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ESSAY

DEEP IN THE SHADOWS?: THE FACTS ABOUT THE EMERGENCY DOCKET

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The past few years have witnessed a particular accusation leveled repeatedly and loudly at the U.S. Supreme Court's conservative supermajority: that they are using the Court's emergency (or pejoratively, "shadow") docket to issue highly consequential decisions in a sneaky, secretive fashion. Using data from the Court's 2021–22 Term and neutral methods, we analyze the entirety of the emergency docket. The results show that conservative interests fare better on the emergency docket, just as they do on the merits docket—no surprise considering the Court's political orientation. Unsettling as this may be from a liberal or legal-formalist perspective, there is little evidence that any of this is happening in the shadows.

INTRODUCTION

Minutes before midnight on September 1, 2021, the U.S. Supreme Court declined to block a Texas law that banned abortions after six weeks.[1] The uproar that followed reflected not only fervent views over

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[1] Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2494–96 (2021).

abortion but also procedural concerns. Among the complaints was that the Court had issued the ruling on its emergency docket—these days, often called the "shadow docket."[2] In dissent, Justice Kagan, joined by Justices Sotomayor and Breyer, criticized the Court's increased reliance on the "shadow docket" as "unreasoned, inconsistent, and impossible to defend."[3] Weeks later, Justice Alito responded in a speech, rebuking critics of the "shadow docket" as wanting to "portray the [C]ourt as having been captured by a dangerous cabal that resorts to sneaky and improper methods to get its ways."[4]

If the goal of using the term "shadow docket" was to draw attention to a heretofore obscure area of the Supreme Court's business, it worked.[5] To be sure, some prior emergency applications have been consequential and attention-grabbing, such as the injunction ordering a halt to the Nixon administration's bombing in Cambodia in 1973.[6] But those were rare. No longer. The last several years have seen an explosion of commentary about the shadowy emergency docket in settings ranging from academic

[2] The emergency docket goes by various names, including the "non-merits docket," the "procedural docket," and the "shadow docket." Credit for originating the term "shadow docket" is generally given to an article by University of Chicago Law Professor Will Baude. See William Baude, Foreword: The Supreme Court's Shadow Docket, 9 N.Y.U. J.L. & Liberty 1,5 (2015).

[3] *Whole Woman's Health*, 141 S. Ct. at 2500 (Kagan, J., dissenting).

[4] Adam Liptak, Alito Responds to Critics of the Supreme Court's 'Shadow Docket,' N.Y. Times (Sept. 30, 2021), https://www.nytimes.com/2021/09/30/us/politics/alito-shadow-docket-scotus.html [https://perma.cc/2NNB-5QX3].

[5] See Ellena Erskine, Senators Spar Over Shadow Docket in Wake of Court's Order Allowing Texas Abortion Law to Take Effect, SCOTUSblog (Sept. 29, 2021, 8:20 PM), https://www.scotusblog.com/2021/09/senators-spar-over-shadow-docket-in-wake-of-courts-order-allowing-texas-abortion-law-to-take-effect [https://perma.cc/6MND-KJYR] (quoting Senator Ted Cruz as saying: "Shadow docket, that is ominous. Shadows are really bad, like really, really bad" (internal quotation marks omitted)); Liptak, supra note 4.

[6] Burt Neuborne, I Fought the Imperial Presidency, and the Imperial Presidency Won, ACLU (Sept. 27, 2019), https://www.aclu.org/issues/national-security/i-fought-imperial-presidency-and-imperial-presidency-won [https://perma.cc/JY8K-KRVN].

articles[7] to tweets,[8] blogs,[9] legal podcasts,[10] news articles,[11] and even congressional hearings.[12]

Why? Two reasons have moved front and center. The first implicates the supposedly "shadowy" bit of the treatment of emergency applications. The accusation leveled by detractors is that the Justices are making increasing use of the emergency docket to issue consequential rulings on matters ranging from redistricting plans[13] to immigration policy[14] to

[7] E.g., Richard J. Pierce, Jr., The Supreme Court Should Eliminate its Lawless Shadow Docket, 74 Admin. L. Rev. 1 (2022); Trevor N. McFadden & Vetan Kapoor, The Precedential Effects of the Supreme Court's Emergency Stays, 44 Harv. J.L. & Pub. Pol'y 827 (2021); Stephen I. Vladeck, The Solicitor General and the Shadow Docket, 133 Harv. L. Rev. 123 (2019).

[8] E.g., Leah Litman (@LeahLitman), Twitter (Feb. 23, 2023, 1:25 PM), https://twitter.com/LeahLitman/status/1628823350092124161 [https://perma.cc/2CR9-RPQP] (tweet quoting Professor Steve Vladeck who, in a video previewing his book on the shadow docket, says: "[T]he Court is regularly using and abusing the Shadow Docket in ways that directly affect all of us").

[9] E.g., Symposium on the Supreme Court's Shadow Docket, SCOTUSblog (Oct. 2020), https://www.scotusblog.com/category/special-features/symposium-on-the-supreme-courts-shadow-docket [https://perma.cc/44DB-V4K7]; Harry Isaiah Black & Alicia Bannon, The Supreme Court 'Shadow Docket,' Brennan Ctr. for Just. (July 19, 2022), https://www.brennancenter.org/our-work/research-reports/supreme-court-shadow-docket [https://perma.cc/C2KH-T6F4].

[10] E.g., Jeffrey Rosen, We the People, The Supreme Court's "Shadow Docket," Nat'l Const. Ctr. (Oct. 7, 2021), https://constitutioncenter.org/news-debate/podcasts/the-supreme-courts-shadow-docket [https://perma.cc/L9D2-TZRV].

[11] E.g., Liptak, supra note 4; Samantha O'Connell, Supreme Court "Shadow Docket" Under Review by U.S. House of Representatives, ABA (Apr. 14, 2021), https://www.americanbar.org/groups/committees/death_penalty_representation/publications/project_blog/scotus-shadow-docket-under-review-by-house-reps [https://perma.cc/92RL-W7B7]; Steve Vladeck, Brett Kavanaugh's Defense of the Shadow Docket Is Alarming, Slate (Feb. 8, 2022, 4:32 PM), https://slate.com/news-and-politics/2022/02/the-supreme-courts-shadow-docket-rulings-keep-getting-worse.html [https://perma.cc/SQ83-2JZ9]; Steve Vladeck, The Supreme Court's Most Partisan Decisions Are Flying Under the Radar, Slate (Aug. 11, 2020, 12:12 PM) [hereinafter Vladeck, Partisan Decisions], https://slate.com/news-and-politics/2020/08/supreme-court-shadow-docket.html [https://perma.cc/TB24-H3MX]; Lydia Wheeler, US Supreme Court 'Shadow Docket' Quieter So Far This Term, Bloomberg L. (Dec. 27, 2022, 4:45 AM), https://www.bloomberglaw.com/bloomberglawnews/us-law-week/X4VOEVIO000000?bna_news_filter=us-law-week#jcite [https://perma.cc/DL7R-HWCG].

