THE PRECEDENTIAL EFFECTS OF THE SUPREME COURT'S EMERGENCY STAYS

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INTRODUCTION

The Supreme Court of the United States makes two types of decisions with far-reaching effects on American life. We are all familiar with the first type. In keeping with the Court's "paramount role" as the nation's "supreme federal appellate" tribunal, these decisions are rulings on the merits of a case and each constitutes the culmination of a petition for certiorari of final decisions made by lower federal or state supreme courts.[1]

But, with "notable frequency" in recent years, the Supreme Court has issued consequential decisions of a different kind: emergency relief staying the effect of a lower court ruling.[2] Stays are part of the Court's so-called "shadow docket," the important but understudied orders and decisions issued without oral argument and with little briefing.[3] While the immediate impact of these stays may be self-evident, the Supreme Court's pronouncements are often less important for their effects on the specific cases before it than the precedent they set for lower courts in future cases.

How should lower courts treat these stay decisions? This question is now particularly pressing. By all appearances, we are in a new era of litigation, in which securing emergency interim relief can sometimes be as important as, if not more important than, an eventual victory on the merits. Consider the types of cases that have resulted in emergency relief from

1. Ohio v. Wyandotte Chems. Corp., 401 U.S. 493, 505 (1971). The Court has a small docket of original jurisdiction cases that would also fall within this first category.

2. Little v. Reclaim Id., 140 S. Ct. 2616, 2618 (2020) (Sotomayor, J., dissenting from the grant of stay) (mem.).

3. *See* William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1–2 (2015); Ian Millhiser, *The Supreme Court's enigmatic 'shadow docket,' explained*, VOX (Aug. 11, 2020, 8:30 AM), https://www.vox.com/2020/8/11/21356913/supreme-court-shadow-docket-jail-asylum-covid-immigrants-sonia-sotomayor-barnes-ahlman [https://perma.cc/7T8H-26ET].

the Supreme Court during the past few terms. These cases "follow[] a now-familiar pattern."[4] Groups of plaintiffs file high-profile lawsuits challenging an Executive Branch action in multiple district courts across the country, often securing from at least one court a judgment granting them broad equitable relief, such as a nationwide injunction.[5] The government then seeks a stay of the order, first from the lower courts and, if unsuccessful there, from the Supreme Court.

Lower courts have just begun to grapple with this issue. In August 2020, the Fourth Circuit considered what effect, if any, the Supreme Court's decision to grant a stay of preliminary injunctions preventing enforcement of the Trump Administration's "public charge" rule should have on the court's evaluation of the rule.[6] Writing for the majority, Judge Wilkinson suggested that while the Fourth Circuit "may of course have the technical authority" to disregard the Supreme Court's stay, "every maxim of prudence suggests that we

4. Wolf v. Cook Cty., 140 S. Ct. 681, 681 (2020) (Sotomayor, J., dissenting from the grant of stay) (mem.).

5. *See, e.g.*, New York v. U.S. Dep't of Homeland Sec., 408 F. Supp. 3d 334, 353 (S.D.N.Y. 2019) (granting plaintiffs a nationwide injunction); East Bay Sanctuary Covenant v. Barr, 385 F. Supp. 3d 922, 960 (N.D. Cal. 2019) (same); U.S. Dep't of Homeland Sec. v. New York, 140 S. Ct. 599, 599 (2020) (Gorsuch, J., concurring in the grant of stay) (mem.) (noting that plaintiffs in four different jurisdictions sought universal injunctions against the Department of Homeland Security's proposed "public charge" rule).

6. CASA de Md., Inc. v. Trump, 971 F.3d 220, 229–30 (4th Cir. 2020). The Immigration and Nationality Act says that an alien who is "likely at any time to become a public charge is inadmissible." 8 U.S.C. § 1182(a)(4)(A) (2018). In a rulemaking, the Department of Homeland Security defined "public charge" as any alien likely to receive certain public benefits for more than twelve months over any thirty-six-month period. District courts in the Second and Seventh Circuits granted nationwide injunctions against the Department's rule. *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) The Supreme Court stayed these injunctions after the Second and Seventh Circuits declined to do so. *See supra* note 5.

should decline to take [that] aggressive step."[7] Judge Wilkinson added that the decision to grant a stay "gives us a window into the Supreme Court's view of the merits," and that the Fourth Circuit "should not cultivate the appearance of denying the Supreme Court action its obvious and relevant import."[8]

Judge King disagreed. In dissent, he argued that "assigning such significance to perfunctory stay orders is problematic," and that treating a Supreme Court stay order as controlling would obviate the need for an intermediate appellate court to consider the merits of an issue where the Court has granted such a stay.[9]

Beyond this Fourth Circuit case and the handful of examples we discuss below, the judiciary has said little else about the possible precedential effects of Supreme Court stays. And the issue has largely escaped academic review, perhaps because it is only recently that the Court's shadow docket has so frequently touched on hot-button topics.

Two articles have considered the authority of individual Justices to grant stays,[10] but neither one focused on the precedential weight such decisions should be accorded in the lower courts. Others have considered the justification for stays more generally,[11] but again there was little discussion of the impact of stays on future cases. A student note from the early 1990s considered the weight Supreme Court stays should be accorded by lower courts,[12] but that article was limited to the

7. *CASA de Md.*, 971 F.3d at 230.

8. *Id.*

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

10. *See* Daniel M. Gonen, *Judging in Chambers: The Powers of a Single Justice of the Supreme Court*, 76 U. CIN. L. REV. 1159 (2008); Lois J. Scali, *Prediction-Making in the Supreme Court: The Granting of Stays by Individual Justices*, 32 UCLA L. REV. 1020 (1985).

11. *See* Portia Pedro, *Stays*, 106 CALIF. L. REV. 869 (2018).

12. *See* Beverly Bryan Swallows, *Stays of Execution: Equal Justice for All*, 45 BAYLOR L. REV. 911 (1993).

unusual milieu of capital punishment cases. And its conclusions may be undermined by the Court's recent practice, discussed below, of ruling on stay applications en banc rather than through an individual Justice.

This Article seeks to fill this gap in the literature about the Supreme Court's shadow docket and further the broader conversation regarding the role of precedent in the American justice system.[13] We argue that the Court's stay decisions are sortable into the following categories, representing a spectrum of precedential force: those that have little value for lower courts, those that are useful as persuasive authority, and those that are authoritative with respect to future cases considering the same legal questions,[14] even if they might "have considerably less precedential value than an opinion on the merits."[15] At the least, stays in the third category should be treated as strong signals from the Court about how to resolve an ambiguity in the law.[16]

The first category includes denials of stay applications and decisions issued by a single Justice without any opinion. Stays with persuasive authority include those granted by a single Justice who issues an opinion explaining his or her views on the merits of the case. Concurrences in, dissents from, and statements respecting a decision to grant a stay also fall into this second category. The third category includes stay grants

13. *See generally* BRYAN A. GARNER ET AL., THE LAW OF JUDICIAL PRECEDENT (2016).

14. *See* Hicks v. Miranda, 422 U.S. 332, 344–45 (1975); Mandel v. Bradley, 432 U.S. 173, 176 (1977) (per curiam).

15. Ill. State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 180–81 (1979) (discussing the Court's summary decisions).

16. *See* Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921, 942–45 (2016) (describing the "signals" model of vertical stare decisis, which suggests that the Justices sometimes "act in their official, adjudicatory capacity without establishing conventional precedent, but nonetheless indicate some aspect of how lower courts should decide cases").

in which a majority of the Supreme Court has clearly indicated that the applicant is likely to succeed on the merits of the question(s) presented.

In the pages that follow we explain the reasons for this categorization and offer examples of stays we believe belong in each group. Part I of the Article reviews the Supreme Court's authority to grant emergency stays, how they work, and the standard of review the Court applies. Part II elaborates on our proposal for how lower courts should think about Supreme Court stays: courts should evaluate three factors to determine what effect to give an emergency stay decision. These include (1) whether the stay was issued by a single Justice or by the full Court; (2) the type of underlying merits dispute; and (3) whether the stay decision explains the Court's reasoning or provides a clear indication of the Court's view of the merits. These factors help answer a single, relatively straightforward question: can the lower court say with confidence that a majority of the Supreme Court has expressed a view on the merits of the stay applicant's case? When the answer to that question is "yes," the lower court should defer to that view or explain why deference is unwarranted.

Late last year, the Supreme Court itself provided a strong indication that shadow docket decisions can have precedential effects. Consider *Roman Catholic Diocese of Brooklyn v. Cuomo*,[17] which involved a church's emergency application for injunctive relief from an Executive Order issued by New York Governor Andrew Cuomo.[18] The Executive Order imposed "very severe restrictions on attendance at religious services" in parts of New York in response to the COVID-19 pandemic.[19] The church argued that the restrictions "treat houses

17. 141 S. Ct. 63 (2020) (per curiam).
18. *Id.* at 65–66.
19. *Id.*

of worship much more harshly than comparable secular facilities," and that they therefore violate the First Amendment's "'minimum requirement of neutrality' to religion."[20]

The Court granted the church's application for emergency relief.[21] In a three-page *per curiam* opinion followed by another twelve pages of concurrences and dissents, the Court held that the church was likely to succeed on the merits of its First Amendment claim.[22] The Court's opinion found that the church "made a strong showing" that the Executive Order "cannot be viewed as neutral because [it] single[s] out houses of worship for especially harsh treatment."[23]

The Court noted that, under the Executive Order, "while a synagogue or church may not admit more than 10 persons" within so-called "red zones," "businesses categorized as 'essential' may admit as many people as they wish."[24] The list of essential businesses included "acupuncture facilities, camp grounds, garages" and a wide variety of other enterprises.[25] More strikingly, in so-called "orange zones," the Executive Order required houses of worship to restrict attendance to twenty-five people, even though non-essential businesses in these zones were free to decide for themselves how many persons to admit.[26]

The Court explained that though "[s]temming the spread of COVID-19 is unquestionably a compelling [state] interest," it is "hard to see how the challenged regulations can be regarded as 'narrowly tailored,'" as they are "far more restrictive

20. *Id.* at 66 (quoting Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 533 (1993)).
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*

than any COVID-related regulations" the Court had previously considered.[27] It therefore enjoined New York from enforcing the Executive Order.[28]

Despite its emergency posture, lack of oral argument, and truncated briefing schedule, *Diocese of Brooklyn* has been quickly recognized as a watershed decision.[29] The Supreme Court and other courts have cited the opinion over one hundred times.[30] The Ninth Circuit, in striking down similar COVID-related regulations in Nevada, found that *Diocese of Brooklyn* "compels the result in this case."[31]

And, critically, the Court vacated other lower court decisions and remanded them for further consideration in light of its *Diocese of Brooklyn* opinion.[32] These "GVR" orders,[33] typical after the

27. *Id.* at 67.

28. *Id.* at 69.

29. *See, e.g.*, Calvary Chapel Dayton Valley v. Sisolak, 982 F.3d 1228, 1232 (9th Cir. 2020) (describing *Diocese of Brooklyn* as "arguably represent[ing] a seismic shift in Free Exercise law"); Ian Milhiser, *Religious conservatives have won a revolutionary victory in the Supreme Court*, VOX (Dec. 2, 2020, 8:00 AM), https://www.vox.com/2020/12/2/21726876/supreme-court-religious-liberty-revolutionary-roman-catholic-diocese-cuomo-amy-coney-barrett [https://perma.cc/DSX7-KMRM] (calling *Diocese of Brooklyn* "one of the most significant religion cases in the past 30 years").

30. *See, e.g.*, Tandon v. Newsom, 141 S. Ct. 1294 (2021) (per curiam); Monclova Christian Acad. v. Toledo-Lucas Cty. Health Dep't, 984 F.3d 477, 480 (6th Cir. 2020); Calvary Chapel v. Mills, 984 F.3d 21 (1st. Cir. 2020).

31. *Calvary Chapel*, 982 F.3d at 1232.

32. *See* Harvest Rock Church, Inc. v. Newsom, 141 S. Ct. 889 (2020) (mem.); Robinson v. Murphy, 141 S. Ct. 972 (2020) (mem.). Indeed, in a recent case, Justice Gorsuch explained that *Diocese of Brooklyn* "made it abundantly clear" that COVID-related restrictions on worship similar to New York's "fail strict scrutiny and violate the Constitution," adding that "the lower courts in these cases should have followed the extensive guidance this Court already gave." S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 719 (2021) (Gorsuch, J., statement respecting the grant in part of the application for injunctive relief) (mem.). And the full Court later chided the Ninth Circuit for failing to follow *Diocese of Brooklyn. See* Tandon v. Newsom, 141 S. Ct. 1294, 1297 (per curiam) (applying *Diocese of Brooklyn* and noting "[t]his is the fifth time the Court has summarily rejected the Ninth Circuit's analysis of California's COVID restrictions on religious exercise").

33. "GVR" stands for granting a petition for certiorari, vacating the lower court's

Court issues a major decision with implications for other pending cases, would be nonsensical if *Diocese of Brooklyn* was "good for one ride only" and irrelevant for subsequent cases. Nor would the lengthy and strongly worded concurrences and dissents be warranted if the emergency relief granted had no implications for the merits of the First Amendment questions the Court considered. In fact, by the time the Court issued its opinion, the red and orange zones at issue in New York no longer covered the plaintiffs' houses of worship.[34] This further supports the view that the Justices expected the opinion to be relevant to, and likely controlling for, similar cases. Thus, the actions of the Court and lower courts suggest that emergency decisions like the one made in *Diocese of Brooklyn* can have significant precedential weight.

I. STAY PROCESS AND RULES

A. The Basics

The Supreme Court's power to stay the enforcement of a judgment by a lower court stems from the All Writs Act, 28 U.S.C. § 1651, and from 28 U.S.C. § 2101(f), which allow for stays of lower court judgments subject to review by the Court on a writ of certiorari.[35] Stays can be granted either by the full Court, or by an individual Justice.[36] Parties seeking a stay from the Supreme Court apply to the "Circuit Justice," the Justice assigned to the Circuit in which the case arose.[37] The

judgment, and remanding the case for further consideration in light of the Court's related ruling. *See, e.g.*, Stutson v. United States, 516 U.S. 193, 194 (1996) (per curiam).

34. Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 68 (2020) (per curiam).

35. *See* Magnum Import Co. v. Coty, 262 U.S. 159, 162 (1923); Barnes v. E-Systems, Inc. Grp. Hosp. Med. & Surgical Ins. Plan, 501 U.S. 1301, 1302 (1991) (Scalia, J., opinion in chambers).

36. *See* 28 U.S.C. § 2101(f) (2018); SUP. CT. R. 23.1.

37. SUP. CT. R. 22.3; *see also* Bennett Boskey, *Stays—General Comment*, 1A WEST'S FED. FORMS, SUPREME COURT § 322 (5th ed.).

applicant must "set out with particularity why the relief sought is not available from any other court or judge."[38] Except in "the most extraordinary circumstances," the applicant must first seek relief from the appropriate lower court(s).[39]

The Circuit Justice to whom the application is addressed may grant the application, deny it, or refer it to the full Court for consideration.[40] If the Circuit Justice elects to grant or deny the application, the Justice will typically issue an "in-chambers" opinion noting that decision.[41] An in-chambers opinion "is written by an individual Justice to dispose of an application by a party for interim relief, e.g., for a stay of the judgment of the court below, for vacation of a stay, or for a temporary injunction."[42] If a Circuit Justice denies an application for a stay, the applicant may renew the application to any other Justice.[43] But reapplications are discouraged[44] and are rarely successful.[45]

Though it was once common for a single Justice to grant or deny a stay, the practice in recent years appears to be that non-trivial stay applications received by a Circuit Justice are referred to the full Court for consideration as a matter of course.[46] In fact, no in-chambers opinion has been published

38. SUP. CT. R. 23.3.

39. *Id.*

40. *See* SUP. CT. R. 22.

41. *See* SUP. CT. R. 22.4.

42. *In-Chambers Opinions*, U.S. SUPREME COURT, https://www.supremecourt.gov/opinions/in-chambers.aspx [https://perma.cc/3JBR-P8D6].

43. SUP. CT. R. 22.4.

44. *See* Holtzman v. Schlesinger, 414 U.S. 1316, 1316 (1973) (Douglas, J., opinion in chambers); Frank Felleman & John C. Wright, *The Powers of the Supreme Court Justice Acting in an Individual Capacity*, 112 U. PA. L. REV. 981, 986 (1964).

45. *See, e.g.*, Dayton Bd. of Educ. v. Brinkman, 439 U.S. 1358, 1358–59 (1978) (Rehnquist, C.J., opinion in chambers) (denying a reapplication for a stay); New York Times v. Jascalevich, 439 U.S. 1331, 1337 (1978) (Marshall, J., opinion in chambers) ("[A] single Justice will seldom grant an order that has been denied by another Justice." (citation omitted)).

46. *See* Ira B. Matetsky, *The Current State of In-Chambers Practice*, 1 J. IN-CHAMBERS

since 2014.[47]

This trend is itself noteworthy. No formal change in Court rules seems to have caused the change. Perhaps it reflects a preference of Chief Justice Roberts or a consensus amongst the current Justices that, with the lower active caseload the Court now carries,[48] it is no longer necessary or appropriate for individual Justices to act unilaterally on behalf of the full Court. Or it might reflect the growing public awareness of the shadow docket and the importance of the Court's emergency decisions. Indeed, while Supreme Court stays historically often concerned individual death penalty cases,[49] they are now more likely to target a nationwide injunction of a high-profile Executive Order.[50] Regardless of the reason, this recent shift in stays being issued by the full Court rather than a single Justice corresponds with the increased importance of these stays.

Opinions issued with stay decisions vary greatly. As most

PRAC. 11 (2016) (noting that "under current practices, the justices frequently refer applications for stays or injunctions to the full Court for disposition").

47. *See In-Chambers Opinions*, *supra* note 42.

48. *See, e.g.*, Oliver Roeder, *The Supreme Court's Caseload Is On Track To Be The Lightest In 70 Years*, FIVETHIRTYEIGHT (May 17, 2016, 9:00 AM), https://fivethirtyeight.com/features/the-supreme-courts-caseload-is-on-track-to-be-the-lightest-in-70-years/ [https://perma.cc/NU57-TFQN].

