

STATE SHADOW DOCKETS

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Just before midnight on September 1, 2021, the U.S. Supreme Court—by a five-to-four vote—denied a stay that would have blocked Texas’s controversial anti-abortion law, S.B. 8, from going into effect. That decision sparked immediate controversy and not just because it was inconsistent with nearly fifty years of precedent since *Roe v. Wade*. But also, as commentators and even some of the Justices pointed out, the Court’s decision regarding S.B. 8 was not made on the Court’s merits docket. Rather, it was made on the “shadow docket.” And like other shadow docket rulings, the S.B. 8 stay resolved important and unsettled legal questions in an unsigned order with scant written reasoning and without the benefit of full briefing and oral argument.

But the Supreme Court’s shadow docket is not unique. State high courts also have their own shadow dockets where they are increasingly deciding significant questions about voting rights, separation of powers, and constitutional rights, sometimes in summary and non-transparent ways that mirror the Supreme Court. While many scholars have focused their attention on the Supreme Court, state shadow dockets have largely avoided scrutiny. This Essay fills that gap and demonstrates how many of the criticisms of the Supreme Court’s shadow docket apply with even greater force to many different states’ shadow dockets. We then draw on best practices from other state supreme courts and propose reforms to the Supreme Court’s shadow docket to improve transparency and the quality of decision-making on state shadow dockets.

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INTRODUCTION

Although it is not new,¹ the U.S. Supreme Court’s “shadow docket”—the orders and summary decisions the Court issues separate from its merits docket²—has become an increasingly prevalent venue for litigation of significant and contentious legal issues³ regarding religious liberty,⁴ voting rights,⁵ and administrative law,⁶ for example.

As the shadow docket’s importance has increased, so too has the criticism.⁷ As critics point out, the Supreme Court’s practices on the

1. “[S]cholars and court-watchers have long *known* about the Court’s shadow docket,” but they have “largely ignored it—because most of the Justices’ decisions on the shadow docket were perceived to be anodyne.” See *Texas’s Unconstitutional Abortion Ban and the Role of the Shadow Docket: Hearing Before the S. Comm. on the Judiciary*, 117th Cong. 3 (2021) [hereinafter Vladeck Testimony] (testimony of Stephen I. Vladeck, Charles Alan Wright Chair in Fed. Cts., Univ. Tex. Sch. Of L.). That is true despite several historic examples of controversial shadow docket rulings, including Justice Douglas’s decisions to temporarily stop Nixon’s bombing of Cambodia and the executions of the Rosenbergs. See *Holtzman v. Schlesinger*, 414 U.S. 1316, 1320 (1973) (“[D]enial of the application before me would catapult our airmen as well as Cambodian peasants into the death zone. I do what I think any judge would do in a capital case—vacate the stay entered by the Court of Appeals.”); *Rosenberg v. United States*, 346 U.S. 273, 280–83 (1953) (highlighting Justice Douglas’s denial of an “application for habeas corpus, but grant[ing] a stay” of execution pending an answer to the “substantial question” presented).

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

3. See Vladeck Testimony, *supra* note 1, at 3–4.

4. See, e.g., *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020) (per curiam) (enjoining enforcement of New York’s occupancy limits on attendance at religious services under the Free Exercise Clause); *Tandon v. Newsom*, 141 S. Ct. 1294, 1297–98 (2021) (per curiam) (enjoining California’s restrictions on in-home gatherings under the Free Exercise Clause).

5. See, e.g., *Merrill v. Milligan*, 142 S. Ct. 879 (2022) (mem.) (staying a preliminary injunction against Alabama’s 2022 congressional redistricting under Section 2 of the Voting Rights Act).

6. See *Louisiana v. Am. Rivers*, 142 S. Ct. 1347 (2022) (mem.) (staying a district court decision striking down a Clean Water Act regulation).

7. See, e.g., Stephen I. Vladeck, Opinion, *Roberts Has Lost Control of the Supreme Court*, N.Y. TIMES (Apr. 13, 2022), <https://www.nytimes.com/2022/04/13/opinion/john-roberts-supreme-court.html> [https://perma.cc/DLN3-3T2J] (criticizing both the Court’s increased use of the shadow docket for consequential decisions and the Court’s decision in *Louisiana v. Am. Rivers*, which stayed a district court order vacating a Trump Administration regulation promulgated under the Clean Water Act); see also Vladeck Testimony, *supra* note 1, at 16–22; Richard J. Pierce, Jr., *The Supreme Court Should Eliminate Its Lawless Shadow Docket*, 74 ADMIN. L. REV. 1, 19 (2022) (arguing that the Court should always issue an opinion when granting or denying stays against major government actions); Barry P. McDonald, *SCOTUS’s Shadiest Shadow Docket*, 56 WAKE FOREST L. REV. 1021, 1022 (2021) (criticizing the practice of justices writing opinions accompanying the denial of certiorari).

shadow docket are not transparent: decisions are often announced in terse, unsigned per curiam or memorandum opinions that do not note individual justices' votes, and the opinions are issued at unpredictable times, without full briefing, amicus participation, or oral argument.⁸ Substantively, critics note that the Supreme Court's shadow docket rulings granting or denying temporary relief sometimes resolve unsettled legal questions, often by a five-to-four or six-to-three vote, even when those issues might not reach the Supreme Court for review on the merits in the future.⁹ The availability of temporary relief on the shadow docket also appears increasingly to turn on the Justices' individual views of the merits, rather than the traditional equitable balancing test for stays and other temporary relief pending appeal.¹⁰ Moreover, there are lingering questions about the precedential value of these cryptic shadow docket orders, both to lower courts and in subsequent Supreme Court decisions.¹¹

Despite this sustained attention to the U.S. Supreme Court's shadow docket, state courts' shadow dockets have not received similar scrutiny.¹² Yet, state supreme courts also decide requests for stays, injunctions, or other temporary relief pending appeal outside their merits dockets,

8. See Vladeck Testimony, *supra* note 1, at 2–3.

9. See *id.* at 18–19.

10. See *id.* at 13 (“[E]mergency relief now appears to rise and fall almost entirely on the merits—with virtually no regard for whether the *other* factors that are usually required . . . for such relief are in fact present.”); see also Alexis Denny, Comment, *Clarity in Light: Rejecting the Opacity of the Supreme Court's Shadow Docket*, 90 UMKC L. REV. 675, 680–85 (2022) (describing the U.S. Supreme Court's standard of review for requests for temporary relief as “a moving target”).

11. See Vladeck Testimony, *supra* note 1, at 16–22 (highlighting these and other reasons why “the shadow docket is problematic *even* to those who think the Court is generally getting the merits of most (or even all) of these disputes ‘right’”); see also *Tandon v. Newsom*, 141 S. Ct. 1294, 1296–98 (2021) (per curiam) (describing prior shadow docket decisions (and separate writings by individual justices) as “dictat[ing] the outcome in th[at] case”); Alexander Gouzoules, *Clouded Precedent: Tandon v. Newsom and Its Implications for the Shadow Docket*, 70 BUFF. L. REV. 87, 91–92 (2022) (asking whether a shift in the Court's application of *Emp. Div. v. Smith*, 494 U.S. 872 (1990), first announced in *Tandon*, will be “qualified or mitigated by *Tandon*'s status as a shadow docket case”); Trevor McFadden & Vetan Kapoor, *Symposium: The Precedential Effects of Shadow Docket Stays*, SCOTUSBLOG (Oct. 28, 2020, 9:18 AM), <https://www.scotusblog.com/2020/10/symposium-the-precedential-effects-of-shadow-docket-stays/> [<https://perma.cc/6KE6-XRCR>] (explaining how several lower courts treated a shadow docket decision, *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080 (2017), as precedential while still disagreeing about what the decision stood for).

