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"Exigency and Equity: A First-Principles Solution for the Supreme Court's Emergency Docket"

Remarks by Justice Ketanji Brown Jackson
Yale Law School James A. Thomas Lecture, New Haven, CT
April 13, 2026

INTRODUCTION

Thank you very much for inviting me to participate in this esteemed speakers' series.[1] I am delighted to have this chance to provide my thoughts about a topic that has recently burst into the public zeitgeist, generating a substantial amount of controversy. You have no doubt heard of an aspect of the Supreme Court's practice that critics sometimes refer to as the "shadow docket."[2] But even if you are not familiar with the part of that docket that involves the use of truncated procedures to evaluate emergency requests for interim relief, I would bet you are aware of the extremely consequential decisions the Court has made recently in cases that have come to us in this posture. Those rulings include declining to stop the executive branch's dismantling of the Department of Education[3] and its vacatur of hundreds of millions of dollars of research-grant funding;[4] allowing the government to misgender passport applicants;[5] and per-mitting roving ICE patrols to conduct race-based searches and seizures of Latino residents in Los Angeles.[6] Decisions on the emergency docket have also pre-vented the President from deploying the National Guard to Illinois over the objection of the Governor and without legal authority.[7] These are but some of many examples. But the point of this Lecture is to focus on the Supreme Court's "emergency docket" (my preferred term) as a whole—as a procedural mechanism—rather than on any particular case.

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1. For a recording of the live Lecture, see *James A. Thomas Lecture: Justice Ketanji Brown Jackson*, Yale L. Sch. (Apr. 15, 2026), https://law.yale.edu/yls-today/yale-law-school-videos/james-thomas-lecture-justice-ketanji-brown-jackson [https://perma.cc/CZW9-S3SA]. I would like to thank two of my law clerks for their vital assistance with this project: Gabrielle Dohmen, October Term 2025, and Ian Miller, October Term 2026.
2. The term "shadow docket" was first coined by University of Chicago Law School Professor William Baude. *See* William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & Liberty 1, 3-5 (2015); *see also* Steve Vladeck, The Shadow Docket, at xii (2023) (discussing the origin of the term "shadow docket"). Technically speaking, the shadow docket refers to a number of procedures the Supreme Court employs to resolve matters before it, including the Court's practice of sometimes summarily reversing the judgment of a lower court or granting certiorari to vacate and remand the case for reconsideration. *Id.* This Lecture only considers emergency applications, and, in particular, emergency applications for stays. When the term "shadow docket" is used pejoratively, most people seem to be reflecting on the Court's emergency docket (and I prefer the term "emergency docket" for reasons that will become clear by the end of this Lecture).
3. McMahon v. New York, 145 S. Ct. 2643 (2025).
4. NIH v. Am. Pub. Health Ass'n, 145 S. Ct. 2658 (2025).
5. Trump v. Orr, 146 S. Ct. 44 (2025).
6. Noem v. Vasquez Perdomo, 146 S. Ct. 1 (2025).
7. Trump v. Illinois, 146 S. Ct. 432 (2025).

And I would like to start by saying that I have come neither to praise the emergency docket nor to bury it. Instead, I want to provide what I hope will be a clarifying perspective that focuses on, first, what the emergency docket is (that is, what it is designed to do and its traditional function within the overall appellate framework); second, how, in my view, the Court's use of that docket has become problematic; and, third, what can be done to return the emergency docket to its original auxiliary role in the judicial process. I propose, first, that the Court impose a threshold criterion before intervening in a pending case in response to a stay request: we should demand that stay applicants show exigent circumstances that warrant the Court's attention. Second, when the Court evaluates an emergency stay application, it should focus on the equitable factors relating to real-world harms to the parties, leaving the question of likelihood of success on the merits of the legal issues to operate as a mere plausibility check on whether an otherwise-warranted stay should be granted. Those two innovations are, in my opinion, necessary to restore equity as the primary driver of the Court's emergency docket.

I. STAY REQUESTED ON THE EMERGENCY DOCKET, EXPLAINED

Let's start by defining the Supreme Court's emergency docket: at the most basic level, the emergency docket is one of several ways that the Court exercises its power to adjudicate cases and controversies under Article III of the Constitution. When I was a law clerk for Justice Stephen Breyer twenty-seven years ago, I remember conceptualizing the Court's case-related responsibilities as basically falling into three buckets: first, the merits rulings (those are the cases in which the Court has decided to grant certiorari review and hold oral argument); second, its decisions about which cases will get certiorari review; and third, applications for emergency relief. Being a Supreme Court law clerk was—and still is!—a lot like being one of those jugglers in a circus with three long poles that have plates spinning on top: your job is to not let anything drop!

In this Lecture, I am focused on the third plate: applications for emergency relief, a category that encompasses a wide variety of requests.[8] But the kinds of requests that have generated the most attention lately are those in which the Court is asked either to stay an injunction that a lower court has issued or to issue an injunction in the first instance. It is those requests that I am homing in

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8. Everything from an application for an injunction to prevent removal of a case to federal court, *see, e.g.*, Tepe v. Whirlpool Corp., No. 25A189, 2025 WL 2411745 (U.S. Aug. 20, 2025) (Kavanaugh, J., in chambers), to a request for a stay of extradition for criminal proceedings in another country, *see, e.g.*, Kanayama v. Kowal, No. 25A633, 2026 WL 598173 (U.S. Mar. 3, 2026) (Sotomayor, J., in chambers), is brought to the Supreme Court's attention via the emergency docket.

on today. And I think the most effective way to explain them is by means of an analogy—so, here it goes.

A.

Imagine two next-door neighbors, both of whom claim ownership of a back-yard shed that appears to straddle the line between their properties. They have been fighting about who owns this shed for years, but the battle escalates when one of them—let's call him "Neighbor *A*"—decides he wants to grow a vegetable garden on that plot and schedules a demolition team to come remove the shed. From one porch to the other, Neighbor *A* says casually to Neighbor *B*: "Oh—by the way, I'm starting a garden, so I've called some folks who will be here next Thursday to take down that shed." Lifting his eyebrows, Neighbor *B* grits his teeth and angrily responds: "I'll see you in court." (Now, I realize that this is not the kind of dispute that would make its way to federal court for jurisdictional reasons, but please go with it—I need a simple analogy.)

So, Neighbor *B* files his complaint a few days later, and in it, he makes a legal claim—namely, that the shed is on his property and thus he owns it. Because it is his, he says, he requests a declaration of ownership from the court. Also—and this is the important part for present purposes—because he knows that it will take a while to resolve this legal claim, he asks the court to issue a preliminary injunction that prevents Neighbor *A* from tearing down the shed while his claims are pending in this court.

