

# ILLUMINATING THE SHADOW DOCKET: ON THE INCREASING IMPACTS OF THIS EVOLVING JUDICIAL PROCEDURE

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## INTRODUCTION

The Supreme Court has been using the orders docket to grant stays and injunctions since 1790,<sup>1</sup> but the orders docket has recently been nicknamed the

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“shadow docket” because its use—and influence—are growing.<sup>2</sup> Because shadow docket decisions have a profound impact on millions of people, and are made without the benefit of full briefing or argument, this Note will explore the modern use of the shadow docket and opportunities for reform. To examine the impact of recent trends, this Note will proceed in six parts. Part I will discuss the orders that make up the shadow docket and explain how they compare with orders on the merits docket. Part II will take a historical look at how the shadow docket was used by the early Supreme Court and explore how that historical use compares to modern use. Part III will address the way that internal and external factors may have played a role in the recent growth of the shadow docket. Part IV will discuss issues that arise from these shadow docket decisions, and how they affect the public’s trust in the judiciary. Part V will then examine how two substantive areas of law have been affected by shadow docket decisions: election law and immigration. Finally, Part VI will present recommendations for shadow docket reform.

### I. UNDERSTANDING THE “SHADOW DOCKET”

Before recent controversial decisions by the Supreme Court, most Americans were likely unfamiliar with the term “shadow docket.” Now, the phrase seems to be ubiquitous. In 2015, Professor William Baude coined the term “shadow docket” to define a “range of orders and summary decisions that defy [the Court’s] procedural regularity.”<sup>3</sup> Professor Stephen Vladeck’s definition is similar: “the significant volume of orders and summary decisions that the Court issues without full briefing and oral argument.”<sup>4</sup> In the last decade, the Supreme Court has addressed numerous high-profile issues via summary orders and shadow docket rulings. Most recently, and perhaps controversially, before the overturning of *Roe v. Wade*, the Supreme Court denied a request by abortion providers in Texas for an injunction on enforcement of an abortion ban after six weeks of pregnancy.<sup>5</sup> This decision not only spurred public debate on the shadow docket but also led to a Senate Judiciary hearing on the topic.<sup>6</sup>

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<sup>1</sup> Susan Sullivan Lagon, *Does Evil Lurk Within the “Shadow Docket”?*, GEO. UNIV.: THE GOV. AFFS. INST. (Nov. 2, 2021), <https://gai.georgetown.edu/does-evil-lurk-within-the-shadow-docket/> [https://perma.cc/3BQT-5S2K].

<sup>2</sup> Louis Jacobson, *The Supreme Court’s ‘Shadow Docket’: What You Need to Know*, POLITIFACT (Oct. 18, 2021), <https://www.politifact.com/article/2021/oct/18/supreme-courts-shadow-docket-what-you-need-know/> [https://perma.cc/K2UQ-BUW3].

<sup>3</sup> William Baude, *Foreword: The Supreme Court’s Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1, 1 (2015). William Baude teaches at the University of Chicago Law School and is a former clerk of Chief Justice John Roberts. See William Baude, THE UNIV. OF CHI. L. SCH., <https://www.law.uchicago.edu/faculty/baude> [https://perma.cc/8PCC-KKQC].

<sup>4</sup> Stephen I. Vladeck, Essay, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123, 125 (2019).

<sup>5</sup> Nate Raymond, *Senate Democrats Target Supreme Court ‘Shadow Docket’ After Texas Abortion Decision*, REUTERS, (Sept. 29, 2021, 6:27 PM), <https://www.reuters.com/legal/gove>

Many are aware of Supreme Court decisions on the merits.<sup>7</sup> The merits docket consists of around seventy cases per year in which the Justices receive complete briefings from the parties, hear oral arguments, and write opinions explaining the disposition of the cases.<sup>8</sup> These opinions clearly state which Justices were in the majority, who concurred, and who dissented.<sup>9</sup> In merits cases, the Justices write detailed decisions to explain to the public exactly what the Court's decision is, and how it got there.<sup>10</sup> Non-parties known as amici curiae can provide the Court with supplementary information and arguments that are relevant to the case.<sup>11</sup> Further, the Court announces in advance which cases it plans to hear on the merits, and on which dates. The merits docket is primarily composed of cases that have come to the Justices from federal circuit courts, but the Court does not have to wait for a ruling from a circuit court before it intervenes.<sup>12</sup>

The Supreme Court's orders docket is less well known. In the orders docket, the Court rules on procedural matters and requests for emergency relief before such cases are scheduled for hearings on the merits.<sup>13</sup> Most of these rulings are standard decisions on litigation management, such as setting timelines and granting or denying certiorari. So, it is not surprising that the majority of these orders need only minimal briefing and no oral argument.<sup>14</sup> However, the Court

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ment/senate-democrats-target-supreme-court-shadow-docket-after-texas-abortion-2021-09-29/ [https://perma.cc/6DZK-E7SC].

<sup>6</sup> *Id.*

<sup>7</sup> PRESIDENTIAL COMMISSION ON THE SUPREME COURT OF THE UNITED STATES: FINAL REPORT 203 (2021) [hereinafter PRESIDENT'S COMMISSION], <https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final-12.8.21-1.pdf> [https://perma.cc/X5DA-VYKP].

<sup>8</sup> Samantha O'Connell, *Supreme Court "Shadow Docket" Under Review by U.S. House of Representatives*, AM. BAR ASS'N. (Apr. 14, 2021), [https://www.americanbar.org/groups/committees/death\\_penalty\\_representation/publications/project\\_blog/scotus-shadow-docket-under-review-by-house-reps/](https://www.americanbar.org/groups/committees/death_penalty_representation/publications/project_blog/scotus-shadow-docket-under-review-by-house-reps/) [https://perma.cc/3B7S-PA2W].

<sup>9</sup> PRESIDENT'S COMMISSION, *supra* note 7, at 203.

<sup>10</sup> See Steve Leben, *Getting It Right Isn't Enough: The Appellate Court's Role in Procedural Justice*, 69 U. KAN. L. REV. 13, 42 (2020).

<sup>11</sup> JOANNA LAMPE, CONG. RSCH. SERV., LSB10637, THE "SHADOW DOCKET": THE SUPREME COURT'S NON-MERITS ORDERS 2 (2021), <https://sgp.fas.org/crs/misc/LSB10637.pdf> [https://perma.cc/3ZSC-YB7Z].

<sup>12</sup> See, e.g., *South Carolina v. North Carolina*, 558 U.S. 256, 267 (2010) (noting the Court's "primary responsibility as an appellate tribunal" (quotation omitted)). The Supreme Court can also hear cases from state supreme courts. See *Supreme Court Procedures*, U.S. CTS., <https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1#> [https://perma.cc/8W6X-T8F4]. The Supreme Court has a right to hear a case starting from the time an appeal is docketed in the federal courts of appeals "[b]y writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree[.]" 28 U.S.C. § 1254.

<sup>13</sup> *The Supreme Court's Shadow Docket: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Committee on the Judiciary*, 117th Cong. 1 (2021) [hereinafter *AliKhan Testimony*] (testimony of Loren L. AliKhan, Solicitor Gen. of the District of Columbia).

<sup>14</sup> *Id.* at 1–2.

could decide a significant issue via the orders docket without the benefit of briefing and oral argument, such as allowing an execution, staying a lower court order, or reversing a decision.<sup>15</sup> Historically, the Court addressed significant issues through orders in exceptional situations.<sup>16</sup> In recent years, however, the Court has decided a greater number of high-profile issues via summary orders.<sup>17</sup>

An injunction is a court order that instructs a party to perform or discontinue a particular action, and its remedies are potent and far-reaching.<sup>18</sup> National injunctions occur when a federal district court judge grants an injunction that controls a policy affecting the whole country, not only the plaintiffs.<sup>19</sup> When a district court issues a preliminary injunction, the losing party has the option to file a motion in circuit court to stay the district court action.<sup>20</sup> If the circuit court denies the motion, the party can file the motion for stay at the Supreme Court.<sup>21</sup> If the Supreme Court stays the preliminary injunction, the stay will remain until the Court can review the merits of the case.<sup>22</sup> And during that time, the action or policy subject to the preliminary injunction can be re-implemented.<sup>23</sup>

The All Writs Act gives the Justices power to issue injunctions, but precedent establishes that extraordinary relief should be used sparingly.<sup>24</sup> And Supreme Court Rule 11 states that a petition for certiorari before judgment will only be granted upon “a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require

<sup>15</sup> *Id.* at 2.

<sup>16</sup> See Mike Fox, *Supreme Court Shadow Docket Leaves Reasoning in the Dark, Professors Say*, UNIV. OF VA. SCH. OF L. (Sept. 22, 2021), <https://www.law.virginia.edu/news/202109/supreme-court-shadow-docket-leaves-reasoning-dark-professors-say> [https://perma.cc/H5SM-3KYY].

<sup>17</sup> *Id.*; see also Samuel L. Bray, *The Presidential Commission on the Supreme Court of the United States: “Case Selection and Review at the Supreme Court”* 1 (June 28, 2021) [hereinafter *Bray Testimony*] (written testimony of Professor Bray given at the Presidential Commission hearing) (stating that the “Supreme Court is now more likely to issue high-profile orders in cases that it has not fully ‘taken,’ cases in which it has not granted a petition for writ of certiorari”). Professor Bray defines the shadow docket as “the portion of the orders list that is substantive, not including the mere grant or denial of a petition for writ of certiorari.” *Id.* at 1 n.1.

<sup>18</sup> BRADFORD E. DEMPSEY ET AL., *INJUNCTIVE RELIEF: TEMPORARY RESTRAINING ORDERS AND PRELIMINARY INJUNCTIONS* 2 (2009).

<sup>19</sup> *Bray Testimony*, *supra* note 17, at 7. Professor Bray explains that while national injunctions have stopped executive initiatives under Presidents Obama, Trump, and Biden, this was not the case during the preceding 225 years. *Id.*

<sup>20</sup> Richard J. Pierce, Jr., *The Supreme Court Should Eliminate Its Lawless Shadow Docket*, 74 ADMIN. L. REV. 1, 3 (2022).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 3–4.

<sup>23</sup> *Id.* at 4.

