Beyond *Elrod*: Extending the Presumption of Irreparable Harm to the Second Amendment

Roland Kim[†]

ABSTRACT

In response to gun violence, many states have attempted to implement gun control laws. Some of these gun control laws have been challenged under the Second Amendment, with parties seeking preliminary injunctions to halt these laws' enforcement until a final judicial decision has been reached.

In legal disputes over whether to grant a preliminary injunction over various gun control laws, circuits are split as to whether an alleged violation of the Second Amendment is presumptively irreparable, i.e., unable to be adequately remedied after a final judgment. In the First Amendment context, the Supreme Court established in Elrod v. Burns that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." The Court has provided little clarity as to why First Amendment violations unquestionably constitute irreparable injury, as well as to whether the rationale in Elrod extends beyond the First Amendment.

This Comment argues that Second Amendment violations are entitled to a presumption of irreparable harm because, as with rights protected by the First Amendment, Second Amendment rights are of an intangible and unquantifiable nature that protects against governmental infringement and deterrence. This Comment proposes the following standard to address whether losses of constitutional rights are presumptively irreparable: A constitutional harm warrants a presumption of irreparable harm if (1) the challenged act directly limits an intangible and unquantifiable right or (2) if the intangible and unquantifiable right at issue is not directly limited, there is a threat or existing impairment on that right at the time injunctive relief is sought.

[†] B.A., University of Illinois at Urbana-Champaign, 2022; J.D. Candidate at The University of Chicago Law School, 2026. I would like to thank Professor Darrell Miller for acting as my Comment advisor, as well as *The University of Chicago Legal Forum* for allowing me to publish my piece. Many thanks as well to Professor Samuel Bray, Jack Altman, Jacob Just, Michael Scott, and Weining Wang for providing advice throughout the Comment process. Finally, I am extremely grateful to my parents and family for supporting me throughout my legal education.

I. INTRODUCTION

In 2024, United States Surgeon General Doctor Vivek Murthy declared firearm violence in America to be a "public health crisis."[1] In 2021, 48,830 people died from gun-related injuries in the United States.[2] Among these deaths, 54% were suicides (26,328) and 43% were murders (20,958).[3] Efforts to combat firearm violence are vital, with Doctor Murthy stating that a failure to address firearm violence constitutes a "moral crisis."[4]

In response to gun violence and this crisis, many states have attempted to implement gun control laws.[5] Some of these gun control laws have been challenged under the Second Amendment by gun owners and organizations.[6] While the parties waited for a final decision from the lower court, plaintiffs sought preliminary injunctions to halt these laws' enforcement.

In legal disputes over whether to grant a preliminary injunction over various gun control laws, circuits are split as to whether an alleged violation of the Second Amendment is presumptively irreparable, i.e., whether they assume that the harm is irreparable without further factual inquiry. In the First Amendment context, the Supreme Court established in *Elrod v. Burns*[7] that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."[8] However, the Court has provided little clarity as to why First Amendment violations presumptively constitute irreparable injury and, therefore, whether the presumptive irreparability rationale in *Elrod* extends beyond the First Amendment.[9] Consequently, there is

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[1] *See* OFF. OF U.S. SURGEON GEN., FIREARM VIOLENCE: A PUBLIC HEALTH CRISIS IN AMERICA 3 (2024), https://www.ncbi.nlm.nih.gov/books/NBK605169/pdf/Bookshelf_NBK605169.pdf [perma.cc/CSK4-R7KJ].

[2] John Gramlich, *What the Data Says About Gun Deaths in the U.S.*, PEW RSCH. CTR. (Apr. 26, 2023), https://www.pewresearch.org/short-reads/2023/04/26/what-the-data-says-about-gun-deaths-in-the-u-s/ [perma.cc/7UA6-MBRW].

[3] *Id.*

[4] *See* Judith Weinstein et al., *The Public Health Crisis of Gun Violence*, CHI. HEALTH (Oct. 12, 2024), https://chicagohealthonline.com/the-public-health-crisis-of-gun-violence/ [perma.cc/4VE8-CDLM].

[5] *See, e.g.*, DEL. CODE ANN. tit. 11, §§ 1466(a), 1468(2), 1469(a) (restricting assault weapons); *see also Compare State Gun Laws*, EVERYTOWN RSCH. (Jan. 15, 2025), https://everytownresearch.org/rankings/compare/ [perma.cc/9YR4-H3NW].

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

[7] 427 U.S. 347 (1976).

[8] *Id.* at 373–74 (citing N.Y. Times Co. v. United States, 403 U.S. 713 (1971)).

[9] *See, e.g.*, Roman Cath. Diocese of Brooklyn v. Cuomo, 592 U.S. 14, 19 (2020).

a circuit split as to whether the logic of *Elrod* applies to claims arising from the Second Amendment.[10]

This Comment argues that the loss of Second Amendment rights should also receive a presumption of irreparable harm. This Comment will begin by laying out the three primary considerations relevant to this argument: traditional principles of equity, case law establishing a presumption of irreparable harm for First Amendment allegations, and precedent emphasizing the Second Amendment's importance. First, preliminary injunctions are rooted within traditional principles of equity—or general maxims developed by English courts of equity—that both emphasize discretion to the particular facts of each case and the use of history and judicial precedent to guide decision-making.[11] As a result, courts may be wary of presuming irreparable harm because it largely jettisons fact-specific analysis. Second, despite these traditional principles of equity, *Elrod* established a presumption of irreparable harm for First Amendment allegations upon establishing that there was a threat to the First Amendment right.[12] Although the explanation from *Elrod* is unclear as to why First Amendment violations are presumptively irreparable, further inquiry will illustrate the decision in *Elrod* rests upon the First Amendment's status as a fundamental, individual right. Third, courts have recognized the Second Amendment to protect a fundamental, individual right that is historically rooted.[13]

Given these considerations, this Comment will argue that Second Amendment violations are entitled to a presumption of irreparable harm because, as with rights protected by the First Amendment, Second Amendment rights are of an intangible and unquantifiable nature that protects against governmental infringement and deterrence.[14] While explaining why Second Amendment claims should receive a presumption of irreparable harm, this Comment will further expound upon a standard for determining whether a constitutional right should receive a presumption of irreparable harm. Such a presumption would (1) rectify a tension in current case law over the rationale of why harm should be presumed as irreparable, and (2) align

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[10] *See* Baird v. Bonta, 81 F.4th 1036, 1042 (9th Cir. 2023) (finding that Second Amendment claims are presumptively irreparable); Hanson v. District of Columbia, 120 F.4th 223, 244 (D.C. Cir. 2024) (declining to adopt a presumption of irreparable harm for Second Amendment allegations), *cert. denied*, 145 S.Ct. 2778 (2025); *Del. State Sportsmen's Ass'n*, 108 F.4th at 203–04 (explaining that only First Amendment allegations receive a presumption of irreparable harm); Ezell v. City of Chicago, 651 F.3d 684, 699 (7th Cir. 2011) (finding irreparable harm because of similarities between the First and Second Amendments).

[11] *See* Starbucks Corp. v. McKinney, 602 U.S. 339, 345–47 (2024); Holland v. Florida, 560 U.S. 631, 649–50 (2010).

[12] *See Elrod*, 427 U.S. at 373.

[13] *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570, 593–94 (2008).

[14] *See Ezell*, 651 F.3d at 699.

with traditional principles of equity. This Comment proposes the following standard:

> An alleged harm can be presumed as irreparable if the act directly limits an intangible and unquantifiable right. If the intangible and unquantifiable right at issue is not directly limited, the moving party must then establish a threat or existing impairment on that right at the time injunctive relief is sought.

This standard for assessing the irreparability of harm in the Second Amendment context synthesizes traditional equitable principles with the logic of *Elrod*. Thus, this standard grants the Second Amendment a presumption of irreparable harm while creating meaningful limiting principles to prevent an overbroad extension of presuming irreparable harm for all constitutional violations.

Further, this standard does not appear from thin air but rather stems from vast case law, including the relevant circuit split, that ultimately established two key principles. The first principle is that there are some rights of an intangible and unquantifiable nature that demand a presumption of irreparable harm.[15] The second principle is that a presumption of irreparable harm was found after establishing that there was a current or future threat to that right.[16] As a result, considering whether the right is (1) intangible and unquantifiable, (2) being directly implicated, and/or (3) facing an established indirect threat is principled and rooted in case law.

This Comment is timely because the very function of a preliminary injunction is to respond to crisis, and in the context of the Second Amendment, preliminary injunctions are sought in response to firearm violence. Preliminary injunctions play a role in managing crises where irreparable harm may occur absent injunctive relief. At the same time, preliminary injunctions can be disruptive in the context of constitutional rights. Given the uncertainty over when it is proper to presume irreparable harm for the alleged loss of a constitutional right, there is also a legal crisis that creates further chaos and confusion amongst courts. Consequently, clarifying how to determine whether to grant a preliminary injunction can help courts reach better decisions over how to deal with crises.

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[15] *Id.*

[16] *See, e.g.*, *Elrod*, 427 U.S. at 373 (citing N.Y. Times Co. v. United States, 403 U.S. 713 (1971)).

II. BACKGROUND TOOLS: TRADITIONAL PRINCIPLES OF EQUITY, *ELROD V. BURNS*, AND THE SECOND AMENDMENT

A. Historical Background

1. Preliminary injunctions are rooted in traditional principles of equity

Preliminary injunctions originated in the English common law system, which distinguished between courts of law and equity.[17] Courts of law provided legal remedies via damages, whereas courts of equity provided equitable remedies, such as injunctions, when a final judgment's remedy was inadequate to compensate harm.[18]

The United States's equitable authority is deeply rooted in tradition from the English courts.[19] The original debates over the Constitution's ratification demonstrated the implementation of equitable authority that was guided by how equity courts analyzed "suits in equity."[20] This understanding of equitable authority was in contrast to an understanding of equity that gave federal judges significant authority to provide relief.[21] Subsequently, Congress authorized federal courts to apply the "form and modes of proceedings" from English courts of equity.[22] After that, the Court created the Federal Equity Rules in response to Congress granting the Court authority to make rules for courts of equity.[23] The Federal Equity Rules were later replaced by the Federal Rules of Civil Procedure, which united the principles of law and equity into the American legal system.[24]

The Federal Rules of Civil Procedure, among other things, authorize federal courts to issue preliminary injunctions.[25] Preliminary injunctions are not permanent and are intended to "[preserve] the status quo before the final judgment."[26] For instance, a preliminary

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[17] *See* Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687, 699 (1990).

