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## UC Irvine Law Review

### Title

Meta-Evidence and Preliminary Injunctions

### Permalink

<https://escholarship.org/uc/item/4rs4n19z>

### Journal

UC Irvine Law Review , 10(4)

### ISSN

2327-4514

### Author

Wittlin, Maggie

### Publication Date

2020-06-01

# Meta-Evidence and Preliminary Injunctions

Maggie Wittlin \*

*The decision to issue a preliminary injunction is enormously consequential; it has been likened to “judgment and execution before trial.” Yet, courts regularly say that our primary tool for promoting truth seeking at trial—the Federal Rules of Evidence—does not apply at preliminary injunction hearings. Judges frequently consider inadmissible evidence to make what may be the most important ruling in the case. This Article critically examines this widespread evidentiary practice.*

*In critiquing courts’ justifications for abandoning the Rules in the preliminary injunction context, this Article introduces a new concept: “meta-evidence.” Meta-evidence is evidence of what evidence will be presented at trial. I demonstrate that much evidence introduced at the preliminary injunction stage is, in fact, meta-evidence. And I show why meta-evidence that initially appears inadmissible under the Rules is often, in fact, admissible. Applying the Rules at the preliminary injunction stage, then, would not exclude nearly as much evidence as courts may have assumed.*

*I offer two proposals for how courts should use the Rules at the preliminary injunction phase. More ambitiously, I suggest courts should apply the Rules with an exception directly tailored to the dangers of limiting admissible evidence when the parties are under time pressure. Alternatively, I suggest that courts simply recognize when evidence is actually meta-evidence and weigh it appropriately. Courts should acknowledge 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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\* Assistant Professor, University of Nebraska College of Law. For helpful comments and conversations, I thank Eric Berger, Robert Bone, Darren Bush, Daniel Capra, Zachary Clopton, Hon. Robert Chatigny, James Duane, Allan Erbsen, Russell Gold, Amalia Kessler, John Leubsdorf, Michael Morley, David Noll, Luke Norris, Michael Pardo, Alex Reinert, Jessica Roth, Jessica Shoemaker, Mark Spottswood, Adam Thimmesch, Alan Trammell, Howard Wasserman, Steve Willborn, Hon. Diane Wood, and participants at the Fourth Annual Civil Procedure Workshop, SEALS Workshop, Nebraska Faculty Workshop, Cardozo Faculty Development Workshop, St. John’s Faculty Workshop, Drexel Kline Faculty Workshop, and the Fordham Faculty Workshop. Thanks also to Rich Leiter, Matt Novak, Stefanie Pearlman, and Sandy Placzek of the Schmid Law Library. I am grateful to the judges who spoke with me for this Article. And thanks to the excellent editors at the *UC Irvine Law Review*. A McCollum Grant helped support the writing of this Article.

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## INTRODUCTION

On January 28, 2017—before he was President Trump’s lawyer—former New York City Mayor and presidential adviser Rudy Giuliani appeared on Fox News.<sup>1</sup> Host Jeanine Pirro had invited him on to discuss President Trump’s “travel ban,” which temporarily suspended immigration from seven countries.<sup>2</sup> 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 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.’”<sup>3</sup>

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1. *Justice with Judge Jeanine: Giuliani: Immigration Ban Is Based on Danger, not Religion* (Fox News television broadcast Jan. 29, 2017), <http://video.foxnews.com/v/5301869519001/> [https://perma.cc/T8BK-KXWG#sp=show-clips].

2. *See* Exec. Order No. 13,769 § 3(c), 82 Fed. Reg. 8977 (Feb. 1, 2017) (suspending entry of persons “from countries referred to in section 217(a)(12) of the [Immigration and Nationality Act]”).

3. *Justice with Judge Jeanine: Giuliani: Immigration Ban Is Based on Danger, not Religion*, *supra* note 1.

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,<sup>4</sup> temporarily halting a similar second travel ban.<sup>5</sup> The judge found the plaintiffs could demonstrate that the primary purpose of the ban was likely to exclude Muslims, not to advance national security interests.<sup>6</sup> In its analysis, the court cited Giuliani's statements from the 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 . . ." <sup>7</sup> When the Supreme Court reversed a preliminary injunction of the ban, it, too, cited the interview as evidence.<sup>8</sup>

But aren't Giuliani's remarks hearsay?<sup>9</sup> They are statements made out of court offered to show the truth of what's asserted in the statements—namely, that President Trump in fact told Giuliani that he wanted a Muslim ban.<sup>10</sup> This is not even particularly *reliable* hearsay.<sup>11</sup> Giuliani spoke spontaneously during a performative television interview, not solemnly under oath. The meaning of his comments was not entirely clear, and he might have misunderstood the President. These are precisely the sorts of ambiguities that cross-examination is designed to resolve. In other words, isn't Giuliani's comment exactly the kind of out-of-court statement that factfinders should be prohibited from relying on?<sup>12</sup> Yet the district court and, later, the Court of Appeals for the Fourth Circuit<sup>13</sup> relied on the statement with little fanfare.

This is hardly surprising. Just one year earlier, the Fourth Circuit, like many circuits before it, held that courts may rely on hearsay or other inadmissible evidence

4. See FED. R. CIV. P. 65.

5. *Int'l Refugee Assistance Project v. Trump*, 241 F. Supp. 3d 539, 565–66 (D. Md. 2017) (enjoining Exec. Order No. 13,780 § 2(c), 82 Fed. Reg. 13209 (Mar. 9, 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 559. Other district courts also cited the interview in preliminary injunction rulings. See *id.*

8. See *Trump v. Hawaii*, 138 S. Ct. 2392, 2417 (2018); see also *id.* at 2436 (Sotomayor, J., dissenting).

9. See FED. R. EVID. 801(c).

10. Trump's statements themselves are not hearsay within hearsay, as they are statements of an opposing party, admissible under section 801(d)(2)(A) of the Federal Rules of Evidence.

11. 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").

12. A proponent of the evidence could argue that Giuliani was an authorized "speaking agent" for the president. See FED. R. EVID. 801(d)(2)(C). But that is not apparent from the video or from how the opinions discussed the comment. See, e.g., *Int'l Refugee Assistance Project*, 241 F. Supp. 3d at 558–59, *aff'd and vacated in part*, 857 F.3d 554 (4th Cir. 2017) (using the Giuliani comment as evidence of Trump's intent), *vacated*, *Trump v. Hawaii*, 138 S. Ct. at 2417 (referring to Giuliani as a "campaign adviser[]"). President Trump had recently named Giuliani "an informal adviser on cybersecurity." Abby Phillip, *Trump Names Rudy Giuliani as Cybersecurity Adviser*, WASH. POST, (Jan. 12, 2017), <https://wapo.st/2ymb19E> [<https://perma.cc/QF72-Q824>].

13. *Int'l Refugee Assistance Project*, 857 F.3d at 594 (en banc), *vacated*, 138 S. Ct. 353 (2017).

when making preliminary injunction decisions.<sup>14</sup> In that standard-setting case, Gavin Grimm (G.G.),<sup>15</sup> a transgender teenager in Virginia, had moved for a preliminary injunction ordering his school to let him use the boys' restroom. The district court denied the motion, in part because Grimm had relied on "mostly inadmissible hearsay"<sup>16</sup>—principally, his own declaration that a psychologist had diagnosed him with gender dysphoria, rather than a declaration from the psychologist herself.<sup>17</sup>

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 injunction."<sup>18</sup> 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."<sup>19</sup> The court joined seven other circuits in concluding that for purposes of a preliminary injunction motion, hearsay is admissible; "the nature of evidence as hearsay goes to 'weight, not preclusion.'"<sup>20</sup>

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 bother challenging the introduction of inadmissible evidence on motions for a preliminary injunction.<sup>21</sup> When they do, courts often deny their motions, saying that admissibility under the Federal Rules of Evidence (FRE) goes to weight, not preclusion. 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.<sup>22</sup> This loose practice has gone largely unquestioned both in the courts and in the academic literature. That is troubling. Given the importance

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14. G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 726 (4th Cir. 2016), *vacated on other grounds*, 137 S. Ct. 1239 (2017).

15. Documents in the case refer to 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> [<https://perma.cc/KN29-LML9>].

16. G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 132 F. Supp. 3d 736, 751, 753 (E.D. Va. 2015), *rev'd and vacated in part*, 822 F.3d 709.

17. He did, however, submit a declaration from a different clinical psychologist who had examined Grimm for purposes of the lawsuit. *See id.* at 749. 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. *Id.* I return to the second declaration later.

18. *Grimm*, 822 F.3d at 715.

19. *Id.* at 725.

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

21. For example, Gloucester County did not challenge Grimm's evidence. *See* Brief in Opposition to Motion for Preliminary Injunction, *Grimm*, 132 F. Supp. 3d 736 (No. 4:15-cv-00054-RGD-TEM), ECF No. 30.

22. *See* Interview with a United States Magistrate Judge within the Second Circuit (July 18, 2017) [hereinafter Magistrate Judge Interview]; Interview with a United States District Judge within the Tenth Circuit (Oct. 25, 2017) [hereinafter Tenth Circuit District Judge 1 Interview].

of preliminary injunction proceedings—they’re often functionally dispositive<sup>23</sup>—the applicable evidentiary standard can have a large influence on a case.

This Article critically examines the existing evidentiary practice on preliminary injunction motions. It uses textual, historical, and policy analysis to pinpoint problems with courts’ justifications for declining to apply the FRE. Ultimately, it concludes that the current practice is suboptimal.

In critiquing the justifications for disregarding the FRE at preliminary injunction hearings, this Article introduces a new and useful concept: “meta-evidence.” I define meta-evidence as evidence of what evidence will be produced at trial. To obtain a preliminary injunction, a plaintiff must show that they are “likely to succeed on the merits.”<sup>24</sup> Evidence offered in support of this key element is meta-evidence; it is evidence of what admissible evidence that party will present at trial.

Here’s why that matters: A central policy concern with applying the FRE at the preliminary injunction stage is that the rules will exclude *too much* evidence and either stop courts from preventing irreparable harm or induce them to inflict it. But simply eliminating the FRE in this context uses a blunt instrument for a nuanced problem. Instead, 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 FRE would actually be admissible. Specifically, the rule against hearsay prohibits parties from introducing out-of-court statements for the truth of the matter asserted.<sup>25</sup> But a meta-evidentiary statement is offered *not* for its truth, but rather to prove that the declarant could testify to the substance of the statement at a future trial.<sup>26</sup> The statement, then, is non-hearsay. Under this understanding, a large portion of the supposedly “inadmissible” evidence at the preliminary injunction stage is, in fact, admissible meta-evidence.

An understanding of meta-evidence also allows judges to come to more accurate determinations of the likelihood of success on the merits. Courts should give greater weight to meta-evidence that clearly indicates that the offering party will be able to produce admissible evidence at trial and less weight to meta-evidence that does not clearly point to forthcoming admissible evidence. The Article also discusses how “meta-evidence” can yield insight into motions for summary judgment and motions to dismiss.

Part I of this Article introduces preliminary injunctions and discusses the current practice of courts with respect to preliminary injunction evidence and the

23. See *infra* Section II.C.1.

24. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

25. FED. R. EVID. 801(c).

26. 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. James Joseph Duane, *The Four Greatest Myths About Summary Judgment*, 52 WASH. & LEE L. REV. 1523, 1531–44 (1995). 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. See FED. R. CIV. P. 56(c). In the preliminary injunction context, the insight has real payoff.

FRE. Part II examines whether disregarding the FRE is justified by looking at text, history, and policy. Part II introduces the concept of meta-evidence and uses that concept to explain why applying the FRE at the preliminary injunction stage will not exclude as much evidence as courts have suggested. Part III sets out the benefits and drawbacks of applying the FRE to preliminary injunctions.

Finally, Part IV makes two proposals for improving consideration of evidence at the preliminary injunction stage. The first proposal is more ambitious and more tentative: Courts should apply the FRE but add an escape hatch, akin to the residual hearsay exception. If (1) time constraints prevent a party from obtaining admissible evidence, and the party offers otherwise-inadmissible evidence that (2) is sufficiently trustworthy and (3) will not unduly prejudice the other party, a court should consider that evidence at the preliminary injunction stage. Applying the FRE with the addition of this escape hatch would enhance both predictability and accuracy.<sup>27</sup> The second proposal is more modest: even if courts continue to ignore the FRE, they should use the meta-evidence idea to determine the weight of evidence at the preliminary injunction stage.

Under both proposals, the Giuliani statement would come in. But under both proposals, courts should give it less weight than they might be tempted to give it. The statement is not admissible under the FRE to prove that President Trump actually made the alleged remarks. But it *is* admissible to prove that this declarant, Rudy Giuliani, could come and testify at a future trial. To the extent the statement tends to prove that the plaintiffs are likely to succeed at trial—and only to that extent—it is admissible and probative meta-evidence.<sup>28</sup>

## 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.<sup>29</sup> 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<sup>30</sup> or violating a

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27. This approach would satisfy the central purpose of the preliminary injunction standard, “to minimize the probable irreparable loss of rights caused by errors incident to hasty decision.” John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525, 540–41 (1978).

28. Under the second proposal, it would be admissible to prove that President Trump actually made the remarks, but only to the extent that it tends to prove there will be evidence of animus at trial.

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

30. See, e.g., *Cerro Fabricated Prods. L.L.C. v. Solanick*, 300 F. Supp. 3d 632 (M.D. Pa. 2018); *Pyro Spectaculars N., 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).

covenant not to compete,<sup>31</sup> or when one company seeks to enjoin another from infringing its patent,<sup>32</sup> copyright,<sup>33</sup> or trademark<sup>34</sup>—to cases with major public impact, such as environmental litigation,<sup>35</sup> challenges to federal immigration policy,<sup>36</sup> and litigation seeking to enjoin state restrictions on abortion.<sup>37</sup>

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 the movant whole. The defendant is at risk of being subject to an invasive court order prior to a full trial on the merits, and the defendant, too, may face the prospect of irreparable harm caused by the preliminary relief.

Federal Rule of Civil Procedure (FRCP) 65 allows a party to seek a preliminary injunction on notice to the other party.<sup>38</sup> The Rule is modeled on Equity Rule 73 and codifies a remedy that extends back to at least eighteenth-century English Chancery.<sup>39</sup> 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.<sup>40</sup>

Courts emphasize that the “preliminary injunction is an extraordinary remedy never awarded as of right.”<sup>41</sup> 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

31. *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).

