THE CHANCELLOR'S REACH: A SUBSTANTIVE EQUITY APPROACH TO EXPANDING PROVISIONAL ASSET FREEZES IN TRANSNATIONAL CASES

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The principle that federal courts exist to provide remedies rather than to vindicate abstract interests is firmly rooted in American jurisprudence and continues to animate doctrines of federal court jurisdiction. But remedies are elusive. Even executing on a money judgment, which is simple enough in principle, has been complicated by technologies that allow judgment debtors to conceal their assets quickly and effectively.

This Note argues that federal courts are falling behind developments in capital mobility because they have been constrained by an irrational and unnecessarily narrow view of equity. Since 1999, federal courts have been unable to enjoin litigants from transferring their assets pending the outcome of litigation, subject to narrow exceptions and work-arounds. By examining provisional relief in transnational litigation, this Note exposes the consequences of the Supreme Court's limited view of equity and proposes an avenue for developing effective provisional relief under the Court's precedents. By doing so, it contributes to the growth of academic engagement with substantive equity and its potential to reshape domestic law.

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* J.D. 2026, Columbia Law School. University of Oxford, M.Sc.; University of Cambridge, MPhil. Managing Editor, *Columbia Law Review*. Thanks very much to Professor George Bermann for advising this Note and for his invaluable guidance. I am also incredibly grateful to Daniel Listwa, whose insight and suggestions improved this piece immensely. This Note, like all of my other work, is dedicated to my family. I owe everything to their sacrifices. See Gregory A. Prince, "There Is Always a Struggle": An Interview With Chieko N. Okazaki, Dialogue, Spring 2012, at 112, 139 ("My mother taught me another principle: *on*. It meant that you felt gratitude and recognized your obligation to someone who had helped you."); see also Chieko N. Okazaki, Being Enough 29, 32 (2002) ("[A]n old family proverb comes from my mother, who used to tell us . . .'Begin well and do not fear the end.' . . . Think about planting trees and sowing seeds, even though the world, or your personal world, seems to be ending.").

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INTRODUCTION

In 1999, the Solicitor General attempted to persuade the Supreme Court that the ability to provisionally freeze assets was essential "in an age of easy global mobility of capital."[1] At that time, capital's ability to permeate national borders had been so revolutionary that it marked a rupture in the concept of territorial sovereignty.[2] Those trends have only accelerated since 1999. Today, capital is more mobile and intangible than ever. In 2024, an estimated $194.6 trillion flowed across national borders—a

1. Brief for the United States as Amicus Curiae Supporting Respondents at *16, Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308 (1999) (No. 98-231), 1999 WL 86498.

2. See Michael Hardt & Antonio Negri, Empire 310 (2000) ("The world market both homogenizes and differentiates territories, rewriting the geography of the globe. Still . . . on a level that is often subordinated to the power of the transnational corporations, reside the general set of sovereign nation-states . . . ."); Steffen Murau & Jens van't Klooster, Rethinking Monetary Sovereignty: The Global Credit Money System and the State, 21 Persps. on Pol. 1319, 1326 (2022) ("The concept of sovereignty that today informs international law is a conception of state sovereignty that focuses on the right of states to exercise power over a territory without interference from other states.").

figure expected to rise to $320 trillion by 2032.[3] Crimes such as money laundering and drug trafficking have profited from this mobility,[4] while the proliferation of cryptocurrency, an explicitly anational means of holding and transferring assets,[5] threatens traditional means of policing.[6] In 2024, "pig butchering" schemes involving cryptocurrency provoked international alarm[7] and produced a great deal of litigation.[8] In the face

3. 2025: Navigating the Cross-Border Payments Evolution, J.P. Morgan (Sep. 9, 2025), https://www.jpmorgan.com/insights/payments/fx-cross-border/2025-trends-for-financial-institutions [https://perma.cc/Y9KL-UHEX].

4. See U.S. Dep't of Treasury, 2024 National Money Laundering Risk Assessment 96 (2024), https://home.treasury.gov/system/files/136/2024-National-Money-Laundering-Risk-Assessment.pdf [https://perma.cc/9TVZ-SYTW] ("A number of recent money laundering threats and vulnerabilities have become more significant and pernicious over the past two years. For example, criminals, scammers, and illicit actors are increasingly using virtual assets and digital peer-to-peer payment systems to engage in fraud and other crimes."). For materials examining the increasingly transnational nature of such crimes, see Yury Fedotov, Remarks at the OSCE Mediterranean Conference Event on "Links Between Drug Trafficking, Organized Crime and Terrorism in the Mediterranean Region", UN Off. on Drugs & Crime (Oct. 24, 2017), https://www.unodc.org/unodc/en/speeches/2017/osce-links-241017.html [https://perma.cc/N7EP-ELY2] ("The cross-border nature of organized crime provides potential avenues for these groups to cooperate where they share interests, and crime presents a number of potential revenue streams for terrorist groups."); see also Yashasvi Chandra, Illicit Drug Trafficking and Financing of Terrorism: The Case of Islamic State, Al Qaeda and Their Affiliate Groups, 14 J. Def. Stud. 69, 69 (2020) ("Over the years, major transnational terrorist groups have emerged as big actors in controlling the network of the illicit drug trade.").

5. See Duncan Smith, Money Laundering, Terrorist Financing and Virtual Assets 57–58 (2024) (defining cryptocurrency and exploring its relationship with national regulation and law enforcement); see also Jason Scharfman, The Cryptocurrency and Digital Asset Fraud Casebook 1–2 (2023) (defining cryptocurrency and citing estimates that, "[a]s of April 2021 . . . the value of the crypto markets is over $2 trillion").

6. Christina Parajon Skinner, Coins, Cross-Border Payments, and Anti-Money Laundering Law, 60 Harv. J. on Legis. 285, 301–11 (2023) (describing the role of banks in preventing terrorist financing and money laundering); see also Chandra, supra note 4, at 72 ("Following the guidelines issued by a majority of countries, banks and other financial institutes adopted comprehensive regulatory measures to curtail money laundering.").

7. See, e.g., Lars Daniel, The Alarming 'Pig Butchering' Cyber Scam Costing Victims Billions—Are You at Risk?, Forbes (Oct. 30, 2024), https://www.forbes.com/sites/larsdaniel/2024/10/30/this-halloween-beware-the-pig-butcher/ [https://perma.cc/4MQM-AH3L] (last updated Dec. 18, 2024) (explaining that "[p]ig butchering is a social engineering scam that combines elements of trust-building and fake investment opportunities" which often involves crypto); 'Pig Butchering' Scam: How China's 'Broken Tooth' Stole Over $75bn From Global Investors Using Crypto Currencies, Econ. Times, https://economictimes.indiatimes.com/news/international/global-trends/pig-butchering-scam-how-chinas-broken-tooth-stole-over-75-bn-from-global-investors-through-crypto-currencies/articleshow/116791522.cms?from=mdr [https://perma.cc/87XM-E3EB] (last updated Dec. 29, 2024) (describing the scam and its relationship to human trafficking); Last Week Tonight, Pig Butchering Scams: Last Week Tonight with John Oliver (HBO), at 3:27–3:34 (YouTube, Feb. 29, 2024), https://www.youtube.com/watch?v=pLPpl2ISKTg (on file with the *Columbia Law Review*) ("[I]f you are thinking, 'this seems like the kind of scam that's been around for decades,' that is partially true, but the way this one works is fairly new . . . .").

of such developments, the law has lagged behind. Unpersuaded by the Solicitor General's argument, a slim majority of the Supreme Court hamstrung federal courts' ability to fashion provisional remedies capable of keeping apace with accelerating asset mobility.[9]

As the mobility and intangibility of capital increases,[10] so too the exigency of reexamining provisional relief. The temptation of frustrating final judgments directly correlates with the ease with which litigants can transfer assets beyond a court's reach,[11] and it is patently impossible to imagine an effective system of litigation that allows a defendant to freely dissipate their assets or otherwise render themselves judgment-proof.[12] Effective provisional relief is accordingly vital. Asset-freeze injunctions are a particularly attractive provisional measure because "claimants can protect their potential judgments . . . when the location of assets against which judgment may be enforced is not a game of hide and seek."[13] In other common law jurisdictions, these injunctions are known as *Mareva* injunctions, interlocutory orders freezing a defendant's assets to prevent their dissipation,[14] and are an "increasingly common feature of modern

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8. See, e.g., Cohn v. Popescu, No. 1:24-CV-00337, 2024 WL 4525500, at *1 (E.D. Tex. Sep. 13, 2024) ("[Plaintiff] alleges that he has been the victim of what is known as a 'pig-butchering scam.'"); Harris v. Upwintrade.com, No. 1:24-CV-00313, 2024 WL 4920599, at *4 (E.D. Tex. Sep. 5, 2024) ("[T]he Harrises have provided evidence that the Defendants intentionally deceived them and misappropriated their assets in what appears to have been an intentional pig-butchering scam."); Song v. Doe, No: 6:24-cv-809-JSS-EJK, 2024 WL 4632242, at *1 n.1 (M.D. Fla. Aug. 19, 2024) ("Plaintiff asserts that she is the victim of what is colloquially known as a 'pig butchering' scam."); Richter v. KRG Trading, Inc., No. CV 24-03622-MWF (SKx), 2024 WL 3050812, at *2 (C.D. Cal. May 28, 2024) ("Plaintiff alleges that Defendants participated in a romance and investment scheme known as 'pig butchering.'").

9. See infra Part II.

10. See S. Nathan Park, Equity Extraterritoriality, 28 Duke J. Comp. & Int'l L. 99, 140 (2017) [hereinafter Park, Equity Extraterritoriality] ("Modern capitalism continuously generates more types of intangible properties of ever-greater dollar amount and ever-greater level of abstraction. The days when intangible properties were mostly debts, shares in a corporation, and simple forms of intellectual property, are firmly behind us . . . .").

11. See Janis Sarra, Stephan Madaus & Irit Mevorach, Chasing Assets Abroad: Ideas for More Effective Asset Tracing and Recovery in Cross-Border Insolvency, 32 Int'l Insolvency Rev. 253, 256 (2023) ("At the touch of computer keys, assets can be shifted through multiple jurisdictions within minutes, creating significant challenges for insolvency professionals and creditors to trace and recover the value for creditors of the insolvent debtor."); cf. Grateful Dead, Friend of the Devil, *on* American Beauty (Warner Records Inc. 1970) ("I ran down to the levee[,] but the devil caught me there[.] [H]e took my 20-dollar bill and vanished in the air.").

12. See David Capper, The Need for *Mareva* Injunctions Reconsidered, 73 Fordham L. Rev. 2161, 2179 (2005) ("[A] lawyer is hired not merely to go to court and win the case. [They] must also collect the debt. Enforcement is everything.").

13. Id. at 2161.

14. See Kern Alexander, The *Mareva* Injunction and *Anton Piller* Order: The Nuclear Weapons of English Commercial Litigation, 11 Fla. J. Int'l L. 487, 488 (1997) ("The purpose of the *Mareva* injunction is to prevent the defendant from dissipating or disposing of assets by removing them from or within the jurisdiction in a manner that would

international-commercial litigation."[15] In the U.S. legal system, provisional asset freezes take the form of preliminary injunctions that operate in personam, which only require jurisdiction over the defendant to command the use of property located beyond the jurisdiction of the court.[16] Asset-freeze injunctions have a distinct advantage over attachment, which requires property to be located within the court's jurisdiction.[17] This advantage is particularly pronounced in transnational

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frustrate a potential judgment."). This instrument draws its name from the case which created it. See Mareva Compania Naviera S.A. v. Int'l Bulkcarriers S.A., [1980] 1 All E.R. 213 (C.A. 1975); George A. Bermann, Provisional Relief in Transnational Litigation, 35 Colum. J. Transnat'l L. 553, 560 (1997) (describing the injunction's history). For a further discussion of *Mareva* injunctions, see Rhonda Wasserman, Equity Renewed: Preliminary Injunctions to Secure Potential Money Judgments, 67 Wash. L. Rev. 257, 336–48 (1992). For a discussion of the injunction's history, see generally James R. Theuer, Pre-Judgment Restraint of Assets for Claims of Damages: Should the United States Follow England's Lead, 25 N.C. J. Int'l L. 419 (2000) (exploring the development of the *Mareva* injunction in England).

15. James E. Pfander & Wade Formo, The Past and Future of Equitable Remedies: An Essay for Frank Johnson, 71 Ala. L. Rev. 723, 726 (2020). Before the *Grupo Mexicano* decision, asset-freezing injunctions also played an important role in ensuring that assets were available to compensate survivors of human rights abuses. Consider, for example, the human rights litigation surrounding the estate of Ferdinand Marcos, the former president of the Philippines. In re Estate of Ferdinand Marcos, Human Rts. Litig., 25 F.3d 1467 (9th Cir. 1994). There, survivors of Marcos and his regime brought suit against his estate for torture, summary execution, and forced disappearance. Id. at 1469. In order to ensure that a final judgment could be satisfied in a related matter, the district court entered a preliminary injunction which was later affirmed by the Ninth Circuit. Republic of the Philippines v. Marcos, 862 F.2d 1355, 1363–64 (9th Cir. 1988) (en banc), cert. denied, 490 U.S. 1035 (1989). The injunction enjoined the estate from transferring assets, and the plaintiffs in the human rights litigation successfully obtained continuation of that injunction. *Marcos*, 25 F.3d at 1480. Eventually, a jury awarded the plaintiffs $1.2 billion in exemplary damages and $766 million in compensatory damages, which the Ninth Circuit affirmed. Hilao v. Estate of Marcos, 103 F.3d 767, 772, 787 (9th Cir. 1996).

16. See *Marcos*, 862 F.2d at 1363–64 ("Because the injunction operates *in personam*, not *in rem*, there is no reason to be concerned about its territorial reach."); see also Wasserman, supra note 14, at 304 ("Both state and federal courts have held that they have authority to enjoin a person from taking . . . action outside the state or district so long as they have personal jurisdiction over the person." (footnotes omitted)). Note, however, that freezing assets held by third parties, including banks, requires personal jurisdiction over the third parties, rather than the real target of the freeze. This issue is taken up in section II.C.

17. 6 Am. Jur. 2d Attachments and Garnishments § 23 (2024) ("It is a fundamental rule that in attachment or garnishment proceedings the res must be within the jurisdiction of the court issuing the process."); see also Wasserman, supra note 14, at 301 (1992) ("The preliminary injunction acts *in personam* and bars the defendant from disposing of assets, but it does not bind the defendant's property in any way."). Asset-freeze injunctions and attachment are otherwise functionally similar. See FTC v. H.N. Singer, Inc., 668 F.2d 1107, 1112 (9th Cir. 1982) ("[T]he asset freeze has an effect comparable to that of an attachment . . . ."); see also Bermann, supra note 14, at 562–65 (explaining that an injunction operating in personam and preventing the disposal of assets can have the same practical effect as attachment).

disputes involving assets located abroad. Such cases may become increasingly common as U.S. residents hold more wealth overseas.[18]

Though the importance of provisional remedies in transnational disputes is increasingly acute, the subject has been neglected.[19] With few exceptions, the study of transnational litigation does not address provisional relief at all,[20] and the most recent satisfactory consideration of the subject is now nearly thirty years old.[21] This neglect is alarming. All of the considerations that emphasize provisional relief's role in protecting judgments in general apply a fortiori to transnational litigation because "it is much easier to frustrate the enforcement of the court's final judgment when the case crosses the national border."[22] The

18. See Greg Falkof, Introduction: The Growth of International Arbitration for Private Wealth Disputes, Glob. Arb. Rev. (Apr. 30, 2025), https://globalarbitrationreview.com/guide/the-guide-high-net-worth-clients-and-arbitration/first-edition/article/introduction-the-growth-of-international-arbitration-private-wealth-disputes [https://perma.cc/ALM6-GRTW] ("The recent growth and internationalisation of private wealth gives rise to a greater demand for legal services tailored to multi-jurisdictional wealth-related disputes . . . ."). Notably, assets may be held abroad through crypto, requiring developments in other areas of the law. Cf. Williams v. Binance, 96 F.4th 129, 139 (2d Cir. 2024) (discussing the possibility that U.S. securities laws may not apply to cryptocurrency transactions that happened to be processed through servers physically located in the United States); Basic v. BProtocol Foundation, No. A-23-CV-533-RP, 2024 WL 4113751, at *9 (W.D. Tex. July 31, 2024) (distinguishing *Binance* and dismissing a claim for forum non conveniens because the electronic exchange was subject to Israeli regulation). As of October 2024, an estimated 17% of U.S. adults hold assets in crypto. Michelle Faverio, Wyatt Dawson & Olivia Sidoti, Majority of Americans Aren't Confident in the Safety and Reliability of Cryptocurrency (Oct. 24, 2024), https://www.pewresearch.org/short-reads/2024/10/24/majority-of-americans-arent-confident-in-the-safety-and-reliability-of-cryptocurrency/ [https://perma.cc/9YJ5-9HD8].

