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The Supreme Court Should Eliminate Its Lawless Shadow Docket

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Introduction

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

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

A court can grant a motion to enjoin a government action pending the outcome of review on the merits only if it determines that the petitioners are likely to prevail on the merits; failure to grant the preliminary injunction would cause irreparable harm that exceeds the irreparable harm that would result from a decision to deny the motion for a preliminary injunction; and issuance of the injunction will not disserve the public interest.[5] The criteria applicable to grant of a stay are identical to the criteria applicable to grant of a motion for a preliminary injunction.[6] In the context of major government actions, courts tend to focus primarily on the first factor—whether the petitioner is likely to prevail on the merits. In that context, either grant or denial of a stay is likely to cause irreparable harm, and the court is likely to conclude that the public interest would be served by staying the action if the petitioner is likely to prevail on the merits and that the public interest would be served by refusing to stay the action if the petitioner is not likely to prevail on the merits.

As recently as 2016, I characterized as "rare" decisions in which courts grant preliminary injunctions that block agencies from implementing an action until the court decides the merits of the

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[2] See generally Vetan Kapoor and Judge Trevor McFadden, *Symposium: The Precedential Effects of Shadow Docket Stays*, SCOTUSBLOG (Oct. 28, 2020, 9:18 AM), https://www.scotusblog.com/2020/10/symposium-the-precedential-effects-of-shadow-docket-stays.

[3] William Baude first coined the term "Shadow Docket" in 2015, although the practice itself stretches back decades. *See* William Baude, *Foreword: The Supreme Court's Shadow Docket, 9 N.Y.U. J. L. & Liberty 1 (*2015).

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

[5] *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam).

[6] *Nken v. Holder*, 556 U.S. 418, 429 n.1 (2009).

action.[7] Until recently, the Supreme Court rarely granted a stay of either an agency action or a preliminary injunction that stopped an agency from implementing an agency action pending review of the action. Both preliminary injunctions and stays were considered extraordinary remedies that courts provided to preserve the status quo ante only when there were unusually good reasons to believe that an action taken by an agency or a court was unlawful and then only for the relatively short time required to review the action on the merits.

That situation has changed dramatically in recent years. When the president or an agency takes any major action, the state attorney generals who are members of the opposite party file both a complaint and a motion for preliminary injunction in a district court with a track record of decisions that favor the interests and perspectives of their party. The district court then issues a preliminary injunction. The average number of nationwide preliminary injunctions issued by district courts has increased over the past decade from three per year to eighteen per year.[8]

After a district court issues a preliminary injunction, the federal government can file a motion to stay the district court action in a circuit court. If the circuit court denies the motion, the government can file a motion for stay at the Supreme Court. The Supreme Court then grants or denies the stay without issuing an opinion. If it stays the preliminary injunction, the stay remains in effect until such time as the Supreme Court reviews the merits of the action. During that time the government can implement the action that was the subject of the preliminary injunction. The number of cases in which the government has sought such a stay has increased over the last decade from less than one per year to over ten per year.[9]

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

If the Court grants the stay, its unexplained order granting the stay allows the agency or the president to take the action, thereby rendering moot the dispute with respect to the legality of the action. Thus, for instance, we will never know whether President Trump's reallocation of many billions of dollars from projects for which Congress had appropriated funds to construction of a wall across the southern

[7] KRISTIN E. HICKMAN & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE §20.2 (6th ed. 2016).

[8] A recent in-depth historical review of nationwide injunctions found that the practice extends as far back as 1939, see Mila Sohoni, *The Lost History of the "Universal" Injunction*, 133 Harv. L. Rev. 920, 925 (2020), but there were only a handful of examples in the first half of the 20th century. There was a significant increase in recent years. Federal courts issued 12 nationwide injunctions against the George W. Bush administration, while 19 nationwide injunctions were issued against the Obama Administration, a 58% increase. By early 2020, federal courts had issued at least 55 nationwide injunctions against the Trump Administration, a rate of 18 nationwide injunctions per year. *See* U.S. DEP'T OF JUSTICE, *Deputy Attorney General Jeffrey A. Rosen Delivers Opening Remarks at Forum on Nationwide Injunctions and Federal Regulatory Programs* (Feb. 12, 2020), https://www.justice.gov/opa/speech/deputy-attorney-general-jeffrey-rosen-delivers-opening-remarks-forum-nationwide.

