

# ESSAY

## THE SUPREME COURT SHOULD ELIMINATE ITS LAWLESS SHADOW DOCKET

RICHARD J. PIERCE, JR.\*

INTRODUCTION .....	1
I. AN ILLUSTRATIVE CASE.....	6
II. HOW DID WE GET HERE? .....	10
III. POTENTIAL SOLUTIONS .....	16
IV. AN OPTIMISTIC POSTSCRIPT .....	19

### INTRODUCTION

The Supreme Court has adopted a regular practice of making decisions that have the effect of either allowing the government to take a major action or permanently blocking the government from taking a major action without providing any explanation for its decision.<sup>1</sup> It does this by either granting or denying motions to stay lower court decisions issuing preliminary injunctions that bar the government from implementing a major action until the courts have decided whether the action is legal.<sup>2</sup> The Court’s decisions granting or denying stays are referred to as its “shadow docket.”<sup>3</sup>

---

\* Lyle T. Alverson Professor of Law, George Washington University. I am grateful for the assistance provided by my research assistants, Spencer Lindsay, and Catherine Chiodo. I am also grateful to Alan Morrison for providing helpful comments on an earlier version of this Essay.

1. See generally Judge Trevor McFadden & Vetan Kapoor, *Symposium: The Precedential Effects of Shadow Docket Stays*, SCOTUSBLOG (Oct. 28, 2020, 9:18 AM), <https://www.scotusblog.com/2020/10/symposium-the-precedential-effects-of-shadow-docket-stays> (noting that “these ‘shadow docket’ stays are typically short orders with little legal reasoning issued without oral argument, with condensed briefing and on compressed timelines.”).

2. See *Hearing Before the U.S. Subcomm. on Courts, Property, and the Internet*, 117th Cong. (2021) (statement of Loren L. AliKhan, Solicitor General of the District of Columbia).

3. William Baude first coined the term “Shadow Docket” in 2015, although the practice

In theory, the Court's decisions granting or denying motions for stays have only temporary effects on the ability of the government to implement a major action.<sup>4</sup> In reality, however, many of the Court's decisions to grant stays allow the government to implement the challenged action, rendering any controversy about its legality moot.<sup>5</sup> Conversely, many of the Court's decisions that deny stays have the practical effect of precluding the government from ever attempting to implement the action.<sup>6</sup>

A court can grant a motion to enjoin a government action pending the outcome of review on the merits only if: (1) it determines that the petitioners are likely to prevail on the merits; (2) failure to grant the preliminary injunction would cause irreparable harm that exceeds the irreparable harm that would result from a decision to deny the motion for a preliminary injunction; and (3) issuance of the injunction will not disserve the public interest.<sup>7</sup> The criteria applicable to grant of a stay and those to grant of a motion for a preliminary injunction are identical.<sup>8</sup> In the context of major government actions, courts tend to focus primarily on the first factor—whether the petitioner is likely to prevail on the merits. Either grant or denial of a stay is likely to cause irreparable harm, and the court is likely to conclude that the public interest would be served by staying the action if the petitioner is likely to prevail on the merits and that the public interest would be served by refusing to stay the action if the petitioner is not likely to prevail on the merits.<sup>9</sup>

---

itself stretches back decades. *See* William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U.J. L. & LIBERTY 1, 1 (2015).

4. *See* McFadden & Kapoor, *supra* note 1.

5. *E.g.*, *Trump v. Sierra Club*, 140 S. Ct. 1 (2019) (overturning the circuit court decision that enjoined the Trump Administration from reallocating funds appropriated for other purposes to build a wall across the southern border).

6. *See Hearing Before the U.S. Subcomm. on Courts, Property, and the Internet*, 117th Cong. (2021) (statement of Loren L. AliKhan, Solicitor General of the District of Columbia).

7. *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam) (holding that “[t]o obtain a stay pending the filing and disposition of a petition for a writ of certiorari, an applicant must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay.”).

8. *See* *Nken v. Holder*, 556 U.S. 418, 429 n.1 (2009) (noting that courts have “long recognized that . . . [orders such as those preventing an immigration removal officer from removing a person is] temporary relief from an administrative order just like temporary relief from a court order is considered a stay.”) (citing *Scripps-Howard Radio, Inc. v. Fed. Commc’ns Comm.*, 316 U.S. 4, 10–11 (1942)).

9. KRISTIN E. HICKMAN & RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* § 20.2 (6th ed. 2019).

As recently as 2016, I characterized decisions in which courts grant preliminary injunctions blocking agencies from implementing an action until the court decides the merits of the action as “rarely” occurring.<sup>10</sup> Until recently, the Supreme Court rarely granted either a stay of an agency action or a preliminary injunction that stopped an agency from implementing an action pending its review.<sup>11</sup> Both preliminary injunctions and stays were considered extraordinary remedies that courts provided to preserve the status quo ante only when there were unusually good reasons to believe that an action taken by an agency or a court was unlawful, and even then, only for the relatively short time required to review the action on the merits.<sup>12</sup>

That situation has changed dramatically in recent years. When a president or an agency takes any major action, the state attorneys general, who are members of the opposite party, file both a complaint and a motion for preliminary injunction in a district court with a track record of decisions that favor the interests and perspectives of their party.<sup>13</sup> The district court then issues a preliminary injunction.<sup>14</sup> The average number of nationwide preliminary injunctions issued by district courts has increased over the past decade from three per year to eighteen per year.<sup>15</sup>

After a district court issues a preliminary injunction, the federal government can file a motion to stay the district court action in the corresponding circuit court. If the circuit court denies the motion, the government can file a motion for stay at the Supreme Court.<sup>16</sup> The Supreme Court then grants or denies the stay without issuing an opinion.<sup>17</sup> If it stays the preliminary

---

10. *Id.*

11. *Id.*

12. *Id.* at § 20.2.2.

13. JOANNA R. LAMPE, CONG. RSCH. SERV., R46902, NATIONWIDE INJUNCTIONS: LAW, HISTORY AND PROPOSALS FOR REFORM 4–5 (2021).

14. *Id.* at 3.

