

3-1-2012

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Recommended Citation

Elisabeth Long, *Alliance for the Wild Rockies v. Cottrell: Raising "Serious Questions" About Post-Winter Injunctive Relief in the Ninth Circuit*, 39 *ECOLOGY L. Q.* 643 (2012).

Available at: <http://scholarship.law.berkeley.edu/elq/vol39/iss2/17>

Link to publisher version (DOI)

<http://dx.doi.org/https://doi.org/10.15779/Z38W56C>

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Alliance for the Wild Rockies v. Cottrell: Raising “Serious Questions” About Post- *Winter* Injunctive Relief in the Ninth Circuit

INTRODUCTION

Preliminary injunctions serve as invaluable tools for plaintiffs seeking to prevent environmental harm from occurring while litigating to enforce an environmental statute.¹ A plaintiff may use a preliminary injunction to prevent “irreparable” environmental injury in the face of inadequate legal remedies.² Where plaintiffs bring suits under the National Environmental Policy Act (NEPA), preliminary injunctions allow courts to ensure agencies accomplish NEPA’s primary goal of informed decision making.³ However, inconsistent standards for preliminary injunctions among the circuits have caused confusion and inconsistent decisions.⁴

In *Alliance for the Wild Rockies v. Cottrell*,⁵ the Ninth Circuit overturned the denial of an environmental advocacy group’s motion for a preliminary injunction. Citing the Supreme Court’s decision in *Winter v. Natural Resources Defense Council*,⁶ the district court held that the Alliance for the Wild Rockies (AWR) failed to show “likelihood of irreparable injury and success on the

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1. See William Krueger, Recent Development, *In the Navy: The Future Strength of Preliminary Injunctions Under NEPA in Light of NRDC v. Winter*, 10 N.C. J.L. & TECH. 423, 423 (2009) (“A preliminary injunction is an incredibly useful and important tool in cases involving the enforcement of environmental statutes and regulations.”); Bethany M. Bates, *Reconciliation After Winter: The Standard for Preliminary Injunctions in Federal Courts*, 111 COLUM. L. REV. 1522, 1547 (2011) (“preliminary injunctions are frequently used to protect the environment while [a] case is being litigated”).

2. See e.g., *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) (“The Court has repeatedly held that the basis for injunctive relief in the federal courts has always been irreparable injury and the inadequacy of legal remedies.”).

3. William S. Eubanks II, *Damage Done? The Status of NEPA After Winter v. NRDC and Answers to Lingering Questions Left Open by the Court*, 33 VT. L. REV. 649, 650–51 (“[T]he primary goal of NEPA is to ensure informed decision-making . . .”).

4. See e.g., Morton Denlow, *The Motion for a Preliminary Injunction: Time for a Uniform Federal Standard*, 22 REV. LITIG. 495, 497 (“[C]onfusion persists’ regarding which standard should apply for granting or denying the preliminary injunction motion.”); Bates, *supra* note 1, at 1522 (arguing for uniformity in granting preliminary injunctions to prevent “inconsistent and inequitable decisions”).

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

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

merits.”⁷ In overturning the district court’s decision, the Ninth Circuit relied on Justice Ginsburg’s dissent in *Winter*⁸ to hold that its “serious questions” version of the “sliding scale” approach to preliminary injunctions survives *Winter*.⁹ This approach allows injunctive relief if there are serious questions on the merits and a balance of hardships that tips “sharply toward the plaintiff” so long as the plaintiff also shows a likelihood of irreparable injury and that the injunction is in the public interest.¹⁰ However, following *Cottrell*, at least two district court judges in the Ninth Circuit have struggled to harmonize *Cottrell* and *Winter*.¹¹ The lack of uniformity across the circuits and the confusion within the Ninth Circuit suggest the Supreme Court will ultimately need to provide further guidance on the continuing validity of sliding scale approaches to preliminary injunctions.¹²

I. BACKGROUND

Prior to the Supreme Court’s decision in *Winter*, the Ninth Circuit held that a possibility—not a likelihood—of irreparable harm justified issuance of a preliminary injunction under certain circumstances.¹³ The Ninth Circuit also employed a serious questions version of the sliding scale approach such that courts could issue a preliminary injunction based on a “stronger showing” of irreparable harm offset by a “lesser showing” of likelihood of success on the merits.¹⁴ While *Winter* explicitly overruled issuance of a preliminary injunction that is based on the possibility of irreparable harm, the majority made no determination as to the continuing validity of the serious questions approach.¹⁵

A. *Winter and the Subsequent Circuit Split*

In *Winter*, the Supreme Court reiterated a four-part test for preliminary injunctive relief that requires a plaintiff to establish 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

7. *Cottrell II*, 632 F.3d at 1128.

