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Ruling in the Shadows: Analysis of the Supreme Court's Use of the 'Shadow Docket' and its Effects

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Ruling in the Shadows: Analysis of the Supreme Court's Use of the 'Shadow Docket' and its Effects

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DISSERTATION

A dissertation submitted in partial
fulfillment of the requirements for
the degree of Doctor of Philosophy
in the College of Arts and Sciences
at the University of Kentucky

By
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ABSTRACT OF DISSERTATION

Ruling in the Shadows: Analysis of the Supreme Court's Use of the 'Shadow Docket' and its Effects

The recent increased use of the shadow docket has left the public and scholars with unanswered questions about how procedures influence outcomes and behavior. Many of these shadow docket cases have been petitioned to the justices as emergencies in very important policy areas such as immigration, abortion, elections, and transgender rights. I collect a large dataset of all outcomes of the Supreme Court's shadow docket from 2010-2022. I examine the language the justices use to justify their decisions made using alternate procedures. I find unique differences in the justifying behavior of the justices as well as significant differences in the amount of justification used over time. To better understand how judges make these emergency decisions, I examine under what conditions Justices agree to grant emergency applications on the docket by examining petitions and outcomes of all emergency cases from 2017-2023. I find that petitioner resources and ideology impacts whether an emergency petition is granted. Finally, I examine how the public reacts to the Court making decisions using alternate procedures. I theorize that procedures matter in changing public opinion of an institution when the procedures are nontransparent, stray from expected norms, and are thus perceived as politically unfair. I administered a survey experiment and find evidence to suggest that use of the shadow docket procedure does lead to less support for decisions as well as an increased support for measures of broad court curbing (e.g., lower legitimacy). The results have important implications for approval of the Court as well as the role of the Court in a transparent democracy.

KEYWORDS: supreme, court, shadow, docket, decision, making

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May 3, 2024

Ruling in the Shadows: Analysis of the Supreme Court's Use of the 'Shadow Docket' and its Effects

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Dedicated to the giants on whose shoulders I stand:
Tonya, Julie, DeLila, Ada, and Laura.

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Without the acknowledgements section, only my name would show up as having produced this dissertation. The assumption would be that I completed this work on my own, and that is not correct. I would never have thought of getting my Ph.D, never have made it through the learning stage, never would have had the strength to complete this dissertation without the community that helped and supported me. So I would like to acknowledge the following individuals because without them, this project would not have been possible.

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Chapter 1 Introduction

Right after the New Year's celebration on January 2nd, 2024, the Supreme Court received a petition from President Joe Biden, requesting the justices weigh in on an important matter relating to a stretch of the U.S. and Mexico border in Texas (*Department of Homeland Security v. Texas* 23A607, 2024). Federal Border Patrol agents were cutting or removing razor wire, put in place by Texas agents, to reach migrants seeking asylum. Lower federal courts had issued an injunction banning federal agents from removing the wire until the lower court could hear a case to determine if Texas could legally put up the razor wire.

The Biden administration petitioned the Supreme Court to vacate the injunction so that Federal Border Patrol agents could reach immigrants, citing reasons stemming from multiple deaths, use of extra resources, and action required by the Mexican government due to agents' inability to access migrants. The petition claimed Texas should not have the right to block access to the federal border even if it is on state land given the current immigration laws. The petition asked to vacate the injunction but makes a legal claim relevant to the case in the lower courts.

Under normal circumstances, the Supreme Court clerk would receive the petition through mail or the online submission portal, give the petition a docket number, then send out a printed copy to the justices, and then the case would follow the normal procedural path with full treatment detailed in Figure 1.1. The Court would review relevant case law, hear oral arguments, converse together in conference, and then

Figure 1.1: Normal Supreme Court Procedures

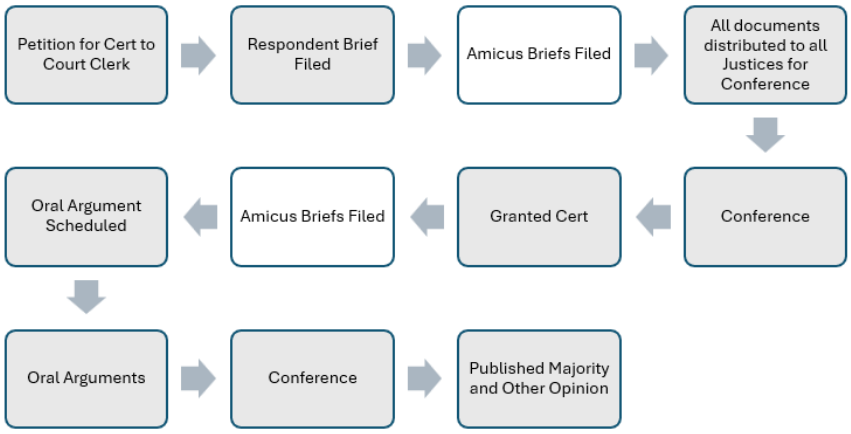

Figure 1.1 shows the normal steps taken to come to a decision by the Court on the merits docket. White blocks indicate optional steps.

come to a decision in a few months. The Court is known for and proud of their slow, deliberate decision making processes. Even the Supreme Court building points to the "pace of justice" as being "slow and deliberate" with architectural flourishes of tortoises (see Figure 1.2). The justices take time to dig through potential outcomes, discuss case facts, and converse together to provide the lower courts and relevant parties with a legal justification for their decision. Court decisions are published with lengthy majority opinions. However, the border patrol case did not follow the normal procedures of the court. In less than 20 days, the Court came to a decision to grant the injunction to stop the lower court injunction without giving any legal justification for their decision making behavior.

The conclusion of the case was decided for the Biden administration that the federal border patrol agents are allowed to cut or remove razor wire. There was no indication if this also means that the Biden administration's arguments about

Figure 1.2: Architectural Flourishes of Supreme Court Building

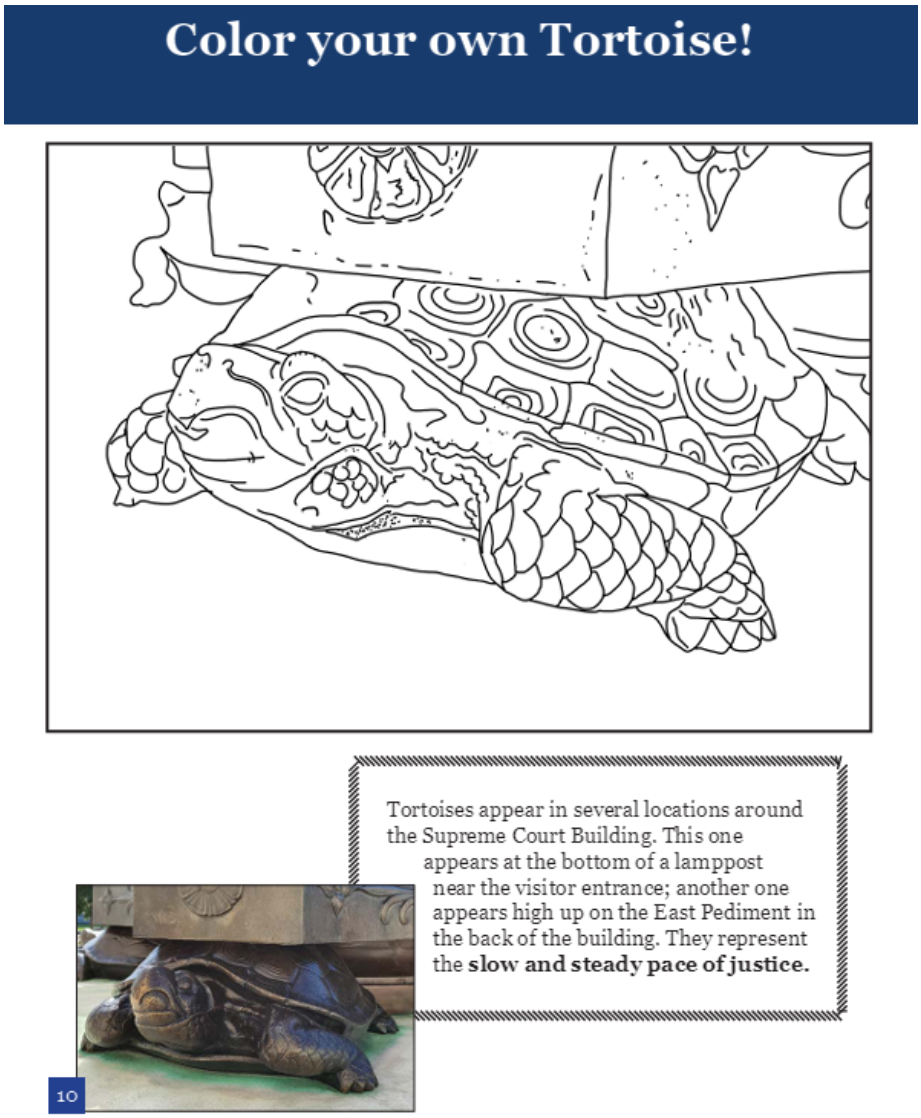

Figure 1.2 is a clipping from the Supreme Court[1] *information material for school children. A coloring page highlighting the regular slow pace of the decision making process.*

the illegality of Texas' actions is correct or not. The court also did not give any justification for their decision or indication on how the lower court should interpret their decision.

Figure 1.3: Shadow Docket Court Procedures

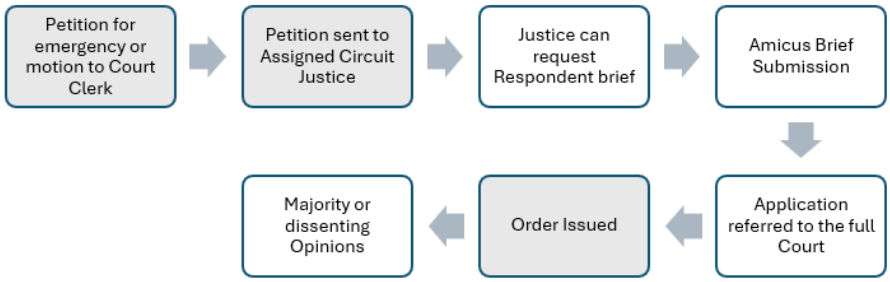

Figure 1.3 shows the steps taken to come to a decision by the Court on the shadow docket. White blocks indicate optional steps.

This border patrol case was decided on the Supreme Court's shadow docket. This docket is also known as the orders docket, the lightning docket, or the emergency docket. This docket consists of cases that are dispensed without following the normal procedures of the Court detailed in Figure 1.1. Instead these shadow docket procedures, displayed in Figure 1.3 vary greatly from the norms of the Court.

The first noticeable difference is the number of steps in the decision making process. For the regular docket there are 11 steps. The shadow docket consists of only 7 steps. Of those steps, only two are optional for the regular docket because they rely on outside individuals to submit amicus briefs. In contrast, the shadow docket only has 3 *required* steps. The rest of the steps in Figure 1.3 are white and indicate that these steps are optional or do not usually occur. It is easy to see why cases decided on the shadow docket are dispensed with quickly.

This docket strays greatly from the norms of the Court. While these quick Court procedures were originally used to dispense of less meaningful office work such as granting parties extra time to file briefs, the Supreme Court's use of the "shadow docket" has increased over time and has expanded to making meaningful policy decisions (Vladeck 2019, 2023; Baude 2015). These important decisions such as *Department of Homeland Security v. Texas* (23A607, 2024) have drawn the attention of the media and scholars. However, scholars of Political Science know very little about the procedures of the docket, the outcomes of the docket, or the effects of the docket (See for exception Badas, Justus and Li 2022).

This dissertation seeks to expand our understanding of the shadow docket in each of the three aforementioned facets: how does the docket work, how are decisions being made, and what are the effects of the docket. I collect the first comprehensive dataset of shadow docket outcomes from 2010-2022 to answer these questions. Each subsequent empirical chapter of the dissertation seeks to address one of these questions.

In chapter two, I provide a descriptive analysis of the Supreme Court's shadow docket by specifically examining the opinions, justifications, and language used by the Justices to explain their decision making on the shadow docket. With no handbook on the rules of the shadow docket, the only insider perspective on how the docket works comes from the justices themselves. Frequently the Court explains denials or grants given on the shadow docket in one or two very formulaic sentences with little detail. However, there are also times when shadow docket decisions are followed by either a short justifying description or a full-length opinion containing information

about the case, future legal applications, restrictions, and even disagreements. I seek to better understand the language and topics Supreme Court Justices focus on when they do provide justification for their decisions made on the shadow docket. I use computer text analysis methods to examine the language provided with shadow docket decisions for over 90,000 orders from the 2010-2022 terms. Interestingly, I find that most of the justices have differences in the amount of justification they give, with the Chief Justice providing more justification than any of the others. Also, I find that justices are more likely to provide justification for denials of certiorari as well as stays. Lastly, I find that the justices discuss a mix of substantive and procedural topics when they do provide justification for their shadow docket discussions.

In chapter three, I look at a specific subset of cases petitioned to the Supreme Court's shadow docket, known as emergency cases. The Supreme Court has seen an increase in emergency petitions to its shadow docket in recent years such as the border patrol case petitioned in January of 2024 (*Department of Homeland Security v. Texas* 23A607, 2024). Even with the increase, little is known about the factors that influence the Court's acceptance or denial of these petitions. The justices themselves disagree on when these petitions should be addressed, even though the Court has released official statements explaining the determinants of petitions that garner grants. In this chapter, I explore the influence of the Court listed factors as well as the influence of emergency decision making behaviors exhibited by the justices. This work is the first of its kind to examine emergency decision making behavior of political elites in the judiciary. I find that a mixture of both stated legal reasons by the court as well as factors that lend cues that justices can use in quick emergency

situations influence the likelihood of an emergency petition being granted. Importantly, I find that higher resourced petitioners are better able to signal to the justices to grant their petitions. This work expands our knowledge on judicial behavior in general as well as elite emergency decision making behavior.

In chapter four, I seek to understand the effects of these decisions on the public. I want to explore how the increased use of the shadow docket influences public opinion of the Supreme Court? In recent years, the shadow docket of the Supreme Court has been used with increased frequency to make important decisions that has led to increased media coverage of these decisions. The little research done previously on this docket has led to speculation that the shadow docket creates potential problems with perceptions of legitimacy for the Court. I theorize that procedures matter in changing public opinion of an institution when the procedures are nontransparent, stray from expected norms, and are thus perceived as politically unfair. I administered a survey experiment and find evidence to suggest that use of the shadow docket procedure does lead to less support for decisions as well as an increased support for measures of broad court curbing (e.g., decreases legitimacy).

Finally, in chapter five, I explore the implications of the shadow docket as well as the implications of my findings. I discuss the ways my findings could impact the Court, the public, and outside actors.

Chapter 2 Whispers and Shouts in the Shadows: Language Used to Justify Decisions Made on the Shadow Docket

2.1 How Justices Explain Their Shadows

For years, scholars, legal experts, and media sources have examined the language, potential audiences, and the meaning behind any justification given when the Court releases the opinion of a legal case decided on the merits, also referred to as the regular docket (e.g.,(Black et al. 2016; Corley 2008; Corley, Collins Jr and Calvin 2011; Clark and Lauderdale 2010; Lauderdale and Clark 2012; Carrubba et al. 2012)). The language used in these justifications is meticulously debated by the justices through memos (Maltzman, Spriggs and Wahlbeck 2000), creates the foundation for legal changes by other branches of government (Benesh and Reddick 2002; Howell 2003), and influences the legitimacy of the Court (Farganis 2012). Nonetheless, despite the Supreme Court's increased use of their "shadow docket" and with it an increase in public attention to the docket, scholars have yet to dedicate attention to the language used to justify decisions made on this separate docket. The following case timeline illustrates inconsistencies in legal justifications and why it is important to increase our understanding.

In 2021, the Supreme Court denied two orders in pending cases using their secondary docket, usually referenced as the shadow docket. The first of the two denials, referred to Justice Kagan, asked for a stay of a California Court of Appeal decision dealing with the recent Eviction Moratorium issued by the CDC. Justice Kagan

gave no justification for the denial, the case was then refiled and addressed to Justice Gorsuch[1]. The Court then gave the following response, "The application for stay addressed to Justice Gorsuch and referred to the Court is denied" (*Ramey v. Superior Court of California* 20A173, 2021). This type of denial appears frequently on the shadow docket and gives almost no information to the parties involved in the case, lower courts, and policymakers. The case was not appealed again.

Legal scholars have lamented the lack of information given for the plenary docket decisions. This dearth of justification partially explains why the docket has received the moniker shadow docket ((Baude 2015; Vladeck 2019; Murphy et al. 2021). Despite this norm of silence, there are select times when the denials or grants of the shadow docket are published with more information, either a short justifying description or a full-length opinion. For example, the second denied application for a stay in the same term, about a similar topic, provided more justification for why the stay was denied as well as the extent of the legal precedent being set (*Biden v. Texas* 21A21 U.S., 2021). The statement of the Court read:

> The application for a stay presented to Justice Alito and by him referred to the Court is denied. The applicants have failed to show a likelihood of success on the claim that the memorandum rescinding the Migrant Protection Protocols was not arbitrary and capricious. See *Department of Homeland Security v. Regents of Univ. of Cal.* (21A21 591 U.S., 2020). Our order denying the Government's request for a stay of the District Court injunction should not be read as affecting the construction of that injunction by the Court of Appeals. Justice Breyer, Justice Sotomayor, and Justice Kagan would grant the application.

[1]Refiling used to be a rare occurance but after 2020 it happens about 5 or so times a year for emergency petitions

While this description of the denial from the Court did not give the same amount of information as a regular majority opinion does for cases decided on the merits, it still provided more than the short, scripted portion of the other stay given in *Ramey v. Superior Court of California* (20A173, 2021) just a few days prior. In this instance, the Court explained why they denied the case, gave citations relating to the decision, set bounds for the precedent of the case, and mentioned which justices disagreed with the Court's outcome. The case was not appealed again.

Legal justification given with a verdict can guide the parties involved in the case on how to make their next move, instruct the lower courts on how to proceed, and even demonstrate disagreement on the decision from fellow Court members. From scholarship, we know this type of information when given in an opinion on the regular docket or the shadow docket, can influence future legal outcomes and policies ((Badas, Justus and Li 2022; Bailey and Maltzman 2008). Knowing the potential for change this information possesses, it is important to understand how frequently extra justification is given on the shadow docket and why the justices choose to not justify their decision-making.

The shadow docket is comprised of cases including petitions for certiorari, habeas corpus, summary decisions, stays of lower court orders, or stays of execution, as well as many others. There have been over 90,000 decisions made over the last 12 years on this docket. The Court strays from the normal procedural steps for these cases because the justices decide the cases without oral arguments, usually on a quick timeline, and do not require the involvement of every or even a majority of the justices. The Court publishes these case decisions as "orders." To fully understand

judicial behavior and the ramifications for the Court's regular docket, scholars should be more circumspect of the justifications of these decisions made in the "shadows." This docket often addresses questions that allow cases to be decided on the regular docket at a different date such as granting stays of lower court orders, or they can set precedent and alert the public to the Court's views. In this chapter, I seek to better understand the patterns and topics of the language the justices use to explain the decisions made on the shadow docket.

In this descriptive analysis, I analyze when Supreme Court Justices choose to provide extra justification as well as what they focus on when they do. I use computer text analysis methods to examine the language given for every order decided on the shadow docket. I begin by explaining why a justice may choose to justify their decision and the subsequent effects using past literature related to lower courts where justification is not a requirement. I then provide a descriptive analysis of the language used on the shadow docket as well as a Latent Dirichlet Allocation (LDA) topic model examining the topics discussed in the extra justification given.

2.1.1 To Justify or Not to Justify

The norm for the Supreme Court is to provide lengthy opinions detailing the justification of their decisions made on the regular docket; nonetheless, this is not the case with the shadow docket. There exist no previous rules, or punishable norms mandating that a justice explain their legal reasoning when making a decision. In fact, the shadow docket was originally created as a way for the justices to dispense meaningless procedural issues to save time and energy (Vladeck 2023). However, the cases decided on this docket are becoming increasingly more meaningful whether of

a procedural nature or a substantive one (Vladeck 2019). Since the decisions are not always meaningless, there is an expectation that justification should be made for the decisions.

Many audiences have the potential to expect or benefit from decision justification. For example, litigants petitioning cases to the Court may have questions about why their case was not accepted, why similar cases were accepted, or if they should just appeal their case to a different justice and hope for a better result. Furthermore, lack of justification or inclusion of specific justifications could create a signal for future litigants to bring similar cases to the Court or specifically the shadow docket. Lower court judges would also benefit from legal justifications as it informs how to interpret precedent, how to determine the status quo of the law, and could clear lower court disagreements. Lastly, scholars would benefit from examining these justifications as this docket is a large portion of the Supreme Court's decision-making. While some of the work is bureaucratic in nature, it could still provide opportunities to examine the personalities, characteristics, norms, and behavior or the justices as individuals and together as a Court.

While other legal actors may have an expectation or receive benefits from justification, there is no institutional rule or norm to provide justification for decisions made on the shadow docket. For this reason, it is informative to examine the scholarship exploring the reasoning and circumstances of opinion writing in other courts where opinions are also not mandated. For example, many lower federal and state courts do not justify every decision made under their jurisdiction. While looking at instances where judges are given the option and do not publish, scholars have

found not justifying decisions results in confusion and uncertainty for litigants and can foster wrongdoing for judges (Rowland and Carp 1996). Thus, the absence of justification can have negative consequences for the judges as well as the legal field more broadly.

Other scholars have bemoaned that lower court judges who do not publish opinions, and Supreme Court Justices who provide no information on decisions like those made on the shadow docket, are choosing to hide inconsistent and poorly reasoned legal outcomes (Vladeck 2019; Collins Jr 2011; Wasby 2004; Mead 2001). In general, it is problematic for the litigants involved in the case as well as the citizens whose lives will be affected by these decisions in the future to not have information about the decision. It is even more problematic if these information deficits are systematically occurring for specific litigants, situations, and outcomes.

Judges at lower courts, including federal district and lower appellate courts, are given the option to publish opinions when decisions are made. Depending on the district or circuit these selective publication rates vary. On average federal district judges publish about one out of every ten opinions (Swenson 2004). These judges are discouraged from publishing too much due to high workloads. While the Supreme Court's plenary docket is smaller than a federal district judge, with the Court answering about 80 cases a year, this small workload does not translate to the shadow docket. The Court has decided over 7,500 cases a year on the shadow docket over the past 12 terms, though there is substantial variation in the number per year. Thus, I expect when the Court has a larger workload on the shadow docket, they are less likely to produce extra justification for their decisions.

Scholars have also found for regular opinions of cases on the merits, justices will put forth less effort when they already have an individually high workload (Maltzman, Spriggs and Wahlbeck 2000). There are only so many hours in the day and so for decisions made on the shadow docket not requiring more information, justices with a higher workload would be more likely to falter on their optional duties. The shadow docket cases are split by circuit and assigned to a specific justice set to oversee the circuit. Some justices are given more cases. Thus, I expect justices with a higher number of cases referred to them on the shadow docket, will be less likely to publish extra justifications.

There may be other institutional factors that could influence whether a justice will write more than the basic script such as being a freshman justice. Justices who are freshmen are less likely to be able to deal with the new pressures on the Court (Hagle 1993; Maltzman, Spriggs and Wahlbeck 2000). Swenson (2004) finds there are individual factors such as if the judge had been on the bench longer leading to more published opinions. Thus, I hypothesize more freshman justices will be more likely to follow norms to publish very little on shadow docket decisions.

Individual preferences might be another reason a justice might provide extra justification. Perhaps a certain justice cares about increasing the transparency of the Court or just likes writing to create a legacy of transparency. Thus, they would be more likely to write more than the script for special orders and grants or denials of cert. We may suspect the Chief Justice may have a specific incentive to create a more transparent environment to keep the good opinion of the public or other branches of government (Maltzman, Spriggs and Wahlbeck 2000; Epstein and Knight 1997;

Vining Jr, Wilhelm and Hughes 2019). There might also be differences based on backgrounds. Swenson (2004) finds that a judge is more likely to publish at lower courts, if they attended an elite law school, or previously served as a law professor. Thus, I hypothesize there will be individual differences between the justices in the rate of providing extra justification. I further hypothesize the Chief Justice is more likely to provide extra justification for decisions he makes on the Court due to the incentive to maintain legitimacy.

Swenson (2004) studied what might lead lower court judges to publish opinions and found that judges are more likely to publish if the opinion is in their preferred policy direction. They are also more likely to publish if attorneys or groups are powerful and of the justice's ideological leanings. Furthermore, at lower courts, judges will author separate opinions when they cast a counter-attitudinal vote to explain themselves (Collins Jr 2011). This theory stems from the psychological idea that people are more comfortable making unpopular decisions when they can explain themselves and "save face" (Krupnikov, Piston and Bauer 2016). This theory would suggest that when an individual justice, to whom the application was given, must report the decision of the Court, and the decision is contrary to their policy preferences, they will be more likely to give more description.

Other scholars have found that fear of noncompliance can cause justices to not publish different opinions or be vague in what they do publish (Staton and Vanberg 2008). Vagueness results in less compliance overall. However, the Court lessens the negative pressure of compliance from the public when they write less or vague justifications. Thus, justices are less likely to write something more than the basic

script and instead opt for something like the short, formulaic justification mentioned in *Ramey v. Superior Court of California* (20A173, 2021). Thus, I hypothesize the justices are less likely to write extra justifications for decisions where the potential for lack of compliance is high.

We also know justices are likely to write vague opinions when the source of law is already vague, and they do not want to set precedent on how to interpret the law (Staton and Vanberg 2008). The decision in the *Ramey v. Superior Court of California* (20A173, 2021) case demonstrates this principle where the legal precedent for a nationwide eviction moratorium and a global pandemic is scarce. Thus, I hypothesize for new or vague topics, justices are less likely to provide extra justification for their decisions so as not to create strong precedent on a vague source of law.

