NOTE

CLOSETED DECISIONS: THE SILENT IMPACT OF THE SHADOW DOCKET ON LGBTQIA+ COMMUNITIES

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ABSTRACT

This Note explores how the Supreme Court's "shadow docket," its set of decisions made outside the full merits process, has increasingly shaped LGBTQIA+ rights. It focuses on three key tools: writs of certiorari, summary dispositions, and emergency relief. This Note argues that, although summary dispositions have had limited positive impact, certiorari decisions often entrench legal fragmentation, while emergency relief, with its emphasis on "irreparable harm" and the "status quo," systematically disadvantages LGBTQIA+ litigants. In doing so, the Note sheds light on how ostensibly procedural rulings are quietly but powerfully shaping constitutional protections.

I. INTRODUCTION

The "shadow docket," a term coined by Professor Will Baude and popularized by Professor Stephen Vladeck, refers to the substantial portion of the Supreme Court's work that occurs outside its well-known merits docket.[1] Unlike full merits decisions, these rulings are often issued without detailed explanation, yet can carry significant legal consequences.[2] This Note focuses on three key

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1. STEPHEN I. VLADECK, THE SHADOW DOCKET: HOW THE SUPREME COURT USES STEALTH RULINGS TO AMASS POWER AND UNDERMINE THE REPUBLIC xii (2023).

2. *Id.*

mechanisms of the shadow docket: *first,* writs of certiorari, through which the Court chooses whether to review lower court decisions; *second,* summary dispositions, where the Court affirms or reverses lower court rulings with precedential effect but typically without written opinion; and *third,* emergency relief, where the Court intervenes mid-litigation to suspend or enforce lower court rulings during the appeals process.[3]

The shadow docket has grown increasingly consequential, particularly in cases affecting the LGBTQIA+ community. During the October 2020 term, the Court issued only 56 signed decisions, despite receiving 5,307 certiorari petitions and 66 applications for emergency relief.[4] As Professor Vladeck explains, "quantitatively, at least, the shadow docket made up almost 99% of the Court's actual decisions."[5] Twenty-four emergency applications were granted that term, including several from the Trump administration which continued its aggressive approach to executive power and against LGBTQIA+ rights.[6] From banning transgender individuals from military service to stripping gender-affirming care from federal health programs, these actions triggered a wave of litigation, much of which has already or may soon reach the Court.[7]

State and local governments have followed suit, proposing or enacting hundreds of anti-LGBTQIA+ measures, such as restricting gender-affirming care, redefining legal sex to exclude transgender individuals, and censoring inclusive curricula.[8] As of September 7, 2025, federal judges had issued more than 40 injunctions or restraining orders against the executive branch,[9] and the ACLU has identified 604 active anti-LGBTQIA+ bills in state legislatures.[10] Many of the legal challenges to these policies are winding their way through the courts and may reach the Supreme Court via the shadow docket.[11]

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3. *Id.* at 63, 87, 123.

4. *Id.* at 11–12.

5. *Id.* at 12.

6. *Id.*; Ricardo Martinez, *Making Sense of the Trump Administration's Anti-LGBTQ+ Executive Orders*, GLAD LAW (Feb. 4, 2025), https://perma.cc/Z4WY-2U8U. *See, e.g.,* Exec. Order No. 14,168, 90 Fed. Reg. 8615 (Jan. 20, 2025) (directing government branches to halt actions that affirm a transgender person's gender identity, such as issuing accurate passports or covering gender-affirming care); Exec. Order No. 14,183, 90 Fed. Reg. 8757 (Jan. 27, 2025) (banning transgender individuals from openly serving in the Armed Forces); Exec. Order No. 14,187, 90 Fed. Reg. 8771 (Jan. 28, 2025) (directing medical professions to "not fund, sponsor, promote, assist, or support" life-saving gender-affirming procedures for transgender adolescents).

7. *See, e.g.,* Talbott v. United States, 775 F. Supp. 3d 283 (D.D.C. 2025) (issuing a preliminary injunction halting enforcement of President Trump's executive order banning transgender military service members after a lawsuit was filed by GLAD); PFLAG Inc. v. Trump, No. 25-cv-00337 (D. Md. Mar. 4, 2025) (granting plaintiffs' motion for preliminary injunction after a lawsuit was filed by the ACLU, Lambda Legal, and others, and enjoining the U.S. Dep't of Health & Human Servs. from withholding funds from medical providers providing gender-affirming medical treatments to minors).

8. *Anti-LGBTQ Bills*, ACLU (last visited Sep. 7, 2025), https://perma.cc/E3UB-P7FU [hereinafter ACLU Anti-LGBTQ Bills].

9. Jordan Rubin, *Incensed over Legal Losses, Trump Asks Supreme Court to End "Interbranch Power Grab,* MSNBC (Mar. 25, 2025), https://perma.cc/UF6R-ZZ48.

10. *Anti-LGBTQ Bills*, *supra* note 8.

11. *See, e.g.*, Labrador v. Poe, 144 S. Ct. 921 (2024).

This Note begins to fill a gap in scholarship by analyzing how each of the shadow docket's tools has shaped, and continues to shape, LGBTQIA+ rights. First, it argues that the Court often uses the writ of certiorari strategically, both to delay and to lay groundwork for future resolution of LGBTQIA+ issues, a dynamic that allows favorable lower court decisions to stand but exacerbates legal fragmentation. Second, it turns to summary dispositions, explaining why their marginal role in LGBTQIA+ jurisprudence has largely worked to the community's benefit. Finally, it scrutinizes the Court's emergency relief jurisprudence and concludes that its criteria, particularly its focus on "irreparable harm" and preserving the "status quo," tend to disfavor LGBTQIA+ litigants living under harmful pre-litigation conditions. While the dynamics explored in this Note may parallel the Court's treatment of other marginalized groups or contentious policy areas, the interaction between the shadow docket and LGBTQIA+ rights is uniquely revealing; it exposes how procedural discretion can simultaneously obscure and shape substantive equality, particularly in moments of legal and political backlash.

II. DENIALS OF CERTIORARI

A. UNDERSTANDING CERTIORARI

Although certiorari denials affect a wide range of litigants, their impact on LGBTQIA+ rights is particularly pronounced: where lower court protections are both vital and vulnerable, the Court's silence can function either as quiet endorsement or strategic delay, with little accountability.[12] The Supreme Court's authority to hear cases—its jurisdiction—comes in two forms: original jurisdiction and appellate jurisdiction.[13] Original jurisdiction refers to cases that the Supreme Court hears first, without any prior ruling from a lower court.[14] In some situations, this jurisdiction is exclusive, meaning only the Supreme Court can hear the case,

12. *See, e.g.*, Gloucester County School Board v. Grimm, 141 S. Ct. 2878 (2021) (denying certiorari in a case on a transgender student's right to use the bathroom that matched their gender identity).

13. Article III of the Constitution prescribes the Supreme Court's jurisdiction and, by extension, Congress' ability to modify it – whether by expanding, limiting, or eliminating certain aspects. Section One creates "one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1. This solidifies the Supreme Court's judicial power as self-enabling and provides Congress the power, as it subsequently exercised through the Judiciary Act of 1789, to create a broader federal court system. An Act to Establish the Judicial Courts of the United States, ch. 20, 1 Stat. 73, 80–81 (1789) [hereinafter "Judiciary Act of 1789"].

