

TEXAS'S UNCONSTITUTIONAL ABORTION BAN AND
THE ROLE OF THE SHADOW DOCKET

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Chairman Durbin, Ranking Member Grassley, and distinguished members of the Committee:

Thank you for the invitation to testify today. As you know, I hold the Charles Alan Wright Chair in Federal Courts at the University of Texas School of Law, where my research and writing focus on the intersection of constitutional law, national security law, and the federal courts. In addition to writing and teaching about the Supreme Court, I also practice before it (I've argued three cases over the last four Terms), and help CNN cover it (as its Supreme Court analyst). It's therefore not only my distinct honor, but also a real treat, to have the opportunity to participate in today's hearing.

The Supreme Court's 5-4 ruling in the SB8 case just before midnight on Wednesday, September 1 helped to bring an enormous amount of public attention not only to Texas's controversial (and, in my view, clearly unconstitutional) anti-abortion law, but to the rise of what has come to be known as the Supreme Court's "shadow docket." In many respects, the one-paragraph decision in *Whole Woman's Health v. Jackson*¹ reflected the inevitable collision of a series of subtle but significant shifts in how the Justices have handled emergency applications with a deliberate attempt by the Texas legislature to frustrate meaningful judicial review of its ban on virtually all abortions after the sixth week of pregnancy.

My goal in my testimony today is to help put both of these developments into context — and to explain in detail why I believe that Justice Kagan was exactly right in her dissent in *Jackson*, in which she concluded that "the majority's decision is emblematic of too much of this Court's shadow-docket decisionmaking — which every day becomes more unreasoned, inconsistent, and impossible to defend."²

To that end, my testimony has six distinct objectives: (1) to introduce the shadow docket and describe what it comprises; (2) to document the rise in several specific *types* of significant shadow docket rulings in the last few years; (3) to identify some of the possible explanations for this uptick; (4) to outline at least some of the serious concerns that these developments raise; (5) to situate SB8 — and the litigation challenging it — within the broader conversation about the shadow docket; and (6) to sketch out some potential reforms that both the Court and Congress ought to consider in response both to SB8 specifically and to the rise of the shadow docket, more generally.

1. *Whole Woman's Health v. Jackson*, No. 21A24, 2021 WL 3910722 (U.S. Sept. 1, 2021) (mem.).

2. *Id.* at *5 (Kagan, J., dissenting).

I. WHAT IS THE “SHADOW DOCKET”?³

The term “shadow docket” was coined by University of Chicago law professor Will Baude in 2015 as a catch-all for a body of the Supreme Court’s work that was, to that point, receiving virtually no academic or public attention.⁴ Unlike the Court’s “merits” docket, which includes the approximately 60–70 cases each Term in which the Justices hear oral argument and resolve the dispute in a signed “opinion of the Court,” the “shadow” docket, as Professor Baude described it, comprises the thousands of *other* decisions the Justices hand down each Term — almost always as “orders” from either a single Justice (in their capacity as “Circuit Justice” for a particular U.S. Court of Appeals) or the entire Court. So understood, although the term itself dates only to 2015, the shadow docket has been around for as long as the Supreme Court. Indeed, from 1802 to 1839, the Court even had a “rump” docket, which allowed a single Justice to handle much of the procedural minutiae.⁵

Although it’s only of recent vintage, the “shadow” metaphor is, in my view, entirely appropriate given the contrast between such orders and merits decisions. The latter receive at least two full rounds of briefing; are argued in public at a date and time fixed months in advance; and are resolved through lengthy written opinions handed down as part of a carefully orchestrated tradition beginning at 10:00 a.m. Eastern time on pre-announced “decision days.” It is impossible to miss these 60–70 cases, which, on top of the attention they receive from the Court, also tend to be the subject of numerous professional and academic Term “preview” events (before they’re argued) and “recap” events (after they’re decided). Indeed, both academic and popular efforts to identify broader trends in the Court’s work tend to focus almost exclusively — and, in my view, to their significant detriment — on this understandably prominent but numerically small slice of the Court’s caseload.

In contrast, rulings on the “shadow docket” typically come after no more than one round of briefing (and sometimes less); are usually accompanied by no reasoning (let alone a majority opinion); invariably provide no identification of how (or how many of) the Justices voted; and can be handed down at all times of day — or, as has increasingly become the norm, in the middle of the night. Owing to their unpredictable timing, their lack of transparency, and their usual

3. Much of this discussion is adapted from my June 30, 2021 testimony before the Presidential Commission on the Supreme Court of the United States.

4. See William Baude, *Foreword: The Supreme Court’s Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1, 3–5 (2015).

5. See Ross E. Davies, *The Other Supreme Court*, J. SUP. CT. HIST., Nov. 2006, at 221.

inscrutability, these rulings come both literally and figuratively in the shadows.⁶

That does not mean that the shadow docket is inherently pernicious. Every court needs a docket to handle applications and other emergency requests that come up outside the normal flow of merits litigation. The Supreme Court is no exception. Indeed, scholars and court-watchers have long *known* about the Court’s shadow docket; they’ve just largely ignored it — because most of the Justices’ decisions on the shadow docket were perceived to be anodyne: denying petitions for certiorari in un-controversial cases; denying applications for emergency relief in cases presenting no true emergency; granting parties additional time to file briefs; dividing up oral arguments; and so on.

That’s not to say that there were *never* controversial rulings on the shadow docket; from the execution of the Rosenbergs⁷ to Justice Douglas halting President Nixon’s bombing of Cambodia⁸ to the initial stay of the Florida recount in what became *Bush v. Gore*,⁹ there certainly have been significant and controversial rulings on the shadow docket across the Court’s modern history. But the shadow docket rulings that provoked public and scholarly attention were sufficiently few and far between that scholarly focus tended to focus on their substance — rather than their procedure. And even as the number of significant shadow docket orders crept upwards in the 1980s, most of those rulings came in capital cases — as various doctrinal shifts provoked a surge in eleventh-hour litigation seeking to halt scheduled executions (or lift lower-court orders halting executions).¹⁰

Because the Court so rarely settled divisive disputes through the shadow docket (outside of the election and death penalty contexts, anyway), the most frequent litigants before the Court did not tend to rely upon it. To take just one example, from 2001–17, across two very different two-term presidencies, the Justice Department (by far, the most common litigant before the Supreme Court) only sought emergency relief from the Justices eight times — once every

6. Unlike merits decisions, shadow docket rulings can appear in any of four different places on the Supreme Court’s website — as an “opinion of the Court”; an “opinion relating to orders”; a published order of the Court; or an unpublished order by an individual Justice that is reflected only on the Court’s docket. This is a minor point, to be sure, but it’s even harder to *find* these orders relative to merits decisions.

7. See *Rosenberg v. United States*, 346 U.S. 313 (Douglas, Circuit Justice 1953).

8. See *Holtzman v. Schlesinger*, 414 U.S. 1316 (Douglas, Circuit Justice 1973).

9. See *Bush v. Gore*, 531 U.S. 1046 (2000) (mem.).

10. See generally CAROL S. STEIKER & JORDAN M. STEIKER, *COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT* (2016) (documenting the doctrinal shifts in post-conviction capital litigation and their implications for emergency appeals).

other Term.¹¹ Although the Court granted four of those requests and denied four,¹² only *one* of the eight orders in those cases provoked any of the Justices to publicly dissent.¹³ Compared to what we have seen over the past four-plus years, the contrast is striking.

II. THE RISE OF THE SHADOW DOCKET SINCE 2017

There's no perfect way to measure the rise of the shadow docket. It's a large dataset to begin with (encompassing thousands of orders each year), and it's hard to separate out the significant rulings (which are *always* a relatively small percentage of the total number of orders the Court hands down) from the insignificant ones. Complicating matters, neither SCOTUSblog nor the *Harvard Law Review*, which separately keep quasi-official "statistics" tracking the Court's work, have previously tracked *orders* other than those relating to stays of execution — although the *Harvard Law Review's* statistics for the October 2020 Term *will*, for the first time, include more shadow docket data when they are published this November.

My focus, at least thus far, has been almost entirely on applications for emergency relief — where a party asks the Supreme Court to provide relief from a lower-court decision pending further litigation (either in the lower courts or in the Supreme Court).¹⁴ Although there may be other examples,¹⁵ the four most common examples are orders: (1) staying a lower-court decision and/or mandate pending appeal; (2) vacating a stay (*e.g.*, of an impending execution)

11. Stephen I. Vladeck, *The Supreme Court, 2018 Term — Essay: The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123, 162 tbl.3 (2019).

12. *See Veasey v. Perry*, 135 S. Ct. 9 (2015) (mem.); *United States v. Comstock*, No. 08A863 (Roberts, Circuit Justice Apr. 3, 2009) (mem.); *Dep't of Health & Human Servs. v. Alley*, 556 U.S. 1149 (2009) (mem.); *Gates v. Bismullah*, 554 U.S. 913 (2008) (mem.); *Rumsfeld v. Reel*, No. 05A231 (Ginsburg, Circuit Justice Sept. 8, 2005); *Ashcroft v. O Centro Espirita Beneficente Uniao do Vegetal*, 543 U.S. 1032 (2004) (mem.); *Bush v. Gherebi*, 540 U.S. 1171 (2004) (mem.); *Ashcroft v. N. Jersey Media Grp.*, 536 U.S. 954 (2002) (mem.).

13. *Veasey*, 135 S. Ct. at 10 (Ginsburg, J., dissenting).

14. There are other contexts in which recent years have seen significant shifts in the Court's procedural practices. To take just one example, the Court had not granted a single petition for a writ of certiorari "before judgment" (an extraordinary vehicle through which the Court can conduct expedited plenary merits review before a court of appeals has ruled on a case) between August 2004 and January 2018. Over the last three-and-a-half years, it has granted 10. *See* Steve Vladeck (@steve_vladeck), TWITTER (Sept. 24, 2021, 12:24 p.m.), https://twitter.com/steve_vladeck/status/1441438408442736652.

15. Prior to the Bail Reform Act of 1984, for instance, it was far more commonplace for Circuit Justices to receive applications for bail and/or release pending appeal (or applications to vacate lower court orders granting such interim relief) — and to grant them. *See* STEPHEN M. SHAPIRO ET AL., SUPREME COURT PRACTICE §§ 17.15–17.21 (11th ed. 2019).

imposed by a lower court; (3) granting an emergency writ of injunction pending appeal; and (4) vacating a lower-court’s grant of an emergency injunction.

