Notre Dame Law Review Reflection

Volume 98 | Issue 1 Article 1

2022

Emergency-Docket Experiments

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Recommended Citation
Edward L. Pickup & Hannah L. Templin, *Emergency-Docket Experiments*, 98 Notre Dame L. Rev. Reflection 1 ().
Available at: https://scholarship.law.nd.edu/ndlr_online/vol98/iss1/1

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EMERGENCY-DOCKET EXPERIMENTS

Edward L. Pickup & Hannah L. Templin***

The Supreme Court's emergency docket is no longer relegated to the shadows.[1] Recently, commentators,[2] congressmen,[3] a Presidential Commission on the Supreme Court,[4] and dissenting Justices have scrutinized the so-called shadow docket.[5] Its defenders are equally vocal: Justice Alito has insisted that the criticism is much ado about nothing.[6]

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We thank Will Baude and Josh Blackman for commenting on earlier drafts and to Grier Barnes, Alexi Ehrlich, and José Giron for their excellent editing and suggestions.

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

2 *See, e.g.*, Adam Liptak, *Missing from Supreme Court's Election Cases: Reasons for Its Rulings*, N.Y. TIMES (Oct. 26, 2020), https://www.nytimes.com/2020/10/26/us/supreme-court-election-cases.html [https://perma.cc/NG4H-PCSY]; Stephen I. Vladeck, *The Supreme Court Is Making New Law in the Shadows*, N.Y. TIMES (Apr. 15, 2021), https://www.nytimes.com/2021/04/15/opinion/supreme-court-religion-orders.html [https://perma.cc/M8M5-PASX].

3 *See, e.g.*, *The Supreme Court's Shadow Docket: Hearing Before the Subcomm. on Cts., Intell. Prop., & the Internet of the H. Comm. on the Judiciary*, 117th Cong. (2021) (testimony of Stephen I. Vladeck, Charles Alan Wright Chair in Federal Courts, University of Texas School of Law); *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 Stephen I. Vladeck, Charles Alan Wright Chair in Federal Courts, University of Texas School of Law) [hereinafter *Vladeck Statement*].

4 *See* PRESIDENTIAL COMM'N ON THE SUPREME COURT OF THE U.S., DRAFT FINAL REPORT 203–09 (2021).

5 *See, e.g.*, Barr v. E. Bay Sanctuary Covenant, 140 S. Ct. 3, 6 (2019) (Sotomayor, J., dissenting) (criticizing her colleagues for failing to "exercise[] . . . restraint" in granting the government's application for a stay); Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2500 (2021) (Kagan, J., dissenting) ("[T]his Court's shadow-docket decisionmaking . . . every day becomes more unreasoned, inconsistent, and impossible to defend."); Merrill v. Milligan, 142 S. Ct. 879, 883 (2022) (Kagan, J., dissenting).

6 *See* Katie Barlow, *Alito Blasts Media for Portraying Shadow Docket in "Sinister" Terms*, SCOTUSBLOG (Sept. 30, 2021, 6:59 PM), https://www.scotusblog.com/2021/09/alito-

All the hubbub is understandable: litigants are asking for emergency relief more frequently. The Solicitor General, for instance, filed more stay applications during the Court's 2018 Term than in the entirety of the Bush and Obama administrations.[7] Often, emergency applications touch important and divisive topics—nationwide injunctions against important federal policies,[8] quickly shifting COVID restrictions,[9] or 2020 election rules,[10] to name a few. Indeed, the Court has recently resolved emergency cases on abortion,[11] religious freedom,[12] public health,[13] and presidential power.[14]

Decisions on charged issues inevitably invite attention; scrutiny only increases when those issues are tackled in an emergency posture. That is because emergency cases get much less process than the Court's merits cases. Merits cases are the seventy or so cases each Term in which the Justices hear oral argument and issue a written "opinion of the Court."[15] Those cases involve at least two full rounds of briefing, are argued in public, and are resolved in reasoned opinions.[16] By contrast, emergency cases get one round of briefing, are almost never argued, and rarely get reasoned opinions.[17] This rushed process is a byproduct of urgency. Emergency cases are often pleas for the Court to stop judicial or executive decisions from going into effect. If the Court does not act fast, it may be too late to make a difference.

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blasts-media-for-portraying-shadow-docket-in-sinister-terms [https://perma.cc/EEH2-CD4S].

7 Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123, 125 (2019).

8 *Id.*

9 *Table—COVID-19 U.S. Supreme Court Judicial Rulings*, NETWORK FOR PUB. HEALTH L., https://www.networkforphl.org/resources/covid-19-related-opinions-and-orders-from-the-u-s-supreme-court (last updated July 22, 2022) [https://perma.cc/74XS-6D8V].

10 *2020 Election Litigation Tracker*, SCOTUSBLOG, https://www.scotusblog.com/election-litigation (last visited Nov. 2, 2022) [https://perma.cc/9UP3-V24A].

11 *See, e.g.*, *In re* Whole Woman's Health, 142 S. Ct. 701 (2022) (mem.); Whole Woman's Health v. Jackson, 141 S. Ct. 2494 (2021); FDA v. Am. Coll. of Obstetricians & Gynecologists, 141 S. Ct. 578 (2021) (mem.).

12 *See, e.g.*, S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613 (2020); Dunn v. Smith, 141 S. Ct. 725 (2021) (mem.); Tandon v. Newsom, 141 S. Ct. 1294 (2021) (per curiam).

13 *See, e.g.*, Chrysafis v. Marks, 141 S. Ct. 2482 (2021) (mem.); Dr. A v. Hochul, 142 S. Ct. 552 (2021) (mem.); Does 1–3 v. Mills, 142 S. Ct. 17 (2021) (mem.).

14 *See, e.g.*, Trump v. Thompson, 142 S. Ct. 680 (2022) (mem.); Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2320 (2021) (mem.); Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485 (2021) (per curiam).

15 *Vladeck Statement*, *supra* note 3, at 2.

16 *See id.*

17 *See id.* at 16–18.

Problems with the emergency docket have been hotly debated for years. Critics have charged that emergency cases get too little process, that they are disposed of with rushed reasoning, and that the Court's decisionmaking is not transparent enough.[18] But the Justices are beginning to take action. During the 2021 Term, they have handled several high-profile emergency-docket cases differently.

Three developments are particularly noteworthy. First, in *Ramirez v. Collier*, the Court transferred a death-row inmate's emergency petition to its merits docket, giving his case full consideration.[19] Second, in two cases challenging the Biden Administration's vaccine mandates, the Court scheduled oral argument on applications to stay government rules for the first time in decades.[20] Third, some Justices have experimented with the Court's test for issuing emergency relief, suggesting that they may be more reluctant to intervene in future emergency cases.[21]

Standing alone, these innovations are not unprecedented. The Court has—albeit rarely—argued emergency cases or transferred them to the merits docket.[22] But it is noteworthy that these latest interventions have come at the same time, as part of a package seemingly tailor-made to address emergency-docket critics.

This short Essay is the first to analyze the Court's recent emergency-docket experiments and discuss their effectiveness. We conclude that the Court's interventions have real benefits: giving emergency cases greater procedure improves transparency, boosts public confidence in the Court, and gives guidance to litigants and lower courts.

But experiments are often iterative—it is unusual to hit the right result the first time. So too with the Court's emergency-docket tinkering. In tweaking its stay factors, the Justices have failed to give sufficient guidance to litigants about how those factors will apply in the future. Plus, in transferring *Ramirez* from the emergency docket to the merits docket, the Court made new law in an emergency posture and entered a remedy that the district court had not passed on. Those moves may well have stretched the bounds of the Court's appellate jurisdiction.

18 *See infra* Part I.

19 Ramirez v. Collier, 142 S. Ct. 50 (2021) (mem.); *see infra* Section II.A.

20 Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661, 664 (2022) (per curiam); Biden v. Missouri, 142 S. Ct. 647, 652 (2022) (per curiam); *see infra* Section II.B.

21 *See supra* note 20; Does 1–3 v. Mills, 142 S. Ct. 17, 18 (2021) (Barrett, J., concurring).

22 *See infra* Part III (discussing historic emergency-docket practices).

Yet those problems are not insuperable. We suggest that the Court should continue to argue emergency cases or transfer them to its merits docket. But in doing so, it should keep in mind the constraints on its authority and should provide greater guidance to lower courts and litigants.

The remainder of this Essay digs into the Court's emergency-docket experiments. Part I summarizes criticism of the emergency docket. Part II explains how the Court's recent experiments address those criticisms. Part III flags questions about these experiments. Finally, Part IV suggests tweaks to those experiments going forward.

I. EMERGENCY-DOCKET CRITIQUES

Critics of the emergency docket have three general concerns.

1. Procedural. Emergency-docket cases get much less procedure. Unlike cases on the traditional merits docket, emergency-docket cases do not get full briefing, argument, or amici participation.[23] Plus, the Justices have little time to analyze the issues: in the typical emergency-docket case they have just days to issue a decision.[24]

Take one of the earliest cases reconciling COVID-19 public-health orders with religious liberty, *South Bay United Pentecostal Church v. Newsom.*[25] There, petitioners asked for emergency relief in time for their Sunday service.[26] The Court denied that application just three days later.[27] Or consider one of the many challenges filed the week before the 2020 election, *Moore v. Circosta.*[28] There, a state legislature sought an injunction against an executive order loosening traditional election rules during the pandemic.[29] The parties briefed their complicated arguments in four days,[30] and the Court denied their application three days after that.[31] To illustrate just how short that turnaround

23 *See Vladeck Statement*, *supra* note 3, at 18.

24 *See id.* at 17.

25 S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613 (2020) (mem.).

26 *See* Emergency Application for Writ of Injunction at 5, S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613 (2020) (No. 19A1044).

27 *S. Bay United Pentecostal Church*, 140 S. Ct. at 1613 (2020).

28 Moore v. Circosta, 141 S. Ct. 46 (2020) (per curiam).

29 *See* Emergency Application for Injunction Pending Appeal at 1, Moore v. Circosta, 141 S. Ct. 46 (2020) (No. 20A72).

30 Emergency Application for Injunction Pending Appeal, Moore v. Circosta, 141 S. Ct. 46 (2020) (No. 20A72); Reply in Support of Emergency Application for Injunction Pending Appeal, Moore v. Circosta, 141 S. Ct. 46 (2020) (No. 20A72).

31 *Moore*, 141 S. Ct. at 46.

was: Justice Barrett joined the Court in the middle of briefing but could not "fully review the parties' filings" before the decision.[32]

Death penalty cases are even quicker. Often, the Court has just hours to decide whether to halt an execution[33]—barely enough time to spot hard legal issues, let alone resolve them. Challenges to restrictions on ministers in the execution chamber illustrate the problem. In 2019, the Court denied a stay of execution requested by a Muslim inmate whose imam was forbidden to attend his execution.[34] That decision drew immediate criticism.[35] So just a month later, the Court reversed course, granting a stay to a Buddhist prisoner who was denied his priest.[36] And it eventually decided that the issue was thorny enough to warrant full briefing and argument when the same issue reached their desks yet again.[37]

As these cases illustrate, the Justices rarely have time to thoroughly consider issues presented to them on the emergency docket. Often, they cannot rely on careful reasoning from the lower courts either: those courts may have had only days to rule too.[38] Thus, by their nature, emergency-docket rulings receive far less consideration than traditional merits cases.

2. Substantive. Critics also worry that emergency opinions are less thorough than the Court's typical work product. Emergency decisions are typically less meaty than their merits counterparts. While merits

32 Zach Montellaro & Josh Gerstein, *Supreme Court Spurns Republicans in North Carolina, Punts on Pennsylvania Ballot Case*, POLITICO (Oct. 28, 2020), https://www.politico.com/news/2020/10/28/barrett-pennsylvania-ballot-case-433449 [https://perma.cc/YE84-ZX4P].

33 *See* Baude, *supra* note 1, at 8; *see, e.g.*, Barr v. Lee, 140 S. Ct. 2590, 2590 (2020) (per curiam); Lee Kovarsky, *Abortion, the Death Penalty, and the Shadow Docket*, SCOTUSBLOG (Sept. 6, 2021, 12:03 PM), https://www.scotusblog.com/2021/09/abortion-the-death-penalty-and-the-shadow-docket [https://perma.cc/7G57-674Y].

34 *See* Dunn v. Ray, 139 S. Ct. 661, 661 (2019) (mem.).

35 *See, e.g.*, Nicole Kennedy & Collin Slowey, *What Can* Dunn v. Ray *Teach Us About Religious Freedom and Justice?*, INSTITUTIONAL RELIGIOUS FREEDOM ALL. (Mar. 18, 2019), https://irfalliance.org/what-can-dunn-v-ray-teach-us-about-religious-freedom-and-justice [https://perma.cc/B42W-2GTG]; Dahlia Lithwick, *An Execution Without an Imam*, SLATE (Feb. 8, 2019), https://slate.com/news-and-politics/2019/02/domineque-ray-alabama-execution-imam-first-amendment-scotus.html [https://perma.cc/5B6X-4KP2].