[12] E.g., Texas's Unconstitutional Abortion Ban and the Role of the Shadow Docket: Hearing Before the S. Comm. on the Judiciary, 117th Cong. (2021) (testimony of Stephen I. Vladeck, Charles Alan Wright Chair in Federal Courts, University of Texas School of Law), https://www.judiciary.senate.gov/imo/media/doc/Vladeck%20testimony1.pdf [https://perma.cc/6MUZ-S24D].

[13] E.g., Merrill v. Milligan, 142 S. Ct. 879 (2022).

[14] E.g., Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080 (2017) (per curiam).

COVID regulations,[15] and, of course, abortion. The resulting orders, critics claim, can have precedential value[16]—even though the Justices received only minimal briefing, did not have the benefit of oral arguments, and resolved the matter in days (not the many months that "merits" decisions receive) in orders with almost no rationale.

The complaint that judges are issuing decisions without reasons and, therefore, undermining rule-of-law values and the development of precedent is not new.[17] But that complaint is often about judges doing less work than detractors would like them to.[18] The claim in the shadow-docket drama is different. It is not that the Justices are being lazy. It is that the conservative Justices have devised a sneaky technique to make big decisions that end up having precedential value in secret.

Which brings us to the second explanation for the growing attention—and concern—over the shadow docket: brute politics. The division between Justices Alito and Kagan is not happenstance. Because it seems that many "emergency rulings" have favored conservative causes, liberals have decried the emergency docket as a dangerous, politically expedient tool that the conservative majority has exploited to advance its partisan and ideological commitments.[19] To (liberal) detractors, the order

[15] E.g., Chrysafis v. Marks, 141 S. Ct. 2482 (2021).

[16] This is so even though they are not formally precedential. See, e.g., 1A, Remaking America: The Supreme Court, the Shadow Docket, and America's Trust, NPR, at 11:38 (Apr. 25, 2022, 3:53 PM), https://www.npr.org/2022/04/25/1094620949/remaking-america-the-supreme-court-the-shadow-docket-and-americas-trust [https://perma.cc/BVM8-UAV6]; Alex Badas, Billy Justus & Siyu Li, Assessing the Influence of Supreme Court's Shadow Docket in the Judicial Hierarchy, 43 Just. Sys. J. 609, 612–14, 21 (2022); McFadden & Kapoor, supra note 7, at 830–31.

[17] For analyses of judicial avoidance, see, e.g., Erin F. Delaney, Analyzing Avoidance: Judicial Strategy in Comparative Perspective, 66 Duke L.J. 1, 18–19 (2016); David C. Vladeck & Mitu Gulati, Judicial Triage: Reflections on the Debate Over Unpublished Opinions, 62 Wash. & Lee L. Rev. 1667, 1676, 1680–84 (2005).

[18] E.g., Mitu Gulati & C.M.A. McCauliff, On *Not* Making Law, 61 L. & Contemp. Probs. 157, 173 (1998). To quote Justice Frankfurter on the matter of emergency docket decisions and why they are given limited attention: "If the Court is to do its work it would not be feasible to give reasons, however brief, for refusing to take these cases. The time that would be required is prohibitive . . . ." Maryland v. Balt. Radio Show, Inc., 338 U.S. 912, 918 (1950) (Frankfurter, J., respecting denial of certiorari).

[19] See Black & Bannon, supra note 9; Vladeck, Partisan Decisions, supra note 11; Damon Root, Elena Kagan's Valid Critique of the Supreme Court's 'Shadow Docket,' Reason (July 20, 2022, 11:58 AM), https://reason.com/2022/07/20/elena-kagans-valid-critique-of-the-supreme-courts-shadow-docket [https://perma.cc/LHW9-9QKM] ("[C]omplaints about the shadow docket have mostly come from liberal legal experts and activists. . . . Put simply, the Supreme Court's recent spate of high-profile emergency interventions have largely aligned with conservative policy preferences."); David S. Cohen, The Supreme Court's 'Shadow

upholding the Texas abortion ban is a prime example. Because the ruling contravened the then "superprecedent" of *Roe v. Wade*,[20] critics argue that the Court should have refrained from issuing an unreasoned "emergency" order without the benefit of full briefing and arguments.[21]

The rebuttal is straightforward: however arresting the metaphor of the "shadow docket," there is reason to be skeptical of it. As an initial matter, especially salient emergency applications, such as those over abortion and COVID, represent but a tiny fraction of the emergency docket.[22] The vast majority of applications are far less consequential administrative requests (such as applications for deadline extensions) that do not require the Court's full consideration. These applications, the argument goes, lack a political dimension, and even for the few with political shadings (e.g., abortion and immigration), the Justices are not partisan or ideological in response; they are simply dealing with cases that "might really be emergencies."[23]

Docket' Is Even Shadier than It Sounds, Rolling Stone (Apr. 10, 2022), https://www.rollingstone.com/politics/political-commentary/supreme-court-shadow-docket-conservative-agenda-1335473 [https://perma.cc/D3YF-D32C] ("[T]his ultraconservative Supreme Court is exploiting a mechanism that used to be reserved for the most emergent matters that come to the Court to further stamp its right-wing view on American law and society."); Kimberly Strawbridge Robinson, Supreme Court Conservatives Want More Robust 'Shadow Docket,' Bloomberg L. (July 8, 2022, 12:51 PM), https://news.bloomberglaw.com/us-law-week/supreme-courts-conservatives-want-more-robust-shadow-docket [https://perma.cc/EKB4-9K2K] (quoting Kimberly Humphrey, Federal Courts Legal Director for Alliance for Justice: "What stands out is that . . . conservative interests are the big winners when the Court grants emergency relief . . . ." (internal quotation marks omitted)).

[20] 410 U.S. 113 (1973); Jeffrey Rosen, So, Do You Believe in 'Superprecedent'?, N.Y. Times (Oct. 30, 2005), https://www.nytimes.com/2005/10/30/weekinreview/so-do-you-believe-in-superprecedent.html [https://perma.cc/DG75-DUCP].

[21] See Claire Hansen, Supreme Court Order on Texas Abortion Ban Puts 'Shadow Docket' in the Spotlight, U.S. News & World Rep. (Sept. 3, 2021), https://www.usnews.com/news/national-news/articles/2021-09-03/supreme-court-order-on-texas-abortion-ban-puts-shadow-docket-in-the-spotlight [https://perma.cc/YF6N-K7JU].

