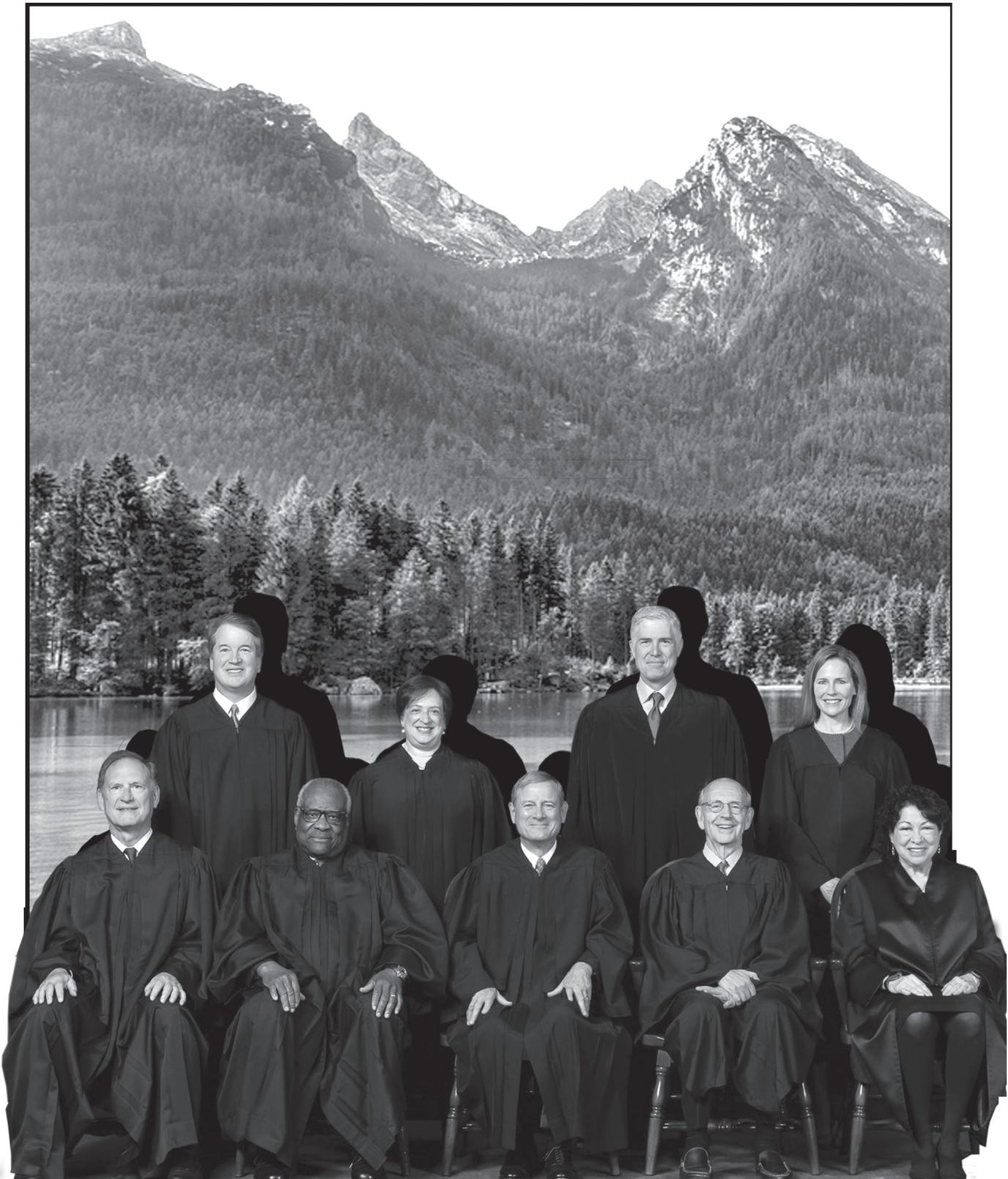


Photo montage illustration by Evan Odoms



# The Shadow Docket

*Orders issued without plenary review and oral argument used to be rare at the Supreme Court. That changed under the Trump administration. The result was emergency stays issued on average every two months, almost exclusively favoring conservative policy outcomes*



**Robert V. Percival** is the Robert F. Stanton professor of law and the director of the Environmental Law Program at the University of Maryland Carey School of Law. He is a former law clerk for the late Supreme Court Justice Byron R. White.

