OUT OF THE SHADOWS: THE PITFALLS OF THE SUPREME COURT'S "SHADOW DOCKET"

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Abstract

The Supreme Court's shadow docket, a term coined to describe the Court's practice of resolving significant legal issues without the usual public scrutiny and comprehensive briefing, has become increasingly prominent in contemporary judicial discourse. This Article explores the nature, implications, and controversies surrounding the shadow docket, shedding light on its evolving role in the American legal system. This Article begins by tracing the historical origins of the shadow docket, highlighting its emergence as a mechanism for addressing urgent matters, such as stay applications and emergency petitions, outside the traditional channels of appellate review. Central to the analysis is an exploration of the implications of the shadow docket on transparency, accountability, and the rule of law. While proponents argue that the shadow docket allows the Court to swiftly address pressing issues and maintain judicial efficiency, critics express concerns about its potential to undermine democratic principles by circumventing established procedures and limiting opportunities for public participation and judicial deliberation. Moreover, this Article delves into controversies that have arisen from the Court's utilization of the shadow docket, including its handling of election-related disputes, pending executions, and emergency public health measures. These examples illustrate the far-reaching consequences of shadow docket decisions on individual rights, governmental powers, and the balance of institutional authority.

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INTRODUCTION

"If you can upend our constitutionally protected right to abortion in a one-paragraph opinion, where does it end?"[1]

The Supreme Court of the United States is quite literally known throughout the country—either because of a universal consensus that the Court hands down important decisions that have meaning in some regard to us all or because the phrase "Supreme Court" has become customarily equated with a group of aficionados who use their knowledge to create decisions—despite a lack of general familiarity with *how* the Court works. The population of the United States generally understands the hierarchy of the judicial system, even if their knowledge is limited.[2] For the most part, it is understood that the Supreme Court is at the top of the ladder, and climbing there is the last chance to effect a change.[3] It is understood that the Court works in terms that begin on the first Monday in October and last until the first Monday in October of the following

1. Fatima Graves, President of the National Women's Law Center, testified at a Senate Judiciary hearing on the shadow docket on September 29, 2021. *Texas's Unconstitutional Abortion Ban and the Role of the Shadow Docket: Hearing Before the S. Comm. on the Judiciary*, 117th Cong. (2021) (testimony of Fatima Graves) https://www.judiciary.senate.gov/meetings/texass-unconstitutional-abortion-ban-and-the-role-of-the-shadow-docket.

2. For instance, most states require middle/high school students to complete at least a semester of civics education. The ABA found that 38 states and D.C. require a high school civics course; only seven for a full year, eight require civics instruction (but not a stand-alone class), and seven states had no requirement at all. Shawn Healy, *Momentum Grows for Stronger Civic Education Across States*, ABA (Jan. 4, 2022), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/the-state-of-civic-education-in-america/momentum-grows-for-stronger-civic-education-across-states/; *see also, e.g.*, Kara Yorio, *A Look at Civics Education, State by State*, SCH. LIBR. J. (Feb. 3, 2020), https://www.slj.com/story/a-look-at-civics-education-state-by-state; Sarah Shapiro & Catherine Brown, *A Look at Civics Education in the United States*, UNION OF PROFESSIONALS (2018), https://www.aft.org/ae/summer2018/shapiro_brown.

3. According to a civics knowledge survey in 2021, fifty-six percent of U.S. adults could name all three branches of government. *Americans' Civics Knowledge Increases During a Stress-Filled Year*, ANNENBERG PUB. POL'Y CTR. (Sept. 14, 2021), https://www.annenbergpublicpolicycenter.org/2021-annenberg-constitution-day-civics-survey/.

year.[4] The Court grants plenary review, with oral arguments, in about eighty cases each term.[5] The justices produce written opinions that are announced in a public ceremony.[6] These cases are generally referred to as the court's "merit docket," which casts a wide shadow on the Court's orders list, now known as the "shadow docket,"[7] a term coined in 2015.[8] The shadow docket comprises the thousands of *other* decisions that the Court hands down, which are almost always orders.[9] Compared to the generally known merits docket, the shadow docket truly lives in the shadows.

William Baude's article in the New York University Journal of Law & Liberty coined the "shadow docket" phrase and explored the procedural differences between the merit and shadow dockets.[10] Baude argued that while criticism is abundant regarding the Court's merit docket, the shadow docket deserves attention and possibly reform just as much, if not more so, than the Court's merit docket.[11] The shadow docket produces orders that are not inherently wrong but raise questions about procedure.[12] Procedural regularity is obvious with the Court's merit docket because the public knows what cases will be decided, when, and why.[13] We know the sixty to eighty cases the Court heard arguments on, and expect opinions explaining the Court's decisions.[14] The Court's decisions are seen as definite, likely because there is "a sense that its processes are consistent and transparent[, which] makes it easier to accept the results of those processes, win or lose."[15] While the Court is valued for its consistency and procedural regularity, there is still a sense of mystery surrounding its internal workings.

The shadow docket, for example, is less transparent and regular than

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4. *The Supreme Court at Work*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/courtatwork.aspx (last visited Mar. 8, 2022).

5. *Id.*

6. *See generally*, *Frequently Asked Questions*, SCOTUSBLOG, https://www.scotusblog.com/faqs-announcements-of-orders-and-opinions/ (last visited Oct. 5, 2023) (discussing the Court's opinion days including how opinions are released).

7. *The Supreme Court's Shadow Docket: Hearing Before the Subcommittee on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 117 Cong. 1 (2021) (statement of Stephen I. Vladeck, Professor, University of Texas School of Law) [hereinafter Statement of Stephen Vladeck].

8. *See* William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1 (2015) ("[S]hadow docket — a range of orders and summary decisions that defy its normal procedural regularity.").

9. Statement of Stephen Vladeck, *supra* note 7.

10. *See generally* Baude, *supra* note 8.

11. *Id.* at 4.

12. *Id.* at 10.

13. *Id.*

14. *Id.* at 12.

15. *Id.* at 13.

the merit docket, with a process that is "sometimes ad hoc or unexplained."[16] For example, the Court may single out an amicus brief for specific discussion at oral argument.[17] There are likely many reasonable explanations for this decision by the Court, but there are just as many reasons why the Court chooses not to do it regularly. Shadow docket orders are usually void of explanation, making observers "ignorant of the Justices' reasoning" and how the justices voted.[18] A lack of explanation or reasoning makes it difficult for lower courts to assess the value of such orders.

