A RESPONSE TO *THE FORESHADOW DOCKET*

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INTRODUCTION

In *The Foreshadow Docket*, Professor Bert Huang adds to the newly blossoming body of scholarship about the Supreme Court's emergency docket.[1] He offers thought-provoking ideas about the precedential value of the Court's emergency decisions, a topic we have also addressed.[2]

We argued that the Court's emergency decisions are sortable into three categories that represent a spectrum of precedential force: when the Court grants an emergency application and issues an opinion joined or supported by a majority of the Justices, that opinion is binding on lower courts. Application grants unaccompanied by a majority opinion are most comparable to summary affirmances, which are precedential only as to those findings the Court necessarily made to enter the order granting relief. And unexplained denials of emergency relief generally carry no precedential weight.[3]

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[1] *See generally* Bert I. Huang, *The Foreshadow Docket*, 124 COLUM. L. REV. 851 (2024) (reviewing PHILOSOPHICAL FOUNDATIONS OF PRECEDENT (Timothy Endicott, Hafsteinn Dan Kristjánsson & Sebastian Lewis eds., 2023)).

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

[3] *See id*. at 849–72. In August 2024, the Court issued a short per curiam opinion explaining the denial of a stay application. *See* Dep't of Educ. v. Louisiana, 144 S. Ct. 2507 (2024) (per curiam). To our knowledge, this was the first time the Court issued an opinion explaining its *denial* of emergency relief. The federal government moved for an emergency stay after a district court preliminarily enjoined—and the Fifth and Sixth Circuits declined to stay—a rule implementing Title IX of the Education Amendments of 1972 that defined sex discrimination to "includ[e] discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions,

Professor Huang offers a different view. He suggests that a ruling on an emergency application "is no more 'the law,' than a draft opinion would be."[4] Instead, emergency docket decisions might best be viewed as the Court's foreshadowing of the law that, depending on the context, lower courts may ignore when making similar predictions about similar legal questions.[5] In his words, "[a] temporary, revisable guess about the future state of the law is all that has been necessarily decided in an emergency ruling."[6]

To be sure, Professor Huang does not suggest that lower courts (and, presumably, practitioners) should ignore the Court's emergency docket decisions altogether. Rather, he develops an elaborate flowchart that considers the type of lower court decision at issue (for example, is it a stay pending certiorari or a merits decision?) and whether the lower court expects that it will issue a final decision before or after the Court issues a merits determination in the relevant emergency docket case.[7] According

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sexual orientation, and gender identity." *Id*. at 2509; *see also* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. 33886 (Apr. 29, 2024). In denying the stay application, the Supreme Court explained that the government had failed to show a likelihood of success on the merits because it had not shown that the definition of sex discrimination was severable from the rest of the rule. *Dep't of Educ.*, 144 S. Ct. at 2510. The Court also found that the equities weighed against a stay, as the Sixth Circuit had already expedited its consideration of the merits of the case. *Id*. In our view, while this per curiam denial of emergency relief is a new development, the arguments for granting precedential effect to a majority opinion granting relief would apply equally to an explained denial, too.

[4] Huang, *supra* note 1, at 857.

[5] *Id*. at 881–85.

[6] *Id.* at 859.

[7] *Id*. at 870–75. Professor Huang's flowchart includes three categories. For the first category, merits rulings, Huang suggests that "it is clear that the lower court can decide based on its best understanding of existing precedent without regard to the current Justices' apparent views." *Id*. For the second, stays or injunctions pending certiorari, Huang says that a lower court "ought not ignore a Supreme Court ruling on a stay or injunction pending certiorari in a parallel case with the same contested legal issue." *Id.* The third "and trickiest" category, preliminary injunctions and stays pending appeal, involves the lower court making a determination about whether it will reach the merits of a legal issue before the Supreme Court does. *Id*. If yes, the

to him, this type of analysis should help lower courts determine how much weight to give the Court's "signals" from the emergency docket.[8]

We are unpersuaded. First, any theory about the precedential value of emergency docket decisions should grapple with observable judicial practice. As a practical matter, the Supreme Court and lower courts have regularly treated emergency docket opinions as precedential over the past few years. Professor Huang's proposed approach therefore invites lower courts to flout emergency docket decisions that other courts have described as a "seismic shift," "significant intervening Supreme Court precedent," and a "rule."[9] Second, as we explain, from a theoretical perspective, the Court's emergency application decisions must be more than mere drafts or law predictions, and so lower courts owe them deference. In the final portion of this essay, we turn from responding to Professor Huang to some possible changes to the Court's emergency docket practice and the implications of these changes for the precedential effects of future emergency orders.

I. PRECEDENTIAL IN PRACTICE

Before considering the theoretical justifications for treating emergency docket decisions as precedential, it is worth briefly considering how courts have, in fact, treated them. It turns out that the Supreme Court and lower courts across the country regularly rely on emergency docket decisions as binding precedent.

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lower court "is to use prior precedent to make its guess about the likelihood of success on the merits." *Id.* If no, the court should set a "holding pattern based on a guess about its own future ruling under existing precedent." *Id.*

[8] *Id.* at 869.

[9] *See infra* notes 35–38.

A. The Supreme Court

Start with the Supreme Court. In *West Virginia v. EPA*,[10] a merits decision, the Court reviewed its prior applications of the major questions doctrine to determine whether the EPA had statutory authority to "substantially restructure the American energy market."[11] The majority opinion noted that "our *precedent* teaches that there are 'extraordinary cases' that call for" a heightened skepticism about whether Congress intended to grant an administrative agency broad authority to address questions of national economic and political significance.[12] The opinion added that "[s]uch cases have arisen from all corners of the administrative state."[13] It then discussed *FDA v. Brown & Williamson Tobacco*,[14] a seminal major questions case, before discussing two emergency docket opinions: *Alabama Association of Realtors v. HHS*,[15] and *National Federation of Independent Businesses v. OSHA* ("*NFIB*").[16] By describing these emergency docket decisions as "our precedent" and through its consideration of the decisions' reasoning, the Court made it clear that these decisions have precedential value. To suggest otherwise would be nonsensical. Indeed, lower courts generally assume that, when the Supreme Court says something, it "said what it meant."[17]

In *Tandon v. Newsom*,[18] the Supreme Court considered the legality of restrictions on religious exercise that California imposed on its residents during the COVID-19 pandemic. The Court noted that its

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[10] 142 S. Ct. 2587 (2022).

[11] *Id*. at 2610.

[12] *Id*. at 2608 (emphasis added).

[13] *Id*.

[14] 529 U.S. 120 (2000).

[15] 141 S. Ct. 2485 (2021) (per curiam).

[16] 142 S. Ct. 661 (2022) (per curiam) [hereinafter *NFIB*].

[17] CBS Inc. v. PrimeTime 24 Joint Venture, 245 F.3d 1217, 1222 (11th Cir. 2001); *see also* Manning v. Caldwell for City of Roanoke, 930 F.3d 264, 281–82 (4th Cir. 2019) (noting lower courts even owe substantial deference to Supreme Court dicta); United States v. Hill, 703 F. Supp. 3d 729, 736 (E.D. Va. 2023) (same).