36 *See* Murphy v. Collier, 139 S. Ct. 1475 (2019) (mem.). The Court also granted a stay to a third inmate denied his priest. *See* Gutierrez v. Saenz, 141 S. Ct. 1260, 1261 (2021) (mem.).

37 Ramirez v. Collier, 142 S. Ct. 50, 50 (2021) (mem.); *see infra* Section II.A.

38 Often, emergency-docket cases are appealed up from rulings on preliminary injunctions. *See* Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123, 134–44 (2019); 28 U.S.C. § 1292 (2018) (interlocutory appeals of rulings on injunctive relief). The District Court has just weeks to rule on a preliminary injunction. *See* FED. R. CIV. P. 65.

opinions routinely span a dozen pages,[39] an emergency case might be disposed of in a few paragraphs.[40]

And in some emergency cases, the majority provides no reasoning at all.[41] Steve Vladeck notes that these naked orders "leav[e] not only the parties and lower courts but [also] other actors who might be affected by the decision . . . to speculate as to *why* the Court ruled the way it did" with no guidance.[42] Will Baude adds another concern: judicial accountability.[43] When the Justices write or sign thorough opinions, they are forced to assess the strengths and weaknesses of their views[44]—doing so puts their "reputation[s] on the line."[45] Indeed, Justice Barrett has admonished the public to read opinions before judging them.[46] But when the Justices act without explanation they give their critics extra ammunition.[47]

Even when the Justices do give reasons, their emergency opinions sometimes appear to change the underlying law, without acknowledging that change.[48] Consider a series of cases grappling with the tension between COVID restrictions and religious liberty.[49] Many court watchers thought those cases announced a new First-Amendment theory for the first time:[50] that "government regulations are not neutral and

39 *How to Read a U.S. Supreme Court Opinion*, AM. BAR ASS'N (May 4, 2022), https://www.americanbar.org/groups/public_education/publications/teaching-legal-docs/how-to-read-a-u-s-supreme-court-opinion [https://perma.cc/FXN2-CA9Y]; Adam Feldman, *Empirical SCOTUS: An Opinion Is Worth at Least a Thousand Words (Corrected)*, SCOTUSBLOG (Apr. 3, 2018, 12:03 PM), https://www.scotusblog.com/2018/04/empirical-scotus-an-opinion-is-worth-at-least-a-thousand-words [https://perma.cc/9X6Z-9VHK].

40 *See, e.g.*, S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613 (2020) (mem.); Trump v. Thompson, 142 S. Ct. 680 (2022) (mem.).

41 *Vladeck Statement*, *supra* note 3, at 16; Baude, *supra* note 1, at 3–4.

42 *Vladeck Statement*, *supra* note 3, at 16.

43 *See* Baude, *supra* note 1, at 17.

44 *See* Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, 1722–23 (2013).

45 Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133, 140 (1990); *see also* Baude, *supra* note 1, at 23.

46 Richard Pierce, *Justice Barrett Says: "Read the Opinion"—Justice Kagan Says: "Where Is the Opinion?"*, YALE J. REGUL. (Apr. 12, 2022), https://www.yalejreg.com/nc/justice-barrett-says-read-the-opinion-justice-kagan-says-where-is-the-opinion [https://perma.cc/Q2XN-QJNR]; *accord* Barrett, *supra* note 44, at 1723.

47 *See* Pierce, *supra* note 46; *Vladeck Statement*, *supra* note 3, at 17 (arguing that the Justices make themselves "more *in*accessible" when they do not give reasons); *accord* Baude, *supra* note 1, at 1.

48 We take no position on the merits of the opinions discussed in this section.

49 *See* S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613 (2020) (mem.); Tandon v. Newsom, 141 S. Ct. 1294 (2021) (per curiam).

50 Jim Oleske, Tandon *Steals* Fulton*'s Thunder: The Most Important Free Exercise Decision Since 1990*, SCOTUSBLOG (Apr. 15, 2021, 10:13 AM), https://www.scotusblog.com/2021/04/tandon-steals-fultons-thunder-the-most-important-free-exercise-decision-since-1990

generally applicable" if "they treat *any* comparable secular activity more favorably than [the] religious exercise" at issue.[51]

Similarly, in an emergency order staying an injunction directing Alabama to redo its redistricting, dissenting Justices accused the majority of changing the law.[52] Justice Kagan called the majority's decision "one more in a disconcertingly long line of cases in which this Court uses its emergency docket to signal or make changes in the law, without anything approaching full briefing and argument."[53] And Chief Justice Roberts refused to join the majority for the same reason.[54] Though he expressed disapproval of existing precedent, he thought that should be resolved on the merits, not previewed on the emergency docket.[55]

Theoretical changes are understandable. As the Court's composition changes,[56] the legal theories accepted by a majority also change.[57] But developments on the emergency docket are different, as the Justices themselves increasingly acknowledge.[58] And that makes sense. Why change the law without full briefing and argument in a hastily written opinion? Plus, because the precedential force of

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[https://perma.cc/U37M-HYS9]; Mark Joseph Stern, *The Supreme Court Broke Its Own Rules to Radically Redefine Religious Liberty*, SLATE (Apr. 12, 2021), https://slate.com/news-and-politics/2021/04/supreme-court-religious-liberty-covid-california.html [https: //perma.cc /5ZZF-V3ZX]; Stephen I. Vladeck, *The Supreme Court Is Making New Law in the Shadows*, N.Y. TIMES (Apr. 15, 2021), https://www.nytimes.com/2021/04/15/opinion/supreme-court-religion-orders.html [https://perma.cc/JK5H-CVWJ].

51 *Tandon*, 141 S. Ct. at 1296.

52 *See* Merrill v. Milligan, 141 S. Ct. 879, 883–89 (2022) (Kagan, J., dissenting); *id.* at 882 (Roberts, C.J., dissenting).

53 *Id.* at 889 (Kagan, J., dissenting).

54 *See id.* at 882–83 (Roberts, C.J., dissenting).

55 *Id.*

56 Laura Bronner & Elena Mejía, *The Supreme Court's Conservative Supermajority Is Just Beginning to Flex Its Muscles*, FIVETHIRTYEIGHT (July 2, 2021), https://fivethirtyeight.com/features/the-supreme-courts-conservative-supermajority-is-just-beginning-to-flex-its-muscles [https://perma.cc/8NC3-SBFC]; Kalvis Golde, *On a New, Conservative Court, Kavanaugh Sits at the Center*, SCOTUSBLOG (May 13, 2021, 11:59 AM), https://www.scotusblog.com/2021/05/on-a-new-conservative-court-kavanaugh-sits-at-the-center [https://perma.cc/G4MR-H6YF]; Angie Gou, *As Unanimity Declines, Conservative Majority's Power Runs Deeper Than the Blockbuster Cases*, SCOTUSBLOG (July 3, 2022, 8:21 PM), https://www.scotusblog.com/2022/07/as-unanimity-declines-conservative-majoritys-power-runs-deeper-than-the-blockbuster-cases [https://perma.cc/R25G-QAJA].

57 *See* Barrett, *supra* note 44, at 1729.

58 Thus, Justice Alito recently wrote that that when the Court considers a case in an emergency posture, it should make determinations "under 'existing law'" and not develop precedent in an emergency ruling. Netchoice, LLC v. Paxton, 142 S. Ct. 1715, 1716 (2022) (Alito, J. dissenting) (quoting Merrill v. Milligan, 142 S. Ct. 879, 882 (2022) (Roberts, C.J., dissenting)).

emergency cases is unclear, lower courts and litigants are left wondering how much weight to give such changes.

3. Precedential. Emergency-docket decisions are often the only guidance litigants and lower courts get from the Supreme Court. But it is not clear whether those decisions are binding.[59] The waters become murkier still when guidance comes—as it occasionally does—from a sole Justice's concurrence.[60]

Challenges to a federal eviction moratorium during the COVID pandemic illustrate the problem. Early in the pandemic, the Centers for Disease Control and Prevention had invoked its public health power to halt evictions.[61] A group of realtors said that moratorium exceeded the agency's authority.[62] Five Justices agreed—but a majority of the Court allowed the moratorium to stand.[63] Even though Justice Kavanaugh thought the moratorium was unlawful, he voted to keep it in place for prudential reasons.[64] Yet when another version of the moratorium was challenged, lower courts did not feel free to grant a stay, even though they knew that Justice Kavanaugh would flip his vote when the issue returned to the Court.[65] As D.C. District Judge Dabney Friedrich summarized it, "the votes of dissenting Justices may not be combined with that of a concurring Justice to create binding law."[66]

And recall the COVID religious-freedom litigation. In the first case to hit the Court, *South Bay United Pentecostal Church v. Newsom*, the majority denied injunctive relief, keeping California's COVID rules in place, but declined to explain its reasoning.[67] So for months, the only

59 *See* Trevor N. McFadden & Vetan Kapoor, *The Precedential Effects of the Supreme Court's Emergency Stays*, 44 HARV. J. L. & PUB. POL'Y 827, 828 (2021).

60 *See id.* at 831.

61 Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55292 (Sept. 4, 2020).

62 Emergency Application for a Vacatur of the Stay Pending Appeal Issued by the United States Dist. Ct. for the D.C., Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2320 (2021) (No. 20A169).

63 Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2320 (mem.); *id.* at 2320–21 (Kavanaugh, J., concurring).

64 *See id.* (Kavanaugh, J., concurring).

65 *See* Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2486, 2488 (2021) (per curiam).

66 Ala. Ass'n of Realtors v. U.S. Dep't of Health & Hum. Servs., 557 F. Supp. 3d 1, 10 (D.D.C. 2021). Judge Friedrich's colleague, Judge Trevor McFadden, attempted to devise standards for lower courts to consult in determining whether shadow-docket decisions are binding. *See* McFadden & Kapoor, *supra* note 59, at 832.

67 S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613 (2020) (mem.).

on-point opinion was a solo concurrence authored by Chief Justice Roberts.[68] Some courts followed his reasoning; others did not.[69]

The Supreme Court has suggested that emergency-docket decisions *may* be binding. *Tandon v. Newsom* chastened the Ninth Circuit for failing to follow earlier emergency-docket decisions.[70] And one of the vaccine-mandate decisions cited an eviction moratorium opinion.[71] Yet other cases hint that emergency-docket decisions do not bind: in a recent dissent from denial of a stay, Justice Alito acknowledged that "as is almost always the case when [the Court] decide[s] whether to grant emergency relief . . . further briefing and argument might convince [him] that [his] current view is unfounded."[72] Needless to say, confusion persists.

II. EXPERIMENTS DURING OT 2021

As critics of the emergency docket have grown louder, the Justices have taken note. During the 2021 Term, individual Justices—and sometimes the Court itself—experimented with solutions to common emergency-docket criticisms. This Part discusses three: (1) transferring more emergency cases to the merits docket, (2) arguing more stays, and (3) increasing the threshold for granting emergency relief.

A. *Emergency Docket to Merits:* Ramirez v. Collier

John Ramirez was convicted of murder and sentenced to death.[73] Having exhausted his appeals and collateral attacks, his execution date loomed.[74] Though Ramirez accepted his fate, he made one final request: that his pastor be allowed to lay hands on him throughout his execution.[75] But the prison refused, fearing that the pastor's presence

68 *Id.* at 1613–14 (Roberts, C.J., concurring).

69 *See, e.g.*, Calvary Chapel of Bangor v. Mills, 459 F. Supp. 3d 273, 284 (D. Me. 2020), *appeal dismissed*, 984 F.3d 21 (1st Cir. 2020), *cert. denied*, 142 S. Ct. 71 (2021); Cassell v. Snyders, 458 F. Supp. 3d 981, 994 (N.D. Ill. 2020), *aff'd*, 990 F.3d 539 (7th Cir. 2021); Elim Romanian Pentecostal Church v. Pritzker, 962 F.3d 341, 346 (7th Cir. 2020), *cert. denied*, 141 S. Ct. 1753 (2021); High Plains Harvest Church v. Polis, No. 20-cv-01480, 2020 WL 3263902, at *2 (D. Colo. June 16, 2020).

70 Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021) (per curiam).

71 Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661, 665 (2022) (per curiam) (quoting Ala. Ass'n of Realtors v Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021) (per curiam)).

