A Cruel and Unusual Docket: The Supreme Court's Harsh New Standard for Last Minute Stays of Execution

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"This is not justice. . . . [T]he Court has allowed the United States to execute thirteen people in six months . . . without resolving the serious claims the condemned individuals raised. Those whom the Government executed during this endeavor deserved more from this Court."[1]

* Harvard Law School, J.D. expected 2022; Dartmouth College, B.A. 2017. I am indebted to many mentors who encouraged my curiosity and passion throughout my education. Thanks specifically to Professor Carol Steiker who introduced me to the Supreme Court's capital jurisprudence, such as it is, encouraged me to write this Note and gave me excellent feedback. Additionally, Professors Lee Kovarsky, Stephen Valdeck, and Jack Goldsmith provided valuable comments on drafts. Brad Levenson and David Anthony shared their first-hand experience with last-minute capital litigation which informed this Note. I am also grateful for my classmates at Harvard Law School, including the participants in the Spring 2020 Capital Punishment Clinic who workshopped a draft, and to the editors of the Harvard Law and Policy Review who provided insightful feedback and edits. Finally, to Nomi, Jan and Elle who give me so much.

[1] United States v. Higgs, 141 S. Ct. 645, 647, 652 (2021) (Sotomayor, J., dissenting).

INTRODUCTION

The Trump administration executed thirteen people during its last six months in power. Never before had the federal government executed that many people in even a single decade.[2] In an age where the capital punishment system is characterized by extreme delay,[3] executing so many people in such a short span was a singular feat. Former-President Trump and his Department of Justice were able to carry out the string of executions only by frequent resort to the Supreme Court. The newly bolstered conservative majority vacated numerous lower court orders pausing executions. The Court, apparently fed-up with delay in capital executions, was applying a strict new—though not yet fully articulated—standard that categorically disfavors last-minute relief for prisoners facing execution.[4] This Note characterizes

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[2] This is at least true for the past 100 years for which there is data. *See* BUREAU OF PRISONS, DEPT. OF JUSTICE, Capital Punishment (2021) https://www.bop.gov/about/history/federal_executions.jsp [https://perma.cc/878R-G6GE].

[3] The 25 people executed in 2018, the last year for which official data is available, were sentenced, on average, almost 20 years earlier. TRACY SNELL, DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS (BJS), Capital Punishment, 2018—Statistical Tables (Table 11); *see also*, Glossip v. Gross, 576 U.S. 863, 923–38 (2015) (Breyer, J., dissenting); Lackey v. Texas, 514 U.S. 1045 (1995) (memorandum of Stevens, J., respecting denial of certiorari); Lee Kovarsky, *The American Execution Queue*, 71 STAN. L. REV. 1163, 1169–76 (2019); Dwight Aarons, *Can Inordinate Delay Between A Death Sentence and Execution Constitute Cruel and Unusual Punishment?*, 29 SETON HALL L. REV. 147, 182 (1998) (suggesting several reasons for this phenomenon).

[4] A second factor that enabled the rapid spate of executions was the long backlog of federal prisoners who had exhausted the traditional processes for challenging their death sentences. This backlog was the result of prior administrations' agnostic attitude towards the death penalty: aggressively defending sentences on appeal but declining to actually carry them out after the appeals were expended. *See* Maurice Chammah, *How Obama Disappointed on the Death Penalty*, SLATE (Jan. 1, 2017), https://www.themarshallproject.org/2017/01/18/how-obama-disappointed-on-the-death-penalty [https://perma.cc/SU73-QXDA].

and critiques this apparent new standard governing the 'capital shadow docket.'

Eight of the thirteen federal executions were directly aided by the Supreme Court vacating lower court stays of execution.[5] The last execution, of Dustin Higgs, was only possible because the Supreme Court took the historically unprecedented step of granting certiorari before judgement and summarily reversed a district court opinion.[6] It did so without articulating any explanation whatsoever. For the thirteen federal prisoners condemned to death, the Supreme Court's new standard meant that the resolution of many of their claims was cut short, even when lower courts thought more time was required to consider them.

This new standard is born of frustration with and—I argue —misunderstanding of capital litigation. Several of the justices view the frequent flurry of last-minute litigation in capital cases as a guerilla abolition campaign by the capital defense bar, and they used the thirteen federal executions to fight back. They took their stand, as they increasingly do, on the "shadow docket," so called because it often hosts unreasoned and unsigned opinions.[7] For years the Court has "tinker[ed] with the machinery of death"[8] via these last-minute orders. In the post *Furman* era, the capital shadow docket has held the final answer to the all-important question: "can this execution proceed?"[9] But the Court's answer to this question is increasingly "yes," even when lower courts, with more time to consider, already issued lengthy opinions explaining why they thought the answer was "no."

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[5] *See* Barr v. Lee, 140 S. Ct. 2590 (2020) (per curiam) (vacating injunction protecting four prisoners who were subsequently executed: Alfred Bourgeois, Daniel Lewis Lee, Dustin Lee Honken, and Wesley Ira Purkey); Barr v. Purkey, 141 S. Ct. 196 (2020) (mem.) (vacating injunction preventing the executions of three prisoners who were subsequently executed: Dustin Lee Konken, Wesley Ira Purkey, and Keith Nelson, who did not participate in *Lee*); Barr v. Hall, 141 S. Ct. 869 (2020) (mem.) (vacating injunction and stay preventing the execution of Orlando Hall); Rosen v. Montgomery, 141 S. Ct. 1232 (2021) (mem.) (vacating stay preventing execution of Lisa Montgomery); *Higgs*, 141 S. Ct. at 645 (vacating stay preventing execution of Dustin Higgs). Several of the other eight executions might also have been stopped by the lower courts, had the Supreme Court not made its impatience with delay so clear. *See*, *e.g.*, United States v. Johnson, 838 F. App'x 765, 766 (4th Cir. 2021) (mem.) (Wilkinson, J., concurring) (arguing that lateness and "numerosity of filings . . . betrays a manipulative intention to circumvent . . . the Supreme Court's warnings against procedural gamesmanship designed to bring the wheels of justice to a halt").

[6] *Higgs*, 141 S. Ct. at 645.

[7] William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 NYU J.L. & Liberty 1, 1 (2015) (coining the term and defining it as the Court's "orders and summary decisions that defy its normal procedural regularity").

[8] Callins v. Collins, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of certiorari). This phrase, which a Note on Supreme Court capital orders would be incomplete without, was made famous by Justice Blackmun's swansong renouncing the death penalty, though the phrase "machinery of death" appeared first ten years earlier in Rumbaugh v. McCotter, 473 U.S. 919, 920 (1985) (Marshall, J., dissenting from denial of certiorari).

[9] *See* Stephen M. Shapiro, Kenneth Geller, Timothy S. Bishop, Edward A. Harnett & Dan Himmelfarb, Supreme Court Practice 351 n.108 (10th ed. 2013) (describing the Court's process for answering this question which usually plays out over a couple hours on the night an execution is scheduled).

This Note evaluates this trend, with a particular focus on the orders in the federal executions cases. I conclude that through these orders the Court put into practice a new standard that appears to categorically disfavor any judicially imposed last-minute delay to an execution, regardless of whether the government or even the courts themselves are to blame for the claim not being raised earlier.

This standard has the potential to eliminate important avenues for death penalty defendants to raise issues with their impending execution. In particular, these decisions threaten "intrinsically delayed claims," which are necessarily raised late in the post-conviction litigation process.[10] Other claims arise late because they are only 'discovered' when the scarce resources of the capital defense bar are marshalled by the urgency of an impending execution. Claims like these are not, and often cannot be, brought until after an execution warrant has been issued. If the Supreme Court continues down this path, it will nullify the jurisprudence establishing many of these claims, not by developing or overruling precedent, but by keeping the federal courts from enforcing these protections when they are actually meaningful: in the face of an imminent execution. Decades of capital jurisprudence could become dead letters, without the Court explaining why.

This Note argues that driving the recent changes in the adjudication of capital stay orders appears to be the Court finding as a quasi-legislative fact[11] that last-minute delay is presumptively the fault of the prisoner and that the harm of delay presumptively outweighs the benefits that accompany it in terms of accuracy, fairness, and transparency. This fits within the Court's recent use of the shadow docket generally, which some commentators have described as an attempt to redistribute upward some of the judicial power of the lower federal courts.[12] And while this Note focuses on what is happening on the capital shadow docket in particular, I argue that the federal executions are an important example of the perils of shaping law through the shadow docket generally. I suggest that these orders present a potential starting point for the political branches to undertake shadow docket reform.

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[10] *See* Lee Kovarsky, *Delay in the Shadow of Death*, 95 N.Y.U. L. Rev. 1319, 1362–70 (2020) (explaining that many claims, such as those surrounding the constitutionality of how death sentences are carried out, "are almost always unripe or speculative when post-conviction litigation begins"); *see, e.g.*, Montgomery v. Watson, No. 20A124, 2021 WL 100808 (U.S. Jan. 12, 2021) (denying stay of execution to allow consideration of whether capital defendant had shown she was mentally incompetent to be executed after district court ruled she was likely to succeed on that claim); Bernard v. United States, 141 S. Ct. 504 (2020) (mem.) (denying stay of execution and petition for certiorari to consider whether a second post-conviction petition raising claims which were previously unavailable due to government misconduct is subject to AEDPA's "no reasonable factfinder" standard).

[11] Brianne J. Gorod, T*he Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 Duke L.J. 1, 39–43 (2011).

[12] *See, e.g.*, Testimony of Stephen I. Vladeck, *Case Selection and Review at the Supreme Court*, Hearing Before the Presidential Commission on the Supreme Court of the United States *13-*16 (Jun. 30, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/06/Vladeck-SCOTUS-Commission-Testimony-06-30-2021.pdf [https://perma.cc/4F54-QBM2].

The Note proceeds in four parts. Part I outlines the federal executions and the broader context surrounding them. I trace the emergence of this new standard and show how these orders effectuated it and in doing so facilitated the executions of several prisoners despite there being substantial unanswered questions about the legality of their executions. Part II presents an empirical analysis of the Court's capital shadow docket. I present an account of the Court's emergency orders on executions over time. I categorize almost 700 stay orders issued by the Supreme Court, and compare their disposition as its membership has changed. This analysis shows that the Court is vacating lower court stays at a markedly increased rate and granting fewer of its own. This supports my argument that the federal execution orders were an escalation to an already ongoing aberration from normal capital shadow docket practice. The Court's change in approach to stays is drastic and well-underway.

Part III argues that this change should be reversed because it is misguided, and as the federal executions laid bare, unjust. A majority of justices on the Court presumably favor the new standard because they believe that last-minute capital litigation is largely a frivolous ploy by capital defendants to manufacture delay. But to the extent this argument has any merit generally, the federal executions in particular prove it is far too broad a generalization on which to stake people's lives. In truth, cutting short last-minute capital litigation unacceptably raises the risk of error. The harms of a rushed and incorrect decision are principally borne by the potential executee, but their effects can be more widespread. I argue that negative externalities have already arisen from the application of this new standard: far from streamlining last-minute litigation, the Court's orders effectuating the new presumption against stays created more uncertainty because they are already being misinterpreted by lower courts and others. All this exacerbates the already arbitrary and racially discriminatory way in which post-sentencing legal proceedings determine which death-sentenced prisoners live and which die.[13]

Finally, the Court's midnight orders vacating reasoned lower court opinions granting stays and injunctions – and, in the unprecedented case of David Higgs, a merits ruling – lacked reasoning and therefore accountability. When the only written opinion on the books is from a federal judge expressing grave doubts about the legality of an execution, the Supreme Court should not, without any explanation, authorize the execution to proceed any-

[13] *See generally,* Scott Phillips & Justin Marceau, *Whom the State Kills*, 55 HARV. C.R.-C.L. L. REV. 585 (2020). While the Federal Government selected three white people to die first in the midst of last summer's racial reckoning, it is not surprising that ultimately more than half of those executed were people of color, and with the exception of Lisa Montgomery, the last seven executed were all black men. *See Execution Database*, DEATH PENALTY INFORMATION CENTER (accessed February 26, 2021) https://deathpenaltyinfo.org/executions/execution-database?filters%5Byear%5D=2020 [https://perma.cc/LJ2G-3H7Z].

way. Decisions like this have the potential to undermine the Court's legitimacy and the public's faith in the rule of law.[14]

Part IV proposes congressional responses to these orders. Congress is the body constitutionally empowered to check the Supreme Court. In response to the Court's failure to carry out its responsibility to protect capital defendants, I call for a Congressional shot across the bow and briefly outline and analyze some potential options. Upstream reforms that remove barriers to death row prisoners raising claims earlier could reduce some – but not all – of the last-minute petitions on the capital shadow docket. More direct options include stripping the Court of the ability to vacate lower court stays entirely, creating a death penalty court of appeals that sits between the Supreme Court and the district courts, with mandatory jurisdiction of all last minute capital cases which the Supreme Court cannot bypass, or creating a deferential standard of review that the Supreme Court owes lower courts on interlocutory appeals of stays, as several commentators have called for in recent months in testimony before Congress and the Presidential Commission on Supreme Court Reform.

Ultimately I suggest that the best reform is a slightly more muscular version of the deference proposal: a statute automatically granting a stay of execution for a death row prisoner litigating their first post-warrant challenge to their execution.

I A brief history in two parts: The Capital Shadow Docket and the federal death penalty

To grasp the doctrinal shift portended by the Supreme Court's orders in the federal execution cases, it's necessary to briefly review the Court's fifty-year relationship with last-minute capital litigation, and the history out of which the recent spate of federal executions arose.

A. The Capital Shadow Docket: A new standard emerges

The Supreme Court's orders list, once passed over by most, has recently garnered significant attention.[15] President Biden, some of the Justices, Congress-people, and scholars alike have recently raised alarms at how frequently the Court is using the shadow docket to change the outcome in cases, early in the appellate process, and often in favor of Republican state and federal executives.[16] This is largely the result of a new solicitousness to the asserted

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[14] *See* The Federalist No. 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (suggesting the courts would lose their ability to constrain the other branches to act consistent with the constitution if they "exercise WILL instead of JUDGMENT").

[15] *See, e.g.*, Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 Harv. L. Rev. 123 (2019); Edward A. Hartnett, *Summary Reversals in the Roberts Court*, 38 Cardozo L. Rev. 591 (2016); Baude, *supra* note 7.

[16] *See* Wolf v. Cook Cnty., Illinois, 140 S. Ct. 681, 684, (2020) (Sotomayor, J., dissenting) ("[Mo]st troublingly, the Court's recent behavior on stay applications has benefited one litigant

harms of the government (or perhaps more precisely, the Trump Administration) even in the face of its own reproachable delay.[17]

But while the Trump Administration's aggressive use of the shadow docket was certainly relevant to the Court's repeated intervention to allow the federal executions, the Court's desire to reduce judicial delays of executions predates Trump's thirteen hasty executions. To determine whether a stay of execution is proper, courts weigh the potential harm to the government caused by delay against the potential harms suffered by a person wrongfully put to death, or put to death in an illegal manner. In the federal execution cases, the Court not only displayed a concern for the government's frustration with court orders delaying executions, it also adopted a remarkably flippant attitude towards the irreversible harms at stake on the capital defendants' side of the scale.

1. Nelson, Hill, *and* Bucklew: *The more things change . . .*

Judicial antipathy for the delay caused by stays began festering long before the Court raised the bar for staying executions in the 2020 term.[18] Since the beginning of the post-*Furman* era and the proceduralization of the death penalty, certain justices have long tried to facilitate speedier death sentences,[19] while others have long cried foul in the face of these efforts.[20] The Court has attempted numerous times to articulate bespoke standards for

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over all others. This Court often permits executions—where the risk of irreparable harm is the loss of life—to proceed, justifying many of those decisions on purported failures to raise any potentially meritorious claims in a timely manner. Yet the Court's concerns over quick decisions wither when prodded by the Government in far less compelling circumstances—where the Government itself chose to wait to seek relief, and where its claimed harm is continuation of . . . [the] status quo . . . . I fear that this disparity in treatment erodes the fair and balanced decision making process that this Court must strive to protect.") (citations omitted) (quotations omitted) (parenthetical omitted); *Hearing on Supreme Court Docket and Case Load Before H. Subcomm. on Courts, Intellectual Property, and the Internet, H. Comm. on Judiciary*, 117th Cong. (statement of Hon. Mondaire Jones) available at 1:41:48 ("Is there any good reason the Supreme Court should be deciding matters of life and death in anonymous rulings the length of tweets?") https://www.c-span.org/video/?509098-1/house-hearing-supreme-court-docket-case-load#&vod [https://perma.cc/FM43-NAHU]. *See generally* Vladeck, *supra* note 12.

[17] Vladeck, *supra* note 12, at 156.

[18] *See, e.g.*, Stephens v. Kemp, 464 U.S. 1027, 1032 (1983) (Powell, J., dissenting from grant of stay) ("This is another capital case in the now familiar process in which an application for a stay is filed here within the shadow of the date and time set for execution . . . Once again . . . a typically 'last minute' flurry of activity is resulting in additional delay of the imposition of a sentence imposed decades ago."); Haynes v. Thaler, 133 S. Ct. 639, 640, (2012) (Scalia, J., dissenting) ("Haynes has already outlived the policeman whom he shot in the head by 14 years. I cannot join the Court's further postponement of the State's execution of its lawful judgment.").

[19] Barefoot v. Estelle, 463 U.S. 880, 894–95 (1983) (encouraging lower courts to "consider whether the delay that is avoided by summary procedures warrants departing from the normal, untruncated processes of appellate review" in capital cases, and approving of the Fifth Circuit practice of denying stays of execution during the disposition of non-frivolous appeals on the basis of a finding of insufficient likelihood of prevailing on the merits to justify delay). *See also generally*, Mark Tushnet, "*The King of France with Forty Thousand Men": Felker v. Turpin and the Supreme Court's Deliberative Processes* 1996 S. Ct. Rev. 163, 163–90 (1996) (discussing this and other efforts to shorten the capital appeals process).

stays in the capital context.[21] Until recently – and still, formally speaking– the standard articulated in *Nelson v. Campbell* and reaffirmed in *Hill v. McDonough* guided lower courts considering stays of execution.[22] *Nelson* instructs courts to consider: "the likelihood of success on the merits and the relative harms to the parties but also the extent to which the inmate has *delayed unnecessarily* in bringing the claim."[23] The likelihood of success prong was restated as "significant probability of success" in *Hill* and generally requires only that a serious legal issue exists, the resolution of which could make the execution unlawful.[24] Even the Court itself struggles to apply this standard consistently.[25] Driving the Court's jurisprudence around this issue is a clear preoccupation with capital defendants "sandbagging"[26] and strategically delaying litigation to extend their time on earth.[27]

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[20] *Barefoot*, 463 U.S. at 913 (Marshall, J., dissenting) (characterizing as "truly . . . perverse" the notion that a state's announced "intention to execute [someone] before the ordinary appellate procedure has run its course" should be accommodated through summary treatment) (emphasis removed).