19. Issues that are more or less well addressed in domestic litigation are often undertheorized and must therefore be reevaluated in the "more turbulent waters of transnational litigation." Bermann, supra note 14, at 556.

20. See King Fung Tsang & Pierce Lai, To Catch the Cheshire Cat: Freezing Injunction Jurisdiction at the Click of a Mouse, 33 Wash. Int'l L.J. 115, 146 (2024) ("Pre-judgment provisional measures in U.S. courts have attracted relatively few discussions. That was status quo prior to the seminal case of *Grupo Mexicano*. Even though that seminal case received sharp criticisms, the lack of discussion continued." (footnotes omitted)). Previous articles on the topic have used its conspicuous absence in relevant textbooks to emphasize the paucity of academic attention paid to this issue. See S. Nathan Park, Recognition and Enforcement of Foreign Provisional Orders in the United States: Toward a Practical Solution, 38 U. Pa. J. Int'l L. 999, 1003–04 (2017) [hereinafter Park, Recognition and Enforcement] ("Provisional orders are such a scholarly afterthought that the leading textbook in transnational litigation in the United States does not even have a chapter on provisional orders." (citing Samuel P. Baumgartner, Transnational Litigation in the United States, 55 Am. J. Comp. L. 793, 797–98 (2007) (reviewing Gary Born & Peter B. Rutledge, International Civil Litigation in United States Courts (4th ed. 2007)))).

21. See Bermann, supra note 14, at 557. Professor Bermann concluded that provisional relief in transnational litigation "is far less well defined than the more conventional sorts of judicial interventions." Id. at 556.

22. Park, Recognition and Enforcement, supra note 20, at 1001. See also Jimi Hendrix, All Along the Watchtower, *on* Electric Ladyland (Sony Music Entertainment 1968) ("There's too much confusion[,] I can't get no relief.").

unique costs, uncertainties, and burdens of transnational litigation compel renewed emphasis on measures to deter "actions that will make ultimate victory pyrrhic."[23] Reassessing provisional relief in transnational litigation is especially timely as academic and practical interest in the field intensifies.[24]

The urgency of a renewed focus on developing effective provisional measures in transnational litigation coincides with current pioneering scholarship on equitable remedies.[25] When applied to assets held abroad, asset-freeze injunctions are an exercise of equity extraterritoriality, that is, "the court's authority, originating from the court's equitable powers, to order a person to take certain actions outside of the court's territorial jurisdiction."[26] This use of a court's equitable powers is a potent and flexible means of replying to asset mobility, especially in transnational cases. Though the Supreme Court limited asset freezes by introducing and relying on a static conception of equity,[27] the time is ripe for a reevaluation of that static approach. As Professor Asaf Raz has pointed out, "[A]ll the cards, from originalism and textualism, through the Constitution's text, to relevant case law, are already on the table."[28] This Note argues that the U.S. approach to asset freezes is inadequate to protect the integrity of transnational disputes in a climate characterized

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23. David Westin & Peter Chrocziel, Interim Relief Awarded by U.S. and German Courts in Support of Foreign Proceedings, 28 Colum. J. Transnat'l L. 723, 723 (1990); cf. Asahi Metal Industry Co. v. Superior Ct. of Cal., 480 U.S. 102, 114 (1987) ("The unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders.").

24. See Christopher A. Whytock, Transnational Litigation in U.S. Courts: A Theoretical and Empirical Reassessment, 19 J. Empirical Legal Stud. 4, 5 (2022) ("Transnational litigation is an increasingly active field of scholarship . . . and legal practice." (citations omitted)); see also Pamela K. Bookman, Litigation Isolationism, 67 Stan. L. Rev. 1081, 1083–84 (2015) ("Transnational suits—cases involving foreign parties, foreign conduct, foreign law, or foreign effects—and the law the governs them have growing significance in the United States and around the world."). Transnational cases themselves are also on the rise; "there has been an absolute increase in the number of disputes with discernible connections or relations to more than one country—or no clear connection to any country at all." Paul Herrup, Transnational Litigation: Trends and Challenges, 56 N.Y.U. J. Int'l L. & Pol. 231, 232 (2024); see also Andrew S. Bell, Forum Shopping and Venue in Transnational Litigation 4 (2003) ("[M]ore international trade means more transnational disputes, contractual, quasi-contractual, and arising from the negligent provision of goods and services."). Exact empirical information on this issue is, however, in dispute. See Whytock, supra, at 48 ("[T]ransnational diversity filings constitute a significant but small portion of overall diversity filings . . . they have decreased overall since at least the mid-1980s and then stabilized, with occasional fluctuations . . . .").

25. See infra section III.A.

26. Park, Equity Extraterritoriality, supra note 10, at 102 (internal quotation marks omitted).

27. See Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 336 (1999) (Ginsburg, J., concurring in part and dissenting in part) ("[T]he Court relies on an unjustifiably static conception of equity jurisdiction."); infra section I.A.

28. Asaf Raz, The Original Meaning of Equity, 102 Wash. U. L. Rev. 541, 593 (2024).

by increasing asset mobility and narrowing approaches to personal jurisdiction. As Professor Nathan Park has suggested, "[T]he developing trends of modern capitalism, in particular its ever-increasing reliance on intangible property, indicate that Equity Extraterritoriality will become even more important in the coming decades."[29] The time has now come to revisit the use of asset-freeze injunctions and put them in productive conversation with current scholarship on equitable remedies.

This Note proceeds in three parts. Part I draws on recent case law to paint a comprehensive portrait of the current state of asset-freeze injunctions in the United States, a project that has not yet been undertaken comprehensively. It shows that asset-freeze injunctions remain available in cases seeking equitable remedies and, more broadly, under the laws of certain states. Part II establishes the urgency of reconsidering asset-freeze injunctions because contemporary asset mobility along with legal developments regarding cryptocurrency and nonparty jurisdiction have rendered the current approach described in Part I inconsistent with the purposes and aims of provisional relief. Part III draws on recent literature on federal equitable remedies to argue that a new federal common law approach to asset-freeze injunctions in transnational cases is now feasible and can equip federal courts to respond to the contextual transformations addressed in Part II. It argues that the transnational context is a particularly attractive one in which to enact changes to federal equity practices because it provides a limiting principle, is less susceptible to *Erie*-based objections, and because "international civil litigation has in the past proved fertile ground for domestic law reform."[30] It then explores some limitations to the proposed approach and concludes that the proposal is nonetheless a worthwhile effort that remedies neglect of provisional relief in transnational litigation, provides a feasible solution that will equip courts to issue effective provisional relief, and advances the study of federal equitable remedies.

I. Provisional Asset Freezes in U.S. Courts

Given the paucity of academic attention dedicated to the subject,[31] a reappraisal of the U.S. approach to asset-freeze injunctions that accounts

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29. Park, Equity Extraterritoriality, supra note 10, at 183.

30. Stephen B. Burbank, Bitter With the Sweet: Tradition, History, and Limitations on Federal Judicial Power—A Case Study, 75 Notre Dame L. Rev. 1291, 1334 (2000).

31. See supra notes 19–21 and accompanying text. The enforcement of foreign asset freezes has also received little attention, and this process is distinct from that of issuing asset freezes. See Bermann, supra note 14, at 557 ("[I]t may also be necessary . . . to distinguish between situations in which a party to foreign litigation seeks relief from a U.S. court and situations in which a foreign court issues its own order of relief and the U.S. court is merely asked . . . to 'enforce' it."). Though there is not sufficient space in this Note to provide a solution to this issue as well, the following provides the current state of law on the issue. Professor Nathan Park has noted that "U.S. law provides virtually no

for the most recent developments in intangible properties is required. This Part provides a comprehensive view of this landscape. After examining the foundations of the doctrine in *Grupo Mexicano de Desarrollo v. Alliance Bond Fund*, it explains that asset freezes are still available under Federal Rule of Civil Procedure 65 in circumstances in which a plaintiff seeks equitable relief,[32] and under Rule 64, when approved by the law of the forum state.[33] *Grupo Mexicano* does not

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guidance" on the issue and that the process "is fraught with uncertainty and delay." Park, Recognition and Enforcement, supra note 20, at 1001. Unsurprisingly, there is a serious paucity of authority that can reveal a uniform approach to enforcing foreign asset freezes. A few state courts have held that foreign provisional orders are entitled to recognition and enforcement. See id. at 1002. In *Amezcua v. Cortez*, a Florida state court relied on comity to enforce an injunction prohibiting a defendant from transferring assets located in Florida. 314 So. 3d 666, 668–69 (Fla. Dist. Ct. App. 2021). The court relied upon *Cermesoni v. Maneiro*, where the court of appeals had observed: "[W]e have repeatedly approved the enforcement in Florida of temporary injunctions issued by foreign courts as a matter of international comity." 144 So. 3d 627, 629 (Fla. Dist. Ct. App. 2014); see also Gorsoan Ltd. v. Bullock, No. 2020-020803-CA-01, at 3 (Fla. Cir. Ct. Feb. 17, 2021) (holding that foreign interim orders are enforceable under Florida law). Authority is similarly sparse in federal court. A few recent cases suggest hostility. For example, in *LMS Commodities DMCC v. Libyan Foreign Bank*, a Texas district court declined to enforce a foreign asset freeze under the Uniform Foreign-Country Money Judgments Recognition Act and declined to allow amendment of the complaint because "it would be futile for LMS to continue to seek recognition of a prejudgment asset-freeze order." No. 1:18-CV-679-RP, 2019 WL 1925499, at *4 (W.D. Tex. Apr. 30, 2019). The court made no mention of the comity considerations that led state courts to enforce foreign asset freezes. Indirectly enforcing foreign asset freezes also proves challenging. In one recent case, a federal court rejected the argument that comity compels considering a foreign court's issuance of a global asset freeze sufficient to demonstrate a likelihood of success on the merits for attachment in the forum where the court sits. Sakab Saudi Holding Co. v. Aljabri, 578 F. Supp. 3d 140, 144 (D. Mass. 2021), aff'd, 58 F.4th 585 (1st Cir. 2023). Finally, a recent bankruptcy case has raised the issue that enforcing a foreign asset freeze is contrary to public policy based on *Grupo Mexicano*. In re Nexgenesis Holdings Ltda., 662 B.R. 406, 416–21 (Bankr. S.D. Fla. 2024) ("[T]he Ex Parte Order violates basic public policies of the United States, that is . . . that, with very limited exception, the assets of U.S. citizens and companies may not be frozen prior to judgment pending the adjudication of a claim for money damages."); see also id. at n.8 ("[G]ranting the requested injunctive relief would harm . . . the public interest, as creditors should be required to receive a judgment before being allowed to dictate control of the property." (second alteration in original) (internal quotation marks removed) (quoting Residential Fin. Corp. v. Jacobs, No. 2:13-cv-1167, 2014 WL 682486, at *4 (S.D. Ohio Feb. 21, 2014))).

32. In addition to the exceptions addressed at length in this note, *Grupo Mexicano* does not prohibit the issuance of asset-freezing injunctions for *secured* creditors. See, e.g., III Finance Ltd. v. Aegis Consumer Funding Grp., Inc., No. 99 CIV. 2579(DC), 1999 WL 461808, at *4 n.1 (S.D.N.Y. July 2, 1999) ("The *Grupo* case is inapplicable here because III Finance claims a security interest in the assets subject to the preliminary injunction."); Tibor Tajti & Peter Iglikowski, A Cross Border Study of Freezing Orders and Provisional Measures: Does Mareva Rule the Waves? 46 n.14 (2018) ("As secured creditors have rights in the collateral, preliminary injunctions are available to them and the restrictions of *Grupo Mexicano* do not apply to them."); c.f. *Grupo Mexicano*, 527 U.S. at 330 ("[B]efore judgment (or its equivalent) an unsecured creditor has no rights at law or in equity in the property of his debtor.").

33. See infra section I.A.2.

directly bind state courts, so they may follow federal courts in making a distinction between legal and equitable remedies or decline to do so.[34] Though the state law on this issue is sparse, this Note assembles as much relevant authority as can be located.[35] The persistence of asset-freeze injunctions emphasizes their utility, indicating that courts view them as a powerful tool to protect final judgments.

A. *Federal Court*

1. *Rule 65.* — The Supreme Court restrained federal courts' ability to issue and enforce asset-freeze injunctions under federal law in *Grupo Mexicano*.[36] Writing for a 5-4 majority, Justice Antonin Scalia concluded that the district court did not have the power to issue an asset-freeze injunction pursuant to Rule 65 because such power was not "traditionally accorded by courts of equity" and therefore was not conferred upon federal courts by the Judiciary Act of 1789,[37] which granted authority "to administer in equity suits the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries."[38] The Court reasoned that, at time of the Founding, it was understood that a creditor had no interest in the debtor's property and thus could not "interfere with the debtor's use of that property," so preliminary relief of this kind was not cognizable absent a prior judgment.[39]

But federal courts have inherent equitable power to issue injunctions freezing assets under Rule 65 when the remedy sought is equitable rather than legal.[40] When seeking an equitable remedy, *Deckert*

34. See infra section I.B.

35. See infra note 53.

36. Tsang & Lai, supra note 20, at 146.

37. *Grupo Mexicano*, 527 U.S. at 318.

38. Id. (quoting Atlas Life Ins. Co. v. W.I. Southern, Inc., 306 U.S. 563, 568 (1939)).

39. Id. at 319–20. Though the Government's amicus brief pointed out that the preliminary injunction sought was analogous to "certain applications of a 'creditor's bill,' Justice Scalia essentially required not analogy but identity" with relief traditionally available in courts of equity. Daniel B. Listwa & Charles Seidell, Note, Penalties in Equity: Disgorgement After *Kokesh v. SEC*, 35 Yale J. on Regul. 667, 686 (2018). Recent district court cases have held that *Grupo Mexicano*'s prohibition applies even in bankruptcy cases. See In re Nexgenesis Holdings Ltda., 662 B.R. 406, 416 (Bankr. S.D. Fla. 2024) ("Although this Court has equitable powers, such powers do not provide this Court with the power to do something forbidden to Article III courts.").

40. Tsang & Lai, supra note 20, at 152; see also Purple Innovation v. Foshan Dirani Design Furniture, No. 2:22-cv-620-HCN-DAO, 2024 WL 1347356, at *8 n.4 (D. Utah Mar. 29, 2024) ("Here, Purple sought final equitable relief against the Defendants in its complaint . . . . It follows that *Grupo Mexicano* does not bar an asset freeze in this case."); Fed. Trade Comm'n v. Verity Int'l, Ltd., No. 00 Civ. 7422 (LAK), 2001 WL 504849, at *2 (S.D.N.Y. May 14, 2001) ("*Grupo Mexicano* was limited to cases seeking strictly legal relief . . . ."). Courts have also interpreted certain statutes as providing for asset-freeze injunctions. See Tiffany (NJ) LLC v. Dong, No. 11 Civ. 2183 (GBD) (FM), 2013 WL 4046380, at *22–23 (S.D.N.Y. Aug. 9, 2013) ("[T]he Lanham Act expressly provides that

v. Independence Shares Corp. controls, standing for the proposition that "a court has sufficient equitable powers to preliminarily freeze a defendant's assets in suits sounding in equity."[41]

2. *Rule 64.* — Federal courts may issue asset-freeze injunctions "under the law of the forum state pursuant to Rule 64."[42] Rule 64 equips federal courts with "every remedy . . . available . . . under the law of the state where the court is located" that "provides for seizing a person or property to secure satisfaction of the potential judgment."[43] In *Pineda v. Skinner Services*, the First Circuit held that Rule 64 authorizes "injunctive relief under state law,"[44] meaning that "*Grupo Mexicano* does not constrain the district court's authority to grant analogous relief under

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federal courts have the power to 'grant injunctions, according to the principles of equity' in trademark infringement cases." (quoting 15 U.S.C. § 1116(a) (2024))); see also Mun. Credit Union v. Queens Auto Mall, Inc., 126 F. Supp. 3d 290, 298–99 (E.D.N.Y. 2015) ("A district court has authority under the Lanham Act to grant injunctive relief to protect a plaintiff's trademark rights.").

