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Legal Sidebar

The "Interim Docket" or "Shadow Docket": Non-Merits Matters at the Supreme Court

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Over the past decade, the U.S. Supreme Court has issued approximately fifty to eighty decisions per year in merits cases—matters that receive full briefing and oral argument—as well as thousands of orders disposing of non-merits matters. The Court's non-merits matters, or subsets of its non-merits matters, are known by various names, including the emergency docket, the shadow docket, and the interim docket. The non-merits docket encompasses a variety of matters—ranging from petitions for writs of certiorari to routine procedural motions to requests for emergency relief—that can have immediate and far-reaching practical impacts.

In recent years, the Supreme Court's non-merits decisions have attracted increasing attention from commentators and policymakers, with a particular focus on the Court's disposition of requests for emergency relief. This Legal Sidebar provides an overview of the Supreme Court's non-merits docket and the procedures that apply to non-merits matters. It briefly describes the legal and policy debate around the non-merits docket then discusses recent developments in this area. The Sidebar closes with selected considerations for Congress related to regulating procedures in non-merits matters.

Overview of Non-Merits Matters

Like all federal Article III courts, the Supreme Court decides both merits cases and an array of non-merits matters. Merits cases are what most people think of when they picture Supreme Court litigation: The parties file written briefs with the court, sometimes supplemented by briefs from non-party *amici curiae* ("friends of the court") who raise additional issues and arguments relevant to the case; the Court holds oral argument at which attorneys for the parties present their cases and answer questions from the Justices; then the Court issues a written opinion deciding the case and explaining its reasoning.

Non-merits decisions are decisions of the Court other than final opinions in argued cases. Key examples of non-merits matters at the Supreme Court include the following:

- **Petitions for writs of certiorari.** Most cases that reach the Supreme Court come via these filings, which are also known as "cert petitions." When a party seeks Supreme Court review via certiorari, the Court has discretion whether to hear the case. It declines

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to hear the vast majority of those cases, making denials of cert the most common type of order the Court issues.

- **Procedural matters.** The Court issues orders setting briefing and argument schedules. It also rules on procedural motions from litigants, such as motions to extend time, to exceed word limits in filings, or to allocate time at oral argument.
- **Emergency applications.** Emergency litigation before the Supreme Court primarily comprises requests for preliminary injunctive relief and requests to stay injunctions issued by lower courts. (Less commonly, requests may take other forms, such as an application to vacate a stay issued by a lower court. While the procedural posture in these cases differs slightly, they raise similar legal and policy considerations.)

Legal and policy debate around the non-merits docket generally focuses on the third category: emergency applications for preliminary injunctions or stays pending appeal.

As background, an *injunction* is a court order requiring a person or entity to take or not take some specific action. A court may issue a *permanent injunction* when it finally decides a case on the merits. By contrast, a *preliminary injunction* is generally issued early in litigation and serves to preserve the status quo as a case makes its way through the courts. A *stay* is a court order pausing a government action. Parties asking the Supreme Court to grant a stay pending appeal often want the Court to pause an injunction issued by a lower court while an appeal of the injunction is litigated. Courts, including the Supreme Court, may also stay other government actions such as agency actions or the execution of prisoners.

In theory, preliminary injunctions and stays pending appeal are temporary in nature, serving to preserve the status quo while cases are pending and remaining in effect only until the courts can fully consider the merits of each case. The term "interim docket" reflects the provisional nature of these orders. Parties often seek preliminary injunctions and stays pending appeal on an expedited basis, arguing that they face imminent practical harm. Thus, these requests are sometimes called "emergency matters," and this portion of the Court's non-motions docket is sometimes called the "emergency docket," though some commentators question the extent to which some of these matters are truly urgent.

Although preliminary injunctions and stays are deemed forms of temporary relief, in practice, emergency matters often arise from fast-moving events, and sometimes the federal courts are not able to consider the merits in full before the relevant events occur or the opportunity to act passes. For instance, cases related to elections or the scheduled execution of prisoners are often litigated on an emergency basis. The Court's October 2025 term has seen emergency litigation on topics including (in no particular order) National Guard deployment, congressional redistricting, citizenship and immigration policies, federal funding, and presidential control of executive agencies. In many of these cases, court-ordered relief may be ineffective or significantly less effective if delayed, so a decision to grant or deny a preliminary injunction (or a stay of a lower court's injunction) may be the last meaningful ruling in the case.