Despite what could be called cons to the shadow docket, there are genuine constraints placed on the Court that may justify such procedures.[19] First, time constraints place the Court in a precarious position, as some questions on the orders list may require decisions immediately.[20] These issues could require pausing proceedings in the lower courts or involve "external deadlines" such as elections or executions.[21] Therefore, swift decision-making is sometimes necessary, even if it comes at the expense of procedural regularity.[22] Second, sometimes, orders address unexpected or unusual issues for which it may be impossible to prepare a set of procedures in advance.[23] Standards are not always preferable to rules, especially when discretion is a large part of the decision-making. For these reasons, Baude urged for a "move toward a norm of transparency" and an overall improvement in the transparency of the Court's shadow docket.[24]

Moreover, summary reversals, which do not "follow the typical course of granting [a] petition and scheduling the case for briefing and oral argument" and instead involve "the Court . . . grant[ing] the petition and decid[ing] the case on the merits, dispensing with further procedure," make up a large portion of the Court's shadow docket.[25] Summary reversal is a form of certiorari governed by the Court's Rule 10.[26] There are approximately 6.2 summary reversals a year.[27] However, the confounding issue surrounding summary reversals is understanding how the Court selects the cases it does. It may be the Court's desire to ensure that lower courts are following Supreme Court precedent and enforcing

16. Baude, *supra* note 8, at 14.
17. *Id.*
18. *Id.* at 15.
19. *Id.* at 16.
20. *Id.* at 15.
21. *Id.* at 16.
22. Baude, *supra* note 8, at 16.
23. *Id.*
24. *Id.* at 19.
25. *Id.* at 18–19.
26. *Id.* at 32.
27. *Id.* at 30.

the Court's supremacy,[28] or it may be that a lower court has simply done something so wrong that the Court must correct it.[29] At the end of the day, the agenda selection is an act of discretion that is important but not thoroughly explained or understood.[30] While the Court is generally scrutinized and accused of acting politically in high-stake, divided cases and seen as acting orderly when it is less divided and out of the spotlight, Baude urges that it is actually when the Court is deciding technical, procedural, and administrative questions out of the spotlight that it deviates from its usual standard of transparency.[31]

Most concerns about the shadow docket stem from an inherent reluctance to deviate from standard procedures. Traditionally, a case reaches the Supreme Court only after full consideration and final decisions by lower courts, which can be a very long and drawn-out process.[32] The shadow docket allows losing litigants to short-cut the system and ask the Supreme Court to issue an emergency stay of a lower court ruling.[33] The standard of emergency stays has ordinarily been exacting, requiring the litigant to show that they would suffer irreparable harm if the lower court's ruling were left in place.[34] Such stays are meant for the most extraordinary circumstances, but the Court's recent use of its shadow docket has shown a willingness to lower the bar and allow them more frequently. Even more troubling is the lack of explanation for such orders that, while not always decisions on the merits, sometimes have the effect of "handing one side a decisive substantive victory."[35] Despite the seemingly demanding standard, the Court has issued stays via the shadow docket in cases that arguably do not meet the criteria. In turn, these emergency stays with little to no explanation make it difficult for lower courts to understand how the Court came to its decisions.

While most people are aware of the usual merits decisions by the Court, the shadow docket's growing breadth should be brought into the light—especially in terms of stays and injunctive relief. Over the last several years, the Court has used the shadow docket to resolve issues relating to abortion,[36] execution,[37] presidential power,[38] and COVID-

28. Baude, *supra* note 8, at 53–54.
29. *Id.* at 20.
30. *Id.* at 38.
31. *Id.* at 40.
32. James Romoser, *Symposium: Shining a Light on the Shadow Docket*, SCOTUSBLOG (Oct. 22, 2020, 12:15 PM), https://www.scotusblog.com/2020/10/symposium-shining-a-light-on-the-shadow-docket/.
33. *Id.*
34. *Id.*
35. *Id.*
36. *In re* Whole Woman's Health, 142 S. Ct. 701, 701 (2022).
37. Hamm v. Reeves, 142 S. Ct. 743, 743 (2022).
38. Trump v. Thompson, 142 S. Ct. 1350, 1350 (2022).

19.[39] Several of these cases involve hotly contested issues, which generally garner much public discussion, yet the Court decided them in the shadows without nearly as much procedure as the Court uses on its merits docket. In fact, the Court used its shadow docket to allow the first federal execution in seventeen years to proceed.[40] While some shadow docket cases deserve emergency procedures, the Court appears to have strayed from its usual, emergency-only use of the shadow docket.

This Article undertakes the task of defining and analyzing the United States Supreme Court's "shadow docket" and its pitfalls: growing breadth, lack of transparency, and questionable precedential value. Part I of this Article will explore the Court's ability to consider an application for a stay and its recent shadow docket rulings that indicate a departure from the usual four-factor test. Part II of this Article will discuss the need for transparency in relation to precedent and the Court's legitimacy. The Court's shadow docket produces decisions that have precedential value. These decisions should be more transparent and well-reasoned to ensure the lower courts' ability to follow precedent and that the Court's legitimacy stays intact.

I. GROWING BREADTH OF THE SHADOW DOCKET

A. *Court's Power to Fashion Emergency Relief*

The Court's power to fashion emergency relief is statutory and stems from 28 U.S.C § 2101 and 28 U.S.C. § 1651 (All Writs Act). Section 2101(f) states:

> In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court, and may be conditioned on the giving of security, approved by such judge or justice, that if the aggrieved party fails to make application for such writ within the period allotted therefor, or fails to obtain an order granting his application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs

39. S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 716 (2021); Chrysafis v. Marks, 141 S. Ct. 2482, 2482 (2021).

40. Jordan S. Rubin, *U.S. Executes First Federal Prisoner After 17-Year Hiatus*, BLOOMBERG L. (July 14, 2020, 6:02 AM), https://news.bloomberglaw.com/us-law-week/supreme-court-clears-way-for-first-federal-execution-in-17-years.

which the other party may sustain by reason of the stay.[41]

The All Writs Act provides that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."[42] The Act was initially codified in the Judiciary Act of 1789.[43] Former U.S. Supreme Court Justice Sandra Day O'Connor remarked that the Act was "the last great event in our Nation's founding and formed the genesis of our Nation's continuing constitutional revolution" and "it is the last of the triad of founding documents, along with the Declaration of Independence and the Constitution itself."[44] The All Writs Act allows a federal court "to avail itself to all auxiliary writs as aids in the performance of its duties, when the use of such historic aids is calculated in its sound judgment to achieve the ends of justice entrusted to it."[45]

Justice Rehnquist, sitting as a circuit justice, remarked in a 2001 case seeking an order enjoining further implementation of a state statute while the petition for certiorari was pending that "[t]he All Writs Act, 28 U.S.C. § 1651(a), is the only source of this Court's authority to issue such an injunction."[46] Inversely, the Court may necessarily lift stays imposed by lower courts.[47] Although the All Writs Act and Section 2101(f) do not limit the Court's ability to issue stays, it is clear that such relief should be used "sparingly and only in the most critical and exigent circumstances."[48] Supreme Court Rule 11 states:

> A petition for a writ of certiorari to review a case pending in a United States court of appeals, before judgment is entered in that court, will be granted only upon a showing that the case is of <u>such imperative public importance</u> as to justify deviation from normal appellate practice and to require immediate determination in this Court.[49]

The Court has granted such petitions sparingly, the last being in

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41. 28 U.S.C. § 2101(f) (emphasis added).

