

TAMING THE SHADOW DOCKET

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The Supreme Court’s shadow docket is causing a supposed legitimacy crisis. The conventional response is that the Court should change how it processes emergency applications to improve transparency and accountability. But the causes of the shadow docket are structural: various jurisdictional and remedial rules permit lower courts to issue orders of national significance that require the Court either to intervene on the emergency docket or to abandon its supremacy over the federal courts. This Article identifies comprehensive structural reforms, all within the Court’s control, that would constrain the power of the lower courts to block national and statewide policies. I discuss ways to limit suits by associations, states, and the United States; constraints on claims brought under Ex parte Young, § 1983, and the Administrative Procedure Act (“APA”); and restrictions on the scope of injunctions, preliminary injunctions, APA remedies, and declaratory relief. And I consider the reforms systematically, with different solutions working as complements to reduce the salience of matters that reach the shadow docket. The assessment of structural causes and solutions also suggests the real source of the supposed problem of emergencies at the Supreme Court. Taming the shadow docket requires reducing the power of the federal courts over the political branches. And if disempowering the lower courts would be a solution worse than the problem, then maybe the shadow docket is not even a problem after all. Instead, retaining the power of the courts might mean embracing the shadow docket.

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INTRODUCTION

In the first months of the second Trump Administration, federal district courts throughout the country issued temporary restraining orders and preliminary injunctions blocking numerous executive actions.¹ The

¹ See, e.g., *CASA, Inc. v. Trump*, 763 F. Supp. 3d 723, 727 (D. Md.), *appeal dismissed*, No. 25-1153, 2025 WL 2141296 (4th Cir. July 29, 2025); *AIDS Vaccine Advoc. Coal. v. U.S. Dep’t of State*, 770 F. Supp. 3d 121, 127 (D.D.C.), *vacated sub nom.*, *Glob. Health Council v.*

courts issued such orders after states and advocacy groups filed suit in favorable forums, seeking broad, often nationwide, relief from the policies. Those orders moved rapidly up through the lower courts, and by mid-February, the first matter landed at the Supreme Court as an emergency application on its “shadow docket.”² The applications continued through the end of the Court’s Term, with almost twenty filed

Trump, 153 F.4th 1 (D.C. Cir. 2025); *New York v. Trump*, 765 F. Supp. 3d 284, 286–87 (S.D.N.Y.), *modified*, 765 F. Supp. 3d 287, 292–93 (S.D.N.Y. 2025); *Dellinger v. Bessent*, 766 F. Supp. 3d 57, 74 (D.D.C.), *appeal dismissed*, No. 25-5028, 2025 WL 559669 (D.C. Cir. Feb. 15, 2025) (per curiam); *Wilcox v. Trump*, 775 F. Supp. 3d 215, 240 (D.D.C.), *rev’d sub nom.*, *Harris v. Bessent*, 160 F.4th 1235 (D.C. Cir. 2025); *California v. U.S. Dep’t of Educ.*, 769 F. Supp. 3d 72, 75 (D. Mass.), *appeal dismissed*, No. 25-1244, 2025 WL 2604596 (1st Cir. Apr. 23, 2025); *J.G.G. v. Trump*, 786 F. Supp. 3d 37, 83 (D.D.C.), *vacated*, No. 25-5217, 2025 WL 2317650 (D.C. Cir. Aug. 8, 2025) (per curiam); *Wilmer Cutler Pickering Hale & Dorr LLP v. Exec. Off. of the President*, 774 F. Supp. 3d 86, 90 (D.D.C. 2025); *D.V.D. v. U.S. Dep’t of Homeland Sec.*, 778 F. Supp. 3d 355, 394 (D. Mass. 2025), *appeal filed*, No. 25-1393 (1st Cir. Apr. 22, 2025); *Nat’l TPS All. v. Noem*, 773 F. Supp. 3d 807, 868 (N.D. Cal.), *aff’d*, 150 F.4th 1000 (9th Cir. 2025); *Learning Res., Inc. v. Trump*, 784 F. Supp. 3d 209, 233 (D.D.C. 2025), *vacated*, 146 S. Ct. 628 (2026); *Newsom v. Trump*, 786 F. Supp. 3d 1235, 1263 (N.D. Cal. 2025), *appeal filed*, No. 25-3727 (9th Cir. June 12, 2025); *President & Fellows of Harvard Coll. v. U.S. Dep’t of Homeland Sec.*, 788 F. Supp. 3d 182, 210–11 (D. Mass. 2025), *appeal filed*, No. 25-1627 (1st Cir. July 1, 2025). For tallies, see *Litigation Tracker: Legal Challenges to Trump Administration Actions*, Just Sec., 150+ results (on file with the *Virginia Law Review*) (filtered by “Case Status”, “Government Action Blocked”, “Government Action Temporarily Blocked”, “Government Action Blocked Pending Appeal”), <https://www.justsecurity.org/107087/tracker-litigation-legal-challenges-trump-administration/> [<https://perma.cc/N6CV-LCXT>] (last visited Jan. 6, 2026, at 18:19 ET) (counting “legal challenges to Trump administration executive actions,” and counting over 150 cases in which action has been “Blocked,” “Temporarily Blocked,” or “Blocked Pending Appeal”); Steve Vladeck, *What District Court Critics Aren’t Telling You*, *Substack: One First* (June 2, 2025), <https://www.stevevladeck.com/p/155-what-critics-of-district-courts> [<https://perma.cc/27YN-32PE>] (finding ninety-seven cases in which federal courts entered “some . . . coercive relief against the Trump administration”).

² See *Bessent v. Dellinger*, 145 S. Ct. 1326, 1326–27 (2025) (mem.). Sometimes the term “shadow docket” refers generally to the Court’s non-merits docket, which includes emergency applications, petitions for certiorari, summary reversals, applications for stays of executions, procedural motions (like motions for extensions of time to file a petition for certiorari), and more. See Stephen Vladeck, *The Shadow Docket: How the Supreme Court Uses Stealth Rulings to Amass Power and Undermine the Republic*, at xii, 12, 23–24, 87–89 (2023) [hereinafter Vladeck, *The Shadow Docket*]; see also Thomas P. Schmidt, *Orders Without Law*, 122 Mich. L. Rev. 1003, 1005 (2024) (reviewing Vladeck, *The Shadow Docket*, *supra*) (defining the “shadow docket” as encompassing “everything the Court does *other* than the merits docket”). In this Article, I use it to refer to the set of high-profile emergency applications that popularized the term. I also use the terms “emergency docket” or “interim docket” in the same way. See Jack Goldsmith, *Interim Orders, the Presidency, and Judicial Supremacy*, 139 Harv. L. Rev. 86, 89–92, 90 n.23 (2025) (discussing the use of various terms to refer to the relevant portion of the Court’s docket).

by the Solicitor General by the time the Court issued its final opinions at the end of June.³ The pattern is familiar from the Court's frequent use of the shadow docket during the first Trump Administration and the Biden Administration.⁴

As that pattern emerged, commentators and some Justices criticized the use of the emergency docket. Critics noted that the Court issued unexplained orders, failed to disclose its votes, intervened too early in the appellate process, changed the substantive law without briefing on the merits, and disregarded the appropriate legal standards for emergency relief—all in cases of immense national significance.⁵ A *New York Times* bestselling book warned in its subtitle that the Court has used “stealth rulings” to “amass power and undermine the republic.”⁶ The remedy, many critics say, is for the Court to develop and implement better rules and procedures for its shadow-docket practices. It should issue opinions explaining itself, get better briefing, delay intervention in the appellate

³ See Trump Administration Litigation Tracker, Lawfare, <https://www.lawfaremedia.org/projects-series/trials-of-the-trump-administration/tracking-trump-administration-litigation#tracker> (last updated Mar. 10, 2026).

⁴ See Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 Harv. L. Rev. 123, 134 (2019) (collecting cases from the first Trump Administration); Adam Liptak, *On the Supreme Court's Emergency Docket, Sharp Partisan Divides*, N.Y. Times (Sep. 14, 2025), <https://www.nytimes.com/2025/09/14/us/politics/supreme-court-emergency-docket-partisan.html> (noting that the Biden Administration filed seventeen applications with the Court and succeeded in fifty-three percent of such applications); Goldsmith, *supra* note 2, at 95 & n.49 (noting that the Court decided “an unusual number of important issues of presidential power via interim orders during the first Trump and Biden Administrations” and listing cases).

⁵ See, e.g., Sarah Voehl, *Illuminating the Shadow Docket: On the Increasing Impacts of This Evolving Judicial Procedure*, 23 Nev. L.J. 945, 957 (2023) (insufficient reasoning and failure to identify votes); Stephen I. Vladeck, *A Court of First View*, 138 Harv. L. Rev. 533, 549–50 (2024) (granting certiorari before judgment); Vladeck, *The Shadow Docket*, *supra* note 2, at 163–95 (changing substantive religious liberty law); Stephen I. Vladeck, *Response, Emergency Relief During Emergencies*, 102 B.U. L. Rev. 1787, 1789 (2022) (applying the wrong standard for emergency relief); see also *Noem v. Doe*, 145 S. Ct. 1524, 1525 (2025) (mem.) (Jackson, J., dissenting from the grant of the application for a stay) (stating that the Court had “botched” consideration of “irreparable harm” for emergency relief); *Trump v. Wilcox*, 145 S. Ct. 1415, 1418 (2025) (mem.) (Kagan, J., dissenting from the grant of the application for stay) (arguing that the “emergency docket . . . should not be used to overrule or revise existing law”); *Merrill v. Milligan*, 142 S. Ct. 879, 883 (2022) (mem.) (Kagan, J., dissenting from grant of applications for stays) (noting the “scanty review” in shadow-docket cases).

⁶ Vladeck, *The Shadow Docket*, *supra* note 2.

process, apply better legal standards for emergency intervention, and more.⁷

But the core pathologies of the shadow docket cannot be cured with tweaks to the Court's internal operating procedures. Given the current structure of federal jurisdiction, emergency applications are inevitable. As Justice Kavanaugh explained in his *Labrador v. Poe ex rel. Poe* concurrence, the Court "cannot avoid" resolving emergency applications about a "new federal statute, federal regulation, or state law."⁸ The Court cannot stop Congress, state legislators, the president, or administrative agencies from enacting or issuing new legislation, executive orders, or rules. It cannot stop litigants from seeking to block those policies in a federal district court perceived to be favorable to the litigant's position.⁹ And it cannot realistically preclude litigants from filing emergency applications in the Supreme Court once a "consequential new law has been mistakenly enjoined or mistakenly green-lighted by the lower courts."¹⁰ No matter how much the Court explains itself or asks the parties for additional briefing, the Court will be asked to resolve consequential issues with limited time to do so. The pressure on the Court to resolve such issues will be irresistible, at least as long as the Court remains committed to supervising the lower federal courts instead of allowing them to make consequential decisions on their own. And there are good reasons to think that the Court will, and perhaps should, remain committed to that supervisory role.

⁷ E.g., Richard J. Pierce, Jr., *The Supreme Court Should Eliminate Its Lawless Shadow Docket*, 74 *Admin. L. Rev.* 1, 16–19 (2022) (suggesting that the Court should explain its actions whenever its opinions are "likely to have significant long-term effects"); Schmidt, *supra* note 2, at 1021 (same); *id.* at 1020 (arguing that "the emergency docket should be reserved for cases that are cert-worthy"); Kristin E. Pamigoni, Note, *Shades of Scrutiny: Standards for Emergency Relief in the Shadow Docket Era*, 63 *B.C. L. Rev.* 2743, 2777 (2022) (proposing a new standard for the Supreme Court's emergency-relief decisions).

⁸ 144 S. Ct. 921, 928 (2024) (mem.) (Kavanaugh, J., concurring in the grant of stay).

⁹ See Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 *Corn. L. Rev.* 481, 486–87 (2011) (noting that a plaintiff will sue where the "expected value of [their] claim (less the costs of litigation) is the highest based on the substantive and procedural rules of that court's legal system"); see also *id.* at 487 n.25 ("This perspective is based on the standard rational-choice model of the decision to sue, according to which a plaintiff will only file a claim if the expected value of the claim . . . is greater than zero.").

¹⁰ *Labrador*, 144 S. Ct. at 928 (Kavanaugh, J., concurring in the grant of stay).

The Court does, however, control the capacity of the lower federal courts to interfere with nationwide or statewide policies.¹¹ Even before the decision in *Trump v. CASA, Inc.*, some of the Justices had explained that district courts' issuance of "universal injunctions," meaning injunctions that order the defendant not to enforce a law or policy against third parties not before the court, had increased the number of "high-profile" cases before the Court by turning "limited dispute[s]" into "consequential referend[a] on the law's every provision as applied to anyone."¹² The scope of injunctive relief, the argument went, is a structural cause of the problems of the shadow docket. Now that the Court in *CASA* has concluded that injunctions that are broader than necessary to provide relief to the parties are impermissible,¹³ some might think that the decision could reduce the pressure for the Court to "resolve significant and difficult questions of law on a highly expedited basis and without full briefing."¹⁴

CASA alone will not suffice to address the structural causes of the shadow docket.¹⁵ Shutting down one avenue by which plaintiffs seek to block federal and state policies will not eliminate the underlying incentives to use the federal courts to prevent undesirable policies from taking effect. And the current jurisdictional and remedial regime makes federal court a quick, cheap, and easy venue for states and organizational plaintiffs to block federal and state policies.¹⁶ That problem depends on a constellation of rules about Article III standing, equitable relief under *Ex parte Young* or 42 U.S.C. § 1983, reviewability under the Administrative Procedure Act ("APA"), class-action certification procedures, preliminary injunctive relief, and many other doctrines. *CASA* did not

¹¹ See, e.g., Toby J. Heytens, *Doctrine Formulation and Distrust*, 83 *Notre Dame L. Rev.* 2045, 2047 (2008) (arguing that the Supreme Court can (and does) use doctrine to "shape and direct lower court behavior").

¹² *Labrador*, 144 S. Ct. at 927 (Gorsuch, J., concurring in the grant of stay).

¹³ See 145 S. Ct. 2540, 2565 (2025).

¹⁴ *Id.* at 2559. But see Nicholas Bagley, *The Supreme Court Put Nationwide Injunctions to the Torch*, *The Atlantic* (June 28, 2025), <https://www.theatlantic.com/ideas/archive/2025/06/supreme-court-trump-injunctions/683354/> (discussing avenues to relief that the Court's opinion did not address); Samuel Bray, *Guest Essay, The Supreme Court Is Watching Out for the Courts, Not for Trump*, *N.Y. Times* (June 28, 2025), <https://www.nytimes.com/2025/06/28/opinion/birthright-citizenship-supreme-court-injunction.html> (similar).

¹⁵ For an argument that *CASA* still permits "lower courts" to "issue orders that check the executive branch in a blanket or near-blanket way," see Mila Sohoni, *In CASA You Missed It*, 78 *Stan. L. Rev.* (forthcoming 2026) (manuscript at 19), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5799882 [<https://perma.cc/RA8E-XPTX>].

¹⁶ See *infra* Part II.

address these alternative litigation strategies.¹⁷ So while eliminating universal injunctions is a start, the Court would need to systematically consider other jurisdictional and remedial rules too. Thinking systematically requires disaggregating the various pathways by which cases reach the shadow docket, identifying how litigants escalate high-salience matters to the Court, and anticipating the alternative strategies they would adopt if any particular avenue were closed.

I thus offer a series of overlapping doctrinal reforms that would constrain the ability of lower courts to interfere with national or statewide policy. These reforms, broadly categorized, apply to *who* should sue, what *claims* they might bring, and what *relief* they might obtain.

As to *who* can sue: the Court could limit the Article III standing of associations and states to prevent them from using alleged injuries to their members or citizens to advance their ideological agendas. The Court could likewise limit the ability of the United States to seek equitable relief against states. Those changes would reduce the vicarious assertion of the interests of members or citizens and thus reduce the scope of relief, even while individual litigants with concrete harms (and classes that satisfy Federal Rule of Civil Procedure 23(b)(2)) could seek tailored redress. During each of the last two presidential administrations, states and associations were repeat players on the shadow docket, and limiting their ability to sue should limit the set of high-profile disputes in the federal courts.¹⁸

As to what *claims* can be brought: the Court could restrict suits in equity for injunctive relief under *Ex parte Young* (and § 1983 and implied constitutional causes of action) and suits challenging agency action under the APA. Regarding injunctive relief, the Court could return *Ex parte Young* to its roots by reinvigorating the “inadequate remedy at law” requirement. In other words, a plaintiff seeking equitable relief could be required to provide specific and concrete reasons why state courts are inadequate fora to adjudicate federal issues. If the Court were to restore that rule for *Ex parte Young*, it would also need to recognize the same rule in suits for injunctive relief under § 1983 or under implied constitutional

¹⁷ *CASA*, 145 S. Ct. at 2558 (declining to address the scope of relief for the states); *id.* at 2565 (Alito, J., concurring) (noting that “the availability of third-party standing and class certification” could “threaten the practical significance of today’s decision”); *id.* at 2567 (Kavanaugh, J., concurring) (noting alternative channels through which plaintiffs will “challenge the legality of a new federal statute or executive action”).

¹⁸ See *infra* Section III.A.

causes of action, which would otherwise be substitutes for claims under *Ex parte Young*. Regarding the APA, the Court could reiterate that the APA precludes challenges to programmatic policies and refuse to allow pre-enforcement review of agency guidance or executive orders. These changes would ensure that challenges to federal regulatory action occur later, attack narrower actions, and focus on agency actions that alter a plaintiff's legal rights instead of internal memoranda about how agencies should operate in the future. The Court might also reiterate that neither the APA nor *Ex parte Young* permits a suit for injunctive relief against the president, and it might embrace a "presumption of constitutionality" for legislative or executive action (or both).¹⁹

As to what *relief* can be granted: the Court could limit the scope of injunctions (preliminary and final), require district courts to demand injunction bonds before entering preliminary injunctions, and reject the theory of universal vacatur under the APA. The Court might also need to tighten the rules for preliminary relief for putative classes after its decision in *A.A.R.P. v. Trump*.²⁰ These changes would appreciably limit the scope of federal judicial interventions, whether by reducing the scope of relief or by delaying intervention to a later stage in the litigation.²¹

But why not address the other structural cause of the shadow docket? If the shadow docket emerges also from the Court's commitment to supervision and control of lower courts, why not dispense with the Supreme Court's supremacy instead?²² First, it is not obvious that there is any realistic alternative at this point. Given the Court's commitment to its supremacy and the plausible constitutional and institutional reasons for that supremacy, the commitment seems durable for the foreseeable future. If there is no realistic way to give broad power to federal district courts without subordinating them to the Supreme Court, taming the shadow docket necessarily requires taming the lower federal courts.

Second, the reasons one might refuse to disempower the lower courts—and thus the reasons that the reforms proposed in this Article would seem unpalatable—might likewise counsel in favor of the Supreme Court's supremacy. In the category of high-salience cases that reach the shadow docket, the federal courts operate as a check on state and federal illegality, which some might think is particularly important if the executive branch

¹⁹ See *infra* Section III.B.

²⁰ 145 S. Ct. 1364, 1369 (2025) (*per curiam*).

²¹ See *infra* Section III.C.