SIX YEARS AGO, the Supreme Court made an unprecedented intervention in an environmental case, derailing the most important U.S. effort to combat the global climate crisis. Because the petitioner had made an emergency motion, the Court dispensed with plenary review and oral argument in staying the Obama administration’s Clean Power Plan to control greenhouse gas emissions from power plants. Using what is now known as its *shadow docket*, the justices voted 5-4 to reverse a unanimous decision by the D.C. Circuit to let the regulations take effect while it heard legal challenges to them.

In the last year, the new conservative super-majority on the Court has come under fire for several shadow-docket decisions. It blocked local Covid prevention mandates as infringements on religious liberty, struck down the Biden administration’s extension of the Centers for Disease Control’s eviction moratorium, refused to block a Texas law that effectively bans abortions, and denied the Biden administration’s request to stay a district court decision dictating immigration policy. These actions have provoked strong criticisms from dissenting justices. Justice Breyer told an interviewer that the refusal to block the Texas abortion law was “very, very, very wrong” and that “it’s a huge mistake to decide major things without full argument.”

Responding to the same decision, Justice Kagan attacked the Court’s use of the shadow docket: “Today’s ruling illustrates just how far the Court’s ‘shadow-docket’ decisions may depart from the

usual principles of appellate process. That ruling, as everyone must agree, is of great consequence. Yet the majority has acted without any guidance from the Court of Appeals — which is right now considering the same issues.” Kagan went on to blast the hurried process. The Court, she said, “has reviewed only the most cursory party submissions, and then only hastily. And it barely bothers to explain its conclusion — that a challenge to an obviously unconstitutional abortion regulation backed by a wholly unprecedented enforcement scheme is unlikely to prevail.”

In conclusion, Kagan chided the majority for a decision she called “emblematic of too much of this Court’s shadow-docket decisionmaking — which every day becomes more unreasoned, inconsistent, and impossible to defend.”

Most orders the Court issues involve routine matters of case management, and the Court has issued them since its very first term in 1790. But in recent years the Court has used the shadow docket to make highly consequential legal decisions without benefit of plenary review. These orders do not reveal any of the votes unless some justices insist that their dissents be noted. Usually they include little or no explanation of whatever legal reasoning produced them. Many of them, like the decision to block the Clean Power Plan, are rulings on motions for stays that can dramatically change the status quo. Law professor Portia Prado has described judicial stay decisions as “nearly a law-free zone” because of the absence of uniform, principled

standards to guide courts and the dearth of written opinions explaining the legal reasons for them.

During a House Judiciary Committee hearing on the shadow docket last winter, concerns were expressed on a bipartisan basis. But when the Senate Judiciary Committee held a hearing on the shadow docket seven months later, Republicans portrayed it as a partisan issue. Senator Ted Cruz (R-TX) argued that “shadow docket” is an “ominous term” invented by Democrats in an effort to intimidate the Supreme Court because “shadows are bad.” The following day Justice Alito pushed back against critics even more harshly in a speech at the University of Notre Dame. Alito declared that “the catchy and sinister term ‘shadow docket’ has been used to portray the Court as having been captured by a dangerous cabal that resorts to sneaky and improper methods to get its ways.” He maintained that “this portrayal feeds unprecedented efforts to intimidate the Court or damage it as an independent institution.”

**T**HE TERM *shadow docket* was coined by University of Chicago professor William Baude in a 2015 law review article. A former law clerk for Chief Justice Roberts, Baude initially entitled the article “Paying Attention to the Orders List.” He changed the title after “a good friend convinced me that nobody would read or cite it.” The new headline was “The Supreme Court’s ‘Shadow Docket.’” Under that rubric, Baude criticized shadow-docket orders and summary decisions for lacking the transparency of cases decided after plenary review. He characterized most of the summary reversals by the Roberts Court as “designed to enforce the Court’s supremacy over recalcitrant lower courts,” while noting that others were “lightning bolts,” which he described as “ad hoc exercises of prerogative.”

