

# NOTES

## THE DECLINE OF SUMMARY REVERSALS AT THE U.S. SUPREME COURT

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*Summary reversals have a long history at the U.S. Supreme Court. These short, unsigned opinions reverse lower court decisions on the merits without briefing and oral argument on the theory that the decisions below were plainly wrong. Summary reversals used to be a regular occurrence, most often reserved by the Roberts Court for decisions granting post-conviction relief to people who are incarcerated and denying qualified immunity to police and prison officers. In the past four years, however, the number of summary reversals has declined significantly. This Note discusses possible explanations for this trend: time constraints from the shadow docket, the appointment of Justice Amy Coney Barrett, the conservative alignment of the judiciary, and critiques of the Court's institutional role. It also explores the impact of a world with fewer summary reversals, particularly for people on death row.*

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## INTRODUCTION

Summary reversals were once a regular feature at the U.S. Supreme Court.<sup>1</sup> The Court's internal rules permit them,<sup>2</sup> and the leading treatise on litigating before the Court discusses them at length.<sup>3</sup> A "summary reversal" refers to the Court's custom of wiping away a decision by a lower court without the usual, lengthy process of receiving briefs, hearing oral argument, and issuing a written opinion, on the theory that the decision was plainly wrong.<sup>4</sup> Although this practice has evolved over time, summary reversals are announced today by means of generally short, unsigned opinions tucked into the end of weekly order lists handling procedural issues.<sup>5</sup>

Recently, however, summary reversals have become a rare occurrence. During the first fifteen annual Terms of John Roberts's tenure as Chief Justice, the Court summarily reversed an average of seven lower court decisions per Term.<sup>6</sup> Typically, the Roberts Court has reserved this treatment for decisions granting post-conviction relief to people who are incarcerated and denying qualified immunity to police and prison officials.<sup>7</sup> During the last four Terms, by contrast, there has been an

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1. William Baude, Foreword: The Supreme Court's Shadow Docket, 9 N.Y.U. J.L. & Liberty 1, 1–2, 20–21 (2015) [hereinafter Baude, Shadow Docket].

2. Sup. Ct. R. 16.1.

3. Stephen M. Shapiro, Kenneth S. Geller, Timothy S. Bishop, Edward A. Hartnett & Dan Himmelfarb, Supreme Court Practice § 5.12(c) (11th ed. 2019).

4. *Id.*

5. E.g., Sup. Ct. of the U.S., Order List: 598 U.S., at 12 (May 22, 2023), [https://www.supremecourt.gov/orders/courtorders/052223zor\\_k5fm.pdf](https://www.supremecourt.gov/orders/courtorders/052223zor_k5fm.pdf) [<https://perma.cc/NRQ9-L6WM>]. This under-the-radar method of deciding cases stands in contrast to the Court's usual fanfare, especially in late June, of announcing its decisions in argued cases from the bench, accompanied by full-length, signed opinions in which all of the participating Justices indicate their agreement or disagreement with the outcome. Orin S. Kerr, Why the Big Supreme Court Cases Cluster at the End of June, Reason: Volokh Conspiracy (June 24, 2015), <https://reason.com/volokh/2015/06/24/why-the-big-supreme-court-case/> [<https://perma.cc/PW8M-3C49>].

6. The exact average is 7.375. Across the 2005 to 2017 Terms, there were an average of eight summary reversals per Term. SCOTUSblog, Final Stat Pack for October Term 2018, at 13 (2019), [https://www.scotusblog.com/wp-content/uploads/2019/07/StatPack\\_OT18-7\\_30\\_19.pdf](https://www.scotusblog.com/wp-content/uploads/2019/07/StatPack_OT18-7_30_19.pdf) [<https://perma.cc/HPG9-FGJ4>]. In the 2018 Term, there were five summary reversals. *Id.* In the 2019 Term, there were four. *Andrus v. Texas*, 140 S. Ct. 1875 (2020) (per curiam); *Davis v. United States*, 140 S. Ct. 1060 (2020) (per curiam); *Roman Cath. Archdiocese of San Juan v. Feliciano*, 140 S. Ct. 696 (2020) (per curiam); *Thompson v. Hebdon*, 140 S. Ct. 348 (2019) (per curiam). And in the 2020 Term, there were eight. *Dunn v. Reeves*, 141 S. Ct. 2405 (2021) (per curiam); *Lombardo v. City of St. Louis*, 141 S. Ct. 2239 (2021) (per curiam); *Pakdel v. City & County of San Francisco*, 141 S. Ct. 2226 (2021) (per curiam); *Alaska v. Wright*, 141 S. Ct. 1467 (2021) (per curiam); *Mays v. Hines*, 141 S. Ct. 1145 (2021) (per curiam); *Shinn v. Kayer*, 141 S. Ct. 517 (2020) (per curiam); *Taylor v. Riojas*, 141 S. Ct. 52 (2020) (per curiam); *Mckesson v. Doe*, 141 S. Ct. 48 (2020) (per curiam).

7. See Edward A. Hartnett, Summary Reversals in the Roberts Court, 38 *Cardozo L. Rev.* 591, 594–96 (2016) [hereinafter Hartnett, Summary Reversals] (classifying forty-five out of seventy-three such summary reversals in the first decade of the Roberts Court).

average of one summary reversal per Term, and in one Term there were zero.<sup>8</sup>

There is plenty of discussion of summary reversals in the literature,<sup>9</sup> including in early discourse around the so-called “shadow docket.”<sup>10</sup> Lately, the shadow docket has become a hot topic. Since the first Trump Administration, scholars, practitioners, and politicians have regularly criticized the Court’s emergency orders responding to a flood of requests to wade into high-profile disputes on the shadow docket, particularly in terms of transparency and accountability.<sup>11</sup> But with all the focus on the uptick in emergency orders, there has been little to no focus on the downturn in summary reversals, previously the shadow docket’s bread and butter.<sup>12</sup>

This Note explores the recent decline of summary reversals. Part I provides background on these rulings, including how they work today and their evolution throughout the twentieth century. Part II then places the recent decline of summary reversals in context. It examines their scarcity

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8. The exact average is 1.25. In the 2021 Term, there were two summary reversals. *City of Tahlequah v. Bond*, 142 S. Ct. 9 (2021) (per curiam); *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4 (2021) (per curiam). In the 2022 Term, there was one. *Calcutt v. Fed. Deposit Ins. Corp.*, 143 S. Ct. 1317 (2023) (per curiam). In the 2023 Term, there were zero. Arthur D. Hellman, *The Federal Question Jurisdiction Under Article III: “First in the Mind of the Framers,” but Today, Perhaps, Falling Short of the Framers’ Expectations*, 104 B.U. L. Rev. 2143, 2193 n.349 (2024) [hereinafter Hellman, *Federal Question Jurisdiction*] (“In the 2023 Term, there were sixty plenary decisions and a single summary opinion. The summary opinion in the 2023 Term . . . rejected an application for emergency relief, thus effectively *affirming* the action of the court below.” (citation omitted)). And in the 2024 Term, there were two: *Goldey v. Fields*, 145 S. Ct. 2613 (2025) (per curiam); *Andrew v. White*, 145 S. Ct. 75 (2025) (per curiam). The Court summarily remanded one additional case this past Term: *Hamm v. Smith*, 145 S. Ct. 9 (2024) (per curiam). This was likely not a summary reversal for three reasons. First, rather than disagreeing with the lower court on the merits, the Court vacated and remanded its ruling—which had held that a man on Alabama’s death row met the state’s threshold for intellectual disability and thus could not be executed—because it was “unclear” what standard the lower court had used to evaluate his multiple IQ scores. *Id.* at 10. Second, Justices Clarence Thomas and Neil Gorsuch dissented, noting merely that they would have granted the petition for full review without waiting for clarification—not that they would have let the lower court’s ruling stand by denying the petition. *Id.* (statement of Thomas & Gorsuch, JJ.). Third, after the court of appeals affirmed its prior ruling and clarified the standard, the state returned to the Court, and the Justices did not summarily reverse, but rather granted the petition. *Hamm v. Smith*, 145 S. Ct. 2776, 2776 (2025) (mem.).

9. See *infra* section II.B.

10. Professor William Baude’s 2015 article coining the term “shadow docket” focused on summary reversals. Baude, *Shadow Docket*, *supra* note 1, at 1.

11. For a thorough overview of these critiques, see generally Stephen Vladeck, *The Shadow Docket: How the Supreme Court Uses Stealth Rulings to Amass Power and Undermine the Republic* (2023) [hereinafter Vladeck, *Shadow Docket*].

12. The only mention of the decline in summary reversals this author could find in the literature comes from Professor Arthur Hellman in a recent article about trends affecting the reach of the federal courts. Hellman, *Federal Question Jurisdiction*, *supra* note 8, at 2193 & n.349.

both at the Court and in the discourse since 2021. And it highlights the litigants most affected by a future with fewer summary reversals: people who are incarcerated, especially those sentenced to death; people who are hurt or killed by police or prison officers, as well as their families; and law enforcement officials.<sup>13</sup>

Finally, Part III discusses possible explanations for the recent decline of summary reversals. The simplest explanation might be one of limited resources. The Court's merits docket—on which it decides cases with signed, written opinions after full briefing and oral argument—is shrinking.<sup>14</sup> Meanwhile, the Justices face a barrage of time-consuming requests for emergency relief on the shadow docket.<sup>15</sup> What's more, over the same period during which summary reversals have slowed to a trickle, an increasing portion of the Court's dwindling merits docket has been devoted to deciding cases on the heels of expedited briefing and oral argument in response to requests for emergency relief on the shadow docket.<sup>16</sup>

The rise of expedited argument can probably be traced to criticism of the shadow docket and specifically the outrage after the Court's cursory order upholding Texas's six-week abortion ban on September 1, 2021.<sup>17</sup> But skeptics of the shadow docket—and of summary reversals, specifically—have long questioned the Court's wisdom in entertaining requests to correct errors in individual disputes, as opposed to resolving circuit splits and wading into the occasional case of national importance.<sup>18</sup> Perhaps summary reversal is proving rarer because the Court is responding, in some fashion, to this criticism.

Another possible explanation for the decline of summary reversals is the appointment of Justice Amy Coney Barrett. Since she joined the Court in 2020, Justice Barrett has expressed skepticism toward ruling on the

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13. See Hartnett, Summary Reversals, *supra* note 7, at 594–96.

14. Id. at 609; Jimmy Hoover, As Docket Shrinks, Supreme Court Lawyers Embrace Circuit Court Work, *Nat'l L.J.* (Aug. 8, 2023), <https://www.law.com/nationallawjournal/2023/08/08/as-docket-shrinks-supreme-court-lawyers-embrace-circuit-court-work> (on file with the *Columbia Law Review*).

15. See Stephen I. Vladeck, The Solicitor General and the Shadow Docket, 133 *Harv. L. Rev.* 123, 125 (2019) [hereinafter Vladeck, Solicitor General] (documenting the rise in emergency applications filed by the federal government under the first Trump Administration); Litigation Tracker: Legal Challenges to Trump Administration Actions, *Just Sec.* (Oct. 16, 2025), <https://www.justsecurity.org/107087/tracker-litigation-legal-challenges-trump-administration/> [<https://perma.cc/65TN-DPU9>] (documenting the subsequent swell of emergency applications filed against the federal government during the second Trump Administration).

16. Edward L. Pickup & Hannah L. Templin, Emergency-Docket Experiments, 98 *Notre Dame L. Rev. Reflection* 1, 10–12 (2022), [https://ndlawreview.org/wp-content/uploads/2022/11/NDLRR101\\_TemplinPickup.pdf](https://ndlawreview.org/wp-content/uploads/2022/11/NDLRR101_TemplinPickup.pdf) [<https://perma.cc/H4AD-4Q9P>].

17. See *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494, 2495–96 (2021); see also Vladeck, Shadow Docket, *supra* note 11, at 239–40 (discussing the backlash).

18. For more on the Court's twin roles of declaring law and correcting errors, see *infra* section I.B.

merits of cases before they are briefed and argued.<sup>19</sup> And although—like most cases decided on the merits docket<sup>20</sup>—most summary reversals do not divide the Court along ideological lines,<sup>21</sup> they do generally require six votes, as opposed to the usual bare majority of five.<sup>22</sup> For lower court decisions that the Court’s conservative majority considers glaringly wrong, Justice Barrett may be less inclined than her five Republican-appointed colleagues to provide a sixth vote to quickly erase them. And for decisions that the three liberal Justices might wish to summarily reverse, the Court’s conservative supermajority—cemented by Justice Barrett’s confirmation—makes it difficult to secure the needed votes.

Finally, the Supreme Court is not the only court becoming more conservative. The cascade of judges appointed during President Donald Trump’s first term has reshaped all levels of the federal judiciary.<sup>23</sup> And Republicans have gained control of a swath of state supreme courts nationwide.<sup>24</sup> Lower courts laden with Republican-appointed or -elected

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19. For more on Justice Barrett’s view, see *infra* section III.B.

20. See SCOTUSblog, Stat Pack for the Supreme Court’s 2021–22 Term 9, 13 (2022), <https://www.scotusblog.com/wp-content/uploads/2022/07/SCOTUSblog-Final-STAT-PACK-OT2021.pdf> [<https://perma.cc/R2FA-U572>] (finding that most merits cases in the 2021 Term were not ideologically divided 6-3, and most merits cases from the 2015 to 2019 Terms were similarly not ideologically divided 5-4).

21. See Hartnett, Summary Reversals, *supra* note 7, at 609 (“[T]he rate of public dissent and separate opinions is considerably lower in summary reversals than in cases decided after full briefing and argument.”). Indeed, only one of the five summary reversals issued by the Court since 2021 garnered a public dissent. *Andrew v. White*, 145 S. Ct. 75, 83 (2025) (Thomas, J., dissenting, joined by Gorsuch, J.). However, a lack of public dissents does not mean a decision to summarily reverse is unanimous. See *infra* notes 37–39 and accompanying text. And summary reversals often do generate public dissents. In the 2020 Term, six of the Court’s eight summary reversals did so, half of which produced 6-3 ideological splits. *Dunn v. Reeves*, 141 S. Ct. 2405, 2413 (2021) (Breyer, J., dissenting) (Sotomayor, J., dissenting, joined by Kagan, J.); *Lombardo v. City of St. Louis*, 141 S. Ct. 2239, 2242 (2021) (Alito, J., dissenting, joined by Thomas & Gorsuch, JJ.); *Shinn v. Kayer*, 141 S. Ct. 517, 526 (2020) (Breyer, Sotomayor & Kagan, JJ., dissenting). As is typical for the Roberts Court, these three ideologically divided summary reversals concerned habeas relief for people in prison and civil rights lawsuits against police officers. See *supra* note 7 and accompanying text.

22. See *infra* notes 31–33 and accompanying text.

23. See John Gramlich, *How Trump Compares With Other Recent Presidents in Appointing Federal Judges*, Pew Rsch. Ctr. (July 15, 2020), <https://www.pewresearch.org/short-reads/2021/01/13/how-trump-compares-with-other-recent-presidents-in-appointing-federal-judges/> [<https://perma.cc/3MHQ-5FPR>] [hereinafter Gramlich, *How Trump Compares*] (last updated Jan. 13, 2021) (stating that, as of January 2021, 28% of active federal judges had been appointed by President Trump during his first term, which included “three of the nine sitting Supreme Court justices, 30% of the nation’s active appeals court judges and 27% of active district court judges”).

24. See Aaron Mendelson, *How Republicans Flipped America’s State Supreme Courts*, Ctr. Pub. Integrity (July 24, 2023), <https://publicintegrity.org/politics/high-courts-high-stakes/how-republicans-flipped-americas-state-supreme-courts> [<https://perma.cc/HCL7-HQ27>] (“In less than a decade, Republican politicians in eight states have transformed their state supreme courts—altering the process by which justices reach the bench, or the size of

judges might issue fewer decisions that the six Republican-appointed Supreme Court Justices view as plainly wrong, warranting summary reversal. This is particularly salient for the two most common types of decisions summarily reversed by the Roberts Court: those granting post-conviction relief to people who are incarcerated and those denying qualified immunity to police and prison officials,<sup>25</sup> both ideologically liberal outcomes.

Summary reversals at the Court might return in full force someday. But even if their recent decline is temporary, it is noteworthy, both for what it says about rapidly changing procedural norms at the Court and for its impact on litigants who seek to undo lower court decisions that leave them out to dry.

### I. THE EVOLUTION OF SUMMARY REVERSALS

A twenty-first-century lawyer with a case before the Supreme Court might view summary reversal as an established tool in the Justices' toolbox. But this modern acceptance belies a contested history. Summary reversals defy the mainstream academic view of the Court's twin, competing roles: declaring law and correcting errors. And, as with much of what the Justices do, frustratingly little about summary reversals is written down. Instead, they are governed almost entirely by flexible norms. To contextualize the recent decline of summary reversals, this Part discusses how the norms surrounding them have evolved over time.