72 Ritter v. Migliori, 142 S. Ct. 1824, 1824 (2022) (Alito, J., dissenting).

73 Ramirez v. Collier, 558 F. Supp. 3d 437, 439 (S.D. Tex. 2021).

74 *See id.*

75 *See id.*

could disrupt the execution.[76] So Ramirez filed a motion for a stay of his execution in federal district court.[77] The court denied his motion, the Fifth Circuit affirmed, and Ramirez filed a stay application in the Supreme Court.[78]

Though the spiritual stakes were high, Ramirez's case was procedurally straightforward. So we might have expected the Supreme Court to take a straightforward next step and rule on Ramirez's stay application. But the Court went one step further. In addition to granting a stay, it also granted certiorari to review Ramirez's case more closely (it eventually granted him a preliminary injunction against the prison's policy).[79]

That was an unusual move. True, Ramirez had filed an application for certiorari along with his stay application. But the normal course would have been for the Court to deal with his stay application, let a lower court decide the merits of his challenge, and only then, if necessary, grant certiorari. Instead, the Court took the case from its "shadow docket to [its] rocket docket," directing the parties to brief the issues on an expedited schedule.[80]

That decision was a striking attempt to tackle problems with the Court's emergency docket. Emergency cases are often dealt with quickly, without the benefit of full briefing and argument. Moving *Ramirez* to the merits docket gave the Court more time to consider the case. The Court's move was praised by commentators. Josh Blackman noted that "[d]eciding th[e] case on the merits would help settle the doctrine, and give guidance to the lower courts."[81] Amy Howe concurred, recognizing that the "last-minute respite [would] allow the justices to fully consider Ramirez's request."[82]

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76 *See id.* at 441.

77 *Id.* at 439.

78 Petition for a Writ of Certiorari, Ramirez v. Collier, 142 S. Ct. 50 (2021) (No. 21-5592); Application for a Stay of Execution, Ramirez v. Collier, 142 S. Ct. 50 (2021) (No. 21-5592).

79 Ramirez v. Collier, 142 S. Ct. 50 (2021) (mem.); Ramirez v. Collier, 142 S. Ct. 1264, 1284 (2022).

80 Josh Blackman, *SCOTUS Moves Capital Case from Shadow Docket to Rocket Docket*, VOLOKH CONSPIRACY (Sept. 9, 2021, 12:15 AM) (emphasis omitted), https://reason.com/volokh/2021/09/09/scotus-moves-capital-case-from-shadow-docket-to-rocket-docket [https://perma.cc/ME9K-RVV7].

81 *Id.*

82 Amy Howe, *Court Blocks Execution, Will Weigh in on Inmate's Religious-Liberty Claims*, SCOTUSBLOG (Sept. 8, 2021, 10:47 PM), https://www.scotusblog.com/2021/09/court-blocks-execution-will-weigh-in-on-inmates-religious-liberty-claims [https://perma.cc/EW2V-LNGX].

B. Full Argument on the Vaccine-Mandate Cases

The Supreme Court's emergency-docket experimentation did not stop with *Ramirez*. In two cases challenging President Biden's COVID vaccine mandates, the Court took the highly unusual step of ordering the parties to fully brief and argue their stay applications.[83]

In the first case, a motley collection of states and business groups challenged the Occupational Safety and Health Administration's (OSHA) vaccine mandate.[84] The agency stipulated that all large employers had to require employees to either be fully vaccinated against COVID or test and wear masks at work.[85] The challengers filed suit in every regional court of appeals, and the Fifth Circuit stayed enforcement of the rule pending review.[86] The cases were then consolidated in the Sixth Circuit, which dissolved the Fifth Circuit's stay.[87] So the challengers asked the Supreme Court to reinstate the stay pending review on the merits.[88]

The second case involved a challenge to a Department of Health and Human Services rule requiring all healthcare workers at hospitals participating in Medicare and Medicaid to get vaccinated.[89] States sued in various district courts asking for a stay.[90] Two courts granted the challengers' request.[91] Then the Biden Administration petitioned the Supreme Court to lift the stay, pending the Administration's appeal to the Eighth Circuit.[92]

Much like *Ramirez*, the ordinary course would have been for the Court to decide both stay applications on the briefing. But given the importance of the cases, the Court decided it needed more information. So it ordered the parties to argue their applications before the full Court.[93] That unusual move quickly piqued the interest of Court watchers. As one commentator put it, "The [Court's] decision . . . to hear oral argument on the emergency requests came as

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83 *See* Amy Howe, *Justices Will Hear Arguments on Jan. 7 in Challenges to Biden Vaccine Policies*, SCOTUSBLOG (Dec. 22, 2021, 8:55 PM), https:// www.scotusblog.com/2021 /12/justices-will-hear-arguments-on-jan-7-in-challenges-to-biden-vaccine-policies [https://perma.cc/6KZ9-ZJ7V].

84 Nat'l Fed. of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661, 662 (2022) (per curiam).

85 *See id.* at 662–64.

86 *Id.* at 664.

87 *Id.*

88 *Id.*

89 Biden v. Missouri, 142 S. Ct. 647, 650 (2022) (per curiam).

90 *Id.* at 651.

91 *Id.*

92 *Id.* at 652.

93 *See* Howe, *supra* note 83.

somewhat of a surprise: It seemed more likely that the [C]ourt would dispose of the requests with a brief order, as it normally does . . . ."[94]

Typically, the Court does not hear oral argument in emergency cases.[95] A petition to the Court for a stay or an injunction is formally presented to the Justice representing the circuit from which the petition originated.[96] That circuit Justice may either act on the petition alone or refer it to the full Court for consideration.[97] In some rare cases, the circuit Justice has granted in-chambers oral argument to get a better grip on the issues. Thus, in *Cousins v. Wigoda,* Justice Rehnquist held oral argument in chambers on a stay application because it "raised what seemed to [him] to be significant legal issues of importance not only to [the parties] but to the public as a whole."[98] But a Justice last heard in-chambers argument in 1980.[99] And only once has the full Court heard argument on a stay application: in the landmark administrative law case *Citizens to Preserve Overton Park, Inc. v. Volpe,* the full Court considered whether to grant a stay[100] before setting a second argument on the merits.[101] So the Court's decision to argue the vaccine-mandate stay was a break from recent practice.

Yet hearing argument on important emergency cases addresses many of the frequent criticisms of the emergency docket. Full briefing and argument enable the Justices to spend more time with the case, reducing the risk that the Court will reach a rushed decision. Plus, because any "merits preview" will be more carefully considered, there is less risk that lower courts and litigants will read the tea leaves inaccurately.[102]

C. Experimenting with the Court's Stay Factors

Two of the Court's OT 2021 emergency-docket cases suggest that the Justices are experimenting with the Court's stay analysis.

To see why, start with the Court's current test for granting stays. Though the decision to enter a stay is discretionary, that discretion is ordinarily guided by four factors. The Court will ask:

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94 *Id.*

95 *See Vladeck Statement, supra* note 3, at 18.

96 *See, e.g.*, Application for a Stay of Execution, Ramirez v. Collier, 142 S. Ct. 50 (2021) (No. 21–5592).

97 *See, e.g.*, Bush v. Gore, 531 U.S. 1046 (2000) (mem.).

98 Cousins v. Wigoda, 409 U.S. 1201, 1201 (1972) (Rehnquist, J., in chambers).

99 *See* Blum v. Caldwell, 446 U.S. 1311 (1980) (Marshall, J., in chambers).

100 *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 400 U.S. 921 (1970) (mem.).

101 *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 400 U.S. 939 (1970) (mem.).

102 *Cf.* Does 1–3 v. Mills, 142 S. Ct. 17, 18 (2021) (Gorsuch, J., dissenting).

- whether the stay applicant has made a strong showing that he is likely to succeed on the merits;
- whether the applicant will be irreparably injured without a stay;
- whether the stay would substantially injure the other parties; and
- if the public interest favors a stay.[103]

But twice this Term the Justices' analysis has deviated from this well-trodden path. First, in *Does 1–3 v. Mills*, several doctors challenged a Maine rule requiring certain healthcare workers to receive COVID vaccines if they wished to keep their jobs.[104] The doctors asked the district court to enjoin Maine's enforcement of the rule, but the court denied their motion.[105] The First Circuit affirmed, so the challengers petitioned the Supreme Court for an emergency injunction blocking the rule.[106] The Court rejected their request.[107]

Justice Barrett concurred, joined by Justice Kavanaugh, to express concerns about the emergency docket.[108] Justice Barrett worried that "applicants [might] use the emergency docket to force the Court to give a merits preview in cases . . . on a short fuse."[109] To address that problem, she suggested that when considering petitions for emergency relief, the Court should make a "discretionary judgment about whether the Court should grant review in the case."[110] Doing so would prevent litigants from "forc[ing] the Court to give a merits preview in cases that it would be unlikely to take" on the merits.[111] Applying that discretionary judgment in this case, she said, "counsel[ed] against a grant of . . . relief."[112]

Justice Barrett's concurrence gives the Court an interesting new tool to deal with tricky emergency-docket cases. Whereas *Ramirez* and the vaccine-mandate cases reflected efforts to give emergency cases

103 Nken v. Holder, 556 U.S. 418, 434 (2009).

104 Does 1–3 v. Mills, 142 S. Ct. 17, 18 (2021) (Gorsuch, J., dissenting).

105 Does 1–6 v. Mills, 556 F. Supp. 3d 34 (D. Me.), *aff'd*, 16 F.4th 20 (1st Cir. 2021), *cert. denied sub nom.* Does 1–3 v. Mills, 142 S. Ct. 1112 (2022).

106 Does 1–6 v. Mills, 16 F.4th 20, 24 (1st Cir. 2021), *cert. denied sub nom.* Does 1–3 v. Mills, 142 S. Ct. 1112 (2022).; *see* Does 1–3 v. Mills, 142 S. Ct. 17, 18 (2021) (mem.).

107 *See* Does 1–3 v. Mills, 142 S. Ct. 17, 17 (2021) (mem.).

108 *See id.* at 17–18.

109 *Id.* at 18 (Barrett, J., concurring).

110 *Id.*

111 *Id.*

112 *Id.*

more consideration, Justice Barrett's exercise of discretion allows the Court to sidestep difficult emergency cases altogether.[113]

The Court hinted at a further shift in its stay analysis in *NFIB v. OSHA*.[114] There, the Court stayed enforcement of OSHA's vaccine-mandate rule, purportedly applying the current stay factors.[115] But a closer look suggests that the Court's analysis was not typical. Indeed, the Court's per curiam opinion included the following passage:

> *The equities do not justify withholding interim relief*. . . . OSHA's mandate will force [the challengers] to incur billions of dollars in unrecoverable compliance costs and will cause hundreds of thousands of employees to leave their jobs. . . . [Yet] the Federal Government says that the mandate will save over 6,500 lives and prevent hundreds of thousands of hospitalizations. . . . *It is not our role to weigh such tradeoffs*. In our system of government, that is the responsibility of those chosen by the people through democratic processes.[116]

That passage suggests a striking departure from the Court's ordinary stay analysis, which expressly *requires* the Court to weigh competing equities.[117] For instance, in *Hollingsworth v. Perry*, the Court said that "[i]n close [stay] cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent."[118]

That Court's unwillingness to weigh the equities may be a consequence of its other innovation in the vaccine-mandate cases. As we have discussed, the Court departed from normal practice and gave those cases full argument and briefing. And that process was dominated by discussion of the first stay factor—whether the challengers were likely to win on the merits. After hearing extensive briefing on that factor, the Court was likely very confident that the government's rule exceeded its authority. In that posture, the Court may have thought equities did not do much work in the stay analysis.

113 As a law professor, Justice Barrett wrote about the discretion inherent in certiorari standards. *See* Barrett, *supra* note 44, at 1731–32.

114 Nat'l Fed. of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661 (2022) (per curiam).

115 *See id.* at 664–66.

116 *Id.* at 666 (emphasis added) (citations omitted).

117 The Court applies the same stay analysis regardless of whether the government is a party. *See generally* Vladeck, *supra* note 38, at 128–32 (summarizing the standards applied to the Solicitor General's emergency appeals). For instance, *Tandon v. Newsom* weighed the risk of irreparable harm to churches caused by COVID restrictions with the harm to the state by "employing less restrictive measures." 141 S. Ct. 1294, 1297 (2021) (per curiam).

118 Hollingsworth v. Perry, 558 U.S. 183, 190 (2010) (per curiam).

III. ANALYZING THE COURT'S EXPERIMENTS

These emergency-docket innovations answer many critics. But they raise problems of their own. The Court's authority over its emergency docket is not unbounded. Limits are set by statutory and constitutional restrictions on the Court's appellate jurisdiction, and by precedent regulating when emergency relief is proper. The Court's recent emergency-docket innovations run into both limitations.

A. Confusion Over the Emergency Stay Factors

As we noted in Part II, the Justices suggested in *Does 1–3 v. Mills* and *NFIB v. OSHA* that they may be reconsidering the Court's current stay factors.[119] Though both cases departed from the prevailing stay analysis, neither provided much explanation or guidance for future litigants. And that lack of guidance has sown confusion. Consider each case in turn.