32. *See, e.g.,* Everett Labs., Inc. v. Breckenridge Pharm., Inc., 573 F. Supp. 2d 855 (D.N.J. 2008); P.N.A. Constr. Techs., Inc. v. McTech Grp., Inc., 414 F. Supp. 2d 1228 (N.D. Ga. 2006).

33. *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).

34. *See, e.g.,* Kos Pharm., Inc. v. Andrx Corp., 369 F.3d 700 (3d Cir. 2004); Bebe Stores, Inc. v. May Dep’t Stores Int’l, Inc., 230 F. Supp. 2d 980 (E.D. Mo. 2002).

35. *See, e.g.,* All. for the Wild Rockies v. Cottrell, 632 F.3d 1127 (9th Cir. 2011); Nat. Res. Def. Council, Inc. v. Winter, 518 F.3d 658 (9th Cir. 2008), *rev’d*, 555 U.S. 7 (2008).

36. *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) (affirming preliminary injunction of President Obama’s deferred action programs), *aff’d*, 136 S. Ct. 2271 (2016).

37. *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).

38. 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).

39. *See* Daniel C. Hopkins, *The New Federal Rules of Procedure as Compared with the Former Federal Equity Rules and the Wisconsin Code*, 23 MARQ. L. REV. 159, 184 (1939); Leubsdorf, *supra* note 27, at 528.

40. 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. Leubsdorf, *supra* note 27, at 530–33.

41. Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 24 (2008) (citing *Munaf v. Geren*, 553 U.S. 674, 689–90 (2008)).



hardship to the parties of granting or denying relief, and [4] sometimes the impact of relief on the public interest.”<sup>42</sup> 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,<sup>43</sup> 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.<sup>44</sup>

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.”<sup>45</sup> He thereby endorsed a sliding-scale type model, where the judge multiplies the plaintiff’s likelihood of success by the prospective harm to the plaintiff of denying the injunction and compares that to the defendant’s likelihood of success times the prospective harm to defendant of granting the injunction.<sup>46</sup> Under this sliding-scale regime, a greater likelihood of success can offset a lower level of harm, and vice versa. The relevant harm, Leubsdorf notes, is “harm resulting from an erroneous preliminary decision” that “final relief cannot redress.”<sup>47</sup> 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.<sup>48</sup> 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.”<sup>49</sup>

The Supreme Court somewhat clarified the standard for awarding preliminary injunctions in 2008’s *Winter v. Natural Resources Defense Council*.<sup>50</sup> 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.”<sup>51</sup> The Ninth Circuit had held that if the

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42. Leubsdorf, *supra* note 27, at 525.

43. 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.”).

44. See, e.g., *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1139 (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.”).

45. Leubsdorf, *supra* note 27, at 540–41; see also *Am. Hosp. Supply Corp. v. Hosp. Prods. Ltd.*, 780 F.2d 589, 593 (7th Cir. 1986) (Posner, J.) (majority opinion).

46. See Leubsdorf, *supra* note 27, at 542.

47. *Id.* at 541.

48. *Id.* at 542.

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

50. *Winter v. Nat. Res. Def. Council*, 555 U.S. 7 (2008).

51. *Id.* at 20.

plaintiff demonstrates a *strong* likelihood of success, it need only show a *possibility* of irreparable harm.<sup>52</sup> The Supreme Court rejected this idea, citing the standard, which specifies that irreparable injury absent an injunction must be “likely.”<sup>53</sup>

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.<sup>54</sup> 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.”<sup>55</sup> 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.<sup>56</sup> Courts have differed in their reaction to *Winter*.<sup>57</sup> The Second,<sup>58</sup> Third,<sup>59</sup> Seventh,<sup>60</sup> and Ninth<sup>61</sup> Circuits kept their (somewhat varied) sliding-scale standards, which, with one possible exception,<sup>62</sup> 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.”<sup>63</sup> The Tenth Circuit came to a similar conclusion.<sup>64</sup> Overall, while its influence was somewhat muted by *Winter*, both the

52. *Id.* at 21.

53. *Id.* at 22 (emphasis omitted).

54. *Id.* at 26.

55. *Id.* at 51 (Ginsburg, J., dissenting) (“This Court has never rejected that formulation, and I do not believe it does so today.”).

56. *Id.*

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

58. See Citigroup Glob. 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.”).

59. See *Reilly v. City of Harrisburg*, 858 F.3d 173, 179 (3d Cir. 2017) (holding that “a movant for preliminary equitable relief must meet the threshold for the first two ‘most critical’ factors,” then the court “considers the remaining two factors and determines in its sound discretion if all four factors, taken together, balance in favor of granting the requested preliminary relief”).

60. See *Hoosier Energy Rural Elec. 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.”).

61. See *All. 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.”).

62. See *Reilly*, 858 F.3d at 176–79 (requiring a threshold showing that the movant “can win on the merits”).

63. *Real Truth About Obama, Inc. v. FEC*, 575 F.3d 342, 346 (4th Cir. 2009).

64. See *Diné Citizens Against Ruining Our Env’t v. Jewell*, 839 F.3d 1276, 1282 (10th Cir. 2016) (“Under *Winter*’s rationale, any modified test which relaxes one of the prongs for preliminary relief and thus deviates from the standard test is impermissible.”).

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.<sup>65</sup>

The procedural and evidentiary regime governing preliminary injunction motions is the focus of the next Section and, indeed, the rest of this Article.

### B. Evidence and Preliminary Injunctions

This Section addresses how federal courts currently evaluate the admissibility of evidence at the preliminary injunction stage. It shows that in decisions addressing the issue, courts overwhelmingly do not apply the FRE—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. This Section then discusses how these published decisions do not capture the full practice of the courts. 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 case, *University of Texas v. Camenisch*.<sup>66</sup> 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.*<sup>67</sup>

*Camenisch* thus both summarized practice to that point and set the stage for more direct dismissal of the FRE in the preliminary injunction context.

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.<sup>68</sup> Specifically, the First,<sup>69</sup>

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65. See Bates, *supra* note 57, at 1543.

66. Univ. of Texas v. Camenisch, 451 U.S. 390 (1981); see, e.g., G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 725 (4th Cir. 2016); Mullins v. City of New York, 626 F.3d 47, 52 (2d Cir. 2010); Kos Pharm., Inc. v. Andrx Corp., 369 F.3d 700, 718 (3d Cir. 2004); Heideman v. South Salt Lake City, 348 F.3d 1182, 1188 (10th Cir. 2003).

67. *Camenisch*, 451 U.S. at 395 (emphasis added).

68. 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).

69. See *Asseo v. Pan Am. Grain Co.*, 805 F.2d 23, 26 (1st Cir. 1986).

Second,<sup>70</sup> Third,<sup>71</sup> Fourth,<sup>72</sup> Fifth,<sup>73</sup> Seventh,<sup>74</sup> Ninth,<sup>75</sup> Tenth,<sup>76</sup> and Eleventh<sup>77</sup> 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 inadmissible evidence on preliminary injunction motions,<sup>78</sup> and district courts within the Sixth Circuit often admit hearsay.<sup>79</sup>

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 FRE, or should they just admit all evidence? And second, are these decisions limited to the rule against hearsay, or are courts free to disregard *all* of the rules of evidence?

### 1. Evaluation of Hearsay Admissibility

Some circuits suggest that while courts may consider hearsay evidence on preliminary injunction motions, 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, “[t]he 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

70. See *Mullins*, 626 F.3d at 52.

71. See *Kos Pharm., Inc.*, 369 F.3d at 718–19.

72. See *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 725–26 (4th Cir. 2016).

73. See *Sierra Club, Lone Star Chapter v. FDIC*, 992 F.2d 545, 551 (5th Cir. 1993).

74. See *SEC v. Cherif*, 933 F.2d 403, 412 n.8 (7th Cir. 1991); see also *Ty, Inc. v. GMA Accessories, Inc.*, 132 F.3d 1167, 1171 (7th Cir. 1997).

75. See *Flynt Distribution Co. v. Harvey*, 734 F.2d 1389, 1394 (9th Cir. 1984).

76. See *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.*

77. See *Levi Strauss & Co. v. Sunrise Int’l Trading Inc.*, 51 F.3d 982, 985 (11th Cir. 1995).

78. *Ohio State Conference of the NAACP v. Husted*, 768 F.3d 524, 535 n.2 (6th Cir. 2014); see also *Unsecured Creditors Comm. of DeLorean Motor Co. v. DeLorean (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 summary judgment. We express no opinion on this question. *But see* 11 C[HARLES ALAN] WRIGHT & A[RTHUR 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’).”).

79. See *Damon’s Rests., 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.”).

of the injunctive proceeding.”<sup>80</sup> Several other circuits have adopted the *Asseo* standard.<sup>81</sup>

Sometimes district courts evaluate admissibility.<sup>82</sup> This reasoning is typically fairly cursory,<sup>83</sup> but sometimes it’s more detailed.<sup>84</sup> Although courts that both recognize this more relaxed standard and evaluate the admissibility of hearsay evidence usually admit it, courts occasionally do exclude evidence after evaluation.<sup>85</sup> 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.<sup>86</sup> Indeed, several courts of appeals have indicated that evidentiary determinations at the preliminary injunction stage should

80. *Asseo v. Pan Am. Grain Co.*, 805 F.2d 23, 26 (1st Cir. 1986). In *Asseo*, the injunction was requested pursuant to section 10(j) of the National Labor Relations Act. *Id.* at 24. The court evaluated the propriety of the relief under the usual preliminary injunction standards. *See id.* at 26.

81. *See Kos Pharm., Inc. v. Andrx Corp.*, 369 F.3d 700, 718–19 (3d Cir. 2004); *SEC v. Cherif*, 933 F.2d 403, 412 n.8 (7th Cir. 1991); *Levi Strauss & Co.*, 51 F.3d at 985 (Eleventh Circuit).

82. *See, e.g., Amadi v. Dep’t of Children & Families*, 245 F. Supp. 3d 316, 319 (D. Mass. 2017) (evaluating affidavits under the *Asseo* standard and deciding not to strike them); *Pendergest-Holt v. Certain Underwriters at Lloyd’s of London*, No. H-09-3712, 2010 WL 3359528, at \*4 (S.D. Tex. Aug. 23, 2010) (evaluating evidence under a “relaxed” standard to ensure only reliable evidence is admitted).

83. *See, e.g., RB Jai Alai, L.L.C. v. Sec’y of the Fla. Dep’t of Transp.*, No. 6:13-cv-1167-Orl-40GJK, 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-PB, 2011 WL 2633026, at \*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 JM (CAB), 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 Ameriquet Mortg. 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 Ameriquet 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.”).

84. *See, e.g., Westernbank P.R. v. Kachkar*, No. 07-1606(ADC), 2009 WL 2871160, at \*21 (D.P.R. Sept. 1, 2009) (discussing circumstances that lend credibility to an affidavit); *Fed. Trade Comm’n v. CCC Holdings Inc.*, No. 08-2043(RMC), 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).

85. *See, e.g., A.A. v. Raymond*, No. 2:13-cv-01167-KJM-EFB, 2013 WL 3816565, at \*7 (E.D. Cal. July 22, 2013) (“The court sustains defendant’s objections to hearsay in the Casillas declaration.” The court noted that while it sustained several objections, it would “otherwise consider[] the objections in assigning appropriate weight to the evidence.”); *X17, Inc. v. Lavandeira*, No. CV06-7608-VBF(JCX), 2007 WL 790061, at \*3 (C.D. Cal. Mar. 8, 2007) (noting that “this Court will continue to observe the prohibition against hearsay evidence” and excluding certain exhibits and testimony).

86. *See, e.g., McGehee v. Hutchinson*, No. 4:17-cv-00179 KGB, 2017 WL 1399554, at \*4 (E.D. Ark. Apr. 15, 2017), *vacated on other grounds*, 854 F.3d 488 (8th Cir. 2017); *Rice v. Wells Fargo Bank, N.A.*, 2 F. Supp. 3d 25, 31 (D. Mass. 2014) (“[T]his court has broad discretion in deciding what evidence to consider in connection with a motion for preliminary injunction, including hearsay.”).

be evaluated under an abuse of discretion standard.<sup>87</sup> The existence of a standard of review indicates that courts should be making reviewable decisions—they should be deciding whether to admit or exclude evidence.

The Second Circuit struck a different note. 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.”<sup>88</sup> 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.<sup>89</sup> 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.<sup>90</sup> Others *do* explicitly consider the admissibility of the evidence in determining the weight to afford it,<sup>91</sup> occasionally giving thoughtful and detailed treatment to the question.<sup>92</sup>

87. See, e.g., *Glossip v. Gross*, 135 S. Ct. 2726, 2744–45 (2015) (“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.”); *Coal. of Concerned Citizens to Make Art Smart v. Fed. Transit Admin.*, 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.”); *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.”).

88. *Mullins v. City of New York*, 626 F.3d 47, 52 (2d Cir. 2010).

89. See, e.g., *McGehee*, 2017 WL 1399554, at \*4 (“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. Bd. of Cty. Comm’rs*, Civ. No. 07-00710 MV/WDS, 2008 WL 11327379, at \*11 (D.N.M. Sept. 30, 2008).

90. See, e.g., *Veramark Techs., 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 L.L.C.*, No. 2:12-CV-00114-MCA-GBW, 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 Found. v. Seven Grp.*, No. 11-cv-00570 BEN (WMC), 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 Sch.*, 762 F. Supp. 2d 745, 747 n.3 (E.D. Pa. 2010); *Commodity Futures Trading Comm’n v. Am. Metals Exch. 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.”).

91. See, e.g., *CF 135 Flat L.L.C. v. Triadou SPV N.A.*, 15-CV-5345(AJN), 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.”) (alteration in original); *Phelps-Roper v. Heineman*, No. 4:09CV3268, 2010 WL 2015269, at \*2 (D. Neb. May 19, 2010) (“The questionable reliability of certain evidence will be considered by the Court when it determines what weight the evidence should be given.”).

92. See, e.g., *USA Visionary Concepts, L.L.C. v. MR Int’l, L.L.C.*, No. 4:09-CV-00874-DGK, 2009 WL 10672094, at \*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

Often, courts parrot the refrain that evidentiary concerns “go to weight rather than admissibility.”<sup>93</sup>

Finally, district courts sometimes appear to apply the FRE with full force in the preliminary injunction context.<sup>94</sup> In these cases, the parties may not have disputed that the FRE apply at this stage; they may have simply argued the evidentiary issues under the Rules.<sup>95</sup>

Some courts exclude evidence at the preliminary injunction stage; some don't. Some courts consider the FRE 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. Judges retain substantial discretion to use the evidence as they see fit.

