

**Presidential Commission on the Supreme Court of the United States**

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Rights, Civil Rights, and Citizenship Program**

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Co-Chair Rodriguez, Co-Chair Bauer, and members of the Commission, thank you for inviting us to testify. The Constitutional Accountability Center (CAC) is a public interest law firm, think tank, and action center dedicated to making real the progressive promise of our Constitution's text, history, and values. As the Presidential Commission on the Supreme Court of the United States pursues its important work, we at CAC appreciate the opportunity to submit this testimony.

The federal judiciary, with the Supreme Court at its head, provides in our constitutional democracy the promise of access to justice, in aid of establishing a government that is both accountable to the people and protective of their rights and liberties.<sup>1</sup> But the Court has far too often fallen short of that promise.

At too many moments in history, the Court has tried to bend our constitutional arc of progress back toward oppression rather than freedom, as it did when it thwarted the promise of the Fourteenth Amendment in ruling after ruling that doomed the project of Reconstruction and set back the cause of equality and racial justice for generations.<sup>2</sup> The Court has taken essential legislation aimed at establishing a truly free and fair, multi-racial democracy and, without legal justification, stripped the law of its unmistakable meaning and opened the door to voter suppression.<sup>3</sup> The Court has erected arcane and nearly impenetrable doctrines that prevent people from accessing the courts, betraying the fundamental right to come to the

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<sup>1</sup> See David Gans, *The Keystone of the Arch: The Text and History of Article III and the Constitution's Promise of Access to Courts* 1 (Constitutional Accountability Center, 2016), [https://www.theusconstitution.org/think\\_tank/the-keystone-of-the-arch-the-text-and-history-of-article-iii-and-the-constitutions-promise-of-access-to-courts/](https://www.theusconstitution.org/think_tank/the-keystone-of-the-arch-the-text-and-history-of-article-iii-and-the-constitutions-promise-of-access-to-courts/).

<sup>2</sup> See, e.g., *United States v. Cruikshank*, 92 U.S. 542 (1876); *Civil Rights Cases*, 109 U.S. 3 (1883); *Plessy v. Ferguson*, 163 U.S. 537 (1896). See generally David Gans, *The Gem of the Constitution: The Text and History of the Privileges or Immunities Clause* (Constitutional Accountability Center, 2008), [https://www.theusconstitution.org/wp-content/uploads/2017/12/Gem\\_of\\_the\\_Constitution.pdf](https://www.theusconstitution.org/wp-content/uploads/2017/12/Gem_of_the_Constitution.pdf)

<sup>3</sup> E.g., *Shelby County v. Holder*, 570 U.S. 529 (2013).

courts to remedy wrongdoing and hold the powerful to account through our justice system.<sup>4</sup>

CAC urges the Commission to view its remit through the lens of justice: what are the problems of justice that court reform can and should solve in this moment?

Can these problems of justice be solved by adding more seats on the Supreme Court or instituting some form of term limits? Perhaps. There is nothing sacred about the number nine when it comes to the Supreme Court, and the Constitution gives substantial discretion on how the Court is structured. What *is* sacred is the Court's duty to equitably and fairly apply the law, manifesting the promise of our Constitution's text and history and ensuring meaningful access to courts—and public faith in the Court's ability to administer equal justice under law. Whether the Court has ever lived up to this duty, or earned this faith, are legitimate questions; whether any reforms can be instituted to help make it so should be the primary goal of this commission.

Issues of Supreme Court expansion or term limits, however, should not end the Commission's discussion. There are other—often overlooked—issues related to our judiciary that warrant your attention, as well. Among them is the Supreme Court's emergency orders process—known as the shadow docket. When the Court issues orders as part of its shadow docket, it is all too often acting without the sustained consideration, reflection, transparency, and accountability Americans expect from its highest Court. Bringing the shadow docket into the light should be an essential part of the Commission's recommendations. The Court is deciding matters of life and death, issues of vital and urgent importance to the daily lives of people in this country—and sometimes shifting the law significantly in the process—in ways that are not in line with the hallmarks of fairness and transparency we expect and deserve from the Supreme Court.