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

"decisions have made" four points about the required Free Exercise Clause analysis "clear," and it cited emergency docket decisions to support each point.[19] Similarly, in *Gateway City Church v. Newsom*, the Court held that "the Ninth Circuit's failure to grant relief was erroneous," and that "[t]his outcome is *clearly dictated* by this Court's decision in *South Bay United Pentecostal Church v. Newsom*," an emergency docket decision.[20]

Most recently, in an emergency docket decision post-dating Professor Huang's piece, the Supreme Court granted a stay in one case on the basis of a prior emergency stay.[21] In a brief per curiam opinion, the Court noted that the application was "squarely controlled" by the prior emergency stay dealing with a similar issue.[22] It further explained that "[a]lthough our interim orders are not conclusive as to the merits, they inform how a court should exercise its equitable discretion in like cases."[23] This accords with our view that while subsequent factual development may distinguish a preliminary ruling, lower courts cannot disregard Supreme Court decisions simply because they appear on the emergency docket.

To be sure, these cases were themselves emergency docket decisions, but the fact remains that the Court has summarily reversed lower courts based largely on emergency docket rulings many times, and it has expressly directed lower courts to consider the effects of its interim orders. Indeed, *Gateway City* entirely relied on the reasoning of another emergency docket ruling, and *Tandon* primarily relied on earlier emergency docket precedents. There are other examples from the merits docket in which the Court has cited

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[19] *Id*. at 1296–97 (citing Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020) (per curiam))24; S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716 (2021) (mem.); Gateway City Church v. Newsom, 141 S. Ct. 1460 (2021) (per curiam)).

[20] 141 S. Ct. at 1460 (emphasis added).

[21] *See* Trump v. Boyle, 145 S. Ct. 2653 (2025) (per curiam).

[22] *Id.* at 2654.

[23] *Id.*

emergency docket decisions.[24] In short, recent practice shows that the Court has treated its emergency docket opinions as binding precedent and demands that lower courts do too.

The Justices have also described emergency docket decisions as having precedential effects in concurring and dissenting opinions. For example, in an opinion concurring in part in the partial grant of the emergency stay in *National Institutes of Health v. American Public Health Ass'n*, Justice Gorsuch reprimanded a district judge for "defy[ing]" another emergency docket decision on a related issue.[25] He explained that "regardless of a decision's procedural posture, its 'reasoning—its *ratio decidendi*'—carries precedential weight in future cases."[26] He also noted that the Court "often addresses requests for interim relief" either before or after certiorari is granted, and regardless, such a decision "constitutes precedent that commands respect in lower courts."[27] Justice Kavanaugh joined this concurrence.[28]

Justice Gorsuch's *NIH* concurrence is the most emphatic statement from a Justice on the question of an emergency stay's precedential effect. But it is hardly the only such statement. In a dissenting opinion in *Louisiana v. American Rivers*, Justice Kagan noted that, by granting relief, the Court "signal[ed] its view of the merits," and that the emergency docket has "become[] only another place for merits determinations."[29] Justice Kagan's opinion was joined by the Chief Justice and Justices Breyer and Sotomayor.[30] Similarly, in her dissenting opinion in *Merrill v. Milligan*, Justice

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[24] *See, e.g.*, Jones v. Hendrix, 143 S. Ct. 1857, 1876 (2023) (citing *Alabama Association of Realtors* for its "presumption that Congress does not casually assign executive agencies 'powers of vast economic and political significance' or 'significantly alter the balance between federal and state power'"); Biden v. Nebraska, 143 S. Ct. 2355, 2371–73 (2023) (citing *Alabama Association of Realtors* repeatedly).

[25] 145 S. Ct. 2658, 2663 (2025).

[26] *Id.* (citing Ramos v. Louisiana, 590 U.S. 83, 104 (2020) (plurality opinion)).

[27] *Id.*

[28] *Id.*

[29] 142 S. Ct. 1347, 1349 (2022) (mem.) (Kagan, J., dissenting).

[30] *Id.* at 1348.

Kagan wrote that the Court's decision was one in a "long line of cases in which this Court uses its shadow docket *to signal or make changes in the law*."[31] And in *Labrador v. Poe*, Justice Kavanaugh acknowledged that a "written opinion by this Court assessing likelihood of success on the merits at a preliminary stage can create a lock-in effect because of the opinion's potential vertical precedential effect (*de jure* or *de facto*), which can thereby predetermine the case's outcome in the proceedings in the lower courts and hamper percolation across other lower courts on the underlying merits question."[32] To be sure, some of these statements do not necessarily suggest wholesale approval of the weight emergency docket decisions can take, much less than decisions themselves. Still, they recognize that emergency docket opinions do have implications far beyond the immediate case they seek to address.[33]

B. The Supreme Court

Consistent with the Justices' views described above, lower courts often cite emergency docket decisions as binding precedent. In *Clark v. Governor of New Jersey*, for instance, the Third Circuit considered a challenge to a COVID-era executive order by New

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[31] 142 S. Ct. 879, 889 (2022) (mem.) (Kagan, J., dissenting) (emphasis added).

[32] 144 S. Ct. 921, 933–34 (2024) (mem.) (Kavanaugh, J., concurring); *see also* Trump v. CASA, Inc., 145 S. Ct. 2540, 2570 (2025) (Kavanaugh, J., concurring) ("[W]hen this Court makes a decision on the interim legal status of a major new federal statute or executive action—that decision will often constitute a form of precedent (*de jure* or *de facto*) that provides guidance throughout the United States during the years-long interim period until a final decision on the merits.").

[33] Professor Huang contends that "a preliminary ruling does not even create law of the case, never mind creating law for any other cases." Huang, *supra* note 1, at 858. But as discussed further in Section II.A below, courts regularly treat preliminary injunction decisions as precedential in making merits determinations. Additionally, as we have previously found, outside the death penalty context, stay grants by the Supreme Court forecast the eventual merits decision in virtually every case. *See* McFadden & Kapoor, *supra* note 2, at 871. Thus, "these initial determinations typically predict—if not predetermine—the actual merits decision." *Id*. at 877.

Jersey's governor limiting certain in-person gatherings.[34] The Third Circuit described *Roman Catholic Diocese of Brooklyn v. Cuomo* and *Tandon* as "significant, intervening Supreme Court precedent."[35] It added that *Tandon* created a "rule" about government regulations restricting gatherings for worship that "provided state officials with crucial guidance in shaping any future COVID restrictions, instructing them that such regulations must be neutral and generally applicable in all but the narrowest of circumstances."[36] The Supreme Court's emergency docket decisions, in other words, created law that put the state of New Jersey "on notice that religious exercise cannot be disfavored relative to comparable secular activity, even if the latter is deemed an 'essential service' during emergency conditions."[37]

The Ninth Circuit went even further in describing *Diocese of Brooklyn*'s effect on the law. In *Calvary Chapel Dayton Valley v. Sisolak*, the court found that *Diocese of Brooklyn* "arguably represented a seismic shift in Free Exercise law," adding that it "compels the result in this case."[38]

Similarly, in *Fellowship of Christian Athletes v. San Jose Unified School District*, the Ninth Circuit, sitting en banc, found that *Tandon* required applying strict scrutiny to a school district's decision to revoke a Christian group's status as an official student club.[39] *Tandon* "held" that "regulations are not neutral and generally applicable . . . whenever they treat *any* comparable secular activity more favorably than religious exercise," and whether two activities are comparable "must be judged against the asserted government interest that justifies the regulation at issue."[40] The court applied

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[34] 53 F.4th 769, 771 (3d Cir. 2022).