<sup>24</sup> See *Brown v. Gilmore*, 533 U.S. 1301, 1303 (2001) (“The All Writs Act, 28 U.S.C. § 1651(a), is the only source of this Court’s authority to issue” an injunction against the enforcement of a statute or a stay. (citation omitted)); *Ex parte Fahey*, 332 U.S. 258, 259–60 (1947).

immediate determination.”<sup>25</sup> Emergency relief is temporary and intended to preserve the status quo until the case can be heard on the merits.<sup>26</sup> So, the Court may be asked to rule in a short time frame if an event or policy would significantly alter the status quo without the Court’s interference.<sup>27</sup> But in most cases, the stay remains in effect for multiple years while the Court waits to hear the case on the merits.<sup>28</sup> And often, the Court’s decision to grant or deny a motion for stay is the final action taken in a case because the Court does not ultimately issue an opinion on the merits.<sup>29</sup>

When the Court decides matters using summary orders, the decisions often lack legal analysis and contain minimal reasoning for lower courts and the public to understand.<sup>30</sup> In addition, these summary orders often do not reveal how the Justices voted.<sup>31</sup> Although some liberal commentators argue that the shadow docket decisions serve a conservative agenda,<sup>32</sup> most of the criticisms are motivated by concerns around Court procedures and public perception. The most often-repeated criticisms include that (1) the decisions are made without the benefit of full briefing and oral argument, (2) the orders have a short turnaround time, (3) the Justices do not have to reveal how they voted or why, and (4) it is more difficult for the public and lower courts to understand the Court’s rulings.<sup>33</sup> These concerns exist regardless of the perception that any one political agenda may be favored in shadow docket rulings.

The Justices themselves seem to be aware of these concerns. For example, in the recent Texas abortion case, Chief Justice Roberts lamented that the Court was asked “to resolve these novel questions . . . in the course of two days, without the benefit of consideration by the District Court or Court of Appeals[,] . . . without ordinary merits briefing[,] and without oral argument.”<sup>34</sup> Justice Kagan’s dissent stated that the majority’s decision “illustrates just how far the Court’s ‘shadow docket’ decisions may depart from the usual principles of appellate process,” and “is emblematic of too much of this Court’s shadow-docket decisionmaking—which every day becomes more unreasoned, inconsistent, and impossible to defend.”<sup>35</sup> And in an interview with the *New York*

<sup>25</sup> SUP. CT. R. 11.

<sup>26</sup> *Bray Testimony*, *supra* note 17, at 8.

<sup>27</sup> Fox, *supra* note 16.

<sup>28</sup> Pierce, *supra* note 20, at 4.

<sup>29</sup> *Id.*

<sup>30</sup> LAMPE, *supra* note 11, at 2.

<sup>31</sup> *Id.*

<sup>32</sup> Jacobson, *supra* note 2; David S. Cohen, *The Supreme Court’s ‘Shadow Docket’ Is Even Shadier than It Sounds*, ROLLING STONE (Apr. 10, 2022), <https://www.rollingstone.com/politics/political-commentary/supreme-court-shadow-docket-conservative-agenda-1335473/> [<https://perma.cc/3BUA-ZP7B>].

<sup>33</sup> Fox, *supra* note 16.

<sup>34</sup> *Whole Woman’s Health v. Jackson*, 141 S. Ct. 2494, 2496 (2021) (Roberts, C.J., dissenting).

<sup>35</sup> *Id.* at 2500 (Kagan, J., dissenting).

*Times*, Justice Breyer stated, “I can’t say never decide a shadow-docket thing . . . Not never. But be careful.”<sup>36</sup>

This Note argues that the Court should avoid using the shadow docket to make decisions on hot-button issues because the Justices lack the benefits of hearing oral arguments and reviewing briefs before reaching a conclusion. Shadow docket decisions should also contain more transparency to reverse the trend of decreasing public trust in the judiciary and turn down the political temperature surrounding the Court. Lastly, this Note suggests that Congress should enact legislation to codify standards that take pressure off of the Court to make shadow docket decisions under immense time constraints.

## II. THE RECENT RISE OF THE SHADOW DOCKET

### A. *Traditional vs. Modern Use of the Shadow Docket*

The shadow docket—traditionally referred to as the orders docket—is not a new phenomenon. In fact, the first action ever taken by the Court was in the form of an order on the shadow docket.<sup>37</sup> Although some historical orders docket decisions were controversial at the time, such as Justice Douglas’ stay of the execution of the Rosenbergs in 1953, the majority were fairly procedural.<sup>38</sup> But beginning in the 1950s, legal commentators began to criticize the Court for its use of summary orders because of their inherent procedural shortcomings and lack of direction for lower courts.<sup>39</sup> Others defended the Court by saying that these summary rulings were necessary to manage a heavy caseload and deal with emergency issues.<sup>40</sup> As legal theorist Lawrence Solum argues, the shadow docket is an essential part of the Supreme Court’s powers when it is “properly confined,” but shadow docket rulings cause problems when the Court decides novel questions of law that are not settled.<sup>41</sup>

The Court’s recent emergency orders have involved controversial issues of national importance that not only have an impact on the lives of millions of Americans but on people around the world. These orders have involved abortion, immigration policy, elections, the census, environmental regulations, reli-

<sup>36</sup> Adam Liptak, *Justice Breyer on Retirement and the Role of Politics at the Supreme Court*, N.Y. TIMES (Aug. 27, 2021), <https://www.nytimes.com/2021/08/27/us/politics/justice-breyer-supreme-court-retirement.html> [https://perma.cc/5LTH-8EA3].

<sup>37</sup> Jack Metzler, *The Quorum Rule*, 23 GREEN BAG 2D 103, 104–05 (2020).

<sup>38</sup> *The Supreme Court’s “Shadow Docket,”* NAT’L CONST. CTR. (Oct. 7, 2021), <https://constitutioncenter.org/interactive-constitution/podcast/the-supreme-courts-shadow-docket> [https://perma.cc/8F5K-47RM] (podcast transcript).

<sup>39</sup> See, e.g., Albert M. Sacks, Foreword, *The Supreme Court, 1953 Term Foreword*, 68 HARV. L. REV. 96, 103 (1954); Ernest J. Brown, Foreword, *The Supreme Court, 1957 Term*, 72 HARV. L. REV. 77, 77–78 (1958).

<sup>40</sup> See, e.g., William O. Douglas, *The Supreme Court and Its Case Load*, 45 CORNELL L.Q. 401, 401–02 (1960); Eugene Gressman, *Much Ado About Certiorari*, 52 GEO. L.J. 742, 742–43 (1964).

<sup>41</sup> Fox, *supra* note 16.

gious practice, and evictions, to name a few.<sup>42</sup> The main critique surrounding these issues is not a partisan one; rather, it is a critique that these hugely important issues are not given the benefit of full briefing or oral argument, and that these orders lack the Court's reasoning and transparency.

Critics and defenders alike agree that nothing is inherently suspect about the Court issuing emergency orders.<sup>43</sup> Every court must have a procedure for dealing with urgent matters, even if it comes at the expense of a more fully reasoned decision.<sup>44</sup> The disagreement focuses not on the emergency procedures themselves but on which cases need the Court's immediate attention.<sup>45</sup> Critics argue that the Court is too often stepping in to intervene without proper deliberation, which has led to the overturning of reasoned and thoughtful lower court opinions.<sup>46</sup> Others contend that the Court too often disrupts the status quo rather than preserving it, without clear explanation of why its intervention was necessary.<sup>47</sup>

Presidential administrations have varied in their use of the shadow docket, with the Trump Administration in the lead for frequency of use. The Trump Administration used the emergency shadow docket process more times than its two predecessors combined.<sup>48</sup> During George W. Bush's eight years in office, the solicitor general sought certiorari before judgment only once, to ensure the constitutionality of the Federal Sentencing Guidelines.<sup>49</sup> From 2001 to 2009, the solicitor general sought stays of lower court rulings five times—with three being connected to 9/11 terrorism.<sup>50</sup> The Obama Administration used the process similarly. From 2009 to 2017, the Obama Administration's solicitor general petitioned for certiorari before judgment in three cases challenging the constitutionality of the Defense of Marriage Act.<sup>51</sup> Like the George W. Bush

<sup>42</sup> See e.g., *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494 (2021); *Biden v. Texas*, 142 S. Ct. 926 (2021); *Ross v. Nat'l Urban League*, 141 S. Ct. 18 (2020); *Gish v. Newsom*, 141 S. Ct. 1290 (2021); *West Virginia v. EPA*, 577 U.S. 1126 (2016); *Ala. Ass'n of Realtors v. Dep't of Health & Human Servs.*, 141 S. Ct. 2485 (2021) (per curiam).

<sup>43</sup> PRESIDENT'S COMMISSION, *supra* note 7, at 206.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> Raymond, *supra* note 5.

<sup>49</sup> This case was *United States v. Fanfan*, 542 U.S. 956 (2004). Vladeck, *supra* note 4, at 133. Under the Bush Administration, the Court addressed preliminary injunction issues on the merits docket. See e.g., *Winter v. Nat. Res. Def. Council*, 555 U.S. 7 (2008).

<sup>50</sup> Vladeck, *supra* note 4, at 133; see, e.g., *Gates v. Bismullah*, 554 U.S. 913 (2008) (mem.); *Ashcroft v. O Centro Espirita Beneficente União do Vegetal*, 543 U.S. 1032 (2004) (mem.); *Bush v. Gherebi*, 540 U.S. 1171 (2004) (mem.); *Ashcroft v. N. Jersey Media Grp., Inc.*, 536 U.S. 954 (2002) (mem.).

<sup>51</sup> Vladeck, *supra* note 4, at 133; see, e.g., *Petition for a Writ of Certiorari Before Judgment, United States v. Windsor*, 570 U.S. 744 (2013) (No. 12-307); *Petition for a Writ of Certiorari Before Judgment, Office of Pers. Mgmt. v. Golinski*, 570 U.S. 931 (2013) (No. 12-16); *Petition for a Writ of Certiorari Before Judgment, Office of Pers. Mgmt. v. Pedersen*, 570 U.S. 932 (2013) (No. 12-302).

Administration, the Obama Administration did not ask for mandamus relief against a district judge.<sup>52</sup> Combined, the George W. Bush and Obama Administrations applied for emergency relief eight times. In comparison, the Trump Administration brought forty-one cases to the shadow docket and won twenty-eight of them.<sup>53</sup> The Biden Administration has also made some use of the shadow docket, although to a lesser extent. As of August 2021, the Biden Administration's first request for relief—freezing a district court injunction that required the Administration to restart the “Remain in Mexico” program—was denied by the Supreme Court.<sup>54</sup>

### B. *Reasons for Change in the Shadow Docket*

Experts provide many explanations for the Court's increasing use of the shadow docket in important cases: more nationwide injunctions, the Trump Administration's increase in requests for emergency relief, cases relating to COVID-19 and the 2020 election, a divide in the views of courts, and inconsistency in the application of the legal standard for shadow-docket relief.<sup>55</sup> Those who defend the Court's increased use of emergency rulings argue that these changes are due to external factors.<sup>56</sup> Professor Johnathan Adler points out that the uptick in these cases began prior to Trump's Supreme Court nominees, and that the numbers increased due to the Court dealing with the same issue repeatedly.<sup>57</sup> But the explanation for the uptick in shadow docket decisions is likely a combination of factors beyond the Court's control, in addition to internal decision-making.