12. One article characterized the Oklahoma Supreme Court's practice of allowing justices to decide not to vote in a case without explanation or to concur or dissent without filing an opinion as a “shadow docket lite.” See Hayley Stillwell, *Shadow Dockets Lite*, 99 DENV. L. REV. 361, 362–63 (2022). But neither that article, which focuses on merits decisions, nor any other addresses state shadow dockets more generally.

sometimes in highly contentious and consequential cases.¹³ State shadow dockets share other similarities with the U.S. Supreme Court's shadow docket. State shadow docket decisions are also made without the benefit of full briefing or argument, on an expedited timeline, often in unsigned orders with little or no written reasoning.¹⁴ Moreover, state shadow dockets are becoming a more frequent venue for litigating significant and unsettled legal questions.¹⁵

Drawing on our experiences at the Wisconsin Supreme Court, its recent practices, and examples from other states, we argue that many of the criticisms of the U.S. Supreme Court's shadow docket apply with even greater force to state shadow dockets. While the U.S. Supreme Court's shadow docket decisions appear on the Court's publicly available orders list and are ultimately published in the official reporters and on

13. See, e.g., *Fabick v. Wis. Elections Comm'n*, No. 2021AP428-OA, unpublished slip op. at 2–3 & n.1 (Wis. June 25, 2021) (denying leave to file an original action and a motion for a temporary or permanent injunction blocking certain election practices); *James v. Heinrich*, Nos. 2020AP1419-OA, 2020AP1420-OA & 2020AP1446-OA, unpublished slip op. at 2–4 (Wis. Sept. 10, 2020) (granting temporary injunctive relief blocking COVID-19 restrictions imposed by local health officials); *Wis. Legislature v. Evers*, No. 2020AP608-OA, unpublished slip op. at 4 (Wis. Apr. 6, 2020) (granting a temporary injunction against an executive order that sought to delay in-person voting during Wisconsin's April 2020 election).

14. See, e.g., *Stempski v. Heinrich*, No. 2021AP1434-OA, unpublished slip op. at 1 (Wis. Aug. 27, 2021) (denying leave to file an original action and an accompanying request for temporary injunctive relief challenging orders of a local health official without significant analysis); *Wis. Voters All. v. Wis. Elections Comm'n*, No. 2020AP1930-OA, unpublished slip op. at 1–2 (Wis. Dec. 4, 2020) (offering only terse analysis of why a case challenging voting practices in the November 2020 election did not meet the court's standards for granting review).

15. For example, the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), has led to numerous state suits challenging restrictive abortion regulations, which in turn have given rise to requests to state supreme courts for stays or other temporary injunctive relief. See, e.g., *Planned Parenthood Great Nw., Haw., Alaska, Ind., Ky. v. State*, Nos. 49615, 49817 & 49899, 2022 WL 335696, at *2, *8 (Idaho Aug. 12, 2022) (declining a request to stay enforcement of Idaho's abortion ban and vacating an earlier stay of enforcement of that law entered by the court in April 2022); *Planned Parenthood of Mont. v. State ex rel. Knudsen*, No. DA 21-0521, 2022 WL 3209766, at *1 (Mont. Aug. 9, 2022) (affirming a trial court decision preliminarily enjoining enforcement of state statutes restricting abortion); *In re Paxton*, No. 22-0527, 2022 WL 2425619, at *1 (Tex. July 1, 2022) (partially granting an emergency motion for temporary relief staying a trial court order which halted criminal enforcement of Texas's abortion ban). And in Wisconsin, the number of petitions to invoke the Wisconsin Supreme Court's original jurisdiction have risen dramatically over the last several years. See Alan Ball, *Original Actions and Judicial Activism: An Update for 2020-21*, SCOWSTATS (Feb. 22, 2022), <https://scowstats.com/2022/02/22/original-actions-and-judicial-activism-an-update-for-2020-21/> [https://perma.cc/ES3D-2D89] (explaining that nineteen petitions were filed in the court's 2020–21 term, compared to just one four years earlier in 2016–17). These petitions are often accompanied by requests for temporary injunctive relief. See cases cited *supra* notes 13–14.

legal research services like Westlaw, some state’s shadow docket decisions are inaccessible on court websites, Westlaw, or both.¹⁶ This lack of transparency raises questions about the precedential value of state shadow docket decisions, the consistency of judicial decision-making, and the public perception of the legitimacy of state courts’ decisions.

We begin in Part I by discussing in further detail the U.S. Supreme Court’s shadow docket. Part II considers state shadow dockets generally before delving into the Wisconsin Supreme Court’s shadow docket specifically. As we explain, our court’s shadow docket is less transparent than even the U.S. Supreme Court’s. That lack of transparency is particularly troubling since—as recent cases demonstrate—the Court considers its unpublished, practically inaccessible orders as binding on lower courts.¹⁷ Part III draws on the examples of other state supreme courts and proposed reforms of the U.S. Supreme Court’s shadow docket to suggest ways the Wisconsin Supreme Court and other state high courts may improve transparency and the quality of decisions on their shadow dockets.

I. THE U.S. SUPREME COURT’S SHADOW DOCKET

A. *The Shadow Docket Generally*

The U.S. Supreme Court’s shadow docket includes “a range of orders and summary decisions that defy [the Court’s] normal procedural regularity.”¹⁸ In other words, the shadow docket includes decisions the Court makes outside its merits docket of approximately sixty to seventy cases per year.¹⁹ Those decisions range from the mundane (*e.g.*, granting extensions of time to file briefs or granting leave to file *amici curiae* briefs) to the highly consequential (*e.g.*, vacating lower courts’ nationwide injunctions against significant government policies).²⁰ Some

16. Although this is true in Wisconsin, it is not universal. As discussed more fully below, some state supreme courts, like those in Michigan and North Carolina, make all court orders (consequential or not) accessible on their websites. *See infra* Part II.A.

17. *See, e.g., Louisiana v. Am. Rivers*, 142 S. Ct. 1347 (2022) (Kagan, J., dissenting) (stating that “the Court goes astray . . . render[ing] the Court’s emergency docket not for emergencies at all. The docket becomes only another place for merits determinations—except made without full briefing and argument”).

18. Baude, *supra* note 2, at 1.

19. *See* Vladeck Testimony, *supra* note 1, at 2; *see also* Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123, 125 (2021) [hereinafter Vladeck, *Solicitor General*].

20. *See* Vladeck Testimony, *supra* note 1, at 3–5. Many other types of decisions fall under this broad umbrella, including grants or denials of certiorari and summary reversals. *See* McDonald, *supra* note 7, at 1022 (criticizing the practice of

have suggested that the shadow docket also includes the Court's decisions granting or denying petitions for writ of certiorari.²¹

The term "shadow docket" is not pejorative. Instead, the term is a metaphor for the ways in which the Court's activities there are "overshadowed by"²²—and handled differently and less transparently than—the Court's merits docket.²³ For example, shadow docket decisions are typically made after less briefing than the Court's merits decisions, usually a single round, with limited opportunities for amicus participation, and generally without oral argument.²⁴ And the Court's shadow docket decisions are typically announced at unpredictable times in short, unsigned per curiam or memorandum opinions that do not disclose how individual Justices voted, while containing little to no written reasoning—markedly different from the Court's reasoned written merits decisions, which not only identify each Justice's vote, but are also formally announced in a "carefully orchestrated" process "beginning at 10:00 a.m. Eastern time on pre-announced 'decision days.'"²⁵

Of course, all courts need a way to handle the daily minutiae of case management and address any requests for emergency relief. Therefore, it should be unsurprising that the shadow docket has deep roots. From 1802 to 1839, for example, a Congressional act gave a single member of the Court (acting alone) the responsibility of presiding over an "August Term" "to make all necessary orders touching any suit, action, appeal, writ of error, process, pleadings or proceedings, returned to the said court or depending therein."²⁶ In more recent times, the Court has assigned each Justice to a federal circuit (or circuits) and made that circuit Justice responsible for handling applications arising from state or federal cases within that circuit.²⁷ The circuit Justice may act alone, with or

justices writing opinions accompanying the denial of certiorari); Baude, *supra* note 2, at 18–19 (discussing summary reversals).

21. See, e.g., Deepak Gupta, Founding Principal, Gupta Wessler PLLC, "Access to Justice and Transparency in the Operation of the Supreme Court," Remarks Before the Presidential Commission on the Supreme Court of the United States 12–13 (June 30, 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/06/Gupta-SCOTUS-Commission-Testimony-Final.pdf> [<https://perma.cc/74U7-ALXB>]. As some have pointed out, these decisions, and the writings that sometimes accompany them, help to shape the Court's merits decisions. See McDonald, *supra* note 7, at 1022. Moreover, delaying the decision to grant or deny certiorari can also shape the law, for example by allowing a statute to go into effect or by leaving in place a lower court order.

