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# Preliminary Injunctions in Public Law: The Merits

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# ARTICLE

## PRELIMINARY INJUNCTIONS IN PUBLIC LAW: THE MERITS

*Kevin J. Lynch*[*]

ABSTRACT

The law of preliminary injunctions has evolved, in many instances, away from its roots in equity and towards a more rigid and formalistic approach that raises the bar for when a preliminary injunction may be granted. This evolution is rooted in hostility held by the Supreme Court toward certain types of rights, such as abortion, voting, public health, and environmental protection, to name a few. In the aftermath of the Supreme Court's 2009 decision in *Winter v. Natural Resources Defense Council*, a few circuits adopted a strict, literal reading of some dicta from *Winter* and dramatically reshaped decades of circuit court precedent on preliminary injunctions. Specifically, that minority of courts has abandoned a more flexible approach to preliminary injunctions that allows a "sliding scale" to consider all relevant factors, in favor of raising the bar on assessing the likelihood of success on the merits. The courts have further erred by treating the factors, traditionally balanced all together, as elements that must be established individually. This mistake should not spread any further to circuits that have not yet decided the issue, and the Supreme Court should correct this mistake at its earliest opportunity.

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Although preliminary injunctions are important in all cases, this Article focuses on public law. These cases typically involve a challenge to government action. Preliminary injunctions are often critical in ensuring that full judicial review of those actions is even possible because if an election passes or a forest is cut down while the litigation plays out over many years, then the claims likely become moot. However, injunctions should not automatically be issued in these cases just because the government has a strong interest in acting without delay to solve problems facing society. Faced with this dilemma, courts are best empowered to use a flexible balancing approach, which has historically been the hallmark of equity jurisprudence. This Article demonstrates why the minority of circuits have badly erred on this issue, lays out the doctrinal and policy reasons supporting a flexible approach, and responds to the arguments in favor of the rigid, inflexible approach coming down from the Supreme Court.

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## I. INTRODUCTION

In an era when federal court litigation typically spans many years, a preliminary injunction is often the only means by which courts can preserve the status quo while the litigation plays out. Although this relief is not granted as a matter of course in every case, it is an important and necessary tool for courts to balance the equities before them, where failure to preserve the status quo would cause irreparable harm to one party. Preliminary injunctions are of particular importance in public law cases, which often involve either broad questions of public policy or intense private interests being affected by laws or administrative regulations. Courts have long employed a flexible approach to granting forms of equitable relief, such as preliminary injunctions; however, more recently, the U.S. Supreme Court has imposed more rigid, formulaic approaches to equitable relief—finding fault with how lower courts balanced competing interests in the cases before them. Most notably for this Article is the 2008 decision in *Winter v. NRDC*, where the Court refused to allow a preliminary injunction to be issued based upon a showing of the mere possibility of irreparable harm, rather than a likelihood of such harm.[1] Although this case focused on the consideration of irreparable harm, it contained sweeping language regarding other traditional factors that courts look to in balancing the equities in preliminary injunction cases, such as the likelihood of success on the merits.[2] This broad language has led some lower courts to adopt similarly rigid approaches, and some circuits have jettisoned their traditional flexible approaches to assessing the merits, while others have retained that flexibility by taking a narrow reading of *Winter*. The circuits employing a newly rigid test have gotten it wrong and should reverse course to return to the equitable balancing approaches used by other circuits to assess the merits of a case at its early stages. If the Supreme Court truly meant to take such a dramatic and ill-conceived approach to assess the merits of a preliminary injunction, it should say so clearly and explain itself while grappling with the arguments in favor of a flexible approach to equity head-on. This issue is of particular importance in public

1. Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 22–23 (2008).

2. The Court also gave independent reasons why the preliminary injunction should not have been issued due to the balance of equities because of strong national security interests. *Id.* at 26–32. The Court also stated that it wasn't clear that the supposedly "incorrect standard affected the Ninth Circuit's analysis of irreparable harm." *Id.* at 22. Even more reason why the Court should not have taken a sledgehammer to decades of precedent in the circuit courts without more careful and detailed consideration of the issues.

law cases where the public interest is of greatest import and needs to be incorporated into the balance along with private interests raised during litigation. Private law cases are outside the scope of this Article, although historically, they have also benefitted from the traditional flexible approach to preliminary injunctions.

A preliminary injunction is the name given to an order when a party, usually the plaintiff, asks the court to enjoin another party from taking some action (or perhaps to require some action be taken, a mandatory injunction) during the pendency of the litigation. This request is made of the trial court, which is typically a federal district court.[3] However, similar requests can be made at different stages of litigation. If the request is made in a rushed fashion, such that a decision is needed quickly, it is called a temporary restraining order.[4] This is typically of short duration, not to exceed fourteen days, but it may provide time to allow for further briefing on a preliminary injunction.[5] If the request is made after a trial court decides a motion for a preliminary injunction, the relief is referred to as a stay or an injunction pending appeal, depending on whether the preliminary injunction was granted or denied, respectively.[6] This Article focuses on preliminary injunctions, although similar issues are raised in these related contexts, and the law has evolved on each front. An injunction that is issued after the merits have been decided is called a permanent injunction, although the issues raised by those are quite different because the merits have been resolved at that point (at least by one court).[7]

Why, then, does the standard for assessing the merits of a preliminary injunction matter? Consider, for example, the following scenario, which illustrates some of the problems associated with setting the bar too high when analyzing the likelihood of success on the merits. Suppose an environmental organization files suit in federal court to challenge a decision by the

3. Preliminary injunctions, of course, are also an issue in state courts; however, the focus in this Article is on the standard in federal courts, which has a lot of impact on procedural issues in many state courts as well. For example, after the Supreme Court announced the tightened "plausibility pleading" standard under Federal Rule of Civil Procedure 8, Colorado courts adopted the new standard under the analogous Colorado rules. *See* Warne v. Hall, 373 P.3d 588, 595 (Colo. 2016) (adopting the *Twombly*/*Iqbal* framework for pleading standards).

4. *See* FED. R. CIV. P. 65(b) (demonstrating that temporary restraining orders are issued quickly because notice to the adverse party is not required).

5. FED. R. CIV. P. 65(b)(2).

6. Portia Pedro, *Stays*, 106 CAL. L. REV. 869, 890 n.122, 891 (2018).

7. eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006).

U.S. Forest Service to authorize a timber sale in a national forest. The merits of the case will turn on the agency's compliance with the approved management plan for that national forest, or the adequacy of an environmental impact statement prepared for the project. Yet these cases will be reviewed based on an administrative record that is before the agency, which will often include behind-the-scenes e-mails among staff for the agency, outside contractors, and potentially interested industry participants. These e-mails sometimes include "smoking gun" information that shows the agency was aware of serious deficiencies in its analysis or problematic conflicts with the existing management plan. However, this information is not necessarily available to the plaintiff until many months into the litigation. Even if the information is available, the case may raise a novel legal issue of first impression, such that it is challenging for a single district court to accurately assess whether the plaintiff will prevail. This may be the first, and only, case regarding a national forest that this judge has presided over, for example. Either way, without guidance to the contrary, timber companies may still enter the land and cut down the forest, even though the activity might later be deemed unlawful by the court. If the court does not issue a preliminary injunction, it is too late because the harm cannot be undone.

Another example may more starkly demonstrate the importance of preliminary injunctions. In a recent case challenging whether the methods used to conduct federal executions violated the Eighth Amendment's prohibition on cruel and unusual punishment, death-row prisoners faced the most irreparable harm of all: being put to death by the state.[8] Although the district court granted a preliminary injunction to pause four planned executions, the Supreme Court vacated the injunction and allowed the executions to proceed.[9] Two dissenting opinions lamented the rush to judgment that inevitably foreclosed any judicial review of these claims.[10] Any serious questions raised by these individuals can no longer be addressed by the courts, whether or not they turn out to have merit in the courts' eyes. By setting the bar too high in assessing the merits related to a preliminary injunction, courts will

8. *See* Barr v. Lee, 140 S. Ct. 2590, 2590–91 (2020) (per curiam).

9. *Id.* at 2591–92.

10. *See id.* at 2592–93 (Breyer, J., dissenting) (noting "significant questions regarding the constitutionality" and the "finality and seriousness of a death sentence"); *Id.* at 2593 (Sotomayor, J., dissenting) (decrying the lack of "meaningful judicial review of the grave, fact-heavy challenges" raised as a result of the "Court's rush to dispose of this litigation in an emergency posture").

expand the category of cases in which meaningful relief is not possible and promote injustice in at least a subset of those cases.

A series of recent high-profile decisions relating to Texas' anti-abortion law SB-8 further show how imposing impossible burdens on parties seeking a preliminary injunction will cause harm. This case involves a Texas bill signed into law on May 19, 2021, which "bans abortion after approximately six weeks of pregnancy," at a time when many women do not even know they are pregnant.[11] Although this law blatantly violated Supreme Court precedent, such as *Roe v. Wade*, it attempted to game the system by circumventing any state official role in enforcement, and instead delegating enforcement to private parties and offering a bounty for successful litigants.[12] Although the law was promptly challenged, and the district court scheduled oral argument on a request for a preliminary injunction before the law took effect on September 1, 2021, the appellate court decided to intervene in a highly unusual manner and prevent the issuance of an injunction.[13] Although the health clinics challenging the law then requested that the Supreme Court intervene, the Court did not act before the law took effect.[14] Instead, only after the law took effect—leading to much chaos in Texas—did the Supreme Court bother to explain why it did not act.[15] The Court noted the "serious questions regarding the constitutionality of the Texas law at issue" but nevertheless declined to intervene because the health clinics did not meet their "burden of making a 'strong showing' that [they are] 'likely to succeed on the merits.'"[16] Several strongly-worded dissents went even further, describing SB-8 as "a flagrantly unconstitutional law engineered to prohibit women from exercising their constitutional rights and evade judicial scrutiny"[17] or as a "patently unconstitutional law banning most abortions."[18] Here, the distinction between "serious questions" and a higher "likely to

11. *Whole Woman's Health et al. v. Jackson et al.*, CTR. FOR REPROD. RTS., https://reproductiverights.org/case/texas-abortion-ban-whole-womans-health-jackson/ [per ma.cc/5CA9-6936] (last updated Feb. 24, 2022).

12. *Id.*

13. *See* Order Granting Temporary Administrative Stay of the District Court Proceeding, Whole Woman's Health v. Jackson, No. 21-50792 (5th Cir. Aug. 31, 2021) (per curiam) (ordering "a temporary administrative stay of the district court proceedings" without supplying any reasoning to support the order).

14. CTR. FOR REPROD. RTS., *supra* note 11.

15. Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2495 (2021).

16. *Id.* (quoting Nken v. Holder, 556 U.S. 418, 434 (2009)).

17. *Id.* at 2498 (Sotomayor, J., dissenting).

18. *Id.* at 2500 (Kagan, J., dissenting).

succeed on the merits" test has critical consequences—many women in Texas lost their constitutional right to abortion during the course of the litigation. A clear statement affirming the serious questions test for preliminary injunctions, which seemingly all nine justices would agree was met in this case, would have allowed the preservation of the status quo while any tricky issues related to the novel enforcement scheme could be carefully and deliberately resolved in the lower courts.[19]

Of course, a preliminary injunction should also not be issued automatically in any case where a party claims irreparable harm. There are often real concerns about issuing a preliminary injunction. But those concerns are better addressed under the "balance of equities" and "public interest" factors, rather than raising the bar on the merits too high. The litigation surrounding COVID vaccine requirements provides a good example of this. Although courts are right to reject preliminary injunctions in those cases where the plaintiff has no chance of succeeding,[20] in cases where at least serious questions are raised regarding the merits, a more cautious approach is warranted. However, even serious questions are not sufficient to support an injunction when the balance of equities and public interest weighs against the issuance of an injunction, such as cases where unvaccinated individuals might threaten the group vaccination dynamics of their communities.

Flexible standards of equity necessarily and heavily rely on the discretion of judges. As a result, judges reach conclusions in balancing these factors that will inevitably spark disagreement between reasonable observers. But the response to such cases should not be to raise the standard required for a preliminary injunction. Egregious outliers can be corrected on appeal through abuse-of-discretion review.[21] Although the temptation is

19. *See id.* at 2495–500 (where the majority explicitly and the dissents implicitly acknowledge the presence of a serious question). *Id.* at 2496 (Roberts, C.J., dissenting) ("I would grant preliminary relief to preserve the status quo ante—before the law went into effect—so that the courts may consider whether a state can avoid responsibility for its laws in such a manner.").