### **I. *The Rise of the Shadow Docket and Why It Harms the Judicial Process***

One of the most important developments of recent years is the stunning expansion of what has been called the Supreme Court's shadow docket, the part of the Court's docket that resolves emergency applications for relief, such as stays or injunctions pending appeal or pending an application for a writ of certiorari.<sup>5</sup> The shadow

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<sup>4</sup> See generally Gans, *Keystone of the Arch*, supra note 1.

<sup>5</sup> William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J. of L. & Liberty 1, 1 (2015) (describing the Court's "shadow docket" as encompassing "a range of orders and summary decisions that defy its normal procedural regularity"); Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 Harv. L. Rev. 123, 125 (2019) (describing the "shadow docket" as the "significant volume of orders and summary decisions that the Court issues without full briefing and oral argument"). As described by Professor

docket lacks the crucial features that ensure transparency, impartiality, accountability, and procedural regularity to the litigants and to the American people. The Justices' consideration and decision-making is rushed, briefing takes place on a very expedited schedule, which often precludes briefing by friends-of-the-court, and there is no opportunity for oral argument. Shadow docket orders are often accompanied by cursory opinions or no reasoning at all and the actual votes are shrouded in mystery. Most of the time, it is impossible to tell how all of the Justices actually voted.<sup>6</sup>

While some process for adjudicating emergency requests for relief is essential, in the Roberts Court, the orders process has become a significant way for the Justices to make new law binding on the lower courts and to alter the rights and responsibilities of huge numbers of people with little to no reasoning, opportunity for broad participation by interested parties, or time for careful deliberation. This is a troubling development that threatens the legitimacy of the Supreme Court and its capacity to do justice for all the litigants that come before it. As Justice Sonia Sotomayor has noted, by issuing orders in this way, the Court “undermines the public’s expectation that its highest court will act only after considered deliberation”<sup>7</sup> and “erodes the fair and balanced decisionmaking process”<sup>8</sup> that should be the hallmark of the judicial process.

A few aspects of the Roberts Court’s use of the shadow docket merit mention.

First, the shadow docket now approaches in significance the Court’s regular merits docket, which has decreased in size as the shadow docket has expanded by leaps and bounds. In the 2020 term, for example, the Supreme Court delivered fifty-eight opinions in argued cases.<sup>9</sup> By contrast, according to a recent empirical study conducted by Reuters,<sup>10</sup> during the 2020 term, there were 150 shadow docket

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Baude, the shadow docket both includes stay orders, which generally are unsigned, considered expeditiously, and provide little to no substantive analysis, and summary reversals of lower court rulings, which receive more thorough consideration and typically result in the publication of a short opinion. The focus of our testimony is on the former type of orders.

<sup>6</sup> Baude, *supra* note 5, at 14 (“Not only are we often ignorant of the Justices’ reasoning, we often do not even know the votes of the orders with any certainty. While Justices do sometimes write or note dissents from various orders, they do not always note a dissent from an order with which they disagree.”); see *Arthur v. Dunn*, 137 S. Ct. 14, 15 (2016) (Mem.) (statement of Roberts, C.J.) (providing a courtesy fifth vote to grant a stay in a case in which only two dissents were publicly noted).

<sup>7</sup> *Little v. Reclaim Idaho*, 140 S. Ct. 2616, 2619 (2020) (Mem.) (Sotomayor, J., dissenting).

<sup>8</sup> *Wolf v. Cook County*, 140 S. Ct. 681, 684 (2020) (Mem.) (Sotomayor, J., dissenting).

<sup>9</sup> <https://www.scotusblog.com/statistics/>.

<sup>10</sup> Lawrence Hurley & Andrew Chung, *Analysis: U.S. Supreme Court’s ‘Shadow Docket’ Favored Religion and Trump*, Reuters (July 28, 2021),

rulings on applications for emergency relief, not counting purely procedural applications, which resulted in twenty-nine applications granted at least in part, many producing rulings altering the status quo and affecting the rights and obligations of huge numbers of people. Accounting for the work of the Court without taking account of the shadow docket is now a precarious undertaking.<sup>11</sup>

Second, one of the most jarring statistics in the Reuters study reveals the depth of the lack of transparency—out of 150 shadow docket rulings, the full vote breakdown among the justices is known in only fourteen.<sup>12</sup> For the overwhelming number of shadow docket applications for relief, we simply do not know how the justices voted. The justices are participating in a secretive system for deciding a huge number of cases that leaves the American people in the dark about the votes they cast. This is unacceptable and unnecessary.