#### A. *Summary Reversals Today*

How do summary reversals work? A natural starting place to look is the Rules of the Supreme Court. Posted on the Court's website, the Rules explain the steps, requirements, and deadlines for litigating a case at various stages before the Court. Several of the Rules outline the modern practice of "certiorari": the Court's broad discretion over whether to grant requests for full review of lower court decisions.<sup>26</sup> The last Rule in this group, Rule 16, begins with a short statement of what happens after the Court has all the documents it needs to decide whether to grant, deny, or otherwise dispose of a petition for a writ of certiorari, known as a "cert petition."<sup>27</sup> "After considering the documents," it reads, "the Court will enter an appropriate order. The order may be a summary disposition on the merits."<sup>28</sup>

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the court. The moves have pushed the courts to the right or solidified conservative control.").

25. Hartnett, *Summary Reversals*, *supra* note 7, at 594–96.

26. Sup. Ct. R. 10–16.

27. Sup. Ct. R. 16.

28. Sup. Ct. R. 16.1.

Intuitively, Rule 16 would then go on to say more about these summary dispositions. Can they both reverse and affirm lower court decisions? How many votes does either outcome require? What are the criteria for decisions that merit summary dispositions, as opposed to the usual process of briefing, argument, and (generally) signed opinions? That intuition, however, is wrong. Instead, Rule 16 turns immediately to what happens after a cert petition is either granted for full review or denied.<sup>29</sup> As quickly as summary reversals are mentioned, they are forgotten.

If the Court's own Rules don't regulate summary reversals, what does? As with so many of the Court's procedures, it turns out, the practice of summary reversals is dictated almost entirely by custom.<sup>30</sup> Two norms of summary reversals are worth noting. First, it usually takes the votes of six Justices, not five, to issue one.<sup>31</sup> As to why six votes, the prevailing theory relates to the firmer norm, known as the "rule of four," that it takes the votes of four Justices to grant a petition for certiorari.<sup>32</sup> Even if a bare, five-Justice majority of the Court could decide to reverse a lower court decision without further review, the logic goes, they should refrain from doing so if their four colleagues would vote to hear oral argument.<sup>33</sup>

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29. Sup. Ct. R. 16.2–16.3. The only other mention of summary dispositions in the Court's Rules comes in Rule 18, which concerns the rare process of direct appeals from decisions by three-judge panels of federal district courts, typically in redistricting and campaign-finance cases. Sup. Ct. R. 18.12; see also Joanna R. Lampe, Cong. Rsch. Serv., IF-12746, *Three-Judge District Courts* (2024) (listing statutes that require adjudication by three-judge panels of federal district courts); Joshua A. Douglas & Michael E. Solimine, *Precedent, Three-Judge District Courts, and the Law of Democracy*, 107 *Geo. L.J.* 413, 421–29 (2019) (discussing the Supreme Court's use of summary dispositions to resolve appeals from three-judge district court decisions and whether these dispositions have precedential weight).

30. To get up to speed on these customs, a well-resourced appellate attorney—or a law student writing a Note and fortunate to have access to their school's library—can consult a copy of *Supreme Court Practice*. Shapiro et al., *supra* note 3, § 5.12(c).

31. This is not a hard-and-fast rule, as the Court has summarily reversed over four dissenting votes. *Id.* § 5.12. But the rarity of this occurrence and the Justices' own remarks suggest that the six-vote norm is usually respected. *Id.*; see also Lisa Schultz Bressman, *The Rise and Fall of the Self-Regulatory Court*, 101 *Tex. L. Rev.* 1, 26 (2022) (noting that Justice Samuel Alito recently disclosed the rule of six in public remarks); Joan Biskupic, *The Secret Supreme Court: Late Nights, Courtesy Votes and the Unwritten 6-Vote Rule*, CNN, <https://www.cnn.com/2021/10/17/politics/supreme-court-conference-rules-breyer/index.html> [<https://perma.cc/W5R4-X95D>] (last updated Oct. 17, 2021) (noting the same from Justice Stephen Breyer).

32. Winston Bowman, *The Supreme Court's Rule of Four*, Fed. Jud. Ctr., <https://www.fjc.gov/history/spotlight-judicial-history/rule-four> [<https://perma.cc/VP3X-2V2A>] (last visited Aug. 7, 2025); cf. Amy Howe, *Rule of Four*, SCOTUSblog, <https://www.scotusblog.com/election-law-explainers/rule-of-four/> [<https://perma.cc/TFU4-V9MY>] (last visited Aug. 7, 2025) ("The rule [of four] is an unwritten internal one; it is not dictated by any law or the Constitution.").

33. Shapiro et al., *supra* note 3, § 5.12.

The second notable norm about summary reversals is that they are explained. When the Court summarily reverses a lower court decision on the merits, it provides an opinion stating why the lower court's decision was wrong.<sup>34</sup> This is not required—indeed, it was unheard of for decades.<sup>35</sup> Today, these opinions tend to be short and unsigned, instead issued *per curiam*, or “by the court.”<sup>36</sup> Unlike with signed opinions, Justices do not typically note when they join an unsigned opinion summarily reversing a lower court decision.<sup>37</sup> Accordingly, the only way to know how they all voted is if three Justices publicly dissent, in which case the six-vote norm suggests that the others all voted to summarily reverse.<sup>38</sup> If two or fewer Justices publicly dissent from a summary reversal, however, others could still have joined the dissenters in spirit, or taken some other view, and simply not noted their stance.<sup>39</sup>

That summary reversals get opinions at all distinguishes them from the orders that make up most of the action on the Court's shadow docket.<sup>40</sup> These unexplained orders come in all shapes and sizes. Most controversially, dozens of emergency orders each Term grant or deny requests for relief from major laws or policies.<sup>41</sup> Dozens more grant cert petitions, wipe away the decisions below, and send the cases back for reconsideration in light of an intervening Supreme Court ruling, with an offhand mention of that ruling as the only explanation for the order.<sup>42</sup> Still others wipe away

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34. Zina Makar, *Per Curiam Signals in the Supreme Court's Shadow Docket*, 98 Wash. L. Rev. 427, 431 (2023).

35. Arthur D. Hellman, *Error Correction, Lawmaking, and the Supreme Court's Exercise of Discretionary Review*, 44 U. Pitt. L. Rev. 795, 825–26 (1983) [hereinafter Hellman, *Error Correction*]; see also *infra* section I.B.

36. Makar, *supra* note 34, at 431.

37. Hartnett, *Summary Reversals*, *supra* note 7, at 610.

38. The same is true for unsigned emergency orders on the shadow docket. Baude, *Shadow Docket*, *supra* note 1, at 14.

39. See *id.* (noting this specifically with regard to orders denying cert petitions).

40. This distinction is breaking down under the weight of the shadow docket during the second Trump Administration. See *infra* section III.A.

41. See, e.g., The Supreme Court's Shadow Docket: Hearing Before the Subcomm. on Cts., Intell. Prop., & the Internet of the H. Comm. on the Judiciary, 117th Cong. 217–98 (2021) (documenting a range of critical testimony about emergency orders on the shadow docket); Vladeck, *Shadow Docket*, *supra* note 11, at 13 (“Because they are unsigned and unexplained, shadow docket orders are supposed to be exceedingly limited . . . . And yet, dozens of times each term, we're now seeing shadow docket orders that fly in the face of those understandings.”); Baude, *Shadow Docket*, *supra* note 1, at 14–15 (“When [the custom of not noting disagreement with orders in emergency applications is] combined with the minimal explanations for these rulings, the result is a Court in which we know very little about what the individual Justices think about their own procedures.”).

42. This type of order is called a “grant, vacate, and remand,” or “GVR.” See generally Aaron-Andrew P. Bruhl, *The Supreme Court's Controversial GVRs—And an Alternative*, 107 Mich. L. Rev. 711 (2009) (disputing the Court's authority to issue GVRs); cf. Stephen L. Wasby, *Case Consolidation and GVRs in the Supreme Court*, 53 U. Pac. L. Rev. 83, 98–100 (2021) (explaining the Court's use of GVRs to efficiently handle multiple cases raising the same question for review).

lower court decisions even without an intervening ruling.<sup>43</sup>

On the less controversial side, thousands of orders each Term deny the vast majority of cert petitions filed before the Court.<sup>44</sup> And hundreds more do not amount to the end of a given case at all but rather deal with small procedural steps during the case's lifetime: extensions of filing deadlines, allowances to file additional briefs, divisions of argument time, and so on.<sup>45</sup>

In sum, although the criteria for choosing which cases to summarily reverse are not set in stone, these rulings do, at least, come with a written explanation of why the Court thinks the lower court decision at issue was wrong.<sup>46</sup> But that was not always the case. For much of the Court's history, summary reversals operated rather differently.

### B. *Summary Reversals Historically*

Understanding how summary reversals work today raises the question of how they came to be and used to function. And looking back is not merely an intellectual exercise. Rather, the history of summary reversals suggests that they occupy an awkward position in Supreme Court practice,

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43. This type of order is a subset of GVR called a "*Munsingwear* vacatur." Pattie Millett, Practice Pointer: Mootness and *Munsingwear* Vacatur, SCOTUSblog (June 10, 2008), <https://www.scotusblog.com/2008/06/practice-pointer-mootness-and-munsingwear-vacatur/> [<https://perma.cc/D4GZ-LA7D>]. They arise when a case has become moot because the party who won in the court of appeals chooses to end the dispute unilaterally—say, by dismissing a lawsuit in the trial court if the party is the plaintiff, or repealing a contested policy if the party is the defendant—rather than risk the Supreme Court granting the cert petition filed by the party who lost below and then reversing. *Id.* Although the Justices in this scenario could simply deny the cert petition, in recent years they have increasingly decided instead to grant it and then issue a GVR, instructing the court of appeals to wipe its existing decision about the case off the books—a practice not without its critics. E.g., *Chapman v. Doe*, 143 S. Ct. 857, 858 (2023) (Jackson, J., dissenting) ("[I]t is crucial that we . . . limit the availability of *Munsingwear* vacatur to truly exceptional cases. To do otherwise risks considerable damage to first principles of appellate review . . .").

44. Vladeck, Shadow Docket, *supra* note 11, at 12. In the 2023 Term, for example, the Court denied over 98% of the more than four thousand cert petitions it received. The Statistics, 138 Harv. L. Rev. 446, 454 tbl. II(B) (2024). Although denying cert is, in effect, a decision to let the ruling below stand, scholars caution against viewing cert denials as merits decisions. Cf. Peter Linzer, The Meaning of Certiorari Denials, 79 Colum. L. Rev. 1227, 1228–29 (1979) (noting this "orthodox view" yet arguing that, although "[n]ot every denial of certiorari means that the Court agrees with the decision and opinion below, . . . in a significant number of cases a denial does indicate that most of the Justices were not strongly dissatisfied with the actions below"). Professor Thomas Schmidt argues that contemporary critiques of the shadow docket might go further and question the Court's unexplained certiorari behavior more broadly. Thomas P. Schmidt, Orders Without Law, 122 Mich. L. Rev. 1003, 1028–33 (2024). Perhaps the most robust version of this critique was published over two decades ago by Professor Edward Hartnett. Edward A. Hartnett, Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill, 100 Colum. L. Rev. 1643 (2000).

45. Vladeck, Shadow Docket, *supra* note 11, at 12.

46. Makar, *supra* note 34, at 432–33.

one in tension with the Court's own views of its role as the head of a coequal branch of government.

The early Court had little say over the cases it heard on appeal.<sup>47</sup> For the first century of its existence, the Court's job was to resolve individual disputes, charting a different course only when lower courts went wrong, and it generally had to do this whenever a party appealed.<sup>48</sup> In other words, the Court was originally a tribunal for error correction.

This began changing, slowly at first, around the end of the nineteenth century. By that point, the Supreme Court was overwhelmed with a backlog of appeals.<sup>49</sup> To alleviate the burden, Congress in 1891 created permanent circuit courts of appeals and gave them final jurisdiction over some cases.<sup>50</sup> Although the Supreme Court was still required to hear many appeals—for example, those about capital or other serious crimes and constitutional issues—the 1891 law used the term “certiorari” for the first time in a federal statute governing the Court's jurisdiction, giving the Justices limited discretion to take up some appeals in which circuit courts had the final word.<sup>51</sup> Other laws in 1914 and 1916 expanded certiorari in small steps, providing more latitude.<sup>52</sup>

A decade later, things changed again, this time dramatically. After World War I, the Justices aggressively lobbied Congress to hand over more control of their docket, citing a still-unmanageable number of appeals they were required to hear.<sup>53</sup> In the Judiciary Act of 1925—commonly known as the Judges' Bill, as it was drafted by a committee of Supreme Court Justices and championed by then-Chief Justice and former President William Howard Taft<sup>54</sup>—Congress complied. The Judges' Bill made certiorari the norm, rather than the exception, leaving to the Court the choice of whether to accept most cases brought to it on appeal.<sup>55</sup>

In doing so, the Judges' Bill rejected the view that the Court's job was merely to correct errors in favor of a different theory: that the Court's job is to declare law.<sup>56</sup> This debate over whether the Supreme Court is

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47. Linzer, *supra* note 44, at 1229–32.

48. Hellman, *Error Correction*, *supra* note 35, at 797.

49. Kathryn A. Watts, *Constraining Certiorari Using Administrative Law Principles*, 160 *U. Pa. L. Rev.* 1, 10 (2011).

50. *Id.* at 10–11.

51. See Linzer, *supra* note 44, at 1234–36 (emphasizing that the 1891 law intended certiorari to allow the Justices to step in only when circuit courts either came to different conclusions on the same issue, known today as a circuit split, or certified a question of law for the Justices to answer).

52. See Watts, *supra* note 49, at 12 (explaining that the 1914 law expanded certiorari to appeals from state-court judgments denying federal rights); see also Linzer, *supra* note 44, at 1237–40 (explaining that the 1916 law expanded certiorari to appeals from state-court judgments in disputes under federal railroad-safety laws).

53. Watts, *supra* note 49, at 13.

54. Linzer, *supra* note 44, at 1241–42.

55. Watts, *supra* note 49, at 13.

56. Hellman, *Error Correction*, *supra* note 35, at 797–98.

primarily an error-correcting or law-declaring institution rages today, with some continuing to favor error correction.<sup>57</sup> But the general consensus is that law declaration has carried the day.<sup>58</sup>

Summary reversal, then, is an anomaly. Its purpose is not to declare new law, which takes time and careful consideration, but to quickly correct glaring mistakes.<sup>59</sup> As Professor Edward Hartnett explains:

One long-noted puzzle of summary reversals is that the Supreme Court has viewed the very point of its discretionary certiorari jurisdiction as enabling it to resolve important legal issues—and avoid being a court for the correction of errors—while summary reversals target lower court decisions that strike the Court as clearly erroneous.<sup>60</sup>

Nonetheless, summary reversals remained a regular part of the Court's practice after the Judges' Bill. Professor Arthur Hellman notes that under Chief Justice Earl Warren in the 1950s and '60s, the Court issued hundreds of summary reversals, generally with "no more than a citation or two by way of explanation."<sup>61</sup>

This provoked sharp criticism. Taking up residency in the foreword to the *Harvard Law Review's* annual issue on the Court's Term, scholars lobbed a series of blows at the Court's summary reversal habit in the late 1950s, arguing that it was both erratic and unexplained.<sup>62</sup> The leading treatise on litigating before the Court then took up the baton, with every edition since 1962 questioning the validity of summary reversal.<sup>63</sup>

For its part, the Court kept calm and carried on summarily reversing. Professor Hellman explains that under Chief Justice Warren Burger, the Court in the 1970s and early '80s did "not give[] up the practice of reversing lower-court rulings summarily."<sup>64</sup> Several of these rulings, he

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57. E.g., Henry Paul Monaghan, On Avoiding Avoidance, Agenda Control, and Related Matters, 112 Colum. L. Rev. 665, 668–69 (2012).

58. See *id.* ("The Court has in significant measure embraced the premises of the law declaration model.").

59. See Schmidt, *supra* note 44, at 1017 ("Law declaration is a difficult, time-intensive process.").

60. Hartnett, Summary Reversals, *supra* note 7, at 597.

61. Hellman, Error Correction, *supra* note 35, at 822. It's possible that many of these came in appeals from state-court judgments raising constitutional issues, which the Court had to hear until 1988. Watts, *supra* note 49, at 14.

