparable injury have involved the termination of franchise or distributorship relationships. See, e. g., *Jacobson & Co. v. Armstrong Cork Co.*, 548 F.2d 438 (2d Cir. 1977); *Interphoto Corp. v. Minolta Corp.*, supra, 417 F.2d 621; *Bergen Drug Co. v. Parke Davis & Co.*, 307 F.2d 725 (3d Cir. 1962); *Carlo C. Gelardi Corp. v. Miller Brewing Co.*, 421 F.Supp. 233 (D.N.J.1976); *Supermarket Services, Inc. v. Hartz Mountain Corp.*, supra, 382 F.Supp. 1248. In that situation, the plaintiff is deprived totally of the opportunity to sell an entire line of merchandise and may incur injury to its goodwill and reputation "as a dependable distributor which offers a full line" of goods. *Supermarket Services, Inc. v. Hartz Mountain Corp.*, 382 F.Supp. at 1256. That kind of loss of goodwill is quite different from the loss of a customer that results simply from a competitor's lower price. Cf. *Automatic Radio Manufacturing Co. v. Ford Motor Co.*, 390 F.2d 113, 116-17 (1st Cir.), Cert. denied, 391 U.S. 914, 88 S.Ct. 1807, 20 L.Ed.2d 653 (1968) (goodwill resulted from "mercurial market" geared to price and demand for personnel rather than from attractiveness of trade name). Every Robinson-Patman plaintiff must prove that the defendant's price discrimination has caused damage to him, *Perkins v. Standard Oil Co.*, 395 U.S. 642, 648, 89 S.Ct. 1871, 23 L.Ed.2d 599 (1969), and the most common form of damage to a plaintiff competing seller would likely be lost profits because of a loss of customers. We would have serious doubts about the wisdom or propriety of finding irreparable injury to exist every time that the defendant's lower price has attracted customers.

Here, however, WPP has waived the argument which it now seeks to raise on appeal. 28 U.S.C. s 636(b)(1) provides that any party who objects to the magistrate's proposed findings and recommendations "may serve and file written objections . . . as provided by rules of court." The United States District Court for the District of Connecticut has adopted Rules for United States Magistrates. Rule 2 requires that "(a)ny party wishing to object must . . . serve on all parties, and file with the Clerk, written objection which shall Specifically identify the ruling, order, proposed findings and conclusions, or part thereof to which objection is made and The factual and legal basis for such objection." (Emphasis added.) WPP objected to the magistrate's conclusion on the grounds that any loss of goodwill resulted from fair competition and that the scale of the alleged loss was too

small to warrant preliminary injunctive relief.⁵ WPP did not, however, "specifically identify the . . . legal basis" on which it now seeks to challenge the magistrate's conclusion. This failure to satisfy *30 Rule 2 resulted in this argument not being considered by the district court and thus it has not been properly preserved for appeal. *Singleton v. Wulff*, 428 U.S. 106, 120, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976); *Wilkerson v. Meskill*, 501 F.2d 297, 298 (2d Cir. 1974).

[8] Although we agree that the district court acted within its discretion in determining that a preliminary injunction should be granted, we believe that the injunction entered was too broad and should be modified. The plaintiffs' complaint sought relief restraining WPP from selling heating oil in the Northwest Corner at a price below that which it charged in Waterbury. The magistrate's recommended ruling proposed a preliminary injunction which would achieve that result by requiring WPP to charge the same price in both areas.

The district court's order,⁶ however, imposed a number of additional restrictions which exceeded the relief requested. The injunction prohibits WPP from granting any discounts which are not cost justified in either the Northwest Corner or Waterbury. None of the plaintiffs, however, competes with WPP in Waterbury, and no complaint has been made as to WPP's pricing policy there. "(A) decree cannot enjoin conduct about which there has been no complaint," *United States v. Spectro Foods Corp.*, 544 F.2d 1175, 1180 (3d Cir. 1976), nor may it "enjoin 'all possible breaches of the law.'" *Hartford-Empire Co. v. United States*, 323 U.S. 386, 410, 65 S.Ct. 373, 385, 89 L.Ed. 322 (1945) (footnote omitted). Furthermore, the injunction's emphasis on allowing only cost justified discounts could be construed to prohibit WPP from offering discounts in order to meet those offered by its competitors, all of whom concededly grant discounts which may or may not be cost justified. The injunction therefore should be modified so as to regulate discounts only in the Northwest Corner and to make clear that WPP may engage in pricing policies that are allowed under the "meeting competition" defense afforded by 15 U.S.C. s 13(b).⁷ The burden of proving the justification *31 for any discounts offered in order to meet competition will remain on WPP, as provided by the statute.

WPP also has attempted to raise two alleged evidentiary errors which it failed to preserve for our review because of its failure to include them in its objections to the recommended ruling. Because these issues are likely to arise again during the trial on the merits, we shall comment on them briefly. The first involved the admission as an exhibit of a list of customers whom plaintiff John B. Hull, Inc. allegedly lost to

WPP. This exhibit presents a close question of admissibility even under the liberal criteria of [Fed.R.Evid. 803\(6\)](#), as it appears to be a list compiled under the special circumstances of WPP's price cut rather than a record kept as a "regular practice" of the plaintiff's business. The second objection concerned the qualifications of the plaintiffs' expert witness. The record suggests that he was adequately qualified to give expert testimony under [Fed.R.Evid. 702](#). The weight to be

given his testimony of course remains for the trier of fact to determine.

The order of the district court is modified and, as modified, is affirmed.

All Citations

588 F.2d 24, 47 A.L.R. Fed. 835, 1978-2 Trade Cases P 62,357, 4 Fed. R. Evid. Serv. 313

Footnotes

- 1 The parties stipulated that the Northwest Corner includes the following locations: Sharon, Lakeville, Canaan, North Canaan, East Canaan, Salisbury, Falls Village, Norfolk, Lime Rock and Cornwall in the State of Connecticut; Millerton in the State of New York; and Great Barrington and Sheffield in the State of Massachusetts.
- 2 About twenty million gallons of heating oil are consumed annually in the Northwest Corner. The plaintiffs collectively sell more than ten million gallons of heating oil annually; however, it is not clear from the record what portion of those sales are made in the Northwest Corner. It is clear that the plaintiffs service a larger share of the market than does the defendant, Waterbury Petroleum Products, Inc.
- 3 The court said:
To maintain an action under [section 13\(a\)](#) the plaintiff must allege and prove, inter alia: (1) That the defendant is engaged in commerce; (2) that, in the course of such commerce, the defendant has discriminated in price between different purchasers of commodities of like grade and quality; (3) that "Either or any of the purchases involved in such discrimination are in commerce"; and (4) that there is likely to be a severe, adverse effect on competition.
[417 F.2d at 208](#). (Emphasis in original.)
- 4 As the discussion below will show, the plaintiffs made a showing of probable effect on competition sufficient to satisfy any jurisdictional requirement, if one had existed.
- 5 The magistrate clearly found against WPP on the former ground. The latter ground might have weight if we were applying the "balancing of hardships" test, but it does not rebut the contention that a possibility of irreparable injury existed.
- 6 The injunction provided, in relevant part:
It is therefore:
ORDERED that the defendant, Waterbury Petroleum Products, Inc., shall establish a single price for sales of fuel oil Number 2. Nothing herein shall prohibit the defendant from granting discounts from such base price, so long as such discounts are cost justified. Examples of such permissible cost justified discounts are discounts relating to tank size and annual volume consumed by the account (including multiple accounts). Any such discounts must be offered uniformly to all customers of Waterbury Petroleum Products, wherever located. Specifically, no discount shall be granted to any of Waterbury Petroleum Products' customers which purports to be for payment within a specified period of time or Waterbury Petroleum Products' non-provision of burner service. Nothing herein shall affect the prices which defendant shall charge its customers where such prices have been or will be hereafter established by contract following public competitive bidding. Subject to the foregoing, the prices which the defendant shall charge its customers for fuel oil Number 2 shall be solely a matter of defendant's business judgment. This injunction mandates full compliance with Section 2(a) of the Robinson-Patman Act on the part of Waterbury Petroleum Products, Inc. . . .
- 7 The injunction shall be modified to read as follows:
It is therefore:
ORDERED that the defendant, Waterbury Petroleum Products, Inc., shall establish a single base price for sales of fuel oil Number 2. Nothing herein shall prohibit the defendant from granting discounts from such base price, so long as any discounts given to customers in the Northwest Corner are cost justified. Examples of such permissible cost justified discounts are discounts relating to tank size and annual volume consumed by the account (including multiple accounts). No discount shall be granted to any of Waterbury Petroleum Products' customers in the Northwest Corner which purports to be for payment within a specified period of time or for Waterbury Petroleum Products' non-provision of burner service. Nothing herein shall affect the prices which defendant shall charge its customers where such prices have been or will be hereafter established by contract following public competitive bidding. Any conduct which is permissible under the

"meeting competition" defense afforded by [15 U.S.C. s 13\(b\)](#) shall be permissible under the terms of this preliminary injunction, and shall not be deemed a violation thereof. Subject to the foregoing, the prices which the defendant shall charge its customers for fuel oil Number 2 shall be solely a matter of defendant's business judgment. This injunction mandates full compliance with Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act on the part of Waterbury Petroleum Products, Inc. . . .

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Called into Doubt by [International Business Machines Corp. v. Johnson](#), S.D.N.Y., June 26, 2009

992 F.2d 430

United States Court of Appeals,
Second Circuit.

NEMER JEEP–EAGLE,
INC., Plaintiff–Appellant,

v.

JEEP–EAGLE SALES
CORPORATION, Defendant–Appellee.

No. 758, Docket 92–9081.

|
Argued Dec. 14, 1992.

|
Decided April 28, 1993.

Synopsis

Automobile dealer sought to enjoin manufacturer's granting of new franchises in area pending arbitration. The United States District Court for the Northern District of New York, Con. [G. Cholakis, J.](#), denied injunctive relief, and appeal was taken. The Court of Appeals, [Cardamone](#), Circuit Judge, held that dealership, objecting to manufacturer's granting of additional franchises in area, was entitled to specific performance of contractual provision calling for status quo injunction pending arbitration.

Reversed and remanded.

West Headnotes (5)

[1] [Federal Courts](#) [Injunction](#)

When reviewing denial of injunctive relief, appellate court must determine whether district court abused its discretion, either through error of law or fact, or error in substantive form of injunctive order; abuse of discretion would be found where error is predicate for district court's disputed decision.

[2 Cases that cite this headnote](#)

[2] [Specific Performance](#) [Requisites and validity in general](#)

To be entitled to specific performance, plaintiff must show that valid contract exists between parties, that plaintiff has substantially performed its part of contract, and that plaintiff and defendant are each able to continue performing their parts of agreement.

[28 Cases that cite this headnote](#)

[3] [Alternative Dispute Resolution](#) [Stay of Proceedings Pending Arbitration](#)

When party seeks preliminary injunction, not to further proceedings in trial court, but to process proceedings in some other forum, such as arbitration, relief requested is more akin to permanent injunction, even though for limited time.

[2 Cases that cite this headnote](#)

[4] [Alternative Dispute Resolution](#) [Particular cases](#)

Automobile dealership's motion for status quo injunction pending arbitration of dispute with manufacturer, based on status quo provisions in parties' contract, must be analyzed under specific performance principles, rather than preliminary injunction principles.

[13 Cases that cite this headnote](#)

[5] [Specific Performance](#) [Contracts for submission to arbitration](#)

Automobile dealership, objecting to manufacturer's granting of additional franchises in area, was entitled to specific performance of contractual provision calling for status quo injunction pending arbitration, regardless of merits of underlying dispute being arbitrated.

[14 Cases that cite this headnote](#)

Attorneys and Law Firms

*431 [Francis V. Imbornone](#), New York City (Snow Becker Krauss P.C., of counsel), for plaintiff-appellant Nemer Jeep-Eagle, Inc.

[Thomas S. Wiswall](#), Buffalo, NY (Phillips, Lytle, Hitchcock, Blaine & Huber, of counsel), for defendant-appellee Jeep-Eagle Sales Corp.

Before: [CARDAMONE](#) and PRATT, Circuit Judges, and LASKER, District Judge * .

Opinion

[CARDAMONE](#), Circuit Judge:

An automobile dealer appeals from the denial of injunctive relief it sought when the manufacturer whose line of autos it sold granted additional dealerships in its market area. In declining to grant injunctive relief, the district court quite naturally applied the familiar rules used to determine when a preliminary injunction should issue. But because of the contractual relationship between the parties, the dealer's motion should have been tested instead under those principles that govern when specific performance of a contract should be ordered. Although both standards involve equitable principles and contain common elements, they are different. R. Frost's journeyer, after choosing "The Road Not Taken," darkly observed, "[a]nd that has made all the difference." Robert Frost, *You Come Too* 84 (5th ed. 1962). Here too the district court took a less travelled road, which made all the difference in the result it reached. Taking the wrong legal path led it to the wrong destination.

In April 1990 brothers Robert and Peter Nemer signed a franchise agreement with auto manufacturer Chrysler Corporation's subsidiary, Jeep-Eagle Sales Corp. (Eagle Sales or appellee). The contract gave the Nemers the right to operate a Jeep-Eagle automobile dealership, Nemer Jeep-Eagle, Inc. (Nemer or appellant) in Latham, near Albany, New York. The Nemers' right to sell Jeep-Eagle automobiles was nonexclusive, and in July 1992 Eagle Sales approved four new Jeep-Eagle dealerships in the Albany market area. According to the Nemers, this has placed their business in peril. The parties agreed to arbitrate the legality of awarding the new franchises, so that question is not before us. Instead, we must decide whether Nemer is entitled to an injunction stopping the implementation of these new franchises and maintaining the *status quo* in the marketplace until arbitration

is complete. Two orders of the United States District Court for the Northern District of New York (Cholakis, J.) denied Nemer such injunctive relief.

BACKGROUND

The parties' franchise agreement, a "Term Sales and Service Agreement" form drafted by Eagle Sales, was executed on April 5, 1990. Originally set to expire on October 5, 1991, the contract was extended on January 30, 1992 and remains in effect. As part of the franchise relationship, Nemer continually must attain certain performance goals, such as the sale of 469 automobiles annually. The agreement also requires the dealer to construct a new facility to showcase Jeep-Eagle automobiles. After investing more than \$500,000 toward meeting those objectives, Nemer's business began to show a profit in May 1992.

