THE ROLE OF EVIDENTIARY RULES IN PRELIMINARY INJUNCTION MOTIONS

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Abstract

Should the Federal Rules of Evidence apply at preliminary injunction hearings? Every federal Court of Appeals to consider whether the rule against hearsay should apply has answered "no," and some courts have said that the Federal Rules of Evidence do not apply at all. This Article is the first to critically examine this evidentiary practice, discussing problems with its foundational justifications and suggesting ways to improve it. I show that the historical justifications for eliminating evidentiary rules are thin; the policy justifications for it are weaker than they appear; and there would, in fact, be several benefits to applying the Rules at the preliminary injunction phase. I pinpoint the specific problem with applying the Rules at this stage: because parties can produce only limited evidence under time pressure, excluding the only evidence they have may frustrate truth-seeking.

To critique the policy justifications for abandoning the rules, I introduce a new concept, "meta-evidence," defined as evidence of what evidence will be presented at trial. I demonstrate that evidence introduced to prove whether the plaintiff is likely to succeed on the merits is meta-evidence; therefore, much evidence that initially appears inadmissible under the rule against hearsay is not, in fact, hearsay—it does not go to prove the truth of the matter asserted. Instead, it proves what evidence the proponent will offer at trial. Applying the rules, then, would not be as harsh as courts have assumed.

I offer two proposals for how courts should apply the Federal Rules of Evidence at the preliminary injunction phase. More ambitiously, I suggest courts should apply the Rules, with an exception directly tailored to the dangers of limiting evidence gathered under time pressure. Less ambitiously, but more confidently, I suggest that courts simply recognize when evidence is actually meta-evidence and weigh it appropriately, by acknowledging that meta-evidence is probative only to the extent it tends to show the proponent will produce admissible evidence at trial.

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INTRODUCTION

On January 28th, 2017—before he was President Trump's lawyer, before he had a reputation for putting his foot in his mouth on national television—former New York City Mayor and presidential adviser Rudy Giuliani appeared on Fox News.[1] Host Jeanine Pirro had invited him on her show to discuss President Trump's "travel ban," which temporarily suspended immigration from seven countries.[2] When Pirro asked Giuliani how Trump chose the specific countries for the ban, Giuliani replied, "I'll tell you the whole history of it. So when [the

[1] *Justice with Judge Jeanine* (Fox television broadcast Jan. 28, 2017), *available at* http://video.foxnews.com/v/5301869519001/.

[2] Exec. Order No. 13,769, 2017 WL 394075 (2017).

President] first announced it, he said 'Muslim ban.' He called me up. He said, 'Put a commission together. Show me the right way to do it legally.'"[3]

States and human rights organizations began filing lawsuits seeking to enjoin the travel ban as soon as it was announced. Not two months after the Giuliani interview, a federal judge in Maryland granted a preliminary injunction,[4] temporarily halting the travel ban.[5] The judge found the plaintiffs could likely demonstrate that the primary purpose of the ban was to exclude Muslims, not to advance national security interests.[6] In its analysis, the court cited Mayor Giuliani's statements during his Fox News interview, noting "Mayor Giuliani's account of his conversations with President Trump reveal that the plan had been . . . to approximate a Muslim ban without calling it one . . . ."[7] The court noted that judges in the Eastern District of Virginia and the Ninth Circuit had also relied on these statements.[8] Affirming the preliminary injunction, the Fourth Circuit also relied in part on the Giuliani interview.[9] And while the Supreme Court later reversed the Ninth Circuit decision upholding a preliminary injunction, Chief Justice Roberts cited the Giuliani interview as part of the plaintiffs' evidence,[10] and Justice Sotomayor included it in a long list of statements evincing animus toward Muslims in her dissent.[11]

But aren't Giuliani's remarks hearsay?[12] They are statements made during a television interview—not in court—offered to show the truth of what's asserted in the statements, that President Trump in fact told Giuliani that he wanted a Muslim ban. This is not even particularly *reliable* hearsay. It suffers from several of the testimonial infirmities of hearsay:[13] Giuliani's statement was made off-the-cuff during a performative television interview, not as a solemn in-court declaration where he would be obligated to be precisely truthful; the meaning of his comments is not entirely clear but could become clearer through cross-examination; and he might have misunderstood the President, as cross-examination could illuminate. A proponent of the evidence could argue that Giuliani was an authorized "speaking

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[3] *Justice with Judge Jeanine*, *supra* note 1.

[4] *See* Fed. R. Civ. P. 65.

[5] Int'l Refugee Assistance Project v. Trump, 241 F. Supp. 3d 539 (D. Md. 2017).

[6] *Id.* at 563 ("Thus, it is more likely that the primary purpose of the travel ban was grounded in religion, and even if the Second Executive Order has a national security purpose, it is likely that its primary purpose remains the effectuation of the proposed Muslim ban.").

[7] *Id.* at 558.

[8] *Id.*

[9] Int'l Refugee Assistance Project v. Trump, 857 F.3d 554, 594 (4th Cir. 2017) (en banc).

[10] Trump v. Hawaii, No. 17-965, slip op. at 27 (filed June 26, 2018).

[11] *Id.* at 7 (Sotomayor, J., dissenting).

[12] *See* Fed. R. Evid. 801(c).

[13] *See* Laurence H. Tribe, *Triangulating Hearsay*, 87 HARV. L. REV. 957, 958 (1974) (noting the "four testimonial infirmities of ambiguity, insincerity, faulty perception, and erroneous memory").

agent" for the president[14] or that the evidence was merely evidence of Giuliani's state of mind and non-hearsay.[15] But neither is apparent from the video or from how the opinions discussed the comment.[16] Isn't this exactly the kind of out-of-court statement factfinders should be prohibited from relying on? Yet both the District Court and the Court of Appeals relied on the statement with little fanfare.

This is hardly surprising: just one year earlier, the Fourth Circuit held that "district courts may look to, and indeed in appropriate circumstances rely on, hearsay or other inadmissible evidence when deciding whether a preliminary injunction is warranted."[17]

That holding arose in another high-profile case. In 2015, Gavin Grimm,[18] a transgender teenager in Virginia, sued his local school board for the right to use the boys' restroom at his high school. He filed a motion for a preliminary injunction, asking the court to order the school to let him use the bathroom of his choice until the district judge made a final determination on his claim. To show that he would suffer harm should the court fail to grant the preliminary injunction, Mr. Grimm submitted a declaration stating that a psychologist had diagnosed him with gender dysphoria and recommended that he live life as a boy, which included using the boys' restroom.[19] He did not submit a declaration from that psychologist.[20] The district court dismissed Grimm's evidence of harm as "mostly inadmissible hearsay,"[21] noting that "admissible evidence is the deciding factor" for preliminary injunction motions.[22] The court denied Grimm's motion "[b]ecause G.G. has failed to show that the balance of hardships weighs in his favor."[23]

The Fourth Circuit vacated the decision, concluding that "the district court used the wrong evidentiary standard in assessing G.G.'s motion for a preliminary

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[14] *See* Fed. R. Evid. 801(d)(2)(C).

[15] *See* Fed. R. Evid. 801(c)(2).

[16] *See, e.g.*, Int'l Refugee Assistance Project v. Trump, 241 F. Supp. 3d 539, 558-59 (D. Md. 2017) (using the Giuliani comment as evidence of Trump's intent).

[17] G.G. ex rel. Grimm v. Gloucester County School Bd., 822 F.3d 709, 726 (4th Cir. 2016).

[18] Documents in the case refer to Mr. Grimm, then a minor, as "G.G." Because he has discussed the case with the press openly, I refer to him by his name here. *See, e.g.*, Moriah Balingit, *Gavin Grimm Just Wanted to Use the Bathroom. He Didn't Think the Nation Would Debate It.*, WASH. POST (Aug. 30, 2016), http://wapo.st/2bA7XL0.

[19] G.G. ex rel. Grimm v. Gloucester County School Bd., 132 F. Supp. 3d 736, 749 (E.D. Va. 2015).

[20] He did, however, submit a declaration from a different clinical psychologist who had examined Grimm for purposes of the lawsuit. The district court gave little weight to that declaration and generally evinced skepticism of Grimm's claims of harm and solicitude toward the school board's claims. I return to the second declaration later.

[21] *Id.* at 751.

[22] *Id.* at 747.

[23] *Id.* at 753.

injunction."[24] The court stated that preliminary injunctions "are governed by less strict rules of evidence," and "it was error for the district court to summarily reject G.G.'s proffered evidence because it may have been inadmissible at a subsequent trial."[25] The court joined seven other circuits—every one that has considered the issue—in concluding that for purposes of a preliminary injunction motion, hearsay is admissible; "the nature of evidence as hearsay goes to 'weight, not preclusion.'"[26]

While these were newsworthy preliminary injunction motions with culturally-salient facts, as far as the evidentiary issues go, they were quite typical: parties sometimes do not challenge the introduction of inadmissible evidence on motions for a preliminary injunction.[27] When they do, if the other party challenges the applicability of the Federal Rules of Evidence ("FRE") at that stage, courts often deny their motions, saying that admissibility under the FRE goes to weight, not admissibility, although sometimes courts first analyze admissibility under a relaxed standard. If the other party does not challenge the applicability of the FRE, the judge may simply entertain the objection and decide whether to admit or exclude the evidence.[28] This loose practice has gone largely unquestioned both in the courts and in the academic literature. Given the importance of preliminary injunction proceedings—they're often functionally dispositive[29]—the evidentiary standard used can have a large influence on a case.

This Article is the first to critically examine evidentiary practice on preliminary injunction motions, discussing problems with its foundational justifications and suggesting ways to improve the practice. Along the way, I introduce a new concept, "meta-evidence," which I define as evidence of what evidence will be produced at trial. The concept of "meta-evidence" allows us to see how applying the FRE at preliminary injunction hearings would not be as harsh as courts have suggested, and it suggests that the Rules of Evidence may also play a role in *weighing* evidence at the preliminary injunction stage.

After introducing the law and function of preliminary injunctions, I first discuss the current practice of courts with respect to evidence and the Rules. When pressed to consider whether the Federal rule against hearsay[30] applies at preliminary injunction hearings, courts have uniformly said it does not and the FRE,

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[24] G.G. ex rel. Grimm v. Gloucester County School Bd., 822 F.3d 709, 715 (4th Cir. 2016).

[25] *Id.* at 725.

[26] *Id.* (quoting Mullins v. City of New York, 626 F.3d 47, 52 (2d Cir. 2010)).

[27] For example, Gloucester County did not challenge Grimm's evidence. *See* Brief in Opposition to Motion for Preliminary Injunction, No. 4:15-cv-00054 (E.D. Va. July 7, 2015), ECF No. 30.

[28] *See* Conversation with [DM], July 18, 2017 (notes on file with author); Conversation with [TC], Oct. 25, 2017 (notes on file with author).

[29] *See infra* Section II.C.1.

[30] Fed. R. Evid. 802.

more generally, do not. However, courts sometimes apply non-hearsay exclusionary rules at the preliminary injunction stage, such as the *Daubert* standard[31] and categorical exclusions,[32] and when not specifically pressed to consider whether the FRE applies, courts sometimes simply rule on motions to exclude evidence. Ultimately, however, courts overwhelmingly tend to consider whatever evidence is offered and give it the weight they deem appropriate.

The paper then critically examines the justifications for this casual disregard of the Rules. I begin by demonstrating that by the textual terms of the Rules of Evidence and Civil Procedure, the FRE should apply (with the exception that courts may receive affidavits or deposition transcripts)—but I acknowledge that courts have generally found this textual argument barely worth discussing, resting instead on policy rationales. I also argue that complete abdication of the rules is not historically justified: Old courts of equity did not have completely flexible evidentiary regimes; as a general matter, they applied the same rules of evidence as applied at common law, but the form of the evidence differed. Also, I identify "doctrinal creep" in U.S. courts: early decisions on whether the FRE apply to preliminary injunctions cautiously noted some level of flexibility; only later do courts begin to say that the Rules do not apply at all.

I then argue that courts have failed to fully articulate a convincing policy justification for departing from the Federal Rules of Evidence. Specifically, courts that have cited the provisional nature and limited purpose of the remedy fail to acknowledge that preliminary injunctions are often effectively dispositive. Courts have also said that the need to prevent irreparable harm under time constraints justifies accepting evidence without regard to the Rules. While this is a serious concern—one I address later—adhering to the FRE would not be as harsh as they suggest. By focusing on what the evidence is being offered to prove at this stage, we can see that much evidence that initially appears inadmissible under the Rules would actually be admissible. When determining the likelihood of success on the merits—a key factor in deciding whether to grant a preliminary injunction—courts should use the evidence presented at the preliminary injunction hearing as "meta-evidence": evidence of what admissible evidence will be presented at trial. If an out-of-court statement is used to prove its truth, it's hearsay; but if it is used only to prove that the declarant could come to trial and testify, it's admissible non-hearsay. James Duane has made a similar move in the summary judgment context—arguing affidavits used at summary judgment are non-hearsay because they are offered only to show what's to come at trial.[33] But the insight here has real payoff: it demonstrates how seemingly-inadmissible evidence can come in under the

[31] *See* Fed. R. Evid. 702.

[32] *See* Fed. R. Evid. 404-411.

[33] James Joseph Duane, *The Four Greatest Myths About Summary Judgment*, 52 WASH. & LEE L. REV. 1523, 1531-44 (1995).

Rules.[34] It also has implications for how judges should *weigh* evidence offered to prove likelihood of success on the merits: the probative value of meta-evidence depends on how certain it is that the trial evidence will actually be offered and how probative that trial evidence is likely to be. I discuss how meta-evidence can be a useful concept in understanding and evaluating other procedures, including summary judgment and motions to dismiss.

I next set out the benefits and drawbacks of applying the FRE to preliminary injunctions. I argue that the benefits include predictability to litigants and forcing judges to articulate how evidence is relevant when evaluating its admissibility. I then pinpoint the most serious concerns with applying the FRE at this stage. When the preliminary injunction occurs under time pressure, applying the Rules might heighten the risk of error, particularly with regard to the "irreparable harm" factor of preliminary injunction analysis. If parties with meritorious claims are unable to produce admissible evidence in time for the hearing, by refusing to receive the evidence they *do* have, courts increase their chance of error. In addition, these errors will fall disproportionately on the producing party, and may therefore disproportionately disadvantage plaintiffs, who bear the burden of proof.

Finally, I make two proposals for improving consideration of evidence at the preliminary injunction stage. The first is both more ambitious and more tentative: I argue that to satisfy the central purpose of the preliminary injunction standard, to minimize "the probable irreparable loss of rights caused by errors incident to hasty decision,"[35] courts should apply the Rules but add an escape hatch, akin to the residual hearsay exception, that allows in reliable evidence implicating the concerns raised in the previous Part.

The second proposal is modest: I acknowledge that the ship may have sailed—courts are unlikely to bind themselves and start voluntarily applying the Rules. I therefore argue that courts should use the meta-evidence idea to determine the weight of evidence introduced to show the likelihood of success on the merits. Meta-evidence is probative *not* to the extent it actually tends to *prove* the merits, but rather to the extent it tends to prove that admissible, credible evidence will be introduced at trial. The Giuliani interview, then, is admissible meta-evidence—but to the extent the court doubts that Giuliani would repeat his interview statement at trial and a factfinder would believe him, it is relatively weak meta-evidence.

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[34] Duane's insight serves to clear up confused descriptions of summary judgment in treatises and advisory committee notes. He does not suggest the argument has any doctrinal implications, as Rule 56 explicitly permits affidavits on summary judgment.

[35] John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525, 541 (1978).

I. THE LAW AS IT STANDS

A. Preliminary Injunctions: A Brief Introduction

When a plaintiff fears that a defendant will cause irreparable harm in the time between the commencement of a lawsuit and trial, that plaintiff may seek a preliminary injunction. A preliminary injunction grants temporary injunctive relief to the movant and usually remains in effect until the court issues a final judgment on the merits.[36] Plaintiffs seek, and courts grant, preliminary injunctions in a wide variety of cases. These range from private disputes—such as when an employer seeks to enjoin a former employee from disclosing trade secrets[37] or violating a covenant not to compete,[38] or when one company seeks to enjoin another from infringing its patent,[39] copyright,[40] or trademark[41]—to cases with major public impact—such as environmental litigation,[42] challenges to federal immigration policy,[43] and litigation seeking to enjoin state restrictions on abortion.[44] The preliminary injunction phase is often high stakes for both the movant and the defendant. The movant alleges that it will be irreparably harmed absent a timely injunction—an injunction at the end of the case will not suffice to prevent injury; compensation will not make it whole. The defendant is at risk of being subject to an invasive court order prior to a full trial on the merits, and it, too, may face the prospect of irreparable harm caused by the preliminary relief.

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[36] *See* 11A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2947 (3d ed. 2002 & Supp. 2018).

[37] *See, e.g.*, Cerro Fabricated Products LLC v. Solanick, 300 F.Supp.3d 632 (M.D. Pa. 2018); Pyro Spectaculars North, Inc. v. Souza, 861 F.Supp.2d 1079 (E.D. Cal. 2012); Uncle B's Bakery, Inc. v. O'Rourke, 920 F.Supp. 1405 (N.D. Iowa 1996).

[38] *See, e.g.*, Maaco Franchising, Inc. v. Augustin, No. 09–4548, 2010 WL 1644278 (E.D. Pa. Apr. 20, 2010); Curtis 1000, Inc. v. Youngblade, 878 F. Supp. 1224 (N.D. Iowa 1995).

[39] *See, e.g.*, Everett Laboratories, Inc. v. Breckenridge Pharmaceutical, Inc., 573 F. Supp. 2d 855 (D.N.J. 2008); P.N.A. Const. Techs., Inc. v. McTech Group, Inc., 414 F. Supp. 2d 1228 (N.D. Ga. 2006).

[40] *See, e.g.*, Ty, Inc. v. GMA Accessories, Inc., 132 F.3d 1167 (7th Cir. 1997); Perfect 10, Inc. v. Cybernet Ventures, Inc., 213 F.Supp.2d 1146 (C.D. Cal. 2002).

[41] *See, e.g.*, Kos Pharm., Inc. v. Andrx Corp., 369 F.3d 700 (3d Cir. 2004); Bebe Stores, Inc. v. May Dept. Stores Intern., Inc., 230 F. Supp. 2d 980 (E.D. Mo. 2002).

[42] *See, e.g.*, Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127 (9th Cir. 2011); Nat. Resources Def. Council, Inc. v. Winter, 518 F.3d 658 (9th Cir. 2008), *rev'd* 555 U.S. 7 (2008).

[43] *See, e.g.*, Int'l Refugee Assistance Project v. Trump, 857 F.3d 554, 594 (4th Cir. 2017) (en banc) (affirming preliminary injunction of President Trump's "travel ban"); Texas v. United States, 809 F.3d 134 (5th Cir. 2015), *aff'd* 136 S.Ct. 2271 (2016) (affirming preliminary injunction of President Obama's deferred action programs).

[44] *See, e.g.*, Edwards v. Beck, 946 F. Supp. 2d 843 (E.D. Ark. 2013); Carhart v. Stenberg, 972 F.Supp. 507 (D. Neb. 1998).

Federal Rule of Civil Procedure 65 allows a party to seek a preliminary injunction on notice to the other party.[45] The Rule is modeled on Equity Rule 73 and codifies a remedy that extends back at least to Eighteenth Century English Chancery.[46] Rule 65 is sparse; it does not set out a substantive standard for granting preliminary injunctions, and it does not specify what sort of hearing a preliminary injunction motion requires. Courts have stepped in on both fronts.[47]

Courts emphasize that the "preliminary injunction is an extraordinary remedy never awarded as of right."[48] But they have also long considered four factors in determining whether to grant a preliminary injunction: "[1] the plaintiff's likelihood of success on the merits, [2] the prospect of irreparable harm, [3] the comparative hardship to the parties of granting or denying relief, and [4] sometimes the impact of relief on the public interest."[49] Courts have differed as to how they apply these factors, however, and both courts and commentators have disagreed as to whether the plaintiff needs to make a strong showing on each element independently,[50] or whether the factors should be evaluated on a "sliding scale" where more serious, more probable harms demand a lower showing of likelihood of success at trial.[51]

In his classic article on preliminary injunctions, John Leubsdorf argued that "the preliminary injunction standard should aim to minimize the probable irreparable loss of rights caused by errors incident to hasty decision."[52] He thereby endorsed a sliding-scale type model, where the judge multiplies the plaintiff's likelihood of success times the harm to plaintiff of denying the injunction and compares that to the defendant's likelihood of success times the harm to defendant of granting the injunction.[53] Under this sliding-scale regime, a greater likelihood of success can offset a lower level of harm, and vice versa. The relevant harm,

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[45] Fed. R. Civ. P. 65(a). Rule 65 also provides for temporary restraining orders, which may be issued without notice to the other party and can remain in place for no more than 14 days. *See* Fed. R. Civ. P. 65(b).

[46] *See* Leubsdorf, *supra* note 35, at 528.

[47] As Leubsdorf notes, these standards initially developed because the preliminary injunction proceeding occurred in Chancery while the eventual trial would occur in a court of law. *Id*. at 530-33.

[48] Winter v. Natural Resources Defense Council, Inc., 555 U.S. 7, 24 (2008).

[49] Leubsdorf, *supra* note 35, at 525.

[50] *Cf.* Morton Denlow, *The Motion for a Preliminary Injunction: Time for a Uniform Federal Standard*, 22 REV. LITIG. 495, 538 (2003) ("If the moving party is able to demonstrate the primary necessity for a preliminary injunction, it should then be required to demonstrate at least a 50% chance of success on the merits.").

[51] *See, e.g.*, Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127 (9th Cir. 2011) (Mosman, J., concurring) ("A sliding scale approach, including the 'serious questions' test, preserves the flexibility that is so essential to handling preliminary injunctions, and that is the hallmark of relief in equity.").

[52] Leubsdorf, *supra* note 35, at 540-41; *see also* American Hosp. Supply Corp. v. Hospital Products Ltd., 780 F.2d 589, 593 (7th Cir. 1986) (Posner, J.).

[53] *See* Leubsdorf, *supra* note 35, at 542.

Leubsdorf notes, is "harm resulting from an erroneous preliminary decision" that "final relief cannot address."[54] This understanding of harm, then, distinguishes preliminary injunctions from permanent injunctions. The court should grant the preliminary injunction when the probable irreparable loss of rights to the plaintiff, if the injunction is denied, exceeds the probable irreparable loss of rights to the defendant, if the injunction is granted.[55] At least one commentator has concluded that the Leubsdorf economic model, later adopted by Judge Posner, has "emerged as the triumphant, dominant theory of preliminary injunctions."[56]

The Supreme Court somewhat clarified the standard for awarding preliminary injunctions in the 2008 case, *Winter v. Natural Resources Defense Council*.[57] The Court proclaimed that "[a] plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest."[58] The Ninth Circuit had held that if the plaintiff demonstrates a *strong* likelihood of success, it need only show a *possibility* of irreparable harm.[59] The Supreme Court rejected this idea, citing the standard, which specifies that irreparable injury absent an injunction must be "likely."[60]

The court did not go so far as to reject "sliding-scale" tests entirely, however, and it ultimately decided the case based on the balance of equities and the public interest.[61] Justice Ginsburg in dissent suggested that, even after *Winter*, courts can sometimes award "relief based on a lower likelihood of harm when the likelihood of success is very high."[62] She noted that the hallmark of equity is flexibility, which permits courts to eschew "particular, predetermined quant[a] of probable success or injury" and instead use a sliding scale.[63] Courts have differed

[54] *Id.* at 541.

[55] *Id.* at 542.

[56] Thomas R. Lee, *Preliminary Injunctions and the Status Quo*, 58 WASH. & LEE L. REV. 109, 154 (2001).

[57] 555 U.S. 7 (2008).

[58] *Winter*, 555 U.S. at 20.

[59] *Id.* at 21.

[60] *Id.* at 22.

[61] *Winter*, 555 U.S. at 26.

[62] *Id.* at 51 (Ginsburg, J., dissenting); *see also id.* ("This Court has never rejected that formulation, and I do not believe it does so today.").

[63] *Id.*

in their reaction to *Winter*.[64] The Second,[65] Ninth,[66] and Seventh[67] Circuits kept their (somewhat varied) sliding-scale standards, which allow a lower likelihood-of-success showing when the balance of harms tips strongly in favor of an injunction. Conversely, *Winter* addressed whether courts could allow a weaker *irreparable harm* showing in the face of a strong likelihood of success. The Fourth Circuit, on the other hand, deemed its sliding-scale standard untenable in *Winter*'s wake and now requires "that the plaintiff make a clear showing that it will likely succeed on the merits at trial."[68] Overall, while its influence was somewhat muted by *Winter*, the Ginsburg dissent and the continued use of sliding-scale tests in several circuits indicate that Leubsdorf's underlying theory retains purchase in the federal courts.[69]

The procedural and evidentiary regime governing preliminary injunction motions is the focus of the next section and, indeed, the rest of the paper.

B. Evidence & Preliminary Injunctions

This section addresses how federal courts currently evaluate the admissibility of evidence at the preliminary injunction stage. It shows that courts overwhelmingly do not apply the Rules—they uniformly reject application of the rule against hearsay, and some courts will not entertain objections under other rules as well. In addition, some courts suggest judges should not exclude evidence *at all* at the preliminary injunction stage. The section then discusses how published decisions on whether the Rules apply do not capture the full practice of the courts, many of which may simply entertain motions to exclude evidence, particularly when the motion is based on a rule other than the rule against hearsay. Ultimately, the general pattern among district courts is that they tend to admit most evidence and give it the weight they deem proper.

When circuit courts have discussed admissibility of evidence for purposes of preliminary injunction motions, they have frequently cited the Supreme Court

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[64] *See generally* Note, Bethany M. Bates, *Reconciliation After* Winter*: The Standard for Preliminary Injunctions in Federal Courts*, 111 COLUM. L. REV. 1522 (2011).