62. See Albert M. Sacks, The Supreme Court, 1953 Term—Foreword, 68 Harv. L. Rev. 96, 103 (1954) (questioning summary reversal and urging further examination); see also Ernest J. Brown, The Supreme Court, 1957 Term—Foreword: Process of Law, 72 Harv. L. Rev. 77, 80 (1958) (emphasizing the lack of criteria for singling out rulings for summary reversal or explanation as to why individual cases were chosen); Henry M. Hart, Jr., The Supreme Court, 1958 Term—Foreword: The Time Chart of the Justices, 73 Harv. L. Rev. 84, 88 & n.10 (1959) (praising the prior critiques of summary reversal).

63. Baude, Shadow Docket, *supra* note 1, at 20 & n.60.

64. Hellman, Error Correction, *supra* note 35, at 825.

emphasizes, were “quite significant from a precedential standpoint.”<sup>65</sup> Nonetheless, Hellman notes that the Burger Court heeded the critiques in part: Summary reversals began to be “accompanied by brief opinions explaining the Court’s reasoning.”<sup>66</sup>

Around the same time, the few remaining pipelines for automatic appeal to the Court grew clogged once again, driven by the expanding economy and administrative state.<sup>67</sup> As before, Congress stepped in. Thanks to a series of statutes enacted during the 1970s<sup>68</sup> and in 1988,<sup>69</sup> soon after William Rehnquist took the helm as Chief Justice in 1986, the only remaining category with automatic appeal to the Court was for cases decided by three-member panels of federal district judges—which remains true today.<sup>70</sup> And yet, the Court’s near-boundless discretion did not cap the issuing of summary reversals. They continued unabated throughout the Rehnquist Court<sup>71</sup> and were a constant at the Roberts Court through 2021.<sup>72</sup>

What might it mean, then, that summary reversals at the Roberts Court have declined since 2021? The next Part will turn to examining this trend and its consequences.

## II. THE DECLINE OF SUMMARY REVERSALS SINCE 2021

Part I outlined the Supreme Court’s modern and historical summary reversal practices. This Part looks more closely at the recent decline of summary reversals. First, it highlights the two groups of litigants most affected by this decline: people who are incarcerated, especially those on death row, and state prison and police officials. And second, it notes that the burgeoning debate over the shadow docket has largely left summary reversals behind, over the same period that they have become less common at the Court.

### A. *Consequences of the Decline of Summary Reversals*

Before 2021, the Roberts Court routinely issued summary reversals.<sup>73</sup> Writing in 2015, Professor William Baude described these rulings as

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65. Arthur D. Hellman, *Case Selection in the Burger Court: A Preliminary Inquiry*, 60 *Notre Dame L. Rev.* 947, 955 (1985).

66. Hellman, *Error Correction*, *supra* note 35, at 825.

67. Watts, *supra* note 49, at 13.

68. Linzer, *supra* note 44, at 1243–44.

69. Watts, *supra* note 49, at 14.

70. See *supra* note 29 and accompanying text.

71. See generally Ali S. Masood & Donald R. Songer, *Reevaluating the Implications of Decision-Making Models: The Role of Summary Decisions in US Supreme Court Analysis*, 1 *J.L. & Cts.* 363 (2013) (analyzing summary reversals and GVRs under the Rehnquist Court); see also *supra* note 42 and accompanying text.

72. See *supra* notes 6–7 and accompanying text.

73. See *supra* notes 6–7 and accompanying text.

“lightning bolts”—as a category, they are routine and expected, yet individually, they are spontaneous and rare.<sup>74</sup>

But the rarity of summary reversals depends on the denominator. The Court grants a vanishingly small number of cert petitions each Term.<sup>75</sup> Compared not to the number of petitions the Court receives each year but to the number it grants for full review, the number of petitions that result in a summary reversal is quite significant.<sup>76</sup> In the words of Professor Hartnett: “[T]he odds of having a Supreme Court merits decision handled summarily rather than with full briefing and argument are considerably greater than having a Supreme Court merits decision at all.”<sup>77</sup>

In addition, the odds of summary reversal during the Roberts Court have traditionally been higher in two types of petitions, both filed by state law enforcement officials: those in which lower courts granted post-conviction relief to people challenging their state criminal convictions or denied qualified immunity to officials accused of civil rights violations.<sup>78</sup> This section takes a closer look at summary reversals in these two areas.

1. *Habeas Relief for Incarcerated People.* — The largest group of summary reversals in the Roberts Court has concerned people in state prisons challenging the validity of their convictions or sentences by filing a petition for a writ of habeas corpus, known as a “habeas petition.”<sup>79</sup> Starting in the 1950s, individuals in state prisons increasingly used the “Great Writ” to seek post-conviction relief first in state and then in federal court.<sup>80</sup> To obtain habeas relief, a person in prison must convince a court

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74. Baude, *Shadow Docket*, supra note 1, at 1–2.

75. See supra note 44.

76. See Hartnett, *Summary Reversals*, supra note 7, at 593–94 (“[S]ummary reversals may seem rather infrequent . . . compared to nearly nine hundred cases argued [during the tenure of Chief Justice Roberts]. But they loom larger when one compares that ratio to . . . that of certiorari petitions filed to cases argued.”).

77. *Id.* at 594.

78. *Id.* at 595–96. For examples of dissenting opinions from recent denials of cert petitions filed by state law enforcement officials requesting summary reversal on both issues, see, e.g., *Pina v. Estate of Jacob Dominguez*, 145 S. Ct. 527, 527 (2025) (Alito, J., dissenting from denial of certiorari, joined by Thomas, J.) (qualified immunity); *Davis v. Smith*, 145 S. Ct. 93, 93 (2025) (Thomas, J., dissenting from denial of certiorari, joined by Alito, J.) (habeas); see also *Chambers-Smith v. Ayers*, 145 S. Ct. 1632, 1633 (2025) (statement of Alito, J., joined by Thomas, J.) (“Ordinarily, we would summarily reverse such a decision or, at the least, grant certiorari to bring the errant Circuit back into alignment. But Ayers has now served her prison sentence and is no longer subject to post-release control. For this reason, the Court’s unwillingness to summarily reverse is understandable . . .”).

79. Hartnett, *Summary Reversals*, supra note 7, at 594–96. Technically speaking, federal law distinguishes between petitions for post-conviction relief and those for writs of habeas corpus brought under two different sections of the relevant statute. U.S. DOJ, *Just. Manual* § 9-37.000 (2020). Given their joint origins in the common law and tracking other scholarship, this Note uses the terms interchangeably. See, e.g., Z. Payvand Ahdout, *Direct Collateral Review*, 121 *Colum. L. Rev.* 159, 168–76 (2021) (using “habeas” to refer to both types of appeals).

80. Ahdout, supra note 79, at 168–69.

that the procedures used to try, convict, or sentence them violated their federal constitutional rights.<sup>81</sup> Many of these challenges focus on misconduct by lawyers: prosecutors burying evidence that someone is not guilty, for example, or defense attorneys entirely failing to do their job.<sup>82</sup>

Seeking to curtail federal judges from second-guessing state convictions and sentences, Congress in 1996 toughened the standard for federal courts to award habeas relief.<sup>83</sup> Since 1996, and continuing under Chief Justice Roberts, the Court has summarily reversed a slew of federal court decisions granting post-conviction relief to individuals in state prisons.<sup>84</sup> Pick a summary reversal of the Roberts Court at random. Odds are good that the short, unsigned opinion will explain why a federal court erred when ruling in favor of an incarcerated person challenging their conviction or sentence.<sup>85</sup> Scholars and commentators suggest that conservative Justices have used summary reversals to rein in what they see as lower federal courts intent on defying Congress's 1996 law, the Court's own decisions interpreting that law, or both.<sup>86</sup>

81. *Id.* at 169.

82. *Id.* at 161–62.

83. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, sec. 104, 110 Stat. 1214, 1218–19 (codified at 28 U.S.C. § 2254 (2018)). Specifically, the statute bars a federal court from granting post-conviction relief unless the state court decision upholding a conviction or sentence violated “clearly established Federal law, as determined by the Supreme Court” or was “based on an unreasonable determination of the facts.” 28 U.S.C. § 2254(d).

84. Ursula Bentele, *The Not So Great Writ: Constitution Lite for State Prisoners*, 5 U. Denv. Crim. L. Rev. 33, 34 (2015).

85. From the 2005 to 2014 Terms, nearly half of the Roberts Court's summary reversals concerned federal habeas relief, and states won the vast majority. Hartnett, *Summary Reversals*, *supra* note 7, at 594–96. In the 2020 Term, the last Term in which the Court issued close to its average number of summary reversals, the numbers tell the same story: Half of these rulings concerned federal habeas, and the state won all of them. *Dunn v. Reeves*, 141 S. Ct. 2405, 2407 (2021) (per curiam) (denying habeas relief); *Alaska v. Wright*, 141 S. Ct. 1467, 1468 (2021) (per curiam) (same); *Mays v. Hines*, 141 S. Ct. 1145 (2021) (per curiam) (same); *Shinn v. Kayer*, 141 S. Ct. 517 (2020) (per curiam) (same).

86. E.g., Hartnett, *Summary Reversals*, *supra* note 7, at 597–98; Accelerating Pace of Supreme Court's Summary Reversals of Habeas Relief Suggests Impatience With Circuit Courts' Failure to Defer to State Tribunals, Bloomberg L. (July 10, 2012), [https://www.bloomberglaw.com/bloomberglawnews/us-law-week/XDLTNV8000000?bna\\_news\\_filter=us-law-week#jcite](https://www.bloomberglaw.com/bloomberglawnews/us-law-week/XDLTNV8000000?bna_news_filter=us-law-week#jcite) (on file with the *Columbia Law Review*). For their part, conservative and liberal Justices openly disagree on this point. Compare *Allen v. Lawhorn*, 562 U.S. 1118, 1123 (2010) (Scalia, J., dissenting from denial of certiorari, joined by Thomas & Alito, JJ.) (“With distressing frequency, especially in capital cases such as this, federal judges refuse to be governed by Congress’s command that state criminal judgments must not be revised by federal courts unless they [meet the 1996 law’s heightened standard]. . . . We should . . . summarily reverse the Eleventh Circuit’s judgment.”), with *Dunn*, 141 S. Ct. at 2420–21 (Sotomayor, J., dissenting, joined by Kagan, J.) (“Today’s decision continues a troubling trend in which this Court strains to reverse summarily any grants of relief to those facing execution. This Court has shown no such interest in cases in which defendants seek relief based on compelling showings that their constitutional rights were violated.” (citations omitted)).

Accordingly, it might seem as though the litigants who will be most affected by the recent decline of summary reversals are the prosecutors and wardens charged with enforcing state convictions and sentences. Prior to 2021, it seems, these officials had a fair shot at getting the Court to quickly undo decisions calling those convictions or sentences into question.

For a few reasons, however, that picture is incomplete. First, the Supreme Court is not bound by the tougher standards imposed by Congress in 1996 when reviewing state court criminal decisions—the first step in the post-conviction appeals pipeline—or direct appeals from state court criminal decisions—the step before convictions become final.<sup>87</sup> Indeed, when they concern state court decisions, the Roberts Court's summary reversals have tended to benefit people who are incarcerated.<sup>88</sup> This is especially true for people challenging death sentences.<sup>89</sup>

Second, people on death row have historically had at least some chance at summary reversal in federal habeas. Although they still face a steep, uphill battle in light of the 1996 law—tellingly titled the Antiterrorism and Effective Death Penalty Act—individuals with death sentences are far more likely than those with life or shorter sentences to obtain habeas relief in federal court.<sup>90</sup> At the Court, capital cases make up a sizable chunk of all summary reversals, whether of federal or state court habeas decisions.<sup>91</sup> And when limited to capital cases, it turns out, summary

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87. This is so because the 1996 law only kicks in once a person files a petition for habeas corpus in federal court. 28 U.S.C. § 2254(a). If the person first files a petition for habeas corpus in state court, however, it stops the clock on the one-year deadline to file a federal habeas petition. *Id.* § 2244(d)(2). At the end of state habeas litigation, the losing party may petition the Supreme Court for review of the state court's decision on the state habeas petition, at which point the 1996 law's standards are not yet in effect. Hartnett, *Summary Reversals*, *supra* note 7, at 595–96.

88. From the 2005 to 2014 Terms, only four summary reversals—one of every ten summary reversals concerning habeas corpus—were of a state court habeas decision, and the person challenging their conviction won three. Hartnett, *Summary Reversals*, *supra* note 7, at 595–96. Recently, the trend has been the same. Since the 2014 Term, the Court has summarily reversed three state court habeas decisions, and the person challenging their conviction won two. *Andrus v. Texas*, 140 S. Ct. 1875, 1878 (2020) (per curiam) (granting habeas relief); *Wearry v. Cain*, 577 U.S. 385, 386 (2016) (per curiam) (same); *Maryland v. Kulbicki*, 577 U.S. 1, 2 (2015) (per curiam) (denying habeas relief).

89. See Hartnett, *Summary Reversals*, *supra* note 7, at 595 (noting that people sentenced to death won three out of four summary reversals concerning state habeas relief between the 2005 and 2015 Terms).

90. See Ahdout, *supra* note 79, at 174 (“According to one empirical study, since [the Act]’s passage, federal habeas relief is afforded in only 0.29% of noncapital cases and 12.4% of capital cases.” (citing Nancy J. King, Fred L. Cheesman II & Brian J. Ostrom, *Final Technical Report: Habeas Litigation in U.S. District Courts 51–52* (2007), <http://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf> [<https://perma.cc/TAF7-3KSC>])).

91. From the 2009 to 2014 Terms, nearly half of the Roberts Court's summary reversals denying federal habeas relief, and all but one of those granting federal habeas relief, concerned death sentences. Bentele, *supra* note 84, at 56–58. For state habeas, three-fourths

reversals favor the person in prison roughly 40% of the time.<sup>92</sup>

Third, the costs to parties of seeking Supreme Court review in capital habeas cases are asymmetric. On the one hand, people on death row risk the ultimate cost: If the Supreme Court refuses to disturb a federal court's denial of habeas relief, they can become eligible for an execution warrant.<sup>93</sup> On the other hand, state officials risk the cost of further litigation: The most common habeas remedy is not release from prison but rather a new trial or sentencing.<sup>94</sup> And even when awarded this remedy, the typical outcome for a person on death row is resentencing to life in prison without the possibility of parole.<sup>95</sup>

Finally, the Justices have a third option besides denying cert or summarily reversing in response to a cert petition in a habeas case. They can also grant the petition for full briefing and argument on the merits. In theory, summary reversals and cert grants serve different purposes.<sup>96</sup> But the Court has blurred the lines.<sup>97</sup> Accordingly, people seeking post-

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of the Roberts Court's summary reversals from the 2005 to 2014 Terms involved death sentences. Hartnett, *Summary Reversals*, supra note 7, at 595.

92. From the 2005 to 2015 Terms, 40% of all summary reversals in capital cases—including federal and state habeas decisions as well as on other kinds of claims raised—provided relief to the person sentenced to death. Hartnett, *Summary Reversals*, supra note 7, at 606–07. In the state habeas category, 100% of summary reversals did. *Id.* at 595.

93. Kristine M. Fox, Fed. Jud. Ctr., *Capital § 2254 Habeas Cases: A Pocket Guide for Judges 2* (2012), <https://www.govinfo.gov/content/pkg/GOVPUB-JU13-PURL-gpo31368/pdf/GOVPUB-JU13-PURL-gpo31368.pdf> [<https://perma.cc/XN2R-PJH8>].

94. *Id.* at 1. And litigating death penalty appeals is expensive. Costs, Death Penalty Info. Ctr., <https://deathpenaltyinfo.org/policy-issues/costs> [<https://perma.cc/E3PF-WMPB>] (last visited Aug. 6, 2025). Indeed, this is often cited as an argument for abolishing the death penalty. See, e.g., Death Penalty Cost, Amnesty Int'l, <https://www.amnestyusa.org/issues/death-penalty/death-penalty-facts/death-penalty-cost/> (on file with the *Columbia Law Review*) (last updated June 26, 2023) (stating that “[e]ven if all post-conviction proceedings (appeals) were abolished, the death penalty would still be more expensive than alternative sentences”); Equal Just. USA, *Wasteful & Inefficient: The Alarming Cost of the Death Penalty*, <https://ejusa.org/wp-content/uploads/EJUSA-DP-factsheet-cost.pdf> [<https://perma.cc/WL5Y-YX82>] (last visited Oct. 17, 2025) (“[The death penalty] is a bloated and expensive system that has bogged down law enforcement, delayed justice for victims’ families, and squandered millions of crime-fighting dollars.”). In light of these costs, the state can always settle, agreeing not to contest a court’s resentencing of someone on death row to life if they are awarded habeas relief.

95. See Federal Death Penalty: Case Summaries for Modern Federal Death Sentences, Death Penalty Info. Ctr., <https://deathpenaltyinfo.org/state-and-federal-info/federal-death-penalty/case-summaries-for-modern-federal-death-sentences> [<https://perma.cc/HX4H-HL88>] (last visited Aug. 7, 2025) (showing that most people awarded habeas relief from federal death row received a new sentence of life without parole—whether after commutation, settlement, or new proceedings).