*432 Although the contract acknowledges a "mutuality of interests" between the automobile dealer and the automobile manufacturer, it also states that Nemer's franchise is "non-exclusive." According to the contract, appellant's "Sales Locality may be shared with other [Jeep-Eagle] dealers of the same line-make as [appellee] determines to be appropriate." Central to the appeal before us is Paragraph 7 of the contract, which requires arbitration of "[a]ny and all disputes" arising under its terms after either party has provided "written notification." Paragraph 7 further states that

[i]f the arbitration provision is invoked when the dispute between the parties is ... the legality of ... adding a new [Jeep-Eagle] dealer of the same line-make ... [Eagle Sales] will stay the implementation of the decision to ... add such new [Jeep-Eagle] dealer ... until the decision of the arbitrator has been announced....

The contract also requires that federal law, [9 U.S.C. §§ 1-14](#) (1988 & Supp.III 1991), govern arbitration proceedings.

In February 1992 an executive for Eagle Sales and Chrysler, Charles T. Polce, told Nemer that the manufacturer had adopted a marketing strategy of combining Jeep-Eagle and Chrysler franchises. In keeping with this strategy, Polce said, Eagle Sales was reviewing Jeep franchise applications from four Chrysler dealerships located between six and 20 miles from Nemer's site. Three Jeep-Eagle dealerships, including Nemer, already shared the Albany market. Robert Nemer contends that Polce delivered an implied ultimatum when he was told that he would be the "loser" in the new marketing

strategy were he not to buy a Chrysler dealership. Appellant subsequently tried to purchase one of two nearby Chrysler dealerships. Despite conducting negotiations throughout the spring, first with Goldstein Chrysler–Plymouth in Latham and then with Izzo Chrysler–Plymouth in nearby Mechanicville, Nemer did not buy a Chrysler dealership.

Eagle Sales went forward with its marketing strategy. In a letter dated July 14, 1992 Polce told Nemer that Chrysler was “ready to approve” the new Jeep–Eagle franchises but would delay approval until July 20 “in order to allow you additional time to conclude your negotiations to purchase Izzo Chrysler–Plymouth and relocate Jeep–Eagle to Mechanicville.” Less than one week later, on July 20, Chrysler granted the new franchises. Appellant claims that it was not notified of this action until July 23. On July 24 Nemer notified Eagle Sales of its intention to arbitrate the legality of simultaneously adding four dealerships in the Albany area. It then commenced an action in district court to compel arbitration and to obtain injunctive relief preventing Eagle Sales from implementing the new franchises. Nemer relied on Paragraph 7 of its franchise contract.

At an August 7 hearing in district court, Eagle Sales conceded its duty to arbitrate, but contested Nemer's request for a *status quo* injunction. In its August 18, 1992 order the district court applied the test for granting a preliminary injunction and denied Nemer's request for that relief. The district court found appellant failed to show (1) it is likely to succeed on the merits of the underlying dispute about the legality of the added franchises; (2) it would suffer irreparable harm if an injunction did not issue; and (3) the balance of the equities was in its favor because the four new Jeep–Eagle dealers would be adversely affected by the issuance of an injunction.

Nemer then moved for reconsideration and reargument pursuant to Fed.R.Civ.P. 59(e), which was denied in a September 21, 1992 order. The district court held that it properly looked to the merits of the underlying dispute, even though that dispute was going to arbitration, because Paragraph 7 “linked the merits of the status quo provision with the merits of the underlying dispute.” From the August 18 and September 21, 1992 orders, Nemer has appealed. We reverse.

DISCUSSION

Appellant contends the district court erred when it based its decision on the merits of the parties' underlying dispute in

both the disputed orders. It urges that we look at Paragraph 7 of the franchise agreement and apply instead the equitable test for specific performance. Eagle Sales responds that the *433 district court correctly considered the merits of Nemer's underlying claim, regardless of whether the equitable test applied is for specific performance or for a preliminary injunction. In the alternative, Eagle Sales declares that appellant failed to satisfy the requirements for specific performance.

A. Standard of Review

[1] When reviewing a denial of injunctive relief, an appellate court must determine whether the district court abused its discretion. See *United States v. W.T. Grant Co.*, 345 U.S. 629, 633, 73 S.Ct. 894, 897, 97 L.Ed. 1303 (1953); *Connecticut Resources Recovery Auth. v. Occidental Petroleum Corp.*, 705 F.2d 31, 35 (2d Cir.1983). Abuse of discretion may entail an error of law or fact in the district court's consideration of injunctive relief or an error in the substance or form of the court's injunctive order. See *Coca-Cola Co. v. Tropicana Prods., Inc.*, 690 F.2d 312, 315 (2d Cir.1982). An abuse of discretion will be found where the error is the predicate for the district court's disputed decision. *Id.* at 316.

In its August 18 order the district court applied the traditional test for a preliminary injunction. It denied plaintiff relief because of Nemer's failure to show the likelihood of success on the merits in the underlying dispute with Eagle Sales. In its September 21 order denying Nemer's motion for reconsideration, the district court again held it had properly reached the merits of the parties' disagreement based on the language of their contract. We conclude that neither applicable precedent nor the contract language afford a basis for reaching the merits of Nemer's arbitrable dispute, and the district court abused its discretion in doing so.

B. Injunctive Relief Standard

Unlike a party seeking specific performance, a party that requests a preliminary injunction *must* discuss the merits of the dispute underlying the injunction motion. The requirements for a preliminary injunction are well settled: a party seeking 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 in its favor. *Jackson Dairy, Inc. v. H.P. Hood & Sons*, 596 F.2d 70, 72 (2d Cir.1979) (per curiam).

[2] The test for specific performance is more flexible. It initially requires proof that (1) a valid contract exists between the parties, (2) the plaintiff has substantially performed its part of the contract, and (3) plaintiff and defendant are each able to continue performing their parts of the agreement. See *Travellers Int'l AG v. Trans World Airlines, Inc.*, 722 F.Supp. 1087, 1104 (S.D.N.Y.1989). A party seeking relief must show equitable factors in its favor, for example, the lack of an adequate remedy at law, and must also demonstrate that its risk of injury, if the injunction is denied, is one that after balancing the equities entitles it to relief. *Id.* One of the factors balanced is irreparable harm, a common element under both tests. See *Guinness-Harp Corp. v. Jos. Schlitz Brewing Co.*, 613 F.2d 468, 472 (2d Cir.1980); see also *Payroll Express Corp. v. Aetna Casualty and Sur. Co.*, 659 F.2d 285, 292 (2d Cir.1981) (specific performance injunction granted where money damages speculative and court found absence of “offsetting equities militating against a grant of equitable relief”); *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064, 1067 (2d Cir.1972) (specific performance injunction upheld based on contract language and showing of irreparable damage).

[3] In its complaint plaintiff requested “a preliminary injunction and a final injunction directing Jeep Eagle to specifically perform the provisions of Paragraph 7.” It is understandable therefore that a trial court could be rushed into relying on preliminary injunction analysis. Nonetheless, when a party seeks a preliminary injunction, *not* to further proceedings in the district court—but to process proceedings in some other forum, notably, the arbitration forum—then the relief requested is more akin to a permanent injunction, even though for a limited time. It is permanent insofar as the trial court is concerned because, unlike its grant of a preliminary injunction, the parties—presently before the trial court, but contemplating further *434 proceedings elsewhere—plan to conduct no further litigation in the district court. See *Manning v. Energy Conversion Devices, Inc.*, 833 F.2d 1096, 1100–01 (2d Cir.1987); see also *Guinness-Harp*, 613 F.2d at 471. Both Nemer and Eagle Sales agree that the merits of their dispute—whether Eagle Sales legally granted four new franchises in the Albany market area—will be litigated in the arbitration forum. Therefore, Nemer's request was not for a traditional preliminary injunction, and the district court erred in treating it as such.

In fact, the circumstances we face are quite similar to those analyzed in *Guinness-Harp*. In that case a brewery sought to end its relationship with a beer distributor. The parties' contract called for arbitration of disputes before the brewery terminated its distributor, and the distributor sought an injunction halting termination until arbitration was complete. In granting the injunction, we relied on the contract language and applied the equitable test for specific performance. See 613 F.2d at 471–72. Thus, the rule seems to be fairly established that where a party's request for a *status quo* injunction pending arbitration is grounded in the words of a contract, specific performance analysis is required. See *Connecticut Resources*, 705 F.2d at 35; *Erving*, 468 F.2d at 1066–67. *But cf. Blumenthal v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 910 F.2d 1049, 1052–54 (2d Cir.1990) (holding that district court has jurisdiction to issue *status quo* injunction pending arbitration but not deciding appropriate standard for injunctive relief); *Roso-Lino Beverage Distribs., Inc. v. Coca-Cola Bottling Co. of N.Y., Inc.*, 749 F.2d 124, 125 (2d Cir.1984) (per curiam) (where underlying contract did not contain *status quo* provision, court applied preliminary injunction analysis in deciding whether to issue an injunction pending arbitration).

[4] Hence, we hold *status quo* injunctions pending arbitration are final in nature because the merits of the parties' underlying dispute will be resolved by an arbitrator. Moreover, when a motion for such an injunction is based on a *status quo* provision in the parties' contract, it must be analyzed under specific performance principles.

C. Application

[5] Before balancing the equities, we examine Nemer's contract with Eagle Sales to determine initially whether it permits a *status quo* injunction.

1. *Contract Language* Paragraph 7 is a broad arbitration provision covering any and all disputes between Nemer and Eagle Sales. When disputes under it concern any one of three distinct issues—the legality of terminating Nemer's franchise, adding a new Jeep-Eagle dealership or relocating an existing Jeep-Eagle dealership—Paragraph 7 requires Eagle Sales to “stay implementation of the decision ... until the decision of the arbitrator has been announced.”

In its September 21 order the district court ruled that the language of Paragraph 7 linked the merits of the *status*

quo provision with the merits of the underlying arbitration. Specifically, the trial court held it proper to consider the merits of the underlying dispute because “[Eagle Sale’s] status quo obligations [are] dependent upon Nemer’s invocation of the right to arbitrate the legality of appointing new dealers.” Of course the *status quo* obligations depend upon the invocation of arbitration; if no arbitration is sought, then there is no *status quo* to preserve. Yet, simply because *status quo* obligations depend upon the *invocation* of arbitration does not mean they depend upon the *likely success* of arbitration. The district court clearly misread Paragraph 7 in reaching this conclusion.

Eagle Sales insists the district court appropriately reviewed the merits of the arbitrable dispute because (1) the “non-exclusive” nature of the franchise shows that Nemer had no legitimate claim for arbitration, and (2) the language of Paragraph 7 required Nemer to invoke the *status quo* provision before Eagle Sales implemented the new dealerships. By insisting that appellant failed to raise a legitimate dispute for arbitration, appellee is in effect suggesting that we review the merits of Nemer’s claim that awarding the new franchises was illegal. As already discussed, a request for a *status quo* injunction pending arbitration does not require examination of the merits of the underlying *435 disputes. Moreover, appellee’s contention is unpersuasive for several other reasons. Fully aware of the non-exclusive nature of Nemer’s franchise, the district court nonetheless ordered arbitration. An arbitration order would be meaningless were no legitimate dispute to exist and where no rights remained to be determined. We disagree with Eagle Sale’s assertion that the district court had to make an explicit finding that a genuine dispute exists. Such finding is implicit in every order to arbitrate.

Again, the contract itself contemplates that the parties could dispute the legality of new dealerships. Such a disagreement may concern the manner in which the dealerships are granted. Read as a whole, the contract grants a non-exclusive franchise, gives appellee the discretion to add new dealerships and gives appellant the right to preserve the *status quo* when it disputes the legality of adding a new Jeep–Eagle dealer. Appellee would have us interpret the contract so that the first two provisions cancel out the *status quo* provision. We decline to read the contract in that fashion, particularly where its provisions reasonably may be reconciled. See *Proyecfin de Venezuela, S.A. v. Banco Industrial de Venezuela, S.A.*, 760 F.2d 390, 395–96 (2d Cir.1985).

Appellee also avers that appellant lost the protection of Paragraph 7’s *status quo* provision because it did not demand arbitration and maintenance of the *status quo* until after Eagle Sales had granted the four new franchises. But, the contract established no time limits for invocation of arbitration. It requires only “written notification,” which appellant states it provided on July 24, 1992, a day after it learned of Eagle Sales’ action, though the latter declares it notified Nemer on July 20th. According to the *status quo* provision, Eagle Sales may implement a disputed decision immediately only if the dealer “in any way attempt[s] to avoid the obligations of this Paragraph 7.” Nemer has not tried to avoid its promise to arbitrate, and appellee does not allege that Nemer failed to follow the procedures outlined in Paragraph 7.

Rather, appellee contends appellant should have invoked arbitration and the *status quo* provision in February 1992, when it was informed that appellee was considering the new franchises. But at that time, the dispute was not ripe for arbitration because it would have involved “uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all.” 13A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3532, at 112 (2d ed. 1984). In sum, the franchise agreement provides for a *status quo* injunction, and on these facts appellant did not forfeit its right to such relief.

2. *Equities* Both parties agree they have a valid contract under which Nemer substantially has performed. To obtain specific performance therefore a plaintiff must show the inadequacy of money damages and a balance of equities in its favor. The district court held that Nemer only offered speculative proof of damages and that harm to the four new Jeep–Eagle dealers outweighed any hardship appellant suffered. Because the district court applied the wrong standard, it reached the wrong result.

Paragraph 7 itself contemplates that the manufacturer’s decision to add a new dealership will cause an existing dealer serious harm, difficult to compensate with money damages, because the contract requires Eagle Sales to maintain the *status quo* only in that and two other circumstances. Appellee yet insists appellant is not harmed by its decision because Nemer may continue to sell Jeep–Eagle products in the Albany market. In making this statement, appellee attempts to distinguish those cases where we granted *status quo* injunctions to stop termination of a franchise. See, e.g., *Roso–Lino*, 749 F.2d at 125–26; *Guinness–Harp*, 613 F.2d at 473;

Semmes Motors, Inc. v. Ford Motor Co., 429 F.2d 1197, 1205 (2d Cir.1970).

We do not read these cases so narrowly. Major disruption of a business can be as harmful as termination, and a “*threat* to the continued existence of a business can constitute irreparable injury.” *John B. Hull, Inc. v. Waterbury Petroleum Prods., Inc.*, 588 F.2d 24, 28–29 (2d Cir.1978) (emphasis added) (citing *Semmes Motors*, 429 F.2d at 1205), *cert. denied*, 440 U.S. 960, 99 S.Ct. 1502, 59 L.Ed.2d 773 (1979).