20. *See, e.g.*, Klaassen v. Tr. of Ind. Univ., 7 F.4th 592, 592–94 (7th Cir. 2021). The court noted that if Supreme Court precedent allowed states to require the entire population to receive a vaccination, then surely a university could require vaccines as a condition of attending in-person classes. *See id.*

21. "It is well established doctrine that an application for an interlocutory injunction is addressed to the sound discretion of the trial court; and that an order either granting or denying such an injunction will not be disturbed by an appellate court unless the discretion was improvidently exercised." Munoz v. Porto Rico Ry. Light & Power Co., 83 F.2d 262, 268 (1st Cir. 1936) (quoting Alabama v. United States, 279 U.S. 229, 230–31 (1929)).

understandable, appellate courts, including the U.S. Supreme Court, should not wade into every dispute to correct perceived errors, particularly when the intervention will foreclose meaningful and deliberate judicial review of the merits of the claims presented.[22]

This issue is not only percolating in the courts, but there is a current legislative proposal regarding a stay on so-called "high-impact" rules under the Administrative Procedure Act.[23] This proposal would amend 5 U.S.C. § 705 to require agencies to postpone the effective date of such rules until the final dispositions of all actions seeking judicial review of the rule.[24] Although limited only to a subject of rules issued by federal agencies, this proposal represents the opposite extreme of staying all rules, no matter how urgent or important they may be, during the course of litigation. This is the flip side of a preliminary injunction standard where the merits factors are set too high, and it would not allow for urgent action on important issues. Fortunately, this legislation seems unlikely to be enacted given the political dynamics in Congress.

As stated previously, this Article is concerned with the standard for granting or denying preliminary injunctions in public law cases. Public law is the "body of law dealing with the relations between private individuals and the government, and with the structure and operation of the government itself . . . ."[25] Public law

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22. *Cf. Whole Woman's Health*, 141 S. Ct. at 2500 (Kagan, J., dissenting) (lamenting the role of "shadow docket" rulings in upending the "usual principles of appellate process" whereby district courts rule on motions for preliminary injunctions and appellate courts review those decisions). The "shadow docket" has long existed but the term was coined in a 2015 article drawing attention to summary reversals in particular, and to issues regarding lack of transparency more broadly. *See* William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1, 5, 18–19 (2015); Louis Jacobson, *The Supreme Court's 'Shadow Docket': What You Need to Know*, POLITIFACT (Oct. 18, 2021), https://www.politifact.com/article/2021/oct/18/supreme-courts-shadow-docket-what-you-ne ed-know/ [perma.cc/2KQQ-3AWT]. The Supreme Court's recent use of its shadow docket indicates a concerning trend toward substituting the judgment of the Court's majority for that of the lower courts, at least with respect to preliminary relief granted to parties that the majority either strongly favors (e.g., religious liberty plaintiffs) or disfavors (e.g., abortion providers). *See, e.g.*, Aaron Blake, *Alito's Political Broadside Against Supreme Court Critics—and How It Misfires*, WASH. POST (Oct. 1, 2021, 12:15 PM), https://www.wa shingtonpost.com/politics/2021/10/01/alito-misfires-his-political-broadside-against-suprem e-court-critics/ [perma.cc/GQ74-T44Y]. There is, of course, an important role for the Supreme Court and the courts of appeals in overseeing lower courts, particularly in correcting abuses of discretion, but examples are easily found going way beyond the traditional role of appellate courts. *See id.*

23. REVIEW Act of 2023, H.R. 49, 118th Cong. (1st Sess. 2023) (referred to the Comm. on the Judiciary).

24. H.R. 49 § 2(b)(3)(A).

25. *Public Law*, BLACK'S LAW DICTIONARY (11th ed. 2019).

thus includes issues of constitutional law, criminal law and procedure, elections law, environmental law, administrative law, public health law, and more.[26] Public law does not include private law cases, which "deal[ ] with private persons and their property and relationships."[27] Although private cases are undoubtedly important, oftentimes they involve disputes where the harm is not irreparable because of the increased availability and sufficiency of monetary damages for private law claims. Public law cases, in contrast, present a myriad of situations where harm will truly be irreparable. A prisoner cannot be brought back to life after execution. A forest cannot be put back after it is cut down for timber. The decision to terminate a pregnancy cannot be exercised after a woman is forced to carry a pregnancy to term. A voter cannot turn back time and submit a valid ballot after being prevented from participating in an election. When—and under what circumstances—those harms will be prevented depends on the standard for a preliminary injunction, especially the standard for assessing the likelihood of success on the merits.

The issues presented by public law cases call for a flexible approach in deciding preliminary injunctions, especially regarding early, and often rushed, assessments of the merits of the case. Over the years, most circuits have developed an array of flexible formulations for how to weed out the meritless cases from those deserving of a closer review. These tests are described as "sliding scale" approaches where the equities related to harm and the public interest can compensate for uncertainty about the merits. One leading formulation is that there need only be "serious questions" going to the merits, rather than a near certainty that the plaintiff will prevail. Abandoning this flexible approach to require a showing that the plaintiff is likely to succeed (which is identical to the ultimate burden in a civil case such as this) sets the bar too high. As a result, the forest may be cut down even though important environmental protections were not complied with, such as those that ensure the forest will regenerate over time. At least, it may be cut down in the Tenth Circuit, which has abandoned its historical flexible standard, but it would likely be protected in the Ninth Circuit, which has retained this approach. Thus, a national

26. *Id.*

27. *Private Law*, BLACK'S LAW DICTIONARY (11th ed. 2019).

forest in Utah is less protected than one just across the border in Arizona.[28]

As the Supreme Court has imposed more rigid standards for equitable relief on lower courts, the courts of appeals have fallen generally into two camps. First, those that have retained their flexible standards and have engaged in thoughtful decision-making with their reasoning clearly explained in writing as to why they retained their standards even after *Winter*. On the other side, courts, such as the Tenth and Fourth Circuits, have taken broad language from *Winter* out of context, finding that the court overturned decades of practice and experience without any kind of analysis, and ignored the different outcomes reached by their sister circuits. This shoddy and overly simplistic judicial decision-making has hamstrung the ability of lower courts to reach equitable and just results accounting for the totality of circumstances in individual cases, and it should be resolved. Although the Supreme Court has the power to correct this misstep, the appellate courts could also fix the problem themselves. If that does not happen, the Federal Rules of Civil Procedure should be updated to help courts better balance competing interests in preliminary injunction cases.

This Article proceeds in four parts. Part II provides an overview of the preliminary injunction standard, both its historical treatment in the lower courts and the turn towards a sequential, multi-factor test in recent Supreme Court cases, especially in *Winter*. Part III examines the scholarly literature on preliminary injunctions and related equitable remedies. Part IV argues that the circuit split should be resolved and provides several reasons why the resolution should restore the flexible approach in assessing the merits of preliminary injunctions across all circuits. Part V responds to arguments that critics of flexible equity have made or are expected to raise in objection to this proposal.

## II. THE PRELIMINARY INJUNCTION STANDARD OVER TIME

The preliminary injunction is a remedy with a long history in equity, including in federal courts in the United States. The hallmark of preliminary injunctions, as with other equitable principles, has always been the flexibility for the court to fashion a remedy that is appropriate under the circumstances. However, in recent years, the Supreme Court has taken steps to limit and focus that flexibility, not just for preliminary injunctions but also for

28. See *infra* Section II.C.1–2, for a discussion of how the Ninth and Tenth Circuits differ in applying the preliminary injunction standard.

related equitable remedies, such as permanent injunctions, stays, and injunctions pending appeal.

Flexibility has consistently been acknowledged as the core of equity. The Supreme Court has long recognized, for example, that "[t]he essence of equity jurisdiction has been . . . [f]lexibility rather than rigidity . . . ."[29] Furthermore, "[e]quity eschews mechanical rules; it depends on flexibility."[30] The Court has further noted that "equity has been characterized by a practical flexibility . . . ."[31]

The unification of law and equity culminated in the creation of the Federal Rules of Civil Procedure.[32] Under this regime, preliminary injunctions are authorized by Rule 65; the rule merely requires notice to the adverse party and a security to cover the costs of any party later found to have been wrongly enjoined.[33] The rule also (at least theoretically) requires that every order granting an injunction "state the reasons why it issued[,] . . . state its terms specifically[,] and describe in reasonable detail . . . the act or acts restrained or required."[34] However, the rule does not state the factors to be used in deciding whether to issue a preliminary injunction, and thus, court decisions lay out the standard to provide the necessary guidance.[35]

Despite the historical flexibility accorded to this area of the law by federal courts, in recent cases, the Supreme Court has turned away from flexibility in favor of more rigid tests to guide lower courts in exercising their equity discretion. This change is described as the "New Equity" by Professor Bray[36] and discussed by other scholars as well, most of whom are critical of it.[37] One of those cases is *Winter*: the most prominent case by which the Court

29. Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944).

30. Holmberg v. Armbrecht, 327 U.S. 392, 396 (1946).

31. Brown v. Bd. of Educ. of Topeka, 349 U.S. 294, 300 (1955).

32. *See, e.g.*, Charles T. McCormick, *The Fusion of Law and Equity in United States Courts*, 6 N.C. L. REV. 283, 293 (1928); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 UNIV. PA. L. REV. 909, 923–26, 943–44, 946, 948–53, 955–61, 963–65, 967–68, 970–74 (1987) (laying out the history of the Rules Enabling Act of 1934 leading to the 1938 adoption of the Federal Rules).

33. FED. R. CIV. P. 65(a)(1), (c).

34. FED. R. CIV. P. 65(d)(1).

35. *See* 11A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2947 (3d ed. 2013).

36. Samuel L. Bray, *The Supreme Court and the New Equity*, 68 VAND. L. REV. 997, 999–1000, 1008 (2015) (describing numerous cases from different fields where the court was "perhaps even accidentally, laying the foundation for a very different future for the law of remedies").

37. For scholarly reaction to *Winter* and related equitable remedy cases discussed in more detail, see discussion *infra* Sections III.B–C.

introduced changes to courts' consideration of preliminary injunctions.

### *A. Flexible Standards Developed in the Circuits*

*1. Historical Treatment of Preliminary Injunctions.* The well-known Wright & Miller treatise on civil procedure notes the "bewildering variety of formulations of the need for showing some likelihood of success."[38] Although divining true differences from the various statements on the likelihood of success on the merits may not be possible, a background discussion of the older cases that lay out the flexible approach to equity will help set the stage for the more recent emphasis on rigid rules and strict tests.

In an early case decided by the U.S. Supreme Court, an injunction was issued to prevent irreparable injury—with the only harm to the opposing party being "a short delay"—and to allow "a fair investigation and determination upon" the claim raised by the State of Georgia.[39] About a century later, the Eighth Circuit held that "[w]hen the questions to be ultimately decided are serious and doubtful, the legal discretion of the judge in granting the writ should be influenced largely by" the balance of harms.[40] In *Ohio Oil Co. v. Conway*, the Supreme Court dealt with a factual dispute relating to the effect of a state tax on oil revenues on the plaintiff, which had to "be resolved before the constitutional validity of [a] statute [could] be determined."[41] Faced with this situation, the Court instructed that "[w]here the questions presented by an application for an interlocutory injunction are grave, and the injury to the moving party [in the absence of such an injunction] will be certain and irreparable . . . the injunction will usually be granted."[42] A short time later, the Court declared "[t]he 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."[43] When both the "plaintiff and defendant present competing claims of

38. WRIGHT, MILLER & KANE, *supra* note 35, § 2948.3.

39. Georgia v. Brailsford, 2 U.S. (2 Dall.) 402, 406 (1792). Many of these early cases were compiled in the amicus brief of Environmental Law Clinic Directors prepared by the Harvard Environmental Law Clinic from a recent First Circuit case. *See* Brief of Environmental Law Clinic Directors as Amici Curiae Supporting Appellants at 5–6, Sierra Club v. U.S. Army Corps of Eng'rs, 997 F.3d 395 (1st Cir. 2021) (No. 20-2195).

40. City of Newton v. Levis, 79 F. 715, 718 (8th Cir. 1897).

41. Ohio Oil Co. v. Conway, 279 U.S. 813, 814–15 (1929) (per curiam).

42. *Id.*

43. Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944).

injury, the traditional function of equity has been to arrive at a 'nice adjustment and reconciliation' between the competing claims."[44] "[T]he basis for injunctive relief . . . has always been irreparable injury and the inadequacy of legal remedies."[45]

Although the "traditional test" for preliminary injunctions laid out four factors that courts would weigh together, for many decades numerous federal courts have adopted a sliding scale test. The traditional test consists of (1) the likelihood of success on the merits; (2) irreparable harm absent an injunction; (3) the balance of hardships or equities; and (4) the public interest.[46] The alternative formulation of the "sliding scale" allowed a preliminary injunction to be issued when there were "[serious] questions going to the merits" as long as "the balance of hardships tip[ped] decidedly toward the [moving party]."[47]

> To justify a temporary injunction it is not necessary that the plaintiff's right to a final decision, after a trial, be absolutely certain, wholly without doubt; if the other elements are present (*i.e.*, the balance of hardships tips decidedly toward[s] [the] plaintiff), it will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation.[48]

Under this test, proof of irreparable harm is still necessary because it is a "fundamental and traditional requirement of all preliminary injunctive relief."[49] The Ninth Circuit took a similar but slightly different test, allowing for a sliding scale approach but describing it not as separate from the traditional test but instead "the outer reaches 'of a single continuum.'"[50]

Many other circuits adopted similar, flexible approaches along the lines of the sliding scale tests adopted in the Second and Ninth

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44. Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982) (quoting *id.*).

