
ESSAY

THE SOLICITOR GENERAL AND THE SHADOW DOCKET

*Stephen I. Vladeck**

[T]he Solicitor General's special relationship to the Court is not one of privilege, but of duty — to respect and honor the principle of stare decisis, to exercise restraint in invoking the Court's jurisdiction, and to be absolutely scrupulous in every representation made.

— Seth P. Waxman, Solicitor General of the U.S. (1997–2001)¹

For almost as long as there has been a Solicitor General of the United States (150 years next June²), there has been debate over the unique functions and obligations of the office.³ It's not just that the Solicitor General is one of the only federal officers who, by statute, must be "learned in the law."⁴ Besides the Vice President, the Solicitor General is the only federal officer with formal offices in multiple branches of the federal government — in both the main building of the Department of Justice and the Supreme Court.⁵ And the Solicitor General does not just have a *physical* presence at the Supreme Court; the Court's rules and traditions both formally and informally privilege the Solicitor General as the de facto head of the Court's bar — and show special solicitude to the Solicitor General across a constellation of considerations.⁶

With these special privileges come special responsibilities. As Simon Sobeloff (Solicitor General from 1954 to 1956) put it, "[t]he Solicitor

* A. Dalton Cross Professor in Law, University of Texas School of Law. I am indebted to the editors of the *Harvard Law Review* for the invitation to write this Essay and their helpful discussions and suggestions along the way; to Will Baude, Joan Biskupic, Adam Feldman, Josh Geltzer, Linda Greenhouse, Tara Leigh Grove, Lindsay Harrison, Rick Hasen, Marty Lederman, Sandy Levinson, Leah Litman, Joshua Matz, H.W. Perry, Mila Sohoni, David Vladeck, Karen Vladeck, and participants in a faculty colloquium at the University of Texas School of Law for incisive and insightful feedback; and to Matt Steinke of the Tarlton Law Library and Alex Holland and Rachael Jensen, University of Texas School of Law Class of 2020, for exceptional research assistance.

¹ Seth P. Waxman, Solicitor Gen. of the U.S., "Presenting the Case of the United States as It Should Be": The Solicitor General in Historical Context, Address to the Supreme Court Historical Society (June 1, 1998), <https://www.justice.gov/osg/about-office> [<https://perma.cc/QV72-3SZD>].

² See An Act to Establish the Department of Justice, ch. 150, § 2, 16 Stat. 162, 162 (1870) (codified at 28 U.S.C. § 505 (2012)) (creating the position).

³ See REBECCA MAE SALOKAR, *THE SOLICITOR GENERAL: THE POLITICS OF LAW* 8–32 (1992) (exploring the structural tensions that have defined the position throughout its history).

⁴ 28 U.S.C. § 505.

⁵ Waxman, *supra* note 1.

⁶ See LINCOLN CAPLAN, *THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW* 19–50 (1987).

General is not a neutral, he is an advocate; but an advocate for a client whose business is not merely to prevail in the instant case. My client's chief business is not to achieve victory, but to establish justice."⁷ The oft-repeated moniker that the Solicitor General is the "tenth Justice"⁸ may well reflect the perception that the forty-eight holders of that office have generally lived up to that responsibility — or, at least, that the Court has acted as if they have.

Recently, that perception has come under unusually significant fire. Solicitor General Noel Francisco was accused of repeatedly misleading the Justices during and after oral argument in the travel ban case.⁹ He was also heavily criticized for how he litigated a controversial dispute over access to abortions by minors in immigration detention.¹⁰ Scholars from across the political spectrum have accused the government of "astounding" conduct in changing its litigating position in a dizzying array of high-profile cases (changes that the Solicitor General would, by tradition, have been involved in approving).¹¹ And critics have argued that the Office of the Solicitor General (OSG) under Solicitor General Francisco's watch has filed an unprecedented number of requests for emergency or extraordinary relief from the Justices, asking the Court (1) to hear certain appeals before the lower courts have finished ruling; (2) to halt the effect of lower court rulings pending the Supreme Court's review; or (3) to jump over the courts of appeals and directly issue writs of mandamus to rein in perceived abuses by different district courts.¹²

There is a veritable mountain of scholarship and popular commentary on the Solicitor General's role and relationship with the Supreme

⁷ Simon E. Sobeloff, *Attorney for the Government: The Work of the Solicitor General's Office*, 41 A.B.A. J. 229, 229 (1955).

⁸ See, e.g., CAPLAN, *supra* note 6, at 3.

⁹ See Joshua A. Geltzer, *The Solicitor General Is Still Misleading the Supreme Court*, SLATE (May 2, 2018, 3:54 PM), <https://slate.com/news-and-politics/2018/05/even-after-issuing-a-correction-noel-francisco-is-still-misleading-the-supreme-court-about-the-muslim-ban.html> [<https://perma.cc/Z4A2-RFLJ>].

¹⁰ See, e.g., Marty Lederman & David Luban, *Who's on Ethical Thin Ice in the Hargan v. Garza Abortion Case?*, BALKINIZATION (Dec. 31, 2017, 1:36 PM), https://balkin.blogspot.com/2017/12/whos-on-ethical-thin-ice-in-hargan-v_31.html [<https://perma.cc/53CX-QFDP>].

¹¹ Jonathan H. Adler, *Justice Department Revises Its Position in Texas ACA Case*, REASON: VOLOKH CONSPIRACY (Mar. 25, 2019, 9:48 PM), <https://reason.com/2019/03/25/justice-department-revises-its-position> [<https://perma.cc/QK8Y-JVMW>]; see also Nicholas Bagley, *Why Trump's New Push to Kill Obamacare Is So Alarming*, N.Y. TIMES (Mar. 27, 2019), <https://nyti.ms/2V5hwUI> [<https://perma.cc/467T-DDHP>].

¹² See, e.g., Joshua Matz, *The Justice Department's New Tactic: Leapfrog Judicial Process and Go Straight to the Supreme Court*, WASH. POST (Nov. 12, 2018), <https://wapo.st/2qGgJMy> [<https://perma.cc/5LRG-SB42>]. Emergency relief includes applications for stays or injunctions under 28 U.S.C. § 2101(f) (2012) and SUP. CT. R. 23. Extraordinary relief includes petitions for writs of certiorari "before judgment" under 28 U.S.C. §§ 1254(1) and 2101(e) and SUP. CT. R. 11; and petitions for "extraordinary writs" under 28 U.S.C. §§ 1651 and 2241(a) and SUP. CT. R. 20.

Court.¹³ But virtually none of it has addressed this last phenomenon, even as more attention is being paid to the Court’s “shadow docket,” that is, the significant volume of orders and summary decisions that the Court issues without full briefing and oral argument.¹⁴ This Essay aims to fill that gap.

Part I briefly introduces the statutes, rules, and case law governing the three most common forms of emergency and extraordinary relief in the Supreme Court. Part II then summarizes the instances (through the end of September 2019) in which the Solicitor General has sought such relief since the beginning of the Trump Administration — and contrasts them with such requests from the Solicitors General who served during the eight-year tenures of Presidents George W. Bush and Barack Obama. As Part II explains, the data are conclusive: Solicitor General Francisco has indeed been *far* more aggressive in seeking to short-circuit the ordinary course of appellate litigation — on multiple occasions across a range of cases — than any of his immediate predecessors. To take one especially eye-opening statistic, 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).¹⁵ During the sixteen years of the George W. Bush and Obama Administrations, the Solicitor General filed a total of eight such applications — averaging one every *other* Term.¹⁶

At first blush, these requests have had mixed success. The Court has turned away or sidestepped each of the mandamus requests, and it has split over the stay applications, granting some in full, some in part, and denying others.¹⁷ If the relevant metric is therefore whether the Court is *granting* all (or even most) of the government’s requests for emergency or extraordinary relief, it’s easy to conclude that, for the most part, the

¹³ See, e.g., CAPLAN, *supra* note 6; SALOKAR, *supra* note 3; Michael A. Bailey et al., *Signals from the Tenth Justice: The Political Role of the Solicitor General in Supreme Court Decision Making*, 49 AM. J. POL. SCI. 72, 82–83 (2005); Neal Devins, *Unitariness and Independence: Solicitor General Control over Independent Agency Litigation*, 82 CALIF. L. REV. 255, 280–320 (1994); Timothy R. Johnson, *The Supreme Court, the Solicitor General, and the Separation of Powers*, 31 AM. POL. RES. 426, 444–46 (2003); Stephen S. Meinhold & Steven A. Shull, *Policy Congruence Between the President and the Solicitor General*, 51 POL. RES. Q. 527, 535 (1998); Richard L. Pacelle, Jr., *Amicus Curiae or Amicus Praesidentis? Reexamining the Role of the Solicitor General in Filing Amici*, 89 JUDICATURE 317, 317–18 (2006); Jeffrey A. Segal, *Supreme Court Support for the Solicitor General: The Effect of Presidential Appointments*, 43 W. POL. Q. 137, 147–50 (1990).

¹⁴ See William Baude, *Foreword: The Supreme Court’s Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1, 3–5 (2015).

¹⁵ A list of all of the relevant filings by the Solicitor General from January 20, 2001, through September 30, 2019, is provided in the Appendix. See *infra* Appendix; see also *infra* note 61 (describing the methodology utilized to identify the relevant filings).

¹⁶ See *infra* p. 133; see also *infra* Appendix, Table 3. The government has also used the *threat* of seeking such relief from the Justices in efforts to encourage lower courts to resolve pending cases quickly (and, in some cases, to rule in a specific way). See, e.g., *infra* p. 141.

¹⁷ See *infra* Appendix, Table 1 (documenting the dispositions).

Solicitor General's new aggressiveness has not succeeded. In that respect, the Solicitor General's middling success rate may well mirror the Trump Administration's overall success rate on having petitions for certiorari granted — where, as Adam Feldman has documented, it has not fared as well as its predecessor.¹⁸

And yet, as Part II concludes, the net *effect* of the Court's actions in most of these cases has left the Solicitor General with most of what he has asked for, generally leaving the specific federal policy under challenge in place (or halting complained-of discovery) pending the full course of appellate litigation. And even in the instances in which that has not been the case, the Court's denial of relief has come summarily and with no public opprobrium — no suggestion from the Court that the Solicitor General is abusing his unique position, taking advantage of his special relationship with the Court, or otherwise acting in a manner unbecoming of the office he holds. Indeed, almost every time the Solicitor General has lost *with* prejudice, multiple Justices have dissented.¹⁹ Thus, although the Court may not be acquiescing in the specific requests the Solicitor General is making, it *is* acquiescing, at least publicly, in their frequency.

As Part III argues, the Court's acquiescence is most likely a reflection of two related doctrinal shifts: *First*, a majority of the Justices now appear to believe that the government suffers an irreparable injury militating in favor of emergency relief *whenever* a statute or policy is enjoined by a lower court, regardless of the actual impact of the lower court's ruling — or the harm the statute or policy would cause if allowed to go into effect. *Second*, and as a result, the conclusive consideration in such cases has become the government's likelihood of success on the merits. Increasingly, the Justices appear to be calibrating their threshold decisions so that the status quo pending the rest of the litigation reflects what they *expect* the outcome to be if and when the merits reach the Court and the Court reaches the merits. With a newly solidified bloc of five conservative Justices, it is not exactly surprising that a Republican administration would generally fare well on those terms.

But insofar as this description is accurate, it is not obvious that it is a positive development. Among other things, such an approach is radically out of kilter with the Court's approach to the rest of its docket. The Justices have repeatedly emphasized, especially lately, that “[o]urs is ‘a court of final review and not first view,’”²⁰ and for good reason. By waiting for

¹⁸ Adam Feldman, *Comparing Cert Stage OSG Efforts Under Obama and Trump*, EMPIRICAL SCOTUS (June 5, 2019), <https://empiricalscotus.com/2019/06/05/cert-stage-osg/> [<https://perma.cc/5S2Y-Y86M>].

¹⁹ See, e.g., *infra* p. 140.

²⁰ *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012) (quoting *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001) (per curiam)). Some variation on this sentiment appeared

most cases to go through multiple layers of review by lower courts (and, often, multiple cases going through those multiple layers), the Court gives itself the benefit of multiple rounds of briefing and argument — and, usually, lower court rulings — on which to base decisions to grant certiorari and, if necessary, analysis of the merits. To abandon this norm only in cases in which the federal government is the complaining party is to invite serious objections grounded in fairness and equity — and to necessarily tilt the Court’s limited resources toward an undoubtedly important, but importantly *narrow*, class of disputes. Worse still, such a shift gives at least the appearance that the Court is showing favoritism not only for the federal government as a party, but for a specific political party when it’s in control of the federal government.

Even then, such an approach also depends upon the *accuracy* of the Justices’ predictive judgments. It assumes that further development of the record or airing of the legal disputes in the lower courts won’t materially change the nature of the case that the Justices believe they are resolving. But there are multiple recent examples to the contrary — in which the Justices’ early intervention on the government’s behalf turned out to have been premature thanks to subsequent developments that rendered grants of emergency or extraordinary relief unnecessary, if not affirmatively unwarranted. Allowing months (if not years) of government policy to be shaped solely by the Justices’ unwritten, subjective predictions about how the litigation is likely to unfold is troubling at best — especially when it comes at the expense of extensive written rulings by lower court judges who are, of necessity, far closer to the facts and the parties.

At a minimum, all of this yields two separate conclusions: First, critiques of the Solicitor General for this newfound aggressiveness are at least somewhat misdirected, given the Court’s own role in tolerating it. The Solicitor General has certainly not been a neutral bystander to these developments, but it is the Court, first and foremost, that is responsible for enabling (if not affirmatively encouraging) the Solicitor General’s unprecedented behavior. Second, it would behoove the Justices to reflect more holistically on their responsibility for this trend — and the longer-term consequences of abandoning the view that one of the Solicitor

in eleven different opinions during the Court’s October 2018 Term alone. *See* *Mitchell v. Wisconsin*, 139 S. Ct. 2525, 2546 (2019) (Sotomayor, J., dissenting); *United States v. Haymond*, 139 S. Ct. 2369, 2385 (2019); *Rehaif v. United States*, 139 S. Ct. 2191, 2200 (2019); *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051, 2056 (2019); *Mont v. United States*, 139 S. Ct. 1826, 1839 n.4 (2019) (Sotomayor, J., dissenting); *Herrera v. Wyoming*, 139 S. Ct. 1686, 1701 n.5 (2019); *Thacker v. Tenn. Valley Auth.*, 139 S. Ct. 1435, 1443 (2019); *Frank v. Gaos*, 139 S. Ct. 1041, 1046 (2019); *Timbs v. Indiana*, 139 S. Ct. 682, 690 (2019); *Moore v. Texas*, 139 S. Ct. 666, 674 (2019) (Alito, J., dissenting); *United States v. Stitt*, 139 S. Ct. 399, 407 (2018).

