IMPORTANT NOTE ON THESE DISCUSSION MATERIALS

The following are discussion materials on CASE SELECTION AND REVIEW: DOCKET, RULES, AND PRACTICES assembled solely for deliberation by the President's Commission on the Supreme Court of the United States. The materials were prepared by various working groups for the Commission's use in studying and deliberating on the issues identified in Executive Order 14023.

These materials attempt to set forth the broad range of arguments that have been made in the course of the public debate over reform of the Supreme Court. They were designed to be inclusive in their discussion of these arguments to assist the Commission in robust, wide-ranging deliberations.

The inclusion of particular arguments in these draft materials does not constitute a Commission endorsement or rejection of any of them, and specific points of analysis or particular perspectives appearing in the drafts should not be understood to reflect the Commission's views or those of any particular Commissioner. Consistent with Executive Order 14023, the Commission includes members with diverse perspectives on these issues. Commissioners therefore can be expected to hold various and even strongly opposing views, which will be the subject of deliberation at the public meeting scheduled for October 15.

The Commission will post a draft Report for deliberation, in advance of its next public meeting.

CASE SELECTION AND REVIEW: DOCKET, RULES, AND PRACTICES

Introduction

In recent years, Supreme Court observers have engaged in vigorous debate about how the Court conducts its work and how it explains its decisions. The Commission recognizes that, in addition to the structural proposals analyzed in prior chapters, much of the discourse about reform has focused on the degree of transparency of the Court's operations and on its procedures in selecting and reviewing cases. As commentators, including members of Congress, have emphasized, internal practices at the Court can have a significant external impact—they affect perceptions of the Court's impartiality, the credibility of its rulings, and the clarity of its guidance for lawyers and for other courts. And, of course, they have real consequences for the parties in each case and for the many people and institutions affected by the federal laws or constitutional rights at issue.

The Commission received testimony on a broad range of the Court's internal procedures and practices; the testimony included criticisms and counterarguments as well as recommendations that the Court itself could implement. This chapter examines four sets of issues. The first is the Court's use of emergency orders, issued without the usual rounds of briefing or oral argument and often without a written explanatory opinion. The second is how the Court chooses the cases that it hears. The third is judicial ethics. The fourth is public access to the Court's proceedings.

While some of these issues have become more salient under the pressure of recent events, others have been the subject of longstanding public discussion, debate, and analysis. Our review of these issues suggests that the Court should consider proposals that may increase transparency, improve procedure, and generate more visible adherence to standards of judicial ethics.

I. Emergency Orders

Many people associate the work of the Supreme Court with its "merits cases." These are cases in which the Court grants review and the parties then conduct established rounds of briefing and participate in oral argument. The Court may also receive briefs from interested non-parties called amici curiae. In these cases, the Court eventually issues a decision with a reasoned, written opinion that discloses the votes of all Justices and is published immediately on the Court's website prior to its eventual official publication in the *United States Reports*.

Yet the Court's business goes beyond its merits docket. As the Court explains, the "vast majority of cases filed in the Supreme Court are disposed of summarily by unsigned orders."[1] The most common orders—there are thousands of these each year—are denials of petitions for

certiorari. Other orders are administrative, such as those extending the filing deadline for a petition or a brief. Some orders can be quite consequential, however, including those that issue or vacate stays or injunctions. The Justices can in their discretion write opinions "to comment on the summary disposition of cases by orders" such as these.[2] The Court also sometimes issues per curiam decisions finally resolving a given case.[3]

This element of the Court's business arises in many legal contexts and can have significant impacts on the parties (including federal, state, or local governments), on the public, and on the law. But in contrast to its merits docket, the Court typically issues orders without the same regularized rounds of full briefing, amicus participation, and oral argument; without much time for deliberation; without a written opinion speaking for the Court and explaining its reasoning; and often without disclosing how each of the Justices voted.

The Supreme Court's use of such truncated procedures has at times attracted controversy. Beginning in the 1950s and 1960s, scholars criticized the Court's extensive use of unreasoned per curiam opinions and summary decisions on grounds of procedural laxity, inconsistency, unfairness to the parties, and lack of adequate guidance for the lower courts.[4] Other scholars defended the Court's practices, arguing that they were necessary to manage the large docket, to deal with emergency matters, and to supervise the lower federal courts.[5] Scholarship since the 1960s has intermittently continued these debates.[6]

Recently, criticisms have intensified as the number of important cases decided by the Court with abbreviated process has increased dramatically.[7] The term "shadow docket" was coined six years ago to describe the Court's "orders and summary decisions that defy its normal procedural regularity."[8] Since then, many commentators have focused their criticism on the Court's use of emergency orders—issuing an injunction, vacating a lower court's injunction, granting or lifting a stay of a lower court ruling, or denying such emergency relief.[9] Because these "shadow docket" orders often occur in the context of challenges to new government policies, they can have substantial effects on people's rights, on political discourse, and on the law.[10]

The Commission received testimony and comments about the Court's recent use of emergency orders. Additionally, several Justices have addressed the issue in recent statements, offering both critiques and defenses of the Court's practices.[11] This section first examines three sets of recurring concerns about emergency orders generally: inadequate process in high-impact cases, inadequate transparency, and confusion about precedential effect. It then examines how such concerns operate in cases involving the death penalty.[12]

A. Recurring Concerns

The robust procedures that characterize the merits docket, including full briefing and opinion writing, are intended to ensure that the Court's decisions are well informed, fair to the parties, and attentive to implications for the broader legal system. Such decisions typically carry the full weight of precedent and are thus written in a manner that not only binds lower courts but also aspires to guide them, all while limiting the likelihood that the Court will dramatically change its own positions in the near future. Merits cases typically are preceded by full

consideration in the lower courts—including adjudication by a trial judge and one or two rounds of appellate review, with briefing and argument at each stage.

The Court's emergency orders, by contrast, generally lack these layers of regular process and deliberation in both the lower courts and at the Court itself. Most are issued in a preliminary posture, before the lower courts have completed their adjudication of the case, and usually involve only one round of briefing at the Court, no oral argument, little time for deliberation, no norm that a written opinion will publicly explain the Court's reasoning, and no expectation that the Justices' votes will be revealed. Yet such orders can affect the rights and obligations of governments, of private institutions, and of broad swathes of the American public.[13]

Most of the recent commentary and criticism of the Court's emergency orders have focused on those that grant applications to overturn decisions of the lower courts. More recently, following the Court's order in *Whole Woman's Health v. Jackson*,[14] attention and criticism have also turned to orders that deny such applications. In the analysis that follows, we focus primarily on the former category of cases, then discuss the issues raised by *Whole Woman's Health*, and then consider proposed reforms.

1. Inadequate Procedure for Important Cases

Many of the Court's recent orders have touched on issues of national importance and public debate, including immigration policy,[15] environmental regulations,[16] and evictions during a surge in COVID-19.[17] Although emergency orders are technically temporary and used in service of further adjudication, they often have the practical effect of being the final word on the issue. Since 2016, for example, the Court has issued orders that have effectively determined the end of the period for responding to the 2020 Census;[18] religious exemption procedures under the Affordable Care Act;[19] access to absentee voting for minority voters and voters with disabilities at the height of the pandemic;[20] the degree of exposure to COVID-19 infection for inmates in prisons and jails;[21] and the right to congregate for religious services during the pandemic.[22] Even where such orders eventually expire, moreover, and even where they directly involve only one person as a party, they can have profound implications for affected individuals and for larger societal debates.[23]

As these examples suggest, the issues resolved on the shadow docket often are controversial as well as consequential. Emergency orders breaking down 6-3 or 5-4 along ideological lines have multiplied in recent years, especially since the retirement of Justice Kennedy in 2018—a trend indicating that the Court increasingly is deciding contested legal questions through cursory and relatively non-transparent emergency procedures.[24] During the 2017 Term, there were five orders from which at least three Justices publicly dissented; during the 2020 Term, there were 29 such orders.[25] This trend has occurred even while the merits docket has remained at historically low levels. In the 2020 Term, the Court decided fewer than 70 merits cases, below its average over the past 15 years.[26] The merits docket for the 2019 Term contained the lowest number of cases since the Civil War;[27] and during that year there were nearly as many 5-4 decisions on the shadow docket as on the merits docket.[28]

Various explanations have been offered for the Court's increasing use of shadow-docket procedures in important and controversial cases: the lower courts' issuance of so-called

"nationwide" or "universal" injunctions that "control the behavior of the federal government toward everyone, not just the plaintiffs," and often prompt the government to seek relief;[29] federal executions during the Trump Administration; emergency requests during the COVID-19 pandemic related to religious freedom, voting, and prisoner safety;[30] a growing divide between the views of the Supreme Court and the lower federal courts; and possible changes in how the Justices apply the traditional legal standard for emergency relief pending appeal.[31] Critics and defenders of the Court's practices draw competing conclusions from such explanations, some of which point to passing rather than persistent causes.

Those who defend the Court's use of the shadow docket argue that the problem—if there is one—is not of the Court's own making. Emergency applications come to the Court from parties seeking urgent relief. The consequential nature of the interests at stake is precisely why the Court must act quickly, lest significant rights be left unprotected or harm imposed on the parties and the public while the full judicial process unfolds.[32] Deciding important issues using a truncated process, on this view, is not illegitimate—it is simply the nature of emergency adjudication. And the de facto final resolution of important matters through temporary relief is an unavoidable part of the tradeoff that can happen at any judicial level. Moreover, in certain cases, the absence of a need for a majority of Justices to agree on legal reasoning may improve the chances of reaching rapid agreement on the outcome, and usefully so in a true emergency.[33]

Indeed, virtually everyone agrees that nothing is inherently suspect about emergency orders. Every court must have procedures for accelerated determination of urgent matters, even at the expense of a more deliberative process or more fully reasoned decisions. "urgent" matters warrant the Court's intervention. Critics of the Court's recent emergency orders argue that the Court has expanded its conception of what counts as urgent, and that it is deciding too many important issues on the basis of relatively impoverished procedures and deliberation.[34] Relatedly, some commentators maintain that the Court is too often acting not to preserve the appropriate "status quo," but rather to disrupt it—in some cases, at least, without clear explanation of when or why intervention is warranted.[35]

2. Lack of Transparency

As noted, the Court often issues emergency orders without accompanying explanation, or with very little of it. A standard defense of such a norm is that emergency decisionmaking may not allow time for a thorough expression of the Court's reasoning in every case, and that anything less (such as a rote citation to a legal standard without elaboration on its application to a given case) would rarely provide much useful information. Yet the question is not whether all emergency orders require explanation; there has been no serious suggestion that routine denials of obviously unwarranted relief need to have a written opinion.[36] Rather, the question is whether some emergency orders are important enough (as all merits cases are presumed to be) that the public—and the public record—should receive an express statement of the Court's reasoning and of how the Justices voted.

As one example, commentators cite the Court's decision in *Dunn v. Smith*, the fourth in a line of emergency rulings concerning the rights of people facing execution to have a religious advisor of their chosen spiritual denomination present in the execution chamber at the time of their death.[37] The Court refused to vacate an injunction issued by the Eleventh Circuit, which had

reasoned that Alabama's policy of excluding spiritual advisors from the execution room likely violated the Religious Land Use and Institutionalized Persons Act ("RLUIPA").[38] There was no opinion for "the Court" explaining the majority's reasoning. Three Justices (Roberts, Thomas, and Kavanaugh) dissented.[39] Four Justices (Kagan, Breyer, Sotomayor, and Barrett) concurred in the Court's denial of the state's application, and explained why, in their view, the Alabama policy was unlawful under RLUIPA.[40] Although Justices Alito and Gorsuch did not indicate how they voted, at least one of them must also have voted to deny the application. For some observers, the failure of the Court to disclose the rationale for its decision—and the failure of Justices Alito and Gorsuch to record their votes publicly, especially against the backdrop of their apparent votes in the prior religious advisor cases—raised a question of how members of the Court understand and apply the substantive legal standards governing claims of religious liberty.

Critics have further argued that it is sometimes unclear whether or how the Court is applying the traditional multipart standard used to determine issuance of emergency relief.[41] One example they cite is *South Bay United Pentecostal Church v. Newsom* (*South Bay II*), in which the Court granted in part an injunction barring enforcement of a California law banning indoor religious services of a certain size as a COVID-19 public health measure.[42] As one Commission witness noted, despite four separate opinions from four individual Justices supporting the order, "*none* of them purported to apply the four-factor test the Court traditionally follows when considering whether to grant an injunction."[43] Critics also maintain that the Court has failed to follow a straight line on the question of whether to grant emergency relief in the face of legal uncertainty: Some contend that the Court's majority has been willing to break new legal ground in certain cases while disclaiming that power in others, without explaining the difference.[44] In the critics' view, the lack of explanation facilitates such variation by removing the discipline, rigor, and consistency that the writing of carefully reasoned opinions is said to impose on judicial decisions.

Critics more broadly charge that the issuance of high-profile orders without adequate explanation damages the perceived impartiality and legitimacy of those rulings, or even of the Court, in the public eye. When the Court does not routinely and publicly explain its reasoning in cases of great public concern, the resulting speculation may turn to the inference—founded or unfounded—that the Justices are making decisions based on ideology or politics. Such an inference may be especially likely in cases involving new laws or government policies, because the Court is being asked to decide whether those laws or policies can go into effect while legal challenges against them continue forward in the courts. Commentators note that the Court often ruled in favor of the Trump Administration, allowing the implementation of policies ranging from funding for the border wall to restarting executions for people on death row.[45] By contrast, the Court has tended not to issue orders favoring state-level restrictions on religious gatherings during the pandemic, including those in California and New York.[46] In the absence of more consistent explanation, some observers infer from such patterns that the Court leans in favor of particular government policies or particular kinds of aggrieved parties.

Defenders of the Court's rulings offer several responses. One is to emphasize that, without a full airing of the Justices' reasoning, one cannot know what principles are guiding their decisions. Patterns that appear irregular or ideologically slanted to some observers may be guided by the Court's view of the likelihood of success on the merits or of the risk of irreparable

harm (both of which are part of the traditional test for assessing emergency relief), in which case the differences in outcome may reflect the Justices' differing views on those factors.[47] A further response is that detailed opinion-writing is infeasible in many emergency settings,[48] and often undesirable. As one Commission witness put it, "[i]t is common in our legal system for preliminary orders, rather than merits decisions, to have different norms of justification and attribution."[49] On this view, the relative lack of transparency in emergency orders is simply part of the process of faster decisionmaking. Moreover, it may be practically useful for the Justices in their emergency orders to reveal less rather than more, so that they do not lock themselves into positions or reasoning that is based on limited process, reflection, and information. A similar argument supplies a reason not to require Justices to reveal their votes in emergency orders.[50]

3. The Problem of Precedential Effect

Another criticism concerns the uncertain precedential effect of the Court's shadow-docket rulings. Even to expert legal observers, including judges, it remains unclear which orders and related opinions operate as precedents binding on lower courts.[51] One might think that, at most, only opinions designated as "Opinions of the Court" should function as binding precedents; indeed, Justice Alito recently noted in a public address that a ruling on an emergency application is not a precedent with respect to the underlying issue in the case.[52] Yet at times the Court has appeared to expect its emergency orders to be treated as precedential, at least if one or more statements of individual Justices or concurring opinions accompany the order—even though none of them is designated as the opinion of the Court.

An example from the Court's pandemic cases illustrates this issue.[53] In *Gateway City Church v. Newsom,* the Court ruled that the Ninth Circuit's "failure to grant relief was erroneous," and explained that "[t]his outcome is clearly dictated by this Court's *South Bay United Pentecostal Church v. Newsom*."[54] But the *South Bay* case was an emergency grant of partial injunctive relief that contained no majority rationale. The Court thus appeared to require lower courts to discern binding legal principles from an emergency order with a concurring opinion by Justice Barrett (joined by Justice Kavanaugh), a statement of Justice Gorsuch (joined by Justices Thomas and Alito), and a concurrence by Chief Justice Roberts.

Defenders and critics of the Court's emergency orders practice alike appear to agree that orders like the one in *South Bay* should not carry precedential weight for lower courts. More broadly, even when emergency orders do include an opinion for "the Court," the nature of such orders and the quality of the processes that precede them generally counsel against giving dispositive weight to decisions reached on an emergency footing.[55] And uncertainty about the precedential effect of emergency orders can breed confusion for the lower courts, for relevant parties, and for the public about the content of the law.

4. Criticisms in Light of Whole Woman's Health

As noted above, attention to the Court's emergency orders grew more intense after the Court's ruling in *Whole Woman's Health v. Jackson*, a case about the constitutionality of a Texas statute that imposed a prohibition on abortions after roughly six weeks, delegated enforcement of that prohibition to private parties, and forbade state officials from enforcing the statute.[56] After the Fifth Circuit issued an administrative stay halting proceedings in the district court,[57] abortion

providers and other groups challenging the law asked the Supreme Court to issue an injunction or, in the alternative, lift the Fifth Circuit's stay. Five Justices voted to deny the application for emergency relief. The Court's order acknowledged that the application "raised serious questions regarding the constitutionality of the Texas law."[58] But it explained that the majority denied the application because the case "present[ed] complex and novel antecedent procedural questions on which [the applicants] ha[d] not carried their burden" under the standard test for issuing a stay or injunction. Four Justices dissented and all four wrote opinions sharply criticizing the Court for allowing a clearly unconstitutional law to go into effect.[59]

The Court's ruling in *Whole Woman's Health* illustrates the challenges presented by the Court's emergency orders. Unlike in the vast majority of cases in which the Court's emergency orders have drawn criticism, the Court in *Whole Woman's Health* denied the application before it and kept the lower court disposition of the case in place. Also unlike many cases that have been the focus of criticism, the majority articulated the standard it was applying and explained, with references to precedents, why it did not believe that standard was met. And yet the Court's ruling attracted strong reactions. The most prominent criticism has been that in a very important context concerning a law one dissenting Justice described as "flagrantly unconstitutional,"[60] the Court did not intervene to overrule the lower court even though it had recently done so in many other high-profile contexts.[61] Echoing some of the same critiques discussed above, commentators have argued that the Court's willingness to intervene in some settings but not others reflects unprincipled decisionmaking. Some also have noted that, while the Court in *Whole Woman's Health* articulated the standard four-part test for relief and concluded that the applicants failed to "me[e]t their burden," it did not explain how it weighed the four factors (or whether it deemed some factors irrelevant in the absence of a sufficient showing on the merits).[62] Defenders of the Court, by contrast, argue that the majority correctly applied the standard for emergency relief; that it lacked a proper defendant to enjoin, as the Court's precedents require; and that the dissents had no effective response to these and related concerns.[63]

To some extent, this debate—and debates about the Court's emergency orders more generally—may reflect disagreement with the Court's judgments about what constitutes the baseline (or "status quo") to be preserved, and what constitutes the harmful or "disruptive force" to be held at bay pending full judicial consideration.[64] Witnesses before the Commission differed on the proper conception of "status quo" for purposes of evaluating the Court's emergency orders,[65] and as one witness acknowledged, the choice will often be contested and "normatively tinge[d]."[66] One possible understanding of the status quo is the state of affairs that exists based on rulings by the lower court(s).[67] This is the baseline that many critics of the Court's emergency rulings claim the Court too often disrupts—and it is the one the Court preserved by refusing to issue the requested relief in *Whole Woman's Health.* A different conception of the status quo is the state of affairs created by the law, policy, or practice being challenged.[68] A third understanding of the status quo was captured by Chief Justice Roberts's dissent in *Whole Woman's Health*, in which he explained: "I would grant preliminary relief to preserve the status quo ante—*before* the law went into effect—so that the courts may consider whether a state can avoid responsibility for its laws in such a manner."[69]

5. Proposals for Reform

Commentators have made various proposals aimed at addressing the concerns described above while acknowledging the reality that emergency orders are, and will remain, a necessary component of the Court's work.

