No. 98-231

In the Supreme Court of the United States

OCTOBER TERM, 1998

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether a federal district court has the power to enjoin a defendant that is threatened with insolvency, or is likely to dissipate its assets, from transferring assets that are not the specific subject of the suit in which the injunction is entered, if such an order is necessary to preserve the plaintiff's ability to collect a money judgment that is likely to be entered in its favor.

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INTEREST OF THE UNITED STATES

This case involves the authority of a federal district court to issue a preliminary injunction prohibiting a defendant from transferring or dissipating assets pending final judgment where the suit seeks monetary relief, but not necessarily the return or transfer of specific monetary assets covered by the injunction. Preserving the ability of federal courts to render enforceable monetary judgments is a matter of considerable importance to the smooth flow of interstate and foreign commerce. In addition, the United States often seeks damages, penalties, or other monetary relief from parties who have violated federal law, and who may attempt to conceal or dissipate their assets. The United States accordingly has a direct interest in the continued recognition

of courts' equitable authority to grant appropriate preliminary relief to ensure the enforceability of money judgments.

STATEMENT

1. Petitioner Grupo Mexicano de Desarrollo, S.A. (GMD), is the holding company for a consortium of Mexican construction firms. The remaining petitioners are subsidiaries of GMD. Pet. ii; Pet. App. 3a. From 1990 to 1994, petitioners participated in a program under which the Mexican government granted concessions to operate intercity toll roads to companies that would arrange private financing for construction of the roads. The concessionaires then hired petitioners and others to build the roads. Revenues from the toll roads fell below expectations, however, and the concessionaires were ultimately unable to pay the construction bills rendered by petitioners and others. Pet. App. 3a; Pet. 4.

In early 1994, petitioner GMD issued $250 million of unsecured notes, guaranteed by the other petitioners (the GMD Notes). Pet. App. 3a. Respondents in this case are United States-based investment funds that purchased some $75 million of the GMD Notes. Later, as the concessionaires failed to pay their bills, petitioners experienced serious financial difficulties. In its annual report filed with the Securities and Exchange Commission in June 1997, GMD admitted that its liabilities exceeded its assets. In August 1997, both GMD and its guarantors defaulted on their obligation to make a periodic interest payment on the notes. *Id.* at 3a-4a.

Some days later, the Government of Mexico implemented a Toll Road Rescue Program, under which it assumed control of the roads and promised to issue government-guaranteed notes (the Government Notes) to petitioners and other construction contractors to compensate them for a portion of the amount left unpaid by the concessionaires. In its financial statements for the third quarter of 1997, GMD

disclosed that it expected to receive some $309 million worth of Government Notes. Pet. App. 4a; Pet. 4-5.

Apart from the GMD Notes, petitioners owed more than $450 million to other creditors, including the Mexican government, Mexican financial institutions, trade creditors, and former employees. Petitioners undertook negotiations with their creditors, including respondents, to settle their outstanding financial obligations. GMD's third-quarter statements for 1997 disclosed that it had a negative net worth of some $214 million, and that it had already assigned its right to receive some $117 million worth of Government Notes to satisfy Mexican tax liabilities and the cost of severance packages for terminated employees. Respondents thereafter exercised their contractual right (in view of petitioners' default) to demand immediate payment on the GMD Notes, and brought this suit in the United States District Court for the Southern District of New York to enforce that demand, seeking damages for breach of contract. Pet. App. 4a- 5a.

Respondents' complaint also alleged that GMD was either insolvent or in immediate danger of becoming insolvent; that the Government Notes were its "most significant liquid asset"; that it was in the process of favoring Mexican creditors over others, including respondents, by assigning its right to receive the government notes; and that distribution of the Government Notes to favored creditors would irreparably harm respondents by "making any judgment for breach of contract rendered in [respondents'] favor uncollectible." J.A. 26-30. On the basis of those allegations, respondents asked the district court to issue a preliminary injunction prohibiting petitioners from "dissipating, disbursing, transferring, conveying, encumbering or otherwise disposing of" the Government Notes pending resolution of their suit. J.A. 31.

The district court granted a temporary restraining order and set a hearing on respondents' request for a preliminary injunction. Pet. App. 5a. At that hearing, petitioners con-

ceded that they had already assigned, to creditors other than respondents, considerably more than $200 million of the Government Notes that they expected to receive. *Id.* at 5a-6a. Respondents also produced evidence suggesting that petitioners planned to make additional assignments, leaving only $5.5 million worth of Government Notes available to satisfy debts to non-Mexican creditors, including the $75 million debt to respondents. *Id.* at 6a, 32a-34a. After argument (see *id.* at 29a-54a; J.A. 70-79), the district court concluded that respondents were "almost certain" to prevail on the merits of their contract claim. Pet. App. 26a. The court also found that GMD had "stated that it plan[ned] to use the Government Notes to satisfy its Mexican creditors to the exclusion of [respondents] and other holders of the [GMD] Notes," and that, in light of petitioners' financial condition and its assignments to other creditors, a judgment in favor of respondents in the present action "[would] be frustrated." On that basis, the court held that respondents had "demonstrated that, in the absence of the requested preliminary injunction, they [would] suffer irreparable injury and [would] not have an adequate remedy at law." *Ibid.* The court accordingly granted the preliminary injunction. *Ibid.* At petitioners' request, however, the court made clear in its order that the injunction did not "prohibit [petitioners] from commencing any insolvency proceedings under any applicable law." *Id.* at 27a.