1. Incorporating Certiorari Factors in *Does 1–3 v. Mills*

First, recall that in *Does 1–3 v. Mills,* Justice Barrett said that as part of its stay analysis the Court should make a "discretionary judgment about whether the Court should grant review in the case."[120] That was an unusual suggestion. The usual stay analysis asks whether the moving party has a "likelihood of success on the merits"—that is, a real chance of winning the case—not whether the case is worthy of the Court's attention.[121]

To support her position, Justice Barrett cited *Hollingsworth.*[122] There, the Court framed the likelihood of success on the merits to include whether there was a "reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari."[123] But the Court did so because the posture of the case warranted it: the applicant in *Hollingsworth* asked for a stay "pending the filing and disposition of a petition for writ of certiorari."[124]

In other words, in *Hollingsworth,* it made sense to ask whether the case would get Supreme Court attention on the merits because that was the avenue by which the stay applicant could ultimately get relief. It would have been pointless for the Court to stay the case only to

119 *See supra* Section II.C.

120 Does 1–3 v. Mills, 142 S. Ct. 17, 18 (2021) (Barrett, J., concurring).

121 *See, e.g.*, Nken v. Holder, 556 U.S. 418, 438 (2009) (Kennedy, J., concurring).

122 *Mills*, 142 S. Ct. at 18 (Barrett, J., concurring) (citing *Hollingsworth*, 558 U.S. at 190).

123 *Hollingsworth*, 558 U.S. at 190.

124 *Id.*

decline merits review. *Does 1–3 v. Mills* was different. If the Court granted a stay, the case would have gone back to the district court for a ruling on the merits. In other words, the stay applicant could have gotten relief *without* the Court reviewing the merits. That difference in procedural posture is important: in *Mills*, the likelihood of success on the merits was procedurally decoupled from the certiorari-worthiness of the issue.

Justice Barrett's suggestion has benefits. Incorporating the Court's certiorari factors gives the Court discretion to avoid confronting difficult issues prematurely in an emergency posture.[125] The Court can use those factors to decide that an issue is underdeveloped and thus deserves percolation in the courts of appeals before a stay is warranted. In one sense, then, Justice Barrett's *Mills* innovation is the inverse of the Court's experiments in *Ramirez* and the vaccine-mandate cases. Those cases gave emergency-docket issues *more* of the Court's time and attention, whereas *Mills* gives the Court a tool to sidestep emergency issues entirely.

And her approach is not unprecedented. Plenty of cases from the 1970s and 1980s suggest that the Court *should* ask whether "four Justices will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction."[126]

Plus, her suggestion may have support in the text of the All Writs Act—the presumed source of authority for an injunction.[127] The Act authorizes the Court to "issue all writs necessary or appropriate in aid of [its] . . . jurisdiction[]."[128] That could mean that the Court may *only* grant injunctive relief under the Act when it plans to hear the case on the merits. In other words, it might be that an injunction is "in aid of . . . jurisdiction[]" only if the Court intends to exercise its jurisdiction by granting merits review in the case.[129]

Yet reading the Act that way would drastically limit its scope. For instance, it might mean that in deciding whether the equities favor a stay, the Court can consider only those injuries that deprive it of

125 *See* SUP. CT. R. 10. Certiorari factors include: (1) circuit splits in the courts of appeals; (2) issues of federal law decided inconsistently by state supreme courts; (3) important issues of federal law. *Id.*

126 *See, e.g.*, Rostker v. Goldberg, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers); *see also* Mahan v. Howell, 404 U.S. 1201, 1201 (1971) (Black, J., in chambers) (same).

127 Brown v. Gilmore, 533 U.S. 1301, 1303 (2001) (Rehnquist, C.J., in chambers); *see also* Biden v. Texas, 142 S. Ct. 2528, 2562 (2022) (Barrett, J., dissenting) (assuming that the Court's injunction power comes from the All Writs Act).

128 28 U.S.C. § 1651 (2018).

129 *Id.*

jurisdiction.[130] That would suggest that many of the Court's emergency orders are impermissible, or at least were evaluated using the wrong factors. Recent emergency-docket decisions did not appear to consider whether certiorari was likely to be granted on the merits later, or whether an imminent injury would deprive the Court of jurisdiction.[131] Indeed, "[t]he authority to grant stays has historically been justified by the perceived need 'to prevent irreparable injury to the parties or to the public' pending review."[132] And it is hard to see how injury to the public, rather than the parties, could ever deprive the Court of jurisdiction.

Plus, even if the All Writs Act authorizes relief only if the Court is likely to hear the case on the merits, that still may not support importing the Court's discretionary certiorari factors as Justice Barrett suggests. The Act was passed in 1789,[133] a full century before the Court's certiorari docket became discretionary.[134] So it seems inappropriate to interpret "in aid of . . . jurisdiction[]"[135] to incorporate the Court's modern discretionary certiorari factors. Thus, a better reading might be that the Act gives the Court the power to grant injunctions to preserve its jurisdiction if a case might, once ripe, ultimately come back up on merits review. And that reading would permit the Court's current emergency-docket practice.

Even if Justice Barrett's analysis is supported by the All Writs Act, it may be practically difficult to apply in many emergency cases. *Tandon v. Newsom* is a good example.[136] There, the Court granted injunctive relief when there was no lower court decision on the merits (indeed, it was unclear that there ever would be).[137] In that posture, it seems hard to ask—as Justice Barrett suggests—"whether the Court should grant review in the case."[138]

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130 *See, e.g.*, Turner Broad. Sys., Inc. v. FCC, 507 U.S. 1301, 1301 (1993) (Rehnquist, C.J., in chambers) (considering whether declining to enjoin a statute would "prevent [the] Court's exercise of its appellate jurisdiction to decide the merits of applicants' appeal.").

131 *See, e.g.*, Tandon v. Newsom, 141 S. Ct. 1296, 1296–97 (2021) (per curiam).

132 Nken v. Holder, 556 U.S. 418, 432 (2009) (quoting Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4, 9 (1942)).

133 Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81.

134 Circuit Court of Appeals Act, ch. 517, § 6, 26 Stat. 826, 828 (1891).

135 28 U.S.C. § 1651 (2018).

136 141 S. Ct. 1294 (2021) (per curiam).

137 *Id.* at 1296*; see also* Wheaton Coll. v. Burwell, 573 U.S. 958, 961 (2014) (Sotomayor, J., dissenting) (noting that the majority had "grant[ed] . . . an interlocutory injunction under the All Writs Act . . . blocking the operation of a duly enacted law . . . in a case in which the courts below have not yet adjudicated the merits.") (citation omitted).

138 Does 1–3 v. Mills, 142 S. Ct. 17, 18 (2021) (Barrett, J., concurring).

Finally, if Justice Barrett's certiorari-worthiness factor is to mean anything, it will bar stays in cases where the traditional equities cut the other way. And that begs the question: what work do those factors do under her test? That is the second question mark in the Court's recent emergency-docket cases.

2. Muddling the Equities in *NFIB v. OSHA* and *Ramirez v. Collier*

Two other cases, *NFIB v. OSHA* and *Ramirez v. Collier*, muddied the Court's test even further. Both appeared to emphasize likelihood of success on the merits while obscuring the irreparable-harm factor.[139]

Take *NFIB v. OSHA*.[140] There, the Court concluded that the "equities d[id] not justify withholding interim relief" because it was beyond the judicial role to "weigh [the] tradeoffs" in the case.[141] That departure from the traditional test for equitable relief sparked confusion. As Will Baude noted in his comment on the decision, the Court's analysis could be read to suggest that "the Court no longer thinks that it has discretion to deny a stay if the movant is correct on the merits."[142] Or it could suggest a more modest change: that is, "[o]nce [the] Court has a firm view about the merits question . . . that [decision] might overtake the equitable factors."[143] Alternatively, it could just be poor use of language—perhaps the Court did balance the equities, but it did not say so expressly.

Either way, the decision departed from the historical underpinnings of equitable relief. At the Founding, equitable relief was the "exception" and not the "general rule."[144] Most cases were "actions at common law."[145] To have a case heard by an equity court, a plaintiff would have to show that that the common law was incapable of giving him relief. As one early case from Virginia put it, an equity court would interfere only "when the law would neither afford an immediate nor adequate remedy" such that a plaintiff would suffer "irreparable

139 *Cf.* Nken v. Holder, 556 U.S. 418, 432 (2009) (quoting Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4, 9 (1942)).

140 142 S. Ct. 661 (2022) (per curiam).

141 *Id.* at 666.

142 Will Baude, *Balancing the Equities in the Vaccine Mandate Case*, VOLOKH CONSPIRACY (Jan. 14, 2022, 11:24 AM), https://reason.com/volokh/2022/01/14/balancing-the-equities-in-the-vaccine-mandate-case/ [https://perma.cc/RM3E-FUG8].

143 *Id.*

144 THE FEDERALIST No. 83 (Alexander Hamilton).

145 *Id.* (noting that keeping equity within narrow confines was essential to preserve the role of the jury trial). Then, as now, equitable issues were resolved by judges, not juries. *See, e.g.*, Schmid v. Simmons, 970 N.W.2d 735, 745 (Neb. 2022).

injury" without its help.[146] In other words, irreparable harm was more than one factor in the test for injunctive relief, it was a critical threshold inquiry that could not be overlooked. Without it, a court would not issue an injunction. Indeed, the Court itself has long explained that equitable relief is *only* available when some irreparable harm in the short term would stop a court from granting relief later.[147]

Thus, when the Supreme Court minimized the equities in *NFIB v. OSHA*, it altered the nature of equitable relief. But the Court's own precedent forbids such alterations: the Court has construed its equity jurisdiction to extend only to "'the system of judicial remedies which had been devised and was being administered by the English High Court of Chancery at the time' of the founding."[148] So it may not increase the scope of equitable remedies now by sidelining irreparable harm and focusing on likelihood of success on the merits.

Perhaps tellingly, the Court has considered the equities in later stay cases.[149] But again, that raises a question: when, if ever, does the Court believe it may disregard the equities?

The Court may also have strayed beyond traditional limits in *Ramirez*.[150] Recall that *Ramirez* required the Court to assess a death-row inmate's stay-of-execution claim and request that his minister be allowed to pray in the execution chamber.[151] There, unlike *NFIB*, the Court balanced the equities after predicting success on the merits.[152] But then it said something odd. Chief Justice Roberts, writing for the majority, advised lower courts that "[i]f Texas reschedule[d] Ramirez's execution and decline[d] to permit audible prayer or religious touch, [they] should . . . enter appropriate preliminary relief."[153] In other

146 Wingfield v. Crenshaw, 14 Va. 474, 474 (Va. Super. Ch. 1809); see also State of Ga. v. Brailsford, 2 U.S. 402, 407 (1792) (Blair, J.) (noting that injunctive relief is appropriate where, without it, "an injury" would be "out of [the Court's] power to repair"); Nesmieth v. Bowler, 6 Ky. 487, 488 (1814) ("We can perceive no reason for the interposition of a Court of Equity in this case, as the law affords to the complainant a complete and ade-quate remedy.").

147 Hipp v. Babin, 60 U.S. 271, 277 (1856).

148 Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 335 (1999) (Scalia, J., concurring) (quoting Atlas Life Ins. Co. v. W.I.S., Inc., 306 U.S. 563, 568 (1939)); *see also* WILLIAM KERR, A TREATISE ON THE LAW AND PRACTICE OF INJUNCTIONS IN EQUITY 200 (1867) (noting that the English chancery courts required irreparable harm).

149 Merrill v. Milligan, 142 S. Ct. 879, 880 (2022) (Kavanaugh, J., concurring).

150 Ramirez v. Collier, 142 S. Ct. 1264, 1282 (2022).

151 *See id.* at 1272.

152 *Id.* at 1282; Nat'l Fed. of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661, 666 (2022) (per curiam).

153 *Ramirez*, 142 S. Ct. at 1284. Indeed, the Chief suggested that a preliminary injunction "ordering the accommodation" was the "proper remedy." *Id.* at 1283. That's because

words, Texas was free to proceed with the execution, even without further merits determination, if it followed the right procedures.

But how could that be if preliminary injunctions simply preserve the status quo so a court can resolve the merits? True, the Court's ruling *suggested* what the merits ruling would be. Yet it did not—could not—resolve the question at the preliminary-injunction stage. By suggesting otherwise, the Court again devalued the role of irreparable harm in its test (and put more emphasis on quasi-merits analysis). Indeed, the Court's injunction essentially gave Texas permission to moot the case. Under the injunction, Texas could (and did) execute Ramirez if it gave him the accommodations he requested.[154] Yet when Texas did that, the case became moot.[155] Given that outcome, it's hard to see how the Court's injunction preserved the status quo. And that's difficult to square with the All Writs Act's requirement that a preliminary injunction be "in aid of [the Court's] jurisdiction[]."[156] No Article III court has jurisdiction over a moot case.