[22] Even the staunchest critics of the shadow docket acknowledge this point. See Paul LeBlanc, Here's What the 'Shadow Docket' Is and How the Supreme Court Uses It, CNN (Apr. 7, 2022, 9:24 AM), https://www.cnn.com/2022/04/07/politics/shadow-docket-supreme-court/index.html [https://perma.cc/9UNS-U27Y] (quoting Steve Vladeck as saying: "[The emergency] orders are unsigned and they're unexplained, and 99% of the time we don't care because they're also entirely anodyne").

[23] Mark Rienzi, The Supreme Court's "Shadow" Docket—A Response to Professor Vladeck, Nat'l Rev. (Mar. 16, 2021, 1:30 PM) (emphasis omitted), https://www.nationalreview.com/bench-memos/the-supreme-courts-shadow-docket-a-response-to-professor-vladeck [https://perma.cc/5X72-U5W4]; see also Nina Totenberg, Justice Alito Calls Criticism of the Shadow Docket 'Silly' and 'Misleading,' NPR (Sept. 30, 2021, 7:12 PM),

Further, in response to accusations of nefarious behavior by the conservative Justices, it seems reasonable to point out the conservatives have a six-person majority. Do they really need to hide their reasoning in the shadows to make ultra-right-wing decisions? The conservatives have not exactly been shy in giving reasons for their decisions unmaking old precedent.[24] One of the liberal complaints about the current Court, in fact, has been that the Court's conservative majority has thrown caution to the wind and is overturning well-respected superprecedent with nary a thought.[25] For these six Justices who are happy to do things in the open no matter what the public outcry, why work in the shadows? To return to abortion, that is hardly a matter on which the Court has tried to hide its views and sneak around via a back channel.[26]

So which side has the better case? Is contemporary use of the shadow docket "unreasoned, inconsistent, . . . impossible to defend,"[27] and politically motivated? Or is it, as Justice Alito contends, benign and apolitical, reserved only for matters that need prompt attention? To answer these related questions, we take a different approach than other commentators who have analyzed the emergency docket. Rather than base conclusions on cherry-picked highly-salient disputes, we examine a full Term's worth of emergency applications, that is, *every* application submitted to the Court in its 2021–22 Term. A caveat: our inferences are

https://www.npr.org/2021/09/30/1042051134/justice-alito-calls-criticism-of-the-shadow-docket-silly-and-misleading [https://perma.cc/76KS-LHEF] (quoting Justice Alito: "'The truth of the matter . . . is that there is nothing shadowy' or really new about the process"); Melissa Quinn, Amy Coney Barrett Says Supreme Court Justices Aren't "Partisan Hacks," CBS News (Sept. 13, 2021, 9:01 AM), https://www.cbsnews.com/news/amy-coney-barrett-supreme-court-justices-partisan-hacks [https://perma.cc/R983-D3AK] (quoting Justice Barrett shortly after the Court issued emergency rulings in which the three Democrats were in dissent: "[My goal] is to convince you that this court is not comprised of a bunch of partisan hacks" (internal quotation marks omitted)).

[24] See Nina Totenberg, The Supreme Court Is the Most Conservative in 90 Years, NPR (July 5, 2022, 7:04 AM), https://www.npr.org/2022/07/05/1109444617/the-supreme-court-conservative [https://perma.cc/3KJP-UZU4].

[25] See Nicholas Goldberg, Column: After the Supreme Court Overturns Roe vs. Wade, What'll It Do for an Encore?, L.A. Times (June 2, 2022, 3:08 AM), https://www.latimes.com/opinion/story/2022-06-02/supreme-court-roe-precedent-religious-liberty-federal-regulation [https://perma.cc/MV57-5TTS].

[26] The "sneaky" behavior accusation with regards to the current Court's rulings on abortion has shown up elsewhere as well. See Michael Barbaro, The Daily, A Secret Campaign to Influence the Supreme Court, N.Y. Times, at 1:29 (Nov. 29, 2022), https://www.nytimes.com/2022/11/29/podcasts/the-daily/supreme-court-abortion-roe-v-wade.html [https://perma.cc/57WK-GJZX].

[27] Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2500 (2021) (Kagan, J., dissenting).

based on data from a single Term. We cannot and do not say anything about how the use of the emergency docket has changed over time in response to external factors such as the internet and recent criticism.

With the goal of assessing the objection that the emergency docket is being abused in a political fashion, we break down the cases and votes by the political perspectives of the key players (Justices and claimants). In so doing, we refrain from inserting our personal judgments about what is conservative and liberal. Instead, we use established categorization methods from the existing literature. Our objective is to offer apolitical, factually-based insights into the patterns and trends in emergency docket rulings so that the debate can be more reasoned and less ideologically driven.

From the data, three findings emerge. First, the vast majority of emergency applications are requests to extend the filing time for certiorari petitions, which the individual Justices simply grant or deny. The Justices referred only 68 (of 871 total petitions) to the full Court (hereinafter "referred applications"). In other words, the individual Justices are happy to make decisions on their own for over 90% of the applications.

Second, for the referred applications, where the Justice who looks at the matter first refers it to their colleagues for more detailed analysis, standard ideological patterns emerge. The conservative Justices usually vote in favor of conservative claims. And the liberals generally vote in favor of liberal claims. Because conservatives outnumber liberals 6-3 on the current incarnation of the Roberts Court, conservative applicants and causes fare far better than liberal applicants in these consequential (referred) applications.

Third, the data unearth a restraint-activism dimension: at conservative and liberal extremes, the Justices either promote more aggressive use of the emergency docket (if they have the majority) or resist it (if they lack a majority). So, Justices Thomas, Alito, and Gorsuch (the conservative end), use the emergency docket in service of conservative interests, while the center-conservative Justices and liberal Justices resist doing so. That is the behavior we would expect out in the open sunlight, not just in the shadows.

All in all, our analysis validates claims on both sides of the debate. Most emergency applications are benign requests, lacking an obvious ideological or partisan component. But when they are not—when they involve salient matters, such as abortion, immigration, and voting

rights—the conservative Court is partial to granting conservative applications.

Is there anything "shadowy" here? Not really. The voting patterns in the emergency applications docket and in the merits docket are similar. In terms of merits determinations, this is the most conservative Court in roughly a century.[28] That that conservatism shows up in the emergency docket as well is not surprising. It is a distressing finding if one expected neutrality in this part of the docket. But why would one expect that?

Part I introduces the emergency docket data we gathered for the 2021–22 Term. The balance of the Essay details the more important findings relating to each Justice's handling of applications they did not refer to the full Court (Part II), Court action in referred applications (Part III), and individual Justice action in referred applications (Part IV).