[21] *See Barefoot*, 463 U.S. at 892–97; Nelson v. Campbell, 541 U.S. 637, 647–50 (2004); Hill v. McDonough, 547 U.S. 573, 584–86 (2006); Bucklew v. Precythe, 139 S. Ct. 1112, 1133–34 (2019).

[22] *Barefoot* is still often cited by the Court as the standard to determine whether it ought to issue a stay of execution when lower courts have not. In that situation, the Court considers, along with the likelihood of irreparable harm in the absence of a stay, whether it is reasonably probable that the Court will grant certiorari and reverse. *See, e.g. Warner v. Gross*, 574 U.S. 1112, 1115 (2015) (Sotomayor, J., dissenting from denial of stay and invoking *Barefoot* test).

[23] *Nelson*, 541 U.S. at 649–50 (emphasis added). The Court has never explicitly articulated the standard for vacating, as opposed to granting a stay, but individual justices have said that similar factors apply, though perhaps more deferentially. *See* Vladeck, *supra* note 12, at 129–31 & nn. 39 & 53; *see also* Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080, 2087 (2017) (per curiam) (citing *Nken*) ("In assessing [a] lower court['s] exercise of equitable discretion, [an appellate court] bring[s] to bear an equitable judgement of [its] own.").

[24] *Hill*, 547 U.S. at 584.

[25] Rebecca R. Sklar, Note, *Executing Equity: The Broad Judicial Discretion to Stay the Execution of Death Sentences*, 40 HOFSTRA L. REV. 771, 776 (2012) (highlighting this inconsistency).

[26] Wainwright v. Sykes, 433 U.S. 72, 89 (1977).

[27] *See Hill*, 547 U.S. at 585 (reaffirming that federal courts should exercise their equitable discretion to protect states from "dilatory or speculative suits" but declining the invitation to create any firmer barrier to late litigation). The standard for identifying abusive delay in the context of successive habeas petitions presents a related example of the concern with strategic delay driving the doctrine in a one-way ratchet-like direction. *McCleskey v. Zant*, 499 U.S. 467, 472 (1991) abandoned the more forgiving 'deliberately withheld' standard previously articulated in *Sanders v. United States*, 373 U.S. 1 (1963), where the burden was on the state to show a prisoner's abuse. *McCleskey* applied a cause and prejudice standard instead, which readily shifted the burden to the petitioner after the state merely alleged abuse of the writ. *McClesky*, 499 U.S. at 494. While *McCleskey* contemplated only the standard for successive petitions, Justice Marshall's dissent pointed out that the majority seemed motivated by the delay resulting from last-minute stays in cases where petitioners delayed raising their claims. *Id.* at 510 n.2. AEDPA created a still less forgiving standard for petitioners bringing successive habeas petitions. *See* Banister v. Davis, 140 S. Ct. 1698, 1707 (2020) (noting that *McCleskey* was codified and strengthened by AEDPA's provision regarding second and successive petitions, 28 U.S.C. § 2244(b)*; see also,* Lee Kovarsky, *supra* note 10 at 1335–38 (arguing that the Court's incorrect notion that death row prisoners strategically defer litigation to the eleventh hour has driven the proliferation of incremental restrictions on post-conviction remedies); Nicole Veilleux, *Staying Death Penalty Executions: An Empirical Analysis of Changing Judicial Attitudes*, 84 GEO. L.J. 2543, 2559–61 (1996).

This history is crucial to understanding the Court's relationship with last-minute capital litigation coming into the summer of 2020. *Barr v. Lee*, a brief per curiam opinion, is the only writing joined by a majority of justices that explained the Court's thinking in the federal execution cases.[28] The terse four paragraph opinion devoted as much attention to the perceived lateness of the plaintiffs' lawsuit as it did to the merits of their Eighth Amendment challenge to the federal execution protocol.[29] And while the latter was relevant only to Lee's case, the discussion of delay applies more broadly and is the first and last explanation the Court gave before granting seven more vacaturs of lower court stays,[30] and denying another sixteen stays.[31]

Lee's discussion of delay relied on *Bucklew v. Precythe*, the Court's leading method-of-execution case.[32] Justice Gorsuch's majority opinion in *Bucklew* dripped with skepticism for the late method-of-execution challenge at issue, which it portrayed as essentially a pretense to buy time.[33] That dismissiveness was misguided in *Bucklew*.[34] While Justice Gorsuch asserted that method-of-execution challenges "must be resolved fairly and expeditiously," the emphasis was decidedly on expedience, and lower courts were instructed to "police carefully against attempts to use such challenges as tools to interpose unjustified delay."[35]

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[28] 140 S. Ct. 2590 (2020) (per curiam).

[29] *Id.* at 2590–92.

[30] United States v. Higgs, 141 S. Ct. 645 (2021) (mem.); United States v. Montgomery, 141 S. Ct. 1233 (2021) (mem.); Rosen v. Montgomery, 141 S. Ct. 1232 (2021) (mem.); Barr v. Hall, 141 S. Ct. 869 (2020) (mem.); United States v. Purkey, 141 S. Ct. 195 (2020) (mem.); Barr v. Purkey, 140 S. Ct. 2594 (2020) (mem.); Barr v. Purkey, 141 S. Ct. 196 (2020) (mem.).

[31] See Section II, Table 2, *infra.*

[32] 139 S. Ct. 1112 (2019).

[33] *See, e.g.*, *id.* at 1118–19 ("Mr. Bucklew raised this claim for the first time less than two weeks before his scheduled execution. He received a stay of execution and five years to pursue the argument, but in the end [all courts found it meritless]."); *id.* at 1119 ("After a decade of litigation, Mr. Bucklew was seemingly out of legal options. . . . As it turned out, though, Mr. Bucklew's case soon became caught up in a wave of litigation over lethal injection procedures."); *id.* at 1120 ("As a result [of pressure from anti-death penalty groups on execution drug suppliers], the State was unable to proceed with executions until it could change its lethal injection protocol again."); *id.* at 1134 ("[Mr. Bucklew] filed his current challenge just days before his scheduled execution. That suit has now carried on for five years and yielded two appeals to the Eighth Circuit, two 11th-hour stays of execution, and plenary consideration in this Court. And despite all this, his suit in the end amounts to little more than an attack on settled precedent . . . . ").

[34] First, it was the Court that accepted the case and stayed Bucklew's execution to hear it, and Justice Gorsuch himself who wrote a twenty-page opinion considering those claims. Indeed, four justices would have given him relief. *Id.* at 1136 (Breyer, J. dissenting, joined by Ginsburg, J., Sotomayor, J., and Kagan, J.). Second, *Bucklew* did not merely apply but affirmatively extended the Court's previous method-of-execution jurisprudence. *Id.* at 1146 (Sotomayor, J., dissenting) ("[T]oday's extension of *Glossip*'s alternative-method requirement is misguided (even on that precedent's own terms."). Finally, and importantly, the proposition that Mr. Bucklew delayed bringing his suit is at odds with the actual history of proactive challenges raised by Mr. Bucklew to the state's execution protocol over the course of years, litigation which was still unresolved when the state scheduled his execution. *Id.* at 1121.

[35] *Id.* at 1134.

Justice Sotomayor was troubled by the majority's focus on delay in *Bucklew*.[36] She warned that "[w]ere those comments to be mistaken for a new governing standard, they would effect a radical reinvention of established law and the judicial role."[37] In hindsight, this may have been, if anything, an understatement.

2. Ray, Murphy, *and* Lee: *The Court practices what it preached*

After *Bucklew* was argued, but before the decision was handed down, the Court issued an order in *Dunn v. Ray*, dismissing a Muslim prisoner's challenge to an Alabama policy that prevented him from having his imam instead of a Christian chaplain with him as he died.[38] Without any discussion of the merits at all the Court remarked that "[o]n November 6, 2018, the State scheduled Domineque Ray's execution date for February 7, 2019. Because Ray waited until January 28, 2019 to seek relief, we grant the State's application to vacate the stay . . . ."[39]

Since *Bucklew* was still a few months from publication, to support this justification, the Court cited *Gomez v. United States Dist. Court for Northern Dist. of Cal.*, a short per curiam including the useful, if misleading, assertion that, "a court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief."[40] Significantly, the Court did not cite or apply *Nelson* perhaps because *Gomez* contains an unconditional assertion of the relevance of the last-minute, whereas *Nelson,* as the Eleventh Circuit noted, held a Court should only hold lateness against a plaintiff if the delay was unnecessary. The Court did not address the finding by the unanimous Eleventh Circuit panel,[41] that Ray did not discover until January 23rd that his request to be accompanied by his imam had been denied.[42]

The *Ray* decision was met with widespread condemnation.[43] So much so that in a footnote in *Bucklew* the Court belatedly offered a justification for

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[36] *Id.* at 1146 (Sotomayor, J., dissenting) ("Given the majority's ominous words about late-arising death penalty litigation, one might assume there is some legal question before us concerning delay. Make no mistake: There is not.") (citation omitted).

[37] *Id.*

[38] 139 S. Ct. 661 (2019) (mem.).

[39] *Id.*

[40] 503 U.S. 653, 654 (1992) (per curiam) (vacating a stay where an inmate's unjustified 10-year delay in bringing a claim was an "obvious attempt at manipulation").

[41] A circuit not known for its liberal justices or defendant-friendly precedent.

[42] Ray v. Comm'r, Alabama Dep't of Corr., 915 F.3d 689, 702–03 (11th Cir. 2019). The 11th Circuit in *Ray a*nalyzed the delay argument at great length, applying the ostensibly controlling standard from *Nelson* and observing that the equitable presumption against stays from that case only applies "where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay." *Id.* quoting *Nelson,* 541 U.S. at 584.

[43] *See, e.g.*, Muslim Pub. Affs. Council, *Justice for Some: The Impact of* Dunn v. Ray (Feb. 15th, 2019) https://www.mpac.org/blog/statements-press/justice-for-some-impact-dunn-v-ray.php [https://perma.cc/ENQ3-6MXN]; Richard Lempert, *Why Kavanaugh and a Conservative Supreme Court Punted a Religious Liberty Case on Procedure*, Brookings (Feb. 15, 2019) https://www.brookings.edu/blog/fixgov/2019/02/15/dunn-v-ray-religious-liberty/

its rejection of Domineque Ray's First Amendment claim: he ought to have known that his request to the prison was going to be denied, and had he asked for clarification sooner a stay might not have been necessary.[44] Evidently this was evidence of unnecessary delay sufficient to make vacatur proper under *Hill* and *Nelson*. But, whatever one makes of this tenuous argument for blameworthy delay, that is only a "but also" factor in the *Nelson* and *Hill* standard, and Ray's request was certainly not meritless, "pursued in a dilatory" fashion or "based on speculative theories."[45] The proof is the fact that the Court granted a substantially identical free exercise claim brought by a Buddhist inmate from Texas two months later in another shadow docket case, *Murphy v. Collier*.[46]

Nothing if not consistent in their application of their novel exacting presumption against stays, Thomas and Gorsuch dissented, without comment.[47] Almost two months later, upon further consideration, Alito wrote a lengthy dissent, acknowledging the hypocrisy of holding that the lower courts in *Murphy* erred when they "rul[ed] exactly as we [did] less than two months earlier."[48]

Kavanaugh and Roberts stood by both their votes and were forced to explain their inexplicable decision to execute the Muslim and save the Buddhist. "In light of Justice Alito's opinion" Kavanaugh issued a statement – also two months late – arguing that technically Ray had made an Establishment Claim rather than a Free Exercise Claim which was mooted by Alabama's agreement to exclude the chaplain from the execution chamber,[49] and that *Murphy* made his claim a couple weeks earlier than *Ray* in relation to his execution date.[50] Whatever can be said about the formalistic first distinction, the difference as to delay is almost certainly because Murphy's attorneys decided in light of *Ray* that they would do better to proceed to Court without an answer from the prison and risk being tossed out on ripeness than make the same mistake the Court had killed Ray for two months earlier.[51] Ray had to give up his religious freedom in his final moments on earth in order for the capital defense bar to learn a lesson about timeliness.

Which brings us back to *Lee*, where the Court – not at all chastened by its mistake in *Ray* – doubled down on Justice Gorsuch's instructions from

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[https://perma.cc/GL3Y-CNDQ]; Adam Liptak, *Justices Allow Execution Inmate Denied Imam*, N.Y. Times, Feb. 7, 2019 at A15.

[44] *Bucklew*, 139 S. Ct. at 1134 n. 5.

[45] *Id.* at 1134 (quoting *Hill*, 547 U.S. at 584).

[46] 139 S.Ct. 1111 (2019) (mem.).

[47] *Id.*

[48] *Id.* at 1112.

[49] For what it is worth, the 11th Circuit construed Ray's claim as falling under both the Free Exercise and Establishment Clauses. *See*, *Ray*, 915 F.3d at 696 ("The Establishment Clause and the Free Exercise Clause work together to safeguard the spiritual freedom of our people.").

[50] *Murphy*, 139 S.Ct. at 1112 n.3.

[51] And in fact, while Murphy did make his request with the state earlier, Ray filed his lawsuit ten days before his execution whereas Murphy first filed in state court eight days before his scheduled execution. *See* Murphy v. Collier, 919 F.3d 913, 915 (5th Cir. 2019).

Bucklew. Perhaps also written by Gorsuch, *Lee* like *Bucklew*, concluded with a warning to death row inmates and lower courts alike:

> "'Last-minute stays' like that issued this morning 'should be the extreme exception, not the norm.' It is our responsibility 'to ensure that method-of-execution challenges to lawfully issued sentences are resolved fairly and expeditiously,' so that 'the question of capital punishment' can remain with 'the people and their representatives, not the courts, to resolve.' In keeping with that responsibility, we vacate the District Court's preliminary injunction so that the plaintiffs' executions may proceed as planned."[52]

Not explicitly stated is the Court's ultimate conclusion that delay is presumptively unnecessary and the fault of the prisoner facing execution, and accordingly that last-minute stays of execution are categorically improper even if two lower courts thought a stay was needed to resolve the merits. The history of *Lee* and the rapid resumption of federal executions supports the hypothesis that this presumption now controls the adjudication of stays of execution.

B. The federal executions

1. The Roane *litigation and the government's long delay*

On June 11, 2001 the Federal Government executed Timothy McVeigh, who, six years earlier killed 168 people in the deadliest act of domestic terrorism in modern United States history.[53] That extraordinary case was the first federal execution carried out since 1963. But the Bush Administration soon made clear that a crime like McVeigh's was not the new bar for execution and carried out two more death sentences for more 'ordinary' capital crimes, one a week after McVeigh, and the other in 2003.[54] Then seventeen years passed before the Trump Administration restarted federal executions.[55]

During those seventeen years, the Federal Government gave every indication, at least in litigation, that it felt no urgency to resume executions. In 2006 the D.C. Federal District Court enjoined the executions of several fed-

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[52] *Lee*, 140 S. Ct. at 2591–92 (quoting *Bucklew*, 139 S. Ct. at 1134).

[53] Bill Hemmer, *Timothy McVeigh Dead*, CNN (June 11, 2001, 9:32 a.m.), http://edition.cnn.com/2001/LAW/06/11/mcveigh.01/ [https://perma.cc/NMU9-KQ3X].

[54] *See* Bureau of Prisons, Dept. of Justice, Capital Punishment *supra* note 2. Juan Garza, a drug trafficker convicted of three murders was the second person executed in 2001. Louis Jones, a black former Army Ranger convicted of a brutal rape and murder of a white nineteen-year old army private, was the third and last person executed by the Federal Government in the 2000s. *See id.*; *see also Gulf War Vet Asks Bush for Clemency*, AP (March 17, 2003, 1:39 p.m.) https://www.cbsnews.com/news/gulf-war-vet-asks-bush-for-clemency/ [https://perma.cc/L7HU-L9RE].

[55] *Federal Government Resumes Executions After 17-Year Hiatus, Executes Seven Prisoners in Three Months*, Am. Bar Ass'n (Oct. 28, 2020) https://www.americanbar.org/groups/committees/death_penalty_representation/project_press/2020/fall-2020/federal-government-executes-seven-in-three-months/ [https://perma.cc/3JS8-5YDC].

eral prisoners without opposition from the Federal Government.[56] This litigation, challenging the government's method of execution, dragged on for years with intermittent status updates from the government indicating it was slowly amending its execution protocol but was not ready to resume executions. The last such update occurred in 2011, and following that, the government took no further action in the case for seven years.[57]

Then on July 25, 2019, the Federal Government announced that three federal executions were to take place over the course of one week in December of 2019 and another two were scheduled for early January 2020.[58] At that point, several more federal prisoners who found themselves facing the newly imminent prospect of execution intervened in the *Roane* litigation.[59]

But on November 20, Judge Tanya Chutkan, who had been assigned the stale *Roane* case, issued preliminary injunctions halting these executions.[60] She held a delay was warranted in order to allow litigation to proceed based on: (1) the prisoners sufficient chance of success on one of their claims, that the government's planned method of execution was inconsistent with the requirements of the Federal Death Penalty Act (FDPA);[61] (2) the irreparable harm the plaintiffs would suffer from "being executed under a potentially unlawful procedure";[62] (3) the government's insubstantial interest in haste after years of delay and inaction in scheduling executions or amending its execution protocol; and (4) the public interest in not "short-circuiting legitimate judicial process," but rather in "ensur[ing] that the most serious punishment is imposed lawfully."[63] The D.C. Circuit refused the government's emergency request to vacate the injunction and ordered expedited briefing and argument of the appeal of the injunction.[64]

The Supreme Court, in what turned out to be the only "win" for federal prisoners over the course of the next six months of executions, also allowed the injunction to stand, but warned in a two sentence order that it expected the case to be adjudicated "with appropriate dispatch."[65] Justice Alito explained in a concurring statement that, "in light of what is at stake, it would be preferable" for the D.C. Circuit to review the District Court's preliminary injunction, but made clear that he believed it should ultimately be vacated

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[56] Roane v. Gonzales, CIV.A. 05-2337 RWR, 2006 WL 6925754 (D.D.C. Feb. 27, 2006).

[57] Matter of Federal Bureau of Prisons' Execution Protocol Cases, 2019 WL 6691814, at *2 (D.D.C., 2019) (filed under the *Roane* docket).

[58] *Id.*

[59] *Id.* Wesley Purkey filed a separate motion for an injunction which was consolidated with the other cases under *Roane*.

[60] *Id.* at *8.

[61] 18 U.S.C. § 3596(a).

[62] *Matter of Federal Bureau of Prisons' Execution Protocol Cases*, 2019 WL at *7.

[63] *Id.* at *8 (applying the standard for granting a preliminary injunction from Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7 (2008)).

[64] Roane v. Barr, No. 19-5322 (D.C. Cir. Dec. 2, 2019) (declining to vacate injunction).