96. The former is intended for correcting errors, the latter for declaring law. See supra notes 56–60 and accompanying text.

97. See Shapiro et al., supra note 3, § 5.12(c) (“Individual Justices accordingly protest when they perceive that the Court’s grant of certiorari and summary reversal is premised not on clear error correction but on one of the ‘compelling reasons’ for granting plenary review of a certiorari case.”).

conviction relief often present the Court with all available alternatives: summary reversal, full merits review, and other options in between.<sup>98</sup> Indeed, although the Court has grown more hostile to federal habeas relief on both its summary reversal and merits dockets,<sup>99</sup> it remains open to state habeas relief on its merits docket—and, prior to 2021, on its summary reversal docket.<sup>100</sup> Given both the efficiency of resolving cases without additional briefing or argument and the negligible chance of convincing the Court to seek those additional steps,<sup>101</sup> summary reversals are an important judicial tool.

Justice Thurgood Marshall famously remarked that “death is different.”<sup>102</sup> In a similar vein, Professor Hartnett has suggested that “to the extent summary reversals are (to use Baude’s phrase) ‘lightning bolts’” in the Roberts Court, “they are lightning bolts used predominantly for the benefit of those sentenced to death.”<sup>103</sup> If summary reversal has fallen out of fashion, then that rare benefit to people on death row risks becoming more difficult to obtain.<sup>104</sup>

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98. *Id.* (“In view of the possibility that the Court may summarily reverse a decision below on the merits, a petitioner who believes that his or her case may be deemed suitable for such summary disposition may so state at the end of the petition.”); see, e.g., *Petition for Writ of Certiorari at 32–35, King v. Emmons*, 144 S. Ct. 2501 (2024) (No. 23-668), 2023 WL 8848815 (seeking full review on the merits, vacatur and remand, or summary reversal of the Eleventh Circuit’s decision in a capital case that alleged evidence of the state’s racial discrimination in jury selection did not warrant habeas relief).

99. In recent years, the Court has issued a few monumental decisions after full briefing and argument that further limit federal habeas relief. E.g., *Jones v. Hendrix*, 143 S. Ct. 1857, 1863 (2023) (holding that people convicted under a statute that has subsequently been found not to apply to their conduct cannot get relief from their convictions through a second federal habeas petition); *Shinn v. Ramirez*, 142 S. Ct. 1718, 1728 (2022) (holding that a person arguing that their attorney in state habeas proceedings was unconstitutionally deficient cannot develop evidence on that claim when raised for the first time, with new counsel, in federal habeas proceedings).

100. See Ahdout, *supra* note 79, at 180–83 (discussing several decisions across the 2015 to 2020 Terms on both the merits and summary reversal dockets awarding state habeas relief, which the author labels “direct collateral review”). Compare, e.g., *King*, 144 S. Ct. at 2502 (Jackson, J., dissenting from denial of certiorari, joined by Sotomayor, J.) (arguing for summary reversal of a federal habeas decision denying relief in a capital case alleging clear evidence of racial discrimination in jury selection), with *Flowers v. Mississippi*, 139 S. Ct. 2228, 2235 (2019) (reversing a state habeas decision denying relief in a capital case alleging the same). Just last Term, the Court granted state habeas relief on the merits docket to an Oklahoma man, who had been convicted and sentenced to death based on testimony from a key witness that the state knew was false, after the state ultimately confessed error and supported his petition for relief in the Supreme Court. *Glossip v. Oklahoma*, 145 S. Ct. 612, 618 (2025).

101. See *supra* note 44.

102. *Ford v. Wainright*, 477 U.S. 399, 411 (1986) (plurality opinion).

103. Hartnett, *Summary Reversals*, *supra* note 7, at 607.

104. Not impossible, however. In January 2025, the Supreme Court summarily reversed a decision by the Fifth Circuit that had refused to provide federal habeas relief to the only woman on death row in Oklahoma. *Supreme Court Grants a New Hearing for the Only Woman on Oklahoma’s Death Row*, AP News, <https://apnews.com/article/supreme-court->

2. *Qualified Immunity for Government Officials.* — After habeas cases, the second-largest group of summary reversals in the Roberts Court has concerned qualified immunity for government officials in civil rights lawsuits.<sup>105</sup> Federal law permits individuals to sue state officials for violating their constitutional rights, such as the right to be free from excessive force.<sup>106</sup> But those officials, the Supreme Court has held, are only liable for a civil rights violation if the right was “clearly established” at the time.<sup>107</sup> Known as “qualified immunity,” this doctrine has, in recent decades, operated to shield state police officers and prison officials who inflict physical—often deadly—harm from liability.<sup>108</sup>

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oklahoma-brenda-andrew-death-row-1ee00fbdfba3de8e8e35315cb383befb (on file with the *Columbia Law Review*) (last updated Jan. 21, 2025). The Justices wrote that the Fifth Circuit was wrong to hold that it was not a clear violation of due process for prosecutors to introduce reams of irrelevant and prejudicial evidence about the woman’s sex life at her trial. *Andrew v. White*, 145 S. Ct. 75, 78 (2025) (per curiam). Short of such a uniquely salacious miscarriage of justice, summary reversal for people on death row who were denied habeas relief has almost become a nullity; the last time the Court had issued one was five years before. See *Andrus v. Texas*, 140 S. Ct. 1875, 1886–87 (2020) (per curiam) (reversing a decision by the Texas Court of Criminal Appeals that failed to adequately address whether a man on Texas’s death row was prejudiced by his constitutionally deficient counsel at trial).

105. William Baude, *Is Qualified Immunity Unlawful?*, 106 *Calif. L. Rev.* 45, 85 (2018) [hereinafter Baude, *Qualified Immunity*]; see also Makar, *supra* note 34, at 433–34 & n.34 (cataloguing twelve qualified immunity summary reversals under the Roberts Court through 2021).

106. 42 U.S.C. § 1983 (2018); see also Baude, *Qualified Immunity*, *supra* note 105, at 69 (discussing this and other federal civil rights statutes). The Supreme Court has recognized a similar cause of action against federal officials. *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 397 (1971). But it has severely limited the scope of this pathway in the decades since. See, e.g., *Egbert v. Boule*, 142 S. Ct. 1793, 1802–04 (2022) (holding that *Bivens* does not extend to Fourth Amendment excessive force or First Amendment retaliation claims against immigration officers at the border). At the end of the 2024 Term, the Court even did so through an increasingly rare summary reversal—at the explicit request of the Acting Solicitor General. *Goldey v. Fields*, 145 S. Ct. 2613, 2615 (2025) (per curiam). In that case, a Virginia man sued federal prison officials for violating his constitutional right to be free from excessive force after guards physically abused him while in solitary confinement, including by ramming his head into a concrete wall while his hands and feet were in chains. *Fields v. Fed. Bureau of Prisons*, 109 F.4th 264, 268 (4th Cir. 2024), *rev’d*, *Goldey*, 145 S. Ct. 2613. After the court of appeals ruled that his claim against the prison could move forward under *Bivens*, the federal government took the “unusual step of filing an uninvited certiorari-stage amicus brief” asking the Court to summarily reverse, citing the “severity of the court of appeals’ error and the gravity of the decision’s potential consequences”—namely, authorizing lawsuits against federal prison guards for severe abuse. Brief for the United States as Amicus Curiae in Support of Petitioners at 1–2, *Goldey*, 145 S. Ct. 2613 (No. 24-809), 2025 WL 735005. A few weeks later, the Court did as the Acting Solicitor General requested, chastising the lower court for “extend[ing] *Bivens* to new contexts.” *Goldey*, 145 S. Ct. at 2615.

107. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

108. Andrew Chung, Lawrence Hurley, Jackie Botts, Andrea Januta & Guillermo Gomez, *For Cops Who Kill, Special Supreme Court Protection*, Reuters (May 8, 2020), <https://www.reuters.com/investigates/special-report/usa-police-immunity-scotus/> (on file with the *Columbia Law Review*).

The Roberts Court has traditionally been fond of qualified immunity. With real vigor since 2012, the Justices have summarily reversed a steady stream of lower court decisions denying qualified immunity to government officials.<sup>109</sup> Indeed, two of the last few summary reversals issued by the Roberts Court in 2021 did just that.<sup>110</sup> Only once, faced with a particularly appalling set of facts, has the Roberts Court ever issued a summary reversal—or any opinion, for that matter—denying qualified immunity because officers violated a person’s clearly established constitutional rights.<sup>111</sup>

Like with habeas, then, the impact of the decline of summary reversals for litigants in qualified immunity cases seems clear. Police and prison officers benefit the most from these summary reversals, the thinking goes, so they have the most to lose if these rulings remain in remission.

But like with habeas, litigants in civil rights disputes face asymmetric costs. On the one hand, plaintiffs, especially those suing on behalf of family members killed by police or prison officers, are often left without redress if those officers are shielded by qualified immunity.<sup>112</sup> On the other hand, officers denied qualified immunity are virtually always indemnified by the state from personal liability for settlement costs or damages.<sup>113</sup> Nonetheless, scholars have argued that concern over liability for police

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109. See *City of Tahlequah v. Bond*, 142 S. Ct. 9 (2021) (per curiam); *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4 (2021) (per curiam); *City of Escondido v. Emmons*, 139 S. Ct. 500 (2019) (per curiam); *Kisela v. Hughes*, 138 S. Ct. 1148 (2018) (per curiam); *White v. Pauly*, 580 U.S. 73 (2017) (per curiam); *Mullenix v. Luna*, 577 U.S. 7 (2015) (per curiam); *Taylor v. Barkes*, 575 U.S. 822 (2015) (per curiam); *Carroll v. Carman*, 574 U.S. 13 (2014) (per curiam); *Stanton v. Sims*, 571 U.S. 3 (2013) (per curiam); *Ryburn v. Huff*, 565 U.S. 469 (2012) (per curiam); *Los Angeles County v. Rettele*, 550 U.S. 609 (2007) (per curiam).

110. *City of Tahlequah*, 142 S. Ct. at 9; *Rivas-Villegas*, 142 S. Ct. at 5.

111. *Taylor v. Riojas*, 141 S. Ct. 52, 53 (2020) (per curiam) (summarily reversing a decision that Texas prison officials could not have known keeping a man with open wounds in facilities covered with feces and flooded with sewage violated his constitutional rights because they held him there for only six days). *Taylor* might also have signaled some hesitancy about qualified immunity in light of the public firestorm following the police killing of George Floyd earlier that year. Katherine Mims Crocker, *The Supreme Court’s Reticent Qualified Immunity Retreat*, 71 *Duke L.J. Online* 1, 2, 7–13 (2021), [https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1089&context=dlj\\_online](https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1089&context=dlj_online) [<https://perma.cc/V6GY-VZAR>]. Indeed, four months after *Taylor*, the Court issued a GVR, see *supra* note 42 and accompanying text, in another decision that had granted qualified immunity to Texas state prison officials “for further consideration in light of *Taylor*.” *McCoy v. Alamu*, 141 S. Ct. 1364, 1364 (2021) (mem.); see also Crocker, *supra*, at 5–6 (elaborating on the implications of *McCoy*).

112. Chung et al., *supra* note 108.

113. See Joanna C. Schwartz, *Police Indemnification*, 89 *N.Y.U. L. Rev.* 885, 890 (2014) (reporting the results of a landmark study that found the state indemnified police and prison officers 99.59% of the time, paid 99.98% of all settlement and damages costs, and paid 100% of punitive damages in misconduct cases).

and prison officers is precisely what has driven the Court's summary reversal habit in qualified immunity cases.<sup>114</sup>

Unlike habeas, however, qualified immunity has nearly disappeared from the Court's merits docket.<sup>115</sup> The Roberts Court's qualified immunity agenda began on the merits docket, with notable early decisions first streamlining<sup>116</sup> and then super-charging<sup>117</sup> qualified immunity in favor of government officials. But whereas the Court has issued some landmark habeas decisions on the merits docket in recent years,<sup>118</sup> the last time the Court heard oral argument in a qualified immunity case was in 2017—ultimately ruling in favor of the police.<sup>119</sup>

Finally, an unusual pair of Justices has recently begun expressing concerns with qualified immunity.<sup>120</sup> The most vocal critic of the doctrine has been Justice Clarence Thomas, who in 2021—the year summary reversals began slowing to a trickle—suggested that today's robust form of qualified immunity should be weakened or reconsidered entirely.<sup>121</sup> And

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114. E.g., Kit Kinports, *The Supreme Court's Quiet Expansion of Qualified Immunity*, 100 Minn. L. Rev. Headnotes 62, 64 (2016), [https://www.minnesotalawreview.org/wp-content/uploads/2016/02/Kinports\\_PDF1.pdf](https://www.minnesotalawreview.org/wp-content/uploads/2016/02/Kinports_PDF1.pdf) [<https://perma.cc/62SR-RXAG>]. And like with habeas, conservative and liberal Justices have openly expressed their conflicting views of this project. Compare *Mullenix*, 577 U.S. at 12 (“We have repeatedly told courts . . . not to define clearly established law [for purposes of qualified immunity] at a high level of generality.” (first alternation in original) (internal quotation marks omitted) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011) (opinion of Scalia, J.))), with *Salazar-Limon v. City of Houston*, 581 U.S. 946, 953–54 (2017) (Sotomayor, J., dissenting from denial of certiorari, joined by Ginsburg, J.) (noting “a disturbing trend regarding the use of this Court's resources . . . to summarily reverse courts for wrongly denying officers the protection of qualified immunity in cases involving the use of force”).

115. *Hellman*, Federal Question Jurisdiction, *supra* note 8, at 2185 n.297.

116. See *Pearson v. Callahan*, 555 U.S. 223, 227 (2009) (collapsing the original two-step qualified immunity inquiry into a single step: whether the constitutional right was clearly established at the time).

117. See *al-Kidd*, 563 U.S. at 741 (emphasizing that clearly established rights must be “beyond debate” and clear from the view of not merely “a” reasonable officer but “every” such officer); Kinports, *supra* note 114, at 65 (discussing the impact of these changes).

118. See *supra* notes 99–100 and accompanying text.

119. *District of Columbia v. Wesby*, 138 S. Ct. 577 (2018). In fall 2023, the Court agreed to hear argument in a dispute over New York officials' restrictions on the free speech rights of the National Rifle Association but declined to weigh in on the qualified immunity question. See *Petition for a Writ of Certiorari at i*, *NRA v. Vullo*, 144 S. Ct. 1316 (2024) (No. 22-842), 2023 WL 2413355 (presenting both a First Amendment and a qualified immunity question); see also *NRA v. Vullo*, 144 S. Ct. 375, 375 (2023) (mem.) (granting cert on the First Amendment question alone).

120. David D. Coyle, *Getting It Right: Whether to Overturn Qualified Immunity*, 17 *Duke J. Const. L. & Pub. Pol'y* 283, 294–96 (2022).

121. Justice Thomas first voiced this view on the merits docket, on the grounds that qualified immunity's current form is inconsistent with both the text of the federal statute authorizing civil rights suits against state officials and the common law principles against which that law was enacted. *Ziglar v. Abbasi*, 582 U.S. 120, 156–60 (2017) (Thomas, J., concurring in part and concurring in the judgment). But his most vocal criticisms of the doctrine, including calls to reconsider it entirely, have come outside of full decisions on the

Justice Sonia Sotomayor has recently echoed the view that the bar for plaintiffs to overcome qualified immunity is set too high.<sup>122</sup> She has also specifically criticized the Court for expanding qualified immunity through summary reversals.<sup>123</sup>

If “death is different,” Professor Baude has remarked that “qualified immunity is special.”<sup>124</sup> Baude was specifically noting the Court’s preferential treatment of the doctrine on its summary reversal docket.<sup>125</sup> But his and others’ concerns with the Court’s summary reversal practice go deeper than qualified immunity. The next section turns to those criticisms.

#### B. *The Decline of Public Debate Over Summary Reversals*

Summary reversal is no stranger to criticism. Scholars and practitioners have questioned the legitimacy of the Court’s summary reversal practice since the late 1950s.<sup>126</sup> Over the past decade, this critique has taken on a new angle: that summary reversals play a key role in the Court’s broader, controversial practice of resolving cases on a short time frame without full briefing and argument, known as the shadow docket.

