

2010

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Recommended Citation

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https://scholarship.shu.edu/student_scholarship/60

Preliminary Injunction: What's Your Function?

The Supreme Court's decision in *Winter v. Natural Defense Council* and the effect on this Extraordinary Remedy.

Amanda Laird

I. INTRODUCTION

“There is no power, the exercise of which is more delicate, which requires greater caution, deliberation and sound discretion, and which is more dangerous in a doubtful case, than the issuing of an injunction.”¹ A preliminary injunction is often described as an extraordinary and potent remedy.² This remedy, however, is a common tool in federal litigation practice and regularly used in a variety of civil actions.³ Despite its extraordinary status and common presence in America's judicial system, there is much disarray surrounding this procedural tool.

The federal circuit courts are in disharmony on the substantive principles pertaining to a preliminary injunction.⁴ “There are variations among the various circuit courts of appeals as to the standard to be applied, how the elements of the standard are considered, the relative weight to be assigned to each element, and the inclination to grant relief beyond the maintenance of status quo.”⁵ While each circuit agrees that the preliminary injunction test rests on four factors, courts apply these four factors in various different ways. The Supreme Court has yet to expressly resolve the variation of standards among the circuit courts.

¹ *Citizens' Coach Co. v. Camden Horse R.R. Co.*, 29 N.J. Eq. 299, 303 (1878).

² Andrew Muscato, *The Preliminary Injunction in Business Litigation*, 3 N.Y.U. J.L. & BUS. 649 (2007).

³ Morton Denlow, *The Motion for a Preliminary Injunction: Time for a Uniform Federal Standard*, 22 REV. LITIG. 495, 496.

⁴ Muscato, *supra* note 2 at 650 (“Somewhat surprisingly, the substantive and procedural principles pertaining to a preliminary injunction in federal court are not as clear or settled as commonly thought.”).

⁵ *Id.* at 650.

Proponents of a uniform standard argue that different standards and different required levels of burdens serve an injustice to parties seeking preliminary injunctive relief.⁶ This injustice includes inequitable decisions and inconsistent applications of the standards. Some proponents argue that the Supreme Court should articulate one standard which would enable seeking a preliminary injunction more efficient for both movants and the courts.⁷ The Supreme Court has yet to enforce one standard; however, the Court recently, in *Winter v. Natural Defense Council*, criticized the standard used by the Ninth Circuit.

The Supreme Court overturned the lower court's decision to grant a preliminary injunction restraining the United States Navy's usage of MFA sonar during anti-submarine warfare training.⁸ The majority opinion, authored by Chief Justice Roberts, stated that the Ninth Circuit's standard for irreparable harm was too lenient.⁹ The Ninth Circuit required that the movant only show that irreparable harm was a *possibility*.¹⁰ The Court ultimately held the preliminary injunction had to be denied because irreparable harm should be *likely* and the movant did not satisfy this heightened burden.¹¹

The Supreme Court raised the threshold level a movant must meet in satisfying the burden of showing irreparable harm beyond that required by the Court of Appeals for the Ninth Circuit. The opinion also discusses applying all four factors equally; however, it does not expressly reject the sliding scale method of granting injunctive relief.¹² This

⁶ Denlow, *supra* note 3; *see also* Muscato, *supra* note 2.

⁷ Denlow, *supra* note 3.

⁸ *Winter v. Natural Res. Def. Council*, 129 S.Ct. 365 (2008).

⁹ *Id* at 375.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id* at 392 (Ginsburg, J., dissenting).

decision may have far reaching effects on lower federal courts' standards for injunctive relief.

This comment discusses the effect of the *Winter* decision on the preliminary injunction standard in the lower courts and how this decision may be one step closer to a uniform standard. The *Winter* decision emphasizes the importance of injunctive relief by tightening the standard and increasing the burden on the movant to show that preliminary injunctive relief is a necessary remedy. Recently, several lower courts, which had used different formulations of the test, have interpreted the Supreme Court's decision as prescribing one standard. The courts of appeals are bound by the decisions of the Supreme Court; the emergence of one standard for granting or denying a preliminary injunction is possible and the circuit courts will finally be in harmony over this extraordinary remedy.

II. THE LEGAL BACKGROUND AND DEVELOPMENT OF THE PRELIMINARY INJUNCTION.

The preliminary injunction is “an equitable remedy derived from the principles of judicial remedies devised and administered by the English Court of Chancery at the time the United States divorced itself from England.”¹³ The main distinction between law and equity is the remedy each offers. In courts of law, the most common remedy is monetary damages. Courts of equity, however, enter injunctions which either prevent someone from acting or require someone to act.

Equity developed during the fourteenth and fifteenth centuries in England into the “extraordinary justice administered by the King's Chancellor to enlarge, supplant or

¹³ Denlow, *supra* note 3 at 500 (quoting *Grupo Mexicano de Desarrollo v. Alliance Bond Fund*, 527 U.S. 308, 318 (1999)).

override the common law system where that system had become too narrow and rigid in its scope.”¹⁴ Equity was to remain flexible and different from the common law system. However, the principles governing injunctions today developed primarily in the eighteenth and nineteenth centuries to forbid parties from doing some threatened act that would work irreparable harm to another party.¹⁵

Equity’s primary focus was to provide relief where the result at law would be unjust and where the public interest would be benefited by either the enforcement or prevention of contracts.¹⁶ To prevent unjust results, “equity, fundamentally, [was and] is based upon the power of the court to do what ‘reason and conscience’ require in the particular case.”¹⁷ Every case that fell into the hands of the Chancery court was to be determined according to the discretion of the court. There were no set ground rules for courts to follow and courts made decisions on a case-by-case basis.

Once English equity practice arrived in the American Colonies, the American courts of equity commonly used the injunction as a preventative and protective tool, rather than a restorative tool in which to make a party whole again.¹⁸ Prior to the merger of law and equity, equity was viewed as a supplemental system of jurisprudence.¹⁹ When

¹⁴ Muscato, *supra* note 2 at 653(quoting Goldwin Smith, A CONSTITUTIONAL AND LEGAL HISTORY OF ENGLAND 209 (1955)); *see also* Bradford E. Dempsey, Nancy L. Dempsey & Kirstin L. Stoll-DeBell, USING PRESUMPTIONS TO TIP THE BALANCE FOR INJUNCTIVE RELIEF, 33 LIT. 15 (Fall, 2006) (“The chancellor, a high minister appointed by the king, exercised the king’s arbitrary power to ‘do justice’ in certain cases, including the power to grant injunctive relief. Vested with these equitable powers, the chancellor was a powerful figure who possessed vast discretion in applying equitable remedies. Often a bishop of the church, the chancellor frequently relied on appeals to conscience in determining whether to grant injunctive relief.”).

¹⁵ *Id.* at 654.

¹⁶ Walsh, *supra* note 15 at 42.

¹⁷ *Id.* at 43.

¹⁸ William F. Walsh, A TREATISE ON EQUITY, § 9 at 155 (1930).

¹⁹ 11A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 2942 (2d ed. 1995).

a legal remedy was inadequate, an equitable remedy was available.²⁰ Thus, equity and law were distinct. However, with the adoption of the Federal Rules of Civil Procedure, law and equity merged.²¹

Towards the end of the nineteenth century, the focus of the preliminary injunction standard was to maintain the status quo of the matter in dispute, pending a trial on the merits.²² The Supreme Court, in *Pennsylvania v. Wheeling & Belmont Bridge Co.*, held that the scope of federal equity jurisdiction should be “in accordance with such rules and principles as governed by the action of the Court of Chancery in England which administered equity at the time of the emigration of our ancestors and down to the Constitution.”²³ Equity cases were governed by the rules of Equity promulgated by the Supreme Court in 1912.²⁴ The Federal Rules of Civil Procedure became effective in 1938, thus creating a union between law and equity.²⁵

Although merged, law and equity differ on many different aspects. Equity prevents someone from acting, while law remedies an injured party through damages. Equity was derived from the *Maxims of Equity* and developed with no fixed rules of its own.²⁶ The Lord Chancellor made decisions based according to his own conscience.²⁷

²⁰ Denlow, *supra* note 3 at 501.

