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COMMENT

EQUITABLE STANDARDS FOR EQUITABLE RELIEF: BRIDGING THE CIRCUIT SPLIT ON IRREPARABLE SECOND AMENDMENT HARM*

I. INTRODUCTION

Imagine you live in North Philadelphia with your large extended family. Concerned about crime, you consider buying a handgun for protection. However, a Pennsylvania statute increases penalties for crimes committed where a gun is present. You know the government applies this statute broadly, meaning that if any crime occurs in your home, the presence of even a legally owned gun could increase the criminal sentence. Your twenty-year-old son is a gang member, and you fear he participates in criminal activity. Though you are eligible for a gun license, you decide against applying, fearing unintended legal consequences if your son brings his unlawful activities into your home. You instead decide to sue, arguing that the Pennsylvania statute violates the Second Amendment. Because litigation takes time, your lawyer requests a preliminary injunction to pause enforcement of the statute. However, the judge denies this request, ruling that you face no irreparable harm—since you can still legally buy a gun, your Second Amendment rights remain intact. But what if the court could consider your circumstances? Your Second Amendment right to self-defense was "chilled." You chose not to buy a gun out of fear of legal consequences, despite believing you need one, and given the conditions in your neighborhood, this decision could one day be fatal.

This Comment explores whether a chilling effect (perhaps as exemplified above) should be considered by courts when analyzing irreparable harm for preliminary

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injunctions in modern Second Amendment litigation. This Comment looks to two circuit court decisions—split on whether to presume irreparable harm if a Second Amendment plaintiff is likely to succeed on the merits—to demonstrate that one resolution of this jurisprudential divide lies in the Supreme Court's willingness to acknowledge that Second Amendment rights can be chilled. The Court already accepts the chilling effect doctrine in the First Amendment context, and accordingly, presumes that First Amendment harm is irreparable for the purposes of preliminary injunctions. This Comment argues that, as with First Amendment harm, statistical, historical, and doctrinal evidence all support granting that same presumption of irreparability to Second Amendment harm at the preliminary injunction stage.

As an overview, Part II.A of this Comment outlines the current preliminary injunction landscape, explaining the four-part standard for granting preliminary injunctive relief and the legal meaning of irreparable harm. Part II.B discusses the special considerations made for First Amendment plaintiffs and explains why chilled First Amendment rights are presumed irreparable. Next, Part II.C discusses the current framework for resolving Second Amendment challenges and outlines the impact this standard has on plaintiff's likelihood of success. Part II.D introduces the unresolved circuit split that motivated this Comment and which may be resolved according to the arguments in Section III. In that discussion, Part III.A outlines the full nature of Second Amendment harm and presents the argument that such harm includes a chilling effect. Part III.B connects this chilling effect to the equitable protections courts should grant by presuming irreparable Second Amendment harm when considering preliminary injunctions.

II. OVERVIEW

A. Current Standards for Preliminary Injunctions

A preliminary injunction is an "extraordinary" remedy[1] that courts issue only when the movant proves the merits of the request.[2] Courts grant preliminary injunctions before holding a trial on the merits.[3] Accordingly, at this stage "the function of the court is not to take whatever steps are necessary to prevent irreparable harm, but primarily to keep things as they were, until the court is able to determine the parties' respective legal

1. *See* Maxey v. Smith, 823 F. Supp. 1321, 1327 (N.D. Miss. 1993) ("The extraordinary relief of a preliminary injunction is a discretionary matter for the trial court."), *rev'd on other grounds*, 59 F.3d 1242 (5th Cir. 1995); Crochet v. Hous. Auth. of Tampa, 37 F.3d 607, 610 (11th Cir. 1994) (stating that preliminary injunctions represent "a drastic remedy").

2. *See* Basham v. Freda, 805 F. Supp. 930, 932 (M.D. Fla. 1992) ("[S]ince an injunction is an extraordinary and drastic remedy, it will not be granted unless the movant clearly carries the burden of persuasion as to all [the requirements]."), *aff'd*, 985 F.2d 579 (11th Cir. 1993).

3. FED. R. CIV. P. 65. In rare circumstances, a court may "advance the trial on the merits and consolidate it with the hearing" for the injunction. *Id.*

rights."[4] Therefore, the "sole purpose"[5] of a preliminary injunction is "to preserve the relative positions of the parties until a trial on the merits can be held."[6]

As a mechanism to preserve this status quo, an injunction is a clear form of equitable relief; that is, a court-ordered remedy that compels a party to perform a specific action or refrain from doing something, rather than a remedy governed strictly by existing legal rules.[7] Accordingly, a trial court has the discretion to craft a preliminary injunction in any reasonable manner it considers appropriate.[8]

Perhaps given this discretion, the Federal Rules of Civil Procedure do not set forth a universal standard for resolving requests for preliminary injunctions.[9] Without this standardized guidance, federal courts evaluate applications for preliminary injunctions on the basis of "traditional equitable grounds."[10] Precise formulas and standards therefore vary from jurisdiction to jurisdiction.[11] At a baseline, however, courts must in

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4. O Centro Espirita Beneficiente Uniao do Vegetal v. Ashcroft, 389 F.3d 973, 1012 (10th Cir. 2004) (en banc) (McConnell, J., concurring), *aff'd sub nom.*, Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal, 546 U.S. 418 (2006).

5. *Id.* ("[T]he *sole* purpose of a preliminary injunction was to preserve the status quo during the pendency of litigation.").

6. Starbucks Corp. v. McKinney, 144 S. Ct. 1570, 1576 (2024) (quoting Univ. of Tex. v. Camenisch, 451 U.S. 390, 395 (1981)); s*ee also* Jordache Enters., Inc. v. Levi Strauss & Co., 841 F. Supp. 506, 521 (S.D.N.Y. 1993) (stating that preliminary injunction may be granted to provide immediate remedy needed to prevent legal harm and preserve the status quo until determination of action); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Grall, 836 F. Supp. 428, 431 (W.D. Mich. 1993) ("The purpose of a preliminary injunction is to preserve the status quo between the parties pending a final determination on the merits."); Cate v. Oldham, 707 F.2d 1176, 1185 (11th Cir. 1983) (stating that maintenance of the status quo is the purpose of preliminary injunctive relief).

7. *See* Bloedorn v. Grube, 631 F.3d 1218, 1229 (11th Cir. 2011).

8. *See, e.g.*, Maxam v. Lower Sioux Indian Cmty. of Minn., 829 F. Supp. 277, 284–85 (D. Minn. 1993) (holding that a request for preliminary injunctive relief aiming to block all gaming revenue was overly harsh and issuing an injunction covering only thirty percent of the revenue).

9. *See* FED. R. CIV. P. 65.

10. 13 MOORE'S FEDERAL PRACTICE § 65.22[1][a] (3d ed. 2025); *see* Doran v. Salem Inn, Inc., 422 U.S. 922, 931 (1975) (holding that although courts must still balance competing interests, the traditional standard for granting a preliminary injunction requires a showing of irreparable injury and a likelihood of success on the merits).

11. *See, e.g.*, Me. Forest Prods. Council v. Cormier, 51 F.4th 1, 5 (1st Cir. 2022) (applying the traditional standard); Sonesta Int'l Hotels Corp. v. Wellington Assocs., 483 F.2d 247, 250 (2d Cir. 1973) ("The settled rule is that a preliminary injunction should issue only upon a clear showing of either (1) probable success on the merits *and* possible irreparable injury, *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."); Hughes Network Sys., Inc. v. InterDigital Commc'ns Corp., 17 F.3d 691, 693 (4th Cir. 1994) (applying the traditional four-part test but giving the relative harms the most weight), *abrogated on other grounds by*, Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7 (2008); Canal Auth. v. Callaway, 489 F.2d 567, 572 (5th Cir. 1974) (applying the four-part test but explicitly requiring that the preliminary injunction serve the public interest); Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S., 549 F.3d 1079, 1085–86 (7th Cir. 2008) (analyzing a two-phase framework that first requires the moving party to show (1) irreparable harm, (2) the inadequacy of legal remedies, and (3) a likelihood of success on the merits, and then balancing (1) the nature and degree of the injury, (2) the likelihood of prevailing at trial, (3) the potential injury to the nonmovant, and (4) the effect on the public interest), *abrogated by*, Nken v. Holder, 556 U.S. 418 (2009), *and*, *Winter*, 555 U.S. 7; All. for the Wild Rockies v. Petrick, 68 F.4th 475, 496–97 (9th Cir. 2023) (applying a sliding scale variation of the four-part test which allows consideration of "serious questions" that "'cannot be resolved one way or the other at the hearing on the injunction' because they require 'more deliberative investigation'" (quoting Manrique v. Kolc, 65 F.4th 1037, 1041 (9th Cir. 2023))).

some way consider the following equitable factors established by the Supreme Court in *Winter v. Natural Resources Defense Council, Inc.*[12]:

1. The movant's likelihood of success on the merits
2. The likelihood that the movant will suffer irreparable injury if the request for preliminary injunction is denied
3. A balance of the hardships between the parties coupled against hardships faced by nonparties
4. The effect of a grant or denial of preliminary injunctive relief on public policy[13]

Among the various circuit courts, the first two of these factors are generally the most critical,[14] but to the extent there is any real conflict between them, "the preferable approach is [a] flexible, sliding scale."[15] Under the typical sliding scale approach, once a movant has shown the likelihood of irreparable harm, the court may balance the remaining factors by permitting a stronger showing on some factors to counterbalance a weaker showing on others.[16] Ultimately, however, an "injunction is a matter of equitable discretion" and courts are permitted to freely exercise this discretion as contemplated by the Supreme Court.[17] "[N]o test for considering preliminary equitable relief should be so rigid as to diminish, let alone disbar, discretion."[18]

Irreparable harm, or irreparable injury, is an injury for which the court could not adequately compensate if the movant were to succeed in a final judgment.[19] However, while the absence of such an adequate remedy at law is a necessary condition, it alone is insufficient to justify the grant of injunctive relief.[20] First, the irreparable injury may not

12. 555 U.S. at 20.

13. *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."). *But see Nken*, 556 U.S. 418 ("Once an applicant satisfies the first two factors, the traditional stay inquiry calls for assessing the harm to the opposing party and weighing the public interest. These factors merge when the Government is the opposing party.").

14. Braintree Lab'ys, Inc. v. Citigroup Glob. Mkts. Inc., 622 F.3d 36, 40–41 (1st Cir. 2010) (explaining that the likelihood that a movant will succeed on merits and the possibility that, without injunction, the movant will suffer irreparable harm "weigh heaviest in the analysis").

15. 13 MOORE'S FEDERAL PRACTICE § 65.22 (3d ed. 2025) (noting that the First, Eighth, and Ninth Circuits all use some form of a sliding scale test).