Transparency. Specific reforms proposed in response to concerns about non-transparency—and the accompanying risk of an appearance of inconsistency, arbitrariness, or bias—generally urge the Court to explain the majority's reasoning in important emergency orders involving matters of great public debate. A different approach would place a premium on providing an explanation whenever the Court is undoing reasoned rulings in the lower courts.[70] Another proposal would urge the Justices to disclose their votes in such emergency orders, if not in all shadow-docket cases.[71] The aim of such explanations and disclosures would be to provide guidance to parties, lawyers, and lower court judges; to allow the public to know the role of each Justice in granting or denying an emergency order; and to ensure that especially consequential decisions benefit from the rigor and discipline associated with reasoned opinions.[72] The explanations need not be lengthy; nor does anyone suggest that opinions need to be written in every case. Instead, the goal is to enable observers to understand the bases for the Court's most significant rulings—to follow the legal trail through each decision and from one decision to the next. Proponents of reform argue that at a minimum, the Court should clearly articulate the test it is using to assess the application for emergency relief and indicate how (or whether) it applied each prong of the test.

To be sure, the category of "important" cases in which explanation may be most valuable is hardly self-defining; reasonable minds will differ over the details. Even short opinions take time to write, moreover, and the suggestion that the Court indicate how it applied each prong of a four-part test may be in tension with the suggestion that the writing need not be lengthy. Indeed, there may be an unavoidable tradeoff between the explanatory benefits of any given opinion and the costs of producing it—including not only the time and effort spent preparing the opinion, but also the possibility of committing the Justices to positions they have not yet had time to consider fully. On the one hand, an opinion in which the Court merely articulates the relevant legal test and states its conclusions on the application of each prong may not pose undue risks of delay or lock-in. On the other hand, such an opinion—lacking the detailed explanation and justification of the underlying reasoning typically found in merits opinions—may not provide much illumination.[73]

Yet the Court has recently demonstrated that it can issue informative opinions in an expedited way. In a high-profile case concerning the second federal eviction moratorium, the Court released an eight-page per curiam opinion providing a concise analysis of the majority's view of the likelihood of success on the merits, weighing of the equities, and consideration of the public interest.[74] Given that public perceptions of the legitimacy of its rulings may be at stake, the Court may benefit from continuing to adjust its explanatory practices in important cases, with an eye toward enabling greater transparency, reinforcing procedural consistency, and avoiding the possible appearance of arbitrariness or bias. Relatedly, the Court might avoid some of the transparency issues and procedural concerns that arise with emergency rulings by more frequently exercising its discretion to transfer emergency applications to the merits docket on an expedited basis, as it recently did in *Ramirez v. Collier*.[75]

Precedential effect. As noted in the previous section, most observers seem to agree that emergency orders should not as a general matter carry precedential weight. In some of its orders, the Court is careful to say that the grant or denial of emergency relief should not be construed as resolving the merits of the case. The opinions accompanying the order denying relief in *Whole Woman's Health* present an especially clear illustration: The Court stated that "we stress that we do not purport to resolve definitively any jurisdictional or substantive claim in the applicants' lawsuit."[76] And, as the dissent by Chief Justice Roberts elaborates, "[a]lthough the Court denies the applicants' request for emergency relief today, the Court's order is emphatic in making clear that it cannot be understood as sustaining the constitutionality of the law at issue."[77]

By contrast, when the Court implies that lower courts are bound even by an emergency order issued with no opinion on behalf of the Court—as it did in *Gateway City Church v. Newsom,* discussed above—it risks confusing lower courts, relevant parties, and the public. Such an implied expectation also is hard to square with a central justification for using truncated and relatively non-transparent procedures for emergency orders.[78] There appears to be good reason for the broad consensus against treating such emergency orders as binding precedents, as seems to have occurred in *Gateway City Church v. Newsom*. More generally, the Court might consider clarifying precisely which, if any, of the various types of orders and related opinions should have precedential effect on lower courts.[79]

Existing norms of deference and standards of review. Further reforms that the Court could directly implement were suggested by two witnesses who appeared before the Commission on behalf of a committee of regular advocates before the Court, including several former Solicitors General and Deputy Solicitors General. This group's collective testimony highlights established principles the Court has endorsed and yet may not be regularly applying. For example, the group invoked "the Supreme Court's traditional 'two-court rule,'" which places an especially heavy thumb on the scale against reversing findings of fact that have been made by the trial court and affirmed by a court of appeals.[80] Also, "when the Court of Appeals sets an expedited schedule to address an important constitutional issue, the interest in ordinary process weighs against Supreme Court intervention."[81] These principles, if applied more consistently, might relieve pressure on the Court to intervene early in at least some lower-court proceedings. The cost of greater deference would be to privilege lower-court rulings (including erroneous ones), at least in the first instance, and to increase potential incentives for lower courts to stray from controlling precedent. An additional limitation is that these principles are relevant only to a subset of cases. The reach of both principles may be expanded, however, by greater use of expedited scheduling in the federal appeals courts for cases likely qualifying as emergencies.[82]

Nationwide injunctions. Beyond addressing the Court's own choices about how to handle emergency matters, another approach would address concerns about the shadow docket by reducing the number of "nationwide injunctions" that account for a share of emergency orders. Proposals include legislation narrowing the availability of nationwide injunctions in the lower courts.[83] Such recommendations have inspired extensive debate among academics and policy-makers, which we do not rehearse here. In the specific context of emergency orders, one obvious limitation is that restrictions on nationwide injunctions would address only a subset of the emergency orders that have been of concern, many of which have not involved the conduct of the federal government.[84] A witness before the Commission proposed the alternative of legislation allowing the government to "transfer all civil suits seeking 'nationwide' injunctive

relief to the D.C. district court — to avoid the concern of overlapping (or diverging) 'nationwide' injunctions."[85] Funneling litigation involving the federal government into a single court would again only affect the subset of cases in which federal law or policy is at issue—and perhaps only the still-smaller subset in which there is a realistic risk of conflicting injunctions.

B. Capital Cases

The Supreme Court's emergency orders draw the most attention in high-profile cases where controversies directly impacting large numbers of people are at stake. A separate component of the Court's emergency rulings, however, arises in the context of capital punishment, where the Court often has the final word on whether a state or federal execution will go forward. These cases come to the Court in an emergency posture as the date of execution approaches, when there are unresolved legal challenges to the execution pending in the lower courts.[86] In almost every case, the question of whether the execution may go forward will be resolved by the Supreme Court. If the lower courts do not stay the execution, the condemned person will ask the Supreme Court to do so. If the lower courts do halt the execution, the state will typically ask the Supreme Court to vacate that stay so the execution can proceed. These applications constitute a major component of the Court's emergency rulings.[87]

In recent years, the Court's handling of emergency applications in capital cases has drawn substantial criticism from commentators as well as from members of the Court itself. Some of the criticisms echo those raised about emergency orders more generally.[88] But the common observation that "death is different" distinguishes the capital docket. Because there is no opportunity for correction of legal error if an execution goes through, and because ending human life is a uniquely serious form of state action, concerns about how the Court handles these emergency orders are more acute. At the extreme, the risk of legal error may compound a risk of factual error, thus raising the worry that the state may kill an innocent person.[89] One Commission witness testified that to date "185 people have been exonerated after being wrongfully convicted of a capital offense and condemned to death."[90] In other cases, the concern is not that the state might execute someone who is innocent but rather that it will violate constitutional or other legal rights and protections in the course of administering a death sentence.[91] These cases include challenges concerning the risk of severe and needless pain and suffering due to the method of execution,[92] the individual's competency to be executed,[93] or the presence of a religious advisor at the time of death.[94]

Accordingly, commentators often urge the Court to take special care when resolving emergency petitions in capital cases—in particular, they argue that the Court should err on the side of pausing an execution if there are unresolved legal challenges awaiting resolution. In the words of one witness, there "is no area of the law in which reliability, accuracy, and fairness are more critical than capital punishment."[95]

On the other hand, there are those who argue that, to quote Justice Thomas, injustice can also come "in the form of justice delayed."[96] Most death sentences are never carried out.[97] Those that are take a very long time: for those put to death in 2014, an average of 18 years had elapsed between the imposition and the execution of sentence.[98] Most of that delay is attributable to the ordinary course of judicial review (as opposed to emergency stay applications) or to factors

independent of the judicial process.[99] But emergency stays can add additional months to these preexisting years of delay by disrupting the execution process itself. Executions typically are authorized pursuant to warrants that expire on a given date, such that if a judicial stay prevents the execution from going forward the state often needs to obtain a fresh warrant. Simply resetting the warrant in this fashion can delay an execution by a month or more, while a stay that remains in effect during the pendency of lower court or Supreme Court review can remain in place for many months more.

As Justice Thomas notes, delay is not merely a bureaucratic impediment. Surviving relatives of the victims in capital cases are left in limbo. They sometimes travel to witness the execution and may be "forced to leave without closure" after years of waiting if the execution is postponed at the last minute.[100] Likewise, the state itself has an interest in seeing its criminal sentences carried out. A Commission witness urged that "when a claim is not likely to succeed—especially when it does not even challenge the lawfulness of the sentence or the risk of material harm in how the sentence will be carried out—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. Postponement for that reason alone would fail to give sufficient weight to the compelling interest of the government and the public in timely executions."[101]

This tension between deliberation and delay is a theme that runs through the shadow-docket debate in general, and it animates much of the debate over the Court's approach to emergency capital rulings in particular. Until very recently, that debate centered on death penalty cases in the states, with little attention paid to federal executions, for the simple reason that federal executions are far less common. Between 1963 and 2001, the federal government did not execute anyone, and it executed only three people between 2001 and 2021.[102] By contrast, the states have executed over 1,500 people since 1973.[103] The longstanding debate over state executions and the litigation surrounding them, which was part of the impetus for a federal statute limiting the review of state-court habeas corpus decisions by federal courts,[104] continues to this day. Against this backdrop, several witnesses who shared assessments and recommendations with the Commission regarding the Court's emergency capital orders grounded their analyses at least in part on cases from the states,[105] including the series of cases from Alabama and Texas, noted earlier in this chapter, about the presence of a religious adviser at the execution.

In the months before the Commission's formation, a spike in federal executions gave rise to multiple emergency applications and rulings at the Court. Commission witnesses and commentators cited these rulings, in addition to the Alabama and Texas cases, as salient examples of problems with the Court's handling of its emergency orders.[106] The federal executions at issue occurred during the last six months of the Trump administration, when the Department of Justice sought the execution of thirteen individuals—far surpassing the number of federal executions in the preceding sixty years.[107] These executions were conducted pursuant to a recently adopted execution protocol that was being implemented for the first time in the midst of a pandemic, and they implicated a set of statutes that had not previously been examined closely by the courts. Legal challenges were filed in all thirteen cases, including claims that the Department's proposed execution plan violated federal statutes and constituted cruel and unusual punishment under the Eighth Amendment.[108] In multiple instances, the lower federal courts noted that the challenges raised significant and complex issues, and in some cases they

concluded that the challengers were likely enough to succeed on the merits to warrant a stay of execution to permit time for the courts to resolve the issues.[109] At the Supreme Court, one or more requests for emergency relief were filed in each case, sometimes from the government seeking to vacate a lower court stay and sometimes from the person seeking the issuance of a stay. The combined effect of the Court's rulings across these cases was to permit all thirteen executions to go forward.[110] In most cases, it did so in brief orders that gave no rationale for its decision,[111] though multiple dissents were filed.[112]

A Commission witness defended the Court's resolution of these cases on the ground that the challengers apparently failed to convince the Justices that they were likely to succeed on the underlying merits.[113] Yet the Court's handling of these cases has drawn strong criticism, including from Justices Breyer and Sotomayor,[114] as well as Commission witnesses.[115] In Justice Sotomayor's view, the way the Court made these decisions, "with little opportunity for proper briefing and consideration, often in just a few short days or even hours," and often without a public explanation of their rationale, "is not justice."[116]

In their testimony before the Commission, several witnesses argued that in the special context of capital cases, the stakes of error are asymmetrical, and that the Court's approach to stays of execution should therefore be asymmetrical as well. "[T]here is no symmetry between an erroneous execution and an erroneous non-execution," one witness reasoned. "If proper attention is given to irreparability [of harm] 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."[117] Below, we address two sets of reforms proposed by witnesses taking this view of asymmetrical stakes.

Asymmetric or automatic stays of execution. Several witnesses endorsed the view that the Court should apply an explicitly asymmetrical approach to staying executions, with a presumption in favor of staying an execution when there is genuine doubt as to its legality—and thus a strong and perhaps even absolute presumption against vacating stays when lower courts have issued them.[118] One witness testified that such an asymmetric approach could be imposed by congressional legislation, either in the form of a statute imposing asymmetric standards of review or one removing the Court's jurisdiction to review stays of execution entered by lower courts.[119] We address the device of jurisdiction stripping in Chapter 4 of this Report. But absent any action from Congress, of course, the Court can alter its own threshold for staying an execution.

Commission witnesses also proposed variations of an automatic stay of execution during certain stages of litigation: Under one proposal, previously endorsed by Justice Stevens and by a commission led by Justice Powell, "the Supreme Court should be required to automatically grant a stay of execution to any defendant who has not yet completed a first federal habeas review"; the witness agreed with Justice Stevens that "granting an automatic stay of execution pending the completion of a full round of federal habeas review is consistent with the goals of the Antiterrorism and Effective Death Penalty Act and would improve the balance between finality and justice in the Court's review of capital cases."[120] In another proposal, every person with a pending execution date would have at least one full opportunity to litigate any challenges to the state's proposed method or administration of execution.[121]

Arguing against these proposals, a Commission witness contended that the availability of automatic stays might induce litigation based on weak claims, and that an asymmetrical approach to stays of execution "would put an unwarranted thumb on the scale in favor of capital inmates," given that "the generally applicable standards for granting and reviewing stays and injunctions are already equipped, without the need for specific modifications, to account for the fact that an execution is irreversible."[122] Moreover, the witness argued, any additional delay could undermine the government's interests in cases where the legal challenge has little chance of success, even if lower court judges view the underlying question as unsettled or unresolved.[123]

Four votes to stay an execution. Another approach would be for the Court itself to reduce the number of votes required to grant a stay of execution, from five votes to four—a reform embraced by a number of Commission witnesses.[124] As one commentator observes, certain justices have urged such a change in vote threshold in the past.[125] Such a reduction would address a related but distinct set of concerns called to the Commission's attention regarding what one commentator has called "a lethal gap" in the Court's internal processes: "It takes four votes to put a case on the court's docket" via a writ of certiorari, "but it takes five to stop an execution."[126] Given these different vote thresholds, it is possible that the Court could grant a petition for certiorari and set a case for full briefing and argument to resolve a presumably significant legal question, but then find itself unable to adjudicate that case because the petitioner is put to death while the case is pending. In view of this concern, some Justices have at times employed a practice known as the "courtesy fifth," whereby a Justice who does not actually believe that either certiorari or a stay is warranted will nonetheless vote to issue a stay if four other Justices have voted to grant certiorari, thus preserving the Court's jurisdiction.[127] The contours and the continuing viability of this norm are unclear, however.[128]

In recent years, the Court has declined to halt executions when four Justices requested more time for consideration—before a vote on certiorari. In one instance, four Justices voted to call for the views of the Solicitor General, a step typically taken only in cases in which the Court is seriously considering granting certiorari. But as Justice Breyer noted in dissent: "[N]o Member of the majority . . . proved willing to provide a courtesy vote for a stay so that we can consider the Solicitor General's view once received. As it is, the request will be mooted by petitioner's execution."[129] More recently, in *Dunn v. Price*,[130] after the state sought to vacate a lower court stay on the evening of the execution, four Justices requested that the application be held until the following morning when all the Justices could discuss the issue at their regularly scheduled conference; the Court refused and entered a brief order vacating the stay.[131]

In such situations, a case that four Justices are seriously considering placing on the merits docket for full consideration can be denied a path forward by a decision disposing of the case through an emergency order. The proposal of an explicit rule stating that four votes are sufficient to grant a stay of execution would resolve this concern. So would an extension of the "courtesy fifth" norm to include circumstances in which four Justices need more time to determine whether to vote to grant certiorari, an approach taken by Chief Justice Roberts in a capital case several years ago.[132]

Arguing against such a proposal, a Commission witness characterized a stay of execution as preventing a government from carrying out a death sentence as scheduled, arguing that "[i]f the Supreme Court is to take such consequential action, it should be done only if a majority of

the Justices vested with the judicial power of the Court actually agrees with that action."[133] A related concern (only rarely stated explicitly) is that justices empowered to pause executions may abuse that power. Then-Justice Rehnquist made the point to his colleagues in response to Justice Brennan's proposal to set the stay threshold at four votes: "four Justices out of a total number of nine could frustrate the effectuation of the will of the majority" by banding together to issue a stay "in every death penalty case."[134] Indeed, at various points over the past few decades, more than four Justices—albeit not all serving at the same time—have expressed their opposition to the death penalty, for instance vowing to no longer "tinker with the machinery of death"; some voted in favor of every capital defendant seeking relief at the Court.[135]

Other commentators are skeptical of the suggestion that four Justices would abuse the ability to issue stays of execution, however, asserting for instance that "there are many reasons—including collegiality, the likelihood of an adverse outcome on the merits, and the probability of negative public and congressional comment—why the minority would be unlikely to behave in this fashion."[136] A Commission witness observed, moreover, that the Court for many years had four Justices who were generally sympathetic to legal issues raised by capital defendants, but who did not use "their existing authority to disrupt the operation of the court" by granting certiorari in every capital case and pressing for a courtesy fifth.[137]

II. Case Selection

Over time, the Supreme Court has gained nearly total control over which cases receive full consideration on its merits docket. Unlike a typical appeals court, which must decide every case that is properly appealed, the Court today chooses virtually all the cases it hears from among petitions for a writ of certiorari, or "cert" for short. For much of its earlier existence, the Court was required by federal law to hear certain categories of appeals, but during the 1970s and 1980s, Congress relieved the Court of all but a vestige of such mandatory appellate jurisdiction. In part as a result of those changes, the Court's merits docket has shrunk over the last several decades. In the 1980s, the Justices decided more than 160 cases after plenary review each year, on average.[138] In recent years, they have chosen around 60 to 80 cases for a full hearing, from among the many thousands of petitions the Court receives annually.[139]

Once the Court decides to take a case or not (by granting or denying a petition for a writ of certiorari), it will say so in the publicly released list of orders described in the previous section. The Court usually does not provide any reasoning or disclose how the Justices voted on the petition.[140] The rules of the Court do state in broad terms several criteria it may consider in its selection of cases.[141] Among them, a leading consideration is whether there is disagreement among federal appeals courts or state high courts about the meaning of a federal law (called a "split"); by taking such a case and thereby providing a single answer about the law's meaning, the Court can restore uniformity on that question across the federal and state courts. Certain details about the internal processing of petitions also are well understood, such as the way the law clerks serving most (but not all) Justices are pooled together to share the work of reviewing petitions, with every petition receiving at least the attention of one of those law clerks.

Observers have offered various critiques of the cert process.[142] Some commentators argue that the contemporary Court is deciding too few cases, or the wrong kinds of cases, to provide needed guidance to lower federal and state courts. Others focus on the Justices' unfettered discretion to select which cases they hear and the lack of transparency surrounding those choices. In recent years such critiques have merged with concerns about limitations in the inputs the Court receives. The Commission received comments and testimony about how case selection might be affected by the fact that a fairly small group of lawyers appear regularly before the Justices, as well as on ways the Court might generally improve the quality and processing of the information it receives at the cert stage.

