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## The Department That Cried Wolf: Tenth Circuit Vacates Preliminary Injunction in Absence of Likely Injury in *New Mexico Department of Game & Fish v. United States Department of the Interior*

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# THE DEPARTMENT THAT CRIED WOLF: TENTH CIRCUIT VACATES PRELIMINARY INJUNCTION IN ABSENCE OF LIKELY INJURY IN *NEW MEXICO DEPARTMENT OF GAME & FISH v. UNITED STATES DEPARTMENT OF THE INTERIOR*

**Abstract:** In the 2017 case, *New Mexico Department of Game & Fish v. United States Department of the Interior*, the United States Court of Appeals for the Tenth Circuit held that the New Mexico Department of Game and Fish (“New Mexico Department”) was not entitled to a preliminary injunction that barred the United States Fish and Wildlife Service from releasing endangered Mexican gray wolves into the wild on federal lands within New Mexico. The Tenth Circuit held that the New Mexico Department did not show that irreparable injury to its wildlife management efforts or its state sovereignty was likely. The Tenth Circuit also departed from other circuits’ use of a modified, “sliding-scale” preliminary injunction test, instead interpreting the United States Supreme Court’s 2008 decision in *Winter v. Natural Resources Defense Council, Inc.* (“*Winter II*”) as invalidating the continued use of sliding-scale tests. This Comment argues that the Tenth Circuit was correct in rejecting sliding-scale preliminary injunction tests and instead requiring that moving parties demonstrate, at a minimum, that all four factors of the traditional test are met. Further, this Comment contends that other jurisdictions should adopt the Tenth Circuit’s approach of emphasizing likely irreparable injury as the most important prerequisite to preliminary relief.

## INTRODUCTION

Once common throughout the southwestern United States, the Mexican gray wolf was all but eliminated from the wild by the 1970s due to hunting and eradication methods by humans.<sup>1</sup> Acting pursuant to the Endangered Species

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<sup>1</sup> See *N.M. Dep’t of Game & Fish v. U.S. Dep’t of the Interior*, 854 F.3d 1236, 1240 (10th Cir. 2017) (discussing gray wolf eradication and subsequent recovery efforts in the United States). By the 1930s, wolves were almost entirely erased from the lower forty-eight states due to one of the most effective eradication campaigns in modern history. *Id.* at 1239–40. These extermination efforts, initiated by government programs and private individuals, primarily sought to decrease loss of livestock from wolf predation by means which included trapping, shooting, and poisoning of wolves, as well as digging pups out of dens. *Humane Soc’y of the U.S. v. Jewell*, 76 F. Supp. 3d 69, 81 (D.D.C. 2014) (quoting Hope M. Babcock, *The Sad Story of the Northern Rocky Mountain Gray Wolf Reintroduction Program*, 24 *FORDHAM ENVTL. L. REV.* 25, 38 (2013)); *WildEarth Guardians v. Ashe*, No. CV-15-00019-TUC-JGZ, 2016 WL 3919464, at \*1 (D. Ariz. May 16, 2016) (citing *Endangered and Threat-*

Act of 1973 (“ESA”), the United States Fish and Wildlife Service (“FWS”) initiated drastic recovery efforts to conserve the various wolf subspecies in the United States in 1977.<sup>2</sup> Nevertheless, by 2015, there were only ninety-seven Mexican gray wolves left in the wild, setting the stage for future federal-state governmental conflicts over wildlife management.<sup>3</sup>

The legal control of wildlife has historically been governed by the individual states where the wildlife is located.<sup>4</sup> Yet, in situations involving endangered species, such as the Mexican gray wolf, state and federal priorities regarding wildlife management are often in conflict.<sup>5</sup> This constant tension allows even judicial procedural determinations, such as whether to grant a preliminary injunction, to expose challenges in balancing substantive legal principles, such as federal supremacy, the public trust doctrine, and federalism.<sup>6</sup>

ened Wildlife and Plants; Revision to the Regulations for the Nonessential Experimental Population of the Mexican Wolf, 80 Fed. Reg. 2512 (Jan. 16, 2015) (codified at 15 C.F.R. pt. 17)).

<sup>2</sup> See Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2012) (providing federal agencies various means of conserving threatened and endangered wildlife); Endangered and Threatened Wildlife and Plants; Revision to the Regulations for the Nonessential Experimental Population of the Mexican Wolf, 80 Fed. Reg. 2512, 2517 (summarizing wolf recovery statistics).

<sup>3</sup> *What You Need to Know: The Mexican Gray Wolf*, EARTHJUSTICE (Jan. 30, 2018), <http://earthjustice.org/features/what-you-need-to-know-about-the-mexican-gray-wolf> [<https://perma.cc/RLN6-N5S7>] (providing that wild Mexican gray wolves totaled only 113 in February 2017); see *Biological Report for the Mexican Wolf*, U.S. FISH & WILDLIFE SERV. SW. REGION (Nov. 2017), <https://www.fws.gov/southwest/es/mexicanwolf/pdf/2017MexicanWolfBiologicalReportFinal.pdf> (providing Mexican gray wolf numbers and recovery efforts as of November 2017); see also *N.M. Dep’t of Game & Fish*, 854 F.3d at 1242, 1243 (explaining that the FWS and New Mexico worked collaboratively until 2011).

<sup>4</sup> See *Geer v. Connecticut*, 161 U.S. 519, 529 (1896) (recognizing a state’s right to regulate wildlife). *But see* *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979) (overruling *Geer* on other grounds); Michael C. Blumm & Aurora Paulsen, *The Public Trust in Wildlife*, 2013 UTAH L. REV. 1437, 1459, 1460 (discussing court recognition of state sovereign ownership of wildlife). The state ownership doctrine provides that states “own” the wildlife that exists within their state. See Blumm & Paulsen, *supra*.

<sup>5</sup> See Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141, 1141, 1144 (1995) (explaining the balance of power between federal and state governments in wildlife and natural resources management).

<sup>6</sup> See *Winter v. Nat. Res. Def. Council, Inc. (Winter II)*, 555 U.S. 7, 22 (2008) (reversing a lower court’s preliminary injunction against the United States Navy for its use of sonar that potentially affected nearby marine mammals); *N.M. Dep’t of Game & Fish*, 854 F.3d at 1256 (reversing a lower court’s preliminary injunction that barred the FWS from releasing Mexican gray wolves on federal land in New Mexico). The doctrine of federal supremacy, as provided by the U.S. Constitution’s Supremacy Clause, establishes that the U.S. Constitution, federal laws made pursuant to it, and treaties made under its authority, constitute the supreme law of the land. U.S. CONST. art. VI, cl. 2; Stephanie Jurkowski, *Supremacy Clause*, LEGAL INFO. INST. (June 2017), [https://www.law.cornell.edu/wex/supremacy\\_clause](https://www.law.cornell.edu/wex/supremacy_clause) [<https://perma.cc/D99B-LRX4>]. The public trust doctrine refers to sovereign control over, and responsibility for, natural resources, which are held in trust by the government for the people. Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 474–83 (1970). Federalism in the United States is the constitutional relationship, including the division of authority and function, between and among the national government and the various state governments. George Charles Roche III, *American Federalism: Origins*,

In the 2008 case *Winter v. Natural Resources Defense Council, Inc.* (“*Winter II*”), the United States Supreme Court held that a preliminary injunction is an extraordinary remedy that requires a clear showing that the movant is entitled to such relief.<sup>7</sup> Further, the Court held that to warrant preliminary relief, moving parties must demonstrate that irreparable injury absent an injunction is likely, not merely possible.<sup>8</sup> Since *Winter II*, the federal circuit courts of appeals have been inconsistent in their relative emphases on the likely irreparable injury requirement and in interpreting the continued validity of modified, “sliding-scale” preliminary injunction tests.<sup>9</sup> For example, the United States Courts of Appeals for the Fourth and Tenth Circuits interpret *Winter II* to invalidate sliding-scale tests.<sup>10</sup> In contrast, the United States Courts of Appeals for the Second, Seventh, and Ninth Circuits continue to apply sliding-scale tests that relax, or completely ignore, one factor’s required showing upon a moving party sufficiently demonstrating either that the other three factors exist or that one factor is especially strong.<sup>11</sup>

In the 2017 unanimous panel decision in *New Mexico Department of Game & Fish v. United States Department of the Interior*, the Tenth Circuit

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FOUND. FOR ECON. EDUC. (Dec. 1, 1966), <https://fee.org/articles/american-federalism-origins/> [https://perma.cc/8WMU-92TJ].

<sup>7</sup> *Winter II*, 555 U.S. at 22; see also *Dominion Video Satellite, Inc. v. EchoStar Satellite Corp.*, 356 F.3d 1256, 1261 (10th Cir. 2004) (noting that “because ‘a preliminary injunction is an extraordinary remedy, the right to relief must be clear and unequivocal’”) (quoting *SCFC ILC, Inc. v. Visa USA, Inc.*, 936 F.2d 1096, 1098 (10th Cir. 1991)). A movant is a party who makes a motion, such as for a preliminary injunction, to a court. *Movant*, BLACK’S LAW DICTIONARY (10th ed. 2014).

<sup>8</sup> See *Winter II*, 555 U.S. at 22.