## 2. Non-Hearsay Rules

At the preliminary injunction stage, the most common evidentiary issues relate to hearsay, and federal courts of appeals have not explicitly considered whether other rules of evidence apply. However, the Tenth Circuit has stated its practice categorically, untethered from the hearsay context: “The Federal Rules of Evidence do not apply to preliminary injunction hearings.”<sup>96</sup> 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 the declaration at face value, generally admitting evidence

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from engaging in settlement discussions”); *Zeneca Inc. v. Eli Lilly & Co.*, No. 99 CIV.1452(JGK), 1999 WL 509471, at \*2 (S.D.N.Y. July 19, 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.”)

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

94. *See, e.g.*, *Spurlock v. Fox*, No. 3:09-cv-0756, 2010 WL 3807167 (M.D. Tenn. Sept. 23, 2010) (considering a litany of objections to evidence presented at a preliminary injunction hearing); *Schering Corp. v. Pfizer, Inc.*, No. 98 CIV. 7000(LMM), 1999 WL 144921 (S.D.N.Y. Mar. 16, 1999), *vacated*, 189 F.3d 218 (2d Cir. 1999).

95. *See* Defendants' Motion to Strike Evidence Presented During the Preliminary Injunction Hearing and Memorandum in Support Thereof, *Spurlock*, No. 3:09-cv-0756, 2010 WL 3807167, ECF No. 128; Plaintiffs' Reply to Defendants' Motion to Strike and Motions in Limine, *id.*, ECF No. 130.

96. *Heideman v. South Salt Lake City*, 348 F.3d 1182, 1188 (10th Cir. 2003).

without regard to the FRE,<sup>97</sup> and it has now become boilerplate.<sup>98</sup> Similarly, the Ninth Circuit has noted in a footnote that “the rules of evidence do not apply strictly to preliminary injunction proceedings.”<sup>99</sup>

But do district courts actually consider evidence that violates 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*<sup>100</sup>—which require 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.) I have also examined whether they apply Rule 408, which targets statements made during settlement negotiations.

Some courts, citing the above cases, have declined to apply Rule 702 and *Daubert*. These courts admit the expert evidence independent of its reliability, but they often consider the parties’ *Daubert* arguments when weighing the testimony.<sup>101</sup> Similarly, some courts have admitted the evidence but used *Daubert* to determine whether the evidence should receive *any* weight.<sup>102</sup> This is somewhat similar to the

97. See, e.g., *Todd v. RWI Acquisition L.L.C.*, No. 2:12-CV-00114-MCA-GBW, 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* . . . . The parties’ arguments pertain to the weight of the evidence, but not its admissibility.”).

98. See, e.g., *Navajo Health Found.—Sage Mem’l Hosp., Inc. v. Burwell*, 100 F. Supp. 3d 1122, 1126 (D.N.M. 2015); *Wildearth Guardians v. Bd. of Cty. Comm’rs*, No. 07-00710 MV/WDS, 2008 WL 11327379, at \*11 (D.N.M. Sept. 30, 2008).

99. *Herb Reed Enters., L.L.C. v. Fla. Entm’t Mgmt., Inc.*, 736 F.3d 1239, 1250 n.5 (9th Cir. 2013).

100. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

101. See *McGehee v. Hutchinson*, No. 4:17-cv-00179 KGB, 2017 WL 1399554, at \*4 (E.D. Ark. Apr. 15, 2017) (declining to apply *Daubert* at the preliminary injunction stage but carefully weighting the expert evidence in accordance with its reliability); *Tex. Med. Providers Performing Abortion Servs. 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) (concluding arguments that declarations did not satisfy *Daubert* and were otherwise inadmissible under the FRE “lack[ed] merit” because courts may rely on otherwise inadmissible evidence); *Half Price Books, Records, Magazines, Inc. v. Barnesandnoble.com, L.L.C.*, No. Civ.A. 302CV2518-G, 2003 WL 23175432, at \*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 Found. 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) (applying *Daubert* nominally, 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”).

102. See, e.g., *A.A. v. Raymond*, No. 2:13-cv-01167-KJM-EFB, 2013 WL 3816565, at \*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



practice in bench trials, where courts regularly take expert testimony and then, once they have heard it, decide whether it satisfies the requirements of *Daubert*.<sup>103</sup>

A substantial number of courts, however, *have* applied *Daubert* at the preliminary injunction phase.<sup>104</sup> On occasion, judges have even deemed experts unqualified to testify at this stage and excluded their testimony.<sup>105</sup> What distinguishes these cases from the cases that decline to apply *Daubert*? In none of the cited cases did the court *consider* whether the Rule should *not* apply at the preliminary injunction phase. From all appearances, it seems that one party moved to exclude the witness's testimony, the other party responded with its own *Daubert* arguments, and the court resolved the evidentiary dispute under Rule 702.

A similar dynamic has played out with Rule 408, which excludes statements made during settlement negotiations for purposes of proving the validity or amount

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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 reliability. . . ."); Oklahoma *ex rel.* Edmondson v. Tyson Foods, Inc., No. 05-CV-329-GKF-SAJ, 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.").

103. 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.").

104. See, e.g., *Michigan v. U.S. Army Corps of Eng'rs*, 667 F.3d 765, 783 (7th Cir. 2011) ("[T]he district judge's decision to admit the expert testimony of Dr. David Lodge. . . reflects a proper application of Federal Rule of Evidence 702."); *FTC v. BF Labs Inc.*, No. 4:14-CV-00815-BCW, 2014 WL 7238080, at \*2 n.3 (W.D. Mo. Dec. 12, 2014); *Healthpoint, Ltd. v. Stratus Pharm., Inc.*, No. SA-00-CA-726-PM, 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'l Bank & Tr. v. Charter One Fin., 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 Rule 703 while not countenancing a hearsay objection); *A Woman's Choice—E. Side Women's Clinic v. Newman*, 980 F. Supp. 962, 973 n.6 (S.D. Ind. 1997) (applying *Daubert* to social science testimony relating to the burden of abortion laws); Transcript of Record at 35, *Warner v. Gross*, No. 5:14-cv-0665-F, 2014 WL 7671680 (W.D. Okla. Dec. 22, 2014) ("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.").

105. *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 & Tr.*, 2001 WL 1035721, at \*6 (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").

of a disputed claim or impeaching a witness.<sup>106</sup> 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.<sup>107</sup> If courts may consider statements made during settlement negotiations at the preliminary injunction stage, that would undermine the incentives created by the Rule. However, some courts have suggested that even this Rule might not apply in the preliminary injunction context,<sup>108</sup> or they have declined to apply the Rule but then given the evidence no weight, so as not to deter settlement talks.<sup>109</sup> But again, courts sometimes do not consider whether the FRE apply at this stage: instead, they simply address Rule 408 motions as they arise.<sup>110</sup>

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.

This final practice suggests that the standard-setting court of appeals decisions do not fully represent actual court practice. The next Section discusses 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 better understanding of how these hearings work in practice. Our conversations suggested that procedures between courts differ, although some common themes emerged.

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106. FED. R. EVID. 408.

107. See FED. R. EVID. 408 advisory committee's note to proposed rule ("[A] more consistently impressive ground is promotion of the public policy favoring the compromise and settlement of disputes."):

108. See, e.g., *Doe #1 ex rel. Lee v. Sevier Cty.*, 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 Enters. 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).

109. See *USA Visionary Concepts, LLC v. MR Int'l LLC*, No. 4:09-CV-00874-DGK, 2009 WL 10672094, at \*5 (W.D. Mo. Nov. 17, 2009).

110. See, e.g., *R.G.I.S. LLC v. A.S.T. Inc.*, No. 07-10975, 2008 WL 878908, at \*4 (E.D. Mich. Mar. 28, 2008) ("[T]he 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 . . ."); *Serotonin Research & Techs., Inc. v. Unigen Pharm., Inc.*, 541 F. Supp. 2d 1238, 1240 n.1 (D. Utah 2008) (granting in part a motion to strike evidence under Rule 408).

A major difference—even among these five judges from within three circuits—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.<sup>111</sup> 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.<sup>112</sup> Another judge, 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.<sup>113</sup> A magistrate judge—who usually hears preliminary injunction motions after a temporary restraining order is already in place—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.<sup>114</sup> She said she rarely, if ever, decides preliminary injunctions on affidavits.<sup>115</sup>

The judges generally said they entertained evidentiary objections, including hearsay objections.<sup>116</sup> (One speculated that lawyers may incorrectly believe that the FRE apply, and that’s why they make objections under the rules.<sup>117</sup>) The judge whose hearings look more like trials tended to apply the FRE fairly strictly,<sup>118</sup> but the other judges overwhelmingly said they tended to be more lenient in this context,<sup>119</sup> particularly if any flaws in the evidence could be fixed at trial.<sup>120</sup> They said that clearly inadmissible evidence, such as an affidavit with no foundation, would not be allowed.<sup>121</sup> But they generally allow reliable evidence to come in—several emphasized that “reliability” is key—even if it is excludable under the FRE.<sup>122</sup> They use the parties’ evidentiary objections largely to determine the appropriate weight of the evidence.<sup>123</sup> For example, two judges said they do apply

111. Interview with a United States District Judge within the Eighth Circuit (Oct. 27, 2017) [hereinafter Eighth Circuit District Judge 1 Interview].

112. *Id.*

113. Tenth Circuit District Judge 1 Interview, *supra* note 22.

114. Magistrate Judge Interview, *supra* note 22.

115. *Id.*

116. Eighth Circuit District Judge 1 Interview, *supra* note 111; Magistrate Judge Interview, *supra* note 22; Tenth Circuit District Judge 1 Interview, *supra* note 22.

117. Interview with a United States District Judge within the Tenth Circuit (Nov. 3, 2017) [hereinafter Tenth Circuit District Judge 2 Interview].

118. Magistrate Judge Interview, *supra* note 22.

119. Tenth Circuit District Judge 1 Interview, *supra* note 22.

120. Interview with a United States District Judge within the Eighth Circuit (Oct. 13, 2017) [hereinafter Eighth Circuit District Judge 2 Interview].

121. Eighth Circuit District Judge 1 Interview, *supra* note 111; Tenth Circuit District Judge 1 Interview, *supra* note 22.

122. Eighth Circuit District Judge 1 Interview, *supra* note 111; Eighth Circuit District Judge 2 Interview, *supra* note 120; Tenth Circuit District Judge 1 Interview, *supra* note 22; Tenth Circuit District Judge 2 Interview, *supra* note 117.

123. Eighth Circuit District Judge 1 Interview, *supra* note 111; Eighth Circuit District Judge 2 Interview, *supra* note 120; Tenth Circuit District Judge 2 Interview, *supra* note 117.

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.<sup>124</sup>

These conversations suggest that preliminary injunction practice varies. Some judges may apply the FRE 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 FRE, and the judges consider them, whether for purposes of exclusion or weight. In light of these judges' comments and the published decisions, it seems that whether and how a court applies the FRE 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 FRE.<sup>125</sup>

## II. CRITIQUE OF THE CURRENT PRACTICE

This highly discretionary, somewhat variable regime is a far cry from trial proceedings, where the Federal Rules of Evidence govern. Although a number of the Rules allow for discretion in admitting evidence,<sup>126</sup> 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 Part critiques the courts of appeals' approach to evidence in preliminary injunction motions. I focus on preliminary injunctions, as opposed to temporary restraining orders (TROs).<sup>127</sup> 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 fourteen days, and they address true emergencies. Because the FRCP 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.

I analyze current practice from three angles: text, history, and policy. First, the FRE and the FRCP do not provide a clear textual basis for departure in the preliminary injunction context. Second, the current, flexible regime is not an

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124. Eighth Circuit District Judge 1 Interview, *supra* note 111; Tenth Circuit District Judge 1 Interview, *supra* note 22.

125. Another possibility is that parties may enter into agreements with *each other* about how to handle evidentiary issues during preliminary injunction proceedings. Cf. Robert G. Bone, *Party Rulemaking: Making Procedural Rules Through Party Choice*, 90 TEX. L. REV. 1329, 1349 (2012) (discussing pretrial agreements to waive evidence objections). These agreements would show up in neither the reported caselaw nor conversations with judges.

126. See, e.g., FED. R. EVID. 403; FED. R. EVID. 807.

127. See FED. R. CIV. P. 65(b).

inherent feature of equity—historically, courts of equity applied rules of evidence—although it *is* a longstanding feature of preliminary injunction practice. Third, the policy justifications courts have advanced to justify the departure from the FRE 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 FRE would not have consequences as dire 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 FRE.

#### *A. The Text of the Rules*

This unregulated evidentiary regime is not specifically authorized by the FRE or the FRCP. Under the best textual reading of those Rules, it should probably be disallowed—the FRE should probably apply to preliminary injunction hearings.

Both the FRCP and the FRE contain a provision instructing courts to interpret them to promote fairness, justice, efficiency, and in the case of evidence, truth seeking.<sup>128</sup> Courts generally interpret both the FRCP and the FRE 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.<sup>129</sup> This equivalence between statutes and rules has come under scholarly fire in the context of the FRCP, which are drafted by an advisory committee and typically enacted through legislative silence.<sup>130</sup> As theories of statutory interpretation tend to begin from the premise of legislative supremacy, they do not translate to the FRCP.<sup>131</sup> Several scholars have therefore suggested interpreting these Rules as though they were administrative regulations.<sup>132</sup> 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 the FRE.<sup>133</sup> According to Rule 1101, the FRE “apply to proceedings before . . . United States

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128. See FED. R. CIV. P. 1; FED. R. EVID. 102.

129. See *Pavelic & LeFlore v. Marvel Entm't Grp.*, 493 U.S. 120, 123 (1989) (Federal Rules of Civil Procedure); *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 508–09 (1989) (Federal Rules of Evidence).