Third, the empirical evidence from the 2020 term reveals that the shadow docket is, all too often, heavily slanted in favor of certain parties. For some litigants, among them the Trump administration, religious entities challenging COVID-19 orders, and states, the “exceptional mechanism” of emergency relief has become the “new normal.”<sup>13</sup> In the 2020 term, the Supreme Court never turned down a single Trump administration request for relief. In the 2020 term, the Court employed the shadow docket to rush through federal executions before President Trump’s term ended,<sup>14</sup>

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<https://www.reuters.com/legal/government/us-supreme-courts-shadow-docket-favored-religion-trump-2021-07-28/>.

<sup>11</sup> See, e.g. Nina Totenberg, *The Supreme Court’s Term Appeared to Be Cautious. The Numbers Tell A Different Story*, NPR (July 9, 2021), <https://www.npr.org/2021/07/09/1013951873/the-supreme-courts-term-appeared-to-be-cautious-the-numbers-tell-a-different-sto> (observing that, despite a veneer of moderation, “liberals’ losses grow only more pronounced if you look at the cases decided without the court’s normal procedures — emergency appeals to block lower court orders, known as the shadow docket”).

<sup>12</sup> Hurley and Chung, *supra* note 10.

<sup>13</sup> *Barr v. E. Bay Sanctuary Covenant*, 140 S. Ct. 3, 6 (2019) (Mem.) (Sotomayor, J., dissenting).

<sup>14</sup> See, e.g. *Barr v. Lee*, 140 S. Ct. 2590 (2020) (per curiam); *Barr v. Purkey*, 140 S. Ct. 2594 (2020) (Mem.); *United States v. Higgs*, 141 S. Ct. 645 (2021) (Mem.); *Barr v. Hall*, 141 S. Ct. 869 (2020) (Mem.); *Rosen v. Montgomery*, 141 S. Ct. 1232 (2021) (Mem.); *United States v. Montgomery*, 141 S. Ct. 1233 (2021) (Mem.). For discussion, see Lee Kovarsky, *The Trump Executions*, U. of Texas Law, Pub. L. Research Paper, at 41 (July 22, 2021), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=389178](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=389178) (explaining that the “[w]hen it came to the Trump Executions, the Supreme Court broke with established practice. They dissolved lower-court stays at an unprecedented rate, and did so without contemporaneous merits dispositions”). As Professor Kovarsky explains, the “record suggests (overwhelmingly) that the Justices were using the shadow docket to police the inaugural margin, presumably because they believed that executions scheduled beyond the margin would not take place.” *Id.*

allow the Trump administration to cut short the Census,<sup>15</sup> and impose new restrictions that make it harder for individuals to obtain medical abortions.<sup>16</sup> For others, the courthouse doors remain bolted shut. No statistic better illustrates this than the fact that, in the 2020 term, plaintiffs seeking religious exemptions through the shadow docket won ten times, while no other private litigant succeeded in obtaining emergency relief.<sup>17</sup> Voters seeking to challenge laws that make it harder to cast a ballot,<sup>18</sup> prisoners on death row,<sup>19</sup> and inmates ravaged by the spread of COVID-19<sup>20</sup> all saw their pleas for relief rejected.

Fourth, not only has the Roberts Court expanded its shadow docket in seismic ways, it has also transformed the role the emergency orders process plays in the Supreme Court's decision-making process. A seriously troubling feature about the Supreme Court's expansion of the shadow docket is a new predilection to use shadow docket applications for emergency relief to craft new substantive legal doctrines binding on the lower courts. The Court's shadow docket decision-making processes are ill-suited to establishing binding legal rules. Rushed decision-making and the lack of full briefing, *amicus* participation, and oral argument create an overwhelming risk of error and invite the premature adjudication of difficult constitutional issues without time for appropriate deliberation. The Court's two most prominent examples of lawmaking through the shadow docket—changes made to make it harder to enforce the right to vote close to Election Day and to make it easier to obtain religious exemptions under the Free Exercise Clause—illustrate why it is so dangerous to use the shadow docket to formulate new legal rules.