15. A recent in-depth historical review of nationwide injunctions found that the practice extends as far back as 1939, but there were only a handful of examples in the first half of the 20th century. See Mila Sohoni, *The Lost History of the “Universal” Injunction*, 133 HARV. L. REV. 920, 925 (2020). There was a significant increase in recent years. Federal courts issued twelve nationwide injunctions against the George W. Bush Administration, while nineteen nationwide injunctions were issued against the Obama Administration, a fifty-eight percent increase. See Deputy Attorney General Jeffrey A. Rosen Delivers Opening Remarks at Forum on Nationwide Injunctions and Federal Regulatory Programs, U.S. DEP’T OF JUST. (Feb. 12, 2020), <https://www.justice.gov/opa/speech/deputy-attorney-general-jeffrey-rosen-delivers-opening-remarks-forum-nationwide>. By early 2020, federal courts had issued at least fifty-five nationwide injunctions against the Trump Administration, a rate of eighteen nationwide injunctions per year. See *id.*

16. See LAMPE, *supra* note 13, at 16.

17. See Baude, *supra* note 3, at 14.

injunction, the stay remains in effect until such time as the Supreme Court reviews the merits of the action. During that time, the government can implement the action that was the subject of the preliminary injunction. The number of cases in which the government has sought such a stay has increased over the last decade from less than one per year to over ten per year.<sup>18</sup>

Like preliminary injunctions, stays are temporary. They expire when the Court issues a decision on the merits.<sup>19</sup> In most cases, however, the stay continues in effect for many years because it usually takes that long for the Court to decide on the merits of the case. In many cases, the decision to grant or deny a motion for stay is the last action the Court takes in the case because it never issues an opinion on the merits.<sup>20</sup>

If the Court grants the stay, its unexplained order allows the agency or the President to take the action, thereby rendering moot the dispute with respect to the legality of the action. We will never know whether President Trump's reallocation of many billions of dollars from projects for which Congress had appropriated funds to the construction of a wall across the southern border was lawful. Further, we will never know what, if any, limits apply to any future "emergency" presidential reallocations of funds.<sup>21</sup>

Conversely, if the Supreme Court denies the stay of the preliminary injunction or issues its own stay of the agency action without an explanation, the agency is unlikely to attempt to take the action in the future because it expects that the Supreme Court would block the action again.<sup>22</sup> We may never know why the Court stayed the Clean Power Plan (CPP), the most significant action the government has taken in its efforts to mitigate climate

---

18. See Stephen Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123, 125 (2019) (discussing that then-Solicitor General Francisco was "aggressive in seeking to short-circuit the ordinary course of appellate litigation . . ." and ". . . in less than three years, the Solicitor General has filed at least twenty-one applications for stays in the Supreme Court (including ten during the October 2018 Term alone).").

19. Trevor McFadden & Vetan Kapoor, *The Precedential Effects of the Supreme Court's Emergency Stays*, 44 HARV. J. L & PUB. POL'Y 827, 842-43 (2021).

20. *Id.* at 837-38.

21. Two years after it overruled a decision by the Ninth Circuit Court of Appeals and granted a stay that allowed the Trump Administration to reallocate funds for the construction of a border wall in 2019, the Court has yet to issue a decision on the merits. *Trump v. Sierra Club*, 140 S. Ct. 1 (2019). The Court is unlikely ever to address the merits of the case. The Biden Administration has stated its intention not to spend any more of the reallocated funds and has asked the Supreme Court to dismiss the case that challenged the reallocation. Proclamation No. 10,142, 86 Fed. Reg. 7225 (Jan. 27, 2021).

22. Emily Hammond & Richard J. Pierce, Jr., *The Clean Power Plan: Testing the Limits of Administrative Law and the Electric Grid*, 7 GEO. WASH. J. ENERGY & ENV'T. 1, 10 (2016).

change.<sup>23</sup> We can guess that the Court believed that the Environmental Protection Agency (EPA) action was unlawful in some respect, but we have no way of knowing which of the six arguments that the petitioners made in support of their motion to stay the action persuaded the Court that they were likely to prevail on the merits.<sup>24</sup>

There are many variations of this now common sequence of actions. Sometimes, the Supreme Court denies the stay of the preliminary injunction without opinion, thereby leaving the preliminary injunction in effect pending the outcome of the proceeding to review the merits of the action.<sup>25</sup> Years later, the Supreme Court has not yet issued any opinion in the case when a change in the party that controls the Executive Branch creates conditions in which the government withdraws its support for the agency action, thereby making it unlikely that the Court will ever issue an opinion on the merits of the agency action.<sup>26</sup>

Each of those sequences of actions raises serious questions about our ability to continue to be governed by the rule of law. In the first sequence, we have no way of knowing whether the action the agency took was lawful. We only have the opinion of the district judge who granted the preliminary injunction and the unexplained decision of the Supreme Court to stay that decision. We can make an educated guess that the Supreme Court disagreed with the district court in some respect, but we have no way of knowing why the Supreme Court disagreed with the district judge.

In a typical case, there are many plausible reasons for that disagreement, and we can only speculate about the Court's reasons for disagreeing with the district judge. The disagreements could be based on the Court's evaluation of one of several alleged substantive flaws in the agency decision; one or more alleged flaws in the procedures the agency used to make the decision; the

---

23. *West Virginia v. EPA*, 136 S. Ct. 1000 (2016). See Courtney Scobie, *Supreme Court Stays EPA's Clean Power Plan*, AM. BAR ASS'N (Feb. 17, 2016), <https://www.americanbar.org/groups/litigation/committees/environmental-energy/practice/2016/021716-energy-supreme-court-stays-epas-clean-power-plan/> (explaining the likelihood the Supreme Court stay would be removed).

24. See generally Application by 29 State Agencies for Immediate Stay of Final Agency Action During Pendency of Petitions for Review at 5, *West Virginia v. EPA*, 577 U.S. 1126 (2016) (arguing that “[a]bsent a stay, the Power Plan will—throughout the lifespan of this litigation—force massive, irreversible changes in terms of state policies and resources, power plant shutdowns, and investments in wind and solar power.”).

25. See Vladeck, *supra* note 18, at 155.

26. See *Trump v. Sierra Club*, 140 S. Ct. 1 (2019); *Trump v. Sierra Club*, SCOTUSBLOG (last visited Feb. 8, 2022), <https://www.scotusblog.com/case-files/cases/trump-v-sierra-club> (detailing the procedural history of the case, and demonstrating that there does not appear to be any action indicating they will make an opinion on the merits).

district court's reasons for concluding that the public interest favored issuance of the preliminary injunction; or the district court's reasons for concluding that the preliminary injunction was required to avoid some form of irreparable harm to the petitioners that exceeds the irreparable harm that the government would suffer as a result of issuance of the preliminary injunction.<sup>27</sup>

We also have no way of knowing whether the agency action was lawful in the second sequence. We only have the opinion of the district judge who granted the preliminary injunction and the unexplained decision of the Supreme Court to deny the motion to stay the preliminary injunction. We have no way of knowing whether the Supreme Court agreed with the district judge's conclusion that the agency was likely to lose on the merits based on one of several alleged substantive flaws in the agency action or whether the Court agreed with the district judge that the agency was likely to lose on the merits based on one of several alleged flaws in the procedures that the agency used to take the action. It is even possible that the Supreme Court disagreed with the district judge's reasoning with respect to all of the alleged flaws in the agency action but decided not to stay the preliminary injunction because it disagreed with the judge's conclusion that a preliminary injunction was in the public interest or the judge's conclusion that the agency action would create irreparable harm to the petitioners that exceeds the irreparable harm that the government would suffer as a result of issuance of the preliminary injunction.