49. *See, e.g.*, Cole v. Texas, 499 U.S. 1301, 1301 (1991) (Scalia, J., opinion in chambers) (explaining that, as Circuit Justice for the Fifth Circuit, he would grant "in every capital case on direct review . . . a stay of execution pending disposition by this Court of the petition for certiorari.").

50. *See, e.g.*, Santa Cruz Lesbian & Gay Cmty. Ctr. v. Trump, 2020 WL 7640460 (N.D. Cal. Dec. 22, 2020) (barring enforcement of most of E.O. 13950 ("Advancing Racial Equity and Support for Underserved Communities Through the Federal Government")); *see also* Trump v. Hawaii, 138 S. Ct. 2392, 2427 (Thomas, J., concurring) (noting that "[f]or most of our history, courts understood judicial power as fundamentally the power to render judgments in individual cases," and concluding that nationwide injunctions "are legally and historically dubious" (cleaned up)); Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123, 124 (2019) (noting that the Office of the Solicitor General under Noel Francisco was criticized by some for filing "an unprecedented number of requests for emergency or extraordinary relief from the Justices ").

applications for a stay are denied, most opinions are, unsurprisingly, short statements with no discussion of the merits of the applicant's position or the reasons a stay was granted or denied.[51] Others are longer and look more like the opinions the Court typically issues when it resolves a merits dispute.[52] Some stay decisions issued by the full Court feature a short opinion along with concurrences, dissents, or statements respecting the Court's decision.[53]

B. The Standard of Review

The Supreme Court has described the standard of review for evaluating stay applications in a number of different and sometimes conflicting ways. It is therefore unclear whether the Court employs a uniform standard, complicating the question of the precedential weight of stay rulings. But regardless of which of the standards discussed below applies, successful stay applicants must show that they are likely to succeed on the merits of their claims. That is the crucial point for our purposes.

In *Nken v. Holder*,[54] the Court described the "traditional" standard that federal courts use to determine whether to grant a stay.[55] This standard has four factors: "(1) whether the stay applicant has made a strong showing that he is likely to

51. *See, e.g.*, Powe v. Deutsche Bank Nat'l Trust Co., 140 S. Ct. 992 (2020) (mem.); *In re* Giordani, 139 S. Ct. 2629 (2019) (mem.); Rucho v. Common Cause, 138 S. Ct. 923 (2018) (mem.); Kwasnik v. Fed. Nat'l Mortg. Assoc., 568 U.S. 1153 (2013) (mem.); Rodriguez v. Pereira, 548 U.S. 937 (2006) (mem.).

52. *See, e.g.*, Heckler v. Lopez, 463 U.S. 1328 (1983) (Rehnquist, C.J., opinion in chambers); Hollingsworth v. Perry, 558 U.S. 183 (2010) (per curiam); *In re* United States, 139 S. Ct. 452 (2018) (mem.).

53. *See, e.g.*, Valentine v. Collier, 140 S. Ct. 1598 (2020) (mem.); Trump v. Sierra Club, 140 S. Ct. 1 (2019) (mem.); Barr v. Roane, 140 S. Ct. 353 (2019) (mem.); Hamm v. Dunn, 138 S. Ct. 828 (2018) (mem.).

54. 556 U.S. 418 (2009).

55. *Id.* at 425.

succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies."[56] The Court noted that the "first two factors of the traditional standard are the most critical."[57] Thus, under the traditional test for stays, the movant must make a "strong" showing that he will succeed on the merits and that he will suffer irreparable harm without a stay.[58]

But while the *Nken* factors are regularly applied by lower courts considering stay applications, the Supreme Court has never explicitly used the *Nken* formulation in granting or denying the emergency applications it has received. Nor, however, has the Court said that the "traditional" stay analysis does not apply.

In the stay opinions the Supreme Court has issued, the most common formulation of the standard of review is that the stay applicant must show "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay."[59]

But there have also been other formulations. For example,

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

57. *Id.* at 434.

58. *See id.* at 435.

59. Hollingsworth v. Perry, 558 U.S. 183, 190 (2010); *see also* Philip Morris USA Inc. v. Scott, 561 U.S. 1301, 1302 (2010) (Scalia, J., opinion in chambers) (describing as "settled practice" the Court's requirement that these three conditions be met); Little v. Reclaim Id., 140 S. Ct 2616, 2616 (2020) (Roberts, C.J., concurring in the grant of stay) (mem.) (calling the standard "well-settled"); STEPHEN M. SHAPIRO ET AL., SUPREME COURT PRACTICE 16-1–16-14 (11th ed. 2019).

some Justices have required there be a "significant possibility" that the judgment below will be reversed.[60] This "significant possibility" language has also been used in the death penalty context.[61] It is unclear whether a "significant possibility" requires a higher showing than a "fair prospect," or whether either of these phrases requires something different than *Nken*'s "strong showing." Some cases have suggested that the Court must "balance the equities" and "determine on which side the risk of irreparable injury weighs most heavily."[62] But the Court has, at other times, suggested that balancing the equities need only be performed "in a close case."[63]

When the stay request arrives at the Court following a denial by a lower court, as is almost always the case, some Justices have said that the movant faces an "especially heavy" burden.[64] In these circumstances, the lower court's decision to

60. *See, e.g.*, Barnes v. E-Systems, Inc. Group Hosp. Med. & Surgical Ins. Plan, 501 U.S. 1301, 1302 (1991) (Scalia, J., opinion in chambers); Times-Picayune Pub. Corp. v. Schulingkamp, 419 U.S. 1301, 1305 (1974) (Powell, J., opinion in chambers); McNary v. Haitian Centers Council, Inc., 505 U.S. 1234, 1234 (1992) (Blackmun, J., dissenting from the grant of stay).

61. *See, e.g.*, Barefoot v. Estelle, 463 U.S. 880, 885 (1983) (White, J., opinion in chambers).

62. Holtzman v. Schlesinger, 414 U.S. 1304, 1308–09 (1973) (Marshall, J., opinion in chambers); *see also* Buchanan v. Evans, 439 U.S. 1360, 1361 (1978) (Brennan, J., opinion in chambers); INS v. Legalization Assistance Project of L.A. Cty. Fed'n of Lab., 510 U.S. 1301, 1304 (1993) (O'Connor, J., opinion in chambers).

63. Ind. State Police Pension Tr. v. Chrysler LLC, 556 U.S. 960, 960 (2009) (per curiam) (quoting Conkright v. Frommert, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., opinion in chambers)); *see also* SHAPIRO ET AL., *supra* note 59, at 17–42.

64. Packwood v. Senate Select Comm. on Ethics, 510 U.S. 1319, 1320 (1994) (Rehnquist, C.J., opinion in chambers); Edwards v. Hope Medical Grp. for Women, 512 U.S. 1301, 1302 (1994) (Scalia, J., opinion in chambers) (quoting *Packwood*, 510 U.S. at 1320); *Reclaim Id.*, 140 S. Ct at 2616, 2618 (Roberts, C.J., concurring in the grant of stay) (quoting *Packwood*, 510 U.S. at 1320).

deny the stay has been described as "presumptively correct,"[65] meriting reversal "only under extraordinary circumstances."[66]

Complicating matters further, it is unclear whether the standard used by the full Court is the same as that used by an individual Justice. As an example, some cases have stated that a "single Justice will grant a stay only in extraordinary circumstances."[67] It is not clear whether this means that stay applications considered by a single Justice must meet a higher threshold than those considered by the full Court.

So what can we say about the standard of review the Supreme Court uses in determining whether to grant a stay? First, it is unclear whether *Nken* applies to the Supreme Court's own decisions to grant or deny a stay. That is, we do not know if irreparable harm and the probability of success on the merits are the two most critical factors in the Court's analysis. Nor do we know whether *Nken*'s "strong showing" of success on the merits is the standard the Court uses, or how this standard differs from those discussed below. The Court has never explicitly used the *Nken* formulation in granting or denying stay applications. But in other areas of the law, the Court does itself utilize the same standards of review it expects the lower courts to employ.[68]

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65. Whalen v. Roe, 423 U.S. 1313, 1316 (1975) (Marshall, J., opinion in chambers).

66. Ruckelshaus v. Monsanto Co., 463 U.S. 1315, 1316 (1983) (Blackmun, J., opinion in chambers) (citation omitted).

67. *Whalen*, 423 U.S. at 1316; Bartlett v. Stephenson, 535 U.S. 1301, 1304 (2002) (Rehnquist, C.J., opinion in chambers) (quoting *Whalen*, 423 U.S. at 1316); *see also* Rostker v. Goldberg, 448 U.S. 1306, 1308 (1980) (Brennan, J., opinion in chambers) (calling it "well established" that "[r]elief from a single Justice is appropriate only in those extraordinary cases where the applicant is able to rebut the presumption that the decisions below—both on the merits and on the proper interim disposition of the case—are correct" (citing *Whalen*, 423 U.S. at 1316–17)).

68. *See, e.g.*, United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948) (applying the "clearly erroneous" standard set out by FED. R. EVID. 52(a)); Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 510–11 (1984) (explaining that appellate judges and

In any event, there are good reasons to think the Supreme Court's own stay criteria are at least as demanding as *Nken*. The Supreme Court is the final arbiter on questions of federal law and the Constitution, the ultimate court of last resort.[69] It would be perverse and illogical for its stay decisions to be triggered by a lower standard than stays issued by the intermediate federal courts. Such a situation would invite Supreme Court stay requests as a matter of course, even when the stay was properly denied by a lower court. It would invert the pyramidal structure of the Judicial Branch. And it would do so in a subset of cases that a single, national court is least well equipped to handle: emergency decisions based on fact-specific, evolving disputes.

Regardless of the specific formulations, several themes emerge. Applicants must show that they will suffer irreparable harm absent a stay.[70] They must also show that the Court will likely consider the merits question important enough to grant certiorari.[71] It is unclear whether they need to demonstrate that the balance of the equities tips in their favor, but given that this factor appears in the *Nken* formulation and in several in-chambers opinions, it is likely that some showing is advisable.

For the purposes of this Article, however, the crucial theme concerns the likelihood of success on the merits. Whether it is using the *Nken* formulation, the "fair prospect" language, or the "significant possibility" version, the Court has consistently indicated that it will not grant a stay unless the movant has shown *some* probability of prevailing on the merits. Thus,

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Supreme Court Justices must exercise de novo review on questions of constitutional law).

69. *Cf.* GARNER ET AL. *supra* note 13, at 28.

70. *See supra* note 59.

71. *Id.*

whatever the strength of the movant's application may be with respect to the other factors, success on the merits is a necessary consideration for a stay.

In seeking to show that they will succeed on the merits, applicants face a heavy burden, particularly where an intermediate appellate court has denied the request for a stay. They must, at the least, show that there is a "fair prospect" that a majority of the Court will share their view of the merits. Given that the Court has often emphasized the extraordinary nature of a decision to grant a stay and the movant's heavy burden, and given the various formulations discussed above, it is likely that a "fair prospect" is not too different from a "strong showing" of success on the merits. That is, unless a movant is very likely to prevail on the merits, the Court (or a single Justice) will not grant the stay.

II. ASSESSING A STAY'S PRECEDENTIAL EFFECTS

A. Precedent Defined

The idea of lower courts' "obedience" or deference to higher courts and their rulings is foundational to the American justice system.[72] This rule is grounded in English common law: Sir William Blackstone explained that it was "an established rule" that courts should "abide by former precedents."[73] *The Federalist Papers* taught that "[t]o avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents."[74] And it is reflected in the Constitution: "the judicial Power of the United States, shall be vested in *one supreme Court*, and in such inferior

72. GARNER ET AL., *supra* note 13, at 27–28.

73. 1 WILLIAM BLACKSTONE, COMMENTARIES *69.

74. THE FEDERALIST NO. 78, at 471 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

Courts as the Congress may from time to time ordain and establish."[75]

Deference to the Supreme Court is warranted not because the high court is always right or because its opinions are always convincing. If this were so, no deference would be necessary. Rather, as Justice Jackson explained, "[w]e are not final because we are infallible, but we are infallible only because we are final."[76]

While the foregoing is common ground for American legal practitioners, jurists, and academics, there are differing theories of vertical stare decisis, or the weight to be accorded to higher courts' rulings. For those who ascribe to the predictive theory of stare decisis—that is, that lower courts "should decide cases according to their reasoned view of the way the Supreme Court would decide the pending case today,"[77]—treating the Court's stay orders as precedential should be especially compelling. After all, these orders are a very recent, and thus highly indicative, insight into the Court's likely resolution of the issue on the merits.[78]

A newer theory about vertical stare decisis looks to higher courts for "signals" for the appropriate resolution in a particular case.[79] Signals can include summary orders, separate opinions, dicta, and even statements during oral arguments.[80]

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75. U.S. CONST. art III, § I, cl. 1 (emphasis added).

76. Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in the result).

77. Vukasovich, Inc. v. Comm'r, 790 F.2d 1409, 1416 (9th Cir. 1986); *see also* Spector Motor Serv., Inc. v. Walsh, 139 F.2d 809, 823 (2d Cir. 1943) (as modified) (L. Hand, J., dissenting) (arguing that "the measure of [a lower court's] duty is to divine, as best it can, what would be the event of an appeal in the case before [it]").

78. 18 MOORE'S FEDERAL PRACTICE § 134.03[4] (3d ed. 2011) ("As a practical matter, the predictive approach requires the lower courts to weight most heavily the recent decisions of the courts that the lower courts are bound to follow.").

79. *See* Re, *supra* note 16, at 942.

80. *Id.*

They are entitled to precedential force but yield to conventional precedent.[81] Stay orders would fit comfortably in this theory, too; indeed, the Eighth Circuit appears to have utilized the signals model when it relied in part on a Supreme Court stay to uphold a preliminary injunction on the enforcement of the contraceptive mandate in the Affordable Care Act.[82]

But even for those who ascribe to the traditional, "authority model" of vertical stare decisis, we believe that Supreme Court stays can—and often should—be entitled to precedential weight.[83] The traditional model recognizes the potential for ambiguity in precedent,[84] and that brief opinions or even orders can count as precedent.[85] For instance, the Supreme Court has explained that

> Votes to affirm summarily, and to dismiss for want of a substantial federal question, it hardly needs comment, are votes on the merits of a case. . . . [T]he lower courts are bound by summary decisions by this Court until such time as the Court informs [them] that [they] are not.[86]

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81. *Id.* at 943.

82. *See* Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs., 801 F.3d 927, 944 (8th Cir. 2015), *vacated and remanded*, 2016 WL 2842448 (U.S. May 16, 2016) (mem.) ("Although the Court's orders were not final rulings on the merits, they at the very least collectively constitute a signal that less restrictive means exist by which the government may further its interests." (citation omitted)); Priests for Life v. U.S. Dep't of Health & Human Servs., 772 F.3d 229, 257 (D.C. Cir. 2014), *vacated and remanded sub nom.* Zubik v. Burwell, 136 S. Ct. 1557 (2016) (finding no substantial burden but acknowledging that "the Supreme Court's recent order in *Wheaton College* might be read to signal a different conclusion").

83. Under the "authority model," "the holdings of the Supreme Court majority opinions are not just relevant to legal correctness, but constitutive of it. The authority model thus calls for lower courts to treat the Court's majority holdings as law in much the way that a statute is law." Re, *supra* note 16, at 936. For a fuller discussion of the various theories of vertical stare decisis, *see id.* at 936–45.

84. *Id.* at 937.

85. *See* GARNER ET AL., *supra* note 13, at 217–18.

86. Hicks v. Miranda, 422 U.S. 332, 344–45 (1975) (cleaned up).

This means that lower courts are not just bound by legal reasoning or the explication for a holding: the Supreme Court expects lower courts to defer even to its summary affirmances and dismissals encapsulated in one-line orders.[87]

One important way in which a summary order is binding is its effect on the precedential value of the lower court opinion under review. While a summary affirmance is not necessarily an endorsement of the reasoning of the court below,[88] a summary reversal carries clear repercussions for the lower court's opinion.[89] Just as any subsequent court or party would be wary of citing or relying upon a lower court opinion that has been summarily reversed by the Court, so should judges and practitioners be cautious about relying upon lower court decisions that are subsequently stayed by the Supreme Court.

To be sure, not all precedential rulings are of equal value, and a mere order or brief *per curiam* opinion may not be entitled to the same weight as full-length opinions on the merits.[90] After all, it is a "judicial decision's reasoning—its *ratio decidendi*—that allows it to have life and effect in the disposition of future cases."[91] But if one-line, summary affirmances can have precedential effects, why not shadow docket stays?

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87. A common description of the four essential elements of a legal holding is "(1) it must be a ruling on a point of law; (2) it must be expressly or impliedly given by a judge; (3) it must relate to an issue raised in the litigation; and (4) it must be necessary as a justification for the decision reached." GARNER ET AL., *supra* note 13, at 46 (citing John Bell, *Precedent*, *in* THE NEW OXFORD COMPANION TO LAW 923 (Peter Cane & Joanne Conaghan eds., 2008)). This definition may anticipate a reasoned opinion, but it does not require it. Indeed, stays and summary affirmances and dismissals will often meet these criteria even without an explanatory opinion.

88. *See* Comptroller of the Treasury v. Wynne, 135 S. Ct. 1787, 1801 (2015) (explaining that a summary affirmance is an affirmance of the judgment only, rather than the reasoning of the lower court).

89. *See* GARNER ET AL., *supra* note 13, at 308; *id.* at 241 ("[I]f a high court or appellate court disapproves of a lower court's decision, the disapproval may render the lower court's opinion virtually worthless.").

90. *Id.* at 214.

91. Ramos v. Louisiana, 140 S. Ct. 1390, 1404 (2020).

Consider also the rules regarding dicta. Dicta are not essential to the reasoning of a court's decision and are therefore not considered binding.[92] But the "carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative."[93] If lower courts must dutifully abide by what Francis Bacon called the "vapors and fumes of law"[94] that emit from the Court, how can they ignore such vapors and fumes merely because they emanate from the Court's orders, terse or otherwise? The key question lower courts should ask is whether a majority of the Court has issued a clear explanation of its views on the merits of a claim.