8. *Winter*, 555 U.S. at 43–54 (Ginsburg, J., dissenting).

9. *Cottrell II*, 632 F.3d at 1135.

10. *Id.* at 1131–32.

11. See Part II for discussion of attempts to harmonize *Winter* and *Cottrell II*; see also Paul W. Conable & Frank J. Weiss, *Surviving Winter: The Ninth Circuit Reaffirms the “Serious Questions” Test for Injunctive Relief*, 30 OR. ST. BAR LITIG. J. 15, 18–19 (2011) (discussing one of three cases in Part II of this In Brief).

12. Conable & Weiss, *supra* note 11, at 19 (concluding that “it is possible that further guidance from the Supreme Court will be forthcoming on this issue”).

13. *Cottrell II*, 632 F.3d at 1131; see also Bates, *supra* note 1, at 1542 (“Before *Winter*, the Ninth Circuit employed a two-step analysis, requiring a movant seeking a preliminary injunction to show either: (1) a likelihood of success on the merits and the possibility of irreparable injury; or (2) that serious questions going to the merits were raised and the balance of hardships tips sharply in its favor.” (internal quotations omitted)) (citing *Clear Channel Outdoor Inc. v. City of Los Angeles*, 340 F.3d 810, 813 (9th Cir. 2003)).

14. *Cottrell II*, 632 F.3d at 1131; see, e.g., *Clear Channel Outdoor*, 340 F.3d at 813.

15. *Cottrell II*, 632 F.3d at 1131.

injunction is in the public interest.”¹⁶ The Court thereby overruled the previous Ninth Circuit standard allowing issuance of a preliminary injunction based on the possibility of irreparable harm.¹⁷ Because the possibility standard was not stringent enough, the Supreme Court held that plaintiffs must demonstrate a likelihood of irreparable injury absent issuance of an injunction.¹⁸

Circuit courts are split as to the effect of *Winter* on the viability of sliding scale tests.¹⁹ The Fourth Circuit held that *Winter* invalidates its prior sliding scale approach that allowed “flexible interplay” among the four elements.²⁰ In the Fourth Circuit, serious questions about the merits of the case are not enough; the plaintiff must clearly demonstrate likely success on the merits.²¹ Other circuits have held that their previous sliding scale approaches survive *Winter*.²² The Seventh Circuit was the first to hold that its version of the sliding scale approach still applies, such that the more harm an injunction can prevent, the “weaker the plaintiff’s claim on the merits can be while still supporting some preliminary relief.”²³ The Second Circuit later held that because *Winter* did not preclude application of its serious questions standard, its flexible approach remained valid.²⁴ In *Cottrell*, the Ninth Circuit also interpreted dicta by the Tenth Circuit and the D.C. Circuit to suggest that they would follow the Seventh and Second Circuits in maintaining sliding scale approaches.²⁵

16. *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008) (citing *Munaf v. Geren*, 553 U.S. 674, 689-90 (2008)).

17. *Id.* at 21.

18. *Id.* at 22.

19. See *Bates*, *supra* note 1, at 1522 (“[C]ircuit courts are divided on the validity of the ‘sliding scale’ test, in which the trial court weighs the strength of each of the factors against one another and allows serious questions going to the merits to satisfy the likelihood of success prong.”).

20. *Real Truth About Obama, Inc. v. Fed. Election Comm’n*, 575 F.3d 342, 346–47 (4th Cir. 2009) (holding *Winter* precluded application of the Fourth Circuit’s prior “flexible interplay” test because “*Winter* articulates four requirements, each of which must be satisfied as articulated”), *vacated on other grounds*, 130 S. Ct. 2371 (2010).