[65] Barr v. Roane, 140 S. Ct. 353 (2019) (mem.).

and invited the government to renew its "application if the injunction is still in place 60 days from now."[66]

2. Breaking the dam

A divided D.C. Circuit panel, without a majority opinion for anything but the result, vacated the injunction on appeal but noted that the prisoners' constitutional claim remained open on remand because "the government did not seek [its] immediate resolution."[67] Shortly thereafter, the prisoners sought rehearing en banc, which was denied on May 15.[68] Two weeks later, on June 1st, they filed a petition for certiorari,[69] which was denied on June 29th.[70] While certiorari was still pending, on June 15, the government scheduled new execution dates for three of the prisoners involved in the litigation.[71] Daniel Lewis Lee's execution was scheduled for July 13, less than a month away.[72] Just four days after the new execution dates were announced, the plaintiffs under warrant asked the District Court for a new preliminary injunction based on their Eighth Amendment claim.[73]

On the morning of Lee's scheduled execution, Judge Chutkan, in a similar but substantially more detailed opinion than her first granting an injunction on the statutory claim, issued a new preliminary injunction to allow the court time to decide the prisoner's Eighth Amendment challenge to the federal execution protocol.[74] That opinion recounted the timeline above and noted that the last-minute nature of the stay was "unfortunate, but no fault of the Plaintiffs," but rather "the result of the Government's decision to set short execution dates even as many claims . . . were pending."[75] Indeed, given the new execution dates were set two weeks before certiorari was denied and jurisdiction returned to the district court, it's unclear how much faster things could have proceeded.[76]

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[66] *Id.* at 353–54 (Alito, J., concurring). Justices Gorsuch and Kavanaugh joined this statement.

[67] In re Fed. Bureau of Prisons' Execution Protocol Cases, 955 F.3d 106, 113 (D.C. Cir. 2020), *cert. denied sub nom.* Bourgeois v. Barr, 141 S. Ct. 180 (June 29, 2020). Several other claims based on the Administrative Procedure Act and the FDA's role in authorizing execution drugs also remained to be decided. *See id.*

[68] *See* Petition for Writ of Certiorari at 4, Bourgeois v. Barr, 141 S. Ct. 180 (2020) (mem.) (No. 19-1348).

[69] *Id.*

[70] *Bourgeois*, 141 S. Ct. at 180.

[71] Matter of Fed. Bureau of Prisons' Execution Protocol Cases, 471 F. Supp. 3d 209, 214 (D.D.C. 2020), *vacated sub nom.* Barr v. Lee, 140 S. Ct. 2590 (2020) (per curiam). The government subsequently scheduled Keith Nelson's execution date after he had already renewed his claims in the District Court.

[72] *Id.*

[73] *Id.* at 217.

[74] *Id.* at 225. This opinion engaged with the *Hill* standard and cited *Bucklew*'s language disfavoring last-minute stays. *See id.* at 217–18.

[75] *Id.* at 214. Judge Chutkan also noted that one of the plaintiffs, Nelson, filed his complaint before his execution date was even announced. *See id.* at 224.

[76] It's also worth noting that, to the extent that Judge Chutkan might have issued an opinion earlier in order to give the appellate courts more time to review it, and the parties more

The Supreme Court saw it differently, and around 2:30 a.m. in the early morning on July 14 vacated the injunction.[77] The short per curiam opinion noted that the protocol being challenged was in use in other states and highlighted the last-minute nature of the stay multiple times.[78] This result is hard to square with the result in *Roane v. Barr* seven months earlier. The constitutional challenge was no less substantial than the statutory challenge on which the Court had granted a stay. Judge Chutkan's opinion, the only one to ever address the issue, found that Lee's Eighth Amendment challenge was supported overwhelmingly by the scientific evidence in the record,[79] and Lee's APA claim remained unresolved. Given that, the two outcomes are hard to reconcile on any basis except the fact that the 60-day reprieve Justice Alito had tolerated was at an end, and so was the justices' patience. The justices who joined the *per curiam* may have been correct that in light of *Bucklew*'s high bar for an Eighth Amendment method of execution challenge and the widespread use of pentobarbital in state executions, Lee was very unlikely to succeed on the merits.[80] However, the district court analyzed actual evidence in the record under the *Bucklew* standard and came to a different conclusion. Perhaps Judge Chutkan engaged in some judicial activism, but the justices in the majority could not have determined that—and did not suggest they believed it—based on the dueling expert testimony in the record. The decision meant that the battle of experts remained unfinished, and the suitability—or lack thereof—of pentobarbital as a method of execution remained unexamined.

Although the death warrant technically expired at midnight on the 13th, the government nonetheless executed Daniel Lee early the next morning.[81]

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warning of her intention to stop the execution, Lee should not be punished for the court's delay.

[77] Barr v. Lee, 140 S. Ct. 2590 (2020) (per curiam). This order cut short the expedited appeal that had been ordered earlier that evening by the D.C. Circuit after it declined the request to summarily vacate the injunction. *See* Roane v. Barr, No. 20-5199 (D.C. Cir. July 13, 2020).

[78] *See Lee*, 140 S. Ct. at 2591. The opinion also stated the Eighth Amendment challenge was frivolous in light of the wide-spread use of pentobarbital for executions by the states. *See id.*

[79] *See Matter of Fed. Bureau of Prison's Execution Protocol Cases*, 471 F. Supp. 3d at 218; *see also Lee*, 140 S. Ct. at 2592 (Breyer, J., dissenting); *Id.* at 2593-94 (Sotomayor, J., dissenting).

[80] *Lee*, 140 S. Ct. at 2591.

[81] *Federal Government Ends Death Penalty Hiatus with Rushed Early-Morning Execution of Daniel Lee*, Death Penalty Information Center (July 14, 2020), https://deathpenaltyinfo.org/news/federal-government-ends-death-penalty-hiatus-with-rushed-early-morning-execution-of-daniel-lee [https://perma.cc/J8W4-C8S9]. The government started the execution at 4 a.m. but was informed by Lee's defense counsel that an Eighth Circuit stay was still in place. Lee was left strapped to the execution gurney for four hours while that was sorted out. He was pronounced dead at 8:07 a.m. ET, shortly after the Eighth Circuit lifted its stay. *See id.*

3. The tidal wave

Thus began the Federal Government's unprecedented rush to execute twelve more prisoners. The executions proceeded at a record-breaking pace even as states' executions were entirely halted by COVID-19.[82] And the Supreme Court made sure that neither it nor any lower courts stood in the way. After the *Roane* litigation, the Court denied every request for a stay, often over strong dissents,[83] and vacated no fewer than eight lower court orders delaying executions.[84]

It cannot be denied that through these decisions the Court stunted the development of several important legal questions. Some of these were narrow questions regarding the construction of the Federal Death Penalty Act and admittedly unlikely to recur outside of the federal death penalty context;[85] other statutory questions were important and broadly applicable even outside the death penalty context;[86] still others raised weighty constitutional challenges.[87] Finally, some issues challenged whether the lower courts had

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[82] *Execution Database*, DEATH PENALTY INFO. CTR. (accessed February 26, 2021), https://deathpenaltyinfo.org/executions/execution-database?filters%5Byear%5D=2020 [https://perma.cc/48HQ-BALW]. The database reveals that no state has carried out an execution after Lee's even as the Federal Government carried out twelve more. *See id*; s*ee also As Legal Proceedings Go Virtual, Many States Postpone Executions*, AM. BAR ASS'N (July 23, 2020), https://www.americanbar.org/groups/committees/death_penalty_representation/project_press/2020/summer/states-postpone-executions-amid-covid19-pandemic/ [https://perma.cc/RE2E-6AW5]. It is also clear that the federal executions contributed to the spread of COVID-19. *See* Michael Tarm, Michael Balsamo, & Michael Sisak, *AP Analysis: Federal Executions Likely a COVID Superspreader*, AP (February 5, 2021), https://apnews.com/article/public-health-prisons-health-coronavirus-pandemic-executions-956da680790108d8b7e2d8f1567f3803 [https://perma.cc/7HTQ-4R7Q].

[83] *See, e.g.*, Bourgeois v. Watson, 141 S. Ct. 507 (2020) (mem.) (Sotomayor, J., dissenting).

[84] *See infra* Part II, Table 1.

[85] *See* United States v. Higgs, 141 S. Ct. 645 (2021) (granting certiorari before judgment and vacating Fourth Circuit's stay of execution pending appeal and District Court's opinion disclaiming statutory authority under the FDPA to change the state law governing an execution after sentencing); *Bourgeois*, 141 S. Ct. 507 (mem.) (denying stay of execution and petition for cert to consider whether the FDPA prohibits executing someone who is intellectually disabled under prevailing diagnostic standards); Rosen v. Montgomery, 141 S. Ct. 1232 (mem.) (vacating D.C. Circuit's stay of execution pending en banc consideration of whether the FDPA requires the Federal Government follow state notice requirements in scheduling executions).

[86] *See* Bernard v. United States, 141 S. Ct. 504 (2020) (mem.) (denying stay of execution and petition for cert to consider whether a second post-conviction petition raising claims which were previously unavailable due to government misconduct is subject to AEDPA's "no reasonable factfinder" standard); Johnson v. United States, 141 S. Ct. 1233 (2021) (mem.) (denying a stay of Fourth Circuit decision declining to reconsider the applicability of the First Step Act to a capital sentence); Barr v. Purkey, 140 S. Ct. 2594 (2020) (mem.) (vacating lower court stay of execution and foreclosing consideration of, *inter alia*, whether a federal capital defendant whose first post-conviction counsel was constitutionally inadequate can raise a claim of ineffective assistance of trial counsel for the first time in a second post-conviction petition).

[87] *See* Barr v. Lee, 140 S. Ct. 2590 (2020) (per curiam) (vacating stay of execution pending litigation of constitutional challenge to use of increasingly popular single drug protocol).

adequately considered defendants' constitutional challenges.[88] At least one human life depended on the resolution (or lack thereof) of each of these issues, and as Justice Breyer noted in his dissent in the final case, *Higgs*, these were not frivolous questions.[89]

But beyond their effects on individual defendants and somewhat esoteric questions of law, these unreasoned orders also portend a deeper trend on the Court, which taken to its logical extreme—as a majority of the justices seemed eager to do in these cases—will effectively neuter significant doctrines of death penalty jurisprudence, not by developing or overruling precedent, but by stripping the lower courts of their own ability to enforce many of the rights of capital defendants that are currently on the books, particularly those which by their nature can only be vindicated through late-stage litigation after a death warrant has issued.[90]

The Supreme Court is set to issue an opinion this year in *Ramirez v. Collier*, where it has an opportunity to state with more particularity the standard they are applying in adjudicating capital stay petitions.[91] Hopefully when it does so, it will at least take the opportunity to make explicit the increased focus on prisoner's delay and will justify why this new balance is necessary despite the strong arguments against it. In Part III I argue that no satisfactory justification exists.

II. Empirical analysis: Observations on stay orders over two decades

In 1988, when Justice O'Connor dissented from the court's denial of the Florida Attorney General's request to vacate a stay of execution issued by a district court, she acknowledged that "the standard under which we consider motions to vacate stays of execution is deferential, and properly so."[92] The data presented below suggests that statement remained true for almost another two decades, but today the Supreme Court no longer treats lower court stays of execution deferentially. While vacating a stay was an "ex-

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[88] Montgomery v. Watson, 141 S. Ct. 1232 (2021) (mem.) (denying stay of execution to allow consideration of whether capital defendant had shown she was mentally incompetent to be executed after district court ruled she was likely to succeed on that claim); Barr v. Purkey, 140 S. Ct. 2594 (2020) (vacating D.C. Circuit's stay pending consideration of mental competence to be executed likewise following favorable ruling for defendant in district court).

[89] *Higgs*, 141 S. Ct. at 646 (Breyer, J., dissenting).

[90] This is not the only area in which the Court has made it all too easy for important civil rights doctrines to remain underdeveloped. *C.f.* Pearson v. Callahan, 555 U.S. 223 (2009) (allowing courts to dispose of qualified immunity claims by skipping the first step from *Sacier v. Katz*, 533 U.S. 194 (2001), of determining whether a constitutional right was violated, and proceeding directly to the second step of deciding whether the right was clearly established.).

[91] *See* Ramirez v. Collier, No. 21-5592, 2021 WL 4129220, at *1 (U.S. Sept. 10, 2021) (order instructing parties "to address the type of equitable relief petitioner is seeking, the appropriate standard for this relief, and whether that standard has been met here") (citing Hill v. McDonough 547 U.S. 573, 584 (2006)).

[92] Dugger v. Johnson, 485 U.S. 945, 947 (1988) (O'Connor, J., dissenting).

traordinary step"[93] in 1988, in 2021 it has become quite an ordinary thing for the Court to do.

This Note represents the first recent comprehensive analysis of the Supreme Court's capital shadow docket orders.[94] While the Court's decisions on capital stay requests are available at least as far back as the 1970s, I chose to analyze from 2021 through 2013 in order to be able to observe the effect of the Court's changing membership on its shadow docket orders. I also analyzed the period from 1999 through 2001 because those are the three years in which the most people were executed in the modern era, and thus are useful years in comparing the Court's traditional approach to stays of execution with the approach adopted recently.

The results show a clear trend against last-minute capital defendants. Table 1 shows that the Court is granting requests to vacate lower court stays at drastically higher rates compared to the five years ago. This is a trend that escalated with the Federal Executions in 2020 but seems to have started when Justice Gorsuch replaced Justice Kennedy. Additionally, Table 2 shows that the Court is also granting fewer stays.[95] However this change is not as drastic because the Court rarely ever grants last-minute relief to capital litigants where the lower courts failed to.[96] This data confirms what was anecdotally evident over the last few years: it is becoming harder and harder for capital defendants to seek protection of their federal rights, particularly those that arise closest to execution.

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[93] *Id.*

[94] The analysis was conducted as follows: I ran a search of the Supreme Court's docket in Westlaw for every item that contained the word "execution" and the words "application" and "stay" in the same sentence. I sorted the 2,569 results by date and then downloaded the most recent 2,000 into an excel document. Using excel "IF" formulas I categorized as many of the cases as possible by application type—"application for stay," "application to vacate stay," and "application to vacate preliminary injunction"—and result—"granted" or "denied." For the years being analyzed, I manually categorized all those that my formulas had been unable to categorize (about half) and then spot-checked the rest, deleting any results that were not shadow docket orders in capital cases pending execution. I also added in a few more results that my original search did not turn up either because they were requests to vacate injunctions rather than stays (I did a systematic search to ensure I was not missing any of these) or did not mention "execution" but nonetheless were death penalty orders that I came across in my research. There may be a handful of orders that I missed, but most likely they are denied stays of execution and therefore unlikely to significantly change the bottom-line answer.

[95] Even some stays that the Court does grant are later vacated by the denial of certiorari, without explanation by the justices who initially were persuaded to grant a stay. *See, e.g.*, Bower v. Texas, 575 U.S. 926 (2015) (Breyer, J., dissenting from denial of certiorari, joined by Ginsburg, J., and Sotomayor, J.); *see also* Linda Greenhouse, *The Supreme Court's Death Trap*, N.Y. TIMES, Apr. 1, 2015, at A23 (wondering "where were" the two other justices who originally voted to grant Mr. Bower a stay and asking "shouldn't they have felt moved to tell us something – anything?"). Mr. Bower's case and others like his counted as a stay.

[96] This may be due in part to the "oft-repeated mantra that the Supreme Court 'is not a court of error correction.'" *See* Robert Yablon, *Justice Sotomayor and the Supreme Court's Certiorari Process*, 123 YALE L.J. FORUM 551, 562 (2014) (quoting Stephen G. Breyer, *Reflections on the Role of Appellate Courts: A View from the Supreme Court*, 8 J. APP. PRAC. & PROCESS 91, 92 (2006)).

TABLE 1:* APPLICATIONS TO VACATE STAY OR PI

	1999	2000	2001	2013	2014	2015	2016	2017	2018	2019	2020	2021
Granted	3	3	1	2	2	0	0	2	1	2	5	5
Denied	1	3	3	2	0	1	1	1	0	1	0	1
# Executions	98	85	66	39	35	28	20	23	25	22	17	11
% Executions 'Rescued'[97]	3%	4%	2%	5%	6%	0%	0%	9%	4%	9%	29%	45%

TABLE 2:* APPLICATIONS FOR STAY

	1999	2000	2001	2013	2014	2015	2016	2017	2018	2019	2020	2021
Granted	6	3	5	0	2	3	1	1	2	1	1	2
Denied	113	93	62	27	77	52	26	48	37	31	24	9

[97] This refers to the percent of executions that would not have occurred were it not for the Supreme Court's vacating a lower court order preventing it.
* Underlying data on file with author and available upon request.

Two points are worth noting in contextualizing this data. First, a majority of the favorable results the Court has given death row prisoners on the shadow docket since 2017 surrounded religious claims.[98] In fact, in 2021 the Court has sanctioned or granted three last-minute stays to allow prisoners facing execution to argue for robust religious liberty rights including being in physical contact with a clergy-person during the execution.[99] Obviously religious liberties are receiving an increasingly favorable reception with this Court generally, however it is not entirely clear why they should be exempted from the Court's otherwise strict presumption against allowing last minute claims. Perhaps the justices themselves are struggling with these competing impulses, as they do not appear to be voting entirely consistently.[100]

It is tempting to conclude that this difference is explained by the developing priority position of religious liberty claims vis-à-vis competing rights. But while such an account is directionally consistent with the Court's recent jurisprudence, it is not a legally rigorous descriptive account of the capital shadow docket religious liberty cases. First, this developing reprioritization is just that—developing. The religious rights claimed by prisoners are at least as speculative as the Eighth Amendment method of execution claims raised by some of the thirteen executed federal prisoners, and more speculative than their statutory and administrative challenges. This is to say that the strength of the merits arguments—according to the law as it currently exists—is not a particularly honest way to distinguish between the religious claims that are being granted and all the others that are not.[101] The three liberal members on the Court are voting for relief in all these cases—religious liberty, method of execution, statutory, and some that are fact-bound and rely on settled law. And given their votes in cases like *Fulton*, Justices Kagan, Sotomayor and Breyer are likely not voting for relief in the capital religion cases based entirely on their agreement with the conservatives as to primacy of religious liberty rights, but rather on their willingness to err on the side of staying an execution whenever a legiti-

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[98] *See*, *e.g.*, Gutierrez v. Saenz, 141 S. Ct. 127 (2020) (mem.) (granting stay to allow litigation of Free Exercise and RLUIPA claims); Murphy v. Collier, 139 S. Ct. 1475 (2019) (mem.).

[99] *See* Ramirez v. Collier, 142 S. Ct. 50 (2021) (mem.) (granting stay of execution and certiorari and setting an accelerated briefing schedule to consider whether Christian prisoner's First Amendment rights are violated by Texas's refusal to allow his pastor to lay his hands on him and pray out loud in the execution chamber); Gutierrez v. Saenz, 141 S. Ct. 1260 (2021) (mem.) (granting stay by vacating Fifth Circuit order vacating district court stay of execution based on Free Exercise Clause challenge); Dunn v. Smith, 141 S. Ct. 725 (2021) (mem.) (declining to vacate stay in Free Exercise Clause challenge).

