UNPRECEDENTED PRECEDENT: THE CASE AGAINST UNREASONED "SHADOW DOCKET" PRECEDENT

Cole Waldhauser[1]

INTRODUCTION

This Article examines the precedential effects of the Supreme Court's so-called "shadow docket." Specifically, I discuss the difficulties confronting lower court judges, exploring how their application of "shadow precedent" has illuminated the dangers in attributing precedential value to the Supreme Court's emergency orders. Though the Court has long issued non-merits orders for routine procedural matters, its recent application of those orders has stirred uncertainty over their precedential weight. The established consensus was that, although public, these orders were of little precedential value.[2] Emergency orders in particular were seen as an important but temporary tool to preserve the *status quo* until a decision on the merits was reached. Today's Court, however, has upended this agreement and transformed the "shadow docket" into a new tool—one that disrupts the *status quo* and assigns its rulings precedential effect. It is because of this unprecedented *use* of the "shadow docket" that the rules must now change. And while scholars and judges have begun to sort the Court's stay decisions into categories of precedential force,[3] these proposals have not yet been adopted as a lodestar for lower courts.

Trial and appellate courts rely heavily on Supreme Court precedent to make sense of the ambiguities before them. A

1. Cole Waldhauser, J.D., UCLA School of Law, 2022; B.A., University of Minnesota – Twin Cities, 2017. My sincerest thanks to Laurie Taylor and Jill Hasday for their helpful comments.

2. *See, e.g.*, Lunding v. N.Y. Tax Appeals Tribunal, 522 U.S. 287, 307 (1998) (explaining that the Court's summary dismissals "do not 'have the same precedential value . . . as does an opinion of this Court after briefing and oral argument on the merits'").

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

district court judge may want to know the proper evidentiary rules for a hearing contesting the veracity of a search warrant, or whether she may impute prior legislative history and intent to a recodification of an earlier statute. The answers to many of the lower courts' murky questions can be found in the binding authority of the courts above. Critical in their application of that authority is the reasoning underlying the rule. After all, "[i]t is emphatically the province and duty of the judicial department to say what the law is,"[4] and "once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law."[5] Well-reasoned opinions are instructive for the courts below, offering clarity and a rationale that lower courts can confidently follow and apply. Full-bodied opinions help distinguish holdings from dicta, and often guide litigants as they navigate their claims.

This Article stresses why the Supreme Court should refrain from binding any court's hands without explaining *why*. The Article offers a cabined view of the shadow docket. It looks not at litigation trends, the politicization of the Court, or supposed doctrinal shifts among the justices,[6] but instead at the sole question of precedential weight. I advocate for a more transparent and consistent non-merits docket, arguing for an all-or-nothing approach: either the order earns its precedence through (i) a reasoned opinion and (ii) signatures from the Justices, or it is devoid of precedential value in future cases. Should the Court choose not to impose this distinction on its own accord, appellate and district courts should sort the Court's decisions according to this simple criterion.

I. THE SHADOW DOCKET AND ITS PRECEDENTIAL EFFECT

The term "shadow docket" was coined by University of Chicago law professor William Baude, who in 2015 defined the phrase as "a range of order and summary decisions that defy [the Supreme Court's] normal procedural regularity."[7] Baude

4. Marbury v. Madison, 5 U.S. 137, 177 (1803).

5. Rivers v. Roadway Exp., Inc., 511 U.S. 298, 312 (1994).

6. *See*, William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1 (2015); Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123 (2019).

7. *Id.* at 1; *see also* Samuel L. Bray, *Hearing before the Presidential Comm'n on the*

describes the "debatable and mysterious" nature of the stays and injunctions granted in the Court's 2013 Term, commenting on the dearth of reasoning in those decisions.[8] It is this mystery that likely inspired the "shadow" in Baude's "shadow docket" label. Indeed, it seems that a lack of transparency is among his chief concerns: "It is on technical procedural and administrative questions," he suggests, "when the spotlight is off that the Court's decisions seem to deviate from its otherwise high standards of transparency and legal craft."[9] Part of those "high standards of transparency" include full briefing, oral argument, and reasoned opinions—all procedures absent from the Court's emergency orders. Their absence is most insidious where the emergency orders implicate questions of significant public import, which are precisely the type of orders the Court has issued at alarming rates in Terms of late.

Baude's work then begs the question of why the orders docket—a longstanding feature of the Court—has only recently garnered criticism.[10] After all, ruling on procedural matters and requests for emergency relief, without the benefit of full briefing and oral argument, is part of the Court's established practice.[11] So, why the concern? The answer lies with three variables: (i) a growing frequency, in both requests and grants, of emergency and extraordinary relief; (ii) the expanding systemic impact of that relief; and (iii) the Court assigning its orders precedential effect.[12]

Supreme Court of the United States 1 n.1 (June 28, 2021) (written testimony of Samuel L. Bray, Notre Dame Law School) https://www.whitehouse.gov/wp-content/uploads/2021/06/Bray-Statement-for-Presidential-Commission-on-the-Supreme-Court-2021.pdf ("I use the term ['shadow docket'] with special reference to the portion of the orders list that is substantive, not including the mere grant or denial of a petition for a writ of certiorari.").

8. Baude, *supra* note 6, at 3.

9. *Id.* at 40.

10. *But cf. Presidential Comm'n on the Supreme Court of the United States* 203–04 (Dec. 7, 2021) [hereinafter Comm'n Report] (noting that "[t]he Court's use of various truncated procedures has at times attracted public scrutiny.") However, these 1950s criticisms focused primarily on "summary dispositions occurring at a time when the Court's docket was more crowded with mandatory appeals (which have largely been eliminated from its present, almost entirely discretionary merits docket)." *See id.* at 203 n.4.

11. The Supreme Court's Shadow Docket: Hearing Before the Subcomm. on the Courts, Intellectual Prop. & the Internet of the H. Comm. on the Judiciary, 117th Cong. (Feb. 18, 2021) (statement of Loren L. AliKhan, Solicitor General, District of Columbia) https://docs.house.gov/meetings/JU/JU03/20210218/111204/HHRG-117-JU03-Wstate-AliKhanL-20210218-U1.pdf.

12. *See* Vladeck, *supra* note 6; *The Supreme Court's "Shadow Docket,"* NAT'L CONST. CTR. (Oct. 7, 2021), https://constitutioncenter.org/interactive-constitution/podcast/the-supreme-courts-shadow-docket.