[18] *Id.*

[19] *See* Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. 518, 563–64 (1852); Robinson v. Campbell, 16 U.S. 212, 222–23 (1818).

[20] *See* Atlas Life Ins. Co. v. W.I.S., Inc., 306 U.S. 563, 568 (1939).

[21] *Id.*

[22] *See* Robert E. Bunker, *The New Federal Equity Rules*, 11 MICH. L. REV. 435, 435–36 (1913).

[23] *Id.* at 438.

[24] *See* Charles W. Joiner & Ray A. Geddes, *The Union of Law and Equity*, 55 MICH. L. REV. 1059, 1088 (1957).

[25] *See* FED. R. CIV. P. 65.

[26] *See generally Preliminary Injunction*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/preliminary_injunction [perma.cc/GYP3-U7N7] ("A preliminary injunction is an injunction that may be granted before or during trial, with the goal of preserving the status quo before final judgment.").

injunction would allow a plaintiff in a trade secret case to prevent further misappropriation of a trade secret—and therefore prevent the irreversible loss of a competitive business advantage—while awaiting a court's final judgment.[27] At the same time, the United States views the issuance of a preliminary injunction as "an extraordinary remedy" because, consistent with the historical practice of English courts of equity, such a remedy is not granted as of right.[28]

2. The *Winter* test and traditional principles of equity

Federal Rule of Civil Procedure 65, which governs preliminary injunctions, does not itself provide a standard for determining whether to grant a preliminary injunction.[29] Rather, in *Winter v. National Resources Defense Council, Inc.*[30] the Court established the modern four-factor test for granting a preliminary injunction.[31] Notably, the Court stated that, to obtain a preliminary injunction, a plaintiff must show they are "[1] likely to succeed on the merits, . . . [2] likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in [their] favor, and [4] that an injunction is in the public interest."[32] In other words, the first prong evaluates whether the movant has a plausible legal claim, the second prong considers whether irreversible damage would be done if the court did not grant a preliminary injunction, and the last two prongs consider the costs and benefits for the parties and society. The Court in *Winter* also noted that injunctions are "a matter of equitable discretion," which means that injunctive relief is meant to provide relief tailored towards the parties based on the particular circumstances of the case.[33]

Although *Winter* did not discuss the history behind its test, the Court had previously established that preliminary injunctions and the *Winter* factors were deeply rooted in traditional principles of equity that should not be lightly ignored.[34] For example, *Weinberger v. Romero-Barcelo*[35] confirmed that the traditional four-factor test came from longstanding equitable principles.[36] These traditional principles

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[27] *See generally* Edmond Gabbay, *All the King's Horses—Irreparable Harm in Trade Secret Litigation*, 52 FORDHAM L. REV. 804 (1984).

[28] *See* Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 24 (2008).

[29] FED. R. CIV. P. 65.

[30] 555 U.S. 7 (2008).

[31] *Id.* at 20.

[32] *Id.*

[33] *Id.* at 32.

[34] *See*, *e.g.*, Weinberger v. Romero-Barcelo, 456 U.S. 305, 311–13 (1982).

[35] 456 U.S. 305 (1982).

[36] *Id.* at 311–13.

include equitable discretion, which values flexible evaluation of each case's facts and the public consequences of granting a preliminary injunction.[37]

The prong of the *Winter* test which requires consideration of the public consequences of a preliminary injunction arises from the fact that the injunction is not final, but rather an interim decision that assesses how best to preserve the status quo until a final decision is made.[38] As a result, the Court rejects granting a preliminary injunction based solely on the plaintiff's likelihood of success on the case's merits. It is therefore important to note that the preliminary injunction test and its factors embody traditional principles of equity. Traditional principles of equity generally demand discretion to consider each case's facts and disfavor rigid analyses of the preliminary injunction factors.[39]

3. Irreparable harm as a factor under the *Winter* test

Irreparable harm is damage suffered by a plaintiff which cannot be adequately compensated after final judgment.[40] Courts presume that certain types of harm are irreparable, although they differ as to which harms they consider irreparable and why.[41]

a. Presumption of irreparable harm in the First Amendment context: Elrod v. Burns

The only constitutional harms that are explicitly recognized by the Court as presumptively irreparable are harms that arise from First Amendment violations.[42] In *Elrod*, the Court evaluated a First Amendment challenge to a practice under which public employees were discharged or threatened with termination based solely on their political affiliation.[43] The employees filed for a preliminary injunction in the Northern District of Illinois and argued that the violation of their rights to freedom of speech and association under the First Amendment

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[37] *Id.* at 313 (citing Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944)).

[38] *Id.*

[39] *See, e.g.*, Kevin J. Lynch, *Preliminary Injunctions in Public Law: The Merits*, 60 HOUS. L. REV. 1067, 1077–78 (2023).

[40] *See, e.g.*, Paul Perell, *The Interlocutory Injunction and Irreparable Harm*, 68 CAN. BAR REV. 538, 539 (1989); Beatrice Catherine Franklin, *Irreparability, I Presume: On Assuming Irreparable Harm for Constitutional Violations in Preliminary Injunctions*, 45 COLUM. HUM. RTS. L. REV. 623, 624–25 (2014) ("Reflecting this unique temporal characteristic, traditional doctrine on injunctions has imposed an irreparable harm requirement: the injunction is only proper if it serves to prevent injury that could not be repaired after the completion of the regular judicial process.").

[41] *See, e.g.*, Mitchell v. Cuomo, 748 F.2d 804, 806 (2d Cir. 1984) (finding that all deprivations of a constitutional right are presumptively irreparable).

[42] U.S. CONST. amend. I; *see also* Elrod v. Burns, 427 U.S. 347, 373 (1976).

[43] *Elrod*, 427 U.S. at 349–50.

constituted irreparable harm.[44] The district court denied the employees' motion for a preliminary injunction, finding that the employees were unable to prove irreparable harm.[45] The Seventh Circuit Court of Appeals reversed the district court's decision.[46]

The Court affirmed the Seventh Circuit's decision because First Amendment interests were "either threatened or in fact being impaired at the time relief was sought . . . [and] [t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."[47] Earlier in the opinion, the Court discussed how freedom of speech and association are fundamental to preserve "competition in ideas," emblematic of "the deeper traditions of democracy embodied in the First Amendment."[48] However, the Court in *Elrod* provided no clear explanation as to why the loss of First Amendment freedoms is, without question, irreparable.

Elrod cited *New York Times Co. v. United States*[49] in support of the principle that harms arising from First Amendment violations were presumptively irreparable.[50] In *New York Times*, the Court considered whether to prevent the New York Times and Washington Post from publishing a classified study by the government.[51] The United States had sought to prevent publication of said studies and, therefore, sought an injunction in the Southern District of New York and District of Columbia.[52] The newspapers challenged this injunction as unconstitutional under the First Amendment.[53] Both cases were granted certiorari.[54]

The Court in *Elrod* did not cite a particular page number from *New York Times*.[55] This is unfortunate because, once again, we are provided with little guidance as to what exactly makes the loss of a First Amendment right presumptively irreparable. However, the Court likely did not include a particular page number because the majority opinion in *New York Times* has little relevant discussion as to whether First Amendment violations are presumptively irreparable.[56] However,

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[44] *Id.*

[45] *Id.* at 373.

[46] *Id.* at 350.

[47] *Id.* at 373 (citing N.Y. Times Co. v. United States, 403 U.S. 713 (1971)).

[48] *Id.* at 357 (quoting Williams v. Rhodes, 393 U.S., 23, 32 (1968)).

[49] 403 U.S. 713 (1971).

[50] *Elrod*, 427 U.S. at 373 (citing *N.Y. Times*, 403 U.S. at 713).

[51] *N.Y. Times*, 403 U.S. at 714.

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *See Elrod*, 427 U.S. at 373.

[56] *See N.Y. Times*, 403 U.S. at 714.

Justice Black's concurrence provides some insight as to why the majority in *Elrod* cited *New York Times* because Justice Black says that "every moment's continuance . . . amounts to a flagrant, indefensible, and continuing violation of the First Amendment."[57] Justice Black also stated:

> In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. . . . The Framers of the First Amendment, fully aware of both the need to defend a new nation and the abuses of the English and Colonial Governments, sought to give this new society strength and security by providing that freedom of speech, press, religion, and assembly should not be abridged.[58]

In other words, Justice Black articulated that one could not permit a First Amendment violation, for even a minimum amount of time, because of the First Amendment's fundamental value in preserving our democracy by protecting peoples' rights from governmental abridgement.[59] Although Justice Black's concurrence appears to be the foundation for presuming irreparable harm, *Elrod* leaves the doctrinal basis uncertain.

b. Presumption of irreparable harm in the First Amendment context: Aftermath of Elrod

Recent Court cases illustrate that the rationale in *Elrod* applies to all clauses within the First Amendment.[60] In *Roman Catholic Diocese of Brooklyn v. Cuomo*,[61] the Court evaluated whether to grant a motion for a preliminary injunction against an executive order that restricted the number of persons that could attend religious service.[62] The Roman Catholic Diocese of Brooklyn argued that the executive order violated the Free Exercise Clause of the First Amendment.[63]

The Court granted the preliminary injunction, finding that all factors of the *Winter* test were met.[64] In doing so, the Court cited *Elrod* to establish that a person's loss of their First Amendment rights under the Free Exercise Clause, even for a minimal amount of time,

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[57] *Id.* at 715 (Black, J., concurring).