In Professor Stephen Vladeck's presentation to Notre Dame Law School, he identified five possible explanations for the shift that started around 2014:

1. An uptick in total grants of emergency relief,
2. More grants with nationwide consequences,
3. More public dissents in both directions,
4. The addition of new forms of emergency relief, and
5. The application of precedent to shadow docket rulings.<sup>58</sup>

<sup>52</sup> Vladeck, *supra* note 4, at 133.

<sup>53</sup> Raymond, *supra* note 5.

<sup>54</sup> Stephen Vladeck, *The Supreme Court's 'Shadow Docket' Helped Trump 28 Times. Biden is 0 for 1.*, WASH. POST (Aug. 26, 2021, 12:24 PM), <https://www.washingtonpost.com/outlook/2021/08/26/shadow-docket-supreme-court-biden-mexico/> [<https://perma.cc/NZF4-Z7ZW>].

<sup>55</sup> PRESIDENT'S COMMISSION, *supra* note 7, at 205.

<sup>56</sup> See Mark Rienzi, *The Supreme Court's "Shadow" Docket—A Response to Professor Vladeck*, NAT'L REV. (Mar. 16, 2021, 1:30 PM), <https://www.nationalreview.com/bench-memos/the-supreme-courts-shadow-docket-a-response-to-professor-vladeck> [<https://perma.cc/FWW3-B5YA>].

<sup>57</sup> Jacobson, *supra* note 2. For example, Professor Adler stated that there were six instances regarding travel ban litigation and multiple cases regarding the census.

<sup>58</sup> Notre Dame L. Sch., *Clearing Up Some Misconceptions About the Supreme Court's Shadow Docket—And Its Critics*, YOUTUBE (Oct. 8, 2021), <https://www.youtube.com/watch?v=xCg4gRgX4SQ> [<https://perma.cc/L24J-WHK2>].



In his testimony to the Senate Judiciary committee, Professor Vladeck included a chart to illustrate the increase in total grants of emergency relief from 2005 to 2020. The chart showed that between 2005 and 2013, the Supreme Court granted approximately five instances of emergency relief per year; between 2014 and 2020, that average increased to approximately fourteen grants of emergency relief per year; the 2019 Term alone had nineteen grants of emergency relief; and the 2020 Term had twenty grants of emergency relief.<sup>59</sup>

Emergency writs of injunction are only appropriate if “(1) it is necessary or appropriate in aid of [the Court’s] jurisdiction, and (2) the legal rights at issue are indisputably clear.”<sup>60</sup> This is a high bar, and differences of opinion among lower courts are usually seen as proof that the standard has not been met.<sup>61</sup> In *Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regulatory Commission*, Justice Scalia explained how rarely it should be used—“sparingly and only in the most critical and exigent circumstances.”<sup>62</sup> The Court’s emergency writs of injunction are the rarest form of relief, and from 2005 through 2019, the Court only issued four.<sup>63</sup> However, in 2020 alone, there were seven.<sup>64</sup> Four decisions were 5-4 and three decisions were 6-3.<sup>65</sup> This uptick shows that a once-extraordinary form of relief may be becoming more common.

Internal procedural changes have also contributed to the shift.<sup>66</sup> In the 1980s, the Court stopped its practice of formally adjourning for the summer, which allowed the full Court to act on contentious cases before circuit judges made their rulings.<sup>67</sup> The full Court also began to issue orders without meeting in person or listening to oral argument.<sup>68</sup> The Court may have also changed the way it applies the emergency relief standard, which states that when deliberating on an application for a stay, it should consider:

- (1) “a ‘reasonable probability’ that four Justices will consider the issue sufficiently meritorious to grant certiorari . . .”;

<sup>59</sup> Vladeck’s chart illustrating the uptick in total grants of emergency relief can be found on page 5 of his senate testimony. *Texas’s Unconstitutional Abortion Ban and the Role of the Shadow Docket: Hearing Before the Senate Comm. on the Judiciary*, 117<sup>th</sup> Cong. 5 (2021) [hereinafter *Vladeck Testimony*], <https://www.judiciary.senate.gov/imo/media/doc/Vladeck%20testimony1.pdf> [<https://perma.cc/R4WW-WJ3X>] (testimony of Professor Stephen Vladeck).

<sup>60</sup> *Turner Broad. Sys., Inc. v. F.C.C.*, 507 U.S. 1301, 1303 (1993) (brackets, internal quotation marks, and citations omitted).

<sup>61</sup> See *Lux v. Rodrigues*, 561 U.S. 1306, 1308 (2010) (“[T]he courts of appeals appear to be reaching divergent results” respecting the applicant’s claim, and that, “[a]ccordingly, . . . it cannot be said that his right to relief is ‘indisputably clear.’”).

<sup>62</sup> *Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regul. Comm’n*, 479 U.S. 1312, 1313–14 (1986).

<sup>63</sup> *Notre Dame L. Sch.*, *supra* note 58.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Vladeck Testimony*, *supra* note 59, at 13.

- (2) “a fair prospect that a majority of the Court will conclude that the decision below was erroneous”; and  
 (3) a likelihood that “irreparable harm [will] result from the denial of a stay.”<sup>69</sup>

In a close case, the justices can balance the equities.<sup>70</sup>

The justices seem to differ in their interpretations of the third factor. Based on their votes in recent decisions, a majority of the Justices appear to believe that the government suffers irreparable harm whenever a statute or policy is enjoined by a lower court.<sup>71</sup> Although Justice Kennedy, who was a fairly consistent conservative vote,<sup>72</sup> did not endorse this view, it appears that the two newest Trump Administration appointees agree with the current conservative majority.<sup>73</sup> This could explain the uptick in grants of emergency relief since Justice Kennedy’s retirement.<sup>74</sup> As a result, the consideration in these cases has become the government’s likelihood of success on the merits.<sup>75</sup> Critics argue that moving away from this norm when the federal government is a party to the case raises questions of fairness and equity and could give the appearance of favoritism to one party: the executive branch of the government.<sup>76</sup>

Critics of the recent shadow docket decisions also differ from its defenders on how to best define the “status quo” that emergency relief is meant to preserve. One understanding of the status quo is the state that existed based on the last ruling in the courts below, which critics argue the Court disrupted in its rulings on pandemic-voting and religious gathering cases.<sup>77</sup> Another understanding is that the baseline is the state of affairs created by the policy or law being challenged.<sup>78</sup> Still another understanding was explained by Chief Justice Roberts as the status quo before the law went into effect.<sup>79</sup> This difference in opinion influences when, and how often, the Court finds it proper to grant emergency relief.

The COVID-19 pandemic added a level of complexity to the shadow docket. When states banned large indoor gatherings to decrease spread of the virus, several religious groups requested emergency relief from the Supreme Court.<sup>80</sup>

<sup>69</sup> *Conkright v. Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers) (citations omitted).

<sup>70</sup> *Id.*

<sup>71</sup> Vladeck, *supra* note 4, at 126.

<sup>72</sup> U.S. Ct. of Appeals for the Ninth Circuit, *Supreme Court Review*, YOUTUBE (Oct. 15, 2018), <https://www.youtube.com/watch?v=V6kJRbhVhFA> [<https://perma.cc/S6HT-TZUP>]. In a presentation with Judge Jay Bybee, Dean Erwin Chemerinsky explains that Justice Kennedy has primarily been a conservative vote on the Court. *Id.* In his 30-year term, Justice Kennedy voted with the conservatives about 75 percent of the time. *Id.*

<sup>73</sup> See *Vladeck Testimony*, *supra* note 59, at 13.

<sup>74</sup> *Id.*

<sup>75</sup> Vladeck, *supra* note 4, at 126.

<sup>76</sup> *Id.* at 127.

<sup>77</sup> PRESIDENT’S COMMISSION, *supra* note 7, at 206.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> See, e.g., *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 716 (2021).

For example, in *South Bay United Pentecostal Church*, Justices Ginsburg, Breyer, Sotomayor, and Kagan were joined by Chief Justice Roberts in ruling that California's law limiting building capacity did not violate the First Amendment because, as the Chief Justice articulated, "[s]imilar or more severe restrictions apply to comparable secular gatherings, including lectures, concerts, movie showings, spectator sports, and theatrical performances, where large groups of people gather in close proximity for extended periods of time."<sup>81</sup> The dissenters argued that the gatherings did violate the First Amendment because other essential services such as grocery stores, factories, offices, retail stores, and pharmacies were not subject to the occupancy cap.<sup>82</sup> However, in a later COVID-19 case, *Harvest Rock Church v. Newsom*, the Court held in a 6-3 decision that California could not stop churches from reopening for indoor worship.<sup>83</sup>

In addition, the shadow docket appears to be competing with the merits docket. Dr. Adam Feldman explains that the growth of the shadow docket correlates with the shrinking of the merits docket.<sup>84</sup> In the 2020 Term, the Court decided less than seventy merits cases, which is below the number of cases it heard on average over the last fifteen years.<sup>85</sup> As Professor Samuel Bray noted, this trend could be problematic because when the Court takes fewer merits cases, readers may be more likely to interpret each order as final "precedent," considering the Court may have fewer merit opinions on point.<sup>86</sup> When the Court takes more merits cases, the public understands the holding to be an answer to the dispute between the parties.<sup>87</sup> Although correlation is not causation, it is possible that the increase in emergency rulings has contributed to fewer resources and less time for merits docket cases.

<sup>81</sup> *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring).

<sup>82</sup> *Id.* at 1614–15 (Kavanaugh, J., concurring).

<sup>83</sup> See *Harvest Rock Church v. Newsom*, 141 S. Ct. 1289, 1290 (2021).

<sup>84</sup> Adam Feldman, *Looking Back to Make Sense of the Court's (Relatively) Light Workload*, EMPIRICAL SCOTUS (Jan. 9, 2018), <https://empiricalscotus.com/2018/01/09/light-workload/> [<https://perma.cc/639U-A92N>].