The Supreme Court has had a shadow docket throughout history, but until recently it was rarely used to issue high-profile, often controversial decisions, even when time was of the essence. This changed when the last administration filed an unprecedented number of requests for emergency relief with the Court. In its four years in office, the Trump administration filed 41 emergency applications with the Court, compared with only eight that had been filed in the 16 previ-

ous years of the George W. Bush and Barack Obama presidencies. Thus, instead of one government request every two years for the Court to issue emergency relief, the Trump administration made such requests almost monthly — and the Court’s conservative majority usually granted them. Professor Steven Vladeck reports:

“Not counting one application that was held in abeyance and four that were withdrawn, the justices granted 24 of the 36 applications in full and four in part.” While only one of the eight applications for emergency relief filed by the Bush and Obama administrations generated any public dissent by a justice, 27 of the applications from the Trump administration did.

The pattern of conservative justices using the shadow docket to speed the implementation of controversial Trump administration policies was decried by Justice Sotomayor in a 2020 dissent from a 5-4 order. “Today’s decision follows a now-familiar pattern. The Government seeks emergency relief from this Court, asking it to grant a stay where two lower courts have not. The Government insists — even though review in a court of appeals is imminent — that it will suffer irreparable harm if this Court does not grant a stay. And the Court yields.” Sotomayor argued that while stay relief is supposed to be reserved for “truly exceptional cases” when it is “absolutely clear” that a lower court erred, the government now views emergency relief as “the new normal.” But even more troubling to Sotomayor was that “the Court’s recent behavior on stay applications has benefited one litigant over all others” — the Trump administration. She argued that “this disparity in treatment erodes the fair and balanced decisionmaking process that this Court must strive to protect.”

As Sotomayor has written, stay decisions “force the Court to consider important statutory and constitutional questions that have not been ventilated fully in the lower courts, on abbreviated timetables and without oral argument. They upend the normal appellate process, putting a thumb on the scale in favor of the party that won a stay.” This is well illustrated by the “lightning bolt” (to use Professor Baude’s term) the Court issued when it stayed the Clean Power Plan in February 2016.

The CPP, affecting the utility sector, had been the centerpiece of U.S. efforts to persuade the nations of

**The Court has always had a shadow docket, but until recently it was rarely used to issue high-profile, often controversial decisions, even when time was of the essence**

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# Shadow Orders Keep Courts in Line

The Supreme Court's opinions in argued cases may attract the most attention, but they are only a small part of the Court's overall work. In a given term the Court may decide 60 or 70 argued cases, but it will consider and rule on petitions and motions in thousands more. It is these other decisions that make up what is often referred to as the *shadow docket*. Although it has been around since the nation's founding, this portion of the Court's work is suddenly controversial. There has been a dramatic increase in the number of cases in which the Court has been willing to provide emergency or extraordinary relief through orders issued without argument.

The vast majority of shadow-docket orders are denials of one sort or another, such as the denial of a petition that the Court hear a case. A smaller portion consists of consideration of pleas for extraordinary relief, such as granting stays or injunctions or vacating those entered by lower courts. The Court denies most of these requests as well, but it is the growing number of exceptions that attract attention.

Scholars debate the reasons the justices seem more willing to grant extraordinary relief, and whether the increase is a problem. The lion's share of relevant cases involve tight timelines or extenuating circumstances, as is the case with election contests, executions, and temporary Covid measures. Many seem to involve a disconnect between the current justices and lower courts, as when the Court has vacated lower court injunctions and stays of execution where such orders had not met the relevant standard for judicial relief. In such cases, the Court is fulfilling its obligation to superintend the federal court system, and ensure



**Jonathan H. Adler**  
 Director, Coleman P. Burke Center  
 for Environmental Law  
 Case Western Reserve University

*“There has been a dramatic increase in the number of cases in which the Court has been willing to provide emergency or extraordinary relief through orders issued without argument”*

lower courts are using their equitable powers appropriately.

Where lower courts step out of line, the justices are sometimes moved to act. This occurred with *Juliana v. United States*, the so-called “Kids Climate Case,” in which the Supreme Court twice signaled to lower courts its displeasure with the course of the proceedings.