[65] *See* Citigroup Global Mkts, Inc. v. VCG Special Opportunities Master Fund Ltd., 598 F.3d 30, 35 (2d Cir. 2010) ("The 'serious questions' standard permits a district court to grant a preliminary injunction in situations where it cannot determine with certainty that the moving party is more likely than not to prevail on the merits of the underlying claims, but where the costs outweigh the benefits of not granting the injunction.").

[66] *See* Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1132 (9th Cir. 2011) ("'[S]erious questions going to the merits' and a hardship balance that tips sharply toward the plaintiff can support issuance of an injunction, assuming the other two elements of the *Winter* test are also met.").

[67] *See* Hoosier Energy Rural Electric Coop., Inc. v. John Hancock Life Ins. Co., 582 F.3d 721, 725 (7th Cir. 2009) ("How strong a claim on the merits is enough 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.").

[68] Real Truth About Obama v. FEC, 575 F.3d 342, 346 (4th Cir. 2009).

[69] *See* Bates, *supra* note 64, at 1543.

case *University of Texas v. Camenisch*.[70] In explaining why a lower court's finding on the "likelihood of success on the merits" factor was not tantamount to an actual decision on the merits, the Court stated:

> The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held. Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, *a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits*.[71]

Camenisch thus both summarized practice to that point and set the stage for more direct dismissal of the Rules in the preliminary injunction context. (Although before *Camenisch*, at least the Sixth Circuit contemplated the application of the Federal Rules of Evidence to a preliminary injunction hearing.[72])

The question of whether the FRE apply at the preliminary injunction stage has arisen most frequently in the context of whether a district court should exclude hearsay. Every circuit to consider whether hearsay can be considered on a preliminary injunction motion has concluded that it can.[73] Specifically, the First,[74] Second,[75] Third,[76] Fourth,[77] Fifth,[78] Seventh,[79] Ninth,[80] Tenth,[81] and Eleventh[82] circuits have all set standards that permit hearsay at the preliminary injunction stage. The Sixth, Eighth, and D.C. Circuits appear not to have addressed the issue, although the Sixth Circuit has acknowledged that courts sometimes receive

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[70] 451 U.S. 390 (1981).

[71] *Id*. at 395 (emphasis added).

[72] *See* U.S. v. School Dist. of Ferndale, Mich., 577 F.2d 1339, 1354-55 & n.26 (6th Cir. 1978) (finding a district court exclusion erroneous because the evidence fell under a hearsay exception).

[73] *See generally* Michael J. Lichtenstein, *Settling the Law in the Circuits: Presenting Hearsay Evidence in A Preliminary Injunction Hearing*, 29 AM. J. TRIAL ADVOC. 415 (2005).

[74] Asseo v. Pan American Grain Co., 805 F.2d 23, 26 (1st Cir. 1986).

[75] Mullins v. City of New York, 626 F.3d 47, 52 (2d Cir. 2010).

[76] Kos Pharmaceuticals v. Andrx Corp., 369 F.3d 700, 718-19 (3d Cir. 2004).

[77] G.G. ex rel. Grimm v. Gloucester County School Bd., 822 F.3d 709, 725-26 (4th Cir. 2016).

[78] Sierra Club, Lone Star Chapter v. FDIC, 992 F.2d 545, 551 (5th Cir. 1993).

[79] S.E.C. v. Cherif, 933 F.2d 403, 412 n.8 (7th Cir. 1991); *see also* Illinois ex rel. Hartigan v. Peters, 871 F.2d 1336, 1342-43 (7th Cir. 1989); Ty, Inc. v. GMA Accessories, Inc., 132 F.3d 1167, 1171 (7th Cir. 1997).

[80] Flynt Distribution Co. v. Harvey, 734 F.2d 1389, 1394 (9th Cir. 1984).

[81] Heideman v. South Salt Lake City, 348 F.3d 1182, 1188 (10th Cir. 2003). Heideman was the one case that did not arise in the context of considering hearsay. Rather, in distinguishing a preliminary injunction hearing from a trial on the merits, the court noted, "[t]he Federal Rules of Evidence do not apply to preliminary injunction hearings." *Id*.

[82] Levi Strauss & Co. v. Sunrise International Trading Inc., 51 F.3d 982, 985 (11th Cir. 1995).

inadmissible evidence on preliminary injunction motions,[83] and district courts within the Sixth Circuit often admit hearsay.[84]

While each of these courts' standards disposes of the rule against hearsay in the preliminary injunction context, the standards aren't precisely identical. Specifically, they suggest potentially divergent answers to two questions: First, should courts evaluate whether to admit or exclude hearsay evidence, even though they are not bound by the Rules? And second, are these decisions limited to the rule against hearsay, or are courts free to disregard *all* of the FRE? The next two sections discuss how courts have approached these questions.

1. Evaluation of Admissibility

Some circuits suggest that while the FRE do not prohibit courts from considering hearsay evidence, judges should still evaluate whether to admit or exclude evidence. The First Circuit was, appropriately, the first circuit to articulate this sort of standard. In *Asseo v. Pan American Grain Co.*, the court noted, "[a]ffidavits and other hearsay materials are often received in preliminary injunction proceedings," and explained, "the dispositive question is not their classification as hearsay but whether, weighing all the attendant factors, including the need for expedition, this type of evidence was appropriate given the character and objectives of the injunctive proceeding."[85] Several other circuits have adopted the *Asseo* standard.[86]

Sometimes district courts, often citing *Asseo*, actually evaluate whether evidence is admissible on a preliminary injunction motion.[87] Often this reasoning

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[83] Ohio State Conference of N.A.A.C.P. v. Husted, 768 F.3d 524, 535 n.2 (6th Cir. 2014); *see also In re DeLorean Motor Co.*, 755 F.2d 1223, 1230 n. 4 (6th Cir.1985) ("The parties assume that the Federal Rules of Evidence are fully applicable to a hearing on a motion for a summary judgment. We express no opinion on this question. *But see* 11 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2949 (1973) (affidavits may be used to support preliminary injunction; 'trial court should be allowed to give even inadmissible evidence some weight.')").

[84] *See* Damon's Restaurants, Inc. v. Eileen K Inc., 461 F. Supp. 2d 607, 620 (S.D. Ohio 2006) ("The United States Court of Appeals for the Sixth Circuit has not explicitly stated whether hearsay evidence may be considered in the context of a preliminary injunction hearing. . . . This Court, however, and other district courts within this circuit have considered such evidence, as have numerous other circuit courts.").

[85] Asseo v. Pan American Grain Co., 805 F.2d 23, 26 (1st Cir. 1986).

[86] *See* Kos Pharmaceuticals, 369 F.3d at 718-19 (Third Circuit); S.E.C. v. Cherif, 933 F.2d at 412 n.8 (Seventh Circuit); Levi Strauss & Co., 51 F.3d at 985 (Eleventh Circuit).

[87] *See, e.g.*, Amadi v. Department of Children and Families, --- F.Supp.3d ----, 2017 WL 1164495, at *2 (D. Mass. Mar. 28, 2017) (evaluating affidavits under the *Asseo* standard and deciding not to strike them); Pendergest-Holt v. Certain Underwriters at Lloyd's of London and Arch Specialty Ins. Co., No. H–09–3712, 2010 WL 3359528, at *4

is fairly cursory,[88] sometimes it's more detailed.[89] Although courts evaluating the admissibility of this evidence almost always admit it, courts occasionally do exclude evidence after evaluation.[90] Other courts do not *evaluate* the admissibility based on an explicit standard but do state that courts have *discretion* to consider or not consider evidentiary submissions on a motion for a preliminary injunction.[91] Indeed, several courts of appeals have suggested, or explicitly stated, that evidentiary determinations at the preliminary injunction stage should be evaluated under an abuse of discretion standard.[92] The existence of a standard of review

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(S.D. Tex. Aug. 23, 2010) (evaluating evidence under a "relaxed" standard to ensure only reliable evidence is admitted).

[88] *See, e.g.*, RB Jai Alai, LLC v. Secretary of The Florida Department of Transportation, No. 6:13–cv–1167, 2014 WL 12617740, at *1 (M.D. Fla. Aug. 22, 2014) ("There is nothing to suggest that Birdoff's or Catina's affidavits are inappropriate in light of the character and objectives of Plaintiffs' Motion for Preliminary Injunction . . . .)"; Novosel v. Wrenn, No. 10–cv–165, 2011 WL 2633026, *7 n.2 (D.N.H. Feb. 16, 2011) ("The preliminary injunction hearing presented sufficient bases for considering Mijo's hearsay statements as evidence of the truth of the matters asserted… ."); Aviara Parkway Farms, Inc. v. Agropecuaria La Finca, S.P.R. de R.L., No. 08 CV 2301, 2009 WL 249790, at *4 (S.D. Cal. Feb. 2, 2009) ("Given the expeditious and complex nature of this proceeding, the declarative evidence has been considered by the court."); In re Ameriquest Mortgage Co., No. 05-CV-7097, 2006 WL 1525661, at *3 (N.D. Ill. May 30, 2006) ("Given the size of the putative class, the stage of this litigation, the purpose of the relief sought, counsel's declarations that Ameriquest borrowers in fact provided them with the NORTCs, and the number, consistency and clarity of the forms themselves, it is appropriate to consider the NORTCs submitted by counsel."); CCBN.com, Inc. v. c-call.com, Inc., 73 F. Supp. 2d 106, 113 (D. Mass. 1999) ("Plaintiff's affidavits contain sufficiently reliable and relevant information to overcome defendant's hearsay objection.").

[89] *See, e.g.*, Westernbank Puerto Rico v. Kachkar, No. 07–1606, 2009 WL 2871160, at *21 (D.P.R. Sept. 1, 2009) (discussing circumstances that lend credibility to an affidavit); Federal Trade Commission v. CCC Holdings Inc., No. 08-2043, 2009 WL 10631282, at *1 (D.D.C. Jan. 30, 2009) (reasoning that the court will consider hearsay, but not double hearsay or unsworn declarations because they lack sufficient reliability).

[90] *See, e.g.*, A.A. v. Raymond, No. 2:13–cv–01167, 2013 WL 3816565, *7 (E.D. Cal. July 22, 2013) ("The court sustains defendant's objections to hearsay in the Casillas declaration.").

[91] *See, e.g.*, McGehee v. Hutchinson, Case No. 4:17-cv-00179 KGB, 2017 WL 1399554, at *4 (E.D. Ark. Apr. 15, 2017) (overruled on other grounds); Rice v. Wells Fargo Bank, N.A., 2 F. Supp. 3d 25, 31 (D. Mass. 2014) ("this court has broad discretion in deciding what evidence to consider in connection with a motion for preliminary injunction, including hearsay").

[92] *See, e.g.*, Glossip v. Gross, 135 S. Ct. 2726, 2744-45 (2016) ("To the extent that the reliability of Dr. Evans' testimony is even before us, the District Court's conclusion that his testimony was based on reliable sources is reviewed under the deferential "abuse-of-discretion" standard."); Coalition of Concerned Citizens to Make Art Smart v. Federal Transit Administration, 843 F.3d 886, 898-99 (10th Cir. 2016) ("As for the evidentiary rulings made by the district court in connection with denying the plaintiffs' motion for preliminary injunction, we apply an abuse of discretion standard."); Kos Pharm., Inc. v. Andrx Corp., 369 F.3d 700, 719 (3d Cir. 2004) (noting district courts must exercise their discretion, then phrasing this as a "clearly erroneous" standard); Republic of the

indicates that courts should be making reviewable decisions—they should be deciding whether to admit or exclude evidence.

The Second Circuit struck a different tone. In *Mullins v. City of New York*, that court explained, "[t]he admissibility of hearsay under the Federal Rules of Evidence goes to weight, not preclusion, at the preliminary injunction stage."[93] Some district courts, in line with this suggestion, do *not* appear to consider whether or not otherwise inadmissible evidence should be admitted on a preliminary injunction motion; they effectively admit the evidence automatically.[94] The issue, then, is whether courts explicitly consider admissibility when they decide how much *weight* to give the evidence. Some courts admit the evidence without discussing whether they considered its admissibility for purposes of weighing the evidence.[95] Others *do* explicitly consider the admissibility of the evidence in determining the weight to afford it,[96] occasionally giving thoughtful and detailed

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Philippines v. Marcos, 862 F.2d 1355, 1363 (9th Cir. 1988) (en banc) ("It was within the discretion of the district court to accept this hearsay for purposes of deciding whether to issue the preliminary injunction.")

[93] 626 F.3d at 52.

[94] *See, e.g.*, McGehee v. Hutchinson, No. 4:17-cv-00179, 2017 WL 1399554 (E.D. Ark. Apr. 15, 2017), *vacated* 854 F.3d 488 (8th Cir. 2017) ("The Court, therefore, in its discretion will consider all evidentiary submissions at this stage, giving these submissions appropriate weight, without regard to whether these evidentiary submissions meet the strict evidentiary requirements . . . ."); Wildearth Guardians v. Board of County Commissioners for County of Catron, Civ. No. 07-00710, 2008 WL 11327379, at *11 (D.N.M. Sept. 30, 2008).

[95] *See, e.g.*, Veramark Technologies, Inc. v. Bouk, 10 F. Supp. 3d 395, 401 (W.D.N.Y. 2014) (overruling admissibility objections because "the rules of evidence are not strictly applied"); Todd v. RWI Acquisition LLC, No. 2:12-CV-00114, 2012 WL 12882371, at *5 (D.N.M. June 12, 2012) ("Because the Federal Rules of Evidence do not apply to hearings on preliminary injunctions, the Court denies *Plaintiffs' Motion to Strike*…"); Keep a Breast Foundation v. Seven Group, No. 11–cv–00570, 2011 WL 2940290, at *2 n.1 (S.D. Cal. July 19, 2011) ("As noted in the Order to Show Cause, however, courts may consider otherwise inadmissible evidence for Rule 65 purposes…. Therefore, Defendants' evidentiary objections are overruled."); R.B. ex rel. Parent v. Mastery Charter School, 762 F.Supp.2d 745, 747 n.3 (E.D. Pa. 2010); Commodity Futures Trading Comm'n v. American Metals Exchange Corp., 693 F. Supp. 168, 173 (D.N.J. 1988) ("I accepted all evidence mindful that hearsay materials and evidence other than live testimony are properly considered by the Court in preliminary injunction proceedings.")

[96] *See, e.g.*, CF 135 Flat LLC v. Triadou SPV N.A., 15-CV-5345, 2016 WL 5945912, at *2, n.3 (S.D.N.Y. June 24, 2016) ("While the fact that certain evidence is hearsay 'goes to [the] weight' that the Court may afford certain evidence, it is not a basis for 'preclusion' at this stage."); Phelps-Roper v. Heineman, No. 4:09CV3268, 2010 WL 2015269, at *2 (D. Neb. 2010) ("The questionable reliability of certain evidence will be considered by the Court when it determines what weight the evidence should be given").

treatment to the question.[97] Often, courts parrot the refrain that evidentiary concerns "go to weight rather than admissibility."[98]

Some courts exclude evidence at the preliminary injunction stage; some don't. Some courts consider the Rules when determining weight; some may not. Do these differences in practice make any difference, in the end? It is difficult to say. Under both the *Asseo* regime and the *Mullins* regime, the court considers whether a particular piece of evidence will help it make a well-founded decision on the motion. The court may be guided by the FRE and its underlying principles of reliability, but the court is never bound by those Rules. Practice looks different in different courts, but judges retain substantial discretion to use the evidence as they see fit.

2. Non-Hearsay Rules

Federal Courts of Appeals have not explicitly considered whether rules other than the rule against hearsay apply. However, the Tenth Circuit has stated its rule categorically, untethered from the hearsay context: "The Federal Rules of Evidence do not apply to preliminary injunction hearings."[99] Unusually, the court announced this broad statement of law not in response to any particular challenged evidence but rather in its "standards of review" section concerning the review of a preliminary injunction denial for abuse of discretion. District courts within the Tenth Circuit have taken it at face value, generally admitting evidence without regard to the Rules.[100] It has now become boilerplate in the Tenth Circuit to note that the Rules don't apply in the preliminary injunction context.[101] Similarly, the Ninth Circuit has noted in a footnote that "the rules of evidence do not apply strictly

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[97] *See, e.g.*, USA Visionary Concepts, LLC v. Mr International LLC, No. 4:09-CV-00874, 2009 WL 10672094, *5 (W.D. Mo. Nov. 17, 2009) (giving limited weight to hearsay of questionable reliability and no weight to comments made during settlement discussions so as not "to deter parties from engaging in settlement discussions."); Zeneca Inc. v. Eli Lilly and Co., No. 99 CIV. 1452, 1999 WL 509471, at *2 (S.D.N.Y. July 9, 1999) ("The Court has, nevertheless, applied the Federal Rules of Evidence in determining the weight to be accorded the evidence that was introduced and has also assessed whether the evidence would be admissible under the Federal Rules of Evidence.")

[98] *See, e.g.*, Am. Hotel & Lodging Ass'n v. City of Los Angeles, 119 F. Supp. 3d 1177, 1185 (C.D. Cal. 2015).

[99] Heideman, 348 F.3d at 1188.

[100] *See, e.g.*, Todd v. RWI Acquisition LLC, No. 2:12-CV-00114, 2012 WL 12882371, at *5 (D.N.M. June 1, 2012) ("Because the Federal Rules of Evidence do not apply to hearings on preliminary injunctions, the Court denies *Plaintiffs' Motion to Strike* … The parties' arguments pertain to the weight of the evidence, but not its admissibility.")

[101] *See, e.g.*, Navajo Health Found.-Sage Memorial Hosp., Inc. v. Burwell, 100 F. Supp. 3d 1122, 1126 (D.N.M. 2015); Wildearth Guardians v. Board of County Commissioners for County of Catron, No. 07-00710, 2008 WL 11327379, at *11 (D.N.M. Sept. 30, 2008).

to preliminary injunction proceedings."[102] And a district court judge, who regularly paraphrases *Asseo* when he states the preliminary injunction standard, writes that the court "may rely on *otherwise inadmissible evidence*, including hearsay."[103]

But do district courts actually consider evidence that violates the rules other than the rule against hearsay? Different district courts appear to have taken different approaches to this question. I have specifically looked at whether courts have applied Federal Rule of Evidence 702 and *Daubert*[104]—which requires a judge to act as a gatekeeper for expert evidence, ensuring that the factfinder considers only reliable evidence—at the preliminary injunction phase. (Courts have noted that *Daubert* is less important in bench trials than in jury trials, but it still applies.) Some courts, citing the above cases, have declined to apply *Daubert*. These courts admit the expert evidence independent of its reliability, but they will often consider the parties' *Daubert* arguments when weighing the testimony.[105] Similarly, some courts have admitted the evidence without consideration of *Daubert* but have analyzed the evidence using *Daubert* to determine whether the evidence should receive *any* weight.[106] This is somewhat similar to the practice in bench trials,

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[102] Herb Reed Enterprises, LLC v. Florida Entertainment Management, Inc., 736 F.3d 1239, 1250 n.5 (9th Cir. 2013).

[103] Amadi v. Dep't of Children and Families, 245 F. Supp. 3d 316, 319 (D. Mass. 2017) (Groton, J.) (citing Asseo v. Pan American Grain Co., 805 F.2d 23, 26 (1st Cir. 1986)) (emphasis added).

[104] *See* Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993).

[105] *See* McGehee v. Hutchinson, Case No. 4:17-cv-00179 KGB, 2017 WL 1399554, at *4 (E.D. Ark. Apr. 15, 2017), *vacated*, 854 F.3d 488 (8th Cir. 2017) (declining to apply *Daubert* at the preliminary injunction stage but carefully weighting the expert evidence in accordance with its reliability); Texas Medical Providers Performing Abortion Services v. Lakey, 806 F. Supp. 2d 942, 956 (W.D. Tex. 2011), *vacated in part on other grounds*, 667 F.3d 570 (5th Cir. 2012) (Arguments that declarations did not satisfy *Daubert* were "without merit" because courts may rely on otherwise inadmissible evidence.); Half Price Books, Records, Magazines, Inc. v. Barnesandnoble.com, LLC, 2003 WL 23175432, *1 (N.D. Tex. Aug. 15, 2003) ("[B]ecause the court is permitted to give weight to otherwise inadmissible evidence when considering an application for a preliminary injunction, Half Price's motion to exclude the Gelb Report is denied."); Greenpeace Foundation v. Daley, 122 F.Supp.2d 1110, 1114 (D. Haw. 2000) ("Even assuming portions of Mr. Karnella's declaration are offered in violation of Rule 702, they need not be stricken. The Court considers the declaration in its entirety, and accords it the weight that is appropriate in light of Plaintiffs' objections."); *see also* Norsworthy v. Beard, 87 F. Supp. 3d 1164, 1181-83, 1188 (N.D. Cal. 2015) (nominally applying *Daubert*, but admitting expert declaration despite serious problems with reliability, and ultimately giving report "very little weight" as it "misrepresents the Standards of Care; overwhelmingly relies on generalizations about gender dysphoric prisoners, rather than an individualized assessment of Norsworthy; contains illogical inferences; and admittedly includes references to a fabricated anecdote.")

[106] *See, e.g.*, A.A. v. Raymond, No. 2:13–cv–01167, 2013 WL 3816565, *4 (E.D. Cal. July 22, 2013) ("[A] trial court may admit expert testimony for purposes of a preliminary injunction evidentiary hearing and conduct its *Daubert* analysis in tandem with its assessment of the evidence's weight…. Even in these cases, the court must still conduct the *Daubert* analysis and make an explicit finding of the expert testimony's

where courts regularly take expert testimony and then, once they have heard it, decide whether it satisfies the requirements of *Daubert*.[107]

A substantial number of courts, however, *have* applied *Daubert* at the preliminary injunction phase.[108] On occasion, judges have even deemed experts unqualified to testify at this stage and excluded their testimony.[109] What distinguishes these cases from the cases that decline to apply *Daubert*? In none of

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reliability…"); Oklahoma ex rel. Edmondson v. Tyson Foods, Inc., No. 05-CV-329, 2008 WL 4453098, at *4 (N.D. Okla. Sept. 29, 2008) ("Upon consideration of the evidence presented, the Court concludes that the testimony and conclusions of expert witnesses Harwood and Olsen presented at the hearing are not sufficiently reliable under the standards enunciated in *Daubert*."); *cf.* Pass & Seymour, Inc. v. Hubbell Inc., 532 F.Supp.2d 418, 436-37 (N.D.N.Y. 2007) ("Upon a motion for a preliminary injunction a court must be guided by the evidentiary principles which would apply at trial and govern the admissibility of evidence, including in the form of expert testimony…. While ultimately the extent, if any, of expert testimony to be permitted from Mr. McGlynn will be a determination for the trial court, I have treated portions of his affidavit which appear to be more in the nature of a legal conclusion as a memorandum, with no particular evidentiary value.")

[107] *See* Metavante Corp. v. Emigrant Sav. Bank, 619 F.3d 748, 760 (7th Cir. 2010) ("Although we have held that the court in a bench trial need not make [*Daubert*] reliability determinations before evidence is presented . . . the determinations must still be made at some point.").

[108] *See, e.g.*, F.T.C. v. BF Labs Inc., No. 4:14–CV–00815, 2014 WL 7238080, at *2 n.3 (W.D. Mo. Dec. 12, 2014); Michigan v. U.S. Army Corps of Engineers, 667 F.3d 765, 783 (7th Cir. 2011) ("the district judge's decision to admit the expert testimony of Dr. David Lodge . . . reflects a proper application of Federal Rule of Evidence 702"); Warner v. Gross, Case No. Civ-14-665-F, Doc. 179, 34-35 (W.D. Okla. Dec. 22, 2014) (transcript) ("The Tenth Circuit has made it very clear that once a *Daubert* challenge is filed, the Court must make its findings on the record indicating its resolution of the *Daubert* challenge."); Healthpoint, Ltd. v. Stratus Pharmaceuticals, Inc., No. SA–00–CA–726, 2002 WL 34364150, at *5 n.17 (W.D. Tex. Feb. 4, 2002) ("In connection with the consideration of his testimony and the survey for purposes of the findings of fact and conclusions of law entered on preliminary injunctive relief, because Mr. Johnson's testimony and survey was the subject of a *Daubert* challenge, the Court entered *Daubert* findings."); Charter Nat. Bank and Trust v. Charter One Financial, Inc., No. 01 C 0905, 2001 WL 1035721, at *6 (N.D. Ill. Sept. 4, 2001) ("[W]e cannot find Professor Lichtman qualified as an expert."); CBS, Inc. v. PrimeTime 24 Joint Venture, 9 F. Supp. 2d 1333, 1342 (S.D. Fla. 1998) (evaluating expert testimony under 703 while not countenancing a hearsay objection); A Woman's Choice-East Side Women's Clinic v. Newman, 980 F. Supp. 962 (S.D. Ind. 1997) (applying *Daubert* to social science testimony relating to the burden of abortion laws).

[109] United States v. Prater, No. CIV8:002CV2052T23MSS, 2002 WL 32107640, at *3 n.2 (M.D. Fla. Dec. 19, 2002) ("Because Mr. Rose qualifies neither as a lay witness under Rule 701 nor as an expert witness under Rule 702, Federal Rules of Evidence, Mr. Rose's testimony and the instructional video are excluded."); Charter Nat'l Bank and Trust v. Charter One Financial, Inc., No. 01 C 0905, 2001 WL 1035721, at *6 (N.D. Ill. Sept. 4, 2001) (excluding testimony after noting, "[a]s a trial court, we must function as a 'gatekeeper' with respect to the screening of expert testimony in order to assure the reliability and relevancy of expert testimony").

the cited cases did the court *consider* whether *Daubert* should not apply at the preliminary injunction phase. From all appearances, it seems that one party moved to exclude the witness's testimony under *Daubert*, the other party responded with its own *Daubert* arguments, and the court resolved the evidentiary dispute under the Rule.