A. The Concentration of Advocacy

The term "Supreme Court bar" formally refers to all attorneys admitted to practice before the Court. The term has taken on a distinctive meaning in the last few decades, however, and is now often used to refer to an elite group of private attorneys who appear regularly before the Justices. That group has become more dominant in recent years, with repeat-player attorneys accounting for a larger proportion of the work before the Court.[143] Such concentration means that the Justices hear more frequently from talented lawyers with specialized expertise in Supreme Court advocacy. Justice Kagan spoke favorably of this trend, for example, saying that "[w]e all hope it will continue" and noting that such specialists "know what kind of questions we ask, the information we need or want."[144] Writing in 2005, then-Judge Roberts made a slightly different point, highlighting the costs of poor advocacy before the Court: "Obviously, better advocacy . . . is a good thing. A well-argued case will not necessarily be well decided; sometimes the judges get in the way. But there is a significant risk that a poorly argued case will be poorly decided. That is a risk of our adversary system."[145]

Yet, as then-Judge Roberts acknowledged, there are costs as well as benefits. "[T]here is no denying," he wrote, "that something is lost as the bar becomes more specialized. . . . If you have a case arising in Iowa that works its way through the Iowa courts, goes to the Iowa Supreme Court, and works its way to Washington, I think there is something beneficial for both the U.S. Supreme Court and certainly for the Iowa bar to have Iowa attorneys present that case."[146] Moreover, practice before the Supreme Court is a sought-after and valuable experience for an attorney; concentration may mean fewer opportunities for attorneys who may be less experienced, but no less talented, to take their turn at the podium.[147]

Other observers have raised similar concerns about the "elitification" of the Supreme Court bar.[148] One strand of critique focuses on the risk that the Justices are operating in an "echo chamber," hearing from advocates who are adept at reflecting their own views back to them rather than giving the Justices information they may not yet know they need or want.[149] For some, these concerns are sharpened by a lack of diversity among the advocates themselves. Commentators have highlighted the low numbers of women and people of color in the group of attorneys that argues before the Justices, including among those the Court invites to serve as amici curiae.[150] Others have focused on the seeming homogeneity in the educational and professional backgrounds of the specialized bar.[151]

A further set of concerns has to do with the types of parties, or interests, most likely to secure elite representation. Outside the government, most of the attorneys with the most

experience before the contemporary Court work for law firms that primarily represent corporate clients.[152] Such attorneys, commentators argue, may be unwilling (or ethically unable) to take positions adverse to those of their corporate clients—for example, claims advanced by consumers, employees, and other parties seeking to challenge corporate interests.[153] Other commentators have raised similar concerns about asymmetries in representation in cases involving criminal defendants, where the government is represented by expert advocates from the U.S. Solicitor General's Office and offices of state attorneys general.[154]

Some argue that these concerns are overstated or misplaced, especially at the merits stage when the Court has already decided to hear the case.[155] Given the limited number of such cases and the value of Supreme Court experience, talented attorneys often will actively seek out cases that receive the Court's full consideration, even if they must work for free. Cases at the merits stage also frequently draw briefs from amici curiae—sometimes many of them—and such contributions may help fill in gaps in the parties' own arguments.[156] As noted above, moreover, one of the most frequent reasons for a cert grant is a split in authority in the lower federal and state courts; in such cases, the Court can take advantage of the analysis contained in the opinions of other judges who have considered the same legal question. The size of the merits docket also allows time for research by the Justices and their law clerks, which may help to smooth out any asymmetries in the quality of advocacy.

To the extent significant imbalances in advocacy exist, commentators have argued, they are likely to be most pronounced when the Court is deciding whether to hear the case in the first place. At the cert stage, cases number in the thousands rather than the dozens and the professional payoff of working on any one of them is not as clear, as the Court may decline review for any number of reasons. Even if the value of Supreme Court experience is sufficient to give expert attorneys incentives to seek out cases that seem cert-worthy, some plausible candidates may yet fall through the cracks.[157] Some commentators contend that the large number of petitions to process also leaves less time for research in each case—beyond reading the judicial opinions creating the split—meaning that the Justices and law clerks may rely more on the advocates' arguments and the information they provide at the cert stage.[158]

B. Proposals

Some suggested reforms focus on the broader market for appellate legal services. For example, the Commission heard testimony from one witness who called for increased funding for civil legal aid and criminal public defender offices so as to "facilitate the development of a larger, more experienced public-interest appellate bar."[159] In the discussion that follows, we focus on tools that commentators and Commission witnesses have suggested the Court itself could employ to enhance the scope, reliability, and processing of information available during the process of case selection.

1. Staff Attorneys

In recent terms, the Supreme Court has considered roughly six thousand petitions for certiorari each year.[160] Much of the initial work of screening the cert petitions falls to the

Justices' law clerks, who typically are recent law school graduates. The law clerks also assist the Justices with cases already slated for decision on the merits, which necessarily limits the amount of time they can spend on any given cert petition. As described more fully in testimony received by the Commission:

> To ease the burden on the law clerks in reviewing thousands of cert petitions, seven of the nine chambers of the Justices at the Court voluntarily participate in a 'cert pool' in which only one clerk within those seven chambers spends any substantial time reviewing the petition and then supplies a memorandum to all the participating chambers in the pool that summarizes the argument and recommends whether plenary review is warranted. . . . The clerks in the two chambers not participating in the cert pool nominally are responsible for sifting through all the thousands of cert petitions themselves.[161]

In addition to limited time, commentators have suggested that law clerks also may have limited expertise on the kinds of questions that are central to cert, including the legal and public importance of the issues involved in the case and whether the case is a good vehicle to facilitate the Court's review.[162] Although the Justices make the decision whether to grant cert, during the initial screening phase the law clerks generally depend on the parties—as well as any amici that may weigh in at the cert stage—to frame the relevant issues and present the arguments for and against review. Interviews with law clerks indicate that they may take special note of any petition or amicus brief filed by a respected attorney, whose association with the case offers some assurance that the assertions are credible.[163] The law clerks may, of course, test those assertions through their own independent research, but the volume of petitions and the law clerks' other responsibilities make it difficult to do so in every case.

One proposal for addressing the challenges presented by the sheer number of cert petitions is for the Court to hire a staff of career attorneys, experienced in appellate and Supreme Court advocacy, who could assist the Justices in deciding which cases to hear. The office could be structured in a variety of ways. On one model, the staff attorneys could perform a first review of the petitions, flag those that appear to be plausible candidates for cert, and write memoranda to aid the Justices and their law clerks in their own appraisal. In any event, the Justices would still make the final decisions on cert, with whatever input from the law clerks the Justices wished to retain. Proponents of reform argue that, because the staff attorneys' work would focus exclusively on the cert stage, they would have time to evaluate each petition more thoroughly than the law clerks currently can, and an extensive review informed by the staff attorneys' own expertise could help compensate for any gaps and distortions that might otherwise exist due to asymmetries in advocacy by the parties and their amici.[164] Moreover, in contrast to law clerks who typically serve for only one year, career staff attorneys arguably could better observe patterns and trends over time in the legal issues about which parties, the public, or the lower courts may need clearer guidance.

Others might question the benefits of this reform, arguing that because most petitions do not present cert-worthy questions or are otherwise unsuitable for the Court's review, the increase in the volume of petitions does not require any increase in personnel. In addition, some observers believe reports of the law clerks' influence on the cert process are exaggerated,[165] because the Justices' own expertise and experience can make up for any limitations in their law clerks' knowledge. On this view, the value of inserting a layer of dedicated screeners into the process

might be limited to catching the false negatives that occur when law clerks would otherwise fail to flag a cert-worthy petition, causing it to escape the Justices' notice. Yet missing a petition that raises a regularly recurring issue may not be much of a problem for the Court's law-declaration function, as future cases may turn out to be equally good or better vehicles for addressing that issue.[166]

A staff attorney office would presumably require funding from Congress, perhaps at a level similar to that already provided to other federal courts for their staff attorney and pro se offices. Beyond those concrete costs, proposals to create such an office at the Supreme Court might raise questions about how the staff attorneys are to be selected, so as to avoid introducing new biases or blind spots into the process. Those who are concerned about such risks or about bureaucratization may find reassurance in the annual turnover of the law clerks; staff attorneys, who might be expected to remain in the office for many years, would present far greater concerns from that perspective. Questions may also arise about the delegation of important aspects of the judicial function, similar to concerns that have been raised about the commonplace use of career staff attorneys in other federal courts.

2. Amicus Views on Certiorari

The Court receives information not only from the parties but also from interested non-parties known as amici curiae. At the cert stage, briefs from amici—often authored by experienced Supreme Court advocates—typically offer additional support for the petitioners' arguments that the case is worthy of the Court's review. For example, amicus briefs may supply data about how many people or businesses are affected by the legal questions presented.

Commentators argue that it can be useful for the Court to receive such additional input from credible sources beyond the parties. Yet, at the cert stage, two possible asymmetries may become more pronounced due to the mobilization of amici. First, the gap may widen between those parties who can and those who cannot attract elite representation, if the former are also more able to recruit amici support for cert.[167] Second, there is a crucial difference between petitioners (who seek the Court's review) and respondents (who seek to avoid review), in that the last thing most respondents want to do is draw the Court's attention by mobilizing amici. Thus, the Court may systematically miss out on amici-supplied information that would weigh against taking a case.

Proposals aimed at addressing such informational gaps tend to recommend ways for the Court to invite broader input as it decides which cases to select for full review. One fairly modest version suggests that the Court expand its existing practice of calling for the views of the Solicitor General (called a "CVSG"), a source with a unique level of credibility with the Justices and their law clerks.[168] The Solicitor General's recommendation also is exceptional in that it is informed by consultations with the parties in the case as well as relevant experts and agencies within the federal government. Others have noted limitations to this approach. In many cases the federal government already is a party and is represented by the Solicitor General. Also, a CVSG brings in only one additional viewpoint, and the Solicitor General may not have any special informational advantage for some legal questions.[169]

It is possible, though, that inviting the Solicitor General to weigh in could facilitate participation by additional amici. Because a CVSG can be seen as a signal of the Court's potential interest in a case, in principle both asymmetries previously noted could be reduced. First, such a signal might make it easier for parties to recruit amici, making more of a difference for parties without the wherewithal to do so otherwise. Second, respondents might feel less constrained about mobilizing amici once it appears the Court is paying attention to the case anyway. The Court's rules do not currently appear to permit additional amici to file briefs while the Solicitor General's office is preparing its response.[170] With a minor amendment, however, the Court could provide for an extended deadline for amicus submissions in cases in which the Court's decision on cert already is on hold pending a submission from the Solicitor General.[171]

A more systematic approach to drawing a broader range of amici participation would be for the Court to publicly announce its potential interest in particular questions presented by a given petition (with or without a CVSG). New amici would then be allowed to submit briefs within a set time period, in advance of the Justice's vote.[172] The asymmetries, if any, among parties could again be reduced, and more effectively so, because the Court's express signal of interest would be clearer, more specific, and better broadcast.

Encouraging input from a wider array of amici by expressly signaling the Court's interest may be especially useful for the certiorari process, observers suggest, where the Court may benefit from receiving further factual information about the impact of the legal issues presented by a case on various segments of society.[173] For example, the predicted impact of the ruling may turn on contestable estimates of how many businesses are potentially subject to the law, or on how often similar disputes arise. Deciding whether to take a case before such factual assertions can be challenged by other credible sources—and more generally, before interested non-parties receive clear notice to offer their input—would, in the view of some commentators, risk a loss of informational quality.[174]

That said, there are potential downsides to proposals for more openly inviting amici input at the cert stage. One is the risk of information overload, if an influx of additional amicus briefs serves more to obscure useful information than to generate new insights or to fact-check others' assertions. Another possible cost is delay. Delays occasioned by inviting submissions from amici can be seen in the same light as those accompanying existing information-gathering practices, such as a CVSG, calling for a response from respondents, or relisting a petition for a later conference. All such practices can be undertaken simultaneously with the broader invitation, and so the delays need not be cumulative. The invitation process on its own would presumably require at least two months, depending on the deadlines the Court sets and on the time needed to consider the new material; whether the informational gains would be outweighed by any sense of urgency could be assessed case by case.

3. Expanding the Involvement of Federal Judges

Other proposals for expanding the range of information available to the Court at the cert stage focus on the role of the Justices' fellow federal judges, who have unique insights about what legal guidance from the Court would be most valuable to the daily work of the federal judiciary. Federal judges are a highly credible source of knowledge about the importance of specific legal questions for parties who appear before them and for the public generally.[175] It is

therefore unsurprising when Justices take cues from the opinions other federal judges write—for example, opinions characterizing the precise point of disagreement among appeals courts on the question presented in a petition—when deciding whether to grant review. In deciding on certiorari, observers note, the Court also seems to take such cues from dissenting or concurring opinions, especially from certain judges.[176] Nevertheless, it seems to be a regular observation among federal judges that the Court is not providing adequate guidance on recurring legal questions in the work of the lower courts.[177]

There is a direct and efficient means—but one which has fallen out of use—for federal judges to present a legal question for the Court to resolve: Under federal law, they can just ask. In a procedure called certification, which is authorized by statute and detailed in the Court's rules, a federal appeals court is allowed to pose such a question to the Court at any time during the case.[178] By all appearances, however, the Court has stopped accepting certified questions. Justice Stevens, in a statement joined by Justice Scalia, expressed dismay at the Court's dismissal of such a request: "The certification process has all but disappeared in recent decades. The Court has accepted only a handful of certified cases since the 1940s and none since 1981; it is a newsworthy event these days when a lower court even tries for certification."[179]

One simple proposal, then, for drawing on the expertise of fellow federal judges is for the Court to revive the practice of certification.[180] Proponents note that no change of law or rules would be needed.[181] The relevant statute and the Court's existing rules give the Justices flexibility in determining how to resolve a certified question. The Court may simply decide the certified question, or it may take the whole case "for decision of the entire matter in controversy";[182] and it may order briefing or oral argument, but need not.[183] For the Court to announce or demonstrate that such requests will not be dismissed as a matter of course would likely be enough to encourage federal appeals courts to begin making such requests when needed. And even if they may be somewhat out of practice, the federal appeals courts could accelerate this revival by taking the first step of trying to certify questions to the Court once again. There may be value in certifying a question even if the Court dismisses the request, in that a future petition raising the same legal question can rightfully point to the earlier request as an indication of the issue's importance.[184]

Certification differs in several significant respects from the more common practice of federal judges flagging issues for the Court through opinions, including dissenting opinions.[185] First, because it is an act of the appeals court rather than an individual judge, certification may carry more weight than a statement in a dissenting opinion. Relatedly, certification is aimed at clarifying unsettled questions of law, whereas dissenting judges—likened to whistleblowers by some observers—often seek to call the Court's attention to the need for error-correction or revision of existing precedent.[186]

Finally and perhaps most importantly, certification can (but need not) occur much earlier in the appellate process. Judicial opinions, whether by an individual judge or a panel of the court of appeals, are written at the end of what may have been a long process of appeal, and the Court may then deny certiorari for any number of unrelated reasons. By contrast, the statute authorizing certification allows a federal appeals court to pose the legal question to the Court and receive an answer "at any time," including at an early stage of the appeal. Proponents of certification see this as enabling the Court to weigh in before unnecessary expense has been incurred by the

parties in the court of appeals, before an unnecessary dissenting opinion or en banc rehearing, and before the appeals court makes a final ruling that the Court might then need to undo. But the potential for early resolution carries costs as well, as there may be good reason to avoid deciding a legal question early in a case. For example, a given case may end up being decided on other grounds, and certification would entail needless delay while the Court addressed the certified question, or the Court's review may be aided by full consideration by the court of appeals. Whether such factors outweigh the benefits of legal clarity can be decided based on timing and on the specific circumstances of each case, including whether the legal question already has been well aired in other courts of appeals. Moreover, in cases in which certification early in the appellate process would be unwise, the court of appeals can simply wait. The statutory authorization of certification "at any time" would seem to permit the court of appeals to flag a legal question as worthy of the Court's attention while also offering its own best answer in a fully reasoned opinion.

A more sweeping set of proposals calls for the legislative creation of a separate panel of judges who would be directly involved in selecting cases for the Court's review. Several variations have been offered, with differences in structure, composition, and degree of control over the Court's certiorari process.[187] In general, these proposals have met with objections ranging from practical difficulties to concerns about constitutionality. We discuss some of the potential constitutional concerns associated with panel proposals in Chapter 2. Commentators also have expressed skepticism that shifting control from one set of judges to another would serve some goals that proponents of this proposal might identify, such as deflecting politically controversial cases from the Court's docket or otherwise addressing any concerns about politicized agenda-setting for the Court.[188] To the extent that the goal is to direct the Court's attention to legal questions that many federal judges consider to be most in need of uniform guidance, then reviving the process of certification may suffice as a less provocative but also less problematic approach.

III. Judicial Ethics

The Justices of the U.S. Supreme Court are the only members of the Article III federal judiciary who are not bound by a written code of conduct. Since 1973, all other Article III judges have been bound by an advisory code composed and updated by the United States Judicial Conference. That Code, by its own terms, does not apply to the Justices of the Supreme Court.

In a 2011 year-end report, Chief Justice Roberts addressed concerns over the Justices' exclusion from the Code. He emphasized that "All Members of the Court do in fact consult the Code of Conduct in assessing their ethical obligations. In this way, the Code plays the same role for the Justices as it does for other federal judges since . . . the Code 'is designed to provide guidance to judges.'"[189] In addition, during a 2019 appropriations hearing, Justice Kagan similarly stated that the Justices follow the Code to the very best of their ability.

Some observers are skeptical that the Justices see themselves as equally bound by the Code. In the past decade, observers have argued that Justices transgressed provisions of the Code by participating in fundraising dinners for outside organizations or by overtly criticizing political

candidates, to take two prominent examples.[190] Others argue that, regardless of whether the Justices follow the existing Code, the lack of a formally adopted code prevents full accountability and transparency. Most significant public and private entities have adopted codes of conduct for their organizations and employees. It is not obvious why the Court is best served by an exemption from what so many consider best practice. To bring the Court into alignment with other courts and other entities, some observers argue that the Supreme Court should adopt a code of conduct—either the existing Code applicable to other judges or its own version of a code—or that Congress should impose one.

The discussion of whether the Court should adopt a code of conduct has included a further discussion about whether the Justices should be subject to a disciplinary framework as well. The Justices are not subject to the complaint and discipline framework that applies to other Article III federal judges. The Judicial Conduct and Disability Act of 1980 allows for any party to file a complaint against a federal judge, so long as the complaint alleges that the judge "engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts" or that the judge "is unable to discharge all the duties of office by reason of mental or physical disability."[191] These complaints may include alleged violations of ethical duties. However, the Judicial Conduct and Disability Act excludes the Justices from its reach.[192]

Relatedly, though the Justices are subject to statutory standards that require recusal in specified situations, unlike recusal decisions by lower court judges, the Justices' recusal decisions are not subject to further review.

This section discusses potential benefits and drawbacks of reforms that would impose a code of conduct, a disciplinary framework, or recusal review.

A. Code of Conduct

A code of conduct for the Court would bring the Court into line with the lower federal courts and demonstrate its dedication to an ethical culture, beyond existing statements that the Justices voluntarily consult the Code. In other contexts, such a demonstration of commitment has affected conduct over time, in part by encouraging periodic training and other similar techniques that enhance attention to ethical concerns.

There are two paths to a code of conduct for the Supreme Court: The Court could *internally* adopt a code, or Congress could *externally* impose a code upon the Court. In either case, the code could mirror the one that applies to other federal judges or could be specific to the Supreme Court.

1. Internal Adoption of a Code

The Court could formally adopt the Code of Conduct that already applies to other Article III federal judges. It has adopted similar non-binding regulations in the past: In 1991, the Court formally adopted ethical regulations enacted by the Judicial Conference under the Ethics Reform Act of 1989.[193] Those regulations now govern the Justices' ability to receive gifts, honoraria, and outside income. Adopting the current Code could be done quickly. Furthermore, the Justices' ethical obligations would then be parallel with the rest of the federal judiciary. The Code comprises, for the most part, broadly stated aspirational principles. Were the current Code to

apply to the Justices, it might not be necessary to amend the actual language of the Code,[194] although the opinion letters interpreting the Code in the context of particular situations involving lower court judges might not be directly applicable to the Justices.