14. STEPHEN M. SHAPIRO, KENNETH S. GELLER, TIMOTHY S. BISHOP, EDWARD A. HARTNETT & DAN HIMMELFARB, SUPREME COURT PRACTICE, § 2.1 n.1 (11th ed. 2019). Section Two of Article III of the Constitution delineates the Supreme Court's original and appellate jurisdiction, categorizing the former as "all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall have a party," and the latter as "all the other cases before mentioned," which includes "all cases, in law and equity, arising under the Constitution, the laws of the United States, and treatises made." U.S. CONST. art III, § 2, cl. 2. (Other categories of appellate jurisdiction include "all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State,—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."U.S. CONST. art III, § 2, cl. 1.)

while in others, it is shared with lower courts.[15] In contrast, and most relevant to this Note, appellate jurisdiction enables the Supreme Court to review decisions made by lower courts.[16] While the Court is occasionally *required* to take up such cases, it more commonly exercises discretion in choosing to hear them.[17] The majority of the Supreme Court's docket consists of cases it selects for review through the certiorari process under its appellate jurisdiction.[18]

The Supreme Court did not always have the discretion to choose which cases it would hear.[19] Under the Judiciary Act of 1789, which established the lower district and circuit courts, Congress granted the Supreme Court mandatory appellate jurisdiction, requiring it to hear every appellate case properly brought before it.[20] Over time, this arrangement became untenable.[21] The post-Civil War expansion of the federal government and the adoption of the Reconstruction Amendments led to a surge in litigation, dramatically increasing the Court's caseload and backlogging the Court.[22] In response, Congress passed the Evarts Act of 1891, which limited the Court's mandatory appellate jurisdiction to specific types of circuit court decisions.[23] This legislation gave the Supreme Court newfound and broad discretion over its appellate docket, including the authority to issue writs of certiorari.[24] Through a series of subsequent Judiciary Acts, Congress gradually reduced the Supreme Court's mandatory appellate jurisdiction.[25] With the passage of the Supreme Court Case Selections Act of 1988, Congress mostly eliminated it altogether, granting the Court broad discretion over its docket and relieving it of most obligations to review lower court decisions.[26] The Supreme Court's docket has shrunk in size as its discretion has expanded.[27]

In all its legislation narrowing the Court's mandatory appellate jurisdiction, and thereby strengthening the Court's plenary discretion, Congress has never specified what criteria governs the Supreme Court's consideration of petitions for

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15. SHAPIRO, GELLER, BISHOP, HARTNETT & HIMMELFARB, *supra* note 14, at § 2.1. *See also* Judiciary Act of 1789.

16. SHAPIRO, GELLER, BISHOP, HARTNETT & HIMMELFARB, *supra* note 14, at § 2.1.

17. *Id.*

18. *Supreme Court Procedures*, UNITED STATES COURTS, https://perma.cc/V63S-VSRC (last visited Sep. 28, 2025).

19. SHAPIRO, GELLER, BISHOP, HARTNETT & HIMMELFARB, *supra* note 14, at § 2.1.

20. *Id. See* Judiciary Act of 1789, *supra* note 13.

21. SHAPIRO, GELLER, BISHOP, HARTNETT & HIMMELFARB, *supra* note 14, at § 2.1.

22. VLADECK, *supra* note 1, at 37–39.

23. *Id.* at 39.

24. *Id.*

25. *Id.* at 40–42. *See, e.g.*, An Act to Amend the Judicial Code, ch. 229, 43 Stat. 936, 937–38 (1925); An Act to Improve the Administration of Justice by Providing Greater Discretion to the Supreme Court in Selecting the Cases it Will Review, Pub. L. 100-352, 102 Stat. 662 (1988).

26. An Act to Improve the Administration of Justice by Providing Greater Discretion to the Supreme Court in Selecting the Cases it Will Review, Pub. L. 100-352, 102 Stat. 662 (1988).

27. WILLIAM BAUDE, JACK GOLDSMITH, JOHN F. MANNING, JAMES E. PFANDER, & AMANDA L. TYLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 97 (7th ed. 2023) (outlining the percentage of cases submitted to the Supreme Court per decade where review was granted: 5.0% in 1970, 4.4% in 1980, 2.6% in 1990, 1.3% in 2000, 1.2% in 2010, and 1.4% in 2020).

certiorari. Rather, Supreme Court Rule 10, a non-binding internal rule that outlines general "considerations" for granting certiorari, is one of the only indications of what guides the Supreme Court in its broad discretion.[28] Rule 10 states that certiorari "will be granted only for compelling reasons" and provides illustrative examples, such as splits among circuit courts, state court decisions that conflict with significant federal law, and cases involving important federal questions that the Supreme Court has not yet addressed.[29] Furthermore, conventional wisdom—but never definitively confirmed—is that a petition for certiorari is granted where four justices vote in approval, dubbed "The Rule of Four."[30] This is a device by which the minority can impose on the majority a question that the majority does not think it appropriate to address.[31] However, this only commits the Court to an extended look at the case and does not compel them to ultimately vote on the merits: the Court can still dismiss the case as improvidently granted after affording cert.[32]

In this Section, I argue that the Supreme Court strategically uses denials of certiorari to shape the trajectory of LGBTQIA+ issues in at least three ways. First, by declining to hear certain cases, the Court can intentionally leave an issue to be resolved at the state level while public and judicial attitudes ripen. Second—and closely related—the Court can delay addressing contentious questions by waiting for what it perceives as the "ideal" case or plaintiff, thereby exercising control over the timing and framing of its intervention. Third, certiorari denials can be a double-edged sword to LGBTQIA+ litigants: while lower court rulings might provide more favorable outcomes than those likely to result from the Supreme Court, the Supreme Court's abstention forces plaintiffs to navigate stratified and uncertain conditions between states.

B. THE CASE STUDY OF MARRIAGE EQUALITY

In *The Shadow Docket*, Professor Stephen Vladeck uses *Obergefell v. Hodges* to illustrate how the Supreme Court can "decide without deciding."[33] He challenges the common belief that the Court first addressed same-sex marriage in its landmark 2015 decision. In reality, the Court had repeatedly declined to hear cases on the issue, allowing lower court rulings to stand.[34] By the time the Court finally took up *Obergefell*, same-sex marriage was already legal in thirty-seven states (and in the District of Columbia and Guam).[35] Of those, eleven had

28. *See* Sup. Ct. R. 10 (2019) (naming "compelling reasons" for granting certiorari, while acknowledging these reasons are "neither controlling nor fully measuring the Court's discretion").

29. *Id.*

30. Winston Bowman, *The Supreme Court's Rule of Four*, FED. JUD. CTR., https://perma.cc/8KY2-KT96.

31. *Id.*

32. Michael E. Solimine & Rafael Gely, *The Supreme Court and the Sophisticated Use of DIGs*, 18 SUP. CT. ECON. REV. 155, 155 (2010).

33. VLADECK, *supra* note 1, at 61.

34. *Id.* at 62.

35. *Id.* at 61.

legalized it through legislation or constitutional amendments, and eight through state court decisions interpreting their constitutions to require marriage equality.[36] As Professor Vladeck explains, the Supreme Court's inaction via its use of the shadow docket had effectively legalized same-sex marriage in the remaining eighteen states:

> In each of those [eighteen] states, same-sex marriage became legal thanks to lower federal court rulings striking down marriage bans. A handful of states refused to appeal those rulings, allowing marriage equality by default. Most attempted to persuade the Supreme Court to take up their appeals of the lower-court decisions, and the justices refused. Those refusals then allowed the lower-court rulings to go into effect, clearing the way for same-sex partners to marry in those states, sometimes within hours of the Supreme Court's "denial of certiorari."
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> Thus, by the time *Obergefell* was decided, the Supreme Court had effectively legalized same-sex marriage in more states than its far-more-visible (and far-more-controversial) ruling in *Obergefell* would . . . .[37]

The Supreme Court's repeated denials of certiorari in same-sex marriage cases yield minimal records, underscoring the sweeping influence of the shadow docket. Although it would take years before the Court formally recognized a constitutional right to marriage equality nationwide, its earlier refusals to hear appeals effectively extended same-sex marriage rights to numerous states. Yet, this gradual shift came with little explanation—the Court's reasoning remained opaque, despite evolving over time.

One consequence of this dynamic is that the Court implicitly shapes which plaintiffs become central to constitutional memory. Despite the shared goals of earlier litigants, it is *Obergefell v. Hodges* that has become synonymous with marriage equality. This often discards the groundbreaking efforts of litigants like Jack Baker and Michael McConnell, who, in 1970, became the first same-sex couple in the United States to apply for a marriage license.[38] In 1972, they were also the first to have their marriage equality claim declined by the Supreme Court.[39]

When John Baker first asked Michael McConnell to enter a committed relationship, McConnell agreed—on one condition: only if they could be legally married.[40] At the time, no state recognized same-sex marriage, and the mainstream equality movement was largely centered on second-wave feminism and the rights of married women in the home.[41] However, when Baker enrolled in law school at

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36. *Id.* at 61–62.
37. *Id.* at 62.
38. Erik Eckholm, *The Same-Sex Couple Who Got a Marriage License in 1971*, N.Y. TIMES (May 16, 2015), https://perma.cc/4XH7-NWU5.
39. *Id.*
40. *Id.*
41. *See Same-Sex Marriage, Stay by State*, PEW RSCH. CTR. (June 26, 2015), https://perma.cc/7SQA-DB5T.

the University of Minnesota, he discovered that the state's marriage statutes did not explicitly mention gender.[42] Upon being denied a marriage license at the county court, the couple sued the County, arguing that because Minnesota's marriage laws did not expressly prohibit marriage between two individuals of the same sex, the county was legally required to issue the license.[43]