3. The court of appeals affirmed. Pet. App. 1a-19a. The court rejected (*id.* at 6a-9a) petitioners' argument that Rule 64 of the Federal Rules of Civil Procedure—which permits parties in federal court to invoke pre-judgment remedies (such as arrest, attachment or garnishment) "providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action * * * under the circumstances and in the manner provided by the law of the state in which the district court is

held" (Fed. R. Civ. P. 64)—impliedly precludes a district court from granting any other form of preliminary relief unless the plaintiff asserts a specific equitable interest in a particular asset held by the defendant. The court held instead that the remedies made available by Rule 64 and the court's general equitable power to grant preliminary injunctive relief, in accordance with the procedures set out in Rule 65, "to preserve the status quo between parties pending a final determination of the merits" (Pet. App. 7a), are "complementary, not mutually exclusive" (*id.* at 6a). Although the court acknowledged that New York law did not authorize the issuance of a preliminary injunction in "an action for a sum of money only," and that respondents could not attach petitioners' interest in property held outside the State, it held that those circumstances did not "render the court powerless." *Id.* at 8a. Rather, "[i]f the court has personal jurisdiction over the defendant, and use of the court's injunctive power is appropriate, the court may order the defendant to bring the assets to New York or restrain the use of the assets." *Ibid.*

The court of appeals recognized that this Court has not squarely addressed the question "whether the district court may issue an injunction to protect the plaintiff's right to recover monetary damages when there is a threat of defendant's insolvency or its dissipation of assets *not* directly involved in the pending litigation." Pet. App. 9a. The court nonetheless "read [this Court's] precedents to suggest that a preliminary injunction should be available under those circumstances." *Ibid.*

The court rejected petitioners' assertion that *De Beers Consolidated Mines, Ltd.* v. *United States*, 325 U.S. 212 (1945), "bars the use of preliminary injunctions to freeze unrelated assets in any case seeking only monetary relief." Pet. App. 9a-10a. It agreed instead with the Third Circuit's conclusion that *De Beers* held only that "a defendant's money

may not be encumbered by a preliminary injunction when the final merits judgment sought by plaintiffs cannot involve a transfer of money from defendants to plaintiffs," and was therefore "simply inapplicable to cases in which a litigant seeks money damages." *Id.* at 10a-11a (quoting *Hoxworth* v. *Blinder, Robinson & Co.*, 903 F.2d 186, 197 (1990)). Moreover, after analyzing this Court's decisions in *Deckert* v. *Independence Shares Corp.*, 311 U.S. 282 (1940), and *United States* v. *First National City Bank*, 379 U.S. 378 (1965), the court concluded that they "endorse[d] the district court's exercise of general equitable power to ensure the preservation of an adequate remedy." Pet. App. 12a.

In view of this Court's decisions, its own precedents, and cases from other circuits, the court of appeals "join[ed] the majority of circuits in concluding that a district court has authority to issue a preliminary injunction where the plaintiffs can establish that money damages will be an inadequate remedy due to impending insolvency of the defendant or that defendant has engaged in a pattern of secreting or dissipating assets to avoid judgment." Pet. App. 15a (quoting *In re Estate of Marcos*, 25 F.3d 1467, 1480 (9th Cir. 1994), cert. denied, 513 U.S. 1126 (1995)). Although the court noted "[this] Court's warning in *De Beers*" that injunctive relief should not be "too freely granted," it remained "confident" that "[t]he defendant's rights are adequately protected [by] the traditional requirements for obtaining equitable relief[, which] must be met before a district court may issue an injunction." *Ibid.*

Finally, the court of appeals determined that the district court did not abuse its discretion in issuing a preliminary injunction under the circumstances presented in this case. Pet. App. 15a-18a. Although it recognized that harm ordinarily is not "irreparable," as is required to justify preliminary relief, unless it is "a kind of injury for which a money judgment cannot compensate," the court held that a "district

court may properly find that the threatened injury would be irreparable if, in the absence of an injunction, the movant would be unable to collect such a judgment." *Id.* at 17a. Concluding that the district court's factual findings were supported by the record, and were sufficient to justify a grant of preliminary relief, the court of appeals affirmed the entry of the preliminary injunction. *Id.* at 17a-18a.

SUMMARY OF ARGUMENT

Federal district courts now exercise all of the powers traditionally possessed by the historically separate courts of law and equity. Petitioners contend that because a claim for damages for breach of contract would once have been brought in a court of law, whereas an injunction restraining the dissipation of assets could only have been obtained from a court of equity, the district court here lacked the power to issue such an injunction on a preliminary basis, before it had the opportunity to reach and decide respondents' legal claim on the merits. That contention is not without some historical force, although there were exceptions to the general rule that might have been applicable in a case such as this. In the modern context, however, there is no functional reason to invoke a rule that, if applicable at all, had its origin in a system of separate and jealously independent courts that has long since ceased to exist.

The relevant historical principles of equity are, instead, those that govern the granting of any form of injunctive relief. Those principles, and particularly the requirement that in the absence of an injunction the moving party will likely suffer unjust and irreparable harm, will serve to preclude any unwarranted use of preliminary injunctions in this context, as in any other.

Petitioners suggest that the result they advocate is compelled by Rule 64 of the Federal Rules of Civil Procedure and is supported by this Court's cases. But Rule 64 merely

makes certain state-law prejudgment remedies available in federal court; it does not purport to prohibit the exercise, under Rule 65, of a district court's general equitable powers in situations in which the remedies incorporated by Rule 64 prove unavailable or inadequate. And this Court's cases, while they do not resolve the issue, support the position advocated by respondents.

Finally, we note that the federal government often seeks various forms of monetary relief through civil actions, and that the ability to obtain prejudgment orders preventing defendants from dissipating or secreting assets is therefore important to the effective enforcement of federal law. Whatever the outcome of this case with regard to the private parties involved, we respectfully request that the Court take account of the important public interest in the availability of prejudgment orders in government litigation.

ARGUMENT

A FEDERAL COURT MAY ISSUE A PRELIMINARY INJUNCTION TO PROTECT A PLAINTIFF'S RIGHT TO RECOVER MONETARY RELIEF WHEN ENFORCEMENT OF THE COURT'S FINAL JUDGMENT WILL OTHERWISE LIKELY BE FRUSTRATED BY THE DEFENDANT'S INSOLVENCY OR DISSIPATION OF ASSETS

A. After The Merger Of Law And Equity, There Is No Functional Justification For Denying District Courts The Power To Grant Equitable Relief To Ensure The Ultimate Enforceability Of A Judgment For Money Damages

A modern federal district court combines at one bench all of the powers traditionally exercised, in Anglo-American practice, by the once-separate courts of "law" and "equity." See generally Fed. R. Civ. P. 1. Those bringing civil causes before the court now do so under "one form of action." Fed.