Regardless of one's preferred theory of stare decisis or views about what, exactly, makes something "precedent," there is another reason to accord the Court's preliminary orders significant weight: other courts are likely to see substantially similar litigation in the aftermath of a shadow docket stay. Seeking broad-based, emergency relief has become a new normal in high-stakes litigation. The rise of nationwide injunctions against the Executive Branch is a notable example.[95] Cases seeking this relief often arise in multiple jurisdictions around the same time.[96] If one plaintiff achieves a nationwide injunction, all plaintiffs are

92. *See* GARNER ET AL., *supra* note 13, at 44.

93. United States v. Dorcely, 454 F.3d 366, 375 (D.C. Cir. 2006) (quoting Sierra Club v. EPA, 322 F.3d 718, 724 (D.C. Cir. 2003)).

94. *See* GARNER ET AL., *supra* note 13, at 44 (quoting Francis Bacon, "The Lord Keeper's Speech in the Exchequer" (1617), *in* 2 THE WORKS OF FRANCIS BACON 477, 478 (Basil Montagu ed., 1887)).

95. *See* William P. Barr, *The Role of the Executive*, 43 HARV. J.L. & PUB. POL'Y 605, 626 (2020) ("It is no exaggeration to say that virtually every major policy of the Trump Administration has been subjected to immediate freezing by the lower courts.").

96. *See* Dep't of Homeland Sec. v. New York, 140 S. Ct. 599, 601 (2020) (Gorsuch, J., concurring) (mem.) (describing how plaintiffs in these suits are not bound by adverse decisions to which they are not parties, allowing them a "nearly boundless opportunity to shop for a friendly forum to secure a win nationwide").

successful.[97] In other words, the government must "run the table" to be able to implement an Executive Order or agency decision.[98]

Until 1963, no federal court had ever issued a nationwide injunction, and until the early 2000s, they were exceedingly rare.[99] But in recent years, the number of such injunctions has skyrocketed.[100] By one estimate, for instance, twelve nationwide injunctions were issued against the administration during President George W. Bush's eight years in office, nineteen during President Barack Obama's eight years, and fifty-five during the first three years of the Trump Administration.[101] In other words, lower courts are issuing nationwide injunctions at over twelve times the rate today as they did during the George W. Bush Administration.

It is no surprise that the rise of the nationwide injunction has coincided with the increasing prominence of the Supreme Court's shadow docket. In cases involving suits against the Executive Branch, emergency stays by the Supreme Court are particularly instructive. When the Court elects to stay a nationwide injunction, the decision speaks both to the stay applicant's likelihood of success on the merits *and* the availability of that form

97. *See id.*

98. Jeffrey A. Rosen, Deputy Attorney General, U.S. Dep't of Justice, Opening Remarks at Forum on Nationwide Injunctions and Federal Regulatory Programs (Feb. 12, 2020), https://www.justice.gov/opa/speech/deputy-attorney-general-jeffrey-rosen-delivers-opening-remarks-forum-nationwide [https://perma.cc/3TR6-6YRG].

99. *See* Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 437–44 (2017). *But see* Mila Sohoni, *The Lost History of the "Universal" Injunction*, 133 HARV. L. REV. 920, 924–26 (2020).

100. *See* Rosen, *supra* note 98.

101. *Id.*; *see also* Amanda Frost, *Academic Highlight: The Debate Over Nationwide Injunctions*, SCOTUSBLOG (Feb. 1, 2018, 10:21 AM), https://www.scotusblog.com/2018/02/academic-highlight-debate-nationwide-injunctions [https://perma.cc/TBC7-H5VZ] (noting agreement among legal scholars that nationwide injunctions "are a relatively new phenomenon and have been used with increasing frequency over the last decade").

of relief to other litigants pressing the same or substantially similar legal claims in lower courts.

* * *

Beyond the various articulations of the standards of review it uses, the Supreme Court has not said much about shadow docket stays. We do not know, therefore, what the Justices intend the precedential effects of these stays to be. In the absence of such guidance, we believe that a lower court should consider three factors when determining what effect, if any, a Supreme Court stay decision should have on its own decisionmaking. These are: (1) whether the stay was issued by a single Justice or by the full Court; (2) the type of underlying merits dispute; and (3) whether the stay decision explains the Court's reasoning or provides a clear indication of the Court's view of the merits. When the lower court can conclude by assessing these factors that a majority of the Court has expressed a clear view on the merits, the lower court should defer to that view or explain why deference is unwarranted. A clear statement by the full Court about the movant's likelihood of success on the merits ought not to be simply ignored or cast aside.

B. Factors to Consider

1. Single Justice or Full Court

As an initial matter, decisions by either a single Justice or the full Court to *deny* a stay application cannot have any precedential or persuasive effect. A stay denial is "not a decision on the merits of the underlying legal issues."[102] More, the Court may deny a stay application if the movant fails to show

102. Ind. State Police Pension Tr. v. Chrysler LLC, 556 U.S. 960, 960 (2009) (per curiam).

any one of the *Nken* stay factors. For instance, a stay application may be denied based on the first factor alone—a reasonable probability that at least four Justices will consider the issue sufficiently meritorious to grant certiorari. And the "denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times."[103]

More still, the rules of the Supreme Court allow a denied movant to resubmit a stay application to another Justice or to the full Court. The full Court could then, in theory, elect to grant the stay.[104] Since it is impossible to determine the Court's view of the merits of a case from a denial of a stay application, the denial offers lower courts little guidance.[105] Of course, the Court receives thousands of applications on its discretionary docket each year, but it grants only a small fraction of them.[106] It is from this narrow pool of grants that lower courts may find persuasive or authoritative guidance from the Supreme Court.

A decision by a single Justice to stay a lower court's order cannot have binding precedential effect. This is because individual Justices do not have the authority to revise or modify the judgments of the lower courts.[107] Nor can they bind the

103. United States v. Carver, 260 U.S. 482, 490 (1923); *see also* 18 MOORE'S FEDERAL PRACTICE § 134.05 (3d ed. 2011) (stating that stare decisis does not apply to a decision denying certiorari).

104. *See* SUP. CT. R. 22.4.

105. *Cf.* DeBoer v. Snyder, 772 F.3d 388, 402 (6th Cir. 2014) ("But don't *these* denials of certiorari signal that, from the Court's perspective, the right to same-sex marriage is inevitable? Maybe; maybe not.").

106. *See The Supreme Court, 2018 Term—The Statistics*, 133 HARV. L. REV. 412, 420 (2019).

107. *See, e.g.*, Locks v. Commanding General, Sixth Army, 89 S. Ct. 31, 32 (1968) (Douglas, J., opinion in chambers) ("As Circuit Justice I have no authority to revise, modify, or reverse the order of the Court of Appeals on the merits of this controversy."); Kimble v. Swackhamer, 439 U.S. 1385, 1385 (1978) (Rehnquist, J., opinion in chambers) ("[A] single Justice has authority only to grant interim relief in order to preserve the

Court.[108] But these opinions certainly have value as persuasive authority. After all, if the rulings of a single district judge can have persuasive value in subsequent cases,[109] so too can the considered opinion of a sitting Justice of the Supreme Court.

More, the Court "is a collegial institution, and its decisions reflect the views of a majority of the sitting Justices."[110] When writing alone, then, a single Justice "bears a heavy responsibility to conscientiously reflect the views of his Brethren as best he perceives them."[111] In this way, a single Justice "act[s] not for [him]self alone but as a surrogate for the entire Court."[112]

Indeed, in-chambers opinions are often cited by lower courts for various substantive propositions.[113] Take Justice Blackmun's opinion in *CBS, Inc. v. Davis* as an example.[114] In 1994, a state court entered a temporary restraining order and

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jurisdiction of the full Court to consider an applicant's claim on the merits.").

108. For instance, a petitioner disappointed by the in-chambers decision of a Circuit Justice may reapply to any other Justice. *See supra* note 104.

109. *See, e.g.*, Alperin v. Vatican Bank, 410 F.3d 532, 546 n.8 (9th Cir. 2005) (explaining that district court decisions from other circuits are not precedential, but courts may refer to them and consider principles applied in those decisions); TMF Tool Co. v. Muller, 913 F.2d 1185, 1191 (7th Cir. 1990) (explaining that decisions of district judges from this or other circuits are only persuasive, not controlling).

110. Holtzman v. Schlesinger, 414 U.S. 1304, 1313 (1973) (Marshall, J., opinion in chambers).

111. *Id.*

112. *Id.*

113. *See, e.g.*, United States v. Motamedi, 767 F.2d 1403, 1405 (9th Cir. 1985) (citing Sellers v. United States, 89 S. Ct. 36, 38 (1968) (Black, J., opinion in chambers)); *In re* Sherwin-Williams Co., 607 F.3d 474, 477 (7th Cir. 2010) (quoting Cheney v. United States Dist. Ct., 541 U.S. 913, 924 (2004) (Scalia, J., opinion in chambers)); Dotson v. Clark, 900 F.2d 77, 79 (6th Cir. 1990) (quoting Aronson v. May, 85 S. Ct. 3, 5 (1964) (Douglas, J., opinion in chambers)); Riley v. City of Chester, 612 F.2d 708, 716 (3d Cir. 1979) (citing New York Times Co. v. Jascalevich, 439 U.S. 1331, 1335 (1978) (Marshall, J., opinion in chambers)); *In re* Air Crash Off Long Island, 209 F.3d 200, 206 (2d Cir. 2000) (quoting *Holtzman*, 414 U.S. at 1312 n.13).

114. 510 U.S. 1315 (1994) (Blackmun, J., opinion in chambers).

preliminarily enjoined a television station from airing an exposé about a meat packing company's unsanitary practices.[115] The court reasoned that the footage could result in national chains "refusing to purchase beef processed at" the company's factory, likely resulting in the factory's closure.[116]

The television station moved for a stay of the injunction, arguing that the state court's order was a prior restraint on free speech that violated the First Amendment of the U.S. Constitution.[117] Justice Blackmun agreed. He explained that "the gagging of publication" is permissible only in "'exceptional cases,'" and that even "where questions of allegedly urgent national security" are implicated, prior restraint of speech is justified "only where the evil that would result from the reportage is both great and certain and cannot be mitigated by less intrusive measures."[118] Speculative economic harm to a meat processing factory, the Justice explained, was insufficient.[119]

Justice Blackmun's opinion in *CBS* has been cited over seventy times, including in decisions about the prior restraint doctrine issued by the First, Sixth, and Ninth Circuits.[120] In short, while these types of in-chambers opinions cannot bind lower courts, they do provide useful data. They offer a Justice's prediction about how his or her colleagues will view the likelihood of the movant's success on the merits. And they can present a persuasive view of the law, particularly if the Justice opines about an underdeveloped or complex legal issue.

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115. *Id.* at 1315–16.

116. *Id.*

117. *See id.*

118. *Id.* at 1317 (quoting Near v. Minnesota, 283 U.S. 697, 716 (1931)).

119. *Id.* at 1318.

120. *See* Sindi v. El-Moslimany, 896 F.3d 1, 32 (1st Cir. 2018); Procter & Gamble Co. v. Bankers Tr. Co., 78 F.3d 219, 225 (6th Cir. 1996); *In re* Dan Farr Prods., 874 F.3d 590, 596 n.8 (9th Cir. 2017).

Unlike decisions by a single Justice, decisions by the full Court can, of course, bind lower courts. As we argue below, when the Court grants a stay application, the decision should be considered authoritative when it is clear that a majority of the Court has expressed a view on the merits of the movant's case. But before moving on to the types of stays that should be accorded precedential weight, there is one complicating circumstance to consider.

When four Justices support granting a stay, sometimes a fifth will vote to grant the stay as a courtesy.[121] In these situations, a lower court cannot say with certainty that a majority of the Justices believe there is a significant possibility the movant will prevail on the merits of his claim. But the stay decision may nonetheless be useful as persuasive authority.

In *Gloucester County School Board v. G.G. ex rel. Grimm*,[122] for instance, Justice Breyer explained in his concurrence that "[i]n light of the facts that four Justices have voted to grant the [stay] application," "that we are currently in recess," "and that granting a stay will preserve the status quo . . . I vote to grant the application as a courtesy."[123] The case concerned a Virginia school board policy that required transgender students to use the bathroom corresponding to their biological sex.[124] G.G., a transgender student, sought a preliminary injunction to prevent the policy from taking effect.[125] The district court denied the motion for a preliminary injunction, but it was reversed by the Fourth Circuit.[126] On remand, the district

121. *See, e.g.*, Arthur v. Dunn, 137 S. Ct. 14 (2016) (Roberts, C.J., statement respecting the grant of the application for stay) (mem.); Gloucester Cty. Sch. Bd. v. G.G. *ex rel.* Grimm, 136 S. Ct. 2442 (2016) (Breyer, J., concurring) (mem.).

122. 136 S. Ct. 2442 (2016) (mem.).

123. *Id.* (Breyer, J., concurring) (mem.).

124. *See* G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 714–15 (4th Cir. 2016), *vacated and remanded*, 137 S. Ct. 1239 (2017).

125. *Id.*

126. *Id.* at 715.

court enjoined the school board from enforcing the policy, and the Fourth Circuit denied the school board's request for a stay of the injunction.[127] The Supreme Court then granted the stay.[128]

In *Dodds v. U.S. Department of Education*,[129] a panel of the Sixth Circuit considered what effect to give the *Gloucester County* stay.[130] *Dodds* involved an Ohio school district rule that was substantially similar to the Virginia policy.[131] The majority declined to accord the stay precedential effect, opining that it "does nothing more than show a possibility of relief."[132] It added that the transgender student in the Ohio case's "young age, mental health history, and unique vulnerabilities" differentiated her from the student in *Gloucester County*.[133] It is not clear whether the majority's view of *Gloucester County* was influenced by the fact that one of the five Justices voted to grant the stay as a courtesy.

Judge Sutton dissented.[134] He argued that "[o]urs is a hierarchical court system, one that will not work if the junior courts do not respect the lead of the senior court."[135] By granting the stay in *Gloucester County*, Judge Sutton reasoned, the Supreme Court "necessarily found that the school board was reasonably likely to succeed on the merits and that it would suffer irreparable harm without a stay. So, it follows, in our case."[136] Like the majority, Judge Sutton did not discuss what

127. *See* G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 654 Fed. App'x. 606 (4th Cir. 2016).

128. *Gloucester Cty.*, 136 S. Ct. at 2442.

129. 845 F.3d 217 (6th Cir. 2016).

130. *Id.*

131. *Id.*

132. *Id.* at 221.

133. *Id.*

134. *See id.* at 222–24 (Sutton, J., dissenting).

135. *Id.* at 222–23.

136. *Id.* at 223.

effect, if any, Justice Breyer's courtesy fifth vote had on his view.[137] Instead, he offered a warning about the possible consequences of an intermediate appellate court electing to ignore a Supreme Court stay decision:

> If we decline to respect the Supreme Court's lead in granting a stay request in precisely the same type of case, why should we expect the district courts in our circuit to respect *our* lead in granting stay requests in related cases? Middle-management courts that ignore instructions from a higher court will eventually learn how it feels and how poorly such a system works.[138]

From both the majority and dissenting opinions in *Dodds*, it is clear that the panel did not believe it could simply ignore the Supreme Court's decision in *Gloucester County*. That the majority felt compelled to distinguish the two cases on factual grounds may suggest an implicit recognition that the Supreme Court's pronouncements on questions of law, even those issued indirectly through a stay grant, can bind lower courts. In our view, Judge Sutton was correct to urge caution about implementing an injunction indistinguishable from one the Supreme Court recently stayed elsewhere. Indeed, even if lower courts believe that stay decisions should not be accorded any precedential weight in subsequent merits determinations, these decisions can and should be considered binding with respect to subsequent *stay* requests concerning the same legal question. But the fact that only a minority of the Justices had signaled their views on the merits of the case in *Gloucester County* lessened the relevance and weight of the Court's stay to future cases.

Apparently, when a Justice votes to grant a stay as a courtesy, the Justice indicates in a separate opinion that the vote is

137. *Id.* at 222–24.
138. *Id.* at 224.

merely a courtesy. In *Arthur v. Dunn*,[139] for example, Chief Justice Roberts made his position abundantly clear: "I do not believe that this application meets our ordinary criteria for a stay," he explained, because "the claims set out in the application are purely fact specific, dependent on contested interpretations of state law, insulated from our review by alternative holdings below, or some combination of the three."[140] But because four Justices voted to grant a stay, the Chief Justice supplied the courtesy fifth vote "[t]o afford [the other Justices] the opportunity to more fully consider the suitability of this case for review."[141]

It is conceivable that Justices regularly vote to grant stays as a courtesy without making it explicit that their votes reflect no view on the merits. Many shadow docket stays are unaccompanied by opinions altogether. But this seems unlikely given the high-profile and contentious nature of the cases in which litigants have successfully sought stays in recent years. Stays have been issued relating to President Trump's "travel ban,"[142] the public charge rule,[143] injunctions prohibiting federal executions,[144] and voting deadlines.[145] Given that these cases often result in hotly-contested and closely-divided rulings at the merits stage, it seems unlikely that a Justice who thought the lower court had acted correctly nonetheless cast

139. 137 S. Ct. 14 (2016) (mem.).

140. *Id.* at 15 (Roberts, C.J., respecting the grant of the application for stay).

141. *Id.*

142. *See* Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080 (2017) (per curiam).

143. U.S. Dep't of Homeland Security v. New York, 140 S. Ct. 599, 599 (2020) (mem.).

144. *See, e.g.*, Barr v. Lee, 140 S. Ct. 2590, 2590–92 (2020) (per curiam).