Table 2.1: Hypotheses and Expectations for Justification

Level	**Hypothesis**	**Expectation**	**Examined Here**
Court	Workload	Higher workload = less justification	Yes
Justice	Workload	Higher workload = less justification	Yes
Justice	Freshman Justice	Newer justices = less justification	Yes
Justice	Chief Justice	Chief Justice = more justification	Yes
Justice	Individual Justice	personality and background = differences	Yes
Case	Preferred Ideological Outcome	Outcome favors ideology of author = more justification	No
Case	Contrary Ideological Outcome	Outcome does not favor ideology of author= more justification	Yes
Case	New Topic	Case discusses a new source of law = less justification	Yes
Case	Fear of Noncompliance	If case could lead to noncompliance = less justification	No

Table 2.1 provides a summary of the hypotheses from previous scholarship including Court level, justice level, and case level characteristics.

Table 2.1 provides a summary of the various hypotheses brought from previous scholarship including Court level, justice level, and case level characteristics. In the following sections, I explore some of these hypotheses, as denoted in column 3 of Table 2.1. I examine these using preliminary descriptive quantitative analyses as well as qualitative exploration of justifications.

2.2 Exploring the Shadow Docket Language

For these analyses, I will examine all types of cases decided on the shadow docket from the 2010-2022 terms. This is a large dataset of 90,280 orders. I obtained the case information from the order lists provided on the Supreme Court's website (www.supremecourt.gov/orders/ordersofthecourt/). I used Wget[2] and BootCat[3], helpful corpus construction tools, to automatically collect the pdfs and extract text from the order pdfs (Baroni, Bernardini et al. 2004).[4] Each PDF was stored as both a separate text file as well as its own pdf file. The order lists were organized into a directory with separate folders for each term. I then processed the text files in R, a widely used programming software, to create a tabular data structure. I then used regular expression searches within the text variable to create a new variable for each order. Since the order lists follow a specific pattern, I was able to separate the order lists into separate cases by separating the text file at any point there was a number+number+letter+number (i.e. 24A6). My unit of analysis is each individual docket number(case number) plus the order given by the Court. I then collected the name of each docket number using similar methods of regular expression searches. I also created a variable to denote the word count of the text of the Court orders. From that point, I was able to create new variables for each of the observations of the metadata of the document such as the date the order list was published, what type of case each order addressed, the file name of the stored text file etc.

[2]Wget is a computer program I used to collect PDFs from the Supreme Court's webpage https://www.gnu.org/software/wget/

[3]Bootcat is a corpus construction tool I used to convert the collected PDFs into searchable and parsable text files. https://bootcat.dipintra.it/

[4]An example PDF of the orders list is included in Appendix A: Pdf Example of Orders List.

To begin to examine the language used to justify shadow docket cases, I consider the orders from the court for each docket number as justification by the Court for their decision. I denote types of justification into three categories. First, I denote which cases received absolutely no justification. In the order documents, this means the case was listed in a string of cases in a column with the order type title. So in the dataframe, they would have a unit of anlysis with docket number and case name as well as case type. However, the order variable would be blank and the word count variable would subsequently be zero. To account for whether an order received a short formulaic response or a longer justification, I rely on a measure of the number of sentences in the order. I determine number of sentences by counting how many periods there are in each order from the Court. Formulaic responses such as the one given in the *Ramey v. Superior Court of California* (20A173, 2021) decision are only ever 1 sentence in length. The sentence formula goes as follows: The petition for *insert order type: habeas corpus, certiorari, etc.* referred to *insert justice name* is *insert conclusion: denied or granted*. While the number of sentences may not be the most specific measure of justification type (I could search for every possible variation of the formulaic response by inserting every possible type, justice, and granted combination), this was the most efficient and allows for changes to the types of cases or justices that could change by year. Furthermore, I know I am not missing anytime there is extra information since I parsed sentences based on the period character. This enables me to count any orders straying from the formula when the justices give the formulaic response but also cite rules or include case citations because the citations include more period characters.

Figure 2.1: Number of Orders Over Time

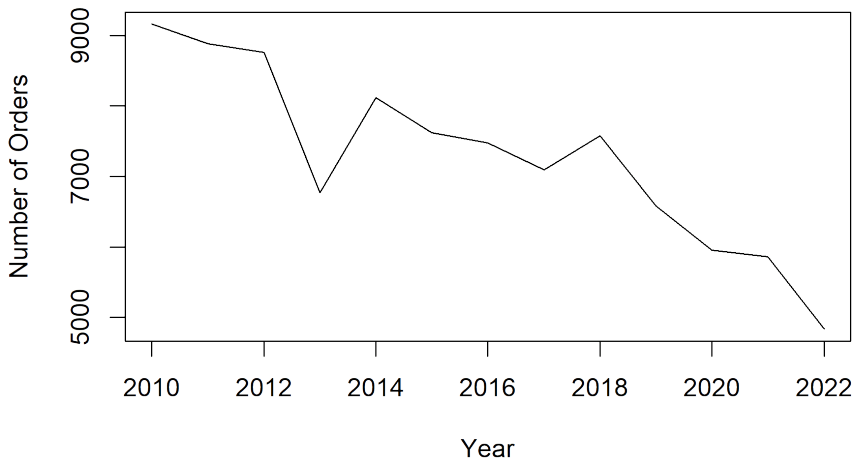

Figure 2.1 shows the number of total orders from the 2010 to 2021 terms.

Figure 2.1 shows the number of orders total for each year in the data set. This is important to note because cases appealed to the justices restrict the expansion of the decision-making process. Thus, the type and number of cases petitioned to the shadow docket binds any decision-making. In Figure 2.1, the number of cases decided on the shadow docket over time decreases overall. In 2010, there were over 9,000 orders addressed on the shadow docket. This number fell greatly in the 2013 term to around 6,500 orders. The number of orders continues to decrease with less than 6,000 orders addressed in 2021. From these numbers and following the Court workload hypothesis, I would expect the justices to provide more justification as their overall workload has decreased. They will have more time to spend justifying their decisions.

Figure 2.2: Number of Sentences Over Time

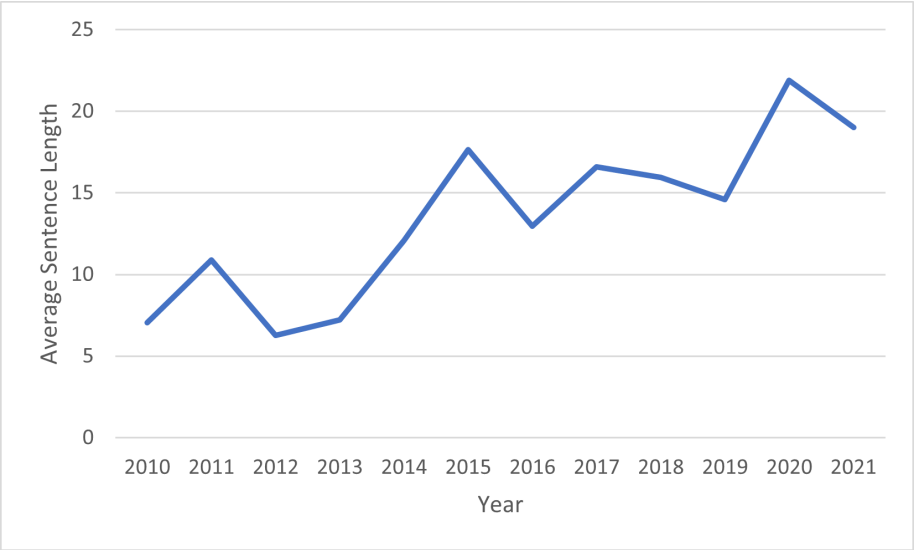

Figure 2.2 examines the average number of sentences used each year for orders made on the Shadow Docket when justification is given from terms 2010-2021.

In Figure 2.2, I show that following expectations, the Court is increasing the amount they write about their decision-making on the shadow docket. In the 2010 term, when the Court chose to provide justification for the decision-making on the shadow docket, whether formulaic or extra, the average length of a decision was about seven sentences. An increase begins around the 2013 term, with the slope rising until in 2020 the average length of a decision was about 22 sentences. While this change might not seem substantial in terms of words, the amount of information given for decision-making more than tripled in 12 years. While the justices may have less cases to write about as seen in 2.1, it seems instead they are providing more justification. This could be because the types of petitions being sent to the Court or the types of petitions being decided on the shadow docket are perhaps more

complex. An anecdotal piece of evidence of this is that the number of emergency petitions have increased over time. I will discuss this fact in more detail later. These petitions are asking the justices to weigh in on important legal questions, not just deciding if someone gets more time in oral arguments.

Figure 2.3: Distribution of Orders Receiving Extra Justification Over Time

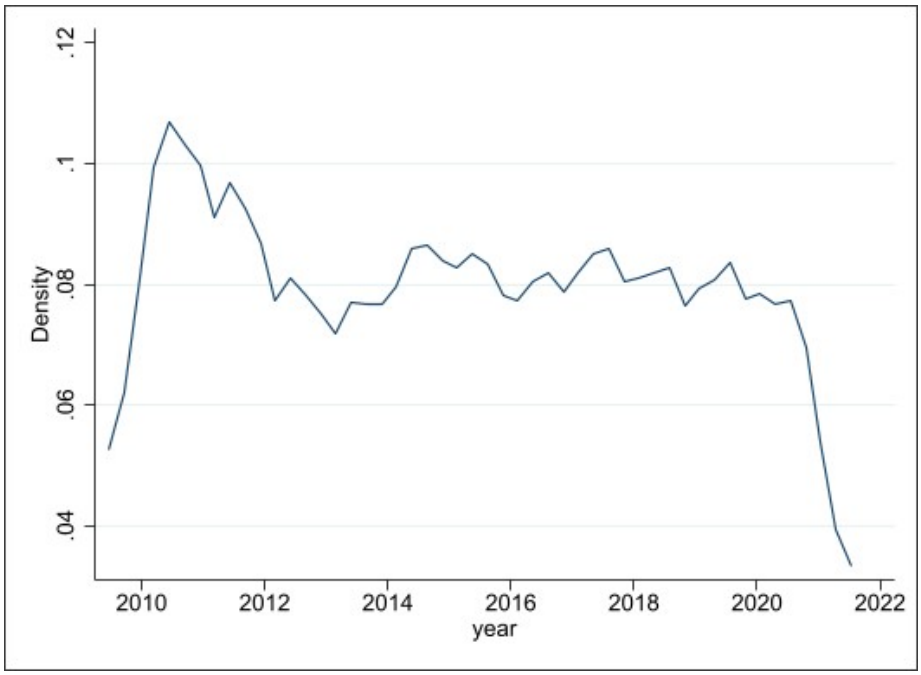

Figure 2.3 Distribution of Orders Receiving Extra Justification Over Time including full length opinions.

Nonetheless, while the decision lengths may be increasing, the number of cases being given the extra information is decreasing. As seen in Figure 2.3, the number of decisions being justified by more than one formulaic sentence decreased sharply from 2011 to 2013. Since then, the number of decisions being given extra information has plateaued. This pattern follows the overall pattern of orders addressed on the shadow docket displayed in Figure 2.1. This is interesting because the shadow docket has

received increased attention since about 2015 with the publication by Baude drawing legal scholars and the media's attention to the docket (Baude 2015). Though it doesn't seem to be the case that more overall orders account for the increase in public attention.

The findings in Figure 2.3 also find mixed support for the workload of the Court hypothesis. While the Court is writing more per order on average, they are writing more for fewer orders. Perhaps the questions being asked of the justices by way of the shadow docket have been changing, with less easy cases like petitions for certiorari and petitions for extra time that need less justification for the decisions being made. Instead, perhaps litigants are bringing more important cases to the docket, such as stays of lower court orders like those frequently addressed to the Court by the Trump and Biden administrations requiring more justification. Or perhaps, the justices are choosing to focus on cases that have precedent already set as would be expected from the case type hypothesis. I will discuss this potential more by first examining the different types of orders addressed to the Court, as well as what topics are discussed in the Topic Model near the end of this chapter.

2.2.1 Justification by Order Type

Table 2.2 contains a more detailed summary of the 90,280 orders given in the last 12 years, sorted by order type. These order type labels come from the order lists provided by the Supreme Court. The largest order types include those dealing with certiorari, orders in pending cases, and denials for rehearing. Orders in pending cases combine a variety of order types including stays, more time to file briefs or print appendixes, or applications for change of attorneys. Certiorari is the largest category

of order types accounting for over 73,000 of the 90,280 orders. In subsequent analyses, I split this category into certiorari grants, certiorari denials, and full opinions based on certiorari. While granting or denying certiorari may not seem of importance for the justices to spend time justifying, or for scholars to study these justifications, they result in real outcomes for individuals as well as potential signals for future litigation (Cameron, Segal and Songer 2000). These signals and potential influence on outcomes can increase in clarity and strength when justification is given by the justices. Even without these reasons, certiorari decisions are published by the Court as part of their shadow docket. For these reasons, it is important to include certiorari decisions in the following analyses.

Table 2.2: Order Types and Numbers

Order Type	**Count**
Certiorari	73,484
Rehearing Denied	7,138
Orders in Pending Cases	5,283
Attorney Discipline	1,201
Habeas Corpus Denied	1,093
Summary Disposition	1,063
Mandamus Denied	920
Prohibition Denied	38
Stays	34
Stay of Execution	11
Miscellaneous	11
Total	**90,280**

Table 2.2 displays the number of orders in each order type.

Figures 2.4 and 2.5 display the count of each order type that receive no justification, formulaic justification, or extra justification. Certiorari denials (excluded from

Figure 2.4: Justification Types for the Most Common Order Types

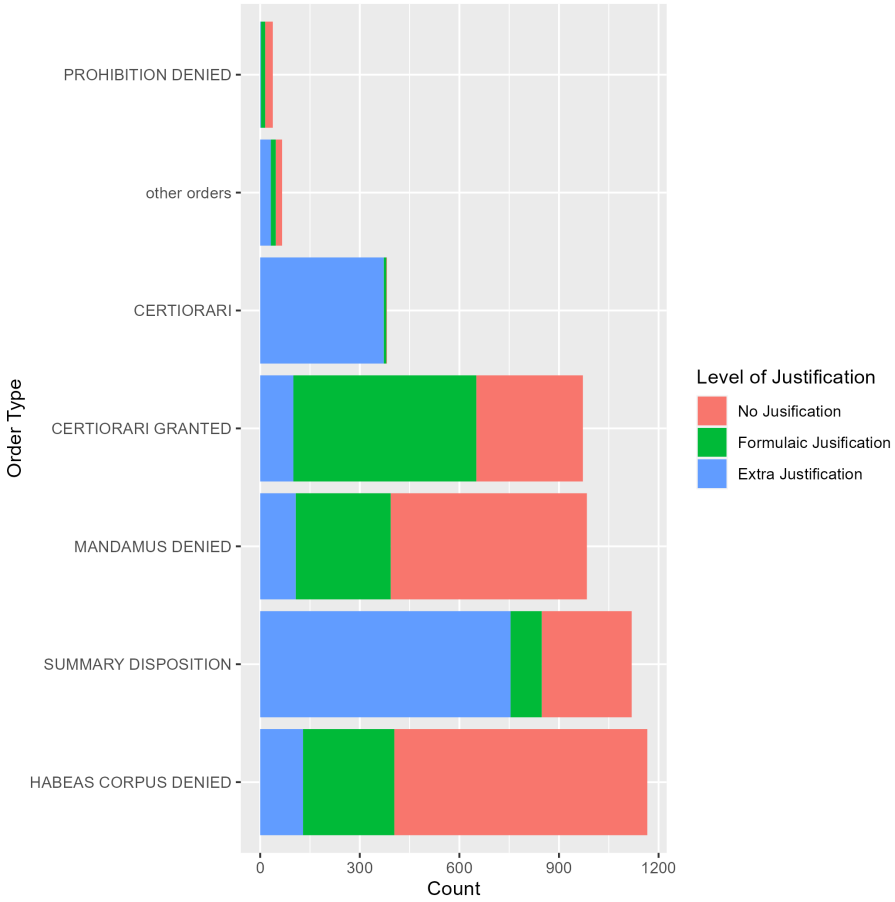

Figure 2.4 shows the counts of the most frequent orders receiving no, formulaic, or extra justification.

2.4 due to the substantially high number) are a large portion of the orders and have been ignored by past scholars most likely due to the large number that do not receive any justification. However, it is worth investigating under what circumstances the justices do provide extra justification for denial. Certiorari denials receive extra justification in about 2,503 cases. For some cases in this category, the justices included discussions about dissents from other justices when petitions for certiorari were denied. This extra information can work as a signal to future litigants of similar issues that the Court is not opposed to taking this type of case or that they will no longer be accepting this type of case. Two other common order types in 2.2 that I do not discuss in subsequent analyses are attorney discipline and rehearing denials because almost no justification is given. I examine the remaining order types by most common in Figure 2.4, the remaining orders in Figure 2.5, and break down the orders in pending cases in Figure 2.6.

Looking at Figure 2.4 the justices provide less extra justification when certiorari is granted as compared to when they deny certiorari that I mentioned earlier. This seems appropriate as the justices will have future opportunities to provide legal reasoning for their decision-making behavior on the merits. The "certiorari" category includes all the full opinions written for cases petitioning for certiorari whether granted or not. Though the justices infrequently provide opinions for shadow docket cases, the justices write the majority of full length opinions about certiorari petitions.[5]

Figure 2.5 displays the remaining order types. While these types of orders are

[5]Certiorari Opinions shown in both Figure 2.4 and Figure 2.5.

Figure 2.5: Justification Types for Remaining Order Types

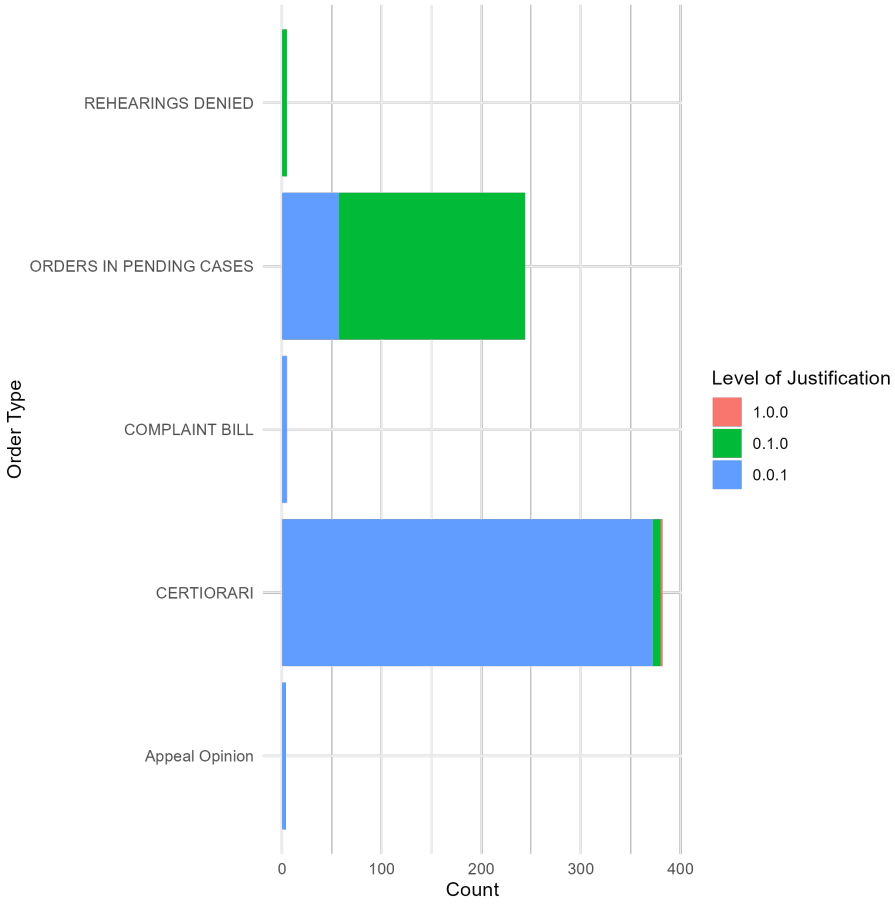

Figure 2.5 displays the types of justification given for the remaining order types.

less frequent, there is variation in the amount of justification given. For example, most habeas corpus denials are most frequently given no justification; nonetheless, a smaller portion is given formulaic justifications and 121 cases are given extra justification. There is a similar pattern with mandamus denials. The least frequent order types include stays, stays of execution, and prohibition denials. However, most of these order types are initially labeled as orders in pending cases. I explore the orders

in pending cases in the next section because they are the cases discussed in many anecdotal examples by media sources as well as usually deal with a salient topic.

Including orders in pending cases, 89% of the total decisions made on the shadow docket received no justification at all, meaning that only 11% of cases received any justification. In other words, the decisions were released by the Court with no legal reasoning provided. They were simply denoted with a single line detailing the docket number and case name listed under a bold header labeled denied or granted. This is not much different from the 10% average publication rates of lower federal courts without rules mandating publication (Swenson 2004). However, this is very different than the Supreme Court's plenary docket with almost 100% of the cases receiving a full opinion. This difference between the norms of the Supreme Court's two dockets is part of what has gained the attention of legal scholars (Murphy et al. 2021; Vladeck 2019; Baude 2015).

Overall, these findings from Figures 2.4 and 2.5 show that for over a decade, the Court has released information for only 11% of its decisions. For cases receiving any kind of reasoning (whether formulaic or extra), the average number of sentences over the 12 years included in the dataset is about 6 sentences. While this might not tell us much, this average provides a baseline of expectations for the procedures that scholars knew very little about prior to these findings.

About 5% of the cases receive a formulaic response for a total of about 4,500 cases. Most formulaic responses, in terms of number count, come to orders in pending cases. Denying or granting certiorari was the order type with the largest number of cases with formulaic justifications with almost 2.4% of those cases receiving a single

sentence justification at about 1,700 cases. Rehearing denials are the second largest order type with formulaic justifications.

When the Court decided to provide extra justification, or non-formulaic responses, they did so for only about 6% of their decisions over the past 12 years. The leading order types in terms of proportion of the total receiving the extra justification are certiorari denials, totaling over 2,503 cases for the 12-year period for about 4% of the 6%. Opinions make up a portion of this number including per curium opinions, majority opinions, as well as dissenting and concurring opinions. However, some opinions such as dissenting opinions might discuss the same case but are given a count for each opinion in this dataset. Summary dispositions also frequently receive extra justification. These two findings are not a surprise as there is some expectation and previously established norms to provide extra justification to guide lower courts and legal teams involved in the cases with summary dispositions, and normal opinions provided for the regular docket are longer than one sentence.

Figure 2.6 displays the different justifications for all types of orders in pending cases. Orders in pending cases have significantly more types of orders. The Court does not break the orders in pending cases down into specific labels. I personally coded the cases based on the text provided by the justices. While some orders addressed multiple types of orders, I ultimately coded each case based on the most specific type of order. For example, an order might discuss filing timing but also discuss petitions for in forma pauperis. In this instance, it would be coded as a case dealing with in forma pauperis.

There are a substantial number of orders in pending case types that do not

Figure 2.6: Justification for Orders in Pending Cases

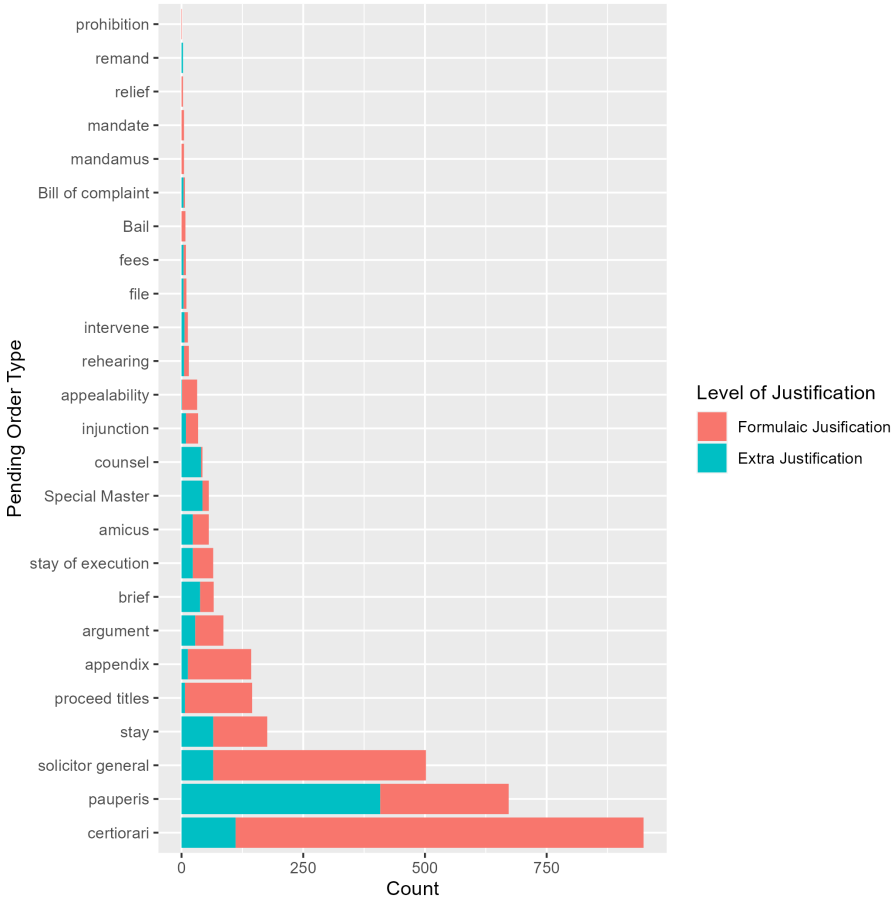

Figure 2.6 displays the justification given for each order type included in the Orders in Pending Cases order type.

include any text and made it impossible to code based on the order lists provided by the Court. In future iterations, I hope to get case information from the docket information provided on the Supreme Court's website that would allow me to code the remaining 5000 orders in pending cases. For this reason, Figure 2.6 only displays whether the justification is formulaic or if the case received extra justification. The Court historically created the shadow docket to address orders in pending cases of a purely procedural nature. For example, almost 80 of the cases deal with oral argument timing or scheduling. Similarly, over 100 cases deal with how the petitioner or respondent proceeds in the case or is titled in the cases, whether as a veteran or not, or even as a seaman.

