SUPREME COURT OF THE UNITED STATES

No. 98–231

GRUPO MEXICANO DE DESARROLLO, S. A., ET AL., PETITIONERS *v.* ALLIANCE BOND FUND, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[June 17, 1999]

JUSTICE GINSBURG, with whom JUSTICE STEVENS, JUSTICE SOUTER, and JUSTICE BREYER join, dissenting.

I

Uncontested evidence presented to the District Court at the preliminary injunction hearing showed that petitioner Grupo Mexicano de Desarrollo, S. A. (GMD), had defaulted on its contractual obligations to respondents, a group of GMD noteholders (Alliance), see App. to Pet. for Cert. 24a, 31a, that Alliance had satisfied all conditions precedent to its breach of contract claim, see *id.*, at 25a, and that GMD had no plausible defense on the merits, see *id.*, at 25a, 36a. Alliance also demonstrated that GMD had undertaken to treat Alliance's claims on the same footing as all other unsecured, unsubordinated debt, see *id.*, at 24a, but that GMD was in fact satisfying Mexican creditors to the exclusion of Alliance, *id.*, at 26a. Furthermore, unchallenged evidence indicated that GMD was so rapidly disbursing its sole remaining asset that, absent provisional action by the District Court, Alliance would have been unable to collect on the money judgment for which it qualified. See *id.*, at 26a, 32a.[1]

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[1] GMD did not seek Second Circuit review of the District Court's fact

Had it been possible for the District Judge to set up "a piepowder court . . . on the instant and on the spot," *Parks* v. *Boston*, 32 Mass. 198, 208 (1834) (Shaw, C. J.), the judge could have moved without pause from evidence taking to entry of final judgment for Alliance, including an order prohibiting GMD from transferring assets necessary to satisfy the judgment. Lacking any such device for instant adjudication, the judge employed a preliminary injunction "to preserve the relative positions of the parties until a trial on the merits [could] be held." *University of Texas* v. *Camenisch*, 451 U. S. 390, 395 (1981). The order enjoined GMD from distributing assets likely to be necessary to satisfy the judgment in the instant case, but gave Alliance no security interest in GMD's assets, nor any preference relative to GMD's other creditors. Moreover, the injunction expressly reserved to GMD the option of commencing proceedings under the bankruptcy laws of Mexico or the United States. App. to Pet. for Cert. 27a. In addition, the District Judge recorded his readiness to modify the interim order if necessary to keep GMD in business. See *id.*, at 53a. The preliminary injunction thus constrained GMD only to the extent essential to the subsequent entry of an effective judgment.

The Court nevertheless disapproves the provisional relief ordered by the District Court, holding that a preliminary injunction freezing assets is beyond the equitable authority of the federal courts. I would not so disarm the district courts. As I comprehend the courts' authority,

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findings on irreparable harm or of that court's determination that Alliance almost certainly would prevail on the merits. See Brief for Petitioners 7. Nor does GMD cast any doubt on those matters here. Instead, GMD forthrightly concedes that had the District Court declined to issue the preliminary injunction, GMD would have had no assets available to satisfy the money judgment that Alliance ultimately obtained. See Tr. of Oral Arg. 8–9.

injunctions of this kind, entered in the circumstances presented here, are within federal equity jurisdiction. Satisfied that the injunction issued in this case meets the exacting standards for preliminary equitable relief, I would affirm the judgment of the Second Circuit.[2]

II

The Judiciary Act of 1789 gave the lower federal courts jurisdiction over "all suits . . . in equity." §11, 1 Stat. 78. We have consistently interpreted this jurisdictional grant to confer on the district courts "authority to administer . . . the principles of the system of judicial remedies which had been devised and was being administered" by the English High Court of Chancery at the time of the founding. *Atlas Life Ins. Co.* v. *W. I. Southern, Inc.*, 306 U. S. 563, 568 (1939).

As I see it, the preliminary injunction ordered by the District Court was consistent with these principles. We long ago recognized that district courts properly exercise their equitable jurisdiction where "the remedy in equity could alone furnish relief, and . . . the ends of justice requir[e] the injunction to be issued." *Watson* v. *Sutherland*, 5 Wall. 74, 79 (1867). Particularly, district courts enjoy the "historic federal judicial discretion to preserve the situation [through provisional relief] pending the outcome of a case lodged in court." 11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure §2943, p. 79 (1995). The District Court acted in this case in careful accord with these prescriptions, issuing the preliminary injunction only upon well-supported findings that Alliance had "[no] adequate remedy at law," would be "frustrated" in its ability to recover a judgment absent interim injunctive relief, and was "almost certain" to prevail on the merits.