16. *See, e.g.*, All. for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1135 (9th Cir. 2010) ("'[S]erious questions going to the merits' and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest.").

17. *Winter*, 555 U.S. at 32; eBay Inc. v. MercExchange, LLC, 547 U.S. 388, 394 (2006) (explaining that district courts have equitable discretion to grant or deny injunctive relief but must exercise that discretion consistent with traditional principles of equity).

18. Reilly v. City of Harrisburg, 858 F.3d 173, 178 (3d Cir. 2017).

19. 13 MOORE'S FEDERAL PRACTICE § 65.22[1][b] (3d ed. 2025).

20. *See, e.g.*, Morales v. Trans World Airlines, Inc., 504 U.S. 374, 381 (1992) (holding that injunctive relief was appropriate because the plaintiff lacked an adequate remedy at law to stop states from enforcing fare guidelines); N. Cal. Power Agency v. Grace Geothermal Corp., 469 U.S. 1306, 1306 (1984) ("A party seeking an injunction from a federal court must invariably show that it does not have an adequate remedy at law.").

include alleged harm that is merely remote or speculative.[21] Rather, the movant must demonstrate that the threatened harm is imminent.[22] Moreover, according to *Winter*,

> [o]ur frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction. 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.[23]

Accordingly, lost income or other calculable economic losses will generally not be considered an irreparable injury.[24] Additionally, discharge from employment,[25] litigation costs,[26] and the cost of compliance with government regulation[27] will not be held irreparable. However, the possibility of bankruptcy,[28] the deprivation of statutory

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21. New York v. Nuclear Regul. Comm'n, 550 F.2d 745, 755 (2d Cir. 1977) ("The case law informs us that the award of preliminary injunctive relief can and should be predicated only on the basis of a showing that the alleged threats of irreparable harm are not remote or speculative but are actual and imminent."), *superseded by rule on other grounds*, FED. R. CIV. P. 52(a), *as recognized in*, Zervos v. Verizon N.Y., Inc., 252 F.3d 163, 169–70 (2d Cir. 2001).

22. *See* JSG Trading Corp. v. Tray-Wrap, Inc., 917 F.2d 75, 79 (2d Cir. 1990) (explaining that because the likelihood standard is higher than mere possibility, the movant must show that they are likely to suffer irreparable harm if equitable relief is denied); *see also* Acierno v. New Castle Cnty., 40 F.3d 645, 653–55 (3d Cir. 1994) (holding that the denial of a building permit did not constitute irreparable harm because the potential harm was speculative in nature); Colo. River Indian Tribes v. Town of Parker, 776 F.2d 846, 849–51 (9th Cir. 1985) (denying preliminary injunction because the economic losses were deemed too speculative).

23. Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 22 (2008) (citations omitted); *see also* Brown v. Chote, 411 U.S. 452, 456 (1973) (explaining that the movant must show that irreparable injury will result absent interlocutory relief).

24. *See* Instant Air Freight Co. v. C.F. Air Freight, Inc., 882 F.2d 797, 801–02 (3d Cir. 1989) (holding that the harm was not irreparable even though the action involved losing most of the business revenue); Rent-A-Center, Inc. v. Canyon Television & Appliance Rental, Inc., 944 F.2d 597, 603 (9th Cir. 1991) ("[E]conomic injury alone does not support a finding of irreparable harm, because such injury can be remedied by a damage award.").

25. *See* Sampson v. Murray, 415 U.S. 61, 89–90 (1974) (explaining that the preliminary injunction was improperly granted in an action concerning discharge of government employee because any loss of wages could eventually be recovered should employee prevail on merits); Together Emps. v. Mass Gen. Brigham Inc., 32 F.4th 82, 86 (1st Cir. 2022) ("It is black-letter law that 'money damages ordinarily provide an appropriate remedy' for unlawful termination of employment." (quoting Does 1-6 v. Mills, 16 F.4th 20, 36 (1st Cir. 2021))).

26. *See* Renegotiation Bd. v. Bannercraft Clothing Co., 415 U.S. 1, 24 (1974) (holding that even substantial or unrecoverable litigation expenses do not constitute irreparable injury for preliminary injunction purposes).

27. *See* Am. Hosp. Ass'n v. Harris, 625 F.2d 1328, 1331 (7th Cir. 1980) ("[I]njury resulting from attempted compliance with government regulation ordinarily is not irreparable harm.").

28. Minard Run Oil Co. v. U.S. Forest Serv., 670 F.3d 236, 255 (3d Cir. 2011) ("As a general matter, 'a purely economic injury, compensable in money, cannot satisfy the irreparable injury requirement,' but 'an exception exists where the potential economic loss is so great as to threaten the existence of the movant's business.' Here, the District Court carefully considered and ultimately credited the testimony of several business owners that the new drilling moratorium had dramatically affected their business and would probably cause them to shut down or go bankrupt if it continued." (first quoting Frank's GMC Truck Ctr., Inc. v. Gen. Motors Corp., 847 F.2d 100, 102 (3d Cir. 1988); and then quoting Vaqueria Tres Monjitas, Inc. v. Irizarry, 587 F.3d 464, 485 (1st Cir. 2009) (citations omitted))).

rights,[29] the loss of an opportunity to pursue a tender offer,[30] or disclosure of confidential information[31] may be considered irreparable. In sum, the lack of adequate remedy of law sufficient to demonstrate irreparable injury is demonstrated by showing that theoretical alternative remedies are immeasurable,[32] unavailable,[33] uncollectible,[34] or otherwise insufficiently compensatory considering the harm caused.[35]

B. Modified Standards for First Amendment Claims

In civil rights actions, courts will more rigorously examine the facts before determining whether a preliminary injunction is appropriate,[36] and equitable relief will only be granted to prevent future or continuing civil rights violations, not to correct past abuses.[37] Thus, to secure a preliminary injunction in a civil rights case, the plaintiff must generally still demonstrate the likelihood of future or ongoing harm.[38] However, in civil rights actions involving First Amendment[39] claims, courts instead *presume* that First

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29. *See* United States v. Nutri-cology, Inc., 982 F.2d 394, 398 (9th Cir. 1992) (noting that irreparable injury need not be shown if statutory conditions authorizing the injunction are satisfied).

30. Martin-Marietta Corp. v. Bendix Corp., 690 F.2d 558, 568 (6th Cir. 1982) (holding that because time is of the essence in a tender offer, the plaintiff would suffer irreparable injury if deprived of opportunity guaranteed to tender offerors by the Williams Act).

31. *See* JAK Prods., Inc. v. Wiza, 986 F.2d 1080, 1084–85 (7th Cir. 1993) (explaining that irreparable injury arises, and injunctive relief is appropriate, when an employee uses experience gained from their employer in violation of a reasonable covenant not to compete).

32. *See, e.g.*, Basicomputor Corp. v. Scott, 973 F.2d 507, 512 (6th Cir. 1992) (holding that the loss of customer goodwill constitutes immeasurable damage, making any alternative remedies at law unavailable); *Wiza*, 986 F.2d at 1084–85 (holding that when a former employee solicited their former employer's customers and made disparaging remarks about the former employer, irreparable and immeasurable harm was demonstrated and thereby preliminary injunctive relief was warranted).

33. *See* Lee v. Bickell, 292 U.S. 415, 421 (1934) (explaining that the necessity for a multiplicity of actions to obtain a legal remedy is sufficient to uphold injunction); Ecolab Inc. v. Paolo, 753 F. Supp. 1100, 1110 (E.D.N.Y. 1991) (granting a motion for preliminary injunction where the plaintiff's only alternative was to seek damages in many separate actions); Ne. Women's Ctr., Inc. v. McMonagle, 665 F. Supp. 1147, 1153–54 (E.D. Pa. 1987) (granting an injunction where pro-life advocates repeatedly trespassed onto premises of an abortion clinic and no other legal remedy was adequate for the plaintiff's continuing injury), *aff'd*, 868 F.2d 1342 (3d Cir. 1989).

34. *See* Lakeview Tech., Inc. v. Robinson, 446 F.3d 655, 657 (7th Cir. 2006) (holding that a judgment awarding damages would not be an adequate legal remedy if the defendant is effectively judgment-proof).

35. *See* Peabody Holding Co. v. Costain Grp. PLC, 813 F. Supp. 1402, 1421 (E.D. Mo. 1993) ("Improper conduct for which monetary remedies cannot provide adequate compensation suffices to establish [irreparable injury].").

36. 13 MOORE'S FEDERAL PRACTICE § 65.22[e][4] (3d ed. 2025).

37. *See* Johnson v. Boreani, 946 F.2d 67, 72 (8th Cir. 1991) (holding that a plaintiff is not entitled to injunctive relief unless they prove that the past problems would recur unless enjoined), *abrogated on other grounds by*, Farmer v. Brennan, 511 U.S. 825 (1994).

38. *See, e.g.*, Porter v. Adams, 639 F.2d 273, 278 (5th Cir. Unit A Mar. 1981) (explaining that although courts have the power to grant preliminary injunctive relief in Title VII claims, the court declined to do so due to the incomplete record).

39. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

Amendment harm constitutes an irreparable injury.[40] This presumption is triggered if the first *Winter* factor—the likelihood of success on the merits—is established,[41] because if the movant can make that necessary showing, this establishes the irreparable harm.[42] In other words, "irreparable injury is presumed upon a determination that the movants are likely to prevail."[43] The connection between success on the merits and irreparable harm is thus so closely linked that even if the remaining factors appear to weigh against injunctive relief, some circuits prohibit their district courts from declining to consider the plaintiff's likelihood of success—lest the court risk missing an opportunity to address the First Amendment harm.[44]

First Amendment harm is presumed irreparable because it often involves the suppression or "chilling" of speech or expression, where individuals may refrain from exercising their rights due to fear of legal repercussions.[45] In such cases "[e]ven the prospect of ultimate failure of such prosecutions by no means dispels their chilling effect on protected expression."[46] Of course, First Amendment harm *generally* is not limited to direct or indirect suppression of speech; it also includes second-order effects such as reputational damage, loss of government sponsorship, or stigmatization.[47] However, it is only the "purposeful unconstitutional [government] suppression of speech [which]

40. Roman Cath. Diocese v. Cuomo, 592 U.S. 14, 19 (2020) (per curiam) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." (quoting Elrod v. Burns, 427 U.S. 347, 373 (1976) (plurality opinion), *abrogated by*, Johnson v. Bergland, 586 F.2d 993 (4th Cir. 1978))); Sisters for Life, Inc. v. Louisville-Jefferson Cnty., 56 F.4th 400, 408 (6th Cir. 2022) ("Because the ordinance [sought to be enjoined] likely violates the First Amendment, applying it to [the plaintiffs] would irreparably injure them."); Topanga Press, Inc. v. City of Los Angeles, 989 F.2d 1524, 1528 (9th Cir. 1993); Cate v. Oldham, 707 F.2d 1176, 1188 (11th Cir. 1983) (explaining that First Amendment rights must be given special protection and that their loss "for even minimal periods of time constitutes irreparable injury"); *cf.* Savage v. Gorski, 850 F.2d 64, 68 (2d Cir. 1988) (explaining that a preliminary injunction was unwarranted because employees fired for exercising First Amendment rights could be made whole by reinstatement and monetary damages).