<sup>9</sup> See *id.* Compare *N.M. Dep’t of Game & Fish*, 854 F.3d at 1246 (invalidating modified, sliding-scale preliminary injunction tests), and *Real Truth About Obama, Inc. v. Fed. Election Comm’n*, 575 F.3d 342, 347 (4th Cir. 2009) (rejecting the use of any type of modified test), with *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131–32 (9th Cir. 2011) (applying the sliding-scale, “serious questions” test), and *Judge v. Quinn*, 612 F.3d 537, 546 (7th Cir. 2010) (holding that preliminary injunction factors are interdependent and must be balanced), and *Citigroup Glob. Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 38 (2d Cir. 2010) (holding that U.S. Supreme Court precedent does not bar its modified test because the Court never expressly rejected such sliding-scale tests). A modified test is an approach that differs from the traditional standard, which requires that all factors are sufficiently and independently met. See *N.M. Dep’t of Game & Fish*, 854 F.3d at 1246. A sliding-scale test is a type of modified test that treats the preliminary injunction factors as relative by relaxing (or completely ignoring) the burden for movants to show one factor upon a sufficiently strong showing of one or more other factors. See *id.*

<sup>10</sup> *N.M. Dep’t of Game & Fish*, 854 F.3d at 1246 (invalidating sliding-scale preliminary injunction tests); *Real Truth About Obama*, 575 F.3d at 347 (rejecting the use of the modified test); see *Winter II*, 555 U.S. at 22 (requiring that a movant for a preliminary injunction demonstrates that irreparable injury is likely).

<sup>11</sup> See *All. for the Wild Rockies*, 632 F.3d at 1131–32 (applying the sliding-scale, “serious questions” test that relaxes the burden to show other factors upon sufficiently demonstrating that serious questions regarding the adverse party’s conduct are present); *Quinn*, 612 F.3d at 546 (holding that preliminary injunction factors are interdependent and must be balanced against each other); *Citigroup Glob. Mkts.*, 598 F.3d at 38 (holding that U.S. Supreme Court precedent does not bar its modified sliding-scale test because the Court never expressly rejected such tests).

vacated a preliminary injunction granted by the United States District Court for the District of New Mexico against FWS's release of Mexican gray wolves onto federal land in New Mexico.<sup>12</sup> Following the release of two wolves without a state permit, the federal district court's order preliminarily enjoined the FWS from importing or releasing any additional wolves into the state without a state permit.<sup>13</sup> On appeal, the Tenth Circuit reversed the injunction and held that the New Mexico Department did not demonstrate that FWS's release of wolves would likely and irreparably harm the state's wildlife management efforts or impact its state sovereignty.<sup>14</sup>

This Comment argues that the Tenth Circuit's holding in *New Mexico Department of Game & Fish* correctly interpreted the U.S. Supreme Court's decision in *Winter II* as rejecting sliding-scale preliminary injunction tests.<sup>15</sup> This Comment further contends that other jurisdictions should follow the Tenth Circuit's approach of requiring a heightened showing by moving parties that irreparable injury is likely absent preliminary relief.<sup>16</sup> Part I of this Comment gives an overview of the preliminary injunction standard, the U.S. Supreme Court's 2008 decision in *Winter II*, and the Tenth Circuit's 2017 holding in *New Mexico Department of Game & Fish*.<sup>17</sup> Part II discusses the split among the federal circuits as to the proper preliminary injunction standard since *Winter II*, especially regarding the validity of sliding-scale approaches and the required emphasis on the likely irreparable harm factor.<sup>18</sup> Part III argues in favor of the Tenth Circuit's interpretation of *Winter II* as invalidating sliding-scale approaches and that each factor must instead be sufficiently and independently shown.<sup>19</sup> Part III also contends that the Tenth Circuit's emphasis on the likely irreparable injury factor is consistent with *Winter II*.<sup>20</sup> This Comment concludes by suggesting that the U.S. Supreme Court should adopt the Tenth Circuit's preliminary injunction approach.<sup>21</sup>

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<sup>12</sup> *N.M. Dep't of Game & Fish*, 854 F.3d at 1256.

<sup>13</sup> *Id.* at 1244–45.

<sup>14</sup> *See id.* at 1254–56.

<sup>15</sup> *See Winter II*, 555 U.S. at 22 (reversing a preliminary injunction because the lower courts improperly relaxed the requirement to show likely irreparable harm absent relief); *N.M. Dep't of Game & Fish*, 854 F.3d at 1246 (holding sliding-scale tests as invalid after *Winter II* and reversing district court's grant of a preliminary injunction where no likely irreparable injury was shown).

<sup>16</sup> *See Winter II*, 555 U.S. at 22 (holding the “possibility” standard as too lenient); *N.M. Dep't of Game & Fish*, 854 F.3d at 1249–50 (requiring movants show the injury is “of such imminence that there is a clear and present need for equitable relief”).

<sup>17</sup> *See infra* notes 221622–85 and accompanying text.

<sup>18</sup> *See infra* notes 86–113 and accompanying text.

<sup>19</sup> *See infra* notes 114–125 and accompanying text.

<sup>20</sup> *See infra* notes 126–133 and accompanying text.

<sup>21</sup> *See infra* notes 134–135 and accompanying text.

## I. JUDICIAL DEVELOPMENT OF PRELIMINARY INJUNCTION STANDARD AND *NEW MEXICO DEPARTMENT OF GAME & FISH*

Courts often disagree over the preliminary injunction standard, especially when state, federal, and nongovernmental interests conflict over management of wildlife.<sup>22</sup> Section A of this Part examines the development of the preliminary injunction standard and the different approaches taken by federal courts of appeals.<sup>23</sup> Section B describes federal and state roles in wildlife management and summarizes Mexican gray wolf reintroduction efforts in the United States.<sup>24</sup> Section C details the factual background, procedural history, and holding of *New Mexico Department of Game & Fish v. United States Department of the Interior*.<sup>25</sup>

### A. The Preliminary Injunction Standard

A party moving for a preliminary injunction must demonstrate four elements to obtain a preliminary injunction.<sup>26</sup> First, the movant must show that they are substantially likely to succeed on the merits.<sup>27</sup> Second, the movant must show they will likely suffer irreparable injury if the injunction is denied.<sup>28</sup> Third, the movant's threatened injury must outweigh the injury the opposing party will suffer if the injunction is granted.<sup>29</sup> Fourth, the injunction

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<sup>22</sup> See *N.M. Dep't of Game & Fish*, 854 F.3d at 1246 (applying traditional four-part test in case seeking an injunction against the FWS's release of Mexican gray wolves in New Mexico); *Nat. Res. Def. Council, Inc. v. Winter (Winter I)*, 518 F.3d 658, 677 (9th Cir. 2008) (applying sliding-scale test in case seeking an injunction against the U.S. Navy's use of sonar that possibly harmed marine mammals), *overruled by Winter II*, 555 U.S. at 22; Percival, *supra* note 5, at 1141, 1144 (discussing how responsibilities for environmental policy are allocated between federal, state, and local governments).

<sup>23</sup> See *infra* notes 26–44 and accompanying text.

<sup>24</sup> See *infra* notes 45–57 and accompanying text.

<sup>25</sup> See *infra* notes 58–85 and accompanying text.

<sup>26</sup> *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 156–57 (2010); *Winter II*, 555 U.S. at 20; *N.M. Dep't of Game & Fish*, 854 F.3d at 1246; *Fish v. Kobach*, 840 F.3d 710, 723 (10th Cir. 2016). A preliminary injunction is a temporary injunction issued before or during trial to prevent an irreparable injury from occurring before the court has a chance to decide the case. *Preliminary Injunction*, BLACK'S LAW DICTIONARY (10th ed. 2014).

<sup>27</sup> *Monsanto Co.*, 561 U.S. at 156; *Winter II*, 555 U.S. at 20; *N.M. Dep't of Game & Fish*, 854 F.3d at 1246; *Kobach*, 840 F.3d at 723.

<sup>28</sup> *N.M. Dep't of Game & Fish*, 854 F.3d at 1246; *Kobach*, 840 F.3d at 723; see *Monsanto Co.*, 561 U.S. at 156; *Winter II*, 555 U.S. at 20; 11A CHARLES ALAN WRIGHT ET AL., FED. PRAC. & PROC. CIV. § 2948.1, at 139 (2d ed. 1995) (noting that a presently existing and actual threat, and not merely a speculative injury, must be demonstrated to warrant a preliminary injunction). *But see* WRIGHT ET AL., *supra* § 2948.1, at 195 (acknowledging that a preliminary injunction only requires a movant to demonstrate a strong threat of injury before trial, but not necessarily a certainty that such injury will occur).

<sup>29</sup> *N.M. Dep't of Game & Fish*, 854 F.3d at 1246; *Kobach*, 840 F.3d at 723; see *Monsanto Co.*, 561 U.S. at 157; *Winter II*, 555 U.S. at 20.

must not be adverse to the public interest.<sup>30</sup> The United States Supreme Court has held that a preliminary injunction is an extraordinary and drastic remedy that should not be granted unless the movant carries the burden of persuasion by a clear showing.<sup>31</sup> Courts often consider the showing of likely irreparable harm as the most important prerequisite for preliminary injunction, and therefore require that movants first demonstrate that element exists before the others are even considered.<sup>32</sup>

Prior to the U.S. Supreme Court's 2008 ruling in *Winter II*, parties moving for preliminary injunctions often argued for a "sliding-scale," test to apply.<sup>33</sup> Courts applying such sliding-scale tests would relax, or "slide," the burden for movants to demonstrate one factor upon a sufficiently high showing of another factor.<sup>34</sup> For example, courts conducted this balancing approach by relaxing the movant's burden to show likelihood of success either when the other three elements were met or when there were questions going to the merits so serious, substantial, difficult, and doubtful that they made issues ripe for litigation.<sup>35</sup> Before *Winter II*, federal courts also applied conflicting standards

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<sup>30</sup> *N.M. Dep't of Game & Fish*, 854 F.3d at 1246; *Kobach*, 840 F.3d at 723; see *Monsanto Co.*, 561 U.S. at 157; *Winter II*, 555 U.S. at 20.

