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## Unlikely to Succeed: How the Second Circuit's Adherence to the Serious Questions Standard for the Granting of Preliminary Injunctions Contradicts Supreme Court Precedent and Turns and Extraordinary Remedy into an Ordinary One

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# Unlikely to Succeed: How the Second Circuit’s Adherence to the Serious Questions Standard for the Granting of Preliminary Injunctions Contradicts Supreme Court Precedent and Turns an Extraordinary Remedy into an Ordinary One

## I. Introduction

In March 2010, the U.S. Court of Appeals for the Second Circuit handed down its decision in *Citigroup Global Markets v. VCG Special Opportunities Master Fund Limited* causing at least one lawyer to note that “[t]he Second Circuit has now put itself on a collision course with the Supreme Court. . . .”<sup>1</sup> The subject matter of this potential collision course is the appropriate standard for the issuance of preliminary injunctions in federal courts.<sup>2</sup> More specifically, it concerns the Second Circuit’s continued use of the serious questions alternative as a substitution for the requirement that a party seeking a preliminary injunction demonstrate a likelihood of success on the merits despite recent Supreme Court precedent that may be read to prohibit that alternative.<sup>3</sup> The ramifications of this potential jurisprudential conflict affect more than just the Second Circuit. Other circuits, including the Ninth and Tenth Circuits, also allow a serious questions alternative to substitute for the likelihood of success requirement.<sup>4</sup> Therefore, the fate of these circuits’ preliminary injunction standard could very well be entwined with *Citigroup’s* fate.

Not only does *Citigroup* raise the issue of a possible deviation from Supreme Court precedent, it speaks to the very nature of injunctive relief. A preliminary injunction “is an exceptionally potent and far-reaching remedy, the grant or denial of which often leads to a cascade of serious consequences.”<sup>5</sup> As such, a preliminary injunction has long been regarded as an extraordinary remedy.<sup>6</sup> Unquestionably, the injunction serves an

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1. Tom P. Taylor, *Civil Procedure – Injunctions: ‘Serious Questions’ Standard Alive and Well For Preliminary Injunctions in the Second Circuit*, 78 U.S.L.W. 1570 (2010).

2. See *Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 32 (2d Cir. 2010).

3. See *id.*

4. See *Alliance for the Wild Rockies v. Cottrell*, No. 09-35756, 2011 WL 208360, at \*4 (9th Cir. Jan. 25, 2011); *Oklahoma ex rel. Okla. Tax Comm’n v. Int’l Registration Plan Inc.*, 455 F.3d 1107, 1112-13 (10th Cir. 2006).

5. KIRSTIN STOLL-DEBELL ET AL., *INJUNCTIVE RELIEF: TEMPORARY RESTRAINING ORDERS AND PRELIMINARY INJUNCTIONS* 2 (2009).

6. *Id.* at 3.

important role in our judicial system. It has been used, after all, to implement noble and necessary measures such as desegregating schools and preventing potentially unconstitutional legislation from taking effect until its constitutionality could be determined.<sup>7</sup> Preliminary injunctions, however, threaten the liberty of those defending against such relief.<sup>8</sup> This is, in part, because the risk of error is high in awarding a preliminary injunction due to the fact that it is awarded before a full trial on the merits is conducted.<sup>9</sup> The requirements that must be met in order to enjoin another party from commencing a specific action serve as a vital protection against the potential error of issuing such an order prior to all the facts being established.<sup>10</sup> Therefore, any case concerning what requirements are appropriate must be carefully analyzed so as not to turn an extraordinary and already risky remedy into an ordinary and potentially more dangerous one.

In *Citigroup*, the Second Circuit defended its continued practice of allowing the serious questions standard to serve as an alternative to the requirement that a party seeking a preliminary injunction demonstrate that the party's claim is likely to succeed on the merits.<sup>11</sup> This note discusses and analyzes the logic, accuracy, and possible implications of the *Citigroup* decision. Part II discusses the relevant law before *Citigroup* was decided including: (1) a brief history of equitable remedies such as preliminary injunctions; (2) the relevant Supreme Court discussions of the standard for preliminary injunctions; (3) the federal circuit courts' applications of the standard for preliminary injunctions; and (4) one of the most recent Supreme Court decisions, *Winter v. Natural Resources Defense Council*, affecting the standard for granting a preliminary injunction in federal court. Part III provides an overview of *Citigroup* including the facts of the case and the Second Circuit's reasons for upholding the serious questions alternative in the face of recent Supreme Court decisions. Part IV will elucidate major flaws of *Citigroup*: (1) *Citigroup* disregards the plain language of *Winter*; (2) *Citigroup* disregards the reasoning of *Winter*; and

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7. *See id.* at 2.

8. *See* DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 337 (1985).

9. *See* DAN B. DOBBS, LAW OF REMEDIES: DAMAGES—EQUITY—RESTITUTION 253 (2d ed. 1993).

10. *See* Real Truth About Obama, Inc. v. Fed. Election Comm'n, 575 F.3d 342, 345-46 (4th Cir. 2009), *partially vacated on other grounds*, 607 F.3d 355 (4th Cir. 2010).

11. *See* Citigroup Global Mkts, Inc. v. VCG Special Opportunities Master Fund Ltd., 598 F.3d 30, 34-38 (2d Cir. 2010).

(3) the elimination of the requirement that a movant demonstrate a likelihood of success on the merits before being granted a preliminary injunction significantly weakens a fundamental judicial safeguard for parties who are under threat of being erroneously forced to act or to refrain from acting, upon the issuance of a preliminary injunction. Finally, part V briefly concludes that the only way *Citigroup* can be allowed to stand is if Supreme Court precedent is disregarded.

## II. Law Before the Case

### A. Historical Perspective

Equitable remedies, such as preliminary injunctions, have historically been deemed harsh, and as such are considered extraordinary.<sup>12</sup> In the words of one court, “[r]elief by way of injunction . . . is a harsh remedy that is used only in special circumstances.”<sup>13</sup> Equitable remedies are considered harsh because, unlike remedies at law, an equitable order is an order against the person.<sup>14</sup> This means that, by being allowed to administer equitable relief, a judge has the power to “command[] conduct of some specified sort, and subject[] the defendant to a punishment if he [does] not obey.”<sup>15</sup> Equitable relief is harsh not only because it forces a defendant either to act or to refrain from acting,<sup>16</sup> but also because the risk of error is high because the defendant has not yet been afforded a full hearing on the merits.<sup>17</sup>

The classification of a preliminary injunction as an extraordinary measure traces back to the reservations the founding fathers had about the English Court of Chancery.<sup>18</sup> Originally in England, only one court system heard cases and handed down decisions in the name of justice.<sup>19</sup> In this system, a person desiring judicial relief commenced an action by petitioning for a “writ.”<sup>20</sup> If a writ were granted it meant that the common

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12. See STOLL-DEBELL ET AL., *supra* note 5, at 3-4.

13. *Atchison, T. & S. F. Ry. Co. v. Parmer*, 496 S.W.2d 241, 242 (Tex. Civ. App. 1973).

14. See DAN B. DOBBS, *HANDBOOK ON THE LAW OF REMEDIES: DAMAGES—EQUITY—RESTITUTION* 25 (1973).

15. *Id.*

16. See RUSSELL WEAVER ET AL., *PRINCIPLES OF REMEDIES LAW* 5 (2007).

17. See DOBBS, *supra* note 9, at 253 (recognizing that it is “[a] possibility that preliminary relief will prove to be erroneous when a full trial on the merits is held”).

18. See STOLL-DEBELL ET AL., *supra* note 5, at 4-11.

19. See WEAVER ET AL., *supra* note 16, at 5.

20. ROBERT S. THOMPSON & JOHN A. SEBERT JR., *REMEDIES: DAMAGES, EQUITY AND RESTITUTION* 220 (2d ed. 1989).

law court was directed “to hear and adjudicate the case.”<sup>21</sup> The type of writ that a litigant needed depended on the type of action. Indeed, “[t]here was a different form of writ for each form of action.”<sup>22</sup> Unless “the facts [of the particular case] fell within the scope of an existing writ,” a litigant did not have a cause of action.<sup>23</sup> As a result, some litigants, despite having suffered injustices, were left without remedy simply because their facts did not fall in line with any existing writs.<sup>24</sup> The English common law system thus became a system that was “hidebound by formality and restrictions.”<sup>25</sup>

In response to this formulaic and rigid system, litigants began by-passing common law courts and petitioning the King himself to provide relief for claims that fell outside of the writ system.<sup>26</sup> Originally the King answered all petitions, but as the number of petitions grew, the King, like most executives, chose to delegate.<sup>27</sup> The King appointed Chancellors to resolve the petitions.<sup>28</sup> As a result, the late 15th century saw the creation of the Court of Chancery.<sup>29</sup> Not bound by the writ system of remedies, the Chancellors had the ability to issue equitable relief. Equitable relief requires a party to “engage, or refrain from engaging, in specific acts.”<sup>30</sup> Among equitable powers, the Chancellors were vested with the right to “exercise[] the King’s arbitrary power to ‘do justice’ in certain cases, including the power to grant injunctive relief.”<sup>31</sup> The men selected to serve as Chancellors “were initially selected primarily from the high ranking clergy.”<sup>32</sup> Chancellors “enjoyed a wide discretion to grant injunctive relief.”<sup>33</sup> In line with their ecclesiastical origin, the Chancellors often turned to conscience and morality when determining whether to issue an injunction and other equitable relief.<sup>34</sup> This led to the appearance that

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21. *Id.*

22. R.J. WALKER, *THE ENGLISH LEGAL SYSTEM* 20-21 (6th ed. 1985).

23. *Id.*

24. *See id.* at 43-44.