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<sup>15</sup> *Ross v. Nat'l Urb. League*, 141 S. Ct. 18 (2020) (Mem.).

<sup>16</sup> *FDA v. Am. Coll. of Obstetricians & Gynecologists*, 141 S. Ct. 578 (2021) (Mem.).

<sup>17</sup> See Hurley and Chung, *supra* note 10. For the cases, see *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020); *High Plains Harvest Church v. Polis*, 141 S. Ct. 527 (2020) (Mem.); *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021) (Mem.); *Harvest Rock Church, Inc. v. Newsom*, 141 S. Ct. 889 (2020) (Mem.); *Agudath Israel of Am. v. Cuomo*, 141 S. Ct. 889 (2020) (Mem.); *Robinson v. Murphy*, 141 S. Ct. 972 (2020) (Mem.); *Harvest Rock Church, Inc. v. Newsom*, 141 S. Ct. 1289 (2021) (Mem.); *Gish v. Newsom*, 141 S. Ct. 1290 (2021) (Mem.); *Tandon v. Newsom*, 141 S. Ct. 1294 (2021) (per curiam); *Gateway City Church v. Newsom*, 141 S. Ct. 1460 (2021) (Mem.).

<sup>18</sup> *Raysor v. DeSantis*, 140 S. Ct. 2600 (2020) (Mem.); *Andino v. Middleton*, 141 S. Ct. 9 (2020) (Mem.); *Merrill v. People First of Alabama*, 141 S. Ct. 25 (2020) (Mem.); *Democratic Nat'l Comm. v. Wisconsin State Legislature*, 141 S. Ct. 28 (2020) (Mem.).

<sup>19</sup> See, e.g., *Mitchell v. United States*, 140 S. Ct. 2624 (2020) (Mem.); *Lee v. Watson*, 141 S. Ct. 195 (2020) (Mem.); *Bernard v. United States*, 141 S. Ct. 504 (2020) (Mem.); *Bourgeois v. Watson*, 141 S. Ct. 507 (2020) (Mem.); *Johnson v. United States*, 141 S. Ct. 1233 (2021) (Mem.); *Johnson v. Rosen*, 141 S. Ct. 1233 (2021) (Mem.); *Montgomery v. Watson*, 141 S. Ct. 1232 (2021) (Mem.).

<sup>20</sup> See *Valentine v. Collier*, 141 S. Ct. 57 (2020) (Mem.); see also *Valentine v. Collier*, 140 S. Ct. 1598 (2020) (Mem.); *Barnes v. Ahlman*, 140 S. Ct. 2620 (2020) (Mem.).

## II. *The Perils of Making Law Through the Shadow Docket*

### A. *The Purcell Principle and the Unravelling of Voting Rights Remedies*

One of the most troubling developments of recent years is the Supreme Court's issuance of unsigned, and often unexplained, stay orders stopping courts from vindicating the right to vote close to an election. Through these cursory orders, decided in a rushed manner and without full briefing or oral argument, the Court has been rewriting the rules of our democracy, despite the obvious truth that there is no time when the right to vote is more dear than when it is about to be exercised. Through these shadow docket orders, the Court has put an expiration date on our Constitution's promise of an inclusive, vibrant, multiracial democracy.<sup>21</sup>

By making it normal practice to stay lower court injunctions protecting the right to vote close to Election Day, the Court has frustrated the enforcement of the bedrock right to vote. Once a voter has been denied his or her constitutional right to cast a ballot, it is impossible to unring the bell. No later order can undo the denial of the right to vote for citizens whose votes have been suppressed.

Importantly, no legal principle commands the courts to shut the courthouse doors on voters when their right to vote matters most. The Roberts Court simply invented this doctrine out of whole cloth. Before John Roberts became Chief Justice, the Supreme Court granted remedies to individuals victimized by restrictive election rules even quite close to Election Day, taking careful account of both the right to vote and governmental interests in the orderly administration of elections.<sup>22</sup>

That all changed beginning in a 2006 shadow docket ruling in a case called *Purcell v. Gonzalez*,<sup>23</sup> which announced that federal courts should be wary of issuing injunctions in voting rights cases close to an election. "Court orders affecting elections, especially conflicting orders," the court's unsigned opinion explained, "can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase."<sup>24</sup> Since then, the Supreme Court has aggressively expanded what has been called the *Purcell* principle.<sup>25</sup> Now, in practice, the *Purcell* principle means that the courthouse doors