42. 28 U.S.C. § 1651.

43. Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81–82 (codified as amended at 28 U.S.C. § 1651(a)).

44. Sandra Day O'Connor, *The Judiciary Act of 1789 and the American Judicial Tradition*, 59 U. CIN. L. REV. 1, 4 (1990).

45. United States v. N.Y. Tel. Co., 434 U.S. 159, 172–73 (1977).

46. Brown v. Gilmore, 122 S. Ct. 1, 2 (2001).

47. *See* Commodity Futures Trading Com'n v. British Am. Commodity Options Corp., 434 U.S. 1316, 1320 (1977) (discussing the Court's ability to dissolve a stay issued by a court of appeals).

48. *Brown*, 122 S. Ct. at 2.

49. SUP. CT. R. 11 (emphasis added).

2004.[50] Similarly, Supreme Court Rule 20 states that "issuance by the Court of an extraordinary writ . . . is not a matter of right, but of discretion sparingly exercised."[51] These rules, together with the Court's precedent, indicate a reluctance to grant extraordinary relief. This reluctance likely exists because of the desire to decide cases on complete records and give deference to the lower courts. However, there has been an increase in the number of rulings in cases seeking emergency injunctive relief via the shadow docket despite the once-onerous standard.[52] Indeed, the Court granted emergency relief eleven times during the October 2021 term.[53]

B. *Granting Stays and Disagreement on the Shadow Docket*

"A stay is an 'intrusion into the ordinary processes of administration and judicial review' and accordingly, 'is not a matter of right, even if irreparable injury might otherwise result to the appellant.'"[54] A stay merely "hold[s] a ruling in abeyance to allow an appellate court the time necessary to review it."[55]

In *Nken v. Holder*, the Court stated that a stay is "an exercise of judicial discretion" dependent on the circumstances of the case.[56] However, while the decision is discretionary, the Court stated that the following four factors traditionally guided federal courts:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably harmed absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.[57]

Additionally, the Court indicated that the first two factors are most critical.[58] Thus, the traditional test requires the movant to show that he will succeed on the merits and suffer irreparable harm without a stay.

The lower courts regularly apply this test, but the Court has neither

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50. Stephen Vladeck, *Power Versus Discretion: Extraordinary Relief and the Supreme Court*, SCOTUSBLOG (Dec. 20, 2018, 3:29 PM), https://www.scotusblog.com/2018/12/power-versus-discretion-extraordinary-relief-and-the-supreme-court/.

51. SUP. CT. R. 20.

52. Statement of Stephen Vladeck, *supra* note 7.

53. Steve Vladeck (@steve_vladeck), TWITTER, https://twitter.com/steve_vladeck/status/1511698585963970565 (last visited Apr. 9, 2022).

54. Nken v. Holder, 556 U.S. 418, 427 (2009).

55. *Id.* at 421.

56. *Id*. at 433 (quoting Virginian R. Co. v. United States, 272 U.S. 658, 672–73 (1926)).

57 *Id*. at 426 (quoting Hilton v. Braunskill, 481 U.S. 770, 776 (1987)).

58. *Id*. at 434.

explicitly used the *Nken* formulation nor indicated that it does not apply.[59] Instead, Justice Ginsburg explained the factors guiding her decision to deny a stay application in *Conkright v. Frommert*[60] as:

> (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction; (2) a fair prospect that a majority of the Court will conclude that the decision below was erroneous; and (3) a likelihood that irreparable harm will result from the denial of stay.[61]

Also, if the case is close, "it may be appropriate to balance the equities" or weigh the relative harms and the public interest.[62] According to Justice Ginsburg, all factors must be satisfied to warrant relief.[63] Thus, it is unclear whether or not the *Nken* test applies to the Court's decisions to grant or deny a stay. An important thing to note with both Supreme Court and other federal courts tests is that, historically, neither one solely considered the merits of the case when deciding to grant or deny a stay.[64] Yet it has become increasingly apparent from the shadow docket cases that the Court is deciding those cases *solely* on the merits.

The high standard for emergency relief has influenced the government's decision to seek such relief. Throughout the Bush and Obama administrations, the government rarely sought emergency relief.[65] But when it did, the underlying cases mostly did not involve hotly contested subjects that would be subject to debate.[66] This pattern changed drastically with the Trump administration, which "sought stays from the Supreme Court on at least twenty-one different occasions; [asked] for certiorari before judgment nine times, and [expressly] requested mandamus relief directly against a district court in at least three different cases."[67] All within thirty-two months![68]

The uptick in shadow docket cases, plus the Court's change in evaluating those cases, shows that *something* is moving within the shadows. Similarly relevant, Justice Alito recently commented that the

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59. *Id*. at 427, 436.

60. 556 U.S. 1401, 1402 (2009).

61. *Id.* at 1862 (citation marks omitted) (citing Rostker v. Goldberg, 448 U.S. 1306, 1308 (1980)).

62. *Id.*

63. *Id.*

64. *See id.* at 1402; Nken v. Holder, 556 U.S. 418, 435 (2009).

65. Nina Totenberg, *The Supreme Court and 'The Shadow Docket'*, NPR (May 22, 2023), https://www.mynspr.org/2023-05-22/the-supreme-court-and-the-shadow-docket.

66. Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123, 134 (2019).

67. *Id.*

68. *Id.*

term "shadow docket" gives the impression that "a dangerous cabal is deciding important issues in a novel, secretive, improper way in the middle of the night, hidden from public view."[69] The criticism of the shadow docket does not lie solely within academia or the media but has settled itself in the Court as well. The Court was asked to enjoin a law that made it unlawful for physicians to perform abortions if they either detect cardiac activity in an embryo or fail to perform a test to detect such activity in *Whole Woman's Health v. Jackson*.[70] The Court denied the application for injunctive relief.[71] According to Justice Kagan's dissent, "[t]oday's ruling illustrates just how far the Court's 'shadow-docket' decisions may depart from the usual principles of appellate process."[72] Justice Kagan criticized the Court's decision to deny the application for injunctive relief, saying that "[t]he majority's decision is emblematic of too much of this Court's shadow-docket decision-making—which every day becomes more unreasoned, inconsistent, and impossible to defend."[73] The Court denied the application for injunctive relief after seventy-two hours and without full briefing or oral argument.[74]

Most recently, on April 6, 2022, the Court, by a 5-4 vote, issued a shadow docket stay of a district court decision that had vacated a Clean Water Act certification rule.[75] Justice Kagan, with whom the Chief Justice, Justice Breyer, and Justice Sotomayor joined, dissented, arguing that the applicants failed to satisfy the *Nken* test and did not meet their burden.[76] The dissent argued that the applicants failed to show irreparable injury (factor two in *Nken*), and more importantly, the issue was not a true emergency worthy of the shadow docket.[77] The applicants waited a month before seeking emergency relief, delaying their own "emergency."[78] In Justice Kagan's own words:

> By nonetheless granting relief, the Court goes astray. It provides a stay pending appeal, and thus signals its view of the merits, even though the applicants have failed to make the irreparable harm showing we have traditionally required. That renders the Court's emergency docket not for

69. Adam Liptak, *Alito Responds to Critics of the Supreme Court's 'Shadow Docket*,' N.Y. TIMES (Sept. 30, 2021), https://www.nytimes.com/2021/09/30/us/politics/alito-shadow-docket-scotus.html.

70. Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2498 (2021) (Sotomayor, J., dissenting).

71. *Id.* at 2495 (Alito, J., in chambers).

72. *Id.* at 2500 (Kagan, J., dissenting).

73. *Id.*

74. *Id.*

75. Louisiana v. Am. Rivers, 142 S. Ct. 1347, 1347 (2022) (Kagan, J., in chambers).

76. *Id.* at 1348 (Kagan, J., dissenting).

77. *Id.* at 1349.

78. *Id.*

> emergencies at all. The docket becomes only another place for merits determinations—except made without full briefing and argument.[79]

It is clear that even amongst the members of the Court, there is disagreement about the shadow docket, its use, and the standard for emergency relief. In line with the dissent's criticism, the shadow docket is often criticized for its late-at-night or early-in-the-morning rulings.[80] It follows simple logic to hand down an emergency order immediately if a true emergency needs an instant response. However, the dissenters were not convinced that the case was worthy of emergency relief—a feeling that may be substantiated by the timing of the Court's order, which it issued at 9:00 AM EST.[81] This timing could indicate the Court listening to criticisms, making them inclined to wait until regular business hours to issue the order. On the other hand, true emergencies often must be handled immediately. The Court has shown its ability and willingness to issue late-night or early-morning rulings before, making this normal-business-hour emergency order ruling suspicious.

C. *Why Does the Court Need an Emergency Docket?*

Consider *South Bay United Pentecostal Church v. Newsom*,[82] where the petitioners sought injunctive relief against California's lockdown orders and reopening restrictions placing strict limitations on all places of worship.[83] Two churches claimed they were disproportionately impacted by restrictions that banned indoor worship services and indoor singing and chanting, while other secular businesses were unaffected.[84] The petitioners requested the injunction by Sunday, their next worship service, which gave the Court little to no time to decide.[85]

As mentioned, shadow docket cases are not given full briefing or oral arguments and are typically decided urgently.[86] Remember the *Whole Woman's Health* case, which the Court decided after only seventy-two

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79. *Id.*

80. Professor Vladeck testified to the House Committee on the Judiciary and explained that the Court handed down a pair of major rulings at 2:10 AM EST and again at 2:46 AM EST two days later. Statement of Stephen Vladeck, *supra* note 7, at 13–14.

81. Steve Vladeck (@steve_vladeck), TWITTER (Apr. 6, 2022, 9:16 AM), https://twitter.com/steve_vladeck/status/1511694212156346369.

82. 141 S. Ct. 716 (2021).

83. *Id.* at 717 (Gorsuch, J., statement).

84. *Id.* at 716 (Kagan, J., in chambers).

85. Emergency App. for Writ of Inj., S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613 (2020) (No. 19A1044).

86. *See* Louisiana v. Am. Rivers, 142 S. Ct. 1347, 1349 (2022) (Kagan, J., dissenting).

hours.[87] The *South Bay*[88] case is a prime illustration of the emergency nature of the shadow docket. The churches asked for immediate relief, which would be otherwise unavailable because the lower courts had already denied their injunction request.[89] As such, the emergency docket was arguably the appropriate place to grant the relief requested.[90]

There are other, less apparent (in comparison to a global pandemic) areas of the law that warrant emergency relief. For example, in 1996, the State of Ohio established a program to provide educational choices to families with children residing in Cleveland.[91] The program was challenged in 1999 on the basis of its constitutionality.[92] On an emergency basis, the Court granted a preliminary injunction permitting students to receive their scholarships while the litigation continued.[93] The Court did not decide the case on the merits for three more years.[94] At least for the children entitled to receive an education because of the program, it was emergent that their scholarships not be left suspended in the air for years on end.

Other notable examples are cases involving elections, which generally impose rigid deadlines.[95] Election Day brings with it a finality. Because of such urgency, such cases often need to be decided on an expedited basis where there is little time to deliberate, and it may be easier to stick to instinct in the face of immediacy. Death penalty cases have frequented the shadow docket in recent years and are even more time-dependent.[96] Like election cases, death penalty cases have a finality to them that cannot be undone. The Court regularly receives "last-minute filings debating

87. Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2500 (2021) (Kagan, J., dissenting).

88. S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 716 (2021) (Kagan, J., in chambers).

89. *Id.* at 719 (Gorsuch, J., statement).

90. However, what constitutes an "emergency" is also arguably subjective. While some may argue that not being able to attend church during a pandemic is an emergency, others may not. *Compare, e.g.*, Roman Cath. Archdiocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 68–69 (2020) (holding that the New York governor's executive order limiting attendance at religious services at houses of worship is a violation of the free exercise clause), *with id.* at 77–78 (Breyer, J., dissenting) (stating that the executive order should be upheld because the church did not show that they were entitled to "the extraordinary remedy of injunction").

91. Zelman v. Simmons-Harris, 536 U.S. 639, 649–53 (2002) (deciding whether the pilot program violated the Establishment Clause).

92. *Id.* at 649.

93. *See* Zelman v. Simmons-Harris, 120 S. Ct. 443, 443 (1999) (mem.) (granting the application for stay of the lower court's preliminary injunction).

94. *Zelman*, 536 U.S. at 644.

95. *See* Republican Nat'l Comm. v. Democratic Nat'l Comm., 140 S. Ct. 1205, 1206 (2020) (deciding whether to stay an injunction concerning deadline for absentee ballots).

96. Jenny-Brooke Condon, *The Capital Shadow Docket and the Death of Judicial Restraint*, 23 NEV. L.J. 809, 810 (2023).

whether a pending execution should be stayed."[97]

In 2022, lawyers for death-row inmate Matthew Reeves obtained a preliminary injunction against his pending execution.[98] Alabama asked the Supreme Court to vacate the injunction, and the Court granted the emergency request to vacate the lower court's injunction and proceed with the execution.[99] The lower court had extensive records before them, including: "a written record of more than 2,000 pages, . . . more than seven hours of testimony[,] and oral argument."[100] According to the Supreme Court's online docket, the application to vacate the injunction was submitted to Justice Thomas on January 26, 2022.[101] The Court granted the application on January 27, 2022.[102] Matthew Reeves was pronounced dead at 9:24 PM on January 27, 2022.[103] The majority's decision to vacate the lower court's injunction was not accompanied by any reasoning, and that evening, a man was executed.[104]

Death rings with irreversible finality, and the justices have barely enough time to truly delve into the facts and spot complex legal issues, much less resolve them in time. Therefore, although time-sensitive matters should be afforded an emergency outlet to ensure the Court can resolve them in time, they also pose grave dangers to those facing those challenges. The justices cannot fully consider the issues to the extent they can in merits cases. While needing an immediate answer may be justified in some cases, postponing the decision-making and forcing the case to travel the well-beaten path of the merits docket might produce more well-reasoned results.