22. Baude, *supra* note 2, at 5.

23. Vladeck Testimony, *supra* note 1, at 2–3.

24. See *id.* at 2, 18.

25. See *id.* at 2.

26. See Ross E. Davies, *The Other Supreme Court*, 31 J. SUP. CT. HIST. 221, 224–26 (2006).

27. See 1 Cynthia Rapp, *Introduction to A COLLECTION OF IN CHAMBERS OPINIONS BY THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES 1926–2001*, at

without issuing a written opinion explaining her reasoning, or, in the case of applications for stays or bail, may refer the matter to the whole Court for resolution.²⁸

Despite the shadow docket's long history, it has only recently drawn substantial public attention.²⁹ And much of that attention has focused on a specific category of shadow docket decisions: those granting or denying temporary relief from lower court decisions pending appeal.³⁰ Although other aspects of the shadow docket certainly merit attention,³¹ orders

v, vi (2001); *see also* 28 U.S.C. § 42 (authorizing the Chief Justice to designate members of the Court to serve “as circuit justices among the circuits by order of the Supreme Court”).

28. *See* STEPHEN M. SHAPIRO, KENNETH S. GELLER, TIMOTHY S. BISHOP, EDWARD A. HARTNETT, DAN HIMMELFARB, SUPREME COURT PRACTICE § 17.1 (11th ed. 2019) [hereinafter SUPREME COURT PRACTICE]; *see also* SUP. CT. R. 22.5. When a circuit justice authors an opinion it is referred to as an “in-chambers opinion[]” and, since 1969, published in the United States Reports. SUPREME COURT PRACTICE, *supra*. In-chambers opinions are also available on various electronic databases such as Westlaw. *Where to Obtain Supreme Court Opinions*, SUP. CT. OF THE U.S., <https://www.supremecourt.gov/opinions/obtainopinions.aspx> [https://perma.cc/X355-J5DW] (last visited Oct. 9, 2022). Such opinions are rare, however, and when a circuit justice does not release an opinion when acting on an application, the order does not appear on the Court's publicly available orders list or in the United States Reports. SUPREME COURT PRACTICE, *supra*. For fuller descriptions of the powers of a circuit justice acting individually and the Court's current in-chambers practices, *see* Daniel M. Gonen, *Judging in Chambers: The Powers of a Single Justice of the Supreme Court*, 76 U. CIN. L. REV. 1159, 1172–82 (2008). When applications for stays are referred to the whole court for resolution, those decisions appear on the order list on the Court's website (as well as on its electronic docket system), on Westlaw, and in the United States Reports. *See, e.g., James v. Alabama*, No. 22A74, 2022 WL 2980556, at *1 (U.S. July 28, 2022) (mem.); *No. 22A74 *** Capital Case *** James v. Alabama*, SUP. CT. OF THE U.S., <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/22a74.html> (last visited Oct. 9, 2022); *Orders of the Court – Term Year 2021*, SUP. CT. OF THE U.S., <https://www.supremecourt.gov/orders/ordersofthecourt/21> (last visited Oct. 9, 2022) (choose “2021”; then choose the 07/28/22 “Miscellaneous Order” to view the Court's order denying an application for stay of execution presented to Justice Thomas and referred to the Court).

29. Indeed, the term “shadow docket” was only coined in 2015. *See* Vladeck, *supra* note 2, at 1.

30. *See, e.g.,* Baude, *supra* note 2, at 11–13 (describing the Supreme Court's orders process, particularly when granting injunctive relief or stays pending appeal, as sometimes “inexplicable” or at least lacking explanation); Josh Blackman & Howard M. Wasserman, *The Process of Marriage Equality*, 43 HASTINGS CONST. L.Q. 243, 245–46 (2016) (identifying the ways in which the Supreme Court sent “shifting signals” “through unexplained stays, denials of stays, and denials of certiorari” in the lead up to deciding *United States v. Windsor*, 570 U.S. 744 (2013), and *Obergefell v. Hodges*, 576 U.S. 644 (2015)).

31. For instance, the sharp increase in grants of “certiorari before judgment” and the Court's summary reversals, have also rightly attracted attention. *See* Vladeck, *Solicitor General*, *supra* note 19, at 129–30; Baude, *supra* note 2, at 18–40 (discussing the prevalence and impact of the Supreme Court's summary reversal decisions).

granting or denying temporary relief have been among the most consequential shadow docket decisions in recent years, often with far-reaching implications for important government policies.³² For that reason, and because these decisions have the most in common with state shadow docket decisions, we too focus our attention there.

B. Temporary Relief on the Shadow Docket

In recent years, the U.S. Supreme Court has been increasingly willing to issue far-reaching shadow docket orders granting or denying temporary relief from lower court decisions in cases.³³ In seven unsigned, shadow docket rulings since November 2020, the Court issued emergency writs of injunction blocking state policies responding to the COVID-19 pandemic.³⁴ Many of these decisions were decided by five-to-four votes (although only the dissenting Justices' votes were noted), and contained little or no written legal reasoning.³⁵ These decisions had a broader impact than many of the Court's prior shadow docket decisions, which historically arose most often in death penalty cases, where their impact was more circumscribed.³⁶ These more recent cases, on the other hand, addressed statewide COVID-19 regulations (and other measures meant to address the effects of the pandemic) in some of the largest states in the country.³⁷ Further underscoring these decisions' importance, when the Court did provide (albeit brief) reasoning for its

32. See Blackman & Wasserman, *supra* note 30, at 286–90.

33. See Vladeck Testimony, *supra* note 1, at 5 (collecting statistics showing that the Court granted or vacated stays or injunctions twenty times in October Term 2020, versus just six times a decade earlier in October Term 2010); see also *supra* notes 4–6 and accompanying text. Professor Steve Vladeck identified the U.S. Supreme Court's four most common shadow docket orders on requests for temporary relief from lower court decisions as: (1) stays of lower court decisions (or the mandate of court of appeals decisions); (2) vacating stays granted by lower courts; (3) granting emergency writs of injunction pending appeal; and (4) vacating lower-court grants of emergency injunctions. See Vladeck Testimony, *supra* note 1, at 4–5. The Court's powers to issue these orders stem primarily from two sources, 28 U.S.C. §§ 1651, 2101(f), both of which have been interpreted broadly. For a comprehensive analysis of these statutes and the Court's interpretation of them, see Vladeck, *Solicitor General*, *supra* note 19, at 129–30.

34. See *Tandon v. Newsom*, 141 S. Ct. 1294 (2021) (per curiam); *Gateway City Church v. Newsom*, 141 S. Ct. 1460 (2021) (mem.); *S. Bay Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021) (mem.); *Harvest Rock Church v. Newsom*, 141 S. Ct. 1289 (2021) (mem.); *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) (per curiam); *Agudath Isr. of Am. v. Cuomo*, 141 S. Ct. 889 (2020) (mem.); *Chrysaifis v. Marks*, 141 S. Ct. 2482 (2021) (mem.).

35. See, e.g., *Tandon*, 141 S. Ct. at 1298; *Gateway City*, 141 S. Ct. at 1460; *S. Bay*, 141 S. Ct. at 716–23; *Harvest Rock*, 141 S. Ct. at 1290; *Agudath*, 141 S. Ct. at 889; *Chrysaifis*, 141 S. Ct. at 2483.