General's foremost responsibilities is to "exercise restraint in invoking the Court's jurisdiction."²¹

I. THE SUPREME COURT'S EMERGENCY AND EXTRAORDINARY DOCKET

With only a handful of exceptions, the modern Supreme Court's docket is composed of cases that have worked their way through the lower state or federal courts, coming to the Justices only on the far side of a ruling (or multiple rulings) on the merits by a federal court of appeals or the court of last resort within a state or territory.²² Almost none of this restraint is required by Article III of the Constitution. As the Justices have interpreted it, the Constitution allows the Court to exercise broad and sweeping appellate jurisdiction that is not limited to review of final rulings by lower Article III and state supreme courts.²³ And only some of the Court's restraint follows from its jurisdictional statutes.²⁴ Instead, as I have explained elsewhere,²⁵ the principal limit on emergency and extraordinary relief from the Supreme Court historically has been the Justices' own appetite for it — or rather, the lack thereof.

For example, the Court's jurisdiction most typically derives from 28 U.S.C. § 1254,²⁶ which governs appeals from the thirteen circuit courts of appeals.²⁷ That statute provides that the Supreme Court may review cases from the moment an appeal is docketed in the federal courts of appeals "[b]y writ of certiorari granted upon the petition of any party to any civil or criminal case, before *or* after rendition of judgment or decree."²⁸ For a case coming up through the lower federal courts, the Court may therefore grant certiorari at any point after the case reaches the

²¹ Waxman, *supra* note 1.

²² See, e.g., *South Carolina v. North Carolina*, 558 U.S. 256, 267 (2010) (noting the Court's "primary responsibility as an appellate tribunal" (quoting *Maryland v. Louisiana*, 451 U.S. 725, 762 (1981) (Rehnquist, J., dissenting))).

²³ See, e.g., *Ortiz v. United States*, 138 S. Ct. 2165, 2172–80 (2018) (holding that the Supreme Court has jurisdiction to review decisions by the Article I Court of Appeals for the Armed Forces).

²⁴ See, e.g., *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 476–87 (1975) (analyzing when state court decisions are "final" for purposes of 28 U.S.C. § 1257).

²⁵ Steve Vladeck, *Power Versus Discretion: Extraordinary Relief and the Supreme Court*, SCOTUSBLOG (Dec. 20, 2018, 3:29 PM), <https://www.scotusblog.com/2018/12/power-versus-discretion-extraordinary-relief-and-the-supreme-court/> [<https://perma.cc/X6K9-4XDG>].

²⁶ *Hohn v. United States*, 524 U.S. 236, 241 (1998).

²⁷ Although there are more than thirteen federal appellate courts with "Court of Appeals" in their titles (including the U.S. Court of Appeals for the Armed Forces and the U.S. Court of Appeals for Veterans Claims), § 1254 encompasses only "[c]ases in the courts of appeals," 28 U.S.C. § 1254 (2012) (emphasis added), a reference to the appellate courts in the "thirteen judicial circuits" identified in 28 U.S.C. § 41. See *id.* § 43(a).

²⁸ *Id.* § 1254 (emphasis added); see also *id.* § 2101(e) ("An application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment.").

court of appeals — and does not have to wait for any rulings, let alone a final judgment, to intervene.²⁹

Another statute that gives the Court broad authority over lower courts is the All Writs Act,³⁰ which empowers the Supreme Court and individual Justices thereof to “issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.”³¹ Usually, the All Writs Act is invoked in the Supreme Court in support of a writ of mandamus or prohibition — an order directed to a lower court requiring that the judge take, or refrain from taking, a specific action.³² But the All Writs Act has also been identified as the only source of the Court’s power to issue writs of injunction — in cases in which “the harm that a party faces does not come from threatened enforcement of a lower court judgment, but instead from the failure of a lower court to block threatened (or require desired) action by his adversary.”³³ And as the Supreme Court established in *Ex parte United States*,³⁴ the All Writs Act permits the Court to issue extraordinary writs even before a case makes its way through a court of appeals³⁵ — including directly to district courts.³⁶

The Court’s power to fashion emergency relief, most often in the form of stays of lower court decisions, is similarly grounded in statutes — to wit, the All Writs Act and 28 U.S.C. § 2101(f).³⁷ As long as the case is one “in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari,” any one Justice, or the Court as a whole, may stay “the execution and enforcement of such judgment or decree . . . for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court.”³⁸ Finally, the Court has also understood its power to *issue* stays to encompass the related but distinct power to *lift* stays imposed by lower courts.³⁹

²⁹ See *Hohn*, 524 U.S. at 241–42.

³⁰ 28 U.S.C. § 1651.

³¹ *Id.* § 1651(a).

³² *Ex parte* Republic of Peru, 318 U.S. 578, 583 (1943).

³³ STEPHEN M. SHAPIRO ET AL., SUPREME COURT PRACTICE § 17.3, at 877 (10th ed. 2013); see also, e.g., *Brown v. Gilmore*, 533 U.S. 1301, 1303 (Rehnquist, Circuit Justice 2001) (“The All Writs Act is the only source of this Court’s authority to issue such an injunction.” (citation omitted)).

³⁴ 287 U.S. 241 (1932).

³⁵ *Id.* at 248–49 (suggesting that an extraordinary writ should not issue except where “a question of public importance is involved, or where the question is of such a nature that it is peculiarly appropriate”).

³⁶ See *Peru*, 318 U.S. at 584, 586 (concluding that the Court had jurisdiction to issue a writ directly to the district court even though it could not entertain a direct appeal from that court).

³⁷ See Daniel M. Gonen, *Judging in Chambers: The Powers of a Single Justice of the Supreme Court*, 76 U. CIN. L. REV. 1159, 1166–68 (2008).

³⁸ 28 U.S.C. § 2101(f) (2012).

³⁹ See, e.g., *Commodity Futures Trading Comm’n v. British Am. Commodity Options Corp.*, 434 U.S. 1316, 1320 (Marshall, Circuit Justice 1977) (highlighting that similar factors are used to lift as to issue stays).

But while these statutes do not limit the Supreme Court's authority, its procedural rules and precedent have always been clear that these forms of extraordinary relief are "drastic and extraordinary remedies" that should be used sparingly: "only where appeal is a clearly inadequate remedy."⁴⁰ Rule 11 states that the Court will grant a petition for certiorari before judgment only if there is "a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination" from the Court.⁴¹ The 2020 Census case was the first time the Court granted such a petition since 2004.⁴² Aside from petitions in cases that were companions to other cases or granted in summary decisions, the Court had not granted such a petition since 1988.⁴³

Rule 20 — which sets out the procedure for "an extraordinary writ" — begins by stressing that extraordinary writs are not issued as "a matter of right, but of discretion sparingly exercised."⁴⁴ A petitioner must demonstrate "that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form."⁴⁵ In fact, the Court issues such extraordinary writs rarely: the last extraordinary writ of habeas corpus was in 1925,⁴⁶ and the last writ of mandamus was granted in 1962.⁴⁷ This is for good reason: as I have noted before,⁴⁸ if a petitioner believes that an appellate court has erroneously denied a petition for mandamus to a district court, the Court can resolve the dispute through a writ of certiorari to the court of appeals, as the Justices did in December 2017 in *In re United States*.⁴⁹

Although stays are somewhat more common, they, too, are supposed to be granted "only in 'extraordinary cases.'"⁵⁰ In considering an application for a stay, the Court (or an individual Justice in chambers⁵¹) looks

⁴⁰ *Ex parte Fahey*, 332 U.S. 258, 259–60 (1947); see also, e.g., *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380 (2004); *Bartlett v. Stephenson*, 535 U.S. 1301, 1304 (Rehnquist, Circuit Justice 2002).

⁴¹ SUP. CT. R. 11.

⁴² See *Dep't of Commerce v. New York*, 139 S. Ct. 953 (2019) (mem.); see also *infra* Appendix, Table 1.

⁴³ See *United States v. Mistretta*, 486 U.S. 1054 (1988) (mem.); see also *Vladeck*, *supra* note 25.

⁴⁴ SUP. CT. R. 20.1.

⁴⁵ *Id.*

⁴⁶ See *Ex parte Grossman*, 267 U.S. 87, 122 (1925).

⁴⁷ See *United States v. Haley*, 371 U.S. 18, 20 (1962) (per curiam). Even in *Haley*, the Court did not formally issue the writ, because it was "confident" that the district court would rectify the identified error without being ordered to do so. *Id.*

⁴⁸ See *Vladeck*, *supra* note 25.

⁴⁹ 138 S. Ct. 443, 444 (2017) (per curiam).

⁵⁰ *Conkright v. Frommert*, 556 U.S. 1401, 1402 (Ginsburg, Circuit Justice 2009) (quoting *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (Brennan, Circuit Justice 1980)).

⁵¹ Justices review applications for emergency relief in their capacity as "Circuit Justices" for the circuit from which the application arises, and are usually empowered both by statute and by the Court's rules to act on their own — "in chambers." Gonen, *supra* note 37, at 1166–71. See generally

to three factors: “(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 conclude that the decision below was erroneous’; and (3) a likelihood that ‘irreparable harm [will] result from the denial of a stay.’”⁵² Additionally, “in a close case[,] it may be appropriate to ‘balance the equities’ — to explore the relative harms to applicant and respondent, as well as the interests of the public at large.”⁵³

The Justices tend to take consistent approaches to the first two factors to be considered in stay applications. But the one area in which there has been some variance is with respect to the third factor — especially in cases raising constitutional challenges to state or federal statutes or policies.⁵⁴ Chief Justice Rehnquist, for example, routinely concluded in in-chambers opinions that the presumption of constitutionality accompanying government action not only weighed in favor of a stay on the merits, but also was itself a basis for concluding that a lower court injunction against enforcement of a putatively unconstitutional statute or policy irreparably harmed the government, without almost any regard to the other equities involved in the particular case.⁵⁵

Chief Justice Roberts has echoed this theme, quoting a Chief Justice Rehnquist in-chambers opinion in 2012 for the proposition that “[a]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.”⁵⁶ This view of injunctions against enforcement of state or federal laws

SHAPIRO ET AL., *supra* note 33, § 17.12, at 894–98 (noting the practice of referring certain applications to the full Court).

⁵² *Conkright*, 556 U.S. at 1402 (alteration in original) (quoting *Rostker*, 448 U.S. at 1308).

⁵³ *Id.* (quoting *Rostker*, 448 U.S. at 1308). The full Court has apparently never articulated a standard for *vacating* stays imposed by lower courts, but individual Justices often cite then-Justice Rehnquist’s in-chambers opinion in *Coleman v. Paccar, Inc.*, 424 U.S. 1301 (Rehnquist, Circuit Justice 1976):

[A] Circuit Justice has jurisdiction to vacate a stay where it appears that the rights of the parties to a case pending in the court of appeals, which case could and very likely would be reviewed here upon final disposition in the court of appeals, may be seriously and irreparably injured by the stay, and the Circuit Justice is of the opinion that the court of appeals is demonstrably wrong in its application of accepted standards in deciding to issue the stay.

Id. at 1304; *see, e.g.*, *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 134 S. Ct. 506, 506 (2013) (Scalia, J., concurring in denial of application to vacate stay); *W. Airlines, Inc. v. Int’l Bhd. of Teamsters*, 480 U.S. 1301, 1305 (O’Connor, Circuit Justice 1987).

⁵⁴ Compare *Maryland v. King*, 567 U.S. 1301, 1303 (Roberts, Circuit Justice 2012) (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (Rehnquist, Circuit Justice 1977)), with *Veasey v. Perry*, 135 S. Ct. 9, 11 (2014) (Ginsburg, J., dissenting).

⁵⁵ *See New Motor*, 434 U.S. at 1351–52; *see also Bowen v. Kendrick*, 483 U.S. 1304, 1304–05 (Rehnquist, Circuit Justice 1987) (suggesting that the presumption of constitutionality also affects the balance of equities); *Walters v. Nat’l Ass’n of Radiation Survivors*, 468 U.S. 1323, 1324 (Rehnquist, Circuit Justice 1984) (same); *Schweiker v. McClure*, 452 U.S. 1301, 1303 (Rehnquist, Circuit Justice 1981) (same).

⁵⁶ *King*, 567 U.S. at 1303 (alteration omitted) (quoting *New Motor*, 434 U.S. at 1351).

“makes it unnecessary to consider the likelihood and magnitude of these actual injuries; it substitutes an abstract injury to sovereignty that requires no proof and that may be given substantial weight in the balancing process.”⁵⁷ And yet, a majority of the Court appeared to endorse such an approach just last year, noting, however briefly, that a state’s “inability to enforce its duly enacted plans clearly inflicts irreparable harm on the State.”⁵⁸

But this view is hardly unanimous; Justice Ginsburg, among others, has been more skeptical of automatically assuming irreparable injury in such cases, particularly in a context in which the injury is “largely attributable to the State itself.”⁵⁹ Whoever has the better of this debate,⁶⁰ as Part III explains in more detail, this disagreement (and the apparent solidification of a majority to one side of it) may bear directly on the Court’s reaction to the Solicitor General’s recent conduct.

II. THE SOLICITOR GENERAL AND THE SUPREME COURT DURING THE TRUMP ADMINISTRATION

Against that backdrop, it is hardly surprising that, historically, the Solicitor General has been highly selective in seeking emergency or extraordinary relief from the Court.⁶¹ For instance, during President

⁵⁷ DOUGLAS LAYCOCK & RICHARD L. HASEN, *MODERN AMERICAN REMEDIES: CASES AND MATERIALS* 397 (5th ed. 2019); see also *Veasey v. Abbott*, 870 F.3d 387, 394 (5th Cir. 2017) (Graves, J., dissenting) (“It cannot be that the single statement from *King* has the result that a state automatically suffers an irreparable injury when a court blocks any law it has enacted — regardless of the content of the law or the circumstances of its passing.”).

⁵⁸ *Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018).

⁵⁹ *Perry*, 135 S. Ct. at 11 (2014) (Ginsburg, J., dissenting); see also *United States v. Oakland Cannabis Buyers’ Coop.*, 530 U.S. 1298, 1298 (2000) (Stevens, J., dissenting from grant of application for stay) (suggesting that a balancing of litigant equities is appropriate to determine irreparable harm). But see *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 134 S. Ct. 506, 506 (2013) (Scalia, J., concurring in denial of application to vacate stay) (arguing that the four dissenting Justices “d[id] not quarrel” with the premise that the State suffers irreparable injury from injunction).

⁶⁰ The presumption of constitutionality, which is supposedly the basis for treating all injunctions against government action as causing irreparable harm, is about *statutes* — not executive branch policies — and is in any event supposed to yield to individual rights grounded in the Constitution. See, e.g., *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). Thus, although some injunctions against government action may implicate the presumption, the notion that *all* such injunctions do so radically overstates — and overenforces — the presumption.

⁶¹ A word about methodology: Although OSG maintains a helpful database of briefs it has filed in the Supreme Court since 1985, see *Supreme Court Briefs*, U.S. DEP’T OF JUST., <https://www.justice.gov/osg/supreme-court-briefs> [<http://perma.cc/NUC8-FV28>], the database unfortunately does not allow *searching* for applications, which can be found only by their docket number. Nor does every disposition of these applications or petitions necessarily make its way into the *United States Reports* or *Supreme Court Reporter*. See, e.g., *infra* note 120.