As an alternative to adopting the current Code, the Court could create its own code. In a 2019 appropriations hearing, Justice Kagan stated that the Chief Justice was "studying" the question of whether to adopt a code applicable only to the Supreme Court.[195] In that same hearing, Justice Alito was asked why the current Code of Conduct does not apply to the Supreme Court; among other things, he commented that the working life of the Court is a "little different" from that of the rest of the federal judiciary.[196]

An advantage of creating a new code drafted by the Justices is that the language of the code and any interpretive guidance could be geared to the unique institutional setting of the Court. For example, the rules on recusal might be different for a Justice, who, unlike a lower court judge, cannot simply be replaced by another judge. As another example, a new code for the Justices might also provide guidance on public and private appearances, as the considerations could be different for a Justice than for other judges who are not the object of so much public attention. The Justices themselves might be well positioned to consider the tensions and issues that can arise from their public and private activities, and to set standards for themselves. While the Justices' participation in a broad range of educational and professional activities undoubtedly benefits the profession and the country, the Justices must be mindful of appearances if they choose to attend meetings of organizations that have a political or other valence that could cause the Justices' attendance to become controversial or cast doubt on their neutrality. A code drafted by the Justices, amplified over time through its application, might help the Justices navigate these waters.[197]

In either case, the Supreme Court clearly has sufficient authority to adopt a code—doing so raises no constitutional problems. The Court has the power to affect its own internal governance, so long as it continues to meet its constitutional responsibilities.

2. External Imposition of a Code

In the absence of Court action, Congress could enact a code for the Supreme Court. Several bills have been proposed to this effect, over the past 30 years, although none has been enacted.[198] Typically, the proposed bills direct the Judicial Conference to craft a code for the Court (or simply make the existing code applicable to the Justices). In his 2011 year-end report, Chief Justice Roberts suggested that the Judicial Conference currently lacks the statutory authority to do so. The Chief Justice put it bluntly: "Because the Judicial Conference is an instrument for the management of the lower federal courts, its committees have no mandate to prescribe rules or standards for any other body."[199] The proposed bills would address this precise issue of Judicial Conference authority.

Alternatively, Congress could write a code itself. One observer points out that Congress already imposes requirements on the Court that are analogous to a code of conduct.[200] For example, Congress requires that Justices take a special oath of office, requiring them to swear to "administer justice without respect to persons, and do equal right to the poor and to the rich."[201] The oath resembles provisions that might be included in a code of conduct.

External proposals would give Congress more control over the composition of a code of conduct. If Congress were to write a code, it would need to be careful to ensure that the code's demands did not encroach on the Courts' constitutionally exclusive judicial decisionmaking function.[202] Further, Congress has largely delegated procedural matters to the courts.[203]

B. Judicial Discipline

Were the Court to adopt a code, the next question is whether and how the code should be enforced. As applied to federal judges, the existing code is in itself only aspirational. However, under The Judicial Conduct and Disability Act, conduct by a judge that is prejudicial to the "effective and expeditious" business of the courts is subject to sanctions. Under this misconduct formulation, the code is highly relevant to an appraisal of judicial conduct.

This section will discuss first the benefits and costs of applying the Judicial Conduct and Disability Act to the Justices. It will then discuss the benefits and consequences of an internal disciplinary framework.

1. Judicial Conduct and Disability Act

The Judicial Conduct and Disability Act is a framework for disciplining misconduct that does not rise to the level of impeachment. The Judicial Conference provides nationally uniform guidelines governing the substantive and procedural aspects of misconduct proceedings. The following is a simplified description of the procedures currently in place for the lower federal courts:

(1) "any person" may file a complaint alleging misconduct or disability,

(2) the chief judge of the relevant circuit (or the most-senior active circuit judge in the event that the chief judge is disqualified) reviews the complaint,

(3) either the chief judge or a special committee appointed by and including the chief judge resolves the complaint,

(4) the complainant may petition for review by the circuit's judicial council,[204] and

(5) finally, if a complainant is dissatisfied with the disposition of the circuit council, the complainant may petition for review by the judicial conduct and disability committee of the United States Judicial Conference (review is discretionary).

These procedures could act as a model for the U.S. Supreme Court; if the Court were to adopt a procedure where complaints were referred to the Chief Justice, it might be useful for the Chief to work with the assistance of other Justices or a body similar to the circuit councils.

Applying the Act to the Justices without modification would place inferior court judges in the position of evaluating members of a body that is hierarchically superior. This would be awkward and might possibly lead to undue deference. Such an arrangement might be constitutionally infirm as well if the disciplinary process encroached on the judicial decisionmaking function of the Court.

Additionally, the Act's lack of a standing or jurisdictional requirement for filing a complaint may be open to abuse. The Act allows "any person" to file a complaint against a federal judge. In 2013, chief circuit judges resolved 1167 filed complaints, dismissing all but 20 as "merits-related, lacking sufficient evidence, frivolous, or otherwise improper."[205] These numbers would likely be even higher if the statute applied to the Supreme Court due to the institutional visibility of the Court and the individual Justices.[206]

Furthermore, the stakes of the procedure would be much higher if applied to the Court. Sanctions under the Act can range from private reprimand to temporarily restricting a judge from hearing cases.[207] At the extreme end, temporarily restricting a Justice from hearing cases would be a highly consequential event that would deprive litigants and the American people of whatever number constitutes a full complement of Justices. Unlike in the lower courts, there is currently no mechanism for replacing an absent Justice. The availability of such a sanction could cause groups to file more complaints in the hope of removing those Justices with whom they tend to disagree. Further, and more broadly, it is possible that interest groups seeking to mobilize support, raise money, and pursue their own agendas will see in this process an avenue for seeking their own ends to the detriment of the Court, individual Justices, and the public.

2. Internal Disciplinary Procedures

An internal disciplinary procedure for the Court would avoid the issue of having inferior court judges sit in judgment of the Justices or the more serious risks that could arise if the disciplinary process were run by persons outside the judiciary.[208] If the procedures called for internal enforcement, the Chief Justice (or next most-senior Justice, in the event of conflict) could review complaints against individual Justices. The complaint could be referred to the entire Court or a subset of Justices. How such a procedure might affect the overall role of the Chief Justice and the working relationships of the Justices is not clear, although the development of deep personal rifts seems at least possible as a result. And again, the sanction of removal from a case could have broad repercussions for the Court, litigants, and the public.

Some might worry that the adoption of a code of conduct might not be beneficial without any avenue for sanctions. However, experience in other contexts suggests that the adoption of a disciplinary code would be a positive step on its own, even absent binding sanctions.[209]

C. Recusal

All federal judges, including the Justices, are subject to statutory standards that require recusal in specified situations. The statute, 28 U.S.C. § 455, requires a judge or Justice to recuse "in any proceeding in which his impartiality might reasonably be questioned."[210] The statute also requires recusal in more specific circumstances, such as when the judge has a financial interest in the proceedings or personal knowledge of disputed facts.[211] Recusal decisions by lower court judges are subject to review on appeal and are orders in a case just like other rulings. By contrast, a recusal decision by a Justice is not subject to further review. Perhaps in part for this reason, the Justices rarely offer any explanation either for refusing to recuse or for recusing. Justices Rehnquist and Scalia famously wrote memoranda explaining their decisions not to recuse in two high-profile cases.[212] But those memoranda were quite unusual.

Moreover, when a lower court judge recuses, another judge is selected to hear the case. While it can be disruptive to a case when a judge recuses after participating in the proceedings for a substantial period of time, most recusals come at the first assignment of a case and do not affect the handling of the case. In contrast, when a Justice recuses there is no current possibility of adding another Justice. For this reason, the mere fact of the recusal may be case dispositive. The Justices may therefore be justified in being more hesitant than lower court judges to recuse, and correspondingly should be more careful to avoid circumstances that might trigger recusal.

The Justices' recusal decisions are subject to significant public attention, and Justices are often criticized for failing to recuse.[213] Even so, the Justices recuse somewhat frequently, at least at the certiorari stage. There was an average of 193 recusals at the certiorari stage over the last six Terms, and an average of four recusals at the merits stage.[214]

U.S. Supreme Court October Term	Recusals at the Certiorari Stage	Recusals at the Merits Stage
2020	201	1
2019	141	4
2018	198	3
2017	228	6
2016	206	4
2015	181	4

The Justices do not offer reasons for their recusals, but reasons sometimes can be inferred based on context. For example, a Justice's financial disclosure forms may reveal whether a recusal was due to an interest, such as owning shares of stock in a publicly traded company. Based on context, it appears that the most common reason for recusal in the past six Terms is that the Justice was involved with a case during previous employment as a circuit judge or as Solicitor General. Following that, recusals due to stock ownership were the next most common.

After stock ownership, there is a significant dip. A few recusals were likely because a Justice (or Justices) were named in the suit, or because of a family relationship (Justice Breyer, for example, will routinely recuse in cases that were handled by his brother, a U.S. district judge). A negligible number of recusals involve other reasons. In 2020, for example, Chief Justice Roberts recused from a case involving the Smithsonian Institute apparently because the Chief Justice serves as the chancellor of that institution.

Proposals for recusal reform largely focus on making the process more transparent and accountable. There are three common proposals for reform: (1) require the Justices to state their reasons for recusal or for refusing to recuse; (2) establish a formal procedure by which recusal decisions may be reviewed by another Justice or by the entire Court; and (3) reform recusal laws to make it easier for Justices to avoid financial conflicts.

1. Stating Reasons for Recusal

Statements from the Justices explaining their reasons for recusal could enhance the transparency of the recusal process and help build a "common law" of recusal on the Court. Recusal decisions could serve as guidance to Justices and might also clarify whether the Justices use the same standards for recusal on recurring issues, particularly a Justice's prior contact with a case when a circuit judge. While the Justices may provide such statements on their own, Congress might also require such statements from the Court.[215] However, requiring full discussion on every decision to recuse could be time consuming and burdensome. A reasoning requirement could also force Justices in some situations to divulge private matters—for example the medical condition of a family member—and might have the appearance or effect of lobbying the other Justices.[216] One answer to these concerns might be to require only a short statement without specific details; for example, the Justice might state that the recusal is based on the Justice's involvement with the case when a circuit judge and identify the nature of the involvement (e.g., served on the panel, reviewed a motion to hear the case en banc).

In tandem with requiring explanations for recusal, there may be benefits to requiring Justices to state reasons for *not* recusing when a motion for recusal has been filed. Requiring reasoned explanations could ensure that the Justices have thoroughly considered whether to recuse. And, like explanations for recusal, explanations for not recusing could help build a body of precedents that provides guidance to future Justices and is accessible to the public. Even more so than with explanations for recusal, however, requiring explanations for not recusing could become burdensome and time-consuming if motions to recuse became more common and interested groups see such motions as an opportunity to harry or embarrass Justices with whom they disagree.

2. Establish a Procedure by Which Recusal Decisions May Be Reviewed

A Justice's decision whether to recuse is totally independent, and recusal decisions are not subject to any kind of review. The Justices may well consult with one another over difficult recusal decisions, but the decision is still that of the individual Justice and not subject to further review. This places the Justice in the position of being the final arbiter of a recusal motion that challenges the Justice's own impartiality.[217]

Other individual decisions made by the Justices are subject to a form of review by another Justice or the full Court. Parties regularly make applications to individual Justices. These applications include, for example, requests for filing deadline extensions and requests for a temporary stay of an injunction. If a Justice denies one of these requests, Supreme Court Rule 22 provides that a party may renew its request to another Justice on the Court.[218] Sometimes Justices refer emergency motions to the entire court.

There have been moments in the Court's history where disagreements over recusal have led to significant feuds.[219] Because recusal can be case dispositive, were the ultimate decision on recusal to rest with the entire Court, a decision by the Court to force a Justice to recuse may lead to accusations of improper purpose. These issues may not be insuperable; some state supreme courts have a referral process for recusal decisions and the process appears to work without undue friction or burden in that setting.[220] The practice of comparable high Courts in other countries, such as those in Canada and the UK, may be instructive. It appears that neither Canada nor the UK has a referral practice for recusal on its highest court such that high court justices

decide recusal on their own without further review, as in the U.S. Supreme Court. The views of the Justices would be particularly helpful in any further analysis.

3. Reform Financial Recusal Laws

Context suggests that a significant number of Supreme Court recusals are due to a Justice's financial conflict. Indeed, a study of recusals at the certiorari stage in Terms 2003-2013 revealed that there was at least one recusal in 10% of certiorari petitions involving a Forbes 100 company.[221] What makes these numbers surprising is that the Justices (along with their spouses and dependent children) are legally allowed to divest themselves of any stock that is causing a conflict without incurring capital gains tax.[222] It may be that there is something about the wording or operation of the relevant statute, 26 U.S.C. § 1043, that limits its reach or effectiveness.[223] If so, the Court might speak to this issue so that the statute might be improved.

Given the significant number of financial recusals, some have suggested reforms that may reduce the number of recusals due to financial conflicts. For example, Congress could act to prohibit Justices, their spouses, and any dependent children from owning individual shares in publicly traded companies, or Congress could require divestment when a conflict arises.[224] Both reforms would reduce financial conflicts significantly (and eliminate conflicts arising from stock ownership).

The Commission notes the consensus among observers that no Justices or their spouses and dependent children should own or continue to own individual publicly traded securities.

IV. Courtroom Transparency

Due to the COVID-19 pandemic, the Supreme Court conducted oral arguments over teleconference beginning in the 2020 Term. For the first time, oral arguments routinely were livestreamed, so the public could listen in from anywhere an internet connection was available. The Court recently announced that October 2021 arguments would also be livestreamed. The experiment in simultaneous audio has added additional fuel to a long-standing debate over whether there ought to be cameras in the Supreme Court's courtroom, which is usually capable of seating only around 50 members of the general public at a time.

In many respects, the work of the Court has become more accessible over the past few decades. The Court's opinions are available online for anyone to access, as are its orders, including decisions on petitions for certiorari. Even before arguments were livestreamed, recordings could be accessed after the fact in most modern cases. Still, the Court has never made the leap to allowing video streaming or video recording of its proceedings.

Proponents of cameras in the courtroom emphasize the importance of transparency and the potential educational, historical, and civic benefits of being able to see the justices at work. Congress has introduced numerous bills calling for cameras. Numerous members of the media and interested members of the public also urge video coverage. Moreover, lower federal courts have experimented with cameras, and scholars and judges have documented the results of those experiments. However, several justices have made clear that they disfavor video recording of the

Court's proceedings. They and other opponents of cameras raise concerns that cameras will lead to grandstanding by attorneys or even by the justices, and that video clips of the Court will be taken out of context and used to mislead the public.

As an alternative to cameras in the courtroom, the Court could continue its current practice of livestreaming audio of oral arguments. Prior to the pandemic, attendance at the courtroom was determined on a first-come, first-serve basis, and important cases often attracted long lines and large crowds.[225] Critics have documented the unfortunate practice of paid line-standers, a problem which the Court itself partially addressed in advance of one especially high-profile case.[226] Livestreamed audio is far more accessible; one does not need to be in Washington, D.C., to listen to arguments, and attendance is not limited by seats available. Livestreamed audio gives the American public largely equal access to important events in the Supreme Court's courtroom. This may be practically important in those few cases where the oral argument itself may have significant immediate effects, for example, on public markets. In addition to hearing arguments, it could also be meaningful for members of the public to hear opinion announcements from the Justices themselves in real time.

Although livestreaming of the arguments prevents the Court from fixing minor mistakes that may occur during oral argument, the past two Terms indicate that this problem is minor. Livestreamed audio has led to few, if any, hiccups; any such technical problems were related to the telephonic format of the arguments. There is also some concern that observers in the courtroom might attempt to use the fact of livestreaming to disrupt the proceedings. A short delay in transmission such that the livestreaming could be halted during any outburst could prevent any issue.

Given the Court's longstanding opposition to cameras, a continuation of near simultaneous audio would be a step forward and would better enable the media to cover the Court's work, while enabling interested members of the Bar and the public to better follow the work of the Court. Perhaps further experience with simultaneous audio will encourage the Court to try cameras as well.

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[1] *Orders of the Court - Term Year 2020*, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/orders/ordersofthecourt/20 (last visited Sept. 18, 2021). The Court releases a list of orders each Monday that it sits and issues "miscellaneous" orders in individual cases "at any time." *Id.* These orders are catalogued by date of issuance on the Court's website and later consolidated into a set of Orders Lists published in the bound volumes of the *United States Reports*, in a section following the Opinions of the Court.

[2] *Opinions Relating to Orders - 2020*, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/opinions/relatingtoorders/20 (last visited Sept. 18, 2021). The Court also makes such opinions available immediately online, prior to their eventual inclusion in the *United States Reports*. The *United*

States Reports are generally printed multiple years after a case is resolved. *See* Richard J. Lazarus, *The (Non)finality of Supreme Court Opinions,* 128 HARV. L. REV. 540, 543 (2014) (noting a five-year delay). In the interim, the Court's orders and its opinions related to orders can be found in various places on the Court's website, including: on a page entitled "Opinions Relating to Orders;" at the end of the regular or miscellaneous "Orders List" catalogued online; and in the preliminary (and eventually final) version of the *United States Reports*, digital images of which the Court makes available for free online. Finally, the Court's orders (but not the opinions relating to those orders) are separately printed in the Journal of the Supreme Court, a bound volume printed at the conclusion of each Term that contains "the official minutes of the Court," digital images of which are also made available online. *Journal*, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/orders/journal.aspx (last visited Sept. 18, 2021).

[3] These per curiam opinions also appear on the Court's web page and in the *United States Reports* alongside other "Opinions of the Court" issued via the merits docket, even though they are often decided summarily without the robust procedures normally associated with merits cases. In addition, the Court sometimes resolves a pending case by granting a petition for certiorari, vacating the opinion below, and remanding for further proceedings (typically with brief instructions, such as to consider a recently issued opinion of the Court). These summary dispositions, known colloquially as "GVRs," for grant, vacate, and remand, appear on the Orders List. Individual Justices also occasionally issue "in chambers" opinions in their capacities as Circuit Justice that are not included in the formal Orders List or published in the *United States Reports*.

[4] *See, e.g.*, Albert M. Sacks, *The Supreme Court, 1953 Term - Foreword*, 68 HARV. L. REV. 96, 103 (1954); Ernest J. Brown, *The Supreme Court, 1957 Term - Foreword: Process of Law*, 72 HARV. L. REV. 77 (1957); Henry M. Hart, Jr., *The Supreme Court, 1958 Term - Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 89 & n.13 (1959); Alexander M. Bickel & Harry H. Wellington, *Legislative Purpose and the Judicial Process: The* Lincoln Mills *Case*, 71 HARV. L. REV. 1, 3-4 (1957); ROBERT L. STERN & EUGENE GRESSMAN, SUPREME COURT PRACTICE 222-24 (4th ed. 1969). Many of the orders and decisions subject to criticisms took place on the Court's mandatory appellate docket that is no longer so prevalent.

[5] *See, e.g.*, William O. Douglas, *The Supreme Court and its* Caseload, 45 CORNELL L.Q. 40 (1960); Eugene Gressman, *Much Ado About Certiorari*, 52 GEO. L.J. 742 (1964); Anthony Lewis, *The Supreme Court and Its Critics*, 45 MINN. L. REV. 305, 319-31 (2016).

[6] *See, e.g.*, Aaron-Andrew P. Bruhl, *The Supreme Court's Controversial GVRs—and an Alternative*, 107 MICH. L. REV. 711 (2009); Ira P. Robbins, *Hiding Behind the Cloak of Invisibility: The Supreme Court and Per Curiam Opinions*, 86 TUL. L. REV. 1197 (2012).

[7] *See Presidential Commission on the Supreme Court of the United States* 5 (June 30, 2021) (testimony of Stephen I. Vladeck, University of Texas School of Law) [hereinafter Vladeck Testimony], https://www.whitehouse.gov/wp-content/uploads/2021/06/Vladeck-SCOTUS-Commission-Testimony-06-30-2021.pdf (documenting the increase in orders either granting or vacating a stay or injunction from 2005 through 2020).