Coined in 2015 by Professor Baude, the term “shadow docket” originally focused on the Court’s summary reversal practice.<sup>127</sup> He defined the term to encompass “a range of orders and summary decisions that defy [the Court’s] normal procedural regularity” and “lack . . . transparency.”<sup>128</sup> Summary reversals were of “particular” interest to Baude.<sup>129</sup> Although “summary reversals have become more transparent and procedurally regular over time,” he contended, “the selection of cases for summary reversal remains a mystery,” which “makes it difficult to tell whether the Court’s selections are fair.”<sup>130</sup>

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merits. See, e.g., *Hoggard v. Rhodes*, 141 S. Ct. 2421, 2422 (2021) (Thomas, J., statement respecting denial of certiorari) (“[I]n an appropriate case, we should reconsider either our one-size-fits-all test [for clearly established law] or the judicial doctrine of qualified immunity more generally.”).

122. *Kisela v. Hughes*, 138 S. Ct. 1148, 1161 (2018) (Sotomayor, J., dissenting).

123. See *id.* at 1162 (“This unwarranted summary reversal is symptomatic of ‘a disturbing trend regarding the use of this Court’s resources’ . . . ‘to summarily reverse courts for wrongly denying officers the protection of qualified immunity’ but ‘rarely interven[ing] where courts wrongly afford officers the benefit of qualified immunity in these same cases.’” (quoting *Salazar-Limon v. City of Houston*, 137 S. Ct. 1277, 1282 (2017) (Sotomayor, J., dissenting from denial of certiorari, joined by Ginsburg, J.))).

124. Baude, *Qualified Immunity*, *supra* note 105, at 85.

125. *Id.* Justice Sotomayor has cited Baude’s piece in her own criticisms of the Court’s summary reversal habit in qualified immunity cases. See *Kisela*, 138 S. Ct. at 1162 (Sotomayor, J., dissenting) (citing Baude, *Qualified Immunity*, *supra* note 105, at 82).

126. See *supra* notes 62–63 and accompanying text.

127. Baude, *Shadow Docket*, *supra* note 1, at 1–2.

128. *Id.* at 1.

129. *Id.*

130. *Id.* at 2–3.

This lack of transparency was the primary motivation for the shadow metaphor Baude invoked. But the critique soon took on a life of its own. The other phenomenon Baude examined was the practice of “debatable and mysterious” grants of “stays and injunctions” in response to emergency applications for relief from lower court decisions.<sup>131</sup> Typically, these emergency orders decide whether a contested government policy can go into effect while a full-fledged legal challenge crawls its way through the lower courts.<sup>132</sup>

Today, emergency orders have come to dominate public debate over the shadow docket.<sup>133</sup> Perhaps no one is a more forceful critic of the Court’s emergency orders than Professor Stephen Vladeck. In his recent book on the shadow docket, Vladeck explains that since Baude’s initial observations in “the mid-2010s, there has been a radical shift in how (and how often) the justices use the shadow docket.”<sup>134</sup> The Court now uses emergency orders, Vladeck notes, to “intervene[] preemptively, if not prematurely, in some of our country’s most fraught political disputes.”<sup>135</sup> Vladeck places original responsibility for this shift with the first Trump Administration’s novel strategy of leapfrogging lower courts whenever its policies were challenged, asking the Justices to green-light the policies while litigation continued—decisions that, while supposedly temporary, often gave the final word.<sup>136</sup>

Like Baude, Vladeck primarily takes issue with the lack of transparency in the Court’s emergency orders. “The problem is not the shadow docket itself,” he emphasizes, but rather that its “rulings . . . are unsigned and unexplained (or, at least, insufficiently explained).”<sup>137</sup> Opacity, however, is not the only charge levied against emergency orders. Critics note that the Justices tend to vote more frequently along ideological lines when intervening on an emergency basis.<sup>138</sup> Scholars question where emergency orders fit on the spectrum from law declaration to error

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131. *Id.* at 3.

132. Vladeck, Solicitor General, *supra* note 15, at 130–32.

133. See *supra* note 41 and accompanying text. But see Greg Goelzhauser, *The Applications Docket*, 58 *Ga. L. Rev.* 97, 104–08 (2023) (arguing that both the shadow docket and emergency orders are misleading baselines for critique).

134. Vladeck, *Shadow Docket*, *supra* note 11, at 12.

135. *Id.* at 12–13.

136. Vladeck, Solicitor General, *supra* note 15, at 125–26.

137. Vladeck, *Shadow Docket*, *supra* note 11, at 247–48.

138. E.g., *id.* at 19–20, 145; Nicholas D. Conway & Yana Gagloeva, *Out of the Shadows: What Social Science Tells Us About the Shadow Docket*, 23 *Nev. L.J.* 673, 686–705 (2023) (noting that “close to 97% of [emergency orders producing dissents from 2013 to 2021] reflect[] ideological purity” and “ideologically extreme Justices appear to be[] even more ideologically consistent ‘in the shadows’ than they [appear] on the merits docket”); Ian Millhiser, *The Supreme Court’s Enigmatic “Shadow Docket,” Explained*, *Vox* (Aug. 11, 2020), <https://www.vox.com/2020/8/11/21356913/supreme-court-shadow-docket-jail-asylum-covid-immigrants-sonia-sotomayor-barnes-ahlman> (on file with the *Columbia Law Review*).

correction.<sup>139</sup> And judges debate whether these orders—particularly unexplained ones—have binding, precedential effect.<sup>140</sup>

Each of these points has also been raised about summary reversals. Whether about transparency,<sup>141</sup> polarization,<sup>142</sup> identity,<sup>143</sup> or precedent,<sup>144</sup> questions abound over the Court’s habit of reversing lower court decisions on the merits without full briefing or argument. But although summary

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139. See Schmidt, *supra* note 44, at 1018 (“[T]he modern emergency docket should be understood as a small pocket of dispute resolution (or dispute *preservation*) in a predominantly law-declaration Court. . . . The circumstances of the emergency docket call for judicial minimalism—for doing less rather than more.”); cf. Vladeck, Shadow Docket, *supra* note 11, at 247 (“[T]he justices . . . are deciding significant questions that impact millions of people through these emergency applications.”).

140. Justice Alito has publicly stated that shadow docket orders are not precedential. Katie Barlow, Alito Blasts Media for Portraying Shadow Docket in “Sinister” Terms, SCOTUSblog (Sep. 30, 2021), <https://www.scotusblog.com/2021/09/alito-blasts-media-for-portraying-shadow-docket-in-sinister-terms/> [<https://perma.cc/YWL2-VZLG>]. But the Court’s own emergency orders seem to belie that notion. See, e.g., *Trump v. Boyle*, 145 S. Ct. 2653, 2654 (2025) (emphasizing that a previous emergency order permitting President Trump to fire members of the National Labor Relations Board and Merits Systems Protection Board “squarely controlled” the question of his ability to fire members of the Consumer Product Safety Commission); *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (*per curiam*) (relying on emergency orders granting relief from policies barring religious services during the pandemic in New York when granting an emergency injunction from a California policy doing the same). Accordingly, lower courts disagree over how to weigh the Justices’ emergency orders. Trevor N. McFadden & Vetan Kapoor, The Precedential Effects of the Supreme Court’s Emergency Stays, 44 Harv. J.L. & Pub. Pol’y 827, 831 (2021).

141. See, e.g., Michael R. Dreeben, Case Selection and Review at the Supreme Court: Statement for the Presidential Commission on the Supreme Court of the United States 11–12 (2021) (on file with the *Columbia Law Review*) (“[T]he Court’s error-correction role may be one of its least transparent areas . . . . Those concerns may be amplified for summary reversals because the Court bypasses merits briefing and a public hearing and resolves often-intricate factual questions . . .”).

142. See, e.g., Richard C. Chen, Summary Dispositions as Precedent, 61 Wm. & Mary L. Rev. 691, 694 (2020) (“Indeed, summary reversals have been far more commonly used to reach results the conservative Justices generally support, favoring government officials in qualified immunity cases and the state in federal habeas cases.”); Robert M. Yablon, Justice Sotomayor and the Supreme Court’s Certiorari Process, 123 Yale L.J. Forum 551, 562 (2014), [https://www.yalelawjournal.org/pdf/9.Yablon\\_FINAL\\_dpysu1mt.pdf](https://www.yalelawjournal.org/pdf/9.Yablon_FINAL_dpysu1mt.pdf) [<https://perma.cc/QP2U-4QTK>] (“[T]he current Court’s disdain for error correction is selective. In a steady trickle of cases, the Court has been granting certiorari and summarily reversing decisions favorable to criminal defendants and habeas petitioners.”); Will Baude, *Tolan v. Cotton*—When Should the Supreme Court Interfere in ‘Factbound’ Cases?, Wash. Post (May 7, 2014), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/05/07/tolan-v-cotton-when-should-the-supreme-court-interfere-in-factbound-cases/> (on file with the *Columbia Law Review*) (suggesting a “crude[]” conclusion from this trend: that conservative Justices “like police officers and don’t like” people who are incarcerated).

143. See *supra* notes 56–60 and accompanying text.

144. See, e.g., Chen, *supra* note 142, at 719 (suggesting that “the Supreme Court use summary dispositions as a means of developing the meaning of high-level legal standards” because “even short, *per curiam* opinions can have precedential value”); Makar, *supra* note 34, at 436–42 (discussing the precedential value of summary reversals on qualified immunity).

reversals and emergency orders held equal focus in Baude's initial observations on the shadow docket in 2015,<sup>145</sup> the heated debate over emergency orders since 2021<sup>146</sup> has seemingly sucked the oxygen out of the conversation about summary reversals.<sup>147</sup> And this shift has occurred over the same period in which emergency orders have proliferated, while summary reversals have seemingly fallen out of fashion.<sup>148</sup>

This might be a coincidence. But it was not inevitable. Increased scrutiny of emergency orders could have shined a light on summary reversals, too. Part III will explore whether these twin patterns might, in fact, be very much related.

### III. POSSIBLE REASONS FOR THE DECLINE OF SUMMARY REVERSALS

Parts I and II set the stage to theorize about the decline of summary reversals at the Court since 2021. This trend is notable regardless of the explanation—especially, as Part II notes, for people on death row. But it does cry out for an account. This Part will explore possible reasons for the decline of summary reversals: time constraints from the shadow docket, particularly from the rise of tools to quickly reach the merits in cases arising there; the appointment of Justice Barrett, particularly for ideologically divisive summary reversals; the conservative alignment of lower courts and the Supreme Court, particularly in the context of habeas and qualified immunity; and internalized critiques of the Court's dabbling, through summary reversals, in error correction.

Which of these factors predominates is impossible to say so long as the Court continues to operate in the shadows. In all likelihood, it is a combination working in tandem.

#### A. *Time Constraints From the Shadow Docket*

One explanation for the recent decline of summary reversals could be workload. The Justices might simply have less bandwidth to issue them.

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145. See *supra* note 129 and accompanying text.

146. See *supra* note 17 and accompanying text.

147. See Makar, *supra* note 34, at 430 (“This debate [over the shadow docket], for the most part, has largely been situated around the review of emergency petitions. But the Court reviews many other cases on its orders docket, [including], although not having engendered as much public scrutiny, summary reversals . . . .”); Schmidt, *supra* note 44, at 1015 & n.69 (“[W]hile . . . criticisms [of summary reversals] have force, summary reversals are not a focus of Vladeck’s book . . . .”). Some scholars, however, continue to critique summary reversals in light of the shadow docket. See Alexander V. Hirsch, Jonathan P. Kastellec & Anthony R. Taboni, *Reviewing Fast or Slow: A Theory of Summary Reversal in the Judicial Hierarchy* 1–7 (Nov. 22, 2024) (unpublished manuscript), [https://jkastellec.scholar.princeton.edu/sites/g/files/toruqf3871/files/documents/Reversal\\_Without\\_Review\\_11\\_22\\_2024.pdf](https://jkastellec.scholar.princeton.edu/sites/g/files/toruqf3871/files/documents/Reversal_Without_Review_11_22_2024.pdf) [<https://perma.cc/QBC6-8XJL>] (outlining a mathematical model that demonstrates the negative effects of summary reversals and other unexplained shadow-docket orders on lower-court decisionmaking).

148. See *supra* notes 6–8 and accompanying text.

By one measure, the Justices' workload is lighter than ever. In recent Terms, the Court has issued fewer decisions on its merits docket than it has at any time since the Civil War.<sup>149</sup> It rarely fills all the available slots on its argument calendar.<sup>150</sup> And this is by design. Alleviating caseload was a key justification for granting the Justices more discretion over their docket during the twentieth century.<sup>151</sup> As expected, centralizing control has corresponded to a shrinking docket, alongside the evolution of views about the Court's institutional role.<sup>152</sup>

Ask a Supreme Court clerk, however, and they are unlikely to say that they—or their boss—have an easy job.<sup>153</sup> That's because the shadow docket is busier than ever. "Even as the total number of cases the Supreme Court is deciding [on its merits docket] has declined (significantly) in recent Terms," Professor Vladeck has noted, "the number of cases in which the Court is reaching and resolving the merits in some kind of preliminary procedural posture has grown—in absolute terms and, thus, in even more significant proportional terms."<sup>154</sup> And this is largely occurring in the most contentious cases.<sup>155</sup> Succumbing to a stream of requests to wade into major disputes before lower courts have resolved them—a stream that has become a torrent during the second Trump Administration—the Court has breathed new life into previously rare procedural tools, blurring the lines between the shadow and merits dockets to stay afloat.<sup>156</sup>

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149. Stephen I. Vladeck, *A Court of First View*, 138 Harv. L. Rev. 533, 537–38, 542–43 & fig. 1 (2024) [hereinafter Vladeck, *Court of First View*].

150. Hartnett, *Summary Reversals*, *supra* note 7, at 611–12. For example, 80% of the Court's second-of-two argument slots per day were empty in the calendar for the February 2023 sitting. See Sup. Ct. of the U.S., *October Term 2022: For the Session Beginning February 21, 2023* (Feb. 16, 2023), [https://www.supremecourt.gov/oral\\_arguments/argument\\_calendars/MonthlyArgumentCalFebruary2023.pdf](https://www.supremecourt.gov/oral_arguments/argument_calendars/MonthlyArgumentCalFebruary2023.pdf) [<https://perma.cc/6962-TV9V>].

151. See *supra* notes 53–55 and accompanying text.

152. See Monaghan, *supra* note 57, at 679–83 & n.80 (hypothesizing that the shift toward law declaration and embrace of agenda control "may be the result of the decline in the Court's workload").

153. Cf. Hoover, *supra* note 14 (noting that a veteran Supreme Court advocate has speculated whether the Justices have realized that "[i]f you can get by on 60 cases, then maybe that's a better way than to work yourself half to death" (internal quotation marks omitted) (quoting Carter Phillips, Partner, Sidley Austin LLP)).

154. Vladeck, *Court of First View*, *supra* note 149, at 536.

155. *Id.* at 538.

156. See *id.* at 536–38 (outlining three categories of tools: deciding the merits in appeals from preliminary injunctions, doing the same in emergency applications, and taking cases on the merits before the courts of appeals hear them). Some Justices have openly encouraged this practice. See *Labrador v. Poe*, 144 S. Ct. 921, 933–34 (2024) (Kavanaugh, J., concurring, joined by Barrett, J.). As to the blurred lines between the merits and shadow dockets, starting in 2021, the *Harvard Law Review's* annual report of Supreme Court statistics began tracking the Court's emergency orders—with over two pages of footnotes trying to parse the divide between the two dockets, as well as other thorny questions. The Statistics, 135 Harv. L. Rev. 491, 505–07 (2021).

Three of these tools are worth highlighting. The first is called “certiorari before judgment.”<sup>157</sup> Provided by Congress for cases of “great importance,” the power to grant cert before judgment allows the Court to hear disputes on the merits directly from trial courts, without waiting for courts of appeals to weigh in.<sup>158</sup> After going fourteen years without granting it once, Professor Vladeck emphasizes that, between 2019 and 2024, the Court granted cert before judgment a whopping twenty-one times.<sup>159</sup> As to the timing, he speculates that “the increasing use of cert before judgment could be a way of mitigating the number of major rulings the court is handing down through emergency orders.”<sup>160</sup>

A second tool is expedited briefing and oral argument. Ordinarily, parties in a case on the Court’s merits docket have months to file their briefs and prepare to argue before the Justices.<sup>161</sup> In rare cases when the parties don’t have months to wait, the Court has fast-tracked the process in a matter of weeks or days.<sup>162</sup> Previously, that only occurred on the merits docket.<sup>163</sup> Beginning in 2021, however, the Justices began ordering expedited briefing and argument in cases arising on the shadow docket.<sup>164</sup> They first did so in response to the public outcry over the Court’s late-night, unsigned, single-paragraph emergency order allowing Texas’s bounty hunter-style abortion ban to go into effect on September 1, 2021, by a vote of 5-4.<sup>165</sup> Since then, it has become, if not the norm, then no longer a rare exception.<sup>166</sup> As Professor Vladeck notes, the Court now

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157. Vladeck, Court of First View, *supra* note 149, at 544–45.