130. The original FRE were enacted by Congress. See Pub. L. No. 93-595, 88 Stat. 1926 (1975).

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

132. See *id.* at 2225; Elizabeth G. Porter, *Pragmatism Rules*, 101 CORNELL L. REV. 123, 177 (2015).

133. Section 101(a) of the Federal Rules of Evidence provides: “These rules apply to proceedings in United States courts. The specific courts and proceedings to which the rules apply, along

district courts,”<sup>134</sup> specifically “civil cases and proceedings.”<sup>135</sup> The FRE, then, apply to both jury trials and bench trials, to both law and equity. Rule 1101(d) specifies “exceptions,” where the FRE 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.”<sup>136</sup> In addition, Rule 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 Rule 1101(d)’s “exceptions.” The best chance for exclusion is Rule 1101(d)(3)’s exclusion for

with exceptions, are set out in Rule 1101.” FED. R. EVID. 101(a). Section 1101 of the Federal Rules of Evidence provides, in its entirety:

- (a) **To Courts and Judges.** These rules apply to proceedings before:
- United States district courts;
  - United States bankruptcy and magistrate judges;
  - United States courts of appeals;
  - the United States Court of Federal Claims; and
  - the district courts of Guam, the Virgin Islands, and the Northern Mariana Islands.
- (b) **To Cases and Proceedings.** These rules apply in:
- civil cases and proceedings, including bankruptcy, admiralty, and maritime cases;
  - criminal cases and proceedings; and
  - contempt proceedings, except those in which the court may act summarily.
- (c) **Rules on Privilege.** The rules on privilege apply to all stages of a case or proceeding.
- (d) **Exceptions.** These rules—except for those on privilege—do not apply to the following:
- (1) the court’s determination, under Rule 104(a), on a preliminary question of fact governing admissibility;
  - (2) grand-jury proceedings; and
  - (3) 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.
- (e) **Other Statutes and Rules.** A federal statute or a rule prescribed by the Supreme Court may provide for admitting or excluding evidence independently from these rules.

FED. R. EVID. 1101.

134. 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.”).

135. 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” indicated the Rules might not apply to certain motions. 5 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *FEDERAL EVIDENCE* § 11:3 (4th ed. 2009). But the word “generally” is no longer in the text. *See* FED. R. EVID. 1101(b). 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 MUELLER & KIRKPATRICK, *supra*. This thin rationale no longer applies.

136. FED. R. EVID. 1101(d).

“miscellaneous proceedings.”<sup>137</sup> The examples given in the list are not exhaustive, as indicated by the introductory phrase “such as,” which was added in the 2011 restyling of the FRE to more accurately capture court practice.<sup>138</sup> But under the principle of *noscitur a sociis*, “a word is known by the company it keeps,”<sup>139</sup> and the phrase “miscellaneous proceedings” should be read in light of the examples that follow. Indeed, some courts have recognized that “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.”<sup>140</sup> But a preliminary injunction hearing does not closely resemble the proceedings listed in Rule 1101(d)(3), all of which relate to *criminal* proceedings ancillary to trial. Indeed, courts have found the FRE 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.<sup>141</sup> Preliminary injunction hearings, as civil proceedings, are distinct.<sup>142</sup>

The FRCP do not permit additional evidence, with one pertinent 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.”<sup>143</sup> This indicates that a court may, in its discretion, hear motions on affidavits.<sup>144</sup>

137. FED. R. EVID. 1101(d).

138. See Memorandum from Daniel Capra, Reporter, Evidence Rules Comm., to Advisory Comm. on Evidence Rules, in ADVISORY COMMITTEE ON EVIDENCE RULES 235–36 (Apr. 23–24, 2009), <https://www.uscourts.gov/file/15559/download> [https://perma.cc/P3HJ-JDYT] (noting that “there are a number of proceedings not on the list in which courts have held that the rules are not applicable,” including “supervised release revocation proceedings and proceedings to determine whether a juvenile should be tried as an adult”). Deborah Jones Merritt notes that before the restyling, some courts interpreted Rule 1101(d)(3) as an exhaustive list, and she argues that the addition of “such as” may have changed the substance of the Rule. See Deborah Jones Merritt, *Social Media, the Sixth Amendment, and Restyling: Recent Developments in the Federal Law of Evidence*, 28 *TOURO L. REV.* 27, 32–36 (2012).

139. *Yates v. United States*, 574 U.S. 528, 543 (2015).

140. *Parker v. State*, 769 S.E.2d 329, 334 (Ga. 2015) (emphasis added).

141. See 11A WRIGHT ET AL., *supra* note 29, § 8077 n.9; see also 5 MUELLER & KIRKPATRICK, *supra* note 135, § 11:5 (citing other criminal proceedings in which the Rules do not apply under Rule 1101(d)(3)).

142. 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 2 JOSHUA DRESSLER & ALAN C. MICHAELS, *UNDERSTANDING CRIMINAL PROCEDURE* 8 (4th ed. 2015). Bail hearings more closely resemble *ex parte* temporary restraining order proceedings than preliminary injunction hearings. Cf. Russell M. Gold, *Jail as Injunction*, 107 *GEO. L.J.* 501 (2019) (arguing that pretrial detention determinations should be made under a standard akin to the preliminary injunction standard).

143. FED. R. CIV. P. 43(c).

144. 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.

Rule 65, which governs preliminary injunction motions, does not expressly permit otherwise-inadmissible evidence. But 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.”<sup>145</sup> This suggests that some evidence received on a preliminary injunction motion will *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 seriously addressed the tension between Rule 1101 and declining to apply the FRE to preliminary injunction motions.<sup>146</sup> Those that have noticed the tension simply use preliminary injunctions as an example of Rule 1101(d)(3) being an inexhaustive list of exceptions.<sup>147</sup> In one instance, a court had relied on Rule 1101(d)(3) to express skepticism about the inapplicability of the FRE 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.<sup>148</sup>

And courts have taken the silence of Rule 65 to indicate a *lack* of restrictions on evidence. Whereas Rule 56, which governs motions for summary judgment, specifies what information is admissible—including requirements for affidavits and a provision for objections that evidence cannot be presented in admissible form<sup>149</sup>—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,<sup>150</sup> as has the Third Circuit.<sup>151</sup> Wright and Miller suggest that it would be illogical to impose the strict standards of Rule 56 on preliminary injunction motions.<sup>152</sup> 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 means only that affidavits submitted pursuant to Rule 43(c) are not specifically governed by Rule 56(c)(4). This does create a tension in the Rules, as Rule 56(c)(4)

145. FED. R. CIV. P. 65 (a)(2).

146. A Westlaw search for “1101(d)” /p “preliminary injunction!” yields three district court cases. THOMSON REUTERS WESTLAW EDGE, <https://www.westlaw.com> [<https://perma.cc/TT6N-MV4V>] (search “1101(d)” /p “preliminary injunction!” in the search bar using all state and federal filters).

147. *See* Forsberg v. Pefanis, 261 F.R.D. 694, 700 (N.D. Ga. 2009) (discussing Arista Records L.L.C. v. Does 1–27, 584 F. Supp. 2d 240 (D. Me. 2008)); *Arista Records*, 584 F. Supp. 2d at 255–56 (citing *Asseo v. Pan Am. Grain Co.*, 805 F.2d 23, 26 (1st Cir. 1986)).

148. *See* Occupy Denver v. City of Denver, No. 11-cv-03048-REB-MJWW, 2011 WL 6096501, at \*1 n.2 (D. Colo. Dec. 7, 2011) (citing *Heideman v. South Salt Lake City*, 348 F.3d 1182 (10th Cir. 2003)).

149. *See* FED. R. CIV. P. 56(c).

150. *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 725 (4th Cir. 2016).

151. *Kos Pharm., Inc. v. Andrx Corp.*, 369 F.3d 700, 718–19 (3d Cir. 2004).

152. 11A WRIGHT ET AL., *supra* note 29, § 2949; *see also* J.P. Morgan Sec. L.L.C. v. Manne, No. 16-818-JWD-RLB, 2016 WL 7223358, at \*2 (M.D. La. Dec. 12, 2016) (order granting temporary restraining order) (“The Fifth Circuit follows Wright & Miller.”).



effectively requires the affiant's statements to conform to the Rules of Evidence. But the tension does not suggest a clear resolution in favor of admissibility.

This rejection of the FRE without explicit authorization is not unique to preliminary injunction motions: courts have also rejected application of the FRE 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).<sup>153</sup> Linda Mullenix has argued that evidentiary rules should apply to these proceedings, in part on this textual basis.<sup>154</sup> 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 FRE 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."<sup>155</sup> The brief called the conclusion that the Rules apply to class certification proceedings "inescapable" "[a]s a logical matter."<sup>156</sup>

Textually, the FRE and FRCP do not provide for a wholesale rejection of the Federal Rules of Evidence in the context of preliminary injunction motions. Instead they provide for a narrow exception: affidavits and depositions. Courts have not been convinced by the text, however, so I turn to history and policy.

### B. Historical Context

The Supreme Court has indicated that "history is a crucial guidepost in evaluating the scope of federal equitable power."<sup>157</sup> Courts have looked to the equity tradition to emphasize that the judge, sitting as chancellor, has broad discretion and flexibility in determining what relief is appropriate.<sup>158</sup> Law and equity have

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

154. See *id.*

155. 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. Behrend*, 569 U.S. 27 (2013) (No. 11-864), 2012 WL 3643755.

156. *Id.*

157. Lee, *supra* note 49, at 125; *Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 333 (1999) ("Because such 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."); 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."). 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).

158. 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").

merged,<sup>159</sup> and the Rules govern all cases, but courts still sometimes invoke equitable tradition and custom when discussing procedural issues.<sup>160</sup> Equity historically focused on considerations of justice and fairness.<sup>161</sup> If nineteenth-century courts of equity<sup>162</sup> 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.

Although courts of chancery had more evidentiary flexibility than courts of law, they were hardly unconstrained. The evidentiary regime in early equity courts may have resembled the civilian law of proof more than the common law.<sup>163</sup> But even in that early period, judges in equity were apparently bound by the rules as they existed.<sup>164</sup> Later, the evidentiary rules of equity and common law converged in many respects, although practice never aligned precisely.<sup>165</sup> “The rules as to evidence are the same in equity as at law,” declared Lord Hardwicke in 1737.<sup>166</sup> 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.<sup>167</sup> 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 limited class of cases,<sup>168</sup> 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.”<sup>169</sup>

159. 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).

160. See, e.g., *Univ. of Tex. 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); Eighth Circuit District Judge 1 Interview, *supra* note 111; see also Mark Spottswood, *Live Hearings and Paper Trials*, 38 FLA. ST. U. L. REV. 827, 870 (2011).

161. See Subrin, *supra* note 159, at 919.

162. 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.” 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. *Id.* at 1001. Since courts look to this period, and since this period runs directly into the era governed by the Federal Rules of Civil Procedure, I focus on it as the most sensible reference point.

163. See MICHAEL R. T. MACNAIR, *THE LAW OF PROOF IN EARLY MODERN EQUITY* 14, 35 (1999).

164. *Id.* at 294.

165. See RICHARD NEWCOMBE GRESLEY, *A TREATISE ON THE LAW OF EVIDENCE IN THE COURTS OF EQUITY* 1 (Christopher Alderson Calvert ed., 1847) (“Evidence in the Courts of Equity, although materially differing in its character and many of its rules from that which is used in the Courts of Common Law . . .”).

166. *Manning v. Lechmere* (1737) 26 Eng. Rep. 288, 288; 1 Atk. 453, 453.

167. See *Glynn v. Bank of England* (1750) 26 Eng. Rep. 26, 27–28; 2 Ves. Sen. 38, 41.

168. *Man v. Ward* (1741) 26 Eng. Rep. 541; 2 Atk. 228; *Glynn* 26 Eng. Rep. at 28; 2 Ves. at 42; 3 SIMON GREENLEAF, *A TREATISE ON THE LAW OF EVIDENCE* § 250 (16th ed. 1899).

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

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 submit testimony in courts of equity.<sup>170</sup> Second, 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.<sup>171</sup> In equity courts, the evidence was all disclosed simultaneously at the moment of “publication,” after which no further evidence was admissible without special leave.<sup>172</sup> (In complicated cases, the court might assign a “master,” who could seek out additional evidence from the parties.<sup>173</sup> The master might take testimony by oral examination with the parties present.<sup>174</sup>) 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.<sup>175</sup> But federal judges sitting in equity relied on written evidence—interrogatories, transcripts, pleadings, and written documentation<sup>176</sup>—until the New Federal Equity Rules went into effect in 1913.<sup>177</sup> Even after 1913, courts continued to hear motions on affidavits at the preliminary injunction stage.<sup>178</sup>

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.<sup>179</sup> 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.<sup>180</sup> But the difference in

manner of taking it is different.”); C.L. BATES, FEDERAL EQUITY PROCEDURE (1901) (“It is a fundamental principle that courts of equity follow the common-law rules of evidence . . .”); 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.”).

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, at 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. EQUITY R. 67 (1842) (repealed in 1938 with the adoption of the FRCP), 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.

177. HOPKINS, *supra* note 175, at 240 (reproducing Federal Rule of Equity 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, at 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 first *Bryant v. Leyland*, 6 F. 125, 127 (C.C.D. Mass. 1881); and then citing *Chi. & Nw. Ry. Co. v. Kendall*, 167 F. 62, 65 (8th Cir. 1909)).

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

manner of taking evidence did not alter other evidence rules, such as competency.<sup>181</sup> The system of gathering evidence differed greatly between the two systems; the rules of evidence differed far less.

The rule against hearsay applied in English equity courts, as well as in common law, by the mid-nineteenth century.<sup>182</sup> The rule was relatively late to develop: it did not apply with rigor in *either* law or equity during most of their separate existence. A few early equity cases suggest that hearsay is different from sworn testimony, and courts should give it little, if any, weight.<sup>183</sup> Other cases indicate that a witness must testify on the basis of his knowledge, not merely his belief.<sup>184</sup> But the exclusionary rule against hearsay likely did not solidify until around the late eighteenth or early nineteenth century—until then, use of hearsay was apparently within the court’s discretion, even at English common law.<sup>185</sup>

Also, there was *some* additional flexibility in equity, beyond that at law. One treatise notes that if it would be “inconvenient and unreasonably expensive” to produce evidence in the regular manner in a court of equity, the court could allow the normally inadmissible evidence by special order.<sup>186</sup>

And at least by the mid-nineteenth century, American equity courts did allow additional flexibility at preliminary injunction proceedings. One court noted specifically 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.”<sup>187</sup>

The rules of evidence at equity, then, contained more flexibility than the rules of evidence at law, and the manner of taking evidence was different; but courts still faced constraints and largely adhered to the rules. However, courts do have a long

181. Manning v. Lechmere (1737) 26 Eng. Rep. 288, 288; 1 Atk. 453, 453.

182. See GRESLEY, *supra* note 165, at 304 (“Hearsay is inadmissible . . .”). I have not found a treatise on either 19<sup>th</sup> Century American equity or 19<sup>th</sup> Century American evidence that discusses whether the rule against hearsay applied at equity.