One final note before we turn to the data. In the discussion that follows, we categorize the ideology of the nine Justices as a function of where they are on the spectrum between liberal or conservative. On the liberal (left) side are the three Democratic appointees (Sotomayor, Kagan, and Jackson); on the very ("ultra") conservative end, we include Thomas, Alito, and Gorsuch. The remaining three Justices—the Chief, Kavanaugh, and Barrett—are slightly less conservative, though much closer to Thomas et al. than the liberals.[29]

I. THE DATA

During the Court's 2021–22 Term, 876 emergency applications were submitted to an individual Justice.[30] Three were withdrawn and the

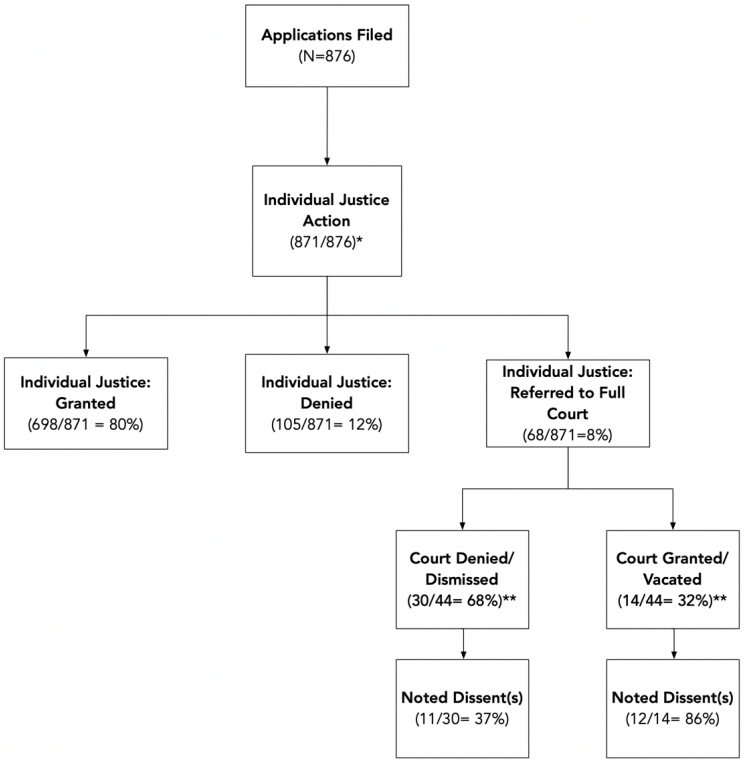
[28] For this data on merits determinations from the 2021 Term, see Lee Epstein, Andrew D. Martin & Kevin Quinn, Provisional Data Report on the 2021 Term 5–7 (2022), https://epstein.usc.edu/s/2021TermDataReport.pdf [https://perma.cc/MH5N-QCPZ].

[29] See Oriana González & Danielle Alberti, The Political Leanings of the Supreme Court Justices, Axios (June 24, 2022), https://www.axios.com/2019/06/01/supreme-court-justices-ideology [https://perma.cc/EMR9-TBN3] (reporting, based on Martin-Quinn scores, the ranking of Justices in terms of conservatism); see also Epstein, Martin & Quinn, supra note 28, at 4.

[30] These are all 21A applications excluding:
(1) Refilings. Seven applications were initially denied by a Justice and then refiled with a second Justice. As a procedural matter (at least this Term), the second Justice always referred the application to the full Court, which always denied.
(2) Consolidations. Three applications were consolidated.
(3) Dismissals/Grant, Vacate, and Remands. Thirteen applications were dismissed in light of the relief granted in *NFIB v. OSHA*, 142 S. Ct. 661 (2022) (per curiam). One application was

Justices did not act on two. We eliminated those five from the analysis, leaving a total of 871 emergency applications. Figure 1 provides an overview of Justice and Court action on the 871.

Figure 1. An Overview of Justice and Court Action on the 876 Emergency Applications Filed in the Supreme Court During the 2021 Term.



*Three applications were withdrawn; there was no action on two applications.

**The denominator is 44 rather than 68 because we eliminated applications that were refiled, consolidated, or dismissed on the basis of *NFIB v. OSHA*, 142 S. Ct. 661 (2022) (per curiam).

granted, vacated, and remanded in light of *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022).

For each application, we identified the type of relief requested and the Justice to whom the request was submitted. We also noted whether the Justice denied, granted, or referred the application to the full Court, and then whether the Court granted or denied relief and provided an explanation for the ruling. Finally, we recorded noted dissents. For applications referred to the full Court, we classified the subject-matter of the underlying case and whether the application was conservative or liberal depending on the identity of the applicant and the nature of the claim.[31]

As Figure 1 shows, an individual Justice decisively handled 92% (803/871) of the applications.[32] (How each responded is the subject of the next Part.) Of the 68 applications the Justices referred to the full Court, over two-thirds were dismissed; in the remaining one-third, the Court took some action. Parts III and IV analyze these referred petitions.

II. ACTIONS BY INDIVIDUAL JUSTICES

There were 876 emergency ("21A") applications filed in the 2021–22 Term. Each application is first allocated to an individual Justice as a function of the circuit from which it comes (each of the Justices is pre-assigned to one of the thirteen federal circuits).[33] That Justice can then, if they think that application is worthy of fuller consideration, refer it to their colleagues. The background norm has long been that determinations on these emergency applications do not need to be done with oral argument and full briefing.[34] Of the applications made during the 2021–22 Term, a Justice took some action (grant, deny, refer) in 871. Three were withdrawn and no action was taken on two. Table 1 shows the breakdown of applications referred to each Justice.

[31] To make these determinations, we generally followed the Supreme Court Database. See generally Harold Spaeth et al., Supreme Court Database Code Book (2022) [hereinafter Supreme Court Database Code Book], http://supremecourtdatabase.org/_brickFiles/2022_01/SCDB_2022_01_codebook.pdf [https://perma.cc/3XYS-WZ4U] (explaining conservative and liberal classifications).

[32] On occasion the Justices may talk with one another (even informally) before ruling on an application. But the extent of consultation is unknown.

[33] The Court describes the basics for reporters covering it in Public Information Office, Supreme Court of the United States, A Reporter's Guide to Applications Pending Before the Supreme Court of the United States 2 (2022), https://www.supremecourt.gov/publicinfo/reportersguide.pdf [https://perma.cc/H89G-7GTE].

[34] Id. at 3.

