Now is the Winter of Ginsburg’s Dissent
Unifying the Circuit Split as to Preliminary Injunctions and Establishing a Sliding Scale Test

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Abstract

The preliminary injunction is an equitable remedy that may be granted to prevent harm to a movant before adjudication on the merits can be reached. The United States Supreme Court most recently iterated in Winter v. Natural Resources Defense Counsel, Inc. the four factors a court must consider for a preliminary injunction to issue.¹ A movant seeking a preliminary injunction must establish that the movant is likely to succeed on the merits; that the movant is likely to suffer irreparable harm in the absence of preliminary

¹ 555 U.S. 7 (2008).
relief; that the balance of equities tips in the movant’s favor; and that an injunction is in the public interest. Federal circuits have long been split over how to apply these factors and what kind of test these factors create. Following Winter, there is still no consensus. The circuits apply three different tests to preliminary injunction questions: the sequential test, the sliding scale test, and the gateway factor test.

Circuits that apply the sequential test require a movant to prove each of the four factors in turn, and a failure to prove one factor bars injunctive relief. Circuits that apply the sliding scale test balance all four factors, and a higher showing on one factor can make up for a lesser showing on another factor. Circuits that apply the gateway factor test require movants to demonstrate a likelihood of success on the merits and a likelihood of suffering irreparable harm in the absence of preliminary relief before addressing the remaining two elements. Under this approach the first two factors are dispositive.

This article argues that the sliding scale test is the most appropriate test when determining whether to issue a preliminary injunction. The history of equity in the United States supports this assertion. Further, the Supreme Court has historically endorsed the sliding scale test.

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I. Introduction

A national music publisher takes notice that a national restaurant chain is violating the music publisher’s copyright for the public performance of certain music. To rectify this, the music publisher seeks to immediately enjoin the continuing copyright violation.
The music publisher must tread carefully, however. If the publisher brings the action in the Seventh Circuit, an injunction may be issued, but if brought in the Fourth Circuit, the injunction may not issue. Different circuits apply different standards to preliminary injunctions, and between the several circuits different results may follow.

The circuit split over the test for the issue of preliminary injunctions is not a recent development. Discrepancies between the circuits have existed for a long time. Winter v. Natural Resource Defense Council, Inc. is the most recent Supreme Court case to address the requirements for a preliminary injunction, and some circuits have used Winter as the strop on which to hone their policy.

Following Winter, the circuits are divided as to whether that case mandated the sequential test, the sliding scale test, or the gateway factor test. A sequential test, generally, is a test that is applied step by step—each element must be fulfilled in turn. For example, the test for adverse possession is generally a sequential test. In Washington, a claimant must show possession that is exclusive, actual and uninterrupted, open and notorious, hostile, and in good faith before a judgment in favor of the movant will be entered. The Fourth, Fifth, Tenth, and Eleventh Circuits apply the sequential test to preliminary injunction questions. These circuits require a movant to demonstrate all four elements, as stated in Winter, before a preliminary injunction will issue—failure to prove any single element will result in the preliminary injunction being denied.

A sliding scale test, generally, is a test that may be fulfilled if the elements of the test taken together favor

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a certain outcome. For example, unconscionability is sometimes a sliding scale test. California courts have used a sliding scale where substantive and procedural unconscionability are balanced but are not required to be present in the same degree.\textsuperscript{6} Less procedural unconscionability may be counterbalanced by a lot of substantive unconscionability and vice versa. The Second, Sixth, Seventh, and Ninth Circuits apply a sliding scale test to preliminary injunction questions by balancing the four traditional factors given in Winter. Under the sliding scale test, a lesser showing on a single factor can be balanced by a greater showing on another factor, and a preliminary injunction may still issue, despite the weak showing on a single factor.

A gateway factor test, generally, is a test that considers certain elements to be threshold elements which must be met before the remaining elements of the test are considered. For example, the Federal Death Penalty Act of 1994 requires juries to conduct a gateway analysis under the Eighth Amendment to determine whether a defendant is eligible for the death penalty before balancing any mitigating factors.\textsuperscript{7} The First, Third, and Eighth Circuits apply the gateway factor test, a hybrid test which blends the sequential test and the sliding scale test. These circuits first examine the likelihood of success on the merits and the likelihood of irreparable harm—the gateway factors—before balancing the remaining factors. A lack of either of these gateway factors is dispositive and will result in an injunction not being issued. The circuit courts disagree on whether the test for issuing a preliminary injunction is a sequential test, sliding scale test, or a gateway factor test.

\footnote{Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 674 (Cal. 2000).}
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Justice Ginsburg’s dissent in Winter states that courts have historically applied the sliding scale test which awards “relief based on a lower likelihood of harm when the likelihood of success is very high.” Ginsburg states that the Supreme Court has historically followed this test, and that Winter does not abrogate previous holdings that have applied that test. The sliding scale test should be applied by all circuits.

Part II of this article discusses the background of the preliminary injunction beginning with the origins of equity, the historical standards for preliminary injunctions, and the most recent Supreme Court cases interpreting preliminary injunctions. Part III of this article addresses the circuit split and how the circuit courts interpret Winter as well as the precedential merits of the sequential test and the sliding scale test. Part IV analyzes each approach and proposes that every circuit court should apply the sliding scale test in determining whether to issue a preliminary injunction.

II. Background

A. History of Equity

Historically, equity was a separate realm of jurisprudence from law. Equity practice arose because English Courts of Law adhered to an unwavering writ system. Each writ was a unique, prefabricated complaint that required plaintiffs to provide specific facts to meet each element of the writ. In this writ system, a plaintiff could bring claims before a common law King’s Court only with these pre-existing writs—writs which

8 Winter, 555 U.S. at 51 (Ginsburg, J. dissenting).
9 Id.
have merged into modern day common law torts, such as trespass or conversion—and, much to many a plaintiff’s chagrin, the scope of these writs was quite narrow. If a person were punched in the face, he could pursue the writ of trespass *vi et armis*, which promised a plaintiff damages if—and only if—the plaintiff presented the evidence listed in the writ in the manner defined by the writ.

The King’s Chancellor prepared and maintained the paperwork for the standardized writs whenever a complaint meeting the requirements of a specific writ was presented. English judges initially served as the King's personal representatives in exercising the King’s own desire to ensure justice was served. In some cases, however, a plaintiff could not fit his claim within the narrow requirements of a writ and could not go to court, so the plaintiff would petition the King directly for relief. Courts gradually grew apart from the King as judges began to recognize substantive law independent of any particular ruler. As the common law courts gradually became an institution separate from the King, petitions to the King continued to be made.

The nature of the system of writs used by the courts motivated the continued appeals to the King. Although the writ system was orderly and consistent,

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12 *Id.* at 440.
13 *Vi et armis*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“By or with force and arms.”).
17 Main, *supra* note 11, at 441.
19 Main, *supra* note 11, at 440–41.
writs did not resolve every injustice, and many would-be plaintiffs were left without a cause of action. In 1258, the Chancellor was prohibited from creating any new writs. No new avenues of relief were laid. By the early fourteenth century, appeals to the King had become so numerous that appeals for relief were referred to the Chancellor.

The Chancellor was “the keeper of the [King’s conscience] and the King’s secretary.” The Chancery itself was the secretary of the state. As the voice of the King, the Chancellor could resolve issues referred to him. Free from the fetters of the unbending writ system, the Chancellor could resolve disputes to fair and just ends.

The traditional view of equity was based on three fundamental ideas. First, natural law served as the proper source for rules to decide equitable disputes. Second, equity eschewed precedent in favor of deciding each case on its own facts. Third, equity was “absolute and unlimited” judicial authority to decide a case as

20 See Pries, supra note 14, at 10.
22 Pries, supra note 14, at 10.
23 Main, supra note 11, at 441.
24 Id.
25 Id. at 438.
26 Id. at 441.
29 Id. at 1434.
justice required.\textsuperscript{30} The overall goal of equity was to provide an avenue for “remedial substantive justice in cases and situations where the common law, with its commitment to fixed rules and inflexible adherence to precedent, will do harm.”\textsuperscript{31} Equity relaxed the rigid and uniform application of law by “incorporating standards of fairness and morality into the judicial process.”\textsuperscript{32}

A distinct court soon rose under the Chancellor, called the Court of Chancery, and practice in that court was less formal than the Courts of Law, requiring plaintiffs to merely tell the Chancellor about their problems.\textsuperscript{33} Over time, the Court of Chancery’s decisions became predictable, and a nebulous law of equity emerged.\textsuperscript{34} The decisions either followed newly created equitable remedies or equitable remedies which followed preexisting legal causes of action.\textsuperscript{35}

Due to the dichotomy between the Courts of Law and the Courts of Equity, conflict arose between the common law courts and the Chancellor with the Courts of Law charging the Chancellor with “attempting to subvert the whole law of England by substituting conscience for definite rule.”\textsuperscript{36} This was especially evident when certain circumstances would give a plaintiff a choice of remedy both in law and in equity.\textsuperscript{37} In other cases, a plaintiff who could not otherwise recover in law could recover in equity if the Chancellor felt recovery was

\textsuperscript{30} Id. at 1435 (quoting \textsc{Lord Nottingham}, \textit{Manual of Chancery Practice and Prolegomena of Chancery and Equity} 189 (D.E.C. Yale ed. 1965)).
\textsuperscript{31} Id. at 1435.
\textsuperscript{32} Main, \textit{supra} note 11, at 430.
\textsuperscript{33} Preis, \textit{supra} note 14, at 11.
\textsuperscript{34} Id.
\textsuperscript{35} Id. at 11–12.
\textsuperscript{36} Lannetti, \textit{supra} note 27, at 279 (quoting Susan H. Black, \textit{A New Look at Preliminary Injunctions: Can Principles from the Past Offer Any Guidelines to Decisionmakers in the Future?}, 36 \textsc{Ala. L. Rev.} 1, 4 (1984)).
\textsuperscript{37} Main, \textit{supra} note 11, at 442.
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appropriate. For example, Courts of Law could award only damages to provide a remedy after a wrong was committed but had no authority to prevent the wrong from occurring in the first place. A Chancellor could issue an injunction which Courts of Law were loath to issue, allowing a plaintiff with no legal remedy to recover in equity.

A few Chancellors sought to rectify the split between equity and law, and under the Chancellories of Lord Bacon, Lord Nottingham, and Lord Hardwicke, the imperfect maxim that “equity follows law” was born. Chancery developed the adequacy doctrine wherein a plaintiff could only obtain equitable relief if the plaintiff could demonstrate a lack of adequate legal remedy. Though equity would follow the law in cases where a preexisting writ afforded relief, equity could not follow law where a legal remedy did not exist, hence “equity follows law” was an imperfect maxim. This reformed view of equity would endure in the subsequent generation of legal scholarship.

As North America was colonized, “[e]quity was transplanted to the American Colonies along with the common law.” The traditional concepts of equity were transplanted as well. For example, chancellors in Virginia were bound to decide cases “according to equity and good conscience,” just as English chancellors had long practiced. By the time the Constitution was

38 Id.; Preis, supra note 14, at 13–14.
39 Lannetti, supra note 27, at 290.
40 Preis, supra note 14, at 12.
42 Weisshaar, supra note 3, at 1019; Denlow, supra note 21, at 501.
43 Preis, supra note 14, at 12–13.
44 Kroger, supra note 28, at 1438.
45 Id.
46 Id. (quoting 1777 Va. Acts ch. 15).
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drafted, “there was a movement to merge law and equity for procedural purposes, because Americans were skeptical” of equity and its shortcomings.\textsuperscript{47}

Specific grievances regarding the courts of equity included the lack of juries, abuse of power by colonial governors acting as chancellors, and that the equity court system was not dissimilar enough from the English Court of Chancery, which was wrapped tightly around the throne.\textsuperscript{48} In response to these criticisms, “[t]he Judiciary Act of 1789 gave American federal courts jurisdiction over all suits in equity, and the Supreme Court has held that this jurisdiction is equivalent to ‘the jurisdiction in equity exercised by the High Court of Chancery in England at the time of the adoption of the Constitution and the enactment of the original Judiciary Act.’”\textsuperscript{49} Three years later, in 1791, Congress “produced the Permanent Process Act, which stated that in equity cases, federal courts were to proceed ‘according to the principles, rules and usages which belong to courts of equity . . . as contradistinguished from courts of common law.’”\textsuperscript{50} The Supreme Court would then interpret these acts to create a uniform scheme of equitable power for federal courts.