A similar dynamic has played out with Rule 408, which excludes statements made during settlement negotiations for purposes of proving the validity or amount of a disputed claim or impeaching a witness.[110] Unlike the rule against hearsay or *Daubert*, Rule 408 does not primarily police evidentiary reliability; instead, it serves to promote desired behavior: free discussion during settlement.[111] If courts may consider statements made during settlement negotiations at the preliminary injunction stage, that would undermine the incentives created by the Rule: if parties know their statements can be used against them later, they will talk less freely during settlement discussions. However, some courts have suggested that even this Rule might not apply in the preliminary injunction context,[112] or they have declined to apply the Rule but then given the evidence no weight, so as not to deter settlement talks.[113] But again, courts sometimes do not consider whether the Rules of Evidence apply at this stage: instead, they simply address Rule 408 motions as they arise.[114]

It seems, then, that courts follow one of three practices: they acknowledge that the FRE don't apply at this stage and accept all evidence; they acknowledge that the FRE don't apply, accept all evidence, and then explicitly decline to give significant weight to inadmissible or unreliable evidence; or they do not consider whether the FRE applies and decide to admit or exclude evidence based on the parties' arguments.

The final practice suggests that the standard-setting Court of Appeals decisions do not fully represent actual court practice. The next section discusses

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[110] Fed. R. Evid. 408.

[111] *See id.* advisory committee's notes ("[A] more consistently impressive ground is promotion of the public policy favoring the compromise and settlement of disputes.").

[112] *See, e.g.*, Doe #1 ex rel. Lee v. Sevier County, Tennessee, No. 3:17-CV-41, 2017 WL 1026491, at *4 (E.D. Tenn. Mar. 15, 2017) ("For the Court to accommodate John Does' request under Rule 408, it would need far more in the way of specifics, and that is only if the Court assumes the Federal Rules of Evidence even remotely apply to the evidentiary hearing—an issue that John Does, again, have left unaddressed."); *cf.* Jackson v. N'Genuity Enterprises Co., No. 09 C 6010, 2011 WL 4628683, at *23 (N.D. Ill. Oct. 3, 2011) (suggesting that the rule against character evidence does not apply in this context).

[113] *See* USA Visionary Concepts, LLC v. Mr International LLC, No. 4:09-CV-00874, 2009 WL 10672094, *5 (W.D. Mo. Nov. 17, 2009).

[114] *See, e.g.*, Seroctin Research & Technologies, Inc. v. Unigen Pharmaceuticals, Inc., 541 F. Supp. 2d 1238, 1240 n.1 (D. Utah 2008) (granting in part a motion to strike evidence under Rule 408); RGIS LLC v. A.S.T. Inc., No. 07-10975, 2008 WL 878908, at *3 (E.D. Mich. Mar. 28, 2008) ("because the Court agrees that Rule 408 prohibits the use of the Agreement to prove liability, and therefore that the preliminary injunction should not issue at this time . . . .").

how preliminary injunction practice may look different on the ground than it does in the circuit-level case law.

3. Unreported Court Practice

I spoke with several federal judges who handle preliminary injunction motions to get a qualitative understanding of how these hearings work in practice. Our conversations suggested that procedures between courts differ, although some common themes emerged.

A major difference—even among the five judges I spoke with—was how quickly the court tends to hold the hearing and, relatedly, what kind of evidence predominates. One judge tended to move more quickly—often asking the parties to consolidate the preliminary injunction hearing with a hearing on a temporary restraining order.[115] She said she encourages affidavit evidence—Federal Rule of Civil Procedure 43(c) allows judges to hear motions on affidavits—as opposed to live testimony.[116] One, who was unlikely to consolidate the motions, said she typically takes affidavits as direct evidence but requires the affiants to be present at the preliminary injunction hearing and available for cross-examination.[117] A third judge said parties often want discovery before the preliminary injunction hearing, and the hearing tends to look more like a trial on the merits, with live testimony and cross-examination.[118] She said she rarely, if ever, decides preliminary injunctions on affidavits.[119]

The judges generally said they entertained evidentiary objections, including hearsay objections.[120] (One speculated that lawyers may incorrectly believe that the Rules of Evidence apply, and that's why they make objections under the rules.[121]) The judge whose hearings look more like trials tended to apply the Rules fairly strictly,[122] but the other judges overwhelmingly said they tended to be more lenient in this context,[123] particularly if any flaws in the evidence could be fixed at trial.[124] They said that clearly inadmissible evidence, such as an affidavit with no foundation, would not be allowed.[125] But they generally allow reliable evidence to come in—several emphasized that "reliability" is key—even if it is excludable under the Rules.[126] They use the parties' evidentiary objections largely to determine

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[115] LS. [Note: before I publish this piece, I will need to confirm with these judges that they are willing to be identified.]

[116] *Id.*

[117] TC.

[118] DM.

[119] *Id.*

[120] TC; DM; LS.

[121] Anon.

[122] DM.

[123] TC.

[124] RK.

[125] TC; LS.

[126] Anon; TC; RK; LS.

the appropriate weight of the evidence.[127] For example, two judges said they do apply the *Daubert* standard at the preliminary injunction stage, but they tend to apply it after hearing the expert testimony in order to decide whether to give the testimony any weight.[128]

These conversations suggest that preliminary injunction practice varies. Some judges may apply the Rules more strictly than the circuit courts suggest, while others have adopted a flexible practice. Certainly, none of the judges suggested preliminary injunctions are an evidentiary wild west where anything goes; parties make evidentiary objections under the Rules, and they consider them, whether for purposes of exclusion or weight. In light of these judges' comments and the published decisions on *Daubert* and Rule 408, it seems that whether and how a court applies the Rules at the preliminary injunction stage depends on the judge, the arguments presented by the parties, and the exigencies of the case. Often, the court will entertain arguments, decline to exclude the evidence, but give the evidence little or no weight if the objecting party demonstrates that the evidence is unreliable or otherwise clearly violates the Rules.

II. CRITIQUE OF THE DOCTRINE

This highly discretionary, somewhat variable regime is a far cry from trial proceedings, where the Rules of Evidence govern. Although a number of the Rules allow for discretion in admitting evidence,[129] the discretion is explicitly guided, and several types of evidence are excluded out of concerns of reliability and unfair prejudice. Is this departure from the trial norm justified? This Section critiques the Courts of Appeals' approach to evidence in preliminary injunction motions. I focus here, as I have, on preliminary injunctions, as opposed to temporary restraining orders.[130] Temporary restraining orders (TROs), also permitted by Rule 65, may be issued without notice to the other party based on facts stated in an affidavit. They may remain in place for no more than 14 days, and they address true emergencies. Because the Rules set out a specific evidentiary regime for TROs—allowing them issued on affidavits alone and without any adversarial testing—and because TROs address such time-sensitive emergencies that any evidence-gathering is likely impossible, I do not critique Rule 65(b) here. I limit my critique to preliminary injunction motions.

First, the Federal Rules of Evidence and the Federal Rules of Procedure do not provide a textual basis for departure. Under the most straightforward reading of these rules, the Federal Rules of Evidence should apply at this stage.

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[127] Anon; RK; LS.
[128] TC; LS.
[129] *See, e.g.*, Fed. R. Evid. 403, 807.
[130] *See* Fed. R. Civ. P. 65(b).

Second, the current, completely flexible regime is not as historically justified as courts have suggested. While written, sworn statements—affidavits or interrogatories—have always been allowed in equity, historically, equity courts did enforce rules of evidence, and hearsay within hearsay could not form the basis of a preliminary injunction. I identify a "doctrinal creep" in the modern era, where courts started out noting that the Rules are applied less strictly at this phase but progressed to, in some cases, doing away with the FRE entirely.

Third, the policy justifications courts have advanced to justify the departure from the Rules are insufficient. Courts have focused on the limited and preliminary nature of the remedy and the need to prevent irreparable harm under time pressure. The first rationale is misguided: preliminary injunctions are often powerful remedies. The second rationale carries more weight, but enforcing the Rules would not be nearly as harsh as courts have suggested. To demonstrate this, I introduce the concept of "meta-evidence"—a key contribution of this Article—and demonstrate that much evidence that at first appears inadmissible is actually admissible under the Rules.

Finally, there are several reasons for preferring a regime with Rules, including predictability and procedural fairness.

A. The Rules

This unregulated evidentiary regime is not specifically authorized by the Federal Rules of Evidence or the Federal Rules of Civil Procedure, and under the best reading of those Rules, it should probably be disallowed—the Federal Rules of Evidence should probably apply to preliminary injunction hearings. Few, if any courts, have addressed this absence of authorization in the Rules.[131] To the contrary, courts have read the Rules to permit evidence in this context that would normally be inadmissible.

Both the Federal Rules of Civil Procedure and the Federal Rules of Evidence contain a provision instructing courts to interpret them to promote fairness, justice, efficiency, and in the case of evidence, truthseeking.[132] Courts generally interpret both the Federal Rules of Civil Procedure and the Federal Rules of Evidence using the usual tools of statutory interpretation, examining the plain meaning of the text, and then often looking to advisory committee notes or other context to resolve ambiguities.[133] This equivalence between statutes and Rules has come under scholarly fire in the context of the Federal Rules of Civil Procedure, which are drafted by an Advisory Committee and typically enacted through

[131] A Westlaw search for "1101(d)!" /p "preliminary injunction!" yields three district court cases.

[132] *See* Fed. R. Civ. P. 1; Fed. R. Evid. 102.

[133] *See* Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120, 123 (1989) (Federal Rules of Civil Procedure); Green v. Bock Laundry Machine Co., 490 U.S. 504, 508-09 (1989) (Federal Rules of Evidence).

legislative silence. (The original Federal Rules of Evidence were enacted by Congress.[134]) As theories of statutory interpretation tend to begin from the premise of legislative supremacy, they do not translate to the Rules of Civil Procedure.[135] Several scholars have therefore suggested interpreting these Rules as though they were administrative regulations.[136] However, for questions of law, even these proposals rely on many of the basic tools of statutory interpretation, including the plain meaning of text and the stated purpose of its drafters.

Federal Rule of Evidence 1101 governs the applicability of those Rules.[137] According to Rule 1101, the Federal Rules of Evidence "apply to proceedings before…United States district courts,"[138] specifically "civil cases and proceedings."[139] The FRE, then, apply to both jury trials and bench trials, to both law and equity. Rule 1101(d) specifies "exceptions," where the Rules do not apply, including preliminary questions governing admissibility, grand jury proceedings, and "miscellaneous proceedings such as: extradition or rendition; issuing an arrest warrant, criminal summons, or search warrant; a preliminary examination in a criminal case; sentencing; granting or revoking probation or supervised release; and considering whether to release on bail or otherwise."[140] In addition 1101(e) permits other statutes or Federal Rules to provide for the admission or exclusion of evidence.

A preliminary injunction proceeding is a civil proceeding before a United States district court, and it does not appear to fall under any of the "exceptions." The best chance for exclusion is 1101(d)(3)'s exclusion for "miscellaneous proceedings." The examples given in the list are not exhaustive, as indicated by the introductory phrase "such as." However, a preliminary injunction hearing does not closely resemble the proceedings listed in 1101(d)(3), all of which relate to *criminal*

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[134] *See* Pub. L. No. 93-595, 88 Stat. 1929.

[135] *See* Lumen N. Mulligan & Glen Staszewski, *Civil Rules Interpretive Theory*, 101 MINN. L. REV. 2167, 2183 (2017).

[136] *See id*. at 2225; Elizabeth G. Porter, *Pragmatism Rules*, 101 CORNELL L. REV. 104, 177 (2015).

[137] Fed. R. Evid. 101(a) provides: "These rules apply to proceedings in United States courts. The specific courts and proceedings to which the rules apply, along with exceptions, are set out in Rule 1101."

[138] Fed. R. Evid. 1101(a); *see also* Fed. R. Evid. 101(a) ("These rules apply to proceedings in United States courts. The specific courts and proceedings to which the rules apply, along with exceptions, are set out in Rule 1101.").

[139] Fed. R. Evid. 1101(b). Before recent amendments, Rule 1101(b) said the Rules "apply generally to civil actions and proceedings." Mueller & Kirkpatrick suggested that the word "generally" suggested the Rules might not apply to certain motions. But the word "generally" is no longer in the text. Even though the amendments were not supposed to effect substantive changes, Mueller & Kirkpatrick note that "there is but one word in the Rules (the qualifier 'generally' in Rule 1101) that supports the conclusion that the Rules do not apply to such motions." 5 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 11:3 (4th ed. 2009). This thin rationale no longer applies.

[140] Fed. R. Evid. 1101(d).

proceedings ancillary to trial. Indeed, courts have found the Rules of Evidence not to apply to other ancillary criminal proceedings—such as supervised-release proceedings, hearings on transfers of criminal defendants, and hearings to determine whether a defendant can stand trial.[141] The interpretive canon of *ejusdem generis* instructs: "Where general words follow specific words in a statutory enumeration, the general words are usually construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words."[142] As a Georgia court put it, "the federal rule expressly authorizes federal courts to limit the application of the rules of evidence in situations *that resemble the situations specified in the rule*."[143] Preliminary injunction hearings, as civil proceedings, do not resemble the enumerated situations.[144]

The Federal Rules of Civil Procedure also fail to provide for admission of evidence outside the rules, with one exception: Rule 43(c) provides that "[w]hen a motion relies on facts outside the record, the court may hear the matter on affidavits or may hear it wholly or partly on oral testimony or on depositions."[145] This indicates that a court may, in its discretion, hear motions on affidavits.[146] And courts have indeed heard a wide variety of motions—such as motions to quash service of process, motions to dismiss for lack of subject matter jurisdiction, and motions for a new trial—on affidavits, pursuant to this rule.[147] Rule 65, which governs preliminary injunction motions, does not have any additional evidentiary specifications: it does not modify the default. It *does* include one *indication* that courts might hear inadmissible evidence on a motion for a preliminary injunction: Rule 65(a)(2) provides, "evidence that is received on the motion and that would be admissible at trial becomes part of the trial record and need not be repeated at trial." This suggests that some evidence received on a preliminary injunction motion will

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[141] *See* 11A WRIGHT ET AL., *supra* note 36, § 2949 n.9 (3d ed. 2002 & Supp. 2016); *see also* 5 MUELLER & KIRKPATRICK, *supra* note 139, § 11:5 (4th ed. 2009) (citing other criminal proceedings in which the Rules do not apply under Rule 1101(d)(3)).

[142] Yates v. United States, 135 S.Ct. 1074, 1086 (2015) (quoting Washington State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler, 537 U.S. 371, 384 (2003)) (brackets omitted).

[143] Parker v. State, 296 Ga. 586, 593-594, 769 S.E.2d 329 (2015) (emphasis added).

[144] There is some resemblance between a preliminary injunction hearing and a bail hearing: the court determines whether to burden the defendant in order to prevent pre-trial harm. However, bail hearings occur on a tighter timeframe, often within twenty-four hours of arrest, giving the defendant little time to prepare. *See* JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE: VOLUME 2: ADJUDICATION 8 (4th ed. 2015). Bail hearings more closely resemble *ex parte* temporary restraining order proceedings than preliminary injunction hearings.

[145] Fed. R. Civ. P. 43(c).

[146] The court may also use deposition transcripts, which are admissible at trial only under certain circumstances. *See* Fed. R. Civ. P. 32(a). This rarely comes up at preliminary injunction hearings, likely because there has typically been insufficient time for discovery at this point, and because the non-offering party either had the opportunity to examine the deponent or to supplement with an affidavit.

[147] *See* 9A WRIGHT ET AL., *supra* note 36, § 2416 (3d ed. 2002 & Supp. 2016).

not be admissible at trial. However, this passage is consistent with allowing only the affidavits and deposition transcripts provided for in Rule 43(c). The Advisory Committee notes offer no clues.

Courts have not seen it this way. As noted, courts have not seriously addressed the tension between Rule 1101 and inapplicability of the Federal Rules to preliminary injunction motions. Those that have noticed the tension simply use preliminary injunctions as an example of 1101(d)(3) being an inexhaustive list of exceptions.[148] In one instance, a court had relied on 1101(d)(3) to express skepticism about the inapplicability of the Rules to a temporary restraining order proceeding, but the judge's skepticism was quelled by a citation to the case law on preliminary injunctions and hearsay.[149]

This attitude is not unique to preliminary injunction motions: Courts have also rejected application of the Rules to class certification proceedings pursuant to Rule 23 of the Federal Rules of Civil Procedure, even though those are also civil proceedings not excepted under Rule 1101(d).[150] Linda Mullenix has argued that the Rules should apply to these proceedings in part on this textual basis.[151] She has also taken courts' use of *Daubert* at the class certification stage as an indication that courts should apply *all* evidentiary rules at that stage.[152] The same could be said for preliminary injunction motions where courts sometimes look to *Daubert*. Perhaps the most forceful call for the Federal Rules of Evidence to apply *to preliminary injunction motions* under Rules 101 and 1101 has come in a parenthetical in a Chamber of Commerce amicus brief to the Supreme Court calling for application of the Rules in *class certification* proceedings. In its brief, the Chamber stated: "Although Rule 1101(d) contains certain enumerated exceptions to that general principle, it contains no exception for class-certification proceedings, or for the many other types of civil pretrial proceedings (such as preliminary-injunction hearings) at which parties routinely present evidence."[153] The brief called the conclusion that the Rules apply to class certification proceedings "inescapable" "as a logical matter."[154]

Courts have taken the silence of Rule 65 to indicate a *lack* of restrictions on evidence. Whereas Rule 56, governing motions for summary judgment, specifies

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[148] *See* Arista Records LLC v. Does 1-27, 584 F.Supp.2d 240 (D. Me. 2008) (citing *Asseo*); Forsberg v. Pefanis, 261 F.R.D. 694, 700 (N.D. Ga. 2009) (citing *Arista Records*).

[149] *See* Occupy Denver v. City and County of Denver, 2011 WL 6096501 (D. Colo. Dec. 7, 2011) (citing *Heideman*).

[150] *See* Linda S. Mullenix, *Putting Proponents to Their Proof: Evidentiary Rules at Class Certification*, 82 GEO. WASH. L. REV. 606, 636-37 (2014).

[151] *See id*. at 636-37.

[152] *See id*. at 636.

[153] Brief for the Chamber of Commerce of the United States of America, Business Roundtable, and the Securities Industry and Financial Markets Association as Amici Curiae Supporting Petitioners at 6, Comcast Corp. v. Behren, 569 U.S. ___ (2013) (No. 11-864), available at 2012 WL 3643755.

[154] *Id*.

what information is admissible—including requirements for affidavits and provision for objections that evidence cannot be presented in admissible form—Rule 65 does not. In *G.G.*, the Fourth Circuit cited this comparison to demonstrate that preliminary injunctions are governed by a laxer evidentiary regime,[155] as did the Third Circuit in *Kos Pharmaceuticals*.[156] Wright and Miller suggest that it would be illogical to impose the strict standards of Rule 56 on preliminary injunction motions and note that courts typically accept affidavits without holding them to Rule 56(c)(4) standards.[157] While I agree with these courts that nothing in the Rules requires that affidavits on a preliminary injunction motion conform to Rule 56(c)(4), this does not in itself imply that the Rules of Evidence as a whole do not apply—rather, it simply means that affidavits submitted pursuant to Rule 43(c) are not specifically governed by Rule 56(c)(4).

The Rules, then, do not provide for a wholesale rejection of the Federal Rules of Evidence. Instead they provide for a narrow exception: affidavits and depositions.

B. Historical Context

The circuit court decisions permitting hearsay in preliminary injunction proceedings suggest that their holding is inevitable—that the "nature and purpose of preliminary injunction proceedings"[158] require a loose evidentiary standard. But as I show, this was not always the way. Traditionally, equity courts adhered to common law rules of evidence. Further, while early circuit cases allowing hearsay permitted deviation from the rules of evidence, only recently have some courts held broadly that *all* hearsay and otherwise inadmissible evidence is permitted at this stage. The loose standard, then, is not an inevitable consequence of an equitable regime or a time-pressured one.

1. Equity

The Supreme Court has indicated that "history is a crucial guidepost in evaluating the scope of federal equitable power."[159] Courts have looked to the

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[155] G.G. ex rel. Grimm v. Gloucester County School Bd., 822 F.3d 709, 725 (4th Cir. 2016).

[156] Kos Pharm., Inc. v. Andrx Corp., 369 F.3d 700, 718-19 (3d Cir. 2004).

[157] 11A WRIGHT ET AL., *supra* note 36, § 2949 (3d ed. 2002 & Supp. 2016); *see also* J.P. Morgan Securities LLC v. Manne, 2016 WL 7223358, at *2 (M.D. La. Dec. 12, 2016) ("The Fifth Circuit follows Wright & Miller.").

[158] G.G. ex rel. Grimm v. Gloucester County School Bd., 822 F.3d 709, 726 (4th Cir. 2016).

[159] Lee, *supra* note 56, at 125; *see also* Anthony DiSarro, *Freeze Frame: The Supreme Court's Reaffirmation of the Substantive Principles of Preliminary Injunctions*, 47 GONZ. L. REV. 51, 53 (2011) ("Thus, a static, historical conception of equity drives the substantive standards for deciding whether to grant injunctive relief."); Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 333 (1999) ("Because such

equity tradition to emphasize that the judge, sitting as chancellor, has broad discretion and flexibility in determining what relief is appropriate.[160] And courts exercise their discretion "in conformity with historic federal equity practice."[161] Law and equity have merged,[162] and the Rules govern all cases, but courts still sometimes invoke equitable tradition and custom when discussing procedural issues.[163] Equity historically focused on considerations of justice and fairness.[164] If Nineteenth Century courts of equity[165] had unlimited flexibility with regard to evidentiary issues, that might suggest that today's courts considering equitable remedies should similarly be free to ignore all constraints and do justice in every case.

Equity courts were not so unconstrained: "The rules as to evidence are the same in equity as at law," declared Lord Hardwicke 1737.[166] He later noted that having different evidentiary regimes in the two courts could have "mischievous consequence," as it could lead to different results on the same issue in different courts.[167] This maxim held across the Pond, as well. In the United States, the evidentiary rules in equity differed from those at law in only a very limited class of

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a remedy was historically unavailable from a court of equity, we hold that the District Court had no authority to issue a preliminary injunction preventing petitioners from disposing of their assets pending adjudication of respondents' contract claim for money damages."). In his concurrence in *Trump v. Hawaii*, Justice Thomas relied heavily on the history of equity to discuss the scope of the injunctive remedy. *See* Trump v. Hawaii, 138 S.Ct. 2392, 2425-29 (2018) (Thomas, J., concurring).

[160] *See, e.g.*, Weinberger v. Romero-Barcelo, 456 U.S. 305, 310 (1982) (noting the district court had "emphasized an equity court's traditionally broad discretion").

[161] 11A WRIGHT ET AL., *supra* note 36, § 2947 (3d ed. 2002 & Supp. 2016).

[162] *See* Fed. R. Civ. P. 2. This is not to imply that law conquered equity. *See generally* Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987).

[163] *See, e.g.*, Univ of. Texas v. Camenisch, 451 U.S. 390, 395 (1981) ("[A] preliminary injunction is *customarily* granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits.") (emphasis added); LS; *see also* Mark Spottswood, *Live Hearings and Paper Trials*, 38 FLA. ST. U. L. REV. 827, 870 (2011).

[164] *See* Subrin, *supra* note 162, at 919.

[165] When the Supreme Court looks at historical rules of equity, it tends to "draw from the equity of the middle-to-late nineteenth century and the early twentieth century," as that is the period "when those rules were most systematically expounded." *See* Samuel L. Bray, *The Supreme Court and the New Equity*, 68 VAND. L. REV. 997, 1022 (2015). Bray argues that pulling from this convenient period is not good academic history, but it is sensible history in the context of legal adjudication. Since courts look to this period, and since this period runs directly into the era governed by the Federal Rules of Civil Procedure, I look to it as the most sensible reference point.

[166] Manning v. Lechmere, 1 Atk. 453, 453 (1737).

[167] *See* Glynn v. Bank of England, 2 Ves. 38, 41 (1750).

cases,[168] and equity treatises repeated the maxim: "In general it may be stated that the rules of evidence are the same in equity as they are at law."[169]

The evidentiary regimes of law and equity differed in two important respects. First, while parties were not competent to testify in courts of law, plaintiffs and defendants could both submit testimony in courts of equity.[170] Second—and more importantly for the preliminary injunction question—the manner of taking the evidence differed: in legal cases, tried in front of a jury, the witnesses gave live testimony, whereas at equity, the evidence was taken in secret via written interrogatories.[171] In equity courts, the evidence was all disclosed simultaneously at the moment of "publication," after which no further evidence was admissible without special leave.[172] (In complicated cases, the court might assign a "master," who could seek out additional evidence from the parties.[173] The master might take testimony by oral examination with the parties present.[174]) This practice evolved over time—the Federal Equity Rules of 1842 allowed parties to consent to an evidence-taking procedure more like a deposition than a written interrogatory.[175] But federal judges sitting in equity relied on written evidence—interrogatories, transcripts, pleadings, and written documentation[176]—until the New Federal Equity

[168] 3 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 250 (16th ed. 1899); Man v. Ward, 2 Atk. 228 (1741); Glynn, 2 Ves. at 42.

[169] 3 JOSEPH STORY & W.H. LYON, COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA 564 (14th ed. 1918); *see also* JOHN ADAMS, THE DOCTRINE OF EQUITY: A COMMENTARY ON THE LAW AS ADMINISTERED BY THE COURT OF CHANCERY 44 (8th ed. 1890) ("The general rules of evidence are the same in equity as at law, but the manner of taking it is different."); 3 GREENLEAF, *supra* note 168, § 250 ("The rules of Evidence, as to the matter of fact, as Lord Hardwicke long since remarked, are generally the same in equity as at law."); C.L. BATES, FEDERAL EQUITY PROCEDURE (1901) ("It is a fundamental principle that courts of equity follow the common-law rules of evidence . . . .").