[58] *Id.* at 717–19 (Black, J., concurring).

[59] *Id.*

[60] *See* Roman Cath. Diocese of Brooklyn v. Cuomo, 592 U.S. 14, 19 (2020); Tandon v. Newsom, 593 U.S. 61, 64 (2021).

[61] 592 U.S. 14 (2020).

[62] *Id.*

[63] *Id.* at 16.

[64] *Id.*

constituted irreparable harm.[65] This ruling demonstrated that *Elrod*, which was a freedom of speech and association case, extended to other clauses—such as the Free Exercise Clause—of the First Amendment. Consequently, the rationale for presuming irreparable harm for the First Amendment must encompass several, if not all, First Amendment clauses. The Court once again did not further explain why harms occurring from First Amendment violations are granted a presumption of irreparable harm. However, the reasoning in *Roman Catholic Diocese of Brooklyn* is consistent with the reasoning from Justice Black's concurrence in *New York Times* because both decisions discuss the First Amendment's fundamental importance in preserving democracy and preventing governmental infringement.[66]

Post-*Elrod*, some circuit courts have further elaborated on the rationale in *Elrod* and when one may presume irreparable harm.[67] For instance, the Second Circuit Court of Appeals has distinguished between presuming irreparable harm for claims with direct infringement on one's First Amendment rights and claims that may indirectly cause a First Amendment violation.[68]

Kane v. De Blasio[69] illustrates the Second Circuit's different treatment towards direct and indirect threats to the First Amendment in the context of presuming irreparable harm.[70] The Second Circuit considered whether to grant a preliminary injunction against New York's COVID-19 vaccine mandate for individuals working in New York City schools.[71] The plaintiffs-appellants argued that the mandate violated the Free Exercise Clause of the First Amendment and therefore should receive a presumption of irreparable harm.[72] The Second Circuit rejected such a claim, finding that the harm occurred because of an indirect restriction on one's religious beliefs that merely caused economic harm.[73] Consequently, the court found that the harm

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[65] *Id.* at 19 ("If only 10 people are admitted to each service, the great majority of those who wish to attend Mass on Sunday or services in a synagogue on Shabbat will be barred. And while those who are shut out may in some instances be able to watch services on television, such remote viewing is not the same as personal attendance. Catholics who watch a Mass at home cannot receive communion, and there are important religious traditions in the Orthodox Jewish faith that require personal attendance.").

[66] *Id.* at 19–20.

[67] *See, e.g.*, Kane v. De Blasio, 19 F.4th 152, 172 (2d Cir. 2021); Bronx Household of Faith v. Bd. of Educ., 331 F.3d 342, 349–50 (2d Cir. 2003).

[68] *Kane*, 19 F.4th at 172; *Bronx Household of Faith*, 331 F.3d at 349–50.

[69] 19 F.4th 152 (2d Cir. 2021).

[70] *Id.* at 158.

[71] *Id.*

[72] *Id.*

[73] *Id.*

was not irreparable because the harm that arose was not a constitutional deprivation, but rather a loss of income.[74]

In *Bronx Household of Faith v. Board of Education*,[75] the Second Circuit heard a motion for preliminary injunction against a policy that excluded community groups from renting school buildings for religious purposes.[76] The plaintiffs argued that such a policy violated the Free Speech Clause of the First Amendment and therefore warranted a presumption of irreparable harm.[77] The Second Circuit refused to presume irreparable harm because the policy did not directly limit a First Amendment right, but rather only indirectly did so.[78] Although the Second Circuit acknowledged the validity of *Elrod*, the Second Circuit found that there had to be an established threat of a free speech violation.[79] The Second Circuit cited *Laird v. Tatum*,[80] which said "that to establish a cognizable claim founded on the chilling of First Amendment rights, a party must articulate a 'specific present objective harm or a threat of specific future harm.'"[81]

Laird is logically consistent with *Elrod* because the Court in *Elrod* established that First Amendment rights were "either threatened or in fact being impaired at the time relief was sought" *before* the Court held that there was a presumption of irreparable harm.[82] As a result, both *Laird* and *Elrod* required showing an actual threat to one's First Amendment rights, rather than a mere allegation that there was a First Amendment violation without evidence to support it. To summarize, the Second Circuit excludes First Amendment claims with only a potential or indirect infringement of a First Amendment right from the *Elrod* presumption in order to determine whether a First Amendment right is actually threatened.

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[74] *Id.* at 172 ("For that reason, this case is different from other pandemic-era cases that have found irreparable harm based on First Amendment violations . . . . Not so here. Plaintiffs are not required to perform or abstain from any action that violates their religious beliefs. Because Plaintiffs have refused to get vaccinated, they are on leave without pay. The resulting loss of income undoubtedly harms Plaintiffs, but that harm is not irreparable.").

[75] 331 F.3d 342 (2d Cir. 2003).

[76] *Id.*

[77] *Id.*

[78] *Id.* at 349–50 ("Where a plaintiff alleges injury from a rule or regulation that directly limits speech, the irreparable nature of the harm may be presumed . . . . In contrast, in instances where a plaintiff alleges injury from a rule or regulation that may only potentially affect speech, the plaintiff must establish a causal link between the injunction sought and the alleged injury, that is, the plaintiff must demonstrate that the injunction will prevent the feared deprivation of free speech rights.").

[79] *Id.* at 350 (quoting Laird v. Tatum, 408 U.S. 1 (1972)).

[80] 408 U.S. 1 (1972).

[81] *Bronx Household of Faith*, 331 F.3d at 350 (quoting *Laird*, 408 U.S. at 14).

[82] Elrod v. Burns, 427 U.S. 347, 373 (1976) (citing N.Y. Times Co. v. United States, 403 U.S. 713 (1971)).

c. *The Court has expressed resistance to extending* Elrod *because of traditional principles of equity*

Although there are circuits that have presumed irreparable harm beyond the First Amendment context, the Court has seemingly cautioned against an extension of such a presumption.[83] In *eBay Inc. v. MercExchange, L.L.C.*,[84] the Court found that, *among other things*, a district court's presumption of a lack of irreparable harm was impermissible.[85] The Court heard an appeal over injunctive relief against eBay that sought to prevent further patent infringement.[86] Both the district and circuit court employed the four-factor test rooted in traditional principles of equity.[87] The Court, however, rejected the district and appellate courts' mere "recit[al]" of the test and found that the courts instead had relied on impermissibly "broad classifications" when analyzing the case.[88] Specifically, the lower court had not found irreparable harm because the plaintiffs were willing to license their patents, yet were not practicing the patents for commercial activity.[89]

By rejecting these broad classifications, the Court reaffirmed the importance of traditional principles of equity in injunctive relief.[90] Specifically, the Court emphasized that judges should use their discretion to evaluate the specific facts of each case rather than ignoring the specific facts by relying on broad classifications.[91] This is because the four-factor test, as previously stated, is rooted in traditional principles of equity and, therefore, adherence to such equitable principles should not be lightly dismissed by breezing through the preliminary injunction analysis.[92] In other words, presuming irreparable harm can be seen by the Court as improperly rushing through the preliminary injunction analysis. Although *eBay* was about a permanent injunction against patent infringement,[93] the value of traditional principles of equity in the context of presuming irreparable

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[83] *See generally* eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388 (2006).

[84] 547 U.S. 388 (2006).

[85] *Id.* at 393.

[86] *Id.*

[87] *Id.*

[88] *Id.*

[89] *Id.* at 390–91.

[90] *eBay*, 547 U.S. at 394.

[91] *Id.*

[92] *Id.* at 391–92 (citing Weinberger v. Romero-Barcelo, 456 U.S. 305, 320 (1982)).

[93] *See* Amoco Production Co. v. Gambell, 480 U.S. 531, 546 n.12 (1987) (rejecting an argument distinguishing between the preliminary and permanent injunction tests and noting that the standards for preliminary and permanent injunctions are "essentially the same").

harm extends broadly to all cases that may attempt to "bypass" the *Winter* factors.

The Court has continued to emphasize traditional principles of equity in preliminary injunction analysis.[94] In *Starbucks Corp. v. McKinney*,[95] the Court concluded that the *Winter* preliminary injunction test applies to injunctions under the National Labor Relations Act (NLRA).[96] Although some courts had historically applied a "less exacting" standard to such injunctions, the Court held that the *Winter* test still applied because the specific language of the NLRA did not explicitly "jettison the normal equitable rules."[97] This matters because *McKinney* reaffirmed that the four factors in the *Winter* test are relevant traditional principles of equity in a preliminary injunction analysis.[98] Additionally, *McKinney* discussed the role of the preliminary injunction as an "extraordinary remedy" that "is merely to preserve the relative positions of the parties until a trial on the merits can be held."[99] As a result, the Court emphasized the preliminary injunction's purpose in considering how its remedial effects may alter the status quo rather than merely trying to eliminate all harm—even if irreparable.[100]

Despite the Court's emphasis on using judicial discretion to rigorously evaluate each case's facts, the Court has noted the role history and precedent have in guiding courts' decision-making.[101] In *Holland v. Florida*,[102] the Court discussed how traditional principles of equity permit an "exercise [of] judgment in light of prior precedent, but with awareness of the fact that specific circumstances, often hard to predict in advance, could warrant special treatment in an appropriate case."[103] Consequently, traditional principles of equity value not only the discretionary function of the courts, but also the consideration of history and precedent.

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[94] *See generally* Starbucks Corp. v. McKinney, 602 U.S. 339 (2024).

[95] 602 U.S. 339 (2024).

[96] *Id.; see also* National Labor Relations Act, 29 U.S.C. §§ 151–69.