Alright, so, you see what has happened: when Neighbor *B* comes to court, he makes two requests—first, judge, please tell everyone the shed is mine, and second, please prevent Neighbor *A* from tearing down the shed while you are evaluating my ownership claim. Those are two distinct requests, and from the court's perspective, they raise completely different issues. The first is a matter of law—that is, what does the law hold about which neighbor (*A* or *B*) is the rightful owner of the shed. The second is a matter of equity—what is the fairest way to proceed in the interim, while the merits of Neighbor *B*'s legal claims are being litigated. Should the shed be torn down, which would destroy Neighbor *B*'s claim but allow Neighbor *A* to move forward with his plantings? Or should it be left standing, which would preserve Neighbor *B*'s legal claim but would impose significant delay and perhaps additional costs on Neighbor *A*? With his request for a preliminary injunction, Neighbor *B* is essentially asking the court to take into account real-world facts on the ground and consider how both the parties might be impacted before the case is resolved.

Now, as many of you in this room know quite well, the district court will look at the applicable law and gather relevant facts to decide Neighbor *B*'s ownership claim as a matter of law. But there are very different standards that govern

the district court's resolution of Neighbor *B*'s request for a preliminary injunction. In a case called *Winter v. Natural Resources Defense Council, Inc.*, the Supreme Court explained that "[a] preliminary injunction is an extraordinary remedy never awarded as of right."[9] It also required courts to find four things to issue a preliminary injunction: that the requester 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."[10] You will hear me say this quite a bit: I cannot emphasize enough that a court uses its *equitable authority* to make this determination[11] and that this decision is fundamentally different from deciding the merits of the legal claim.[12] For the equitable decision at issue here, the court is looking at the facts on the ground to determine what should happen in the real world, *in the interim*, while the legal claims are being litigated.

B.

If you're still following me, let's suppose that the district court issues the preliminary injunction that Neighbor *B* requests, thus preventing the shed from being razed while the legal claim is under consideration. Neighbor *A* is disappointed, but he could, of course, accept this and promptly turn his attention to mounting his merits defense; he still has every opportunity to prove that he owns the shed, and he may very well be right about that in the end. But in the hypothetical I am building, Neighbor *A* is an impatient character: he is upset because he has already scheduled the demolition crew and really wants to move forward with his garden. His beef is not that he is going to lose the case; it's that he does not want to have to wait until the end of the case for his victory. So, rather than accepting this temporary pause to his gardening plan or even asking the court for an expedited ruling, Neighbor *A* goes to the court of appeals asking for review of the preliminary-injunction ruling. On top of that, he also asks for a stay of that injunction—a "stay" lifts an injunction, so if Neighbor *A* gets the

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9. 555 U.S. 7, 24 (2008).

10. *Id*. at 20.

11. *See, e.g.*, Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 318-19 (1999).

12. Equity requires that courts "loo[k] for justice on both sides of the suit and beyond." Peter Charles Hoffer, The Law's Conscience 14 (1990). When a court makes an equitable determination as to interim status, it is giving temporary relief based on a preliminary estimate of the strength of the case and a consideration of the equities. In making this determination, the touchstone is fairness. *See* Trump v. Orr, 146 S. Ct. 44, 48 (2025) (Jackson, J., dissenting from grant of stay). When a court decides the merits of a claim, on the other hand, it is conclusively determining who wins and who loses, who must pay whom, etc., based on who has the better of the arguments on the law.

stay, it would basically resolve the case because it would allow the shed to be torn down while the appeal is pending.[13]

This is where I need you to start paying attention, because Neighbor *A*'s stay request is the kind of ask that is at the heart of many of the controversial opinions the Supreme Court has recently issued. To repeat: granting a stay would suspend the preliminary injunction and allow the demolition crew to proceed apace, while denying the stay request would keep the injunction in place—the shed would continue to exist, and the parties would continue litigating about its ownership.

Thus, just like the district court before it, the court of appeals now has two determinations to make: one as to the merits of Neighbor *A*'s appeal and the other as to whether to stay the preliminary injunction pending the result of the appeal. A federal appellate court typically gets its power to issue a stay from a statute called the All Writs Act.[14] The All Writs Act authorizes federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law,"[15] and thus gives the appellate court equitable discretion to determine whether to lift a ruling that a lower court has made. The courts of appeals often use this authority to ensure that nothing happens in the real world to extinguish an eventual appeal.[16]

The Supreme Court has also long recognized that "[t]he authority to grant stays has historically been justified by the perceived need 'to prevent irreparable injury to the parties or to the public' pending review."[17] So, traditionally, the crux of the stay inquiry is determining what would be "fair and right" while litigation is proceeding.[18] The Supreme Court standardized the stay determination in a case called *Nken v. Holder*, requiring courts of appeals to determine four factors: "(1) [W]hether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured

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13. And, of course, Neighbor *A*'s interaction with the court of appeals follows the procedurally required request to the district court to stay its own injunction. *See* Fed. R. App. P. 8(a)(1).

14. When the Court issues a stay from a final judgment or decree, it can rely on 28 U.S.C. § 2101(f) (2024). But when the Court is staying an interlocutory decision, like a decision to issue a preliminary injunction, it is not able to rely on that statute.

15. 28 U.S.C. § 1651 (2024).

16. *See, e.g.*, SEC v. Janvey, 404 F. App'x 912, 916 (5th Cir. 2010) (noting the importance of stays pending appeal because "[i]f proceedings are not stayed, then an event may occur while a case is pending appeal that makes it impossible for the court to grant any effectual relief"); *see also* SEC v. Daspin, 557 F. App'x 46, 49 (2d Cir. 2014) ("A stay may be used to preserve a possibly meritorious appeal.").

17. Nken v. Holder, 556 U.S. 418, 432 (2009) (quoting Scripps-Howard Radio v. FCC, 316 U.S. 4, 9 (1942)).

18. *Equity*, Black's Law Dictionary 679 (12th ed. 2024).

absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies."[19] If those factors sound familiar, they should—they are essentially the same ones that courts use to determine whether a preliminary injunction should issue in the first place.[20]

C.

For present purposes, please assume that the court of appeals decides *not* to issue the stay that Neighbor *A* requests—because, for example, Neighbor *B* would obviously suffer irreparable harm if the shed is torn down before his law-suit is resolved, and Neighbor *A* hasn't shown he would suffer any harm if the stay is imposed—that is, he hasn't offered any reason why he needs to build this garden *now*. So, the stay request is denied, the injunction remains in place, and one might think that would be the end of the story.

But wait—there's more. Under Supreme Court Rule 22, if a court of appeals denies a stay, the aggrieved party (Neighbor *A* in my hypothetical) can go immediately to the Supreme Court and ask *it* to grant the stay.[21] Please do not miss the fact that, when Neighbor *A* goes to the Supreme Court under this rule, significant portions of the dispute are still pending in the lower courts: the district court still has the merits question of who owns the shed, and the court of appeals still has the appeal of the district court's grant of the preliminary injunction pre-venting Neighbor *A* from tearing down the shed while the merits claims are being resolved. But Neighbor *A* is undaunted: with Rule 22 in hand, he asks the Supreme Court of the United States to enter the fray.