<sup>85</sup> See Kalvis Golde, *In Barrett's First Term, Conservative Majority Is Dominant but Divided*, SCOTUSBLOG (July 2, 2021, 6:37 PM), <https://www.scotusblog.com/2021/07/in-barretts-first-term-conservative-majority-is-dominant-but-divided> [<https://perma.cc/A6GE-V6J5>]. In 2019, the number of cases on the merits docket was the lowest it had been since the Civil War. See Adam Feldman, *Empirical SCOTUS: Something We Haven't Seen in the Supreme Court Since the Civil War*, SCOTUSBLOG (Apr. 16, 2020, 5:22 PM), <https://www.scotusblog.com/2020/04/empirical-scotus-something-we-havent-seen-in-the-supreme-court-since-the-civil-war> [<https://perma.cc/EAH9-CL8J>].

<sup>86</sup> *Bray Testimony*, *supra* note 17, at 3. Bray bases this conclusion on a statement by President Lincoln which states that although Court decisions have the ability to settle large issues, "it is not in the nature of the Court to be able to do so merely by saying so." *Id.*

<sup>87</sup> *Id.*

## III. PROBLEMS WITH THE SHADOW DOCKET

A. *Lack of Reasoning and Transparency*

Because the Court is the final word in decision-making on all legal issues, including highly controversial ones, it has maintained its legitimacy, at least partially, through careful procedural and deliberative frameworks.<sup>88</sup> Loren AliKhan, former solicitor general of the District of Columbia and current DC Court of Appeals Judge, testified before the House Committee that “[e]ven on sharply divisive issues like integration, school prayer, abortion, and immigration, the public overwhelmingly respects the Court’s pronouncements as authoritative—a triumph largely attributable to the Court’s strict adherence to an institutional framework that ensures transparency and consistency across cases and court compositions.”<sup>89</sup> Transparent decisions based on sound reasoning promote public confidence that the Court’s power is not being used in an arbitrary way.<sup>90</sup> While the Court is often accused of being political, the public nonetheless treats its merits cases as conclusive due to the Court’s procedural regularity.<sup>91</sup>

Shadow docket decisions often do not indicate how each justice voted, and more importantly, often do not explain why the justices came to a particular conclusion.<sup>92</sup> This leaves lower-court judges in the dark about how and to what extent these shadow docket decisions should inform their own rulings.<sup>93</sup> “Because the lower-court judges don’t know why the Supreme Court does what it does, they sometimes divide sharply when forced to interpret the [C]ourt’s nonpronouncements,” writes William Baude.<sup>94</sup> Nicholas Stephanopoulos, a Harvard law professor, argues that judges in a democracy owe the public more transparency in their opinions.<sup>95</sup> “If courts don’t have to defend their decisions, then they’re just acts of will, of power.”<sup>96</sup>

Those who critique the Court’s lack of transparency do not argue that *every* emergency order requires detailed explanation; rather, they contend that certain orders are important enough to provide the public with reasoning and transparency.<sup>97</sup> The fact that individual justices frequently write concurrences or dissents from these orders shows that reasoned explanation could be possible in

<sup>88</sup> *AliKhan Testimony*, *supra* note 13, at 8.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 12.

<sup>91</sup> Baude, *supra* note 3, at 12–13.

<sup>92</sup> O’Connell, *supra* note 8.

<sup>93</sup> *Id.*

<sup>94</sup> David Leonhardt, *Rulings Without Explanations*, N.Y. TIMES (Sept. 3, 2021), <https://www.nytimes.com/2021/09/03/briefing/scotus-shadow-docket-texas-abortion-law.html> [https://perma.cc/C398-G7YQ].

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> PRESIDENT’S COMMISSION, *supra* note 7, at 207.

cases of national importance.<sup>98</sup> Yet, defenders point out that emergency orders may not leave enough time for the justices to provide a longer explanation of their reasoning, and that short statements would rarely give useful information.<sup>99</sup> They argue that the lack of explanation is a consequence of rushed decision-making, and that it may be useful for the justices to avoid locking themselves into reasoning based on limited information and process.<sup>100</sup>

Another common critique of shadow docket decisions stems from the lack of knowledge regarding which justices were in the majority. Justice Ginsburg wrote that the disclosure of votes holds each judge accountable and “puts the judge’s conscience and reputation on the line.”<sup>101</sup> Justice Scalia agreed that signing a decision provided accountability: “They cannot, without risk of public embarrassment, meander back and forth—today providing the fifth vote for a disposition that rests upon one theory of law, and tomorrow providing the fifth vote for a disposition that presumes the opposite.”<sup>102</sup> In a shadow docket decision preventing Alabama from executing a prisoner without his pastor present, only seven of the nine Justices disclosed their votes, with four indicating they were in the majority.<sup>103</sup> AliKhan commented on this case at the House hearing, stating that “it takes five justices to rule on something . . . so there was clearly someone lurking in the background that cast that vote who did not want to be accountable for it.”<sup>104</sup> An undisclosed Justice casting the tiebreaking vote in a controversial case affects the public’s opinion on the Court’s consistency and fairness.<sup>105</sup>

However, the idea of disclosing votes has been opposed by some, including Professor Suzanna Sherry.<sup>106</sup> She argues that justices have become “celebrities” who tour around the country, make speeches, and write opinions or dissents to cater to their fans.<sup>107</sup> Sherry suggests prohibiting dissents and concurrences and instead requiring each opinion to be completely unsigned.<sup>108</sup> When asked whether Congress could require the justices to disclose their votes, Stephen

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 206–07.

<sup>100</sup> *Id.* at 208.

<sup>101</sup> Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133, 140 (1990).

<sup>102</sup> Antonin Scalia, *The Dissenting Opinion*, 1994 J. SUP. CT. HIST. 33, 42 (1994).

<sup>103</sup> Amy Howe, *Court Won’t Allow Alabama Execution Without a Pastor*, SCOTUSBLOG (Feb. 12, 2021, 2:35 AM), <https://www.scotusblog.com/2021/02/court-wont-allow-alabama-execution-without-a-pastor/> [<https://perma.cc/S9MP-WR4R>].

<sup>104</sup> James Romoser, *Lawmakers Consider Nudging Supreme Court Toward More Transparency on the Shadow Docket*, SCOTUSBLOG (Feb. 18, 2021, 9:26 PM), <https://www.scotusblog.com/2021/02/lawmakers-consider-nudging-supreme-court-toward-more-transparency-on-the-shadow-docket/> [<https://perma.cc/2CCM-23CC>].

<sup>105</sup> *AliKhan Testimony*, *supra* note 13, at 11.

<sup>106</sup> Suzanna Sherry, *Our Kardashian Court (and How to Fix It)*, 106 IOWA L. REV. 181, 182 (2020).

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 224–26.

Vladeck testified that it was a close question.<sup>109</sup> He points out that the justices might respond to such a requirement by issuing shadow docket rulings unanimously, even if there was actual disagreement in privacy.<sup>110</sup> Vladeck instead suggests that Congress should enact reforms that would make it easier for the Court to quickly address time-sensitive issues.<sup>111</sup>

Further, shadow docket decisions have become more publicly and politically divisive in recent years. Only one of the eight applications for emergency relief from the George W. Bush or Obama Administrations resulted in a dissent.<sup>112</sup> However, twenty-seven of the thirty-six applications from the Trump Administration caused at least one justice to dissent.<sup>113</sup> Even if we zoom out from the Executive Branch and look at the wider scope of emergency docket rulings, we see a sharp increase in rulings with dissenting opinions.<sup>114</sup> During the 2017 Term, Justice Kennedy's last term on the Court, there were only two shadow docket rulings with four dissents.<sup>115</sup> In the following two Terms, there were twenty rulings with four dissents.<sup>116</sup>

The dissents have also become more ideologically homogenous. Of the sixty-eight orders during the 2020 Term with at least one dissent, there was not a single case in which a Justice to the left of Chief Justice Roberts joined a Justice to his right.<sup>117</sup> There were only ten merits cases in which the three Democratic appointed Justices dissented.<sup>118</sup> In contrast, there were twenty-five instances on the orders docket.<sup>119</sup>

#### *B. Decisions Made Without Merits Briefing, Amicus Participation, or Oral Argument*

Unlike cases on the shadow docket, merits docket cases are decided with great care and months of pondering.<sup>120</sup> In fact, an entire year could pass before

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<sup>109</sup> Romoser, *supra* note 104.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Vladeck Testimony, supra* note 59, at 7.

<sup>113</sup> *Id.* Recall that earlier in the Note it was mentioned that the Trump Administration brought forty-one applications for relief. *See supra* note 53 and accompanying text. The number of surviving applications ended up being thirty-six as one application was held in abeyance, and four were withdrawn.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> Notre Dame L. Sch., *supra* note 58.

<sup>118</sup> *Vladeck Testimony, supra* note 59, at 8.

<sup>119</sup> Steve Vladeck (@steve\_vladeck), TWITTER (Sept. 1, 2021, 9:25 PM), [https://twitter.com/steve\\_vladeck/status/1433284987806261250?s=20](https://twitter.com/steve_vladeck/status/1433284987806261250?s=20) [<https://perma.cc/8WDR-BVS8>].

<sup>120</sup> Ian Millhiser, *The Supreme Court's Enigmatic "Shadow Docket," Explained*, VOX (Aug. 11, 2020, 8:30 AM), <https://www.vox.com/2020/8/11/21356913/supreme-court-shadow-docket-jail-asylum-covid-immigrants-sonia-sotomayor-barnes-ahlman> [<https://perma.cc/VZ8V-5HPG>].

the Supreme Court finally releases a merits opinion.<sup>121</sup> The Court typically grants less than eighty out of seven to eight thousand certiorari petitions per year.<sup>122</sup> The Supreme Court's rules state that unless a case is an unusually important question of federal law, the Court will rarely grant certiorari unless a disagreement exists among two or more federal courts of appeal, state supreme courts, or a federal court of appeal and a state supreme court.<sup>123</sup> Once a petition for certiorari is granted, lawyers spend months compiling detailed briefs and documents.<sup>124</sup> Friends of the Court may also file amicus briefs in high-profile cases, which create hundreds of pages for the justices to study and consider.<sup>125</sup>

The shadow docket stands in stark contrast. Rather than months, lawyers for each side may only have days to prepare their briefs.<sup>126</sup> The justices receive very little briefing and rarely grant the opportunity for oral argument.<sup>127</sup> This is a serious detriment to the Court because oral argument is an important opportunity for justices to clarify the claims from the parties, ask about the consequences for particular decisions, and question specifics in the record.<sup>128</sup> In fact, Justice Scalia stated that he often made up his mind at oral arguments.<sup>129</sup> Further, the nature of the compressed schedule dictates that the justices have far less time for debate amongst themselves.<sup>130</sup> When consequential decisions must be made on the shadow docket, the justices lose out on the information, research, and time that would have gone into a decision based on the merits.