D. *Converting the Shadow Docket to a Mini-Merits Docket*

As discussed above, the Court's standard for emergency or extraordinary relief does not just focus on the case's merits. The justices have to act quickly and decide based on shorter briefs, likely with no oral argument, and the final product is usually an order with little to no explanation. However, it appears that the shadow docket has become a sort of mini-merits docket because of the way the justices have applied the traditional factors in deciding to grant relief or not—or, rather, how

97. Baude, *supra* note 8, at 8.

98. Hamm v. Reeves, 142 S. Ct. 743, 743 (2022).

99. *Id.* at 743.

100. *Id.*

101. *Supreme Court Docket No. 21A372, Hamm v. Reeves*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/21a372.html.

102. *Id.*

103. *Alabama Executed Man After Divided Supreme Court Sided with the State*, NPR (Jan. 28, 2022, 5:05 AM), https://www.npr.org/2022/01/27/1076279635/supreme-court-clears-the-way-for-the-execution-of-an-alabama-inmate.

104. *Hamm*, 142 S. Ct. at 743.

the justices have seemingly ignored the traditional test and instead, are wholly focusing on the merits.

Consider again *South Bay United Pentecostal Church v. Newsom*,[105] where California imposed a total ban on religious worship services in the face of the COVID-19 pandemic.[106] *South Bay* produced four statements from the six justices in the majority, but none of them seemed to apply the traditional four-factor test for granting an injunction.[107] Rather, the justices focused on the merits of the First Amendment dispute and ignored the other factors of the test.[108] The Court used the shadow docket, which requires decisions to be made quickly on scant information (compared to the merits docket) and often produces short orders without explanation, to rule on critical constitutional questions concerning the First Amendment.[109] Significant, influential constitutional questions ought to be considered out of the shadows and afforded the opportunity to be shaped by interested parties (e.g., amicus curiae briefs).

The Court decided another significant question of constitutional law that turned out to be unnecessary in *Roman Catholic Diocese of Brooklyn v. Cuomo*.[110] There, the Court enjoined New York's COVID-19 restrictions (which were no longer in effect) on the ground that they violated the First Amendment.[111] In effect, the Court decided a constitutional issue prematurely before the case went through the courts. However, the Court repeatedly stated that it is "a court of review, not of first review" and that the Court is "not in the business of volunteering new rationales neither raised nor addressed below."[112] The Court also stated that "[e]nsuring that an issue has been fully litigated allows the court the benefit of developed arguments on both sides and lower court opinions squarely addressing the question."[113]

Further, requiring the case to travel the path of the merits docket

105. 141 S. Ct. 716 (2021).

106. *Id.* at 717 (Gorsuch, J., statement).

107. *See id.* at 716–20 (Roberts, C.J., concurring; Barrett, J., concurring; Gorsuch, J., statement; Kagan, J., dissenting). *Cf.* Nken v. Holder, 556 U.S. 418, 434 (2009) (providing the four-factor test used to determine whether to implement an injunction).

108. *See S. Bay United Pentecostal Church*, 141 S. Ct. at 717 (Gorsuch, J., statement) ("When a State so obviously targets religion for differential treatment, our job becomes that much clearer. As the Ninth Circuit recognized, regulations like these violate the First Amendment unless the State can show they are the least restrictive means of achieving a compelling government interest.").

109. *Id.* at 716 (Kagan, J., in chambers); Nina Totenberg, *The Supreme Court and 'The Shadow Docket.'* NPR (May 22, 2023, 5:00 AM), https://www.npr.org/2023/05/22/1177228505/supreme-court-shadow-docket.

110. 141 S. Ct. 63 (2020) (per curiam).

111. *Id.* at 68.

112. Mitchell v. Wisconsin, 139 S. Ct. 2525, 2546 (2019) (Sotomayor, J., dissenting) (critiquing the majority's analysis and holding).

113. *Id.*

"begets more informed decision-making by the Court and ensure[s] greater fairness to litigants, who cannot be expected to respond pre-emptively to arguments that live only in the minds of the justices."[114] By answering such central constitutional questions via the shadow docket in *Roman Catholic Diocese* and *South Bay*, the Court left the well-traveled path of the merits docket for the shadows, where there is comparably less procedural protection and informed decision-making. By doing so, the Court is sending a message that the merits are the main consideration in emergency applications despite the *Nken* test, weakening the standard and making it easier for future applicants to get emergency relief even when it may not be warranted.

II. LEGITIMACY, TRANSPARENCY, AND PRECEDENT

The Framers of the U.S. Constitution believed that concentrating the powers of the government in a single entity would subject the people to an oppressive government.[115] In response to this concern, the Framers separated the basic functions of the government into three branches: legislative, executive, and judicial.[116] This principle has become known as the separation of powers, and although those exact words are not expressly in the Constitution, the Constitution vests the legislative power in Congress,[117] the executive power in the President,[118] and the judicial power in the Supreme Court and any lower courts created by Congress.[119] The Framers placed checks and balances to ensure no branch aggrandized too much power.[120] For example, the President has the power to veto legislation passed by Congress, but Congress may overrule that veto by a supermajority vote of both houses.[121]

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114. *Id.*

115. *See* THE FEDERALIST NO. 47 (James Madison) ("[T]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether or one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.").

116. *Id.* ("The preservation of liberty requires that the three great departments of power should be separate and distinct.").

117. U.S. CONST. art. I, § 1.

118. U.S. CONST. art. II, § 1.

119. U.S. CONST. art. III, § 1. *See also* BLACK'S LAW DICTIONARY 1572 (10th ed. 2014) (defining "separation of powers" as the "division of governmental authority into three branches of government—legislative, executive, and judicial—each with specified duties on which neither of the other branches can encroach").

120. *See* THE FEDERALIST NO. 51 (James Madison) ("But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack.").

121. U.S. CONST. art. I, § 7, cl. 3.

Compared to the explicit checks on the legislature and executive,[122] checks on the judiciary are less pronounced. The President indeed checks the judiciary through the power of appointment.[123] However, another less explicit check on the judiciary lies in Article VI: "judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this Constitution."[124] The Court is effectively a check on itself. By taking an oath to uphold and support the Constitution, judges and justices submit to check themselves to ensure that the judiciary is in line with the Constitution and its ultimate meaning.[125] As a result, the judiciary's legitimacy is vital. The Court's duty to check itself directly correlates to its legitimacy. The Court abides by its constitutional duty by producing reasoned decisions faithful to the Constitution that, in turn, foster the people's trust in it as an institution, which determines its legitimacy.