Let me pause here for a moment to provide the nuts and bolts of what hap-pens internally when a stay request is filed with the Supreme Court. Parties who want a stay or an injunction from the Court file an "application" requesting that relief.[22] The applicant typically argues that the stay or injunction is urgent because they are experiencing harm either directly from the lower court's ruling or from a real-world consequence that the lower courts have allowed to take place.

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19. *Nken*, 556 U.S. at 434.

20. *See supra* notes 9-10 and accompanying text.

21. Sup. Ct. R. 22(1) ("An application addressed to an individual Justice shall be filed with the Clerk, who will transmit it promptly to the Justice concerned if an individual Justice has authority to grant the sought relief."); *see also* Sup. Ct. R. 23(1) ("A stay may be granted by a Justice as permitted by law.").

22. Note that the filing of a petition for certiorari does not automatically operate as a stay with respect to the execution of the judgment below. *See* Stephen M. Shapiro, Kenneth S. Geller, Timothy S. Bishop, Edward A. Hartnett & Dan Himmelfarb, Supreme Court Practice § 17.3 (11th ed. 2019).

The application is addressed to a single Justice: the one who has been assigned as the Circuit Justice for the region from which the matter originates.[23] And the Circuit Justice can either handle the application within her chambers (yes, each Justice has the power to issue stays) or refer the application to the full Court for consideration.[24]

If the application is referred to the entire Court, a truncated decision process follows, and a cursory order usually results. It is not uncommon for the Supreme Court to rule within a few weeks, and to enter a one-line order that simply says, "The application for a stay presented to Justice *X* and by her referred to the Court is [granted or denied]." There is no requirement or expectation that the parties will engage in a full round of briefing, and the Court does not ordinarily schedule oral argument. Still, to decide the stay question, the Court applies the same four *Nken* factors I have described, and it also sometimes considers whether it is likely certiorari review would be granted if the case had been brought to the Court in the usual course.[25]

D.

Those are the basics of how a stay request gets to the Justices' inboxes. Here are three more background considerations before I discuss how the Court's re-view of stay requests has been operating recently, why I think it's problematic, and the solutions I would offer to try to get it back on track.

First, you might be surprised to know that the composition of the Court's emergency docket (that is, the types of stay requests that have predominated) has changed in recent years. When I clerked in October Term 1999, the overwhelming majority of stay requests were filed by criminal defendants in capital cases. In fact, requests for stays of execution were so prevalent that we equated them with the emergency docket itself—the law clerks colloquially referred to the staff attorney who monitored all emergency-docket filings as the "death clerk." A Justice might occasionally receive a stay request in a noncapital case, but

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23. *See* Daniel M. Gonen, *Judging in Chambers: The Powers of a Single Justice of the Supreme Court*, 76 U. Cin. L. Rev. 1159, 1172-73 (2008).

24. *See* Sup. Ct. R. 22(3), (5); Gonen, *supra* note 23, at 1173.

25. *See, e.g.*, Does 1-3 v. Mills, 595 U.S. 1029, 1029 (2021) (Barrett, J., concurring in denial of application for injunctive relief) (explaining that the *Nken* factors encompass "a discretionary judgment about whether the Court should grant review in the case" (first citing Hollingsworth v. Perry, 558 U.S. 183, 190 (2010) (per curiam); and then citing Sup. Ct. R. 10)); Labrador v. Poe, 144 S. Ct. 921, 931 (2024) (Kavanaugh, J., concurring in grant of stay) (agreeing that "the Court can and should take care to focus on certworthiness when considering emergency applications"). *But see Poe*, 144 S. Ct. at 924 (Gorsuch, J., concurring in grant of stay) (suggesting that certworthiness is unhelpful).

the bread and butter of the emergency docket were matters of life and death, as was the norm for most of the Court's history.[26]

Fast forward to October Term 2024. In that year, the Court decided many more noncapital emergency applications than capital-case stay requests, and the number of noncapital stay applications that were referred to the full Court was nearly five times greater than what it had been two-and-a-half decades before.[27] There has been a clear shift in the kinds of emergency applications the Court is entertaining, and I think that is significant for myriad reasons—one of which is that it makes eminent sense for stays *of execution* to be addressed by the Court on an emergency basis. Those requests are quintessential "emergencies": a capital defendant seeking a stay of his impending execution cannot wait for his claims to be handled by the Supreme Court in the ordinary course. Moreover, as far as the stay factors are concerned, irreparable harm to the capital defendant is a given, so much of the focus of the stay inquiry in capital cases is on the defend-ant's merits arguments. The factors play out differently in other kinds of cases, because they rationally involve an assessment of the concrete harms that
applicants say warrant interim relief.

Second, and this will be obvious given the first point: Not all stay requests are the same. And it is critical to understand how the underlying facts—and, thus, the basis for granting or denying a stay—can differ.

Consider once again my feuding-neighbor analogy. Neighbor *B* ran to court and successfully secured a preliminary injunction to keep the shed from being torn down while his claims were pending. Under those circumstances, the stay question was whether to lift that injunction and allow the shed to be destroyed. But imagine a different set of facts: instead of Neighbor *B*, Neighbor *A* goes to court, requesting a declaratory judgment that *he* is the owner of the shed, and asking for a preliminary injunction that allows him to remove the shed at his discretion. If the district court grants Neighbor *A* that interim relief, the stay request would be made on appeal by Neighbor *B*, who would want that

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26. Just to put a finer point on this: in October Term 1999, my clerkship year, for example, 130 death-penalty stay applications were filed (this was a bit unusual; we later learned that the number of executions in calendar year 1999 was the highest for any year since the death penalty was reinstated in 1976). *See The Death Penalty in 1999: Year End Report*, Death Penalty Info. Ctr. (Dec. 1, 1999), https://deathpenaltyinfo.org/research/analysis/reports/year-end-reports/the-death-penalty-in-1999-year-end-report [https://perma.cc/Z6BX-UR7Z]. Compare that to the number of noncapital-case emergency-docket applications that were referred to the full Court that year: only thirteen. *See* October Term 1999 Emergency Application Data (on file with Robert Meek, III, Emergency Applications Clerk, U.S. Sup. Ct.).