[35] *Id*. at 780. Although Judge Matey dissented on the mootness question, he also recognized *Diocese of Brooklyn* and *Tandon* to be controlling on the merits. *See id*. at 785–86 (Matey, J., dissenting).

[36] *Clark*, 53 F.4th at 780.

[37] *Id*. at 781.

[38] 982 F.3d 1228, 1232 (9th Cir. 2020).

[39] 82 F.4th 664, 689–90 (9th Cir. 2023) (en banc).

[40] *Id*. at 688–89 (emphasis in original).

this test and found that the school district had engaged in a pattern of selective enforcement that favored secular activities.[41]

Other examples from across the country abound. The Eighth Circuit found that what constitutes a comparable secular activity for the purpose of a Free Exercise Clause analysis "has divided the Supreme Court, but the Court has now ruled that the relevant comparison extends beyond movie theaters and lecture halls to hardware stores, hair salons, acupuncture facilities, and garages."[42] The cases that the Eighth Circuit cited as resolving this dispute were *Tandon* and *Diocese of Brooklyn*.[43] A judge in the Southern District of New York agreed, calling *Diocese of Brooklyn* "binding precedent for this Court."[44] So too did the First and Sixth Circuits.[45]

To be sure, many of the instances of lower courts treating an emergency docket decision as binding involve decisions the Supreme Court made during the COVID-19 pandemic. Professor Huang suggests that "a majority of the Justices now look back warily at their pandemic-era experimentation with using emergency orders to send precedent-ish signals to the lower courts."[46] Professor Huang acknowledges, however, that there was, at minimum "a stretch of months when the Supreme Court acted as if some of its emergency orders should have been treated as binding precedent."[47]

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[41] *Id*. at 689.

[42] Hawse v. Page, 7 F.4th 685, 693 (8th Cir. 2021).

[43] *Id*.

[44] Hopkins Hawley LLC v. Cuomo, 518 F. Supp. 3d 705, 712 (S.D.N.Y. 2021).

[45] *See* Lowe v. Mills, 68 F.4th 706, 714 (1st Cir. 2023) (noting that in *Tandon*, the "Supreme Court has explained" the governing standard for the Free Exercise Clause analysis); Resurrection Sch. v. Hertel, 35 F.4th 524, 529 (6th Cir. 2022) (en banc) (explaining that in *Tandon* and *Diocese of Brooklyn*, the Supreme Court and other courts "provid[ed] concrete examples of mandates and restrictions that violate the Free Exercise Clause").

[46] Huang, *supra* note 1, at 867; *see also* Merrill v. Milligan, 142 S. Ct. 879, 879 (2022) (mem.) (Kavanaugh, J., concurring) ("To reiterate: The Court's stay order is not a decision on the merits.").

[47] Huang, *supra* note 1, at 867–68.

This acknowledgment understates the Court's treatment of these decisions. The Court may not currently be issuing binding opinions on the emergency docket as often as it did in 2020–2021.[48] But as explained above, it continues to cite those decisions as precedential.[49] Practitioners and lower courts cannot merely shrug off those COVID-era opinions as being irrelevant idiosyncrasies. As Professor Huang acknowledges at one point, an emergency docket opinion "cannot be dismissed as dicta, for it underpins an actual ruling."[50]

Nor were the COVID-era opinions some isolated experiment. In 2006, the Court decided *Purcell v. Gonzalez* on the emergency docket, an opinion that continues to guide courts on when and how to judge changes to voting procedures.[51] It has been cited nearly 500 times in the two decades since it was issued.[52] And recent decisions like *Trump v. Boyle* indicate the Court is still quite willing to issue binding guidance on the emergency docket and expects lower courts to comply.[53]

Professor Huang is also mistaken to suggest that the Justices have rejected their COVID-era practice of using the emergency docket to guide lower courts in related cases. In one of the last Term's most important cases, *Trump v. CASA*, Justice Kavanaugh wrote at length on the need for a nationally uniform answer to the question of whether a major new federal statute or executive action can be legally enforced in the often years-long interim period until its legality is finally determined on the merits, and opined that the

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[48] Though as noted above, the Court has treated post-COVID-19 emergency docket cases like *NFIB* as precedential. *See supra* note 16 and accompanying text.

[49] *See id.*

[50] *See* Huang, *supra* note 1, at 854.

[51] 549 U.S. 1 (2006) (per curiam).

[52] *See* "Citing References," Purcell v. Gonzalez, 549 U.S. 1 (2006) (per curiam), next.westlaw.com (accessed Oct. 19, 2025) (listing 490 cases citing *Purcell*). For example, see Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2347 (2021); Robinson v. Callais, 144 S. Ct. 1171, 1171 (2024) (mem.); Kim v. Hanlon, 99 F.4th 140, 160 (3d Cir. 2024).

[53] *See supra* notes 20–23 and accompanying text.

Supreme Court should be the body that provides that interim uniform answer.[54] As he concluded, when the Court issues "a decision on the interim legal status of a major new federal statute or executive action—that decision will often constitute a form of precedent (*de jure* or *de facto*) that provides guidance throughout the United States during the years-long interim period until a final decision on the merits."[55] This conclusion nicely encapsulates the thrust of our argument too. At times, the Court will issue emergency docket opinions that have *de jure* precedential effect for lower courts, while in other cases the Court issues an emergency docket stay without opinion that may nonetheless be a *de facto* guide for lower courts on that issue, through law-of-the-case doctrine or otherwise.

In any event, lower courts continue to treat emergency docket decisions as precedential. Last year, the Ninth Circuit remanded a case to the court below "to reconsider the appropriate scope of injunctive relief in light of the Supreme Court's decision in *Labrador v. Poe*," an emergency docket decision.[56] And recent decisions by both the Fifth and Sixth Circuits rely extensively on the Supreme Court's reasoning in *NFIB*.[57]

In short, courts have, in practice, treated the Supreme Court's emergency docket decisions as precedential, as has the Court itself. This makes sense. When the Supreme Court tells lower courts something about the merits of a legal question, we would expect that explanation to carry authoritative weight.

Indeed, during the 2021–2022 Term, over 70% of the Supreme Court's grants of applications for a stay or an injunction "got some explanation," while "close to a third of them received an explanation of multiple pages."[58] These pages of explanation

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[54] *See* Trump v. CASA, Inc., 606 U.S. 831, 868–79 (Kavanaugh, J., concurring).

[55] *Id.* at 873.

[56] Hecox v. Little, 104 F.4th 1061, 1068 (9th Cir. 2024), *as amended* (June 14, 2024).

[57] *See* Louisiana v. Biden, 55 F.4th 1017, 1028–34 (5th Cir. 2022); Allstates Refractory Contractors, LLC v. Su, 79 F.4th 755, 767–69 (6th Cir. 2023), *cert. denied*, 144 S. Ct. 2490 (2024).

[58] Pablo Das, Lee Epstein & Mitu Gulati, *Deep in the Shadows?: The Facts About the*

provide valuable guidance to lower courts, even though much of this guidance would come from non-binding concurrences or dissents. And by citing emergency docket decisions, lower courts are acknowledging, in effect, that emergency docket orders say something about "the law" that the Supreme Court's prior merits decisions did not.

II. THEORETICAL JUSTIFICATIONS

For several reasons, from a theoretical perspective, lower courts have appropriately been treating emergency docket orders as precedential rather than, as Professor Huang suggests, draft opinions or mere law predictions.