45. *Id.* at 312.

46. *See, e.g.*, Jean C. Love, *Teaching Preliminary Injunctions After* Winter, 57 ST. LOUIS L.J. 689, 690 (2013).

47. *See, e.g.*, Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738, 740 (2d Cir. 1953).

48. *Id.*

49. Love, *supra* note 46, at 695 (quoting Triebwasser & Katz v. Am. Tel. & Tel. Co., 535 F.2d 1356, 1359 (2d Cir. 1976)).

50. Regents of the Univ. of Cal. v. Am. Broad. Co., 747 F.2d 511, 515, 521 (9th Cir. 1984) (quoting L.A. Mem'l Coliseum Comm'n v. Nat'l Football League, 632 F.2d 1197, 1200 (9th Cir. 1980)).

Circuits. The Tenth Circuit explained that, in addition to the traditional test,

> [i]f the plaintiff can establish that the latter three requirements tip strongly in his favor, the test is modified, and the plaintiff may meet the requirement for showing success on the merits by showing "that questions going to the merits are so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation."[51]

A version of this serious questions test was also used by the Fourth,[52] Sixth,[53] and D.C. Circuits.[54] Similar tests using slightly different wording were used by the Third,[55] Fifth,[56] Seventh,[57] Eighth,[58] and Federal Circuits.[59] Thus, before the Supreme Court decided *Winter*, the flexible approach of the lower courts included some version of a sliding scale test that would allow an injunction to be issued, even when the moving party did not prove it was certain to prevail on the merits.

### *B.* Winter

Before it decided to impose a more rigid test for preliminary injunctions, the Court had taken a similar approach to the related issue of permanent injunctions.[60] For permanent injunctions, the case has already been decided on the merits, and so the test replaces the likelihood of success on the merits factor with one asking whether "th[e] remedies available at law, such as monetary damages, are inadequate to compensate for that injury."[61] Key to this case was that the Court reaffirmed that its pronouncements regarding the standard for injunctive relief were trans-substantive

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51. Davis v. Mineta, 302 F.3d 1104, 1111 (10th Cir. 2002) (quoting Fed. Lands Legal Consortium *ex rel.* Robart Estate v. United States, 195 F.3d 1190, 1195 (10th Cir. 1999)) (utilizing the Second Circuit's language from *Hamilton Watch*).

52. Blackwelder Furniture Co. of Statesville v. Seilig Mfg. Co., 550 F.2d 189, 196 (4th Cir. 1977), *overruled by* Real Truth About Obama, Inc. v. FEC, 575 F.3d 342 (4th Cir. 2009).

53. *In re* DeLorean Motor Co., 755 F.2d 1223, 1229–30 (6th Cir. 1985).

54. Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 844 (D.C. Cir. 1977) (quoting *Hamilton Watch Co.*, 206 F.2d 738, 740 (2d Cir. 1953)).

55. Constructors Ass'n of W. Pa. v. Kreps, 573 F.2d 811, 815 (3d Cir. 1978).

56. Texas v. Seatrain Int'l, S.A., 518 F.2d 175, 180 (5th Cir. 1975).

57. Cavel Int'l, Inc. v. Madigan, 500 F.3d 544, 547 (7th Cir. 2007).

58. *See* City of Newton v. Levis, 79 F. 715, 718 (8th Cir. 1897).

59. FMC Corp. v. United States, 3 F.3d 424, 427 (Fed. Cir. 1993).

60. eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 390 (2006).

61. *Id.* at 390–91.

and rejected arguments that disputes arising under the Patent Act should have a different standard.[62]

In *Winter*, the Court extended the "traditional doctrine" approach from *eBay* to the context of preliminary injunctions. The test was slightly different because it included a factor assessing the merits of the case because preliminary injunctions are issued before a final decision on the merits, as opposed to permanent injunctions, which are issued after a final decision. Thus, the Court established four factors for a preliminary injunction—not as considerations to balance in equity, but as individual requirements to be met.[63] Those four factors were: (1) irreparable harm absent an injunction; (2) likelihood of success on the merits; (3) balance of harms between the parties; and (4) the public interest.[64] This restatement (or transformation) of the test was not necessary to the resolution of the case, which was focused on the burden concerning irreparable harm carried by the movant.[65] The Court ultimately rejected the "possibility" of irreparable harm standard from the Ninth Circuit that had been applied by the lower courts.[66] However, a strict reading of *Winter*[67] arguably upset the longstanding practice of the lower courts, which had developed more detailed, flexible approaches in deciding preliminary injunctions. The circuit split over how to read *Winter*, and how it should be resolved, is the primary focus of this Article.

In its prior term, the Court issued a related decision in *Munaf v. Geren*.[68] In this case, a lower court granted a preliminary injunction with regard to a habeas petition submitted by two American citizens who traveled to Iraq and allegedly committed

62. *Id.* at 391–92.

63. Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008) (explaining that the plaintiff "must establish" these elements, rather than the court considering and balancing them).

64. *Id.*

65. And as explained above, *supra* note 2, the Court could have decided the case simply by finding that lower courts abused their discretion in considering the balance of equities given the strong national security interests in this case. *Winter*, 555 U.S. at 21–23. This would have avoided the need to make broad pronouncements about the preliminary injunction standard and fault the lower courts for their flexible equitable approach to deciding injunctions. *Id.* at 26–27.

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

67. By a strict reading of *Winter*, I mean taking the implication that the four factors are each essential elements that must individually be proven by the party seeking an injunction. This interpretation and the subsequent circuit split is discussed below. *See* discussion *infra* Section II.C.

68. Munaf v. Geren, 553 U.S. 674 (2008).

crimes there.[69] The Supreme Court faulted the lower court for failing to consider the likelihood of success on the merits at all, instead focusing on the difficult and substantial questions of jurisdiction posed by the habeas petition.[70] The Court did not question the "serious questions" formulation but instead focused only on the jurisdictional versus merits distinction.

There is a related group of cases focusing not on the principles that guide equity decisions, but rather on the boundaries of what courts may do when issuing equitable relief. In *Grupo Mexicano*, for example, Justice Scalia authored a 5-4 opinion that split along ideological lines, holding that equitable relief was limited to the types of relief that had been issued before 1789.[71] Justice Ginsburg wrote the dissent and reiterated the view that equity was adaptable, dynamic, and flexible.[72] Although the focus there was not on the principles or tests to be applied in deciding equitable remedies, it illustrated the same tension between a narrow view of history in conflict with the flexible approach to equity.

### *C. Post-*Winter *Development of a Circuit Split*

*1. Circuits Retaining Serious Questions Test.* Most circuits that have considered the question have decided that *Winter* did not alter their long-established tests for deciding whether to grant preliminary injunctions, specifically where they have a flexible approach to the merits prong.

The Second Circuit faced this question of the continuing viability of its serious questions test in a case involving a dispute between financial firms over credit default swaps.[73] The court examined not just *Winter* but also the *Munaf* and *Nken* cases to see whether the serious questions test remained valid—and concluded that it did.[74] The Second Circuit framed the question as to whether *Winter* and its companion cases require a showing that the movant "is more likely than not to succeed on its underlying claims," but

69. *Id.* at 681–84.

70. *Id.* at 690.

71. Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 309, 318, 333 (1999).

72. *Id.* at 333, 336–37, 342 (Ginsburg, J., dissenting).

73. Citigroup Glob. Mkts, Inc. v. VCG Special Opportunities Master Fund, Ltd., 598 F.3d 30, 32, 34 (2d Cir. 2010). These are the financial instruments that caused so much economic havoc when used recklessly by investment banks and hedge funds leading up to the Great Recession of 2008–09, the worst economic situation since the Great Depression.

74. *Id.* at 34–38.

rejected that as too broad a reading.[75] The court upheld its prior statement of the test, which requires a showing of either "likelihood of success on the merits or . . . sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting preliminary relief."[76] The court praised the flexibility of its serious questions approach, which allowed it to avoid confining relief to cases that are simple or easy.[77]

The Third Circuit has not addressed the question in the context of a preliminary injunction, but has upheld its "'sliding scale' approach" for the merits for a stay pending appeal.[78] The court explicitly noted that *Winter* changed the standard for irreparable harm, but it retained a broad reading of what constituted likely success on the merits.[79] The court noted the wide variance in formulations of the "degree of likelihood of success" required to obtain equitable relief, including "more likely to succeed than fail," "substantial possibility, although less than a likelihood of success," or "a reasonable chance, or probability, of winning."[80] Although stays pending appeal are not the same as preliminary injunctions, the similarities are such that the same reasoning should apply with equal force to a preliminary injunction, especially since the court explicitly noted *Winter*'s impact on the irreparable harm requirement.

The Seventh Circuit faced this issue in a business dispute where one party claimed it faced bankruptcy, which would cause irreparable harm.[81] After citing *Winter* for the preliminary injunction factors, the court went on to explain that in the Seventh Circuit, "[h]ow strong a claim on the merits is enough depends on the balance of harms: the more net harm an injunction can prevent, the weaker the plaintiff's claim[s] on the merits can be while still supporting some preliminary relief."[82] In this case, the claims had

75. *Id.* at 34–35.

76. *Id.* at 35.

77. *Id.* The court also cited the venerable Wright & Miller treatise on civil procedure to support its position. *Id.* at 35–36.

78. *In re* Revel AC, Inc., 802 F.3d 558, 569–71 (3d Cir. 2015).

79. *Id.* at 569.

80. *Id.* at 568–69 (emphasis omitted) (first quoting Mohammed v. Reno, 309 F.3d 95, 100 (2d Cir. 2002); then quoting Abdul Wali v. Coughlin, 754 F.2d 1015, 1026 (2d Cir. 1985); then quoting Dubose v. Pierce, 761 F.2d 913, 920 (2d Cir. 1985); and then quoting Singer Mgmt. Consultants, Inc. v. Milgram, 650 F.3d 223, 229 (3d Cir. 2011) (en banc)).

81. Hoosier Energy Rural Elec. Coop., Inc. v. John Hancock Life Ins., 582 F.3d 721, 725 (7th Cir. 2009).

82. *Id.*

"enough punch to justify interlocutory relief" given the harm avoided by an injunction.[83] The court later noted numerous uncertainties about how the case would come out and held that "[a]ll of these uncertainties collectively support the district court's conclusion that Hoosier Energy has some prospect of prevailing on the merits."[84]

The Ninth Circuit decided that its sliding scale test survived *Winter* in a case challenging logging and timber sales in a National Forest.[85] The court described its approach to preliminary injunctions as "a stronger showing of irreparable harm to plaintiff might offset a lesser showing of likelihood of success on the merits" or specifically allowing an injunction when "serious questions going to the merits were raised and the balance of hardships tips sharply in [plaintiff's] favor."[86] The court noted that an injunction could not be issued simply based on serious questions and strong irreparable harm, but also requires all four prongs identified in *Winter* to have some showing for a successful preliminary injunction.[87]

The D.C. Circuit reaffirmed the sliding scale in an employment law case brought by a group of pilots.[88] The court did not go into great depth but noted that, although a broad reading of *Winter* might change the sliding scale approach, it continued to apply; however, the issue was unnecessary to its decision because the pilots involved in the litigation could not succeed even under the sliding scale approach.[89] It should be noted that then-Judge Kavanaugh filed a concurring opinion in this case, stating his belief that the four prongs of *Winter* were each independent requirements for a preliminary injunction, and thus, a movant must show "*both* a likelihood of success *and* a likelihood of irreparable harm . . . ."[90] Thus, he might be expected to push for a further reduction in flexibility given to lower courts if presented with the question at the Supreme Court.[91] Additionally, some district court judges in the

83. *Id.*

84. *Id.* at 729–30.

85. All. for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1134–35 (9th Cir. 2011).

86. *Id.* at 1131 (alteration in original).

87. *Id.* at 1135.