[8] *See* William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1, 1 (2015); *see also Presidential Commission on the Supreme Court of the United States* 1 n.1 (June 30, 2021) (written testimony of Samuel L. Bray, Notre Dame Law School) [hereinafter Bray Testimony], https://www.whitehouse.gov/wp-content/uploads/2021/06/Bray-Statement-for-Presidential-Commission-on-the-Supreme-Court-2021.pdf (defining the shadow docket as "the portion of the orders list that is substantive, not including the mere grant or denial of a petition for a writ of certiorari").

[9] The leading critic on these issues is Professor Stephen Vladeck. *See, e.g.*, *The Supreme Court's Shadow Docket: Hearing Before the Subcomm. on the Courts, Intellectual Prop. & the Internet of the H. Comm. on the Judiciary,* 117th Cong. (2021) (statement of Stephen I. Vladeck, University of Texas School of Law), https://docs.house.gov/meetings/JU/JU03/20210218/111204/HHRG-117-JU03-Wstate-VladeckS-20210218-U1.pdf; Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123 (2019) [hereinafter Vladeck, *The Solicitor General and the Shadow Docket*]; Vladeck Testimony, *supra* note 7. For other critics of various elements of the shadow docket in recent years, including emergency relief and summary decisions, see, for example, *The Supreme Court's Shadow Docket: Hearing Before the Subcomm. on the Courts, Intellectual Prop. & the Internet of the H. Comm. on the Judiciary,* 117th Cong. (2021) (statement of Loren L. AliKhan, Solicitor

General, District of Columbia), https://docs house.gov/meetings/JU/JU03/20210218/111204/HHRG-117-JU03-Wstate-AliKhanL-20210218-U1.pdf; Mark Walsh, *The Supreme Court's 'Shadow Docket' Is Drawing Increasing Scrutiny*, A.B.A. J. (Aug. 20, 2020, 9:20 AM), https://www.abajournal.com/web/article/scotus-shadow-docket-draws-increasing-scrutiny; Richard C. Chen, *Summary Dispositions as Precedent*, 61 WM. & MARY L. REV. 691 (2020); Edward A. Hartnett, *Summary Reversals in the Roberts Court*, 38 CARDOZO L. REV. 591 (2016).

[10] The Commission sometimes follows growing usage of the term "shadow docket" to describe the Court's emergency orders rulings. When the Commission uses this phrase, it intends none of the negative connotations assumed by some commentators who object to the term.

[11] On September 30, 2021, Justice Alito gave a public address on "The Emergency Docket" at Notre Dame Law School in which he responded to many of the critiques of the Court's recent orders. The address was livestreamed, but a recording is not publicly available. *See* https://events nd.edu/events/2021/09/30/justice-samuel-alito-the-emergency-docket/. *See also, e.g.,* Adam Liptak, *Justice Breyer on Retirement and the Role of Politics at the Supreme Court*, N.Y. TIMES (Aug. 27, 2021), https://www.nytimes.com/2021/08/27/us/politics/justice-breyer-supreme-court-retirement.html (quoting Justice Breyer in an interview: "I can't say never decide a shadow-docket thing," he said. "Not never. But be careful. And I've said that in print. I'll probably say it more.").

[12] This section is not meant to exhaustively engage every criticism advanced about the Court's procedures in its issuance of orders, including in shadow-docket cases. We have focused on especially salient critiques—and responses to those critiques—that have been developed by scholars and practitioners, and more recently the Justices themselves, over the past few years.

[13] *See* Vladeck Testimony, *supra* note 7, at 17 (describing the "dramatic real-world impacts" of shadow-docket rulings).

[14] 141 S. Ct. 2494 (2021).

[15] *E.g.*, Biden v. Texas, No. 21A21, slip op. at 1 (U.S. Aug. 24, 2021) (mem.); Dep't of Homeland Sec. v. New York, 140 S. Ct. 599 (2020) (mem.).

[16] *E.g.*, West Virginia v. EPA, 136 S. Ct. 1000 (2016) (mem.).

[17] Alabama Ass'n of Realtors v. Dep't of Health & Human Servs., No. 21A23, slip op. at 1 (U.S. Aug. 26, 2021) (per curiam); Alabama Ass'n of Realtors v. Dep't of Health & Human Servs., No. 20A169, slip op. at 1 (U.S. June 29, 2021) (mem.); Chrysafis v. Marks, No. 21A8, slip op. at 1 (U.S. Aug. 12, 2021) (mem.).

[18] *See* Ross v. Nat'l Urban League, 141 S. Ct. 18 (2020) (mem.).

[19] *See* Wheaton College v. Burwell, 573 U.S. 958 (2014) (mem.).

[20] *See* Merrill v. People First of Ala., 141 S. Ct. 190 (2020) (mem.).

[21] *See* Barnes v. Ahlman, 140 S. Ct. 2620 (2020) (mem.).

[22] *See, e.g.*, Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020) (per curiam); Tandon v. Newsom, 141 S. Ct. 1294 (2021) (per curiam).

[23] *Presidential Commission on the Supreme Court of the United States* 13 (July 20, 2021) (written testimony of Sharon McGowan, Lambda Legal), https://www.whitehouse.gov/wp-content/uploads/2021/07/McGowan-Testimony.pdf (describing how although the Court later denied cert in a Virginia school board's effort to reverse a lower court injunction allowing a transgender student to use the boys' bathroom, the Supreme Court's initial stay in the case, Gloucester Cty. Sch. Bd. v. G.G. *ex rel.* Grimm, 136 S. Ct. 2442 (2016) (mem.), had the effect of barring Gavin Grimm from "using the boys' restroom along with all the other boys throughout his last year of high school").

[24] Vladeck Testimony, *supra* note 7, at 7.

[25] Steve Vladeck (@steve_vladeck), TWITTER (Sept. 5, 2021 1:27 PM), https://mobile.twitter.com/steve_vladeck/status/1434568812045742086.

[26] *See* Kalvis Golde, *In Barrett's First Term, Conservative Majority Is Dominant but Divided*, SCOTUSBLOG (July 2, 2021, 6:37 PM), https://www.scotusblog.com/2021/07/in-barretts-first-term-conservative-majority-is-dominant-

but-divided; SCOTUSBLOG, STAT PACK FOR THE SUPREME COURT'S 2020-21 TERM 18 (2021), https://www.scotusblog.com/wp-content/uploads/2021/07/Final-Stat-Pack-07.02.2021.pdf.

[27] Adam Feldman, *Empirical SCOTUS: Something We Haven't Seen in the Supreme Court Since the Civil War*, SCOTUSBLOG (Apr. 16, 2020, 5:22 PM), https://www.scotusblog.com/2020/04/empirical-scotus-something-we-havent-seen-in-the-supreme-court-since-the-civil-war; *see* SCOTUSBLOG, FINAL STAT PACK FOR OCTOBER TERM 2019, at 1 (2020), https://www.scotusblog.com/wp-content/uploads/2020/07/Final-Statpack-7.20.2020.pdf.

[28] Vladeck Testimony, *supra* note 7, at 7-8.

[29] Bray Testimony, *supra* note 8, at 5-7 (discussing such injunctions and their relationship to the shadow docket).

[30] [To add citation to Justice Alito's Notre Dame address when transcript is available.]

[31] As an example of the latter point, Professor Vladeck argues that a majority of the Justices believe that state and federal governments are irreparably harmed when their actions are enjoined by a lower court and suggests that this is a relatively new development. Vladeck Testimony, *supra* note 7, at 14.

[32] [To add citation to Justice Alito's Notre Dame address when transcript is available.] *See* Mark Rienzi, *The Supreme Court's "Shadow" Docket—A Response to Professor Vladeck*, NAT'L REV. (Mar. 16, 2021, 1:30 PM), https://www.nationalreview.com/bench-memos/the-supreme-courts-shadow-docket-a-response-to-professor-vladeck.

[33] As Professor Michael Morley argued in congressional testimony, "it may often be much easier for Justices to agree on an ultimate outcome than to craft an opinion with detailed reasoning . . . ." *The Supreme Court's Shadow Docket: Hearing Before the Subcomm. on the Courts, Intellectual Prop. & the Internet of the H. Comm. on the Judiciary,* 117th Cong. 3 (2021) (statement of Michael T. Morley, Florida State University College of Law) [*hereinafter* Morley House Testimony], https://docs.house.gov/meetings/JU/JU03/20210218/111204/HHRG-117-JU03-Wstate-MorleyM-20210218-U1.pdf.

[34] *See, e.g.,* Vladeck Testimony, *supra* note 7, at 12 (questioning whether a case resolved through an emergency order truly involved "an 'emergency'"); *id.* at 14-15 (critiquing the Court's apparent belief that "when *any* government action is enjoined by a lower court, the government is irreparably harmed, and the equities weigh in favor of emergency relief *no matter* the consequences to those who might be injured by allowing the policy to remain in effect," and its willingness to grant emergency relief to protect "newly minted rights").

[35] *Id.* at 6 (describing the rise of "cases in which the Justices are using the shadow docket to change the status quo" and arguing that "part of the significance of the shadow docket of late has been in how often the Justices are using it to disrupt the state of affairs until a case reaches the Court on the merits (which, increasingly, may be never"). This disagreement may turn in part on how to select the "status quo" to be protected by emergency relief—an issue we discuss below. *See infra* note 65 and accompanying text.

[36] For example, Justice Barrett recently denied a request for emergency relief concerning Indiana University's vaccine requirement. The denial is noted on the Court's docket without any accompanying explanation. *See* Klaassen v. Trustees of Indiana University, No. 21A15, https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/21a15.html; Amy Howe, *Barrett leaves Indiana University's vaccine mandate in place*, SCOTUSblog (Aug. 12, 2021, 9:40 PM), https://www.scotusblog.com/2021/08/barrett-leaves-indiana-universitys-vaccine-mandate-in-place/.

[37] 141 S. Ct. 725 (2021) (mem.). The three prior cases were *Dunn v. Ray*, 139 S. Ct. 661 (2019) (mem.), *Murphy v. Collier,* 139 S. Ct. 1475 (2019) (mem.), and *Gutierrez v. Saenz,* 141 S. Ct. 127 (2020) (mem.).

[38] Smith v. Commissioner, Alabama Dep't of Corrections, 844 Fed. Appx. 286 (11th Cir. 2021).

[39] Justice Kavanaugh dissented in a brief opinion joined by the Chief Justice. *Smith*, 141 S. Ct. at 726 (Kavanaugh, J., dissenting from denial of application to vacate injunction). Justice Thomas dissented without stating any reasons.

[40] *Id.* at 725-26 (Kagan, J., concurring in denial of application to vacate injunction).

[41] *See* Vladeck, *The Solicitor General and the Shadow Docket*, *supra* note 9, at 131. For one recent articulation of the standard, see *Whole Woman's Health v. Jackson*, No. 21A24, 2021 WL 3910722, at *1 (U.S. Sept. 1, 2021) ("To

prevail in an application for a stay or an injunction, an applicant must carry the burden of making a strong showing that it is likely to succeed on the merits, that it will be irreparably injured absent a stay, that the balance of equities favors it, and that a stay is consistent with the public interest." (internal quotation marks omitted)).

[42] 141 S. Ct. 716, 716–717 (2021) (mem.).

[43] Vladeck Testimony, *supra* note 7, at 14.

[44] *See, e.g.,* Steve Vladeck, *The Supreme Court Doesn't Just Abuse Its Shadow Docket. It Does So Inconsistently.*, WASH. POST (Sept. 3, 2021, 10:43 AM), available at https://www.washingtonpost.com/outlook/2021/09/03/shadow-docket-elena-kagan-abortion (contrasting the Court's refusal to issue relief in *Whole Woman's Health,* the Texas abortion case, on grounds of legal uncertainty, with cases in which the Court "showed no compunction about [making new law] where alleged infringements on religion were at issue"); Lee Kovarsky, *Abortion, the Death Penalty, and the Shadow Docket,* SCOTUSBLOG (Sept. 6, 2021, 12:03 PM), https://www.scotusblog.com/2021/09/abortion-the-death-penalty-and-the-shadow-docket (contrasting *Whole Woman's Health* with cases involving federal executions); *see also* Alabama Ass'n of Realtors v. Dep't of Health & Human Servs., No. 21A23, slip op. at 1-2 (U.S. Aug. 26, 2021) (Breyer, J., dissenting) (criticizing the majority for vacating a stay entered by a lower court when the agency order was not "demonstrably wrong" (citation omitted)); Wheaton College v. Burwell, 573 U.S. 958, 965-68 (2014) (Sotomayor, J., dissenting) (objecting to the majority's decision to issue an emergency injunction where the legal rights at issue were not "indisputably clear," as required by precedent interpreting the All Writs Act, 28 U.S.C. § 1651 (citing Turner Broad. Sys., Inc. v. FCC, 507 U.S. 1301, 1303 (1993))).

[45] *See, e.g.*, Steven Vladeck, *The Supreme Court's 'Shadow Docket' Helped Trump 28 Times. Biden is 0 for 1.*, WASH. POST (Aug. 26, 2021 12:24 PM), https://www.washingtonpost.com/outlook/2021/08/26/shadow-docket-supreme-court-biden-mexico.

[46] *See, e.g.*, Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020) (per curiam); Tandon v. Newsom, 141 S. Ct. 1294 (2021); Gateway City Church v. Newsom, 141 S. Ct. 1460 (2021).

[47] *See, e.g.,* Rienzi, *supra* note 32. For a response, see *Texas's Unconstitutional Abortion Ban and the Role of the Shadow Docket, Hearing Before the Senate Committee on the Judiciary* 20-21 (Sept. 29, 2021) (written testimony of Stephen I. Vladeck, University of Texas School of Law), https://www.judiciary.senate.gov/imo/media/doc/Vladeck%20testimony1.pdf [*hereinafter* Vladeck Senate Testimony].

[48] [To add citation to Justice Alito's Notre Dame address when transcript is available.]

[49] Bray Testimony, *supra* note 8, at 13.

[50] *Id.*

[51] *See, e.g.,* Richard C. Chen, *Summary Dispositions as Precedent*, 61 WM. & MARY L. REV. 691, 702 (2020); Trevor N. McFadden & Vetan Kapoor, *The Precedential Effects of the Supreme Court's Emergency Stays*, 44 HARV. J.L. & PUB. POL'Y 827, 830 (2021).

[52] [To add citation to Justice Alito's Notre Dame address when transcript is available.]

[53] There are other examples. One witness testified that the U.S. Court of Appeals for the Fourth Circuit grappled with the same problem in *CASA de Md., Inc. v. Trump*, 971 F.3d 220 (4th Cir. 2020). *See* Vladeck Testimony, *supra* note 7, at 10 n.30; *see also* Baude, *supra* note 8, at 13 (describing the Seventh Circuit's effort in *Frank v. Walker,* 769 F.3d 494 (7th Cir. 2014), to discern the meaning of the Supreme Court's stays in the earlier marriage equality cases). *Cf.* Alabama Assn. of Realtors v. Dept. of Health & Human Servs., No. 21A23, slip op. at 4, (U.S. Aug. 26, 2021) (per curiam) (explaining, in the second of two eviction moratorium cases, that the district court concluded that "the Government was unlikely to succeed on the merits, given the four votes to vacate the stay in this Court and Justice Kavanaugh's concurring opinion" in the first case); *id.* at 5 (Breyer, J., dissenting) ("Certainly this Court did not resolve the question by denying applicants' last emergency motion, whatever one Justice might have said in a concurrence.").

[54] 141 S. Ct. 1460, 1460 (2021).

[55] *See, e.g.,* Bray Testimony, *supra* note 8, at 7-9, 18 (analogizing shadow-docket rulings to preliminary injunctions and arguing that "[i]f the shadow docket works (and fails to work) in the same way as the preliminary injunction, then we want to tamp down the precedential effects, not ramp them up").

[56] Whole Woman's Health v. Jackson, 141 S. Ct. 2494 (2021).

[57] Whole Woman's Health v. Jackson, No. 21-50792, 2021 WL 3919252 (5th Cir. Aug. 27, 2021) (per curiam).

[58] The five Justices explained these complex and novel questions as follows: "For example, federal courts enjoy the power to enjoin individuals tasked with enforcing laws, not the laws themselves. . . . And it is unclear whether the named defendants in this lawsuit can or will seek to enforce the Texas law against the applicants in a manner that might permit our intervention. . . . The State has represented that neither it nor its executive employees possess the authority to enforce the Texas law either directly or indirectly. Nor is it clear whether, under existing precedent, this Court can issue an injunction against state judges asked to decide a lawsuit under Texas's law. . . . Finally, the sole private-citizen respondent before us has filed an affidavit stating that he has no present intention to enforce the law." *Whole Woman's Health*, 141 S. Ct. at 2495 (citations omitted).

[59] Chief Justice Roberts stated that he "would grant preliminary relief to preserve the status quo ante—before the law went into effect—so that the courts may consider whether a state can avoid responsibility for its laws in such a manner." *Id.* at 2496 (Roberts, C.J., dissenting). He acknowledged the procedural complications in the case, but noted that "the consequences of approving the state action, both in this particular case and as a model for action in other areas, counsel at least preliminary judicial consideration before the program devised by the State takes effect." *Id.* at 2496. Justice Breyer acknowledged those complications as well, but maintained that that they could be overcome. *Id.* at 2497 (Breyer, J., dissenting). Justice Sotomayor stated that the Court's order was "stunning" because it allowed a "flagrantly unconstitutional law engineered to prohibit women from exercising their constitutional rights and evade judicial scrutiny." *Id.* at 2498 (Sotomayor, J., dissenting). She added that the majority's rationale for denying the application was "untenable" because "it cannot be the case that a State can evade federal judicial scrutiny by outsourcing the enforcement of unconstitutional laws to its citizenry." *Id.* at 2499. Finally, Justice Kagan maintained that the majority's ruling "illustrates just how far the Court's 'shadow-docket' decisions may depart from the usual principles of appellate process," and added that "the majority's decision is emblematic of too much of this Court's shadow-docket decisionmaking—which every day becomes more unreasoned, inconsistent, and impossible to defend." *Id.* at 2500 (Kagan, J., dissenting).

[60] *Id.* at 2499 (Sotomayor, J., dissenting).

[61] *See, e.g.,* Vladeck Senate Testimony, *supra* note 47, at 27-29.

[62] *Id.* at 27 ("In focusing entirely on the unsettled question of whether the defendants were properly subject to injunctive relief, the Court's analysis entirely ignored the extent to which the *other* parts of the traditional four-factor stay analysis weighed *overwhelmingly* in their favor.").

[63] *See generally, e.g., Jurisdiction and the Supreme Court's Orders Docket, U.S. Senate Committee on the Judiciary* (Sept. 29, 2021) (written testimony of Jennifer L. Mascott).

[64] Bray Testimony, *supra* note 8, at 9.

[65] *Compare Presidential Commission on the Supreme Court of the United States* 5:19:47 (June 30, 2021) (oral testimony of Samuel L. Bray) [hereinafter Bray Oral Testimony], https://www.whitehouse.gov/pcscotus/public-meetings/june-30-2021 (defining "status quo" as used in the testimony of Samuel L. Bray) *with id.* at 50:20:12 (defining "status quo" as used in the testimony of Stephen I. Vladeck).

[66] Bray Testimony, *supra* note 8, at 9 ("I recognize that these judgments inevitably have a normative tinge. I know that it is a choice to see the national injunction as the disruptive force, not the executive policy or rule that prompted the national injunction. I know it is a choice to see the state public health measures as the disruptive force, not the worship services that ran up against the public health measures.").

[67] *See, e.g.*, Vladeck Testimony, *supra* note 7, at 4 (describing "orders that . . . change the status quo" as those that "stay[] a lower-court decision and/or mandate pending appeal," "vacat[e] a stay . . . imposed by a lower court,"

"grant[] an emergency writ of injunction pending appeal," or "vacat[e] a lower-court's grant of an emergency injunction").

[68] *See, e.g.,* Alabama Assn. of Realtors v. Dept. of Health & Human Servs., 594 U.S. ____ (2021) (slip op., at 8) (Breyer, J., dissenting) ("We should not set aside the CDC's eviction moratorium in this summary proceeding."); Bray Oral Testimony, *supra* note 65 (defining status quo as "the last peaceable moment" that existed prior to a disruption, and explaining that in a case in which a lower court enters an injunction blocking a new executive policy, "the disruption is coming from the lower courts usually").

