

## How 3rd Circ. Raised Bar For Constitutional Case Injunctions

By Lee Crain, Grace Hart and Zach Edelman (August 2, 2024, 5:42 PM EDT)

A plaintiff seeking a preliminary injunction has a clear burden. She must prove her claims are likely to succeed on the merits. She must show that absent emergency injunctive relief, she will face irreparable harm.

And she must demonstrate to a court that the balance of equities between the parties and the public interest favor injunctive relief. These four hornbook elements are the bedrock of any request for emergency injunctive relief.

Many courts, however, apply those elements a little differently in constitutional cases. In those cases, some courts have relaxed the need to show irreparable harm — concluding that irreparable injury should be presumed where a plaintiff demonstrates she has constitutional claims that are likely to succeed.

As the U.S. Supreme Court explained in the First Amendment context in its 1976 decision in *Elrod v. Burns*, for instance, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."<sup>[1]</sup> Other courts — including the U.S. Court of Appeals for the D.C. Circuit — have extended that rule to encompass all constitutional claims.<sup>[2]</sup>

That approach is meaningfully different from how courts assess preliminary injunctions in nonconstitutional cases, where the plaintiff seeking the extraordinary relief of a preliminary injunction must present actual evidence of tangible irreparable harm that is likely to occur absent judicial intervention.

On July 15, the U.S. Court of Appeals for the Third Circuit issued a decision that appears to chart a different course in at least some constitutional cases. Portending a potential shift in constitutional cases going forward, the court in *Delaware State Sportsmen's Association Inc. v. Delaware Department of Safety & Homeland Security* forcefully rejected the relaxed preliminary injunction standards many courts have used when plaintiffs allege constitutional harms.

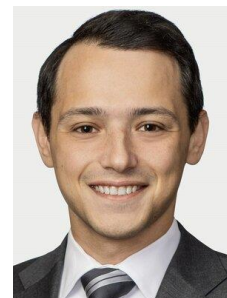
How big a shift this is remains to be seen, but the Third Circuit's analysis will undoubtedly impose a higher bar for plaintiffs in constitutional cases already facing long odds against powerful government defendants.



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## Case Background

In 2022, Delaware enacted bans on the sale of assault weapons and large magazines. Shortly after these laws were enacted, gun owners and gun rights groups challenged the new statutes. Four months later, the plaintiffs moved for a preliminary injunction to enjoin the laws as a violation of their Second Amendment rights.

The plaintiffs' motion for a preliminary injunction focused on the likelihood of success on the merits of their Second Amendment challenge, largely to the exclusion of the other preliminary injunction factors. The district court held a preliminary injunction hearing.

During the hearing, the plaintiffs did not call any live witnesses or offer any evidence that Delaware had tried to enforce the gun restrictions or take away their magazines, or that the plaintiffs would suffer any tangible harm at all. Instead, the plaintiffs submitted four declarations from people who wanted to buy or sell assault weapons or large magazines, but offered no details about how they would be harmed — let alone irreparably so — without immediate access to these weapons.

In March 2023, the district court denied the plaintiffs' motion. On July 15 of this year, the Third Circuit affirmed. Writing for the court, Judge Stephanos Bibas declined to address the merits of the plaintiffs' Second Amendment challenge, and instead focused almost entirely on whether the plaintiffs would suffer irreparable harm without an injunction.

The court's decision emphasized that injunctions are and have traditionally been extraordinary remedies. Injunctions themselves can "irreparably injure parties," so "courts must use 'great caution'" in granting them.[3] Preliminary injunctions create an even greater risk because "[t]ime pressures limit adversarial testing," limit evidence, and "[make] the district court jump to conclusions." [4]

As a result, the Third Circuit explained, preliminary injunctions should generally be limited to their primary historical purpose: "preserv[ing] the status quo during the pendency of litigation." [5] Where a nonpecuniary harm would not moot a case, harm can still be repairable, and preliminary injunctions should be rare.

Although the court recognized that case preservation is not the sole purpose of a preliminary injunction, it asserted that courts should "usually" deny the "extraordinary remedy" of a preliminary injunction "if a plaintiff's alleged injury does not threaten to moot the case." [6]

Applying these principles, the Third Circuit held that the plaintiffs had not shown a risk of irreparable harm to warrant a preliminary injunction enjoining enforcement of the assault weapons and magazine bans. The Third Circuit rejected the plaintiffs' argument that all constitutional harms are presumptively irreparable, explaining that presumption "would trample on traditional principles of equity." [7]

The court noted that injuries from First Amendment violations warrant a presumption of irreparable harm based on "[u]nique First Amendment doctrines" — including the notion that every day a plaintiff can't speak, write, associate or pray is necessarily irreparable. [8] But the court expressly refused to extend the presumption of irreparable harm outside the First Amendment context — including to the Second Amendment. [9]

The Third Circuit then held that without any presumption, the plaintiffs had failed to show they were likely to suffer irreparable harm. The four declarations the plaintiffs had submitted did not explain how

or why the plaintiffs were harmed by their alleged loss of access to assault weapons or large magazines — and the deprivation of access alone was not enough to qualify as "irreparable," case-mooting harm.[10]

The court also explained that the plaintiffs' delay weighed against a preliminary injunction. The plaintiffs had waited four months after filing suit before seeking a preliminary injunction, and then chose to appeal the preliminary injunction denial instead of proceeding to trial or seeking any expedition.

The court reasoned that this delay suggests that the plaintiffs "felt little need to move quickly," and undermined their arguments for emergency preliminary injunctive relief.[11]

### **Impact on Constitutional Challenges**

The Third Circuit's articulation of the irreparable harm standard is poised to have a significant impact on constitutional cases in the Third Circuit, in at least four material ways.