The District Court ruled that the clerk was not required to issue a marriage license to Baker and McConnell and specifically directed that a license not be issued to them, likely reflecting how inconceivable their claim seemed at the time.[44] Undeterred, the couple appealed to the Minnesota Supreme Court, which unanimously rejected their constitutional argument in October 1971.[45] They then brought their case to the U.S. Supreme Court in *Baker v. Nelson*, urging it to consider the issue of same-sex marriage—a full 45 years before the Court would ultimately affirm that right.[46] On October 10, 1972, the Supreme Court denied certiorari with a single sentence: "The appeal is dismissed for want of a substantial federal question."[47] This brief dismissal preserved the status quo in Minnesota, permitting the state's ban on same-sex marriage to stand for another 41 years until the state legislature legalized marriage equality in May 2013.[48]

While the Supreme Court's reason for repeatedly denying certiorari in cases involving marriage equality likely evolved over time and across contexts, the Court offered no explanation. Consistently and without commentary, the Court declined to intervene—yet these refusals progressively had the effect of instituting marriage equality across the country as legislative and judicial beliefs evolved. In *Hollingsworth v. Perry*, the Court declined to hear a challenge to California's Proposition 8, a ballot initiative banning same-sex marriage after the state had legalized it.[49] The Court dismissed the case, ruling that the petitioners lacked standing to appeal the lower court's decision striking down the ballot.[50] In 2014, the Supreme Court similarly denied certiorari in *Kitchen v. Herbert,* Utah's appeal of a Tenth Circuit decision that invalidated the state's same-sex marriage ban.[51] The Court offered only one sentence: "Petition for writ of certiorari to the

42. Eckholm, *supra* note 38.

43. *See id.*; Baker v. Nelson, 191 N.W.2d 185, 186 (Minn. 1971).

44. *Id.* at 185.

45. *Id.*

46. *See id.*; Obergefell v. Hodges, 576 U.S. 644 (2015) (establishing the constitutionality of marriage equality).

47. Baker v. Nelson, 409 U.S. 810, 810 (1972).

48. Emma Margolin, *Marriage equality in Minnesota: A gay-rights victory in the Midwest*, MSNBC (May 13, 2013), https://perma.cc/CJ2T-BN5X. While depicted as a summary dismissal (to be explained in further detail in the subsequent section), the Court's dismissal at the time reflected the belief that, along with the absence of federal statutory protections, there could be no constitutional ground to gay marriage that would warrant the Supreme Court's intervention. It was likely so inconceivable that the courts did not even consider that they had the discretion to hear such a claim. For this reason, the dismissal could very well be viewed as a denial of certiorari based on the Supreme Court's implicit value judgments.

49. Hollingsworth v. Perry, 570 U.S. 693 (2013).

50. *Id.* at 693.

51. Kitchen v. Herbert, 755 F.3d 1193 (10th Cir. 2014), *cert. denied*, 574 U.S. 874 (2014).

United States Court of Appeals for the Tenth Circuit denied."[52] The Court followed the same pattern in subsequent cases from Virginia, Indiana, Oklahoma, and Wisconsin, each of which challenged federal appellate rulings striking down their respective marriages.[53]

In each of these cases, the U.S. Supreme Court effectively legalized same-sex marriage in the affected states—without offering a single word on the merits. This pattern raises a pressing question: If the Court was prepared to affirmatively recognize marriage equality just one year later in *Obergefell v. Hodges*, why did it decline to hear the earlier cases? What distinguished the plaintiffs in Oklahoma, Virginia, Wisconsin, and Indiana from those in *Obergefell*? And why were their claims deemed unworthy of resolution by the Court at that time?

One possible explanation for the Court's shift is the passage of the time: that the year between the Supreme Court's denial of certiorari in October 2014 and its decision in *Obergefell* brought about greater societal and judicial acceptance of same-sex marriage. But that theory is contestable. Even before the Court declined to take up those earlier cases, the nation's socio-legal momentum towards marriage equality was well underway. In June 2013, in *United States v. Windsor,* the Supreme Court struck down Section 3 of the Defense of Marriage Act (DOMA), federal legislation that defined marriage as a union between one man and one woman, on Fifth Amendment grounds.[54] *Windsor* centered state law in the national debate, increasing challenges to remaining state bans. The following summer, in June 2014, the White House extended Family Medical Leave Act benefits to *married* same-sex couples, a policy shift that both implemented *Windsor* and increased the practical stakes of marital rights.[55] Around the same time, the Presbyterian Church voted to permit its ministers to perform same-sex weddings in states where they were legal, signaling growing religious acceptance.[56]

In the months after the Court's denial of certiorari, several more courts struck down state marriage bans, including a federal judge in Arizona later in October

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52. *Id.*

53. *See* Bostic v. Schaefer, 760 F.3d 352 (4th Cir. 2014), *cert. denied*, 547 U.S. 875 (2014) (denying certiorari against Virginia's appeal of the Fourth Circuit's decision striking down Virginia's same-sex marriage ban) ("Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied."); Baskin v. Bogan 766 F.3d 648 (7th Cir. 2014), *cert. denied*, 574 U.S. 876 (2014) (denying certiorari of Indiana's appeal of a Seventh Circuit decision striking down Indiana's same-sex marriage ban); Bishop v. Smith, 760 F.3d 1070 (10th Cir. 2014), *cert. denied*, 574 U.S. 875 (2014) (denying certiorari against Oklahoma's appeal of the Tenth Circuit's decision against the state's same-sex marriage ban); Wolf v. Walker, 766 F.3d 648 (7th Cir. 2014) (combined in the Seventh Circuit with Indiana's challenge to their same-sex marriage ban), *cert. denied*, 574 U.S. 876 (2014) (denying certiorari against Wisconsin's appeal of the Seventh Circuit's decision against the state's same-sex marriage ban).

54. United States v. Windsor, 570 U.S. 744 (2013).

55. Bill Chappell, *Married Same-Sex Couples To Receive More Federal Benefits*, NPR (June 20, 2014), https://perma.cc/PU89-G2V8.

56. Dana Ford, *Presbyterians vote to allow same-sex marriage*, CNN (June 25, 2014), https://perma.cc/MG6A-Y798.

2014[57] and a federal judge in South Carolina in November 2014.[58] But then came a major disruption: In November 2014, the Sixth Circuit broke from every other appellate court that had considered the issue, upholding bans in Michigan, Ohio, Kentucky, and Tennessee.[59] This circuit split created the direct legal conflict that ultimately compelled the Supreme Court to act in *Obergefell*.

The facts of *Obergefell v. Hodges* are more universally well-known than the denied cases. *Obergefell* involved laws in Michigan, Kentucky, Ohio, and Tennessee, which, like those in the denied cases, entrenched marriage as a union between one man and one woman.[60] However, unlike the denied cases, all of which appealed circuit rulings *against* same-sex marriage bans, the Court of Appeals for the Sixth Circuit in *Obergefell* upheld the ban. Departing from other circuits, the Sixth Circuit found that the Constitution did not confer upon a State an obligation to license or recognize same-sex marriages.[61] Therefore, in addition to the newfound presentation of a circuit split, the Court might have been less compelled to *affirm* a lower court ruling it deemed correct than it was to *intervene* where a lower court answered the question wrongly. After all, this would present a "compelling reason" for granting certiorari under Rule 10: "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter."[62]

Taken together, the Supreme Court's treatment of certiorari in marriage equality cases reveals the immense, and often unacknowledged, power of judicial silence. By declining to review appeals, the Court effectively shaped the legal and political landscape of marriage equality, all while avoiding the controversy of a definitive ruling. While this quiet facilitation often benefited LGBTQIA+ individuals, it also entrenched ambiguity and diminished the visibility of early plaintiffs whose bravery helped lay the groundwork for later victories. The Court wielded the shadow docket not just to delay engagement, but to write history – "to decide without deciding" which claims were worthy of recognition and when the state-delegated issue was "ripe" enough for their intervention.[63]

C. GATEKEEPING THROUGH CERT

Beyond *Obergefell*, denials of certiorari have enabled the Court to more carefully select cases that can more securely meet their ends. *Arlene's Flowers v. Washington* illustrates this theory. The case involved a florist who refused to

57. Bill Mears, *Judge rules Arizona's same-sex marriage ban unconstitutional*, CNN (Oct. 17, 2014), https://perma.cc/28BC-7HPU.