[170] STORY & LYON, *supra* note 169, at 564.

[171] *See* ADAMS, *supra* note 169, at 44-45, 365.

[172] *See id.* at 45.

[173] *See* AMALIA D. KESSLER, INVENTING AMERICAN EXCEPTIONALISM: THE ORIGINS OF AMERICAN ADVERSARIAL LEGAL CULTURE, 1800-1877 26, 52 (2017).

[174] *See id.* at 82-83, 87. Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181, 1226 (2005) (citing Rule 77 of the Federal Equity Rules of 1842).

[175] *See* Fed. R. Equity 67 (1842), *in* JAMES LOVE HOPKINS, THE NEW FEDERAL EQUITY RULES 119-20 (7th ed., 1930); Kessler, *supra* note 174, at 1230-31.

[176] *See* KESSLER, *supra* note 173, at 70-71; Kessler, *supra* note 174, at 1232.

Rules went into effect in 1913.[177] Even after 1913, courts continued to hear motions on affidavits at the preliminary injunction stage.[178]

The written nature of the evidence at equity does not suggest a major breakdown in the rules; rather, courts distinguished between the *rules* of evidence and the *mode* or *manner of taking* evidence.[179] As the central purpose of taking evidence in equity was "to elicit a sworn detail of facts on which the court may adjudge the equities," not to resolve conflicts between witnesses, written interrogatories sufficed as a manner of taking evidence.[180] But the difference in manner of taking evidence did not alter other evidence rules, such as competency[181] or, presumably, the rule against hearsay. The system of gathering evidence differed greatly between the two systems; the rules of evidence differed far less.

However, equity courts did note that "[u]pon the hearing of a motion for a preliminary injunction, the rules of evidence are applied less strictly than upon the final hearing of the cause, and consequently evidence that would not be competent in support of an application for a perpetual injunction should be admitted."[182] One treatise notes that if it would be "inconvenient and unreasonably expensive" to produce evidence in the regular manner for a preliminary injunction, the court could allow the normally-inadmissible evidence by special order.[183] However, the evidence allowed by special order did not deviate substantially from the evidence normally permitted: it seems largely to have consisted of depositions taken in different cases and testimony of interested witnesses, or alternate methods of authenticating documents.[184]

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[177] HOPKINS, *supra* note 175, at 240 (reproducing Rule 46, which read, "In all trials in equity the testimony of witnesses shall be taken orally in open court, except as otherwise provided by statute or these rules . . . .," and noting that the rule was new). Beginning in 1893, the court could, in its discretion, allow testimony to be received in open court. But that was not the default practice. *See* Kessler, *supra* note 174, 1232-33.

[178] FELIX FRANKFURTER & NATHAN GREENE, THE LABOR INJUNCTION 55, 67-68 (1930).

[179] *See* Charles C. Callahan & Edwin E. Ferguson, *Evidence and the New Federal Rules of Civil Procedure,* 45 YALE L. J. 622, 625 n.13 (1936) (citing Bryant v. Leyland, 6 Fed. 125, 127 (C.C. Mass. 1881); Chicago & Northwestern Ry. Co. v. Kendall, 167 Fed. 62, 65 (C.C.A. 8th 1909)).

[180] ADAMS, *supra* note 169, at 45.

[181] Manning v. Lechmere, 1 Atk. 453, 453 (1737).

[182] Casey v. Cincinnati Typographical Union No. 3, 45 F. 135, 147 (C.C. S.D. Ohio 1891) (noting that evidence both was not hearsay and that even if it were, the rules apply less strictly in this context); *see also* Buck v. Hermance, 1 Blatchf. 322 (C.C. N.D.N.Y. 1848) (noting that while a verdict from one case could not be admitted as evidence in another lawsuit, it could be admitted in a preliminary injunction proceeding, because "[i]n this preliminary proceeding the parties are not tied down to the strict rules of evidence").

[183] 3 GREENLEAF, *supra* note 168, at 325, § 340.

[184] *Id.* at §§ 340-44.

Even though the rules were more flexible on a preliminary injunction motion, courts and treatises noted that plaintiffs seeking preliminary injunctions could not rely *primarily* on hearsay within an affidavit. In his 1871 treatise, William Kerr noted that allegations in a complaint are insufficient for purposes of a preliminary injunction; instead, the plaintiff must introduce affidavits.[185] As another equity treatise noted: "A preliminary injunction will not be granted where the material allegations of the bill are merely on information and belief."[186] (The treatise notes, as a limited exception, that sometimes a preliminary injunction could be granted on this basis pending a hearing with proper evidence.[187]) Instead, if the plaintiff's statement contained matters sworn on information and belief, the plaintiff was obligated to include an affidavit of the person who told him the information or some other person who had personal knowledge and could swear to the allegations.[188] In other words, he had to produce evidence on the same point that, but for being in an affidavit, would not be hearsay.

The rules of evidence at equity, then, contained some exceptions, but courts did not have complete flexibility: the rules at common law controlled.

2. Doctrinal Creep

Equity courts relied on sworn written statements—affidavits and verified bills in the preliminary injunction context, written interrogatories more generally—and Federal Rule of Civil Procedure 43(c) allows a court to hear a motion on sworn writings—affidavits and depositions. But federal courts have gone beyond allowing affidavits and declared, broadly, that judges may consider *any* hearsay at the preliminary injunction stage, and the FRE do not apply. This Section demonstrates that it wasn't always so.

As discussed above, courts of equity considering preliminary injunction motions did so on the basis of affidavits. This remained the uncontroversial practice through the middle of the Twentieth Century, before Congress passed the Federal Rules of Evidence in 1975.[189] In the pre-Rules era, then, federal Court of Appeals cases focused not on the *admissibility* of affidavits—they were, of course, admissible—but rather on whether a court could grant a preliminary injunction on the basis of affidavits *alone*. In 1947, the Third Circuit held that where the pleadings and affidavits conflict, a court must hold a live hearing to resolve the factual issues.[190] Several years later, the Ninth Circuit expressed doubt that an oral hearing

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[185] WILLIAM WILLIAMSON KERR, A TREATISE ON THE LAW AND PRACTICE OF INJUNCTIONS IN EQUITY 207 (1871).

[186] WILLIAM MEADE FLETCHER, EQUITY PLEADING AND PRACTICE 519 (1902).

[187] *Id*. at 519 n.26.

[188] BATES, *supra* note 169, at 543 (discussing bills for injunction generally, not preliminary injunctions specifically).

[189] *See* Pub. L. No. 93-595, 88 Stat. 1929.

[190] *See* Sims v. Greene, 161 F.2d 87, 88 (3d Cir. 1947).

is required.[191] But instead of resting its decision on those grounds, it determined that even under the Third Circuit standard a hearing was not required, because there was "no dispute as to the basic facts."[192] In 1968, Judge Friendly, writing for a Second Circuit panel, also addressed whether an oral hearing is required before a court issues a preliminary injunction.[193] He reasoned that the answer will vary from case to case, depending on both the urgency of the motion and whether the parties seriously dispute key facts.[194] These early cases, then, did not focus on admissibility of hearsay evidence—rather, they focused on sufficiency of affidavits.[195]

Courts continued to follow the old equity Rule that a preliminary injunction would not be granted where the principal evidence is an affidavit is made on information and belief as opposed to on personal knowledge.[196] As the Fifth Circuit wrote, "While we do not rule out the possibility that hearsay may form the basis for, or contribute to, the issuance of a preliminary injunction, the district courts have shown appropriate reluctance to issue such orders where the moving party substantiates his side of a factual dispute on information and belief."[197] Courts then, did not exclude affidavits with statements made on information and belief, but they did not rely on them to grant a preliminary injunction. (Courts today remain reluctant to grant a preliminary injunction *solely* based on affidavits.[198])

Similarly, district courts and treatises sometimes noted that on a preliminary injunction motion, while affidavits on personal knowledge are preferable (and oral testimony even better), "the court may properly consider affidavits at preliminary injunction hearings which do not measure up to the standards of the summary judgment affidavits."[199] Therefore, a court could consider affidavits containing hearsay, although courts would sometimes go out of their way to explain how the

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[191] *See* Ross-Whitney Corp. v. Smith Kline & French Laboratories, 207 F.2d 190, 198 (9th Cir. 1953).

[192] *Id.*

[193] S.E.C. v. Frank, 388 F.2d 486, 490-91 (2d Cir. 1968).

[194] *See id.*

[195] The question of whether a hearing was required did not abate after the Federal Rules were enacted. *See* 11A WRIGHT ET AL., *supra* note 36, § 2949 (3d ed. 2002 & Supp. 2018) ("Although the Ninth Circuit permits the trial court to exercise discretion to decline to hear testimony even when the facts are controverted, most courts hold that when the written evidence reveals a factual dispute, an evidentiary hearing must be provided to any party who requests one.").

[196] *See id*. ("[W]hen the primary evidence introduced is an affidavit made on information and belief rather than on personal knowledge, it generally is considered insufficient to support a motion for a preliminary injunction.").

[197] Marshall Durbin Farms, Inc. v. National Farmers Org., 446 F.2d 353 (5th Cir. 1971).

[198] *See* notes 282-283 & accompanying text.

[199] *See, e.g.*, Kennedy ex rel. N.L.R.B. v. Sheet Metal Workers Intern. Ass'n Local 108, 289 F. Supp. 65, 91 (C.D. Cal. 1968) (citing 7 MOORE'S FEDERAL PRACTICE ¶ 65.04(3) at 1641 (2d ed. 1966)).

hearsay was reliable or harmless.[200] And Courts of Appeals recognized that courts *could* exclude evidence, particularly if facts were disputed, and the proceeding left time to gather witnesses.[201]

Later, after the FRE were enacted, federal courts of appeals began ruling on challenges that evidence submitted in support of a preliminary injunction was inadmissible. Earlier decisions, from the 1980s and 1990s, allowed courts to consider hearsay and otherwise inadmissible evidence but fell short of completely disregarding the FRE.

Some of these earlier cases admitted notably reliable hearsay evidence. For example, in *Asseo*, the district court accepted into evidence transcripts of employee testimony before an administrative law judge. The defendants challenged these transcripts as inadmissible hearsay, but the First Circuit rejected their argument. It noted that "[a]ffidavits and other hearsay materials are often received in preliminary injunction proceedings."[202] Here, the hearsay evidence at issue—prior testimony before a judge—was of high quality, comparable to an affidavit or deposition. Similarly, in *S.E.C. v. Cherif*, the Seventh Circuit cited *Asseo* to allow consideration of statements in a plea agreement.[203] Plea agreements may not be as reliable as affidavits, but they are still sworn statements to a court.[204]

Other earlier cases, similar to those before the rules were enacted, allowed some hearsay within affidavits but emphasized the limited or harmless nature of the hearsay. For example, in *Federal Savings & Loan Insurance Corp. v. Dixon*,[205] the defendants objected to the district court's reliance on "affidavits that contained hearsay."[206] The court, citing *Camenisch*, Wright & Miller, and *Asseo*, noted that hearsay is admissible in preliminary injunction proceedings. But it cabined this broad statement, concluding: "Considering the extensive nature of the record," among other things, "reliance on some hearsay evidence at the preliminary

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[200] *See* Kennedy, 289 F. Supp. at 90-91 (noting the affidavit's "weakness has not been adequately shown by any opposing affidavits"); *cf.* Model-Etts Corp. v. Merck & Co., 118 F. Supp. 259, 261 (S.D.N.Y. 1953) (acknowledging that the rules of evidence apply less strictly at preliminary injunction proceedings but declining to consider letters that "consist largely of generalities, conclusions, speculation and indefinite hearsay comment obtained from persons not specifically described"); Wiley v. Pomerance, 347 F. Supp. 188, 190 (S.D. Fla. 1972) (noting evidence had been ruled inadmissible at the preliminary injunction hearing).

[201] *See* Wounded Knee Legal Defense/Offense Committee v. Fed. Bureau of Investigation, 507 F.2d 1281, 1286-87 (8th Cir. 1974); Industrial Electronics Corp. v. Cline, 330 F.2d 480, 483 (3rd Cir. 1964).

[202] Asseo v. Pan American Grain Co., 805 F.2d 23, 26 (1st Cir. 1986).

[203] *See* S.E.C. v. Cherif, 933 F.2d 403, 412 n.8 (7th Cir. 1991).

[204] The Seventh Circuit also later noted that affidavits themselves are admissible at this stage. *See* Ty, Inc. v. GMA Accessories, Inc., 132 F.3d 1167, 1171 (7th Cir. 1997).

[205] 835 F.2d 554 (5th Cir. 1987).

[206] *Id*. at 558.

injunction stage was not inappropriate."[207] It thereby noted that the hearsay was only a drop in the bucket and stopped short of blessing unrestrained consideration of hearsay evidence.

Similarly, in *Flynt Distribution Co. v. Harvey*,[208] the plaintiff introduced several affidavits to show that the Harveys were alter egos of their corporations, so the court could exercise personal jurisdiction over all of their corporations. The defendants challenged these affidavits as hearsay. It is not entirely clear whose affidavits the Ninth Circuit relied on, but defendants' brief suggests it was the plaintiff's lawyer's testimony, made on "information and belief."[209] The court held that due to the "urgency" of preliminary injunction proceedings, a "trial court may give even inadmissible evidence some weight, when to do so serves the purpose of preventing irreparable harm before trial."[210] By noting that "some weight" was permissible, the Ninth Circuit suggested that caution is appropriate when considering hearsay or otherwise inadmissible evidence.

However, later cases that built off of those cases broadened their statements of law and the types of evidence they considered. For example, within the Fifth Circuit, *Dixon* concluded that the district court's consideration of hearsay was "not inappropriate" in the context of that case. But several years later, in *Sierra Club, Lone Star Chapter v. FDIC*, the court cited *Dixon* for a broader proposition: "At the preliminary injunction stage, the procedures in the district court are less formal, and the district court may rely on otherwise inadmissible evidence, including hearsay evidence. Thus, the district court can accept evidence in the form of deposition transcripts and affidavits."[211] And while the court in *that* case used affidavits and depositions as its primary examples of hearsay, district courts now often cite *Sierra Club* purely for the first proposition: district courts can rely on otherwise inadmissible evidence including hearsay.[212]

The Tenth Circuit set its standard outside the context of any specific evidentiary challenge. Instead, to support the point that a preliminary injunction hearing is different from a trial on the merits, it noted: "The Federal Rules of Evidence do not apply to preliminary injunction hearings."[213] The court cited three

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[207] *Id*.

[208] 734 F.2d 1389 (9th Cir. 1984).

[209] Defendants-Appellants' Brief in Support of Emergency Appeal at 33, Flynt v. Harvey, 734 F.2d 1389 (9th Cir. 1984) (No. 83-5941).

[210] *Id.* at 1394. *See also* Republic of the Philippines v. Marcos, 862 F.2d 1355, 1363 (9th Cir. 1988) (en banc) ("It was within the discretion of the district court to accept this hearsay for purposes of deciding whether to issue the preliminary injunction.").

[211] Sierra Club, Lone Star Chapter v. FDIC, 992 F.2d 545, 551 (5th Cir. 1993) (citations to *Dixon* omitted).

[212] *See, e.g.*, Bar J-B Co. v. Texas Dep't of Transportation, No. 3:18-CV-0576, 2018 WL 2971157, at *11 (N.D. Tex. May 15, 2018); Sirius Computer Solutions, Inc. v. Sparks, 138 F. Supp. 3d 821, 836 (W.D. Tex. 2017); ODonnell v. Harris Cnty., Texas, 251 F. Supp. 3d 1052, 1132-33 (S.D. Tex. 2017).

[213] Heideman v. South Salt Lake City, 348 F.3d 1182 (10th Cir. 2003).

cases as support for this proposition: *Asseo, S.E.C. v. Cherif*, and a district court case out of Ohio,[214] which is the only one of the three to state categorically that the Rules do not apply.

The Second Circuit has made perhaps the strongest statements in favor of allowing hearsay on preliminary injunction motions. In, *Mullins v. City of New York*, a labor suit by police officers, the district court enjoined the City of New York and the NYPD from investigating and disciplining police officer plaintiffs based upon their participation in the lawsuit.[215] The plaintiffs argued that a preliminary injunction was necessary because plaintiffs who were not protected would drop out of the lawsuit due to fear of retaliation. The evidence included in-court statements and affidavits averring that *other* plaintiffs had voiced concern about participating in the case absent an injunction. While the district court judge's finding of irreparable harm relied on testimony that *named* the out of court declarants,[216] the Second Circuit also noted an affidavit from one officer stating that approximately five sergeants—unnamed—said they were considering dropping out of the lawsuit for fear of reprisal.[217] Here we have hearsay within hearsay, spoken by anonymous declarants.

The court issued a ruling broadly permitting hearsay at preliminary injunction proceedings. Citing the cases discussed above, along with district courts within the Second Circuit that had admitted hearsay at this stage, it concluded:

> We agree with these courts and conclude that hearsay evidence may be considered by a district court in determining whether to grant a preliminary injunction. The admissibility of hearsay under the Federal Rules of Evidence goes to weight, not preclusion, at the preliminary injunction stage. To hold otherwise would be at odds with the summary nature of the remedy and would undermine the ability of courts to provide timely provisional relief."[218]

The Second Circuit, then, endorsed admitting all hearsay—including hearsay within hearsay from anonymous declarants—taking reliability objections into account only when weighing the evidence.

Finally, just two years ago, the Fourth Circuit permitted hearsay within an affidavit in Gavin Grimm's case—the case of the transgender boy who wanted to

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[214] United States v. O'Brien, 836 F. Supp. 438, 441 (S.D. Ohio 1993). *O'Brien* cited only *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981), which says only that "procedures [] are less formal and evidence [] is less complete than in a trial on the merits," not that the Rules do not apply at all.

[215] 626 F.3d 47, 48 (2d Cir. 2010); *see also* Mullins v. City of New York, 634 F. Supp. 2d 373 (S.D.N.Y. 2009).

[216] 634 F. Supp. 3d at 383.

[217] 626 F.3d at 51; *see* Decl. of Edward Scott at 6, Mullins v. City of New York, No. 1:04-cv-02979 (S.D.N.Y. Apr. 16, 2009), ECF No. 169.

[218] 626 F.3d at 52.

use the boys' restroom at his high school.[219] It concluded that the district court had erred by summarily rejecting the hearsay in Grimm's affidavit,[220] which included a representation that his doctor had diagnosed him with gender dysphoria and recommended he lead his life as a boy."[221] It reasoned that, "because preliminary injunction proceedings are informal ones designed to prevent irreparable harm before a later trial governed by the full rigor of usual evidentiary standards, district courts may look to, and indeed in appropriate circumstances rely on, hearsay or other inadmissible evidence when deciding whether a preliminary injunction is warranted."[222]

The focus on hearsay in this case was somewhat odd. Grimm's lawyers appear to have anticipated that this evidence would be insufficient or excluded: they introduced the declaration of a psychologist who examined Grimm for purposes of the case, concluding that he "meets the criteria for Gender Dysphoria" and that use of the boys' restroom was "medically necessary treatment."[223] As Judge Andre Davis noted in his concurrence, this declaration, along with Grimm's own statements of his subjective psychological distress and urinary infections, were sufficient to find irreparable harm.[224] Only because the district judge discounted this evidence so severely did he have to explicitly reject hearsay within Grimm's affidavit. The Fourth Circuit was left endorsing hearsay within hearsay—Grimm's treating psychologist's diagnosis—when Grimm's own lawyers seem to have anticipated the objection to this low-quality evidence.[225]

And that is how we got from allowing the court, in its discretion, to consider affidavits that contain some hearsay, to considering Rudy Giuliani's comments on

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[219] G.G. ex rel. Grimm v. Gloucester County School Bd., 822 F.3d 709 (4th Cir. 2016).

[220] *Id*. at 725.

[221] *See* G.G. ex rel. Grimm v. Gloucester County School Bd., 132 F. Supp. 3d 736, 749 (E.D. Va. 2015).

[222] 822 F.3d at 725-26.

[223] Expert Declaration of Randi Ettner, Ph.D, at 9, G.G. ex rel. Grimm v. Gloucester County School Bd., 132 F. Supp. 3d 736 (E.D. Va. 2015) (No. 4:15-cv-00054, Doc. 10).

[224] *Id*. at 727-28 (Davis, J., concurring); *cf*. Whitaker v. Kenosha Unified School District No. 1 Board of Education, Case No. 16–CV–943–PP, 2016 WL 5239829, at *5 (E.D. Wis. Sep. 22, 2016) (relying primarily on transgender boy's description of his own harm to find irreparable injury, acknowledging an objection to the affidavit of a psychologist retained for the litigation), *aff'd* ---F.3d --- 2017 WL 2331751 (7th Cir. May 30, 2017).

[225] Judge Niemeyer's dissent is also odd. He would conclude that the court did not abuse its discretion in its determination of the balance of the hardships, "particularly when we are only now expressing as binding law an evidentiary standard that the majority asserts the district court violated." *Id*. at 739 (Niemeyer, J., dissenting). This suggestion that courts should not reverse for abuse of discretion based on their legal holdings on appeal seems off base.

Fox News without hesitation.[226] Again, even Nineteenth Century equity cases said that the rules of evidence applied less strictly at the preliminary injunction phase—courts might not have been constrained from introducing the Giuliani video then, technology aside. But the way courts talk about admitting evidence has changed remarkably, from a discretionary relaxation of the rules to broad statements that the rules do not apply. This shift does not prove that disposal of the rules is incorrect. It doesn't even prove that it's unnecessary. But it does indicate that the doctrine is not inevitable—courts sitting in equity could hew much more closely to the rules.

C. Policy Justifications

Courts have advanced two central reasons for permitting inadmissible evidence in preliminary injunction proceedings: the provisional and limited nature of the remedy, and the need to prevent irreparable harm given time constraints. I discuss both. First, I argue that the "provisional and limited nature" rationale is unconvincing: preliminary injunctions are often highly consequential, and any suggestion that evidentiary regulation is unimportant because the findings are unimportant is misguided. Second, I agree that the need to prevent irreparable harm before the parties have had a full opportunity for discovery is a weighty concern that requires compromising the Rules to some degree. However, I demonstrate that applying the rules would not be as harmful as courts have suggested. To make this showing, I introduce the concept of "meta-evidence"—evidence demonstrating what evidence will be presented at trial. By recognizing that evidence going to likelihood of success on the merits is meta-evidence, we see that the FRE would exclude very little evidence on this important factor.

1. Provisional and Limited Nature of Remedy

In *University of Texas v. Camenisch*, the Supreme Court case that served as the basis for many of the circuit cases allowing hearsay,[227] the court emphasized that "[t]he purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held."[228] It reasoned that "*[g]iven this limited purpose*, and given the haste that is often necessary if those positions are to be preserved, *a preliminary injunction is customarily granted on the basis of procedures that are less formal* and evidence that is less complete *than in a trial on the merits*."[229] Wright and Miller note that on motions for summary judgment, it is important to impose the same evidentiary safeguards that exist at

[226] The government, of course, may have declined to raise the issue for strategic purposes.

[227] *See, e.g.*, G.G. ex rel. Grimm v. Gloucester County School Bd., 822 F.3d 709, 725 (4th Cir. 2016) (citing *Camenisch*); Mullins v. City of New York, 626 F.3d 47, 52 (2d Cir. 2010) (same); Kos Pharm., Inc. v. Andrx Corp., 369 F.3d 700, 718 (3d Cir. 2004) (same); Heideman v. South Salt Lake City, 348 F.3d 1182, 1188 (10th Cir. 2003) (same).

[228] University of Texas v. Camenisch, 451 U.S. 390, 395 (1981).

[229] *Id*. (emphasis added).

trial because summary judgment is a substitute for trial. In the preliminary injunction context, however, the order "only has the effect of maintaining the positions of the parties until the trial can be held; the order neither replaces the trial nor represents an adjudication of the merits."[230] Judge Scheindlin, who wrote the district court opinion affirmed by the Second Circuit in *Mullins*, reasoned that "[a] preliminary injunction is an interim remedy, and the burdensome requirements of trial testimony are at odds with its provisional purpose."[231]

This emphasis on preliminary injunctions as a device that merely preserves the status quo has a long history[232] that continues to present day,[233] but as several scholars have demonstrated,[234] it is awfully incomplete. Preliminary injunctions sometimes, but do not always, preserve the status quo, the existing state of things. Instead, courts often focus on minimizing or avoiding irreparable harm, and sometimes altering the status quo is the only way to do that:[235] "If the currently existing status quo itself is causing one of the parties irreparable injury, it is necessary to alter the situation so as to prevent the injury . . . ."[236] In the travel ban cases, for example, courts preliminarily enjoined an Executive Order that was already in effect. In *Asseo*, the preliminary injunction ordered the defendant to reinstate four employees who had been discharged five to six months before the order.[237] In a Seventh Circuit case often cited for the proposition that hearsay is admissible at preliminary injunction proceedings, the district court had enjoined the sale of imitation Beanie Babies that were already being sold.[238] And somewhat ironically, in *Camenisch v. University of Texas* itself,[239] the district court's preliminary injunction ordered the defendant university to provide an interpreter for the plaintiff, a deaf student. That, too, disrupted the status quo—although the plaintiff would have lost his job if he could not take classes at the university,[240] so in one sense, the order maintained the status quo. Several circuit courts have adopted a preliminary injunction standard that holds a movant to a higher burden if

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[230] 11A WRIGHT ET AL., *supra* note 36, § 2949 (3d ed. 2002 & Supp. 2016).

[231] Mullins v. City of New York, 634 F. Supp. 2d 373, 377 (S.D.N.Y. 2009).

[232] *See* KERR, *supra* note 185, at 11-12 ("The effect and object of the interlocutory injunction is merely to preserve the property in dispute *in statu quo* until the hearing or further order."); Lee, *supra* note 56, at 124-38 (2001).