41. Turnkey Offshore Project Servs., LLC v. JAB Energy Sols., LLC, No. 21-672, 2021 WL 3509677, at *6 (E.D. La. Aug. 10, 2021) (citing Deckert v. Independence Shares Corp., 311 U.S. 282, 289–91 (1940)); Theuer, supra note 14, at 484 ("If equitable relief is sought, injunctions may issue . . . ."); see also Fed. Sav. & Loan Ins. Corp. v. Dixon, 835 F.2d 554, 562 (5th Cir. 1987) ("[O]nce a plaintiff establishes an equitable cause of action, the district court may use its full equitable powers to grant appropriate preliminary relief as well.").

42. Pineda v. Skinner Servs., Inc., 22 F.4th 47, 53 (1st Cir. 2021); see also Fed. R. Civ. P. 64 ("[E]very remedy is available that, under the law of the state where the court is located, provides for seizing a person or property to secure satisfaction of the potential judgment."); Fed. Trade Comm'n v. Zurixx, LLC, No. 2:19-cv-713-DAK-DAO, 2021 WL 5179139, at *7 (D. Utah Nov. 8, 2021) ("Rule 64 allows the court to follow Utah rules allowing receiverships and asset freeze injunctions."); cf. *Grupo Mexicano*, 527 U.S. at 330 ("The remedy sought here could render Federal Rule of Civil Procedure 64, which authorizes use of state prejudgment remedies, a virtual irrelevance."); Gilead Scis., Inc. v. Safe Chain Sols., LLC, 684 F. Supp. 3d 51, 69–71 (E.D.N.Y. 2023) (declining to issue an asset freeze under state law because the Lanham Act was applicable to the assets in question). Though asset-freeze injunctions do not deprive a party of possession of their assets like other measures described in Rule 64, their functional equivalence counsels against drawing too sharp a distinction between these remedies, especially when the rule specifies "other corresponding or equivalent remedies, however designated." Burbank, supra note 30, at 1313 (citing Fed. R. Civ. P. 64). For further arguments against distinguishing between Rules 64 and 65 for asset-freeze injunctions, see id. at 1312–16.

43. Fed. R. Civ. P. 64.

44. *Pineda*, 22 F.4th at 53 (citing United States ex rel. Rahman v. Oncology Assocs., 198 F.3d 489, 501 (4th Cir. 1999) (holding that FRCP 64 "incorporates state procedures authorizing any meaningful interference with property to secure satisfaction of a judgment, including any state-authorized injunctive relief for freezing assets" and that this form of provisional relief was available under Maryland law)); see also Hendricks v. Bank of Am., N.A., 408 F.3d 1127, 1139 (9th Cir. 2005) ("[W]e look to California law to determine whether the district court could grant a preliminary injunction even though final resolution of the underlying fraud claim would not occur in that court."); Charlesbank Equity Fund II v. Blinds To Go, Inc., 370 F.3d 151, 161 (1st Cir. 2004) ("The [Supreme] Court's reasoning [in *Grupo Mexicano*] supports the continued vitality of Rule 64 . . . .").

Rule 64 when authorized by the law of the forum state."[45] District courts in the First Circuit have relied upon this principle,[46] and the Fourth Circuit has as well.[47]

The *Pineda* court went on to reject the defendant's argument that a federal court's power to issue an asset-freeze injunction under Rule 64 extends only to cases in which the court sits in diversity because "nothing in Rule 64 indicates that the power . . . turns on the basis for the district court's subject-matter jurisdiction."[48] Accordingly, the court held that the district court had "correctly asserted its authority"[49] in enjoining the defendant "from selling, transferring, or otherwise conveying any assets . . . except in the ordinary course of business, unless the net value of the assets of Skinner Services, Inc. will be at least $1,425,000 regardless of any such sale, transfer, or conveyance."[50] Though a domestic case, the court's rationale for granting the injunction—that "defendants may dissipate or conceal their assets in order to avoid judgment"[51]—is no less applicable to transnational litigation. So long as a federal district court has personal jurisdiction over a party, and state law authorizes provisional asset-freezing measures, there is no reason why the court could not enjoin them from transferring foreign assets.[52]

B. *State Court*

State courts may issue provisional asset freezes if permitted to do so by state law.[53] *Grupo Mexicano* does not directly bind state courts which

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45. *Pineda*, 22 F.4th at 49.

46. See BRT Mgmt., LLC v. Malden Storage, LLC, No. 17-10005-FDS, 2022 WL 95926, at *2 (D. Mass. Jan. 10, 2022) (citing *Pineda* and holding that the district court may grant asset-freeze injunctions under Massachusetts law); Revolutions Med. Corp. v. Med. Inv. Grp. LLC, No. 12-10753-GAO, 2012 U.S. Dist. LEXIS 186815, at *14 n.10 (D. Mass. Nov. 7, 2012) ("Rule 64 'allows a federal court to borrow provisional remedies created by state law.'" (quoting Goya Foods, Inc. v. Wallack Mgmt. Co., 290 F.3d 63, 70 (1st Cir. 2002))).

47. See *Rahman*, 198 F.3d at 501 (holding that FRCP 64 "incorporates state procedures authorizing any meaningful interference with property to secure satisfaction of a judgment, including any state-authorized injunctive relief for freezing assets" and that this form of provisional relief was available under Maryland law).

48. *Pineda*, 22 F.4th at 54.

49. Id. at 55.

50. Pineda v. Skinner Servs., Inc., No. 16-12217-FDS, 2019 WL 8262655, at *3 (D. Mass. Dec. 23, 2019), aff'd *Pineda*, 22 F.4th. 47.

51. Id. at *1.

52. See Bermann, supra note 14, at 566 (arguing that courts should not hesitate to issue orders restraining property abroad and should issue contempt orders in the event of noncompliance regardless of whether foreign judicial assistance is forthcoming); cf. Abi Jaoudi & Azar Trading Corp. v. Cigna Worldwide Ins. Co., Civ. No. 91-6785, 2016 WL 3959078, at *1 (E.D. Pa. July 22, 2016) (concluding that the foreign nationality of nonparties did not insulate them from being held in contempt).

53. Though state case law is sparse, the following attempts to account for as many state law positions on the issue as possible. For Alabama, see Norman v. Occupational

Safety Ass'n of Ala. Workmen's Comp. Fund, 811 So. 2d 492, 501 (Ala. 2001) ("Although the Supreme Court's holding on the jurisdiction of the federal district courts does not control Alabama courts' authority to issue injunctions, the analysis is persuasive and consistent with Alabama law."). For California, see Morris v. Lee, No. 30-2021-01234127-CU-EN-CJC, 2022 Cal. Super. Lexis 51, at *1 (Cal. Super. Ct. Jan. 3, 2022) (issuing an asset freeze because of a risk of "immediate and irreparable damage to the Court's ability to grant effective final relief in the form of permanent injunctive relief, restitution, disgorgement, or other equitable monetary relief"); see also Pavone & Fonner, LLP v. Willis, No. D072986, 2018 WL 1476694, at *6–7 (Cal. Ct. App. Mar. 27, 2018) (declining to issue an asset freeze to preserve effectiveness of potential monetary judgment). For Connecticut, the only available analysis is federal. See Sec. Ins. Co. of Hartford v. Trustmark Ins. Co., 221 F.R.D. 300, 302 (D. Conn. 2003) (appearing to distinguish sharply between provisional remedies available under FRCP 65 and those available under FRCP 64). For Delaware, see Am. Healthcare Admin. Servs. v. Aizen, 285 A.3d 461, 482 (Del. Ch. 2022) ("Equitable relief that has the sole function and effect of freezing [a litigant's] assets in place to make them available to satisfy any possible future money judgment . . . is not within the proper exercise of the Court's power." (alterations in original) (internal quotation marks omitted) (quoting Uragami v. Century Int'l Credit Corp., No. Civ.A. 15659, 1997 WL 33175027, at *2 (Del. Ch. Dec. 2, 1997))); Seiden v. Kaneko, No. 9861-VCN, 2015 WL 7289338, at *14 (Del. Ch. Nov. 3, 2015) (citing *Grupo Mexicano* approvingly and drawing a distinction between fraudulent transfer and a future monetary judgment). For Florida, see Stand Up for Animals, Inc. v. Monroe Cnty., 69 So. 3d 1011, 1013 (Fla. Dist. Ct. App. 2011) (declining to freeze assets because the claims, "while sounding in equity, are no more than a claim for damages stemming from a breach of contract" and thus are reparable by money damages). For Georgia, see Western Sky Fin., LLC v. State ex rel. Olens, 793 S.E.2d 357, 369 (Ga. 2016) (citing *Grupo Mexicano* approvingly and noting that "this Court, applying Georgia law, has held that injunctive relief may be available in cases in which equitable relief is sought"); see also SRB Inv. Servs., LLLP v. Branch Banking & Trust Co., 709 S.E.2d 267, 273–74 (Ga. 2011) (affirming an asset-freeze injunction involving fraudulent transfers). For Illinois, see Franz v. Calaco Dev. Corp., 751 N.E.2d 1250, 1256 (Ill. App. Ct. 2001) ("The law does not provide for a process of equitable attachment."); see also Oak Leaf Outdoors, Inc. v. Double Dragon Int'l, Inc., 812 F. Supp. 2d 944, 946–49 (C.D. Ill. 2011) (citing *Franz* and declining to issue an asset freeze under FRCP 64). For Indiana, see Paul v. I.S.I. Servs., Inc., 726 N.E.2d 318, 321–22 (Ind. Ct. App. 2000) (affirming an asset freeze because it was more "practicable, efficient, and adequate" than a legal remedy, despite plaintiff's pursuit of money damages). For Massachusetts, see SW Invs., Inc. v. 75 Sydney St., LLC, No. 2184CV00338BLS2, 2021 WL 5626284, at *1 (Mass. Super. Ct. Apr. 6, 2021) (following *Grupo Mexicano* and concluding that the injunction sought amounted to an illegal "creditor's bill"); Interisle Consulting Grp., LLC v. Galaxy Internet Servs., Inc., 32 Mass. L. Rptr. 177, 177 (Super. Ct. 2014) ("The Court is not obligated to follow the Supreme Court's decision in *Grupo Mexicano,* . . . [b]ut the Supreme Judicial Court has made clear that the same limitations on equity jurisdiction discussed in *Grupo Mexicano* also apply under Massachusetts law."). Emphasizing the complexity of state/federal divides on this issue, the Court of Appeals for the First Circuit declined to follow both of these cases, instead authorizing an asset freeze for a money judgment on the basis that "[t]he weight of Massachusetts authority indicates that the Supreme Judicial Court of Massachusetts would permit the preliminary injunction at issue here." *Pineda*, 22 F.4th at 54. For Minnesota, see U.S. Bank Nat'l Ass'n v. Angeion Corp., 615 N.W.2d 425, 434 (Minn. Ct. App. 2000) ("Although the Supreme Court's holding on the jurisdiction of the federal district courts does not control Minnesota courts' authority to issue injunctions, the analysis is persuasive and consistent with Minnesota law."). For Nebraska, the only available analysis is federal. See Pioneer Hi-Bred Int'l, Inc. v. AltEn, LLC, Nos. 8:22CV70; 8:22CV71; 8:22CV82, 2023 WL 1822724, at *10–15 (D. Neb. Feb. 8, 2023) (sharply distinguishing between asset freezes available under FRCP

remain free to offer broader provisional relief than that available in federal court.[54] Of course, state courts may continue to draw distinctions between legal and equitable relief and will often follow the Supreme Court's reasoning.[55] Some state courts have reached the same position as the Supreme Court based on state law alone.[56] In cases in which the moving party seeks equitable relief, state courts, like their federal counterparts, are willing to issue asset-freeze injunctions.[57]

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65 and attachment under Nebraska law under FRCP 64). For Nevada, see Triangulum Partners, LLC v. Galaxy Gaming, Inc., No. 79555, 2021 WL 1346095, at *2 (Nev. Apr. 9, 2021) (citing *Grupo Mexicano* approvingly for the proposition that a right to recover must be established before equitable interference with property). For North Carolina, see State ex rel. Cooper v. Western Sky Fin., LLC, No. 13 CVS 16487, 2015 WL 5091229, at *19 (N.C. Super. Ct. Aug. 27, 2015) (citing *Grupo Mexicano* approvingly for its law/equity distinction but in dicta). For New York, see Credit Agricole Indosuez v. Rossiyskiy Kredit Bank, 729 N.E.2d 683, 686 (N.Y. 2000) ("[T]he evidence is that section 6301 was intended to embody the very same traditional principles of equity jurisdiction *Grupo Mexicano* found reflected in Federal Rules of Civil Procedure, rule 65 in an action on a debt."). For Oklahoma, see H.A. Sand Springs, LLC v. Lakeside Care Center, LLC, 273 P.3d 73, 77 (Okla. Civ. App. 2011) ("The *Grupo* decision, which recognizes the limits of a federal court's equity jurisdiction, is not dispositive of this state court proceeding . . . ."). For South Carolina, see Scratch Golf Co. v. Dunes West Residential Golf Props., Inc., 603 S.E.2d 905, 907 (S.C. 2004) ("There is no federal question here that would cause the *Grupo* decision to be binding in this state court proceeding."). For Texas, the position is complex. Courts have endorsed *Grupo Mexicano*. See, e.g., Michael v. NE CS First Nat'l, LP, No. 02-23-00307-CV, 2024 WL 1579009, at *48 (Tex. Ct. App. Apr. 11, 2024) (following principles established in *Grupo Mexicano*); RWI Construction, Inc. v. Comerica Bank, 583 S.W.3d 269, 276 (Tex. Ct. App. 2019) (endorsing *Grupo Mexicano's* reasoning that courts may not enjoin assets unrelated to the suit because it reasoned from English common law, and Texas state law had adopted English common law as the "rule of decision in Texas courts"). However, Texas courts will allow asset freezes so long as they are not "completely unrelated to the subject matter of the suit," that is, if they may be used to "satisfy claims in the parties' dispute." Tex. Black Iron, Inc. v. Arawak Energy Int'l Ltd., 527 S.W.3d 579, 586–87 (Tex. Ct. App. 2017) ("Here, Arawak presented evidence that the particular 20" and 26" drilling equipment it sought to enjoin related to and would be used to mitigate Arawak's claims related to its purchase of these items."); see also Renovation Gurus, LLC v. Lake Point Assisted Living, LLC, No. 05-19-00499-CV, 2020 WL 477135, at *3 (Tex. Ct. App. Jan. 29, 2020) (summarizing the "general rule and its exception").

54. See, e.g., *U.S. Bank Nat'l Ass'n*, 615 N.W.2d at 434 (Minn. Ct. App. 2000) ("[T]he Supreme Court's holding on the jurisdiction of the federal district courts does not control Minnesota courts' authority to issue injunctions . . . ."); *H.A. Sand Springs*, 273 P.3d at 77 (Okla. Civ. App. 2011) ("The *Grupo* decision, which recognizes the limits of a federal court's equity jurisdiction, is not dispositive of this state court proceeding . . . ."); see also Emigrant Bus. Credit Corp. v. Hanratty, No. 158207/2022, 2022 N.Y. Misc. LEXIS 7416, at *12 n.3 (N.Y. Sup. Ct. Nov. 29, 2022) ("Defendants also cite the United States Supreme Court case *Grupo Mexicano* . . . . Defendants fail to explain the applicability of this federal court case, which, even if it were, for argument's sake, applicable, would also be unavailing.").