58. John Newsome & Lindsey Knight, *Federal court overturns South Carolina same-sex marriage ban*, CNN (Nov. 26, 2014), https://perma.cc/8A53-PBC3.

59. Joshua Berlinger, *Court upholds 4 same sex marriage bans; will Supreme Court review?*, CNN (Nov. 6, 2014), https://perma.cc/RP8M-3ZTT.

60. *See* Obergefell v. Hodges, 576 U.S. 644, 655–56 (2015).

61. *Id.* at 656.

62. Sup. Ct. R. 10 (2019).

63. *See generally* VLADECK, *supra* note 1.

provide flower arrangements to a same-sex couple planning their wedding, citing herreligious beliefs.[64] The couple sued the florist under the Washington Law Against Discrimination and previous court decisions, which had held that businesses open to the public may not violate anti-discrimination laws, even if on behalf of their religious beliefs.[65]

If this fact pattern sounds familiar, it is likely because it mirrors that of *303 Creative LLC v. Elenis,* a case decided on the Supreme Court's merits docket in 2023. *303 Creative* held that a similar anti-discrimination law in Colorado could not compel a website designer to create a website on behalf of a same-sex couple if it violated her religious beliefs.[66] However, these cases are different in two crucial ways. First, when *Arlene's Flowers* made it to the Supreme Court, the Supreme Court of Washington's petition for the writ of certiorari was granted, but its judgment was vacated and the case remanded for further consideration due to the Court's then-recent ruling in *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission*.[67] *Masterpiece Cakeshop* held that the Colorado Civil Rights Commission violated the First Amendment when it issued a cease-and-desist order against a cake shop that refused, based on their religious values, to sell a wedding cake to a same-sex couple.[68] The case involved a similar state anti-discrimination statute as Washington's in *Arlene's Flowers* but the Court did not resolve the question of whether businesses could refuse services to same-sex couples on free speech or religious grounds. In *Masterpiece Cakeshop,* it was sufficient for the Court to find that the Commission had shown "religious hostility" to the Cakeshop and thereby violated their First Amendment in that way.[69] In 2021, however, the Court denied certiorari of a rehearing on *Arlene's Flowers* after the Supreme Court of Washington reaffirmed that the state's anti-discrimination law, as applied to the flower shop, did not violate First Amendment protections.[70] In 2023, however, the Court granted certiorari in *303 Creative*.[71]

In addition to not getting its day in the Supreme Court, *Arlene's Flowers* differs from *Masterpiece Cakeshop* and *303 Creative* in that it was simply a weaker case.[72] When the Supreme Court ultimately addressed whether the First

64. *Arlene's Flowers et al. v. Washington et. al*, ACLU (Nov 22, 2021), https://perma.cc/H8XB-KKAH.

65. *Id.*

66. 303 Creative LLC v. Elenis, 600 U.S. 570 (2023).

67. Arlene's Flowers, Inc. v. Washington, 585 U.S. 1013 (2018) ("On petition for writ of certiorari to the Supreme Court of Washington. Petition for writ of certiorari granted. Judgment vacated, and case remanded to the Supreme Court of Washington for further consideration in light of *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Comm'n*, 138 S.Ct. 1719 (2018).").

68. Masterpiece Cakeshop v. Colo. Civ. Rts. Comm'n, 584 U.S. 617 (2018).

69. *Id.* at 625.

70. Arlene's Flowers, Inc. v. Washington, 141 S. Ct. 2884 (2021) ("Petition for writ of certiorari to the Supreme Court of Washington denied. Justice Thomas, Justice Alito, and Justice Gorsuch would grant the petition for writ of certiorari.") (denying certiorari of *State v. Arlene's Flowers, Inc.,* 193 Wash. 2d. 469 (2019)).

71. *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023).

72. *See Arlene's Flowers*, 141 S. Ct. 2884 (2021) (mem.).

Amendment exempts certain religious objectors from compliance with state anti-discrimination laws, it did so in the context of website design.[73] A central question in *303 Creative* was whether the services provided by the business constituted "expressive conduct" involving speech.[74] That threshold determination was critical: only if the conduct was expressive could the Court conclude, as it did, that compelling the business to engage in such speech violated the First Amendment.[75] In contrast, the floral arrangements in *Arlene's Flowers* were less likely to be categorized as expressive conduct: they are perceived as decorative rather than communicative. This distinction may have influenced the Court's denial of certiorari in *Arlene's Flowers*. Still, the denial was accompanied by a note that Justices Thomas, Alito, and Gorsuch, three members of the majority in *303 Creative*, would have granted review, suggesting that partisan alignment, or timing, may have also played a role in the decision to deny cert.[76] The bottom line is that the commonplace absence of explanation around certiorari decisions gives broad discretion for the Supreme Court to stage its issues, and leaves many questions unanswered.

D. THE EFFECT OF DENIALS OF CERTIORARI ON LGBTQIA+ ISSUES

While federal circuit courts vary in their approaches, many are more progressive than the Supreme Court – both in political composition and in their willingness to issue broad rulings affirming equal rights. For this reason, the Supreme Court's denial of certiorari has often preserved favorable appellate decisions, where its intervention might have curtailed those protections. This is particularly relevant in cases involving transgender rights. For instance, in *Doe v. Boyertown Area School District*, the Court declined to review a Third Circuit ruling that upheld a school policy allowing transgender students to use facilities consistent with their gender identity, rejecting claims of privacy violations by cisgender students.[77] Similarly, in *Gloucester County School Board v. Grimm*, the Court let stand a Fourth Circuit decision finding that denying a transgender student access to the bathroom of his gender identity violated both Title IX and the Equal Protection Clause.[78]

However, the Supreme Court's silence carries significant consequences. In *Boe v. Marshall,* for example, the plaintiffs petitioned the Supreme Court for review of an Eleventh Circuit decision that had upheld Alabama's ban on gender-affirming care. [79] At the time, a clear circuit split had already emerged: the Eighth Circuit, in *Brandt v. Rutledge,* had struck down a similar ban in Arkansas, finding that it violated parents' substantive due process rights and constituted discrimination based on transgender status under the Equal Protection Clause.[80] As a result,

73. *303 Creative LLC*, 600 U.S. 570.
74. *Id.* at 600.
75. *Id.*
76. See Arlene's Flowers, 141 S. Ct. 2884 (2021) (mem.).
77. Doe v. Boyertown Area Sch. Dist., 139 S. Ct. 2636 (2019) (mem.) (denying cert.).
78. Gloucester Cnty. Sch. Bd. v. Grimm, 141 S. Ct. 2878 (2021) (mem.) (denying cert.).
79. *Boe v. Marshall,* GLAD LAW (2024), https://perma.cc/938Z-RFZR.
80. Brandt ex rel.Brandt v. Rutledge, 47 F.4th 661 (8th Cir. 2022).

the constitutionality of gender-affirming care bans varied by jurisdiction. In practical terms, a transgender person could access necessary medical care in one state while being categorically denied the same care in another. Although the *Boe* petition became moot when the parties jointly dismissed the case, the case illustrates a broader problem: when the Court declines to grant certiorari in LGBTQIA+ cases, it often allows fundamental questions of LGBTQIA+ rights to remain unsettled across circuits, foreclosing uniform nationwide protections or prohibitions.[81]

Meanwhile, states remain deeply divided on LGBTQIA+ rights, many of which raise serious constitutional questions. This may echo the Court's wait-and-see approach in *Obergefell,* where the Court may only intervene once a critical mass of states has shifted. But the current landscape is stratified. As of August 2025, 27 states have, in part or whole, banned gender-affirming health care for transgender youth, impeding access to care for 40% of the nation's transgender adolescents who reside in those states.[82] In response, 14 other states and the District of Columbia enacted "shield" laws to protect residents from out-of-state prosecution for providing or receiving such care.[83] Additionally, 23 states and the District of Columbia now include gender identity in their hate crime laws.[84] As of 2025, only 8 states have adopted an LGBTQIA+ education measure, while 19 states, including Florida's infamous "Don't Say Gay" bill, censor such discussion in schools.[85]

Meanwhile, anti-LGBTQIA+ violence has surged. In 2023, LGBTQIA+ hate crime increased by 16% for gender identity and 23% for sexual orientation from the previous year.[86] Transgender individuals remain over four times more likely to experience violence than cisgender people.[87] This crisis underscores the growing legal and social stratification between states, and the danger of the Court's continued silence on these critical issues. When some states convey that LGBTQIA+ people are undeserving of existence, it erodes respect for them nationwide. Furthermore, where no national consensus exists on civil rights protections, public officials may escape liability under qualified immunity, which

81. Attorney General Steve Marshall Announces Victory in Defense of Alabama's Law Prohibiting Sex-Change Procedures for Minors, Alabama Attorney General's Office (May 1, 2025), https://perma.cc/LWV7-3FRS.