The "frequency" variable is borne out in statistics. Federal courts scholar and "shadow docket" oracle Stephen Vladeck recently explained that

> in less than three years, the Solicitor General has filed at least twenty-one applications for stays in the Supreme Court (including ten during the October 2018 Term alone). During the sixteen years of the George W. Bush and Obama Administrations, the Solicitor General filed a total of eight such applications—averaging one every *other* Term.[13]

And this uptick in applications brings an uptick in grants; "more [grants of] emergency relief than ever before."[14] Thus, the federal government has found a backchannel through which it can bypass the "ordinary appellate mechanics," and a fruitful one at that.[15] This method evades lower court scrutiny and appeals to doctrinal shifts on the Court—a strategy in which the Justices have readily acquiesced.[16] Worse, by limiting emergency relief to predominantly the federal government, the Court necessarily favors the governing party. Yet when the "shadow docket" is plagued with "unreasoned inconsistent and impossible to defend" decision making, as Justice Kagan wrote in her *Whole Woman's Health I* dissent,[17] that favoritism skews toward the Court's supermajority and conservative policies, as was the case during the Trump administration.[18]

Then there is the substantive effect of the orders. Many of the recent grants have been stays in district court injunctions of federal or state policies, authorizing controversial, even "flagrantly

13. Vladeck, *supra* note 5, at 125. Vladeck stresses that "it is the Court, first and foremost, that is responsible for enabling (if not affirmatively encouraging) the Solicitor General's unprecedented behavior." *Id.* at 127.

14. NAT'L CONST. CTR., *supra* note 12; *Examining the Supreme Court's use of emergency applications*, NAT'L PUB. RADIO (Oct. 7, 2021) https://www.npr.org/2021/10/07/1043938022/ examining-the-supreme-courts-use-of-emergency-applications.

15. Vladeck, *supra* note 6, at 153.

16. *Id.* at 126, 156 (contending that the Court has undergone two doctrinal shifts: 1) a belief that "the government suffers an irreparable injury militating in favor of emergency relief *whenever* a statute or policy is enjoined by a lower court;" and 2) "as a result, the conclusive consideration in such cases has become the government's likelihood on the merits.").

17. Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2500 (2021) [hereinafter *Whole Woman's Health I*] (Kagan, J., dissenting).

18. *See* NAT'L PUB. RADIO, *supra* note 14.

unconstitutional,"[19] laws to remain in effect.[20] These orders run the gamut of election laws, immigration policies, eviction moratoria, and abortion protections, and each tends to result in deprivations—not preservations—of constitutional rights.[21] Entwined with the impact of the Court's orders is the core focus of this Article: the precedential force conferred upon those orders. Emergency orders, though theoretically temporary, often become the "final word on the issue."[22] The grant or denial of an emergency stay may well influence more lives than just those as party to a case. And increasingly, the Court is giving dispositive weight to its emergency orders, most of which are devoid of any explanation or guidance for lower courts.[23] Of the "shadow docket's" myriad critiques, the concern over precedent seems the most universally prevalent, animating discourse across political ideologies.[24]

19. *Whole Woman's Health I*, 141 S. Ct. at 2498 (2021) (Sotomayor, J., dissenting) (declaring Texas' Senate Bill 8 "clearly unconstitutional under existing precedents" for its "near-categorical ban on abortions beginning six weeks after a woman's last menstrual period, before many women realize they are pregnant, and months before fetal viability.").

20. Steve Vladeck, *"Shadow Dockets" Are Normal. The Way SCOTUS Is Using Them Is the Problem*, SLATE.COM (Apr. 12, 2021, 6:09 PM) https://slate.com/news-and-politics/2021/04/scotus-shadow-docket-use-problem.html; *see* Merrill v. Milligan, 142 S. Ct. 879 (2022) (mem.) (staying District Court order blocking AL from implementing a new congressional district plan that includes only one district with a Black majority); Republican Nat'l Comm. v. Democratic Nat'l Comm., 140 S. Ct. 1205 (2020) (per curiam) (staying District Court order that would have required WI to count absentee ballots postmarked after its primary election date); Wolf v. Cook Cty., Ill., 140 S. Ct. 681 (2020) (staying injunction of Department of Homeland Security regulation that permits immigration officers to consider non-cash public benefits in deciding whether a noncitizen "is likely at any time to become a public charge," pursuant to 8 U.S.C. § 1182(a)(4)(A)); Dep't of Homelans Sec. v. New York, 140 S. Ct. 599 (2020) (mem.) (same); West Virginia v. EPA, 136 S. Ct. 1000 (2016) (mem.) (staying EPA rule aimed at curbing greenhouse gas emissions from power plants). The same can sometimes be said of the Court's *refusals* to grant stays, likewise under cover of scarcely reasoned orders, *see, e.g.*, *Whole Woman's Health I*, 141 S. Ct. 2494 (denying a request for a stay enjoining enforcement of Texas abortion law). There is speculation that the *Whole Woman's Health I* majority delayed its order until the moment S.B. 8 took effect to invert the posture of its decision. *I.e.*, the delay allowed the Court to preserve the *status quo ante* rather than disrupt it. *See Flagrantly Unconstitutional*, STRICT SCRUTINY (Sept. 4, 2021), https://podcasts.apple.com/us/podcast/strict-scrutiny/id1469168641?i=1000534303832.

21. *See* Mark Walsh, *The Supreme Court's "Shadow Docket" Is Drawing Increasing Scrutiny*, ABA J. (Aug. 20, 2020, 9:20 AM) https://www.abajournal.com/web/article/scotus-shadow-docket-draws-increasing-scrutiny.

22. Comm'n Report, *supra* note 10, at 204 (collecting cases).

23. *See, e.g.*, Alabama Ass'n of Realtors v. Dep't of Health & Human Servs., No. 21A23, slip op. at 4 (U.S. Aug. 26, 2021) (per curiam); Gateway City Church v. Gavin Newsom, Governor of Cal. 141 S. Ct. 1460 (2021); South Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716 (2021); CASA de Md., Inc. v. Trump, 971 F.3d 220 (4th Cir. 2020). A more thorough explanation of some of these cases is provided below.

24. Comm'n Report, *supra* note 10, at 208.

Indeed, evidence of this phenomenon continues to mount. There is a growing list of cases confirming the Justices' intent to establish precedent through its emergency orders, perhaps none more baldly than *Roman Catholic Diocese of Brooklyn v. Cuomo*.[25] The case involved a church's motion for preliminary injunction seeking relief from the New York Governor's Executive Order, which imposed limits on large religious gatherings in response to the COVID-19 pandemic.[26] After the motions were denied by the district and appellate courts, the Supreme Court granted emergency relief for the church, enjoining enforcement of the Executive Order.[27] *Diocese of Brooklyn* has since been cited hundreds of times, including by the Supreme Court, in spite of its "emergency posture, lack of oral argument, and truncated briefing schedule."[28] Ninth Circuit Judge Milan D. Smith, Jr. has regarded *Diocese of Brooklyn* as a "seismic shift in Free Exercise law,"[29] and it has dictated numerous lower court outcomes.[30]

For instance, in *Branch v. Newsom*, the Ninth Circuit held that *Diocese of Brooklyn* "alone confirms that California's prohibition on in-person instruction is not sufficiently tailored."[31] Likewise, in *Air Force Officer v. Austin*, the U.S. District Court for the Middle District of Georgia relied on *Diocese of Brooklyn*'s Free Exercise doctrine to impose strict scrutiny on a military COVID-19 vaccine requirement, enjoining its enforcement against an Air Force officer.[32] All the while, the Court has given its blessing of such precedential effect, vacating lower court

25. 141 S. Ct. 63 (2020) (per curiam).