[69] Whole Woman's Health v. Jackson, No. 21A24, 2021 WL 3910722, at *2 (Roberts, C.J., dissenting) (emphasis added).

[70] *See, e.g.*, Vladeck Testimony, *supra* note 7, at 22-26.

[71] *Id.*

[72] One defender of the Court's use of emergency orders explained that "there does not appear to be a need for either vote tallies, or the identities of the Justices who voted to grant or deny a petition, to be withheld from the public." Morley House Testimony, *supra* note 33, at 3.

[73] *See* Whole Woman's Health v. Jackson, 141 S. Ct. at 2500 (U.S. Sept. 1, 2021) (Kagan, J., dissenting) (faulting the majority for "barely bother[ing] to explain its conclusion—that a challenge to an obviously unconstitutional abortion regulation backed by a wholly unprecedented enforcement scheme is unlikely to prevail").

[74] Alabama Assn. of Realtors v. Dept. of Health & Human Servs., No. 21A23, slip op. (U.S. Aug. 26, 2021) (per curiam).

[75] *See* Ramirez v. Collier, No. 21-5592 (21A33), 2021 U.S. LEXIS 3681 (Sept. 8, 2021), https://www.supremecourt.gov/orders/courtorders/090821zr_n7ip.pdf.

[76] *Whole Woman's Health,* 141 S. Ct., at 2495.

[77] *Id.* at 2496 (Roberts, C.J., dissenting).

[78] Bray Testimony, *supra* note 8, at 18.

[79] The Commission has focused primarily on the issue of emergency orders as "vertical precedents" that are binding on lower courts. Significant complications are raised by the questions of whether, when, and how emergency orders should operate as "horizontal precedents" that bind the Court itself in later cases. The Court might, for example, treat its statements about the standards for review in emergency rulings as carrying some precedential weight in later cases even if it does not treat the more substantive elements of its emergency rulings, such as predictions about likelihood of success on the merits, as precedential. One's views on these matters might inform the questions of whether and on what issues the Court should be "consistent" across the run of its emergency rulings, and vice versa.

[80] *Presidential Commission on the Supreme Court of the United States* 18-19 (July 16, 2021) (written testimony of Kenneth Geller, Mayer Brown LLP & Maureen Mahoney, Latham & Watkins, LLP) [*hereinafter* Geller & Mahoney Testimony], https://www.whitehouse.gov/wp-content/uploads/2021/07/Geller-Mahoney-Testimony.pdf (citing *Glossip v. Gross*, 576 U.S. 863, 882 (2015) (stating that Supreme Court does not review "concurrent findings of fact by two courts below in the absence of a very obvious sand exceptional showing of error").

[81] *Id.* at 19 (detailing these principles but noting that "the Court may not always garner universal acclaim—even among the Justices themselves—for its adherence to these settled standards"). The testimony points to *Doe v. Gonzales*, 546 U.S. 1301, 1303 (2005) (Ginsburg, J., in chambers), as an endorsement of the expedited-schedule norm. *Id.*

[82] Professor Vladeck, for example, has proposed that "[i]n any cases in which *any* (state or federal) government action is enjoined by a lower federal court, speed up the appellate timelines so that appeals of lower-court rulings receive plenary appellate review much faster — by shortening the time for filing an appeal; by mandating aggressive briefing schedules; and by strongly encouraging courts to give such cases all due priority." Vladeck Testimony,

supra note 7, at 24. Although Professor Vladeck is suggesting this as a reform for Congress to enact, similar acceleration may be accomplished to some degree by the courts themselves.

[83] Bray Testimony, *supra* note 8, at 18 (endorsing the Injunctive Authority Clarification Act of 2021, H.R. 43, 117th Cong. (2021)); *see also* Morley House Testimony, *supra* note 33, at 7 (arguing that if nationwide injunctions were "curtailed—whether through a clear Supreme Court precedent directly on point, a federal statute, or an amendment to the Federal Rules of Civil Procedure—at least one of the contributing factors to the recent growth of the shadow docket w[ould] be removed").

[84] Vladeck Testimony, *supra* note 7, at 11-12 (reporting that cases involving the federal government—and, thus, the potential for a nationwide injunction—account for "only one modest slice of the shadow docket," and that "even within the DOJ slice, less than half of the Trump administration's applications for emergency relief involved nationwide injunctions" (emphasis omitted)).

[85] *Id.* at 24.

[86] There is a debate over the extent to which litigation commenced as execution dates approach is an example of strategic gamesmanship, versus a more benign outgrowth of the nature of death penalty law and litigation itself. Several Justices clearly view it as the former. *See, e.g.,* Murphy v. Collier, 139 S. Ct. 1475, 1482 (2019) (mem.) (Alito, J., dissenting) ("This Court receives an application to stay virtually every execution; these applications are almost all filed on or shortly before the scheduled execution date; and in the great majority of cases, no good reason for the late filing is apparent."); Price v. Dunn, 139 S. Ct. 1533, 1538 (2019) (mem.) (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."). On the other hand, Professor Lee Kovarsky observes that litigation in the lead up to an execution is a natural consequence of two other factors. First, the Court's own doctrine creates a set of "intrinsically delayed claims," such as challenges to a person's competency to be executed or to the method of execution, for which "the nature of the constitutional challenge itself thwarts early-phase litigation" because the claims are unripe for adjudication until an execution date is imminent. Lee Kovarsky, *Delay in the Shadow of Death,* 95 N.Y.U. L. REV. 1319, 1322-23 (2020) (citing, *inter alia,* Panetti v. Quarterman, 551 U.S. 930, 946 (2007)); *cf. Glossip v. Gross,* 576 U.S. 863, 923-24 (2015) (Breyer, J., dissenting) ("[D]elay is in part a problem that the Constitution's own demands create."). Second, Kovarsky observes that a lack of resources available to capital defendants forces a small number of lawyers to triage their representation, such that litigation is often "undertaken after the state sets an execution date—because that is the first time that many capital prisoners have the legal representation necessary to enforce certain rights." Kovarsky, *supra* at 1321. *See generally id.* at 1356-85.

[87] *See* Adam Liptak, *To Beat the Execution Clock, the Justices Prepare Early*, N.Y. TIMES, Sept. 4, 2012, at A19.

[88] The religious advisor cases noted above, for example, were a series of capital cases which critics contend lacked sufficient transparency.

[89] *Cf. Glossip,* 576 U.S. at 937 (Breyer, J., dissenting) ("[R]eview by courts at every level helps to ensure reliability; if this Court had not ordered that Anthony Ray Hinton receive further hearings in state court he may well have been executed rather than exonerated.") (citing *Hinton v. Alabama,* 571 U.S. 263 (2014)).

[90] *See Presidential Commission on the Supreme Court of the United States* 2 (June 25, 2021) (written testimony of Christina Swarns, Innocence Project) [hereinafter Swarns Testimony], https://www.whitehouse.gov/wp-content/uploads/2021/06/Swarns-Presidential-Commission-on-SCOTUS-Testimony.pdf. Given these statistics, "the risk of convicting and executing an innocent person is real and," the witness argued, "constitutionally unacceptable." *Id. See also Glossip v. Gross,* 567 U.S. 863, 927 (2015) (Breyer, J., dissenting) ("Several inmates have come within hours or days of execution before later being exonerated.") (citing multiple examples); Dahlia Lithwick, *Cruel but not Unusual*, SLATE (Apr. 1, 2011, 7:43 PM), https://slate.com/news-and-politics/2011/04/connick-v-thompson-clarence-thomas-writes-one-of-the-cruelest-supreme-court-decisions-ever html (noting that John Thompson had seven death warrants signed, each setting an imminent date for his execution, before he was exonerated).

[91] One Commission witness drew a sharp distinction between challenges to a condemned person's conviction and arguments that the execution itself would violate the condemned person's constitutional or statutory rights. *Presidential Commission on the Supreme Court of the United States* 2 (September 15, 2021) (written testimony of

Hashim M. Mooppan) [hereinafter Mooppan Testimony], https://www.whitehouse.gov/wp-content/uploads/2021/09/Hashim-Mooppan.pdf.

[92] *See, e.g.,* Glossip, 576 U.S. at 876-77 (2015) (describing the standard for an Eighth Amendment method-of-execution claim).

[93] *See* Ford v. Wainwright, 477 U.S. 399 (1986).

[94] *See supra* pages 4-5 (discussing religious advisor cases).

[95] Swarns Testimony, *supra* note 90, at 1.

[96] *Price v. Dunn* 139 S. Ct. 1533, 1540 (2019) (mem.) (Thomas, J., concurring in denial of certiorari) (quoting Ivana Hrynkiw, *Execution Called Off for Christopher Price; SCOTUS Decision Allowing It Came Too Late*, ALABAMA.COM (Apr. 12, 2019, 7:03 AM), https://www.al.com/news/birmingham/2019/04/christopher-price-set-to-be-executed-thursday-evening-for-1991-slaying-of-minister.html).

[97] *See Glossip,* 576 U.S. at 931 (Breyer, J., dissenting) ("Of the 8,466 inmates under a death sentence at some point between 1973 and 2013, 16% were executed, 42% had their convictions or sentences overturned or commuted, and 6% died by other causes; the remainder (35%) are still on death row.").

[98] *See id.* at 924-25.

[99] *See, e.g., Jones v. Chappell,* 31 F. Supp. 3d 1050, 1055-60 (C.D. Cal. 2014) (concluding after reviewing multiple reports on death penalty delay in California "that delay is evident at each stage of the post-conviction review process, including from the time the death sentence is issued").

[100] *Dunn v. Price,* 139 S. Ct. 1533, 1540 (2019) (mem.).

[101] Mooppan Testimony, *supra* note 91, at 3.

[102] *See* Federal Bureau of Prisons, *Historical Information: Capital Punishment*, at https://www.bop.gov/about/history/federal_executions.jsp (accessed Oct. 3, 2021); *see also* Lee Kovarsky, *The Trump Executions* 10 (July 27, 2021) (U. Tex. L. Sch., Pub. L. Res. Paper), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3891784.

[103] *See Execution Database*, Death Penalty Information Center (accessed Oct. 3, 2021) https://deathpenaltyinfo.org/executions/execution-database.

[104] Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 28. U.S.C.).

[105] *See* Swarns Testimony, *supra* note 90; Bray Testimony, *supra* note 8; *cf.* Mooppan Testimony, *supra* note 91, at 22 n. 10.

[106] *See Presidential Commission on the Supreme Court of the United States* (July 26, 2021) (written testimony of Federal Capital Habeas Project) [hereinafter Federal Capital Habeas Project Testimony], https://www.whitehouse.gov/wp-content/uploads/2021/08/Federal-Capital-Habeas-Project.pdf.; Vladeck Testimony, *supra* note 7; *see also* Kovarsky, *The Trump Executions, supra* note 102. The Commission also solicited and received testimony from one witness who defended the Court's approach to the federal execution cases. *See* Mooppan Testimony, *supra* note 91.

[107] For detailed (and divergent) accounts of the cases and litigation described in this section, see Kovarsky, *The Trump Executions, supra* note 102; Federal Capital Habeas Project Testimony, *supra* note 106; Mooppan Testimony, *supra* note 91.

[108] Federal Capital Habeas Project Testimony, *supra* note 106, at 5-6 (listing legal challenges raised by federal prisoners that were unanswered by the Supreme Court); Kovarsky, *The Trump Executions*, *supra* note 102, at 27-28 (noting Eighth Amendment claims)

[109] Federal Capital Habeas Project Testimony, supra note 106, at 3 & n.14.

[110] Professor Kovarsky summarized these cases as follows: the Court "entertained some twenty-four requests for emergency relief, touching on all of the executions"; and while it "granted no emergency relief to prisoners," it issued "shadow-docket orders granting emergency relief to the U.S. Solicitor General" multiple times. Kovarsky, *supra* note 102, at 43 & n. 322 (citing United States v. Higgs, 141 S. Ct. 645 (2021); Rosen v. Montgomery, 141 S. Ct. 1232 (2021); United States v. Montgomery, 141 S. Ct. 1233 (2021); Barr v. Hall, 141 S. Ct. 869 (2020); Barr v. Purkey, 141 S. Ct. 196 (2020); Barr v. Lee, 140 S. Ct. 2590 (2020)). *See also* Federal Capital Habeas Project Testimony, *supra* note 106, n.14 ("In eight of these cases, the government filed emergency applications to vacate the stays, which the Court uniformly granted—and in seven of those eight, the Court provided no explanation at all for its orders.")

[111] *See, e.g.*, United States v. Higgs, 141 S. Ct. 645 (2021) (granting certiorari before judgment and vacating two lower court decisions preventing execution); Barr v. Purkey, 141 S. Ct. 196 (2020) (vacating lower court preliminary injunction without reasoning). As one commentator observes, in the rare instance where the Court did issue a brief per curiam opinion, it appeared to change the underlying Eighth Amendment doctrine. Prior precedent issued in 2019 (via the merits docket) had held that a person challenging a method of execution under the Eighth Amendment must demonstrate that the challenged method would "superadd" pain above and beyond a "feasible and readily implemented alternative method of execution." Buckley v. Precythe, 139 S. Ct. 1112, 1125 (2019). In contrast to that comparative analysis, the Court's per curiam opinion in the federal execution case of *Barr v. Lee*, 140 S. Ct. 2590 (2020), "appeared to ground its vacatur [of the lower court's stay] in the idea that pentobarbital-only executions [a]re *unconditionally* consistent with the Eighth Amendment," even when compared to a proposed less painful alternative that had not previously been analyzed by the Court. Kovarsky, *supra* note 102, at 24 (emphasis added).

[112] Ten of the orders, out of 25, were issued over dissents. Mooppan Testimony, *supra* note 91, at 11. Also, in several cases, the Court vacated lower court stays even though the courts of appeals had set expedited briefing schedules to resolve the cases promptly. *See, e.g.*, Rosen v. Montgomery, 141 S. Ct. 1232 (2021) (mem.) (vacating D.C. Circuit's stay of execution pending highly expedited en banc consideration of FDPA statutory question); Barr v. Lee, 140 S. Ct. 2590 (2020) (per curiam) (vacating similarly expedited D.C. Circuit consideration of Eighth Amendment challenge to federal execution protocol). On one occasion, the Supreme Court took the highly unusual step of granting certiorari before judgment and reversing a district court on the merits of its final decision before the court of appeals could rule on a pending appeal—all without writing a reasoned opinion. *See Higgs*, 141 S. Ct. 645 (2021) (mem.); *see* Vladeck Testimony, *supra* note 9, at 9 (noting that the Court had never before reversed a district court via certiorari before judgment in a summary order).

[113] *See generally* Mooppan Testimony, *supra* note 91, at 1-16; *see also id.* at 12 (defending "the orders where the criticism of the Court would seem to be most relevant, because a divided Court used emergency rulings to" summarily vacate lower court says, on the ground that "the dissenting Justices did not assert that the inmate's claim was likely to succeed").

[114] Justice Sotomayor's dissent in *United States v. Higgs,* the final case to reach the Court during the Trump administration, argued that:

> This unprecedented rush of federal executions has predictably given rise to many difficult legal disputes. . . . Throughout this expedited spree of executions, this Court has consistently rejected inmates' credible claims for relief. The Court has even intervened to lift stays of execution that lower courts put in place, thereby ensuring those prisoners' challenges would never receive a meaningful airing. The Court made these weighty decisions in response to emergency applications, with little opportunity for proper briefing and consideration, often in just a few short days or even hours. Very few of these decisions offered any public explanation for their rationale. This is not justice.

Higgs, 141 S. Ct. at 647 (Sotomayor, J., dissenting). Justice Breyer was similarly critical: "None of these legal questions is frivolous. What are courts to do when faced with legal questions of this kind? Are they simply to ignore them? Or are they, as in this case, to 'hurry up, hurry up'? That is no solution." *Id.* at 646 (Breyer, J., dissenting).

[115] *See* Vladeck Testimony, *supra* note 7; Federal Capital Habeas Project Testimony, *supra* note 106; *Presidential Commission on the Supreme Court of the United States* 16 (September 1, 2021) (written testimony of Janai S. Nelson, NAACP Legal Defense Fund), https://www.whitehouse.gov/wp-content/uploads/2021/09/NAACP-LDF.pdf

("In eight orders supported by little to no reasoning, the Court lifted lower court stays of federal executions, denying the inmates a fair opportunity to present evidence for their claims.")

[116] *Id.*

[117] Bray Testimony, *supra* note 8, at 16. Professor Bray's point echoed others, most notably Mr. Amir Ali, who told Congress earlier this year that "When it comes to ending someone's life, there is no do-over. And when the matter before the Court is one of life or death, the public's interest in transparency and the need to ensure public confidence in our legal system are at their apex." *The Supreme Court's Shadow Docket: Hearing Before the Subcomm. on the Courts, Intellectual Prop. & the Internet of the H. Comm. on the Judiciary,* 117th Cong. 1 (2021) (statement of Amir H. Ali, Roderick & Solange MacArthur Justice Center) [hereinafter Ali House Testimony], https://docs.house.gov/meetings/JU/JU03/20210218/111204/HHRG-117-JU03-Wstate-AliA-20210218-U2.pdf; *see also* Swarns Testimony, *supra* note 90; *cf.* Eric M. Freedman, *No Execution If Four Justices Object,* 43 HOFSTRA L. REV. 639, 652-54 (2015) (arguing that executions should be stayed whenever necessary to afford the Justices "time to think" about whether to grant certiorari in a case).

[118] *See* Bray Testimony, *supra* note 8, at 16-17; Swarns Testimony, *supra* note 90, at 5-6; *see also* Ali House Testimony, *supra* note 117, at 5-6.

[119] See *Presidential Commission on the Supreme Court of the United States* 5:42:00 (June 30, 2021) (oral testimony of Stephen Vladeck, University of Texas Law School) [hereinafter Vladeck Oral Testimony], https://www.whitehouse.gov/pcscotus/public-meetings/june-30-2021 (describing an asymmetrical, statutorily imposed standard of review as "clearly constitutional"); *see also* Ali House Testimony, *supra* note 7, at 5-6 (proposing a statutory approach).

[120] Swarns Testimony *supra* note 90, at 6. See also id. at 7 ("While it may be unlikely for an execution to proceed while a first-time habeas petition pends, the assurance of an automatic stay is nevertheless called for given the gravity of what is at stake."). *See also* 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); Emmett v. Kelly, 552 U.S. 942, 943 (2007) (statement of Stevens, J., joined by Ginsburg J. respecting denial of certiorari).

[121] See Vladeck Oral Testimony, *supra* note 119, at 5:44:22 (proposing a statutory bar on carrying out an execution during the course of such a legal challenge to the method of execution, as well as arguing for mandatory review at the Supreme Court of such a challenge). *But see* Mooppan Testimony, *supra* note 91, at 23 (noting practical problems with automatically allowing a full round of litigation on administration-of-execution challenges, including potential incentives for capital inmates to raise weak claims).

[122] Mooppan Testimony, *supra* note 91, at 3.

[123] *Id.* at 3 ("Especially given the lengthy delay before an execution is scheduled at all, further delaying an execution even for a limited time in these circumstances essentially undermines for that period the judgment of Congress, the Executive Branch, and the sentencing judge and jury that continued imprisonment is inadequate and only death is sufficient punishment for the most heinous of murders.").

[124] See *Presidential Commission on the Supreme Court of the United States* 5:46:40 (June 30, 2021) (oral testimony of Michael Dreeben, O'Melveny & Myers LLP) [hereinafter Dreeben Oral Testimony], https://www.whitehouse.gov/pcscotus/public-meetings/june-30-2021 ("I think a much better approach would be that if four Justices vote to hear a case, that there either be a courtesy fifth or just a policy that four in that instance trumps five and that the Court hear the case on the merits. I think that would be more consistent with the traditional rule of four and the underlying purposes that it serves.").