Here is a table documenting the frequency of these types of relief since Chief Justice Roberts’s first Term (the October 2005 Term, or “OT2005”):

Table 1. Total Grants of Emergency Relief by Supreme Court Term (OT2005–Present)¹⁶

<u>Term</u>	<u>Grant Stay</u>	<u>Vacate Stay</u>	<u>Grant Injunction</u>	<u>Vacate Injunction</u>	<u>Total</u>
OT2020¹⁷	7	5	7	1	20
OT2019	15	4	0	1	19
OT2018	12	3	0	0	15
OT2017	9	0	0	0	9
OT2016	10	1	0	0	11
OT2015	11	1	1	0	13
OT2014	7	2	1	0	10
OT2013	4	2	2	0	8
OT2012	1	0	0	0	1
OT2011	6	0	0	0	6
OT2010	6	0	0	0	6
OT2009	3	1	0	0	4
OT2008	8	0	0	0	8
OT2007	7	0	0	0	7
OT2006	1	0	0	0	1
OT2005	6	0	0	0	6

16. The data were collected by running a series of different searches through Westlaw’s Supreme Court database. Given the different terminology that the Court (and individual Justices) use in describing emergency relief in some of these contexts, there may be slight variations compared to any official data source (if one exists).

17. The October 2020 Term does not formally end until 11:59 p.m. EDT this coming Sunday, October 3, 2021. *See* 28 U.S.C. § 2 (“The Supreme Court shall hold at the seat of government a term of court commencing on the first Monday in October of each year . . .”). This data is complete as of Monday, September 27.

These numbers help to show that, especially in the last few years, the Court has been granting emergency relief far more often than before. But the uptick in shadow docket rulings granting applications for emergency relief is far more than *quantitative*; there have also been at least six distinct respects in which the past four years have seen *qualitative* shifts in the nature of the Court’s rulings on applications for emergency relief, as well.

a. Six Changes in How SCOTUS Uses the Shadow Docket

First, excepting ordinary grants of certiorari, as the chart on the previous page shows, there are a lot more cases in which the Justices are using the shadow docket not only to grant emergency relief — where the Court’s summary action disrupts what was previously true under rulings by lower courts — but to grant emergency writs of injunction, which are supposed to be the most extraordinary and unusual form of such relief. Consider, for example, the order handed down at 11:34 p.m. EDT on Friday, April 9 in *Tandon v. Newsom*, in which a 5-4 majority issued an emergency “writ of injunction” to block California’s COVID-based limits on in-home gatherings to members of no more than three households on the ground that it violated the Free Exercise Clause.¹⁸ Neither the district court nor the Ninth Circuit had blocked California’s limits, so it was the Justices, in the first instance, who put them on hold. Indeed, *Tandon* was the sixth of *seven* emergency writs of injunction issued by the Court since November 2020 — after it hadn’t issued a single emergency injunction since 2015, and had issued only *four* since Chief Justice Roberts’s 2005 confirmation.¹⁹

What these injunctions underscore is that the *kind* of emergency relief the Court is issuing has changed. Even when the Court was granting a handful of stays between 2005 and 2013, for instance, most involved executions — where the ruling had little impact beyond the case at issue. Now, in contrast, many of these rulings are either directly enjoining statewide policies (as in *Tandon*) or staying lower-court rulings that had enjoined state/federal policies. In that respect, these emergency rulings are having a far broader *substantive* impact, for better or worse, compared to emergency rulings in the past.

18. 141 S. Ct. 1294 (2021) (per curiam).

19. The other five prior to *Tandon* were in *Gateway City Church v. Newsom*, 141 S. Ct. 1460 (2021) (mem.); *South Bay Pentecostal Church v. Newsom* (“*South Bay II*”), 141 S. Ct. 716 (2021) (mem.); *Harvest Rock Church v. Newsom*, 141 S. Ct. 1289 (2021) (mem.); *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) (per curiam); and *Agudath Israel of Am. v. Cuomo*, 141 S. Ct. 889 (2020) (mem.). The seventh was *Chrysafis v. Marks*, No. 21A8, 2021 WL 3560766 (U.S. Aug. 12, 2021) (per curiam). For the 2015 example, see *Akina v. Hawaii*, 577 U.S. 1024 (2015) (mem.).

Second, the shadow docket during the Trump administration saw a remarkable increase in action from the Solicitor General. In contrast to the eight applications for emergency relief filed by the Justice Department between January 2001 and January 2017 that I described above, the Justice Department filed 41 applications for such relief during Trump’s presidency — asking the Justices to intervene at a preliminary stage of litigation more than 20 times as often as either of its immediate predecessors.²⁰ Emergency applications became such a central feature of the Office of the Solicitor General during the Trump administration that it even led to a restructuring of the Office’s staff.²¹ And the dramatic increase in applications paid dividends. Not counting one application that was held in abeyance and four that were withdrawn, the Justices granted 24 of the 36 remaining applications in full, and another four in part. Even among the eight applications that were denied in full, only three were denied with prejudice. Thus, not only was there a dramatic increase in the *demand* for shadow docket rulings from the Court’s “Tenth Justice,” but the Justices — or at least a majority of them — were willing to go along with it.

Third, both in cases in which the Solicitor General sought emergency relief and otherwise, the shadow docket has become far more publicly divisive in recent years. I already noted that only one of the eight applications filed by the Bush 43 or Obama Justice Departments provoked *any* public dissent. In contrast, 27 of the 36 applications from the Trump administration on which the Justices ruled provoked at least one Justice to publicly dissent. And expanding the focus beyond applications from DOJ, there has been a sharp increase in the total number of shadow docket rulings that have provoked four (and even three) public²² dissents. During the October 2017 Term (Justice Kennedy’s last on the Court), for instance, there were exactly *two* shadow docket rulings with four public dissents. In the next two Terms, there were 20. Indeed, during the October 2019 Term, there were almost as many public 5-4 rulings on the shadow docket (11) as there were on the merits docket (12).²³

20. For the final data on Trump administration filings, see Steve Vladeck (@steve_vladeck), TWITTER (Jan. 20, 2021, 11:21 a.m.), https://twitter.com/steve_vladeck/status/1351927798882066436.

21. See Steve Vladeck, *Symposium: The Solicitor General, the Shadow Docket, and the Kennedy Effect*, SCOTUSBLOG, Oct. 22, 2020, <https://www.scotusblog.com/2020/10/symposium-the-solicitor-general-the-shadow-docket-and-the-kennedy-effect/>.

22. As noted below, this qualifier is important: Except when four Justices dissent (or three dissent from an order denying certiorari), we usually can only guess as to how the Justices voted on unsigned orders — or even unsigned opinions.

23. See Steve Vladeck, *The Supreme Court’s Most Partisan Decisions Are Flying Under the Radar*, SLATE, Aug. 11, 2020, <https://slate.com/news-and-politics/2020/08/supreme-court-shadow-docket.html>.

Even *this* Term (the Court’s first without Justice Ginsburg), there have been six orders with four public dissents,²⁴ compared to eight 5-4 merits rulings. And there have been 29 orders respecting emergency applications from which at least three Justices publicly dissented — more than *twice* the total from any prior year that I’ve tracked.²⁵ What’s more, these dissents are homogeneously ideological; there hasn’t been a *single* dissent respecting an application for emergency relief in which a Justice to the left of Chief Justice Roberts was joined by a Justice to his right. There are no “strange bedfellows” on the shadow docket. Indeed, the volume and homogeneity of shadow docket dissents tells something of a different story about the Court than the merits docket. If one looks at rulings from which (at least) all three Democratic appointees dissented, there were only 10 “merits” cases during OT2020. In contrast, there were 25 *orders* from which Justices Breyer, Sotomayor, and Kagan each dissented — and four from which they were the *only* public dissenters.²⁶

Fourth, although it has long been a criticism of the shadow docket, especially denials of certiorari, that the public usually has no idea how many Justices voted for a specific outcome (let alone *which* Justices), that concern has become that much more pronounced as the *public* tally has increasingly reflected multiple dissents. Consider, in this respect, the Court’s February 2021 order refusing Alabama’s request to vacate a lower-court injunction that had blocked a scheduled execution.²⁷ Four Justices joined in an opinion explaining the basis for their concurrence.²⁸ Only three Justices noted dissents.²⁹ So we know that either (or both) of Justices Alito and Gorsuch joined the majority to block the execution. But we have no idea which of them, or if they both did, or why. Stealth votes aren’t new,³⁰ but as the shadow docket grows in both

24. See *Whole Woman’s Health v. Jackson*, No. 21A24, 2021 WL 3910722 (U.S. Sept. 1, 2021) (mem.); *Tandon*, 141 S. Ct. 1294; *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) (per curiam); *Agudath Israel v. Cuomo*, 141 S. Ct. 889 (2020) (mem.); *Scarnatti v. Boockvar*, 141 S. Ct. 644 (2020) (mem.); *Republican Party of Pa. v. Boockvar*, 141 S. Ct. 643 (2020) (mem.).

25. See Steve Vladeck (@steve_vladeck), TWITTER (Sept. 5, 2021, 11:27 a.m.), https://twitter.com/steve_vladeck/status/1434568812045742086?s=20.

26. See Steve Vladeck (@steve_vladeck), TWITTER (Sept. 2, 2021, 12:25 a.m.), https://twitter.com/steve_vladeck/status/1433284987806261250?s=20.

27. *Dunn v. Smith*, 141 S. Ct. 725 (2021) (mem.).

28. *Id.* at 725 (Kagan, J., concurring).

29. *Id.* at 726 (Kavanaugh, J., dissenting).

30. For an example of why we can’t infer from the fact that *some* Justices publicly noted their dissents that there weren’t other dissenters, see *Arthur v. Dunn*, 137 S. Ct. 14, 15 (2016)

absolute terms and divisiveness, the stealth votes are increasingly the *dispositive* ones — which, among other things, complicates efforts to decipher the potential impact of the Court’s ruling beyond the instant case.

Fifth, accompanying the rise of the shadow docket has been the rise of new (and unusual) forms of relief. Consider the aftermath of the “*South Bay II*” decision handed down on February 5,³¹ in which the Court, in an unsigned order, issued an emergency writ of injunction barring California from enforcing at least some of its COVID-related restrictions on indoor worship services. The following Monday, the Court issued an order in another California case in which a plaintiff had also sought an emergency injunction. Instead of granting the injunction, the Court treated the application as if it were seeking a petition for a writ of certiorari *before judgment* (itself an unusual procedural vehicle).³² It granted the petition and issued a “GVR,” *i.e.*, a summary order granting the petition; vacating the district court’s order; and remanding “for further consideration in light of” *South Bay II* — itself an unsigned order that was not accompanied by an opinion of the Court.³³ What about the Court’s summary ruling in *South Bay II* was supposed to lead the district court to reconsider its prior ruling? To similar effect, on January 15, the Court granted another petition for certiorari before judgment in a federal death penalty case — and, unlike the “GVR” order in *Gish*, summarily *reversed* the district court on the merits.³⁴ That is, the Court jumped over the Court of Appeals and issued a one-sentence merits ruling. I haven’t found a single other instance of the Court issuing such a summary merits ruling in that posture (cert. before judgment).