Perhaps most importantly, emergency docket decisions are acts of judicial power that change the status quo (for example, by removing the effect of a nationwide injunction issued by a lower court). Indeed, whether a law, agency regulation, or executive action "is enforceable during the several years while the parties wait for a final merits ruling—*itself* raises a separate question of extraordinary significance to the parties and the American people."[59] The Court "often must address" such weighty questions when considering applications challenging new laws or regulations.[60] And in doing so, the Court may change "the law," clarify how a lower court misapplied existing law, or explain how to analyze new factual circumstances under the Court's precedent.

Professor Huang suggests that an emergency stay or injunction "turns upon law-prediction rather than law-declaration," and that because "this guess can be modified at any time by the issuing court," "[i]t is no more 'the law' than a draft opinion would be."[61] An emergency docket decision, he contends, "anticipates its own

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Emergency Docket, 109 VA. L. REV. ONLINE 73, 87 (Apr. 2023).

[59] Labrador v. Poe, 144 S. Ct. 921, 929 (2024) (mem.) (Kavanaugh, J., concurring) (emphasis in original).

[60] *Id*.

[61] Huang, *supra* note 1, at 857.

erasure."[62] But the finality of a pronouncement by the Supreme Court cannot be the litmus test for whether the pronouncement has precedential force.

A. Other Non-Final Decisions, Like Preliminary Injunctions, Are Binding Too

That the Supreme Court may later modify a decision does not mean that it has no precedential value. Nor does the fact that the case will continue after the issuance of an emergency docket opinion preclude that order from having precedential effects.

Rather than being comparable to "leaks of actual draft[] [opinions]" as Professor Huang suggests,[63] an emergency docket order is better analogized to a preliminary injunction decision.[64] Indeed, in deciding whether to grant or deny an emergency application, the Court borrows the familiar preliminary injunction standard of *Nken v. Holder*[65] to determine whether a party is entitled to relief based on, among other things, a likelihood of success on the merits.[66] Thus, if preliminary injunction decisions can have precedential effects, so too can emergency docket decisions.

Courts regularly cite preliminary injunction decisions when resolving merits disputes. Take *Trump v. Hawaii*.[67] There, various plaintiffs challenged an executive order by the President that banned the entry into the United States of foreign nationals from countries deemed to present a heightened risk to national security.[68] The District Courts for the Districts of Maryland and

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[62] *Id*.

[63] *Id*. at 872.

[64] *See* Univ. of Texas v. Camenisch, 451 U.S. 390, 395 (1981) ("[T]he findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits.").

[65] 556 U.S. 418, 434 (2009).

[66] *See* Ohio v. EPA, 144 S. Ct. 2040, 2052 (2024).

[67] 585 U.S. 667 (2018).

[68] *Id*. at 677.

Hawaii entered nationwide preliminary injunctions.[69] The Supreme Court reversed the grants of the preliminary injunction after finding that the plaintiffs had failed to show a likelihood of success on the merits of their claims.[70]

Lower courts have frequently cited *Trump v. Hawaii* as precedential. For example, in *Baan Rao Thai Restaurant v. Pompeo*, the D.C. Circuit cited the case for the proposition that "an American citizen can challenge the exclusion of a noncitizen if it burdens the citizen's constitutional rights."[71] Similarly, in *Khachatryan v. Blinken*, the Ninth Circuit cited the case for the rule that while foreign nationals seeking admission into the United States have no constitutional right to entry and therefore may not challenge a denial of admission, a "circumscribed judicial inquiry" is available when the denial of admission allegedly burdens the constitutional rights of a U.S. citizen.[72] And in *Baaghil v. Miller*, the Sixth Circuit cited *Trump v. Hawaii* to confirm that the court had "no authority to second guess the visa decisions" of an American consulate abroad that denies a foreign national entry into the United States.[73]

This treatment of *Trump v. Hawaii* makes a great deal of sense. A preliminary injunction is "preliminary" because facts developed during discovery or trial may show that the law should apply differently at the merits stage than the court may have anticipated at the start. But the prospect of further factual development is not a reason to disregard a court's clear statements about "the law" or the governing standard simply because those statements are made in the context of preliminary relief.

The same logic applies to the Supreme Court's emergency docket decisions. The non-finality of those decisions does not render statements of law within them non-precedential. For example, assume that a lower court applies established Supreme Court

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[69] *Id.*

[70] *Id.* at 711.

[71] 985 F.3d 1020, 1024–25 (citing *Trump v. Hawaii*, 585 U.S. at 698).

[72] 4 F.4th 841, 849–850 (9th Cir. 2021) (citing *Trump v. Hawaii*, 585 U.S. at 702).

[73] 1 F.4th 427, 432 (6th Cir. 2021) (citing *Trump v. Hawaii*, 585 U.S. at 702).

precedent to a new factual scenario and grants Party A injunctive relief. The Supreme Court then grants Party B's application for a stay. In doing so, the Court explains that Party B is likely to prevail on the merits because the lower court misapplied the established Supreme Court precedent to the new factual scenario. The Court's explanation of its established precedent is a binding statement about "the law."

Diocese of Brooklyn illustrates this principle. There, the established precedent was *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*.[74] *Lukumi* held that a law "burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny."[75] This means that the law must advance a government "interest[] of the highest order," and it "must be narrowly tailored in pursuit of" that interest.[76]

Diocese of Brooklyn applied this well-settled rule to a new factual scenario: state restrictions on attending religious services during the COVID-19 pandemic.[77] The Court explained that while "[s]temming the spread of COVID-19 is unquestionably a compelling interest," "it is hard to see how the challenged regulations can be regarded as 'narrowly tailored.'"[78] This was because, among other things, under the regulations, "a large store in Brooklyn" could "literally have hundreds of people shopping there on any given day," but "a nearby church or synagogue would be prohibited from allowing more than [ten] or [twenty-five] people inside for a worship service."[79] The Court's explanation of how to apply *Lukumi* to the novel pandemic scenario was a statement about what "the law" is. Reflecting that reality, *Diocese of Brooklyn* has been cited in over 700 cases according to Westlaw.[80]

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[74] 508 U.S. 520 (1993).

[75] *Id*. at 546.

[76] *Id*. (quoting McDaniel v. Paty, 435 U.S. 618, 628 (1978)).

[77] Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 67 (2020) (per curiam).

[78] *Id*.

[79] *Id*. at 17 (internal citation omitted).

[80] *See* "Citing References," Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S.

Similarly, in *NFIB*, the court applied a familiar principle (the major questions doctrine) to a new factual context (a nationwide vaccine mandate).[81] The Court noted that it "expect[s] Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance," and it applied that rule to an emergency standard issued by the Secretary of Labor that required "[eighty-four] million Americans to either obtain a COVID-19 vaccine or undergo weekly medical testing at their own expense."[82] Again, the Court's explanation of how the major questions doctrine applies to an emergency public health mandate issued by OSHA was a statement about "the law."

Sometimes, in granting an emergency application and explaining why the moving party is likely to succeed on the merits of the question(s) presented, the Supreme Court may provide a clear and definite rule statement. Why should such a statement not bind lower courts? For instance, in *Tandon*, the Court held that "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise."[83] In making this pronouncement, the Court did not overrule any precedent. Rather, it made clear that the strict scrutiny review standard applies to factual scenarios like the one presented by the emergency application (that is, a government regulation treating a comparably secular activity more favorably than religious exercise). As discussed above, lower courts understand *Tandon*'s rule statement to be binding.[84]

The Court could also, in theory, resolve a subsidiary question of law in the process of deciding that the movant has shown a

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Ct. 63 (2020), next.westlaw.com (accessed July 9, 2025).