26. *Id.* at 65-66.

27. *Id.* at 69.

28. McFadden & Kapoor, *supra* note 3, at 834; *see, e.g.*, Tandon v. Newsom, 141 S. Ct. 1294 (2021) (per curiam).

29. Calvary Chapel Dayton Valley v. Sisolak, 982 F.3d 1228, 1232 (9th Cir. 2020).

30. *See, e.g.*, *Calvary Chapel*, 982 F.3d at 1232; Poffenbarger v. Kendall, No. 3:22-cv-1, 2022 WL 594810, at *16 (S.D. Ohio, Feb. 28, 2022) (citing *Tandon*, 141 S. Ct. at 1296 and *Diocese of Brooklyn*, 141 S. Ct. 63 for the Supreme Court's new interpretation of regulatory neutrality, triggering strict scrutiny review); Northland Baptist Church of St. Paul, Minnesota v. Waltz, 530 F.Supp.3d 790, 811 (D. Minn. 2021) ("Based on the Supreme Court's recent application of traditional tiers of constitutional scrutiny in *Roman Catholic Diocese*, the Court concludes that *Jacobsen*, does not replace the traditional tiers of constitutional scrutiny."); *see also* McFadden & Kapoor, *supra* note 3, at 834.

31. Brach v. Newsom, 6 F.4th 904, 932 (9th Cir. 2021), *reh'g en banc granted*, No. 20-56291, 2021 WL 5822544 (9th Cir., Dec. 8, 2021).

32. Air Force Officer v. Austin, No. 5:22-cv-00009-TES, 2022 WL 468799, at *13 (M.D. Ga., Feb. 15, 2022).

decisions that defy its *Diocese of Brooklyn* order.[33] In *Tandon v. Newsom*, the Court enjoined enforcement of California's restrictions on at-home gatherings, citing *Diocese of Brooklyn* as precedent no less than seven times.[34] In reversing the district and circuit courts, the *Tandon* Court invoked *Diocese of Brooklyn*'s more exacting Free Exercise jurisprudence, stating that "government regulations are not neutral and generally applicable . . . whenever they treat *any* comparable secular activity more favorably than religious exercise."[35]

Diocese of Brooklyn is but one precedential "shadow docket" case, emblematic of a larger pattern that is now fueling discourse amongst both critics and defenders.[36] It is time now for Congress to rein in the discretionary review power it granted the Supreme Court long ago and has continued to expand over the years.[37] This is not a radical call for the return to mandatory appellate review; the Court need not consider the briefs, hold oral argument, or resolve the merits of each case that comes before it.[38] Rather, I submit a narrow statutory presumption of non-precedence, applicable only to the Court's non-merits orders. This presumption would freely permit the Court to issue orders from its emergency docket, and even to issue summary orders if it so pleases. The constraint bears solely on the precedential effect conferred upon those orders. By explaining its reasoning and collecting a signature from each Justice, the Court can signal its precedential intent to the lower courts and return transparency to its orders.

33. *See* Harvest Rock Church, Inc. v. Newsom, 141 S. Ct. 889 (2020) (mem.); Robinson v. Murphy, 141 S. Ct. 972 (2020); *see also* McFadden & Kapoor, *supra* note 3, at 834 n.32.

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

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

36. *See* James Romoser, *Lawmakers consider nudging Supreme Court toward more transparency on the shadow docket*, SCOTUSBLOG (Feb. 18, 2021, 9:26 PM), https://www.scotusblog.com/2021/02/lawmakers-consider-nudging-supreme-court-toward-more-transparency-on-the-shadow-docket/.

37. *See* Tara Leigh Grove, *The Exceptions Clause as a Structural Safeguard*, 113 COLUM. L. REV. 929, 932, 958 (2013) (describing how, in 1891, Congress granted discretionary review power to the Court through certiorari or certification, and in 1988, "made 'exceptions' to the Court's mandatory appellate jurisdiction and replaced it with discretionary review via writs of certiorari").

38. *See* Eugene Gressman, Requiem for the Supreme Court's Obligatory Jurisdiction, 65 A.B.A. J. 1325, 1327 (1979) ("From 1789 to 1891 the Court was under congressional mandate to take jurisdiction over every case that properly came before it, to consider the briefs, to hear the oral argument, and to resolve the merits of each case by written opinions or otherwise.").

II. A RESPONSE TO JUSTICE ALITO'S PUBLIC ADDRESS ON "THE EMERGENCY DOCKET"[39]

Perhaps the most ardent defender of the Court's "shadow docket" practices sits on the Bench itself: Associate Justice Samuel Alito. In a speech at the University of Notre Dame Law School in late September, Justice Alito derided the media's use of the "sinister" term "shadow docket."[40] The term, he warned, frames the Court as "having been captured by a dangerous cabal that resorts to sneaky and improper methods to get its way."[41] "The suggestion that these emergency rulings definitively decide important issues is false," he said.[42] But the protesting Justice commits a non sequitur. When the Court issues an emergency order, that order is not simply stripped of all subsequent value because the Court chose not to engage a merits analysis; quite the contrary. Non-merits decisions, though not precedential *to the underlying issue*, have been proven to hold precedential value *in related cases*.[43]

Take for example the Supreme Court's post-*Diocese of Brooklyn* pandemic policy cases. In what is now the archetype of emergency order precedent, the Court in *Gateway City Church v. Newsom* reversed a Ninth Circuit order denying a church's equitable motion seeking to bar enforcement of Santa Clara County, California's restrictions on indoor gatherings as applied to their places of worship.[44] The Court concluded that the circuit court's "failure to grant relief was erroneous," because the right to injunctive relief was "clearly dictated" by the Supreme Court's prior summary order in *South Bay United Pentecostal Church v.*

39. J. Samuel Alito, "The Emergency Docket" (Sept. 30, 2021) *at* UNIV. OF NOTRE DAME. The address was livestreamed, but a recording is not publicly available.