First, this case's discussion of irreparable harm reconceptualizes what preliminary injunctions can do — substantially narrowing their applicability. The Third Circuit made clear that in determining whether there is a sufficient threat of irreparable harm to warrant a preliminary injunction, the definition of "irreparable harm" includes the requirement that the harm would alter the status quo or prevent the court from adjudicating the case.

This focus on cases where a harm might moot the case departs from a recent trend of courts taking a broader view of the preliminary injunction remedy as a more general tool to prevent harm that at least facially appears irreparable. And it ignores the admittedly rare instance of mandatory preliminary injunctions — injunctions that compel a change in the status quo, by forcing a party to take a certain action.

Second, by holding that constitutional violations outside the First Amendment context are not presumptively irreparable, the Third Circuit's decision puts a greater burden on movants seeking a preliminary injunction to enjoin unconstitutional laws. In other words: The decision gives the government greater power in these cases.

It is not enough for movants merely to show a violation of their constitutional rights to obtain a preliminary injunction — they instead need to present actual evidence showing that the government "has tried to enforce the disputed laws against" the plaintiff, or "a time-sensitive need" for the movants to exercise the rights that have allegedly been infringed.[12]

Plaintiffs may have an easier time demonstrating that type of irreparable harm outside the Second Amendment context, where constitutional injuries more obviously change the status quo. For example, some of the out-of-circuit cases cited in the Third Circuit's ruling that applied a presumption of irreparable harm involved injunctions against constitutional injuries caused by ongoing cavity-search practices or impending prison transfers.[13]

Plaintiffs could still show irreparable harm under the Third Circuit's analysis in those instances even without a presumption, because those injuries more obviously change the status quo than does a prospective gun owner being barred from purchasing a new firearm. But requiring that showing still adds an additional hurdle for plaintiffs to jump through in challenging actions by already powerful governmental actors.

Third, the decision has set up a circuit split. It makes clear that in the Third Circuit, only First Amendment violations cause presumptively irreparable harm — other constitutional violations do not.

A slew of other circuits — including the D.C., Second, Sixth and Ninth Circuits — have disagreed. The U.S. Court of Appeals for the Ninth Circuit has even specifically presumed irreparable harm from alleged Second Amendment violations, in its decision last year in *Baird v. Bonta*.<sup>[14]</sup> The Third Circuit's decision thus sets up a circuit split that the Supreme Court may need to step in to resolve in the future.

Fourth, as a practical matter, parties challenging laws as unconstitutional in the Third Circuit should consider other avenues to seek expedited relief that do not require a showing of irreparable harm. Such relief would include, for example, an early motion for summary judgment, an expedited discovery and trial schedule, or a motion for a speedy declaratory judgment hearing under Rule 57 of the Federal Rules of Civil Procedure.

For parties that decide to move for a preliminary injunction to enjoin a law as unconstitutional, movants need to seek that relief expeditiously, and should work to present clear and tangible evidence of irreparable harm that would effectively moot the case if it ensues.

And given the Third Circuit's reasoning that the plaintiffs' decision to appeal instead of seeking an expedited trial amounted to a delay that undermined their injunction request, parties facing the denial of a preliminary injunction motion should consider options for seeking expedited relief in the trial court instead of through appeal — and should generally resist staying trial court proceedings pending appeal.

The Third Circuit's decision in this case was clearly an attempt to rein in the availability of preliminary injunctions in constitutional cases. This appears to be a purposeful signal, because the court did not necessarily have to go as far as it did to resolve the appeal before it.

The appeal could have been resolved on narrower grounds, given that the Third Circuit reviewed the district court's denial for abuse of discretion, and it was undisputed the plaintiffs had delayed four months in seeking their request for emergency injunctive relief. The Third Circuit wouldn't have been the first court to conclude a district court did not abuse its discretion by rejecting a delayed motion for a preliminary injunction.<sup>[15]</sup>

But the Third Circuit went farther. And this being the case, plaintiffs in the Third Circuit seeking a preliminary injunction should take care to read this decision closely, abide by its mandates going forward, and be wary of giving the Third Circuit further opportunities to narrow the availability of preliminary injunctive relief.

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[1] *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion).

[2] *Karem v. Trump*, 960 F.3d 656, 667 (D.C. Cir. 2020).

[3] Del. State Sportsmen's Ass'n Inc. v. Del. Dep't of Safety & Homeland Sec., -- F.4th --, 2024 WL 3406290, at \*3 (3d Cir. 2024) (citation omitted).

[4] Id.

[5] Id. at \*4 (citation omitted).

[6] Id. at \*5.

[7] Id. at \*6.

[8] Id. at \*7.

[9] Id.

[10] Id.

[11] Id. at \*8.

[12] Id. at \*7.

[13] Id. at \*6 (citing Covino v. Patrissi, 967 F.2d 73, 77 (2d Cir. 1992), and Mitchell v. Cuomo, 748 F.2d 804, 806 (2d Cir. 1984)).

[14] Baird v. Bonta, 81 F.4th 1036, 1042 (9th Cir. 2023).

[15] See, e.g., Wreal LLC v. Amazon.com Inc., 840 F.3d 1244, 1248 (11th Cir. 2016) (holding that "the district court did not abuse its discretion" in "conclud[ing] that [plaintiff's] unexplained five-month delay in seeking a preliminary injunction, by itself, fatally undermined any showing of irreparable injury" and affirming denial of preliminary injunction).