<sup>31</sup> See *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997); Rachel A. Weisshaar, *Hazy Shades of Winter: Resolving the Circuit Split Over Preliminary Injunctions*, 65 VAND. L. REV. 1011, 1026–27 (2012) (explaining the circuit split over the proper preliminary injunction standard following the U.S. Supreme Court's 2008 holding in *Winter II*).

<sup>32</sup> See *Dominion Video*, 356 F.3d at 1260 (emphasizing preliminary injunction movant's requirement to show likely irreparable harm); WRIGHT ET AL., *supra* note 28, § 2948.1, at 195 (noting that "[p]erhaps the single most important prerequisite for the issuance of a preliminary injunction is a demonstration that if it is not granted the applicant is likely to suffer irreparable harm before a decision on the merits can be rendered"); see also *Port City Props. v. Union Pac. R.R. Co.*, 518 F.3d 1186, 1190 (10th Cir. 2008) (holding that because courts consider demonstrating likely irreparable harm as the most important prerequisite, the moving party must demonstrate this factor before the others will be considered).

<sup>33</sup> See *Winter II*, 555 U.S. at 22 (not addressing sliding-scale tests directly, but reversing preliminary injunction due to lack of clear showing of likely irreparable harm); *N.M. Dep't of Game & Fish*, 854 F.3d at 1246 (discussing previously-applied "serious questions" sub-approach of sliding-scale test, and invalidating such modified tests after *Winter II*); *Winter I*, 518 F.3d at 677 (applying sliding-scale test that relaxed movant's burden to show "likely irreparable harm" factor when the movant sufficiently demonstrated the other factors).

<sup>34</sup> See *N.M. Dep't of Game & Fish*, 854 F.3d at 1246; *Winter I*, 518 F.3d at 677; Weisshaar, *supra* note 31, at 1037, 1038. The term "slide" describes the relaxing of the burden to demonstrate one factor upon a stronger showing of another. See *id.* at 1037.

<sup>35</sup> See *Walmer v. U.S. Dep't of Def.*, 52 F.3d 851, 854 (10th Cir. 1995) (applying a modified "likelihood of success" test that relaxed the requirement to show that factor where the other three were shown and there existed "serious questions" going to the merits of the case); see also *N. Nat. Gas Co. v. L.D. Drilling, Inc.*, 697 F.3d 1259, 1266 (10th Cir. 2012) (holding that where the three latter harm factors weigh in favor of the movant, the probability of success factor is relaxed). Referred to by multiple federal circuits as the "serious questions test," this sub-approach made issues worthier of deliberate investigation because the burden to show all four factors is reduced. See *Walmer*, 52 F.3d at 854.

for the irreparable injury requirement.<sup>36</sup> For example, the United States Court of Appeals for the Tenth Circuit held that injury had to be both certain and great, and not merely serious or substantial.<sup>37</sup> In contrast, the United States Court of Appeals for the Ninth Circuit required the plaintiff show only a “possibility” of irreparable harm.<sup>38</sup>

In 2008, in *Natural Resources Defense Council, Inc. v. Winter* (“*Winter I*”), the United States Court of Appeals for the Ninth Circuit affirmed a preliminary injunction granted by the United States District Court for the District of Southern California against the United States Navy.<sup>39</sup> The preliminary injunction, which barred the Navy from using mid-frequency sonar off the coast of Southern California, was based only on a possibility that the sonar irreparably harmed marine mammals in the geographic vicinity of the Navy’s operations.<sup>40</sup> Hoping to resolve the confusion over the irreparable injury standard, in *Winter II* in 2008, the U.S. Supreme Court held that the U.S. Court of Appeals for the Ninth Circuit erred by affirming the lower court’s preliminary injunction.<sup>41</sup> The U.S. Supreme Court held that a movant seeking preliminary relief must demonstrate that irreparable injury is likely, not just possible.<sup>42</sup> Nevertheless, the Court’s majority opinion in *Winter II* did not address the continued validity of the Ninth Circuit’s sliding-scale test that relaxed the requirement to show one element upon sufficient showing of another.<sup>43</sup> As a result, disagreement

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<sup>36</sup> See *Winter II*, 555 U.S. at 22 (holding that mere “possibility” of harm standard was inadequate); *Winter I*, 518 F.3d at 696 (granting preliminary injunction where Natural Resources Defense Council, Inc. only alleged a possibility that the U.S. Navy’s sonar would irreparably harm marine mammals); *Dominion Video*, 356 F.3d at 1262 (holding that to meet the irreparable harm requirement, the injury “must be both certain and great . . . [not] merely serious or substantial”) (quoting *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1250 (10th Cir. 2001)).

<sup>37</sup> *Prairie Band of Potawatomi Indians*, 253 F.3d at 1250 (holding that a Native American tribe demonstrated the irreparable harm requirement because, absent an injunction, Kansas’s motor vehicle registration requirements would cause the tribe injury that could not be remedied with money); see also *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003) (holding that movant must show that injury complained of is “of such imminence that there is clear and present need for equitable relief”); *Greater Yellowstone Coal. v. Flowers*, 321 F.3d 1250, 1258, 1260 (10th Cir. 2003) (holding that the injury must be likely to occur before the district court rules on the merits).

<sup>38</sup> See *Winter I*, 518 F.3d at 696 (requiring the plaintiff show only a “possibility” of irreparable injury when it preliminarily enjoined the U.S. Navy from using mid-frequency sonar that possibly harmed marine mammals off the southern coast of California).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 661, 696. The federal district court’s analysis in granting the Natural Resources Defense Council’s (NRDC’s) motion for a preliminary injunction against the U.S. Navy was primarily focused on the NRDC’s probability of success on the merits at trial. See *id.* at 661.

<sup>41</sup> See *Winter II*, 555 U.S. at 22.

<sup>42</sup> See *id.*

<sup>43</sup> *Id.* at 51 (Ginsburg, J., dissenting) (arguing that the majority’s opinion should not be construed as rejecting flexible “sliding-scale” approaches); see *id.* at 22 (majority opinion) (emphasizing importance of irreparable harm prerequisite, but not discussing validity of sliding-scale tests).

persists over both the validity of sliding-scale tests and the relative emphasis on the likely irreparable injury factor among the other three factors.<sup>44</sup>

### *B. Federal and State Roles in Wildlife Management and Mexican Gray Wolf Reintroduction Efforts*

In the United States, the individual states and the federal government share authority in managing wildlife.<sup>45</sup> Although this current balance creates opportunities to coordinate state and federal laws to better protect wildlife, the overlap of powers often instead creates tension between the levels of government over their differing wildlife management priorities.<sup>46</sup> At the state level, the New Mexico Department of Game and Fish (“New Mexico Department”) is the government agency of New Mexico responsible for maintaining wildlife and fish in the state.<sup>47</sup> At the federal level, the United States Department of the Interior (“DOI”) is the federal executive department responsible for management and conservation of about seventy-five percent of federal public land and natural resources.<sup>48</sup> The FWS is the agency within the Department of the Interior responsible for enforcing federal wildlife laws and protecting endangered species.<sup>49</sup>

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<sup>44</sup> Compare *Diné Citizens Against Ruining Our Env’t v. Jewell*, 839 F.3d 1276, 1282 (10th Cir. 2016) (invalidating sliding-scale tests), with *id.* at 1287 (Lucero, J., concurring in part and dissenting in part) (supporting more flexible, sliding-scale approach used by other federal circuits).

<sup>45</sup> See Phillip M. Kannan, *The 2009 Colorado State of the Rockies Report Card*, U.S. LAWS & POLICIES PROTECTING WILDLIFE 76, 76–78 (2009), <https://www.coloradocollege.edu/dotAsset/fc919f40-c24a-4287-ab6c-d649e4dca7a6.pdf> [<https://perma.cc/J2UD-LAJ3>] (discussing state and federal authority to manage wildlife in the United States). The federal government uses its authority under the interstate commerce clause and the property clause to enact laws protecting wildlife. See *id.* at 76. Any state law in conflict with such federal laws will be invalid under the supremacy clause. See *id.* at 77. States assert state ownership of wildlife through the public trust doctrine and their police power to enact laws to protect wildlife. See *id.*; see also Michael O’Loughlin, Note, *Understanding the Public Trust Doctrine Through Due Process*, 58 B.C. L. REV. 1321, 1324 n.21 (2017) (citing *In re Complaint of Steuart Transp. Co.*, 495 F. Supp. 38, 40 (E.D. Va. 1980)) (claiming that state and federal governments have an obligation to protect wildlife).

<sup>46</sup> Percival, *supra* note 5, at 1141, 1143. But see Erin Ryan, *Negotiating Federalism*, 52 B.C. L. REV. 1, 18 (2011) (noting that the Environmental Protection Agency shows much greater deference to state interests than other federal agencies).

<sup>47</sup> *Who We Are*, N.M. DEP’T GAME & FISH (2016), <http://www.wildlife.state.nm.us/home/contact/who-we-are/> [<https://perma.cc/4XKZ-R6DP>]. The New Mexico Department of Game and Fish protects, conserves, and regulates the use of game and fish to ensure there is an adequate supply for recreation and food. See *id.*

<sup>48</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-09-223, FEDERAL LAND MANAGEMENT: OBSERVATIONS ON A POSSIBLE MOVE OF THE FOREST SERVICE INTO THE DEPARTMENT OF THE INTERIOR (2009); *About*, U.S. DEP’T INTERIOR (Jan. 31, 2018), <https://www.doi.gov/whoweare> [<https://perma.cc/UP6K-BKUX>].