²² See *infra* Section I.B.

has become more willing to stretch or violate the law to obtain its preferred policy outcomes.²³ On this view, disempowering the lower courts would fix the shadow docket, but the inability to constrain the political branches would make matters worse. If that is one's view, however, the shadow docket might in fact be an integral component of a federal judiciary that effectively constrains political actors.²⁴ The threat of the Court's intervention, and the availability of recourse to the Supreme Court for the parties, might ensure the efficacy of the orders and precedents that lower federal courts *do* issue. If the supremacy of the Supreme Court is essential to the ability of the lower federal courts to rein in state and federal illegality, and if the shadow docket emerges from that supremacy, then retaining the power of the federal courts means retaining the shadow docket. Indeed, the conclusion of this line of argument might be that the effective subordination of the political branches to the federal judiciary could benefit from a more aggressive shadow docket. Perhaps reforms should aim not to disempower the federal courts to fix the shadow docket, but to strengthen the federal courts by expanding it. Indeed, that is the future for the shadow docket that Justice Kavanaugh proposed in his concurrence in *CASA*.²⁵

Two more points are worth noting at the outset, one about this Article's methodology and one about its novelty. Methodologically, this Article assesses legal doctrines as causes of a particular problem emerging from the institutional design of the federal courts. I do not claim that any suggested reform is the "correct" interpretation of a doctrinal regime from an internal perspective. Instead, I offer reforms that could, if adopted, solve the problem of the shadow docket. At the same time, because reforms must be doctrinally plausible to be realistic options for courts confronting the problem of the shadow docket, they must have some basis in legal doctrine. Thus, each of the proposed reforms has a plausible basis in current doctrine or an extension of that doctrine.

²³ See, e.g., Transcript of Oral Argument at 57–59, *Trump v. CASA, Inc.*, 145 S. Ct. 2540 (2025) (No. 24A884) (statement of Kavanaugh, J.) (suggesting that "presidents of both parties," with "good intentions," "push hard to . . . stretch or use existing authority" because "it's harder to get legislation through Congress"); Kent Greenfield et al., "We Are in a Constitutional Crisis": Statement of Law Professors and Law Teachers (Apr. 7, 2025), <https://www.acslaw.org/wp-content/uploads/2025/04/We-Are-in-a-Constitutional-Crisis-Statement-of-Law-Professors-and-Law-Teachers-4.7.25-1.pdf> [<https://perma.cc/97J3-YK77>].

²⁴ See *infra* Part IV.

²⁵ See *infra* text accompanying notes 277–79.

On novelty, this Article's novel contribution is neither to identify individually new jurisdictional and remedial proposals, nor to offer comprehensive legal arguments in support of any reform. What is novel is the comprehensive structural reconsideration of the problems of the shadow docket. Prior critiques of the shadow docket have tended to focus on the Court's responses to emergency applications—not the structural pressures to resolve them.²⁶ When commentators have focused on structural causes, they often have either identified reforms that require congressional action (as with proposals to restore three-judge district courts for emergency relief) or addressed one doctrinal problem in isolation (as with discussions of universal injunctions before *CASA*).²⁷ The Article's focus on structural causes and solutions is thus neither idealistic nor myopic. Instead, it offers the Court (and lower courts) solutions within its control to reduce the pressure on the shadow docket. Adopting many or some of those solutions would be, in my view, the better solution to the problems of the shadow docket. But this Article also suggests, in the alternative, a possible future for the shadow docket if the proposed reforms to the lower courts seem too costly and if, accordingly, the shadow docket must be integrated into the federal judicial system.

This Article proceeds as follows. Part I identifies the relevant structural causes of the shadow docket. Section I.A disaggregates the features of typical emergencies at the Supreme Court. Section I.B explains the Supreme Court's commitment to supervision of the lower courts in significant cases. Part II explains why prior reforms miss the mark. Some fail to target the structural causes; others offer incomplete or unrealistic fixes to the structural causes. Part III offers structural solutions, grouped as party-based, claim-based, and remedy-based limitations. It also explains why the reforms would not reproduce the same problems in the state courts. Part IV discusses the relationship between the scope of federal judicial power and Supreme Court supervision of the lower federal courts. It concludes with alternative reforms that could make the shadow docket a better mechanism for supervising the lower courts. Those alternative reforms should function as, depending on one's perspective, either a *reductio* supporting my initial reforms or a possible future for the shadow docket.

²⁶ See *infra* Section II.A.

²⁷ See *infra* Section II.B.

I. STRUCTURAL CAUSES OF THE SHADOW DOCKET

The problems of the shadow docket emerge from two basic features of federal jurisdiction. The first is that issues of great importance reach the Supreme Court after resolution in the lower courts. The second is that the Supreme Court has a position of structural supremacy within the federal system. These two features cause the basic pathologies of the shadow docket. To be sure, those two features of the federal system are downstream of other causes—including, for example, executive action, state legislation, and the litigation decisions of challengers. But this Article focuses on the doctrinal causes of the structural problem.

A. Emergencies at the Supreme Court

The behavior of the lower courts is a structural cause of high-profile emergency applications. That behavior is, in turn, caused by the system of jurisdictional and remedial rules that permit federal district courts to intervene in national and statewide policy. Because the Court articulates those rules, it retains indirect power to reduce the salience of emergency applications. This Section identifies the features of emergency applications that tend to make them significant enough to demand the Court's attention.

In *Labrador v. Poe ex rel. Poe*, Justice Kavanaugh issued a concurring opinion that sought to “explain how this Court typically resolves emergency applications.”²⁸ The emergency “typically arises,” he explained, when a “new federal statute, federal regulation, or state law has been enacted.”²⁹ A litigant then seeks a “pre-enforcement preliminary injunction,” and whatever party loses in the lower courts files an emergency application.³⁰ The application contends that the lower courts “mistakenly enjoined or mistakenly green-lighted” the law or regulation pending full consideration on the merits.³¹ When presented with such an application, the concurrence concluded, the Court cannot just “turn [it] away” but must choose whether to “grant or deny.”³²

That description of the typical emergency application reveals how the Court perceives the problem of the shadow docket. As an initial matter,

²⁸ 144 S. Ct. 921, 928 (2024) (mem.) (Kavanaugh, J., concurring in the grant of stay).

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

Labrador reiterates that an emergency application is caused by a series of actions outside the Court's control. The Court does not enact new laws or promulgate regulations, does not file the lawsuits to block them, does not enter the initial order blocking (or greenlighting) their implementation, and does not file the emergency applications that bring such matters to the Court. From the standpoint of any given emergency application, the Court has nothing to do with its origins, no way to stop it, and no choice but to do something about it.

But the concurrence overlooks that the Court controls the doctrinal framework that constitutes the district court's authority, the litigation options for the parties, and the incentives for policymakers anticipating the threat of litigation.³³ The Court articulates the rules that permit or preclude lower courts from intervening in the implementation of national and statewide policies, and its rules and actions contribute to the perception of the likelihood that the Court will intervene. Those litigation possibilities alter the incentives of the parties to bring suit in federal court in the first place. Justice Kavanaugh's concurrence mostly places the Court outside the system that results in shadow docket filings, but that perspective focuses on the Court's one-off response to an emergency application rather than its status as the institution with substantial control over the federal courts.

The *Labrador* concurrence's "typical" emergency also lumps together distinct cases. The perceived importance of the emergency application pressures the Court to consider using the shadow docket, but the importance of the application is often a function of the jurisdictional and remedial rules that structure the intervention in the political process. The significance of the application, from the one-off, *ex post* standpoint, seems already determined. But again, the significance of the matter is also constituted in part by the Court's articulation of the rules of doctrine that constrain and empower the lower courts. And it is possible to reverse-engineer the discrete doctrinal causes of a high-profile emergency application by identifying patterns in the cases that the Court has perceived to be emergencies. The rest of this Section does just that.

³³ See Curtis Bradley & Tara Leigh Grove, *Disfavored Supreme Court Precedent in the Lower Federal Courts*, 111 Va. L. Rev. 1353, 1363 (2025) ("[L]ower courts . . . do in fact aim to comply with the Supreme Court's rulings."); Whytock, *supra* note 9, at 487 (noting that forum-shopping decisions are based on the plaintiffs' expectations about the courts' behavior); David A. Strauss, *Rights, Remedies, and Texas's S.B. 8*, 2022 Sup. Ct. Rev. 81, 87–88 (noting that Texas's S.B. 8 was "obviously drafted with Section 1983 and *Ex parte Young* in mind").

1. Party-Based Distinctions

The typical shadow-docket lawsuits differ depending on *who* brings the litigation. The Court has confronted lawsuits brought not only by private persons, but also by associations, states, and the United States.³⁴ The identity of the plaintiffs matters because permissive standing for states and associations invites claims that would not otherwise be brought, would be brought later, or would seek redress for a narrower set of harms.³⁵ Because the scope of relief depends on the theory of injury alleged by the plaintiffs, permissive standing increases the interference with the defendant's policies. And because some such litigation pits two sovereigns against one another, the Court may perceive that litigation as more important. In general, then, permitting litigation by these entities—associations, states, and the United States—might increase the salience of the matter presented to the Court.

Labrador itself provides a good example. There, plaintiffs were two children and their parents who alleged that a recently enacted Idaho law violated their Fourteenth Amendment rights. The district court entered a preliminary injunction against enforcement of any provision of the law against anyone, and the Court stayed the district court's preliminary injunction *except* as applied to those two plaintiffs.³⁶ Given that Idaho sought relief from the Court only as to nonparties,³⁷ the case may never have reached the shadow docket if the remedy had been limited to those two parties.

Litigation by associations and sovereigns, by contrast, often results in broader theories of injury and thus broader requests for relief. In *Moyle v. United States*, the United States sought to enjoin Idaho and all of its agents from enforcing its prohibition on almost all abortions.³⁸ The United States claimed that a federal statute preempted the Idaho law, and it argued that the Supremacy Clause required declaratory and injunctive relief against the statute in its entirety—not that any particular application of the statute

³⁴ See, e.g., *West Virginia v. Jackson ex rel. B.P.J.*, 143 S. Ct. 889 (2023) (mem.) (suit brought by an individual); *Griffin v. HM Fla.-ORL, LLC*, 144 S. Ct. 1 (2023) (mem.) (restaurant); *Free Speech Coal. v. Paxton*, 144 S. Ct. 1473 (2024) (mem.) (businesses, a trade association, and an individual); *Arizona v. Mayorkas*, 143 S. Ct. 1312 (2023) (mem.) (states); *Moyle v. United States*, 144 S. Ct. 2015 (2024) (per curiam) (United States).

³⁵ See *infra* Section III.A.

³⁶ *Labrador*, 144 S. Ct. at 921.

³⁷ *Id.* at 922.

³⁸ 144 S. Ct. at 2016–17 (Kagan, J., concurring).

to any particular plaintiff should be enjoined.³⁹ In *United States v. Texas*, the State sought to vacate immigration enforcement guidelines in their entirety, arguing that the federal government's failure to detain noncitizens would increase the financial cost of law enforcement for the State.⁴⁰ If the injury were to the State's budget from some known sum of unknown released noncitizens, then complete redress would have to undo the federal policy of nonenforcement entirely. Similar analysis applies to associations, which might assert broader theories of harm by invoking the interests of members who would not otherwise sue or might not otherwise proceed as a class.⁴¹

2. Claim-Based Distinctions

The typical lawsuits differ depending on what kind of law or rule is challenged. Claims challenging *state* policies tend to proceed under § 1983, *Ex parte Young*, or implied causes of action under the Constitution.⁴² Generally, these claims operate as substitutes for one another as mechanisms to seek prospective relief from allegedly unconstitutional or unlawful state policy, and sometimes litigants challenging state laws spend little time identifying the precise cause of action.⁴³ The United States has challenged state laws too, relying on the Supremacy Clause or on suits for “equitable” relief under *Ex parte Young* and *In re Debs*.⁴⁴ Claims challenging federal laws, federal administrative

³⁹ See, e.g., Complaint at 15–16, *United States v. Idaho*, 623 F. Supp. 3d 1096 (D. Idaho 2022) (No. 22-cv-00329); Response in Opposition to the Applications for a Stay at 38 n.10, *Moyle*, 144 S. Ct. 2015 (No. 23-726) (advancing an “equitable cause of action consistent with centuries of precedent”); see also Brief for the United States at 10, *United States v. Texas*, 142 S. Ct. 522 (2021) (No. 21-588) (arguing that the United States may sue “in equity against the State of Texas” to prevent the “ongoing nullification of [the] Court’s precedents”).

⁴⁰ 143 S. Ct. 1964, 1989–91 (2023) (Alito, J., dissenting).

⁴¹ See *infra* text accompanying notes 111–23.

⁴² See, e.g., Appendix to Emergency Application for Stay: Volume 1 of 2 at 34–42, *Merrill v. Milligan*, 142 S. Ct. 879 (2022) (No. 21A375) (claims under, among others, the Fourteenth Amendment and § 1983); Complaint for Declaratory & Injunctive Relief at 27–32, *Poe ex rel. Poe v. Labrador*, 709 F. Supp. 3d 1169 (D. Idaho 2023) (No. 23-cv-00269) (Fourteenth Amendment and § 1983); *Whole Woman’s Health v. Jackson*, 142 S. Ct. 522, 532–38 (2021) (*Ex parte Young* and § 1983).

⁴³ I use the term “cause of action” to include, perhaps imprecisely, the bases of equitable jurisdiction. But see Samuel L. Bray & Paul B. Miller, *Getting Into Equity*, 97 *Notre Dame L. Rev.* 1763, 1772–76 (2022) (concluding that there is no such thing as an “equitable” cause of action).

⁴⁴ See *supra* note 39; see also Aditya Bamzai & Samuel L. Bray, *Debs* and the Federal Equity Jurisdiction, 98 *Notre Dame L. Rev.* 699 (2022) (explaining the basis for *Debs*).

rules, or executive orders cannot rely on § 1983, but they sometimes proceed under the APA, again *Ex parte Young* (or other theories of non-statutory judicial review of agency action), or implied causes of action under the Constitution.⁴⁵

The key points here, then, are that litigants often invoke the equitable powers of the federal courts and that the claims have certain substitutes depending on the kind of alleged illegality challenged. For suits against the states, the substitutes are equitable causes of action, § 1983, and potentially implied constitutional causes of action; for suits against the federal government, the substitutes are equitable causes of action, implied constitutional causes of action, and the APA; and for claims brought by the United States, the claims depend on the Supremacy Clause, *Ex parte Young* or *In re Debs*, or implied constitutional causes of action. Parties also sometimes assert multiple theories or remain ambiguous about the theory. Thus, any attempt to reform the structures that permit efforts to block national or statewide policy must grapple with the substitution of one legal theory for another.

3. Remedy-Based Distinctions

The typical case differs based on the *remedies* entered. Currently, the remedies entered tend to be preliminary injunctions or orders “setting aside” administrative action under the APA. Sometimes courts enter both, throw in declaratory judgments, or enter either temporary restraining orders or final injunctions.⁴⁶ These should, again, be partial substitutes for one another if the litigant’s aim is to intervene in state or federal policy. The main advantage of the APA is that the conventional wisdom in the lower courts is that the APA permits universal vacatur of unlawful agency action.⁴⁷ The Court may even agree, though doing so would confirm the

⁴⁵ Compare, e.g., *Sierra Club v. Trump*, 929 F.3d 670, 685, 694–98 (9th Cir. 2019) (finding causes of action in equity and under the APA to block using “reprogrammed funds to construct . . . border barrier[s]”), with *Trump v. Sierra Club*, 140 S. Ct. 1, 1 (2019) (granting stay because the United States sufficiently established that plaintiffs lacked a “cause of action”); see also Josh Blackman & Seth Barrett Tillman, *The Unresolved Threshold Issues in the Emoluments Clauses Litigation: The President Has Three Bodies and There Is No Cause of Action for Ultra Vires Conduct*, 20 *Geo. J.L. & Pub. Pol’y* 163, 202–17 (2022) (discussing causes of action in litigation under the Emoluments Clauses).

⁴⁶ E.g., *Texas v. Biden*, 554 F. Supp. 3d 818, 857 (N.D. Tex. 2021), *rev’d*, 142 S. Ct. 2528 (2022) (injunction and vacatur).

⁴⁷ See, e.g., *Griffin v. HM Fla.-ORL*, 144 S. Ct. 1, 2 n.1 (2023) (mem.) (statement of Kavanaugh, J.).

need for the shadow docket.⁴⁸ On the other hand, the lawfulness of injunctions (temporary or not) that benefit nonparties has been conclusively rejected by *CASA*.⁴⁹ The reason to resort to an injunction is, of course, that vacatur is not available under the non-APA causes of action.

Three other problems of remedial substitution are worth mentioning. The first is that the plaintiffs in shadow-docket litigation tend to seek temporary restraining orders and preliminary injunctions; these remedies offer much faster relief without the same evidentiary burdens. But limiting access to preliminary injunctions might cause litigants to seek expedited resolution on the merits. The second is that foreclosing or limiting the availability of injunctions or vacatur might pressure the parties to resort to declaratory judgments instead. Thus, any efforts to limit injunctions and vacatur may need to anticipate declaratory workarounds. The third is that certification of class actions, and requests for relief by putative classes, might be an effective substitute for universal relief. Given the Court's holding in *CASA* and its approval of temporary relief for putative classes, it may need to clarify Rule 23(b)(2) and the prerequisites for preliminary relief for putative classes.⁵⁰

B. Supremacy of the Supreme Court

The *Labrador* concurrence also underscores that the cause of the shadow docket is that important issues must be addressed by the Court. As Justice Kavanaugh noted a few times, the Court “cannot avoid” resolving some filings and cannot “turn away” filings without addressing them.⁵¹ But of course that assertion is not quite true. The Court could adopt a rule denying all emergency applications. It has no problem

⁴⁸ Three Justices have expressed serious doubts about vacatur. See *United States v. Texas*, 143 S. Ct. 1964, 1978–85 (2023) (Gorsuch, J., concurring in the judgment, joined by Barrett & Thomas, JJ.). Justice Alito withheld judgment. *Id.* at 1996 (Alito, J., dissenting). Justice Kavanaugh has embraced it. *Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys.*, 144 S. Ct. 2440, 2460 (2024) (Kavanaugh, J., concurring); see *infra* text accompanying notes 216–20.

⁴⁹ *Trump v. CASA, Inc.*, 145 S. Ct. 2540, 2556–57 (2025).

⁵⁰ See generally Sohoni, *supra* note 15 (noting alternative avenues to effectively universal relief).

⁵¹ *Labrador v. Poe ex rel. Poe*, 144 S. Ct. 921, 928 (2024) (mem.) (Kavanaugh, J., concurring in the grant of stay).

denying thousands of petitions for certiorari on its discretionary docket.⁵² It summarily resolves cases on its supposedly mandatory jurisdiction.⁵³ It summarily denies emergency-docket applications for stays of execution.⁵⁴ And it decided to hold an emergency application “in abeyance”—maybe not turning it away, but certainly delaying resolution—presumably because it thought the problem might go away if the district court’s time-limited temporary restraining order expired.⁵⁵

The concurrence means, instead, that the Court cannot just adopt a policy of summary denial for significant issues. As Justice Kavanaugh put it in *Labrador*, “this Court has a responsibility to resolve major questions of national importance,” and leaving lower-court decisions in place “would amount to an abdication of this Court’s proper role.”⁵⁶ As long as the Court maintains its position and self-conception as a “supervisor of the system of federal law,” the emergency applications that the Court deems to present questions of “extraordinary significance to the parties and the American people” must be resolved by the Court.⁵⁷ So although the Court might change the standards for emergency relief or alter its rules to reduce the availability of relief, the Court is committed to intervention whenever the decisions of the lower courts undermine its supremacy over the federal courts.⁵⁸

⁵² See, e.g., *The Supreme Court, 2022 Term — The Statistics*, 137 *Harv. L. Rev.* 490, 498 (2023) (noting that the Court granted just 60 of 4,186 petitions for certiorari in the 2022 October Term).