145. *See, e.g.*, Democratic Nat'l Comm. v. Wisconsin State Legislature, 141 S. Ct. 28 (2020) (mem.). Just under one in every five non-administrative stay decisions the Supreme Court issued over the past five years involved the Executive Branch as a party. *See* Appendix. The Solicitor General must generally personally authorize any appeal by the United States to the Supreme Court, suggesting that many of the Supreme Court's stay decisions involved issues of critical importance to the federal government. *See* 28 C.F.R. § 0.20(a) (2020).

the deciding vote to stay the injunction, much less that they did so without issuing an opinion. As will be discussed below, litigants who successfully seek a Supreme Court stay almost invariably go on to win if the case does proceed to the merits before the Court.[146] This further undermines the suggestion that Justices are granting courtesy stays *sub silentio*. At the very least, that the Justices have felt compelled to issue statements explaining courtesy votes on more than one occasion supports the notion that, in the absence of such an opinion, a vote in favor of granting a stay is a vote implying a view that the movant is likely to succeed on the merits of his claim.

Thus, *Gloucester County* offers a cautionary note for lower courts: they must consider whether any of the Justices who vote to grant a stay have done so for non-merits reasons. When that is the case, the lower courts cannot say one way or another what a majority of the Court believes with respect to the merits of the movant's case.[147]

2. The Type of Underlying Merits Dispute

When a majority of the Supreme Court has expressed its view on a stay applicant's likelihood of success on the merits, lower courts seeking to determine the stay's precedential effect should examine the underlying merits dispute. If the stay grant makes it clear that the movant's position on a legal question is likely correct, lower courts can—and should—treat the Court's decision as precedential.

Consider a couple of examples. Relying on Section 8005 of

146. *See infra* notes 215–18 and accompanying text.

147. Of course, even if one of the Justices votes to grant an application for non-merits reasons, a Supreme Court stay may still guide lower courts considering a stay application in a substantially similar case. A Supreme Court stay indicates, at the very least, that the merits question warrants further study. In such circumstances, it may be prudent for a lower court to await that further consideration before allowing a similar case to proceed.

the Department of Defense Appropriations Act of 2019, the U.S. Department of Defense (DoD) sought to transfer roughly $2.5 billion to the U.S. Department of Homeland Security to build border barriers in several Southern states.[148] The Sierra Club and the Southern Border Communities Coalition sued the Government to prevent this transfer of funds, and a federal district court permanently enjoined DoD and DHS from using the monies to build a border wall.[149] The Government sought a stay of the injunction from the Ninth Circuit, but this request was denied.[150]

The Government then sought a stay from the Circuit Justice, Justice Kagan, who referred the application to the full Court.[151] In a one-paragraph opinion, the Court granted the stay and noted that "[a]mong the reasons" for its decision was "that the Government has made a sufficient showing at this stage that the plaintiffs have no cause of action to obtain review of [DoD's] compliance with Section 8005."[152] Justices Ginsburg, Sotomayor, and Kagan indicated that they would have denied the stay application, while Justice Breyer concurred in part and dissented in part.[153]

What can lower courts glean from the Supreme Court's decision to grant this stay? Recall that because the stay application arrived at the Court after first being denied by the Ninth Circuit, the Government faced an especially heavy burden.[154] Nonetheless, a majority of the Justices apparently thought that the Government met this burden, in part because it showed that the plaintiffs lacked a cognizable cause of action

148. *See* Sierra Club v. Trump, 929 F.3d 670, 676 (9th Cir. 2019).
149. *Id.*; *see also* Sierra Club v. Trump, 2019 WL 2715422 (N.D. Cal. June 28, 2019).
150. *Sierra Club*, 929 F.3d at 676–77.
151. *See* Trump v. Sierra Club, 140 S. Ct. 1, 1 (2019).
152. *Id.*
153. *Id.* at 1–2.
154. *See supra* notes 58–60 and accompanying text.

to challenge DoD's use of funds pursuant to Section 8005.[155] That is, the plaintiffs had not shown that their alleged harm was within the zone of interests protected or regulated by Section 8005.[156]

In subsequent cases before district courts across the country, organizations like the Sierra Club challenged DoD's transfer of funds under Section 8005.[157] In at least one of these cases, a lower court treated the Supreme Court's stay in *Sierra Club* as binding.[158] A district judge in Texas considered claims about DoD's use of Section 8005 funds brought by El Paso County and the Border Network for Human Rights.[159] The judge considered the Supreme Court's stay, and held that, in light of the Court's reasoning, the plaintiffs' Section 8005 claims were "unviable."[160]

Treating the *Sierra Club* stay in this manner makes sense if a judge views shadow docket stays as precedential. The Supreme Court considered the following question: do non-profit organizations like the Sierra Club and the Southern Border Communities Coalition have a cause of action to challenge DoD's use of funds under a particular statute?[161] By granting the stay, a majority of the Court signaled that it believed such organizations do not. Thus, in cases involving the same statute and similarly situated non-profit entities, adopting a view of the law ex-

155. *Sierra Club*, 140 S. Ct. at 1.

156. *See* Gov't's Application for a Stay Pending Appeal at 24, Trump v. Sierra Club, 140 S. Ct. 1 (2019) (No. 19A-60), 2019 WL 3451617 (arguing that because Section 8005 is the "provision whose violation forms the legal basis for the complaint," to have a cause of action the respondents' "asserted interests must fall within the zone of interests protected by Section 8005 to maintain this suit"); *id*. at 17–20.

157. *See, e.g.*, El Paso Cty. v. Trump, 408 F. Supp. 3d 840 (W.D. Tex. 2019); Ctr. for Biological Diversity v. Trump, 453 F. Supp. 3d 11 (D.D.C. 2020).

158. *See El Paso Cty.*, 408 F. Supp. 3d at 846.

159. *See id.* at 843–45.

160. *Id.* at 846.

161. Trump v. Sierra Club, 140 S. Ct. 1 (2019) (mem.).

pressed by a majority of the Supreme Court is reasonable, prudent, and in accord with traditional notions of precedent.[162]

Or consider another example. In *Trump v. International Refugee Assistance Project* (*IRAP*),[163] the Executive Branch asked the Supreme Court to stay nationwide injunctions issued by lower courts against President Trump's Executive Order banning the entry into the United States of foreign nationals from countries deemed to present a heightened risk to national security.[164] The Court granted the Government's stay applications in part.[165] Finding that the scope of the injunctions was too broad, the Court emphasized that a lower court "need not grant the total relief sought by the applicant," but instead may "mold its decree to meet the exigencies of the particular case."[166] The Court stayed the injunctions with respect to foreign nationals with no connection to the United States, but it left the injunctions intact as they applied to foreign nationals with ties to the country.[167]

The Fourth, Seventh, and Eleventh Circuits all treated the

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162. But contrast the district court's decision in *El Paso Cty.* with the Ninth Circuit's subsequent decision in *Sierra Club*, 963 F.3d 874, 887 (9th Cir. 2020). The Ninth Circuit panel acknowledged that the Supreme Court "suggest[ed] that Sierra Club may not be a proper challenger here." *Id.* Though it purported to "heed the words of the [Supreme] Court," the panel nonetheless found that the Sierra Club has a "constitutional and an *ultra vires* cause of action." *Id.* The panel reached this conclusion despite the fact that, in seeking a stay before the Supreme Court, the government argued that the Sierra Club had failed to adequately allege a constitutional or equitable cause of action. *See* Gov't's Reply in Support of Application for a Stay at 5–10, Trump v. Sierra Club, 140 S. Ct. 1 (2019) (No. 19A-60), 2019 WL 3451617. The Supreme Court has since granted the government's petition for writ of certiorari in response to the Ninth Circuit's latest decision, Trump v. Sierra Club, 141 S. Ct. 618 (2020) (mem.), although further briefing has since been held in abeyance and the case removed from the Court's 2021 argument calendar.

163. 137 S. Ct. 2080 (2017) (per curiam).

164. *Id.* at 2082–86.

165. *Id.* at 2087.

166. *Id.* (quoting 11A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 2947 (3d ed. 2013)).

167. *Id.* at 2088.

IRAP decision as precedential. But they disagreed on exactly what *IRAP* stands for. In *Roe v. Department of Defense*,[168] the Fourth Circuit held that *IRAP* "affirmed the equitable power of district courts, in appropriate cases, to issue nationwide injunctions extending relief to those who are similarly situated to the litigants."[169] The court called *IRAP* "binding precedent" that "require[d]" it to reject the Government's arguments against the legality of nationwide injunctions.[170]

Similarly, in *Chicago v. Barr*,[171] the Seventh Circuit suggested that the Supreme Court's *IRAP* decision "should put to rest any argument that the courts lack the authority to provide injunctive relief that extends to non-parties."[172] By contrast, in *Democratic Executive Committee of Florida v. Lee*,[173] the Eleventh Circuit cited *IRAP* in support of an injunction that was challenged as being too narrow.[174] Relying on *IRAP*, the court called it "axiomatic" that a limited injunction granting only some of the relief the plaintiffs sought was within the district court's discretion.[175]

Despite their differing views on *IRAP*'s meaning, all three circuits agreed that the decision to grant a stay had precedential value. Again, this reflects a view that Supreme Court stay grants should compel results in lower courts. In the abstract, identifying the limits of a federal court's equitable powers is an inquiry that does not depend on the facts of the particular case before the court. Thus, guidance from a majority of the

168. 947 F.3d 207 (4th Cir. 2020).
169. *Id.* at 232.
170. *Id.*
171. 961 F.3d 882 (7th Cir. 2020).
172. *Id.* at 916 (emphasis omitted).
173. 915 F.3d 1312 (11th Cir. 2019).
174. *Id.* at 1327–29.
175. *Id.* at 1327.

Justices on the permissible scope of an injunction can be controlling, even if it comes in the context of a decision to grant an emergency application for a stay.

However, there is at least one category of merits dispute in which some lower courts have held that Supreme Court stays are not authoritative: capital punishment cases.[176] In the 1980s, the Fifth Circuit typically voted to stay executions when the Supreme Court had issued a stay in a prior case presenting the same or similar legal claims.[177] For example, in 1985, the Supreme Court stayed an execution to consider whether the practice of excluding from a capital jury opponents of the death penalty violated a defendant's Sixth Amendment rights.[178] While the issue was pending before the Supreme Court, multiple defendants obtained stays of execution from the Fifth Circuit by relying on the same merits issue.[179]

But in *Wicker v. McCotter*,[180] the Fifth Circuit reversed course. The court stated that the "significance" of the Supreme Court's stays "is not clear," and that "[i]n the absence of a declaration by the Supreme Court that executions should be stayed in cases presenting the [same or similar] issue," the Fifth Circuit would continue to "follow our circuit's precedents" and deny a stay.[181] It added that, in its view, "the fact that the [Supreme] Court has agreed to consider [the stayed] cases does not alter the authority of our prior decisions."[182]

It is unclear whether the Fifth Circuit panel believed that the *Wicker* view should be extended beyond death penalty cases.

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176. *See* Wicker v. McCotter, 798 F.2d 155, 157–58 (5th Cir. 1986); Swallows, *supra* note 12, at 916–20.

177. *See, e.g.*, Rault v. Louisiana, 774 F.2d 675, 677 (5th Cir. 1985).

178. Celestine v. Blackburn, 473 U.S. 938 (1985); *see also* Lockhart v. McCree, 476 U.S. 162 (1986).

179. *See Rault*, 774 F.2d at 677; Wingo v. Blackburn, 783 F.2d 1046, 1052 (5th Cir. 1986).

180. 798 F.2d 155 (5th Cir. 1986).

181. *Id.* at 157.

182. *Id*. at 158.

The *Wicker* panel emphasized that it was "releasing this opinion in time to permit [the defendant] to seek review by the Supreme Court so that, if that Court considers it advisable to review our opinion, it may issue a writ."[183] It may be that the Circuit intended to confine its reasoning to the unique nature of capital punishment jurisprudence. After all, these cases are particularly fact-intensive and thus stand apart from the Court's typical shadow docket matters.

More, the Court has long espoused a "death is different" attitude when reviewing capital cases.[184] For instance, as Circuit Justice for the Fifth Circuit, Justice Scalia announced his intention to grant "in every capital case on direct review . . . a stay of execution pending disposition by this Court of the petition for certiorari."[185] Such a policy of automatic stays certainly does not exist in other areas of the law. More still, it is unclear whether other circuit courts treat Supreme Court stays of execution as a separate class of decisions. Given the finality of capital punishment, the fact-intensive nature of sentencing generally, and the Court's unique treatment of this class of cases in the past, it would not be surprising if stays of execution would be treated both by the Supreme Court and lower courts as *sui generis*. Additionally, because the death penalty is "exacted with great infrequency," decisions to stay these executions may not, as a practical matter, offer lower courts much precedential value.[186] Stays in the capital punishment context may thus create an unusual subset of issues warranting further study.

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183. *Id*.

184. *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 188 (1976) ("[T]he penalty of death is different in kind from any other punishment imposed under our system of criminal justice.").

185. Cole v. Texas, 499 U.S. 1301, 1301 (1991).

186. *Gregg*, 428 U.S. at 188 (quoting Furman v. Georgia, 408 U.S. 238, 313 (1972) (White, J., concurring)).

In sum, while death penalty disputes may be an example of a situation in which the Court stays a lower court decision simply to preserve jurisdiction to allow it to make a decision on the merits, other stays likely have no such justification. These stays are best understood as signaling disapproval of the lower court's judgment and a desire to allow the disputed action to proceed. Lower courts hearing similar matters would do well to heed this guidance rather than following the reasoning of the now-stayed judgment of the initial court.

3. The Reasoning or Explanation Offered

When determining what effect to accord a Supreme Court stay grant, lower courts should evaluate any rationale or explanation the Court's opinion offers in support of its decision. In general, a thorough and well-reasoned opinion is likely more instructive than a decision with little or no analysis. This is true for all judicial opinions, in the stay context or otherwise. But ultimately, even a decision with little or no reasoning can be authoritative if it is clear from the decision that the Supreme Court has expressed a view on the merits of a question.

The more detail and clarity the Supreme Court provides about why it is granting a stay, the more confident a lower court can be in treating the Court's opinion as precedential. This insight flows from the general standard that shorter, unsigned opinions are ordinarily entitled to less weight than a signed opinion that details its reasoning and analysis.[187] As one leading treatise on precedent explains: "The more thoroughly an opinion explains its holding, the less likely it should be overruled or distinguished on the ground that its

187. GARNER ET AL., *supra* note 13, at 214–15 (discussing relative precedential weights to be assigned to per curiam opinions and summary dispositions).

holding was not thoroughly considered."[188] That is true in the merits context as much as in the context of stays, preliminary injunctions, and other forms of emergency relief.

One reason why the quality of analysis matters is the vexing problem of distinguishing between an opinion's holding and dicta.[189] While it is axiomatic that lower courts are bound by the holding of a Supreme Court merits opinion, "[h]oldings are rarely presented in neatly packaged statements."[190] Instead, lower courts "must analyze the facts, issues, rationales, and result" of a case to determine the scope of its holding.[191] Such an undertaking is difficult if not impossible without a detailed rationale or explanation of the holding.

Thus, a lower court can confidently rely on *IRAP*'s discussion about the scope of injunctions[192] in part because the discussion reads much like the Supreme Court's traditional merits opinions.[193] Similarly, in *Republican National Committee v. Democratic National Committee*,[194] the Court offered several paragraphs of reasoning for a stay in an election-related case.[195] This reasoning made clear the Court's view of the merits and provided a roadmap for lower courts considering similar election law issues. The Court stayed a district court order requiring the State of Wisconsin to: (1) count absentee ballots postmarked after April 7, 2020, in an election scheduled to be

188. *Id.* at 158.

189. *See, e.g.*, Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1258 (2006) ("There is no line demarcating a clear boundary between holding and dictum. What separates holding from dictum is better seen as a zone, within which no confident determination can be made whether the proposition should be considered holding or dictum.").

190. Judith M. Stinson, *Why Dicta Becomes Holding & Why It Matters*, 76 BROOK. L. REV. 219, 222 (2010).

191. *Id*.

192. *See supra* note 151.

193. *See* Int'l Refugee Assistance Project v. Trump, 137 S. Ct. 2080, 2087–89 (2017).

194. 140 S. Ct. 1205 (2020) (per curiam).

195. *Id.*

held on that day; and (2) keep secret any election results until at least six days after election day.[196]

The high court "emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election," explaining that to do so is to ensure "judicially created confusion."[197] And it added that while the Supreme Court itself "would prefer not to" intervene in a state's elections, "when a lower court intervenes and alters the election rules so close to the election date, our precedents indicate that this Court, as appropriate, should correct that error."[198]

In *Texas Democratic Party v. Abbott*,[199] the Fifth Circuit relied on the Supreme Court's reasoning to stay a preliminary injunction issued by a district court.[200] In response to challenges posed by the COVID-19 pandemic, the district court "intervene[d] just weeks before an election, entering a sweeping preliminary injunction that requires state officials, *inter alia*, to distribute mail-in ballots to any eligible voter who wants one."[201] The circuit court noted that whether or not all citizens should have the right to vote by mail is a question of public policy, and that a federal district court lacks the power to compel a state to adopt such a policy against its will.[202] The court then quoted *Republican National Committee* to emphasize that lower courts should not alter election rules on the eve of an election, and that appellate courts must intervene to correct that error when it occurs.[203]

196. *Id.* at 1206–08.
197. *Id.* at 1207.
198. *Id*.
199. 961 F.3d 389 (5th Cir. 2020).
200. *Id.* at 394.
201. *Id*.
202. *Id*. at 411–12.
203. *Id*.