41. *See* Phelps-Roper v. Nixon, 509 F.3d 480, 485 (8th Cir. 2007) ("In a First Amendment case, therefore, the likelihood of success on the merits is often the determining factor in whether a preliminary injunction should issue."); Sindicato Puertorriqueño de Trabajadores v. Fortuño, 699 F.3d 1, 10–11 (1st Cir. 2012) (per curiam) ("In the First Amendment context, the likelihood of success on the merits is the linchpin of the preliminary injunction analysis. . . . Accordingly, irreparable injury is presumed upon a determination that the movants are likely to prevail.").

42. *See* Cal. Chamber of Com. v. Council for Educ. & Rsch. on Toxics, 29 F.4th 468, 482 (9th Cir. 2022) ("'Irreparable harm is relatively easy to establish in a First Amendment case.' The plaintiff 'need only demonstrate the existence of a colorable First Amendment claim.' . . . '[I]t is always in the public interest to prevent the violation of a party's constitutional rights.'" (alteration in original) (first quoting CTIA - The Wireless Ass'n v. City of Berkeley (*CTIA II*), 928 F.3d 832, 903 (9th Cir. 2016); then quoting Brown v. Cal. Dep't of Transp., 321 F.3d 1217, 1225 (9th Cir. 2003); and then quoting Am. Beverage Ass'n v. City & County of San Francisco, 916 F.3d 749, 756 (9th Cir. 2019) (en banc))).

43. *Sindicato*, 699 F.3d at 11.

44. *See id.* ("It [is] . . . incumbent upon the district court to engage with the merits before moving on to the remaining prongs of its analysis."). The first two factors are generally considered the most critical and courts often weigh them more heavily than the third and fourth factors. *See supra* notes 14–16 and accompanying text.

45. *See* Dombrowski v. Pfister, 380 U.S. 479, 487 (1965) ("The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure." (citing NAACP v. Button, 371 U.S. 415, 432–33 (1963))).

46. *Id.* at 494.

47. *See* Nat'l Rifle Ass'n of Am. v. City of Los Angeles, 441 F. Supp. 3d 915, 939 (C.D. Cal. 2019).

constitutes irreparable harm for preliminary injunction purposes."[48] This nuance makes it clear that not all First Amendment harm is necessarily synonymous with the irreparable harm necessary for preliminary injunctive relief.[49] Rather, the movants "must show a chilling effect on free expression."[50]

In addition to the unique harm caused by the chilling effect, other First Amendment doctrine warrants the presumption of irreparability as well. For example, the law also makes a "heavy presumption" against prior restraint on free speech.[51] Courts consider First Amendment activity to be time sensitive, like in cases of weekly worship or political expression.[52] In light of this, prior restraint is presumed unconstitutional,[53] and the government may never preliminarily enjoin speech.[54] Additional doctrine gives deference to sincere religious belief, such that if an individual's religious principles are sincere, the courts will not second-guess their significance.[55] The logic is that "the judges of the civil courts" are not "competent in the ecclesiastical law and religious faith," and are therefore ill-equipped to weigh religious harms, let alone assess whether they would be irreparable.[56] These doctrines inform the courts' treatment of First Amendment harm at the preliminary injunction stage.[57] Because speech and expression are time sensitive, and because courts are often unqualified to question their sincerity, the law cannot provide an adequate remedy when the right is infringed.[58]

C. The Bruen Framework and Fallout

In *New York State Rifle & Pistol Ass'n v. Bruen*, the Supreme Court held that a government restriction on the right to keep and bear arms is unconstitutional if the

48. Goldie's Bookstore, Inc. v. Superior Ct. of Cal., 739 F.2d 466, 472 (9th Cir. 1984); *cf.* Cate v. Oldham, 707 F.2d 1176, 1188 (11th Cir. 1983) ("So too, direct penalization, as opposed to incidental inhibition, of First Amendment rights constitutes irreparable injury." (citing Johnson v. Bergland, 586 F.2d 993, 995 (4th Cir. 1978))).

49. Hohe v. Casey, 868 F.2d 69, 72–73 (3d Cir. 1989) ("But the assertion of First Amendment rights does not automatically require a finding of irreparable injury, thus entitling a plaintiff to a preliminary injunction if he shows a likelihood of success on the merits." (citing Rushia v. Town of Ashburnham, 701 F.2d 7, 10 (1st Cir. 1983))).

50. *Id.* at 73 (internal quotation marks omitted) (quoting Dombrowski v. Pfister, 380 U.S. 479, 487 (1965)).

51. Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963).

52. *See* Elrod v. Burns, 427 U.S. 347, 374 n.29 (1976) (plurality opinion), *abrogated by*, Johnson v. Bergland, 586 F.2d 993 (4th Cir. 1978).

53. *See* Pittsburgh Press Co. v. Pittsburgh Comm'n on Hum. Rels., 413 U.S. 376, 390 (1973) ("[C]ommunication will be suppressed . . . before an adequate determination that it is unprotected by the First Amendment."), *abrogated by*, Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748 (1976).

54. *See* Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 169–72 (1998).

55. *See* Holt v. Hobbs, 574 U.S. 352, 361–62 (2015); Thomas v. Rev. Bd. of the Ind. Emp. Sec. Div., 450 U.S. 707, 716 (1981).

56. Watson v. Jones, 80 U.S. 679, 729 (1871).

57. *See* Del. State Sportsmen's Ass'n v. Del. Dep't of Safety & Homeland Sec., 108 F.4th 194, 204 (3d Cir. 2024) *cert. denied sub nom.*, Gray v. Jennings, 145 S. Ct. 1049 (2025).

58. *See id.*

restriction is inconsistent with America's historical tradition of firearms regulation.[59] The state's standard for proper cause was satisfied only if an applicant could "demonstrate a special need for self-protection distinguishable from that of the general community."[60] Members of the petitioner organization, the New York State Rifle and Pistol Association, were law abiding citizens whose concealed carry license applications were denied for failure to meet the proper-cause standard: They could not prove that they faced unique dangers to their personal security and were granted only licenses "to carry concealed for purposes of off road back country, outdoor activities similar to hunting."[61] They sued the superintendent of the New York State Police and a New York Supreme Court justice, alleging that these respondents violated their Second and Fourteenth Amendment rights by limiting their ability to legally carry concealed weapons.[62]

The Supreme Court, in a 6–3 decision authored by Justice Thomas, held that "New York's proper-cause requirement violates the Fourteenth Amendment in that it prevents law-abiding citizens with ordinary self-defense needs from exercising their right to keep and bear arms."[63] The decision reemphasized the perspective that the Second Amendment guarantees to individuals the right to keep and bear arms in self-defense[64] and rejected the "two-step" means-end scrutiny previously employed by lower courts in Second Amendment cases.[65] This overruled test required the government to "establish that the challenged law regulates activity falling outside the scope of the right [to keep and bear arms] as originally understood."[66] If the government could not make this showing, the courts would move on to analyze "how close the law comes to the core of the Second Amendment right and the severity of the law's burden on the right."[67] The Court in *Bruen*, however, expressly adopted the *District of Columbia v. Heller* test,[68] requiring the government to "affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms."[69]

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59. 142 S. Ct. 2111, 2129–30 (2022).

60. Klenosky v. N.Y.C. Police Dep't, 428 N.Y.S.2d 256, 257 (N.Y. App. Div. 1980), *abrogated by*, *Bruen*, 142 S. Ct. 2111.

61. *Bruen*, 142 S. Ct. at 2125.

62. *Id.*; *see* U.S. CONST. amend. II ("A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."); *id.* amend. XIV.

63. *Bruen*, 142 S. Ct. at 2156.

64. *See generally* McDonald v. City of Chicago, 561 U.S. 742 (2010) (holding that the Second Amendment's right to keep and bear arms for self-defense is applicable to state and local governments through the Fourteenth Amendment's Due Process Clause); District of Columbia v. Heller, 554 U.S. 570 (2008) (guaranteeing an individual Second Amendment right to keep and bear arms apart from any military purpose).

65. *Bruen*, 142 S. Ct. at 2125.

66. Kanter v. Barr, 919 F.3d 437, 441 (7th Cir. 2019), *abrogated by*, *Bruen*, 142 S. Ct. 2111. *But see* United States v. Boyd, 999 F.3d 171, 185 (3d Cir. 2021) (requiring that the claimant show "a burden on conduct falling within the scope of the Second Amendment's guarantee" (internal quotation mark omitted) (quoting United States v. Marzzarella, 614 F.3d 85, 89 (3d Cir. 2010))).

67. *Kanter*, 919 F.3d at 441 (quoting Ezell v. City of Chicago, 846 F.3d 888, 892 (7th Cir. 2017)).

68. *Bruen*, 142 S. Ct. at 2134 ("Having made the constitutional standard endorsed in *Heller* more explicit, we now apply that standard to New York's proper-cause requirement.").

69. *Id.* at 2127.

Applying this new historical test, the Court examined various sources including English common law,[70] colonial-era restrictions,[71] early American statutes,[72] and nineteenth-century regulations both pre-[73] and post-Civil War.[74] They ultimately concluded that "the historical record compiled by respondents [did] not demonstrate a tradition of broadly prohibiting the public carry of commonly used firearms for self-defense. Nor [was] there any such historical tradition limiting public carry only to those law-abiding citizens who demonstrate a special need for self-defense."[75] This ruling marked a significant development in Second Amendment jurisprudence, clarifying that courts must evaluate firearm regulation through a lens of historical tradition.[76]

Importantly, the Court's decision in *Bruen* also makes it more challenging for the government to defend gun regulations as district courts around the country since *Bruen* have consistently found that modern firearm regulations fail to meet the Supreme Court's historical tradition test.[77] For example, in *United States v. Hale*[78] and *United States v.*

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70. *Id.* at 2139 ("We interpret the English history that respondents and the United States muster in light of these interpretive principles. We find that history ambiguous at best and see little reason to think that the Framers would have thought it applicable in the New World. It is not sufficiently probative to defend New York's proper-cause requirement.").

71. *Id.* at 2142 ("In the colonial era, respondents point to only three restrictions on public carry. For starters, we doubt that three colonial regulations could suffice to show a tradition of public-carry regulation. In any event, even looking at these laws on their own terms, we are not convinced that they regulated public carry akin to the New York law before us." (emphasis omitted)).