R. Civ. P. 2. One result of those procedural developments is that a party seeking a monetary recovery that would once have been awarded by a court of law, like the contract damages at ultimate issue in the present case, may without difficulty include in its pleadings a request for a form of preliminary relief, such as an injunction requiring the defendant to conserve, *pendente lite*, assets not themselves otherwise subject to the jurisdiction of the court, that might once have been awarded only by a chancellor in equity. We submit that a district court has the power to issue such an injunction in appropriate circumstances, in order to protect both the interests of the litigants before it and its own ability to render a judgment that may be effectively enforced.[1]

On the facts of this case, as described by the courts below (Pet. App. 3a-6a, 23a-26a), respondents were presented with a simple practical problem. They had invested a significant amount of money in bonds issued by a foreign corporation, which had defaulted on its obligations. The issuer had agreed to submit itself to the jurisdiction of United States courts for purposes of enforcement of those obligations, but it had no assets located within the jurisdiction of those courts. See Pet. Br. 2 n.2. Moreover, respondents had reason to believe that the issuer had only one substantial liquid asset, which was markedly insufficient to cover all of its

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[1] While this case was pending on appeal, the district entered judgment in favor of respondents for a sum certain, and ordered petitioners to assign to respondents receivables or Government Notes of sufficient value to satisfy the judgment. Pet. App. 58a-59a; J.A. 110-112. The court further converted the preliminary injunction restraining transfer or dissipation of the Government Notes into a permanent injunction pending compliance with the assignment order. Pet. App. 59a; J.A. 112. Petitioners appealed those orders (J.A. 113), and the court of appeals stayed the assignment order pending appeal (J.A. 115-116). Although respondents suggested to the court of appeals that petitioners' challenge to the preliminary injunction had become moot, the court rejected that suggestion. J.A. 117-118; see also Pet. 10; Br. in Opp. 4 n.3. We do not address that question.

outstanding debts; and that it was dissipating that asset by making preferential transfers that would fully discharge its debts to certain favored creditors, while leaving respondents and other creditors with worthless paper claims.

Faced with those circumstances, respondents invoked the jurisdiction of a federal district court.[2] The core of their complaint was a straightforward "legal" claim seeking money damages for breach of contract. See J.A. 30. In order to protect their ability to recover on that claim, however, and on the basis of their detailed allegations concerning the financial condition of the issuer and its ongoing transfer of Government Notes to other creditors, respondents also asked the court to exercise its equitable authority to enjoin the defendant from making further such transfers, pending the reduction of respondents' contract claim to an enforceable judgment. *Ibid.*

Petitioners concede (Br. 11) that a pre-judgment restraint on a defendant's use of assets may issue "to preserve a final equitable remedy of restitution or constructive trust when the plaintiff has an equitable claim to a specific *res* or thing in the possession of the defendant." And petitioners do not present any issue concerning a district court's powers of enforcement once it has rendered a decision on the merits of a legal claim.[3] They contend, however, that because respondents' contract claim is one that would historically have been brought in a court of law, whereas a preliminary injunction

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[2] There is no dispute that the district court had both personal and subject-matter jurisdiction. See Pet. Br. 2 n.2.

[3] See Pet. App. 33a-34a; Fed. R. Civ. P. 69(a); N.Y. C.P.L.R. 5222 (McKinney 1998) (restraint on defendant's "sale, assignment, transfer or interference with" assets, pending satisfaction of judgment, issuable as matter of course), 5229 (court may enjoin defendant from transferring assets as soon as verdict or decision has been rendered, without awaiting formal judgment). See also *Riggs* v. *Johnson County*, 73 U.S. (6 Wall.) 166, 167 (1867); *Wayman* v. *Southard*, 23 U.S. (10 Wheat.) 1, 23 (1825).

could only have been obtained from a court of equity, the district court here lacked the power to restrain petitioners' use of the Government Notes before it had reached and decided respondents' contract claim on the merits.

That contention is not without some historical force. It is true, for instance, that traditionally a "creditor's bill," seeking equity's aid in the enforcement of a legal debt, would generally be entertained only if the debt had been confessed, or if the creditor had already obtained a legal judgment establishing the validity of his claim and attempted to execute that judgment. See, *e.g.*, *Hollins* v. *Brierfield Coal & Iron Co.*, 150 U.S. 371, 378-381 (1893); *Scott* v. *Neely*, 140 U.S. 106, 113 (1891); *Smith* v. *Railroad Co.*, 99 U.S. 398, 401 (1878); *Case* v. *Beauregard*, 99 U.S. 119, 125, 129 (1878); 4 S. Symons, *Pomeroy's Equity Jurisprudence* § 1415 (5th ed. 1941) (Pomeroy (5th ed.)). As this Court explained, however, such requirements were "only evidence that [a plaintiff's] legal remedies ha[d] been exhausted, or that he [was] without remedy at law. They [were] not the only possible means of proof. The necessity of resort to a court of equity [might] be made otherwise to appear. Accordingly the rule, though general, [was] not without many exceptions. Neither law nor equity require[d] a meaningless form." *Case* v. *Beauregard*, 101 U.S. 688, 690 (1879); see 5 J. Pomeroy, *Equity Jurisprudence and Equitable Remedies* § 2307, at 5114 n.75 (4th ed. 1919) (quoting *Austin, Nichols & Co.* v. *Morris*, 23 S.C. 393, 402 (1885)). Pomeroy notes two such exceptions that might have been relevant in a case like this one: "Whether the debtor's insolvency [would] obviate the necessity of proceeding at law * * * [was] unsettled," and "under certain circumstances equity [would] lend its aid to set aside fraudulent conveyances of property and apply it to a creditor's demands, by a proceeding that [might] be called 'equitable attachment,' without a judgment having been obtained, where the debtor ha[d] absconded, or removed from

or reside[d] out of the state[,] * * * and to reach money of an absconding debtor not subject to garnishment at law." Pomeroy (5th ed.) § 1415, at 1067 n.12; see *Case*, 101 U.S. at 690-692.