[81] *See NFIB*, 142 S. Ct. 661, 665 (2022).

[82] *Id*.

[83] Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021) (per curiam) (emphasis in original).

[84] *See supra* notes 36 and 45, and accompanying text.

likelihood of success on the merits. This clarification of what "the law" is with respect to that subsidiary question should bind lower courts confronted with the same question.

In arguing otherwise, Professor Huang argues that emergency docket decisions are only "guesses" as to the "future of the law" that should only be relied on for "lower court guesses (on the same question) that require the same or a lesser degree of confidence."[85] We think he's doubly mistaken here.

First, we very much doubt that the Justices would describe themselves as merely predicting "future law." Rather, the Justices are applying existing law to new—or as is often the case in an emergency context—uncertain facts. Indeed, the strongest arguments for an emergency stay arise when lower courts blatantly misapply settled law. This helps explain the quick action and strong language from the Court in some emergency stays that summarily rebuked lower courts for failing to adhere to guidance in prior emergency stay decisions.[86] Putting aside examples of lower court insubordination or waywardness, we think the circumstances in which the Justices are anticipating an outright reversal of prior precedent are the rare exception rather than a rule-setting norm. Certainly, the statistics suggest as much.[87] Professor Huang is thus mistaken in believing that these decisions only arise when the Court is making a jurisprudential U-turn.

Second, Professor Huang incorrectly assumes that the "confidence level" employed by courts in preliminary rulings automatically applies to all parts of the ruling. To be sure, historically, the Court has been less than clear about the factors it considers in entering a stay.[88] But recently the Court confirmed that it considers—among

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[85] *See* Huang, *supra* note 1, at 879.

[86] *See, e.g.*, *supra* notes 22, 25, and 29.

[87] *See* Adam Liptak, *The Supreme Court's Mixed Record on Adhering to Precedent*, N.Y. TIMES (Jan. 29, 2024), https://www.nytimes.com/2024/01/29/us/supreme-court-precedent-chevron.html [https://perma.cc/RM4D-UGWB] (finding that the Roberts Court has only overturned between 1.6 and 2.2 precedents on average per term, the lowest of any Chief Justice since the 1950s).

[88] *See* McFadden & Kapoor, *supra* note 2, at 838–41 (describing the different

other things—the likelihood of the movant's success on the merits, the same consideration that drives preliminary injunction rulings.[89] And as we explained above, just as a higher court's decision in a preliminary injunction case can announce a binding statement of law, so too can the Supreme Court's emergency docket decisions. The key stare decisis questions in either scenario are: what does the Court purport to determine, and is this a statement of law pivotal to its decision?[90] The procedural posture of the ruling in which the statement is made is inconsequential for this stare decisis analysis.

Likewise, statements that are not determinative for the outcome of the case do not become binding precedent simply because they appear in a merits opinion. Indeed, the Court has a long history of "foreshadowing" future law developments—including future precedent reversals—in merits opinions. For instance, the Court foreshadowed its eventual U-turns on the constitutionality of sodomy laws,[91] the use of the *Lemon* test in Establishment Clause

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standards employed).

[89] *See* Ohio v. EPA, 144 S. Ct. 2040, 2052 (2024) (explaining that the Court applies "the same 'sound . . . principles' as other federal courts" when issuing a stay); Nken v. Holder, 556 U.S. 418, 426 (2009) (describing traditional stay factors courts should use). Justice Barrett recently suggested that she understands the likelihood of success on the merits prong to "encompass not only an assessment of the underlying merits but also a discretionary judgment about whether the Court should grant review in the case." Does 1–3 v. Mills, 142 S. Ct. 17, 18 (2021) (mem.) (Barrett, J., concurring). The important point for our purposes is that this cert-worthiness consideration is in addition to rather than instead of a finding that the applicant is likely to win on the merits.

[90] *See* GARNER ET AL., THE LAW OF JUDICIAL PRECEDENT 44 (2016).

[91] *See* Romer v. Evans, 517 U.S. 620, 623 (1996). Indeed, lower courts regularly apply Supreme Court precedents that the Court itself has expressed deep skepticism about. Before being overruled, *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984), was faithfully applied by lower courts, even though both lower court judges and Supreme Court justices frequently criticized the *Chevron* approach. *See, e.g.*, Valent v. Comm'r of Social Sec., 918 F.3d 516, 524 (6th Cir. 2019) (Kethledge, J., dissenting) ("In every case where an Article III court defers to the Executive's interpretation of a statute under *Chevron*, our constitutional separation of powers is surely disordered. That disorder, the Supreme Court has said, is constitutionally permissible. But it is disorder nonetheless."); Egan v. Del. River Port Auth., 851 F.3d 263, 278 (3d Cir. 2017) (Jordan, J., concurring) ("In our ruling today, we are required

cases,[92] and agency deference[93] all on the merits docket well before the final reversal occurred. As Professor Huang rightly implies, even undermined Supreme Court precedents remain binding on lower courts unless the Court gives the coup de grace,[94] and this principle remains even if the prior undermining efforts appeared on the merits docket.

To be fair, Professor Huang's guidance to discount any precedential potential for the emergency docket is relevant for a particular type of emergency docket procedure: administrative stays. Such stays "freeze legal proceedings until the court can rule on a party's request for expedited relief."[95] Unlike a stay pending appeal, administrative stays "do not typically reflect the court's consideration of the merits of the stay application," and so would have no precedential weight.[96] As Justice Barrett recently emphasized, administrative stays do not involve analysis of the *Nken* factors, and thus reflect no view of the merits.[97] Thus, Professor Huang's admonitions not to read too much into these short stays is fully appropriate. But by the same token, the more traditional emergency docket decisions—stays pending appeal—that *do* involve an evaluation of the likelihood of success on the merits, may have precedential effect for the same reasons that rulings on preliminary injunctions are precedential.

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to defer to the Department of Labor's interpretation of the FMLA. While I concur in the judgment, I write separately to note my discomfort with our reasoning, which is dictated by the regimes of deference adopted by the Supreme Court in *Chevron* . . . . The doctrine of deference deserves another look."); Buffington v. McDonough, 143 S. Ct. 14, 18–19 (2022) (mem.) (Gorsuch, J., dissenting) ("Rather than say what the law is, we tell those who come before us to go ask a bureaucrat.").

[92] Lemon v. Kurtzman, 403 U.S. 602 (1971), *abrogated by* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2427–28 (2022); Am. Legion v. Am. Humanist Ass'n, 588 U.S. 29, 51 (2019) (declining to employ *Lemon*); Van Orden v. Perry, 545 U.S. 677, 686 (2005) (limiting *Lemon*).

[93] Kisor v. Wilkie, 588 U.S. 558, 563–64 (2019).

[94] *See* Huang, *supra* note 1, at 872.

[95] Rachel Bayefsky, *Administrative Stays: Power and Procedure*, 97 NOTRE DAME L. REV. 1941, 1942 (2022).

[96] United States v. Texas, 144 S. Ct. 797, 798 (2024) (Barrett, J., concurring).

[97] *Id.*; *see also* June Med. Servs., LLC v. Gee, 139 S. Ct. 661 (2019) (mem.).