55. See supra note 53.

56. See supra note 53.

57. See supra note 53 (no courts disputing their authority to issue these injunctions where equitable relief is sought). For example, a state court in Florida issued an asset-freeze injunction against Heathrow Financial Corporation for violations of state law which

Other state courts reject this position more or less explicitly. Appellate courts in Oklahoma[58] and South Carolina[59] have noted that they do not consider *Grupo Mexicano* dispositive. California state courts appear to have reached this same conclusion implicitly.[60] Given that *Grupo Mexicano* does not bind state courts, commentators on state law, like critics of *Grupo Mexicano* generally, favor the issuance of asset-freeze injunctions that are not burdened by the Justice Scalia's "static conception of equity jurisdiction,"[61] preferring Justice Ruth Bader Ginsburg's approach.[62]

II. CONTEXTUAL TRANSFORMATIONS AND THE INADEQUACY OF CURRENT LAW

If the case for robust provisional measures to protect a final judgment against dissipation was persuasive in 1999, matters are now well beyond the Rubicon.[63] The ease of transferring and concealing assets has increased exponentially since the Supreme Court considered the issue.[64] In response to these developments, commentators in foreign jurisdictions have urged more vigorous pursuit of *Mareva* injunctions because "the possibility to now wire transfer millions of dollars from one country to another in the blink of an eye, combined with the speed and complex-

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applied to assets worldwide because plaintiffs sought "equitable relief in the form of restitution." State v. Heathrow Fin. Corp., No. 2016-CA-00136, 2016 Fla. Cir. LEXIS 4924, at *2 (Fla. Cir. Ct. Jan. 14, 2016).

58. *H.A. Sand Springs*, 273 P.3d at 77.

59. Scratch Golf Co. v. Dunes West Residential Golf Props., Inc., 603 S.E.2d 905, 907 (S.C. 2004).

60. In *ODG Sweegen LLC v. Chen*, for example, a California state court relied on state law to note that "there are circumstances allowing for the issuance of an injunction when monetary damages are sought." No. 30-2020-01140383-CU-BT-CXC, 2020 Cal. Super. LEXIS 7481, at *12 (July 8, 2020). The court's analysis did not address the plaintiff's equitable interest in the frozen assets, id., and the order was affirmed by the appellate court. ODG Sweegen v. Chen, No. G059226, 2021 WL 2657016, at *14 (Cal. Ct. App. June 29, 2021).

61. Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 336 (1999) (Ginsburg, J., concurring in part and dissenting in part).

62. See 1 Enforcement of Judgments and Liens in Virginia § 2.4 ("Justice Ginsburg's dissenting opinion . . . argues persuasively for Equity's generative capacity to grow and accommodate to changing economic and legal developments. . . . Other states' courts, including Virginia's, might consider it carefully in evaluating whether their jurisprudence supports an asset-freezing injunction, when the court has in personam jurisdiction over the defendant . . . .").

63. See supra notes 2–8 and accompanying text; see also Tom Holland, Rubicon: The Last Years of the Roman Republic, at xv (2003) ("Narrow and obscure the stream may have been, so insignificant that its very location was ultimately forgotten, yet its name is remembered still. No wonder. So fateful was Caesar's crossing of the Rubicon that it has come to stand for every fateful step taken since.").

64. See Park, Recognition and Enforcement, supra note 20, at 1013–14 ("Thanks to ever-increasing international commerce and advancements in technology, it takes mere seconds to move money across the border, and mere hours to move a person."); Sarra et al., supra note 11, at 256.

ity of international trade, makes it easier than ever to dissipate assets."[65] Currently, courts in the United States are unable to follow suit, and this Part argues that the current American approach to asset freezes in a climate of extreme asset mobility undermines the very rationale of provisional measures, which is to protect the integrity of the litigation.[66] This Part then examines two particular developments that compel reexamination of asset-freeze injunctions under U.S. law, each of which has further inhibited courts' ability to protect final judgments in transnational cases.[67] First, the development of case law over the last two years in response to the proliferation of crypto fraud cases threatens to further restrict the availability of asset-freeze injunctions in the very cases in which they are most crucial. Second, the Supreme Court's narrowing approach to personal jurisdiction has severely curtailed courts' ability to enforce orders against foreign nonparties who serve as custodians of defendants' assets. This Part begins by arguing that the law/equity distinction in federal court is increasingly incompatible with the purposes of provisional relief because it does not deter opportunistic behavior. It then explores why developments in cryptocurrency and jurisdiction have made the artificiality of the law/equity distinction especially untenable.

A. *Current Asset Mobility Makes the Law/Equity Distinction Untenable*

The contemporary degree of asset mobility exposes current law's inconsistency with the purpose of provisional measures, which is to "protect[] the judicial process from fraud and other deceptive behavior."[68] Asset-freeze injunctions protect litigation by preventing a defendant from dissipating their assets pending a final judgment.[69] The current approach to asset-freeze injunctions is increasingly ineffectual in

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65. Mareva Injunctions in Cross-Border Litigation: A Canadian Perspective, NYSBA, https://nysba.org/NYSBA/Sections/International/Seasonal%20Meetings/Tokyo%202019/Coursebook/Semerjian%20Materials%201%20%20Mareva%20injunctions%20in%20crossborder%20litigation_%20a%20Canadian%20Perspective.pdf?srsltid=AfmBOoqi8xyZm5ZdbMIxAxZSUxzJ5JKqrKEQjK6mVW73-xZlWl-_0eB [https://perma.cc/DRE4-785K].

66. See Wasserman, supra note 14, at 299 ("If a plaintiff obtains a preliminary injunction to freeze the defendant's assets, the public interest is served in at least six ways. First and most obvious, the preliminary injunction protects the integrity of the judicial process."); see also Chieko N. Okazaki, Peacemaking: Our Essential Work in the Last Days, 2 Serv. & Integrity 101, 108 (2009) (expressing attorneys' hope that "the rule of law will be stronger than individual selfishness").

67. Transnational cases, of course, are uniquely vulnerable to judgment frustration. See Park, Recognition and Enforcement, supra note 20, at 1001 ("[I]t is much easier to frustrate the enforcement of [a] court's final judgment when the case crosses the national border.").

68. Wasserman, supra note 14, at 299.

69. Park, Recognition and Enforcement, supra note 20, at 1013 ("[A]ll provisional orders share a common goal: enhancing the efficacy of litigation. Securing the satisfaction of the forthcoming judgment . . . [is] necessary to ensure that the lawsuit can practically deliver the desired end result . . . .").

serving this purpose because it draws irrational distinctions that are irrelevant to the integrity of litigation.

Consider two illustrations. First, Defendant B defrauded Plaintiff A and made off with Plaintiff A's crypto assets. Plaintiff A alleges conversion and seeks, among other remedies, a constructive trust. Defendant B is preparing to conceal their ill-gotten crypto assets. Second, Defendant D breached a contract with Plaintiff C. Plaintiff C sues for damages. Defendant D is preparing to dissipate their assets held abroad to render themselves judgment-proof. Under current law, Plaintiff A would have a cognizable claim to an asset-freeze injunction while Plaintiff C would not. Put another way, Defendant D may opportunistically abuse the law/equity limitation to frustrate litigation simply because Plaintiff C does not seek an equitable remedy. There is no practical or normative basis for these results. The nature of a remedy is irrelevant to whether a defendant should have more or less latitude to frustrate litigation, for "although a plaintiff's claim to money that was originally [the plaintiff's] is theoretically different from a claim to money as damages only, the harm . . . in the two actions . . . is identical if the defendant dissipates the fund."[70]

The ease of dissipating assets today makes such arbitrary results especially intolerable. Even if Justice Scalia's historically fixed understanding of equity's limits could outweigh the reality of international commerce twenty-seven years ago, the same cannot be said today. In *Grupo Mexicano*, Justice Ginsburg worried that "increasingly sophisticated foreign-haven judgment proofing strategies, coupled with technology that permits the nearly instantaneous transfer of assets abroad, suggests that defendants may succeed in avoiding meritorious claims in ways unimaginable before the merger of law and equity."[71] Even then, she may not have appreciated that such technology would soon be in the pocket of every potential defendant.[72] The intense proliferation of cryptocurrencies over the last few years represents the latest and most extreme revolution in capital mobility, which is regularly used to evade asset seizure.[73] Courts have consistently recognized capital mobility's potential to frustrate judgments in civil litigation, singling out crypto

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70. See Wasserman, supra note 14, at 334.

71. Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 338–39 (1999) (Ginsburg, J., concurring in part and dissenting in part) (citing Lynn M. LoPucki, The Death of Liability, 106 Yale L.J. 1, 32–38 (1996)).

72. See, e.g., Vodafone Is Bringing Crypto Payments to SIM Card-Based Mobile Wallets, PYMNTS (May 6, 2024), https://www.pymnts.com/cryptocurrency/2024/vodafone-is-bringing-crypto-payments-to-sim-card-based-mobile-wallets/ [https://perma.cc/6QX6-NVPD] ("[I]ntegrating crypto wallets with smartphone SIM cards could offer a more secure and convenient way to manage cryptocurrency assets . . . .").

73. See, e.g., Christos Alexakis, Giulio Anselmi & Giovanni Petrella, Flight to Cryptos: Evidence on the Use of Cryptocurrencies in Times of Geopolitical Tensions, 89 Int'l Rev. Econ. & Fin. 498, 499–500 (2024) (exploring the increased use of cryptocurrency and its use to avoid asset seizure in cases of financial sanctions).

cases for special treatment because of the ease of concealment and dissipation.[74] The law/equity distinction that has resulted from the current approach is therefore especially irrational today.

B. *Emerging Approaches to Crypto Cases Further Strain Current Law*

Courts' attempts to cope with the emergence of mobile and intangible currencies have revealed that the current approach is becoming conceptually inadequate. Without reform, asset freezes may become unavailable in the very cases in which they are the most necessary. In 2024, for example, "pig-butchering" schemes involving cryptocurrency have provoked intense alarm.[75] In the ultimate phase of these schemes, fraudsters abscond with the assets that they have persuaded their targets to convert into cryptocurrency.[76] Recognizing the unique concerns of judgment frustration entailed by crypto, courts have paid particular attention to the mobility and anonymity of crypto assets in issuing provisional asset freezes as these cases increasingly appear on their dockets.[77] Because schemes such as "pig butchering" entail theft,

74. See, e.g., Cohn v. Popescu, No. 1:24-CV-00337, 2024 U.S. Dist. LEXIS 190419, at *9–10 (E.D. Tex. Aug. 16, 2024) ("In light of the speed with which cryptocurrency transactions are made, as well as the potential that the Defendants may further move the assets they are alleged to have stolen, . . . Mr. Cohn's request to freeze the exchange accounts to which those assets were transferred is justified . . . ."); Fitzgerald v. Defendant, No. 24-21925-CV-WILLIAMS, 2024 WL 3537916, at *2 (S.D. Fla. June 12, 2024) ("Considering the speed with which cryptocurrency transactions are made as well as the anonymous nature of those transactions, it is necessary to freeze the Destination Addresses to maintain the status quo to avoid dissipation of the money taken from Plaintiff."); Jacobo v. Doe, No. 1:22-cv-00672-DAD-BAK (BAM), 2022 WL 2052637, at *5 (E.D. Cal. June 7, 2022) (finding that the plaintiff would likely suffer irreparable harm absent an asset-freeze injunction due to the speed and anonymity of cryptocurrency transactions); Astrove v. Doe, No. 22-CV-80614-RAR, 2022 WL 2805315, at *3 (S.D. Fla. Apr. 22, 2022) ("[C]onsidering the speed with which cryptocurrency transactions are made as well as the anonymous nature of those transactions, it is imperative to freeze the Destination Addresses to maintain the *status quo* to avoid dissipation of the money illegally taken from Plaintiff."); Heissenberg v. Doe, No. 21-CIV-80716-ALTMAN/Brannon, 2021 WL 8154531, at *2 (S.D. Fla. Apr. 23, 2021) ("Because of the speed and potential anonymity of cryptocurrency transactions, . . . Plaintiff is likely to suffer immediate and irreparable injury if a temporary restraining order is not granted . . . . Plaintiff has good reason to believe the Defendant will . . . transfer his ill-gotten gains beyond the jurisdiction of this Court unless those assets are restrained."); cf. Gaponyuk v. Alferov, No. 2:23-cv-01317-KJM-JDP, 2023 WL 4670043, at *2 (E.D. Cal. July 20, 2023) (citing the risk that cryptocurrencies can "rapidly become lost and untraceable").

75. See supra notes 7–8 and accompanying text.

76. Daniel, supra note 7.

77. See, e.g., *Cohn*, 2024 U.S. Dist. LEXIS 190422, at *6, 10 ("[T]he assets allegedly stolen from Mr. Cohn could be further transferred to unretrievable locations at any time, with the click of a button . . . . Several federal courts have found that this exigency justified issuance of freezing orders in similar crypto-fraud cases, and this Court finds their reasoning persuasive here."); *Gaponyuk*, 2023 WL 4670043, at *2 (granting an asset freeze for a plaintiff seeking an equitable remedy because of the risk that cryptocurrencies can "rapidly become lost and untraceable"); *Jacobo*, 2022 WL 2052637, at *15–16 (finding that

plaintiffs often seek equitable remedies, meaning that an asset freeze injunction would be available.[78] But at least one district court has declined to issue an asset freeze for a crypto case involving equitable remedies because it characterized crypto assets as fungible.[79] The court reasoned that though conversion "generally constitutes an irreparable injury that will justify an injunction,"[80] cryptocurrency is unique because its "purpose is to provide an analogue for traditional currency."[81] The court held that to obtain an injunction, the plaintiff would have to show that the defendant would "not have the money to pay for the loss after trial."[82] Other courts have taken note of this issue,[83] and commentators too generally consider cryptocurrency to be fungible.[84]

This emerging approach is unsound. Practically, it fails to consider that cryptocurrencies are not traceable in the same way as money, which usually passes through financial institutions.[85] More importantly, it places

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plaintiff seeking restitution would likely suffer irreparable harm absent an asset-freeze injunction due to the speed and anonymity of cryptocurrency transactions); *Heissenberg*, 2021 WL 8154531, at *2 (granting an asset freeze seeking an equitable remedy citing the "speed and potential anonymity of cryptocurrency transactions" to constitute irreparable harm).

78. See, e.g., *Gaponyuk*, 2023 WL 4670043, at *6 (seeking a constructive trust); *Jacobo*, 2022 WL 2052637, at *14 (seeking restitution among other remedies); *Heissenberg*, 2021 WL 8154531, at *7–8 (seeking a constructive trust and disgorgement). Other courts have been more stringent in requiring a showing that dissipation is likely. See Huntley v. Vbit Techs. Corp., No. 22-1164-CFC-SRF, 2023 WL 5938665, at *6–7, *14–17 (D. Del. Aug. 10, 2023) (affirming that asset freezes are available when seeking equitable relief and that crypto poses heightened dissipation risk but denying the asset freeze because of an insufficient showing that irreparable harm is likely).

79. Schiermeyer v. Thurston, 697 F. Supp. 3d 1265, 1272–73 ("[C]ryptocurrency tokens are fungible and easy to value. To show that he is likely to suffer irreparable injury, Mr. Schiermeyer must therefore demonstrate that Mr. Thurston would *likely* be unable to pay an award of money damages after a trial."); see also First Amended Verified Shareholder Derivative Complaint at 31–32, *Schiermeyer,* 697 F. Supp. 3d 1265 (D. Utah 2023) (No. 2:23-cv-00589-HCN), 2023 U.S. Dist. LEXIS 181478 (seeking restitution and a constructive trust).

80. *Schiermeyer,* 697 F. Supp. 3d, at 1272 (quoting AAAG-California, LLC v. Kisana, 439 F. Supp. 3d 1265, 1279 (D. Utah 2020)).

81. Id.

82. Id.

83. See, e.g., United States v. Approximately 69,370 Bitcoin BTC, No. 20-cv-07811-RS, 2022 WL 2755353, at *3 (N.D. Cal. July 14, 2022) ("There may, of course, be reasons to treat the fungibility of cryptocurrency differently from that of paper currency. At least at this point, however, neither Buckley nor any or the other claimants has shown that the law would permit them to trace individual bitcoins without consideration of fungibility issues.").

84. Christa J. Laser, Legal Issues in Blockchain, Cryptocurrency, and Non-Fungible Tokens (NFTs), 102 Neb. L. Rev. 761, 766 (2024) ("Cryptocurrencies are perceived stores of value or money that are generally considered fungible, meaning one Bitcoin is equivalent in value to any other Bitcoin just as one dollar bill would be equivalent to, and tradable for, another.").