[97] *McKinney*, 602 U.S. at 347.

[98] *Id.* at 345.

[99] *Id.* at 346 (quoting Univ. of Tex. v. Camenisch, 451 U.S. 390, 395 (1981)).

[100] *Id.*

[101] *See generally* Holland v. Florida, 560 U.S. 631 (2010).

[102] 560 U.S. 631 (2010).

[103] *Id.* at 650.

4. The Second Amendment and its jurisprudence

The Second Amendment protects the right to "keep and bear arms."[104] In *District of Columbia v. Heller*,[105] the Court clarified that the Second Amendment protects the arms of citizens "for lawful purposes" such as self-defense.[106] Importantly, *Heller* articulated that the Second Amendment has, since the founding, been considered to protect a fundamental right."[107] In *United States v. Cruikshank*,[108] the Court established that the Second Amendment has "no other effect than to restrict the powers of the national government, leaving the people to look for their protection against any violation by their fellow-citizens of the rights it recognizes."[109] This case law demonstrates that both the First and Second Amendments are fundamental rights that protect people from governmental infringement and deterrence.

In *New York State Rifle & Pistol Ass'n v. Bruen*,[110] the Court established a framework for evaluating Second Amendment challenges that looked at whether the challenged law is "relevantly similar" to what our tradition permits.[111] The Court elaborated upon the *Bruen* framework in *United States v. Rahimi*,[112] where the Court said:

> A court must ascertain whether the new law is "relevantly similar" to laws that our tradition is understood to permit, "apply[ing] faithfully the balance struck by the founding generation to modern circumstances." . . . Even when a law regulates arms-bearing for a permissible reason, though, it may not be compatible with the right if it does so to an extent beyond what was done at the founding.[113]

The Court's framework rejected governmental interest-balancing and means-end scrutiny in favor of a historical analysis. In other words, the Court rejected "[asking] whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests."[114] Given the Second Amendment's status as a fundamental right, the framers

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[104] U.S. CONST. amend. II.

[105] 554 U.S. 570 (2008).

[106] *Id.* at 624–26.

[107] *Id.* at 593–94.

[108] 92 U.S. 542 (1875).

[109] *Id.* at 553.

[110] 597 U.S. 1 (2022).

[111] *Id.* at 17, 24.

[112] 602 U.S. 680 (2024).

[113] *Id.* at 692 (quoting *Bruen*, 597 U.S. at 29).

[114] *Bruen*, 597 U.S. at 22.

already contemplated the balancing of interests between a law-abiding citizen's right to bear arms and the government's interest in restricting it.[115]

Relatedly, the Court also emphasized that the Second Amendment is not "a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees."[116] Simply put, the Second Amendment's protection of a fundamental right means that it should not be treated as lesser—in this case, subject to interest-balancing—than other rights like those protected by the First Amendment.[117]

In summary, determining whether rights under the Second Amendment are entitled to a presumption of irreparable harm requires three primary considerations: (1) traditional principles of equity, (2) the presumption of irreparable harm for the deprivation of First Amendment rights, and (3) jurisprudence establishing Second Amendment rights as fundamental.

III. THERE IS A CIRCUIT SPLIT AS TO WHETHER THE DEPRIVATION OF SECOND AMENDMENT RIGHTS IS PRESUMPTIVELY IRREPARABLE

A. There is Confusion as to Whether the Rationale in *Elrod* Extends to Other Constitutional Rights

Multiple circuits have extended *Elrod* to deprivations of other constitutional rights.[118] To clarify, the circuit split for this Comment is narrower, i.e., whether the deprivation of Second Amendment rights unquestionably constitutes irreparable harm. However, explanation of the confusion generally amongst other constitutional rights may help situate this Comment's purpose in addressing the particular Second Amendment related circuit split. In *Mitchell v. Cuomo*,[119] the Second Circuit stated that "[w]hen an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary."[120] The Sixth and Ninth Circuits have

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[115] *Id.* at 23 ("[T]he very enumeration of the right takes out of the hands of government . . . the power to decide on a case-by-case basis whether the right is really worth insisting upon." (quoting District of Columbia v. Heller, 554 U.S. 570, 634 (2008))).

[116] *Id.* at 70 (quoting McDonald v. Chicago, 561 U.S. 742, 780 (2010)).

[117] *Id.*

[118] *See, e.g.*, Mitchell v. Cuomo, 748 F.2d 804, 806 (2d Cir. 1984) (finding that all deprivations of a constitutional right are presumptively irreparable); ACLU of Ky. v. McCreary County, 354 F.3d 438, 445 (6th Cir. 2003), *aff'd*, 545 U.S. 844 (2005) ("[I]f it is found that a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated."); Monterey Mech. Co. v. Wilson, 125 F.3d 702, 715 (9th Cir. 1997) ("We have stated that an alleged constitutional infringement will often alone constitute irreparable harm."(quoting Associated Gen. Contractors of Cal., Inc. v. Coal. for Econ. Equity, 950 F.2d, 1401, 1412 (9th Cir. 1991))).

[119] 748 F.2d 804 (2d Cir. 1984).

[120] *Id.* at 806 (quoting 11 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE

also extended *Elrod* to all alleged constitutional violations.[121] In all of these decisions, no further explanation was provided for this extension.

Although the Second, Sixth, and Ninth Circuit Courts of Appeals presume irreparable harm for all harms arising from constitutional challenges, other circuits do not have such a broad presumption of irreparable harm. In particular, the Third, Seventh, and Eleventh Circuit Courts of Appeals have rejected extending a presumption of irreparable harm toward every constitutional claim.[122] The Eleventh Circuit, specifically, warned against expanding a presumption of irreparable harm beyond the First Amendment and the right to privacy.[123] In *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville*,[124] the Eleventh Circuit established that the only constitutional deprivations that are presumptively irreparable concern the First Amendment and the right to privacy because of these rights' intangible natures.[125] As the word "intangible" suggests, courts have been unclear on what constitutes an "intangible" right.[126]

Circuits disagree as to which, if any, violations of constitutional rights should be presumed as irreparable outside of the First Amendment.[127] Unpacking the rationale behind *Elrod* is not only

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AND PROCEDURE § 2948 (1973)).

[121] *See ACLU of Ky.*, 354 F.3d at 445; *Monterey Mech.*, 125 F.3d at 715; Zepeda v. INS, 753 F.2d 719, 727 (9th Cir. 1983) (applying the presumption of irreparable harm to the Fourth Amendment); Am. Trucking Ass'ns, Inc. v. City of Los Angeles, 559 F.3d 1046, 1058–59 (9th Cir. 2009) (extending the presumption of irreparable harm to the Supremacy Clause).

[122] *See, e.g.*, Hohe v. Casey, 868 F.2d 69, 73 (3d Cir. 1989) ("Constitutional harm is not necessarily synonymous with the irreparable harm necessary for issuance of a preliminary injunction."); Campbell v. Miller, 373 F.3d 834, 835 (7th Cir. 2004) (rejecting constitutional harms that amount to a "constitutional tort"); Pub. Serv. Co. of N.H. v. Town of West Newbury, 835 F.2d 380, 382 (1st Cir. 1987) (declining to presume irreparable harm for a procedural due process violation); Cunningham v. Adams, 808 F.2d 815, 821–22 (11th Cir. 1987) (declining to extend a presumption of irreparable harm to the Fourteenth Amendment).

[123] *See, e.g.*, Siegel v. LePore, 234 F.3d 1163, 1177–78 (11th Cir. 2000).

[124] 896 F.2d 1283 (11th Cir. 1990).

[125] *Id.* at 1285–86 ("The rationale behind these decisions was that chilled free speech and invasions of privacy, because of their intangible nature, could not be compensated for by monetary damages; in other words, plaintiffs could not be made whole. The facts of this case do not fit the rationale of these decisions. This case involves neither a [F]irst [A]mendment nor a right of privacy claim; and the damage to plaintiff here is chiefly, if not completely, economic."); *see also* Deerfield Med. Ctr. v. City of Deerfield Beach, 661 F.2d 328, 338 (5th Cir. 1981) (noting the similarities between the First Amendment and the right to privacy in terms of intangibility) ("Similarly the right of privacy must be carefully guarded for once an infringement has occurred it cannot be undone by monetary relief.").

[126] *See generally* Ezell v. City of Chicago, 651 F.3d 684 (7th Cir. 2011) (noting that First and Second Amendment rights are intangible and unquantifiable but not elaborating as to how one determines that).

[127] *See, e.g.*, Mitchell v. Cuomo, 748 F.2d 804, 806 (2d Cir. 1984) (finding that all deprivations of a constitutional right are presumptively irreparable); *Hohe*, 868 F.2d at 73 ("Constitutional harm is not necessarily synonymous with the irreparable harm necessary for issuance of a

important in a First Amendment context, but also with respect to other constitutional rights. In essence, understanding why harms flowing from First Amendment violations are presumptively irreparable will clarify whether the deprivation of other constitutional rights may also be presumptively irreparable.

B. The Presumption of Irreparable Harm in the Second Amendment Context

In particular, circuits disagree over the application of the *Winter* test and whether irreparable harm should be presumed in a Second Amendment context.[128] This circuit split involves disagreement over the role of preliminary injunctions and the scope of the Court's rationale in *Elrod*.[129]

1. The Ninth Circuit presumes irreparable harm in Second Amendment preliminary injunction cases because the Second Amendment is not a second-class right

In *Baird v. Bonta*,[130] the Ninth Circuit evaluated a preliminary injunction claim over California's statewide ban on the open carry of a firearm.[131] The case was appealed after the district court denied a preliminary injunction without analyzing the petitioners' likelihood of success on the merits of their claim or whether petitioners were likely to suffer irreparable harm.[132] The Ninth Circuit found that the lower court had abused its discretion in failing to consider the first factor and noted that "[i]t is well-established that the first factor is especially important when a plaintiff alleges a constitutional violation and injury."[133] The Ninth Circuit reasoned that a constitutional challenge "will almost always demonstrate [the moving party] is suffering irreparable harm as well" regardless of the length of the violation

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preliminary injunction.").