25. *Id.* at 42.

26. *See* WEAVER ET AL., *supra* note 16, at 5; WALKER, *supra* note 22, at 44.

27. *See* WEAVER ET AL., *supra* note 16, at 5; WALKER, *supra* note 22, at 44.

28. *See* WEAVER ET AL., *supra* note 16, at 5 (explaining that originally a plaintiff could bypass the King’s Court and petition the King himself but due to the volume of these petitions, the King delegated judgment on these petitions to his Chancellor).

29. *See* WALKER, *supra* note 22, at 44.

30. *See* WEAVER ET AL., *supra* note 16, at 7.

31. STOLL-DEBELL ET AL., *supra* note 5, at 4-11.

32. THOMPSON & SEBERT JR., *supra* note 20, at 220; *see* WALKER, *supra* note 22, at 44.

33. *See* STOLL-DEBELL ET AL., *supra* note 5, at 3-4.

34. *See id.* at 3; THOMPSON & SEBERT JR., *supra* note 20, at 222 (stating that “true to their ecclesiastical origin, chancery courts continued to act ‘in equity as a court of conscience’”).

decisions handed down by the Court of Chancery were based on moral whims of the conscience instead of legal principles.<sup>35</sup>

The wide discretion afforded to Chancellors, combined with an absence of concrete legal principles, resulted in many decisions of the Court of Chancery being criticized as improper and unnecessarily arbitrary.<sup>36</sup> The sometimes harsh remedies of equity were imposed with little regard to consistency as well as little to no mechanisms for keeping in check the personal agendas of the Chancellors. Unregulated Chancellor discretion motivated Thomas Jefferson's Anti-Federalists to oppose the idea of allowing federal judges to distribute equitable relief in the newly formed United States.<sup>37</sup> The Anti-Federalists' main concern was that allowing federal courts to have such power "would invest judges with arbitrary Chancellor-like power 'to decide as their conscience, their opinions, their caprice, or their politics might dictate.'"<sup>38</sup> Alexander Hamilton attempted to assuage Anti-Federalists' concerns, assuring that "the great and primary use of a court of equity [will be] to give relief in extraordinary cases."<sup>39</sup> In line with Hamilton's views, United States federal courts have traditionally held that a preliminary injunction is an extraordinary remedy and as such should not be imposed absent special circumstances.<sup>40</sup>

#### *B. The Supreme Court's Rulings on Preliminary Injunction Before Winter*

Due to the belief that preliminary injunctions are "extraordinary" and should not be used except in special circumstances, the Supreme Court has consistently held there is no absolute right to a preliminary injunction in any situation.<sup>41</sup> Since there is no right to receive injunctive relief, whether such relief is awarded is generally left up to the discretion of the district court.<sup>42</sup> Although a district court has discretion to determine whether or not

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35. See STOLL-DEBELL ET AL., *supra* note 5, at 3-4.

36. See *id.* at 3.

37. See *id.* at 3-4.

38. *Id.* at 4 (quoting Fed. Farmer No. 15, Jan. 18, 1788, in 2 THE COMPLETE ANTI-FEDERALIST 322-23 (Herbert J. Storing ed., 1981)).

39. THE FEDERALIST No. 83, at 569 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

40. See *Munaf v. Geren*, 553 U.S. 674, 689-90 (2008); *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997).

41. See *Yakus v. United States*, 321 U.S. 414, 440 (1944); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) (stating that injunctive relief is not a matter of right even in cases where the movant may eventually suffer irreparable harm).

42. See *Ashcroft v. ACLU*, 542 U.S. 656, 664 (2004) (stating that "[the Supreme] Court, like other appellate courts, has always applied the abuse of discretion standard on review of a preliminary injunction."); *Yakus*, 321 U.S. at 440.

to award a preliminary injunction, the Supreme Court issued guidelines that a court must consider when determining whether such relief is appropriate.<sup>43</sup> Such guidelines make sense given that the founders did not fear all discretion, just unchecked, arbitrary discretion like that of the Chancellors in England.

In *Doran v. Salem Inn, Inc.*, the Supreme Court emphasized two traditional requirements a plaintiff must meet in order to be awarded a preliminary injunction:<sup>44</sup> the plaintiff must “show that in the absence of [the preliminary injunction’s] issuance he will suffer irreparable harm and that he is likely to prevail on the merits.”<sup>45</sup> The *Doran* Court noted that “the standard to be applied by the district court in deciding whether a plaintiff is entitled to a preliminary injunction is *stringent*.”<sup>46</sup> In line with this stringency, the Supreme Court continues to require a party to demonstrate a likelihood of success on the merits of a case in order to be awarded a preliminary injunction.<sup>47</sup>

In addition to the two requirements laid out in *Doran*, the Supreme Court also instructed courts to “balance[] the conveniences of the parties and possible injuries to them according as they may be affected by the granting or withholding of the injunction.”<sup>48</sup> This factor is often referred to as “balancing the equities”<sup>49</sup> or “balancing the hardships.”<sup>50</sup> Essentially, it requires a court to weigh the burdens that will be placed on the defendant if the injunction is issued against the burdens on the plaintiff if relief is denied.<sup>51</sup> Finally, the Supreme Court has instructed courts to take into consideration the effect that the issuance or denial of a preliminary injunction would have on public interests.<sup>52</sup>

As a result, even though *Doran* states only two factors in the “traditional” test for preliminary injunction, federal courts have developed a

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43. See *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975).

44. *Id.* at 932.

45. *Id.* at 931.

46. *Id.* (emphasis added).

47. See *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 428 (2006); *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004); *Grupo Mexican de Desarrollo v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 340 (1999).

48. *Yakus v. United States*, 321 U.S. 414, 440 (1944); see also *Amoco Prod. Co. v. Village of Banbell, Alaska*, 480 U.S. 531, 542 (1987).

49. RICHARD L. HASEN, *REMEDIES: EXAMPLES AND EXPLANATIONS* 193 (2d ed. 2010).

50. WEAVER ET AL., *supra* note 16, at 12.

51. See *Heritage of America, LLC v. United States*, 77 Fed. Cl. 66, 78-79 (Fed. Cl. 2007).

52. *Amoco Prod. Co.*, 480 U.S. at 542.

four-part traditional test for determining whether a court should grant a motion for preliminary injunction.<sup>53</sup> The four factors can be stated as such: “(1) the significance of the threat of irreparable harm to plaintiff if the injunction is not granted; (2) the state of the balance between this harm and the injury that granting the injunction would inflict on defendant; (3) the probability that plaintiff will succeed on the merits; and (4) the public interest.”<sup>54</sup>

### C. Circuit Court Confusion

Even though the Supreme Court has set forth the factors that should be considered when determining whether preliminary injunctive relief is appropriate, there has been little agreement among the federal circuit courts on exactly how to articulate the appropriate factors or how those factors should be applied.<sup>55</sup> For instance, some courts rely on a two-part test, some a three-part test, and others the traditional four-part test.<sup>56</sup> Whether factors should be articulated in a four part, three part, or two part test is beyond the scope of this note. For purposes of this note, the traditional four part test and the serious questions alternative to the likelihood of success requirement are relevant. Federal circuits also differ widely on how the factors should be applied.<sup>57</sup> Significant approaches include the sliding scale test, the serious questions version of the sliding scale, and the threshold test.

#### 1. Sliding Scale Approach

The “sliding scale approach” is a common method of applying *Doran* factors.<sup>58</sup> The United States Court of Federal Claims has articulately and succinctly explained the sliding scale approach.<sup>59</sup> In applying the four traditional factors, the court, in *Eskridge Research Corp. v. United States*, stated, “[n]o single factor is determinative and the ‘weakness of the showing regarding one factor may be overborne by the strength of the others.’”<sup>60</sup> The D.C. Court of Appeals described this approach similarly: “[the traditional four factors] interrelate on a sliding scale and must be

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53. See 11A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2948 (2d ed. 1995).

54. *Id.*

55. See DOUGLAS LAYCOCK, THE DEATH OF THE IRREPARABLE INJURY RULE 118 (1991).

56. See STOLL-DEBELL ET AL., *supra* note 5, at 19-20.

57. See *id.* at 19-20.

58. LAYCOCK, *supra* note 55, at 118.

59. See *Eskridge Research Corp. v. United States*, 92 Fed. Cl. 88, 96 (Fed. Cir. 2010).

60. *Id.* at 96 (quoting *FMC Corp. v. United States*, 3 F.3d 424, 427 (Fed. Cir. 1993)).



balanced against each other.”<sup>61</sup> The court clarified, “[i]f the arguments for one factor are particularly strong, an injunction may issue even if the arguments in other areas are weak.”<sup>62</sup>

Some courts couch this approach as a “balancing” test but in essence the balancing involves the same analysis as applying the “sliding scale.”<sup>63</sup> In a circuit that adopts this approach, the movant need not fully establish that each individual factor weighs in his favor, but instead must show that the factors as a whole weigh in his favor.<sup>64</sup> For example, a party may not be able to establish that the irreparable harm that it will suffer absent injunction will outweigh the harm to the other party if the injunction is granted. But that party can still obtain an injunction so long as the party makes a strong showing of likelihood of success on the merits.<sup>65</sup> Likewise, a strong showing of irreparable harm may allow an injunction to be granted despite a weak showing of likelihood of success.<sup>66</sup> This approach eases the plaintiff’s burden compared to an approach that requires a plaintiff to prove that each factor is in his favor.