<sup>49</sup> See *About the U.S. Fish and Wildlife Service*, U.S. FISH & WILDLIFE SERV. (Mar. 24, 2016), [https://www.fws.gov/help/about\\_us.html](https://www.fws.gov/help/about_us.html) [<https://perma.cc/26SW-N62R>]. The FWS is dedicated to managing and protecting fish, wildlife, and natural habitats for future generations of Americans. See *id.* This Comment refers to Federal Appellants (FWS, DOI, and Intervenor Appellants) collectively as “FWS.” See *id.*

The FWS has authority to reintroduce certain endangered species onto federal lands under the Endangered Species Act of 1973 (“ESA”).<sup>50</sup> The ESA directs the Secretary of the Interior (“Secretary”), acting through the FWS, to classify species whose survival is in question as either “endangered” or “threatened,” as well as to promulgate regulations listing those species as such and to designate their critical habitat.<sup>51</sup> If a species is given either classification, the ESA requires the Secretary to develop and implement “recovery plans” to aid the species’ conservation and survival.<sup>52</sup>

The North American gray wolf has long been a major focus of the movement to conserve endangered wildlife.<sup>53</sup> By the 1930s, wolves were almost entirely eliminated from the lower forty-eight states due to one of the most

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<sup>50</sup> See 16 U.S.C. §§ 1531–1544 (2012). Congress enacted the ESA to provide various means of conserving endangered and threatened species and their ecosystems. See *id.* § 1531(b); Determination That Two Species of Butterflies Are Threatened Species and Two Species of Mammals Are Endangered Species, 41 Fed. Reg. 17,736, 17,737 (Apr. 28, 1976) [hereinafter Determination That Species Are Threatened and Endangered] (codified at 50 C.F.R. pt. 17) (listing Mexican gray wolves as endangered).

<sup>51</sup> See 16 U.S.C. §§ 1531, 1533, 1538(a) (providing methods for determining “threatened” and “endangered” statuses of species and to protect and conserve such species); *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978) (stating the ESA’s provisions mandating that federal agencies “‘conserve’ [a species includes] . . . ‘the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary’”) (emphasis omitted) (quoting 16 U.S.C. § 1532(2)); *Fish and Wildlife Service*, FED. REG. (Jan. 31, 2018), <https://www.federalregister.gov/agencies/fish-and-wildlife-service> [<https://perma.cc/QR8Q-2K4Z>] (describing the placement of the FWS in the Department of the Interior); *Endangered Species: Overview*, U.S. FISH & WILDLIFE SERV. (Jan. 3, 2018), <http://www.fws.gov/endangered/about/index.html> [<https://perma.cc/5DA5-5ULB>] (explaining that the goals of conserving an endangered species includes the pursuit of its recovery); see also 16 U.S.C. § 1532(6) (defining “threatened”); 16 U.S.C. § 1532(20) (defining “endangered”). A species is deemed “endangered” if it is in danger of extinction throughout all or a significant portion of its range, and a species is “threatened” if it is likely to become an endangered species within the foreseeable future. 16 U.S.C. § 1532(6), (20); see *What Is the Difference Between Endangered and Threatened?*, U.S. FISH & WILDLIFE SERV. (Mar. 2003), <http://www.fws.gov/endangered/esa-library/pdf/tvs-e.pdf> [<http://perma.cc/XW23-XSR2>] (explaining that endangered species are species that are at the brink of extinction now). The ESA defines critical habitat as the endangered or threatened species species’ specific geographic area, or closely outside the geographic area, on which are found those physical or biological features essential to the conservation of the species and which may require special management considerations or protection. 16 U.S.C. § 1532.

<sup>52</sup> See 16 U.S.C. § 1533(f)(1). In order to avoid possible conflict between state and federal agencies, the ESA requires the Secretary to fully cooperate with states whenever possible. See *id.* § 1535(a); *N.M. Dep’t of Game & Fish*, 854 F.3d at 1248. In accordance with the ESA, the Secretary issued one of the regulations at issue in this case. See 43 C.F.R. § 24.4(i)(5)(i); *N.M. Dep’t of Game & Fish*, 854 F.3d at 1248. One regulation requires that: “(i) Federal agencies of the department of the interior shall: . . . (5) Consult with the States and comply with State permit requirements in connection with the activities listed below, except in instances where the Secretary of the Interior determines that such compliance would prevent him from carrying out his statutory responsibilities: (i) In carrying out . . . programs involving reintroduction of fish and wildlife . . .” 43 C.F.R. § 24.4(i)(5)(i); see also 16 U.S.C. § 1535(f) (providing guidance when state and federal laws conflict).

<sup>53</sup> *N.M. Dep’t of Game & Fish*, 854 F.3d at 1240.

effective eradication campaigns by humans in modern history.<sup>54</sup> As a result, the smallest, rarest, and southernmost subspecies of the gray wolf, the Mexican gray wolf, was almost completely extirpated by 1970.<sup>55</sup> In 1976, the Mexican gray wolf was first listed as endangered under the ESA.<sup>56</sup> After capturing the last remaining wild Mexican wolves, the United States and Mexico partnered to initiate the Mexican Wolf Species Survival Plan, which strives to prevent the extinction of the subspecies by breeding the wolves in captivity and releasing them into the wild.<sup>57</sup>

*C. The Tenth Circuit Addresses Preliminary Injunctions in New Mexico Department of Game & Fish v. United States Department of the Interior*

New Mexico collaborated with FWS to conserve the Mexican gray wolf until 2011, when the New Mexico Department began requiring that FWS receive state permits before releasing or importing any more wolves within New Mexico's borders.<sup>58</sup> The FWS filed two permit applications with the New Mexico Department in April and May 2015, seeking to import a family of Mexican gray wolves into the state for release onto federal land.<sup>59</sup> In June 2015, the Director of the New Mexico Department ("Director") denied both permit applications, claiming that the New Mexico Department could not determine whether federal releases of wolves would conflict with New Mexico's

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<sup>54</sup> *Id.*; see *Humane Soc'y of the U.S.*, 76 F. Supp. 3d at 81 (citing Babcock, *supra* note 1, at 38) (explaining that government programs and private individuals initiated these wolf extermination efforts primarily to decrease the loss of livestock to wolf predation, and that these extermination efforts included trapping, shooting, and poisoning of wolves, as well as digging pups out of dens).

<sup>55</sup> *WildEarth Guardians*, 2016 WL 3919464, at \*1 (citing Endangered and Threatened Wildlife and Plants; Revision to the Regulations for the Nonessential Experimental Population of the Mexican Wolf, 80 Fed. Reg. 2512). The loss of an apex predator can have a cataclysmic impact on the health of an entire ecosystem, disrupting food webs and setting off a phenomenon called a "trophic cascade." See Thomas M. Newsome & William J. Ripple, *A Continental Scale Trophic Cascade from Wolves Through Coyotes to Foxes*, 84 J. ANIMAL ECOLOGY 49, 52 (2015). An example of this trophic cascade effect occurred in Yellowstone after the extirpation of wolves in the Rocky Mountains in the early twentieth century which caused huge elements of the ecosystem to collapse. See William J. Ripple & Robert L. Beschta, *Trophic Cascades in Yellowstone: The First 15 Years After Wolf Reintroduction*, 145 BIOLOGICAL CONSERVATION 205, 205–13 (2012). When wolves were returned to the park years later, these ecologically key areas began to regenerate, and species of animals returned. See *id.* Scientists believe that the return of the Mexican wolves' population to healthy levels in the Southwest would have a similar beneficial impact on the environment. See *id.*; *What You Need to Know: The Mexican Gray Wolf*, *supra* note 3.

<sup>56</sup> Determination that Species Are Threatened and Endangered, *supra* note 50, at 17,740.

<sup>57</sup> *N.M. Dep't of Game & Fish*, 854 F.3d at 1241. In 1982, the FWS created the first Mexican Wolf Recovery Plan, which resulted in the subspecies' eventual reintroduction into the wild. *Id.*

<sup>58</sup> *Id.* at 1243.

<sup>59</sup> *Id.* Federal regulation requires the FWS to consult with the states and to comply with state permit requirements when reintroducing wildlife except when the Secretary of the Interior determines that such compliance prevents the completion of statutory duties under the ESA. See 43 C.F.R. § 24.4(i)(5); *N.M. Dep't of Game & Fish*, 854 F.3d at 1243.

wildlife management efforts.<sup>60</sup> The FWS appealed the decision to the state's Game Commission ("Commission"), which upheld the New Mexico Department's rejection of FWS's permit applications.<sup>61</sup>

In October 2015, the FWS and the Secretary wrote to the New Mexico Department, arguing that compliance with the state's permitting requirements would prevent the Secretary from carrying out his responsibilities under the ESA.<sup>62</sup> The FWS also believed it had independent legal authority under federal law to import, export, hold, and transfer wolves within the state, and to release wolves onto federal lands without state permits.<sup>63</sup> Therefore, in early 2016, FWS issued an Initial Release and Translocation Plan and released two Mexican gray wolves onto federal land within New Mexico without a state permit.<sup>64</sup>

In response to the FWS's wolf releases, the New Mexico Department filed a complaint for injunctive relief against the FWS in May 2016, and simultaneously filed a motion for preliminary injunction requesting the United States District Court for the District of New Mexico temporarily halt FWS's further release of wolves within state borders.<sup>65</sup> The New Mexico Department based its requests on three different provisions of state law that specifically prohibit the importation and release of non-domesticated animals, including Mexican gray wolves, without a permit from the New Mexico Department.<sup>66</sup>

The New Mexico Department argued it would be harmed in two irreparable ways.<sup>67</sup> First, it asserted the unpermitted release of wolves threatened to disrupt the state's management efforts by introducing an apex predator in numbers not known to the state, thereby threatening the state's wild elk and

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<sup>60</sup> See N.M. CODE R. § 19.35.7.19(A)(3) (LexisNexis 2017) (indicating that to obtain a permit to release a non-domesticated animal, an applicant must "demonstrate that the intended release is provided for in state or federal resource or species management plans or strategies"); *id.* § 19.35.7.19(C) (stating that "[t]he director shall not approve any release permit that conflicts with current conservation management."); *N.M. Dep't of Game & Fish*, 854 F.3d at 1243–44. New Mexico's wildlife management efforts included monitoring the state's wild deer and elk populations, which the New Mexico Department of Game and Fish claimed could potentially be affected by the FWS's release of Mexican gray wolves in numbers unknown to the state. *N.M. Dep't of Game & Fish*, 854 F.3d at 1250.