[9] Stephen Vladeck, *The Solicitor General and the Shadow Docket*, 133 Harv. L. Rev. 123 (2019).

border was lawful or what, if any, limits apply to any future "emergency" presidential reallocations of funds.[10]

Conversely, if the Supreme Court denies the stay of the preliminary injunction or issues its own stay of the agency action without explaining its action, the agency is unlikely to attempt to take the action in the future because of its expectation that the Supreme Court would block the agency action again without providing any explanation for its decision. Thus, for instance, we will never know why the Court stayed the Clean Power Plan, the most significant action the government has taken in its efforts to mitigate climate change.[11] We can guess that the Court believed that the EPA action was unlawful in some respect, but we will never know which of the six arguments that the petitioners made in support of their motion to stay the action persuaded the Court that they were likely to prevail on the merits.[12]

There are many variations of this now common sequence of actions. Sometimes, the Supreme Court denies the stay of the preliminary injunction without opinion, thereby leaving the preliminary injunction in effect pending the outcome of the proceeding to review the merits of the action. Years later, the Supreme Court has not yet issued any opinion in the case when a change in the party that controls the Executive Branch creates conditions in which the government withdraws its support for the agency action, thereby making it unlikely that the Court will ever issue an opinion on the merits of the agency action.[13]

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

In a typical case, there are many plausible reasons for that disagreement, and we can only speculate about the Court's reasons for disagreeing with the district judge. The disagreements could be based on the Court's evaluation of one of several alleged substantive flaws in the agency decision, one or more alleged flaws in the procedures the agency used to make the decision, the district court's reasons for concluding that the public interest favored issuance of the preliminary injunction, or the district court's reasons for concluding that the preliminary injunction was required to avoid some form of irreparable harm to the petitioners that exceeds the irreparable harm that the government would suffer as a result of issuance of the preliminary injunction.

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[10] Two years after it overruled a decision by the Ninth Circuit Court of Appeals and granted a stay that allowed the Trump Administration to reallocate funds for the construction of a border wall in 2019 in *Trump v. Sierra Club*, 140 S.Ct. 1, the Court has yet to issue a decision on the merits. The Court is unlikely ever to address the merits of the case. The Biden administration has stated its intention not to spend any more of the reallocated funds and has asked the Supreme Court to dismiss the case that challenged the reallocation.

[11] West Virginia v. EPA, 136 S.Ct. 1000 (2016).*See* Courtney Scobie, *Supreme Court Stays EPA's Clean Power Plan*, ABA J. (Feb. 17, 2016) https://www.americanbar.org/groups/litigation/committees/environmental-energy/practice/2016/021716-energy-supreme-court-stays-epas-clean-power-plan/

[12] *See generally* Brief for Petitioner, West Virginia v. EPA, 577 U.S. 1126 (2016).

[13] *See Trump v. Sierra Club*, 140 S.C. 1 (2019).

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

An Illustrative Case

I will illustrate the reasons for my concern about the shadow docket by describing yet another variation of the typical sequence. During the Obama administration, EPA issued the Clean Power Plan (CPP).[14] The CPP was by far the most ambitious attempt by the government to reduce the rate at which the climate is changing. It required massive fuel-switching by electric utilities from coal to natural gas and from coal to wind or solar.[15] Since use of natural gas to generate electricity produces less than half the emissions of carbon dioxide that use of coal produces, and use of solar or wind to generate electricity produces no emissions of carbon dioxide, fuel switching is by far the most effective way of reducing the effects of electricity generation on climate change.

Many Republican State Attorney Generals joined many electric generating companies in filing petitions to review the CPP and motions to stay the CPP. The. D.C. Circuit denied their motion for a stay.[16] The Supreme Court then took the unprecedented action of granting the stay before any court issued an opinion on the merits.[17] The Justices divided five to four but neither the majority nor the dissent wrote an opinion. The stay was to last until either the D.C. Circuit issues an opinion on the merits of the CPP and the Supreme Court denies a petition for a writ of certiorari to review the D.C. Circuit opinion or the Supreme Court issues a decision on the merits of the CPP. It is unlikely that either of those events will ever take place.