The Supreme Court held in \textit{Robinson v. Campbell} that a federal court was not bound to apply state law that created specific equitable remedies.\textsuperscript{51} In 1819, in \textit{United States v. Howland}, Chief Justice Marshall stated that “as

\textsuperscript{47} Dylan Ruga, \textit{The Role of Laches in Closing the Door on Copyright Infringement Claims}, 29 NOVA L. REV. 663, 671 (2005).
\textsuperscript{48} Id.
\textsuperscript{49} Weisshaar, supra note 3, at 1020 (footnote omitted) (quoting Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 318 (1999)).
\textsuperscript{51} Id. at 276 (citing Robinson v. Campbell, 16 U.S. 212, 222–23 (1818)).
the courts of the Union have a chancery jurisdiction in every state, and the judiciary act confers the same chancery powers on all, and gives the same rule of decision, its jurisdiction in Massachusetts must be the same as in other states. Howland held that federal courts would apply a uniform body of equity procedures, regardless of substantive or procedural state law or the adequacy of state law remedies.

Three years after Howland, in 1822, the first federal rules of equity were drafted—likely by Justice Story—to codify uniform equity procedure in the lower federal courts. The Supreme Court also issued an additional set of equity rules in 1842. Both sets of equity rules gave the circuit courts authority to “make further rules and regulations, not inconsistent with the rules hereby prescribed, in their discretion,” and any gaps left by the equity rules would “be regulated by the practice of the High Court of Chancery in England.”

In its early equitable decisions, other factors also played important roles in Supreme Court decisions. The Court rejected stare decisis by employing discretionary authority in procedural and substantive matters to reach results equitable in a particular case. Also, the Court

56 Rules of Practice, 20 U.S. (7 Wheat.) at xiii, r. 32, 33; accord Rules of Practice, 42 U.S. (1 How.) at lxix, r. 89, 90; see also Collins, supra note 50, at 274.
57 See Kroger, supra note 28, at 1474 (citing GARY L. McDOWELL, EQUITY AND THE CONSTITUTION 9 (1982)).
58 Id.
relied upon discourses outside of the realm of law to justify its decisions based on moral reasoning and public policy.\textsuperscript{59} All of these principles have continued to be applied to equity cases in federal courts.\textsuperscript{60}

In 1938, the federal district courts of the United States recognized a single unified set of actions, both legal and equitable, under the Federal Rules of Civil Procedure.\textsuperscript{61} Like previous iterations of federal equity law, the Federal Rules of Civil Procedure remained open-ended as to how courts should apply equitable remedies. Modern cases like \textit{Brown v. Board of Education}\textsuperscript{62} demonstrated that the long-held principles applied by the Supreme Court were still viable even after the adoption of the Federal Rules of Civil Procedure.\textsuperscript{63} Modern equity jurisprudence has led to much debate over the limit of contemporary federal equity powers as viewed in the framework of the historical application of equity in the United States.\textsuperscript{64}

Gary McDowell argues in his book, \textit{Equity and the Constitution}, that both the Warren and Burger Courts' equity jurisprudence was “illegitimate” because the “understanding of equity expressed in \textit{Brown} (II) and its progeny differs from the traditional understanding” of equity.\textsuperscript{65} McDowell states that “[t]he Court, in using its ‘historic equitable remedial powers’ to impose its politics on society, is often forced to ignore or deny the great tradition of equitable principles and precedents, which had always been viewed as the inherent source of restraint in equitable dispensations.”\textsuperscript{66} In \textit{The Law’s

\textsuperscript{59} Id.
\textsuperscript{60} Id.
\textsuperscript{61} Main, supra note 11, at 431 (citing \textit{Fed. R. Civ. P. 2} (“There shall be one form of action to be known as ‘civil action.”)).
\textsuperscript{62} 347 U.S. 483 (1954).
\textsuperscript{63} Kroger, supra note 28, at 1471–72.
\textsuperscript{64} Id.
\textsuperscript{65} Id. at 1473 (quoting McDowell, supra note 57, at 9).
\textsuperscript{66} Id. at 1472 (quoting McDowell, supra note 57, at 4).
Conscience: Equitable Constitutionalism in America, Peter Charles Hoffer responds to McDowell’s criticism, stating that Brown and subsequent cases are “very good constitutional equity” but poor constitutional law.\textsuperscript{67} As to both of these commentators, John Kroger states that both reach “contradictory, but equally suspect” conclusions.\textsuperscript{68} The modern Supreme Court has continued to apply traditional equitable principles in cases where an equitable remedy is appropriate.\textsuperscript{69} The primary difference between modern equity jurisprudence and the equity jurisprudence of the past is that law and equity have largely fused following the Federal Rules of Civil Procedure. Though the line between law and equity has blurred, the division has persisted, however, in remedies.\textsuperscript{70} “Courts and scholars continue[] to refer to some remedies as ‘legal’ and others as ‘equitable.’”\textsuperscript{71} Legal and equitable remedies both are awarded by courts of law.

One equitable remedy perpetuated from centuries past is the injunction—an action in equity designed to protect a plaintiff from irreparable injury to his property or other rights by prohibiting or commanding certain acts.\textsuperscript{72} The next section will discuss the origins of the preliminary injunction and how it has evolved in American law.

B. The Preliminary Injunction

\textsuperscript{67} Kroger, supra note 28, at 1472 (quoting PETER CHARLES HOFFER, THE LAW’S CONSCIENCE: EQUITABLE CONSTITUTIONALISM IN AMERICA xiii (1990)).

\textsuperscript{68} Id. at 1473.

\textsuperscript{69} See id. at 1474.


\textsuperscript{71} Id.

\textsuperscript{72} Ladner v. Siegel, 148 A. 699, 701 (Pa. 1930); 42 AM. JUR. 2D Injunctions § 2 (2018).
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An injunction is a court order that requires a party to act or abstain from acting.\(^{73}\) Injunctions are equitable remedies derived from decisions in the English Court of Chancery.\(^{74}\) “There are three basic types of injunctions . . . : (1) temporary restraining orders, (2) preliminary injunctions, and (3) permanent injunctions.”\(^{75}\) Each variety of injunction varies in duration, but all require a party to act or refrain from acting, and all are enforceable through contempt.\(^{76}\) “[T]he primary purpose for granting a preliminary injunction . . . is to preserve the relative positions of the parties until a [full] trial on the merits can be held.”\(^{77}\) A preliminary injunction cannot be issued \textit{ex parte}, like a temporary restraining order, and unlike a permanent injunction, a full hearing is not needed for a preliminary injunction to issue.\(^{78}\)

The modern standards for preliminary injunctions developed in the seventeenth and eighteenth centuries when the “Court of Chancery began to speak in terms of irreparable harms and [the] assessment of the [likely] outcome on the merits.”\(^{79}\) “By the nineteenth century, the Court of Chancery first began to speak of the role of preliminary injunctions in preserving the ‘status quo.’”\(^{80}\) These early articulations regarding maintenance of the status quo were soon synthesized in William Kerr’s influential treatise on injunctions:

\(^{73}\) Denlow, \textit{supra} note 21, at 498–99.
\(^{74}\) \textit{Id.} at 500.
\(^{75}\) \textit{Id.} at 499.
\(^{76}\) \textit{Id.}
\(^{77}\) \textit{Id.} at 507 (quoting Univ. of Tex. v. Camenisch, 451 U.S. 390, 395 (1981)).
\(^{78}\) \textit{Id.}
\(^{80}\) \textit{Id.} at 127.
The effect and object of the interlocutory injunction is merely to preserve the property in dispute in statu quo until the hearing or further order. In interfering by interlocutory injunction, the court does not in general profess to anticipate the determination of the right, but merely gives [it] as its opinion that there is a substantial question to be tried, and that till the question is ripe for trial, a case has been made out for the preservation of the property in the meantime in statu quo.81

Kerr states that injunctions seek to preserve the status quo. He also notes that a court issuing an injunction does not “profess to anticipate the determination of the right,”82 that is, that a court need not determine that a claim will absolutely be successful. Kerr illustrates this point multiple times:

A man who comes to the Court for an interlocutory injunction is not required to make out a case which will entitle him at all events to relief at the hearing. It is enough if he can show that he has a fair question to raise as to the existence of the right which he alleges, and can satisfy the Court that the property should be preserved in its present actual condition, until such question can be disposed of.83

81 WILLIAM W. KERR, A TREATISE ON THE LAW AND PRACTICE OF INJUNCTIONS IN EQUITY 11–12 (1867), as quoted in Lee, supra note 79, at 128.
82 Id.
83 KERR, supra note 81, at 11–12, as quoted in Denlow, supra note 21, at 502.
Kerr states that a party seeking an injunction need only demonstrate a "fair question" of the right he is seeking to enforce, not an absolute likelihood of success.

The United States Supreme Court addressed Kerr’s treatise in Russell v. Farley, the Court’s first substantive decision regarding injunctions. In Russell, the Court noted in dicta that the “settled rule of the Court of Chancery, in acting on applications for injunctions,” required that preliminary injunctive relief depended on a comparison of the balance of the harms between the parties. Further, when considering an injunction, a court must “regard the comparative injury which would be sustained by the defendant, if an injunction were granted, and by the complainant, if it were refused,” and “if the legal right is doubtful, either in point of law or of fact, the court is always reluctant to take a course which may result in material injury to either party.”

In discussing Kerr’s treatise, the Court did not state that a likelihood of success must be shown to issue an injunction. Rather, a balancing test examining the harms and “comparative injuries” the parties may sustain should be applied. Further, even a low likelihood of success does not bar a court from issuing an injunction. If no “material injury” will result from the injunction, a court may issue the injunction. “Russell’s dicta also is consistent with the notion of a “sliding scale”—if the moving party’s ‘legal right is doubtful,’ then the court should be more ‘reluctant’ to enter the preliminary injunction,” but a court is not barred.

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84 Id.
86 Lee, supra note 79, at 114.
87 Id. (quoting Russell, 105 U.S. at 438).
88 Id. (quoting Russell, 105 U.S. at 438).
89 Russell, 105 U.S. at 438.
90 Id.
91 Lee, supra note 79, at 114 (quoting Kerr, supra note 81, at 220).
Arthur Wolf asserted that if the movant could demonstrate a clear legal right, “plain and free from doubt,” the injunction would issue; whereas if the legal right was in doubt, then the movant would have to show a balance of hardships in her favor. Courts would consider the likelihood of success, but that element was not dispositive. “[A]s early as Russell, the Supreme Court had adopted at least three of the four factors currently applied by the [Circuit] Courts.”

Following Russell, the Court issued unclear but largely consistent opinions regarding preliminary injunctions. In its per curiam opinion in Ohio Oil citing a lower court decision, the Court “suggest[ed] that if the movant can show he will likely suffer irreparable harm in the absence of a preliminary injunction and that the preliminary injunction will cause only ‘inconsiderable’ harm to the nonmovant, then the injunction should be granted.” This was merely a reiteration of the balancing test in Russell. Into the 1940s, in Yakus v. United States, the Court continued to hold that “even though irreparable injury may otherwise result to the plaintiff,” other factors must be considered.

In the late 1930s, the final element—the public interest element—emerged, creating a four-part test

92 Id. (quoting Arthur D. Wolf, Preliminary Injunctions: The Varying Standards, 7 W. New Eng. L. Rev. 173, 177–78 (1984)).
93 Id.
94 Ohio Oil Co. v. Conway, 279 U.S. 813, 815–16 (1929) (per curiam) (citing Love v. Atchison, Topeka & Santa Fe Ry. Co., 185 F. 321, 331–32 (8th Cir. 1911)).
95 Weissghaar, supra note 3, at 1026 (citing Ohio Oil Co., 279 U.S. at 814).
96 Yakus v. United States, 321 U.S. 414, 440 (1944). Cf. Weissghaar, supra note 3, at 1026 (asserting that Yakus creates a stricter standard by holding that “irreparable injury was necessary, but not sufficient, to obtain a preliminary injunction”).
97 Lannetti, supra note 27, at 288; Lee, supra note 79, at 114;
generally consisting of: “(1) the movant’s likelihood of success on the merits; (2) the irreparable harm to the movant in the absence of preliminary relief; (3) the balance of the equities between the movant and the nonmovant; and (4) the public interest” and how it will be affected by the injunction.\textsuperscript{98} Though widely adopted by courts, the analysis of the public interest factor remained inconsistent, even at the Supreme Court level.\textsuperscript{99}

In \textit{Hecht Company v. Bowles}, the Supreme Court held that “the standards of the public interest[,] not the requirements of private litigation[,] measure the propriety and need for injunctive relief” in price setting cases.\textsuperscript{100} In \textit{Hecht}, the Court also rejected a proposal to apply a rigid test, noting that equity allows a court “to mould each decree to the necessities of the particular case” and that “[f]lexibility rather than rigidity has distinguished” law from equity.\textsuperscript{101} The Court felt that applying a rigid test would be a “major departure from that long tradition” of flexibility in equity.\textsuperscript{102} Subsequent Supreme Court cases continued to apply a flexible standard.