## I. AN ILLUSTRATIVE CASE

I will illustrate the reasons for my concern about the shadow docket by describing yet another variation of the typical sequence. During the Obama Administration, the EPA issued the CPP.<sup>28</sup> The CPP was by far the most ambitious attempt by the government to reduce the rate of climate change.<sup>29</sup> It required massive fuel-switching by electric utilities from using coal to using natural gas, wind, or solar.<sup>30</sup> Since the use of natural gas to generate electricity produces less than half the emissions of carbon dioxide than the use of coal produces, and the use of solar or wind to generate electricity produces no emissions of carbon dioxide, fuel switching is by far the most effective way of reducing the effects of electricity generation on climate change.

Many Republican state attorneys general joined many electric generating companies in filing petitions to review the CPP and motions to stay the

---

27. See Vladeck, *supra* note 18, at 155.

28. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,661 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60).

29. See Hammond & Pierce, *supra* note 22, at 1.

30. See Hammond & Pierce, *supra* note 22 for a detailed description of the Clean Power Plan (CPP).

CPP.<sup>31</sup> The D.C. Circuit denied their motion for a stay.<sup>32</sup> The Supreme Court then took the unprecedented action of granting the stay before any court issued an opinion on the merits.<sup>33</sup> The Justices divided five to four but neither the majority nor the dissent wrote an opinion.<sup>34</sup> The stay was to last until either the D.C. Circuit issued an opinion on the merits of the CPP and the Supreme Court denied a petition for a writ of certiorari to review the D.C. Circuit opinion, or, the Supreme Court issued a decision on the merits of the CPP.<sup>35</sup> It is unlikely that either of those events will ever take place.

In 2019, the EPA during the Trump Administration repudiated the CPP and replaced it with the Affordable Clean Energy (ACE) rule.<sup>36</sup> The D.C. Circuit dismissed the petitions to review the CPP in light of the Supreme Court's stay of the CPP and the EPA's repudiation of the CPP.<sup>37</sup> Many Democratic state attorneys general joined numerous environmental advocacy organizations in filing petitions to review the ACE rule.<sup>38</sup> A divided panel of the D.C. Circuit then vacated the ACE rule based on its holding that the rule was unlawful.<sup>39</sup> Both the majority and the dissent wrote lengthy opinions.<sup>40</sup>

Depending on whether you believe the claims of the EPA from the Trump Administration or the claims of the petitioners, the ACE rule would have had either modest beneficial effects in mitigating climate change by slightly reducing emissions of carbon dioxide, or it would actually have accelerated the rate at which the climate is changing by increasing emissions of carbon dioxide. The Trump EPA attempted to defend the ACE rule based on only one argument—that issuance of the ACE rule was the most effective action that the EPA could take to mitigate climate change because the EPA lacked the power to issue the far more

---

31. Abby Harvey, *Coal Companies Met with AGs Before CPP Lawsuit*, EXCH. MONITOR (Sept. 8, 2016), <https://www.exchangemonitor.com/coal-companies-met-ags-cpp-lawsuit/?printmode=1>.

32. *See West Virginia v. EPA*, No. 15-1363 (D.C. Cir. Jan. 21, 2016) (order denying motion to stay).

33. *See West Virginia v. EPA*, 136 S. Ct. 1000 (Feb. 9, 2016) (order granting motion to stay).

34. *Id.*

35. *Id.*

36. Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations, 84 Fed. Reg. 32,520 (July 8, 2019) (to be codified at 40 C.F.R. pt. 60).

37. *See Bob Sussman, The Supreme Court's Clean Power Plan Missteps*, BROOKINGS (Feb. 12, 2016), <https://www.brookings.edu/blog/planetpolicy/2016/02/12/the-supreme-courts-clean-power-plan-missteps/>.

38. *See Am. Lung Ass'n v. EPA*, 985 F.3d 914, 922–29 (D.C. Cir. 2021) (per curiam).

39. *Id.* at 914–15.

40. *See id.* at 995 (Walker, J., concurring in part, dissenting in part).

effective CPP.<sup>41</sup> That lone justification for issuing the ACE rule created a strange situation: the D.C. Circuit could decide whether the ACE rule was valid only by deciding whether the CPP that was issued by the Obama EPA and repudiated by the Trump EPA was lawful.

The petitioners who persuaded the Supreme Court to stay the CPP argued that it was invalid for six reasons.<sup>42</sup> The members of the D.C. Circuit who debated the validity of the ACE rule wrote lengthy opinions in which they debated the merits of each of the six arguments that the EPA and its allies made in support of the EPA's decision to repudiate the CPP and to issue the ACE rule.<sup>43</sup> Those were the same arguments that the petitioners who challenged the validity of the CPP used to persuade the Supreme Court to stay the CPP.<sup>44</sup> As a result, we now know a great deal about the contrasting views of three members of the D.C. Circuit with respect to the issues raised by the CPP and the ACE rule.

We also know that the D.C. Circuit has, in effect, upheld the validity of the CPP in its opinion on the merits of the ACE rule.<sup>45</sup> As the dissenting judge noted, however, it is difficult to reconcile the D.C. Circuit's opinion on the merits of the ACE rule and the CPP with the Supreme Court's order that stayed the CPP.<sup>46</sup> The Supreme Court's stay order almost certainly was based in part on the views of five Justices that the EPA was unlikely to be able to support the legality of the CPP on the merits. It follows that a majority of Justices almost certainly disagree with the reasoning and conclusion of the majority of the D.C. Circuit panel with respect to one or more of the six important issues that the D.C. Circuit resolved in the process of holding that the ACE rule was invalid because the CPP was valid.