In 2019, EPA in the Trump administration repudiated the CPP and replaced it with the Affordable Clean Energy rule (ACE).[18] The D.C. Circuit dismissed the petitions to review the CPP in light of the combination of the Supreme Court's stay of the CPP and the EPA's repudiation of the CPP. Many Democratic State Attorney Generals joined numerous environmental advocacy organizations in filing

[14] 80 Fed. Reg. 64,661 (2015).
[15] The CPP is described in detail in Emily Hammond & Richard Pierce, *The Clean Power Plan: Testing the Limits of Administrative Law and the Electric Grid*, 7 G.W. J. En. & Env. 1 (2016).
[16] *See* West Virginia v. EPA, No. 15-1363 (D.C. Cir. Jan. 21, 2016).
[17] *See* West Virginia v. EPA, 136 S. Ct. 1000 (Mem) (2016).
[18] 84 Fed. Reg. 32,523 (2019).

petitions to review the ACE rule. A divided panel of the D.C. Circuit then vacated the ACE rule based on its holding that the rule was unlawful.[19] Both the majority and the dissent wrote lengthy opinions.[20]

Depending on whether you believe the claims of the EPA in the Trump administration or the claims of the petitioners, the ACE rule would have had either modest beneficial effects in mitigating climate change by slightly reducing emissions of carbon dioxide or it would actually have accelerated the rate at which the climate is changing by increasing emissions of carbon dioxide. The Trump EPA attempted to defend the ACE rule based on only one argument—that issuance of the ACE rule was the most effective action that EPA could take to mitigate climate change because EPA lacked the power to issue the far more effective CPP.[21] That lone justification for issuing the ACE rule created a strange situation. The D.C. Circuit could decide whether the ACE rule was valid only by deciding whether the CPP that was issued by the Obama EPA and repudiated by the Trump EPA was lawful.

The petitioners who persuaded the Supreme Court to stay the CPP argued that it was invalid for six reasons.[22] The members of the D.C. Circuit who debated the validity of the ACE rule wrote lengthy opinions in which they debated the merits of each of the six arguments that EPA and its allies made in support of EPA's decision to repudiate the CPP and to issue the ACE rule. Those were the same arguments that the petitioners who challenged the validity of the CPP used to persuade the Supreme Court to stay the CPP.[23] As a result, we now know a great deal about the contrasting views of three members of the D.C. Circuit with respect to the issues raised by the CPP and the ACE rule.

We also know that the D.C. Circuit has, in effect, upheld the validity of the CPP in its opinion on the merits of the ACE rule.[24] As the dissenting judge noted, however, it is difficult to reconcile the D.C. Circuit's opinion on the merits of the ACE rule and the CPP with the Supreme Court's order that stayed the CPP.[25] The Supreme Court's stay order almost certainly was based in part on the views of five Justices that the EPA was unlikely to be able to support the legality of the CPP on the merits. It follows that a majority of Justices almost certainly disagree with the reasoning and conclusion of the majority of the D.C. Circuit panel with respect to one or more of the six important issues that the D.C. Circuit resolved in the process of holding that the ACE rule was invalid because the CPP was valid.

We will never know the views of the Justices on the six important issues that the D.C. Circuit resolved in ways that almost certainly are inconsistent with the views of a majority of Justices. EPA in the

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[19] *See* Am. Lung Ass'n v. EPA, 985 F. 3d 914 (D.C. Cir. 2021).

[20] *See id*. (Walker, J., concurring in part, dissenting in part).

[21] Brief for Respondents, *Am. Lung Ass'n v. EPA*, 985 F. 3d 914 (D.C. Cir. 2021) (No. 19-1140), 2020 WL 4729111.