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<sup>21</sup> The discussion in this and the following paragraphs draws on David Gans, *The Roberts Court, The Shadow Docket, and the Unravelling of Voting Rights Remedies* (American Constitution Society, October 2020), <https://www.acslaw.org/wp-content/uploads/2020/10/Purcell-Voting-Rights-IB-Final-Version.pdf>

<sup>22</sup> See, e.g., *Williams v. Rhodes*, 393 U.S. 23, 34 (1968); *McCarthy v. Briscoe*, 429 U.S. 1317, 1322-23 (1976) (Powell, J., Circuit Justice); *Clark v. Roemer*, 500 U.S. 646, 654 (1991).

<sup>23</sup> 549 U.S. 1 (2006) (per curiam).

<sup>24</sup> *Id.* at 4-5.

<sup>25</sup> See Richard L. Hasen, *Reining in the Purcell Principle*, 43 Fla. St. U. L. Rev. 427 (2016).

must be bolted shut as Election Day nears. This effectively reduces the right to vote to a second-class right and inevitably harms marginalized and less-powerful citizens. If courts announce that they will essentially never intervene, they invite partisan manipulation of our democracy.

This dynamic played out repeatedly during the 2020 elections. In April 2020, in a 5–4 ruling in *Republican National Committee v. Democratic National Committee*,<sup>26</sup> the Supreme Court’s conservative majority held that “courts should ordinarily not alter the election rules on the eve of an election,” blocking an order designed to ensure that voters in Wisconsin did not have to sacrifice their health in order to vote.<sup>27</sup> Even the extraordinary circumstances in Wisconsin—thousands of voters would likely be disenfranchised because they had not received absentee ballots on a timely basis due to the COVID-19 pandemic, a public health crisis unparalleled in our lifetime—did not qualify for an exception from this so-called ordinary rule. The consequences were felt hardest in communities of color in cities such as Milwaukee, where only five polling places were open.<sup>28</sup> Justice Ruth Bader Ginsburg’s plea that “[e]nsuring an opportunity for the people of Wisconsin to exercise their votes should be our paramount concern” went unheeded.<sup>29</sup>

In a string of unsigned, unexplained orders in the run-up to the 2020 election, the Supreme Court repeatedly refused to protect the right to vote during an election year. In a string of shadow docket orders in cases challenging voting or ballot access restrictions, the Court repeatedly sided with the state,<sup>30</sup> prompting Justice Sonia Sotomayor to take the Court to task for its pattern of repeatedly “condoning disfranchisement” and “forbid[ding] courts [from] mak[ing] voting safer during a pandemic.”<sup>31</sup> The upshot is that *Purcell* has become an inflexible rule that sanctions voter suppression and prevents courts from playing their historic role in protecting constitutional rights.

The Court accomplished this jurisprudential reversal without a modicum of procedural regularity. The Supreme Court announced *Purcell* without full briefing and oral argument. It repeatedly applied *Purcell* in a string of cases that also

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<sup>26</sup> 140 S. Ct. 1205 (2020) (per curiam).

<sup>27</sup> *Id.* at 1207.

<sup>28</sup> Sherrilyn Ifill, *Never Forget Wisconsin* (Slate, Apr. 8, 2020), <https://slate.com/news-and-politics/2020/04/never-forget-wisconsin.html>.

<sup>29</sup> *Republican National Committee*, 140 S. Ct. at 1211 (Ginsburg, J., dissenting).

<sup>30</sup> *Texas Democratic Party v. Abbott*, 140 S. Ct. 2015 (2020) (Mem.); *Raysor v. DeSantis*, 140 S. Ct. 2600 (2020) (Mem.); *Little v. Reclaim Idaho*, 140 S. Ct. 2616 (2020) (Mem.); *Andino v. Middleton*, 141 S. Ct. 9 (2020) (Mem.); *Merrill v. People First of Alabama*, 141 S. Ct. 25 (2020) (Mem.); *Democratic Nat’l Comm. v. Wisconsin State Legislature*, 141 S. Ct. 28 (2020) (Mem.); *Clarno v. People Not Politicians Oregon*, 141 S. Ct. 206 (2020) (Mem.).