<sup>61</sup> *Id.* at 1244.

<sup>62</sup> *Id.* Relevant New Mexico law provides, in pertinent part, that the FWS must comply with State permit requirements in reintroducing wildlife, except in instances where the Secretary of the Interior determines that such compliance would prevent the completion of statutory responsibilities. *Id.*; see 43 C.F.R. § 24.4(i)(5)(i).

<sup>63</sup> *N.M. Dep't of Game & Fish*, 854 F.3d at 1244.

<sup>64</sup> See *id.*

<sup>65</sup> *Id.* 1244–45, 1249; see 5 U.S.C. § 702 (2012).

<sup>66</sup> *N.M. Dep't of Game & Fish*, 854 F.3d at 1245; see N.M. CODE R. § 19.31.10.11 (prohibiting release of wildlife in New Mexico without a state permit); *id.* § 19.35.7.8 (prohibiting importation of wild animals into New Mexico without a state permit); *id.* § 19.35.7.19 (prohibiting release of imported wild animals in New Mexico without a state permit).

<sup>67</sup> *N.M. Dep't of Game & Fish*, 854 F.3d at 1250; *N.M. Dep't of Game & Fish v. U.S. Dep't of the Interior*, No. CV 16-00462 WJ/KBM, 2016 WL 4536465, at \*9 (D.N.M. June 10, 2016).

deer herds.<sup>68</sup> Second, the New Mexico Department argued that the FWS's unpermitted releases would harm its state sovereignty interests.<sup>69</sup> In response to both allegations of irreparable injury, the FWS asserted that the New Mexico Department could not show how the anticipated releases were likely to harm either its management of wild elk and deer herds or its state sovereignty.<sup>70</sup> FWS further contended that legal precedents reject the idea that federal actions concerning federally protected wildlife on federally protected land could interfere with a state's sovereignty interests.<sup>71</sup>

The district court issued a memorandum opinion and order, determining the New Mexico Department was entitled to injunctive relief.<sup>72</sup> Accordingly, the district court's order enjoined the FWS from (1) importing or releasing any Mexican wolves in the State without first obtaining permits from the New Mexico Department, and (2) importing or releasing Mexican wolf offspring in violation of previously issued state permits.<sup>73</sup>

On appeal to the Tenth Circuit, the FWS challenged the district court's findings on all four preliminary injunction factors.<sup>74</sup> In part, the FWS contended the district court erred by finding that the New Mexico Department had sufficiently established a significant risk of irreparable injury, and therefore, that the district court erred in granting preliminary relief to the New Mexico Department.<sup>75</sup> The Tenth Circuit held that the district court incorrectly considered only the seriousness of the potential irreparable harm shown, without regard for the likelihood of the harm.<sup>76</sup> Thus, the Tenth Circuit determined it must review the evidence supporting the New Mexico Department's irreparable injury claims.<sup>77</sup>

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<sup>68</sup> *N.M. Dep't of Game & Fish*, 854 F.3d at 1250; *U.S. Dep't of the Interior*, 2016 WL 4536465, at \*9. An apex predator is a predator residing at the top of a food chain upon which no other animals prey. *Apex predator*, MERRIAM-WEBSTER ONLINE DICTIONARY (Jan. 20, 2018), <https://www.merriam-webster.com/dictionary/apex%20predator> [<https://perma.cc/FBK8-666A>].

<sup>69</sup> *See N.M. Dep't of Game & Fish*, 854 F.3d at 1250. Although the New Mexico Department did not initially contend injury to its state sovereignty it introduced this argument on appeal. *See id.* Specifically, the New Mexico Department argued that the FWS's unpermitted releases would significantly interfere with New Mexico's core government functions to establish and enforce laws within its borders. *Id.* at 1254. Additionally, the New Mexico Department contended that the FWS's actions were designed to pressure New Mexico to change its laws to meet the desired goals of the FWS. *Id.*

<sup>70</sup> *Id.* at 1254; *U.S. Dep't of the Interior*, 2016 WL 4536465, at \*10. Why should FN 70 be an *Id.* at 854 if you didn't want me to change footnote 61?

<sup>71</sup> *N.M. Dep't of Game & Fish*, 854 F.3d at 1250.

<sup>72</sup> *Id.* at 1245.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* Between June and July of 2016, several interested states and nonprofit organizations filed a motion to intervene and a notice of appeal. *See id.* at 1240, 1245. A notice of appeal followed shortly thereafter from the DOI and the FWS. *See id.* When this Comment discusses procedural history after July 2016, reference to "FWS" is intended to collectively refer to all Federal Appellants, including Intervenor Appellants. *See id.*

<sup>75</sup> *Id.* at 1245.

<sup>76</sup> *See id.* at 1245, 1250.

<sup>77</sup> *See id.*

First, the only evidence the New Mexico Department presented to show harm to the state's wildlife management efforts was a declaration by its Director.<sup>78</sup> The Tenth Circuit noted that the Director's declaration did not identify or address the type, likelihood, imminence, or degree of harm that the anticipated releases or importations would allegedly have on the state's elk and deer species as a whole or the New Mexico Department's ability to manage the species' population.<sup>79</sup> The Tenth Circuit therefore held that the district court had no rational basis for finding the state's wildlife management efforts would likely suffer irreparable harm.<sup>80</sup>

Second, to demonstrate harm to its state sovereignty, the New Mexico Department analogized its situation to one in which a state is enjoined from enforcing or effectuating its own statutes.<sup>81</sup> The Tenth Circuit explicitly chose not to address the underlying issue of whether the state even had a valid sovereignty interest in creating and enforcing laws related to management of wildlife on federal lands.<sup>82</sup> The Tenth Circuit then noted that even assuming such an interest existed, the New Mexico Department presented no evidence to support its claim that the FWS's releases would interfere with the state's ability to enforce or make its own laws.<sup>83</sup> Consequently, the Tenth Circuit held the New Mexico Department's claims of harm to the state's sovereignty were insufficient.<sup>84</sup> Since the New Mexico Department failed to demonstrate at least one of the four required preliminary injunction factors, the Tenth Circuit held it was unnecessary to examine the other three factors, and therefore reversed and vacated the district court's order granting a preliminary injunction to the New Mexico Department.<sup>85</sup>

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<sup>78</sup> See *id.* at 1253–54. The declaration claimed this because wolves prey primarily on ungulates, and therefore, the predator and prey species could not be managed in isolation. *Id.* at 1253.

<sup>79</sup> *Id.* at 1251.

<sup>80</sup> See *id.* at 1254. The Tenth Circuit Court of Appeals reviews rulings by subordinate federal district courts for abuses of discretion. *N.M. Dep't of Game & Fish*, 854 F.3d at 1245; *Diné Citizens*, 839 F.3d at 1281. The Tenth Circuit held that an abuse of discretion occurs where a decision is premised on an erroneous conclusion of law or where there is no rational basis in the evidence for the ruling. *N.M. Dep't of Game & Fish*, 854 F.3d at 1245; *Kobach*, 840 F.3d at 723.

<sup>81</sup> *N.M. Dep't of Game & Fish*, 854 F.3d at 1254. The New Mexico Department argued that the FWS's unpermitted releases significantly interfered with the State's ability to enforce its laws and therefore pressured the State to amend its laws to meet the FWS's demands. *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> See *id.* at 1255. In fact, the Tenth Circuit Court of Appeals observed that the DOI and the FWS were the ones enjoined from effectuating their interpretation of the ESA. See *id.* The Tenth Circuit further agreed with FWS's argument that federal law exempted FWS from New Mexico's permit requirements in the limited situation where the state's requirements prevented FWS from executing its congressionally-mandated responsibility to recover the species. *Id.* In contrast, the New Mexico Department presented no evidence to demonstrate that this limited exemption harmed New Mexico's sovereignty. *Id.*

<sup>84</sup> See *id.*

<sup>85</sup> See *id.* at 1255, 1256.

## II. CIRCUITS IN CONFLICT OVER PRELIMINARY INJUNCTION STANDARD

In 2008, in *Winter v. Natural Resources Defense Council, Inc.* (“*Winter II*”), the United States Supreme Court explicitly required that plaintiffs seeking preliminary relief demonstrate that irreparable injury is likely absent an injunction.<sup>86</sup> Only the dissenting opinion by Justice Ginsburg directly addressed the issue of whether sliding-scale tests were still valid.<sup>87</sup> Since the *Winter II* decision, courts have struggled with the questions of whether sliding-scale preliminary injunction approaches are still valid and whether the likelihood of injury factor should be emphasized among the other factors.<sup>88</sup> Section A of this Part examines the approach taken by the United States Courts of Appeals for the Second, Seventh, and Ninth Circuits, which continue to apply sliding-scale preliminary injunction tests and under-emphasize the likelihood of irreparable injury prerequisite.<sup>89</sup> Section B details the approach taken by the United States Courts of Appeals for the Fourth and Tenth Circuits, which have interpreted *Winter II* as invalidating sliding-scale approaches, and which treat likely irreparable injury as the most important prerequisite that moving parties must meet.<sup>90</sup>

### A. Second, Seventh, and Ninth Circuits: Sliding-Scale Tests Still Valid After *Winter II* and Likely Irreparable Injury Factor Not Emphasized

Since the U.S. Supreme Court’s decision in *Winter II*, several federal circuits have continued to apply sliding-scale preliminary injunction tests that lessen a moving party’s burden of demonstrating one factor upon a sufficiently strong showing of another.<sup>91</sup> By relaxing a movant’s burden to demonstrate a clear showing of all four factors independently, these federal circuits allow the trial judge more discretion to balance the relative strength of each factor on a

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<sup>86</sup> *Winter v. Nat. Res. Def. Council, Inc.* (*Winter II*), 555 U.S. 7, 22 (2008).