Our point is not to resolve, or to suggest that this Court resolve, the question whether a court sitting in equity a hundred or more years ago would have exercised its considerable discretion to apply (or create), on the facts of this case, an exception in favor of respondents to a rule that might have favored petitioners. It is rather to suggest that any such debate is an arid one. In particular, it is well to recall that many prudential restrictions on the use of equity powers arose in practice from the historical circumstance that actions at law and suits in equity were originally entertained by different courts, which were at once both jealous of their own prerogatives and conscious of the need to preserve comity by observing certain boundaries. See, *e.g.*, 1 D. Dobbs, *Law of Remedies* § 2.5(1), at 123-124 (2d ed. 1993) ("Equity's expansive power ignited opposition from law court judges * * *. When the equity courts did *not* create a new right, but instead merely added a remedy to rights already recognized by the law courts, they prudently stated the" rule that equity would not intervene unless legal remedies were inadequate.). Thus, for example, it is not surprising that courts of equity would have been reluctant to grant pre-judgment injunctions to aid the collection of legal debts, where doing so might trench unacceptably on the jurisdiction of the law courts to decide which debts would be recognized as "legal" and which would not, and to afford the primary means for the securing and enforcement of their own judgments.

The functional need for such rules of comity lessened considerably when, as in the federal judicial system, law and equity came to be administered by the same courts, albeit through separate forms of action. It receded still further

when the two were essentially merged into one civil action proceeding under one common set of procedural rules. As a result of that merger, federal "courts now can give specific relief without being concerned about potential interference with another independent system of courts or the niceties of equity jurisdiction." 4 C. Wright & A. Miller, *Federal Practice and Procedure* § 1043, at 143 (2d ed. 1987). Indeed, ideally, "the merger of law and equity and the abolition of the forms of action furnish a single uniform procedure by which a litigant may present his claim in an orderly manner to a court empowered to give him whatever relief is appropriate and just." *Id.* at 138 & n.1.

There would be little functional reason now to adopt a rule —the unavailability of a pre-judgment injunction to preserve the ability to render an effective legal judgment—the major effect of which is to police a boundary that long since ceased to exist. That conclusion is, moreover, reenforced by the difficulty of ascertaining whether, in pre-merger practice, the "rule" that petitioners invoke would or would not actually have been applied under any given set of circumstances. The relevant question today is whether it makes any sense to deny a federal district court, fully invested with both legal and equitable powers, the authority to invoke an otherwise appropriate pre-judgment remedy, simply because of the different historical labels attached to that remedy and to the lawsuit's central claim. The answer is that in the absence of some compelling authority, it does not.

We do not mean to suggest that history is irrelevant to the proper modern application of equitable principles. It is not, any more than the history of tort or contract law is irrelevant to the understanding and application of their respective modern rules. In particular, the traditional requirements for the issuance of any preliminary injunction apply equally in this context. Thus, in order to obtain a pre-judgment order restraining a defendant from dissipating its

assets, a private plaintiff will always be required to show not only that it is likely to succeed on the merits of its claim, but also that it will suffer "irreparable injury" in the absence of an injunction; and the terms of the injunction must be tailored to serve its purposes without imposing undue hardship on the defendant. See, *e.g.*, *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 931 (1975); Pet. App. 16a; *Hoxworth* v. *Blinder, Robinson & Co.*, 903 F.2d 186, 199 (3d Cir. 1990) (reversing grant of preliminary injunction because district court did not "match the scope of its injunction to the most probable size of the likely judgment"). The irreparable injury requirement, in particular, serves as a significant check on the availability of preliminary relief where a plaintiff seeks primarily money damages, because, as the court of appeals noted in this case (Pet. App. 16a-17a), an injury is rarely "irreparable" if it can be remedied by a money judgment. See *Sampson* v. *Murray*, 415 U.S. 61, 89-92 (1974).[4]

Moreover, even where the prerequisites for relief are met, the decision whether or not to issue a preliminary injunction, and on what terms, rests in the sound discretion of the district court. See, *e.g.*, *Doran*, 422 U.S. at 931-932; *Brotherhood of Locomotive Eng'rs* v. *Missouri-Kansas-Texas R.R.*, 363 U.S. 528, 531-532 (1960); *Yakus* v. *United States*, 321 U.S. 414, 440 (1944); *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329-330 (1944). In exercising that discretion, the district court

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[4] As the court also noted, however, the requirement may be met where, as here, the plaintiff can make a persuasive showing that, in the absence of an injunction, any ultimate judgment is likely to be uncollectible. Pet. App. 17a; see also, *e.g.*, *Hoxworth*, 903 F.2d at 197; *American Hosp. Supply Corp.* v. *Hospital Prods. Ltd.*, 780 F.2d 589, 596 (7th Cir. 1986); cf. *Sampson*, 415 U.S. at 92 n.68 (although temporary loss of wages because of wrongful discharge would not normally be "irreparable" in view of possible monetary recovery, "cases may arise in which the circumstances * * * may so far depart from the normal situation that irreparable injury might be found").

may and must take appropriate account of the special circumstances that attend each case. See *Yakus*, 321 U.S. at 440 (equity court should seek to "avoid * * * inconvenience and injury so far as may be, by attaching conditions to the award"); *Hecht Co.*, 321 U.S. at 329 ("The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it.").