A. *Supreme Court Legitimacy*

As the Court iterated in *Planned Parenthood v. Casey*,[126] "the Court cannot buy support for its decisions by spending money and, except to a minor degree, it cannot independently coerce obedience to its decrees."[127] The Court does not have a standing military awaiting its call to enforce the law it has just declared.[128] The Court cannot exercise the power of the purse and indirectly force compliance with its declarations.[129] The Court does not benefit from the legitimacy of an electoral vote, either. 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."[130] The Court's authority is derived from the people and the

122. *Compare* U.S. CONST. art. I, § 9, cl. 7 *and* U.S. CONST. art. I, § 8, cl. 1 (granting Congress the power of the purse, to control the money used to fund executive actions), *with* U.S. CONST. art. II, § 2 (granting the President the power to appoint federal officials, but the Senate confirms those nominations).

123. U.S. CONST. art. I, § 2.

124. U.S. CONST. art. VI.

125. *Id.*

126. 505 U.S. 833 (1992).

127. *Id.* at 865.

128. U.S. CONST. art. II, § 2, cl. 1. (delegating the power to command the military to the President).

129. The power of the purse is solely vested in the Congress as declared in the United States Constitution. *See* U.S. CONST. art. I, § 9, cl. 7 (giving Congress the power to control the spending of money from the Treasury); U.S. CONST. art. I, § 8, cl. 1 (granting the federal government of the United States its power of taxation).

130. Planned Parenthood v. Casey, 505 U.S. 833, 865 (1992).

Court's ability to make reasoned decisions.[131] Thus, the Court must be sure its decisions and behavior on the bench align with relevant and accepted public norms and the Constitution, lest it risks losing its legitimacy.

This concept is not new. Justice Frankfurter argued in *Baker v. Carr*[132] that the Court must nourish the public perception.[133] In his own words:

> The Court's authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court's complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements.[134]

In fact, the idea of the Court's legitimacy resting in the people and the Court's reasoned judgments dates back as far as 1788 when Alexander Hamilton said in The Federalist Papers No. 78, "[the judiciary] may truly be said to have neither FORCE nor WILL, but merely judgment."[135] In a sense, the Court's legitimacy stems from institutional loyalty and the "perception of the Court as a symbol of justice and liberty."[136] This symbolism is important because legitimacy and loyalty are intertwined. As long as the Court continues to symbolize justice and hand down reasoned decisions that are generally in line with the public view while staying faithful to the law, its legitimacy is safe because the people value the Court's status, reasoned judgment, and loyalty.[137]

B. *The Shadow Docket Threatens the Court's Legitimacy*

Despite generally faring well in the public's perception, the Court's legitimacy risks being compromised by its increased activity on the

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131. *See* United States v. Butler, 297 U.S. 1, 62–63 (1936) ("All that the court does or can do in such cases is to announce its considered judgment upon the question."); *see also* Luis Fuentes-Rohwer, *Taking Judicial Legitimacy Seriously*, 93 CHI.-KENT L. REV. 505, 519 (2018) [hereinafter Fuentes-Rohwer].

132. 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting).

133. *Id.*

134. *Id.*

135. THE FEDERALIST NO. 78 (Alexander Hamilton).

136. Fuentes-Rohwer, *supra* note 131, at 508.

137. *See* Fuentes-Rohwer, *supra* note 131, at 508–09 ("Courts are special, they are different, and it is for those reasons that they are respected and their edicts are obeyed."); Gregory A. Calderia & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635, 635 (1992) ("Still, the Supreme Court has traditionally fared well in the estimations of the public, especially in comparison with other political institutions."); James L. Gibson, *Challenges to the Impartiality of State Supreme Courts: Legitimacy Theory and "New Style" Judicial Campaigns*, 102 AM. POL. SCI. REV. 59, 60 (2008) (discussing the role that partiality has on the confidence citizens have in their courts).

shadow docket. The Court's legitimacy fails when the people view it as just another political institution instead of the non-partisan branch that the Constitution deliberately insulated from political influences. The Framers found it necessary for judges to apply the law freely and fairly without interference from the other branches of government.[138] The shadow docket produces unsigned and unexplained decisions that affect Americans and thus "exacerbates charges—fair or not—that the Justices are increasingly beholden to the politics of the moment rather than broader jurisprudential principles."[139] These decisions do not follow the normative procedural safeguards usually in place for merits decisions despite often focusing on the merits, and they often do not provide insight into how the justices decided.[140] It is destructive and destabilizing when the people begin to lose faith in their institutions.[141] Trust is essential because it builds the foundation of legitimacy.[142] The rise in the shadow docket's unexplained and often unsigned opinions threatens the people's trust in the judiciary.[143] What was once a rarely used emergency docket with an established list of factors used to determine whether to grant relief has become widely used in cases affecting many Americans.[144] This change has gone unexplained, which erodes the trust of the people.

Further, the Court increasingly granted emergency relief where a state or the federal government is a party in publicly divisive cases.[145] This increase, combined with the fact that there has been an increase in the

138. *See* Martin H. Redish, *Federal Judicial Independence: Constitutional and Political Perspectives*, 46 MERCER L. REV. 697, 697 (1995) (discussing various perspectives regarding the federal judicial branch's independence); Christopher M. Larkins, *Judicial Independence and Democratization: A Theoretical and Conceptual Analysis*, 44 AM. J. COMP. L. 605, 606 (1996) (analyzing the relationship between the federal judicial branch's independence and democratization).

139. Statement of Stephen Vladeck, *supra* note 7, at 17.

140. *Id.* at 1–2.

141. *See Public's Views of Supreme Court Turned More Negative Before News of Breyer's Retirement*, PEW RSCH. CTR. (Feb. 2, 2022), https://www.pewresearch.org/politics/2022/02/02/publics-views-of-supreme-court-turned-more-negative-before-news-of-breyers-retirement/ ("In a national survey by Pew Research Center, 54% of U.S. adults say they have a favorable opinion of the Supreme Court while 44% have an unfavorable view.").

142. *See Trust in Government*, OECD, https://www.oecd.org/gov/trust-in-government.htm (last visited Nov. 19, 2023) ("[Public trust] also nurtures political participation, strengthens social cohesion, and builds institutional legitimacy.").

143. *See* Statement of Stephen Vladeck, *supra* note 7, at 6 ("The public usually has no idea how many Justices voted for a specific outcome (let alone *which* Justices.").

144. *Id.* at 3–5 (explaining that, from 2001-2017, the Justice Department sought emergency relief from the Supreme Court eight times and the Court only granted four of those requests, while the Trump administration sought emergency relief from the Supreme Court forty-one times in four years and the Court granted twenty-four of those requests in full or in part).