Finally, as the *Gish* order suggests, the dramatic increase in significant shadow docket rulings has brought with it novel questions about how lower courts are supposed to give precedential effect to rulings that the Supreme Court has *itself* previously suggested are of little precedential value.³⁵ For instance, a panel of the Fourth Circuit split sharply in August 2020 over what

(statement of Roberts, C.J.) (noting that he was providing a courtesy fifth vote to grant a stay in an order from which only two Justices publicly dissented — and none recused).

31. *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021) (mem.).

32. *See supra* note 14.

33. *Gish v. Newsom*, 141 S. Ct. 1290 (2021) (mem.).

34. *United States v. Higgs*, 141 S. Ct. 645 (2021) (mem.).

35. *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) (alteration in original)).

to make of how the Supreme Court had handled emergency applications in different cases brought by different parties challenging the same underlying governmental policy.³⁶ And D.C. district judge Trevor McFadden has even published a paper, together with one of his former clerks, attempting to taxonomize the different kinds of shadow docket rulings and what their value as precedent should — and should not — be.³⁷ In the unsigned majority opinion in *Tandon*, the Court made this problem explicit, chastising the Ninth Circuit for refusing to give effect to four prior rulings involving California COVID restrictions — *none* of which had been accompanied by a majority rationale.³⁸

Simply put, it is no longer possible for any reasonable observer to dispute that there has been a dramatic uptick in significant, broad-impact rulings on the shadow docket in the past few years; that these rulings have been unusually divisive; that they are leading to novel forms of procedural relief from the Court; and that their substantive effects are causing significant uncertainty both in lower courts and among those government officers, lawyers, and court-watchers left to parse what, exactly, these rulings portend both for the specific policies at issue and for the broader contours of the relevant legal doctrines.

b. What Caused the Rise of the Shadow Docket?

There is no single explanation for the source of this uptick. The most common effort to downplay the uptick as a source of concern is to suggest that it's the result of a unique confluence of one-off factual circumstances — the increase in “nationwide” injunctions during the Trump administration; the unique legal issues arising out of government reactions to the COVID-19 pandemic; the flurry of litigation relating to the 2020 elections; shifts in standing doctrine; increased forum-shopping; etc. On this view, the Justices are merely reacting to circumstances beyond their control, and so the roots of (and any solutions to) the shifts documented above lay elsewhere.

With respect to those advancing these arguments, I fear that they rest on an incomplete assessment of the Court's “shadow docket” jurisprudence — which has never invoked *any* of these developments as a justification for the uptick. My own view is that the surge in high-profile shadow docket rulings can best be traced to a confluence of four factors: (1) subtle procedural changes that have made it easier for the Court to act collectively even when the Justices are

36. Compare *Casa de Maryland, Inc. v. Trump*, 971 F.3d 220, 229–30 (4th Cir. 2020), *with id.* at 281 n.16 (King, J., dissenting). The Fourth Circuit has agreed to rehear *Casa de Maryland* en banc. See *Casa de Maryland, Inc. v. Trump*, 981 F.3d 311 (4th Cir. 2020).

37. See Trevor N. McFadden & Vetan Kapoor, *The Precedential Effects of the Supreme Court's Emergency Stays*, 44 HARV. J.L. & PUB. POL'Y 827 (2021).

38. See *Tandon v. Newsom*, 141 S. Ct. 1294, 1297–98 (2021) (per curiam).

physically dispersed; (2) a subtle but significant shift in how a majority of the Justices *apply* the traditional four-part standard for emergency relief pending appeal; (3) the effects of the changing composition of the Court on both the substance and procedure of these disputes; and (4) repetition — where what used to be extraordinary has increasingly become routine.

Before briefly outlining these shifts, let me first debunk one of the most common claims about the rise of the shadow docket — that it is a response to the rise of “nationwide” injunctions. Practically and empirically, that’s just not true. First, that only describes cases in which the federal government is the party invoking the shadow docket — which, as the myriad election and COVID cases of the past year drive home, is only one modest slice of the shadow docket. Without considering any of those cases, we’ve still seen a dramatic uptick.

Second, even *within* the DOJ slice of the data, fewer than half of the Trump administration’s applications for emergency relief involved nationwide injunctions. Rather, the theory on which the Trump administration routinely (and usually successfully) litigated most of its applications was that *any* injunction of a government policy created the kind of irreparable harm that justified emergency relief. That’s why, after staying a “nationwide” injunction against the “public charge” rule,³⁹ the Court *separately* (and later) voted to stay an Illinois-only injunction against the same rule;⁴⁰ the geographic scope of the injunction just wasn’t the driving consideration. Nor can the uptick be traced only (or even largely) to COVID-19 or 2020 election disputes. As Table 1 (pg. 5) demonstrates, the uptick really began to emerge during OT2014 — years before either of those topics were remotely on our radar. Indeed, there have been any number of momentary justifications for at least some of the uptick in emergency orders. The larger point is that none of these provocations explains either the overall trend or the *substance* of the Court’s reactions thereto.

To take just one case in point, consider the *Mifeprex* dispute. There, a district judge had blocked the FDA’s requirement that Mifeprex, an FDA-approved medication used to terminate early pregnancies, be dispensed in person only by licensed pharmacies — relying on the difficulties that the in-person dispensation requirement imposed at the height of the COVID-19 pandemic. After the Court of Appeals refused to stay the ruling, the Trump Administration sought an emergency stay pending appeal — filing its application on August 26, 2020.⁴¹ This was not a nationwide injunction; it was

39. See *Dep’t of Homeland Sec. v. New York*, 140 S. Ct. 599 (2020) (mem.).

40. See *Wolf v. Cook County, Ill.*, 140 S. Ct. 681 (2020) (mem.).

41. See *Food & Drug Admin. v. Am. Coll. of Obstetricians & Gynecologists*, No. 20A34 (U.S. filed Aug. 26, 2020).

not an election case; it was not a religious liberty dispute. And a lower-court ruling that provided pregnant women with easier access to an FDA-approved medication was, whatever its merits, hardly an “emergency.”

The Court sat on the application for months (complicated, perhaps, by Justice Ginsburg’s death while the application was pending). Finally, over three public dissents, the Court granted the government’s application on January 12, 2021⁴² — four-and-a-half months after it was filed. During that same time period, the Court: (1) added to its merits docket a challenge to President Trump’s proposal to exclude undocumented immigrants from the post-Census reapportionment; (2) received full merits and *amicus* briefings; (3) heard oral argument; and (4) handed down a lengthy merits opinion.⁴³ In other words, the Court clearly had time to elevate the dispute to its merits docket if it wanted to; it just didn’t want to.

To me, the best explanation is that the rise of the shadow docket reflects a more nuanced (and longer-developing) confluence of catalysts. For instance, it used to be standard practice for the Justices to resolve most contentious shadow docket disputes by themselves — “in chambers,” acting as the Circuit Justice for the Court of Appeals from which the dispute arose. Into the 1970s, Justices would often even hear oral argument in such contexts, and routinely published opinions *as* Circuit Justices setting forth their rationale for granting or denying emergency relief (Justice Douglas once famously nailed such an order to a tree).

But two shifts starting in the 1980s moved away from this practice. First, the Court stopped formally adjourning for its summer recess — so that the Court was technically *always* “in session,” even when the Justices were scattered across the globe.⁴⁴ This made it easier for the full Court to act on especially contentious cases — and took significant authority away from the individual Circuit Justices. Second, and related, although individual Justices often heard argument in chambers in shadow docket disputes (especially on matters they perceived to be of public importance⁴⁵), the full Court, as a matter

42. See *Food & Drug Admin. v. Am. Coll. of Obstetricians & Gynecologists*, 141 S. Ct. 578 (2021) (mem.).

43. See *Trump v. New York*, 141 S. Ct. 530 (2020) (per curiam). The jurisdictional statement in *New York* was filed on September 22, 2020; and argument was held on November 30.

44. See SHAPIRO, *supra* note 15, § 1.2(F).

45. See, e.g., *Cousins v. Wigoda*, 409 U.S. 1201, 1201 (Rehnquist, Circuit Justice 1972) (“Because applicants’ application raised what seemed to me to be significant legal issues of importance not only to them but to the public as a whole, I heard oral argument of counsel on the application.”).

of practice (but not formal rule) did not.⁴⁶ Thus, the Court slowly normalized the practice of issuing orders, even in contentious cases, by the full Court, without meeting in person, and without any opportunity for oral argument.⁴⁷

As the Court's procedures shifted subtly, its composition shifted dramatically. It's not just that the two most recent appointments have moved the Court rightward; it's that they also appear to have provided a fifth (and sixth) vote for a particular (and idiosyncratic) view of *when* the Court should issue emergency relief. As I've explained in detail elsewhere, there now appears to be a majority of Justices who believe that, when *any* government action is enjoined by a lower court, the government is irreparably harmed, and the equities weigh in favor of emergency relief *no matter* the consequences to those who might be injured by allowing the policy to remain in effect.⁴⁸ Not only did Justice Kennedy never expressly endorse this view (which may help to explain why the uptick has dramatically accelerated since his retirement), but the underlying justification for this approach does not actually hold up to meaningful scrutiny; it just gets repeated as if its logic is beyond dispute.⁴⁹

The upshot is that emergency relief now appears to rise and fall almost entirely on the merits — with virtually no regard for whether the *other* factors that are usually required (whether by custom, rule, or statute) for such relief are in fact present. Once again, *South Bay II* stands out. Although there were four statements from the six Justices in the majority,⁵⁰ *none* of them purported to apply the four-factor test the Court traditionally follows when considering

46. SHAPIRO ET AL., *supra* note 15, § 17.2.

47. In the 1973 Cambodia bombing case, one of Justice Douglas's central objections to the denouement — where Justice Marshall obtained the telephone acquiescence of the other seven Justices in his effective overruling of Douglas — was that it short-circuited both formal rules and informal norms concerning what had to happen before the full Court reached a decision. *See Holtzman v. Schlesinger*, 404 U.S. 1321, 1323–26 (Douglas, J., dissenting from grant of stay).