In this case, for example, the fact that petitioners and their assets were located outside the United States reenforced, on the one hand, respondents' argument that other prejudgment remedies (such as attachment of assets within the court's jurisdiction) would not be effective to safeguard their interest; but it also required judicial sensitivity in framing an injunctive order to avoid any unnecessary interference with obligations imposed on petitioners under Mexican law. See, *e.g.*, *United States* v. *First Nat'l City Bank*, 379 U.S. 378, 384-385 (1965) (noting need for sensitivity and flexibility where freeze order affected activity abroad); compare *Meredith* v. *Winter Haven*, 320 U.S. 228, 235-236 (1943) (because exercise of equity jurisdiction is discretionary, federal courts may decline to exercise it in various situations touching the government or laws of the States). Similarly, because respondents' allegations that petitioner GMD was insolvent, and that it was making preferential transfers of its assets to other creditors, raised obvious questions about the possibility of formal insolvency proceedings, it would have been inadvisable for the district court to enter an injunction that might have been deemed to interfere with the commencement or orderly conduct of such proceedings. The district court took account of both the international and the insolvency aspects of this case, by declining respondents' request that it order petitioners to create a trust under Mexican law, and by accepting respondents' suggestion to

include in the injunction a provision specifying that it did not prohibit petitioners from commencing insolvency proceedings "under any applicable law." Pet. App. 27a; see *id.* at 30a-31a, 36a-39a, 44a, 51a; J.A. 72-75, 77, 79.[5]

Historical principles that continue to have present application—such as those requiring a showing of irreparable harm and directing the district court to exercise sound discretion in determining whether or not to grant, and how to frame, a preliminary injunction—generally also continue to have articulable functional justifications. See, *e.g.*, *American Hosp. Supply Corp.* v. *Hospital Prods. Ltd.*, 780 F.2d 589, 593-594 (7th Cir. 1986). Petitioners offer no such justification in support of the rule for which they argue here. By contrast, one may easily enumerate various functional reasons for confirming the power of courts to issue preliminary injunctions under circumstances like those in this case. They would include: simplicity and uniformity of procedure; preservation of the court's ability to render a judgment that will prove enforceable; prevention of inequitable conduct on the part of defendants; avoiding disparities between defendants that have assets within the jurisdiction (which would be subject to pre-judgment attachment "at law") and those that do not; avoiding the necessity for plaintiffs to locate a forum in which the defendant has substantial assets; and, in an age of easy global mobility of capital, preserving the attractiveness of the United States as a center for financial transactions like the issuance of the bonds at issue in this case, by assuring potential creditors that they will be able to obtain

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[5] The court also heard argument at some length concerning the limits of the injunction, and whether it would be desirable to include a provision allowing for disbursements in the ordinary course of business. See generally Pet. App. 38a-54a; J.A. 70-79. The court made clear that it stood ready to entertain requests from petitioners, on an emergency basis if necessary, should there be a need to modify the terms of the injunction. See J.A. 77-79.

effective remedies in our courts in the event of a default. See also 11A C. Wright et al., *Federal Practice and Procedure* § 2947, at 123 (2d ed. 1995) ("[T]he most compelling reason in favor of entering [a preliminary injunction] is the need to prevent the judicial process from being rendered futile by defendant's action or refusal to act.").[6] In this case, function favors respondents.

B. Neither The Federal Rules Nor This Court's Cases Deny District Courts The Power To Enter Preliminary Injunctions In Actions For Money Damages

Petitioners argue that adoption of the rule they advocate here—whatever its functional disadvantages—is compelled either by Rule 64 of the Federal Rules of Civil Procedure (Br. 18-20), or by this Court's cases (Br. 10-14). Neither authority can bear the weight petitioners would place upon it.

1. Petitioners contend that Rule 64 establishes the state-law remedies it incorporates as the exclusive means of obtaining prejudgment relief in federal court "for the purpose of securing satisfaction of the judgment ultimately to be entered in the action." As they concede (Br. 18), however, nothing in the text of the Rule conveys that meaning. The Rule's language is, instead, permissive and supplementary, providing that the slate of ordinary prejudgment remedies provided by local law, with which district judges and many of the lawyers who practice before them are presumptively most familiar, shall also be "available" for use in the federal

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[6] It is instructive that, as petitioners note, the English chancery courts are now authorized to grant injunctions of the sort at issue here. See Pet. Br. 16-17 & n.8. That change confirms both the functional value of such injunctions, particularly in commercial litigation (see *id.* at 17 n.8), and "the inestimably valuable flexibility and capacity for growth and adaption to newly emerging problems which the principles of equity have supplied in our legal system." *Bereslavsky* v. *Caffey*, 161 F.2d 499, 500 (2d Cir.), cert. denied, 332 U.S. 770 (1947).

venue. Fed. R. Civ. P. 64. The Rule nowhere suggests that the state remedies so incorporated are to be exclusive of any federal remedy that may otherwise apply; indeed, to the contrary, it provides that federal law, and the Federal Rules, *continue* to apply in the federal action, and specifically notes that certain procedures that may be required by state law, such as the bringing of a separate action to secure a particular remedy, do not apply. *Ibid.*

We may assume that when one of the remedies made available by Rule 64 is provided by the relevant state law and is adequate to its purpose, parties seeking a money judgment in federal court ordinarily must avail themselves of that remedy and comply with its attendant forms and procedures. But if a state-law remedy is unavailable or inadequate under the circumstances of a particular case, a federal court is not left powerless to protect the parties before it and its own ultimate ability to enter an effective judgment. See 28 U.S.C. 1651 (federal courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law"); *Hoxworth*, 903 F.2d at 197 n.15; cf. *Wayman* v. *Southard*, 23 U.S. (10 Wheat.) 1, 23 (1825) (Marshall, C.J.) (All Writs Act applies to both pre- and post-judgment orders). It is wholly consonant with tradition to observe that where the prejudgment remedies provided under Rule 64 prove unavailable or inadequate, a party may turn to equity—in this case, to the judicial injunctive power recognized by Rule *65* of the Federal Rules — to seek and obtain appropriate judicial protection.[7]

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[7] The United States ordinarily does not follow state procedures when it seeks a prejudgment seizure, because the Federal Debt Collection Procedures Act (FDCPA), 28 U.S.C. 3001 *et seq.*, by its terms "provides the exclusive civil procedures for the United States * * * to obtain, before judgment on a claim for a debt, a remedy in connection with such claim." 28 U.S.C. 3001(a). The term "debt" is defined broadly to include most monetary claims, including claims for fines, penalties, or restitution.

2. Although they recognize (Br. 10) that the question is an open one, petitioners argue that this Court's decisions "suggest" (Br. 14) that the district court lacked the authority to grant the preliminary relief at issue here. Like the court of appeals (Pet. App. 9a), we find in the same cases the opposite suggestion.