[233] *See* Benisek v. Lamone, No. 17-333, slip op. at 5 (June 18, 2018) (quoting *Camenisch*).

[234] *See* Lee, *supra* note 56, at 140-43 (discussing "mandatory" injunctions that altered the status quo in Nineteenth Century America); Leubsdorf, *supra* note 35, at 546.

[235] *See* Lee, *supra* note 56, at 163; James T. Carney, *Rule 65 and Judicial Abuse of Power: A Modest Proposal for Reform*, 19 AM. J. TRIAL ADVOC. 87, 88-89 (1995).

[236] Canal Auth. v. Callaway, 489 F.2d 567, 576 (5th Cir. 1974).

[237] Asseo v. Pan Am. Grain Co., Inc., 805 F.2d 23, 24, 29 (1st Cir. 1986).

[238] *See* Ty, Inc. v. GMA Accessories, Inc., 959 F. Supp. 936, 938-39 (N.D. Ill. 1997), *aff'd* 132 F.3d 1167 (7th Cir. 1997).

[239] Camenisch v. Univ. of Texas, No. A-78-CA-061, 1978 WL 51 (W.D. Tex. May 17, 1798), *vacated in part sub nom.* Univ. of Texas v. Camenisch, 451 U.S. 390 (1981).

[240] *Id.* at *2 (noting "the state requirement that Plaintiff obtain his Master's degree, and the potential irreparable injury resulting from Plaintiff's loss of employment").

the requested injunction would disturb the status quo or is mandatory (requiring action), as opposed to prohibitory (forbidding action).[241] Although this standard *favors* status-quo-preserving injunctions, it also acknowledges that preliminary injunctions will not *always* preserve the status quo.

Some courts have attempted to evade the potentially harmful nature of the status quo by defining it as "the last peaceable, noncontested status of the parties."[242] But in a number of cases—think of Gavin Grimm trying to use the boys' room or Walter Camenisch seeking a sign language interpreter—there is no noncontested state of affairs to which the parties can revert. And even if a court leaves a relatively peaceable current state of affairs unchanged, "a court interferes just as much when it orders the status quo preserved as when it changes it."[243] Preventing an important change can be a large imposition. And while a preliminary injunction is not permanent, it can be in place for years while a lawsuit is pending. In patent infringement cases, defendants have noted that while a final order requiring them to obtain a license before producing a product would be a blow, an interim prohibition on production is much worse.[244] In sum, the idea that the stakes are somehow lower because a preliminary injunction classically preserves the status quo is off base.

Relatedly, in contrast to some courts' suggestion that the preliminary injunction is merely an interim remedy, the decision on the preliminary injunction motion can have significant downstream consequences.[245] While judges may, of course, change their conclusions after a trial on the merits—findings on a preliminary injunction motion are indeed preliminary—the suggestion that preliminary injunction determinations are categorically less important or consequential than trial findings is unjustified.[246]

Preliminary injunction decisions may effectively resolve a case—particularly when timing is key to the parties' interests. For example, if an employer seeks to enjoin a former employee from going to a competitor and divulging a trade secret, the preliminary injunction decision may render further proceedings moot. If

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[241] Lee, *supra* note 56, at 115-21.

[242] Opticians Ass'n of America v. Independent Opticians of America, 920 F.2d 187, 197 (3d Cir. 1990) (quoting 5 J. THOMAS MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION § 30:19 (2d ed. 1984)); *see also Developments in the Law—Injunctions*, 78 HARV. L. REV. 994, 1058 (1965).

[243] Leubsdorf, *supra* note 35, at 546.

[244] Jean O. Lanjouw & Josh Lerner, *Tilting the Table? The Use of Preliminary Injunctions*, 44 J.L. & ECON. 573, 574 (2001) (quoting the CEO of Napster).

[245] *See id.* at 573 ("[P]ractitioner accounts suggest that injunctions have substantial effects on the outcome of disputes.").

[246] *See* FRANKFURTER & GREENE, *supra* note 178, at 78-80 (noting that while courts have granted preliminary injunctions while doubtful about the facts because the injunction "does not pass finally on the merits," that "rationale must be rejected," because "the preliminary injunction in the main determines and terminates the controversy in court")

the injunction is denied, the trade secret will be divulged, so a permanent injunction would be useless; if the preliminary injunction is granted, the protected information may well lose its value before a trial on the merits, so the defendant's interest in the information will be lost.[247] In Gavin Grimm's case, the Supreme Court stayed the preliminary injunction issued in his favor,[248] vacating and remanding only after most of his senior year had passed.[249] Grimm graduated without ever being permitted to use the boys' bathroom.[250] And consider labor injunctions—an historically-significant breed of injunction that is less prominent today, thanks to New Deal legislation protecting the right to strike.[251] Because strikes are so time-sensitive,[252] a preliminary injunction—or even a temporary restraining order—enjoining a strike may spur the workers to abort their efforts entirely.[253] As Felix Frankfurter and Nathan Greene put it, "it is undeniably the fact that the preliminary injunction in the main determines and terminates the controversy in court."[254]

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[247] *See, e.g.*, PepsiCo, Inc. v. Redmond, 54 F.3d 1262, 1269 (7th Cir. 1995) (describing the relevant trade secret as "extensive and intimate knowledge about PCNA's strategic goals for 1995 in sports drinks and new age drinks").

[248] Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm, No. 15-2056, 16-1733, 16A52, slip op. at 1 (Aug. 3, 2016).

[249] Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm, No. 16-273, order list at 1 (Mar. 6, 2017).

[250] His suit continues, seeking nominal damages and a declaratory judgment. *See* Matt Stevens, *Transgender Student in Bathroom Dispute Wins Court Ruling*, N.Y. TIMES (May 22, 2018), *available at* https://www.nytimes.com/2018/05/22/us/gavin-grimm-transgender-bathrooms.html.

[251] *See* Norris-LaGuardia Act of 1932, ch. 90, 47 Stat. 70 (codified as amended at 29 U.S.C. §§ 101-115 (2012)) (prohibiting preliminary injunctions in labor cases, except as permitted by law); National Labor Relations Act of 1935, ch. 372, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151-169 (1994)). Employers do still move to enjoin strikes today, particularly in the transportation industry, thanks to the Railway Labor Act of 1926, ch. 1120, 64 Stat. 1238. *See, e.g.*, ABX Air, Inc. v. International Brotherhood of Teamsters, No. 1:16-cv-1096, 2016 WL 7117388 (S.D. Ohio Dec. 7, 2016); Brotherhood of Maintenance of Way Employees Division/IBT v. BNSF Railway, Inc., 134 F. Supp. 3d 1208 (C.D. Cal. 2015).

[252] *See* Jon R. Kerian, Injunctions in Labor Disputes: The History of the Norris-LaGuardia Act, 37 N. DAK. L. REV. 49, 51 (1961) ("strikes are usually won or lost within a few days"); Ruben J. Garcia, *Labor's Fragile Freedom of Association Post-9/11*, 8 U. PA. J. LAB. & EMP. L. 283, 327 (2006) ("The timing of a strike at the most inopportune time for the employer is a major source of the economic leverage the union gains in striking.")

[253] *See* Luke P. Norris, *Labor and the Origins of Civil Procedure*, 92 N.Y.U. L. REV. 462, 489 (2017); Kerian, *supra* note 252, at 52 ("Once the injunction was granted, the strikers' ferv[o]r was abated and the strike was lost.")

[254] FRANKFURTER & GREENE, *supra* note 178, at 80.

Even if a preliminary injunction decision does not end a case, it may heavily influence the judge's ultimate ruling on the case.[255] Kevin Lynch has addressed how the psychological "lock-in effect" applies to preliminary injunction determinations.[256] Psychological research has shown that decisionmakers "lock in" to an initial decision and are reluctant to change their decision when asked to revisit it.[257] This effect is particularly strong when a judge's decision allows irreparable harm to occur: the judge will then face both "internal and external pressures to justify the harm," and will be less likely to alter his decision later.[258] Therefore, when a judge grants or denies a preliminary injunction based on the likelihood of success on the merits, and irreparable harm occurs, the judge may be highly unlikely to change his view of the merits.[259]

In addition, settlement negotiations occur in the shadow of a preliminary injunction decision.[260] The decision severely alters the bargaining positions of the parties, and parties often settle after a preliminary injunction decision.[261] The preliminary injunction, then, is the final ruling the parties receive from the judge, and it in effect resolves the dispute.

Courts have sometimes recognized—and sometimes declined to acknowledge—the potential effective finality of preliminary injunction determinations. Some judges, like Jerome Frank, have emphasized that "a

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[255] *See* Kenneth R. Berman, *Litigating Preliminary Injunctions: Sudden Injustice on a Half-Baked Record*, 15 No. 4 PRAC. LITIGATOR 31, 33 (2004) ("As a practical matter, the decision on the preliminary injunction motion is often case dispositive.").

[256] *See* Kevin J. Lynch, *The Lock-In Effect of Preliminary Injunctions*, 66 FLA. L. REV. 779 (2014).

[257] *Id*. at 781.

[258] *Id*.

[259] Lynch focuses on *denial* of preliminary injunction. However, because granting a preliminary injunction may also allow irreparable harm to occur, as discussed *infra*, his reasoning could also apply to decisions in which a judge grants the remedy and permits harm. Lynch also suggests that the standard for "likelihood of success" on the merits is functionally the same as the ultimate burden of proof. *Id*. at 798. I disagree with this in the next section.

[260] *But see* Geoffrey P. Miller, *Preliminary Judgments*, 2010 U. ILL. L. REV. 165, 195 (suggesting preliminary injunction decisions give too weak a signal as to likelihood of success on the merits).

[261] *See* Julie S. Turner, Comment, *The Nonmanufacturing Patent Owner: Toward a Theory of Efficient Infringement*, 86 CALIF. L. REV. 179 (1998) (noting, in the patent context, "[t]he grant or denial of a preliminary injunction has a very powerful impact on settlement."); Douglas Laycock, *The Triumph of Equity*, 56-SUM LAW & CONTEMP. PROBS. 53, 60 (1993) ("Chancellor Allen said to me that almost none of his cases get to final judgment—that he grants or denies the preliminary injunction and then the case settles."); Douglas Lichtman, *Uncertainty and the Standard for Preliminary Relief*, 70 U. CHI. L. REV. 197, 202 n.14 (2003) (noting that preliminary hearings inform parties of how the judge is thinking about the case), *cf.* Leubsdorf, *supra* note 35, at 547 ("More detailed analysis at the interlocutory stage . . . would also provide the parties with a prediction of the final outcome that could ease settlement.").

preliminary injunction—as indicated by the numerous more or less synonymous adjectives used to label it—is, by its very nature, interlocutory, tentative, provisional, ad interim, impermanent, mutable, not fixed or final or conclusive, characterized by its for-the-time-beingness."[262] Others have acknowledged that "a preliminary injunction is somewhat like a judgment and execution before trial."[263] In the Ninth Circuit, parties looking to seal documents have to make a lesser showing "when those materials are used in connection with a non-dispositive motion."[264] While acknowledging that preliminary injunction motions are technically non-dispositive, that court has deemed them "dispositive" for this purpose in part because they "go to the heart of the case,"[265] "may even, as a practical matter, determine the outcome of a case,"[266] and "are so significant, they are one of the few categories of motions that may be heard as interlocutory appeals."[267]

Both perspectives are, in a way, correct. Findings made for purposes of a preliminary injunction order are subject to change—the order is not a final judgment on the merits—but the decision can have enormous consequences both in the long term and the short term. The importance of the preliminary injunction motion suggests that courts should, at the very least, take evidentiary issues seriously at this stage.[268] The evidentiary regime matters. Of course, the significance of the preliminary injunction stage does not tell us *what* evidentiary rules courts should use. But to the extent that courts suggest that the rules of evidence need not apply because the remedy is merely provisional, that justification is weak.

2. Equity Under Pressure

Courts have also reasoned that the need to prevent irreparable harm under tight time constraints justifies a lax evidentiary regime. In *Camenisch*, the Supreme Court cited "the haste that is often necessary"[269] on preliminary injunction motions as a reason for informality. Wright and Miller similarly say Rule 56(c)(4) constraints should not apply to affidavits on preliminary injunctions because "the urgency that necessitates a prompt determination of the preliminary-injunction

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[262] Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738, 742 (2d Cir. 1953).

[263] Herman v. Dixon, 393 Pa. 33, 36 (1958) (opinion of Justice Herbert Cohen).

[264] Quest Integrity USA, LLC v. A. Hak Industrial Services US, LLC, 2015 WL 4495283, at *2 (W.D. Wash. July 23, 2015).

[265] Center for Auto Safety v. Chrysler Group, LLC, 809 F.3d 1092, 1098 (9th Cir. 2016).

[266] *Id*. at 1099.

[267] *Id*.

[268] *Cf.* Mullenix, *supra* note 150, at 632 ("Once the serious consequences of class certification are embraced, it follows that all actors involved should be required to produce and secure as reliable a record as necessary to ensure that a court has appropriate information upon which to make a serious class certification decision.").

[269] 451 U.S. at 395.

application may make it more difficult to obtain affidavits from people who are competent to testify at trial."[270] And because the decision to grant a preliminary injunction is discretionary, "the trial court should be allowed to give even inadmissible evidence some weight when it is thought advisable to do so in order to serve the primary purpose of preventing irreparable harm before a trial can be had."[271] The Ninth Circuit has justified the use of affidavits by the need to avoid a full hearing and "give speedy relief from irreparable injury,"[272] a central purpose of preliminary injunctions.

The timing concern appears to break into two related parts: the inability of litigants to discover the best evidence in a short timeframe,[273] and the need for courts to spend less time on the preliminary injunction hearing than they would on a full trial.[274] I'll take the second concern first, because it poses less of a problem. True, if the preliminary injunction is particularly time sensitive, the parties will likely want a hearing that lasts hours, not days or weeks. But permitting affidavits in lieu of live testimony, particularly on uncontested issues, should suffice to limit the time of the hearing. Where a written statement would be more efficient than live testimony, the parties will be able to submit that sworn testimony in written form. The elimination of other Rules of Evidence will allow in *more* evidence, lengthening hearing time. And making evidentiary determinations should not take up too much time: The Rules are designed to be applied quickly, in a trial context.[275] This timing argument, then, is primarily an argument for allowing affidavits.

The first concern is more troubling: litigants may not be able to discover all relevant evidence in a short timeframe, so even if admissible, discoverable, favorable evidence exists, they may be unable to present it. If courts are unable to

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[270] 11A WRIGHT ET AL., *supra* note 36, § 2949 (3d ed. 2002 & Supp. 2016).

[271] *Id*.; *see also* G.G. ex rel. Grimm v. Gloucester County School Bd., 822 F.3d 709, 726 (4th Cir. 2016) (a laxer evidentiary regime "is warranted by the nature and purpose of preliminary injunction proceedings to prevent irreparable harm before a full trial on the merits").

[272] Ross-Whitney Corp. v. Smith Kline & French Laboratories, 207 F.2d 190, 198 (9th Cir. 1953).

[273] *See* Flynt Distrib. Co., Inc. v. Harvey, 734 F.2d 1389, 1394 (9th Cir. 1984) ("The urgency of obtaining a preliminary injunction necessitates a prompt determination and makes it difficult to obtain affidavits from persons who would be competent to testify at trial.").

[274] *See* Mullins v. City of New York, 626 F.3d 47, 52 (2d Cir. 2010) ("To hold otherwise would be at odds with the summary nature of the remedy and would undermine the ability of courts to provide timely provisional relief."); Mullins v. City of New York, 634 F. Supp. 2d 373, 387 (S.D.N.Y. 2009) ("Through affidavits and hearsay testimony, a court may maximize the breadth of evidence without necessitating hearings that span days or weeks… In the instant case, the Court received the benefit of evidence of concern expressed by dozens of individually-named sergeants without the burden of a parade of witnesses and the loss of time by busy law enforcement officers.").

[275] *See* Thomas M. Mengler, *The Theory of Discretion in the Federal Rules of Evidence*, 74 IOWA L. REV. 413, 414 (1989).

consider inadmissible evidence, then, they will have insufficient information. And this dearth of probative evidence increases the risk of error, so courts are more likely to cause or allow irreparable harm. This undermines the central purpose of the preliminary injunction: preventing irreparable harm pending a full trial on the merits.

This is a real problem, and I discuss the precise way in which it is a real problem in the next Part. However, in this Section, I discuss why it's not *as serious* a problem as some courts have suggested. First, if courts were to apply the Rules at this stage, Federal Rule of Civil Procedure 43 would allow judges to admit affidavits and deposition transcripts, which would give the court significant flexibility. Second, and more interestingly, by understanding that evidence submitted to prove likelihood of success on the merits is "meta-evidence" and need not be introduced to prove the merits directly, we can see that much evidence thought of as inadmissible is actually admissible.

a. Affidavits Admissible

First, affidavits would be allowed. FRCP 43(c) explicitly permits a judge to hear a motion on affidavits, live testimony, or deposition transcripts when that motion relies on information outside the record. Preliminary injunction motions fit the bill. This effectively creates a Rule-based exception to the rule against hearsay: affidavits may be considered on a motion, even though the declarant is not present and subject to cross-examination. The use of affidavits, in and of itself, could save an enormous amount of time over requiring live testimony—it could both allow plaintiffs to collect evidence with greater ease, allowing them to spend more time searching for evidence that can't be presented in affidavit form, and it would save time at the hearing.

The Federal Rules of Civil Procedure do not specify whether affidavits introduced on a motion under Rule 43(c) have to comply with the requirements of affidavits introduced on summary judgment, under Rule 56(c)(4). Affidavits introduced to support or oppose a motion for summary judgment "must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated."[276] As discussed above,[277] courts have held that they need not comply with these strict requirements at this stage. However, if the Rules were to apply, treating affidavits as the equivalent of in-court testimony, that would effectively incorporate the Rule 56 requirements. Rule 56 essentially requires that if the affiant were to testify in court to the material in the affidavit, that testimony would be admissible. Although the Local Rules of several District Courts already require affidavits to be made on

[276] Fed. R. Civ. P. 56(c)(4).
[277] *See supra* Section I.B.

personal knowledge,[278] at least one explicitly does not.[279] Imposing the Rule 56(c)(4) requirements on affidavits would, indeed, impose a heavier burden than allowing all affidavits, even if made on information and belief.

Even this single relaxation of the FRE to allow affidavits is somewhat troubling. Affiants cannot be cross-examined, so courts are deprived of the "greatest legal engine ever invented for the discovery of truth,"[280] and deciding a motion based affidavits alone may be inadequate.[281] However, most courts will hold—or at least allow a party to request—a live hearing, if facts are contested.[282] Many courts *require* a live hearing at a party's request, if the parties dispute the facts.[283] In the Ninth Circuit, the court has discretion to decline to hear oral testimony at a preliminary injunction hearing.[284] But if the parties would prefer to resolve the motion on a "battle of affidavits," some courts will allow it.[285] In sum, courts seem to take heed of Judge Friendly's wisdom in *S.E.C. v. Frank*,[286] in which

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[278] *See* D.N.J. Civ. R. 7.2(a) ("Affidavits, declarations, certifications and other documents of the type referenced in 28 U.S.C. § 1746 shall be restricted to statements of fact within the personal knowledge of the signatory."); W.D. Wis. Injunction Procedure II(A)(2)(b) n.3 ("Affidavits must be made on personal knowledge setting forth facts that would be admissible in evidence, including any facts necessary to establish admissibility."); *cf.* D. Neb. Civ. R. 7.1(a)(2)(C) (requiring affidavits authenticating evidence admitted on a motion to satisfy the Rule 56 requirements); S.D.N.Y. R. Swain Practices (A)(2)(f) ("Recitals in notices of motion, attorneys' affirmations, assertions of material factual matters 'on information and belief' and the like are generally insufficient to establish factual matters.").

[279] *See* D. Md. Misc. R. 601(3) ("Unless the applicable rule expressly requires the affidavit to be made on personal knowledge, the statement may be made to the best of the affiant's knowledge, information, and belief.").

[280] California v. Green, 399 U.S. 149, 158 (1970) (quoting 5 J. WIGMORE, EVIDENCE § 1367 (3d ed. 1940)).

[281] *See* 2 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 263 (J.S. Mill ed. 1827) ("As a mode of coming at the truth of the case, where the extraction of the truth is attended with any considerable difficulty, nothing can be more palpably incompetent than the use of [affidavits] . . . .").

[282] *See* 11A WRIGHT ET AL., *supra* note 36, § 2949 nn.29-48 & accompanying text (3d ed. 2002 & Supp. 2016) (discussing the practice in different courts under various circumstances); Davis v. New York City Housing Authority, 166 F.3d 432, 437-38 (2d Cir. 1999) ("[W]hile affidavits may be considered on a preliminary injunction motion, motions for preliminary injunction should not be resolved on the basis of affidavits that evince disputed issues of fact.").

[283] *See* 11A WRIGHT ET AL., *supra* note 36, § 2949 n.43 (3d ed. 2002 & Supp. 2016) (citing cases); Cobell v. Norton, 391 F.3d 251, 261 (D.C. Cir. 2004) ("Particularly when a court must make credibility determinations to resolve key factual disputes in favor of the moving party, it is an abuse of discretion for the court to settle the question on the basis of documents alone, without an evidentiary hearing.").

[284] Stanley v. Univ. of Southern California, 13 F.3d 1313, 1326 (9th Cir. 1994).

[285] *See* Holt v. Continental Group, Inc., 708 F.2d 87, 90 n. 2 (2d Cir. 1983) ("Normally a party that elects to gamble on a 'battle of affidavits' must live by that choice.").

[286] 388 F.2d 486 (2d. Cir. 1968).

he advocated for tailoring the thoroughness of the preliminary injunction proceeding to the centrality of the factual disputes: "where everything turns on what happened and that is in sharp dispute . . . , the inappropriateness of proceeding on affidavits attains its maximum . . . ."[287] Courts will consider affidavits, but when the facts are in dispute, they will allow the parties to present additional testimony and challenge each other's evidence at a live hearing. This does not eliminate the concern with affidavits—courts may still consider this "uninterrogated testimony"[288]—but it at least mitigates the problem by allowing *some* interrogation of the other party's evidence.

b. Meta-Evidence

The second reason adhering to the FRE would not be as draconian as courts have suggested is that much supposedly inadmissible evidence is actually admissible under the Rules. To see why, we need to understand what that evidence actually tends to prove: Evidence introduced to prove likelihood of success of the merits is *not* direct evidence of the merits—rather, it is proof of what evidence will be introduced *at trial*. I call this evidence of what is to come "meta-evidence." This sub-section explains how the meta-evidence idea negates many evidentiary objections at the preliminary injunction stage. It then discusses "meta-evidence" as a lens through which we can view a number of procedural motions.

i. Meta-Evidence and Likelihood of Success

Although the preliminary injunction standard has four factors, it breaks down neatly into two categories: the "likelihood of success on the merits" factor and the harm factors (irreparable harm absent an injunction, balance of equities, and public interest).

What does a plaintiff need to show to demonstrate likelihood of success? He does not need to preliminarily demonstrate that he *should win* on the merits, were the court to make a decision on the evidence presented *now*. Rather, he is tasked with demonstrating that when there is a trial later on, he will likely win *at trial*. This understanding accords with every discussion of the preliminary injunction standard. The "likelihood of success" factor involves "predicting the strength of the plaintiff's case"[289] and "apprais[ing] the likelihood that various views of the facts and the law will prevail at trial."[290] As Douglas Laycock notes, the relevant issue is "the probability that the preliminary relief to be granted will be a part of the relief to be awarded at final judgment, or at least not inconsistent with

[287] *Id.* at 491.

[288] 2 BENTHAM, *supra* note 281, at 262.

[289] Leubsdorf, *supra* note 35, at 533 (discussing historical practice at Chancery).

[290] *Id*. at 541 (setting out the proper standard); *see also id.* at 555 ("Although the court cannot know at the preliminary hearing what evidence the parties will present at trial, it can estimate the probability of different findings of fact by using affidavits, representations of counsel, inferences from the failure to produce accessible evidence, and the judge's own notions about the plausibility of the parties' contentions.")

the rights to be determined by the final judgment."[291] In addition, a focus on likelihood of success at trial provides the parties with the most useful information for purposes of settlement negotiation.[292]

For purposes of evidence, this is an important distinction: each piece of evidence is not being introduced to prove the merits; instead it is being introduced to prove that the plaintiff will be able to succeed at a future trial. In this way, the evidence introduced on a preliminary injunction hearing is "meta-evidence," or evidence of what evidence will be presented at trial. This is somewhat distinct from the idea of a trial "preview,"[293] in that meta-evidence does not necessarily *reveal* what will happen at trial, but rather it provides probative evidence of what will happen at trial. That evidence may be weaker or stronger, and it may point to a single possibility or multiple possibilities. Evidence that goes to prove the harm factors is *not* meta-evidence: when it issues a decision on a preliminary injunction motion, the court makes an actual determination of likelihood of harm; it does not determine how likely it is that the plaintiff will be able to prove likelihood of harm absent a preliminary injunction at some later date.

The Federal Rules of Evidence exclude certain types of evidence *when used for an improper purpose*. For example, an out-of-court statement is only inadmissible hearsay if it is offered "to prove the truth of the matter asserted in the statement."[294] When evaluating whether some piece of evidence is inadmissible hearsay, then, a judge needs to ask: is this evidence being offered for the truth of the matter asserted? If we understand that evidence as being used to prove a likelihood of success, that affects our determination of whether it is being admitted for the truth of the matter asserted: If evidence that somebody said something once is admitted to prove that they will say it in admissible form at trial, that evidence is not being used for the truth of the matter. Therefore, it is not hearsay, and it is admissible under the Rules.