72. *Id.* at 2145 ("[I]n the century leading up to the Second Amendment and in the first decade after its adoption, there is no historical basis for concluding that the pre-existing right enshrined in the Second Amendment permitted broad prohibitions on all forms of public carry.").

73. *Id.* at 2150 ("The historical evidence from antebellum America does demonstrate that the manner of public carry was subject to reasonable regulation. Under the common law, individuals could not carry deadly weapons in a manner likely to terrorize others. Similarly, although surety statutes did not directly restrict public carry, they did provide financial incentives for responsible arms carrying. Finally, States could lawfully eliminate one kind of public carry—concealed carry—so long as they left open the option to carry openly. None of these historical limitations on the right to bear arms approach New York's proper-cause requirement because none operated to prevent law-abiding citizens with ordinary self-defense needs from carrying arms in public for that purpose." (emphasis omitted)).

74. *Id.* ("Evidence from around the adoption of the Fourteenth Amendment also fails to support respondents' position. For the most part, respondents and the United States ignore the 'outpouring of discussion of the [right to keep and bear arms] in Congress and in public discourse, as people debated whether and how to secure constitutional rights for newly free slaves' after the Civil War." (alteration in original) (quoting District of Columbia v. Heller, 554 U.S. 570, 614 (2008))).

75. *Id.* at 2138.

76. In *United States v. Rahimi*, the Supreme Court clarified that the *Bruen* standard does not require a "historical twin" for a gun regulation to be constitutional, but rather a "historical analogue" that is "relevantly similar." 144 S. Ct. 1889, 1897–98 (2024).

77. *See generally* United States v. Hale, 717 F. Supp. 3d 704 (N.D. Ill. 2024) (striking down federal prohibitions on firearm dispossession of felons), *appeal docketed*, No. 24-1270 (7th Cir. Feb. 21, 2024); Barnett v. Raoul, 756 F. Supp. 3d 564 (S.D. Ill. 2024) (invalidating Illinois's assault weapons ban, finding that the historical regulations cited by the state did not sufficiently justify the modern restriction on commonly used firearms); Koons v. Platkin, 673 F. Supp. 3d 515 (D.N.J. 2023) (invalidating New Jersey's restrictions on carrying firearms in "sensitive places" and holding that the government failed to demonstrate a historical tradition of broadly restricting firearms in public spaces), *aff'd in part*, *vacated in part, rev'd in part sub nom.*, Koons v. Att'y Gen. N.J., Nos. 23-1900, 23-2043, 2025 WL 2612055 (3d Cir. 2025), *as amended,* (Sep. 17, 2025).

78. 717 F. Supp. 3d at 713.

Quailes,[79] two separate district courts struck down the federal prohibition on firearm possession by felons,[80] finding that the government failed to provide historical evidence of a sufficiently analogous regulation with a "comparable burden on the right of armed self-defense" as the challenged statute.[81] Similarly in *Barnett v. Raoul*, the court invalidated Illinois' assault weapons ban, finding that the historical regulations cited by the state did not sufficiently justify the modern restriction on commonly used firearms.[82] Lastly, in *Koons v. Platkin*, a district court invalidated New Jersey's restrictions on carrying firearms in "sensitive places," a term referring to locations where the government claims heightened safety concerns justify gun restrictions, holding that the government failed to demonstrate a historical tradition of broadly restricting firearms in public spaces.[83]

Beyond individual rulings, broader empirical evidence reinforces the conclusion that *Bruen* shifts the legal terrain in favor of Second Amendment claimants. Data compiled in the *Virginia Law Review* revealed trends from a comprehensive study of every federal, state, trial, and appellate opinion issued between *Bruen* and the ruling's one-year anniversary.[84] This study found that post-*Bruen* challenges to sensitive places policies succeeded sixty-nine percent of the time, compared to just eighteen percent post-*Heller*.[85] Challenges to firearm restrictions based on age, specifically those disarming young adults between eighteen and twenty years old, succeeded sixty percent of the time, compared to a zero percent success rate before.[86] Similarly, challenges to public carry permitting policies had a thirty-three percent success rate post-*Bruen*, compared to nine percent in the years following.[87] Challenges to restrictions on weapon categories had a success rate of twenty-three percent post-*Bruen*, rising from the thirteen percent pre-*Heller*.[88] More specifically in this weapons restrictions category, judges granted relief in challenges to assault weapons bans thirty-three percent of the time, rising exponentially from the zero percent success rate after *Heller*.[89] Finally, the study found that the success rates for individual plaintiffs compared to organizational plaintiffs rose steeply too: Post-*Bruen* the success rates rose from nine and twenty-eight percent to fifty-one and sixty-five percent, respectively.[90]

From this information it is clear that *Bruen* shifted the legal landscape to directly and positively impact plaintiffs' challenges to Second Amendment regulations, and as

79. 688 F. Supp. 3d 184, 187 (M.D. Pa. 2023), *rev'd*, 126 F.4th 215 (3d Cir. 2025).

80. 18 U.S.C. § 922(g)(1).

81. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2133 (2022).

82. *Barnett*, 756 F. Supp. 3d at 654.

83. Koons v. Platkin, 673 F. Supp. 3d 515, 627–53 (D.N.J. 2023), *aff'd in part*, *vacated in part*, *rev'd in part sub nom.*, Koons v. Att'y Gen. N.J., Nos. 23-1900, 23-2043, 2025 WL 2612055 (3d Cir. 2025), *amended by*, (Sep. 17, 2025).

84. Eric Ruben, Rosanna Smart & Ali Rowhani-Rahbar, *One Year Post-Bruen: An Empirical Assessment*, 110 VA. L. REV. ONLINE 20, 25, 38 (2024), https://virginialawreview.org/wp-content/uploads/2024/02/Ruben_Book.pdf [https://perma.cc/33U7-G869].

85. *Id.* at 38.

86. *Id.* at 37.

87. *Id.* at 38.

88. *Id.*

89. *Id.* at 38–39.

90. *Id.* at 34.

Baird v. Bonta—the case upholding one side of the irreparable harm circuit split—points out, this ultimate success at trial tracks the likelihood of success on the merits factor at the preliminary injunction stage.[91] Accordingly, because *Bruen* strengthened plaintiffs' likelihood of success at trial by raising the government's evidentiary burden, plaintiffs challenging firearm regulations under the Second Amendment are also better equipped to demonstrate their likelihood of success on the merits before a trial ever occurs.[92]

D. The Circuit Split

While most courts only presume irreparable harm when a plaintiff demonstrates a likely violation of their First Amendment rights, some courts are beginning to expand this presumption to other constitutional violations.[93] In the wake of *Bruen*, this divide became particularly pronounced in Second Amendment litigation.

First, the Ninth Circuit in *Baird* embraced a presumption of irreparable harm, recognizing the unique nature of harm caused by Second Amendment violations.[94] By contrast, the Third Circuit in *Delaware State Sportsmen's Ass'n v. Delaware Department of Safety & Homeland Security* rejected this presumption, requiring plaintiffs to provide evidence of actual harm.[95]

1. Presuming Irreparable Harm in *Baird v. Bonta*

In *Baird*, the Ninth Circuit held that, for purposes of a preliminary injunction, a showing of likely success on the merits of a Second Amendment claim automatically establishes irreparable harm.[96] Appellants Mark Baird and Richard Gallardo challenged California's handgun licensing regime, which imposed criminal liability on people carrying handguns openly without a permit.[97] The California licensing laws prohibited those living in counties with more than two hundred thousand residents—roughly ninety-five percent of all state residents—from even applying for an open-carry license.[98] Mr. Baird and Mr. Gallardo sued California Attorney General Rob Bonta, arguing that the licensing regime infringed their Second Amendment rights because California's licensing law had no historical analogue as required by *Bruen*.[99] The appellants requested a preliminary injunction against the enforcement of the law three times to no avail.[100]

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91. *See* Baird v. Bonta, 81 F.4th 1036, 1044 (9th Cir. 2023) ("*Bruen* obviously affects the first *Winter* factor—the likelihood of success on the merits inquiry in a motion for a preliminary injunction.").

92. See *infra* notes 115–18 and accompanying text for a discussion of the Ninth Circuit's discussion in *Baird*.

93. *See, e.g.*, Covino v. Patrissi, 967 F.2d 73, 77 (2d Cir. 1992) (presuming irreparable harm from Fourth Amendment violations); Mitchell v. Cuomo, 748 F.2d 804, 806 (2d Cir. 1984) (presuming irreparable harm when Eighth Amendment rights were implicated).

94. *Baird*, 81 F.4th at 1046.

95. 108 F.4th 194, 203 (3d Cir. 2024), *cert. denied sub nom.*, Gray v. Jennings, 145 S. Ct. 1049 (2025).

96. *Baird*, 81 F.4th at 1042.

97. *See* CAL. PENAL CODE §§ 25850(a), 26350(a), 26150, 26155 (West 2025).

98. *Baird*, 81 F.4th at 1039.

99. *Id.*; *see also* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2133 (2022) ("[A]nalogical reasoning requires only that the government identify a well-established and representative historical analogue, not a historical twin." (emphasis omitted)).

100. *Baird*, 81 F.4th at 1039.

The district court denied their motions without analyzing either their likelihood of success on the merits or their claim of suffering irreparable injury.[101] Mr. Baird and Mr. Gallardo appealed to the Ninth Circuit, arguing that by conducting this incomplete analysis the district court abused its discretion and that their denial of the injunction should be overruled.[102]

In its review of the case, the Ninth Circuit employed the four-factor *Winter* test[103] and specified that as a general matter the district courts "*must* consider" all four factors.[104] However, in their sliding scale variation on the traditional test,[105] the Ninth Circuit directed that "[i]f a plaintiff in such a case shows he is likely to prevail on the merits, that showing usually demonstrates he is suffering irreparable harm."[106] This first factor is therefore the "most important factor" in a motion for a preliminary injunction.[107] In fact, the Ninth Circuit dictated that a finding of irreparable injury "follows inexorably from a conclusion that the government's current policies are likely unconstitutional."[108] If plaintiffs show that "an alleged deprivation of a constitutional right is involved, . . . no further showing of irreparable injury is necessary."[109]

Additionally, the Ninth Circuit held that a plaintiff's likelihood of success on the merits also tips the public interest factors "sharply" in their favor.[110] The court emphasized that "public interest concerns are implicated when a constitutional right has been violated[] . . . [and] all citizens have a stake in upholding the Constitution."[111] Therefore "it is always in the public interest to prevent the violation of a party's constitutional rights."[112] Furthermore, the government "'cannot suffer harm from an injunction that merely ends an unlawful practice' implicating 'constitutional concerns.'"[113] With this in mind, the Ninth Circuit held that "because of the importance of the first *Winter* factor in cases where a plaintiff alleges a constitutional injury, it is no surprise that our caselaw clearly favors granting preliminary injunctions to [the] plaintiff . . . who is likely to succeed on the merits of his [Second Amendment] claim."[114]

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101. *Id.*

102. *Id.* at 1039–40.

103. Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008); *accord* Chamber of Com. of the U.S. v. Bonta, 62 F.4th 473, 481 (9th Cir. 2023).

104. *Baird*, 81 F.4th at 1040 (citing Vivid Ent., LLC v. Fielding, 774 F.3d 566, 577 (9th Cir. 2014)).

105. See *supra* notes 15–16 for a discussion of the sliding scale variation.

106. *Baird*, 81 F.4th at 1040 (citing Planned Parenthood Ariz., Inc. v. Humble, 753 F.3d 905, 911 (9th Cir. 2014), *abrogated on other grounds by*, Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022)).

107. *Id.* (quoting Env't Prot. Info. Ctr. v. Carlson, 968 F.3d 985, 989 (9th Cir. 2020)).

108. *Id.* at 1042 (internal quotation marks omitted) (quoting Hernandez v. Sessions, 872 F.3d 976, 995 (9th Cir. 2017)).

109. *Id.* (quoting 11 WRIGHT & MILLER'S FEDERAL PRACTICE AND PROCEDURE § 2948.1 (3d ed. 1998)).

110. *Id.* at 1040.

111. *Id.* at 1042 (omission in original) (quoting Preminger v. Principi, 422 F.3d 815, 826 (9th Cir. 2005)).

112. *Id.* (quoting Riley's Am. Heritage Farms v. Elsasser, 32 F.4th 707, 731 (9th Cir. 2022)).

113. *Id.* (quoting Rodriguez v. Robbins, 715 F.3d 1127, 1145 (9th Cir. 2013)). *But see* Trump v. CASA, Inc., 145 S. Ct. 2540, 2562 (2025) ("The question before us is whether the Government is likely to suffer irreparable harm from the District Courts' entry of injunctions that likely exceed the authority conferred by the Judiciary Act. The answer to that question is yes.").

114. *Baird*, 81 F.4th at 1042 (internal quotation marks omitted) (quoting Klein v. City of San Clemente, 584 F.3d 1196, 1208 (9th Cir. 2009)).

The Ninth Circuit then briefly addressed the effect of *Bruen* on the four-factor preliminary injunction test.[115] The court believed that because *Bruen* expressly overturned the use of the previous means-end standard[116] and because the "burdens at the preliminary injunction stage track the burdens at trial,"[117] it was therefore obvious that *Bruen* would affect the determination of the first *Winter* factor.[118] The court again clarified that "under *Winter*'s well-settled standards—which apply to Second Amendment claims like any other constitutional claim—courts consider all of the *Winter* factors and assess irreparable harm and the public interest *through the prism* of whether or not the plaintiff has shown a likelihood of success on the merits."[119] In sum, the Ninth Circuit held that the district court failed to consider both the interplay between the *Winter* factors and the impact of *Bruen* on the likelihood of success.[120] The Ninth Circuit then set forth requirements to guide the district court,[121] including a direction that it not "shrink from [its] obligation to enforce [the plaintiff's] constitutional rights,"[122] and stressing that "we *presume* that a constitutional violation causes a preliminary injunction movant irreparable harm."[123] The Ninth Circuit concluded by remanding the case for further reconsideration.[124]

2. Requiring Proof of Harm in *Delaware State Sportsmen's Ass'n v. Delaware Department of Safety & Homeland Security*

In *Delaware State Sportsmen's Ass'n*, a number of Delaware residents and organizations challenged the state's ban on assault weapons and large-capacity magazines,[125] arguing these laws violated their Second and Fourteenth Amendment rights.[126] These challengers moved for preliminary injunctions against the Delaware laws, which the district court consolidated for the purposes of a hearing.[127] At the hearing, the "challengers put on no live witnesses, nor did they offer any evidence that Delaware had tried to enforce these laws or take away their magazines. . . . They offered no details about how they would be harmed."[128] On this limited evidentiary record, the district court "found that the challengers were not likely to succeed on the merits because [the] bans [were] consistent with the Nation's historical tradition of firearm

115. *Id.* at 1043–44.

116. *Id.* at 1043 (citing N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2127 (2022)).

117. *Id.* at 1044 (quoting Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal, 546 U.S. 418, 429 (2006)).

118. *Id.*; *see also* Ashcroft v. ACLU, 542 U.S. 656, 666 (2004) (discussing how courts must consider government's ultimate burden of proof at trial when ruling on preliminary injunctions).

119. *Baird*, 81 F.4th at 1044 (emphasis added).

120. *Id.*

121. *Id.* at 1046–48.

122. *Id.* at 1047 (first alteration in original) (quoting Porretti v. Dzurenda, 11 F.4th 1037, 1047 (9th Cir. 2021)).

123. *Id.* at 1046.

124. *Id.* at 1048.

125. DEL. CODE ANN. tit. 11, §§ 1466(a), 1468(2), 1469(a) (West 2025).

126. Del. State Sportsmen's Ass'n v. Del. Dep't of Safety & Homeland Sec., 108 F.4th 194, 197–98 (3d Cir. 2024), *cert. denied sub nom.*, Gray v. Jennings, 145 S. Ct. 1049 (2025).

127. *Id.* at 198.

128. *Id.*

regulation."[129] The district court additionally "refused to presume that all Second Amendment [harm is] irreparable," and "[b]ecause the challengers had not borne their burden" in proving the first and second *Winter* elements, denied preliminary injunction without reaching the third and fourth factors.[130]

On appeal to the Third Circuit, the court upheld the denial of the preliminary injunction, finding that the plaintiffs failed to meet the standards to show irreparable harm.[131] The court's opinion, written by Judge Bibas, focused on the four *Winter* elements but emphasized that courts' "recent drift" away from the proper aim of preliminary injunctions as a tool for "[c]ase preservation" to a focus on preventing interim harm "stunt[s] litigation" has become all too "ordinary."[132] Rather, to the Third Circuit, the argument that they must presume irreparable harm because "constitutional rights are priceless, and the government has no interest in enforcing unconstitutional laws" was a "siren song" they would not hear.[133] First, the court reasoned that preliminary injunctions are never to be awarded as a right,[134] and that tests for considering them must be flexible enough to allow for judicial discretion.[135] Next, the court cautioned that the likelihood of success on the merits is "just one piece of the puzzle" and that the court must always weigh the remaining three *Winter* factors.[136] Arguing for the necessary consideration of all four *Winter* factors, the court warned that if the challengers' argument that the court presume irreparable harm is right, courts would be forced to turn from Supreme Court precedent and prejudge the merits in every case.[137] The court pointed out that in *Winter*, the Supreme Court did not address the underlying merits and even assumed irreparable injury, yet it "overturned an injunction based solely on the balance of equities and the public interest [factors]."[138] Finally, the court cautioned against presuming clarity on the merits so early in the litigation process, reminding judges that "[j]umping to conclusions this early is like finding guilt right after hearing each side's key witness, without keeping an open mind long enough to reflect on their weaknesses."[139]

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129. *Id.* (internal quotation marks omitted).

130. *Id.*

131. *Id.* at 204–05.

132. *Id.* at 201–02 ("All too often, 'the preliminary injunction [becomes] the whole ball game.' That shortcut exceeds injunctions' limits. The 'purpose of such interim equitable relief is not to conclusively determine the rights of the parties.' Rather, it is supposed to be 'only a prediction about the merits of the case.'" (alteration in original) (first quoting Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 33–34 (2008); then quoting Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080, 2087 (2017); and then quoting United States v. Local 560 (I.B.T.), 974 F.2d 315, 330 (3d Cir. 1992))).

133. *Id.* at 202.

134. *Id.* ("[A] preliminary injunction is an extraordinary remedy never awarded as of right. Instead, it is a matter of equitable discretion that does not follow from success on the merits as a matter of course." (internal quotation marks omitted) (quoting *Winter*, 555 U.S. at 24, 32)).

135. *Id.* ("[N]o test for considering preliminary equitable relief should be so rigid as to diminish, let alone disbar, discretion." (quoting Reilly v. City of Harrisburg, 858 F.3d 173, 178 (3d Cir. 2017))).

136. *Id.*

137. *Id.*

138. *Id.* (citing *Winter*, 555 U.S. at 26, 31–32).

139. *Del. State Sportsmen's Ass'n*, 108 F.4th at 203.

The Third Circuit thus began its core analysis not with the appellants' likelihood of success on the merits but with the severity of the alleged harm.[140] They remained firm that the presumption of irreparable harm applied in some First Amendment cases was not applicable to Second Amendment claims.[141] To the Third Circuit, the "traditional principles of equity" must guide the facts of each case and extending the special presumption granted to First Amendment claims to Second Amendment litigation would "trample on" these purposes.[142] It reasoned that the Supreme Court has generally rejected overly "broad classifications" as "foreign to [principles of] equity,"[143] and reaffirmed that it is only because of the chilling effect on speech or expression, that any suppression of speech or worship truly inflicts irreparable injury.[144] The court clarified "[w]e do not hold that Second Amendment harms, or constitutional harms generally, cannot be irreparable" in specific circumstances.[145] However, the Third Circuit concluded that in this case, the challengers had shown "no evidence that without a preliminary injunction, the [d]istrict [c]ourt w[ould] be unable to decide the case or give them meaningful relief."[146] The court therefore required the plaintiffs to demonstrate that enforcement of the Delaware bans would result in immediate, tangible harm that could not be remedied through legal or monetary means.[147]

III. DISCUSSION

If post-*Bruen* plaintiffs pursuing Second Amendment claims can demonstrate a likelihood of success on the merits, courts should presume irreparable harm when considering their requests for preliminary injunctions. Second Amendment harm encompasses more than just the direct infringement of an individual's right to self-defense. Rather, substantial evidence confirms that overbroad regulations can chill Second Amendment rights, just like rights covered by the First Amendment. When understood this way, violations of Second Amendment rights warrant equal consideration to First Amendment harms at the preliminary injunction stage as neither can be adequately remedied through traditional legal relief, and the Supreme Court should recognize this to resolve the split between the Third and Ninth Circuits.