*Juliana* was likely the most ambitious and aggressive climate change suit filed to date. Among other things the plaintiffs claimed the federal government violated their substantive due process rights to life and liberty by failing to control the emission of greenhouse gases. *Juliana* presented audacious claims, but it took more than aggressive pleadings to stir the justices into action.

The solicitor general only sought Supreme Court intervention after the district court denied the federal government's motion to dismiss and blocked an interlocutory appeal, setting the stage for intrusive discovery requests against the federal government, and the appeals court refused to intervene. On the SG's second try, the Court issued an order denying relief, but making clear a majority of justices believed the district court was out of line. The lower courts got the message, and the

case was ultimately dismissed on standing grounds.

The justices also used the shadow docket to put the Obama administration's Clean Power Plan on ice. As with *Juliana*, the Court's intervention is best seen as reactive, here to maintain the status quo so as to ensure courts would have an adequate opportunity to consider challenges to EPA's aggressive regulatory plan. In a prior case, *Michigan v. EPA*, judicial review was effectively thwarted, as the agency's rule was held unlawful only after compliance had been achieved. The folks at EPA celebrated this fact, and it appears the justices were not amused and sought to prevent a repeat occurrence. In this regard, the Court issued a stay so as to preserve its ability to engage in meaningful judicial review.

The Court's forays into the *Juliana* and Clean Power Plan litigation were unexpected. They may also be a sign of things to come. In both cases, a majority of the Court exhibited impatience with aggressive judicial or regulatory moves responding to the threat of climate change without express congressional authorization. This is further evidence it may take legislative action to get climate policy on course, and keep it out of the shadows.

the world to adopt the Paris Agreement in December 2015. It was the culmination of EPA's response to the Court's landmark *Massachusetts v. EPA* decision in 2007, where the Court held that greenhouse gases are "air pollutants" that may be regulated under the Clean Air Act if the agency finds that they endanger public health or welfare. In 2009 EPA made such an endangerment finding. In 2014, the agency proposed regulations to limit GHG emissions from existing power plants. After successfully fending off a premature industry lawsuit seeking judicial intervention to block EPA from even issuing regulations, the agency published them in final form in October 2015. EPA adopted the CPP only after considering 4.3 million public comments, the most the agency had ever received in any rulemaking action during its then 45-year history.

On the very day the final regulations appeared in the Federal Register, coal companies, utilities with coal-fired power plants, and attorneys general from more than two dozen states filed petitions for judicial review in the U.S. Court of Appeals for the D.C. Circuit, the exclusive venue under the Clean Air Act for legal challenges to nationally applicable regulations. They also moved immediately for a stay of EPA's final rule. After two months of briefing and more than 2,500 pages of evidentiary submissions, the D.C. Circuit panel unanimously denied a stay on January 21, 2016. The panel explained that "petitioners have not satisfied the stringent requirements for a stay pending court review." The panel cited *Winter v. Natural Resources Defense Council*, which required a petitioner to "establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest."

**O**PPONENTS of the CPP then took the unprecedented step of filing a stay request with the Supreme Court. No legal observer expected the Court to intervene, because there was no precedent for doing so. The case did not meet any of the normal criteria for Supreme Court review. There was no conflict in rulings by other courts — indeed there could not be, because the Clean Air Act gives the D.C. Circuit exclusive

venue. Yet the Supreme Court on February 9, 2016, granted the stay request without offering any explanation. Because justices Ginsburg, Breyer, Sotomayor, and Kagan noted their dissents, all that was known was that the order had been issued by a 5-4 vote.

Although the order was not a judgment on the merits, many interpreted it as a signal that the Court would strike down the CPP regardless of how the D.C. Circuit ruled. "President Obama's Clean Power Plan is dead and will not be resurrected," exulted lawyers for the state of Oklahoma in a *Wall Street Journal* op-ed the following day. Three days later it was Justice Scalia who was dead of a heart attack at the age of 79, making the stay order the last vote he ever cast. It was certainly one of his most consequential acts.