For example,[295] say we have a trademark dispute between one pharmaceutical company that makes a drug called Flexxor and another that makes a drug called Lexxor. To prove likelihood of success on the merits—to show Flexxor will be able to prove people confuse the drugs—a manager at the Flexxor company submits an affidavit saying that five of his salespeople have told him that

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[291] DOUGLAS LAYCOCK, THE DEATH OF THE IRREPARABLE INJURY RULE 12 (1991). Laycock distinguishes this from "the probability that plaintiff will prevail on some issue of ultimate liability." But the likelihood that plaintiff will prevail is inherently a part of the likelihood that he will obtain the same relief permanently.

[292] *Cf.* Miller, *supra* note 260, at 195; Robert G. Bone, *Who Decides? a Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961, 2015 (2007) (suggesting trial judges get involved in settlement discussions so as to communicate tentative merits evaluations).

[293] *See* Bert I. Huang, *Trial by Preview*, 113 COLUM. L. REV. 1323, 1332 (2013).

[294] Fed. R. Evid. 801(c)(2).

[295] This hypothetical is loosely based on the facts of Kos Pharm., Inc. v. Andrx Corp., 369 F.3d 700 (3d Cir. 2004).

doctors have called them to ask how much Lexxor costs. Are these statements within the affidavit hearsay? I submit that they are not: The affidavit is not being introduced to show that doctors have *in fact* called Flexxor salespeople asking for the price of Lexxor.[296] Instead, it is being introduced to prove that there are five salespeople in the plaintiff's employ who could come to court and testify that they received these calls. At that point, they would be cross-examined, and the factfinder could choose whether to credit their testimony. This is not as powerful meta-evidence as a transcript from a previous proceeding or live testimony would be. A transcript would be strong proof that the declarant is willing and able to testify in court. And if the salespeople testified live, the judge would be much more certain that they would testify to the confusion at trial, and she could perform a preliminary credibility determination. But the affidavit *is* still probative of what would happen at trial.

This does not mean that no statements offered to show likelihood of success are hearsay. Say that instead of the affidavit above, the manager submitted an affidavit saying, "My friend, the late, great Dr. Cautious,[297] told me that he did not prescribe Flexxor because he often got it confused with Lexxor." In this case, Dr. Cautious is deceased and therefore unable to testify. This affidavit, then, is not admissible meta-evidence. It *is* still probative of Flexxor's ability to prove its case at trial. However, it is probative only if Dr. Cautious's statement is offered for the truth. The chain of inference is: Dr. Cautious said he often got the two drugs confused; therefore, he did in fact get the drugs confused; therefore, the drugs are confusing; therefore, there are likely other doctors who will testify to confusing the drugs. In this case, because the court needs to accept the truth of the out of court statement to find it relevant to the ultimate issue—what evidence will be presented at trial—it is hearsay and inadmissible.

If the court were faced with true hearsay that is absolutely necessary to do justice, the court would still have discretion to accept it under Rule 807, the residual exception to the rule against hearsay. One of the requirements of Rule 807 is that the evidence be "more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable effort."[298] "Reasonable effort" here could be interpreted as effort *reasonable in the preliminary injunction context*, given time and resource constraints. The hearsay catch-all may, then, have wider arms at preliminary injunction hearings than it does at trial.

This reasoning, showing that statements within affidavits are often non-hearsay and therefore admissible, *does* require courts to accept *affidavits themselves* as non-hearsay for purposes of a preliminary injunction motion. James

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[296] The doctors' question—"How much does Lexxor cost?"—is also not hearsay. This statement is not offered for the truth. Instead, it's being offered as evidence that the doctors thought the Flexxor company could tell them about Lexxor, i.e., that they were confusing the products.

[297] Ironically, Dr. Cautious died while BASE jumping.

[298] Fed. R. Evid. 807.

Duane has previously made a point very similar to my meta-evidence idea in an argument that affidavits considered on a motion for summary judgment are not hearsay.[299] He argues that these affidavits are not introduced for the truth of the statements within them but rather as evidence that the affiant will testify to those statements at trial.[300] Therefore, Rule 56 is not an exception to the rule against hearsay—affidavits introduced in that context are simply non-hearsay.[301] At the preliminary injunction stage, I rely on Rule 43(c)—and the longstanding practice of accepting affidavits—for the proposition that affidavits are admissible, at the judge's discretion, on a preliminary injunction motion. The advisory committee notes to FRE 802, the rule against hearsay, specifically identify affidavits admitted under Rule 43 as an exception to the rule. I therefore take affidavits made on personal knowledge to be the equivalent of in-court testimony. Statements *within* affidavits, however, may still be inadmissible hearsay.

In the summary judgment context, Duane calls the idea that a court may consider hearsay *in the form of* affidavits but not hearsay *within* affidavits "senseless."[302] He argues that the difference in reliability between hearsay and "multiple hearsay" is, at best, a difference "only in degree of reliability, not in kind," and multiple hearsay may well be more reliable than simple hearsay.[303] It is true, of course, that affidavits are not subject to cross-examination and are therefore less reliable than in-court testimony. However, they are made under penalty of perjury—one safeguard of live testimony against insincerity—and they are written down, lowering the chances of a remark being misleading simply because it is ill-phrased.[304] Hearsay within the affidavit still has these attendant dangers.[305] In

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[299] *See* Duane, *supra* note 33, at 1531-44 (arguing that affidavits submitted in support of or in opposition to a Rule 56 motion are non-hearsay).

[300] *See id.*

[301] I agree with Duane, but I note that evidence supporting a preliminary injunction motion is even more clearly meta-evidence than evidence supporting a motion for summary judgment: In its order on a preliminary injunction motion, a court actually makes *findings* as to the likelihood of success on the merits. On a motion for summary judgment, the court does not make findings, but rather draws all reasonable inferences from the evidence in favor of the non-moving party, for purposes of resolving the motion. McCarthy v. Dun & Bradstreet Corp., 482 F.3d 184, 202 (2d Cir. 2007). Evidence, then, plays a slightly different role in the summary judgment context than it does at trial, whereas meta-evidence on a preliminary injunction motion operates as evidence normally does: it may be more or less probative on a point of fact.

[302] Duane, *supra* note 33, at 1529.

[303] *Id.* at 1530.

[304] Equity practice accounted for this advantage of testimony taken outside of the courtroom. While a witness grilled under rapid-fire cross-examination might slip up, a witness responding at a deliberate pace to written interrogatories, who has the opportunity to review his testimony, is unlikely to misstate a fact by accident. Therefore, at equity, if it was determined that witness had made a false statement, "his entire testimony would be disregarded as likely perjurious." KESSLER, *supra* note 173, 28.

[305] To support his comment that multiple hearsay may be more reliable than simple hearsay, Duane writes: "When the New York Times quotes the Pope as saying he has been praying for world peace, it is technically 'multiple hearsay.' But who would argue that this

addition, Duane argues, the FRE do not otherwise differentiate between hearsay and multiple hearsay.[306] There, I disagree: the advisory committee notes on Rule 802 list multiple exceptions to the rule against hearsay from the Federal Rules of Civil Procedure: on Rule 43 motions based on material outside the record, yes, but also affidavits used to secure a temporary restraining order and depositions used at trial.[307] The Rules contemplate that affidavits and depositions, admitted for the truth of their contents, are sufficiently reliable for some circumstances. I disagree with Duane, then, that this distinction is incoherent. However, I agree with him that for purposes of a motion for summary judgment, an affidavit that satisfies the Rule 56 requirements is not, in fact, hearsay.

Understanding likelihood-of-success evidence as meta-evidence has the greatest impact on admissibility despite the hearsay prohibition. But it may also help us understand how a court could hear *expert* evidence that would not be allowed at trial. Rule 702, and therefore *Daubert*, applies whenever an expert testifies to his or her opinion, independent of what that opinion is used for.[308] However, this does not necessarily mean that every case requiring an expert will require the expert to produce *final conclusions* that meet the *Daubert* standard at the preliminary injunction. An expert can testify to intermediate conclusions or the methodology that he would use, if he were to testify at trial. For example, researchers often run pilot studies to determine if a full study with the same methodology is feasible and whether the study is worth pursuing.[309] If a researcher would need to run a complete study to present as an expert witness at trial, and if the pilot study is considered a reliable method of forming an opinion that a full study is sufficiently likely to show the same results that it is worth undertaking, a researcher could introduce the pilot study at the PI stage as meta-evidence.[310] As

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news report is less reliable than a simple hearsay affidavit from a convicted mass murderer who denies his guilt to avoid the death penalty on his most recent arrest?" *Id*. at 1530 n.25. The news report is only "reliable" because, first, we need not cross-examine the Pope to believe he's credible, and second, there is a high prior probability that he has been praying for peace, because that's something Popes do. *See, e.g.*, @Pontifex, TWITTER (Aug. 21, 2017, 7:30 AM), https://twitter.com/Pontifex/status/899594432361713665. The better comparison is the affidavit from the convicted murderer compared to a report from the Times quoting the murderer denying his guilt. Ultimately, we may not believe the murderer in either instance, but the affidavit has greater indicia of reliability.

[306] *Id.*

[307] *See* Fed. R. Evid. 802 advisory committee notes; Fed. R. Civ. P. 32, 65(b).

[308] Fed. R. Evid. 702 (referring to when a "witness who is qualified as an expert . . . may testify").

[309] *See* Edwin R. van Teijlingen & Vanora Hundley, *The Importance of Pilot Studies*, 35 SOC. RES. UPDATE at 2 tbl.1 & 4 (2001) ("Well-designed and well-conducted pilot studies can inform us about the best research process and occasionally about likely outcomes."), *available at* http://sru.soc.surrey.ac.uk/SRU35.pdf.

[310] *Cf.* Hon. Daniel p. Ryan, *The Use of Gilles De La Tourette's Syndrome as an Impulse Control Defense in Criminal Cases: A Comprehensive Review*, 14 MICH. ST. U. J. MED. & L. 375, 424 (2010) ("[A] pilot study may be performed with scientifically reliable

long as this testimony itself is reliable, it would satisfy *Daubert* and be sufficiently probative for use at the preliminary injunction hearing.

The categorical exclusion Rules—Rules 404 through 411—would generally apply with full force at the preliminary injunction stage. For example, evidence of a person's character trait is inadmissible to prove that the person acted in accordance with that character in a particular instance.[311] Say we have a copyright case, where the plaintiff must prove that the defendant copied original elements of the plaintiff's work.[312] On a preliminary injunction motion, the plaintiff wants to introduce evidence that the defendant has copied works in the past to show a propensity for copying.[313] How would this show likelihood of success on the merits? This evidence itself would not be admissible at trial, under the character evidence prohibition. It could also show likelihood of success on the merits through the following chain of inference: the defendant has a propensity for copying, therefore he copied on this occasion, therefore the plaintiff is likely to unearth evidence of copying during discovery, and therefore, the plaintiff is likely to succeed on the merits. However, this chain of reasoning *also* invokes the forbidden character inference: the defendant has a propensity for copying so he copied on this occasion. This use of character evidence is forbidden, and the court should not consider the evidence.

For similar reasons, the other categorical-exclusion rules—those excluding evidence of subsequent remedial measures,[314] settlement offers,[315] and offers to pay medical expenses,[316] among others—would apply to exclude likelihood-of-success evidence. But these sorts of Rules—Rules that primarily serve the purpose of creating an incentive for certain out-of-court behavior[317]—*should* apply at the preliminary injunction stage. If admitting evidence of subsequent remedial measures, settlement offers,[318] or offers to pay medical expenses at *trial*

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methods but because it is a pilot study a judge may not consider it 'reliable' from an evidentiary perspective.")

[311] *See* Fed. R. Evid. 404.

[312] *See* Feist Publications, Inc. v. Rural Telephone Serv. Co., 499 U.S. 340, 361 (1991).

[313] *Cf.* Loggerhead Tools, LLC v. Sears Holdings Corporation, No. 12 C 9033, 2017 WL 4161976, at *2 (N.D. Ill. Apr. 11, 2017).

[314] *See* Fed. R. Evid. 407. Evidence of subsequent remedial measures used to prove a defect is unlikely to arise in a preliminary injunction proceeding. If the product has already been remedied, there is no urgent need for an injunction.

[315] *See* Fed. R. Evid. 408.

[316] *See* Fed. R. Evid. 409.

[317] Fed. R. Evid. 407 notes of advisory committee on proposed rules. For a criticism of this rationale, see Dan M. Kahan, *The Economics—Conventional, Behavioral, and Political—of "Subsequent Remedial Measures" Evidence*, 110 COLUM. L. REV. 1616 (2010).

[318] The logic is more complicated than for the other exclusionary rules. Rule 408 forbids using statements made during settlement negotiations to prove the "validity" of a disputed "claim." A statement made during settlement negotiations could be introduced to

disincentivizes those behaviors, admitting the evidence during preliminary injunction hearings could have the same effect. These Rules would operate to exclude evidence, even meta-evidence introduced to prove likelihood of success on the merits.

Some courts have come close to articulating the meta-evidence idea. For example, in *Bebe Stores, Inc. v. May Department Stores International, Inc.*, the District Court addressed a hearsay objection to affidavits by noting that the affidavits could come in under Rule 807, and having "sworn statements of thirty-five more [witnesses]—who certainly can all be called live or by deposition when we ultimately have trial on the merits—is probative on the issue of whether bebe is likely to succeed on the issue of confusion."[319] Others have suggested that the hearsay status of evidence presented at a preliminary injunction hearing renders it inadmissible or goes to its weight not because the evidence is less reliable but rather because it will not be admissible at trial.[320] And courts have correctly suggested that the likelihood of success should also be tied to the completeness of the evidence: if discovery is complete before the hearing, the likelihood of success is directly related to the admissible evidence the plaintiff can present at that hearing.[321] If the hearing happens without much opportunity for discovery, much weaker evidence may show a likelihood of success. But courts have not taken the idea to its logical conclusion concerning hearsay and other rules, discussed above. And no court has suggested that the admissibility standard might look different for the different elements of the preliminary injunction test.

ii. Meta-Evidence Generally

The meta-evidence concept is useful beyond the preliminary injunction stage—at several points in a litigation, parties may be required to present evidence of what they will be able to prove at trial. And at each of these points, an evidentiary

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prove that the person would make the same statement if called to the stand, which seems not to violate Rule 408. However, first, even if this were permissible, the evidence would be weak; during settlement negotiations, parties choose their words strategically, and may well speak differently on the stand. Second, and more importantly, the broad language of Rule 408 should be interpreted to further its aims. *See* 2 MUELLER & KIRKPATRICK, *supra* note 139, § 4:57 (4th ed. 2009). Proving the need for a preliminary injunction or proving likelihood of success could both be construed as proving the "validity" of the "claim." This evidence should be excluded.

[319] 230 F. Supp. 2d 980, 988 n.4 (E.D. Mo. 2002).

[320] *See, e.g.*, Gluco Perfect, LLC v. Perfect Gluco Products, Inc., No. 14–CV–1678, 2014 WL 4966102, *2 (E.D.N.Y. Oct. 3, 2014) ("Moreover, this court has considered whether the exclusion at trial of inadmissible hearsay evidence will affect plaintiffs' likelihood of success on the merits."); Lawson v. Parish of St. Tammany, No. CIV.A. 02–1223, 2002 WL 1837870, at *5 (E.D. La. Aug. 6, 2002) (concluding inadmissible evidence fails to show likelihood of success on the merits).

[321] *See* Rouser v. White, 707 F. Supp. 2d 1055, 1066 (E.D. Cal. 2010) ("Where discovery is complete as to actions occurring before April 3, 2009, plaintiff's likelihood of success is closely tied to the admissible evidence he can present at trial.").

regime will govern the meta-evidence that each party may present and the burden each party faces. Meta-evidence allows a new way of conceptualizing what happens at each juncture.

The most obvious point at which meta-evidence is introduced is on a motion for summary judgment. The parties have typically engaged in extensive discovery at this point, and they present a "preview" of what evidence will be available at trial.[322] Therefore, the parties are held to a high evidentiary standard and burden—they must submit reliable, highly-probative proof of what evidence will be presented at trial. An affidavit on a motion for summary judgment must be made by an affiant who is competent to testify at trial, and it must set out facts to which the affiant could testify at trial.[323] This is strong evidence that the affiant will, in fact, testify to the facts set out in the affidavit:[324] a person who was willing to swear to facts in an affidavit is likely to swear to the same facts on the witness stand.[325] (For the same reason, affidavits submitted on a preliminary injunction motion that satisfy the Rule 56 criteria are highly probative evidence of what will happen at trial.) All other evidence cited on a motion for summary judgment must be presentable in admissible form;[326] that evidence, too, is highly probative of what will be presented at trial. Courts have generally held, therefore, that hearsay *within* an affidavit cannot be considered on a motion for summary judgment.[327] As James Duane has pointed out, this means that *no* hearsay is admissible on a motion for summary judgment: the affidavits—out of court statements—are *not* being offered for their truth, but rather to demonstrate that the affiant will testify to the facts stated in the affidavit.[328]

Meta-evidence considered on a motion for summary judgment is *dispositive* as to the meta-evidence issue: what evidence will be presented at trial? In other words, the court takes the evidence submitted on the motion for summary judgment and asks himself: "If I assume that all of these witnesses . . . would testify at trial just as they have in their affidavits, is there any way this case could survive a motion

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[322] *See generally* Fed. R. Civ. P. 56; Duane, *supra* note 33.

[323] Fed. R. Civ. P. 56(c)(4).

[324] *See* Duane, *supra* note 33, at 1541-42.

[325] This is not conclusive evidence, of course. "[T]he affiant need not state a willingness to submit to cross-examination at trial and thereby waive the ability to claim a privilege and refuse to give testimony." 10B WRIGHT ET AL., *supra* note 36, § 2738 (4th ed. 2008 & Supp. 2018).

[326] *See* Fed. R. Civ. P. 56(c)(2).

[327] *See, e.g.*, Macuba v. Deboer, 193 F.3d 1316, 1322-24 (11th Cir. 1999); Garside v. Osco Drug, Inc., 895 F.2d 46, 50 (1st Cir. 1990); Friedel v. City of Madison, 832 F.2d 965, 970-71 (7th Cir.1987); Miller v. Solem, 728 F.2d 1020, 1026 (8th Cir. 1984); 10B WRIGHT ET AL., *supra* note 36, § 2738 n.15 (4th ed. 2008 & Supp. 2018) (collecting cases). *But see* Gannon Int'l, Ltd. v. Blocker, 684 F.3d 785, 793 (8th Cir. 2012); Ali v. District Director, 209 F. Supp. 3d 1268, 1276 (S.D. Fla. 2016). These courts, which allow hearsay if the declarant *could* testify, essentially operate under a different meta-evidentiary regime, allowing less reliable evidence to prove what will be heard at trial.

[328] *See* Duane, *supra* note 33, at 1535.

for [judgment as a matter of law]?"[329] For purposes of a summary judgment motion, then, meta-evidence that satisfies Rule 56's strict standards is not merely probative of what evidence will be presented at trial—it's *conclusive*.

The meta-evidence idea also presents a new way of understanding motions to dismiss and a new way to interrogate the standard on a motion to dismiss. A party's allegations in his complaint are, in a sense, meta-evidence. By signing a pleading, a party's attorney certifies that "after an inquiry reasonable under the circumstances," to the best of her "knowledge, information, and belief," "the factual contentions [in the pleading] have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery."[330] Therefore, each allegation in a pleading is the equivalent of a sworn statement from a lawyer that, after a reasonable investigation, she believes that there is or will be evidentiary support for the factual proposition. This sworn statement makes it more likely that there *will*, in fact, be evidentiary support for the factual proposition.

On a motion to dismiss, the plaintiff's meta-evidentiary burden is low. The court "must accept as true all of the factual allegations contained in the complaint."[331] Another way of understanding this standard is that for purposes of a motion to dismiss, the lawyer's certification is dispositive meta-evidence: if a lawyer certifies that after a reasonable inquiry, she has determined that there is or will be evidence to support the well-pleaded factual contention, the court *must* conclude from that evidence that the party *will* present evidence on that point. (The court must also conclude that the jury will credit the evidence and find the fact in the plaintiff's favor.) At this stage—before any discovery, while the plaintiff is asking for no more than that the case move forward—the party need not present evidence beyond the lawyer's certification.

Twombly[332] and *Iqbal*[333] can be understood as imposing a heightened meta-evidentiary standard relative to what came before. Under those cases, a court ruling on a Rule 12(b)(6) motion to dismiss first disregards any conclusory allegations and then determines whether the well-pleaded allegations state a plausible claim to relief.[334] In other words, *Twombly* and *Iqbal* impose a rule of weight, a rule that "guides the factfinder's evaluation of the evidence by specifying the probative value the factfinder ought to attach to a given piece of evidence."[335] If an allegation is non-conclusory, it has infinite probative value. If it is conclusory, it has no probative value. The implication of *Twombly* and *Iqbal* is that when a lawyer swears that she has or will likely have evidence to support a more concrete and

[329] Duane, *supra* note 33, at 1580.
[330] Fed. R. Civ. P. 11(b)(3).
[331] Swierkiewicz v. Sorema N. A., 534 U.S. 506, 508, n.1 (2002).
[332] Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).
[333] Ashcroft v. Iqbal, 556 U.S. 662 (2009).
[334] Iqbal, 556 U.S. at 680-81.
[335] *See* Charles L. Barzun, *Rules of Weight*, 83 NOTRE DAME L. REV. 1957, 1958 (2008)

specific statement, that is sufficiently probative for purposes of a motion to dismiss. Where a lawyer swears that she has or will likely have evidence to support a legal conclusion, that is insufficiently probative for purposes of that motion.

This presents a potential way to partially reduce the wisdom of *Twombly* and *Iqbal* to an empirical question: how probative *is* a conclusory statement at the pleading stage, before the plaintiff has had the opportunity for discovery? When a lawyer certifies that there is or will be evidentiary support for a conclusory allegation, how strongly does that, in fact, indicate that there will be evidentiary support for the proposition at trial? If it is weak—if many plaintiffs who make conclusory allegations will eventually come up empty-handed after discovery—perhaps *Twombly* and *Iqbal* have it right. But if plaintiffs who make conclusory allegations *do* tend to come up with admissible evidence during discovery—this seems more likely in some areas of law than others—these cases may impose too high a meta-evidentiary burden. An empirical study of this issue may not be possible, but meta-evidence presents one new way of conceptualizing these cases.[336]

c. Other Elements of the Preliminary Injunction Standard

While the question for the first prong of the test is, "what is the plaintiff likely to prove at trial?", the other prongs of the *Winter* test[337] concern facts outside of the court context. What is the likely irreparable harm of denying or granting a preliminary injunction? In what direction does the balance of hardships lean? Is it in the public interest to grant or deny the preliminary injunction? For these prongs, the Rules of Evidence would apply conventionally (again, with the exception of affidavits, as permitted by the Rules). The "meta-evidence" idea is irrelevant.[338] Wouldn't this be too hard on plaintiffs, especially—wouldn't the mere addition of affidavits to normally admissible evidence be insufficient for them to prove harm under such a short timeframe?

As I discuss in the next Part, this concern is real. Particularly in certain classes of cases, including environmental litigation, plaintiffs will not have ready access to admissible evidence showing irreparable harm. But again, the regime would not be as harsh as it sounds. The irreparable harm prong is often deemed the most important of the three harm prongs, and some courts consider it the most

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[336] *MW: These are recent thoughts and not fully fleshed-out or researched. I'm happy to hear thoughts on these ideas or other places that meta-evidence may arise.*

[337] *See* Winter v. Natural Resources Defense Council, Inc., 555 U.S. 7, 24 (2008).

[338] This is true for the irreparable harm *prong* but not the irreparable harm *inquiry*. Likelihood of success on the merits includes the likelihood that the plaintiff will be granted a permanent injunction—which requires a showing of irreparable harm absent the injunction. *See* eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006). The plaintiff must submit meta-evidence showing that it will be able to prove irreparable harm at a trial on the merits. But they will also have to submit evidence—not meta-evidence—showing they will in fact be harmed if the preliminary injunction does not enter. I therefore address irreparable harm outside the meta-evidence paradigm.

important prong of the four.[339] Whereas plaintiffs likely do not have access to all the evidence they need to prove success on the merits, they're much more likely to have access to evidence that will show *they themselves* will be harmed by denial of injunctive relief. And defendants, similarly, are more likely to have evidence showing they will be harmed if injunctive relief is granted. It makes sense to hold parties to a stricter evidentiary standard with regard to evidence that is in their possession.[340] Applying the Rules to the irreparable harm prong should not exclude very much key affirmative evidence.

But what about Gavin Grimm—the transgender boy? Would he be unable to show irreparable harm at the preliminary injunction stage under this new regime? No; Grimm's lawyers likely recognized that the plaintiff's sworn statement concerning his own diagnosis would be insufficient, so they retained a psychologist for purposes of the lawsuit who filed her own declaration. The district judge said her declaration "add[ed] little to [Grimm's] factual claims," because she was retained for litigation and "beyond confirming that G.G. has a '*severe* degree of Gender Dysphoria,' . . . there are no facts particular to G.G. in the report."[341] However, Ettner did opine, based on her "clinical assessment" of G.G. and her expertise, that "[a]s an adolescent, medically necessary treatment for G.G. currently includes . . . social transition in all aspects of his life – including with respect to use of the restrooms," and that the school's bathroom policy "is currently causing emotional distress to an extremely vulnerable youth and placing G.G. at risk for accruing lifelong psychological harm."[342] The court's decision not to credit these statements seems to be at least as substantial a factor in Grimm's loss at the district court as the court's decision not to consider hearsay. Applying the Rules should make little difference in this case: while the judge *here* denied the preliminary-injunction motion after excluding the hearsay in Grimm's affidavit, many other judges would consider the Ettner declaration sufficiently probative of irreparable harm to Grimm.[343]

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[339] *See* Bates, *supra* note 64, at 1528 ("The irreparable harm prong is seen as the most important by at least two circuits.").