183. See MACNAIR, *supra* note 163, at 260 (quoting Bath & Montague’s Case (1693) 22 Eng. Rep. 963, 1002; 3 Ch. Cas. 54, 119 (Somers, LK) (“[T]here is no Proof of it; it is at most but an Hear-say, testified by one Witness.”)).

184. See *id.*

185. John H. Langbein, *The Historical Foundations of the Law of Evidence: A View from the Ryder Sources*, 96 COLUM. L. REV. 1168, 1201 (1996); T.P. Gallanis, *The Rise of Modern Evidence Law*, 84 IOWA L. REV. 499, 530–37 (1999); Richard D. Friedman, *The Mold that Shapes Hearsay Law*, 66 FLA. L. REV. 433, 437 n.18 (2014).

186. 3 GREENLEAF, *supra* note 168, § 340.

187. Casey v. Cincinnati Typographical Union No. 3, 45 F. 135, 147 (C.C.S.D. Ohio 1891) (noting that evidence was not hearsay and that even if it were, the rules apply less strictly in this context); see also Green v. City of Lynn, 55 F. 516, 518 (C.C.D. Mass. 1893) (“[T]his question did not arise on a motion for an ad interim injunction, with reference to which the rules of evidence are not strict, but are molded to meet the convenience of a summary hearing.”); Buck v. Hermance, 4 F. Cas. 548, 549 (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”).

history of flexibility at the preliminary injunction stage, which suggests a need for at least some relief from the FRE at this stage. To see when that is and isn't necessary, I turn to policy.

### C. Policy Justifications

Courts have advanced two central reasons for permitting inadmissible evidence in preliminary injunction proceedings: the provisional nature and limited purpose of the remedy, and the need to prevent irreparable harm given time constraints. I discuss both. First, I argue that the provisional-and-limited 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 FRE to some degree. However, I demonstrate that applying the FRE 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 little evidence on this important factor.

#### 1. Provisional Nature and Limited Purpose 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,<sup>188</sup> 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.”<sup>189</sup> 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.”<sup>190</sup> Wright and Miller note that on motions for summary judgment, it is important to impose the same evidentiary safeguards that exist at 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.”<sup>191</sup>

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188. See, e.g., *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 725 (4th Cir. 2016) (citing *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981)); *Mullins v. City of New York*, 626 F.3d 47, 52 (2d Cir. 2010) (citing *Camenisch*, 451 U.S. 390); *Kos Pharm., Inc. v. Andrx Corp.*, 369 F.3d 700, 718 (3d Cir. 2004) (citing *Camenisch*, 451 U.S. 390); *Heideman v. South Salt Lake City*, 348 F.3d 1182, 1188 (10th Cir. 2003) (citing *Camenisch*, 451 U.S. 390).

189. *Camenisch*, 451 U.S. at 395.

190. *Id.* (emphasis added).

191. 11A WRIGHT ET AL., *supra* note 29, § 2949; see also *Mullins v. City of New York*, 634 F. Supp. 2d 373, 377 (S.D.N.Y. 2009) (“A preliminary injunction is an interim remedy, and the burdensome requirements of trial testimony are at odds with its provisional purpose.”). Note that the preliminary injunction in *Mullins* was truly provisional, as it enjoined penalizing participation in the suit.

This emphasis on preliminary injunctions as a device that merely preserves the status quo has a long history<sup>192</sup> that continues to present day,<sup>193</sup> but as several scholars have demonstrated,<sup>194</sup> it is 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,<sup>195</sup> and “[i]f 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 . . . .”<sup>196</sup> In the travel ban cases, for example, courts preliminarily enjoined an executive order that was already in effect.<sup>197</sup> In *Camenisch* itself,<sup>198</sup> the district court’s preliminary injunction ordered the defendant university to provide an interpreter for the plaintiff, a deaf student, to assist him in his classes. That, too, disrupted the status quo: the status quo was Walter Camenisch being disadvantaged in class. On the other hand, the plaintiff would have lost his job if he could not take classes at the university,<sup>199</sup> so in another 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 the requested injunction would disturb the status quo or is mandatory (requiring action), as opposed to prohibitory (forbidding action).<sup>200</sup> 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.”<sup>201</sup> But in a number of cases—think of Gavin Grimm trying to use the boys’ room or Walter Camenisch seeking an interpreter—there is no “peaceable, 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.”<sup>202</sup>

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192. See WILLIAM WILLIAMSON KERR, A TREATISE ON THE LAW AND PRACTICE OF INJUNCTIONS IN EQUITY 11–12 (1871) (“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 49, at 124–38.

193. See *Benisek v. Lamone*, 138 S. Ct. 1942, 1945 (2018) (quoting *Camenisch*, 451 U.S. 390).

194. See Lee, *supra* note 49, at 140–43 (discussing “mandatory” injunctions that altered the status quo in Nineteenth Century America); Leubsdorf, *supra* note 27, at 546.

195. See James T. Carney, *Rule 65 and Judicial Abuse of Power: A Modest Proposal for Reform*, 19 AM. J. TRIAL ADVOC. 87, 88–89 (1995); Lee, *supra* note 49, at 163.

196. *Canal Auth. v. Callaway*, 489 F.2d 567, 576 (5th Cir. 1974).

197. See, e.g., *Aziz v. Trump*, 234 F. Supp. 3d 724 (E.D. Va. 2017).

198. *Camenisch v. Univ. of Tex.*, No. A-78-CA-061, 1978 WL 51 (W.D. Tex. May 17, 1978), *vacated in part sub nom., Camenisch*, 451 U.S. 390; *Camenisch v. Univ. of Tex.*, 616 F.2d 127, 129 (5th Cir. 1980), *vacated in part sub nom., Camenisch*, 451 U.S. 390.

199. *Camenisch*, 1978 WL 51, 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”).

200. Lee, *supra* note 49, at 115–21.

201. *Opticians Ass’n of Am. v. Indep. Opticians of Am.*, 920 F.2d 187, 197 (3d Cir. 1990) (quoting 2 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).

202. Leubsdorf, *supra* note 27, at 546.

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.<sup>203</sup> The notion 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.<sup>204</sup> 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.<sup>205</sup>

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 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.<sup>206</sup> In Gavin Grimm's case, the Supreme Court stayed the preliminary injunction issued in his favor,<sup>207</sup> vacating and remanding only after most of his senior year had passed.<sup>208</sup> Grimm graduated without ever being permitted to use the boys' bathroom.<sup>209</sup> And consider labor injunctions—an historically significant breed of injunction that is less prominent today, thanks to New Deal

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203. 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).

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

205. *See* FRANKFURTER & GREENE, *supra* note 178, at 78–80 (noting that while, in the labor dispute context, 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”).

206. *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”).

207. Gloucester Cty. Sch. Bd. v. G.G. *ex rel.* Grimm, No. 16A52, 136 S. Ct. 2442, 2442 (2016) (mem.).

208. Gloucester Cty. Sch. Bd. v. G.G. *ex rel.* Grimm, No. 16-273, 137 S. Ct. 1239, 1239 (2017) (mem.).

209. 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), <https://www.nytimes.com/2018/05/22/us/gavin-grimm-transgender-bathrooms.html> [https://perma.cc/K9SV-6KCF].

legislation protecting the right to strike.<sup>210</sup> Because strikes are so time sensitive,<sup>211</sup> a preliminary injunction enjoining a strike may spur the workers to abort their efforts entirely.<sup>212</sup> 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.”<sup>213</sup>

Even if a preliminary injunction decision does not end a case, it may heavily influence the judge’s ultimate ruling on the case.<sup>214</sup> Kevin Lynch has addressed how the psychological “lock-in effect” applies to preliminary injunction determinations.<sup>215</sup> Psychological research has shown that decisionmakers “lock in” to an initial decision and are reluctant to change their decision when asked to revisit it.<sup>216</sup> 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.<sup>217</sup> 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.<sup>218</sup>

In addition, settlement negotiations occur in the shadow of a preliminary injunction decision.<sup>219</sup> The decision severely alters the bargaining positions of the

210. 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., *A.B.X. Air, Inc. v. Int’l Bhd. of Teamsters*, No. 1:16-cv-1096, 2016 WL 7117388 (S.D. Ohio Dec. 7, 2016); *Bhd. of Maint. of Way Emps. Division/IBT v. B.N.S.F. Ry., Inc.*, 134 F. Supp. 3d 1208 (C.D. Cal. 2015).

211. See 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.”); Jon R. Kerian, *Injunctions in Labor Disputes: The History of the Norris-LaGuardia Act*, 37 N.D. L. REV. 49, 51 (1961) (“[S]trikes are usually won or lost within a few days . . .”).

212. See Kerian, *supra* note 211, at 52 (“Once the injunction was granted, the strikers’ fervor was abated and the strike was lost.”); Luke P. Norris, *Labor and the Origins of Civil Procedure*, 92 N.Y.U. L. REV. 462, 489 (2017).

213. FRANKFURTER & GREENE, *supra* note 178, at 80.

214. See Kenneth R. Berman, *Litigating Preliminary Injunctions: Sudden Injustice on a Half-Baked Record*, 15 PRAC. LITIGATOR 31, 33 (2004) (“As a practical matter, the decision on the preliminary injunction motion is often case dispositive.”).

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

216. *Id.* at 781.

217. *Id.*

218. Lynch focuses on *denial* of preliminary injunction. However, because granting a preliminary injunction may also allow irreparable harm to occur, as discussed *infra* Section II.C.2., 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. Lynch, *supra* note 215, at 798. I disagree with this in the next section.

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



parties, and parties often settle after a preliminary injunction decision.<sup>220</sup> 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 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.”<sup>221</sup> Others have acknowledged that “a preliminary injunction is somewhat like a judgment and execution before trial.”<sup>222</sup> 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.”<sup>223</sup> 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,”<sup>224</sup> “may even, as a practical matter, determine the outcome of a case,”<sup>225</sup> and “are so significant, they are one of the few categories of motions that may be heard as interlocutory appeals.”<sup>226</sup>

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.<sup>227</sup>

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220. See Douglas Laycock, *The Triumph of Equity*, 56 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); Julie S. Turner, Comment, *The Nonmanufacturing Patent Owner: Toward a Theory of Efficient Infringement*, 86 CALIF. L. REV. 179, 205 (1998) (noting, in the patent context, “[t]he grant or denial of a preliminary injunction has a very powerful impact on settlement”); cf. Leubsdorf, *supra* note 27, 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.”).

221. *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 742 (2d Cir. 1953).

222. *Herman v. Dixon*, 141 A.2d 576, 577 (Pa. 1958) (opinion of Justice Herbert Cohen).

223. *Quest Integrity USA, L.L.C. v. A.Hak Indus. Servs. US, L.L.C.*, No. C14-1971RAJ, 2015 WL 4495283, at \*2 (W.D. Wash. July 23, 2015).

224. *Ctr. for Auto Safety v. Chrysler Grp., L.L.C.*, 809 F.3d 1092, 1098 (9th Cir. 2016).

225. *Id.* at 1099.

226. *Id.*

227. Cf. Mullenix, *supra* note 153, 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.”).

## 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”<sup>228</sup> 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 application may make it more difficult to obtain affidavits from people who are competent to testify at trial.”<sup>229</sup> And because the decision to grant a preliminary injunction is discretionary, “the trial court should be allowed to give even inadmissible evidence some weight . . . in order to serve the primary purpose of preventing irreparable harm before a trial can be had.”<sup>230</sup> The Ninth Circuit has justified the use of affidavits by the need to avoid a full hearing and “give speedy relief from irreparable injury,”<sup>231</sup> a central purpose of preliminary injunctions.

The timing problem has two related parts: the inability of litigants to discover the best evidence in a short timeframe,<sup>232</sup> and the need for courts to spend less time on the preliminary injunction hearing than they would on a full trial.<sup>233</sup> The second concern 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. If and when a written statement would be more efficient than live testimony, the parties may submit that sworn testimony in written form. The elimination of other Federal Rules of Evidence will allow in *more* evidence, lengthening hearing time. Arguments on evidentiary objections could, indeed, require significant time. But they should not typically take up *too* much time: the FRE are designed to be applied quickly, in a trial context.<sup>234</sup> Applying the FRE could cost time in some cases, but it could save time in others.

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228. *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981).

229. 11A WRIGHT ET AL., *supra* note 29, § 2949.

230. *Id.*; *see also* G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 726 (4th Cir. 2016) (explaining that 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”).

231. *Ross-Whitney Corp. v. Smith Kline & French Labs.*, 207 F.2d 190, 198 (9th Cir. 1953).

232. *See* *Flynt Distrib. Co. 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.”).

233. *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, 387–88 (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.”).

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

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, and favorable evidence exists, they may be unable to present it. If courts are unable to 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 Federal 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 nor subject to cross-examination. The use of affidavits allows parties to focus their prehearing investigation time searching for evidence that can't be presented in affidavit form.

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,"<sup>235</sup> and deciding a motion based on affidavits alone may be inadequate.<sup>236</sup> However, most courts will hold a live hearing if facts are contested.<sup>237</sup> Many courts *require* a live hearing at a

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

236. *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] . . .").

237. *See* *Davis v. N.Y.C. Hous. Auth.*, 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."); 11A WRIGHT ET AL., *supra* note 29, § 2949 nn.29–48 and accompanying text (discussing the practice in different courts under various circumstances).

party's request if the parties dispute the facts.<sup>238</sup> If the parties would prefer to resolve the motion on a "battle of affidavits," some courts will allow it.<sup>239</sup> In sum, courts seem to take heed of Judge Friendly's wisdom in *SEC v. Frank*,<sup>240</sup> in which he advocated for tailoring the thoroughness of the preliminary injunction proceeding to the centrality of the factual disputes: "[W]here everything turns on what happened and that is in sharp dispute . . . , the inappropriateness of proceeding on affidavits attains its maximum . . ." <sup>241</sup> 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"<sup>242</sup>—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 those 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 Subsection 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 theoretical discussion of the preliminary

238. See *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."); 11A WRIGHT ET AL., *supra* note 29, § 2949 n.43 (citing cases).

239. See *Holt v. Cont'l Grp., 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.").

240. *SEC v. Frank*, 388 F.2d 486 (2d Cir. 1968).

241. *Id.* at 491.

242. 2 BENTHAM, *supra* note 236, at 262.

injunction standard. The “likelihood of success” factor involves “predicting the strength of the plaintiff’s case”<sup>243</sup> and “apprais[ing] the likelihood that various views of the facts and the law will prevail at trial.”<sup>244</sup> 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 the rights to be determined by the final judgment.”<sup>245</sup> In addition, a focus on likelihood of success at trial provides the parties with the most useful information for purposes of settlement negotiation.<sup>246</sup> In practice, courts deciding preliminary injunction motions often simply recite a litany of factual findings without couching them in terms of what the parties can likely prove at trial.<sup>247</sup> That practice clashes with the “likelihood of success” standard.