82. Lindsey Dawson & Jennifer Kates, *Policy Tracker: Youth Access to Gender-Affirming Care and State Policy Restrictions*, KAISER FAMILY FOUNDATION (Aug. 12, 2025), https://perma.cc/PHR8-QRMF.

83. *Shield Laws & Youth Care Bans,* MOVEMENT ADVANCEMENT PROJECT (last visited Sept. 24, 2025), https://perma.cc/Y22M-EXQE.

84. *Hate Crime Laws*, MOVEMENT ADVANCEMENT PROJECT, https://perma.cc/WFT8-UHJG.

85. *LGBTQ Curricular Laws,* MOVEMENT ADVANCEMENT PROJECT (last visited Nov. 15, 2025), https://perma.cc/ML2Q-9TKQ.

86. Delphine Luneau, *New FBI Data: Anti-LGBTQ+ Hate Crimes Continue to Spike, Even as Overall Crime Rate Declines*, HUMAN RIGHTS CAMPAIGN (Sept. 23, 2024), https://perma.cc/4KHN-3WCL.

87. Andrew Demillo, *What to Know About Transgender Day of Remembrance and Violence Against Trans People*, AP NEWS (Nov. 21, 2024), https://perma.cc/8L2Y-XQFJ.

exonerates them when the law is not "clearly established."[88] This results in legal uncertainty, and leaves LGBTQIA+ individuals exposed and unprotected.

In conclusion, the Supreme Court's certiorari decisions are more than procedural – they are acts of profound authority. By choosing what cases to hear and which to bypass, the Court not only shapes the legal landscape, but also creates a historical record, determining which plaintiffs are remembered, which rights are affirmed, and which injustices are left to wither. This is particularly profound in cases involving LGBTQIA+ rights, where certiorari denials both enable progressive lower rulings to stand and foreclose opportunities to entrench those victories as binding precedent. This privileges certain narratives, delays doctrinal clarity, and evades certain political and jurisprudential consequences. As the certiorari process continues to influence the trajectory of civil rights litigation, it is necessary to track and amplify its force in shaping the contours of LGBTQIA+ equality.

III. SUMMARY DISPOSITIONS

A. DISTINGUISHING FROM CERTIORARI

While summary dispositions are rare across many areas of law, their near-absence in LGBTQIA+ jurisprudence reflects the Court's reluctance to attach precedential weight to questions of queer equality—often to the community's short-term benefit, but at the long-term cost of doctrinal clarity and legitimacy. Like denials of certiorari, in which the Supreme Court declines to hear a case and thereby leaves the lower court's ruling in place, summary decisions involve the Court acting on the certiorari briefs alone, without oral argument.[89] This derives from Rule 16 of the Supreme Court's certiorari rules, which states that an appropriate order "may be a summary disposition on the merits."[90] However, unlike denials of certiorari, summary decisions either affirm or reverse the lower court's decision.[91] These decisions are frequently issued as *per curiam* opinions, which dispose of the merits but do not name an author.[92]

Summary decisions come in two forms: summary reversals and summary affirmations. Summary reversals occur when the Court finds clear error in the lower court's ruling and reverses it with a brief or unsigned opinion.[93] Conversely, summary affirmations *uphold* the lower court's decision, also through an unsigned and typically unexplained opinion.[94] Like certiorari denials, both forms of summary disposition rely solely on the existing judicial record and often provide

88. Natalie Knight, *Keeping Closets in Our Classrooms: How the Qualified Immunity Test Is Failing LGBT Students,* THE DUKEMINIER AWARDS JOURNAL 35 (Williams Inst. UCLA Sch. of Law 2014), https://perma.cc/HDN4-FDS6.

89. SHAPIRO, GELLER, BISHOP, HARTNETT & HIMMELFARB, *supra* note 14, § 5.12.

90. Sup. Ct. R. 16.2.

91. SHAPIRO, GELLER, BISHOP, HARTNETT & HIMMELFARB, *supra* note 14, § 5.12(a).

92. *Id.* at § 5.12(c).

93. *Id.* at § 5.12(a).

94. *Id.*

minimal reasoning, yet they carry significant weight by altering or cementing lower court outcomes.[95]

However, the key distinction between summary decisions and denials of certiorari are that the former are decisions on the merits, while the latter carry no precedential value.[96] Although summary dispositions are decided without the traditional practice of briefing and oral argument, they carry legal weight and are thus binding on the lower courts until and unless subsequently overruled.[97] This is a powerful vehicle, allowing the Supreme Court to either condone or condemn lower court's legal decisions, without issuing an opinion by which it is then held accountable. The Supreme Court has scarcely employed this in relation to denials of gay rights. For example, in *Doe v. Commonwealth's Attorney of Richmond,* the Court summarily affirmed a lower court decision that upheld Virginia's sodomy law, endorsing the criminalization of consensual same-sex activity without briefing or argument.[98] Interestingly, the Court explicitly upheld a similar law in Georgia a decade later in *Bowers v. Hardwick,* this time through full briefing and a written merits opinion.[99]

Following the Judiciary Act of 1988, which rendered nearly all the Supreme Court's jurisdiction discretionary, summary dispositions became increasingly rare, comprising only a small fraction of the Court's docket.[100] Prior to that, the Court relied more heavily on summary dispositions to swiftly resolve cases it was required to hear under its mandatory appellate jurisdiction.[101] While summary decisions were once more common, few involved LGBTQIA+ issues.[102] This rarity stems from at least three key factors. First, constitutional litigation involving LGBTQIA+ rights has historically been less frequent than other types of claims and was particularly sparse during the period of mandatory jurisdiction when summary dispositions were more commonly used. Second, LGBTQIA+ cases often present novel constitutional questions that require thorough briefing, careful consideration, and reasoned opinions. Third, the Supreme Court may less readily identify issues of LGBTQIA+ rights as "clearly established," as they continuously seek to overturn pro-LGBTQIA+ laws or to deny it broader application. *Pavan v. Smith* best illustrates these contentions.[103]

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95. *Id.*

96. *Id.* ("An affirmance in these situations, of course, has precedential value.").

97. SHAPIRO, GELLER, BISHOP, HARTNETT & HIMMELFARB, *supra* note 14, § 5.12(a).

98. Doe v. Commonwealth's Att'y for City of Richmond, 425 U.S. 901 (1976) (mem.) (While affirming judgment, the opinion notes that Justices Brennan, Marshall, and Stevens would "note probable jurisdiction and set case for oral argument.").

99. Bowers v. Hardwick, 478 U.S. 186 (1986).

100. SHAPIRO, GELLER, BISHOP, HARTNETT & HIMMELFARB, *supra* note 14, § 5.17; *see also* Schweiker v. Hansen, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting) (Summary reversals are "usually reserved by this Court for situations in which the law is well settled and stable, the facts are not in dispute, and the decision below is clearly in error.").

101. SHAPIRO, GELLER, BISHOP, HARTNETT & HIMMELFARB, *supra* note 14, § 5.17.

102. Summary dispositions include Baker v. Nelson, 409 U.S. 810 (1972) ((a summary dismissal, discussed in the previous section on denials of certiorari); Doe v. Commonwealth's Att'y for City of Richmond, 425 U.S. 901 (1976) (a summary affirmance).

103. Pavan v. Smith, 582 U.S. 563 (2017).

In *Pavan v. Smith,* the Supreme Court issued a rare summary reversal, striking down an Arkansas State Supreme Court decision that had denied married same-sex couples the right to list the non-biological parent on their child's birth certificate, a right reserved for opposite-sex couples.[104] In a *per curiam* opinion, the Court reaffirmed its ruling in *Obergefell,* decided just two years prior, that the Constitution guarantees same-sex couples access to civil marriage "on the same terms and conditions as opposite-sex couples."[105] By treating similarly situated couples differently, the Arkansas court had undermined *Obergefell* and denied same-sex couples the full "constellation of benefits that the States have linked to marriage."[106] The summary reversal served not only to correct this legal error, but to reinforce the authority of Supreme Court precedent and publicly condemn the lower court's decision.