[340] *Cf.* Playboy Enterprises, Inc. v. Chuckleberry Pub., Inc., 486 F. Supp. 414, 433 (S.D.N.Y. 1980) ("Once plaintiff introduced sufficient evidence of irreparable harm, however, defendants were obliged to produce evidence other than affidavits respecting the economic effects of an injunction, particularly since such information is exclusively within their possession."); *cf.* Dale A. Nance, *The Best Evidence Principle*, 73 IOWA L. REV. 227, 227 (1988) ("[M]y thesis is that there exists, even today, a principle of evidence law that a party should present to the tribunal the best evidence reasonably available on a litigated factual issue.").

[341] G.G. ex rel. Grimm v. Gloucester County School Bd., 132 F. Supp. 3d 736, 749 (E.D. Va. 2015).

[342] Expert Declaration of Randi Ettner, Ph.D, at 2, 8, 9, G.G. ex rel. Grimm v. Gloucester County School Bd., 132 F. Supp. 3d 736 (E.D. Va. 2015) (No. 4:15-cv-00054, Doc. 10).

[343] *See, e.g.*, Norsworthy v. Beard, 87 F. Supp. 3d 1164, 1186-87 (N.D. Cal. 2015) (relying on a declaration by Dr. Ettner written after one clinical evaluation); Hicklin v. Precynthe, No. 4:16–cv–01357, 2018 WL 806764, at *6, *9-10 (E.D. Mo. Feb. 9, 2018)

And what about the officers in *Mullins*, the police labor case? The court admitted evidence that officers other than the affiant said they feared retaliation and would withdraw from the lawsuit if there were no injunction in place. As the plaintiffs' attorneys[344] argued to the district court, this evidence was likely admissible under Rule 803(3), the hearsay exception for statements of "the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional . . . condition . . . ."[345] These statements concerned the declarants' fear[346] and intent to withdraw from the suit. They likely fall under the exception. However, even if the court ruled that the Rule 803(3) exception did not apply, each named officer could sign a short affidavit, which would suffice for the preliminary injunction proceedings. As for officers who remained unnamed in the declarations, if they were not willing to come forward, their voices would go unheard. But this is likely a just result: granting an injunction—a harsh remedy—based on anonymous, unsworn, out-of-court statements is potentially more troubling than the exclusion of those statements.

In a number of cases, then, applying the Rules would not unjustly exclude evidence relevant to the "harm" factors. I discuss the cases where application of the Rules would pose a problem in the next Part.

III. BENEFITS AND DRAWBACKS OF APPLYING THE RULES

I have critiqued both the historical and policy justifications for declining to apply the Rules of Evidence at the preliminary injunction stage, saying they offer insufficient justification for declining to apply the Rules. But what are the arguments *for* applying the Rules? And are there *good* reasons not to apply them? In this Part, I discuss the benefits and drawbacks of applying the Rules at the preliminary stage.

A. Reasons for Preferring Rules, Generally

There are several reasons for preferring a system of rules—either the FRE, specifically, or others—as opposed to a purely discretionary system.

First, rules increase predictability. To the extent courts maintain a wholly discretionary regime with regard to which evidence they will credit and which they

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(relying, in part, on Dr. Ettner's clinical evaluation to grant a preliminary injunction); *cf.* Oakleaf v. Martinez, 297 F.Supp.3d 1221, 1230 (D.N.M. 2018) (concluding, in part based on Dr. Ettner's affidavit after two evaluations, that plaintiff had a "sufficiently serious medical need," but ultimately denying a preliminary injunction).

[344] Plaintiffs were represented by attorneys at Patterson Belknap Webb & Tyler LLP, my former employer. The case settled before I arrived at the firm, and I did not work on it.

[345] *See* Fed. R. Evid. 803(3).

[346] Plaintiffs' Bench Memorandum Concerning the City's Hearsay Objection to Testimony to Be Elicited at the Hearing, No. 1:04-cv-02979, at 2-3 (S.D.N.Y. Apr. 1, 2009), ECF No. 165.

will not, attorneys will be unable to predict reliably what evidence the court will consider and what evidence the court will—perhaps *sub silentio*—disregard entirely. While attorneys may try to produce the best possible evidence at the preliminary injunction stage,[347] if they are under time pressure, rules tell the attorneys which evidence to prioritize in the days or weeks before the preliminary injunction hearing. If they know what evidence the judge will consider, they know what to look for. Imposition of rules would also tell parties how to argue their evidentiary objections. Anecdotal evidence suggests many attorneys believe the FRE apply at the preliminary injunction stage,[348] despite court statements to the contrary, and those attorneys may waste time on misguided arguments. Applying the FRE would bring the law in line with their expectations. Rules tell the parties what evidence to search for and how to argue for its exclusion.

More importantly, rules of evidence require judges to justify their decisions under those rules. Forcing judges to give reasons for their decisions has at least two benefits. First, it helps judges make better-thought-out, more evenhanded evidentiary decisions. Giving reasons for evidentiary decisions may serve as a check on those decisions, particularly in a domain where error correction by an appellate court is unlikely.[349] In the current regime, a court can note that the rules do not apply and state: "The Court, therefore, in its discretion will consider all evidentiary submissions at this stage, giving these submissions appropriate weight, without regard to whether these evidentiary submissions" satisfy the requirements of Rule 56 or the FRE.[350] In a system with rules, the court would need to articulate

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[347] Judge Anon.

[348] Judge Anon conversation; E-mail from [name withheld], Senior Attorney, Nat'l Res. Def. Council, to author (Oct. 30, 2017, 10:11 AM) (on file with author).

[349] *See* Robin J. Effron, *Reason Giving and Rule Making in Procedural Law*, 65 ALA. L. REV. 683, 701-02 (2014); *cf.* Mullenix, *supra* note 150, at 611 ("requiring judges to evaluate class certification motions based on a true and reliable evidentiary record will enhance the judicial function, inducing judges to make deliberative decisions in the shadow of possible appellate reversal for erroneous reliance on inadmissible materials"). Judith Resnik has even suggested that the *threat* of appellate review may be such a strong check on judges that it forces them to make overwhelmingly reasonable decisions, explaining the low reversal rate. *See* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 408 n.137 (1982).

[350] McGehee v. Hutchinson, No. 4:17-cv-00179, 2017 WL 1399554, at *4 (E.D. Ark. Apr. 15, 2017), *vacated on other grounds by* 854 F.3d 488 (8th Cir. 2017); *see also* Federal Trade Comm'n v. Lifewatch Inc., 176 F. Supp. 3d 757, 762 (N.D. Ill. 2016) ("[T]he court has assigned the appropriate weight to the evidence, including hearsay, and has considered only the hearsay that bears sufficient indicia of reliability."); Startrak Systems, LLC v. Hester, No. 07–3203, 2007 WL 2705159, at *9 (D.N.J. Sept. 14, 2007) ("Given the nature of this proceeding, the court will not strike the affidavit of Thomas Robinson. Instead, the court will exercise its discretion in determining the weight given to each affiant in this matter."); Southern Foods Group L.P. v. Ben & Jerry's Homemade Inc., No. 98CV-54S, 1998 WL 718302, at *2 (D. Utah Aug 24, 1998) ("While there are portions of some of the affidavits that are conclusory or otherwise inappropriate to be considered as evidence, the Court denies the motion to strike, and has given what it deems the appropriate weight to the various evidentiary submissions of the parties.").

why each challenged piece of evidence satisfied the rules—it would be forced to think about whether and why each piece of evidence merited consideration.

The Rules could limit judicial bias by compelling judges to exclude evidence that helps the party they tend to favor, or vice versa.[351] Without this reason-giving, a judge would be able to credit even unreliable evidence given by a party she was predisposed to favor. With reason-giving, confabulation is of course still possible, and judges could silently or subconsciously consider evidence they have rejected. But there is at least potential for mitigation. "The judge who is required to enforce the rules of evidence on herself is a judge who might in an ideal world be able to function simultaneously as . . . archangel and prole."[352] And limiting discretion can contribute to a *perception* of procedural fairness, which can make the work of the courts appear more legitimate in the public's eye.[353]

Second, reason-giving forces judges to clarify their thinking about the proper role of each challenged piece of evidence.[354] For example, in the travel ban case, judges appeared to take Giuliani's statement as direct evidence of President Trump's intent to keep Muslims out of the country.[355] Had the statement been challenged on hearsay grounds, the plaintiffs and the court would have been forced to articulate *why* the evidence was relevant—it suggests a likelihood of success on the merits because it presents a potential witness—which in turn would help the court appreciate the probative value of the evidence. If a challenged piece of evidence has one permissible use and one impermissible use, when a judge chooses to consider it, she will articulate the permissible use and recognize the evidence as probative on that point only. Relatedly, when a judge makes an evidentiary determination, she may clarify how she understands the law—when she discussed why a piece of evidence is probative, she may can signal what the plaintiff has to prove. That information will allow the parties to make stronger arguments down the road.

Next, Dale Nance has argued that evidence law is designed to force parties to produce the "best evidence" possible.[356] In other words, more than controlling potentially irrational jurors, rules of evidence protect tribunals from abusive litigants by requiring those litigants "to provide evidence that will best facilitate

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[351] *Cf.* Norris, *supra* note 253, at 489 (recounting how judges used to refuse to hear oral evidence from labor unions when employers moved for preliminary injunctions).

[352] Frederick Schauer, *On the Supposed Jury-Dependence of Evidence Law*, 155 U. PA. L. REV. 165, 193 (2006).

[353] *See* Pamela K. Bookman & David L. Noll, *Ad Hoc Procedure*, N.Y.U. L. Rev. (forthcoming November 2017), draft at *7, *9; Effron, *supra* note 349, at 704; *see also* Charles Nesson, *The Evidence or the Event? on Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357, 1368 (1985) (noting procedures promote the public acceptability of verdicts).

[354] *See* Effron, *supra* note 349, at 714-15.

[355] *See, e.g.*, Int'l Refugee Assistance Project v. Trump, 241 F. Supp. 3d 539, 558 (D. Md. 2017).

[356] *See generally* Nance, *supra* note 340.

this central task of accurately resolving disputed issues of fact."[357] Lawyers must "present the set of evidentiary items that will be most probative within the constraints arising from the expenses and inconveniences of litigation and the need for finality."[358] In one sense, the "best evidence" rationale is less applicable in the preliminary injunction context: Parties have not yet had an opportunity for discovery, so if they are not producing trial-quality evidence, there is a good chance it's not because they are trying to prejudice the judge. They may just not have the evidence, yet. On the other hand, it may be particularly difficult for the judge to tell at the preliminary injunction stage whether the party is producing the best evidence it could have obtained in the time before the hearing—the judge may want to spend limited time evaluating the quality of the evidence and may more readily assume parties are producing low-quality evidence because of the time pressure. If the judge evinces less skepticism about low-quality evidence, that increases the incentive for parties to produce favorable, prejudicial evidence. Which, in turn, heightens the need for regulation. But overall, the "best evidence" rationale probably applies with somewhat less force in this context than it does at trial.

Finally, there is the possibility that the Federal Rules of Evidence actually do what they are designed to do: enhance accuracy of decisionmaking by excluding evidence that factfinders are likely to overvalue.[359] Although the Rules have been widely[360]—and in some cases quite persuasively[361]—criticized, we have, as a polity, determined that they enhance accuracy.[362] Fred Schauer has argued, based on the general benefits of having legal rules, "there appears to be more justification for a rule-based approach to evidence than is accepted nowadays, and the idea of Free Proof may have more cognitive and epistemic disadvantages than" some believe.[363] To the extent that the Rules of Evidence helpfully eliminate evidence that is likely to bias factfinders, application of the Rules could have some salutary effect.

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[357] *Id.* at 233; *see also id.* at 291-92 ("[T]he main problem with, for example, prejudicial evidence is that it involves an *attempt* to prejudice the tribunal—whether likely to be successful or not.").

[358] *Id*. at 227.

[359] *See* Richard D. Friedman, Minimizing the Jury Over-Valuation Concern, 2003 Mich. St. L. Rev. 967, 967-68 (noting that for hearsay, character, and expert evidence, "a large part of the reason usually given for exclusion of evidence . . . is fear that the jury will overvalue the evidence").

[360] *See generally* BENTHAM, *supra* note 281 (advocating free proof); *see also* Friedman, *supra*.

[361] *See, e.g.*, United States v. Boyce, 742 F.3d 792, 796 (7th Cir. 2014) (discussing criticisms of the present sense impression and excited utterance exceptions to the rule against hearsay).

[362] *See* Alex Stein, Foundations of Evidence Law 133 (2005) ("To be legitimate, [adjudicators'] risk-allocating decisions ought to be justified by moral and political principles classifying as authoritative. These principles ought to reflect societal preferences in the area of risk-allocation. These general preferences need to be both adopted and adapted by the law of evidence.").

[363] Schauer, *supra* note 352, at 193-94.

Application of the Rules may ultimately make little difference. Even though the Federal Rules of Evidence do apply to bench trials, courts apply them very loosely in that context.[364] This may be in part because judges think themselves more capable than jurors[365] and in part because they recognize that they can't "unhear" evidence whose admissibility they've considered. And as Wistrich, Guthrie & Rachlinski have demonstrated, judges are sometimes unable to disregard inadmissible evidence.[366] Further, appellate courts would be very unlikely to reverse many decisions based on evidentiary determinations.

However, requiring application of the Rules would discourage parties from even *attempting* to introduce clearly inadmissible evidence, affording some protection. Also, application of the Rules might put a thumb on the scale when judges weigh evidence: even if they can't unhear hearsay, by formally saying they will not consider it, it may factor less into their decision.[367] Unlike juries, who typically issue general verdicts,[368] judges issuing preliminary injunctions must state their findings of fact.[369] If the court has excluded the only piece of evidence supporting a necessary finding, it will have a difficult time making that finding. And certainly, making a *Daubert* determination could alter a judge's perspective on that evidence: if a court takes the time to determine whether expert evidence is scientifically reliable and decides that it is not, the court will probably give less weigh to that evidence than it otherwise would have. Studies have shown that people are better able to ignore evidence when "the credibility of the inadmissible information sought to be ignored is destroyed or at least called into question."[370]

The arguments for imposing rules—particularly the FRE—are admittedly weaker here than in other contexts where scholars have advocated their application outside trial. In her argument for applying the Rules to class certification proceedings, Linda Mullenix points out that those proceedings have become bloated with large quantities of inadmissible evidence, and she worries that judges might be influenced by volume rather than quality.[371] In preliminary injunction

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[364] *Id*. at 165-66, 195.

[365] *See* James R. Dillon, *Epistemic Exceptionalism* (Draft of June 3, 2017).

[366] *See generally* Andrew J. Wistrich, Chris Guthrie & Jeffrey J. Rachlinski, *Can Judges Ignore Inadmissible Information? the Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251 (2005).

[367] In at least a couple of their studies, Wistrich, Guthrie, and Rachlinski found a sizeable but—due to the size of the sample—statistically insignificant difference in outcome between judges who admitted the evidence at issue and judges who excluded the evidence. It is not clear whether this difference would attain significance with a larger sample. *See id.* at 1296, 1302.

[368] *See* Donald Olander, Note, *Resolving Inconsistencies in Federal Special Verdicts*, 53 FORDHAM L. REV. 1089, 1089 (1985); 9B WRIGHT ET AL., *supra* note 36, § 2501 (3d ed. 2002 & Supp. 2016).

[369] Fed. R. Civ. P. 52(a)(2).

[370] Wistrich, Guthrie & Rachlinski, *supra* note 366, at 1275-76.

[371] Mullenix, *supra* note 150, at 624-25. I am skeptical that judges will succumb to this error.

proceedings, time constraints may limit the amount of evidence parties can gather in time for a hearing. None of the judges I spoke with suggested they were overwhelmed with evidence at preliminary injunction hearings.

Several commentators, most notably Deborah Young, have advocated imposing the Federal Rules of Evidence at sentencing.[372] (Sentencing is explicitly excluded from the Federal Rules by Rule 1101(d)(3), so their proposal would require a Rule change.) These commentators argue that there was less of a need for evidentiary regulation before the 1984 Federal Sentencing Guidelines, because judges could freely adjust the sentence based on the reliability of the evidence.[373] After imposition of the Guidelines, when courts had to affirmatively find facts and calculate a sentencing range, evidentiary reliability became more important.[374] (These articles were all written when the Guidelines were mandatory, so factual findings could have a direct effect on the sentence imposed.[375]) Preliminary injunction decisions sit somewhere in between these two extremes. Unlike pre-Guidelines sentencing, courts *do* have to enter factual findings on a preliminary injunction decision.[376] And while a judge can tailor injunctions to his view of the case, granting or denying an injunction is closer to a binary decision, whereas a sentence falls on a continuous scale and can be incrementally adjusted based on evidentiary reliability. In those ways, preliminiary injunctions are unlike purely discretionary sentencing. However, courts have discretion whether to grant preliminary injunctions, so factual findings don't have the same direct consequences that they did when the Guidelines were mandatory.

More importantly, in sentencing, allowing in more evidence on Guidelines-relevant facts will overwhelmingly benefit the prosecution and disfavor the defendant.[377] As Young notes, most evidence introduced at sentencing will be inculpatory,[378] so even if including more evidence reduces errors overall, more of these errors will be "borne by the defendant."[379] To the extent we are concerned about over-punishment, this asymmetry exacerbated by disregarding the Rules is

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[372] *See* Deborah Young, *Fact-Finding at Federal Sentencing: Why the Guidelines Should Meet the Rules*, 79 CORNELL L. REV. 299 (1994); *see also* Margaret A. Berger, *Rethinking the Applicability of Evidentiary Rules at Sentencing: Of Relevant Conduct and Hearsay and the Need for an Infield Fly Rule,* 5 FED. SENT. R. 96 (1992); Aviva A. Orenstein & Edward R. Becker, *The Federal Rules of Evidence After Sixteen Years – The Effect of "Plain Meaning" Jurisprudence, the Need for an Advisory Committee on the Rules of Evidence, and Suggestions for Selective Revision of the Rules*, 60 GEO. WASH. L. REV. 857, 885-91 (1992).

[373] *See* Young, *supra* note 372, at 314; Berger, *supra* note 372, at 96; Orenstein & Becker, *supra* note 372, at 887.

[374] *See* Orenstein & Becker, *supra* note 372, at 887.

[375] *Cf.* United States v. Booker, 543 U.S. 220 (2005) (excising the portion of the law that made the Guidelines mandatory); *see generally* U

[376] Fed. R. Civ. P. 52(a)(2).

[377] *See* Young, *supra* note 372, at 332.

[378] *Id.* at 360.

[379] *Id*. at 354.

troubling. The concerns are different in the preliminary injunction context: allowing in more evidence will not systematically benefit powerful civil defendants at the expense of little-guy plaintiffs; if anything, it will benefit plaintiffs, who bear the burden of proof on every element of the preliminary injunction standard.[380] This more evenhanded regime is far more palatable than a regime that systematically disfavors criminal defendants. Declining to impose the Rules at the preliminary injunction stage does not introduce the same problems that it does at sentencing.

B. Problems with Applying the Rules

The previous sections have critiqued the justifications for doing away with the FRE at preliminary injunction proceedings and have discussed how applying the Rules could be beneficial. But there *are* potentially serious problems with applying the FRE at the preliminary injunction stage. Specifically, the FRE may lead to less accurate findings in preliminary injunction proceedings than they do after discovery. Also, this inaccuracy may disproportionately fall on plaintiffs, improperly reallocating the risk of error.

As discussed above, courts have justified ditching the Rules by citing the need to prevent irreparable harm *quickly*.[381] How does that need justify abandonment of the FRE? If litigants cannot discover all relevant evidence in the time before the preliminary injunction hearing, applying the FRE may operate to exclude the evidence that they *do* have, and it may deny the court a factual basis for imposing (or declining to impose) a preliminary injunction. This increases the likelihood that the court will fail to prevent (or cause) irreparable harm. In other words, it increases "the probable irreparable loss of rights caused by errors incident to hasty decision."[382]

But excluding evidence at trial *also* may deprive the court of the only evidence the litigants have. Why is doing so more likely to cause the court to err at a preliminary injunction hearing? Because time constraints mean even parties with valid claims may be able to collect only "fragmentary information" before a preliminary injunction hearing,[383] so the inability to produce high-quality, admissible evidence is less characteristic of a weak case at the preliminary injunction stage than it is at trial. Parties with strong cases are likely to be able to obtain high-quality, admissible evidence during discovery. Therefore, by excluding low-quality evidence at trial, the FRE do not seriously prejudice strong cases. At the preliminary injunction stage, however, many meritorious plaintiffs will *not* have admissible evidence. By excluding low-quality evidence at the preliminary injunction stage, then, the court prejudices more strong cases than it does by

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[380] Of the cases I have read where the admissibility of evidence was challenged at the preliminary injunction stage, a large majority involved a defendant challenging plaintiff evidence. A few involved plaintiffs challenging defendant evidence.

[381] *See supra* text accompanying notes 269-271.

[382] Leubsdorf, *supra* note 35, at 541.

[383] Berman, *supra* note 255, at 34.

excluding low-quality evidence at trial. Applying the FRE thus inhibits accurate fact-finding.

Importantly, this distinction holds *only* where the plaintiffs could obtain admissible evidence if given the time but can obtain only inadmissible evidence due to time limitations. In cases where the parties are able to obtain evidence for the preliminary injunction hearing equivalent to what they would obtain for trial, accuracy considerations provide no justification for admitting additional evidence at the preliminary injunction stage. This is particularly likely if the harm evidence is within the proponent's possession or if the preliminary injunction hearing occurs long after the motion is filed. For example, two researchers found that in patent cases in the early 1990s, preliminary injunction hearings occurred a little over 6 months after case initiation, on average.[384] In 2009, three researchers analyzed every reported decision on a TRO or preliminary injunction motion in the federal courts from 2003 to 2006, looking at the average time in each district. Averages ranged from about one month to nearly two years, with many districts averaging about six months.[385] Individual cases will vary even more. Anticipating this variation, Rule 65(a)(2) not only allows admissible evidence from the preliminary injunction hearing to come in at trial but even allows a judge to consolidate the hearing with the trial on the merits. Time constraints are not so much a hallmark of a PI motion as a distinct possibility. Only when time is short and the evidence suffers for it is there a strong reason to abandon the FRE.

This result jibes with Dale Nance's understanding that evidence law is designed to force litigants to produce "the best evidence reasonably available."[386] Under a pretrial timeline, a litigant could find a hearsay declarant and bring him to court or take the time for reliable scientific analysis. At the preliminary injunction stage, however, parties may not have time to find a more reliable substitute. This means that the alternative to inadmissible evidence is more likely to be "no evidence" than "better evidence." A regime that excludes the only probative evidence to which the parties have access is unlikely to foster truthseeking.

An additional problem with applying the FRE at the preliminary injunction stage is that it may shift the risk of error disproportionately onto plaintiffs. In his book, *Foundations of Evidence Law*, Alex Stein argues that allocating risk of error is a primary function of rules of evidence.[387] In civil litigation, we generally allocate

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[384] Lanjouw & Lerner, *supra* note 343, at 595 tbl.3B.

[385] *See* KRISTIN STOLL-DEBELL, NANCY L. DEMPSEY & BRADFORD E. DEMPSEY, INJUNCTIVE RELIEF: TEMPORARY RESTRAINING ORDERS AND PRELIMINARY INJUNCTIONS 189-91 (2009). I have not included districts that reported only one decision during this period. The District of Nebraska reported only one decision, which appears to have taken about a week, and the District of Wyoming reported only one decision, which took about 26 months.

[386] Nance, *supra* note 340, at 227.

[387] ALEX STEIN, FOUNDATIONS OF EVIDENCE LAW 133-40 (2005). He is not the first to discuss error allocation as a key function of evidence law. *See* Michael S. Pardo, *The Political Morality of Evidence Law*, 5 INT'L COMMENT. ON EVIDENCE 1, 5 (2007)

the risk so as not to prefer one party over the other: the plaintiff's losses and defendant's losses are equally bad.[388] The burden of proof on each element is essentially a tie-breaking rule.[389]

The imposition of exclusionary rules under time constraints, could, however, shift this risk. Plaintiffs, who carry the burden of production and persuasion, always need to present evidence of likelihood of success and of irreparable harm to themselves. Evidence will not come solely from the plaintiff's side, of course: defendants introduce evidence both negating the plaintiff's case and demonstrating that an injunction will itself cause irreparable harm. Still, among the cases in which a party challenges the admissibility of evidence, they appear to be overwhelmingly challenges by defendants to plaintiff evidence—in every one of the standard-setting cases discussed above, the challenge was to the plaintiff's evidence.[390] If plaintiffs are the ones offering inadmissible evidence, applying the FRE will shift the risk of error in preliminary injunction proceedings against plaintiffs. This asymmetrical risk of error clashes with our idea of even-handedness in civil suits, and it is of particular concern when plaintiffs face the possibility of irreparable harm. Reallocation of risk of error and increase in risk of error are the two most serious problems with applying the Federal Rules of Evidence to preliminary injunction motions.

IV. WHAT IS TO BE DONE?

At this point I have demonstrated both the lack of justification for abandoning the Federal Rules of Evidence and the problems with applying them. So, where does that leave us? In this Part, I offer two proposals for how courts—and, potentially, rulemakers—should use the lessons from this paper. First, I offer a proposal that is both more ambitious and more tentative: apply the FRE at preliminary injunction proceedings, but include an escape hatch for evidence that implicates the specific dangers of applying the Rules before the parties have had a full opportunity for discovery. But I recognize that is unlikely to happen: courts may be uninterested in changing a practice that has not resulted in any outcry from parties. In that event, I offer a second proposal that is incontrovertible: courts should recognize that evidence submitted to show likelihood of success on the merits is

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(reviewing Stein's book and noting that part of the "moral" task of evidence law is to allocate the risk of error, calling this "orthodoxy in evidence scholarship").