<sup>87</sup> *See id.* at 51 (Ginsburg, J., dissenting) (arguing that that the majority opinion does not invalidate continued use of sliding-scale tests that lessened the requirement to show likelihood of injury upon the sufficient showing of a probability of success).

<sup>88</sup> *See id.* at 22 (majority opinion) (deciding to not explicitly invalidate modified preliminary injunction tests, but requiring that movants clearly demonstrate the likely irreparable harm factor); *N.M. Dep’t of Game & Fish v. U.S. Dep’t of the Interior*, 854 F.3d 1236, 1249–50 (10th Cir. 2017) (holding that modified tests are invalid and showing likely irreparable harm is the most important prerequisite); *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131–32 (9th Cir. 2011) (recognizing *Winter II*’s requirement for movants to demonstrate that irreparable harm is likely, but holding that sliding-scale tests are still valid).

<sup>89</sup> *See infra* notes 91–100 and accompanying text.

<sup>90</sup> *See infra* notes 101–113 and accompanying text.

<sup>91</sup> *See All. for the Wild Rockies*, 632 F.3d at 1133–34 (applying “serious questions” test, a sub-approach of the sliding-scale test); *Citigroup Glob. Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 34–35, 38 (2d Cir. 2010) (holding that U.S. Supreme Court precedent has not foreclosed application of the sliding-scale approach).

case-by-case basis.<sup>92</sup> In 2010, in *Citigroup Global Markets v. VCG Special Opportunities Master Fund Ltd.*, the Second Circuit Court of Appeals held that U.S. Supreme Court precedent supported its three-part sliding-scale test, which always requires movants demonstrate irreparable injury but allows the success-on-the-merits factor to “slide.”<sup>93</sup> Similarly, in the 2010 case *Judge v. Quinn*, the Seventh Circuit Court of Appeals reaffirmed its use of a sliding-scale test, which provided that the greater the likelihood of success on the merits, the less the likelihood of irreparable harm was required to grant preliminary relief.<sup>94</sup>

An intra-circuit split exists within the Ninth Circuit Court of Appeals as to whether sliding-scale tests are still valid after *Winter II*.<sup>95</sup> In the 2010 case *DISH Network Corp v. FCC*, the Ninth Circuit applied the traditional standard by holding that DISH’s failure to demonstrate likely success on the merits was sufficient grounds for denying a preliminary injunction.<sup>96</sup> In contrast, in 2011, in *Alliance for the Wild Rockies v. Cottrell*, the Ninth Circuit held that sliding-scale tests that relaxed the need to show one factor were still valid because the U.S. Supreme Court did not explicitly discuss the continuing validity of sliding-scale tests in *Winter II*.<sup>97</sup> The Ninth Circuit reasoned that the importance of judicial flexibility further supported its continued use of a sliding-scale approach.<sup>98</sup> After *Winter II*, the Second, Seventh, and Ninth Circuits all recog-

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<sup>92</sup> See *All. for the Wild Rockies*, 632 F.3d at 1134 (explaining that the flexibility of Ninth Circuit’s “serious questions” preliminary injunction test supported its continued application); Weisshaar, *supra* note 31, at 1040 (noting that the U.S. Supreme Court has endorsed a flexible approach in some cases).

<sup>93</sup> See *Citigroup Glob. Mkts.*, 598 F.3d at 34–35, 37–38. The Second Circuit held that *Winter II* did not invalidate the use of a “flexible” approach, which allows the likelihood-of-success factor to “slide,” or be relaxed, when there exists “serious questions going to the merits [of the case].” See *id.*; Weisshaar, *supra* note 31, at 1038.

<sup>94</sup> See *Judge v. Quinn*, 612 F.3d 537, 546 (7th Cir. 2010); see also *Hoosier Energy Rural Elec. Coop., Inc. v. John Hancock Life Ins. Co.*, 582 F.3d 721, 725 (7th Cir. 2009) (applying a balancing test, reasoning that “[h]ow strong a claim on the merits is . . . depends on the balance of harms: the more net harm an injunction can prevent, the weaker the plaintiff’s claim on the merits can be while still supporting some preliminary relief”).

<sup>95</sup> Weisshaar, *supra* note 31, at 1040; see *Winter II*, 555 U.S. at 22; *DISH Network Corp. v. FCC*, 653 F.3d 771, 776–77 (9th Cir. 2011) (applying the traditional four-factor test); *All. for the Wild Rockies*, 632 F.3d at 1131–32 (applying the “serious questions” sub-approach)

<sup>96</sup> *DISH Network*, 653 F.3d at 776 (requiring the movant to meet all four elements of the preliminary injunction test).

<sup>97</sup> See *All. for the Wild Rockies*, 632 F.3d at 1131–32. The Ninth Circuit held that its “serious questions” approach survived *Winter II*, and that serious questions going to the merits and a hardship balance that tips sharply toward the plaintiff could support the issuance of an injunction, assuming that the other two elements of the *Winter II* test are also met. *Id.* In other words, this test ignored the requirement for movants to demonstrate likely success on the merits. See *id.*; see also *Winter II*, 555 U.S. at 51 (Ginsburg, J., dissenting) (arguing that the majority did not discuss the validity of modified tests so courts should consider flexible sliding-scale approaches as still valid).

<sup>98</sup> See *All. for the Wild Rockies*, 632 F.3d at 1133–34. At times, the Ninth Circuit even applies a “serious questions” sub-approach to its modified test, completely ignoring the requirement to show a likelihood of success when serious questions exist going to the merits of the case, and the other two elements tip in the movant’s favor. See *id.* at 1131–32.

nized the requirement for irreparable injury to be likely, and not merely possible.<sup>99</sup> Nonetheless, these circuits have refused to place a heightened burden on the likely irreparable injury prerequisite, treating it instead with equal or less weight than the other three factors.<sup>100</sup>

### *B. Fourth and Tenth Circuits: Sliding-Scale Tests Invalidated; Likely Irreparable Injury Factor Emphasized*

The Fourth and Tenth Circuits have both repeatedly affirmed interpretations of *Winter II* as requiring a traditional, sequential test, invalidating any approach that relaxes or ignores any of the four requirements.<sup>101</sup> In the 2009 case *The Real Truth About Obama, Inc. v. Federal Election Commission*, the Fourth Circuit held that *Winter II* invalidated its previously-applied modified preliminary injunction test that did not require a clear showing of the likelihood of success factor.<sup>102</sup> The Fourth Circuit held that *Winter II* required that a moving party make a sufficiently clear showing on each of the four traditional factors.<sup>103</sup>

In *Diné Citizens Against Ruining our Environment v. Jewell*, the Tenth Circuit Court of Appeals held in 2009 that any modified preliminary injunction

<sup>99</sup> See *Winter II*, 555 U.S. at 22; *All. for the Wild Rockies*, 632 F.3d at 1131 (recognizing that irreparable harm must be likely, not merely possible, to warrant preliminary relief); *Quinn*, 612 F.3d at 546 (requiring movant demonstrate likely irreparable harm, but also holding that factors are interdependent); *Citigroup Glob. Mkts.*, 598 F.3d at 33 (acknowledging movant's requirement to demonstrate likelihood of irreparable harm).

<sup>100</sup> See *Winter II*, 555 U.S. at 22; *All. for the Wild Rockies*, 632 F.3d at 1131; *Quinn*, 612 F.3d at 546; *Citigroup Glob. Mkts.*, 598 F.3d at 33. For example, in *Alliance for the Wild Rockies*, the Ninth Circuit Court of Appeals acknowledged that a possibility of irreparable harm was no longer sufficient to grant preliminary relief after *Winter II*, but still placed less weight on the likelihood of harm factor than the it placed on the other three factors. See *Winter II*, 555 U.S. at 22; *All. for the Wild Rockies*, 632 F.3d at 1131.

<sup>101</sup> See *Winter II*, 555 U.S. at 22; *Diné Citizens Against Ruining Our Env't v. Jewell*, 839 F.3d 1276, 1282 (10th Cir. 2016) (holding that any preliminary injunction test that is modified to relax one of the prongs is invalidated after *Winter II*); *Dewhurst v. Century Aluminum Co.*, 649 F.3d 287, 290 (4th Cir. 2011) (requiring a sequential test that considers each factor on its own); *Scott v. Bierman*, 429 F. App'x 225, 228–29 (4th Cir. 2011) (requiring sequential test); *Real Truth About Obama, Inc. v. FEC*, 575 F.3d 342, 347 (4th Cir. 2009) (holding previously applied sliding-scale approaches as invalid); *WV Ass'n of Club Owners & Fraternal Servs., Inc. v. Musgrave*, 553 F.3d 292, 298 (4th Cir. 2009) (requiring a sequential test). The term “sequential” denotes a test in which each factor is examined in sequence, independent of the strength of the other factors. See *Weisshaar*, *supra* note 31, at 1016 (explaining that a sequential test is one that requires a movant to demonstrate all four factors of the traditional test).