⁵³ See *Walen v. Burgum*, 145 S. Ct. 1041 (2025) (mem.) (“[The a]ppeal [is] dismissed with respect to Subdistrict 9A, and [the] judgment [is] affirmed with respect to Subdistrict 4A.”); see also *Texas v. California*, 141 S. Ct. 1469, 1469–70 (2021) (mem.) (Alito, J., dissenting) (objecting to the Court’s denial of Texas’s motion to file a bill of complaint against California in the Court’s “original and exclusive jurisdiction of all controversies between two or more States” (quoting 28 U.S.C. § 1251(a))).

⁵⁴ See, e.g., *The Supreme Court, 2022 Term — The Statistics*, *supra* note 52, at 505 (noting the unanimous denials of seventeen out of eighteen applications for stays of execution).

⁵⁵ *Bessent v. Dellinger*, 145 S. Ct. 515, 516 (2025) (mem.).

⁵⁶ *Labrador*, 144 S. Ct. at 930 (Kavanaugh, J., concurring in the grant of stay).

⁵⁷ Robert Post, *The Supreme Court’s Crisis of Authority: Law, Politics, and the Judiciary Act of 1925*, *Notre Dame L. Rev.* (forthcoming 2026) (manuscript at 1), <https://ssrn.com/abstract=5075524> [<https://perma.cc/77J2-3KS2>]; *Labrador*, 144 S. Ct. at 929 (Kavanaugh, J., concurring in the grant of stay).

⁵⁸ See, e.g., *Whole Woman’s Health v. Jackson*, 142 S. Ct. 522, 545 (2021) (Roberts, C.J., concurring in the judgment in part and dissenting in part) (stating that “the role of the Supreme Court in our constitutional system” is “at stake” when a state defies the Court’s rulings); Stephen I. Vladeck, *The Supreme Court’s (Self-Defeating) Supremacy*, 2025 *Sup. Ct. Rev.* (forthcoming 2026) (manuscript at 6), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5

That supremacy over the lower courts seems durable for the foreseeable future. It has a doctrinal and institutional basis on the current Court. For example, the Court considers the certworthiness of the issues presented in an emergency application in deciding whether to grant it,⁵⁹ and certworthiness includes consideration of the importance of the legal question, the need for uniformity on such an important question, or the need to exercise “supervisory power” over erroneous decisions.⁶⁰ Many of the current Justices have expressed similar views in separate writings,⁶¹ as have earlier decisions of the Court.⁶²

The Court’s commitment to institutional supremacy arguably follows from conscious design choices in the Constitution and relevant statutes. The Constitution established “one supreme Court” over any congressionally established “inferior Courts.”⁶³ Commentators often

661011 [<https://perma.cc/32KB-YBJG>] (arguing that the Justices acted in the 2024 October Term “to preserve *their* supremacy”).

⁵⁹ See *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam).

⁶⁰ See Sup. Ct. R. 10(a), (c).

⁶¹ See, e.g., *Nicholson v. W.L. York, Inc.*, 145 S. Ct. 1528, 1529 (2025) (mem.) (Jackson, J., dissenting from the denial of certiorari, joined by Sotomayor, J.) (arguing that the Court should “summarily reverse[]” an opinion that “flouts this Court’s clear precedents”); *Trump v. Wilcox*, 145 S. Ct. 1415, 1419 (2025) (mem.) (Kagan, J., dissenting from the grant of the application for stay) (arguing that the President, like lower court judges, “must . . . follow existing precedent”); *Rogers v. Grewal*, 140 S. Ct. 1865, 1875 (2020) (mem.) (Thomas, J., dissenting from the denial of certiorari, joined by Kavanaugh, J.) (claiming that the Court should have granted certiorari to “provide lower courts with much-needed guidance, ensure adherence to our precedents, and resolve a Circuit split”); see also Stephen G. Breyer, *Reflections on the Role of Appellate Courts: A View from the Supreme Court*, 8 *J. App. Prac. & Process* 91, 93–94 (2006) (stating that a Justice does not “merely attempt[] to dispose of the cases before him” but “tr[ies] to answer the important legal question that each case raises”); William J. Brennan, Jr., *The National Court of Appeals: Another Dissent*, 40 *U. Chi. L. Rev.* 473, 482–83 (1973) (discussing the Court’s “essential duties”).

⁶² The Court often made such claims with respect to *state* courts. See, e.g., *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 416 (1821) (“[T]he necessity of uniformity, as well as correctness in expounding the constitution and laws of the United States, would itself suggest the propriety of vesting in some single tribunal the power of deciding, in the last resort, all cases in which they are involved.”); *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 347–48 (1816) (similar); see also Leonard G. Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 *U. Pa. L. Rev.* 157, 166–67 (1960) (citing *Cohens v. Virginia* and *Martin v. Hunter’s Lessee* to show that the Court has long recognized that one of its “indispensable functions” is to “resolve conflicting interpretations of the federal law”).

⁶³ See U.S. Const. art. III, § 1; see also James E. Pfander, *Jurisdiction-Stripping and the Supreme Court’s Power to Supervise Inferior Tribunals*, 78 *Tex. L. Rev.* 1433, 1451 (2000) (“The text of Article III confirms both the idea of judicial independence and the notion that a single supreme court was to exercise supervisory authority over any inferior tribunals that Congress chose to create.”).

derive constitutional rules from that structural relationship, as when, for example, the relationship justifies vertical stare decisis or limits Congress's power to strip the jurisdiction of the Supreme Court.⁶⁴ The Judiciary Act of 1789 granted the Supreme Court appellate jurisdiction, with exclusions and limitations, over the lower federal courts.⁶⁵ And after the 1925 Judges' Bill, the Court became "the acknowledged supervisor of the system of federal law, a role envisioned by the [statute] and warmly embraced by the Court."⁶⁶ The Court sought, and obtained, a discretionary certiorari docket because of "the need of securing harmony of decision and the appropriate settlement of questions of general importance so that the system of federal justice may be appropriately administered."⁶⁷ And there are plausible arguments that the system makes sense. An apex appellate court provides clarity and uniformity in federal law.⁶⁸ And the commitment to supremacy might also help constitute a system in which the federal judiciary constrains the illegality of the political branches.⁶⁹

My claim about the Supreme Court's commitment to institutional supremacy is descriptive rather than normative. The Court just is, and has long been, committed to its supervisory position. Yet the descriptive claim is qualified because many of the constitutive features of institutional supremacy are contingent,⁷⁰ because the arguments about the

⁶⁴ See Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 *Stan. L. Rev.* 817, 832–34 (1994); Pfander, *supra* note 63, at 1452.

⁶⁵ See Pfander, *supra* note 63, at 1467–68 (describing limitations on the Supreme Court's review of lower federal courts); Curtis A. Bradley & Neil S. Siegel, *Court-Stripping, Court-Packing, and Court-Defying: Revisiting the Supreme Court's Essential Functions*, 104 *Tex. L. Rev.* (forthcoming 2026) (manuscript at 13–14), <https://ssrn.com/abstract=5259367>, [<https://perma.cc/8HJY-S5LJ>].

⁶⁶ *Post*, *supra* note 57.

⁶⁷ Charles Evans Hughes, *Address of the Chief Justice of the United States*, in 11 *A.L.I. Procs.* 313, 315 (1934).

⁶⁸ See Harlon Leigh Dalton, *Taking the Right to Appeal (More or Less) Seriously*, 95 *Yale L.J.* 62, 70–71 (1985); Breyer, *supra* note 61, at 92; Roger J. Traynor, *Some Open Questions on the Work of State Appellate Courts*, 24 *U. Chi. L. Rev.* 211, 221 (1957); William Howard Taft, *The Jurisdiction of the Supreme Court Under the Act of February 13, 1925*, 35 *Yale L.J.* 1, 2 (1925); *U.S. Bank Nat'l Ass'n ex rel. CWC Capital Asset Mgmt. LLC v. Vill. at Lakeridge, LLC*, 583 U.S. 387, 396 (2018).

⁶⁹ See *infra* Part IV.

⁷⁰ For example, appellate review by petition for writ of certiorari, the selection mechanism for the Court, might be eliminated in favor of more mandatory jurisdiction. See, e.g., Daniel Epps & William Ortman, *The Lottery Docket*, 116 *Mich. L. Rev.* 705, 732–34 (2018); 28 U.S.C. § 1253 (appeals from three-judge district courts).

Court's institutional supremacy have detractors,⁷¹ and because the extent of the Court's supervision of the lower courts is a matter of degree.⁷² So of course one could imagine functional or legal arguments in favor of more decentralized federal supervision.⁷³ But the current Court is committed to a strong form of institutional supremacy, that commitment has a long history, and constitutional and normative arguments support that commitment. Thus, the basic commitment to the supremacy of the Supreme Court imposes some limits, even if indeterminate, on the decentralization of federal judicial power.

* * *

The *Labrador* concurrence's discussion of a "typical" emergency underscores the structural causes of the problem of the shadow docket: the federal courts intervene (or refuse to intervene) in the implementation of nationally important federal or state policies when litigants request it, and the Supreme Court is institutionally committed to resolving the most important issues of federal law. Disaggregating the typical emergencies, however, reveals that the doctrines that permit high-profile interventions differ for several reasons related to the nature of the litigant, of the claim, and of the remedy sought. The set of doctrines that permit intervention also offers litigants multiple alternative avenues to high-profile rulings. Accordingly, reducing the need for emergency intervention by the Court would require the diminution of *either* the power of the federal courts to block national and statewide policies *or* the Court's power compared to the lower federal courts.

II. INCOMPLETE SOLUTIONS

Critics of the shadow docket tend to focus not on the complex set of structural causes of the shadow docket, but instead on the Court's

⁷¹ See Bradley & Siegel, *supra* note 65 (manuscript at 9) (describing the "traditional view" that "Congress has plenary power to regulate the Court's appellate jurisdiction—even to the point of eliminating it entirely—if, in doing so, Congress does not violate other restrictions in the Constitution such as the Equal Protection Clause").

⁷² Cf. Heytens, *supra* note 11, at 2054 n.40 (explaining the technique of summary reversal, "a procedure whereby the Court issues a single order and opinion that both grants certiorari and reverses a lower court decision without the benefit of briefing and oral argument").

⁷³ See, e.g., Fed. Jud. Ctr., Report of the Study Group on the Caseload of the Supreme Court 18–24 (1972) (proposing an establishment of a "National Court of Appeals," drawn from judges of the federal courts of appeals, which would screen petitions for certiorari for the Supreme Court).

supposed abuses—the frequency of interventions, failures to explain, departures from precedent, and misstated or misapplied standards for relief. Because this diagnosis of the problem is incomplete, the prescriptions treat the problem incompletely. Section II.A canvasses the standard critiques and shows why the proposed reforms cannot fully solve the shadow docket. Section II.B identifies some of the proposed reforms that would target the structural problems and notes why those reforms are inadequate.

A. Incomplete Institutional Solutions

Deference. Some critics suggest that the Court should intervene in the appellate process less frequently by deferring to the judgments of lower courts. For example, maybe the Court should adopt a “default posture of deference” to the lower courts or decline to intervene whenever two lower courts concur.⁷⁴ The problem is that “deference” would shift power from the Supreme Court to federal district courts and courts of appeals. That shift, however, asks the Court to weaken its commitment to resolving important questions of federal law.⁷⁵ As long as that institutional commitment remains, the Court cannot ignore the set of emergency applications that present issues that pass some threshold of significance. The argument for “deference,” then, assumes away *either* the Court’s commitment to supremacy over the federal system *or* the significance of lower court opinions.

Certworthiness. Others have argued—and many of the Justices appear to agree—that the Court should grant emergency applications only if the underlying issue is “certworthy.”⁷⁶ The problem is that such a requirement again depends on whether the issue is significant enough to

⁷⁴ *Labrador v. Poe ex rel. Poe*, 144 S. Ct. 921, 934–35 (2024) (mem.) (Jackson, J., dissenting from grant of stay) (arguing for “restraint” on the shadow docket and noting that the applicant’s request contradicts the decisions of both the district court and court of appeals); *id.* at 930 (Kavanaugh, J., concurring in the grant of stay) (describing that view of some critics); Voehl, *supra* note 5, at 971 (referring to “traditional norms of deference”); see also Presidential Comm’n on the Sup. Ct. of the U.S., Final Report 211 (2021), <https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final-12.8.21-1.pdf> [<https://perma.cc/X5DA-VYKP>] (citing the “two-court rule” as an example of deference).

⁷⁵ See *Labrador*, 144 S. Ct. at 930 (Kavanaugh, J., concurring in the grant of stay) (“[T]his Court has a responsibility to resolve major questions of national importance.”).

⁷⁶ *Does 1–3 v. Mills*, 142 S. Ct. 17, 18 (2021) (mem.) (Barrett, J., concurring in the denial of application for injunctive relief); *Labrador*, 144 S. Ct. at 931 (Kavanaugh, J., concurring in the grant of stay); Schmidt, *supra* note 2, at 1020 (arguing that emergency relief “should be reserved for cases that are cert-worthy”).

intervene. The certiorari determination is, after all, a discretionary determination that the case presents an “important question” worth the Court’s time.⁷⁷ And that assessment depends on the Court’s commitment to supremacy and the significance of the case.

Standards of Review. Other commentators debate the standards for emergency relief, arguing that the Court should adopt a higher burden for injunctions pending appeal than for stays⁷⁸ or should alter its theories of irreparable harm.⁷⁹ But if a theory raises the bar for Supreme Court intervention, then it shifts power to lower courts, sacrificing the Supreme Court’s institutional commitment to supervision. That is true in a qualified sense even for the more modest argument that injunctions should be disfavored compared to stays. On that view, injunctions are disfavored because they do not merely suspend a judicial order but instead enjoin the parties directly, and the Court should “rarely operate[] directly on the parties” and should “leave[] lower courts to issue compulsory orders to parties.”⁸⁰ Though there are plausible doctrinal and functional reasons to hesitate before enjoining the parties directly, too much deference to lower courts will be unpalatable. The lower court’s *potential* remedial power (which it has refused to exercise) establishes the alternative baseline of judicial interference to which the noninterventionist world is compared. An erroneous departure from a world *with* judicial intervention will seem unpalatable if it becomes significant enough.⁸¹

Deliberation. Some critics argue that the Court issues shadow-docket orders without sufficient deliberation. For example, some recommend that the Court transfer more of its high-profile emergency cases to the merits docket.⁸² On the Court, Justice Barrett noted that the emergency docket requires the Court to issue decisions on a “short fuse without

⁷⁷ Sup. Ct. R. 10(c) (noting that certiorari may be warranted for an “important question of federal law”).

⁷⁸ See Schmidt, *supra* note 2, at 1023.

⁷⁹ See Vladeck, *The Shadow Docket*, *supra* note 2, at 133–34.

⁸⁰ Schmidt, *supra* note 2, at 1022–23; see also *id.* at 1009–10 (discussing procedural and doctrinal differences between stays and injunctions).

⁸¹ That higher standard for injunctions pending appeal would present less of a problem to the extent that the Court would require a “presumption of constitutionality” when courts review legislation or executive action. See *infra* note 206.

⁸² Edward L. Pickup & Hannah L. Templin, *Emergency-Docket Experiments*, 98 *Notre Dame L. Rev. Reflection* 1, 3–4, 35–36 (2022).

benefit of full briefing and oral argument.”⁸³ And Justice Kagan criticized the majority in an election-law case for staying an order with only the “scanty review this Court gives matters on its shadow docket.”⁸⁴

The Court has internalized these critiques, but not in a way that fully resolves the problem. In recent years, it has occasionally sought additional briefing and heard oral argument on some of the applications that it has received.⁸⁵ Most prominently, in *TikTok, Inc. v. Garland*, the Court received an emergency application on December 16; transferred the case to the merits docket, ordered briefing, and scheduled oral argument for January 10; and issued a decision on January 17.⁸⁶ Still, the timeline for emergency relief is dictated by the urgency of the underlying dispute. Given that timeline, the briefing and deliberation will be rushed compared to the normal timeline on the merits calendar. And the Court has limited capacity to add such cases to its argument calendar without detracting from its merits work.⁸⁷ Thus, inferior deliberative processes are inevitable. The question is how inferior those processes will be, which is determined by the number of and timeline for the emergency applications that the Court receives. In other words, the structural causes of the shadow docket constrain the Court’s ability to convert emergency applications to merits decisions.⁸⁸

Explanations and Precedential Effect. Related to the concerns about deliberation, other critics argue that the Court fails to *explain* its decisions on the shadow docket. They suggest that the Court should offer more or better reasoning for its decisions by publishing more reasoning in

⁸³ *Does 1–3 v. Mills*, 142 S. Ct. 17, 18 (2021) (mem.) (Barrett, J., concurring in the denial of application for injunctive relief).

⁸⁴ *Merrill v. Milligan*, 142 S. Ct. 879, 883 (2022) (mem.) (Kagan, J., dissenting from grant of applications for stays).

⁸⁵ See, e.g., *Ohio v. EPA*, 144 S. Ct. 2040, 2052, 2058 (2024) (deciding a stay application in a full opinion after oral argument); *Nat’l Fed’n of Indep. Bus. v. OSHA*, 142 S. Ct. 661, 664, 666–67 (2022) (per curiam) (same); see also *Labrador v. Poe ex rel. Poe*, 144 S. Ct. 921, 933 (2024) (mem.) (Kavanaugh, J., concurring in the grant of stay) (citing cases).

⁸⁶ 145 S. Ct. 57, 57, 62 n.1 (2025) (per curiam).

⁸⁷ On limited judicial capacity and the development of constitutional law, see generally Andrew Coan, *Rationing the Constitution: How Judicial Capacity Shapes Supreme Court Decision-Making* (2019).

⁸⁸ But given the shrinking merits docket, see Michael Heise, Martin T. Wells & Dawn M. Chutkow, *Does Docket Size Matter? Revisiting Empirical Accounts of the Supreme Court’s Incredibly Shrinking Docket*, 95 *Notre Dame L. Rev.* 1565, 1567–68 (2020), the Court could reduce the problem by devoting more of its resources to emergency applications.

opinions⁸⁹ or by identifying the votes of the Justices.⁹⁰ But neither reform would reduce the salience of the policies addressed on the interim docket. Instead, these reforms would be aimed at increasing the “public perception of the Court’s legitimacy”⁹¹—which could, if anything, legitimate more aggressive judicial action. In any event, the Court’s limited capacity constrains its ability to explain itself just as it constrains how many cases it resolves and how quickly it acts.