21. *Id.* at 347–48.

22. See *Bates*, *supra* note 1, at 1529-35 (summarizing each circuit’s pre-*Winter* standard for injunctive relief).

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

24. *Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 38 (2d Cir. 2010) (holding that the “standard for assessing a movant’s probability of success on the merits remains valid and that the district court did not err in applying the ‘serious questions’ standard”).

25. *Cottrell II*, 632 F.3d at 1134; see also *Bates supra* note 1, at 1543–44 (“The remaining circuits have continued using their pre-*Winter* tests without direct comment on whether *Winter* affected the tests’ continuing validity. The Tenth Circuit employs a modified test that allows for the grant of a preliminary injunction when there are only serious questions as to the merits on the likelihood of success prong. After *Winter*, it mentioned this test in dicta, but indicated that it was not applicable to the case before the court. The D.C. Circuit, which had previously employed a sliding scale analysis at least some of the time, notes that *Winter* ‘does not squarely discuss whether the four factors are to be balanced on a sliding scale.’ The Eighth Circuit, which had allowed for ‘serious questions’ on the merits to suffice when the movant made a strong showing on the other three factors, has not directly addressed *Winter* The Third Circuit has also not directly addressed whether its test, which allowed for the balancing of the four factors, was still valid in light of *Winter*. Both the Eleventh and Fifth Circuits maintain their requirement of a substantial likelihood of success on the merits.”).

B. Ninth Circuit Reaffirms the “Serious Questions” Test in Cottrell

In late summer 2007, the Rat Creek Wildfire burned approximately 27,000 acres of Montana’s Beaverhead-Deerlodge National Forest.²⁶ Post-fire, the Forest Service planned the Rat Creek Salvage Project (“the Project”).²⁷ The Project proposed salvage logging of dead and dying trees between four and fifteen inches diameter and removal of surviving trees infected with mistletoe on approximately 1,652 out of the 27,000 burned acres.²⁸ Pursuant to NEPA, the agency released an Environmental Assessment (EA) for the Project in April 2009 and requested an Emergency Situation Determination (ESD) from the Chief of the Forest Service in June 2009.²⁹ The Chief granted the ESD request in July on the grounds that delaying the Project would result in a “substantial loss of economic value to the government,” harm the local economy, and eliminate an opportunity to accomplish tree planting and mistletoe control objectives.³⁰ The ESD allowed logging to commence in August 2009.³¹

AWR filed suit in federal district court, requesting a preliminary injunction and alleging the Forest Service violated the Forest Service Decisionmaking and Appeals Reform Act,³² NEPA,³³ and the National Forest Management Act.³⁴ AWR sought to enjoin logging to prevent irreparable harm to members’ ability to use the area for recreation and work.³⁵ Relying on *Winter*, the district court denied AWR’s request for a preliminary injunction because AWR failed to show likelihood of success on the merits and likelihood of irreparable injury absent an injunction.³⁶ AWR appealed.³⁷

On appeal, the Ninth Circuit held that the district court committed an error of law when it failed to apply the serious questions test.³⁸ In holding that the serious questions approach survived *Winter*, the *Cottrell* court cited Justice

26. *Id.* at 1129.

27. *Id.*; see also U.S. FOREST SERV., DECISION NOTICE/FINDING OF NO SIGNIFICANT IMPACT, RAT CREEK SALVAGE PROJECT (2009), available at http://a123.g.akamai.net/7/123/11558/abc123/forestservic.download.akamai.com/11558/www/nepa/52987_FSPLT1_008935.pdf; U.S. FOREST SERV., ENVIRONMENTAL ASSESSMENT, RAT CREEK SALVAGE PROJECT (2009), available at http://a123.g.akamai.net/7/123/11558/abc123/forestservic.download.akamai.com/11558/www/nepa/52987_FSPLT1_008918.pdf.

28. *Cottrell II*, 632 F.3d at 1129.

29. *Id.*; see, e.g., Melanie Stidham et al., *The Role of Economic Emergency Situation Determinations in Expediting Fire Salvage*, 38 *Envtl. L. Rep.* 10,741 (2008) (describing the expansion of ESDs in 2003 and their use in enabling implementation fire salvage sales on national forests without waiting for resolution of project appeals).