The Court's order not only offered no legal justification for staying the CPP, it also did not explain how the Court even had jurisdiction to issue it. Rule 11 of the Supreme Court's rules of procedure authorizes review of a case pending in a U.S. Court of Appeals before judgment if "the case is of such imperative public importance as to justify deviation

from normal appellate practice and to require immediate determination." But the Court's order left the case to be decided by the lower court without explaining the reasons for the stay. The Court apparently accepted the thinnest of assertions that power companies would be harmed by a rule that did not impose any immediate legal obligations on them. The CPP allowed states 30 months before submitting compliance plans or they could opt out entirely and leave the planning to EPA. Oklahoma had a hard time claiming irreparable harm because its governor already had issued an executive order banning any state cooperation with EPA. Initial deadlines for power plants to comply did not kick in until 2022 and full compliance was not required until 2030. On its own motion, the D.C. Circuit expedited the case and heard it en banc on September 27, 2016.

A primary criticism of the recent use of shadow-docket orders has been that they do not give the Court sufficient time to reach considered decisions. Throughout history, even when time was of the essence, the Court has been able to hold oral arguments and decide cases in an expedited fashion. In 1952 the Court expedited briefing and oral argument in the *Steel Seizure* case, granting review within weeks of President Tru-

**Opponents of the Clean Power Plan took the unprecedented step of filing a stay request with the Supreme Court. There was no precedent for the Court to intervene**

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# Antithetical to Reasoned Decisionmaking

**T**HE tale of two dockets is not one that is often told in law schools. Indeed, as students dive into the mechanics of the nation’s highest court, one learns only of the merits docket. This is the ordinary nature of the Supreme Court’s proceedings, where cases are granted review by four justices and which subsequently proceed to months-long briefings, oral arguments, and a majority opinion with detailed explanations for a given decision. But until recent years, the non-merits docket, with its fondness for caseload management, or the issuance of minor routine orders such as time extensions, was hardly newsworthy.

Today’s non-merits docket, however, contains a tale revealing the worst of times in the High Court’s jurisprudential history.

This tale of two dockets describes the extraordinary way in which the Supreme Court can make stay orders, without substantiation or transparency. Granted on rare historic occasions, emergency stay orders had been by no means a regular practice of the Court. But today, the justices are increasingly willing to permit or block agency action without explanation, by simply granting or denying motions to stay.

The above practice is the *shadow docket*, a phrase coined by Professor William Baude. Recent expanded use of the non-merits docket in this way rings warning bells for many. Indeed, the notion of unreasoned court orders seems antithetical to one of the core elements of the rule of law, one often touted by the Supreme Court in the administrative context: the duty to engage in reasoned decisionmaking.

Notwithstanding Supreme Court Justice Samuel Alito’s recent denial of anything “shadowy” going on in the Court’s use of this procedural function, there are dark implications



**Achintha C. Vithanage**  
Associate Director, Environmental Law Program  
Elisabeth Haub School of Law

*“This expanded use of the shadow docket rings warning bells for many. Indeed, the notion of unreasoned court orders seems antithetical to one of the core elements of the rule of law”*

for the environment. Recall the Supreme Court’s surprising intervention with the Clean Power Plan rule in 2016. In overruling the D.C. Circuit Court’s decision to keep EPA’s regulation to cut carbon emissions from power plants in place pending further review, Chief Justice Roberts, for the first time in the Supreme Court’s history, issued a stay on regulations before an initial review was conducted by a federal appeals court. No arguments were heard, nor a formal opinion given by the Court. However, four justices did feel compelled to note their objection to the order.

Or recall the 2018 Supreme Court stay order, issued without explanation, which effectively halted discovery and trial in the *Juliana* case, a constitutional climate lawsuit brought by youth plaintiffs against the U.S. government.

In 2019, when the Sierra Club secured a win against the Trump administration’s plan to fund the U.S.-Mexico border wall with Defense Department funds, the Supreme Court intervened by granting the government’s application for a stay with a mere sentence providing the reasoning for the decision. The result: the building of environmentally destructive barriers across wildlife refuges, national monuments, public

land and waters, and through communities in multiple states.

In short, the multitude of stay orders issued in the last five years is irregular. The tilted appearance of those decisions in favor of certain administrations is apparent. The lack of reasoning and transparency in those decisions is unbecoming of the highest arbiter of this land. The shadow docket is, unmistakably, a cause for concern for an administration seeking strong environmental regulation.