In \textit{Brown v. Chote}, the Supreme Court affirmed a lower court opinion that balanced two factors to determine whether to issue a preliminary injunction: the plaintiff’s “possibilities of success on the merits” and “the

\textsuperscript{98} Lannetti, \textit{supra} note 27, at 289.
\textsuperscript{99} \textit{Id.} at 289–90; \textit{see} Fred Fisher Music Co. v. M. Witmark & Sons, 318 U.S. 643, 646 (1943) (noting that the district court “considered no evidence and made no findings upon the question whether equitable relief should be denied on other grounds, such as inadequacy of consideration and the like”).
\textsuperscript{100} Hecht Co. v. Bowles, 321 U.S. 321, 331 (1944); \textit{see also} Marconi Wireless Tel. Co. v. United States, 320 U.S. 1, 3 (1943); Inland Steel Co. v. United States, 306 U.S. 153, 158 (1939); Bowles v. Montgomery Ward & Co., 143 F.2d 38, 42 (7th Cir. 1944).
\textsuperscript{101} \textit{Hecht}, 321 U.S. at 329; \textit{see also} Meredith v. Winter Haven, 320 U.S. 228, 235 (1943).
\textsuperscript{102} \textit{Hecht}, 321 U.S. at 329–30.
possibility that irreparable injury would have resulted, absent interlocutory relief.”

A year later in *Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers*, the Court noted that when seeking a temporary restraining order the Court may treat the request identically to a preliminary injunction and require the party seeking the injunction to “bear the burden of demonstrating the various factors justifying preliminary injunctive relief, such as the likelihood of irreparable injury” if an injunction is denied and the “likelihood of success on the merits.”

The Court did not fully describe the test for a preliminary injunction; rather, the Court succinctly noted “various factors” must be proven, such as the likelihood of injury and success. The Court did not abandon the four-factor sliding scale test.

Following those cases, the Court observed in *Doran v. Salem Inn* that the “traditional standard for granting a preliminary injunction requires the plaintiff to show that in the absence of its issuance he will suffer irreparable injury and also that he is likely to prevail on the merits.” “[T]he Court cautioned that a district court must ‘weigh carefully the interests of both sides,’” and this requirement is “stringent.”

The Supreme Court has repeatedly held that the basis for injunctive relief in the federal courts has always been irreparable injury and the inadequacy of legal

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105 Id.
106 Id. at 441. But see Denlow, supra note 21, at 510 (asserting the Court moved away from the sliding scale test and spoke of a two-factor test).
107 Doran v. Salem Inn, Inc., 422 U.S. 922, 931 (1975); Denlow, supra note 21, at 510–11 (quoting Doran, 422 U.S. at 931).
108 Denlow, supra note 21, at 510–11 (quoting Doran, 422 U.S. at 931–32 (citing Brown, 411 U.S. at 457)).

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remedies. This follows the traditional notions of equity. Trial courts have the discretion to allow equitable claims to be tried ahead of legal ones to protect the rights of the plaintiff to have a fair and orderly adjudication of the controversy. Though not always clear, the Supreme Court—even in the modern day—has continued to apply the sliding scale test and uphold traditional notions of equity. The next section will examine the most recent decisions issued by the Supreme Court regarding preliminary injunctions.

C. The Supreme Court Preliminary Injunction Decisions

1. Munaf v. Geren

Munaf was a consolidated case involving two separate but factually similar cases. Two American citizens, Mohammad Munaf and Shawqi Omar, voluntarily traveled to Iraq and allegedly committed crimes there. Both were captured by an international coalition of military forces, including the United States, and detained pending investigation and prosecution under Iraqi law. They were then placed in the custody of the U.S. military. Both plaintiffs sought habeas corpus petitions. Before a writ of habeas corpus was issued, the district court granted a preliminary injunction at

112 Id. at 679.
113 Id.
114 Id. at 680–81.
115 Id. at 679.
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Omar’s request to prevent his transfer to Iraqi custody, to prevent sharing details concerning his potential release with the Iraqi government, and to prevent presenting him to the Iraqi courts for investigation and prosecution. The United States Court of Appeals for the District of Columbia Circuit affirmed.

On petition of certiorari, the Supreme Court examined the jurisdictional limits of the injunction and “whether United States district courts may exercise their habeas jurisdiction to enjoin our Armed Forces from transferring individuals detained within another sovereign’s territory to that sovereign’s government for criminal prosecution.” The Court addressed these issues “cognizant that ‘courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs.”

The Court noted that a preliminary injunction is an “extraordinary and drastic remedy,” never awarded as of right. Further, a party seeking a preliminary injunction must “demonstrate, among other things, a likelihood of success on the merits.” The district court failed to address the likelihood of success on the merits of Omar’s claim, and only concluded that the “jurisdictional issues” presented questions “so serious, substantial, difficult and doubtful, as to make them fair ground for litigation and thus for more deliberative

116 Id. at 683.  
117 Id. at 682.  
118 Id. at 689.  
119 Id. (quoting Dep’t of the Navy v. Egan, 484 U.S. 518, 530 (1988)).  
120 Id. at 689 (quoting 11A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2948 (3d ed. 2013)).  
121 Id. at 690 (citing Yakus v. United States, 321 U.S. 414, 440 (1944)).  
122 Id. (quoting Gonzales v. O Centro Espirita Beneficente União do Vegetal, 546 U.S. 418, 428 (2006)).

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investigation.” 123 Likewise, on appeal, the United States Court of Appeals for the District of Columbia Circuit held that it “need not address” the merits of Omar’s habeas claims because the merits had “no relevance.” 124 The D.C. Circuit stated that the only question before it was whether the district court had jurisdiction. 125

The Supreme Court held that a difficult question as to jurisdiction was no reason to grant a preliminary injunction. 126 Finding a low likelihood of success on the merits due to potential impediments to reaching the merits of the case was not a determination of the “likelihood of success on the merits.” 127 If the likelihood of success on the merits only meant that the district court likely had jurisdiction, then preliminary injunctions would become a matter of right, not the drastic, exceptional remedy they are. 128 The Court concluded that it was an abuse of discretion for the district court to grant a preliminary injunction on the basis of “jurisdictional issues” in Omar’s case without even considering the merits of the underlying habeas petition, so the Court reversed and remanded with instruction to consider the likelihood of success on the merits. 129 The next major Supreme Court case involving with preliminary injunctions is Winter v. Natural Resources Defense Council.

2. Winter v. Natural Resources Defense Council

123 Id. (quoting Omar v. Harvey, 416 F. Supp. 2d 19, 23–24, 27 (D.D.C. 2006)).
124 Id. (quoting Omar v. Harvey, 479 F.3d 1, 11 (D.C. Cir. 2007)).
125 Id. (citing Omar, 479 F.3d at 11).
126 Id.
127 Id.
128 Id.
129 Id. at 690–91.

[37]
Winter v. Natural Resources Defense Council concerned the Navy’s use of “mid-frequency active” sonar during training exercises involving surface ships, submarine, and aircraft together as a “strike group.”\textsuperscript{130} The Southern California waters where the exercises were conducted contained thirty-seven species of marine mammals that the Natural Resources Defense Council alleged were being harmed by the sonar.\textsuperscript{131} The district court entered a preliminary injunction prohibiting the Navy from using the sonar during its training exercises, but the Ninth Circuit remanded the case, holding the injunction to be overbroad.\textsuperscript{132}

The district court then entered another preliminary injunction, imposing six specific restrictions on the Navy’s use of sonar during its training exercises.\textsuperscript{133} The Navy appealed, seeking two of the district court’s restrictions removed. The Circuit Court of Appeals upheld the district court’s injunction holding that “the Navy may return to the district court to request relief on an emergency basis’ if the preliminary injunction ‘actually result[s] in an inability to train and certify sufficient naval forces to provide for the national defense.’”\textsuperscript{134} In reaching their holdings, both the district court and the Ninth Circuit held that a preliminary injunction may be entered based only on a “possibility” of irreparable harm.\textsuperscript{135} The United States Supreme Court then granted certiorari.

\textsuperscript{131} Id.
\textsuperscript{132} Id.
\textsuperscript{133} Id. at 8.
\textsuperscript{134} Id. at 31 (quoting Nat. Res. Def. Council, Inc. v. Winter, 518 F.3d 658, 703 (9th Cir. 2008), [hereinafter “Winter II”]).
\textsuperscript{135} Id. at 21 (citing Winter II, 518 F.3d at 696; Nat. Res. Def. Council, Inc. v. Winter, 530 F. Supp. 2d 1110, 1118 (C.D. Cal. 2008) (quoting Faith Center Church Evangelistic Ministries v. Glover, 480 F.3d 891, 906 (9th Cir. 2007); Earth Island Inst. V. United States Forest Serv., 442 F.3d 1147, 1159 (9th Cir. 2006))).
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In the Court’s opinion, Chief Justice Roberts, author of Munaf, wrote that “a plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits; that he is likely to suffer irreparable harm in the absence of preliminary relief; that the balance of equities tips in his favor; and that an injunction is in the public interest.”136 The Court noted that historically it has iterated that irreparable harm must be “likely” to occur, not merely possible, the standard used by the Ninth Circuit.137 In determining whether irreparable harm is likely to occur, the Court “must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.”138 Further, the Court should especially heed “public consequences in employing the extraordinary remedy of injunctive relief.”139

In determining whether a preliminary injunction should issue, the Court “conclude[d] that the balance of equities and consideration of the overall public interest . . . tip strongly in favor of the Navy.”140 Even if the plaintiffs had shown irreparable injury from the Navy’s training exercises, any such injury was outweighed by the public interest and the Navy’s interest in effective, realistic training of its sailors.141 The Court held that a proper consideration of the four preliminary injunction factors required denial of the requested injunctive relief, and the Court removed the restrictions to the extent sought by the Navy.142

136 Id. at 20.
137 Id. at 22.
138 Id. at 24 (quoting Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 542 (1987)).
139 Id. at 24 (quoting Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982)).
140 Id. at 26.
141 Id.
142 Id. at 33.
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i. Ginsburg’s Dissent

Justice Ginsburg concluded in her dissent that the district court “conscientiously balanced the equities and did not abuse its discretion.” 143 Justice Ginsburg provided more specific facts in her dissent than the majority did in its opinion and stated that “[i]n light of the likely, substantial harm to the environment” and “NRDC’s almost inevitable success on the merits of its claim,” the Ninth Circuit’s decision should be upheld. 144 It is notable that the majority opinion stated that “[a]lthough the [Ninth Circuit] referred to the ‘possibility’ standard, and cited Circuit precedent along the same lines, it affirmed the [district court’s] conclusion that plaintiffs had established a ‘near certainty’ of irreparable harm” and that it was unclear whether using a “possibility” standard actually bore on the Ninth Circuit’s decision. 145 The facts, states Justice Ginsburg, clearly show that the Natural Resources Defense Council met its burden. 146 Though Justice Ginsburg comes to the opposite conclusion of the majority, the most important element of her dissent is Justice Ginsburg’s statements regarding the test for preliminary injunctions.