Like the Fifth Circuit, the Sixth Circuit also relied on *Republican National Committee* to stay a district court's "rewriting" of Ohio's election laws "with its injunction."[204] It explained that, because of the potential unintended consequences of such equitable relief, the court felt compelled to "heed the Supreme Court's warning that federal courts are not supposed to change state election rules as elections approach."[205]

But even when the Supreme Court grants a stay without offering much explanation, the decision may still be accorded significant weight. *Sierra Club*, discussed above, offers one example of this. The decision to grant a stay was explained in a single paragraph and included just one sentence about the merits.[206] Yet because it provided a clear indication of a majority of the Justices' views on a legal issue, that sentence was relied upon as authoritative by a district court.[207]

Or consider *Barr v. Lee*.[208] In that case, a federal prisoner sentenced to death sought an injunction against his execution on the ground that the use of pentobarbital sodium—the drug the government planned to use to execute him—constituted cruel and unusual punishment in violation of the Eighth Amendment.[209] The district judge granted the injunction, and the court of appeals declined to stay it.[210]

A majority of the Supreme Court found that a stay or vacatur of the injunction was "appropriate because, among other reasons, the plaintiffs have not established that they are likely to succeed on the merits of their Eighth Amendment claim."[211]

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204. Thompson v. DeWine, 959 F.3d 804, 812 (6th Cir. 2020) (per curiam).
205. *Id*. at 813.
206. Trump v. Sierra Club, 140 S. Ct. 1 (2019) (mem.).
207. El Paso Cty. v. Trump, 408 F. Supp. 3d 840 (W.D. Tex. 2019).
208. 140 S. Ct. 2590 (2020) (per curiam).
209. *Id*. at 2590.
210. *Id*.
211. *Id*. at 2591.

The Court did not provide a detailed assessment of the plaintiffs' claims about the health effects of pentobarbital.[212] Nonetheless, in a subsequent case brought by similarly situated federal prisoners, the district court correctly explained that it "is bound by the Supreme Court's holding that . . . [the] risk [of experiencing a pulmonary edema from the pentobarbital] does not justify last-minute judicial intervention."[213]

What about cases in which the Supreme Court grants a stay without any discussion of the merits? On the one hand, the absence of any substantive reasoning makes it difficult for a lower court to determine why the Supreme Court reached the decision it did. On the other hand, the standard of review makes clear that the Court will not grant a stay unless a majority of the Justices believe there is at least a "fair prospect"[214] or a "significant possibility"[215] that the movant will prevail on the merits. And if a lower court has first denied the movant a stay, as is the norm before the Supreme Court will entertain the application, the lower court's decision to deny the stay is "presumptively correct" and will be reversed only under "extraordinary circumstances."[216] In other words, even without any reasoning, the decision to stay a lower court ruling is not one the Court will take without a compelling reason to do so.

More, if the *Nken* standard applies to decisions of the Supreme Court, then a stay grant means that the movant has shown a strong likelihood of success on the merits and that this showing was a critical factor in the Court's decision. And

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212. *See id.*

213. *In re* Fed. Bureau of Prisons' Execution Protocol Cases, No. 19-mc-145 (TSC), 2020 WL 4004474, at *4 (D.D.C. July 15, 2020), *order vacated on other grounds sub nom.* Barr v. Purkey, 141 S. Ct. 196 (2020).

214. *See* Hollingsworth v. Perry, 558 U.S. 183, 190 (2010).

215. *See, e.g.*, Barnes v. E-Systems, Inc. Grp. Hosp. Med. & Surgical Ins. Plan, 501 U.S. 1301, 1302 (1991) (Scalia, J., opinion in chambers).

216. *See supra* notes 58–60 and accompanying text.

as explained above, regardless of the standard that applies, a stay grant from the Court almost certainly implies appellants have shown a significant probability of success on the merits.[217] Thus, even stay grants without any reasoning or explanation can provide the lower courts with guidance about the Supreme Court's views on the merits.

In fact, a decision by the full Court to grant a stay almost invariably foreshadows how the Court will eventually decide the case on the merits. In 2018, the Fifth Circuit found that a Louisiana law requiring physicians performing abortions to have admitting privileges at a nearby hospital did not impose a constitutionally undue burden on women seeking abortions.[218] The text of the Louisiana law was largely identical to a Texas law that the Supreme Court struck down as unconstitutional in 2016.[219]

After the Fifth Circuit denied a request to rehear the case and allowed the Louisiana law to stand,[220] the Supreme Court stayed the lower court's mandate.[221] The stay decision did not offer any discussion of the merits of the case.[222] But the stay grant itself suggested that a majority of the Court believed the Louisiana law was unconstitutional. Sure enough, a little over a year after granting the stay, the full Court struck down the law.[223] Indeed, both the decision to grant a stay and the decision to strike down the law were supported by the same five Justices.

A few weeks before the Supreme Court issued its merits de-

217. *See supra* notes 51–55 and accompanying text.
218. June Med. Servs. L.L.C. v. Gee, 905 F.3d 787 (5th Cir. 2018).
219. *See* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016).
220. *See* June Med. Servs. L.L.C. v. Gee, 913 F.3d 573 (5th Cir. 2019).
221. June Med. Servs. L.L.C. v. Gee, 139 S. Ct. 663 (2019) (mem.).
222. *Id.* at 663–64.
223. *See* June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103 (2020).

cision, the Sixth Circuit considered a case about the constitutionality of a Kentucky abortion law.[224] The Circuit cited the Supreme Court's stay decision in support of its own holding, noting that "the [Supreme] Court does not stay a decision absent a 'significant possibility that the judgment below will be reversed.'"[225]

Or consider the litigation surrounding the so-called "travel ban."[226] In 2017, President Trump issued multiple Executive Orders and a Proclamation that temporarily restricted foreign nationals deemed to be a national security risk from entering the country.[227] The legality of the Proclamation and the Executive Orders was immediately challenged, and a federal district court in Hawaii issued a nationwide preliminary injunction barring enforcement of the ban.[228] The Ninth Circuit partially denied a motion by the government to stay the injunction, leaving it in effect with respect to all foreign nationals with any plausible connection to the United States.[229]

The Supreme Court stayed the injunction without any discussion on the merits of the government's position.[230] A month later, in a case before a district court about a similar Executive Order, the government relied on the Supreme Court's stay decision to argue that national security interests justify certain executive actions restricting the entry of foreign

224. EMW Women's Surgical Ctr., P.S.C. v. Friedlander, 960 F.3d 785 (6th Cir. 2020).

225. *Id.* at 804 (citation omitted) (quoting Philip Morris U.S.A., Inc. v. Scott, 561 U.S. 1301, 1302 (2010)).

226. *See supra* Part II.B.

227. *See* Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017); Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017); Proclamation No. 9,645, 82 Fed. Reg. 45,161 (Sept. 24, 2017).

228. *See* State v. Trump, 265 F. Supp. 3d 1140, 1147–48, 1160–61 (D. Haw. 2017).

229. *See* State v. Trump, No. 17-17168, 2017 WL 5343014, at *1 (9th Cir. Nov. 13, 2017).

230. Trump v. Hawaii, 138 S. Ct. 542 (2017) (mem.).

nationals into the country.[231] The district court rejected this argument.[232] It "declined to speculate on the reasons for the Supreme Court's" decision, calling the stay "devoid of any analysis."[233]

As it turns out, it would have been appropriate for the district court to rely on the Supreme Court's stay decision. The Court later confirmed in a merits decision that the President has the authority to temporarily suspend entry into the country by certain foreign nationals upon making a finding that such entry would be detrimental to national security.[234]

These cases show that once the Supreme Court decides a movant is likely to succeed on the merits, the movant typically ends up being the prevailing party when a merits decision is issued.

Available data about recent stay decisions support this claim. From 2015 until August 2020, Westlaw reports that the Supreme Court made roughly 250 non-administrative stay decisions.[235] Except in the death penalty context, stay grants issued by the full Court forecasted the eventual merits decision in *every instance* that the Court went on to rule on the merits.[236] In fact, it appears that the only time a stay decision did not forecast the eventual merits decision in the last fifteen years was in *Phillip Morris USA Inc. v. Scott*.[237] In that case, Justice Scalia issued an in-chambers opinion staying the Fourth Circuit's judgment.[238] Justice Scalia found it "reasonably prob-

231. Doe v. Trump, 284 F. Supp. 3d 1172, 1180 (W.D. Wash. 2018).
232. *Id.* at 1180–81.
233. *Id.*
234. Trump v. Hawaii, 138 S. Ct. 2392, 2408–09 (2018).
235. See the Appendix for a compilation of these decisions.
236. *See id.*
237. 561 U.S. 1301 (2011).
238. *Id.* at 1305 (Scalia, J., opinion in chambers).

able that four Justices will vote to grant certiorari, and significantly possible that the judgment below will be reversed."[239] Ultimately, the full Court denied the petition for certiorari.[240]

In short, some of the Supreme Court's stay decisions should be treated by lower courts much as other *per curiam* opinions and summary dispositions are treated. Even a brief *per curiam* opinion can be precedential if it sets forth the Court's view regarding the applicable legal principles.[241]

C. Objections Considered

To be sure, weighty objections can be raised to granting precedential status to the Court's stay orders. We address some of them below.

First, in contrast to the Court's normal opinions, which issue after lengthy briefing from the parties and often *amici*, as well as oral arguments, the Court's shadow docket involves rushed briefing deadlines, and oral arguments almost never occur. Should we really be according decisions that issue from such a process precedential weight? A fair question, but principles of stare decisis are rarely grounded on the quality or timeliness of briefing and argument before the higher court.[242]

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239. *Id.* at 1304.

240. *See* Philip Morris USA Inc. v. Jackson, 561 U.S. 1037 (2011). It is noteworthy that while recent stay grants issued by the full Court have almost invariably predicted the final ruling on the merits, the sole example of a stay grant that did not predict the eventual outcome was an in-chambers opinion. This further supports our view that in-chambers opinions can be useful as persuasive, but not precedential, authority. And even there, the Court ultimately decided not to hear the case on the merits, rather than actually ruling against the party that had successfully sought a stay.

241. *See* GARNER ET AL., *supra* note 13, at 214.

242. *See, e.g.*, U.S. Court of Appeals—Cases Terminated on the Merits After Oral Arguments or Submission on Briefs, by Circuit, During the 12-Month Period Ending September 30, 2020, https://www.uscourts.gov/sites/default/files/data_tables/jb_b10_0930.2020.pdf [https://perma.cc/4RY5-MP2X] (During the 12 months ending on September 30, 2019, only 20.4 percent of cases were terminated on the merits by U.S. Courts of Appeals after oral arguments, and 79.6 percent of cases were so terminated after submissions of briefs.).

Indeed, courts—including the Supreme Court—routinely issue precedential opinions after condensed briefing schedules and without oral argument.[243]

Consider *Bush v. Gore*,[244] for instance, which effectively decided the 2000 presidential election.[245] Simultaneous briefing took place the day after the petition for certiorari was granted with oral argument occurring the day after that.[246] The Court issued its opinion the following day, just three days after the writ was originally granted.[247] Despite this abbreviated schedule, lower courts regularly cite the decision as binding precedent, and the Ninth Circuit has recognized it as "the leading case on disputed elections."[248] Indeed, while many commentators at the time and since suggested *Bush v. Gore* was a ticket "good for one ride only," someone forgot to tell lower courts: it is still very much alive and relied upon by them in election cases.[249]

Or take *Cheney v. U.S. District Court for the District of Columbia*.[250] Judicial Watch and the Sierra Club sued Vice President

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243. *Id.*

244. Bush v. Gore, 531 U.S. 98, 105–11 (2000) (per curiam) (striking down an order by the Florida Supreme Court to manually recount votes because the order violated the Equal Protection Clause).

245. *Id.*

246. *See* Bush v. Gore, 531 U.S. 1046 (2000) (order granting certiorari and stay, on Dec. 9, 2000).

247. *Bush*, 531 U.S. at 98.

248. Sw. Voter Registration Educ. Project v. Shelley, 344 F.3d 914, 918 (9th Cir. 2003) (en banc); *see also* Baten v. McMaster, 967 F.3d 345, 351–52 (4th Cir. 2020) (relying on *Bush v. Gore* for proposition that when a state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental); League of Women Voters v. Brunner, 548 F.3d 463, 476 (6th Cir. 2008) (relying on *Bush v. Gore* for claim that a state may not arbitrarily value one person's vote over another after granting the right to vote on equal terms).

249. *See* Ian MacDougall, *Why Bush v. Gore Still Matters in 2020*, PROPUBLICA (Nov. 1, 2020, 5:00 AM), https://www.propublica.org/article/why-bush-v-gore-still-matters [https://perma.cc/E5FB-9LGR].

250. 541 U.S. 913 (2004) (Scalia, J., opinion in chambers).

Dick Cheney, seeking certain records relating to the National Energy Policy Development Group, which the Vice President headed.[251] The case made its way to the Supreme Court, and the Sierra Club asked Justice Scalia to recuse himself from hearing the case.[252] The Sierra Club suggested that because Justice Scalia was friends with Cheney, and because the pair had gone on a duck-hunting trip shortly before the case began, the Justice was required to "resolve any doubts" about his impartiality "in favor of recusal."[253]

The Sierra Club's brief was submitted to the Court on March 11, 2004.[254] No oral argument on the recusal issue was held, and Justice Scalia issued an in-chambers opinion declining to recuse himself just seven days later.[255] Yet despite this rushed briefing and the lack of oral argument, Justice Scalia's opinion is regularly cited when lower courts consider recusal questions.[256]

Second, Supreme Court stay grants typically include little to no reasoning or analysis.[257] Decisions issuing from the Court's shadow docket rarely involve the same lengthy discussions and back-and-forth between the majority and dissenting Justices that characterize the Court's merits docket.[258] Perhaps these factors militate against precedential weight? But while a short opinion or order may sometimes be entitled to less precedential weight than a lengthier opinion,[259] that does not

251. *Id.* at 918.

252. *See id.* at 914–15.

253. *Id.*

254. *See* Brief of Respondent Sierra Club, *Cheney*, 541 U.S. 913 (No. 03-475).

255. *See Cheney*, 541 U.S. at 926–27.

256. *See, e.g.*, United States v. Ciavarella, 716 F.3d 705, 719 (3d Cir. 2013); United States v. Toohey, 448 F.3d 542, 546 (2d Cir. 2006); Perry v. Schwarzenegger, 630 F.3d 909, 915 (9th Cir. 2011).

257. *See supra* Part I.A.

258. *See id.*

259. *See* GARNER ET AL., *supra* note 13, at 215.

mean that the Court's view of the merits of the matter is automatically unclear, nor that lower courts may simply ignore it.[260] Inferior federal courts owe "obedience" to the Supreme Court as a matter of constitutional principle and long-recognized common law practice, not just when the Supreme Court's reasoning is pellucid or persuasive.[261] After all, deference only when the lower court is convinced by the higher court's reasoning is no deference at all.

Third, the Court does not treat its stay orders as binding on itself, so perhaps lower courts need not treat them as precedential, either. To begin with, after *Diocese of Brooklyn*, this assumption may no longer be correct. Recall that shortly after issuing this ruling, the Court vacated two similar lower court opinions and remanded them for further consideration in light of *Diocese of Brooklyn*.[262] The natural conclusion from the Court's remands is that it believed these lower court cases were now governed by *Diocese of Brooklyn* and should thus be decided using a similar analysis.

But in any event, the Supreme Court is always free to revisit or ignore its prior rulings, and it frequently does.[263] This is especially true in the context of *per curiam* opinions or summary affirmances. For instance, in *John Baizley Iron Works v. Span*,[264] the Court reversed a compensation award under the Workmen's Compensation Act of Pennsylvania for an injured employee.[265] Justice Stone dissented, arguing that the Court

260. *See, e.g.*, Neb. Press Ass'n v. Stuart, 427 U.S. 539, 558 (1976) (relying on per curiam decision in N.Y. Times Co. v. United States, 403 U.S. 713 (1971), to recognize that prior restraints are presumptively unconstitutional).

261. *See* GARNER ET AL., *supra* note 13, at 7–8, 28.

262. *See supra* note 32 and accompanying text.

263. *See* GARNER ET AL., *supra* note 13, at 214–15; 18 MOORE'S FEDERAL PRACTICE § 134.04[4] (3d ed. 2011).

264. 281 U.S. 222 (1930).

265. *Id.* at 230.

should have followed *Rosengrant v. Havard*, a summary affirmance without opinion.[266] The majority did not even acknowledge *Rosengrant* in its opinion.[267] But lower courts must "do as [the Court] says, not as it does."[268] And while the Supreme Court is of course free to overrule or even ignore its prior decisions, lower courts have no such luxury.[269]

More, while it is true that the Justices themselves are not bound by their preliminary views on a case, a decision to grant a stay is at least, as we argue, a signal of their views. Indeed, it is intended to be such a signal, as the standard for granting a stay requires the Court to consider whether the movant will prevail on his or her view of the merits. Absent compelling reasons, it will typically be prudent for lower courts to address these signals when considering the same merits question.[270]

Fourth, stays are by nature preliminary orders that typically maintain the status quo. One might suggest that these quick, initial reviews should not bind lower courts that can consider similar matters with the benefit of more time and fuller briefing and factual development. This is essentially the objection raised by Judge King in *CASA de Maryland*.[271]

But this objection overlooks the fact that appellate courts

266. *Id.* at 232 (citing Rosengrant v. Havard, 273 U.S. 664 (1927) (per curiam)).

267. *Id.* at 222–232.

268. Penkoski v. Bowser, 486 F. Supp. 3d 219, 234 (D.D.C. 2020).

269. GARNER ET AL., *supra* note 13, at 28, 40–41.

270. *See* Sharpe Holdings, Inc. v. U.S. Dep't of Health & Hum. Servs., 801 F.3d 927, 944 (8th Cir. 2015), *vacated and remanded*, 2016 WL 2842448 (U.S. May 16, 2016) (mem.) ("Although the Court's orders were not final rulings on the merits, they at the very least collectively constitute a signal that less restrictive means exist by which the government may further its interests." (citing Priests for Life v. U.S. Dep't of Health & Hum. Servs., 808 F.3d 1, 25 (D.C. Cir. 2015) (Kavanaugh, J., dissenting from denial of rehearing en banc))).