*436 As evidence of the harm it suffered, appellant points to the fact that the number of customers entering its showroom decreased by 20 percent after the new franchises were implemented on July 20. It also states that during most of August it sold 15 new vehicles, down from sales of 25 vehicles in July. Appellant alleges that Eagle Sales cut back its allocation of new vehicles after the new franchises were granted so that it now receives 40 percent fewer of the most popular models for sale. Appellee's response that Nemer's sales in the summer of 1992 increased from those in 1991 and 1990 is unavailing. This increase in sales perhaps more accurately reflects the ongoing growth of Nemer's new business, and, in any event, does not make the crucial comparison in sales before and after the new franchises were awarded.

In addition to this loss of business, appellant has demonstrated that the four new Jeep–Eagle dealerships seriously threaten its continued existence and that money damages are inadequate compensation for such loss. See *Guinness–Harp*, 613 F.2d at 473. Calculation of Nemer's lost profits would be highly speculative because—as a two-year-old dealership that only began to show a profit in May 1992—it lacks a track record from which to extrapolate. Doubts concerning the adequacy of money damages should be resolved in favor of granting specific performance. See *Restatement (Second) of Contracts*, § 359, cmt. a (1981).

Further, the balance of the equities in this case tips decidedly in favor of appellant being granted specific performance of its contract because neither Eagle Sales nor the four new dealers will suffer harm proportionate to appellant's loss of business as a result of a *status quo* injunction. See *United States v. Alexander*, 736 F.Supp. 1236, 1242 (N.D.N.Y.1989), *aff'd*, 901 F.2d 272 (2d Cir.1990). As a practical matter, all four new

dealers already possess Chrysler franchises and may continue to sell these automobiles pending arbitration. Thus they will not suffer “unreasonable hardship or loss.” *Restatement, supra*, § 364(1)(b). In contrast, Nemer's business depends exclusively on the sale of Jeep–Eagle vehicles, and these sales declined significantly after the new franchises were implemented. Moreover, because the four dealers acquired their franchises *after* Nemer entered its contract with Eagle Sales, they are not third parties with rights superior to appellant's. See *Joneil Fifth Ave. Ltd. v. Ebeling & Reuss Co.*, 458 F.Supp. 1197, 1200 (S.D.N.Y.1978).

Moreover, that Eagle Sales may have to face legal action by the new dealerships when their franchises are suspended pending arbitration does not weigh heavily against Nemer's claim for equitable relief. The fact that appellee bound itself in conflicting contracts should not work to penalize appellant, especially because appellee itself drafted the contract language upon which appellant relies. Again, the arbitration remedy for which Nemer and Eagle Sales bargained would remain a hollow formality were the *status quo* not preserved. See *Blumenthal*, 910 F.2d at 1053.

Finally, in the event Nemer is successful in the underlying arbitration, the arbitrator's ability to fashion an adequate remedy will be severely thwarted if the new franchises have become well-established in the meantime. Appellant exercised its right to request arbitration within either one or four days after learning the new dealerships were created, when Eagle Sale's potential liability to the new dealers was minimal. Consequently, under the circumstances of this case it is not inequitable to grant appellant specific performance.

CONCLUSION

The district court orders dated August 18 and September 21, 1992 are accordingly reversed and the case is remanded with directions that appellant's application for a *status quo* injunction compelling specific performance by appellee be granted.

All Citations

992 F.2d 430

Footnotes

- * Hon. [Morris E. Lasker](#), Senior Judge, United States District Court for the Southern District of New York, sitting by designation.

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129 S.Ct. 365

Supreme Court of the United States

Donald C. WINTER, Secretary
of the Navy, et al., Petitioners,

v.

**NATURAL RESOURCES
DEFENSE COUNCIL, INC.**, et al.

No. 07-1239.

|
Argued Oct. 8, 2008.

|
Decided Nov. 12, 2008.

Synopsis

Background: Environmental organizations, which were concerned that the Navy's use of mid-frequency active (MFA) sonar in training exercises would cause serious harm to various species of marine mammals present in the southern California waters, sought a preliminary injunction based on alleged violations of the National Environmental Policy Act (NEPA), the Endangered Species Act (ESA), the Administrative Procedure Act (APA), and the Coastal Zone Management Act (CZMA). The United States District Court for the Central District of California, [Florence Marie Cooper, J.](#), 530 F.Supp.2d 1110, granted motion for preliminary injunction. Navy appealed. The Court of Appeals for the Ninth Circuit, 518 F.3d 658, [Betty B. Fletcher](#), Circuit Judge, upheld preliminary injunction imposing restrictions on the Navy's sonar training. Certiorari was granted.

[Holding:] The Supreme Court, Chief Justice [Roberts](#), held that:

[1] plaintiffs seeking preliminary relief are required to demonstrate that irreparable injury is likely in absence of injunction; abrogating [Faith Center Church Evangelistic Ministries v. Glover](#), 480 F.3d 891; [Earth Island Inst. v. United States Forest Serv.](#), 442 F.3d 1147, and

[2] alleged irreparable injury to marine mammals resulting from Navy's training exercises using mid-frequency active

(MFA) sonar was outweighed by the public interest and the Navy's interest in effective, realistic training of its sailors.

Reversed.

Justice [Breyer](#), with whom Justice [Stevens](#) joined as to Part I, concurred in part and dissented in part, and filed opinion.

Justice [Ginsburg](#), with whom Justice [Souter](#) joined, dissented and filed opinion.

West Headnotes (6)

[1] **Injunction** 🔑 Grounds in general; multiple factors

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.

[12847 Cases that cite this headnote](#)

[2] **Injunction** 🔑 Irreparable injury

Plaintiffs seeking preliminary relief are required to demonstrate that irreparable injury is likely in the absence of an injunction; abrogating [Faith Center Church Evangelistic Ministries v. Glover](#), 480 F.3d 891; [Earth Island Inst. v. United States Forest Serv.](#), 442 F.3d 1147.

[5363 Cases that cite this headnote](#)

[3] **Environmental Law** 🔑 Duty of government bodies to consider environment in general

When the Government conducts an activity, the National Environmental Policy Act (NEPA) itself does not mandate particular results; instead, NEPA imposes only procedural requirements to ensure that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts. National Environmental

Policy Act of 1969, § 2 et seq., [42 U.S.C.A. § 4321 et seq.](#)

[93 Cases that cite this headnote](#)

[4] **Environmental Law**  Preliminary injunction

Alleged irreparable injury to marine mammals resulting from Navy's training exercises using mid-frequency active (MFA) sonar was outweighed by the public interest and the Navy's interest in effective, realistic training of its sailors, and therefore preliminary injunction imposing a 2,200-yard shutdown zone and requiring the Navy to power down its MFA sonar during significant surface ducting conditions would be vacated; for environmental organization plaintiffs, the most serious possible injury would be harm to an unknown number of the marine mammals that they studied and observed, and, in contrast, forcing the Navy to deploy an inadequately trained antisubmarine force would jeopardize the safety of the fleet, as active sonar was the only reliable technology for detecting and tracking enemy diesel-electric submarines, and the President had determined that training with active sonar was essential to national security.

[283 Cases that cite this headnote](#)

[5] **Injunction**  Extraordinary or unusual nature of remedy

Injunction  Balancing or weighing hardship or injury

A preliminary injunction is an extraordinary remedy never awarded as of right; in each case, courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.

[4690 Cases that cite this headnote](#)

[6] **Injunction**  Extraordinary or unusual nature of remedy

Injunction  Public interest considerations

In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.

[1177 Cases that cite this headnote](#)

****366 Syllabus***

Antisubmarine warfare is one of the Navy's highest priorities. The Navy's fleet faces a significant threat from modern diesel-electric submarines, which are extremely difficult to detect and track because they can operate almost silently. The most effective tool for identifying submerged diesel-electric submarines is active sonar, which emits pulses of sound underwater and then receives the acoustic waves that echo off the target. Active sonar is a complex technology, and sonar operators must undergo extensive training to become proficient in its use.

This case concerns the Navy's use of "mid-frequency active" (MFA) sonar during integrated training exercises in the waters off southern California (SOCAL). In these exercises, ships, submarines, and aircraft train together as members of a "strike group." Due to the importance of antisubmarine warfare, a strike group may not be certified for deployment until it demonstrates proficiency in the use of active sonar to detect, track, and neutralize enemy submarines.

The SOCAL waters contain at least 37 species of marine mammals. The plaintiffs—groups and individuals devoted to the protection of marine mammals and ocean habitats—assert that MFA sonar causes serious injuries to these animals. The Navy disputes that claim, noting that MFA sonar training in SOCAL waters has been conducted for 40 years without a single documented sonar-related injury to any marine mammal. Plaintiffs sued the Navy, seeking declaratory and injunctive relief on the grounds that the training exercises violated the National Environmental Policy Act of 1969 (NEPA) and other federal laws; in particular, plaintiffs contend that the Navy should have prepared an environmental impact statement (EIS) before conducting the latest round of SOCAL exercises.

The District Court entered a preliminary injunction prohibiting the Navy from using MFA sonar during its

training exercises. The Court of Appeals held that this injunction was overbroad and remanded to the District Court for a narrower remedy. The District Court then entered another preliminary injunction, imposing six restrictions on the Navy's use of sonar during its SOCAL training exercises. As relevant to this case, the injunction required the Navy to shut down MFA sonar when a marine mammal was spotted within 2,200 yards of a vessel, and to power down sonar by 6 decibels during conditions known as “surface ducting.”

****367** The Navy then sought relief from the Executive Branch. The Council on Environmental Quality (CEQ) authorized the Navy to implement “alternative arrangements” to NEPA compliance in light of “emergency circumstances.” The CEQ allowed the Navy to continue its training exercises under voluntary mitigation procedures that the Navy had previously adopted.

The Navy moved to vacate the District Court's preliminary injunction in light of the CEQ's actions. The District Court refused to do so, and the Court of Appeals affirmed. The Court of Appeals held that there was a serious question whether the CEQ's interpretation of the “emergency circumstances” regulation was lawful, that plaintiffs had carried their burden of establishing a “possibility” of irreparable injury, and that the preliminary injunction was appropriate because the balance of hardships and consideration of the public interest favored the plaintiffs. The Court of Appeals emphasized that any negative impact of the injunction on the Navy's training exercises was “speculative,” and determined that (1) the 2,200-yard shutdown zone was unlikely to affect naval operations, because MFA sonar systems are often shut down during training exercises; and (2) the power-down requirement during surface ducting conditions was not unreasonable, because such conditions are rare and the Navy has previously certified strike groups not trained under these conditions.

Held: The preliminary injunction is vacated to the extent challenged by the Navy. The balance of equities and the public interest—which were barely addressed by the District Court—tip strongly in favor of the Navy. The Navy's need to conduct realistic training with active sonar to respond to the threat posed by enemy submarines plainly outweighs the interests advanced by the plaintiffs. Pp. 374 – 382.

(a) The lower courts held that when a plaintiff demonstrates a strong likelihood of success on the merits, a preliminary injunction may be entered based only on a “possibility” of

irreparable harm. The “possibility” standard is too lenient. This Court's frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction.

Even if plaintiffs have demonstrated a likelihood of irreparable injury, such injury is outweighed by the public interest and the Navy's interest in effective, realistic training of its sailors. For the same reason, it is unnecessary to address the lower courts' holding that plaintiffs have established a likelihood of success on the merits. Pp. 374 – 377.

(b) A preliminary injunction is an extraordinary remedy never awarded as of right. In each case, courts must balance the competing claims of injury and consider the effect of granting or withholding the requested relief, paying particular regard to the public consequences. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312, 102 S.Ct. 1798, 72 L.Ed.2d 91. Military interests do not always trump other considerations, and the Court has not held that they do, but courts must give deference to the professional judgment of military authorities concerning the relative importance of a particular military interest. *Goldman v. Weinberger*, 475 U.S. 503, 507, 106 S.Ct. 1310, 89 L.Ed.2d 478.

Here, the record contains declarations from some of the Navy's most senior officers, all of whom underscored the threat posed by enemy submarines and the need for extensive sonar training to counter this threat. Those officers emphasized that realistic training cannot be accomplished under the two challenged restrictions imposed ****368** by the District Court—the 2,200-yard shutdown zone and the power-down requirement during surface ducting conditions. The use of MFA sonar under realistic conditions during training exercises is clearly of the utmost importance to the Navy and the Nation. The Court does not question the importance of plaintiffs' ecological, scientific, and recreational interests, but it concludes that the balance of equities and consideration of the overall public interest tip strongly in favor of the Navy. The determination of where the public interest lies in this case does not strike the Court as a close question. Pp. 376 – 378.

(c) The lower courts' justifications for entering the preliminary injunction are not persuasive. Pp. 377 – 381.

(1) The District Court did not give serious consideration to the balance of equities and the public interest. The Court of Appeals did consider these factors and conclude that

the Navy's concerns about the preliminary injunction were "speculative." But that is almost always the case when a plaintiff seeks injunctive relief to alter a defendant's conduct. The lower courts failed properly to defer to senior Navy officers' specific, predictive judgments about how the preliminary injunction would reduce the effectiveness of the Navy's SOCAL training exercises. Pp. 377 – 378.

(2) The District Court abused its discretion by requiring the Navy to shut down MFA sonar when a marine mammal is spotted within 2,200 yards of a sonar-emitting vessel. The Court of Appeals concluded that the zone would not be overly burdensome because marine mammal sightings during training exercises are relatively rare. But regardless of the frequency of such sightings, the injunction will increase the radius of the shutdown zone from 200 to 2,200 yards, which expands its surface area by a factor of over 100. Moreover, because training scenarios can take several days to develop, each additional shutdown can result in the loss of several days' worth of training. The Court of Appeals also concluded that the shutdown zone would not be overly burdensome because the Navy had shut down MFA sonar several times during prior exercises when marine mammals were spotted well beyond the Navy's self-imposed 200-yard zone. But the court ignored undisputed evidence that these voluntary shutdowns only occurred during tactically insignificant times. Pp. 378 – 380.

(3) The District Court also abused its discretion by requiring the Navy to power down MFA sonar by 6 decibels during significant surface ducting conditions. When surface ducting occurs, active sonar becomes more useful near the surface, but less effective at greater depths. Diesel-electric submariners are trained to take advantage of these distortions to avoid being detected by sonar. The Court of Appeals concluded that the power-down requirement was reasonable because surface ducting occurs relatively rarely, and the Navy has previously certified strike groups that did not train under such conditions. This reasoning is backwards. Given that surface ducting is both rare and unpredictable, it is especially important for the Navy to be able to train under these conditions when they occur. Pp. 380 – 381.