<sup>31</sup> *Raysor*, 140 S. Ct. at 2603 (Sotomayor, J., dissenting).

lacked full briefing and argument. The Court’s reasoning in these cases ranges from cursory to none. It is not surprising that the Roberts Court has not given any attention to all the ways *Purcell* diverges from the Court’s earlier case law that took as its touchstone the imperative of protecting the right to vote when it matters most. The *Purcell* principle has been developed without the sustained consideration and reflection necessary for proper judicial decision-making. Deciding major voting rights issues without time for proper consideration, argument, and reflection produces shoddy, error-ridden decisions that short-change the right to vote, one of our most cherished constitutional rights.

### ***B. Religious Exemptions and COVID-19: Using the Shadow Docket to Redefine Religious Liberty***

The Free Exercise Clause of the First Amendment generally does not require that religious entities or persons who hold deeply held religious beliefs be exempted from neutral, generally applicable laws. This view, deeply rooted in the First Amendment’s text and history,<sup>32</sup> has been the foundation of the Supreme Court’s precedents in this area since the landmark case *Employment Division v. Smith* was decided more than thirty years ago.<sup>33</sup> This year, in a string of closely divided shadow docket orders, the Court repeatedly held that the Free Exercise Clause required a religious exemption from state laws that sought to prevent the spread of the COVID-19 virus. Through these shadow docket orders, the Court has made new law—what is known as the most favored nations theory of the Free Exercise Clause—that threatens to undermine *Smith*’s rule, mandating religious exemptions in what could prove to be a very significant range of cases. These shadow docket rulings are all the more significant because, in *Fulton v. City of Philadelphia*,<sup>34</sup> after full briefing, oral argument, and eight months of deliberations, the Justices left *Smith*’s rule intact, refusing to overrule it. Although *Fulton* drew the lion’s share of attention, the shadow docket rulings were the ones that truly broke new legal ground.

Importantly, in the spring and summer of 2020, the Supreme Court voted 5-4 to reject requests by churches in California and Nevada for a religious exemption from state restrictions on gatherings.<sup>35</sup> These orders were consistent with the general rule established in *Smith*. But following the death of Justice Ruth Bader Ginsburg

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<sup>32</sup> See Brief of First Amendment Scholars as *Amici Curiae* Supporting Respondents, at 2, *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021) (No. 19-123) (arguing that “historical evidence does not support the view that individuals’ Free Exercise rights entitle them to ignore neutral and generally applicable laws”).

<sup>33</sup> 494 U.S. 872 (1990).

<sup>34</sup> 141 S. Ct. 1868 (2021).

<sup>35</sup> *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020) (Mem.); *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603 (2020) (Mem.).

and the confirmation of Justice Amy Coney Barrett, the Supreme Court repeatedly granted emergency applications to prevent enforcement of state COVID measures designed to protect the public health, mandating that churches and others be given a religious exemption from the law’s requirements.<sup>36</sup> Emergency injunctions pending appeal have long been considered an extraordinary form of relief—before the 2020 term, the Court did not issue any for the previous five years—but this past year, the Justices repeatedly granted them to plaintiffs seeking religious exemptions from state COVID orders.<sup>37</sup>

In these rulings that provided at best cursory analysis, the Supreme Court held that the Free Exercise Clause presumptively mandates a religious exemption where the government “treat[s] *any* comparable secular activity more favorably than religious exercise.”<sup>38</sup> This is a huge doctrinal development. One commentator called this holding “[t]he most important free exercise decision since 1990.”<sup>39</sup> The Court adopted it without full briefing, oral argument, or time for deliberation. This is a reckless way to make new law.

In *Tandon v. Newsom*, the April shadow docket ruling in which the Court adopted the broadest formulation of its new rule, the Court held that a pastor and congregant who wanted to perform in-home Bible services to large groups of people were entitled to a religious exemption from COVID regulations barring in-home gatherings in private residences involving three or more households. This did not involve discrimination against religion in any meaningful sense. Both secular and religious in-home gatherings alike were subject to the same rule. But the majority insisted that religious believers were entitled to more favorable treatment than their secular counterparts.<sup>40</sup>

The *Tandon* majority reasoned that a religious exemption was constitutionally required because some commercial businesses, such as hair salons and retail stores,

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<sup>36</sup> See *supra* note 17.