The largest order type deals with certiorari. This includes combining cases with a currently pending case, or a petition for a case that is pending in the lower courts. Most of these cases are given the one sentence formulaic justification. The second largest portion (627) are denials or granting of in forma pauperis petitions. The third largest category of orders is interactions dealing with the Solicitor General. These types include petitions to the Solicitor General (SG) to participate in a case or allow the SG to participate in oral arguments or a brief. Again, these are mostly formulaic.

Of most interest to the public and media lately, 159 of the orders in pending cases dealt with stays across the 12-year period. 59 additional cases dealt with stays of execution. Almost half of these stays are given extra justification. Many of the more recent instances of extra justification for stays are statements of dissent like the following, "Justice X would deny (grant) the stay." There has also been an increase in full dissenting opinions over time. In 2010, there were 3 dissents relating to stays or

orders in pending cases, in 2019 it reached a peak with 18 dissents, and it has leveled out again in 2021 with 9 dissents. All this extra justification provides information about the case, decision-making behavior, legal justifications, and coalitions between the justices that would not have been provided normally. This information has the potential to influence lower court behavior, petitioner and respondent behavior, as well as future petitioner behavior.

From the previous three figures, it is easier to see the differences in language treatment between the different order types. The figures shed light on just how little explanation the Supreme Court is giving for the decisions made on the shadow docket with only 6% of the over 90,000 decisions receiving a meaningful justification. This is concerning for those within the legal system hoping for direction on the status of the law. On the flip side, this 6% of justification amounts to decision-making reasoning for over 9,000 cases. Even if scholars arbitrarily sampled just examined the cases that received at least 10 sentences of justification, that would be the equivalent of almost four and a half years of data for merit cases that have largely been ignored.

2.2.2 Justification by Justices

Another way to examine the language use and application on the shadow docket is to examine the behavior of the different justices. We know most petitions to the shadow docket are given to a specific justice depending on the filing location of the petitioner (Felleman and Wright 1964). The Chief Justice gets to assign the other eight justices to a specific circuit and the ensuing petitions. These assignments do not seem to have any specific order in terms of justice, nor have these circuit assignments been studied extensively in the past by scholars. Sometimes the assignments change by

year and sometimes they do not. However, there are cases where the petitioner can file an appeal to a different justice rather than their assigned justice for their circuit as seen in the case of *Ramey v. Superior Court of California* (20A173, 2021). This case, originally filed with Justice Kagan, was denied (not mentioned at all in the order list), and then filed again and referred to Justice Kavanaugh. This may not have happened had Kagan originally given justification. Even formulaic justification would have informed the appellant that the case had been presented to the full court and was not granted, meaning that addressing it to any other justice would not have resulted in a different outcome. This would have saved time and resources for all parties involved with even just a formulaic sentence.

Thus, I seek to better understand the differences between the justices when the justification mentions which justice received the order, or if the judges signed a justification or order. Not all cases denote the justice the order was referred or presented to, but whenever there is any sort of justification given this information is usually included. It is important to note the resulting information is not a causal analysis since I do not know what predicates inserting the word "referral/presented to" into a justification for a case. In future projects, I think it will be worthwhile to examine what predicts whether or not an author signs onto a case. Some of these come from dissenting or majority opinions where the full length opinion format is to sign your name. However, some are just names tacked onto a very short order that may be the result of individual preference, or individual clerk influence.

The referral justices mentioned themselves or signed 550 orders (about 1% of the total number of cases). Out of those 550 orders, about 65% of these cases received

Figure 2.7: Justification by Justice

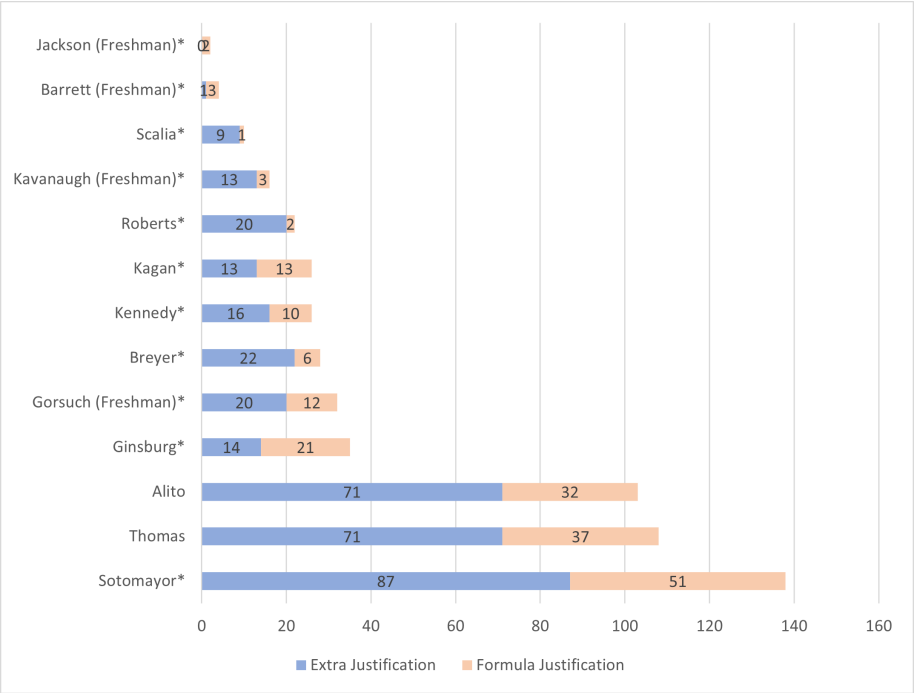

Figure 2.7 displays the number of orders authored by each justice when given either formulaic or extra justification. These numbers include opinions. A star indicates that the difference between that justice and all the other justices combined is statistically significant at p=0.05.

extra justification (about 358 cases). This is a much higher percentage than the full sample of shadow docket cases with only about 6% receiving extra justification. Figure 2.7 displays the count of orders receiving either formulaic or extra justification for each of the justices. I ran difference of proportions tests to examine the statistical significance of the differences between the individual justices' patterns of providing extra justification compared to the rest of the Justices. The results are indicated by a star by the justice names if the difference is significant at p=0.05.

First glance at Figure 2.7 shows that over half of these cases were referred to

or signed by Justices Sotomayor, Thomas, and Alito. Many of the authored orders from Sotomayor or Thomas were dissenting opinions. While Thomas and Alito have a higher proportion of signed orders with extra justification the difference is not statistically significant. However, Sotomayor's lower proportion of cases that received extra justification is significantly different from others on the Court. While the behavior of providing extra justification is also significant for Jackson and Barrett, I have less confidence in the findings due to the smaller sample of orders.

Almost all of the justices are singularly different than the group as a whole, excluding Alito and Thomas. This may be the case that while the Court has an average of extra justification that is a little of half justified, that average is created from some extremes of low or high justification.

The most interesting finding from Figure 2.7 is the support for the Chief Justice hypothesis. Chief Justice Roberts has the highest percentage of cases where he provides extra justification where 91% of the cases referred to him were justified (about 20 cases). This proportion is statistically significant and shows that Roberts seems to have a different motivation to provide extra justification for the decisions signed by him. Since there is no other Chief Justice in the dataset, I can only speculate as to whether this behavior is driven by the institutional role as chief or a personal preference by Roberts. Scalia gets the closest to the Chief Justice with a high percentage of cases where he provides extra justification. This result may be due to the shorter time period of Scalia in the dataset and the smaller number of cases he signed. Further investigation is needed to examine Scalia's justification behavior.

Figure 2.7 also begins a preliminary analysis to examine the freshmen hypothesis during this time. There is mixed support for this hypothesis as the freshmen behave differently. Justice Gorsuch provided extra justification about 63% of the time (about 20 cases), but in his first year, he provided extra justification for 60% of the cases referred to him. This difference is statistically significant at p=0.05 but in the opposite direction of what was expected. Justice Kavanaugh provided extra justification about 81% of the cases he received (about 13 cases), but in his first term as a justice, he provided extra justification for one case that had his name on it. Justice Barrett provided extra justification about 25% of the cases she received. Her first year on the Court she provided extra justification for 50% of the cases she received. The only true freshman justice in the dataset, where the only time included in the dataset is her first year on the Court, is Justice Jackson who provided 0% of her cases with extra justification. These results show mixed support for the Freshman hypothesis.

In future iterations, I plan to examine justice justification by issue area. As we will see evidenced later in the structural topic model in Table 2.5, some justices are more highly associated with certain topics such as Thomas might be more likely to write about state rights. At this point, there is not a way to analyze issue area without hand coding all of the petitions since no database exists. Furthermore, not all of the petitions exist for the orders and we would be left analyzing what the justices choose to discuss in their justification that may perhaps not be the same as the topic of the petition.

These results on providing more justification become more interesting when bro-

Table 2.3: Justification Given by Justices Separated into Grants and Denials

Justice	**Denied**	**Extra**	**% Denied with Extra**	**Granted**	**Extra**	**% Granted with Extra**
Alito	61	34	56%	13	12	92%
Barrett	4	1	25%	0	0	0%
Breyer	19	14	74%	3	3	100%
Ginsburg	23	4	17%	0	0	0%
Gorsuch	21	11	52%	4	2	50%
Jackson	0	0	0%	0	0	0%
Kagan	21	8	38%	5	5	100%
Kavanaugh	9	6	67%	5	5	100%
Kennedy	13	6	46%	3	2	67%
Roberts	5	4	80%	2	1	50%
Scalia	5	5	100%	2	2	100%
Sotomayor	108	63	58%	9	8	89%
Thomas	75	51	68%	11	10	91%
Total	**364**	**207**	**57%**	**57**	**50**	**88%**

Table 2.3 displays the number of denied and granted for each justice, as well as the percent of those counts that received extra justification

ken down into whether the case was granted or denied. Looking at Table 2.3, for all the justices combined, they are more likely to provide more justification for cases they granted. Contrary to the others, Justices Barrett, Gorsuch, and Roberts justify more frequently cases they denied. While these numbers are small, this is still substantively meaningful since the docket itself is small. Overall, it seems perhaps there are individual differences in the amount of justification given when a decision is made on the shadow docket between the justices.

2.3 Topic Model of Justification

After examining the descriptive statistics of this new data set, next I provide an analysis of the topics of the orders given extra justification. For this analysis, I use a Latent Dirichlet Allocation (LDA) topic model on the over 5,000 orders receiving extra justification. This will allow me to examine if the justices are using the extra justification to "save face" by explaining their decision or citing legal precedent or rules, or it may help me understand if there is a new topic being discussed in cases such as COVID-19.

Table 2.4: Top 5 Words Used in Orders

Word	**Frequency**
Petitioner	2713
Part	2702
Case	2296
States	2261
United	2004

Table 2.4 displays the top terms used in the extra justifications along with their frequency of use.

The top features (words) across all the orders after removing common stop words are displayed in Table 2.4. It is interesting to note that United and/or states occur over 2000 times in the dataset of 5,000 cases. This could be indicating a preference to provide extra justification when the US is a party in the case, or it could be indicating a preference to provide extra justification when discussing Federal/ Constitutional issues.

A simple LDA is a statistical model allowing latent topics to be inferred from the text. These models are known as "unsupervised" approaches because there are no

prior assumptions fed to the model to help the machine create topics. Instead, the machine is given the text and makes inferences based solely on the documents and their text. These types of models have been used successfully in Political Science and legal fields to examine text (Rice 2019; Roberts et al. 2014; Grimmer and Stewart 2013; Kumar and Raghuveer 2012). I use the Quanteda package in R to complete the LDA topic model.

From the 5,000 orders I collected with extra justifications, I created a data frame of the most frequent unigrams. I chose unigrams, single words, as the unit of analysis in the data frame. I chose this as a preliminary step to analyze the data. In future iterations, I plan to explore outcomes using bigrams and trigrams. I removed common english stop words[6] and punctuation to reduce the noise in the results as determined by the Quanteda package in R. Every word in each order is assigned to a topic by the topic model, not by the researcher. Then, the machine assigns a proportion of each order to each topic based on the words within the order. Thus, this is considered a mixed-membership model because each order can discuss more than one of the latent topics.

Table 2.5 shows the 10 different topics generated for the orders along with the most frequently used words for those topics. In the second column, I named the topics after viewing the most frequently used words to make it easier to discuss the different topics. This is simply a label and not an interpretation of the list of words from the topic model. From this table, we see a variety of topics are discussed when the justices choose to provide further justification. It seems a top word in a few of

[6]Stop words are defined by R package *Quanteda*

Table 2.5: Topics and Most Frequent Words

Topic	Name	Top Words
1	Death Penalty	State, death, trial, court's, federal, claim, circuit, case, supreme
2	Jurisdiction	State, trial, court's, evidence, case, jury, law, circuit, federal
3	Police	Officer, case, per curiam, district, law, force, police
4	Oral Arguments	Granted, file, leave, writs, argument, time, clerk, direct, motions
5	Legal	Slip, law, state, dissenting, may, courts, case, whether, thomas
6	Missing Justices	Part, took, kagan, Sotomayor, alito, application, writs, Gorsuch, breyer
7	Fees	Petitioner, proceed, leave, forma pauperis, dismissed, required, docketing
8	Religion	State, dissenting, Thomas, amendment, religious, law, states, right
9	Stay	United states, case, judgment, circuit, appeals, vacated, remanded, light
10	Criminal Cases	Evidence, counsel,state, trial, jury, reeves, case, death, dissenting

Table 2.5 displays the top topics discussed in the extra justification orders. I include the top words that do not repeat for each category. Ex. state and state's.

the topics is dissent. Thus, there are a variety of instances where a justice might provide extra justification if there is a dissent.

Moving further down the table, other topics of importance are substantive ones dealing with Religion, particularly for Thomas, as well as policing, and criminal cases. It is very interesting to note how many of the topics discuss procedural issues mentioning arguments, briefs, rules, and lower courts. These topics follow the norms of the shadow docket as dealing with paperwork type of cases. The Missing Justice topic is another procedural topic not discussed much by the public or legal scholars. If a justice is missing from the decision, the docket does note who was not present.

This is interesting because there are very few times on the regular docket when justices are missing or excuse themselves from the decision-making process; however, it occurs enough that it appears as a major topic for the shadow docket orders.

The LDA topic model shed light on the topics the justices are choosing to discuss when they spend the time providing extra justification for their decisions on the shadow docket. They are choosing to discuss both substantive and procedural topics even though the shadow docket has a norm of procedural decisions. It also sheds light on how frequently the justices discuss these topics with many revolving around rules and legal reasoning. In future iterations, it may be more meaningful to remove proper names from topics such as Court of Appeals.

2.4 Discussion and Conclusion

While there are many expectations for why a justice may decide to justify or not justify their decision-making, for the shadow docket it seems all reasons point to very little justification. Overall, there is little justification given for decisions made on the shadow docket with only 11% receiving any type of justification at all. Even less is the number of orders receiving nonformulaic language in the reasoning provided. However, there are some interesting patterns between justices and for different order types in the amount of justification provided. I was able to begin examining these patterns in this chapter. I also found when justices do decide to justify their decisions, they choose to talk about both substantive topics such as religious and second amendment rights, as well as procedural topics such as legal rules and petitions for amicus briefs.

The abnormalities of information and justification of the use of the shadow docket

is compelling and worth further investigation. It is important to evaluate what may lead the Court to provide extra information and what kind of information the justices find important enough to stray from the norm of silence in the shadows. There are many avenues for future research using this data including examination of justice coalitions, examining clerk influence on these justifications, as well as understanding how these justifications are interpreted as signals or how they are administered to other legal actors as well as the public.

Furthermore, this research can more broadly inform our understanding of judicial decision-making both at the federal and state level. State Supreme Courts also have shadow dockets with different institutional rules and norms for justification (Dallet and Woleske 2022). Increasing our knowledge of judicial behavior when institutional norms vary does not occur frequently within a single court and thus these dockets and the ensuing behavior provide unique grounds for research. Of most interest is that these institutional variations are occurring outside of the normal spotlight allowing scholars the opportunity to examine justices in the shadows.

Chapter 3 The Nature of Decision Making in Emergencies: The Supreme Court Emergency Docket

3.1 Introduction

During the 2020 election, multiple cases were petitioned to the Supreme Court's shadow docket, specifically the emergency portion of the shadow docket. This emergency docket utilizes abbreviated procedures that result in quick decisions with no oral arguments, little time to submit briefs, no requirements for all the justices to respond, and no requirement to publish a majority opinion. For cases submitted as emergency petitions, the justices do not have months to sort through potential legal outcomes, petitioner and respondent information, nor conference with fellow judges. These petitions used to form just a small portion of the Court's workload, but over time the number of these petitions has expanded the emergency docket. For example, during the 2020 election these cases needed to circumvent the normal timeline of a petition to the Supreme Court. The normal legal timeline could take years if a case is just originating in a district court, or at the least take months if the Supreme Court has already agreed to hear the case during a regular term. The 2020 voting cases could not be petitioned to the regular docket with the election day for the Presidential election set in November. The cases were all petitioned to the emergency docket within about a month of each other, all requesting stays of lower court decisions dealing with voting rules and regulations.

Table 3.1 lists the seven different emergency petitions all submitted to the emergency docket directly related to the 2020 election. Table 3.1 includes information about each case that prior research would use to understand why some cases were not granted and some were. Looking at Table 3.1, a puzzle begins to emerge. The cases vary in a variety of aspects and there does not seem to be a pattern in the ideological direction of the outcome, the lower courts, or the number of amici briefs filed along with the petitions.

Diving into three of the cases that received the most publicity, it becomes even more puzzling why some petitions for emergency stays were granted and why some were not. One of the stays was denied: *Scarnati v. Boockvar* (20A53, 2020) while *Republican Party of Pennsylvania v. Degraffenreid* (20A84, 2020) and *Merrill v. People First of Alabama* (20A67, 2020)) were both granted.

Scranati was petitioned as an emergency case to Justice Alito, had amicus briefs filed along with the petition and ultimately was a review of a State Supreme Court. While Justice Alito made the decision, it was decided in a 4-4 decision (missing

Table 3.1: 2020 Shadow Docket Voting Cases

Case	Granted	Previous Court	Petitioned To	Days Decided	Petition Ideology	Outcome Direction	Amicus Briefs
Scarnati v.Boockvar	No	PA Supreme Court	Alito	31	Conservative	Liberal	4
Republican Party of PA v.Degraffenreid	Yes	PA Supreme Court	Alito	1	Conservative	Conservative	3
Merrill v.People First of AL	Yes	11th COA	Thomas	6	Conservative	Conservative	4
Swenson v.WI State Legislature	No	7th COA	Kavanaugh	13	Liberal	Conservative	1
Gear v.WI State Legislature	No	7th COA	Kavanaugh	13	Liberal	Conservative	1
Wise v.Circosta	No	4th COA	Roberts	6	Conservative	Liberal	1
Berger v.NC Board of Elections	No	NC Supreme Court	Roberts	2	Conservative	Liberal	0

Table 3.1 presents case-related information on seven, 2020 election- related Shadow Docket Cases. I code petition ideology and outcome based on the coding scheme I detail further in the methods portion of this chapter. COA means Court of Appeals.

Justice Amy Coney Barrett) because 4 justices noted their dissent in the case. By not granting the stay, the Court allowed extra time for mail-in ballots to be sent resulting in a liberal outcome as opposed to the conservative outcome requested by the petition. This decision took 31 days to resolve. The second case, *Republican Party of Pennsylvania v. Degraffenreid* was granted injuntive relief from the Pennsylvania State Supreme Court pending certiorari to the regular docket, in a same day response from only Justice Alito. The case did not have any amicus briefs filed, and it was not referred to the full court. Finally, *Merrill v. People First of Alabama* was an application for a stay of an 11th Circuit Court of Appeals decision. By granting the stay, the Court allowed a ban on providing curbside voting during the pandemic. This petition was submitted to Thomas but referred to the whole court. The decision took 6 days and was granted in a 5-3 decision.

Normal determinants of judicial decision making behavior do not explain these emergency outcomes very well. For example, there is little evidence for straight ideological behavior due to the varied ideological outcomes. There is also little evidence of strategic behavior by the justices in considering fellow justices as some of these cases were decided by individual justices. For example, the *Republican Party of Pennsylvania v. Degraffenreid* case was only seen by Justice Alito. The petition was never referred to the full court for a vote. Finally, there is not a guaranteed grant for all cases dealing with emergency time constraints since each of the three cases dealt with voting in the same election year, and all required immediate responses from the Court. Why did the justices choose to grant one stay and not the others? In this chapter, I seek to address this puzzle by examining under what conditions the Supreme Court chooses to grant or deny cases on its emergency docket. I theorize that a combination of Court specific reasons as well as cues provided by petitioners influence justices' emergency decision making (EDM) behavior. The answer to this puzzle, these types of emergency cases, and my findings have important implications for fully understanding the behavior of political elites as well as shedding light on the equality of the legal system and its influences on democracy.

While these emergency decisions may seem uncommon or not worthy of an extended study on a narrow set of circumstances, it is important to examine the decision making behavior of the justices when deciding emergency cases for a number of reasons. First, emergency petitions have had sizable impacts on the individuals involved in the specific cases as well as an impact on the public at large. Anytime decisions are being made that could potentially influence the outcomes of elections, life and death, the status of the abortion law, and other important policy areas, it is essential to understand what factors influence these outcomes.[1] Secondly, while these

[1]These are just a few of the issue areas that have been addressed on the Court's shadow docket

emergency petitions have historically been few and far between, they are occurring more and more frequently. In the 2017 term, there were only a total of 27 emergency petitions sent to the Court. However, in the 2019 term there were 80 emergency petitions, and that number had increased to over 99 emergency petitions in the 2022 term.[2] The justices do not even make 99 regular decisions on the merits for each term. Petitioners are increasingly asking justices to make impactful decisions under less than ideal decision making conditions.

As scholars, we know much about how justices make slow deliberate decisions during regular court terms, but we know almost nothing about what considerations play a role in decision making in an emergency, high stakes, low information and low time environment. Lastly, it is important to understand this behavior because these petitioners are asking justices to forgo the normal drawn-out petition process through the lower courts, ignore the standards established in the appeals process, and circumvent the legal opinions of lower court justices. The emergency petitions are asking for immediate review and stay of lower court decisions. These petitioners are asking for preferential treatment because they view their cases as substantially different or more pressing than the other thousands of cases petitioned to the Court through the regular process.

3.1.1 Shadow Docket

The shadow docket is made up of summary reversals, emergency petitions, and special orders submitted to the Court, such as the stays to lower Court decisions mentioned previously (*Scarnati v. Boockvar* (20A53, 2020), *Republican Party of Pennsylvania v. Degraffenreid* (20A84, 2020), *Merrill v. People First of Alabama* (20A67, 2020). The orders that are granted result in upholding or overturning lower court decisions on a quick timeline, potentially without the review or votes of all the members of the Court, and without the Court's normal proceedings. For these cases there is usually little time for submission of amicus briefs, oral arguments, and lengthy majority opinions. The shadow docket cuts out the deliberation process the Court is known for. While the shadow docket has always been an option for the justices to make quick decisions with the use of orders, there has been a recent uptick in the number of cases petitioned to or resolved on the shadow docket.

Baude (2015) was one of the first to raise doubts about the clarity and procedural irregularities of the docket, particularly of the emergency portion of the shadow docket. He argues the lack of transparency from the docket procedures is problematic. However, he does not examine why the justices are choosing to grant or deny petitions

stemming from emergency petitions.

[2]The Court gives the full treatment to approximately 70-85 cases each term.

to this docket. Legal professionals, Court scholars, and the justices themselves, have been baffled by the lack of regulations and norms in dealing with the shadow docket (Vladeck 2019; Baude 2015; Felleman and Wright 1964).

While the justices are dependent upon others to bring cases to the docket by filing petitions, the number of these petitions has increased over time as seen in Chapter 2. Emergency cases include petitions to halt or override an order or decision from a lower court such as in the case of the voting petitions listed in Table 3.1. These emergency petitions could also ask for relief from a legislative or executive order, mandate, or law. These include petitions for relief from from prisoners on death row asking to stop execution orders of governors, citizens asking for a pause to an executive order by the President of the US, or businesses asking for review of a newly passed congressional law. This emergency option is chosen by parties as a way to block legal outcomes that influence policy immediately, before a case could be appealed through the traditional appeals process to the U.S. Supreme Court. Often emergency petitions deal with capital punishment cases and is partially the reason for the historic existence of the emergency docket (Vladeck 2023). If a lower court denies an appeal from a petitioner on death row, there is no time to wait until the Supreme Court meets again in conference to decide to accept or deny the petition for writ of certiorari. Thus, the individual must file an emergency petition to bypass the time normally required to appeal to the Supreme Court. These petitions can essentially act as a pause button so the Supreme Court can return to their normal decision making processes before pushing play on the legal stage before them.

The justices receive these emergency petitions both during and outside of the regular term calendar. They can also receive these petitions outside of regular business hours with famous examples detailing midnight phone calls from the Supreme Court clerk to petitioners and death row inmates (Felleman and Wright 1964; Vladeck 2023). These cases are currently filed through the online application like other petitions for cert, just under a different form. However, litigants are encouraged to reach out to the Supreme Court Clerk by telephone to expedite the process.[3] Each term the Chief Justice, at his discretion, assigns each justice to a lower court circuit and geographical area. Emergency petitions are sent first to the justice assigned to the circuit where the case originated. If that justice is unavailable, the petition is sent to the next available justice (if it is during the summer, weekend, or during the night) or the justice of their choosing. The justice can either make the decision alone, or can send the case to the full court for review.[4]

[3]https://www.supremecourt.gov/filingandrules.