For purposes of evidence, this distinction between assessing the claim on the evidence presented and predicting the strength of the case at trial is an important one: 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 Michael Pardo’s words, the immediate goal is not “material accuracy,” or determining “what actually happened,” but rather “procedural accuracy,” or aligning the outcome with what would happen at trial.<sup>248</sup> 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,”<sup>249</sup> 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, by contrast, 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

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243. Leubsdorf, *supra* note 27, at 533 (discussing historical practice at Chancery).

244. *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.”).

245. DOUGLAS LAYCOCK, *THE DEATH OF THE IRREPARABLE INJURY RULE* 120 (1991). Laycock distinguishes this from “the probability that plaintiff will prevail on some issue of ultimate liability.” *Id.* But the likelihood that plaintiff will prevail is inherently a part of the likelihood that he will obtain the same relief permanently.

246. *Cf.* 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); Miller, *supra* note 219, at 195.

247. *See, e.g.*, *Smith v. Aroostook Cty.*, 376 F. Supp. 3d 146, 149-54 (D. Me. 2019). Courts are required to make findings of fact, *see* Fed. R. Civ. P. 52(a)(2), but I see no reason these cannot be framed in terms of what the parties are likely to be able to prove.

248. *See* Michael S. Pardo, *Pleadings, Proof, and Judgment: A Unified Theory of Civil Litigation*, 51 B.C. L. REV. 1451, 1470-71 (2010).

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

how likely it is that the plaintiff will be able to prove likelihood of harm absent a preliminary injunction at some later date.

The FRE exclude certain types of evidence *when used for an improper purpose*. For example, an out-of-court statement is inadmissible hearsay only if it is offered “to prove the truth of the matter asserted in the statement.”<sup>250</sup> 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 FRE.

For example,<sup>251</sup> 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 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.<sup>252</sup> 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,<sup>253</sup> told me that on multiple occasions, he started to write a prescription for Lexxor, and halfway through realized he actually meant to prescribe Flexxor.” 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

250. FED. R. EVID. 801(c)(2).

251. This hypothetical is loosely based on the facts of *Kos Pharmaceuticals*.

252. The doctors’ question—“How much does Lexxor cost?”—is also not hearsay, as it is not an assertion, express or implied.

253. Ironically, Dr. Cautious died B.A.S.E. jumping.

(1) Dr. Cautious said he mixed up the drugs on multiple occasions; (2) therefore, he did in fact mix up the drugs; (3) therefore, the drugs are easily confused; and (4) therefore, there are likely other doctors who will testify to mixing up 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 efforts.”<sup>254</sup> “Reasonable efforts” here could be interpreted as efforts *reasonable in the preliminary injunction context*, given time and resource constraints. The hearsay catchall 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 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.<sup>255</sup> 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.<sup>256</sup> Therefore, Rule 56 is not an exception to the rule against hearsay—affidavits introduced in that context are simply non-hearsay.<sup>257</sup> 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.<sup>258</sup>

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254. FED. R. EVID. 807(a)(2).

255. *See* Duane, *supra* note 26, at 1531–44 (arguing that affidavits submitted in support of or in opposition to a Rule 56 motion are non-hearsay).

256. *See id.*

257. The advisory committee notes to FRE 802 indicate that Rule 56 is an exception. 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.

258. In the summary judgment context, Duane calls the idea that a court may consider hearsay

Understanding likelihood-of-success evidence as meta-evidence has the greatest impact on hearsay analysis. But it may also help illuminate 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.<sup>259</sup> 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 they would use, if they 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.<sup>260</sup> 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 feasible, a researcher could introduce the pilot study at the preliminary injunction stage as meta-evidence.<sup>261</sup> As 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.<sup>262</sup> Say we have a copyright case, where

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*in the form of affidavits but not hearsay within affidavits* “senseless.” Duane, *supra* note 26, at 1529. 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. *Id.* at 1529–30. 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. Hearsay within the affidavit still has these attendant dangers.

In addition, Duane argues, the FRE do not otherwise differentiate between hearsay and multiple hearsay. *Id.* at 1530. 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: 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. FED. R. EVID. 802; FED. R. CIV. P. 43. 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.

259. FED. R. EVID. 702 (referring to when a “witness who is qualified as an expert . . . may testify”).

260. See Edwin R. van Teijlingen & Vanora Hundley, *The Importance of Pilot Studies*, SOC. RES. UPDATE, Winter 2001, at 2 tbl.1, 4 (2001), <http://sru.soc.surrey.ac.uk/SRU35.pdf> [<https://perma.cc/A4LK-7VRD>] (“Well-designed and well-conducted pilot studies can inform us about the best research process and occasionally about likely outcomes.”).

261. 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 methods but because it is a pilot study a judge may not consider it ‘reliable’ from an evidentiary perspective.”).

262. See FED. R. EVID. 404.



the plaintiff must prove that the defendant copied original elements of the plaintiff's work.<sup>263</sup> 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.<sup>264</sup> 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: (1) the defendant has a propensity for copying; (2) therefore, he copied on this occasion; (3) therefore, the plaintiff is likely to unearth evidence of copying during discovery; and (4) 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,<sup>265</sup> settlement offers,<sup>266</sup> and offers to pay medical expenses,<sup>267</sup> 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<sup>268</sup>—*should* apply at the preliminary injunction stage. If admitting evidence of subsequent remedial measures, settlement offers,<sup>269</sup> or offers to pay medical expenses at *trial* disincentivizes those behaviors, admitting the evidence during preliminary injunction hearings should 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

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263. See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991).

264. Cf. *Loggerhead Tools, L.L.C. v. Sears Holdings Corp.*, No. 12 C 9033, 2017 WL 4161976, at \*2 (N.D. Ill. Apr. 11, 2017).

265. 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.

266. See FED. R. EVID. 408.

267. See FED. R. EVID. 409.

268. FED. R. EVID. 407 advisory committee's note 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).

269. The logic is more complicated than for the other exclusionary rules. Federal Rule of Evidence 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 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 135, § 4:57. 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.

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.”<sup>270</sup> 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.<sup>271</sup> 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.<sup>272</sup> 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 I have found no court suggesting 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 some sort of proof of what they will be able to demonstrate at trial. And at each of these points, rules govern the meta-evidence that each party may present and the burden each party faces. Meta-evidence provides a helpful new way of conceptualizing what happens at each juncture. For purposes of this theoretical discussion, I use “evidence” in a broad sense: I include not only proof *admitted as evidence* but rather all factual material the parties present to a decisionmaker.

One 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.<sup>273</sup> Therefore, the parties are held to a high meta-evidentiary standard and burden—they must submit reliable, highly-probative proof of what evidence will be presented at trial. Compliance with the Rule 56(c)(4) requirements provides strong evidence that an affiant will, in fact, testify to the facts set out in the affidavit<sup>274</sup>: a person who was willing to swear to facts in an affidavit is likely to swear to the same

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270. 230 F. Supp. 2d 980, 988 n.4 (E.D. Mo. 2002), *aff'd in part*, 313 F.3d 1056 (8th Cir. 2002).

271. *See, e.g.*, *Gluco Perfect, L.L.C. v. Perfect Gluco Prods., Inc.*, No. 14-CV-1678, 2014 WL 4966102, at \*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).

272. *See Rouser v. White*, 707 F. Supp. 2d 1055, 1066 n.4 (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.”).

273. *See generally* FED. R. CIV. P. 56; Duane, *supra* note 26.

274. *See* Duane, *supra* note 26, at 1541–42.

facts on the witness stand.<sup>275</sup> All other evidence cited on a motion for summary judgment must be presentable in admissible form;<sup>276</sup> 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.<sup>277</sup> 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.<sup>278</sup>

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 itself, “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 for [judgment as a matter of law]?”<sup>279</sup> 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 potential approach to evaluating the standard on a motion to dismiss. A party’s allegations in a 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 their “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.”<sup>280</sup> This certification makes it more likely that there *will*, in fact, be evidentiary support for the factual proposition. Rule 11 does not explicitly require that the attorney believe that there will be *admissible* evidentiary support for the fact, although at least one commentator has noted that “the use of the words ‘evidence’ and ‘evidentiary support’ impart the notion of admissibility.”<sup>281</sup>

275. 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 29, § 2738.

276. See FED. R. CIV. P. 56(c)(2).

277. 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 29, § 2738 n.15 (collecting cases). *But see* *Gannon Int’l, Ltd. v. Blocker*, 684 F.3d 785, 793 (8th Cir. 2012); *Ali v. Dist. Dir.*, 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.

278. See Duane, *supra* note 26, at 1535.

279. *Id.* at 1580.

280. FED. R. CIV. P. 11(b)(3).

281. GREGORY P. JOSEPH, SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE § 1(A)(4), at 28 (5th ed. 2013). Some courts have suggested as much. See *Jackson v. Cronin*, No. 2:11-CV-00058-WCO, 2013 WL 12099477, at \*4 (N.D. Ga. Aug. 23, 2013) (“As the record suggests that there was no admissible evidence to support either of these claims, the court must necessarily conclude that plaintiff’s

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."<sup>282</sup> 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 factfinder 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*<sup>283</sup> and *Iqbal*<sup>284</sup> 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.<sup>285</sup> 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."<sup>286</sup> If an allegation is non-conclusory, it has infinite meta-evidentiary probative value. If it is conclusory, it has no probative value. The implication of this aspect of *Twombly* and *Iqbal* is that when a lawyer certifies that they have or will likely have evidence to support a more concrete and specific statement,<sup>287</sup> that is sufficiently probative for purposes of a motion to dismiss. When a lawyer certifies that they have or will likely have evidence to support a legal conclusion, that is insufficiently probative to be credited for purposes of that motion.

Although the purpose of the motion to dismiss is contested,<sup>288</sup> one commonly cited function, which the Supreme Court invoked in *Twombly*, is to filter out unmeritorious cases and allow the cases that are more likely to ultimately succeed to proceed to discovery.<sup>289</sup> Reading *Twombly* and *Iqbal* ("*Twigbal*") through a meta-

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counsel failed to conduct a reasonable inquiry to determine whether they had a legitimate basis in fact before he advocated them before the court.").

282. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508 n.1 (2002).

283. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

284. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

285. *Iqbal*, 556 U.S. at 680–81.

286. See Charles L. Barzun, *Rules of Weight*, 83 NOTRE DAME L. REV. 1957, 1958 (2008).

287. Adam Steinman suggests that non-conclusory allegations are those that identify "the real-world acts or events underlying the plaintiff's claim." Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1334 (2010).

288. Compare Daniel A. Epstein, *How Probable Is "Plausible"?*, 86 U. CHI. L. REV. ONLINE 34, 39–45 (2018) (proposing a model of the motion to dismiss that minimizes error costs), with Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551, 556 (2002) (arguing, pre-*Twombly* and *Iqbal*, that "under the Federal Rules pleadings serve but a single function: providing notice").

289. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559–60 (2007); Steinman, *supra* note 287, at 1347 (characterizing the purposes of pleading as "notice-giving, process-facilitating, and merits-screening").

evidentiary lens suggests one way to partially reduce the effectiveness of its first step 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 is likely to 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 very weak—if plaintiffs who make conclusory allegations only overwhelmingly 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 particularly likely in areas where defendants hold key evidence<sup>290</sup>—these cases may impose too high a meta-evidentiary burden.

To be clear, I am not suggesting that *judges* should inquire into the likelihood that a specific plaintiff will be able to produce evidence when ruling on a motion to dismiss. Rather, I suggest that the meta-evidence concept lets us evaluate whether *Twigbal* draws a distinction that is likely to aid in separating meritorious cases from unmeritorious cases at the motion to dismiss stage. An empirical study of this issue may not be possible—Alex Reinert likely got as close as possible by studying pre-*Twigbal* cases, concluding that “thinly” pleaded cases were no less likely to result in a plaintiff-favorable outcome than cases generally.<sup>291</sup> But meta-evidence presents one new way of conceptualizing the *Twigbal* standard.

Third, and perhaps least interestingly, offers of proof are meta-evidence. When a court sustains an evidentiary objection, the proponent of the evidence may make an offer of proof, or “proffer.”<sup>292</sup> The offer of proof informs the court of the substance of the proposed evidence and the lawyer’s theory of admissibility.<sup>293</sup> This allows the court to reconsider its ruling and, more importantly, preserves the objection for appellate review.<sup>294</sup>

Offers of proof are functionally dispositive meta-evidence for both the trial court and the court of appeals: the judge determines admissibility based on the substance of the evidence offered. However, a lawyer may make an offer of proof in one of two basic ways, and these methods differ in their meta-evidentiary value. Either counsel may summarize the evidence, orally or in writing, or counsel may

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290. Cf. Keith N. Hylton, *When Should a Case Be Dismissed? The Economics of Pleading and Summary Judgment Standards*, 16 SUP. CT. ECON. REV. 39, 41 (2008) (concluding that “pleading standards should vary with the evidentiary demands of the associated legal standards and the social costs of litigation”).

291. See generally Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 IND. L.J. 119 (2011); see also Jonah B. Gelbach, *Material Facts in the Debate over Twombly and Iqbal*, 68 STAN. L. REV. 369, 374 n.8, 376 (2016) (concluding “empirics cannot conclusively resolve the case-quality aspects of the *Twigbal* debate” and criticizing Reinert’s study for coding settlements as plaintiff-favorable outcomes).

292. See Lewis Kapner, *Offers of Proof*, 21 FAM. L.Q. 265, 268 (1987).

293. See 1 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN’S FEDERAL EVIDENCE § 103.20 (2d ed. 1997).

294. See FED. R. EVID. 103(a)(2).

produce actual witness testimony, live or by deposition.<sup>295</sup> While the witness’s live testimony out of the presence of the jury is very strong evidence of what the witness would say, counsel may be mistaken, optimistic, or imprecise in their summary.<sup>296</sup> Implicitly recognizing these concerns, Federal Rule 103(c) allows the court to direct that the offer of proof be made in “question-and-answer form.”<sup>297</sup> In this way, the Federal Rules themselves provide a mechanism to achieve sufficiently reliable meta-evidence—evidence of what evidence would be offered at trial—for both the trial court and the reviewing court of appeals.

Meta-evidence may arise elsewhere in the law,<sup>298</sup> but these three examples suffice to show that the concept is not limited to the preliminary injunction context.