²¹ Dempsey, *supra* note 14.

²² *Id.*

²³ *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. 460, 462 (1855).

²⁴ Arthur D. Wolf, *Preliminary Injunctions: The Varying Standards*, 7 W. NEW ENG. L. REV 173, 177 (1984).

²⁵ *Id.*

²⁶ See Wright, *supra* note 21 at § 2942 (The maxims of equity are the traditional principles applied by the courts of equity. Some include: “equity regards as done that which ought to be done,” “equity will not suffer a wrong to be without a remedy,” and “equity delights in equality.”).

²⁷ *Id.*

However, equity began to lose a bit of its flexibility as the system became a law of precedent.²⁸

After 1938, Federal Rule of Civil Procedure 65 governed injunctive relief.²⁹ This rule set forth certain procedural requirements to prevent abuse of the rule. When Rule 65 was formulated, it depended on traditional principles of equity and did not alter substantive prerequisites.³⁰ Rule 65 did “not set out a comprehensive or detailed procedural framework for seeking injunctive relief.”³¹ Since the rule does not set forth a detailed procedural framework, the court is left to the principles of equity when granting or denying injunctive relief.

III. THE ROLE OF A PRELIMINARY INJUNCTION IN TODAY’S FEDERAL COURTS

Today, courts frequently issue preliminary injunctions to protect the plaintiff from irreparable injuries and to ensure that courts may provide meaningful relief after a trial on the merits.³² Plaintiffs do not always seek monetary damages as relief. A preliminary injunction is a remedy that temporarily restrains activity until there has been a trial on the merits.³³ A plaintiff may request a preliminary injunction to “guard against a change in conditions” which may prevent the granting of proper relief.³⁴ This guard functions as a way to preserve “the status quo,” as well as require someone *to* act through affirmative

²⁸ *Id.*

²⁹ FED. R. CIV. P. 65.

³⁰ *See* Wright, *supra* note 21 at § 2941.

³¹ Muscato, *supra* note 2 at 657.

³² *See* Wright, *supra* note 21 at § 2947.

³³ *Id.*

³⁴ U.S. v. Adler’s Creamery, Inc., 107 F.2d 987, 990 (2d Cir. 1939).

preliminary injunctions, and “is to be issued only upon showing that there would otherwise be danger of irreparable injury.”³⁵

Rule 65 governs every injunction and restraining order, including preliminary injunctions.³⁶ However, the final decision whether to grant or deny a preliminary injunction rests in the discretion of the court. While each court retains discretion, most courts discuss or examine some or all of the *four* most important factors in deciding whether to grant or deny an injunction:

- a. the movant’s likelihood of success;
- b. the likelihood that movant will suffer irreparable injury if the request for preliminary injunction is denied;
- c. the balance of hardships between the parties coupled against hardship faced by non-parties; and
- d. the effect of grant or denial of preliminary injunctive relief on public policy.³⁷

The courts of appeals employ different formulations of these four factors when determining whether to grant or deny injunctions.³⁸

A movant’s likelihood of success, focuses on the probability that the movant will ultimately succeed on the merits.³⁹ “If the trial court determines the movant is not likely to ultimately succeed on the merits, preliminary injunctive relief generally will be

³⁵ *Id.*

³⁶ FED. R. CIV. P. 65.

³⁷ 13 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE § 65.22(1)(a) (3d. ed. 1999).

³⁸ *See* Wright, *supra* note 21 at § 2947 (“The circumstances in which a preliminary injunction may be granted are not prescribed by the Federal Rules. As a result, the grant or denial of a preliminary injunction remains a matter for the trial court’s discretion, which is exercised in conformity with historical federal practice.”).

³⁹ 13 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE § 65.22(2) (3d. ed. 1999)

denied.”⁴⁰ There are several variations of this test, ranging from a “reasonable certainty” that the plaintiff will ultimately succeed on the merits to a “strong likelihood.”⁴¹

Courts generally consider the irreparable injury to be the most important prerequisite for the issuance of a preliminary injunction.⁴² Irreparable harm is harm for which a court could not compensate a “movant should the movant prevail in the final decree.”⁴³ In the past, courts balanced this factor with the movant’s likelihood of success, and the level of harm needed by the movant varied. Some circuits held that a movant had to show a “possibility “ of harm, while others required that irreparable harm be “likely” if the injunction were not granted.⁴⁴

Courts also balance the hardship to the parties when considering whether to deny or grant a preliminary injunction.⁴⁵ Courts will compare the severity of the impact on both the plaintiff and the defendant in determining whether to grant the injunction.⁴⁶ Courts determine hardship by considering “if the hardship experienced by the movant, if the injunction were denied, would outweigh the hardship experienced by the non-movant, if the injunction were granted.”⁴⁷ Courts will likely deny a request for a preliminary injunction if the non-movant may experience hardship if the injunction were granted that outweighs the hardship of the movant, if the injunction were denied.⁴⁸ Thus, courts balance the effects of injunctions on both movants and non-movants and will grant

⁴⁰ *Id.*

⁴¹ See Wright, *supra* note 21 at § 2948.3.

⁴² *Id.* at § 2948.1.

⁴³ 13 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE § 65.22(1)(a) (3d. ed. 1999).

⁴⁴ See *Winter*, 129 S.Ct. at 375.

⁴⁵ See Wright, *supra* note 21 at § 2948.2.

⁴⁶ *Hughes Network Sys., Inc. v. Interdigital Communications Corp.*, 17 F.3d 691 (4th Cir. 1994).

⁴⁷ 13 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE § 65.22(1)(e) (3d. ed. 1999).

⁴⁸ 13 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE § 65.22(1)(e) (3d. ed. 1999).

preliminary injunctions in favor of movants only if the denial of the injunction would cause the movant to experience greater irreparable harm.

Lastly, courts discuss the effect of injunctive relief on public policy when rendering a decision.⁴⁹ Courts often emphasize whether the public interest is furthered or if it is injured by the grant or denial of a preliminary injunction.⁵⁰ “In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.”⁵¹ In *Winter v. Natural Resources Defense Council, Inc.*, the Supreme Court disagreed with the lower courts’ decisions to grant a preliminary injunction stating that the lower courts “significantly understated the burden the preliminary injunction would impose on the Navy’s ability to conduct realistic training exercises, and the injunction’s consequent adverse impact on the public interest in national defense.”⁵² Thus, the consideration of public interest is pertinent in considering whether to grant or deny injunctive relief.⁵³

IV. DIFFERING STANDARDS AMONG FEDERAL COURT OF APPEALS

Each court of appeals employs the four general factors when determining whether to grant or deny a preliminary injunction; however, each court varies in its articulation of these factors. The circuit courts fall into distinct groups based on the standard each employs for determining whether to grant or deny preliminary injunctive relief. The majority of the circuits (the First, Third, Fourth, Fifth, Sixth, Eighth, Tenth, Eleventh,

⁴⁹ *Winter*, 129 S.Ct. at 376.

⁵⁰ See Wright, *supra* note 21 at § 2948.4.

⁵¹ *Winter*, 129 S.Ct. at 376-77 (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982)).