Petitioners rely principally on *De Beers Consolidated Mines, Ltd.* v. *United States*, 325 U.S. 212 (1945), which reversed a grant of preliminary relief entered in an action by the United States against several foreign corporations alleging violation of the antitrust laws. The order obtained by the government prohibited the defendants from "withdrawing from the country any property located in the United States, and from selling, transferring or disposing of any property in the United States 'until such time as [the trial court] shall have determined the issues of this case and defendant corporations shall have complied with its orders.'" *Id.* at 215. The Court observed, however, that the only *permanent* relief authorized by the laws under which the government brought suit was an injunction against "future continuance of actions or conduct intended to monopolize or restrain commerce." *Id.* at 219-220. The Court concluded that the injunction that had issued was impermissible because, although "[a] preliminary injunction is always appropriate to grant intermediate relief of the same character as that which may

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28 U.S.C. 3002(3). The FDCPA does not, however, "supersede or modify the operation of * * * any Federal law authorizing, or any inherent authority of a court to provide, injunctive relief." 28 U.S.C. 3003(c)(7). Where the FDCPA does not apply or does not provide an effective remedy—for example, where a party's suspected concealment of assets makes it impossible for the government to provide "a reasonable description of the property to be attached," 28 U.S.C. 3102(c)(3)(E)—the United States must rely on the All Writs Act, 28 U.S.C. 1651, or on the "inherent authority of a [district] court to provide[] injunctive relief," as permitted by Section 3003(c)(7), in endeavoring to protect the ultimate enforceability of a potential monetary award.

be granted finally," under the circumstances an injunction prohibiting the transfer of assets "deal[t] with a matter lying wholly outside the issues in the suit," and interfered with the defendants' use of "property which in no circumstances [could] be dealt with in any final injunction that [might] be entered." *Id.* at 220.

The Court noted that the preliminary injunction purportedly sought "to provide security for the performance of a future order which may be entered by the court." 325 U.S. at 219. Because, however, the "future order" authorized as final relief in the case would not include an order to pay money, restraint of the defendants' assets could only be defended "as a method of providing security for compliance with other process which conceivably may be issued for satisfaction of a money judgment for contempt." *Id.* at 220. The asserted need for the injunction was therefore necessarily predicated on the likelihood not only that the government would prevail on the merits, but also that the defendants would violate the court's final injunction, "that a proceeding may be instituted for contempt and will result adversely to the defendants[,] that a fine may be imposed[,] that the defendants may neglect or refuse to pay the fine[, and] that an execution issued for the collection of the fine * * * may be ineffectual to seize property or money of the defendants in liquidation of the fine." *Id.* at 219. If, the Court remarked, a preliminary injunction could issue to insure against such a speculative potential harm, then:

> Every suitor who resorts to chancery for any sort of relief by injunction may, on a mere statement of belief that the defendant can easily make away with or transport his money or goods, 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. And, if so, it

> is difficult to see why a plaintiff in any action for a personal judgment in tort or contract may not, also, apply to the chancellor for a so-called injunction sequestrating his opponent's assets pending recovery and satisfaction of a judgment in such a law action. No relief of this character has been thought justified in the long history of equity jurisprudence.

Id. at 222-223.

As the Court below recognized, *De Beers* held only that "a defendant's money may not be encumbered by a preliminary injunction when the final merits judgment sought by plaintiffs cannot involve a transfer of money from defendants to plaintiffs." Pet. App. 10a-11a (quoting *Hoxworth*, 903 F.2d at 197). It is therefore quite different from this case, in which respondents did seek (and, indeed, obtained) money damages, and where a prejudgment injunction against petitioners' dissipation of monetary assets was accordingly "of the same character" as the final order the court would enter if respondents prevailed on the merits. And although *De Beers* certainly also stands for the proposition that a district court may not properly grant a preliminary injunction restraining the transfer of property merely in order to secure against a remote and contingent risk of non-compliance with the court's future orders, that is merely a particular application of the general principles that an injunction must be appropriately tailored to achieve its results, and should not in any event issue unless the party seeking it can establish that in the absence of relief it is at genuine risk of suffering irreparable harm. See pp. 13-15, *supra*; *First Nat'l City Bank*, 379 U.S. at 398-399 (Harlan, J., dissenting) ("Clearly the Court's point [in *De Beers*] in emphasizing the scope of the order which could issue in the first instance was that the possibility of an ultimate levy was too remote in practical terms to justify freezing the property from the

outset of the litigation. Remoteness is the determinative point, whatever its cause.").[8]

A more pertinent precedent is *Deckert* v. *Independence Shares Corp.*, 311 U.S. 282 (1940). The underlying suit in that case alleged that one defendant (Independence) had fraudulently sold securities to the plaintiffs; that Independence was "insolvent and threatened with many law suits, that its business is virtually at a standstill because of unfavorable publicity, that preferences to creditors are probable, and that its assets are in danger of dissipation and depletion"; and that the proceeds of the fraudulent sales had been transferred to another defendant (the Pennsylvania Co.), which held a portfolio of securities in trust and possessed some cash derived from its administration of the trust. *Id.* at 285-286. The plaintiffs sought a preliminary injunction "restraining Pennsylvania from transferring or disposing of any of the assets of the corporations or of the trust," and the district court granted such an injunction to the limited extent of some $38,000 in cash. *Ibid.*

This Court concluded that the Securities Act of 1933 established "a statutory right which the litigant may enforce in designated courts by such legal or equitable actions or procedures as would normally be available to him," and that the plaintiffs' complaint adequately "state[d] a cause for equitable relief." 311 U.S. at 288. The Court then held that

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[8] This is the sense of the Court's observation (325 U.S. at 223) that it would be startling if the plaintiff in "any" legal action could obtain a prejudgment injunction, based solely on the remote but ever-present possibility that a judgment would go unsatisfied. Of course prejudgment injunctions should not be routine, any more than prejudgment attachments or sequestrations are in litigation among solvent parties. They will be permissible only where, as here, the moving party can make an adequate preliminary showing that, for example, the defendant is or is about to become insolvent, or is likely to conceal or dissipate the only assets available to satisfy a judgment.