Finally, in previewing the merits, the Court extended its precedent. It clarified that "a total ban" on audible prayer and religious touch violates the Religious Land Use and Institutionalized Persons Act.[157] Yet that result was not inevitable before the Court took up the case, particularly because the issue was novel. As one commentator noted, "[o]ral argument in *Ramirez* . . . was the first time [the Court] heard argument on the right of inmates to receive religious comfort and guidance in their final moments," having only previously dealt with the issue in unargued emergency cases.[158] Yet the emergency

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an injunction ordering something would let the state quickly proceed with the execution. *Id.*

154 Maria Luisa Paul, *Texas Executes John Henry Ramirez, Who Won Religious Rights Supreme Court Case*, WASH. POST (Oct. 6, 2022, 4:36 A.M.), https://www.washingtonpost.com/nation/2022/10/06/john-henry-ramirez-executed-texas [https://perma.cc/6KVK-FXGN].

155 Indeed, the parties appeared to agree that the case was mooted by Texas's acquiescence to the accommodations. *See* Joint Motion to Dismiss, Ramirez v. Collier, No. 21-CV-2609 (S.D. Tex. May 4, 2022). Granted, that acquiescence would have mooted the case with or without the Supreme Court's ruling: Texas gave Ramirez what he had asked for in the first place. But it's doubtful Texas would have agreed had the Court not essentially resolved the merits.

156 28 U.S.C. § 1651 (2018).

157 *See Ramirez*, 142 S. Ct. at 1280.

158 Amy Howe, *Court Debates Inmate's Request for Prayer and Touch During Execution, but a Key Justice Remains Silent*, SCOTUSBLOG (Nov. 9, 2021, 4:46 PM), https://www.scotusblog.com/2021/11/court-debates-inmates-request-for-prayer-and-touch-during-execution-but-a-key-justice-remains-silent [https://perma.cc/NYP6-HCZL]; Madeleine Carlisle, *Supreme Court Ruling Expands Death Row Prisoners' Religious Rights*, TIME (Mar. 24, 2022), [https://perma.cc/M6HW-VUBN].

docket's critics have cautioned against developing new law in an emergency posture.[159] True, functionally *Ramirez* got more process than the run-of-the-mill emergency-docket case (decided without opinion or argument). But formally, *Ramirez* is no different than *Tandon* and the other COVID cases, in which the Court seemed to apply a novel approach to First Amendment free exercise.

Together, *Mills*, *NFIB*, and *Ramirez* throw the Court's preliminary-equitable-relief framework into doubt. Should applicants focus on the usual stay factors? Should they disregard equity altogether? Or should they add in traditional certiorari factors? Making changes without careful explanation leaves litigants puzzled and makes it harder to brief future stay cases. Going forward, the Court should take care in how it articulates its stay analysis.

B. *Appellate Jurisdiction*

The Court's procedural moves in *Ramirez* and the vaccine-mandate cases also raise important questions about the Court's appellate jurisdiction.

Recall that in *Ramirez*, the Court granted a stay of execution on the emergency docket, then a preliminary injunction after argument.[160] But no lower court had taken that later step. And there are questions about whether the Court's appellate jurisdiction allows it to grant a *remedy* that the lower court did not consider.

And in *NFIB v. OSHA*—one of the vaccine cases—Ohio asked the Court to grant certiorari to address the merits directly, even though there was no lower court ruling on that issue.[161] Though the Court formally declined that invitation, the case and its disposition underscore confusion over the distinction between *emergency relief* and the *merits*.[162]

But before digging into cases further, the following paragraphs explain the scope of the Court's appellate jurisdiction, the relationship between equitable relief and certiorari, and how those concepts limit the ways in which the Court can dispose of emergency-docket cases.

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159 *See supra* notes 50–54 and accompanying text.

160 *See* Ramirez v. Collier, 142 S. Ct. 50 (2021) (mem.); *Ramirez*, 142 S. Ct. at 1284.

161 *See* Nat'l Fed. of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661, 664 (2022) (per curiam); Emergency Application for an Admin. Stay & Stay of Admin. Action, & Alternative Petition for Writ of Certiorari Before Judgment at 35, Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661 (2022) (Nos. 21A244 & 21A247).

162 *See Nat'l Fed. of Indep. Bus.*, 142 S. Ct. at 667.

1. The Scope of the Court's Appellate Jurisdiction

When hearing appeals, the Supreme Court is limited to reviewing the lower courts' decisions; it cannot reach the merits where lower courts have not. To see why, we need to dive into the Court's constitutional jurisdiction.

The Constitution gives the Supreme Court jurisdiction over two categories of cases. The Court has "original [j]urisdiction" over cases involving foreign ambassadors, controversies between the United States and a state, disputes between two or more states, and proceedings by one state against the citizens of another.[163] It has appellate jurisdiction over most other cases involving federal law or diverse parties.[164] Here, we are principally concerned with the scope of the Court's appellate jurisdiction. Neither Ramirez nor the vaccine plaintiffs invoked the Court's original jurisdiction.[165]

Appellate-jurisdiction cases dominate the Supreme Court's regular docket, but this aspect of the Court's power is underexplored. While the leading treatise on federal courts contains an entire section devoted to original jurisdiction, it glosses over appellate jurisdiction in just a few pages.[166] So we begin with the structure of Article III.

The contrast between appellate and original jurisdiction tells us that the "Court's 'appellate [j]urisdiction' cannot be 'original.'"[167] Original cases start and finish in the Supreme Court. Appellate cases start in the lower federal courts or in the state courts.[168] Either way, when the Court exercises its appellate jurisdiction, "it revises and corrects the proceedings in a cause already instituted, and does not create that cause."[169] Thus, the Court has repeatedly confirmed that its appellate jurisdiction reaches only issues decided below:

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163 U.S. CONST. art. III, § 2, cl. 2; 28 U.S.C. § 1251 (2018); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 330 (1816).

164 *See* U.S. CONST. art. III, § 2, cl. 2; 18 U.S.C. §§ 1331, 1332 (2018).

165 *See Ramirez*, 142 S. Ct. at 1272; *Nat'l Fed. of Indep. Bus.*, 142 S. Ct. at 663.

166 *See* RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 18–19, 267–95 (Robert C. Clark et al. eds. 7th ed. 2015).

167 Ortiz v. United States, 138 S. Ct. 2165, 2184 (2018) (Thomas, J., concurring) (quoting U.S. CONST. art. III, § 2, cl. 2); *see also* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 175 (1803) ("[T]he plain import" of Article III "seems to be, that in one class of cases its jurisdiction is original, and not appellate; in the other it is appellate, and not original.").

168 *See* U.S. CONST. art. III, § 2, cl. 2; *Martin*, 14 U.S. (1 Wheat.) at 352.

169 *Marbury*, 5 U.S. (1 Cranch) at 175. At the time of the Founding, appellate jurisdiction "denote[d] nothing more than the power of one tribunal to review the proceedings of another." THE FEDERALIST No. 81 (Alexander Hamilton). Specifically, appellate courts could "reverse or affirm the judgment of the inferior courts." 3 WILLIAM BLACKSTONE, COMMENTARIES *411; *see also id.* at *55 (describing a "court of appeal" as limited to "correct

- Appellate jurisdiction allows "[a] supervising Court . . . to correct the errors of an inferior Court."[170] So the Court must carefully examine the proceedings below to ensure that it's reviewing an "inferior court's" decision.[171]
- Appellate jurisdiction reviews final judgments that are "an exercise of judicial power," binding on the parties.[172] So the Court could not reexamine nonbinding opinions from the Court of Claims.[173]
- "[A]ppellate jurisdiction necessarily implies some judicial determination, some judgment, decree, or order of an inferior tribunal, from which an appeal has been taken."[174] So parties cannot voluntarily transfer cases pending in the lower courts to the Supreme Court before entry of "such order, judgment, or decree."[175]

Thus, there must be a lower court judgment before the Supreme Court intervenes. But that leaves an important question unanswered: can the Court reach the merits of a case where a lower court has decided only whether to grant preliminary relief? It cannot.

To start, consider the statutes channeling the Court's jurisdiction. The Supreme Court largely fills its merits docket by agreeing to hear cases "in the courts of appeals" by writ of certiorari.[176] Ordinarily, parties appeal from appellate decisions, but the Court need not wait for a circuit to weigh in. Sometimes, parties may appeal "from a decision of a district court."[177] Or they may petition "for a writ of certiorari to review a case before judgment has been rendered in the court of appeals."[178] But importantly, all those procedures require a merits decision in a lower court.[179]

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the errors of other jurisdictions"). This tracked review of common-law cases in England: an appellate court had jurisdiction over only "final decrees" of the trial court. Lester B. Orfield, *Appellate Procedure in Equity Cases: A Guide for Appeals at Law*, 90 U. PA. L. REV. 563, 563 (1942).

170 Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 396 (1821).

171 *See, e.g.*, *Ortiz*, 138 S. Ct. at 2173–74; *Martin*, 14 U.S. (1 Wheat.) at 315.

172 *In re* Sandborn, 148 U.S. 222, 224 (1893).

173 *Id.*; Gordon v. United States, 117 U.S. 697, 699, 702 (1864).

174 The Alicia, 74 U.S. (7 Wall.) 571, 573 (1868).

175 *Id.*

176 28 U.S.C. § 1254 (2018); *see also Supreme Court Procedures*, U.S. CTS., https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1 [https://perma.cc/H8J2-HDA3].

177 28 U.S.C. § 2101(b) (2018).

178 *Id.* § 2101(e).

179 *See* McClellan v. Carland, 217 U.S. 268, 280 (1910) (certiorari requires a final decision); 28 U.S.C. § 1291 (2018).

Preliminary equitable relief is set off from the merits. Three statutes govern emergency relief. One grants the Court appellate jurisdiction to review injunctions.[180] Another grants the power to enter them.[181] And a third grants the power to stay injunctions pending a merits appeal.[182]

Importantly, those statutes do not grant the Court the power to use an application for emergency relief to address the merits.[183] Thus, in *Clinton v. Goldsmith*, the Court explained that the statute giving it the power to enter emergency injunctions (the All Writs Act) "is not an independent grant of appellate jurisdiction."[184] And in *Council Tree Communications, Inc. v. FCC*, the Third Circuit confirmed that where the Act "serve[s] as a . . . basis for deciding [an] emergency motion, it may not be used to consider the underlying petition."[185] Similarly, the Court's power to issue common-law writs—like prohibition or mandamus—may be "constitutionally exercised only insofar as such writs are in aid of its appellate jurisdiction."[186]

Thus, the Court is limited to reviewing only what was decided below. Put differently, the channels of appellate review are separate. An appeal on the merits is distinct from an appeal on a lower court's decision to stay a case (or not) or grant a preliminary injunction (or not). Appeals on the merits do not automatically grant emergency relief, and vice versa: an appeal on the merits does not automatically stay the lower court's decision.[187] Conversely, appeals from stays or injunctions have never justified a merits determination.[188] Those are different decisions. If a district court grants a preliminary injunction, it makes no

180 28 U.S.C. § 1292(a) (2018).

181 *Id.* § 1651.

182 *Id.* § 2101(f).

183 For interlocutory appeals, see *Gardner v. Westinghouse Broad. Co.*, 437 U.S. 478, 480–81 (1978). For the All Writs Act, see *Clinton v. Goldsmith*, 526 U.S. 529, 534 (1999); FTC v. Dean Foods Co., 384 U.S. 597, 603–04 (1966); *cf.* Council Tree Commc'ns, Inc. v. FCC, 503 F.3d 284, 292 (3d Cir. 2007). For stays, see *N.Y. Times Co. v. Jascalevich*, 439 U.S. 1317, 1318 (1978) (White, J., in chambers).

184 *Clinton*, 526 U.S. at 535 (quoting 16 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD FEDERAL PRACTICE AND PROCEDURE § 3932 (2d ed. 1996)).

185 *Council Tree Commc'ns, Inc.*, 503 F.3d at 292 (citation omitted).

186 *Ex parte* Republic of Peru, 318 U.S. 578, 582 (1943).

187 *See* Jill Wieber Lens, *Stays of Injunctive Relief Pending Appeal: Why the Merits Should Not Matter*, 43 FLA. ST. U. L. REV. 1319, 1323 (2016); *see also* Slaughterhouse Cases, 77 U.S. (10 Wall.) 273, 297 (1869) ("[I]t seems to be well settled everywhere . . . that an appeal from the decision of the court denying an application for an injunction does not operate as an injunction or stay of the proceedings pending the appeal.").

188 *See* Wing v. Warner, 2 Doug. 288, 291–93 (Mich. 1846); State v. Judge of First Dist. Ct., 17 La. 511, 512–13 (1841); Howell v. Howell, 40 N.C. (5 Ired. Eq.) 218, 220 (1848).

determination on the merits. So when one party appeals, its appeal is confined to the preliminary issue.