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[2] I agree, for the reasons JUSTICE SCALIA states, see *ante*, at 4-9, that the case is not moot; accordingly, I join Part II of the Court's opinion.

App. to Pet. for Cert. 26a.[3]

The Court holds the District Court's preliminary freeze order impermissible principally because injunctions of this kind were not "traditionally accorded by courts of equity" at the time the Constitution was adopted. *Ante*, at 10; see *ante*, at 25. In my view, the Court relies on an unjustifiably static conception of equity jurisdiction. From the beginning, we have defined the scope of federal equity in relation to the *principles* of equity existing at the separation of this country from England, see, *e.g.*, *Payne* v. *Hook*, 7 Wall. 425, 430 (1869); *Gordon* v. *Washington*, 295 U. S. 30, 36 (1935); we have never limited federal equity jurisdiction to the specific practices and remedies of the pre-Revolutionary Chancellor.

Since our earliest cases, we have valued the adaptable character of federal equitable power. See *Seymour* v. *Freer*, 8 Wall. 202, 218 (1869) ("[A] court of equity ha[s] unquestionable authority to apply its flexible and comprehensive jurisdiction in such manner as might be necessary to the right administration of justice between the parties."); *Hecht Co.* v. *Bowles*, 321 U. S. 321, 329 (1944) ("Flexibility rather than rigidity has distinguished [federal equity jurisdiction]."). We have also recognized that equity must evolve over time, "in order to meet the requirements of every case, and to satisfy the needs of a progressive social condition in which new primary rights and duties are constantly arising and new kinds of wrongs are

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[3] We have on three occasions considered the availability of a preliminary injunction to freeze assets pending litigation, see *Deckert* v. *Independence Shares Corp.*, 311 U. S. 282 (1940); *De Beers Consol. Mines, Ltd.* v. *United States*, 325 U. S. 212 (1945); *United States* v. *First Nat. City Bank*, 379 U. S. 378 (1965). As the Court recognizes, see *ante*, at 14–18, these cases involved factual and legal circumstances markedly different from those presented in this case and thus do not rule out or in the provisional remedy at issue here.

constantly committed." *Union Pacific R. Co.* v. *Chicago, R. I. & P. R. Co.,* 163 U. S. 564, 601 (1896) (internal quotation marks omitted); see also 1 J. Pomeroy, Equity Jurisprudence §67, p. 89 (S. Symons 5th ed. 1941) (the "American system of equity is preserved and maintained . . . to render the national jurisprudence as a whole adequate to the social needs . . . . [I]t possesses an inherent capacity of expansion, so as to keep abreast of each succeeding generation and age."). A dynamic equity jurisprudence is of special importance in the commercial law context. As we observed more than a century ago: "It must not be forgotten that in the increasing complexities of modern business relations equitable remedies have necessarily and steadily been expanded, and no inflexible rule has been permitted to circumscribe them." *Union Pacific R. Co.,* 163 U. S., at 600–601. On this understanding of equity's character, we have upheld diverse injunctions that would have been beyond the contemplation of the eighteenth century Chancellor.[4]

Compared to many contemporary adaptations of equitable remedies, the preliminary injunction Alliance sought

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[4] In a series of cases implementing the desegregation mandate of *Brown* v. *Board of Education,* 347 U. S. 483 (1954), for example, we recognized the need for district courts to draw on their equitable jurisdiction to supervise various aspects of local school administration. See *Freeman* v. *Pitts,* 503 U. S. 467, 491–492 (1992) (describing responsibility shouldered by district courts, "in a manner consistent with the purposes and objectives of [their] equitable power," first, to structure and supervise desegregation decrees, then, as school districts achieved compliance, to relinquish control at a measured pace). Similarly, courts enforcing the antitrust laws have superintended intricate programs of corporate dissolution or divestiture. See *United States* v. *E. I. du Pont de Nemours & Co.,* 366 U. S. 316, 328–331, and nn. 9–13 (1961) (cataloging cases); cf. *United States* v. *American Tel. & Tel. Co.,* 552 F. Supp. 131 (DC 1982), aff'd *sub nom. Maryland* v. *United States,* 460 U. S. 1001 (1983) (approving consent decree that set in train lengthy judicial oversight of divestiture of telephone monopoly).