This is an impediment to the Court, which prefers full disposition of cases to “guarantee[] that a factual record will be available to [the Court], thereby discouraging the framing of broad rules, seemingly sensible on one set of facts, which may prove ill-considered in other circumstances.”<sup>131</sup> The Court hesitates to address “far-reaching and important questions” if they “are not presented by the record with sufficient clarity to require or justify their decision.”<sup>132</sup> Shadow docket resolutions do not allow for the safeguard of a fully-developed factual record and consideration from circuit courts.

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<sup>121</sup> Jacobson, *supra* note 2.

<sup>122</sup> Millhisser, *supra* note 120.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> Jacobson, *supra* note 2.

<sup>127</sup> Millhisser, *supra* note 120.

<sup>128</sup> See Stephen M. Shapiro, *Oral Argument in the Supreme Court of the United States*, 33 CATH. U. L. REV. 529, 530–31 (1984).

<sup>129</sup> See Brian Lamb, *Q&A with Antonin Scalia*, C-SPAN (May 2, 2008), <https://www.c-span.org/video/?205000-1/qa-antonin-scalia#> [<https://perma.cc/3SLV-8V7H>].

<sup>130</sup> Millhisser, *supra* note 120. The justices traditionally discuss cases amongst themselves, so the unpredictability and timing of shadow docket cases can deprive the justices of this chance to deliberate. See *AliKhan Testimony*, *supra* note 13, at 10.

<sup>131</sup> *Illinois v. Gates*, 462 U.S. 213, 224 (1983).

<sup>132</sup> *Mishkin v. New York*, 383 U.S. 502, 512–13 (1966).

*C. A Decrease in Public Trust in the Judiciary*

While all the concerns above could be cause for alarm, the strongest objection to the shadow docket process is that its use has negative impacts on the public perception of the Court's legitimacy. In September of 2021, a *Gallup* study found that approval of the US Supreme Court was at a new low: 40 percent.<sup>133</sup> This was down from 49 percent of people in July 2021 who approved of the job the Court was doing.<sup>134</sup> *Gallup* conducted this poll after the Court (1) declined to block the recent Texas abortion law, (2) allowed colleges to mandate vaccines, and (3) rejected the Biden Administration's attempt to extend a moratorium on evictions during the COVID-19 pandemic.<sup>135</sup>

*Gallup*'s September survey also found a decline in the percentage of Americans who have a "great deal" or "fair amount" of trust in the federal judicial branch.<sup>136</sup> The number decreased from 67 percent in 2020 to 54 percent in the fall of 2021.<sup>137</sup> *Gallup* reported that this was only the second occurrence of a trust score under 60 percent, with the first being a score of 53 percent in 2015.<sup>138</sup> This loss of confidence in the Supreme Court is occurring among Republicans, Democrats, and Independents alike.<sup>139</sup>

In June 2022, *Gallup* released even more startling data: Americans' confidence in the Court had reached a new fifty-year low.<sup>140</sup> Only 25 percent of adults say they have "a great deal" or "quite a lot" of confidence in the Court, which is down from 36 percent a year ago.<sup>141</sup> The survey was taken before the Court ended its Term and released its most controversial decisions, such as overturning *Roe v. Wade*. But unlike 2021, this new drop in confidence came from Democrats and Independents while the Republican numbers remained essentially unchanged.<sup>142</sup> The Democratic number was the lowest confidence rating that *Gallup* had ever measured for any party group.<sup>143</sup>

As the Court mentioned in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the legitimacy of the Court is tied to its ability to explain it-

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<sup>133</sup> Jeffrey M. Jones, *Approval of U.S. Supreme Court Down to 40%, a New Low*, GALLUP (Sept. 23, 2021), <https://news.gallup.com/poll/354908/approval-supreme-court-down-new-low.aspx> [<https://perma.cc/3GT2-BRCY>].

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> Jeffrey M. Jones, *Confidence in U.S. Supreme Court Sinks to Historic Low*, GALLUP (June 23, 2022), <https://news.gallup.com/poll/394103/confidence-supreme-court-sinks-historic-low.aspx> [<https://perma.cc/68AE-DQRX>].

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*



self.<sup>144</sup> The power and respect that the Court has come to expect is created out of the public perception of its perceived legitimacy, yet there has always been some level of mystery surrounding much of what goes on behind the scenes. Though Congress's proceedings are live streamed on C-SPAN, the Supreme Court does not allow video coverage of oral arguments.<sup>145</sup> Although merit cases may be accused of being excessively political or secretive, lawyers and the public treat the Court's decisions as conclusive because of its transparent reasoning.<sup>146</sup> The consistency and transparency of the decisions make the results easier to accept, win or lose.<sup>147</sup>

#### D. *The Question of Precedence*

Historically, one justice would decide shadow docket applications and provide the reasoning behind that decision.<sup>148</sup> Because only one justice made the decision, it did not have precedential value.<sup>149</sup> The traditional assumption is that shadow docket decisions have less precedential value than fully-argued cases because "they rarely resolve cases on the merits and almost by definition are temporary," according to Professor Carl Tobias.<sup>150</sup> Legal theorist Lawrence Solum agrees that cases decided on the shadow docket without the benefit of full briefing and oral arguments should not be given the same precedential value as decisions made on the merits docket.<sup>151</sup> He argues that lower courts giving substantial weight to shadow docket rulings is troubling, especially when adherence to other precedent would lead the Court to a different decision.<sup>152</sup>

<sup>144</sup> *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 865–66 (1992) ("That substance is expressed in the Court's opinions, and our contemporary understanding is such that a decision without principled justification would be no judicial act at all. . . . [T]he Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible. . . .").

<sup>145</sup> See Ryan C. Black et al., *Livestreaming Arguments? The Supreme Court Made the Right Decision*, THE HILL (May 8, 2020, 11:00 AM), <https://thehill.com/opinion/judiciary/496247-livestreaming-arguments-the-supreme-court-made-the-right-decision> [<https://perma.cc/PN8H-FPWJ>]. Justices do not want cameras in the courtroom for fear the media might misrepresent the Court, which would hurt its legitimacy. *Id.* However, 67 percent of survey respondents stated that they wish cameras were allowed in the courtroom to watch oral arguments. *Id.*

<sup>146</sup> Baude, *supra* note 3, at 12–13.

<sup>147</sup> *Id.* at 13.

<sup>148</sup> *Vladeck Testimony*, *supra* note 59, at 12.

<sup>149</sup> *Kimble v. Swackhamer*, 439 U.S. 1385, 1385 (1978) ("[A] single Justice has authority only to grant interim relief in order to preserve the jurisdiction of the full Court to consider an applicant's claim on the merits.").

<sup>150</sup> Jacobson, *supra* note 2.

<sup>151</sup> Fox, *supra* note 16.

<sup>152</sup> *Id.* ("Predictions about what the Supreme Court will do are not law and deciding on the basis of such prediction is improper. The shadow docket, by encouraging this predictive approach, has resulted in a serious breach of judicial duty by the lower courts.").

While the Supreme Court has previously suggested that shadow docket rulings should be given little precedential weight, if any,<sup>153</sup> scholars have raised questions regarding whether this standard has changed.<sup>154</sup> Professor Vladeck pointed out that the Supreme Court criticized the Ninth Circuit in its unsigned *Tandon v. Newsom* decision for not giving weight to its previous COVID-19 religion restriction decisions made on the shadow docket.<sup>155</sup> The cases cited by the Court did not contain the majority's reasoning.<sup>156</sup> Similarly, in *Gateway City Church v. Newsom*, the Court stated that “[t]he Ninth Circuit’s failure to grant relief was erroneous. This outcome is clearly dictated by this Court’s decision in *South Bay United Pentecostal Church v. Newsom*.”<sup>157</sup> But *South Bay* was also a shadow docket decision that did not contain reasoning for the Ninth Circuit to apply.<sup>158</sup> These statements by the Court seem to imply that it expects lower courts to give precedential weight to its rulings on the shadow docket.

But not everyone agrees with the conclusion that the Court is giving precedential value to shadow docket cases. Professor Adler argued that the lower courts should expect the Supreme Court to treat COVID-19 cases similarly, but that this does not make a shadow docket order precedential.<sup>159</sup> Justice Alito also said in a speech at Notre Dame that rulings on the emergency docket did not create precedent.<sup>160</sup> Judge Trevor McFadden and Vetan Kapoor take a third approach and suggest that there are three categories of shadow docket orders, which represent a spectrum of precedential value.<sup>161</sup> The first category has little precedential value for lower courts, such as denials of stay applications and decisions issued by a single justice with no reasoning.<sup>162</sup> The second category serves as persuasive authority and includes in-chambers opinions, statements, dissents, and concurrences regarding stay grants.<sup>163</sup> The third category should

<sup>153</sup> See, e.g., *Lunding v. N.Y. Tax Appeals Tribunal*, 522 U.S. 287, 307 (1998) (“Although we have noted that ‘[o]ur summary dismissals are . . . to be taken as rulings on the merits in the sense that they rejected the specific challenges presented . . . and left undisturbed the judgment appealed from,’ we have also explained that they do not ‘have the same precedential value . . . as does an opinion of this Court after briefing and oral argument on the merits.’” (citation omitted)).

<sup>154</sup> *Vladeck Testimony*, *supra* note 59, at 9.

<sup>155</sup> See *Tandon v. Newsom*, 141 S. Ct. 1294, 1297–98 (2021) (per curiam).

<sup>156</sup> *Id.*

<sup>157</sup> *Gateway City Church v. Newsom*, 141 S. Ct. 1460, 1460 (2021).

<sup>158</sup> See *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021).

<sup>159</sup> *Jacobson*, *supra* note 2.

<sup>160</sup> Adam Liptak, *Alito Responds to Critics of the Supreme Court’s ‘Shadow Docket’*, N.Y. TIMES (Sept. 30, 2021), <https://www.nytimes.com/2021/09/30/us/politics/alito-shadow-docket-scotus.html> [<https://perma.cc/EK4Q-VK4K>]. Justice Alito’s public address at Notre Dame Law School was livestreamed, but there is no recording available. See *Address by Justice Samuel Alito: “The Emergency Docket,”* UNIV. OF NOTRE DAME, <https://events.nd.edu/event/s/2021/09/30/justice-samuel-alito-the-emergency-docket/> [<https://perma.cc/T2ZA-P5S2>].

