

NOTES

THE ROLE OF CERTIORARI IN EMERGENCY RELIEF

Emergency relief at the Supreme Court takes two major forms: injunctions pending appeal and stays pending appeal.¹ An injunction pending appeal “directs the conduct of a party” while the appeals process unfolds.² A common example is an order prohibiting a state from enforcing one of its laws while the case is pending on appeal.³ A stay pending appeal, by contrast, “operates upon the judicial proceeding itself.”⁴ “It does so either by halting or postponing some portion of the proceeding, or by temporarily divesting an order of enforceability.”⁵ There is often overlap between what injunctions and stays accomplish. Both tend to have the “practical effect of preventing some action before the legality of that action has been conclusively determined.”⁶ But the difference is that “a stay achieves this result by temporarily suspending the source of authority to act — the order or judgment in question — not by directing an actor’s conduct.”⁷

The legal standard that the Supreme Court uses for granting emergency injunctions is similar to the standard that it uses for granting emergency stays. Both standards consider the merits of the case, the possibility of irreparable harm absent relief, and (at least in close cases) the public interest and the equities.⁸ One difference between the standards is that the Court requires applicants seeking a stay to show that there is “a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari.”⁹ This certworthiness consideration is not part of the traditional test for an emergency injunction even though a request for an injunction “‘demands a significantly higher justification’ than a request for a stay.”¹⁰

¹ See Greg Goelzhauser, *The Applications Docket*, 58 GA. L. REV. 97, 117 fig.2.2 (2023) (illustrating frequency of applications involving stays and injunctions relative to “miscellaneous applications that do not involve stays or injunctions,” *id.* at 115).

² *Nken v. Holder*, 556 U.S. 418, 428 (2009).

³ See, e.g., *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 65–66 (2020) (per curiam).

⁴ *Nken*, 556 U.S. at 428.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at 428–29.

⁸ Compare *Roman Cath. Diocese*, 141 S. Ct. at 66 (injunctions), with *Ind. State Police Pension Tr. v. Chrysler LLC*, 556 U.S. 960, 960 (2009) (per curiam) (stays).

⁹ *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam).

¹⁰ *Respect Me. PAC v. McKee*, 562 U.S. 996, 996 (2010) (quoting *Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regul. Comm’n*, 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers)); see *Roman Cath. Diocese*, 141 S. Ct. at 66 (not requiring a certworthiness showing before granting injunctive relief); *Tandon v. Newsom*, 141 S. Ct. 1294, 1297 (2021) (per curiam) (same).

Commentators in recent years have criticized the Supreme Court's willingness to grant emergency injunctions and stays.¹¹ One prominent criticism is that the Court has been issuing injunctive relief too frequently, turning the Court into one of "first view" rather than one of "final review."¹² The Court granted seven emergency injunctions in the six-month period between October 2020 and April 2021.¹³ Before that, the Court "had gone five *years* without issuing a single injunction pending appeal."¹⁴ Critics contend that this pattern shows that the Court is too often providing "judicial intervention that has been withheld by lower courts," in violation of the supposedly higher standard that governs emergency injunctions.¹⁵

In what was viewed by many as a response to these criticisms,¹⁶ Justice Barrett filed a concurrence in *Does 1-3 v. Mills*¹⁷ with a seemingly modest suggestion: the Court should consider certworthiness as a prerequisite to issuing injunctive relief.¹⁸ The applicants in *Does 1-3* asked the Supreme Court to enjoin a Maine law that required all workers in licensed healthcare facilities to be vaccinated against Covid-19.¹⁹ The Court denied the application without explanation.²⁰ But Justice Barrett, joined by Justice Kavanaugh, provided a one-paragraph explanation for her vote to withhold injunctive relief.

Justice Barrett began her opinion by explaining that "[w]hen th[e] Court is asked to grant extraordinary relief," one factor that it considers is "whether the applicant is 'likely to succeed on the merits.'"²¹ In Justice Barrett's view, this success-on-the-merits prong "encompass[es] not only an assessment of the underlying merits but also a

¹¹ See, e.g., STEPHEN VLADECK, *THE SHADOW DOCKET* 24–25 (2023); Adam Liptak, *Missing from Supreme Court's Election Cases: Reasons for Its Rulings*, N.Y. TIMES (Oct. 26, 2020), <https://www.nytimes.com/2020/10/26/us/supreme-court-election-cases.html> [<https://perma.cc/DX8G-9UUW>].

¹² Stephen I. Vladeck, Opinion, *The Supreme Court Is Making New Law in the Shadows*, N.Y. TIMES (Apr. 15, 2021), <https://www.nytimes.com/2021/04/15/opinion/supreme-court-religion-orders.html> [<https://perma.cc/UHA3-KE28>]; cf. *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012) ("Ours is 'a court of final review and not first view.'" (quoting *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001) (per curiam))).

¹³ Vladeck, *supra* note 12.

¹⁴ *Id.*

¹⁵ *Id.* (quoting *Ohio Citizens for Responsible Energy, Inc.*, 479 U.S. at 1313); see also VLADECK, *supra* note 11, at 189.

¹⁶ See, e.g., Josh Blackman, *Justices Barrett and Kavanaugh Cut the Fuse on the Shadow Docket (Updated)*, REASON: VOLOKH CONSPIRACY (Oct. 30, 2021, 12:25 PM), <https://reason.com/volokh/2021/10/30/justices-barrett-and-kavanaugh-cut-the-fuse-on-the-shadow-docket> [<https://perma.cc/7KPN-ZNPC>]; VLADECK, *supra* note 11, at 251.

¹⁷ 142 S. Ct. 17 (2021) (mem.).

¹⁸ *Id.* at 18 (Barrett, J., concurring in the denial of application for injunctive relief).

¹⁹ Emergency Application for Writ of Injunction Pending Disposition of Petition for Writ of Certiorari Relief Requested by October 26, 2021, at 1–2, *Does 1-3*, 142 S. Ct. 17 (No. 21A90).

²⁰ *Does 1-3*, 142 S. Ct. at 17.

²¹ *Id.* at 18 (Barrett, J., concurring in the denial of application for injunctive relief) (citing *Nken v. Holder*, 556 U.S. 418, 434 (2009)).

discretionary judgment about whether the Court should grant review in the case.²² The logic here is that certworthiness is part and parcel of the success-on-the-merits inquiry because an applicant cannot succeed on the merits in the Supreme Court absent a discretionary grant of review.²³

While Justice Barrett's opinion in *Does 1-3* has attracted considerable attention,²⁴ the commentary has not carefully examined (i) the legal basis for a certworthiness requirement or (ii) the full implications of the opinion. This Note aims to do both of those things. Part I explains the tests for stays and injunctions in the Supreme Court and shows that certworthiness has historically been relevant for one but not the other. Part II demonstrates that Justice Barrett's suggestion that certworthiness is relevant for granting emergency injunctions has a firm basis in the statute that authorizes the Court to grant injunctions. Part III extends the logic of Justice Barrett's opinion in *Does 1-3* to two areas that have been largely neglected in the commentary: vacatur of stays and vacatur of injunctions. It argues that the same precedents and statutory analysis that support a certworthiness requirement for injunctions apply with equal force when it comes to vacatur. Part IV considers whether and how a certworthiness requirement might have bite in the Court's emergency jurisprudence today.

I. THE RELEVANCE OF CERTIORARI FOR STAYS AND INJUNCTIONS

The Supreme Court's test for granting an emergency stay considers whether the underlying dispute is certworthy.²⁵ But this certworthiness requirement is not part of the traditional test for providing an emergency injunction.²⁶ One reason that this difference is puzzling is that the same statute that empowers the Court to issue stays of nonfinal judgments also empowers the Court to issue injunctions. A single provision of the All Writs Act²⁷ authorizes both forms of relief.²⁸ And the Court has explicitly stated that "the All Writs Act standard" requires applicants to make a "showing that a grant of certiorari and eventual reversal are probable."²⁹ Yet certworthiness has traditionally been

²² *Id.* (citing *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam); SUP. CT. R. 10).

²³ *Cf.* Transcript of Oral Argument at 79, *Ohio v. EPA*, No. 23A349 (U.S. Feb. 21, 2024) (statement of Deputy Solic. Gen. Malcolm L. Stewart) ("[I]f likelihood of success means likelihood of success in this Court, then that has to be not just would the Court rule in their favor if it took the case but what's the chance that the Court would take the case.")