[22] The majority rejected the arguments that: (1)) the Clean Air Act (CAA) authorizes EPA only to apply emission reduction measures at and to a stationary source, *Am. Lung Ass'n v. EPA*, 985 F. 3d at 943-957; (2) the CPP is an extraordinary measure that cannot be supported solely by relying on an ambiguous statutory provision, *id.* at 957-967; (3) EPA lacks the expertise with respect to generation of electricity required to make the many technical decisions that are reflected in the CPP, *id.* at 967-968; (4) the CPP is inconsistent with the principles of federalism that are embedded in the constitution, *id.* at 968-971; (5) the CPP is invalid because Congress amended the CAA to preclude the EPA from using both section 7411(d) and section 7412 as the basis for regulating electric generating companies, *id.* at 977-989; (6) the endangerment finding that was the basis for the CPP was not adequately supported by evidence, *id.* at 972-977.

[23] *See* Brief for Petitioners, West Virginia v. EPA, S.Ct. Docket No. 15A773.

[24] *See Am. Lung Ass'n v. EPA*, 985 F. 3d at 957-968.

[25] *See id.* at 999-1002 (Walker, J., concurring in part, dissenting in part).

Biden administration has withdrawn its support for the ACE rule, so the Supreme Court will not have occasion to address those issues in the process of reviewing the merits of the ACE rule. The Supreme Court is also highly unlikely to have an opportunity to address the merits of the CPP directly. The D.C. Circuit understandably dismissed the petitions to review the CPP once the EPA in the Trump administration repudiated it. EPA in the Biden administration is highly unlikely to attempt to reissue the CPP because of the extraordinary negative reception that it got from the Supreme Court when it was issued by EPA during the Obama administration.

This sequence of actions and its many variants have created a situation in which the Supreme Court is taking actions on its shadow docket that have a wide variety of permanent major effects without ever providing any explanation for its actions. The Supreme Court's shadow docket is large and growing. During the George W. Bush and Obama administrations from 2000-2016, the federal government only sought emergency injunctive relief from the Supreme Court eight times in total, and the Court granted only four of those requests. In contrast, the Trump Administration sought emergency relief from the Supreme Court 41 times in four years, and the Court granted 28 of those requests either in full or in part.[26]

The Supreme Court's actions in this important line of cases contrasts starkly with the approach the Court has taken when it has reviewed agency actions on the merits during the same period of time. In many of its opinions issued during the last few years the Court has emphasized the importance of the duty to engage in reasoned decision making.[27] The Court has held numerous agency actions unlawful because the agency did not comply with the most fundamental duty of any agency or court—it failed to provide an explanation for its action that is anchored in the language of statutes or the constitution and consistent with the available evidence.

I have joined many other scholars in praising this line of cases.[28] It is ironic and disturbing that the Supreme Court has taken many actions that have major permanent effects without providing any legal basis for those actions during this same period of time. The Court would have held all of the actions it took on its shadow docket to be arbitrary, capricious, and not in accordance with law if they had been taken by any agency. It is not an overstatement to characterize this long list of Supreme Court actions as lawless, in the sense that the Court has never provided any explanation for any of the actions.

How Did We Get Here?

We now have a situation in which a high proportion of major judicial decisions are made by the Supreme Court without providing any reasons for the decisions. To understand how we reached this point we must start with the extreme political polarization that now characterizes the country.[29] That polarization has been growing for decades.[30] When it is combined with the unusually difficult process that

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

[27] E.g., Department of Commerce v. New York, 141 S.Ct. 530 (2020); Trump v. Vance, 140 S.Ct. 2412 (2020); Trump v. Mazars, 140 S.Ct. 2019 (2020); Department of Homeland Security v. Regents of University of California, 140 S. Ct. 1891 (2020); Trump v. Hawaii, 138 S.Ct. 2392 (2018).

[28] E.g., Benjamin Edelson, *Reasoned Explanation and Political Accountability in the Roberts Court*, forthcoming in Yale L. J. (2021); Richard Pierce, *Reason Trumps Pretext*, The Regulatory Review July 30, 2020).