<sup>161</sup> Trevor McFadden & Vetan Kapoor, *The Precedential Effect of the Supreme Court’s Emergency Stays*, 44 HARV. J. L. & PUB. POL’Y 827, 831 (2021).

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

be deferred to by lower courts and includes grants of stay applications by the full Court, even when the decision contains little or no reasoning.<sup>164</sup> The authors argue that deferring to these judgments will reduce the risk of reversal, promote confidence in the justice system, and ensure efficiency.<sup>165</sup>

Lower courts have said very little about the precedential effects of Supreme Court stays.<sup>166</sup> In August 2020, Judge Wilkinson of the Fourth Circuit suggested in a majority opinion that while the Fourth Circuit might have the “technical authority” to disregard the Court’s decision to grant a stay preventing enforcement of the Trump Administration’s public charge rule, “every maxim of prudence suggests that we should decline to take [that] aggressive step.”<sup>167</sup> Judge King dissented, arguing that “‘assigning such significance to perfunctory stay orders is problematic,’ and that treating a stay order as controlling would eliminate the need for circuit courts to consider the merits of an issue in cases where the Court has granted a stay.”<sup>168</sup>

#### IV. HOW IMMIGRATION LAW AND ELECTIONS ARE AFFECTED BY THE SHADOW DOCKET

##### A. *Election Law*

Many election law disputes are “effectively resolved on the shadow docket.”<sup>169</sup> However, the Court’s adjudication of election disputes has long been controversial. Section IV.A focuses on elections because of their unique time restraints, wide-ranging impact, and inherently partisan implications. If the Supreme Court adjudicates election issues on the shadow docket, it should provide reasoning to reassure the public that it is operating in good faith.

Professor Edward Foley explains that few areas of law are as affected by shadow docket decisions as election law because elections are dominated by a single, important date.<sup>170</sup> To illustrate this, he points to the 2000 Presidential Election.<sup>171</sup> He argues that the most important decision in *Bush v. Gore* was not the merits decision released on December 12, 2000, but rather the stay decision issued on December 9, 2000.<sup>172</sup> The stay stopped the Florida recount and ended up being decisive on the issue of whether Florida would have another chance to

<sup>164</sup> *Id.* at 882.

<sup>165</sup> *Id.* at 886.

<sup>166</sup> *Id.* at 830.

<sup>167</sup> *See id.* at 829–30 (citing *CASA de Md., Inc. v. Trump*, 971 F. 220, 229–30 (4th Cir. 2020)).

<sup>168</sup> *Id.* at 830 (citing *CASA de Md., Inc.*, 971 F. at 281 n.16 (King, J., dissenting)).

<sup>169</sup> Edward Foley, *Symposium: The Particular Perils of Emergency Election Cases*, SCOTUSBLOG (Oct. 23, 2020, 5:28 PM), <https://www.scotusblog.com/2020/10/symposium-the-particular-perils-of-emergency-election-cases/> [https://perma.cc/CFQ5-5TA9].

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

continue the recount in the presidential election.<sup>173</sup> If the Court had not issued the stay before the merits decision came out, the time would not have expired for the recount to finish.<sup>174</sup>

In 2020, orders on the shadow docket decided many of the rules and procedures that applied to votes cast in the election.<sup>175</sup> Because Election Day constitutes a firm deadline, many election issues arrive on the Court's emergency docket.<sup>176</sup> When a lower court issues a preliminary ruling shortly before an election, the losing side may not have time for a full appeal.<sup>177</sup> Instead, they might file an emergency request and ask the Supreme Court for a stay while the appeal is pending.<sup>178</sup> Stays are intended to be a temporary form of relief, but they often resolve the issue at the heart of election cases due to the nature of election deadlines.<sup>179</sup>

The COVID-19 pandemic created additional election-related litigation as parties fought over the safest way for voters to cast their ballots. In *Middleton v. Andino*, a district court issued an order that prevented South Carolina from requiring mail-in ballots to be verified by signature in front of another person.<sup>180</sup> The judge reasoned that in the context of a deadly pandemic, the additional signature placed a high burden on those who were particularly vulnerable.<sup>181</sup> In an unsigned, two-paragraph decision released less than one month before the election, the Supreme Court stayed the order, so all mail-in ballots received after a certain date had to be verified with a signature made in front of another person.<sup>182</sup>

In another influential case, a district court lifted Alabama's ban on curbside voting and enjoined the defendants from enforcing the witness requirement for voters vulnerable to COVID-19.<sup>183</sup> The Alabama Secretary of State filed an appeal to the Eleventh Circuit, who declined to stay the order.<sup>184</sup> In October 2020, the Supreme Court ruled that the ban on curbside voting could stand, and reversed the lower court's ruling that the restriction violated the Constitution and the Americans with Disabilities Act.<sup>185</sup> Justice Sotomayor dissented, arguing that Alabama's Secretary of State did not "meaningfully dispute that the plain-

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<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *AliKhan Testimony*, *supra* note 13, at 3.

<sup>176</sup> Amy Howe, *Emergency Appeals: Stay Requests*, SCOTUSBLOG, <https://www.scotusblog.com/election-law-explainers/emergency-appeals-stay-requests/> [<https://perma.cc/7LXH-8CXD>].

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Middleton v. Andino*, 488 F. Supp. 3d 261, 307 (D.S.C. 2020).

<sup>181</sup> *Id.* at 302.

<sup>182</sup> *Andino v. Middleton*, 141 S. Ct. 9, 10 (2020).

<sup>183</sup> *People First of Ala. v. Merrill*, 467 F. Supp. 3d 1179, 1226–27 (N.D. Ala. 2020).

<sup>184</sup> *Merrill v. People First of Ala.*, 815 Fed. Appx. 505 (11th Cir. 2020) (unpublished).

<sup>185</sup> *Merrill v. People First of Ala.*, 141 S. Ct. 25, 25 (2020).

tiffs have disabilities, that COVID-19 is disproportionately likely to be fatal to these plaintiffs, and that traditional in-person voting will meaningfully increase their risk of exposure.”<sup>186</sup> But in *Pennsylvania Democratic Party v. Boockvar*, the Supreme Court declined to stay a Pennsylvania Supreme Court order that allowed mail-in votes mailed on or before Election Day to be counted as long as they were received by November 6th.<sup>187</sup>

More recently, the Justices reinstated Alabama’s gerrymandered Congressional map after an Alabama district court found that the new map was racially discriminatory in violation of Section 2 of the Voting Act.<sup>188</sup> A three-judge panel in the District of Alabama, including two judges appointed by President Trump, found that the plaintiffs were substantially likely to establish a constitutional violation of the Voting Rights Act.<sup>189</sup> The panel also determined that the plaintiffs established the elements for injunctive relief and instructed the state to draw a new map.<sup>190</sup>

Alabama sought a stay from the Supreme Court, which the Court granted in a one-paragraph decision on the shadow docket.<sup>191</sup> Only Justices Kavanaugh and Alito provided reasoning for the decision, which they wrote in a separate concurrence.<sup>192</sup> They stated that the majority was following election-law precedent establishing that district courts should not ordinarily enjoin state election laws close to an election, and if they do, their injunctions should be stayed by appellate courts.<sup>193</sup> However, the Court’s decision to stay the injunction meant that the gerrymandered map would remain in place for the 2022 midterm elections. Chief Justice Roberts dissented, explaining that the district court applied the proper vote-dilution test with no apparent errors, and thus their analysis should control in the upcoming election.<sup>194</sup> Justices Kagan, Breyer and Sotomayor also dissented, arguing that staying the decision “forces Black Alabamians to suffer what under law is clear vote dilution.”<sup>195</sup>

### B. Immigration Law

Due to increasing geopolitical conflicts and future climate change displacement, immigration policy is of extreme importance. The field of immigra-

<sup>186</sup> *Id.* at 27 (Sotomayor, J., dissenting).

<sup>187</sup> Amy Howe, *Court Will Not Weigh in on Pennsylvania’s Mail-in Ballot Deadline Before Election*, SCOTUSBLOG (Oct. 28, 2020, 8:02 PM), <https://www.scotusblog.com/2020/10/court-will-not-weigh-in-on-pennsylvanias-mail-in-ballot-deadline-before-election/> [<https://perma.cc/W8XW-HDW2>].

<sup>188</sup> *Singleton v. Merrill*, 582 F. Supp. 3d 924, 934–36 (N.D. Ala. 2022).

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at 1026, 1033.

<sup>191</sup> *Merrill v. Milligan*, 142 S. Ct. 879, 879 (2022).

<sup>192</sup> *Id.* (Kavanaugh, J., concurring).

<sup>193</sup> *Id.* (Kavanaugh, J., concurring).

<sup>194</sup> *Id.* at 882–83 (Roberts, C.J., dissenting).

<sup>195</sup> *Id.* at 883 (Kagan, J., dissenting).

tion law is perceived as vast and complex to American citizens and non-citizens alike.<sup>196</sup> However, immigration policy decisions made on the shadow docket have the effect of further mystifying this area of law rather than clarifying it. Because American immigration law is vitally important to both domestic and international policymaking, shadow docket decisions in this area affect the lives of people who may be at their most vulnerable. Section IV.B will explain how recent shadow docket decisions on immigration policies have affected migrants and migrant hopefuls.

One example of a notable shadow docket immigration decision focused on the Trump Administration's executive order underlying *Trump v. Hawaii*,<sup>197</sup> commonly known as "the travel ban."<sup>198</sup> The travel ban consisted of a set of policies created by the Trump Administration that imposed travel and immigration restrictions on people from eight countries: Libya, Iran, Chad, Somalia, Syria, North Korea, Venezuela, and Yemen.<sup>199</sup> When federal district courts in Maryland<sup>200</sup> and Hawaii<sup>201</sup> issued injunctions to enjoin the ban, the Trump Administration applied for a stay from the Supreme Court. The Supreme Court granted the stay and allowed the ban to take effect.<sup>202</sup> As the case progressed, the Fourth and Ninth Circuits found in favor of the plaintiffs.<sup>203</sup> When the case returned to the Supreme Court to be heard on the merits on June 26, 2018, after it had been amended in response to court challenges, the Supreme Court upheld the ban in a 5-4 decision.<sup>204</sup>

President Trump later added six more majority-Muslim countries to the list of banned countries.<sup>205</sup> The travel ban contributed to doctor shortages in rural America, a drop in enrollment among foreign students, and the denial of visas

<sup>196</sup> *What Every Lawyer Needs to Know About Immigration Law*, AM. BAR ASS'N (June 2017), <https://www.americanbar.org/news/abanews/publications/youraba/2017/june-2017/immigration-law-basics-every-lawyer-should-know/#> [<https://perma.cc/ET2L-ZVBC>].