27. In October Term 2024, the Court decided only forty-one capital emergency applications and thirty-five noncapital dispositions happened in chambers, but sixty-three noncapital emergency applications were referred to the full Court. *See* October Term 2024 Emergency Application Data (on file with Robert Meek, III, Emergency Applications Clerk, U.S. Sup. Ct.).

injunction lifted in order to keep the shed intact. Notice that when the district court's preliminary injunction is the impetus for the shed's destruction, granting Neighbor *B* a stay on appeal would *preserve* the status quo. But the opposite result occurs if (as in my original hypothetical) the district court enjoins destruction of the shed. Then, issuing a stay on appeal *upsets* the status quo. Knowing the procedural history of a stay request is key to understanding how the equities play out.[28]

Third and finally for this background portion, in my experience, the equities are rarely a wash. Recall that the point of the underlying merits proceeding (which is still pending in the district court) is to determine who owns the shed as a matter of law. With respect to the separate request for interim relief, the focus is quite different—the court must make an equitable determination about where things should stand in the interim (should the shed exist or not) while that merits claim is being litigated. Thus, what the courts are looking for when deciding what the interim status should be is evidence of and arguments about any concrete, real-world injuries that might result from the delay caused by the course of the litigation over the ownership issue. The court is a neutral adjudicator—it does not know who has the better legal argument walking in the door. But it *does* know that fully and fairly deciding that issue takes time. So, for equity's sake, the goal of the court's interim-relief assessment is to minimize the harms that can occur while the underlying legal claim is being evaluated.

In my hypothetical, Neighbor *B* would have a strong harm-based argument that tearing down the shed while the case is being litigated qualifies as irreparable harm and that this harm outweighs the harm to Neighbor *A* if the scheduled demolition is cancelled. Neighbor *A* might have a harm-based argument too, if, for example, he were able to demonstrate that a concrete injury would result from his inability to plant the seeds right now as he had hoped (like, say, he is hosting a party in a couple of months, and he needs the resulting harvest). But Neighbor *A* cannot just say, "I am harmed by this injunction because I am going to win on the merits, since I am the actual shed owner."[29] Sorting through the real-world facts and figuring out the harm-based allegations is what the interim-relief determination is all about.

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28. There is a significant difference between staying a case that preserves the status quo and staying a case that changes the status quo. Contrasting requests from the Biden Administration and the Trump Administration make that clear. For example, the drug mifepristone had been widely available before a district court enjoined its continued approval by the FDA. *See* All. for Hippocratic Med. v. FDA, 2023 WL 2913725, at *2 (5th Cir. Apr. 12, 2023). The Fifth Circuit stayed the portion of the district court's order that had suspended the FDA's original approval, returning to the status quo under which mifepristone was widely available. *Id.* at *1. On the other hand, in cases such as *Department of Education v. California* and *NIH v. American Public Health Ass'n*, the lower courts maintained the status quo by keeping existing government-funding grants in place. *See* Dep't of Educ. v. California, 604 U.S. 650, 650 (2025) (per curiam); NIH v. Am. Pub. Health Ass'n, 145 S. Ct. 2658, 2659 (2025). It was the Supreme Court's decision that changed the status quo in these cases, where the equities clearly favored *keeping* the status quo. *See California*, 604 U.S. at 654 (Jackson, J., dissenting); *Am. Pub. Health Ass'n*, 145 S. Ct. at 2668 (Jackson, J., concurring in part and dissenting in part).

II. THE SUPREME COURT'S RECENT STAY PRACTICES

I have given you a lot of background. So, now let's turn to how the Supreme Court has been handling stay requests in noncapital emergency-docket cases lately, and why I think its current practices are problematic.

A.

The first thing I want to highlight in this regard is the relatively unique nature of the Supreme Court's jurisdiction, and, in particular, the fact that, with the exception of a handful of matters, the Supreme Court has discretion over the cases it hears—indeed, its jurisdiction is *highly* discretionary.[30] You might think, "well, people are *filing* stay applications, so surely the Court has to rule on them." But, actually, that is not the case, at least not as to the merits of those stay re-quests. Unlike the lower courts, which are required to make substantive determinations with respect to any request, claim, or issue brought to them (they have no choice), the Supreme Court can decide *not to decide*, and it does so all the time. Certiorari is the perfect example. A party that loses in the lower courts files a petition that essentially pitches to the Supreme Court the reasons why it should hear their case. There is no expectation that the Supreme Court will take up the matter, and we routinely decide not to do so for reasons that have nothing to do with our view of the correctness of the lower court's ruling. The Court has traditionally used its certiorari discretion strategically—to advance its institutional interests.

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29. This is so even if, instead of feuding neighbors, the challenged action is an executive order and the actor is a government official who claims to be proceeding consistent with the law. The government is, of course, not irreparably harmed whenever it is stopped from doing whatever it wants. *See* Trump v. Cook, 146 S. Ct. 2234, 2259 (2026) (Jackson, J., concurring) ("The thought that the President suffers a comparable level of harm simply because he is temporarily unable [to act as he wishes] is 'facially absurd.'" (quoting Dep't of Homeland Sec. v. D.V.D., 145 S. Ct. 2153, 2159 (2025) (Sotomayor, J., dissenting from grant of stay))); Trump v. Orr, 146 S. Ct. 44, 51 (2025) (Jackson, J., dissenting from grant of stay) (noting that it is "far-fetched" to contend "that the President must be injured whenever he is prevented from doing as he wishes" (citing *D.V.D.*, 145 S. Ct. at 2158-60 (Sotomayor, J., dissenting from grant of stay))). And even if it were, the point of the stay inquiry is to *balance* the equities. Of course, when the government is litigating, the Court has indicated that the equitable factors may need to be treated differently, as the balance of the equities and the public interest might be focused on broader concerns. *See, e.g.*, Nken v. Holder, 556 U.S. 418, 435 (2009).

30. *See* Vladeck, *supra* note 2, at 27-59 (discussing the history of the Court's certiorari discretion).

For example, the Court simply declined to hear cases related to the scope or legal status of the Vietnam War because it wanted to avoid wading into hot-button issues.[31] It also sometimes waits to hear an issue to permit percolation in the lower courts before weighing in on a topic.[32]

Stay requests are substantially similar: they are discretionary asks that the Court could absolutely treat in that same fashion. When a party to litigation that is pending in the lower courts seeks a stay of an interim order the lower court has issued (think Neighbor *A*), the Supreme Court could reach the merits of that stay request, granting or denying it substantively, or it could conclude that there are already enough irons in this fire, and unless there is a real need to add another one, the lower courts can make the interim-status determination. In other words, the Court might simply decline to exercise its power to entertain the ap-plication, thereby allowing the lower court's stay decision to stand—sometimes discretion is the better part of valor. And, indeed, there is a long track record of Justices opting out of making *substantive* stay decisions in precisely this manner; historically, it happened most often when a single Circuit Justice would deny a stay request in chambers because they saw no urgent need for the Court to get involved. Justice Scalia was known for doing this—for example, he once wrote that, when two lower courts had already denied a stay request, the applicant bore "an especially heavy burden" to secure one from the Supreme Court.[33]

B.