B. Emergencies Happen

As the COVID-19 pandemic illustrated, when a time-sensitive question arising from a crisis is presented to the Supreme Court, its emergency docket may well become the merits docket for that issue.[98] Crises "force[]" the Court to "decide complex legal issues in an emergency posture."[99] But the emergency posture aside, the Court's decision still resolves the legal issue presented, and this resolution will impact the state of "the law."[100] The Court is, in other words, "responsible for resolving questions of national importance, even when they arise on the emergency docket."[101]

For instance, during World War II, the Court encountered the extraordinary question of the legality of a military commission that was trying several German saboteurs who had arrived by U-boat on the East Coast.[102] This case was argued in the Court while it technically remained pending in an appellate court.[103] The Supreme Court summarily affirmed the commission's legality only three days after the district court had upheld the military commission's order and *one minute* after the saboteurs' attorneys officially filed their petition for review in the Supreme Court.[104] Chief Justice Stone issued an opinion for the Court three months later, after most of the saboteurs had been executed.[105] Despite the rushed nature of this case, it remains a leading case on military commissions and has been invoked repeatedly by the Supreme Court and lower courts

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[98] *See* Labrador v. Poe, 144 S. Ct. 921, 934 n.5 (2024) (Kavanaugh, J., concurring) ("[T]he emergency docket during the COVID-19 pandemic in essence *was* the merits docket as to certain COVID-19-related issues." (emphasis in original)).

[99] Dr. A. v. Hochul, 142 S. Ct. 2569, 2571 (2022) (Thomas, J., dissenting).

[100] *Id.*

[101] *Labrador*, 144 S. Ct. at 934.

[102] *See Ex parte* Quirin, 317 U.S. 1 (1942); *see also* Harlan G. Cohen, *"Undead" Wartime Cases: Stare Decisis and the Lessons of History*, 84 TUL. L. REV. 957, 966–69 (2010).

[103] CLIFF SLOAN, THE COURT AT WAR: FDR, HIS JUSTICES, AND THE WORLD THEY MADE 99 (2023).

[104] *Id.*

[105] *Id.* at 101.

as an influential precedent on due process for enemy combatants in military commissions.[106]

Or consider the *Pentagon Papers* case, *New York Times Co. v. United States*, in which the Court found that the Government had not met its burden of justifying an attempt to prevent newspapers from publishing leaked classified documents only one week after conflicting rulings from two lower courts.[107] This three paragraph per curiam opinion and its accompanying concurrences have been cited nearly a thousand times by the Supreme Court and lower courts in the last fifty years.[108] And of course there is *Bush v. Gore*,[109] which went from a grant of certiorari to an issued opinion in just three days.[110] This per curiam opinion is a leading election law case and has been cited over 600 times by the courts in the last two decades.[111]

To be sure, these examples all involved oral arguments and may not technically fit the parameters of today's emergency docket. Even so, each case was briefed and decided in an incredibly compressed timeframe and resulted in abbreviated, often per curiam, opinions. Yet they addressed critical issues of the day and remain important precedents in our legal canon even decades later. It would take a dose of heroic optimism to believe the Court will not face new emergencies in the years to come. Those decisions—whether or not they include oral argument—will necessarily guide

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[106] *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507, 518–19, 522–23 (2004); Boumediene v. Bush, 553 U.S. 723, 786–87 (2008); Padilla v. Hanft, 423 F.3d 386, 392, 395–96 (4th Cir. 2005).

[107] 403 U.S. 713, 714 (1971) (per curiam).

[108] *See* "Citing References," *Pentagon Papers*, 403 U.S. 713 (1971), next.westlaw.com (accessed Oct. 19, 2025); *see also, e.g.*, Bartnicki v. Vopper, 532 U.S. 514, 528 (2001); Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 545 (1976); Bernard v. Gulf Oil Co., 619 F.2d 459, 473–74 (5th Cir. 1980).

[109] 531 U.S. 98 (2000) (per curiam).

[110] McFadden & Kapoor, *supra* note 2, at 873.

[111] *See* "Citing References," Bush v. Gore, 531 U.S. 98 (2000), next.westlaw.com (accessed Oct. 19, 2025); *see also, e.g.*, Moore v. Harper, 143 S. Ct. 2065, 2089 (2023); Baten v. McMaster, 967 F.3d 345, 351–52 (4th Cir. 2020); League of Women Voters v. Brunner, 548 F.3d 463, 476–77 (6th Cir. 2008).

lower courts when they deal with similar issues afterward. It is therefore mistaken to brush off the COVID-19 era emergency docket cases as non-precedential idiosyncrasies or to expect that exigent circumstances will not require similar expedited rulings again.

C. Some Emergency Docket Decisions Will Be the Court's Final Word on an Issue

Professor Huang suggests that lower courts could disregard the Supreme Court's emergency docket decisions if courts treat the "likelihood of success on the merits" inquiry as "guessing who would win if the merits had to be decided right now."[112] Under this "right now" approach, courts could "assum[e] that the future state of the law is irrelevant, not just too speculative" and look only to the Supreme Court's merits decisions for guidance.[113]

But, at least in some cases, an emergency docket order may be the Court's last or only word on an important legal question (for example, in an election law case, or in cases about executive orders that become moot because of a change in administration). In those cases, an emergency docket order may be the only relevant Supreme Court decision on a question before the lower court. Indeed, Professor Huang's "right now" conceptual approach ignores how many emergency docket cases evolve. Typically, decisions in these cases do not overrule old precedents, but correct how lower courts apply those precedents in new or unusual situations.

Professor Huang also suggests that lower courts may simply "proceed apace" with the Supreme Court rather than following the Court's lead (that is, the lower court may reach a different decision on the merits by resolving its case after an emergency docket order but before a merits decision by the Supreme Court).[114] To hold a

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[112] Huang, *supra* note 1, at 876.

[113] *Id.* at 876–77.

[114] *Id.* at 874.

case "in abeyance in light of a nonexistent Supreme Court merits case," he says, "may well be seen as shirking or gamesmanship."[115] But this approach would not work when an emergency docket decision provides the Supreme Court's final or only word on "the law." And, of course, there is a risk that "proceeding in parallel"—which in practice means ignoring the last word by the Supreme Court on a question of law just because it is on the emergency docket—could also be seen as gamesmanship. Prudence and respect for the principle of a hierarchical judicial structure require more deference to the Court's pronouncements about the law.

Perhaps an important distinction can be drawn between these "case-ending" decisions and more traditional emergency docket decisions that only offer temporary relief while the cases play out in lower courts. A subsequent full opinion on the merits with the benefit of complete briefing and oral arguments will likely supplant an earlier emergency ruling, even under traditional rules of horizontal stare decisis. But this is not a dichotomy that Professor Huang or others have yet drawn when discounting the precedential effect of emergency docket rulings. What is more, an eventual merits decision may not necessarily address all the same issues an earlier, emergency ruling decided.

Consider *Merrill v. Milligan*, a re-districting case that appeared on the Court's emergency docket shortly before Alabama's 2022 primary elections.[116] The Court stayed the lower court's order to redraw the state's congressional districts and granted certiorari before judgment.[117] Although the emergency order itself gave no explanation of the stay, Justice Kavanaugh explained, in a concurrence joined by Justice Alito, that while he did not necessarily question the merits of the lower court's decision, its timing was too close to the election and therefore violated the "*Purcell* principle."[118] A year later, the Court ultimately affirmed the

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[115] *Id.* at 875.