Interestingly, Justices Gorsuch, Thomas, and Alito dissented from the summary reversal in *Pavan*, arguing that such action is typically reserved for cases where "the law is settled and stable, the facts are not in dispute, and the decision below is clearly in error."[107] Gorsuch wrote, "respectfully, I don't believe this case meets that standard."[108] The dissent maintained that, while *Obergefell* had addressed the question of "whether a State must recognize same-sex marriages," it had not addressed birth registration regimes supported by rational reasoning.[109] As they put it, "nothing in *Obergefell* indicates that a birth registration regime based on biology, one no doubt with many analogues across the country and throughout history, offends the Constitution."[110] To this end, the dissent sought to limit the reach of *Obergefell,* arguing it only applied to formal marriage recognition and not to the broad set of benefits associated with marriage. This dispute represents the manipulability of summary dispositions; although they presume clearly established law, they often raise contested, value-based questions about how far that law extends. Notably, the dissenting justices in *Pavan* had also dissented in *Obergefell*.[111] Curiously, Chief Justice Roberts, who had dissented in *Obergefell,* did not publicly dissent in *Pavan*.[112]

B. THE EFFECT OF SUMMARY DECISIONS ON LGBTQIA+ ISSUES

Summary dispositions also prove to be a double-edged sword. On one hand, when the Court does decide LGBTQIA+ cases on the merits, it is preferable that it does so through full briefing and oral argument. Comprehensive briefing and oral argument give the Court a fuller understanding of the legal and social

104. *Id.* at 564.
105. *Id.*
106. *Id.* (citing Obergefell v. Hodges, 576 U.S. 644, 670 (2015)).
107. *Id.* at 567–68.
108. *Id.*
109. Pavan v. Smith, 582 U.S. 563, 567–68 (2017).
110. *Id.*
111. *See Obergefell,* 576 U.S. 644.
112. *See id.*

context, allowing Justices to question advocates and grapple with the broader implications of their decisions. This is particularly important given the Justices' historical and ongoing distance from the LGBTQIA+ community, underscored by the absence of any openly LGBTQIA+ Justice in the Court's history. In addition, signed opinions give more credence to issues of importance to the LGBTQIA+ community, and explained opinions give all readers a pulse on where the law stands, however agreeable that may be to them. Written decisions also invite greater accountability, exposing the Justices' words to public scrutiny. At the same time, the rarity of summary dispositions in LGBTQIA+ cases does not mean the Court has avoided issuing adverse rulings. *Bowers v. Hardwick* is a striking example: rather than summarily affirming, or even denying, the constitutionality of sodomy laws, the Court issued a full opinion to the same effect, which moved the needle away from LGBTQIA+ protections.[113] Summary rulings therefore may shield the LGBTQIA+ community from the full consequences of the Court's substantive decisions.

Why would the Court summarily affirm a lower court decision rather than simply deny certiorari if it agrees with the outcome and has nothing further to add? Which approach better serves LGBTQIA+ issues? Like any good legal answer, it depends. As the conversation around certiorari illustrates, the key question is whether the lower court ruling was favorable. Denying certiorari leaves that decision intact without comment, while a summary affirmation gives the decision precedential weight by signaling agreement with the lower court's reasoning. While summary dispositions can reflect the Court's current stance on an issue, the lack of full briefing and of written opinion makes it difficult for legal advocates to discern *how* the Court is interpreting the law. Both approaches contribute to a broader issue: when the Supreme Court affirms or upholds a result without explanation, it fails to "clearly establish" the law. This lack of clarity not only creates legal uncertainty but also perpetuates the conditions that allow doctrines like qualified immunity to persist in cases involving constitutional violations.

IV. EMERGENCY RELIEF

A. UNDERSTANDING EMERGENCY RELIEF

The emergency relief process is arguably the most opaque and discretionary tool in the Court's arsenal, but its use in LGBTQIA+ cases is especially troubling: by prioritizing "status quo" and state interests, the Court often suspends hard-won protections during the moments when they are most needed. Emergency relief refers to instances where the Supreme Court intervenes in a case before the normal appellate process is complete.[114] This typically occurs when a party seeks immediate action to prevent irreparable harm or to preserve the status quo while the case proceeds through the courts.[115] There are two

113. Bowers v. Hardwick, 478 U.S. 186 (1986).
114. SHAPIRO, GELLER, BISHOP, HARTNETT & HIMMELFARB, *supra* note 14, § 17.1.
115. *Id.* at § 17.3.

common types of emergency applications. First, a petitioner may ask the Court to *stay* a lower court judgment, which would temporarily freezes the lower court's decision and reinstates the status quo from before litigation until final resolution.[116] Alternatively, a petitioner may ask the Court to issue or vacate a writ of *injunction* against a party pending appeal.[117] Unlike a stay, which attaches to a court decision and pauses the effect of a legal proceeding, an injunction operates directly against an adversary and restricts their conduct during an appeal.[118] Both, however, are temporary "band-aids," addressing the issue while the case works through appeal.[119]

To illustrate the distinction between stays and injunctions, and the immense consequences each can carry, consider a state law that criminalizes gender-affirming care for minors. Suppose a lower court upholds the law's constiutionality, thereby subjecting a minor's parents to criminal penalties for providing such care to their child. Because the law was never enjoined, neither the state nor the parents can seek a *stay* of the lower court's judgment — the decision already aligns with the pre-litigation status quo, leaving the statute in full effect. However, suppose the lower court rejected the law as unconstitutional. The parents could then seek an *injunction pending appeal*, against the state legislature, which would preclude the legislature from effectuating the statute until after the disposition culminates. In both instances, the Supreme Court is given vast authority to not only disrupt the normal litigation process, but to severely influence an issue – all without written opinion. Luckily, some decisions have provided insights into the Court's decision-making process when considering emergency relief. Despite similarities between the two forms of emergency reliefs, the tests for each slightly differ.

The Court typically considers three main factors when deciding whether to stay a lower court's judgment. First, it asks whether there is a "reasonable probability" that it will grant certiorari.[120] Second, the Court examines whether there is a "fair probability" that it will ultimately reverse the lower court's decision.[121]

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116. *Id.; see also,* 28 U.S.C. § 2101(f); 28 U.S.C. § 1651(a).

117. *Id.; but see* Williams v. Rhodes, 89 S. Ct. 1, 2 (1968) (Court's injunctive power "should be used sparingly and only in the most critical and exigent circumstances.").

118. *Id.*

119. SHAPIRO, GELLER, BISHOP, HARTNETT & HIMMELFARB, *supra* note 14, § 17.3.

120. *Id.* at § 17.13. *See* Rostker v. Golberg, 448 U.S. 1306, 1308 (1980) ("First, it must be established that there is a "reasonable probability" that four Justices will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction."). In making this determination, the Court may look to circuit splits, disagreements among lower courts, or whether the ruling has broader implications beyond the parties involved. SHAPIRO, GELLER, BISHOP, HARTNETT & HIMMELFARB, *supra* note 14, § 17.13. In *Maryland v. King*, the Supreme Court found that the lower court's ruling that the DNA Collection Act violated the petitioner's constitutional rights would affect other states by requiring the removal of DNA samples from their databases. 567 U.S. 1301, 1303 (2012).

121. SHAPIRO, GELLER, BISHOP, HARTNETT & HIMMELFARB, *supra* note 14, § 17.13. *See* Rostker, 448 U.S. at 1308 ("Second, the applicant must persuade [the Circuit Justice] that there is a fair prospect that a majority of the Court will conclude that the decision below was erroneous.").

Third, the Court considers whether the lower court's decision causes "ongoing irreparable harm."[122] This factor is less clearly defined but can carry significant weight. For example, in *Maryland v. King*, the Court strongly emphasized this concern, stating that "any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury."[123] Beyond this broad claim, the Court also pointed to specific harms to public safety, reasoning that the challenged statute was a valuable tool for solving unsolved crimes and removing violent offenders from society.[124] While the Court's explanation in *Maryland v. King* sheds light on its reasoning for granting a stay, it is also unsettling to realize that the Court could have reached the same result without offering any explanation at all.