But in recent years, the Supreme Court has taken a decidedly different approach to addressing emergency stay applications. It has been noticeably less re-strained, especially with respect to pending cases that involve controversial matters. When I clerked, the Justices were aware of the high-profile, hot-button issues that were moving through the lower courts, but they hoped those cases would stay away from the Supreme Court for as long as possible—they did not view stay applications as an opportunity to enter the arena as de facto superintendent. I think the Justices understood that very little good comes from taking an institution that is supposed to be operating outside of the political realm and routinely steering it into the fray. There is value in *avoiding* having the Court

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31. *Id.* at 53-54.

32. *Id.* at 61-82.

33. Edwards v. Hope Med. Grp. for Women, 512 U.S. 1301, 1302 (1994) (Scalia, J., in chambers) (quoting Packwood v. Senate Select Comm. on Ethics, 510 U.S. 1319, 1320 (1994) (Rehnquist, C.J., in chambers)).

continually touching the third rail of every divisive policy question in American life.

Back then, the Justices also revered the work of their lower-court brethren. They understood how important it was to have firmly established factual records and fully developed lower-court opinions before the Supreme Court sat down to do its work. The high court is, after all, "a court of final review and not first view," as we are fond of saying.[34] And, of course, as final as the Supreme Court is, it does not, and cannot, know everything. So, back then, the Justices humbly waited until the facts were established and the lower courts had fully and fairly assessed the law before making pronouncements. It was only in exigent circum-stances—actual emergencies—that they felt the need to intervene in pending cases, much less use their extraordinary power to revise a lower court's fact-bound determinations about the most equitable interim status of a case.

Things are different now. Today, the Court routinely opts to enter the fray. And it fails to acknowledge the harms that follow when the Supreme Court of the United States consistently and casually divests the lower courts of their equitable authority in this way. In the most high-profile cases—I am talking now, specifically, about legal challenges to executive orders and administrative actions—the Court's modern stance as it relates to stay requests generally plays out as follows.

The federal government will announce a dramatic change to an existing government policy or program—one that, on its face, will have enormous real-world impacts when it is implemented. Consider, for example, the Department of Homeland Security's March 2025 termination of the lawful parole status of nearly half a million migrants from conflict-ridden countries who had been granted temporary permission to live and work in the United States.[35] In the old days, the administration might have set the effective date of this policy change off by some months into the future. But, recently, the government has seen fit to make many of its sweeping policy changes effective immediately.[36] So, naturally, those who are affected run to federal court to try to stop the immediate implementation of that new policy. And, just like my hypothetical judge adjudicating the dispute between the feuding neighbors, the district court then has to determine

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34. Zivotofsky *ex rel.* Zivotofsky v. Clinton, 566 U.S. 189, 201 (2012) (quoting Adarand Constructors v. Mineta, 534 U.S. 103, 110 (2001) (per curiam)).

35. *See* Termination of Parole Processes for Cubans, Haitians, Nicaraguans, and Venezuelans, 90 Fed. Reg. 13611, 13611-12 (Mar. 25, 2025).

36. *See id.* at 13611 (stating that the parole programs were being terminated the same day that the notice was published); Noem v. Doe, 145 S. Ct. 1524, 1527 (2025) (Jackson, J., dissenting from grant of stay) (noting that the Department of Homeland Security "does not establish an urgent need to effectuate blanket [] parole terminations *now*, before courts can determine whether that en masse agency action is lawful").

both the lawfulness of that policy change and—sometimes within hours—whether to enjoin the implementation of that new policy until its lawfulness can be determined.

To decide the injunction issue, the district judge homes in on the facts, as equity requires, asking both sides what is likely to happen if the policy change is halted versus if it is allowed to take immediate effect. From the challengers, for example, he asks for proof of how and to what extent immediate implementation will impact them. And from the administration, he asks for evidence establishing the harms that will occur if the government is not allowed to implement this new policy now. This inquiry into real-world effects lies at the heart of the judge's duty to balance the equities and set the interim status so as to minimize the harms to all concerned. If you take away one thing from this Lecture, let it be this: that the preliminary-injunction and stay determinations are about the fair-ness of the immediate implementation of a challenged action. Thus, the proper evaluation strives to identify and balance out the relative harms.[37]

Yet, somehow, in case after case, the modern Supreme Court has ignored this, focusing largely on the merits, and thereby facilitating real harm to real people and their interim interests.[38] In the case I mentioned involving the Department of Homeland Security's immediate termination of discretionary immigration parole, even though the district court had carefully explained why it was less harmful and more equitable to prevent immediate implementation of the new parole-termination policy, and the court of appeals agreed, the Supreme Court summarily granted the government's stay application.[39] Without explanation, the Court thus unleashed "social and economic chaos" as half a million people were suddenly put at risk of losing their legal status overnight.[40] And we *still* don't know what harm would have befallen the government or the public if the Administration had simply been made to wait for the courts to review its new

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37. Indeed, it cannot be that the Executive is irreparably harmed any time its policy initiatives are delayed. The entire point of the underlying proceeding is to determine the lawfulness of the challenged action. It boggles belief that the Executive would be irreparably harmed by not doing something that is unlawful. Importing the merits into the harm analysis and making the harm turn on the merits is to collapse the analysis in a way that cannot make sense. In-stead, the point is that the Executive should be pointing to something in the real world, such as impacts to its operations or some other loss, to explain how it is harmed. The harm cannot just be delay of effecting a desired policy.

38. *See, e.g.*, Trump v. Orr, 146 S. Ct. 44, 46 (2025); Noem v. Nat'l TPS All., 146 S. Ct. 23, 23 (2025); *see also Nat'l TPS All.*, 146 S. Ct. at 26 (Jackson, J., dissenting from grant of stay) (drawing attention to the disruptive and harmful effects of the Court's decision to grant the stay application).

39. *Noem*, 145 S. Ct. at 1524 (granting a stay); *id.* at 1527-28 (Jackson, J., dissenting from grant of stay) (noting the district court's discussion of the relative harms to both parties).

40. *Id.* at 1527 (Jackson, J., dissenting from grant of stay).

policy and confirm its lawfulness before potential harms were inflicted on those migrants and their families.

In short, the Supreme Court's predominately merits-focused analysis has led it to consistently ignore—or at least undervalue—real-world harms when resolving stay requests on our emergency docket.

C.

Let me turn now to specific problems that the Court's stay practices have caused. There are many, but here I will quickly highlight three that I find particularly significant.

1.