While the tale of two dockets seems to be here to stay, the tale can certainly be retold. The Biden Commission, tasked with exploring Supreme Court reform, recently concluded its review and included, among its suggestions, an invitation to the Court to consider proposals “that may increase transparency, improve procedure, and generate more visible adherence of judicial ethics.” Indeed, recent actions by the Court, such as the accompaniment of its refusal to stay Maine’s vaccine mandate, with concurring and dissenting opinions, provides a glimmer of transparency and reasoned decisionmaking.

Whether this marks the beginning of a trend bringing the non-merits docket out of the shadows, it is too soon to tell.

man's seizure order and deciding the case just a month later. Twelve days after the *New York Times* received a restraining order to cease publication of the Pentagon Papers, the Court heard two days of oral argument and decided the case five days later. In the Nixon tapes case the Court granted review less than a month after a district judge ordered the president to turn over his tape recordings. Delaying its summer recess, the Court held oral argument 13 days later and issued its decision just 16 days after that. Each of those cases produced landmark decisions that have withstood the test of time.

**T**HE HISTORY OF environmental law in the Supreme Court demonstrates the importance of granting plenary review. The papers of Justice Thurgood Marshall revealed that the landmark “snail darter” case of *TVA v. Hill* almost came out the other way in a summary order. The Sixth Circuit had blocked completion of the Tellico dam to save an endangered species of fish. But when the case initially was considered at conference, five justices voted to reverse the injunction summarily. Justice Rehnquist quickly circulated a six-page draft per curiam opinion allowing the dam to be completed. But after Justice Stevens circulated a three-paragraph dissent blasting the Court majority for “unprecedented” and “lawless” action, the five-justice majority found that it could not agree on a rationale for reversal. Only then did the Court agree to hear oral argument. The argument was a true classic, pitting Attorney General Griffin Bell against University of Tennessee law professor Zyg Plater, arguing his first case ever. Plater clearly got the best of the argument, particularly when parrying questions from Chief Justice Burger about equitable discretion in the issuance of injunctions. Ultimately both Burger and Justice White changed their initial votes, producing a resounding, 6-3 victory for the snail darter and the Endangered Species Act.

The Court's unprecedented stay of the Clean Power Plan represents its most egregious issuance of a “lightning bolt” in an environmental case, but it is not the Court's only important environmental intervention. Four years ago, the Court issued a shadow-docket

order to block a federal district court from holding a trial in the *Juliana* climate litigation against the federal government. Plaintiffs, who included 21 children between the ages of eight and nineteen, alleged that the federal government violated their substantive due process rights and its public trust obligations by knowing about the dangers of climate change for more than 50 years, but failing to protect them against it.

Federal district judge Anne Aiken rejected the government's motion to dismiss and scheduled a trial to commence in October 2018. After the Ninth Circuit denied the federal government's motion for a writ of mandamus to halt discovery and any trial, the federal government then turned to the Supreme Court. On July 30, 2018, the last day before Justice Kennedy's retirement, the Court denied the government's request as “premature.” But it did so without prejudice, noting: “The breadth of respondents' claims is striking, however, and the justiciability of those claims presents substantial grounds for difference of opinion.” The court sent a message to Judge Aiken that she “should take these concerns into account in assessing the burdens of discovery and trial, as well as the desirability of a prompt ruling on the government's pending dispositive motions.”

On October 19, 2018, days before the trial was scheduled to commence, Chief Justice Roberts, in a one-sentence order, issued before even receiving a response from the plaintiffs, indefinitely stayed discovery and trial in the case. He did so in response to an application from the United States asking for a writ of mandamus dismissing the *Juliana* petition. Although the Court later vacated its stay, over dissents from justices Thomas and Gorsuch, who would have mandated dismissal of the litigation, it did so on the grounds that the Ninth Circuit could provide adequate relief by persuading Aiken to certify an interlocutory appeal to it. After she did so, in January 2020 a divided panel of the Ninth Circuit dismissed the case for failure to meet the redressability prong of standing doctrine. The two judges in the majority believed that an Article III court did not have the power to remediate the climate change problem.