[4]Little is known about why a justice would send a petition to the full court versus choosing to decide the case alone. Anecdotally, it seems the justices usually make the decisions alone and the

Whether the justice makes a decision alone or with the whole court there are ultimately three different options for outcomes. First, the justice can deny the case, either in full or require the petitioners to go through the regular appellate process with the lower courts because the issue is not deemed an emergency. Second, the justice can grant the petition and issue an order. Third, the justice can grant the order requested by the petition for a short time, contingent upon the petitioners filing for certiorari and being accepted to be heard on the merits docket.[5]

If a case is denied on the emergency docket by a single justice and is not referred to the whole court, a petitioner can re-petition the case to a different justice of their choosing. There are no official specific rules for refiling a case, although it seems to be discouraged. Many of the refilings start with a letter of apology from the petitioner to the new Justice insinuating they were told not to refile by someone though it is unclear who. Re-petitioning a case is a relatively new phenomenon. In 2017 there were just 2 cases that were refiled to a new justice after being denied, compared to the 24 cases that were refiled to a new justice in 2022. None of the refiled cases were granted when sent to a new justice, and no cases have been re-petitioned more than once.

Emergency applications have historically resulted in either a denial or a pause button until certiorari can be granted, essentially the docket is being used as a pause button by both the justices as well as the litigants hoping to delay lower court procedings. However, more recently these petitions have resulted in final outcomes from granting petitions that never move to the merits docket or through the normal certiorari process. These cases influence more than just the petitioners and respondents in the specific legal case being petitioned for an emergency stay such as being cited as precedent in different cases (Badas, Justus and Li 2022). Furthermore, with the petitions the Court has granted, it has signalled that it is willing to use its pause button as a fast forward button to bypass both federal and state lower, appellate, and supreme courts as well as other political elites such as governors, legislators, and presidents.

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full court approves as a courtesy (Felleman and Wright 1964; Vladeck 2023) The orders published by the court denote that about 91% of emergency petitions are referred to the whole court. However, very rarely does a justice who received a petition end up in the dissenting portion of the court indicating a courtesy approval from the full court instead of a majority vote

[5]While there are varying degrees of granting and denying, it is not always clear due to limited descriptions by the justices on the outcome. For this reason, in this chapter I will discuss simply whether a case was granted or denied.

3.2 On the Nature of Judicial decision making

Research indicates that justices have many considerations they examine prior to making decisions(Epstein and Knight 2013). Some of these considerations are legally based such as case facts (Bailey and Maltzman 2008; Segal 1984; Epstein and Knight 1997). Other considerations are based on ideology or partisan preferences (Segal and Spaeth 2002; Baum 2017). Some consideration are based on the legal teams and petitions (McGuire 1995; Szmer, Sarver and Kaheny 2010; Wedeking 2010). Finally, there are a myriad of other considerations outside of the courtroom that could influence decision making behavior such as public opinion (Bryan and Kromphardt 2016; Casillas, Enns and Wohlfarth 2011), amicus support (Collins, Corley and Hamner 2015), case or issue salience (Clark, Lax and Rice 2015), and other political actors like the solicitor general (Black and Owens 2012; Segal, Westerland and Lindquist 2011). We know these factors exert influence when justices have months to make decisions with all kinds of resources at their disposal, but what about when making emergency decisions?

Under what conditions does the Court grant stays petitioned to the emergency docket? There are different responses to these questions that I classify into two general categories. The first, are conditions outlined by the Court in an official report published in 2020 that inform reporters and litigants when the justices will grant an emergency petition. I label these as Court considerations. The second category includes conditions based on emergency decision making (EDM) models of behavior. Finally, I expect that a combination of both sets of factors, the justice and EDM conditions, will greatly increasing our understanding of how the Supreme Court is granting emergency petitions.

3.2.1 Court Considerations

Prior to 2020, there were no official rules detailing the use of the emergency docket. The docket was used so infrequently or to solely deal with death penalty cases that there was little official information detailing the rules, procedures, and norms associated with this docket. However, in 2020 the Court published a document for reporters labeled "A Reporter's Guide to Applications Pending Before the Supreme Court." This document outlined four reasons why the Court would grant emergency petitions (GUIDE 2020). The Court lists the following reasons:

1. that there is a "reasonable probability" that four justices will grant certiorari, or agree to review the merits of the case

2. that there is a "fair prospect" that a majority of the Court will conclude upon review that the decision below on the merits was erroneous

3. that irreparable harm will result from the denial of the stay

4. Finally, in a close case, the Circuit Justice may find it appropriate to balance the equities, by exploring the relative harms to the applicant and respondent, as well as the interests of the public at large.

While some of these factors are vague and allow room for interpretation by the justices, I define them to make them operational for a decision making model. The first condition is based on the merits of the case or the legal factors involved in the case. The shadow docket is not the first time judges and Court actors have pointed to legal factors as influencing decisions. Other scholars have made use of case law and legal precedent to examine to what extent the law influences judicial decision making on the regular docket (Cushman 1938). Some scholars have found evidence to suggest that certain individual justices rely more on legal factors in First amendment cases (Bailey and Maltzman 2008). Others have found that legal factors such as case facts in fourth amendment and death penalty cases do have some, even if very little, influence on judicial decision making (Segal 1984; George and Epstein 1992).

Another important factor for whether a case is granted certiorari on the merits docket is whether there is disagreement in the lower courts on the issue (*Supreme Court Rule 10* 2019). However, lower court conflict can be difficult to determine with emergency cases as the issue has not evolved enough to have conflicting precedent in different jurisdictions. Also, the emergency docket has such a wide range of case types relative to the small amount of cases that they receive that there is very little theory as to what case facts may be important to the justices. Furthermore, with the high level of variance it would be not be meaningful to sort cases into categories of case types. The exception to both of these problems is the importance of capital cases. Based on norms of the court, we know that justices are more likely to grant a stay of execution at least until the petitioner is able to petition for certiorari to the merits docket. These petitions also garner a courtesy fifth vote if four of the justices want to grant the petition because an execution is not something that can be undone and any future litigation of the case would then be considered moot (Vladeck 2023). Thus, I expect if there were any aspect of merit that would lead to a granted emergency petition, it would be a capital punishment case.

The second condition the court details is if the majority would disagree with the status quo or in other words if they would agree with the request of the petitioner.[6]

[6]I discuss the request of the petitioner as opposed to the decision of the lower court or ideology of the panel of judges on the lower court such as has been done in previous literature (Black and Owens 2009). I do this because there are no measures of ideology for state courts or district court level judges, nor measures for each act or order signed by Congress or the President. Also, many

We know that often the median of the court is the key to understanding the decisions of the majority since the fifth justice is needed to make a majority (Bonneau et al. 2007). The easiest way to capture the majority agreement would be to examine the ideological difference between the median of the court and the ideological direction of the requested outcome from the petition.

The third condition is met when the petition is able to denote irreparable harm. I assume that harm is indicated using language within the petitions.

The fourth condition listed as important is that the circuit justice must balance the equities by exploring the interests of the public at large. One way past literature has measured interest and support from the public has been to use amicus support (Wright and Caldeira 2009; Collins Jr 2018). This is a blunt measure for two reasons. First, it is unclear what other sources justices use to explore the relative harms to the public as there is little time for them to scour public opinion, polls, or even news sources. Secondly, due to the time constraints it is inconceivable that there is no bias in which cases receive amicus briefs. For example, a case that a justice decided in a night is not likely to receive amicus submissions as there would not be time, as opposed to a case that took a week to decide. Nonetheless, it is a definition that previous research has indicated as important in helping the justices understand the interests of the public (Wright and Caldeira 2009; Collins Jr 2018).

From this list, I hypothesize that justices will grant a case if the merits of the case allow, if the majority would agree to review the decision if the case made it to the certiorari stage, if the petition denotes harm, and if there is an aspect of public interest in the case.

3.2.2 Emergency Decision Making Factors

The 4–item list published by the Court is a step towards creating rules and procedures for the shadow docket. However, the wording and use of quotations around specific phrases such as "there is a 'fair prospect' that four justices will grant cert" indicate a lot of discretion will be left to the justices on the Court. This discretion allows room for other factors to influence the decision making behavior (Bartels 2009).

While legal factors do influence justices' decision making under some specific instances, many studies have found that a combination of attitudinal, or even strategic factors influence decision making (Epstein and Knight 1997; Maltzman, Spriggs and Wahlbeck 2000; Bryan 2020). Thinking about agenda setting on the merits, scholars have examined why and under what conditions the justices grant a case on the merits. Some of these include details about the specific justice votes for each case.

of the petitions do not ask for emergency relief from the decision of the lower court in whole but in part.

The justices closer to the majority are the more likely to grant cert (Clark and Lauderdale 2010). Coincidentally, justices further from the majority are more likely to deny petitions for certiorari. These results point to extralegal and attitudinal factors influencing the justices' choices. Hammond, Bonneau and Sheehan (2005) argue that the current status quo of the law relating to specific cases can also influence individual justices. Black and Owens (2009) combine the two preceding arguments and again examine whether the justices granted certiorari to hear a case on the merits. They find when each justice grants petitions, they consider their own ideal policy point, the current status quo of the law, and the expected policy outcome if the Court takes the case. I argue that the weight of these other factors changes due to the crisis nature of these emergency decisions.

The term emergency indicates that there will be some kind of physical, financial, ecological, or social harm done unless action is taken, or that the action can mitigate some of the looming negative consequences. Emergency decision making (EDM) is a way individuals make decisions in high risk, low information, and low time environments (Zhang, Wang and Wang 2018). Examples of these situations for regular citizens include decision making during natural disasters, physical accidents, and pressured purchasing. Individuals are more likely to make decisions that are inconsistent had they been presented these decisions in an alternate format or timeline. This is because individuals rely on bounded rationality when faced with decisions during an emergency. For example, during a house fire an individual might leave their house without shoes on even though in normal circumstances they would never leave without slipping something onto their feet.

Using bounded rationality means that individuals disregard probabilities and factors when making emergency decisions that they would consider during normal circumstances. Furthermore, they are more likely to rely on individual preferences and strong informational cues when making emergency decisions (Tversky and Kahneman 1981) because they do not have the time or space to investigate information fully for themselves or evaluate their biases and potential future outcomes. I argue that when justices are required to make emergency legal decisions, they will exhibit similar emergency decision making behavior by relying on petitioner and ideological cues.

Prospect theory is another name used to explain the idea of bounded rationality (Kahneman and Tversky 1979). In prospect theory, if the alternate decision to the status quo will provide clear gains to the individual and their group as opposed to leaving the status quo then an individual will choose the alternate decision. For justices, this means that if the petitioned outcome (the alternate) will clearly provide gains to the justice as opposed to leaving the lower court order (status quo), then the

justice would grant a case. Furthermore, due to time and information constraints in emergency situations, judges will rely on the most obvious cues to denote gains whether they be financial, public support, or ideological or policy focused. Importantly, research shows that alternative choices with the most resources, usually look the most promising and are eventually chosen (Zhang, Wang and Wang 2018). These resources can be displayed in a variety of forms but mainly concern financial, informational, and reputation-based resources. This is because high resourced options are better able to signal to decision-makers the value that is gained from choosing their alternative. Thus, I expect that petitioners with higher resources are more likely to have their emergency petitions granted as they will be better able to signal to the justices that granting their petition will result in further gains as opposed to the status quo.

> *Resource Hypothesis*: Petitions are more likely to be granted for petitioners with greater resources.

Even more so, I argue that the US government as a petitioner is more likely to have their petition granted for two reasons. The first reason follows the resources argument from the previous section. The US government is one of the most resource rich litigators that participate in the legal system in the US. Furthermore, they frequently appear before the court on the merits docket and this leads to a high level of interaction with the court (McGuire 1995; Black and Owens 2012; Smith 2020). During emergencies, decision making is usually centralized and decision-makers tend to give deference to preexisting networks, familiar experts, and informational sources they can rely upon even more so than during normal circumstances (Hart, Rosenthal and Kouzmin 1993). The US government in the form of the Solicitor general and other political elites are more likely to have familiarity with the court and brand themselves as reliable information sources.

The second reason the US government as a party is more likely to have emergency petitions granted is because of the nontransparent nature of the emergency and shadow docket cases. For these cases the public cannot as effectively play a role in enforcing or enacting compliance as they might for regular docket cases. Engaging the public as an actor is necessary when the Court is making an anti-government decision (Krehbiel 2013, 2016). When making anti-government decisions the Court must engage in highly transparent procedures. Even if public approval of the Court is at an all-time low, it is still higher than the approval rates of Congress and the President. So, if the Court makes an anti-government decision on the merits docket, they could still reliably turn to the public for help with compliance if the court has been transparent enough for the public to be aware of the outcome. For regular

decisions, public interference decreases the costs associated with making an anti-government decision such as noncompliance or retaliation tipping the scale of gains away from the government's alternate decision or petition. This scale tipping is not possible with emergency cases because the public are less aware of the docket due to the quickened time frame, lack of news coverage, and lack of a majority opinion. Thus the court has to rely on other political actors such as the President or Congress to enforce emergency decisions. US government actors are more likely to comply with a decision in their favor, thus increasing the gains associated with the proposed alternate decision in the petition. Thus, I expect the US government is more likely to have a petition granted as compared to other petitioners of other resource levels.

> *US Party Hypothesis*: Petitions have an increased likelihood of being granted if the petitioner is the US government than other resource groups.

As mentioned previously, the applications are given first to the justice assigned to the circuit where the application was filed. So, if Chief Justice Roberts is over the DC circuit, then he would receive all applications originating from that circuit.[7] There is no requirement that the justice that receives the application send it to the full Court for review. Any one of the single justices could potentially deny an application without a vote by the full Court. Even though the justices are given petitions individually, it does not mean they make decisions in a vacuum with no considerations for their fellow justices. Somewhat similarly, a parent caught in a house fire may forget their shoes when exiting the building but they are likely to account for and make sure children and other family members escape the house as well. When making emergency decisions with a group, individuals must deal with their own preferences while also accounting for every other individual assessing the risks and benefits(Wang, Wang and Martínez 2017). When decision-makers need to make decisions collectively, there can be many uncooperative behaviors that can impede an ultimate decision. However, when emergency conditions occur, individuals in the group are more likely to defer to group members with the most information because there is not time for uncooperative behavior. For these emergency cases, the petitioned justice is most likely to have the most information because they have communicated with the parties, received the briefs first and have read them along with any supplemental materials most closely.[8] The traditions of emergency petitions

[7]While there is some discussion that litigants do Circuit shop to file cases of an issue type in a specific area, there is little evidence that circuit shopping occurs based on the currently assigned Supreme Court Circuit Justice.

[8]Some of these petitions are just a series of requests and informal letters sent between the petitioned justice and the parties using the Supreme Court clerk as an intermediary.

seems to follow EDM models where the circuit justice who was petitioned is likely to have more influence on whether or not a case is granted. While the justices on the Court may not see eye to eye in a variety of situations, they generally agree with their colleagues and respect them as qualified legal experts.

I argue that not only will the petitioned justice matter but the congruence between the expected ideology of the alternate decision and the ideology of the petitioning justice will also matter. Since the justices are constrained in the amount of outside information they can get for these emergency cases, meaning usually there are no requests for amici, no respondent briefs, no oral arguments, no law clerk cert pool, and no conference between the justices, the petitioned justice must rely heavily on only the petitions. Furthermore, since these decisions are constrained by time, the justices must rely on easy cues to estimate the gains of accepting the alternate decision.

In EDM models individuals are likely to rely on their individual preferences like ideology and strong informational cues like expected ideological outcomes when making emergency decisions (Tversky and Kahneman 1981). Ideology and policy outcomes can serve as effective decision making cues for individuals in political and legal spheres (Malka and Lelkes 2010; Nicholson and Hansford 2014; Baum 2017). They serve as a signal of higher gains for those with similar political ideals. The expected ideological outcome is clearly expressed in the opening of most of the petitions and is argued for throughout the document. The justices need to perceive cues quickly and effectively to make emergency decisions in a time constrained manner and the petitions are the main source of information. Thus, I expect the congruence between the petitioned justice and the expected ideological outcome to increase the likelihood of a petition being granted.

> *Congruence Hypothesis*: Petitions are more likely to be granted if the requested outcome is ideologically congruent with the petitioned justice.

3.3 Research Design

To test my theory, I will be utilizing data collected from the emergency orders list and the emergency petitions for all emergency cases from 2017 to 2023. My unit of analysis is petition. Cases that are petitioned more than once are included multiple times in the dataset. For re-petitioned cases, the docket number stays the same but the petitioned justice changes, as does the opportunity for amicus briefs, and theoretically the potential for a case to be granted. I collected all petitions, amicus briefs (if any), respondent briefs (if any), orders and opinions related to all emergency

petitions from 2017-2023 totaling 441 different emergency petitions.[9] I chose this time period due to data limitations. The petitions are unavailable online prior to 2017.[10] However, this time period allows for variation in the number of petitions over time as well as multiple shifts of personnel on the bench. For these reasons, I believe the results are generalizable to future court contexts.

To gather all this information, I created a list of all emergency petitions for each term from the Court Journal located on the Supreme Court website (www.supremecourt.gov/orders/journal.aspx). Emergency petitions include the letter *A* (e.g., 16A424). I used that list of docket numbers to generate a list of urls for each docket number as if I was searching for them by hand on the Supreme Court website.[11] I used BootCat, a helpful corpus construction toolkit, to automatically collect the html and text from the url list (Baroni, Bernardini et al. 2004).

Next, I parsed the html in R using regular expressions to extract the timeline of each case listed on the website, as well as the urls for the pdfs of all documents submitted to the court such as petitions, amicus briefs, letters etc.. I then used a combination of wget scraping software and BootCat to download all the pdfs containing the court documents and convert them into text files. I further processed those files in R to create the variables I explain below.

My dependent variable for this research design is a dichotomous indicator for each order with 1 indicating that a petition was granted and 0 indicating that the petition was denied.[12] I run three different models all with the same dependent variable. Model 1 (Court Considerations) includes the set of conditions outlined by the Court as reasons why a case is granted. Model 2 (EDM) includes the set of conditions outlined by my emergency decision making behavior theory. Finally, model 3 (Full) includes a full model with all the conditions outlined by the Court and by the EDM theory.[13] I include fixed effects for year in Models 1-3 as the use of

[9]There are less than 30 re-petitioned cases. While they are included in the dataset, they are eventually excluded from the models because re-petitioned perfectly predicts denials.

[10]Petitions from prior years can be found on microfiche at the Library of Congress. I plan to eventually collect from 2000 to 2017 if possible.

[11]An example docket search URL would be: https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/20a137.html.
For these urls, the only thing that changes is the docket number.

[12]Petitions were considered granted if they were granted in part or in full as I consider any type of granting as a success for the petitioners and even a partial grant is indicative of emergency decision making behavior.

[13]Models 1-3 include year and justice fixed effects. Model 4 (Full 2) is the same as Model 3 without justice or year fixed effects. It is included to show there is very little difference between the estimates because Model 4 estimates are used to calculate margins. Margins are unable to be calculated with justice fixed effects due to the small number of observations.

the emergency docket by petitioners has increased over time, as well as to account for any changes that might have occurred as a result of the court publishing their emergency docket statement in 2020.[14,15] I expound upon the measurement and operationalization strategy of each of the independent variables in the next section.

3.3.1 Court Considerations Model

Model 1 includes the four Court considerations detailed in the GUIDE (2020). For the first consideration about the merit of a case, I code capital punishment cases as 1 in the data, all other cases are coded as 0.

The second condition in model 1 is if the majority would disagree with the status quo or in other words if they would agree with the request of the petitioner. I use Martin-Quinn Ideology Scores to determine the median justice of each term (Martin and Quinn 2002). Since my data runs from 2017 to 2023, but the Martin-Quinn scores have only been updated through June 2022, I make the assumption that the median of the court does not change after Justice Jackson was appointed by President Biden to replace Justice Breyer in 2022.[16]

To collect the ideology of the petitions, I hand coded over 100 petitions following the guidelines set for the Supreme Court database as to whether an opinion was liberal or conservative (Spaeth et al. 2023). I then used those hand-coded petitions to train a Linear Distance Weighted Discrimination classification model to read the text of the remaining 331 petitions and predict the ideology.[17,18] The ideology is measured as a -1 for liberal petitions and a 1 for conservative petitions. This follows the same scale as the Martin-Quinn ideology scores with negative values indicating a liberal justice and positive values indicating a conservative justice. The final measure included in the model is the absolute value of the median justice ideology per term subtracted from the petition ideology. This ideological distance value ranges from 0.186 to 1.814. Per the Court's statements in their reporter guide (GUIDE 2020)

[14]For example, after 2020, many petitions started to include a specific section titled "Irreparable Harm" most likely tied to the third condition of the statement released by the Court.

[15]I include a table with each of the years listed out, as well as the justices, in Appendix B:Full Model

[16]I assume Justice Jackson falls on the liberal side of the spectrum, at the least more liberal than Kavanaugh, and due to the conservative skew of the Court the median would continue to be Justice Kavanaugh in 2022 and 2023. This would be the case if Justice Jackson was a direct replacement for Justice Breyer, more liberal than Justices Kagan or Sotomayor, or if her ideology was measured as an average of Justices Kagan and Sotomayor.

[17]The classification model was able to predict a sub sample of previously coded petitions with 75% accuracy.

[18]Details on other training methods and the accuracy matrix are included in Appendix B: Training Petition Ideology.

the more likely the median is to support the petition, indicated by lower values of distance, the more likely the case is to be granted.

The third independent variable in model 1 is a measure of harm derived from the petition. The Court claims that for a petition to be granted the petitioner must show that there would be irreparable harm if the stay is denied. While this is left up to each justice to determine, I create a measure based on the language used in the petitions. I created a simple harm dictionary based on common words used in the emergency petitions I read as well as common synonyms for those words.[19,20] I ran this dictionary on each of the petitions for a count of the number of appearances of these terms. I then standardized the measure by taking into account the total number of words in the petition since some petitions are quite short and others are substantially longer. The final indicator of harm is a percent of the petition that uses harm language. This variable ranges from 0.01% to 0.5% of the petition.[21] These numbers are small but it is important to remember that these petitions need to cover multiple topics, citations, and legal arguments in one document.

The last Court consideration in model 1 is that the circuit justice must balance the equities by exploring the interests of the public at large. I use amicus interest as a proxy measure of interest and support from the public as has been done previously in the literature (Wright and Caldeira 2009; Collins Jr 2018). The count of briefs per case ranges from zero to eleven briefs. Most cases did not receive amicus support and for this reason, I use the natural log of the count of amicus briefs submitted for each case.

3.3.2 EDM Model

The first variable of interest in the EDM model focuses on the petitioner resources. I follow similar, though parsed down, coding schemes as previous literature to categorize party resources (McGuire 1995; Smith 2020). Party resource is coded on a scale from 1 to 6. 1 indicates a single individual or collection of individuals, 2 indicates nonprofits such as churches or schools or political groups such as the league of women voters and 3 indicates any type of business or corporation. The remaining

[19]I derived this list from checking synonmyns for the words irreparable and harm in a thesaurus. The full list of terms is included in Appendix B:Dictionary Robustness Checks

[20]I used a previously created dictionary on grievance (van der Vegt et al. 2021) as a robustness check on my self-created dictionary and found similar effects. I include the robustness check with the other dictionary in Appendix B: Dictionary Robustness Checks

[21]High harm seem to fit with death penalty cases and other cases involving physical harm that cannot be undone. Low harm cases give no specific section to discussing harm nor does the language throughout seem to express fear of harm. An example of a high harm case is included in Appendix B: High Harm Example

variables indicate local government coded as 4, state government coded as 5, and US government and actors in official capacities as 6. Each of these petitioners were hand coded based on petitioner name.[22] I include fixed effects for the petitioner resource level to examine any differences between the US government as a party as compared to other groupings of petitioners.

The second measure included in the EDM model is an indicator of the petitioned justice. This is also another way to account for circuit location since the majority of cases from each circuit are determined by their assigned justice. Each justice is assigned a number randomly for this variable. I include fixed effects for each of the eleven justices included in the dataset.

Finally, in the EDM model, I include a variable accounting for the difference between the ideological position of the petitioned justice in relation to the ideological location of the petition. I created this variable using the updated 2021 term Martin Quinn ideology scores (Martin and Quinn 2002). Since these scores are not updated to 2023, I include each justice at their previous ideological point. I change these to be a binary indicator of conservative and liberal ideologies to match the coding of the petitions mentioned earlier. The most recent set of Martin Quinn ideology scores do not include Justice Jackson but I include her as liberal justice in the dataset. I then create an indicator of congruence. The measure equals 1 if the justice is liberal and receives a conservative petition, 2 if the justice and the petition are liberal, 3 if the justice is conservative and the petition is liberal, and 4 if the justice and the petition are conservative. I did not use absolute values of the measure as it would mean liberal justices with a conservative petition and conservative justices with a liberal petition are equal. However, due to the conservative lean of the Court as well as the high number of liberal cases, I do not want to loose the chance of exposing nuances in the relationship between congruence and granting emergency cases. In the model, the baseline category is 1 where the justice is liberal and receives a conservative petition.

Model 3 is a full model that includes the Court considerations as well as the EMD considerations together to give a whole picture of the decision making behavior of the justices on the emergency docket.

3.4 Results

Due to the dichotomous dependent variable, I run a series of logit models to investigate under what conditions emergency petitions are granted. My models are shown

[22]While this is a paired down measure compared to previous measures, there is significant variation between the groups. Furthermore, there is difficulty in more finite grouping of the petitioners since more details are difficult to find for cases not on the merit docket. There is little publicity or even court documentation about the petitioners and respondents in emergency cases, especially if the case is denied with little justification usually given by the Court.

in Table 3.2.

Model 1 examines the extent that the factors the Supreme Court detailed as important in their report influence whether a case is granted. From the four different factors, only two variables are statistically significant. The first factor that is statistically significant is the percent of harm language used in the petition. This variable performs in the opposite direction as expected. The more the petition uses language that denotes harm, the less likely it is to be granted. When a petition does not use any harm language, the probability of being granted is about 23% but that drops to an almost 0% chance of being granted once at least 0.2% of the petition uses harm language. This is a change of about twenty words in the average length petition. Including this language seems to be detrimental to a petition being granted.[23] This finding might lead us to think that justices are choosing to ignore or deny petitions that will result in the most harm. This seems unlikely as the justices have no motivation to actively pursue harmful outcomes. Another explanation might be that the justices are less concerned with this information since the petition is already being made on the emergency docket or that lawyers for petitioners are trying to artificially inflate the amount of "harmful" language to make their petition seem more serious. In essence, the justices already know there is a fire to put out and it does not matter to them if you tell them how hot the fire is or is going to get.