Instead, I have used the “U.S. Supreme Court Dockets” database on Westlaw (which contains data from 2000 onward) to identify every applicable filing the Solicitor General has made since

George W. Bush's eight years in office, the Solicitor General sought certiorari before judgment exactly once — in a companion case to *United States v. Booker*,⁶² where he did so only to ensure a clean vehicle for fully adjudicating the constitutionality of the (then-mandatory) Federal Sentencing Guidelines.⁶³ From 2001 to 2009, the Solicitor General sought stays of lower court rulings on only five occasions — three of which came in post-September 11th terrorism cases.⁶⁴ And the Solicitor General never asked the Justices to issue mandamus relief directly against a district court.⁶⁵

The Obama Administration's track record on this score was comparably modest. Between 2009 and 2017, the Solicitor General petitioned for certiorari before judgment only in a trio of cases challenging the constitutionality of Section 3 of the Defense of Marriage Act⁶⁶ — petitions that were mooted, at least with respect to the unusual posture of certiorari before judgment, by the Second Circuit's intervening decision in *Windsor v. United States*.⁶⁷ Like the Bush Administration, the Obama Administration never asked the Justices for mandamus relief directly against a district judge. And it appears that, over eight years, President Obama's Solicitors General sought a stay of a lower court decision, or vacatur of a lower court stay, in only three cases — none of which involved any of the nationwide injunctions issued against the

January 20, 2001, regardless of its ultimate disposition. Even then, the dataset may still be under-inclusive at the margins because, like any party, the Solicitor General sometimes asks for relief in the alternative — requests that may not receive their own docket entries. *See, e.g.*, Motion for Clarification at 40, *Trump v. Hawaii*, 138 S. Ct. 34 (2017) (mem.) (No. 16-1540) (asking the Court to treat a motion for clarification of its earlier ruling as, “[i]n the alternative,” a petition for certiorari before judgment, a petition for a writ of mandamus, or a stay of a modified district court injunction). I have included such alternative requests in the dataset only when the Court has formally acted upon them, and have otherwise treated applications as seeking the principal relief requested.

⁶² 543 U.S. 220, 226–27 (2005) (holding that the mandatory nature of the Federal Sentencing Guidelines violated criminal defendants' Sixth Amendment right to have all facts that enhance their sentence found, beyond a reasonable doubt, by a jury).

⁶³ *United States v. Fanfan*, 542 U.S. 956 (2004) (mem.); *see also Booker*, 543 U.S. at 229.

⁶⁴ *See Gates v. Bismullah*, 554 U.S. 913 (2008) (mem.); *Ashcroft v. O Centro Espírita Beneficente União do Vegetal*, 543 U.S. 1032 (2004) (mem.); *Bush v. Gherebi*, 540 U.S. 1171 (2004) (mem.); *Ashcroft v. N.J. Media Grp., Inc.*, 536 U.S. 954 (2002) (mem.). A fifth application, in *Rumsfeld v. Reil*, No. 05A231 (U.S. Sept. 8, 2005), was denied by Justice Ginsburg without prejudice to renewal — and does not appear to be reported.

⁶⁵ In *Cheney v. U.S. Dist. Court*, 542 U.S. 367 (2004), the Supreme Court held that the D.C. Circuit had the authority to issue a writ of mandamus to a district court in a dispute involving Vice President Dick Cheney, but did so via an ordinary writ of certiorari to the D.C. Circuit. *Id.* at 378.

⁶⁶ *See* Petition for a Writ of Certiorari Before Judgment, *United States v. Windsor*, 570 U.S. 744 (2013) (No. 12-307); Petition for a Writ of Certiorari Before Judgment, Office of Pers. Mgmt. v. Golinski, 570 U.S. 931 (2013) (No. 12-16); Petition for a Writ of Certiorari Before Judgment, Office of Pers. Mgmt. v. Pedersen, 570 U.S. 932 (2013) (No. 12-302).

⁶⁷ 699 F.3d 169 (2d Cir. 2012), *aff'd*, 570 U.S. 744.

executive branch.⁶⁸ Across sixteen years, and two (very different) presidencies, the pattern was, unsurprisingly, the same: the government sought emergency or extraordinary relief from the Court only in isolated instances, many of which did not involve high-profile partisan disputes.

That pattern stands in sharp contrast to the first thirty-two months of the Trump Administration. As of this writing, since January 20, 2017, the Solicitor General⁶⁹ has sought stays from the Supreme Court on at least twenty-one different occasions; has asked for certiorari before judgment nine times; and has expressly requested mandamus relief directly against a district court in at least three different cases.⁷⁰ To help put these requests into context, the bulk of this Part is devoted to describing the arguments that the government has advanced in support of these requests.

A. *Nationwide Injunctions*

By volume, the most common ground the Trump Administration has invoked for needing emergency or extraordinary relief has been as a response to nationwide⁷¹ injunctions issued by district courts against executive branch policies. Of the twenty-one stay applications, twelve sought to allow a policy that had been subjected to a nationwide injunction to remain in place, and six of the nine petitions for certiorari before judgment invoked the unique harm caused by nationwide relief as the reason the Court should bypass the courts of appeals.⁷²

⁶⁸ See Emergency Application to Vacate the Stay, *United States v. Texas*, 135 S. Ct. 9 (2014) (mem.) (No. 14A404); Emergency Application for a Stay, *Dep't of Health & Human Servs. v. Alley*, 556 U.S. 1149 (2009) (mem.) (No. 08A794), 2009 WL 829921. The third application, in *United States v. Comstock*, No. 08A863 (U.S. Apr. 3, 2009), is unreported, but was granted by Chief Justice Roberts in his capacity as Circuit Justice for the Fourth Circuit on April 3, 2009, pending disposition of a petition for a writ of certiorari. *Id.* The petition was granted and the case decided the next Term. See *United States v. Comstock*, 560 U.S. 120 (2010).

⁶⁹ For ease of narrative, I refer in general to “the Solicitor General.” But to be specific, Noel Francisco served as Acting Solicitor General from January 23 to March 10, 2017, and has served as the forty-eighth Solicitor General of the United States since his confirmation by the Senate on September 19, 2017. Jeffrey Wall served as Acting Solicitor General between March 10 and September 19, 2017 (while Francisco’s nomination was pending). *Cf.* 5 U.S.C. § 3345(b)(1) (2012).

⁷⁰ Unsurprisingly, there are no examples across this entire time period of the Solicitor General seeking extraordinary writs of habeas corpus or injunction. Instead, this Essay focuses solely on the unusual relief the government *has* sought — applications for stays and petitions for writs of mandamus or certiorari before judgment.

⁷¹ It is something of a misnomer to refer to such relief as a “nationwide” injunction. In reality, the injunction is “universal,” in the sense that it bars the government from continuing to enforce the challenged statute or policy not just against the plaintiffs in the same case, but against *anyone*, geography aside. See, e.g., Mila Sohoni, *The Lost History of the “Universal” Injunction*, 133 HARV. L. REV. (forthcoming 2020) (manuscript at 3 n.12), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3457701 [<https://perma.cc/3HBZ-QCA2>]. For ease of reference, though, this Essay follows the terminological convention.

⁷² See *infra* Appendix.

I. *The Travel Ban.* — Six of the twenty-one stay applications filed in the Supreme Court by the Trump Administration came in the cases challenging the “travel ban,” that is, the three different executive orders President Trump issued categorically limiting entry into the country of refugees as well as other noncitizens from an evolving list of specifically identified foreign countries.⁷³ Due to initial court rulings against “Travel Ban 1.0,”⁷⁴ the government adopted a modified policy (colloquially known as “Travel Ban 2.0,” and promulgated as Executive Order 13,780).⁷⁵ That policy, in turn, was subject to partial nationwide injunctions issued by district courts in Maryland⁷⁶ and Hawaii,⁷⁷ which were affirmed in substantial part by the Fourth⁷⁸ and Ninth Circuits,⁷⁹ respectively. In particular, the Fourth Circuit enjoined section 2(c) of Executive Order 13,780, the provision suspending entry for ninety days of most noncitizens from six countries,⁸⁰ and the Ninth Circuit also enjoined sections 6(a) and 6(b), which suspended all refugee admissions for 120 days and any refugee admission in excess of 50,000 for the year.⁸¹

On June 1, 2017, the Solicitor General filed a petition for certiorari in the Fourth Circuit case⁸² and applications for stays of both the Fourth⁸³ and (forthcoming) Ninth Circuit⁸⁴ rulings pending disposition of the petition. In support of the stay applications, the Solicitor General argued that there was a high likelihood that certiorari would be granted, the government had a strong likelihood of success on the merits, and “preventing the Executive from effectuating his national-security judgment will continue to cause irreparable harm to the government and the public interest.”⁸⁵ Relying upon Chief Justice Roberts’s in-chambers opinion in *Maryland v. King*,⁸⁶ the government’s central argument for irreparable harm was that *any* injunction against a federal policy irreparably harms the federal government — all the more so when the policy is based upon

⁷³ Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 24, 2017); Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017); Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Feb. 1, 2017).

⁷⁴ Exec. Order No. 13,769, 82 Fed. Reg. at 8977; see *Washington v. Trump*, No. C17-0141, 2017 WL 462040, at *1 (W.D. Wash. Feb. 3, 2017) (granting temporary restraining order).

⁷⁵ Exec. Order No. 13,780, 82 Fed. Reg. at 13,209.

⁷⁶ *Int’l Refugee Assistance Project v. Trump*, 241 F. Supp. 3d 539, 556 (D. Md. 2017).

⁷⁷ *Hawai’i v. Trump*, 245 F. Supp. 3d 1227, 1239 (D. Haw. 2017).

⁷⁸ *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554, 605–06 (4th Cir. 2017) (en banc).

⁷⁹ *Hawaii v. Trump*, 859 F.3d 741, 789 (9th Cir. 2017) (per curiam).

⁸⁰ *Int’l Refugee Assistance Project*, 857 F.3d at 572–73.

⁸¹ *Hawaii v. Trump*, 859 F.3d at 789.

⁸² Petition for a Writ of Certiorari, *Trump v. Int’l Refugee Assistance Project*, 137 S. Ct. 2080 (2017) (per curiam) (No. 16-1436).

⁸³ Application for Stay, *Int’l Refugee Assistance Project*, 137 S. Ct. 2080 (2017) (No. 16A1190).

⁸⁴ Application for Stay, *Trump v. Hawaii*, 138 S. Ct. 49 (2017) (mem.) (No. 16A1191).

⁸⁵ Application for Stay at 3–4, *Int’l Refugee Assistance Project*, 137 S. Ct. 2080 (2017) (No. 16A1190).

⁸⁶ 567 U.S. 1301 (Roberts, Circuit Justice 2012).

“a national-security judgment of the President and Cabinet-level officials,” and the injunction runs to the executive branch on a nationwide basis.⁸⁷

From the outset, the government’s argument for urgency rang at least somewhat hollow. The government did not ask the Court for a stay of the district court’s injunction until *after* it was affirmed by the en banc Fourth Circuit, and even then, it waited a full week to apply for a stay — a delay that made it effectively impossible for the Court to actually *hear* the government’s forthcoming appeal until it came back from its summer recess.⁸⁸ (Indeed, in its application, the government tellingly asked for expedited briefing but *not* expedited argument.⁸⁹) Nor did the government, as it easily could have given the claimed urgency of the matter, seek certiorari *before* judgment in the Fourth Circuit.⁹⁰ Thus, a proper balance of the traditional factors governing stays might well *not* have militated in favor of emergency relief.

Nevertheless, on June 26, the Court granted the government’s applications for stays in part and denied them in part.⁹¹ (Justices Thomas, Alito, and Gorsuch would have granted the applications in full.⁹²) In particular, the Court stayed the lower courts’ injunctions of the provisions suspending entry for ninety days of “foreign nationals who lack any bona fide relationship with a person or entity in the United States,”⁹³ but refused to stay the injunctions with respect to “foreign nationals who have a credible claim of a bona fide relationship with a person or entity in the United States.”⁹⁴ The Court applied a similar formula to the suspension of refugee admissions and the overall cap on refugees: “Section 6(a) may not be enforced against an individual seeking admission as a refugee who can credibly claim a bona fide relationship with a person or entity in the United States. Nor may § 6(b) As applied to all other individuals, the provisions may take effect.”⁹⁵

What is especially telling about this compromise resolution is that no party had sought it. Instead, the Justices appeared to be drawing the

⁸⁷ Application for Stay at 33, *Int’l Refugee Assistance Project*, 137 S. Ct. 2080 (2017) (No. 16A1190) (citing *King*, 567 U.S. at 1303).

⁸⁸ See Steve Vladeck, *How the Acting Solicitor General (Sort of) Saved the Travel Ban*, SCOTUSBLOG (July 12, 2017, 2:18 PM), <https://www.scotusblog.com/2017/07/symposium-acting-solicitor-general-sort-saved-travel-ban/> [<https://perma.cc/BAW7-36CC>].

⁸⁹ Application for Stay at 40, *Int’l Refugee Assistance Project*, 137 S. Ct. 2080 (2017) (No. 16A1190).

⁹⁰ The curious timing of the government’s actions could be seen as a play for time, since Travel Ban 2.0 was set to expire in September — before the Court would have been able to hear argument on the merits thanks to the Solicitor General’s tactics. See Vladeck, *supra* note 88.

⁹¹ *Int’l Refugee Assistance Project*, 137 S. Ct. at 2089.

⁹² *Id.* (Thomas, J., concurring in part and dissenting in part).

⁹³ *Id.* at 2087 (majority opinion).

⁹⁴ *Id.* at 2088.

⁹⁵ *Id.* at 2089.

line that *they* believed they would ultimately draw on the merits — allowing that part of Travel Ban 2.0 to go into effect that they believed they would ultimately uphold, but denying the government’s request as applied to the cases the government was likely to lose. To that end, the Court proceeded to grant certiorari in both cases (treating a supplemental brief in the Ninth Circuit case as a petition for certiorari), consolidated the two cases, and set them for argument (which was subsequently scheduled for October).⁹⁶

In the interim, a dispute arose over the exact scope of the Court’s ruling — especially as applied to refugees for whom a refugee resettlement agency had made a “formal assurance” to provide services.⁹⁷ After the Hawaii district court modified its injunction to encompass such refugees,⁹⁸ the government filed a motion with the Supreme Court seeking clarification of its June 26 ruling or, in the alternative, a stay of the district court’s ruling.⁹⁹ In denying the motion, the Court nevertheless granted a further stay of the (modified) district court decision “pending resolution of the Government’s appeal to the Court of Appeals for the Ninth Circuit.”¹⁰⁰ When the Ninth Circuit affirmed the district court’s injunction as modified,¹⁰¹ the government once again asked the Supreme Court for a stay pending the Court’s forthcoming merits disposition, again vaguely invoking the government’s “paramount interest in safeguarding national security” as the source of the irreparable injury the government would suffer without a stay.¹⁰² On September 12, 2017, the Court agreed — staying the Ninth Circuit’s mandate “pending further order of this Court.”¹⁰³ Thus, the Court issued four separate stays (two in June; one in July; and one in September) just to preserve its preferred status quo pending the October argument.