48. Vladeck, *supra* note 11, at 131–32.

49. This view appears to originate with then-Justice Rehnquist, who traced the idea to the “presumption of constitutionality” that accompanies (most) government action. *See New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (Rehnquist, Circuit Justice 1977); *see also Maryland v. King*, 567 U.S. 1301, 1303 (Roberts, Circuit Justice 2012) (endorsing Rehnquist's formulation). But the presumption of constitutionality (1) is principally about *statutes*, not executive action; (2) is supposed to yield when constitutional rights are implicated; and (3) is, in any event, not a justification for declining to take into account the harm caused by *allowing* the policy to remain in effect pending appeal. *See Vladeck, supra* note 11, at 132 n.60.

50. *See South Bay II*, 141 S. Ct. at 716 (notation of Alito, J.); *id.* (Roberts, C.J., concurring); *id.* at 717 (Barrett, J., concurring); *id.* (statement of Gorsuch, J.).

whether to grant an injunction. Instead, all of the discussion, and all of the Justices’ analysis, was focused on the merits of the First Amendment dispute.

Worse still, the grant of an emergency injunction in *Tandon* — which, unlike *South Bay II*, came with a four-page per curiam opinion for the Court adopting a *new* understanding of the Free Exercise Clause — necessarily exceeded the Court’s *statutory* authority to issue such relief. As the Justices have long explained, because the Court’s authority to issue emergency injunctions derives from the All Writs Act, and not 28 U.S.C. § 2101, such relief is supposed to be available only “where the legal rights at issue are ‘indisputably clear.’”⁵¹ It ought to follow that newly minted rights, such as the one *Tandon* articulated, cannot justify an emergency injunction pending appeal. As an exercise of appellate jurisdiction via the All Writs Act, the relevant question is supposed to be whether the *lower courts* indisputably erred in denying relief. A court bound by prior precedent failing to anticipate a shift in constitutional doctrine hardly can commit such error.

And yet, using what are supposed to be emergency *procedural* rulings to effect *substantive* changes in the law is increasingly the norm in these contexts — which may also help to explain why it’s happening so much more often. The more that the Justices issue emergency relief on the shadow docket, especially in cases in which it might not previously have been available, the more the standard for such relief is necessarily diluted — making it easier for the next applicant to state a claim. Issuing such relief through either unsigned orders or cryptic unsigned opinions may also be *easier* for the Justices than doing so through lengthy merits opinions more likely to divide even those who agree as to the bottom line.⁵²

As the merits have become the all-but exclusive consideration in shadow docket cases, it is hardly surprising that positions likely to resonate with the Court’s conservative majority are faring better. But the shadow docket also helps to illustrate how the shift in the Court’s composition has also had *procedural* consequences. For instance, in *Tandon*, just as in *Roman Catholic Diocese* and its companion case in November, Chief Justice Roberts joined the

51. *Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regulatory Comm’n*, 479 U.S. 1312, 1313 (Scalia, Circuit Justice 1986) (quoting *Communist Party of Ind. v. Whitcomb*, 409 U.S. 1235, 1235 (Rehnquist, Circuit Justice 1972)).

52. In that respect, compare *Tandon* with *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021), in which the Justices divided over whether to overrule *Employment Division v. Smith*, 494 U.S. 872 (1990). *Tandon*, which takes a pretty healthy bite out of *Smith*, reached the Court a full year after *Fulton* had been granted, and months after it had been briefed, argued, and voted upon — and yet it was decided before *Fulton* with the Justices *knowing* how *Fulton* was going to come down. Only two Justices in the *Tandon* majority — Justices Kavanaugh and Barrett — joined Chief Justice Roberts’s narrower opinion in *Fulton*.

three Democratic appointees in dissenting from the majority’s decision to grant an emergency injunction pending appeal. Repeatedly, the Chief Justice has dissented on procedural grounds even in cases in which he agreed (or likely agreed) with the majority on the merits. That’s why, as much as in any other context this Term, Justice Barrett’s confirmation in place of Justice Ginsburg had a direct and immediate impact on the *results* of the Court’s decisions.

But the shift in composition is relevant not only with respect to emergency relief such as stays or injunctions, but also with respect to summary reversals of lower courts — for which there is at least a norm (if not a rule) that *six* votes, not five, are required (on the theory that any four Justices could grant plenary review, and so it takes six to prevent that from happening). Thus, the Court’s novel January 15 ruling in *Higgs*⁵³ — a summary reversal on a petition for a writ of certiorari before judgment — seems possible only *because* there are no longer four Justices who would dissent from such a procedural move.

Simply put, if a majority of the Justices are now of the view that the merits are the predominant consideration in considering emergency applications (even without the consistent support of Chief Justice Roberts, who has dissented from some of those rulings), and if six Justices are willing to summarily dispose of the merits even in novel procedural contexts, then that not only explains why we’ve seen such a dramatic uptick on the shadow docket in the last few years, but it also suggests that this shift is here to stay even as COVID cases wane and even if the Biden administration is less aggressive in pursuing (or the Justices are less solicitous in providing) such relief going forward.⁵⁴ Instead, the focus will likely shift, as we have already seen, to cases in which *states* are parties, or cases in which those *challenging* federal policies are asking the Justices to intervene to freeze a lower-court ruling in favor of the federal government — as with the Clean Power Plan late in the Obama administration,⁵⁵ and the CDC’s eviction moratorium in the Biden administration.⁵⁶

Finally, it’s worth noting that, whatever the cause of this uptick, it has almost nothing to do with Congress — which hasn’t touched the Court’s

53. *United States v. Higgs*, 141 S. Ct. 645 (2021) (mem.).

54. To date, the Biden administration has filed exactly one application for emergency relief in the Supreme Court — in the “Remain in Mexico” case. Over three public dissents, the Court denied its application for a stay of a nationwide injunction issued by a Texas district court. *See Biden v. Texas*, No. 21A21, 2021 WL 3732667 (U.S. Aug. 24, 2021) (mem.).

55. *See West Virginia v. EPA*, 136 S. Ct. 1000 (2016) (mem.).

56. *See Ala. Ass’n of Realtors v. Dep’t of Health & Human Servs.*, No. 21A23, 2021 WL 3783142 (U.S. Aug. 26, 2021) (per curiam); *see also Ala. Ass’n of Realtors v. Dep’t of Health & Human Servs.*, 141 S. Ct. 2320 (2021) (mem.).

jurisdiction or procedures in any meaningful way since 1988. Even the change in the Court’s Term — from one that formally ended with the summer recess to a “continuous” Term — was accomplished via a largely unnoticed 1990 amendment of Rule 3 of the Court’s rules.⁵⁷ Everything else has come, by all appearances, through unexplained behind-the-scenes shifts in how the Court applies its own standards for emergency relief under statutes that Congress has not disturbed in decades.

III. (SOME OF) THE PROBLEMS WITH THE RISE OF THE SHADOW DOCKET

The uptick identified above is not simply an assessment of volume. Rather, the Supreme Court’s significant shadow docket rulings in recent years have had dramatic real-world impacts — from allowing controversial immigration policies affecting millions to go into effect⁵⁸ to clearing the way for the first federal executions in 17 years;⁵⁹ from blocking state-wide COVID restrictions⁶⁰ and rulings by lower federal courts extending access to the polls in the 2020 election⁶¹ to staying out of cases after the election seeking to overturn the result.⁶² Reasonable minds will surely disagree about the merits of each (and all) of these rulings. But it seems important to me to highlight some of the many ways in which handing down significant rulings via the shadow docket is problematic *even* to those who think the Court is generally getting the merits of most (or even all) of these disputes “right.”

1. The absence of reasoning. Most significantly, these rulings are generally coming down without any explanation from a majority of the Justices as to their reasoning, leaving not only the parties and lower courts but other actors who might be affected by the decision (*e.g.*, state executive officials) to speculate as to *why* the Court ruled the way it did. At the very least, if, as I’ve suggested above, the Justices truly are focusing on the merits to the exclusion of all other considerations in applications for emergency relief, it might behoove them to say so — so that lower courts stop applying what may increasingly be

57. Prior to the rule change, if the Court needed to decide a case en banc during the summer recess, it had to return for a “Special Term,” of which there were five during the twentieth century: one in 1942; two in 1953; one in 1958; and one in 1972.

58. *See, e.g., Trump v. Int’l Refugee Assistance Proj.*, 137 S. Ct. 2080 (2017) (mem.).

59. *See Barr v. Lee*, 140 S. Ct. 2590 (2020) (per curiam).

60. *See, e.g., S. Bay United Pentecostal Church v. Newsom* (“*South Bay II*”), 141 S. Ct. 716 (2021) (mem.).

61. *See Merrill v. People First of Ala.*, 141 S. Ct. 25 (2020) (mem.).

62. *See, e.g., Gohmert v. Pence*, 141 S. Ct. 972 (2021) (mem.); *Texas v. Pennsylvania*, 141 S. Ct. 1230 (2020) (mem.); *Kelly v. Pennsylvania*, 141 S. Ct. 950 (2020) (mem.).

the *wrong* standard. Either way, the lack of reasoning makes it impossible to scrutinize the merits of the Court’s action in far too many of these cases.

2. The anonymity of the vote. The uncertainty over which Justices voted which way, especially on contentious issues, also perpetuates uncertainty among parties and lower courts — who have been instructed by the Supreme Court to generally give weight to the “narrowest” view that commands the support of a majority of the Justices.⁶³ When, as in the *Dunn v. Smith* ruling in February, we don’t even know *who* the fifth (and perhaps sixth) votes were in support of a shadow docket ruling, that only further complicates efforts to figure out exactly what the Court has commanded.

3. The unpredictable timing of decisions. Another issue that has arisen with the rise of the shadow docket has been the proliferation of what Bloomberg Supreme Court reporter Greg Stohr has called the “night Court” — with decisions often coming down late in the evening (or very early in the morning), especially on Friday nights.⁶⁴ In July 2020, for example, the Court handed down *major* rulings clearing the way for the first federal executions in 17 years in a pair of 5-4 decisions that came at 2:10 a.m. EDT one night and at 2:46 a.m. EDT two nights later. Executions raise unique timing concerns with respect to last-minute stay applications (or applications to lift stays), but even cases with no comparable urgency have led to late-night rulings — such as the decision in *South Bay II*, which came at 10:44 p.m. EST on a Friday night *six days* after briefing had been completed, or the ruling in *Tandon* at 11:34 p.m. EDT on a Friday night two months later. Likewise, the Court’s significant ruling blocking New York’s COVID-based restrictions on certain religious services in *Roman Catholic Diocese of Brooklyn v. Cuomo* was handed down at 11:56 p.m. EST on Wednesday, November 25 — the night before Thanksgiving. There’s a reason why the Court follows a longstanding protocol for when it hands down rulings in argued cases. Among other things, it increases public access to and awareness of the decisions. Indeed, the hand-down announcements are even recorded and eventually published. Here, in contrast, the rulings are handed down in a manner that makes them that much more *inaccessible*.⁶⁵

63. See *Ramos v. Louisiana*, 140 S. Ct. 1390, 1403 (2020) (citing *Marks v. United States*, 430 U.S. 188, 193 (1977)).

64. Greg Stohr (@gregstohr), TWITTER (Feb. 6, 2021, 1:02 p.m.), <https://twitter.com/GregStohr/status/1358113817696288769?s=20>.