[125] *See* Freedman, *supra* note 127, at 650 n. 45 (describing proposals separately advanced over the years, most explicitly by Justices Brennan and Marshall).

[126] Adam Liptak, *A Fitful Commitment to Halting Executions,* N.Y. TIMES, Dec. 13, 2016, at A13.

[127] *See, e.g.,* Darden v. Wainwright, 473 U.S. 928, 928–29 (1985) (mem.) (Powell, J., concurring in the granting of the application for a stay) ("I find no merit whatever in any of the claims advanced in the petition for certiorari . . . .

But in view of the unusual situation in which four Justices have voted to grant certiorari . . . and in view of the fact that this is a capital case with petitioner's life at stake . . . I feel obligated to join in granting the application for a stay."). In practice, however, this norm has been difficult to discern and has not always been applied consistently. *See* Freedman, *supra* note 117; Liptak, *supra* note 126 (describing the courtesy-fifth practice as operating "in fits and starts" and as being "inconsistent"). The Court also often denies stays of execution or vacates lower court stays over four dissents. *See, e.g.*, Dunn v. Ray, 139 S. Ct. 661 (2019) (mem.) (Kagan, J., joined by Ginsburg, Breyer, and Sotomayor, JJ., dissenting); *see also* Freedman, *supra* note 117, at 651 n. 50 (recounting "dozens of cases . . . denying stays over four dissents"). Some observers contend that these votes might be consistent with the courtesy-fifth norm if the norm requires the four dissenting Justices to actually vote to grant certiorari, and not merely to vote for a stay to permit more time to consider granting certiorari. *See* Tom Goldstein, *Death Penalty Stays*, SCOTUSBLOG (Oct. 13, 2007, 12:06 PM), http://www.scotusblog.com/wp/2007/10/death-penalty-stays.

[128] As one commentator notes, "the Court has chosen to reveal neither whether it is governed by a rule nor what the contents of that rule might be," while any potential pattern one might attempt to glean from the Court's public actions are consistent with "ad hoc negotiations by the Justices on a case-by-case basis." Freedman, *supra* note 117, at 651.

[129] Medellin v. Texas, 554 U.S. 759, 765-66 (2008) (Breyer, J., dissenting).

[130] 139 S. Ct. 1312 (2019) (mem.). In *Dunn,* Justice Breyer's request to consider the state's application the following morning would have carried the execution past its warrant date. As it turns out, the Court's majority did not vacate the lower court's stay until after the warrant expired, which resulted in the execution being postponed. *See* Adam Liptak, *Dissent As Court Splits Over Execution*¸ N.Y. TIMES, Apr. 13, 2019, at A1.

[131] *Id.* at 1313-14 (Breyer, J., dissenting). *But cf.* Price v. Dunn, 139 S. Ct. 1533, 1539 (2019) (mem.) (Thomas, J., concurring in denial of certiorari) ("Insofar as Justice Breyer was serious in suggesting that the Court simply 'take no action' on the State's emergency motion to vacate until the following day, it should be obvious that *emergency* applications ordinarily cannot be scheduled for discussion at weekly (or sometimes more infrequent) Conferences.").

[132] As Chief Justice Roberts noted in voting for a stay as a "courtesy" when four other Justices had voted for a stay (before deciding on certiorari): "I do not believe that this application meets our ordinary criteria for a stay. This case does not merit the Court's review: the claims set out in the application are purely fact-specific, dependent on contested interpretations of state law, insulated from our review by alternative holdings below, or some combination of the three. Four Justices have, however, voted to grant a stay. To afford them the opportunity to more fully consider the suitability of this case for review, including these circumstances, I vote to grant the stay as a courtesy." Arthur v. Dunn, 137 S. Ct. 14 (2016) (mem.) (statement of Roberts, C.J., respecting the grant of the application for stay).

[133] Mooppan Testimony, *supra* note 91, at 5.

[134] Freedman, *supra* note 117, at 652 n. 55 (quoting Memorandum from Justice William H. Rehnquist, Supreme Court of the U.S., on Darden v. Wainwright to the Conference 2 (Sept. 9, 1985)).

[135] Callins v. Collins, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of certiorari); *see also* Green v. Zant, 469 U.S. 1143, 1143 (1985) (mem.) (Brennan, J., joined by Marshall, J., dissenting) ("Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, I would grant the application for a stay of execution.") (citation omitted); Baze v. Rees, 553 U.S. 35, 86 (2008) (Stevens, J., concurring) ("[T]he imposition of the death penalty represents the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes.") (quotation omitted); Glossip v. Gross, 576 U.S. 863, 909 (2015) (Breyer, J., joined by Ginsburg, J., dissenting) ("[M]y own 20 years of experience on this Court, that lead me to believe that the death penalty, in and of itself, now likely constitutes a legally prohibited cruel and unusual punishment."); *see generally* CAROL S. STEIKER & JORDAN M. STEIKER, COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT ch. 2 (2016).

[136] Freedman, *supra* note 117, at 652 n. 55.

[137] Swarns Testimony, *supra* note 90, at 5.

[138] See LEE EPSTEIN, JEFFREY A. SEGAL, HAROLD JOSEPH SPAETH, & THOMAS G. WALKER, THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENTS 82 tbl. 2-6 (SAGE 6th ed. 2015).

[139] *The Supreme Court, 2019 Term—The Statistics*, 134 HARV. L. REV. 610, 618-19 tbl. II (2020) (showing 60 cases granted plenary review, resulting in 59 dispositions by full opinion, out of 5,718 petitions considered); *The Supreme Court, 2018 Term—The Statistics*, 133 HARV. L. REV. 412, 420-21 tbl. II (2019) (showing 86 cases granted plenary review, resulting in 70 dispositions by full opinion, out of 6,581 petitions considered); *The Supreme Court, 2017 Term—The Statistics*, 132 HARV. L. REV. 447, 455-56 tbl. II (2018) (showing 78 cases granted plenary review, resulting in 65 dispositions by full opinion, out of 6,229 petitions considered); *The Supreme Court, 2016 Term—The Statistics*, 131 HARV. L. REV. 403, 410-11 tbl. II (2017) (showing cases 75 granted plenary review, resulting in 66 dispositions by full opinion, out of 6,289 petitions considered). These numbers do not include the Court's occasional "original jurisdiction" cases, nor cases that are summarily decided.

[140] Occasionally, individual Justices will choose to issue an opinion or statement accompanying the order, such as a dissent from the denial of certiorari, which other Justices may sign on to; from such writings, observers may draw some limited inferences about which Justices voted to grant or to deny the petition and, presumably, arguments that fell short of persuading four Justices. Also, in the eventual opinion which decides a case that is granted review, there may be a passing mention of the procedural history of the case with a suggestion of why the Court took the case. *See* Tejas N. Narechania, *Certiorari in Important Cases*, 121 COLUM. L. REV. (forthcoming 2022) (analyzing such statements).

[141] SUP. CT. R. 10.

[142] *See, e.g.*, Paul D. Carrington & Roger C. Cramton, *Judicial Independence in Excess: Reviving the Judicial Duty of the Supreme Court*, 94 CORNELL L. REV. 587 (2009); Daniel Epps & William Ortman, *The Lottery Docket*, 116 MICH. L. REV. 705 (2018); Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567 (2008); Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643 (2000); Arthur D. Hellman, *The Shrunken Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403; Frederick Schauer, *Is It Important to Be Important?: Evaluating the Supreme Court's Case-Selection Process*, 119 YALE L.J. ONLINE 77, 81–82 (2009), https://www.yalelawjournal.org/pdf/839_rgqgoasj.pdf; Carolyn Shapiro, *The Limits of the Olympian Court: Common Law Judging Versus Error Correction in the Supreme Court*, 63 WASH. & LEE L. REV. 271 (2006); Kathryn A. Watts, *Constraining Certiorari Using Administrative Law Principles*, 160 U. PA. L. REV. 1 (2011).

[143] H.W. Perry, Jr., *Elitification of the U.S. Supreme Court and Appellate Lawyering*, 72 S.C. L. REV. 245, 248-52 (2020).

[144] Tony Mauro, *Kagan Dishes on Supreme Court Bar, State of the Union, and Law Schools*, NAT'L L.J. (Feb. 4, 2015), https://plus.lexis.com/api/document?collection=legalnews&id=urn:contentItem:5F76-RRR1-JBM3-R4CJ-00000-00&context=1530671.

[145] John G. Roberts, Jr., *Oral Advocacy and the Re-Emergence of a Supreme Court Bar*, 30 J. SUP. CT. HIST. 68, 79 (2005) (citation omitted).

[146] Roberts, *supra* note 145, at 79.

[147] *Cf.* Dreeben Oral Testimony, *supra* note 124, at 5:51:45 ("Everybody is a first-timer once, and it does not mean that you do a bad job. I lost cases to a lot of people that were arguing their first case."); Katherine Shaw, *Friends of the Court: Evaluating the Supreme Court's Amicus Invitations*, 101 CORN. L. REV. 1533, 1538 (2016) (noting that when Justices appoint counsel to argue as amici, "a majority of recent invitations have gone to attorneys with *no* previous Supreme Court arguments").

[148] *See, e.g.*, Perry, *supra* note 143.

[149] Joan Biskupic, Janet Roberts, & John Shiffman, *The Echo Chamber*, REUTERS (Dec. 8, 2014 10:30 A.M. GMT), https://www.reuters.com/investigates/special-report/scotus/; *see also Presidential Commission on the Supreme Court of the United States* 8 (July 16, 2021) (written testimony of Craig Becker, American Federation of Labor & Congress of Industrial Organizations) [hereinafter Becker Testimony], https://www.whitehouse.gov/wp-content/uploads/2021/07/Becker-Testimony.pdf ("As a consequence [of consolidation in the Supreme Court bar],

labor cases are argued by lawyers without extensive experience representing working people or their unions; without extensive experience with labor law; and without a deep commitment to the right of workers to representation. In such cases, the Court hears argument from lawyers proficient with doctrinal analysis and accustomed to appearing before the Justices, but not from lawyers deeply knowledgeable about the doctrine's implications for workers.").

[150] For example, of the 66 top private lawyers identified in a Reuters report as the most frequent practitioners before the Court between 2004 and 2012, 63 were white, and 58 were men. Biskupic, Roberts, & Shiffman, *supra* note 149. A study of the 2019 Term reported that, of 155 oral argument appearances made by 103 advocates, 20 (12.9%) were made by women, and 27 (17.4%) by advocates of color (14 of which were appearances on behalf of the Office of the Solicitor General). Leah M. Litman, Melissa Murray & Katherine Shaw, *A Podcast of One's Own*, 28 MICH. J. GENDER & L. 51, 57-58 (2021). *See also* Jennifer Crystal Mika (née Mullins), *The Noteworthy Absence of Women Advocates at the United States Supreme Court*, 25 AM. U. J. GENDER, SOC. POL'Y & L. 31, 35 (2017) ("A total of 117 different advocates appeared during the 2015-2016 term. Only twenty advocates (17%) were women. This is similar to the number of women advocates for the last six terms."). Representation of women and people of color among the Court's invited amici is similarly low. *See Presidential Commission on the Supreme Court of the United States* 17 (June 30, 2021) (written testimony of Deepak Gupta, Gupta Wessler PLLC) [hereinafter Gupta Testimony], https://www.whitehouse.gov/wp-content/uploads/2021/06/Gupta-SCOTUS-Commission-Testimony-Final.pdf; Shaw, *supra* note 147, at 1561.

[151] *See, e.g.*, Kedar S. Bhatia, *Top Supreme Court Advocates of the Twenty-First Century*, 2 J.L. 561, 579 (2012) (studying advocacy before the Court between 2000 and the end of the 2011 Term and finding that 63% of the advocates who argued more than five times had served as a law clerk for a justice and 75% had current or previous experience in the Office of the Solicitor General); Perry, *supra* note 143, at 276-87 (studying advocacy before the Court from the 2013 Term through the 2019 Term and reporting on clerkship experience, experience in the Solicitor General's office, and attendance at elite law schools).

[152] Gupta Testimony, *supra* note 150, at 2-3, 6-11; Becker Testimony, *supra* note 149, at 4-9. *See generally* Biskupic, Roberts & Shiffman, *supra* note 152 (noting the professional homogeneity of the Supreme Court bar); Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487 (2008) (considering the relationship between the Supreme Court bar and the success of corporate interests).

[153] Gupta Testimony, *supra* note 152, at 2; Lazarus, *supra* note 152, at 1560 ("There are . . . areas of law in which the vast majority of the private Supreme Court Bar regularly declines to serve as pro bono counsel because of its concern that doing so will upset some of its most financially important business clients. For that reason, almost all of the practices refuse to provide such help to plaintiffs involved in employment discrimination, tort, and environmental pollution control cases.").

[154] *See, e.g.*, Daniel Epps & William Ortman, *The Defender General*, 168 U. PA. L. REV. 1469, 1470-72 (2020); Andrew Manuel Crespo, *Regaining Perspective: Constitutional Criminal Adjudication in the U.S. Supreme Court*, 100 MINN. L. REV. 1985 (2016); *see also* Biskupic, Roberts & Shiffman, *supra* note 149 (quoting Justice Sotomayor as "lament[ing] the refusal of some criminal defense lawyers to turn over high court cases to specialists" and as saying, "I think it's malpractice for any lawyer who thinks 'this is my one shot before the Supreme Court and I have to take it'").

[155] Dreeben Oral Testimony, *supra* note 124, at 5:48:52-5:50:50.

[156] *See, e.g.*, *Presidential Commission on the Supreme Court of the United States* 2 (Aug. 15, 2021) (written testimony of Richard Lazarus, Harvard Law School) [hereinafter Lazarus Testimony], https://www.whitehouse.gov/wp-content/uploads/2021/08/Professor-Richard-Lazarus.pdf; Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amici Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 750 (2000).

[157] *See* Biskupic, Roberts & Shiffman, *supra* note 149 (quoting attorney David Frederick, who is often cited as one of the lawyers providing a counterbalance to the corporate-focused Supreme Court bar, as saying: "Are we a valid alternative? We certainly could handle responsibly a few more cases . . . [b]ut for the large quantity of cases your data reflects, it would not be realistic to call us the alternative.").

[158] Richard J. Lazarus, *Docket Capture at the High Court*, 119 YALE L.J. ONLINE 89, 93-96 (2009); Kelly J. Lynch, *Best Friends? Supreme Court Law Clerks on Effective Amicus Curiae Briefs*, 20 J. L. & POL. 33, 54-56 (2004).

[159] Gupta Testimony, *supra* note 152, at 20; *see also* Geller & Mahoney Testimony, *supra* note 80, at 39 (suggesting that imbalances in criminal representation be addressed "through federal and state legislative appropriation of increased resources to develop more Supreme Court specialization within the criminal defense bar in state and federal public defender offices").

[160] *See* Lazarus Testimony, *supra* note 156.

[161] *Id.* at 3. The law clerks for Justices Alito and Gorsuch do not currently participate, and before them the law clerks for Justice Stevens did not participate, in the cert pool. Even Justices who participate in the pool may use individualized screening mechanisms as well, including input and supplemental memoranda from their own clerks. *See, e.g.*, Margaret Meriwhether Cordray & Richard Cordray, *The Supreme Court's Plenary Docket*, 58 WASH. & LEE L. REV. 737, 791 (2001).

[162] *See, e.g.*, Lazarus Testimony, *supra* note 156, at 3.

[163] KEVIN T. MCGUIRE, THE SUPREME COURT BAR: LEGAL ELITES IN THE WASHINGTON COMMUNITY, 179-80 (1993); *see also* Kelly J. Lynch, *Best Friends? Supreme Court Law Clerks on Effective Amicus Curiae Briefs*, 20 J. L. & POL. 33, 54-56 (2004) (88 percent of clerks interviewed reported giving more careful consideration to amicus briefs authored by reputed attorneys); Becker Testimony, *supra* note 149, at 9 (proposing that "[p]etitions should be stripped of any information identifying counsel, similar to procedures of double-blind, peer-review of submissions to academic journals, blind grading of law school exams, and blind auditions for symphony orchestras").

[164] Lazarus Testimony, *supra* note 156, at 5-7.

[165] *See* David R. Stras, *The Supreme Court Gatekeepers: The Role of Law Clerks in the Certiorari Process*, 85 TEX. L. REV. 947, 968- (2007) (reviewing TODD C. PEPPERS, COURTIERS OF THE MARBLE PALACE (2006) and ARTEMUS WARD & DAVID L. WEIDEN, SORCERERS' APPRENTICES (2006)) (discussing competing views of the relationship between the cert pool and the composition of the plenary docket).

[166] *See, e.g.,* Margaret Meriwether Cordray & Richard Cordray, *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, 82 WASH. U. L. Q. 389, 435-41 (2004) (considering arguments about the value of "percolation" of issues in the lower courts, including differing views among the Justices).

[167] *See* Allison Orr Larsen & Neal Devins, *The Amicus Machine*, 102 VA. L. REV. 1901, 1915-25 (2016) (analyzing campaigns of supplemental legal briefs submitted by amici and coordinated by sophisticated Supreme Court advocates).

[168] *Presidential Commission on the Supreme Court of the United States* 16-17 (June 25, 2021) (written testimony of Michael Dreeben, O'Melveny & Myers LLP) [hereinafter Dreeben Testimony]; *see also* Lynch, *supra* note 163, at 46-47 (2004) (documenting former law clerks' views about the exceptional credibility of amicus briefs from the Solicitor General).

[169] Dreeben Oral Testimony, *supra* note 124, at 5:29:20-5:29:30 (on certain legal issues farther afield from the work of the federal government, the Solicitor General's office, in responding to a CVSG, "almost functioned as kind of the 35th law clerk" though "we still have some value add for the Court"). In his 2005 article, then-Judge Roberts expressed concern about the high percentage of cases in which the Office of the Solicitor General already appears. Roberts, *supra* note 145, at 79 (stating that the SG already is involved in more than 80% of the Court's argued cases and observing that "[i]f you asked me as an abstract proposition whether I would be troubled by the idea that the executive branch was going to file something in every case before the Supreme Court explaining its views, as a sort of super law clerk, my answer would be yes, I would find that very troubling"). Other observers have suggested that the Court might reach beyond the Solicitor General's office to "make similar requests from other knowledgeable organizations as a method of ensuring the wisdom of the Court's jurisdictional determinations." Richard J. Lazarus, *Docket Capture at the High Court*, 119 YALE L.J. ONLINE 89, 96 (2009). *See also* David C. Thompson & Melanie F. Wachtell, *An Empirical Analysis of Supreme Court Certiorari Petition Procedures: The Call for Response and the Call for the Views of the Solicitor General,* 16 GEO. MASON L. REV. 237, 270 n.131 (2009) ("In the past, the Court would on occasion call for the views of a state attorney general or state solicitor general. This practice is now

defunct." (citing Brown v. Bd. of Educ., 349 U.S. 294, 298-99 (1955))). *But see* Neal Devins & Saikrishna B. Prakash, *Reverse Advisory Opinions*, 80 U. CHI. L. REV. 859, 862 (2013) (arguing that "when the parties to the case are perfectly willing to advance all legal claims that a federal court deems relevant but the court nonetheless solicits legal arguments from nonparties, the court operates outside the boundaries of Article III").

[170] SUP. CT. R. 37.

[171] Such follow-on effects could only occur in cases where a CVSG is an available option (excluding, for example, all federal criminal cases, because the Solicitor General already represents the government in those cases), and potential amici may not notice when a CVSG concerns an issue of importance to them.

[172] *See, e.g.*, Kathryn A. Watts, *Constraining Certiorari Using Administrative Law Principles*, 160 U. PA. L. REV. 1, 64-67 (2011) (proposing that "the Court might seek to increase amicus participation at the certiorari stage by publicly releasing the Court's discuss list a certain number of weeks prior to voting on the petitions to enable interested amici to file briefs addressing whether certiorari should be granted" and analogizing this approach to the notice-and-comment procedures in administrative agencies).