The first is the corrosive effect of the Supreme Court's stay-related interventions on standard litigation and appeals practices, especially when the Court purports to grant a stay on the basis of the applicant's likelihood of success on the merits. Our federal justice system is structured around a fairly simple concept: there are tiered layers of review, and each court exercises jurisdiction in seriatim—one court at a time.[41] A corollary to this is that the circumstances under which the same case can be considered by more than one court simultaneously are supposed to be few and far between; indeed, we have a complicated set of rules that establish exactly when a party with a case pending in one court can obtain interlocutory review.[42] And for the most part, courts of appeals simply have to wait for the trial courts to finish before exercising *their* power to consider issues in a case.[43]

This means that stay requests are an anomaly—they really do show up as exceptions to the usual order of operations. And like many exceptions, there is a risk they will swallow the rule. You can see this by thinking back to Neighbors *A* and *B*. If the Supreme Court steps in and gives Neighbor *A* a stay based on its conclusion that he is, in fact, the likely owner of the shed, what then remains of the underlying ownership dispute? I mean, really, what is left for the lower courts to do? I suppose the district court could carry on, reviewing the evidence and listening to arguments about an issue that the Supreme Court has already

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41. *See* Griggs v. Provident Consumer Disc. Co., 459 U.S. 56, 58 (1982).

42. The Court has repeatedly said that interlocutory appeals "are the exception, not the rule." Johnson v. Jones, 515 U.S. 304, 309 (1995); *see also* Coopers & Lybrand v. Livesay, 437 U.S. 463, 476 (1978) (discussing the importance of preserving the "appropriate relationship" be-tween district and appellate courts via the final-judgment rule).

43. *See* Coinbase, Inc. v. Bielski, 599 U.S. 736, 740 (2023) ("[T]he usual rule [is] that parties may not appeal before final judgment.").

basically decided. But it is hard to fathom that our justice system would countenance preordained outcomes following from zombie proceedings in this way. When based on the merits, Supreme Court stays effectively take all of the wind out of the sails of the pending lower-court proceedings, which is a terrible result and, even more importantly, is not how our justice system is designed to work.

Nor is it conceivable that, as the Court has recently suggested, its rulings on stay applications should "inform how a [lower] court should exercise its equitable discretion in like cases."[44] Does that mean that the lower courts should forget what equity requires of them and refrain from making nuanced assessments of the particular harm-related facts that arise in individual cases? The Court has now puzzlingly suggested that equitable fairness assessments can be precedential, which, for the reasons I've explained, is not and cannot be the case. So, the Court has left confusion in its wake. And it offers little guidance because it does not ordinarily spell out the circumstances giving rise to its own equities evaluations, making it incredibly difficult for lower courts to understand *which* facts were important to the stay determination and thus to identify "like cases."[45]

But even *that* debate obscures a more fundamental issue: it simply does not make sense for the Supreme Court to create lock-in effects with respect to legal issues while deciding emergency stay applications. As I noted before, the point of an emergency application is just to avoid the real-world harms that can come from litigation delay—having lock-in effects regarding who will win on the merits is not the mission. Nor can it be because, as I explained earlier, not all stay decisions are the same. Consequently, it is one thing for the Supreme Court to entertain a stay application early in a case's litigation life cycle and publish its back-of-the-envelope, first-blush impressions of the merits of the legal issues. It is quite another for the Court to then insist that those scratch-paper musings be applied by other courts in other cases, stymieing the full deliberative process.

Thus, there is a serious concern that the Supreme Court's modern stay practices are having an enormously disruptive and potentially corrosive effect on the functioning of the federal judiciary's usual decision-making and review process.

2.

The second concern is the potential for dilution of equal-justice principles. The emergency docket is a procedural outlier that is operating in a system where the core objective is to ensure that all litigants receive equal treatment. Courts

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44. Trump v. Boyle, 145 S. Ct. 2653, 2654 (2025).

45. *Id.*

have a duty to provide "equal justice under law."[46] And achieving that goal hap-pens largely by design. We have one Supreme Court that is the final arbiter of legal disputes that arise under federal law, and that Court has standard procedures that apply across the board, regulating its decision-making.

We also have a standard practice for obtaining Supreme Court review: an aggrieved party prepares a petition for a writ of certiorari, files it in a timely fashion, and waits in line for the Court to address it. Thousands of petitions are filed in this fashion every term. There are certainly emergencies, and our system does need to have a mechanism that allows the Court to address exigent circum-stances. But if we are not careful, the emergency docket can and will become an end run around the standard review process—a special avenue that certain privileged litigants can utilize selectively.

Think about that for a moment. Why is it that Neighbor *A* should get a fast pass to having the Supreme Court of the United States opine on the merits of his ownership dispute when so many other parties are queued up waiting patiently for the Court's attention? Is there a reason why *he* warrants this special treatment? Why can't Neighbors *A* and *B* finish litigating in the lower courts and then come stand in line for Supreme Court review like everybody else? My worry is that Neighbor *A* has spotted a strategic advantage—through the emergency docket, he can get two bites at the apple. If the Court denies the stay he wants, he'll just go back and litigate below, and then return to the Court later, in the ordinary course. For savvy parties who have the money and the wherewithal, there really is no disincentive to doing that. Savvy parties are also more likely to *know* about this shortcut to a potential early resolution and can seek to position their claims and arguments accordingly. As one of my colleagues recently suggested in an opinion, while other litigants have to wait in line, some frequent emergency-docket filers have the Court on "speed dial."[47]

With its unfettered approach to emergency stay applications, the Court ap-pears to have opened up more than one lane to get to essentially the same result—having the final arbiter rule on the merits of the underlying claims. And the alternative path is a much easier row to hoe, both for litigants and the Court, since there are no procedural requirements ensuring regularity or transparency with respect to rulings on the emergency docket. In my view, then, having a so-called "interim relief" docket that enables sophisticated parties to vet live legal claims that are proceeding in the lower courts is a threat to equal justice under law. For some parties, the Court now offers a merits-ruling "preview"—they can skip to

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46. Indeed, that phrase is the only thing inscribed above the Supreme Court's front entrance. *See The Court and Constitutional Interpretation*, U.S. Sup. Ct., https://www.supremecourt.gov/about/constitutional.aspx [https://perma.cc/YS9U-9DUN].

47. Dep't of Homeland Sec. v. D.V.D., 145 S. Ct. 2627, 2633 (2025) (Sotomayor, J., dissenting).

the front of the line and the Court will take a peek at the merits and provide its take before the lower courts have acted. But, of course, this special opportunity will not and cannot be offered in an evenhanded fashion. So, instead of equal justice under law, the likely outcome is a patently inequitable procedural hybrid: the standard (slow and deliberate) review process for some claimants, operating alongside a fast lane to victory for others.

3.

Third and finally, I am very troubled by the institutional costs that the Supreme Court's current stay practices impose on the institution in terms of its relationships with the lower courts and the American people. These costs are substantial.