Procedures in Non-Merits Matters

The Supreme Court's usual procedures in non-merits matters differ significantly from its procedures in merits cases. As noted, in merits cases, the Court typically considers briefs and oral argument from the parties and may receive input from non-parties known as *amici curiae*. By contrast, in non-merits matters, the Court generally does not hear oral argument and receives less input from non-parties. Briefs from the parties are generally shorter than merits briefs, may be prepared on a tight timeline, and may be based on a limited factual record. In some cases, the Court does not wait for full briefing before issuing an order. While Supreme Court merits decisions are generally announced publicly on scheduled days, non-merits decisions may issue without warning and at inconsistent times, sometimes in the middle of the night.

The Supreme Court's decisions also generally take different forms in merits cases and non-merits matters. When issuing a merits decision, the Court usually publishes a written opinion that explains the majority's reasoning and identifies the Justice who authored the opinion and the Justices who joined it. (A small number of merits decisions are unsigned and are issued *per curiam*, meaning "by the court.") Justices may also file separate opinions concurring or dissenting in full or in part. Those separate opinions are signed by their authors and identify any other Justices who joined them.

By contrast, the Court frequently decides non-merits matters using summary orders. Many summary orders briefly state how matters have been resolved without explaining the legal reasoning underlying the decisions. Justices may choose to issue written opinions on non-merits matters, though such opinions have historically been relatively rare and are usually shorter than the written majority opinions in merits cases. Justices may also choose to file concurring or dissenting opinions in non-merits matters or to indicate that they dissent from a disposition without filing a separate dissenting opinion. Summary orders typically do not reveal how the Justices voted, though it may be possible to ascertain how most or all members of the Court voted based on concurrences or dissents.

Debate Over the Non-Merits Docket

Court observers generally agree that, in recent years, the Supreme Court has issued an increased number of orders on its non-merits docket that concern high-profile litigation relating to issues of public interest. The rising prominence of the non-merits docket has generated discussion on several fronts, including, in no particular order:

- **Speed.** The rapid pace of litigation on the non-merits docket can allow the Court to respond quickly in time-sensitive situations, but some raise concerns that the factual and legal records in these cases may not be fully developed. With less time to consider the issues and fewer opportunities for *amicus* participation, some worry that Justices may be less able to reach a well-reasoned decision and seek compromise or consensus when appropriate.
- **Transparency.** Beginning with the commentator who coined the term "shadow docket" more than a decade ago, some contend that the lack of noted votes and written explanations for non-merits orders may make it difficult for observers to evaluate the Court's reasoning and determine whether Justices are being consistent over time. Some note, however, that in the past few years the Court appears to be providing more explanation of its non-merits rulings than it did in the past.
- **Politicization and judicial legitimacy.** Some commentators contend that the increase in high-profile non-merits decisions may exacerbate concerns about politicization of the Supreme Court, though some believe that the Court's rulings in politically charged non-merits rulings do not differ significantly from the outcomes in merits cases. Relatedly, some note that it may undermine public confidence in the judiciary when the Supreme Court overturns precedent or sets aside a lengthy and carefully reasoned lower court decision through a brief summary order.
- **Guidance to lower courts.** Lower federal courts are bound by Supreme Court precedent, and the Supreme Court has indicated that this requirement includes an obligation to follow its non-merits decisions to the extent they indicate the likely resolution of substantive legal questions. Without comprehensive written opinions, it may be difficult for lower courts to determine how the Supreme Court's non-merits decisions should apply in other cases that present similar but distinct legal and factual questions.

The Non-Merits Docket During the 2024 and 2025 Terms

Key developments related to the non-merits docket during the Supreme Court's October 2024 and October 2025 Terms involve suits against the federal government. While emergency litigation before the Supreme Court can involve a variety of public and private parties, many recent, high-profile non-merits cases concern challenges to policies of the federal executive branch.

One significant development is the increase in the number of emergency applications filed in the Supreme Court by the second Trump Administration. Relatedly, the Justices have granted relief to the federal government in a relatively high number of cases. One commentator has identified thirty requests for emergency relief filed between January 20, 2025, and November 6, 2025. He contrasts that number with nineteen such applications filed during the four years of the Biden Administration and a total of eight such requests in the sixteen years of the George W. Bush and Obama Administrations. Of the thirty requests filed by the second Trump Administration in that time period, twenty-four were granted and two remained pending as of the date of the count. Another tracker using a different methodology identified "25 decisions on the shadow docket concerning administration actions" as of December 23, 2025. The Court ruled in favor of the federal government in twenty of those decisions and against the government in five. (These rulings are preliminary in nature, and as noted below, the government's success rate may be due in part to its selection of cases in which to file emergency appeals.)