[100] *Compare Smith*, 141 S. Ct. at 725–26 (Chief Justice Roberts and Justices Kavanaugh and Thomas all noting their dissents, meaning that one or both of Justices Gorsuch and Alito must have joined Breyer, Sotomayor, Kagan, and Barrett in denying vacatur), *with Murphy*, 139 S. Ct. at 1478 (Justices Alito, Thomas, and Gorsuch noting their dissent and highlighting delay while Justice Kavanaugh and Chief Justice Roberts noted their concurrence).

[101] *But see Presidential Commission on the Supreme Court of the United States* 2 (July 20, 2021) (written testimony of Hashim M. Mooppan), https://www.whitehouse.gov/wp-content/uploads/2021/09/Hashim-Mooppan.pdf [https://perma.cc/JG5H-D9WD] (arguing that the Court was right to vacate stays protecting the federal capital defendants whenever their likelihood of success on the merits of their claims was doubtful under clearly established law).

mate question exists regarding its legality.[102] The stay analysis should not be—and at least in the religious rights context is not—controlled by the merits where the law is unsettled around an execution.

That the differential treatment received by the religious liberty claims cannot be explained by the strength of their merits, suggests a different explanation: the justices' own weighing of the harms on either side in each case. If the legal merits of the claims were equally unsettled, but the religious liberty claims resulted in relief, it suggests the justices whose votes made the difference are more concerned about the harm to a person executed in a way that might inhibit their First Amendment rights than a person executed in way that might inhibit their Eighth Amendment rights. The justices consider the former a weightier harm than the latter. This means that for all the Court's suggestions that the presumption against late stays of execution is a new legal rule—a presumption that can only be overcome by the strongest of legal claims brought at the earliest possible minute – in practice the Court's own practice appears more fact dependent. I would argue that, as with other shadow docket orders, the justices' own subjective balancing of the harms—a question of fact rather than law—explains the apparent dissonance between religious claims and all others on the capital shadow docket. Through the shadow docket, the Court is asserting supervisory power over the fact-finding of the lower courts.[103]

The second point worth noting is that the imminent transition to a new administration, one which had announced its opposition to the death penalty, may have added to the Court's interest in ensuring that all the scheduled executions were carried out before January 20. The Court did not—and could not have—explicitly considered that the new administration would almost certainly not have moved forward with the executions. The Court could not have because that political change is legally irrelevant. While the government could argue that it is "irreparably harmed" whenever it cannot carry out "duly enacted plans,"[104] the fact that a new administration will change the plan if it gets a chance should not add to the Court's solicitude. On the other hand, the change may have snuck into the justices' consideration due to their awareness that the incentive to seek a stay was uniquely high because the prisoners and their lawyers knew that if they could get a stay of a few weeks, their chance of living out their lives would dramatically increase. For example, even when the lower courts set incredibly accelerated briefing schedules, that nonetheless would have

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[102] Justice Thomas dissented in *Dunn v. Smith*, ostensibly based on his opposite commitment to the standard described in Part I. *See Smith*, 141 S. Ct. at 726–27 (Thomas, J., dissenting).

[103] *See* Lee Kovarsky, *The Trump Executions* 60–62 (July 27, 2021) (U. Tex. L. Sch., Pub. L. Res. Paper), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3891784 [https://perma.cc/TL66-UFJ3] (making some preliminary suggestions regarding the jurisprudential implications of the Court's aggressive shadow docket orders in the federal executions and characterizing it as an "[u]pward redistribution of judicial power").

[104] Abbott v. Perez, 138 S. Ct. 2305, 2324 n.17 (2018); *see also* Maryland v. King, 567 U.S. 1301, 1303 (2012) (Roberts, Circuit Justice) ("Any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.") (quoting New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co., 434 U.S. 1345, 1351 (Rehnquist, Circuit Justice 1977)).

extended to just past the inauguration, the Court cut short the litigation.[105] By contrast, in state capital litigation, a stay of execution usually buys a couple of years, but often not a complete reprieve from the death penalty.

It seems likely that this did weigh on the justices' minds, particularly in the November, December and January orders, which arguably escalated in their unusualness and culminated in *Higgs*, in which the Court, for apparently the first time in its history, granted certiorari before judgment and summarily reversed a district court.[106] That the incoming administration was the elephant in the room was studiously ignored, even by Justice Sotomayor in dissent. The only opinion I came across that came close to forthrightness on the subject was from Judge Chutkan who noted that she was "dismayed by the government's 'urgent' need to execute an inmate five days before a presidential inauguration."[107]

For the capital defense bar, the 'now or never' motivation underneath the justice's actions may contain a silver lining: some of the harshness of the apparent new standard the Court applied in the waning days of the Trump administration was due to the moment's idiosyncratic political environment rather than a deeper commitment to a severe substantive standard. If this is true, the new standard for granting stays, while strict, may be somewhat more forgiving than the denials of stays and grants of vacaturs during the federal executions suggests. However, as the data I present shows, the effect of the new standard is certainly not limited to the federal executions. The Court has continued to vacate stays as states have slowly resumed executions over the past year. Since President Biden took office, the Court has vacated three stays of state executions. Most recently the Court vacated a stay granted by a District Judge appointed by President Trump and affirmed by a unanimous Eleventh Circuit panel. It did so without explanation and over four dissents, including Justice Barrett.[108] Over the next few years, as the COVID pandemic abates and the gears of the states' execution systems begin churning once more, the staying power of the new standard will become clearer.

III. Assessment of the new standard

Thus far I have shown that beginning around the time *Bucklew* was argued, the Court has been articulating, and enforcing a stringent new standard

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[105] A notable example is that the Fourth Circuit scheduled oral argument for just three weeks after the district court's merits ruling in *United States v. Higgs*, but even that was not fast enough for the Supreme Court, perhaps because it would have taken place a week after President Biden's inauguration. *See* United States v. Higgs, 833 F. App'x 387, 388 (4th Cir. 2021).

[106] *Higgs*, 141 S. Ct. at 645. It did so without any explanation whatsoever as to why the lower court's view of the law was so patently incorrect as to merit such an unusual step. *See id.*

[107] Matter of Fed. Bureau of Prisons' Execution Protocol Cases, No. 05-CV-2337, 2021 WL 127602, at *3 (D.D.C. Jan. 13, 2021).

[108] *See,* Hamm v. Reese, 142, S. Ct. 743 (2022) (mem.); *see also* Crow v. Jones, 142 S. Ct. 417 (2021) (mem.); Dunn v. Smith, 142 S. Ct. 1290 (2021) (mem.). Note that on the same day it vacated a stay in *Dunn v. Smith*, the Court declined to vacate a separate injunction against Smith's execution based on a religious freedom claim. Alabama ultimately complied with the terms of this injunction and executed Willie B. Smith III on October, 21, 2021.

for stays of execution. The implementation of this standard was accelerated during the spree of federal executions, when the Court itself intervened to 'rescue' Seven of these executions from being stopped by lower court stays, and likely foreclosed relief for several other prisoners as lower courts caught on to the change. The fact that the Court implemented this standard so aggressively during the federal executions threw into sharp relief the change that otherwise might have proceeded more imperceptibly.

There are two primary reasons the federal execution cases made the change so stark. First, there were more opportunities to bring meritorious late-stage litigation in the federal context compared to the state context, both because the long pauses in federal executions left unchallenged the legality of the government's execution procedures, and because the statutes governing federal execution are complex and their enforcement lies with the federal judiciary, rather than state courts. Second, many of the justifications often invoked against federal court interference in executions, like federalism and comity, are absent from the federal context, meaning that the Court had fewer hooks on which to hang the new implicit standard.

This Part then examines what may be said for and against categorically disfavoring last-minute stays of execution.

A. The last minute delay incentive

The justices' motivation for the new standard is plain: they want to cut down on the strategic delay they believe is employed widely by the capital defense bar.[109] Justice Thomas, for example, made this explicit in his (delayed) response to Justice Breyer's plea,[110] for the Court to consider an Alabama prisoner's request to use nitrogen hypoxia as an alternative method of execution.[111] Justice Thomas asserted the prisoner employed "the same strategy adopted by many death row inmates with an impending execution: bring last-minute claims that will delay the execution, no matter how groundless."[112] Relatedly the justices also appear to be annoyed with the frequency that they are asked to adjudicate

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[109] *See* Kovarsky, *supra* note 10, at 1321–36 (cataloging evidence of this desire).

[110] Dunn v. Price, 139 S. Ct. 1312, 1314 (2019) (Breyer, J., dissenting from grant of application to vacate stay) ("I requested that the Court take no action until tomorrow, when the matter could be discussed at Conference. I recognized that my request would delay resolution of the application and that the State would have to obtain a new execution warrant, thus delaying the execution by 30 days. But in my judgment, that delay was warranted, at least on the facts as we have them now.").

[111] Price v. Dunn, 139 S. Ct. 1533, 1538 (2019) (Thomas, J., concurring) ("A stay [when] the petitioner inexcusably filed additional evidence hours before his scheduled execution after delaying bringing his challenge in the first place[ ] only encourages the proliferation of dilatory litigation strategies that we have recently and repeatedly sought to discourage.").

[112] *Id.* at 1540. Justice Thomas's concerns with gamesmanship continue. In fact, he asked about gamesmanship and delay three separate times during the November 2021 oral argument in *Ramirez v. Collier*. *See* Oral Argument at 1:40 & 41:00, (No. 21-5592), https://apps.oyez.org/player/#/roberts-12/oral_argument_audio/25300 [https://perma.cc/9TLJ-JT2A].

last minute challenges to executions, and the drain this exerts on the Court's time and energy.[113]

It would be naïve or disingenuous to reject this perspective entirely. Capital defense attorneys know that once a warrant is issued their only chance at saving their client's life depends first on buying some time, and the best way to do so is with a claim pending that justifies a stay. So it is true that they dig deep in the record and find claims that haven't been fully adjudicated and that tend to be weaker. Sometimes, when they know a warrant is imminent, they may even hold back new weaker claims—by not initiating new litigation—in order to have something to file once the warrant is issued and potentially catch their client a delay.[114]

However, 'weaker' is the key word. Over the past two decades the Court has usually granted less than 5% of stay requests, and lower courts are granting stays at largely the same rate based on the number of requests to vacate lower court stays that the Court has received.[115] Based on this, it does not seem that the courts have any issue identifying and dismissing the clearly weak claims. The focus of this Note is the occasional claims that are not weak, that raise a substantial legal question, and that prisoners would not have chosen to delay.[116] That a claim is brought under warrant does not necessarily mean that it is weak. This is confirmed by the fact that historically the Court has granted a handful of stays every year, and sometimes those cases have resulted in full appeals that lead to changes in the law.[117]

In justifying the stringent new standard on this basis, the Court overemphasizes strategic delay and ignores the many other reasons that, through no fault of the prisoner, claims might not be litigated until the eleventh hour.

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[113] *See id.* at 12:45 (Justice Kavanaugh predicting, "if we rule in [Ramirez's] favor here, this is going to be a heavy part of our docket for years to come, would be my sense given the history of death penalty litigation"); *id.* at 17:00 (Justice Alito predicting "we can look forward to an unending stream of variations" of religious liberty based challenges to execution methods).

[114] This is not necessarily the fault of capital defense attorneys as much as it is the fault of the system as it exists. The Court's own jurisprudence and AEDPA have also necessarily pushed many of these claims down the road by making it harder to raise successive claims. The courts are not exactly inviting capital defendants to come down and file a new petition as soon as they think they might have a new claim. Furthermore, appointed representation often effectively ends after a prisoner's first round of state and federal habeas. Often no one realizes that a meritorious claim remains to be litigated until a warrant is issued and specialized consulting attorneys parachute in and review the case. *See* Kovarsky, *supra* note 10, at 1380–85.

Ultimately, who lives and who dies remains so capricious and random, subject to the whims of a change in executive administration as much as anything else, that you cannot blame a capital defense lawyer for using every trick in the book to buy their client a couple more months in the judicial system in order to have a shot at convincing a new DA, governor, or president to show them mercy. The fact that some lawyers may hold back weak claims in certain situations should not be held against prisoners raising substantial claims in the interest of not undermining an incentive scheme.

[115] *See supra* Section II, Tables 1 & 2.

[116] I would be remiss if I did not note somewhere that the concept of prisoners as the legal decision makers who ought to suffer the repercussions of their choices seems like a complete fiction. It is the lawyers who are usually making the decisions about when to raise claims. *See* Kovarsky, *supra* note 10 at 1339 & n. 116.

[117] *See, e.g.*, Bucklew v. Precythe, 139 S. Ct. 1112 (2019).

Professor Lee Kovarsky's recent article in the NYU Law Review powerfully argues that strategic delay is overblown in the judicial imagination and has wrongly lead to ever stricter standards blocking judicial review of capital sentences.[118] While the Court seems to think that delayed claims are the result of strategy and sand bagging, far more often late claims are the result of factors entirely outside of a defendant's control including limited defense resources being triaged to the most imminent executions and intrinsic barriers to raising claims earlier.[119] Additionally, to the extent that there is some incentive to hold onto a claim and raise it under warrant, that incentive is outweighed by the clear reduction in the likelihood of success that is already baked into the system to disincentivize strategic delay.[120] If a lawyer discovers a claim they believe has a legitimate chance of overturning their client's death sentence, they are not tempted to hold onto it and risk not getting a stay to litigate it at all.

Professor Kovarsky's refutation of the strategic delay account convincingly shows that capital defendants and their lawyers are rarely to blame for claims being raised on the eve of execution, and that the Court does not need to pile on one more disincentive to prevent sandbagging that has already been thoroughly deterred. To his account I would only add that appeals to strategic delay as justification for vacating stays is particularly inapt in the federal death penalty context. As discussed in Part I, many federal capital prisoners tried bringing statutory and constitutional claims to the government's execution protocol years earlier only to have the litigation stayed while the government slowly decided its next move. And it is hard to fault the federal prisoners and their lawyers for not vigorously pursuing every possible lead and claim earlier, when for decades the chance of a federal prisoner being executed seemed quite remote. In light of this fact, some meritorious claims may not have been raised earlier by the federal defendants because state prisoners whose executions seemed more imminent were prioritized by federal capital defense offices handling both state and federal prisoner's post-conviction litigation.

Additionally, as I showed in Part I, often the government is more to blame for the urgency of last-minute capital litigation than the prisoners.[121] A standard categorically disfavoring last-minute claims may actually invite more of them, because it attempts to deter a strategy that prisoners are not pursuing while simultaneously incentivizing states to provide ever shorter windows of

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[118] *See* Kovarsky, *supra* note 10, at 1328–30 (explaining the logic of strategic delay in the context of stays); *id.* at 1341–57, and particularly 1353–57 (arguing that delay is not actually all that strategic and is rarely engaged in, at least with meritorious claims).

[119] *See id.* at Part III (discussing intrinsically delayed claims) and Part IV (discussing resource triage).

[120] *See, e.g.*, Wainwright v. Sykes, 433 U.S. 72, 87–88 (1977) (imposing cause and prejudice standard to overcome state procedural default); 28 U.S.C. § 2244(b)(2) (provision of AEDPA requiring dismissal of successive habeas petitions except in very narrow circumstances); *see also* Kovarsky, *supra* note 10, at 1335–39 (outlining many of these doctrines).

[121] *See, e.g.*, supra note 112 *Ramirez* Oral Argument at 1:32:17 (Justice Sotomayor asking Texas Solicitor General, "what was so slow? Why were you so slow here? . . . If you don't want there to be delay, what took you so long?"); Matter of Fed. Bureau of Prisons' Execution Protocol Cases, 471 F. Supp. 3d 209, 217 (D.D.C. 2020), *vacated sub nom.* Barr v. Lee, 140 S. Ct. 2590 (2020) (per curiam) (blaming government for the delay).

time between warrant and execution, or to disclose critical information at the last minute. The strong presumption against last-minute stays is a potent motivation for the government to be dilatory itself, because it knows that the less time a prisoner has to bring a claim, the more likely it will be summarily denied. If the Court really is concerned with that last-minute nature of these requests, then the Court would do far better to punish the government for short timelines and late disclosures, rather than prisoners for understandably continuing to bring their claims within whatever time they have. It is interesting that in the oral arguments from *Ramirez v. Collier*, several of the conservative justices were singularly focused on Ramirez's sincerity in his religious beliefs, but only Justice Sotomayor asked about Texas' delay, which was at least as evident from the record.

Finally, as I hinted at earlier, the strict standard for stays seems particularly inapposite in these federal executions, because aside from the concern with sandbagging, much of the typical doctrinal justification for denying relief to death row prisoners is based on appeals to federalism, comity and respect for states' prerogatives to run their own criminal systems.[122] Justices concerned with promoting these values might believe that last minute stays show a particular lack of regard for state officials who are forced to postpone executions in the eleventh hour. But, whatever merit this concern may have in general, it could not have justified the strict standard that evolved during the *federal* executions.[123] The United States Attorney General's federal criminal justice prerogatives deserve no special respect from the United States Supreme Court, at least not in the same sense that state attorneys, who represent separate sovereign governments, do.

There is not much, then, that can be said for a standard that so disfavors last-minute stays. The Court applied the standard seeking to disincentivize death row prisoners from engaging in strategic delay, but if they were not doing so with any frequency anyway, then the deterrent purpose falls flat. The Court may still point to other benefits of the new regime, such as minimizing the emotional and administrative whiplash that comes from halting an execution hours before it is to begin. The family members of a defendant's victims no doubt want finality.[124] And of course, the longer an execution is delayed, the

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[122] *See, e.g.*, *Hill*, 547 U.S. at 585 ("The federal courts can and should protect States from dilatory or speculative suits . . . .").

[123] This is not the only area in which the Court is importing anti-criminal defendant doctrines that are ostensibly justified by federalism and judicial comity into the federal criminal setting where those justifications have no force. For example, the rule of *Teague v. Lane*, 489 U.S. 288 (1989) baring the application of new rules of procedure in state habeas proceedings is also applied to deny relief to federal prisoners. *See, e.g.*, Chaidez v. United States, 568 U.S. 342, 358 & n. 16 (2013) (holding in a federal habeas case that the rule from Padilla v. Kentucky, 559 U.S. 356 (2009), requiring defense counsel to advise the defendant about the risk of deportation arising from a guilty plea, was a new rule of criminal procedure that did not apply retroactively and declining to address the argument that it did not apply in the federal context).