To start, having a docket that allows the Court to routinely interfere with lower-court cases while they are in progress disrespects the lower courts' authority and withholds the deference appellate courts have traditionally provided regarding fact-bound matters that are within a trial court's expertise. In addition, the Court is withholding its own work product by issuing summary orders, further undermining the public's confidence in our judicial colleagues. A one-line stay grant that overturns a lower court's contrary conclusion suggests that the judgment call was such an "easy" one that no real deliberation or explanation is required. And *that* suggestion casts aspersions on the tedious work that our col-leagues have done to carefully parse the evidence, weigh the various factors, and exercise their considerable equitable discretion.

Summary stay orders on the emergency docket are also costly in terms of the Court's relationship with the public. The Supreme Court's power comes from its reasoning, so it really does need to inform the public as to why it has decided to chart a particular course. Issuing important decisions in such a cursory manner disrespects not only the people whose lives are upended by the Court's rulings but also the public that has given it trust and authority.

And then there is the fact that significant real-world harms can follow Supreme Court stay rulings, and when our orders do not acknowledge that reality, they seem oblivious and thus ring hollow. Similarly, given the real-world facts that a stay request asks the Court to consider—recall the harm-minimizing in-junction that Neighbor *B* sought and that Neighbor *A* seeks to destroy via stay—the Court's stay decisions can, at times, come across as utterly irrational. We can-not expect the public to have faith in our judicial system if, without clear explanation, we consistently green-light harmful acts that do real damage to litigating plaintiffs without a court decision fully and fairly determining the lawfulness of that challenged conduct on the merits. A litigant can do all that our justice system requires to promptly bring the case to court, to name the law at issue, and to

gather the evidence needed to persuade a judge or jury that the challenged con-duct violates the law. And *still*, if our Court permits the harm to happen in the interim, that person gets no remedy and our legal process is reasonably perceived to be a farce. That outcome is not only unfortunate; it is the archetype of *in*justice. And, indeed, avoiding injury is precisely why equitable power and interim injunctive relief exist in the first place.

III. EXIGENCY AND EQUITY: A SOLUTION

In this remaining Part, I bring the good news. Having now identified the problems, I am confident that my Court can easily avoid them—here's how. I propose that we return to and rely upon first principles related to restraint and equity. As explained below, the Court should (1) require applicants to show exigent circumstances before entertaining a stay request, and (2) prioritize equitable considerations when conducting the stay assessment.

A.

When the Court gets a stay request, we should remember, first of all, that there is an underlying lawsuit, the entire point of which is to resolve the merits of the legal claim. The temporary injunction and stay proceedings are merely auxiliary; they are not supposed to be the main event. Similarly, we should recall that the lower courts have a substantial role to play in the fair and full adjudication of the primary dispute, and they should generally be allowed to carry out their duties without our interference.

We should also understand what equitable discretion is and, importantly, how it differs from law. Equity is rooted in fundamental fairness, which is the goal of interim relief. Wisely exercising equitable discretion involves evaluating *facts*—including assessing the credibility of witnesses and weighing disparate assertions—things that appellate courts really are not well equipped to do. That is to say, as a matter of first principles, we should have some humility about stay determinations.

And, although it will be hard, we *can* patiently await our turn to exercise our discretion, as respect for the judicial process requires. Litigating parties need to be encouraged to make their case at every stage of the litigation, *not* to run back and forth to the courts of appeals anytime the lower court does something they don't like. Yes, stay processes exist, but they are inefficient and distracting, and as I've explained, absent an emergency, they are ultimately incompatible with

how our system works best.[48] The most reliable outcomes happen when the par-ties focus on developing the factual record, crafting their best legal arguments, and trying to persuade the lower courts to rule in their favor before seeking our review. And, ultimately, the Justices need to return to acting like the final court of review that the Supreme Court holds itself out to be; this is not a novel concept—our predecessors called it "judicial restraint."[49] We don't hear about that much anymore. I think it's time to bring it back.

B.

So here is a specific proposal—it has two parts, both of which are relatively straightforward.

1.

First, when someone asks the Supreme Court for a stay, we should impose a threshold criterion that will allow us to neutrally ascertain whether or not to intervene. Having this initial hurdle is both a first-principles concern (restoring restraint and discretion) and also a resources issue: the Supreme Court *cannot* involve itself in real-time supervision and correction of every lower-court exercise of equitable discretion—we simply do not have the resources to do that.[50] So, if the Court is going to step in sometimes, we need to know *when*—we need a threshold criterion that is neutral and consistently applied.

My proffer is, you guessed it, *exigency*, as derived from the traditional purpose of the emergency docket. Exigency not only rationally justifies our early intervention, it also helpfully ensures we rarely exercise this power.

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48. Many Justices discouraged stay requests, noting that there was "an especially heavy burden" to granting such relief. *See* Edwards v. Hope Med. Grp. for Women, 512 U.S. 1301, 1302 (1994) (Scalia, J., in chambers) (quoting Packwood v. Senate Select Comm. on Ethics, 510 U.S. 1319, 1320 (1994) (Rehnquist, C.J., in chambers)); *see also* 96 Cong. Rec. app. at 3750, 3751 (1950) (statement of Rep. Franklin D. Roosevelt, Jr.) (providing the text of Justice Robert H. Jack-son's statement regarding the Court's grant of stay in United States *ex rel*. Knauff v. Shaughnessy, 338 U.S. 537 (1950), where he asserted, "As circuit justice for the second circuit, it is my almost invariable practice to refuse stays which the court of appeals or its judges have denied. This is because they are closer to the facts, have heard the merits fully argued, and because I have confidence that they would grant stays in worthy cases").

49. *See, e.g.*, John Paul Stevens, *Judicial Restraint*, 22 San Diego L. Rev. 437, 446-52 (1985).

50. I am not saying there are not little fires everywhere; I am saying that the nine of us cannot possibly serve as the entire nation's frontline firefighter. Indeed, this reality was a large part of why the Court originally needed the power to decline to hear cases through use of the writ of certiorari. *See* Vladeck, *supra* note 2, at 27-60 (describing the Court's growing caseload in the early twentieth century and the Court's corresponding need to exercise discretion over its docket).

And it reasonably focuses on facts: we'd be looking at the outset for a fact-based reason to step into this matter now. That the applicant is a high-level government official or the case presents important issues is simply not enough. Rather, any and all stay applicants would need to show that something harmful will happen in the real world absent the Court's intervention, thereby demonstrating urgency.[51] So, hypothetically, when Neighbor *A* requests a stay, the Court would start by asking a very simple question: "What are you doing here?" That is, what is so urgent that all nine Justices and their staffs have to put down what they are working on and turn to address *your* case? The right answer is not "well, the district court is making a mistake," or "I am going to win on the merits," or even "I really want to build this garden now, before the case is over." Neighbor *A* needs facts on the ground that indicate impending harm or some other reason why he simply cannot wait until the lower courts are done.[52]

2.