85. See Skinner, supra note 6, at 301–11 (describing the role of banks in preventing terrorist financing and money-laundering); see also Newton AC/DC Fund L.P. v. Hector

pressure on the law/equity distinction because it creates the possibility that asset freezes may remain out of reach even when an equitable remedy is claimed in cases in which they are the most necessary, that is, when judgment frustration is uniquely likely.[86] The exception for insolvency also leads to an absurd result because an asset freeze would not be available in a functionally equivalent circumstance, that is, when a plaintiff seeking money damages could show that a defendant would be judgment-proof if they were not enjoined from transferring their assets.[87]

C. *Nonparty Jurisdiction Developments Counsel Against the Current Approach*

The Supreme Court's narrowing approach to general jurisdiction has also provided opportunities for judgment-frustration. If a defendant cannot be enjoined from moving their assets, they may transfer them to a nonparty foreign bank or crypto platform.[88] Those transfers can frustrate post-judgment discovery, which aims to uncover assets to satisfy a final judgment.[89] Post-judgment discovery is governed by Rule 69.[90] Though broad in scope,[91] a district court "must have personal jurisdiction" over nonparties to compel their compliance with discovery orders.[92]

DAO, No. 24-722 (RK) (JBD), 2024 WL 580182, at *3 (D. N.J. Feb. 13, 2024) ("[C]ryptocurrencies cannot be traced with the same clarity, and potentially recovered via the same methods, as funds transferred via the traditional financial system."); Anshu Siripurapu & Noah Berman, The Crypto Question: Bitcoin, Digital Dollars, and the Future of Money, Council on Foreign Rels. (Sep. 23, 2021), https://www.cfr.org/backgrounder/crypto-question-bitcoin-digital-dollars-and-future-money [https://perma.cc/JMA8-67YF] (last updated Jan. 17, 2024) ("[C]ryptocurrencies . . . can be transferred relatively quickly and anonymously, even across borders, without the need for a bank that could block the transaction or charge a fee.").

86. See supra note 74 and accompanying text.

87. See supra note 70 and accompanying text.

88. See Aaron D. Simowitz, Transnational Enforcement Discovery, 83 Fordham L. Rev. 3239, 3306 (2015) ("[S]cofflaw debtors frequently attempt to transfer their assets to nominal third parties, to trusts that will shield the assets from enforcements, or to creditors that they would rather pay ahead of their current antagonist." (citing Douglas G. Baird & Thomas H. Jackson, Fraudulent Conveyance Law and Its Proper Domain, 38 Vand. L. Rev. 829 (1985)); id. at 3306–07 ("Some assets—buildings, equipment, oil tankers, private planes—are easier to locate than others . . . . It is certainly true, however, that . . . intangible property that in practice cannot be located without discovery ha[s] become dominant.").

89. See id. at 3305–06.

90. Fed. R. Civ. P. 69.

91. See EM Ltd. v. Republic of Argentina, 695 F.3d 201, 207 (2d Cir. 2012) ("The scope of discovery under Rule 69(a)(2) is constrained principally in that it must be calculated to assist in collecting on a judgment.").

92. See Motorola Credit Corp. v. Uzan, 132 F. Supp. 3d 518, 520 (S.D.N.Y. 2015) (internal quotation marks omitted) (quoting Gucci v. Bank of China, 768 F.3d 122, 141 (2d Cir. 2014)). Personal jurisdiction is also required to enforce an asset-freeze injunction against nonparties. See Tiffany (NJ) LLC v. China Merchs. Bank, 589 F. App'x 550, 553 (2d Cir. 2014) (citing Canterbury Belts Ltd. v. Lane Walker Rudkin, Ltd., 869 F.2d 34, 40 (2d Cir. 1989)) (noting that courts "can enforce an injunction against a nonparty only if it has personal jurisdiction over that nonparty").

Daimer's restrictive approach to general jurisdiction[93] significantly diminished federal courts' ability to compel compliance by foreign nonparties.[94] The extent to which international comity[95] influenced the Court's reasoning marked a "significant break" from past practices, which depended upon a less-deferential view of personal jurisdiction.[96] And even if a court can assert specific jurisdiction over a nonparty, the Second Circuit has required district courts to conduct a comity analysis to decide whether compelling compliance with an order is appropriate.[97] Courts in other circuits have cited this requirement approvingly.[98] But comity analyses can be challenging and unpredictable because "courts and commentators repeatedly confess that they do not really understand what international comity means."[99] With courts' ability to issue orders

93. See Daimler AG v. Bauman, 571 U.S. 117, 137, 139 (2014) (holding that a company is subject to general jurisdiction in a forum when it is incorporated there or when its contacts with that forum are so "continuous and systematic" as to render it at home in the forum); Tsang & Lai, supra note 20, at 152–53 (explaining that Daimler has made it much harder to establish personal jurisdiction over nonparties).

94. See Diego Zambrano, A Comity of Errors: The Rise, Fall, and Return of International Comity in Transnational Discovery, 34 Berkeley J. Int'l L. 157, 193 (2016) ("*Daimler* and *Gucci* have severely limited the existence of general personal jurisdiction over foreign companies with affiliates in the United States.").

95. Courts often base their understanding of comity on *Hilton v. Guyot*, in which the Supreme Court defined comity as "the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation." 159 U.S. 113, 164 (1895).

96. Zambrano, supra note 94, at 192; see also Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. for S. Dist. of Iowa, 482 U.S. 522, 539–40 (1987) (holding that "the Hague Convention did not deprive the District Court of the jurisdiction it otherwise possessed to order a foreign national party before it to produce evidence physically located within a signatory nation"); Zambrano, supra note 94, at 176 (Aérospatiale damaged the [Hague] Convention to such an extent that even in circumstances where the Federal Rules seemed inappropriate, such as ordering discovery from foreign non-parties, courts nonetheless rejected the Convention.").

97. *Gucci*, 768 F.3d at 138–40; Zambrano, supra note 94, at 188 ("Regardless of the reasons for the renewed importance of comity, the Second Circuit wanted to make clear to lower courts that comity should be seriously considered in every decision affecting foreign countries.").

98. See Hawkins v. i-TV Digitális Távközlési zrt., 935 F.3d 211, 229 (4th Cir. 2019) (citing *Gucci* and concluding "foreign nonparty contemnors must . . . have minimum contacts with the forum"); see also Receiver for Rex Venture Grp., LLC v. Banca Comerciala Victoriabank SA, 843 F. App'x 485, 491 (4th Cir. 2021) (citing *Hawkins* approvingly for the minimum contacts proposition); Aviva Sports, Inc. v. Fingerhut Direct Mktg., No. 09-cv-1091 (JNE/HB), 2021 WL 5276668, at *8 (D. Minn. Nov. 12, 2021) ("In the absence of Eighth Circuit case law on point, the Court finds the Second Circuit's reasoning instructive, and therefore will apply its translated specific personal jurisdiction test to the present motion to compel discovery."); Am. Fid. Assurance Co. v. Bank of N.Y. Mellon, No. CIV-11-1284-D, 2014 U.S. Dist. LEXIS 183099, at *3–5 (W.D. Okla. Dec. 12, 2014) (endorsing the Second Circuit's approach in *Gucci* but distinguishing the question of waiver of jurisdiction).

99. William S. Dodge, International Comity in American Law, 115 Colum. L. Rev. 2071, 2073 (2015); see also Park, Equity Extraterritoriality, supra note 10, at 168 ("For

aimed at enforcing a final judgment diminished and uncertain, an injunction that deters an individual from transferring their assets abroad immediately is an especially important provisional tool.[100]

Cryptocurrency exchanges present further challenges. Establishing personal jurisdiction can be especially challenging in cases involving cryptocurrency exchanges which often "do not have a territorial affiliation"[101] and are therefore beyond the general jurisdiction of U.S. courts.[102] Specific jurisdiction is also uniquely difficult to establish because of the difficulty of finding "sufficient jurisdictional contacts with the forum."[103] Therefore, as cryptocurrencies become easier to purchase and transfer,[104] the ability to enjoin a person from converting their assets

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those trained in the U.S. legal tradition, the comity doctrine may be an uninspiring, weak tea of a doctrine.").

100. See Simowitz, supra note 88, at 3322 (describing the *Mareva* injunction as a "robust approach to enforcement" in the context of post-judgment discovery).

101. Tsang & Lai, supra note 20, at 152–53, 157; see also Mallory Mecklenburg, Note, A Plaintiff's Cryptonite: Charting a Path Forward for Minimum Contacts in the Cryptocurrency Era, 91 Geo. Wash. L. Rev. 785, 788–89 (2023) (explaining that many crypto platforms are located overseas and that users can easily circumvent restrictions on trading on overseas exchanges).

102. See Mecklenburg, supra note 101, at 791 (explaining the challenges in analyzing personal jurisdiction for cryptocurrency exchanges); Tsang & Lai, supra note 20, at 157 (discussing cryptocurrency exchanges' lack of territorial affiliation and collecting cases). The challenge of exercising jurisdiction over cryptocurrency platforms has also emerged in the related field of legislative jurisdiction. See Williams v. Binance, 96 F.4th 129, 138 (2d Cir. 2024) (rejecting Binance's argument that matching between buyers and sellers on the platform does not occur anywhere "even if the Binance exchange lacks a physical location"); see also Morrison v. Nat'l Australia Bank Ltd., 561 U.S. 247, 267 (2010) (applying the presumption against extraterritoriality to limit the Exchange Act's jurisdictional reach).

103. Tsang & Lai, supra note 20, at 157. Applying current minimum contacts standards to cryptocurrency platforms is especially challenging. Mecklenburg, supra note 101, at 803–06. Though the Second Circuit recently ruled on the application of U.S. securities laws to crypto platforms which initially were held to have insufficient contacts with the forum, the court noted that its decision may be different if faced with "plaintiffs seeking to apply United States securities laws based on the happenstance that a transaction was initially processed through servers located in the United States despite all parties to the transaction understanding that they were conducting business on a foreign-registered exchange." *Williams*, 96 F.4th at 139. If the standards for specific personal jurisdiction and prescriptive jurisdiction are analyzed in a similar way, a defendant wishing to transfer their assets abroad to evade enforcement of a judgment is certainly aware that their actions are meant to be conducted on a foreign exchange.

104. See Nathan Reiff, Cryptocurrency Exchanges: What They Are and How to Choose, Investopedia, https://www.investopedia.com/tech/190-cryptocurrencyexchanges-so-how-choose/ [https://perma.cc/U5RN-8XDC] (last updated Nov. 22, 2024) ("Cryptocurrency exchanges make it easy to buy and sell the currencies you want with low fees and strong security features."); Use Cases for Blockchain Gain Momentum as User Experience Simplifies, PYMNTS (June 3, 2024), https://www.pymnts.com/cryptocurrency/2024/use-cases-for-blockchain-gainmomentum-as-user-experience-simplifies/ [https://perma.cc/LR7L-V7KX] ("[N]ew marketplace moves from traditional financial services players . . . show the emergence of a new focus on simplifying crypto's

into a form that makes it more difficult for a court to enforce orders aiding the plaintiff is especially important.[105]

It is essential that U.S. courts reform their approach to asset-freeze injunctions in response to these developments. Asset freezes are a straightforward deterrent when a defendant is considering transferring their assets to a foreign bank account or crypto platform at any point in the litigation. Without this tool, a court may lack the ability to prevent defendants from increasing the costs and undermining the efficacy of litigation by shielding their assets from the court's jurisdictional reach and potentially frustrating the enforcement of an eventual judgment.[106]

III. TOWARD RENEWED EQUITABLE PROVISIONAL REMEDIES IN TRANSNATIONAL CASES

This Part argues that federal courts have the equitable authority to develop standards for provisional asset-freeze injunctions in transnational cases that abandon the law/equity distinction. For the purposes of this Note, a case is transnational when a defendant's assets, which would be necessary to satisfy a final judgment, are located outside of the territorial jurisdiction of any U.S. court.[107] Section III.A examines the Supreme Court's implicit acceptance of equitable remedies that prevent opportunism arising from situations that cannot be squared with a truly static view of equity. It demonstrates that judicial innovation in equitable remedies remains feasible. Section III.B proposes model standards for issuing a provisional asset-freeze injunction in transnational cases by synthesizing considerations unique to transnational litigation and the *Winter* factors. Section III.C fits the proposed model into the Supreme Court's equity jurisprudence, demonstrating that it is a reasonable and plausible development in the Court's case law.

A. *The Supreme Court and Substantive Equity*

The Supreme Court's equity jurisprudence has not foreclosed innovation in provisional equitable relief for three reasons. First, the Court has implicitly departed from its approach in *Grupo Mexicano* when necessary to correct results that would otherwise reward opportunism. Provisional asset freezes are narrowly tailored to serve precisely this

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more complex aspects by creating the more intuitive, user-friendly experiences that are essential for broader adoption.").

105. See Tsang & Lai, supra note 20, at 157 (discussing how *Daimler* made it "more difficult for the U.S. court to establish personal jurisdiction over third-party banks and therefore seriously reduces the occasions where a court can compel a foreign bank to comply with a preliminary injunction to freeze the defendant's assets").

106. See, e.g., Gucci Am., Inc. v. Weixing Li, 768 F.3d 122, 134 (2d Cir. 2014) ("[A] district court can enforce an injunction against a nonparty such as [Bank of China] only if it has personal jurisdiction over that nonparty.").

107. In other words, if a defendant possesses sufficient assets to satisfy an eventual judgment in the United States, the dispute is not transnational in character.

purpose.[108] Second, and relatedly, even though Court's historical method is here to stay, the Court has softened its historical inquiry to accommodate cases for which Founding-era courts did not contemplate. Third, even if *Grupo Mexicano* has been subsequently affirmed, a preliminary injunction of the kind proposed here would be permissible because it is not a "substantial expansion of past practice"[109] and is uniquely situated to avoid the *Erie* concerns that motivated the Court in *Grupo Mexicano*.[110] By way of background, this section introduces "equitable originalism," an approach inaugurated by *Grupo Mexicano*, and contrasts it with substantive equity, a view that scholars have urged is more faithful to the original meaning of "equity" in the Constitution and the Judiciary Act of 1789 and provides for more flexible approaches to equitable remedies.

Grupo Mexicano represented the Court's first articulation of equitable originalism,[111] the view that federal courts may only grant equitable remedies "'traditionally accorded by courts of equity' at our country's inception."[112] Equitable originalism is a "static conception of equity jurisdiction"[113] because its historical approach "freez[es] in amber the precise remedies available at the time of the Judiciary Act."[114] The Court's

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108. See infra note 186 and accompanying text.

109. Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 329 (1999).

110. See Samuel L. Bray, The Supreme Court and the New Equity, 68 Vand. L. Rev. 997, 1010 (2015) (explaining Justice Scalia's approach).

111. Anna Conley, A Challenge to "Equitable Originalism"—The History of Injunctions as a Principle-Based Adaptable Judicial Power, 17 N.Y.U. J.L. & Liberty 112, 116 (2023) ("The first and so far only big win for the equitable originalism approach to injunctive power was Justice Scalia's 1999 majority opinion in *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*").

112. Trump v. CASA, Inc., 145 S. Ct. 2540, 2551 (2025) (quoting Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 319 (1999)); see also Liu v. Sec. & Exch. Comm'n, 140 S. Ct. 1936, 1950 (2020) (Thomas, J., dissenting) ("According to our usual interpretive convention, 'equitable relief' refers to forms of equitable relief available in the English Court of Chancery at the time of the founding."); Riley T. Keenan, Functional Federal Equity, 74 Ala. L. Rev. 879, 895 (2023) ("*Grupo Mexicano* was the first case in which the Supreme Court rejected a federal equitable remedy because of its supposed inconsistency with founding-era English equity practice.").

113. *Grupo Mexicano*, 527 U.S. at 336 (1999) (Ginsburg, J., concurring in part and dissenting in part); see also Bray, supra note 110, at 1010 (noting that Justice Scalia "was seeking an equity that seemed almost frozen in time: the remedies that could have been given, or that were analogous to the remedies that could have been given, by the chancellor in 1789").

114. *Trump*, 145 S. Ct. at 2588 (Sotomayor, J., dissenting); see also Ruth Bader Ginsburg, Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication, 22 Yale L. & Pol'y Rev. 329, 333–34 (2004) (discussing *Grupo Mexicano* and the pitfalls of "frozen-in-time interpretation").

"rejection of the more dynamic approach to equity"[115] has prompted intense academic criticism which has reached a fever pitch over the last two years.[116] The use of the term "equity" in the Constitution and the Judiciary Act of 1789,[117] these scholars contend, is broader than the precise set of remedies employed by courts of equity at the founding.[118] This broader view of equity has been called "substantive" or "functional" equity and is defined as "a system of meta-law, designed to respond to unpredictable situations" in which a legal rule would otherwise produce, inter alia, "pro-opportunistic results."[119] Put another way, equity is a form of "second-order law" that prevents ex ante–focused legal rules from producing "unforeseen and undesired results."[120] Substantive equity's focus on responding to unforeseen applications of an ordinarily appropriate rule of law is therefore in tension with equitable originalism's inflexibility.[121]

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115. Listwa & Seidell, supra note 39, at 687; see also *Grupo Mexicano*, 527 U.S. at 336 (Ginsburg, J., concurring in part and dissenting in part) ("In my view, the Court relies on an unjustifiably static conception of equity jurisdiction.").