²⁴ *See, e.g.*, Edward L. Pickup & Hannah L. Templin, *Emergency-Docket Experiments*, 98 NOTRE DAME L. REV. REFLECTION 1, 15–18 (2022); VLADECK, *supra* note 11, at 251; Blackman, *supra* note 16.

²⁵ *See* *Ind. State Police Pension Tr. v. Chrysler LLC*, 556 U.S. 960, 960 (2009) (per curiam).

²⁶ *See, e.g.*, *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 65–66 (2020) (per curiam).

²⁷ 28 U.S.C. § 1651.

²⁸ *See id.* § 1651(a).

²⁹ *Lawrence ex rel. Lawrence v. Chater*, 516 U.S. 163, 168 (1996) (per curiam).

relevant only for stays. This Part begins by introducing the statutes that authorize the Court to issue emergency stays and then explains the legal test for granting those stays. It then does the same for emergency injunctions.

A. *Stays Pending Appeal*

There are two legal bases for an emergency stay in the Supreme Court.³⁰ The first is 28 U.S.C. § 2101(f). This statute authorizes the Court to stay the execution of a “final judgment or decree . . . for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court.”³¹ This law is limited in several respects. For one, it applies only to *final* judgments or decrees and so it “does not allow the Court to issue a stay involving review of an interlocutory judgment or order.”³² For another, it authorizes emergency relief “only for the limited purpose of preserving the Supreme Court’s ability to rule on the petition for certiorari.”³³ Given this limited purpose, it makes sense for the Court to require a certworthiness showing before granting a stay under § 2101(f). It would be pointless for the Court to stay a judgment to “enable the party aggrieved to obtain a writ of certiorari”³⁴ when the Court is not going to grant that writ.

The second legal basis for the Court’s power to issue an emergency stay is the All Writs Act.³⁵ This Act is broader than § 2101(f). Originally codified in 1789,³⁶ the All Writs Act is a short statute authorizing federal courts to “issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.”³⁷ Unlike § 2101(f), the All Writs Act is “broad enough to cover interlocutory judgments or orders,” not just final judgments or decrees.³⁸ The text of the All Writs Act does not mention certiorari. But the Court still requires a certworthiness showing before it grants an emergency stay under the Act.³⁹

³⁰ See Stephen I. Vladeck, Essay, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123, 129 (2019).

³¹ 28 U.S.C. § 2101(f).

³² Daniel M. Gonen, *Judging in Chambers: The Powers of a Single Justice of the Supreme Court*, 76 U. CIN. L. REV. 1159, 1166 (2008); see *Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regul. Comm’n*, 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers) (“[I]t is only the execution or enforcement of *final* orders that is stayable under § 2101(f).”).

³³ Gonen, *supra* note 32, at 1167.

³⁴ 28 U.S.C. § 2101(f).

³⁵ See *Nken v. Holder*, 556 U.S. 418, 426 (2009); Vladeck, *supra* note 30, at 129.

³⁶ *Pa. Bureau of Corr. v. U.S. Marshals Serv.*, 474 U.S. 34, 40 (1985).

³⁷ 28 U.S.C. § 1651(a).

³⁸ Gonen, *supra* note 32, at 1167–68.

³⁹ See *Little v. Reclaim Idaho*, 140 S. Ct. 2616, 2616 (2020) (Roberts, C.J., concurring in the grant of stay); Vladeck, *supra* note 30, at 130–31 (reciting this test as a blanket standard without reference to the source of the Court’s authority).

The Supreme Court's test for a stay pending appeal stems from its per curiam decision in *Hollingsworth v. Perry*.⁴⁰ The test has three prongs. *First*, whether the applicant has shown a “‘reasonable probability’ that [the] Court will grant certiorari.”⁴¹ *Second*, whether there is “a ‘fair prospect’ that the Court [would] reverse the judgment below.”⁴² *Third*, whether there is a “likelihood” that there would be “irreparable harm” without a stay.⁴³ In close cases the Court may also consider the public interest and “balance the equities.”⁴⁴ It is true that some Justices in dissenting opinions have instead relied on a different test that does not consider certworthiness.⁴⁵ But those opinions have never garnered five votes. And a majority of the Court has twice explained that a case must be certworthy in order for the Court to grant an emergency stay.⁴⁶

B. Injunctions Pending Appeal

The “only source” of the Supreme Court’s authority to issue an emergency injunction is the All Writs Act.⁴⁷ Section 2101(f) is irrelevant here because that statute authorizes only stays.⁴⁸ Under the All Writs Act, the Supreme Court can issue an emergency injunction only when it is (i) “necessary or appropriate in aid of [its] jurisdiction[]” and (ii) “agreeable to the usages and principles of law.”⁴⁹ And the Court has supplemented the All Writs Act’s requirements with several other considerations.

A party seeking an injunction pending appeal must make four showings.⁵⁰ *First*, “that he is likely to succeed on the merits.”⁵¹ *Second*, “that

⁴⁰ 558 U.S. 183, 190 (2010) (per curiam); see also *Little*, 140 S. Ct. at 2616 (Roberts, C.J., concurring in the grant of stay) (describing *Hollingsworth* as providing the “well-settled standard” for granting a stay pending appeal); *Merrill v. Milligan*, 142 S. Ct. 879, 880 (2022) (Kavanaugh, J., concurring in grant of applications for stays) (relying on the *Hollingsworth* factors).

⁴¹ *Little*, 140 S. Ct. at 2616 (Roberts, C.J., concurring in the grant of stay) (quoting *Hollingsworth*, 558 U.S. at 190).

⁴² *Id.* (quoting *Hollingsworth*, 558 U.S. at 190).

⁴³ *Id.* (quoting *Hollingsworth*, 558 U.S. at 190).

⁴⁴ *Ind. State Police Pension Tr. v. Chrysler LLC*, 556 U.S. 960, 960 (2009) (per curiam) (quoting *Conkright v. Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers)); cf. *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020) (per curiam) (similar test for issuing emergency injunctions).

⁴⁵ See, e.g., *Smith v. Hamm*, 144 S. Ct. 414, 415 (2024) (Sotomayor, J., dissenting from the denial of application for stay and denial of certiorari) (citing *Nken v. Holder*, 556 U.S. 418 (2009)); *Johnson v. Vandergriff*, 143 S. Ct. 2551, 2556 (2023) (Sotomayor, J., dissenting from the denial of application for stay and denial of certiorari) (same); *Merrill*, 142 S. Ct. at 883 (Kagan, J., dissenting from grant of applications for stays) (same).

⁴⁶ *Ind. State Police*, 556 U.S. at 960; *Hollingsworth*, 558 U.S. at 190.

⁴⁷ *Wis. Right to Life, Inc. v. FEC*, 542 U.S. 1305, 1306 (2004) (Rehnquist, C.J., in chambers); *Brown v. Gilmore*, 533 U.S. 1301, 1303 (2001) (Rehnquist, C.J., in chambers).

⁴⁸ 28 U.S.C. § 2101(f); see Gonen, *supra* note 32, at 1167–68.

⁴⁹ 28 U.S.C. § 1651(a); see also SUP. CT. R. 20.1 (emphasizing that, among other things, petitions for relief under the All Writs Act “must show that the writ will be in aid of the Court’s appellate jurisdiction”).

⁵⁰ See *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

⁵¹ *Id.*

he is likely to suffer irreparable harm” without relief.⁵² *Third*, “that the balance of equities tips in his favor.”⁵³ *Fourth*, “that an injunction is in the public interest.”⁵⁴ There is no certworthiness requirement like there is for stays.⁵⁵ Yet a request for an injunction in the Supreme Court “‘demands a significantly higher justification’ than a request for a stay.”⁵⁶ This heightened standard is justified on the ground that “unlike a stay, an injunction ‘does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts.’”⁵⁷ To that end, members of the Court have repeatedly explained that they will issue injunctions only when “the legal rights at issue are indisputably clear and, even then, sparingly and only in the most critical and exigent circumstances.”⁵⁸

But this “indisputably clear” requirement has been applied unevenly at best. In several recent cases, the Court did not mention it at all. In *Tandon v. Newsom*,⁵⁹ for example, the Court issued an injunction pending appeal without suggesting that the underlying legal issues were “indisputably clear.”⁶⁰ The same was true in *Roman Catholic Diocese of Brooklyn v. Cuomo*.⁶¹ And other recent decisions have also declined to give heightened scrutiny to applications for emergency injunctions.⁶² This pattern has led some commentators to lament that there “appears to be consensus at the Court that it may issue injunctions not only when claims are ‘indisputably clear,’ but also when they are clearly disputable.”⁶³ And the data may support the commentators’ concerns: the Court issued more emergency injunctions in the six-month period

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ See *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020) (per curiam) (not requiring a certworthiness showing before granting injunctive relief); *Tandon v. Newsom*, 141 S. Ct. 1294, 1297 (2021) (per curiam) (same).