Less than two weeks later (and just over one week before oral argument), the Trump Administration announced significant changes to the policy (“Travel Ban 3.0,” promulgated as Proclamation No. 9645).¹⁰⁴ In light of the changed circumstances, the Court removed the cases from

⁹⁶ *Id.* at 2086.

⁹⁷ See *Hawai’i v. Trump*, 263 F. Supp. 3d 1049, 1059 (D. Haw. 2017) (order granting in part and denying in part plaintiffs’ motion to enforce, or, in the alternative, to modify preliminary injunction) (“Once a particular refugee has been approved by the Department of Homeland Security . . . the refugee is assigned to one of several Government-contracted resettlement agencies, which then submits an assurance agreeing to provide basic, required services if and when the refugee arrives in the United States.”).

⁹⁸ *Id.* at 1059–60.

⁹⁹ Motion for Clarification at 4–5, *Trump v. Hawaii*, 138 S. Ct. 34 (2017) (mem.) (No. 16-1540).

¹⁰⁰ *Trump v. Hawaii*, 138 S. Ct. at 34.

¹⁰¹ *Hawaii v. Trump*, 871 F.3d 646, 649 (9th Cir. 2017) (per curiam).

¹⁰² Application for a Stay of the Mandate at 18, *Trump v. Hawaii*, 138 S. Ct. 49 (2017) (mem.) (No. 17A275).

¹⁰³ *Trump v. Hawaii*, 138 S. Ct. at 50.

¹⁰⁴ 82 Fed. Reg. 45,161 (Sept. 24, 2017).

the calendar and ultimately issued a pair of *Munsingwear* orders, vacating the decisions below and remanding with instructions to dismiss.¹⁰⁵

The challenges to Travel Ban 3.0 followed a similar pattern. Once again, district courts in Hawaii and Maryland entered preliminary nationwide injunctions against the policy.¹⁰⁶ This time, though, the Solicitor General immediately sought stays of the district court injunctions pending appeal — and, unlike with regard to Travel Ban 2.0, the Court granted both applications in their entirety.¹⁰⁷ Thus, Travel Ban 3.0 had been in full effect for over six months by the time a 5-4 Court finally reached the merits on June 26, 2018, and upheld it against statutory and constitutional challenges.¹⁰⁸

In several respects, the travel ban litigation set the tone for much of what followed: the government used what it portrayed as the inappropriate effects of nationwide injunctions as the sole basis for emergency relief; the Court appeared to focus its reaction entirely on its view of the merits of the government's case; its *final* predictive judgment ultimately came to pass; but only as applied to a different version of the challenged policy from the one that was allowed to go into effect, and after a significant amount of time and resources had been wasted on the ultimately mooted cases.

2. *The Transgender Ban.* — That pattern has largely replicated itself in three other cases in which the government has sought emergency relief in response to nationwide injunctions. Consider, for example, the “Transgender Ban” — the government's response to two July 2017 tweets by President Trump that “the United States Government will not accept or allow . . . [t]ransgender individuals to [sic] serve in any capacity in the U.S. Military.”¹⁰⁹ Four different district courts — in the Central

¹⁰⁵ *Trump v. Hawaii*, 138 S. Ct. 377, 377 (2017) (mem.) (citing *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950)); *Trump v. Int'l Refugee Assistance Project*, 138 S. Ct. 353, 353 (2017) (mem.) (same). A “*Munsingwear*” order is the relief the Court typically issues when the party that prevailed in the lower courts has mooted the dispute while an appeal was pending. See *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 22–23 (1994). By vacating the decision below and remanding with instructions to dismiss, such relief prevents the prevailing party from insulating a positive lower court ruling from appellate review. See, e.g., *id.* Whether *Munsingwear* orders were an appropriate resolution of the Travel Ban 2.0 cases (in which the government *lost* below) is a matter of considerable debate. See, e.g., Daniel Epps, *Mootness and Munsingwear in the Travel Ban Litigation*, TAKE CARE (June 6, 2017), <https://takecareblog.com/blog/mootness-and-munsingwear-in-the-travel-ban-litigation> [<https://perma.cc/5GAR-WD5W>].

¹⁰⁶ *Hawaii v. Trump*, 265 F. Supp. 3d 1140, 1145 (D. Haw. 2017); *Int'l Refugee Assistance Project v. Trump*, 265 F. Supp. 3d 570, 583 (D. Md. 2017).

¹⁰⁷ *Trump v. Hawaii*, 138 S. Ct. 542, 542 (2017) (mem.); *Trump v. Int'l Refugee Assistance Project*, 138 S. Ct. 542, 542 (2017) (mem.).

¹⁰⁸ *Trump v. Hawaii*, 138 S. Ct. 2392, 2415, 2423 (2018).

¹⁰⁹ Donald J. Trump (@realDonaldTrump), TWITTER (July 26, 2017, 8:55 AM), <https://twitter.com/realDonaldTrump/status/890193981585444864> [<https://perma.cc/A6GD-33VV>]; Donald J. Trump (@realDonaldTrump), TWITTER (July 26, 2017, 9:04 AM), <https://twitter.com/realDonaldTrump/status/890196164313833472> [<https://perma.cc/PS4Y-WDJH>].

District of California,¹¹⁰ the District of Columbia,¹¹¹ the District of Maryland,¹¹² and the Western District of Washington¹¹³ — entered preliminary nationwide injunctions against the ban. But after those rulings, Secretary of Defense James Mattis introduced a substantially more nuanced policy in lieu of a categorical ban on military service by transgender individuals.¹¹⁴ The government then moved to dissolve each of the injunctions in light of the changed circumstances.¹¹⁵ Three of the district courts denied the government’s motions (the fourth held it in abeyance).¹¹⁶

The government then filed appeals to the D.C. and Ninth Circuits, which, in two of the cases, denied its application for a stay of the district court’s order pending appeal and its motion to dissolve a preliminary injunction, respectively.¹¹⁷ While those appeals were pending, it filed petitions for certiorari before judgment in each of the three cases, along with separate applications for stays pending the full course of its appeals.¹¹⁸ In each case, the argument for bypassing the courts of appeals, or at least allowing the Mattis policy to go into effect pending their review, was similar: “Absent a stay, the nationwide injunction would thus remain in place for at least another year and likely well into 2020 — a

¹¹⁰ *Stockman v. Trump*, No. 17-1799, 2017 WL 9732572, at *16 (C.D. Cal. Dec. 22, 2017).

¹¹¹ *Doe 1 v. Trump*, 275 F. Supp. 3d 167, 217 (D.D.C. 2017).

¹¹² *Stone v. Trump*, 280 F. Supp. 3d 747, 769 (D. Md. 2017).

¹¹³ *Karnoski v. Trump*, No. C17-1297, 2017 WL 6311305, at *10 (W.D. Wash. Dec. 11, 2017).

¹¹⁴ U.S. DEP’T OF DEFENSE, DEPARTMENT OF DEFENSE REPORT AND RECOMMENDATIONS ON MILITARY SERVICE BY TRANSGENDER PERSONS 19–43 (2018).

¹¹⁵ See Defendants’ Motion to Dissolve the Preliminary Injunction, *Doe 2 v. Trump*, 315 F. Supp. 3d 474 (D.D.C. 2018) (No. 17-cv-1597); Defendants’ Motion to Dissolve the Preliminary Injunction, *Karnoski v. Trump*, No. 17-cv-1297 (W.D. Wash. Mar. 23, 2018); Defendants’ Motion to Dissolve the Preliminary Injunction, *Stockman v. Trump*, 331 F. Supp. 3d 990 (C.D. Cal. 2018) (No. 17-CV-01799); Defendants’ Motion to Dissolve the Preliminary Injunction, *Stone v. Trump*, No. 17-cv-02459 (D. Md. Mar. 23, 2018).

¹¹⁶ *Stockman*, 331 F. Supp. 3d at 993; *Doe 2*, 315 F. Supp. 3d at 498; *Karnoski v. Trump*, No. C17-1297, 2018 WL 1784464, at *14 (W.D. Wash. Apr. 13, 2018); see Application for a Stay at 35, *Trump v. Stockman*, 139 S. Ct. 950 (2019) (mem.) (No. 18A627).

¹¹⁷ See, e.g., *Doe 1 v. Trump*, No. 17-5267, 2017 WL 6553389, at *3 (D.C. Cir. Dec. 22, 2017) (per curiam); *Stockman*, 331 F. Supp. 3d at 998.

¹¹⁸ Petition for Writ of Certiorari Before Judgment, *Trump v. Karnoski*, 139 S. Ct. 946 (2019) (mem.) (No. 18-676); Petition for Writ of Certiorari Before Judgment, *Trump v. Doe 2*, 139 S. Ct. 946 (2019) (mem.) (No. 18-677); Petition for Writ of Certiorari Before Judgment, *Trump v. Stockman*, 139 S. Ct. 946 (2019) (mem.) (No. 18-678); Application for a Stay, *Trump v. Karnoski*, 139 S. Ct. 950 (2019) (mem.) (No. 18A625); Application for a Stay, *Trump v. Doe 2*, 139 S. Ct. 950 (2019) (mem.) (No. 18A626); Application for a Stay, *Trump v. Stockman*, 139 S. Ct. 950 (2019) (mem.) (No. 18A627). The government had already filed a separate application for a stay in the Supreme Court related to a discovery dispute in one of the Ninth Circuit cases, but withdrew that application after the Ninth Circuit granted a stay. See Letter from Noel J. Francisco, Solicitor General, U.S. Dep’t of Justice, to Hon. Scott S. Harris, Clerk, Supreme Court of the U.S. (Sept. 17, 2018), https://www.supremecourt.gov/DocketPDF/18/18A276/64010/20180917181702950_18A276%20Trump%20ov.%20US%20District%20Ct.%20for%20WDWA.pdf [<https://perma.cc/Q669-EFZS>]; see also *Karnoski v. Trump*, 926 F.3d 1180, 1187 (9th Cir. 2019) (per curiam).

period too long for the military to be forced to maintain a policy that it has determined, in its professional judgment, to be contrary to the Nation's interests."¹¹⁹ In other words, the harm from the nationwide injunction was simply the harm of being unable to carry out the policy.

On January 22, 2019, the Supreme Court denied the three petitions for certiorari before judgment, but granted two of the applications for stays — over four dissents.¹²⁰ In essence, the Court declined to take up the merits of the policy before the courts of appeals, but allowed the policy to go into effect pending the government's appeals. All of this despite the fact that the only proffered justification for such emergency relief was the likelihood that, without such relief, the Supreme Court would not be able to conclusively resolve the merits during its October 2018 Term, and the government would be prevented from implementing the Mattis policy in the interim.¹²¹

3. *DACA*. — A similar pattern appeared in the litigation challenging the Trump Administration's rescission of DACA — the Deferred Action for Childhood Arrivals immigration program. After the Trump Administration took a discovery dispute to the Supreme Court,¹²² the district court denied the government's motion to dismiss and entered a preliminary injunction requiring the government to "maintain the DACA program on a nationwide basis."¹²³ It certified parts of its denial of the motion to dismiss for interlocutory appeal under 28 U.S.C. § 1292(b),¹²⁴ and the government also challenged the preliminary injunction on appeal under 28 U.S.C. § 1292(a).¹²⁵ Shortly thereafter, the government filed a petition for certiorari before judgment in the Supreme Court, arguing, as in the transgender ban cases, that the length of time DACA's rescission would remain on hold was itself a reason for

¹¹⁹ Application for a Stay at 3, *Karnoski*, 139 S. Ct. 950 (No. 18A625).

¹²⁰ The denials of the petitions are reported at 139 S. Ct. 946 (2019) (mem.). *Karnoski*, 139 S. Ct. 946; *Stockman*, 139 S. Ct. 946; *Doe 2*, 139 S. Ct. 946. The grants of the stays are reported at 139 S. Ct. 950 (2019) (mem.). *Karnoski*, 139 S. Ct. 950; *Stockman*, 139 S. Ct. 950. The denial of the stay is accessible on the Supreme Court docket at No. 18A626, SUPREME COURT OF THE UNITED STATES, <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/18-677.html> [<https://perma.cc/L2VT-SNBH>].

¹²¹ On January 4, 2019, the D.C. Circuit vacated the injunction in *Doe 2*. See *Doe 2 v. Shanahan*, 755 F. App'x 19, 25 (D.C. Cir. 2019) (per curiam); see also *Doe 2 v. Shanahan*, 917 F.3d 694 (D.C. Cir. 2019) (separate opinions respecting the January 4 order). On June 14, 2019, the Ninth Circuit ordered the district court to reconsider the government's motion to dissolve the injunction in *Karnoski*, and stayed the injunction pending such reconsideration. *Karnoski*, 926 F.3d at 1187. The government's appeal in *Stockman* remains pending as of this writing.

¹²² See *infra* pp. 148–49 (summarizing the discovery dispute).

¹²³ *Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 279 F. Supp. 3d 1011, 1048 (N.D. Cal. 2018).

¹²⁴ *Id.* at 1050.

¹²⁵ See Appellants' Opening Brief at 3–4, *Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476 (9th Cir. 2018) (No. 18-15068).

the Court to resolve the issue expeditiously.¹²⁶ As for why immediate intervention, and not just a stay, was needed, the government argued that “a stay would not address the institutional injury suffered by the United States of being embroiled in protracted litigation over an agency decision that falls squarely within DHS’s broad discretion over federal immigration policy and that is not even judicially reviewable.”¹²⁷

On February 26, 2018, the Court denied the petition “without prejudice,” noting that “[i]t is assumed that the Court of Appeals will proceed expeditiously to decide this case.”¹²⁸ The case was argued to a three-judge panel on May 15.¹²⁹ On October 17, the Justice Department filed a letter with the Ninth Circuit (that the Solicitor General would have had to approve), informing the Court of Appeals that it intended to file another petition for certiorari before judgment if the panel did not issue its judgment by October 31.¹³⁰ On November 5, again invoking the need to have the matter resolved by the end of the Court’s October 2018 Term, the government filed the promised petition for certiorari before judgment (and filed similar petitions in related cases from the Second and D.C. Circuits).¹³¹ Three days later, the Ninth Circuit ruled against the government on appeal.¹³² As of this writing, the Second and D.C. Circuits had still not ruled on the appeals. And in another potential procedural compromise, the Justices granted all three petitions on the last day of the October 2018 Term (two of which were still “before judgment”) — agreeing to take the cases up, but on the Court’s, rather than the government’s, preferred timing, and in a manner that left the lower court injunctions in place pending the Court’s disposition of the merits.¹³³

4. *Other Examples.* — The government has also sought emergency relief from the Supreme Court in three other cases in which it has been subjected to nationwide injunctions from district courts. First, the government sought a partial stay of the Seventh Circuit’s decision in *City of Chicago v. Sessions*,¹³⁴ which had affirmed a preliminary nationwide

¹²⁶ Petition for a Writ of Certiorari Before Judgment at 12, *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 138 S. Ct. 1182 (2018) (mem.) (No. 17-1003).