Justice Ginsburg noted that “[f]lexibility is a hallmark of equity jurisdiction,” and that a Chancellor has the power “to do equity and to mould each decree to the necessities of the particular case.” 147 Equity, as distinguished from Law, is flexible. 148 “[C]ourts do not insist that litigants uniformly show a particular, predetermined quantum of probable success or injury

143 Id. at 44 (Ginsburg, J., dissenting).
144 Id. at 53.
145 Id. at 22 (majority opinion).
146 Id. at 53 (Ginsburg, J., dissenting).
147 Id. at 51 (quoting Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982)).
148 Id. at 51.
before awarding equitable relief.”149 Rather, courts evaluate equitable claims on a sliding scale, even “awarding relief based on a lower likelihood of harm when the likelihood of success is very high.”150 Ginsburg stated that the Court has never rejected such a formulation and the majority did not do so in its opinion, a contention not disputed by the majority.151 The next major Supreme Court case involving preliminary injunctions is *Nken v. Holder*.152

3. *Nken v. Holder*

*Nken v. Holder* involved Jean Marc Nken, a citizen of Cameroon who entered the United States on a transit visa in April 2001.153 Nken sought asylum and to stay his removal until a determination of asylum was made.154 An immigration judge and the Fourth Circuit both denied asylum and his request to stay removal.155 Nken then appealed to the Supreme Court for a stay of removal pending adjudication of a petition for review of his case or, in the alternative, for a resolution to a split among the circuits as to what standard governs a request for a stay.156

The Court noted that a stay pending appeal functionally overlaps with a preliminary injunction.157 Both a stay and a preliminary injunction can have the practical effect of preventing some action before a conclusive legal determination; however, “a stay achieves this result by temporarily suspending the source of

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149 *Id.*
150 *Id.*
151 *Id.*
153 *Id.* at 422.
154 *Id.* at 423.
155 *Id.* at 422–23.
156 *Id.* at 423.
157 *Id.* at 428.
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authority to act—the order or judgment in question—not by directing an actor’s conduct,” as an injunction does.158 “A stay ‘simply suspend[s] judicial alteration of the status quo,’ while injunctive relief ‘grants judicial intervention that has been withheld by lower courts.’”159

The Court lists the four factors for a stay. A court must determine: “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies” if the injunction is issued.160 These four factors are virtually identical to the factors recited in Winter.161 Though the elements considered for a stay and a preliminary injunction may be similar,162 the Court is careful to note that a stay and a preliminary injunction are not “one and the same”; rather, the elements are similar “because similar concerns arise whenever a court order” requires “action before the legality of that action has been conclusively determined.”163 The Court cites to Winter, though, for the assertion that a mere possibility of irreparable harm is not sufficient for a stay to issue.164

Justice Kennedy’s concurrence notes that the statutory authority governing stays is a very narrow category.165 Justice Kennedy notes that the Illegal Immigration Reform and Immigrant Responsibility Act

158 Id. at 428–29.
159 Id. at 429 (alteration in original) (quoting Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regulatory Comm’n, 479 U.S. 1312, 1313 (Scalia, Circuit Justice 1986)).
160 Id. at 434 (quoting Hilton v. Braunskill, 481 U.S. 770, 776 (1987)).
162 Id. (citing Winter, 555 U.S. at 24).
163 Id.
164 Id. at 435 (citing Winter, 555 U.S. at 22).
165 Id. at 437 (Kennedy, J., concurring).
of 1996 repealed prohibitions on removal as well as an automatic stay provision thus allowing courts to review petitions of aliens after they have been removed. These changes greatly raised the threshold for proving “irreparable harm” because only the most extreme circumstances would cause irreparable harm. Removal alone no longer constitutes irreparable harm because a petition may still be granted in absentia. Though the requirements for a stay and preliminary injunction are similar, they vary in application and should not be considered identical. The next major Supreme Court case involving preliminary injunctions is Glossip v. Gross.

4. Glossip v. Gross

In Glossip v. Gross, several prisoners sentenced to death in the State of Oklahoma filed an action in federal court to enjoin the use of the drug midazolam in executions. The complaint contended that midazolam violated the Eighth Amendment protections against cruel and unusual punishments by creating an unacceptable risk of severe pain. After holding an evidentiary hearing, the district court denied the prisoners’ application for a preliminary injunction, finding that they had failed to prove that midazolam was ineffective. The Court of Appeals for the Tenth Circuit affirmed, accepting the district court’s finding of fact regarding midazolam’s efficacy. Before the United States Supreme Court accepted certiorari, Oklahoma executed one of the prisoners; however, the Court “subsequently voted to grant review and then stayed the executions of

166 Id. at 438.
167 Id.
168 Id.
170 Id. at 2731.
171 Id.
172 Id.
The Court discussed the history of the Eighth Amendment—made applicable to the states through the Fourteenth Amendment—and what methods of execution are considered infliction of cruel and unusual punishments. In order for a prisoner to successfully challenge a method of execution, they must establish that the method presents a risk that is “sure or very likely to cause serious illness and needless suffering,” and give rise to ‘sufficiently imminent dangers.’ To prevail on such a claim, “there must be a ‘substantial risk of serious harm,’ an ‘objectively intolerable risk of harm’ that prevents prison officials from pleading that they were ‘subjectively blameless for purposes of the Eighth Amendment.’”

The Court cited the factors from Winter: “[a] plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” The parties agreed that the primary issue was whether the plaintiffs were able to establish a likelihood of success on the merits, as required for a preliminary injunction.

The Court did not define a “likelihood of success on the merits,” rather, the Court examined whether the

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173 Id. at 2736.
174 Id. at 2737.
175 Id. (emphasis omitted) (quoting Baze v. Rees, 553 U.S. 35, 50 (2008) (plurality opinion)).
177 Id. at 2737.
plaintiffs would succeed on their individual claims. First, the Court held that plaintiffs “failed to identify a known and available alternative method of execution that entails a lesser risk of pain,” which must be shown to succeed on all Eighth Amendment method-of-execution claims. Second, the Court held that “the [d]istrict [c]ourt did not commit clear error when it found that the prisoners failed to establish that Oklahoma’s use of a massive dose of midazolam in its execution protocol entails a substantial risk of severe pain.” Because the plaintiffs presented insufficient evidence as to their claims, the Court affirmed the lower court decision. A very recent case involving preliminary injunctions is *Trump v. International Refugee Assistance Project*.

5. *Trump v. International Refugee Assistance Project*

*Trump v. International Refugee Assistance Project* involves a series of consolidated cases involving challenges to President Donald J. Trump’s Executive Order No. 13780, Protecting the Nation From Foreign Terrorist Entry Into the United States. The executive branch sought a stay on injunctions enjoining the enforcement of Executive Order No. 13780. Though the primary issue in this case was whether to stay an injunction—as opposed whether to issue one—the Court made several notes about its prior decisions involving preliminary injunctions.

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178 *Id.* at 2736–37.
179 *Id.* at 2731 (citing *Baze*, 553 U.S. at 61).
180 *Id.*
181 *Id.*
183 *Id.* at 2082.
184 *Id.* at 2083.
First, the Court noted that “[c]rafting a preliminary injunction is an exercise of discretion and judgment, often dependent as much on the equities of a given case as the substance of the legal issues it presents”. Further, “a court must also ‘consider[ ] . . . the overall public interest.’” The purpose of a preliminary injunction is “to balance the equities as the litigation moves forward.” The Court did not cite to the factors in Winter.

Second, the Court noted that “[b]efore issuing a stay, it is ultimately necessary . . . to balance the equities—to explore the relative harms to [the parties], as well as the interests of the public at large.” The Court mentions no element-based test; rather, the Court states that the circuit courts “took account of the equities in fashioning interim relief, focusing specifically on the concrete burdens” arising if the executive order was enforced. The Court granted President Trump’s stay over all aspects of the injunction except provisions barring foreign nationals with connections to the United States. The next section will address the Circuit Split over the requirements for a preliminary injunction to issue.

II. The Circuit Split

This section will first outline the sequential test applied by the Fourth, Fifth, Tenth, and Eleventh Circuits. Then, this section will outline the sliding scale test applied by the Second, Sixth, Seventh, Ninth, and

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186 Id. (alteration in original) (quoting Winter, 518 F.3d at 26).
187 Id.
189 Id. at 2087.
190 Id. at 2088.
District of Columbia Circuits. Finally, this section will discuss the gateway factor test as applied by the First, Third, and Eighth Circuits.

A. The Sequential Test: The Fourth, Fifth, Tenth, and Eleventh Circuits

The Fourth, Fifth, Tenth, and Eleventh Circuits apply the sequential test. A sequential test generally is a step-wise test where each individual element must be met before the relief sought will be granted. These circuits require plaintiffs to demonstrate each element before a preliminary injunction will be issued. “[A]ny modified test which relaxes one of the prongs for preliminary relief and thus deviates from the [Winter] standard test is impermissible” in these circuits. The Winter analysis is a “difficult” and “stringent” test to fulfill, and the failure of a plaintiff to establish even one of the four elements bars injunctive relief. Each factor is independent of the others, and “satisfying one

191 For additional sequential tests, see Pepper v. Barnhart, 342 F.3d 853, 854 (8th Cir. 2003) (discussing a three-step sequential test to determine the validity of an alleged disability); Bingue v. Prunck, 512 F.3d 1169, 1173 (9th Cir. 2008) (applying the Supreme Court’s two-part sequential test for qualified immunity).
192 Diné Citizens Against Ruining Our Env’t v. Jewell, 839 F.3d 1276, 1282 (10th Cir. 2016).
193 See e.g., Texans for Free Enter. v. Tex. Ethics Comm’n, 732 F.3d 535, 536–37 (5th Cir. 2013); Dennis Melancon, Inc. v. City of New Orleans, 703 F.3d 262, 275, 278 (5th Cir. 2012); Planned Parenthood Ass’n of Hidalgo Cty. Tex., Inc. v. Suehs, 692 F.3d 343, 348 (5th Cir. 2012); S. Monorail Co. v. Robbins & Myers, Inc., 666 F.2d 185, 186 (5th Cir. 1982); Spiegel v. City of Houston, 636 F.2d 997, 1001 (5th Cir. Unit A Feb. 1981); Vision Ctr. v. Opticks, Inc., 596 F.2d 111, 114 (5th Cir. 1979).
requirement does not necessarily affect the analysis of the other requirements.”

One commentator suggests that Winter creates a sequential test because the “most natural reading of Winter is that it requires a sequential test, with likely success on the merits constituting one of the four required elements.” Further, “Winter’s articulation of the traditional preliminary injunction test contains four factors, joined by semicolons and the conjunction ‘and,’” a formulation generally indicating that “all of the elements are required.” It is alleged that circuits which do not follow the sequential test “ignore the plain meaning of Winter’s text and instead invoke the ‘venerability’ of their sliding-scale tests in order to justify their conclusions.” A case illustrative of the sequential test is Diné Citizens Against Ruining Our Environment v. Jewell.

1. Diné Citizens Against Ruining Our Environment v. Jewell

In Diné Citizens Against Ruining Our Environment v. Jewell, plaintiffs moved for a preliminary injunction to prevent drilling on certain oil wells while a claim under the National Environmental Policy Act proceeded. In 2000, the Bureau of Land Management

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194 Def. Distributed v. U.S. Dep’t of State, 838 F.3d 451, 457 (5th Cir. 2016).
195 Weisshaar, supra note 3, at 1049.
196 Id.
197 Id. (alteration in original) (quoting Citigroup Global Mkts, Inc. v. VCG Special Opportunities Master Fund, Ltd., 598 F.3d 30, 38 (2d Cir. 2010); Judge v. Quinn, 612 F.3d 537, 546 (7th Cir. 2010)).
198 Diné Citizens Against Ruining Our Env’t v. Jewell, 839 F.3d 1276, 1282 (10th Cir. 2016).
199 Id. at 1280.
began revising its 1988 Resource Management Plan.\textsuperscript{200} The Bureau contacted “the New Mexico Institute of Mining and Geology to develop a ‘reasonably foreseeable development scenario,’ . . . to predict the foreseeable oil and gas development likely to occur over the next twenty years.”\textsuperscript{201} It was projected “that 9,970 new oil and gas wells would be drilled on federally managed lands in the New Mexico portion of the San Juan Basin.”\textsuperscript{202} In 2014, the Bureau prepared amended predictions to add the possibility of an additional 1,930 oil wells and 2,000 gas wells.\textsuperscript{203} In 2015, plaintiffs filed suit challenging approval for 260 of these wells and seeking to enjoin their use.

The district court issued a 101-page decision giving its reasoning for not issuing a preliminary injunction.\textsuperscript{204} The district court held that though the plaintiffs had proven irreparable harm, they were not likely to succeed on the merits of their claims, and if the injunction were issued, the potential harm to plaintiffs would be outweighed by the economic harms to the defendant and the public.\textsuperscript{205} Plaintiff appealed.\textsuperscript{206}

The circuit court noted that for a preliminary injunction to issue, the plaintiff must establish: “(1) a substantial likelihood of prevailing on the merits; (2) irreparable harm unless the injunction is issued; (3) that the threatened injury outweighs the harm that the preliminary injunction may cause the opposing party; and (4) that the injunction, if issued, will not adversely

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{200}] Id.
\item[\textsuperscript{201}] Id. at 1279.
\item[\textsuperscript{202}] Id.
\item[\textsuperscript{203}] Id. at 1280.
\item[\textsuperscript{204}] Id.
\item[\textsuperscript{205}] Id.
\item[\textsuperscript{206}] Id.
\end{itemize}
\end{footnotesize}
affect the public interest.” Further, “[b]ecause a preliminary injunction is an extraordinary remedy, the [plaintiff]’s right to [injunctive] relief must be clear and unequivocal.”

The plaintiffs demonstrated “irreparable harm but had not satisfied the other three prerequisites for obtaining a preliminary injunction,” and each of the preliminary injunction elements must be met for a preliminary injunction to issue. The circuit court then affirmed the district court’s holdings as to each element under an abuse of discretion standard. Because the court found no abuse of discretion in the district court’s reasoning, the Tenth Circuit affirmed the district court’s rejection of the preliminary injunction. The following section will address the policy considerations behind the sliding scale test.