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

[30] *See id*.

the U.S. Constitution requires to enact a statute, political polarization makes it extremely difficult for Congress to enact or amend any major regulatory statute.[31]

As a result, when an agency encounters a new problem it typically must search for a solution in a statute that was enacted thirty to eighty years ago by a Congress that could not have anticipated the problem that the agency is attempting to address.[32] Thus, for instance, when the FCC decides how to regulate internet service providers, it must rely primarily on the Communications Act of 1934,[33] a statute that was enacted long before the internet was created. Similarly, when EPA decides how to mitigate climate change, it must rely primarily on the Clean Air Act (CAA) of 1970.[34] The CAA was last amended in 1990, and those amendments did not address climate change.

When a newly elected president takes office in these political conditions, his advisors tell him that it would be an exercise in futility to attempt to persuade Congress to enact or amend a statute by giving an agency the tools it needs to address today's problems.[35] The president then must choose either to ignore today's problems or to instruct agencies to search through old statutes to find some provision that might provide a mechanism to address a modern problem.[36] The agency then finds the best candidate among the old statutory provisions and attempts to use it as the basis for an action that will address the new problem. In today's legal environment, the agency almost always must base its actions on a provision of an old statute that was never intended to be used for the purpose of addressing a modern problem.

Leaders of the opposition party are incensed by the administration's attempt to stretch its statutory authority in an effort to address a problem in a way that is favored by the president's party but that is strongly opposed by the opposition party.[37] The Supreme Court has empowered one subset of those opposition party leaders to take immediate action when they believe that the administration has overstepped its statutory boundaries. In its 2007 opinion *in Massachusetts v. EPA*, the Court held that states always have standing to challenge any action of the federal government that threatens any sovereign interest of a state. [38]

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

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[31] For detailed discussion of this problem, see Richard Pierce, *The Combination of Chevron and Political Polarity Is Creating Awful Problems*, 70 Duke L. J. Online (2021); Richard Pierce, *Delegation, Time and Congressional Capacity: A Response to Adler & Walker*, 105 Iowa L. Rev. Online 1 (2020).

[32] See Jonathan Adler & Christopher Walker, *Delegation and Time, 105 Iowa L. Rev. 1931 (2020).*

[33] 47 U.S.C. §§151 et seq, P.L. 73-416, 73d Cong. (1934), applied in Mozilla Corp. v. FCC, 940 F. 3d 1 (2015).

[34] 42 U.S.C. §§7401 et seq, discussed in EPA, *Evolution of the Clean Air Act* (2021).

[35] *See* Pierce, supra. note 32.

[36] *See* Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1, 12 (Dec. 2014).

[37] *See* Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123, 124 (2021).

[38] 549 U.S. 497, 516-21 (2007).

Since the jurisdiction and venue provisions of most of the statutes that agencies rely on as the basis for major actions allow complaints to be filed in any district, the attorney generals then search the nation for the district court that is most likely to view the major agency action with suspicion and to view the arguments of the Attorney Generals with sympathy. They then file a complaint and a motion for a preliminary injunction in that district court. In most cases, they are successful in obtaining the preliminary judgment. The preliminary injunctions vary in scope. Some are limited to the district in which the court sits, but many are nationwide.

The agency then files a motion for a stay of the preliminary injunction in a circuit court. If the circuit court denies the motion, the government files a motion for stay in the Supreme Court. In some cases, the Court grants the stay, typically until such time as the Supreme Court either decides the case on the merits or denies a petition for a writ of certiorari with respect to a circuit court opinion that decides the merits of the case. In other cases, the Court denies the stay of the preliminary injunction. The Court never accompanies its order granting or denying a stay with an opinion in which it explains why it granted or denied the stay, though individual Justices sometimes write concurring or dissenting opinions in which they provide some explanation for their vote.[39]

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

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

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

If a district judge concludes that a federal action that is the subject of a petition for review and a motion for a preliminary injunction is probably unlawful and would cause irreparable harm, it is entirely appropriate for the judge to grant the motion for a preliminary injunction. It is also entirely appropriate for a majority of Supreme Court Justices to stay the preliminary injunction if they disagree with the district court's evaluation of the likely resolution of the merits of the dispute and for the Justices to allow the preliminary injunction to remain in effect if they agree with the district court. It would make sense for the

[39] For reasons that the Court has never articulated, it does write an opinion when it issues a preliminary injunction against a state action. See, e.g., Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S.Ct. 63 (2020).