⁵⁶ *Respect Me. PAC v. McKee*, 562 U.S. 996, 996 (2010) (quoting *Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regul. Comm’n*, 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers)).

⁵⁷ *Id.* (quoting *Ohio Citizens for Responsible Energy, Inc.*, 479 U.S. at 1313).

⁵⁸ *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring in denial of application for injunctive relief) (internal quotation marks omitted) (quoting STEPHEN M. SHAPIRO ET AL., *SUPREME COURT PRACTICE* § 17.4 (11th ed. 2019)); see also *Hobby Lobby Stores, Inc. v. Sebelius*, 568 U.S. 1401, 1403 (2012) (Sotomayor, J., in chambers); *Lux v. Rodrigues*, 561 U.S. 1306, 1307 (2010) (Roberts, C.J., in chambers).

⁵⁹ 141 S. Ct. 1294 (per curiam).

⁶⁰ See *id.* at 1296–97.

⁶¹ 141 S. Ct. 63, 74 (2020) (per curiam).

⁶² See, e.g., *Whole Woman’s Health v. Jackson*, 141 S. Ct. 2494, 2495 (2021); *Wheaton Coll. v. Burwell*, 573 U.S. 958, 958–59 (2014).

⁶³ Richard M. Re, *Must SCOTUS Injunctions Abide by Precedent?*, RE’S JUDICATA (Sept. 27, 2021, 6:10 AM), <https://richardresjudicata.wordpress.com/2021/09/27/must-scotus-injunctions-abide-by-precedent> [<https://perma.cc/E2A5-X9EH>]; see also *Wheaton Coll.*, 573 U.S. at 961 (Sotomayor, J., dissenting) (lamenting that the Court granted an emergency injunction “even though no one could credibly claim” that the applicant’s “right to relief [was] indisputably clear”).

between October 2020 and April 2021 than it issued in the prior fifteen years combined.⁶⁴

II. *DOES 1-3*

But things began to change in October 2021. That was when the Court denied an application for an emergency injunction in *Does 1-3 v. Mills*.⁶⁵ Recall that the case involved a Maine law that required all workers in private healthcare facilities to be vaccinated against Covid-19.⁶⁶ The applicants argued that this law violated the First Amendment and Title VII of the Civil Rights Act because there was no religious exception.⁶⁷ As such, the applicants asked the Court to enjoin the State of Maine from enforcing the law.⁶⁸ The Court declined.⁶⁹ It did not explain that decision.⁷⁰ But Justice Barrett, joined by Justice Kavanaugh, penned a short concurrence explaining her vote to withhold injunctive relief.⁷¹ Her opinion suggested that an emergency injunction was unwarranted because the case was not certworthy.⁷² In so suggesting, Justice Barrett invoked the certworthiness requirement that is traditionally part of the test for emergency *stays*, not *injunctions*.⁷³ This Part begins by explaining that analytical move. It then shows why Justice Barrett's concurrence has a firm basis in the All Writs Act.

A. Justice Barrett's *Does 1-3* Opinion

Justice Barrett began her opinion in *Does 1-3* by explaining that “[w]hen [the] Court is asked to grant extraordinary relief,” one factor that it considers is “whether the applicant is ‘likely to succeed on the merits.’”⁷⁴ This factor is part of the test for both stays and injunctions.⁷⁵ In Justice Barrett's view, this success-on-the-merits prong “encompass[es] not only an assessment of the underlying merits but also a discretionary judgment about whether the Court should grant review in

⁶⁴ See *Texas's Unconstitutional Abortion Ban and the Role of the Shadow Docket: Hearing Before the S. Comm. on the Judiciary*, 117th Cong. (2021) (testimony of Stephen I. Vladeck, at 5 tbl.1), <https://www.judiciary.senate.gov/imo/media/doc/Vladeck%20testimony1.pdf> [<https://perma.cc/J2BM-ELF9>] [hereinafter Vladeck Testimony]; Vladeck, *supra* note 12.

⁶⁵ 142 S. Ct. 17, 17 (2021) (mem.).

⁶⁶ See Emergency Application for Writ of Injunction Pending Disposition of Petition for Writ of Certiorari Relief Requested by October 26, 2021, at 1-2, *Does 1-3*, 142 S. Ct. 17 (No. 21A90).

⁶⁷ *Id.* at 16, 32.

⁶⁸ *Id.* at 5.

⁶⁹ *Does 1-3*, 142 S. Ct. at 17.

⁷⁰ *Id.*

⁷¹ *Id.* at 18 (Barrett, J., concurring in the denial of application for injunctive relief).

⁷² *Id.*

⁷³ See *supra* notes 25-26 and accompanying text.

⁷⁴ *Does 1-3*, 142 S. Ct. at 18 (Barrett, J., concurring in the denial of application for injunctive relief) (quoting *Nken v. Holder*, 556 U.S. 418, 434 (2009)).

⁷⁵ Compare *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam) (stays), with *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020) (per curiam) (injunctions).

the case.”⁷⁶ To support this point, Justice Barrett cited *Hollingsworth*: a case establishing the legal test that the Court uses for emergency stays.⁷⁷ This citation was noteworthy because the applicants in *Does 1-3* sought an *injunction*, not a *stay*. And the legal test for an injunction differs from the legal test for a stay in that certworthiness has traditionally been relevant only for stays. But Justice Barrett reasoned that if certworthiness were *not* part of the test for injunctions, then “applicants could use the emergency docket 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.”⁷⁸

Justice Barrett ultimately concluded that an emergency injunction was unwarranted in *Does 1-3* because the case was not certworthy. The “discretionary judgment about whether the Court should grant review in the case” counseled against granting an injunction because the Court would have been “the first to address the questions presented.”⁷⁹ In this way, the opinion appeared to vindicate the adage that the Supreme Court is “a court of final review and not first view.”⁸⁰ And it rebutted the criticism that the Court was abdicating its “primary responsibility . . . as an appellate tribunal” by issuing emergency injunctions too often.⁸¹

The significance of this opinion is that it copied the certworthiness requirement that is part of the Court’s test for stays and pasted it into the Court’s test for injunctions. The vessel for this certworthiness criterion is the success-on-the-merits prong. Under Justice Barrett’s approach in *Does 1-3*, certworthiness is simply part and parcel of an applicant’s likelihood of success on the merits.⁸² The rationale here is that certworthiness is a necessary component of the success-on-the-merits inquiry because an applicant by definition cannot succeed on the merits in the Supreme Court without a grant of certiorari. So to Justices Barrett and Kavanaugh, applicants seeking emergency injunctions in the Supreme Court must show not only that they are right on the merits but also that the dispute is certworthy.

⁷⁶ *Does 1-3*, 142 S. Ct. at 18 (Barrett, J., concurring in the denial of application for injunctive relief) (citing *Hollingsworth*, 558 U.S. at 190; SUP. CT. R. 10).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001) (per curiam) (quoting *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 399 (1996) (Ginsburg, J., concurring in part and dissenting in part)).

⁸¹ Vladeck, *supra* note 12.

⁸² *Cf.* Transcript of Oral Argument at 74, *Ohio v. EPA*, No. 23A349 (U.S. Feb. 21, 2024) (statement of Kavanaugh, J.) (stating that the success-on-the-merits prong “accounts for certworthiness”).