With a firm grip on appellate jurisdiction, we can now turn to consider the issues raised by the vaccine cases and *Ramirez*.

2. Jurisdictional Confusion in the Vaccine-mandate Cases

The vaccine-mandate litigation also reflected confusion over the scope of the Court's appellate jurisdiction in two ways.

Litigant confusion. First, the litigants appeared confused about whether they could petition the Court for merits review. To see why, focus on the challenges to OSHA's vaccine mandate. Like most petitions for judicial review of agency action, the suits in *NFIB v. OSHA* were filed directly in the federal courts of appeals.[189] So no district court had first considered the case. And by the time the Supreme Court weighed in, the courts of appeals had reached only the stay issue, not the merits.[190] But in addition to asking the Court to reinstate the stay, the challengers also requested a writ of certiorari before judgment. If granted, that would have allowed the Court to review the challenge on the merits.

In support of their argument, one of the challengers—Ohio—argued that the Court could review the merits under 28 U.S.C. § 1254(1), which authorizes the Supreme Court to review cases from the courts of appeals "before or after rendition of judgment or decree."[191] But as some observers quickly noted, that statute cannot expand the Court's constitutional jurisdiction.[192] And here, there was no lower court merits decision. Thus, it is hard to see how the case could fit within the Court's appellate jurisdiction. As the Solicitor General put it in her brief:

> [In most cases] certiorari before judgment . . . is an exercise of this Court's appellate jurisdiction because the district court has entered an order amenable to appeal [before the case reaches the court of appeals]. Here,

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189 Nat'l Fed. of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661, 663 (2022) (per curiam). Congress often authorizes parties to challenge federal agency action by filing suit directly in the federal courts of appeals. *See, e.g.*, 15 U.S.C. § 77i(a) (2018) (SEC actions); 21 U.S.C. § 371(f)(1) (2018) (FDA actions); 42 U.S.C. § 2022(c)(2) (2018) (EPA actions).

190 *See Nat'l Fed. of Indep. Bus.*, 142 S. Ct. at 664.

191 28 U.S.C. § 1254(1) (2018); *see also* Emergency Application for an Admin. Stay & Stay of Admin. Action, & Alternative Petition for Writ of Certiorari Before Judgment at 3, Nat'l Fed. of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661 (2022) (Nos. 21A244 & 21A247).

192 *See* Aditya Bamzai, *Administrative Agencies and the Supreme Court's Appellate Jurisdiction*, YALE J. ON REGUL.: NOTICE & COMMENT (Jan. 4, 2022), https://www.yalejreg.com/nc/administrative-agencies-and-the-supreme-courts-appellate-jurisdiction [https://perma.cc/Z7C6-MPZ2].

> however, no court has rendered a ruling on the petitions for review of the [rule]; instead, the court of appeals is exercising original jurisdiction to address those petitions in the first instance. Accordingly, there is a serious question whether "certiorari before judgment" to review those petitions could properly be viewed as an exercise of this Court's *appellate* jurisdiction.[193]

The "serious question" alluded to by the Solicitor General is whether *administrative* action (rather than a decision by an Article III court) is enough for appellate jurisdiction.[194]

The best answer to that question is "no." True, the Court has held that it could review final decisions of an Article I tribunal, the Court of Appeals for the Armed Forces.[195] But it relied heavily on the historical pedigree of the military justice system, its essentially judicial character, and the fact that its "jurisdiction and structure . . . resemble[s] th[at] of other courts."[196] By contrast, administrative agency tribunals are necessarily kept distinct from Article III courts by the Constitution's structure.[197] And the Court usually will not hear appeals from those distinct tribunals.[198] Thus, the Supreme Court could not (and did not) rely on its appellate jurisdiction to reach the merits. Instead, it just reinstated the stay.[199]

But the very fact that the challengers were willing to ask the Court to reach the merits in a case with no lower-court merits determination reflects confusion about the scope of the Court's appellate jurisdiction when a case reaches the Court in an emergency posture.

Indeed, the litigants' muddling over appellate jurisdiction prevented them from latching onto a better jurisdictional argument: the Supreme Court may have had *original jurisdiction* to consider their challenge to OSHA's vaccine mandate. The Supreme Court has original jurisdiction over "controversies between the United States and a State."[200] In *NFIB*, several of the challengers were states and they were

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193 Response in Opposition to the Applications for a Stay at 85–86, Nat'l Fed. of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661 (2022) (Nos. 21A244 & 21A247) (internal citations omitted).

194 *See id.* at 86.

195 Ortiz v. United States, 138 S. Ct. 2165, 2174 (2018).

196 *Id.* at 2174, 2174–79.

197 *See, e.g.*, Stern v. Marshall, 564 U.S. 462, 469 (2011) (finding that Article I tribunals may not exercise the "judicial power").

198 Gordon v. United States, 117 U.S. 697, 704–05 (1864).

199 Nat'l Fed. of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661, 662 (2022) (per curiam).

200 28 U.S.C. § 1251(b)(2) (2018).

suing a federal agency.[201] Thus, that case could fall within the Court's original jurisdiction.[202]

Judicial confusion. Though the Court declined the challengers' request to hear the merits, the Justices still blurred the line between the stay and the merits. That is an equity problem, as we have discussed.[203] But it may be an appellate jurisdiction one too. After all, if the separation between emergency relief and merits review means anything, it must restrict the Court from dressing up a merits opinion as an emergency disposition. If it could do that, the distinction becomes a mere formality. And the more a court emphasizes the merits in a preliminary decision, the fuzzier the line becomes.

3. The Remedy in *Ramirez* May Have Been a Jurisdictional Error

Ramirez ran into a similar problem. Recall that Ramirez had asked the courts for a stay of execution.[204] Both the district court and the Fifth Circuit said no.[205] So he came to the Supreme Court, asking for both a stay and closer review of his case.[206] The Court accepted both invitations: it stayed Ramirez's execution and set the case for argument.[207]

Though the lower courts had only ruled on a *stay*, the Supreme Court went further. It did not reconsider its earlier stay at argument.[208] Instead, it entered a new preliminary injunction and instructed lower courts that "an injunction ordering the accommodation, not a stay of the execution," was the "proper remedy."[209]

That disposition is odd—and possibly outside the Court's appellate jurisdiction. Appeals courts may only "reverse or affirm the *judgment* of [an] inferior court[]."[210] And the lower courts' judgment was to deny the *stay*.[211] Tellingly, Ramirez could not have filed suit seeking

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201 *Nat'l Fed. of Indep. Bus.*, 142 S. Ct. at 662.

202 *See* discussion *supra* Section III.A. Note also that the parties failed to follow the procedure for an original jurisdiction case: they did not file a "motion for leave to file" an "original action" as required by the Court's rules. SUP. CT. R. 17(3).

203 *See supra* Section III.B.

204 Ramirez v. Collier, 142 S. Ct. 1264, 1274 (2022).

205 *Id.*

206 Petition for a Writ of Certiorari at 15, Ramirez v. Collier, 142 S. Ct. 1264 (2022) (No. 21-5592); Application for a Stay of Execution at 1, Ramirez v. Collier, 142 S. Ct. 1264 (2022) (No. 21-5592).

207 Ramirez v. Collier, 142 S. Ct. 50 (2021) (mem.).

208 *See Ramirez*, 142 S. Ct. at 1283; *id.* at 1291 (Thomas, J., dissenting).

209 *Id.* at 1283 (majority opinion).

210 3 WILLIAM BLACKSTONE, COMMENTARIES *411 (emphasis added).

211 *See Judgment* (def. 2), BLACK'S LAW DICTIONARY (11th ed. 2019); *Ramirez*, 142 S. Ct. at 1274.

a preliminary injunction directly in the Supreme Court. Doing so would plainly have flouted the Court's appellate jurisdiction. So why could the Court decide whether to issue a preliminary injunction when no lower court had?

Perhaps the answer is that the Court typically applies the same test for stays and injunctions.[212] So it was not doing any additional analysis. Still, the formal difference between stays and injunctions matters. The lower courts had passed only on whether Texas had to refrain from putting Ramirez to death.[213] Conversely, the Supreme Court was suggesting that Texas should affirmatively adopt certain execution procedures.[214] Those are different things.[215]

And by pushing Texas to adopt certain procedures, the Court again skirted the line between merits and emergency relief: as we have explained, it extended its precedent to resolve Ramirez's constitutional claims.[216] That may be an equity problem, and it borders on an appellate-jurisdiction problem too. If preliminary equitable relief addresses harms under existing law and merits consideration resolves the final claims, the court dipped its toe into merits territory when it set out the standard for execution-room ministrations under the Free Exercise Clause.[217]

This blurring of the lines itself is noteworthy. It suggests that there are downsides to—or at least teething problems with—the Court's emergency-docket experimentation. And these teething problems are related. As the Court relies more heavily on the likelihood of success on the merits, it disregards the foundation of equity: preventing irreparable harm before a final, legal decision later. Similarly, that distorted merits focus blends merits analysis with emergency analysis—even though the Court is jurisdictionally constrained to deciding the equities, not the merits.

212 *See Ramirez*, 142 S. Ct. at 1275.

213 *See id.* at 1274.

214 *See id.* at 1283.

215 Later in the Term, the Court split over an analogous issue. In *Biden v. Texas*, a five-Justice majority said it had appellate jurisdiction to enter an injunction, even though statutes forbade lower courts from doing so. 145 S. Ct. 2528, 2538–39 (2022). But Justice Barrett wasn't convinced that the Court could enter relief lower courts hadn't, at least not without some separate, inherent authority. *See id.* at 2560–63 (Barrett, J., dissenting).

216 *See supra* Section III.A.

217 *See* Netchoice, LLC v. Paxton, 142 S. Ct. 1715, 1716 (2022) (Alito, J., dissenting); *Ramirez*, 142 S. Ct. at 1283.

IV. RECOMMENDATIONS

Though the Court's recent emergency-docket experiments have merit, addressing many of the docket's traditional problems, a few bugs remain to be worked out. In the remaining paragraphs of this Essay, we suggest tweaks to address those nits.

A. Clearer Standards

As we have noted, the Court has experimented with the factors it uses to assess stay applications. Thus, Justice Barrett said the Court should apply its test for granting certiorari to decide whether to reverse a lower court's emergency-relief decision.[218] And in *NFIB v. OSHA* the Court indicated that it may be reluctant to balance the equities in some stay cases.[219]

Experimentation is good; fettling with legal standards can produce better law. But the Court should be cautious when developing its stay factors. Litigants rely on them to brief important emergency cases before the Court. So where the Court's guidance is unclear, litigants' analyses may focus on the wrong issues and miss the mark.

Justice Barrett's concurrence in *Does 1–3 v. Mills* highlights this problem. True, the Court's discretionary test for granting certiorari is well understood.[220] But how do those factors apply to a stay application? For instance, one certiorari factor asks whether there is a circuit split for the Court to resolve.[221] Yet given the short fuse on many emergency-docket issues, circuit splits are unlikely to happen—particularly given the growing use of nationwide injunctions.[222] Plus, for now, it is unclear how many other members of the Court share Justice Barrett's approach to stays. Justice Kavanaugh joined her concurrence in *Does 1–3 v. Mills*, but the two Justices have voted differently in subsequent emergency cases.[223]

The Court should clarify its test for stays soon. It would help litigants, the public, and lower courts to understand how the Court assesses stays. And if there is methodological disagreement among the

218 *See* Does 1–3 v. Mills, 142 S. Ct. 17, 18 (2021) (Barrett, J., concurring).

219 Nat'l Fed. of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661, 666 (2022) (per curiam).

220 *See* SUP. CT. R. 10.

221 *See id.* at 10(a).

222 Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 461 (2017) (noting that nationwide injunctions prevent percolation).

223 *See Mills*, 142 S. Ct. at 18 (Barrett, J., concurring); Hamm v. Reeves, 142 S. Ct. 743 (2022) (mem.).

Justices, it would help for litigants to know that too.[224] Then they can strategically decide how to pitch their arguments. Perhaps the Court could adopt a new rule, describing its test, as it did for certiorari in Supreme Court Rule 10.[225]

In clarifying the standards for equitable relief, the Court would reinforce its jurisdictional limits. Prescribing a clear test for the lower courts and sticking to that test on its own review would tether the Court to the lower courts' decisions. And it would lessen the risk that the Court could engage in something resembling merits analysis instead.

It would also illuminate the precedential value of its emergency-docket decisions. So far, the Court has sometimes treated emergency-docket cases as precedent and has sometimes ignored them.[226] Thus, in *West Virginia v. EPA*, the Court cited its emergency decision in *NFIB v. OSHA* as precedent to support its application of the major-questions doctrine.[227] Yet in *Fulton v. City of Philadelphia*, the Court "quite deliberately did not cite *Tandon v. Newsom*" or other recent emergency-docket cases on religious accommodations.[228]

Our view is that the precedential value of emergency-docket cases flows from their emergency nature. If grants of equitable relief are pegged mostly to the risk of irreparable harm, they cannot serve as merits precedents. They are at best predictions about likelihood of success on the merits. Instead, their primary value is in showing lower courts how to weigh various factors.