88. Davis v. Pension Benefit Guar. Corp., 571 F.3d 1288, 1292 (D.C. Cir. 2009).

89. *Id.*

90. *Id.* at 1295–96 (Kavanaugh, J., concurring).

91. The possibility of resolving the split in a beneficial way at the Supreme Court is discussed *infra* Section IV.C.

District of D.C. have recently questioned whether the sliding scale approach survived *Winter*.[92]

The reasons for retaining these flexible standards are discussed in more detail later,[93] but the courts gave several reasons for why they did not take a broad reading of *Winter*. One reason was the longstanding practice of applying the flexible standard.[94] Another reason was the belief that existing precedent should not lightly be overruled absent explicit direction from the Supreme Court.[95] Some found support for retaining a flexible merits standard in *Winter* and noted the relevance of other factors, such as the balance of harms in assessing the merits.[96] Thus, the movant must show a "better than negligible" chance of success but need not show it is "more likely than not" to succeed.[97] Another reason is that the serious questions formulation requires an "overall burden [that] is no lighter than . . . the 'likelihood of success' standard."[98]

*2. The Fourth Circuit Rejected Its More Lenient Test After* Winter. In contrast to most circuits, the Fourth Circuit was an early outlier in finding that *Winter* had tightened the merits prong in addition to the irreparable harm inquiry. In *Real Truth About Obama, Inc. v. FEC*, the court found that *Winter* required it to abandon its more lenient standard for assessing the merits on preliminary injunctions.[99] This case was later vacated by the Supreme Court,[100] but the Fourth Circuit affirmed in a later case that *Winter* compelled a change in how it decided preliminary injunctions.[101] Notably, the previous Fourth Circuit standard

92. *See, e.g.*, Trump v. Thompson, 573 F. Supp. 3d 1, 12–13, 28 (D.D.C. 2021) (denying preliminary injunction under each factor, including merits); Banks v. Booth, 459 F. Supp. 3d 143, 149–50, 163 (D.D.C. 2020) (granting in part and denying in part the temporary restraining order).

93. *See infra* Section IV.B.

94. Citigroup Glob. Mkts, Inc. v. VCG Special Opportunities Master Fund, Ltd., 598 F.3d 30, 35 (2d Cir. 2010).

95. All. for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1134 (9th Cir. 2011); *Citigroup*, 589 F.3d at 35; *Davis*, 571 F.3d at 1292 (majority opinion).

96. Hoosier Energy Rural Elec. Coop., Inc. v. John Hancock Life Ins., 582, F.3d 721, 725 (7th Cir. 2009); *All. for the Wild Rockies*, 632 F.3d at 1132.

97. *In re* Revel AC, Inc., 802 F.3d 558, 569 (3d Cir. 2015) (first quoting Nken v. Holder, 556 U.S. 418, 434 (2009); then quoting Singer Mgmt. Consultants, Inc. v. Milgram, 650 F.3d 223, 229 (3d Cir. 2011)).

98. *Citigroup*, 598 F.3d at 35.

99. Real Truth About Obama, Inc. v. FEC, 575 F.3d 342, 346–47 (4th Cir. 2009), *vacated*, 599 U.S. 1089 (2010).

100. Real Truth About Obama, Inc. v. FEC, 599 U.S. 1089 (2010), *vacating and remanding Real Truth About Obama, Inc.*, 575 F.3d 342

101. Pashby v. Delia, 709 F.3d 307, 320–21 (4th Cir. 2013).

required a lessened overall burden and also allowed courts to disregard some of the four preliminary injunction factors identified in *Winter*, so the court found it to be inconsistent.[102] However, the court did not consider whether it should have adopted any of the sliding scale standards from sister circuits rather than take a strict, simplistic reading of the dicta from *Winter*.

*3. The Tenth Circuit Rejected Serious Questions but Even Has an Intra-Circuit Split.* In the immediate aftermath of the *Winter* decision, the Tenth Circuit, at first, seemed to reaffirm the serious questions test. The court later issued two decisions in 2013 that followed the same standard as applied in *RoDa Drilling*, one of which specifically upheld a preliminary injunction issued under the serious questions standard.[103] These cases led scholarly observers, including the Author, to describe the Tenth Circuit as taking a narrow reading of *Winter* and preserving the serious questions test.[104] However, the Tenth Circuit eventually reversed course.

When faced with the question for the fourth time, a divided panel of the Tenth Circuit held that although *Winter* "dealt with a different prong of the preliminary injunction" standard, the rationale of that decision meant that "any modified test which relaxes one of the prongs for preliminary relief and thus deviates from the standard test is impermissible."[105] The case dealt with oil and gas leases on public lands and whether new developments in fracking technology required an assessment of the environmental impacts under the National Environmental Policy Act.[106] The panel majority did not cite *RoDa Drilling*—or the other Tenth Circuit decisions that had reached the opposite conclusion—or discuss the other circuits which had considered this question, instead relying only on its broad reading of *Winter*.[107] Judge Lucero, in dissent,

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102. *Id.* at 320.

103. Newland v. Sebelius, 542 F. App'x 706, 708–09 (10th Cir. 2013); Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1128 (10th Cir. 2013).

104. *See, e.g.*, Kevin J. Lynch, *The Lock-in Effect of Preliminary Injunctions*, 66 FLA. L. REV. 779, 799 (2014) (citing *RoDa Drilling*'s specific language reaffirming the serious questions test); Bethany M. Bates, Note, *Reconciliation After* Winter*: The Standard for Preliminary Injunctions in Federal Courts*, 111 COLUM. L. REV. 1522, 1543–44 (2011); Sarah J. Morath, *A Mild* Winter*: The Status of Environmental Preliminary Injunctions*, 37 SEATTLE U. L. REV. 155, 160 (2013).

105. Diné Citizens Against Ruining Our Env't v. Jewell, 839 F.3d 1276, 1282 (10th Cir. 2016) (finding that the district court did not abuse its discretion in requiring a showing the plaintiff was "likely to succeed on the merits").

106. *Id.* at 1279–80.

107. *See id.* at 1282.

disagreed "that the Supreme Court has sub silentio reversed a decades-old standard used by a majority of circuits."[108] Judge Lucero went on to go through the history of the serious questions test in the Tenth Circuit and also canvassed the approaches taken by other circuits.[109]

Due to the limited attention given to this critical issue by the majority, and Judge Lucero's strong dissent, an en banc hearing was sought by the petitioner, supported by a large number of amici who were environmental nonprofits regularly engaged in litigation in the Tenth Circuit.[110] However, the court failed to take up the en banc petition, and thus, did not resolve the intra-circuit split or give more complete and thorough attention to the split with other circuits.[111] As a result, the Tenth Circuit has joined the Fourth in the minority of circuits, that have rejected their more flexible approaches to assessing the merits in preliminary injunction cases, in favor of a broad reading of *Winter*.

*4. The First Circuit Avoids the Issue in 2021*. The First Circuit was the most recent to consider this issue, although ultimately, it avoided deciding whether a relaxed standard for the merits survived *Winter*. Several environmental groups were denied a preliminary injunction in the district court in an attempt to halt the construction of an electric power transmission corridor running from Quebec, Canada to Massachusetts.[112] The environmental groups had argued in the lower court, and on appeal, for the serious questions test to be used regarding the merits prong.[113] The court did issue an injunction pending appeal while it considered the appeal on an expedited basis, so that it could preserve the status quo while the litigation played out, although it did not lay out the

108. *Id.* at 1285 (Lucero, J., concurring in part and dissenting in part).

109. *Id.* at 1286–87.

110. *Amici Curiae* Brief by Coalition of Conservation Organizations in Support of Plaintiff's Rehearing Petition at i, vi–ix, 1, 7–8, *Diné Citizens Against Ruining Our Env't*, 839 F.3d 1276 (No. 15-2130).

111. *Diné Citizens Against Ruining Our Env't*, 839 F.3d 1276, *reh'g denied sub nom*. Diné Citizens Against Ruining Our Env't v. Bernhardt, 923 F.3d 831 (10th Cir. 2019). Perhaps this circuit split can be addressed through the proposal recently outlined by Professor Wyatt Sassman in *How Circuits Can Fix Their Splits*. Wyatt G. Sassman, *How Circuits Can Fix Their Splits*, 103 MARQUETTE L. REV. 1401, 1451–54 (2020).

112. Sierra Club v. U.S. Army Corps of Eng'rs, 997 F.3d 395, 399, 403 (1st Cir. 2021).

113. *See id.* at 399 n.1 (recognizing a request for de-emphasis of the first prong to earn a preliminary injunction); Reply Brief of Appellants Sierra Club, et al. at 1–2, Sierra Club v. U.S. Army Corps of Eng'rs, 997 F.3d 395 (1st Cir. 2021) (No. 20-2195), 2021 WL 777336, at *1–2.

factors it considered in granting this request.[114] The case even attracted amicus briefs from environmental law clinic directors who laid out the implications of the issue for the court.[115] Ultimately, though, the First Circuit avoided the issue because it decided that the environmental groups would not succeed even under the serious questions test.[116] Thus, this Article will be particularly timely if the First Circuit (or another) is presented with the issue in another case soon.

*5. The U.S. Supreme Court Has Reaffirmed a Flexible Approach to the Merits Prong*. Although it is not a preliminary injunction case, the U.S. Supreme Court did reaffirm a flexible approach to assessing the merits of a case that involved a requested stay of a district court order, which is like a preliminary injunction and often involves similar factors to consider. In *Hollingsworth v. Perry*, the Court considered whether to grant a stay that would prevent the broadcast of a trial determining the constitutionality of Proposition 8, which banned gay marriage in California.[117] The Court stated that all that was required regarding the merits factor was "a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari."[118] This is the same degree of probability as required under the serious questions test in numerous circuits.[119] Thus, later Supreme Court precedent supports the idea that the Court did not intend to impose too high of a bar regarding merits before equitable relief (such as a stay or preliminary injunction) could be granted.

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114. *See* Order of Court, 997 F.3d 395 (1st Cir. 2021) (granting injunction pending appeal and setting an expedited briefing schedule).

115. *See, e.g.*, Brief of Environmental Law Clinic Directors As *Amici Curiae* in Support of Plaintiffs-Appellants and Reversal at 1, Sierra Club v. U.S. Army Corps of Eng'rs, 997 F.3d 395 (1st Cir. 2021) (No. 20-2195).

116. *See Sierra Club*, 997 F.3d at 399 n.1. The court did, however, state that First Circuit case law "has emphasized [the merits] prong's primacy in the preliminary injunction assessment." *Id.* (citing Ryan v. ICE, 974 F.3d 9, 18 (1st Cir. 2020)).

117. Hollingsworth v. Perry, 558 U.S. 183, 185–89 (2010). Although this case had potential to be a groundbreaking civil rights case in favor of gay marriage, the Court ultimately punted on the issue based on standing concerns in *Hollingsworth v. Perry*, 570 U.S. 693, 715 (2013), creating another circuit split as gay marriage was allowed in California, see *id.* at 701–02, 715, but not nationwide until the issue was resolved by *Obergefell v. Hodges*, 576 U.S. 644, 656, 680–81 (2015).

118. *Hollingsworth*, 558 U.S. at 190.

119. *See, e.g.*, Winnemucca Indian Colony v. U.S. *ex rel.* Dep't of the Interior, 837 F. Supp. 2d 1184, 1190 (D. Nev. 2011) (applying the Ninth Circuit version of serious questions).

## III. THEORETICAL APPROACHES TO PRELIMINARY INJUNCTION STANDARDS

### *A. Early Views of Preliminary Injunctions*

Earlier generations of scholars recognized the variety of formulations that courts used to weigh the equities when deciding whether to grant a preliminary injunction. John Leubsdorf, for example, provided an early scholarly look at preliminary injunctions in the 1970s.[120] In his article, Professor Leubsdorf catalogued the great variety of formulations that had been used by courts, provided a coherent rationale to explain this variety, and highlighted the common elements.[121] However, the article did not anticipate the sharp turn towards rigid factor tests that the Supreme Court would take in the 2000s. Drawing on Leubsdorf's work, the Seventh Circuit even adopted the sliding scale test and applied an algebraic formula to preliminary injunctions.[122] Other scholars who looked at preliminary injunctions were primarily focused on the public interest prong, which they noted functioned often as a judicial Rorschach test, allowing a judge to use highly subjective views of the public interest to tip the scales on a preliminary injunction.[123] Orin Lewis characterizes the public interest factor as an amorphous factor that simply reflects the court's estimation of the likely success on the merits in a majority of cases.[124]

In contrast to the view of preliminary injunctions that favors preserving the status quo, one author found that judicial flexibility in deciding whether to grant preliminary injunctions had its genesis in the court's role protecting economic efficiency at the

120. John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525 (1978).

121. *Id.* at 540–44.