These are two distinct things.⁸³ A litigant can have a high likelihood of success on the merits but not have a certworthy case. For example, it would be unlikely for the Court to grant certiorari in a case where “the asserted error consists of . . . the misapplication of a properly stated rule of law.”⁸⁴ As discussed in Part IV, it is unclear just how much this certworthiness requirement limits the availability of emergency relief. But for now the key point is that Justice Barrett’s opinion in *Does 1–3* blended the tests for granting emergency stays and injunctions by transplanting the certworthiness requirement from the stay context into the injunction context.

B. *The Legal Source*

Some commentators have lamented that the legal basis for Justice Barrett’s opinion is made up “out of whole cloth.”⁸⁵ Not so. Justice Barrett presumably linked a certworthiness requirement to the success-on-the-merits prong because litigants cannot prevail on the merits in the Supreme Court if the Court does not grant certiorari. This linkage makes sense for stays issued under § 2101(f) because these stays are designed “to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court.”⁸⁶ But recall that § 2101(f) authorizes only stays of “final judgment[s] or decrees.”⁸⁷ It cannot support Justice Barrett’s approach when it comes to injunctions or stays of interlocutory orders.

Instead, for those types of relief, Justice Barrett’s approach is likely justified by the All Writs Act. This Act is the source of the Court’s power to issue emergency injunctions and stays of interlocutory orders.⁸⁸ It provides that the Court “may issue all writs necessary or appropriate in aid of [its] jurisdiction[] and agreeable to the usages and principles of law.”⁸⁹ It might seem “inappropriate” to locate a certworthiness requirement in these provisions because the All Writs Act was passed at a time when the Supreme Court lacked discretion to shape its docket.⁹⁰ But the Court has described its authority under the All Writs Act as “‘essentially equitable’ and thus discretionary.”⁹¹ As such, “to determine when

⁸³ See Pickup & Templin, *supra* note 24, at 15 (“The usual stay analysis asks whether the moving party has a ‘likelihood of success on the merits’ — that is, a real chance of winning the case — not whether the case is worthy of the Court’s attention.” (quoting *Nken v. Holder*, 556 U.S. 418, 438 (2009) (Kennedy, J., concurring))).

⁸⁴ SUP. CT. R. 10.

⁸⁵ Blackman, *supra* note 16.

⁸⁶ 28 U.S.C. § 2101(f).

⁸⁷ *Id.*; *Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regul. Comm’n*, 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers) (“[I]t is only the execution or enforcement of *final* orders that is stayable under § 2101(f).”).

⁸⁸ See *supra* notes 36–48 and accompanying text.

⁸⁹ 28 U.S.C. § 1651(a).

⁹⁰ Pickup & Templin, *supra* note 24, at 17.

⁹¹ 33 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 8313 (2d ed. 2023) (quoting *Clinton v. Goldsmith*, 526 U.S. 529, 537 (1999)).

writs are ‘necessary or appropriate in aid of the Supreme Court’s jurisdiction and agreeable to the usages and principles of law,’” one must “turn to the cases, for this field of the law has developed in common-law fashion.”⁹² And the cases reveal that the Court has long required a showing of certworthiness before granting emergency relief under the All Writs Act.

The Supreme Court has expressly confirmed that “the All Writs Act standard” requires applicants to make a “showing that a grant of certiorari and eventual reversal are probable.”⁹³ And Justice Blackmun was similarly explicit about the connection between certworthiness and the All Writs Act in a 1994 opinion.⁹⁴ There, he explained that a stay was warranted “under the All Writs Act” because there was “a reasonable probability that the case would warrant certiorari.”⁹⁵ And many earlier cases have also looked to certworthiness before issuing relief under the All Writs Act. In 1976, for example, then-Justice Rehnquist evaluated an application to dissolve a stay entered by the Ninth Circuit.⁹⁶ His sole authority to grant that request was the All Writs Act.⁹⁷ Section 2101(f) was inapplicable because the Ninth Circuit’s stay was not a final judgment or decree: the case was “presently pending” before the court of appeals.⁹⁸ Yet Justice Rehnquist wrote that he could not grant relief unless the case “could and very likely would be reviewed [in the Supreme Court] upon final disposition in the court of appeals.”⁹⁹ Similarly, in 1989, Justice Brennan was asked to dissolve an injunction issued by a district court.¹⁰⁰ His sole authority to confer this remedy was again the All Writs Act. Section 2101(f) was inapplicable because the case did not involve granting a stay.¹⁰¹ And Justice Brennan declined to dissolve the injunction because the applicants did not show “a ‘reasonable probability’ that four Justices [would] consider the issue sufficiently meritorious to grant certiorari.”¹⁰²

Recent opinions have also looked to certworthiness before issuing relief under the All Writs Act. In 2020, Justice Kavanaugh explained that an emergency injunction was warranted because (among other things) the applicants showed “a likelihood that the Court would grant

⁹² STEPHEN M. SHAPIRO ET AL., SUPREME COURT PRACTICE § 11.1 (10th ed. 2013) (alteration in original omitted) (citing *Pulliam v. Allen*, 466 U.S. 522, 528 n.5 (1984)).

⁹³ *Lawrence ex rel. Lawrence v. Chater*, 516 U.S. 163, 168 (1996) (per curiam).

⁹⁴ *CBS Inc. v. Davis*, 510 U.S. 1315, 1315 (1994) (Blackmun, J., in chambers).

⁹⁵ *Id.* at 1318.

⁹⁶ *Coleman v. PACCAR Inc.*, 424 U.S. 1301, 1301 (1976) (Rehnquist, J., in chambers).

⁹⁷ *See id.* at 1302.

⁹⁸ *See id.* at 1301–02.

⁹⁹ *Id.* at 1304.

¹⁰⁰ *Bhd. of R.R. Signalmen v. Se. Pa. Transp. Auth.*, 489 U.S. 1301, 1301 (1989) (Brennan, J., in chambers).

¹⁰¹ *See Gonen*, *supra* note 32, at 1166–67.

¹⁰² *Bhd. of R.R. Signalmen*, 489 U.S. at 1301 (quoting *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers)).

certiorari and reverse.”¹⁰³ And in a separate 2020 case arising under the All Writs Act, the Court was asked to stay two district court preliminary injunctions.¹⁰⁴ A four-Justice plurality led by Chief Justice Roberts explained that the Court could not grant the stay unless the applicant showed “a ‘reasonable probability’ that [the] Court will grant certiorari.”¹⁰⁵ Two years later, in the “vaccine mandate” case, the Court again stayed two district court preliminary injunctions under the All Writs Act.¹⁰⁶ In dissent, Justice Thomas wrote that the applicants had to show a “reasonable probability” that the Court would grant certiorari to obtain relief.¹⁰⁷

In addition to having a firm basis in the Court’s emergency-docket precedents involving the All Writs Act, Justice Barrett’s approach in *Does 1–3* also has a direct foothold in the text of the Act. The All Writs Act does not permit the Court to issue emergency relief unless it is (i) “necessary or appropriate in aid of [its] jurisdiction[]” and (ii) “agreeable to the usages and principles of law.”¹⁰⁸ Justice Barrett’s concurrence in *Does 1–3* can be justified by either provision. *First*, the “in aid of jurisdiction” prong suggests that the Court may grant emergency relief under the All Writs Act only when it plans to exercise its jurisdiction over that case.¹⁰⁹ This reading of the Act may have some support in early Supreme Court precedents. Take the 1872 case of *Insurance Co. v. Comstock*.¹¹⁰ There, the Court confirmed that it could issue a writ of mandamus under the All Writs Act “to direct a subordinate Federal court to decide a pending cause.”¹¹¹ The Court explained that this writ was justified “in order that [the] court may *exercise* the jurisdiction of review given by law.”¹¹² That is, the writ was warranted because it enabled the Supreme Court to *exercise* its jurisdiction over the case. Other cases also suggest that the Court’s early view of the “in aid of jurisdiction” provision “confined it to filling the interstices of federal judicial power when those gaps threatened to thwart the otherwise proper *exercise* of federal courts’ jurisdiction.”¹¹³ In *McClellan v. Carland*,¹¹⁴ for example, the Court stated that a writ was “in aid of” an appellate

¹⁰³ *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 74 (2020) (Kavanaugh, J., concurring).

¹⁰⁴ *Little v. Reclaim Idaho*, 140 S. Ct. 2616, 2616 (2020) (mem.).

¹⁰⁵ *Id.* (Roberts, C.J., concurring in the grant of stay) (quoting *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam)).