145. *See id.* at 5 ("[B]oth in cases in which the Solicitor General sought emergency relief and otherwise, the shadow docket has become far more publicly divisive in recent years.").

amount of shadow docket decisions producing public dissents where the federal government is involved, perhaps indicates political motives. This political split indicates to many that the Court is, or is in the process of becoming, just another political branch. Professor Vladeck observed that the justices tend to split along conventional ideological lines in recent shadow docket decisions "with the progressives on one side, one bloc of conservatives consistently on the other, and one or two of the conservative Justices occasionally voting with the progressives."[146] Professor Vladeck further expounded in an interview with NPR that the recent Texas abortion ruling,[147] where the Court declined to intervene by a 5-4 vote, is most troubling when compared to other shadow docket cases where the Court intervened on weaker claims.[148] The problem, according to Professor Vladeck:

> is that by . . . [declining to intervene], in contrast to what it had done in other cases and by not really explaining why the Texas case was different from the California or New York cases, the court at least leaves the impression that the relevant difference is red state, blue state as opposed to intervention, nonintervention.[149]

Moreover, the shadow docket orders are not explained and are missing "the rationale that would allow us to give these orders legal legitimacy," which would persuade the people that even if they disagree with the outcome, the decision "smacks of legal principle as opposed to just partisan politics."[150] The Court's legitimacy, which depends on the people's perception of its integrity, is being compromised by these inconsistent, unseen, unsigned, and unexplained decisions that disrupt the lives of many Americans.

C. *Transparency and Precedential Effect*

Two interrelated topics are connected with the Court's legitimacy and the increase in shadow docket decisions: transparency and precedential effect. Without the kind of transparency and deliberation expected from the Court, the shadow docket produces real decisions that often have substantive implications for many Americans. The Court's transparency "is at its highest point when it deals with the merits cases" because

146. *Id.* at 6.

147. Whole Woman's Health v. Jackson, 141 S. Ct. 2494 (2021).

148. *See* Steve Inskeep & Stephen Vladeck, *Examining the Supreme Court's Use of Emergency Applications*, NPR (Oct. 7, 2021, 7:20 AM), https://www.npr.org/2021/10/07/1043938022/examining-the-supreme-courts-use-of-emergency-applications; Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 68 (2020) (per curiam); S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716 (2021).

149. Inskeep & Vladeck, *supra* note 148.

150. *Id.*

"[o]bservers know in advance what cases the Supreme Court will decide, and they know how and when the parties and others can be heard."[151] The Court's rules for voting are available online, and the public knows that the Court will explain the merits of its decisions in reasoned written opinions.[152] The Court follows a "longstanding protocol for when it hands down" those written opinions, increasing public awareness and access to its decisions.[153] This consistency and transparency further support the Court's legitimacy by making it easier to accept the results of its processes because the people know what to expect. Conversely, the shadow docket lacks procedural regularity. These decisions are expedited, without oral argument, and often released at all times of the day.[154] The Court dispenses its usual transparency, leaving the people in the shadows.

Consistent transparency leads to reliance, which is essential in our judicial system. As the Court said in *Marbury v. Madison*,[155] "[i]t is emphatically the province and duty of the judicial department to say what the law is."[156] The Court declares what the law is, and lower courts have a "duty to obey hierarchical precedent [that] tracks the path of review followed by a particular case as it moves up the three federal judicial tiers: A court must follow the precedents established by the court(s) above it."[157] This idea that the lower courts abide by precedent is foundational to the American judicial system and stems from the English common law.[158] Sir Blackstone explained that:

> For it is an established rule to abide by former precedents, where the same points come again in litigation: as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion; as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from according to his private sentiments: he being sworn to determine, not according to his own private judgement, but according to the known laws and customs of the land; not delegated to

151. Baude, *supra* note 8, at 9–10.

152. *Id.* at 10.

153. *See* Statement of Stephen Vladeck, *supra* note 7, at 14.

154. *See id.* at 13–14 (describing how the Court handed down rulings in shadow docket cases as early (or late) as 2:46 AM EST).

155. 5 U.S. 137, 177 (1803).

156. *Id.*

157. Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 824 (1994).

158. Trevor N. McFadden & Vetan Kapoor, *The Precedential Effects of the Supreme Court's Emergency Stays*, 44 HARV. J.L. & PUB. POL'Y 827, 843 (2021).

> pronounce a new law, but to maintain and expound the old one.[159]

Blackstone further intimated that "[t]he doctrine of law then is this: that precedent and rules must be followed" unless they were unjust, because deference is owed to "former times as not to suppose that they acted wholly without consideration."[160] Judges and justices—who take an oath to uphold the Constitution and whose legitimacy depends on their ability to determine and apply the law reasonably—look to other judges and justices above them in the judicial hierarchy for guidance.[161] Ultimately, judges and justices are "sworn to determine [cases], not according to [their] own private judgment" but according to the precedent crafted by those above them.[162] The swearing-in is critical to taking the Article VI oath and becoming a judge or justice. Thus, it is vital to the lower court's ability to follow precedent that the Court is clear in its decisions because "it is difficult for the lower courts to follow the Supreme Court's lead without an explanation of where they are being led."[163] The increase in significant shadow docket rulings has brought with it questions as to their precedential effect—are these unexplained orders precedential?

The Court itself has been of little help in answering this question. In *Lunding v. N.Y. Tax Appeals Tribunal*,[164] the Court 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" but they do not "have the same precedential value . . . as does an opinion of this Court after briefing and oral argument on the merits."[165] Yet, the Court has cited its shadow docket decisions in later cases.[166] If the Court did not think these orders had precedential value, why cite them in other cases? Despite the Court's declaration that these orders do not have the same precedential value as merits decisions, the Court's Justices have indicated that they expect lower courts to follow whatever precedential value they *do* have.[167] For

159. WILLIAM BLACKSTONE, *Book I*, in COMMENTARIES ON THE LAWS OF ENGLAND 69 (1893).

160. *Id.* at 70.

161. *Id.* at 69. In terms of Supreme Court Justices, because there are no judges above them in the judicial hierarchy they can, but are not required to, look to judges below them for guidance.

162. *Id.*

163. Baude, *supra* note 8, at 14.

164. 522 U.S. 287 (1998).

165. *Id.* at 307 (quoting Washington v. Confederated Bonds & Tribes of Yakima Indian Nation, 439 U.S. 463, 477 n.20 (1979)).

166. *See* Tandon v. Newsom, 141 S. Ct. 1294, 1296–97 (2021) (citing Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 67–70 (2020) (per curiam)).

167. *See* S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 719 (2021) (Gorsuch, J., statement) ("[T]he lower courts in these cases should have followed the extensive guidance

example, Justice Gorsuch explained that the Court's shadow docket order in the *Diocese of Brooklyn*[168] case "made it abundantly clear" that COVID-related restrictions on worship similar to New York's "fail strict scrutiny," and "the lower courts in these cases should have followed the extensive guidance this court already gave."[169]

Moreover, the Court began issuing grant, vacate, and remand (GVR) orders in light of its *Diocese of Brooklyn* shadow docket decision.[170] A GVR order occurs when the Court "'grants certiorari, vacates the decision below, and remands' a case to the lower court."[171] These orders typically follow a merits decision with significant implications for other cases.[172] Therefore, the Court's decision to issue a GVR in light of a shadow docket decision arguably indicates that the justices expected the decision to have precedential weight.