122. Am. Hosp. Supply Corp. v. Hosp. Prods. Ltd., 780 F.2d 589, 593–94 (7th Cir. 1986); Roland Mach. Co. v. Dresser Indus. Inc., 749 F.2d 380, 387–88 (7th Cir. 1984).

123. *See, e.g.*, Arthur D. Wolf, *Preliminary Injunctions: The Varying Standards*, 7 W. NEW ENG. L. REV. 173, 234 (1984); Lea B. Vaughn, *A Need for Clarity: Toward a New Standard for Preliminary Injunctions*, 68 OR. L. REV. 839, 864 (1989); Orin H. Lewis, Note, *"The Wild Card That Is the Public Interest": Putting a New Face on the Fourth Preliminary Injunction Factor*, 72 TEX. L. REV. 849 (1994). The public interest factor was revisited in a recent note as well, which provided a focus on the identity of the parties, the underlying cause of action, and the scope of injunctive relief. M Devon Moore, Note, *The Preliminary Injunction Standard: Understanding the Public Interest Factor*, 117 MICH. L. REV. 939, 954 (2019).

124. Lewis, *supra* note 123, at 852–53.

expense of environmental interests.[125] Goldstein highlighted judicial flexibility as a hallmark of the court's power to protect the interests of industry while denying relief to less favorable environmental interests.[126]

### *B. Scholarly Reaction to* Winter

Professor Sarah Morath conducted an interesting empirical study of the effect of *Winter* on environmental cases.[127] This study found that most trial courts continued to look to circuit court precedent on preliminary injunctions, and only the Fourth Circuit had modified its test at that time. Thus, the study found that the effects of *Winter* were mild in environmental cases in the years following the decision.[128] However, now that the Tenth Circuit has also rejected its sliding scale test, perhaps the effect will be more pronounced.[129] Morath notes that post-*Winter*, courts are also making more of an effort to analyze the public interest factor.[130] Another outcome might be that environmental plaintiffs may be less likely to seek preliminary injunctions in circuits that have rejected the sliding scale test.

Additionally, several insightful student notes were published in the first few years after *Winter* was decided.[131] The first of these was published in 2011, and it examined the different approaches circuit courts were taking in applying *Winter* to their sliding scale tests for preliminary injunctions.[132] This note called for greater uniformity among the circuits by applying a variation of the sliding scale test.[133] Another interesting student note from 2012 looked at the developing state of the circuit split on preliminary injunctions

125. Jared A. Goldstein, *Equitable Balancing in the Age of Statutes*, 96 VA. L. REV. 485, 500 (2010).

126. *Id.* at 491.

127. Sarah J. Morath, *A Mild* Winter*: The Status of Environmental Preliminary Injunctions*, 37 SEATTLE U. L. REV. 155 (2013). *Winter* was an environmental law case, of course, so this focus on that subject area was particularly relevant.

128. *Id.* at 186, 197, 206.

129. Although the Fourth Circuit does hear some environmental cases, it does not have the same number of cases as are more common in the Western United States, particularly public land management cases.

130. Morath, *supra* note 127, at 204.

131. In addition to these notes focusing on the circuit split, a more recent student note discusses the circuit split while focusing on the public interest factor. *See* Moore, *supra* note 123, at 945–48.

132. Bethany M. Bates, Note, *Reconciliation After* Winter*: The Standard for Preliminary Injunctions in Federal Courts*, 111 COLUM. L. REV. 1522 (2011).

133. *Id.* at 1548–49.

in the immediate aftermath of *Winter*.[134] Even at this early stage the potential circuit split was evident, as the Fourth Circuit had already indicated it thought its test did not survive *Winter*. Although that decision was ultimately vacated on other grounds, the Fourth Circuit did later reaffirm that decision with respect to its preliminary injunction standard. The note also identified the D.C. Circuit and Tenth Circuit as not yet having addressed the issue,[135] although in part that is because the note was published before the Tenth Circuit decided *Diné CARE v. Jewell*.[136] The note proposed that the Supreme Court should resolve the circuit split by adopting "a sequential preliminary injunction test" with a narrow exception allowing a showing of serious questions going to the merits when the balance of hardships tips sharply in favor of an injunction.[137] Overall though, this note concluded that "the disadvantages of sliding[ ]scale tests outweigh the advantage of flexibility."[138] This conclusion was premised on the assumption that federal judges are able to accurately predict the likely success on the merits at an early stage,[139] an assumption that is not proven and one that this Author disagrees with based on personal litigation experience. The introduction to this Article, sets out the complications facing a judge who is presiding over a case involving a national forest for the first time. With novel or complex litigation, a judge may not be able to accurately predict the success on the merits at an early stage of litigation. Even in areas where the judge has more experience, accurate predictions of the merits are not always possible at early stages.

Professor Jean Love has also written an article about whether *Winter* precludes a sliding scale test for preliminary injunctions.[140] She concludes that *Winter* does not necessarily foreclose all iterations of the sliding scale test and that circuits might continue to employ these more flexible approaches, at least under certain

134. Rachel A. Weisshaar, Note, *Hazy Shades of* Winter*: Resolving the Circuit Split Over Preliminary Injunctions*, 65 VAND. L. REV. 1011 (2012).

135. *Id.* at 1046–47.

136. *See* Diné Citizens Against Ruining Our Env't v. Jewell, 839 F.3d 1276 (10th Cir. 2016).

137. Weisshaar, *supra* note 134, at 1048.

138. *Id.* at 1052.

139. *Id.* at 1054–55. The note does provide for exceptions where "substantial additional factual development is needed" or "the [legal] question is one of first impression." *Id.* at 1055. I agree that factual issues make the application of a strict "likely to succeed on the merits" standard problematic, as discussed in more detail below. *Id.*

140. Love, *supra* note 46.

constraints.[141] Professor Love's approach praises the Ninth Circuit's retention of the serious questions test in *Alliance for the Wild Rockies*,[142] and I believe that her approach is also consistent with my call for the circuit split to be resolved in favor of retaining the flexible, serious questions standard.

Earlier, this Article focused on a related issue associated with assessing the merits at the early stages of litigation for a preliminary injunction: the potential for cognitive bias in the form of lock-in.[143] The lock-in effect is of particular concern where a party can show significant irreparable harm, but cannot demonstrate a sufficient likelihood of success on the merits.[144] In such cases, a court will deny a preliminary injunction, and if the plaintiff was correct, then the irreparable harm will occur during the course of the litigation. If the party continues to pursue the claim, because it is not moot and there is potential for further harm still, then the judge will have a strong incentive to rationalize any additional evidence that comes to light or any change in position on the merits that might result from further reflection and fuller development of the issues by the parties.[145] Although this does not mean that a judge might never change her mind, the lock-in effect can be expected to bias the ultimate resolution of the merits against a party who sought but did not obtain a preliminary injunction.[146] This issue highlights the importance of not setting the bar too high regarding likely success on the merits so as not to risk bias on the ultimate merits decision.

Another interesting reaction to *Winter* focused on the conflict of equitable balancing in federal statutory cases with the principle of separation of powers.[147] That author argues that equitable balancing in federal statutory cases should be abandoned in favor of traditional principles of statutory interpretation because of a conflict with the separation of powers. Of some concern is that equitable balancing in cases involving competing federal polices "requires, that judges pick which federal policy they consider most important."[148] The author further argues that this level of judicial

141. *See id.* at 693.

142. *Id.* at 708–10, 712 (describing *Alliance for the Wild Rockies* as a "godsend" for practitioners in the Ninth Circuit).

143. Lynch, *supra* note 104.

144. *Id.* at 781, 797, 804–05.

145. *See id.* at 804, 806–07.

146. *Id.* at 804.

147. Goldstein, *supra* note 125, at 488.

148. *Id.* at 489–90.

decision-making is an aggrandizing action of the judicial branch and is best resolved by the traditional principles of statutory interpretation or left to the political branches to decide.[149]

### *C. Related Areas in the Literature*

*1. Permanent Injunctions.* The area of permanent injunctions has a clear relationship to preliminary injunctions, although the differences are critical for the focus of this Article, which is the assessment of the likelihood of success on the merits. The major difference between a preliminary injunction and a permanent injunction is when it is granted during litigation. A preliminary injunction would be granted before the final resolution of the case on the merits, while a permanent injunction is part of the final relief granted by the court after trial or other resolution of the merits (such as summary judgment or the resolution of appeal-style Administrative Procedure Act challenges). Thus, the "likelihood of success on the merits" is critical for a preliminary injunction but is not even considered for a permanent injunction because the plaintiff has necessarily already prevailed on the merits.

However, despite these differences and the absence of the "likelihood of success on the merits" factor, scholars have traced a direct line from earlier cases imposing more rigid requirements on permanent injunctions to *Winter*, which applied similar constraints on preliminary injunctions. For example, the Supreme Court issued its decision in *eBay* in 2006,[150] just a few years before its *Winter* decision. This led Professor Bray to describe the Supreme Court's evolving case law on equitable relief—such as permanent and preliminary injunctions—as "the New Equity."[151] The hallmark of these new equity cases is a focus on the distinction between legal and equitable remedies and an entrenchment of the "'no adequate remedy at law' requirement for equitable relief."[152]

In similar fashion to the unclear decision in *Winter*, Bray calls the test instituted by the Supreme Court in *eBay* surprising in how

149. *See id.* at 517, 537–39.

150. eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006) (laying out the updated formulation of factors for permanent injunctions). Despite early attempts to limit the application of *eBay* by advocates, the Supreme Court later affirmed the trans-substantive nature of its ruling on permanent injunctions. *See* Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 156–57 (2010) (applying *eBay*'s test in a different legal context).

151. Samuel L. Bray, *The Supreme Court and the New Equity*, 68 VAND. L. REV. 997, 1000 & n.5 (2015).

152. *Id.* at 999–1000.

accidental it seems to have been.[153] The Court's announcement of a traditional test for permanent injunctions was a surprise because prior to *eBay*, remedies scholars had never heard of a traditional, four-factor test for permanent injunctions.[154] The appeal to a historical standard for permanent injunctions by the Court mirrors the later *Winter* decision.

*2. Stays, Injunctions Pending Appeal, and Similar Procedures.* As explained above, preliminary injunctions are not the only time when courts must decide whether to preserve the status quo while litigation plays out. Stays and injunctions pending appeal are two such areas, and courts have historically applied very similar standards to the preliminary injunction standard in those areas. The hallmark of all, of course, has been equitable balancing. Although these are treated as distinct remedies by courts,[155] they typically employ similar, perhaps even identical, language to help them weigh the equitable issues presented by the request for relief.[156]

The leading scholar in the area of stays is Professor Portia Pedro.[157] She defines a stay pending appeal as when "a court determines whether to prevent the enforcement of a final order or judgment until an appellate court issues an opinion."[158] Stays are ostensibly decided based on the same four factors as preliminary injunctions at the circuit court or Supreme Court levels.[159] However, the standard for stays pending certiorari is notably lenient regarding the merits: "a fair prospect that a majority of the Court will vote to reverse the judgment below."[160] In contrast, the standard typically applied to the merits of stays pending appeal in the circuit courts is often "a strong showing" rather than a "mere

153. *Id.* at 1023.

154. *Id.* at 1025 (citing Mark P. Gergen et al., *The Supreme Court's Accidental Revolution? The Test for Permanent Injunctions*, 112 COLUM. L. REV. 203, 205 (2012)).

155. *See, e.g.*, Nken v. Holder, 556 U.S. 418, 428–29 (2009) ("A stay pending appeal certainly has some functional overlap with an injunction, particularly a preliminary one. Both can have the practical effect of preventing some action before the legality of that action has been conclusively determined. But a stay achieves this result by temporarily suspending the source of authority to act—the order or judgment in question—not by directing an actor's conduct.").

156. Pedro, *supra* note 6, at 889–92, 889 n.117, 890 n.121, 891 & n.127.

157. *See* Pedro, *supra* note 6.

158. *Id.* at 871. The article also notes other contexts where courts may issue a stay, although they are not the focus of its analysis. *Id.* at 873 n.11.

159. *Id.* at 886–87, 886 n.102, 889.