<sup>37</sup> See *Roman Catholic Diocese*, 141 S. Ct. at 75 (Roberts, C.J., dissenting); *id.* at 77 (Breyer, J., dissenting); Mark Joseph Stern, *The Supreme Court Broke Its Own Rules to Redefine Religious Liberty*, Slate (Apr. 12, 2021), <https://slate.com/news-and-politics/2021/04/supreme-court-religious-liberty-covid-california.html>.

<sup>38</sup> *Tandon*, 141 S. Ct. at 1296; *Roman Catholic Diocese*, 141 S. Ct. at 66-67; *id.* at 69 (Gorsuch, J., concurring); *id.* at 73 (Kavanaugh, J., concurring); *S. Bay Pentecostal*, 141 S. Ct. at 718-19 (statement of Gorsuch, J.).

<sup>39</sup> Jim Oleske, *Tandon Steals Fulton’s Thunder*, Scotusblog (Apr. 15, 2021), <https://www.scotusblog.com/2021/04/tandon-steals-fultons-thunder-the-most-important-free-exercise-decision-since-1990/>.

<sup>40</sup> *Tandon*, 141 S. Ct. at 1298 (Kagan, J., dissenting); see also *Roman Catholic Diocese*, 141 S. Ct. at 80 (Sotomayor, J., dissenting) (criticizing Court’s order granting a religious exemption even though “New York treats houses of worship far more favorably than their secular comparators”).

were not subject to the three-household limit.<sup>41</sup> But the fact that California treated in-home gatherings differently from commercial businesses hardly demonstrates that the government is discriminating against religion.

This new view of what counts as discrimination against religion effectively means that, if the government exempts some secular activity, “it must place religious organizations in the favored or exempt category” unless it can survive strict scrutiny.<sup>42</sup> In other words, religious entities enjoy “something analogous to most-favored nation status.”<sup>43</sup> This is potentially an incredibly sweeping rule, one that could effectively gut *Smith*. As Douglas Laycock put it, “[i]f a law with even a few secular exceptions isn’t neutral and generally applicable, then not many laws are.”<sup>44</sup>

Using the emergency orders process to undermine an important and longstanding decision of the Supreme Court is deeply troubling. The Supreme Court’s legitimacy and standing depends on its commitment to transparency, procedural regularity, and fairness. The increasing willingness to use the shadow docket to make new law that affects the rights and responsibilities of millions of people in decisions that are rushed and communicate little or no reasoning to the public erodes our system of justice.

### III. *Conclusion*

The Supreme Court’s authority and legitimacy depend on providing reasoned explanations of what the Constitution and federal law require. The shadow docket, particularly in the expansive form it occupies today, undermines this essential function. The Commission should carefully examine ways to bring the shadow docket to light and shrink the outsized role it currently plays. This is not simply about process—though process is indeed vital to a justice system that is meant to be open to all and aims to be perceived as fair and equitable. Rather, what we have seen recently suggests that the use of the shadow docket tends toward substantive results that privilege certain interests over others, that work against democratic

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<sup>41</sup> *Tandon*, 141 S. Ct. at 1297 (stressing that “California treats some comparable secular activities more favorably than at-home religious exercise, permitting hair salons, retail stores, personal care services, movie theaters, private suites at sporting events and concerts, and indoor restaurants to bring together more than three households at a time”).

<sup>42</sup> *Calvary Chapel*, 140 S. Ct. at 2612 (Kavanaugh, J., dissenting); *Roman Catholic Diocese*, 141 S. Ct. at 73 (Kavanaugh, J., concurring).

<sup>43</sup> *Calvary Chapel*, 140 S. Ct. at 2612 (Kavanaugh, J., dissenting) (quoting Douglas Laycock, *The Remnants of Free Exercise*, 1990 S. Ct. Rev. 1, 49-50).

<sup>44</sup> Douglas Laycock, *The Broader Implications of Masterpiece Cakeshop*, 2019 B.Y.U. L. Rev. 167, 173 (2019).

participation instead of for it, and that further disempower already marginalized people.