65. In his testimony to the Presidential Commission on Supreme Court reform, Professor Sam Bray described these concerns as “trivial.” I strongly disagree. There are good reasons for the Court’s normal practices when it comes to handing down merits rulings — reasons sounding principally but not exclusively in public accessibility and transparency. Yes, it is

4. The lack of merits briefing, *amicus* participation, and/or oral argument. Deciding significant questions through the shadow docket also deprives any number of affected parties of the opportunity to participate, including through the filing of friend-of-the-Court briefs. Although the Supreme Court’s rules do not preclude the filing of such *amicus* briefs in conjunction with shadow docket applications, the timing makes them exceedingly difficult, especially in support of the *respondents* — who, unlike the applicants, may have virtually no advance notice that the matter is going to the Supreme Court. Anecdotally, the Clerk’s Office has even been known to describe *amicus* filings with respect to applications as being “disfavored.” And effectively handing down merits decisions on the shadow docket also deprives the parties of a chance to fully brief the merits (as opposed to briefing whether *emergency relief* is warranted) *and* oral argument — notwithstanding the settled view that both of those are salutary features of the Court’s plenary consideration.

5. The problems with predictions. The above concerns all go to the transparency of the Court’s decisions and the opportunities of interested parties to help shape them. But even on their merits, shadow docket rulings suffer from multiple flaws, including the difficulties of making predictive judgments about the merits of a dispute so early in the progress of litigation. Consider, in this respect, the Court’s shadow docket ruling issuing a partial stay of two district court injunctions against the second iteration of President Trump’s travel ban.⁶⁶ Presumably (although we’ll never know), that decision reflected a judgment by a majority of the Justices that they would uphold that policy if and when it reached them for plenary review. But right before the Court was set to hear argument, the Trump administration withdrew the second iteration, and replaced it with the more legally nuanced third version — mooted the appeal and leading the Court to dump the cases from its calendar *without* reaching those merits. (The Court would eventually uphold the third iteration by a 5-4 vote.⁶⁷) As these cases show, the Justices are sometimes making predictions about what they’re going to do in cases on which they never actually have a chance to rule. Indeed, the Court was supposed to hear arguments this Term on challenges to President Trump’s border wall and his “Remain in Mexico” asylum policy — which no lower court ever sustained. But because the Biden administration changed those policies, the Court removed those cases from its argument calendar, and will likely never reach the merits of those disputes

impossible to avoid handing down at least *some* emergency rulings during off hours, but those ought to be the exception, rather than the growing norm.

66. *Trump v. Int’l Refugee Assistance Proj.*, 137 S. Ct. 2080 (2017) (mem.).

67. *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

notwithstanding its earlier rulings that allowed the policies to go into effect pending appeals of adverse lower-court rulings.

6. Prematurely (and unnecessarily) resolving constitutional questions. The increasing prominence of the shadow docket also means that the Justices are more frequently deciding significant questions of constitutional law at an incredibly early stage of litigation — including in contexts in which such constitutional analyses turn out to be premature and/or entirely unnecessary. Consider, in this respect, the decision in *Roman Catholic Diocese of Brooklyn*, in which a 5-4 majority enjoined New York COVID restrictions that were *no longer in effect* on the ground that they likely violated the First Amendment. Although the dispute certainly appeared to be moot, the majority (in a rare — but unsigned — opinion for the Court) justified such an intervention because “*if*” the state were to re-apply the challenged restrictions on religious worship, such a hypothetical move would “*almost certainly* bar individuals in the affected area from attending services before judicial relief can be obtained.”⁶⁸ In other words, the Court used a shadow docket ruling to resolve major First Amendment questions about a policy that wasn’t even in effect — and did so before the litigation had a chance to make its way through the courts on the merits. The Court is fond of saying that it is “a court of final review and not first view,”⁶⁹ trumpeting the virtues of percolation, of developments of factual records, and of the benefit of having several rounds of lower-court briefing (and rulings) in the record before deciding weighty constitutional cases. Except on the shadow docket.

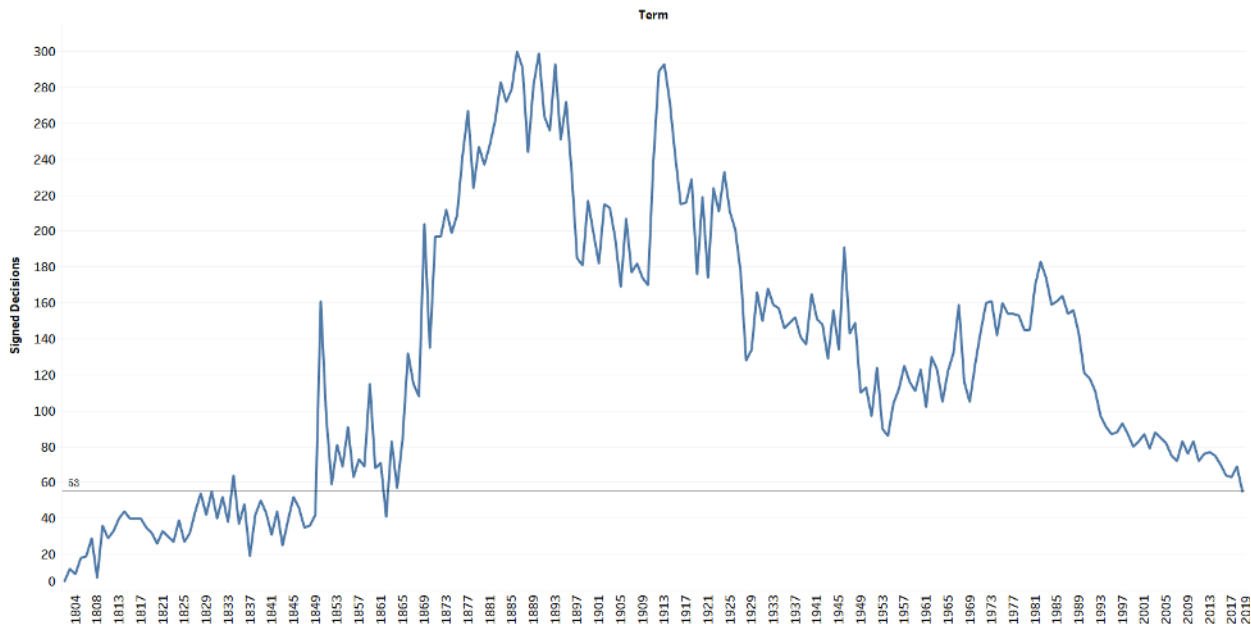
7. Distorting the Supreme Court’s workload. In addition to these procedural and substantive concerns, the shadow docket also appears to be increasingly competing with merits cases for the Justices’ attention. During its October 2019 Term, the Court handed down signed opinions in only 53 merits cases — the fewest since the Civil War. Some of that can be blamed on COVID, which led the Justices to postpone arguments in 10 cases from the March 2020 and April 2020 sessions to October 2020. But as this Term draws to a close, the Court has handed down signed opinions in only 56 merits cases — which would be the *second*-lowest total since the Civil War. The following chart by Dr. Adam Feldman shows how the Court’s merits docket has shrunk — not just right after

68. *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020) (per curiam) (emphases added).

69. *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012) (quoting *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001) (per curiam)). During the October 2018 Term alone, this sentiment was referenced in 11 different opinions. See Vladeck, *supra* note 11, at 126–27 n.20.

the 1988 amendments took away most of the Court’s remaining mandatory appeals, but increasingly in *recent* years, as well:

Table 2. Total Supreme Court Merits Decisions by Term (1800–Present)



Simply put, as the shadow docket has grown, the merits docket has shrunk. Correlation is not causation, but it’s not hard to imagine how the increasing volume of (and attention paid to) these emergency rulings has consumed resources that the Justices, their staffs, and the Court could otherwise have devoted to the merits docket.

8. Undermining the Court’s legitimacy. All of the above concerns tie together in respect to the final, and most significant objection: That the rise of the shadow docket, especially at the expense of the merits docket, has negative effects on public perception of the Court — and of the perceived legitimacy of the Justices’ work. If the Court is handing down a higher number of decisions affecting Americans in unsigned, unreasoned orders, both in absolute terms and relative to merits rulings, that necessarily exacerbates charges — fair or not — that the Justices are increasingly beholden to the politics of the moment rather than broader jurisprudential principles. As Justice Sotomayor has warned, all of these developments in the aggregate “erode[] the fair and balanced decisionmaking process that this Court must strive to protect.”⁷⁰

A common response to these concerns is that those who have raised them are simply overreacting — and that the real problem that critics of the Court’s increasingly expansive use of the shadow docket have is disagreement with the

70. *Wolf v. Cook County, Ill.*, 140 S. Ct. 681, 684 (2020) (Sotomayor, J., dissenting).

outcomes of these cases.⁷¹ The not-so-subtle insinuation is that progressive critics of the shadow docket are arguing in bad faith — seeking to delegitimize (otherwise legitimate) rulings by the conservative majority.

Leaving aside the obvious point that not all critics of the shadow docket are progressives, what this response truly illustrates is that those offering it don't actually understand the critiques. The concern is not the volume of shadow docket rulings in the abstract. Nor is it that the Justices are granting emergency relief more often. Nor is it that the Justices are more divided when they are doing it. Nor is it that the Justices are deciding significant questions that impact millions of people through these emergency applications. It's that (1) all of this is happening through rulings that are unexplained (or, at least, insufficiently explained); (2) those rulings are inconsistent in how they apply the same procedural standards in ways that certainly *appear* to favor Republican policies (or plaintiffs) over Democratic ones; and (3) the Justices themselves are now insisting that these inconsistent and insufficiently explained rulings have precedential effects. If critics like me were just unhappy with the *results* in these cases, it sure would be odd for us to be encouraging the Justices to provide more *persuasive* rationales to support those results.

More fundamentally, this reaction bespeaks surprising disregard for the notion that procedural regularity matters — and that, as the Supreme Court itself has said, its legitimacy *depends* upon its ability to explain itself:

The Court's power lies . . . in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands.