Another explanation might be that perhaps there are other ways the justices are perceiving potential harm from granting or not granting a case beside the language used in the petition. However, due to the time constraints it does not seem likely they are getting this information from normal outside sources. To explore this more, I examined the likelihood of granting given the amount of harm language if the amicus briefs submitted were at the highest or lowest amount as the justices may be relying on outside sources to denote harm. However, the substantive effects of harm language do not change whether the case has more or less amicus briefs submitted. More accounts from the justices, or exploration into the justifications for these decisions will likely shed light on how harm is meaningfully portrayed to the justices.

The next variable that is statistically significant is the effect of amicus briefs on a case being granted. This performs in the expected direction. A petition that receives one amicus brief as opposed to zero, is 2.5 times more likely to be granted. This likelihood increases exponentially for each additional amicus brief. This is showing that outside interest in a case is more likely to lead to a case being granted.

Moving onto model 2, focused on EDM variables, I find support for my resource

[23]The other dictionary which includes many more terms on different dimensions of harm performs in the same direction to a similar extent.

Table 3.2: Decision Making Behavior for Emergency Orders

	Court Considerations	EDM	Full	Full 2
Capital Case	0.0477		0.331	0.506
	(0.340)		(0.417)	(0.407)
Petition Distance from Median	-0.133	-	3.311***	3.054***
	(0.285)		(1.240)	(1.185)
Percent Harm Language	-18.38**	-	-16.892***	-16.209***
	(7.258)		(7.119)	(6.615)
Log of Amicus Briefs	0.700*	-	0.510	0.554
	(0.398)		(0.447)	(0.423)
Resources: Individuals	-			
Resources: Groups	-	1.939***	1.912***	2.084***
		(0.559)	(0.615)	(0.584)
Resources: Business	-	1.778***	1.624***	1.764***
		(0.365)	(0.386)	(0.377)
Resources: State Governments	-	1.393***	1.501***	1.568***
		(0.483)	(0.478)	(0.482)
Resources: US Government	-	2.395***	2.235***	2.171***
		(0.455)	(0.472)	(0.439)
Congruence:				
Lib Justice and Cons Petition	-			
Lib Justice and Petition	-	-0.522	-3.886***	-3.510***
		(0.623)	(1.563)	(1.427)
Cons Justice and Lib Petition	-	-1.537*	-4.785***	-4.077***
		(0.867)	(1.684)	(1.444)
Cons Justice and Petition	-	-0.868	-0.118	0.065
	-	(0.896)	(0.0.936)	(0.729)

Table 3.3: Decision Making Behavior for Emergency Orders Continued

	Court Considerations	EDM	Full	Full 2
Justice Fixed Effects	-	Yes	Yes	No
Year Fixed Effects	Yes	Yes	Yes	No
N	433	433	433	433

Dependent variable is whether a petition was granted (0/1). Model 1, variables from the Supreme Court. Model 2, EDM variables. Model 3, combination of models 1 and 2. Model 4 (Full 2), same as model 3 without justice or year fixed effects to calculate marginal effects for figure 2. Baseline for Congruence is a liberal justice with a conservative petition. Baseline for Resource is the individual. Robust standard errors in parentheses.
(* p<0.10), (** p<0.05), (*** p<0.01)

hypotheses. First, it is helpful to examine how levels of resources influence the likelihood of a case being granted. I use individuals as the baseline resource level. Compared to individuals, all other resource levels are more likely to be granted. This is interesting and I will discuss the effects and implications more when discussing model 3.

Finally, the congruence between the petitioned justice and the ideological direction of the petition outcome is also significant when compared to a liberal justice receiving a conservative petition for model 3.

I want to spend the most time discussing model three. It is important to note that the EDM factors are still significant when accounting for the Court considerations. Additionally, there are some changes in the effects of Court considerations. I will examine these effects further.

For the full model, the petition ideological distance from the median becomes statistically significant when accounting for EDM considerations. However, the variable does not perform in the expected direction. As the absolute value of the ideological distance between the petition and the median of the court increases, the likelihood of a case being granted also increases. This runs contrary to what the Court details. Nonetheless, it does lend credence to the EDM model, because in low time and low information environments individuals are less likely to bargain and will instead show deference to their own ideological preferences. For the justices this means they are less likely to engage in political behaviors like bargaining than what is normally or historically expected at the Court.

Moving further down the column, percent harm performs almost identically to

model 1 with the same counter-intuitive results. More harm language in a brief is less likely to lead to a granted petition. The next variable of the log of amicus briefs is no longer significant when I account for petitioner resources and justice congruence factors.

The EDM factors hold statistical significance and similar substantive effects when accounting for the Court considerations in model 3. In terms of resources cues, every other resource group is more likely to have their case granted than an individual petitioner. This lends support to the resource hypothesis. The justices seem to be using the names of the petitioners as emergency decision making cues, with higher resources groups being more able to persuade a justice to grant their case or take their proposed alternate decision. This could be explaining the negative effect of the harm language in that perhaps the lower resources individuals are relying on brief content to send stronger cues that are ignored by the justices.[24] However, examining the petitioner motivations in writing style and scope is beyond the reach of this project.

By looking at a predicted margins plot in Figure 3.1, I can examine the substantive effects between the different petitioner resource groups to examine whether the US Government enjoys greater success than others as I hypothesized. From this figure, an individual petition's likelihood of being granted is less than 10%. Groups such as nonprofits or political groups enjoy higher rates of success at 35%. In the dataset, most of these groups are political groups representing a specific political party in a specific state or a large evangelical organization. Businesses and state governments do not fair as well on the emergency docket though the probability of their petitions being granted is over double that of individuals. Finally, official entities of the US government enjoy the most success at on the emergency docket with a 37% probability of their petition being granted. This follows the EDM model since justices are more likely to decide in favor of networks they know will provide important cases and reliable cues.

The next variables of interest is whether a justice and petition are congruent in ideal ideological outcomes. Figure 3.2 displays the predicted margins of petition and petitioned justice ideology. It is interesting to see that the likelihood of a case being granted decreases when a liberal reads a liberal petition as opposed to when they get a conservative petition. This is opposite of expected in that liberal justices are not just granting petitions that would lead to their desired ideological outcome. We

[24]One might also hypothesize that petitioner resource is a proxy for a better written brief. However, there is a small negative correlation between petitioner resource level and the clarity of a petition. More details on the robustness check and clarity measures are included in Appendix B:Petitioner Resource and Clarity

Figure 3.1: Predicted Margins of Petition Resources

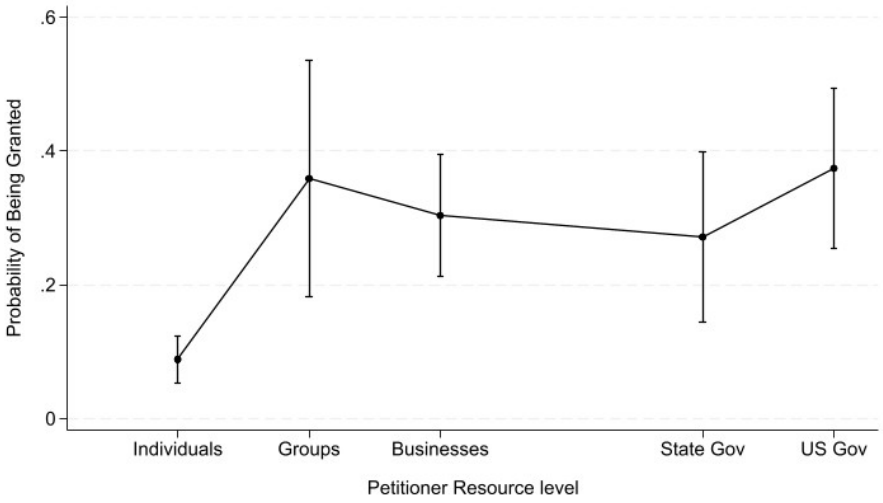

Figure 3.1 displays the probability of a petition being granted given the resource level of the petitioners from Model 3. Local business is omitted because of limited observations. 95% confidence intervals are given.

Figure 3.2: Predicted Margins of Petition and Author Congruence

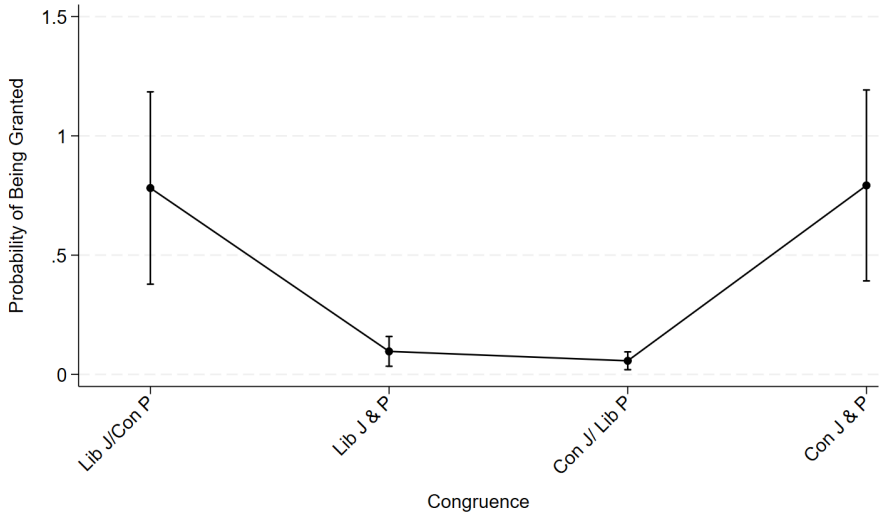

Figure 3.2 displays the probability of a petition being granted given the congruence between the ideology of the Petition and the ideology of the Petitioned Justice. Results come from Model 4. 95% confidence intervals are given.

do see the expected behavior from the conservative justices, with the conservative justices less likely to grant a liberal position than liberals looking at a conservative petition. There is no significance difference when we look at conservative justices looking at conservative petitions. When looking at the substantive effects of all pairwise combinations of this variable, these results hold with conservative justices being *5*times more likely to grant a conservative petition versus a liberal petition. As mentioned earlier, liberals are 3 times *less* likely to grant liberal petitions than conservative petitions. This provides some support for the EDM hypothesis about ideological cues but only for the conservative justices. Liberal justices who receive liberal petitions have a very low probability of granting. This outcome could be due to the conservative skew of the Court or the fact that there are very few conservative petitions with only 64 conservative petitions in the dataset.

It could also be due to the fact that I lose information about the justices when I put them on the same binary scale as the petition ideology. In future iterations of this project, I plan to find a more detailed measure of petition ideology by using location of citations included in the petition.

3.5 Discussion

In this chapter, I examined under what conditions justices choose to grant emergency petitions using the Supreme Court's shadow docket. I establish a combined theory building off of Court consideration to explain how justices make decisions in emergency situations determined by high stakes, low information, and low time circumstances. I find that justices are not likely to consider the median and thus the majority's perception of the petition contrary to the claims of the Justices. Furthermore, I find contrary to the Court's claims, that more space in a brief used to discuss the irreparable harm done if the petition is not granted will actually decrease the probability of a petition being granted.

I also find that in particular, conservative justices are more likely to grant conservative petitions. This fits with EDM behaviors since individuals are likely to use quick cues such as ideology to make decisions Furthermore, I find that higher resourced petitioners are more likely to have their petitions granted, with the US government benefiting the most. This follows theories on EDM because the higher resourced alternatives are more likely to be chosen when there is no time to access outside information or evaluate all possibilities.

This is a potentially alarming finding since the Court is touted as an anti-majoritarian institution and a protector of individuals against the clutches of government overreaches. However, this does not seem to be the themes supported by the evidence of the emergency docket. Large groups, corporations, and different

levels of government all fair better than individuals in emergency situations. This has important applications for democracy and levels of protections for citizens. If an emergency rises, and the Supreme Court must intercede, they are unlikely to do so on behalf of individuals. This supports claims that the Court is an elitist institution focused on the problems and situations of political elites. While my theory posits that this is an effect of the situation and is not likely to occur at the same rate on the regular docket, it does bring into question the constitutionality and increased reliance of petitioners on the Supreme Court's emergency docket.

Overall, this project is one of the first to apply EDM models to elite decision makers, in particular to the judges. However, future research should consider other political institutions and examine how behaviors change when situational factors shift into an emergency. For example, how does the behavior of legislators change when they are faced with a government shutdown deadline, how do the behaviors of bureaucrats change when there is a pandemic that shuts down normal avenues of information, or how does a president change when his behavior when faced with violent threats against the US. It is important to examine the behavior of political elites when they are forced to make decisions in less than ideal situations as these can have serious impacts on which outcomes are chosen, who benefits from those outcomes, and precedent that is created from these situations.

Chapter 4 A Shadow's Influence? How the Shadow Docket Influences Public Opinion

4.1 The New Normal

In September of 2021, the Supreme Court used its shadow docket to deny emergency relief to groups who opposed the Texas abortion ban (*Whole Women's Health et al. v. Jackson*21A24 U.S. 595, 2021). The decision was made by five conservative justices on the Court without hearing oral arguments. The decision resulted in the U.S. Supreme Court banning all abortions after 15 weeks. The Court did not accompany the verdict with the normal lengthy legal explanation in a majority opinion. In fact, the Court announced the verdict in just one paragraph, a common trait of shadow docket decisions.

The shadow docket is a collection of Court orders used to address decisions such as petitions for certiorari, emergency petitions, and petitions for procedural changes in pending cases on the merits docket ((Baude 2015; Vladeck 2019, 2023). The Court can resolve legal questions on the shadow docket, dismiss the case to the lower courts, or move the case to the Supreme Court's regular docket. The name "shadow docket" is frequently used by the media, though subsets of the docket have been referred to by other names such as the lightning docket or the emergency docket. When the Court addresses questions on this docket, cases are usually processed quickly without full debriefing from all the parties, without oral arguments, and frequently without the full consent or even a majority of the Court.

Historically, the Supreme Court used the shadow docket almost exclusively for procedural orders related to pending cases on the merits. The cases were usually resolved quickly and quietly. However, the previously mentioned abortion case was not resolved quietly, as four justices wrote dissents. Justice Kagan wrote a pointed dissent not just against the case outcome but against the use of the shadow docket as a way to resolve the case:

> Today's ruling illustrates just how far the Court's shadow-docket decisions may depart from the usual principles of appellate process. That ruling, as everyone must agree, is of great consequence. Yet the majority has acted without any guidance from the Court of Appeals—that is right now considering the same issues. It has reviewed only the most cursory party submissions, and then only hastily. And it barely bothers to explain

> its conclusion—that a challenge to an obviously unconstitutional abortion regulation backed by a wholly unprecedented enforcement scheme is unlikely to prevail. In all these ways, the majority's decision is emblematic of too much of this Court's shadow docket decision making—which every day becomes more unreasoned, inconsistent, and impossible to defend *Whole Women's Health et al. v. Jackson* (21A24 U.S. 595, 2021)

Justice Kagan, using the term "shadow docket" herself, highlights the differences between the shadow and regular docket. She also predicts the continued use of the docket could diminish the Court's ability to defend their decision and the processes by which the decision was made.

Sparked by this same legal case, Congress discussed the potential pros and cons of the Court's increased use of the shadow docket (*Whole Women's Health et al. v. Jackson*21A24 U.S. 595, 2021). The Senate Judiciary Committee considered what was to be done about the special docket with its nontraditional procedures. Democrats and other opposing individuals bemoaned the lack of time and considerations spent on the decision. Conversely, Republicans, and those in support of the outcome, argued that the docket is perfectly legitimate

Currently, not much is known about how using the shadow docket influences public perceptions of the outcome, the political actors involved, and the institution's power. I investigate these questions by describing the shadow docket's expanded use, as well as the norms associated with the docket. I then explain how levels of transparency, deviations from institutional norms, and perceptions of fairness lead me to expect that when individuals are given details about a case being decided on the shadow docket, they will be less likely to agree with case outcomes and more likely to support measures to curb the institution's power. Next, I discuss

the survey experiment I administered on MTurk using a vignette treatment. I find that mentioning the Court's potential use of the shadow docket leads to less support for the ensuing decisions as well as increased support for measures of broad court curbing. I find evidence of procedural influence even when matched with a polarizing topic like abortion, where individuals have strong preferences that would be more likely to negate any influence of procedures. Finally, I discuss the implications of the findings and ways to move this research forward.

4.2 Shadow Docket

The Supreme Court's shadow docket has been of little interest to scholars, elected officials, and the public— until recently (e.g., Walsh 2021; Hurley, Andrew and Allen 2021; Romoser 2020).[1] The term shadow docket, coined by Professor William Baude in 2015, refers to all decisions made by the Court that skip the usual decision-making process. The docket consists of orders from the Court such as stays, emergency orders, petitions for rehearing, and the ensuing opinions on those orders. While this term "shadow docket" is not accepted by all political actors, it is commonly used by politicians, media sources, and even the justices themselves (i.e. Erskine 2021; Hurley, Andrew and Allen 2021).

These decisions, normally classified as purely procedural in nature, have largely been ignored. However, interest in the shadow docket has recently spiked. For example, during the recent confirmation of then Judges Amy Coney Barrett and

[1] A search of Nexis Uni shows 2,273 hits of the term shadow docket for news sources in the last two years. This equals about 95 articles each month. While this is not a measure of public knowledge, it is an indication of how frequently the public could come across information about the shadow docket.

Ketanji Brown Jackson, senators questioned the nominees about their thoughts on the Court's current use of the docket. This interest came as a result of the decisions made on this docket leading to lasting substantive outcomes as well as last minute decision-making behavior (Murphy et al. 2021; Vladeck 2019, 2023; Baude 2015). Examples of these types of decisions include outcomes influencing voting during the 2020 Presidential Election (*Scarnati v. Boockvar* 20A53, 2020), the distribution of the US Census (*New York v. Department of Commerce* 588 U.S., 2019), and travel bans (*Trump v Hawaii* 585 U.S, 2018) to name a few.

The surge in cases is due to litigants petitioning cases to the shadow docket as well as the Court issuing shadow docket orders in cases that were petitioned and accepted to the regular docket. Orders made relating to cases currently on the merits docket are called pending orders. Pending orders allow the Justices the opportunity to make legal decisions relating to regular docket cases using the procedures of the shadow docket. As with the regular docket, the Court is limited in its decision-making ability and can only create policy based on petitioned cases. Starting in 2019, President Trump appealed many substantively important cases to the shadow docket as emergency cases (Vladeck 2019). With the success garnered in his cases, there has been a subsequent uptick in the number of cases petitioned specifically to the shadow docket since that time by other petitioners. Moreover, the Court continues to provide verdicts on these petitions instead of rejecting or remanding the cases to the lower courts or moving the case through the normal procedures on the merits only. With the increased use of the docket, as well as an increased focus by media outlets, Congress members, and lower court judges, it is important

to understand the shadow docket's impact on public opinion of the Court.

Baude (2015) argues that while the Court is already the least transparent branch of the government, shadow docket procedures are even more secretive than the Court's regular procedures. He argues these decisions are how justices implement policy in the shadows without calling attention to the decisions (Baude 2015). These decisions are usually made within a short amount of time and can be made without the consent of the full Court (Scali 1984; Stern et al. 1985; Felleman and Wright 1964). In the 2019 term, just three of the nine Supreme Court Justices upheld a lower court decision because six justices were unable to meet. Thus, the remaining three justices decided to keep the lower court's decision without the consent of the full Court (*Arunachalam, Lakshmi v. USDC ND CA, et al.* 589 U.S., 2019). These contextual factors, such as time and the justices involved (or not involved), can be problematic. The shortened amount of time to come to a decision can lead to outcomes based on either incomplete information due to lack of attorney arguments or judgements based solely on the decision of a single justice or block of justices.

Besides the fact that the Court makes shadow docket decisions in vastly different contexts than regular Court decisions, the resulting shadow docket orders are becoming increasingly important in their policy reach. Some of the shadow docket outcomes are meant to be short term until the Court can decide the case on the merits. In the past, these decisions have not only been short term, but they have usually left the law in its previously established form.

However, the Court has more recently provided verdicts that change the status quo or upheld decisions from lower courts that previously altered the status quo. This

has forced lower courts to rely on these new shadow docket decisions as precedent, thus continuing to influence legal outcomes over a longer period (Badas, Justus and Li 2022). While there is no consensus on the exact extent of the policy impact and the level of precedent created in these shadow cases, there is no denying the real consequences to individuals and institutions. The substantive importance of these cases has made this docket a new political topic in the public eye.

4.3 Public Opinion and the Court

Public opinion and public approval of the Court is essential to the success of the justices as political actors. While Supreme Court Justices are not elected to office, and do not need to worry about pleasing the public to keep their positions, public opinion is nonetheless crucial to the success of the Court. The literature shows that justices issue decisions in line with public opinion to obtain support for their decisions (Bryan 2020; Bryan and Kromphardt 2016). Furthermore, justices are more likely to be responsive to public opinion when overall support of the Court is low (Bryan and Kromphardt 2016; Collins and Cooper 2016).[2] Since the Court does not have its own enforcement mechanism, it is dependent upon the other branches to enact its decisions. Specific support, which is derived from support of specific outcomes, from the public can provide incentives for public officials to comply with the Court's decisions. Additionally, justices have goals such as ensuring a celebrated legacy and likeability, that result in more attention to public approval of the Court (Epstein and Knight 1997). All these factors point to some of the reasons why it is important

[2]There is some debate on just how much influence public opinion has on judicial decision making (i.e. Johnson and Strother 2021).

to increase understanding of factors that influence decision specific public opinion of the Court.

Besides exploring public support as an enforcement mechanism, it is also important to increase understanding of public support of the institution through analyzing support for court curbing (Bartels and Johnston 2020). Public support for court curbing is measured by an individual's willingness to diminish the procedures and power available to the Court. Political elites and other government institutions could be fueled by or strengthened by public opinion to restrict or alter the Court's powers and the Justices have been aware of this behavior in the past (Clark 2009). Court curbing sentiments are already arising in Congress with discussions on ways to diminish the reach of shadow docket decisions as well as limit its use. If Baude (2015) is correct, then the procedural choice to use the shadow docket as a pathway for discreet decision-making may not always be available if the public is aware of and feels negatively about the procedure. Understanding the influence of the shadow docket on public opinion is key to understanding the full scope of consequences for using the shadow docket.

4.4 The Cost of the Shadows: How Alternate Procedures Influence Public Approval

I argue procedures like the shadow docket are more likely to lead to negative evaluations and outcomes by the public if the procedures are nontransparent and do not follow established norms. Limiting transparency and disregarding norm-following behavior can lead to perceptions of unfairness. With many of the shadow docket cases resulting in ideologically polarized policy, some media sources and individuals

are already concluding that the procedures are unfair (Snodgrass 2023; Cohen 2022; McDonald 2021). The lack of transparency and lack of norms deprives remaining sections of the public of their ability to produce any type of evidence-based rebuttal against claims of unfairness. These negative perceptions linked with the diminished ability to prove otherwise will cause citizens to be more likely to support measures to curb the Court's procedures and their policy-making power.

I contend that negative consequences of using the shadow docket will occur more predominantly when the term "shadow docket" is used to explain the change in procedure as opposed to using other terms that might reference parts of the docket such as the "emergency docket," the "lightning docket," or the "orders docket" for two reasons. First, the term, without any additional information, implies a lack of transparency that is one of the components of the procedure I later theorize will influence public opinion. Second, and most importantly, I use this term because it is the term most used in the media to encompass all types of cases addressed on this docket.[3] By using the term the public is most likely to be aware of and interact with, I am increasing the external validity of the study.

Early research on procedures finds that individuals are influenced by procedures based on their prior interactions with the justice system and judges in the decision-making process (e.g Hurwitz and Peffley 1987, 2010; Tyler 2006). However, the Supreme Court is notoriously the least public branch of the US government (Hib-

[3]A search of Nexis Uni shows 2,273 hits of the term shadow docket for news sources. Looking specifically at the New York Times, there were 94 hits for the term shadow docket. An alternate term used to indicate parts of the same docket is the emergency docket. This term only appeared with 591 hits on Nexis Uni, with only 11 hits for the New York Times. This search demonstrates the much more frequent use of the term shadow docket as being more common, and thus more likely for individuals to encounter in the real world.

bing and Theiss-Morse 2001) and it is unlikely that individuals have had a personal interaction with the Court. Nonetheless, the public, legal scholars, and the media are still aware of the procedures on the merits docket.[4] This is true particularly for high salience cases as they are covered more heavily in the media besides them having policy reach through lower court implementation or future legislation (Hitt, Saunders and Scott 2019; Gibson and Caldeira 2009). This interaction with information about the normal procedures of the merits docket counts as a prior interaction with the system and thus there is potential for the procedures, or lack of normal procedures, to influence opinions of the Court.

4.4.1 Transparency

Lind and Tyler (1988) found that there are instances where procedure has influence on the endorsement of legal institutions, sometimes more than outcomes do. Procedures of the Supreme Court, in particular, can lead to high levels of support for the institution as well as the end decisions (Gibson 1989). A lack of knowledge of new procedures as well as the inability to physically view the procedures dismisses opportunities to generate support. For the Court to continue to enjoy higher levels of support, the procedures may require greater transparency.

The definition of transparency is two-pronged. First, transparency refers to the ability of those inside and outside of the institution to understand, follow, and review the procedures that lead to a final decision. The second prong of the transparency

[4]To provide some evidence of public knowledge of the regular procedures, in the survey for this study almost half of respondents correctly identified the "rule of four" norm by correctly choosing how many justices need to vote to grant certiorari, out of five multiple choice options. This is arguably more difficult of a test of procedural knowledge than knowing that the Supreme Court holds oral arguments or releases majority opinions.

definition focuses on the literal and physical ability of seeing the process as well as the presentation of the outcome taking place (Schafer 2013; Ellis III 2008). Both prongs of the definition are important to understanding how the public views the shadow docket as both aspects of transparency are lowered when cases are decided on the docket.