At a time of great public concern for the environment nearly a half century ago, the Court used a shadow-docket order to pressure another U.S. circuit court to act. In 1974, after the Eighth Circuit stayed

**The Court's unprecedented stay of the Clean Power Plan represents its most egregious issuance of a “lightning bolt” in an environmental case, but not its only one**

a district court's order requiring the Reserve Mining Company immediately to cease discharging taconite tailings into Lake Superior, the state of Minnesota asked the Supreme Court to vacate the stay. On July 9, 1974, the Court denied the motion over Justice William O. Douglas's dissent. Concerned that the stay was allowing deadly pollutant discharges to continue, Michigan, Wisconsin, and environmental groups joined Minnesota in October 1974 in again asking the Supreme Court to vacate the stay. To pressure the Eighth Circuit into reaching a decision expeditiously, the Court invited the applicants to renew their request "if the litigation has not been finally decided by the court of appeals" within 16 weeks. The Court's order helped convince the Eighth Circuit to expedite consideration of the case, which it heard en banc and decided shortly after the Court's implicit deadline.

Some have suggested that the Court has relaxed the requirement for showing irreparable harm by presuming such harm whenever a district court issues an injunction against the federal government. But because shadow-docket orders typically are issued with little explanation, one cannot be sure. In July 2019, a sharply split Supreme Court stayed an injunction the Sierra Club had obtained to block expenditures of funds to construct President Trump's border wall. In that case the Court majority explained that "the government has made a sufficient showing at this stage that the plaintiffs have no cause of action to obtain review" of compliance with appropriations restrictions. Writing in partial dissent, Justice Breyer argued that irreparable harm to both sides could be avoided if the government were allowed to enter into contracts to build the wall, without starting the construction that the Sierra Club claimed, and the district court agreed, would be the source of irreparable harm. The Supreme Court's order allowed the Trump administration to continue building the border wall, even though the funding whose legality was questioned likely would be exhausted before the Court ruled on the merits. In addition to Justice Breyer, three other justices dissented from the stay.

In litigation challenging construction of the Keystone XL pipeline, the Court in July 2020 stayed a district court's nationwide injunction blocking construction of pipelines crossing federal waters. The district court had vacated the Nationwide Permit authorizing

such crossings because it found that the Army Corps of Engineers had failed to adequately consider effects on endangered species when the permit was renewed. However, perhaps because the Court decided not to stay the injunction as it applied to the Keystone XL pipeline that precipitated the litigation, this decision did not spawn any dissent.

**T**HERE IS NOTHING illegitimate about the Court having a shadow docket, and the term was not coined to place the Court in a bad light. But the Court's recent use of emergency orders to aggressively promote exclusively conservative ends

**The Court's recent use of emergency orders to aggressively promote exclusively conservative ends has cast doubt on its impartiality, undermining its legitimacy**

has cast doubt on its impartiality, undermining its legitimacy. In the year that Justice Barrett has been on the Court, creating a conservative super-majority, the Court has issued seven emergency orders blocking state Covid restrictions. That is nearly twice as many as the four times combined the Court directly blocked state laws during the first 15 years of Chief Justice Roberts's tenure. Thus it is not surprising that justices Thomas and Barrett have found it necessary to give speeches insisting that the Court is not political, and Justice Alito has

responded harshly to critics of the Court's recent shadow-docket practices. By issuing summary rulings that effectively decide major matters of law and policy with scant briefing and no argument — and by issuing them exclusively to promote conservative causes — the Court may be seriously undermining its credibility.

On October 29, 2021, two conservative justices questioned use of the shadow docket. Voting not to block Maine's vaccine mandate for infringing on religious freedom, Justice Barrett, joined by Justice Kavanaugh, wrote that the "emergency docket" should not be used "to force the Court to give a merits preview in cases that it would be unlikely to take — and to do so on a short fuse without benefit of full briefing and oral argument." But on the same day, the Court stunned observers by announcing it would review a decision that the Trump administration had illegally rescinded the Clean Power Plan even though the Biden administration has no plans to revive it. Conservative judicial activism reigns. **TEF**