Lower courts struggle with what value to give to the Court's shadow docket orders. Even judges within the same circuit disagree on how to view these decisions. For example, the Fourth Circuit was divided over how to handle a recent shadow docket ruling and what precedential weight to give it in *Casa de Maryland, Inc. v. Trump*.[173] The *Casa de Maryland* majority regarded the Court's previous shadow docket order granting the government's application to stay the preliminary injunctions as precedential.[174] The majority went on to say:

> We may of course have the technical authority to hold that, notwithstanding the Supreme Court's view, the plaintiffs are likely after all to succeed on the merits of their challenge. But every maxim of prudence suggests that we should decline to take the aggressive step of ruling that the plaintiffs here are in fact likely to succeed on the merits right upon the heels of the Supreme Court's stay order necessarily concluding that they were unlikely to do so. Such a step

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this Court already gave."); Harry Isaiah Black & Alicia Bannon, *The Supreme Court 'Shadow Docket'*, BRENNAN CTR. FOR JUST. (July 19, 2022), https://www.brennancenter.org/our-work/research-reports/supreme-court-shadow-docket ("The Court has sent mixed signals, suggesting that such decisions are of little precedential value, while also rebuking the Ninth Circuit Court of Appeals for not following four prior Supreme Court rulings involving California Covid-19 restrictions — all of which were shadow docket orders.").

168. *Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 68.

169. S. Bay United Pentecostal Church, 141 S. Ct. at 719.

170. *See* Harvest Rock Church, Inc. v. Newsom, 141 S. Ct. 889, 889 (2020).

171. Erin Miller, *Glossary of Supreme Court Terms*, SCOTUSBLOG (Dec. 31, 2009, 8:04 PM), https://www.scotusblog.com/2009/12/glossary-of-legal-terms/.

172. *See* Sara C. Benesh et al., *Supreme Court GVRs and Lower-Court Reactions*, 35 JUST. SYS. J. 162, 165 (2014) ("The Court may also choose to place a stronger "hold" on the case, postponing the cert decision until the Court issues a ruling in a similar case to which they have decided to give plenary hearing.").

173. 971 F.3d 220, 229–30 (4th Cir. 2020), *reh'g granted* 981 F.3d 311, 314 (4th Cir. 2020).

174. *Id.*

> would require powerful evidence that the Supreme Court's stay was erroneously issued.[175]

However, the dissent regarded the Court's shadow docket order as a "perfunctory stay order[]" that did not "put a thumb on the scale in favor" of anyone.[176] On the other hand, more in line with the *Casa de Maryland* majority, the United States District Court for the District of Columbia cited a Supreme Court shadow docket order (*Barr v. Lee*)[177] and declared it was bound by the Supreme Court's holding there.[178] Yet a district court in Washington "declined to speculate on the reasons for the Supreme Court's" shadow docket decision, which it called "devoid of any analysis."[179]

The weight of the Court's shadow docket decisions—how the lower courts should view or use them or how the Court considers their precedential value—is still largely unknown. It is clear, however, that the lower courts and scholars are recognizing the issue of what exactly shadow docket orders mean in the realm of precedent,[180] a question that is arguably of utmost importance considering the oath judges and justices take and the fact the Court's legitimacy depends on its ability to hand down reasoned decisions with the capability to lead lower courts in applying the law.

D. *Proposed Suggestions*

Several scholars I agree with wrote on how the Court can improve its shadow docket practice.[181] Most importantly, the Court should carefully consider and explain the precedential value of shadow docket opinions and exercise due care in explaining each order. As justices who took the Article VI oath and as a Court that depends on the public for its

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175. *Id.* at 230.

176. *Id.* at 281 n.16 (King, J. dissenting).

177. *In re* Fed. Bureau of Prisons' Execution Protocol Cases, 474 F. Supp. 3d 171, 180 (D.D.C. 2020), *vacated sub nom.* Barr v. Purkey, 141 S. Ct. 196, 207 L. Ed. 2d 1128 (2020), and *vacated sub nom. In re* Fed. Bureau of Prisons' Execution Protocol Cases, No. 20-5206, 2020 WL 6778420 (D.C. Cir. July 22, 2020).

178. *Id.*

179. Doe v. Trump, 284 F. Supp. 3d 1172, 1180–81 (W.D. Wash. 2018).

180. Judge Trevor McFadden, who sits on the U.S. District Court for the District of Columbia, wrote extensively on the issue and proposed a three-tier system to help courts evaluate the precedential value of Supreme Court shadow docket decisions. *See generally* McFadden & Vetan, *supra* note 158.

181. *See* McFadden & Kapoor, *supra* note 158, at 849 (suggesting three factors a lower court may use to determine what effect shadow docket decisions have); Edward L. Pickup & Hannah L. Templin, *Emergency-Docket Experiments*, 98 NOTRE DAME L. REV. REFLECTION 1, 33 (2022) (suggesting oral arguments for shadow docket cases); Statement of Stephen Vladeck, *supra* note 7, at 33 (suggesting codifying the traditional four-factor test that the Court applies in considering applications for emergency relief).

legitimacy, the justices should strive to hear the people's concerns and address the shadows around emergency applications. Lower courts have a duty to follow the Court's precedent, which is impossible when there is no explanation coupled with conflicting interpretations on the weight of shadow docket orders. Further, the Court should adopt a clear standard for emergency relief, whether it's the *Nken* test described above or a variation thereof.

CONCLUSION

The Court drastically increased its use of the shadow docket—a docket traditionally used to issue emergency decisions after assessing the petition in light of a four-factor test.[182] This docket transformed into a mini-merits docket, sometimes rising and falling exclusively on the merits even when the "emergency" alleged is not so emergent. The shadow docket orders are often void of explanation, perpetuating uncertainty in the lower courts and among the people. Such uncertainty is caused by a lack of transparency—transparency that is expected of the Court because of its established merits procedures—that threatens the Court's legitimacy, which depends on the public perception of the Court as a non-partisan branch of the government charged with interpreting the laws in accordance with the Constitution.

Increasingly, the Court utilizes its shadow docket to make decisions (such as stays) that arguably hold precedential value.[183] By choosing to forego explanations and often signatures of who agrees or disagrees, the Court is imposing significant challenges on the lower courts in determining what sort of value they should give these shadow docket decisions. Further, the Court indicated that its shadow docket decisions have at least *some* precedential value despite the expedited procedure, lack of oral argument, and little to no explanation.[184] The shadow docket has significant pitfalls ranging from its lack of transparency, which threatens the Court's legitimacy, to its procedural irregularity and questionable precedential value.

182. *See infra* Section I.B.

183. *See infra* Section II.C.

184. *See, e.g.*, S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 719 (2021) (Gorsuch, J., statement); Harvest Rock Church, Inc. v. Newsom, 141 S. Ct. 889, 889 (2020).