160. *See id.* at 887 (quoting Hollingsworth v. Perry, 558 U.S. 183, 190 (2010)).

possibility" or "better than negligible" chance of success.[161] Despite the similarities to preliminary injunctions, there are, of course, meaningful differences—most notably in the context of litigation. Thus, Professor Pedro proposes a presumption in favor of stays for guaranteed-review appeals, and a presumption against stays pending appeal for discretionary appeals, unless the movant demonstrates that the court is likely to grant appellate review.[162] She also proposes a number of critical reforms that would greatly benefit this area of the law, such as asking courts to write more to explain their decisions and several improvements to the procedures used in deciding stay requests from parties.[163] Pedro's proposal to ask courts to write more could be applied to great effect in denials of preliminary injunctions to lessen the impact of the lock-in effect and provide a clearer picture for litigants to understand why an injunction is granted.[164]

Pedro also highlights the inconsistent application of the stay factors courts apply.[165] When they do write opinions on stays, courts are split on the application of the factors.[166] The Fourth Circuit applies a balance-of-hardships approach that only considers the likelihood of success after a balancing of the hardships and applies the serious questions standard to the issues presented for litigation.[167] Some courts, however, apply a sliding scale approach which allows for a stronger showing of likelihood of success to excuse a weaker showing of irreparable injury.[168] Some courts even use a distinct serious questions test that allows for a less than likely success on the merits to be excused by a strong showing of the other three stay factors.[169] Pedro notes that the decision in *Winter* has forced some reconciliation of the standard for stays, but also notes that "some courts have not yet determined whether the sliding scale or serious-questions approaches, as applied in determining stays pending appeal, survive *Winter*."[170]

161. *Id.* at 888 (internal quotation marks omitted).

162. *Id.* at 912–13. The proposal would allow the party that obtained an injunction below to rebut a presumption in favor of a stay by showing irreparable harm and likely success on appeal. *Id.*

163. *See id.* at 915, 923.

164. *See* Lynch, *supra* note 104.

165. Pedro, *supra* note 6, at 892.

166. *Id.*

167. *Id.* at 892–93.

168. *Id.* at 893.

169. *Id.* at 893–94.

170. *Id.* at 895.

## IV. REMEDYING THE PRELIMINARY INJUNCTION STANDARD

### *A. Is the Circuit Split a Problem?*

Of course, the mere presence of a circuit split is not necessarily a problem. In fact, one could easily argue that a circuit split existed before *Winter*, as the circuits have each developed their own versions of the considerations for granting a preliminary injunction. Many of these have notable similarities, of course, but some of the differences have proven meaningful. For example, the Fourth Circuit's lesser standard on the merits arguably did not require a heightened showing for the other factors, and this may explain why the fourth was the first circuit to apply a strict reading of *Winter* to the merits factor.[171]

So, is the growing circuit split a problem? I would argue that it is, for several main reasons. First, the stricter standard in the Fourth and Tenth Circuits can be expected to discourage litigants from seeking preliminary injunctions because of the increased burden. Or when they do seek injunctions, they will prevail less frequently. As a practical matter, this means that effective, meaningful relief will be precluded to some portion of litigants in those circuits. These impacts can be expected to be concentrated in areas where establishing likely success on the merits is difficult without first engaging in discovery,[172] or where review depends on an administrative record that may not be available or complete.[173]

Second, a higher standard for preliminary injunctions, specifically related to the merits factor, can be expected to introduce bias into the system due to the lock-in effect of courts denying an injunction based on failure to show likely success on the merits.[174] In such a case, where irreparable harm is demonstrated and then eventually occurs, the court will be biased towards denying relief to the plaintiff, even if subsequent developments in the case should lead the plaintiff to succeed.

Third, and finally, the Supreme Court's attempts to impose rigidity on courts deciding whether to issue a preliminary injunction, or to make equitable remedies such as preliminary injunctions even more "extraordinary," should be resisted by the

171. *See* Real Truth About Obama, Inc. v. FEC, 575 F.3d 342, 346 (4th Cir. 2009) (holding that "all four requirements [for a preliminary injunction] must be satisfied").

172. See discussion *infra* Section IV.B.3 for further commentary on the difficulties associated with deciding the merits before discovery can be completed.

173. *See* discussion *infra* Section IV.B.3.

174. Lynch, *supra* note 104, at 781–82, 803–04, 809.

lower courts and halted or abandoned by the Supreme Court. Although federal courts love to refer to preliminary injunctions as an "extraordinary remedy"[175] there are many circumstances where they are justified and necessary. Attempts to put a thumb on the scale thus harm plaintiffs and favor entrenched interests and those with political power. Additionally, as numerous scholars have noted,[176] the Court has been wrong to embark on its effort, intentional or not, to reduce the flexibility of lower courts by cabining their discretion using mandatory factor standards.

These reasons suggest that the circuit split should be resolved. The following section will explain in more detail reasons why the strict interpretation of *Winter*, requiring an early showing of likely success on the merits, should be rejected or limited whenever the chance arises.

### *B. Reasons Not to Extend a Strict Interpretation of* Winter

There are many strong reasons why the strict interpretation of *Winter* should not extend to the merits factor, especially in public law cases. *Winter* should not be read to overturn decades of practice without clear intent. Such an approach would move the doctrine of preliminary injunctions significantly away from the flexible approach that has always been the hallmark of equity. Additionally, the information asymmetries are often particularly pronounced in public law cases, many of which are decided based on an administrative record that has not even been prepared at the time a decision on a preliminary injunction is reached. A rigid approach in this area will also lead to significant irreparable harm occurring over the objection of the plaintiff. As a result, judges will likely be subjected to cognitive bias when ultimately reaching a decision on the merits, inappropriately skewing the results against plaintiffs who unsuccessfully seek a preliminary injunction. A flexible approach to equity also comports with judicial humility, recognizing that the judges asked to assess the merits at the early stages of litigation would often get the question wrong, thereby depriving deserving plaintiffs of relief from illegal government action. Thus, although courts love to state that a preliminary injunction is an extraordinary remedy, that does not necessarily mean it should be a rare remedy in public law cases; otherwise,

175. *See, e.g.*, Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 22 (2008); Diné Citizens Against Ruining Our Env't v. Jewell, 839 F.3d 1276, 1281 (10th Cir. 2016); Wilderness Workshop v. U.S. Bureau of Land Mgmt., 531 F.3d 1220, 1224 (10th Cir. 2008).

176. *See* discussion *supra* Section II.B–C.

much illegal conduct would no longer be accountable to judicial review.

*1.* Winter *Should Not Overturn Decades of Practice Without Thought/*Sub Silentio. If *Winter* really was intended to overturn decades of precedent and experience of the lower courts applying the flexible sliding scale approach to preliminary injunctions, including the evaluation of the merits, then it should have clearly done so. But at best, *Winter* simply includes a broad statement of four preliminary injunction factors, including likely success on the merits.[177] The decision does not cite any of the circuit court precedent applying the sliding scale or serious questions approaches to evaluating the likelihood of success on the merits.[178] This is perhaps unsurprising, given that the merits factor was not at issue in *Winter*, where the plaintiff had demonstrated likely success on its underlying claims.[179] Thus, lower courts should resist mechanical extrapolations of the broad language from *Winter* and push back on any claim that *Winter sub silentio* overturned their decades of practice and precedent with respect to early and incomplete evaluation of the merits in preliminary injunction cases.

The Supreme Court itself has cautioned against changes to equity tradition, stating that "a major departure from the long tradition of equity practice should not be lightly implied."[180] Following this principle, it would not be proper for lower courts to read into *Winter* such a radical departure from decades of equity practice without some kind of clear statement from the Court that it intended to effect this radical change. This would also be consistent with Justice Ginsburg's dissent in *Winter*, stating that the court did not reject the sliding scale formulation.[181] Notably, Chief Justice Roberts, in the opinion for the Court in *Winter*, did not object to this statement from Justice Ginsburg even though he did respond to other points made in the concurrence and dissent.[182] Thus, lower courts are wrong to read too much into statements from *Winter* taken out of context, especially when they would use those statements to overturn decades of settled equity tradition.

177. *Winter*, 555 U.S. at 20.

178. *See id. Contra id.* at 51 (Ginsburg, J., dissenting) (discussing the "sliding scale" approach and citing a treatise collecting circuit court cases).

179. *Id.* at 20, 23–24 (majority opinion).

180. Weinberger v. Romero-Barcelo, 456 U.S. 305, 320 (1982).

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

182. *See id.* at 31 n.5 (majority opinion) (focusing on the balance of equities due to national security interests at stake).

As the Second Circuit noted in *Citigroup*, if the Supreme Court wanted to "abrogate the more flexible standard[s], one would expect some reference to the considerable history of the flexible standards applied in various circuits and the Supreme Court."[183]

In direct contravention of the preceding points, the Tenth Circuit decision in *Diné CARE v. Jewell* is a poor example of judicial reasoning and decision-making,[184] highlighting the pitfalls of taking a simplistic reading of broad language from *Winter* out of context, and refusing even to minimally engage with contrary precedent from other circuits and even prior decisions of the Tenth Circuit that applied the sliding scale test even in the aftermath of the *Winter* decision. When abandoning decades of precedent applying the flexible sliding scale standard, the court had an obligation to engage in thoughtful and reasoned decision-making. It failed badly in that regard. Even more perplexing, and frustrating, was the failure of the full court to hear the case en banc to address not only the circuit split but also the unexamined break from precedent, which effectively overruled prior cases without even citing, let alone discussing, why a change in course was necessary.[185]

One must concede, of course, that the Supreme Court has exhibited a clear hostility in recent years towards the flexible standards that once were the hallmark of equity, instead favoring the application of supposedly clear, but certainly more rigid, rules and factor-based tests.[186] Thus, it is not crazy to think that the Supreme Court, were it to consider whether the serious questions test should continue to be applied, might take the rigid and restrictive approach that the Fourth and Tenth Circuits have read into *Winter*. But if it wants to make such a dramatic change in the law, the Supreme Court should do so clearly and explicitly, after weighing the arguments on both sides and considering the impacts such a change would have on the lower courts.

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183. Lawrence Lee Budner, *Preserving Flexibility:* Alliance for the Wild Rockies v. Cottrell *and the Preliminary Injunction Standard*, 39 B.C. ENV'T. AFFS. L. REV. 15, 26 (2012) (citing Citigroup Glob. Mkts, Inc. v. VCG Special Opportunities Master Fund. Ltd., 598 F.3d 30, 38 (2d Cir. 2010)).

184. Diné Citizens Against Ruining Our Env't v. Jewell, 839 F.3d 1276 (10th Cir. 2016).

185. The lack of discussion around key issues of procedure has also been acknowledged by Professor Pedro, who points out that "courts do not write" when they decide stay determinations. Pedro, *supra* note 6, at 897–98 (noting that courts frequently do not provide reasoning for their stay determinations and when they do, they are not consistent in what factors they consider).

186. Bray, *supra* note 36, at 1024–25, 1029–32.

*2. Flexibility Rather Than Rigidity.* Flexibility used to be the hallmark of equity: no longer. Each incremental step from the Supreme Court has had the effect, intentional or not, of restricting the flexibility of lower courts. Perhaps some of this can be explained by the adage, "bad facts make bad law." Who is surprised that the Supreme Court, when faced with dire claims by the military opposed to protections for whales in the *Winter* case, decided that lower courts (especially those in the Ninth Circuit) cannot be trusted to exercise their discretion appropriately and must be reined in? The Court, of course, has never repudiated its often-repeated language that flexibility is the hallmark of equity. Instead, it chooses to focus on other language in tension with that, that equitable relief such as injunctions are "an extraordinary remedy" and therefore should be granted only in rare circumstances.[187] And to ensure that preliminary injunctions are granted less frequently, it has created ever more hurdles whenever faced with lower courts that granted injunctive relief when the Court would have disagreed.[188] At the same time, the Supreme Court itself is part of a worrying trend in federal courts where the courts will not explain themselves when deciding whether to grant equitable relief.[189] The Court grants stays of lower court orders with regularity, even though that form of equitable relief is also supposedly extraordinary.[190] This situation leaves lawyers and litigants to wonder what the test really is, other than a convenient means for appellate courts to second-guess the discretion of lower courts without applying the proper abuse of discretion standard.

*3. Information Asymmetries/Administrative Record Issues.* One of the biggest reasons why the merits prong should be treated differently from irreparable harm comes down to information asymmetries between the parties as well as other difficulties in accurately assessing the merits at the early stage of litigation. Irreparable harm is all about the harm to the party seeking an injunction. While there are often difficulties in establishing harm, especially when asked to predict events in the future, at least the

187. Of course, extraordinary does not necessarily mean the same as rare. It could be common to grant preliminary injunctions, even if they are not always issued as a matter of course, and thus are extraordinary. Bray, *supra* note 36, at 1038–39, 1038 n.243.

188. The Court could have, of course, handled these cases by arguing that the lower courts abused their discretion in granting particular injunctive relief. But for some reason, it chose not to.

189. *See supra* note 163 and accompanying text.

190. *See* Little v. Reclaim Idaho, 140 S. Ct. 2616, 2618 & n.1 (2020) (Sotomayor, J., dissenting).

difficulty is not due to a lack of access to information that would prove such harm. Instead, the party seeking an injunction usually has access to all the information it needs to demonstrate the likelihood of irreparable harm. Any failure to demonstrate irreparable harm would then be due to bad facts or failure to provide sufficient convincing evidence, perhaps expert testimony, that would demonstrate irreparable harm.