First, there is a lack of transparency relating to the rules and procedures of shadow docket decisions that leads both individuals within, such as Justice Kagan discussing the inconsistency of the docket, as well as individuals outside of the institution such as the public, congress members, and the media to be unaware of how the Court operates on the shadow docket. Individuals are left with questions such as how a case gets petitioned to the docket, how it is decided, how many judges support the verdict, and how the verdict is announced. The lack of this aspect of transparency leads to a deficit of information about the outcomes and the procedures of the Court (Baude 2015; Vladeck 2019). When there is a lack of education or information about how a system works or the ensuing outcomes, citizens tend to blame actors and institutions for outcomes they do not like (Hibbing and Theiss-Morse 1996). Without a proper understanding of the procedures, there is little recourse for review, little trust in the resulting verdicts, and increased calls for judicial accountability. While the procedures may not be transparent, this is not synonymous with the procedures being absent from public knowledge. As mentioned earlier, the media, congress members, and the public use the term shadow docket and discuss the cases, but it does not mean they fully understand the procedure.

Secondly, the shadow docket also removes all opportunities for individuals to

see or read about the Justices debating, the legal teams arguing, read the majority opinions, as well as see the courtroom. Gibson and Caldeira (2009) argue judicial symbols, such as black robes and seeing the justices in the courtroom, lead to reservoirs of goodwill for the Court (Gibson and Caldeira 2009). By deciding cases on the shadow docket, the Court removes oral arguments and the usually required and publicly announced majority opinions from the procedural formula. While the public may not be fully aware of all the procedures of the Court, many are familiar with these two aspects of the process. When the shadow docket eliminates these two steps in the judicial processes, they remove all public-facing aspects of the decision-making process. The Justices are discarding the very judicial symbols that bolster support for their institution.

When procedures are non-transparent because people have little knowledge about how the procedure works, accompanied by being unable to physically see the procedures, I hypothesize,

H_1: Use of the shadow docket (as opposed to the merits docket) will decrease specific support for the ruling.

4.4.2 Straying from Norms

To better understand how the shadow docket will influence public opinion, it is beneficial to look at studies of how other political institutions that use nontraditional strategies influence public opinion. The public does not generally support political actors who stray from normal policy making procedures, particularly when actors use strategies to make decisions without the cooperation of other political actors.

For example, Reeves and Rogowski (2016) examine how the strategies a president uses to create political change influence presidential approval ratings. Their experiment shows presidential candidates who say they will use executive orders instead of working with Congress to create legislation have lower levels of public approval. This finding fits with Braman (2016) who finds people view policies as less legitimate when they believe the result was achieved through unilateral means (Braman 2016).

For the Supreme Court, the usual procedures such as the process of granting certiorari, having conference, oral arguments, and an eventual published opinion built by majority consensus have changed little over time and have been established as unwritten norms (Helmke and Levitsky 2012). Norms are formal or informal processes or rules that usually entail sanctions for violations of predetermined rules (Sommer, Li and Parent 2022). The public may not be aware of all norms or rules related to the Supreme Court, but the basic procedures of the Court have precedent and have become well known (Gibson and Caldeira 2009). These norms aid in developing a myth of legality and are associated with higher levels of public support (Tyler and Rasinski 1991; Gibson and Caldeira 2009; Gibson and Nelson 2016).

While the continuation of norms may not draw attention, straying away from established norms does draw attention. Use of the shadow docket breaks norms. There are no oral arguments, no full party briefs, usually no amicus briefs, and no majority opinion. Moreover, not all the Justices have to be involved in the cases decided on the shadow docket. When the Trump Presidency started filing more cases to the shadow docket and the Justices subsequently handed down verdicts on these cases using the procedures of the shadow docket, reporters and Congress members

alike started to take note of the break in norms. For example, The Hill, when discussing a specific shadow docket decision, wrote, "Over the last several weeks, the Supreme Court has issued several important rulings on its 'shadow docket' — cases that are heard on motions to grant a stay or for other immediate relief without oral argument and usually without written opinions by the justices" (Mincberg 2019). Other media outlets have used similar descriptions to describe not only the outcome but the departure from procedural norms.[5]

The Court may be responsible for upholding norms within the institution. However, the public can also impose sanctions for breaking procedural tradition. These sanctions can take the shape of increased support to curb the Court's power or procedures. There are two types of curbing previously detailed in the literature: broad court curbing and narrow court curbing. Broad court curbing deals with fundamentally changing the institution, such as restricting the docket to specific case types, or to specific procedures. Narrow court curbing measures explicitly discuss support for noncompliance of Court decisions by individuals or other political actors. I argue that when justices stray from established procedural norms by deciding cases on the shadow docket, individuals will show higher levels of support to diminish the power of the institution to punish the institution for their irregularity. However, support for

[5]See for example, the Press Harold, "In cases on what has been called the court's 'shadow docket,' those in the majority typically do not provide detailed reasoning for why they granted or denied the requests" (Barnes 2019).

Or the New York Times, "The term 'shadow docket' was introduced by the University of Chicago law professor Will Baude in 2015 to describe the more obscure part of the Supreme Court's work — the thousands of unsigned and usually unexplained orders that the justices issue each year to manage their docket. Those orders are in contrast to the merits docket, the 60 to 70 cases each year that go through rounds of briefing and oral argument before being resolved in long, signed opinions for the court" (Vladeck 2022).

noncompliance does not address the procedural irregularities of the institution thus providing no sanction to the institution. Therefore, I do not expect individuals to fully disregard the ruling of the institutions through support of narrow court curbing but will instead support broad court curbing. Thus, I hypothesize,

H_2 Narrow: Use of the shadow docket (as opposed to the merits docket) will not increase support for narrow court curbing.

H_2 Broad: Use of the shadow docket (as opposed to the merits docket) will increase support for broad court curbing.

The Court's current use of the shadow docket strays from the general procedural norms of the merit docket as well as strays from the norms of the shadow docket itself. The shadow docket has been used historically to address purely procedural issues. The procedural issues could involve things such as allowing parties more time to file briefs, combining two cases together, or waiving Court fees. In the past, all substantive issues have been addressed on the merits docket. However, as mentioned previously, more substantively important cases are being addressed to and subsequently decided on the shadow docket under claims by petitioners of a time sensitive or crisis nature. The Court is not currently following the norm of using the shadow docket only for procedural issues. Following the logic explained for Hypothesis 2, citizens can sanction the institutions by supporting measures to curb their power. Thus, I hypothesize,

H_3: Use of the shadow docket to decide substantive issues (as opposed to procedural issues) will decrease specific support for the rulings.

4.4.3 Unfairness and Prior Attitudes

Both a lack of transparency and deviations of norms have combined to increase perceptions of unfairness for the shadow docket. Informational deviations from official policies and procedures induce perceptions of arbitrariness and discrimination (Carlson, Jakli and Linos 2018). This is already occurring as Congress members opposed to shadow docket outcomes discuss ways to mitigate the Court's policy reach based on claims of unfair behavior (Raymond 2021).

This perception of unfairness resonated with the media and public when the current majority conservative Court upheld many of former President Trump's orders and bans using shadow docket procedures. The Court itself has done little by its behavior to counter these claims, as it continues to provide little information about the docket or the outcomes. Consequently, other would-be supporters are left with a diminished ability to dispute claims of unfairness because they possess little information about the procedures. Some criteria by which procedures are evaluated as fair include how motivated justices are to be fair, the consistency of the procedures, the level of representation for both the prosecutor and defendant, and the quality of the decision (Tyler 1988; Sheppard and Lewicki 1987)

A lack of transparency and nontraditional procedures coupled with the commentary from political elites and journalists about the abandonment of norms can lead the public to be uncertain about their perceptions of procedures. Doherty and Wolak (2012) find when procedures are clearly fair, people make unbiased assessments of procedural justice. When it is unclear whether a strategy is fair, individuals instead rely on their prior attitudes about the specific policies being discussed (Doherty and

Wolak 2012). Thus, in this stage of uncertainty, I expect individuals will rely on their prior attitudes to assess the procedures. However, as more media sources, political actors, and scholars push the perceived unfairness of a procedure, by markedly using the term "shadow docket", I theorize prior attitudes will matter less in determining support for the decisions.

I chose abortion as the policy issue for a few different reasons. First, it is a real salient political issue adding to the ability of this study to speak to real world issues. Abortion has been a salient topic for the Court since *Roe v. Wade* (410 U.S. 113, 1973). More cases in this issue area are being addressed every term on both the regular and shadow docket, continuing past the time of this study (*Dobbs v. Jackson Women's Health Organization* 597 U.S., 2022). The Court and discussions of support are at the epicenter of the abortion debate and attitudes about the Court are likely to be readily associated with this topic (Cohen 2022; Annas 2007; Tyler and Mitchell 1993; Byrn 1972).

Secondly, this issue is supposed to imitate real substantive issues being answered by the Court on both the merits and more recently the shadow docket to enhance the external validity of the experiment (*United States v. Texas* 21-588 U.S., 2021, *Whole Women's Health et al. v. Jackson* 21A24 U.S. 595, 2021).[6] There are few substantive issues that have been addressed on both the regular docket and shadow docket.

Lastly, picking abortion as the decision topic is a difficult test for my theory because of the polarizing nature of the issue where opinions are established and solidified. I expect many individuals will base much of their support of the Court

[6]The respondents were asked about immigration policy views to mitigate any priming effects or perceptions of the purpose of the survey.

on the case outcomes whether for or against abortion. Thus, it will be more difficult to find evidence that procedures could also influence support. Also, since peoples' attitudes on abortion are unlikely to change, any evidence I find of changes in the opinions of the Court can be attributed to the treatment and not shifting policy opinions.

I conceptualize prior abortion attitudes into two broad categories for ease of interpretation. Those who support abortion prior to treatment are categorized as prochoice. Those who do not support abortion prior to receiving the treatment are categorized as prolife.

Thus, I hypothesize,

H_4: Use of the shadow docket will decrease specific support for the ruling when prolife (prochoice) respondents are given a prochoice (prolife) case outcome.

Given the previous discussion, I expect prior attitudes, along with procedures, to predict support for broad court curbing. Bartels and Johnston (2020) find procedural perceptions are used to bolster favored decisions and denigrate decisions they do not like by increasing support for both broad and narrow court curbing policies. They also find that individuals who experience both general policy disagreement and specific policy disagreement express more support of court curbing (Bartels and Johnston 2020). This same behavioral relationship holds when examining perceptions of fairness of the Court (Armaly 2021). Compared to narrow court curbing, broad curbing deals with reforms such as restricting the dockets that would punish the Court for these perceptions of unfairness. Support for broad court curbing demonstrates

individuals' willingness to diminish the procedures they see as the problem instead of not complying with a single ruling. Thus, I hypothesize that,

H $_5$:Use of the shadow docket will increase support for broad court curbing when prolife (prochoice) respondents are given a prochoice (prolife) case outcome.

4.5 Research Design, Data, and Methods

To examine how use of the shadow docket influences public opinion, I used a survey vignette experiment conducted through Mturk during February 2022 with a total of 1,065 respondents.[7] Mturk is a common survey platform used to answer questions in the social sciences (Kennedy et al. 2020). To be eligible for participation in the experiment, respondents had to be in the United States, be at least 18 years of age, and have completed at least 50 prior tasks on Mturk. While conducting research on Mturk might have some possible drawbacks (Berinsky, Huber and Lenz 2012), studies have demonstrated that Mturk surveys can produce results that replicate across nationally representative samples Clifford, Jewell and Waggoner (2015); Thomas and Clifford (2017) and others have used them in recent studies to test political attitudes about the Courts and other topics (Armaly and Lane 2022; Bakker, Lelkes and Malka 2021; Bøggild, Aarøe and Petersen 2021; Peyton 2020).

The survey experiment is a 2x2x2 factorial design plus a control condition resulting in about 118 respondents in each condition with a total of 1,065 respondents

[7]It is valuable to note this survey experiment was given prior to the public leak and the outcome of the *Dobbs v. Jackson Women's Health Organization* (597 U.S., 2022) decision, thus avoiding any confounding factors.

across the nine conditions. [8] Prior to treatment, respondents answered demographic, ideology, prior abortion attitude, and political knowledge questions. Following the treatment, each respondent answered a collection of manipulation checks as well as various questions about supporting the Court.

4.5.1 Independent Variables

All respondents were given a short vignette replicating real news articles detailing the procedures of the Court in relation to a specific issue.[9] The vignette manipulated three factors: docket condition (shadow vs. regular), issue type condition (procedural vs. substantive), and outcome condition (prochoice vs. prolife). The shadow docket vignette is displayed in Table 1A and the merits docket vignette is displayed in Table 1B. The other two conditions that vary in the vignette are denoted by brackets within the text in Table 4.1.

The conditions are composed of docket assignment, issue type assignment, and outcome assignment. For docket assignment, the respondents either received an article discussing the shadow docket or the regular docket. The differences between the vignettes consist of the different norms of the dockets. These portions were brief and followed the format of real news articles that discuss how much time was spent deciding a case along with how much information would be shared post-decision. Docket equals one if the respondent received the shadow docket treatment. The term shadow docket is used to determine the real-world effects of the term popularly used by the media and political actors. I understand that while political elites are

[8] A table of the number of respondents and all conditions is included in Appendix C: Respondent Numbers Per Condition

[9] The control group did not receive an article to gauge support in the absence of treatment.

Table 4.1: Vignette Manipulations

A. Shadow Docket Vignette	**B. Merit Docket Vignette**
Over the next few months, the Supreme Court will release a variety of decisions through its shadow docket. There are many potential cases dealing with [**procedures for things like parties requesting extra time to submit written briefs / abortion laws making their way through federal and state lower courts**]. With these cases, the Supreme Court could ultimately decide to [**restrict/ expand**] abortion access across the US. The justices can determine the outcome of a case as part of the shadow docket. On this docket, the Supreme Court's final decision is not signed by the justices who voted for it, consisting of nothing more than a single paragraph which lacks a detailed explanation for their reasoning. These cases would be decided with no oral arguments, during which opposing lawyers can make their cases and answer questions from the justices. The decisions of the shadow docket are often made quickly, without the usual written briefs, oral arguments, and signed opinions. In recent years, the shadow docket has made up a large part of the Supreme Court's work and decides [**procedural matters / important issues like abortion**].	Over the next few months, the Supreme Court will release a variety of decisions through its regular docket. There are many potential cases dealing with [**procedures for things like parties requesting extra time to submit written briefs / abortion laws making their way through federal and state lower courts**]. With these cases, the Supreme Court could ultimately decide to [**restrict/ expand**] abortion access across the US. The justices can determine the outcome of a case as part of the regular docket. On this docket, the Supreme Court's final decision is signed by the justices who voted for it, consisting of the usual, lengthy opinion that contains a detailed explanation for their reasoning. These cases would be decided with lengthy oral arguments, during which opposing lawyers can make their cases and answer questions from the justices. The decisions of the regular docket are often made deliberately, with the usual written briefs, oral arguments, and signed opinions. In recent years, the regular docket has made up a large part of the Supreme Court's work and decides [**procedural matters / important issues like abortion**].

Table 4.1A displays the shadow docket treatment condition. Table 4.1B displays the merit docket treatment condition. The differences between the outcome conditions are in boldface. The differences in the remaining conditions (substantive/ procedural; prochoice/ prolife) are in brackets.

aware of the shadow docket, others are perhaps less aware. Thus, I do provide a short, impartial explanation of the docket in the vignette without advocating for either docket as many news sources are prone to do when covering shadow docket cases.

For type of issue assignment, the vignette varied by either explaining that the Court was answering a procedural or a substantive question. This variable equals one when the respondent received the substantive issue vignette. The substantive issue focuses on long lasting impacts of a verdict on a policy question, while the procedural treatment is whether the Court will allow the petitioners or respondents in the case to file their party briefs after the deadline. This is a common procedural question often presented to the Court on the shadow docket. These bureaucratic procedural questions generally have little or no policy impact.

For the final condition, respondents received an outcome assignment supporting either prochoice or prolife abortion laws. The variable equals one if the respondent received a prochoice outcome.

For the last part of the analysis, I interacted prior policy views on abortion for each respondent with the outcome type to examine how their existing policy views mitigate the influence of the outcome. Prior to receiving the vignette, respondents reported their views on abortion.[10] Higher scores in the measure of abortion policy views indicates more openness and acceptance with abortion i.e., a prochoice stance.

[10]I also include questions about their views on groups to decrease the chance of experimenter demand effects (Mummolo and Peterson 2019).

Table 4.2: Measures of Independent Variables (IV), Dependent Variables (DV), and Controls

Variable Name	**Values and Question Summary**
Independent Variables	
Regular Docket or Shadow Docket	=0 if Regular Docket, =1 if Shadow Docket
Procedural Issue or Substantive Issue	=0 if Procedural Issue, =1 if Substantive Issue
Prolife or Prochoice Outcome	=0 if Prolife Outcome, =1 if Prochoice
Abortion Attitudes	=1 if Prolife/Excluded Category, =2 if Prolife with limited exceptions such as rape, =3 if Prochoice under most circumstances, =4 if Prochoice
Dependent Variables	
Ruling Support	=0 if No Support, =1 if Neutral, =2 if Support
Broad Court Curbing	Higher value if agree with more of these statements (Do away with the Court, Reduce types of cases, Court should be less independent, Controlling the Court, Remove judges)
Narrow Court Curbing	Higher value if agree with more of these statements (The government should refuse to implement, Don't agree, shouldn't have to comply, Should challenge rulings)
Controls	
Demographics	Age, Race, Gender, Education
Others	Perceived ideological distance from the Court, Political Knowledge questions answered correctly, Number of attention check questions answered correctly

Table 4.2 details the variables with their corresponding survey questions included in the analyses. Full question wordings and coding included in Appendix C:Survey Questions

4.5.2 Dependent Variables

For this experiment, I examined three dependent variables: ruling support, narrow court curbing support, and broad court curbing support. The first dependent variable is a measure of support for the ruling (ruling support) the respondent received in the treatment condition. This question of support was asked as a 5-point scale item condensed to a 3-point scale to indicate no support, neutrality, or support of the ruling of the Court they received in their vignette.

The other two main dependent variable measures, narrow and broad court curbing, are built by asking respondents how strongly they agree to strongly disagree (on a 5-point scale) with a variety of statements about curbing the Court's power.[11] The combinations of questions follow the format set forth by previous literature to measure support for narrow and broad court cubing (Bartels and Johnston 2020). [12] Narrow court curbing adds the answers to three separate questions about an individual's willingness and support of noncompliance, jurisdiction stripping, and legislative override. In the past, this has been referenced as policy legitimacy or decision acceptance (Mondak 1990, 1994). The additive measure can range from 3 to 15. Higher values of this measure indicate higher support of narrow court curbing measures.

[11]Often these variables have been combined. However, recent studies have parsed apart these concepts into two separate categories both theoretically and methodologically (Bartels and Johnston 2020). I also make a distinction between the two types of court curbing. Thus, combining the measures would result in loss of information and distinction in citizen attitudes.

[12]I construct these variables and their scales using multi-item questions and subject them to factor analysis. Each of the factor scores suggest the unidimensional structure of the items I included in the final additive scale, with eigenvalues all over 1 (Cliff 1988; Kaiser 1960). Models using the factor analysis DV's are also included in Appendix C: Support for Court Curbing Measures Using Factor Analysis with very similar results. I chose to display the additive DV's due to the ease of interpretation of the results.

My third dependent variable is broad court curbing. In the past, this has been referred to in part as legitimacy, as well as diffuse support (Caldeira and Gibson 1992). This measure is built by adding responses for five questions asking respondents about their willingness to fundamentally change the structure or procedures of the Court as an institution such as getting rid of judges, restricting the issue areas the Court can address, or making the Court less independent. This additive measure can range from 5 to 25 with higher values indicating greater support of broad court curbing measures.

4.5.3 Control Variables

Following standard practice in political science, I also account for several demographic and ideological controls. All control questions were answered prior to the respondents receiving any treatment. The basic demographics I control for are race, gender, education level, political knowledge, and age.[13]

I also include a control for general policy disagreement by measuring the perceived ideological distance between each respondent and the Court. I took the absolute value of the self-reported ideology of the respondent subtracted from their perceived ideology of the Supreme Court, both from a 7-point ideology scale.

Lastly, inattentiveness by respondents can be problematic for researchers and I follow the procedure of many studies by including attention check questions throughout the survey experiment to detect shirkers and control for the number of questions they answered correctly (Paas, Dolnicar and Karlsson 2018; Hauser and Schwarz

[13]The coding for each of these controls and other variables follows previous literature, with the exact coding included in Appendix C: Survey Questions

2016; Berinsky, Huber and Lenz 2012).

4.6 Results

Table 4.3 contains the results for ruling support, estimated with an ordered logit. The results show that when individuals are given the vignette detailing the Court potentially using the shadow docket, they are less likely to support the ruling of the Court. This finding provides support for Hypothesis 1. This is important as the first piece of evidence to indicate that just the possibility of the Court using the procedure of the shadow docket is influencing public views of the Court. Even with no expectation that individuals have a full understanding of the shadow docket and that individuals are given very little information about the norm-straying behavior of the shadow docket, it still influences ruling support.

Furthermore, even when controlling for matches between respondents' prior attitudes and the vignette outcome, the shadow docket treatment is still a significant predictor of ruling support. These results point to the importance of the procedures of the Court in influencing perceptions even if individuals are not fully knowledgeable about those procedures. Moreover, with the polarizing abortion topic, where I would expect policy agreement to be a much greater influence on support, the fact that I still find significant differences based on the procedures of the Court points to the impact of the shadow docket.

Moving further down Table 4.3, I do not find support for Hypothesis 3. There is no statistically significant influence from the issue type on an individual's support for the ruling. I surmise this lack of influence is a result of individuals not fully understanding the change in norms from a procedural to a substantive caseload

Table 4.3: Ruling Support

Variable	Coefficient	(Standard Error (SE)
Docket Condition: Shadow	-0.291**	(0.144)
Issue Type Condition: Substantive	0.106	(0.142)
Outcome Condition: Prochoice	-1.582***	(0.469)
Abortion Attitude: Prolife	Baseline	
Abortion Attitude: Limited Exceptions	-0.208	(0.399)
Abortion Attitude: More Exceptions	-0.488	(0.431)
Abortion Attitude: Prochoice	-1.465***	(0.367)
Prochoice Outcome x Limited Exceptions Abortion View	0.569	(0.540)
Prochoice Outcome x More Exceptions Abortion View	0.842	(0.580)
Prochoice Outcome x Prochoice Abortion View	2.380**	(0.520)
Ideological Distance from the Court	-0.160***	(0.041)
Log Likelihood	-1158	

Table 4.3 shows results from an ordered logit regression with robust standard errors reported in parentheses for 919 individuals. DV is a trichotomous measure of support for the ruling. Cut point 1 = -5.063 (0.573) and cut point 2 = -3.559 (0.557). All tests are for two-tailed tests, except for the Shadow Docket, which uses a 1-tailed test due to directional expectation. The analysis with controls reported are included in Appendix C:Full Ruling Support, Analysis displays the same overall results. p=0.05, ** p=0.01, ***p=0.001.*

within the shadow docket itself. Instead, individuals know about the norms of the shadow docket as compared to the norms of the Court more generally. However, I suspect as more individuals are made aware of the shadow docket's intended and historical use due to more scholars and historians studying the topic, the influence of the issue type may become more salient.

In terms of controls, the perceived ideological distance from the Court is a significant predictor of ruling support. Where there is a larger perceived ideological distance between an individual and the Court, an individual is less likely to support the ruling. Further exploration of these influences comes from an examination of

the interaction term between prior abortion attitudes and case outcomes that lends support to Hypothesis 4.

Figure 4.1: Ruling Support based on Prior Abortion Attitudes and Outcome Treatment

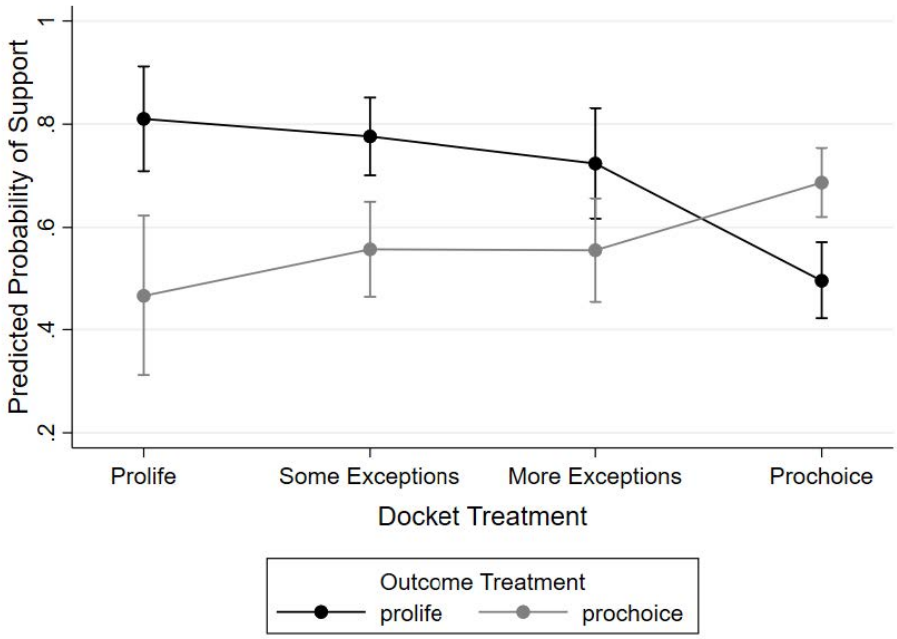

Figure 4.1 shows the probability of supporting a ruling given citizens' prior abortion attitudes and the outcome treatment they received. 95% confidence intervals are included.