the preliminary injunction "was a reasonable measure to preserve the status quo pending final determination of the questions raised by the bill," because in view of allegations "that Independence was insolvent and its assets in danger of dissipation or depletion[,] * * * the legal remedy against Independence, without recourse to the fund in the hands of Pennsylvania, would be inadequate." *Id.* at 290. *Deckert* thus confirms that injunctive relief is available to secure the ability to recover money, at least through an action that is itself characterized as "equitable."[9]

Moreover, although petitioners characterize *Deckert* as involving "an equitable claim to a specific *res* or thing in the possession of the defendant" (Br. 11), it is not at all clear that that characterization is consistent with (let alone required by) this Court's analysis. That analysis emphasized that the plaintiffs' claims were against a vendor of securities (Independence); that they sought to "enforce" their right to restitution of consideration (from the vendor) "against a third party where the vendor is insolvent and the third party has assets in its possession belonging to the vendor"; and that the district judge had properly limited his injunction to prohibiting the transfer, not of some specifically identifiable "res" (such as shares of stock held for the benefit of the plaintiffs), but to a modest amount of miscellaneous cash held by the Pennsylvania Co. and more than sufficient to secure any judgment that might be rendered on the plaintiffs' claims against Independence. See 311 U.S. at 284, 286, 290. While *Deckert* does not decide this case, its essential circumstances are so similar to those at issue here that its holding lends considerable support to respondents' position.

Finally, in *United States* v. *First National City Bank*, 379 U.S. 378 (1965), this Court upheld a preliminary injunction

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[9] See *Steelman* v. *All Continent Corp.*, 301 U.S. 278, 289 (1937); *Richmond* v. *Irons*, 121 U.S. 27, 44-45 (1887).

freezing assets to secure the payment of a likely future money judgment. The underlying case was an action to collect federal taxes from Omar, S.A., a Uruguayan corporation. *Id.* at 379-380. Alleging that Omar had been transferring its assets abroad, the government sought and obtained a preliminary injunction restraining various banks and brokers from transferring property belonging to Omar pending the outcome of the action. *Id.* at 380. In sustaining the injunction, this Court noted that the district court had specific statutory authority to issue any injunction "necessary or appropriate for the enforcement of the internal revenue laws." *Ibid.* (quoting 26 U.S.C. 7402(a)); see also *id.* at 383 ("our review of the injunction as an exercise of the equity power granted by 26 U.S.C. § 7402(a) must be in light of the public interest involved"). The Court then held that "[o]nce personal jurisdiction of a party is obtained, the District Court has authority to order [the party] to 'freeze' property under its control, whether the property be within or without the United States" (*id.* at 384), and that the preliminary injunction actually issued by the district court was "eminently appropriate to prevent further dissipation of assets." *Id.* at 385. Adverting to its own prior decisions, the Court distinguished *De Beers* on the ground that the case before it, "[u]nlike *De Beers*," involved "property which would be 'the subject of the provisions of any final decree in the cause,'" and relied on *Deckert* to support its concluding observation that the preliminary injunction was "'a reasonable measure to preserve the status quo' * * * pending service of process on Omar and an adjudication of the merits." *Id.* at 385 (quoting *De Beers*, 325 U.S. at 220, and *Deckert*, 311 U.S. at 290).

First National City Bank involved a specific statutory grant of injunctive authority and the paramount public interest in tax collection, elements that are not present in this case. Nonetheless, the Court's reasoning that it was proper

to use that injunctive authority to "freeze" property to secure the payment of a future money judgment, and that such an order was (as in *Deckert*) "a reasonable measure to preserve the status quo," sweeps more broadly, and again supports respondents' position in this case. Moreover, the Court's distinction of *De Beers* on the ground that it did not involve a potential monetary award is similarly applicable here. See also 379 U.S. at 397-399 (Harlan, J., dissenting) (arguing that the key factor in *De Beers* was "the remoteness of any levy by the Government against the property of the defendants," *id.* at 398).

Thus, contrary to petitioners' argument (Br. 14), this Court's cases do not suggest the result that they seek here; to the contrary, they support the position advanced by respondents. At a minimum, they are too equivocal in whatever support they furnish petitioners to justify relying on their authority to reach a result that, as we have seen, is not justified by logic or function in the context of modern unified practice before the federal courts.

C. The Availability Of Prejudgment Injunctive Relief In Actions Brought By Public Authorities Is Important To The Effective Enforcement Of Federal Law

For the reasons we have given, we believe that a district court may grant any plaintiff a pre-judgment injunction restraining the defendant's dissipation of its assets, on the basis of an appropriate showing that insolvency or other factors make such an order necessary in order to protect the enforceability of a final monetary judgment that the court is likely to render in the plaintiff's favor. Whatever the result, however, in a case like this one that involves only private parties, such injunctions are available in actions brought by the government to enforce federal law.

This Court has long recognized that when Congress has authorized a federal agency to bring an action to enjoin acts

made illegal by statute, "all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction." *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 398 (1946).[10] Indeed, because "the public interest is involved in a proceeding of th[at] nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake." *Ibid.*; see also *First Nat'l City Bank*, 379 U.S. at 383; *Virginian Ry.* v. *System Fed'n No. 40*, 300 U.S. 515, 552 (1937). Thus, for example, in injunctive actions brought by the Securities and Exchange Commission, courts have held that "any form of ancillary relief may be granted where necessary and proper to effectuate the purposes of the statutory scheme." *SEC* v. *Materia*, 745 F.2d 197, 200 (2d Cir. 1984) (disgorgement of illegal profits), cert. denied, 471 U.S. 1053 (1985).[11] Moreover, the government frequently brings suit to obtain restitution or disgorgement of amounts obtained by, for example, the filing of false claims, and often also seeks the imposition of monetary penalties prescribed by law. In all such actions, we submit, a district court may grant a pre-

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[10] *Porter* arose under Section 205(a) of the Emergency Price Control Act of 1942, Ch. 26, 56 Stat. 33, which authorized the government to seek court orders enjoining actual or threatened violations of the Act. There are numerous similar provisions presently in force. See, *e.g.*, 15 U.S.C. 77t(a), 78u(d)(1), 80a-41(d), 80b-9(d) (securities laws); 7 U.S.C. 13a-1 (Commodity Exchange Act); 15 U.S.C. 53(b) (Federal Trade Commission Act); 15 U.S.C. 1714(a) (Interstate Land Sales Full Disclosure Act); see also *FTC* v. *Southwest Sunsites, Inc.*, 665 F.2d 711, 717-718 (5th Cir.) (listing statutes), cert. denied, 456 U.S. 973 (1982).