---

41. See Brief for Respondents at 49–50, *Am. Lung Ass'n v. EPA*, 985 F.3d 914 (D.C. Cir. 2020) (No. 19-1140).

42. The majority rejected the arguments that: (1) the Clean Air Act (CAA) authorizes the Environmental Protection Agency (EPA) only to apply emission reduction measures at and to a stationary source, *Am. Lung Ass'n*, 985 F.3d at 943–57; (2) the CPP is an extraordinary measure that cannot be supported solely by relying on an ambiguous statutory provision, *id.* at 957–67; (3) the EPA lacks the expertise with respect to generation of electricity required to make the many technical decisions that are reflected in the CPP, *id.* at 967–68; (4) the CPP is inconsistent with the principles of federalism that are embedded in the Constitution, *id.* at 968–71; (5) the CPP is invalid because Congress amended the CAA to preclude the EPA from using both § 7411(d) and § 7412 as the basis for regulating electric generating companies, *id.* at 977–88; (6) the endangerment finding that was the basis for the CPP was not adequately supported by evidence, *id.* at 971–77.

43. See *supra* note 42 and accompanying text.

44. See Brief for Petitioners at 3–4, *West Virginia v. EPA*, 577 U.S. 1126 (2016) (No. 15A773).

45. See *Am. Lung Ass'n*, 985 F.3d at 957–68.

46. See *id.* at 999–1002 (Walker, J., concurring in part, dissenting in part).

We may never know the views of the Justices on the six important issues that the D.C. Circuit resolved in ways that almost certainly are inconsistent with the views of a majority of Justices. The EPA in the Biden Administration has withdrawn its support for the ACE rule, so the Supreme Court will not have occasion to address those issues when reviewing the merits of the ACE rule.<sup>47</sup> The Supreme Court is also highly unlikely to have an opportunity to address the merits of the CPP directly. The D.C. Circuit understandably dismissed the petitions to review the CPP once the EPA in the Trump Administration repudiated it. The EPA in the Biden Administration is highly unlikely to attempt to reissue the CPP because of the extraordinarily negative reception that it received from the Supreme Court when it was issued by the EPA during the Obama Administration.

This sequence of actions and its many variants have created a situation in which the Supreme Court is taking actions on its shadow docket that have a wide variety of permanent, major effects without ever providing any explanation for its actions. The Supreme Court's shadow docket is large and growing. During the George W. Bush and Obama Administrations from 2000–2016, the federal government only sought emergency injunctive relief from the Supreme Court eight times in total, and the Court granted only four of those requests. In contrast, the Trump Administration sought emergency relief from the Supreme Court forty-one times in four years, and the Court granted twenty-eight of those requests either in full or in part.<sup>48</sup>

The Supreme Court's actions in this important line of cases contrasts starkly with the approach the Court has taken when it has reviewed agency actions on the merits during the same period of time. In many of its opinions issued during the last few years, the Court has emphasized the importance of the duty to engage in reasoned decisionmaking.<sup>49</sup> The Court has held numerous agency actions unlawful because the agency did not comply with the most fundamental duty of any agency or court—it failed to provide an explanation for its action that is anchored in the language of statutes or the Constitution and consistent with the available evidence.

---

47. To my surprise, the Supreme Court granted a petition for a writ of certiorari to address issues about the scope of EPA's power under Clean Air Act § 111(d). *American Lung Association v. EPA*, 985 F.3d 914 (D.C. Cir. 2021), *cert granted*, 2021 BL 416638 (U.S. Oct. 29, 2021) (No. 20-1530).

48. See Stephen I. Vladeck, *The Supreme Court Needs to Show Its Work*, THE ATLANTIC (Mar. 10, 2021), <https://www.theatlantic.com/ideas/archive/2021/03/supreme-court-needs-show-its-work/618238/>.

49. *E.g.*, *Dep't of Com. v. New York*, 139 S. Ct. 2551 (2019); *Trump v. Vance*, 140 S. Ct. 2412 (2020); *Trump v. Mazars*, 140 S. Ct. 2019 (2020); *Dep't of Homeland Sec. v. Regents of Univ. of Cal.*, 140 S. Ct. 1891 (2020); *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

I have joined many other scholars in praising this line of cases.<sup>50</sup> It is ironic and disturbing that the Supreme Court has taken many actions that have major permanent effects without providing any legal basis for those actions during this same period of time. The Court would have held all of the actions it took on its shadow docket to be arbitrary, capricious, and not in accordance with law if they had been taken by any agency. It is not an overstatement to characterize this long list of Supreme Court actions as lawless, in the sense that the Court has never provided any explanation for any of the actions.

## II. HOW DID WE GET HERE?

We now have a situation in which a high proportion of major judicial decisions are made by the Supreme Court without providing any reasons for the decisions. To understand how we reached this point, we must start with the extreme political polarization that now characterizes the country.<sup>51</sup> That polarization has been growing for decades.<sup>52</sup> When it is combined with the unusually difficult process that the U.S. Constitution requires to enact a statute, political polarization makes it extremely difficult for Congress to enact or amend any major regulatory statute.<sup>53</sup>

As a result, when an agency encounters a new problem, it typically must search for a solution in a statute that was enacted thirty to eighty years ago by a Congress that could not have anticipated the problem that the agency is attempting to address.<sup>54</sup> For instance, when the Federal Communications Commission decides how to regulate internet service providers, it must rely primarily on the Communications Act of 1934,<sup>55</sup> a statute that was enacted long before the internet was created. Similarly, when the EPA decides how to mitigate climate change, it must rely primarily on the Clean Air Act (CAA)

---

50. *E.g.*, Benjamin Eidelson, *Reasoned Explanation and Political Accountability in the Roberts Court*, 130 YALE L.J. 1748, 1826 (2021); Richard J. Pierce, Jr., *Reason Trumps Pretext*, THE REGUL. REV. (July 30, 2020), <https://www.theregreview.org/2020/07/30/pierce-reason-trumps-pretext/>.

51. *See* Charlton C. Copeland, *Seeing Beyond Courts: The Political Context of the Nationwide Injunction*, 91 U. COLO. L. REV. 789, 814 (2020) (discussing political polarization leading to political gridlock).

52. *See id.* at 809–14.

53. For detailed discussion of this problem, see Richard J. Pierce, Jr., *The Combination of Chevron and Political Polarity Is Creating Awful Problems*, 70 DUKE L.J. ONLINE 91 (2021) [hereinafter *Awful Problems*]; Richard J. Pierce, Jr., *Delegation, Time, and Congressional Capacity: A Response to Adler & Walker*, 105 IOWA L. REV. ONLINE 1 (2020) [hereinafter *Congressional Capacity*].

54. *See* Jonathan Adler & Christopher Walker, *Delegation and Time*, 105 IOWA L. REV. 1931 (2020).

55. Communications Act of 1934, ch.652, Pub. L. No. 473-16, 48 Stat. 1064 (1934) (codified as amended at 47 U.S.C. §§ 151–63), applied in *Mozilla Corp. v. FCC*, 940 F.3d 1 (2019).

of 1970.<sup>56</sup> The CAA was last amended in 1990, and those amendments did not address climate change.