The underlying substance of this legitimacy is of course the warrant for the Court's decisions in the Constitution and the lesser sources of legal principle on which the Court draws. 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.** . . . Thus, the Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation.⁷²

71. See also Mark Rienzi, *The Supreme Court's "Shadow" Docket — A Response to Professor Vladeck*, NAT'L REVIEW, Mar. 16, 2021, <https://www.nationalreview.com/bench-memos/the-supreme-courts-shadow-docket-a-response-to-professor-vladeck/> (suggesting that my criticism of the Court's shadow docket rulings in religious liberty cases is because "Vladeck or other law professors may not put the ability to attend worship very high in their own values rankings").

72. *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 865–66 (1992) (emphasis added).

This, then, is the true problem with the Court’s expanding use of the shadow docket: The *way* it has been used over the past four years raises serious concerns about the Court’s legitimacy. That those concerns are not shared by many who think that the Court is reaching the correct bottom-line *results* in these cases speaks as much to their true motivations as it does to these critiques.

IV. SB8 AND THE SHADOW DOCKET

It’s against that backdrop that I come, finally, to SB8 — and how it ended up on the shadow docket (and, indeed, is likely to do so again). Because at least one of the other witnesses is situating SB8 in the broader context of ongoing abortion access debates, my focus is on the law itself — and the confusing litigation that it (deliberately) precipitated.

a. SB8

SB8 was enacted by the Texas legislature and signed into law by Governor Greg Abbott in May 2021. As is familiar by now, the law:

purports to ban all abortions performed on any pregnant person where cardiac activity has been detected in the embryo, with no exceptions for pregnancies that result from rape, sexual abuse, incest, or a fetal defect incompatible with life after birth. S.B. 8 is enforced through a dual private and public enforcement scheme, whereby private citizens are empowered to bring civil lawsuits in state courts against anyone who performs, aids and abets, or intends to participate in a prohibited abortion, and the State may take punitive action against [providers] through existing laws and regulations triggered by a violation of S.B. 8— such as professionally disciplining a physician who performs an abortion banned under S. B. 8.⁷³

The shift of enforcement responsibility away from the State of Texas and to private individuals was designed — deliberately — to complicate, if not frustrate, efforts to block SB8 from going into effect, and even from challenging it once it was in effect. Because of a 2001 en banc ruling by the Fifth Circuit,⁷⁴ this enforcement structure makes it impossible for private parties to seek injunctive relief against state executive officers — including the Governor, the Attorney General, and so on — as a means of blocking enforcement of the act. SB8 also prohibits providers from recovering costs or fees from plaintiffs who sue them under the statute (even frivolously), meaning that providers bear the

⁷³ *Whole Woman’s Health v. Jackson*, No. 1:21-cv-616-RP, 2021 WL 3821062, at *2 (W.D. Tex. Aug. 25, 2021).

⁷⁴ *Okpalobi v. Foster*, 244 F.3d 405 (5th Cir. 2001) (en banc).

expense of defending against every case filed under the act even if they win. Finally, it also provides that abortions performed while SB8 is subject to a judicial temporary restraining order or injunction can nevertheless provide a basis for liability if that injunction or restraining order is vacated or reversed on appeal. SB8 was scheduled to go into effect on September 1, 2021.

The way these provisions fit together is in the litigation that they both frustrate and incentivize. To the former, these provisions are designed to cut off pre-enforcement review. Even if there is an appropriate *private* defendant to a suit for pre-enforcement injunctive relief, there is no single defendant against whom an injunction would bar *all* potential enforcement actions. And if providers violate the law once it is in effect and are sued, and seek to invoke *Roe* and *Casey* as a *defense* to the enforcement proceeding, all that the providers would obtain if they succeed is a judgment against the plaintiff who sued them — without *any* opportunity to recover their costs and fees. Nothing would stop an endless flood of copycat lawsuits — even though they would be patently meritless, if not frivolous, once SB8 is held to violate *Casey* — that providers would have to pay to defend against *ad infinitum*. As Professor Tribe and I wrote back in July, if sustained, SB8’s novel procedural Catch-22 “would not just make it impossible for anyone to challenge one of the most restrictive abortion laws in the country. It would also set an ominous precedent for turning citizens against one another on whatever contentious issue their state legislature chose to insulate from ordinary constitutional review.”⁷⁵ This is perhaps the most important thing that can and should be said about the procedural conceit of the law: Whatever one thinks about abortion, the ability of Americans to vindicate their constitutional rights ought not to depend upon the whim of each of the 50 state legislatures. And yet, that’s exactly the regime SB8 attempts to create.

Thus far, there have been two major federal lawsuits seeking to strike down SB8 in a manner that would leave it unenforceable going forward (there have also been a number of lawsuits in Texas state court, as well, but they have not generally sought such widespread relief). Chronologically, the second of these is the pending lawsuit by the United States itself, which is scheduled for a hearing before Judge Pitman of the U.S. District Court for the Western District of Texas on the federal government’s motion for a preliminary injunction this Friday, October 1.⁷⁶

In the first, the *Whole Woman’s Health* case, numerous providers sued eight defendants — including a Texas state court judge and a state court clerk

75. Laurence H. Tribe & Stephen I. Vladeck, *The Texas Abortion Law Threatens Our Legal System*, N.Y. TIMES, July 22, 2021, at A20.

76. See *United States v. Texas*, No. 1:21-cv-796-RP, order at 1 (W.D. Tex. Sept. 15, 2021).

— seeking injunctive relief. The suit named the judge and the clerk as putative representatives of statewide classes of such officials — on the theory that an injunction against a class comprising every state court judge or clerk would be sufficient to block additional enforcement actions.

On Wednesday, August 25, the district court denied the defendants’ motion to dismiss based upon various immunity doctrines, and scheduled a preliminary injunction hearing for Monday, August 30.⁷⁷ After several of the defendants filed notices of appeal in the Fifth Circuit, they applied for a stay pending appeal — arguing that their appeals divested the district court of the power to even hold a preliminary injunction hearing. On Friday, August 27, the Fifth Circuit (with no explanation) granted an administrative stay, blocking all proceedings in the district court.⁷⁸ Although the Court of Appeals ordered the defendants to file responsive briefs by 9:00 a.m. CDT on Tuesday, August 31 (presumably so it could conclusively rule on the stay by the end of the day on August 31), it did not rule on the application until 10 days later, on Friday, September 10 (summarily denying the providers’ motion for an injunction pending appeal in the meantime).⁷⁹ Thus, it was from the preliminary, administrative stay that the providers sought emergency relief in the Supreme Court on Monday, August 30 — asking Justice Alito (and, through him, the Court) to vacate the Fifth Circuit’s administrative stay or to directly enjoin SB8 pending further litigation.

b. SB8 on the Shadow Docket

The first thing to note about the Court’s ruling is that it did *not* come in time to prevent SB8 from going into effect. Exactly 11 days earlier in the *MPP* case, Justice Alito had issued an administrative stay to prevent the district court’s injunction from going into effect *until* the full Court could rule on the Biden administration’s application for a stay pending appeal.⁸⁰ Even though the full Court eventually *rejected* that application four days later,⁸¹ Justice Alito as Circuit Justice for the Fifth Circuit still froze the status quo long enough for the

77. *Whole Woman’s Health*, 2021 WL 3821062.

78. *Whole Woman’s Health v. Jackson*, No. 21-50792, 2021 WL 3919252 (5th Cir. Aug. 27, 2021) (per curiam).

79. *See Whole Woman’s Health v. Jackson*, No. 21-50792, 2021 WL 4128951 (5th Cir. Sept. 10, 2021) (per curiam). Argument in the defendants’ appeal in *Jackson* is currently scheduled for the week of December 6, 2021, but the plaintiffs have also sought certiorari “before judgment” from the Supreme Court — asking the Justices to take up the case *before* the Fifth Circuit rules. *See infra* note 98.

80. *Biden v. Texas*, No. 21A21, 2021 WL 3702101 (Circuit Justice Alito Aug. 20, 2021) (mem.).

81. *Biden v. Texas*, No. 21A21, 2021 WL 3732667 (U.S. Aug. 24, 2021) (mem.).

full Court to reach such a result. No such interim relief was issued in the SB8 case. Instead, midnight CDT on September 1 came and went with no order from the Court — and the most aggressive abortion restrictions since *Roe* was decided went into effect in the nation’s second-largest state.⁸²

It was only just before midnight the *following* night — at 11:58 p.m. EDT on Wednesday, September 1⁸³ — that the Supreme Court handed down its ruling. In one long, unsigned paragraph, a 5-4 majority declined both forms of emergency relief sought by the providers. Among other things, the majority noted, the application:

presents complex and novel antecedent procedural questions on which [the Applicants] have not carried their burden. For example, federal courts enjoy the power to enjoin individuals tasked with enforcing laws, not the laws themselves. And it is unclear whether the named defendants in this lawsuit can or will seek to enforce the Texas law against the applicants in a manner that might permit our intervention. The State has represented that neither it nor its executive employees possess the authority to enforce the Texas law either directly or indirectly. Nor is it clear whether, under existing precedent, this Court can issue an injunction against state judges asked to decide a lawsuit under Texas’s law. Finally, the sole private-citizen respondent before us has filed an affidavit stating that he has no present intention to enforce the law.⁸⁴

In other words, the cryptic order justified the Court’s refusal to intervene by invoking three variations on the same procedural uncertainty: Whether the named defendants could properly be the subject of the injunction that the providers were seeking. The majority went out of its way to “stress that we do not purport to resolve definitively any jurisdictional or substantive claim in the applicants’ lawsuit. In particular, this order is not based on any conclusion about the constitutionality of Texas’s law, and in no way limits other procedurally proper challenges to the Texas law, including in Texas state courts.”⁸⁵

82. Justice Sotomayor made this point explicitly in her dissent. See *Whole Woman’s Health v. Jackson*, No. 21A24, 2021 WL 3910722, at *3 (U.S. Sept. 1, 2021) (Sotomayor, J., dissenting) (“Last night, the Court silently acquiesced in a State’s enactment of a law that flouts nearly 50 years of federal precedents. Today, the Court belatedly explains that it declined to grant relief because of procedural complexities of the State’s own invention.”).

83. The time-stamp is unofficial, and reflects the time-stamp on the e-mail that members of the Supreme Court’s press corps received with the ruling.

84. *Id.* at *1 (majority order).