30. *Cottrell II*, 632 F.3d at 1130.

31. *Id.* at 1131; see Stidham et al., *supra* note 29, 10,742 (explaining that, once the Chief of the Forest Service determines that an emergency situation exists, the Appeals Reform Act allows project implementation after publication of the NEPA decision document, even if an appeal has been filed).

32. 16 U.S.C. § 1612 (2006).

33. 42 U.S.C. §§ 4321–4370f (2006).

34. 16 U.S.C. §§ 1600–1614; *Cottrell II*, 632 F.3d at 1130.

35. *Cottrell II*, 632 F.3d at 1135.

36. *Id.* at 1130.

37. *Id.* at 1131.

38. *Id.* at 1135.

Ginsburg’s *Winter* dissent where she opined the majority did not overrule such an approach and highlighted its importance in allowing flexibility.³⁹ Therefore, in the Ninth Circuit, serious questions on the merits and a balance of hardships that tips “sharply toward the plaintiff” supports issuance of a preliminary injunction when applied as part of the *Winter* test.⁴⁰

The *Cottrell* court found the district court erred in denying AWR’s request for a preliminary injunction because it satisfied the serious questions test.⁴¹ The court found there were serious questions on the merits whether the factors considered by the Chief, including Project effects to the local economy, were sufficient to grant the ESD.⁴² The balance of hardships tipped “sharply” in AWR’s favor because the potential harm to AWR members from lost work and recreation opportunities far outweighed potential lost revenue to the agency.⁴³ Further, AWR adequately showed irreparable harm to enjoy the project area in an “undisturbed state.”⁴⁴ Finally, public interests served by a preliminary injunction outweighed those that would be harmed, such as local job creation.⁴⁵

II. ATTEMPTS TO HARMONIZE *COTTRELL* AND *WINTER*

At least two district court judges in the Ninth Circuit have struggled with whether *Cottrell* is consistent with *Winter*. Part of the confusion stems from the difficulty in reconciling prior Ninth Circuit law applying *Winter* with the court’s decision in *Cottrell*.⁴⁶ The Ninth Circuit recognized in one post-*Winter* decision, *Stormans v. Selecky*, that plaintiffs must meet the four-part *Winter* test for preliminary injunctive relief.⁴⁷ While the *Selecky* decision affirmed the *Winter* test, it left room for uncertainty when it did not address the continuing validity of a post-*Winter* sliding scale approach in the Ninth Circuit.⁴⁸

39. *Id.* at 1131–32 (citing *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 51 (2008)).

40. *Id.* at 1132.

41. *Id.* at 1135.

42. *Id.* at 1136–37 (“But the impact of a project on a local economy is not one of the factors that the Chief Forester was permitted to consider in deciding whether to issue an ESD Thus, [she] ‘relied on factors Congress did not intend [her] to consider.’” (quoting *Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008)).

43. *Id.* at 1138.

44. *Id.* at 1135.

45. *Id.* at 1138–39.

46. See Conable & Weiss, *supra* note 11, for a discussion of district court difficulty of harmonizing *Cottrell II*, prior Ninth Circuit case law, and *Winter*.

47. *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1127 (9th Cir. 2009) (“The proper legal standard for preliminary injunctive relief requires a party to demonstrate ‘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.’”) (citing *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008)); *see also* *Am. Trucking Ass’ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009) (holding “to the extent that our cases have suggested a lesser standard [than *Winter* requires], they are no longer controlling or even viable”).

48. *Id.*

In *Quiroga v. Chen*, Nevada District Court Judge Navarro interpreted *Cottrell* as potentially in conflict with *Selecky* and *Winter*.⁴⁹ According to Judge Navarro, *Winter* clearly stated that a plaintiff must show both a likelihood of success on the merits and a likelihood of irreparable harm.⁵⁰ Therefore, *Cottrell* was inconsistent with previous cases if it “meant to imply that its ‘serious questions’ standard was a lesser standard than ‘likely.’”⁵¹ Judge Navarro reconciled *Cottrell*’s serious questions requirement with the *Winter* and *Selecky* likelihood standard by requiring movants to show serious questions on the merits “such that success on the merits is likely.”⁵² Finally, Judge Navarro interpreted that while a claim raising serious questions can be “weaker” on the merits if the injunction will prevent great harm, a plaintiff cannot have a weaker than likely chance of success on the merits.⁵³