¹²⁷ *Id.* at 12–13.

¹²⁸ *Regents*, 138 S. Ct. at 1182.

¹²⁹ *See Regents*, 908 F.3d at 477.

¹³⁰ Letter from Mark B. Stern, Attorney, U.S. Dep’t of Justice, to Molly C. Dwyer, Clerk, U.S. Court of Appeals for the Ninth Circuit (Oct. 17, 2018), <https://www.courthousenews.com/wp-content/uploads/2018/10/DACA-Letter-to-9CA.pdf> [<https://perma.cc/2SU6-9F8A>].

¹³¹ Petition for a Writ of Certiorari Before Judgment at 15–16, *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 139 S. Ct. 2779 (2019) (mem.) (No. 18-587); Petition for a Writ of Certiorari Before Judgment at 14–15, *Trump v. NAACP*, 139 S. Ct. 2779 (2019) (mem.) (No. 18-588); Petition for a Writ of Certiorari Before Judgment at 14–15, *McAleenan v. Vidal*, 139 S. Ct. 2773 (2019) (mem.) (No. 18-589).

¹³² *Regents*, 908 F.3d at 486.

¹³³ *See Vidal*, 139 S. Ct. 2773; *NAACP*, 139 S. Ct. 2779; *Regents*, 139 S. Ct. 2779.

¹³⁴ 888 F.3d 272 (7th Cir. 2018).

injunction against two conditions the Attorney General had imposed upon “sanctuary cities” receiving funds under a federal grant.¹³⁵ The government’s application in *City of Chicago* did not seek a stay of the injunction as applied to the withholding of funds from Chicago, but “only as to the nationwide scope of the injunction.”¹³⁶ In other words, the government did not even argue that it was likely to succeed on the merits of the underlying dispute. When the en banc Seventh Circuit granted a stay of the nationwide scope of the injunction,¹³⁷ the government withdrew its application with the Court.¹³⁸

The one nationwide injunction from which the government categorically failed to obtain relief came in response to a rule promulgated by the Attorney General and the Secretary of Homeland Security that prohibited asylum officers from granting relief to individuals who did not enter the United States at a designated port of entry.¹³⁹ (The relevant statute expressly authorizes *any* noncitizen to apply for asylum “whether or not at a designated port of arrival.”¹⁴⁰) A host of legal and social service organizations in northern California brought suit challenging the rule, claiming that it directly conflicted with the statute and was therefore invalid.¹⁴¹ On November 19, 2018, the district court in San Francisco issued a preliminary nationwide injunction against the policy.¹⁴²

The government applied to the Ninth Circuit for a stay, but was rejected.¹⁴³ From there, it sought a stay from the Supreme Court — once again invoking as the irreparable harm the government’s inability to vindicate its “law enforcement and public safety interests” while the policy remained on hold.¹⁴⁴ On December 21, with Chief Justice Roberts taking the unusual step of joining his four more progressive colleagues, the Court denied the government’s application without comment.¹⁴⁵

¹³⁵ See *id.* at 277–78, 293.

¹³⁶ Application for Partial Stay at 2–3, *Sessions v. City of Chicago*, No. 17A1379 (U.S. June 18, 2018).

¹³⁷ See *City of Chicago v. Sessions*, No. 17-2991, 2018 WL 4268817, at *1 (7th Cir. June 4, 2018) (vacating the nationwide injunction before rehearing en banc); *City of Chicago v. Sessions*, No. 17-2991, 2018 WL 4268814, at *2 (7th Cir. Aug. 10, 2018) (vacating the decision to rehear en banc and maintaining the stay of the preliminary injunction).

¹³⁸ Letter from Noel J. Francisco, Solicitor General, U.S. Dep’t of Justice, to Hon. Scott S. Harris, Clerk, Supreme Court of the U.S. (June 27, 2018), https://www.supremecourt.gov/DocketPDF/17/17A1379/51573/20180627154913597_Letter%20Sessions%20AG%20v.%20City%20of%20Chicago.pdf [https://perma.cc/2ZD4-FT6Y].

¹³⁹ Aliens Subject to a Bar of Entry Under Certain Presidential Proclamations; Procedures for Protection Claims, 83 Fed. Reg. 55,934 (Nov. 9, 2018) (to be codified at 8 C.F.R. pts. 208, 1003, 1208).

¹⁴⁰ 8 U.S.C. § 1158(a)(1) (2012).

¹⁴¹ *E. Bay Sanctuary Covenant v. Trump*, 349 F. Supp. 3d 838, 855 (N.D. Cal. 2018).

¹⁴² *Id.* at 868.

¹⁴³ *E. Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219, 1231 (9th Cir. 2018).

¹⁴⁴ Application for a Stay at 37–38, *Trump v. E. Bay Sanctuary Covenant*, 139 S. Ct. 782 (2018) (mem.) (No. 18A615) (quoting *Maryland v. King*, 567 U.S. 1301, 1303 (Roberts, Circuit Justice 2012)).

¹⁴⁵ *E. Bay Sanctuary Covenant*, 139 S. Ct. at 782.

Justices Thomas, Alito, Gorsuch, and Kavanaugh would have granted the stay.¹⁴⁶

Finally, the most recent example (as of this writing) of the government seeking emergency relief from the Supreme Court came in the context of challenges to a different ban on a class of asylum claims — an interim final rule categorically denying asylum to applicants who did not first seek protection from third countries through which they traveled before entering the United States.¹⁴⁷ Eight days after it was promulgated, the rule was subject to a nationwide injunction issued by the U.S. District Court for the Northern District of California — which held that the challengers were likely to succeed on the merits both with respect to their substantive challenge to the rule, and their claim that the way the rule was promulgated violated the Administrative Procedure Act.¹⁴⁸ The government sought a stay from the Ninth Circuit, a divided panel of which agreed to stay the effect of the injunction *outside* the Ninth Circuit, at least pending further explanation by the district court of why nationwide relief was appropriate.¹⁴⁹

Despite convincing the Ninth Circuit to limit the scope of the injunction, the government nevertheless applied to the Supreme Court for a stay of that part of the injunction that remained in force.¹⁵⁰ Specifically, the government argued that, even as limited by the Ninth Circuit, the injunction was still “vastly overbroad,” and that its “circuit-wide sweep . . . violates the well-settled rule that injunctive relief must be limited to redressing a plaintiff’s own injuries, and unduly interferes with the Executive’s authority to establish immigration policy.”¹⁵¹ While the government’s application was pending, the district court reaffirmed the nationwide scope of the injunction — providing the justification for nationwide relief that the Ninth Circuit had initially held to be lacking.¹⁵² Although the Ninth Circuit issued an administrative stay of the reaffirmed injunction,¹⁵³ the Supreme Court on September 11, 2019, granted a stay of *both* that part of the original injunction that remained

¹⁴⁶ *Id.*

¹⁴⁷ See Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33,829, 33,830 (July 16, 2019).

¹⁴⁸ See *E. Bay Sanctuary Covenant v. Barr*, 385 F. Supp. 3d 922, 929–31 (N.D. Cal. 2019).

¹⁴⁹ See *E. Bay Sanctuary Covenant v. Barr*, 934 F.3d 1026, 1029–30 (9th Cir. 2019). Judge Tashima would have denied the government’s application in its entirety. See *id.* at 1031–32 (Tashima, J., concurring in part and dissenting in part).

¹⁵⁰ See Application for a Stay at 1, *Barr v. E. Bay Sanctuary Covenant*, No. 19A230 (U.S. Aug. 26, 2019).

¹⁵¹ *Id.* at 5–6.

¹⁵² See *E. Bay Sanctuary Covenant v. Barr*, No. 19-cv-04073, 2019 WL 4265078, at *5–9 (N.D. Cal. Sept. 9, 2019); see also Supplemental Brief in Support of Application for a Stay at 1, *Barr*, No. 19A230 (U.S. Sept. 10, 2019) (“That order underscores the need for this Court to grant the government’s pending application for a stay of that injunction, which remains ripe for resolution.”).

¹⁵³ See Order at 1, *E. Bay Sanctuary Covenant v. Barr*, No. 19-16487 (9th Cir. Sept. 10, 2019).

in effect (within the Ninth Circuit) *and* the reaffirmed nationwide injunction in its entirety¹⁵⁴ — over a published dissent by Justice Sotomayor, which Justice Ginsburg joined.¹⁵⁵ Even though neither injunction was in effect on a nationwide basis at the time of the Justices' ruling, the Court nevertheless put both of them on hold.

* * *

In each of these cases, the gravamen of the government's case for emergency relief was its inability to continue enforcing the challenged policy in the interim. Sometimes, the Court agreed; sometimes, it didn't. But any suggestion from the Court that the government had to demonstrate anything further was noticeably lacking. And as Part III examines in more detail, it's not at all obvious that a nationwide injunction, in the abstract, should otherwise justify such relief.¹⁵⁶

B. Discovery Disputes

The other major category in which the government has repeatedly sought emergency or extraordinary relief from the Court has been discovery disputes — in which the Solicitor General has invoked the specter of district courts abusing their authority in structuring discovery in litigation against the executive branch as a justification for unusual intervention from the Court.

1. *The Juliana Case.* — Perhaps the most striking example of this phenomenon has come in the *Juliana* litigation — a lawsuit filed in 2015 by a group of plaintiffs, including minor children, arguing that the government's failure to take adequate measures to arrest the impact of climate change violates the Due Process Clause of the Fifth Amendment.¹⁵⁷ In 2016, the district court denied the government's motion to dismiss.¹⁵⁸ Roughly seven months later, it also declined to certify its ruling for permissive interlocutory appeal under 28 U.S.C. § 1292(b).¹⁵⁹ After the Ninth Circuit refused to issue a writ of mandamus or to stay discovery, the Solicitor General sought a stay from the Supreme Court pending disposition of a second petition in the Ninth Circuit for a writ of mandamus.¹⁶⁰ The heart of the government's argument for emergency relief

¹⁵⁴ See *E. Bay Sanctuary Covenant v. Barr*, No. 19A230, 2019 WL 4292781 (U.S. Sept. 11, 2019) (mem.).

¹⁵⁵ See *id.* at *1 (Sotomayor, J., dissenting from grant of stay).

¹⁵⁶ See *infra* section III.A, pp. 153–55.

¹⁵⁷ See *Juliana v. United States*, 217 F. Supp. 3d 1224, 1233, 1248 (D. Or. 2016).

¹⁵⁸ *Id.* at 1234.

¹⁵⁹ *Juliana v. United States*, No. 15-cv-01517, 2017 WL 2483705, at *2 (D. Or. June 8, 2017).

¹⁶⁰ Application for a Stay at 1, *United States v. U.S. Dist. Court*, 139 S. Ct. 1 (2018) (mem.) (No. 18A65).

was that it would suffer significant harm if it had to participate in discovery (and, potentially, a trial) in a case in which there was serious reason to dispute the plaintiffs' standing (and whether the constitutional right they sought to vindicate actually exists).¹⁶¹

On July 30, 2018, the Supreme Court denied the government's application, but not without adding an unusual (and deliberately worded) observation about the nature of the plaintiffs' claims:

The Government's request for relief is premature and is denied without prejudice. The breadth of respondents' claims is striking, however, and the justiciability of those claims presents *substantial grounds for difference of opinion*. The District Court should take these concerns into account in assessing the burdens of discovery and trial, as well as the desirability of a prompt ruling on the Government's pending dispositive motions.¹⁶²

Just over two months later, and two weeks before trial was scheduled to begin,¹⁶³ the district court ruled on the government's motions, partially granting judgment on the pleadings and summary judgment to the government, but otherwise declining to terminate the case.¹⁶⁴ Despite the Supreme Court's earlier hint, Judge Aiken also declined to certify her ruling for interlocutory appeal.¹⁶⁵ Three days after Judge Aiken's ruling, the government filed a petition for a writ of mandamus directly in the Supreme Court, and an application for a stay of her decision pending disposition of that petition — asking the Justices “to end this profoundly misguided suit.”¹⁶⁶ As the application argued:

Absent a stay, the government will be forced to proceed with a 50-day liability trial that is fundamentally inconsistent with Article III and the separation of powers under the Constitution, as well as with procedures Congress has prescribed in agencies' organic statutes and the APA for agencies to consider factual and legal issues concerning major policy and for the courts to review their determinations.¹⁶⁷

On November 2, 2018, over two dissents, the Court denied the application — because mandamus was still available to the government in

¹⁶¹ *Id.* at 20–31, 36–38.

¹⁶² 139 S. Ct. at 1 (emphasis added). The emphasized language tracks the language of 28 U.S.C. § 1292(b) with regard to when a district court should certify one of its rulings for an immediate interlocutory appeal. *See* 28 U.S.C. § 1292(b) (2012) (“When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order.”).

¹⁶³ Application for a Stay at 4, *In re* United States, 139 S. Ct. 452 (2018) (mem.) (No. 18A410).

¹⁶⁴ *Juliana v. United States*, 339 F. Supp. 3d 1062, 1105 (D. Or. 2018).

¹⁶⁵ *Id.*

¹⁶⁶ Application for a Stay at 4, *United States*, 139 S. Ct. 452 (2018) (No. 18A410).

¹⁶⁷ *Id.* at 32.

the Ninth Circuit.¹⁶⁸ But it sent yet another thinly veiled message to the lower courts in the process:

Although the Ninth Circuit has twice denied the Government's request for mandamus relief, it did so without prejudice. And the court's basis for denying relief rested, in large part, on the early stage of the litigation, the likelihood that plaintiffs' claims would narrow as the case progressed, and the possibility of attaining relief through ordinary dispositive motions. Those reasons are, to a large extent, no longer pertinent. The 50-day trial was scheduled to begin on October 29, 2018, and is being held in abeyance only because of the current administrative stay.¹⁶⁹

On remand, the Ninth Circuit stayed the trial pending its consideration of the government's renewed petition for mandamus,¹⁷⁰ and requested that the district court "promptly resolve" the government's motion for reconsideration of the court's refusal to certify its October ruling for interlocutory appeal.¹⁷¹ The district court, in turn, did just that — certifying the government's appeal on November 21.¹⁷² That appeal remains pending as of this writing.

In a superficial sense, the government lost its requests for emergency and extraordinary relief in *Juliana*: the Court denied both of its stay applications, and it has effectively tabled its mandamus petition. Formally, at least, the Court resisted the Solicitor General's entreaties for urgency, even as it expressed sympathy with the government's position. But the Court's November 2 order still nudged the lower courts to provide much of the relief the government had sought directly from the Justices — nudging the Court refused to provide in any of the nationwide injunction cases.

2. *The Census Litigation.* — A discovery dispute was also the original ground on which the 2020 Census litigation reached the Supreme Court. One of the core issues in the cases was whether Secretary of Commerce Wilbur Ross and other high-level government officials should be subject to deposition over the actual reasons why the Trump Administration decided to add a citizenship question to the census, or whether the dispute must be resolved solely on the administrative record.

After Judge Furman ruled that the plaintiffs had carried their heavy burden to justify extra-record discovery,¹⁷³ and ordered the depositions of Secretary Ross and John Gore, the Acting Assistant Attorney General

¹⁶⁸ See *United States*, 139 S. Ct. at 453.