(4) The Navy has previously taken voluntary measures to address concerns about marine mammals, and has chosen not to challenge four other restrictions imposed by the District Court in this case. But that hardly means that other, more intrusive restrictions pose no threat to preparedness for war. The Court of Appeals noted that the Navy could return to the

District Court to seek modification of the ****369** preliminary injunction if it actually resulted in an inability to train. The Navy is not required to wait until it is unable to train sufficient forces for national defense before seeking dissolution of the preliminary injunction. By then it may be too late. Pp. 380 – 381.

(d) This Court does not address the underlying merits of plaintiffs' claims, but the foregoing analysis makes clear that it would also be an abuse of discretion to enter a permanent injunction along the same lines as the preliminary injunction. Plaintiffs' ultimate legal claim is that the Navy must prepare an EIS, not that it must cease sonar training. There is accordingly no basis for enjoining such training pending preparation of an EIS—if one is determined to be required—when doing so is credibly alleged to pose a serious threat to national security. There are many other remedial tools available, including declaratory relief or an injunction specifically tailored to preparation of an EIS, that do not carry such dire consequences. Pp. 380 – 382.

[518 F.3d 658](#), reversed; preliminary injunction vacated in part.

[ROBERTS](#), C.J., delivered the opinion of the Court, in which [SCALIA](#), [KENNEDY](#), [THOMAS](#), and [ALITO](#), JJ., joined. [BREYER](#), J., filed an opinion concurring in part and dissenting in part, in which [STEVENS](#), J., joined as to Part I, *post*, pp. 382 – 387. [GINSBURG](#), J., filed a dissenting opinion, in which [SOUTER](#), J., joined, *post*, pp. 387 – 393.

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Opinion

****370** Chief Justice [ROBERTS](#) delivered the opinion of the Court.

***12** “To be prepared for war is one of the most effectual means of preserving peace.” 1 Messages and Papers of the Presidents 57 (J. Richardson comp. 1897). So said George Washington in his first Annual Address to Congress, 218 years ago. One of the most important ways the Navy prepares for war is through integrated training exercises at sea. These exercises include training in the use of modern sonar to detect and track enemy submarines, something the Navy has done for the past 40 years. The plaintiffs, respondents here, complained that the Navy’s sonar-training program harmed marine mammals, and that the Navy should have prepared an environmental impact statement before commencing its latest round of training exercises. The Court of Appeals upheld a preliminary injunction imposing restrictions on the Navy’s sonar training, even though that court acknowledged that “the record contains no evidence that marine mammals have been harmed” by the Navy’s exercises. [518 F.3d 658, 696 \(C.A.9 2008\)](#).

The Court of Appeals was wrong, and its decision is reversed.

I

The Navy deploys its forces in “strike groups,” which are groups of surface ships, submarines, and aircraft centered around either an aircraft carrier or an amphibious assault ship. App. to Pet. for Cert. 316a–317a (Pet. App.). Seamless coordination among strike-group assets is critical. Before deploying a strike group, the Navy requires extensive integrated training in analysis and prioritization of threats, execution of military missions, and maintenance of force protection. App. 110–111.

Antisubmarine warfare is currently the Pacific Fleet’s top war-fighting priority. Pet.App. 270a–271a. Modern diesel-electric submarines pose a significant threat to Navy vessels because they can operate almost silently, making them extremely ***13** difficult to detect and track. Potential adversaries of the United States possess at least 300 of these submarines. App. 571.

The most effective technology for identifying submerged diesel-electric submarines within their torpedo range is active sonar, which involves emitting pulses of sound underwater and then receiving the acoustic waves that echo off the target. Pet.App. 266a–267a, 274a. Active sonar is a particularly useful tool because it provides both the bearing and the distance of target submarines; it is also sensitive enough to allow the Navy to track enemy submarines that are quieter than the surrounding marine environment.¹ This case concerns the Navy’s use of “mid-frequency active” (MFA) sonar, which transmits sound waves at frequencies between 1 kHz and 10 kHz.

Not surprisingly, MFA sonar is a complex technology, and sonar operators must undergo extensive training to become proficient in its use. Sonar reception can be affected by countless different factors, including the time of day, water density, salinity, currents, weather conditions, and the contours of the sea floor. *Id.*, at 278a–279a. When working as part of a strike group, sonar operators must be able to coordinate with other Navy ships and planes while avoiding interference. The Navy conducts regular training exercises ****371** under realistic conditions to ensure that sonar operators are thoroughly skilled in its use in a variety of situations.

The waters off the coast of southern California (SOCAL) are an ideal location for conducting integrated training exercises,

as this is the only area on the west coast that is relatively close to land, air, and sea bases, as well as amphibious *14 landing areas. App. 141–142. At issue in this case are the Composite Training Unit Exercises and the Joint Tactical Force Exercises, in which individual naval units (ships, submarines, and aircraft) train together as members of a strike group. A strike group cannot be certified for deployment until it has successfully completed the integrated training exercises, including a demonstration of its ability to operate under simulated hostile conditions. *Id.*, at 564–565. In light of the threat posed by enemy submarines, all strike groups must demonstrate proficiency in antisubmarine warfare. Accordingly, the SOCAL exercises include extensive training in detecting, tracking, and neutralizing enemy submarines. The use of MFA sonar during these exercises is “mission-critical,” given that MFA sonar is the only proven method of identifying submerged diesel-electric submarines operating on battery power. *Id.*, at 568–571.

Sharing the waters in the SOCAL operating area are at least 37 species of marine mammals, including dolphins, whales, and sea lions. The parties strongly dispute the extent to which the Navy's training activities will harm those animals or disrupt their behavioral patterns. The Navy emphasizes that it has used MFA sonar during training exercises in SOCAL for 40 years, without a single documented sonar-related injury to any marine mammal. The Navy asserts that, at most, MFA sonar may cause temporary hearing loss or brief disruptions of marine mammals' behavioral patterns.

The plaintiffs are the Natural Resources Defense Council, Inc., Jean–Michael Cousteau (an environmental enthusiast and filmmaker), and several other groups devoted to the protection of marine mammals and ocean habitats. They contend that MFA sonar can cause much more serious injuries to marine mammals than the Navy acknowledges, including permanent hearing loss, [decompression sickness](#), and major behavioral disruptions. According to the plaintiffs, several mass strandings of marine mammals (outside of SOCAL) *15 have been “associated” with the use of active sonar. They argue that certain species of marine mammals—such as beaked whales—are uniquely susceptible to injury from active sonar; these injuries would not necessarily be detected by the Navy, given that beaked whales are “very deep divers” that spend little time at the surface.

The procedural history of this case is rather complicated. The Marine Mammal Protection Act of 1972 (MMPA), 86 Stat. 1027, generally prohibits any individual from “taking” a marine mammal, defined as harassing, hunting, capturing, or killing it. [16 U.S.C. §§ 1362\(13\), 1372\(a\)](#). The Secretary of Defense may “exempt any action or category of actions” from the MMPA if such actions are “necessary for national defense.” § 1371(f)(1). In January 2007, the Deputy Secretary of Defense—acting for the Secretary—granted the Navy a 2–year exemption from the MMPA for the training exercises at issue in this case. Pet.App. 219a–220a. The exemption was conditioned on the Navy adopting several mitigation procedures, including: (1) training lookouts and officers to watch for marine mammals; (2) requiring at least five lookouts with binoculars **372 on each vessel to watch for anomalies on the water surface (including marine mammals); (3) requiring aircraft and sonar operators to report detected marine mammals in the vicinity of the training exercises; (4) requiring reduction of active sonar transmission levels by 6 dB if a marine mammal is detected within 1,000 yards of the bow of the vessel, or by 10 dB if detected within 500 yards; (5) requiring complete shutdown of active sonar transmission if a marine mammal is detected within 200 yards of the vessel; (6) requiring active sonar to be operated at the “lowest practicable level”; and (7) adopting coordination and reporting procedures. *Id.*, at 222a–230a.

The National Environmental Policy Act of 1969 (NEPA), 83 Stat. 852, requires federal agencies “to the fullest extent *16 possible” to prepare an environmental impact statement (EIS) for “every ... major Federal actio[n] significantly affecting the quality of the human environment.” [42 U.S.C. § 4332\(2\)\(C\) \(2000 ed.\)](#). An agency is not required to prepare a full EIS if it determines—based on a shorter environmental assessment (EA)—that the proposed action will not have a significant impact on the environment. [40 CFR §§ 1508.9\(a\), 1508.13 \(2007\)](#).

In February 2007, the Navy issued an EA concluding that the 14 SOCAL training exercises scheduled through January 2009 would not have a significant impact on the environment. App. 226–227. The EA divided potential injury to marine mammals into two categories: Level A harassment, defined as the potential destruction or loss of biological tissue (*i.e.*, physical injury), and Level B harassment, defined as temporary injury or disruption of behavioral patterns such as migration, feeding, surfacing, and breeding. *Id.*, at 160–161.

The Navy's computer models predicted that the SOCAL training exercises would cause only eight Level A harassments of common dolphins each year, and that even these injuries could be avoided through the Navy's voluntary mitigation measures, given that dolphins travel in large pods easily located by Navy lookouts. *Id.*, at 176–177, 183. The EA also predicted 274 Level B harassments of beaked whales per year, none of which would result in permanent injury. *Id.*, at 185–186. Beaked whales spend little time at the surface, so the precise effect of active sonar on these mammals is unclear. Erring on the side of caution, the Navy classified all projected harassments of beaked whales as Level A. *Id.*, at 186, 223. In light of its conclusion that the SOCAL training exercises would not have a significant impact on the environment, the Navy determined that it was unnecessary to prepare a full EIS. See [40 CFR § 1508.13](#).

Shortly after the Navy released its EA, the plaintiffs sued the Navy, seeking declaratory and injunctive relief on the grounds that the Navy's SOCAL training exercises violated [*17](#) NEPA, the Endangered Species Act of 1973(ESA), and the Coastal Zone Management Act of 1972 (CZMA).² The District Court granted plaintiffs' motion for a preliminary injunction and prohibited the Navy from using MFA sonar during its remaining training exercises. The court held that plaintiffs had “demonstrated a probability of success” on their claims under NEPA and the CZMA. Pet.App. 207a, 215a. The court also determined that equitable relief was [**373](#) appropriate because, under Ninth Circuit precedent, plaintiffs had established at least a “‘possibility’” of irreparable harm to the environment. *Id.*, at 217a. Based on scientific studies, declarations from experts, and other evidence in the record, the District Court concluded that there was in fact a “near certainty” of irreparable injury to the environment, and that this injury outweighed any possible harm to the Navy. *Id.*, at 217a–218a.

The Navy filed an emergency appeal, and the Ninth Circuit stayed the injunction pending appeal. [502 F.3d 859, 865 \(2007\)](#). After hearing oral argument, the Court of Appeals agreed with the District Court that preliminary injunctive relief was appropriate. The appellate court concluded, however, that a blanket injunction prohibiting the Navy from using MFA sonar in SOCAL was overbroad, and remanded the case to the District Court “to narrow its injunction so as to provide mitigation conditions under which the Navy may conduct its training exercises.” [508 F.3d 885, 887 \(2007\)](#).

On remand, the District Court entered a new preliminary injunction allowing the Navy to use MFA sonar only as long as it implemented the following mitigation measures (in addition to the measures the Navy had adopted pursuant to its MMPA exemption): (1) imposing a 12 nautical mile “exclusion [*18](#) zone” from the coastline; (2) using lookouts to conduct additional monitoring for marine mammals; (3) restricting the use of “helicopter-dipping” sonar; (4) limiting the use of MFA sonar in geographic “choke points”; (5) shutting down MFA sonar when a marine mammal is spotted within 2,200 yards of a vessel; and (6) powering down MFA sonar by 6 dB during significant surface ducting conditions, in which sound travels further than it otherwise would due to temperature differences in adjacent layers of water. [530 F.Supp.2d 1110, 1118–1121 \(C.D.Cal.2008\)](#). The Navy filed a notice of appeal, challenging only the last two restrictions.

The Navy then sought relief from the Executive Branch. The President, pursuant to [16 U.S.C. § 1456\(c\)\(1\)\(B\)](#), granted the Navy an exemption from the CZMA. [Section 1456\(c\)\(1\)\(B\)](#) permits such exemptions if the activity in question is “in the paramount interest of the United States.” The President determined that continuation of the exercises as limited by the Navy was “essential to national security.” Pet.App. 232a. He concluded that compliance with the District Court's injunction would “undermine the Navy's ability to conduct realistic training exercises that are necessary to ensure the combat effectiveness of ... strike groups.” *Ibid.*

Simultaneously, the Council on Environmental Quality (CEQ) authorized the Navy to implement “alternative arrangements” to NEPA compliance in light of “emergency circumstances.” See [40 CFR § 1506.11](#).³ The CEQ determined that alternative arrangements were appropriate because the District Court's injunction “create[s] a significant and unreasonable risk that Strike Groups will not be [*19](#) able to train and be certified as fully mission capable.” Pet.App. 238a. Under the alternative arrangements, the Navy would be permitted to conduct its training exercises under the mitigation procedures adopted in conjunction with the exemption [**374](#) from the MMPA. The CEQ also imposed additional notice, research, and reporting requirements.