116. See infra section III.C.3.

117. See U.S. Const. art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases, in Law and Equity . . . ."); see also *Grupo Mexicano*, 527 U.S. at 318–19 (interpreting the use of "equity" in the Judiciary Act of 1789 to confine federal jurisdiction to the "system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries" (internal quotation marks omitted) (quoting Atlas Life Ins. Co. v. W.I. Southern, Inc., 306 U.S. 563, 568 (1939))).

118. Raz, supra note 28, at 543; see also Keenan, supra note 110, at 897 ("[T]he historical evidence suggests that an informed reader in 1789 would have understood the term 'equity'—whether in Article III of the Constitution or the Judiciary Act of 1789—as referring to the traditional, precedent-based equity practice inherited from England's Chancery Court." (citing Owen W. Gallogly, Equity's Constitutional Source, 132 Yale L.J. 1213, 1281–90, 1310–14 (2023)).

119. Id. at 543–44; Henry E. Smith, Equity as Meta-Law, 130 Yale L.J. 1050, 1076, 1080–81 (2021) [hereinafter Smith, Equity as Meta-Law] (arguing that equity has always had "a special role in combatting opportunism" because it prevents parties from taking advantages of gaps in the law that could not be "cost-effectively defined, detected, and deterred by explicit ex ante rulemaking").

120. Smith, Equity as Meta-Law, supra note 119, at 1054–56. See also Keenan, supra note 112, at 908 (discussing and endorsing literature arguing that equity is meant to prevent parties from taking "unforeseen advantage of existing legal rules"); Raz, supra note 28, at 550–56 (offering a historical account of equity's role in "preserv[ing] the correct operation of law in unforeseeable situations"); James Fullmer, Note, The Outer Limits of Equity: A Proposal for Cautious Expansion, 39 Harv. J.L. & Pub. Pol'y 557, 569 (2016). For the origin of this premise, see Aristotle, Nicomachean Ethics, *in* The Basic Works of Aristotle 1020 (W.D. Ross trans., Richard McKeon ed., 2001) ("[T]his is the nature of the equitable, a correction of law where it is defective owing to its universality.").

121. See Keenan, supra note 112, at 909 ("If federal equity's function is to address complexity, then federal courts should be freer to modify equity's doctrines and remedies to address complex problems."); see also *Grupo Mexicano*, 527 U.S. at 336 (Ginsburg, J., concurring in part and dissenting in part) ("Since our earliest cases, we have valued the adaptable character of federal equitable power."); Fullmer, supra note 120, at 572

Despite the Court's nominal adherence to equitable originalism,[122] its jurisprudence has been far from settled. The Court's approach to equity in *Liu v. SEC*,[123] for example, illustrates a deviation from equitable originalism and a limited embrace of a substantive view of equity.[124] In *Liu*, the Court interpreted the SEC's authority to seek "equitable relief" in civil actions under the Securities Exchange Act[125] to include disgorgement.[126] Instead of referencing Founding-era practice, the majority instead considered whether the category of relief was "typically available in equity."[127] Notably, the Court emphasized the "principles" of equity jurisprudence,[128] echoing Justice Ginsburg's insistence on focusing on the general "*principles* of equity" existing at the Founding rather than on the "specific practices and remedies of the pre-Revolutionary Chancellor" in her *Grupo Mexicano* opinion.[129] The majority's limited departure from *Grupo Mexicano* was not meaningful as a matter of the Court's equity jurisprudence. In his dissenting opinion, Justice Clarence Thomas reiterated the view that "'equitable relief' refers to forms of equitable relief available in the English Court of Chancery at the time of the founding" and discussed the application of this principle to the Judiciary Act in *Grupo Mexicano*.[130] In his view, the remedy approved in *Liu* would not have passed muster under a strict application of equitable originalism.[131] Commentators agree, noting that the approval of

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(proposing a "peripheral equity rule" which would approve novel equitable remedies when traditional equitable remedies would not do justice).

122. See Trump v. CASA, Inc., 145 S. Ct. 2540, 2551 (2025) ("We must therefore ask whether universal injunctions are sufficiently 'analogous' to the relief issued '"by the High Court of Chancery in England at the time of the adoption of the Constitution and the enactment of the original Judiciary Act."'" (quoting *Grupo Mexicano*, 527 U.S. at 318–19)).

123. 140 S. Ct. 1936 (2020).

124. See Raz, supra note 28, at 548, 558 (explaining that the court "relied more broadly on substantive equity to shape both the reasoning and the outcome" of the case (emphasis omitted)).

125. 15 U.S.C. § 78u(d)(5) (2024) ("In any action or proceeding brought or instituted by the [SEC] under any provision of the securities laws, . . . any Federal court may grant . . . any equitable relief that may be appropriate or necessary . . . .").

126. *Liu*, 140 S. Ct. at 1942.

127. Id. at 1942 (emphasis omitted) (internal quotation marks omitted) (quoting Mertens v. Hewitt Assocs., 508 U.S. 248, 256 (1993)).

128. Id.

129. Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 336 (1999) (Ginsburg, J., concurring in part and dissenting in part).

130. *Liu*, 140 S. Ct. at 1950 (Thomas, J., dissenting).

131. Id. Notably, the Court had previously deviated from strict equitable originalism in *Kansas v. Nebraska*. 574 U.S. 445 (2015). There, the Court had also approved disgorgement in a water dispute between Kansas and Nebraska. Id. at 463. Though the case represented a "rare and unique invocation of original jurisdiction" and may have therefore led the justices to believe that *Grupo Mexicano* did not apply, it still "represent[ed] a change in the Court's equitable mood" because disgorgement would have been foreclosed by Founding-era practice. Fullmer, supra note 120, at 560–61, 566 (2016).

disgorgement in *Liu* over Justice Thomas's dissent represented a significant shift "in that the Court (without announcing it in so many words) relied more broadly on *substantive* equity to shape both the reasoning and the outcome."[132] Professor Riley Keenan has argued that *Liu* marked a turn to "equitable traditionalism,"[133] an approach focusing on "English and American equity practice more generally before 1938."[134] In his view, *Dobbs v. Jackson Women's Health Organization*[135] imported this traditionalist approach to federal courts' "general equity power under the Judiciary Act of 1789," by "citing cases from after 1789 but before 1938 to determine what 'traditional' equity allowed."[136]

The fluctuations in the Court's equity jurisprudence suggested that equitable originalism's constraint on "judges using equity flexibly as intended in Article III" explain the "long gap between *Grupo Mexicano* and a second United States Supreme Court decision re-affirming equitable originalism."[137] Though that reaffirmance finally came in *Trump v. CASA, Inc.*,[138] the Court's opinion did not foreclose the flexible approach to equity toward which the Court had long been moving. In fact, the majority opinion had a distinctly functionalist flavor, speaking of equity as a mechanism "to secure justice where it would not be secured by the ordinary and existing processes of law,"[139] a view consistent with scholars who criticize equitable originalism. Like *Liu*, the Court's discussion of traditional equitable remedies was more flexible, citing cases after 1798 in its analysis.[140]

These fluctuations demonstrate that though the Court has repeatedly reaffirmed its historical approach to originalism,[141] its jurisprudence is not immune from the exigencies of addressing opportunism or other abuses of the legal system. Professor Raz has noted that *Liu* "illustrates how even static equity-oriented federal judges have

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132. Raz, supra note 28, at 548, 558; see also Bray, supra note 110, at 1010 n.61 (noting that *Grupo Mexicano* "advanced a more fixed conception of equity than in later cases").

133. See Keenan, supra note 112, at 899.

134. Id. at 881.

135. 142 S. Ct. 2228 (2022).

136. Keenan, supra note 112, at 899, 901.

137. Anna C. Conley, The Inevitability of Adaptability - Comparative Contributions to Understanding Originalism, 39 Emory Int'l L. Rev. 467, 512 (2025).

138. 145 S. Ct. 2540, 2551 (2025) (citing Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 319 (1999)).

139. Id. (internal quotation marks omitted) (quoting George Burton Adams, The Origin of English Equity, 16 Colum. L. Rev. 87, 91 (1916)).

140. See id. at 2552 (first citing Scott v. Donald, 165 U.S. 107, 109 (1897), then citing Frothingham v. Mellon, 262 U.S. 447, 447–89 (1923), then citing Cutting v. Gilbert, 6 F. Cas. 1079, 1080 (C.C.S.D.N.Y. 1865) (No. 3519), then citing Gregory v. Stetson, 133 U.S. 579, 586 (1890)).

141. See Gallogly, supra note 118, at 1218 ("[L]ike the Court's revival of equity in general, its reliance on history shows no sign of abating.").

gradually had to take . . . into account" the reality that equitable relief must be flexible.[142] The Court's post-*Grupo Mexicano* progression toward a broader approach to history has developed Justice Scalia's gestures that "the historical inquiry is broader than 1789 and that incremental change is not ruled out."[143] Though a very different area of law, the Court's recent Second Amendment jurisprudence provides an illuminating example of how the Court can step away from static historical analysis when undesirable results would otherwise follow. Though *New York State Rifle & Pistol Ass'n Inc. v. Bruen* introduced a strict historical test to restrictions on the right to bear arms,[144] the Court's refinement of that test in *United States v. Rahimi*[145] was considerably more relaxed.[146] In fact, many opinions, even by Justices who consider themselves originalists, recognized "that a strict form of a frozen-in-time Founding-era focus absolved of any obligation to translate historical examples to the modern-day world simply cannot work."[147]

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142. Raz, supra note 28, at 564.

143. Bray, supra note 110, at 1010 n.61 (citing *Grupo Mexicano*, 527 U.S. at 322, 327, 329, 332–33); Christopher D. Moore, So-Called "Administrative Stays" in Trump 2.0, 104 Tex. L. Rev. Online 1, 24 (2025), https://texaslawreview.org/so-called-administrative-stays-in-trump-2-0/ [https://perma.cc/YC5Z-B65D] (noting that "*Grupo* may leave open the possibility that courts may issue remedies that the High Court of Chancery itself could not issue so long as that issuing remedy does not amount to a 'substantial expansion of past practice'" (quoting *Grupo Mexicano*, 527 U.S. at 329)).

144. 142 S. Ct. 2111, 2126 (2022) ("Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command.'" (quoting Konigsberg v. State Bar of Cal., 366 U.S. 36, 50 n.10 (1961))).

145. 144 S. Ct. 1889, 1903 (2024).

146. See Daniel S. Harawa, Between a Rock and a Gun, 134 Yale L.J. Forum 100, 112 (2024), https://yalelawjournal.org/pdf/HarawaYLJForumEssay_m7qtyweb.pdf [https://perma.cc/2SPD-MT7V] ("As Justice Thomas explained, *Rahimi* should have been 'an easy case' if the Supreme Court had hewed faithfully to what it said in *Bruen*." (quoting Nelson Lund, The Fidelity of 'Originalist' Justices Is About to Be Tested, N.Y. Times (Apr. 9, 2024), https://www.nytimes.com/2024/04/09/opinion/guns-supreme-court.html (on file with the *Columbia Law Review*))); see also Ian Ayres & Fredrick E. Vars, The Coming Assault on Categorical Gun Prohibitions, 77 Stan. L. Rev. Online 31, 42 (2025), https://review.law.stanford.edu/wp-content/uploads/sites/3/2025/02/Ayres-Vars-77-Stan.-L.-Rev.-Online-31.pdf [https://perma.cc/X47F-33K6] (considering the possibility that *Rahimi* loosened "the necessary resemblance between the challenged burden and the historic burden). But see Mark W. Smith, Much Ado About Nothing: *Rahimi* Reinforces *Bruen* and *Heller*, Harv. J.L. & Pub. Pol'y: Per Curiam (July 22, 2024), https://journals.law.harvard.edu/jlpp/much-ado-about-nothing-rahimi-reinforces-bruen-and-heller-mark-w-smith/ [https://perma.cc/Y5SY-Q4EY] (arguing the *Rahimi* did not depart from *Bruen*). Cf. Trump v. CASA, Inc., 145 S. Ct. 2540, 2588 (2025) (Sotomayor, J., dissenting) ("[G]eneral principles of equity that themselves existed at the founding militate against requiring a near exact match as the majority does." (citing *Rahimi*, 144 S. Ct. at 1898)); *Rahimi*, 144 S. Ct. at 1898 ("The law must comport with the principles underlying the Second Amendment, but it need not be a 'dead ringer' or a 'historical twin.'" (citing *Bruen*, 142 S. Ct. at 2133)).

147. Amanda L. Tyler, Levels of Generality, the Limits of Originalism, and the Supreme Court's Second Amendment Jurisprudence, 78 SMU L. Rev. 265, 277 (2025).

B. *Model Standards for Transnational Cases*

A party seeking an asset freeze must meet the requirements for an injunction to issue under Rule 65.[148] When determining whether to issue a preliminary injunction, courts consider five factors: irreparable injury, inadequacy of a remedy at law, balance of hardships, public interest, and likelihood of success on the merits.[149] The following sections address each element and explore considerations unique to the transnational context that courts should evaluate when considering issuing an asset-freeze injunction. This section then briefly discusses the interaction between this standard and *Erie*.

1. *Irreparable Injury*. — The fact that a case is transnational should place a thumb on the scale in favor of finding a likelihood of irreparable injury to account for the relative ease of frustrating a judgment when the dispute crosses borders.[150] Courts must still undertake a fact-intensive inquiry to determine if frustration is likely, considering factors such as refusal to disclose location of assets,[151] prior fraudulent activity,[152] or announced plans to frustrate a judgment.[153] Judgment-frustration is irreparable harm,[154] but a court in a transnational case may consider whether the frustration of a judgment by a court in the United States

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148. The Rule itself contains no standard for injunctions, which instead "depend[s] on traditional principles of equity jurisdiction." *Grupo Mexicano*, 527 U.S. at 318–19 (quoting 11A Wright & Miller's Federal Practice and Procedure § 2941 (2d ed. 1995) (internal quotation marks omitted)); see also Michael T. Morley, The Federal Equity Power, 59 B.C. L. Rev. 217, 254–56 (2018) (exploring the source of the injunction standard under Rule 65).

149. Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008); see also Bethany M. Bates, Note, Reconciliation After *Winter*: The Standard for Preliminary Injunctions in Federal Courts, 111 Colum. L. Rev. 1522, 1535–37 (2011).

150. See Park, Recognition and Enforcement, supra note 20, at 1001 ("[I]t is much easier to frustrate the enforcement of [a] court's final judgment when the case crosses the national border."); supra note 71–74 and accompanying text.

151. See, e.g., EBSCO Indus., Inc. v. Lilly, 840 F.2d 333, 336 (6th Cir. 1988) (affirming a preliminary injunction because "the defendant had taken specific steps to conceal assets and had refused to disclose what assets he has or where they are located").

152. See, e.g., USACO Coal Co. v. Carbomin Energy, Inc., 689 F.2d 94, 98 (6th Cir. 1982) (concluding that there was a risk of asset dissipation because of "previous questionable dealings in matters connected to the present lawsuit").

153. See, e.g., In re Uranium Antitrust Litig., 617 F. 2d 1248, 1259 (7th Cir. 1980) (affirming a preliminary injunction because a defendant had "instructed its American subsidiaries to transfer their assets to Canada").