And for cases that remain on the shadow docket, some suggest that these quick decisions should have limited precedential effect.⁹² This is sometimes presented as an alternative to the previous reform: either a shadow-docket order “earns its precedence through (i) a reasoned opinion and (ii) signatures from the Justices, or it is devoid of precedential value.”⁹³ However that argument shakes out, though, it is hard to see why treating the orders as non-precedential would reduce the need for the Court’s intervention. If the Justices are wary of making precedent without full deliberation, they may be more willing to issue orders that lack precedential effect.⁹⁴ And if the Court’s orders are non-precedential, that might increase disuniformity in the lower courts and require repeated intervention by the Court.⁹⁵ So it is hard to see why limiting the

⁸⁹ Voehl, *supra* note 5, at 970. But see Justin Driver, *The Insignificance of Judicial Opinions*, 113 *Calif. L. Rev.* 2181, 2183 (2026) (“The Supreme Court’s particular rationale for issuing decisions matters almost not at all in comparison to the Court’s bottom-line outcomes.”).

⁹⁰ Voehl, *supra* note 5, at 970; Alexis Denny, *Comment, Clarity in Light: Rejecting the Opacity of the Supreme Court’s Shadow Docket*, 90 *UMKC L. Rev.* 675, 696 (2022); cf. Gabe Roth & Tyler Cooper, *The Shadow Docket: Problems and Solutions*, *Fix the Court* (Feb. 18, 2021), <https://fixthecourt.com/2021/02/shadow-docket-problems-solutions/> [<https://perma.cc/M4Z7-NLAC>] (asserting that the Court should record each Justice’s votes, explain its reasoning, and publish the opinions on its website).

⁹¹ Voehl, *supra* note 5, at 960.

⁹² Cole Waldhauser, *Unprecedented Precedent: The Case Against Unreasoned “Shadow Docket” Precedent*, 37 *Const. Comment.* 149, 165 (2022); Voehl, *supra* note 5, at 970; Denny, *supra* note 90, at 698; Violet Mulligan, *Assessing Paths to Reform the Supreme Court’s Shadow Docket*, 25 *Hinckley J. Pol.* 31, 38 (2024); Bert I. Huang, *The Foreshadow Docket*, 124 *Colum. L. Rev.* 851, 858–68 (2024) (reviewing *Philosophical Foundations of Precedent* (Timothy Endicott, Hafsteinn Dan Kristjánsson & Sebastian Lewis eds., 2023)).

⁹³ Waldhauser, *supra* note 92, at 150.

⁹⁴ Cf. *Labrador v. Poe ex rel. Poe*, 144 S. Ct. 921, 933–34 (2024) (mem.) (Kavanaugh, J., concurring in the grant of stay) (noting the “cost” of shadow-docket opinions having a “lock-in effect because of the opinion’s potential vertical precedential effect (*de jure* or *de facto*)”).

⁹⁵ See, e.g., *NIH v. Am. Pub. Health Ass’n*, 145 S. Ct. 2658, 2663–65 (2025) (mem.) (Gorsuch, J., concurring in part and dissenting in part) (claiming that the lower court’s failure to follow interim decisions by the Court required additional grants of interim relief).

precedential effect of interim orders would lower the frequency of the Court's interventions.

B. Incomplete Structural Solutions

Many reformers do recognize that “the problems of the shadow docket are often exacerbated by things external to the Court itself.”⁹⁶ They recognize, for example, that litigants’ decisions to file emergency applications often force the Court’s hand⁹⁷ or that forum shopping contributes to the likelihood that a plaintiff obtains a favorable forum.⁹⁸ And some suggest that all of this litigation is generated by the decisions of the executive branch.⁹⁹

But the suggested solutions to these external problems have been too dependent on political solutions or targeted at only narrow aspects of the problem. First, many reformers have suggested that *Congress* should act to limit the problems of the shadow docket.¹⁰⁰ For example, proposed reforms include statutory changes (or changes to the Federal Rules of Civil Procedure) that would limit the availability of emergency relief or limit forum shopping, including by requiring some temporary relief to be issued by three-judge district courts.¹⁰¹ These suggestions target the structural conditions of the shadow docket, and reducing litigants’ ability

⁹⁶ Schmidt, *supra* note 2, at 1025.

⁹⁷ See Vladeck, *supra* note 4, at 134–52 (documenting the federal government’s emergency filings during the first Trump Administration).

⁹⁸ Schmidt, *supra* note 2, at 1025–26; Josh Blackman, *Bilateral Judicial Reform*, 1 *J.L. & Civ. Governance* Tex. A&M 59, 138–39 (2024).

⁹⁹ E.g., William N. Eskridge Jr., *Trump 2.0 Removal Cases & the New Shadow Docket*, *U. Chi. L. Rev. Online* *4–5 (2025) (suggesting that the Trump Administration’s “blizzard of executive orders” generated lawsuits challenging those orders and, ultimately, applications for stays filed with the Supreme Court); sources cited *supra* note 23.

¹⁰⁰ See, e.g., Michael E. Solimine, *Three-Judge District Courts, Direct Appeals, and Reforming the Supreme Court’s Shadow Docket*, 98 *Ind. L.J. Supplement* 37, 56 (2023); *The Supreme Court’s Shadow Docket: Hearing Before the Subcomm. on Cts., Intell. Prop. & the Internet of the H. Comm. on the Judiciary, 117th Cong.* 218–19 (2021) (statement of Stephen I. Vladeck); *id.* at 273–74 (statement of Loren L. AliKhan, *Solic. Gen. of D.C.*).

¹⁰¹ E.g., Blackman, *supra* note 98, at 137 (proposing changes to the Federal Rules of Civil Procedure or by statute for scope of emergency relief); Stephen I. Vladeck, *F.D.R.’s Court-Packing Plan Had Two Parts. We Need to Bring Back the Second.*, *N.Y. Times* (Jan. 7, 2022), <https://www.nytimes.com/2022/01/07/opinion/supreme-court-vaccine-mandate.html>; see sources cited *supra* note 100. For statutory reforms that could centralize judicial review, see generally E. Garrett West, *Abstract Review in Article III Courts*, 139 *Harv. L. Rev.* (forthcoming 2026), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5667410 [<https://perma.cc/656B-89Q4>].

to select an optimal forum—or requiring consensus from a three-judge panel for certain kinds of relief—could indeed reduce the pressure on the shadow docket. But those solutions assume that Congress might act.¹⁰² They also underestimate the possibility that Congress might be motivated to act only to solve flaws that a current political majority perceives.¹⁰³ But assuming that Congress cannot be expected to act (or expected to act reasonably), the congressional solutions overlook the reforms within the Court’s control.

Apart from the congressional solutions, some reformers, including some Justices, have suggested a few ways that the Supreme Court (or lower federal courts) could reduce the salience of the emergency docket. The Court’s elimination of universal injunctions in *CASA* might reduce some pressure on the docket.¹⁰⁴ Other commentators have suggested that instructing lower courts to embrace the “presumption of constitutionality” could likewise reduce the salience of the emergency docket.¹⁰⁵ In addition, Justice Kavanaugh has argued that the *Purcell* principle prevents the Court from resolving complicated election-law issues on the emergency docket, and it does so by instructing federal courts that they should (generally) not intervene too close to elections.¹⁰⁶ The *Purcell* principle targets the structural problem of the shadow docket by reducing the power of the federal courts in a narrow subset of cases, and, indeed, application of that principle in one shadow-docket order precluded a similar case from reaching the Court.¹⁰⁷ Finally, a recent paper explains how reforms to the preliminary injunction would help solve the “new-law” problem—meaning how courts grapple with “challenges to new

¹⁰² See Josh Chafetz, *The Phenomenology of Gridlock*, 88 *Notre Dame L. Rev.* 2065, 2081–82 (2013) (discussing legislative gridlock and examining motivators of congressional action).

¹⁰³ For example, the House passed a bill that would restrict the use of appropriated funds to enforce certain contempt citations, but the effort to amend the rule seems to have failed. See Samuel Bray, *The End of the Road for the Injunction-Bond Proposals?*, *Divided Argument* (June 23, 2025), <https://blog.dividedargument.com/p/the-end-of-the-road-for-the-injunction> [<https://perma.cc/KQ6T-LWVZ>].

¹⁰⁴ See 145 S. Ct. 2540, 2562–63 (2025).

¹⁰⁵ See William Baude, *Fear of Balancing*, 2024 *Sup. Ct. Rev.* 169, 183 & n.80 (2025); see also Thomas P. Schmidt, *Judicial Minimalism in the Lower Courts*, 108 *Va. L. Rev.* 829, 891 (2022) (suggesting that lower courts should adopt “Thayerian minimalism”).

¹⁰⁶ *Merrill v. Milligan*, 142 S. Ct. 879, 879 (2022) (mem.) (Kavanaugh, J., concurring in grant of applications for stays).

¹⁰⁷ See Vladeck, *The Shadow Docket*, *supra* note 2, at 15 (discussing *Merrill v. Milligan*’s consequences); see also *id.* at 197–227 (critiquing *Purcell*).

legal norms, such as statutes, rules, and executive orders”—though with limited direct discussion of the shadow docket.¹⁰⁸

These reforms are the right kind of structural solutions and lie within the Court’s control, but they do not approach the problem systematically. While limiting the ability to grant universal injunctions in *CASA* will take some pressure off the shadow docket, other avenues for sweeping relief remain available. Suits by associations, states, the United States, and even classes of individuals, for example, offer other routes to effectively nationwide relief.¹⁰⁹ And universal vacatur under the APA remains an option in the subset of cases challenging federal agency actions or executive orders. While enforcing the presumption of constitutionality might reduce the number of judicial orders blocking new laws or actions, the presumption applies only to constitutional claims (and maybe just to constitutional challenges to legislation). Even when the presumption does apply, some courts will still conclude that the relevant action is clearly illegal—particularly if the court adjudicating the question is the plaintiff’s chosen forum. While the *Purcell* principle should reduce the need for the Court’s intervention when an election is imminent, the election cases are a small portion of the docket. And while reforming the preliminary injunction might ease the pressure on the Court from that remedy, plaintiffs might instead seek final injunctions, declaratory relief, or vacatur as substitutes for the preliminary injunction. Reform requires a more systematic assessment of the overlapping set of jurisdictional and remedial rules that permit and constrain the federal courts.

III. STRUCTURAL SOLUTIONS

If the shadow docket is really a structural problem, then the Court could alter the jurisdictional and remedial rules that allow district courts to force matters onto the interim docket. Under this approach, the Court could refine several doctrines to impose stricter limits on who might sue, what claims they might bring and when, and what relief they might obtain. This Part presents the Court with a series of potential options, which could be adopted seriatim and which have a basis in current doctrine, including reasonably possible reforms to current doctrine. Some of the reforms might also be available to lower courts, if consistent with the obligations

¹⁰⁸ See Samuel L. Bray, *The Purpose of the Preliminary Injunction*, 78 *Vand. L. Rev.* 809, 857, 867 (2025).

¹⁰⁹ See, e.g., Sohoni, *supra* note 15 (manuscript at 14–19).

of stare decisis. I do not, of course, exhaustively consider these legal arguments. Nor do I claim that all or even any of the reforms are all-things-considered desirable. Instead, I offer a menu of options designed to fix the structural pressure on the shadow docket, which here means reining in the lower courts to prevent high-salience disputes from reaching the shadow docket in the first place.

A. Party-Based Limitations

The first set of reforms would rigorously insist that the plaintiffs include only the parties (potentially) injured.¹¹⁰ Expanding the set of plaintiffs makes it easier both to get into court and to obtain broader relief. Restricting the set of plaintiffs who might sue, by contrast, could minimize litigation or at least narrow the remedies imposed—either of which would reduce the salience of judicial intervention. I address associational standing, then state standing, then standing for the United States.

I. Associations

Currently, associational standing permits an association to sue on behalf of its members if (1) the members “would otherwise have standing to sue in their own right,” (2) “the interests it seeks to protect are germane to the organization’s purpose,” and (3) “neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.”¹¹¹ Advocacy groups and trade associations have long used the doctrine to get into federal court,¹¹² but judges and commentators have argued that Article III precludes such lawsuits.¹¹³

¹¹⁰ See William Baude & Samuel L. Bray, *Proper Parties, Proper Relief*, 137 *Harv. L. Rev.* 153, 156 (2023) (“Requiring the plaintiff to show injury will frequently operate as a rough proxy that ensures that the plaintiff has a legitimate reason to be in court, distinct from someone requesting an advisory opinion.”).

¹¹¹ *Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333, 343 (1977); see also Michael T. Morley & F. Andrew Hessick, *Against Associational Standing*, 91 *U. Chi. L. Rev.* 1539, 1550–67 (2024) (describing the development of associational standing doctrine and arguing against further expansion).

¹¹² See, e.g., *Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2396 (2024); *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2156 (2023); *Nat’l Motor Freight Traffic Ass’n v. United States*, 372 U.S. 246, 247 (1963) (per curiam).

¹¹³ See Morley & Hessick, *supra* note 111, at 1593 (“Neither historical practice nor traditional equitable principles support associational standing.”); *FDA v. All. for Hippocratic*

As a functional matter, associational standing allows organizational plaintiffs to obtain high-salience rulings. Courts sometimes issue broad relief on the ground that the organization's members are numerous and geographically disparate.¹¹⁴ In theory, then, while courts should tailor relief to the specific members harmed,¹¹⁵ in practice courts sometimes skip over that question and allow the association to obtain broader relief than if the members were the plaintiffs seeking redress for their own injury. What is more, associational standing permits the organization to vindicate the injuries of the *members*, but the membership might be more numerous than the set which could proceed as individual or class *plaintiffs*.¹¹⁶ An association does not need “consent or even knowledge” of the members before filing a lawsuit, and the association has “ultimate control” over decisions “concerning the relief to seek and settlement or termination of the action.”¹¹⁷ Likewise, an association need not satisfy the requirements for class certification under Rule 23(a) and (b)(2),¹¹⁸ thus allowing associations to obtain injunctive relief for their members that might not otherwise satisfy Rule 23.¹¹⁹ And in suits in which attorney's fees are available to the “prevailing party,” the association has an additional incentive to litigate because it might obtain attorney's fees that would otherwise, formally speaking, go to the member-plaintiffs.¹²⁰

Associational standing thus permits higher-salience decisions than if the members litigated individually or even as a class (and even if the same advocacy group paid attorneys to represent them individually or as a

Med., 144 S. Ct. 1540, 1566–70 (2024) (Thomas, J., concurring); *Indus. Energy Consumers of Am. v. FERC*, 125 F.4th 1156, 1167–70 (D.C. Cir. 2025) (Henderson, J., concurring).

¹¹⁴ See, e.g., *CASA, Inc. v. Trump*, No. 25-cv-00201, 2025 WL 545840, at *1 (D. Md. Feb. 18, 2025) (holding that a nationwide injunction was necessary to provide “complete relief” because an organization had over “680,000 members” in “all 50 states and several U.S. territories”).

¹¹⁵ See *infra* text accompanying notes 207–12 (injunctions) and 216–19 (vacatur).

¹¹⁶ *Morley & Hessick*, *supra* note 111, at 1588–91.

¹¹⁷ *Id.* at 1579–82.

¹¹⁸ See *UAW v. Brock*, 477 U.S. 274, 288–90 (1986); *Morley & Hessick*, *supra* note 111, at 1572–82.

¹¹⁹ For competing views on how onerous those requirements really are, compare Michael T. Morley, *Nationwide Injunctions, Rule 23(b)(2), and the Remedial Powers of the Lower Courts*, 97 *B.U. L. Rev.* 615, 633–39 (2017) (“[C]ertification under Rule 23(b)(2) is a formalistic gesture . . .”), with Zachary D. Clopton, *National Injunctions and Preclusion*, 118 *Mich. L. Rev.* 1, 34 (2019) (“[A]t the same time as national injunctions have become more popular, the ability to obtain a national (b)(2) class has waned.”).

¹²⁰ See 28 U.S.C. § 2412 (suits against federal government); 42 U.S.C. § 1988 (suits under civil-rights statutes).

class). Eliminating or curtailing associational standing, as Justice Thomas has suggested, would thus reduce the frequency and salience of federal judicial intervention.¹²¹ At the very least, the Court (and lower federal courts) could reiterate that the remedy for associational plaintiffs must redress only the injury for which the specific members “would otherwise have standing to sue in their own right.”¹²² The narrower remedial holding would cohere with the basic holding of *CASA*.¹²³

2. States

States have also been frequent plaintiffs in shadow-docket disputes, and the Court has a range of options to constrain their ability to challenge federal policy.¹²⁴ In *United States v. Texas*, the Court dismissed a claim that challenged immigration guidance instructing federal officials on how (and how not) to enforce immigration laws.¹²⁵ It reasoned that states, like private citizens, “lack[] a judicially cognizable interest in the prosecution . . . of another.”¹²⁶ In *Haaland v. Brackeen*, the Court reiterated that states cannot assert *parens patriae* standing to assert the interests of their citizens in litigation against the federal government.¹²⁷

The Court could further clarify that states cannot assert as injuries cost increases resulting from the regulation (or lack of regulation) of third parties. Also in *United States v. Texas*, the State’s theory of standing was that the federal government’s immigration policy caused it monetary

¹²¹ See *FDA v. All. for Hippocratic Med.*, 144 S. Ct. 1540, 1565 (2024) (Thomas, J., concurring).

¹²² See *Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333, 343 (1977); see also Morley & Hessick, *supra* note 111, at 1550–67 (describing how associational standing operates).

¹²³ See *Trump v. CASA, Inc.*, 145 S. Ct. 2540, 2557–58 (2025).

¹²⁴ See Ann Woolhandler & Michael G. Collins, *Reining in State Standing*, 94 *Notre Dame L. Rev.* 2015, 2017–21 (2019); see also Jonathan H. Adler, *State-Led Lawfare Eclipses Freedom-Preserving Federalism*, Civitas Inst. (Mar. 21, 2025), <https://www.civitasinstitute.org/research/state-led-lawfare-eclipses-freedom-preserving-federalism> [<https://perma.cc/Y6EY-MT5Q>] (distinguishing different kinds of state injuries and critiquing the “use of litigation as a proxy for political contestation by state [attorneys general]”).

¹²⁵ *United States v. Texas*, 143 S. Ct. 1964, 1968 (2023).

¹²⁶ *Id.* at 1970 (second alteration in original) (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973)).