Court to grant or deny a motion for stay without writing an opinion in which it explains its action if the stay is likely to remain in effect only for a brief period, but that is rarely the case.

The Supreme Court's increased tendency to stay major government actions and to refuse to stay preliminary injunctions of major government actions issued by lower courts is understandable. In 2015, the Justices got a rude awakening to the reality that their decisions on the merits of major government actions often have no real effect unless the government action is stayed pending review. In *Michigan v. EPA*, the Court held that a major EPA action was invalid because the agency had not adequately considered the cost of the action.[40] The Court reversed the action and remanded the case to allow the EPA to comply with its decision and to allow the circuit court to decide whether the EPA's action on remand complied with the Supreme Court's mandate.[41] Immediately after the Supreme Court issued that decision, EPA told the press that the Court's decision would have no real effect because the firms that were the targets of the EPA action—electric utilities--had already made the billions of dollars of expenditures required to comply with the action.[42]

The firms confirmed the accuracy of the EPA's assertion shortly thereafter.[43] The D.C. Circuit convened an oral argument on remand from the Supreme Court's decision to decide whether to vacate the agency action pending the outcome of the proceedings on remand.[44] I attended that argument. During the argument, counsel for the utilities asked the D.C. Circuit not to vacate the action even though the utilities were among the petitioners that had persuaded the Supreme Court to hold the action invalid.[45] Counsel for the utilities explained that the utilities had already made the expenditures needed to comply with the agency action and had persuaded their state public utility commissions to allow them to recover their costs of compliance in the rates that they charge their customers. The utilities feared that a court decision vacating the agency action would induce state regulators to disallow their costs of compliance with the rule on the basis that they were not necessary expenditures. The D.C. Circuit complied with that request and declined to vacate the agency action that the Supreme Court had held to be invalid.[46]

The statements of EPA and the utilities sent the message to the Court that its decisions holding government actions invalid are exercises in futility in many cases unless the Supreme Court or a lower court stays the government action immediately after the government announces the action. The Court's unprecedented decision to stay the CPP before any court had an opportunity to address the merits of the CPP was a logical response to the message that the Court got from those statements. The Court recognized

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[40] 576 U.S. 743 (2015).

[41] *See* i*d*.; Timothy Cama & Lydia Wheeler, *Supreme Court overturns landmark EPA air pollution rule*, (JUNE 29, 2015, 10:38 AM), https://thehill.com/policy/energy-environment/246423-supreme-court-overturns-epa-air-pollution-rule?rl=1

[42] *See* Emily Holden et al., *Mercury Regs Ruling Emboldens Clean Power Plan critics, but Few Changes Seen for Utilities*, E&E NEWS, (June 30, 2015), https://www.eenews.net/stories/1060021072. As many as 70 percent of affected sources may already have been in compliance.

[43] *See id.*

[44] *See* Timony Cama, *Court refuses to overturn air pollution rule despite Supreme Court defeat*, THE HILL (December 15, 2015, 10:43 PM), https://thehill.com/policy/energy-environment/263234-court-upholds-epa-air-pollution-rule

[45] *See White Stallion Energy Center v. E.P.A.*, *2015 WL 11051103 (D.C. Cir. 2014).

[46] *See Mercury Power Plant Rule Left Intact by DC Circ.*, LAW 360, https://www.law360.com/articles/737964 (Dec. 15, 2015).

that it must stay a government action if it believes that it eventually will hold the action invalid to avoid issuing opinions on the merits that are irrelevant by the time that they are issued.