¹⁶⁹ *Id.*

¹⁷⁰ *United States v. U.S. Dist. Court*, No. 18-73014 (9th Cir. Nov. 8, 2018).

¹⁷¹ *Id.* at 2.

¹⁷² *Juliana v. United States*, No. 15-cv-1517, 2018 WL 6303774, at *3 (D. Or. Nov. 21, 2018).

¹⁷³ See *New York v. U.S. Dep't of Commerce*, 333 F. Supp. 3d 282, 285 (S.D.N.Y. 2018) (discussing Judge Furman's earlier oral order "authoriz[ing] extra-record discovery" and discussing the strong showing required to justify deposing major public officials).

in charge of the Civil Rights Division,¹⁷⁴ the government applied for a stay from the Supreme Court.¹⁷⁵ It argued that the irreparable injury justifying such relief stemmed from the fact that “high-ranking officials in two agencies — including a Cabinet Secretary — will be forced to prepare for and attend depositions, which will indisputably ‘interfer[e] with’ their ‘ability to discharge [their] constitutional responsibilities.’”¹⁷⁶

Justice Ginsburg denied the government’s first application without prejudice on October 5, 2018.¹⁷⁷ After the Second Circuit rejected the government’s request for a stay and mandamus relief blocking the Ross and Gore depositions and other extra-record discovery,¹⁷⁸ the government filed a second application with the Supreme Court for a stay.¹⁷⁹ On October 22, the Court granted the second application as applied to Secretary Ross pending the disposition of a forthcoming petition for a writ of mandamus, but denied the application as applied to Acting Assistant Attorney General Gore and other extra-record discovery.¹⁸⁰ On October 29, the government filed a petition for a writ of mandamus challenging the district court’s taking of extra-record discovery, and an application to expand the stay the Court had entered on October 22.¹⁸¹ On November 2, the Court denied the government’s (third) application for a stay, over three dissents.¹⁸² Two weeks later, treating the government’s petition for a writ of mandamus as a petition for a writ of certiorari, the Court granted the petition and set the case for argument in February.¹⁸³

Having proceeded to trial in the interim, the district court entered a final judgment on January 15, 2019, ruling for the plaintiffs based solely on the administrative record — and thereby mooting, functionally if not

¹⁷⁴ See Application for a Stay at 1, *In re* Dep’t of Commerce, No. 18A350 (U.S. Oct. 3, 2018) (summarizing the district court proceedings).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 39 (alterations in original) (quoting *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 382 (2004)).

¹⁷⁷ See Renewed Application for a Stay at 2, *In re* U.S. Dep’t of Commerce, 139 S. Ct. 16 (2018) (mem.) (No. 18A375). Justice Ginsburg’s in-chambers order denying the government’s first application is accessible on the Supreme Court docket at No. 18A350, SUPREME COURT OF THE UNITED STATES, <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/18a350.html> [<https://perma.cc/T5L7-7QD6>].

¹⁷⁸ See *In re* U.S. Dep’t of Commerce, No. 18-cv-2921, No. 18-cv-5025, 2018 WL 6006885, at *1 (2d Cir. Oct. 9, 2018); *In re* U.S. Dep’t of Commerce, No. 18-cv-2921, No. 18-cv-5025, 2018 WL 6006904, at *1 (2d Cir. Sept. 25, 2018).

¹⁷⁹ See Renewed Application for a Stay at 1, *Dep’t of Commerce*, 139 S. Ct. 16 (2018) (No. 18A375).

¹⁸⁰ *Dep’t of Commerce*, 139 S. Ct. 16; see also Renewed Application for a Stay at 14–17, *Dep’t of Commerce*, 139 S. Ct. 16 (2018) (No. 18A375).

¹⁸¹ Application to Expand the Stay at 1, *In re* Dep’t of Commerce, 139 S. Ct. 452 (2018) (mem.) (No. 18A455); Petition for a Writ of Mandamus at 1, *In re* Dep’t of Commerce, 139 S. Ct. 566 (2018) (mem.) (No. 18-557).

¹⁸² *Dep’t of Commerce*, 139 S. Ct. 452.

¹⁸³ *Dep’t of Commerce*, 139 S. Ct. 566.

formally, the question on which the Supreme Court had granted certiorari in November.¹⁸⁴ The Court removed the original case from the argument calendar,¹⁸⁵ but by the time it did so, the Solicitor General had filed a new petition — for certiorari before judgment — challenging the January 15 ruling on the merits.¹⁸⁶ The Court deferred resolution of the first case pending the new petition, which it granted on February 15.¹⁸⁷ As in the Travel Ban 2.0 cases, significant effort was expended in favor of preserving a status quo that evaporated before the merits reached the Court.

3. *DACA*. — A discovery dispute was also the original vehicle through which *DACA* reached the Court. Although challenges were filed in four different district courts, the case that has provoked the most attention from the Supreme Court to date is the one filed by the University of California in the U.S. District Court for the Northern District of California. After the district court in that case ordered additions to the (incomplete) administrative record,¹⁸⁸ the government unsuccessfully sought a writ of mandamus from the Ninth Circuit, which ruled on November 16, 2017, that the government had failed to show “clear” legal error by the district court.¹⁸⁹

Two weeks later, the government filed a petition for a writ of mandamus directly in the Supreme Court, and an application for a stay of the district court’s ruling pending disposition of its petition.¹⁹⁰ Although the district court order encompassed at least some putatively privileged materials, the crux of the harm the government invoked to justify such relief was the onerous efforts it would have to undertake to comply with the district court’s order — and “the burdens that the government may face if discovery is permitted to resume.”¹⁹¹

On December 8, the Court granted the application.¹⁹² Writing for himself and Justices Ginsburg, Sotomayor, and Kagan, Justice Breyer dissented, expressly raising the specter that the Court’s deference to the

¹⁸⁴ *New York v. U.S. Dep’t of Commerce*, 351 F. Supp. 3d 502, 516, 679 (S.D.N.Y. 2019).

¹⁸⁵ See No. 18-557, SUPREME COURT OF THE UNITED STATES, <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/18-557.html> [<https://perma.cc/4HY7-2ABS>] (reporting the case was removed from the calendar on January 18, 2019).

¹⁸⁶ See Petition for a Writ of Certiorari Before Judgment at 1, *Dep’t of Commerce v. New York*, 139 S. Ct. 953 (2019) (mem.) (No. 18-557).

¹⁸⁷ *Dep’t of Commerce*, 139 S. Ct. 953. After the Court resolved the merits, it issued a *Munsingwear* vacatur respecting the original discovery dispute. See *Dep’t of Commerce v. U.S. Dist. Court*, 139 S. Ct. 2779 (2019) (mem.); see also *supra* note 105 (describing *Munsingwear* relief).

¹⁸⁸ See *Regents of the Univ. of Cal. v. U.S. Dep’t of Homeland Sec.*, No. 17-05211, 2017 WL 4642324, at *8 (N.D. Cal. Oct. 17, 2017).

¹⁸⁹ *In re United States*, 875 F.3d 1200, 1205 (9th Cir. 2017).

¹⁹⁰ Application for a Stay at 1, *In re United States*, 138 S. Ct. 371 (2017) (mem.) (No. 17A570); Petition for a Writ of Mandamus, *In re United States*, 138 S. Ct. 443 (2017) (per curiam) (No. 17-801).

¹⁹¹ Application for a Stay at 6, 29, *United States*, 138 S. Ct. 371 (2017) (No. 17A570).

¹⁹² *United States*, 138 S. Ct. at 371.

executive branch could set a more general precedent for a novel degree of appellate intervention in discovery disputes, “certainly when the Government is involved and potentially when it is not involved.”¹⁹³ Twelve days later, the Court, treating the government’s petition for mandamus as a petition for certiorari, granted the writ, vacated the Ninth Circuit’s refusal to issue a writ of mandamus, and sent the case back to the district court with instructions to address the government’s threshold arguments *before* taking any steps to “complete” or otherwise supplement the administrative record.¹⁹⁴

* * *

Unlike the nationwide injunction cases, the principal argument for emergency or extraordinary relief in these contexts has been that wayward district judges have imposed too heavy a discovery burden on the executive branch as a whole, or individual officials thereof. The problem with that argument, as Justice Breyer highlighted in his December 8 dissent in the first DACA case, is that the Court has otherwise repeatedly insisted that discovery disputes are generally committed to the discretion of trial judges — and that appellate courts should only intervene in cases of clear abuses of that discretion (in which mandamus is appropriate).¹⁹⁵ In other words, the flaw the government seemed to be identifying was not just erroneous trial court rulings, but erroneous rejections of mandamus petitions by the courts of appeals. If the Court agrees, the proper recourse should be to take one of these cases on the merits and clarify what the courts of appeals are getting wrong. Leaving these disputes for the shadow docket gives the impression, deserved or otherwise, that the Court believes there are *two* standards for mandamus relief from discovery disputes: one for the federal government, and one for everyone else.

C. Urgent Timing

The third justification that has surfaced in the Trump Administration’s applications for emergency or extraordinary relief from the Supreme Court has been the need for expeditious resolution of a dispute because of external time constraints. Even here, though, the cases have been fraught with controversy.

i. The Census Litigation. — In the 2020 Census cases, for example, the Solicitor General expressly held out, on at least five occasions, that the courts needed to settle the validity of adding a citizenship question no later than June 30, 2019 — as that was the deadline for finalizing the

¹⁹³ *Id.* at 376 (Breyer, J., dissenting).

¹⁹⁴ *United States*, 138 S. Ct. at 444–45.

¹⁹⁵ *See, e.g., Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 109–12 (2009).

census questionnaire without additional congressional appropriations. The timing was the principal basis the government offered in seeking certiorari before judgment to review both Judge Furman's January 15 ruling in favor of the plaintiffs in the New York case,¹⁹⁶ and Judge Seeborg's ruling in favor of the State of California in the San Francisco case.¹⁹⁷ The Court granted the government's petition in the New York case — the first time it had granted certiorari before judgment in fifteen years¹⁹⁸ — in February 2019, heard argument in April, and handed down its decision on June 27, in time to meet the government's professed deadline, which the Chief Justice's majority opinion expressly referenced.¹⁹⁹

Matters might have ended there, but for President Trump — who initially appeared to overrule Secretary Ross's decision to concede defeat in the case, and ordered the Justice Department, well into the first week of July, to explore options for restoring the citizenship question.²⁰⁰ The President ultimately backed down, but not before the government's post-deadline conduct raised the distinct possibility that the Solicitor General's representations had been false — and that the Court, which had accepted the government's factual representations without question, had been snookered.²⁰¹

2. *Abortion for Minor Immigrants.* — Another example of the government seeking emergency relief based upon urgent timing came in *Garza v. Hargan*,²⁰² a lawsuit arising out of the government's refusal to allow minors in immigration detention to have access to otherwise legal abortions.²⁰³ After the district court entered a preliminary injunction and the D.C. Circuit, sitting en banc, rejected the government's application for a stay,²⁰⁴ the Solicitor General filed a "singularly remarkable"

¹⁹⁶ See Petition for a Writ of Certiorari Before Judgment at 13–14, *Dep't of Commerce v. New York*, 139 S. Ct. 2551 (2019) (No. 18-966).

¹⁹⁷ See Petition for a Writ of Certiorari Before Judgment at 11, *Ross v. California*, 139 S. Ct. 2778 (2019) (mem.) (No. 18-1214).

¹⁹⁸ See *infra* Appendix, Table 1.

¹⁹⁹ See *Dep't of Commerce*, 139 S. Ct. at 2565. After its ruling in the New York case, the Court "GVRd" the California petition — granting it, vacating the lower court's judgment, and remanding for further proceedings. See *Ross*, 139 S. Ct. 2778.

²⁰⁰ See, e.g., Michael Wines et al., *Justice Dept. Reverses Course on Citizenship Question on Census, Citing Trump's Orders*, N.Y. TIMES (July 3, 2019), <https://nyti.ms/2LBzPz2> [<https://perma.cc/7GPZ-CC8KJ>].

²⁰¹ See Marty Lederman, *Census Citizenship Question Re-do? Part I: Moment of Truth (and Integrity) for the Office of the Solicitor General*, BALKINIZATION (July 7, 2019, 10:48 PM), <https://balkin.blogspot.com/2019/07/census-citizenship-question-re-do-part.html> [<https://perma.cc/WUL5-PUZJ>].

²⁰² 874 F.3d 735 (D.C. Cir. 2017) (per curiam).

²⁰³ Plaintiff's Memorandum in Support of Her Application for a Temporary Restraining Order at 1, *Garza v. Hargan*, No. 17CV02122 (D.D.C. Oct. 13, 2017), 2017 WL 7805787.

²⁰⁴ *Garza*, 874 F.3d at 736; *Garza v. Hargan*, No. 17-cv-02122, 2017 WL 4707287, at *1 (D.D.C. Oct. 18, 2017).

petition for a writ of certiorari, not asking the Court to take up the merits of the dispute, but rather asking for a vacatur of the lower court rulings (since the original plaintiff had obtained an abortion in the interim), and sanctions against the ACLU for allegedly misleading the government in order to obtain that abortion.²⁰⁵ Leaving aside the merits of that petition, while it was pending, the government became aware of another plaintiff ostensibly covered by the lower courts' rulings — and applied to the Supreme Court for a stay of the injunction pending disposition of its petition (which, again, did not actually ask the Court to conduct plenary review of the merits).²⁰⁶ When the government subsequently determined that the plaintiff was not a minor (and was therefore not subject to detention by the Department of Health and Human Services), it withdrew the application.²⁰⁷

3. *Funding President Trump's Border Wall.* — The government also invoked the press of time to justify its request for emergency relief in the context of litigation challenging President Trump's repurposing of appropriated federal funds to build a border wall. In *Sierra Club v. Trump*,²⁰⁸ the Northern District of California issued a preliminary (and later permanent) injunction against the use of such funds as exceeding the President's statutory authority,²⁰⁹ and a divided panel of the Ninth Circuit denied the government's application for a stay.²¹⁰ In asking the Supreme Court for emergency relief, the government stressed "the harm to the public from halting the government's efforts to construct barriers to stanch the flow of illegal narcotics across the southern border," along with significant timing concerns arising from the Department of Defense contracting process.²¹¹ On July 26, 2019, the Court granted the government's application.²¹² Unusually, the unsigned order provided a modicum of explanation: "Among the reasons is that the Government has made a sufficient showing at this stage that the plaintiffs have no cause

²⁰⁵ See Marty Lederman, *The SG's Remarkable Cert. Petition in Hargan v. Garza, the "Jane Doe" Abortion Case*, BALKINIZATION (Nov. 8, 2017, 7:47 AM), <https://balkin.blogspot.com/2017/11/the-sgs-remarkable-cert-petition-in.html> [<https://perma.cc/TR8E-8R56>]; see also *Petition for a Writ of Certiorari, Hargan v. Garza*, No. 17-654 (U.S. Nov. 3, 2017).