¹⁰⁶ *Biden v. Missouri*, 142 S. Ct. 647, 650 (2022) (per curiam).

¹⁰⁷ *Id.* at 655 (Thomas, J., dissenting).

¹⁰⁸ 28 U.S.C. § 1651(a).

¹⁰⁹ *Cf. Pickup & Templin*, *supra* note 24, at 15–16.

¹¹⁰ 83 U.S. (16 Wall.) 258 (1872).

¹¹¹ *Id.* at 270.

¹¹² *Id.* (emphasis added).

¹¹³ *Pa. Bureau of Corr. v. U.S. Marshals Serv.*, 474 U.S. 34, 41 (1985) (emphasis added) (citing *McClung v. Silliman*, 19 U.S. (6 Wheat.) 598 (1821); *M’Intire v. Wood*, 11 U.S. (7 Cranch) 504 (1813)).

¹¹⁴ 217 U.S. 268 (1910).

court's jurisdiction when that jurisdiction "might otherwise be defeated by the unauthorized action of the court below."¹¹⁵ But using the All Writs Act to issue emergency relief in cases that the Court has no intention of hearing does not guard against threats to the Court's jurisdiction. Instead — almost by definition — an emergency writ can be "in aid of" the Supreme Court's jurisdiction only when the Court plans to exercise its jurisdiction over the case. Otherwise, the writ would be "in aid of" nothing. The writ could not "aid" the Court's jurisdiction because the Court is not going to exercise its jurisdiction. There would be nothing to aid.

Second, a grant of emergency relief in the Supreme Court may be "agreeable to the usages and principles of law" only when the Court is likely to review the case on the merits. The boundaries of this phrase "are not always clear."¹¹⁶ But the Court has explained that its meaning is "unlimited by the common law or the English law."¹¹⁷ And the Court has stated that "law" in this context is "not a static concept, but expands and develops as new problems arise."¹¹⁸ The phrase is thus a "legislatively approved source of procedural instruments designed to achieve 'the rational ends of law.'"¹¹⁹ And issuing emergency relief only in cases when the Court is likely to grant certiorari advances the rational ends of law. It ensures that the Court is not required 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."¹²⁰ Limiting emergency relief to only certworthy cases also responds to the "new problem"¹²¹ of the Court using the emergency docket "to signal or make changes in the law, without anything approaching full briefing and argument."¹²² Restricting emergency relief to only certworthy cases allows the Court to decide the merits of those cases (and thus create law) "in an orderly fashion — after full briefing, oral argument, and . . . extensive internal deliberations."¹²³ In this way, Justice Barrett's approach in *Does 1–3* ensures that the Court "do[es] *not* have to decide the merits on the emergency docket."¹²⁴

¹¹⁵ *Id.* at 280; see also *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 25 (1943) (explaining that a writ was "in aid of" a court's jurisdiction even before jurisdiction was "acquired by appeal" because "[o]therwise the appellate jurisdiction could be defeated and the purpose of the statute authorizing the writ thwarted by unauthorized action of the district court obstructing the appeal").

¹¹⁶ *Am. Fid. Fire Ins. Co. v. U.S. Dist. Ct. for N. Dist. of Cal.*, 538 F.2d 1371, 1374 (9th Cir. 1976).

¹¹⁷ *Price v. Johnston*, 334 U.S. 266, 282 (1948).

¹¹⁸ *Id.*

¹¹⁹ *Id.* (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 273 (1942)).

¹²⁰ *Does 1–3 v. Mills*, 142 S. Ct. 17, 18 (2021) (Barrett, J., concurring in the denial of application for injunctive relief).

¹²¹ See *Price*, 334 U.S. at 282.

¹²² *Merrill v. Milligan*, 142 S. Ct. 879, 889 (2022) (Kagan, J., dissenting from grant of applications for stays).

¹²³ *Id.* at 879 (Kavanaugh, J., concurring in grant of applications for stays).

¹²⁴ *Id.*

Given the Court's inconsistency in considering certworthiness outside the stay context, these readings of the All Writs Act may well mean that "many of the Court's emergency orders are impermissible, or at least were evaluated using the wrong factors."¹²⁵ But perhaps that is the point. Some commentators have speculated that Justice Barrett's opinion in *Does 1-3* was a course correction of sorts, a recognition that "the Court had gone a bit too far in prior cases."¹²⁶ Justices Barrett and Kavanaugh "seemed to be signaling that they would not automatically grant emergency relief just because they thought the party seeking it was right."¹²⁷ And that seems to be what the All Writs Act requires.

III. VACATUR OF STAYS AND INJUNCTIONS

Justice Barrett's opinion in *Does 1-3* also has important implications for two forms of emergency relief that have been largely neglected in the scholarly commentary: vacatur of stays and injunctions. The Supreme Court has the authority to issue an emergency writ that vacates a stay imposed by a lower court.¹²⁸ These orders dissolve existing stays and clear the way for executing the stayed judgment. The Court can also vacate an injunction issued by a lower court.¹²⁹ These emergency orders sap the lower court's injunction of any force. The Supreme Court has not adopted a definite legal standard for issuing either of these forms of emergency relief. And the lack of an established test often leads advocates and individual Justices to cite different legal standards, creating confusion in the law.¹³⁰ These standards are mainly divided over whether applicants must show that the underlying dispute is certworthy.¹³¹ The logic of Justice Barrett's concurrence in *Does 1-3* resolves this confusion: since these forms of emergency relief are issued under the All Writs Act, the Court cannot provide them unless the case is certworthy. This Part first addresses the muddled state of the law

¹²⁵ Pickup & Templin, *supra* note 24, at 17.

¹²⁶ See VLADECK, *supra* note 11, at 251.

¹²⁷ *Id.* But cf. Note, *Halting Administrative Action in the Supreme Court*, 137 HARV. L. REV. 2016, 2024 (2024) (writing that "certworthiness is neither here nor there" when it comes to emergency injunctions because, "[i]n this context, the Supreme Court has been in the business of correcting grievous errors by the lower courts").

¹²⁸ See, e.g., *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2486 (2021) (per curiam).

¹²⁹ See, e.g., *Dep't of Homeland Sec. v. Texas*, No. 23A607, 2024 WL 222180, at *1 (U.S. Jan. 22, 2024) (mem.).

¹³⁰ See, e.g., Reply in Support of Application to Vacate the Injunction Entered by the United States Court of Appeals for the Fourth Circuit at 2, *West Virginia v. Jackson ex rel. B.P.J.*, 143 S. Ct. 889 (2023) (No. 22A800) ("Applicants invoked the correct legal standard. In suggesting otherwise, Respondent misunderstands both the form of the order below and the nature of the relief that Applicants seek from this Court.")

¹³¹ Compare, e.g., *Ala. Ass'n of Realtors*, 141 S. Ct. at 2488 (not requiring a certworthiness showing before vacating a stay), with *Coleman v. PACCAR Inc.*, 424 U.S. 1301, 1304 (1976) (Rehnquist, J., in chambers) (requiring a certworthiness showing).

when it comes to vacatur of stays. It then does the same for vacatur of injunctions.

A. Vacating Stays

The Supreme Court has “understood its power to *issue* stays to encompass the related but distinct power to *lift* stays imposed by lower courts.”¹³² In a 1977 opinion, Justice Marshall explained matter-of-factly that “[t]here is no question as to the power of a Circuit Justice to dissolve a stay entered by a court of appeals.”¹³³ Scholars have explained that the source of this power is “implied, rather than expressly granted by statute.”¹³⁴ But the probable source of this authority is the All Writs Act. It is doubtful that § 2101(f) allows the Court to vacate stays. For one, § 2101(f) empowers the Court to preserve the pre-litigation status quo by holding final judgments or decrees in abeyance. It authorizes the Supreme Court to *prevent* the “execution and enforcement” of a judgment so that the aggrieved party can petition for certiorari before the judgment goes into effect.¹³⁵ But vacating a stay does the opposite. It lifts the stay that was previously in effect, clearing the way for the “execution and enforcement” of a judgment.¹³⁶ For another, Justice O’Connor has explained that the Court has jurisdiction to vacate a stay “*regardless* of the finality of the judgment below.”¹³⁷ Yet § 2101(f) applies *only* to final judgments or decrees.¹³⁸ Thus, the Court’s ability to vacate a stay likely comes from the All Writs Act. As such, emergency orders vacating stays must be “in aid of” the Court’s jurisdiction and “agreeable to the usages and principles of law.”¹³⁹

The Supreme Court “has apparently never articulated a standard for vacating stays imposed by lower courts.”¹⁴⁰ As a result, different Justices appear to rely on different legal tests. There are two primary approaches. The first comes from then-Justice Rehnquist’s in-chambers opinion in *Coleman v. PACCAR Inc.*¹⁴¹ Under *Coleman*, a party seeking to vacate a stay must make three showings. *First*, that the case “could and very likely would be reviewed [in the Supreme Court] upon final

¹³² Vladeck, *supra* note 30, at 129.