B. The Sliding Scale Test: The Second, Sixth, Seventh, Ninth, and D.C. Circuits

The Second, Sixth, Seventh, and Ninth Circuits apply the sliding scale test by balancing the four traditional factors given in Winter. A sliding scale test

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207 Id. at 1281 (quoting Davis v. Mineta, 302 F.3d 1104, 1111 (10th Cir. 2002)).
208 Id. (quoting Wilderness Workshop v. U.S. Bureau of Land Mgmt., 531 F.3d 1220, 1224 (10th Cir. 2008)).
209 Id. at 1281.
210 Id.
211 Id.
212 See e.g., Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd., 598 F.3d 30, 37 (2d Cir. 2010); Hoosier Energy Rural Elec. Co-op., Inc. v. John Hancock Life Ins. Co., 582 F.3d 721, 725 (7th Cir. 2009); All. For The Wild Rockies v. Cottrell, 632 F.3d 1127, 1134 (9th Cir. 2011). Though the Seventh Circuit has not expressly stated that the effect Winter had on preliminary injunctions, the Seventh Circuit
generally is a test where a “strong showing on one factor could make up for a weaker showing on another.” Each of these circuits balance the preliminary injunction factors against each other to determine whether to issue a preliminary injunction. A case illustrative of this approach is *Southern Glazer’s Distributors of Ohio, LLC v. Great Lakes Brewing Company.*

1. *Southern Glazer’s Distributors of Ohio, LLC v. Great Lakes Brewing Company*

*Southern Glazer’s Distributors of Ohio, LLC v. Great Lakes Brewing Company* involved a claim for a preliminary injunction in a dispute between a craft beer company and a beer distributor. The Great Lakes Brewing Company is a craft beer manufacturer based in Ohio; “its home and most important market, accounting for two-thirds of its sales.” Glazer’s of Ohio, Inc., an alcohol distributor specializing in beer distribution, was Great Lakes’ distributor in the Columbus market.

reached holdings in accord with the Second and Ninth District. See *Bloedorn v. Francisco Foods, Inc.,* 276 F.3d 270, 286-87 (7th Cir. 2001); *Michigan v. United States Army Corps of Engineers,* 2010 U.S. Dist. LEXIS 127376, at *108 (N.D. Ill. Dec. 2, 2010) (noting that if potential harm in a worst case scenario is great, a preliminary injunction may be warranted).


* Id. at 847.

* Id. (internal quotation marks omitted).

* Id.
agreement for distribution which included provisions for the termination of the agreement, such as a change in ownership of Glazer’s.\textsuperscript{218}

In January 2016, rumors of a merger between Glazer’s and another large distributor, Southern Wine & Spirits of America (“Southern”) became public.\textsuperscript{219} “Great Lakes asked Ohio Glazer’s for details of the impending deal ‘in order to assess their options in the Greater Columbus market.’”\textsuperscript{220} Ohio Glazer’s informed Great Lakes that Great Lakes’ consent was not necessary.\textsuperscript{221} Great Lakes considered the merger plans a change of ownership as defined by their agreement, withheld consent, and offered to provide evidence to support its reasonable business judgment in that regard.\textsuperscript{222} The merger was completed in June 2016, with Glazer’s and Southern becoming Ohio Southern Glazer’s, and Great Lakes cancelled the franchise agreement by written notice.\textsuperscript{223}

Glazer’s attempted to salvage the relationship through a letter stating that “while it did not believe prior consent was required, it ‘respectfully request[ed] its consent’ after the fact, [and] offer[ed] to provide any information Great Lakes might need to make that decision.”\textsuperscript{224} “Great Lakes declined the invitation to retroactively cure the purported breach and sought to implement a mutually agreeable plan to ensure an orderly transition to a new distributor.”\textsuperscript{225}

\begin{footnotes}
\item[218] \textit{Id}.
\item[219] \textit{Id}.
\item[220] \textit{Id}.
\item[221] \textit{Id. at} 848.
\item[222] \textit{Id}.
\item[223] \textit{Id}.
\item[224] \textit{Id}.
\item[225] \textit{Id}.
\end{footnotes}
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Glazer's immediately filed a declaratory action in federal court, seeking a preliminary injunction barring Great Lakes from terminating its franchise agreement.\footnote{Id. at 849.} The District Court granted the motion for a preliminary injunction by balancing the four traditional preliminary injunction factors: (1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury absent the injunction; (3) whether the injunction would cause substantial harm to others; (4) and whether the public interest would be served by the issuance of an injunction.\footnote{Id. (citing Bays v. City of Fairborn, 668 F.3d 814, 818–19 (6th Cir. 2012)).} The District Court held that the first three factors weighed in favor of granting the injunction, and the fourth factor was neutral.\footnote{Id.} An appeal followed.

The Sixth Circuit reviewed the District Court’s analysis of each of the four factors. As to Glazer’s likelihood of success on the merits, the Sixth Circuit found that “the contractual basis for Great Lakes’ proposed termination [was] valid under” Ohio law, and “[t]hus, the sole basis on which plaintiff intended to succeed at trial [was] without legal support.”\footnote{Id. at 852.} The second factor, whether Glazer’s was likely to suffer irreparable harm in the absence of preliminary relief, was based on whether the injury was “fully compensable by monetary damages” and whether “the nature of the plaintiff’s loss would make damages difficult to calculate.”\footnote{Id. (quoting Obama for Am. v. Husted, 697 F.3d 423, 436 (6th Cir. 2012); Basicomputer Corp. v. Scott, 973 F.2d 507, 511 (6th Cir. 1992)).} The Circuit Court found that Glazer’s had proven irreparable harm because “Great Lakes[']
products make up a large portion of Ohio Southern Glazer’s portfolio, comprising 25% of the Columbus branch’s beer revenue and 4% of that branch’s overall revenue.  

As to the third factor, whether the injunction would cause substantial harm to others, there was no sign that restricting Great Lakes from terminating the franchise would harm anyone else because Columbus area retailers would continue to receive Great Lakes products through other means. The fourth factor, whether the public interest would be served by the injunction, did not favor an injunction. The Circuit Court held that the public had a strong interest in holding private parties to their agreements, and Ohio law supported Great Lakes’ termination of the franchise agreement. Based on these conclusions, the Sixth Circuit reversed the issuance of the injunction because only two factors were in favor of the injunction. The next section will address the policy considerations of the gateway factor test.

C. The Gateway Factor Test: The First, Third, and Eighth Circuits

The First, Third, and Eighth Circuits apply the gateway factor test, a hybrid test which blends the sequential test and the sliding scale test. These circuits first examine the likelihood of success on the merits and the likelihood of irreparable harm—the gateway factors—before balancing the factors together. These

251 Id. at 853.
252 Id.
253 Id. at 853.
254 Id.
255 Id. at 854.
256 Reilly v. City of Harrisburg, 858 F.3d 173, 177 (3d Cir. 2017).
gateway factors must be met before any balancing occurs.237 A lack of either of the first two factors is dispositive.238 These circuits do not apply either a purely sequential or a purely sliding scale test. A case illustrative of this approach is Reilly v. City of Harrisburg.

1. Reilly v. City of Harrisburg

In Reilly v. City of Harrisburg, the City of Harrisburg, Pennsylvania, issued an ordinance prohibiting anyone from "knowingly congregat[ing], patrol[ing], picket[ing], or demonstrat[ing] in a zone extending 20 feet from any portion of an entrance to, exit from, or driveway of a health care facility."239 The ordinance exempted certain classes, including police and employees of the health care facility.240 Plaintiffs—"individuals purporting to provide ‘sidewalk counseling’ to those entering abortion clinics . . . to dissuade [them] from getting abortions"—argued that the ordinance created unconstitutional "buffer zones" that prevented them from effectively counseling.241 The plaintiffs "claim[ed] that the ordinance violat[ed] their First Amendment rights to speak freely, exercise their religion, and assemble, as well as their Fourteenth Amendment due process and equal protection rights."242 The plaintiffs "sought a preliminary injunction to enjoin enforcement of the ordinance."243 The district court ruled that the plaintiffs did not meet their burden of demonstrating that they were likely to succeed on the

237 Id.
238 Id.
239 Id. at 175 (quoting HARRISBURG, PA. MUN. CODE § 3-371.4A).
240 Id.
241 Id.
242 Id.
243 Id.
merits, and thus denied plaintiffs their requested relief.\textsuperscript{244}

The Third Circuit historically applied a four factor test to preliminary injunctions.\textsuperscript{245} For an injunction to issue, a plaintiff must demonstrate, “(1) a reasonable probability of eventual success in the litigation, and (2) that it will be irreparably injured . . . if relief is not granted.”\textsuperscript{246} Further, if they are relevant, a court should consider, “(3) the possibility of harm to other interested persons from the grant or denial of the injunction, and (4) the public interest.”\textsuperscript{247} The circuit court noted that in \textit{Nken} that the Supreme Court held that the “first two factors of the traditional standard are the most critical.”\textsuperscript{248} \textit{Nken} would be nonsensical if it elevated two factors and then required a moving party to prevail in a balance of all factors.\textsuperscript{249} The Third Circuit then settled its own precedent by holding “that a movant for preliminary equitable relief must meet the threshold for the first two ‘most critical’ factors,” and “[i]f these ‘gateway factors’ [were] met, a court . . . then determines . . . if all four factors . . . balance in favor of granting the requested preliminary relief.”\textsuperscript{250}

The Third Circuit did not reach the merits of the plaintiff’s claims. The Third Circuit remanded the case to the district court to reconsider the case in accordance with the test created in \textit{Reilly}.\textsuperscript{251} The next section will analyze the policy considerations and justifications between the three approaches.

\textsuperscript{244} \textit{Id.}

\textsuperscript{245} \textit{Id.} at 176 (citing Del. River Port Auth. v. Transamerican Trailer Transp., Inc., 501 F.2d 917, 919–20 (3d Cir. 1974)).

\textsuperscript{246} \textit{Id.} (alterations in original) (quoting \textit{Del. River Port Auth.}, 501 F.2d at 919–20).

\textsuperscript{247} \textit{Id.} (quoting \textit{Del. River Port Auth.}, 501 F.2d at 919–20).

\textsuperscript{248} \textit{Id.} at 179 (quoting \textit{Nken}, 556 U.S at 434).

\textsuperscript{249} \textit{Id.}

\textsuperscript{250} \textit{Id.}

\textsuperscript{251} \textit{Id.} at 180.
III. Analysis and Proposal

This section will analyze the considerations behind the sliding scale test, the sequential test, and the gateway factor test and discuss how each comports with equitable precedent and traditional notions of Supreme Court equity. This section will then propose a solution to the split based on that analysis.

A. Analysis

There are three different tests that circuit courts apply to preliminary injunctions: the sequential test, the sliding scale test, and the gateway factor test. Circuits that apply the sequential test analyze each preliminary injunction factor in turn, and if any factor is not proven to a certain degree, a preliminary injunction will not be issued. Circuits that apply the sliding scale test balance each of the four factors and issue an injunction if the factors taken together balance in favor of the plaintiff. These circuits will award “relief based on a lower likelihood of harm when the likelihood of success is very high.”

Circuits that apply the gateway factor test consider the first two factors of the preliminary injunction test—the likelihood of success on the merits and the likelihood of irreparable harm—dispositive of whether the injunction should issue. These circuits first examine those two factors; if those factors are met, the remainder of the factors will be examined, and all four factors will be balanced. The next section will examine the sequential test and the considerations that have led circuits to apply it.

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1. The Sequential Test

The Fourth, Fifth, Tenth, and Eleventh Circuits apply the sequential test. The Fourth Circuit justifies the sequential test based on Winter’s articulation of four requirements. Prior to Winter, the Fourth Circuit applied a four-part test, the Blackwelder test, which asked: “[1] Has the petitioner made a strong showing that it is likely to prevail upon the merits? [(2)] Has the petitioner shown that without such relief it will suffer irreparable injury? [(3)] Would the issuance of the injunction substantially harm other interested parties? [(4)] Wherein lies the public interest?”

The Fourth Circuit abandoned this test on the grounds that Winter requires a plaintiff to make a clear showing that it will likely succeed on the merits and that it is likely to be irreparably harmed absent preliminary relief. Further, the Fourth Circuit noted that the Supreme Court “emphasized the public interest requirement” by requiring courts of equity to “pay particular regard for the public consequences in employing the extraordinary remedy of [the] injunction,” a factor that was not always examined under Blackwelder. Without further explanation, the Fourth Circuit concludes that each of the four factors must be proven before a preliminary injunction will issue.