In light of these actions, the Navy then moved to vacate the District Court's injunction with respect to the 2,200–yard shutdown zone and the restrictions on training in surface ducting conditions. [The District Court refused to do so, 527 F.Supp.2d 1216 \(2008\)](#), and the Court of Appeals affirmed. The Ninth Circuit held that there was a serious question

regarding whether the CEQ's interpretation of the "emergency circumstances" regulation was lawful. Specifically, the court questioned whether there was a true "emergency" in this case, given that the Navy has been on notice of its obligation to comply with NEPA from the moment it first planned the SOCAL training exercises. 518 F.3d, at 681. The Court of Appeals concluded that the preliminary injunction was entirely predictable in light of the parties' litigation history. *Ibid.* The court also held that plaintiffs had established a likelihood of success on their claim that the Navy was required to prepare a full EIS for the SOCAL training exercises. *Id.*, at 693. The Ninth Circuit agreed with the District Court's holding that the Navy's EA—which resulted in a finding of no significant environmental impact—was "cursory, unsupported by cited evidence, or unconvincing." *Ibid.*⁴

The Court of Appeals further determined that plaintiffs had carried their burden of establishing a "possibility" of irreparable injury. Even under the Navy's own figures, the court concluded, the training exercises would cause 564 physical injuries to marine mammals, as well as 170,000 disturbances *20 of marine mammals' behavior. *Id.*, at 696. Lastly, the Court of Appeals held that the balance of hardships and consideration of the public interest weighed in favor of the plaintiffs. The court emphasized that the negative impact on the Navy's training exercises was "speculative," since the Navy has never before operated under the procedures required by the District Court. *Id.*, at 698–699. In particular, the court determined that: (1) The 2,200–yard shutdown zone imposed by the District Court was unlikely to affect the Navy's operations, because the Navy often shuts down its MFA sonar systems during the course of training exercises; and (2) the power-down requirement during significant surface ducting conditions was not unreasonable because such conditions are rare, and the Navy has previously certified strike groups that had not trained under such conditions. *Id.*, at 699–702. The Ninth Circuit concluded that the District Court's preliminary injunction struck a proper balance between the competing interests at stake.

We granted certiorari, 554 U.S. 916, 128 S.Ct. 2964, 171 L.Ed.2d 883 (2008), and now reverse and vacate the injunction.

III

A

[1] 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. See *Munaf v. Geren*, 553 U.S. 674, 689–690, 128 S.Ct. 2207, 2218–2219, 171 L.Ed.2d 1 (2008); *Amoco Production Co. v. Gambell*, 480 U.S. 531, 542, 107 S.Ct. 1396, 94 L.Ed.2d 542 (1987); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311–312, 102 S.Ct. 1798, 72 L.Ed.2d 91 (1982).

**375 The District Court and the Ninth Circuit concluded that plaintiffs have shown a likelihood of success on the merits of their NEPA claim. The Navy strongly disputes this determination, arguing that plaintiffs' likelihood of success is low because the CEQ reasonably concluded that "emergency *21 circumstances" justified alternative arrangements to NEPA compliance. 40 CFR § 1506.11. Plaintiffs' briefs before this Court barely discuss the ground relied upon by the lower courts—that the plain meaning of "emergency circumstances" does not encompass a court order that was "entirely predictable" in light of the parties' litigation history. 518 F.3d, at 681. Instead, plaintiffs contend that the CEQ's actions violated the separation of powers by readjudicating a factual issue already decided by an Article III court. Moreover, they assert that the CEQ's interpretations of NEPA are not entitled to deference because the CEQ has not been given statutory authority to conduct adjudications.

The District Court and the Ninth Circuit also held that when a plaintiff demonstrates a strong likelihood of prevailing on the merits, a preliminary injunction may be entered based only on a "possibility" of irreparable harm. *Id.*, at 696–697; 530 F.Supp.2d, at 1118 (quoting *Faith Center Church Evangelistic Ministries v. Glover*, 480 F.3d 891, 906 (C.A.9 2007); *Earth Island Inst. v. United States Forest Serv.*, 442 F.3d 1147, 1159 (C.A.9 2006)). The lower courts held that plaintiffs had met this standard because the scientific studies, declarations, and other evidence in the record established to "a near certainty" that the Navy's training exercises would cause irreparable harm to the environment. 530 F.Supp.2d, at 1118.

The Navy challenges these holdings, arguing that plaintiffs must demonstrate a likelihood of irreparable injury—not just a possibility—in order to obtain preliminary relief. On the facts of this case, the Navy contends that plaintiffs' alleged

injuries are too speculative to give rise to irreparable injury, given that ever since the Navy's training program began 40 years ago, there has been no documented case of sonar-related injury to marine mammals in SOCAL. And even if MFA sonar does cause a limited number of injuries to individual *marine mammals*, the Navy asserts that plaintiffs have failed to offer evidence of species-level harm that *22 would adversely affect *their* scientific, recreational, and ecological interests. For their part, plaintiffs assert that they would prevail under any formulation of the irreparable injury standard, because the District Court found that they had established a “near certainty” of irreparable harm.

[2] We agree with the Navy that the Ninth Circuit's “possibility” standard is too lenient. Our frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction. *Los Angeles v. Lyons*, 461 U.S. 95, 103, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983); *Granny Goose Foods, Inc. v. Teamsters*, 415 U.S. 423, 441, 94 S.Ct. 1113, 39 L.Ed.2d 435 (1974); *O’Shea v. Littleton*, 414 U.S. 488, 502, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974); see also 11A C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* § 2948.1, p. 139 (2d ed.1995) (hereinafter Wright & Miller) (applicant must demonstrate that in the absence of a preliminary injunction, “the applicant is likely to suffer irreparable harm before a decision on the merits can be rendered”); *id.*, at 154 – 155, 94 S.Ct. 669 (“[A] preliminary injunction will not be issued simply to prevent the possibility of some remote future injury”). Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our **376 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. *Mazurek v. Armstrong*, 520 U.S. 968, 972, 117 S.Ct. 1865, 138 L.Ed.2d 162 (1997) (*per curiam*).

It is not clear that articulating the incorrect standard affected the Ninth Circuit's analysis of irreparable harm. Although the court referred to the “possibility” standard, and cited Circuit precedent along the same lines, it affirmed the District Court's conclusion that plaintiffs had established a “ ‘near certainty’ ” of irreparable harm. 518 F.3d, at 696–697. At the same time, however, the nature of the District Court's conclusion is itself unclear. The District Court originally found irreparable harm from sonar-training exercises generally. But by the time of the District Court's final decision, the Navy challenged only two of six restrictions *23 imposed by the court. See *supra*, at 373 – 374. The District Court did not reconsider the

likelihood of irreparable harm in light of the four restrictions not challenged by the Navy. This failure is significant in light of the District Court's own statement that the 12 nautical mile exclusion zone from the coastline—one of the unchallenged mitigation restrictions—“would bar the use of MFA sonar in a significant portion of important marine mammal habitat.” 530 F.Supp.2d, at 1119.

[3] We also find it pertinent that this is not a case in which the defendant is conducting a new type of activity with completely unknown effects on the environment. When the Government conducts an activity, “NEPA itself does not mandate particular results.” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350, 109 S.Ct. 1835, 104 L.Ed.2d 351 (1989). Instead, NEPA imposes only procedural requirements to “ensur[e] that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts.” *Id.*, at 349, 109 S.Ct. 1835. Part of the harm NEPA attempts to prevent in requiring an EIS is that, without one, there may be little if any information about prospective environmental harms and potential mitigating measures. Here, in contrast, the plaintiffs are seeking to enjoin—or substantially restrict—training exercises that have been taking place in SOCAL for the last 40 years. And the latest series of exercises were not approved until after the defendant took a “hard look at environmental consequences,” *id.*, at 350, 109 S.Ct. 1835 (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 410, n. 21, 96 S.Ct. 2718, 49 L.Ed.2d 576 (1976); internal quotation marks omitted), as evidenced by the issuance of a detailed, 293–page EA.

As explained in the next section, 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. A proper consideration of these factors alone requires denial of the requested injunctive relief. For the same reason, we *24 do not address the lower courts' holding that plaintiffs have also established a likelihood of success on the merits.

B

[4] [5] [6] A preliminary injunction is an extraordinary remedy never awarded as of right. *Munaf*, 553 U.S., at 689 – 690, 128 S.Ct., at 2218–2219. In each case, courts “must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of

the requested relief.” *Amoco Production Co.*, 480 U.S., at 542, 107 S.Ct. 1396. “In exercising their sound discretion, courts of equity should pay particular regard for the **377 public consequences in employing the extraordinary remedy of injunction.” *Romero-Barcelo*, 456 U.S., at 312, 102 S.Ct. 1798; see also *Railroad Comm’n of Tex. v. Pullman Co.*, 312 U.S. 496, 500, 61 S.Ct. 643, 85 L.Ed. 971 (1941). In this case, the District Court and the Ninth Circuit significantly understated the burden the preliminary injunction would impose on the Navy’s ability to conduct realistic training exercises, and the injunction’s consequent adverse impact on the public interest in national defense.

This case involves “complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force,” which are “essentially professional military judgments.” *Gilligan v. Morgan*, 413 U.S. 1, 10, 93 S.Ct. 2440, 37 L.Ed.2d 407 (1973). We “give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest.” *Goldman v. Weinberger*, 475 U.S. 503, 507, 106 S.Ct. 1310, 89 L.Ed.2d 478 (1986). As the Court emphasized just last Term, “neither the Members of this Court nor most federal judges begin the day with briefings that may describe new and serious threats to our Nation and its people.” *Boumediene v. Bush*, 553 U.S. 723, 797, 128 S.Ct. 2229, 171 L.Ed.2d 41, 2008 WL 4722127 (2008).

Here, the record contains declarations from some of the Navy’s most senior officers, all of whom underscored the threat posed by enemy submarines and the need for extensive sonar training to counter this threat. Admiral Gary *25 Roughead—the Chief of Naval Operations—stated that during training exercises:

“It is important to stress the ship crews in all dimensions of warfare simultaneously. If one of these training elements were impacted—for example, if effective sonar training were not possible—the training value of the other elements would also be degraded....” Pet.App. 342a.

Captain Martin May—the Third Fleet’s Assistant Chief of Staff for Training and Readiness—emphasized that the use of MFA sonar is “mission-critical.” App. 570–571. He described the ability to operate MFA sonar as a “highly perishable skill” that must be repeatedly practiced under realistic conditions. *Id.*, at 577. During training exercises, MFA sonar operators learn how to avoid sound-reducing “clutter” from ocean floor topography and environmental conditions; they also learn how to avoid interference and how to coordinate their

efforts with other sonar operators in the strike group. *Id.*, at 574. Several Navy officers emphasized that realistic training cannot be accomplished under the two challenged restrictions imposed by the District Court—the 2,200-yard shutdown zone and the requirement that the Navy power down its sonar systems during significant surface ducting conditions. See, e.g., Pet.App. 333a (powering down in presence of surface ducting “unreasonably prevent[s] realistic training”); *id.*, at 356a (shutdown zone would “result in a significant, adverse impact to realistic training”). We accept these officers’ assertions that the use of MFA sonar under realistic conditions during training exercises is of the utmost importance to the Navy and the Nation.

These interests must be weighed against the possible harm to the ecological, scientific, and recreational interests that are legitimately before this Court. Plaintiffs have submitted declarations asserting that they take whale watching trips, observe marine mammals underwater, conduct scientific *26 research on marine mammals, and photograph these animals in their natural habitats. Plaintiffs contend that the Navy’s use of MFA sonar will injure marine **378 mammals or alter their behavioral patterns, impairing plaintiffs’ ability to study and observe the animals.

While we do not question the seriousness of these interests, we conclude that the balance of equities and consideration of the overall public interest in this case tip strongly in favor of the Navy. For the plaintiffs, the most serious possible injury would be harm to an unknown number of the marine mammals that they study and observe. In contrast, forcing the Navy to deploy an inadequately trained antisubmarine force jeopardizes the safety of the fleet. Active sonar is the only reliable technology for detecting and tracking enemy diesel-electric submarines, and the President—the Commander in Chief—has determined that training with active sonar is “essential to national security.” *Id.*, at App. 232a.

The public interest in conducting training exercises with active sonar under realistic conditions plainly outweighs the interests advanced by the plaintiffs. Of course, military interests do not always trump other considerations, and we have not held that they do. In this case, however, the proper determination of where the public interest lies does not strike us as a close question.

C

1. Despite the importance of assessing the balance of equities and the public interest in determining whether to grant a preliminary injunction, the District Court addressed these considerations in only a cursory fashion. The court's entire discussion of these factors consisted of one (albeit lengthy) sentence: "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 if prevented from using MFA sonar, absent the use of effective mitigation *27 measures, during a subset of their regular activities in one part of one state for a limited period." *Id.*, at 217a–218a. As the prior Ninth Circuit panel in this case put it, in staying the District Court's original preliminary injunction, "[t]he district court did not give serious consideration to the public interest factor." 502 F.3d, at 863. The District Court's order on remand did nothing to cure this defect, but simply repeated nearly verbatim the same sentence from its previous order. Compare 530 F.Supp.2d, at 1118, with Pet.App. 217a–218a. The subsequent Ninth Circuit panel framed its opinion as reviewing the District Court's exercise of discretion, 518 F.3d, at 697–699, but that discretion was barely exercised here.

The Court of Appeals held that the balance of equities and the public interest favored the plaintiffs, largely based on its view that the preliminary injunction would not in fact impose a significant burden on the Navy's ability to conduct its training exercises and certify its strike groups. *Id.*, at 698–699. The court deemed the Navy's concerns about the preliminary injunction "speculative" because the Navy had not operated under similar procedures before. *Ibid.* But this is almost always the case when a plaintiff seeks injunctive relief to alter a defendant's conduct. The lower courts failed properly to defer to senior Navy officers' specific, predictive judgments about how the preliminary injunction would reduce the effectiveness of the Navy's SOCAL training exercises. See Wright & Miller § 2948.2, at 167 – 168 ("The policy against the imposition of judicial restraints prior to an adjudication of the merits becomes more significant when there is reason to believe that the decree will be burdensome").

2. The preliminary injunction requires the Navy to shut down its MFA sonar if a **379 marine mammal is detected within 2,200 yards of a sonar-emitting vessel. The Ninth Circuit stated that the 2,200-yard shutdown zone would not be overly burdensome because sightings of marine mammals *28 during training exercises are relatively rare. But regardless of the frequency of marine mammal sightings, the injunction will greatly increase the size of the shutdown zone. Pursuant

to its exemption from the MMPA, the Navy agreed to reduce the power of its MFA sonar at 1,000 yards and 500 yards, and to completely turn off the system at 200 yards. Pet.App. 222a–230a. The District Court's injunction does not include a graduated power-down, instead requiring a total shutdown of MFA sonar if a marine mammal is detected within 2,200 yards of a sonar-emitting vessel. There is an exponential relationship between radius length and surface area ($\text{Area} = r^2$). Increasing the radius of the shutdown zone from 200 to 2,200 yards would accordingly expand the surface area of the shutdown zone by a factor of over 100 (from 125,664 square yards to 15,205,308 square yards).