¹³³ *Commodity Futures Trading Comm’n v. Brit. Am. Commodity Options Corp.*, 434 U.S. 1316, 1319 (1977) (Marshall, J., in chambers).

¹³⁴ Gonen, *supra* note 32, at 1174.

¹³⁵ 28 U.S.C. § 2101(f).

¹³⁶ *Id.*

¹³⁷ *See* *W. Airlines, Inc. v. Int’l Bhd. of Teamsters*, 480 U.S. 1301, 1305 (1987) (O’Connor, J., in chambers) (emphasis added). While Justice O’Connor was specifically referring to the power of an individual Circuit Justice, “the power to issue extraordinary writs under § 1651 is granted to the Supreme Court itself.” Gonen, *supra* note 32, at 1168.

¹³⁸ 28 U.S.C. § 2101(f).

¹³⁹ *Id.* § 1651(a).

¹⁴⁰ Vladeck, *supra* note 30, at 131 n.53 (emphasis omitted).

¹⁴¹ 424 U.S. 1301 (1976) (Rehnquist, J., in chambers).

disposition in the court of appeals.”¹⁴² *Second*, that “the rights of the parties . . . may be seriously and irreparably injured by the stay.”¹⁴³ *Third*, “that the court of appeals [was] demonstrably wrong in its application of accepted standards in deciding to issue the stay.”¹⁴⁴ Individual members of the Court often rely on this formulation.¹⁴⁵ So do advocates.¹⁴⁶

The second approach looks to the four factors that the Supreme Court has explained are relevant for *courts of appeals* when they consider whether to grant a stay.¹⁴⁷ Under this framework, the Court considers (i) whether the applicant is “likely to succeed on the merits”; (ii) “whether the applicant will be irreparably injured absent a stay”; (iii) whether a stay would injure the other parties; and (iv) whether a stay is in the public interest.¹⁴⁸ The Court took this approach in its recent per curiam opinion in *Alabama Ass’n of Realtors v. Department of Health & Human Services*.¹⁴⁹ There, the Court vacated a stay because it was “no longer justified under the governing four-factor test.”¹⁵⁰ The Court did not address whether the case was certworthy.

But the same principles that justify Justice Barrett’s suggestion that certworthiness is relevant for issuing injunctions apply with equal force when it comes to vacating stays.¹⁵¹ *First*, as a matter of logic, an applicant cannot succeed on the merits in the Supreme Court absent a grant of certiorari. *Second*, the All Writs Act is what authorizes the Court to vacate stays, and “the All Writs Act standard” requires applicants to show that “a grant of certiorari and eventual reversal are probable.”¹⁵²

¹⁴² *Id.* at 1304; *accord* *Certain Named & Unnamed Non-Citizen Child. & Their Parents v. Texas*, 448 U.S. 1327, 1330 (1980) (Powell, J., in chambers).

¹⁴³ *Coleman*, 424 U.S. at 1304.

¹⁴⁴ *Id.*

¹⁴⁵ *See, e.g.*, *W. Airlines, Inc. v. Int’l Bhd. of Teamsters*, 480 U.S. 1301, 1305 (1987) (O’Connor, J., in chambers); *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 571 U.S. 1061, 1064–65 (2013) (Breyer, J., dissenting) (joined by Ginsburg, Sotomayor, and Kagan, JJ.); *Raysor v. DeSantis*, 140 S. Ct. 2600, 2602 (2020) (Sotomayor, J., dissenting from denial of application to vacate stay); *see also* Vladeck, *supra* note 30, at 131 n.53.

¹⁴⁶ *See, e.g.*, *Federal Respondents’ Response in Support of Emergency Application to Vacate Stays of Agency Authorizations Pending Review* at 11, *Mountain Valley Pipeline, LLC v. Wilderness Soc’y*, 144 S. Ct. 42 (2023) (No. 23A35) (Solicitor General); *Emergency Application for Immediate Administrative Relief and to Vacate Stay of Preliminary Injunction Issued by the United States Court of Appeals for the Fifth Circuit* at 14, *NetChoice, LLC v. Paxton*, 142 S. Ct. 1715 (2022) (No. 21A720) (counsel for applicant).

¹⁴⁷ *See, e.g.*, *Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2485, 2488 (2021) (per curiam) (citing *Nken v. Holder*, 556 U.S. 418, 434 (2009)); *Emergency Application to the Chief Justice John G. Roberts, Jr. to Vacate the Stays of Agency Authorizations Pending Adjudication of the Petitions for Review* at 11–12, *Mountain Valley Pipeline*, 144 S. Ct. 42 (No. 23A35).

¹⁴⁸ *Nken*, 556 U.S. at 434.

¹⁴⁹ 141 S. Ct. 2485 (per curiam).

¹⁵⁰ *Id.* at 2488.

¹⁵¹ *See* *United States v. Texas*, No. 23A814, 2024 WL 1163923, at *1 (U.S. Mar. 19, 2024) (Barrett, J., concurring in denial of applications to vacate stay) (writing that an “assessment of certworthiness” is relevant to the decision whether to vacate a stay pending appeal).

¹⁵² *Lawrence ex rel. Lawrence v. Chater*, 516 U.S. 163, 168 (1996) (per curiam).

Third, and turning to the text of the All Writs Act, it is doubtful that an emergency vacatur could be “in aid of” the Court’s jurisdiction if the Court is not going to exercise its jurisdiction over the case.¹⁵³ Indeed, if the Court is not going to grant certiorari and review the case on the merits, then the emergency vacatur would be “in aid of” nothing. *Fourth*, limiting emergency vacaturs to only cases that are certworthy is “agreeable to the usages and principles of law.”¹⁵⁴ Doing so advances the “rational ends of law”¹⁵⁵ by ensuring that the Court is not forced to “give a merits preview in cases that it would be unlikely to take.”¹⁵⁶

B. Vacating Injunctions

The Supreme Court also has the power to dissolve an injunction issued by a lower court.¹⁵⁷ The probable source of this authority is the All Writs Act.¹⁵⁸ Section 2101(f) is likely inapplicable here. That statute authorizes the Court to *temporarily* hold a lower-court order in abeyance “for a reasonable time to enable the party aggrieved to obtain a writ of certiorari.”¹⁵⁹ By contrast, when the Supreme Court vacates an order, it *permanently* saps that order’s binding force.¹⁶⁰ Section 2101(f) does not appear to authorize this “extraordinary remedy.”¹⁶¹ The Court had vacated only two injunctions between October Terms 2005 and 2020.¹⁶² But the Court has vacated four emergency injunctions since then, including one in January 2024.¹⁶³ None of these vacaturs featured any explanation of the applicable legal standard.

In a 1989 in-chambers opinion, though, Justice Brennan declined to vacate an injunction because the applicants did not show “a ‘reasonable probability’ that four Justices will consider the issue sufficiently meritorious to grant certiorari.”¹⁶⁴ Two recent Supreme Court briefs filed by

¹⁵³ See *supra* notes 108–115 and accompanying text.

¹⁵⁴ 28 U.S.C. § 1651(a).

¹⁵⁵ *Adams v. United States ex rel. McCann*, 317 U.S. 269, 273 (1942).

¹⁵⁶ *Does 1–3 v. Mills*, 142 S. Ct. 17, 18 (2021) (Barrett, J., concurring in the denial of application for injunctive relief).

¹⁵⁷ See, e.g., *Dep’t of Homeland Sec. v. Texas*, No. 23A607, 2024 WL 222180, at *1 (U.S. Jan. 22, 2024) (mem.).