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255 Id. at 347 (quoting Winter, 555 U.S. at 24).
256 Id. at 346.
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The Fifth, Tenth, and Eleventh Circuits applied four factor tests virtually identical to the Winter test before Winter was decided. Before Winter, the Fifth Circuit held that a preliminary injunction was an extraordinary equitable remedy that may be granted only if plaintiff established four factors identical to the Winter test.258 Winter did not alter the Fifth Circuit’s application of a sequential test, and the circuit continues to affirm that the injunction is an “extraordinary remedy.”259 The Tenth and Eleventh Circuits, likewise, before Winter, applied sequential tests similar in construction to the Winter test and, following Winter, have not substantially altered their tests.260

259 Id. (quoting Winter, 555 U.S. at 24).
260 See Schrier v. Univ. of Colo., 427 F.3d 1253, 1258 (10th Cir. 2005) (quoting Heideman v. S. Salt Lake City, 348 F.3d 1182, 1188 (10th Cir. 2003) (holding that a plaintiff must demonstrate that “(1) [he or she] will suffer irreparable injury unless the injunction issues; (2) the threatened injury . . . outweighs whatever damage the proposed injunction may cause the opposing party; (3) the injunction, if issued, would not be adverse to the public interest; and (4) there is a substantial likelihood [of success] on the merits” (alterations in original)); Jysk Bed’N Linen v. Dutta-Roy, 810 F.3d 767, 774 (11th Cir. 2015) (holding that district court may issue a preliminary injunction where the moving party demonstrates “(1) a substantial likelihood of success on the merits; (2) that irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the moving party outweighs whatever damage the proposed injunction may cause the non-moving party; and (4) if issued, the injunction would not be adverse to the public interest.”); see also Siegel v. LePore, 234 F.3d 1163, 1176 (11th Cir. 2000); All Care Nursing Serv., Inc. v. Bethesda Mem’l Hosp., Inc., 887 F.2d 1535, 1537 (11th Cir. 1989).
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Out of the four circuits which apply the sequential test, only the Fourth Circuit altered its approach following Winter. The Fifth, Tenth, and Eleventh Circuits have traditionally applied a four-part sequential test. Though Winter did not change the test for all four of the sequential test circuits, all four circuits have held that no prong of the test for a preliminary injunction may be relaxed to require less than a “likelihood” of success or irreparable harm.\(^{261}\) The next section will examine the policy considerations behind the circuits that apply the sliding scale test.

2. The Sliding Scale Test

The Second, Sixth, Seventh, Ninth, and District of Columbia Circuits continue to employ the sliding scale test by balancing the four traditional factors given in Winter. The Second Circuit historically required a party seeking a preliminary injunction to show “(a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief.”\(^{262}\) This circuit has noted that the

\(^{261}\) N.M. Dep't of Game & Fish v. U. S. Dep't of the Interior, 854 F.3d 1236, 1246 (10th Cir. 2017) (“Although we have applied this modified approach in the past, our recent decisions admonish that it is not available after the Supreme Court’s ruling in [Winter].”); United States v. Stinson, 661 F. App’x 945, 951 (11th Cir. 2016) (quoting Jysk Bed ‘N Linen, 810 F.3d at 774 n.16) (“[T]he plaintiff must show a likelihood of success on the merits rather than actual success.”).

\(^{262}\) Citigroup Glob. Mkts., Inc. v. VCG Special Opportunities Master Fund, Ltd., 598 F.3d 30, 35 (2d Cir. 2010) (quoting Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc., 596 F.2d 70, 72 (2d Cir. 1979).

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overall burden of this test is no lighter than the likelihood of success on the merits prong stated in Winter.263

The Second Circuit holds that the value of this approach, “lies in its flexibility in the face of varying factual scenarios and the greater uncertainties inherent at the outset of particularly complex litigation.”264 Preliminary injunctions, being extraordinary remedies, should not be “mechanically confined to cases that are simple or easy.”265

The Second Circuit holds that “Munaf, Winter, and Nken have not undermined . . . [the circuit’s] approval of the more flexible approach signaled” by the Supreme Court in 1929’s Ohio Oil.266 The Second Circuit holds that Winter was decided upon the balance of the equities and the public interest, not upon a sequential test.267 Although Winter did not reject the sliding scale test,268 courts cannot apply a lesser standard than the “likelihood” standard in Winter.269 As previously stated, the Second Circuit holds that the sliding scale test as it has long been applied is not a lesser standard than “likelihood of success on the merits” standard.270 The

263 Id. at 35.
264 Id.
265 Id.
266 Id. at 37; see Ohio Oil Co. v. Conway, 279 U.S. 813, 815 (1929) (per curiam).
268 All. For The Wild Rockies v. Cottrell, 632 F.3d 1127, 1132 (9th Cir. 2011) (citing Winter, 555 U.S. at 50 (Ginsburg, J., dissenting)).
269 Id. (citing Am. Trucking Ass’ns, Inc. v. City of Los Angeles, 559 F.3d 1046, 1052 (9th Cir. 2009)); see also Barker ex rel. Nat’l Labor Relations Bd. v. A.D. Conner Inc., 807 F. Supp. 2d 707, 718 (N.D. Ill. 2011) (citing Bloedorn v. Francisco Foods, Inc., 276 F.3d 270, 286–87 (7th Cir. 2001)).
270 See supra note 263.
Second Circuit contends that “[i]f the Supreme Court had . . . [intended] to abrogate the more flexible standard for a preliminary injunction,” the Court would have referenced “the considerable history of the flexible standards applied in this circuit, seven of our sister circuits, and in the Supreme Court itself.”

The Seventh Circuit, citing to Winter, holds that “[i]rreparable injury is not enough to support equitable relief.” In addition to irreparable injury there must also be a “plausible claim on the merits,” and the “balance of equities” must favor the plaintiff. “[T]he more net harm an injunction can prevent, the weaker the plaintiff’s claim on the merits can be while still supporting some preliminary relief.” The Seventh Circuit notes that a preliminary injunction need not be an exhaustive remedy. It can be limited to rectifying only “some preliminary relief.”

Though the Ninth Circuit’s decision was overturned in Winter due to its application of less than a “likelihood” of irreparable harm, the Ninth Circuit continues to apply a sliding scale on the grounds that the Supreme Court has not defined “likelihood.” The Ninth Circuit holds that in Munaf the Supreme Court did nothing more than note that the lower court had failed to

271 Citigroup, 598 F.3d at 38.
273 Id. (citing Winter, 555 U.S. 7; Ill. Bell Tel. Co., 157 F.3d 500).
274 Id.
275 All. For The Wild Rockies v. Cottrell, 632 F.3d 1127, 1133 (9th Cir. 2011) (quoting Hoosier Energy Rural Elec. Coop., 582 F.3d at 725).
276 Id. (quoting Hoosier Energy Rural Elec. Coop., 582 F.3d at 725).
277 Id.
address the likelihood of success on the merits, but the Court provided nothing in the way of a definition for a “likelihood of success on the merits.” Nken, likewise, included the phrase “likely to succeed on the merits,” but the Court did not suggest that this factor requires a showing that the movant is “more likely than not” to succeed on the merits for a preliminary injunction to issue. Further the Ninth Circuit states that in Winter, the Supreme Court only “cabined that flexibility with regard to the likelihood of harm,” leaving open the possibility of treating likelihood of success on the merits differently.

Similar to the Second and Ninth Circuits, the District of Columbia Circuit weighs the four preliminary injunction factors and “allow[s] that a strong showing on one factor could make up for a weaker showing on another.” Two justices of this circuit have suggested that Winter appears to require “that a party moving for a preliminary injunction must meet four independent requirements.” Despite this observation, this circuit has not yet decided whether Winter requires a sequential test and continues to apply a sliding scale test. The following section will analyze the gateway factor test and the policy consideration behind it.

278 Id. at 1134.
279 Nken v. Holder, 556 U.S. 413, 434 (2009); All For The Wild Rockies, 632 F.3d at 1133 (quoting Citigroup Glob. Mkts., Inc., 598 F.3d at 35).
280 All For The Wild Rockies, 632 F.3d at 1139.
283 League of Women Voters of the U. S. v. Newby, 838 F.3d 1, 7 (D.C. Cir. 2016) (holding that “appellants satisfy each of the four preliminary injunction factors, this case presents no occasion for the court to decide whether the ‘sliding scale’ approach remains valid”).
3. The Gateway Factor Test

The First, Third, and Eighth Circuits apply the Gateway Factor test, a hybrid test which blends the sequential test and the sliding scale test. The status of the law in the Third Circuit has been muddied by inconsistent precedent. The Third Circuit has acknowledged an “inconsistent line of cases within [the Third Circuit] holding that all four factors must be established by the movant and the ‘failure to establish any element in its favor renders a preliminary injunction inappropriate.’”284 This line of cases stated that an “injunction shall issue only if the plaintiff produces evidence sufficient to convince the district court that all four factors favor preliminary relief.”285 If a plaintiff failed to demonstrate that all four elements favored their claim for a preliminary injunction, a preliminary injunction would be “inappropriate.”286

This test was unlike the sliding scale test, as followed by other circuits where “[t]he more the balance of harms tips in favor of an injunction, the lighter the burden on the party seeking the injunction to demonstrate that it will ultimately prevail.”287 This line of Third Circuit cases required each factor to be analyzed

284 Reilly v. City of Harrisburg, 858 F.3d 173, 177 (3d Cir. 2017) (citing Ferring Pharm., Inc. v. Watson Pharm., Inc., 765 F.3d 205, 210 (3d Cir. 2014); NutraSweet Co. v. Vit-Mar Enters., Inc., 176 F.3d 151, 153 (3d Cir. 1999)).
286 Id. (quoting NutraSweet Co, 176 F.3d at 153).
287 Id. (alteration in original) (quoting Korte v. Sebelius, 528 Fed. App’x 583, 586 (7th Cir. 2012)).
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in turn and each element met for a preliminary injunction to issue.288

The second line of Third Circuit cases applied a balancing test. These cases required “[a]s a prerequisite to the issuance of a preliminary injunction” a plaintiff to show a “reasonable probability of eventual success in the litigation, and [] that it will be irreparably injured pendente lite if relief is not granted to prevent a change in the status quo.”289 Further, “in considering whether to grant a preliminary injunction, [a court] should take into account, when . . . relevant, [] the possibility of harm to other interested persons from the grant or denial of the injunction, and [] the public interest.”290 These factors would then be “delicate[ly]” balanced.291

This conflicting standard began with Opticians Association of America v. Independent Opticians of America, holding that a court: “must consider four factors” and that “[o]nly if the movant produces evidence sufficient to convince the trial judge that all four factors favor preliminary relief should the injunction issue.”292 Through various subtle misinterpretations of longstanding jurisprudence starting with Opticians, the Third Circuit’s precedent became confused and unclear.293 In Reilly v. City of Harrisburg, the Third Circuit sought to unify its precedent in light of Winter with—quite appropriately—four reasons why Winter does not support the sequential test.

288 Id.
291 Id.
292 Reilly v. City of Harrisburg, 858 F.3d 173,177 (alteration in original) (quoting Opticians Ass’n of America v. Indep. Opticians of Am., 920 F.2d 187, 191–92 (3d Cir. 1990)).
293 Id.

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First, Winter held that an injunction is a matter of equitable discretion that requires a court to balance the equities, and Justice Ginsburg in her dissent stated that the Court has never rejected the sliding scale formulation.\textsuperscript{294} Second, other courts, such as the Seventh Circuit, agree with the Third Circuit that Winter supports a sliding scale test.\textsuperscript{295} “Third, no test for considering preliminary equitable relief should be so rigid as to diminish, let alone disbar, discretion” because such a test would contravene traditional principles of equity.\textsuperscript{296} Fourth, barring the use of a sliding scale test is “inconsistent with the Supreme Court’s post-Winter instruction in Nken” which directed courts that “when evaluating whether interim equitable relief is appropriate, ‘[t]he first two factors of the traditional standard are the most critical.’”\textsuperscript{297}

The Third Circuit reads Winter in conjunction with Nken to create a hybrid test. When seeking a preliminary injunction, a plaintiff must meet the threshold for the first two factors—that it can likely succeed on the merits and that it is more likely than not to suffer irreparable harm in the absence of preliminary relief.\textsuperscript{298} “If these gateway factors are met, a court then considers . . . in its sound discretion if all four factors, taken together, balance in favor of granting the requested preliminary relief.”\textsuperscript{299}


\textsuperscript{295} Id. (quoting Hoosier Energy Rural Elec. Coop., Inc. 582 F.3d at 725).

\textsuperscript{296} Id.