85. *Id.*

Each of the four dissenting Justices wrote a short opinion. Justices Breyer and Sotomayor, in particular, focused on the merits — and on the undeniable hardships that allowing SB8 to go into effect would put on Texans seeking to vindicate their constitutional right to a pre-viability abortion.⁸⁶ Chief Justice Roberts, no fan of the Court’s abortion jurisprudence,⁸⁷ wrote to stress that “the consequences of approving the state action [in insulating the six-week ban from judicial review], both in this particular case and as a model for action in other areas, counsel at least preliminary judicial consideration before the program devised by the State takes effect.”⁸⁸ But it was Justice Kagan’s dissent that most directly contrasted the Court’s non-intervention in the SB8 case with its prior shadow docket rulings. She sharply criticized the majority for “barely bother[ing] to explain its conclusion—that a challenge to an obviously unconstitutional abortion regulation backed by a wholly unprecedented enforcement scheme is unlikely to prevail.”⁸⁹ As she concluded, “[i]n all these ways, the majority’s decision is emblematic of too much of this Court’s shadow-docket decisionmaking—which every day becomes more unreasoned, inconsistent, and impossible to defend.”⁹⁰

c. Four Critiques of the Court’s SB8 Ruling

At first blush, the Court’s decision to *not* intervene in the SB8 case may seem to avoid some of the pitfalls of its growing use of the shadow docket recounted above. On closer inspection, though, there are at least four serious flaws in how the majority justified its non-intervention — flaws as compared to how the Court *generally* treats such applications, and flaws as compared to how the Court has treated a specific subset of applications over the last Term.

1. Conflating the Standards of Review. First, and most obviously, the majority’s cryptic analysis opened by suggesting that the standard for the two forms of relief the providers sought were the same. As it wrote, “[t]o prevail in an application for a stay or an injunction, an applicant must carry the burden of making a ‘strong showing’ that it is ‘likely to succeed on the merits,’ that it will be ‘irreparably injured absent a stay,’ that the balance of the equities favors it, and that a stay is consistent with the public interest.”⁹¹ But that’s the standard

86. *Id.* at *2–3 (Breyer, J., dissenting); *id.* at *3–5 (Sotomayor, J., dissenting).

87. *See, e.g., June Medical Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2133 (2020) (Roberts, C.J., concurring in the judgment) (“I joined the dissent in *Whole Woman’s Health* [v. *Hellerstedt*, 136 S. Ct. 2292 (2016),] and continue to believe that the case was wrongly decided.”).

88. *Whole Woman’s Health*, 2021 WL 3910722, at *2 (Roberts, C.J., dissenting).

89. *Id.* at *5 (Kagan, J., dissenting).

90. *Id.*

91. *Id.* at *1 (majority order).

for a stay (or to vacate a stay). The standard for an emergency writ of injunction focuses instead on whether the substantive right at issue is “indisputably clear,” and the case presents “critical and exigent circumstances” justifying such relief.⁹² It’s usually understood that the burden for an injunction is *higher*, but it’s also asking a different question — focusing on the underlying right at issue rather than the impact of the lower-court’s rulings. By invoking only the stay standard, the majority thereby elided over the subtle but significant distinctions between the two forms of relief.

2. Ignoring the Equities. In focusing entirely on the unsettled question of whether the defendants were properly subject to injunctive relief, the Court’s analysis entirely ignored the extent to which the *other* parts of the traditional four-factor stay analysis weighed *overwhelmingly* in favor of relief. The providers undoubtedly had demonstrated an irreparable injury; the public interest clearly supported a stay given the implications; and there could be no doubt that the providers had made a “strong showing” that SB8 was unconstitutional under *Roe* and *Casey*. Given the stakes, it would have behooved the majority to explain why the procedural uncertainty *outweighed* the serious and substantial arguments in *support* of vacating the Fifth Circuit’s administrative stay — at least largely because it’s hard to imagine how such an explanation could have been convincing. Instead, the majority simply omitted the rest of the (necessarily countervailing) analysis.

3. Relying on Procedural Questions — Not Procedural Obstacles. Relatedly, the majority relied not on procedural *obstacles* to the relief the providers were seeking, but merely on the fact that granting such relief would require courts to answer unsettled procedural *questions*. It would be one thing if the majority’s analysis *held* that, in fact, the defendants were *not* properly subject to suit. But it expressly disclaimed doing so.⁹³ Given that the stay analysis, again, requires only a “strong showing” of likelihood of success on the merits, and not an irrefutable one, the Court’s refusal to actually resolve whether the procedural issue was *actually* an obstacle is hard to justify.

4. Not Explaining Inconsistency With Prior Shadow Docket Rulings. I have saved what, in my view, is the biggest problem with the Supreme Court’s SB8 ruling for last: the stark contrast between the Court’s reliance upon unsettled procedural questions to justify not intervening in the SB8 case, and its flat-out disregard for procedural *obstacles* — not just procedural *questions* —

92. See, e.g., *Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regulatory Comm’n*, 479 U.S. 1312, 1312 (Circuit Justice Scalia 1986).

93. *Whole Woman’s Health*, 2021 WL 3910722, at *1 (“[W]e stress that we do not purport to resolve definitively any jurisdictional or substantive claim in the applicants’ lawsuit.”).

in at least three of the emergency injunctions it had issued in the preceding nine months. In *Roman Catholic Diocese* and *Agudath Israel*, for instance, the same 5-4 majority issued emergency writs of injunction to block New York COVID restrictions that were *no longer in effect* — on the ground that the restrictions violated the Free Exercise Clause of the First Amendment (as incorporated against the states).⁹⁴ The unsigned majority opinion in *Roman Catholic Diocese* briefly explained *why* the Court was issuing an injunction against an order that was not then in effect,⁹⁵ but never grappled with whether the prudential mootness of the dispute presented a procedural obstacle to the substantive relief the applicants sought.

Worse still, in *Tandon* — the April ruling blocking California’s restrictions on in-home gatherings, also on religious liberty grounds — the same 5-4 majority blew right past a statutory procedural bar when it made new law under the Free Exercise Clause.⁹⁶ For generations, the Court had interpreted its authority to issue emergency writs of injunction under the All Writs Act as being confined to cases in which the rights at issue were “indisputably clear.”⁹⁷ It is axiomatic, or at least it should have been, that no such relief can issue when, as in *Tandon*, it’s based upon a *new* interpretation of the Constitution. Against the backdrop of *Roman Catholic Diocese*, *Agudath Israel*, and *Tandon*, all of which produced the same 5-4 division, the majority’s refusal to intervene in the SB8 case is hard to fathom. As I wrote shortly after the SB8 ruling, given the procedural roadblocks in the earlier cases, “if the court was justified in intervening in April to protect a new understanding of constitutional rights, it was surely justified in intervening Wednesday to protect an old one.”⁹⁸

In all, then, the central problem with the SB8 ruling was not the Supreme Court’s refusal to intervene in the abstract; it was its refusal to intervene, *without* resolving the identified (and intentionally created) procedural issues, in a context in which it had simply *ignored* concrete procedural obstacles to grant emergency relief at least three times already in the same Term. If the Court had, consistent with what had been true historically, only intervened on the

94. *Roman Catholic Diocese v. Cuomo*, 141 S. Ct. 63 (2020) (per curiam); see also *Agudath Israel of Am. v. Cuomo*, 141 S. Ct. 889 (2020) (mem.).

95. *Roman Catholic Diocese*, 141 S. Ct. at 68 (“[I]njunctive relief is still called for because the applicants remain under a constant threat that the area in question *will be reclassified* as red or orange.” (emphasis added)).

96. *Tandon v. Newsom*, 141 S. Ct. 1294 (2021) (per curiam).

97. See *supra* note 90 and accompanying text.

98. Steve Vladeck, *The Supreme Court Doesn’t Just Abuse Its Shadow Docket. It Does So Inconsistently*, WASH. POST, Sept. 3, 2021, <https://www.washingtonpost.com/outlook/2021/09/03/shadow-docket-elena-kagan-abortion/>.

shadow docket in rare and non-contentious circumstances, the non-intervention in the SB8 case might be more defensible. Here, in contrast, the Court’s differential treatment leaves the impression that the same five Justices were willing to bypass procedural roadblocks on the shadow docket to expand religious liberty, but relied upon open procedural questions that they wouldn’t resolve to justify *not* protecting a clearly established constitutional right. The intervention the providers were seeking might still not have been *enough* (after all, an injunction against the named defendants would probably *not* have barred all SB8 suits). But that doesn’t change the fact that the relief the providers were seeking was clearly within both the Court’s formal power and what had increasingly become the norms of the Court’s recent practice. And if there *were* plausible grounds on which to differentiate the Court’s interventions in the New York and California cases and its non-intervention in the Texas case, it sure would have behooved the majority to say what they were.

d. Ongoing SB8 Litigation

To be sure, the shadow docket may not be done with SB8. The providers in the *Whole Woman’s Health* case have already asked the Court to grant certiorari “before judgment” in their lawsuit to resolve the procedural issues that doomed their application for emergency relief — and have asked the Court to expedite its consideration of whether to do so.⁹⁹ And however Judge Pitman rules on the federal government’s pending motion for a preliminary injunction in *United States v. Texas*, it’s not at all hard to imagine that whoever he rules *against* will seek immediate, emergency relief from the Fifth Circuit — and whoever loses *that* dispute in the Fifth Circuit will seek immediate, emergency relief from the Supreme Court. Thus, it is distinctly possible — if not likely — that SB8 will be back before the Justices even *before* they are scheduled to hear oral argument on December 1 in *Dobbs v. Jackson Women’s Health Organization*, the Mississippi case in which the state and numerous of its supporting *amici curiae* have asked the Court to formally overrule *Roe* and *Casey*.¹⁰⁰ After all, there is at least some universe in which the Court could uphold the Mississippi law without formally overruling *Roe* and *Casey* (even if such a holding would require narrowing them substantially). But there is no universe in which SB8’s substantive restrictions and *Roe* and *Casey* can coexist. That is, after all, the whole point.

99. Motion to Expedite Consideration of the Petition for a Writ of Certiorari Before Judgment and to Expedite Consideration of this Motion, *Whole Woman’s Health v. Jackson*, No. 21M__ (U.S. filed Sept. 23, 2021), <https://s3.documentcloud.org/documents/21068354/wwh-v-jackson-motion-to-expedite-1.pdf>.

100. *Dobbs v. Jackson Women’s Health Org.*, No. 19-1392 (U.S. to be argued Dec. 1, 2021).