A. The Full Nature of Second Amendment Harm

When a law violates the Second Amendment, the core legally recognized harm suffered is the infringement on an individual's right to self-defense.[148] This individual right was affirmatively recognized in *Heller* where the Court held that a law preventing a law-abiding citizen from keeping a handgun in the home for self-defense constituted a

140. *Id.*
141. *Id.* at 203–04.
142. *Id.* at 203.
143. *Id.* at 203 (quoting eBay Inc. v. MercExchange, LLC, 547 U.S. 388, 393 (2006)).
144. *Id.* at 204.
145. *Id.* at 205.
146. *Id.*
147. *See id.*
148. *See* District of Columbia v. Heller, 554 U.S. 570, 635 (2008).

violation of the Second Amendment.[149] The *individual* nature of the right was crucial to the *Heller* Court despite the Second Amendment's reference only to "the right of the *people*."[150] In explaining why the Court emphasized the individual nature of the right, it pointed out that:

> The unamended Constitution and the Bill of Rights use the phrase "right of the people" two other times, in the First Amendment's Assembly–and–Petition Clause and in the Fourth Amendment's Search–and–Seizure Clause. . . . [T]hese instances unambiguously refer to individual rights, not "collective" rights, or rights that may be exercised only through participation in some corporate body.[151]

The Supreme Court next reiterated this individual right in *McDonald v. City of Chicago* when they held that the Second Amendment's protection of the individual right to keep and bear arms for self-defense applies against both federal and state law.[152] Furthermore in *Bruen*, the Court elaborated that the Second Amendment guarantees the right of law-abiding citizens to protect themselves from lethal violence not only by possessing but also, if necessary, by *using* a gun.[153] Therefore, as it is currently recognized, Second Amendment harm is the deprivation of the ability to defend oneself with a firearm, which is a fundamental, individual right.

Beyond legal restrictions, however, Second Amendment harm can also encompass mere practical limitations. In *Wrenn v. District of Columbia*, the Court of Appeals for the District of Columbia overturned the good-reason law which required applicants to show a "good reason to fear injury" in order to obtain a gun for self-defense.[154] This law, the court stated, fell short of the Second Amendment's protections by protecting only the possibility of obtaining a gun, rather than the right to keep and carry the gun itself.[155] The court there noted that the Second Amendment does not merely "secure a right to have some *chance* at self-defense"[156] and that the remote possibility of one day carrying arms in self-defense alone does not satisfy the constitutional requirements of the Second Amendment.[157] Rather, the court made clear that "at a minimum the Amendment's core must protect *carrying* given the risks and needs typical of law-abiding citizens."[158]

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149. *Id.* ("[W]e hold that the District's ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense.").

150. U.S. CONST. amend. II (emphasis added).

151. *Heller*, 554 U.S. at 579.

152. 561 U.S. 742, 750 (2010).

153. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2149 (2022) ("[F]ounding-era laws punishing unlawful discharge 'with a small fine and forfeiture of the weapon . . . , not with significant criminal penalties,' likely did not 'preven[t] a person in the founding era from using a gun to protect himself or his family from violence, or that if he did so the law would be enforced against him.'" (omission in original) (second alteration in original) (quoting *Heller*, 554 U.S. at 633–34)).

154. 864 F.3d 650, 655, 668 (D.C. Cir. 2017) (quoting D.C. CODE ANN. § 22-4506(a)–(b) (West 2025)) ("[T]he law challenged here . . . confine[d] carrying a handgun in public to those with a special need for self-defense.").

155. *Id.* at 668 ("[T]he law-abiding citizen's right to bear common arms must enable the typical citizen to carry a gun.").

156. *Id.* at 665 (emphasis added).

157. *Id.*

158. *Id.* (emphasis added).

Extrapolating from *Wrenn*, an individual may therefore suffer Second Amendment harm when a regulation denies them the practical ability to carry a firearm in self-defense.[159] This harm is not hypothetical; it arises whenever a regulation imposes barriers that effectively prevent law-abiding citizens from exercising their right to self-defense in circumstances where such defense is necessary or typical.[160]

This idea is not unlike the chilling effect that is recognized in First Amendment jurisprudence.[161] In the First Amendment context, the chilling effect is contained within the "auxiliary protections for the core right."[162] This auxiliary protection, as well as other doctrines such as the overbreadth[163] and prior restraint doctrines,[164] "ensure that the core right is genuinely protected by creating a buffer zone that prevents officious government actors from stripping the right of real meaning through regulations that indirectly—but perhaps fatally—burden its exercise."[165] Arguably, the chilling effect need not be exclusive to the First Amendment, and some jurisdictions have applied the doctrine to the Second Amendment as well. For instance, in *Firearm Owners Against Crime v. Papenfuse*, Pennsylvania Supreme Court Justice Wecht recognized in his concurrence that "[t]he current, actual, and threatened enforcement of the challenged ordinances has a chilling effect on the Individual Plaintiff's rights to engage in constitutionally protected activities with respect to firearms."[166] Additionally, state statutes such as Idaho[167] and Mississippi's[168] Second Amendment Financial Privacy Acts explicitly acknowledge the potential for a chilling effect on Second Amendment activities.[169] These statutes

159. *Id.* ("*Heller I* closed off the possibility that courts would erroneously find some benefits weighty enough to justify other effective bans on the right to keep common arms.").

160. *Id.* at 655 ("[T]he Second Amendment erects some absolute barriers that no gun law may breach.").

161. Counterman v. Colorado, 143 S. Ct. 2106, 2114 (2023) ("Prohibitions on speech have the potential to chill, or deter, speech outside their boundaries.").

162. Glenn Harlan Reynolds, *Second Amendment Penumbras: Some Preliminary Observations*, 85 S. CAL. L. REV. 247, 248 (2012).

163. New York v. Ferber, 458 U.S. 747, 768–69 (1982) ("The doctrine is predicated on the sensitive nature of protected expression: 'persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions by a statute susceptible of application to protected expression.' It is for this reason that we have allowed persons to attack overly broad statutes even though the conduct of the person making the attack is clearly unprotected and could be proscribed by a law drawn with the requisite specificity." (citations omitted) (quoting Gooding v. Wilson, 405 U.S. 518, 521 (1972))).

164. Alexander v. United States, 509 U.S. 544, 550 (1993) ("The term prior restraint is used 'to describe [unconstitutional] administrative and judicial orders *forbidding* certain communications when issued in advance of the time that such communications are to occur.'" (citation omitted)).

165. Reynolds, *supra* note 162, at 248.

166. 261 A.3d 467, 496 (Pa. 2021) (Wecht, J., concurring) (alteration in original) (quoting Firearm Owners Against Crime v. City of Harrisburg, 218 A.3d 497, 506 (Pa. Cmmw. Ct. 2019)).

167. IDAHO CODE ANN. § 18-3326(1)(f) (West 2025).

168. MISS. CODE ANN. § 45-9-203(g) (West 2025).

169. IDAHO CODE ANN. § 18-3326(1)(f) (West 2025) ("This potential for cooperative surveillance and tracking of lawful firearm and ammunition purchases will have a significant chilling effect on citizens wishing to exercise their federal and state constitutional rights to keep and bear arms in Idaho."); MISS. CODE ANN. § 45-9-203(g) (West 2025) ("The creation or maintenance of records of purchases of firearms or ammunition . . . may frustrate the right to keep and bear arms and violate the reasonable privacy rights of lawful purchasers of firearms or ammunition.").

highlight concerns that certain regulatory actions, such as tracking firearm purchases, could deter individuals from exercising their rights to keep and bear arms.[170]

Efforts to extend the chilling effect doctrine to the Second Amendment have garnered academic support as well. Professor Glenn Harlan Reynolds in the *Southern California Law Review* reasoned that the chilling effect approach to protecting constitutional rights "seems particularly appropriate with regard to the Second Amendment, which plainly commands that the right to keep and bear arms shall not be 'infringed.'"[171] Under Professor Reynolds's logic, protecting the "fringe" of the right should involve indirect protections to address any chilling effect.[172] Accordingly, since *Heller* protects the right to possess firearms for self-defense and "implies a corresponding right to acquire and maintain proficiency in their use,"[173] the "auxiliary protections that might matter most would be those that would make that right practicable in the real world."[174] Thus, any "[l]egal approaches [that] seem intended to stigmatize and denormalize [sic] firearms possession generally, and [which] produce an in terrorem effect that will make gun ownership less common"[175]—in other words, any legal approaches "in which the underlying goal is to discourage people from having anything to do with firearms at all"[176]—would run afoul of the Second Amendment.

Professor Reynolds's work predates *Bruen* by a decade; however, his perspective nonetheless considers the then-ongoing changes in Second Amendment jurisprudence. Professor Reynolds predicted that "[a]s a full-fledged constitutional right that until recently was regulated as if it were not a right at all, the right to bear arms is likely to raise questions in numerous contexts as activists and litigants continue to explore its boundaries."[177] Professor Reynolds foresaw that the full scope of Second Amendment rights, and therefore Second Amendment harm, was yet to be fully articulated, and just as First Amendment jurisprudence surrounding the chilling effect underwent significant development in the mid-twentieth century, Professor Reynolds likewise believed that the chilling effect on Second Amendment rights provided "considerable grist" for future courts to mill.[178]

The Supreme Court has yet to formally recognize that Second Amendment rights can be chilled, and many lower courts have taken the opportunity to officially deny the possibility of a chilling effect as well.[179] The prevailing logic seems to be that there "is

170. IDAHO CODE ANN. § 18-3326(1)(f) (West 2025); MISS. CODE ANN. § 45-9-203 (West 2025).

171. Reynolds, *supra* note 162, at 248.

172. *See id.*

173. *Id.* at 250.

174. *Id.* at 249.

175. *Id.* at 253.

176. *Id.* at 252.

177. *Id.* at 255.

178. *Id.*

179. *See, e.g.*, People v. Burns, 79 N.E.3d 159, 172 (Ill. 2015) (Garman, J., concurring) ("There is no similar concern that the AUUW statute will have an inappropriate chilling effect on those with full second amendment rights who wish to carry their firearms in public.").

no constitutional concern that taking away one individual's gun will prevent other people from exercising their right to own guns."[180]

But this view is too reductive, as not all gun laws specifically confiscate firearms. Regardless of the merits of the public policies in play, it is logical that laws which erect difficult procedures for firearms collection and licensing,[181] or laws that lay out detailed background checks for individuals seeking to obtain a gun for any purpose,[182] for example, could easily chill other individuals' desire to exercise their Second Amendment rights, due to the expense, inconvenience, or relinquishing of personal information required to comply with the regulations. Furthermore, it need not matter if the alleged chilling effect is only theoretical: When the Supreme Court recognized the First Amendment chilling effect in *New York Times v. Sullivan*, they wrote that the "pall of fear and timidity . . . is an atmosphere in which the First Amendment freedoms cannot survive," *without ever finding any evidence of said fear or timidity*.[183] Thus, "[i]f plausible speculation about the potential for a chilling effect demands a Constitutional remedy for the First Amendment, then certainly evidence of . . . [a chilling effect] is sufficient to compel a Constitutional remedy for the Second Amendment."[184] In short, courts do not need empirical proof to recognize this constitutional harm.