When a newly elected president takes office in these political conditions, his advisors tell him that it would be an exercise in futility to attempt to persuade Congress to enact or amend a statute by giving an agency the tools it needs to address today's problems.<sup>57</sup> The president then must choose either to ignore today's problems or to instruct agencies to search through old statutes to find some provision that might provide a mechanism to address a modern problem.<sup>58</sup> The agency then finds the best candidate among the old statutory provisions and attempts to use it as the basis for an action that will address the new problem. In today's legal environment, the agency must almost always base its actions on a provision of an old statute that was never intended to be used for the purpose of addressing a modern problem.<sup>59</sup>

Leaders of the opposition party are incensed by the administration's attempt to stretch its statutory authority in an effort to address a problem in a way that is favored by the president's party but that is strongly opposed by their own.<sup>60</sup> The Supreme Court has empowered one subset of opposition party leaders to take immediate action when they believe that the administration has overstepped its statutory boundaries. In its 2007 opinion in *Massachusetts v. EPA*,<sup>61</sup> the Court held that states always have standing to challenge any action of the federal government that threatens any sovereign interest of a state.<sup>62</sup>

State attorneys general of both parties have interpreted that opinion as an invitation for them to obtain high visibility in their parties by challenging every major government action that is inconsistent with their party's preferences. In today's polarized political environment, the vast majority of major actions that are taken by agencies in any administration are inconsistent with the preferences of the opposition party. Attorneys general who are members of the opposition party band together to challenge most of the major actions that are taken by agencies. They can always establish standing to obtain review of the agency action by identifying some way in which the action adversely affects some sovereign

56. Clean Air Act of 1970, Pub. L. No. 91-604, 81 Stat. 486 (1970) (codified as amended at 42 U.S.C. §§ 7401–515), discussed in *Evolution of the Clean Air Act*, ENV'TL PROT. AGENCY (Oct. 8, 2020), <https://www.epa.gov/clean-air-act-overview/evolution-clean-air-act>.

57. See Pierce, *Congressional Capacity*, *supra* note 53, at 6–7.

58. See Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1, 12 (2014) (describing this process as “the product of inertia, luck, and other forces”).

59. See *id.*

60. See Vladeck, *supra* note 18, at 124 (exemplifying how the solicitor general has been used to stretch presidential power).

61. 549 U.S. 497 (2007).

62. *Id.* at 516–21.

interest of one of the states.<sup>63</sup>

Since the jurisdiction and venue provisions of most of the statutes that agencies rely on as the basis for major actions allow complaints to be filed in any district, the attorneys general then search the nation for the district court that is most likely to view the major agency action with suspicion and the arguments of the attorney general with sympathy.<sup>64</sup> They then file a complaint and a motion for a preliminary injunction in that district court, and in most cases, obtain it.<sup>65</sup> The preliminary injunctions vary in scope; some are limited to the district in which the court sits, but many are nationwide.<sup>66</sup>

The agency then files a motion for a stay of the preliminary injunction in the corresponding circuit court.<sup>67</sup> If the circuit court denies the motion, the government files a motion for stay in the Supreme Court. In some cases, the Court grants the stay, typically until such time as the Supreme Court either decides the case on the merits or denies a petition for a writ of certiorari with respect to a circuit court opinion that decides the merits of the case.<sup>68</sup> In other cases, the Court denies the stay of the preliminary injunction.<sup>69</sup> The Court never accompanies its order granting or denying a stay with an opinion explaining its decision, though individual Justices sometimes write concurring or dissenting opinions in which they provide some explanation for their vote.<sup>70</sup>

---

63. *Id.*

64. *See DACA Litigation Timeline*, NAT'L IMMIGR. L. CTR. (May 8, 2020), <https://www.nilc.org/issues/daca/daca-litigation-timeline/> (describing the 2018 challenge to the Deferred Action for Childhood Arrivals (DACA) program brought by the State of Texas in the Southern District of Texas, where the court had previously granted an injunction against the program in 2015).

65. *See id.* (noting the GOP attorneys general (AG) success in obtaining an injunction against DACA in 2015).

66. *See id.* (describing the 2015 nationwide injunction against DACA).

67. *See, e.g., 5th Circuit Court of Appeals Decision on the Emergency Stay Pending Appeal*, NAT'L IMMIGR. L. CTR. (May 27, 2015), <https://www.nilc.org/issues/litigation/texasvusstaydecision/> (describing federal government appeal of the 2015 DACA injunction to the Fifth Circuit Court of Appeals).

68. *See* Stephen I. Vladeck, *The Supreme Court is Making New Law in the Shadows*, N.Y. TIMES (Apr. 15, 2021), <https://www.nytimes.com/2021/04/15/opinion/supreme-court-religion-order-s.html> (noting that twenty-eight of forty-one requests by the Trump Administration were granted).

69. *See, e.g., Andrew R. Arthur, The State of Play on "Remain in Mexico"*, CTR. FOR IMMIGR. STUDIES (Nov. 4, 2021) (detailing the Supreme Court's decision to deny the Biden Administration's request for a stay of the injunction to end the "Remain in Mexico" policy).

70. For reasons that the Court has never articulated, it does write an opinion when it issues a preliminary injunction against a state action. *See, e.g., Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 69, 72, 75–76, 78 (2020) (providing an example of multiple concurring and dissenting opinions).

In most cases, the Supreme Court never has any occasion either to decide the merits of the case or to deny a petition for a writ of certiorari with respect to a circuit court opinion that decides the merits of the case. As a result, we know only the outcome of the case—the major agency action either goes into effect or does not go into effect—but we never know why the Supreme Court allowed or refused to allow the action to take place.

It would be easy to solve this problem if we could conclude that any of the actions in this typical sequence are unlawful or that any of the actors are behaving in an impermissible manner. Unfortunately, it is easy to empathize with each of the actors. The actions of presidents in these common situations are predictable and laudable. If the country is experiencing a major new problem, and the president knows that he cannot persuade Congress to address the problem by enacting a statute, it makes sense for him to search for provisions of old statutes that he can try to stretch to support an action that allows the government to address the problem.

If a state attorney general concludes that an action taken by the federal government is unlawful, injures a sovereign interest of the state, and would cause irreparable injury to the state, the attorney general is acting in accordance with the duties of her office when she files a complaint and a motion for a preliminary injunction. It is predictable and lawful for the attorney general to file a complaint and motion in the district court that is most likely to grant the petition and the motion.<sup>71</sup>

If a district judge concludes that a federal action that is the subject of a petition for review and a motion for a preliminary injunction is probably unlawful and would cause irreparable harm, it is entirely appropriate for the judge to grant the motion for a preliminary injunction. It is also entirely appropriate for a majority of Supreme Court Justices to stay the preliminary injunction if they disagree with the district court's evaluation of the likely resolution on the merits of the dispute and for the Justices to allow the preliminary injunction to remain in effect if they agree with the district court. It would make sense for the Court to grant or deny a motion for stay without writing an opinion in which it explains its action if the stay is likely to remain in effect only for a brief period, but that is rarely the case.