The lower courts did not give sufficient weight to the views of several top Navy officers, who emphasized that because training scenarios can take several days to develop, each additional shutdown can result in the loss of several days' worth of training. *Id.*, at 344a. Limiting the number of sonar shutdowns is particularly important during the Joint Tactical Force Exercises, which usually last for less than two weeks. *Ibid.* Rear Admiral John Bird explained that the 2,200-yard shutdown zone would cause operational commanders to "lose awareness of the tactical situation through the constant stopping and starting of MFA [sonar]." *Id.*, at 332a; see also *id.*, at 356a ("It may take days to get to the pivotal attack in antisubmarine warfare, but only minutes to confound the results upon which certification is based"). Even if there is a low likelihood of a marine mammal sighting, the preliminary injunction would clearly increase the number of disruptive sonar shutdowns the Navy is forced to perform during its SOCAL training exercises.

The Court of Appeals also concluded that the 2,200-yard shutdown zone would not be overly burdensome because the Navy had shut down MFA sonar 27 times during its eight *29 prior training exercises in SOCAL; in several of these cases, the Navy turned off its sonar when marine mammals were spotted well beyond the Navy's self-imposed 200-yard shutdown zone. 518 F.3d, at 700, n. 65. Vice Admiral Samuel Locklear III—the Commander of the Navy's Third Fleet—stated that any shutdowns beyond the 200-yard zone were voluntary avoidance measures that likely took place at tactically insignificant times; the Ninth Circuit discounted this explanation as not supported by the record. *Ibid.* In reaching this conclusion, the Court of Appeals ignored key portions of Vice Admiral Locklear's declaration, in which he stated unequivocally that commanding officers "would not shut down sonar until legally required to do so if in contact with a submarine." Pet.App. 354a–355a. Similarly, if

a commanding officer is in contact with a target submarine, “the CO will be expected to continue to use active sonar unless another ship or helicopter can gain contact or if regulatory reasons dictate otherwise.” *Id.*, at 355a. The record supports the Navy’s contention that its shutdowns of MFA sonar during prior training exercises only occurred during tactically insignificant times; those voluntary shutdowns do not justify the District Court’s imposition of a mandatory 2,200–yard shutdown zone.

Lastly, the Ninth Circuit stated that a 2,200–yard shutdown zone was feasible because the Navy had previously adopted a 2,000–meter zone for low-frequency active ****380** (LFA) sonar. The Court of Appeals failed to give sufficient weight to the fact that LFA sonar is used for long-range detection of enemy submarines, and thus its use and shutdown involve tactical considerations quite different from those associated with MFA sonar. See App. 508 (noting that equating MFA sonar with LFA sonar “is completely misleading and is like comparing 20 degrees Fahrenheit to 20 degrees Celsius”).

3. The Court of Appeals also concluded that the Navy’s training exercises would not be significantly affected by the requirement that it power down MFA sonar by 6 dB during ***30** significant surface ducting conditions. Again, we think the Ninth Circuit understated the burden this requirement would impose on the Navy’s ability to conduct realistic training exercises.

Surface ducting is a phenomenon in which relatively little sound energy penetrates beyond a narrow layer near the surface of the water. When surface ducting occurs, active sonar becomes more useful near the surface but less useful at greater depths. Pet.App. 299a–300a. Diesel-electric submariners are trained to take advantage of these distortions to avoid being detected by sonar. *Id.*, at 333a.

The Ninth Circuit determined that the power-down requirement during surface ducting conditions was unlikely to affect certification of the Navy’s strike groups because surface ducting occurs relatively rarely, and the Navy has previously certified strike groups that did not train under such conditions. 518 F.3d, at 701–702. This reasoning is backwards. Given that surface ducting is both rare and unpredictable, it is especially important for the Navy to be able to train under these conditions when they occur. Rear Admiral Bird explained that the 6 dB power-down requirement makes the training less valuable because it “exposes [sonar operators] to unrealistically lower levels

of mutual interference caused by multiple sonar systems operating together by the ships within the Strike Group.” Pet.App. 281a (footnote and some capitalization omitted). Although a 6 dB reduction may not seem terribly significant, decibels are measured on a logarithmic scale, so a 6 dB decrease in power equates to a 75% reduction. *Id.*, at 284a–285a.

4. The District Court acknowledged that “ ‘the imposition of these mitigation measures will require the Navy to alter and adapt the way it conducts antisubmarine warfare training—a substantial challenge. Nevertheless, evidence presented to the Court reflects that the Navy has employed mitigation measures in the past, without sacrificing training ***31** objectives.’ ” 527 F.Supp.2d, at 1238. Apparently no good deed goes unpunished. The fact that the Navy has taken measures in the past to address concerns about marine mammals—or, for that matter, has elected not to challenge four additional restrictions imposed by the District Court in this case, see *supra*, at 373 – 374—hardly means that other, more intrusive restrictions pose no threat to preparedness for war.

The Court of Appeals concluded its opinion by stating that “the Navy may return to the district court to request relief on an emergency basis” if the preliminary injunction “actually result[s] in an inability to train and certify sufficient naval forces to provide for the national defense.” 518 F.3d, at 703. This is cold comfort to the Navy. The Navy contends that the injunction will hinder efforts to train sonar operators under realistic conditions, ultimately leaving strike groups more vulnerable to enemy submarines. Unlike the Ninth Circuit, we do not think the Navy is required to wait until the injunction “actually result[s] in an inability to train ... sufficient naval forces for the national defense” before ****381** seeking its dissolution. By then it may be too late.

IV

As noted above, we do not address the underlying merits of plaintiffs’ claims. While we have authority to proceed to such a decision at this point, see *Munaf*, 553 U.S., at 691 – 692, 128 S.Ct., at 2219 – 2220, doing so is not necessary here. In addition, reaching the merits is complicated by the fact that the lower courts addressed only one of several issues raised, and plaintiffs have largely chosen not to defend the decision below on that ground.⁵

*32 At the same time, what we have said makes clear that it would be an abuse of discretion to enter a permanent injunction, after final decision on the merits, along the same lines as the preliminary injunction. An injunction is a matter of equitable discretion; it does not follow from success on the merits as a matter of course. *Romero-Barcelo*, 456 U.S., at 313, 102 S.Ct. 1798 (“[A] federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law”).

The factors examined above—the balance of equities and consideration of the public interest—are pertinent in assessing the propriety of any injunctive relief, preliminary or permanent. See *Amoco Production Co.*, 480 U.S., at 546, n. 12, 107 S.Ct. 1396 (“The standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success”). Given that the ultimate legal claim is that the Navy must prepare an EIS, not that it must cease sonar training, there is no basis for enjoining such *33 training in a manner credibly alleged to pose a serious threat to national security. This is particularly true in light of the fact that the training has been going on for 40 years with no documented episode of harm to a marine mammal. A court concluding that the Navy is required to prepare an EIS has many remedial tools at its disposal, including declaratory relief or an injunction tailored to the preparation of an EIS rather than the Navy's training in the interim. See, e.g., *Steffel v. Thompson*, 415 U.S. 452, 466, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974) (“Congress plainly intended declaratory relief to act as an alternative to the strong medicine of the injunction”). In the meantime, we see no basis for jeopardizing national security, as the present injunction does. Plaintiffs confirmed at oral argument that the preliminary injunction was “the whole ball game,” Tr. of Oral Arg. 33, and our analysis of the **382 propriety of preliminary relief is applicable to any permanent injunction as well.

* * *

President Theodore Roosevelt explained that “the only way in which a navy can ever be made efficient is by practice at sea, under all the conditions which would have to be met if war existed.” President's Annual Message, 42 Cong. Rec. 81 (1907). We do not discount the importance of plaintiffs' ecological, scientific, and recreational interests in marine mammals. Those interests, however, are plainly outweighed by the Navy's need to conduct realistic training exercises

to ensure that it is able to neutralize the threat posed by enemy submarines. The District Court abused its discretion by imposing a 2,200-yard shutdown zone and by requiring the Navy to power down its MFA sonar during significant surface ducting conditions. The judgment of the Court of Appeals is reversed, and the preliminary injunction is vacated to the extent it has been challenged by the Navy.

It is so ordered.

*34 Justice BREYER, with whom Justice STEVENS joins as to Part I, concurring in part and dissenting in part. As of December 2006, the United States Navy planned to engage in a series of 14 antisubmarine warfare training exercises off the southern California coast. The Natural Resources Defense Council, Inc., and others (NRDC) brought this case in Federal District Court claiming that the National Environmental Policy Act of 1969 (NEPA) requires the Navy to prepare an environmental impact statement (EIS) (assessing the impact of the exercises on marine mammals) prior to its engaging in the exercises. As the case reaches us, the District Court has found that the NRDC will likely prevail on its demand for an EIS; the Navy has agreed to prepare an EIS; the District Court has forbidden the Navy to proceed with the exercises unless it adopts six mitigating measures; and the Navy has agreed to adopt all but two of those measures.

The controversy between the parties now concerns the two measures that the Navy is unwilling to adopt. The first concerns the “shutdown zone,” a circle with a ship at the center within which the Navy must try to spot marine mammals and shut down its sonar if one is found. The controverted condition would enlarge the radius of that circle from about one-tenth of a mile (200 yards) to one and one-quarter miles (2,200 yards). The second concerns special ocean conditions called “surface ducting conditions.” The controverted condition would require the Navy, when it encounters any such condition, to diminish the sonar's power by 75%. The Court of Appeals affirmed the District Court order that contained these two conditions. 518 F.3d 658, 703 (C.A.9 2008).

I

We must now decide whether the District Court was legally correct in forbidding the training exercises *unless* the Navy implemented the two controverted conditions. In *35 doing

so, I assume, like the Court, that the NRDC will prevail on its demand for an EIS. (Indeed, the Navy is in the process of preparing one.) And, I would ask whether, in imposing these conditions, the District Court properly “balance[d] the harms.” See, e.g., *Amoco Production Co. v. Gambell*, 480 U.S. 531, 545, 107 S.Ct. 1396, 94 L.Ed.2d 542 (1987).

Respondents' (the plaintiffs) argument favoring the District Court injunction is a strong one. As Justice GINSBURG well points out, see *post*, at 389 – 390 (dissenting opinion), the very point of NEPA's insistence upon the writing of an EIS is to ****383** force an agency “carefully” to “consider ... detailed information concerning significant environmental impacts,” while “giv[ing] the public the assurance that the agency ‘has indeed considered environmental concerns in its decisionmaking process.’ ” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349, 109 S.Ct. 1835, 104 L.Ed.2d 351 (1989). NEPA seeks to assure that when Government officials consider taking action that may affect the environment, they do so fully aware of the relevant environmental considerations. An EIS does not force them to make any particular decision, but it does lead them to take environmental considerations into account when they decide whether, or how, to act. *Id.*, at 354, 109 S.Ct. 1835. Thus, when a decision to which EIS obligations attach is made without the informed environmental consideration that NEPA requires, much of the harm that NEPA seeks to prevent has already taken place. In this case, for example, the *absence* of an injunction means that the Navy will proceed with its exercises in the absence of the fuller consideration of environmental effects that an EIS is intended to bring. The absence of an injunction thereby threatens to cause the very environmental harm that a full preaction EIS might have led the Navy to avoid (say, by adopting the two additional mitigation measures that the NRDC proposes). Consequently, if the exercises are to continue, conditions designed to mitigate interim environmental harm may well be appropriate.

***36** On the other hand, several features of this case lead me to conclude that the record, as now before us, lacks adequate support for an injunction imposing the two controverted requirements. *First*, the evidence of need for the two special conditions is weak or uncertain. The record does show that the exercises as the Navy originally proposed them could harm marine mammals. The District Court found (based on the Navy's study of the matter) that the exercises might cause 466 instances of Level A harm and 170,000 instances of Level B harm. App. to Pet. for Cert. 196a–197a. (The environmental

assessment actually predicted 564 instances of Level A harm. See App. 223–224.) The study defines Level A injury as “any act that injures or has the significant potential to injure a marine mammal or marine mammal stock in the wild” through “destruction or loss of biological tissue,” whether “slight to severe.” *Id.*, at 160. It defines Level B harm as “‘any act that disturbs or is likely to disturb a marine mammal ... by causing disruption of natural behavioral patterns including, but not limited to, migration, surfacing, nursing, breeding, feeding, or sheltering to a point where such behaviors are abandoned or significantly altered’ ” and describes it as a “short term” and “temporary” “disturbance.” *Id.*, at 161, 175.

The raw numbers seem large. But the parties argue about the extent to which they mean likely harm. The Navy says the classifications and estimates err on the side of caution. (When in doubt about the amount of harm to a mammal, the study assumed the harm would qualify as Level A harassment. *Id.*, at 200.) The Navy also points out that, by definition, mammals recover from Level B injuries, often very quickly. It notes that, despite 40 years of naval exercises off the southern California coast, no injured marine mammal has ever been found. App. to Pet. for Cert. 274a–275a. (It adds that dolphins often swim alongside the ships. *Id.*, at 290a, 346a.) At the same time, plaintiffs point to instances where whales have been found stranded. They add ***37** that scientific studies have found a connection between those beachings and the Navy's use of sonar, see, e.g., App. 600–602, and the ****384** Navy has acknowledged one stranding where “U.S. Navy mid-frequency sonar has been identified as the most plausible contributory source to the stranding event,” *id.*, at 168.

Given the uncertainty the figures create in respect to the harm caused by the Navy's original training plans, it would seem important to have before us at least some estimate of the harm likely avoided by the Navy's decision not to contest here *four of the six mitigating conditions* that the District Court ordered. Without such evidence, it is difficult to assess the *relevant* harm—that is, the environmental harm likely caused by the Navy's exercises with the four uncontested mitigation measures (but without the two contested mitigation measures) in place.

Second, the Navy has filed multiple affidavits from Navy officials explaining in detail the seriousness of the harm that the delay associated with completion of this EIS (approximately one year) would create in respect to the Navy's ability to maintain an adequate national defense. See generally App. to Pet. for Cert. 260a–357a. Taken by

themselves, those affidavits make a strong case for the proposition that insistence upon the two additional mitigating conditions would seriously interfere with necessary defense training.

The affidavits explain the importance of training in antisubmarine warfare, *id.*, at 263a; the need to use active sonar to detect enemy submarines, *id.*, at 266a–267a, App. 566; the complexity of a training exercise involving sonar, App. to Pet. for Cert. 343a; the need for realistic conditions when training exercises take place, *id.*, at 299a–300a, App. 566; the “cascading” negative “effect” that delay in one important aspect of a set of coordinated training exercises has upon the Navy’s ability “to provide combat ready forces,” App. to Pet. for Cert. 343a; the cost and disruption that would accompany the adoption of the two additional mitigating conditions that *38 the NRDC seeks, *ibid.*; the Navy’s resulting inability adequately to train personnel, *id.*, at 278a; the effectiveness of the mammal-protecting measures that the Navy has taken in the past, *id.*, at 285a–298a; and the reasonable likelihood that the mitigating conditions to which it has agreed will prove adequate, *id.*, at 296a.