<sup>102</sup> See *Winter II*, 555 U.S. at 22; *Real Truth About Obama*, 575 F.3d at 346, 347 (holding that *Winter II* invalidated the Fourth Circuit's previously-applied “Blackwelder” test, which instructed that the likelihood of success requirement can only be reviewed after purported hardships are balanced, which itself requires a satisfactory showing of questions appropriate for litigation); *Weisshaar*, *supra* note 31, at 1033.

<sup>103</sup> See *Winter II*, 555 U.S. at 22; *Real Truth About Obama*, 575 F.3d at 346; *Weisshaar*, *supra* note 31, at 1034.

test that relaxes one of the prongs of the traditional test is no longer valid after *Winter II*.<sup>104</sup> In *Diné Citizens*, the plaintiffs argued that sliding-scale tests were still valid because the U.S. Supreme Court never expressly rejected them in *Winter II* and because the invalidated Ninth Circuit standard dealt with a different prong of the preliminary injunction test.<sup>105</sup> The Tenth Circuit disagreed, holding that *Winter II*'s rationale applied with equal force even though a different prong of the preliminary injunction test was relaxed.<sup>106</sup> The court thus suggested that the intent of *Winter II* was to require movants demonstrate that all four factors independently and sufficiently exist.<sup>107</sup> Additionally, the U.S. Supreme Court's own subsequent treatment of preliminary injunction tests after *Winter II* further suggests that the Court requires a sequential test that considers all four of the preliminary injunction factors on an independent basis.<sup>108</sup> Nevertheless, the Court has not defined which standard of proof applies to demonstrate that each factor is sufficiently met.<sup>109</sup>

In the 2004 case *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, the Tenth Circuit Court of Appeals held that demonstrating likely irrep-

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<sup>104</sup> *Diné Citizens*, 839 F.3d at 1287 (concluding that its modified test is inconsistent with the U.S. Supreme Court's recent decision in *Winter II*, which held that any modified test which relaxes one of the prongs for preliminary relief, thus deviating from the standard test, is impermissible); see *N.M. Dep't of Game & Fish*, 854 F.3d at 1246; see also *Planned Parenthood Ass'n of Utah v. Herbert*, 839 F.3d 1301, 1310 (10th Cir. 2016) (Gorsuch, J., dissenting from the denial of rehearing en banc) (recognizing that although the Tenth Circuit "once suggested that the plaintiff's burden on the likelihood of success factor may be relaxed when the other preliminary injunction factors are satisfied . . . the Supreme Court has since cast doubt on that judgment").

<sup>105</sup> See *Diné Citizens*, 839 F.3d at 1282.

<sup>106</sup> *Id.*

<sup>107</sup> See *id.*

<sup>108</sup> *Weisshaar*, *supra* note 31, at 1050–51; see *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 157, 158 (2010) (citing *Winter II* to hold that an injunction should issue only if the traditional four-factor test is satisfied); *Nken v. Holder*, 556 U.S. 418, 433 (2009) (Kennedy, J., concurring) (rejecting sliding-scale tests and stating that courts could not disperse with the required showing of one factor because there is a strong likelihood of another).

<sup>109</sup> See *Weisshaar*, *supra* note 31, at 1053 (arguing that although precise quantification of probabilities in any given case is difficult, this should not prevent the Supreme Court from enunciating a clear standard). For example, the U.S. Supreme Court has never elaborated on whether "a clear showing of likelihood" of irreparable injury is intended to require that likelihood of harm be proved "beyond a reasonable doubt," "by clear and convincing evidence," "by a preponderance of the evidence," or by some other standard of proof. *Id.*; see also *Morton Denlow, The Motion for a Preliminary Injunction: Time for a Uniform Federal Standard*, 22 REV. LITIG. 495, 532 (2003) (arguing that a party seeking a preliminary injunction should be required to prove at least a fifty-percent chance of prevailing on the merits). "Beyond a reasonable doubt" is the standard of proof that requires the factfinder (judge or jury) to be firmly convinced of a criminal defendant's guilt. *Beyond a Reasonable Doubt*, BLACK'S LAW DICTIONARY (10th ed. 2014). "Clear and convincing evidence" is the standard of proof that requires a factfinder to determine that the thing to be proved is highly probable or reasonably certain. *Clear and Convincing Evidence*, *id.* The lowest burden of the three standards of proof, "preponderance of the evidence" is defined as the burden of proof in most civil trials, in which the jury is instructed to find for the party that has the stronger evidence on the whole, however slight the party's edge. *Preponderance of the Evidence*, *id.*

arable harm was the single most important prerequisite for the issuance of a preliminary injunction.<sup>110</sup> The Tenth Circuit's heightened burden on the likelihood of irreparable harm factor was later supported by the U.S. Supreme Court's holding in *Winter II*.<sup>111</sup> The Court's primary legacy in *Winter II* was its mandate that a movant must demonstrate a likelihood, not merely a possibility, of irreparable harm absent preliminary relief.<sup>112</sup> Nevertheless, the Court also suggested the relative importance of the likelihood of harm factor among the other three factors by indicating that likely harm must be demonstrated before a decision on the merits could be rendered.<sup>113</sup>

### III. *WINTER II* HOLDING INVALIDATES SLIDING-SCALE TESTS AND REQUIRES EMPHASIS OF LIKELY IRREPARABLE INJURY

The United States Court of Appeals for the Tenth Circuit's 2017 decision in *New Mexico Department of Game & Fish v. United States Department of the Interior* correctly held that sliding-scale preliminary injunction tests, which relax the requirement to show any factor below the clear showing standard, are no longer valid after the United States Supreme Court's 2008 decision in *Winter v. Natural Resources Defense Council, Inc.* ("*Winter I*").<sup>114</sup> Further, the Tenth Circuit correctly suggested that the requirement to demonstrate likely irreparable injury should be emphasized because of the U.S. Supreme Court's intent to treat preliminary relief as an extraordinary remedy available only in situations in which irreparable harm is likely to occur.<sup>115</sup> This Part argues that the Tenth Circuit Court of Appeals' 2017 holding in *New Mexico Department of Game & Fish* correctly interpreted the U.S. Supreme Court's 2008 decision in *Winter II* as invalidating sliding-scale tests.<sup>116</sup> Additionally, this Part suggests that the other federal circuits should adopt the Tenth Circuit's approach

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<sup>110</sup> See *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 356 F.3d 1256, 1260 (10th Cir. 2004); see also *Port City Props. v. Union Pac. R.R. Co.*, 518 F.3d 1186, 1190 (10th Cir. 2008) (reiterating the Tenth Circuit's emphasis on likely irreparable harm as the most important factor).

<sup>111</sup> See *Winter II*, 555 U.S. at 22; *N.M. Dep't of Game & Fish*, 854 F.3d at 1249–50 (citing *Winter I*'s holding that a movant must demonstrate that irreparable harm is likely absent an injunction).

<sup>112</sup> See *Winter II*, 555 U.S. at 22; *N.M. Dep't of Game & Fish*, 854 F.3d at 1249–50 (citing *Winter I*'s holding that movant must demonstrate that irreparable harm is likely absent injunction); WRIGHT ET AL., *supra* note 28, § 2948.1, at 139 (noting that the primary lesson from *Winter II* was its requirement that movants demonstrate a likelihood of irreparable harm, not merely a possibility of such harm).

<sup>113</sup> See *Winter II*, 555 U.S. at 22 (citing WRIGHT ET AL., *supra* note 28, § 2948.1, at 139).

<sup>114</sup> See *Winter v. Nat. Res. Def. Council, Inc. (Winter I)*, 555 U.S. 7, 22 (2008); *N.M. Dep't of Game & Fish v. U.S. Dep't of the Interior*, 854 F.3d 1236, 1246 (10th Cir. 2017).

<sup>115</sup> See *Winter II*, 555 U.S. at 22 (holding that issuing a preliminary injunction based only on a possibility of irreparable harm as inconsistent with the U.S. Supreme Court's 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); *N.M. Dep't of Game & Fish*, 854 F.3d at 1253.

<sup>116</sup> See *infra* notes 118–125 and accompanying text.

of placing a heightened emphasis on the likelihood of irreparable harm factor.<sup>117</sup>

Following *Winter II*, the U.S. Supreme Court has consistently reaffirmed that all four elements must be clearly and independently demonstrated to warrant preliminary relief.<sup>118</sup> This standard suggests that relaxing the burden to show any one of the prongs of the traditional test would not lead to a clear showing of all four factors.<sup>119</sup> Therefore, sliding-scale tests that do not require a clear showing of all factors independently, but instead balance the relative strength of the factors, are no longer valid after *Winter II*.<sup>120</sup>

The Second, Seventh, and Ninth Circuits should reconsider their continued use of sliding-scale preliminary injunction tests for three reasons.<sup>121</sup> First, the natural reading of the *Winter II* holding expresses the four traditional factors in a list format, with semicolons and the conjunction “and” joining the factors, indicating that all elements are equally required.<sup>122</sup> Second, the U.S. Supreme Court’s own interpretations of *Winter II* suggest that *Winter II*’s preliminary injunction standard requires a sequential test wherein movants must demonstrate all four factors by a clear and independent showing.<sup>123</sup> Finally, the traditional, sequential test that requires an independent showing of each factor is fairer than a balancing test.<sup>124</sup> Although the latter provides flexibility for federal district court judges, it significantly disadvantages non-movants by allowing preliminary relief even in cases where movants have very little chance of later succeeding on the merits at trial.<sup>125</sup>

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<sup>117</sup> See *infra* notes 126–133 and accompanying text.