154. If a judgment cannot be collected, "no remedy, at law or equity, will ever compensate [a defendant] for the permanent loss of [the] right to recover." Wasserman, supra note 14, at 291; see also Douglas Laycock, The Death of the Irreparable Injury Rule, 103 Harv. L. Rev. 688, 716, 728–32 (1990) ("[D]amages are no remedy at all if they cannot be collected, and most courts sensibly conclude that a damage judgment against an insolvent defendant is an inadequate remedy."). Therefore, "in cases in which the plaintiff sues to collect money damages and can demonstrate that the defendant is about to . . . frustrate the potential [] judgment, the plaintiff's . . . harm should be considered irreparable." Wasserman, supra note 14, at 293.

could be repaired by, for example, ongoing litigation in a court of the country where the assets are located.[155]

2. *Inadequacy of Legal Remedy.* — In the context of a provisional asset-freeze injunction, the remedy available at law is attachment.[156] Under Rule 64, federal courts draw upon state attachment statutes that are territorially limited, meaning that a federal court would be unable to attach assets located outside of the state's territory.[157] The provisional remedy of attachment is therefore inherently incapable of being an adequate remedy when the assets in question are already beyond the court's territorial jurisdiction. Of course, attachment would be an adequate provisional remedy if there were sufficient assets within the forum state to satisfy an eventual judgment[158] or within the United States as a whole.[159]

3. *Balance of Hardships.* — A court may consider mitigating the harshness of an asset-freeze injunction by only enjoining the defendant from making transfers "outside the ordinary course of business" or "freez[ing] all assets except those needed for ordinary living expenses or attorneys' fees."[160] In transnational cases, a court could enjoin assets located extraterritorially only to the extent necessary to satisfy an eventual judgment to mitigate the harshness of the injunction. It is also plausible that the injunction would cause the defendant to violate foreign law. In that case, the court should consider whether the foreign sovereign compulsion doctrine would prohibit issuing the injunction.[161]

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155. A court may also consider forum non conveniens dismissal in such circumstances, which may provide a better opportunity for recovery. In a case in which litigation to freeze or attach assets abroad is ongoing, the court may grant a lis pendens motion to stay proceedings in the United States. See Continental Time Corp. v. Swiss Credit Bank, 543 F. Supp. 408, 410 (S.D.N.Y. 1982) (noting that a court has inherent power to stay or dismiss an action in favor of a proceeding in a foreign forum which presents "the same claims and issues").

156. Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 337–38 (1999) (Ginsburg, J., concurring in part and dissenting in part).

157. See supra note 16 and accompanying text.

158. This is a requirement for a worldwide *Mareva* injunction under English law. Alexander, supra note 14, at 501.

159. If there are not sufficient assets within the state in which the federal court sits, however, attachment may still pose challenges because attaching those assets would require duplicative litigation in several states. Wasserman, supra note 14, at 280.

160. Id. at 297.

161. See Interamerican Refining Corp. v. Texaco Maracaibo, Inc., 307 F. Supp. 1291, 1296 (D. Del. 1970) ("[D]efendants were compelled by regulatory authorities in Venezuela to boycott plaintiff . . . . [S]uch compulsion is a complete defense to an action under the antitrust laws based on that boycott."); see also Restatement (Fourth) of the Foreign Relations Law of the United States § 442 (A.L.I. 2024) (indicating that "courts in the United States have discretion to excuse violations of law, or moderate the sanctions imposed for such violations, on the ground that the violations are compelled by another state's law" under certain conditions).

4. *Public Interest.* — Based on the findings of the court under the likelihood of irreparable injury analysis, a court should conclude that an asset freeze to prevent judgment frustration is in the public interest because the injunction protects "the integrity of the judicial process," the very reason the courts have the power to issue preliminary injunctions.[162] This factor will be especially compelling in cases when U.S. plaintiffs have suffered wrongs at the hands of defendants concealing assets abroad, for the inability to freeze assets could de facto deprive them of the adequacy of their home forum.[163]

Courts may consider the potential offense to foreign nations as part of its public interest analysis. Injunctions that have extraterritorial effects potentially create "diplomatic strife."[164] Foreign governments' resentment of U.S. discovery orders demonstrates the potential extent of this tension.[165] Before a court issues an asset-freeze injunction, it should consider whether the particular injunction is likely to generate a response that may be contrary to a public interest in the nation's diplomatic relations.[166]

5. *Likelihood of Success on the Merits.* — Though a plaintiff's likelihood of success on the merits is completely fact-specific, courts evaluating asset-freeze injunctions in transnational cases should be particularly attuned to choice of law issues.[167] Federal courts must consult the choice of law rules of the forum state to determine what substantive law will govern the merits of the claim[168] before determining whether the

162. Wasserman, supra note 14, at 299.

163. Cf. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254 (1981) (noting that "if the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all, the unfavorable change in law may be given substantial weight" in a forum non conveniens analysis). It may be especially compelling in human rights litigation.

164. See Park, Equity Extraterritoriality, supra note 10, at 148.

165. See Restatement (Third) of the Foreign Relations Law of the United States § 442 n.1 (A.L.I. 1987) ("No aspect of the extension of the American legal system beyond the territorial frontier of the United States has given rise to so much friction as the requests for documents in investigation and litigation in the United States."); see also Stephen N. Subrin, How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective, 135 U. Pa. L. Rev. 909, 919 (1987) (discussing the equitable roots of discovery under the federal rules).

166. See supra note 97 and accompanying text.

167. See Gary Born & Peter B. Rutledge, International Civil Litigation in United States Courts 733 (4th ed. 2007) ("International litigation inevitably presents choice-of-law issues . . . .").

168. See Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941) (holding that federal courts must apply forum state choice-of-law rules); Christopher A. Whytock, Myth of Mess? International Choice of Law in Action, 84 N.Y.U. L. Rev. 719, 724 (2009) ("There is no uniform choice-of-law doctrine in the United States. To the contrary, different U.S. states have adopted different doctrines, which use a variety of methods for making choice-of-law decisions."); see also Roger P. Alford, Human Rights After *Kiobel*: Choice of Law and the Rise of Transnational Tort Litigation, 63 Emory L.J. 1089, 1102–11 (2014) (providing a brief summary of a variety of choice-of-law rules).

plaintiff is likely to succeed under the applicable law.[169] Though courts routinely apply choice of law doctrine,[170] they may be less familiar with foreign law and be especially cautious in determining a plaintiff's likelihood of success under the foreign law at issue.[171]

6. Erie *and Equity in Federal Court.* — The solution presented presupposes that federal courts are free to apply a federal standard for preliminary injunctions under Rule 65. That is the law,[172] but this section nevertheless raises *Erie* objections to fortify its approach against potential criticism based on emerging literature.[173] After presenting the tension between *Erie* and the federal standard governing injunctions under Rule

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169. See, e.g., Reiff v. CyberRisk All., LLC, No. 25-CV-6351(VM), 2025 WL 3019938, at *2, 5 (S.D.N.Y. Oct. 29, 2025) (determining that Delaware law applied to a contractual dispute before evaluating the plaintiff's likelihood of success on the merits).

170. See Symeon C. Symeonides, Choice of Law in the American Courts in 2020: Thirty-Fourth Annual Survey, 69 Am. J. Compar. L. 177, 179 (collecting data on conflicts cases available on Westlaw).

171. See Bodum USA, Inc. v. La Cafetiere, Inc., 621 F.3d 624, 631 (7th Cir. 2010) (Posner, J., concurring) (condemning as "unsound" the "practice of trying to establish the meaning of a law of a foreign country by testimony or affidavits of expert witnesses"); see also Fed. R. Civ. P. 44.1 ("In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence.").

172. Beber v. NavSav Holdings, LLC, 118 F.4th 921, 930 (8th Cir. 2024) ("[A] federal district court applies a federal standard, not a state standard, when it decides to grant or refuse a preliminary injunction."); Schuler v. Adams, 27 F.4th 1203, 1209 (6th Cir. 2022) (noting that federal injunction standards apply in federal court); Flood v. ClearOne Commc'ns, Inc., 618 F.3d 1110, 1117 (10th Cir. 2010) ("[F]ederal law governs the procedural questions when a preliminary injunction may issue and what standards of review we apply . . . ."); Instant Air Freight Co. v. C.F. Air Freight, Inc., 882 F.2d 797, 799 (3d Cir. 1989) ("Rule 65(a) of the Federal Rules of Civil Procedure contemplates a federal standard as governing requests addressed to federal courts for preliminary injunctions." (internal quotation marks omitted) (quoting Sys. Operations, Inc. v. Sci. Games Dev. Corp., 555 F.2d 1131, 1141 (3d Cir. 1977))); see also Guar. Tr. Co. of N.Y. v. York, 326 U.S. 99, 105 (1945) ("[A] federal court may not afford an equitable remedy not available in a State court."); Caprice L. Roberts, Remedies, Equity & *Erie*, 52 Akron L. Rev. 493, 504 (2019) ("Federal courts sitting in diversity generally do and should apply federal equitable remedies standards."); David E. Shipley, The Preliminary Injunction Standard in Diversity: A Typical Unguided *Erie* Choice, 50 Ga. L. Rev. 1169, 1172–73 (2016). In *Grupo Mexicano* itself, the Supreme Court assumed that federal law governed the issuance of injunctions. Keenan, supra note 38, at 892 n.108; see also Burbank, supra note 30, at 1312 ("[T]he Court . . . refused to consider the implications of *Erie*."). But, for much older cases suggesting the opposite conclusion, see Kaiser Trading Co. v. Associated Metals & Mins. Corp., 321 F. Supp. 923, 931 n.14 (N.D. Cal. 1970) ("[T]he best approach would be to look to state law to determine if a preliminary injunction is permissible."); Port of N.Y. Auth. v. E. Air Lines, Inc., 259 F. Supp. 745, 753 (E.D.N.Y. 1966) (applying state law to the preliminary injunction standard).

173. Equity's *Erie* problem has become an increasingly dynamic field of debate. See, e.g., Andrea Olson, Resolving Equity's *Erie* Problem, 56 Ariz. St. L.J. 289, 299 (2024) ("[The] field is itself recognized as neither substantive nor procedural, defying the classic dividing line of the *Erie* test."); see also Keenan, supra note 112, at 892 n.107 (citing Roberts, supra note 172, at 498) (taking whether *Erie* applies to equity to be an open question).

65, this section argues that even if the federal standard failed the twin aims test,[174] its application to transnational cases could still prevail.[175]

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174. See Hanna v. Plumer, 380 U.S. 460, 468 (1965) ("The 'outcome-determination' test therefore cannot be read without reference to the twin aims of the Erie rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws.").

175. It should also be noted "that transnational litigation...can impact foreign affairs." Bookman, supra note 24, at 1100 (citing Gary B. Born, Reflections on Judicial Jurisdiction in International Cases, 17 Ga. J. Int'l & Comp. L. 1, 11 (1987)). That impact is no less pronounced in purely private disputes. See Andrew W. Davis, Note, Federalizing Foreign Relations: The Case for Expansive Federal Jurisdiction in Private International Litigation, 89 Minn. L. Rev. 1464, 1496 (2005) ("[M]ost private international litigation in the United States has some impact on foreign states, [and] the impact will at times be substantial enough to warrant federal uniformity."); see also Jack L. Goldsmith, Federal Courts, Foreign Affairs, and Federalism, 83 Va. L. Rev. 1617, 1634–36 (1997) (noting that a variety of private international law issues potentially implicate the federal common law of foreign relations). For that reason, federal courts may make substantive federal common law in cases that impact foreign affairs. See Sosa v. Alvarez-Machain, 542 U.S. 692, 729 (2004) ("[P]ost-Erie understanding has identified limited enclaves in which federal courts may derive some substantive law in a common law way."); Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 641 (1981) ("[F]ederal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases." (footnotes omitted)); see also Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 427–28 (1964) (holding that the act of state doctrine is governed by federal common law because of its bearing on foreign affairs), superseded by statute on other grounds, Foreign Assistance Act of 1964, Pub. L. No. 88-633, § 301(d)(4), 78 Stat. 1009, 1013 (amended 1965) (codified as amended at 22 U.S.C. § 2370(e)(2) (2024)), as recognized in, Republic of Hung. v. Simon, 145 S. Ct. 480 (2025); id. at 425 (deeming it "fair to assume that the Court did not have rules like the act of state doctrine in mind when it decided Erie"); id. at 425 & n.24 (noting "a judge of the International Court of Justice[] recognized the potential dangers were Erie extended to legal problems affecting international relations." (citing Philip C. Jessup, The Doctrine of Erie Railroad v. Tompkins Applied to International Law, 33 Am. J. Int'l L. 740 (1939))); In re Whittaker Clark & Daniels Inc., 152 F.4th 432, 474 (3d Cir. 2025) (Krause, J., concurring) (noting that "federal courts sitting in diversity jurisdiction may theoretically formulate special federal common law to protect important federal interests); Ungaro-Benages v. Dresdner Bank AG, 379 F.3d 1227, 1232–33 (11th Cir. 2004) ("Because our foreign relations could be impaired by the application of state laws, which do not necessarily reflect national interests, federal law applies to these cases even where the court has diversity jurisdiction."). And conflicts with foreign affairs justifying federal preemption need not arise from an "actual conflict with federal law" or be "based on evidence of a real disruption in international relations." Judith Resnik, Foreign as Domestic Affairs: Rethinking Horizontal Federalism and Foreign Affairs Preemption in Light of Translocal Internationalism, 57 Emory L.J. 31, 76 (2007). The conflict may be "dormant." Id. Asset freeze injunctions may "contravene the interests of foreign sovereigns." See Park, Equity Extraterritoriality, supra note 10, at 104 ("By reaching beyond their territorial jurisdiction via Equity Extraterritoriality, U.S. courts often contravene the interests of foreign sovereigns and cause diplomatic rows."); cf. Gucci Am., Inc. v. Weixing Li, 768 F.3d 122, 139 (2d Cir. 2014) ("[W]here the Bank objected to application of the Asset Freeze Injunction to it, . . . citing an apparent conflict with the requirements of Chinese banking law, comity . . . required the district court to consider the Bank's legal obligations pursuant to foreign law before compelling it to comply with the . . . [i]njunction."). Potentially, then, there is a greater place for federal law in transnational asset freezes.

Despite persistent critique, there is no complete academic consensus that the federal injunction standard should yield to contrary state standards. In 2000, Professor Stephan Burbank argued that Rule 65 does not support a "broad charter for federal common law," so a common law rule on the issue should yield to "the requirements of contrary state law."[176] In contrast, more recent scholarship has argued that federal preliminary injunction standards should apply when a federal court considers state law claims under their diversity jurisdiction.[177] Professor David Shipley, for example, has argued that applying a federal standard is consistent with the twin aims of *Erie*, and that the case is especially strong for preliminary injunctions because "the grant or denial of this interim equitable relief is provisional and not a final adjudication of the merits of the claim."[178] Circuit courts of appeal have consistently concluded that a federal standard applies to preliminary injunctions, holding that Rule 65 "incorporates traditional federal equity practice."[179]

Even if it were subjected to the twin-aims test, this federal practice would likely survive. The twin aims as articulated in *Hanna* are (1) discouraging forum shopping and (2) avoiding the inequitable administration of law.[180] On the first aim, there is an apparent consensus that forum shopping is problematic "only if it leads to unfairness" and is not "itself a *per se* evil."[181] Therefore, though the proposed rule would make a federal forum more appealing when assets are located abroad, the injunction would only be granted if the court found that the defendant intended to frustrate the judgment. Allowing forum shopping to help a plaintiff prevent judgment frustration is hardly objectionable. On the second aim, inequitable administration of the law would result if the "character or result of a litigation" would have been materially different in federal court.[182] This concern would arise in a case in which a party cannot invoke diversity jurisdiction to reach federal court. But the role of equity is to ensure the integrity of litigation, so it would be strange

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176. Burbank, supra note 30, at 1320, 1335. Professor Morley agrees, arguing that the modified outcome-determination test from *Hanna* "dictates that state law should govern equitable remedies because applying state law furthers the *Erie* Doctrine's objectives." Morley, supra note 148, at 259.

177. Roberts, supra note 172, at 504.

178. Shipley, supra note 172, at 1231.

179. Ferrero v. Associated Materials Inc., 923 F.2d 1441, 1448 (11th Cir. 1991); see also Instant Air Freight Co. v. C.F. Air Freight, Inc., 882 F.2d 797, 799 (3d Cir. 1989) ("Rule 65(a) of the Federal Rules of Civil Procedure contemplates a federal standard as governing requests addressed to federal courts for preliminary injunctions." (internal quotation marks omitted) (quoting Sys. Operations, Inc. v. Sci. Games Dev. Corp., 555 F.2d 1131, 1141 (3d Cir. 1977))).

180. Hanna v. Plumer, 380 U.S. 460, 468 (1965).

181. Richard W. Bourne, Federal Common Law and the *Erie-Byrd* Rule, 12 U. Balt. L. Rev. 426, 473 (1983).

182. *Hanna*, 380 U.S. at 467.

to conclude that some state courts' inability to effectively meet that goal means that federal courts should be similarly ineffectual.