[388] *See* STEIN, *supra* note 387, at 219.

[389] *Id*. at 221-22.

[390] *See* G.G. ex rel. Grimm v. Gloucester County School Bd., 822 F.3d 709 (4th Cir. 2016); Mullins v. City of New York, 626 F.3d 47 (2d Cir. 2010); Kos Pharm., Inc. v. Andrx Corp., 369 F.3d 700 (3d Cir. 2004); Illinois ex rel. Hartigan v. Peters, 871 F.2d 1336 (7th Cir. 1989); Asseo v. Pan Am. Grain Co., Inc., 805 F.2d 23 (1st Cir. 1986); Flynt Distrib. Co., Inc. v. Harvey, 734 F.2d 1389 (9th Cir. 1984); *but see* Warner v. Gross, Case No. Civ-14-665-F, Doc. 179, 34-35 (W.D. Okla. Dec. 22, 2014) (transcript); Rice v. Wells Fargo Bank, N.A., 2 F. Supp. 3d 25, 31 (D. Mass. 2014).

meta-evidence. They should weigh that evidence by determining how clearly it demonstrates that the proponent will be able to produce admissible, credible evidence at trial. This would not change what evidence is admissible, but it could dramatically change how much probative value judges assign to this evidence.

A. Proposal One: Apply the Rules, Add an Exception

To determine what evidentiary regime best suits the preliminary injunction context, I start by reiterating the central goal of preliminary injunctions: to minimize "the probable irreparable loss of rights caused by errors incident to hasty decision."[391] Unsurprisingly,[392] an evidentiary regime will minimize the probable irreparable loss of rights by facilitating accurate factfinding: a judge will tend to minimize the "errors" through a more accurate determination of likelihood of success on the merits, and she will also be better able to determine the irreparable harm to each party—the loss of rights if the court has indeed erred—through accurate factfinding. In addition, the evidentiary regime should not reallocate the risk of error between parties to too great a degree—it should, as best as possible, put plaintiffs and defendants at equal risk of error.[393]

So, what rules best facilitate truthseeking? The question has been debated for centuries. Jeremy Bentham famously called for a regime of "free proof," where exclusionary rules are largely abolished in the name of truthseeking.[394] This idea has many fans today—a number of evidence scholars have called for the abolition of the rule against hearsay or other exclusionary rules.[395] Bentham's project achieved partial success—one of his major targets was competency rules that excluded witnesses with an interest in the case, and today nearly all witnesses are deemed competent to testify.[396] But on the whole, Bentham's view is not

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[391] Leubsdorf, *supra* note 35, at 541.

[392] *See* D. Michael Risinger, *Unsafe Verdicts: The Need for Reformed Standards for the Trial and Review of Factual Innocence Claims*, 41 HOUS. L. REV. 1281, 1283-84 (2004) (discussing the "search for truth" or "rationalist" model as the dominant account of the purpose of trial).

[393] *See* STEIN, *supra* note 387, at 133-40, 219.

[394] *See* 5 BENTHAM, *supra* note 281, at 615 (arguing for free proof but also noting that the factfinder should be instructed on the untrustworthiness of certain types of evidence); WILLIAM TWINING, THEORIES OF EVIDENCE: BENTHAM AND WIGMORE 27-28 (1985); *see also* Barzun, *supra* note 335, at 1966-67.

[395] *See, e.g.*, Michael L. Seigel, *Rationalizing Hearsay: A Proposal for a Best Evidence Hearsay Rule*, 72 B.U. L. REV. 893, 894 (1992) ("The degree of consensus among twentieth century evidence scholars concerning the intellectual bankruptcy of hearsay doctrine is nothing short of remarkable."); Mark Spottswood, *Signal vs. Noise: Some Comments on Professor Stein's Theory of Evidential Efficiency*, 66 ALA. L. REV. 471, 471 (2015) ("Evidence is an unusual field of legal study, in part because so many of its devotees doubt, from time to time, that it should exist at all.").

[396] *See* Todd E. Pettys, *The Immoral Application of Exclusionary Rules*, 2008 WIS. L. REV. 463, 479; Roger C. Park & Michael J. Saks, *Evidence Scholarship Reconsidered: Results of the Interdisciplinary Turn*, 47 B.C. L. REV. 949, 951 (2006); Fed. R. Evid. 601.

encapsulated in the Federal Rules of Evidence, which is largely a list of exclusionary rules. Some of these Rules, such as those that protect privileges,[397] exclude evidence for reasons other than truthseeking.[398] But those rules are in the minority. In other words, the rulemakers—the advisory committee and congress—made the judgment that exclusionary rules facilitate truthseeking.[399] And the rulemakers applied the FRE to bench trials as well as jury trials.

Without necessarily agreeing with that premise, I take it as an assumption inherent in our law of evidence: In the normal trial context, the Federal Rules of Evidence facilitate truthseeking. Any departure from the FRE, then, should be justified on the grounds that a new context disrupts the FRE's truthseeking function, and the departure should do no more than remedy that disruption. I have identified this disruption above: In the preliminary injunction context, parties are sometimes unable to discover all reliable, relevant evidence before the hearing, so excluding evidence inadmissible under the Rules may frustrate the truthseeking process by eliminating the only evidence available to parties with meritorious claims.

But applying the Rules will not *always* harm accuracy at a preliminary injunction proceeding relative to trial. If admissible evidence on point is within the proponent's possession or easily obtainable on short notice, or if the preliminary injunction hearing is held long after the motion is filed, the justification for deviating from the FRE no longer applies. In many cases, a party will be able to offer evidence that it will be irreparably harmed if the court fails to issue an injunction (or does issue an injunction), so applying the FRE will not prejudice that party. In addition, Rule 43 explicitly allows the motion to be heard partly on affidavits. And as discussed above, much evidence submitted on the likelihood-of-success prong will be admissible, because that evidence need only point to admissible evidence that the party will produce at trial. The harm of applying the FRE arises with regard to only *some* pieces of evidence in *some* cases. If the FRE generally foster accurate factfinding, any deviation from those rules should be tailored to only those pieces of evidence where the deviation is justified.

The most straightforward way to target this problem is with an escape hatch: an exception to the Federal Rules of Evidence that allows a court to consider any piece of evidence, despite its inadmissibility under the FRE, if it implicates the problems unique to offering evidence in the preliminary injunction context. The exception should allow only relevant, helpful evidence, of course. And the exception should *not* allow courts to consider evidence that undermines the non-truthseeking purposes of the Federal Rules of Evidence, such as incentivizing desirable primary conduct.

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[397] *See* Fed. R. Evid. 501, 502.

[398] 2 MUELLER & KIRKPATRICK, *supra* note 139, § 5:2 (4th ed. 2009)

[399] Seigel, *supra* note 395, at 905 (noting that the standard defense of the rule against hearsay is that "[m]inimizing the hearsay risks maximizes the accuracy of the fact-finding process"); Fed. R. Evid. 102 (noting that one purpose of the FRE is "ascertaining the truth").

With those principles in mind, I propose four criteria for the Preliminary Injunction Exception: Otherwise inadmissible evidence may be considered on a preliminary injunction motion if the proponent demonstrates that (1) the time constraints of the preliminary injunction make obtaining admissible evidence on the same point impracticable; (2) the evidence has sufficient guarantees of trustworthiness, considering the time constraints; (3) admission will not unduly prejudice the objecting party; and (4) consideration of the evidence will serve, not thwart, the purposes of the Rules and the interests of justice.

Under this exception, a number of Federal Rules of Evidence would still apply with full force. Rules such as the categorical exclusions—Rule 408, regulating the admissibility of settlement offers, for example—and the privilege rules would apply under prong 4. Admitting evidence that would disincentivize plea-bargaining or disincentivize open conversation between attorneys and their clients would thwart important purposes of those Rules.

Rule 702 and *Daubert* would still apply, to some degree, under prong 2: expert testimony that is not the product of reliable principles and methods, and expert testimony where the principles and methods have been unreliably applied, is insufficiently trustworthy. However, a court might relax its usual *Daubert* standards for purposes of a preliminary injunction motion. For example, a convention holds that an effect measured in an experiment is "statistically significant" if the "p-value" is less than 0.05. In other words, if a researcher wants to investigate whether there is a relationship between two variables—say, whether a certain chemical causes fish to die—she would gather data, analyze the relationship between the variables in her data set, and ask, "If there were *no* real relationship here—if this chemical did *not* in fact cause fish death—would I have at least a 5% chance of observing a relationship at least this strong in my data?"[400] If the answer is "no," she may reject the hypothesis that there is no relationship; in other words, she has a significant result.[401] Even if a court normally requires evidence to meet this $p < 0.05$ threshold,[402] the court may soften this requirement at the preliminary

[400] *See* Jacob Cohen, *The Earth Is Round (p < .05)*, 49 AM. PSYCHOL. 997, 997-98 (1994). Null-hypothesis significance testing of this sort has been roundly criticized for decades. *See id.*; William W. Rozeboom, *The Fallacy of the Null-Hypothesis Significance Test*, 57 PSYCHOL. BULL. 416 (1960); Daniel J. Benjamin et al., *Redefine Statistical Significance*, 2 NATURE HUM. BEHAVIOR 6 (2018); Dan Kahan, *The Earth Is (Still) Round, Even at P < 0.005*, CULTURAL COGNITION BLOG (Aug. 23, 2017, 7:40 AM), http://www.culturalcognition.net/blog/2017/8/23/the-earth-is-still-round-even-at-p-0005.html. Nevertheless, the method and convention persist.

[401] "The overwhelming majority of courts have accepted as dogma a rule that any P-value greater than either .05 or less than two standard deviations is not sufficient to disprove a null hypothesis of random chance." Michael I. Meyerson & William Meyerson, *Significant Statistics: The Unwitting Policy Making of Mathematically Ignorant Judges*, 37 PEPP. L. REV. 771, 821 (2010) (criticizing courts' reliance on p-values).

[402] *See* Bruce R. Parker, *Effective Strategies for Closing the Door on Junk Science Experts*, 65 DEF. COUNS. J. 338, 347 (1998) (advising attorneys to "educate" the court about the $p < 0.05$ standard at *Daubert* hearings).

injunction hearing. If a party's expert has not had time to collect enough data to yield a significant result, the court, considering the facts in front of it, may decide that $p < 0.10$ is sufficient for the purposes of the preliminary injunction stage. But the court would still need to analyze reliability under the *Daubert* standard to see how reliable she believed it to be.

Other rules, including the rule against hearsay and the "best evidence" rule, requiring a party to produce an original document, recording, or photograph to prove its contents,[403] are more likely to bend. Parties may not always be able to track down the original evidentiary source before a preliminary injunction hearing; hearsay and summaries of document content may, depending on the circumstances, be sufficiently reliable; and in certain cases, consideration of this evidence will neither prejudice the other party nor thwart the purposes of the Rules.

A new exception to the FRE may sound like a cop-out: too easy to conjure up and too difficult to apply. But in this case, the exception has several advantages and few disadvantages. As for advantages, it maintains many of the benefits of applying rules, generally.[404] If a party objected to the evidence, the court would first consider whether it is admissible under the Rules—forcing it to articulate and appreciate a theory of relevance. It would then need to consider whether the evidence is trustworthy and whether it advances the purposes of the FRE, forcing it to consider any dangers inherent in the evidence. Further, while admissibility will not be as predictable as it would be without the exception, it is far more predictable than without any rules. Parties will know that as a general matter, they will have to submit admissible evidence, and they will know what they have to show if they can obtain only inadmissible evidence in time for the hearing. Further, addressing Dale Nance's concern,[405] it discourages parties from purposefully introducing more favorable, inadmissible evidence, as they know they will have to justify its consideration.

The exception has few disadvantages. While four prongs may sound time consuming, three of them pose questions familiar to a judge: How trustworthy is the evidence?[406] Will it unduly prejudice the other party?[407] Does admitting the evidence serve the purposes of the Rules and the interests of justice?[408] Those questions are often decided fairly quickly. As for the first prong, the proponent or its attorney could testify to any efforts made to secure admissible evidence and why those efforts failed, or they could testify to what difficult or time-consuming tasks would be necessary to obtain admissible evidence. And the court could limit this presentation, so significant hearing time would not be spent arguing about admissibility.

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[403] *See* Fed. R. Evid. 1002.
[404] *See supra* Section III.A.
[405] *See* Nance, *supra* note 340.
[406] *See, e.g.*, Fed. R. Evid. 807(a)(1); 803(6)(E), (7)(C), (8)(B); 804(3).
[407] *See, e.g.*, Fed. R. Civ. P. 15(b)(1); 24(b)(3); 37(e)(1).
[408] *See, e.g.*, Fed. R. Evid. 807(a)(4); 403

The exception may seem unnecessary, as the FRE already contain a residual exception to the rule against hearsay, Rule 807. And a broad reading of that Rule could allow much of the evidence allowed by the Preliminary Injunction Exception. In particular, Rule 807 states that the hearsay must be "more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts."[409] The phrase "reasonable efforts" could be read in context to mean "reasonable efforts under the time constraints attendant to a preliminary injunction motion." But Rule 807 also requires the hearsay statement to have "equivalent circumstantial guarantees of trustworthiness."[410] In other words, the hearsay must be as trustworthy as hearsay permitted by the enumerated exceptions.[411] Although a court could stretch this prong, the Preliminary Injunction Exception explicitly permits somewhat less reliable evidence out of necessity. It is not redundant with Rule 807.

There are two ways the FRE and this exception could be implemented. First, the exception could be implemented by an amendment to either the Federal Rules of Civil Procedure or the Federal Rules of Evidence. The two most logical locations for the Rule are as Federal Rule of Civil Procedure 65(a)(3), an addition to the Preliminary Injunctions Rule, or as an amendment to Federal Rule of Evidence 1101(b), setting out the applicability of the FRE. In either location, the Rule would prescribe that the FRE apply to preliminary injunction motions, with an exception. Although, as I have argued, the FRE should, by its own terms, apply to preliminary injunction hearings, courts would not be so quick to ignore a Rule that *explicitly* makes the FRE applicable.

Second, courts could simply begin announcing that they will apply the FRE at the preliminary injunction stage, unless the evidence meets the criteria in the exception. In circuits where the Court of Appeals has explicitly said they do not apply, that court can reverse course. In circuits that have not discussed the issue, district courts can simply begin to apply the FRE; ideally, they would post this policy in their Chambers Rules to put the parties on notice. Although the exception would contravene the terms of the Rules—which apply the FRE in full—as courts have not previously been applying the FRE, it is unlikely that they would feel they were exceeding their authority by beginning to apply the rules with one exception.

Either way, applying the Federal Rules of Evidence plus an escape hatch at the preliminary injunction phase would give us the best of both worlds: the predictability and reason-giving forced by rules and the flexibility necessary to facilitate truthseeking.

I said this proposal was both ambitious and tentative. The ambition is clear: what I suggest goes against what every court has prescribed. The tentativeness is related. Although there are a number of deficiencies with the current haphazard

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[409] Fed. R. Evid. 807(a)(3).
[410] Fed. R. Evid. 807(a)(1).
[411] *See* 5 MUELLER & KIRKPATRICK, *supra* note 139, § 8:141 (4th ed. 2009).

system, there has been no great outcry from litigants or judges. Although I have not found any relevant empirical work, it may be that the existing system works reasonably well. In fact, many scholars would argue that this discretionary regime is far preferable to the rules-bound regime we have in bench trials.[412] A judge who receives all available evidence and chooses whether to consider it and how heavily to weigh it may be in a better position to determine truth than a judge who considers only information admissible under the FRE. In that case, the better remedy would not be to level up but rather to level down: Stop applying the FRE to bench trials. Or any trials. Let Bentham's free proof reign supreme. I don't argue against that point because I think it's wrong—it may well be right. But I take it as a given that we are not about to eliminate the Federal Rules of Evidence, because we think that, on the whole, they are helpful. It is only because I accept that premise that I recommend expanding the FRE's purview instead of contracting it.

B. Proposal Two: Weigh Meta-Evidence Appropriately

But perhaps that ship has also sailed. Perhaps everyone is sufficiently happy with the status quo, and courts will continue accept whatever evidence they deem sufficiently reliable and give it whatever weight they deem appropriate. In that case, I have a second proposal—and this one I offer without hesitation: Understand that evidence of likelihood of success on the merits is meta-evidence, and weigh it accordingly.

Whether or not the evidence presented at the preliminary injunction hearing is admissible, in order for a party to succeed at trial, he will have to offer admissible evidence. Therefore, in order to demonstrate likelihood of success on the merits, the party has to present evidence to the court tending to prove that he will be able to offer admissible evidence at trial.[413] Evidence introduced to prove likelihood of success on the merits is probative *only* to the extent that it tends to prove the proponent will offer admissible evidence when it counts.

If the evidence presented at the preliminary injunction hearing is itself admissible, this evidence is likely dispositive of what will be presented at trial. Unless there is some reason to believe the same evidence will not be available at

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[412] *See* Schauer, *supra*, at 166 n.4 (citing James H. Chadbourn, *Bentham and the Hearsay Rule—A Benthamic View of Rule 63(4)(c) of the Uniform Rules of Evidence*, 75 HARV. L. REV. 932, 937 (1962); Kenneth Culp Davis, *An Approach to Rules of Evidence for Nonjury Cases*, 50 A.B.A. J. 723 (1964); Peter L. Murray & John C. Sheldon, *Should the Rules of Evidence be Modified for Civil Non-Jury Trials?*, 17 ME. B.J. 30 (2002); John Sheldon & Peter Murray, *Rethinking the Rules of Evidentiary Admissibility in Non-Jury Trials*, 86 JUDICATURE 227, 231 (2003)).

[413] *Cf.* Leubsdorf, *supra* note 35, at 555 ("Although the court cannot know at the preliminary hearing what evidence the parties will present at trial, it can estimate the probability of different findings of fact by using affidavits, representations of counsel, inferences from the failure to produce accessible evidence, and the judge's own notions about the plausibility of the parties' contentions.").

trial, the court can simply look at how far the evidence goes toward proving the proponent's case on the merits.

If, on the other hand, the evidence presented at the preliminary injunction hearing would *not* be admissible at trial, the court must determine, from that evidence, how likely it is that the proponent will be able to present admissible evidence at trial. The court's task is *not* to determine how well the inadmissible evidence *proves the merits*. It is only to determine likelihood of success. For example, take a copyright case, where the plaintiff must prove that the defendant copied the plaintiff's original work.[414] The defendant's wife's best friend testifies at the preliminary injunction hearing: "The defendant's wife told me that her husband told her that he copied the plaintiff's work." A reasonable factfinder might find this to be strong evidence of copying, particularly if neither the friend nor the wife appear to have any motive to lie. However, this is not very probative of whether the plaintiff is likely to succeed at trial. The wife's out-of-court statement—"My husband told me he copied the plaintiff's work"—is hearsay when offered to show that her husband indeed told her he copied the work. So, the best friend will not be able to testify to the wife's statement at trial. Further, the defendant's statement to his wife is protected by the spousal communications privilege.[415] The defendant can prevent her from testifying at trial. This evidence, then, while strong evidence of the merits, is weak evidence of likelihood of success on the merits. The court should weigh it accordingly.

To be clear, courts should weigh meta-evidence this way *whether or not* they are applying the FRE at the preliminary injunction hearing. But there is one difference between a court weighing meta-evidence under the Rules and one weighing meta-evidence without the limitations of the FRE. If a court has abandoned the FRE, it may make inferences prohibited by those Rules in determining likelihood of success. In the hypothetical copyright case above, a court applying the Rules could *not* infer from the best friend's testimony that the husband *actually* told his wife that he copied plaintiff's work. That would be hearsay, and the judge may not consider hearsay in her analysis. However, if a court is *not* applying the Rules, it *may* infer that the husband *actually* told her he copied. That inference may be helpful to the judge, because she may run through the following chain of reasoning: "This testimony suggests the defendant told his wife he copied; that, in turn, suggests he *did*, in fact, copy; and *that*, in turn, suggests that even if *this* evidence is inadmissible, there is likely to be *other* evidence of copying introduced at trial. If he in fact copied, the plaintiff is likely to find evidence of copying." Through this reasoning, the best friend's testimony is probative of likelihood of success. It is not nearly as probative as it would be if it pointed directly to admissible evidence. But it is not irrelevant.

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[414] *See* Feist Publications, Inc. v. Rural Telephone Serv. Co., 499 U.S. 340, 361 (1991).

[415] 2 MUELLER & KIRKPATRICK, *supra* note 139, § 5:40 (4th ed. 2009) ("Since both spouses hold the privilege, it seems that the act of one spouse in disclosing the substance of a communication cannot waive the privilege claim of the other spouse.").

There is a potential injustice lurking here: If the point of a preliminary injunction is to prevent irreparable harm, why are we not concerned with the merits themselves? Why are we concerned only with *likelihood* of success later on? Is it not more just for a plaintiff to get the preliminary injunction he needs and (in a sense) deserves, even if he will eventually lose at trial? First, independent of whether it is a good standard or a bad standard, "likelihood of success on the merits" is the standard we have.[416] The Supreme Court has direct that "likely to succeed" is one of the four preliminary injunction factors, so this is the inquiry courts must undertake. Evidence that does not tend to show whether the plaintiff can succeed at trial is irrelevant to the inquiry. Second, the standard is sensible give the purpose of a preliminary injunction. As Leubsdorf discusses, the purpose of a preliminary injunction is to minimize the loss of "rights" caused by "errors" that stem from the short timeline.[417] A preliminary injunction decision is "erroneous" only "in the sense that it may be different from the decision that ultimately will be reached."[418] In other words, the parties' "rights" are "legal rights"[419] determined by the trial on the merits. If the preliminary injunction decision deviates from the decision on the merits, one party has suffered a loss of "rights," due to the preliminary injunction decision. If a court were to make its preliminary injunction decision *not* based on likelihood of success at trial, that court would fail to minimize the probable loss of rights.

A further difficulty arises when evidence relates to *both* likelihood of success on the merits and irreparable harm. At trial, the plaintiff will have to demonstrate that it would suffer irreparable harm absent a permanent injunction.[420] So, in order to prove likelihood of success on the merits, the plaintiff must demonstrate that it will be able to show irreparable harm at trial. That inquiry, however, is distinct from the showing of irreparable harm at the preliminary injunction phase: at the first stage, the plaintiff must show that absent a preliminary injunction, it will suffer harm that cannot be remedied at trial, whether by a damages award *or* by a permanent injunction.[421] But the two inquiries will almost certainly overlap.[422] The plaintiff may present evidence that the defendant's actions are likely to cause harm, and this evidence can relate to *both* the irreparable-harm prong and the likelihood-of-success prong. But the court should approach the evidence differently, depending on which prong it is analyzing. For the irreparable-

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[416] *See* Winter v. Nat. Resources Def. Council, Inc., 555 U.S. 7, 20 (2008) ("A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits . . . .").

[417] Leubsdorf, *supra* note 35, at 541.

[418] *Id.*

[419] *See id.* ("Not even all irreparable harm, but only irreparable harm to legal rights, should count.").

[420] *See* eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006).

[421] *See* Leubsdorf, *supra* note 35, at 541.

[422] *Cf.* LAYCOCK, *supra* note 291, at 12 (Noting the relevant issue at the preliminary injunction stage is "the probability that the preliminary relief to be granted will be a part of the relief to be awarded at final judgment, or at least not inconsistent with the rights to be determined by the final judgment.").

harm inquiry, the evidence is probative to the extent it tends to show likelihood of harm; for the likelihood-of-success inquiry, the evidence is probative to the extent it tends to show that the plaintiff will be able to present evidence of likely irreparable harm at trial. Therefore, if a court does not follow the FRE at the preliminary injunction hearing, the plaintiff may present inadmissible evidence of irreparable harm. That evidence could be very probative on the irreparable-harm prong and far less probative on the likelihood-of-success prong, if it does not suggest admissible evidence to come. The court should consider the probative value of the evidence on each inquiry separately.

We can now return to the Giuliani statement. The District Court appeared to take this statement as direct evidence of President Trump's animus against Muslims.[423] But the statement—that President Trump told him to create a legal version of the Muslim ban—is probative only on the likelihood-of-success-on-the-merits inquiry, and it is probative only to the extent that it points to admissible evidence. Even under the FRE, the evidence is admissible on this point as non-hearsay, but only because the court should *not* use it as evidence of animus. Rather, it is evidence that this potential witness could testify at trial about the origins of the ban, and that this evidence would tend to support the plaintiffs' claim. The evidence is therefore admissible, but it is less probative than some courts have suggested.

CONCLUSION

Classically, the Federal Rules of Evidence operate to keep prejudicial or unreliable evidence from a jury, so the jury can render an accurate final verdict at a trial that takes place months or years of discovery. The preliminary injunction hearing is a different sort of proceeding: it takes place before a judge, often after little time to discover evidence, and it does not involve a final decision on the merits. Courts have thrown of the yoke of the FRE under these circumstances. Yet the reasons for deviating from the usual practice are surprisingly thin: the FRE apply to bench trials as well as jury trials; they are highly consequential, even if they do not involve a final decision on the merits; and one of the major inquiries at this stage—likelihood of success on the merits—allows courts to consider evidence that would not be admissible on the merits. A narrow, discretionary exception can retain the benefits of the rules while accounting for the situations where the haste of a preliminary injunction motion calls for flexibility.

But even if the old system remains in place, and courts continue to disregard the Rules, the Federal Rules of Evidence cast a shadow over the preliminary injunction motion: The court must determine likelihood of success on the merits, and parties will succeed at trial only if they are able to present admissible evidence. The FRE, then, still have a function in determining the evidentiary weight of meta-evidence. Even at a preliminary injunction hearing, the Federal Rules of Evidence are inescapable.

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[423] *See, e.g.*, Int'l Refugee Assistance Project v. Trump, 241 F. Supp. 3d 539, 558 (D. Md. 2017).