[173] *See* Lynch, *supra* note 163, at 42 ("Clerks citing the serviceability of amicus briefs in technical, statutory, regulatory, and medical cases alike frequently noted that it was largely the *non-legal* information presented in these briefs that made them useful." (emphasis added)); *cf.* Dreeben Testimony, *supra* note 168, at 15 ("Amicus briefs can shed light on the wider importance of an issue and place it in broader context, particularly if filed by well-known organizations and counsel with a track record of insight and credibility. But clerks and the Justices themselves have little way to check the accuracy of those assertions, which are now a regular feature of certiorari practice. A raft of amicus briefs by the usual suspects is not necessarily helpful to the Court.").

[174] Professor Allison Orr Larsen has documented the prevalence of factual claims presented (sometimes with minimal support) in amicus briefs and raised concerns about their reliability in the absence of adversarial testing. *See* Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 VA. L. REV. 1757 (2014)*; cf. Presidential Commission on the Supreme Court of the United States* 8 (June 30, 2021) (written testimony of Allison Orr Larsen, William & Mary Law School) (in context of amicus briefs generally, including at the merits stage, recommending that the Court permit a "limited letter" format of response to allow parties to challenge factual assertions made by amici, noting that "[e]ven the threat of a response . . . may discourage amici from relying on questionable authorities.").

[175] *Presidential Commission on the Supreme Court of the United States* 17-21 (June 30, 2021) (written testimony of Judith Resnik, Yale Law School) (emphasizing disjunction between issues, including challenges of access to justice, important in the lower courts and issues the Justices deem worthy of attention and review).

[176] Adam Feldman, *Major Players in the Lower Courts*, EMPIRICAL SCOTUS (Nov. 27, 2017), https://www.empiricalscotus.com/major-players/ (noting that "[f]our of the ten judges with the most dissents leading to cert grants [in the Terms from 2005 to 2017] are from the 9th Circuit"—Judges O'Scannlain, Bea, Bybee, Callahan—and inferring that "[t]his fits with the rationale that more conservative judges on the 9th Circuit will alert the Supreme Court of specific cases to take with liberal decision dimensions"); *see also id*. ("[A]ll of O'Scannlain's nine dissents relate to decisions that the Supreme Court later overturned," a fact which "speaks to Judge O'Scannlain's efficacy in deciding when to dissent and what information to highlight in these dissents."); Tracey E. George & Michael E. Solimine, *Supreme Court Monitoring of the United States Courts of Appeals En Banc*, 9 SUP. CT. ECON. REV. 171, 197-98 (2001) (analyzing relationship between certiorari decisions and the presence of a dissent from denial of en banc rehearing in the federal appeals court). As then-federal appeals judge Patricia Wald once noted: "[T]he elaborate statements by dissenting members when en banc is denied . . . have been described, probably accurately, as thinly disguised invitations to certiorari." Patricia M. Wald, *The D.C. Circuit: Here and Now*, 55 GEO. WASH. L. REV. 718, 719 (1987). Twenty-five years later, there seemed no longer to be any need for disguise. *See* Diarmuid F. O'Scannlain, *A Decade of Reversal: The Ninth Circuit's Record in the Supreme Court Through October Term 2010*, 87 NOTRE DAME L. REV. 2165, 2177 (2012) ("I propose that there is another mechanism available internally within my court which can alert the Justices to Ninth Circuit error and act as a stabilizing force for the rule of law: the dissent from order denying rehearing en banc.").

[177] Amanda L. Tyler, *Setting the Supreme Court's Agenda: Is There a Place for Certification?*, 78 GEO. WASH. L. REV. 1310, 1315 (2010) ("[O]ne complaint that comes up time and again when one talks with lower federal court

judges about the Supreme Court's case selection process" is that "[a] large number of these judges routinely say that they are not receiving enough guidance from the Supreme Court on matters that regularly come before them."); *cf.* Dreeben Testimony, *supra* note 168, at 7 (stating that, in contrast to high-profile cases and cases implicating splits, the Court "does a less effective job in identifying important issues of federal law in discrete and potentially obscure areas that have not generated a conflict, but where guidance is needed").

[178] 28 U.S.C. § 1254(2) (Cases in the court of appeals may be reviewed by the Supreme Court "[b]y certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy."); SUP. CT. R. 19 (specifying the "Procedure on a Certified Question" from a federal court of appeals).

[179] United States v. Seale, 558 U.S. 985, 986 (2009) (Stevens, J., in statement respecting the dismissal of the certified question).

[180] *See, e.g.*, Tyler, *supra* note 177; Aaron Nielson, *The Death of the Supreme Court's Certified Question Jurisdiction*, 59 CATH. U. L. REV. 483 (2010); *see also* Dreeben Testimony, *supra* note 168, at 18 (arguing that reviving the Court's use of the certification process could be one technique for "improving the flow of information about a case's significance from sources outside the parties, who have obvious reasons to oversell or undersell a case's significance," notably for "low-profile cases that are legally important but have not yet generated a conflict").

[181] Professor Tyler points to authorities noting that, as a historical and technical matter, certified question jurisdiction is actually considered "mandatory" for the Court. Tyler, *supra* note 177, at 1321 & n.62, 1323-24; *see also* Hartnett, *supra* note 142, at 1652-56, 1710 (2000) (discussing history of the Judges' Bill and asserting that "it was repeatedly noted [in hearings] that the Supreme Court would not alone control its jurisdiction, but that the courts of appeals, by use of certification, would share in that control"); *Presidential Commission on the Supreme Court of the United States* 6 (Aug. 13, 2021) (written testimony of Edward A. Hartnett, Seton Hall University School of Law) [hereinafter Hartnett Testimony], https://www.whitehouse.gov/wp-content/uploads/2021/08/Professor-Edward-A.-Hartnett.pdf (describing certification as "a process that was not designed to give the Supreme Court discretion"). Professor Tyler notes that, although the statute is phrased "in terms that could easily be read as permissive rather than mandatory," "the Court technically treats certified questions [as within its mandatory jurisdiction] when it dismisses them (rather than denying review of them)." Tyler, *supra* note 177, at 1321 nn.62 & 66. Professor Tyler's proposal to revive certification would not require the Court to answer questions certified by the courts of appeals. *But cf.* Hartnett Testimony, *supra*, at 7 (noting that "either as a replacement for certiorari or in addition to it: Congress could create a revised version of certification and provide for an appeal as of right from any court of appeals decision where the court of appeals certifies that its decision conflicts with the decision of another court of appeals. Or Congress could provide for an appeal as of right from any en banc court of appeals decision where more than one-third of the participating judges dissent").

[182] 28 U.S.C. § 1254(2).

[183] SUP. CT. R. 19.

[184] *See, e.g.*, Dreeben Testimony, *supra* note 168, at 20 ("[R]eview of certified questions that a court of appeals has not decided is at odds with the Supreme Court's frequent statement that it is a 'court of review, not of first view.' Still, court of appeals' certification could be a valuable additional source of information for the Court in deciding which below-the-radar issues are worthy of review." (citation omitted)).

[185] *Cf.* O'Scannlain, *supra* note 176, at 2177 (2012) ("In the 152 cases [over the prior 25 years] in which at least one Ninth Circuit judge wrote a dissental, the losing litigant petitioned for cert at the Supreme Court. Of those 152 cert petitions, sixty-five have resulted in a cert grant. Therefore, an astounding 42.8% of all cert petitions stemming from Ninth Circuit cases involving a written dissental are granted by the Supreme Court." (citations omitted)). The term "dissental" refers to a dissent from the denial of a rehearing en banc in a given case.

[186] *Id.* at 2176-78 (describing role of dissentals for highlighting the need for error correction in a specific case).

[187] *See, e.g.*, Carrington & Cramton, *supra* note 142, at 632 (proposing that 13 Article III judges be designated as the "Certiorari Division of the Supreme Court," tasked with selecting up to 120 cases per year that the Court would be

obligated to decide, while also allowing the Justices to grant certiorari to cases beyond those); Sanford Levinson, *Assessing the Supreme Court's Current Caseload: A Question of Law or Politics?*, 119 YALE L.J. ONLINE 99, 102 (2010), https://www.yalelawjournal.org/pdf/842_q862jfiz.pdf (proposing a broader selection panel, including federal and state judges as well as non-lawyer public representatives); Melody Wang, *Don't Let the Court Choose Its Cases*, N.Y. TIMES (Oct. 27, 2020), https://www nytimes.com/interactive/2020/10/27/opinion/supreme-court-reform.html#wang (proposing that cases be selected by a randomly chosen panel of federal appeals judges, serving no longer than one year at a time, with no further cases to be selected by the Justices).

[188] *See, e.g.*, Daniel J. Meador, *Reining in the Superlegislature: A Response to Professors Carrington and Cramton*, 94 CORNELL L. REV. 657, 663-64 (expressing skepticism that the Carrington-Cramton proposal would consistently deflect "hot button" cases from the Court's docket, though generally favoring serious consideration of the proposal); Tyler, *supra* note 177, at 1318 (2010) (questioning whether placing selection authority with circuit judges would result in much practical difference or depoliticize the process); Geller & Mahoney Testimony, *supra* note 80, at 33-34 (expressing constitutional concerns); Dreeben Testimony, *supra* note 168, at 21 (questioning claims of depoliticization and the quality of the process).

[189] 2011 YEAR-END REPORT ON THE FEDERAL JUDICIARY 4 (2011) [hereinafter 2011 YEAR-END REPORT], https://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf.

[190] *See e.g.*, Andrew Rosenthal, *Step Right Up. Buy Dinner with a Justice*, N.Y. TIMES (Nov. 10, 2011, 4:30 PM), https://takingnote.blogs.nytimes.com/2011/11/10/step-right-up-buy-dinner-with-a-justice; Editorial Board, *Justice Ginsburg's Inappropriate Comments on Donald Trump*, WASH. POST (July 12, 2016), https://www.washingtonpost.com/opinions/justice-ginsburgs-inappropriate-comments-on-donald-trump/2016/07/12/981df404-4862-11e6-bdb9-701687974517_story.html. Justice Ginsburg later apologized for her comments and acknowledged that "[j]udges should avoid commenting on a candidate for public office." Meg Anderson, *LISTEN: Justice Ginsburg Expands on Decision to Apologize for Trump Remarks*, NPR (July 14, 2016), https://www npr.org/2016/07/14/486080234/listen-justice-ginsburg-expands-on-decision-to-apologize-for-trump-remarks.

[191] 28 U.S.C. § 351(a).

[192] *Id.* § 351(d).

[193] 1991 SUPREME COURT INTERNAL ETHICS RESOLUTION 1 (1991), https://www.documentcloud.org/documents/296686-1991-supreme-court-internal-ethics-resolution html.

[194] Although, as noted below, there might be reason to be cautious when considering the current Code's provisions on recusal because recused Justices cannot be replaced.

[195] *Hearings Before a Subcomm. of the H. Comm. on Appropriations*, 116th Cong. (2019) (statements of Hons. Samuel Alito & Elena Kagan, Associate Justices, U.S. Supreme Court), https://www.govinfo.gov/content/pkg/CHRG-116hhrg38124/html/CHRG-116hhrg38124.htm.

[196] *Id.*

[197] In 2020, the Code of Conduct Committee of the Judicial Conference released a draft opinion concluding that the Code prohibits membership in the Federalist Society and American Constitution Society. COMM. ON CODES OF CONDUCT, ADVISORY OPINION NO. 117 (EXPOSURE DRAFT): JUDGES' INVOLVEMENT WITH THE AMERICAN CONSTITUTION SOCIETY, THE FEDERALIST SOCIETY, AND THE AMERICAN BAR ASSOCIATION (2020). But the opinion was rescinded after widespread opposition from many members of the judiciary.

[198] *See, e.g.*, Supreme Court Ethics Act of 2015, S. 1072, 114th Cong. (2015); Supreme Court Ethics Act, H.R. 1057, 116th Cong. (2019).

[199] 2011 YEAR-END REPORT, *supra* note 189, at 4.

[200] Amanda Frost, *Judicial Ethics and Supreme Court Exceptionalism*, 26 GEO. J. LEGAL ETHICS 443, 460-61 (2013).

[201] 28 U.S.C. § 453.

[202] Several observers have argued that Congress is limited in its capacity to regulate the ethical practices of the Supreme Court when such regulation might intrude on the Court's inherent constitutional powers. *See* Louis J. Virelli III, *Congress, the Constitution, and Supreme Court Recusal*, 69 WASH. & LEE L. REV. 1535, 1562-75 (2012); Suzanne Levy, *Your Honor, Please Explain: Why Congress Can, and Should, Require Justices to Publish Reasons for Their Recusal Decisions*, 16 U. PA. J. CONST. L. 1161, 1181-84 (2014); *but see* Amanda Frost, *supra* note 12, at 463–75 (arguing against various constitutional objections to proposed ethics legislation governing the Supreme Court, in part because ethics legislation might encroach on the Court's decisionmaking function).

[203] *See* 28 U.S.C. § 2072 (Rules Enabling Act).

[204] Circuit judicial councils are comprised of a circuit's chief judge sitting as chair and an equal number of other circuit and district court judges. Circuit judicial councils perform various administrative roles within their circuits. *See Governance & the Judicial Conference*, U.S. COURTS, https://www.uscourts.gov/about-federal-courts/governance-judicial-conference (last visited Sept. 18, 2021).

[205] Anthony J. Scirica, Senior Circuit Judge, U.S. Court of Appeals for the Third Circuit, *Judicial Governance and Judicial Independence*, Madison Lecture, *in* 90 N.Y.U. L. REV. 779, 788 (2015).

[206] *Presidential Commission on the Supreme Court of the United States* 8 (June 30, 2021) (written testimony of Russell Wheeler), https://www.whitehouse.gov/wp-content/uploads/2021/07/R.-Wheeler-statement-6.30-rev.7.12-on-SCOTUS_.pdf (noting that a "small bureaucracy" would be required to sift through the high number of potential complaints against Supreme Court justices).

[207] *See* 28 U.S.C. § 354(a)(2).

[208] A disciplinary option frequently proposed is the creation of an Inspector General for the Federal Courts. Some variations of the proposal give the Inspector General the power to investigate misconduct on the Supreme Court. This proposal has been around for decades and has been heavily discussed. *See, e.g.*, Diane M. Hartmus, *Inspection and Oversight in the Federal Courts: Creating an Office of Inspector General*, 35 CAL. W. L. REV. 243 (1999); Ronald D. Rotunda, *Judicial Transparency, Judicial Ethics, and a Judicial Solution: An Inspector General for the Courts*, 41 LOY. U. CHI. L.J. 301 (2010). Members of the federal judiciary have criticized the proposal. *See* Scirica, *supra* note 205, at 789-97 (2015). Since 2018, the Judicial Conference has provided for a "Judicial Integrity Officer" who oversees workplace conduct in the federal judiciary. The responsibilities of the Judicial Integrity Office include "answering individuals' questions, providing guidance on conflict resolution, mediation, and formal complaint options." *Judicial Integrity Officer Named for Federal Judiciary*, U.S. COURTS (Dec. 3, 2018), https://www.uscourts.gov/news/2018/12/03/judicial-integrity-officer-named-federal-judiciary.

[209] *Cf.* W. Bradley Wendel, *Nonlegal Regulation of the Legal Profession: Social Norms in Professional Communities*, 54 VAND. L. REV. 1955 (2001) (arguing that where lawyers are given clear rules to follow, informal social pressures from other members of the profession can serve the role of formal sanctions).

[210] 28 U.S.C. § 455(a).

[211] *Id.* § 455(1)-(4).

[212] *See* Tuan Samahon, *Rehnquist's Recusals*, 10 GREEN BAG 2D 205, 207 (2007); Memorandum of Justice Scalia, Cheney v. U.S. Dist. Court for D.C., 541 U.S. 913 (2004), available at https://www.supremecourt.gov/opinions/03pdf/03-475scalia.pdf.

[213] *See Recent Times in Which a Justice Failed to Recuse Despite a Conflict of Interests*, FIX THE COURT (June 13, 2021), https://fixthecourt.com/2021/06/recent-times-justice-failed-recuse-despite-clear-conflict-interest.

[214] This data was compiled with the help of Fix the Court's regular reports on Supreme Court recusal. *See, e.g.*, *The Supreme Court's Unexplained OT17 Cert.-Stage Recusals Explained*, FIX THE COURT, https://fixthecourt.com/wp-content/uploads/2018/05/OT17-cert.-stage-recusals-chart.pdf (last visited Sept. 18, 2021).

[215] Even some who are skeptical of congressional regulation of the Court's recusal practices have argued that requiring statements explaining recusal decisions would be a permissible procedural reform. *See* Virelli, *supra* note 202, at 1591-92.

[216] In a 2015 appropriations hearing, Justice Kennedy voiced a concern that presenting reasons for recusal might resemble lobbying. Justice Kennedy said: "In the rare cases when I recuse, I never tell my colleagues, oh, I'm recusing because my son works for this company and it's a very important case for my son. Why should I say that? That's almost like lobbying. So, in my view, the reason for recusal should never be discussed." Rich Gardella, *Why Don't Supreme Court Justices Have an Ethics Code*, NBC NEWS (Apr. 11, 2017, 2:26 PM) (quoting Justice Kennedy), https://www.nbcnews.com/news/us-news/why-don-t-supreme-court-justices-have-ethics-code-n745236.

[217] Under 28 U.S.C. § 455, all federal judges decide certain recusal motions in the first instance. However, for lower court judges, the decision not to recuse may be appealed. Under 28 U.S.C. § 144, an affidavit alleging personal bias or prejudice by a United States District Judge must be heard by another judge if the affidavit is timely and sufficient.

[218] SUP. CT. R. 22(4).

[219] Justice Black and Justice Jackson feuded over Black's refusal to recuse himself in a case where the plaintiff's counsel was Black's former law partner and personal lawyer. Jackson wrote a concurrence to an order denying rehearing of the case that has been interpreted as a shot at Black. *See* Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of America, 325 U.S. 897 (1945) (Jackson, J., concurring); *see also* Dennis J. Hutchinson, *The Black-Jackson Feud*, 1988 SUP. CT. REV. 203 (covering the Black-Jackson feud in detail).

[220] *See* RUSSELL WHEELER & MALIA REDDICK, JUDICIAL RECUSAL PROCEDURES: A REPORT ON THE IAALS CONVENING 19-21 (2017) (listing state statutes and codes that allow or require a judge's recusal decision to be referred to another judge or the entire court, including some statutes and codes that create such a referral process for the state's highest court).

[221] James M. Anderson, Eric Helland & Merritt McAlister, *Measuring How Stock Ownership Affects Which Judges and Justices Hear Cases*, 103 GEO. L.J. 1163, 1178 (2015).

[222] *See* 26 U.S.C. § 1043.

[223] For example, the divestment statute only allows for divestiture when doing so is "reasonably necessary" to avoid a conflict. 26 U.S.C. § 1043(b)(2). Perhaps the justices interpret this language as not permitting preemptive divestments to avoid conflicts.

[224] *See* Anderson, Helland & McAlister, *supra* note 221, at 1207-08 (proposing divestment requirements for judges or Justices).

[225] *Visitor's Guide to Oral Argument*, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/visiting/visitorsguidetooralargument.aspx (last visited Sept. 18, 2021).

[226] Robert Barnes, *Supreme Court Tells Lawyers: Stand in Line Yourselves. You Can't Pay Others to Hold a Spot*, WASH. POST (Oct. 6, 2015), https://www.washingtonpost.com/politics/courts_law/supreme-court-bar-bans-line-standing-for-hearings/2015/10/06/a309e0e6-6c15-11e5-aa5b-f78a98956699_story.html; *see Presidential Commission on the Supreme Court of the United States* 3 (June 30, 2021) (testimony of Amy Howe), https://www.whitehouse.gov/wp-content/uploads/2021/06/Testimony-of-Amy-Howe.pdf; Katie Bart, *Courtroom Access: Line-standing Businesses Save Spots in the Public Line*, SCOTUSBLOG (Apr. 15, 2020, 4:48 PM), https://www.scotusblog.com/2020/04/courtroom-access-line-standing-businesses-save-spots-in-the-public-line.