36. See Vladeck Testimony, *supra* note 1, at 3.

37. See cases cited *supra* note 35.

decisions, it was arguably at odds with its prior interpretations of the First Amendment's Free Exercise Clause and rested in large part on prior shadow docket decisions.³⁸

These closely divided shadow docket rulings also broke from the norm in another respect. In the preceding two decades, there were relatively few noted dissents from orders granting or denying temporary relief.³⁹ These recent decisions, however, broke almost universally along ideological lines, with the Justices typically described as more liberal in the dissent (sometimes with Chief Justice Roberts) and the more conservative Justices seemingly in the majority.⁴⁰ We say "seemingly" because the Court's practice of omitting each Justice's individual vote on its shadow docket rulings—a practice unique to the shadow docket—can make it unclear which Justices formed the majority.⁴¹

In summary, the following is clear: First, the shadow docket is an increasingly important part of the Court's docket, in some respects more meaningful than even the Court's merits decisions.⁴² Second, recently, the Court has been more willing to grant relief on the shadow docket.⁴³ The reasons for that increase are outside the scope of this Essay, but can be chalked up to a number of different factors, including increased litigation relating to both the pandemic and the 2020 election, shifts in the Court's own practices and legal standards for addressing requests for stays or other emergency relief, the changing composition of the Court, and, perhaps, because more grants of relief encourage more requests for

38. See, *Tandon*, 141 S. Ct. at 1297 (citing several prior shadow docket decisions as "dictat[ing] the outcome in this case"); see also, e.g., Gouzoules, *supra* note 11, at 91–92 (discussing the doctrinal implications of the Court's decision in *Tandon*); Vladeck Testimony, *supra* note 1, at 9–10 (noting the difficulties lower courts have had in determining the precedential effect of other shadow docket rulings).

39. See Vladeck Testimony, *supra* note 1, at 7–8 (contrasting the lack of public dissents from applications filed by the Justice Department during the George W. Bush and Barack Obama administrations with those filed since the October Term 2017).

40. See *id.* at 8 (noting that during the October Term 2020, "there hasn't been a *single* dissent respecting an application for emergency relief in which a Justice to the left of Chief Justice Roberts was joined by a Justice to his right," and that, therefore, "[t]here are no 'strange bedfellows' on the shadow docket"). But see *Dunn v. Smith*, 141 S. Ct. 725, 725 (2021) (mem.) (denying an application to vacate an injunction in which Justice Amy Coney Barrett joined Justices Kagan, Breyer, Sotomayor, and either Justice Alito or Gorsuch to temporarily block an execution).

41. See, e.g., *Dunn*, 141 S. Ct. at 725–26 (identifying just seven Justices' votes).

42. See Z. Payvand Ahdout, *Direct Collateral Review*, 121 COLUM. L. REV. 159, 163 (2021) (suggesting that "in some areas of law, the shadow docket is even more influential than [the Court's] merits docket").

43. See, e.g., Vladeck Testimony, *supra* note 1, at 6–7 (describing this trend).

relief.⁴⁴ Third, the availability of relief on the shadow docket appears to rest in large part on the Justices' individual assessments of how they would vote on the merits of a particular dispute.⁴⁵ Fourth, the Court is making substantive changes to the law on its shadow docket, often in orders lacking the type of reasoning we typically expect when the Court changes the law. And fifth, by doing so, new questions arise about the precedential weight other courts (and the Court itself) should give to shadow docket rulings.⁴⁶

C. *Shadow Docket Criticisms*

There are at least three sets of critiques of the Court's recent shadow docket rulings and practices. The first relate to transparency. As we have previously noted, the Court's shadow docket decisions are always unsigned, do not indicate the majority Justice's votes, and lack significant (if any) reasoning.⁴⁷ Additionally, the shadow docket decisions are reached after truncated briefing, with little to no amicus participation and without oral argument.⁴⁸ Making significant decisions following such a streamlined process is problematic because the Court might lack the full factual and legal context and because it leaves lower courts, the parties, and the public, guessing about the Court's reasoning and which Justices made up the majority.⁴⁹ Failing to note which Justices make up a majority is also problematic because it raises questions about whether individual Justices are voting consistently from case to case.⁵⁰

The second set of criticisms are substantive. Shadow docket rulings appear generally to rely on the Justices' predictions about how they would rule on the merits of disputes not before the Court.⁵¹ In some respects this is unsurprising, and perhaps uncontroversial, since one of

44. See *id.*, at 10–16 (cataloging these and other reasons for the trend); see also William Baude, *Reflections of a Supreme Court Commissioner*, 106 MINN. L. REV. 2631, 2650 (2022) (explaining that the Court “appears to have triggered a cycle of increasing requests for emergency relief” by granting enough of the requests to “encourage litigants to come back more often in the future”).

45. See Vladeck Testimony, *supra* note 1, at 18–19.

46. See *supra* note 11 and accompanying text.

47. See Vladeck Testimony, *supra* note 1, at 2–3.

48. *Id.* at 18.

49. See *id.* at 16–17.

50. See Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133, 139–140 (1990) (“Disclosure of votes and opinion writers . . . serves to hold the individual judge accountable” and “puts the judge’s conscience and reputation on the line.”); Antonin Scalia, *The Dissenting Opinion*, 19 SUP. CT. HIST. J. 33, 43–44 (1994) (arguing that while judges may change their mind over the course of their careers, they should not meander day to day, and should explain themselves when they do change their minds).

51. See Vladeck Testimony, *supra* note 1, at 18–19.

the traditional factors courts apply in deciding whether to grant a stay or other preliminary relief is the movant's likelihood of success on the merits—an inherently predictive judgment.⁵² But at times the Court has gone further, for example by addressing moot COVID-19 restrictions and opining that they would violate the First Amendment if they were put back into effect.⁵³ And even more fundamentally, the Court's treatment of the traditional factors governing stays and other preliminary injunctive relief suggests that the decision of whether or not to grant relief rests primarily on the Justices' views of the merits rather than on the balance of the equities.⁵⁴

Third, and finally, the shadow docket's critics note that issues with transparency and the Court's substantive decisions collectively undermine the public's perception of the Court's legitimacy.⁵⁵ These critics point out that the public's perception of the Court has suffered substantially as the shadow docket's importance has increased, largely because unidentified Justices are making enormously consequential decisions without explaining their reasoning.⁵⁶ The lack of transparency, coupled with at least the appearance of inconsistent outcomes and uncertain precedential value of shadow docket decisions, reinforces the

52. See, e.g., *Maryland v. King*, 567 U.S. 1301, 1302 (2012) (Roberts, C.J., in chambers) (noting that one factor in granting a stay of judgment pending a petition for certiorari is “a ‘fair prospect’ that the Court will . . . reverse the decision below”) (quoting *Conkright v. Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers)).

53. See, e.g., *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020) (per curiam) (justifying injunctive relief despite mootness because “if” COVID restrictions were imposed again, they would “almost certainly bar individuals in the affected area from attending services before judicial relief [could] be obtained”).

54. See Vladeck Testimony, *supra* note 1, at 18. Additionally, but still substantively, some have pointed out that the increased time and attention the justices must pay to the shadow docket comes at a cost to the Court's ability to decide more cases on the merits—a fact reflected in the marked decline in merits decisions by the Court over the last several decades. See *id.* at 19–20 (explaining that “as the shadow docket has grown, the merits docket has shrunk,” and that “it's not hard to imagine how the increasing volume of (and attention paid to) these emergency rulings has consumed resources that . . . could otherwise have [been] devoted to the merits docket”).

55. See *id.* at 20; see also Baude, *supra* note 2, at 10 (noting that the lack of procedural regularity on the shadow docket undermines perceptions of the Court's legitimacy because “procedural regularity begets substantive legitimacy”).

56. See Vladeck Testimony, *supra* note 1, at 21 (contrasting claims that shadow docket critics are arguing in bad faith with the fact that “the Justices are deciding significant questions that impact millions of people” in “rulings that are unexplained (or, at least, insufficiently explained),” are “inconsistent in how they apply the same procedural standards . . . ; and” that “the Justices themselves are now insisting . . . have precedential effects”).

perspective of some that Justices make decisions based on politics, not law.⁵⁷

II. STATE SHADOW DOCKETS

A. State Shadow Dockets Generally

Similar to the U.S. Supreme Court, state high courts have their own shadow dockets, where they make many decisions—some minor, and some major—that arise outside their merits dockets. Of course, because each state has its own high court (or courts),⁵⁸ it is not easy to generalize about these state shadow dockets, and a full survey of all fifty states’ practices is outside the scope of this Essay. Additionally, although there are indications that contentious issues are being litigated more frequently on state court shadow dockets, empirical data is hard to come by.⁵⁹ Nevertheless, it is clear each state’s high court issues orders outside of their merits dockets on everything from motions for extensions of time to motions for temporary relief pending appeal.⁶⁰

57. *See id.*

58. For example, in both Oklahoma and Texas, the court of last resort is different in criminal and civil cases. *See Appellate Courts*, OKLA. STATE CTS. NETWORK, <https://www.oscn.net/schome/appellate-courts/> [https://perma.cc/64W3-4WAB] (last visited Oct. 9, 2022) (“Unlike most states, Oklahoma has two courts of last resort.”); *Court of Criminal Appeals*, TEX. JUD. BRANCH, <https://www.txcourts.gov/cca/> [https://perma.cc/4RU9-4NFL] (last visited Oct. 9, 2022) (“The Court of Criminal Appeals is Texas’ highest court for criminal cases.”); *Supreme Court*, TEX. JUD. BRANCH, <https://www.txcourts.gov/supreme/> [https://perma.cc/CAE7-GX2S] (last visited Oct. 9, 2022) (“[T]he Supreme Court of Texas is the court of last resort for civil matters in the state.”).