¹²⁷ 143 S. Ct. 1609, 1640 (2023); see also Ann Woolhandler & Julia D. Mahoney, *State Standing after Biden v. Nebraska*, 2023 *Sup. Ct. Rev.* 303, 319–23 (2024) (arguing that the Court could restrict state standing by reinforcing *Brackeen*’s “blanket disallowance of state *parens patriae* suits against the United States”); *CASA*, 145 S. Ct. at 2565–66 (Alito, J., concurring) (discussing the permissibility of third-party standing for states).

harm.¹²⁸ Texas advanced the same theory of standing in an earlier emergency-docket case in which Texas challenged the Biden Administration’s rescission of an immigration policy called Migrant Protection Protocols.¹²⁹ Other state-initiated suits against the Biden Administration claimed injuries from increased “law enforcement, education, and healthcare” costs,¹³⁰ and already states challenging the second Trump Administration’s policies have invoked the same theory.¹³¹

The Court in *United States v. Texas* toyed with eliminating such claims, suggesting in a footnote that the “indirect effects on state revenues or state spending” were “attenuated.”¹³² The Court elaborated on the logic of “attenuated” injuries in *FDA v. Alliance for Hippocratic Medicine*.¹³³ There, doctors argued that loosening federal regulation of a drug would cause them to suffer “monetary and related injuries” in the form of “divert[ed] resources and time from other patients,” higher “risk of liability,” and greater “insurance costs.”¹³⁴ The Court concluded that the harms were “too attenuated” for Article III.¹³⁵ It reasoned that the doctors’ challenge to “general public safety requirements” would not suffice even if “more individuals might then show up at emergency rooms or in doctors’ offices with follow-on injuries.”¹³⁶ Otherwise, the Court warned, doctors could “sue in federal court to challenge almost any policy affecting public health.”¹³⁷

The logic of *Alliance*, if applied to states, would substantially limit their ability to challenge national policy. The *Alliance* theory is that (some) predictable downstream costs of federal (de)regulation are too “attenuated” to justify standing—even if those costs are borne by the plaintiffs. But if attenuated “insurance costs” cannot confer standing for

¹²⁸ See 143 S. Ct. at 1969; *id.* at 1976–77 (Gorsuch, J., concurring in the judgment); *id.* at 1993–94 (Alito, J., dissenting).

¹²⁹ *Texas v. Biden*, 554 F. Supp. 3d 818, 840 (N.D. Tex. 2021) (citing *Texas v. United States*, 809 F.3d 134, 155 (5th Cir. 2015)) (finding injury due to the cost to Texas of providing driver’s licenses to noncitizens released into the United States due to the Biden Administration’s immigration policy); see also *Biden v. Texas*, 142 S. Ct. 2528, 2537 (2022) (noting the Court’s previous emergency-docket ruling on the case).

¹³⁰ Application for a Stay Pending Certiorari at 14–15, *Arizona v. Mayorkas*, 143 S. Ct. 478 (2022) (No. 22A544).

¹³¹ See, e.g., *California v. U.S. Dep’t of Educ.*, 769 F. Supp. 3d 72, 76 (D. Mass. 2025).

¹³² 143 S. Ct. at 1972 n.3.

¹³³ 144 S. Ct. 1540, 1561–63 (2024).

¹³⁴ *Id.* at 1561.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* at 1562.

doctors, then the costs of increased law enforcement and healthcare spending might not suffice for states. A counterargument might be that *Massachusetts v. EPA* instructs that states must receive “special solicitude” in standing analysis,¹³⁸ but the Court could retire that rule too.¹³⁹

Those limitations on state standing would reduce pressure on the emergency docket. State standing sometimes allows claims to proceed when no private person’s claim would, as with the challenges to student-loan forgiveness in the Biden Administration.¹⁴⁰ But state standing also broadens the scope of relief in litigation challenging federal action. If the state’s injury is the increase in expenditures from federal agency regulatory action (or inaction), then the relief normally has to run against the operation of the federal regulatory action in its entirety (or at least within the entirety of a state). Limiting potential litigants to *individual* plaintiffs permits courts to tailor the relief to the specific injuries of specific plaintiffs.¹⁴¹

3. *United States*

The United States has been the plaintiff suing a state in a couple high-profile shadow-docket cases, and similar lawsuits have been filed by the Trump Administration already.¹⁴² (The United States also recently filed

¹³⁸ 549 U.S. 497, 520 (2007).

¹³⁹ See, e.g., Baude & Bray, *supra* note 110, at 164–68 (critiquing *Massachusetts v. EPA*); Woolhandler & Mahoney, *supra* note 127, at 328 (suggesting that courts “retire as a basis for standing the state’s interest in creating and enforcing law”). But see Katherine Mims Crocker, *Not-So-Special Solicitude*, 109 Minn. L. Rev. 815, 823 (2024) (noting that “contra conventional wisdom, special solicitude does not appear to be a consequential contributor to the doctrinal architecture that allows” states to “act as plaintiffs” in “politically charged circumstances”).

¹⁴⁰ Compare *Biden v. Nebraska*, 143 S. Ct. 2355, 2366 (2023) (finding state standing via an injury to an “instrumentality” of the State), with *Dep’t of Educ. v. Brown*, 143 S. Ct. 2343, 2348 (2023) (finding no standing for “individual borrowers” who “do not qualify for the maximum relief available under the Plan”).

¹⁴¹ Compare *Washington v. Trump*, 847 F.3d 1151, 1167 (9th Cir. 2017) (endorsing a nationwide injunction of immigration policy because no “workable alternative” to injunctive relief “would protect the proprietary interests of the States”), with *Trump v. Hawaii*, 585 U.S. 667, 698–99 (2018) (finding standing for three individual plaintiffs threatened with separation from their families).

¹⁴² See Nate Raymond, *Trump Administration Sues Four Democratic-Led States to Block Climate Laws, Lawsuits*, Reuters (May 2, 2025, at 11:43 ET), <https://www.reuters.com/legal/trump-administration-sues-michigan-block-planned-climate-change-lawsuit-2025-05-01/> [https://perma.cc/7P9V-2843].

an unusual civil claim against federal judges,¹⁴³ and many of the arguments here could apply to that kind of claim too.) The cases might get the Court's attention for a couple reasons. First, some Justices might view disputes between sovereigns as generally important, which could pressure the Court to resolve shadow-docket filings pitting one sovereign against another.¹⁴⁴ Another point is that the theory of the United States in such cases has been that state law is preempted under the Supremacy Clause.¹⁴⁵ That theory, coupled with the comprehensive nature of the interests of the United States, encourages courts to address state laws in their entirety and enjoin their enforcement by every agent of the state.

Without the federal government as a plaintiff, then, litigation against the state might be narrowed, delayed, or never brought. In *Moyle v. United States*, for example, the substitutes for the United States' suit would have been much more targeted.¹⁴⁶ The doctors regulated by the abortion ban would have had to (1) wait for a state-initiated enforcement action to raise preemption as a defense or (2) bring a pre-enforcement challenge to the statute under *Ex parte Young* (or file a similar pre-enforcement claim in state court). In the litigation about Texas's Senate Bill 8, which banned certain abortions, permitted lawsuits by private persons to enforce the ban, and eliminated any state enforcement mechanism, the Court rejected *Ex parte Young* claims brought against state judges, court clerks, and (most) executive officials.¹⁴⁷ The United States also sued to enjoin the enforcement of the statute in its entirety.¹⁴⁸ The potential substitutes for the lawsuit by the United States (and the rejected *Ex parte Young* claims) were (1) defensive assertion of constitutional claims in enforcement actions, (2) pre-enforcement challenges in state court, or (3) potentially pre-enforcement *Ex parte Young* claims against the deputized enforcers of the statute.¹⁴⁹ Each of these alternatives would have narrowed the scope of the dispute compared to the claim brought by the United States.

¹⁴³ See Complaint, *United States v. Russell*, 797 F. Supp. 3d 552 (D. Md. 2025) (No. 25-cv-02029).

¹⁴⁴ Cf. *United States v. Washington*, 142 S. Ct. 1976, 1984 (2022) (resolving a question of intergovernmental immunity despite the absence of a circuit split).

¹⁴⁵ See *id.* at 1982 (holding that a Washington law "is unconstitutional under the Supremacy Clause"); see sources cited *supra* note 39.

¹⁴⁶ See 144 S. Ct. 2015 (2024) (*per curiam*).

¹⁴⁷ See *Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 532–36 (2021).

¹⁴⁸ Brief for the United States, *supra* note 39.

¹⁴⁹ See, e.g., E. Garrett West, *Constitutional Private Law*, 103 *Wash. U. L. Rev.* 409, 467–69 (2025).

The United States has relied on a few potential causes of action. Usually, it has argued that the Supremacy Clause, an implied constitutional cause of action, or *In re Debs*¹⁵⁰ authorizes it to seek declaratory or injunctive relief against enforcement of the state law at issue. The complaint in *Moyle* thus asserted a single claim for relief: “preemption under the Supremacy Clause and [the relevant federal statute].”¹⁵¹ In *United States v. Texas*, two of the three counts were based on (1) the Supremacy Clause and the Fourteenth Amendment and (2) “[p]reemption” under the Supremacy Clause.¹⁵² The brief for the United States then repackaged the Supremacy Clause theory as an equitable cause of action, relying on *Debs* to seek to enjoin the enforcement of state laws.¹⁵³ And in the Trump Administration’s recent suits to preempt state regulation of climate change, the complaints alleged various forms of statutory and constitutional preemption.¹⁵⁴

Several complementary theories could keep such claims out of court. The Court could easily dispatch with the Supremacy Clause theory. *Armstrong v. Exceptional Child Center, Inc.* held that the Clause “does not create a cause of action.”¹⁵⁵ The Court’s statement that the Clause “instructs courts what to do when state and federal law clash, but is silent regarding who may enforce federal laws in court,” would seem to rule out an implied cause of action for the United States.¹⁵⁶ Another theory holds that the Constitution creates an implied cause of action that allows the

¹⁵⁰ 158 U.S. 564 (1895). The decision in *Debs* is often understood to permit the United States to “bring an equitable suit without express statutory authority.” Bamzai & Bray, *supra* note 44, at 703.

¹⁵¹ Complaint at 15–16, *United States v. Idaho*, 623 F. Supp. 3d 1096 (D. Idaho 2022) (No. 22-cv-00329).

¹⁵² Complaint at 24–26, *United States v. Texas*, 566 F. Supp. 3d 605 (W.D. Tex. 2021) (No. 21-cv-00796). The third was for “[v]iolation of [i]ntergovernmental [i]mmunity.” *Id.* at 26.

¹⁵³ See Brief for the United States, *supra* note 39, at 26; see also *United States v. Washington*, 142 S. Ct. 1976, 1983 (2022) (suit under the Supremacy Clause); *Arizona v. United States*, 567 U.S. 387, 393–94 (2012) (same).

¹⁵⁴ See, e.g., Complaint at 14, 18, 21, 24, 26, *United States v. New York*, No. 25-cv-03656 (S.D.N.Y. May 1, 2025) (alleging Clean Air Act preemption, unconstitutional extraterritorial regulation, violations of the Interstate and Foreign Commerce Clauses, and foreign affairs preemption).

¹⁵⁵ 575 U.S. 320, 324–25 (2015).

¹⁵⁶ *Id.* at 325.

United States to sue, but of course implied causes of action are disfavored for the reasons generally given in recent *Bivens* cases.¹⁵⁷

Equitable relief under *Debs* thus provides the soundest basis, but the enigmatic decision could be reinterpreted in several ways.¹⁵⁸ The Court might demand, for example, that the United States identify a specific statutory cause of action to sue a state or its officials, which would effectively overrule the decision.¹⁵⁹ Or the Court might require the United States to identify a specific “proprietary interest—whether a proprietary interest of the sovereign itself, or the proprietary interests of the public that are protected in the abatement of a public nuisance.”¹⁶⁰ And if the Court determines that neither of those limitations should preclude claims by the United States to protect the interests of its citizens, the Court might at least require the United States to explain why the alternative enforcement channels are “inadequate” for specific reasons—say, because an imminent threat to national security requires swift federal intervention.¹⁶¹ Regardless of the precise doctrinal formulation, limiting the capacity of the United States to preemptively challenge state policies should channel litigation over such policies into lawsuits seeking narrower relief—if such litigation is brought at all.¹⁶²

¹⁵⁷ See generally *Egbert v. Boule*, 142 S. Ct. 1793, 1803 (2022) (“[R]ecognizing a cause of action under *Bivens* is ‘a disfavored judicial activity.’” (quoting *Ziglar v. Abbasi*, 582 U.S. 120, 135 (2017))).

¹⁵⁸ See Note, Nonstatutory Executive Authority to Bring Suit, 85 Harv. L. Rev. 1566, 1568–70 (1972) (suggesting several possible interpretations of *Debs*).

¹⁵⁹ See *Bamzai & Bray*, *supra* note 44, at 735–36; *United States v. City of Philadelphia*, 644 F.2d 187, 189–90 (3d Cir. 1980). Congress has done so before. See *United States v. Texas*, 143 U.S. 621, 630–31 (1892) (noting that Congress authorized the United States to sue Texas for “a speedy and final judicial determination” regarding a border dispute (citing Act of May 2, 1890, ch. 182, § 25, 26 Stat. 81, 92–93)).

¹⁶⁰ *Bamzai & Bray*, *supra* note 44, at 737.

¹⁶¹ See, e.g., *N.Y. Times Co. v. United States (The Pentagon Papers Case)*, 403 U.S. 713, 741–42 (1971) (Marshall, J., concurring); *infra* text accompanying notes 167–69.

¹⁶² The Trump Administration’s climate change lawsuits, filed in districts in the U.S. Courts of Appeals for the Second, Sixth, and Ninth Circuits, might provide an opportunity to clarify the availability of these lawsuits. Press Release, Off. of Pub. Affs., U.S. Dep’t of Just., Justice Department Files Complaints Against Hawaii, Michigan, New York and Vermont Over Unconstitutional State Climate Actions (May 1, 2025), <https://www.justice.gov/opa/pr/justice-department-files-complaints-against-hawaii-michigan-new-york-and-vermont-over> [https://perma.cc/A4EY-CGBF]. See generally Complaint for Declaratory & Injunctive Relief, *United States v. Hawaii*, No. 25-cv-00179, 2025 WL 1269597 (D. Haw. Apr. 30, 2025); Complaint for Declaratory & Injunctive Relief, *United States v. Michigan*, No. 25-cv-00496, 2025 WL 1269622 (W.D. Mich. Apr. 30, 2025); Complaint for Declaratory & Injunctive Relief, *United States v. New York*, No. 25-cv-03656, 2025 WL 1276266 (S.D.N.Y. May 1, 2025); Complaint

B. Claim-Based Limitations

Apart from party-based limitations, the Court might also limit kinds of claims parties can bring. The primary mechanisms for challenges to state policies are *Ex parte Young* and suits for injunctive relief under § 1983; the primary mechanisms for challenges to federal policies are the APA (or related non-statutory causes of action¹⁶³) and *Ex parte Young*. The Court could limit the availability of these claims with tweaks to the current doctrine. But many of the claims are substitutes for one another. For instance, limiting *Ex parte Young* would channel plaintiffs into § 1983 or the APA. Effective reform must anticipate the second-order effects of changes to some of the doctrines.

I. Ex Parte Young

Ex parte Young offers one of the most important mechanisms to get into federal court to challenge national or statewide policies.¹⁶⁴ The Court recently glossed *Ex parte Young* as a continuation of “traditional equity practice” permitting suits to enjoin “state executive officials from enforcing state laws that are contrary to federal law.”¹⁶⁵ The Court has concluded that such relief should also be available against *federal* officials.¹⁶⁶

The Court could more rigorously insist that there be no “adequate remedy at law” before entering a preliminary or final injunction in these cases.¹⁶⁷ In *Ex parte Young* itself, for example, the Court assumed that a “plain and adequate remedy at law” would mean that the “court of equity” would have “no jurisdiction.”¹⁶⁸ The remedy was deemed inadequate there, however, because requiring the plaintiff to disobey the statute and challenge its unconstitutionality in an enforcement proceeding “would place the [plaintiff] in peril of large loss and its agents in great risk of

for Declaratory & Injunctive Relief, *United States v. Vermont*, No. 25-cv-00463, 2025 WL 1276264 (D. Vt. May 1, 2025).

¹⁶³ See *Am. Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 109–11 (1902).

¹⁶⁴ See James E. Pfander & Jacob P. Wentzel, *The Common Law Origins of Ex Parte Young*, 72 *Stan. L. Rev.* 1269, 1271 (2020) (“*Ex parte Young* occupies a central place in the Supreme Court’s public law canon . . .” (footnote omitted)).

¹⁶⁵ *Whole Woman’s Health v. Jackson*, 142 S. Ct. 522, 532 (2021).

¹⁶⁶ *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 491 n.2 (2010); *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 326–27 (2015).

¹⁶⁷ Samuel L. Bray, *The System of Equitable Remedies*, 63 *UCLA L. Rev.* 530, 544 (2016).

¹⁶⁸ 209 U.S. 123, 163 (1908).

finer and imprisonment if it should be finally determined that the act was valid.”¹⁶⁹

Courts could require plaintiffs to show the inadequacy of alternatives to federal court before entertaining challenges to either state or federal policies. For example, with respect to challenges to *state* policies, federal courts might begin with the premise that state courts are an “adequate forum for resolving federal questions” given their “constitutional obligation” to “uphold federal law.”¹⁷⁰ As long as the state “furnish[es] easy and ample means” for asserting the relevant federal claim, the district courts could refuse to grant equitable relief against state officials.¹⁷¹ In other words, the plaintiff should have to offer specific reasons why proceeding in state court—whether in a state pre-enforcement proceeding or a defensive enforcement action—would be burdensome enough to require an exceptional equitable remedy. That line of argument could build on, and supplement, the line of cases in which the Court has developed specific abstention doctrines.¹⁷²

For federal claims, the Court might ask whether other avenues to litigate displace *Ex parte Young*. The Court could conclude, for example, that the APA displaces non-statutory review of agency action,¹⁷³ or it could conclude that the APA *usually* provides an adequate remedy at law—unless, for example, waiting for APA review imposes some “unreasonable cost,” presents some “intolerable risk of punishment,” precludes certain claims for relief, or similar.¹⁷⁴ And in cases with complicated statutory review frameworks, the Court might—tacking back

¹⁶⁹ Id. at 165.

¹⁷⁰ *Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U.S. 261, 275 (1997) (opinion of Kennedy, J.) (quoting *Allen v. McCurry*, 449 U.S. 90, 105 (1980)).

¹⁷¹ *R.R. Comm’n of Tex. v. Pullman Co.*, 312 U.S. 496, 501 (1941).

¹⁷² See *Sprint Commc’ns, Inc. v. Jacobs*, 571 U.S. 69, 76–78 (2013); *Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 75–76 (1997); *Younger v. Harris*, 401 U.S. 37, 52–54 (1971); *Harris Cnty. Comm’rs Ct. v. Moore*, 420 U.S. 77, 83–84, 87–89 (1975); *Pullman*, 312 U.S. at 501–02.

¹⁷³ See *Nuclear Regul. Comm’n v. Texas*, 145 S. Ct. 1762, 1775 (2025) (noting that the Court has “strictly limited nonstatutory ultra vires review”); see also *Sierra Club v. Trump*, 929 F.3d 670, 715–17 (9th Cir. 2019) (Smith, J., dissenting) (arguing that the court should not have constructed an “‘equitable’ work-around” when the party lacked a claim under the APA); Braden Currey, *Rationalizing the Administrative Record for Equitable Constitutional Claims*, 133 *Yale L.J.* 2017, 2076–83 (2024) (discussing non-statutory review).

¹⁷⁴ See Brian M. Lipshutz, *Bypassing Agency Adjudication*, 103 *Wash. U. L. Rev.* (forthcoming 2026) (manuscript at 35–36), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5376305 [<https://perma.cc/AEY7-CBBK>].

from its decision in *Axon Enterprise, Inc. v. FTC*¹⁷⁵—express greater willingness to conclude that the statutory schemes displace any preexisting equitable cause of action.¹⁷⁶

If the Court limited the availability of *Ex parte Young*, however, litigants might pursue substitutes like § 1983 actions and APA claims. I turn next, then, to the doctrinal rules that might also constrain judicial power under these alternative channels.