Moving beyond the theoretical, the possibility of a chilling effect on the Second Amendment has been at least tacitly broached by the Court. The Court in *Bailey v. United States*[185] considered the government's interpretation of a gun statute which criminalized the "use" of a firearm "during and in relation to any crime of violence or drug trafficking."[186] The government's broad interpretation of "use" within the meaning of the statute went far beyond the Court's precedential interpretation of the term in gun crime statutes as "an *active employment* of the firearm by the defendant, a use that ma[de] the firearm an operative factor in relation to the predicate offense."[187] Scholars have since recognized that under this broad application, the likelihood of a chilling effect was extremely high "because the government's proffered interpretation could have deterred even law-abiding residents of a drug-infested neighborhood, who are perhaps most in need of whatever protection firearms can provide, from possessing firearms that might be found near the narcotics of a family member, housemate, or fellow passenger in an automobile."[188]

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180. Katherine Grace Howard, Note, *You Have the Right to Free Speech: Retaliatory Arrests and the Pretext of Probable Cause*, 51 GA. L. REV. 607, 633 (2017).

181. *See* 18 U.S.C. § 923 (outlining requirements for licensed collectors and licensees, including maintaining firearm transaction records and reporting multiple pistol or revolver sales to unlicensed persons).

182. 42 U.S.C. § 2201a(c) (requiring background checks for individuals who receive, possess, or use firearms under certain conditions to ensure compliance with federal and state laws).

183. 376 U.S. 254, 278 (1964).

184. David B. Kopel & Richard E. Gardner, *The Sullivan Principles: Protecting the Second Amendment from Civil Abuse*, 19 SETON HALL LEGIS. J. 737, 770 (1995).

185. 516 U.S. 137, 138–39 (2013), *superseded by statute*, 18 U.S.C. § 924(c), *as recognized in*, Welch v. United States, 578 U.S. 120 (2016).

186. 18 U.S.C. § 924(c)(1)(A).

187. *Bailey*, 516 U.S. at 141–43.

188. Robert Batey, *Vagueness and the Construction of Criminal Statutes—Balancing Acts*, 5 VA. J. SOC. POL'Y & L. 1, 64 (1997); *see* Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 361 (1991) ("Much of the contemporary crime that

In sum, the chilling effect on Second Amendment rights is both real and significant. It impacts countless individuals, often those most in need of self-defense, by discouraging the lawful exercise of their constitutional freedoms.[189] As scholars have observed, "[b]roadly drafted gun control statutes can chill the right to keep and bear arms just as sweeping libel laws can chill the exercise of free speech."[190] Accordingly, when overbroad firearm regulations create an atmosphere of uncertainty and deterrence, they effectively suppress the right to keep and bear arms without directly banning it. And those who support this chilling effect as a feature, not a bug, of gun regulation reveal precisely why courts must intervene: Constitutional rights must not be subject to erosion through regulatory intimidation simply because some policymakers—or segments of the public—disfavor their exercise. Just as First Amendment doctrine protects the periphery to safeguard the core, so too must Second Amendment jurisprudence recognize that truly preserving the right to self-defense requires shielding its outer boundaries. Recognizing this indirect but profound infringement is essential to understanding the full scope of Second Amendment harm for purposes of preliminary injunctions.

B. First and Second Amendment Harm Warrant Analogous Treatment

In a hearing for a preliminary injunction, Second Amendment rights deserve equitable protection comparable to those afforded to First Amendment rights, particularly where plaintiffs allege their Second Amendment rights were chilled. As explained in this Part, doctrinal, historical, and procedural analyses all reveal that the First and Second Amendments already share identical treatment in numerous respects. Second Amendment challenges also often implicate First Amendment rights, and furthermore, the core rights are not so distinct that both cannot potentially result in harm to others. Finally, this Part argues that Second Amendment harm—especially harm that occurs when Second Amendment rights are chilled—already meets the baseline requirements for a showing of irreparable harm under *Winter*. Courts should therefore presume irreparable harm in Second Amendment cases once plaintiffs demonstrate their likelihood of success.

The First and Second Amendments are similar in many regards. Both are contained in the Bill of Rights, and they represent two of the only three such amendments that guarantee a particular, substantive right.[191] The Supreme Court has also consistently suggested that similar overarching principles apply to both the First and Second Amendments, given that the rights to speech, assembly, and to keep and carry arms are

concerns Americans is in poor black neighborhoods and a case can be made that greater firearms restrictions might alleviate this tragedy. But another, perhaps stronger case can be made that a society with a dismal record of protecting a people has a dubious claim on the right to disarm them.").

189. Batey, *supra* note 188, at 62–63.

190. *Id.*

191. Kopel & Gardner, *supra* 184, at 743 ("Amendments Four through Eight are due process requirements for the government to obey, while Amendments Nine and Ten are non-specific reservations of rights."); *see* U.S. CONST. amend. I; *id.* amend. II; *see also id.* amend. III ("No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.").

found together "wherever civilization exists."[192] The Court has been adamant that where the First Amendment is a facially absolute provision, so too the Second Amendment embodies an "equally unqualified command."[193] Additionally, both First and Second Amendment rights are treated as fundamental rights since they are both rights "explicitly . . . guaranteed by the Constitution."[194]

Historical scholarship regarding the First and Second Amendments also confers similar treatment between them. St. George Tucker, former professor of law at William and Mary, justice of the Supreme Court of Virginia, and federal district judge, opined that:

> For a representative democracy ceases to exist the moment that the public functionaries are by any means absolved from their responsibility to their constituents; and this happens whenever the constituent can be restrained in any manner from speaking, writing, or publishing his opinions upon any public measure, or upon the conduct of those who may advise or execute it.[195]

Just a few pages later, however, Judge Tucker was adamant that:

> The right of self defence is the first law of nature: in most governments it has been the study of rulers to confine this right within the narrowest limits possible. Whenever standing armies are kept up, and the right of the people to keep and bear arms is, under any colour or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction.[196]

These parallel visions for what comprise a free society put the right to free expression and association on the same level as the right to keep and bear arms, reflecting equal regard for the two constitutional provisions. The Founding Fathers of the Constitution also treated the Second Amendment with the highest regard. In the *Federalist* paper number forty-six, James Madison revered the "advantage of being armed, which the Americans possess over the people of almost every other nation."[197] Similarly Thomas Jefferson, in his model constitution for Virginia proclaimed that "[n]o freeman shall be debarred [from] the use of arms," transposing the value from the federal Constitution down to the state level.[198] Clearly then, the fact that the right to bear arms is enumerated after the right to freedom of speech does not diminish its significance or importance.

Despite the strong language contained in the First and Second Amendments, both are nonetheless subject to reasonable limitations, and these respective constraints protect the rights in analogous ways. The *Heller* Court, for example, compared restricting the

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192. *See* United States v. Cruikshank, 92 U.S. 542, 551–53 (1875), *overruled on other grounds by*, United States v. Miller, 307 U.S. 174 (1939).

193. Konigsberg v. State Bar of Cal., 366 U.S. 36, 49 n.10 (1961).

194. S.A. Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 33 (1973).

195. George Tucker, *Appendix* to 1 WILLIAM BLACKSTONE, COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES, AND OF THE COMMONWEALTH OF VIRGINIA 297 (photo. reprt. 1969) (George Tucker ed., 1803).

196. *Id.* at 300.

197. THE FEDERALIST NO. 46, at 238 (James Madison) (Clinton Rossiter ed., 1961).

198. Thomas Jefferson, *Third Draft by Jefferson [Before June 1776]*, NAT'L ARCHIVES (footnote omitted), https://founders.archives.gov/documents/Jefferson/01-01-02-0161-0004# [https://perma.cc/ZK3Z-X2JX] (last visited Nov. 14, 2025).

right to keep and bear arms with the right to freedom of speech several times.[199] It noted that in the First Amendment context, "[w]hen the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions."[200] In certain cases, that burden involves demonstrating whether the expressive conduct lies outside the scope of protected speech,[201] and to meet that burden "the government must generally point to *historical* evidence about the reach of the First Amendment's protections."[202] The requirement for the government to present historical evidence to justify restrictions under both the First and Second Amendments demonstrates that the rights are already granted comparable protection.[203] It also further underscores the idea that these rights should be treated with the same equitable protections at the preliminary injunction stage.

More specifically, when it comes to sensitive places policies,[204] "[i]n the First Amendment context, the Supreme Court long ago made it clear that 'one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.'"[205] Analogously, harm to an individual's Second Amendment rights is not measured "by the extent to which it can be exercised in another jurisdiction."[206] No one would suggest that a city "may prohibit the exercise of a free-speech or religious-liberty right within its borders on the rationale that those rights may be freely enjoyed in the suburbs."[207] Accordingly, "[t]hat sort of argument should be no less unimaginable in the Second Amendment context."[208] Thus, from the joint requirements for historical evidence to the type of logic applied, the justifications for regulating First and Second Amendment rights follow analogous patterns, further reinforcing the idea that they should share equivalent treatment at the preliminary injunction stage.

An additional reason why Second Amendment rights deserve equitable protections comparable to those afforded to First Amendment rights is that many lawsuits aimed at restricting Second Amendment rights jeopardize First Amendment rights too.[209] A

199. District of Columbia v. Heller, 554 U.S. 570, 582, 595, 606, 618, 634–35 (2008).

200. United States v. Playboy Ent. Grp., 529 U.S. 803, 816 (2000); *see also* Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 777 (1986) ("[A] private-figure plaintiff must bear the burden of showing that the speech at issue is false before recovering damages for defamation from a media defendant.").

201. *See* Illinois *ex rel.* Madigan v. Telemarketing Assocs., 538 U.S. 600, 620 n.9 (2003).

202. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2130 (2022); *see, e.g.*, United States v. Stevens, 559 U.S. 460, 468–71 (2010) (placing the burden on the government to show that a type of speech belongs to a "historic and traditional categor[y]" of constitutionally unprotected speech "long familiar to the bar" (internal quotation marks omitted) (quoting Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 127 (1991) (Kennedy, J., concurring)), *superseded by statute*, 18 U.S.C. § 48 (2010).

203. *See Bruen*, 142 S. Ct. at 2130.

204. *See supra* note 83 and accompanying text.

205. Ezell v. City of Chicago, 651 F.3d 684, 697 (7th Cir. 2011) (quoting Schad v. Borough of Mount Ephraim, 452 U.S. 61, 76–77 (1981)).

206. *Id.*

207. *Id.*

208. *Id.*

209. *See generally* Way v. Boy Scouts of Am., 856 S.W.2d 230 (Tex. Ct. App. 1993) (involving a lawsuit against the Boy Scouts of America, alleging that the Boy Scouts magazine "Boys' Life" had encouraged a twelve-year-old boy to engage in dangerous play with a .22 caliber rifle after the magazine published a sixteen-page advertising supplement featuring firearms).

significant category of claims against gun manufacturers, for example, look to assign fault for advertising practices[210] or for communicating with other gun manufacturing companies.[211] It is, however, commonly held that truthful advertising falls squarely within the First Amendment's protections.[212] For that reason, lawsuits targeting the actions protected by the Second Amendment often cause a kind of collateral damage to First Amendment rights. Ensuring that Second Amendment rights enjoy the same protections at the preliminary injunctions stage can therefore guarantee that First Amendment rights are not inadvertently infringed.