59. *See supra* note 15 and accompanying text.

60. *See, e.g.*, Marc James Ayers, *Notes on Stays Pending Appeals in Alabama’s Appellate Courts*, 70 ALA. LAW. 284, 286 (2008) (describing the Alabama Supreme Court’s “miscellaneous docket,” where the court resolves stay motions, among other things); *J.P. & S.P. v. State*, No. S-18107, unpublished slip op. at 1 (Alaska July 9, 2021) (explaining the court’s reasoning for an earlier, three-sentence order denying a motion for a stay pending appeal), *appeal dismissed as moot*, 506 P.3d 3 (Alaska 2022); ARIZ. R. CIV. APP. P. 7(c) (authorizing appellate courts to “suspend, modify, restore, or grant an injunction while an appeal is pending,” and to grant stays, and other temporary relief to preserve the status quo); *Arkansas Supreme Court Blocks Lower Court’s Ruling, Allows Controversial Voting Laws to Go into Effect*, ARK. DEMOCRAT-GAZETTE (Apr. 1, 2022, 4:11 PM), <https://www.arkansasonline.com/news/2022/apr/01/arkansas-supreme-court-blocks-lower-courts-ruling-allows-controversial-voting-laws-to-go-into-effect/> [https://perma.cc/GJ95-MNSY] (explaining that an “unsigned order” by the state supreme court that “did not give reason for its decision” granted an emergency stay of a lower court ruling blocking new voting laws); *see also* David Ettinger, *The Shadow Docket . . . of California’s Supreme Court, Part 2*, AT THE LECTERN (Nov. 4, 2021, 7:21 AM), <http://www.atthelectern.com/the-shadow-docket-of-californias-supreme-court-part-2/> [https://perma.cc/3PNL-4KML] (describing some of types of “cases decided

Anecdotally, practices on state court shadow dockets vary widely. Some state high courts allow individual justices to rule on certain types of motions on a rotating basis, similar in some respects to the U.S. Supreme Court's circuit Justice practice,⁶¹ while in other states, only the court as a whole may act.⁶² The amount of written legal analysis state courts provide on applications for temporary relief also varies widely, with some courts providing no analysis at all, even for orders touching on issues of great public concern,⁶³ while other courts provide more fulsome reasoning even in relatively uncontroversial matters.⁶⁴ Finally, transparency on state shadow dockets also varies enormously. Some courts' orders are available (at least in table format) in the official reporters,⁶⁵ while some are never available in published volumes or on

without full briefing or oral argument" in the California Supreme Court); Christopher Jackson, *Certiorari Before Judgment: An Examination of C.A.R. 50*, COLO. LAW., Aug.–Sept. 2021, at 18, 19–20 (discussing the power of the Colorado Supreme Court to review certain cases prior to judgment in the intermediate appellate court—a practice that mirrors somewhat the U.S. Supreme Court's power to grant certiorari before judgment); STATE OF CONN. JUD. BRANCH, HANDBOOK OF CONNECTICUT APPELLATE PROCEDURE 15–17 (2018) (discussing motions that may be filed before Connecticut appellate courts, including those for review of adverse decisions on applications for stays (or to terminate stays) pending appeal).

61. See DEL. SUP. CT. R. 3(c) (“[A] member of the Court shall be designated as the Motion Justice to consider and initially review all motions.”); MASS. R. CRIM. PRO. 15(c) (authorizing an individual justice of the Massachusetts Supreme Judicial Court to rule on motions for leave to file interlocutory appeals in criminal cases); WIS. SUP. CT. INTERNAL OPERATING PROC. III.B.6.a (authorizing the chief justice to act on behalf of the court on routine scheduling motions and on uncontroversial applications for leave to file amicus curiae briefs).

62. See WIS. SUP. CT. INTERNAL OPERATING PROC. III.B.6.b (directing that substantive motions are assigned to court staff for review and reporting to the court as a whole).

63. Compare *Planned Parenthood Great Nw., Haw., Alaska, Ind., Ky. v. State*, Nos. 49615, 49817 & 49899, 2022 WL 335696, at *1 (Idaho Aug. 12, 2022) (declining a request to stay enforcement of Idaho's abortion ban and vacating an earlier stay in a signed, written opinion), and *Planned Parenthood of Mont. v. State ex rel. Knudsen*, No. DA 21-0521, 2022 WL 3209766, at *1 (Mont. Aug. 9, 2022) (affirming a decision preliminarily enjoining enforcement of state statutes restricting abortion in a signed, written opinion), with *In re Paxton*, No. 22-0527, 2022 WL 2425619, at *1 (Tex. July 1, 2022) (partially granting an emergency motion for temporary relief staying a trial court order which halted criminal enforcement of Texas's abortion ban in a one-sentence, unsigned order).

64. See, e.g., *J.P. & S.P.*, unpublished slip op. at 1 (providing a comprehensive analysis of an earlier order denying a motion to stay pending appeal).

65. For example, the Michigan and North Carolina Supreme Court's orders, even on issues as prosaic as extensions of time to file briefs, appear in the tables of the official reporters. See, e.g., *McKinney v. Goins*, 874 S.E.2d 205, 206 (N.C. 2022) (granting a motion for extension of time to file a brief); *People v. Welch*, 978 N.W.2d 117 (Mich. 2022) (granting an extension of time for leave to file a supplemental brief).

legal research websites like Westlaw.⁶⁶ Some courts' orders state each justice's individual vote, others are always unsigned.⁶⁷ Some courts' orders are easily accessible on their website or electronic docket, while other courts' orders are totally unavailable online.⁶⁸ And even within individual courts, practices may vary from case to case, with only some orders containing written reasoning or only occasional orders being published.

As these examples suggest, some state shadow dockets may be less "shadowy" than the U.S. Supreme Court's. After all, the term "shadow docket" refers, in part, to the different ways orders and merits decisions are treated.⁶⁹ Indeed, in states without intermediate courts of appeals or where pockets of mandatory appellate jurisdiction still exist, the treatment of orders and merits cases may not vary much.⁷⁰ Similarly, courts that note each justice's individual vote on all orders or provide more meaningful reasoning for their orders may be more transparent in these respects than the U.S. Supreme Court.⁷¹

Nevertheless, some state shadow dockets are far less transparent than the U.S. Supreme Court's. Contrast the U.S. Supreme Court's shadow docket rulings, which can be available in four different places on

66. The only orders of the Wisconsin Supreme Court that appear in the official reports, whether in table form or otherwise, are those rare orders designated for publication. As discussed in Part II.B, *infra*, that includes virtually none of the court's orders.

67. Compare *Espinoza v. Mont. Dep't of Rev.*, no. DA 17-0492, unpublished order at 2 (Mont. Jan. 24, 2019) (identifying each justices' vote), with *Paxton*, 2022 WL 2425619, at *1 (noting no justices' votes).

68. In Michigan, for example, orders are easily searchable on the court's website. See *Cases, Opinions & Orders*, MICH. CTS., <https://www.courts.michigan.gov/case-search/> (last visited Oct. 9, 2022) [hereinafter *Cases, Opinions & Orders*, MICH CTS.]. In Wisconsin, by contrast, orders from the Wisconsin Supreme Court cannot be accessed either on the court's website or electronic docketing system.

69. See Vladeck Testimony, *supra* note 1, at 2–3 (explaining that although the "shadow" metaphor is, in [the author's] view, entirely appropriate given the contrast between such orders and merits decisions," the shadow docket is not "inherently pernicious").