2. 42 U.S.C. § 1983

Parties seeking to bring pre-enforcement challenges to state laws often rely not on (or not just on) the implied cause of action in *Ex parte Young*, but also under the cause of action established in § 1983.¹⁷⁷ The statute makes state actors who “subject[]” persons to the “deprivation of any rights, privileges, or immunities secured by the Constitution and laws . . . liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.”¹⁷⁸ Currently, the authorization of a “suit in equity” permits a plaintiff to seek injunctive relief from state officials.¹⁷⁹

Any effort to limit *Ex parte Young* would push plaintiffs into § 1983 claims instead, but the Court could simply state that the same inadequate-remedy-at-law requirement that applies under *Ex parte Young* operates for § 1983. That approach might, at first, seem to be in tension with the established principle that a litigant under § 1983 does not have to exhaust state remedies before filing a § 1983 suit.¹⁸⁰ But the Court has often funneled § 1983 claims into state fora using the no-adequate-remedy-at-law rule. It has held, for example, that “Congress did not authorize injunctive or declaratory relief under § 1983 in state tax cases where there is an adequate remedy at law.”¹⁸¹ It relied on the “adequate remedy at

¹⁷⁵ 143 S. Ct. 890, 900 (2023).

¹⁷⁶ See William Baude, Jack Goldsmith, John F. Manning, James E. Pfander & Amanda L. Tyler, Hart and Wechsler’s *The Federal Courts and the Federal System* 1349–50 (8th ed. 2025) (suggesting that *Axon* could be cabined if the questions resolved were considered “within a framework of equitable or remedial preclusion”).

¹⁷⁷ But see *Williams v. Reed*, 145 S. Ct. 465, 474 n.* (2025) (Thomas, J., dissenting) (questioning whether § 1983 provides a cause of action at all (citing Tyler B. Lindley, *Anachronistic Readings of Section 1983*, 75 Ala. L. Rev. 897, 900–01 (2024))).

¹⁷⁸ 42 U.S.C. § 1983.

¹⁷⁹ *Mitchum v. Foster*, 407 U.S. 225, 242 (1972).

¹⁸⁰ *Heck v. Humphrey*, 512 U.S. 477, 480 (1994).

¹⁸¹ *Nat’l Priv. Truck Council, Inc. v. Okla. Tax Comm’n*, 515 U.S. 582, 588 (1995).

law” requirement in defending the abstention doctrine in *Younger v. Harris*.¹⁸² The Court has construed § 1983 to incorporate background legal assumptions,¹⁸³ and the no-adequate-remedy-at-law rule could be implicit in § 1983’s authorization of a “suit in equity.”¹⁸⁴ Any effort to restrict the availability of *Ex parte Young* would not work for claims against state officials, of course, without the simultaneous clarification that the limitation applies in § 1983.

3. Administrative Procedure Act

If § 1983 is the obvious substitute for *Ex parte Young* against states, then the APA is the obvious substitute against the federal government, and many of the lawsuits challenging the policies of the Biden and Trump Administrations have been brought under the APA.¹⁸⁵ The APA is an attractive cause of action for plaintiffs for at least two reasons. First, plaintiffs may sue in federal district court in (usually) a favorable forum—for example, where the “plaintiff resides.”¹⁸⁶ Second, the standard remedy is vacatur of the unlawful agency action in its entirety,¹⁸⁷ which avoids disputes about the scope of injunctive relief.

The Court could limit the availability of high-salience APA claims by states and associations (in particular) in a few ways. First, as discussed in more depth below, the Court could adopt the theory advanced by the United States in recent cases that the APA does not permit “vacatur” but

¹⁸² 401 U.S. 37, 43–44 (1971); see also *Harris v. Younger*, 281 F. Supp. 507, 509 (C.D. Cal. 1968) (noting that the plaintiffs in *Harris* brought suit under § 1983).

¹⁸³ Cf., e.g., *Pierson v. Ray*, 386 U.S. 547, 556 (1967) (discussing § 1983’s “background of tort liability” (quoting *Monroe v. Pape*, 365 U.S. 167, 187 (1961))).

¹⁸⁴ See *Mitchum*, 407 U.S. at 243 (stating that usual “principles of equity” continue to “restrain a federal court” in § 1983 actions).

¹⁸⁵ See, e.g., *AIDS Vaccine Advoc. Coal. v. U.S. Dep’t of State*, 766 F. Supp. 3d 74, 82 (D.D.C. 2025); *New York v. Trump*, 765 F. Supp. 3d 284, 285–86 (S.D.N.Y. 2025); *Dellinger v. Bessent*, 766 F. Supp. 3d 57, 62 (D.D.C. 2025); *California v. U.S. Dep’t of Educ.*, 769 F. Supp. 3d 72, 75 (D. Mass. 2025); *J.G.G. v. Trump*, 772 F. Supp. 3d 18, 30 (D.D.C. 2025); *Nat’l TPS All. v. Noem*, 773 F. Supp. 3d 807, 823 (N.D. Cal. 2025); *Learning Res., Inc. v. Trump*, 784 F. Supp. 3d 209, 230 (D.D.C. 2025); *Newsom v. Trump*, 786 F. Supp. 3d 1235, 1246 (N.D. Cal. 2025).

¹⁸⁶ 28 U.S.C. § 1391(e)(1)(C); see also Nate Raymond, *New England Courts Become a Battleground for Challenges to Trump*, Reuters (Oct. 13, 2025, at 06:53 ET), <https://www.reuters.com/legal/government/new-england-courts-become-battleground-challenges-trump-2025-10-13/> [<https://perma.cc/63YD-LAUA>] (noting that many challenges to the Trump Administration’s policies have been filed in federal district courts within the First Circuit).

¹⁸⁷ *Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys.*, 144 S. Ct. 2440, 2462–64 (2024) (Kavanaugh, J., concurring).

“permits a court only to enjoin an agency from enforcing a rule against the plaintiff.”¹⁸⁸ Second, the Court could insist that plaintiffs identify a “discrete” final agency action, refusing to permit plaintiffs to seek “programmatically” challenges to the agency’s operations.¹⁸⁹ (Some of the lawsuits against the second Trump Administration’s policies appear to raise such issues.¹⁹⁰) The insistence on reviewing *discrete* actions should reduce the salience of the actions that are eventually vacated.¹⁹¹ Third, and most technically, the Court could refuse to treat agency “guidance”—and particularly agency documents that direct the internal decision-making of the agency’s employees—as final agency action on the theory that such guidance does not have *legal* consequences. Instead, the argument goes, the appropriate remedy for unlawful guidance is to invalidate any agency action in which the guidance is improperly invoked or applied.¹⁹² The restriction on guidance challenges would cohere with the rule that executive orders instructing agency officials to act do not constitute reviewable final agency action.¹⁹³

Any of that set of reforms could stop, delay, or narrow APA claims challenging federal policies in district courts.¹⁹⁴ Though the forum

¹⁸⁸ Id. at 2460–61; sources cited *infra* notes 216–20; see also Aditya Bamzai, *The Path of Administrative Law Remedies*, 98 *Notre Dame L. Rev.* 2037, 2040 & n.14 (2023) (discussing and citing literature on whether the APA permits *vacatur*).

¹⁸⁹ *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 61–62 (2004); *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 891 (1990).

¹⁹⁰ *Nat’l Council of Nonprofits v. OMB*, 763 F. Supp. 3d 36, 53 (D.D.C. 2025); *New York v. Trump*, 133 F.4th 51, 67–68 (1st Cir. 2025).

¹⁹¹ Cf. *Lujan*, 497 U.S. at 894 (suggesting that the “case-by-case approach” to intervention in the “administration of the laws” is not “as swift or as immediately far-reaching a corrective process as those interested in systemic improvement would desire”).

¹⁹² See, e.g., David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 *Yale L.J.* 276, 289–94 (2010) (discussing and critiquing previous scholars and judges who have defended some version of this proposal); Alexander Nabavi-Noori, *Note, Agency Control and Internally Binding Norms*, 131 *Yale L.J.* 1278, 1333–45 (2022) (suggesting a rule tailored to internally binding guidance). But see *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 381–85 (D.C. Cir. 2002); *Texas v. United States*, 809 F.3d 134, 176–77 (5th Cir. 2015), *aff’d by an equally divided court*, 579 U.S. 547 (2016).

¹⁹³ See *infra* text accompanying notes 197–202.

¹⁹⁴ The Supreme Court recently suggested one additional limitation. In APA challenges alleging that rules are inconsistent with substantive statutes, courts often ask whether the “[r]ule contravenes ‘clear statutory text’ or otherwise ‘exceeds the [statute’s] legislatively-imposed limits on agency authority.’” *Bondi v. VanDerStok*, 145 S. Ct. 857, 881 (2025) (Thomas, J., dissenting) (quoting *VanDerStok v. Garland*, 86 F.4th 179, 182 (5th Cir. 2023)). In *Bondi v. VanDerStok*, though, the majority assumed that a “facial” challenge to a regulation must show that the rule “is inconsistent with the statute on its face,” which can be disproven if “at least some” applications of that rule are valid. Id. at 865–66 (majority opinion) (citations

shopping permitted under the APA by § 1391(e) also increases the likelihood that some district court will block a federal policy, changes to the venue statute (or a requirement that some challenges be resolved by three-judge panels) would require congressional action. The limitations on APA claims above, by contrast, have bases in current doctrine and could alter the incentives of the lower courts in future cases.

4. Implied Causes of Action

Another theory litigants sometimes invoke, often coterminously with *Ex parte Young* or indistinguishable from such a claim, is an implied constitutional cause of action.¹⁹⁵ The argument would be unnecessary if *Ex parte Young* were available, but an effort to limit availability of relief under *Ex parte Young* or § 1983 (or the APA) could pressure litigants to ask courts to infer a constitutional cause of action. Of course, the Court has stated that such a practice is disfavored.¹⁹⁶ One way to reiterate that point would be to note, if a particular case permits, that a plaintiff's theory of the case invokes both *Ex parte Young* and an implied constitutional cause of action and to address both of those theories.

5. Suits Against the President

The Court might also restrain plaintiffs from suing the president. Recently, litigants have directly challenged executive orders and other federal directives issued by the president,¹⁹⁷ and thus many of the shadow docket lawsuits have captions including “Trump” or “Biden.” The efforts to sue the president and challenge administrative action matter because litigants challenge presidential action before the orders have discrete legal

omitted). Raising the bar for administrative-law facial challenges would narrow the challenges brought and thus reduce the salience of cases reaching the Court.

¹⁹⁵ E.g., Complaint at 73–78, *Missouri v. Biden*, 680 F. Supp. 3d 630 (W.D. La. 2023) (No. 22-cv-01213) (asserting a claim for “violation of the First Amendment”). For present purposes, it is irrelevant whether *Ex parte Young* is an equitable cause of action or an implied constitutional cause of action. See John Harrison, *Ex Parte Young*, 60 *Stan. L. Rev.* 989, 990 (2008) (critiquing the “commonly” held view that the decision “recognized a new cause of action founded in the Constitution”).

¹⁹⁶ See *Ziglar v. Abbasi*, 582 U.S. 120, 135 (2017) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009)).

¹⁹⁷ See Lisa Manheim & Kathryn A. Watts, *Reviewing Presidential Orders*, 86 *U. Chi. L. Rev.* 1743, 1781–89 (2019).

consequences for discrete litigants.¹⁹⁸ The reference to the president and the executive order also distracts from what is usually the proper legal issue: the legality of discrete federal action by a particular officer or agency implementing the executive order, not the legality of the executive order as such.

The Court has announced doctrines that could eliminate suits against the president. First, the president is not an “agency” within the meaning of the APA, and therefore executive orders cannot be “agency action” subject to review under the APA.¹⁹⁹ Second, the Court has disclaimed jurisdiction over “a bill to enjoin the President.”²⁰⁰ But even when courts carve out the president from an injunction, they sometimes seem to issue relief that would be effective only if it were directed against the president.²⁰¹ Third, the Court has grown hostile to causes of action implied by the Constitution.²⁰²

Those restrictions would not eliminate review of executive orders, but would channel complaints about presidential action into justiciable disputes with officials who *implement* those orders. Those disputes would, in turn, be subject to the limiting requirements of the APA and *Ex parte Young*. For example, a challenge to the implementation of an executive order under the APA should identify a discrete final agency action that has been unlawfully withheld or promulgated. Eliminating disputes against the president would thus focus the litigation on more

¹⁹⁸ The exception is that some presidential actions might purport to have immediate legal consequences without the intervention of other officials, as when the President announced higher tariffs pursuant to the International Emergency Economic Powers Act. See, e.g., Exec. Order No. 14,298, 90 Fed. Reg. 21831, 21832 (May 12, 2025) (stating that the Harmonized Tariff Schedule of the United States “shall be modified as follows”).

¹⁹⁹ *Franklin v. Massachusetts*, 505 U.S. 788, 800–01 (1992).

²⁰⁰ *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 501 (1867). But see Thomas P. Schmidt, *Presidential Immunity: Before and After Trump*, 79 *Vand. L. Rev.* (forthcoming 2026) (manuscript at 106–21), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5187348 [<https://perma.cc/4XQJ-JBJ5>] (defending narrower interpretation of *Mississippi v. Johnson*); *Franklin*, 505 U.S. at 827 n.2 (Scalia, J., concurring in part and concurring in the judgment) (noting that the Court reserved the question whether the president could be enjoined to perform a “ministerial” duty).

²⁰¹ See *Dellinger v. Bessent*, No. 25-5028, 2025 WL 559669, at *13 n.2 (D.C. Cir. Feb. 15, 2025) (Katsas, J., dissenting) (arguing that a TRO “necessarily targets the President” because he is the “only official with the statutory and constitutional authority” to take the ordered action).

²⁰² See, e.g., *Ziglar v. Abbasi*, 582 U.S. 120, 135 (2017). But see *Blumenthal v. Trump*, 373 F. Supp. 3d 191, 209 (D.D.C. 2019) (finding an implied cause of action under the Emoluments Clause), *rev'd on other grounds*, 949 F.3d 14 (D.C. Cir. 2020).

specific and imminent harms, which should likewise limit the scope of the remedies imposed and the salience of the matters that ultimately reach the shadow docket.

6. Presumption of Constitutionality

A final possibility that could cut across the various causes of action would be for the Court to reiterate that a “presumption of constitutionality” applies to legislative or executive action (or both).²⁰³ The Court could instruct lower courts that, unless the action is clearly unconstitutional, a court should decline to find a constitutional violation. The argument could reduce the set of cases in which lower federal courts have *blocked* statewide or national legislation (and potentially executive action) from going into effect. That approach implicitly assumes that the default should be nonintervention by the federal courts in constitutional cases.

This solution is only a partial one, however, for a couple reasons. First, the presumption of constitutionality would just be a presumption, and judges would still need to determine the constitutionality of the relevant action—just with “some deference” to the political actor.²⁰⁴ When the federal court has been chosen by the plaintiff, the judge might be particularly likely to agree with the plaintiff—and, indeed, likely to think that a question the broader legal community considers difficult is actually clearly resolved in the plaintiff’s favor. Thus, the set of cases in which that presumption would make a difference might be small. Second, the presumption would apply only to constitutional claims, which again would limit its applicability. Third, the enforcement of the presumption on the emergency docket would still require the Court to make controversial merits determinations, even if the presumption would color that determination. Fourth, whenever a federal court would determine that the presumption of constitutionality preserves the underlying legislation or action, the question whether that action should have been stopped might *itself* be a high-profile issue.²⁰⁵ Still, if the court would embrace a general preference for nonintervention, a decision *not* to enjoin a policy

²⁰³ See Baude, *supra* note 105, at 180–83 (proposing judicial deference to the legislature).

²⁰⁴ See Schmidt, *supra* note 105, at 891 (proposing that lower courts defer to Congress).

²⁰⁵ Cf. *Labrador v. Poe ex rel. Poe*, 144 S. Ct. 921, 928 (2024) (mem.) (Kavanaugh, J., concurring in the grant of stay) (noting that emergency applicants might argue that lower courts “mistakenly green-lighted” a “consequential new law”).

should often put less pressure on the Court to intervene on the shadow docket.²⁰⁶

C. Remedial Limitations

The remedies available to plaintiffs likewise have a substantial impact on the significance of the matters that reach the Court's shadow docket. The Court could limit injunctive relief (whether preliminary or final), the remedies available under the APA, and declaratory relief. These remedial limitations complement the party-based and claim-based limitations discussed above by limiting the scope of relief—and thus the significance of the case—when one of the claims succeeds. But the remedies (often) operate as substitutes, so these reforms, more often than the others, would need to be implemented as a set.

1. Injunctions

In suggesting reforms for the shadow docket, both Justices and reformers had focused on nationwide injunctions as a cause of the high-salience determinations on the shadow docket long before *CASA*.²⁰⁷ Commentators and Justices note that the Court's shadow-docket interventions have frequently addressed nationwide injunctions against federal policies.²⁰⁸ An injunction that protects third-party non-litigants obviously increases the significance of that particular lawsuit. And as a systemic matter, given forum-shopping and multiple plaintiffs, success in one of many cases filed in the most favored forum blocks the policy

²⁰⁶ If the Court were to enforce a presumption of constitutionality, then it could continue to distinguish between stays and injunctions pending appeal in the relevant class of cases. The lesser stay standard would permit intervention to enforce the presumption, while the higher standard would reinforce the presumption in cases in which the lower courts do not intervene.

²⁰⁷ *Trump v. CASA, Inc.*, 145 S. Ct. 2540, 2562–63 (2025). For competing arguments on the permissibility of injunctions applied to nonparties, compare Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 *Harv. L. Rev.* 417, 469–73 (2017) (proposing injunctions that protect only the parties before the court), with Mila Sohoni, *The Lost History of the “Universal” Injunction*, 133 *Harv. L. Rev.* 920, 924–25 (2020) (defending nationwide injunctions that protect nonparties).

²⁰⁸ See, e.g., *Labrador*, 144 S. Ct. at 926 (Gorsuch, J., concurring in the grant of stay); *id.* at 933 (Kavanaugh, J., concurring in the grant of stay); *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 600 (2020) (mem.) (Gorsuch, J., concurring in the grant of stay); *Trump v. Hawaii*, 585 U.S. 667, 720 (2018) (Thomas, J., concurring); *Vladeck*, *supra* note 4, at 134.

entirely.²⁰⁹ That race-to-the-bottom incentive makes it increasingly likely that the Supreme Court will have to decide whether a policy will survive or not. The Court has now emphatically held that such injunctions are not permissible; instead, injunctions must be no broader than “necessary to provide complete relief.”²¹⁰

But eliminating nationwide injunctions alone will not work. With respect to federal policies, if the Court retains universal vacatur for APA claims, then the problem of universal injunctions will persist in challenges to agency action.²¹¹ Likewise, if the Court permits states to sue because a federal policy increases expenditures, the plaintiff-protective remedy might have to be nearly as broad as a nationwide injunction—particularly if multiple states join the action on similar theories. The Court in *CASA* expressly left open the scope of relief necessary for the states, and Justice Alito’s concurrence suggested that states might sue to vindicate the rights of all of their residents.²¹² With respect to challenges to state laws by the United States, the injunction or declaration necessary for a claim that the Constitution or federal law preempts the relevant (portion of a) state law might as well be a statewide injunction.²¹³ And with respect to both state and federal policies, associations with sufficiently large memberships might obtain plaintiff-protective injunctions that begin to approximate nationwide injunctions—all without seeking class certification, which the members would have to do if they sued as plaintiffs with the association as the lawyer. Again, *CASA* left open the possibility that associations and class actions could obtain relief that is (almost) as broad.²¹⁴ The problem

²⁰⁹ See, e.g., *Trump v. Int’l Refugee Assistance Project*, 582 U.S. 571, 571 n.*, 575 (2017) (per curiam) (consolidating cases filed in Hawaii and Maryland); *Trump v. Hawaii*, 585 U.S. at 677 (same).