in this case was a modest measure. In operation, moreover, the preliminary injunction to freeze assets *pendente lite* may be a less heavy-handed remedy than prejudgment attachment, which deprives the defendant of possession and use of the seized property. See Wasserman, Equity Renewed: Preliminary Injunctions to Secure Potential Money Judgments, 67 Wash. L. Rev. 257, 281–282, 323–324 (1992). Taking account of the office of equity, the facts of this case, and the moderate, status quo preserving provisional remedy, I am persuaded that the District Court acted appropriately.[5]

I do not question that equity courts traditionally have not issued preliminary injunctions stopping a party sued for an unsecured debt from disposing of assets pending adjudication. (As the Court recognizes, however, see *ante*, at 10–12, the historical availability of prejudgment freeze injunctions in the context of creditors' bills remains cloudy.) But it is one thing to recognize that equity courts typically did not provide this relief, quite another to conclude that, therefore, the remedy was beyond equity's capacity. I would not draw such a conclusion.

Chancery may have refused to issue injunctions of this sort simply because they were not needed to secure a just result in an age of slow-moving capital and comparatively immobile wealth. By turning away cases that the law courts could deal with adequately, the Chancellor acted to reduce the tension inevitable when justice was divided between two discrete systems. See Wasserman, *supra*, at

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[5] The Court suggests that a "debtor's right to a jury trial on [a] legal claim" counsels against the exercise of equity power here. *Ante*, at 21. But the decision to award provisional relief– whether equitable or legal– *always* rests with the judge. Moreover, the merits of any legal claim will be resolved by a jury, if there is any material issue of fact for trial, and findings made at the preliminary stage do not bind the jury. See Wasserman, 67 Wash L. Rev., at 322–323.

319. But as the facts of this case so plainly show, for creditors situated as Alliance is, the remedy at law is worthless absent the provisional relief in equity's arsenal. Moreover, increasingly sophisticated foreign-haven judgment proofing strategies, coupled with technology that permits the nearly instantaneous transfer of assets abroad, suggests that defendants may succeed in avoiding meritorious claims in ways unimaginable before the merger of law and equity. See Lynn Lopucki, The Death of Liability, 106 Yale L. J. 1, 32–38 (1996). I am not ready to say a responsible Chancellor today would deny Alliance relief on the ground that prior case law is unsupportive.

The development of *Mareva* injunctions in England after 1975 supports the view of the lower courts in this case, a view to which I adhere. As the Court observes, see *ante*, at 19–21, preliminary asset-freeze injunctions have been available in English courts since the 1975 Court of Appeal decision in *Mareva Compania Naviera S. A.* v. *International Bulkcarriers S. A.*, 2 Lloyd's Rep. 509. Although the cases reveal some uncertainty regarding *Mareva*'s jurisdictional basis, the better-reasoned and more recent decisions ground *Mareva* in equity's traditional power to remedy the "abuse" of legal process by defendants and the "injustice" that would result from defendants "making themselves judgment-proof" by disposing of their assets during the pendency of litigation. *Iraqi Ministry of Defence* v. *Arcepey Shipping Co.*, 1 All E. R. 480, 484–487 (1979) (internal citations omitted); see Hetherington, Introduction to the Mareva Injunction, in Mareva Injunctions 1, 10–13, and n. 95, 20 (M. Hetherington ed. 1983) (explaining the doctrinal basis of this jurisdictional theory and citing cases adopting it). That grounding, in my judgment, is secure.

III

A

The Court worries that permitting preliminary injunctions to freeze assets would allow creditors, "'on a mere statement of belief that the defendant can easily make away with or transport his money or goods, [to] impose an injunction on him, indefinite in duration, disabling him to use so much of his funds or property as the court deems necessary for security or compliance with its possible decree.'" *Ante,* at 19 (quoting *De Beers Consol. Mines, Ltd.* v. *United States,* 325 U. S. 212, 222 (1945)). Given the strong showings a creditor would be required to make to gain the provisional remedy, and the safeguards on which the debtor could insist, I agree with the Second Circuit "that this 'parade of horribles' [would] not come to pass." 143 F. 3d 688, 696 (1998).