## 2. *Serious Questions Test: Sliding Scale Redux*

As long as there are serious questions going to the merits of the case, some circuits allow the grant of a preliminary injunction without the movant showing a likelihood of success on the merits.<sup>67</sup> Although this approach is couched as the “serious questions standard,” in application it

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61. *Serono Labs., Inc. v. Shalala*, 158 F.3d 1313, 1317-18 (D.C. Cir. 1998).

62. *Id.* (quoting *CityFed Fn. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 746 (D.C. Cir. 1995)).

63. *See In re Delorean*, 755 F.2d 1223, 1229 (6th Cir. 1985) (holding that the factors were “not prerequisites that must be met” but rather were to be balanced against one another in such a way that one factor may be weak so long as the other factors are strong enough in plaintiff’s favor that they balance out the weak factor); *Dataphase Sys., Inc. v. C.L. Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981) (stating that “no single factor is determinative, and thus if the showing of irreparable harm is weak, an injunction can be granted so long as the showing of likelihood of success is strong.”).

64. *See Hoosier Energy Rural Elec. Co-op., Inc. v. John Hancock Life Ins. Co.*, 582 F.3d 721, 725 (7th Cir. 2009).

65. *See Dataphase Sys. Inc.*, 640 F.2d at 113.

66. *See Serono Labs.*, 158 F.3d at 1318 (stating that an injunction may be granted if the arguments for one factor are strong and the arguments for another are weak).

67. *See Alliance for the Wild Rockies v. Cottrell*, No. 09-35756, 2011 WL 208360, at \*4 (9th Cir. Jan. 25, 2011); *Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 35 (2d Cir. 2010); *Oklahoma ex rel. Okla. Tax Comm’n v. Int’l Registration Plan Inc.*, 455 F.3d 1107, 1113 (10th Cir. 2006).

proves simply to be a version of the sliding scale approach.<sup>68</sup> More specifically, it functions as a qualified sliding scale.<sup>69</sup> A full-fledged sliding scale approach generally allows an injunction to issue when *any* factor is weak as long as other factors are strong enough to balance out the weak factor.<sup>70</sup> The serious questions standard, on the other hand, deals specifically with the weakness of the likelihood of success on the merits.<sup>71</sup> For instance, in *Oklahoma ex rel. Oklahoma Tax Commission v. International Registration Plan Inc.*, the Tenth Circuit stated that a movant must establish all four of the traditional factors in order to be awarded a preliminary injunction.<sup>72</sup> This test, however, becomes modified if the movant shows that the likelihood of irreparable harm, the balance of the equities, and the public interest factors “tip strongly in his favor.”<sup>73</sup> This modified test allows the movant to be awarded an injunction merely by showing the existence of “serious, substantial, difficult, and doubtful” questions as to the merits of the case in lieu of demonstrating a likelihood of success on the merits.<sup>74</sup>

The Second Circuit, in cases like *Citigroup*, allows the serious questions standard wholly to substitute for a movant showing a likelihood of success on the merits.<sup>75</sup> Importantly, however, the Second Circuit’s serious questions alternative proves to be less stringent than the standard applied by the Tenth Circuit.<sup>76</sup> In *Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc.*, the Second Circuit stated that a plaintiff can obtain a preliminary injunction by showing he will suffer irreparable harm absent the injunction. Moreover, the plaintiff must show: “(1) likelihood of success on the merits or (2) [a] sufficiently serious question going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief.”<sup>77</sup> In contrast, the Tenth Circuit’s language in *Oklahoma ex rel. Oklahoma Tax Commission* only allows the

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68. See *Alliance for the Wild Rockies*, 2011 WL 208360, at \*4.

69. *Id.*

70. See *Serono Labs. Inc.*, 158 F.3d at 1317-18; *Dataphase Sys., Inc.*, 640 F.2d at 113.

71. See *Oklahoma ex rel. Okla. Tax Comm’n*, 455 F.3d at 1113.

72. *Id.*

73. *Id.* (quoting *Davis v. Mineta*, 302 F.3d 1104, 1111 (10th Cir. 2002)).

74. *Id.* (quoting *Davis*, 302 F.3d at 1111).

75. *Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 35 (2d Cir. 2010); *Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc.*, 596 F.2d 70, 72 (2d Cir. 1979).

76. Compare *Jackson Dairy, Inc.*, 596 F.2d at 72 with *Oklahoma ex rel. Okla. Tax Comm’n*, 455 F.3d at 1113.

77. *Jackson Dairy, Inc.*, 596 F.2d at 72.

serious questions alternative if the movant can establish that *all* the other factors tip decidedly in his favor.<sup>78</sup> *Jackson Dairy, Inc.*, on the other hand, requires the movant to show only that the balance of hardships tips decidedly in his favor in order to reach the serious questions alternative.<sup>79</sup>

### 3. Threshold Test

Finally, some circuits require all four factors<sup>80</sup> to be established, or at the very least the *Doran* traditional two factors,<sup>81</sup> or treat one or more of the traditional requirements as thresholds that must be met before a court considers other requirements.<sup>82</sup> For instance, the Eleventh Circuit stated that a movant should not be awarded a preliminary injunction unless all four prerequisites are “clearly established.”<sup>83</sup> The Eleventh Circuit reasoned that the “grant[ing] of preliminary injunction ‘is the exception rather than the rule,’ and plaintiff must clearly carry the burden of persuasion.”<sup>84</sup> Likewise, the Fifth Circuit held that prerequisites for preliminary injunctions must be clearly established by the plaintiff based on the fact that there is no right to a preliminary injunction and it is an exception to the rule rather than the rule itself.<sup>85</sup> Other circuits apply this standard more narrowly and emphasize that one or more factors are the *sine qua non* of the remedy of injunctive relief.<sup>86</sup> For instance, the First Circuit

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78. See *Oklahoma ex rel. Okla. Tax Comm’n*, 455 F.3d at 1113.

79. *Jackson Dairy, Inc.*, 596 F.2d at 72.

80. See WRIGHT, MILLER & KANE, *supra* note 53, § 2948 (stating the four traditional factors as “(1) the significance of the threat of irreparable harm to plaintiff if the injunction is not granted; (2) the state of the balance between this harm and the injury that granting the injunction would inflict on defendant; (3) the probability that plaintiff will succeed on the merits; and (4) the public interest”).

81. See *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975) (stating that the two traditional factors are irreparable harm and likelihood of success on the merits).

82. See *Real Truth About Obama, Inc. v. Fed. Election Comm’n*, 575 F.3d 342, 345-46 (4th Cir. 2009), *partially vacated on other grounds*, 607 F.3d 355 (4th Cir. 2010); *Siegel v. Lepore*, 234 F.3d 1163, 1176-77 (11th Cir. 2000) (stating that “even if [p]laintiffs establish a likelihood of success on the merits, the absence of irreparable injury would, standing alone, make preliminary injunctive relief improper.”).

83. *Siegel*, 234 F.3d at 1176.

84. *Id.* (quoting *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981)).

85. *Texas V. Seatrain Int’l*, 518 F.2d 175, 179 (5th Cir. 1975) (however, the court confusingly also endorses a sliding scale approach in the same decision).

86. See *New Comm. Wireless Servs. v. Sprintcom, Inc.*, 287 F.3d 1, 8-9 (1st Cir. 2002); *Northeastern Fla. Chapter of the Ass’n of Gen. Contractors v. City of Jacksonville*, 896 F.2d 1283, 1285 (11th Cir. 1990).

stated, “if the moving party cannot demonstrate that he is likely to succeed in his quest, the remaining factors become matters of idle curiosity.”<sup>87</sup>

#### D. *Winter v. Natural Resources Defense Council*

In 2008, the Supreme Court clarified not only which factors should be used in determining whether a federal court should grant a preliminary injunction, but also how the factors should be applied.<sup>88</sup> The *Winter* Court stated that, in order to be awarded a preliminary injunction, a movant “must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.”<sup>89</sup> Significantly, the Court spent relatively little time discussing the likelihood of success requirement and did not address whether it intended to prohibit the serious questions alternative to the likelihood of success requirement.<sup>90</sup> The *Winter* decision remains significant, however, because it may have direct implications for the future of the sliding scale approach. While the Court never explicitly overruled the sliding scale, it declared the lower court’s grant of a preliminary injunction on a showing of “possible” irreparable harm inappropriate regardless of whether the movant had made a strong showing on the likelihood of success requirement.<sup>91</sup> It appears, therefore, that *Winter* should be read to hold that a weak showing on irreparable harm cannot be balanced by the strength of other factors.<sup>92</sup>

It may be argued that the *Winter* decision is a qualitative holding that should be read to negate the sliding scale approach only in situations where the strength of other factors are needed to compensate for the inability to show that irreparable harm is likely. In other words, *Winter* may be read to negate the sliding scale approach when used to compensate for a weak showing of likelihood of success on the merits.<sup>93</sup> However, the *reasoning*

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87. *New Comm. Wireless Servs.*, 287 F.3d at 9 (citing *Weaver v. Henderson*, 984 F.2d 11, 12 (1st Cir. 1993)).

88. *See Winter v. Natural Resources Defense Council*, 129 S. Ct. 365, 374 (2008).

89. *Id.*

90. *See id.* It is curious that the Court did not include a serious questions alternative despite the fact that this case was appealed from the Ninth Circuit, a circuit that has employed the serious questions alternative in the past in its formulation of the factors for preliminary injunction.

91. *See id.* at 375-76.

92. *See Real Truth About Obama, Inc. v. Fed. Election Comm’n*, 575 F.3d 342, 345-47 (4th Cir. 2009), *partially vacated on other grounds*, 607 F.3d 355 (4th Cir. 2010).