Table 1. Emergency Applications Referred to Each Justice

Justice	N of Referrals	% of Total
Kagan	147	17%
Alito	141	16
Kavanaugh	141	16
Thomas	121	14
Roberts	117	13
Barrett	58	7
Gorsuch	56	6
Sotomayor	54	6
Breyer	36	4
Total	871	100

A. Grants

Of the 871 applications referred to an individual Justice, the Justice granted the request for relief in 80% (698/871). In other words, the vast majority of emergency requests are granted by individual Justices and are never considered by the full Court.

Now, for the content. Of the 698 "grants," 677 were to extend time to file a certiorari petition and 13 were to increase word or page limits. Literally, 99% of all grants were responding to pleas of the form of "I need more time to do my homework." And the Justices seem to have been rather generous here. They granted almost all of these requests—except (former professor) Justice Barrett who was stricter. She granted only 61% of the requests (30/49).

B. Denials

Parsing the data further, we see that of the 871 applications, a Justice denied the request in 12% (105/871). Table 2 shows the type of relief denied.

Table 2. Type of Relief Denied by Individual Justices

Relief Requested	N of Apps	% of Total
Denied Stay	48	46%
Denied Extend Time	27	26
Denied Injunction	11	10
Denied Appeal	7	7
Denied Word/Page Limits	7	7
Denied Other	5	5
Total	105	100

As Table 2 reports, of the 105 denials, 27 were denials to extend time to file a certiorari petition (19 of the 27 were by Justice Barrett). Taken together, denied stays/injunctions is the largest category of denials: 56%, or 59/105 of the applications were denied. Table 3 breaks down the 59 denials of stays/injunctions by Justice. We reiterate here that whether the individual Justices consult with one another (even informally) before denying is unknown.

Table 3. Justices' Denials of Stays/Injunctions

Justice	N of Denials (Stays/Injunctions)	% of Total
Roberts	10	17%
Kagan	9	15
Thomas	8	14
Alito	8	14
Kavanaugh	7	12
Breyer	6	10
Barrett	5	8
Gorsuch	3	5
Sotomayor	3	5
Total	59	100

C. Referrals

To get to the real action, the individual Justices referred only 68 of the 871 applications—8%—to the full Court. Consolidations, refilings, dismissals, and a "GVR"[35] were eliminated from the analysis to follow, leaving 44 referrals to the Court. These, because they were referred to the full Court, were presumably the most consequential of the applications for emergency action.

Table 4 compares the 44 referrals to the Court for stays/injunctions and the 59 denials of injunctions/stays, by Justice. For example, seven emergency applications were submitted to Justice Breyer for stays/injunctions. He denied 86% (6) and referred 14% (1) to the Court. At the other end of the spectrum, Justice Alito referred many more applications to the full Court: 13 (or 62%). On the numbers alone, that is a notable difference. One possibility is that Justice Alito has more confidence than Justice Breyer that his view will prevail with the full Court. Then again, applicants know the identity of the Justice who will tackle their application—and they presumably take that into account in choosing whether to make the application.

[35] A "GVR" or Grant/Vacate/Remand order is where the Court grants a petition for certiorari while vacating the decision being challenged and also remanding the matter. This type of order is often used where there has been a change in the law—and the Court sends the case back down for reconsideration in light of the new law. See J. Mitchell Armbruster, Note, Deciding Not to Decide: The Supreme Court's Expanding Use of the "GVR" Power Continued in *Thomas v. American Home Products, Inc.* and *Department of the Interior v. South Dakota*, 76 N.C. L. Rev. 1387, 1387–88 (1998).

Table 4. Comparison of Stay/Injunction Requests: Denied by the Justice Versus Referred to the Full Court. (59 applications were denials and 44 were referrals, for a total of 103 applications).

Justice	% Denied by Justice	% Referred to Court	N of Apps
Breyer	86%	14%	7
Gorsuch	75	25	4
Thomas	73	27	11
Barrett	71	29	7
Roberts	67	33	15
Kagan	56	44	16
Sotomayor	50	50	6
Kavanaugh	44	56	16
Alito	38	62	21
Average/Total	57%	43%	103

Note the average percentage split in Table 4: for those emergency applications requesting stays/injunctions, the individual Justices denied 57% on their own and referred 43% to the full Court. Digging into the 59 individually denied applications and the 44 referrals, we find that capital (death penalty) applications were almost always referred to the full Court. Of the 103 applications under analysis in Table 4, 16 were capital cases; 15 of which were referred to the full Court.[36]

In addition, 20 of the 103 applications were supported or opposed by one or more amici;[37] none of the 20 were denied by an individual Justice. Then again, there were no amici in 24 of the 44 applications referred to the Court.

The causal dynamics are hard to discern from the plain numbers. It seems likely, though, considering the importance of formal and informal norms on the Court, that norms exist for evaluating emergency

[36] The exception is *Stirling v. Stokes*, No. 21A61 (2021), an application filed by South Carolina to stay a decision by the U.S. Court of Appeals for the Fourth Circuit. Chief Justice Roberts denied the application for emergency relief. The Court ultimately granted certiorari, vacated the judgment, and remanded the case in light of *Shinn v. Ramirez*, 142 S. Ct. 1718 (2022). Stirling v. Stokes, 142 S. Ct. 2751, 2751 (2022).

[37] This includes motions to file.

applications.[38] Our conjecture is that applications involving stays of executions and those with amici are considered presumptively important and, therefore, are generally submitted for fuller consideration. If that conjecture is right, then the data suggest that in terms of referrals to the full Court, the individual Justices taking a first cut at the applications are following the norms. That is, they are playing (somewhat) fair. That then leads us to ask what happens after referral.

III. AFTER REFERRAL: COURT ACTION

The Justices referred 68 emergency applications to the full Court. The analysis that follows eliminates consolidated applications, dismissals and refilings, and a GVR order based on *Dobbs v. Jackson Women's Health Organization* and so is based on 44 applications. Of these 44 applications, the Court denied stays/injunctive relief or dismissed 68% (30/44). In the remaining 32% (14/44), the Court granted some relief—a stay, injunction, or reversal.

A. Reasoning

To go back to where we started, a key element of the claim of "shadowy" behavior is that the Court gives little explanation for impactful decisions granting or denying these emergency applications. One simple measure of the degree of shadowy behavior therefore is the length of the order.