[124] *See, e.g.*, *Hill*, 547 U.S. at 584 (noting "the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts" and that crime victims also "have an important interest in the timely enforcement of a sentence."); *Price*, 139 S.Ct. at 1540 (2019) (Thomas, J., concurring) (recounting experience of Bessie Lynn, the widow of Price's victim who

more attenuated its penological justification becomes.[125] The fact remains that a human life depends on the courts' careful decision making and that cannot "be rushed or taken lightly; there can be no 'justice on the fly' in matters of life and death."[126]

Many areas of the law require decision makers to draw a line between maximal deterrence of sandbagging and maximal prevention of injustice. For example, we do not withdraw social security benefits at the slightest hint of fraud, but nor do we pretend that fraud in entitlement claims does not exist at all. This policy decision has been explicitly recognized by the Court in the context of capital punishment as far back as *Brown v. Allen*.[127] Given that prisoners facing death do face a powerful incentive to try and get a stay, it might be unworkable to automatically grant any stay request for a pending claim filed in the warrant stage. But likewise, it is unworkable to say there is a (potentially) rebuttable presumption that no late claim should receive a stay, no matter how blameless the prisoner is for delay nor how weighty the merits. As with all doctrines that undermine the absolute finality of a criminal sentence, the line must be drawn somewhere between these extremes.

Staying an execution, even at the very last minute, where necessary to allow a full and fair adjudication seems to be nothing less than what running a system of capital punishment requires. The alternative would mean "limiting constitutional protections for prisoners on death row" which is far "too high a constitutional price."[128] This risk is particularly high when it is the Supreme Court—and not a lower court—denying relief without explanation. Because at the Supreme Court, even if an individual prisoner—or more accurately their appointed lawyers—did engage in reproachable delay, denying their meritorious claim inevitably has downstream effects on similarly situated future claimants. This Part argues that reflexively denying last-minute relief inflicts significant harms, both on individuals facing execution and on the judicial system as a whole. I suggest that these harms far outweigh the dubious benefits that the Court's new implicit standard might provide.

"waited for hours with her daughters to witness petitioner's execution, but was forced to leave without closure" after the Court failed to vacate the Eleventh Circuit's stay until after the warrant had expired at midnight). *But see, e.g.*, Noah Shepardson, *Family of Murder Victims Wants to Stop the Feds From Resuming Executions*, REASON (Nov. 6, 2020, 12:36 pm) https://reason.com/2019/11/06/family-of-murder-victims-wants-to-stop-the-feds-from-resuming-executions/ [https://perma.cc/4G3X-M92P]. Not infrequently the victim's family say they would rather there be no execution at all.

[125] *See* Glossip v. Gross, 576 U.S. 863, 923–38 (2015) (Breyer, J., dissenting)

[126] United States v. Higgs, 141 S. Ct. 645, 652 (2021) (Sotomayor, J., dissenting) (*quoting* Nken v. Holder, 556 U.S. 418, 427 (2009)).

[127] 344 U.S. 443, 496 (1953) (Frankfurter, J.) ("Judges dealing with the writ of habeas corpus, as with temporary injunctions, must be left some discretion—room for assessing fact and balancing conflicting considerations of public interest.").

[128] Bucklew v. Precythe, 139 S. Ct. 1112, 1145 (2019) (Breyer, J., dissenting).

B. Harm to individuals

The risk of getting it wrong attends all judicial decision making, but it is particularly acute on the capital shadow docket when decisions are irreversibly made, late at night, and in a matter of hours.[129] Last minute stay decisions inherently involve underdeveloped facts and uncertain law, and the risk of this uncertainty is the unlawful death of a human being. Additionally, by increasingly vacating lower court stays in this way the Supreme Court is sowing confusion for capital defendants as to how and when they can bring challenges. The Court leaves these people without clear guidance as to the state of the law and therefore as to what arguments are actually available to them as they engage in last minute fights to prove their innocence or their executions unlawful. Combining the inherent challenge for judges of getting these decisions right every time with the uncertainty for litigants of how to most effectively make their arguments, results in an unacceptable risk that the courts will allow a wrongful execution to take place. The Court's requirement that heightened reliability attend capital punishment is entirely inconsistent with its new shoot first and ask questions later approach to stays of execution.

1. Sometimes the Court gets it wrong

This fear is not merely hypothetical. The Court has almost certainly blessed the execution of innocent people in the past.[130] Many more people have been sentenced to death through procedures that the Court, upon further contemplation, realized were unconstitutional. For example, Justice Scalia wrote for a unanimous Court in *Hitchcock v. Dugger*, holding that the sentencer must be able to consider non-statutory mitigating evidence contrary to Florida's death penalty statute,[131] but during the seven years before the opinion was handed down, at least thirteen men presented an identical claim in their certiorari petitions and requests for stays.[132] With the Court's denial of each man's final appeal, Florida carried out each unlawful sentence.[133]

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[129] In a variety of contexts, the Court has acknowledged that the irreversibility of capital punishment demands "heightened reliability." *See, e.g.*, Woodson v. North Carolina, 428 U.S. 280, 305 (1976) ("Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."); Simmons v. South Carolina, 512 U.S. 154 (1994) (requiring heightened reliability in jury instruction regarding future eligibility for parole when death penalty is under consideration).

[130] *See, e.g.* James S. Liebman, Shawn Crowley, Andrew Markquart, Lauren Rosenberg, Lauren Gallo White & Daniel Zharkovsky, *Los Tocayos Carlos*, 43 COLUM. HUM. RTS L. REV. 711 (2012) (documenting in painstaking detail the extensive proof that Carlos DeLuna was executed for a murder that in all likelihood was committed by Carlos Hernandez). The evening before DeLuna was executed, Supreme Court denied DeLuna a stay of execution over the dissents of Justices Brennan and Marshall. DeLuna v. Lynaugh, 493 U.S. 999 (1989) (mem.)

[131] 481 U.S. 393, 394, 399 (1987).

[132] Eric M. Freedman, *No Execution If Four Justices Object*, 43 HOFSTRA L. REV. 639, 641 n.7 (2015)

[133] *Id.*

The Court has also issued orders on the capital shadow docket that allowed executions to be carried out in ways that subsequently proved to be troublingly flawed. For example, the Court missed its chance to stop Oklahoma's botched execution of Charles Warner in January of 2015.[134] Six months earlier, Oklahoma had executed Clayton Lockett, who suffered on the execution gurney for 40 minutes before dying, crying out that "something is wrong" and "the drugs aren't working."[135] Then Oklahoma—the first state to ever experiment with lethal injection—[136] announced its intention to resume executions with the same set of drugs, including the sedative midazolam which many experts believed was inadequate for executions.[137] Warner and three other prisoners facing execution sued.[138] The Supreme Court denied Warner a stay, and during his 18 minute long execution, he reportedly screamed, "my body is on fire."[139] Oklahoma's haste to execute Warner was unrestrained by the Court and in this haste the state not only kept using midazolam rather one of the more effective sedatives used by other states, but also to accidentally gave Warner potassium acetate instead of potassium chloride, as the protocol required.[140] After Oklahoma's second failed attempt, the Court did ultimately grant certiorari in *Glossip v. Gross* to consider the merits of the surviving prisoners' argument that midazolam is an ineffective sedative that risks consciousness during painful executions.[141] Following Warner's execution, Oklahoma paused executions for six years.[142]

But in 2021 Oklahoma scheduled several new executions, despite the fact that a challenge to Oklahoma's new execution protocol, which still relied on midazolam, was pending in federal court.[143] In late October, the Tenth Circuit issued a stay of two imminent executions, in light of factual issues regarding midazolam's suitability for executions that should be resolved at trial.[144] On the eve of the first execution, without explanation, the Supreme Court vacated the

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[134] Warner v. Gross, 574 U.S. 1112 (2015) (mem.) (denying application for stay of execution).

[135] *Id.* (Sotomayor, J., dissenting).

[136] Deborah W. Denno, *The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty*, 76 FORDHAM L. REV. 49, 65 (2007).

[137] *Warner*, 574 U.S. at 1112.

[138] *Id.*

[139] Kaleigh Rogers, *How Do You Confuse Two Lethal Injection Drugs? We Asked a Pharmacologist*, VICE (October 9, 2015, 9:45am), https://www.vice.com/en/article/d7ygkk/how-do-you-confuse-two-lethal-injection-drugs-we-asked-a-pharmacologist [https://perma.cc/F48E-7QF2].

[140] *Id.* Based on the similar chemical makeup of these two compounds it seems unlikely that this mix-up contributed significantly to Warner's suffering.

[141] 576 U.S. 863, 881 (2015). While the Court held that the district court did not commit clear error by finding midazolam was likely to keep a person unconscious during an execution, this may have been in part out of a subconscious reluctance not to reach the contrary conclusion and be faced with the blame for Warner's fate. *See infra* note 152 and accompanying text.

[142] Keaton Ross, *State Officials Say Oklahoma is on Track to Resume Executions*, OKLA. WATCH (October 14, 2020), https://oklahomawatch.org/2020/10/14/state-officials-say-oklahoma-is-on-track-to-resume-executions/ [https://perma.cc/AVN7-6JDT].

[143] Jones v. Crow, No. 21-6139 (10th Cir. Oct. 28, 2021) (order granting stays of execution to John Grant and Julius Jones).

[144] *Id.* at 3.

Tenth Circuit's stay.[145] Later that evening, John Marion Grant was seen convulsing and vomiting after being injected with midazolam, drawing comparisons to Oklahoma's earlier botched executions.[146] Undeterred, and unrestrained by the Court, Oklahoma vowed to press on with the other scheduled executions.[147]

2. Inherently delayed claims usually can only be raised under warrant and take time to properly adjudicate

Some claims that can only be raised after a warrant is issued are incredibly complex and require sensitive factual inquiries, specific to each death row prisoner. For example, *Ford* claims require the Court to determine whether a prisoner's mental deficiencies prevent them from rationally understanding their execution.[148] As the prisoners on death row are increasingly elderly, more people with significant dementia face execution.[149] Following *Madison v. Alabama*'s,[150] articulation of the nuanced and complex individual considerations at play in a *Ford* claim, it is very important that there is an adequate forum to hear expert testimony supporting and refuting the claim.[151] However, these claims can only be brought once a prisoner has an execution date scheduled, and given the short length of time states often provide between scheduling and carrying out an execution, a stay may well be necessary to adequately consider a claim, as it was in *Madison*.[152] Madison was granted a reprieve by the Court less than an hour before his execution was set to begin.[153] If the Court disfavors all stays of execution, then people in Madison's position in the future may be denied stays and face unconstitutional executions, even though it is the state, rather than the prisoner, who caused the need for a last minute scramble.

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[145] Crow v. Jones, No. 21A116, 2021 WL 4999201 (U.S. Oct. 28, 2021) (mem.). Justices Sotomayor, Kagan and Breyer dissented.

[146] *See* Austin Sarat, *Oklahoma Botched Yet Another Execution*, SLATE (Nov. 1, 2021), https://slate.com/news-and-politics/2021/11/oklahoma-botches-another-execution-using-lethal-injection-drugs.html [https://perma.cc/D26P-CGHY].

[147] Nicholas Bogel-Burroughs, *Oklahoma to Continue Lethal Injections After Man Vomits During Execution*, N.Y. TIMES (Oct. 29, 2021), https://www.nytimes.com/2021/10/29/us/oklahoma-execution-lethal-injection.html [https://perma.cc/AB75-2J7C].

[148] Ford v. Wainwright, 477 U.S. 399, 406 (1986) (holding that the Eighth Amendment forbids the execution of a prisoner whose mental illness at the time a sentence is to be carried out, prevents him from rationally understanding his execution).

[149] Kim Chandler, *Aging Death Row: Is Executing Old or Infirm Inmates Cruel?*, AP NEWS (April 18, 2018), https://apnews.com/article/d4d2040cceed48529d17cc33438a72cd [https://perma.cc/UW3P-FKZD].

[150] 139 S. Ct. 718, 729 (2019) (calling for judges to carefully "attend to the particular circumstances of a case and make the precise judgment" of whether a prisoner's dementia inhibits his rational understanding of his sentence).

[151] Alexander H. Updegrove & Michael S. Vaughn, *Evaluating Competency for Execution after* Madison v. Alabama, 48 J. AM. ACAD. PSYCHIATRY L. 530, 534 (2020).

[152] *See,* Madison v. Alabama, 138 S.Ct. 943 (2019) (mem.) (granting application of stay).

[153] *See* Steve Almasy & Mayra Cuevas, *Supreme Court stays execution of inmate who lawyer says is not competent*, CNN (Jan. 26, 2018), https://apnews.com/article/d4d2040cceed48529d17cc33438a72cd [https://perma.cc/3R9T-TYAH].

And beyond the individual prisoners who will be denied stays they ought to receive, the legal doctrine itself will suffer, which will affect all similarly situated future plaintiffs. If Madison had brought his claim in 2021 under the new implicit standard categorically disfavoring last-minute stays, it seems unlikely the Court would have delayed his execution to hear his appeal. This would have left the question presented by his case unresolved and other capital defendants with dementia facing execution uncertain as to how to raise their *Ford* claims, or whether there is any point to raising them at all.

Furthermore, *Madison* is one of many cases that could be pointed to in response to those who defended the Court's vacaturs in the federal cases by arguing that relief was not proper in any of those cases because it was not ever clear that the petitioners were likely to succeed on the merits.[154] The legal question in *Madison*'s case was not clearly answered at the time the Court stayed his execution (in fact, that was precisely why the Court issued a stay), and even after the Court issued its opinion, there was still considerable doubt as to whether the Eighth Amendment right the Court articulated made Madison's own execution illegal.[155] In the context of capital cases, an exacting requirement of success on the merits is simply unworkable in that it would stunt the development of law and is inconsistent with the Court's actual practice.

The Court's decision in *Madison* was not particularly prisoner-friendly, but it at least provided a modicum of clarity around when memory loss is and is not sufficient to make out a *Ford* claim. Indeed, the federal capital defendants executed in the last three months of the Trump administration suffered from the fact that numerous legal questions were not resolved in the cases of the capital defendants executed over the summer.[156] Especially at the Supreme Court, it is better to resolve these legal questions on which a life depends than to foist upon lower courts and death row prisoners alike an undeveloped doctrine to muddle through as an execution date looms. Even if the Court would like to eliminate protections such as *Ford*, it should do so by overruling cases on its merits docket, with an opinion signed by five or more justices, not through unsigned opinions arbitrarily vacating the stays which are predicate to the protection of *Ford* being meaningful.[157]

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[154] *Presidential Commission on the Supreme Court of the United States* 2–3, 16–19 (July 20, 2021) (written testimony of Hashim M. Mooppan), https://www.whitehouse.gov/wp-content/uploads/2021/09/Hashim-Mooppan.pdf [https://perma.cc/6L9X-L6L4] ("[W]hen a claim is not likely to succeed . . . the execution should not be postponed until the claim is finally rejected due merely to the existence of doubts and questions held by some judges.").

[155] *Madison*, 139 S. Ct. at 729–30 (remanding and requiring further adjudication before execution because "we come away at the least unsure whether" the state court erred in its adjudication of Madison's claim).

[156] *See, e.g.*, Mitchell v. United States, 140 S. Ct. 2624 (2020) (Sotomayor, J., statement respecting denial of stay) (noting that four federal executions in, considerable uncertainty still remains as to the meaning of the FDPA's requirement that sentences are carried out "in the manner prescribed by the law of the State in which the sentence is imposed.").

Even when all was said and done, this question remained unresolved despite the D.C. Circuit's offer to do so en banc on an expedited schedule. That question and others would arise again if the federal government ever resumed executions. *See Higgs*, 141 S. Ct. 648–49.

[157] There is reason to fear that this arbitrariness will fall disproportionately on defendants of color. *See* Phillips & Marceau *supra* note 13.

C. Effect on lower court decision making

The lower courts too have cause to complain, because they are saddled with unclear—and questionably controlling—guidance from the Supreme Court. They are forced to read the proverbial tea leaves of late night orders, which are increasingly unreasoned and unsigned. And while lower court judges always dislike being overruled, this concern is elevated in the context of last minute death penalty litigation. Judges know that their decision in a last-minute capital petition is very likely to be appealed to the Supreme Court, and that the Court is certain to pay attention if they give last minute relief to a petitioner. Additionally, the harm to litigants and others of reversal by the Supreme Court no doubt weighs heavily on judges when they are considering a request to stay an execution. For the defendant, lower court orders giving them relief can give them false hope, only to be dashed hours later by a subsequent Supreme Court order vacating the stay protecting their life. For these prisoners, it would surely have been better not to receive any stay at all than to have their life be the rope in a capricious tug of war. Therefore, good judges will pay careful attention to what the Court is saying and doing in terms of allowing or vacating stays in capital cases, to minimize the risk of stopping an execution only to have the Supreme Court allow it to proceed.

Already, lower Courts are applying the stricter standard themselves in capital cases, relying on signals that the Court has transitioned to a higher standard.[158] In a striking example, the Seventh Circuit vacated a district court's stay of Lisa Montgomery's execution based *primarily* on the statement that "last-minute stays of execution should by the extreme exception, not the norm" and that even if the delay was not strategic, nothing in Montgomery's petition overcomes the "strong presumption" that a stay will not be granted where a claim could have been brought sooner.[159] Eventually, if the Court consistently vacates lower court stays, lower Courts will stop bothering to grant them at all.[160]

Beyond the lack of clarity in the standard for granting a stay, lower courts also have to grapple with uncertainty as to the precedential value shadow docket rulings carry for the merits of a claim. In the past, the Court itself maintained that non-merits rulings carried minimal precedential effect.[161] However, some

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[158] *See, e.g.*, Price v. Comm'r, Ala. Dep't of Corr., 920 F.3d 1317, 1329 (11th Cir. 2019) (citing *Bucklew* and acknowledging that the court must address the fact that litigation was delayed).

[159] Montgomery v. Watson, 833 Fed. App'x. 438, 439 (C.A.7, 2021) (mem.) (alteration in original) (quoting *Bucklew*, 139 S. Ct. at 1134 & n.5).

[160] *C.f.* Dugger v. Johnson, 485 U.S. 945, 948 (1988) (O'Connor, J., dissenting from denial of application to vacate stay) ("If this Court defers only to grants of stays, while giving searching review to every denial of a stay, the lower federal courts may in time come to issue stays routinely. In that event, *Barefoot v. Estelle's* statement that stays of execution are not automatic in capital cases, would be effectively overruled) (quoting Wainwright v. Booker, 473 U.S. 935, 936, n. 3 (1985) (Powell, J., concurring)).

[161] See, e.g., *Lunding v. N.Y. Tax Appeals Tribunal*, 522 U.S. 287, 307 (1998) ("Although we have noted that '[o]ur summary dismissals are . . . to be taken as rulings on the merits in the sense that they rejected the specific challenges presented . . . and left undisturbed the judgment appealed from,' we have also explained that they do not 'have the same precedential value . . . as does an

lower court judges nonetheless peer into the shadows in search of guidance from the Court,[162] particularly as more and more important decisions are made on the shadow docket.[163] One federal judge has even created a framework categorizing the precedential value of different types of shadow docket result based on clarity to encourage lower courts to "defer to the [C]ourt's guidance, as terse as it may be."[164]

And the Court itself has recently suggested that it too believes its shadow docket orders deserve some deference. Though not a death penalty case, a recent example of this, is the "GVR"[165] the Court issued in *Gish v. Newsom*, a case regarding California's COVID restrictions.[166] The order instructed a district court to reconsider its decision preliminarily upholding California COVID restrictions affecting religious attendance in light of an earlier shadow docket decision, *South Bay II*, that itself did not even produce a majority opinion.[167] It is still not entirely clear what aspect of the four different opinions that emerged from *South Bay II* the Court though should inform the district court's further consideration.