¹⁵⁸ See *Application to Vacate the Injunction Pending Appeal Entered by the United States Court of Appeals for the Fifth Circuit at 1, Dep’t of Homeland Sec. v. Texas*, No. 23A607, (United States applying for vacatur of an injunction “[p]ursuant to . . . the All Writs Act”); *Application to Vacate the Injunction Entered by the United States Court of Appeals for the Eighth Circuit at 1, Biden v. Nebraska*, 143 S. Ct. 477 (2022) (No. 22A444) (same).

¹⁵⁹ 28 U.S.C. § 2101(f).

¹⁶⁰ See John Harrison, *Vacatur of Rules Under the Administrative Procedure Act*, 40 YALE J. ON REGUL. BULL. 119, 119 (2023).

¹⁶¹ *U.S. Bancorp Mortg. Co. v. Bonner Mall P’ship*, 513 U.S. 18, 26 (1994).

¹⁶² Vladeck Testimony, *supra* note 64, at 5 tbl.1.

¹⁶³ See *Dep’t of Homeland Sec. v. Texas*, 2024 WL 222180, at *1; *Garland v. Blackhawk Mfg. Grp., Inc.*, 144 S. Ct. 338, 338 (2023) (mem.); *Hamm v. Miller*, 143 S. Ct. 50, 50 (2022) (mem.); *Hamm v. Reeves*, 142 S. Ct. 743, 743 (2022) (mem.).

¹⁶⁴ *Bhd. of R.R. Signalmen v. Se. Pa. Transp. Auth.*, 489 U.S. 1301, 1301 (1989) (Brennan, J., in chambers) (quoting *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980)).

the Solicitor General relied on this standard. They argued that applicants seeking to vacate an injunction must show, among other things, “a reasonable probability that [the] Court would eventually grant review.”¹⁶⁵ And another recent Supreme Court brief contended that the Court should not vacate a lower-court injunction because the applicants had not “attempted to show that this case is a likely candidate for review under [the] Court’s criteria for granting certiorari.”¹⁶⁶

But many recent Supreme Court briefs — including one by the Solicitor General — make no mention of certworthiness. Instead, they frame the inquiry as an evaluation of whether the lower court correctly applied the traditional factors for issuing an injunction.¹⁶⁷ The rationale here is that the “[a]pplicants are challenging an injunction, so the traditional factors for analyzing an injunction apply.”¹⁶⁸ And under *Winter v. Natural Resources Defense Council*,¹⁶⁹ these factors are (i) whether the applicant is “likely to succeed on the merits”; (ii) whether the applicant is “likely to suffer irreparable harm” absent an injunction; (iii) whether the equities favor the applicant; and (iv) whether the “injunction is in the public interest.”¹⁷⁰ If this framework governs, then applicants seeking to vacate an injunction need not show that the underlying dispute is certworthy.

But again, the logic of Justice Barrett’s *Does 1–3* opinion suggests that the proper inquiry for vacating an injunction includes a certworthiness requirement. The analysis here largely overlaps with the analysis for vacating stays: a certworthiness requirement for vacating injunctions is supported by (i) logic; (ii) precedent; and (iii) the text of the All Writs Act.¹⁷¹

* * *

Having established that applicants seeking emergency relief under the All Writs Act must show that the underlying dispute is certworthy,

¹⁶⁵ Application to Vacate the Injunction Pending Appeal Entered by the United States Court of Appeals for the Fifth Circuit, *supra* note 158, at 15 (quoting *Merrill v. Milligan*, 142 S. Ct. 879, 880 (2022) (Kavanaugh, J., concurring)); Application to Vacate the Injunction Pending Appeal Entered by the United States District Court for the Northern District of Texas at 14, *Garland*, 144 S. Ct. 338 (No. 23A302) (same).

¹⁶⁶ Respondent’s Opposition to Application to Vacate the Injunction Entered by the United States Court of Appeals for the Fourth Circuit at 28, *West Virginia v. Jackson ex rel. B.P.J.*, 143 S. Ct. 889 (2023) (No. 22A800).

¹⁶⁷ See, e.g., Application to Vacate the Injunction Entered by the United States Court of Appeals for the Eighth Circuit, *supra* note 158, at 14–15 (Solicitor General); Application to Vacate the Injunction Entered by the United States Court of Appeals for the Fourth Circuit at 11–12, *B.P.J.*, 143 S. Ct. 889 (No. 22A800).

¹⁶⁸ Reply in Support of Application to Vacate the Injunction Entered by the United States Court of Appeals for the Fourth Circuit at 2, *B.P.J.*, 143 S. Ct. 889 (No. 22A800).

¹⁶⁹ 555 U.S. 7 (2008).

¹⁷⁰ *Id.* at 20.

¹⁷¹ See *supra* notes 152–156 and accompanying text.

it is natural to ask whether this requirement meaningfully constrains the Court's ability to grant relief. In other words, does a certworthiness requirement really make a difference? The following Part addresses this question, concluding that the evidence is mixed.

IV. THE BITE OF A CERTWORTHINESS REQUIREMENT

Some commentators have argued that a certworthiness requirement will “significantly curtail[]” the use of the emergency docket because Justices Barrett and Kavanaugh have “shown themselves parsimonious with cert grants.”¹⁷² In fact, the entire Court has shown itself to be parsimonious with cert grants. The Supreme Court is deciding fewer cases than almost ever before.¹⁷³ It grants certiorari in only about one percent of all applications.¹⁷⁴ There is “enormous pressure” to deny review.¹⁷⁵ And the data support the notion that *something* changed after Justice Barrett's concurrence in *Does 1-3*. In the two years since that opinion was released, there have been fifty-four emergency applications for injunctive relief.¹⁷⁶ Zero have been granted.¹⁷⁷ (Recall that the Court granted seven emergency injunctions in the six months between October 2020 and April 2021, shortly before *Does 1-3* was decided.¹⁷⁸) The Court did not explain its rationale for denying these applications. But Justice Barrett's suggestion that the Court should not provide emergency relief unless the case is certworthy may have contributed to the Court's recent reticence.

Yet it is not so simple. Grants of certiorari “are matters of grace.”¹⁷⁹ Supreme Court Rule 10 guides the Court's decision whether to grant certiorari.¹⁸⁰ The problem is that Rule 10 provides almost no guidance. Many people who have been involved in the certiorari process believe that it is “impervious to meaningful generalization.”¹⁸¹ Perhaps that is because Rule 10 effectively “grants the Justices permission to deny certiorari.”¹⁸² A Justice is “free to cast a negative vote for whatever reason

¹⁷² Josh Blackman, *A Deeper Dive on Justice Barrett's Concurrence in Does v. Mills*, REASON: VOLOKH CONSPIRACY (Oct. 30, 2021, 3:47 PM), <https://reason.com/volokh/2021/10/30/a-deeper-dive-on-justice-barretts-concurrence-in-does-v-mills> [<https://perma.cc/2RLB-WUSN>].

¹⁷³ See VLADDECK, *supra* note 11, at 57.

¹⁷⁴ *See id.*

¹⁷⁵ H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 218 (1991).

¹⁷⁶ *See* List of Emergency Applications for Injunctive Relief since Oct. 29, 2021 (on file with the Harvard Law School Library) (data through March 18, 2024).

¹⁷⁷ *Id.*

¹⁷⁸ Vladeck, *supra* note 12.

¹⁷⁹ *Wade v. Mayo*, 334 U.S. 672, 680 (1948).

¹⁸⁰ *See* SUP. CT. R. 10.

¹⁸¹ PERRY, *supra* note 175, at 2.

¹⁸² Richard M. Re, *Precedent as Permission*, 99 TEX. L. REV. 907, 934 (2021).

he or she sees fit.”¹⁸³ But Rule 10 does offer a nonexhaustive list of three situations that may justify granting certiorari.