40. Catholic News Service, *At Notre Dame, Justice Alito defends court's use of "shadow docket,"* NAT'L CATHOLIC REP. (Oct. 4, 2021), https://www.ncronline.org/news/justice/notre-dame-justice-alito-defends-courts-use-shadow-docket.

41. *Id.*

42. Katie Barlow, *Alito blasts media for portraying shadow docket in "sinister" terms,* SCOTUSBLOG (Sep. 30, 2021, 6:59 PM), https://www.scotusblog.com/2021/09/alito-blasts-media-for-portraying-shadow-docket-in-sinister-terms/.

43. *Id.*; Adam Liptak, *Alito Responds to Critics of the Supreme Court's 'Shadow Docket'*, N.Y. TIMES (Oct. 4, 2021) https://www.nytimes.com/2021/09/30/us/politics/alito-shadow-docket-scotus.html.

44. Gateway City Church v. Newsom, No. 5:20-cv-08241-EJD, 2021 WL 781981, at *1 (9th Cir., Feb. 12, 2021) *disapproved in later proceedings sub nom.* Gateway City Church v. Gavin Newsom, Governor of Cal. 141 S. Ct. 1460 (2021).

Newsom.[45] It may well be that in so holding, the Court was simply treating like cases alike for the purpose of emergency relief. But that is no answer when the dispositive case (*South Bay*) is devoid of any discernable legal principles or guidance for the courts below.[46] Moreover, it appears from conjecture[47] that *Diocese of Brooklyn* compelled strict scrutiny review of the pandemic restrictions in *South Bay*, clearing the path for the Court's ultimate grant of emergency relief. Merits aside, such a cross-referential string of reasoning may have proven suitable had the Court shown its work. But instead, that which was "clearly dictated by th[e] Court's decision in [*South Bay*]" is in fact not clear at all.

Similarly, the Fourth Circuit puzzled over questions of precedential effect in a 2020 immigration case concerning the "public charge" provision of 8 U.S.C. Section 1182(a)(4)(A).[48] After district courts in the Second and Seventh Circuits enjoined nationwide enforcement of a new rule defining "public charge,"[49] the Supreme Court stayed the injunctions.[50] When faced with the same rule challenge, Judge Wilkinson, writing for the Fourth Circuit majority, contemplated the weight of the Supreme Court's stay. "We may of course have the technical authority" to disregard the stay, "[b]ut every maxim of prudence suggests that we should decline to take [that] aggressive step," wrote the

45. South Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716 (mem.) (2021); *see* Joanna R. Lampe, *The "Shadow Docket": The Supreme Court's Non-Merits Orders*, 1 U.S. (1 Dall.) 1 (August 27, 2021).

46. *See* Williams v. Illinois, 567 U.S. 50, 141 (2012) ("Precedent-based decisionmaking provides guidance to lower court judges and predictability to litigating parties.").

47. *See* Wendy K Mariner, *Shifting Standards of Judicial Review During the Coronavirus Pandemic in the United States*, 22 German L.J. 1039, 1054 (2021) ("In [the view of Justices Alito, Gorsuch, Kavanaugh, and Thomas,] claims of violations of discrimination against religion should normally be subject to strict scrutiny whenever religion is limited more than some secular entities, even when the law does not target religion, even when there are good reasons for different treatment, and even in an emergency. Their view became the majority after Justice Ruth Bader Ginsburg died on September 18, 2020, and Amy Coney Barrett became the ninth Justice on October 26, 2020. [*Diocese of Brooklyn*] confirmed that a new majority of Justices would apply strict scrutiny to claims of religious freedom."). Conjecture is necessary where the Court omits its underlying reasoning.

48. CASA de Md., Inc. v. Trump, 971 F.3d 220 (4th Cir. 2020); 8 U.S.C. § 1182(a)(4)(A) (2019) (stating that an immigrant who is "likely at any time to become a public charge is inadmissible").

49. *See* Cook Cty. v. McAleenan, 417 F.Supp.3d 1008 (N.D. Ill. 2019); New York v. U.S. Dep't of Homeland Sec., 408 F.Supp.3d 334, 353 (S.D.N.Y. 2019).

50. Dep't of Homeland Sec. v. New York, 140 S. Ct. 599 (2020).

judge.[51] He continued, asserting that the decision to grant the stay "gives us a window into the Supreme Court's view of the merits."[52]

Now transpose this practice onto Texas' abortion law, Senate Bill (S.B.) 8—the catalyst for Justice Alito's diatribe.[53] In *Whole Woman's Health I*, the Court refused to grant a stay of S.B. 8's implementation in a single paragraphed, unsigned order.[54] Despite its expedited merits review of the near-total abortion ban, the Court's emergency order may well be interpreted as fresh authority for denying interim injunctive relief where "novel antecedent procedural questions" exist.[55] Litigants have already begun to pepper their briefs with this excerpt, treating procedural uncertainties as automatic denials of equitable relief,[56] despite precedent to the contrary.[57] The Court has since clarified its position as to which named defendants can be sued in a "pre-enforcement" S.B. 8 challenge,[58] but without a decision on the law's ultimate legitimacy, the Court's emergency order remains a blank check for lower courts to interpret as another "window into the Supreme Court's view of the merits."[59] This is not to say that

51. *CASA de Md.*, 971 F.3d at 230; McFadden & Kapoor, *supra* note 3, at 829–30.

52. *CASA de Md.*, 971 F.3d at 230. In dissent, Judge King argued that "assigning such significance to perfunctory stay orders is problematic," particularly because "such stays . . . have become commonplace." *Id.* at 281 n.16 (King, J., dissenting) ("If the Court's decision to grant a stay could be understood to effectively hand victory to the government regarding the propriety of a preliminary injunction, there would be little need for an intermediate appellate court to even consider the merits of an appeal in which the Court has granted a stay.").

53. Tex. Health & Safety Code Ann. § 171.204(a) (West 2021)

54. *Whole Woman's Health I*, 141 S. Ct. 2494 (2021).

55. *Whole Woman's Health I*, 141 S. Ct. at 2495.

56. *See, e.g.*, Def.'s Motion to Dismiss (Dkt. 43) at 3, United States v. Texas, No. 1:21-cv-00796-RP, 2021 WL 5141234 (W.D.Tex., Sept. 29, 2021) ("In the end, the motion for preliminary injunction 'presents complex and novel antecedent questions on which [the federal government has] not carried [its] burden.").

57. *See, e.g.*, Ramirez v. Collier, 142 S. Ct. 50 (mem.) (2021) (granting an emergency stay order blocking execution of death sentence where legal questions remained unresolved); *see also Messing with Texas*, STRICT SCRUTINY (Sept. 10, 2021), https://podcasts.apple.com/us/podcast/messing-with-texas/id1469168641?i=1000534986599.