271. *See supra* note 9 and accompanying text.

frequently issue precedential opinions on preliminary injunctions and stays, often after expedited briefing by the parties.[272] And the Supreme Court has cited legal conclusions made in interlocutory appeals without suggesting that they are due less weight.[273] Indeed, it is not unusual for cases to settle after a definitive ruling on a preliminary injunction.[274]

It is not clear why a lower court's ruling on a preliminary injunction after expedited briefing should have precedential effect, but a preliminary order from the Supreme Court—which at least has the benefit of the briefing and rulings from the lower courts—should not. Of course, if the Supreme Court subsequently indicates that it has a different view of the merits of the matter, either through a later merits opinion in the same case or an opinion in another case, then the initial order would no longer be entitled to precedential weight.[275]

Relatedly, some might argue that, as a formal matter, preliminary orders do not technically dispose of the underlying merits dispute, speaking instead only to the *likely* outcome when the merits questions are eventually addressed.[276] But as discussed above, these initial determinations typically predict—if not predetermine—the actual merits decision. This is likely especially true when the major questions at issue are ones of law, rather than factual questions that can develop as the case evolves.

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272. *See, e.g.*, Celebrity, Inc. v. Trina, Inc., 264 F.2d 956 (1st Cir. 1959).

273. GARNER ET AL., *supra* note 13, at 156.

274. *See, e.g.*, John M. Newman, *Raising the Bar and the Public Interest: On Prior Restraints, "Traditional Contours," and Constitutionalizing Preliminary Injunctions in Copyright Law*, 10 VA. SPORTS & ENT. L.J. 323, 328 (2011) (stating that "an order regarding the plaintiff's motion for a preliminary injunction often facilitates settlement"); Douglas Lichtman, *Uncertainty and the Standard for Preliminary Relief*, 70 U. CHI. L. REV. 197, 202 n.14 (2003) ("Preliminary hearings—whether or not they lead to injunctions—surely do promote settlement by increasing the information available to the parties.").

275. GARNER ET AL., *supra* note 13, at 301, 303.

276. Cook Cty. v. Wolf, 962 F.3d 208, 234 (7th Cir. 2020).

More, in many contexts, decisions on preliminary relief are as important, if not more so, than a final determination on the merits. Cases about elections are a prime example.[277] "Few areas of law are as consistently dominated by one crucial date,"[278] and emergency decisions made before, on, or immediately after an election day about how and by when votes must be counted often prove decisive. It was, after all, the stay the Supreme Court issued in *Bush v. Gore* that halted Florida's recount and placed at issue the state's vote-counting deadline.[279] Similarly, Executive Orders are often intended to address temporary situations[280] or are unlikely to be willingly adopted by a subsequent presidential administration.[281] Preliminary relief barring such an order may, as a practical matter, prevent it from ever being implemented. Thus, while it is of course true that stay grants are not formally decisions on the merits of a case, they can nonetheless be instructive and should not simply be ignored.

Finally, one might worry that treating Supreme Court stays as precedent will unnaturally freeze the development of the caselaw and rob the Court of the benefit of conflicting lower court opinions to consider when reaching its own, ultimate determination. Judges and commentators have recognized this value in the multi-tiered structure of federal courts and suggested that the Court may use circuit splits to crystalize issues before it takes them up.[282]

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277. *See* Edward Foley, *The Particular Perils of Emergency Election Cases*, SCOTUSBLOG (Oct. 23, 2020 5:28 PM), https://www.scotusblog.com/2020/10/symposium-the-particular-perils-of-emergency-election-cases/ [https://perma.cc/M9J8-ZBBB].

278. *Id.*

279. *See id.*

280. *See, e.g.*, Exec. Order No. 13,945, 85 Fed. Reg. 49,935 (Aug. 8, 2020) ("Fighting the Spread of COVID-19 by Providing Assistance to Renters and Homeowners").

281. *Cf.* William P. Barr, *supra* note 95, at 628 (describing how Trump Administration has been forced to maintain Obama Administration's DACA regime by court order).

282. *See, e.g.*, Barnes v. Ahlman, 140 S. Ct. 2620, 2623 (2020) (Sotomayor, J., dissenting

But the decision to grant a stay, an extraordinary action for the Court to take, is itself suggestive that the issue is sufficiently crystallized that a majority of the Court believes specific action by the Court is necessary. More, the Court will presumably have the considered opinions of one, and probably two, lower courts in the record of the case before rendering its stay decision. At least one of those lower court opinions will present the opposite view from the one the Court is poised to take. More still, other courts can show their hand without also ignoring the Court's stay order. Lower courts occasionally discuss their misgivings about a Supreme Court decision even while faithfully applying it;[283] there is no reason they cannot do so in this context, too.

D. A Note on Concurrences, Dissents, and Statements Respecting Stay Decisions

Justices frequently author concurrences, dissents, and statements respecting the full Court's decision to grant or deny a stay.[284] As with the Court's normal merits docket, concurrences and dissents are, of course, not binding on lower

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from grant of stay) (mem.) (discussing whether the Ninth Circuit had created a "certworthy circuit split"); Nunez v. United States, 554 U.S. 911, 911 (2008) (Scalia, J., dissenting) (mem.) ("I had thought that the main purpose of our certiorari jurisdiction was to eliminate circuit splits, not create them."); White v. Finkbeiner, 753 F.2d 540, 546 n.1 (7th Cir. 1985) (Swygert, J., dissenting) ("By allowing issues to percolate up through the various circuits, the Supreme Court is able to benefit from observing the treatment of issues in different contexts, the alternative resolutions of issues, and even the mistakes of appellate courts.").

283. GARNER ET AL., *supra* note 13, at 28–29 (citing Lyons v. City of Xenia, 417 F.3d 565, 582–84 (6th Cir. 2005) (Sutton, J., concurring)); Khan v. State Oil Co., 93 F.3d 1358, 1363–64 (7th Cir. 1996) (relying on Albrecht v. Herald Co., 390 U.S. 145 (1968), despite its "increasingly wobbly, moth-eaten foundations" because the Supreme Court had not "expressly overruled it").

284. *See, e.g.*, Wolf v. Cook County, 140 S. Ct. 681, 681 (2020) (Sotomayor, J., dissenting from the grant of stay) (mem.).

courts.[285] But generally, these opinions will be useful as persuasive authority.[286]

In *Department of Homeland Security v. New York*,[287] for instance, Justice Gorsuch wrote an opinion concurring in the grant of a stay.[288] The opinion questioned whether nationwide injunctions fall within the scope of a federal court's Article III powers, noting that such injunctions "have little basis in traditional equitable practice."[289] Justice Gorsuch added that this form of equitable relief necessarily requires "high-stakes, low-information" decisionmaking, and that our justice system typically "encourages multiple judges and multiple circuits to weigh in only after careful deliberation, a process that permits the airing of competing views that aids [the Supreme] Court's own decisionmaking process."[290]

More, if nationwide injunctions are permitted, Justice Gorsuch reasoned, nothing stops groups of plaintiffs from forum shopping, filing repeated lawsuits in district after district until a sympathetic judge agrees to ban an Executive Branch policy or action from taking effect anywhere in the country.[291] For these reasons, Justice Gorsuch, joined by Justice Thomas, expressed deep concern about the constitutionality of nationwide injunctions.[292] Of course, the Supreme Court has not yet ruled on whether such injunctions are constitutionally permissible. Nonetheless, courts have cited Justice Gorsuch's concurrence in *Department of Homeland Security* to explain de-

285. *See* 18 MOORE'S FEDERAL PRACTICE § 134.05[2] (3d ed. 2011).
286. *Id.*
287. Dep't of Homeland Sec. v. New York, 140 S. Ct. 599 (2020) (mem.).
288. *Id.* at 599–601 (Gorsuch, J., concurring in the grant of stay).
289. *Id.* at 600.
290. *Id.*
291. *Id.* at 601.
292. *Id.* at 600–602.

cisions to issue narrowly tailored, rather than broad, injunctive relief, or to deny plaintiffs' requests for nationwide injunctions.[293]

Concurrences, dissents, and statements signed by multiple Justices are also useful as a source for understanding the views on the merits held by the Court. In *Barr v. Roane*,[294] the Court declined to stay an injunction issued by the U.S. District Court for the District of Columbia preventing the federal government from executing four prisoners convicted of murder.[295] Justice Alito, joined by Justices Gorsuch and Kavanaugh, issued a statement respecting the denial of the stay.[296] At issue in *Roane* was how to interpret 18 U.S.C. § 3596(a), which requires that federal executions be performed "in the manner prescribed by the law of the State in which the sentence is imposed."[297] The government argued that this statute required only that the *mode* of execution must be the same as that required by the law of the State in question.[298] The prisoners argued that the statute required also that all procedures used in an execution in the State in question must be followed by the federal government.[299]

Justice Alito wrote that the government "has shown that it is very likely to prevail when this question is ultimately decided," in part because the prisoners' interpretation "would demand that the [Bureau of Prisons] pointlessly copy minor

293. *See, e.g.*, Mayor of Baltimore v. Azar, 439 F. Supp. 3d 591, 610 n.8 (D. Md. 2020); Guilford College v. Wolf, No. 1:18CV891, 2020 WL 586672 at *11 (M.D.N.C., Feb. 6, 2020); CASA de Maryland, Inc., v. Trump, 971 F.3d 220, 256–57 (4th Cir. 2020).

294. Barr v. Roane, 140 S. Ct. 353 (2019) (mem.).

295. *Id.* at 353.

296. *Id.* (Alito, J., statement respecting the denial of stay or vacatur).

297. See *In re* Federal Bureau of Prisons' Execution Protocol Cases, 955 F.3d 106, 109–111 (D.C. Cir. 2020).

298. *Id.* at 109.

299. *Barr*, 140 S. Ct. at 353 (Alito, J., statement respecting the denial of stay or vacatur).

details of a State's protocol; and it could well make it impossible to carry out executions of prisoners sentenced in some States."[300] That at least three Justices believed the government's interpretation of the statute to be correct is useful information for any lower courts that are required to consider the question. Indeed, on remand the D.C. Circuit vacated the trial court's injunction, and Judge Katsas relied in part upon Justice Alito's statement for his concurrence in the panel opinion.[301]

* * *

In sum, we argue that decisions to deny a stay have no precedential value. Nor do decisions to grant a stay issued by a single Justice without an explanatory opinion. In-chambers opinions can be quite useful as persuasive authority, as can concurrences, dissents, and statements respecting stay decisions. When the full Supreme Court grants a stay application, lower courts should accord that decision great weight, unless there is compelling reason not to do so. This is true even if the stay grant features little legal reasoning, and may well be true even when there is no reasoning. Of course, any discussion of the merits of a question increases the confidence with which a lower court can act. But a statement by the full Court about the movant's likelihood of success on the merits ought not to be simply ignored or cast aside.

CONCLUSION

As requests for emergency relief are becoming the new normal in Supreme Court litigation, the importance of stay deci-

300. *Id.*

301. *See In re* Federal Bureau of Prisons' Execution Protocol Cases, 955 F.3d 106, 119–20 (D.C. Cir. 2020) (Katsas, J., concurring).

sions issued by the Court will increase. Some of these decisions—those in which a majority of the Court makes clear that it believes the movant has shown a strong possibility of prevailing on the merits—should be treated as precedential by the lower courts until the Court tells them otherwise.

The alternative view, that these stays can be ignored until the Supreme Court issues a final decision on the merits, is problematic for at least two reasons. First, following the Supreme Court's lead promotes national uniformity and faith in the rule of law.[302] These ideals are especially important in high-profile litigation on the hot-button topics of the day, where litigants and the public are particularly likely to suspect that judges are just applying their personal policy preferences. Rulings that seem to conflict with pronouncements by the Supreme Court on similar topics may appear calculated to flout the Court's authority and invite the public to similarly question the legitimacy of the justice system.[303] Different courts coming to different conclusions on the same legal question, one that the Supreme Court has already expressed a view on, are likely to lead to a decrease in faith in the judiciary.[304] Indeed, given that these cases are often pitted

302. *Cf.* Hutto v. Davis 454 U.S. 370, 375 (1982) (per curiam) ("[U]nless we wish anarchy to prevail within the federal judiciary system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be."); Cohens v. Virginia, 19 U.S. 264, 416 (1821) ("[T]he necessity of uniformity, as well as correctness in expounding the constitution and laws of the United States, would itself suggest the propriety of vesting in some single tribunal the power of deciding, in the last resort, all cases in which they are involved."); *see also* Re, *supra* note 16, at 945 ("To a great extent, the Supreme Court exists to promote uniformity"); ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 10 (1962).

303. *See e.g.*, CASA de Maryland, Inc., v. Trump, 971 F.3d 220, 230 (4th Cir. 2020).

304. *See, e.g.*, Tara Leigh Grove, *Sacrificing Legitimacy in a Hierarchical Judiciary*, 121 COLUM. L. REV. (forthcoming 2021), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3554027 [https://perma.cc/M48F-YQ7U] (noting the "considerable risks to the lower courts" in terms of their perceived legitimacy when they "take the lead on the content of federal law in high-profile areas").

against the Executive Branch, permitting lower court actions to restrain the Executive after the Supreme Court has stayed similar actions in similar cases also encourages a lack of due respect for a coordinate branch of government[305] and may erode the public's faith in the constitutional power structure as a whole.

Second, ignoring the possible precedential effects of Supreme Court stay grants could also create confusion for litigants. It often takes the Court years to fully consider and resolve the merits of a legal question. Until such resolution, the clearest statement of what the law is may well be an emergency decision, issued by the full Court, signaling that a movant is likely to prevail on the merits of the question. Decisions by lower courts that ignore this signal effectively treat a majority of the Supreme Court's preliminary views on the merits as "perfunctory," thereby "denying the Supreme Court action its obvious and relevant import."[306] Beyond violating traditional notions of vertical stare decisis, decisions ignoring the Supreme Court's actions also create uncertainty about prevailing law, increasing the possibility of splits among the federal courts. Such splits are needlessly resource-consuming if, as we suggest, the Supreme Court's stay grants serve as effective and reliable predictors of the Court's ultimate decision on the merits question presented. Lower courts, in other words, are compelled by judicial restraint and principles of prudence to not issue judgments that they are aware will likely be overturned by the Supreme Court.

Decisions that ignore Supreme Court stays can also undermine the reasonable reliance interests that may adhere to the

305. *Cf.* United States v. Nixon, 418 U.S. 683, 702 (1974) ("[W]here a subpoena is directed to a President of the United States, appellate review, in deference to a coordinate branch of Government, should be particularly meticulous.").

306. *CASA de Maryland, Inc.*, 971 F.3d at 230.

Court's action.[307] Consider, for instance, the practical difficulties a federal agency must no doubt face when it is enjoined from enacting an intended policy after the Supreme Court has stayed a prior injunction regarding the policy. More, individuals, companies, and state and local governments must continually modify their behavior and expectations when confronted with conflicting rulings emanating from various courts around the country.

To be sure, some commentators question the need for prioritizing uniformity within federal caselaw.[308] But even they recognize there "are cases for which standardizing federal law is important," including situations in which inconsistent interpretations would "be too difficult for interstate actors to follow [or] would lead to confusion."[309] And since many of the shadow docket stays involve the federal government—the ultimate interstate actor—as a party, and are usually high profile enough to lead to confusion should they be disregarded by lower courts, both of these provisos would likely apply. In any event, once the Supreme Court has made the extraordinary decision to intervene in an issue, lower courts no longer have the same latitude to explore an array of possible interpretations to a common legal problem.[310] Rather, they owe obedience to the higher court's decision.[311]

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307. Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 597 (1987) ("When a decisionmaker must decide this case in the same way as the last, parties will be better able to anticipate the future. The ability to predict what a decisionmaker will do helps us plan our lives, have some degree of repose, and avoid the paralysis of foreseeing only the unknown.")

308. *See generally* Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567 (2008) (arguing that neither fairness to the litigants, nor the perceived legitimacy of federal law and the justice system require federal courts to strive to maintain uniformity in decisionmaking).

309. *Id.* at 1637.

310. *Cf. id.* at 1604.

311. 18 MOORE'S FEDERAL PRACTICE 3D § 134.02[2] (3d ed. 2011).

A final note is in order. Though we have focused only on stays, the analysis presented here applies to any order or decision from the Supreme Court's shadow docket that requires the Court to make a preliminary determination about the movant's likelihood of success on the merits.[312] That is, we believe that any time a majority of the Court signals that a party is likely to succeed on a legal question, lower courts should carefully consider whether this determination should be accorded controlling weight by them in subsequent cases. Doing so will reduce the risk of reversal, promote confidence in the rule of law, and ensure that judicial resources are marshaled effectively and efficiently.

312. *See, e.g.*, Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020) (per curiam).

APPENDIX

NON-ADMINISTRATIVE SUPREME COURT STAYS (2015–AUGUST 2020)

Case	Full Court or Single Justice	Stay Granted (Y/N)	Merits Discussion in Opinion (Y/N)	Stay Cited by Lower Courts (Y/N)	Citing Court(s)	Notes
Raysor v. DeSantis, 2020 WL 4006868 (2020)	Full Court	N	N	N	N/A	Dissent by Justice Sotomayor (joined by Justices Ginsburg and Kagan).
Hartkemeyer v. Barr, 2020 WL 4006836 (2020)	Full Court	N	N	N	N/A	
Barr v. Purkey, 2020 WL 4006809 (2020)	Full Court	Y	N	N	N/A	Dissent by Justice Breyer (joined by Justice Ginsburg); Dissent by Justice Sotomayor (joined by Justices Ginsburg, Breyer, and Kagan).
Barr v. Lee, 2020 WL 3964985 (2020)	Full court	Y	Y	Y	*In re Federal Bureau of Prisons' Execution Protocol Cases*, 2020 WL 4004474 (D.D.C. 2020).	Dissent by Justice Breyer (joined by Justice Ginsburg); Dissent by Justice Sotomayor (joined by Justices Ginsburg and Kagan).
Peterson v. Barr, 2020 WL 3964236 (2020)	Full Court	N	N	N	N/A	
Lee v. Watson, 2020 WL 3964235 (2020)	Full Court	N	N	N	N/A	

Wardlow v. Davis, 2020 WL 3818898 (2020)	Full Court	N	N	N	N/A	
Wardlow v. Texas, 2020 WL 3818897 (2020)	Full Court	N	N	N	N/A	
Army Corps of Engineers v. N. Plains Res. Council, 2020 WL 3637662 (2020)	Full Court	In part	N	N	N/A	
Merrill v. People First of Alabama, 2020 WL 3604049 (2020)	Full Court	Y	N	N	N/A	Justices Ginsburg, Breyer, Sotomayor, and Kagan would deny the application.
Bourgeois v. Barr, 2020 WL 3492763 (2020)	Full Court	N	N	N	N/A	Justices Ginsburg and Sotomayor would grant the application.
Bugarenko v. Barr, 2020 WL 3492637 (2020)	Full Court	N	N	N	N/A	
Gutierrez v. Saenz, 2020 WL 3248349 (2020)	Full Court	Y	N	Y	*Murphy v. Collier*, 2020 WL 3448582 (S.D. Tex. 2020).	The Supreme Court's stay opinion said: "The District Court should promptly determine, based on whatever evidence the parties provide, whether serious security problems would result if a prisoner facing

						execution is permitted to choose the spiritual adviser the prisoner wishes to have in his immediate presence during the execution."
Williams v. Wilson, 2020 WL 2644305 (2020)	Full Court	N	N	N	N/A	Justices Thomas, Alito, and Gorsuch would grant the application.
Perry-Bey v. Norfolk, VA, 2020 WL 2621674 (2020)	Full Court	N	N	N	N/A	
ID DOC v. Edmo, 2020 WL 2569747 (2020)	Full Court	N	N	N	N/A	Justices Thomas and Alito would grant the application.
DOJ v. House Comm. on Judiciary, 2020 WL 2550408 (2020)	Full Court	Y	N	N	N/A	
Barton v. Stange, 2020 WL 2536738 (2020)	Full Court	N	N	N	N/A	
Friends of Danny DeVito v. Wolf, 2020 WL 2177482 (2020)	Full Court	N	N	N	N/A	
Texas Democratic Party v. Abbott, 140 S. Ct. 2015 (2020)	Full Court	N	N	N	N/A	Justice Sotomayor wrote statement respecting denial of application.