⁵² *Id.* at 377.

⁵³ *Amoco Production Co v. Gambell*, 480 U.S. 531, 542 (1987); see also 13 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE § 65.22(1)(e) (3d. ed. 1999) (“ . . . the public interest may be a predominant factor, even in the preliminary injunction determination in an action between private parties, if the matter is found to have a substantial impact on the public interest.”).

D.C. and Federal courts) utilize some variation of the traditional four-part test when considering preliminary injunctions.⁵⁴ The Second and the Ninth Circuits employ a two-part test that focuses on balancing factors that courts find most important; this two part test combines the four factors and does not weigh each one separately as seen in the traditional four part test.⁵⁵ The Seventh Circuit “uses a sliding-scale method in which a five-part test is implemented.”⁵⁶

A. Traditional Four Part Test

The traditional four-part test generally requires a movant to satisfy certain criteria before a court will grant an injunction. The required criteria are: “(1) that plaintiff will suffer irreparable injury if the injunction is not granted; (2) that such injury outweighs any harm which granting injunctive relief would inflict on the defendant; (3) that plaintiff has exhibited a likelihood of success on the merits; and (4) that the public interest will not be adversely affected by the granting of the injunction.”⁵⁷ Although a majority of the courts of appeals uses the traditional four-part test, virtually all of these courts employ varying forms of the test.⁵⁸

Some courts, such as those in the Fifth, Eighth, Tenth, Eleventh, District of Columbia and Federal, require strict adherence to the traditional four part test.⁵⁹ These

⁵⁴ Denlow, *supra* note 3 at 515.

⁵⁵ *Id.*

⁵⁶ *Id.*; see also *Promatek Indus., Ltd. v. Equitrac Corp.*, 300 F.3d 808, 811 (7th Cir. 2002) (“Sitting as a court of equity, the court then weighs all these factors employing a sliding-scale approach.”).

⁵⁷ *Planned Parenthood v. Bellotti*, 641 F.2d 1006 (1st Cir. 1981) (quoting *Women’s Community Health Ctr., Inc. v. Cohen*, 477 F. Supp. 542, 544 (D.Me. 1979); see also *Al-Fayed v. CIA*, 254 F.3d 300, 303 (D.C. Cir. 2001).

⁵⁸ Muscato, *supra* note 2 at 665.

⁵⁹ Denlow, *supra* note 3 at 515-16; see also 13 JAMES WM. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* § 65.22(5)(m) (3d. ed. 1999) (“In the Federal Circuit, procedural matters and substantive matters over which the court does not have exclusive jurisdiction are reviewed under the law of the circuit in which the district court is located . . . because of the unique nature of the Federal Circuit’s jurisdiction, two different standards may be applied in cases involving general federal jurisdiction as well as issues subject to the court’s exclusive jurisdiction.”).

courts weigh the four factors separately and require a strong showing for each factor. The Fifth, Eighth and Eleventh Circuits require district courts to apply their four-part test because “a preliminary injunction is an extraordinary remedy [which] should only be granted if the movant has clearly carried the burden of persuasion on all four factors.”⁶⁰ The circuit courts consider all four factors and no factor alone “will tip the balance.”⁶¹ The Tenth Circuit and the DC Circuit, however, merely require the presence of all four factors and do not require that each factor meet a threshold level.⁶² For example, the court in *Koerpel v. Heckler* stated that in situations where the plaintiff satisfied just three of the preliminary injunction requirements, it would apply a “modified version of the fourth requirement, the ‘substantial success on the merits’ test:”

Where the movant prevails on the other factors this court has adopted the Second Circuit’s liberal definition of the ‘probability of success’ requirement: ‘To justify a temporary injunction it is not necessary that the plaintiff’s right to a final decision, after a trial, be absolutely certain, wholly without doubt; if the other elements are present (i.e., the balance of hardships tips decidedly toward plaintiff), it will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful as to make them a fair ground for litigation and thus for more deliberate investigation.’⁶³

Five of the courts of appeals emphasize specific factors. The First Circuit’s preliminary injunction test required that the plaintiff meet four criteria: “(1) that plaintiff will suffer irreparable injury if the injunction is not granted; (2) that such injury

⁶⁰ *Mississippi Power & Light v. United Gas Pipe Line Co.*, 760 F.2d 618, 621 (5th Cir. 1985).

⁶¹ *Denlow*, *supra* note 3 at 518.

⁶² *See Star Fuel Marts, LLC v. Sam’s East, Inc.* 362 F.3d 639, 652-653 (10th Cir. 2004) (citing *Lundgrin v. Claytor*, 619 F.2d 61, 63 (10th Cir. 1980) (These circuits do not require a conclusive showing of each factor, “[t]o justify a temporary injunction it is not necessary that the plaintiff’s right to a final decision, after a trial, be absolutely certain, wholly without doubt; if the other elements are present (i.e., the balance of hardships tips decidedly toward plaintiff), it will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful as to make them a fair ground for litigation and thus for more deliberate investigation.”)); *see also* *Federal Lands Legal Consortium v. US*, 195 F.3d 1190 (10th Cir. 1999); *see also* *Cityfed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 747 (D.C. Cir. 1995) .

⁶³ *Koerpel v. Heckler*, 797 F.2d 858, 866 (10th Cir. 1986).

outweighs any harm which granting injunctive relief would inflict on the defendant; (3) that plaintiff has exhibited a likelihood of success on the merits; and (4) that the public interest will not be adversely affected by the granting of the injunction.”⁶⁴ Further, the First Circuit has held that “the heart of this test is the second and third steps, which present the question whether the harm caused plaintiff without the injunction, *in light of* the plaintiff’s likelihood of eventual success on the merits, outweighs the harm the injunction will cause defendant.”⁶⁵ Here the First Circuit considered all factors but focused on the movant’s likelihood of success and the likelihood the movant will suffer irreparable injury if the request for preliminary injunction is denied in rendering its decision.

Similarly in *Latin American Music Company, Inc. v. Cardena Fernandez & Assoc., Inc.*, the First Circuit reiterated its tendency to focus on the plaintiff’s likelihood of success on the merits.⁶⁶ The court vacated the lower court’s decision to deny injunctive relief based on the plaintiff’s failure to meet irreparable harm and remanded for further proceedings.⁶⁷ The court stated that likelihood of success is “likely to be the key issue as to injunctive relief” and wanted the lower court to make an appropriate finding of all factors under FRCP 65.⁶⁸

The Third Circuit also considers and weighs the four factors utilized in the traditional four factor test, but emphasizes two factors: (1) the likelihood of success on

⁶⁴ Vargas-Figueroa v. Saldana, 826 F.2d 160, 162 (1st Cir. 1987).

⁶⁵ *Id.* (citing Massachusetts v. Watt, 716 F.2d 946, 953 (1st Cir. 1983); SEC v. World Radio Mission, 544 F.2d 535, 541 (1st Cir. 1976)).

⁶⁶ *Latin American Music Company, Inc. v. Cardenas Fernandez & Assoc., Inc.*, 2 Fed. Appx. 40 (1st Cir. 2001).

⁶⁷ *Id.* at 42.

⁶⁸ *Id.*

the merits and (2) the probability of immediate and irreparable harm.⁶⁹ The Third Circuit overturned a preliminary injunction in *Campbell Soup Company v. Conagra Inc.* because the movant was unable to show immediate and irreparable harm.⁷⁰ The movant, Campbell Soup Company, requested a preliminary injunction to prevent its competitor, Conagra, Inc. from creating a non-fried frozen chicken product similar to one in production at Campbell Soup Company.⁷¹ The court when weighing all four factors places a special emphasis on irreparable harm by stating that a movant must “demonstrate potential harm which cannot be redressed by a legal or equitable remedy following a trial.”⁷² The court held the movant did not satisfy this burden because there was no evidence that immediate irreparable harm would occur without the injunction because Conagra was not close to marketing a non-fried frozen chicken product.⁷³ The court overturned the preliminary injunction primarily because the movant did not satisfy its burden just on a showing of irreparable harm.