Thus, it is easy to explain and to defend the steps taken by presidents, state attorney generals, district judges, and Supreme Court Justices that have produced the enormous increase in the Supreme Court's shadow docket. Yet, that sequence of actions has produced an unacceptable situation.[47] The Supreme Court is now making many decisions that have massive permanent effects without ever issuing an opinion in which it explains why it has made the decision. Thus, for instance, we will never know whether President Trump's unprecedented decision to reallocate billions of dollars in funds that Congress had appropriated for other purposes to build a wall across the southern border was a lawful exercise of the president's emergency power, even though that action was implemented. We will also never know whether EPA's decision during the Obama administration to take the most effective action to mitigate climate change that the country has ever taken was lawful even though that action was permanently blocked by the Supreme Court's decision.

We can guess that five Justices considered President Trump's action to be legal and President Obama's action to be illegal, since the Court stayed the Obama action but declined to stay the Trump action. Even if that educated guess is accurate, we will never know why President Trump's action was legal and why President Obama's action was illegal. That is an unacceptable situation in a country that claims to be governed by the rule of law. As the Supreme Court has repeatedly emphasized in other contexts, compliance with the duty to engage in reasoned decision making is one of the most important requirements of the rule of law.[48]

Potential Solutions

Ideally, we should address this problem at its source—the inability of Congress to legislate. I have proposed some potential ways of addressing that problem,[49] but it is not realistic to assume that Congress will adopt those proposals or implement any other means of enhancing its power to legislate in the near future. There is also no reason to expect that the extreme political polarity that underlies congressional impotence will abate any time soon.

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

When a president of either party stretch's the statutory authority of the executive branch to take such an action, the next step is inevitable in today's politically polarized environment. Leaders of the opposition party will try to stop the president from taking the action by filing a complaint coupled with a motion for a preliminary injunction. The Supreme Court could make it harder for state Attorney Generals of the opposite party to succeed in blocking the president's actions by overruling the five-to-four

[47] *See* Paul J. Larkin, Jr. & GianCarlo Canaparo, *One Ring to Rule Them All: Individual Judgements, Nationwide Injunctions*, *and Universal Handcuffs*, 96 NOTRE DAME L. REV. REFLECTION 55, 56-57 (2020).
[48] See cases cited in note 28 supra.
[49] See sources cited in note 38 supra.

precedent that ensures that they will almost always have standing to obtain review of the actions that they oppose.

That attempt to remedy the problem would be largely ineffective, however. In most cases there would be other parties who have an incentive to seek review and the ability to demonstrate that they have suffered the "concrete and particularized injury-in-fact" caused by the action that is required to obtain standing to obtain review of the action.[50] In the few cases in which no party with standing seeks review, the lack of a petitioner with standing will be attributable to the breadth of the injuries caused by the action. It would be strange if the Court began to acquiesce tacitly but routinely in presidential actions that are illegal but are unreviewable because they cause severe injuries that are "shared by the many."[51]

Congress could address the problem by making it more difficult for state Attorney Generals to file their petitions for review in courts that they have chosen based on their well-founded belief that the court has a strong bias in favor of the views of the Attorney Generals' party and against the views of the President's party. Congress could eliminate the opportunity to engage in forum shopping by specifying that all petitions for review can be filed only in the D.C. Circuit or only in a special three-judge district court. That would reduce the problem to some uncertain extent, but it would create other problems, e.g., it would concentrate power in a few judges. Moreover, it is totally unrealistic to expect Congress to take any action to address the problem in today's conditions of extreme political polarity.

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

The Court could issue an opinion in which it emphasizes the need for courts to exercise restraint in applying that standard, but it is not clear that any such opinion would have the desired effect. The Court attempted to send district courts the message that they should exercise restraint in issuing preliminary injunctions in its 2008 opinion in *Winter v. NRDC*,[52] but there is no evidence that district courts have internalized that message and changed their approach. In fact, district courts have increased significantly the number of preliminary injunctions that they have issued since 2008.[53]

Moreover, any action that the Court takes to limit the power of district courts to enjoin or stay government actions would not apply to the Supreme Court itself. The "temporary" stay the Supreme Court issued to stop the Obama EPA from implementing the Clean Power Plan and the many cases in which the Court has refused to stay preliminary injunctions issued by district courts suggest that the Supreme Court believes that courts should enjoin agency's from implementing an action pending the outcome of proceedings to review the merits of the action in many cases. In some important subset of cases, the Court obviously approves of the decisions of the district courts to issue preliminary injunctions, while in another subset of cases the Supreme Court disapproves of that decision. Unfortunately, we have no way of

[50] For detailed discussion of the requirements for standing, see Hickman & Pierce, supra. note 7, at chapter 16.
[51] Injuries suffered by the many do not qualify a petitioner for standing. Id. at §16.4.
[52] 566 U.S. 7 (2008).
[53] See note 8, supra.

knowing why the Court approves of the issuance of preliminary injunctions in some cases and not in other cases, since the Court never issues an opinion in which it explains its decision.