Third, and particularly important in my view, the District Court did not explain *why* it rejected the Navy’s affidavit-supported contentions. In its first opinion enjoining the use of sonar, the District Court simply stated:

“The Court is ... 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 if prevented from using [mid-frequency active (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.” *Id.*, at 217a–218a.

Following remand from the Court of Appeals, the District Court simply repeated, word for word, this same statement. It said:

“The Court is ... 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.” 530 F.Supp.2d 1110, 1118 (C.D.Cal.2008).

With respect to the imposition of the 2,200-yard shutdown zone, the District Court **385 noted evidence of the harm that MFA sonar poses to marine mammals, and then concluded that “[t]he Court therefore is persuaded that while the 2200 yard shutdown requirement may protect marine mammals *39 from the harshest of sonar-related consequences, it represents a minimal imposition [on] the Navy’s training exercises.” *Id.*, at 1119. The District Court did not there explain the basis for that conclusion. With respect to the imposition of the surface ducting condition, the District Court said nothing about the Navy’s interests at all. *Id.*, at 1120–1121.

While a district court is often free simply to state its conclusion in summary fashion, in this instance neither that conclusion, nor anything else I have found in the District Court’s opinion, answers the Navy’s documented claims that the two extra conditions the District Court imposed will, in effect, seriously interfere with its ability to carry out necessary training exercises.

The first condition requires the Navy to reduce the power of its sonar equipment by 75% when the ship encounters a condition called “surface ducting” that occurs when the presence of layers of water of different temperature make it unusually difficult for sonar operators to determine whether a diesel submarine is hiding below. Rear Admiral John Bird, an expert in submarine warfare, made clear that the 75% power-reduction requirement was equivalent to forbidding any related training. App. to Pet. for Cert. 297a. But he says in paragraph 52 of his declaration: “Training in surface ducting conditions is critical to effective training because sonar operators need to learn how sonar transmissions are altered due to surface ducting and how submarines may take advantage of them.” *Id.*, at 299a–300a. The District Court, as far as I can tell, did not even acknowledge in its opinion the Navy’s asserted interest in being able to train under these conditions. 530 F.Supp.2d, at 1120–1121.

The second condition requires the Navy to expand the sonar “shutdown” area surrounding a ship (*i.e.*, turn off the sonar if a mammal is spotted in the area) from a circle with a radius of about one-tenth of a mile to a circle with a radius of about one mile and a quarter. Both sides agree that this *40 requirement will lead to more shutdowns. Admiral Gary Roughead, Chief of Naval Operations, states in paragraph 12 of his declaration that this expanded zone requirement “will result in increased interruptions to training exercises, ... vastly increas[ing] the risk of negating

training effectiveness, preventing strike group certification, and disrupting carefully orchestrated deployment plans to meet world-wide operational commitments.” App. to Pet. for Cert. 344a. Again, I can find nothing in the District Court’s opinion that specifically explains why this is not so. 530 F.Supp.2d, at 1119–1120.

Fourth, the Court of Appeals sought, through its own thorough examination of the record, to supply the missing explanations. But those explanations are not sufficient. In respect to the surface ducting conditions, the Court of Appeals rejected the Navy’s contentions on the ground that those conditions are “rar[e],” and the Navy has certified trainings that did not involve any encounter with those conditions. 518 F.3d, at 701–702. I am not certain, however, why the rarity of the condition supports the District Court’s conclusion. Rarity argues as strongly for training when the condition is encountered as it argues for the contrary.

In respect to the expansion of the “shutdown” area, the Court of Appeals noted that (1) the Navy in earlier exercises had shut down its sonar when marine mammals were sited within about one-half a ****386** mile, (2) the Navy has used a larger shutdown area when engaged in exercises with lower frequency sonar equipment, and (3) foreign navies have used larger shutdown areas. *Id.*, at 699–701, and nn. 63, 67. But the Navy’s affidavits state that (1) earlier shutdowns when marine mammals were spotted at farther distances “likely occurred during tactically insignificant times,” App. to Pet. for Cert. 356a, (2) ships with low frequency sonar (unlike the sonar here at issue) have equipment that makes it easier to monitor the larger area, particularly by significantly reducing the number of monitoring personnel necessarily involved, and (3) foreign navy experience is not relevant given the ***41** potentially different military demands upon those navies, App. 508–509.

Finally, the Court of Appeals, mirroring a similar District Court suggestion in the language I have quoted, says that “the exercises in southern California are only a subset of the Navy’s training activities involving active sonar.” 518 F.3d, at 702. It adds that the Navy’s study “shows the Navy is still able to conduct its exercises in alternative locations, in reduced number, or through simulation.” *Ibid.*, n. 69. The Court of Appeals, however, also concluded that the study “provides reasonably detailed justifications for why the Southern California Operating Area is uniquely suited to these exercises, and demonstrates that the Navy would

suffer a certain hardship if the considered alternatives were employed instead.” *Ibid.*

Fifth, when the Court of Appeals first heard this case following the District Court’s imposition of a broad, absolute injunction, it held that any injunction must be crafted so that the Navy could continue its training exercises. Noting that the Navy had, in the past, been able to use mitigation measures to “reduce the harmful effects of its active sonar,” it “vacate[d] the stay and remand[ed] this matter to the district court to narrow its injunction so as to provide mitigation conditions *under which the Navy may conduct its training exercises.*” 508 F.3d 885, 887 (C.A.9 2007) (emphasis added). For the reasons just stated, neither the District Court nor the Court of Appeals has explained why we should reject the Navy’s assertions that it cannot effectively conduct its training exercises under the mitigation conditions imposed by the District Court.

I would thus vacate the preliminary injunction imposed by the District Court to the extent it has been challenged by the Navy. Neither the District Court nor the Court of Appeals has adequately explained its conclusion that the balance of the equities tips in favor of plaintiffs. Nor do those parts of the record to which the parties have pointed supply the missing explanation.

***42** II

Nonetheless, as the Court of Appeals held when it first considered this case, the Navy’s past use of mitigation conditions makes clear that the Navy can effectively train under *some* mitigation conditions. In the ordinary course, I would remand so the District Court could, pursuant to the Court of Appeals’ direction, set forth mitigation conditions that will protect the marine wildlife while also enabling the Navy to carry out its exercises. But, at this point, the Navy has informed us that this set of exercises will be complete by January, at the latest, and an EIS will likely be complete at that point, as well. Thus, by the time the District Court would have an opportunity to impose new conditions, the case could very well be moot.

In February of this year, the Court of Appeals stayed the injunction imposed by the District Court—but *only pending this Court’s resolution of the case*. The Court ****387** of Appeals concluded that “[i]n light of the short time before the Navy is to commence its next exercise, the importance of the Navy’s mission to provide for the national defense

and the representation by the Chief of Naval Operations that the district court's preliminary injunction in its current form will 'unacceptably risk' effective training and strike group certification and thereby interfere with his statutory responsibility ... to 'organiz[e], train[], and equip[] the Navy,' " interim relief was appropriate, and the court then modified the two mitigation conditions at issue. 518 F.3d 704, 705 (C.A.9 2008).

With respect to the 2,200-yard shutdown zone, it required the Navy to suspend its use of the sonar if a marine mammal is detected within 2,200 yards, *except* when sonar is being used at a "critical point in the exercise," in which case the amount by which the Navy must power down is proportional to the mammal's proximity to the sonar. *Id.*, at 705–706 (internal quotation marks omitted). With respect to surface ducting, the Navy is only required to shut down sonar altogether *43 when a marine mammal is detected within 500 meters and the amount by which it is otherwise required to power down is again proportional to the mammal's proximity to the sonar source. *Ibid.* The court believed these conditions would permit the Navy to go forward with its imminently planned exercises while at the same time minimizing the harm to marine wildlife.

In my view, the modified conditions imposed by the Court of Appeals in its February stay order reflect the best equitable conditions that can be created in the short time available before the exercises are complete and the EIS is ready. The Navy has been training under these conditions since February, so allowing them to remain in place will, in effect, maintain what has become the status quo. Therefore, I would modify the Court of Appeals' February 29, 2008, order so that the provisional conditions it contains remain in place until the Navy's completion of an acceptable EIS.

Justice GINSBURG, with whom Justice SOUTER joins, dissenting.

The central question in this action under the National Environmental Policy Act of 1969 (NEPA) was whether the Navy must prepare an environmental impact statement (EIS). The Navy does not challenge its obligation to do so, and it represents that the EIS will be complete in January 2009—one month after the instant exercises conclude. 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. Instead, the Navy acted first,

and thus thwarted the very purpose an EIS is intended to serve. To justify its course, the Navy sought dispensation not from Congress, but from an executive council that lacks authority to countermand or revise NEPA's requirements. I would hold that, in imposing manageable measures to mitigate harm until completion of the *44 EIS, the District Court conscientiously balanced the equities and did not abuse its discretion.

I

In December 2006, the Navy announced its intent to prepare an EIS to address the potential environmental effects of its naval readiness activities in the Southern California (SOCAL) Range Complex. See 71 Fed.Reg. 76639 (2006). These readiness activities include expansion and intensification of naval training, as well as research, development, and testing of various systems and weapons. *Id.*, at 76639, 76640. The EIS process is underway, and the **388 Navy represents that it will be complete in January 2009. Brief for Petitioners 11; Tr. of Oral Arg. 11.

In February 2007, seeking to commence training before completion of the EIS, the Navy prepared an environmental assessment (EA) for the 14 exercises it planned to undertake in the interim. See App. to Pet. for Cert. 235a.¹ On February 12, the Navy concluded the EA with a finding of no significant impact. App. 225–226. The same day, the Navy commenced its training exercises. *Id.*, at 227 ("The Proposed Action is hereby implemented.").

On March 22, 2007, the Natural Resources Defense Council, Inc. (NRDC), filed suit in the U.S. District Court for the Central District of California, seeking declaratory and injunctive relief based on the Navy's alleged violations of NEPA and other environmental statutes. As relevant here, the District Court determined that NRDC was likely to succeed on its NEPA claim and that equitable principles warranted preliminary relief. On August 7, 2007, the court *45 enjoined the Navy's use of mid-frequency active (MFA) sonar during the 11 remaining exercises at issue.

On August 31, the Court of Appeals for the Ninth Circuit stayed the injunction pending disposition of the Navy's appeal, and the Navy proceeded with two more exercises. In a November 13 order, the Court of Appeals vacated the stay, stating that NRDC had shown "a strong likelihood of success on the merits" and that preliminary injunctive relief

was appropriate. 508 F.3d 885, 886 (2007). The Court of Appeals remanded, however, instructing the District Court to provide mitigation measures under which the Navy could conduct its remaining exercises.

On remand, the District Court received briefing from both parties. In addition, the court “toured the *USS Milius* at the naval base in San Diego, California, to improve its understanding of the Navy’s sonar training procedures and the feasibility of the parties’ proposed mitigation measures. Counsel for both [parties] were present.” 530 F.Supp.2d 1110, 1112 (2008). On January 3, 2008, the District Court entered a modified preliminary injunction imposing six mitigation measures. The court revised the modified injunction slightly on January 10 in response to filings by the Navy, and four days later, denied the Navy’s application for a stay pending appeal.

On the following day, January 15, the Council on Environmental Quality (CEQ), an advisory body within the Executive Office of the President, responded to the Navy’s request for “alternative arrangements” for NEPA compliance. App. to Pet. for Cert. 233a. The “arrangements” CEQ set out purported to permit the Navy to continue its training without timely environmental review. *Id.*, at 241a–247a. The Navy accepted the arrangements on the same day. App. 228.

The Navy then filed an emergency motion in the Court of Appeals requesting immediate vacatur of the District Court’s modified injunction. CEQ’s action, the Navy urged, *46 eliminated the injunction’s legal foundation. In the alternative, the Navy sought a stay of two aspects of the injunction pending its appeal: the 2,200–yard mandatory shutdown zone and the power-down requirement in significant **389 surface ducting conditions, see *ante*, at 373 – 374 (opinion of the Court). While targeting in its stay application only two of the six measures imposed by the District Court, the Navy explicitly reserved the right to challenge on appeal each of the six mitigation measures. Responding to the Navy’s emergency motion, the Court of Appeals remanded the matter to allow the District Court to determine in the first instance the effect of the intervening executive action. Pending its own consideration of the Navy’s motion, the District Court stayed the injunction, and the Navy conducted its sixth exercise.

On February 4, after briefing and oral argument, the District Court denied the Navy’s motion. The Navy appealed, reiterating its position that CEQ’s action eliminated all justification for the injunction. The Navy also argued that vacatur of the entire injunction was required irrespective of

CEQ’s action, in part because the “conditions imposed, in particular the 2,200 yard mandatory shutdown zone and the six decibel (75%) power-down in significant surface ducting conditions, severely degrade the Navy’s training.” Brief for Appellants in No. 08–55054(CA9), p. 15. In the February 29 decision now under review, the Court of Appeals affirmed the District Court’s judgment. 518 F.3d 658, 703 (2008). The Navy has continued training in the meantime and plans to complete its final exercise in December 2008.

As the procedural history indicates, the courts below determined that an EIS was required for the 14 exercises. The Navy does not challenge that decision in this Court. Instead, the Navy defends its failure to complete an EIS before launching the exercises based upon CEQ’s “alternative arrangements”—arrangements the Navy sought and obtained in order to overcome the lower courts’ rulings. As *47 explained below, the Navy’s actions undermined NEPA and took an extraordinary course.

II

NEPA “promotes its sweeping commitment” to environmental integrity “by focusing Government and public attention on the environmental effects of proposed agency action.” *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371, 109 S.Ct. 1851, 104 L.Ed.2d 377 (1989). “By so focusing agency attention, NEPA ensures that the agency will not act on incomplete information, only to regret its decision after it is too late to correct.” *Ibid.*

The EIS is NEPA’s core requirement. *Department of Transportation v. Public Citizen*, 541 U.S. 752, 757, 124 S.Ct. 2204, 159 L.Ed.2d 60 (2004). This Court has characterized the requirement as “action-forcing.” *Andrus v. Sierra Club*, 442 U.S. 347, 350, 99 S.Ct. 2335, 60 L.Ed.2d 943 (1979) (internal quotation marks omitted). Environmental concerns must be “integrated into the very process of agency decisionmaking” and “interwoven into the fabric of agency planning.” *Id.*, at 350–351, 99 S.Ct. 2335. In addition to discussing potential consequences, an EIS must describe potential mitigation measures and alternatives to the proposed course of action. See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351–352, 109 S.Ct. 1835, 104 L.Ed.2d 351 (1989) (citing 40 CFR §§ 1508.25(b), 1502.14(f), 1502.16(h), 1505.2(c) (1987)). The EIS requirement “ensures that important effects will not be overlooked or underestimated only to be discovered after

resources have been committed or the die otherwise cast.” 490 U.S., at 349, 109 S.Ct. 1835.