Regardless of which vehicle allows for it, the key so long as *Roe* and *Casey* remain good law is for courts to provide some kind of permanent injunctive relief that bars not just individual plaintiffs from suing providers under SB8, but that bars SB8 lawsuits *altogether*. Until and unless that happens, it is hard to imagine that there will be widespread provision of abortions in violation of SB8 in Texas — even if there are a few. Of course, every day that passes *without* such relief is another day in which millions of Americans are deprived of their constitutional rights. So even if SB8 is ultimately blocked in a manner in which it cannot be enforced, it still will have caused not just harm, but *irreparable* harm to hundreds — if not thousands — of individuals who were unable to obtain an abortion in Texas while SB8 was in force, and for whom it is too late to obtain an abortion even when future SB8 suits are blocked. Again, whatever one thinks about the constitutional right to obtain a pre-viability abortion, allowing this procedural Rube Goldberg device to succeed sets a terrible precedent for the ability of courts to protect *all* constitutional rights going forward.

V. POTENTIAL AVENUES FOR REFORM

In that respect, the Supreme Court’s handling of the SB8 case underscores the need for two very different sets of reforms: Reforms to make it harder (if not impossible) for states to copy SB8’s devious procedural traps in future legislation on *any* subject, including abortion; and more general reforms to the shadow docket. I address these each in turn.

a. SB8-Inspired Reforms

Taking SB8 first, it seems to me uncontroversial to suggest that Congress should make it harder for *any* state to adopt this kind of procedural contraption to frustrate the enforcement of constitutional rights. One possible means of doing so is reflected in section 8 of the Women’s Health Protection Act of 2021,¹⁰¹ which the House of Representatives passed last Friday. That provision not only creates an express cause of action for those aggrieved by laws such as SB8 against any state official (or private official authorized by the state) responsible for enforcing state abortion restrictions, but it expressly abrogates a state’s sovereign immunity in such cases — a move that is well within Congress’s constitutional authority under Section 5 of the Fourteenth Amendment to enforce Section 1 of the Fourteenth Amendment.¹⁰²

101. H.R. 3755, 117th Cong. § 8 (2021), <https://www.congress.gov/117/bills/hr3755/BILLS-117hr3755eh.pdf>.

102. *See Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (holding that statutes enacted pursuant to Congress’s power to enforce the Fourteenth Amendment may constitutionally abrogate the sovereign immunity of non-consenting states).

If anything, Congress might consider a version of section 8 that would more broadly allow such litigation *anytime* that a state transfers enforcement responsibility to private citizens of a law to which there are colorable federal constitutional objections — including codifying what has already been true as a practical matter, *i.e.*, that the federal government is a proper party to bring such cases. And insofar as judicial immunity is a common law doctrine and not a constitutional command, Congress might also consider legislation that more precisely identifies when injunctive relief against state court judges is and is not appropriate — in light of the lessons learned from the litigation thus far. Of course, this dovetails with what, to me, are far more fundamental reforms that Congress should pursue to make enforcement of constitutional rights easier *across the board*, but that’s for another time.

b. Shadow Docket Reforms

As I’ve suggested above, the Supreme Court’s (first) shadow docket ruling in the SB8 case drives home a series of *broader* problems with the Court’s growing use (and, in some cases, abuse) of these kinds of rulings in recent years. In that respect, reform of the shadow docket strikes me as being about so much *more* than just as a reaction to the Court’s September 1 ruling.

Moreover, just as the rise of the shadow docket has largely been the result of judge-made shifts in judge-made norms and procedures, the first place where reforms to address these concerns should be pursued is at the Supreme Court itself. Hopefully, the mere fact that the Committee is considering this topic as part of a broader reform conversation will bring additional light to the concerns I and others have raised — and perhaps the Justices will take those into account as they approach shadow docket rulings going forward. Among other reforms that the Court could adopt, whether formally or informally, *without* an Act of Congress, it might include:

- Reviving the practice of having individual Circuit Justices (rather than the full Court) resolve even contentious emergency applications whenever and wherever possible (including, where appropriate, holding in-chambers oral argument).
- Formally publishing any order by an individual Circuit Justice denying an application, whether or not it is accompanied by an opinion.¹⁰³

103. Although in-chambers *opinions* are published today as a matter of course, even *that* wasn’t always so. See Cynthia Rapp, *Introduction*, in 1 RAPP v (2001). Still today, in-chambers *orders* denying applications for emergency relief are *not* usually reported in either the *Supreme Court Reporter* or the *U.S. Reports*; they can be found online only by searching the docket listing for the specific case (so that one cannot search for cases they don’t already know about). See, e.g., *Rumsfeld v. Rell*, No. 05A231 (Ginsburg, Circuit Justice Sept. 8, 2005)

- Amending the Court’s formal rules and informal norms to provide far clearer guidelines for the procedures and timing of emergency applications (at least in non-capital cases), including the rules governing *amicus* participation and the possibility of oral argument before either the full Court or the Circuit Justice.
- Committing, at least informally, to publishing a rationale (and publicly identifying the concurring and dissenting Justices) for (1) any order that grants an application for emergency relief; (2) any order (other than a denial of certiorari) from which a Justice publicly dissents; or (3) any other order that the Justices intend to have precedential effect in the lower courts.
- Tying any order granting emergency relief to a specific statutory authority — and, where possible, articulating why the relevant standard for such relief has been satisfied.
- Committing to scheduled releases of orders on emergency applications except where circumstances prohibit it (as in last-minute execution-related litigation), and to provide advance public notice of order issuance wherever possible.
- Treating applications for emergency relief on novel and important questions of federal law as petitions for certiorari — and adding the case to the merits docket for plenary review at the same time as the Court rules on the emergency application.¹⁰⁴

I should also note that I’m one of those who is generally opposed to undue congressional interference in the workings of the federal courts in general, and the Supreme Court in particular. To that end, I don’t think that the concerns that I and others have identified can or should be addressed through reforms designed to *prohibit* the Court from doing what it’s doing — or, for example, to mandate that the Justices publicly disclose their votes on all (or even some) orders, etc. For starters, the problem is not the shadow docket *itself*; for as long as we have a Court the jurisdiction of which extends to emergency applications, *some* action on the shadow docket is inevitable. What’s more, even if such legislation doesn’t raise constitutional concerns (and some of it might), I fear

(mem.). My thanks to Professor Ed Hartnett for pointing out that in-chambers orders *granting* emergency relief *are* published as orders by the full Court.

104. Just one week after the SB8 ruling, the Court did exactly that — granting a stay, granting certiorari, and expediting plenary merits review of a Texas death-row inmate’s claims. *See Ramirez v. Collier*, No. 21A33, 2021 WL 4077814 (U.S. Sept. 8, 2021) (mem.).

that it could open up a can of worms that could lead to intrusions on norms of judicial independence going forward.

That's not to say, however, that Congress is (or would be) entirely powerless to address the rise of the shadow docket. Rather, I think that there's a meaningful conversation to be had about shadow-docket inspired legislative reforms, which I see as falling into two basic camps:

First, Congress can and should consider mechanisms for taking pressure off of the shadow docket. If the rise of the shadow docket is in part a reaction to external catalysts, Congress can, of course, address them. Among other things, such reforms might include:

- Allowing the federal government to transfer all civil suits seeking “nationwide” injunctive relief to the D.C. district court — to avoid the concern of overlapping (or diverging) “nationwide” injunctions.
- In cases in which *any* (state or federal) government action is enjoined by a lower federal court, speed up the appellate timelines so that appeals of lower-court rulings receive plenary review much faster — by shortening the time for filing an appeal; by mandating aggressive briefing schedules; and by strongly encouraging courts to give such cases all due priority.
- In capital cases (where Justices from across the spectrum have bemoaned the difficulty of confronting novel legal questions on the literal eve of a scheduled execution), give the Court *mandatory* appellate jurisdiction at least over direct appeals — and make it easier for prisoners to bring method-of-execution challenges *before* an execution date has been set.

Second, Congress might consider codifying certain features of the shadow docket that were only norms historically. These could include:

- Codifying the traditional four-factor test that the Court applies in considering applications for emergency relief.¹⁰⁵
- Encouraging the Justices to provide at least a brief explanation of any order that grants any type of emergency relief.
- Encouraging the Court to hold arguments on applications where there is at least a reasonable likelihood that the Justices will grant relief.¹⁰⁶

105. Congress has previously prescribed standards of review even for injunctions against unconstitutional governmental action. *E.g.*, *Miller v. French*, 530 U.S. 327 (2000) (upholding provision of the Prison Litigation Reform Act that prescribes a standard of review courts must apply to grant injunctions to remedy unconstitutional prison conditions).

106. Indeed, the Court's shift to conducting remote oral arguments via telephone in merits cases from May 2020 through May 2021 reinforces the possibility that similar remote arguments could be staged in the future for suitable emergency applications, as well.

- Requiring (or, at least, encouraging) applications to be resolved in the first instance by the Circuit Justice *without* referral to the full Court.

VI. CONCLUSION

I harbor no illusion that these reform ideas are either unique or exhaustive. But they do circle around a broader proposition of more general relevance to this Committee: The overwhelming majority of orders that the Supreme Court hands down through the shadow docket are exercises of the Court’s constitutional *appellate* jurisdiction — not its original jurisdiction. As such, it is subject to “such exceptions[] and . . . such regulations as the Congress shall make.”¹⁰⁷ Even for those, like me, who believe that Congress’s power under the Exceptions Clause is not plenary,¹⁰⁸ Congress still has significant and substantial leeway and latitude to regulate the Court’s appellate docket.

And that is the broader point on which I’d like to close my testimony today: It has been over 33 years since the last time that Congress passed legislation generally regulating the Supreme Court’s docket. That legislation, as the Committee well knows, eliminated almost all of the Court’s remaining “mandatory” appellate jurisdiction — so that, except for the handful of original cases and appeals from three-judge district courts that the Justices receive each year, the Court would have complete control over its docket.¹⁰⁹

If nothing else, the rise of the shadow docket and the decline of the merits docket, as powerfully reflected in the SB8 litigation, should at the very least provoke this Committee to ask whether Congress went too far in 1988 — and whether, across an array of topics, it’s time for Congress to re-assert some modicum of control over the *entire* docket of the highest court in the land, both procedurally and substantively. I just hope that any conversation along those lines *includes* the shadow docket, because regardless of any reforms that the Committee considers, bringing this increasingly important source of significant Supreme Court rulings out of the shadows is an important step unto itself.

Thank you again for the invitation to testify today. I look forward to your questions.

107. U.S. CONST. art. III, § 2, cl. 2.

108. *See Felker v. Turpin*, 518 U.S. 651, 667 (1996) (Souter, J., concurring).

109. *See* Act of June 27, 1988, Pub. L. No. 100-352, 102 Stat. 662 (codified in scattered sections of 2, 7, 22, 25, 28, 33, 43, and 45 U.S.C.).