Some Justices have issued separate concurring or dissenting opinions in some of the cases in which the Court has granted or denied a motion to stay a preliminary injunction without issuing an opinion. Those opinions suggest that some of the Justices are particularly concerned about district court preliminary injunctions that have national scope.[54] The Court could respond to that concern by holding that district courts can only issue preliminary injunctions that apply to the district or circuit in which the court is located. Such a holding would not have any beneficial effect on the problem that I have identified, however. It would change the situation only by limiting the scope of each preliminary injunction issued by each district court and then stayed or not stayed by the Supreme Court without issuing an opinion.

A Supreme Court opinion that limits the permissible geographic scope of preliminary injunctions would also have the unfortunate effect of creating a situation in which a federal statute is given widely varying meanings in each region of the country. That situation could persist for many years, as our experience with judicial efforts to reach agreement with respect to the meaning of "waters of the United States" illustrates. District courts have adopted differing interpretations of the indeterminate four-one-four split among the Justices in *Rapanos v. United States*.[55] The unfortunate result has been a legal regime in which the EPA and the Corps of Engineers have been required to apply completely different interpretations of that critically important jurisdictional term in different parts of the country for over a decade.[56]

In fact, the separate opinions of the Justices that express their skepticism about the legality or propriety of nationwide injunctions illustrate well the problem that the Court has created with its practice of granting or denying stays of preliminary injunctions without issuing an opinion in which the Court explains why it has taken either action. The separate opinions suggest that at least two of the Justices decide to vote to stay or not to stay a preliminary injunction based in part on the geographic scope of the injunction.[57] They obviously do not believe that the scope of the injunction alone should be dispositive of its legality, however, since they vote to uphold some nationwide injunctions. That leaves us with no way of knowing the significance that those Justices attach to the scope of the injunction in their decision-making process. What are the other factors that they consider in deciding whether to stay a preliminary injunction? How do they balance the factors that influence their decisions when they conflict? We also do not know how many Justices agree with the apparent significance that two Justices attach to the geographic scope of a preliminary injunction or any of the other factors that those Justices consider in deciding whether to grant or deny stays of preliminary injunctions.

Having eliminated the possibility of addressing the problems created by the Supreme Court's large and growing shadow docket by making changes at any of the earlier points in the sequence of actions that

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[54] Department of Homeland Security v. New York, 140 S.Ct. 599 (concurring opinion of Justices Gorsuch and Thomas).

[55] 547 U.S. 715 (2006). (*See generally* Navigating Through the Confusion in the Wake of Rapanos: Why a Rule Clarifying and Broadening Jurisdiction Under the Clean Water Act is Necessary, 39 WM & M. ENVTL. L. & POL'Y REV. 295 (2014).

[56] *See id*.

[57] *New York v. Dep't of Homeland Security*, 140 S. Ct. 599 (2020) (concurring opinion of Justices Gorsuch and Thomas).

leads to the shadow docket, we are left only with the possibility that the Court might eliminate the problems by making some change in its own practices. The Court should adopt a practice of never issuing an opinion that is likely to have significant long-term effects without issuing an opinion in which it explains its action. By now it should be obvious to the Court that many, perhaps even most, of its decisions that grant or deny stays of preliminary injunctions that bar the government from taking a major action will have significant long-term effects. The Court should not issue such a stay without explaining its action. Such a change in practice would add to the workload of the Justices, but that is a small price to pay to reduce the adverse effects of a large and growing shadow docket that is rapidly eroding one of the most important elements of the rule of law—the duty to engage in reasoned decision making.