Table 5 reports the number of words in orders in the 44 referred applications. For 66% of the 44 referred applications, the Court issued (usually) a one-sentence order—i.e., no explanation. But a difference emerges between denied and granted applications. For the 30 denials, 83% received no reasoning and none got a multi-page explanation. For the 14 that were granted (29%), however, 71% got some explanation. Indeed, close to a third of them received an explanation of multiple pages. Again, we suspect norms are at play. If the grant of the application for a stay/injunction is considered to be a significant action, we would expect there to be a norm of providing explanation. That seems to be happening in the majority of determinations; even if those explanations are brief. It

[38] See, e.g., Gregory A. Caldeira & Christopher J. W. Zorn, Of Time and Consensual Norms in the Supreme Court, 42 Am. J. Pol. Sci. 874, 878, 900 (1998); Lee Epstein, Jeffrey A. Segal & Harold J. Spaeth, The Norm of Consensus on the U.S. Supreme Court, 45 Am. J. Pol. Sci. 362, 364–65 (2001).

is but a small number of these granted applications—only 4 of 14—for which the Court supplied no explanation.

Table 5. The Court's Explanation for its Order in the 44 Applications Referred to It by an Individual Justice.

Explanation	All Apps (n=44)	Apps Denied (n=30)	Apps Granted (n=14)
Order: No Explanation	66%	83%	29%
Order: Under 200 words	18	10	36
Order: 200-500 words	7	7	7
Per Curiam: 2,000+ words	9	0	29

B. Vote Splits

The data in the prior subsection suggested a norm of denials of applications being considered more routine (less in need of explanation) than grants of applications. Consistent with that, Table 6 shows that when the Court denies relief, it is more often unanimous than not (63% or 19/30). However, when relief is granted, it is usually by a divided Court. Only 2 of the 14 grants of relief (14%) were unanimous.

Overall, on the face of the data, the Court looks more unified over emergency applications than in merits cases. That is somewhat surprising if one expects the Justices to be more suspicious of each other in the emergency order context because nefarious activity is going on. The unanimity rate for emergency applications is 48%, as compared to 28% for merits cases—a 20 percentage-point gap.[39] However, it is worth keeping in mind that there may be disagreements on the determinations of the fate of emergency applications that do not get noted for whatever reason. The end result might be some dissents that are silent. An implication of the foregoing is that one should be cautious in combining analyses of the emergency and merits dockets. They appear to be different animals.

[39] Calculated from the Supreme Court Database, MODERN database: 2022 Release 01, Wash. Univ. L. (Nov. 2, 2022), http://supremecourtdatabase.org/data.php [https://perma.cc/2MCW-JZD7].

Table 6. Comparison of Apparent Vote Splits When the Court Denied Versus Granted Applications

Vote Split	All Apps (n=44)	Apps Denied (n=30)	Apps Granted (n=14)
9-0/8-0	48%	63%	14%
8-1	5	7	—
7-2	2	—	7
6-3/5-3	32	27	43
5-4	14	3	36

Looking closer at Table 6, when the Court split 6-3/5-3 (14 applications), the most common configuration of dissenters was of Justices Thomas, Alito, and Gorsuch (n=8 applications) followed by Breyer, Sotomayor, and Kagan (n=6 applications). In other words, the two political extremes of the Court consistently align in these contentious cases. Justices Thomas, Alito, and Gorsuch most commonly dissented together when the Court denied emergency applications (7/8). And Justices Breyer, Sotomayor, and Kagan most commonly dissented together when the Court granted emergency applications (5/6).

C. Ideological Direction

We now turn to the question of whether ideological patterns emerge in the orders issued on the emergency applications. For the 44 referred applications, we specified an ideological direction of the Court's order (conservative or liberal) based on the applicant's identity/relief requested. In these specifications of what counted as liberal or conservative, we used standard and pre-existing coding methods from the political science literature.[40]

Table 7 shows the ideological breakdown for all emergency applications and for denials and grants. For example, overall, 59% of the 44 referred emergency applications resulted in orders favoring conservative interests. That said, perhaps surprising given the conservative majority of the current Court, 53% of the 30 applications denied were also conservative.

[40] See Supreme Court Database Code Book, supra note 31, at 50–52.

But the real story here is in the applications granted relief: in 71% of the 14 grants of orders, conservative interests were the winners. That may explain the mostly liberal criticism of the emergency docket. Nevertheless, it is worth noting that the 71% figure is roughly the same (if just slightly lower) as the conservative share of merits decisions in the 2021 Term (73.8%[41]).

Table 7. Ideological Direction of the Court's Orders

	All Apps (n=44)	**Apps Denied (n=30)**	**Apps Granted (n=14)**
Conservative	59%	53%	71%
Liberal	41	47	29

D. A Closer Look at the Applications Denied

Two observations emerge when we look closer at the set of applications that were denied. Overall, 81% of the conservative denials were unanimous (13/16). The liberal Justices seem to be showing restraint here, perhaps even cooperating with the conservative majority. On the flip side, only 43%—6/14—of liberal denials were unanimous. As to the remaining eight: Thomas, Alito, and Gorsuch noted dissents in seven; Thomas alone dissented in one. This suggests ideological activism on the part of the three Justices at the conservative end of the spectrum.[42] We return to this activism-restraint dynamic in Part IV.C.

E. Additional Notes on Applications Granted

Of the 14 grants of emergency applications, only 4 were decided in the liberal direction. That is not surprising, given that the majority of the Court is conservative. Also not surprising is that of those 4, only 1 was unanimous.[43] The 3 other liberal grants were divided—with Thomas,

[41] See Epstein, Martin & Quinn, supra note 28, at 7. This figure is for non-unanimous decisions, the proper comparison, because in almost all applications granted a dissent is noted.

[42] See González & Alberti, supra note 29 (reporting, based on Martin-Quinn scores, the ranking of Justices in terms of conservatism).

[43] Ramirez v. Collier, 142 S. Ct. 50 (2021) (mem.).

Alito, and Gorsuch dissenting in one;[44] and Thomas, Alito, Gorsuch, joined by Barrett in another[45] and Kagan in the other.[46] As for the conservative grants of emergency applications, 9 of the 10 conservative grants were issued by divided votes, with the liberals, Kagan and Sotomayor, dissenting in all 9. The other liberal, Breyer, joined them in 8. Roberts joined the liberals in 2, and Barrett joined them in 1. The message from the foregoing is that the stakes are higher when it comes to grants of applications than denials.

IV. ACTIONS OF INDIVIDUAL JUSTICES

A. Majority Voting

Table 8 shows whether the individual Justices voted in the majority in all 44 of the applications that were referred to the full Court (the 30 denials and the 14 grants). Table 9 breaks down the data further and shows the frequency with which each Justice voted with the majority in the 23 applications that generated 1 or more noted dissents.

[44] Austin v. U.S. Navy Seals 1–26, 142 S. Ct. 1301, 1301–02 (2022) (Alito, J., dissenting, joined by Gorsuch, J.) ("Justice Thomas would deny the application for a partial stay.").