Similarly the Fourth Circuit requires the movant to demonstrate the four traditional factors; equal weight is not placed on each factor.⁷⁴ The Fourth Circuit stated in *Hughes Network Sys. v. Interdigital Corp.*, that all four factors are considered; however, not all weighed equally.⁷⁵ The court stated that “the ‘balance of hardships’ reached by comparing relevant harms to the plaintiff and defendant is the most important

⁶⁹ *E.g.*, *Campbell Soup v. Conagra*, 977 F.2d 86, 92 (3d Cir. 1992).

⁷⁰ *Campbell Soup*, 977 F.2d 86.

⁷¹ *Id.*

⁷² *Id.* at 91-92 (“Establishing a risk of irreparable harm is not enough. A plaintiff has the burden of proving a ‘clear showing of immediate irreparable injury.’ The ‘requisite feared injury or harm must be irreparable—not merely serious or substantial,’ and it ‘must be of a peculiar nature, so that compensation in money cannot atone for it.’”).

⁷³ *Id.* at 92.

⁷⁴ *E.g.*, *Hughes Network Sys.*, 17 F.3d 691.

⁷⁵ *Id.* at 693.

determination”⁷⁶ The court ultimately remanded the case for further proceedings because the district court did not take a close enough look at the magnitude of harm to each party.⁷⁷

While the Sixth Circuit primarily has followed the traditional four part test, some of the court’s past decisions indicate a different approach, such as in *Roth v. Bank of the Commonwealth*.⁷⁸ The court in *Roth* held that an appraisal of the traditional factors is necessary, but that a mechanical application of each standard is not an adequate test.⁷⁹ After this decision, the Sixth Circuit placed an emphasis on certain factors and employs a similar test as the First, Third and Fourth Circuits.

B. Separate Two-Prong Tests

The Second and Ninth Circuits utilize different variations of the standard for preliminary injunctions. The Second Circuit implements a two-part alternative test.⁸⁰ This two part test requires that “[a] party seeking a preliminary injunction must establish (1) irreparable harm and (2) either (a) a likelihood of success on the merits or (b) a sufficiently serious question going to the merits and a balance of hardships tipping decidedly in the moving party's favor.”⁸¹

The Ninth Circuit, by contrast, before being reversed by the Supreme Court, required that a movant demonstrate either: “(1) a combination of probable success on the merits and the possibility of irreparable harm; or (2) that serious questions are raised and

⁷⁶ *Id.*

⁷⁷ *Id.* at 695.

⁷⁸ *E.g.*, *Mason County Med. Ass’n v. Knebel*, 563 F.2d 256, 261 (6th Cir. 1977); *See Roth v. Bank of the Commonwealth*, 583 F.2d 527, 537-38 (6th Cir. 1978) (Plaintiffs requested an injunction to restrain the defendant bank from enforcing notes pledged by defendants as collateral for loans that were fraudulently obtained through an illicit financing scheme.).

⁷⁹ *Roth*, 583 F.2d at 537.

⁸⁰ *Denlow*, *supra* note 3 at 527.

⁸¹ *Brennan’s Inc. v. Brennan’s Restaurant, L.L.C.*, 360 F.3d 125, 129 (2d Cir. 2004) (quoting *Jackson Dairy, Inc. v. H.P. Hood & Sons*, 596 F.2d 70, 72 (2d Cir. 1979)).

the balance of hardships tips in [the movant's] favor.”⁸² This test appears similar to that of the Second Circuit; however, a movant in the Ninth Circuit could prevail by “demonstrating success on two alternative balancing tests, one involving probable success on the merits and the possibility of irreparable harm and the other involving a weighing of serious questions raised on the merits and the balance of hardships.”⁸³

C. The Sliding Scale Method

The Seventh Circuit uses a “sliding scale method” when determining whether to grant or deny a preliminary injunction. Under the sliding scale approach, the more likely the movant will succeed on the merits, the less the court requires the balance of harms to tip in the movant’s favor.⁸⁴ However, if the plaintiff is less likely to win on the merits, the balance of harms must weigh more heavily in the plaintiff’s favor. While the Seventh Circuit does consider the four factors,⁸⁵ the court generally relies on the sliding scale method.

V. PROPONENTS OF A UNIFORM STANDARD

As of yet, the Supreme Court has not expressly articulated one standard to be utilized by all the lower federal courts. However, many proponents of a uniform standard urge the Supreme Court to articulate one standard for various different reasons.

⁸² *Sammartano v. First Judicial District Court, et. al.* 303 F.3d 959 (9th Cir. 2002) (The Ninth Circuit reversed the lower court’s decision to deny a preliminary injunction because the plaintiffs demonstrated both probable success on the merits and irreparable harm. The Plaintiffs were denied access to the Carson City, Nevada government building because they were wearing clothing bearing symbols of different motorcycle organizations. The court stated that the plaintiffs were able to show a high probability of success on the merits that the rule by the Nevada government was discriminatory and that irreparable injury would occur because of their loss of First Amendment freedoms. Due to the showing of both success on the merits and irreparable injury, the court did not have to address the balancing of hardships.).

⁸³ Denlow, *supra* note 3 at 528.

⁸⁴ *Roland Mach Co. v. Dresser Indus., Inc.*, 749 F.2d 380 (7th Cir. 1984); *see also* *Ty, Inc. v. Jones Group, Inc.*, 237 F.3d 891, 895-96 (7th Cir. 2001).

⁸⁵ *Libertarian Party v. Packard*, 741 F.2d 981 (7th Cir. 1984).

Proponents argue that having different standards and levels of burdens on movants in separate circuits does not serve justice.⁸⁶ Discussion among proponents of a uniform standard have brought to life that “apart from a lack of uniformity the standards articulated are not precise rules and they are subject to case-by-case decision making – ‘a procedure that emphasizes the salience of particulars and hampers judges in discerning the systemic effects of the interpretive approaches they adopt.’”⁸⁷

Proponents also argue that these varying standards lead to inequitable decisions and cause the preliminary injunction tool to be commonly misunderstood.⁸⁸ Scholars have argued that a more uniform standard should replace the current standard for considering preliminary injunctions or courts should simplify their standards. Also, proponents of a more uniform standard argue that district courts apply the current standard inconsistently.⁸⁹

One proponent of a uniform standard is U.S. Magistrate Judge Martin Denlow. In his article, *The Motion for a Preliminary Injunction: Time for a Uniform Federal Standard*, Denlow argues that courts should develop a uniform standard and suggested this standard focus on efficiency.⁹⁰ He also proposes a stricter standard for granting preliminary injunctions.⁹¹

⁸⁶ Muscato, *supra* note 2 at 667.

⁸⁷ *Id.*

⁸⁸ Denlow, *supra* note 3 at 531.

⁸⁹ John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525, 566 (1978) (“A more serious defect is the lack of an articulated rationale. As a result, the relationship between the elements of the standard remains obscure and the standard is subject to thoughtless and inconsistent application.”).