[11] See *SEC* v. *Unifund SAL*, 910 F.2d 1028, 1041 (2d Cir. 1990) (asset freeze); *SEC* v. *American Bd. of Trade, Inc.*, 830 F.2d 431, 436 (2d Cir. 1987) (appointment of receiver), cert. denied, 485 U.S. 938 (1988); *International Controls Corp.* v. *Vesco*, 490 F.2d 1334, 1339 (2d Cir.) (appointment of interim board of directors), cert. denied, 417 U.S. 932 (1974); *SEC* v. *Radio Hill Mines Co.*, 479 F.2d 4, 6 (2d Cir. 1973) (imposition of additional reporting requirements); *SEC* v. *Manor Nursing Ctrs., Inc.*, 458 F.2d 1082, 1104 (2d Cir. 1972) (appointment of trustee).

judgment order "freezing" assets of the defendant, if such an order is necessary to assure that sufficient assets will be available to satisfy a final monetary judgment.[12]

The specific statutory basis for, and the public interest necessarily involved in, most government actions distinguishes them from many private actions, including the underlying action in this case. Thus, for example, although a court that is asked to issue an injunction in a statutory enforcement action must "giv[e] necessary respect to the private interests involved" (*Porter*, 328 U.S. at 400), the courts have recognized that "the statutory imprimatur given [government] enforcement proceedings is sufficient to obviate the need for a finding of irreparable injury[,] at least where the statutory prerequisite * * * has been clearly demonstrated." *SEC* v. *Management Dynamics, Inc.*, 515 F.2d 801, 808 (2d Cir. 1975); see also *Mitchell* v. *Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 291-292 (1960); *CFTC* v. *Muller*, 570 F.2d 1296, 1300 (5th Cir. 1978). Similarly, lower courts have properly held that in such actions a district court may enter a pre-judgment order restricting a defendant's control over its assets in order "to preserve the status quo so that an ultimate decision for the [government] could be effective." *Id.* at 1300 (citing *SEC* v. *Manor Nursing Ctrs., Inc.*, 458 F.2d 1082, 1105-1106 (2d Cir. 1972)); see also *SEC* v. *Cherif*, 933 F.2d 403, 407 (7th Cir. 1991) (enjoining asset transfers "so as to preserve the possibility of recovering civil penalties or disgorgement of illegally obtained profits"), cert. denied, 502 U.S. 1071 (1992).[13] And the

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[12] A number of federal statutes provide expressly for such orders. See, *e.g.*, 18 U.S.C. 1345(a)(2) (1994 & Supp. II 1996); 42 U.S.C. 1320a-7a(k), 1320a-8(h).

[13] See also, *e.g.*, *United States* v. *Taylor*, 139 F.3d 924, 926 (D.C. Cir. 1998) (noting freeze imposed on all personal and corporate assets); *SEC* v. *Interlink Data Network, Inc.*, 77 F.3d 1201, 1202 (9th Cir. 1996) (freezing assets); *FTC* v. *H.N. Singer, Inc.*, 668 F.2d 1107, 1111-1112 (9th Cir. 1982)

same analysis applies whether or not the assets involved are specifically traceable to alleged illegal activity. *Kemp* v. *Peterson*, 940 F.2d 110, 113-114 (4th Cir. 1991).[14]

The ability to obtain prejudgment orders preventing defendants from dissipating or secreting assets is important to the effective enforcement of federal law, whether in regulatory actions or in government litigation involving commercial misconduct or civil fraud. Unless a court can maintain the financial status quo before final judgment, the government's ability to pursue and collect monetary remedies will be seriously compromised. Whatever the outcome of this case with regard to the private parties involved, we respectfully request that the Court take account of the important public interest in the availability of prejudgment orders in government litigation.[15]

(freezing assets except for ordinary business and living expenses); *FTC* v. *Southwest Sunsites, Inc.*, 665 F.2d at 717-719 (freezing assets).

[14] It is sometimes possible to protect a potential disgorgement judgment by means of an order limited to transfers of specific assets, such as identifiable proceeds of illegal conduct. *SEC* v. *Cavanagh*, 155 F.3d 129, 131 (2d Cir. 1998) (freezing assets to the extent of proceeds of illegal conduct); *SEC* v. *Certain Unknown Purchasers of Common Stock*, 817 F.2d 1018, 1019 (2d Cir. 1987) (freezing insider trading profits), cert. denied, 484 U.S. 1060 (1988). In many cases, however, the specific proceeds of illegal activity have been dissipated or cannot be traced. Moreover, when the expected monetary award consists of civil penalties, rather than disgorgement, "tracing" is not relevant. Cf. *SEC* v. *Unifund SAL*, 910 F.2d at 1041 ("the order freezes funds in an amount sufficient to cover not just the profits that might have to be disgorged but the civil penalty, equal to three times the profits, that the Commission may recover").

[15] Petitioners' brief includes (at 20-30) an extensive argument based on the principles of *Erie Railroad* v. *Tompkins*, 304 U.S. 64 (1938). That argument was not advanced in the petition, and it is not apparent whether it is fairly included within the question presented. Compare Pet. i with Pet. Br. i (adding reference to diversity jurisdiction). In any event, because the United States may always invoke the jurisdiction of the federal

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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FEBRUARY 1999

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courts (see 28 U.S.C. 1345) and suits brought by the federal government are almost invariably governed by federal law, we do not address the *Erie* argument.