[45] Biden v. Missouri, 142 S. Ct, 647, 655 (2022) (Thomas, J., dissenting, joined by Alito, Gorsuch, & Barrett, JJ.) (per curiam).

[46] NetChoice, LLC v. Paxton, 142 S. Ct. 1715, 1716–18 (2022) (Alito, J., dissenting, joined by Thomas & Gorsuch, JJ.) ("Justice Kagan would deny the application to vacate stay.").

Table 8. Percent in the Majority in the 44 Applications Referred to the Full Court (30 applications denied and 14 applications granted; all Justices participated in all applications except Gorsuch. He was out for one denial and one grant).

(1) % Majority All Apps		(2) % Majority Apps Denied		(3) % Majority Apps Granted	
Kavanaugh	100%	Kavanaugh	100%	Kavanaugh	100%
Barrett	95	Barrett	100	Barrett	86
Roberts	93	Roberts	97	Roberts	86
Breyer	77	Kagan	93	Alito	79
Alito	77	Breyer	93	Thomas	79
Gorsuch	76	Sotomayor	90	Gorsuch	77
Thomas	75	Alito	77	Breyer	43
Kagan	73	Gorsuch	76	Sotomayor	36
Sotomayor	73	Thomas	73	Kagan	29
Average %	82		89		68

Table 9. Percent in the Majority in the 23 Applications Referred to the Full Court with 1 or More Noted Dissents (11 applications were denied with a dissent and 12 applications were granted with a dissent; all Justices participated in all application determinations except Gorsuch who was out for one grant).

(1) % Majority All Apps		(2) % Majority Apps Denied		(3) % Majority Apps Granted	
Kavanaugh	100%	Kavanaugh	100%	Kavanaugh	100%
Barrett	91	Barrett	100	Barrett	83
Roberts	87	Roberts	91	Roberts	83
Breyer	57	Breyer	82	Alito	75
Alito	57	Kagan	82	Thomas	75
Gorsuch	55	Sotomayor	73	Gorsuch	73
Thomas	52	Gorsuch	36	Breyer	33
Kagan	48	Alito	36	Sotomayor	25
Sotomayor	48	Thomas	27	Kagan	17
Average %	66		70		63

Looking at the All Applications column (col. 1) in Table 8, we see that the percentage voting with the majority is high. That is no surprise considering the relatively high overall unanimity rate. Kavanaugh's 100% and Barrett's 95% are also not unexpected since they are also at the political center of the Court in terms of voting on merits cases. As the Court's central players, they win most of the time (and more than others) regardless of whether the dispute appeared on the emergency or merits docket.

Turning to the more contentious matters—orders with a noted dissent(s)[47]—the players in the middle dominate again. Table 9 reports that the preferences of Justices Barrett and Kavanaugh almost always prevail.

Moving to Applications Denied (col. 2 in Tables 8 and 9): if denials are a rough measure of judicial restraint, the three middle Justices (Roberts, Kavanaugh, Barrett) and the three liberals demonstrate restraint. They rarely dissent in orders denying relief. The three extreme conservatives are more activist, more prone to dissent. Indeed, had Justices Thomas, Alito, and Gorsuch had their way, the Court would have granted relief in seven more applications (for Thomas, eight more). And that would have likely exacerbated criticism of the Court's use of truncated procedures.

Further, we see that 4 of the 7 applications where the ultra conservatives were in dissent (that is, the center conservatives sided with the liberals) were COVID-related.[48] The remaining 3 were about affirmative action[49] and election law.[50] Also worth noting: in all 7 of these applications, the applicant could be characterized as "conservative."

[47] The logic is that since writing a dissent takes extra effort that the Justice would otherwise not have to expend, the Justice will only exert that effort if they have a strong disagreement. See Jonathan Remy Nash, Measuring Judicial Collegiality Through Dissent, 70 Buff. L. Rev. 1561, 1582–89 (2022).

[48] Does 1–3 v. Mills, 142 S. Ct. 17, 18 (2022) (Gorsuch, J., dissenting, joined by Thomas & Alito, JJ.); We The Patriots USA, Inc., v. Hochul, 142 S. Ct. 734, 734 (2021) (mem.) ("Justice Thomas, Justice Alito, and Justice Gorsuch would grant the application."); Dr. A v. Hochul, 142 S. Ct. 552, 552 (2021) (Gorsuch, J., dissenting, joined by Alito, J.) ("Justice Thomas would grant the application."); Dunn v. Austin, 142 S. Ct. 1707, 1707 (2022) (mem.) ("Justice Thomas, Justice Alito, and Justice Gorsuch would grant the application for an injunction pending appeal.").

[49] Coal. for TJ v. Fairfax Cnty. Sch. Bd., 142 S. Ct. 2672, 2672 (2022) (mem.) ("Justice Thomas, Justice Alito, and Justice Gorsuch would grant the application to vacate the stay.").

[50] Moore v. Harper, 142 S. Ct. 1089, 1089–91 (2022) (Alito, J., dissenting, joined by Thomas & Gorsuch, JJ.); Ritter v. Migliori, 142 S. Ct. 1824, 1824–25 (2022) (Alito, J., dissenting, joined by Thomas & Gorsuch, JJ.).

Finally, comparing Applications Denied and those Granted (n=13) (cols. 2 and 3 in Tables 8 and 9), the percentage ranking of majority voting flips between the three ultra conservatives and the three liberals. The general pattern of activism-restraint remains, except that the positions of the ultra conservatives and liberals flip. For the grants of applications, Justices Thomas, Alito, and Gorsuch are in the middle range, while the three liberals dissent more often than not. Of the 14 applications granted, the three ultra conservatives noted dissent in only three determinations (in one, joined by Barrett and, in another, joined by Kagan). They were the winners in the vast majority of grants, although not 100% of the time.

It bears note that the foregoing patterns likely reflect more than an activism-restraint dynamic. Ideology is at play too. The three extreme conservatives dissented when relief was denied to conservative applicants. Likewise, the three liberals dissented together when the Court granted relief to conservative applicants (e.g., three COVID applications[51]). But, again, to the extent that grants of relief drive criticism of the "shadow docket," Justices Thomas, Alito, and Gorsuch were the winners (with help from the Chief Justice and Justices Kavanaugh and Barrett). And confirming that the left side of the Court was the loser, one or more of the three liberal Justices dissented in 9 of the 14 grants.

B. Ideological Voting

Tables 10 and 11 show the percentage of votes favoring conservative interests in unanimous and non-unanimous decisions. In both Tables, a familiar ideological pattern emerges: the three ultra conservatives (Thomas, Alito, and Gorsuch) usually vote in favor of conservative applicants/claims and the three liberals (Breyer, Sotomayor, and Kagan) generally vote against those applicants/claims.