93. *See Alliance for the Wild Rockies v. Cottrell*, No. 09-35756, 2011 WL 208360, at \*4 (9th Cir. Jan. 25, 2011); *Citigroup Global Mkts., Inc. v. VCG Special Opportunities*

in *Winter* could have serious implications for the circuits which utilize the serious questions standard. The *Winter* Court held that allowing a diminished showing of irreparable harm would be “inconsistent with [the 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.”<sup>94</sup> As a result, the Court appears to have held that a light showing of one of the factors is insufficient not because of that particular factor’s relative importance<sup>95</sup> but because the extraordinary nature of preliminary injunctions requires a movant to demonstrate clearly that *all* of the factors are in his favor.<sup>96</sup> This interpretation of *Winter* would mean that the likelihood of success requirement must be established on its own and that a lesser showing of that requirement, such as serious questions as to the merits, is inappropriate regardless of the strength of the other factors.<sup>97</sup> This reasoning is consistent with previous Supreme Court discussions of the standard for preliminary injunctions.<sup>98</sup> In *Doran*, for example, the Court held that the test for preliminary injunctions should be “stringently” applied.<sup>99</sup> Likewise, in *Grupo Mexican de Desarrollo*, Justice Ginsburg specifically addressed the likelihood of success requirement, stating that “[p]laintiffs with questionable claims would not meet the likelihood of success criterion.”<sup>100</sup> Justice Ginsburg continued, “as a general rule, [a] plaintiff seeking [a] preliminary injunction must demonstrate a reasonable probability of success.”<sup>101</sup> Despite the language of *Winter*, circuits remain split as to whether *Winter* overrules the sliding scale approach to the granting of preliminary injunctions.<sup>102</sup> Therefore, the question still remains

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Master Fund Ltd., 598 F.3d 30, 35 (2d Cir. 2010).

94. *Winter*, 129 S. Ct. at 374, 375-76.

95. There is a series of cases that hold that the irreparable harm factor is the *sine qua non* of the preliminary injunction test (e.g., *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1223, 1241 (11th Cir.2005)). Therefore an argument can be made that the ruling in *Winter* could be attributed to the importance of the irreparable harm factor.

96. *See Winter*, 129 S. Ct. at 375-76.

97. *See Real Truth About Obama*, 575 F.3d at 345-47.

98. *See Grupo Mexican de Desarrollo v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 340 (1999); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931-32 (1975).

99. *Doran*, 422 U.S. at 931-32.

100. *Grupo Mexican de Desarrollo*, 527 U.S. at 340 (Ginsburg, J., dissenting in part and concurring in part) (citing WRIGHT, MILLER & KANE, *supra* note 53, § 2948.3, at 184-88).

101. *Id.* (Ginsburg, J., dissenting in part and concurring in part) (citing WRIGHT, MILLER & KANE, *supra* note 53, § 2948.3, at 184-88).

102. *Compare Alliance for the Wild Rockies v. Cottrell*, No. 09-35756, 2011 WL 208360, at \*4-7 (9th Cir. Jan. 25, 2011) with *Real Truth About Obama, Inc. v. Fed. Election Comm’n*, 575 F.3d 342, 345-47(4th Cir. 2009), *partially vacated on other grounds*, 607 F.3d

as to whether it is appropriate to utilize the serious questions alternative in determining whether to grant a motion for a preliminary injunction. The Second Circuit considered this precise issue in *Citigroup v. VCG Special Opportunities Master Fund Limited*.<sup>103</sup>

### III. *Citigroup Global Markets, Inc., v. VCG Special Opportunities Master Fund Limited*

#### A. *Facts and Procedural History*

VCG Special Opportunities Master Fund Limited (VCG), a hedge fund, and Citigroup Global Markets, Incorporated (CGMI) entered into an agreement in which CGMI would “provide prime brokerage services by clearing and settling trades in fixed income securities for VCG.”<sup>104</sup> After this brokerage services agreement was consummated, VCG “entered into a credit default swap agreement with Citibank, N.A. (Citibank).”<sup>105</sup> Because both were under the “corporate umbrella of Citigroup, Inc.,” Citibank was an affiliate of CGMI.<sup>106</sup> Due to Citibank “declar[ing] a writedown of the assets covered in [the] credit swap[.]” VCG was obligated to pay Citibank \$10,000,000.<sup>107</sup> In response, VCG sued Citibank, claiming that declaring the writedown was a breach of the credit swap agreement.<sup>108</sup> The district court ruled in favor of Citibank.<sup>109</sup>

At the same time VCG sued Citibank, VCG also entered into an arbitration with CGMI in accordance with rules set out by the Financial Industry Regulatory Authority (FINRA).<sup>110</sup> FINRA “requires members . . . to arbitrate disputes . . . if arbitration is ‘requested by [a] customer,’ ‘[t]he dispute is between a customer and a member . . .’ and ‘[t]he dispute arises in connection with the business activities of the member.’”<sup>111</sup> VCG claimed it was CGMI’s customer and therefore that CGMI was supposed to serve as a middleman between VCG and Citibank in the credit swap

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355 (4th Cir. 2010).

103. *Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 34 (2d Cir. 2010).

104. *Id.* at 32.

105. *Id.*

106. *Id.*

107. *Id.*

108. *See id.*

109. *Id.*

110. *Id.*

111. *Id.* (quoting FINRA Rule 12200).

agreement.<sup>112</sup> CGMI claimed that VCG was not a customer of CGMI for purposes of the credit swap agreement, and thus that CGMI was not obligated to serve as a middleman between VCG and Citibank.<sup>113</sup> According to CGMI, since VCG was not a customer for purposes of the credit swap, it had no duty to enter into arbitration with VCG on the issue.<sup>114</sup> Based on its arguments, CGMI filed suit in the “[federal] district court to permanently enjoin the arbitration.”<sup>115</sup>

After filing suit, CGMI moved to obtain a preliminary injunction in order to enjoin arbitration until a final judgment was issued on its suit to enjoin the arbitration permanently.<sup>116</sup> In response to the motion for a preliminary injunction, VCG argued that the credit swap agreement was recommended by CGMI and that terms for the agreement were accordingly set by CGMI.<sup>117</sup> VCG further argued that CGMI representatives dealt with VCG with regards to the credit swap agreement.<sup>118</sup> CGMI countered by stating that the representatives, while working in connection with the credit swap agreement, were acting as agents of Citibank, not CGMI.<sup>119</sup> To bolster its claim, CGMI introduced evidence that VCG, in its initial disclosures, listed two of these representatives as being employed by Citibank, not CGMI.<sup>120</sup>

The district court held that although CGMI had established that it was likely to suffer irreparable harm if an injunction was not issued, it failed to demonstrate a probability of success on the merits.<sup>121</sup> Nevertheless, the district court granted the preliminary injunction and applied the serious questions test in lieu of the likelihood of success requirement.<sup>122</sup> Specifically, the district court ruled that whether VCG was a customer of CGMI for purposes of the credit swap agreement raised serious questions as to the merits of the case.<sup>123</sup> In addition, the district court held that the balance of hardships tipped decidedly in CGMI’s favor.<sup>124</sup> VCG filed a motion to reconsider the ruling on the grounds that *Winter* eliminated the

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112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* at 33.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 33-34.

124. *Id.* at 34.

serious questions alternative to the likelihood of success on the merits factor.<sup>125</sup> The district court denied the motion and VCG appealed to the Second Circuit.<sup>126</sup>

*B. The Second Circuit's Decision*

The Second Circuit focused its decision on whether “the district court abused its discretion by applying the wrong legal standard to CGMI’s request for preliminary injunction.”<sup>127</sup> The court considered whether recent Supreme Court decisions, including *Winter*, “eliminated [the Second] [C]ircuit’s ‘serious question’ standard for the entry of a preliminary injunction.”<sup>128</sup> The Second Circuit panel unanimously held that the Supreme Court did not overrule the circuit’s long-standing practice of utilizing the serious questions standard.<sup>129</sup>

In determining that the serious questions alternative was still valid, the *Citigroup* court offered four justifications.<sup>130</sup> First, the court stated that the serious questions alternative was justified on policy grounds.<sup>131</sup> The court feared that the result of applying a strict requirement that a movant demonstrate likelihood of success on the merits would limit preliminary injunctions “to cases that are simple or easy.”<sup>132</sup> The court noted the varying complexity of cases: “[t]he value of this circuit’s approach to assessing the merits of a claim at the preliminary injunction stage lies in its flexibility in the face of varying factual scenarios and the greater uncertainties inherent at the outset of particularly complex litigation.”<sup>133</sup> The court inherently stated that a strict application of the likelihood of success requirement could rarely, if ever, be applied in a complex case because it would be impossible for a judge to determine if the movant is likely to succeed until the complexities have been fully litigated.<sup>134</sup> The court did acknowledge the policy consideration that allowing a softer test in lieu of likelihood of success appears to lessen the burden on the movant in proving that an injunction should be awarded.<sup>135</sup> However, the court

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125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* at 37.

130. *Id.* at 35-39.

131. *Id.* at 35-36.

132. *Id.* at 35.

133. *Id.*

134. *See id.* at 35-36.