58. Whole Woman's Health v. Jackson, No. 21-463, 2021 WL 5855551, at *9 (U.S., Dec. 10, 2021) [hereinafter *Whole Woman's Health II*].

59. *CASA de Md.*, 971 F.3d at 230. To be sure, the Court's order in *Whole Woman's Health I* is "emphatic in making clear that it cannot be understood as sustaining the constitutionality of the law at issue." *Whole Woman's Health I*, 141 S. Ct. at 2496 (Roberts, J., dissenting). Nevertheless, there is little value in debating whether *Roe v. Wade*, 410 U.S. 113 (1973) or *Planned Parenthood of S.E. Pa. v.* Casey, 505 U.S. 833 (1992) have been overruled *de jure*, because *de facto*, the Supreme Court's non-merits order ensured there would be no abortion access in the state of Texas. *See* STRICT SCRUTINY, *supra* note 57. *See also Whole Woman's Health II*, 2021 WL 5855551, at *17 (Sotomayor, J., concurring in

problems of "shadow precedent" only exist until the Court issues a regular opinion on the issue. Despite the Court occasionally stamping its non-merits orders with expiration terms,[60] those orders are nevertheless published and interpreted by lower courts until a clarifying judgment comes along—a day that seldom arrives. So long as unreasoned and unsigned summary orders continue to line the case reporters, their havoc on lower courts will persist.

III. "SHADOW PRECEDENT" AND THE FEDERAL TRIAL COURTS[61]

Federal appellate courts are not the only tribunals grappling with the Supreme Court's "shadow precedent." United States District Courts have faced these questions of vertical *stare decisis* with growing frequency. As courts of first review, district courts face the unique task of applying law from above while simultaneously sorting facts and developing a record for review. As such, they are asked to view and assess new evidence that may distinguish the cases on its docket from those that bind the court. This balance between fact-finding and legal analysis is central to the work of the district court judge.

Take any multidistrict litigation (MDL) case. These actions often present novel and complex questions of personal jurisdiction, testing the boundaries of Supreme Court precedent. When faced with close, complex cases such as these, the judge must review the parties' briefing, outline the operative legal standards, and conclude whether the case falls within the ambit of controlling precedent. On occasion, a case might fit snugly in the cavities of binding authority, precisely where the circuit or Supreme Court opted not to venture. This demands a careful

part and dissenting in part) ("The chilling effect [of S.B. 8] has been near total, depriving pregnant women in Texas of virtually all opportunity to seek abortion care within their home State after their sixth week of pregnancy.").

60. *See, e.g.*, *Tandon*, 141 S. Ct. at 1296 ("Should the petition for a writ of certiorari be denied, this order shall terminate automatically. In the event the petition for a writ of certiorari is granted, the order shall terminate upon the sending down of the judgment of this Court.").

61. I use the term "shadow precedent" as an extension of Baude's "shadow docket" label, to describe the Supreme Court's emergency rulings that have been given precedential effect or interpreted to operate as binding on lower courts. This use of the term differs from that of scholars Brian Broughman and Deborah Widiss in their 2017 article. *See* Brian J. Broughman & Deborah A. Widiss, *After the Override: An Empirical Analysis of Shadow Precedent*, 46 J. LEGAL STUD. 51 (2017).

reading of the landmark decision, beginning with the factual background. In the hands of the district court judge, the most useful opinions are those that clearly explain why a decision was reached, emphasizing the dispositive facts and core holdings.[62] A well-reasoned opinion, even if silent on the MDL's key issues, would at minimum signal to the judge that hers is a case of first impression. Of course, this brings its own challenges, but it nevertheless enables the district court to bypass needless guesswork to instead soldier forth to develop the law.

Sometimes the Supreme Court explicitly recognizes the limited scope of its holdings;[63] other times, it implies that its ruling is more cabined.[64] But in either instance, the district court judge can readily discern the precedent's relevance to the case at issue and offer a legal conclusion grounded in reasoning from a higher court. There are facts that underlie reasoned opinions, pushing or pulling the majority toward its chosen outcome, all of which are tools for the district court as it translates its case through the language of binding precedent. This lies in stark contrast to a precedential summary order. Should the district court encounter a case that turns on, say, a reading of the Free Exercise Clause, it would look to the most recent controlling authority. Inevitably, it would arrive at *Diocese of Brooklyn*, *South Bay*, and *Gateway*, where it would then parse through the orders in search for rationale and any sort of guiding principle. In lieu, it would find "only a brief summary of the reasons why immediate relief is essential" in *Diocese of Brooklyn*,[65] and two skeletal paragraphs

62. *See, e.g.*, Fry v. Napoleon Cmty. Sch., 137 S. Ct. 743, 756 (2017) (crafting a pair of hypothetical questions in IDEA case to aid courts in determining whether the gravamen of a complaint against a school concerns the denial of a free appropriate public education (FAPE)); Baughman v. Walt Disney World Co., 685 F.3d 1131, 1136 (9th Cir. 2012) ("If [defendant] can make [plaintiff's] experience less onerous and more akin to that enjoyed by its able-bodied patrons, it must take reasonable steps to do so."); Nat'l Fed'n of Indep. Business v. Sebelius ("NFIB"), 567 U.S. 519, 574 (2012) ("If a tax is properly paid, the Government has no power to compel or punish individuals subject to it . . . . imposition of a tax [] leaves an individual with a lawful choice to do or not do a certain act, so long as he is willing to pay a tax levied on that choice.").

63. *See, e.g.*, Matal v. Tam, 137 S. Ct. 1744, 1763 n.16 (2017) ("We leave open the question whether this is the appropriate framework for analyzing free speech challenges to provisions of the Lanham Act.").

64. *See, e.g.*, Tennessee v. Lane, 541 U.S. 509, 533–534 (2004) ("[W]e conclude that Title II [of the ADA], as it applies to the class of cases implicating the fundamental right of access to the courts, constitutes a valid exercise of Congress' § 5 authority to enforce the guarantees of the Fourteenth Amendment.").

65. Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 66 (2020).

granting relief in *South Bay*[66] and *Gateway*.[67] These unsigned orders, stripped of the procedural guardrails of briefing and argument, are, by the Court's own admission,[68] far too hurried and summary to meet the needs of any lower court judge. Ultimately, the district court would find little guidance in the Supreme Court's orders, rendering them wholly inadequate as controlling precedent.