⁹⁰ Denlow, *supra* note 3; *see also* Morton Denlow, PRELIMINARY INJUNCTIONS: LOOK BEFORE YOU LEAP, 28 LIT. 8 (Summer, 2002) (“[A preliminary injunction] . . . has limited utility because the standards for obtaining an injunction are unclear; the decision to grant or deny the injunction involves a number of issues, unrelated to the merits of the dispute; and a motion for a preliminary injunction creates the possibility of two rounds of discovery, two sets of trials, and two appeals Whenever possible, courts and parties should avoid motions for a preliminary injunction and proceed directly to a trial on the merits.”).

⁹¹ *Id.*

Denlow's standard sets forth three factors. Denlow's first factor requires that the movant explain to the court why a preliminary injunction is necessary instead of proceeding to a trial on the merits.⁹² Denlow argues that courts should actively discourage preliminary injunctions and should encourage parties to proceed to trial by asking "what is the critical component of the case that requires the grant of the injunction between the time the preliminary injunction can be decided and the time an actual trial on the merits can take place that cannot be satisfied by proceeding to a trial on the merits?"⁹³ He argues that if there is no immediacy to prevent a situation that may become irreparable before a trial, "the parties and the court will be better served with a trial on the merits instead of a duplicitous hearing on the preliminary injunction followed by a trial on the merits."⁹⁴

The second factor, which Denlow argues is the most important, requires movants to demonstrate at least a 50% chance of success on the merits.⁹⁵ According to Denlow, this factor is intended to dissuade those parties who do not have a strong case from seeking a preliminary injunction when permanent relief would not necessarily be available to them if their case proceeded to a trial on the merits.⁹⁶ Lastly, he suggests that "a preliminary injunction should not be entered unless the harm to the movant is greater than the harm to the nonmoving party taking into account possible bonds by either side."⁹⁷ Based on these factors, Denlow argues that adopting a sliding scale method, a two-part test, or a four-part balancing test manipulates the judicial process and wastes

⁹² *Id.* at 537 ("First, the litigant must explain what aspect of their case requires that an injunction be granted instead of proceeding to a trial on the merits. Second, the litigant must show that there is irreparable harm and that there is not an adequate remedy without the preliminary injunction.").

⁹³ *Id.* at 537.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ Denlow, *supra* note 3 at 537.

⁹⁷ *Id.*

valuable court time because these tests allow a movant to succeed on a motion for a preliminary injunction with a lower chance of success on the merits because there is a strong showing of irreparable harm.⁹⁸

Denlow proposes a uniform standard because parties face confusion when confronted with determining what standard should apply for granting or denying a preliminary injunction motion.⁹⁹ He argues that a uniform standard would remedy the discord present among the circuits due to the differing applications of the substantive four factors. Denlow states that the lack of a uniform standard has caused inconsistent judgments and inequitable decisions.¹⁰⁰

Denlow refers to two Seventh Circuit cases to demonstrate how differing standards can cause inconsistent judgments.¹⁰¹ The Seventh Circuit in *Eli Lilly & Co. v. Natural Answers, Inc.*, affirmed a preliminary injunction to prevent the use of the name “HERBROZAC” on herbal dietary supplements.¹⁰² Conversely, in *Barbecue Marx, Inc. v. Ogden, Inc.*, the Seventh Circuit reversed the preliminary injunction enjoining the use of the name “BONE DADDY” for a forthcoming restaurant because it was too similar to the movant’s “SMOKE DADDY” restaurant.¹⁰³ In those cases, the two movants were required to establish two different standards for the likelihood of success on the merits factor.¹⁰⁴

⁹⁸ *Id.*

⁹⁹ *Id.* at 497.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 531; *See also* *Eli Lilly & Co. v. Natural Answers, Inc.*, 233 F.3d 456 (7th Cir. 2000) and *Barbecue Marx, Inc. v. 551 Ogden, Inc.*, 235 F. 3d 1041 (7th Cir. 2000).

¹⁰² *Eli Lilly & Co. v. Natural Answers, Inc.*, 233 F. 3d 456 (7th Cir. 2000).

¹⁰³ *Barbecue Marx, Inc. v. 551 Ogden, Inc.*, 235 F. 3d 1041 (7th Cir. 2000).

¹⁰⁴ Denlow, *supra* note 3 at 531 (“In order to succeed in *Eli Lilly*, the plaintiff was required to establish ‘a likelihood of success on the merits.’ Conversely, in *Barbecue Marx* the plaintiff was required to show only ‘a greater than negligible chance of prevailing on the merits’ to meet the reasonable likelihood of success standard . . . it is unmistakable that ‘a likelihood of success on the merits’ standard and ‘a greater than

As a magistrate judge, Denlow grounds his reasons for a uniform standard in his concern for administrative efficiency in courts. His concerns for a routine application of one standard, so as to promote efficiency in the court system, and limiting the judge's discretion are contrary to the essence of the preliminary injunction and its label as being an extraordinary remedy. The Supreme Court has not yet stated any need for a uniform standard, but the Supreme Court has recently expounded on its standard for injunctive relief.¹⁰⁵ This recent decision by the Supreme Court paves the way for a uniform standard which may address some of the concerns voiced by the proponents of a uniform standard; however, the court does not discuss any of the concerns set forth by Judge Denlow.

VI. THE IMPLICATIONS OF RECENT SUPREME COURT DECISIONS ON THE PRELIMINARY INJUNCTION STANDARD.

The Supreme Court has had several opportunities to discuss the applicable standards of granting or denying preliminary injunctive relief in the federal system. However, the Court has not expressly addressed the issue of differing standards amongst the circuit courts. The Court commented on the purpose of preliminary injunctive relief in *University of Texas v. Camenisch*:

The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held. Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits. A party thus is not required to prove his case in full at a preliminary-injunction hearing and the findings

negligible chance of prevailing on the merits' standard are not the same, thereby creating widespread confusion and potentially leading to inconsistent results depending on the panel. This confusion is multiplied when one looks at the variety of standards that exist among the circuits.”).

¹⁰⁵ *Winter*, 129 S.Ct. 265.

of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits.¹⁰⁶

The Supreme Court continued to acknowledge the flexibility of the preliminary injunction standard.

In *Grupo Mexicano de Desarrollo v. Alliance Bond Fund*, “the Supreme Court circumscribed modern federal equity jurisdiction by holding that a district court has no authority to issue a preliminary injunction restraining a debtor’s assets in order to protect an anticipated money judgment since such relief was not traditionally granted by equity.”¹⁰⁷ The Court considered the issue of “whether, in an action for money damages, a United States District Court has the power to issue a preliminary injunction preventing the defendant from transferring assets in which no lien or equitable interest is claimed.”¹⁰⁸ The Supreme Court reversed the Second Circuit’s decision to preliminarily enjoin the holding company from transferring certain assets prior to final judgment.¹⁰⁹ The majority opinion referenced the traditional notion of equity and flexibility; however, stated that the injunction granted by the District Court did not meet the standards of a preliminary injunction.¹¹⁰

¹⁰⁶ *University of Texas v. Camenisch*, 451 U.S. 390, 394-95 (1981).

¹⁰⁷ Muscato, *supra* note 2 at 661 (discussing recent Supreme Court decisions that have given the Court the opportunity to discuss the applicable standards for the use of preliminary injunctive relief); *Grupo Mexicano de Desarrollo v. Alliance Bond Fund*, 527 U.S. 308 (1999).

¹⁰⁸ *Grupo Mexicano de Desarrollo*, 527 U.S. at 310.

¹⁰⁹ *Id.* (Scalia stated in the opinion that the equitable powers conferred on the American federal legal system did no include a power to create remedies that had been previously unknown to the courts of equity: “Equity jurisdiction of the federal courts is 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 of 1789 . . . the equitable powers conferred by they Judiciary Act of 1789 did not include the power to create remedies previously unknown to equity jurisprudence.”).