[116] 142 S. Ct. 879 (2022) (mem.); *id.* at 879 (Kavanaugh, J., concurring).

[117] *Id.* (mem.).

[118] *Id.* at 880–82 (Kavanaugh, J., concurring).

lower court's ruling.[119] No Justice mentioned *Purcell v. Gonzalez*,[120] given that there was no longer a looming election deadline. While Justice Kavanaugh's emergency stay concurrence, of course, has no precedential effect,[121] had the Court majority similarly relied on *Purcell* in its emergency decision, that ruling could have been an important precedent on redistricting cases during election season apart from the Court's ultimate merits determination.

III. EVOLUTION OF EMERGENCY DOCKET PRACTICES

The preceding discussion has focused on why, from practical and theoretical perspectives, emergency docket orders have and should be viewed as more than mere draft opinions or law predictions. The Supreme Court's most recent decisions, however, suggest that the Justices are actively and iteratively considering how best to resolve emergency applications given the clear challenge that these applications present: the need to resolve an important question on a tight timeline and without the benefit of fuller briefing or oral argument.[122]

Changes to the Court's emergency docket practice will likely have significant and potentially beneficial implications for lower courts and the development of the law. "Given the extraordinary significance" of the questions often presented on the emergency docket, "the Court should use as many tools as feasible and

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[119] *See* Allen v. Milligan, 143 S. Ct. 1487, 1498 (2023). This ruling is a rare example of the Court granting one party emergency relief even though it ultimately ruled for the opposite party on the merits. We previously recognized that this can happen when a Justice concurring in the stay decision explicitly notes he does so for reasons unrelated to a likelihood of success on the merits, as Justice Kavanaugh did here. *See* McFadden & Kapoor, *supra* note 2, at 853, 871–72.

[120] 549 U.S. 1 (2006).

[121] *See* McFadden & Kapoor, *supra* note 2, at 879–80.

[122] *See, e.g.*, Labrador v. Poe, 144 S. Ct. 921, 928 (2024) (Kavanaugh, J., concurring) ("[W]hen resolving emergency applications involving significant new laws, this Court often cannot avoid that difficulty. It is not ideal, but it is reality. Given that reality, the Court must then determine the best processes for analyzing likelihood of success on the merits in emergency cases.").

appropriate to make the most informed and best decision."[123] Justice Kavanaugh recently highlighted a few of these tools, including granting certiorari before judgment and expediting oral argument, inviting briefing on an accelerated timeline, and ordering supplemental briefing where appropriate.[124]

The Court appears to have adopted some of these options in recent emergency docket cases. Take *Ohio v. EPA*, for example.[125] Several states and industry groups asked the Court to stay the enforcement of an EPA Federal Implementation Plan to control ozone pollution.[126] The petitioners submitted their stay applications in October 2023.[127] Over the course of about a month, the parties and public interest groups filed sixteen briefs.[128] The Court granted the stay roughly seven months later, and Justice Gorsuch wrote an 11-page opinion for the majority.[129] Justice Barrett authored a 13-page dissent.[130]

Ohio v. EPA mimicked the Court's merits docket decisions in several important respects. The case featured extensive briefing and oral argument. And the Justices explained their reasoning in lengthy opinions. There is no reason, then, not to consider the Court's statements about "the law" in *Ohio v. EPA* as binding on lower courts.

Ohio v. EPA also clarified a lingering question about emergency docket decisions: does the Court use the traditional *Nken* factors that lower courts use to evaluate emergency applications, or does it

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[123] *Id*. at 933.

[124] *See id*. at 933–34.

[125] 144 S. Ct. 2040 (2024).

[126] *Id*. at 2052.

[127] *See, e.g.*, Emergency Application for Immediate Stay of Final Agency Action Pending Disposition of Petition for Review, Ohio v. EPA, 144 S. Ct. 2040 (2024) (No. 23A351), 2023 WL 7040199; Emergency Application for Stay of Final Agency Action Pending Judicial Review, Ohio v. EPA, 144 S. Ct. 2040 (2024) (No. 23A351), 2023 WL 7163329.

[128] *See* "Filings," Ohio v. EPA, 144 S. Ct. 2040 (2024), next.westlaw.com (accessed Oct. 19, 2025).

[129] 144 S. Ct. at 2048–58.

[130] *Id*. at 2058–70.

rely on some other standard? Before *Ohio v. EPA*, the Court had often described the standard of review using various formulations.[131] *Ohio v. EPA* made clear that the Court "appl[ies] the same 'sound . . . principles' as other federal courts" that were outlined in *Nken*.[132]

Unlike lower courts, the Supreme Court's assessment of the movant's likelihood of success on the merits encompasses a judgment about the cert-worthiness of the question presented, a factor Justice Barrett recently emphasized.[133] Professor Huang takes this idea a step further, suggesting that "'granting certiorari before judgment'" "for full-dress merits review" could serve as the bright line between a precedential and non-precedential emergency ruling.[134]

Cert-worthiness is, of course, a reason why unexplained *denials* of emergency applications cannot be precedential. Sometimes such a denial may simply reflect the Court's judgment that the question presented does not warrant Supreme Court review.[135] But whenever the Court *grants* an emergency application, it usually finds that the movant is likely to succeed on the merits of the question presented. Thus, an emphasis on cert-worthiness cannot affect the import of the Court's assessment of that likelihood of success, unless the Court alters the *Nken* factors or creates a new emergency relief test in which cert-worthiness is a super factor—an independent and sufficient reason to grant an emergency application.

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[131] *See* McFadden & Kapoor, *supra* note 2, at 838–43 (discussing the "number of different and sometimes conflicting ways" the Court had described the standard of review).

[132] 144 S. Ct. at 2052 (quoting Nken v. Holder, 556 U.S. 418, 434 (2009)).

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

[134] Huang, *supra* note 1, at 865–66.

[135] *See, e.g.*, Labrador v. Poe, 144 S. Ct. 921, 931 (2024) (Kavanaugh, J., concurring) ("Emphasizing certworthiness as a threshold consideration helps to prevent parties from using 'the emergency docket to force the Court to give a merits preview in cases that it would be unlikely to take.'" (quoting *Does 1–3*, 142 S. Ct. at 18)).

Other ideas may merit further exploration. For example, the Court could make clear in an emergency docket order that nothing in the order ought to be considered precedential.[136] When a majority of the Justices make such a declaration, the decision may fairly be treated as nonbinding, perhaps like lower courts' so-called "unpublished opinions."[137] Indeed, presumably the Court could decide by internal rule to make all or some emergency docket rulings nonbinding, unpublished opinions.

Alternatively, the Court could consider granting administrative stays and ordering expedited merits briefing and oral argument in lieu of granting emergency relief accompanied by opinions. In her concurring opinion in *United States v. Texas*, Justice Barrett noted that "[a]dministrative stays do not typically reflect the court's consideration of the merits of [a] stay application."[138] Rather, such stays merely "freeze legal proceedings until the court can rule on a party's request for expedited relief."[139] The Court could increase its grants of administrative stays, which "rarely generate opinions" and serve as a "flexible, short-term tool" to give judges more

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[136] *See, e.g.*, Merrill v. Milligan, 142 S. Ct. 879, 879 (2022) (Kavanaugh, J., concurring) ("The stay order does not make or signal any change to voting rights law.").