Valentine v. Collier, 140 S. Ct. 1598 (2020)	Full Court	N	N	Y	▪*Maney v. Brown*, 2020 WL 2839423 at *2 (D. Ore. 2020).▪ *Duvall v. Hogan*, 2020 WL 3402301 at *8 (D. Md. 2020)▪ *United States v. Monge*, 2020 WL 3872168 at *3 (S.D.N.Y. 2020).	Justice Sotomayor (joined by Justice Ginsburg) wrote statement respecting denial of application.
Wolf v. Innovation Law Lab, 140 S. Ct. 1564 (2020)	Full Court	Y	N	N	N/A	Justice Sotomayor would deny the application.
Actavis Holdco U.S., Inc. v. Connecticut, 140 S. Ct. 1290 (2020)	Full Court	N	N	N	N/A	
Woods v. Stewart, 140 S. Ct. 1290 (2020)	Full Court	N	N	N	N/A	
Woods v. Dunn, 140 S. Ct. 1290 (2020)	Full Court	N	N	N	N/A	
Goad v. Steel, 140 S. Ct. 1260 (2020)	Full Court	N	N	N	N/A	

Republican Nat'l Comm. v. Democratic Nat'l Comm., 140 S. Ct. 1205 (2020)	Full Court	Y	Y	Y	▪ *Texas Democratic Party v. Abbott*, 961 F.3d 389, 412 (5th Cir. 2020).▪ *Clark v. Edwards*, 2020 WL 3415376 at *5 (M.D. La. 2020).▪ *Thompson v. Dewine*, 959 F.3d 804, 812 (6th Cir. 2020).	Dissent by Justice Ginsburg (joined by Justices Breyer, Sotomayor, and Kagan).
Pratt v. Barr, 140 S. Ct. 1100 (2020)	Full Court	N	N	N	N/A	
Powe v. Deutsche Bank Nat'l Trust Co., 140 S. Ct. 992 (2020)	Full Court	N	N	N	N/A	
Sutton v. Tennessee, 140 S. Ct. 991 (2020)	Full Court	N	N	N	N/A	
In re Sutton, 140 S. Ct. 991 (2020)	Full Court	N	N	N	N/A	
Ochoa v. Collier, 140 S. Ct. 990 (2020)	Full Court	N	N	N	N/A	
Lance v. Ford, 140 S. Ct. 990 (2020)	Full Court	N	N	N	N/A	
Lance v. Georgia, 140 S. Ct. 989 (2020)	Full Court	N	N	N	N/A	
Roberts v.	Full	N	N	N	N/A	

Texas, 140 S. Ct. 952 (2020)	Court					
Henry Schein, Inc. v. Archer and White Sales, Inc., 140 S. Ct. 951 (2020)	Full Court	Y	N	N	N/A	Justice Ginsburg would deny the application.
Jefferson v. Sup. Ct. of Georgia, 140 S. Ct. 930 (2020)	Full Court	N	N	N	N/A	
Wolf v. Cook County, Illinois, 140 S. Ct. 681 (2020)	Full Court	Y	N	N	N/A	Justices Ginsburg, Breyer, Sotomayor, and Kagan would deny the application. Dissent by Justice Sotomayor.
DHS v. New York, 140 S. Ct. 599 (2020)	Full Court	Y	N	N	N/A	Justices Ginsburg, Breyer, Sotomayor, and Kagan would deny the application. Justice Gorsuch (joined by Justice Thomas) concurred.
Trump v. Deutsche Bank AG, 140 S. Ct. 660 (2019)	Full Court	Y	N	N	N/A	
Runnels v. Texas, 140 S. Ct. 659 (2019)	Full Court	N	N	N	N/A	
Geimah v. Barr, 140 S. Ct. 603 (2019)	Full Court	N	N	N	N/A	
In re Hall, 140 S. Ct. 602 (2019)	Full Court	N	N	N	N/A	

Trump v. Mazars USA, LLP, 140 S. Ct. 581 (2019)	Full Court	Y	N	N	N/A	
Cromartie v. Shealy, 140 S. Ct. 519 (2019)	Full Court	N	N	N	N/A	
Bank of America Corp. v. City of Miami, Florida, 140 S. Ct. 450 (2019)	Full Court	N	N	N	N/A	
BP P.L.C. v. Mayor and City Council of Baltimore, 140 S. Ct. 449 (2019)	Full Court	N	N	N	N/A	Justice Alito was recused.
Barr v. Roane, 140 S. Ct. 353 (2019)	Full Court	N	N	N	N/A	Justice Alito (joined by Justices Gorsuch and Kavanaugh) wrote statement respecting the denial.
Rams Football Co. v. St. Louis Regional Convention and Sports Complex Auth., 140 S. Ct. 338 (2019)	Full Court	N	N	N	N/A	
Morgan v. Morgan, 140 S. Ct. 131 (2019)	Full Court	N	N	N	N/A	
Newsome v. RSL Funding, LLC, 140 S. Ct. 130 (2019)	Full Court	N	N	N	N/A	

Xiao-Ying Yu v. Neall, 140 S. Ct. 130 (2019)	Full Court	N	N	N	N/A	
Sankara v. Barr, 140 S. Ct. 129 (2019)	Full Court	N	N	N	N/A	
Crutsinger v. Texas, 140 S. Ct. 32 (2019)	Full Court	N	N	N	N/A	
In Re Gary R. Bowles, 140 S. Ct. 27 (2019)	Full Court	N	N	N	N/A	
In Re Larry Swearingen, 140 S. Ct. 26 (2019)	Full Court	N	N	N	N/A	
Cannon v. Seay, 140 S. Ct. 26 (2019)	Full Court	Y	N	N	N/A	
West v. Parker, 140 S. Ct. 25 (2019)	Full Court	Y	N	N	N/A	
Rhines v. Young, 140 S. Ct. 8 (2019)	Full Court	N	N	N	N/A	Justice Sotomayor wrote statement respecting denial of application.
Sparks v. Davis, 140 S. Ct. 6 (2019)	Full Court	N	N	N	N/A	Justice Sotomayor wrote statement respecting denial of application.

Trump v. Sierra Club, 140 S. Ct. 1 (2019)	Full Court	Y	Y	Y	▪*El Paso Cty. v. Trump*, 408 F. Supp. 3d 840, 844 (W.D. Tex. 2019)▪*Ctr. for Biological Diversity v. Trump*, 2020 WL 1643657 at *4 (D.D.C. 2020).	Stay opinion says: "Among the reasons is that the Government has made a sufficient showing at this stage that the plaintiffs have no cause of action to obtain review of the Acting Secretary's compliance with Section 8005." Justices Ginsburg, Sotomayor, and Kagan would deny the application. Justice Breyer concurred in part and dissented in part.
Ford v. United States, 139 S. Ct. 2764 (2019)	Full Court	N	N	N	N/A	
Wilson v. Georgia, 139 S. Ct. 2738 (2019)	Full Court	N	N	N	N/A	
Presbyterian Church USA v. Edwards, 139 S. Ct. 2686 (2019)	Full Court	N	N	N	N/A	
Chatfield v. League of Women Voters of Michigan, 139 S. Ct. 2636 (2019)	Full Court	Y	N	N	N/A	
Chabot v. Ohio A. Philip Randolph Institute,	Full Court	Y	N	N	N/A	

139 S. Ct. 2635 (2019)						
Long v. Inch, 139 S. Ct. 2635 (2019)	Full Court	N	N	N	N/A	
In re Giordani, 139 S. Ct. 2629 (2019)	Full Court	N	N	N	N/A	
In re Samra, 139 S. Ct. 2049 (2019)	Full Court	N	N	N	N/A	
Price v. Dunn, 139 S. Ct. 1794 (2019)	Full Court	N	N	N	N/A	Dissent by Justice Breyer (joined by Justice Ginsburg and joined in part by Justices Sotomayor and Kagan).
Morrow v. Ford, 139 S. Ct. 1651 (2019)	Full Court	N	N	N	N/A	
Smith v. Daniel, 139 S. Ct. 1646 (2019)	Full Court	N	N	N	N/A	
King v. Texas, 139 S. Ct. 1617 (2019)	Full Court	N	N	N	N/A	
Murphy v. Collier, 139 S. Ct. 1475 (2019)	Full Court	Y	N	Y	*Murphy v. Collier*, 942 F.3d 704, 708–09 (5th Cir. 2019).	Justice Kavanaugh wrote opinion concurring in the grant and wrote a statement (joined by Chief Justice Robert) respecting the grant. Dissent by Justice Alito (joined by Justices Thomas and Gorsuch).
Guedes v. ATF,	Full Court	N	N	N	N/A	Justices Thomas and Gorsuch

139 S. Ct. 1474 (2019)						would grant the application.
Republic of Hungary v. Simon, 139 S. Ct. 1474 (2019)	Full Court	N	N	N	N/A	
Gun Owners of America, Inc. v. Barr, 139 S. Ct. 1406 (2019)	Full Court	N	N	N	N/A	
Dressler v. Circuit Court of Wisconsin, 139 S. Ct. 1402 (2019)	Full Court	N	N	N	N/A	
Coble v. Texas, 139 S. Ct. 1289 (2019)	Full Court	N	N	N	N/A	
Golz v. Carson, 139 S. Ct. 1235 (2019)	Full Court	N	N	N	N/A	
Harihar v. US Bank NA, 139 S. Ct. 123 (2019)	Full Court	N	N	N	N/A	
Ray v. Alabama, 139 S. Ct. 953 (2019)	Full Court	N	N	N	N/A	
Jennings v. Texas 139 S. Ct. 952 (2019)	Full Court	N	N	N	N/A	
Trump v. Karnoski, 139 S. Ct. 950 (2019)	Full Court	Y	N	Y	*Stone v. Trump*, 2019 WL 5697228 at *2 (D. Md. 2019); *Roe v. Shanahan*, 359 F. Supp. 3d	Justices Ginsburg, Breyer, Sotomayor, and Kagan would deny the application.

					382, 420 n.45 (E.D. Va. 2019).	
Trump v. Stockman, 139 S. Ct. 950 (2019)	Full Court	Y	N	Y	*Stone v. Trump*, 2019 WL 5697228 at *2 (D. Md. 2019).	Justices Ginsburg, Breyer, Sotomayor, and Kagan would deny the application.
In re Grand Jury Subpoena, 139 S. Ct. 914 (2019)	Full Court	N	N	N	N/A	
Virginia House of Delegates v. Golden Bethune-Hill, 139 S. Ct. 914 (2019)	Full Court	N	N	N	N/A	
Zodhiates v. United States, 139 S. Ct. 857 (2019)	Full Court	N	N	N	N/A	
June Medical Services, LLC v. Gee, 139 S. Ct. 663 (2019)	Full Court	Y	N	Y	*EMW Women's Surgical Ctr., P.S.C. v. Friedlander, 960 F.3d 785, 804* (6th Cir. 2020).	Justices Thomas, Alito, Gorsuch, and Kavanaugh would deny the application. Dissent by Justice Kavanaugh.
Trump v. East Bay Sanctuary Covenant, 139 S. Ct. 782 (2018)	Full Court	N	N	N	N/A	Justices Thomas, Alito, Gorsuch, and Kavanaugh would grant the application.
Jimenez v. Jones, 139 S. Ct. 659 (2018)	Full Court	N	N	N	N/A	*See also Jimenez v. Florida*, 139 S. Ct. 659.
In re Garcia, 139 S. Ct. 625	Full Court	N	N	N	N/A	*See also* 139 S. Ct. 626.

(2018)						
Ramos v. Davis, 139 S. Ct. 499 (2018)	Full Court	N	N	N	N/A	*See also Ramos v. Texas*, 139 S. Ct. 499.
Keyes v. Banks, 139 S. Ct. 473 (2018)	Full Court	N	N	N	N/A	
In re United States, 139 S. Ct. 452 (2018)	Full Court	N	Y	Y	*Juliana v. United States*, 947 F.3d 1159, 1169 (9th Cir. 2020).	Justices Thomas and Gorsuch would grant the application.
In re Dep't of Commerce, 139 S. Ct. 452 (2018)	Full Court	N	N	N	N/A	Justices Thomas, Alito, and Gorsuch would grant the application. *See also* 139 S. Ct. 16.
Yackel v. South Dakota, 139 S. Ct. 449 (2018)	Full Court	N	N	N	N/A	
Miller v. Parker, 139 S. Ct. 399 (2018)	Full Court	N	N	N	N/A	Dissent by Justice Sotomayor.
In re Acker, 139 S. Ct. 52 (2018)	Full Court	N	N	N	N/A	*See also Acker v. Texas*, 139 S. Ct. 52.
Crossroads Grassroots Policy Strategies v. Citizens for Responsibility and Ethics in Washington, 139 S. Ct. 50 (2018)	Full Court	N	N	N	N/A	
Michigan State A. Philip Randolph Insti-	Full Court	N	N	N	N/A	Justices Ginsburg and Sotomayor would grant the application.

tute v. Johnson, 139 S. Ct. 50 (2018)						
Chasson v. Sessions, 139 S. Ct. 44 (2018)	Full Court	N	N	N	N/A	
Qorane v. Sessions, 139 S. Ct. 38 (2018)	Full Court	N	N	N	N/A	
Zagorski v. Haslam, 139 S. Ct. 20 (2018)	Full Court	N	N	N	N/A	Dissent by Justice Sotomayor. *See also* 139 S. Ct. 11; 139 S. Ct. 360.
Brakebill v. Jaeger, 139 S. Ct. 10 (2018)	Full Court	N	N	N	N/A	Justice Kavanaugh did not participate in the case. Dissent by Justice Ginsburg (joined by Justice Kagan).
Food Mktg. Inst. v. Argus Leader Media, 139 S. Ct. 5 (2018)	Full Court	Y	N	N	N/A	Justices Ginsburg, Sotomayor, and Kagan would deny the application.
Irick v. Tennessee, 139 S. Ct. 1 (2018)	Full Court	N	N	N	N/A	Dissent by Justice Sotomayor. *See also* 139 S. Ct. 4.
United States v. U.S. Dist. Ct. for Dist. of Oregon, 139 S. Ct. 1 (2018)	Full Court	N	Y	Y	*Juliana v. United States*, 947 F.3d 1159, 1169 (9th Cir. 2020).	The stay opinion says: "The Government's request for relief is premature and is denied without prejudice. The breadth of respondents' claims is striking, however, and the justiciability of those claims presents substantial grounds for difference of opinion.

						The District Court should take these concerns into account in assessing the burdens of discovery and trial, as well as the desirability of a prompt ruling on the Government's pending dispositive motions."
Bible v. Davis, 138 S. Ct. 2700 (2018)	Full Court	N	N	N	N/A	
Jovel-Jovel v. Sessions, 138 S. Ct. 2040 (2018)	Full Court	N	N	N	N/A	
Butts v. Georgia, 138 S. Ct. 1975 (2018)	Full Court	N	N	N	N/A	*See also Butts v. Sellers*, 138 S. Ct. 1975.
Davila v. Texas, 138 S. Ct. 1611 (2018)	Full Court	N	N	N	N/A	
In re Moody, 138 S. Ct. 1590 (2018)	Full Court	N	N	N	N/A	*See also Moody v. Alabama* and *Moody v. Stewart*, 138 S. Ct. 1590.
Qorane v. Sessions, 138 S. Ct. 1584 (2018)	Full Court	N	N	N	N/A	
In re Rodriguez, 138 S. Ct. 1347 (2018)	Full Court	N	N	N	N/A	
Bucklew v. Precythe, 138 S. Ct. 1323 (2018)	Full Court	Y	N	N	N/A	Justices Roberts, Thomas, Alito, and Gorsuch would deny the application.

Turzai v. League of Women Voters of Pennsylvania, 138 S. Ct. 1323 (2018)	Full Court	N	N	N	N/A	
Timbes v. Deutsche Bank Nat. Trust Co., 138 S. Ct. 1316 (2018)	Full Court	N	N	N	N/A	
Eggers v. Alabama, 138 S. Ct. 1278 (2018)	Full Court	N	N	N	N/A	
In re Gary, 138 S. Ct. 1278 (2018)	Full Court	N	N	N	N/A	*See also Gary v. Georgia*, 138 S. Ct. 1278.
Henry Schein, Inc. v. Archer and White Sales, Inc., 138 S. Ct. 1185 (2018)	Full Court	Y	N	N	N/A	
Branch v. Florida, 138 S. Ct. 1164 (2018)	Full Court	N	N	N	N/A	
Battaglia v. Texas, 138 S. Ct. 943 (2018)	Full Court	N	N	N	N/A	*See also Battaglia v. Davis*, 138 S. Ct. 943.
In re Rayford, 138 S. Ct. 943 (2018)	Full Court	N	N	N	N/A	*See also Rayford v. Davis*, 138 S. Ct. 943.
Hamm v. Dunn, 138 S. Ct. 828 (2018)	Full Court	N	N	N	N/A	Justice Breyer wrote statement respecting denial of stay. Dissent by Justice Ginsburg (joined by Justice Sotomayor).