<sup>197</sup> *Trump v. Hawaii*, 138 S. Ct. 542 (2017).

<sup>198</sup> Shoba Sivaprasad Wadhia, *Symposium: From the Travel Ban to the Border Wall, Restrictive Immigration Policies Thrive on the Shadow Docket*, SCOTUSBLOG (Oct. 27, 2020, 3:51 PM), <https://www.scotusblog.com/2020/10/symposium-from-the-travel-ban-to-the-border-wall-restrictive-immigration-policies-thrive-on-the-shadow-docket/> [<https://perma.cc/SG2F-3T25>].

<sup>199</sup> *Id.*

<sup>200</sup> *Int'l Refugee Assistance Project v. Trump*, 241 F. Supp. 3d 539, 556 (D. Md. 2017).

<sup>201</sup> *Hawaii v. Trump*, 245 F. Supp. 3d 1227, 1239 (D. Haw. 2017).

<sup>202</sup> *Trump v. Hawaii*, 138 S. Ct. 542, 542 (2017); *Trump v. Int'l Refugee Assistance Project*, 138 S. Ct. 542, 542 (2017).

<sup>203</sup> See *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 605–06 (4th Cir. 2017) (en banc) ("lift[ing] the injunction as to the President only" and leaving the preliminary injunction otherwise "fully intact"); *Hawaii v. Trump*, 859 F.3d 741, 789 (9th Cir. 2017) (per curiam).

<sup>204</sup> *Trump v. Hawaii*, 138 S. Ct. 2392 (2018); Nicole Narea, *Biden is Ending Trump's Travel Ban*, VOX (Jan. 20, 2021, 5:50 PM), <https://www.vox.com/policy-and-politics/2021/1/20/22235986/biden-trump-travel-muslim-ban> [<https://perma.cc/X849-3PXR>].

<sup>205</sup> Narea, *supra* note 204.

to more than 41,000 people.<sup>206</sup> People affected by the travel ban with relatives in the United States were forced to endure family separation during the tenure of the ban.<sup>207</sup> On his first day in office, President Biden issued an executive order to end the travel ban.<sup>208</sup>

Another shadow docket decision impacting immigration policy centered around President Trump's 2016 election campaign promise to build a concrete barrier wall between Mexico and the United States.<sup>209</sup> The US government spent billions of dollars to expand and reconstruct the wall.<sup>210</sup> While \$5 billion came through the traditional means of US Customs and Border Patrol, President Trump also ordered billions in funds from the Department of Defense to be diverted for wall funding.<sup>211</sup> In *Trump v. Sierra Club*,<sup>212</sup> an environmental group sued to stop the wall, arguing that government officials lacked the authority to spend more on the wall than was already allocated for border security.<sup>213</sup> They argued that the government could not use \$2.5 billion allocated for military personnel, which the Department of Defense redirected from counter-narcotics funds.<sup>214</sup>

The Northern District of California issued a preliminary injunction against the use of these funds, but the Supreme Court stayed the injunction in a one-paragraph order allowing the administration to use the funds while proceedings continued.<sup>215</sup> The Ninth Circuit ruled in favor of the plaintiffs, so the Sierra Club asked the Supreme Court to lift its stay.<sup>216</sup> However, in a 5-4 vote, the Court's one-sentence order refused to lift the stay.<sup>217</sup> Justices Ginsburg, Breyer, Sotomayor, and Kagan dissented from the denial of the motion.<sup>218</sup> The dissenters shared their concern about the majority's decision, with Justice Breyer writing, "The Court's decision to let construction continue nevertheless, I fear, may 'operat[e], in effect, as a final judgment.'" <sup>219</sup> And they were right. As of now, in 2022, a few years after the Court overruled the Ninth Circuit, it has yet to is-

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> Lucy Rodgers & Dominic Bailey, *Trump Wall: How Much Has He Actually Built?*, BBC NEWS (Oct. 31, 2020), <https://www.bbc.com/news/world-us-canada-46824649> [<https://perma.cc/CPX6-VZGB>].

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Trump v. Sierra Club*, 140 S. Ct. 2620 (2020).

<sup>213</sup> *Sierra Club v. Trump*, 379 F. Supp. 3d 883, 891 (N.D. Cal. 2019).

<sup>214</sup> Amy Howe, *Justices Take Up Border-Wall, "Remain in Mexico" Cases*, SCOTUSBLOG (Oct. 19, 2020, 11:03 AM), <https://www.scotusblog.com/2020/10/justices-take-up-border-wall-remain-in-mexico-cases/> [<https://perma.cc/332F-EA95>].

<sup>215</sup> *Trump v. Sierra Club*, 140 S. Ct. 1 (2019) (mem.).

<sup>216</sup> *Sierra Club v. Trump*, 963 F.3d 874, 897 (9th Cir. 2020).

<sup>217</sup> *Trump*, 140 S. Ct. at 2620.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* (Breyer, J., dissenting) (citation omitted).

sue a decision on the merits.<sup>220</sup> In fact, the Court is unlikely to ever address the merits.<sup>221</sup> So we will never know whether the Trump Administration's reallocation of billions of dollars to construct a border wall was lawful.<sup>222</sup>

Other immigration rules that were allowed to remain in effect through emergency stays were the "Asylum transit rule," and the "Remain in Mexico" policy.<sup>223</sup> The transit rule, put in place by the Trump Administration in 2019, announced that people who arrived at the southern border were blocked from asylum eligibility if they passed through another country in transit to the United States and did not apply for asylum in that country.<sup>224</sup> A federal district court in California issued a nationwide injunction, so the Trump Administration asked the Supreme Court for an emergency stay.<sup>225</sup> The Supreme Court paused the injunction, thus reenacting the transit rule.<sup>226</sup>

The Court's unsigned order contained a five-page dissent authored by Justice Sotomayor and joined by Justice Ginsburg.<sup>227</sup> The dissent criticized the majority for upending "longstanding practices regarding refugees who seek shelter from persecution," and implementing the policy without providing notice.<sup>228</sup> Justice Sotomayor also did not believe the government had met its weighty burden for the relief it sought.<sup>229</sup> She noted that the district court found the rule unlawful because (1) it was inconsistent with the asylum statute, (2) the challengers would have likely won because the government did not follow usual rulemaking procedures, and (3) the explanation for the rule was so poorly reasoned that the action was likely arbitrary and capricious.<sup>230</sup> On July 6, 2020, the Ninth Circuit found that the transit rule was contrary to law.<sup>231</sup> But seventy thousand migrants were subject to the policy from when it was introduced in 2019 until President Biden suspended it on his first day in office in January 2021.<sup>232</sup>

On August 24, 2021, the Court issued a shadow docket decision allowing the Remain in Mexico policy to stay in effect after the Biden Administration attempted to end it.<sup>233</sup> With only the three Democratic appointees dissenting,

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<sup>220</sup> Pierce, *supra* note 20, at 4 n.21.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.* at 4.

<sup>223</sup> Wadhia, *supra* note 198.

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> Barr v. E. Bay Sanctuary Covenant, 140 S. Ct. 3, 3 (2019) (mem.).

<sup>227</sup> *Id.* at 4.

<sup>228</sup> *Id.* (Sotomayor, J., dissenting).

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> E. Bay Sanctuary Covenant v. Barr, 964 F.3d 832, 838, 846 (9th Cir. 2020).

<sup>232</sup> ASSOCIATED PRESS, *Biden Administration Ends Trump-era 'Remain in Mexico' Policy*, PBS NEWS HOUR (Aug. 9, 2022, 11:22 AM), <https://www.pbs.org/newshour/politics/biden-administration-ends-trump-era-remain-in-mexico-policy> [<https://perma.cc/5ESA-547T>].

<sup>233</sup> Biden v. Texas, 142 S. Ct. 926, 926 (2021).



the majority offered one sentence of reasoning and cited the previous Deferred Action for Childhood Arrivals (“DACA”) case to support their decision that the government had “failed to show a likelihood of success on the claim that the memorandum rescinding the Migrant Protection Protocols was not arbitrary and capricious.”<sup>234</sup> Finally, the Supreme Court ruled on June 30, 2022, that the Biden Administration could end the policy.<sup>235</sup> The Court’s shadow docket has greatly impacted our immigration system, and these decisions have prompted calls for reform.

## V. SHADOW DOCKET REFORM

### A. *The Debate Around Reform*

Shadow docket reform may not be a far-fetched idea. During the first senate judiciary hearing on the topic in February of 2021, both Democrats and Republicans on the House panel agreed that the Supreme Court should be more transparent in significant shadow docket rulings and have discussed using legislation to encourage this outcome.<sup>236</sup> Chairman of the House Judiciary Subcommittee on Courts, Representative Henry Johnson, a Democrat from Georgia, argued that “[k]nowing why the justices selected certain cases, how each of them voted, and their reasoning is indispensable to the public’s trust in the court’s integrity.”<sup>237</sup> Representative Louie Gohmert, a Republican from Texas, stated that he would welcome reforms to make it clear how the justices are voting.<sup>238</sup>

However, a more recent Senate hearing did not have the same consensus between Republicans and Democrats. While Democratic senators argued that the Court’s shadow docket rulings were inconsistent and politicized, Republican senators replied that the rulings were ordinary and that the term “shadow docket” was used to make them seem more nefarious.<sup>239</sup> Justice Alito, at a Notre Dame presentation in September 2021, criticized the term “shadow docket” for portraying the Court as having been “captured by a dangerous cabal.”<sup>240</sup> He encouraged the use of the term “emergency docket” and compared

<sup>234</sup> *Id.* at 926–27.

<sup>235</sup> *Biden v. Texas*, 142 S. Ct. 2528, 2548 (2022).

<sup>236</sup> James Romoser, *Lawmakers Consider Nudging Supreme Court Toward More Transparency on the Shadow Docket*, SCOTUSBLOG (Feb. 18, 2021, 9:26 PM), <https://www.scotusblog.com/2021/02/lawmakers-consider-nudging-supreme-court-toward-more-transparency-on-the-shadow-docket/> [https://perma.cc/PE4D-GBXS].