¹¹⁰ *Id.*

On November 12, 2008 the Supreme Court announced its decision in *Winter v. Natural Defense Council*.¹¹¹ This case concerned the United States Navy’s usage of a certain type of sonar during anti-submarine warfare training.¹¹² The movants argued that the use of this sonar was detrimental to the health of the marine mammals living off the coast of Southern California.¹¹³ The movants sought declaratory and injunctive relief on the grounds that these training exercises violated the National Environmental Policy Act of 1969, the Endangered Species Act of 1973, and the Coastal Zone Management Act of 1972.¹¹⁴

The District Court granted the movants’ motion for injunctive relief and prohibited the Navy from using MFA sonar during the anti-submarine warfare training exercises.¹¹⁵ “The court held that plaintiffs had ‘demonstrated a probability of success’ on their claims [and] . . . also determined that equitable relief was appropriate because, under Ninth Circuit precedent, plaintiffs had established at least a ‘possibility’ of irreparable harm to the environment.”¹¹⁶ The Navy appealed the district court’s injunction, but the Ninth Circuit Court of Appeals agreed with the lower court’s decision that an injunction was necessary.¹¹⁷ However, the appellate court concluded that “a blanket injunction prohibiting the Navy from using MFA sonar . . . was overbroad” and remanded the case to the District court to narrow the injunction “so as to provide mitigation conditions under which the Navy may conduct its training exercises.”¹¹⁸ On

¹¹¹ *Winter*, 129 S.Ct. 265.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* at 372.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 372-73.

¹¹⁷ *Winter*, 129 S.Ct. at 373.

¹¹⁸ *Id.*

remand, the district court enforced mitigation measures to be implemented by the Navy; however the Navy sought relief from the Executive Branch.¹¹⁹

The Council on Environmental Quality determined that the injunction set forth by the district court created an unreasonable risk because the Navy will not be able to properly train and certify a fully capable mission.¹²⁰ Based on these findings, the Navy again moved to vacate the district court's injunction; however, the district court refused to do so and the Ninth Circuit affirmed the lower court's decision again.¹²¹ The Ninth Circuit held that the plaintiffs established a likelihood of success on the merits and also determined that they "carried their burden of establishing a 'possibility' of irreparable injury."¹²²

On writ of certiorari, the Supreme Court reviewed the Ninth Circuit's second decision to affirm and vacated the preliminary injunction. The Supreme Court first set forth the four factors a movant must establish when seeking a preliminary injunction.¹²³ The Supreme Court did not agree with the standard used by the district court and the Ninth Circuit Court of Appeals. The Court rejected the Ninth Circuit's standard for irreparable harm. "The district court and the Ninth Circuit also held that when a plaintiff demonstrates a strong likelihood of prevailing on the merits, a preliminary injunction may be entered based only on a 'possibility' of irreparable harm . . . [w]e agree with the

¹¹⁹ *Id.* at 373 ("The Navy then sought relief from the Executive Branch. The President, pursuant to 16 U.S.C. §1456(c)(1)(B), granted the Navy an exemption from the CZMA. Section 1456(c)(1)(B) permits such exemptions if the activity in question is 'in the paramount interest of the United States.' The President determined that continuation of the exercises as limited by the Navy was 'essential to national security.' He concluded that compliance with the District Court's injunction would 'undermine the Navy's ability to conduct realistic training exercises that are necessary to ensure the combat effectiveness of . . . strike groups.'").

¹²⁰ *Id.*

¹²¹ *Id.* at 374.

¹²² *Id.*

¹²³ *Id.* ("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.").

Navy that the Ninth Circuit’s ‘possibility’ standard is too lenient.”¹²⁴ The standard the Supreme Court requires is stricter; a movant must demonstrate that irreparable injury is likely and not just a *possibility*.¹²⁵ The Court stated that “issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.”¹²⁶

The Court continued by stating that injunctive relief is not proper because any irreparable injury the plaintiffs may have shown is outweighed by the public interest and Navy’s interest in “realistic training of its sailors.”¹²⁷ The Navy argued that the injunction will hinder training efforts and ultimately leave strike groups vulnerable to enemy submarine warfare, thus reducing national defense.¹²⁸ The Court stated the overall public interest weighed significantly in favor of the Navy.¹²⁹

The Supreme Court concluded that “the District Court and Ninth Circuit significantly understated the burden the preliminary injunction would impose on the Navy” and the injunction would have an adverse impact on the public interest in the country’s national defense.¹³⁰ The Court reversed the injunctive relief affirmed by the court of appeals and vacated the preliminary injunction to the extent challenged by the Navy.¹³¹

¹²⁴ *Winter*, 129 S.Ct. at 375.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.* at 376.

¹²⁸ *Id.* at 380.

¹²⁹ *Id.*

¹³⁰ *Winter*, 129 S.Ct. at 377.

¹³¹ *Id.* at 382.

VII. HOW MAY THE *WINTER* DECISION AFFECT THE STANDARD UTILIZED BY THE LOWER FEDERAL COURTS TODAY AND IS THIS A STEP TOWARD A MORE UNIFORM STANDARD.

The Supreme Court's decision in *Winter* may have far-reaching effects beyond its environmental impact. This decision "affects every federal case in which a preliminary injunction is requested."¹³² The Court reiterated the four factors that a plaintiff must show when seeking a preliminary injunction, but tightened the standard compared to the standard utilized by the Ninth Circuit.

The Supreme Court rejected the Ninth Circuit's formulation of the standard, in which a plaintiff only had to show a *possibility* of irreparable harm if able to show a *strong likelihood* of success on the merits.¹³³ The Court stated that this standard was "too lenient" and "inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief."¹³⁴ Thus, the court tightened the standard by stating that the denial of the injunction must make irreparable harm *likely* to the plaintiff.¹³⁵

The Supreme Court's decision in *Winter* leans towards a clear showing of all four factors.¹³⁶ The circuits that relied on a sliding scale test, "the higher the likelihood of success, the less irreparable harm need be proved, so when success looks like a sure

¹³² Robert A. Brundage, Frank M. Hinman & David B. Salmons, *Supreme Court Tightens Preliminary Injunction Standard*, Nov. 18, 2008, <http://www.bingham.com/Media.aspx?MediaID=7817>.

¹³³ Brundage, *supra* note 137 (discussing *Winter v. Natural Res. Def. Council*, 129 S.Ct. 265 (2008)).

¹³⁴ *Winter*, 129 S.Ct. at 375-76 (quoting *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (*per curiam*)).

¹³⁵ *Id.* at 376.

¹³⁶ *Id.* at 374 (quoting *Munaf v. Geren*, 553 U.S. __, __ (2008) (slip op., at 12); *Amoco Production Co v. Gambell*, 480 U.S. 531, 542 (1987); *Weinberger v. Romero Barcelo*, 456 U.S. 305, 311-12 (1982)); ("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.").

thing, sometimes only the possibility of irreparable harm will suffice,”¹³⁷ may have to adopt a new formulation of the standard; however, Justice Ginsburg’s dissent states that as of yet the Court has not expressly rejected the sliding scale method.

In Ginsburg’s dissenting opinion, she states that she does not believe that the majority opinion rejects the sliding scale formulation.¹³⁸ Ginsburg reminds the court that one of the most important characteristics of equity is flexibility.¹³⁹ She emphasizes the flexibility of equity by stating that courts in the past have not required that a movant “show a particular, predetermined quantum of probable success or injury before awarding equitable relief.”¹⁴⁰ Thus, in keeping with the essential characteristic of equity, Ginsburg denies that the majority opinion rejects the use of a sliding scale formulation. The majority opinion does not make it clear whether it is or is not rejecting the sliding scale formulation; the answer is left to the lower federal courts in interpreting the *Winter* decision. Thus, the *Winter* decision may only help to harmonize the circuit courts on the issue of the appropriate standard for a preliminary injunction, but has not expressly set forth one standard.