[128] *See* Baird v. Bonta, 81 F.4th 1036, 1042 (9th Cir. 2023) (finding that Second Amendment claims are presumptively irreparable); Hanson v. District of Columbia, 120 F.4th 223, 244 (D.C. Cir. 2024) (declining to adopt a presumption of irreparable harm for Second Amendment allegations), *cert. denied,* 145 S.Ct. 2778 (2025); Del. State Sportsmen's Ass'n v. Del. Dept. of Safety & Homeland Sec., 108 F.4th 194, 203–04 (3d Cir. 2024) (explaining that only First Amendment allegations receive a presumption of irreparable harm), *cert. denied sub nom.* Gray v. Jennings, 145 S.Ct. 1049 (2025) (mem.); *Ezell*, 651 F.3d at 699 (finding irreparable harm because of similarities between the First and Second Amendments).

[129] *Baird*, 81 F.4th at 1042 (9th Cir. 2023); *Hanson*, 120 F.4th at 244; *Del. State Sportsmen's Ass'n*, 108 F.4th at 203–04; *Ezell*, 651 F.3d at 699.

[130] 81 F.4th 1036 (9th Cir. 2023).

[131] *Id.*

[132] *Id.* at 1039–40.

[133] *Id.* at 1040.

because "[t]he deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'"[134] Although *Baird* concerned extending a presumption of irreparable harm to Second Amendment claims, the Ninth Circuit's logic applies to every constitutional claim because the rationale was based upon the Second Amendment being a constitutional right.[135]

Additionally, the Ninth Circuit cited *Bruen* to establish that because Second Amendment rights are not "second-class," the Second Amendment should be entitled to the same presumption of irreparable harm as the First Amendment.[136] Otherwise, the Second Amendment would be "subject to an entirely different body of rules than the other Bill of Rights guarantees."[137] Lastly, the Ninth Circuit discussed the importance of the likelihood of the merits in the preliminary injunction context.[138] The court articulated how showing a likelihood of success on the merits "tips the public interest sharply in [the moving party's] favor because it is 'always in the public interest to prevent the violation of a party's constitutional rights.'"[139] While the Ninth Circuit did acknowledge that courts should consider all four factors, it emphasized the "settled interplay between the factors" in holding that the first factor is the decisive one and must always be considered.[140]

2. The District of Columbia Circuit Court of Appeals does not presume irreparable harm for Second Amendment allegations because preliminary injunctions are meant to serve as stopgaps

The Ninth Circuit's presumption of irreparable harm for Second Amendment harm is not uniformly held among the circuits.[141] The D.C. Circuit has stated that irreparable harm from a constitutional violation is insufficient by itself to warrant a preliminary injunction.[142] In *Hanson v. District of Columbia*,[143] the court heard an injunction claim

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[134] *Id.* at 1042 (quoting Melendres v. Arpaio, 695 F.3d 990, 1002 (9th Cir. 2012)).

[135] *Id.*

[136] *Baird*, 81 F.4th at 1042 (quoting McDonald v. City of Chicago, 561 U.S. 742, 780 (2010)).

[137] *Id.*

[138] *Id.*

[139] *Id.* (citing Riley's Am. Heritage Farms v. Elsasser, 32 F.4th 707, 731 (9th Cir. 2022)).

[140] *Id.* at 1044.

[141] *See generally* Hanson v. District of Columbia, 120 F.4th 223 (D.C. Cir. 2024), *cert. denied*, 145 S.Ct. 2778 (2025).

[142] *Id.*

[143] 120 F.4th 223 (D.C. Cir. 2024), *cert. denied,* 145 S.Ct. 2778 (2025).

over a statute criminalizing the possession of a gun magazine capable of holding greater than ten rounds.[144]

First, the D.C. Circuit emphasized the role of the preliminary injunction as a "stopgap measure."[145] The court cited *McKinney* to hold that, even with a showing of irreparable harm, a preliminary injunction is not a matter of right nor a "shortcut to the merits" and is meant to "preserve the relative positions of the parties until a trial on the merits can be held" that does not necessitate preventing all harm.[146] Consequently, the court noted that, although the public interest in protecting constitutional rights "rises and falls with the strength of [the moving party's] showing," a constitutional violation does not necessarily warrant collapsing the third and fourth prongs of the *Winter* test.[147] To rephrase, the court found that judges should be hesitant to provide preliminary relief that functionally provides relief that the movant would be entitled to post-trial, even if there is irreparable harm, because of its potential to disrupt the status quo.[148]

Additionally, the court in *Hanson* also found that an alleged deprivation of a Second Amendment right is insufficient to establish a presumption of irreparable harm because the plaintiff must show why meaningful relief cannot be given post-trial.[149] The D.C. Circuit argued that their holding does not make the Second Amendment a "second-class" right because other circuits, such as the Second Circuit, have also required plaintiffs to show why a final judgment cannot provide adequate relief for First Amendment challenges.[150] In other words, subjecting every constitutional right to such a requirement demonstrates that all rights were being treated equally. As a result, the court required a demonstration that the injury "is sufficiently certain, persuasively demonstrated, and so clearly irremediable that it warrants a court reaching out to grant a preliminary injunction before the merits are resolved."[151] The court in *Hanson* found that there was no specific articulation of irreparable harm from not being able to fire

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[144] *Id.*

[145] *Id.* at 247.

[146] *Id.* at 244 (quoting Starbucks Corp. v. McKinney, 602 U.S. 339, 346 (2024)).

[147] *Id.* at 247.

[148] *Id.* (citing Archdiocese of Wash. v. Wash. Metro. Area Transit Auth., 897 F.3d 314, 335 (D.C. Cir. 2018)).

[149] *Hanson*, 120 F.4th at 244.

[150] *Id.* ("Even in the sensitive areas of freedom of speech and religion, where the risk of chilling protected conduct is especially high, we do not 'axiomatically' find that a plaintiff will suffer irreparable harm simply because it alleges a violation of its rights. Rather, a plaintiff must show why the court will be unable to grant meaningful relief following trial.").

[151] *Id.* ("Hanson must demonstrate injury that is sufficiently certain, persuasively demonstrated, and so clearly irremediable that it warrants a court reaching out to alter the status quo before the merits are resolved.").

more than ten rounds at once and that the plaintiff's theory was, at best, a remote and not time-sensitive conjecture.[152]

To summarize, the court in *Hanson* emphasized the importance of preserving the status quo until final judgment and that a preliminary injunction may therefore permit some level of irreparable harm.

3. The Third Circuit does not presume irreparable harm for Second Amendment violations because the First Amendment protects a unique right

The Third Circuit, like the D.C. Circuit, refused to extend a presumption of irreparable harm to Second Amendment rights.[153] In *Delaware State Sportsmen's Ass'n v. Delaware Department of Safety & Homeland Security*,[154] the court heard a preliminary injunction challenge over Delaware's assault-weapon and large magazine bans.[155]

The Third Circuit found that a broad presumption of irreparable harm goes against traditional principles of equity that are meant to ensure that district courts consider the specific facts of a case.[156] The Third Circuit, citing *eBay*, found that "district courts must apply their equitable discretion to the facts of each case."[157] The Third Circuit cautioned against the Ninth Circuit's approach toward presuming irreparable harm because it risks "collaps[ing] the four factors into one [i.e., the likelihood of success on the merits]."[158] The Third Circuit rejected such an approach because the court reasoned, like in *Hanson*, that injunctions constitute "extraordinary relief" which "does not follow from success on the merits as a matter of course."[159] Thus, a collapsed approach would lead to a "rushed judgment" on the merits that goes against traditional principles of equity.[160] To reiterate, the Third Circuit warned against a view of preliminary injunctions as a short-cut to the merits because it contravenes traditional equitable principles.[161]

The Third Circuit, however, held that First Amendment rights warrant a broad presumption of irreparable harm despite the

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[152] *Id.* at 245.

[153] *See* Del. State Sportsmen's Ass'n v. Del. Dept. of Safety & Homeland Sec., 108 F.4th 194 (3d Cir. 2024), *cert. denied sub nom.* Gray v. Jennings, 145 S.Ct. 1049 (2025) (mem.).

[154] 108 F.4th 194 (3d Cir. 2024), *cert. denied sub nom.* Gray v. Jennings, 145 S.Ct. 1049 (2025) (mem.).

[155] *Id.*

[156] *Id.* at 203.

[157] *Id.* (citing eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 394 (2006)).

[158] *Id.* at 202.

[159] *Id.* (quoting Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 24, 32 (2008)).

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

[161] *Id.*

aforementioned traditional principles of equity.[162] The Third Circuit argued that First Amendment rights are entitled to a presumption of irreparable harm because of First Amendment jurisprudence's longstanding principles of having a "heavy presumption" against prior restraints and deferring to "sincere religious belief" because "[c]ourts are ill-suited to weigh religious harms."[163] The Third Circuit noted that presuming irreparable harm is "the exception, not the rule."[164] Thus, by the Third Circuit's reasoning, there are instances where presuming irreparable harm is permissible even with the existence of traditional principles of equity.

4. It is unclear whether the Seventh Circuit presumes irreparable harm for Second Amendment allegations

In *Ezell v. City of Chicago*,[165] the Seventh Circuit reversed and remanded a district court decision denying a preliminary injunction over a Chicago ordinance that banned firing ranges.[166] The Seventh Circuit reasoned that First Amendment violations are presumed as irreparable because of a First Amendment right's intangible nature and "the fear that . . . persons will be deterred . . . from exercising those rights in the future."[167] In summary, the Seventh Circuit attributes the First Amendment's presumption of irreparable harm to its intangible and fundamental nature, which, in this case, is the First Amendment's fundamental role in protecting rights from outside infringement.