158. Michael Morley, Congressional Intent and the Shadow Docket, *Harv. L. Rev. Blog* (Jan. 24, 2020), <https://harvardlawreview.org/blog/2020/01/congressional-intent-and-the-shadow-docket> [<https://perma.cc/KUV8-3B4Y>] (internal quotation marks omitted) (quoting H.R. Rep. No. 100-660, pt. 3, at 11 (1988)).

159. Vladeck, Court of First View, *supra* note 149, at 545–47.

160. Steve Vladeck, The Rise of Certiorari Before Judgment, *SCOTUSblog* (Jan. 25, 2022), <https://www.scotusblog.com/2022/01/the-rise-of-certiorari-before-judgment/> [<https://perma.cc/QDN8-GR6Z>].

161. Generally, briefs on the merits are filed over 105 days, Sup. Ct. R. 25, and oral argument takes place at least two weeks after the respondent files their brief, Sup. Ct. R. 27.

162. Shapiro et al., *supra* note 3, § 13.2 n.3. See, e.g., *Trump v. Anderson*, 144 S. Ct. 539, 539 (2024) (mem.) (ordering expedited briefing and argument over Colorado’s exclusion of Donald Trump from the state’s 2024 electoral ballot so a decision could be reached before the deadline to print ballots).

163. Texas’s Unconstitutional Abortion Ban and the Role of the Shadow Docket: Hearing Before the S. Comm. on the Judiciary, 117th Cong. 88 (2021) (testimony of Stephen I. Vladeck, Charles Alan Wright Chair in Federal Courts, Univ. of Tex. Sch. of L.).

164. Pickup & Templin, *supra* note 16, at 9–12.

165. *Whole Woman’s Health v. Jackson*, 141 S. Ct. 2494, 2495 (2021) (emergency order green-lighting the ban); see also *Whole Woman’s Health v. Jackson* (*Whole Woman’s Health II*), 142 S. Ct. 522, 531 (2021) (expediting briefing and argument when the ban returned to the Court). For the full story, see Vladeck, Shadow Docket, *supra* note 11, at 239–40, 250–51.

166. The Court has recently ordered expedited briefing and argument through a range of procedural vehicles on the shadow docket: granting petitions for cert before judgment, e.g., *Whole Woman’s Health II*, 142 S. Ct. at 531; granting cert petitions accompanying

regularly “hustle[s] disputes onto the merits docket to avoid having to grapple with complicated legal questions on the shadow docket”—spending considerable time and effort to brief, argue, and decide them.<sup>167</sup>

A third tool is unsigned opinions in response to emergency applications for relief. Traditionally, the Court has issued two types of rulings on the shadow docket: unsigned opinions summarily reversing lower court decisions in response to cert petitions<sup>168</sup> and unsigned orders granting or denying emergency applications for relief from lower court decisions on challenges to controversial government policies.<sup>169</sup> Today, this line is blurring under the crush of emergency requests for relief in disputes over challenges to unprecedented policies enacted during the second Trump Administration. In response to these requests, the Court has begun issuing a mix of unsigned opinions<sup>170</sup> and orders<sup>171</sup>—sometimes even in the same dispute<sup>172</sup>—with no clear rationale for the distinction.

Is it a coincidence that summary reversals have declined over the same period in which these procedural changes have occurred? Perhaps. But it could also simply be that emergency orders have come to dwarf summary reversals in the Court’s shadow docket workload, as well as in the public discourse over it.<sup>173</sup> Decades ago, Justice John Paul Stevens repeatedly

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emergency applications for stays of execution, e.g., *Ramirez v. Collier*, 142 S. Ct. 1264, 1274 (2022); treating emergency applications as petitions for writs of certiorari, e.g., *TikTok Inc. v. Garland*, 145 S. Ct. 1001, 1001 (2024) (mem.); treating emergency applications as petitions for writs of certiorari before judgment, e.g., *Biden v. Nebraska*, 143 S. Ct. 477, 477 (2022) (mem.); and even by ordering argument over emergency applications themselves by issuing so-called “administrative stays” of lower-court rulings, e.g., *Trump v. CASA, Inc.*, 145 S. Ct. 1917, 1917 (2025) (mem.). Though not always with an expedited argument order, the Court deployed the move of treating emergency applications as cert petitions and then granting them seventeen times between October 2020 and December 2024. Vladeck, *Court of First View*, *supra* note 149, at 540 n.34.

167. Vladeck, *Shadow Docket*, *supra* note 11, at 251.

168. See *supra* notes 34–36 and accompanying text.

169. See *supra* note 41 and accompanying text.

170. E.g., *Dep’t of Educ. v. California*, 145 S. Ct. 966, 968–69 (2025) (per curiam) (permitting, by a 5–4 vote, the government to cancel millions of dollars in federal grants to public schools).

171. E.g., *McMahon v. New York*, 145 S. Ct. 2643, 2643 (2025) (mem.) (allowing, by a 5–4 or 6–3 vote, the Secretary of Education to fire half of her Agency’s workforce).

172. The saga over President Trump’s efforts to deport scores of Venezuelan residents whom the government alleges are part of a group known as *Tren de Aragua* is illustrative. In early April 2025, the Court issued an unsigned opinion turning away a handful of the challengers, by a 5–4 vote, because they had filed their case in the wrong court. *Trump v. J.G.G.*, 145 S. Ct. 1003, 1005–06 (2025) (per curiam). Two weeks later, the Court issued an unsigned order temporarily barring the government from deporting hundreds more of the challengers while their class action lawsuit proceeded in the correct court. *A.A.R.P. v. Trump*, 145 S. Ct. 1034, 1034 (2025) (mem.). In May, the Court issued another unsigned opinion, this time extending its temporary bar on the deportations because the government had not given the challengers proper notice. *A.A.R.P. v. Trump*, 145 S. Ct. 1364, 1367 (2025) (per curiam).

173. See *supra* section II.B.

chided his colleagues for wasting time with summary reversals.<sup>174</sup> “This Court is much too busy to spend its time correcting harmless errors,” he once wrote, for example, in dissent from one.<sup>175</sup> Maybe today’s Justices—swamped with requests for emergency relief, petitions for cert before judgment, and briefing and oral argument on tight timelines—have unintentionally come around to Justice Stevens’s point of view.

#### B. *Justice Barrett and the Six-Vote Norm*

Another explanation for the recent decline of summary reversals could be skepticism from Justice Barrett. Since her appointment to the Court, she has criticized issuing decisions without full briefing and oral argument, a critique that might impact summary reversals.

Justice Barrett’s confirmation in the fall of 2020 cemented a conservative, six-member supermajority on the Supreme Court.<sup>176</sup> That shift had begun two years earlier with the retirement of Justice Anthony Kennedy, the Court’s longtime swing vote, and his subsequent replacement by Justice Brett Kavanaugh.<sup>177</sup> Although Chief Justice Roberts enjoyed a brief period of control as the Court’s new median Justice after Justice Kennedy’s retirement,<sup>178</sup> that quickly changed after Justice Ruth Bader Ginsburg’s death on September 18, 2020.<sup>179</sup> In the throes of the COVID-19 pandemic

174. Shapiro et al., *supra* note 3, § 5.12(c).

175. *Alabama v. Pugh*, 438 U.S. 781, 782–83 (1978) (Stevens, J., dissenting).

176. Lawrence Hurley & Andrew Chung, *Barrett Finds Own Voice at Center of Conservative U.S. Supreme Court*, Reuters (July 2, 2021), <https://www.reuters.com/world/us/barrett-finds-own-voice-center-conservative-us-supreme-court-2021-07-02/> (on file with the *Columbia Law Review*).

177. Did Anthony Kennedy Just Destroy His Own Legacy?, *Politico Mag.* (June 27, 2018), <https://www.politico.com/magazine/story/2018/06/27/anthony-kennedy-legacy-supreme-court-218900/> (on file with the *Columbia Law Review*). Indeed, in public remarks a year after Justice Kennedy’s retirement, Justice Ruth Bader Ginsburg called it “the event of greatest consequence for the current [T]erm and perhaps for many [T]erms ahead.” Debra Cassens Weiss, *Ginsburg Says Kennedy’s Retirement Was ‘Event of Greatest Consequence’ for Current Term*, A.B.A.J. (June 10, 2019), <https://www.abajournal.com/news/article/justice-ginsburg-suggests-sharply-divided-decisions-will-increase-as-term-ends> [<https://perma.cc/TY2B-BYFP>]; see also Tessa Berenson Rogers, *Inside Brett Kavanaugh’s First Term on the Supreme Court*, *Time* (June 28, 2019), <https://time.com/longform/brett-kavanaugh-supreme-court-first-term/> [<https://perma.cc/TE59-5QHA>] (documenting Kavanaugh’s early, decisive impact in cases with 5-4 rulings along ideological lines).

178. Adam Liptak, *John Roberts Was Already Chief Justice. But Now It’s His Court.*, N.Y. Times (June 30, 2020), <https://www.nytimes.com/2020/06/30/us/john-roberts-supreme-court.html> (on file with the *Columbia Law Review*).

179. Justice Ruth Bader Ginsburg Passes, Justice Amy Coney Barrett Seated as Replacement, ABA (Jan. 25, 2021), [https://www.americanbar.org/groups/committees/death\\_penalty\\_representation/project\\_press/2020/year-end-2020/amy-coney-barrett-replaces-ginsburg-on-supreme-court/](https://www.americanbar.org/groups/committees/death_penalty_representation/project_press/2020/year-end-2020/amy-coney-barrett-replaces-ginsburg-on-supreme-court/) (on file with the *Columbia Law Review*) [hereinafter *Justice Ruth Bader Ginsburg Passes*]. Indeed, as observers had cautioned, the Chief’s “pivotal role on the court could be fleeting. Were President Trump able to appoint a replacement for Justice Ruth Bader Ginsburg, who is 87, . . . the chief justice would almost certainly be outflanked by a conservative majority on his right.” Liptak, *supra* note 178.

and the heat of a presidential election, President Trump nominated, and Senate Republicans rapidly confirmed, then-Judge Barrett to the Supreme Court.<sup>180</sup> At the end of her first Term, the Court seemed to have not one controlling vote, but three: the newly confirmed Justice Barrett alongside Chief Justice Roberts and Justice Kavanaugh.<sup>181</sup> This uneasy triumvirate has since remained in control of the most conservative Supreme Court in nearly a century.<sup>182</sup>

Speculation about Barrett's potential impact abounded during her rushed confirmation.<sup>183</sup> Perhaps a first for a Supreme Court nominee, she faced questions about the shadow docket. Senator Richard Blumenthal unsuccessfully sought her stance on the shadow docket during her confirmation hearing.<sup>184</sup> And before the hearing, buried in dozens of pages of written answers to 150 questions from Senator Sheldon Whitehouse, Barrett had dodged another one-off inquiry about it: "As a sitting judge," she wrote, "it would not be appropriate for me to offer an opinion on the circumstances in which the Supreme Court should resolve issues without argument or written opinions."<sup>185</sup>

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180. Justice Ruth Bader Ginsburg Passes, *supra* note 179.

181. Laura Bronner & Elena Mejia, The Supreme Court's Conservative Supermajority Is Just Beginning to Flex Its Muscles, *FiveThirtyEight* (July 2, 2021), <https://fivethirtyeight.com/features/the-supreme-courts-conservative-supermajority-is-just-beginning-to-flex-its-muscles/> [<https://perma.cc/2V5H-XHTN>].

182. Adam Liptak & Abbie VanSickle, A Triumphant Supreme Court Term for Trump, Fueled by Emergency Rulings, *N.Y. Times* (June 28, 2025), <https://www.nytimes.com/2025/06/28/us/supreme-court-trump-victories.html> (on file with the *Columbia Law Review*) (last updated June 30, 2025); Nina Totenberg, The Supreme Court Is the Most Conservative in 90 Years, *NPR* (July 5, 2022), <https://www.npr.org/2022/07/05/1109444617/the-supreme-court-conservative> [<https://perma.cc/TX4J-5JKZ>].

183. Initially, Democrats argued the Senate shouldn't consider a Supreme Court nominee before the next President was elected. Alex Woodward, Ruth Bader Ginsburg Death: Top Democrat Quotes Republican's Own Words to Demand Delay on New SCOTUS Appointment, *Independent* (Sep. 19, 2020), <https://www.independent.co.uk/news/world/americas/us-politics/bader-ginsburg-schumer-mcconnell-scotus-rbg-latest-b490830.html> [<https://perma.cc/8M56-7R2Z>]. Republican Party pressure overcame Democratic resistance, however. Rich Lowry & John McCormack, How Republicans Quickly Lined Up to Confirm a Supreme Court Nominee, *Nat'l Rev.* (Sep. 26, 2020), <https://www.nationalreview.com/2020/09/how-republicans-quickly-lined-up-to-confirm-a-supreme-court-nominee/> (on file with the *Columbia Law Review*). When it became clear that Barrett's nomination would move forward, Democrats then turned to scrutinizing her record for signs of how she might rule on hot-button issues from abortion to healthcare. Jeremy Herb & Clare Foran, Democrats Grill Barrett on Health Care and Abortion as Trump Pick Refuses to Say How She'll Rule, *CNN*, <https://www.cnn.com/2020/10/13/politics/barrett-supreme-court-hearing-day-two/index.html> [<https://perma.cc/D2BJ-EEDE>] (last updated Oct. 13, 2020).

184. Confirmation Hearing on the Nomination of Hon. Amy Coney Barrett to Be an Associate Justice of the Supreme Court of the United States, 116th Cong. (2020) (statement of Sen. Blumenthal).

185. Responses from Amy Coney Barrett, Judge, 7th Cir., to Questions for the Record by Sheldon Whitehouse, Sen. for R.I. ¶ 133 (Oct. 16, 2020), <https://www.judiciary.senate.gov/imo/media/doc/Barrett%20Responses%20to%20QFRs.pdf> [<https://perma.cc/RBG2-ENAK>] [hereinafter Barrett Senate Questionnaire].

A year into her tenure, Justice Barrett took an opportunity to revisit Senator Whitehouse's question. During the pandemic, Maine required frontline healthcare workers to be vaccinated against COVID-19.<sup>186</sup> A group of healthcare workers went to the federal courthouse in Bangor, seeking to prevent the rule from going into effect because of their religious objections to vaccines.<sup>187</sup> After failing in the lower courts, the workers turned to the Supreme Court, filing an emergency request on the shadow docket to put Maine's policy on hold.<sup>188</sup>

In *Does 1–3 v. Mills*, the Court denied that request.<sup>189</sup> Its decision, as is usually the case with emergency orders, was unsigned and unexplained. But Justice Barrett wrote separately to explain her vote in favor of Maine's new policy. In a single, brief paragraph, she stressed that requests for emergency relief on the shadow docket should turn on not only the merits of plaintiffs' claims and the balance of harms to both parties but also on "whether the Court should grant review" of the dispute if it later resurfaces on the merits docket, after lower courts have considered it in full.<sup>190</sup> "Were the standard otherwise," she continued, "applicants could use the emergency docket to force the Court to give a merits preview in cases that it would be unlikely to take—and to do so on a short fuse without benefit of full briefing and oral argument."<sup>191</sup> That concern weighed against relief in this case, Justice Barrett concluded, because it was the Court's first encounter with a novel issue.<sup>192</sup>

Justice Barrett's concern about making decisions "on a short fuse" was directed at emergency orders.<sup>193</sup> But it could apply just as easily to summary reversals. Those rulings are similarly handed down "without benefit of full briefing and oral argument."<sup>194</sup> They likewise reflect a judgment that a case is one the Court "would be unlikely to take."<sup>195</sup>

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186. *Does 1–3 v. Mills*, 142 S. Ct. 17, 18 (2021) (Gorsuch, J., dissenting).

187. Verified Complaint at 2–7, *Does 1–6 v. Mills*, 566 F. Supp. 3d 34 (D. Me. 2021) (No. 1:21-cv-00242-JDL), 2021 WL 3781097.

188. Emergency Application for Writ of Injunction at 4, *Mills*, 142 S. Ct. 17 (No. 21A90), [https://www.supremecourt.gov/DocketPDF/21/21A90/196983/20211020152710123\\_Application%20-%20Emergency%20Writ%20of%20Injunction%20Pending%20Cert%20FINAL.pdf](https://www.supremecourt.gov/DocketPDF/21/21A90/196983/20211020152710123_Application%20-%20Emergency%20Writ%20of%20Injunction%20Pending%20Cert%20FINAL.pdf) [<https://perma.cc/6NSN-B7AP>].

189. 142 S. Ct. at 17 (mem.).

190. *Id.* at 18 (Barrett, J., concurring).