²⁰⁶ See *Application for a Stay Pending Appeal* at 1–2, *Azar v. Garza*, 138 S. Ct. 1790 (2018) (per curiam) (No. 17A655). The Court ultimately disposed of the petition (and sidestepped the sanctions kerfuffle) through a *Munsingwear* order. See *Garza*, 138 S. Ct. at 1793.

²⁰⁷ Letter from Noel J. Francisco, Solicitor General, U.S. Dep't of Justice, to Hon. Scott S. Harris, Clerk, Supreme Court of the U.S. (Jan. 18, 2018), https://www.supremecourt.gov/DocketPDF/17/17-654/28376/20180118201025346_Hargan%20v.%20Garza%2017-654.pdf [<https://perma.cc/KAE6-3VFH>].

²⁰⁸ 379 F. Supp. 3d 883 (N.D. Cal. 2019).

²⁰⁹ See *id.* at 928; see also *Sierra Club v. Trump*, No. 19-cv-00892, 2019 WL 2715422 (N.D. Cal. June 28, 2019).

²¹⁰ *Sierra Club v. Trump*, 929 F.3d 670, 707 (9th Cir. 2019).

²¹¹ *Application for a Stay Pending Appeal* at 5, *Trump v. Sierra Club*, No. 19A60 (U.S. July 12, 2019).

²¹² *Trump v. Sierra Club*, No. 19A60, 2019 WL 3369425 (U.S. July 26, 2019) (mem.).

of action to obtain review of the Acting Secretary's compliance with Section 8005."²¹³ Justices Ginsburg, Sotomayor, and Kagan noted that they would have denied the application in its entirety,²¹⁴ whereas Justice Breyer would have granted it in part and denied it in part.²¹⁵

* * *

In all, then, the Trump Administration, through its first thirty-two months, sought twenty-one stays from the Supreme Court (twelve of which were granted in whole or in part); directly requested mandamus relief against district judges in at least three different filings (none of which were granted as such, although two were converted into granted petitions for certiorari); and sought certiorari before judgment nine times across three unrelated classes of disputes (five of which were granted — including in one case after the court of appeals had ruled). As noted above, this overall track record is fairly mixed, at least in raw numerical terms. But as the discussion in this Part should make clear, with the exception of the first asylum ban case, the government generally received at least *some* support from the Supreme Court every time the Court ruled, even if it did not always receive formal relief, and even though its arguments for emergency or extraordinary relief have been, at least in historical terms, rather unexceptional.

As significantly, even when the Court has rejected the government's entreaties, it has often done so without prejudice, and generally without any public suggestion that the government was overstepping its bounds or abusing its privileges.²¹⁶ Even when the Justices are not agreeing with the government's requests, a majority is not disagreeing, at least outwardly, with the requests' propriety. That, in itself, sends a message — or at least will surely be *understood* as sending a message — that the government's unprecedented approach is not untoward or even unwelcome. The harder questions, to which Part III turns, are *why* the Court has been so complacent, and whether its complacency is justified.

III. EXPLAINING — AND CRITIQUING — THE COURT'S REACTION

As Part II demonstrates, a common explanation for the government's newfound aggressiveness — and the Court's acquiescence therein — is the significant uptick in nationwide injunctions against executive

²¹³ *Id.* at *1.

²¹⁴ *Id.*

²¹⁵ *Id.* at *1–2 (Breyer, J., concurring in part and dissenting in part from grant of stay).

²¹⁶ *But see* Barr v. E. Bay Sanctuary Covenant, No. 19A230, 2019 WL 4292781, at *1–3 (U.S. Sept. 11, 2019) (Sotomayor, J., dissenting from grant of stay).

branch policies during the Trump Administration.²¹⁷ As the Solicitor General argued in seeking a stay in one of the transgender ban cases, absent emergency relief from an appellate court, “the Executive will continue to be denied the ability to implement significant policy measures, subject to appropriate checks by an independent Judiciary in resolving individual cases and controversies.”²¹⁸ There are several respects, however, in which nationwide injunctions do not seem to fully account for or justify either the sharp rise in applications for emergency or extraordinary relief or the Court’s largely positive reaction thereto. This Part begins by rejecting this most obvious explanation for the pattern identified in Part II — before turning to an explanation that is far more mundane and, in the long term, potentially far more consequential.

A. Nationwide Injunctions as the Focal Point

Viewing the rise of nationwide injunctions as the principal (if not sole) cause of this phenomenon runs into at least two formal objections and one more atmospheric qualm. Taking the formal objections first, as Part II makes clear, a nonfrivolous percentage of the government’s applications for emergency or extraordinary relief have had nothing to do with nationwide injunctions, and instead centered on other case-specific reasons why the government believed it could not wait for ordinary appellate mechanics to run their course. Thus, even if nationwide injunctions are behind much of this development, they cannot be behind all of it.²¹⁹

In any event, a nationwide injunction is no less susceptible to modification by a court of appeals than a more focused injunction — and, in at least some respects, perhaps *more* susceptible thereto (since, in addition to its other facets, its arguable overbreadth as applied to non-parties is an additional ground on which it can be attacked).²²⁰ In other words,

²¹⁷ There has been significant debate about the merits and validity of this increase in nationwide injunctions. Compare Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 420 (2017) (arguing that the emergence of nationwide injunctions is a result of the transformations of both judicial institutions and judicial behavior), with Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065, 1069 (2018) (noting the need for nationwide injunctions “is particularly great in an era when major policy choices are increasingly made through unilateral executive action affecting millions”).

²¹⁸ Application for a Stay at 5, *Trump v. Karnoski*, 139 S. Ct. 950 (2019) (mem.) (No. 18A625).

²¹⁹ The knee-jerk reaction to (wrongly) blame nationwide injunctions for this phenomenon is nicely illustrated by the *Wall Street Journal*, the editorial board of which celebrated the Supreme Court’s grant of a stay in *Sierra Club*, 2019 WL 3369425, as “good news . . . that the High Court is finally sending a message about the proliferation of national injunctions by lower court judges.” Editorial, *National Injunction Dysfunction*, WALL ST. J., July 29, 2019, at A16. Not only did the Supreme Court’s explanation for its order in *Sierra Club* include nary a word about nationwide injunctions, see *Sierra Club*, 2019 WL 3369425, at *1, but the injunction at issue did not have “nationwide” scope.

²²⁰ See, e.g., *E. Bay Sanctuary Covenant v. Barr*, 934 F.3d 1026, 1029–30 (9th Cir. 2019) (mem.) (narrowing a nationwide injunction because the district court did not adequately explain why nationwide — as opposed to circuit-wide — relief was necessary).

nothing about the nationwide scope of an injunction explains why a circuit court would be more likely to erroneously leave it in place — thereby justifying the invocation of emergency relief from the Supreme Court — as compared to an injunction limited to the government’s treatment of the parties to the case. It may be that a majority of the Justices believe that the *courts of appeals* have been too chary in refusing to revisit nationwide injunctions, but (1) only one Justice has publicly *said so*;²²¹ and (2) the proper approach, in that circumstance, would be for the Court to take a case in which it can provide better guidance — rather than issuing a series of one-sentence orders that fail to identify the putative errors in these lower court rulings.

The more troubling argument is the suggestion that novel anti-government lower court rulings have in turn justified novel forms of emergency and extraordinary relief.²²² The President himself has fueled this narrative to a degree, repeatedly attacking “Obama judges” in the Ninth Circuit for ruling against his immigration policies,²²³ even though he has not fared much better in lower courts in other parts of the country, or with judges appointed by other presidents, either.²²⁴ So conceived, this narrative holds out Supreme Court stays of nationwide injunctions as a necessary check on an unruly (lower) federal judiciary.

It’s impossible to prove or disprove this claim, of course. But in at least one crucial sense, its premise is flawed, for it assumes that rulings like the Supreme Court’s decision on Travel Ban 3.0 necessarily repudiate all of the lower court rulings on the *earlier* — and more problematic — versions of policies as well. The transgender ban cases are another illustrative example: the nationwide injunctions issued by four different district courts look far shakier in light of the more nuanced Mattis policy, but that policy was not promulgated until *after* the district courts had ruled. In both contexts, the superficial attacks on lower court judges have missed the extent to which the executive branch and the courts are in dialogue with each other — in a manner that vindicates, rather than vilifies, the original trial court rulings. In other words, in many of the cases discussed herein, by the time the Supreme Court reached the merits, it was considering later policies — versions shaped by the earlier trial court rulings from which the government sought emergency relief.

²²¹ See *Trump v. Hawaii*, 138 S. Ct. 2392, 2425–29 (2018) (Thomas, J., concurring).

²²² See, e.g., Editorial, *Judging the Travel Ban — and Judges*, WALL ST. J. (Jan. 19, 2018), <https://www.wsj.com/articles/judging-the-travel-ban-and-judges-1516406680> [<https://perma.cc/FTH5-WWZK>].

²²³ See Adam Liptak, *Roberts Rebukes Trump for Swipe at “Obama Judge,”* N.Y. TIMES, Nov. 22, 2018, at A1.

²²⁴ See, e.g., Fred Barbash & Deanna Paul, *The Real Reason the Trump Administration Is Constantly Losing in Court*, WASH. POST (Mar. 19, 2019), https://www.washingtonpost.com/world/national-security/the-real-reason-president-trump-is-constantly-losing-in-court/2019/03/19/f5ffbo56-33a8-11e9-af5b-b51b7ff322e9_story.html [<https://perma.cc/4SGG-EGH9>].

In the cases in which this scenario has played out, the true justification for emergency or extraordinary relief therefore is *not* that the lower courts have unduly hamstrung the executive branch from the beginning; it's that the government has seen the error of its ways, and should be let off the hook for its original sin. And although the policy revisions may well provoke a different result on the merits, it is not immediately obvious why the *nationwide* nature of the relief explains why the government should receive the benefit of the doubt during the pendency of the litigation — versus some other consideration.

B. The Court's Own (Quietly) Shifting Jurisprudence

As Part I introduces, the Court's established standards for evaluating an application for emergency or extraordinary relief do not just focus on the merits of the applicant's case. For stays, whether the lower court ruling will cause irreparable harm if left intact is a critical consideration, just as the unavailability of potential remedies from other courts weighs heavily in considering petitions for writs of mandamus or certiorari before judgment. How the Justices have *applied* those standards, though, has quietly shifted in recent years — especially with regard to what a party must show to demonstrate irreparable injury. And that shift may explain much (if not most) of what is going on in these cases.

Recall from above that a majority of the Court has now endorsed the view Chief Justice Roberts expressed in chambers in 2012 — that “[a]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.”²²⁵ In practice, this understanding means that whenever a governmental party seeks a stay of a lower court ruling enjoining a governmental policy, the only variable that will typically be at issue is the government's likelihood of success on the merits — even in cases in which the irreparable harm to the *plaintiffs* from allowing the challenged policy to remain in effect dramatically outweighs whatever harm the government suffers from having the policy placed on hold.

The Court's resolutions of stay applications from the federal government have thus been reduced to little more than predictive judgments — in which the Justices are effectively deciding at a preliminary stage just how likely they are to uphold the challenged law or policy on the merits. And although such judgments have always been *part* of the calculus, the per se satisfaction of the irreparable injury prong makes those judgments conclusive in the Supreme Court in a way that they might not be in the lower courts, which lack both the ability to read the Justices'

²²⁵ *Maryland v. King*, 567 U.S. 1301, 1303 (Roberts, Circuit Justice 2012) (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (Rehnquist, Circuit Justice 1977)).

minds and formal guidance as to the shift in the irreparable injury prong (whether or not the injunction is nationwide in its scope).

Perhaps the best evidence in support of this thesis comes from Justice Breyer's separate opinion respecting the Court's July 2019 grant of a stay in the *Sierra Club* litigation.²²⁶ Whereas the majority voted to grant the application in full, and Justices Ginsburg, Sotomayor, and Kagan would have denied it in full,²²⁷ Justice Breyer voted to split the difference. Emphasizing that, "[b]efore granting a stay, . . . we must still assess the competing claims of harm and balance the equities,"²²⁸ Justice Breyer complained that he could "find no justification for granting the stay in full, as the majority does."²²⁹ As he explained:

[T]here is a straightforward way to avoid harm to both the Government and respondents while allowing the litigation to proceed. Allowing the Government to finalize the contracts at issue, but not to begin construction, would alleviate the most pressing harm claimed by the Government without risking irreparable harm to respondents. Respondents do not suggest that they will be harmed by finalization of the contracts alone, and there is reason to believe they would not be.²³⁰

In a world in which the Court still *was* balancing the equities on the side of each party in such cases, Justice Breyer's reasoning would be unanswerable. But the reason it was not answered in *Sierra Club* appears to be because a majority did not believe that the irreparable harm a stay might cause to the *plaintiffs* was even relevant in light of the irreparable harm the underlying injunction inflicted upon the government. Justice Breyer was applying the old standard for emergency relief to the government, not the new one.²³¹

C. Potential Objections to the New Normal

Focusing on the Solicitor General's responsibility, then, misses the larger point — not only that the Justices have acquiesced in this uptick, but that they may themselves be responsible for it. In that respect, if this really is the new normal, it is worth flagging at least four different sets of reasons why it may not be a salutary development.

1. *The Messiness of Shadow Doctrine.* — If the shift really can be attributed at least in part to the Court's own adjustment (and relaxation) of its standards, having that shift reflected solely on the "shadow

²²⁶ See *Trump v. Sierra Club*, No. 19A60, 2019 WL 3369425 (U.S. July 26, 2019) (mem.).

²²⁷ *Id.* at *1.

²²⁸ *Id.* (Breyer, J., concurring in part and dissenting in part from grant of stay).

²²⁹ *Id.* at *2.

²³⁰ *Id.* at *1.