<sup>118</sup> See *Nken v. Holder*, 556 U.S. 418, 433 (2009) (requiring clear showing of all four preliminary injunction factors); *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 157–58 (2010) (holding that all four factors were required to warrant an injunction); *Winter II*, 555 U.S. at 22.

<sup>119</sup> See *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997); *WRIGHT ET AL.*, *supra* note 28, § 2948.1, at 195.

<sup>120</sup> See *N.M. Dep’t of Game & Fish*, 854 F.3d at 1246; *Diné Citizens Against Ruining Our Env’t v. Jewell*, 839 F.3d 1276, 1282 (10th Cir. 2016); *Real Truth About Obama, Inc. v. Fed. Election Comm’n*, 575 F.3d 342, 347 (4th Cir. 2009).

<sup>121</sup> See *Weisshaar*, *supra* note 31, at 1048 (providing similar reasons why the U.S. Supreme Court should adopt a sequential test, but arguing further that the Court should adopt a modified “likely-success-on-the-merits” test that emphasizes that factor as most important).

<sup>122</sup> *Id.* at 1049. The sentence format of different factors joined by semicolons and the word “and” generally indicates that all the elements in the list are required. See *id.* (explaining that this sentence format indicates a sequential test in which all four traditional factors are required).

<sup>123</sup> *Id.*; see *Monsanto Co.*, 561 U.S. at 157–58 (holding that the traditional four-factor test applies when a plaintiff seeks a permanent injunction to remedy a NEPA violation); *Nken*, 556 U.S. at 433 (requiring a movant to demonstrate all four traditional factors to warrant preliminary relief); *Munaf v. Geren*, 553 U.S. 674, 690 (2008) (holding that a party seeking a preliminary injunction must demonstrate the other three factors, and not only the “likelihood of success on the merits” factor).

<sup>124</sup> *Weisshaar*, *supra* note 31, at 1052.

<sup>125</sup> See *id.*; *Denlow*, *supra* note 109, at 532 (arguing that sliding-scale tests should not be used because they allow parties with little chance of ultimately prevailing on the merits to obtain preliminary injunctions, thus manipulating the judicial process and wasting valuable and limited court time).

The Tenth Circuit's heightened emphasis on the likelihood of irreparable harm factor in *New Mexico Department of Game & Fish* is consistent with the U.S. Supreme Court's characterization of injunctive relief as an extraordinary remedy in *Winter II*.<sup>126</sup> The Tenth Circuit's emphasis on this factor reflects the U.S. Supreme Court's intent that a plaintiff's right to relief must be clear and unequivocal, especially because preliminary injunctions often provide the plaintiff with the ultimate remedy sought from the trial itself.<sup>127</sup> Although the Ninth Circuit now requires a clear showing of all four preliminary injunction factors since *Winter II*, it should place a heightened emphasis on the likelihood of harm requirement.<sup>128</sup> The Tenth Circuit's standard, which requires demonstrating likely irreparable harm before considering the other factors, is more consistent with the U.S. Supreme Court's intent in *Winter II* because it properly treats a preliminary injunction as an extreme measure necessary to avoid almost certain irreparable harm that would otherwise occur absent relief.<sup>129</sup>

The conflict among the federal circuits over the preliminary injunction standard should be resolved by the other circuits adopting the Tenth Circuit's stricter, sequential approach.<sup>130</sup> The Tenth Circuit's approach requires all four factors independently meet a "clear showing" baseline burden of proof but also

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<sup>126</sup> See *Winter II*, 555 U.S. at 22 (holding that a plaintiff's right to preliminary relief must be clear and unequivocal); *N.M. Dep't of Game & Fish*, 854 F.3d at 1249 (holding that a preliminary injunction is an extraordinary remedy that requires a movant to demonstrate a clear showing of all four traditional factors).

<sup>127</sup> See *Winter II*, 555 U.S. at 22; *N.M. Dep't of Game & Fish*, 854 F.3d at 1250, 1253; Weisshaar, *supra* note 31, at 1057.

<sup>128</sup> See *Winter II*, 555 U.S. at 22; *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011).

<sup>129</sup> See *Winter II*, 555 U.S. at 22. Compare *N.M. Dep't of Game & Fish*, 854 F.3d at 1250 (citing *Greater Yellowstone Coal. v. Flowers*, 321 F.3d 1250, 1258 (10th Cir. 2003)) (holding that, while not an easy burden to meet, a plaintiff who can show a significant risk of irreparable harm has demonstrated that the harm is not speculative), with *Ferring Pharm., Inc. v. Watson Pharm., Inc.*, 765 F.3d 205, 210 (3d Cir. 2014) (requiring all four traditional factors, but under-emphasizing the relative importance of likelihood of irreparable harm in the issuance of a preliminary injunction), and *All. for the Wild Rockies*, 632 F.3d at 1131 (requiring that movants demonstrate likely irreparable injury, but omitting any discussion on the relative importance of the likely harm factor in relation to the other three factors).

<sup>130</sup> See *Winter II*, 555 U.S. at 22 (holding that movants for preliminary injunctions must demonstrate all four traditional preliminary injunction factors, including likelihood of irreparable injury absent immediate preliminary relief); *Ferring Pharm., Inc.*, 765 F.3d at 210 (requiring all four factors be demonstrated to warrant preliminary relief in the Third Circuit, but not discussing the relative importance of the likely irreparable harm factor among the other three factors). Compare *N.M. Dep't of Game & Fish*, 854 F.3d at 1246–47, 1249 (requiring that movants demonstrate at least a clear showing of all four traditional factors, but also placing a heightened emphasis on the demonstration of likely irreparable injury), and *Diné Citizens*, 839 F.3d at 1282 (holding that the Tenth Circuit's previously-applied sliding-scale test was inconsistent with the U.S. Supreme Court's intent in *Winter II*), with *All. for the Wild Rockies*, 632 F.3d at 1131–32 (holding that the Ninth Circuit's use of sliding-scale tests was still valid after *Winter II* because the U.S. Supreme Court never expressly rejected sliding-scale tests).

allows courts to apply heightened burdens for movants to demonstrate any of the four factors, such as to the likely irreparable injury element.<sup>131</sup> This baseline approach is similar to the type of “floor” requirements established by the U.S. Supreme Court for other types of procedural safeguards.<sup>132</sup> Further, it is consistent with the U.S. Supreme Court’s intent for preliminary injunctions to serve as extraordinary remedies granted only upon a clear showing that the movant is entitled to such relief.<sup>133</sup>

Finally, the U.S. Supreme Court should clarify its preliminary injunction standard by rejecting sliding-scale tests, defining the burdens of proof required for the four factors, and further emphasizing the likely injury requirement.<sup>134</sup> Such a resolution would promote the interests of the justice system by ensuring fairness for all parties and consistency among the courts, thereby discouraging frivolous litigation and forum-shopping.<sup>135</sup>

## CONCLUSION

In *New Mexico Department of Game & Fish v. United States Department of the Interior*, the United States Court of Appeals for the Tenth Circuit correctly held that the United States Supreme Court’s 2008 holding in *Winter v. Natural Resources Defense Council, Inc.* invalidated continued use of sliding-scale preliminary injunction tests that unfairly permit preliminary relief without a sufficient and independent showing of all four required elements. Additionally, the court held that likely irreparable injury is the most important prerequisite to grant a preliminary injunction. The decision in *New Mexico Department of Game & Fish* was a victory for federal efforts to conserve endangered species, especially in future cases involving states’ attempts to control wildlife on federal land within their borders. Within the Tenth Circuit, states may no longer preliminarily enjoin federal agencies from conserving endan-

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<sup>131</sup> See *N.M. Dep’t of Game & Fish*, 854 F.3d at 1245, 1253.

<sup>132</sup> See *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 86 (1980); *N.M. Dep’t of Game & Fish*, 854 F.3d at 1245, 1253. In *PruneYard Shopping Center*, the U.S. Supreme Court held that a state’s constitutional provision that required private property owners to allow others to express their First Amendment free speech rights on their property in certain situations did not violate the Fourteenth Amendment. See *PruneYard*, 447 U.S. at 86. The Court explained that state constitutions could provide individual liberties more expansive than those conferred by the Federal Constitution. See *id.* at 81. Similarly, regarding grants of preliminary injunctions, movants in federal courts are required to demonstrate a baseline clear showing of all four factors, but specific jurisdictions should be permitted to require heightened burdens for certain factors. See *id.*

<sup>133</sup> See *Winter II*, 555 U.S. at 22; *N.M. Dep’t of Game & Fish*, 854 F.3d at 1245, 1253.

<sup>134</sup> See Denlow, *supra* note 109, at 538 (contending that courts should require parties moving for a preliminary injunction to demonstrate an at least fifty percent likelihood of succeeding on the merits, because allowing any less likelihood manipulates the judicial process by allowing injunction when success at trial is unlikely).

<sup>135</sup> See *N.M. Dep’t of Game & Fish*, 854 F.3d at 1253; Weisshaar, *supra* note 31, at 1015; Denlow, *supra* note 109, at 538.

gered species in the absence of a clear showing of likely irreparable harm. Nevertheless, the Second, Seventh, and Ninth Circuits continue to apply more relaxed sliding-scale approaches that ignore one or more factors by balancing the relative strengths of each factor on a case-by-case basis. Therefore, it is likely that the U.S. Supreme Court will need to address this circuit split and clarify its preliminary injunction standard. When that happens, the Court should adopt the Tenth Circuit's approach and establish a preliminary injunction standard consistent with its own extensive precedent, prohibiting continued use of sliding-scale tests and emphasizing likely irreparable harm as the most important prerequisite. For now, at least, where states cannot show likely irreparable injury, state agencies seeking preliminary relief are simply crying wolf.

CURTIS CRANSTON

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