In stark contrast, assessment of the merits at the early stage of litigation will often run up against the barriers of information asymmetries. Specifically, while the plaintiff may have enough evidence to state a claim for relief, oftentimes the evidence needed to prove success on the merits is in the possession of the defendant. This is the entire purpose of discovery in our adversarial system. Thus, when a preliminary injunction is sought before discovery has been completed, or especially before any discovery is allowed, asking the court to assess the merits with any accuracy is problematic. A lower standard for the merits, such as serious questions, still allows courts to weed out cases that are particularly weak on the merits, while not presenting an insurmountable barrier.

Many cases where preliminary injunctions are sought against government defendants raise related but different concerns. One of the main ways to sue the federal government is through the Administrative Procedure Act, which is processed like an appeal based on an administrative record.[191] Although the administrative record was theoretically prepared at the time the agency made a decision subject to judicial review under the APA, in practice, it often takes many months for the government to produce the administrative record to the court. Although plaintiffs can sometimes identify documents that will be part of the administrative record and submit them to the court early, they do not always have access to the full record and may not know about a "smoking gun" e-mail or another document in the record that will significantly bolster their chances of success. Thus, just as in cases where an injunction is sought before discovery has concluded, it is unfair and unrealistic to require courts to assess the merits of a case where the full administrative record has not yet been produced to the court.

191. *See, e.g.*, Olenhouse v. Commodity Credit Corp., 42 F.3d 1560, 1579–80 (10th Cir. 1994).

*4. Practical Effects: Preserving the Status Quo During Judicial Review/Lock In.* The principal reason for courts to issue a preliminary injunction is to preserve the status quo while the litigation plays out. Unique circumstances might justify deciding the case on an expedited timeframe so that any delay imposed by the injunction is of limited duration. However, justice is not served by courts abdicating their duty to resolve disputes or by rushing judgment in a manner likely to increase errors by the courts. A preliminary injunction that preserves the status quo thus allows for deliberate consideration of the issues, which can be properly presented after the adversarial system plays out to fairly resolve disputed facts.

In contrast, denial of preliminary injunctions in the face of substantial irreparable harm is likely to significantly skew or bias the outcome of litigation. First, if irreparable harms are allowed to occur, then plaintiffs' claims might become moot, and no relief would ever be possible. Even if claims are not mooted, however, a judge who allows significant irreparable harm to occur is going to face cognitive pressure to later justify an initial finding that the plaintiff was not likely to succeed on the merits. Otherwise, the judge would be faced with the stress of cognitive dissonance where a plaintiff ultimately demonstrates she should prevail on the merits, but the court previously found otherwise and allowed significant illegal and irreparable harm to be inflicted upon her. Maintaining a flexible approach to lock-in, thus, is a much better approach in that it preserves the status quo and allows for careful and deliberate consideration of serious issues raised in litigation.

In addition to the lock-in effect for those cases where irreparable harm is easy to prove but success on the merits is not, it is worth paying attention to the probable effects that a more stringent preliminary injunction standard will have in the real world. For example, in the environmental context, fewer preliminary injunctions favor development at the expense of the environment because projects that would have been enjoined under the more lenient standard can now proceed—often more quickly than judicial review can occur.[192] In the business context, raising

192. *See, e.g.*, Nat'l Parks Conservation Ass'n v. Semonite, 311 F. Supp. 3d. 350 (D.D.C. 2018). In this case, regarding a challenge to the construction of power lines and associated towers near historic Jamestown, the court denied a preliminary injunction, but when the plaintiffs prevailed on the merits, the court allowed the towers to remain in place even though they were erected in violation of law. Thus, there was no effective relief in this case, despite success on the merits, due to the failure of the court to preliminarily enjoin construction of the challenged project. *Id.* at 357–60; *see* Press Release, National Parks

the standard for preliminary injunctions will provide incentives for defendants to drag litigation out, thus unfairly favoring businesses with greater resources to spend on litigation. In fields, such as employment law—particularly in employment discrimination—the plaintiffs are primarily employees, and thus this change will shift power to employers.[193] In more general suits against the government, which is rife with corruption and the influence of lobbyists, fewer injunctions means that changes sought by the powerful interests in society will be able to proceed without facing effective judicial review. While counterexamples can be imagined,[194] this change in procedural requirements will have a meaningful impact on substantive rights in this country, with power skewing ever further in favor of the rich and powerful.

*5. Judicial Humility*. This point may seem simple, but it is worth making. Judges are human beings. They make mistakes. They do not have perfect foresight. We should not expect these people, flawed like the rest of us, to accurately predict the merits of a case on a rushed timeline, at an early stage of litigation where the facts and legal issues have not been fully developed, and without the benefit of normal briefing in the case. Thus, taking a flexible approach in assessing the merits allows time for more deliberate investigation. Crafting a standard that assumes perfect prescience on the part of trial court judges is unrealistic at best, and perhaps lacks humility. Courts should thus return to the flexible approach of equity and acknowledge the limitations necessarily involved in early assessments of the merits.

For example, the Supreme Court issued a rushed decision in 2020 regarding the administration of Wisconsin's election in light of the COVID pandemic.[195] The Wisconsin governor sought to delay the election in light of the stay-at-home order issued by the state due to the pandemic, which was then in its early and uncertain

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Conservation Association, Court Allows Dominion Energy to Continue Construction of Massive Transmission Line at Historic Jamestown (Oct. 20, 2017), https://www.npca.org/articles/1666-court-allows-dominion-energy-to-continue-construction-of-massive [perma.cc/FUE2-YVRZ]. The D.C. Circuit eventually ruled in favor of the plaintiffs on the merits. *Semonite*, 916 F.3d at 1089.

193. *See, e.g.*, 42 U.S.C. § 2000e-2(a) (describing unlawful employment discrimination by employers).

194. The stay of orders of removal in immigration proceedings would be one such counterexample. *See* Nken v. Holder, 556 U.S. 418, 421–22 (2009) (describing stays of removal).

195. Republican Nat'l Comm. v. Democratic Nat'l Comm., 140 S. Ct. 1205 (2020) (per curiam).

stages.[196] But the state legislature, controlled by the Republican party, refused to comply.[197] A district court judge in Wisconsin, and then the Seventh Circuit, had granted the request for a preliminary injunction to allow more time for absentee ballots to be properly counted due to administrative challenges resulting from a dramatically higher use of absentee ballots because of the dangers associated with in-person voting.[198] The Supreme Court, took it upon itself to wade into this partisan fight, ultimately siding with the Republicans on the eve of the election—ironically, leaning on the principle that federal courts should not make last-minute changes in state elections.[199] Rather than deferring to the lower courts, which had considered the issue in more detail and under less time-pressure, the Court decided to step in and substitute its judgment for that of the lower courts.[200] Unsurprisingly, the Court messed up a key fact in this case when it described the relief requested by the plaintiffs compared to the relief granted by the district court.[201] As a result, unknown numbers of absentee ballots were not counted in the election.[202] It should be too obvious to state, but courts should not rush to issue decisions, but rather, should take actions to preserve the status quo and take the necessary time to properly weigh the merits of claims presented to them.

196. *Id.* at 1208–09 (Ginsburg, J., dissenting); Shawn Johnson, *To the Polls in a Pandemic: How Wisconsin Went Ahead with an Election Amidst a Public Health Crisis*, WIS. PUB. RADIO (Apr. 13, 2020, 11:40 AM), https://www.wpr.org/polls-pandemic-how-wisconsin-went-ahead-election-amidst-public-health-crisis [perma.cc/27QM-VD6B].

197. Johnson, *supra* note 196.

198. Democratic Nat'l Comm. v. Bostelmann, Nos. 20-1538 & 20-1546, 20-1539 & 20-1545, 2020 WL 3619499, at *1 (7th Cir. 2020); *Republican Nat'l Comm.*, 140 S. Ct. at 1206–07.

199. *Republican Nat'l Comm.*, 140 S. Ct. at 1206–07.

200. *See id.* at 1206 (staying a preliminary injunction that had been issued by the lower court).

201. *See* Amicus Podcast with Dalia Lithwick, *Why, Wisconsin?*, SLATE (Apr. 11, 2020), https://slate.com/podcasts/amicus/2020/04/wisconsin-election-scotus [perma.cc/Z5JS-XAXM]. The Supreme Court actually read into Wisconsin law a requirement that did not exist—that the ballots be postmarked before the date of the election. *Id.* In reality, state law simply set a deadline for receipt of ballots, which was moved from the date of the election until the following Monday. *Id.* Thus, the Supreme Court seriously misstated the extent of the change in the law that was affected by the preliminary injunction entered by the district court and upheld by the Seventh Circuit. *Id.*

202. *Id.*

*6. Should Preliminary Injunctions Really Be Extraordinary?* In some fields, preliminary injunctions are commonly necessary to preserve the status quo. Environmental law is one of those areas. Although preliminary actions may not be the norm in all fields, in some fields they should be more common. This is not to suggest that preliminary injunctions should be granted willy-nilly, but instead, that courts should not continually harp on the supposed extraordinary nature of preliminary injunctions. Although they may not formally mean that extraordinary means rare, if they think about it, the unexamined repetition of the word extraordinary has a risk of giving the impression that it is a remedy that should rarely be granted.

Many injunction cases will distinguish between mandatory and prohibitory injunctions. A mandatory injunction requires the non-moving party to affirmatively do something and are often said to be disfavored. On the other hand, a prohibitory injunction simply enjoins a party from carrying out a project, enforcing a law, or otherwise taking some action that the other party is hoping to forestall to preserve the status quo. Prohibitory injunctions—though they should not always be granted—pose less of a concern and should be less extraordinary than mandatory injunctions.

Professor Bray has noted that although preliminary injunctions are exceptional, that does not mean they are rare or unusual, and the courts have not said that they are.[203] Instead, when noting that preliminary injunctions and other equitable relief are extraordinary, the court means that they are a departure from a norm of granting legal relief after resolving the merits of a case. And thus, the departure from a norm "demands [a] justification."[204]

### *C. Paths Forward*

Assuming that the relevant constituencies are convinced now that the flexible approach to preliminary injunctions is preferable, how can that best be accomplished? The three clearest ways to resolve the issue include a clear, on-point decision from the Supreme Court; the circuits resolving the split themselves; or amendments to the rules of procedure in the district and circuit courts, specifically Federal Rule of Civil Procedure 65 and Federal Rule of Appellate Procedure 8.

The Supreme Court is the obvious entity that can resolve the circuit split. Indeed, Supreme Court practice often involves letting

203. Bray, *supra* note 36, at 1038.

204. *Id.*

issues percolate in the lower courts until there is a circuit split, and then stepping in to resolve the issue. Thus far, the Supreme Court has not taken up a case that clearly presents the issue of whether the serious questions test survived *Winter*. However, the development of the circuit split has made it increasingly likely that the Supreme Court will take up the issue in a future case.[205] This approach is also the riskiest approach, however, at least from the perspective that a flexible approach to preliminary injunctions is important. The majority in *Winter*, of course, displayed great distrust in the ability of lower courts to weigh the equities in any given case to reach the appropriate outcome, and thus imposed a bright-line rule for irreparable harm. Unless the case is presented carefully to the Court, it can be expected to continue imposing rigid factor-based tests in this area of the law.[206]

Another approach to resolving the circuit split is less obvious, but the circuits could resolve the split themselves if they so choose by moving past the doctrine of the "law of the circuit" to allow later panels, or even the full circuits en banc, to reevaluate their decisions considering the conflict with other circuits. This is the approach detailed by Professor Wyatt Sassman in his recent article.[207] The general idea is that "courts of appeals should relax the law of the circuit doctrine when a prior panel opinion has subsequently resulted in a conflict with another circuit."[208] This approach would work particularly well for the Fourth Circuit, where the initial strict reading of *Winter* made in *Real Truth About Obama* occurred before other circuits had made their conflicting interpretations of *Winter*. The Fourth Circuit should also consider whether, even if its more lenient standard was precluded by *Winter*, it should instead adopt the sliding scale or serious questions tests used by other circuits, which place the same overall burden on the party seeking a preliminary injunction. This approach would not be as simple to apply to the Tenth Circuit, where the panel in *Diné*

205. Although the composition of the Court has changed since *Winter* was decided, there is no indication that the most recent additions will be any more favorable towards flexible approaches to equity. *See, e.g.*, Davis v. Pension Benefit Guar. Corp., 571 F.3d 1288, 1295–96 (D.C. Cir. 2009) (Kavanaugh, J., concurring) (then-Judge Kavanaugh bothered to write separately that he believed *Winter*, *Munaf*, and *Nken* require an independent showing for each preliminary injunction factor).