The three conservative Justices in the middle of the Court, are, as one might predict, more variable. They vote with the ultra conservatives when the Court grants relief but in a more liberal direction when the Court

[51] Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2490 (2021) (Breyer, J., dissenting, joined by Sotomayor & Kagan, JJ.) (per curiam); Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin., 142 S. Ct. 661, 670 (2022) (Breyer, Sotomayor, Kagan, JJ., dissenting) (per curiam); Chrysafis v. Marks, 141 S. Ct. 2482, 2483 (2021) (Breyer, J., dissenting, joined by Sotomayor & Kagan, JJ.) (mem.).

denies. Still, and overall, the ideological rankings depicted in Tables 10 and 11 roughly mirror merits voting.[52]

Table 10. Percent Conservative Votes in the 44 Applications Referred to the Full Court (30 applications denied and the 14 applications granted; all Justices participated in all applications except Gorsuch who was out for one deny and one grant).

	% Conservative Votes (All Applications)		
	All Apps	**Apps Denied**	**Apps Granted**
Thomas	84%	80%	93%
Alito	82	77	93
Gorsuch	81	76	92
Barrett	59	53	71
Kavanaugh	59	53	71
Roberts	52	50	57
Breyer	36	47	14
Kagan	36	47	14
Sotomayor	32	43	7
Average	58	58	57

[52] The only difference appears to be that in the 2021 Term, Justice Gorsuch cast more liberal votes than Chief Justice Roberts. See Epstein, Martin & Quinn supra note 28, at 8.

Table 11. Percent Conservative Votes in in the 23 Applications Referred to the Full Court With 1 or More Noted Dissent (11 applications denied with dissent and 12 applications granted with dissent; all Justices participated in all applications except Gorsuch who was out for one grant).

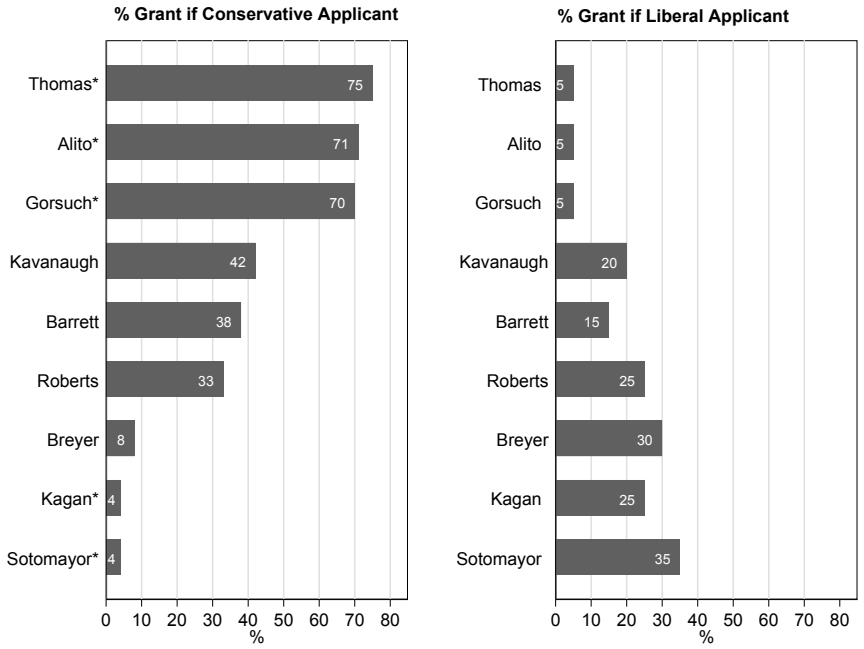
	% Conservative Votes (All Applications)		
	All Apps	**Apps Denied**	**Apps Granted**
Thomas	100%	100%	100%
Alito	96	91	100
Gorsuch	95	91	100
Barrett	52	27	75
Kavanaugh	52	27	75
Roberts	39	18	58
Breyer	9	9	8
Kagan	9	9	8
Sotomayor	0	0	0
Average	50	41	58

C. Ideological Voting v. Judicial Self-Restraint

Taken collectively, the data suggest that voting on emergency applications is similarly ideologically patterned as voting on the merits of cases. But there is also an indication in the data that the three ultra conservatives (Thomas, Alito, and Gorsuch) have promoted more aggressive use of truncated procedures in service of conservative interests, while the center and even liberal Justices have exercised more restraint.

Figure 2 confirms the foregoing. It shows the percentage of votes to grant relief based on the applicant's/claim's ideology.

Figure 2. Percent Votes to Grant Based on the Applicant's Ideology.



*This indicates a statistically significant difference, at $p \leq 0.05$. 24 applications were filed by conservative applicants; 20 applications were filed by liberal applicants.

Looking first at the three ultra conservative Justices, they almost never vote in favor of a grant when the applicant is liberal but frequently vote for a grant when the applicant is conservative. The difference for each Justice is statistically significant. For this reason, it is not a leap to conclude that conservative causes and interests, if they apply for emergency relief, have a good shot at receiving the votes of these Justices.

The liberals, for their part, are more likely to grant applications that favor liberal interests; for Kagan and Sotomayor, the difference is statistically significant at $p \leq 0.05$ (for Breyer, $p = 0.06$). But note: The percentage-point differences are far lower. Kagan, for example, voted to grant 25% for liberal applicants and 4% for conservative applicants—for a 21 percentage-point difference. For Thomas, Alito, and Gorsuch, the percentage-point differences were triple (70 for Thomas, 66 for Alito, and 65 for Gorsuch). Even Sotomayor's gap (31 percentage points) is substantially lower.

As to the three center-conservative Justices, they are more inclined to grant emergency applications when the applicant is conservative (although not in the majority of applications). But for none of the three is the difference statistically significant.

CONCLUSION

The shadow docket has been one of the Supreme Court's most controversial features in recent years. Boiled down, however, the numbers reveal little that is particularly nefarious. The overwhelming majority of emergency applications are so trivial that they are granted by an individual Justice without consultation with the other Justices. As for the small fraction of matters that are deemed worthy of more attention, the individual Justice refers the matter to the collective for a decision by the full Court.

Once we focus in on the small subset of consequential matters on the emergency docket, the Justices behave pretty much as they do with the merits determinations. The conservatives win most of the time, at roughly the same rates as they do on the merits docket. Broken down by individual Justice, the three moderate conservatives control the outcomes and win almost all the time, whereas the three conservatives at the extreme and the three liberals lose more (the liberals lose the most). Again, the pattern that we see on the merits docket. Depressing, from a liberal or legal formalist perspective. But not particularly shadowy.