North Carolina v. Covington; 138 S. Ct. 974 (2018)	Full Court	In part	N	N	N/A	Justices Thomas and Alito would grant the application in full. Justices Ginsburg and Sotomayor would deny the application in full.
Madison v. Alabama, 138 S. Ct. 943 (2018)	Full Court	Y	N	N	N/A	Justices Thomas, Alito, and Gorsuch would deny the application.
Rucho v. Common Cause, 138 S. Ct. 923 (2018)	Full Court	Y	N	N	N/A	Justices Ginsburg and Sotomayor would deny the application.
Rothbard v. United States, 138 S. Ct. 569 (2017)	Full Court	N	N	N	N/A	
Trump v. Hawaii, 138 S. Ct. 542 (2017)	Full Court	Y	N	N	N/A	Justices Ginsburg and Sotomayor would deny the application. *See also Trump v. IRAP*, 138 S. Ct. 542 .
Campbell v. Jenkins, 138 S. Ct. 466 (2017)	Full Court	N	N	N	N/A	
Hannon v. Jones, 138 S. Ct. 442 (2017)	Full Court	N	N	N	N/A	*See also Hannon v. Florida*, 138 S. Ct. 441.
Cardenas Ramirez v. McCraw, 138 S. Ct. 442 (2017)	Full Court	N	N	N	N/A	*See also Cardenas Ramirez v. Texas*, 138 S. Ct. 442.
Smith v. HSBC Bank, 138 S. Ct. 418 (2017)	Full Court	N	N	N	N/A	

In re United States, 138 S. Ct. 371 (2017)	Full Court	Y	N	N	N/A	Dissent by Justice Breyer (joined by Justices Ginsburg, Sotomayor, and Kagan).
McNabb v. Dunn, 138 S. Ct. 370 (2017)	Full Court	N	N	N	N/A	
In re Pruett, 138 S. Ct. 353 (2017)	Full Court	N	N	N	N/A	*See also Pruett v. Choate*, 138 S. Ct. 353.
In re Lambrix, 138 S. Ct. 312 (2017)	Full Court	N	N	N	N/A	*See also Lambrix v. Florida*, *Lambrix v. Jones*, 138 S. Ct. 312.
Saro v. Sessions, 138 S. Ct. 287 (2017)	Full Court	N	N	N	N/A	
Tharpe v. Sellers, 138 S. Ct. 53 (2017)	Full Court	Y	N	N	N/A	Justices Thomas, Alito, and Gorsuch would deny the application.
Trump v. Hawaii, 138 S. Ct. 49 (2017)	Full Court	Y	N	N	N/A	
Abbott v. Perez, 138 S. Ct. 49 (2017)	Full Court	Y	N	N	N/A	Justices Ginsburg, Breyer, Sotomayor, and Kagan would deny the application.
Asay v. Florida, 138 S. Ct. 41 (2017)	Full Court	N	N	N	N/A	
Preyor v. Davis, 138 S. Ct. 35 (2017)	Full Court	N	N	N	N/A	
Phillips v. Ohio, 138 S. Ct. 35 (2017)	Full Court	N	N	N	N/A	*See also Phillips v. Jenkins*, 138 S. Ct. 35.
Anderson v.	Full	Y	N	N	N/A	Justices Ginsburg

Loertscher, 137 S. Ct. 2328 (2017)	Court					and Sotomayor would deny the application.
Otte v. Morgan, 137 S. Ct. 2238 (2017)	Full Court	N	N	N	N/A	Dissent by Justice Sotomayor (joined by Justice Ginsburg). *See also Otte v. Ohio*, 138 S. Ct. 49.
Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080 (2017)	Full Court	In part	Y	Y	*Roe v. Dep't of Defense*, 947 F.3d 207, 231–33 (4th Cir. 2020); *City of Chicago v. Barr*, 961 F.3d 882, 915-16 (7th Cir. 2020); *Democratic Exec. Comm. of Florida v. Lee*, 915 F.3d 1312, 1327–29 (11th Cir. 2019).	Justice Thomas (joined by Justices Alito and Gorsuch) concurred in part and dissented in part.
Gill v. Whitford, 137 S. Ct. 2289 (2017)	Full Court	Y	N	N	N/A	Justices Ginsburg, Breyer, Sotomayor, and Kagan would deny the application.
Ledford v. Dozier, 137 S. Ct. 2156 (2017)	Full Court	N	N	N	N/A	*See also Ledford v. Sellers*, 137 S. Ct. 2156.
Tartt v. Magna Health Systems, 137 S. Ct. 1836 (2017)	Full Court	N	N	N	N/A	Justice Gorsuch took no part in the consideration of the application.
Melson v. Dunn,	Full Court	N	N	N	N/A	

137 S. Ct. 1664 (2017)						
Lee v. Hutchinson, 137 S. Ct. 1623 (2017)	Full Court	N	N	N	N/A	*See also Lee v. Jegley; Lee v. Kelley; Lee v. Arkansas*, 137 S. Ct. 1623.
Johnson v. Kelley, 137 S. Ct. 1622 (2017)	Full Court	N	N	N	N/A	Justices Breyer, Sotomayor, and Kagan would grant the application. Dissent by Justice Breyer.
Arkansas v. Davis, 137 S. Ct. 1621 (2017)	Full Court	N	N	N	N/A	
Arthur v. Dunn, 137 S. Ct. 1521 (2017)	Full Court	N	N	N	N/A	Dissent by Justice Sotomayor. *See also* 137 S. Ct. 2185.
Jones v. Kelley, 137 S. Ct. 1284 (2017)	Full Court	N	N	N	N/A	Dissent by Justice Sotomayor. *See also Jones v. Arkansas*, 137 S. Ct. 1284.
Williams v. Kelley, 137 S. Ct. 1284 (2017)	Full Court	N	N	N	N/A	Dissent by Justice Sotomayor. *See also Williams v. Arkansas*, 137 S. Ct. 1842 ; *In re Williams*, 137 S. Ct. 1841.
McGehee v. Hutchinson, 137 S. Ct. 1275 (2017)	Full Court	N	N	N	N/A	Justices Ginsburg, Breyer, Sotomayor, and Kagan would grant the application. Dissent by Justice Sotomayor.
Ruiz v. Texas, 137 S. Ct. 1246 (2017)	Full Court	N	N	N	N/A	Dissent by Justice Breyer. *See also Ruiz v. Davis*, 137 S. Ct. 1247.
Fisch v. United States, 137 S. Ct. 1127 (2017)	Full Court	N	N	N	N/A	
Christeson v.	Full	N	N	N	N/A	Justice Ginsburg

Griffith, 137 S. Ct. 910 (2017)	Court					would grant the application.
Edwards v. Collier, 137 S. Ct. 909 (2017)	Full Court	N	N	N	N/A	*See also Edwards v. Davis*, 137 S. Ct. 909.
Gray v. McAuliffe, 137 S. Ct. 826 (2017)	Full Court	N	N	N	N/A	
North Carolina v. Covington, 137 S. Ct. 808 (2017)	Full Court	Y	N	N	N/A	
Wilkins v. Davis, 137 S. Ct. 808 (2017)	Full Court	N	N	N	N/A	
Smith v. Alabama, 137 S. Ct. 588 (2016)	Full Court	N	N	N	N/A	Justices Ginsburg, Breyer, Sotomayor, and Kagan would grant the application.
Sallie v. Sellers, 137 S. Ct. 588 (2016)	Full Court	N	N	N	N/A	
Arizona Sec'y of State v. Feldman, 137 S. Ct. 446 (2016)	Full Court	Y	N	N	N/A	
Lawler v. Sellers, 137 S. Ct. 368 (2016)	Full Court	N	N	N	N/A	
Zhenli Ye Gon v. Dyer, 137 S. Ct. 347 (2016)	Full Court	N	N	N	N/A	
Tilton v. SEC, 137 S. Ct. 29 (2016)	Full Court	N	N	N	N/A	

Ferrer v. Senate Permanent Subcomm. on Investigations, 137 S. Ct. 28 (2016)	Full Court	N	N	N	N/A	Justice Alito took no part in consideration of the application.
Johnson v. Michigan State A. Philip Randolph Institute, 137 S. Ct. 28 (2016)	Full Court	N	N	N	N/A	Justices Thomas and Alito would grant the application.
Ohio Democratic Party v. Husted, 137 S. Ct. 28 (2016)	Full Court	N	N	N	N/A	
Dignity Health v. Rollins, 137 S. Ct. 28 (2016)	Full Court	Y	N	N	N/A	
North Carolina v. North Carolina State Conference of NAACP, 137 S. Ct. 27 (2016)	Full Court	N	N	N	N/A	Chief Justice Roberts and Justices Kennedy and Alito would grant the stay in part. Justice Thomas would grant the stay in full.
Libertarian Party of Ohio v. Husted, 137 S. Ct. 27 (2016)	Full Court	N	N	N	N/A	
Ohio Democratic Party v. Donald J. Trump for President, 137 S. Ct. 15 (2016)	Full Court	N	N	N	N/A	Justice Ginsburg wrote a statement respecting denial of application.

Coalition for Homeless v. Husted, 137 S. Ct. 14 (2016)	Full Court	N	N	N	N/A	
Arthur v. Dunn, 137 S. Ct. 14 (2016)	Full Court	Y	N	N	N/A	Justices Thomas and Alito would deny the application. Chief Justice Roberts wrote statement respecting grant of application.
J&K Admin. Mgmt. Servs., Inc. v. Robinson, 136 S. Ct. 2483 (2016)	Full Court	N	N	N	N/A	
Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm, 136 S. Ct. 2442 (2016)	Full Court	Y	N	N	N/A	Justice Breyer concurred. Justices Ginsburg, Sotomayor, and Kagan would deny the application.
Conner v. Sellers, 136 S. Ct. 2440 (2016)	Full Court	N	N	N	N/A	Justice Breyer dissented.
Matta v. Matta, 136 S. Ct. 2404 (2016)	Full Court	N	N	N	N/A	
Adekunle Olufemi Adetiloye v. United States, 136 S. Ct. 2044 (2016)	Full Court	N	N	N	N/A	
Weston Educational, Inc. v. U.S. ex rel Miller, 136 S. Ct. 1841 (2016)	Full Court	Y	N	N	N/A	
Forrest v.	Full	N	N	N	N/A	

Griffith, 136 S. Ct. 1841 (2016)	Court					
Sibley v. U.S. Dist. Ct. for Dist. of Columbia, 136 S. Ct. 1837 (2016)	Full Court	N	N	N	N/A	
Veasey v. Abbott, 136 S. Ct. 1823 (2016)	Full Court	N	N	N	N/A	
Lucas v. Chatman, 136 S. Ct. 1731 (2016)	Full Court	N	N	N	N/A	
Taylor v. Taylor, 136 S. Ct. 1702 (2016)	Full Court	N	N	N	N/A	
In re Fults, 136 S. Ct. 1539 (2016)	Full Court	N	N	N	N/A	
Vasquez v. Texas, 136 S. Ct. 1538 (2016)	Full Court	N	N	N	N/A	
Bishop v. Chatman, 136 S. Ct. 1512 (2016)	Full Court	N	N	N	N/A	
In re Ward, 136 S. Ct. 1407 (2016)	Full Court	N	N	N	N/A	*See also Ward v. Texas*, 136 S. Ct. 1407.
June Medical Services, LLC v. Gee, 136 S. Ct. 1354 (2016)	Full Court	Y (vacatur of stay)	N	Y	*Comprehensive Health of Planned Parenthood Great Plains v. Williams*, 2017 WL 3475500 at *1 n.3 (W.D. Mo. 2017).	

Robinson v. Superior Ct. of California, 136 S. Ct. 1239 (2016)	Full Court	N	N	N	N/A	
Sherbow v. United States, 136 S. Ct. 1238 (2016)	Full Court	N	N	N	N/A	
McCrory v. Harris, 136 S. Ct. 1001 (2016)	Full Court	N	N	N	N/A	
Hittson v. Chatman, 136 S. Ct. 1000 (2016)	Full Court	N	N	N	N/A	
Garcia v. Stephens, 136 S. Ct. 1000 (2016)	Full Court	N	N	N	N/A	
West Virginia v. EPA, 136 S. Ct. 1000 (2016)	Full Court	Y	N	N	N/A	Justices Ginsburg, Breyer, Sotomayor, and Kagan would deny the application. *See also Murray Energy Corp. v. EPA, North Dakota v. EPA, and Chamber of Commerce v. EPA*, 136 S. Ct. 999 ; *Basin Elec. Power Co-Op v. EPA*, 136 S. Ct. 998.
Gutierrez v. United States, 136 S. Ct. 998 (2016)	Full Court	N	N	N	N/A	
Jones v. Bryson, 136 S. Ct. 998 (2016)	Full Court	N	N	N	N/A	*See also Jones v. Chatman*, 136 S. Ct. 998 .
Wittman v. Personhuballah,	Full Court	N	N	N	N/A	

136 S. Ct. 998 (2016)						
In re Masterson, 136 S. Ct. 927 (2016)	Full Court	N	N	N	N/A	*See also Masterson v. Texas*, 136 S. Ct. 927.
Bolin v. Florida, 136 S. Ct. 790 (2016)	Full Court	N	N	N	N/A	*See also Bolin v. Jones*, 136 S. Ct. 790.
Brooks v. Alabama, 136 S. Ct. 708 (2016)	Full Court	N	N	N	N/A	Justice Breyer dissented. *See also Brooks v. Dunn*, 136 S. Ct. 979.
Smith v. E.L., 136 S. Ct. 701 (2015)	Full Court	Y	N	N	N/A	
Terrell v. Bryson, 136 S. Ct. 614 (2015)	Full Court	N	N	N	N/A	*See also Terrell v. Chatman*, 136 S. Ct. 613.
Sorensen v. United States, 136 S. Ct. 606 (2015)	Full Court	N	N	N	N/A	
Johnson v. Chatman, 136 S. Ct. 532 (2015)	Full Court	N	N	N	N/A	
Israni v. 960 Crystal Lake Assoc., 136 S. Ct. 524 (2015)	Full Court	N	N	N	N/A	
Duncan v. Owens, 136 S. Ct. 500 (2015)	Full Court	Y	N	N	N/A	
Johnson v. Griffith, 136 S. Ct. 444 (2015)	Full Court	N	N	N	N/A	
Johnson v. Lombardi, 136 S. Ct. 443 (2015)	Full Court	Y	Y	N	N/A	

Holiday v. Stephens, 136 S. Ct. 387 (2015)	Full Court	N	N	N	N/A	Justice Sotomayor wrote a statement respecting denial of stay.
Watson v. Florida Judicial Qualifications Comm'n, 136 S. Ct. 352 (2015)	Full Court	N	N	N	N/A	
Manska v. Minnesota, 136 S. Ct. 352 (2015)	Full Court	N	N	N	N/A	
Correll v. Florida, 2015 WL 6111441 (2015)	Full Court	N	N	N	N/A	Justice Breyer dissented.
In re Prieto, 136 S. Ct. 29 (2015)	Full Court	N	N	N	N/A	*See also Prieto v. Zook*, 136 S. Ct. 28.
Glossip v. Oklahoma, 136 S. Ct. 26 (2015)	Full Court	N	N	N	N/A	Justice Breyer dissented.
Gissendaner v. Bryson, 136 S. Ct. 25 (2015)	Full Court	N	N	N	N/A	Justice Sotomayor would grant the application. *See also Gissendaner v. Chatman*, 136 S. Ct. 26.
Venezuela v. Helmerich & Payne Intern. Drilling Co., 136 S. Ct. 24 (2015)	Chief Justice Roberts	N	N	N	N/A	Though unclear from the text of the stay order, it appears that the application for a stay was not referred to the whole Court.
FibroGen, Inc. v. Akebia Theraputics, Inc., 136 S. Ct. 24 (2015)	Full Court	N	N	N	N/A	Justice Kennedy initially granted stay. *See* 136 S. Ct. 1. The full court vacated Justice Kennedy's order a

month later.

Nunley v. Griffith, 136 S. Ct. 24 (2015)	Full Court	N	N	N	N/A	*See also In re Nunley*, 136 S. Ct. 24; *Nunley v. Bowersox*, 136 S. Ct. 23.
McDonnell v. United States, 136 S. Ct. 23 (2015)	Full Court	Y	N	N	N/A	
Davis v. Miller, 136 S. Ct. 23 (2015)	Full Court	N	N	N	N/A	
Arkaji v. Hess, 136 S. Ct. 18 (2015)	Full Court	N	N	N	N/A	
Mellouli v. Lynch, 136 S. Ct. 18 (2015)	Full Court	Y	N	N	N/A	
Duncan v. Owens, 136 S. Ct. 18 (2015)	Full Court	N	N	N	N/A	
Lopez v. Stephens, 136 S. Ct. 17 (2015)	Full Court	N	N	N	N/A	
Roeder v. Kansas, 136 S. Ct. 8 (2015)	Full Court	N	N	N	N/A	
Zink v. Steele, 136 S. Ct. 6 (2015)	Full Court	N	N	N	N/A	*See also In re Zink*, *Zink v. Griffith*, 136 S. Ct. 7.
Dahlgren v. Lynch, 136 S. Ct. 1 (2015)	Justice Ginsburg	N	N	N	N/A	
Whole Women's Health v. Cole,	Full Court	Y	N	N	N/A	Chief Justice Roberts and Justices Scalia, Thomas,

135 S. Ct. 2923 (2015)	and Alito would deny the application.