In two later decisions, *Winnemucca Indian Colony v. United States ex rel. Dep’t of Interior* and *Accelerated Care Plus Corp. v. Diversicare Management Services Co.*, Nevada District Court Judge Jones found that *Cottrell* presented similar difficulty.⁵⁴ In order to reconcile this difficulty, Judge Jones held that to the extent *Cottrell*’s interpretation of *Winter* was inconsistent with *Selecky*, the latter case controls.⁵⁵ Judge Jones then analyzed the *Winter* standard’s language, which is “presented as a four-part conjunctive test, not as a four-factor balancing test.”⁵⁶ Because the word “likely” in the *Winter* test modifies the “irreparable harm” prong of the four-factor *Winter* test in the same way that the word modifies the “success-on-the-merits” prong, Judge Jones concluded the test requires at least a “likely” chance of success on the merits.⁵⁷

Judge Jones further explained that Justice Ginsburg’s dissent failed to address whether courts could grant relief if the chance of success on the merits was “less than likely” because a “lower likelihood is still *some* likelihood.”⁵⁸ Therefore, Judge Jones concluded in *Winnemucca* and *Accelerated Care* that, when left with the language of the *Winter* test, a movant is required to show

49. See *Quiroga v. Chen*, 735 F. Supp. 2d 1226, 1229 (D. Nev. 2010). The *Quiroga* court was discussing an earlier opinion at the Ninth Circuit, *Alliance for the Wild Rockies v. Cottrell* (*Cottrell I*), 622 F.3d 1045 (9th Cir. 2010). *Cottrell I* was withdrawn and amended on denial of rehearing en banc. See *Cottrell II*, 632 F.3d at 1128. *Cottrell I* and *Cottrell II* are not “materially different on the issues discussed in *Quiroga*.” See Conable & Weiss, *supra* note 11, at 15, 19.

50. *Quiroga*, 735 F. Supp. 2d at 1229.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Winnemucca Indian Colony v. United States ex rel. Dep’t of the Interior*, No. 3:11 cv 00622 RCJ VPC, 2011 WL 4377932, at *3 (D. Nev. Sept. 16, 2011); *Accelerated Care Plus Corp. v. Diversicare Mgmt. Servs. Co.*, No. 3:11 cv 00585 RCJ RAM, 2011 WL 3678798, at *2 (D. Nev. Aug. 22, 2011).

55. *Winnemucca*, 2011 WL 4377932, at *3 (citing *Miller v. Gammie*, 335 F.3d 889, 899 (9th Cir. 2003) (en banc) (holding that absent an intervening Supreme Court decision, “when the en banc court exercises its supervisory authority over three-judge panels, its decisions should be recognized as authoritative and binding”)); *Accelerated Care*, 2011 WL 3678798, at *2 (citing *Miller*, 335 F.3d at 899).

56. *Winnemucca*, 2011 WL 437792, at *3.

57. *Id.*

58. *Id.*

likely success on the merits.⁵⁹ In order to define “likely,” Judge Jones looked to the Merriam-Webster Dictionary, which defines “likely” as “having a high probability of occurring or being true,” and Black’s Law Dictionary, which defines the “likelihood-of-success-on-the-merits test” as the rule that a litigant seeking preliminary relief “‘must show a reasonable probability of success.’”⁶⁰ Because “‘reasonable probability’ appears to be the most lenient position on the sliding scale that can satisfy the requirement that success be ‘likely,’” Judge Jones concluded that “[s]erious questions going to the merits” must therefore mean that “there is at least a *reasonable probability* of success on the merits.”⁶¹