In *Maryland v. King*, the Court's emphasis on the State's interests, and its disregard for the respondent who had just been awarded a decision that overturned his conviction, is starkly clear. This, however, is not always the case. In "close" cases, the Court will often balance the equities and weigh the relative harms between the parties.[125] This includes looking at the status quo at the time the claim occurred, gauging the extent and duration of the harm experienced by the parties and the public, and evaluating the merits.[126] Due to the nature of the petition sought, this fact-intensive inquiry is not meant to resolve the disputes on the merits, but to analyze how the status quo might be preserved most effectively as the case is funneled through the lower courts.[127] However, where the equities are low or unclear, the Court is more likely to issue emergency relief in the way it feels like the proceeding will culminate.[128]

In *Labrador v. Poe*, the Court uniquely took the opportunity to address its process for evaluating emergency relief. In this case, the District Court issued a preliminary injunction against Idaho from enforcing a law banning gender-affirming medical care for transgender minors, finding it violated the plaintiffs' families' Fourteenth Amendment Due Process rights.[129] Idaho appealed to the Supreme Court, asking for a stay of the enforcement of the law except as it applied to the specific plaintiffs.[130] Justice Kavanaugh, in granting Idaho's stay, spoke scarcely about the specific issue of gender-affirming care and Fourteenth Amendment

122. SHAPIRO, GELLER, BISHOP, HARTNETT & HIMMELFARB, *supra* note 14, § 17.13. *See* Rostker, 448 U.S. at 1308 ("Third, there must be a demonstration that irreparable harm is likely to result from denial of a stay.").

123. Maryland v. King, 567 U.S. 1301, 1303 (2012) (citing New Motor Vehicle Bd. of Cal. V. Orrin W. Fox Co., 434 U.S. 1345, 1351 (1977)).

124. *Id.*

125. SHAPIRO, GELLER, BISHOP, HARTNETT & HIMMELFARB, *supra* note 14, § 17.13. *See* Rostker, 448 U.S. at 1308 ("In a close case, it may be appropriate to "balance the equities" – to explore the relative harms to applicant and respondent, as well as the interests of the public at large.").

126. SHAPIRO, GELLER, BISHOP, HARTNETT & HIMMELFARB, *supra* note 14, § 17.13.

127. *Id.* at § 17.12.

128. *Id.* at § 17.13.

129. Poe by and through Poe v. Labrador, 709 F. Supp 3d 1169 (D. Idaho 2023).

130. Labrador v. Poe by and through Poe, 144 S.Ct. 921 (2024).

rights.[131] Rather, he addressed the factors enumerated in *Maryland v. King* and how he perceived them to be relevant.[132] In pertinent part, Kavanaugh wrote that it was not ideal to resolve an emergency application by assessing the likelihood of success on the merits, but that the Court must primarily consider this regardless.[133] Kavanaugh then critiqued the factor of attempting to preserve the "status quo," finding the concept ambiguous.[134] He disagreed with affording deference to the lower courts and agreed that the Court should focus on cert-worthiness when considering the application.[135]

The second form of emergency relief is an injunction. The test for injunctive relief is, at first glance, like the test for a stay: An applicant must demonstrate its likelihood of success on the merits, irreparable injury absent the injunction, a favorable balance of equities, and that the injunction is in the public interest.[136] However, unlike stays, statutory authority for injunctive relief is derived from the All-Writs Act, which allows federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."[137] In *Ohio Citizens for Responsible Energy Inc. v. Nuclear Regulatory Commission*, Justice Scalia characterized the Court's injunctive power as one to be used "sparingly and only in the most critical and exigent circumstances, and only where the legal rights at issue are "indisputably clear."[138] This attitude is also likely reflected in judicial law-making; the Court might be wary of issuing coercive affirmative relief against a party when such relief was withheld by the lower courts.[139] Such injunctive relief compels a party, who is often a state, to do something – more affirmative than a stay that delays a decision's impact.[140]

Emergency relief can serve as a powerful tool to block clearly harmful and potentially unconstitutional anti-LGBTQIA+ laws from taking effect, especially when those laws are initially upheld by unsympathetic circuit courts. At the same time, the same mechanism allows the Supreme Court to set aside circuit court findings that strike down harmful policies, effectively permitting those policies to remain in place throughout the lengthy litigation process. With manipulable

131. *Id.* at 928–934.

132. *Id.* at 935.

133. *Id.* at 930 ("One of the traditional, tried-and-true factors has been the likelihood of success on the merits."). *See also Id.* at 933 ("This Court cannot avoid evaluation of the merits in at least *some* emergency applications involving consequential new laws.") (emphasis included.).

134. *Id.* at 930 ("In practice, difficulties emerge when trying to define the status quo. Is the status quo the situation on the ground *before* enactment of the new law? Or is the status quo the situation *after* the enactment of the new law, but before any judicial injunction . . .?") (emphasis included).

135. *Id.* at 931.

136. SHAPIRO, GELLER, BISHOP, HARTNETT & HIMMELFARB, *supra* note 14, § 17.13.

137. 28 U.S.C § 1651(a).

138. Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regulatory Comm'n, 479 U.S. 1312 (1986).

139. *Id.* at 1313 (explaining that a writ of injunction, "unlike a § 2101(f) stay, does not simply suspend judicial alternation of the status quo but grants judicial intervention that has been withheld by lower courts," and therefore "demands a significantly higher justification than that described in § 2101(f) stay cases").

140. *Id.*

factors and an ability to evade explanation, emergency relief affords even more discretion to the Supreme Court to steer the landscape of LGBTQIA+ issues.

B. THE EFFECT OF EMERGENCY RELIEF ON LGBTQIA+ ISSUES

As previously discussed, applications for stays and injunctive relief require the Court to consider, in part, how it can preserve the status quo during ongoing litigation. But, as Justice Scalia posits, this raises a fundamental and perhaps existential question: what is the status quo? One interpretation is that it refers to the circumstances as they existed before the litigation began. If a lower court has expanded LGBTQIA+ rights, preserving the status quo could then mean undoing that expansion. Similarly, if a court has found a state policy unconstitutional, maintaining the status quo could involve reinstating that policy. But if the pre-litigation status quo is itself harmful to LGBTQIA+ individuals, does preserving it inherently work against the LGBTQIA+ community?

Likely, yes. In some circumstances, the Supreme Court intervenes where a lower court is trying to push the needle forward in terms of LGBTQIA+ rights. For example, in *Gloucester County School Board v. G.G.,* a predecessor to the Supreme Court's denial of certiorari in *Gloucester County School Board v. Grimm,* the Supreme Court granted the County's petition to stay the Fourth Circuit's mandate to permit Grimm, a transgender boy, from using the bathroom that aligned with his gender identity.[141] In effect, the Supreme Court's grant of this stay precluded the Fourth Circuit from enforcing its judgment that Grimm was statutorily and constitutionally entitled to use the bathroom of his choice. Justice Breyer's short concurrence offered rare rationale for the stay, writing that "we are currently in recess, and that granting a stay will preserve the status quo (as of the time the Court of Appeals made its decision) until the Court considers the forthcoming petition for certiorari."[142] Justices Ginsburg, Sotomayor, and Kagan noted that they would have denied the application.[143] The "status quo," as seen by the Court, were the pre-litigation circumstances in which Grimm, and others, would be denied the facilities that aligned with their gender identity and forced to misgender themselves. Five years later, the Supreme Court denied certiorari, subsequently lifting its stay and giving effect to the Fourth Circuit's legal decision against the bathroom bans.[144]

Justice Breyer's brief but telling concurring explanation in *Gloucester County* is puzzling. In an application for stay, where the Supreme Court purportedly considers various factors, including the public interest and the harm done to parties, it seems odd for Justice Breyer to have cherry-picked one factor for resolution of emergency relief: the status quo. Isolating the status quo as dispositive overlooks how its preservation may itself do serious harm, particularly on vulnerable

141. Gloucester County School Board v. G.G., 579 U.S. 961 (2016).
142. *Id.* (Breyer, J., concurring).
143. *Id.* (Ginsburg, Sotomayor & Kagan, JJ., dissenting).
144. Gloucester Cnty. Sch. Bd. v. Grimm, 579 U.S. 961 (2021).

parties. It is difficult to evaluate the "status quo" in a vacuum, divorced from its real-world consequences. Does the fact that the lower court disrupted the status quo somehow diminish the severity of the harm that reinstating it would cause? Or suggest that those affected have become so accustomed to the harm that they can more readily return to it? After all, the question presented to the Supreme Court in *Gloucester County's* application for stay was whether to reinstate a policy that the Fourth Circuit found unconstitutionally denied transgender individuals equal protection or whether to compel the school district to enforce the order and accommodate transgender individuals while litigation proceeded. By privileging the status quo over a holistic assessment of the harm, the Supreme Court diminished the needs of and harms against transgender individuals for five additional years.