A. Lower Federal Courts’ Interpretation of the Supreme Court’s Decision in Winter.

Recently, several lower federal courts have interpreted the *Winter* decision as setting forth a new standard for injunctive relief. District courts in the First, Second, Fourth, Ninth, Eleventh and D.C. Circuits, have all interpreted the standard set forth in

¹³⁷ Likely to Be Confused – The Softer Side of IP Law, *Supreme Court Decision Clarifying Preliminary Injunction Standards*, <http://secondarymeaning.blogspot.com/2008/11/supreme-court-decision-clarifying.html> (November 12, 2008, 15:20 EST).

¹³⁸ *Winter*, 129 S.Ct. at 392 (Ginsburg, J. dissenting) (“This Court has never rejected that formulation, and I do not believe it does so today.”).

¹³⁹ *Id.* at 391.

¹⁴⁰ *Id.* at 392.

Winter.¹⁴¹ Thus, the implications of the Supreme Court’s decision may include raising the threshold level needed for all four factors to receive injunctive relief by requiring that irreparable harm and success on the merits be likely, and not just a possibility, and the possible disappearance of the sliding scale formulation because of the need for a clear showing of all four factors.

The United States District Court for the District of Maine discussed the recent *Winter* decision in *Animal Welfare Institute v. Martin*.¹⁴² In its discussion of irreparable harm, the court interpreted the *Winter* decision and concluded that “the correct test for irreparable injury is whether the [movants] have demonstrated irreparable injury is likely if the injunction is not granted.”¹⁴³ The court also stated that it “does not agree, particularly following *Winter*, that if [movants] demonstrate the other prongs for injunctive relief, the [movants] are relieved from demonstrating irreparable injury.”¹⁴⁴

Maine is in the First Circuit. The recent decision in *Animal Welfare Institute* discussed the previous standard used by the First Circuit. The court acknowledged the heightened standard used in *Lanier Professional Services, Inc. v. Ricci*; the court in *Lanier* used the language of “a significant risk of irreparable harm.”¹⁴⁵ However, the court also acknowledged that the First Circuit did “not carry forward *Lanier*’s precise

¹⁴¹ See generally *Animal Welfare Inst. v. Martin*, 588 F.Supp.2d 70 (D. Me. Nov. 26, 2008), *Newmarkets Partners LLC v. Oppenheim*, 2008 U.S. Dist. LEXIS 99808 (S.D.N.Y. Dec. 4, 2008), *Quesenberry v. Volvo Group North America*, 2009 U.S. Dist. LEXIS 22468 (W.D. Va. Mar. 10, 2009), *Signature Flight Support Corp. v. Landow Aviation Ltd. P’ship*, 2009 U.S. Dist. LEXIS 2541 (E.D. Va. Loc. Adm. R. (a)(3) Jan. 14, 2009), *Greater Yellowstone Coal. v. Timchak*, 2008 U.S. Dist. LEXIS 96674 (D. Idaho R. 1.1(a) Nov. 26, 2008), *Sierra Club v. United States Forest Serv.*, 2008 U.S. Dist. LEXIS 106750 (N.D. Ga. Nov. 24, 2008), *UFW v. Chao*, 2009 U.S. Dist. LEXIS 2702 (D.D.C. Jan. 15, 2009).

¹⁴² *Animal Welfare*, 588 F.Supp.2d 70.

¹⁴³ *Id.* at 102.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 101 (quoting *Lanier Professional Services, Inc. v. Ricci*, 192 F.3d 1,3 (1st Cir. 1999)).

wording”¹⁴⁶ and the irreparable injury test used predominantly by the First Circuit was “the potential for irreparable harm if injunction is denied.”¹⁴⁷ This test utilized by the First Circuit required only a potential for harm, while the court in *Winter* required harm be likely. Thus, the court in *Animal Welfare Institute* interpreted *Winter* as changing the standard in the First Circuit. It adopted the that “a movant must ‘demonstrate that irreparable injury is *likely* in the absence of an injunction,”¹⁴⁸ consistent with *Winter*, as the “correct test” for granting injunctive relief.¹⁴⁹

Idaho is in the Ninth Circuit, in which the *Winter* decision originated. The United States District Court for the District of Idaho discussed the change of the preliminary injunction standard in the Ninth Circuit in *Greater Yellowstone Coalition v. Timchak*.¹⁵⁰ The Ninth Circuit strays from the traditional four part test and follows its own formulated two part test. However, the Supreme Court criticized one aspect of the Ninth Circuit’s test. The District Court stated in its opinion that “the Supreme Court . . . criticized the portion of the Ninth Circuit’s standard that allows the preliminary injunction to be entered based only on the ‘possibility’ of irreparable harm . . . judicial prudence would dictate . . . to require that a plaintiff demonstrate that irreparable harm is *likely* rather than

¹⁴⁶ *Id.* at 101-102.

¹⁴⁷ *Ross-Simons of Warwick, Inc. v. Baccarat, Inc.*, 102 F.3d 12, 18 (1st Cir. 1996) (noting that the standard was lower than the standard used in *Lanier Professional Services, Inc.* by referring to a First Circuit decision where “the court was satisfied that the possibility of irreparable damage . . . was very faint” (citing *Narragansett Indian Tribe v. Guilbert*, 934 F.2d 4, 7 (1st Cir. 1991))).

¹⁴⁸ *Animal Welfare*, 588 F.Supp.2d at 102.

¹⁴⁹ *Id.*

¹⁵⁰ *Greater Yellowstone Coal*, 2008 U.S. Dist. LEXIS 96674 at *16 - *17 (“ . . . a preliminary injunction is appropriate when the party seeking the injunction demonstrates ‘either (1) a likelihood of success on the merits and the possibility of irreparable injury; or (2) that serious questions going to the merits were raised and the balance of hardships tips sharply in [the plaintiff’s] favor.’”).

a mere *possibility*.”¹⁵¹ Thus, a district court in the Ninth Circuit has modified the standard previously used based on the Supreme Court’s decision in *Winter*.

The Fourth Circuit adopted the revised standard in *W. Va. Ass’n of Club Owners & Fraternal Servs., Inc. v. Musgrave*.¹⁵² The Fourth Circuit had always employed the a hardship balancing test set forth in *Blackwelder Furniture Co. v. Seilig Mfg. Co.*.¹⁵³ Following *Blackwelder*, the courts in the Fourth Circuit considered factors set forth by the *Blackwelder* court in determining whether to grant a preliminary injunction: “(1) the likelihood of irreparable harm to the plaintiff if the preliminary injunction is denied; (2) the likelihood of harm to the defendant if the preliminary injunction is granted; (3) the likelihood that the plaintiff will succeed on the merits; and (4) the public interest.”¹⁵⁴ However, after the Supreme Court’s decision in *Winter*, the court employed a revised standard and adopted the Supreme Court’s standard for further use.¹⁵⁵ The revised standard condenses the “hardship balancing test” previously used by the Fourth Circuit into the Supreme Court’s third factor.¹⁵⁶ Thus, the Fourth Circuit applied the revised standard set forth by the *Winter* court and addressed the heightened irreparable harm burden by condensing the hardship test previously applied.

¹⁵¹ *Id.* at *18.