Figure 4.1 offers an efficient way to examine the interactive results for Hypothesis 4 (e.g.,(Brambor, Clark and Golder 2006), by displaying the predicted effects on supporting a ruling given the prior abortion attitude and the outcome treatment received. In Figure 4.1, the x-axis displays the four different categories of prior abortion attitudes of the respondents. For prior attitudes, prolife indicates the individual does not support abortion under any circumstances while limited exceptions indicate the individual would support abortion only under certain circumstances such as rape

or incest. Conversely, prochoice indicates the individual always supports abortion and more exceptions indicates the individual supports abortion when there is a clear justification given.

The y-axis depicts the probability of respondents supporting the ruling they received. The black line represents the probability when given the prolife outcome treatment and the grey line represents the probability when given the prochoice outcome treatment. In Figure 4.1 I find respondents opposed to abortion (prolife), who received the prolife vignette denoting a prolife outcome by the Court, have a higher probability of supporting the ruling. Conversely, when prolife respondents receive the prochoice outcome, they are less likely to support the decision. Respondents who support abortion (prochoice), who receive the prochoice outcome. are also more likely to support the ruling. As expected, prochoice respondents, who receive the prolife outcome are less likely to support the ruling. Hence, for all respondents, when the ruling is in opposition to their personal views, individuals are less likely to support the ruling, but when the ruling is in congruence with their personal views, they are more likely to support the ruling irrespective of the procedure used to make the decision. This matches with previous literature finding that individuals care how rulings align with their personal views (Bartels and Johnston 2020; Zilis 2015).

After looking at the support for the ruling and finding evidence of shadow docket influence, I turn to Table 4.4 with results from two Ordinary Least Squares (OLS) regression models. My dependent variable in model 1 is the measure of narrow court curbing, and the dependent variable in model 2 is the measure of broad court curbing. In model 1, I find that the shadow docket is not a significant predictor of support

for narrow court curbing. This fits the expectation for Hypothesis 2narrow. While individuals are less likely to support decisions from the shadow docket as seen in Table 4.3, it does not seem they are willing to risk noncompliance by themselves, or noncompliance by other government actors. Perhaps this may change in the future as the media and other political elites shed light on the shadow docket.

Model 2 in Table 4.4 also follows expectations for Hypothesis 2broad. I find that the shadow docket is a significant predictor of support for broad court curbing with a p-value of 0.0545. In terms of marginal effects, for respondents who received the vignette detailing the shadow docket procedure, holding all other variables at their means, support for broad court curbing increased by 1.7%. Individuals who receive the shadow vignette are more likely to support broad measures of curbing the Court's power such as "doing away with the Supreme Court altogether," reducing "the right of the Supreme Court to decide certain types of controversial issues," or even more extreme by "removing judges from their position as judges." Supporting these measures means supporting fundamental changes to the judicial independence of the Supreme Court.

Moving back to marginal effects from the results in Table 4.4, support for broad curbing rises by 2.7% when the issue area of the potential case is substantive and decided on the shadow docket. Substantive cases with long-term effects increases public support to curb the Court's power. It seems respondents are focused on limiting the Court's ability to make decisions on the shadow docket in the future seen by the significant results in Table 4.4, instead of fighting over specific outcomes as seen by the null results in Table 4.3 for issue assignment. While these effects are

Table 4.4: Support for Court Curbing Measures

	Model 1	Model 2
	Narrow Court Curbing	**Broad Court Curbing**
Docket Condition: Shadow	0.108	0.435*
	(0.1702)	(0.2711)
Issue Condition: Substantive	-0.151	-0.688**
	(0.1673)	(0.2688)
Outcome Condition:Prochoice	-1.224**	-1.940***
	(0.4851)	(0.7215)
Prior Attitude (PA): Prolife	Baseline	Baseline
PA: Limited Exceptions	-1.223***	-2.012***
	(0.3787)	(0.5689)
PA: More Exceptions	-0.965**	-1.724***
	(0.3807)	(0.5782)
PA: Prochoice	-1.493***	-2.269***
	(0.3613)	(0.5457)
Condition Prochoice x PA: Prior Limited Exceptions	1.259**	1.859**
	(0.5839)	(0.8893)
Condition Prochoice x PA: Prior More Exceptions	0.816	1.392
	(0.5835)	(0.8994)
Condition Prochoice x PA: Prior Prochoice	0.946*	1.132
	(0.5594)	(0.8601)
Ideological Distance from the Court	-0.00782	0.0646
	(0.0498)	(0.0803)
Constant	16.76***	28.20***
	(0.5580)	(0.8734)
Observations	1,004	1,021
R-squared	0.400	0.344

*Table 4.4 show results from OLS regression with robust standard errors reported in parentheses. DV in model 1 is the additive variable for narrow court curbing. DV in model 2 is the additive variable for broad court curbing. All tests are for two-tailed tests, except for the Shadow Docket, which uses a 1-tailed test due to directional expectation. p=0.1, ** p=0.05, ***p=0.01.* [14]

small, given the salient and polarizing abortion issue area, they are still meaningful.

Figure 4.2: Support for Broad Court Curbing based on Prior Abortion Attitudes and Outcome Treatment

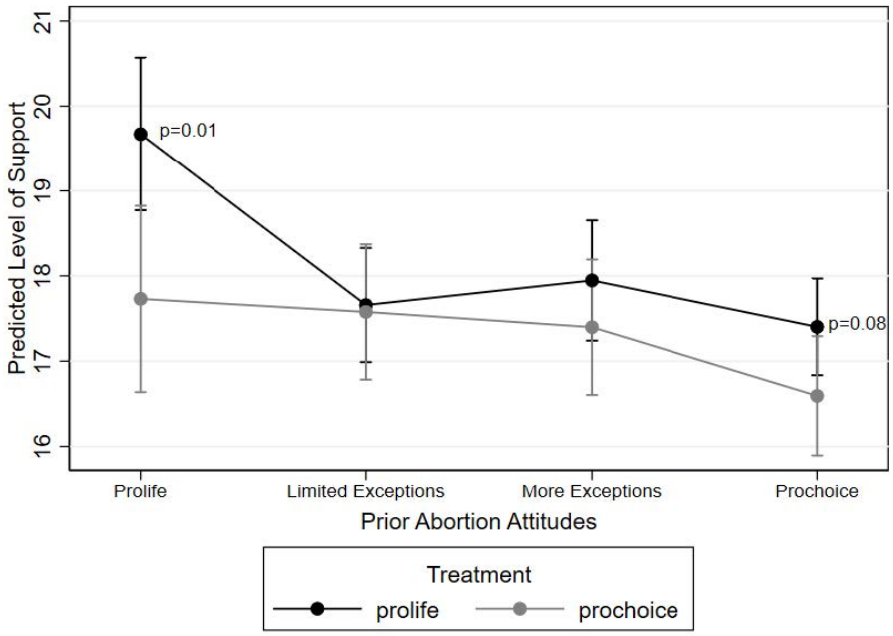

Figure 4.2 shows predicted level of support for broad court curbing measures (e.g.,support to reduce Court power) given citizens' prior abortion attitudes. 95% confidence intervals are included (Austin and Hux 2002). The listed p-values denote the statistical significance for the differences between the predicted probabilities for prolife or prochoice individuals who received the prolife treatment versus the prochoice treatment.

Examining the last independent variable of interest, I graph the interaction between the outcome treatment and prior abortion attitudes in Figure 4.2. The x-axis displays the categories of prior abortion attitudes. The y-axis depicts the predicted level of support for broad court curbing for each outcome treatment received (each line represents a treatment). Individuals with prolife abortion attitudes are more likely to support curbing the Court's power when they receive the prolife condition. This finding runs contrary to the expectations of Hypothesis 5. It is interesting to

note that the probability of them supporting court curbing is higher than prochoice individuals both when they receive the attitude congruent vignette and the attitude incongruent vignette. This finding requires further investigation, though it could perhaps be a result of prolife individuals also holding stronger views on the limited role of government.

Individuals with prochoice abortion attitudes are also more likely to support curbing the Court's power when they are given the prolife outcome treatment. These findings fit with Hypothesis 5 that show that individuals are more likely to support Court curbing measures when the outcome does not fit with their prior attitudes.

4.7 Discussion and Conclusion

In this analysis, I find that the Court's use of the shadow docket, as frequently portrayed in a brief manner to the public, does influence support of the ruling as well as support for broad court curbing measures. I also find that the outcomes of the cases and prior attitudes play a role in shaping support for rulings and court curbing measures. Even when discussing a polarizing topic like abortion where I would expect procedures to not matter considering the outcome, I still find significant differences in support for decisions when the procedures are changed. While the substantive impact is small in increasing support for broad court curbing, I expect these numbers to increase when the shadow docket is actually used with a real outcome and not just hinted at being a procedural option, as is the case in my vignette. Furthermore, I expect more substantial results when decisions are made on less of a polarizing issue. Nonetheless, these significant results highlight the impact of the shadow docket procedural changes.

These findings are instrumental in helping other political actors, as well as the justices using the docket, understand the role procedures have in influencing public opinion. Consistent with other scholars, I still find that outcomes and prior attitudes influence support of rulings as well as support to curb the Court's power. However, it is notable that the process, particularly changes in the process, by which the outcome is derived also matters. When individuals are informed, even to a very small degree, of the lack of procedural norms or change in procedural norms, they are less likely to support the resulting decision and more likely to support altering the institution making the decisions.

This is the first project to examine how official changes in Supreme Court procedure influence public opinion. These findings contribute to better understanding of Congressional attempts to mitigate the power of the Court (Erskine 2021). Congress, as well as other judicial advocates are calling for specific reform to the Supreme Court's use of the shadow docket. This could be because Congress is built of individuals like those in the survey who react negatively to changes in norms and procedures, or it could be due to the public's negative responses to the shadow docket. More work should be pursued to examine how public opinion influences behaviors of Congress towards the Judicial branch. Overall, these findings have implications for the perception of legitimacy of the Court and the ensuing behavior of the political elites who care about these types of public concerns (Mark and Zilis 2019).

The most striking finding is the increased support to curb the power and fundamental independence of the Court. The Court has long held the position and formal makeup of an antimajoritarian institution. It has been free from elections, restric-

tions on its power, as well as majoritarian oversight. This level of independence has allowed the Court to defend minority rights and oversee the constitutionality of legislative actions and laws, all while maintaining a reservoir of goodwill. However, this independence has historically been paired with fixed procedures. As is evidenced by the results of this study, increased use of the shadow docket with its change in procedures has the potential to create a crack in the dam supporting the reservoir of goodwill through a decrease in support of rulings. More importantly, these non-traditional and nontransparent procedures are leading to citizen's increased support to curb the Court through broad strokes, fundamentally changing the current level of judicial independence of the Court.

I expect over time and with more individuals speaking out against the use of the shadow docket, the citizenry will become more sensitive to this procedural choice. The media has already played a large role in making citizens aware of the docket, with the justices and other political elites following suit. Further research might explore how the credibility of the individuals speaking out about the docket might influence public opinion. It would also be beneficial to better understand the strength, emotional direction, and clarity of claims of unfairness about the docket.

This project is crucial to helping scholars and Court members determine the influence of procedures on public approval of the Court. This chapter advances an extensive theory on what procedural conditions can lead to changes in public opinion. In this research, I utilize a timely research design focused on the new variation in procedures on the Supreme Court, known as the shadow docket. I argue the results from this survey experiment will not only be influential to better understanding

the Courts but will impact scholars examining other types of procedural changes in other branches of government and their influence on public approval. This research provides key foundations to better understanding the new phenomenon known as the shadow docket and warns of the potential effects for policy makers willing to play in the shadows.

Chapter 5 Conclusions

The Supreme Court has held the attention of scholars for many years as we try to figure out the decision making processes of the justices, the institutional rules and their effects. Yet, in all that studying, we have missed a large swath of the Supreme Court's actual workload and behavior due to lack of interest, lack of knowledge, and lack of data. This project begins to fill in the gaps by drawing attention to the Supreme Court's shadow docket. Scholars cannot continue to ignore this portion of the Supreme Court's workload without coming to unfulfilling, misleading or limited conclusions.

Throughout this project, I provided many anecdotal examples of the importance of the shadow docket decisions for the lives of US citizens, law makers, and even international actors such as the President of Mexico mentioned in the Texas Border example in the introduction chapter. In chapter two, I demonstrated that shadow docket decisions are a substantial part of the Supreme Court's workload and that these decisions are increasing over time through the interests of litigators and the use of the Justices. This type of decision making is unlikely to disappear completely due to the required nature of emergency decisions and lack of time for full review of procedural motions. Furthermore, there is a current upward trend to the number of decisions being made through shadow docket procedures. It is the responsibility of scholars to continue to systematically examine the shadow docket and the effects of these decisions.

The descriptive analysis in chapter two currently includes the largest dataset of shadow docket orders from 2010-2022. This data will be a resource to scholars as they continue to examine questions related to the decision outcomes.[1] I looked at the order types and the amount of justification given for the orders. It is clear from chapter two that the behavior of the justices is very different than their behavior when making decisions on the normal docket due to the small percentage of cases that receive any type of justification at only 11% receiving any justification. These numbers are noteworthy, since the Court who gets to have the last say in a legal dispute, is not speaking.

The descriptive analyses I provide are necessary due to the lack of information about the docket. However, moving forward, it will be up to scholars to examine the reasons why the justices are not speaking. While I begin this search for answers

[1]The data will be available after a future book project is published.

by finding statistically significant differences between the individual justices, more theorizing and analysis is needed.

In chapter three, I apply a theory of emergency decision making to justices for the first time. Justices are not normally placed in emergency situations, thus there has been little need or benefit to examine their behavior under such situations. However, with the increase of the emergency docket it is necessary to examine their behavior to better understand the outcomes made by the Court. I find that there are some court considerations that do matter for the justices to grant an emergency decision, there are some past theories of decision making that are helpful in explaining behavior, but there are also some factors that emergency decision making models would expect to matter. These theories could be helpful when examining justices in other emergency situations such as deciding cases on the merits during wartime. They also may prove helpful when applied to other elite actors during emergencies such as the President or governor during a natural disaster, or Congress members when approaching a government shutdown due to budgetary issues.

In chapter four, I examined the effects of shadow docket decisions on the public. I theorize that procedures of the Court would matter in influencing public opinion when the procedures are nontransparent, stray from expected norms, and are thus perceived as politically unfair. I found evidence that not only does use of the shadow docket procedure lead to less support for the ensuing decisions, it also increases support for measures of broad court curbing.

5.1 Implications

This project is part of a larger research agenda looking towards the unknown of institutions and the decisions that are quietly and quickly being made that influence the lives of citizens within the US. The findings from this research have important implications for different sets of actors all revolving around the Supreme Court's shadow docket.

First, there are implications for a variety of legal actors. The finding from chapter two points to a future of confusion for litigants and lower courts as they try to navigate the waters left whirling after interference and outcomes from the Supreme Court. The shadow docket, more so than the regular docket interrupts legal proceedings in the lower courts. As I mentioned previously, the Court is often using the shadow docket as a pause and fast forward button on lower court proceedings. If the Court provided substantial justification and direction when they announce their shadow decisions, there would be less confusion.

However, my research puts on display how little justification is not provided from the shadow docket cases. There are often no citations, no justifications, no instruc-

tions given to the lower courts. For example, I would assume there was confusion after the decision was made for the *Department of Homeland Security v. Texas* (23A607, 2024) case. There was no instruction given to the 5th Circuit Court judges who were supposed to hear the original case later in the year. Does the order I mentioned in the introduction to allow Federal Agents to cut wire mean the Supreme Court thinks that Texas did not have a right to put the wire there in the beginning? Furthermore, can President Biden's legal team cite the shadow docket case in their oral arguments before the Circuit Court as the current law of the land? These types of situations will continue to arise as the number of cases decided on the shadow docket increase if the Court continues to provide little justification for those cases.

Also, the findings from chapter three detail the impact of resources for current litigants and may shape the future composition of the shadow docket. If higher resourced litigants, such as other political elites representing the US, are more likely to win cases on the shadow docket, it would seem likely that they will increase the amount of petitions to the docket due to high rates of success. We certainly see that sitting Presidents have increased the number of petitions to the emergency docket with both President Trump and President Biden taking advantage of the docket that previous Presidents did not. This may be one new way that Presidents are using the Court to further their policy agendas.

On the opposite side, it is interesting that low resourced individuals are unlikely to have their emergency petitions granted. This finding is disturbing as it may increase perceptions of unfair treatment by the legal system for minorities and individuals. Future research should further examine how historically ignored or mistreated groups of individuals fair in the shadows.

In conclusion, this project is an impactful start to examining the Supreme Court's shadow docket. This project contributes a new dataset, an increase in understanding of the shape of the shadow docket, applications of theories of decision making in emergencies and an understanding of the influence of alternative procedures on the public, and findings that display the nuance and necessity of researching the Supreme Court's shadow docket. The concept of this court docket is now more of a silhouette than a shadow.

Appendix

Appendix A: Whispers and Shouts in the Shadows: Language Used to Justify Decisions Made on the Shadow Docket

Pdf Example of Order List

(ORDER LIST: 582 U.S.)

MONDAY, JUNE 12, 2017

CERTIORARI -- SUMMARY DISPOSITIONS

16-1003 McKNIGHT, MATTHEW, ET AL. V. PETERSEN, STEVEN O.

The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of *White* v. *Pauly*, 580 U. S. ____ (2017) (per curiam).

16-7234 McINTOSH, DANIEL V. UNITED STATES

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Fourth Circuit for further consideration in light of *Honeycutt* v. *United States*, 581 U. S. ___ (2017).

16-7794 BROWN, CYNTHIA E. V. UNITED STATES

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Third Circuit for further consideration in light of *Honeycutt* v. *United States*, 581 U. S. ___ (2017).

CERTIORARI GRANTED

16-712 OIL STATES ENERGY SERVICES V. GREENE'S ENERGY GROUP, ET AL.

The petition for a writ of certiorari is granted limited to Question 1 presented by the petition.

CERTIORARI DENIED

16-1029 BALL, BARBARA, ET AL. V. MILWARD, MELISSA, ET AL.

16-1060 KUTLAK, LEVENT R. V. COLORADO

16-1062 JEFFERS, GREG V. METROPOLITAN LIFE INS CO., ET AL

16-1074 CARAFFA, GIOVANNA S. V. CARNIVAL CORP.

16-1092 LOCKWOOD, ANDREWS & NEWMAN V. MASON, JENNIFER, ET AL.

16-1201 SCHOCKNER, MANFRED V. CASH, WARDEN

16-1209 RIEMER, GEORGE A. V. OREGON, ET AL.

16-1217 TICHICH, SARAH K., ET AL. V. BLOOMINGTON, MN, ET AL.

16-1223 BLUE SPIKE, LLC V. GOOGLE INC.

16-1228 OWNER-OPERATOR IND. DRIVERS V. DEPT. OF TRANSP., ET AL.

16-1235 FRANKLIN, BOBBY V. LAUGHLIN, D. J., ET AL.

16-1247 BARTH, JOHN V. McNEELY, STARLET, ET AL.

16-1249 D. E. V. JOHN DOE 1, ET AL.

16-1266 DIVERSIFIED INGREDIENTS, INC. V. TESTA, JOSEPH W.

16-1270 POPE, MAYNER J. V. GUNS, ALICIA, ET AL.

16-1282 ADAMS, RICHARD V. NILES, AVERY, ET AL.

16-1317 HERNANDEZ, GILBERT, ET AL. V. AVERY, WILLIAM D.

16-1325 AKHTAR-ZAIDI, SYED J., ET AL. V. UNITED STATES

16-1333 NEASE, HOWARD E., ET UX. V. FORD MOTOR CO.

16-5895 ZEBBS, ARTHUR A. V. VIRGINIA

16-7763 PERRY, ANGELA V. UNITED STATES

16-7775 CUEVAS CABRERA, ERMINSO V. UNITED STATES

16-7776 DAVIS, FRANKLIN V. TEXAS

Appendix B: The Nature of Decision Making in Emergencies

Training Petition Ideology

To predict ideology of petitions, I hand coded 122 petitions, randomly gathered from 2017-2021. I used 110 petitions to train my model. I then tested the training on the remaining 12 petitions. I cleaned the hand coded petitions by removing punctuation, numbers, symbols, and common English stop words [2]. I also put all words into lowercase letters and lemmatized the words (used only the base forms of words). The lemmatized words had to be present in at least 10 of the documents as a way to make sure unique words dealing with a single topic were excluded. This gets rid of any words that are very rare such as petitioner specific names. I then sorted the individuals words into a dataframe of bigrams (two word units). I then used this dataframe to train a few different language models used to predict binary factors. I used dwdPoly, dwdLinear, and sdwd models all with similar accuracy rates and predictions. Each of these models come from the *Caret* text package in R. These are all different forms of Distance Weighted Discrimination models.

The following table includes the confusion matrix of the model used in the main text. The confusion matrix denotes how well the model was able to predict each type of petition (conservative or liberal) based on how it was hand-coded. From the confusion matrix, we see that the 9 of the 12 petitions were predicted correctly with conservative petitions predicted correctly 3 times and liberal petitions predicted correctly 6 times. There were 3 instances where petitions that I had hand coded as conservatives were machine predicted as liberals.

Table B1: Confusion Matrix

		Hand-Coded (True coding)	
		Cons	Lib
Machine Predictions	Cons	3	0
	Lib	3	6

Table 2 displays the accuracy metrics of the model. The model was 75% accurate at predicting petition ideology with the 95% confidence intervals included in the second row. The positive and negative predicted value is another way of displaying the fact that the model correctly predicted liberal petitions (positive (pos) predicted value) as opposed to the conservative petitions (Negative (neg) Pred Value).

[2]Stop words are defined by R package *Quanteda*

Table B2: Accuracy Matrix

Metric	Value
Accuracy	0.75
95% CI	(0.4281, 0.9451)
Pos Pred Value	1.0000
Neg Pred Value	0.6667

Dictionary Robustness Checks

To account for harm language, I created a simple harm dictionary including the terms in the following table. I searched the documents as well as a Thesaurus for synonymns relating to the words "irreparable" and "harm."

Table B3: List of Terms Used In Simple Harm Dictionary

harm	irreparable
injury	damage
irreversible	destruction
loss	ruin
abuse	pain
suffering	hurt
injury	destruction

While this dictionary is simple, it is easy to interpret. Furthermore, there is less dispute that these words could mean something different in these briefs. However, I do run my output using another dictionary (van der Vegt et al. 2021). This dictionary was computer and user created. It was also tested on individuals to verify that the language had the correct meaning. The dictionary includes a list of over 7500 terms separated into over 5 different categories of harm. While this is a reliable dictionary, it was created to examine language on the internet used by individuals who could be identified as potential threats to local or national security. Thus, I include my self created dictionary in the main analysis. However, the results remain very similar when I use the grievance dictionary. One difference is that the coefficient derived from the grievance dictionary applied to the corpus of petitions increases dramatically in size due to the larger number of words included in the dictionary which inflates the percentage of the briefs that use grievance language. I show the robustness check results in the following table.

Table B4: Decision Making on Emergency Orders With Grievance Dictionary

	EDM	Full
capital	0.185	0.331
	(0.420)	(0.417)
petitiondistancefrommedian	-0.101	3.311***
	(0.297)	(1.240)
grievancedictionarypercent	-211.8***	
	(76.70)	
amiccountlog	0.628	0.510
	(0.402)	(0.447)
harmdictionarypercent		-16.89**
		(7.120)
1.petitioncongruencefulljks		-3.886**
		(1.563)
2.petitioncongruencefulljks		-4.667***
		(1.580)
3.petitioncongruencefulljks		0
		(.)
2.petresource		1.912***
		(0.615)
3.petresource		1.624***
		(0.386)
4.petresource		0
		(.)
5.petresource		1.501***
		(0.478)
6.petresource		2.235***
		(0.472)
Justice Fixed Effects	-	Yes
Year Fixed Effects	Yes	Yes
N	441	433

Standard errors in parentheses

* $p < 0.10$, ** $p < 0.05$, *** $p < 0.01$

Petitioner Resource and Clarity

One might hypothesize that petitioner resource is a proxy for a better written brief. However, there is a small negative correlation (-0.207) between petitioner resource level and the clarity of a petition. I account for petition clarity by running readability measures in the *Quanteda* package. Specifically, I use the Flesch Kincaid readability measures displayed below that account for *st* number of sentences, *w* number of words, and *sy* number of syllables.This readability score is commonly used to determine the readability of a text (Flesch 2007).

$$FK = 0.39 \times \frac{w}{st} + 11.8 \times \frac{Sy}{w} - 15.59 \tag{1}$$

Full Model 3.2

The full model including justice and year fixed effects are included in the following table.

Table B5: Decision Making on Emergency Orders Full Model with Fixed Effects

	Full Model
Capital Case	0.331
	(0.417)
Petition Distance from Median	3.311***
	(1.240)
Percent Harm Language	-16.89**
	(7.120)
Log of Amicus Briefs	0.510
	(0.447)
Congruence: Lib Justice and Cons Petition	Baseline
Congruence: Lib Justice and Petition	-3.886**
	(1.563)
Congruence: Cons Justice and Lib Petition	-4.785***
	(1.684)
Congruence: Cons Justice and Petition	-0.118
	(0.936)
Resources: Individuals	Baseline
Resources: Groups	1.912***
	(0.615)
Resources: Businesses	1.624***
	(0.386)
Resources: Local Gov	0
	(.)
Resources: State Gov	1.501***
	(0.478)
Resources: US Gov	2.235***
	(0.472)
Sotomayor	Baseline
Barrett	-0.120
	(1.159)
Breyer	0.00230
	(1.042)
Ginsburg	-0.637
	(1.123)
Gorsuch	-0.00453
	(0.760)
Jackson	0
	(.)
Kagan	0.782
	(0.630)

Table B5 Continued: Decision Making on Emergency Orders Full Model

Kavanaugh	1.469**
	(0.607)
Kennedy	1.769
	(1.225)
Thomas	1.300**
	(0.662)
Roberts	0.451
	(0.609)
2017	Baseline
2018	-0.490
	(0.742)
2019	-1.425*
	(0.784)
2020	-0.559
	(0.702)
2021	-1.140
	(0.788)
2022	-3.220***
	(0.892)
2023	-3.156***
	(1.058)
N	433

Dependent variable is whether a petition was granted (0/1). Baseline for Congruence is a liberal justice with a conservative petition. Baseline for Resource level is the individual. Baseline for individual justice is Sotomayor and 2017 for year. Robust standard errors in parentheses.