III. ANALYSIS

District courts within the Ninth Circuit have harmonized *Cottrell*, *Winter*, and prior Ninth Circuit case law with some difficulty. It is uncertain whether the *Cottrell* court would agree with these attempted reconciliations. If *Winter* and *Selecky* require a likelihood of success on the merits and a likelihood of irreparable harm, it is unclear whether the survival of the serious questions test under *Cottrell* adds anything to the *Winter* four-part test. However, if “serious questions” on the merits means less than a “likelihood” of success on the merits, it is questionable whether the Ninth Circuit is in line with *Winter*. The split between the circuits and within the Ninth Circuit suggests that the Supreme Court should rule on the validity of this particular balancing test.⁶² A uniform standard would prevent inconsistent and inequitable decisions.⁶³

According to Judge Mosman’s concurrence in *Cottrell*, the serious questions approach is beneficial because it preserves “essential” flexibility for courts.⁶⁴ Flexibility on the likelihood of success on the merits prong is more important than the flexibility expressly overruled in *Winter* because courts are better positioned to predict the likelihood of harm than the likelihood of success at the preliminary injunction stage.⁶⁵ Because the question of whether plaintiffs

59. *Id.* at *4.

60. *Id.* (quoting MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/likely> and BLACK’S LAW DICTIONARY 1012 (9th ed. 2009)).

61. *Id.* (emphasis added).

62. *See* Denlow, *supra* note 4, at 533 (“Parties and judges would benefit greatly from the Supreme Court’s articulation of a clear standard to be applied in deciding preliminary injunction motions. The failure to adopt such a standard has led to confusion by the courts and possible forum shopping by parties. The standard should define the elements necessary for obtaining a preliminary injunction and provide guidance as to how those standards should apply while providing trial courts with necessary discretion.”).

63. *Id.* at 530–32; *see also* Bates, *supra* note 1, at 1554 (“The lack of uniformity causes ‘havoc in litigation,’ which the courts have consistently failed to confront. Uniformity also has clear benefits to practitioners who litigate in multiple circuits.” (quoting Lea B. Vaughn, *A Need for Clarity: Toward a New Standard for Preliminary Injunctions*, 68 OR. L. REV. 839, 841 (1989))).

64. *Cottrell II*, 632 F.3d at 1139 (Mosman, J., concurring); *see also* Bates, *supra* note 1, at 1550–51 (discussing historical support for a flexible standard for issuing preliminary injunctions prior to the merger of courts of equity and courts of law and Supreme Court precedent for “using historical practice to inform the proper standard for granting a preliminary injunction”).

65. *Id.*

are likely to prevail often does not have a “legitimate answer” at the preliminary injunction stage, Judge Mosman asserted that it is better to ask whether there are serious questions on the merits.⁶⁶ Additionally, this flexible standard may allow a more equitable and holistic view of a plaintiff’s case.⁶⁷

The serious questions test may provide flexibility for district court judges, but it has caused confusion. If clarity is the goal, the Fourth Circuit approach, holding that *Winter*’s four requirements must be satisfied “as articulated,” may be preferable.⁶⁸ Such a standard would allow courts to rule on preliminary injunctions without the linguistic analyses and second-guessing seen in the Ninth Circuit after *Cottrell*. Furthermore, a clear requirement of likelihood of success on the merits may reduce litigation and conserve judicial resources.⁶⁹

CONCLUSION

In *Cottrell*, the Ninth Circuit held that its serious questions test survives the Supreme Court’s ruling in *Winter* when applied under the four-part *Winter* test. Therefore, a court may issue a preliminary injunction if there are serious questions going to the merits and a balance of hardships that tips sharply in the plaintiff’s favor, as long as the other two elements of the *Winter* test are satisfied. However, the split among the circuits and within the Ninth Circuit suggest that the Supreme Court should provide further guidance on the viability of the serious questions test post-*Winter*. A clearly articulated standard is needed to reduce confusion and the potential for inconsistency.

Elisabeth Long

66. *Id.* at 1140.

67. Bates, *supra* note 1, at 1554.

68. Real Truth About Obama, Inc. v. Fed. Election Comm’n, 575 F.3d 342, 347 (4th Cir. 2009).

69. See Denlow, *supra* note 4, 532 (arguing the serious questions approach encourages additional litigation “because neither the winning nor the losing side on the motion for a preliminary injunction is able to predict the likely outcome of litigation on the merits. If a party must show at least a 50% chance of prevailing, then the decision on the preliminary injunction helps the parties evaluate their positions”).

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