The Supreme Court's increased tendency to stay major government actions and to refuse to stay preliminary injunctions of major government actions issued by lower courts is understandable. In 2015, the Justices got a rude awakening to the reality that their decisions on the merits of major government actions often have no real effect unless the government action is stayed pending

---

71. See *What Attorney Generals Do*, NAT'L ASS'N OF ATT'YS GENERAL, <https://www.naag.org/attorneys-general/what-attorneys-general-do/> (describing the role of state AGs in representing their states in federal court).

review. In *Michigan v. EPA*,<sup>72</sup> the Court held that a major EPA action was invalid because the Agency had not adequately considered the cost of the action.<sup>73</sup> The Court reversed the action and remanded the case to allow the EPA to comply with its decision and the circuit court to decide whether the EPA's action on remand complied with the Supreme Court's mandate.<sup>74</sup> Immediately after the Supreme Court issued that decision, the EPA told the press that the Court's decision would have no real effect because the firms that were the targets of the EPA action—electric utilities—had already made the billions of dollars of expenditures required to comply with the action.<sup>75</sup>

The firms confirmed the accuracy of the EPA's assertion shortly thereafter.<sup>76</sup> The D.C. Circuit convened an oral argument on remand from the Supreme Court's decision to decide whether to vacate the agency action pending the outcome of the proceedings on remand.<sup>77</sup> I attended that argument. During the argument, counsel for the utilities asked the D.C. Circuit not to vacate the action even though the utilities were among the petitioners that had persuaded the Supreme Court to invalidate the action.<sup>78</sup> Counsel for the utilities explained that the companies already made the expenditures needed to comply with the agency action and persuaded their state public utility commissions to allow them to recover their costs of compliance in the rates they charge their customers.<sup>79</sup> The utilities feared that a court decision vacating the agency action would induce state regulators to disallow their costs of compliance with

---

72. 576 U.S. 743 (2015).

73. *Id.* at 760.

74. See *id.*; Timothy Cama & Lydia Wheeler, *Supreme Court Overturns Landmark EPA Air Pollution Rule*, THE HILL (June 29, 2015, 10:38 AM), <https://thehill.com/policy/energy-environment/246423-supreme-court-overturns-epa-air-pollution-rule?ri=1>.

75. See Emily Holden, Jeffrey Tomich & Edward Klump, *Mercury Regs Ruling Emboldens Clean Power Plan Critics, but Few Changes Seen for Utilities*, E&E NEWS (June 30, 2015), <https://www.eenews.net/stories/1060021072>. As many as seventy percent of affected sources may already have been in compliance. *Id.* (indicating that the Energy Information Administration had predicted that “more than [sixty-four] percent of coal capacity was already in compliance [ ] at the end of 2012”).

76. See *id.*

77. See Timothy Cama, *Court Refuses to Overturn Air Pollution Rule Despite Supreme Court Defeat*, THE HILL (Dec. 15, 2015, 10:43 PM), <https://thehill.com/policy/energy-environment/263234-court-upholds-epa-air-pollution-rule>.

78. Compare Oral Argument at 33:30, *White Stallion Energy Ctr. v. EPA*, 748 F.3d 1222 (D.C. Cir. 2015) (No. 12–1100), [https://www.cadc.uscourts.gov/recordings/recordings2016.nsf/4DE2A2ED99709EB985257F110069816C/\\$file/12-1100%20\(2\).mp3](https://www.cadc.uscourts.gov/recordings/recordings2016.nsf/4DE2A2ED99709EB985257F110069816C/$file/12-1100%20(2).mp3), with Brief of Petitioner-Appellant at 77, *Michigan v. EPA*, 576 U.S. 743.

79. See Jimmy Hoover, *Power Plants Ask DC Circ. To Save EPA Mercury Rule*, LAW360 (Dec. 4, 2015, 2:35 PM), <https://www.law360.com/articles/734366>.

the rule on the basis that they were not necessary expenditures.<sup>80</sup> The D.C. Circuit complied with that request and declined to vacate the agency action that the Supreme Court had held to be invalid.<sup>81</sup>

The statements of the EPA and the utilities told the Court that its decisions to hold government actions invalid are frequently exercises in futility unless the Supreme Court or a lower court stays the government action immediately after the government announces it. The Court's unprecedented decision to stay the CPP before any court had an opportunity to address its merits was a logical response to the message that the Court got from those statements. The Court recognized that it must stay a government action if it believes that it eventually will hold the action invalid to avoid issuing opinions on the merits that are irrelevant by the time that they are issued.

Thus, it is easy to explain and to defend the steps taken by presidents, state attorneys general, district judges, and Supreme Court Justices that have led to the enormous increase in the Supreme Court's shadow docket. Yet, that sequence of actions has produced an unacceptable situation.<sup>82</sup> The Supreme Court is now making many decisions that have massive, permanent effects without ever issuing an opinion explaining why. We have no way of knowing if either Trump's reallocation of billions to build a wall on the southern U.S. border or the EPA's actions to mitigate climate change during the Obama Administration were lawful.<sup>83</sup>

We can guess that five Justices considered President Trump's action to be legal and President Obama's action to be illegal, since the Court stayed the Obama action but declined to stay the Trump action. Even if that educated guess is accurate, we will never know why President Trump's action was legal and why President Obama's action was illegal. That is an unacceptable situation in a country that claims to be governed by the rule of law. As the Supreme Court has repeatedly emphasized in other contexts, compliance with the duty to engage in reasoned decisionmaking is one of the most important requirements of the rule of law.<sup>84</sup>

80. *See id.*

81. *See* Juan Carlos Rodriguez, *Mercury Power Plant Rule Left Intact by DC Circ.*, LAW360 (Dec. 15, 2015, 10:26 AM), <https://www.law360.com/articles/737964>.

82. *See* Paul J. Larkin, Jr. & GianCarlo Canaparo, *One Ring to Rule Them All: Individual Judgements, Nationwide Injunctions, and Universal Handcuffs*, 96 NOTRE DAME L. REV. REFLECTION 55, 56–57 (2020) (detailing the exponential rise in the use of the shadow docket from the Court throughout several administrations and its likely permanence).

83. *See generally* Hammond & Pierce, *supra* note 22 (describing the Obama Administration EPA's CPP in detail).