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.* Though with summary reversals, the justification for not granting full review is different: The lower court's error is so clear that further briefing and argument is unnecessary to resolve the issue. Shapiro et al., *supra* note 3, § 5.12(c). But the factors for granting certiorari ordinarily do not bear on whether to grant emergency stays, either. Pickup & Templin, *supra* note 16, at 12–13; cf. *Labrador v. Poe*, 144 S. Ct. 921, 933–34 (2024) (Kavanaugh, J., concurring, joined by Barrett, J.) (arguing that they should). Whether for summary reversals or emergency orders, Justice Barrett's proposal in *Mills* that the Justices should avoid wading into disputes in which they would not grant full review

And more than a “merits preview,”<sup>196</sup> they are decisions on the merits themselves.

In light of *Mills*, Justice Barrett’s past statements take on a new meaning. Responding to Senator Whitehouse’s questionnaire before her confirmation hearing in 2020, then-Judge Barrett answered another question about the standard she would use when deciding whether a case is an “appropriate candidate for summary reversal.”<sup>197</sup> After briefly citing the Court’s Rules, Barrett demurred that she “would consider the relevant legal framework, the factual record, the arguments of the parties, and the views of [her] colleagues.”<sup>198</sup> *Mills* suggests a different approach. Far from deferring to the views of her colleagues, Justice Barrett might be willing to question their habit of summarily reversing lower court decisions without full briefing and oral argument.

Justice Barrett is not alone on the Court in criticizing the shadow docket.<sup>199</sup> Nor have her votes uniformly pumped the brakes. Professor

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“gives the Court an interesting new tool” to “sidestep difficult [shadow-docket] cases altogether.” Pickup & Templin, *supra* note 16, at 13–14. Justice Kavanaugh, in an opinion joined by Justice Barrett, has broadly endorsed using “as many tools as feasible and appropriate to make the most informed and best decision” in disputes on the shadow docket. *Labrador*, 144 S. Ct. at 933 (Kavanaugh, J., concurring, joined by Barrett, J.). And Justice Barrett could be uniquely influential on this point, given her apparent hesitancy—especially compared to Justice Kavanaugh and the Court’s three most conservative Justices—to vote to grant cert. See Josh Blackman, Justices Thomas, Alito, Gorsuch, and Kavanaugh Are Active on the Cert Docket, Reason: Volokh Conspiracy (Dec. 9, 2024), <https://reason.com/volokh/2024/12/09/justices-thomas-alito-gorsuch-and-kavanaugh-are-active-on-the-cert-docket/> [<https://perma.cc/TH6E-SEFV>] (noting that “Justice Barrett remains the most gun-shy Justice” on the certiorari docket).

196. *Mills*, 142 S. Ct. at 18 (Barrett, J., concurring).

197. Barrett Senate Questionnaire, *supra* note 185, ¶ 132.

198. *Id.*

199. Justice Kavanaugh joined Justice Barrett’s *Mills* concurrence. *Mills*, 142 S. Ct. at 17 (Barrett, J., concurring, joined by Kavanaugh, J.). He later specifically endorsed her stance that whether the Court would take a case on the merits should influence whether to grant relief requested on the shadow docket. *Labrador*, 144 S. Ct. at 931 (Kavanaugh, J., concurring) (quoting *Mills*, 142 S. Ct. at 17 (Barrett, J., concurring)). Justice Elena Kagan has been an even more strident critic of the Court’s issuing emergency orders that “make changes in the law[] without anything approaching full briefing and argument.” *Merrill v. Milligan*, 142 S. Ct. 879, 889 (2022) (Kagan, J., dissenting). Dissenting from the emergency order upholding Texas’s six-week abortion ban in September 2021—an order that Justices Barrett and Kavanaugh joined a month before *Mills*—Justice Kagan called the Court’s shadow docket behavior “unreasoned, inconsistent, and impossible to defend.” *Whole Woman’s Health v. Jackson*, 141 S. Ct. 2494, 2500 (2021) (Kagan, J., dissenting). And since *Mills*, Justice Kagan has quoted Justice Barrett’s opinion in that case when the Court declares further law through emergency orders. *Trump v. Boyle*, 145 S. Ct. 2653, 2655 (2025) (Kagan, J., dissenting, joined by Sotomayor & Jackson, JJ.) (quoting *Mills*, 142 S. Ct. at 18 (Barrett, J., concurring)). In the Texas abortion case, the reason we know that Justices Barrett and Kavanaugh both voted to uphold the state’s ban is because Chief Justice Roberts dissented alongside the Court’s three liberal Justices. *Whole Woman’s Health*, 141 S. Ct. at 2496 (Roberts, C.J., dissenting). Although he stopped short of joining Justice Kagan’s broader critique of the shadow docket, the Chief Justice did express concern for ruling on the novel Texas scheme “without ordinary merits briefing and without oral argument.” *Id.*

Vladeck has noted that the Court's rate of issuing emergency orders actually "accelerated precipitously after . . . the confirmation of Justice Amy Coney Barrett."<sup>200</sup> Her "impact was especially visible," Vladeck emphasized, "in the context of emergency orders directly blocking state policies that lower courts refused to freeze pending appeal"—the precise relief sought by the healthcare workers in *Mills*.<sup>201</sup>

The countervailing decrease in summary reversals, by contrast, took a year after Justice Barrett's confirmation to materialize.<sup>202</sup> Yet it began almost immediately after *Mills*.<sup>203</sup> If Justice Barrett soured on summary reversals a year into her tenure, it might help explain their decline.

That is especially so because, unlike emergency orders, summary reversals generally require six votes.<sup>204</sup> When it was routinely issuing summary reversals, the Roberts Court tended to do so in favor of conservative outcomes in habeas and qualified immunity cases.<sup>205</sup> With Justice Barrett on the bench, the three Justices on either end of the Court's ideological spectrum need her vote, in addition to those of Chief Justice Roberts and Justice Kavanaugh, to summarily reverse ideologically divisive rulings.<sup>206</sup> During Justice Barrett's first Term—before *Mills*, and the last in

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A year later, the Chief Justice for the first time joined an opinion that leveled a broader critique at the shadow docket. See *Louisiana v. Am. Rivers*, 142 S. Ct. 1347, 1349 (2022) (Kagan, J., dissenting, joined by Roberts, C.J.) (criticizing the Court for treating the "emergency docket" as "not for emergencies at all" but "only another place for merits determinations—except made without full briefing and argument").

200. Vladeck, *Shadow Docket*, supra note 11, at 17.

201. *Id.*

202. A blink of an eye in judicial time. In Justice Barrett's first Term, the Court issued eight summary reversals—on par with its average since the start of the Roberts Court. See supra note 6. Justice Barrett did not participate in two, issued right after her confirmation. *Taylor v. Riojas*, 141 S. Ct. 52 (2020) (per curiam); *Mckesson v. Doe*, 141 S. Ct. 48 (2020) (per curiam).

203. *Mills* was decided on October 29, 2021, one year and three days after Justice Barrett was confirmed. 142 S. Ct. at 17.

204. See supra notes 31–33 and accompanying text.

205. See supra notes 84–86 and accompanying text (illustrating this in the habeas context); supra notes 109–111 and accompanying text (demonstrating the same for qualified immunity). But cf. supra notes 120–123 and accompanying text (cataloguing concerns with qualified immunity from Justices at opposite ends of the ideological spectrum).

206. In addition, two of this Term's summary rulings in capital habeas cases both tend to show that this holds when divisive summary rulings produce imperfectly ideological lineups. In one ruling—a difficult-to-categorize summary remand without reaching the merits against a person on death row in habeas, an ideologically conservative outcome—we can't determine the precise lineup, because only Justices Thomas and Gorsuch dissented. *Hamm v. Smith*, 145 S. Ct. 9, 10 (2024) (statement of Thomas & Gorsuch, JJ.); see also supra notes 37–39 and accompanying text (explaining why, if fewer than three Justices dissent from a summary opinion, it is impossible to determine the votes). In the other ruling—a summary reversal in favor of a person on death row in habeas, an ideologically liberal outcome—Justice Alito wrote a one-paragraph concurring opinion, indicating that he might have provided a sixth vote. *Andrew v. White*, 145 S. Ct. 75, 83 (2025) (Alito, J., concurring

which the Court summarily reversed a significant number of lower court decisions—the Court issued eight summary reversals.<sup>207</sup> Three of them, nearly 40%, divided the Court 6-3 along ideological lines. Justice Barrett was in the majority of all three.<sup>208</sup>

On the Court’s merits and emergency dockets, where five votes decide cases, Justice Barrett occupies one seat on a triumvirate.<sup>209</sup> On the summary reversal docket, by contrast, she might be a lone swing vote. And if she has grown skeptical of summary reversals without briefing or argument, as her writings might suggest, it could be a factor in their recent decline.

### C. *Conservative Alignment of the Judiciary*

The previous section discussed Justice Barrett’s influence on an increasingly conservative bench as one possible explanation for the recent decline of summary reversals. But the Supreme Court is not the only court that has shifted further to the right. As both lower federal and state courts have become more conservative, the resulting alignment among all levels of the judiciary might also explain why summary reversals are suddenly scarce.

Summary reversals are reserved, in theory, for a rare scenario. According to the leading treatise on litigating before the Supreme Court, they “reflect[] the feeling of a majority of the Court that the lower court result is so clearly erroneous . . . that full briefing and argument would be a waste of time.”<sup>210</sup> Some errors are obvious,<sup>211</sup> and many summary reversals are (at least publicly) unanimous.<sup>212</sup> But as Professor Hartnett explains, the largest subset of decisions summarily reversed by the Roberts Court “are not really ‘errors’ at all,” but rather examples of “resistance” by lower courts that are “out-of-sync” with the Justices.<sup>213</sup> The bulk of these, he notes, are in habeas and qualified immunity cases.<sup>214</sup>

Professor Hartnett was writing in 2016, examining the first decade of Chief Justice Roberts’s tenure. For fifteen of the twenty-four years before

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in the judgment). Justices Thomas and Gorsuch dissented. *Id.* (Thomas, J., dissenting, joined by Gorsuch, J.). Justice Barrett was silent.

207. See *supra* note 6 (listing summary reversals in the 2020 Term).

208. See *supra* note 21.

209. See *supra* notes 181–182 and accompanying text.

210. Shapiro et al., *supra* note 3, § 5.12(a).

211. See Hartnett, Summary Reversals, *supra* note 7, at 603–05 (classifying twelve summary reversals in the first decade of the Roberts Court as interventions when lower courts were “out to lunch” and made an indisputable mistake).

212. See *supra* note 21 and accompanying text.

213. Hartnett, Summary Reversals, *supra* note 7, at 597.

214. *Id.* at 598–99. Professor Hartnett separately classifies habeas decisions in which lower courts were resistant not to Supreme Court directives themselves but to the notion that only the Supreme Court can “clearly establish” constitutional rights for purposes of the 1996 law restricting habeas relief in federal court. *Id.* at 601–03; see also 28 U.S.C. § 2254(d) (2018).

then, Democratic presidents had appointed federal judges.<sup>215</sup> The Supreme Court, which has had a majority of Republican appointees for decades,<sup>216</sup> has frequently summarily reversed courts of appeals laden with Democratic appointees.<sup>217</sup>

President Trump's election soon after Hartnett's observation ushered in a rapid transformation of the judiciary. During his first term, Trump appointed not only a third of the Supreme Court but also more federal judges than any prior recent President had in a single term.<sup>218</sup> Although President Joseph Biden broke Trump's appointment record,<sup>219</sup> he failed to shift the ideological balance of the courts of appeals or the Supreme Court, on which Trump's impact was greatest.<sup>220</sup> That balance promises to tilt further rightward in Trump's second term, the effects of which on the judiciary are only just emerging.<sup>221</sup> And there is a parallel trend in state

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215. From 1993 to 2001, President Bill Clinton appointed 203 federal judges, thirty to courts of appeals; from 2009 to 2016, President Barack Obama appointed 173, thirty to courts of appeals. Judicial Appointments Tracker, Heritage Found., <https://datavisualizations.heritage.org/courts/judicial-appointments-tracker> [<https://perma.cc/CX4U-KECD>] (last updated Oct. 16, 2025). Obama's judicial appointments ground to a halt during his last year, following Senator Mitch McConnell's refusal to consider D.C. Circuit Judge Merrick Garland's nomination to the Supreme Court in March 2016. See Charles Homans, Mitch McConnell Got Everything He Wanted. But at What Cost?, *N.Y. Times Mag.* (Jan. 22, 2019), <https://www.nytimes.com/2019/01/22/magazine/mcconnell-senate-trump.html> (on file with the *Columbia Law Review*) ("The decision not to fill the Scalia vacancy . . . [is] the most consequential thing I've ever done." (internal quotation marks omitted) (quoting Sen. McConnell)).

216. Ron Elving, How the Supreme Court's Conservative Majority Came to Be, *NPR* (July 1, 2023), <https://www.npr.org/2023/07/13/1185496055/supreme-court-conservative-majority-thomas-trump-bush> [<https://perma.cc/K3RR-5BLU>].

217. See, e.g., Diarmuid F. O'Scannlain, A Decade of Reversal: The Ninth Circuit's Record in the Supreme Court Since October Term 2000, 14 *Lewis & Clark L. Rev.* 1557, 1558–59 (2010) ("[A]pproximately one in ten Ninth Circuit cases reviewed by the Supreme Court [between the 2000 and 2009 Terms] result[ed] in a summary reversal.").

218. Gramlich, How Trump Compares, *supra* note 23.

219. Alexander Bolton, Senate Confirms 235th Biden Judge, Surpassing Trump's Record, *The Hill* (Dec. 20, 2024), <https://thehill.com/homenews/senate/5051917-biden-judges-trump-record/> (on file with the *Columbia Law Review*).

220. Trump appointed more judges than Biden (or any recent President in one term) to the courts of appeals. John Gramlich, How Biden Compares With Other Recent Presidents in Appointing Federal Judges, *Pew Rsch. Ctr.* (Jan. 9, 2025), <https://www.pewresearch.org/short-reads/2025/01/09/how-biden-compares-with-other-recent-presidents-in-appointing-federal-judges/> [<https://perma.cc/S6E5-HJNB>]. This tipped the majority of federal appellate judges from Democratic to Republican appointees, in which the balance remains. Suzanne Monyak, Liberals Face More Conservative Courts to Fight Trump Policies, *Bloomberg L.* (Nov. 6, 2024), <https://news.bloomberglaw.com/us-law-week/liberals-face-more-conservative-courts-to-fight-trump-policies> (on file with the *Columbia Law Review*).

221. Russell Wheeler, How Much Will Trump's Second-Term Judicial Appointments Shift Court Balance?, *Brookings Inst.* (May 12, 2025), <https://www.brookings.edu/articles/how-much-will-trumps-second-term-judicial-appointments-shift-court-balance/> [<https://perma.cc/5WLU-DUAW>]. As of October 16, 2025, President Trump has appointed eight more federal judges—one more than he had by that point in his first term. Judicial Appointments Tracker, *supra* note 215.

supreme courts, which, over the same period, have become increasingly Republican controlled.<sup>222</sup>

What might this mean for summary reversals? In the context of habeas and qualified immunity, the two most frequent topics of the Roberts Court's summary reversals, one purpose of these rulings has been to rein in supposedly recalcitrant lower courts.<sup>223</sup> Accordingly, if lower courts have grown stingier with post-conviction relief and more generous with qualified immunity—either because they have taken the hint and fallen in line, or because they are increasingly staffed by judges with views on these issues similar to those of the six conservative Justices—then the Supreme Court might simply have less of a need for summary reversals to send, in Professor Hartnett's words, a “corrective message . . . in the face of resistance.”<sup>224</sup>

Reality, in all likelihood, is more complicated. First, this factor might predict a more gradual decline in summary reversals, as opposed to the rapid decrease since 2021. Second, in the habeas context, it is not clear that lower courts were quite so recalcitrant before the Roberts Court's summary reversals of decisions granting post-conviction relief.<sup>225</sup> Headbutting still occurs over death sentences,<sup>226</sup> to be sure, though with

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222. Mendelson, *supra* note 24.

223. See *supra* note 86 and accompanying text. Detractors argue that summary reversal is too dismissive a way of accomplishing this goal, especially because some Justices frequently disagree that the error was clear enough to rule without full briefing and argument, or that there was an error at all. E.g., Bentele, *supra* note 84, at 35.

224. Hartnett, *Summary Reversals*, *supra* note 7, at 613. The Court's latest summary reversal in a civil rights lawsuit against federal (as opposed to state) prison officers suggests that is one area in which the Court has still felt a need to send a corrective message. *Goldey v. Fields*, 145 S. Ct. 2613, 2614 (2025) (per curiam) (stating that “[d]espite [decades of] precedents” declining to extend the right to sue federal officers over constitutional violations, “the U. S. Court of Appeals for the Fourth Circuit permitted the plaintiff here to maintain an Eighth Amendment excessive-force . . . claim for damages against federal prison officials”).