\textsuperscript{297} Id. at 179 (alteration in original) (quoting Nken v. Holder, 556 U.S. 418, 434(2009)).

\textsuperscript{298} Id.

\textsuperscript{299} Id.

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Though the Third Circuit purports to apply a sliding scale test, this test is a hybrid test: the gateway factor test. The first two factors are applied sequentially and only if those are met are the remaining two factors considered and balanced. The Eighth Circuit applies a similar test.

The Eighth Circuit, like a Third Circuit, applies a hybrid test to determine whether a preliminary injunction should issue. The Eighth Circuit has long applied four factors comparable to the Winter factors when considering preliminary injunctions. The factors cited in Dataphase Systems are consistent with the factors stated in Winter; however, Winter altered the Eighth Circuit’s historical requirement that the plaintiff establish “a fair ground for litigation” to require the plaintiff to establish “likelihood of success on the merits.”

The Eighth Circuit holds that a court must “flexibly weigh the case’s particular circumstances to determine whether the balance of equities so favors the movant that justice requires the court to intervene.” Like the Third Circuit, this circuit first examines gateway factors. The lack of irreparable harm is “an independently sufficient ground upon which to deny” an injunction regardless of what the plaintiff proves

300 Id.
303 Hubbard Feeds, Inc. v. Animal Feed Supplement, Inc., 182 F.3d 598, 601 (8th Cir. 1999) (quoting United Indus. Corp. v. Clorox Co., 140 F.3d 1175, 1179 (8th Cir. 1998)).
regarding the other three factors. Further, the Eighth Circuit holds that “[t]he basis of injunctive relief in the federal courts has always been irreparable harm and the inadequacy of legal remedies.” This creates a hybrid test. The Eighth Circuit will not issue a preliminary injunction if there is a lack of irreparable harm regardless of the severity of the other factors.

The First Circuit likewise does not balance the factors equally. “The likelihood of success on the merits and irreparable harm weigh heavily in the analysis and these factors are assessed in relation to one another”; however, the likelihood of success on the merits has been held to be the most important factor and may be dispositive. First Circuit courts have also held that when the likelihood of success on the merits is great, a preliminary injunction will issue even if the plaintiff does not demonstrate an equal likelihood of irreparable harm.

The next section will describe a proposal for the universal application of the sliding scale test among the several circuits.

B. Proposal

304 Watkins Inc. v. Lewis, 346 F.3d 841, 844 (8th Cir. 2003).
307 Corp. Techs., Inc. v. Harnett, 731 F.3d 6, 10 (1st Cir. 2013).
Federal Courts should apply the sliding scale test when determining whether to issue a preliminary injunction. Winter and other Supreme Court cases do not abrogate the sliding scale test traditionally applied when determining whether a preliminary injunction should issue. Further, cases subsequent to Winter do not apply a sequential test, and a sequential test is not mentioned. The traditional sliding scale test comports with the function of the preliminary injunction and the traditional notions of equity currently and historically applied by the Supreme Court.

This section will first discuss how the language of Winter does not abrogate the traditional sliding scale test. Next, this section will discuss how Winter does not alter any aspect of the traditional sliding scale test. Then, this section will discuss the significance of the Winter test containing “factors” as opposed to “elements.” Then, this section will discuss how Supreme Court precedent supports the sliding scale approach. Finally, this section will conclude with a discussion of how the equities must be balanced regardless of which test is applied, concluding that only the sliding scale test allows the equities to be properly balanced.

1. The Language of Winter Does Not Abrogate the Sliding Scale Test

Winter does not abrogate the traditional sliding scale test. First, the language of Winter does not suggest that a sequential test has now replaced the sliding scale test. Nothing in the opinion expressly or implicitly creates a sequential test. The Fourth Circuit may apply the sequential test, but the Fifth, Tenth, and Eleventh Circuits have always applied the sequential test, Winter notwithstanding. These circuits have noted that Winter requires a showing of likelihood of success on the merits
plus a likelihood of irreparable harm, but they have not stated how Winter has altered their test beyond that.\textsuperscript{309} The Fourth Circuit is the only circuit to expressly interpret Winter to create a sequential test.

The Fourth Circuit holds that Winter created a strict sequential test but does not cite language or give reasoning as to how the Supreme Court mandated it. This circuit only concludes that the factors must be proven "as articulated."\textsuperscript{310} Nothing in Winter suggests that the Sliding Scale Test may no longer be applied. Further, Justice Ginsburg, in her dissent in Winter, states that the Supreme Court has historically followed a test which awards "relief based on a lower likelihood of harm when the likelihood of success is very high."\textsuperscript{311} Justice Ginsburg states that Winter does not abrogate that test,\textsuperscript{312} and the majority does not dispute her contention.\textsuperscript{313}

2. The Plain Language of Winter Does Not Alter Any Element of the Test

Second, the plain language of Winter changes nothing about the sliding scale test. The Supreme Court held that issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with the

\textsuperscript{309} Diné Citizens Against Ruining Our Env’t v. Jewell, 839 F.3d 1276, 1282 (10th Cir. 2016).
\textsuperscript{310} The Real Truth About Obama, Inc. v. Fed. Election Comm’n, 575 F.3d 342, 348 (4th Cir. 2009).
\textsuperscript{312} Id.
\textsuperscript{313} Cf. SBRMCOA, LLC v. Morehouse Real Estate Invs., LLC, 62 V.I. 168, 183–84 (V.I. 2015) (noting that the “Ginsburg sliding scale test” is a unique variation of the sliding scale test).
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Court’s characterization of preliminary injunctions. The Ninth Circuit—the circuit where Winter originated—acknowledges that, following Winter, “any modified test which relaxes one of the prongs for preliminary relief” is impermissible. Further, the Ninth Circuit states that in Winter, the Supreme Court only “cabin[ed] that flexibility with regard to the likelihood of harm,” leaving open the possibility of treating likelihood of success on the merits differently. The Ninth Circuit’s assertions are not correct, however. In Winter, the Court did not “cabin[ed] flexibility;” the Court merely restated its longstanding rule. The Supreme Court has always required a showing of a likelihood of success on the merits. Further, the Supreme Court has never endorsed a test which always issues an injunction if certain requirements are met.

In Ohio Oil, the Supreme Court noted that when “questions presented in an application for a[,] [preliminary] injunction are grave, and the injury to the moving party is certain and irremediable,” the injury to the defendant is inconsequential or indemnifiable through bond, and the final decree is in the moving party’s favor, the injunction usually will be granted. The Court notes that the injunction will “usually” be granted regardless of

314 Winter, 555 U.S at 23.
315 Diné, 839 F.3d at 1282; Bloedorn v. Francisco Foods, Inc., 276 F.3d 270, 286–87 (7th Cir. 2001).
316 All. For The Wild Rockies v. Cottrell, 632 F.3d 1127, 1139 (9th Cir. 2011).
317 Ohio Oil Co. v. Conway, 279 U.S. 813, 815 (1929) (per curiam) (holding that for a preliminary injunction to issue it must be shown that the injury to the moving party will be certain and irremediable if the application be denied and the final decree be in his favor).
318 Id. (citing Love v. Atchison, Topeka & Santa Fe Ry. Co., 185 F. 321, 331–32 (8th Cir. 1911)).
whether the factors are fulfilled.\textsuperscript{319} A preliminary injunction, as has often been stated, is not an automated process. It is not a right that arises if certain conditions are met.

The lack of clarity in the test for preliminary injunctions is a byproduct of the flexibility of the test itself. The Supreme Court has long adhered to certain equitable principles that are demonstrated throughout its decisions.\textsuperscript{320} Most importantly, the Court has always been flexible in issuing preliminary injunctions to reach equitable conclusions.\textsuperscript{321}

In \textit{Ohio Oil}, the Court held that harm must be “certain and irreparable” and the final decree “is in the moving party’s favor” without further definition.\textsuperscript{322} In \textit{Winter}, a moving party must show “that he is likely to succeed on the merits” and “that he is likely to suffer irreparable harm in the absence of preliminary relief.”\textsuperscript{323} Also, “[t]he standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success.”\textsuperscript{324} Likelihood then is less than actual success and greater than merely possible success, but the standard is still amorphous. District courts are given great discretion in issuing preliminary injunctions and are not overturned

\textsuperscript{319} \textit{Id.}
\textsuperscript{320} Kroger, \textit{supra} note 28, at 1471–72 (quoting Hoffer, \textit{supra} note 67, at xiii).
\textsuperscript{321} \textit{Hecht Co.} v. \textit{Bowles}, 321 U.S. 321, 330 (1944); \textit{see also} \textit{Meredith} v. \textit{Winter Haven}, 320 U.S. 228, 235 (1943).
\textsuperscript{322} \textit{Hecht Co.}, 321 U.S. at 330; \textit{see also Meredith}, 320 U.S. at 235.
\textsuperscript{324} \textit{Id.} (quoting Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 546, n.12 (1987)).
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unless there has been an abuse of discretion. The test is unclear so that it can be flexible.

In Winter, the district court did not consider all facts before it when reaching its conclusion. In considering all the facts, the Supreme Court found that in determining that the plaintiffs suffered only a “possibility” of irreparable harm—the harm was too remote. “A preliminary injunction will not be issued simply to prevent the possibility of some remote future injury.” The district court effectively reached a conclusion counter to long standing precedent due to its lack of consideration of the facts.

If the facts in Winter had pointed to a likelihood of irreparable harm, the Supreme Court would have allowed the lower court decision to stand regardless of the language used. In cases involving questions of national defense, which Winter involved, the Court will “give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest.” The Court noted that “it is not clear that articulating the incorrect standard affected the Ninth Circuit’s analysis of irreparable harm.” It would not have mattered if the Ninth Circuit had applied the facts to a likelihood standard.

325 Id. at 33 (holding that the “District Court abused its discretion by imposing a 2,200-yard shutdown zone and by requiring the Navy to power down its MFA sonar during significant surface ducting conditions”); see also Summum v. Pleasant Grove City, 483 F.3d 1044, 1049 (10th Cir. 2007) (reviewing the district court’s legal conclusions and findings of fact for abuse of discretion).
326 Winter, 555 U.S. at 22.
327 Id. at 21.
328 Id.
329 Winter, 555 U.S. at 23 (citing Goldman v. Weinberger, 475 U.S. 503, 507 (1986)).
330 Id. at 22.
“Likelihood” is not a magic word that allows a court to abuse its discretion; rather, it is a standard less than actual success which must be met when fact pattern in question is analyzed.

Munaf only noted that the lower court had failed to address the likelihood of success on the merits, but the Court provided nothing in the way of a definition for a “likelihood of success on the merits.”\(^{331}\) Nken, likewise, included the phrase “likely to succeed on the merits,” but the Court did not suggest that this factor requires a showing that the movant is more likely than not to succeed on the merits for a preliminary injunction to issue.\(^{332}\) In Winter, the facts simply did not demonstrate a likelihood of irreparable harm. The Ninth Circuit is incorrect in its assertion that Winter changed the standard for irreparable harm.

One commentator has posited that the “plain language” of Winter establishes a sequential test because “Winter’s articulation of the traditional preliminary injunction test contains four factors, joined by semicolons and the conjunction ‘and.’”\(^{333}\) Further, the commentator suggests that “[t]ypically, this sort of formulation indicates a list where all of the elements are required.”\(^{334}\) Syntax and punctuation are thin nails on which to hang such a heavy assertion. For one, Winter does not use semi-colons to separate the preliminary injunction factors: “A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in


\(^{334}\) Weisshaar, supra note 3, at 1049
his favor, and that an injunction is in the public interest.\textsuperscript{335}

Further, a semicolon and conjunction formulation is not always used to create a sequential test. Some Supreme Court cases create sequential tests without using such a formulation.\textsuperscript{336} For example, \textit{Complete Auto Transit v. Brady}, is often cited as creating a four-part test for evaluating the constitutionality of state taxes though the Court never expressly cites a test.\textsuperscript{337} Oftentimes, the Supreme Court actually states whether a test is sequential.\textsuperscript{338} In \textit{Winter}, the Court does not expressly state that the test is sequential, and Justice Ginsburg does not believe the \textit{Winter} test to be sequential. Further,

\textsuperscript{335} \textit{Winter}, 555 U.S. at 20.


\textsuperscript{337} Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 287 (1977); see Barclays Bank PLC v. Franchise Tax Bd., 512 U.S. 298, 310–11 (1994) (holding that \textit{Complete Auto} created a four part test: “(1) applies to an activity lacking a substantial nexus to the taxing State; (2) is not fairly apportioned; (3) discriminates against interstate commerce; or (4) is not fairly related to the services provided by the State”).

the semicolon and conjunction formulation is used for applications that are not tests at all.\textsuperscript{339}

Courts have considered punctuation when interpreting statutes, but \textit{Winter} did not interpret a statute. A semicolon can be used to punctuate a long sentence and indicate unrelated elements.\textsuperscript{340} A semicolon can be used to separate unrelated requirements in a statute.\textsuperscript{341} In some cases, a semicolon can be interpreted as “or” or “and” and still create a logical sentence.\textsuperscript{342} Context is important, and \textit{Winter} does not specify a sequential test anywhere.