### *c. Other Elements of the Preliminary Injunction Standard*

While the question for the first prong of the preliminary injunction test is “what is the plaintiff likely to prove at trial?” the other prongs of the *Winter* test<sup>299</sup> 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). The “meta-evidence” idea is irrelevant.<sup>300</sup> Wouldn’t this be too hard on plaintiffs, especially? Wouldn’t they have trouble proving irreparable harm under such a short time frame, using only evidence admissible under the FRE and affidavits?

As I discuss in the next Part, this concern is real. Plaintiffs may not have ready access to admissible evidence showing irreparable harm. But again, applying the

295. See 1 WEINSTEIN & BERGER, *supra* note 293; Jason S. Lambert, *The Perfect Proffer*, 89 FLA. B.J. 38, 38–39 (2015).

296. See Kapner, *supra* note 292, at 269–70. Counsel might also be dishonest. See Comment, *The Offer of Proof in Grounding Exceptions*, 31 YALE L.J. 542, 543 (1922).

297. FED. R. EVID. 103(c).

298. For example, meta-evidence can arise in discovery. In *Zubulake v. U.B.S. Warburg*, 216 F.R.D. 280 (S.D.N.Y. 2003), the defendants resisted producing emails stored on backup tapes—an expensive process—and they argued that if they were required to produce the emails, the plaintiff should pay for production. To determine whether the tapes were likely to contain relevant evidence not available elsewhere, Judge Scheindlin directed the production of a sample of emails, and she used that evidence as a sort of meta-evidence to analyze what evidence the other tapes might contain. See *id.* at 281–87. I thank John Leubsdorf for this example. And a sort of counterfactual meta-evidence may arise in legal malpractice suits, where the plaintiff must show that he would have prevailed or achieved a better result if not for his attorney’s deficient performance. See 4 RONALD E. MALLEY, *LEGAL MALPRACTICE* § 33:29 (2020 ed. 2020). I thank Keith Sharfman for this example.

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

300. 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.

FRE would not be as hard on movants as it sounds. Whereas plaintiffs likely do not have access to all the evidence they need to prove probable success on the merits, they're 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.<sup>301</sup> Applying the FRE 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 the FRE? No. Grimm's lawyers—likely recognizing that the plaintiff's sworn statement concerning his own diagnosis would be insufficient—retained a psychologist for purposes of the lawsuit who filed her own declaration. That analyst opined, based on her “clinical assessment” of G.G. and her expertise, that the school's bathroom policy “is currently . . . placing G.G. at risk for accruing lifelong psychological harm.”<sup>302</sup> The court's decision not to credit her 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 FRE 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 psychologist's declaration sufficiently probative of irreparable harm to Grimm.<sup>303</sup>

Would the new regime have excluded key evidence in *Mullins v. City of New York*, the Second Circuit case that held courts may consider hearsay on preliminary injunction motions? In that labor suit brought 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.<sup>304</sup> 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

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301. *Cf. Playboy Enters., Inc. v. Chuckleberry Publ'g, 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.”); 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.”).

302. Expert Declaration of Randi Ettner, Ph.D at 2, 8, 9, G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 132 F. Supp. 3d 736 (E.D. Va. 2015) (No. 4:15-cv-00054).

303. *See, e.g., Hicklin v. Precynthe*, No. 4:16-cv-01357, 2018 WL 806764, at \*6, \*9–10 (E.D. Mo. Feb. 9, 2018) (relying, in part, on Dr. Ettner's clinical evaluation to grant a preliminary injunction); *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); *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).

304. *Mullins v. City of New York*, 626 F.3d 47, 48 (2d Cir. 2010); *see also Mullins v. City of New York*, 634 F. Supp. 2d 373, 393 (S.D.N.Y. 2009). This preliminary injunction differs from the usual sort in that it enjoined pretrial activities, as opposed to preliminarily ordering the relief plaintiff sought.

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,<sup>305</sup> 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.<sup>306</sup> As the plaintiffs' attorneys<sup>307</sup> 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 . . . .”<sup>308</sup> These statements concerned the declarants’ fear<sup>309</sup> and intent to withdraw from the suit, so they likely fall under the exception. However, even if the court ruled that the 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. In one sense, this is a just result: granting an injunction based on anonymous, unsworn, out-of-court statements is potentially more troubling than excluding those statements. However, in unusual circumstances similar to *Mullins*—where the preliminary injunction would protect witnesses from retaliation—a court might need to take steps to protect anonymity, pending resolution of the motion.

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

### III. BENEFITS AND DRAWBACKS OF APPLYING THE RULES

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

305. *Mullins*, 634 F. Supp. 2d at 383 & n.70.

306. *Mullins*, 626 F.3d at 51; *see* Declaration of Edward Scott at 6, *Mullins*, 634 F. Supp. 2d 373 (No. 1:04-cv-02979), ECF No. 169.

307. 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.

308. *See* FED. R. EVID. 803(3).

309. Plaintiffs’ Bench Memorandum Concerning the City’s Hearsay Objection to Testimony to Be Elicited at the Hearing at 2–3, *Mullins*, 634 F. Supp. 2d 373 (No. 1:04-cv-02979), ECF No. 165.



discretionary regime with regard to which evidence they will credit and which they 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,<sup>310</sup> 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,<sup>311</sup> 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.

Additionally, 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 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.<sup>312</sup> 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.<sup>313</sup> In a system with rules, the court might need to articulate 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.

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310. Tenth Circuit District Judge 2 Interview, *supra* note 117.

311. *Id.*

312. See Robin J. Efron, *Reason Giving and Rule Making in Procedural Law*, 65 ALA. L. REV. 683, 701–02 (2014); cf. Mullenix, *supra* note 153, at 611 (“[R]equiring 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 suggested that the creation of a public trial record, along with the threat of appellate review, may compel judges to make sufficiently well-supported decisions, explaining the low reversal rate. See Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 408 n.137 (1982).

313. *McGehee v. Hutchinson*, No. 4:17-cv-00179, 2017 WL 1399554, at \*4 (E.D. Ark. Apr. 15, 2017); see also *Fed. 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, L.L.C. 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.”); *S. Foods Grp. 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.”).

The FRE could limit judicial bias by compelling judges to exclude evidence that helps the party they tend to favor, or vice versa.<sup>314</sup> 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,<sup>315</sup> 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.”<sup>316</sup> 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.<sup>317</sup>

Second, reason-giving forces judges to clarify their thinking about the proper *role* of each challenged piece of evidence.<sup>318</sup> 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.<sup>319</sup> 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 can signal what the plaintiff has to prove. That information will allow the parties to make stronger arguments down the road.

Finally, there is the possibility that the FRE actually do what they are designed to do: enhance accuracy of decision-making by excluding evidence that factfinders

314. Cf. Norris, *supra* note 212, at 489 (recounting how judges used to refuse to hear oral evidence from labor unions when employers moved for preliminary injunctions).

315. See Mathilde Cohen, *When Judges Have Reasons Not to Give Reasons: A Comparative Law Approach*, 72 WASH. & LEE L. REV. 483, 518–22 (2015) (arguing that because judges will use motivated reasoning to construct post hoc justifications for preferred results, requiring reason-giving “may yield insincerity and artificiality in judicial discourse, rather than promoting accountability and transparency”).

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

317. See Pamela K. Bookman & David L. Noll, *Ad Hoc Procedure*, 92 N.Y.U. L. REV. 767, 780 (2017); Efron, *supra* note 312, 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). *But see* Cohen, *supra* note 315, at 514–17 (arguing that detailed reason-giving can expose points of disagreement and cause legitimacy problems).

318. See Efron, *supra* note 312, at 714–15.

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

are likely to overvalue.<sup>320</sup> Although the FRE have been widely<sup>321</sup>—and in some cases quite persuasively<sup>322</sup>—criticized, we have, as a polity, determined that they enhance accuracy.<sup>323</sup> Frederick 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.<sup>324</sup> To the extent that the Rules of Evidence helpfully eliminate evidence that is likely to bias factfinders, application of the FRE could have some salutary effect.

Application of the FRE may ultimately make little difference. Even though the FRE do apply to bench trials, courts often apply them loosely in that context.<sup>325</sup> This may be in part because judges think themselves more capable than jurors<sup>326</sup> and in part because they recognize that they can’t “unhear” evidence whose admissibility they’ve considered. And as Wistrich, Guthrie, and Rachlinski have demonstrated, judges are sometimes unable to disregard inadmissible evidence.<sup>327</sup> Further, appellate courts would be unlikely to reverse many decisions based on evidentiary determinations.

However, requiring application of the FRE would discourage parties from even *attempting* to introduce clearly inadmissible evidence, affording some protection. Also, application of the FRE 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.<sup>328</sup> Unlike juries, who typically issue general verdicts,<sup>329</sup> judges issuing preliminary injunctions must state their findings of fact.<sup>330</sup> 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

320. See Richard D. Friedman, *Minimizing the Jury Over-Valuation Concern*, MICH. ST. L. REV. 967, 967–68 (2003) (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”).

321. See Friedman, *supra* note 320. Cf. BENTHAM, *supra* note 236 (advocating free proof).

322. 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).

323. 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.”).

324. Schauer, *supra* note 316, at 193–94.

325. *Id.* at 165–66, 195.

326. See James R. Dillon, *Expertise on Trial*, 19 COLUM. SCI. & TECH. L. REV. 247 (2018).

327. 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).

328. 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. See *id.* at 1296, 1302. It is not clear whether this difference would attain significance with a larger sample. See *id.*

329. See 9B WRIGHT ET AL., *supra* note 29, § 2501; Donald Olander, Note, *Resolving Inconsistencies in Federal Special Verdicts*, 53 FORDHAM L. REV. 1089, 1089 (1985).

330. FED. R. CIV. P. 52(a)(2).

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 weight to that evidence than it otherwise would have. Studies have found 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.”<sup>331</sup>

The arguments for imposing rules—particularly the FRE—are admittedly weaker here than in other contexts where scholars have advocated their application outside trial. For example, in her argument for applying evidentiary rules to class certification proceedings, Linda Mullenix observes 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.<sup>332</sup> In preliminary injunction 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.

### *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 those 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 FRE by citing the need to prevent irreparable harm *quickly*.<sup>333</sup> 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 John Leubsdorf’s words, it increases “the probable irreparable loss of rights caused by errors incident to hasty decision.”<sup>334</sup>

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,<sup>335</sup> the inability to produce high-quality, admissible

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331. Wistrich, Guthrie & Rachlinski, *supra* note 327, at 1275–76.

332. Mullenix, *supra* note 153, at 624–25. I am skeptical that judges will succumb to this error.

333. See *supra* text accompanying notes 228–33.

334. Leubsdorf, *supra* note 27, at 541.

335. Berman, *supra* note 214, at 34.

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 should rarely seriously prejudice strong cases; instead, they force parties to produce the “best evidence reasonably available.”<sup>336</sup> At the preliminary injunction stage, however, many meritorious plaintiffs may *not* have admissible evidence. This means that the alternative to inadmissible evidence will not be “better evidence”; it will be “no evidence.” By excluding low-quality evidence at the preliminary injunction stage, then, the court prejudices more strong cases than it does by excluding low-quality evidence at trial. It 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. The time from case initiation to the preliminary injunction hearing varies dramatically, from days to years.<sup>337</sup> 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 preliminary injunction 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.

An additional problem with applying the FRE at the preliminary injunction stage is that it may shift the risk of error disproportionately onto plaintiffs. Allocating risk of error is a primary function of rules of evidence.<sup>338</sup> In civil litigation, we generally allocate the risk so as not to prefer one party over the

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336. Nance, *supra* note 301, at 227.

337. See Lanjouw & Lerner, *supra* note 203, at 595 tbl.3B (examining patent cases in the early 1990s and finding that preliminary injunction hearings occurred a little over six months after case initiation, on average). Another set of authors analyzed every reported decision on a TRO or preliminary injunction motion in the federal courts from 2003 to 2006. See KIRSTIN STOLL-DEBELL, NANCY L. DEMPSEY & BRADFORD E. DEMPSEY, *INJUNCTIVE RELIEF: TEMPORARY RESTRAINING ORDERS AND PRELIMINARY INJUNCTIONS* 189–91 (2009). Averages ranged from about one month to nearly two years, with many districts averaging about six months. *Id.* 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 twenty-six months. *Id.* at 190–91, 194.

338. STEIN, *supra* note 323, at 133–40; see also Michael S. Pardo, *The Political Morality of Evidence Law*, 5 INT’L COMMENT. ON EVIDENCE [i], 4 (2007) (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”).

other: the plaintiff's losses and defendant's losses are equally bad.<sup>339</sup> The burden of proof on each element is essentially a tie-breaking rule.<sup>340</sup>

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 that they are likely to succeed and likely to suffer irreparable harm absent an injunction. 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 largely challenges by defendants to plaintiff evidence—in every one of the major circuit cases discussed above, the challenge was to the plaintiff's evidence.<sup>341</sup> 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 evenhandedness 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 FRE to preliminary injunction motions.

#### IV. WHAT IS TO BE DONE?

At this point I have demonstrated both the shortcomings of several justifications for abandoning the FRE and the problems with applying them. So, where does that leave us? In this Part, I offer two proposals for how courts—and, potentially, rule makers—should use the lessons from this Article. 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 FRE 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, firmer proposal: courts should recognize that evidence submitted to show likelihood of success on the merits is 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 this evidence.

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339. See STEIN, *supra* note 323, at 219.

340. *Id.* at 221–22.

341. See *G.G. ex rel. Grimm v. Gloucester Cty. Sch. 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.*, 805 F.2d 23 (1st Cir. 1986); *Flynt Distrib. Co. v. Harvey*, 734 F.2d 1389 (9th Cir. 1984). *But see* Transcript of Court's Ruling at 34–35, *Warner v. Gross*, No. 5:14-cv-00665-F, 2014 WL 7671680 (W.D. Okla. Dec. 23, 2014), ECF No. 179; *Rice v. Wells Fargo Bank, N.A.*, 2 F. Supp. 3d 25, 31 (D. Mass. 2014).