The second prong of my proposal involves restoring the role of equity in cases that are filed on our emergency docket. Once an applicant has established exigency, in my view, the only remaining question is whether the equities favor the requested intervention. And that question is best resolved by considering the equities *first* and turning to the merits only later, as a check, if needed.[53]

So, how would that work? In my feuding-neighbor hypothetical, assuming the Court is considering the substance of Neighbor *A*'s stay application, we would set aside the merits of the question of who owns the shed and start by evaluating who has the better argument about the intervening harms if the shed is torn down or left standing. By doing this, it would quickly become apparent that the district court did not abuse its discretion when it assessed the relative

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51. *See, e.g.*, Trump v. Orr, 146 S. Ct. 44, 50-51 (2025) (Jackson, J., dissenting from grant of stay) (noting the applicant's failure to allege real-life harms).

52. As I have previously stated, we should make the applicant provide a "line-jumping justification" in the form of exigent circumstances; he is pushing ahead of everyone else who is patiently waiting for this Court to rule in their favor. Labrador v. Poe, 144 S. Ct. 921, 934 (2024) (Jackson, J., dissenting from grant of stay). And without any such circumstances, the Court should simply decline to intervene, letting the process play out in the lower courts. The reality is that the Supreme Court will ordinarily have the chance to address the legal issues later, even if the applicant is right about the merits. So, the key question when it comes to a stay grant is really one of *timing*: has the applicant shown that time is of the essence such that the Court should step in and order his victory *now*?

53. Evaluating the equities as the first order of business solves the vast majority of the problems I have raised. For example, doing so preserves deference to and respect for the lower courts, and it provides more reliable information and guidance to the public and lower courts than giving rushed answers about the merits of potentially complex legal questions.

harms and concluded that the shed should be left standing for the duration of the case. And, if the court of appeals agreed, we could require Neighbor *A* to bear the especially heavy burden of persuading us that the harm balance turns out differently.[54] Imposing that burden would likely be the end of the stay inquiry. But I do think that there could be circumstances in which an assessment of the underlying merits might be helpful, on the back end, as an additional input for the equities analysis.

Capital cases provide a good example of this. There is obvious exigency and very real harm will befall the defendant if the stay of execution is denied—arguably more harm than would be suffered by the state if the stay is granted. But often the legal claims that capital defendants raise have little-to-no chance of succeeding based on established law. So, while the harm-based equities would favor granting the requested stay, the minimal likelihood of a capital defendant's eventual success on the merits means that, in fairness, the State should not be made to wait until those non-meritorious legal claims have been fully vetted be-fore being allowed to carry out the authorized punishment. When we do the stay analysis in this way—equities balancing first and then asking whether the underlying legal claims are plausible—the likelihood-of-success factor becomes part and parcel of the overall equities assessment in a manner that makes perfect sense given the auxiliary role of the stay determination.

My feuding neighbors bear this out. Suppose Neighbor *A* has an urgent need to get seeds in the ground right now, and to sustain his stay request he also pro-duces a copy of the original plat that plainly shows the shed (which his great-great-grandmother built with her bare hands) is sitting on his property. Mean-while, although Neighbor *B* is facing irreparable harm if the shed he claims to own is dismantled, if Neighbor *B* has no evidence to support his underlying ownership claim, it is implausible that he will ultimately succeed on the merits. So, on balance, the injunction seems inequitable, and Neighbor *A*'s stay request should probably be granted.

I posit that what I am proposing is much closer to how the "likelihood of success" factor should be operating than how the Court has been treating it lately.[55] How could it possibly be that the test requires courts to speculate about the outcome of the primary merits issue in order to answer the auxiliary interim-relief question? Talk about putting the cart before the horse. And it doesn't make sense to require that; indeed, there is only one logical connection between the

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54. *See supra* note 48.

55. *See, e.g.*, Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 51 (2008) (Ginsburg, J., dissenting) (asserting that "[c]onsistent with equity's character, courts do not insist that litigants uniformly show a particular, predetermined quantum of probable success or injury before awarding equitable relief" and noting that the majority had not disagreed with this conception of the factor).

interim-relief decision (what is "fair and right" with respect to the parties' interim status) and the determination of which party is likely to succeed on the merits at the end of the case: when the challenger has no chance of winning, it would not be fair to make the obvious winner suffer real-world delay by having to go through the process of fully litigating the matter.

That idea—of evaluating fairness as it relates to the delay caused by litigating the merits—is what my proposal addresses. And I argue that the concern about the fairness of the eventual winner being stymied by the loser in this way only really surfaces in a situation in which the challenger has *no* likelihood of success on the merits. If there is a chance that the challenger could win (that is, if he has a plausible claim) then it is not unfair to the challenged party to have to await the outcome of the normal litigation process. Put differently, where there is a plausible claim, to say it is unfair to have to wait presumes the answer (the challenger party wins at the end of the day), which we cannot and do not know until the underlying merits have been decided. It is only in a circumstance in which there is no realistic possibility that the challenger will succeed that the litigation delay imposes truly unfair costs on the (in that case, obvious) winner.

Thus, what the Court is doing in stay analyses now—routinely endeavoring to determine who is actually going to win on the merits—really bears no relationship to the actual interim-status assessment that the stay decision requires. And the only conceivably relevant merits-related inquiry merely serves the function of eliminating patently non-meritorious legal arguments.

To summarize: I propose that the equities be evaluated first and that the merits enter only as a plausibility check after the relative harms have been assessed, to ensure that a plaintiff who does not have a realistic chance of winning cannot use the legal process to throw sand into the gears, despite being potentially subjected to intervening harm. But if a claimant *does* have some chance of winning on the merits, equity usually would not permit his claim to be mooted out by a harmful act that interim injunctive relief can easily prevent. Litigants should not have to suffer injury while the courts are considering their legal claims if the equities favor them and there is a chance that they can win their case. The touch-stone of equity is fairness. In my view, the Supreme Court's stay practices should be designed accordingly.

CONCLUSION

So that's it. I hope that you have found this discussion edifying and that it has given you a better sense of the stay requests the Supreme Court receives on its emergency docket, how the Court is handling them, and why I think our modern methods are not serving the Court or our country well. I hope it is also clear why I adamantly reject any effort to normalize a process whereby the

Supreme Court actively superintends matters that are pending in the lower courts. There is no such thing as an "interim docket." Rather, we have an appellate-review process with an equitable exception that can sometimes warrant the Supreme Court's early intervention, but only when exigent circumstances re-quire that intervention. I feel strongly that we need to stick with *that* history and tradition.

I do not pretend to have all the answers, but I would like to be a catalyst for change. My hope is that this Lecture opens up the conversation and that readers—and all of us—will carefully examine the operation of the Supreme Court's emergency docket and suggest reforms with an eye toward ensuring equal justice under law.