The first situation is when there is a conflict among the courts of appeals on a question of law.¹⁸⁴ These circuit splits are “the single most important generalizable factor in assessing certworthiness.”¹⁸⁵ But this factor often will not apply to emergency applications. Many of the Court’s applications for emergency relief involve new laws, policies, or Supreme Court rulings.¹⁸⁶ As such, there is often not enough time for a circuit split to develop around the relevant question of law. The recent case of *Students for Fair Admissions v. U.S. Military Academy at West Point*¹⁸⁷ is illustrative. There, in the wake of the Court’s 2023 affirmative action decision,¹⁸⁸ an organization sought an emergency injunction prohibiting West Point from using race as a factor in its admissions decisions.¹⁸⁹ The United States responded by arguing that an injunction was unwarranted because (among other things) the case was not certworthy.¹⁹⁰ The Solicitor General emphasized that the case was not certworthy because it was “filed a mere four months ago,” and the question presented had not “resulted in an opinion from any other court of appeals, much less a circuit conflict.”¹⁹¹

Rule 10 also states that certiorari might be warranted when multiple state supreme courts have offered conflicting interpretations of federal law.¹⁹² But again, because many emergency applications involve recent changes in the law, it is doubtful that they will raise issues that are the subject of a state supreme court split. So applicants for emergency relief will likely have to invoke Rule 10’s final guidepost: whether the case involves “an important question of federal law that has not been, but

¹⁸³ SHAPIRO ET AL., *supra* note 92, § 5.5.

¹⁸⁴ SUP. CT. R. 10(a).

¹⁸⁵ PERRY, *supra* note 175, at 246; *see, e.g.*, *Maryland v. King*, 567 U.S. 1301, 1302 (2012) (Roberts, C.J., in chambers) (“[T]here is a reasonable probability this Court will grant certiorari. Maryland’s decision conflicts with decisions of the U.S. Courts of Appeals for the Third and Ninth Circuits as well as the Virginia Supreme Court . . .”).

¹⁸⁶ *See, e.g.*, *Moyle v. United States*, No. 23A469, 2024 WL 61828 (U.S. Jan. 5, 2024) (mem.) (involving a new Idaho law); *Dep’t of Homeland Sec. v. Texas*, No. 23A607, 2024 WL 222180 (U.S. Jan. 22, 2024) (mem.) (involving a new Texas policy); *Students for Fair Admissions v. U.S. Mil. Acad. (USMA)*, No. 23A696, 2024 WL 394423 (U.S. Feb. 2, 2024) (mem.) (involving the Supreme Court’s new affirmative action ruling); *Griffin v. HM Fla.-ORL, LLC*, 144 S. Ct. 1 (2023) (involving a new Florida law).

¹⁸⁷ No. 23A696, 2024 WL 394423.

¹⁸⁸ *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2166 (2023).

¹⁸⁹ Emergency Application for an Injunction Pending Appellate Review at 3, *USMA*, No. 23A696.

¹⁹⁰ Response in Opposition to the Emergency Application for an Injunction Pending Appellate Review at 19, *USMA*, No. 23A696.

¹⁹¹ *Id.*

¹⁹² SUP. CT. R. 10(b).

should be, settled by [the Supreme] Court.”¹⁹³ It hardly bears mentioning that this standard is “ultimately subjective.”¹⁹⁴

Commentators often criticize Rule 10 as “hopelessly indeterminate” (or variants thereof).¹⁹⁵ Yet the Rule’s ambiguity “is not some unfortunate oversight by the justices.”¹⁹⁶ It is intentional.¹⁹⁷ Justices have openly acknowledged the flexibility that Rule 10 affords them. Justice Harlan explained that the test for certworthiness “is more a matter of feel than of precisely ascertainable rules.”¹⁹⁸ And Chief Justice Rehnquist expressed a similar sentiment when he wrote that the decision to grant certiorari is “a rather subjective decision, made up in part of intuition and in part of legal judgment.”¹⁹⁹ In the end, then, it appears that certworthiness is mostly in the eye of the beholder.²⁰⁰

But it is probably an exaggeration to say that the Court’s standards for granting review are hopelessly indeterminate.²⁰¹ Recent scholarship has suggested that “the Court’s merits opinions offer some (frequently overlooked) suggestions regarding the reasons for granting review.”²⁰² For example, the Court appears likely to view cases that invalidate federal statutes as important enough to merit certiorari.²⁰³ Commentators have also suggested that the Court has increasingly viewed cases that seek to overturn precedents as certworthy.²⁰⁴ And it has long been true that the Court is typically receptive when the Solicitor General petitions for certiorari.²⁰⁵

In any event, Rule 10’s subjectivity and indeterminacy do not automatically mean that a certworthiness requirement lacks bite. Justice Barrett’s opinion in *Does I-3* suggested that the Supreme Court has a duty to pause over two questions before it grants emergency relief. *First*, does the case present “an important question of federal law”?²⁰⁶ *Second*, even if so, is that question one that should be “settled by [the]

¹⁹³ SUP. CT. R. 10(c).

¹⁹⁴ PERRY, *supra* note 175, at 253.

¹⁹⁵ Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court’s Responsibilities: An Empirical Study*, 59 N.Y.U. L. REV. 681, 790 (1984) (describing the predecessor to Rule 10); Tejas N. Narechania, *Certiorari in the Roberts Court*, 67 ST. LOUIS U. L.J. 587, 590–91, 591 n.14 (2023) (collecting sources lamenting the ambiguity involved in the certiorari process).

¹⁹⁶ PERRY, *supra* note 175, at 34.

¹⁹⁷ *Id.*

¹⁹⁸ SHAPIRO ET AL., *supra* note 92, § 4.2 (internal quotation marks omitted) (quoting John M. Harlan, *Manning the Dikes*, 13 REC. ASS’N BAR CITY N.Y. 541, 549 (1958)).

¹⁹⁹ *Id.* § 4.2 n.14 (quoting WILLIAM H. REHNQUIST, *THE SUPREME COURT* 234 (2001)).

²⁰⁰ See PERRY, *supra* note 175, at 253.

²⁰¹ See Richard M. Re, *Do the Justices Have Permission to Deny Review?*, RE’S JUDICATA (Nov. 11, 2021, 8:30 AM), <https://richardresjudicata.wordpress.com/2021/11/11/do-the-justices-have-permission-to-deny-review> [<https://perma.cc/N86W-YKBS>]; Tejas N. Narechania, *Certiorari in Important Cases*, 122 COLUM. L. REV. 923, 926 (2022).

²⁰² Narechania, *supra* note 201, at 927.

²⁰³ *Id.* at 928–29; Re, *supra* note 201.

²⁰⁴ See Narechania, *supra* note 195, at 592.

²⁰⁵ SHAPIRO ET AL., *supra* note 92, § 4.1.

²⁰⁶ SUP. CT. R. 10(c).

Court”²⁰⁷ Justice Barrett’s concurrence thus focused the Court’s attention on two questions that it might have previously glossed over. And the very act of pausing over these questions serves as another hurdle to emergency relief. At a minimum, these questions give the Justices another reason to deny relief. True, it is impossible to tell whether this new hurdle contributed to the Court’s fifty-four consecutive denials of injunctive relief since *Does 1-3* was decided. But just because we cannot conclusively say that Justice Barrett’s certworthiness suggestion is doing the work here, that does not mean that it is not doing any work at all.

CONCLUSION

Justice Barrett’s concurrence in *Does 1-3* may go a long way toward allaying the recent concerns that the Supreme Court is granting emergency relief too loosely. Several commentators perceived this opinion to be “unusual”²⁰⁸ or made up “out of whole cloth.”²⁰⁹ But the opinion’s suggestion that certworthiness is a necessary condition for emergency relief in the Supreme Court has a firm basis in both the Court’s precedents involving the All Writs Act and the text of the Act itself. While *Does 1-3* was a case involving emergency injunctions, the logic of the opinion applies with equal force to emergency vacatur as well. Given the discretionary nature of certiorari, it is unclear just how much bite this certworthiness requirement has. But at the very least, Justice Barrett’s opinion in *Does 1-3* acts as a speed bump, concentrating the Court’s attention on questions that it might have previously overlooked. And the early returns suggest that something in the Court’s process for granting emergency relief has changed in the wake of *Does 1-3*. After securing seven emergency injunctions in the six-month period between October 2020 and April 2021,²¹⁰ applicants seeking injunctive relief have gone 0-for-54 (and counting) since *Does 1-3* was decided.²¹¹ That could be a coincidence. But it would be some coincidence.

²⁰⁷ *Id.*

²⁰⁸ Pickup & Templin, *supra* note 24, at 15.

²⁰⁹ Blackman, *supra* note 16.

²¹⁰ Vladeck, *supra* note 12.

²¹¹ See List of Emergency Applications for Injunctive Relief, *supra* note 176.