*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.”<sup>342</sup> Unsurprisingly,<sup>343</sup> an evidentiary regime will minimize the probable irreparable loss of rights if it facilitates accurate fact finding. First, a judge will tend to minimize the “errors” through a more accurate determination of likelihood of success on the merits. Second, the judge will be better able to determine the irreparable harm to each party—the loss of rights if the court has indeed erred. 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.<sup>344</sup>

So, what rules best facilitate truth seeking? 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 truth seeking.<sup>345</sup> 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.<sup>346</sup> Bentham’s project achieved partial success—relevant evidence is presumed admissible, and one of Bentham’s major targets was competency rules that excluded witnesses with an interest in the case; today nearly all witnesses are deemed competent to testify.<sup>347</sup> But on the whole, Bentham’s view is not encapsulated in the FRE, which are largely a list of exclusionary rules. Some of these rules, such as those that protect privileges,<sup>348</sup> exclude evidence for reasons other than truth seeking.<sup>349</sup> But those rules are in the minority. In other words, the rule makers—the advisory committee

342. Leubsdorf, *supra* note 27, at 541.

343. 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).

344. See STEIN, *supra* note 323, at 133–40, 219.

345. See 5 BENTHAM, *supra* note 236, 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 286, at 1966–67. “Free proof” is not Bentham’s term, but it is now associated with his approach.

346. 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.”).

347. See FED. R. EVID. 402; FED. R. EVID. 601; Roger C. Park & Michael J. Saks, *Evidence Scholarship Reconsidered: Results of the Interdisciplinary Turn*, 47 B.C. L. REV. 949, 951 (2006); Todd E. Pettys, *The Immoral Application of Exclusionary Rules*, 2008 WIS. L. REV. 463, 479.

348. See FED. R. EVID. 501; FED. R. EVID. 502.

349. 2 MUELLER & KIRKPATRICK, *supra* note 135, § 5:2.

and Congress—made the judgment that exclusionary rules facilitate truth seeking.<sup>350</sup> And the rule makers 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, including the bench-trial context, the FRE facilitate truth seeking. Any departure from the FRE, then, should be justified on the grounds that a new context disrupts the FRE's truth-seeking 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 FRE may frustrate the truth-seeking process by eliminating the only evidence available to parties with meritorious claims.

But preliminary injunction cases vary dramatically,<sup>351</sup> and applying the FRE 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 may 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 rules generally foster accurate fact finding, 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 FRE 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-truth-seeking purposes of the FRE, such as incentivizing desirable primary conduct.

With those principles in mind, I propose three criteria for the Preliminary Injunction Exception: otherwise inadmissible evidence<sup>352</sup> may be considered on a preliminary injunction motion if the proponent demonstrates that (1) the time

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350. FED. R. EVID. 102 (noting that one purpose of the FRE is “ascertaining the truth”); Seigel, *supra* note 346, 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”).

351. *See supra* notes 30–37 and accompanying text.

352. Evidence that may be considered under Federal Rule of Civil Procedure 43(c) would remain admissible under this rule.



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; and (3) admission will not unduly prejudice the objecting party.

Under this exception, a number of Federal Rules of Evidence would still apply. The privilege rules would be unaffected by the exception, per Rule 1101(c).<sup>353</sup> And courts should enforce the categorical exclusions—Rule 408, regulating the admissibility of settlement offers, for example—under the directives of FRE 102 and FRCP 1, which require courts to construe and administer the FRE and FRCP “fairly”<sup>354</sup> and “to secure the just . . . determination” of the proceeding.<sup>355</sup> Admitting evidence that would disincentivize plea bargaining or disincentivize open conversation between attorneys and their clients would thwart important purposes of the FRE.<sup>356</sup>

Rule 702 and *Daubert* would still apply, to some degree, under prong two: expert testimony that is not the product of reliable principles and methods and expert testimony where the principles and methods have been unreliably applied are insufficiently trustworthy. However, a court might relax its usual *Daubert* standards for purposes of a preliminary injunction motion. For example, convention holds that an effect measured in an experiment is “statistically significant” if the “*p*-value” is less than 0.05.<sup>357</sup> 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 was *no* real relationship here—if this chemical did *not* in fact correlate with fish death—would I have less than a 5% chance of observing a relationship at least this strong in my data?”<sup>358</sup> If the answer is “yes,” she may reject the hypothesis that there is no relationship; in other words, she has a significant result.<sup>359</sup> Null-hypothesis significance testing of this sort has been roundly and

353. See FED. R. EVID. 1101(c) (“The rules on privilege apply to all stages of a case or proceeding.”).

354. FED. R. EVID. 102.

355. FED. R. CIV. P. 1.

356. The exception could contain a fourth prong, explicitly allowing the court to consider the evidence only if consideration of the evidence will serve, not thwart, the purposes of the Federal Rules of Evidence and the interests of justice. Rule 807, the residual exception to the hearsay rule, used to contain a similar requirement. See FED. R. EVID. 807(a)(4) (amended 2019) (“[A]dmitting [the hearsay statement] will best serve the purposes of these rules and the interests of justice.”). The amendments to the Rule eliminated this prong as “superfluous” in light of Rules 102 and 401. See FED. R. EVID. 807 advisory committee’s note to 2019 amendment. I agree and decline to include an explicit “interests of justice” requirement in the proposed Rule.

357. See Saul McLeod, *What a P-Value Tells You About Statistical Significance*, SIMPLY PSYCHOL. (May 20, 2019), <https://www.simplypsychology.org/p-value.html> [https://perma.cc/2DUR-22YG].

358. See Jacob Cohen, *The Earth Is Round ( $p < .05$ )*, 49 AM. PSYCHOLOGIST 997, 997–98 (1994).

359. “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

persuasively criticized for decades.<sup>360</sup> Nevertheless, the method and convention persist. Even if a court would otherwise require evidence to meet this  $p < 0.05$  threshold, as courts occasionally do,<sup>361</sup> the court may soften this requirement at the preliminary 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 judge 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, which requires a party to produce an original document, recording, or photograph to prove its contents,<sup>362</sup> 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 not prejudice the other party.

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.<sup>363</sup> If a party objected to the evidence, the court would first consider whether it is admissible under the FRE—forcing it to articulate and appreciate a theory of relevance. The court would then need to consider whether the evidence is trustworthy and unduly prejudicial, 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

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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).

360. See Daniel J. Benjamin et al., *Redefine Statistical Significance*, 2 NATURE HUM. BEHAV. 6 (2018); Cohen, *supra* note 358, at 997–98; William W. Rozeboom, *The Fallacy of the Null-Hypothesis Significance Test*, 57 PSYCHOL. BULL. 416 (1960); Jonah B. Gelbach & Bruce H. Kobayashi, *Legal Sufficiency of Statistical Evidence* (George Mason Legal Studies Research, Paper No. LS 18-29, 2018), <https://ssrn.com/abstract=3238793> [<https://perma.cc/X6EX-F2BJ>] (concluding that evidence should be legally sufficient when  $p < 0.5$ , not 0.05); Dan Kahan, *The Earth Is (Still) Round, Even at P < 0.005*, CULTURAL COGNITION PROJECT: 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> [<https://perma.cc/Z4ST-2VUV>].

361. See DAVID H. KAYE, DAVID E. BERNSTEIN & JENNIFER L. MNOOKIN, *THE NEW WIGMORE: A TREATISE ON EVIDENCE: EXPERT EVIDENCE* § 12.8.4 (2d ed. 2011) (noting that in some contexts, “courts have treated statistical significance as an important consideration affecting the admissibility of expert testimony under *Daubert*”); see also 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).

362. See FED. R. EVID. 1002.

363. See *supra* Section III.A.

in time for the hearing. Further, it discourages parties from purposefully introducing more favorable, inadmissible evidence, as they know they will have to justify its consideration.<sup>364</sup>

While three prongs may sound time consuming, two of them pose questions familiar to a judge: How trustworthy is the evidence?<sup>365</sup> Will it unduly prejudice the other party?<sup>366</sup> Those questions are often decided fairly quickly. As for the first prong, the proponent or their 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.

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.”<sup>367</sup> The phrase “reasonable efforts” could be read in context to mean “reasonable efforts under the time constraints attendant to a preliminary injunction motion.” And while the old version of Rule 807 required the hearsay statement to have “equivalent circumstantial guarantees of trustworthiness,”<sup>368</sup> meaning the hearsay must be *as* trustworthy as hearsay permitted by the enumerated exceptions,<sup>369</sup> the newly-amended Rule 807 requires only “sufficient guarantees of trustworthiness,”<sup>370</sup> similar to the proposed exception. The proposed exception, then, does not deviate much from existing law. However, the Preliminary Injunction Exception would clarify that time constraints, specifically, justify admitting otherwise inadmissible evidence, and it would address admissibility despite exclusionary rules *other than* the rule against hearsay. It is not simply 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 FRCP or the FRE. The two most logical locations for the rule are as an addition to the Preliminary Injunctions Rule, Federal Rule of Civil Procedure 65, 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

364. See Nance, *supra* note 301.

365. See, e.g., FED. R. EVID. 807(a)(1); FED. R. EVID. 803(6)(E), (7)(C), (8)(B); FED. R. EVID. 804(b)(3).

366. See, e.g., FED. R. CIV. P. 15(b)(1); FED. R. CIV. P. 24(b)(3); FED. R. CIV. P. 37(e)(1). These rules are not specifically evidentiary, but they require the court to evaluate the prejudice of a change in litigation circumstances.

367. FED. R. EVID. 807(a)(2).

368. FED. R. EVID. 807(a)(1) (amended Dec. 1, 2019).

369. See 5 MUELLER & KIRKPATRICK, *supra* note 135, § 8:141.

370. FED. R. EVID. 807(a)(1).

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 just begin to apply the FRE; ideally, they would include this policy in the local rules or post it in their chambers rules to put the parties on notice. Although the exception would contravene the text of the Federal 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 FRE 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 truth seeking.

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 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.<sup>371</sup> 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 FRE, 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 to accept whatever evidence they deem sufficiently reliable and give it whatever weight they deem appropriate. In that case,

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371. See 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); Schauer, *supra* note 316, 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)); John Sheldon & Peter Murray, *Rethinking the Rules of Evidentiary Admissibility in Non-Jury Trials*, 86 JUDICATURE 227, 231 (2003).

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, that party 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 it will be able to offer admissible evidence at trial.<sup>372</sup> 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 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.<sup>373</sup> The plaintiff testifies at the preliminary injunction hearing: "The defendant and I spoke before the hearing and tried to resolve the case. During that conversation, he admitted to me that he copied my work." A reasonable factfinder might find this to be strong evidence of copying. However, this is not very probative of whether the plaintiff is likely to succeed at trial: the defendant's statement made during settlement negotiations would be inadmissible at trial to prove the validity of the claim under FRE 408(a)(2),<sup>374</sup> and a judge might be skeptical that the defendant would repeat the statement on the witness stand. This evidence, then, while strong evidence of the merits, is fairly weak evidence of likelihood of success on the merits.<sup>375</sup> 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

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372. Cf. Leubsdorf, *supra* note 27, 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.>").

373. See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991).

374. Most courts would probably exclude this statement from the preliminary injunction hearing. See *supra* notes 106–110 and accompanying text. But a court that did not follow the FRE at all would permit it.

375. The evidence *is* helpful meta-evidence to the extent it suggests the defendant would testify to copying at trial, or it suggests the defendant has admitted the copying to others, and those witnesses could testify.

between a court weighing meta-evidence under the FRE and one weighing meta-evidence without those limitations. 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 FRE could *not* infer from the plaintiff's testimony that the defendant copied the plaintiff's work. The judge may not consider statements made during settlement negotiations as evidence proving the validity of the claim. However, if a court is *not* applying the FRE, it *may* infer that the defendant actually made this statement during settlement negotiations and, therefore, that he actually copied the plaintiff's work. That inference may be helpful to the judge, because the judge may run through the following chain of reasoning:

This testimony suggests the defendant said he copied the plaintiff's work; that, in turn, suggests he *did*, in fact, copy the plaintiff's work; 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 plaintiff'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.

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.<sup>376</sup> The Supreme Court has directed 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 given 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.<sup>377</sup> A preliminary injunction decision is "erroneous" only "in the sense that it may be different from the decision that ultimately will be reached."<sup>378</sup> In other words, the parties' "rights" are "legal rights"<sup>379</sup> 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

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376. See *Winter v. Nat. Res. 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 . . .").

377. Leubsdorf, *supra* note 27, at 541.

378. *Id.*

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

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. Some causes of action that might form the basis of a preliminary injunction motion, such as defamation or false advertising, have “harm” as an element of the claim itself.<sup>380</sup> To show likelihood of success on the merits, then, the plaintiff must demonstrate that it will be able to show 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.<sup>381</sup> But the two inquiries will likely overlap.<sup>382</sup> 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-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 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—in theory—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.<sup>383</sup> 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.

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380. *See* Graboff v. Collieran Firm, 744 F.3d 128, 136 (3d Cir. 2014) (noting that a statement is defamatory under Pennsylvania law only if it tends to harm another’s reputation); Clark v. Time Inc., 242 F. Supp. 3d 1194, 1215 (D. Kan. 2017) (noting that a plaintiff asserting a defamation claim under Kansas law must establish “injury to plaintiff’s reputation”); N. Am. Med. Corp. v. Axiom Worldwide, Inc., 522 F.3d 1211, 1224 (11th Cir. 2008) (listing injury or likelihood of injury as one element of a false advertising claim a plaintiff must show to establish likelihood of success on the merits). Courts frequently say injunctions are typically inappropriate in defamation cases. *See, e.g.*, Cmty. for Creative Non-Violence v. Pierce, 814 F.2d 663, 672 (D.C. Cir. 1987). These cases often focus on prior restraints; injunctions requiring a party to take down specific material may be less troubling.

381. *See* Leubsdorf, *supra* note 27, at 541.

382. *Cf.* Vonderheide v. Harrisburg Area Cmty. Coll., No. 19-3096, 2019 WL 5423089, at \*6, \*10 (E.D. Pa. Oct. 23, 2019) (addressing harm to reputation in both likelihood of success analysis and irreparable harm analysis); Muhaisen v. Does 1 Through 100, No. 17-cv-01575-PAB-KLM, 2017 WL 6945043, at \*3 (D. Colo. Oct. 10, 2017) (considering harm to reputation and business when analyzing both likelihood of success and irreparable harm); Riverdale Mills Corp. v. Cavatorta N. Am., Inc., 146 F. Supp. 3d 356, 363 (D. Mass. 2015) (referring to danger of damage to reputation in both likelihood of success analysis and irreparable harm analysis noting they “dovetail[]”).

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

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. If the FRE don't apply, the interview might tend to prove animus, but that is helpful only to the extent that it suggests additional admissible evidence of animus might emerge before trial. Either way, the evidence is admissible, but it is less probative than some courts have suggested.

#### CONCLUSION

Classically, the FRE 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 after 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 off 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 FRE 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.