135. *Id.* at 35.



clarified that in order to benefit from the softer serious questions standard, the movant must “establish that ‘the balance of hardships tips decidedly’ in its favor,” thereby insisting that the burden on the movant is no lighter than it would be if he were required to establish likelihood of success on the merits.<sup>136</sup>

Second, the *Citigroup* court cited specific Supreme Court cases in order to justify the serious questions alternative.<sup>137</sup> The court began with *Ohio Oil Co. v. Conway*, a 1929 decision<sup>138</sup> in which the Supreme Court confronted a factual dispute concerning a state tax on oil revenues.<sup>139</sup> The *Citigroup* court cited the following language: “[w]here the questions presented by an application for an interlocutory injunction are grave, and the injury to the moving party [in the absence of such an injunction] will be certain and irreparable . . . the injunction will usually be granted.”<sup>140</sup> The *Citigroup* court also cited to *Mazurek v. Armstrong*, claiming that the *Mazurek* Court recognized a “fair chance” standard for proving likelihood of success.<sup>141</sup>

Third, the *Citigroup* court narrowly construed *Winter* and other recent Supreme Court decisions instructing that a movant must demonstrate likelihood of success on the merits in order to receive a preliminary injunction.<sup>142</sup> The court noted the absence in recent cases of commentary on the serious questions alternative.<sup>143</sup> The court distinguished *Winter* by stating that it was decided on the issue of the balance of the equities and public interest and therefore that it “expressly withheld any consideration of the merits of the parties’ underlying claims.”<sup>144</sup> Because the *Winter* Court did not determine whether the movant had demonstrated a likelihood of success, the *Citigroup* court held that *Winter* should have no effect on the serious questions alternative.<sup>145</sup> *Citigroup* distinguished another recent Supreme Court decision, *Munaf v. Geren*, in which the Court held that it was improper to issue a preliminary injunction because of serious jurisdictional questions without considering the actual merits of the case.

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136. *Id.*

137. *See id.* at 36-37.

138. *Ohio Oil Co. v. Conway*, 279 U.S. 813 (1929).

139. *Citigroup*, 598 F.3d at 36-37 (citing *Ohio Oil*, 279 U.S. at 814).

140. *Id.* (quoting *Ohio Oil*, 279 U.S. at 814).

141. *Id.* (citing *Mazurek v. Armstrong*, 520 U.S. 968, 975-76 (1997)).

142. *See id.* at 37.

143. *Id.*

144. *See id.* (citing *Winter v. Natural Resources Defense Council*, 129 S. Ct. 365, 375-76, 381 (2008)).

145. *See id.*

The Second Circuit concluded that *Munaf* had no application to the serious questions standard because serious jurisdictional questions and serious questions as to the merits are different issues.<sup>146</sup>

Finally, the *Citigroup* court set out what is probably its most telling justification for adhering to the serious questions alternative in spite of recent Supreme Court decisions. It stated that despite all arguments that the Supreme Court has implicitly done away with the alternative, it has yet to explicitly do so.<sup>147</sup> The court pointed out that the Second Circuit “recognized this flexible standard since at least 1953.”<sup>148</sup> The court argued that not only does the long history of the standard justify its continued use, but the fact it has yet to be overturned in over five decades speaks to its credence.<sup>149</sup> In the Second Circuit’s view, “[i]f the Supreme Court had meant . . . to abrogate the more flexible standard for a preliminary injunction” and thus eliminate over five decades of Second Circuit jurisprudence it would have explicitly done so.<sup>150</sup>

#### IV. Analysis

##### A. *Citigroup Ignores the Language of Winter*

*Citigroup* held that the serious questions alternative to likelihood of success on the merits is not inconsistent with *Winter* and thus remains valid.<sup>151</sup> The Second Circuit justified its narrow reading of the Supreme Court’s decision in *Winter* because the Supreme Court refrained from considering the merits of the parties’ claims and never even mentioned the serious question alternative.<sup>152</sup> Essentially, the *Citigroup* court argued that because the letter of the law handed down in *Winter* fails expressly to negate the serious questions alternative, the *Winter* decision is irrelevant to the issue of the validity of that alternative.<sup>153</sup> *Citigroup* is correct that *Winter* did not expressly address the serious questions alternative. However, by failing to give due consideration to the language used by the Supreme Court, the Second Circuit improperly narrowed the standard set forth in *Winter* and allowed for constructive elimination of a requirement

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146. *See id.*

147. *See id.* at 38.

148. *See id.*

149. *Id.*

150. *See id.*

151. *Id.* at 35-38.

152. *See id.* at 37.

153. *See id.*

dictated by the Supreme Court. If the serious questions alternative contradicts the Supreme Court's standard in *Winter*, then *Winter* should be read as a *de facto* overruling of the serious questions alternative.

*1. Citigroup Improperly Weakens the Winter Standard For Preliminary Injunctions*

When setting forth the requirements for the granting of a preliminary injunction, the *Winter* Court clearly and unmistakably used mandatory language.<sup>154</sup> The Court stated, among other things: “[a] plaintiff seeking a preliminary injunction *must* establish that he is likely to succeed on the merits. . . .”<sup>155</sup> This idea did not originate with *Winter*. Rather, the concept can be traced back to *Doran v. Salem Inn Inc.*, in which the Supreme Court stated that a traditional requirement for granting a preliminary injunction is that the movant demonstrate “that he is likely to prevail on the merits.”<sup>156</sup> After *Doran*, the Supreme Court again acknowledged the “well-established principle that the party seeking [a preliminary injunction] bears the burden of demonstrating a likelihood of success on the merits.”<sup>157</sup> The Supreme Court has also held that the standard for a preliminary injunction is “stringent.”<sup>158</sup> Thus, in the context of preliminary injunctions, the use of the word “must” should not be read lightly.

Despite the well-established principle that the movant demonstrate a likelihood of success on the merits and the use of the word “must” in *Winter*, *Citigroup* holds that a movant may be granted a preliminary injunction by demonstrating something less than a likelihood of success.<sup>159</sup> By ignoring the strict, mandatory language of the Supreme Court, *Citigroup* weakens the *Winter* standard and essentially transforms the Court's language from mandatory to precatory.<sup>160</sup> Under the serious questions alternative, as articulated in *Citigroup*, a movant is not required to demonstrate likelihood of success in order to enjoin another party from engaging in a specific action. Rather, demonstrating likelihood of success proves to be merely an option that a party may or may not utilize on its path

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154. See *Winter v. Natural Resources Defense Council*, 129 S. Ct. 365, 374 (2008).

155. *Id.* (emphasis added)

156. *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975).

157. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 428 (2006).

158. See *Doran*, 422 U.S. at 931-32.

159. *Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 35 (2d Cir. 2010).

160. See *id.*

to receiving an order for preliminary injunction.<sup>161</sup> *Citigroup* allows this result despite the fact that there is no indication that the Supreme Court intended the word “must” to mean anything less than a mandate.<sup>162</sup> On the contrary, it is arguable that the inclusion of a specific, mandatory requirement overrules or excludes the use of other requirements that would alter, narrow, or weaken that specific requirement.<sup>163</sup> As a result, the nature of the serious questions alternative clearly violates and weakens the mandatory nature of *Winter*’s standard.

*Citigroup* attempts to negate criticism that its holding weakens *Winter* by stating that, in order to utilize the serious questions alternative, the movant must also demonstrate “that the balance of hardships tips decidedly in her favor.”<sup>164</sup> According to the Second Circuit, since the *Winter* standard requires only a showing of the balance of hardships tipping in the movant’s favor, the *Citigroup* standard remains as strict as the *Winter* standard.<sup>165</sup> *Citigroup* fails to acknowledge that the serious questions alternative is more flexible for the movant, because it allows the movant two paths to securing a preliminary injunction whereas the *Winter* standard allows only one. In *Citigroup*, the Second Circuit noted the district court’s initial consideration of whether CGMI had established a probability of success on the merits.<sup>166</sup> After ruling that CGMI was unable to establish such a probability, the district court considered whether the serious questions standard saved CGMI’s motion for preliminary injunction.<sup>167</sup> This is significant because it demonstrates that, in the Second Circuit at least, a movant does not have to choose between the likelihood of success path or the serious questions path at the beginning of the proceeding and stay on that path until the end. Rather, a petitioner can start out by arguing likelihood of success and use the serious questions path as a safety net should the likelihood of success argument fail. As a result, the serious questions alternative is much broader than the *Winter* standard. Under the strict language of *Winter*, CGMI’s

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161. *See id.*

162. *See Winter v. Natural Resources Defense Council*, 129 S. Ct. 365, 374-76 (2008).

163. *See Real Truth About Obama, Inc. v. Fed. Election Comm’n*, 575 F.3d 342, 345-47 (4th Cir. 2009) (holding that *Winter* overrules the use of a balancing approach because the strict language in *Winter* negates the use of the lighter serious questions standard), *partially vacated on other grounds*, 607 F.3d 355 (4th Cir. 2010).

164. *Citigroup*, 598 F.3d at 35 (quoting *Jackson Dairy, Inc. v. H.P. Hood & Sons Inc.*, 596 F.2d 70, 72 (2d Cir. 1979)).

165. *Id.*

166. *Id.* at 33.

167. *Citigroup Global Markets, Inc. v. VCG Special Opportunities Master Fund Ltd.*, No. 08-CV-5520 (BSJ), 2008 WL 4891229, at \*4-5 (S.D.N.Y. Nov. 12, 2008).

motion for preliminary injunction should have been denied after likelihood of success could not be established. *Winter's* mandatory language allows only one path to being awarded a preliminary injunction—by demonstrating, among other things, a likelihood of success on the merits.<sup>168</sup> CGMI's motion was not denied, however, because under the Second Circuit's standard, an alternative existed: CGMI could take the serious questions path to a preliminary injunction.<sup>169</sup> The second path was available to CGMI only because the Second Circuit inaccurately read the language in *Winter* as optional, not mandatory. If the likelihood of success route was truly treated as mandatory, no other option should have been available. If the Supreme Court had intended to allow the weakening of its standard, one would expect it either to mention such intention or to refrain from using language suggesting that a party *must* establish likelihood of success on the merits. As a result, even though *Winter* does not speak directly to the serious questions alternative, the strict, mandatory language used by the Court should be read as a *de facto* rejection of that alternative.