The issue with binding lower courts to the Supreme Court's shadow docket is that the orders are terse at best and decide individual outcomes without articulating clear rules to apply going forward. And this is to be expected since it is hard to see how the orders could develop law on these complicated issues without full briefing, oral arguments, and greater time for consideration. Nevertheless, as Professor William Baude put it, "it is difficult for lower courts to follow the Supreme Court's lead without an explanation of where they are being led."[168]

Furthermore, difficulty and danger attends reading too far into shadow docket rulings. Consider the Fourth Circuit's denial of federal death row defendant Corey Johnson's motion to stay his execution to allow him to prove that

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opinion of this Court after briefing and oral argument on the merits.'" (quoting *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 477 n.20 (1979)) (alterations in original)).

[162] *See, e.g.*, CASA de Maryland, Inc. v. Trump, 971 F.3d 220, 281 n.16 (4th Cir.) (King, J., dissenting) (admonishing the majority for its heavy reliance an emergency order staying related injunctions from district courts in other circuits), reh'g en banc granted, 981 F.3d 311 (4th Cir. 2020).

[163] *See* Stephen Vladeck, *The Supreme Court Needs to Show its Work,* ATLANTIC (March 10, 2021, 9:35 AM) https://www.theatlantic.com/ideas/archive/2021/03/supreme-court-needs-show-its-work/618238/ [https://perma.cc/CXX9-Y732].

[164] Vetan Kapoor & Judge Trevor McFadden, *Symposium: The Precedential Effects of Shadow Docket Stays*, SCOTUSBLOG (Oct. 28, 2020, 9:18 AM) https://www.scotusblog.com/2020/10/symposium-the-precedential-effects-of-shadow-docket-stays/ [https://perma.cc/DE6W-M4UK]. *But see, The Precedential Effects of the Supreme Court's Emergency Stays*, 44 HARV. J.L. & PUB. POL. 827 (2021) (acknowledging that due the fact-intensive, unique and irreversible characteristics of capital stay decisions, they "may not, as a practical matter, offer lower courts much precedential value").

[165] *See* Aaron-Andrew P. Bruhl, *The Supreme Court's Controversial GVRs - And an Alternative*, 107 MICH. L. REV. 711, 712 (2009) (describing and critiquing the practice of issuing a GVR: granting a petition for certiorari, vacating a lower court opinion, and remanding for further consideration).

[166] No. 20A120, 2021 WL 422669 (U.S. Feb. 8, 2021) (mem.).

[167] *Id.; see also,* S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716 (2021) (mem.).

[168] Baude, *supra* note 7, at 18.

his intellectual disability made him ineligible for the death penalty under the Federal Death Penalty Act (FDPA).[169] Judge Motz wrote a concurring opinion arguing that the strong evidence Johnson presented of his intellectual disability under prevailing clinical standards, raised a "grave" challenge to "the propriety of now executing him."[170] But Judge Motz nonetheless concurred in the denial of Johnson's motion, because she believed the issue was resolved by the fact that a month earlier the Supreme Court, without any explanation, had denied a stay of execution to Alfred Bourgeois who also brought a successive claim under the same provision.[171] Indeed Judge Motz approvingly quoted Justice Sotomayor's dissent in *Bourgeois*—the only writing that accompanied the order—before inferring that since the whole Court allowed Mr. Bourgeois' execution to go forward, a majority must have rejected Sotomayor's construction of the FDPA's prohibition on the execution of the intellectually disabled.[172]

But it is far from clear that a majority of the Supreme Court did disagree with Justice Sotomayor's reading of the FDPA on the merits, especially given that no member of the majority explained their thinking at all. Several distinctions between the two cases might have been relevant, including the Court's perception that Mr. Bourgeois had delayed bringing his claim. This possibility was not explored by Judge Motz and we do not know whether she would have ruled the same way if she knew that a new presumption against last minute claims, rather than a rejection of Sotomayor's interpretation of the FDPA, was the reason the justices denied Bourgeois relief.[173]

D. Harms to the Court and the Rule of Law

Hasty denials or vacaturs of stays also creates issues for the justices themselves, for the Court as an institution and ultimately for our belief in the rule of law. For the justices, an unforgiving standard around stays of execution may undermine their ability to effectively adjudicate future cases. And for the Court, exhibiting an unwillingness to entertain the claims of individuals facing the irreversible infliction of society's gravest punishment inevitably undermines the Court's legitimacy and with it faith in the rule of law. The mere possibility or

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[169] 18 U.S.C. § 3596(c) (providing that "a sentence of death shall not be carried out" against someone who is intellectually disabled).

[170] *United States v. Johnson*, 2021 WL 118854, at *2 (4th Cir. Jan. 12, 2021) (Motz, J. concurring in part).

[171] *Id.*

[172] *Id.* (quoting *Bourgeois*, 141 S. Ct. at 509 (Sotomayor, J., dissenting)).

[173] Even when there is a per curiam it can be very hard to disentangle the impact of the delay versus the merits. For example, Judge Chutkan's one decision denying a stay was overturned on appeal in the D.C. Circuit because they said she read too much into the court's per curiam in *Lee* which, as discussed *supra* Part I.B, vacated a stay based on both the merits of Lee's Eighth Amendment challenge and the perceived delay in bringing it. *See In re Fed. Bureau of Prisons' Execution Protocol Cases*, 980 F.3d 123, 133-35 (D.C. Cir. 2020); *Matter of Fed. Bureau of Prisons' Execution Protocol Cases*, No. 19-MC-145 (TSC), 2020 WL 4915563 (D.D.C. Aug. 15, 2020), *appeal dismissed sub nom. In re Fed. Bureau of Prisons' Execution Protocol Cases*, No. 20-5252, 2020 WL 6038916 (D.C. Cir. Sept. 16, 2020), and *rev'd and remanded sub nom. In re Fed. Bureau of Prisons' Execution Protocol Cases*, 980 F.3d 123 (D.C. Cir. 2020)

appearance of any judge, let alone Supreme Court justices, succumbing to partisan pressures in their capital decisions "casts a cloud of illegitimacy over the criminal justice system."[174]

1. Disposing of so many capital appeals on the shadow docket creates perverse incentives for individual justices

The justices themselves are not well served by a categorical presumption against stays of execution. First, as *Johnson* shows, there seems to be a perverse incentive for justices not to write dissent in capital cases. Perhaps by consistently writing to underscore the wrongheadedness of the Court's orders greenlighting the federal executions, Justice Sotomayor actually added precedential weight to those decisions by making explicit the reasoning that a majority of the Court impliedly rejected.[175]

Second, if the Court realizes upon further reflection that it erroneously allowed an execution to proceed, the justices might nonetheless be reluctant to reverse course and admit their mistake, especially given the stakes of capital cases. This might explain Justice Kennedy's vote in *Glossip v. Gross* to allow Oklahoma to continue using midazolam despite clear evidence that its "ceiling effect" renders it an exceedingly poor choice as a sedative in executions.[176] Joining the four liberal justices in dissent in *Glossip* would have required an acknowledgement that the Court should have stopped Charles Warner's execution. If this is correct, one hastily denied stay led to the continued use of a sedative that does not adequately keep people from experiencing physical and mental anguish during their execution. Justice Kavanaugh's statement in *Murphy* also supports this point.[177] While Justice Kavanaugh, and Chief Justice Roberts who joined him, were willing to correct their mistake and prevent further religious discrimination, they did not own up to the error in *Ray* and instead issued a two-months too-late statement relying on tenuous nuances to distinguish *Ray* from *Murphy*.[178]

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[174] Woodward v. Alabama, 571 US 1045, 1050–51(2013) (Sotomayor, J., dissenting from denial of certiorari).

[175] *See,* Kapoor & McFadden *supra* note 165 (arguing that "dissents from" shadow docket decisions should serve as persuasive authority).

The liberal justices on the Court increasingly face a Hobson's choice between explicitly calling out the seemingly drastic changes being made to precedent and practice, and potentially reinforcing them, or playing along with the conservative majority's characterization of their actions as standard incremental precedential developments. Justice Sotomayor seems to be increasingly choosing the former over the latter. *See, e.g.*, Jones v. Mississippi, 141 S. Ct. 1307, 1328 (2021) ("[T]he Court attempts to circumvent *stare decisis* principles by claiming that the Court's decision today carefully follows [prior precedent]. The Court is fooling no one." (citations omitted).

[176] *See* Freedman *supra* note 133 at 657 n.71 (correctly predicting that the justices might have some "psychological reluctance" to rule in favor of the three remaining Oklahoma plaintiffs after denying Warner's request for a stay).

[177] Murphy v. Collier, 139 S. Ct. 1111, 1111–12 (2019) (mem.)

[178] *See* notes 49-51 and accompanying text.

2. Unreasoned and reflexive denials of prisoners' claims undermine the Court's legitimacy and the rule of law

A doctrine that reflexively closes the door to death row prisoners' appeals does not allow the Court to engage in the deliberate decision making that should characterize the actions of the highest court in a mature democracy. In fact, the Court's federal capital decisions did not even live up to the standards it holds the executive branch to in the context of agency decision making.[179] Regardless of one's view of capital punishment, it is not controversial to hope that our capital punishment system will be as free as possible of arbitrariness and the appearance of it. But the Court's current ad hoc and unforgiving standard, which seems to make exceptions primarily for prisoners bringing claims around religious rights, appears profoundly and increasingly arbitrary.[180] That the highest court in our judicial system is the primary source of this apparent arbitrariness compounds the problem in several ways. First, these unsigned orders signal a lack of accountability on the part of the justices to the people whose lives are in their hands, and to those of us watching. Second, that the orders are not justified by articulated reasons creates a lack of transparency leading not only to the confusion discussed above in the context of capital litigation, but also to an erosion of the public's esteem for the Court and faith in the rule of law in general.[181]

The Court is now solidly made up of conservative justices, and more likely than at any point in modern history to issue decisions that are relatively predictable based upon justices' partisan affiliations.[182] Taking as a given that the results are increasingly preordained, especially in the context of capital punishment, the fact remains that the way the Court makes decisions matters enormously. In the coming decades there is little doubt that the liberals and progressives will stridently disagree with many of the decisions that the Court makes, but it is not preordained that they will also disagree with the way the Court makes those decisions. It should be more important to the conservative justices than anyone else that those who disagree with—but are nonetheless

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[179] Dep't of Homeland Sec. v. Regents of the Univ. of California, 140 S. Ct. 1891, 1909 (2020) (requiring the executive to "turn square corners in dealing with the people" and "defend its action[ ]" with consistent reasoning) (citations omitted); Dep't of Com. v. New York, 139 S. Ct. 2551, 2576 (2019) (requiring "[r]easoned decisionmaking . . . [and] an explanation for agency action", not distraction or obfuscation).

[180] Dunn v. Price, 139 S. Ct. 1312, 1313 (2019) ("Should anyone doubt that death sentences in the United States can be carried out in an arbitrary way, let that person review the following circumstances as they have been presented to our Court this evening.") (Breyer, J., dissenting from vacatur of stay).

[181] Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148, 151, 167–68 (2019) ("[T]he Supreme Court plays a significant role in the public imagination as a citadel of justice. For many Americans, given the Supreme Court's salience, faith in the Court may be deeply intertwined with feelings about the very idea of law.").

[182] *Id.* at 152.

governed by—their decisions cannot complain about *how* those decisions are being made.[183] On this score, the conservative Court is not off to a good start.[184]

First, the justices have not acted with accountability as a whole or individually when it comes to the capital shadow docket. Collectively, the Court has repeatedly denied stays to death row prisoners , and worse, vacated lower court stays without explanation. I have cataloged numerous examples above. Perhaps the historical nadir of the Supreme Court's accountability is *United States v. Higgs* where the Court granted certiorari before judgment and reversed the Federal District Court of Maryland without so much as a word of explanation.[185] The text of the FDPA allows a district court to either sentence a federal defendant to die "in the manner prescribed by the law of the State in which the sentence is imposed" or "[i]f the law of the State does not provide for implementation of a sentence of death, the court shall designate another State [under whose law] the sentence shall be implemented."[186] When Mr. Higgs was sentenced to death, he was sentenced to die in Maryland, but the State subsequently abolished the death penalty and the government asked the Court to amend or supplement the sentence to allow the execution to take place in Indiana. The district court applied a textualist reading of the statute, and held that the "designation of a different state . . . invariably occurs at the time of sentence" and accordingly the court is without "jurisdiction . . . to amend or supplement its judgment well after the fact."[187] It is difficult to imagine the textualists on the Supreme Court writing an opinion explaining why this analysis was incorrect, but they did reach the contrary result through an unprecedented, unsigned order.[188]

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[183] *See, e.g.*, *id.* at 163; Tom R. Tyler & Kenneth Rasinski, *Procedural Justice, Institutional Legitimacy, and the Acceptance of Unpopular U.S. Supreme Court Decisions: A Reply to Gibson*, 25 L. & Soc'y Rev. 621, 627 (1991) (arguing that "the legitimacy of the U.S. Supreme Court is based on the belief that it makes decisions in fair ways, not on agreement with its decisions").

[184] Of course the justices might point out that their approval at the moment is relatively high, far better than the other two co-equal branches, and indeed at the end of 2020, it was doing better among Democrat than Republican poll respondents, likely due to its dismissal of challenges to the presidential election. Kathy Frankovic, *Election Cases Hurt the Supreme Court's Image Among Republicans*, YouGov (Dec. 18 2020, 3:00 PM), https://today.yougov.com/topics/politics/articles-reports/2020/12/18/election-cases-hurt-supreme-courts-image [https://perma.cc/VU45-WWQW]. To the extent this refutes my argument, it is only due to the unhappy fact that death penalty cases are not the most salient on the Court's docket, and the average American is simply not paying attention to the capital shadow docket.

[185] United States v. Higgs, 141 S. Ct. 645, 645 (2021) (mem.).

[186] 18 U.S.C. § 3596(a).

[187] United States v. Higgs, No. PJM 98-520, 2020 WL 7707165, at *6 (D. Md. Dec. 29, 2020), *rev'd and remanded*, 141 S. Ct. 645 (2021).

[188] Justice Kagan has famously declared that the Supreme Court justices are "all textualists now." Harvard Law School, *A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YouTube (Nov. 25, 2015) (at 8:25), https://www.youtube.com/watch?v=DPEtszFT0Tg [https://perma.cc/6JSD-M7XU]. Justices Gorsuch and Barrett have loudly and proudly declared their commitment to a strict textualism, and both might have had trouble signing a merits opinion reversing the district court's close reading of the statute in *Higgs*. *See* Confirmation Hearing on the Nomination of Hon. Neil M. Gorsuch to Be an Associate Justice of the Supreme Court of the United States, Hearing Before the S. Comm. on the Judiciary, 115th Cong. 131 (2017) (statement of Judge Neil M. Gorsuch) ("[W]hat a good judge always strives to do . . . is try to understand what the words on the page mean."); Confirmation Hearing on the Nomination of Hon. Amy C.

The fact that these decisions are unsigned creates accountability issues as well. Take for example *Dunn v. Smith*, the Court's first capital shadow docket decision after the federal executions, in which an unknown majority of the Court denied an application to vacate the Eleventh Circuit's stay of execution for a religious Alabaman prisoner seeking to have his pastor at his side in the execution chamber.[189] Justice Kavanaugh and the Chief Justice noted their dissent in a short statement reiterating their position from *Murphy*.[190] Justice Thomas did not join their dissent but noted that he would have vacated the injunction.[191] Justice Kagan—joined by Justices Breyer, Sotomayor, and Barrett—wrote a several paragraph long explanation of why she let the stay of execution stand based on her view that Alabama's policy violates the Religious Land Use and Institutionalized Persons Act's requirement that prisons adopt policies that least restrict prisoners' religious freedom.[192] The astute reader counting to nine will notice that two names are missing: Justices Alito and Gorsuch did not note their opinion, but at least one of them must have sided with Mr. Smith, the prisoner. But still today the public has no inkling which of them did so or why. Indeed, we are only left to observe three odd results: in *Ray,* a Muslim prisoner was allowed to die without his spiritual advisor; a few months later in *Murphy,* a Buddhist prisoner's execution was stopped because the Court said that a state could not selectively deny religious advisors access to the chamber; and the next year in *Smith*, a Christian prisoner's execution was stopped based on his claimed right to have his advisor present in the chamber. Surely Justice Gorsuch or Alito has a compelling explanation for these results, but as of now, the public does not even know which justice to ask for an explanation.

Justices have long cast dispositive anonymous votes on the shadow docket, but as the docket grows in importance, and as the capital shadow docket becomes harder and harder for prisoners to navigate, results like this become more common and more problematic. Not only does it create the appearance that the Court is deciding cases based on results and favored litigants rather than principles,[193] but it also makes it harder for prisoners to divine what sort of last-

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Barrett to Be an Associate Justice of the Supreme Court of the United States, Hearing Before the S. Comm. on the Judiciary, 116th Cong. (stating that her textualism requires her to "appl[y] the law as written").

[189] Dunn v. Smith, 141 S. Ct. 725 (2021) (mem.).

[190] *Id.* at 726–27 (Kavanaugh, J., dissenting) (arguing that a state policy that equally bars all clergy from the execution chamber should be allowed, but that as a practical matter states should nonetheless allow clergy in to "avoid still further delays and bring long overdue closure for victims' families"). It bears mentioning that their position in *Murphy* is no doubt what Alabama relied on when it changed its policy to exclude all clergy from the execution chamber. Thus it is not only prisoners and lower courts who are harmed by the Court's capriciousness on the shadow docket, but also states seeking to execute prisoners in a manner that will comply with the law. Alabama did not know that one of the justices who would have granted no relief to the Buddhist prisoner in Texas would mysteriously change his mind when a Christian prisoner in Alabama was to be treated the same way.

[191] *Id.* at 725.

[192] *Id.* at 725–26.

[193] The Supreme Court's Shadow Docket, Hearing Before the House Judiciary Comm., Subcomm. on Courts, Intellectual Prop. & Internet, 117th Cong. 6 (2021) (written statement of

minute arguments might be met favorably, leaving them to throw everything at the wall to see what might stick. While there are good reasons for giving the members of a firing squad the plausible deniability that comes from inserting a blank into some of their guns, the judges at the helm of our criminal justice system deserve no such dispensation.[194] The Justices should sign their names when they send a prisoner to die, or when they spare his life.

The Court has long acknowledged that its "power lies . . . in its legitimacy" and thus that "a decision without principled justification would be no judicial act at all."[195] And principled justifications do little to reinforce legitimacy if they are not elaborated. Perhaps the justices believe that this principle only constrains the Court in the most politically salient cases before it. But the shadow docket is increasingly host to many such high-profile issues,[196] and I believe the justices underestimate the salience of the death-penalty at their own peril. Others who study the Court's legitimacy in this area like William Baude agree, "this is no way to run a railroad."[197] For capital defendants, the Court itself, and the legitimacy of our legal system, something has to change.