In fact, the Court's recent "shadow precedent" in these cases has already begun to mystify district courts. Senior Judge Paul Crotty for the Southern District of New York recently pondered:

> *Roman Catholic Diocese* and *Agudath Israel* are binding precedent for this Court. But the scope of their rulings is unclear. Have those decisions abrogated *Jacobson*'s relevance in *all* Constitutional cases arising from the pandemic? Or can they be cabined to the free exercise context in which their holdings arose?[69]

Clearly the Supreme Court is "breed[ing] confusion about the content of the law for the lower courts, for relevant parties, and for the public."[70] In *Diocese of Brooklyn*, it seems to have crafted a new Free Exercise standard out of whole cloth, applying strict scrutiny to state laws without properly explaining why.[71] At the district court, judges not only rely on Supreme Court precedent to counsel their decisions; they adhere to it faithfully to "promote the evenhanded, predictable, and consistent

66. South Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716 (2021).

67. Gateway City Church v. Gavin Newsom, Governor of Cal., 141 S. Ct. 1460 (2021).

68. *See Roman Catholic Diocese of Brooklyn*, 141 S. Ct. at 66 ("Because of the need to issue an order promptly, we provide only a brief summary of the reasons why immediate relief is essential."); *see also* Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2500 (2021) (Kagan, J., dissenting) ("Today's ruling illustrates just how far the Court's 'shadow-docket' decisions may depart from the usual principles of appellate process. . . . It has reviewed only the most cursory party submissions, and then only hastily. And it barely bothers to explain its conclusion.").

69. Hopkins Hawley LLC v. Cuomo, 518 F.Supp.3d 705, 712 (S.D.N.Y. 2021) (cleaned up).

70. Comm'n Report, *supra* note 10, at 208.

71. *Roman Catholic Diocese of Brooklyn*, 141 S. Ct. at 67. In one sentence, the Court explains that its strict scrutiny application is "[b]ecause the challenged restrictions are not 'neutral' and of 'general applicability,'" neglecting that the state law at issue "singles out religious institutions for preferential treatment in comparison to secular gatherings, not because it discriminates against them." *Id.* at 80 (Sotomayor, J., dissenting). This creates a new standard by which a state law that imposes on religious liberty is now subject to heightened scrutiny if it treats a religious institution differently than any secular institution, effectively nullifying settled "comparator" analyses. *See* Gamble v. United States, 139 S. Ct. 1960, 1969 (2019) ("a departure from precedent 'demands special justification'").

development of legal principles."[72] A doctrinal shift of *Diocese of Brooklyn*'s magnitude leaves judges guessing at both its basis and its effect. Though technically an emergency stay, *Diocese of Brooklyn* purports to "establish clear rules" and "dispel . . . misconceptions about the role of the Constitution."[73] These discrepancies between what the Court says (assigning precedential weight) and how it says it (through emergency orders) have left those charged with faithful adherence between the devil and the deep blue sea.

IV. CHECKS AND/OR BALANCES: LEGISLATIVE AND EXECUTIVE OVERSIGHT

Concerns over "shadow precedent" have permeated beyond courtrooms and classrooms, taking hold of institutional bodies like the United State Senate Committee on the Judiciary (Committee) and the Presidential Commission on the Supreme Court of the United States (Commission). These groups have investigated the rising prominence of "shadow docket" decisions and their impact on the judiciary, lending their attention to the "uncertain precedential effect of the Court's emergency rulings."[74] Though criticized as toothless,[75] they have helped lift this issue off the groaning shelves of law libraries and into the public eye. Both groups have heard extensive testimony, written and oral, from leading constitutional experts.[76] The Committee has held and broadcast a hearing on the role of the "shadow

72. Payne v. Tennessee, 501 U.S. 808, 827 (1991).

73. *Roman Catholic Diocese of Brooklyn*, 141 S. Ct. at 72 (Gorsuch, J., concurring). Justice Gorsuch's embrace of precedential effect in this instance is at odds with his earlier demands for lower court guidance. *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2425 (2019) (Gorsuch, J., concurring) ("Respectfully, we owe our colleagues on the lower courts more candid and useful guidance than this.").

74. Comm'n Report, *supra* note 10, at 208.

75. *See, e.g.*, Charles P. Pierce, *The Supreme Court's 'Shadow Docket' Is Looking Increasingly Shady*, ESQUIRE (Apr. 12, 2021) https://www.esquire.com/news-politics/politics/a36099436/supreme-court-shadow-docket-california-churches-covid-19/; Dr. William J. Murphy, *Senate Judiciary FISA Subpoenas Likely Toothless without Enforcement Reforms*, GOOD GOV'T NOW (June 11, 2020) https://goodgovernmentnow.org/2020/06/11/senate-judiciary-fisa-subpoenas-likely-toothless-without-enforcement-reforms/.

76. *See* Comm'n Report, *supra* note 10; Texas's Unconstitutional Abortion Ban and the Role of the Shadow Docket: Full Comm. Hearing, Comm. on the Judiciary, 117th Cong. (Sept. 29, 2021) [hereinafter Comm. Hearing] https://www.judiciary.senate.gov/meetings/texass-unconstitutional-abortion-ban-and-the-role-of-the-shadow-docket.

docket,"[77] and the Commission recently published its final report to the President.[78] Their findings and public reception warrant the brief discussion below.

The Commission, comprised of thirty-six bipartisan "experts on the Court and the Court reform debate,"[79] was formed on April 9, 2021, in accordance with Executive Order 14023.[80] Its primary function was to produce a report for the President that summarizes the role and history of the Court and analyzes "the principal arguments in the contemporary public debate for and against Supreme Court reform."[81] A response to the Court's conservative supermajority, the Commission's focus spanned court expansion, term limits, and other structural reforms, with 13 of the report's 288 pages dedicated to "shadow docket" discussion. Of those 13 pages, an even narrower subset examines the docket's precedential effect. The report ultimately advances four proposals aimed at addressing the core "shadow docket" concerns, two of which speak to the problems of the lower courts. It first proposes that the Court "explain the majority's reasoning in emergency orders involving matters of great public debate," and that the Justices disclose their votes in those cases.[82] This, the report suggests, would provide guidance to litigants and lower courts, display each Justice's role in the decision, and reinforce decisions with the rigor and discipline of reasoned opinions. The report then briefly proposes that the Court "clarify whether emergency rulings should have any precedential effect on lower courts," or specify "which aspects of individual rulings should or should not be construed as precedent."[83]

In other words, the Commission recommends that the Court reinforce its orders "of great public debate" with reasoning or explain whether the orders are precedential.[84] I suggest a shift in perspective. Rather than asking the Court to self-impose a nebulous standard, we ought to start with a rule and work backward: All non-

77. *See* Comm. Hearing, *supra* note 76.

78. *See* Comm'n Report, *supra* note 10.

79. Press Release, White House, President Biden to Sign Executive Order Creating the Presidential Commission on the Supreme Court of the United States (Apr. 9, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/09/president-biden-to-sign-executive-order-creating-the-presidential-commission-on-the-supreme-court-of-the-united-states.