It can be argued, and in fact is argued by the Second Circuit, that the *Winter* Court did not intend to invalidate the serious questions alternative by excluding it from the standard it set forth because the serious questions alternative was not at issue in the that case.<sup>170</sup> This is a valid argument that is probably the primary reason why some circuits continue to use the serious questions alternative.<sup>171</sup> Significantly, the *Winter* case arrived at the Supreme Court out of the Ninth Circuit.<sup>172</sup> The Ninth Circuit continuously propounds a serious questions alternative in its articulation of the standard for preliminary injunctions.<sup>173</sup> Moreover, in the Ninth Circuit's opinion in *Winter*, the court included the serious questions alternative in its statement of the requirements for preliminary injunction.<sup>174</sup> Accordingly, the Supreme Court was aware of the Ninth Circuit's use of the serious questions alternative. Despite this fact the *Winter* Court created no exception to the requirement that a party *must* show a likelihood of success

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168. See *Winter v. Natural Resources Defense Council*, 129 S. Ct. 365, 374 (2008).

169. See *Citigroup*, 598 F.3d at 33-34.

170. *Id.* at 37.

171. See *id.*; *Alliance for the Wild Rockies v. Cottrell*, No. 09-35756, 2011 WL 208360, at \*4-7 (9th Cir. Jan. 25, 2011).

172. *Winter*, 129 S. Ct. at 374.

173. *Natural Resources Defense Council, Inc. v. Winter*, 518 F.3d 658, 677 (9th Cir. 2008); *Dollar Rent a Car of Wash., Inc. v. Travelers Indem. Co.*, 774 F.2d 1371, 1374-75 (9th Cir. 1985); *Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1201 (9th Cir. 1980).

174. *Winter*, 518 F.3d at 677.

in order to be awarded a preliminary injunction.<sup>175</sup> *Citigroup*, however, reasons that because the *Winter* Court withheld any discussion on likelihood of success, then *Winter* is irrelevant to the validity of the serious questions alternative.<sup>176</sup> Actually, the *Winter* Court withheld a discussion of whether the movant in that case had *demonstrated* a likelihood of success.<sup>177</sup> The Court chose not to discuss whether the movant had demonstrated this requirement because it had already determined, based on other grounds, that the lower court's granting of a preliminary injunction was erroneous.<sup>178</sup> Failure to determine specifically whether the movant had demonstrated a likelihood of success fails to render *Winter* irrelevant to the serious questions alternative. *Winter* expressly stated that demonstrating a likelihood of success is a requirement that a movant *must* meet in order to be awarded a preliminary injunction.<sup>179</sup> Furthermore, the *Winter* Court did not state that a plaintiff must establish likelihood of success only in the context of the case at hand, but simply affirmed that a requirement in preliminary injunction cases in general is that the party seeking the injunction must establish that it is likely to succeed on the merits.<sup>180</sup> This arguably supports the Court's intention to establish a uniform standard for preliminary injunctions. If that were the intent of the Court, the expression of the requirements in *Winter* should be read to negate all substitutes for demonstrating likelihood of success as well as any language weakening those requirements.

2. *Citigroup Not Only Softens Winter, It Constructively Eliminates a Requirement Dictated By the Supreme Court*

*Citigroup* states that the Supreme Court has not issued a decision that negatively affects the serious questions standard,<sup>181</sup> yet every time a court applies that standard it not only weakens the language used in *Winter* but also eliminates a requirement that the Supreme Court has continually mandated must be established.<sup>182</sup> In *Munaf v. Geren*, the Supreme Court emphasized the extraordinary nature of preliminary relief: "a party seeking

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175. *See Winter*, 129 S. Ct. at 374.

176. *Citigroup Global Mkts, Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 37 (2d Cir. 2010).

177. *Winter*, 129 S. Ct. at 381.

178. *Id.*

179. *See id.* at 374.

180. *See id.*

181. *Citigroup*, 598 F.3d at 37-38.

182. *See Munaf v. Geren*, 553 U.S. 674, 690 (2008); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975).

a preliminary injunction must demonstrate, among other things ‘a likelihood of success on the merits.’”<sup>183</sup>

In *Munaf*, the Supreme Court considered whether “United States district courts may exercise their habeas jurisdiction to enjoin” the United States military from handing over individuals detained in another country to that country’s government for criminal prosecution.<sup>184</sup> The district court enjoined the military from doing so, and the D.C. Circuit affirmed, stating that the issue of whether the court had jurisdiction “presented questions so serious, substantial, difficult and doubtful, as to make them fair ground for litigation and thus for more deliberative investigation.”<sup>185</sup> Accordingly, the D.C. Circuit never concluded that the movant demonstrated a likelihood of success. Ultimately, the Supreme Court held that the district court abused its discretion because it issued an injunction based on “the view that the ‘jurisdictional issues’ . . . were tough, without even considering the merits of the underlying habeas petition.”<sup>186</sup> The Court stressed that “one searches the opinions below in vain for any mention of a likelihood of success as to the merits. . . .”<sup>187</sup>

*Citigroup* disregarded *Munaf* and claimed that “[t]he Supreme Court vacated that injunction on the grounds that a ‘likelihood of jurisdiction’ was irrelevant to the preliminary injunction consideration and could not substitute for a consideration of the merits.”<sup>188</sup> This analysis is a misinterpretation of *Munaf*. In actuality, the *Munaf* Court did not vacate the injunction because of the irrelevance of the likelihood of jurisdiction issue. Instead, the Court vacated the preliminary injunction because the lower court failed to take any consideration of the movant’s likelihood of success on the merits.<sup>189</sup> The decision turned on the fact that the lower court inappropriately substituted one issue, likelihood of jurisdiction, for the requirement that the movant demonstrate that he was likely to succeed on the merits.<sup>190</sup>

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183. *Munaf* 553 U.S. at 690 (quoting *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 428 (2006)).

184. *Id.* at 689.

185. *Id.* at 690 (quoting *Omar v. Harvey*, 416 F.Supp.2d 19, 23-24, 27 (DC 2006)).

186. *Id.* at 690-91.

187. *Id.* at 690.

188. *Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 37 (2d Cir. 2010).

189. *See Munaf*, 553 U.S. at 690.

190. *See id.* at 689-91.

The *Citigroup* court made the very same mistake.<sup>191</sup> The Second Circuit's test for a preliminary injunction, as articulated in *Citigroup*, allows for an injunction to be granted if the movant can show, among other things, "either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief."<sup>192</sup> The test is either/or, meaning that if a party shows serious questions as to the merits coupled with the hardships tipping decidedly in its favor it can treat that as a substitution for the likelihood of success requirement.<sup>193</sup> Consideration of the seriousness of the questions going to the merits of a case is not synonymous with consideration of the likelihood of success on the merits themselves. A party may be able to show that the merits of a particular case are complex and the factual record incomplete but that is a far cry from demonstrating that the party has a strong enough case, at the time the motion for preliminary injunction is made, to demonstrate that the party's claim is likely to succeed at trial.<sup>194</sup> Consequently, like the lower court in *Munaf*, *Citigroup* inappropriately allows a substitution for the likelihood of success requirement. According to the Supreme Court's decision in *Munaf*, the serious questions alternative should be viewed as an abuse of discretion because it allows a preliminary injunction to be issued without the court ever considering whether the movant is likely to succeed on the merits.

The *Citigroup* court also minimized the *Munaf* decision by reasoning that the Supreme Court did not define "likelihood of success" in its holding.<sup>195</sup> Therefore, according to the Second Circuit, likelihood of success does not necessarily have to mean that a claim is more likely than not to succeed.<sup>196</sup> Although the Supreme Court did not define likelihood of success, it did maintain that a movant *must* demonstrate that he is likely to succeed.<sup>197</sup> Not only does the Second Circuit's version of the standard for a preliminary injunction give district courts the discretion to define likelihood

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191. See *Citigroup*, 598 F.3d at 35.

192. *Id.* (emphasis added) (quoting *Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc.*, 596 F.2d 70, 72 (2d Cir. 1979)).

193. See *id.*

194. See *id.* at 33-34 (holding that CGMI was able to prove that the complexities of the case were enough to establish serious questions as to the merits but was unable to prove likelihood of success on those merits).

195. *Id.* at 37.

196. *Id.* at 34-35.

197. *Munaf v. Geren*, 553 U.S. 674, 690-91 (2008); *Winter v. Natural Resources Defense Council*, 129 S. Ct. 365, 374 (2008); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975).



of success, it also grants courts wide discretion to completely remove the requirement from the equation.<sup>198</sup> Even though it does not explicitly say so, the Second Circuit gives its district courts the power to overrule the Supreme Court's mandate that a party seeking a preliminary injunction *must* demonstrate likelihood of success on the merits.