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> Ellena Erskine, *Senators Spar over Shadow Docket in Wake of Court’s Order Allowing Texas Abortion Law to Take Effect*, SCOTUSBLOG (Sept. 29, 2021, 8:20 PM), <https://www.scotusblog.com/2021/09/senators-spar-over-shadow-docket-in-wake-of-courts-order-allowing-texas-abortion-law-to-take-effect/> [https://perma.cc/7R8P-R7H8].

<sup>240</sup> Debra Cassens Weiss, *Alito Defends ‘Shadow Docket,’ Says SCOTUS is Wrongly Portrayed as ‘Dangerous Cabal,’* ABA J. (Oct. 1, 2021, 10:19AM), <https://www.abajournal.com>

the Court's procedures to those used by emergency responders at the scene of an accident.<sup>241</sup> He acknowledged the spike in shadow docket rulings when the Trump Administration appealed pandemic-related decisions by lower courts, but contended that the Court had applied its usual standards.<sup>242</sup>

*B. Recommendations for Reform*

Suggestions for reforming the shadow docket vary widely. Beginning with reform that would come from the justices themselves, the justices should attach their names to their decisions. An opinion issued with the full strength and gravitas of the Supreme Court should not be done without the public understanding where each justice stands on the decision.

The justices should also delineate their reasoning in notable or controversial emergency orders, such as when they are undoing rulings from lower courts. This clarity would provide guidance to parties and lower court judges, allow the public to better understand why the Court ruled the way it did, and ensure that consequential decisions benefit from the same rigor the public associates with reasoned opinions.<sup>243</sup> At a minimum, the Court should clearly articulate the test being applied to grant or deny emergency relief and explain how it administered the prongs of the test.<sup>244</sup> The Court demonstrated its ability to issue both explanatory and expedited decisions in its eight-page order concerning the federal eviction moratorium, in which it clarified how each prong of the test would apply.<sup>245</sup> Based on the new data regarding the public's perception of the Court's legitimacy, increased transparency would assist the Court in avoiding a biased or political appearance.

The Court should also avoid implying that emergency orders have precedential value. Both critics and defenders of the shadow docket generally agree that emergency orders should not carry precedential weight, lest it risk confusing lower courts.<sup>246</sup> Similarly, lower courts benefit when the Court clarifies whether its ruling implicates the substantive claims in a lawsuit, as it did in *Whole Women's Health*: "[T]he Court's order is emphatic in making clear that it cannot be understood as sustaining the constitutionality of the law at issue."<sup>247</sup>

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/news/article/alito-defends-shadow-docket-says-supreme-court-is-wrongly-portrayed-as-dangerous-cabal [https://perma.cc/8SCZ-MY3P].

<sup>241</sup> Liptak, *supra* note 160 ("You can't expect the E.M.T.s and the emergency rooms to do the same thing that a team of physicians and nurses will do when they are handling a matter when time is not of the essence in the same way.").

<sup>242</sup> *Id.*

<sup>243</sup> PRESIDENT'S COMMISSION, *supra* note 7, at 209.

<sup>244</sup> *Id.*

<sup>245</sup> *Id.* at 210.

<sup>246</sup> *Id.* at 210–11.

<sup>247</sup> *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494, 2496 (2021) (Roberts, C.J., dissenting).

Further, the Court's application of traditional norms of deference would relieve the burden on the shadow docket. Several former solicitors general testified in a judiciary hearing that the Court has previously endorsed principles that could take pressure off shadow docket rulings.<sup>248</sup> For example, the "traditional 'two-court rule'" provides deference to findings of fact made by the trial court and affirmed by the court of appeals.<sup>249</sup> And when a circuit court sets an accelerated schedule to address an important issue, "the interest in ordinary process weighs against Supreme Court intervention."<sup>250</sup> Although these principles are relevant in a subset of cases, the Court could apply them in the scheduling of appeals court cases for emergency relief.

The attorney general and solicitor general provide an additional avenue for reform. The solicitor general is often referred to as the "tenth Justice" because of their dual responsibilities to both the Judicial and Executive Branch.<sup>251</sup> Not only does the solicitor general serve in the Department of Justice, they also have chambers in the Supreme Court.<sup>252</sup> The main responsibility of the solicitor general is to represent the Executive Branch in front of the Supreme Court, and the Court, in turn, relies on the solicitor general to guide them to the right result.<sup>253</sup>

The solicitor general has both substantive and procedural influence over the development of the law when they choose cases to bring before the Court.<sup>254</sup> For example, the Office of the Solicitor General can shape the Court's docket by declining to defend certain federal statutes, despite the understanding that the solicitor general has a general duty to defend federal statutes whenever a reasonable argument can be made.<sup>255</sup> Although scholars debate the importance of preserving the duty to defend,<sup>256</sup> there is reason to be concerned about the Department of Justice asking the Court to overturn federal statutes in partisan cases.<sup>257</sup> The attorney general could therefore enact policies limiting the situations in which the Office of the Solicitor General could seek emergen-

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<sup>248</sup> PRESIDENT'S COMMISSION, *supra* note 7, at 211.

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> LINCOLN CAPLAN, *THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW* 3 (1987).

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

<sup>254</sup> Seth P. Waxman, *Foreword: Does the Solicitor General Matter?*, 53 STAN. L. REV. 1115, 1117 (2001).

<sup>255</sup> See Letter from William French Smith, Attorney General of President Reagan, to Senator Joe Biden and Senator Thurmond, Comm. on the Judiciary (Apr. 6, 1981), [<https://perma.cc/96M5-SVLV>].

<sup>256</sup> See, e.g., Neal Devins & Saikrishna Prakash, *The Indefensible Duty to Defend*, 112 COLUM. L. REV. 507 (2012).

<sup>257</sup> See, e.g., Brief for the United States as Amicus Curiae Supporting Petitioners, at 3–4, *Obergefell v. Hodges*, 576 U.S. 644 (2015) (Nos. 14-556, 14-562, 14-571 & 14-574).

cy relief from the Court, which would give stronger support for a non-partisan view of the Court.

Though reforms can, and arguably should, come from within the Court itself, others can come from Congress.<sup>258</sup> Congress has the power to mandate special appellate procedures that would allow for quicker adjudication of certain types of cases.<sup>259</sup> Emergency applications, stay requests, and petitions for certiorari before judgment are related to the Court's appellate jurisdiction—thus, Congress has the ability to address them under Article III.<sup>260</sup> Professor Vladeck recommends shortening the appellate timelines by reducing the time for filing an appeal, mandating tight briefing schedules, and encouraging courts to prioritize these cases when possible.<sup>261</sup> Additionally, legislation to limit nationwide injunctions might reduce the need for the Court to review them on such a time-sensitive basis.<sup>262</sup>

Additionally, Congress can mitigate forum shopping to make it more difficult for state attorneys general to file their petitions in courts they believe to have a political bias.<sup>263</sup> To achieve this, Congress would specify that all petitions to be reviewed could only be filed in the DC District Court or another particular three-judge court.<sup>264</sup> Transferring all civil suits seeking nationwide injunctive relief to a single court could also avoid the problem of multiple conflicting nationwide injunctions on the same issue. However, this solution would only affect the cases regarding federal policy and would concentrate a high level of power in a small number of judges.<sup>265</sup>

Congress has broad power to regulate the way in which cases move through the federal system. As long its actions do not violate the Constitution, Congress has plenary control over federal courts' jurisdiction.<sup>266</sup> Even though political polarization makes it difficult for Congress to enact or amend major pieces of legislation, Congress should consider codifying the legal four-factor test for emergency relief.<sup>267</sup> For example, in *Miller v. French*, the Court acknowledged that Congress had established new standards for the enforcement

<sup>258</sup> *Vladeck Testimony*, *supra* note 59, at 33; *see also* Daniel Epps & Ganesh Sitaraman, *The Future of Supreme Court Reform*, 134 HARV. L. REV. F. 398–99 (2021).

<sup>259</sup> Romoser, *supra* note 236.

<sup>260</sup> U.S. CONST. art. III, § 2, cl. 2 (emphasis added). “In all [non-original] cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.” *Id.*

<sup>261</sup> *Vladeck Testimony*, *supra* note 59, at 33.

<sup>262</sup> *Id.* Professor Michael Morley from Florida State University College of Law, and several Republican lawmakers, have agreed that a decrease in the number of overbroad injunctions from district courts against federal policies could lessen the number of emergency orders. Romoser, *supra* note 236.

<sup>263</sup> Pierce, *supra* note 20, at 17.

<sup>264</sup> *Id.*

<sup>265</sup> *Id.*

<sup>266</sup> *Patchak v. Zinke*, 138 S. Ct. 897, 906 (2018).

<sup>267</sup> *See* Charlton C. Copeland, *Seeing Beyond Courts: The Political Context of the Nationwide Injunction*, 91 U. COLO. L. REV. 789, 814 (2020).

of relief under the Prison Litigation Reform Act.<sup>268</sup> Congress required that the Court's relief was precisely tailored and supported by findings.<sup>269</sup> However, court reform is seen by some as an extreme action, and questions exist regarding the level of power Congress has over the Supreme Court. In his 2021 year-end report, Chief Justice Roberts argued that changes to the court system should, and would, come from within.<sup>270</sup>

#### CONCLUSION

While Congress should enact reforms to the shadow docket to ensure the transparency, consistency, and legitimacy that the public expects, the most influential changes would come from the Court itself. The Court should consider the importance of its shadow docket decisions and provide reasoning in cases with far-reaching impact. For the Supreme Court to maintain its position as the highest judicial authority, the public will require not only vote transparency, but more importantly, the majority's reasoning. The Court's decisions would be made more meaningful through an explanation of the test being applied and a description of the way in which the test affects the outcome of that particular case. Providing this clarification would enable the Court to better demonstrate that their shadow docket decisions have been given the care and attention they deserve.

Clear rationale and transparency are especially important in areas such as election law and immigration law because of their perennial influence on American life. If the Court's perceived legitimacy continues to decline in the public's perception, increased transparency in its controversial shadow docket decisions could help reverse the trend. The recent notoriety of the shadow docket gives the Court a chance to consider public opinion and debate ways to improve its internal procedures. Although the shadow docket is a necessary part of the Court's operation, if it is used too often or in the wrong context, it could further distance the Court from the public it serves.

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<sup>268</sup> *Miller v. French*, 530 U.S. 327, 347 (2000).

<sup>269</sup> *Id.*

<sup>270</sup> See generally 2021 YEAR-END REPORT ON THE FEDERAL JUDICIARY (2021), <https://www.supremecourt.gov/publicinfo/year-end/2021year-endreport.pdf> [<https://perma.cc/JGL5-ATWM>].

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