“Publication of an EIS ... also serves a larger informational role.” *Ibid.* It demonstrates that an agency has indeed considered environmental concerns, and **390 “perhaps more significantly, provides a springboard for public comment.” *Ibid.* At the same time, it affords other affected governmental bodies “notice of the expected consequences and the opportunity to plan and implement corrective measures in a timely manner.” *Id.*, at 350, 109 S.Ct. 1835.

*48 In light of these objectives, the timing of an EIS is critical. CEQ regulations instruct agencies to “integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values.” 40 CFR § 1501.2 (1987). An EIS must be prepared “early enough so that it can serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made.” *Andrus*, 442 U.S., at 351–352, n. 3, 99 S.Ct. 2335 (quoting 43 Fed.Reg. 55995 (1478) (codified in 40 CFR § 1502.5 (1979))).

The Navy's publication of its EIS in this case, scheduled to occur *after* the 14 exercises are completed, defeats NEPA's informational and participatory purposes. The Navy's inverted timing, it bears emphasis, is the very reason why the District Court had to confront the question of mitigation measures at all. Had the Navy prepared a legally sufficient EIS before beginning the SOCAL exercises, NEPA would have functioned as its drafters intended: The EIS process and associated public input might have convinced the Navy voluntarily to adopt mitigation measures, but NEPA itself would not have impeded the Navy's exercises. See *Public Citizen*, 541 U.S., at 756, 769, n. 2, 124 S.Ct. 2204 (noting that NEPA does not mandate particular results, but rather establishes procedural requirements with a “focus on improving agency decisionmaking”).

The Navy had other options. Most importantly, it could have requested assistance from Congress. The Government has sometimes obtained congressional authorization to proceed with planned activities without fulfilling NEPA's requirements. See, e.g., Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, Pub.L. 106–398, § 317, 114 Stat. 1654A–57 (exempting the military from preparing a programmatic EIS for low-level flight training); 42 U.S.C. § 10141(c) (2000 ed.) (exempting the

Environmental Protection Agency from preparing an EIS for the development of criteria for handling spent nuclear fuel and high-level *49 radioactive waste); 43 U.S.C. § 1652(d) (exempting construction of the trans-Alaska oil pipeline from further NEPA compliance).

Rather than resorting to Congress, the Navy “sought relief from the Executive Branch.” *Ante*, at 373 (opinion of the Court). On January 10, 2008, the Navy asked CEQ, adviser to the President, to approve alternative arrangements for NEPA compliance pursuant to 40 CFR § 1506.11 (1987). App. to Pet. for Cert. 233a; see *ante*, at 373, n. 3. The next day, the Navy submitted supplementary material to CEQ, including the Navy's EA and after-action reports, the District Court's orders, and two analyses by the National Marine Fisheries Service (NMFS). App. to Pet. for Cert. 237a–238a. Neither the Navy nor CEQ notified NRDC, and CEQ did not request or consider any of the materials underlying the District Court orders it addressed.

Four days later, on January 15, the Chairman of CEQ issued a letter to the Secretary of the Navy. Repeating the Navy's submissions with little independent analysis, the letter stated that the District Court's orders posed risks to the Navy's training exercises. See *id.*, at 238a (“You have explained that the training restrictions set forth in the ... injunctive orders prevent the Navy from providing Strike Groups with adequate proficiency training **391 and create a substantial risk of precluding certification of the Strike Groups as combat ready.”).

The letter continued:

“Discussions between our staffs, your letter and supporting documents, and the classified declaration and briefings I have received, have clearly determined that the Navy cannot ensure the necessary training to certify strike groups for deployment under the terms of the injunctive orders. Based on the record supporting your request ... CEQ has concluded that the Navy must be able to conduct the [exercises] ... in a timeframe that does not provide sufficient time to complete an EIS. *50 Therefore, emergency circumstances are present for the nine exercises and alternative arrangements for compliance with NEPA under CEQ regulation 40 C.F.R. § 1506.11 are warranted.” *Id.*, at 240a.

The alternative arrangements CEQ set forth do not vindicate NEPA's objectives. The arrangements provide for “public participation measures,” which require the Navy to provide

notices of the alternative arrangements. *Id.*, at 241a, 242a. The notices must “seek input on the process for reviewing post-exercise assessments” and “include an offer to meet jointly with Navy representatives ... and CEQ to discuss the alternative arrangements.” *Id.*, at 242a–243a. The alternative arrangements also describe the Navy’s existing research and mitigation efforts. *Id.*, at 243a–247a.

CEQ’s hasty decision on a one-sided record is no substitute for the District Court’s considered judgment based on a two-sided record.² More fundamentally, even an exemplary CEQ review could not have effected the short circuit the Navy sought. CEQ lacks authority to absolve an agency of its statutory duty to prepare an EIS. NEPA established CEQ to assist and advise the President on environmental policy, 42 U.S.C. § 4342, and a 1977 Executive Order charged CEQ with issuing regulations to federal agencies for implementation of NEPA’s procedural provisions, *Exec. Order No. 11991*, 3 CFR 123 (1977 Comp.). This Court has recognized that CEQ’s regulations are entitled to “substantial deference,” *Robertson*, 490 U.S., at 355, 109 S.Ct. 1835, and 40 CFR § 1506.11 indicates that CEQ may play an important consultative role in emergency circumstances, but we have never suggested that CEQ could eliminate the statute’s command. If the *51 Navy sought to avoid its NEPA obligations, its remedy lay in the Legislative Branch. The Navy’s alternative course—rapid, self-serving resort to an office in the White House—is surely not what Congress had in mind when it instructed agencies to comply with NEPA “to the fullest extent possible.” 42 U.S.C. § 4332.³

III

A

Flexibility is a hallmark of equity jurisdiction. “The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to **392 the necessities of the particular case. Flexibility rather than rigidity has distinguished it.” *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312, 102 S.Ct. 1798, 72 L.Ed.2d 91 (1982) (quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 329, 64 S.Ct. 587, 88 L.Ed. 754 (1944)). 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. 11A C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* § 2948.3, p. 195 (2d ed.1995). This Court has never rejected that formulation, and I do not believe it does so today.

Equity’s flexibility is important in the NEPA context. Because an EIS is the tool for *uncovering* environmental harm, environmental plaintiffs may often rely more heavily on their probability of success than the likelihood of harm. The Court is correct that relief is not warranted “simply to prevent the possibility of some remote future injury.” *52 *Ante*, at 375 (quoting Wright & Miller, *supra*, § 2948.1, at 155). “However, the injury need not have been inflicted when application is made or be certain to occur; a strong threat of irreparable injury before trial is an adequate basis.” Wright & Miller, *supra*, § 2948.1, at 155–156 (footnote omitted). I agree with the District Court that NRDC made the required showing here.

B

The Navy’s own EA predicted substantial and irreparable harm to marine mammals. Sonar is linked to mass strandings of marine mammals, hemorrhaging around the brain and ears, acute spongiotic changes in the central nervous system, and lesions in vital organs. *E.g.*, App. 600–602; *id.*, at 360–362, 478–479. As the Ninth Circuit noted, the EA predicts that the Navy’s “use of MFA sonar in the SOCAL exercises will result in 564 instances of physical injury including permanent hearing loss (Level A harassment) and nearly 170,000 behavioral disturbances (Level B harassment), more than 8,000 of which would also involve temporary hearing loss.” 518 F.3d, at 696; see App. 223–224. Within those totals,

“the EA predicts 436 Level A harassments of Cuvier’s beaked whales. According to [the National Oceanic and Atmospheric Administration (NOAA)], as few as 1,121 ... may exist in California, Oregon and Washington combined. Likewise, the EA predicts 1,092 Level B harassments of bottlenose dolphins, of which only 5,271 may exist in the California Coastal and Offshore stocks.” 518 F.3d, at 691–692.

The majority acknowledges the lower courts’ findings, *ante*, at 374, but also states that the EA predicted “only eight Level A harassments of common dolphins each year” and “274 Level B harassments of beaked whales per year, none of

which would result in permanent injury,” *ante*, at 372. Those numbers do not fully capture the EA's predictions.

*53 The EA classified the harassments of beaked whales as Level A, not Level B. The EA does indeed state that “modeling predicts non-injurious Level B exposures.” App. 185. But, as the majority correctly notes, *ante*, at 372, the EA also states that “all beaked whale exposures are counted as Level A,” App. 185. The EA counted the predicted exposures as Level A “[b]y Navy policy developed in conjunction with NMFS.” *Id.*, at 200. The record reflects “the known sensitivity of these species to tactical sonar,” *id.*, at 365 (NOAA letter), **393 and as the majority acknowledges, beaked whales are difficult to study, *ante*, at 372. Further, as the Ninth Circuit noted, “the EA ... maintained that the methodology used was based on the ‘best available science.’ ” 518 F.3d, at 669.⁴

In my view, this likely harm—170,000 behavioral disturbances, including 8,000 instances of temporary hearing loss; and 564 Level A harms, including 436 injuries to a beaked whale population numbering only 1,121—cannot be lightly dismissed, even in the face of an alleged risk to the effectiveness of the Navy's 14 training exercises. There is no doubt that the training exercises serve critical interests. But those interests do not authorize the Navy to violate a statutory command, especially when recourse to the Legislature remains open. “Of course, military interests do

not always trump other considerations, and we have not held that they do.” *Ante*, at 378.

In light of the likely, substantial harm to the environment, NRDC's almost inevitable success on the merits of its claim *54 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. Cf. *Amoco Production Co. v. Gambell*, 480 U.S. 531, 545, 107 S.Ct. 1396, 94 L.Ed.2d 542 (1987) (“Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment.”).

For the reasons stated, I would affirm the judgment of the Ninth Circuit.

All Citations

555 U.S. 7, 129 S.Ct. 365, 172 L.Ed.2d 249, 67 ERC 1225, 77 USLW 4001, 08 Cal. Daily Op. Serv. 13,990, 2008 Daily Journal D.A.R. 16,797, 21 Fla. L. Weekly Fed. S 547

Footnotes

- * The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.
- 1 In contrast, passive sonar “listens” for sound waves but does not introduce sound into the water. Passive sonar is not effective for tracking diesel-electric submarines because those vessels can operate almost silently. Passive sonar also has a more limited range than active sonar, and cannot identify the exact location of an enemy submarine. Pet.App. 266a–271a.
- 2 The CZMA states that federal agencies taking actions “that affect [t] any land or water use or natural resource of the coastal zone” shall carry out these activities “in a manner which is consistent to the maximum extent practicable with the enforceable policies of approved State management programs.” 16 U.S.C. § 1456(c)(1)(A).
- 3 That provision states in full: “Where emergency circumstances make it necessary to take an action with significant environmental impact without observing the provisions of these regulations, the Federal agency taking the action should consult with the Council about alternative arrangements. Agencies and the Council will limit such arrangements to actions necessary to control the immediate impacts of the emergency. Other actions remain subject to NEPA review.”
- 4 The Ninth Circuit's discussion of the plaintiffs' likelihood of success was limited to their NEPA claims. The court did not discuss claims under the CZMA or ESA.
- 5 The bulk of Justice GINSBURG's dissent is devoted to the merits. For the reasons stated, we find the injunctive relief granted in this case an abuse of discretion, even if plaintiffs are correct on the underlying merits. As to the injunction, the dissent barely mentions the Navy's interests. *Post*, at 392 – 393. We find that those interests, and the documented risks to national security, clearly outweigh the harm on the other side of the balance.

We agree with much of Justice BREYER's analysis, *post*, at 383 – 386 (opinion concurring in part and dissenting in part), but disagree with his conclusion that the modified conditions imposed by the stay order should remain in force until the Navy completes its EIS, *post*, at 386 – 387. The Court is reviewing the District Court's imposition of the preliminary injunction; once we conclude, as Justice BREYER does, *post*, at 386, that the preliminary injunction should be vacated, the stay order is no longer pertinent. A stay is a useful tool for managing the impact of injunctive relief *pending further appeal*, but once the Court resolves the merits of the appeal, the stay ceases to be relevant. See 518 F.3d 704, 706 (C.A.9 2008) (“[T]he partial stay ... shall remain in effect until final disposition by the Supreme Court”). Unexamined conditions imposed by the stay order are certainly no basis for what would be in effect the entry of a new preliminary injunction by this Court.

- 1 An EA is used “for determining whether to prepare” an EIS. *Department of Transportation v. Public Citizen*, 541 U.S. 752, 757, 124 S.Ct. 2204, 159 L.Ed.2d 60 (2004) (quoting 40 CFR § 1508.9(a) (2003)); see *ante*, at 371 – 372 (opinion of the Court). By definition, an EA alone does not satisfy an agency's obligation under NEPA if the effects of a proposed action require preparation of a full EIS.
- 2 The District Court may well have given too spare an explanation for the balance of hardships in issuing its injunction of August 7, 2007. The court cured any error in this regard, however, when it closely examined each mitigation measure in issuing the modified injunction of January 3, 2008. The Court of Appeals, too, conducted a detailed analysis of the record.
- 3 On the same day that CEQ issued its letter, the President granted the Navy an exemption from the requirements of the Coastal Zone Management Act of 1972 (CZMA) pursuant to 16 U.S.C. § 1456(c)(1)(B) (2006 ed.). That exemption, expressly authorized by the CZMA, does not affect NRDC's NEPA claim.
- 4 The majority reasons that the environmental harm deserves less weight because the training exercises “have been taking place in SOCAL for the last 40 years,” such that “this is not a case in which the defendant is conducting a new type of activity with completely unknown effects on the environment.” *Ante*, at 376. But the EA explains that the proposed action is not a continuation of the “status quo training.” App. 128. Instead, the EA is based on the Navy's proposal to employ a “surge” training strategy, *ibid.*, in which the commander “would have the option to conduct two concurrent major range events,” *id.*, at 124.