IV. Potential reforms to the Capital Shadow Docket

Thus far I have argued that the Court acted in an unjustified and basically lawless way when it short-circuited the late-stage legal processes of the thirteen federal prisoners facing execution. I have also argued that the Court should not continue cutting short the legal claims of those facing execution. But in the months following the federal executions, there has been little indication from the Court that it is likely to change its approach to the capital shadow docket on its own. Instead, the lawlessness of the capital shadow docket demands a response from the co-equal branch constitutionally empowered to curb the Court.[198]

Stephen I. Vladeck), https://docs.house.gov/meetings/JU/JU03/20210218/111204/HHRG-117-JU03-Wstate-VladeckS-20210218-U1.pdf [https://perma.cc/UKE7-4N9J].

[194] Thank you to Professor Carol Steiker for this apt analogy.

[195] Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 865 (1992).

[196] *See, e.g.*, Whole Woman's Health v. Jackson, 141 S. Ct. 2494 (2021) (mem.) (denying application for vacatur or injunction).

[197] Will Baude, *Death and the Shadow Docket*, Reason (Apr. 12, 2019, 3:30 PM), https://reason.com/volokh/2019/04/12/death-and-the-shadow-docket/ [https://perma.cc/24ZP-FY4K].

[198] One might object at this point that reform should not come from Congress at all. After all, the over-use of the shadow docket is a problem entirely of the Court's creation, and one which is within its power to quickly correct. As one prominent shadow docket scholar told me in a private conversation, "all the best reforms exist inside the Court." While this institutionalist perspective might have merit in theory, especially considering the Court's relatively light merits docket, ultimately, I do not find it compelling. For starters, until the Court refused to use the shadow docket to stay Texas S.B. 8, Justice Sotomayor was the only member of the Court to even acknowledge that there is a problem with the way the Court is using the shadow docket, and she remains the only one to do so. *See* Little v. Reclaim Idaho, 140 S. Ct. 2616, 2618 (2020) (Sotomayor, J., dissenting from the grant of stay).

Justice Kagan did eventually take a stand in Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2500 (2021) (Kagan, J., dissenting), where she used strong language to criticize the Court's use of the shadow docket, saying it "every day becomes more unreasoned, inconsistent, and impossible to defend." However, the sophistication of her critique left a little to be desired. For example,

Some in Congress seem to agree with my assessment.[199] A subcommittee of the House Judiciary Committee held a hearing on the shadow docket in February 2021, a heavy focus of which was the capital cases, and the full Senate Judiciary Committee held a hearing on the Shadow Docket following its ruling on the Texas abortion ban in September.[200] Publicly acknowledging the need for a change to the Court's use of the shadow docket is an important first step towards reform.[201] Reasonable people might disagree about what the best reform is, but something must be done. And even introducing legislation targeting this problem could put tangible and impactful pressure on the Court. This Part briefly outlines and analyzes several possible congressional reforms to the capital shadow docket.

While the reforms I discuss here focus on the capital shadow docket, proceeding with any of them would likely have implications beyond it, at least expressively. Congressional action targeted narrowly at the capital shadow docket might be more politically and practically feasible than broader reform disabling the Court from resorting to its emergency orders power at all. For those interested in curbing the shadow docket generally, pointing to the Court's recent errors and inconsistencies on the capital shadow docket, and beginning reform from there, seems like an appropriate first step.

Ultimately I argue that the best option for congressional reform would be a statute automatically staying the execution of a prisoner pursuing their first challenge to their fitness to be executed or the method with which they will be executed.

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she puzzlingly said that the Court's decision in *Jackson* typified the Court's recent use of the shadow docket; however, *Jackson*, in contrast with many of the orders regarding the federal executions, articulated some reasons for leaving in place a reasoned (if sparsely) lower-court decision. The truly concerning uses of the shadow docket have neither of those positive characteristics.

The fact that even Justice Kagan does not seem to be meaningfully attuned to the real issues with the Court's use of the shadow docket suggests that if reform ever comes from within the Court, it will not happen until the chorus outside the Court grows louder and more specific in their criticism. This final section attempts to contribute to that project.

Further, beyond the unlikely prospect of the Court imminently reforming itself, I have doubts that any reform coming from within the Court would go far enough towards securing protections for capital defendants. The new majority has shown an appetite for speedy unimpeded executions, and I am not optimistic that they could be persuaded to abruptly return the Court to its previous more measured ways.

[199] The Presidential Commission on Supreme Court Reform has also been very focused on the shadow docket, and the capital shadow docket in particular, though this Note focuses on Congress' options, because ultimately any meaningful Court reforms will have to be legislative.

[200] Supreme Court Docket and Case Load, Hearing Before House Judiciary Comm., Subcomm. on Courts, Intellectual Prop. & Internet, 117th Cong. (2021); Texas's Unconstitutional Abortion Ban and the Role of the Shadow Docket, Hearing Before the Senate Judiciary Comm., 117th Cong. (2021).

[201] *Cf.* Epps & Sitaraman, *supra* note 182, at 152 ("Whether policymakers adopt these precise proposals or not, it is imperative that they search for reforms along these lines. Doing nothing means that the Court's legitimacy will continue to suffer in the eyes of the public.").

A. Jurisdiction-based reforms

1. Strip the Court of jurisdiction to review lower court stays and temporary injunctions of executions

Starting off bold, Congress could strip the Court's jurisdiction to review lower-court decisions delaying executions to allow litigation to proceed. This could be accomplished through a carefully drafted standalone piece of legislation providing that, "notwithstanding any other jurisdictional provisions, the Supreme Court shall not have jurisdiction to review, by appeal, writ of certiorari before judgment, or otherwise, any decision of a lower court granting a temporary stay or injunction of a scheduled execution."[202] Alternatively—though I think more riskily–the jurisdiction strip could be accomplished by identifying and amending the various provisions under which the Court's jurisdiction is currently invoked and accepting review of lower-court stays of execution under them.[203]

Stripping the Court's jurisdiction to vacate lower court stays should not raise constitutional objection because it would not strip the Court of jurisdiction entirely—which itself would not necessarily be unconstitutional –[204] but would merely regulate the time at which the Court could take an appeal over a certain class of cases. The Court can only exercise jurisdiction over appeals of stay decisions, which by their nature are not final judgements, because Congress gave it the power to do so in 28 U.S.C. § 2101(f)[205] and in the All Writs Act.[206] When submitting an application to vacate a stay, government lawyers generally assert jurisdiction under the Supreme Court's Rule 23, which itself references § 2101(f) and the All Writs Act.[207] What Congress gives the Court,

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[202] *Cf.* H.R. 3676 (2017) (proposing similar, but broader, language to limit the Court's jurisdiction to review any state statute on abortion).

[203] I say this is a riskier approach because the Court has seen its way around such jurisdiction strips in the past by invoking other sources of jurisdiction. *See, e.g.*, Ex parte Yerger, 75 U.S. 85, 106 (1868) (holding that the Court still had jurisdiction over appeals of habeas decisions under Section 14 of the Judiciary Act of 1789, notwithstanding Congress' abrogation of its direct appellate jurisdiction over those cases in the Act of 1867 upheld in *Ex parte McCardle*, as explained in the following footnote).

[204] *See, e.g.*, Ex parte McCardle, 74 U.S. 506, 515 (1868) (upholding statute stripping the Supreme Court of jurisdiction to directly review lower federal court habeas decisions). Of course, the scope of *McCardle*'s holding is the subject of ongoing debate, but the narrow and time-limited strip of jurisdiction over a specific class of cases contemplated here is necessarily within even the narrowest reading of *McCardle*. *See* Patchak v. Zinke, 138 S. Ct. 897, 907 n.4 (2018) ("[T]he core holding of *McCardle*—that Congress does not exercise the judicial power when it strips jurisdiction over a class of cases—has never been questioned.").

[205] This subsection provides: "In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court."

[206] 28 U.S.C. § 1651(a) ("The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.").

[207] *See, e.g.*, Application for Stay or Vacatur of Injunction at 1, Barr v. Purkey, 140 S. Ct. 2594 (2020) (No. 20A9).

it can take away, and amending these acts to limit the Court's power to take an interlocutory appeal over ongoing litigation is well within Congress' constitutional authority to make exceptions and regulations to the Court's appellate jurisdiction.[208]

This reform would disable the Court from cutting short last-minute capital cases, and it would send a broader message of disapproval to the Court. If Congress is concerned with the Court's expanding use of the shadow docket, taking this step might even cause the Court to rely less on the shadow docket, and would do so in a relatively limited and innocuous way, leaving the Court with flexibility to maneuver and invoke its emergency orders power as necessary.[209] Additionally, while this would not be a meek reform, it would be unlikely to spark a direct and potentially destabilizing confrontation.

One likely response to this reform is that it goes too far and would make it too easy for a handful of activist lower court judges to bring the capital punishment system to a halt. If Congress means to end the death penalty in the United States, perhaps it should go about doing so in a more transparent and accountable way.[210] However, in light of the limited scope of the jurisdiction strip to only reach interlocutory appeals, this response seems overblown. The gears of executions would only stop turning if a majority of judges in a given circuit were willing to play along with indefinite delay of litigation, never issuing a final ruling over which the Court would regain jurisdiction. Lower court judges are bound to even-handedly apply the law just the same as the justices of the Supreme Court are, and even the Ninth Circuit denies many—likely most—applications for last minute stays of execution.[211] There is no particular reason that Congress should not be able to decide that lower courts are entitled to unexamined discretion when they believe they need more time or further proceedings to determine the legality of an impending execution.

A different but related counter-argument is that this change would make it hard for the Supreme Court to weigh in on the legal questions unique to stays of execution, including the appropriate standard for granting them. Perhaps this is actually the point of the reform. If Congress did this, it would be expres-

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[208] U.S. CONST. art. III, § 2, cl. 2 ("[T]he supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.").

[209] *See* Katie Barlow, *Alito Blasts Media for Portraying Shadow Docket in Sinister Terms,* SCOTUSBLOG (Sept. 30, 2021, 6:59 PM), https://www.scotusblog.com/2021/09/alito-blasts-media-for-portraying-shadow-docket-in-sinister-terms/ [https://perma.cc/3L6Z-PERU]; Mark Rienzi, *The Supreme Court's "Shadow" Docket: A Response to Professor Vladeck,* NAT'L REVIEW. (Mar. 16, 2021, 1:30 PM), https://www.nationalreview.com/bench-memos/the-supreme-courts-shadow-docket-a-response-to-professor-vladeck [https://perma.cc/9EFX-DA6J].

[210] Whether Congress even has the power to end capital punishment in the states is a matter of some debate. There is a legitimate argument that given the Court has held that capital punishment is constitutional, Congress does not have the power to second guess that decision under *City of Boerne v. Flores*, 521 U.S. 507 (1997). However, I believe that with a strong factual record showing that the death sentence is imposed and carried out in an impermissibly discriminatory manner, Congress might be able to legislate (at least temporarily) the death penalty out of existence.

[211] *See, e.g.*, United States v. Mitchell, 971 F.3d 993, 995 (9th Cir. 2020) (per curiam).

sing its judgment that the Court's new standard for capital stays is wrong. However, without additional legislation affirmatively saying what the standard should be—which I propose below—lower courts might find themselves stuck with the Court's new standard categorically disfavoring all last-minute stays, particularly if the Court's upcoming decision in *Ramirez* articulates it more clearly in a merits decision.

Without further legislation articulating a standard for capital stays, there would be nothing to stop the Court from reviewing, after the fact on appeal of a final judgment, a lower court's grant of a stay, and suggesting that a stay should not be granted again in similar circumstances.[212] Of course, it would be up to the lower courts to decide what precedential value such a statement in dicta would be entitled to. And even with statutory guidance as to the proper standard for evaluating stay applications, the circuits might reach different conclusions about the proper interpretation of that standard.

Thus this reform might not make it hard enough for the Court to at least attempt to influence lower court grants of stays, because even if some circuits ignored the Court's statements as dicta and contrary to Congress's intent, a lack of uniformity in the last-minute procedures available to death row defendants would be likely to emerge across the different circuits. Such arbitrariness in the capital punishment has historically been a powerful argument against the imposition of the death penalty,[213] and it is a challenging moral and jurisprudential question whether we should enact a reform that attempts to reinforce the constitutional safeguards on executions but which will not benefit all death row prisoners equally.

2. Create an intermediate capital court of appeals with exclusive jurisdiction to review stays of execution

This concern with inconsistency could be alleviated with the creation of a court, other than the Supreme Court, with appellate jurisdiction over stay decisions. The United States Death Penalty Court of Appeals would sit between the Supreme Court and the district courts, and have mandatory jurisdiction of all capital cases that the Supreme Court cannot bypass. Along with a strip of the Supreme Court's interlocutory jurisdiction over stays of execution, this specialized court would ensure uniformity and would be able to give last-minute capital cases the time and focus they require. This reform would take seriously the justices' articulated concern that last-minute litigation overburdens their docket,[214] and would respond by giving this duty to a court with the narrow mandate of reviewing last-minute capital appeals. The district courts would still be the first finders of fact and would deny or grant stay applications as neces-

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[212] *See, e.g.*, *Bucklew*, 139 S. Ct. at 1134 (emphasizing in dicta that stays should be the extreme exception).

[213] *See* Furman v. Georgia, 408 U.S. 238 (pausing capital punishment due largely to arbitrariness in the imposition of death sentences).

[214] *See supra* note 114 (questions of Justices Kavanaugh and Alito).

sary, but then appeals would be taken to and only to—the Death Penalty Court of Appeals, rather than to the circuits and then the Supreme Court.[215]

This might seem like an extreme and risky proposal, and I will note that none of the law professors I have discussed it with are on board. Many express the legitimate fear that creating specialized courts of appeal for politically charged issues is a slippery slope that leads to the politicization of the judiciary and undermines the rule of law. This concern is not unreasonable, and applies with some force to a jurisdiction stripping solution as well: perhaps neither is a road down which we want to walk, especially given the partisanship and norm-busting that characterizes our current political moment.

However, perhaps Congress occasionally flexing the power to rearrange federal jurisdiction is exactly what is required to keep the Court from following the political branches down the path towards partisanship. Indeed, Charles Black has long argued that Congress' plenary power over the federal courts' jurisdiction is the rock upon which the democratic legitimacy of Article III courts depends.[216] According to this view, Congress must have the power and wherewithal to act when the Court acts without legitimacy or in a way that is consistently contrary to the will of the populace. Of course there is a counter—that sometimes it is proper for the Court to act contrary to the will of the populace—and a counter to that, all of which is beyond the scope of this paper. Ultimately it is hard to separate one's priors about the Court's history and current direction around salient issues from one's intuitions about the appropriate relationship between the Court and the political branches. Pragmatically, I am skeptical of arguments that ask us to forgo a tool for popular political change today because of the potential that the tool will be turned against our interests at some far-off point in the future. I doubt that politics and the political effects of legal changes are so predictable.

Support for the idea of a specialized court has materialized from an unexpected quarter: Congressman Darrell Issa (R-CA) asked during the House of Representative subcommittee hearing on the shadow docket whether creation of such a court might be desirable.[217] It is also not unprecedented: both the United States Court of Appeals for the Federal Circuit and the United States Foreign Intelligence Surveillance Court of Review are Article III courts with specialized fields of jurisdiction. The United States Death Penalty Court of Appeals should be staffed with judges confirmed consistent with Article III, but it could be modeled either after the Federal Circuit with permanent judges

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[215] Stay appeals coming from state supreme courts would likely still need to go to the Supreme Court.

[216] Charles L. Black Jr., Decision According to Law 18 (1981) ("'Jurisdiction' is the power to decide. If Congress has wide and deep-going power over the courts' jurisdiction, then the courts' power to decide is a continuing and visible concession from a democratically formed Congress.").

[217] Supreme Court Docket and Case Load, Hearing Before House Judiciary Comm., Subcomm. on Courts, Intellectual Prop. & Internet, 117th Cong. (2021) (statement of Hon. Darrell Issa at 50:15), https://www.c-span.org/video/?509098-1/house-hearing-supreme-court-docket-case-load#&vod [https://perma.cc/69F9-XMZG]. It should be noted that Professor Vladeck gave a resounding "no" in response to this question. *See id.*

or after the Foreign Intelligence Surveillance Court with temporarily assigned judges.

The issue with the former is that permanently assigning judges would give the current President significant power to shape the new court, which might be practically advantageous if the proposal were enacted within the next few years, but would certainly politicize the Court and might raise *a fortiori* the concern discussed above regarding effectively stopping the implementation of capital punishment in the United States. The latter proposal of rotation might allay some of the concerns around politicization, although that would depend largely on how assignments were made—in the FISA Court, the Chief Justice makes the assignments, which would be less politicizing. A rotating bench would have the disadvantage of diminishing the subject matter expertise of judges on the court.[218]

Ultimately, though interesting and superficially appealing, I do not think jurisdiction-based reforms alone are the right way to proceed. First, if the Supreme Court is stripped of jurisdiction over capital cases, it is possible that no federal court would be empowered to review them, because a federalism issue might exist if Congress attempted to channel direct review of state courts of last resort decisions to a federal court other than the Supreme Court. Additionally, congressional action selectively stripping jurisdiction over particular issues from the Supreme Court may not be a precedent we should be eager to set, particularly not in the name of preserving the rule of law. The executive and legislative branches controlled by the same party and clearly empowered to remove from the Court's jurisdiction any matters over which they find a third branch's supervision inconvenient is a scary prospect.

B. Rules-of-decision-based reforms

1. Prescribe a deferential standard of review for the Supreme Court to apply to lower court grants of stays

A less confrontational option would leave the Supreme Court with final jurisdiction over capital stays and injunctions but would explicitly instruct the Court (and the courts of appeals) to afford significant deference to the decisions of lower courts granting prisoners relief. This is plainly constitutional. Congress has enacted many pieces of legislation requiring the federal courts to defer to the decisions of district courts or even of other adjudicators.[219] Take *Miller v.*

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[218] It would perhaps be more tolerable to the judges themselves to spend three-month rotations on a court whose role is to engage quickly and deeply with legal questions arising shortly before a capital sentence is to be carried out. Perhaps few judges would be interested in a life appointment to such a court characterized by long periods of idleness and short sprints of work, often requiring very late hours.

[219] *See, e.g.*, 18 U.S.C. § 3626(e) (Prison Litigation Reform Act providing for automatic stay of a court order granting a prisoner prospective relief); 42 U.S.C. § 2000cc (Religious Land Use and Institutionalized Persons Act instructing courts to apply strict scrutiny in certain situations); 5 U.S.C. § 706 (Administrative Procedure Act establishing various standards to different categories of agency decisions and actions).