²³¹ In her dissenting opinion in the second asylum ban case, Justice Sotomayor similarly objected that the majority's decision to grant a stay was inconsistent with the Court's established standards for such "extraordinary" relief. See *Barr v. E. Bay Sanctuary Covenant*, No. 19A230, 2019 WL 4292781, at *1–3 (U.S. Sept. 11, 2019) (Sotomayor, J., dissenting from grant of stay).

docket,” and without opinions for the Court in which the shift is made clear, is likely to provoke only further uncertainty. Indeed, a similar phenomenon appeared to surface during the October 2018 Term with regard to the Justices’ approach to eleventh-hour applications for stays of execution in capital cases — in which an apparent ratcheting up of the standard for relief in such cases was (evidently) accomplished through a series of summary rulings denying or vacating stays.²³²

As Professor Will Baude has pointed out in that context, effecting such a doctrinal change through the “shadow docket” deprives affected parties (to say nothing of amici curiae) of the opportunity to fully brief and argue the issue; creates at least a possibility of arbitrariness in implementation; and leaves a fog of uncertainty as to exactly what the standards are in different categories of cases — a muddle that is as unhelpful to lower courts as it is to the parties.²³³ So too, here. If a reliable majority of the Justices are now of the view that the federal government is *generally* entitled to a stay whenever it has a colorable argument against a district court injunction, it would behoove all involved, including lower court judges ruling on applications for such relief, for the Court to say so. Otherwise, the Court risks the perception that the rule is not one for the federal government *in general*, but for the federal government at particular moments in time — perhaps depending upon the identity (or political affiliation) of the sitting President, or perhaps, more granularly, depending upon the political or ideological valence of the particular federal government policy at issue (which could be even less

²³² Compare, e.g., *Price v. Dunn*, 139 S. Ct. 1794, 1794–95 (2019) (Breyer, J., dissenting from denial of application for stay) (arguing that a death row inmate had not engaged in unreasonable delay in mounting a challenge to the method planned for his execution), and *Dunn v. Price*, 139 S. Ct. 1312, 1313–15 (2019) (Breyer, J., dissenting from grant of application to vacate stay) (same), with *Price v. Dunn*, 139 S. Ct. 1533, 1540 (2019) (Thomas, J., concurring in the denial of certiorari) (“The proper response to this maneuvering is to deny meritless requests expeditiously.”). Cf. *Bucklew v. Precythe*, 139 S. Ct. 1112, 1134 & n.5 (2019) (“Courts should police carefully against attempts to use [method-of-execution] challenges as tools to interpose unjustified delay.” *Id.* at 1134.). For media accounts, see Adam Liptak, *Rancor and Raw Emotion Surface in Supreme Court Death Penalty Ruling*, N.Y. TIMES (Apr. 1, 2019), <https://nyti.ms/2COgu8u> [<https://perma.cc/NB3S-US5Y>]; and Nina Totenberg, *Supreme Court’s Conservatives Defend Their Handling of Death Penalty Cases*, NPR (May 14, 2019, 5:00 AM), <https://www.npr.org/2019/05/14/722868203/supreme-courts-conservatives-defend-their-handling-of-death-penalty-cases> [<https://perma.cc/P7A4-73Q3>].

²³³ Will Baude, *Death and the Shadow Docket*, REASON: VOLOKH CONSPIRACY (Apr. 12, 2019, 3:30 PM), <https://reason.com/2019/04/12/death-and-the-shadow-docket/> [<https://perma.cc/78L8-RGWA>].

predictable, in a sense).²³⁴ As Baude wrote of the October 2018 Term's capital cases, "this is no way to run a railroad."²³⁵

2. *The Virtues of Percolation.* — Such a shift would also be radically inconsistent with what has become almost an article of faith among all of the Justices in recent years — that the Court does not reach out to decide important questions, even on an interim basis, before the lower courts have had a full opportunity to do so. The Court has identified a number of different reasons for such prudence — most of which derive from the very real possibility that a dispute that might have seemed grave and intractable at first blush is able to be fully and adequately resolved by the lower courts, sparing the Justices of the need to expend their heavily (self-)limited resources on cases they do not deem to be of sufficient importance or on issues they would, for whatever reason, just as soon not be forced to confront.²³⁶ Indeed, the Court still appears to follow these norms and rules in litigation between private parties — and even in cases in which the federal government *prevails* below. It is not obvious why the same justifications carry less weight when (but only when) the federal government is the complaining party.

As discussed above, in both the Travel Ban 2.0 cases and the first census case, the Court expended significant resources on multiple sets of government applications for emergency or extraordinary relief, ultimately granted those applications in part and denied them in part (over published dissents as to why they should have been granted in full), and set the cases for argument. When subsequent events within those cases mooted the questions presented, the Court cancelled oral argument, but not before most of the briefing was complete. In both contexts, the predictive judgments the Justices made in trying to structure the status quo necessarily failed to anticipate that, by the time the merits reached the Court, the status quo would have materially changed.

3. *The Problems With Predictions.* — As the saying goes, "it's tough to make predictions, especially about the future."²³⁷ The virtues of percolation do not end with the possibility that additional litigation will moot the factual or legal playing field; percolation also spares the Justices

²³⁴ For instance, on several occasions during the Obama Administration, the Supreme Court granted emergency relief to *private* parties (freezing politically controversial policies) after courts of appeals had rejected legal challenges thereto. *See, e.g.,* West Virginia v. EPA, 136 S. Ct. 1000 (2016) (mem.) (one of five related rulings granting stays pending appeal over four dissents); Wheaton College v. Burwell, 573 U.S. 958 (2014) (mem.) (granting an injunction pending appeal over three dissents). In contrast, there have been no examples to date of the Court granting emergency relief to a private party challenging a Trump Administration policy that was upheld by lower courts.

²³⁵ Baude, *supra* note 233 (emphasis omitted).

²³⁶ *See* H.W. PERRY, DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 230–34 (1991).

²³⁷ *See* Pamela S. Karlan, *Reapportionment, Nonapportionment, and Recovering Some Lost History of One Person, One Vote*, 59 WM. & MARY L. REV. 1921, 1922 & n.1 (2018) (noting the uncertain origins of this phrase).

from having to accurately predict what they will think about the same issues on the far side of those developments in cases in which the controversy remains live. There is also the distinct possibility that the Court that votes on a threshold application for relief will be different from the Court that ultimately hears the case on the merits — such that there may no longer be a majority, by the time the dispute returns, for sustaining the status quo that a prior majority of the Court sought to preserve. And tying emergency or extraordinary relief almost entirely to predictive judgments about the merits also raises a cause-and-effect concern — that the same Justices may feel pressure to abide by the consequences of their original votes (and opinions respecting those votes), even if the subsequent litigation unfolds in a manner that calls that vote into question.²³⁸

4. (*The Appearance of*) *Substantive and Procedural Inequity*. — Finally, and perhaps most importantly, tolerating, if not affirmatively inviting, such aggressive litigating behavior by the Solicitor General sets the Court up for charges of unfairness and arbitrariness when it does not facilitate comparable behavior by, or afford comparable relief to, private parties. For example, the Court’s deep-seated aversion to issuing “original” writs of habeas corpus nearly caused a real crisis in the aftermath of its ruling in *Johnson v. United States*,²³⁹ when thousands of federal prisoners who were otherwise entitled to benefit from *Johnson* had no mechanism through which to prompt the Supreme Court to hold that *Johnson* was retroactive — a predicate to any second-or-successive application for postconviction relief under 28 U.S.C. § 2255(h).²⁴⁰ And just last Term, the Court’s willingness to accommodate, or at least tolerate, the government’s repeated requests for expedition were invoked by private parties in favor of an attempt to have the Justices resolve the legality and constitutionality of the appointment of then-Acting Attorney General Matthew Whitaker, even though no lower court had yet ruled on the subject. When the Solicitor General urged the Court to follow its regular procedures in response, it provoked a charge that the Court now has two sets of procedural rules: one for the federal government and one for all other parties.²⁴¹

²³⁸ See, e.g., G. Edward White, *Felix Frankfurter’s “Soliloquy” in Ex parte Quirin*, 5 GREEN BAG 2D 423, 440 (2002) (summarizing and publishing a memorandum Justice Frankfurter circulated to his colleagues between the Court’s initial judgment and its later, published opinion in *Ex parte Quirin*, 317 U.S. 1 (1942), which admonished his colleagues not to call the original judgment into question).

²³⁹ 135 S. Ct. 2551 (2015).

²⁴⁰ See Stephen I. Vladeck, *Using the Supreme Court’s Original Habeas Jurisdiction to “Ma[k]e” New Rules Retroactive*, 28 FED. SENT’G REP. 225, 225, 227–29 (2016).

²⁴¹ Reply in Support of Motion to Substitute at 5 n.2, *Michaels v. Sessions*, 139 S. Ct. 936 (2019) (mem.) (No. 18-496), 2018 WL 6651244.

Especially in this fraught moment in American political discourse, that is a charge of which the Justices ought to be wary²⁴² — not only because of the appearance of substantive favoritism, but also because of the potential impact on their docket. For a Court that continues to take roughly the same total number of cases each Term, and that tends to actually discuss only a small percentage of pending matters formally slated for discussion at its weekly conference (versus those matters that are “dead listed”),²⁴³ the uptick in emergency applications from the government — often in the same case — necessarily comes at the expense of the Justices’ ability to consider other matters. And, as in the Travel Ban 2.0 cases and the first round of the 2020 Census case, often for naught.

CONCLUSION

Many will understandably see these concerns as outweighed by the benefits of a more solicitous Supreme Court when it comes to government applications for emergency or extraordinary relief. So be it. What cannot be gainsaid is that these concerns *exist* — and that there are therefore costs to this new normal even in contexts in which the Justices’ predictive judgments turn out to be accurate (and especially when they do not).

The Solicitor General may be tantamount to the “tenth Justice,” but like so many of the rest of us, he takes his cues from the other nine. And insofar as the Solicitor General’s increased resort to emergency or extraordinary relief may reflect that office’s increasing prioritization of the politics of the moment over longer-term institutional considerations, the fact that it has not provoked any visible backlash (let alone a sharp one) suggests that a majority of the Justices’ focus may have shifted along similar lines. Reasonable minds will surely disagree about the virtues and vices of such a development, but we should all have common cause in encouraging the Court to formalize any such shift — and to bring it out of the shadows.

²⁴² Cf. Tara Leigh Grove, *The Origins (and Fragility) of Judicial Independence*, 71 VAND. L. REV. 465, 544 (2018) (“These conventions of judicial independence have been built over time, and could be deconstructed — or, alternatively, expanded — if we alter the way in which we think and talk about the federal judicial power.”).

²⁴³ See Gregory A. Caldeira & John R. Wright, *The Discuss List: Agenda Building in the Supreme Court*, 24 LAW & SOC’Y REV. 807, 812 (1990); see also PERRY, *supra* note 236, at 85 (noting that the “dead list” includes “all cases considered not worthy of discussion”).

APPENDIX

*Government Requests for Emergency or Extraordinary Relief
from the Supreme Court (Jan. 20, 2001 — Sept. 30, 2019)^a*

Table 1: Petitions for Writs of Certiorari Before Judgment

Docket	Caption	Disposition	Date
04-105	United States v. Fanfan	Granted	Aug. 2, 2004
12-16	Office of Pers. Mgmt. v. Golinski	Denied	June 27, 2013
12-302	Office of Pers. Mgmt. v. Pedersen	Denied	June 27, 2013
12-307	United States v. Windsor	Granted ^b	Dec. 7, 2012
17-1003	Dep't of Homeland Sec. v. Regents of the Univ. of Cal.	Denied	Feb. 26, 2018
18-587	Dep't of Homeland Sec. v. Regents of the Univ. of Cal.	Granted ^c	June 28, 2019
18-588	Trump v. NAACP	Granted	June 28, 2019
18-589	McAleenan v. Vidal	Granted	June 28, 2019
18-676	Trump v. Karnoski	Denied	Jan. 22, 2019
18-677	Trump v. Doe 2	Denied	Jan. 22, 2019
18-678	Trump v. Stockman	Denied	Jan. 22, 2019
18-966	Dep't of Commerce v. New York	Granted	Feb. 15, 2019
18-1214	Ross v. California	Granted	June 28, 2019

^a For details on the methodology behind the identification of cases in the Appendix, see *supra* note 61. Each of the tables is sorted in order of docket number.

^b By the time the Court granted certiorari, the Second Circuit had ruled on the merits, such that the petition was no longer for a writ “before judgment.” See *supra* p. 133.

^c By the time the Court granted certiorari, the Ninth Circuit had ruled on the merits, such that the petition was no longer for a writ “before judgment.” See *supra* p. 141.

Table 2: Extraordinary Writs

Docket	Caption	Disposition	Date
17-801	<i>In re</i> United States	Granted ^a	Dec. 20, 2017
18-505	<i>In re</i> United States	Dismissed	July 29, 2019
18-557	Dep't of Commerce v. U.S. Dist. Court	Granted ^b	Nov. 16, 2018

^a The government's petition in No. 17-801 sought a writ of mandamus, and asked for certiorari in the alternative to review the Ninth Circuit's denial of the government's petition for a writ of mandamus from that court. The Court construed it as the latter, and granted certiorari. *See In re United States*, 138 S. Ct. 443, 444 (2017) (per curiam).

^b The government's petition in No. 18-557 sought a writ of mandamus, and asked for certiorari in the alternative to review the Second Circuit's denial of the government's petition for a writ of mandamus from that court. The Court construed it as the latter, and granted certiorari. *See In re Dep't of Commerce*, 139 S. Ct. 566 (2018) (mem.).

Table 3: Applications for Stays and Applications to Vacate Stays

Docket	Caption	Disposition	Date
01A991	Ashcroft v. N.J. Media Grp.	Granted	June 28, 2002
03A637	Bush v. Ghorebi	Granted	Feb. 5, 2004
04A469	Ashcroft v. O Centro Espírita Beneficente União do Vegetal	Denied	Dec. 10, 2004
05A231	Rumsfeld v. Rell	Denied without prejudice	Sept. 8, 2005
07A677	Gates v. Bismullah	Denied	June 23, 2008
08A794	Dep't of Health & Human Servs. v. Alley	Granted	Mar. 25, 2009
08A863	United States v. Comstock	Granted	Apr. 3, 2009
14A404	United States v. Texas	Denied	Oct. 18, 2014
16A1190	Trump v. Int'l Refugee Assistance Project	Granted/denied in part	June 26, 2017
16A1191	Trump v. Hawaii	Granted/denied in part	June 26, 2017
16A1191 ^a	Trump v. Hawaii	Granted	July 19, 2017
17A275	Trump v. Hawaii	Granted	Sept. 12, 2017

17A550	Trump v. Hawaii	Granted	Dec. 4, 2017
17A560	Trump v. Int'l Refugee Assistance Project	Granted	Dec. 4, 2017
17A570	<i>In re</i> United States	Granted	Dec. 8, 2017
17A655	Hargan v. Garza	Withdrawn	Dec. 19, 2017
17A1379	Sessions v. City of Chicago	Withdrawn	June 27, 2018
18A65	United States v. U.S. Dist. Court	Denied without prejudice	July 30, 2018
18A276	Trump v. U.S. Dist. Court	Withdrawn	Sept. 17, 2018
18A350	<i>In re</i> Dep't of Commerce	Denied without prejudice	Oct. 5, 2018
18A375	<i>In re</i> Dep't of Commerce	Granted/denied in part	Oct. 22, 2018
18A410	<i>In re</i> United States	Denied without prejudice	Nov. 2, 2018
18A455	<i>In re</i> Dep't of Commerce	Denied	Nov. 2, 2018
18A615	Trump v. E. Bay Sanctuary Covenant	Denied	Dec. 21, 2018
18A625	Trump v. Karnoski	Granted	Jan. 22, 2019
18A626	Trump v. Doe 2	Denied	Jan. 22, 2019
18A627	Trump v. Stockman	Granted	Jan. 22, 2019
19A60	Trump v. Sierra Club	Granted	July 26, 2019
19A230	Barr v. E. Bay Sanctuary Covenant	Granted	Sept. 11, 2019

^a The government did not separately apply for a second stay under the same docket number. Rather, the Court treated the government's "motion to clarify" in No. 16-1540 as an application for a stay, and granted the application. *See supra* p. 137. As noted above, I have only treated such alternative relief as a *request* for such relief when it was granted. *See supra* note 61.