[137] *See, e.g.*, Hogan v. Carter, 85 F.3d 1113, 1118 (4th Cir. 1996) ("Under our own internal rules, unpublished opinions are not precedential; indeed, '[i]n the absence of unusual circumstances,' we are bound as a court 'not [to] cite an unpublished disposition in any of [our] published opinions or unpublished dispositions.'" (internal citation omitted)). It is worth noting, however, that there is considerable disagreement about whether federal courts ought to resolve cases through "unpublished dispositions." *See, e.g.*, Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. APP. PRAC. & PROCESS 219, 222–26 (1999) (noting that Judge Arnold would, with one narrow exception, "take the position that all decisions have precedential significance" and therefore should be "published"); Charles E. Carpenter, Jr., *The No-Citation Rule for Unpublished Opinions: Do the Ends of Expediency for Overloaded Appellate Courts Justify the Means of Secrecy?*, 50 S.C. L. REV. 235, 237 (1998) ("When an unpublished opinion is cloaked within a no-citation rule, the parties will not know who has decided the case or why they won or lost. Furthermore, the decision does not count; nobody can rely on the decision in another case.").

[138] 144 S. Ct. 797, 798 (2024) (Barrett, J., concurring).

[139] *Id*.

time.[140] That said, Justices may rightly question the appropriateness of granting one party significant—if interim—relief without any explanation and in the face of a contrary explained judgment from one or more lower courts.

The Court has already made a similar move, transferring cases from the "shadow docket" to the "rocket docket." Over the last couple of years, the Court has granted expedited consideration to a range of cases that originated on its emergency docket. These have included a pre-*Dobbs* challenge to Texas' abortion prohibition,[141] a religious freedom question in a looming death penalty case,[142] and a challenge to the corporate vaccine mandate.[143] In each of these high-profile cases, the Court reviewed lower courts' stays or refusals to issue stays,[144] thus making them preliminary injunctions rather than final merits determinations. In each case, the Court issued thorough majority opinions and one or more separate writings.[145] There can be no doubt each of these majority opinions has precedential effect; indeed, they have been cited repeatedly by lower courts.[146] While the rocket docket treatment allowed for oral arguments, as well as fuller briefing and explanations by the Court, the essential posture remains the same from typical emergency docket decisions.

Another possible route to providing interim relief while avoiding the potential for a rushed precedential decision is for a majority order accompanied by a concurrence, rather than a per curiam opinion. This would allow the parties and the public to understand

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[140] *Id*. at 799.

[141] Whole Woman's Health v. Jackson, 142 S. Ct. 522, 531 (2021) (describing expedited briefing and argument for a "second emergency request").

[142] Ramirez v. Collier, 142 S. Ct. 1264, 1274 (2022) ("We then stayed Ramirez's execution, granted certiorari, and heard argument on an expedited basis.").

[143] *NFIB*, 142 S. Ct. at 664–65 (per curiam) (describing expedited arguments in the case).

[144] *See, e.g.*, *id.* at 663.

[145] *See, e.g.*, *id.* at 662–67; *id.* at 667–70 (Gorsuch, J., concurring).

[146] *See, e.g.*, "Citing References," *NFIB*, 142 S. Ct. 661 (2022), next.westlaw.com (accessed Oct. 19, 2025) (showing 198 cases, the vast majority of which lower courts authored).

at least one of the concurring Justices' rationales for the stay without "locking in" the Court majority to a snap precedential judgment. This alternative was on display recently in *Noem v. Permodo*, an emergency docket case involving an injunction limiting immigration enforcement raids in Los Angeles.[147] A majority of the Court stayed the lower court's injunction without explanation, but Justice Kavanaugh provided a lengthy concurrence explaining his vote.[148] Justice Sotomayor, joined by Justices Kagan and Jackson, issued a similarly lengthy dissent.[149] This back-and-forth provided the public with a window into at least some of the Justices' thinking on an important issue with ongoing implications for other cases. This approach is also presumably faster than waiting for the drafting of an opinion that can garner at least five Justices' approval. On the other hand, as the *Perdomo* dissenters point out, there are downsides to an emergency decision with significant implications for the parties and other with no majority explanation.[150] The Court must weigh the efficiencies and flexibility from an unexplained majority order with the clarity and guidance that a per curiam opinion can provide. Each of these routes has benefits and drawbacks.

Finally, as a practical matter, it seems likely that the Court will tend to prioritize emergency applications from the Executive Branch, regardless of which political party occupies the White House. This is, in part, because of the role the modern emergency docket plays in addressing high-profile lower-court injunctions of presidential initiatives. Examples of the modern emergency docket's prominent role in addressing such injunctions include rulings on President Trump's travel ban,[151] construction of his border wall,[152] President Biden's Title IX rule on sex

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[147] No. 25A169, 2025 WL 2585637 (Sept. 8, 2025) (mem.).
[148] *Id.* at *1–5 (Kavanaugh, J., concurring).
[149] *Id.* at *5–15 (Sotomayor, J., dissenting).
[150] *Id.* at *14.
[151] Trump v. Hawaii, 583 U.S. 1009 (2017) (mem.).
[152] Trump v. Sierra Club, 588 U.S. 930 (2019) (mem.).

discrimination,[153] and his mifepristone prescription rules.[154] These universal injunctions were rare 25 years ago, but their frequency has surged in the last decade.[155] While the Supreme Court recently repudiated most universal injunctions, the Court left open the possibility for similar outcomes through class actions and vacatur.[156] And Justice Kavanaugh's concurrence made clear that he at least expects questions on interim relief for major federal regulations to be decided definitively by the Supreme Court.[157] Often these injunctions derail major presidential priorities, sometimes ones that respond to perceived emergencies.[158] Thus, it is unsurprising that the Solicitor General, regardless of which political party controls the White House, often urgently seeks Supreme Court relief and that the Court agrees to stay the lower court order.

More, the Solicitor General plays a unique role in Supreme Court jurisprudence and has even been called the "Tenth Justice."[159] Indeed, the Justices regularly "turn to the [Solicitor General] for help on legal problems that appear especially vexing" and "regard [the Solicitor General] as a counselor to the court" whom the Justices "expect" "to take a long view."[160] Reflecting this role, the Solicitor General is likely to be the main beneficiary of the Court's increased use of the emergency docket.

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[153] Dep't of Educ. v. Louisiana, 144 S. Ct. 2507 (2024).

[154] Danco Lab'ys v. All. for Hippocratic Med., 143 S. Ct. 1075 (2023) (mem.).

[155] *See District Court Reform: Nationwide Injunctions*, 137 HARV. L. REV. 1701, 1705 (2024).

[156] *See* Trump v. CASA, Inc., 145 S. Ct. 2540, 2554 n.10, 2555 (2025).

[157] *Id.* at 2570 (Kavanaugh, J., concurring).

[158] Trevor N. McFadden & Stephen Vladeck, *The Docket Debate*, 108 JUDICATURE, no. 1, 2024, at 69, 71.

[159] *See generally* LINCOLN CAPLAN, THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW (1987).

[160] *Id*. at 7.

CONCLUSION

Professor Huang's *The Foreshadow Docket* is a welcome addition to the ever-evolving literature on the Supreme Court's emergency docket. But we continue to believe that, whether guided by prudence, pragmatism, or the theoretical underpinnings of precedent, lower courts ought to treat as binding decisions by the Supreme Court that grant emergency relief and include a majority opinion explaining the reasons for doing so. Recent decisions by the Court on the emergency docket confirm that a majority of the Justices agree.