C. *The Legality of the Proposed Expansion*

Expanding the availability of preliminary asset-freeze injunctions in transnational cases is consistent with the trend in the Supreme Court's equity cases because these injunctions are analogous to substantive-equity remedies that the Court already endorsed. As discussed above, substantive equity prevents injustice when an otherwise applicable legal rule would produce an unforeseen result.[183] Preliminary injunctions serve that very purpose.[184] Asset-freeze injunctions deter opportunistic behavior by preventing defendants from "misus[ing] . . . first-order legal rights (in this case, property rights) to obstruct the correct operation of law,"[185] thus resolving "a gap in complex procedural devices and their vulnerability to opportunism" and "preserv[ing] the integrity of the litigation, especially against judgment-proofness—traditional targets of equity—in a focused way."[186] The current approach to asset-freeze injunctions eviscerates their utility in preventing opportunism.[187] Because transnational cases present unique opportunities for judgment-frustration,[188] they are an ideal case for courts to recognize that flexible equitable remedies are necessary and contribute to the reevaluation of federal courts' equitable powers that is now underway.[189] The Supreme Court has already taken the first steps. Its previous departures from strict originalism have responded to a recognition that a static conception of equity is inadequate to confront contemporary legal issues.[190] Part II demonstrated that the current approach to asset-freeze injunctions is one such case, while emphasizing that transnational cases are especially vulnerable to abuse.[191] Justice Ginsburg raised this very issue in *Grupo Mexicano*, arguing that "a dynamic equity jurisprudence is of special importance in the commercial law context," and that a restrictive

183. See supra section III.A.

184. Smith, supra note 119, at 1137.

185. Raz, supra note 28, at 560.

186. Smith, supra note 119, at 1137. The *Mareva* injunction is similarly grounded in "equity's traditional power to remedy the 'abuse' of legal process by defendants and the 'injustice' that would result from defendants 'making themselves judgment-proof' by disposing of their assets during the pendency of litigation." Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 339 (1999) (Ginsburg, J., concurring in part and dissenting in part) (citing Iraqi Ministry of Defence v. Arcepey Shipping Co. [1979] 1 All E.R. 480 at 484–87 (Eng.)).

187. See supra Part II.

188. Park, Recognition and Enforcement, supra note 20, at 1001 ("[I]t is much easier to frustrate the enforcement of a court's final judgment when the case crosses [a] national border.").

189. See supra section III.A.

190. See supra notes 122–140 and accompanying text.

191. See supra Part II.

approach to asset-freeze injunctions was ill-advised because "Chancery may have refused to issue injunctions of this sort simply because they were not needed to secure a just result in an age of slow-moving capital and comparatively immobile wealth."[192]

In response to this reality, liberalizing asset-freeze injunctions in transnational cases is a modest and plausible expansion of the Court's equity jurisprudence for three reasons. First, there are requisite historical antecedents for asset-freeze injunctions. Second, limiting such injunctions to transnational cases is consistent with a gradual expansion of equity arguably approved by *Grupo Mexicano*.[193] Specifically, it provides a limiting principle which resolves Justice Scalia's concern that animated that majority opinion. Third, there is a growing academic consensus that a historically informed originalism requires a substantive, rather than static, approach to equity. Asset-freeze injunctions are a modest expansion of equitable practice which are consistent with that originalist interpretation.

1. *Limiting Principles.* — There are plausible historical antecedents to asset-freeze injunctions that are compelling under the Court's softening approach to equitable originalism. Justice Scalia's opinion in *Grupo Mexicano* seemed to require "not analogy but identity"[194] by rejecting the Government's argument that a "creditor's bill" was sufficiently analogous to the injunction requested.[195] This historical analogue is more persuasive under the Court's recent jurisprudence. The Court's gestures to more general principles of equity, rather than specific remedies,[196] is consistent with Justice Ginsburg's observation that a remedy's rarity does not entail that "the remedy was beyond equity's capacity."[197] In *Liu*, the Court implicitly contradicted Justice Scalia's rejection of the creditor's

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192. Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 337–38 (1999) (Ginsburg, J., concurring in part and dissenting in part). Early equity cases foresaw such circumstances; the Court wrote in 1896: "It must not be forgotten that, in the increasing complexities of modern business relations, equitable remedies have necessarily and steadily been expanded, and no inflexible rule has been permitted to circumscribe them." Union Pac. Ry. Co. v. Chicago, R.I. & P. Ry. Co., 163 U.S. 564, 600–01 (1896).

193. Bray, supra note 110, at 1010 n.61 (citing *Grupo Mexicano*, 527 U.S. at 322, 327, 329, 332–33).

194. Listwa & Seidell, supra note 39, at 686.

195. See *Grupo Mexicano*, 527 U.S. at 319–20; Listwa & Seidell, supra note 39, at 686 (noting that Justice Scalia rejected the historical analogy because doing so would require speculating on whether the present case would have qualified for an exception in which the creditor's bill did not require a previous judgment).

196. See, e.g., Liu v. Sec. & Exch. Comm'n, 140 S. Ct. 1936, 1942–43 (2020) ("Equity courts have routinely deprived wrongdoers of their net profits from unlawful activity, even though that remedy may have gone by different names."); see also Trump v. CASA, 145 S. Ct. 2540, 2563 (2025) (noting that injunctions must "comply with principles of equity"); Raz, supra note 28, at 565–66 (discussing the tension between static equity and the broader principles of equity).

197. *Grupo Mexicano*, 527 U.S. at 338 (Ginsburg, J., concurring in part and dissenting in part).

bill as a plausible historical analogue by authorizing disgorgement over Justice Thomas's dissent which, like Justice Scalia's majority opinion in *Grupo Mexicano*, "focused on specific diverging details" and treated those distinctions as if "they entirely negate[d] a much broader legal concept."[198] The Court's retreat from static interpretations of equitable remedies suggests that a limited departure from *Grupo Mexicano* is plausible, especially considering that approving asset-freeze injunctions in transnational cases would not entail reversing *Grupo Mexicano* as a whole.[199]

Furthermore, an approval of asset-freeze injunctions in transnational cases is arguably consistent with *Grupo Mexicano*. The majority opinion arguably "le[ft] open the possibility that courts may issue remedies that the High Court of Chancery itself could not issue so long as issuing that remedy does not amount to a 'substantial expansion of past practice.'"[200] An asset-freeze injunction of the type proposed in this Note would not constitute a substantial expansion of equity practices for three reasons.

First, the expansion would only apply to transnational disputes that are subject to unique concerns regarding judgment frustration. These limits give effect to Justice Scalia's concern that the injunction would be

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198. Raz, supra note 28, at 566. In fact, "the possible exceptions to the general rule that a creditor's bill required a judgment . . . . [are] exactly the sort of issue[s] that should have concerned [the] Court, given its attention to the particular nature of the relief 'traditionally accorded by courts of equity.'" The Supreme Court, 1999 Term—Leading Cases, 113 Harv. L. Rev. 316, 323 n. 63 (1999) [hereinafter Leading Cases] (quoting *Grupo Mexicano*, 527 U.S. at 319); see also Brief for the United States as Amicus Curiae, supra note 1, at *11 (discussing exceptions to the general rule that a creditor's bill required a previous judgment).

199. The remedy could be limited because, relying on principles of equity where a remedy is available at law, those legal remedies like attachment will be more likely effective in domestic litigation. Anyway, it cannot be said that the Supreme Court has been particularly hesitant to overturn precedent. See, e.g., Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024) (overturning *Chevron*'s "interpretive methodology" but holding that prior cases relying upon *Chevron* are still subject to stare decisis); Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2278–79 (2022) (overturning *Roe v. Wade* and noting that stare decisis "is the norm but not an inexorable command"); see also id. at 2301 (Thomas, J., concurring) ("[I]n future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*."). Nor can it be said that the Court has always considered stare decisis in developing its precedent. See, e.g., Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2239 (2023) (Sotomayor, J., dissenting) ("It is a disturbing feature of today's decision that the Court does not even attempt to make the extraordinary showing required by *stare decisis*.").

200. Moore, supra note 143, at 24 (quoting Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 329 (1999)); see also Bray, supra note 110, at 1010 n.61 (analyzing Justice Scalia's discussion of "remedies that were 'traditionally accorded by courts of equity,'" and identifying numerous phrases "suggesting that . . . incremental change is not ruled out" (quoting *Grupo Mexicano*, 527 U.S. at 319)).

too powerful a remedy, lacking any limiting principle.[201] Academics have expressed similar concerns. Professor Henry Smith wrote that Justice Ginsburg's opinion "at most gestured to the test of injunctive relief without giving much sense of any limits," concluding that "[e]mploying equity only when it can be justified is not much of a restraint."[202] In sum, "Justice Scalia's nearly static approach has no persuasive principle; Justice Ginsburg's alternative, no limiting one."[203]

But the transnational limitation proposed here makes the provisional remedy strong enough to deal with the contextual transformations in asset mobility across borders, but not so broadly applicable as to become an all-purpose remedy.[204] Far from representing an all-encompassing federal remedy, the proposed approach strikes a desirable balance with state law. In general, the federal injunction standard strikes a balance with state law because state law determines a plaintiff's likelihood of success on the merits.[205] The approach described in section III.B effectively imposes additional deference to state law in the consideration of whether a legal remedy is inadequate. To satisfy that element, attachment under state law must be inadequate for an asset freeze to issue.[206] Determining the adequacy of the legal remedy therefore requires consulting the forum state's attachment statute.[207] This requirement ensures that an asset freeze would not "render . . . use of state prejudgment remedies[] a virtual irrelevance."[208] Furthermore, the proposed standard would pursue the stated goals of *Grupo Mexicano* by emphasizing state law because state attachment statues are currently irrelevant in cases seeking equitable relief.[209] In fact, the proposed approach is broadly preferable to attachment under Rule 64, as invoked by Justice Scalia, because asset freezes are less intrusive than attachment orders and produce fewer effects on third parties.[210]

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201. See *Grupo Mexicano*, 527 U.S. at 330–31 ("Why go through the trouble of complying with local attachment and garnishment statutes when this all-purpose prejudgment injunction is available?").

202. Smith, supra note 119, at 1137.

203. Bray, supra note 110, at 1019.

204. See supra note 201 and accompanying text.

205. Roberts, supra note 170, at 503. The analysis of likelihood of success on the merits implicates the forum state's choice of law rules for which substantive law governs the dispute. See Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941) (holding that state choice of law rules apply in federal courts sitting in diversity).

206. See supra section III.B.2.

207. See supra notes 154–157; see also supra section I.A. (explaining that, in the wake of Grupo Mexicano, Rule 65 cannot support a prejudgment asset freeze in suits seeking legal relief, and that Rule 64 instead ties the availability of comparable relief to the forum state's attachment statute and related prejudgment remedies).

208. Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 330 (1999).

209. See supra section I.A.

210. See Wasserman, supra note 14, at 281–85 ("[V]irtually all of the state attachment statutes authorize the sheriff to physically seize the defendant's tangible

Second, even in a transnational case, the plaintiff would still have to satisfy the procedural requirements of *Winter*,[211] which would be especially restrictive under the proposed solution.[212] Third, Part I demonstrated that asset-freeze injunctions are already available in cases in which plaintiffs seek equitable relief in federal court.[213] The proposed approach would merely expand their availability in a manner consistent with the aim of preventing judgment frustration.

2. *The Future of Equity in the Supreme Court.* — Finally, approving asset-freeze injunctions is consistent with a growing body of literature[214] suggesting that substantive equity is consistent with the Judiciary Act of 1789,[215] or even mandated by the Constitution.[216] Though *Grupo Mexicano*'s method was statutory in nature, analyzing federal courts' equitable authority with reference to the Judiciary Act,[217] scholars have argued that "Article III vests the federal courts with an equity power considerably different from what the Court has interpreted most federal statutes to confer."[218] On this view, Article III provides "greater leeway to adapt the federal system of equitable remedies than the Supreme Court's statute-based doctrine" would permit.[219] Though the Court continues to

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property, whether found in the possession of the defendant or in the possession of a third party.").

211. See Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008) (setting out the standard for preliminary injunctions in federal court).

212. See supra section III.B.2.

213. See supra Part I.

214. See Raz, supra note 28, at 548 (describing the current "wave of scholarship" in the field).

215. See Keenan, supra note 110, at 909 ("What if, in giving federal courts equity powers, Congress authorized them to address complex problems in the areas of law where equity governs—today, that is to say, primarily in the field of remedies?").

216. See Gallogly, supra note 118, at 1222 (arguing that Article III is a primary source of "federal equity power," which gives federal courts "greater leeway to adapt the federal system of equitable remedies than the Supreme Court's statute-based doctrine seems to permit"); id. *passim* (offering an originalist interpretation of Article III to determine the scope of federal courts' equitable powers); Raz, supra note 28, at 543 ("[S]ubstantive equity[] is the equity mentioned in the Constitution, which judges are required to apply, especially within the framework of originalism and textualism." (emphasis omitted) (footnotes omitted)); id. at 593 (arguing that the static conception of equity is "an unjustified departure from the functional, historical, and textually binding idea of equity as corrective meta-law or second-order law"). But see Keenan, supra note 110, at 905 ("Gallogly's account contradicts the Supreme Court's repeated statements identifying the Judiciary Act as federal equity's source. Such a contradiction might be warranted if historical evidence supported Gallogly's reading overwhelmingly—but, as Gallogly acknowledges, the historical record is largely inconclusive on this issue." (footnotes omitted)).

217. See Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 318 (1999). The Court has been restrictive in determining "the extent the general jurisdictional statutes are read to authorize courts to administer equitable remedies . . . in part because of the obvious tension with Erie." Moore, supra note 143, at 23–24.

218. Gallogly, supra note 118, at 1222.

219. Id.

insist that the Judiciary Act of 1789 is the source of the federal equity power, its approach has not been without conceptual difficulty.[220] Notably, non-statutory sources of the federal equity power can provide a theoretical basis for *Ex parte Young* relief,[221] which has been difficult to square with the Court's current approach to equity.[222] In sum, a revival of substantive equity is possible today because, in addition to the Court's retreat from static equity,[223] "all the cards, from originalism and textualism, through the Constitution's text, to relevant case law, are already on the table."[224] Because static equity is "only a recent innovation in the federal courts, it should not take too much effort to end this misadventure."[225] Asset freezes in transnational cases are a good place to start.

3. *The Future of Equity in State Courts.* — Despite the Supreme Court's reticence to squarely confront the need for flexible equitable remedies in federal court, state courts are free to liberalize their own approaches to asset-freeze injunctions. Part II has emphasized the desirability of rejecting *Grupo Mexicano*, at least for transnational cases,[226] and Part III has provided a plausible roadmap and rationale for developing effective provisional relief jurisprudence.

CONCLUSION

The law of provisional remedies must continue to develop alongside the accelerating mobility of assets. To undermine the process and integrity of litigation is to undermine the values it serves and the rights it vindicates. From commercial litigation to human rights litigation, which each have increasingly transnational dimensions, provisional relief is essential and deserves renewed attention. Asset freezes are a simple but powerful means of fortifying the efficacy of litigation, and this Note has attempted to revive interest in their utility in the transnational context. The convergence of the undertheorization of transnational provisional relief, its importance in a climate characterized by extreme asset mobility,

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220. See Trump v. CASA, Inc., 145 S. Ct. 2540, 2551 (2025) (treating §11 of the Judiciary Act of 1789 as the source of the federal equity power). But "the problem is that neither Section 11 of the 1789 Judiciary Act, nor any other provision of that act, [was] the basis for federal subject matter jurisdiction for the suits in CASA." Jack Goldsmith, A Legal Mistake at the Heart of Trump v. CASA?, Executive Functions (July 11, 2025), https://www.execfunctions.org/p/a-legal-mistake-at-the-heart-of-trump [https://perma.cc/78PX-24AH].

221. Id.

222. See *CASA*, 145 S. Ct at 2589 (Sotomayor, J., dissenting) ("Under the majority's rigid historical test, however, even plaintiff-protective injunctions against patently unlawful Government action should be impermissible. Such a result demonstrates the folly of treating equity as a closed system, rather than one designed to adapt to new circumstances." (footnote omitted)).

223. See supra section III.A.

224. Raz, supra note 28, at 593.

225. Id. at 596.

226. See supra Part II.

and an emerging literature on federal equitable remedies makes this a unique time for intervention. This Note's proposal brings attention to provisional relief in a rapidly developing field of scholarship, arms courts with a reply to contemporary asset mobility, and offers an opportune context in which to continue challenging the untenable stasis in equitable remedies.