There are several possible reasons for these changes. Some observers point to the litigation strategy of parties, particularly the federal government, filing more requests for emergency relief, though at least one commentator contends that the second Trump Administration has prevailed on many of its applications because it "has been very selective in deciding which cases to bring to the justices." Some attribute the increase in high-profile non-merits rulings at least in part to the Court itself, citing possible changes in how the Justices apply the legal test for emergency relief. Others debate whether use of the non-merits docket has been driven in part by lower courts' issuance of *nationwide injunctions*—court orders that bar the federal government from taking a certain action not only against parties to the litigation but also against anybody else. Because nationwide injunctions prevent the government from implementing an enjoined policy in its entirety, the government may be more likely to file an emergency appeal of a nationwide injunction than it would of a more limited injunction that allows the government to implement its policy as to non-parties.

To the extent nationwide injunctions have been a significant factor in the caseload on the non-merits docket, the Supreme Court's June 2025 decision in *Trump v. CASA, Inc.* may alter the relevant legal landscape. As discussed in more detail in a CRS report, the Supreme Court's decision in *CASA* imposed a new limit on nationwide injunctions but left open the possibility that courts could issue nationwide injunctions in some cases. The impact of *CASA* on federal court litigation remains to be seen, but if the decision causes lower federal courts to issue fewer nationwide injunctions, the government may have less incentive to seek emergency relief from the Supreme Court.

CASA is also of potential interest as an example of a non-merits case in which the Supreme Court departed from its usual procedures. *CASA* reached the Court when the government sought partial stays of three nationwide injunctions issued by district courts. The Supreme Court ordered responses from the parties opposing the stays, consolidated the cases, and held oral argument. One commentator noted that this was the fourth time the Court held oral argument on emergency applications since 1971. The Court ultimately decided the consolidated cases in a lengthy, signed written opinion like those that it issues in merits cases, accompanied by five concurrences and dissents. Thus, while the cases originally came to the Court as emergency matters, the Court considered and resolved them more like it would a merits case. In January 2026, the Court heard oral argument in another emergency matter, *Trump v. Cook*.

Justice Kavanaugh wrote a concurrence in *CASA* that specifically touched on the role of the Supreme Court's non-merits docket. While the majority opinion focused on the power of district courts to issue

nationwide injunctions, Justice Kavanaugh wrote separately to emphasize the role of the federal appellate courts—and particularly the Supreme Court—in determining whether a challenged law or policy will apply while a case remains pending. Justice Kavanaugh opined that "there often (perhaps not always, but often) should be a nationally uniform answer on whether a major new federal statute, rule, or executive order can be enforced throughout the United States during the several-year interim period until its legality is finally decided on the merits" and that, typically, that answer should come from the Supreme Court. He explained that "the Court's disposition of applications for interim relief often will effectively settle, *de jure* or *de facto*, the interim legal status of those statutes or executive actions nationwide" and concluded that the decision in *CASA* "will not affect this Court's vitally important responsibility to resolve applications for stays or injunctions with respect to major new federal statutes and executive actions."

In addition to Justice Kavanaugh's *CASA* concurrence, almost every current member of the Court has discussed the non-merits docket in separate opinions or public remarks. In 2024 remarks before the Eleventh Circuit Judicial Conference, Justice Thomas attributed the rise in filings on the "expedited docket" to aggressive strategies by litigants and lower courts' issuance of nationwide injunctions. He stated that emergency filings "short circuit" the Court's process and that the Court's current way of handling those matters "is not a thorough way." In a 2021 speech, Justice Alito defended the Court's practices, dismissing critiques of the handling of non-merits matters as "silly" and asserting that such criticism "feeds unprecedented efforts to intimidate the court or damage it as an independent institution."

Justice Kagan has made multiple statements about the non-merits docket. For instance, in a 2025 dissent in *Trump v. Wilcox*, she opined, "Our emergency docket, while fit for some things, should not be used to overrule or revise existing law," and objected that the majority's grant of a stay in that case amounted to doing so. In 2025 remarks before the Ninth Circuit Judicial Conference, she stated that some cases warrant emergency relief but emphasized that the Court "should be cautious" in its handling of emergency matters and should explain its reasoning in resolving them.

In a 2025 dissent in *Department of Homeland Security v. D.V.D.*, Justice Sotomayor asserted that the majority had improperly granted emergency relief to the government despite the government's "flagrantly unlawful conduct" and contended that "each time this Court rewards noncompliance with discretionary relief, it further erodes respect for courts and for the rule of law." In contrast, Justice Gorsuch authored a 2025 opinion concurring in part and dissenting in part in *National Institutes of Health v. American Public Health Association* in which he admonished the district court for failing to follow a prior non-merits decision of the Supreme Court, stating that the reasoning in such decisions "binds lower courts as a matter of vertical *stare decisis*."