²¹⁰ *CASA*, 145 S. Ct. at 2562–63. The opinion is ambiguous about how to tailor an injunction within that outer limit. See, e.g., *id.* at 2563 (Thomas, J., concurring) (noting that the Court recognizes that the “complete-relief principle operates as a ceiling” and arguing that treating the principle as a “mandate” would be an error).

²¹¹ See *infra* text accompanying notes 216–18.

²¹² See *CASA*, 145 S. Ct. at 2558–59; *id.* at 2565 (Alito, J., concurring). But cf. *Haaland v. Brackeen*, 143 S. Ct. 1609, 1640 (2023) (“[A] State does not have standing as *parens patriae* to bring an action against the Federal Government.” (quoting *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 610 n.16 (1982))).

²¹³ See *supra* text accompanying notes 142–59.

²¹⁴ See *CASA*, 145 S. Ct. at 2566–67 (Alito, J., concurring). On the possibility that competing class actions will require involvement by the Judicial Panel on Multidistrict Litigation, see Samuel Issacharoff & Derek T. Muller, *Relocating Nationwide Injunctions, Just Sec.* (June 9, 2025), <https://www.justsecurity.org/114260/relocating-nationwide-injunctions/> [<https://perma.cc/9VQY-XT5N>].

is particularly acute given the Court's earlier holding regarding preliminary relief for putative classes, which could permit district court judges to issue broad and effectively nationwide injunctions.²¹⁵ Eliminating the nationwide injunction, then, will do very little without the other reforms identified in this Article.

2. APA Remedies

Unless the Court rejects the theory that courts might “vacate” agency actions deemed unlawful, it will replicate the functional problems created by universal injunctions. True, the problem would apply only to claims brought under the APA, but many of the cases that reach the shadow docket are challenges to agency action. Thus, if the Court intends to reduce the pressures on the shadow docket with respect to agency action, it should reject the theory of universal vacatur and hold that relief must be tailored to the individual parties. The Court has not yet endorsed one position or the other, but at least one Justice who repudiated universal injunctions has supported the issuance of universal vacatur.²¹⁶

If the Court permits universal vacatur, a few other limitations on the remedy might serve as second-best solutions. First, the Court might more aggressively implement the restrictions, discussed above, on the kinds of actions subject to review under the APA.²¹⁷ In other words, the front-end limitations on APA review become more important if the back-end relief is more aggressive. Second, the Court might bless a “harmless error” rule or the remedy of “remand without vacatur” for cases that challenge the rationale but not the substance of the federal action.²¹⁸ Indeed, *Seven County Infrastructure Coalition v. Eagle County* seemed to endorse something like those practices for certain kinds of challenges to agency action, the opinion in *FDA v. Wages & White Lion Investments, L.L.C.* discussed the harmless-error doctrine at length, and there are good reasons to adopt such a rule anyway.²¹⁹ Some of the Court's shadow-docket cases

²¹⁵ See *infra* text accompanying notes 230–31.

²¹⁶ Compare *CASA*, 145 S. Ct. at 2567 (2025) (Kavanaugh, J., concurring) (rejecting universal injunctions), with *Corner Post, Inc. v. Bd. of Governors of the Fed. Rsv. Sys.*, 144 S. Ct. 2440, 2460–61 (2024) (Kavanaugh, J., concurring) (concluding the APA permits vacatur of agency rules).

²¹⁷ See *supra* notes 188–93.

²¹⁸ See, e.g., Nicholas Bagley, *Remedial Restraint in Administrative Law*, 117 *Colum. L. Rev.* 253, 302–12 (2017).

²¹⁹ See *Seven Cnty. Infrastructure Coal. v. Eagle County*, 145 S. Ct. 1497, 1514 (2025) (“Even if an [environmental impact statement] falls short in some respects, that deficiency

have involved repeated efforts to reach the same result,²²⁰ and in those cases a remedy that does not vacate the order entirely but sends it back to the agency for additional explanation might reduce the federal courts' interference with the implementation of federal policy.

3. *Preliminary Relief*

Many high-profile shadow-docket cases involve preliminary injunctions (or temporary restraining orders) entered by district courts under Federal Rule of Civil Procedure 65. Plaintiffs likely prefer these motions because they can be filed and resolved quickly and skip over time-intensive pre-trial procedures and, if necessary, the trial itself.²²¹ Courts often adjudicate the merits and decide the motion for a preliminary injunction almost entirely on that factor alone.²²² And the district court's grant or denial of a motion for a preliminary injunction permits an immediate interlocutory appeal, thus providing a procedural avenue by which emergency applications reach the Court.

The Court could shift litigants from preliminary injunctions by clarifying that the Federal Rules of Civil Procedure require a movant seeking a preliminary injunction to give "security"—thus literally raising the cost of seeking a preliminary injunction. Rule 65(c) states that a court "may issue a preliminary injunction or a temporary restraining order *only if* the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained."²²³ Although the language is mandatory,²²⁴ some courts dispense with the bond—or require only a nominal bond—for various reasons, including that the plaintiff is a

may not necessarily require a court to vacate the agency's ultimate approval of a project, at least absent reason to believe that the agency might disapprove the project if it added more to the EIS." (citing 5 U.S.C. § 706)); *FDA v. Wages & White Lion Invs., L.L.C.*, 145 S. Ct. 898, 928–31 (2025); Bagley, *supra* note 218, at 302–12.

²²⁰ E.g., *Trump v. Hawaii*, 585 U.S. 667, 676–77 (2018) (noting the Trump Administration's revisions to a challenged policy banning travel from certain foreign countries).

²²¹ Of course, there are avenues to expedite a final judgment. See, e.g., *Texas v. Biden*, 554 F. Supp. 3d 818, 829 (N.D. Tex. 2021) (noting that the district court held a bench trial after the parties "consolidat[ed] the preliminary injunction hearing with the trial on the merits").

²²² See Bray, *supra* note 108, at 828–34.

²²³ Fed. R. Civ. P. 65(c) (emphasis added).

²²⁴ See Bray, *supra* note 108, at 861 n.310 (citing *Hoechst Diafoil Co. v. Nan Ya Plastics Corp.*, 174 F.3d 411, 421 (4th Cir. 1999)).

public-interest organization.²²⁵ The executive branch now has a policy of seeking such bonds in litigation against the federal government.²²⁶

Enforcing the bond requirement should reduce the scope of preliminary injunctions by altering plaintiffs' incentives. Right now, the marginal cost of seeking a broader rather than a narrower preliminary injunction is effectively zero. A bond forces plaintiffs to internalize the marginal cost (to the defendant) of the breadth of the injunction, because a plaintiff who ultimately loses on the merits will pay defendants' costs and damages (usually) only if a bond has been imposed.²²⁷ The result is that the plaintiff should seek a broader remedy only if the expected value of the redress is greater to the plaintiff than the defendant's expected cost from the redress (based on the plaintiff's perspective of what the judge will do). The plaintiff must thus anticipate the likelihood of *ultimate* success in the litigation.²²⁸ If the Court were to expressly reiterate that this requirement is mandatory, then, it should result in narrower preliminary injunctions—some of which might be narrow enough that the Court will not feel compelled to intervene. For example, in a case regarding the Trump Administration's funding freeze, a court waived the bond *because* the case involved "trillions of dollars," but it is hard to imagine a litigant staking a trillion dollars on ultimate success.²²⁹

Another potential limitation on preliminary injunctions might be necessary. As discussed above, Rule 23(b)(2) constrains class certification for final injunctive relief. But in *A.A.R.P. v. Trump*, the Court endorsed the proposition that "courts may issue temporary relief to a

²²⁵ See Appendix to Application to Vacate the Injunction Entered by the United States Court of Appeals for the Fourth Circuit at 47a, *West Virginia v. Jackson ex rel. B.P.J.*, 143 S. Ct. 889 (2023) (No. 22A800) (waiving an injunction bond); *Richland/Wilkin Joint Powers Auth. v. U.S. Army Corps of Eng'rs*, 826 F.3d 1030, 1043 (8th Cir. 2016); *Nat'l Council of Nonprofits v. OMB*, 775 F. Supp. 3d 100, 130 (D.D.C. 2025); *Nat'l Ass'n of Diversity Officers in Higher Educ. v. Trump*, 767 F. Supp. 3d 243, 291 (D. Md. 2025).

²²⁶ See Memorandum on Ensuring the Enforcement of Federal Rule of Civil Procedure 65(c), 2025 Daily Comp. Pres. Doc. 336 (Mar. 6, 2025).

²²⁷ See *W.R. Grace & Co. v. Local Union 759, Int'l Union of the United Rubber Workers*, 461 U.S. 757, 770 n.14 (1983) ("A party injured by the issuance of an injunction later determined to be erroneous has no action for damages in the absence of a bond.").

²²⁸ See, e.g., *Glob. NAPs, Inc. v. Verizon New Eng., Inc.*, 489 F.3d 13, 22 (1st Cir. 2007) (adopting the "majority position" that an injunction is "wrongful" under Rule 65(c) if the party "had a right all along to do what it was enjoined from doing," rather than a minority rule that issuance of an injunction must be "an abuse of discretion at the time it was issued").

²²⁹ *Nat'l Council of Nonprofits*, 775 F. Supp. 3d at 130.

putative class.”²³⁰ Litigants might now circumvent limitations on nationwide injunctions, or limitations on associational standing, by filing on behalf of a putative class and seeking a preliminary injunction *before* Rule 23(b)(2) is satisfied. To prevent wholesale circumvention of Rule 23 for preliminary relief, the Court might need to clarify that lower courts must conclude that a putative class is *likely* to be certified before entering preliminary class-wide relief (or that a preliminary injunction is necessary to preserve the court’s capacity to grant relief to the class).²³¹ Without those limitations, the problems arising out of nationwide injunctions could reemerge as (effectively) nationwide preliminary injunctions for amorphous putative classes.

4. Declaratory Relief

A final point is that the Court must prevent litigants from using declaratory judgments to circumvent any limitations identified here. Parties deprived of other relief might instead seek a declaratory judgment, arguing that the limitation on (say) equitable relief or the APA does not apply to the Declaratory Judgment Act.²³² The Court has sometimes permitted a litigant to use a request for declaratory relief to evade a limitation on the availability of injunctive relief.²³³ But it also held that a declaratory judgment “cannot alone supply jurisdiction otherwise absent”²³⁴ and indicated that litigants seeking declarations should show that the dispute “would be justiciable in this Court if presented in a suit for injunction.”²³⁵ The Court could reiterate that declaratory relief is not

²³⁰ 145 S. Ct. 1364, 1369 (2025) (per curiam) (citing 2 William B. Rubenstein, Newberg and Rubenstein on Class Actions § 4:30 (6th ed. 2022)).

²³¹ See *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (requiring likelihood of success); *Bray*, supra note 108, at 841 (arguing that a preliminary injunction should “preserve[] the status quo *in order to protect the efficacy of the court’s remedial options*”).

²³² See, e.g., Samuel L. Bray, *The Myth of the Mild Declaratory Judgment*, 63 *Duke L.J.* 1091, 1150 (2014) (suggesting that *Powell v. McCormack*, 395 U.S. 486 (1969), “intruded on congressional self-government” on the ground that it was “merely providing a declaratory judgment”).

²³³ See *Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992).

²³⁴ *California v. Texas*, 141 S. Ct. 2104, 2116 (2021); see also *Samuels v. Mackell*, 401 U.S. 66, 73 (1971) (“[T]he same equitable principles relevant to the propriety of an injunction must be taken into consideration by federal district courts in determining whether to issue a declaratory judgment, and . . . where an injunction would be impermissible under these principles, declaratory relief should ordinarily be denied as well.”).

²³⁵ *California v. Texas*, 141 S. Ct. at 2115–16 (quoting *Nash., Chattanooga & St. Louis Ry. v. Wallace*, 288 U.S. 249, 262 (1933)).

available unless the plaintiff has some other underlying cause of action and, perhaps with some caveats, that an injunction would otherwise be available.²³⁶

D. State Court Alternatives

A final consideration is whether, if federal courts were to embrace the reforms articulated in the prior three Sections, the parties would shift to state courts to seek the kind of relief that they might have otherwise obtained in the federal courts. The risk is that some set of claims that would otherwise proceed in federal court would proceed instead in state court, and the need for the shadow docket would emerge yet again, but now with additional complications about the Supreme Court's jurisdiction over the judgments of the state courts. Overall, that risk is likely to be low, certainly for suits challenging federal action and probably for those challenging state action.

1. State Courts for Federal Action

As noted, many of the claims that demand the Court's intervention on the emergency docket present claims against federal officials and agencies. That has certainly been the most important set of claims during the second Trump Administration. State court power to control federal officials raises interesting theoretical problems.²³⁷ But none matters much in practice. Even if state courts do have jurisdiction to enjoin federal officers,²³⁸ the Federal Officer Removal Statute (28 U.S.C. § 1442) permits broad removal to federal court for any civil and criminal actions against "any agency [of the United States] or any officer (or any person acting under that officer) of the United States or of any agency thereof, in

²³⁶ On when a declaratory judgment might be issued but an injunction should not, see Bray, *supra* note 232, at 1140–44 (noting that the declaratory judgment is "used in situations in which little management is needed" and "is available at an earlier stage than the injunction in some disputes").

²³⁷ See Baude et al., *supra* note 176, at 584–85; *Trump v. Anderson*, 114 S. Ct. 662, 668 (2024) (per curiam) (noting that states cannot "issue writs of mandamus against federal officials" or "grant habeas corpus relief to persons in federal custody" (first citing *McClung v. Silliman*, 19 U.S. (6 Wheat.) 598, 603–05 (1821); and then citing *Tarble's Case*, 80 U.S. (13 Wall.) 397, 405–10 (1872))).

²³⁸ But see sources cited *supra* note 237.

an official or individual capacity, for or relating to any act under color of such office.”²³⁹

Assuming that the federal government prefers litigating in its own courts,²⁴⁰ the removal statute should capture most challenges to claims against federal action.²⁴¹ In particular, the federal government would likely remove claims under the APA brought against federal agencies, any claims under *Ex parte Young* or an implied cause of action against federal officials, and any claims brought against the president.²⁴² And if a federal court were to remand any case removed under that statute back to state court, then the United States could appeal that remand order.²⁴³ Thus, the shadow docket cases involving federal action would likely have to proceed in federal court.

A related question is whether a state law action could be enforceable against federal officials in federal court once such a case is removed.²⁴⁴ Suppose, for example, that a state enacts (or recognizes by implication) a cause of action permitting plaintiffs to sue to enjoin unconstitutional conduct by federal officials—i.e., a “converse-1983 statute” permitting injunctive relief, or what might be called a “converse-*Ex parte Young*” claim.²⁴⁵ If there were such a statute or implied cause of action, federal courts would adjudicate whether the state statute has been preempted by

²³⁹ 28 U.S.C. § 1442(a)(1). The government must also assert a federal defense, but that requirement should be easily satisfied when the plaintiff challenges the federal action as unconstitutional or unauthorized. See *Mesa v. California*, 489 U.S. 121, 128 (1989) (noting that an officer must raise “a Federal question” (emphasis omitted) (quoting *Tennessee v. Davis*, 100 U.S. 257, 271 (1880))).

²⁴⁰ Cf. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 391 n.4 (1971) (noting Department of Justice policy to remove “all suits in state courts against federal officers for trespass or false imprisonment” (citation omitted)).

²⁴¹ See, e.g., Richard S. Arnold, *The Power of State Courts to Enjoin Federal Officers*, 73 *Yale L.J.* 1385, 1406 (1964) (arguing that state courts could “issue injunctions against federal officials” but conceding that the position “would have only a limited practical effect” given the “present broad right of removal”).

²⁴² APA claims cannot be brought in state court anyway because the APA waives sovereign immunity only in “[a]n action in a court of the United States.” See 5 U.S.C. § 702 (2018); see also *Double “LL” Contractors, Inc. v. State ex rel. Okla. Dep’t of Transp.*, 918 P.2d 34, 41 (Okla. 1996) (“No waiver [of sovereign immunity] was made for actions brought in state courts.”).

²⁴³ See 28 U.S.C. § 1447(d).

²⁴⁴ See Arnold, *supra* note 241, at 1406.

²⁴⁵ See Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 *Yale L.J.* 1425, 1512–17 (1987) (proposing such a statute, though focusing on damages).

federal law anyway.²⁴⁶ The risk of state control of federal action thus seems quite limited.²⁴⁷

2. State Courts for State Action

The systemic consequences of shifting litigation from federal court to state courts for challenges to state action are more complicated. Suppose that the limitations on *Ex parte Young*, § 1983, and the remedies available in federal court reduced the likelihood that federal courts intervene to block state policy. What would litigants do? One potential set of substitutes to federal litigation might be non-litigation alternatives, like more ex ante lobbying or compliance with the legislation. But some of the federal litigation might still generate alternative state-court litigation. The first possible litigation substitute would be pre-enforcement litigation in state court, instigated by plaintiffs who would have otherwise filed suit in federal court.²⁴⁸ The second possible litigation substitute would involve state enforcement proceedings, in which a party that might have been a plaintiff in federal pre-enforcement proceedings instead raises the federal constitutional issue as a defense.

First, for state court pre-enforcement challenges, fewer cases should present serious problems for the Supreme Court's emergency docket. As an initial matter, if a challenge presents only state law theories, then the Supreme Court usually has no jurisdiction and need not intervene.²⁴⁹ If a challenge raises both state law claims *and* conventional federal claims, then the case might proceed in state court or be removed by the officials to federal courts. If the case is not removed, the state court might resolve the matter on the state law ground rather than the federal ground—thus obviating the need for the Supreme Court's intervention at all. Importantly, resolution on state law grounds would not usually occur in cases originally filed in federal courts because the Court has held that the Eleventh Amendment deprives federal courts of authority to enjoin state

²⁴⁶ Cf. Seth P. Waxman & Trevor W. Morrison, What Kind of Immunity? Federal Officers, State Criminal Law, and the Supremacy Clause, 112 Yale L.J. 2195, 2202 (2003) (arguing that a converse-1983 statute would be “subject to implied conflict preemption on the ground that it conflicts with the federal interest in qualified immunity for federal officers”).

²⁴⁷ See, e.g., *Trump v. Anderson*, 144 S.Ct. 662, 668 (2024) (per curiam) (“[T]he Constitution guarantees ‘the entire independence of the General Government from any control by the respective States.’” (quoting *Trump v. Vance*, 140 S. Ct. 2412, 2425 (2020))).