80. Exec. Order No. 14,023, 86 Fed. Reg. 19,569 (Apr. 9, 2021).

81. *Id.*

82. Comm'n Report, *supra* note 10, at 209.

83. *Id.* at 210–11.

84. Comm'n Report, *supra* note 10, at 209–11.

merits orders are presumed non-precedential unless they (i) contain a published rationale and (ii) are signed by each Justice. Under the Commission's proposal, the question of whether a case merits such explanations and disclosures is a matter of pure Supreme Court discretion. In contrast, a presumption of non-precedence moves the inquiry to lower courts, where judges can readily ascertain the order's effect, the operative legal standards, and most importantly, the reasoning underlying the Court's decision. The Supreme Court would still retain significant discretion under this proposal, as the clear boundaries would enable the Court to pick and choose the orders it deems precedential, albeit with some surplus ink spilled.[85] This draws from the Commission report but builds in a more workable standard.

Since its submission to the President on December 7, 2021, the report has attracted mixed, though mostly negative, attention. Some have praised its "academic quality,"[86] while others have deemed the entire Commission an exercise in futility.[87] Most critics seem to agree that the report's measured tone has stunted its influence.[88] A product of the Commission's fractured ideology, its extensive disagreement left the proposals so diluted they hardly resemble any position at all. Yet, much unlike the report's other subjects, "shadow precedent" escapes the same erosion. There is a consensus that unreasoned, unsigned emergency orders should not carry precedential weight for lower courts.[89] This

85. "The Court has demonstrated [] that it can issue informative opinions in an expedited way . . . . [and it] may well benefit from continuing to adjust is explanatory practices in important cases, with an eye toward providing insight into the Court's reasoning, reinforcing procedural consistency, and avoiding the possible appearance of arbitrariness or bias." Comm'n Report, *supra* note 10, at 210.

86. Jess Bravin, *Commission Approves Report on Supreme Court Amid Partisan Differences*, WALL ST. J. (Dec. 7, 2021, 7:33 PM) https://www.wsj.com/articles/commission-approves-report-on-supreme-court-amid-partisan-differences-11638923592.

87. Thomas Jipping, Biden's Supreme Court Commission Does What He Intended: Nothing, HERITAGE FOUND. (Dec. 7, 2021) https://www.heritage.org/courts/commentary/bidens-supreme-court-commission-does-what-he-intended-nothing.

88. *See, e.g.*, Scott Douglas Gerber, *The Presidential Commission on the Supreme Court failed the president*, HILL (Dec. 16, 2021, 12:01 PM) https://thehill.com/opinion/white-house/585893-the-presidential-commission-on-the-supreme-court-failed-the-president?rl=1 (dismissing the report's discussion of judicial independence as "superficial"); Sarah Turberville, *Biden's Supreme Court Commission Releases Milquetoast Report*, POGO (Dec. 7, 2021) https://www.pogo.org/press/release/2021/bidens-supreme-court-commission-releases-milquetoast-report/ ("[The commission's] deliberations made painfully apparent that it would only give Biden what he asked for: a book report.").

89. Comm'n Report, *supra* note 10, at 208, 210.

unanimity signals a global understanding of the dangers in "shadow precedent" and an appetite for immediate reform.

The Committee has likewise contributed, though perhaps less prominently, to public "shadow docket" discourse. Prompted in part by the House Judiciary Committee's "shadow docket" hearings in February of 2021, the Senate Judiciary Committee held its first full hearing on the subject after the *Whole Woman's Health I* decision in September.[90] Witnesses included congresspeople, practitioners, and legal scholars, representing a wide swath of perspectives. The subject of precedent was broached only peripherally,[91] with much of the debate returning to the divisive S.B. 8 and its broader implications. Nevertheless, this Congressional concern has surely captured the Court's attention.[92] Whether it conduces change is another question.

V. ANALOGIES AND REFORM

In some respects, the issues of precedential non-merits orders are the same that plague selective publication. Federal courts may freely choose to ordain an opinion with precedential force, but this should not devolve into absolute discretion. There are clear standards for publication, including local rules of court and reports from federal judicial committees. Still, eligible opinions slip through these advisory cracks, sometimes creating carve-outs in what is otherwise settled law.[93] If a decision meets any one of the criteria established by the 1973 Advisory Council on Appellate Justice Report,[94] publication should be mandatory.

90. *See* Comm. Hearing, *supra* note 76.

91. *Id.* at 1:42:00 (oral testimony of Stephen I. Vladeck, Professor of Law, University of Texas School of Law) https://www.judiciary.senate.gov/meetings/texass-unconstitutional-abortion-ban-and-the-role-of-the-shadow-docket ("[T]he Court is treating these rulings as much more impactful than emergency rulings of the past, [and] instead of unsigned orders that don't have any analysis that no one expects to have effect beyond the parties to that case, the Court has actually now gone out of its way to chastise lower courts for failing to follow unsigned orders.").

92. *See* J. Alito, *supra* note 39.

93. *See* Plumley v. Austin, 574 U.S. 1127, 831 (2015) (Thomas, J., dissenting from denial of certiorari) (the Fourth Circuit's decision "announces a rule that is at odds with the decisions of this Court and Court of Appeals. And, it does so in an unpublished opinion that preserves its ability to change course in the future.").

94. An opinion should be published if it does any one of the following: 1) "lays down a new rule of law, or alters or modifies an existing rule"; 2) "involves a legal issue of continuing public interest," 3) "criticizes existing law," especially calling for change by a higher court or legislature; or 4) resolves a conflict of authority and "rationalizes apparent divergencies in the way an existing rule has been applied." A Report of the Comm. on Use

Should a federal court deviate from stare decisis or create new standards, it has no business hiding behind a "non-precedential" designation that only ensures an unequal application of the law. Such insulated decisions smack of the same qualifications seen in *Bush v. Gore*.[95]

"Shadow precedent" is a sort of inverted analog of such abuses of judicial discretion. In a joint article, former Ninth Circuit Judges Kozinski and Reinhardt implored us not to cite their "memdispos" as precedent.[96] They all but predicted the current issues plaguing the "shadow docket:"

> Language that might be adequate when applied to a particular case might well be unacceptable if applied to future cases raising from different fact patterns. And, though three judges might agree on the outcome of the case before them, they might not agree on the precise reasoning or the rule to be applied to future cases. Unpublished concurrences and dissents would become much more common, as individual judges would feel obligated to clarify their differences with the majority, even when those differences had no bearing on the case before them.[97]

In their handwringing, the judges paint a picture of a phenomenon known today as "graveyard dissents."[98] Even more concerning are the *public* dissents that dominate the current Bench.[99] Of the 36 emergency applications filed by the Trump administration, 27 provoked public dissent from the Justices.[100] Compare this to the lone (one) public dissent to an emergency order provoked by the Bush and Obama administrations combined.[101] Most recently, dissents expressly condemning the "shadow docket" have widened beyond the Court's so-called

of Appellate Court Energies of the Advisory Council for Appellate Justice, Standards for Publication of Judicial Opinions, FJC Research Series No. 73-2, at 15–17 (1973).

