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WHAT DOES THE SCOTUS SHADOW DOCKET MEAN FOR APPELLATE PRACTITIONERS (AND THE COUNTRY)?

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WHAT STARTS HERE CHANGES THE WORLD

THE SHADOW DOCKET: INTRO

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. It 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 all these ways, the majority's decision is emblematic of too much of this Court's shadow-docket decisionmaking—which every day becomes more unreasoned, inconsistent, and impossible to defend. I respectfully dissent.

— *Whole Women's Health* v. *Jackson*, 141 S. Ct. 2494, 2500 (2021) (Kagan, J., dissenting)

"[T]he majority's decision is emblematic of too much of this Court's shadow-docket decisionmaking — which every day becomes more unreasoned, inconsistent, and impossible to defend."

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Today's decision is one more in a disconcertingly long line of cases in which this Court uses its shadow docket to signal or make changes in the law, without anything approaching full briefing and argument. Here, the District Court applied established legal principles to an extensive evidentiary record. Its reasoning was careful—indeed, exhaustive—and justified in every respect. To reverse that decision requires upsetting the way Section 2 plaintiffs have for decades—and in line with our caselaw—proved vote-dilution claims. That is a serious matter, which cannot properly occur without thorough consideration. Yet today

— *Merrill* v. *Milligan*, No. 21A375, 2022 WL 354467, at *8 (Kagan, J., dissenting); *id.* at *1 (Kavanaugh, J. concurring) →

← Justice Kagan returned to this theme in February in the Alabama redistricting cases, provoking a snarky rebuke from Justice Kavanaugh:

The principal dissent's catchy but worn-out rhetoric about the "shadow docket" is similarly off target. The stay will allow this Court to decide the merits in an orderly fashion—after full briefing, oral argument, and our usual extensive internal deliberations—and ensure that we do *not* have to decide the merits on the emergency docket. To reiterate: The Court's stay order is not a decision on the merits.

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THE SHADOW DOCKET: INTRO

"Recently, 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. <u>This portrayal feeds unprecedented efforts to intimidate the Court or damage it as an independent institution</u>."

— Justice Samuel Alito, Sept. 30, 2021

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PRESENTATION OUTLINE

1. What *is* the "shadow docket"?
2. Is Justice Alito right that this is simply the continuation of long-settled practices?
3. If there *is* something new here, what *is* it?
4. Are these new developments problematic?
5. What, if anything, can/should be done?

I. WHAT *IS* THE "SHADOW DOCKET"?

"Democrats are fond of concocting ominous terms like 'dark money' and 'shadow docket.'"

— **Sen. Ted Cruz** (R-Tex.), Sept. 29, 2021

Work at the Supreme Court is divided into two main categories. One is deciding the cases it hears on the merits: the 70-some cases each year that the court selects for extensive briefing, oral argument and a substantial written opinion, sometimes with dissents. These are the cases we hear about in the news.

The orders docket includes nearly everything else the court must decide — which cases to hear, procedural matters in pending cases, and whether to grant a stay or injunction that pauses legal proceedings temporarily. There are no oral arguments in these cases and, as in Mr. Warner's situation, they are often decided with no explanation.

This docket operates in such obscurity that I call it the "shadow docket." (I was a law clerk for Chief Justice John G. Roberts Jr. in 2008-9, but these views are solely mine.)

— **Will Baude**, *The Supreme Court's Secret Decisions*, N.Y. Times, Feb. 3, 2015, at A23

Title search: What does the SCOTUS Shadow Docket Mean for Appellate Practitioners (and the country)?

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