Constraining the precedential value of emergency-docket opinions in that way may assuage concerns that the Court decides important legal issues on a quick fuse. The Justices are always free to rethink an emergency decision made quickly once the case comes back in a merits posture, as Justice Alito correctly explained in *Migliori.*[229]

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224 The apparent methodological split among Justices on stay factors in *Does 1–3 v. Mills* raises an interesting question. Is the prevailing test for stays binding precedent, or is it more like nonbinding rules of statutory interpretation? *Cf.* William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1120 (2017). Historically, the Justices have treated the test for stays as though it is precedential. Thus, for example, a Westlaw search suggests that the Court's statement of the test in *Nken v. Holder* has been cited by the Court a dozen times. 556 U.S. 418 (2009). And unlike the Court's certiorari process—which is discretionary under 28 U.S.C. § 1257—the Supreme Court's power to grant injunctions draws on a long equitable tradition, which may implicitly require the Court to conduct a traditional equitable analysis. *See* 28 U.S.C. § 1651 (2018).

225 *See* SUP. CT. R. 10.

226 *See* Josh Blackman, *The Precedential Value of Shadow Docket Cases*, VOLOKH CONSPIRACY (July 6, 2022, 2:47 AM), https://reason.com/volokh/2022/07/06/the-precedential-value-of-shadow-docket-cases/ [https://perma.cc/5T85-YXAD].

227 West Virginia v. EPA, 142 S. Ct. 2587, 2608 (2022).

228 *See* Blackman, *supra* note 226.

229 Ritter v. Migliori, 142 S. Ct. 1824, 1824 (2022) (Alito, J., dissenting)

That diminishes any concerns about emergency-docket cases upsetting the apple cart.

B. More Opinions

Recall that the Court's bare-bones emergency orders leave lower courts and litigants without guidance.[230] That problem is particularly pronounced where the Court does not give reasons for granting or withholding relief.[231] At best, a lack of reasoning suggests that "the legal questions involved [are] not . . . substantial."[232] And at worst, it implies that the Court does not take certain cases seriously.[233] Either way, that sends a bad signal to the lower courts.

To fix this problem, the Court should consider two changes. First, it should clarify how much precedential weight to give its emergency-docket orders.[234] As we have argued, if opinions on stays and preliminary injunctions are to remain within the Court's appellate jurisdiction, those opinions cannot resolve the merits of the underlying dispute. That conclusion should guide the precedential value of emergency-docket opinions: they are precedential in so far as they show lower courts how to balance the stay factors, illustrating harms significant enough to warrant emergency relief. They are not precedential as to the *merits*. Of course, lower courts might find the Justices' merits preview persuasive and decide to follow it. But they are not bound to do so.[235] If the Court clarified that emergency docket opinions carry

230 *See supra* Part I.

231 *See, e.g.*, Dr. A. v. Hochul, 142 S. Ct. 2569 (2022) (mem.).

232 Adam Liptak, *Supreme Court Allows Vaccine Mandate for New York Health Care Workers*, N.Y. TIMES (Dec. 13, 2021), https://www.nytimes.com/2021/12/13/us/politics/supreme-court-vaccine-mandate-new-york-healthcare.html [https://perma.cc/V9X3-K8BS].

233 Mary Ziegler, *Supreme Speed: The Court Puts Abortion on the Rocket Docket*, SCOTUSBLOG (Oct. 25, 2021, 12:39 P.M.), https://www.scotusblog.com/2021/10/supreme-speed-the-court-puts-abortion-on-the-rocket-docket [https://perma.cc/3J4S-BDXR].

234 *See supra* Part I.

235 *See supra* Section IV.A. Judge Trevor McFadden has proposed an alternate precedential framework. He suggests that the Court could group emergency orders into three buckets: (1) nonprecedential summary dispositions, (2) persuasive concurrences, and (3) binding opinions in which a majority of the Court indicates that an applicant is likely to succeed on the merits. McFadden & Kapoor, *supra* note 59, at 831–32. But that view requires a broader view of precedent, under which lower Courts are bound to consider "carefully considered language of the Supreme Court . . . even if technically dictum," or to parse the Court's decisions for "signals" about how it might resolve cases in the future. *Id.* at 844, 847 (quoting United States v. Dorcely, 454 F.3d 366, 375 (D.C. Cir. 2006)). We view precedent more narrowly. It is the holding of a prior case that is binding precedent. Dicta on an issue not properly before the Court—for instance, merits analysis in a preliminary-injunction opinion—is not and cannot be the holding. *See, e.g.*, Brown v. Davenport, 142 S. Ct. 1510, 1525 (2022) ("This Court's dicta cannot supply a ground for relief. Nor can

only this weight, litigants might be less inclined to parse every jot and tittle for some major precedential shift. Thus, the Court would decrease the risk of locking itself into a merits position when it quickly issues an emergency opinion.

With that clarification, the Court might feel free to write more frequently. If so, it might consider adopting a presumption in favor of issuing a short one-page per curiam opinion in more cases. It should give reasons when it reverses a lower court's decision on emergency relief.[236] That would signal to the public that the Court has seriously considered each case. Indeed, in other contexts the Court itself has underscored the importance of giving reasons. For instance, it has said due process may demand an executive agency to give reasons when adjudicating claims for benefits.[237] Doing so gives us confidence that a "decisionmaker's conclusion . . . rest[s] solely on the legal rules and evidence."[238] The same benefits would accrue if the Court gave reasons when it reversed a lower court's emergency disposition.

Plus, a majority of the Court should give reasons whenever a Justice writes a concurring or dissenting emergency opinion. Where the Court disposes of an application without giving reasons and a few Justices write separately, there is a real risk that litigants and lower courts will be confused. They may not know how much weight to give a concurrence;[239] or they may be left wondering why the Court departed from a dissenter's reasoning.[240]

Hamm v. Reeves is a good recent example. There, the Court vacated a lower court injunction blocking the execution of a mentally disabled prisoner.[241] The prisoner was unable to effectively choose the method of his execution because the State refused to help him understand his choice.[242] Justice Kagan wrote a dissent, joined by Justices

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holdings that speak only at a high level of generality." (citation omitted)). Dicta may be useful, but it does not resolve the case or controversy properly before the Court.

236 Cases in which the Court *affirms* a lower Court's decision to enter a stay (or not) do not raise the same concerns. In those cases, the lower court will typically have explained its decision to the parties. So the litigants already understand why their case came out the way it did. Plus, lower courts may reasonably infer from the Supreme Court's silence that it agreed with the lower court's reasoning, giving some indication of what the Court is likely to do in the future.

237 *See* Goldberg v. Kelly, 397 U.S. 254, 271 (1970).

238 *Id.*

239 *See, e.g.*, S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613 (2020) (Roberts, C.J., concurring).

240 *See, e.g.*, Hamm v. Reeves, 142 S. Ct. 743, 743 (2022) (Kagan, J., dissenting).

241 *Id.*

242 *Id.*

Breyer and Sotomayor.[243] Justice Barrett also voted to keep the injunction in place, but she did not join the dissent.[244] Problematically, the majority gave no reasoning for its decision.[245] That leaves future litigants guessing: did the majority disagree with Justice Kagan's legal analysis? Or did they decide that the equities favored a swift execution? Why did Justice Barrett not join the dissent? Plus, the lack of reasoning makes the majority easier to criticize. Thus, one commentator decried the majority's "two-sentence order that offers no explanation whatsoever" as enough to "make your skin crawl."[246]

Even a short statement of reasons would assuage confusion and give critics of the Court less ammunition. So the Court should provide one in more emergency-docket cases.

C. More Stay Arguments

Even if the Court cannot resolve the merits, it could answer some emergency-docket criticisms by scheduling more arguments on stay applications, as it did in the vaccine-mandate cases.[247] At minimum, this would reduce the risk of a rushed opinion: oral argument would let the Justices spend more time with a case. Arguments would be particularly useful in three types of cases.

1. Cases Generally Resolved at the Preliminary-Relief Stage. Most emergency-docket litigation involves pressing issues that need quick resolution. Any delay risks imminent harm. Consider, for example, challenges to state COVID restrictions in the early days of the pandemic. Those public-health rules rode roughshod over the interests of religious people, restricting their ability to worship together. And churches could not wait for full merits litigation. The risk of harm was imminent: missing just one service would be a spiritual injury. Plus, by the time a district court ruled on a motion to dismiss, state guidelines would likely have changed, mooting the case. Meanwhile, the church would have been shut down for months.

Claims of this sort will almost never reach the Court's merits docket. Yet the Court may still need to weigh in, particularly if lower courts need guidance. For instance, in the COVID-church cases, lower

243 *Id.*

244 *Id.* (mem.).

245 *See id.*

246 Ian Millhiser, *The Supreme Court's New Death Penalty Order Should Make Your Skin Crawl*, VOX (Jan. 28, 2022), https://www.vox.com/22906309/supreme-court-death-penalty-alabama-intellectually-disabled-hamm-reeves [https://perma.cc/G2E9-35NZ].

247 *See* Nat'l Fed. of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661, 664 (2022) (per curiam).

courts split over how to balance religious liberty and public health.[248] Those courts would have benefited from an argued and well-reasoned Supreme Court opinion setting out a framework to evaluate similar stay applications. To give itself time to provide that guidance, the Court should issue an administrative stay pending argument on emergency relief.

2. Repeating Issues. The COVID cases illustrate a second reason for the Court to occasionally grant argument on stays. Sometimes, issues end up on the Court's emergency docket again and again. Justices wrote opinions in half a dozen COVID-church cases.[249] And they have seen the *Ramirez* fact pattern—death row inmate challenges restriction on ministers in the execution chamber—several times.[250] Those repeating fact patterns suggest that some issues need to be settled more definitively.[251] A thorough argument and opinion explaining how the Court sees the issue could help.

3. Other High-Profile Cases. The Court should also set argument in high-profile emergency cases, even if those cases present unique issues, unlikely to be replicated. Setting argument indicates that the Court takes these cases seriously. The Texas abortion cases illustrate as much. The Court initially rejected a challenge in a short per curiam opinion.[252] Commentators thought that quick disposition demonstrated "indifference."[253] But when the Court set a second challenge for argument, the same commentators changed their tune. "[T]he justices are taking [the challenge] seriously now," one wrote.[254]

Of course, arguing more stay applications is not a silver bullet. There are practical limits on the Court's ability to grant argument in every emergency case. For one, where a lower court declines to enter an injunction or stay a decision, leaving it to go into effect, harm to the

248 *See, e.g.*, On Fire Christian Ctr. v. Fischer, 453 F. Supp. 3d 901 (W.D. Ky. 2020). *But see, e.g.*, Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021) (per curiam).

249 *See, e.g.*, S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613 (2020) (mem.); Dunn v. Smith, 141 S. Ct. 725 (2021) (mem.); *Tandon*, 141 S. Ct. at 1294; S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716 (2021) (mem.); Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020) (per curiam).

250 *See, e.g.*, Ramirez v. Collier, 142 S. Ct. 1264 (2021); Gutierrez v. Saenz, 141 S. Ct. 1260 (2021) (mem.); Murphy v. Collier, 139 S. Ct. 1475 (2019) (mem.); Dunn v. Ray, 139 S. Ct. 661 (2019) (mem.).

251 *Cf.* SUP. CT. RULE 10 (cert. considerations).

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

253 Ziegler, *supra* note 233.

254 *Id.*

parties may be imminent. Thus, the nature of the case may sometimes preclude full briefing and argument before the Court.[255]

Plus, fully briefing and arguing emergency cases can put a significant pressure on the Court's time and resources. In the vaccine-mandate cases, argument lasted nearly four hours.[256] And some of the Justices noted how hard they had been working to prepare. As Justice Breyer put it at oral argument, "[M]y law clerks have been busy beavers on this case, I promise you."[257]

Even so, resource constraints might be minimal. Recent years have seen a dramatic reduction in the Court's merits caseload: in the 1985 Term, the Court heard 171 cases; in the 2020 Term it heard 73.[258] And the Court's resources have not dipped, which suggests that it may have capacity to write a few more emergency opinions.[259] Plus, even if the Court really is at capacity, its resources are not set in stone. Congress could appropriate funds to pay for more Court staff. Courts of appeals use staff attorneys to write draft per curiam opinions in pro se cases; the Supreme Court could do a similar thing for some easy emergency cases.[260]

D. More Emergency-to-Merits Transfers

The Court should continue to transfer emergency cases to the merits docket. Doing so has real benefits. It would give the Justices enough time to deliberate and write clear opinions. It would produce

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255 That set of cases is likely to be small, particularly because the Court can enter an administrative stay to preserve the status quo and avoid severe harms while it considers the application. Still, in those cases, the Court may yet be able to get increased input through amicus briefs. *See, e.g.*, Josh Blackman, *Amicus Filings on the Shadow Docket*, VOLOKH CONSPIRACY (Sept. 9, 2022, 2:38 P.M.), https://reason.com/volokh/2022/09/05/amicus-filings-on-the-shadow-docket/ [https://perma.cc/9U2Q-JMMU].