225. A 2007 study found that, after passage of the 1996 law restricting federal habeas relief, grants of habeas relief in federal court dropped precipitously: Among cases filed from 2000 to 2005, federal courts granted habeas relief to people not sentenced to death less than 0.3% of the time. Nancy J. King, Fred L. Cheesman II & Brian J. Ostrom, *Final Technical Report: Habeas Litigation in U.S. District Courts* 52 (2007), <http://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf> [<https://perma.cc/TAF7-3KSC>].

226. See *supra* notes 86, 90–92 and accompanying text. One summary reversal issued in a death penalty case in 2021, just before President Biden took office, is particularly illustrative. By a vote of 6–3, along ideological lines, the Court green-lit the execution of a man on federal death row by—for possibly the first and only time ever—granting cert before judgment to then GVR a federal district court's ruling in his favor before the court of appeals had the chance to hear the appeal. *United States v. Higgs*, 141 S. Ct. 645, 645 (2021) (mem.); see also Vladeck, *Court of First View*, *supra* note 149, at 548–50 (emphasizing how aberrant this ruling was).

decreasing frequency.<sup>227</sup> Third, in the qualified immunity context, the Court has seemingly grown hesitant to aggressively promote the doctrine—in light of public backlash,<sup>228</sup> the jurisprudential doubts of Justices Thomas and Sotomayor,<sup>229</sup> or both. This would track the curious absence of qualified immunity cases from not only the Court’s summary reversal docket<sup>230</sup> but also its merits docket, compared to the continuation of habeas cases on the latter.<sup>231</sup>

In the end, these questions might simply add another angle to the explanation. Whether because lower courts have reluctantly or willingly fallen in line with the Supreme Court on habeas and qualified immunity or because the sands of both doctrines at the Court are shifting, the recent decline of summary reversals might be an unintended consequence.

#### D. *Internalized Critiques of Error Correction*

A final factor in the recent decline of summary reversals could be that public debate over the shadow docket has convinced some Justices that they should be more hesitant to issue them. To explore that idea, this section returns to the topics discussed in Part I: the Court’s Rules, the Judges’ Bill, and the tension between error correction and law declaration.

As discussed in Part I, Supreme Court Rule 16 allows for the possibility of summary reversals, a vestige of when the Court mostly corrected errors.<sup>232</sup> Rule 16 concludes the set of the Court’s Rules describing certiorari—the legacy of the Judges’ Bill, which kickstarted the Court’s evolution from a body for correcting errors to one for declaring law.<sup>233</sup> The first Rule in this set is Rule 10, which outlines the most common reasons

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227. See Goelzhauser, *supra* note 133, at 118–19 (reporting that the number of emergency applications regarding stays of execution steadily decreased between the 2003 and 2021 Terms, in line with the concurrent nationwide decrease in state death sentences).

228. See Crocker, *supra* note 111, at 7–13 (suggesting that “the movement to reform the doctrine has gathered so much steam that even the majority-conservative Supreme Court recognizes the need for restraint, at least at the margins”); Patrick Jaicomo & Anya Bidwell, *Recalibrating Qualified Immunity: How *Tanjin v. Tanvir*, *Taylor v. Riojas*, and *McCoy v. Alamu* Signal the Supreme Court’s Discomfort With the Doctrine of Qualified Immunity*, 122 J. Crim. L. & Criminology 105, 130–35 (2022) (noting that although the Justices denied thirteen cert petitions asking them to reconsider qualified immunity in the summer of 2020, later summary rulings rolling back qualified immunity might have signaled that lower courts were taking the doctrine too far).

229. See *supra* notes 120–123 and accompanying text.

230. Curiously, however, two of the Court’s last three summary reversals were of lower court decisions that had denied qualified immunity. See *supra* note 110 and accompanying text.

231. See *supra* notes 99–101, 115–119 and accompanying text. Professor Hartnett has remarked that deciding cases on the merits docket with “full briefing and argument threatens to undermine the corrective message” sent by summary reversals “by suggesting that they—like most cases the Court selects to decide—present difficult and close issues that have divided the lower courts.” Hartnett, *Summary Reversals*, *supra* note 7, at 614.

232. See *supra* notes 27–28 and accompanying text.

233. See *supra* notes 54–56 and accompanying text.

the Court will grant a cert petition.<sup>234</sup> In many ways, these reasons are the Court's answer to the error-correction versus law-declaration debate.<sup>235</sup>

According to Rule 10, the most common reason for granting cert is to answer an "important federal question" of law that has either divided the lower courts<sup>236</sup> or demands an urgent answer.<sup>237</sup> The Rule contains two further guidelines. On the one hand, it notes that the Court may grant cert when a federal court of appeals "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power."<sup>238</sup> On the other hand, the Rule concludes: "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."<sup>239</sup>

Rules 10 and 16, then, raise a pair of important questions. If the Court views itself as a law-declaring institution, one that will not review petitions that merely "assert[] error[s]" of fact or of applying settled law,<sup>240</sup> then why summarily reverse any of these errors at all? And when has an error "so far departed from the accepted and usual course"<sup>241</sup> that, instead of ordering further briefing or argument, the Justices will simply grant cert, reverse the lower court, and move on?<sup>242</sup>

234. Sup. Ct. R. 10.

235. The essence of the Rule has remained largely unchanged since it was added to the Court's Rules in the wake of the Judges' Bill in 1925. See Robert C. Post, *The Taft Court: Making Law for a Divided Nation, 1921–1930*, at 497 n.51 (2024) (reproducing the original Rule).

236. Sup. Ct. R. 10(a)–(b).

237. Sup. Ct. R. 10(c).

238. Sup. Ct. R. 10(a). Then-Judge Barrett cited this provision of Rule 10 in response to Senator Whitehouse's question about when she would consider a case to be an appropriate candidate for summary reversal. Barrett Senate Questionnaire, *supra* note 185, ¶ 132; see also *supra* notes 197–198 and accompanying text.

239. Sup. Ct. R. 10. Indeed, *Supreme Court Practice* advises counsel for the party opposing a cert petition to do so by arguing, whenever relevant, that the petition is precisely the type proscribed by this guideline: a fact-bound request for error correction. See Shapiro et al., *supra* note 3, § 6.37(i) ("The respondent's counsel should remember that the aim is to induce the Court to deny the petition for certiorari . . . [and thus] emphasize that the decision below turns upon its own facts, and that it will affect few others besides the litigants, if that is the case.").

240. Sup. Ct. R. 10.

241. Sup. Ct. R. 10(a).

242. Indeed, *Supreme Court Practice* acknowledges the quagmire that this question poses for advocates. See Shapiro et al., *supra* note 3, § 5.12(c) ("To minimize the risk of a summary reversal . . . a respondent's counsel who reasonably fears that the decision below may be in jeopardy may feel compelled to add a substantial argument on the merits to the opposing brief. In most cases, this will turn out to be unnecessary and counterproductive." (footnote omitted)). One commentator has suggested that, because of this discrepancy, the Roberts Court's summary reversal practice has distorted both its error-correcting and law-declaring functions: the former by encouraging the Court to wade into fact-bound disagreements between federal and state courts in the name of deference to state tribunals, and the latter

Recall Justice Stevens's objection that the Court has no time for summary reversals.<sup>243</sup> That objection rested on a second premise: that summary reversals are less important than the Court's other work. "It is not appropriate for this Court to expend its scarce resources crafting opinions that correct technical errors" by means of summary reversals, Justice Stevens explained, "where the correction in no way promotes the development of the law."<sup>244</sup> In other words, Justice Stevens had answers to the two questions raised by the Court's Rules about when and why the Justices should issue summary reversals: They shouldn't, because it isn't their job.

Rather than subconsciously aligning with Justice Stevens because of the impact of the shadow docket on their workload, as section III.A suggested, might some Justices have instead come to consciously agree with him that summarily reversing errors is rarely worth their time? As section III.B explored, Justice Barrett has suggested as much for granting emergency relief in disputes that don't meet the traditional certiorari factors in Rule 10.<sup>245</sup> Justice Kavanaugh seems to agree.<sup>246</sup> And other Justices might well have reached similar conclusions about emergency orders, summary reversals, or both without publicly expressing their views.<sup>247</sup>

When it comes to summary reversals, the Justices have the option to issue them less often by denying cert petitions. For that, the Justices can thank their predecessors who drafted and lobbied for the Judges' Bill a century ago, which gave the Court discretion over most of its docket.<sup>248</sup> By contrast, as Justice Kavanaugh has noted, "When an emergency application comes to th[e] Court, [the Justices] must decide it—grant or deny."<sup>249</sup> It is an irony of the Judges' Bill that, in granting the Justices new procedural tools to shape their merits docket, it also helped pave the way for emergency applications on the shadow docket a century later.<sup>250</sup>

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by claiming to apply settled questions of law while in fact answering those questions anew without the benefit of slow, considered judgment. Alex Hemmer, *Courts as Managers: American Tradition Partnership v. Bullock* and Summary Disposition at the Roberts Court, 122 Yale L.J. Online 209, 219–23 (2013), [https://www.yalelawjournal.org/pdf/1133\\_kc9wdzv5.pdf](https://www.yalelawjournal.org/pdf/1133_kc9wdzv5.pdf) [<https://perma.cc/97GP-PUDY>].

243. See *supra* notes 174–175 and accompanying text.

244. *Anderson v. Harless*, 459 U.S. 4, 12 (1982) (Stevens, J., dissenting).

245. *Does 1–3 v. Mills*, 142 S. Ct. 17, 18 (2021) (Barrett, J., concurring); *supra* notes 189–192 and accompanying text. For further discussion of Justice Barrett's infusion of certiorari considerations into requests for emergency relief, see also Vladeck, *Shadow Docket*, *supra* note 11, at 251; Pickup & Templin, *supra* note 16, at 12–14.

246. See *supra* note 199.

247. Justices are not required, by custom, to note when they agree or disagree with unsigned dispositions such as summary reversal opinions or emergency orders. See *supra* note 37 and accompanying text.

248. See *supra* notes 53–55 and accompanying text.

249. *Labrador v. Poe*, 144 S. Ct. 921, 928 (2024) (Kavanaugh, J., concurring).

250. The Judges' Bill did more than expand the reach of certiorari; it also gave the Court two procedural powers that enable the shadow docket. The first is the power to issue stays of lower-court decisions pending the filing of cert petitions. Judiciary Act of 1925, ch. 229, § 8(d), 43 Stat. 936, 940–41 (codified as amended at 28 U.S.C. § 2101(f) (2018)). The

Forced to wade into dispute after high-profile dispute on the shadow docket, the Court is increasingly using emergency orders not merely to resolve these disputes but to declare new law. This began during the COVID-19 pandemic, when the Court transformed both death penalty and religious free exercise jurisprudence through emergency orders.<sup>251</sup> Recently, the Court did the same for administrative law, expanding the President's ability to fire federal officials.<sup>252</sup> Sustained disapproval of this

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second is the power to grant cert before judgment. Id. § 1 at 938–39 (codified as amended at 28 U.S.C. §§ 1254(1), 2101(e)). In combination with a provision of the very first Judiciary Act, these provisions allow the Court—at the request of the parties or of the Justices' own volition—to pause or erase lower court decisions temporarily restraining or reinstating government policies, temporarily restrain or reinstate those policies themselves, or bypass the lower courts altogether and issue final opinions on the merits of the policies. Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81–82 (codified as amended at 28 U.S.C. § 1651(a)); see also Vladeck, Solicitor General, *supra* note 15, at 129 (explaining how this statute, known as the All Writs Act, and the Judges' Bill interact to enable the Court's shadow-docket procedures).

251. See Alexander Gouzoules, *Clouded Precedent: Tandon v. Newsom and Its Implications for the Shadow Docket*, 70 Buff. L. Rev. 87, 91–92 (2022) (concluding that an emergency order lifting a bar on church services during the pandemic ushered in a “dramatic reinterpretation of the longstanding . . . standard” for neutral and generally applicable laws under the Free Exercise Clause); Jay Clayton, Case Note, *Willfully Blind to the Machinery of Death: The State of Execution Challenges After Barr v. Lee*, 2021 U. Chi. L. Rev. Online, <https://lawreview.uchicago.edu/online-archive/willfully-blind-machinery-death-state-execution-challenges-after-barr-v-lee> [<https://perma.cc/GVH7-FV7V>] (arguing that an emergency order green-lighting the first federal execution in nearly twenty years under the first Trump Administration, also during the pandemic, took a “step toward a total refusal to examine execution procedures for potential Eighth Amendment violations”); see also *Labrador*, 144 S. Ct. at 933 n.5 (Kavanaugh, J., concurring) (“[T]he emergency docket during the COVID-19 pandemic in essence *was* the merits docket as to certain COVID-19-related issues.”).

252. In May 2025, the Court lifted an emergency injunction barring President Trump from firing without cause members of the National Labor Relations Board and Merits Systems Protection Board, both of whose members have for-cause removal protection. *Trump v. Wilcox*, 145 S. Ct. 1415, 1415 (2025). In dissent, Justice Kagan remarked that the Court's emergency order “allows the President to overrule” *Humphrey's Executor v. United States*—a landmark decision that upheld the constitutionality of so-called independent agencies, multimember commissions whose members can only be removed by the President for cause—“by fiat.” Id. at 1419 (Kagan, J., dissenting, joined by Sotomayor & Jackson, JJ.). In July, the Court allowed the President to fire members of the Consumer Product Safety Commission over a lower-court order blocking their removal. *Trump v. Boyle*, 145 S. Ct. 2653, 2654 (2025). In September, the Court then allowed the same for a member of the Federal Trade Commission, this time taking the further step of construing the government's emergency application for relief as a petition for certiorari before judgment and setting the issue of whether to overrule *Humphrey's Executor* for oral argument this Term. *Trump v. Slaughter*, Nos. 25A264, 25-332, 2025 WL 2692050 (U.S. Sep. 22, 2025) (mem.). Again in dissent, Justice Kagan lamented that “[o]ur emergency docket should never be used, as it has been this year, to permit what our own precedent bars” or “to transfer government authority from Congress to the President, and thus to reshape the Nation's separation of powers.” Id. at \*1 (Kagan, J., dissenting, joined by Sotomayor & Jackson, JJ.). In the latest chapter of this fight, the Court deferred President Trump's request to lift a lower court order barring him from firing Federal Reserve Governor Lisa Cook—this time, Trump alleges, for cause—until after the Justices hear oral argument in the dispute in January 2026. *Trump v. Cook*, No. 25A312, 2025 WL 2784699 (U.S. Oct. 1, 2025) (mem.).

practice, from both inside and outside the Court, has led to changes in how the Court handles emergency applications.<sup>253</sup> Professor Vladeck explains that “as criticism of the Justices’ growing use of emergency applications . . . has grown, the Court has gravitated toward other means of expediting its [merits] consideration of” urgent cases.<sup>254</sup>

The same criticisms of emergency orders have been lodged against summary reversals.<sup>255</sup> When summary reversals were common, Justices routinely dissented from them “when they perceive[d]” that the rulings were “premised not on clear error correction but on” deciding a “novel, complex, or substantial constitutional question”—in other words, declaring law.<sup>256</sup> Others, like Justice Stevens, dissented when they felt the rulings did the opposite: corrected errors without declaring new law and thus wasted the Court’s time.<sup>257</sup>

This tension between summary reversals and the Court’s evolving identity is nothing new.<sup>258</sup> What is new, however, is the proliferation of criticism over the shadow docket and the parallel tension with emergency orders.<sup>259</sup> Perhaps the recent decline of summary reversals is a sign that some Justices have heeded the critiques and “gravitated toward other means”<sup>260</sup> of resolving cases.

#### CONCLUSION

Summary reversals have long been a misfit in Supreme Court practice. Nonetheless, litigants have counted on their existence, especially those in disputes over post-conviction relief for people on death row and civil rights violations by police and prison officials. If the recent decline of summary reversals holds true, it will be the latest change to the Court’s procedures in the age of the shadow docket. As with other similar changes, the Justices have provided no explanation for the decline of summary reversals. “But whatever (or whoever) is responsible for these developments,” in the words of Professor Vladeck, “the critical takeaway for present purposes is that there has been a quietly significant shift in the last few Terms not just in the shape of the Supreme Court’s docket, but in the nature of the Justices’ decisionmaking.”<sup>261</sup>

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253. Vladeck, *Court of First View*, *supra* note 149, at 540.

254. *Id.*

255. See *supra* notes 141–144 and accompanying text.

256. Shapiro et al., *supra* note 3, § 5.12(c).

257. See *supra* notes 243–244 and accompanying text.

258. See *supra* notes 59–61 and accompanying text.

259. See *supra* section II.B.

260. Vladeck, *Court of First View*, *supra* note 149, at 540.

261. *Id.* at 540–41.