70. In Montana, for example, all appeals go to its supreme court as a matter of right. As a result, the Montana Supreme Court often handles merits appeals in unpublished, but signed, opinions. See, e.g., *In re Marriage of Grigg*, No. DA 21-0195, 2022 WL 3368503 (Mont. Aug. 16, 2022) (affirming a lower court's divorce judgment in a non-precedential memorandum opinion). These memorandum dispositions do not differ much in form from the court's unpublished decisions on orders. See, e.g., *Espinoza*, unpublished order at 2.

71. The North Carolina and Montana Supreme Courts, for example, note each justice's individual vote on orders. See *McKinney v. Goins*, 874 S.E.2d 205, 206 (N.C. 2022); *Espinoza*, unpublished order at 2.

the Court's website,⁷² with several state supreme courts, whose orders are available only at the clerk's office.⁷³ Even when orders are available on state high courts' websites, they are harder to find than the U.S. Supreme Court's. Unlike the U.S. Supreme Court, which publishes orders lists identifying most orders issued over a period of time, in many states, the only way to search for orders is by looking up each case individually.⁷⁴ And because many state high courts' orders are not available on their website or included in official reporters (either by publication or inclusion in tables), they are also not available on legal research services like Westlaw or Lexis. This inaccessibility, coupled with the truncated briefing, lack of oral argument, unpredictable timing, and often inscrutable reasoning of shadow docket orders generally, means that state shadow dockets are often less transparent than the U.S. Supreme Court's.

To further illustrate these issues, and to illuminate others, we draw on our experiences at the Wisconsin Supreme Court.

B. The Wisconsin Supreme Court's Shadow Docket

The Wisconsin Supreme Court handles motions and other emergency applications differently than the forty to sixty merits decisions it issues each year.⁷⁵ Most of these motions and emergency applications

72. See Vladeck Testimony, *supra* note 1, at 3 n.6.

73. This is true of the Wisconsin Supreme Court, as well as the Iowa Supreme Court. See *Iowa Courts Online Search*, IOWA CTS., <https://www.iowacourts.state.ia.us/ESASWebApp/SelectFrame> (last visited Oct. 9, 2022) ("Appellate case electronic document viewing available, at a public terminal at the courthouse, in the county where the appeal was filed."). To access even the briefs in merits cases before the Colorado Supreme Court, a request must be made in writing. See *Policies, Fees and Miscellaneous*, COLO. JUD. BRANCH, https://www.courts.state.co.us/Courts/Supreme_Court/feesandfiling.cfm (last visited Oct. 9, 2022). Aside from orders denying review in cases, which are available on the court's website, other orders appear to be available only through the same process. See *Supreme Court Case Announcements*, COLO. JUD. BRANCH, https://www.courts.state.co.us/Courts/Supreme_Court/Case_Announcements/Index.cfm (last visited Oct. 9, 2022). The Maryland Court of Appeals is similar. See, e.g., *Court of Appeals, Petitions for Writ of Certiorari – July, 2022*, MD. CTS., <https://www.courts.state.md.us/coappeals/petitions/202207petitions> [<https://perma.cc/4RYU-RF3V>] (last visited Oct. 9, 2022); *Court of Appeals, Judicial Records Requests*, MD. CTS., <https://www.courts.state.md.us/coappeals/recordsrequests> [<https://perma.cc/QK48-TYFG>] (last visited Oct. 9, 2022).

74. This is true, for example, in the Supreme Courts of Tennessee, *Appellate Case Search*, TENN. STATE CTS., <https://www.tncourts.gov/PublicCaseHistory/> (last visited Oct. 9, 2022), and Virginia, *Supreme Court of Virginia Case Information*, SUP. CT. OF VA., <https://eapps.courts.state.va.us/acms-public> (last visited Oct. 9, 2022).

75. Ball, *supra* note 15 (noting that over the last decade the Wisconsin Supreme Court issued between forty and sixty-one merits decisions each year). These numbers do

fall into three broad categories: (1) the usually mundane day-to-day requests for extensions of time to file briefs, leave to file amicus briefs, or those relating to the scheduling of court proceedings; (2) requests for the court to exercise its appellate jurisdiction to review lower court decisions, or to exercise its original jurisdiction;⁷⁶ and (3) motions for temporary relief from lower court decisions, including for stays or temporary injunctions. Before ruling on any of these motions, the court receives only limited briefing—usually just a motion and opposition⁷⁷—and never holds oral argument.

Although the court's orders deciding motions in each of these categories are technically public, they are nearly impossible to access. That is because, unlike the U.S. Supreme Court, the Wisconsin Supreme Court does not publish a comprehensive orders list on its website,⁷⁸ and copies of individual orders in a given case are available only by requesting them through the clerk's office.⁷⁹ Moreover, with only a few

not include cases in which the court was unable to reach a decision on the merits (either due to a tie or otherwise). *See id.*

76. The Wisconsin Supreme Court's jurisdiction is typically invoked when a party petitions for review of an adverse decision of the Wisconsin Court of Appeals and the court grants the petition. *See* WIS. STAT. § 809.62 (2019–20). There are no appeals as of right to the Wisconsin Supreme Court; the court's review "is a matter of judicial discretion, . . . and will be granted only when special and important reasons are presented." § 809.62(1r). The court also has jurisdiction to accept original actions, which are cases that begin in the Wisconsin Supreme Court. *See* WIS. CONST. art. VII, § 3(2).

77. Although amicus participation is not prohibited, given the compressed timelines that apply to motions, it is rare.

78. The court's public information officer does, however, publish a list on the court's website each month of cases in which review was granted or denied. *See, e.g.*, Press Release, Sup. Ct. of Wis., Wisconsin Supreme Court Accepts Three New Cases (June 28, 2022), <https://www.wicourts.gov/courts/supreme/docs/oac/grants062822.pdf> [<https://perma.cc/6SFV-4EVY>]. The public information officer also sometimes shares copies of orders with the media.

79. Although the court's publicly accessible electronic docketing system states whether a motion was granted or denied, and notes whether any justice dissented, concurred, or filed an opinion, the text of the order—along with any written legal analysis and separate writings—are not available there. *See, e.g.*, *Supreme Court and Court of Appeals Access: James v. Heinrich, Appeal Number 2020AP001419-OA*, WIS. CT. SYS., <https://wscca.wicourts.gov/appealHistory.xsl?caseNo=2020AP001419&cacheId=31A09F66D6F1CF766B38342ADD69400&recordCount=1&offset=0&linkOnlyToForm=false&sortDirection=DESC> (last visited Sept. 18, 2022) (noting a September 10, 2020 order granting leave to commence an original action and a temporary injunction on the docket along with the notation "Rebecca Grassl Bradley, J. concurs. Rebecca Frank Dallet, J. dissents, joined by Ann Walsh Bradley and Jill J. Karofsky" but without attaching the concurrence, dissent, or order). The court's website's search function says that it allows users to search for "[o]pinions and dispositional orders," which includes only orders published in the official reports. *See Supreme Court Opinions: Search for Court Opinions & Dispositional Orders*, WIS. CT. SYS., <https://www.wicourts.gov/opinions/supreme.jsp>. (Feb. 13, 2022). Because the court

notable exceptions,⁸⁰ the court's orders are not published in the Wisconsin or North Western Reporters and are not available on Westlaw or Lexis. This is true even when orders contain substantive legal analysis and when one or more justices file a concurring or dissenting opinion,⁸¹ even though the court's rules require publication when an "order disposes of any appeal, review, or proceeding before the supreme court and contains significant discussion or explanation of the grounds for disposition."⁸²

The court's practices when it comes to publishing orders under this rule have been inconsistent at best. For example, contrast the lone published order from the last several years, *Hawkins v. Wisconsin Elections Commission*,⁸³ with the unpublished order in *James v. Heinrich*, issued just four days earlier.⁸⁴ The published order in *Hawkins* is unsigned and contains ten paragraphs of reasoning for why the court rejected an original action and motion for temporary injunctive relief directing the Wisconsin Elections Commission to place the Green Party's 2020 presidential ticket on the general election ballot.⁸⁵ Meanwhile, the unpublished order in *James* is also unsigned and contains roughly the same amount of reasoning for why the court decided to accept an original action and grant a temporary injunction stopping a local health official's order delaying in-person instruction in schools as a result of COVID-19.⁸⁶ And both *Hawkins* and *James* were accompanied by dissenting opinions.⁸⁷ Although both orders and the dissenting opinions contain written reasoning regarding issues that were the subject of significant public interest and were resolved by a four-to-three vote, the court

almost never publishes orders in the official reports, however, the public cannot access most court orders there either.