French, where the Court upheld a provision of the Prison Litigation Reform Act (PLRA) that automatically stays injunctions granted to rectify unconstitutional prison conditions whenever prison officials challenge such injunctions.[220] If Congress can give one class of litigants the power to grant themselves an automatic stay of a court's judgment, and can further restrain all federal courts from using their equitable powers to enjoin that stay, then surely Congress can create a very deferential standard of review that the Supreme Court owes lower courts on interlocutory appeals of stays.

If Congress believes that deterring delay weighs too heavily in the current standard for staying executions, then it ought to say so. Congress made just such a calculation in 1996 when it enacted AEDPA and instructed federal courts exercising habeas jurisdiction to afford significant deference to state court decisions upholding convictions before exercising plenary review over them.[221] Professor Amir Ali suggested this reform in congressional testimony, arguing that "where a lower court has reviewed the record and determined that an execution is likely to violate the law . . . a lower court's request for additional time to consider the lawfulness of an execution should be disturbed only if it is apparent to the Supreme Court that the lower court's decision" was unreasonable in light of clearly established federal law or based on an unreasonable determination of the facts. It is not without irony that Professor Ali suggested the § 2254(d) standard which comes from AEDPA, where it is usually a barrier to capital litigants seeking federal review of state court decisions denying them relief.[222]

While there would be a certain poetic justice to requiring the Court to grant AEDPA deference to district court stays, a few improvements to the § 2254(d) standard, tailored to the setting of capital stays, would be useful. First, there is no reason that the law district courts are applying needs to be clearly established. In fact, that requirement would likely have allowed the Court to overturn most of the stays granted for federal prisoners just because the dearth of litigation over the FDPA meant that most of the law had not yet been established at all, least of all by the Supreme Court. The "clearly established" requirement has been the source of significant mischief in the context of capital litigation,[223] and while it would still restrain a district court from vacating an underlying state conviction, there is no reason to reiterate and reinforce it in our new standard, which is intended to make it easier to secure more time to consider the legality of an execution. Second, Congress ought to explicitly

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[220] 530 U.S 327, 350 (2000).

[221] 28 U.S.C § 2254(d) (instructing that federal courts should not overturn state court judgements unless they are "(1) contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence").

[222] The Supreme Court's Shadow Docket, Hearing Before the House Judiciary Comm., Subcomm. on Courts, Intellectual Prop. & Internet, 117th Cong. 6 (2021) (written statement of Amir Ali), https://docs.house.gov/meetings/JU/JU03/20210218/111204/HHRG-117-JU03-Wstate-AliA-20210218-U2.pdf [https://perma.cc/NT82-6PNT].

[223] *See, e.g.*, Sawyer v. Smith, 497 U.S. 227, 236 (1990) (holding that *Caldwell v. Mississippi*, 472 U.S. 320 (1985) was not clearly established prior to the petitioner's conviction).

address delay and say, in no uncertain terms, that the fact a claim is delayed in reaching the court, whether the delay is the fault of the prisoner or not, should not affect the court's decision of whether a stay is necessary.[224]

And finally, a court should not have to find that an impending execution is "likely" to violate the law, but merely that there is a "significant possibility" that it will.[225] Defenders of the Court's capital shadow docket decisions leaned on the idea that an execution should only be stopped if the prisoner is likely to succeed on the merits, and that most of the federal prisoners never reached that threshold.[226] This argument selectively ignores *Hill*'s articulation of a lower standard for those facing execution than the normal likelihood of success standard required for an injunction and the Supreme Court cases authorizing stays of execution even in the face of unsettled law or claims that turned out to not be successful.[227] Congress should articulate a standard that takes into account the irreversibility of an execution and the difficulty of establishing a likelihood of success in the face of the often unsettled law in this area.

Critics might ask whether the application of this reform to decisions to grants of stays but not to denials of stays unfairly gives prisoners the upper hand in litigation. But it is sensible for this deference only to apply in one direction, primarily because of the irreversibility of an execution.[228] Additionally, the Supreme Court and the courts of appeals need not give any particular deference to a lower court's decision that a claim does not merit further consideration. Appellate courts exist to decide whether a lower court missed something, and so should consider for themselves whether they require more time to consider the merits of a claim. On the other hand, when a lower court has concluded that it does need more time to adjudicate something fairly, and when a life is on the line, appellate courts should not second-guess that conclusion before the lower court has had time to actually make a decision, especially since appellate courts usually have far less time to consider the issue than lower courts do.

Another counter-argument might sound in federalism. A state might even raise a constitutional challenge to the reform as limiting the Court's core function of preserving the constitutional balance between federal and state power. While there might be some cases that provide meager support for such an argu-

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[224] If this seems like too categorical an approach, then perhaps Congress could at least set a safe-harbor date. For example, the statute might provide that all claims that are brought at least a week before a scheduled execution would be entitled to deference under the statute.

[225] Hill v. McDonough, 547 U.S. 573, 584 (2006).

[226] *See* Mooppan Testimony, *supra* note 155, at 2.

[227] *See, e.g.*, Bucklew v. Precythe, 139 S. Ct. 1112 (2019); Dunn v. Smith, 141 S. Ct. 725 (2021) (mem.).

[228] *Presidential Commission on the Supreme Court of the United States* 16 (June 30, 2021) (written testimony of Samuel L. Bray), https://www.whitehouse.gov/wp-content/uploads/2021/06/Bray-Statement-for-Presidential-Commission-on-the-Supreme-Court-2021.pdf [https://perma.cc/PD5K-AQ26] ("[T]here is no symmetry between an erroneous execution and an erroneous non-execution. If proper attention is given to irreparability and the need to preserve the judiciary's ability to decide a case, then the justices should be much more willing to give shadow docket orders that *delay* an execution than shadow docket orders that *accelerate* an execution."); Freedman, *supra* note 133, at 652–54 (arguing that executions should be stayed whenever necessary to afford the Justices "[t]ime to [t]hink" about whether to grant certiorari in a case).

ment, it does not seem particularly persuasive given that the Constitution does not explicitly say that it is the federal judiciary, much less the Supreme Court, that is solely responsible for preserving this balance, and any impingements on state sovereignty would be justified by constitutional violations—or potential violations—found by the lower federal courts. Furthermore, just as AEDPA represents a Congressional decision to require federal courts observe various rules based in comity before second guessing the final judgment of a state court, Congress has every right to push the needle a little way in the other direction.

A deference standard of review would be a good step, and would at least signal that Congress will not abide capricious shadow docket decisions sending prisoners to die when legitimate doubts remain regarding the legality of doing so. Additionally, the moderation of this reform, and its similarity to AEDPA, might make it more politically feasible. But I have doubts that it would really restrain the Court adequately in the long run because standards of deference are malleable, particularly in the hands of the Supreme Court. Furthermore, this reform would be of no use if the district and appellate courts that first adjudicate a claim themselves are deeply skeptical of delayed claims. If Congress is in the mood to take action on the capital shadow docket, perhaps it should go further than this.

2. *Automatically stay executions of prisoners bringing their first challenge to their fitness or method of execution*

Prisoners should have an opportunity to litigate their challenge to their fitness to be executed and the method of their execution, and they should receive a reasoned decision one way or the other. This could be accomplished, as Professor Ali also suggested, by requiring the Court to "state its reasons for concluding that the lower court's decision" to stay an execution was incorrect.[229] Congress might go even further and require the Court to overturn a stay of execution—if at all—on its merits docket. This more aggressive reform would have the paradoxical benefit of being less constitutionally questionable. Constitutional questions might arise if Congress tried to tell the justices that they must sign their names or how long or detailed their opinions must be,[230] but since the Court's "rules of decisions" test most explicitly prevents Congress from arrogating judicial power,[231] Congress is certainly empowered to ask the Court to exercise *more* judicial power by holding arguments and issuing an opinion that sets down a principle reaching beyond the present case.[232]

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[229] Ali Testimony, *supra* note 222, at 6.

[230] Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 225 (1995) (providing that Congress cannot direct "what particular steps shall be taken in the progress of a judicial inquiry").

[231] *See id.*; United States v. Klein, 80 U.S. (13 Wall.) 128, 146 (1871).

[232] *But see* Schiavo ex rel. Schindler v. Schiavo, 404 F.3d 1270, 1272–75 (11th Cir. 2005) (Birch, J., specially concurring) (arguing the Act for the Relief of the Parents of Theresa May Schaivo, Pub. L. 109-3 (2005), violates separation-of-powers principles for a variety of reasons, most relevant here because the power to extend or withdraw jurisdiction does not include a power to dictate "how a federal court should exercise its judicial functions"), *stay denied*, 544 U.S. 957 (2005). While some of Judge Birch's language might extend to this context, it is not necessarily

But Congress could do something that is both simpler and even less constitutionally controversial: grant an automatic stay to prisoners who are going to be executed before their challenge to their execution can be heard. Justice Scalia once announced his uncontroversial policy of staying executions long enough for the Court to decide on a pending petition for direct review.[233] And justices have previously called for, and an informal norm generally guarantees, prisoners a chance to litigate their first federal habeas petition before they are executed.[234]

A similar presumption should exist for prisoners who wish to challenge their fitness to be executed or their execution method, particularly at a time when states are experimenting with new methods of execution to circumvent the limitations on access to the drugs traditionally used.[235] Thus I envision a statute that automatically stays an execution – or requires district courts to grant a stay – where an execution date has been set and a prisoner is challenging their fitness to be executed under *Ford* or *Atkins*, the method of their execution under *Glossip* and *Bucklew*, or the infringement on their religious exercise under RLUIPA and—presumably—*Ramirez*.

A prisoner would not be entitled to unlimited automatic stays, but would get one opportunity to file a § 1983 petition that includes all the challenges to their execution that they intend to lodge. Successive petitions could be subject to the same sort of rules governing successive habeas petitions under AEDPA, where a second chance would only be allowed if a state changed the execution procedures or withheld information so that a particular aspect of the execution could not be challenged the first time around.[236] This would prevent states from manufacturing last-minute urgency by setting such short timelines that prisoners cannot meaningfully bring their intrinsically delayed claims. It would essentially require states to set execution dates at least six months in advance to allow these claims to be adequately raised, briefed, and decided without running up against the clock.

Ultimately this seems to be the simplest and most straightforward reform congress could enact. The stay mechanism is similar to the one the Court ap-

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true that he would see these requirements as raising the same issues as Congress' instructions in the Schaivo case because that law applied only to one family and explicitly interfered in pending state court litigation, and was thus closer to the traditional "rule of decision" forbidden by *Klein*.

[233] Cole v. Texas, 499 U.S. 1301, 1301 (1991) (Scalia, J., in chambers) ("While I will not extend the time for filing a petition beyond an established execution date, neither will I permit the State's execution date to interfere with the orderly processing of a petition on direct review by this Court.") (citation omitted).

[234] Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, *Report on Habeas Corpus in Capital Cases*, reprinted in 45 Crim. L. Rep. 3239 (1989) (the commission, chaired by Justice Powell, recommended formalizing entitlement to an automatic stay of execution during the pendency of a prisoner's first federal habeas petition); Emmett v. Kelly, 552 U.S. 942, 943 (2007) (statement of Stevens, J., joined by Ginsburg, J., respecting denial of certiorari) (endorsing the same proposal).

[235] Ken Ritter, *Second Nevada Death Row Inmate Seeks to Join Zane Floyd Execution Case*, AP News (July 24, 2021) https://news3lv.com/news/local/second-nevada-death-row-inmate-looks-to-join-zane-floyd-execution-case [https://perma.cc/HF34-YXUP] (discussing Nevada's "plan to administer drugs never before tried in any lethal injection in any state").

[236] *See* 28 U.S.C. § 2244(b)(1)–(2); *see also infra* note 245, describing this standard.

proved in *Miller v. French*.[237] If anything, it is less potentially problematic than the PLRA which stays a judge's relief of a constitutional violation just in case a higher court does not believe there is a violation. On the other hand, if this proposed reform undermines judicial power at all, it is by delaying the implementation of decision finding an execution constitutionally acceptable just in case a higher court believes there is a violation. It would ensure that at least two federal courts fully consider the legality of an execution before it proceeds. And applied to state executions, it is plainly within Congress' Fourteenth Amendment enforcement power. Opponents would argue that this will just further delay executions, and it would likely lead most prisoners to bring some challenge, no matter how frivolous, to their executions. However, as I have argued throughout, a short delay is a small price to pay to ensure that the most serious punishment in our penal system is meted out lawfully.

C. Upstream reforms

Finally, we could take the Supreme Court at their word and join them in their effort to minimize last minute stays of execution by enacting reforms that make it easier for prisoners to bring their claims earlier, ideally before their execution dates have been set. The ways in which other laws and doctrines prevent prisoners from raising their claims until the last-minute are manifold.[238] For example, AEDPA makes it very difficult to raise successive claims or to present new evidence challenging a conviction.[239] Since the ways in which the courthouse doors are shut to prisoners earlier in the appeals process are so numerous, there are many ways we might go about opening them.

One potential reform that has long been discussed, and which was recently brought back up by Professor Vladeck in his congressional testimony is giving the Court mandatory appellate jurisdiction over appeals of capital sentences.[240] He optimistically noted that this would "make it easier for death-row prisoners to bring timely method-of-execution challenges."[241] Justice Rehnquist first suggested something along these lines in *Coleman v. Balkcom*.[242] Frustrated with the delay in resuming executions after *Gregg*, he proposed a regime where the Court would grant certiorari in every state capital habeas case, "review" and deny petitioners' claims, and thus trigger 28 U.S.C. § 2244(c), which would foreclose any further federal jurisdiction.[243] With great respect for Professor Vladeck, I think the most likely outcome of this proposal, particularly with current makeup of the Supreme Court, would be the same as Justice Stevens foresaw in the 80s: making "the primary mission of th[e] Court the vindication

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[237] 530 U.S. 327 (2000).
[238] *See generally* Tushnet, *supra* note 19.
[239] *See* Kovarsky, *supra* note 8, at 1336.
[240] *See* Vladeck, *supra* note 194, at 18.
[241] *Id.* However, as discussed above, Eighth Amendment claims are often not ripe until states set execution dates, so this would not necessarily mean that prisoners are able to bring their claims "early" as opposed to "timely."
[242] 451 U.S. 949, 963 (1981) (Rehnquist, J., dissenting from denial of certiorari).
[243] *Id.*

of certain States' interests in carrying out the death penalty."[244] Anyway, allowing prisoners to appeal as a right to the Supreme Court would not actually solve many of the issues leading to delay, unless the Court was also empowered to, for example, appoint special masters in each case to conduct evidentiary hearings. Even then, and even if the Court was inclined (and constitutionally enabled) to waive the normal justiciability rules that make many claims unripe until an execution date has been set, many of the facts underlying *Ford* or *Glossip* claims must be found very close to the moment of execution for them to be meaningful at all.

Instead, we could amend AEDPA to make it easier to raise claims earlier. For instance, Congress could amend 28 U.S.C § 2244, into which AEDPA inserted strict limits on successive claims, and return to the more permissive pre-1996 regime where successive claims can be brought if the "ends of justice permit it."[245] If it were not so hard for prisoners to bring claims earlier, there would be less excuse for not raising meritorious claims as soon as they discover them. To the extent that prisoners do wait to raise new claims in successive federal petitions, it is at least partially because they have very little to gain by bringing them sooner and they may believe that courts are less likely to hold them to the strictest interpretations of AEDPA when their actual execution is imminent.

Conclusion

Like never before, the Court's capital shadow docket is governed by "[p]ower, not reason."[246] During the October 2019 term there were eleven "5 to 4" shadow docket rulings—almost half of them capital cases—compared to twelve merits rulings provoking four dissents.[247] And the Court is increasingly hostile to death row prisoners in last-minute litigation, even as the Court has granted the federal government stays of lower court decision with such "notable frequency" that it looks as if it has "nearly no burden at all" when seeking to

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[244] *See id.* at 950 (Stevens, J., concurring in denial of certiorari and objecting to Justice Rehnquist's proposal).

[245] *Compare* Tyler v. Cain, 533 U.S. 656, 661–62 (2001) (describing today's 28 U.S.C. § 2244(b)(1)–(2), which requires successive petitions be dismissed unless they present new claims which rely on a previously unavailable, retroactive constitutional rule or a factual predicate that was unavailable and which now establishes "by clear and convincing evidence" that but for the error the applicant would not have been found guilty), *with* McCleskey v. Zant, 499 U.S. 467, 492–97 (1991) (describing prior version of 28 U.S.C § 2244 (a-b) allowing state prisoners to bring successive petitions if they could show "cause and prejudice" or that "the ends of justice" would be served by allowing the inquiry).

[246] Payne v. Tennessee, 501 U.S. 808, 844 (1991) (Marshall, J., dissenting).

[247] *See* Steve Vladeck, *The Supreme Court's Most Partisan Decisions Are Flying Under the Radar*, Slate (Aug. 11, 2020, 12:12 PM), https://slate.com/news-and-politics/2020/08/supreme-court-shadow-docket.html [https://perma.cc/24BX-UDBP]. Professor Vladeck again highlighted this in his testimony before the House Subcommittee on Courts, Intellectual Property and the Internet, available (at 20:22) at https://www.c-span.org/video/?509098-1/house-hearing-supreme-court-docket-case-load#&vod [https://perma.cc/VMD2-A263].

undo lower court orders.[248] In the context of the death penalty this gets it exactly backwards. As Justice Marshall argued 40 years ago, "a stay of execution must be granted unless it is clear that the prisoner's appeal is entirely frivolous."[249] The irreversible nature of death demands nothing less.

This Note is not calling for an end to the death penalty.[250] My argument is only that the courts must allow a condemned person to live long enough to challenge the legality of his death. However, like Justice Breyer, I believe "it may be that, as [we] come[ ] to place ever greater importance upon ensuring that we accurately identify, through procedurally fair methods, those who may lawfully be put to death, there simply is no constitutional way to implement the death penalty."[251] But assuming that capital punishment exists, for now, we must ensure that it is carried out in as constitutional a manner as possible. The Supreme Court appears increasingly uninterested in that goal. Faced with the choice Justice Breyer offered between "a death penalty that at least arguably serves legitimate penological purposes *or* . . . a procedural system that at least arguably seeks reliability and fairness in the death penalty's application,"[252] the Court has opted for the former.

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[248] Little v. Reclaim Idaho, 140 S. Ct. 2616, 2618 (2020) (Sotomayor, J., dissenting from the grant of stay) (highlighting the Court's solicitousness of government requests for stays of lower-court orders, including the first two federal death penalty orders).

[249] Barefoot v. Estelle, 463 U.S. 880, 907–08 (1983) (Marshall, J., dissenting).

[250] Though that important conversation continues apace. *See, e.g.*, Federal Death Penalty Prohibition Act, H.R. 262, 117th Cong. (2021); S.B. 1165, 2021 Leg., Reg. Sess. (Va. 2021) (signed Mar. 24, 2021).

[251] Bucklew v. Precythe, 139 S. Ct. 1112, 1145 (2019) (Breyer, J., dissenting).

[252] Glossip v. Gross, 576 U.S. 863, 938 (2015) (Breyer, J., dissenting).