84. *E.g.*, Eidelson, *supra* note 50; Pierce, *Reason Trumps Pretext*, *supra* note 50.

### III. POTENTIAL SOLUTIONS

Ideally, we should address this problem at its source—the inability of Congress to legislate. I have proposed some potential ways of addressing that problem,<sup>85</sup> but it is not realistic to assume that Congress will adopt those proposals or implement any other means of enhancing its power to legislate in the near future. There is also no reason to expect that the extreme political polarity that underlies congressional impotence will abate any time soon.<sup>86</sup>

Given congressional impotence, we should praise any attempt by a president to identify a statutory basis for an action that will respond effectively to a new problem, even if the statute the government relies on was enacted long ago and was never intended to be used to address the new problem. The alternative—do nothing to address the new problem—would be far worse.

When a president of either party stretches the statutory authority of the Executive Branch to take such an action, the next step is inevitable in today's politically polarized environment. Leaders of the opposition party will try to stop the president from taking the action by filing a complaint coupled with a motion for a preliminary injunction. The Supreme Court could make it harder for state attorneys general of the opposite party to succeed in blocking the president's actions by overruling the five-to-four precedent that ensures they will almost always have standing to obtain review of the actions that they oppose.<sup>87</sup>

However, that attempt to remedy the problem would be largely ineffective. In most cases, there would be other parties with an incentive to seek review and the ability to demonstrate that they have suffered the concrete and particularized injury-in-fact caused by the action necessary to obtain standing to obtain review of the action.<sup>88</sup> In the few cases in which no party with standing seeks review, the lack of a petitioner with standing will be attributable to the breadth of the injuries caused by the action. It would be strange if the Court began to acquiesce tacitly but routinely in presidential actions that are illegal but are unreviewable because they cause severe injuries that are “shared by the many.”<sup>89</sup>

---

85. See Pierce, *Awful Problems*, *supra* note 53; Pierce, *Congressional Capacity*, *supra* note 53.

86. See Pierce, *Congressional Capacity*, *supra* note 53, at 7–8 (2020).

87. See *Massachusetts v. EPA*, 549 U.S. 497, 516–21 (2007) (holding states always have standing to challenge any action of the federal government that threatens any sovereign interest of a state).

88. For detailed discussion of the requirements for standing, see KRISTIN E. HICKMAN & RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* § 16 (5th ed. 2010). See also *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (holding a concrete and imminent injury must be found to establish standing).

89. Injuries suffered by the many do not qualify a petitioner for standing. See HICKMAN & PIERCE, *supra* note 88, at § 16.4.

Congress could address the problem by making it more difficult for state attorneys general to file their petitions for review in courts they believe to have a strong bias in favor of the views of the attorneys' general party and against the views of the president's party.<sup>90</sup> Congress could eliminate the opportunity to engage in forum shopping by specifying that all petitions for review can only be filed in the D.C. Circuit or only in a special three-judge district court. While this could reduce the problem to some uncertain extent, it would create other problems, e.g., concentrating power in a few judges. Unfortunately, it is totally unrealistic to expect Congress to take any action to address the problem in today's conditions of extreme political polarity.

The Supreme Court could address the problem by making it more difficult for district courts to enjoin government actions pending the outcome of review on the merits. It is not clear whether any such action would address the problem effectively without creating more serious problems. The present standard for issuing a stay or preliminary injunction has existed for many decades.<sup>91</sup> It is hard to imagine an alternative standard that would be an improvement on the status quo.

The Court could issue an opinion emphasizing the need for courts to exercise restraint in applying that standard, but it is not clear that any such opinion would have the desired effect. The Court attempted to send district courts the message that they should exercise restraint in issuing preliminary injunctions in its 2008 opinion in *Winter v. Natural Resource Defense Council*,<sup>92</sup> but there is no evidence that district courts have internalized that message and changed their approach. In fact, district courts have significantly increased the number of preliminary injunctions that they have issued since 2008.<sup>93</sup>

Moreover, any action the Court takes to limit the power of district courts to enjoin or stay government actions would not apply to the Supreme Court. The "temporary" stay the Supreme Court issued to stop the Obama EPA from implementing the CPP, and the many cases in which the Court has refused to stay preliminary injunctions issued by district courts, suggest that the Supreme Court believes courts, in many cases, should enjoin agencies from implementing an action pending the outcome of proceedings to review the merits of the action.<sup>94</sup> In an important subset of cases, the Court

---

90. See Pierce, *Congressional Capacity*, *supra* note 53.

91. See Part I (introducing the three factors courts use to determine whether to grant or to stay a preliminary injunction request).

92. 555 U.S. 7 (2008).

93. See U.S. DEP'T OF JUST., *supra* note 15 (noting the "exponential increase in the issuance of nationwide injunctions").

94. See generally *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 69, 72, 75–76, 78 (2020) (upholding the Supreme Court of Puerto Rico's issuance of a preliminary injunction).

obviously approves of the decisions of the district courts to issue preliminary injunctions, while in another subset of cases, the Supreme Court disapproves of that decision.<sup>95</sup> Unfortunately, we have no way of knowing why the Court approves of the issuance of preliminary injunctions in some cases and not in others, since the Court never issues an opinion in which it explains its decision.

In some cases, Justices issue separate concurring or dissenting opinions when the Court has granted or denied a motion to stay a preliminary injunction without issuing an opinion. Those opinions suggest that some of the Justices are particularly concerned about district court preliminary injunctions that have a national scope.<sup>96</sup> The Court could respond to that concern by holding that district courts can only issue preliminary injunctions that apply to the district or circuit in which they are located. Such a holding would not have any beneficial effect on the problem that I have identified, however. It would change the situation only by limiting the scope of each preliminary injunction issued by each district court and then stayed, or not stayed, by the Supreme Court without issuing an opinion.

A Supreme Court opinion that limits the permissible geographic scope of preliminary injunctions would also have the unfortunate effect of creating a situation in which a federal statute is given widely varying meanings in each region of the country.<sup>97</sup> That situation could persist for many years, as our experience with judicial efforts to reach agreement with respect to the meaning of “waters of the United States” illustrates.<sup>98</sup> District courts have adopted differing interpretations of the indeterminate four-one-four split among the Justices in *Rapanos v. United States*.<sup>99</sup> The unfortunate result has been a legal regime in which the EPA and the Corps of Engineers have been required to apply completely different interpretations of that critically important jurisdictional term in different parts of the country for over a decade.<sup>100</sup>

In fact, the separate opinions of the Justices that express their skepticism about the legality or propriety of nationwide injunctions illustrate well the problem that the Court has created with its practice of granting or denying

---

95. *See id.*

96. *See* Dep’t of Homeland Sec. v. New York, 140 S. Ct. 599, 600 (Gorsuch, J. & Thomas, J., concurring) (“Universal injunctions have little basis in traditional equitable practice.”).