*Citigroup* does attempt to justify the serious questions alternative and its corresponding elimination of a requirement dictated by the Supreme Court. The Second Circuit reasoned that since the movant must demonstrate that the balance of hardships tips decidedly in his favor, the movant's burden is equal to the burden of establishing likelihood of success.<sup>199</sup> *Citigroup's* rationale depends on the validity of the idea that removing one factor and replacing it with an increased burden as to another factor results in an overall equal burden on the moving party.<sup>200</sup> Yet the facts of *Citigroup* itself contradict this argument. In *Citigroup*, in order for CGMI to prove that it was likely to succeed, it would have had to show that some of its employees who worked on the credit swap were, at the time of the swap, acting as representatives of Citibank, which was an *affiliate* of CGMI, not CGMI itself.<sup>201</sup> Not only was the fact pattern of *Citigroup* complex, but according to the Second Circuit, the issue of whether VCG was a customer of CGMI was in sharp dispute due to contradictions in the record.<sup>202</sup> Obviously, proving likelihood of success was extremely difficult in this scenario. In fact, the district court found that CGMI could not prove that it was likely to succeed.<sup>203</sup> In contrast, all CGMI had to do in order to prove that the balance of hardships tipped decidedly in its favor was to show that "an injunction would simply freeze the arbitration without destroying VCG's ability to continue that arbitration" should CGMI lose its suit for a permanent injunction.<sup>204</sup> Proving probable success on a complicated fact pattern that is in sharp dispute should not be considered an equal burden to the burden of showing that the party opposing a preliminary injunction of arbitration can simply continue that arbitration should it eventually win the injunction case. In fact patterns like *Citigroup* at least, proving that the balance of hardships tips decidedly in one's favor is much easier than

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198. See *Citigroup*, 598 F.3d at 35 (stating that a movant has to show a likelihood of success *or* serious questions as to the merits, but not both).

199. *Id.*

200. See *id.*

201. *Id.* at 31-34.

202. *Id.* at 39.

203. *Id.* at 33.

204. *Id.* at 34.

proving probability of success on the merits. Therefore, the reality is that eliminating or weakening one requirement and increasing the burden as to another does not always equal the burden of having to establish all of the original requirements.

*B. Citigroup Ignores the Reasoning Used by the Supreme Court in Winter*

*Winter* should be interpreted to eliminate the serious questions standard as a substitute for demonstrating likelihood of success on the merits.<sup>205</sup> Noting the Court's "frequently reiterated standard [that] requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of injunction," the *Winter* Court held that demonstrating a mere possibility of irreparable harm was "too lenient" to justify granting a preliminary injunction.<sup>206</sup> To prove that its standard was "frequently reiterated," *Winter* cited *Los Angeles v. Lyons*, in which the Supreme Court held that an injunction was inappropriate "absent a showing of irreparable injury. . . ."<sup>207</sup> The importance of *Winter's* discussion as to the appropriate standard for demonstrating irreparable harm lies in its emphasis on the word "likely."<sup>208</sup> The Court held that *likely* meant something stronger than the *possibility* of injury.<sup>209</sup> The Court reached this conclusion not because the irreparable injury factor is more important than the other factors but because of the extraordinary nature of the remedy.<sup>210</sup> Other Supreme Court precedent has similarly emphasized the extraordinary nature of preliminary injunctions. As a result, parties have no absolute right to such relief.<sup>211</sup> The *Winter* Court highlighted the extraordinary nature of preliminary relief as the reason why a strong demonstration of a likelihood of success is not enough to balance out the inability to establish that irreparable harm is likely.<sup>212</sup> For practical purposes, this reasoning eliminated the use of a sliding scale to balance out a weak showing on irreparable harm, but not because of the importance of that specific factor. Rather, the basis for the Court's reasoning was the overall drastic nature of the relief.

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205. *See Winter v. Natural Resources Defense Council*, 129 S. Ct. 365, 374-76 (2008).

206. *Id.* at 375.

207. *Id.* (citing *Los Angeles v. Lyons*, 461 U.S. 95, 103 (1983)).

208. *See id.* ("Our frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction.").

209. *Id.* at 375-76.

210. *See id.*

211. *See Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) (stating that injunctive relief is not a matter of right even in cases where the movant may eventually suffer irreparable harm); *Yakus v. United States*, 321 U.S. 414, 440 (1944).

212. *Winter*, 129 S. Ct. at 375-76.

In light of *Winter*'s rationale, it would seem appropriate to revert back to the Court's "frequently reiterated standard" to determine the appropriate burden for demonstrating a likelihood of success on the merits. When stating the test for a preliminary injunction, the Supreme Court has continually emphasized that the movant *must* demonstrate that he is likely to succeed on the merits.<sup>213</sup> In *Grupo Mexicano de Desarrollo v. Alliance Bond Fund, Inc.*, Justice Ginsburg acknowledged that a plaintiff seeking preliminary relief must demonstrate both a likelihood of success and that "[p]laintiffs with questionable claims would not meet the likelihood of success criterion."<sup>214</sup> Furthermore, the Supreme Court acknowledged that it is a "well established principle" that a movant seeking a preliminary injunction must demonstrate a likelihood of success on the merits.<sup>215</sup> It is true, as *Citigroup* points out, that the Supreme Court in *Ohio Oil Co. v. Conway* issued a favorable ruling vis-à-vis the serious questions standard.<sup>216</sup> It should be noted, however, that *Ohio Oil Co.* was decided in 1929, before the Court laid out the traditional factors in *Doran*,<sup>217</sup> before demonstrating a likelihood of success was acknowledged as a "well established principle" as it was in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*,<sup>218</sup> and before *Winter* stated that likelihood of success *must* be established.<sup>219</sup> Whatever the test in 1929, it appears evident that, in the eight decades since *Ohio Oil Co.* was decided, the Supreme Court has frequently reaffirmed that a movant seeking a preliminary injunction must demonstrate a likelihood of success.<sup>220</sup>

Applying these precedents, the *Winter* Court stated, "a plaintiff seeking preliminary injunction must establish that he is *likely* to succeed on the merits, [and] that he is *likely* to suffer irreparable harm."<sup>221</sup> Given the frequently reiterated standard for demonstrating likelihood of success

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213. *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004); *Grupo Mexicano de Desarrollo v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 340 (1999) (Ginsburg, J., concurring in part and dissenting in part); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975).

214. *Grupo Mexicano de Desarrollo*, 527 U.S. at 340 (Ginsburg, J., concurring in part and dissenting in part).

215. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 428 (2006).

216. *Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 36-37 (2d Cir. 2010).

217. *Doran*, 422 U.S. at 932.

218. *Gonzales*, 546 U.S. at 428.

219. *Winter v. Natural Resources Defense Council*, 129 S. Ct. 365, 374 (2008).

220. *See id.*; *Gonzales*, 546 U.S. at 428; *Doran*, 422 U.S. at 932.

221. *Winter*, 129 S. Ct. at 374 (emphasis added).

coupled with *Winter*'s own discussion of the term "likely," it makes no sense to suggest that the *Winter* Court intended the first "likely" to have a less stringent application than the second "likely." The Court clearly intended the requirement that a movant demonstrate that he is "likely" to suffer irreparable harm to mean more than a mere possibility of irreparable harm balanced out by the strength of another factor. It follows that requiring a movant to show that he is "likely" to succeed on the merits *also* means that he must demonstrate more than serious questions as to the merits coupled with the balance of hardships tipping decidedly in the movant's favor.

Significantly, *Winter* cited *Mazurek v. Armstrong* and stated that awarding a preliminary injunction despite the movant's failure to establish one of the requirements "is inconstant with [the 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."<sup>222</sup> In *Mazurek*, the Court considered a challenge to a Montana law prohibiting all but licensed physicians from performing abortions.<sup>223</sup> The main issue before *Mazurek* Court was whether the petitioners, who were seeking to enjoin Montana from enforcing the law, had adequately demonstrated a likelihood of success on the merits.<sup>224</sup> In determining that the petitioners had not made an adequate showing of likelihood of success, the Court stated that the burden of proof that an injunction is proper is "much higher" than the proof necessary for a summary judgment.<sup>225</sup> As a result, the Court overruled the Ninth Circuit's grant of an injunction. According to *Mazurek*, the drastic and extraordinary nature of relief dictates that an injunction should be granted only upon a clear showing that the movant has carried the burden of persuasion concerning likelihood of success.<sup>226</sup> *Mazurek*'s requirement that likelihood of success be clearly shown in order for preliminary relief to be granted supplements *Winter*'s requirement that irreparable harm must be demonstrated on its own clear showing regardless of the strength of another factor. *Winter*'s citation of *Mazurek* to justify its holding should be read to support the conclusion that each of the *Winter* factors must be clearly shown on its own and that the strength of one factor cannot balance out the weakness of another.

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222. *Id.* at 375-76 (citing *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997)).

223. *Mazurek*, 520 U.S. at 969.

224. *Id.* at 969-71.

225. *Id.* at 972.

226. *Id.*

In contrast, the serious questions standard allows a plaintiff to be granted a preliminary injunction without demonstrating a likelihood of success.<sup>227</sup> This can only be reconciled with the Supreme Court's continued requirement that a plaintiff *must* demonstrate a likelihood of success if a stronger showing of other factors coupled with a serious question on the merits does in fact demonstrate likelihood of success. But such an argument goes directly against the reasoning of *Winter*. Some may argue that the reasoning in *Winter* should apply only to the irreparable harm requirement because of the importance of that factor.<sup>228</sup> However, that idea is found nowhere in *Winter*. Indeed, the Court explicitly stated that its decision was based on the extraordinary nature of injunctive relief as a whole. The Court did not even remotely suggest that the importance of the irreparable harm factor influenced its decision.<sup>229</sup> Therefore, it simply does not follow that the Supreme Court would agree that the extraordinariness of preliminary injunctions prohibits a sliding scale to be applied to irreparable harm but allows one to be applied to the other factors. The reasoning in *Winter* should be read to invalidate the serious questions alternative because that alternative allows a lack of demonstrating one factor, likelihood of success, to be balanced out by the heightened strength of another factor.