80. See, e.g., *Hawkins v. Wis. Elections Comm'n*, 948 N.W.2d 877, 879 (Wis. 2020). This order, and the decision to publish it, are discussed further below.

81. See, e.g., *James v. Heinrich*, Nos. 2020AP1419-OA, 2020AP1420-OA & 2020AP1446-OA, unpublished slip op. (Wis. Sept. 10, 2020).

82. Wis. SUP. CT. R. 80.003(1)(a). Publication is also permitted in the court's discretion if an "order concerns a legal, factual, jurisdictional, or procedural issue of significant public interest or importance," "contains significant discussion or explanation of . . . any law, statute, or court rule," or if "[t]he order enhances access to or transparency of the court's work to the general public." *Id.* at (2)(a)–(c). The rules do not, however, define what is a "significant discussion or explanation," and the decision of whether to publish an order ultimately rests with a majority of the court.

83. 948 N.W.2d 877 (Wis. 2020).

84. Nos. 2020AP1419-OA, 2020AP1420-OA & 2020AP1446-OA, unpublished order. (Wis. Sept. 10, 2020).

85. See *Hawkins*, 948 N.W.2d at 877–80.

86. See *James*, unpublished order at 1–5.

87. See *Hawkins*, 948 N.W.2d at 880–98 (dissenting opinions by Chief Justice Roggensack, Justice Ziegler, and Justice Rebecca Grassl Bradley); *James*, unpublished order at 6–10 (Dallet, J., dissenting).

provided no explanation for why one was published and the other was not.

Relatedly, the role of orders in the development of the law and their precedential value is unclear. Most orders contain little or no written reasoning for the court's conclusions, due at least in part to the limited briefing, lack of oral argument, and inherent time constraints imposed by emergency requests. And, as explained above, the orders themselves are almost never published and copies are very difficult to obtain. For these reasons, one would expect these shadow docket orders to simply apply existing law and to not have much precedential value. But the court has announced new principles of law in such orders, and then treated those newly announced rules as binding in subsequent cases.

One example is in *Hawkins*, where the court—in a rare published order—voiced a concern similar to the so-called *Purcell*⁸⁸ principle: “the idea that courts should not issue orders which change election rules in the period just before the election.”⁸⁹ In *Hawkins*, the Green Party candidates sought an injunction directing that their names be placed on the general election ballot just over two weeks prior to statutory deadlines for sending out absentee ballots, and after municipal clerks had “already sent out hundreds, and more likely thousands, of . . . absentee ballots.”⁹⁰ As a result, the court concluded that “given their delay in asserting their rights, we would be unable to provide meaningful relief without completely upsetting the election,” and that the remedies the candidates proposed—reprinting ballots and sending a second ballot to voters who had already received one—“would result in confusion and disarray and would undermine confidence in the general election results.”⁹¹

The court has since cited *Hawkins* as support for the denial of injunctive relief challenging certain Wisconsin election procedures after elections were already underway.⁹² This demonstrates that the court considered *Hawkins* precedential, but that should not be surprising or particularly troubling. After all, *Hawkins* was published. When courts make precedential rulings, they publish those decisions in official reporters, thus signaling to litigants, lower courts, and the public that

88. See *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam).

89. See Richard L. Hasen, *Reining in the Purcell Principle*, 43 FLA. ST. U. L. REV. 427, 428 (2016).

90. *Hawkins*, 948 N.W.2d at 877–79.

91. *Id.* at 880.

92. See *Fabick v. Wis. Elections Comm'n*, No. 2021AP428-OA, unpublished order at 2 n.1 (Wis. June 25, 2021) (denying petition for leave to commence an original action); *Teigen v. Wis. Elections Comm'n*, No. 2022AP91, unpublished order at 3 (Wis. Jan. 28, 2022); see also *id.* at 4 (Hagedorn, J., concurring) (citing *Hawkins*, 948 N.W.2d 877, as support for the proposition that, “[a]s a general rule, this court should not muddy the waters during an ongoing election.”).

those conclusions are binding on lower courts and will be treated as *stare decisis* by the court that decided them. In this respect, *Hawkins* is an example of how, if a court is going to change the law on the shadow docket, it should make that change.

But that is not the only time in recent years when the court substantially altered Wisconsin law on its shadow docket. In a series of three unpublished orders beginning in 2019, the Wisconsin Supreme Court changed the analysis lower courts must conduct in deciding whether to grant temporary relief pending appeal.⁹³

For more than two decades prior to 2019, the availability of temporary relief pending appeal in Wisconsin hinged on the factors set forth in *State v. Gudenschwager*,⁹⁴ which required a movant show: (1) a strong likelihood of success on the merits of the appeal; (2) irreparable injury to the movant if relief was not granted; (3) no substantial harm to other interested parties if relief is granted; and (4) no harm to the public interest from granting relief.⁹⁵ In two unpublished orders staying lower court decisions that invalidated laws passed during an “extraordinary session” of the state legislature in late 2018, *League of Women Voters v. Evers (LWV)*⁹⁶ and *Service Employees International Union, Local No. 1 v. Vos (SEIU)*,⁹⁷ the court substantially rewrote the analysis under each of these factors by: (1) suggesting that the *de novo* standard of review alone is sufficient to demonstrate a strong likelihood of success on the merits, no matter what the lower courts concluded in their own review of the merits; (2) concluding that “the harm that stems from refusing to stay an injunction against the enforcement of a law passed by the Legislature and signed by the Governor, regardless of the nature of the challenge to the law, is an irreparable harm of the first magnitude”;⁹⁸ and (3) collapsing the second through fourth *Gudenschwager* factors into a

93. See *League of Women Voters v. Evers (LWV)*, No. 2019AP559, unpublished order (Wis. Apr. 30, 2019) (granting in part motion for temporary relief); *Serv. Emps. Int’l Union, Local 1 v. Vos (SEIU)*, No. 2019AP622, unpublished order (Wis. June 11, 2019) (granting motion in part for temporary relief); *Waity v. LeMahieu*, No. 2021AP802, unpublished order (Wis. July 15, 2021) (granting motion for temporary relief pending appeal).

94. 529 N.W.2d 225 (Wis. 1995) (per curiam).

95. *Id.* at 229.

96. No. 2019AP559, unpublished order (Wis. Apr. 30, 2019).

97. No. 2019AP622, unpublished order (Wis. June 11, 2019).

98. See *LWV*, No. 2019AP559, unpublished order at 8; see also *SEIU*, No. 2019AP622, unpublished order at 8 (“[T]he Legislature . . . and the public suffer a substantial and irreparable harm of the first magnitude when a statute enacted by the people’s elected representatives is declared unenforceable and enjoined before any appellate review can occur.”).

free-flowing balancing exercise.⁹⁹ Then, in a third unpublished order in *Waity v. LeMahieu*,¹⁰⁰ the court chided the trial court for “completely fail[ing] to understand” and “never consider[ing]” the changes to the stay-pending-appeal standard that were announced in the unpublished *LWV* and *SEIU* orders.¹⁰¹

The foregoing episode illustrates the most pressing problems with the Wisconsin Supreme Court’s shadow docket and echoes the criticisms of the U.S. Supreme Court’s shadow docket discussed earlier. First, the Wisconsin Supreme Court, like the U.S. Supreme Court, is changing the law on its shadow docket. And because those changes are happening in unsigned orders, sometimes with relatively little written reasoning, and always without the benefit of full briefing, oral argument, or amicus participation, there is reason for concern about the quality and consistency of the court’s rulings. Second, and equally troubling, the Wisconsin Supreme Court is making these changes in unpublished orders that are effectively unavailable, and then treating its rulings as binding precedent, even though the only way to access those precedents is through the clerk’s office, or maybe by finding them on a newspaper’s website.¹⁰² Even though the court eventually included changes to the stay-pending-appeal standard in a published opinion, it first did so years after announcing the change in an unpublished order.¹⁰³ Third, the upshot of the substantive changes the court made to the standards for temporary relief pending appeal in *LWV*, *SEIU*, and *Waity* is that the availability of temporary relief pending appeal now appears to hinge almost entirely on the merits—and each individual justice’s prediction about how she will vote on the merits without the benefit of full briefing and argument—rather than the weighing of the equities under the other three *Gudenschwager* factors.¹⁰⁴ Finally, as the decision to publish the order in

99. See Jeffrey A. Mandell, *The Wisconsin Supreme Court Quietly Rewrote the Legal Standard Governing Stays Pending Appeal, Leaving Circuit Courts Effectively Powerless to Enjoin Unconstitutional Statutes*, 2019 WIS. L. REV. FORWARD 29, 36–42 (summarizing the effects of the first two of these three cases and contrasting them with *Gudenschwager*).