Now, the primary objection to close comparisons between First and Second Amendment rights is that speech is different from firearms: "Speech does not harm people, whereas firearms do."[213] However, words do have impact, and words can lead to harm. "The holocaust ended with gas chambers, but began with words, the words of hatmongers [sic] like Hitler, as well as the words of German philosophers who told their nation that true morality required the negation of individualism and submission to the collective."[214] Speech has a profound impact in shaping attitudes and can indirectly promote violence.[215] Nazi speech and other dangerous philosophies are, however, protected under the First Amendment,[216] as is, for example, speech that promotes sexism and rape.[217] With narrow exceptions, the downstream effects of free speech therefore do not justify heavy-handed restrictions on the right.[218] So too, the fact that exercising one's right to self-defense may harm another should not be an adequate basis for suppressing Second Amendment rights. Like speech, the exercise of the right to bear arms in self-defense may create environments that some perceive as threatening,[219] or it may

210. *See, e.g.*, Merrill v. Navegar, Inc., 28 P.3d 116, 119–20 (Cal. 2001) (arising out of a fatal 1993 shooting at a San Francisco high-rise building, the gun manufacturer was sued for strict liability negligence after claiming that its product is effective for protection and is "as tough as your toughest customer").

211. *See, e.g.*, Hamilton v. Accu-tek, 935 F. Supp. 1307, 1317, 1321 (E.D.N.Y. 1996) (claiming that companies whose products were never used to harm the plaintiffs were nonetheless part of a conspiracy with other handgun manufacturers).

212. *See, e.g.*, Ibanez v. Fla. Dep't of Bus. & Pro. Reg., 512 U.S. 136, 141–43 (1994); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976).

213. Kopel & Gardner, *supra* note 184, at 748.

214. *Id.*

215. *See, e.g.*, Youngdahl v. Rainfair, Inc., 355 U.S. 131, 139 (1957) (holding that the striking workers' conduct and mass name-calling were calculated to provoke violence and highly likely to do so).

216. Village of Skokie v. Nat'l Socialist Party of Am., 373 N.E.2d 21, 23 (Ill. 1978) (holding that the National Socialist Party could not be barred from displaying a swastika during a public demonstration).

217. *See* Am. Booksellers Ass'n v. Hudnut, 771 F.2d 323, 329–30 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986).

218. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (holding that the government may not punish speech unless it is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action").

219. *See* Katherine Schaeffer, *Key Facts About Americans and Guns*, PEW RSCH. CTR. (July 24, 2024), https://www.pewresearch.org/short-reads/2024/07/24/key-facts-about-americans-and-guns/ [https://perma.cc/FB93-GHXF] ("Around half of Americans (52%) say gun ownership does more to increase safety by allowing law-abiding citizens to protect themselves, while a slightly smaller share (47%) say gun ownership does more to reduce safety by giving too many people access to firearms and increasing misuse.").

escalate tensions even when no weapon is fired.[220] But these are indirect effects—downstream consequences of the right's exercise—not the right itself and thus should not be treated as categorical justification for restraint. Furthermore, not all armed self-defense requires the firing of a gun. The mere sight of a handgun can sometimes be enough to dissuade would-be attackers.[221] Therefore, the likelihood that exercising one's constitutional rights has the potential to cause harm is not valid justification for differentiating between First and Second Amendments rights, especially at the preliminary injunction stage.

Critics may also argue that extending a presumption of irreparable harm to Second Amendment claims risks undermining the cautious approach courts traditionally apply to preliminary injunctions.[222] Indeed, preliminary injunctive relief is granted before full adjudication, often on limited records,[223] raising legitimate concerns about prejudging merits[224] or disrupting the balance of equities.[225] Ordinarily, the trial process ensures that judges evaluate all arguments with an open mind before reaching a decision.[226] Requests for equitable relief disrupt this process, solidifying initial impressions.[227] While judges are expected to revise those impressions as the case progresses, this naturally becomes more challenging once a preliminary ruling is made.[228] However, courts already routinely overcome these concerns in the First Amendment context, recognizing that such constitutional harms both cannot be properly measured by the law and also cannot wait for final judgment.[229] The extraordinary nature of preliminary injunctions does not disappear when applied to speech cases; rather, the rare presumption reflects a judicial commitment to preventing irreparable harm where waiting would nullify core constitutional protections. Second Amendment rights, no less fundamental, therefore deserve that same equitable vigilance when plaintiffs demonstrate both a likelihood of success and a chilling effect on their right to self-defense.

Finally, Second Amendment harm, particularly the harm caused when Second Amendment rights are chilled, already satisfies the foundational doctrinal criteria for

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220. Brad J. Bushman, *The "Weapons Effect,"* PSYCH. TODAY (Jan. 18, 2013), https://www.psychologytoday.com/us/blog/get-psyched/201301/the-weapons-effect [https://perma.cc/5649-FUCY].

221. *See* Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun*, 86 J. CRIM. L. & CRIMINOLOGY 150, 173, 185 (1995) (finding that in roughly three-quarters of the studied defensive gun uses involved brandishing, with the remainder involving firing the gun).

222. *See* Del. State Sportsmen's Ass'n v. Del. Dep't of Safety & Homeland Sec., 108 F.4th 194, 203 (3d Cir. 2024), *cert. denied sub nom.*, Gray v. Jennings, 145 S. Ct. 1049 (2025).

223. O Centro Espirita Beneficiente Uniao do Vegetal v. Ashcroft, 389 F.3d 973, 1015 (10th Cir. 2004) (en banc) (McConnell, J., concurring) ("[M]any preliminary injunctions must be granted hurriedly and on the basis of very limited evidence . . . ."), *aff'd sub nom.*, Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal, 546 U.S. 418 (2006).

224. *Del. State Sportsmen's Ass'n*, 108 F.4th at 200 ("[F]orecasting the merits risks prejudging them.").

225. *See Ashcroft*, 389 F.3d at 1014–15 (stating that preliminary injunctions "force[] a party to act or desist from acting, not because the law requires it, but because the law *might* require it").

226. *Del. State Sportsmen's Ass'n*, 108 F.4th at 200.

227. *Id.*

228. *Id.*

229. See *supra* notes 45–58 and accompanying text for discussion of why the First Amendment warrants unique considerations.

legal irreparability. As discussed, to obtain the presumption of irreparable harm at a hearing for a preliminary injunction, First Amendment litigants must typically show a chilling effect on free expression.[230] Irreparable harm is also understood at a baseline to mean harm which is likely imminent, and which cannot be compensated for via traditional remedies at law.[231] A plaintiff's chilled Second Amendment right satisfies each of these requirements. An individual's need to act in self-defense can arise at any time.[232] Similarly, because an individual can subjectively experience a chilling effect at any moment, the risk of experiencing the harm of being unable to freely exercise one's rights is inherently both likely and imminent as well. Furthermore, given the inadequacy and difficulty in calculating monetary damages to address a missed opportunity for self-defense, a traditional remedy at law will always be insufficient where Second Amendment violations occur.[233] The right to protect one's life and personhood in self-defense is priceless. Therefore, even a brief deprivation of that right can be irreparable.[234]

In sum, if Second Amendment litigants can demonstrate their likelihood of success on the merits and allege a chilling of their Second Amendment rights, courts should presume irreparable injury at the preliminary injunction stage. The Second Amendment is not of secondary importance. The right to keep and bear arms in self-defense should receive the same equitable protections given to First Amendment rights. As David B. Kopel and Richard E. Gardner in the Seton Hall Legislative Journal Symposium argued, "[w]hile some persons may object to the Second Amendment on policy grounds, as long as it remains in the Constitution, it deserves as much protection as any other Constitutional guarantee."[235] It is "therefore the judiciary's duty to defend the Second Amendment" against unconstitutional infringements with the same vigilance and rigor applied to other fundamental constitutional guarantees.[236] This includes the full equitable considerations available at the preliminary injunction stage.

IV. CONCLUSION

Put yourself back in the shoes of the North Philadelphia resident. This time, when your lawyer seeks that preliminary injunction, the judge recognizes that you were harmed. She acknowledges that your Second Amendment rights were chilled when you did not buy the gun you both needed and were legally entitled to because you knew that it might be used against your son. Given the circumstances in your neighborhood, the

230. See *supra* notes 36–58 and accompanying text for full discussion of First Amendment plaintiffs' burden at the preliminary injunction stage.

231. 13 MOORE'S FEDERAL PRACTICE § 65.22[b] (3d ed. 2025).

232. *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2135 (2022) (noting that confrontation can occur outside the home); Peruta v. California, 137 S. Ct. 1995, 1998–99 (2017) (Thomas, J., dissenting) (noting that the need for self-defense may arise at any time and place, not only in the home where it is "most acute" (quoting District of Columbia v. Heller, 554 U.S. 570, 628 (2008))).

233. *See* Nelson v. NASA, 530 F.3d 865, 882 (9th Cir. 2008) ("Unlike monetary injuries, constitutional violations cannot be adequately remedied through damages and therefore generally constitute irreparable harm."), *rev'd*, 562 U.S. 134 (2011).

234. Free the Nipple-Fort Collins v. City of Fort Collins, 916 F.3d 792, 806 (10th Cir. 2019).

235. Kopel & Gardner, *supra* note 184, at 775.

236. *Id.*

judge also understands that your need to act in self-defense could arise at any time. She knows that if you are put in danger and you do not have a gun to defend yourself, the results could be devastating in a way that no money could ever repair. Under Second Amendment precedent, the judge also acknowledges that you are likely to win at trial. She believes the act is likely unconstitutional, and she grants your preliminary injunction. Now, while you wait for a ruling at trial, you can still secure the necessary arms to keep you and your family safe.

This Comment advocates for a preliminary injunction regime which recognizes that Second Amendment harm includes the irreparable harm of a chilled individual right to self-defense. Second Amendment rights are of extraordinary importance, and equitable protections should reflect that when these rights are violated. In recognizing the irreparable nature of Second Amendment harm, courts do not stretch equitable principles—they apply them as intended to prevent injuries that legal remedies cannot later repair. This Comment's approach thus provides a principled framework for resolving the Third and Ninth Circuit's divide. By recognizing that chilled Second Amendment rights can constitute irreparable harm, courts can harmonize equitable doctrine with constitutional principle—preserving both the integrity of preliminary injunction standards and the full scope of individual rights.