$*p < 0.10$, $**p < 0.05$, $***p < 0.01$

High Harm Brief Example

DOCKET NO. ____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2018

BOBBY JOE LONG,

Petitioner,

vs.

MARK S. INCH, ET AL,

Respondent

APPLICATION FOR STAY OF EXECUTION PENDING RESOLUTION OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

CAPITAL CASE, DEATH WARRANT SIGNED
EXECUTION IMMINENT
SCHEDULED FOR MAY 23, 2019, AT 6:00 p.m.

Robert A. Norgard
Florida Bar Number 322059
Counsel for Petitioner
P.O. Box 811
Bartow, FL 33831
Telephone 863-533-8665
Fax 863-533-1334

REQUEST FOR STAY OF EXECUTION

Comes now the Petitioner, **BOBBY JOE LONG** by and through undersigned counsel, and hereby requests a stay of execution. Mr. Long is currently scheduled to be executed in Florida on May 23, 2019, at 6:00 p.m. Mr. Long applies to this Court pursuant to 28 U.S.C. § 2201(f) for a stay of his execution, currently scheduled for May 23, 2019 at 6:00 p.m. Mr. Long will suffer irreparable harm if this Court does not enter the requested stay of execution. *Barefoot v. Estelle*, 463 U.S. 880 (1983). In support Mr. Long states:

I. PROCEDURAL HISTORY

A. Proceedings on the Writ

On April 23, 2019 Governor DeSantis signed a death warrant setting Mr. Long's execution for May 23, 2019 at 6:00 p.m. Shortly before Mr. Long's death warrant litigation was completed in state court, Mr. Long filed a § 1983 action in the District Court for the Middle District of Florida. The District Court entered an Order denying Mr. Long's accompanying Emergency Motion for Temporary Restraining Order, Preliminary Injunction and/or Stay of Execution. The Eleventh Circuit Court of Appeals affirmed the Order.

B. Prior Proceedings

Mr. Long's procedural history has been previously described in detail in his

pending Application for Stay in this Court on his Petition for Certiorari from his state court proceedings.

II. BASIS FOR A STAY OF EXECUTION

A. The relevant law governing stays of execution.

In *Hill v. McDonough* the U.S. Supreme Court stated that the requirements for a stay of execution listed in *Nelson v. Campbell*, 541 U.S. 637 (2004) and *Gomez v. United States Dist. Court for Northern Dist. Of Cal.*, 503 U.S. 653, 654 (1992) (*per curiam*) should be followed. 126 S.Ct 2096 (2006). The Eleventh Circuit Court of Appeals has in the past used a four-part test in determining whether a stay of execution should be granted that generally comports with *Gomez*:

> whether the movant has made a showing of likelihood of success on the merits and of irreparable injury if the stay is not granted, whether the stay would substantially harm other parties, and whether granting the stay would serve the public interest.

Bundy v. Wainwright, 808 F.2d 1410, 1421 (11th Cir.1987). Mr. Chavez has met the standards attendant to the granting of a stay of his execution. Each of the *Gomez* criteria are satisfied in this case.

B. Mr. Long is likely to succeed on the merits of his claims

The Eleventh Circuit Court of Appeals was clearly erroneous in holding there was inexcusable delay by Mr. Long in filing his § 1983 action when it was

filed well within the four year statute of limitations, and the lower court did not even address that issue. A further analysis of the lower court's analysis points out the clear flaws in reasoning.

In holding that res judicata applied, the lower court stated petitioner's position was unprecedented, but failed to look at all of the precedent cited by the petitioner. The lower court failed to even examine the compelling reasons supporting manifest injustice.

C. Irreparable injury to Mr. Long of the stay is not granted.

Nothing is more irreparable than death. If a stay is not granted, Mr. Long will suffer irreparable injury as a matter of law, and as a matter of fact.

1) Mr. Long will suffer irreparable injury as a matter of law

Because Mr. Long has demonstrated a likelihood of success on his constitutional claims, a finding of irreparable harm exists as a matter of law. If the requested temporary injunction is not issued, Mr. Long will be executed at Florida State Prison on May 23, 2019 at 6:00 p.m. without being afforded federal review of his claims by this Court. This constitutes irreparable injury. *See, e.g., Evans v. Bennett*, 440 U.S. 1301, 1306 (1979) (Rehnquist, Circuit Justice, granting a stay of execution and noting the "obviously irreversible nature of the death penalty"); *O'Bryan v. Estelle*, 691 F.2d 706, 708 (5th Cir. 1982) (the "irreversible nature of the death penalty" constitutes irreparable injury and weighs heavily in favor of

granting a stay); *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996) (holding that continued pain and suffering resulting from deliberate medical indifference is irreparable harm).

2) Mr. Long will suffer irreparable injury as a matter of fact

Even if a finding of irreparable harm were not mandated by law upon a finding of likely success on Mr. Long's constitutional claims, there is no doubt in this case that failure to grant a stay would cause Mr. Long irreparable injury in fact, since Defendants will execute him, and soon. Further harm will result from Mr. Long's execution because he will no longer have any meaningful remedy, because he will be dead. The State's violation of Mr. Long's constitutional rights alone validates a presumption of irreparable harm. *See Associated General Contractor's of California, Inc. v. Coalition for Economic Equity,* 950 F.2d 1401, 1412 (9th Cir. 1991) (an alleged constitutional infringement will often alone constitute irreparable harm).

D. Harm to parties

While recognizing that the State of Florida has a finality interest in imposing the sentence of death, substantial harm will not ensue if a stay of execution is granted. Mr. Long will remain in the custody of FDOC, where he has been held since his conviction. Mr. Long is only seeking to prohibit the Defendants from violating his constitutional rights. Under these circumstances, this Court should not

permit Mr. Long's execution to proceed before the Court has the opportunity to review Mr. Long's constitutional claims. Mr. Long has demonstrated specific facts unique to him that require judicial action. The delay resulting from granting the relief sought here will have little adverse effect on the State's interest and will ensure that it does not perform an unconstitutional execution.

A continuation of the status quo while this Court reviews Mr. Long's constitutional claims can cause absolutely no harm to other parties. *See Gomez v. U.S. Dist. Ct. For Northern Dist. Of Cal.,* 966 F.2d 460, 462 (9th Cir. 1992) (Noonan, J., dissenting from grant of writ of mandate) ("The state will get its man in the end. In contrast, if persons are put to death in a manner that is determined to be cruel, they suffer injury that can never be undone, and the Constitution suffers an injury that can never be repaired.") Granting a stay will not substantially harm other parties and, if there was some harm, Mr. Long's potential injury outweighs that harm

E. Public interest

Upholding the U.S. Constitution is always in the public interest. Although there are competing public interests, ultimately one factor favors the issuance of the relief sought. Certainly, the public has an interest in the execution of Mr. Long pursuant to the judgment of the Florida Courts. More importantly, however, it has an interest in having no execution take place until it is determined that Mr. Long's

execution will be carried out consistent with the requirements of the Eighth and Fourteenth Amendments. It is therefore paramount that Mr. Long's weighty constitutional claims be resolved on the merits. The delay in carrying out the execution, which will be necessitated by review and consideration of the merits of Mr. Long's case, is a small price to pay to assure fairness in this critical aspect of carrying out Mr. Long's sentence.

This Court should not be blinded by the State of Florida's rush to execute Mr. Long in violation of his constitutional rights until his constitutional claims are reviewed by this Court.

IV. CONCLUSION

WHEREFORE, Mr. Long respectfully requests this Court stay his execution and allow his Petition for Writ of Certiorari to be fully and fairly litigated without an imminent execution date looming.

Respectfully submitted,

/s/ ROBERT A. NORGARD
Robert A. Norgard
Counsel for Mr. Long

Appendix C: A Word about figures

Respondent Numbers Per Condition

Table C1 details the number of respondents that received each of the different vignette conditions in the Mturk survey.

Table C1 Description of Conditions and Number of Respondents

Condition	**Number of Respondents**
Shadow Docket-Procedural-Prochoice	118
Shadow Docket-Substantive-Prolife	119
Shadow Docket-Procedural-Prolife	117
Shadow Docket-Substantive-Prochoice	119
Regular Docket-Procedural-Prochoice	118
Regular Docket-Substantive-Prolife	119
Regular Docket-Substantive-Prochoice	117
Regular Docket-Procedural-Prolife	120
Control	118
Total	1,065

Manipulation Checks: T-test Difference of Means

I checked the manipulation questions asked after each treatment to discern if subjects correctly perceived the three different manipulations. Using a t-test, I find that all three manipulations were correctly perceived, and the results are listed in Table C2. This suggests that the treatments were valid and effective.

Table C2: Description of Conditions and Different Means

Condition	**Different Means**	**Results Ha: diff !=0**
Docket Condition	Regular mean: 3.035 Shadow mean: 2.608	Pr(T > t) = 0.0001
Issue Condition	Procedural mean: 2.139 Substantive mean: 2.259	Pr(T > t) = 0.0462
Outcome Condition	Prolife mean: 2.247 Prochoice mean: 2.491	Pr(T > t) = 0.0001

This figure shows the T-Test Difference in Means between the means of the manipulation check question for the group who received each condition compared to respondents who did not receive the condition.

Support for Court Curbing Measures Using Factor Analysis Values

Table C3 shows results from the Court Curbing Model using a factor analysis of the Court curbing Measures instead of the additive measures used in the main text.

Table C3: Support for Court Curbing Measures Using Factor Analysis Values

Variable	**Model 1**	**Model 2**
Docket Condition: Shadow	0.0333***	0.0811***
	(0.045)	(0.049)
Issue Condition: Substantive	-0.0432***	-0.127***
	(0.044)	(0.049)
Outcome Condition: Prochoice	-0.343***	-0.359***
	(0.126)	(0.130)
Abortion Attitude: Prolife	Baseline	
Abortion Attitude: Limited Exceptions	-0.321***	-0.366***
	(0.010)	(0.102)
Abortion Attitude: More Exceptions	-0.260***	-0.310***
	(0.101)	(0.104)
Abortion Attitude: Prochoice	-0.401***	-0.411***
	(0.095)	(0.098)
Outcome Condition Prochoice x Abortion View Limited Exceptions	0.357***	0.349***
	(0.153)	(0.161)
Outcome Condition Prochoice x Abortion View More Exceptions	0.246	0.262
	(0.153)	0.162
Outcome Condition Prochoice x Abortion View Prochoice	0.278**	0.214
	(0.146)	(0.155)
Ideological Distance from the Court	-0.00576	0.0119
	(0.013)	(0.014)
Constant	1.846***	1.936***
	(0.148)	(0.157)
Observations	1,004	1,021
R-squared	0.405	0.347

Models show results from OLS regression with robust standard errors reported in parentheses. DV in model 1 is the factor variable for narrow court curbing. DV in model

*2 is the factor variable for broad court curbing. All tests are for two-tailed tests. ** p<0.01 ** p<0.05 *p<0.1, except for the Shadow Docket, which uses a 1-tailed test due to directional expectation.*

Regression Results with Different Attention Checks

Inattentiveness by respondents can be problematic for researchers and I follow the procedure of many studies that use instructional manipulation check controls to be effective at detecting shirkers (Paas, Dolnicar and Karlsson 2018; Hauser and Schwarz 2016; Berinsky, Huber and Lenz 2012). I ran the model excluding respondents with different levels of attentiveness (Berinsky, Huber and Lenz 2012). These robustness checks are included in Tables C4 and C5. There are very small differences, but I chose to include a control for attention check to include all respondents in the main text.

Table C4: Support With Out Attention Checks

Variable	Ruling Support	Narrow CC Support	Broad CC Support
Shadow Docket	-0.203	0.0968	0.417*
	(0.1243)	(0.174)	(0.275)
Substantive Issue	0.118	-0.125	-1.643**
	(0.1225)	(0.170)	(0.272)
Prochoice Outcome (OC)	-1.083**	-1.074**	-1.735**
	(0.4286)	(0.498)	(0.737)
Abortion Attitude(AA) Prolife	Baseline		
AA Limited Exceptions	-0.393	-1.232***	-2.025***
	(0.2827)	(0.381)	(0.566)
AA More Exceptions	-0.626**	-0.961**	-1.729***
	(0.2970)	(0.381)	(0.578)
AA Prochoice	-1.272***	-1.603***	-2.45***
	(0.2879)	(0.361)	(0.543)
OC Prochoice x AA Limited Exceptions	0.466	1.172**	1.741*
	(0.4797)	(0.596)	(0.905)
OC Prochoice x AA More Exceptions	0.832*	0.757	1.311
	(0.4979)	(0.600)	(0.920)
OC Prochoice x AA Prochoice	1.679***	0.761	0.893
	(0.4735)	(0.575)	(0.875)
Observations	919	1,004	1,021
R-squared		0.372	0.325

Table C4 shows the OLS models for ruling support, and narrow and broad support court curbing ***not controlling for survey shirkers.*** *Robust Standard Errors Reported in Parentheses.*** p<0.01 ** p<0.05 *p<0.1.*

Table C5: Support Excluding Shirkers

Variable	**Ruling Support**	**Narrow CC Support**	**Broad CC Support**
Shadow Docket	-0.296**	0.0788	0.439****
	(0.1317)	(0.181)	(0.290)
Substantive Issue	0.114	-0.159	-0.763***
	(0.1281)	(0.178)	(0.288)
Prochoice Outcome (OC)	-1.307***	-1.107**	-2.046**
	(0.4642)	(0.523)	(0.818)
Abortion Attitude (AA) Prolife	Baseline		
AA Limited Exceptions	-0.406	-1.210***	-2.095***
	(0.3056)	(0.392)	(0.600)
AA More Exceptions	-0.614*	-0.968**	-1.843***
(0.3211)	(0.397)	(0.613)	
AA Prochoice	-1.351***	-1.680***	-2.533***
	(0.3109)	(0.376)	(0.576)
OC Prochoice x AA Limited Exceptions	0.647	1.208*	2.063**
	(0.5153)	(0.624)	(0.981)
OC Prochoice x AA More Exceptions	0.837	0.694	1.577
	(0.5370)	(0.639)	(1.023)
OC Prochoice x AA Prochoice	1.923***	0.816	1.227
	(0.5076)	(0.599)	(0.945)
Observations	838	928	940
R-squared		0.369	0.323

Table C5 shows the models for ruling support, and narrow and broad support court curbing ***excluding those who answered any attention check questions incorrectly.***
*Robust Standard Errors Reported in Parentheses. *** p<0.01 ** p<0.05 *p<0.1.*

Full Ruling Support Analysis

Table C6 details the full results from the model used in chapter 5 for Ruling Support including all controls.

Table C6: Ruling Support With all Controls

Variable	Coefficient	(Standard Error)
Docket Condition: Shadow	-0.291**	(0.144)
Issue Type Condition: Substantive	0.106	(0.142)
Outcome Condition: Prochoice	-1.582***	(0.469)
Abortion Attitude: Prolife	Baseline	
Abortion Attitude: Limited Exceptions	-0.208	(0.399)
Abortion Attitude: More Exceptions	-0.488	(0.431)
Abortion Attitude: Prochoice	-1.465***	(0.367)
Prochoice Outcome x Limited Exceptions Abortion View	0.569	(0.540)
Prochoice Outcome x More Exceptions Abortion View	0.842	(0.580)
Prochoice Outcome x Prochoice Abortion View	2.380**	(0.520)
Age	-0.060	(0.058)
White	0.204	(0.197)
Male	0.022	(0.143)
Education	0.141**	(0.067)
Ideological Distance from the Court	-0.160***	(0.041)
Party Ideology	0.002	(0.030)
Knowledge	-2.195**	(0.414)
Attention Check	-1.175**	(0.360)
Log Likelihood	-1158	

*Table C6 shows results from an ordered logit regression with robust standard errors reported in parentheses for 919 individuals. DV is a trichotomous measure of support for the ruling. Cut point 1 = -5.063 (0.573) and cut point 2 = -3.559 (0.557). All tests are for two-tailed tests, except for the Shadow Docket, which uses a 1-tailed test due to directional expectation. * p=0.05, ** p=0.01, ***p=0.001.*

Full Court Curbing Analysis

Table C7 details the full results from the model used in chapter 5 for Court Courbing including all controls.

Table C7: Full Model Support for Court Curbing Measures

	Model 1	Model 2
	Narrow Court Curbing	**Broad Court Curbing**
Docket Condition: Shadow	0.108	0.435*
	(0.1702)	(0.2711)
Issue Condition: Substantive	-0.151	-0.688**
	(0.1673)	(0.2688)
Outcome Condition:Prochoice	-1.224**	-1.940***
	(0.4851)	(0.7215)
Prior Attitude (PA): Prolife	Baseline	Baseline
PA: Limited Exceptions	-1.223***	-2.012***
	(0.3787)	(0.5689)
PA: More Exceptions	-0.965**	-1.724***
	(0.3807)	(0.5782)
PA: Prochoice	-1.493***	-2.269***
	(0.3613)	(0.5457)
Condition Prochoice x PA: Prior Limited Exceptions	1.259**	1.859**
	(0.5839)	(0.8893)
Condition Prochoice x PA: Prior More Exceptions	0.816	1.392
	(0.5835)	(0.8994)
Condition Prochoice x PA: Prior Prochoice	0.946*	1.132
	(0.5594)	(0.8601)
Ideological Distance from the Court	-0.00782	0.0646
	(0.0498)	(0.0803)
Age	-.110**	-0.103**
	(0.019)	(0.021)
White	-0.0477	-0.101*
	(0.056)	(0.061)
Male	-0.0219	-0.121**
	(0.045)	(0.049)
Education	0.0370*	0.0155
	(0.020)	(0.024)
Party Ideology	0.0326**	0.0396**
	(0.010)	(0.009)
Knowledge	-1.398**	-1.421**
	(0.114)	(0.121)
Attention Check	-0.700**	-0.605**
	(0.098)	(0.102)
Constant	1.846**	1.936**
	(0.148)	(0.157)
Observations	1,004	1,021
R-squared	0.405	0.347

*Table C7 show results from OLS regression with robust standard errors reported in parentheses. DV in model 1 is the additive variable for narrow court curbing. DV in model 2 is the additive variable for broad court curbing. All tests are for two-tailed tests, except for the Shadow Docket, which uses a 1-tailed test due to directional expectation. p=0.1, ** p=0.05, ***p=0.01.*

Significance of Outcome Treatment and Prior Attitudes

Figure 1C displays the statistical significance of the outcome treatments and prior attitudes. This makes the significance more easily visible.

Figure 1C: Significance of Outcome Treatment and Prior Attitudes

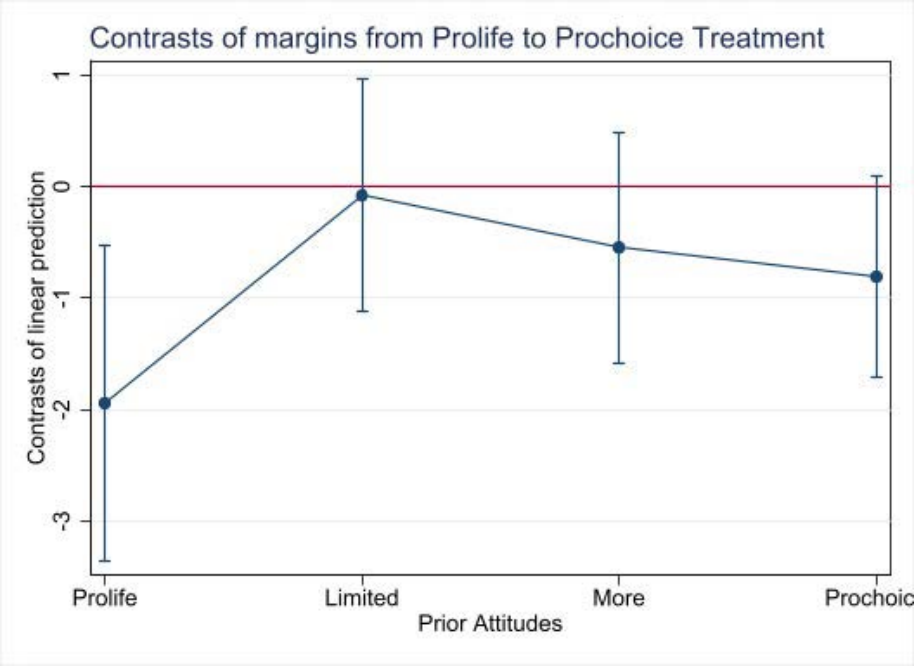

Figure 1C displays the significance of the Outcome treatment of prolife to prochoice given an individual's prior attitudes on abortion.

Survey Information

IRB approval: [redacted to preserve anonymity]
Platform: Amazon Mechanical Turk
Date: February 2022
Number of subjects: 1,065
Compensation: $0.35
Consent: Prior to data collection, all subjects agreed to participate in a research study using an IRB-approved consent form. There was no deception and no debrief.

Survey Questions

Survey questions are listed in the order they were given in the survey with the vignette coming before the manipulation check questions. Section titles are included only in the appendix, not in the survey.
Demographics

- How old are you?
- What is your sex?
  Male, Female, Nonbinary/ Third gender, Prefer not to say
- Which racial category would best describe you from the options provided?
  White, Black or African American, American Indian or Native Alaskan, Asian, Native Hawaiian or Pacific Islander, Other
- What is the highest level of education you have completed?
  High School or less, some college, college graduate, graduate coursework, graduate or advanced degree

Policy Attitudes

- Which one of the opinions on this page best agrees with your view?
  a. By law, abortion should never be permitted
  b. The law should permit abortion only in case of rape, incest, or when the woman's life is in danger
  c. The law should permit abortion other than for rape/incest/danger to woman but only after need clearly established
  d. By law, a woman should always be able to obtain an abortion as a matter of personal choice

- How important is this issue to you personally? [4 point scale, Not at all important, not too important, Somewhat important, Extremely important]
- Which one of the opinions on this page best agrees with your view?
  a. Racial and Ethnic groups should maintain their distinct cultures
  b. Groups should change so that they blend into the larger society
- How important is this issue to you personally? [5 point scale, Not at all to Extremely used previously]

Ideology and partisanship

- We hear a lot of talk these days about liberals and conservatives. Here is a seven-point scale on which the political views that people might hold are arranged from extremely liberal to extremely conservative. Where would you place yourself on this scale?
  Extremely conservative, conservative, slightly conservative, moderate or middle of the road, slightly liberal, liberal, extremely liberal

- Generally speaking, do you usually think of yourself as a Republican, Democrat, an Independent, or something else?

- Would you call yourself a strong [Republican/Democrat] or a not so very strong [Republican/Democrat]?

- Do you think of yourself as closer to the Republican party or to the Democratic party?

Knowledge

- According to Supreme Court custom, a case is granted a writ of certiorari when at least how many justices vote to do so?
  9, 2, 4, 3, 5 [four=correct]

- Which party holds a majority of seats in the U.S. House of Representatives in Washington?
  Democratic party, republican party, green party, none of the above, all of the above [Democrats=correct]

- How long is one term for a member of the U.S. Senate?
  life term, 6 years, 5 years, until they turn 40, 2 years [six years=correct]

- The ability of a minority of senators to prevent a vote on a bill is known as a bill, committee report, whip, minority overtake, filibuster [filibuster=correct]

- Who is the Vice President of the United States?
  Joe Biden, Tammy Baldwin, Mike Pence, Kamala Harris, Maggie Hansen [Kamala Harris=correct]

- Members of the U.S. Supreme court serve
  life terms, for 4 years, for 5 years, until reelection, until 80 years of age [life terms=correct]

- Who is Chief Justice of the United States Supreme Court?
  Kevin McCarthy, Sonia Sotomayor, John Roberts, Nancy Pelosi, Brett Kavanaugh [John Roberts=correct]

- Social Security is a benefit program for
  students, senior citizens, the poor, new mothers, veterans [senior citizens=correct]

Ideological positions Before and After Treatment

- Turning to a different topic, please indicate where the following actors are located on the 7-point ideology scale. (same scale as used previously)
  The U.S. Supreme Court
  President Trump
  The U.S. House of Representatives
  The U.S. Senate

Manipulation check – Scenarios

Strongly agree, Agree, Neither agree nor disagree, Disagree, Strongly disagree:

- The Supreme Court tends to answer procedural questions.

- The Supreme Court does not spend a lot of time deliberating over decisions.

- The Supreme Court tends to uphold pro-life abortion laws.

Outcomes

Please rate your agreement with the following statements: [Strongly agree, Agree, Neither agree nor disagree, Disagree, Strongly disagree]:

- It is inevitable that the U.S. Supreme Court gets mixed up in politics; therefore, we ought to have stronger means of controlling the actions of the U.S. Supreme Court.

- The U.S. Supreme Court ought to be made less independent so that it listens a lot more to what the people want.

- Judges on the U.S. Supreme Court who consistently make decisions at odds with what a majority of the people want should be removed from their position as judge.

- Supreme Court Justices are just like any other politicians; we cannot trust them to decide court cases in a way that is in the best interests of our country.

- If the U.S. Supreme Court started making a lot of decisions that most people disagree with, it might be better to do away with the Supreme Court altogether.
- The U.S. Supreme Court gets too mixed up in politics.
- The right of the Supreme Court to decide certain types of controversial issues should be reduced.
- I support the Supreme Court rulings that the article described.
- There should be an effort to challenge the rulings and get them changed.
- The rulings ought to be considered the final word on the matter.
- The government should refuse to implement the rulings.
- If you don't agree with the decision, you shouldn't have to comply.
- Supreme Court judges are little more than politicians in robes
- The justices of the Supreme Court can be trusted to tell us why they actually decide the way they do, rather than hiding some ulterior motives for their decisions
- Judges may say that their decisions are based on the law and the Constitution, but in many cases, judges are really basing their decisions on their own personal beliefs

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