3. The \textit{Winter} Test Has Factors, Not Elements

Third, the Court refers to the four parts of the preliminary injunction test as “factors,” not elements.\textsuperscript{343} “Elements” is the term generally used for sequential tests. For example, in \textit{Apprendi v. New Jersey} the Supreme Court noted that “in order for a jury trial of a crime to be proper, all elements of the crime must be proved to the jury.”\textsuperscript{344} Factors are generally reserved for

\begin{itemize}
\item \textsuperscript{339} See Crawford-El v. Britton, 523 U.S. 574, 582 (1998) (listing lower court propositions separated by semicolons and a conjunction).
\item \textsuperscript{341} See, e.g., GTE New Media Servs. v. BellSouth Corp., 199 F.3d 1343, 1350 (D.C. Cir. 2000).
\item \textsuperscript{342} Fed. Ins. Co. v. Stroh Brewing Co., 127 F.3d 563, 571 (7th Cir. 1997).
\item \textsuperscript{344} Winter v. New Jersey, 530 U.S. 466, 500 (2000) (emphasis added); see also Lujan v. Defs. of Wildlife, 504 U.S. 555, 561 (1992) (holding that the elements of standing “are not mere pleading requirements but rather an indispensable part of the plaintiff’s case”). \textit{Compare} Illinois v. Gates, 462 U.S. 213, 230 (1983) (“We do not agree, however, that these elements should be understood as entirely separate and independent

[76]
Sliding Scale Tests. For example, in Miller-El v. Cockrell, the Court held that the credibility of a prosecutor’s race-neutral statements “can be measured by, among other factors, the prosecutor’s demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy.”

The Court also uses “factors” to mean conditions considered in reaching a decision. In Winter, the Court separates the requirements created by the district court for its injunction with semicolons. The Court’s use of

requirements to be rigidly exacted in every case, which the opinion of the Supreme Court of Illinois would imply.”), with Hamling v. United States, 418 U.S. 87, 99 (1974) (quoting Roth v. United States, 354 U.S. 476 (1957)) (“[T]hree elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.”).

345 Lockett v. Ohio, 438 U.S. 586, 630 (1978) (in Florida, a trial court “is directed to weigh eight aggravating factors against seven mitigating factors to determine whether the death penalty shall be imposed”) (White, J., dissenting).
348 Winter, 555 U.S. at 17–18 (“(1) imposing a 12-nautical mile ‘exclusion zone’ from the coastline; (2) using lookouts to conduct additional monitoring for marine mammals; (3) restricting the use of ‘helicopter-dipping’ sonar; (4) limiting the use of MFA sonar in geographic ‘choke points’; (5) shutting down MFA sonar when a marine mammal is spotted within 2,200 yards of a vessel; and (6) powering down MFA sonar by 6 dB during significant surface ducting conditions, in which sound travels further than it otherwise would due to temperature differences in adjacent layers of water.”)
certain punctuation is neither dispositive nor helpful in determining whether the Winter test is sequential.

4. Precedent of the Supreme Court Supports a Sliding Scale

Fourth, Supreme Court precedent supports the Sliding Scale Test for issuing preliminary injunctions. One commentator suggests that earlier Supreme Court cases support a sequential test. In Doran v. Salem Inn, the Court stated that the plaintiff must show “he will suffer irreparable injury and also that he is likely to prevail on the merits.”349 The Doran Court continued, “It is recognized, however, that a district court must weigh carefully the interests on both sides.”350 In Yakus, the Court “indicated that irreparable injury was necessary, but not sufficient, to obtain a preliminary injunction”;351 however, the Court continued that “the award is a matter of sound judicial discretion, in the exercise of which the court balances the conveniences of the parties and possible injuries to them.”352 Applying a strict sequential test will allow preliminary injunctions to issue only in the narrowest of narrow, simple circumstances. The court in Citigroup v. VCG stated in its opinion that “limiting the preliminary injunction to cases that do not present significant difficulties would deprive the remedy of much of its utility.”353 The Supreme Court has never rejected

349 Weisshaar, supra note 3, at 1051 (quoting Doran v. Salem Inn, Inc., 422 U.S. 922, 931 (1975)).
350 Doran, 422 U.S. at 931.
351 Weisshaar, supra note 3, at 1051 (citing Yakus v. United States, 321 U.S. 414, 440 (1944)).
352 Yakus, 321 U.S. at 440.
353 Citigroup Global Mkts, Inc. v. VCG Special Opportunities Master Fund, Ltd., 598 F.3d 30, at 36 (2d Cir. 2010) (quoting Wright et al., supra note 120, § 2948.3); see also Dataphase
the sliding scale test which requires a balancing of the equities and did not do so in Winter.\textsuperscript{354}

The Supreme Court had the opportunity in Winter to create a definitive sequential test; however, the Court did not do so. The Court’s primary concern in Winter was the Ninth Circuit’s holding that a mere “possibility” of irreparable harm was sufficient to warrant an injunction.\textsuperscript{355} That does not follow the “basic doctrine of equity jurisprudence that courts of equity should not act . . . when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief.”\textsuperscript{356} In Winter, the Supreme Court merely stated its own precedent and objected to the Ninth Circuit’s failure to consider all the facts.

5. All Circuits Balance the Equities Regardless of the Test Applied

Fifth, the Winter factors create a balancing test whether the sequential test, sliding scale test, or the gateway factor test is applied. The third factor in the Winter test requires “that the balance of equities” tip in the movant’s favor.\textsuperscript{357} “In each case, courts ‘must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.’”\textsuperscript{358} If the movant has shown only a

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\textsuperscript{354} Winter, 555 U.S. at 51 (Ginsburg, J., dissenting).
\textsuperscript{355} Diné Citizens Against Ruining Our Env’t v. Jewell, 839 F.3d 1276, 1288 (10th Cir. 2016) (Lucero, J., dissenting).
\textsuperscript{356} Id. at 1287–88 (alteration in original) (quoting Younger v. Harris, 401 U.S. 37, 43–44 (1971)).
\textsuperscript{357} Winter, 555 U.S. at 20.
\textsuperscript{358} Id. at 24 (quoting Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 542 (1987)).
\end{flushleft}
likelihood of success on the merits or only irreparable harm, the balance of the equities will not likely sufficiently favor the movant.\textsuperscript{359} Further, the balance the equities may tip somewhat in favor of movant, but the lack of a likelihood of success on the merits and irreparable harm may not tip the equities far enough.\textsuperscript{360} A sequential test circuit may deny an injunction because a movant has not shown a likelihood of success on the merits while a sliding scale circuit would deny that same injunction on the grounds that not showing a likelihood of success on the merits fails to tip the balance of equities in favor of the movant. Circuits may reach identical conclusions regardless of the test applied, but this is not a universal maxim.

“The [Supreme] Court has repeatedly held that the basis for injunctive relief in the federal courts has always been irreparable injury and the inadequacy of

\textsuperscript{359} See, e.g., Video Gaming Techs., Inc. v. Bureau of Gambling Control, 356 F. App’x 89, 94 (9th Cir. 2009) (holding that plaintiff only established a likelihood of success on the merits); Young v. 3.1 Phillip Lim, LLC, Case No.: SA CV 16-1556-DOC (KESx), 2016 WL 6781200, at *4, *6 (C.D. Cal. Nov. 16, 2016) (holding that plaintiff established a likelihood of success on the merits but that the balance of equities favored defendant); Dep’t of Educ. v. C.B. \textit{ex rel.} Donna, Civil No. 11-00576 SOM/RLP, 2012 WL 220517, at *3 (D. Haw. Jan. 24, 2012) (holding the Dept. of Education “does not show that it will suffer irreparable harm or that the balance of equities tips in its favor”; however, “[t]he DOE does show that it is likely to succeed on the merits. The public interest factor is neutral”); Syngenta Seeds, Inc. v. Bunge N. Am., Inc., 820 F. Supp. 2d 953, 991 (N.D. Iowa 2011); Champagne v. Gintick, 871 F. Supp. 1527, 1537 (D. Conn. 1994) (holding that even with a likelihood of success on the merits, the balance of the equities would still favor against an injunction).

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legal remedies.”\textsuperscript{361} This is because an injunction should issue only where the intervention of a court of equity “is essential in order effectually to protect property rights against injuries otherwise irremediable.”\textsuperscript{362} \textit{Winter} is merely reiterating that a preliminary injunction is an extraordinary remedy that may only be awarded upon a clear showing that the movant is entitled to such relief\textsuperscript{363} and never as a matter of right.\textsuperscript{364} The four factor test exists to ensure that when an injunction—a drastic remedy depriving a party of certain freedom to act—is issued there is no other way to make the movant whole.

When courts balance the equities, they consider the likelihood of success on the merits and the likelihood of irreparable harm. Without a likelihood of success on the merits and without a likelihood of irreparable harm, the equities as far as issuing a preliminary injunction are concerned, cannot be balanced except in extraordinary circumstances, such as the equities being balanced as a matter of law.\textsuperscript{365} If the movant is not likely to succeed and


\textsuperscript{362} Weinberger, 456 U.S at 312 (citing Cavanaugh v. Looney, 248 U.S. 453, 456 (1919)).

\textsuperscript{363} Winter, 555 U.S. at 23 (citing Mazurek v. Armstrong, 520 U.S. 968, 972 (1997)).

\textsuperscript{364} Id. at 24 (citing Mun v. Geren, 553 U.S. 674, 689–90 (2008)).

\textsuperscript{365} See Bhandari v. Capital One, N.A., No. C 12-04533 PSG, 2012 WL 5904694, at *7 (N.D. Cal. Nov. 26, 2012) (holding that failure to show likelihood of success on the merits and success in showing irreparable harm tip the balance in favor of the defendant); Cf. Defs. of Wildlife v. Salazar, 812 F. Supp. 2d 1205, 1210 (D. Mont. 2009) (holding that though the plaintiffs have failed to meet their burden for issuing a preliminary injunction, the plaintiffs are likely to be able to meet their
not likely to be irreparably harmed, an injunction would not fulfill its purpose.

There must be a likelihood of success on the merits and a likelihood of irreparable harm before a preliminary injunction will issue; however, one of these factors may have a “lower likelihood” than the other.\textsuperscript{366} The Supreme Court has never defined what a “likelihood” of success on the merits entails. The Court has held that “likelihood” is less than “actual success.”\textsuperscript{367} As the Tenth Circuit has noted, under the “serious questions” test still applied by some Circuits, a party must show that there are serious questions going to the merits and that the balance of hardships tips decidedly in its favor, a burden no less than a “likelihood of success.”\textsuperscript{368} The test is vague because the entire point of a preliminary injunction is to balance the equities. If the test were mechanical, a preliminary injunction would not be an extraordinary remedy that is malleable to fit any set of circumstances; rather, an injunction would be a matter of right. Regardless of how the factors are applied, the Winter test still requires a balancing of the equities. To the extent that the third element of the Winter test is “balancing of the equities,” all three tests are balancing tests. Insisting on a rigid application of the factors may deprive courts of the flexibility historically associated with equity.

\textsuperscript{366} Winter, 555 U.S. at 51 (Ginsburg, J., dissenting).
\textsuperscript{367} Id. at 32 (majority opinion) (citing Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 546 n.12 (1987)).
\textsuperscript{368} Diné Citizens Against Ruining Our Env’t v. Jewell, 839 F.3d 1276, 1288 (10th Cir. 2016) (Lucerno, J., dissenting) (citing Citigroup Global Mkts, Inc. v. VCG Special Opportunities Master Fund, Ltd., 598 F.3d 30, 35 (2d Cir. 2010)).
IV. Conclusion

The traditional sliding scale test for a preliminary injunction to issue is a sliding scale Test which most totally balances the equities. This sliding scale test was not abrogated by Winter. Circuits which apply the sequential test or the gateway factor test are still required to balance the equities as the third factor in the Winter analysis. In applying the Winter test, circuits who do not apply the sliding scale test should err on the slide of flexibility as historically applied to preliminary injunctions by the Supreme Court. Preserving flexibility in the application of equitable remedies is paramount to ensuring that an actual equity result is reached. In considering whether to issue a preliminary injunction, courts should focus on the reaching an equitable remedy, a result which can only be reached through the application of the flexible sliding scale test.