The Seventh Circuit then reasoned that harms flowing from Second Amendment violations are similar to claims arising under First Amendment violations because both implicate "intangible and unquantifiable interests."[168] The Seventh Circuit cited *Heller* to demonstrate that the right to protect oneself via firearm possession is intangible and unquantifiable and therefore cannot be remedied via monetary damages.[169] It is important to note that the Seventh Circuit

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[162] *Id.* at 204 ("Unique First Amendment doctrines warrant that [exception of presuming irreparable harm]. Take the 'heavy presumption' against prior restraints on speech . . . . First Amendment activity, like weekly worship and political speech, can be especially time-sensitive . . . . Or take courts' deference to sincere religious belief. Courts are ill-suited to weigh religious harms, much less assess whether they would be irreparable. If a believer's religious scruples are sincere, courts will not second-guess their centrality.").

[163] *Id.*

[164] *Id.*

[165] 651 F.3d 684 (7th Cir. 2011).

[166] *Id.*

[167] *Id.* at 699 (quoting Miles Christi Religious Ord. v. Township of Northville, 629 F.3d 533, 548 (6th Cir. 2010)).

[168] *Id.*

[169] *Id.*

said that "for some kinds of constitutional violations, irreparable harm is presumed."[170] For example, the Seventh Circuit cited substantive claims that are characterized as a "constitutional tort" as unworthy of a presumption of irreparable harm.[171] The Seventh Circuit also cited procedural claims that were characterized as an "improper" order as claims that would be remediable via damages.[172] Although the explanation by the Seventh Circuit was unclear as to what constitutes an "intangible" or "unquantifiable" right, the reasoning in *Ezell* demonstrates that not every constitutional right is "intangible" or "unquantifiable." As a result, the Seventh Circuit left the door open to further determine which constitutional rights are presumptively irreparable.

It is vital to recognize, however, that the Seventh Circuit did not rule that the deprivation of Second Amendment rights was presumptively irreparable.[173] Rather, the Seventh Circuit, having likened the First and Second Amendment rights, found that the Second Amendment violation in this specific instance constituted irreparable harm.[174]

The Seventh Circuit in *Bevis v. Naperville*[175] expressed uncertainty over whether harms arising from a Second Amendment violation should be presumed as irreparable.[176] The court, additionally, declined to address how to view the balance of equity and public interest prongs in a Second Amendment context; the Seventh Circuit said it had "no need to decide whether an alleged Second Amendment violation gives rise to a presumption of irreparable harm, and if so, whether any such presumption is rebuttable or ironclad."[177] This was because the Seventh Circuit found that there was no strong likelihood of success on the merits, so the court was able to deny a motion for preliminary injunction simply because it failed the first factor of the *Winter* test.[178]

In the dissent, however, Judge Brennan cited *Ezell* to argue that the Seventh Circuit implicitly recognized a presumption of irreparable

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[170] *Id.*

[171] *Ezell*, 651 F.3d at 699 n.10 (citing Campbell v. Miller, 373 F.3d 834, 835 (7th Cir. 2004) (rejecting constitutional harms that amount to a "constitutional tort" and are "often . . . analogized to (other) personal-injury litigation.")).

[172] *Id.* (citing Pub. Serv. Co. of N.H. v. Town of West Newbury, 835 F.2d 380, 382 (1st Cir. 1987) (declining to presume irreparable harm for a procedural due process claim because "[a]n improper order requiring the removal of utility poles can easily be remedied by damages")).

[173] *Id.* at 699–700.

[174] *Id.*

[175] 85 F.4th 1175 (7th Cir. 2023), *cert. denied sub nom.* Harrel v. Raoul, 144 S. Ct. 2491 (2024) (mem.).

[176] *Id.*

[177] *Id.* at 1202–03.

[178] *Id.* at 1188.

harm for Second Amendment violations because the Second Amendment's form and substance means there is no adequate legal remedy for violating a Second Amendment right.[179] Given the Seventh Circuit not committing to the rationale of *Ezell*, there is uncertainty as to whether the Seventh Circuit will presume irreparable harm in a Second Amendment context.

To conclude, *Ezell* teased out the Second Amendment's intangible and unquantifiable nature that makes it similar to the First Amendment. And although this rationale may seem precedential, *Bevis* illustrated that that rationale was dicta and, therefore, may not be deemed good rationale in the future.

5. Table summarizing circuit split

Circuit	**Case**	**Presume 2A?**	**Rationale**
D.C.	*Hanson v. District of Columbia*	No	Preliminary injunctions are "stopgap measures"; must show why meaningful relief cannot be given post-trial
Third	*Delaware State Sportsmen's Ass'n v. Delaware Dep't of Safety*	No	Broad presumption goes against traditional principles of equity; First Amendment is unique
Seventh	*Ezell v. City of Chicago*	Maybe	Second Amendment has "intangible and unquantifiable" nature like First Amendment; not all constitutional rights
Seventh	*Bevis v. Naperville*	Maybe	*Ezell* is dicta; declined to decide
Ninth	*Baird v. Bonta*	Yes	Second Amendment is not a "second-class" right; constitutional deprivations

[179] *Id.* at 1219 (Brennan, J., dissenting).

			"unquestionably constitute irreparable injury"

IV. COURTS SHOULD ADOPT A STANDARD FOR PRESUMING IRREPARABLE HARM

This Comment advances four main arguments. First, Second Amendment rights warrant a presumption of irreparable harm like First Amendment rights. Second, the Third Circuit's attempts to distinguish the First Amendment from the Second Amendment should be rejected. Third, a presumption of irreparable harm for the deprivation of Second Amendment rights is consistent with traditional principles of equity. Lastly, this Comment proposes a standard for presuming irreparable harm that aligns with traditional principles of equity and considers concerns vocalized by the D.C. and Third Circuits. This standard will determine whether a harm is presumptively irreparable based on (1) whether the right is intangible and unquantifiable, (2) whether the right is being directly limited, and (3) if the right is indirectly being limited, whether there is a threat or existing impairment on that right.

A. Courts Should Presume Irreparable Harm for Second Amendment Allegations in Accordance with *Ezell*

The Court should utilize *Ezell* to explain why Second Amendment rights also warrant a presumption of irreparable harm. The Seventh Circuit in *Bevis* did not deny a presumption of irreparable harm toward allegations arising under the Second Amendment, rather it merely left the question open for another day.[180] Consequently, the Seventh Circuit did not foreclose applying the rationale of *Ezell* to future Second Amendment challenges. The logic of *Ezell* is preferable to resolve the circuit split because it most closely aligns with the logic from *Elrod* and *Roman Catholic Diocese of Brooklyn* as to why harms flowing from the First Amendment are presumptively irreparable.

Harms originating from First Amendment violations, "for even minimal periods of time," warrant a presumption of irreparable injury because of the First Amendment's fundamental nature in protecting persons' rights from governmental infringement.[181] *Elrod* and *Roman Catholic Diocese of Brooklyn* presume irreparable harm for different

[180] *Id.* at 1202–03.

[181] *See* Elrod v. Burns, 427 U.S. 347, 373 (1976) (citing N.Y. Times Co. v. United States, 403 U.S. 713 (1971)).

clauses of the First Amendment, so the reasoning for presuming irreparable harm cannot be limited to a unique trait of either free speech, free association, religious expression, etc.[182] As the Court in *New York Times* suggested, the First Amendment is important to preserve deep traditions of democracy.[183] As *New York Times* further explained, this deep tradition of democracy is to empower the people to express their rights against an abuse of governmental authority.[184]

The Court's reasoning in *Elrod* and *Roman Catholic Diocese of Brooklyn*, however, does not generally apply to all harms that arise from an allegation of constitutional harm.[185] For example, the Court could have said that the First Amendment is fundamental because it is a constitutional right. Instead, the Court justified its reasoning based on specific qualities of the First Amendment (e.g., individual, fundamental right).[186] So, although other constitutional amendments could share key characteristics with the First Amendment, the Court seemingly did not intend for this presumption to apply to every right. Consequently, the Ninth Circuit's approach to presuming irreparable harm for all constitutional harms is incorrect.

The Seventh Circuit, however, rightfully aligns the logic of *Elrod* and *Roman Catholic Diocese of Brooklyn* to other constitutional harms in *Ezell*. Like in *Elrod*, the Seventh Circuit in *Ezell* notes that First Amendment violations are presumptively irreparable because of a First Amendment right's intangible and unquantifiable nature that necessitates safeguarding to prevent the government from broadly deterring its exercise.[187] Even if such harm occurs for even a minimal amount of time, the fundamental nature of the deprived right means that the moving party cannot be adequately compensated after a final judgment.

Claims originating from a Second Amendment violation should receive a presumption of irreparable harm because the reasoning for presuming irreparable harm in *Elrod* logically extends to Second Amendment harms. As discussed in *Ezell*, the Second Amendment also serves to protect an intangible and unquantifiable interest (i.e., the right for a law-abiding citizen to protect oneself) from governmental infringement and deterrence onto other individuals who have such a

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[182] *See id.* at 357 (quoting Williams v. Rhodes, 393 U.S. 23, 32 (1968)); Roman Cath. Diocese of Brooklyn v. Cuomo, 592 U.S. 14, 19 (2020)).

[183] *N.Y. Times*, 403 U.S. at 715 (Black, J., concurring).

[184] *Id.*

[185] *See, e.g.*, *Elrod*, 427 U.S. at 357 (quoting *Williams*, 393 U.S. at 32).

[186] *Id.*

[187] Ezell v. City of Chicago, 651 F.3d 684, 699 (7th Cir. 2011) (quoting Miles Christi Religious Ord. v. Township of Northville, 629 F.3d 533, 548 (6th Cir. 2010)).

right.[188] This is overwhelmingly supported by Second Amendment jurisprudence, such as *Heller*, which establishes that both the First and Second Amendments protect fundamental rights that are intended to prevent governmental infringement.[189] Thus, the deprivation of a Second Amendment right, for even a minimal amount of time, should be presumptively irreparable.