In a 2024 dissent in *Ohio v. Environmental Protection Agency*, Justice Barrett wrote that the emergency docket "requires us to evaluate quickly the merits of applications without the benefit of full briefing and reasoned lower court opinions. ... Given those limitations, we should proceed all the more cautiously in cases like this one with voluminous, technical records and thorny legal questions." In a 2025 speech, Justice Barrett emphasized the interim nature of decisions on the emergency docket and said that writing full opinions in these matters "risks a lock-in effect" when the cases are fully litigated.

Justice Jackson has addressed the non-merits docket in separate opinions, including a 2025 dissent in *Trump v. Orr*, in which she opined that it "is becoming routine" for the government to seek emergency stays of lower court orders and for the Court to misapply the relevant legal standards in ruling on those requests. She criticized the majority for what she viewed as disregarding harms to private plaintiffs and "opting instead to intervene in the Government's favor without equitable justification, and in a manner that permits harm to be inflicted on the most vulnerable party."

Some lower court judges have also expressed views on the Supreme Court's handling of non-merits matters, with some supporting the Court's current practices and others raising concerns, including that the

Court's non-merits decisions may undermine public confidence in the judiciary or provide insufficient legal guidance to lower courts.

Considerations for Congress

Commentators and policymakers have proposed a number of possible reforms related to the Supreme Court's non-merits docket. The House Judiciary Subcommittee on Courts, Intellectual Property, and the Internet held a hearing on the issue in 2021.

If reforms are made, one key question is which branch of government should implement any changes. Some commentators assert that it would be most appropriate for the Court itself to address these issues out of deference to the judicial branch and to avoid any possible constitutional issues related to the separation of powers. To the extent the increasing prominence of the non-merits docket stems from the federal government's litigation strategy, the executive branch could also play a role in reform. Some commentators assert that Congress also has authority to act in this area. Judicial procedures are generally based on statutes or rules created by Congress or the courts rather than constitutional mandates, and Congress can alter those procedures through legislation.

Some recent legislative proposals would regulate Supreme Court emergency litigation directly. For example, some commentators have suggested that Congress could codify the legal test for emergency relief or enact legislation imposing more stringent standards for when the Supreme Court may overrule a lower court. A proposal from the 119th Congress, the Shadow Docket Sunlight Act of 2025 would provide in relevant part that the Supreme Court could not issue certain rulings granting or denying stays or injunctions on appeal unless it "publishes a written explanation of reasons supporting such order and indicates in writing how each participating justice voted regarding such order." The Restoring Judicial Separation of Powers Act would provide in part that "[n]o order reversing a decision of a court on appeal[ ] ... shall issue unless [the reversing] court provides to the parties a written explanation supporting such reversal, which shall be published on the website of such court." Some commentators have also proposed reforms that would apply to particular types of emergency litigation, such as death penalty cases.

Other proposals do not specifically target the Supreme Court's non-merits docket but could affect the Court's non-merits proceedings. For instance, multiple recent legislative proposals would limit the authority of lower federal courts to issue nationwide injunctions, and some commentators have advocated for such limits in part to limit the pressure on the Supreme Court to resolve emergency appeals in nationwide injunction cases. The Supreme Court's decision in *CASA* may lessen the perceived policy need for legislative limits on nationwide injunctions, but it does not render the proposals moot, because the limits on nationwide injunctions in the *CASA* decision and the legislative proposals differ in scope.

Other proposals concern forum selection. As background, plaintiffs bringing lawsuits have some flexibility in selecting the courts where their suits will proceed. They sometimes choose where to file suit based on their perceptions of how particular legal rules in certain jurisdictions might apply or how likely the judges or juries in particular courts are to rule favorably on their claims—a practice colloquially called *forum shopping*. Some commentators posit that forum shopping may drive cases to the Supreme Court on an emergency basis if plaintiffs are able to find outlier courts that are willing to enjoin federal policies, perhaps nationwide, giving the government a strong incentive to appeal. They thus assert that proposals limiting forum shopping—for example, by allowing the defendant to transfer to another forum—may reduce demand for emergency rulings from the Supreme Court. A related proposal would require a suit challenging a federal statute or policy to be litigated before a three-judge district court, potentially in a specific venue such as the District of Columbia district court.

Legislation related to the non-merits docket is just one way in which Congress might consider regulating the Supreme Court. A CRS report provides general analysis of congressional control over the Court.

Author Information

Joanna R. Lampe
Legislative Attorney

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