¹⁵² *W. Va. Ass’n of Club Owners & Fraternal Servs., Inc. v. Musgrave*, 553 F.3d 292 (4th Cir. 2009).

¹⁵³ *Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189, 195 (4th Cir. 1977) (“Under *Blackwelder*, if the plaintiff made a clear showing of irreparable injury, the court next balanced the likelihood of irreparable harm to the plaintiff resulting from the failure to grant the interim relief against the likelihood of harm to the defendant resulting from the grant of such relief.”)

¹⁵⁴ *W. Va. Ass’n of Club Owners* at 298.

¹⁵⁵ *Quesenberry v. Volvo Group North America*, 2009 U.S. Dis. LEXIS 22468 (W.D. Va. Mar. 10, 2009) (“In November 2008, the Supreme Court set forth a somewhat revised standard to be used in determining when the grant of preliminary injunctive relief is appropriate. Earlier this year, the Fourth Circuit employed this revised standard in *W. Va. Ass’n of Club Owners & Fraternal Servs., Inc. v. Musgrave*, 553 F.3d 292, (4th Cir. 2009). This revised test requires the court to consider the following factors: (1) the likelihood of success on the merits; (2) the likelihood of irreparable harm in the absence of preliminary relief; (3) the balance of equities between the parties; and (4) the public interest.”)

¹⁵⁶ *Id.* at *28.

Also, lower courts in the Fourth Circuit interpreted the Supreme Court's decision by requiring that a plaintiff show that success on the merits was likely instead of showing success on the merits was a probability.¹⁵⁷ The court in *Quesenberry v. Volvo Group North America* stated "it appears that under standards set forth in *Winter* and employed in *Musgrave*, the plaintiff must, at the very least, show that success on the merits is more likely than not."¹⁵⁸ In the past, the courts in the Fourth Circuit required only a probability of success on the merits to establish a likelihood of success on the merits.¹⁵⁹ If this revised standard set forth in *Quesenberry* is followed, it would establish a burden of persuasion on two factors and not just on the irreparable harm factor set forth in *Winter*.

VIII. CONCLUSION

"The essence of equity jurisdiction has been the power of the Chancellor to do equity and mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it."¹⁶⁰

The circumstances to which each factor of the preliminary injunction test should be applied were never prescribed by the Rule and thus, left the courts to determine their application.¹⁶¹ "Because of its discretionary character, an injunction decree typically is drafted in flexible terms, can be molded to meet the needs of each case, and may be

¹⁵⁷ *Id.* at *27 ("A probability, not a mere possibility, of success of the ultimate trial on the merits was required to establish a likelihood of success on the merits).

¹⁵⁸ *Id.* at *29.

¹⁵⁹ *Id.* at *27 ("When the hardship balance did not tip decidedly or significantly in favor of the plaintiff, a probability, not a mere possibility, of success of the ultimate trial on the merits was required to establish likelihood of success on the merits.").

¹⁶⁰ *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) (Supreme Court describing the purposes of an injunction).

¹⁶¹ *See* *Wright*, *supra* note 21 at § 2948; *See* *Penn v. San Juan Hosp., Inc.*, 528 F.2d 1181, 1185 (1975) ("Grant or denial of preliminary injunction is subject to trial court's discretion and trial court's findings are not to be disturbed on appeal unless they are clearly erroneous or abuse of discretion."); *see* *Walsh*, *supra* note 15 at 297 ("On motion for preliminary injunctions the whole matter is to be determined in the court's discretion according to what seems fairest and most expedient, with no right as a matter of course to the injunction.").

modified if circumstances change after it is issued or in the event that it fails to achieve its objectives.”¹⁶² The preliminary injunction was deemed an extraordinary remedy because of its discretionary character. No single factor was determinative as to whether equitable relief was appropriate or not, a balancing was required and not a mechanical application of a laid out test.¹⁶³

The different applications of these factors cause many to urge the Supreme Court to articulate one standard for granting injunctive relief. Among this group is U.S. Magistrate Judge Martin Denlow. Denlow’s argument for one standard does not take into consideration the characteristics of injunctive relief and only focuses on efficiency.¹⁶⁴ Denlow briefly discussed the concerns raised by other proponents, but his argument focuses on the additional expenses and delay created by motions for preliminary injunctions.¹⁶⁵ Arguments for one standard should be more concerned with inconsistent judgments, forum shopping and inequitable decisions. When each court is able to apply a different standard or require differing levels of burden on the plaintiff, inconsistent judgments may occur and this does not serve justice.

Originally, equity essentially was a system of a single chancellor making decisions according to his conscience; therefore there was no need for a single, uniform standard. However, in today’s larger federal system it is harder to have such a system. One chancellor is not making the same decisions continuously, but many “chancellors”

¹⁶² See Wright, *supra* note 21 at § 2942; see Hecht Co. v. Bowles, 321 U.S. 321, 329 (“The essence of equity jurisdiction has been to mold each injunction decree to fit the necessities of each case.”).

¹⁶³ Roth, 583 F.2d at 537 (“To those who might claim that there is an inconsistency in the standards employed by this circuit in its various decisions reviewing the exercise of the trial court’s preliminary injunctive powers, we believe that the following quotation by the trial judge . . . is most appropriate: ‘This apparent disparity in the wording of the standard merely reflects the circumstance that no single factor is determinative as to the appropriateness of equitable relief.’”).

¹⁶⁴ Denlow, *supra* note 3.

¹⁶⁵ Muscato, *supra* note 2.

are making decisions and some are not consistent. Therefore, the application of the factors continues to vary throughout the judicial system.

However, post-*Winter*, lower federal courts have heightened the burden of showing irreparable harm based on the Supreme Court's decision.¹⁶⁶ The court stated that one circuit was "too lenient" in its standard, thus applying the test incorrectly.¹⁶⁷ By heightening the Ninth Circuit's standard, the Supreme Court is reiterating the extraordinary characterization of this remedy by making it more difficult for a movant to obtain a preliminary injunction and limiting judges' broad discretion.

The Supreme Court may realize that the differing standards in each circuit may lead to inconsistent judgments and inequitable remedies; however, the Court seems reluctant to expressly articulate one standard. The Court may be reluctant to articulate one standard due to the characterization of equity as flexible, as evidenced by Justice Ginsburg's dissenting opinion.¹⁶⁸ Despite this reluctance, lower federal courts have altered their standards after interpreting the *Winter* decision. Thus, in a way, the *Winter* decision has indirectly lessened the flexibility of the preliminary injunction standard.

¹⁶⁶ See generally *Animal Welfare Inst. V. Martin*, 2008 U.S. Dist. LEXIS 97765 (D. Me. Nov. 26, 2008), *Newmarkets Partners LLC v. Oppenheim*, 2008 U.S. Dist. LEXIS 99808 (S.D.N.Y. Dec. 4, 2008), *Quesenberry v. Volvo Group North America*, 2009 U.S. Dis. LEXIS 22468 (W.D. Va. Mar. 10, 2009), *Signature Flight Support Corp. v. Landow Aviation Ltd. P'ship*, 2009 U.S. Dist. LEXIS 2541 (E.D. Va. Loc. Adm. R. (a)(3) Jan. 14, 2009), *Greater Yellowstone Coal. V. Timchak*, 2008 U.S. Dist. LEXIS 96674 (D. Idaho R. 1.1(a) Nov. 26, 2008), *UFW v. Chao*, 2009 U.S. Dist. LEXIS 2702 (D.D.C. Jan. 15, 2009).

¹⁶⁷ *Winter*, 129 S.Ct. at 375.

¹⁶⁸ *Winter*, 129 S.Ct. at 392 (Ginsburg, J., dissenting).