When establishing whether the deprivation of Second Amendment rights should receive a presumption of irreparable harm like the loss of First Amendment rights, it is unnecessary to determine whether the Second Amendment is protecting a "second-class" right. This is because regardless of whether the Second Amendment protects a "first" or "second-class" right, the right to bear arm's intangible and unquantifiable nature warrants a presumption like the First Amendment.

It is worth noting, however, several concerns with this "second-class" argument. First, the language from *Bruen* discussing the "second-class" argument is that the Second Amendment is "subject to an entirely different body of rules than the other Bill of Rights guarantees."[190] It is not clear that a presumption of irreparable harm subjects the Second Amendment to an "entirely different" set of rules. After all, a presumption of irreparable harm has the court undergo the same four-factor *Winter* analysis with a quicker resolution of the irreparable harm prong.

More importantly, the "second-class" argument is concerning because if courts were to presume irreparable harm for the loss of First and Second Amendment rights based on the need to treat the rights equally, then it would justify presuming irreparable harm for the deprivation of any right in the Bill of Rights. If harms flowing from the First and Second Amendments were the only constitutional rights to be considered presumptively irreparable, then that would leave other Bill of Rights violations as "second-class."[191] This "second-class" argument rejects treating any of the rights in the Bill of Rights as lesser than one another.[192] So, courts would likely then require presuming irreparable harm for every right in the Bill of Rights. Given traditional principles of equity and hesitance toward jettisoning fact-specific analysis, we should err towards a more limiting principle that does not broadly

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[188] *Id.*

[189] District of Columbia v. Heller, 554 U.S. 570, 592 (2008).

[190] N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 70 (2022) (quoting McDonald v. Chicago, 561 U.S. 742, 780 (2010).

[191] *Id.*

[192] *Id.*

classify many constitutional rights to be presumptively irreparable.[193] This Comment's approach is therefore preferable.

B. The Third Circuit's Attempts to Distinguish the First Amendment from the Second are Unpersuasive

The Third Circuit attempts to distinguish the First Amendment from the Second Amendment in *Delaware State Sportsmen's Ass'n* by arguing that a First Amendment right's time-sensitivity and judicial deference to sincere religious belief is something the Second Amendment does not possess.[194] This distinction is insignificant for multiple reasons.

First, the Third Circuit's justifications are incomplete; the presumption for the Free Speech Clause is related to time-sensitivity and the presumption for the Free Exercise Clause exists because of deference to religious claims. Taken together however, the Third Circuit did not provide a holistic reason for the entire First Amendment that distinguishes it from the Second Amendment. The Third Circuit's explanation should be disfavored because it provides a disjointed, arbitrary explanation for whether a harm is presumptively irreparable. In other words, why should time-sensitivity and deference be the only criteria to warrant a presumption, and why should a First Amendment clause qualify if it only meets one criterion? Furthermore, the Third Circuit's explanation still does not explain why the deprivation of the freedom of association was deemed to be presumptively irreparable in *Elrod*. On the other hand, the reasoning in *Ezell* holistically explains why the First Amendment receives a presumption of irreparable harm: the rights' intangible and unquantifiable nature.[195]

Second, even if one viewed time-sensitivity and deference to religious claims as legitimate reasons to presume irreparable harm, the Second Amendment possesses such characteristics.[196] As discussed in *Heller*, the Second Amendment permits law-abiding citizens to lawfully defend themselves.[197] This is logically time-sensitive, as intrusion of one's home and/or assault on one's body can occur at any time and, therefore, a loss of one's fundamental right to protect themselves while

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[193] eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 390–91 (2006).

[194] Del. State Sportsmen's Ass'n v. Del. Dept. of Safety & Homeland Sec., 108 F.4th 194, 204 (3d Cir. 2024), *cert. denied sub nom.* Gray v. Jennings, 145 S.Ct. 1049 (2025) (mem.).

[195] Ezell v. City of Chicago, 651 F.3d 684, 699 (7th Cir. 2011) (quoting Miles Christi Religious Ord. v. Township of Northville, 629 F.3d 533, 548 (6th Cir.2010)).

[196] *See, e.g.*, N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 23 (2022) ("[T]he very enumeration of the right takes out of the hands of government . . . the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." (quoting District of Columbia v. Heller, 554 U.S. 570, 634 (2008)).

[197] *Heller*, 554 U.S. at 628.

waiting for final judgment is also not something that can be monetarily compensated.

Additionally, the Court also shows deference towards Second Amendment claims. Specifically, *Bruen* rejected an interest-balancing approach (i.e., a standard that weighs harms) in favor of a historical test for Second Amendment challenges.[198] This is because, given a Second Amendment right's fundamental status, the framers have already contemplated the balancing of interests between a law-abiding citizen's right to bear arms and the government's interest in restricting such arms.[199] To summarize, the Court defers to historical analogues, rather than weighing the interests of the government against one's right to bear arms on a case-by-case basis, to evaluate Second Amendment claims.[200] As a result, the Court also disfavors judicial balancing in the context of Second Amendment litigation. Therefore, the Third Circuit's justifications are also unpersuasive because the Second Amendment also protects a time-sensitive right that requires deference.

C. Presuming Irreparable Harm for Second Amendment Violations Does Not Contravene Traditional Principles of Equity

Although the D.C. and Third Circuits are incorrect in denying a presumption of irreparable harm toward alleged violations of the Second Amendment, those circuits are correct in cautioning against contravening traditional principles of equity. As shown in *eBay*, traditional principles of equity are not to be lightly discarded.[201] *McKinney* reaffirms that the *Winter* prongs are relevant traditional principles of equity that demand discretion to the particular facts of each case.[202] Additionally, traditional principles of equity demonstrate the preliminary injunction's role as a stopgap measure that is meant to stabilize the status quo and the relative positions of each party until final judgment.[203] Circuits are correct to be concerned against an overly broad extension of presuming irreparable harm, as too broad of an extension can—like in *Baird*—bypass case-specific analysis and collapse the *Winter* factors into a rushed judgment on the merits.[204]

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[198] *Bruen*, 597 U.S. at 23 ("[T]he very enumeration of the right takes out of the hands of government . . . the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." (quoting *Heller*, 554 U.S. at 634)).

[199] *Id.*

[200] *Id.*

[201] eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 390–91 (2006).

[202] Starbucks Corp. v. McKinney, 602 U.S. 339, 346 (2024).

[203] *Id.*

[204] *See, e.g.*, Del. State Sportsmen's Ass'n v. Del. Dep't of Safety & Homeland Sec., 108 F.4th

However, both the D.C. and Third Circuits acknowledge that traditional principles of equity can permit a presumption of irreparable harm.[205] For example, the Third Circuit, despite recognizing traditional principles of equity, permits a presumption of irreparable harm for First Amendment claims because of the right's time-sensitivity and deference to sincere religious beliefs.[206] Neither circuit denies the legitimacy of *Elrod* as good precedent.[207]

Presuming irreparable harm is also logically consistent with traditional principles of equity; while discretion is an important function in decision-making, *Holland* demonstrates that courts may use previous history and precedent to guide its decision-making.[208] As a result, a presumption of irreparable harm can be in line with traditional principles of equity so long as it is guided by precedent and allows for attention to special facts that may warrant discretion.[209]

A presumption of irreparable harm for the deprivation of Second Amendment rights would be guided by substantial precedent.[210] Second Amendment jurisprudence such as *Heller*, *Bruen*, and *Rahimi* demonstrate significant historical and legal contemplation of Second Amendment rights as fundamental, intangible, and unquantifiable.[211] Consequently, the D.C. and Third Circuits are incorrect in viewing the presumption of irreparable harm towards Second Amendment allegations as a rushed, irresponsible extension of *Elrod*.

This is not to say, of course, that all constitutional violations should be granted a presumption of irreparable harm like in *Baird*. As previously mentioned, understanding the rationale behind *Elrod* and why First Amendment violations are presumptively irreparable affects whether we should grant the presumption of irreparable to not only the Second Amendment, but also to other constitutional harms. Given the deeply rooted traditional principles of equity that the D.C. and Third Circuit outline as relevant in the preliminary injunction analysis, it is worthwhile to clearly establish a framework that respects such equitable principles.

194, 202 (3d Cir. 2024), *cert. denied sub nom.* Gray v. Jennings, 145 S.Ct. 1049 (2025) (mem.) (quoting Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 32 (2008)).

[205] *See Del. State Sportsmen's Ass'n*, 108 F.4th at 204; Hanson v. District of Columbia, 120 F.4th 223, 244 (D.C. Cir. 2024).

[206] *See Del. State Sportsmen's Ass'n*, 108 F.4th at 204.

[207] *See id.*; *Hanson*, 120 F.4th at 244.

[208] Holland v. Florida, 560 U.S. 631, 649–50 (2010).

[209] *Id.*

[210] *See* District of Columbia v. Heller, 554 U.S. 570, 593–94 (2008); N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 17, 24 (2022); United States v. Rahimi, 602 U.S. 680, 692 (2024).

[211] *Heller*, 554 U.S. at 593–94; *N.Y. State Rifle & Pistol Ass'n*, 597 U.S. at 17, 24; *Rahimi*, 602 U.S. at 692.

D. A Framework for Presuming Irreparable Harm in Line with Traditional Principles of Equity

A framework for presuming irreparable harm should be centered around the principles that justify a presumption of irreparable harm for First Amendment rights. This is the most sensible approach because First Amendment rights are the only constitutional rights for which the Court recognizes that their depravation is presumptively irreparable.[212]

Thus, this Comment proposes the following standard to determine whether one can presume irreparable harm: A harm is presumptively irreparable if the alleged act directly limits an intangible and unquantifiable right. If the intangible and unquantifiable right is not directly limited, then there must be an establishment of a threat or existing impairment on that right at the time injunctive relief is sought. There are three essential characteristics of this standard to discuss.