That is not to suggest that the Court's treatment of "irreparable harm" fares any better. In *Maryland v. King,* the Court defined irreparable harm primarily through the government's perspective—namely, whether a state policy had been disturbed.[145] The theory for this is that the legislative act represents the will of the people, because it was enacted by elected representatives. This generally favors reinstating harmful anti-LGBTQIA+ laws, even if a lower court has determined them unconstitutional. Regardless, whether framed as preserving "the status quo" or preventing "irreparable harm," the Court's emergency rulings in LGBTQIA+ cases instead often undermine lower court decisions that disrupt local, state, and even federal policies.

In effect, emergency decisions are merit-based. While the Supreme Court does not ordinarily explain these decisions, their rulings tend to preserve anti-LGBTQIA+ practices. In *Trump v. Karnoski,* the Supreme Court granted the government's application to stay an injunction that had temporarily blocked the Trump administration's policy barring transgender individuals from military service.[146] One year later, in *United States v. Shilling,* the Supreme Court similarly gave effect to the administration's ban on transgender military service, staying lower court rulings that had found the policy unconstitutional.[147] Justices Kagan, Jackson, and Sotomayor dissented, characterizing the policy as "demeaning, cruel, and unsupported badges of infamy" on transgender troops.[148] In both *Karnowski* and *Shilling*, the administration's policy was new, thereby absent from the "status quo" before the litigation. Nonetheless, in both instances, the

145. Maryland v. King, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) ("Any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.").

146. Trump v. Karnoski, 586 U.S. 1124 (2019) (with Justices Ginsburg, Breyer, Sotomayor, & Kagan dissenting).

147. *Supreme Court Issues Ruling in* Shilling *Blocking the Preliminary Injunction Protections and Greenlighting Implementation of Trump's Transgender Military Ban,* NATIONAL CENTER FOR LGBTQ RIGHTS (May 6, 2025), https://perma.cc/AC8R-V76Z.

148. Erin Reed *SCOTUS Allows Military Ban That Calls Trans People "Dishonorable" To Go into Effect*, ERIN IN THE MORNING (May 6, 2025), https://perma.cc/9UHJ-REUR.

Supreme Court allowed the policy to take effect as the case proceeded, depriving transgender individuals of the opportunity to participate in military service in the interim. Similarly, in *Labrador v. Poe,* the Supreme Court granted Idaho's request to stay a federal district court's preliminary injunction, which would have prevented the state from enforcing an act prohibiting gender-affirming care for minors.[149] This allowed the state to enforce the Act statewide to parties other than the specific plaintiffs.

Labrador v. Poe, and the reasoning offered by Justice Gorsuch's concurrence, may confirm the Court's preoccupation with the state when considering the "status quo" and "irreparable harms." *Labrador v. Poe* is not only significant because of the Court's decision to grant stay; it additionally provides rare commentary on the justices' thought process when considering emergency applications, a luxury the public is usually denied. As aforementioned, Justice Kavanaugh concurred in the grant of the stay, writing to explain his "hierarchy" of emergency relief factors, which prioritizes we the merits and disregards discretion.[150] Justice Gorsuch also concurred in the decision, uniquely analyzing each relevant factor.[151] First, Gorsuch concluded that Idaho was likely to succeed on the merits of its claim – despite not mentioning the challenged Act once and instead broadly criticizing the scope of the lower court's injunction.[152] Next, when evaluating the relative harms, Justice Gorsuch merely quoted *Maryland v. King* for the proposition that "any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury."[153] In this discussion, Justice Gorsuch only cursorily stated, with no elaboration, that "the plaintiffs face no harm from the partial stay the State requests."[154] The only benefit to Gorsuch's reasoning is that it is for the world to see.

Jackson's dissent in *Labrador v. Poe*, joined by Justice Sotomayor, identified many of the concerns tainting the shadow docket:

> We do not have to address every high-profile case percolating in lower courts, and there are usually many good reasons not to do so. Few applicants can meet our threshold requirement of "an exceptional need for immediate relief," by showing that they will suffer not just substantial harm but an "irreversible injury . . . occurring during the appeals process that cannot be later redressed." *Louisiana American Rivers,* 142 S.Ct. 1347, 1348 (2022) (Kagan J. dissenting). Even when an applicant establishes that highly unusual line-jumping justification, we still must weigh the serious danger of making consequential dangers "on a short fuse without benefit of

149. Labrador v. Poe, 144 S. Ct. 921, 922 (2024).
150. *Id.* at 928–34 (Kavanaugh, J., concurring).
151. *Id.* at 921–28 (Gorsuch, J., concurring).
152. *Id.* at 923.
153. *Id.* (quoting *Maryland v. King*, 567 U.S. 1301, 1303 (2012)).
154. *Id.*

> full briefing and oral argument." *Does 1-3 v. Mills,* 142 S.Ct. 17, 18 (2021) (Barrett J., concurring in denial of application for injunctive relief).[155]

Justice Jackson's dissent also spoke to the "numerous reasons for exercising restraint" specifically in the *Labrador* case.[156] First, Justice Jackson emphasized that not one, but two, lower federal courts found the Act unconstitutional.[157] Second, she disagreed with the Court's implicit finding that the case is certworthy, challenging the majority's premise that the case's nationwide injunction makes it worthy of their intervention.[158] Third, and perhaps most refreshingly, Justice Jackson afforded discretion to the District Court's statewide preliminary injunction and its decision that it "was necessary to protect the particular plaintiffs before the court, including two minors proceeding under pseudonyms, against action by the State it deemed likely unconstitutional."[159]

These kinds of exchanges between Justices about what factors matter and how much deference should be given to lower courts are important. They are also typically missing from emergency decisions. The public, including the parties directly affected, often receive nothing more from the Court than a few terse sentences, despite the sweeping consequences of the emergency application. As a result, the Court remains largely unaccountable for its opaque reasoning, which may stem from flawed legal interpretations or implicit biases—especially toward the LGBTQIA+ community. In most cases, the Justices are not required to justify their decisions at all.

The Supreme Court's tendency to preserve anti-LGBTQIA+ legislation, even where the lower courts have declared them unconstitutional, is of deep detriment to the LGBTQIA+ community who is subject to a growing number of anti-LGBTQIA+ bills. An estimated 616 active state bills seek to target LGBTQIA+ rights in 2025.[160] This number is steadily increasing; a recorded 510 in 2023, 180 in 2022, 154 in 2021, and 77 in 2020.[161] Of the 510 bills in 2023, 314 targeted education, 167 regulated healthcare, including gender-affirming care, 43 sought to prevent drag performances, 42 involved civil rights, 16 pertained to accurate IDs, and 7 involved public accommodations.[162] When passed, such laws become subject to litigation that seeks intervention from the Supreme Court.[163]

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155. *Id.* at 934–35 (Jackson, J., dissenting).

156. *Id.* at 935.

157. *Id.*

158. *Id.* at 936.

159. *Id.*

160. *Mapping Attacks on LGBTQ Rights in U.S. State Legislatures in 2025*, ACLU (Sept. 19, 2025), https://perma.cc/JFL9-ASHZ.

161. Annette Choi, *Record number of anti-LGBTQ bills were introduced in 2023,* CNN (Jan. 22, 2024), https://perma.cc/8K3L-AW28.

162. *Id.*

163. *See, e.g., Labrador v. Poe,* 144 S. Ct. 921 (2024) (considering Idaho's Vulnerable Child Protection Act, which regulates the "practices upon a child for the purpose of attempting to alter the . . . child's sex.").

Upholding such legislation denies litigants any protection during the most critical phases of their legal battles. That this detriment is achieved absent briefing or any written explanation is especially ignorant to the grave burden subsequently experienced by LGBTQIA+ litigants and their community.

V. CONCLUSION

As today's LGBTQIA+ rights cases begin to amass on the Court's doorstep, the Supreme Court's shadow docket remains more critical than ever. Its shadow docket, manifested through strategic certiorari denials, sparing use of summary dispositions, and unaccountable emergency relief, is far from a neutral procedural framework. First, through its use of certiorari, the Court both defers contentious questions until conditions ripen" and allows a patchwork of state and circuit rulings—some hostile and some favorable—to harden into law. Next, while summary dispositions remain rare, such unexplained *per curiam* rulings can cement adverse outcomes without demanding full briefing or scrutinizing the Court. Lastly, the Court's emergency orders preserve injurious status quos and favor the state, all while depriving LGBTQIA+ individuals of urgently needed protections in the interim of litigation. In each instance, the Supreme Court is afforded the discretion to dictate not only whose voices are heard, but which rights are realized. This often entrenches state-by-state discrimination, deepens uncertainty, and precludes equal protection. As anti-LGBTQIA+ laws proliferate, the Court's unaccounted use of the shadow docket must be brought to light and out of the closet.