97. *See* Pierce, *Congressional Capacity*, *supra* note 53 (discussing the impact of preliminary injunction limitations based on geographic scope).

98. *See* *Rapanos v. United States*, 547 U.S. 715, 716 (2006) (defining the interpretation of “waters of the United States”)

99. 547 U.S. 715 (2006). *See generally* Kristen Clark, *Navigating Through the Confusion in the Wake of Rapanos: Why a Rule Clarifying and Broadening Jurisdiction Under the Clean Water Act is Necessary*, 39 WM & M. ENV’T L. & POL’Y REV. 295 (2014) (describing various approaches by district courts).

100. *See generally* *Rapanos*, 547 U.S. 715.

stays of preliminary injunctions without issuing an opinion. The separate opinions suggest that at least two of the Justices decide to vote to stay or not to stay a preliminary injunction based in part on the geographic scope of the injunction.<sup>101</sup> They obviously do not believe that the scope of the injunction alone should be dispositive of its legality, however, since they vote to uphold some nationwide injunctions.<sup>102</sup> That leaves us with no way of knowing the significance that those Justices attach to the scope of the injunction in their decisionmaking process. What other factors do they consider in deciding whether to stay a preliminary injunction? How do they balance the factors that influence their decisions when they conflict? We also do not know how many Justices agree with the apparent significance that two Justices attach to the geographic scope of a preliminary injunction.

Having eliminated the possibility of addressing the problems created by the Supreme Court's large and growing shadow docket by making changes at any of the earlier points in the sequence of actions that leads to the shadow docket, we are left only with the possibility that the Court might eliminate the problems by making some change in its own practices. The Court should adopt a practice of never issuing an opinion that is likely to have significant long-term effects without also issuing an opinion explaining its action. By now, it should be obvious to the Court that many, perhaps even most, of its decisions granting or denying stays of preliminary injunctions that bar the government from taking a major action will have significant long-term effects. The Court should not issue such a stay without explaining its action. Such a change in practice would add to the workload of the Justices, but that is a small price to pay to reduce the power of the shadow docket to rapidly erode one of the most important elements of the rule of law—the duty to engage in reasoned decisionmaking.

#### IV. AN OPTIMISTIC POSTSCRIPT

As this Essay was going to press, the Supreme Court took a series of steps that suggest it may be in the process of abandoning its practice of taking major actions without providing any explanation for the action. The Court accompanied its August 24, 2021 decision staying the Biden Administration's repeal of the Trump Administration's "Stay in Mexico" policy with a brief opinion.<sup>103</sup> The Court referred to one of its prior opinions holding that an agency must provide an adequate explanation for any major change in policy if the existing policy induced individuals or institutions to take actions in

---

101. *See* *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599 (2020) (Gorsuch, J. & Thomas, J., concurring).

102. *See id.* at 600–01.

103. *Biden v. Texas*, No. 21A21, 2021 WL 3732667 (Aug. 24, 2021).

reliance on it.<sup>104</sup> The value of even such a brief explanation became apparent when the Biden Administration responded to the stay order on October 29, 2021 by issuing a much more detailed explanation for its action.<sup>105</sup> This sets the stage for a judicial decision to determine the adequacy of the government's revised explanation.

There have been several other recent steps in the right direction. The Court provided a brief explanation for its September 1, 2021 decision not to stay the Texas abortion statute.<sup>106</sup> The Court can be criticized for providing an inadequate explanation for its action, but even a brief explanation is better than no explanation. On October 22, 2021, the Court agreed to reconsider its decision not to stay the Texas statute.<sup>107</sup> The reconsideration process will provide the Court with the opportunity both to reconsider its decision and to provide a much more detailed explanation for its decision to either grant or deny the stay.

In an October 29, 2021 order, the Court granted certiorari to a case in which it will decide whether the Trump Administration's ACE rule is lawful.<sup>108</sup> Since the sole justification for ACE was the Trump EPA's belief that President Obama's CPP was unlawful, the Court's decision to rule on whether ACE is lawful will force it to determine whether the CPP was lawful. Thus, the Court's opinion in the ACE case will provide a basis for understanding why the Court stayed the CPP without opinion in 2016. Even the brief order granting certiorari provides a good clue about the reason for the 2016 stay order.<sup>109</sup> The Court granted certiorari in the ACE case only on the issue of whether the CPP exceeded the EPA's power to implement section 111(d) of the Clean Air Act. That was one of six issues that were raised in the motion to stay the CPP.

The Court issued another encouraging order on October 29. It declined to stay the controversial Maine vaccine mandate which does not include a religious exemption.<sup>110</sup> Three Justices joined in a dissenting opinion explaining why they would have granted the stay.<sup>111</sup> Notably, two Justices

---

104. *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1905–07, 1910–15 (2020).

105. Memorandum from Alejandro N. Mayorkas, Sec'y of the Dep't of Homeland Sec., to Tae D. Johnson, Acting Dir. of U.S. Immigr. & Customs Enf't, et al., *Termination of the Migrant Protection Protocols and Explanation of the Decision to Terminate the Migrant Protection Protocols* (Oct. 29, 2021).

106. *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494 (2021).

107. *Partial Grant for Writ of Certiorari Before Judgment, U.S. v. Texas*, No. 21A85 (Oct. 22, 2021).

108. *Grant for Writ of Certiorari, West Virginia v. EPA*, No. 20-1530 (Oct. 29, 2021).

109. *See id.*

110. *Denial of Application for Injunctive Relief, Does v. Mills*, No. 21A90 (Oct. 29, 2021).

111. *Denial of Application for Injunctive Relief, Does v. Mills*, No. 21A90 (Oct. 29, 2021) (Gorsuch, J., Thomas, J. & Alito, J., dissenting).

joined in an opinion explaining that their decision not to grant the stay was based on their concerns about another characteristic of the shadow docket.<sup>112</sup> They were unwilling to grant the stay without first receiving and considering briefs in which the moving parties provide their reasons for believing that the Maine mandate is illegal, and Maine has the opportunity to explain why it believes that its mandate is legal.

I am greatly encouraged by this combination of recent actions. They suggest that the Court is rapidly moving away from its dangerous practice of making major decisions without explaining why.

---

112. Denial of Application for Injunctive Relief, *Does v. Mills*, No. 21A90 (Oct. 29, 2021) (Barrett, J. & Kavanaugh, J., concurring).