*C. The Serious Questions Alternative Eliminates an Important Protection for Parties Opposing Preliminary Injunction and Turns an Extraordinary Remedy into an Ordinary One*

Requiring a party to prove likelihood of success on the merits erects an important protection for those defending against preliminary injunctions.<sup>230</sup> A preliminary injunction prevents a party from taking specific action prior to a case being decided.<sup>231</sup> In other words, a preliminary injunction gives one party the same relief before a trial that it would receive after a complete trial, albeit on a temporary basis.<sup>232</sup> Because preliminary injunctions grant relief prior to a full hearing on the merits, an injunction is considered harsh.<sup>233</sup> *Citigroup* itself stated that “[t]he very purpose of an injunction . . .

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227. See *Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 35 (2d Cir. 2010).

228. See *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1223, 1241 (11th Cir. 2005) (holding that irreparable harm is the *sine qua non* of the preliminary injunction test).

229. See *Winter v. Natural Resources Defense Council*, 129 S. Ct. 365, 375-76 (2008).

230. See *Real Truth About Obama, Inc. v. Fed. Election Comm'n*, 575 F.3d 342, 345-46 (4th Cir. 2009), *partially vacated on other grounds*, 607 F.3d 355 (4th Cir. 2010).

231. BLACK'S LAW DICTIONARY 358 (3d pocket ed. 2006).

232. *Real Truth About Obama*, 575 F.3d at 345-47.

233. DOBBS, *supra* note 9, at 187.

is to give temporary relief based on a preliminary estimate of the strength of a plaintiff's suit, prior to the resolution at trial of the factual disputes and difficulties presented by the case."<sup>234</sup> The likelihood of success requirement serves as protection to an opposing party. The requirement prevents an opposing party from having to endure temporary defeat despite the fact that the movant has little to no chance of winning at trial.<sup>235</sup> Therefore, a preliminary injunction should be inappropriate "[n]o matter how severe and irreparable an injury one seeking [the] preliminary injunction may suffer in its absence . . . if there is no chance that the movant will eventually prevail on the merits."<sup>236</sup> Serious questions on the merits, coupled with a showing that the balance of hardships tips decidedly in the movant's favor, estimates the level of harm the movant may suffer but not the strength of the suit overall. The balance of hardships is irrelevant to the likelihood of success requirement. If the movant cannot demonstrate he is likely to succeed on the merits, he should not be allowed to prevent another party from exercising its right to act.<sup>237</sup> Although it may seem strict to prohibit a party who is under threat of irreparable harm to enjoin another from causing that harm prior to the outcome of a case solely because the movant cannot establish likelihood of success, preliminary relief is a drastic remedy and, as such, "is the exception rather than the rule."<sup>238</sup>

*Citigroup* states that the rationale behind the serious questions alternative, and consequently the removal of the protection that the likelihood of success requirement erects, is that limiting preliminary injunctions to cases in which the movant can demonstrate a likelihood of success would confine the relief "to cases that are simple or easy."<sup>239</sup> This rationale erroneously assumes that preliminary injunctions should be available in all types of cases. In fact, preliminary injunctions should instead be awarded only in *extraordinary* cases.<sup>240</sup> Furthermore, just because a case is complex does not necessarily mean that a party cannot

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234. *Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 35 (2d Cir. 2010) (quoting *WRIGHT, MILLER & KANE, supra* note 53, § 2948.3).

235. *Real Truth About Obama*, 575 F.3d at 345-46.

236. *Texas v. Seatrain Int'l, S.A.*, 518 F.2d 175, 180 (5th Cir. 1975).

237. *Id.*

238. *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (quoting *Seatrain*, 518 F.2d at 179).

239. *Citigroup*, 598 F.3d at 35.

240. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) (stating that injunctive relief is not a matter of right even in cases where the movant may eventually suffer irreparable harm); *Yakus v. United States*, 321 U.S. 414, 440 (1944).

demonstrate a likelihood of success on the merits.<sup>241</sup> A movant, in order to satisfy the likelihood of success requirement, “is not required to prove to a moral certainty that his is the only correct position.”<sup>242</sup> Likelihood of success simply requires a determination of the probable outcome at the time the request for preliminary injunction is made.<sup>243</sup> It does not require the court to determine who will ultimately win once the case has been presented in full.<sup>244</sup> In the Second Circuit, however, even if a party is unable to prove likelihood of success due to the complexities of the case, that party must be given the same chance to obtain preliminary relief as parties with simpler cases. This flies directly in the face of the constant affirmation of the Supreme Court that the granting of a preliminary injunction is not a matter of right.<sup>245</sup> It may be true that it is an extraordinary case in which, in the face of complex or incomplete facts, the movant can demonstrate at the time a preliminary injunction is sought that he is likely to succeed. Yet this only proves the point that preliminary injunctions are only to be granted in extraordinary cases.

Because of the danger of making requirements for a preliminary injunction so inflexible that it becomes unavailable as a remedy, *Citigroup's* policy consideration for utilizing the serious questions alternative should be given proper regard. In fact, equitable relief originated because of the rigid nature of the English writ system. Due to inflexibility, injustices lacked remedy.<sup>246</sup> The Second Circuit's policy consideration, however, must be balanced against the extraordinary nature of preliminary injunctions. A preliminary injunction gives the court power to compel action of a party, despite the fact that there is “[a] possibility that preliminary relief will prove to be erroneous when a full trial on the merits is held.”<sup>247</sup> The extraordinary nature of this relief is evident: “[n]early every judicial opinion addressing a request for preliminary injunctive relief recognizes the historical principle that such relief is a drastic remedy to be granted sparingly. . . .”<sup>248</sup> A recent study of relevant case law, however, revealed that between 2003 and 2006 forty-percent of motions for

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241. *See Seatrain*, 518 F.2d at 180-81.

242. *Id.*

243. *Narragansett Indian Tribe v. Guilbert*, 934 F.2d 4, 6 (1st Cir. 1991).

244. *Id.*

245. *See Weinberger*, 456 U.S. at 312 (stating that injunctive relief is not a matter of right even in cases where the movant may eventually suffer irreparable harm); *Yakus*, 321 U.S. at 440.

246. *See WALKER*, *supra* note 22, at 43-44.

247. *DOBBS*, *supra* note 9, at 253.

248. *STOLL-DEBELL ET AL.*, *supra* note 5, at 3.

preliminary injunction were granted in federal district courts.<sup>249</sup> Clearly, a once extraordinary remedy is on its way to becoming ordinary in our legal system.<sup>250</sup> If *Citigroup's* reasoning that preliminary injunctions should be available in all types of cases, not just extraordinary ones, is followed, the granting of preliminary injunctions will continue its path towards normalcy. *Winter* acknowledged that its reason for narrowing the standard for preliminary injunction was to uphold the belief that such relief is “an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to [it].”<sup>251</sup> Thus, even if the Second Circuit’s policy consideration is valid, *Winter* indicates that the current Supreme Court may be inclined to sacrifice availability of preliminary injunctions to parties with complex cases in order to protect the remedy’s extraordinary status. Requiring a party to demonstrate likelihood of success, while possibly making it harder for parties with complex cases to obtain a preliminary injunction, serves to protect the extraordinary nature of this harsh remedy.

#### V. Conclusion

In *Citigroup*, the Second Circuit sidestepped Supreme Court precedent in an effort to sustain five decades of its own jurisprudence.<sup>252</sup> The strongest argument *Citigroup* makes to justify its avoidance of that precedent is that the Supreme Court never explicitly stated that it was overruling the serious questions alternative.<sup>253</sup> A closer look at *Winter*, however, reveals that the Court explicitly used mandatory, strict language to set forth the requirement that a party seeking a preliminary injunction must establish likelihood of success.<sup>254</sup> *Winter's* mandatory language should be interpreted as overruling the serious questions alternative, despite the fact that the Court never expressly addressed that alternative, because a lesser standard transforms the Court’s language from mandatory to optional. Moreover, the reasoning used by the Court can be read to require that all the *Winter* factors for a preliminary injunction be clearly established without the strength of one factor compensating for the weakness of another.<sup>255</sup> The

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249. *Id.*

250. *Id.*

251. *Winter v. Natural Resources Defense Council*, 129 S. Ct. 365, 375-76 (2008).

252. *See Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 35, 38 (2d Cir. 2010).

253. *See id.* at 38.

254. *See Winter*, 129 S. Ct. at 374.

255. *See id.* at 374-76.



only way *Citigroup* can stand is if this aspect of *Winter* is completely disregarded.

Because the English Court of Chancery failed to implement concrete legal principles to govern awarding of relief, some of this nation's founding fathers feared arbitrary rulings concerning equitable remedies.<sup>256</sup> For too long the federal circuit courts have been in disagreement over the appropriate standards and requirements for determining whether a preliminary injunction is appropriate in a particular case.<sup>257</sup> The Supreme Court, in *Winter*, took a monumental step forward in establishing a uniform, concrete test for the granting of preliminary injunctions. However, in an effort to sustain decades' worth of Second Circuit jurisprudence, the *Citigroup* court improperly narrowed *Winter* and other Supreme Court precedent.<sup>258</sup> If a court can take requirements dictated by years of Supreme Court precedent and eliminate or replace those requirements at its convenience, arbitrary rule is the result. If each federal court is allowed to disregard Supreme Court reasoning and language when it comes to preliminary injunctions, then valuable safeguards for defendants will be abandoned. Allowing the requirements for preliminary injunctions to be changed or weakened, depending on the complexity of the case at hand, is one step closer to the preliminary injunction becoming the rule rather than the exception. Allowing preliminary injunctions to be issued absent a showing that the movant is likely to succeed on the merits is similarly one step closer to turning an extraordinary remedy into an ordinary one.

*Jacob S. Crawford*

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256. See STOLL-DEBELL ET AL., *supra* note 5, at 3-4.

257. See LAYCOCK, *supra* note 55, at 118.

258. See *Citigroup*, 598 F.3d at 35-38.