²⁴⁸ *Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 537 (2021) (discussing state pre-enforcement as an alternative to an *Ex parte Young* claim).

²⁴⁹ See *Murdock v. City of Memphis*, 87 U.S. (20 Wall) 590, 612–13 (1875).

officials on the basis of state law.²⁵⁰ If a state court enjoins a state law under federal law, the Court might think that a state court's decision to block a state policy presents less pressing need for *immediate* Supreme Court intervention.²⁵¹ If the case *is* removed to federal court, then the state officials' decision to remove to federal court should indicate that the state officials think they have a better likelihood of success there, and thus that the state policy is less likely to be blocked.²⁵² Altogether, though generalizing across the states and the many permutations of litigation is difficult, the pre-enforcement challenges in state courts should place less pressure on the Supreme Court than does the current system of federal claims in federal courts.

Second, for state court enforcement proceedings involving federal constitutional defenses, the cases should present narrower disputes that (usually) do not involve efforts to block national or statewide policies. Of course, some important emergency-docket cases have arisen in this posture,²⁵³ but the limited scope of such decisions should reduce the need for immediate intervention. In exceptional cases, however, the Court would maintain authority to intervene in the state court proceedings. The Court has taken a "pragmatic approach" to its jurisdiction over "[f]inal judgments" of the "highest court of a State."²⁵⁴ Of particular relevance here, the Court has found review permissible if "reversal of the state court on the federal issue would end the litigation" and "a refusal to review the federal issue would immediately threaten serious erosion of a significant federal policy."²⁵⁵ That category should permit review of any dispositive federal defenses that pose questions of great significance.

Altogether, it seems unlikely that, if the various limitations on federal courts were adopted, the litigation in state courts would reproduce the same pressure on the emergency docket. Any cases challenging federal officials or agencies would likely be removed to federal court anyway.

²⁵⁰ See *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984).

²⁵¹ But see, e.g., *Minnesota v. Nat'l Tea Co.*, 309 U.S. 551, 557 (1940) (suggesting that state courts should "not be the final arbiters of important issues under the federal constitution").

²⁵² The federal court in such a case should have jurisdiction over state law claims notwithstanding *Pennhurst*. See *Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 620 (2002).

²⁵³ See, e.g., *Trump v. New York*, 145 S. Ct. 1038 (2025) (mem.); *Yeshiva Univ. v. YU Pride All.*, 143 S. Ct. 1, 1 (2022) (mem.); cf. *Trump v. Anderson*, 144 S. Ct. 662, 666 (2024) (per curiam) (noting that the Colorado Supreme Court "automatically stayed" its decision excluding Donald Trump from the primary ballot pending review by the Supreme Court).

²⁵⁴ *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 486 (1975); 28 U.S.C. § 1257.

²⁵⁵ *Baude et al.*, *supra* note 176, at 721–22 (glossing the fourth *Cox* category).

Litigation challenging state policy might be avoided because of *ex ante* investment in political recourse, because state pre-enforcement review obviates the need for federal judicial supervision, because the state court's own prevention of the enforcement of state laws presents a less significant issue than federal intervention, or because enforcement proceedings are limited to the particular parties. And if emergency intervention became necessary, the Court's pragmatic interpretation of its own jurisdiction should permit it to intervene.

* * *

The problem of the shadow docket is that consequential rulings are issued by the lower courts, which the Supreme Court is institutionally committed to supervising. Without that supervision, the states and federal government would be governed by the plaintiff's choice of district court and the relevant court of appeals. The shadow docket, then, appears as a symptom of the scope of judicial review in the lower federal courts. If federal judges intervene quickly to block unlawful state or federal laws, the Court has to exercise control over them—often by resolving the emergency applications that it receives. Or the system might be designed to ensure that the Court resolves disputes cautiously, deliberately, after years of percolation, and with deep engagement with the issues presented in briefs and oral arguments. But more delay and deliberation would require disempowerment of the lower federal courts. The system cannot be expected both to maximize the power of the federal courts and to minimize the Court's control of that power. The reforms above, then, hold constant the Supreme Court's commitment to institutional supremacy and provide a roadmap to reduce the need for the shadow docket. The next Part suggests an alternative conclusion if those reforms seem unpalatable.

IV. EMBRACING THE INTERIM DOCKET?

The last Part offered a solution to the shadow docket that disempowers the lower courts. But those reforms are substantial, and perhaps for some the cure will seem worse than the disease. Therefore, this Part considers another possible approach: disempowering the Supreme Court relative to the lower courts. I suggest, though only tentatively, that the reason that disempowering the lower courts might be unattractive also counsels in favor of keeping, and perhaps strengthening, the Court's shadow docket. I thus shift to a contingent defense of the shadow docket, offered on the

assumption that some will find the proposed reforms unattractive, and I propose an alternative future for emergency applications. In describing this alternative, I sometimes use the term “interim” docket to suggest, without wading too far into debates about terminology, that this future involves regularizing the docket as a normal component of the Court’s day-to-day work.

As noted, this Article has so far held constant the supremacy of the Court over the lower courts, but that supremacy is a contingent, if durable, feature of the judiciary. Maybe the solution to the shadow docket is not for the Court to disempower lower courts, but for the Court to be disempowered. There is of course no shortage of proposals for structural changes to the Supreme Court,²⁵⁶ but the focus here is on whether the problems of the shadow docket could be better avoided by disempowering the Supreme Court relative to the lower federal courts. Assuming that such changes to the Supreme Court are possible, that could mean a “default posture of deference” to the lower courts,²⁵⁷ stricter standards for “certworthiness,”²⁵⁸ maybe higher voting thresholds for grants of emergency applications,²⁵⁹ greater acceptance of disuniformity among lower courts, or a stronger preference for resolving matters on the ordinary docket. The claim generalizes: the Court should just “turn away” some set of the emergency filings, waiting to intervene until the end of the normal appellate process. And the set of cases in which the Court defers would apply to the set of cases in which the Court now intervenes most frequently: cases involving efforts to block national or statewide policy. The desired result would be a federal judiciary that continues to constrain political actors, but with more limited interventions from the Court.

But the reasons to empower the lower courts relative to the political branches potentially undermine any argument for disempowering the Supreme Court relative to the lower courts. Specifically, the efficacy of the lower courts as checks on state and federal illegality might depend on the potential or actual intervention of the Supreme Court. In other words,

²⁵⁶ See, e.g., Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 *Calif. L. Rev.* 1703, 1706 (2021).

²⁵⁷ See *Labrador v. Poe ex rel. Poe*, 144 S. Ct. 921, 930 (2024) (mem.) (Kavanaugh, J., concurring in the grant of stay).

²⁵⁸ *Id.* at 931.

²⁵⁹ But see Doerfler & Moyn, *supra* note 256, at 1756–57 (discussing the debate about the legality of prescribing voting rules for the Justices).

the Supreme Court's intervention in the federal judicial system might make judicial precedent a (relatively) stronger constraint on political actors and increase compliance with judicial orders, including the orders of lower courts. If so, the reduction in the Supreme Court's capacity to intervene would result not in more but less effective constraints on the political branches.

First, consider the deference political actors—and particularly the executive branch—show to the *precedent* of federal courts. Political actors accord greater institutional deference to the Supreme Court than to courts of appeals (and district courts).²⁶⁰ In *CASA*, the Solicitor General repeatedly asserted that it would accept the precedents of the Supreme Court as binding on the entire executive branch, but he refused to accord the same deference to circuit court precedent.²⁶¹ Indeed, the executive branch has often declined to acquiesce to circuit precedent—despite criticism from the courts.²⁶²

The Supreme Court's intervention (or lack thereof) alters the strategic calculus for nonacquiescence. On the one hand, the Supreme Court's resolution of an issue means that its holding will be binding in every federal court, and indirectly on the lawyers appearing in those federal courts,²⁶³ so nonacquiescence would be close to pointless.²⁶⁴ Thus, the executive branch today claims to follow the precedent of the Supreme Court, even though it has plausible legal arguments that it has no such categorical obligation.²⁶⁵ On the other hand, if the Supreme Court declines to resolve a matter (including on the emergency docket), then it permits the government to force the lower courts to re-adjudicate the

²⁶⁰ See *Matter of K-S-*, 20 I. & N. Dec. 715, 715 (B.I.A. 1993) (“[T]he Board of Immigration Appeals is not bound to follow the published decision of a United States district court in cases arising within the same district.”); see also *Trump v. CASA, Inc.*, 145 S. Ct. 2540, 2560 n.17 (2025) (defending executive nonacquiescence to district courts).

²⁶¹ See Transcript of Oral Argument at 35, 60–66, *CASA*, 145 S. Ct. 2540 (No. 24A884).

²⁶² For the classic treatment, see Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 *Yale L.J.* 679, 681–82 (1989); see also *id.* at 687–88 (distinguishing intercircuit and intracircuit nonacquiescence); *id.* at 681 n.7, 699–702 (describing judicial responses to nonacquiescence policy).

²⁶³ See Fed. R. Civ. P. 11(b)(2) (requiring attorney certification that a legal position is “warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law”).

²⁶⁴ But see Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 *Geo. L.J.* 217, 276 (1994) (noting that President “Lincoln directed his subordinates to grant U.S. patents and visas to *citizens* that the Court in *Dred Scott* had said could not be considered citizens”).

²⁶⁵ See *CASA*, 145 S. Ct. at 2561 n.18 (2025).

legality of a policy. A government might exploit any gap between enforcement and adjudication, try to distinguish the precedents of the courts of appeals before different district judges or panels of the courts of appeals, or maintain a position of nonacquiescence precisely because the Supreme Court might eventually agree with the legal position. Of course, it is hard to generalize, because the efficacy of nonacquiescence to precedents depends on the nature of the relevant governmental action, the rules of venue for challenges to that action, the scope of judicial *orders* constraining those challenges, and so on. But the Supreme Court's nonintervention makes strategies of nonacquiescence more effective.

Second, consider political actors' compliance with judicial *orders* like injunctions. The historical norm is that presidents (and other officials) comply with federal court orders.²⁶⁶ But the leading academic work on the topic suggests that agency compliance with such orders is "imperfect and fraught."²⁶⁷ When federal agencies fail to comply with such orders, district judges occasionally hold them in contempt, but courts of appeals show a "virtually complete unwillingness" to impose sanctions, while refusing to conclude that they are categorically off-limits; nonetheless, contempt findings, even without sanctions, have a "shaming effect that gives them substantial if imperfect deterrent power."²⁶⁸ The efficacy of court orders thus rests on a "strong norm" that "officials comply with court orders."²⁶⁹

The Supreme Court's frequent intervention in high-profile matters might preserve that norm against erosion by political actors. Incomplete compliance with, or outright defiance of, the orders of lower courts might be more politically palatable without the Supreme Court's intervention. Compared to the Supreme Court, lower court judges have a "less

²⁶⁶ See Nicholas R. Parrillo, *The Endgame of Administrative Law: Governmental Disobedience and the Judicial Contempt Power*, 131 *Harv. L. Rev.* 685, 694 n.30 (2018) (discussing the "near-total consensus that the President is bound to obey a federal court judgment," the dissenting position, and some near-violations of the norm).

²⁶⁷ *Id.* at 687.

²⁶⁸ *Id.* at 697.

²⁶⁹ *Id.*; cf. Keith E. Whittington, *Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History* 9 (2007) ("Judicial supremacy itself rests on political foundations. The judiciary may assert its own supremacy over constitutional interpretation, but such claims ultimately must be supported by other political actors making independent decisions about how the constitutional system should operate.").

compelling claim to a ‘democratic pedigree.’”²⁷⁰ They are not subjected to the same scrutiny during the appointment and confirmation practice,²⁷¹ and district court judges (or panels of the courts of appeals) might stray more from the “legal mainstream.”²⁷² Optically, if the decisions of lower courts seem to be a greater departure from democratic decision-making, then it might be easier to defy the lower courts.²⁷³ More cynically, the affiliation of district judges (or randomly selected panels) with the political party of the appointing president might make it easier for opposite-party political actors to dismiss contempt findings as partisan,²⁷⁴ and noncompliance or partial noncompliance, if it occurs, might undermine the “self-reinforcing perception that compliance is the norm.”²⁷⁵ None of these possibilities seem far-fetched today, though it is much harder to imagine outright defiance of an order of the Supreme Court. And even the threat of the Supreme Court’s intervention in any given dispute—and potential recourse to the Supreme Court when an order seems groundless—might encourage *ex ante* compliance with the orders of the lower courts. The Supreme Court might thus reinforce the judiciary’s ability to insist on compliance with judicial orders.²⁷⁶

This line of argument about the efficacy of the federal courts now suggests some awkward conclusions in an article about taming the shadow docket—conclusions that follow, I suggest, if the reforms proposed to disempower the federal courts seem intolerable. If reducing the Supreme Court’s intervention on the emergency docket requires reducing the number of high-salience issues in the lower federal courts, and if reducing the power of the lower federal courts would be intolerable because of the judiciary’s critical role in checking the illegality of the political branches, then maybe the emergency docket is not even a problem. On this view, the Court’s intervention in high-profile matters is inevitable and maybe even desirable, because through such intervention

²⁷⁰ Schmidt, *supra* note 105, at 876 (quoting Christopher L. Eisgruber, *Constitutional Self-Government* 64–65 (2001)).

²⁷¹ *Id.*

²⁷² *Id.* at 877.

²⁷³ *Cf. id.* at 890–91 (“Judge Learned Hand once protested against rule by a ‘bevy of Platonic Guardians’; whatever one feels about a ‘bevy’ of nine Justices, I would think that a random triumvirate or a single guardian would be worse.” (quoting Learned Hand, *The Bill of Rights* 73 (1958))).

²⁷⁴ Parrillo, *supra* note 266, at 794.

²⁷⁵ *Id.* at 790.

²⁷⁶ See Bradley & Siegel, *supra* note 65 (manuscript at 4–5).

the Court ensures that the judiciary operates as an effective check on the political branches.

A more provocative implication of this contingent defense of the shadow docket might be that the Supreme Court does not intervene *enough*. Instead, perhaps, the Court should intervene earlier and more often, before cases make their way through the appellate process and maybe even before lower courts resolve such high-profile issues at all. The Court could, for example, show *no* deference to the decisions of the lower courts in assessing whether a national or statewide policy should go into effect; it could expand its use of certiorari before judgment to preempt the disuniformity and uncertainty of percolation; it could devote argument days from its (shrinking) merits docket to the most pressing emergency applications on its docket at the time.²⁷⁷ The Court could invite judges of the courts of appeals to certify important legal issues for resolution by the Court, perhaps even as soon as an appeal of a district court's order—or even a motion to stay that order—hits the docket at the court of appeals.²⁷⁸ The Court could permit certain institutions, maybe state or federal solicitors general or members of Congress, to notify the Supreme Court of pressing legal issues that might require the Supreme Court's intervention *before* any lower courts resolve the matter, thus giving the Supreme Court more time to consider the issues outside of the emergency posture.²⁷⁹ Some of the institutional reforms to the shadow docket might seem like a major departure from the ordinary course of appellate review today, but today's emergency docket would have seemed like a major departure from the ordinary course even ten years ago.²⁸⁰

Something like those reforms might be the most likely future for the shadow docket. Justice Kavanaugh's concurrence in *CASA* suggests that there may be more appetite at the Court for a more aggressive use of the

²⁷⁷ See *supra* text accompanying note 86 (discussing TikTok litigation).

²⁷⁸ See 28 U.S.C. § 1254 (“Cases in the courts of appeals may be reviewed by the Supreme Court by . . . certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.”).

²⁷⁹ The Court already sometimes calls for the views of the Solicitor General after a petition for certiorari has been filed, and this “CVSG” practice developed from the Court's earlier practice of simultaneously granting certiorari and asking the Solicitor General to file an amicus brief. See Stefanie A. Lepore, *The Development of the Supreme Court Practice of Calling for the Views of the Solicitor General*, 35 J. Sup. Ct. Hist. 35, 39 (2010). Perhaps a “notification of the views of the Solicitor General” (“NVSG”) before a petition is filed could be helpful too.

²⁸⁰ See Baude et al., *supra* note 176, at 398.

emergency docket. There, he argued that the Court should intervene to provide a “nationally uniform answer on whether a *major* new federal statute, rule, or executive order can be enforced” during the normal appellate period.²⁸¹ The Court’s role, he explained, is “to resolve major legal questions of national importance and ensure uniformity of federal law.”²⁸² And he proposed that the Court could use various “procedural tools,” including “certiorari before judgment,” to make the best possible decision in the time allotted.²⁸³ Maybe it should also consider some of the more drastic institutional changes suggested above.²⁸⁴ Unless the Court undertakes systematic efforts to disempower the lower courts compared to the political branches, the emergency applications will indeed remain “part of [the] job” at the Court.²⁸⁵ And it might be a necessary part of the job if the judiciary is to continue to constrain political actors.

CONCLUSION

The problem of the shadow docket is not that the Court fails to explain itself or applies the wrong standards of review. The problem is structural. The lower federal courts, applying current doctrines governing judicial review of federal and state policies, have broad authority to block legislation and administrative action. The Supreme Court, meanwhile, is institutionally committed to its position of supremacy over those lower courts, necessitating the exercise of control over the lower courts in significant matters. Those factors mean that proposed reforms for the Court’s *use* of the shadow docket misdiagnose the structural problem.

This Article, by contrast, offers structural reforms that would allow the Court to change the conditions in the lower courts to prevent significant matters from landing on the shadow docket in the first place. The set of reforms is systematic rather than myopic because focusing on (for example) nationwide injunctions but not also standing and *Ex parte Young* would solve a problem that would reemerge in a new doctrinal form. And the reforms are pitched at just the right level of ambition—not too fatalistic and not too quixotic: not too fatalistic, because I suggest actual changes that the Court (and lower courts) could implement to reduce the structural causes of the problem that it faces; not too quixotic,

²⁸¹ See *Trump v. CASA, Inc.*, 145 S. Ct. 2540, 2568–69 (2025) (Kavanaugh, J., concurring).

²⁸² *Id.* at 2571.

²⁸³ *Id.*

²⁸⁴ See *supra* text accompanying notes 277–80.

²⁸⁵ *CASA*, 145 S. Ct. at 2573 (Kavanaugh, J., concurring).

because I assume that Congress will do nothing and because the proposed “reforms” are either technically already the law or reasonably plausible refinements or developments of current doctrine. What this Article provides, then, is a menu of options for reducing the pressure on the Court to intervene in the appellate process. Not all such options will seem necessary; some might seem to go too far. But they should all be on the table if the shadow docket is really a problem that needs to be managed.

Or perhaps the shadow docket is a necessary feature of a constitutional system in which the federal courts constrain political actors. On that view, the reforms proposed would fix the shadow docket but undermine the critical judicial function. If so, the solution is not to weaken the courts but to embrace an interim docket, and potentially to make the Supreme Court more effective at its supervisory function. Reforms that allow the Court to intervene earlier or more often might change the composition of the Court’s day-to-day work, but such an evolution might be inevitable if the federal courts are to effectively police political actors. Whether the better course is to disempower the lower courts or to embrace the Court’s new role is up for debate. But it is implausible to argue that the lower courts should regularly resolve matters of national significance while the Supreme Court declines to intervene.