206. In contrast to my grim assessment, others have predicted that the Supreme Court would not reject the serious questions test and would instead affirm Justice Ginsburg's statement from her dissent in *Winter* that the court did not reject the sliding scale approach. *See* Love, *supra* note 140, at 707–08.

207. Sassman, *supra* note 111, at 1451–54.

208. *Id.* at 1451.

*CARE* made its decision after those of other circuits, but simply failed to consider those conflicting decisions.[209] However, the Tenth Circuit could still take an appropriate opportunity to correct these deficiencies in a future case by aligning itself with its sister circuits that have retained a flexible approach to assessing the merits in preliminary injunction cases.

Finally, the circuit split could also be resolved through amendments to the federal rules of procedure, particularly Federal Rule of Civil Procedure 65[210] and Federal Rule of Appellate Procedure 8.[211] Specifically, Federal Rule of Civil Procedure 65(a) could be amended to explicitly allow an injunction to be issued based on serious questions going to the merits, or on a sliding scale approach. Federal Rule of Appellate Procedure 8 could similarly be amended to allow injunctions pending appeal upon a showing of serious questions or a sliding scale approach to the merits, at least where the lower court denied a preliminary injunction before discovery was complete or before the full administrative record was presented to the court.

## V. RESPONDING TO ANTICIPATED OBJECTIONS

### *A.* Winter *Is Clear*

This is the argument accepted by the Fourth Circuit and Tenth Circuit. While this argument may seem terrible on its face, it has somehow prevailed in those two circuits. Thus, it is worth addressing this argument fully head-on. Several courts have already done so, and their reasoning is persuasive.

First, the statements relied upon were not necessary to the decision in the case, and therefore may appropriately be described as dicta. While sometimes we make too much of the nebulous dicta/holding distinction, in this case it helps to avoid cherry-picking a statement out of context in a way that upends decades of circuit precedent. It is important to keep in mind that

209. Of course, the Tenth Circuit also, unfortunately, denied the en banc petition in the case, despite concerns about a circuit split being raised. However, having made a hasty decision in the past is no good reason to avoid improving that decision going forward.

210. Federal Rule of Civil Procedure 65(a) discusses preliminary injunctions, but only requires notice to the adverse party and authorizes the court to advance and consolidate the trial on the merits with a hearing on a preliminary injunction.

211. Federal Rule of Appellate Procedure 8(a) contemplates the filing of a motion in the court of appeals in a number of circumstances, including a request for "granting an injunction while an appeal is pending."

the Supreme Court in *Winter* did not claim to modify the test for likelihood of success on the merits at all.

Second, as Justice Ginsburg pointed out in her dissent, and the opinion for the Court did not contest, the Court did not intend to upend decades of doctrine regarding the sliding scale tests in the lower courts. Instead, the case was focused on what it found to be an improper "possibility of irreparable harm" test.

Finally, good reasons exist to treat the merits factor and harm factors differently. Irreparable harm is something that the plaintiff knows a lot about. The harm must be to the plaintiff itself, and it is likely what motivated the plaintiff to sue in the first place. Thus, setting a higher bar for irreparable harm can be justified more than a higher bar for the merits. Relatedly, the harm must be shown to be irreparable in the sense that damages at law would be inadequate to remedy the harm, as it is explicitly part of the standard for a permanent injunction. The merits, in contrast, are often covered in a fog of litigation at the outset of a case. There is great uncertainty in how the case will play out (otherwise the parties would have strong incentives to settle). Important facts may not be fully developed yet, and thorny legal issues will not have had time for full briefing and deliberate consideration by the court. Thus, a more flexible standard on the merits will allow closer cases to proceed, where the absence of a preliminary injunction might make the claims moot. This is why courts have stated that "[l]imiting the preliminary injunction to cases that do not present significant difficulties would deprive the remedy of much of its utility."[212]

### *B. Injunctions Are Too Commonly Issued*

The push to tighten preliminary injunction standards often reflects the view that such injunctions are issued too frequently, and inappropriately. The Supreme Court has apparently tasted the porridge left by the lower courts and found it to be "too hot." But whether courts are currently finding the Goldilocks zone of preliminary injunctions is entirely in the eye of the beholder, and it is difficult to conceive of any objective standard for making this judgment. Yet the Supreme Court has arguably decided to tighten the standard for assessing the merits related to preliminary injunctions—apparently without any realization of what it was doing.

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212. Citigroup Glob. Mkts, Inc. v. VCG Special Opportunities Master Fund, Ltd., 598 F.3d 30, 35–36 (2d Cir. 2010).

However, if it is correct that the burden on movants is the same under serious questions as it is under likely to succeed on the merits, then one can question whether differential outcomes should turn solely on a judge's preliminary assessment of the merits. If the burden is set at the appropriate threshold, then the number of preliminary injunctions issued should be "just right." However, by taking away the flexibility to weigh all the competing considerations, a strict reading of the *Winter* factors means that courts are "too cold" in issuing injunctions.

One argument noted by many circuit courts that have rejected a literal reading of *Winter* is that the serious questions or other flexible standards for assessing the merits are not a relaxation of the traditional test at all. With this view, shared by this Author, any decreased burden on likelihood of success on the merits is offset by an increase in the other factors, especially the requirement that the balance of equities tips strongly in favor of an injunction. Under the traditional test, the balance of equities need only favor an injunction, instead of strongly favoring one. This is why, for example, the Second Circuit describes its approach to preliminary injunctions not as two separate tests with one lower than the other, but instead as variations on the same test that elaborate how the factors are to be weighed collectively.[213] Thus, those who argue that the serious questions test is a lower bar and therefore impermissible have simply misunderstood the serious questions formulation.

### *C. Plaintiffs Should Be Able to Prove They Will Succeed*

Another potential argument against a lower threshold on the merits is that the party seeking an injunction should be able to prove it will prevail in the litigation. In an ideal world, where all parties have perfect knowledge of the facts, this argument would be very convincing. However, that is not the world we live in. As discussed previously, the litigation process, and discovery in particular, is designed to address, among other things, the information asymmetries that are known to exist. There is no reason, and courts have not identified any, why parties who lack information are less deserving of having their legal interests protected by the courts. Or why defendants with great informational advantages (like the government or large corporations) should be shielded from liability more than other defendants who lack those advantages. This is why equity

213. Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc., 596 F.2d 70, 72 (2d Cir. 1979).

developed such a flexible framework over time—to deal with the unique issues raised by each case.[214] When judges are not trusted to use their discretion but are instead hamstrung to reduce preliminary injunctions, fairness and equity in our judicial system suffer.

This is not to say that preliminary injunctions should be issued as a matter of course. The requirement for irreparable harm still imposes a significant limit on the availability of a preliminary injunction as a remedy. And requiring serious questions as to the merits weeds out cases that have no merit, and then some. Judges still retain the flexibility to craft an appropriate remedy. Thus, if there is significant irreparable harm to the defendant caused by an injunction, the injunction may be time limited. This could allow for narrow, targeted discovery to occur, which may shed light on whether the injunction should be continued or perhaps even lead to a settlement or faster judicial resolution of the case.

### *D. Delays Harm Defendants and the Public*

Delays in resolving litigation cause obvious harm to plaintiffs, of course. Justice delayed is justice denied, as the saying goes. However, when preliminary injunctions are removed as a practical, available remedy, then defendants have every incentive to delay litigation and carry on with the plans which the plaintiff hopes to enjoin. If they wait long enough, the product might be sold, the forest cut down, or the pipeline built. Irreparable harm, by its very definition, cannot simply be undone or compensated for with monetary damages.

But is adding even more incentives for the delay in our litigation system good for the system as a whole? Delay also harms defendants who face longer uncertainty over the legality of their actions and perhaps damages they owe (in many cases, there is reparable harm along with irreparable). By engaging in delay tactics, defendants also increase their own legal expenses. Delay harms the public as well by prolonging uncertainty, dragging out bitter fights among competing interest groups, and imposing greater transaction costs on society. The delay also harms courts, whose dockets remain more crowded than before, and that often must referee the attempts at delay. Thus, by making preliminary injunctions even more extraordinary than they were before, courts risk imposing greater costs on society.

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

### *E. "Serious Questions" and Other Limiting Principles*

This proposal does not mean that preliminary injunctions will be issued as a matter of course in nearly every case. Several key limiting principles will give courts all the tools they need to equitably consider the totality of circumstances when considering preliminary injunctions. Mainly, of course, serious questions about the merits will weed out cases with a low likelihood of success, or none at all.[215] But in addition, the remaining equitable factors and the requirement from *Winter* that irreparable harm be shown to be probable will ensure that preliminary injunctions do not become a commonplace means of bogging down the machinery of government and other important actions that are challenged in public law cases.

Regarding serious questions, this test is still a bar that must be passed. The idea here is that courts can recognize when there are really important issues deserving of litigation, even though they cannot say with any certainty whether the plaintiff will prevail or not. Thus, open questions that have not been decided but could plausibly prevail should meet this test. Arguments for a change in the law likely would not. Cases where only a minor distinguishing fact would not be enough to escape negative precedent would not pass this bar. But close cases—where the law is being extended into new territory or where the existing law is not determinative of outcomes—would be the types of cases that would raise serious questions, even if they are not probable to succeed.

And of course, a preliminary injunction would not be issued just because the plaintiff shows a sufficient likelihood of success on the merits. This comports with the Supreme Court's decision in *eBay*, where it rejected an automatic permanent injunction once a finding of patent infringement had been proven. The same reasoning would apply to preliminary injunctions, perhaps with even greater force. As a result, even if a plaintiff shows that serious questions have been raised, they must show that the other factors tip strongly in favor of an injunction. This means that irreparable harm must be significant and/or incredibly likely, that the balance of harms should tip strongly in favor of an injunction and that the public interest must favor an injunction as well. Therefore, if an injunction poses a threat to national security, then it would not be issued on a mere showing of serious questions. If the public interest would be threatened by delaying an important public health

215. The Ninth Circuit, for example, has been clear that "[n]o chance of success at all . . . will not suffice" under its sliding scale test. Benda v. Grand Lodge of Int'l Ass'n of Machinists & Aerospace Workers, 584 F.2d 308, 315 (9th Cir. 1978).

regulation, then a preliminary injunction should not be issued. But if the public interest supports an injunction and there is minimal harm from delay, then an injunction supported by serious questions would be appropriate.

Of course, such an inherently discretionary standard will not be implemented perfectly by imperfect human judges. This Author cannot claim that this proposed standard will "fix" preliminary injunctions such that judges will not occasionally grant or deny injunctions in error. Although, which cases are in error will depend greatly on your perspective and ideological approach to the law. Nevertheless, the flexible equitable approach to injunctions is preferable to a more rigid approach that prevents the issuance of preliminary injunctions in cases where justice requires, such as close cases where a strong likelihood of success cannot be shown.

### *F. The Bond Requirement Can Protect Defendants*

The bond requirement for a preliminary injunction[216] is one final issue that must be considered, and that should allay, at least partly, any concerns that a flexible approach to preliminary injunctions will impose inappropriate delay or other harm on defendants. This issue is more complicated in public law cases than private law cases because of the possibility that the court might impose a nominal bond.[217] But at least in some cases, a bond will give added insurance that the party seeking the injunction is confident it will prevail on the merits even though it cannot show it is probable that it will succeed at an early stage of the litigation.

## VI. CONCLUSION

Public law cases often involve important and controversial issues of public policy. They seek to hold the government accountable for appropriately enforcing and complying with the law, and thus, these cases are a critical part of ensuring the rule of law. Without the possibility of preliminary injunctions (or if the bar is set too high), then in many cases there would be no possibility of relief even if the government is found to have violated the law. Such judicial impunity would not be appropriate. On the flip side, if the

216. The federal rules require the moving party to post "security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." FED. R. CIV. P. 65(c).

217. *See, e.g.*, Nat. Res. Def. Council, Inc. v. Morton, 337 F. Supp. 167, 168–69 (D.D.C. 1971) (requiring only a nominal bond where amount requested by government would foreclose nonprofits from obtaining effective relief).

government was enjoined every time it took an action deemed controversial by anyone with the means to sue it in court, then government could hardly function and would not be able to meet the challenges of the day. Historically and traditionally, courts have decided requests for preliminary injunctions using a flexible approach grounded in equity. The Supreme Court and a minority of circuit courts have moved away from that flexible approach in recent years. This shift was in error, and this error should be corrected at the next possible opportunity. Preliminary injunctions in public law are a critical part of our judicial system and are the only means available for ensuring that important issues have a fair shot at litigation.