100. No. 2021AP802, unpublished order (Wis. July 15, 2021).

101. See *id.* at 7, 10–12 (granting a motion for a stay of a circuit court ruling granting a declaratory judgment and permanent injunction against legal services contracts entered into by state legislative leaders).

102. See Molly Beck, *Wisconsin Supreme Court Restores Appointments Made by Scott Walker in Legal Battle over Lame-Duck Action*, MILWAUKEE J. SENTINEL, <https://www.jsonline.com/story/news/politics/2019/04/30/wisconsin-supreme-court-restores-82-appointments-made-scott-walker-legal-battle-over-lame-duck-actio/3633611002/> (May 3, 2019, 6:13 PM).

103. See *Waity v. LeMahieu*, 969 N.W.2d 263, 278–81 (Wis. 2022).

104. See Mandell, *supra* note 99, at 37–38 (explaining the puzzling logic of both *LWV* and *SEIU* that “after granting a temporary injunction based on a careful assessment of the merits,” trial courts should then “stay that injunction on the basis that the appeals

Hawkins while not publishing the orders in *James*, *LWV*, *SEIU*, and *Waity* demonstrates, the Wisconsin Supreme Court's practices on its shadow docket are ad hoc. That inconsistency is not limited to publication only; the court also sometimes provides written reasoning and sometimes does not. This, in turn, can lead to questions about the quality of the court's decisions from case to case.

III. REFORMING STATE SHADOW DOCKETS

In considering reforms to address the concerns we have identified with state shadow dockets, we first look to best practices among various state high courts. To begin, basic transparency is a necessity—it is unacceptable for any court to make consequential decisions in a way that is practically inaccessible to the public. Although there are various approaches, including publishing orders lists or simply making PDF versions of orders available on the court's electronic docketing system, the Michigan Supreme Court's approach is among the very best. Its website allows users to search for orders chronologically, without having to know a case name or docket number, and to access PDF versions of every order the court issues.¹⁰⁵ Beyond that bare minimum of transparency, however, when orders make substantive changes to the law or when any justice publicly dissents, those orders should be published in the official reports. And to avoid inconsistency in that process, courts should adopt rules with clear guidelines for when an order must be published. Furthermore, such measures would avoid pitfalls of rules like Wisconsin's that give the court too much discretion and define too narrowly the types of orders that should be published.¹⁰⁶ Additionally, other state courts should consider identifying the votes of all participating justices, like the Montana Supreme Court does,¹⁰⁷ to increase public accountability and consistency in reasoning.¹⁰⁸ Indeed, transparency in publishing individual justices' votes may be particularly important on state courts, where justices are typically elected or run in retention elections, and thus must be able to be held publicly accountable for their decisions. Moreover, committing to providing even brief reasoning on all orders granting or denying temporary relief pending appeal would

court might see those merits differently"); *see also* Vladeck Testimony, *supra* note 1, at 13 (noting that at the U.S. Supreme Court, "emergency relief now appears to rise and fall almost entirely on the merits").

105. *See Cases, Opinions & Orders*, MICH. CTS., *supra* note 68.

106. *See supra* notes 79–80, 83–87 and accompanying text.

107. *See, e.g., Espinoza v. Mont. Dep't of Rev.*, No. DA 17-0492, unpublished order at 2 (Mont. Jan. 24, 2019).

108. *See supra* note 57 and accompanying text.

also improve transparency and accountability.¹⁰⁹ Finally, to decrease the unpredictable timing of shadow docket rulings, courts could follow the Texas Supreme Court's lead and stick to a set schedule for releasing orders whenever possible.¹¹⁰

Aside from the examples of these other states, state high courts could also draw on some of the proposals for reforming the U.S. Supreme Court's shadow docket. For example, standardizing the timing for responses to applications for temporary relief when possible may help to encourage amicus participation on state shadow dockets.¹¹¹ Although oral argument before the full court may not be possible for emergency applications, courts could also consider designating a motions justice on a rotating basis akin to the U.S. Supreme Court's circuit justices, who have historically heard oral argument and issued in-chambers opinions ruling on many motions for temporary relief.¹¹² And when novel issues of law come up on the shadow docket, state courts could also construe those requests as petitions for review or otherwise add cases to their merits docket on an expedited basis in order to give novel legal issues more complete treatment.¹¹³

Finally, state legislatures may also have a role to play in reforming state shadow dockets. For example, state legislatures may be able to codify the legal standards courts must use when ruling on applications for emergency relief, including temporary injunctions or stays pending appeal.¹¹⁴ Additionally, state legislatures might, subject to state

109. Some state supreme courts appear to do this already. *See, e.g., Leibsohn v. Hobbs*, No. CV-22-0204-AP/EL, unpublished order at 4 (Ariz. Aug. 24, 2022) (explaining the court's order, but noting that, "[a] written Opinion [sic] detailing the Court's reasoning will follow in due course"); *J.P. & S.P. v. State*, No. S-18107, unpublished slip op. at 1 (Alaska July 9, 2021) (providing a comprehensive analysis of an earlier brief order denying a motion to stay pending appeal).

110. *Frequently Asked Questions*, TEX. CTS., <https://www.txcourts.gov/supreme/frequently-asked-questions/> (last visited Sept. 18, 2022) ("Orders of the Supreme Court are scheduled for release at 9:00 a.m. each Friday. The orders are posted on the Court's web page that day.").

111. *See* Vladeck Testimony, *supra* note 1, at 32 (proposing this reform at the U.S. Supreme Court).

112. *See id.* at 31 (suggesting the U.S. Supreme Court should revive this practice as much as possible). It is worth noting that at the U.S. Supreme Court, the Court as a whole may, if requested by a party, review an individual Justice's in-chambers order. *See* SUPREME COURT PRACTICE, *supra* note 28.

113. *See* Vladeck Testimony, *supra* note 1, at 32 (recommending the U.S. Supreme Court adopt this practice).

114. *See, e.g.,* WIS. STAT. § 751.12(1), (4) (2019–20) (granting the Wisconsin Supreme Court the power to "regulate pleading, practice, and procedure in judicial proceedings in all courts" by rule, but noting that "[t]his section shall not abridge the right of the legislature to enact, modify, or repeal statutes or rules relating to pleading, practice, or procedure"); *see also* Vladeck Testimony, *supra* note 1, at 33 ("Congress

constitutional limitations, require publication of certain types of orders, or require courts to provide even brief reasoning for their decisions.¹¹⁵

CONCLUSION

Although they have not received the same level of scrutiny, state shadow dockets have a lot in common with the U.S. Supreme Court's shadow docket. For that reason, state shadow dockets share many of the same flaws: procedural irregularity, opaque reasoning, little briefing, no oral argument, and a lack of transparency. Yet some state shadow dockets are even less transparent than the U.S. Supreme Court because their decisions are unavailable on the court's website, in official reporters, or on Westlaw. Given that unsettled legal questions of substantial statewide importance are being decided there, state high courts should make their shadow docket decisions publicly accessible on the court's website and commit to publishing shadow docket orders that make substantive changes to the law or from which any justice publicly dissents. Although other reforms should be explored, public accessibility and publication of substantive state shadow docket orders should be prioritized above all else.

might consider . . . [c]odifying the traditional four-factor test that the [U.S. Supreme] Court applies in considering applications for emergency relief.”).

115. See WIS. STAT. § 751.12(4).

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