First, the alleged harm at issue must be related to an intangible and unquantifiable right. This prong comes from *Ezell* and *Elrod*, which recognize a constitutional right's fundamental nature as warranting a presumption of irreparable harm.[213] The First and Second Amendments are deemed as intangible and unquantifiable because the rights are meant to preserve an individual right from governmental infringement and restraint. As the meanings of intangible and unquantifiable suggest, however, it is difficult to precisely ascertain what constitutes an intangible and unquantifiable right. Future scholarship would prove fruitful in this regard.

However, *Ezell* and *Elrod*, at least implicitly, recognize that not every right is intangible and unquantifiable.[214] The Seventh Circuit in *Ezell* discussed how an alleged violation of one's right to procedural due process or to be free from an unreasonable search are not unquantifiable and intangible rights and can be compensated via damages because they amount to "constitutional torts" or an "improper order."[215] Additionally, other circuits deny a presumption of irreparable harm for other constitutional harms.[216] For instance, the Eleventh Circuit rejected a presumption of irreparable harm arising from the Fourteenth Amendment, limiting the presumption to the First

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[212] *See* Elrod v. Burns, 427 U.S. 347, 373 (1976) (citing N.Y. Times Co. v. United States, 403 U.S. 713 (1971)).

[213] *See id.* at 373 (citing *N.Y. Times*, 403 U.S. at 713); Ezell v. City of Chicago, 651 F.3d 684, 699 (7th Cir. 2011) (quoting Miles Christi Religious Ord. v. Township of Northville, 629 F.3d 533, 548 (6th Cir. 2010)).

[214] *See id.* at 370; *Ezell*, 651 F.3d at 699 n.10 (citing Campbell v. Miller, 373 F.3d 834, 835 (7th Cir. 2004)); Pub. Serv. Co. of N.H. v. Town of West Newbury, 835 F.2d 380, 382 (1st Cir. 1987)).

[215] *Ezell*, 651 F.3d at 699 n.10 (citing *Campbell*, 373 F.3d at 835; *Pub. Serv. Co. of N.H.*, 835 F.2d at 382).

[216] *See, e.g.*, Siegel v. LePore, 234 F.3d 1163, 1177–78 (11th Cir. 2000).

Amendment and the right to privacy because of their intangible and unquantifiable nature.[217] As a result, the first requirement is not a meaningless one that permits any constitutional right to be presumed as irreparable.

Second, *Elrod* shows that there must be a direct limitation on that right to presume irreparable harm.[218] Absent a direct limitation, it is not clear that the right at issue is being threatened or impaired.[219] This requirement is supported by the Second Circuit, where the court rejected presuming irreparable harm for a First Amendment claim because there was not a direct limitation on one's free speech or religious practice and therefore not an obvious showing of a First Amendment right being threatened or impaired in fact.[220] Although the Second Circuit's logic is not explicitly recognized by the Court, the Second Circuit's logic is consistent with *Elrod*, which stated that harms flowing from a First Amendment allegation "unquestionably constitute[ ] irreparable injury" after establishing that the First Amendment "was either threatened or in fact being impaired at the time relief was sought."[221] So, while a direct limitation such as a prohibition on speech or handgun ban may obviously limit an intangible and unquantifiable right, a more indirect limitation such as a COVID-19 vaccine mandate or a background check for gun purchases would not obviously impair a fundamental right.[222]

Lastly, if a limitation on one's intangible and unquantifiable right is indirect, then there must be a showing that the right at issue is either threatened or in fact being impaired at the time relief is sought.[223] This last limitation matters because mere allegations of the deprivation of an intangible and unquantifiable right may not receive a presumption of irreparable harm.[224] For instance, a Second Amendment challenge claiming lost income from a gun control policy that restricts gun sales would not have a presumption of irreparable harm as compared to a handgun ban because, like in *Kane*, the actual harm is not related to why we deemed the right at issue to be unquantifiable and intangible.[225]

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[217] *Id.*

[218] *See Elrod*, 427 U.S. at 373 (citing *N.Y. Times*, 403 U.S at 713); Bronx Household of Faith v. Bd. of Educ., 331 F.3d 342, 350 (2d Cir. 2003) (quoting Laird v. Tatum, 408 U.S. 1, 14 (1972)).

[219] *See, e.g.*, *Bronx Household of Faith*, 331 F.3d at 350 (quoting *Laird*, 408 U.S. at 1).

[220] *Id.*

[221] *Elrod*, 427 U.S. at 373 (citing *N.Y. Times*, 403 U.S. at 713).

[222] *See, e.g.*, *Bronx Household of Faith*, 331 F.3d at 350 (quoting *Laird*, 408 U.S. at 1).

[223] *Id.*

[224] *Id.*

[225] Kane v. De Blasio, 19 F.4th 152, 172 (2d Cir. 2021).

E. Why This Standard is Pragmatically Valuable

A potential criticism of this standard is that this "presumption" standard is not a presumption at all, requiring significant analysis to determine whether to presume irreparable harm. To further elaborate, the value behind a presumption is to avoid laborious analysis; critics would argue that this Comment's standard erodes such a value.[226] This criticism is flawed for two reasons.

First, regardless of "cost-effectiveness," this standard is necessary to rectify tension between legitimate values of traditional principles of equity and the presumption of irreparable harm for certain rights as established in *Elrod*. This Comment's proposed standard strikes a proper balance between using relevant jurisprudence and history to make more "efficient" decisions as per *Holland*[227] (i.e., the right at issue has historically been recognized as intangible and unquantifiable) while also allowing for discretion to the particular facts of a case where it may be warranted as discussed in *McKinney*.[228] In the context of this standard, the second and third requirements leave open the ability for courts to use their discretion to deny a presumption of irreparable harm where the limitation may not actually infringe upon the right at issue. For instance, although history and case law support the First Amendment's intangible and unquantifiable nature, the unique facts of a given case may demonstrate that the restriction at issue does not actually threaten or pose a threat to a First Amendment right. As a result, this standard reaches a happy medium between adhering to traditional principles of equity and the logic of *Elrod*.

Second, this type of standard exists in other legal contexts.[229] For example, antitrust law has a per se rule that presumes certain types of agreements or practices to be illegal if those agreements or practices are found to be so clearly bad for competition.[230] This per se rule, however, can only be established after courts have gained considerable experience with that type of agreement or practice.[231] And there are multiple cases where, to establish whether an act is per se illegal, extensive analysis occurs despite the intuition of the per se rule as being "cost-efficient."[232] Yet despite such potential concerns, antitrust law

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[226] *See generally* Alan Grant & Chetan Sanghvi, *The Economic Foundations and Implications of the Per Se Rule*, 2021 COLUM. BUS. L. REV. 92.

[227] Holland v. Florida, 560 U.S. 631, 649–50 (2010).

[228] Starbucks Corp. v. McKinney, 602 U.S. 339, 346 (2024).

[229] *See generally* Max Schulman, *The Quick Look Rule of Reason: Retreat from Binary Antitrust Analysis*, 2 SEDONA CONF. J. 89 (2001).

[230] *See, e.g.*, Broad. Music, Inc. v. CBS, 441 U.S. 1, 7–8 (1979).

[231] *See, e.g.*, United States v. Topco Assocs., Inc., 405 U.S. 596, 607–608 (1972).

[232] *See, e.g.*, Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 9–29 (1984).

still firmly uses such a practice.[233] While the antitrust example is not a constitutional context, it demonstrates that it is entirely permissible to adopt such an approach. There seems to be no reason why a constitutional setting would change the value of a rule that considers both discretion and precedent in judicial decision-making.

V. CONCLUSION

The Second Amendment protects a right that, like the First Amendment, is intangible and unquantifiable. This Comment argues that because of the First and Second Amendment's similarities, the deprivation of either constitutional right should receive a presumption of irreparability. Although preliminary injunctions are rooted in traditional principles of equity that demands discretion to the particular facts of each case, equitable principles also permit decision-making guided by precedent and history. This Comment has proposed a standard for presuming irreparable harm that is guided by precedent and history and permits discretion to evaluate whether the specific facts of a case establish a threat or actual infringement upon an intangible or unquantifiable right.

Although this Comment provides a framework for irreparable harm, future discussion may involve the following. First, scholarship may discuss whether other constitutional rights may warrant a presumption of irreparable harm under the Comment's standard. Furthermore, additional scholarship may consider whether harms outside of the Constitution can be "intangible" or "unquantifiable".

Lastly, this Comment does not focus on the policy implications of presuming irreparable harm for the deprivation of Second Amendment rights. However, it is unlikely that this framework would significantly alter long-term gun control efforts. First, a preliminary injunction is not a final judgment on a policy's constitutionality.[234] Second, presuming irreparable harm does not mean that a preliminary injunction is automatically granted: there must be a consideration of the other three factors in the *Winter* test.[235] Even if a Second Amendment claim was deemed presumptively irreparable, a preliminary injunction could still be denied if, for example, the likelihood of success on the merits is weak.

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[233] *See generally Antitrust Laws*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/antitrust_laws [perma.cc/34Z4-DRG3] ("Violations under the Sherman Act take one of two forms -- either as a per se violation or as a violation of the rule of reason.").

[234] *See generally Preliminary Injunction*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/preliminary_injunction [perma.cc/GYP3-U7N7] ("A preliminary injunction is an injunction that may be granted before or during trial, with the goal of preserving the status quo before final judgment.").

[235] *See* Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7 (2008).

If there are to be certain gun control policies that are enjoined, such as an outright ban of a weapon, then that likely means there is credence in enjoining such a policy because of Second Amendment jurisprudence. Future scholarship and discussion may affirm or reject such policy analysis.