Under standards governing preliminary injunctive relief generally, a plaintiff must show a likelihood of success on the merits and irreparable injury in the absence of an injunction. See *Doran* v. *Salem Inn, Inc.,* 422 U. S. 922, 931 (1975). Plaintiffs with questionable claims would not meet the likelihood of success criterion. See 11A Wright, Miller, & Kane, Federal Practice and Procedure §2948.3, at p. 184–188 (as a general rule, plaintiff seeking preliminary injunction must demonstrate a reasonable probability of success). The irreparable injury requirement would not be met by unsubstantiated allegations that a defendant may dissipate assets. See *id.,* §2948.1, at 153 ("Speculative injury is not sufficient."); see also Wasserman, *supra,* at 286–305 (discussing application of traditional preliminary injunction requirements to provisional asset-freeze requests). As the Court of Appeals recognized, provisional freeze orders would be appropriate in damages actions only upon a finding that, without the freeze, "the movant would be unable to collect [a money] judgment." 143 F. 3d, at 697. The preliminary asset-

freeze order, in short, would rank and operate as an extraordinary remedy.

Federal Rule of Civil Procedure 65(c), moreover, requires a preliminary injunction applicant to post a bond "in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined." As an essential condition for a preliminary freeze order, a district court could demand sufficient security to ensure a remedy for wrongly enjoined defendants. Furthermore, it would be incumbent on a district court to "match the scope of its injunction to the most probable size of the likely judgment," thereby sparing the defendant from undue hardship. See *Hoxworth* v. *Blinder, Robinson & Co.*, 903 F. 2d 186, 199 (CA3 1990); cf. App. to Pet. for Cert. 53a (District Court expressed readiness to modify the preliminary injunction if necessary to GMD's continuance in business).

The protections in place guard against any routine or arbitrary imposition of a preliminary freeze order designed to stop the dissipation of assets that would render a court's judgment worthless. Cf. *ante*, at 19, 24–25. The case we face should be paradigmatic. There was no question that GMD's debt to Alliance was due and owing. And the short span– less than four months– between preliminary injunction and summary judgment shows that the temporary restraint on GMD did not linger beyond the time necessary for a fair and final adjudication in a busy but efficiently operated court. Absent immediate judicial action, Alliance would have been left with a multimillion dollar judgment on which it could collect not a penny.[6] In

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[6] Before the District Court, Alliance frankly acknowledged the existence of other, unrepresented creditors. While acting to protect its own interest, Alliance asked the District Court to fashion relief that "does

my view, the District Court properly invoked its equitable power to avoid that manifestly unjust result and to protect its ability to render an enforceable final judgment.

At the hearing on the preliminary injunction, the District Judge asked: "We have got a case where there is no defense presented, why shouldn't I be able to provide [Alliance] with [injunctive] relief?" App. to Pet. for Cert. 34a. Why, the District Judge asked, should GMD be allowed "to use the process of the court to delay entry of a judgment as to which there is no defense? Why is that equitable?" The Court gives no satisfactory answer.

B

Contrary to the Court's suggestion, see *ante*, at 24, this case involves no judicial usurpation of Congress' authority. Congress, of course, can instruct the federal courts to issue preliminary injunctions freezing assets pending final judgment, or instruct them not to, and the courts must heed Congress' command. See *Guaranty Trust Co.* v. *York*, 326 U. S. 99, 105 (1945) ("Congressional curtailment of equity powers must be respected."). Indeed, Congress has restricted the equity jurisdiction of federal courts in a variety of contexts. See *Yakus* v. *United States*, 321 U. S. 414, 442, n. 8 (1944) (cataloging statutes regulating federal equity power).

The Legislature, however, has said nothing about preliminary freeze orders. The relevant question, therefore,

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not just directly benefit us, but benefits . . . the whole class of creditors" by creating "an even playing field" among creditors. App. to Pet. for Cert. 46a; see also *id.*, at 45a (Alliance suggests that District Court direct GMD to set up a trust in compliance with Mexican law in order to oversee distributions to creditors). The Court supplies no reason to think that Alliance should have abandoned its rock-solid claim just because other creditors, for whatever reason, failed to bring suit. But cf. *ante*, at 23 ("respondents did not represent all of the holders of the Notes; they were an active few who sought to benefit at the expense of the other [creditors]").

is whether, absent congressional direction, the general equitable powers of the federal courts permit relief of the kind fashioned by the District Court. I would find the default rule in the grand aims of equity. Where, as here, legal remedies are not "practical and efficient," *Payne*, 7 Wall., at 431, the federal courts must rely on their "flexible jurisdiction in equity . . . to protect all rights and do justice to all concerned," *Rubber Co.* v. *Goodyear*, 9 Wall., 788, 807 (1870). No countervailing precedent or principle holds the federal courts powerless to prevent a defendant from dissipating assets, to the destruction of a plaintiff's claim, during the course of judicial proceedings. Accordingly, I would affirm the judgment of the Court of Appeals and uphold the District Court's preliminary injunction.