95. 531 U.S. 98, 109 ("Our consideration is limited to the present circumstances.").

96. Alex Kozinski & Stephen Reinhardt, *Please Don't Cite This! Why We Don't Allow Citation to Unpublished Opinions*, CAL. LAW. (2000).

97. *Id.*

98. Barlow, *supra* note 42 (defining graveyard dissents as "dissents that circulated internally among the justices but are never publicized").

99. Texas's Unconstitutional Abortion Ban and the Role of the Shadow Docket: Hearing Before the Senate Comm. on the Judiciary, 117th Cong., at 4, 7 (Sept. 29, 2021) (written testimony of Stephen I. Vladeck, Professor of Law, University of Texas School of Law) [hereinafter Vladeck Written Testimony] https://www.judiciary.senate.gov/imo/media/doc/Vladeck%20testimony1.pdf.

100. *Id.* at 7.

101. *Id.*

"liberal wing." In *Louisiana v. American Rivers*, Chief Justice Roberts joined Justice Kagan's dissent calling the emergency docket "not for emergencies at all," and "only another place for merits determinations."[102] And in a recent congressional redistricting case, Justices Kagan and Kavanaugh exchanged blows over the Court's use of its emergency docket.[103] Justice Kavanaugh rejected the dissent's use of "catchy but worn-out rhetoric," while Justice Kagan responded in a footnote that the District Court's proper application of the law was undermined by a merits application of the Court's non-merits order.[104] The frequency and tenor of these dissents illustrate the divisive nature of the Court's recent "shadow docket" rulings.

But unlike the lower courts, the Supreme Court cannot hide—it must publish everything.[105] And while it may try to limit the effect of its decisions, it cannot legitimately tell lower court judges to look the other way when it makes a consequential merits decision. Yet, its non-merits decisions are on a different footing. The Court's emergency docket confronts momentous, pressing issues, and it ought to utilize that docket to settle requests for preliminary injunctive relief. Summary orders have a legitimate place on the Bench, and their publication, too, is inescapable. The federal judiciary could thus benefit greatly from a set of principles by which it can distinguish the global from the contained. This Article's proposal supplies this framework through a presumption of non-precedence, rebuttable by published reasoning and a record of each Justice's vote.

In fact, this two-prong rule mirrors other longstanding Supreme Court practices. By the Court's own horizontal *stare decisis* standards, a decision to reverse a precedent must be, *inter alia*, a well-reasoned one.[106] While not perfectly analogous, cases

102. Louisiana v. American Rivers, 142 S. Ct. 1347, 1349 (2022) (mem.) (staying District Court order blocking a Clean Water Act rule that reduced federal protections for streams, wetlands, and other bodies of water).

103. Merrill v. Milligan, 142 S. Ct. 879 (2022) (mem.).

104. *Id.* at 879, 883 n.1. Confirming Justice Kagan's point, Justices of the Ohio Supreme Court later urged the majority to follow *Merrill* to reach an identical decision on the merits, stating "[w]e should therefore take guidance from . . . what the United States Supreme Court did in [*Merrill*]; allow the congressional election to proceed under the duly adopted and presumptively constitutional plan . . ." Neiman v. LaRose, 166 Ohio St.3d 1452, 145 (2022).

105. *See Information About Opinions*, SUPREME COURT OF THE UNITED STATES, (Dec. 12, 2021) https://www.supremecourt.gov/opinions/info_opinions.aspx.

106. Montejo v. Louisiana, 556 U.S. 778, 792–93 (2009) ("Beyond workability, the

applying this standard can serve as a compass for lower courts to determine which orders are adequately reasoned for precedential purposes. Factors might include whether the order was decided "by the narrowest of margins, over spirited dissents challenging [the order's] basic underpinnings," or if it has "defied consistent application by the lower courts."[107] To be sure, this would create work for the lower courts, but when compared with the current postulation, the trade would be a welcome one.

This proposal is of course not seamless. The Justices, for one, may have their misgivings with Congressional intervention. Moreover, legislative action is neither swift nor guaranteed. If the Justices' remarks[108] or the Senate committee hearings[109] are any indication, bipartisan support would be a battle. Nevertheless, Congress has exercised its exceptions power before—most recently through The Judiciary Act of 1988.[110] And while other proposals, like the Commission's, may evade Congressional action, there's does little more than politely ask the Court to change its methods. The point is to recalibrate the Court's discretion—not to enhance it. This Article's proposal does what the emergency docket was designed to do: preserve the *status quo*. It removes the precedential weight the Court has been assigning its summary orders and builds a bright-line rule to guide litigants, lower courts, and the High Court itself. Critical procedural differences would endure under this rule, including truncated briefing and lack of argument. But some sacrifices are inevitable for preserving the speed and efficiency of emergency orders. Striking this balance will be a central challenge for Congress, should it choose to move forward with reform under the Exceptions Clause.[111]

relevant factors in deciding whether to adhere to the principle of *stare decisis* include the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned.").

107. Payne v. Tennessee, 501 U.S. 808, 810 (1991).

108. *See, e.g.*, *Whole Woman's Health I*, at 2500 (Kagan, J., dissenting); Alito, J., *supra* note 39.

109. *See* Comm. Hearing, *supra* note 76.

110. Act of June 27, 1988, Pub. L. No. 100-352, §§ 2–4, 102 Stat. 662, 662–63 (codified at 28 U.S.C. §§ 1254, 1257–58 (2006)) (granting the Supreme Court certiorari jurisdiction over nearly every appeal).

111. U.S. Const. art. III, § 2, cl. 2.

CONCLUSION

From the perspective of trial and appellate courts, the bottom line is simple: if the Court wishes to use its non-merits orders as precedent, it should include a substantive majority opinion and outline the operative legal standards, rather than confound lower courts with opacity. Of course, asking the justices to show their work for each and every non-merits order, of which there are thousands each year,[112] is a bridge too far. But that is not what is asked of the Court when observers call for greater transparency. To cushion the impact of unreasoned precedent, the Court need only buttress those orders it deems illustrative on the merits—all else remains cabined, procedural, and routine. These simple but critical steps can help mend a broken docket, and begin to restore the Court's clarity, consistency, and in turn, its integrity.

112. William Baude, *The Supreme Court's Secret Decisions*, N.Y. TIMES (Feb. 3, 2015) https://www.nytimes.com/2015/02/03/opinion/the-supreme-courts-secret-decisions.html.