256 *See* Transcript of Oral Argument, Nat'l Fed. of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661 (2022) (Nos. 21A244 & 21A247); Transcript of Oral Argument, Biden v. Missouri, 142 S. Ct. 647 (2022) (Nos. 21A240 & No. 21A241).

257 Transcript of Oral Argument at 49, Nat'l Fed. of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661 (2022) (Nos. 21A244 & 21A247).

258 JOHN G. ROBERTS, JR., 2021 YEAR-END REPORT ON THE FEDERAL JUDICIARY 7 (2021).

259 *Congressional Budget Request*, UNITED STATES COURTS, https://www.uscourts.gov/about-federal-courts/governance-judicial-conference/congressional-budget-request/ (last visited Nov. 2, 2022) [https://perma.cc/E4KE-HNGD].

260 *See, e.g.*, Cheyenne N. Chambers, *A Peek Behind the Curtain: The Inner-Workings of the Judiciary, and Why Judges Should Address the Lack of Diversity Among Law Clerks*, AM. BAR. ASS'N (Feb. 18, 2020), https://www.americanbar.org/groups/judicial/publications/appellate_issues/2020/winter/a-peek-behind-the-curtain [https://perma.cc/87HG-4ZB4] (describing the work that staff attorneys do in the courts of appeals); *Staff Attorney's Office*, U.S. CT. APPEALS FOR THE 11TH CIR., https://www.ca11.uscourts.gov/staff-attorneys-office/ [https://perma.cc/ACC8-JGFQ].

precedential opinions *on the merits*, reducing lower courts' reliance on emergency opinions.[261] Plus, resolving the merits could stop overuse of the emergency docket: clear guidance disincentivizes litigants from peppering the Court with emergency applications.

Here, Justice Barrett's *Does 1–3* test might prove useful in guiding the Court's decision to hear a case on the merits. Recall that test incorporates both stay and certiorari factors.[262] The stay factors provide guidance for when the Court should step in on short notice, without the benefit of long deliberation at conference (would one party suffer irreparable harm?). And the certiorari factors focus the Justices on the most important cases (is there significant disagreement about the law?). Together, these factors would point to the cases most deserving of the Justices' time and attention.

But in selecting these cases, the Court must also be mindful of the limits on its appellate jurisdiction, as our discussion of *Ramirez* and *NFIB v. OSHA* shows. It should ensure that cases it transfers to the merits fall into one of two broad categories: (1) cases with merits opinions below, or (2) cases within the Court's original jurisdiction.

1. Type One: Emergency Cases with Merits Decisions Below

The Court has appellate jurisdiction when a lower court has ruled on the merits. True, only a small number of emergency cases fall into that bucket: most petitions for emergency relief happen before any court has addressed the merits. And if there *is* a merits determination, litigants will often file a petition for certiorari, not a stay application. But not always.

Consider *Citizens to Preserve Overton Park, Inc. v. Volpe*.[263] A citizens' group wanted to stop the government building a highway through their city park.[264] They argued that approval of the highway violated several statutes.[265] The district court disagreed and granted summary judgment; the court of appeals affirmed.[266] But instead of appealing directly, the petitioners asked the Supreme Court for a stay.[267] After

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261 *Cf.* Dr. A. v. Hochul, 142 S. Ct. 2569, 2571 (2022) (Thomas, J., dissenting) ("I would not miss the chance to answer this recurring question in the normal course on the merits docket. . . . Here, the Court could grant a petition that squarely presents the disputed question and consider it after full briefing, argument, and deliberation.").

262 *See* Does 1–3 v. Mills, 142 S. Ct. 17, 18 (2021) (Barrett, J., concurring).

263 401 U.S. 402 (1971).

264 *Id.* at 406–08.

265 *Id.* at 406.

266 Citizens to Preserve Overton Park, Inc. v. Volpe, 309 F. Supp. 1189, 1195 (W.D. Tenn. 1970), *aff'd* 432 F.2d 1307, 1315 (6th Cir. 1970).

267 *See* Citizens to Pres. Overton Park, Inc. v. Volpe, 400 U.S. 921 (1970) (mem.).

oral argument, the Court granted that relief.[268] Then, it treated "the application for a stay . . . as a petition for a writ of certiorari" and set a second argument on the merits.[269] Famously, the Court's ultimate merits ruling clarified which administrative decisions are "committed to agency discretion by law."[270]

Another notable emergency-to-merits transfer is *Bush v. Gore.*[271] The closely contested 2000 presidential election failed to produce a clear winner. Florida was too close to call. So litigation over a recount ensued: the Florida Supreme Court ordered a manual recount.[272] And the Bush campaign asked the Supreme Court to stay that order.[273] The Court granted a stay, but also treated Bush's stay application as a petition for certiorari and set the case for oral argument on the merits.[274] That argument produced the infamous decision holding that a recount would violate the Equal Protection Clause.[275]

And in the recent litigation over Texas's six-week abortion ban, a district court held that abortion providers could sue state judges, clerks, and executive officials[276] and that the federal government could sue the state itself[277] to stop enforcement of a six-week abortion ban. The Fifth Circuit stayed both injunctions,[278] so both sets of challengers appealed. Abortion providers sought certiorari before judgment,[279] but the federal government simply asked the Court to vacate the Fifth Circuit's stay.[280] Instead, the Court treated the federal government's application like a petition for certiorari before judgment and set both cases for argument.[281]

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268 Citizens to Pres. Overton Park, Inc., v. Volpe, 401 U.S. 402, 406 (1971).

269 Citizens to Pres. Overton Park, Inc., v. Volpe, 400 U.S 939 (1970) (mem.); *see also* Citizens to Pres. Overton Park, Inc., 400 U.S. 921 (1970) (mem.) (setting the stay application for argument a few days earlier).

270 *See Volpe*, 401 U.S. at 410 (quoting 5 U.S.C. § 701(a)(2)).

271 531 U.S. 98 (2000) (per curiam).

272 *Id.* at 100.

273 *Id.*; *see also* Gore v. Harris, 772 So. 2d 1243, 1247, 1262 (Fla. 2000) (per curiam), *rev'd and remanded sub. nom. Bush*, 531 U.S. at 98.

274 Bush v. Gore, 531 U.S. 1046 (2000) (mem.).

275 *Bush*, 531 U.S. at 103.

276 Whole Women's Health v. Jackson, 556 F. Supp. 3d. 595, 608 (W.D. Tex. 2021).

277 United States v. Texas, 566 F. Supp. 3d. 605, 692 (W.D. Tex. 2021).

278 United States v. Texas, No. 21-50949, 2021 WL 4786458, at *1 (5th Cir. Oct. 14, 2021); Whole Women's Health v. Jackson, 13 F.4th 434, 439 (5th Cir. 2021).

279 Petition for a Writ of Certiorari Before Judgment, Whole Woman's Health v. Jackson, 142 S. Ct. 522 (2021) (No. 21-463).

280 Application to Vacate Stay of Preliminary Injunction Issued by the United States Court of Appeals for the Fifth Circuit, United States v. Texas, 142 S. Ct. 14 (2021) (No. 21-588).

281 Whole Woman's Health v. Jackson, 142 S. Ct. 522, 529 (2021). The Court ultimately held that the abortion providers' suit could proceed only against a narrow set of defendants.

The Court had jurisdiction to hear those three cases[282] on the merits docket because in each an inferior or state court had given judgment on the merits. So the Court could reach the merits too.[283]

2. Type Two: Cases Within the Court's Original Jurisdiction

In another small subset of cases, the Supreme Court might be able to reach the merits of a claim, even if no lower court passed on them below. The Court has original jurisdiction[284] over:

- "[C]ontroversies between two or more States";
- "All actions or proceedings to which ambassadors, other public ministers, consuls, or vice consuls of foreign states are parties";
- "All controversies between the United States and a State"; and
- "All actions or proceedings by a State against the citizens of another State or against aliens."[285]

The Court retains "exclusive jurisdiction [over] all controversies between two or more States."[286] But it shares original jurisdiction over other cases involving states, the federal government, or foreign ministers.[287] And because the Court is by no means guaranteed to accept a

See id. at 529–30. And it dismissed the federal government's suit as improvidently granted. *See* United States v. Texas, 142 S. Ct. 522 (2021) (mem.).

282 A few less prominent examples: take *Nken v. Holder*, 556 U.S. 418 (2009). There, the Fourth Circuit denied an alien's petition for review, without comment. *Id.* at 423. The alien petitioned for a stay of removal, which the Court treated as a certiorari petition. Nken v. Mukasey, 555 U.S. 1042 (2008) (mem.). Or take many death penalty cases put on the merits docket. Often, petitioners request a stay of execution after lower courts deny their habeas petitions. *See, e.g.*, Barefoot v. Estelle, 459 U.S. 1169 (1983) (mem.) (granting cert.); Barefoot v. Estelle, 463 U.S. 880, 889–91 (1983) (summarizing procedural history); Harris v. Texas, 400 U.S. 1003 (1971) (granting cert.); Harris v. State, 457 S.W.2d 903, 917 (Tex. Crim. App. 1970), *rev'd*, 403 U.S. 947 (1971) (explaining the appellate court's finding of due process); Darden v. Wainwright, 473 U.S. 928 (1985) (mem.) (granting cert.); Darden v. Wainwright, 477 U.S. 168, 171 (1986) (summarizing procedural history).

283 The Court has common-law power to issue a writ of certiorari even when the parties don't ask for it. In England, the King's Bench used certiorari to "remov[e] a case before final judgment, where for some reason it was believed that a fair and impartial trial could not be had." Frank J. Goodnow, *The Writ of Certiorari*, 6 POL. SCI. Q. 493, 500 (1891); *see also* 4 WILLIAM BLACKSTONE, COMMENTARIES *262. The Supreme Court retained that common-law power, though it is limited by its appellate jurisdiction. *In re* Kaine, 55 U.S. (14 How.) 103, 130 (1852) (Nelson, J., dissenting).

284 U.S. CONST. art. III, § 2, cl. 2.

285 28 U.S.C. § 1251 (2018).

286 *Id.* § 1251(a).

287 *See id.* § 1251(b).

case within its original jurisdiction,[288] litigants might prefer to file in district court, as usual. But should they later ask the Court for emergency relief, the Justices would not be precluded from also considering the merits.

Consider the federal government's suit to enjoin Texas's heartbeat abortion ban.[289] That was a "controvers[y] between the United States and a State," so the Court would have had jurisdiction to resolve the merits, if it so chose.[290]

Or take the vaccine-mandate cases. Those involved a state and a federal officer or agency.[291] Granted, there, the Supreme Court's original jurisdiction is less apparent: the United States itself is not a named party.[292] Nevertheless, they might be cases "between the United States and a State"[293] if "[t]he United States is . . . the real party affected by the judgment and against which in fact it will operate."[294] Sometimes agency suits fall into that category;[295] sometimes they do not.[296] If the Supreme Court is interested in resolving the merits, it can do that analysis.

CONCLUSION

The emergency-docket status quo has its problems. But solutions pose their own issues. As it continues to experiment with emergency-docket management, the Supreme Court should take care to clarify its standards for relief—and its own power to grant it.

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288 *See, e.g.*, Illinois v. City of Milwaukee, 406 U.S. 91, 108 (1972); Ohio v. Wyandotte Chems. Corp., 401 U.S. 493, 496–97, 505 (1971). For a criticism of the Court's discretionary management of its original docket, see *Texas v. California*, 141 S. Ct. 1469 (2021) (Alito, J., dissenting).

289 United States v. Texas, 566 F. Supp. 3d 605 (W.D. Tex. 2021).

290 28 U.S.C. § 1251(b)(2) (2018) ("The Supreme Court shall have original . . . jurisdiction of: . . . [a]ll controversies between the United States and a State"); *see also* U.S. CONST. art. III, § 2, cl. 2.

291 Biden v. Missouri, 142 S. Ct. 647, 651 (2022) (per curiam); Nat'l Fed. of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661, 661 (2022) (per curiam) (noting that Ohio was a party).

292 *Cf.* United States v. Lee, 106 U.S. 196, 250–51 (1882).

293 28 U.S.C. § 1251(b)(2) (2018).

294 Minnesota v. Hitchcock, 185 U.S. 373, 387 (1902).

295 *See* Louisiana v. McAdoo, 234 U.S. 627, 629, 632 (1914).

296 *See* Larson v. Domestic & Foreign Com. Corp., 337 U.S. 682, 687 (1949).