The Regrettable Rebirth of "Irreparable Harm to the Government"

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A new trend in Supreme Court decisionmaking has picked up since the start of Donald Trump's second term as President. The Administration has made extensive use of the Supreme Court's "shadow docket," making numerous applications for emergency stays of lower-court injunctions against executive orders and actions, and by and large, the Supreme Court has acquiesced in granting those stays. A key reason for this phenomenon is the idea, first advanced by the Court in 2012 but expanded upon in 2025 in Trump v. CASA*, that the government is "irreparably harmed" whenever one of its actions is enjoined by a district court. Since the* CASA *decision in June 2025, this "irreparable harm to the government" doctrine has been relied upon extensively by the Administration in its applications for emergency relief, and by the Court in its decisions granting such relief.*

Analysis of the Court's recent decisions unearths multiple important takeaways about their use of "irreparable harm to the government." First, the justifications for this doctrine generally do not apply to the kinds of actions for which the Administration has been seeking emergency relief in 2025—in other words, they do not provide legal cache to the idea that the government is always irreparably harmed by an injunction. Second, in the broader context of the four-factor Nken *balancing test that is meant to govern when a stay is granted or denied, the Court's 2025 decisions have generally incorporated this flawed view of "irreparable harm to the government" into the balancing, tipping the scales in the government's favor and placing the burden on the respondent to prevail clearly on the merits.*

The Court has placed a thumb on the scale in the government's favor and stay balancing on the shadow docket has now become a fait accompli*: the Trump Administration will nearly always win, and that is in large part because of the regrettable rebirth of "irreparable harm to the government."*

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INTRODUCTION

So far in President Trump's second term,[1] he has signed 249 executive orders, after signing a total of 220 executive orders in his entire first term.[2] In response, plaintiffs have challenged many of these executive actions. According to one website tracking litigation against the federal government, as of March 31, 2026, there were "233 active cases challenging Trump [A]dministration actions."[3] Many of these executive actions have been enjoined by district courts.[4] One analysis found that, "[b]y mid-2025," approximately 85% of cases had resulted in the "[executive order] or related agency action" being enjoined "in whole or part."[5] However, the Administration has not taken these losses lying down, filing 32 applications on the Supreme Court's "shadow docket."[6] The shadow docket frequently receives emergency applications for stays of a lower court's preliminary injunction on the merits, which will allow the government to continue to enforce the challenged order while the lawsuit makes its way through the judiciary.[7] This approach has been quite fruitful for the President: of the Court's 25 shadow docket decisions in 2025 regarding the Trump Administration's actions, it only ruled against the President five times—an 80% win rate.[8]

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[1] Unless otherwise noted, all statistics in this Section are as of March 31, 2026.

[2] Gerhard Peters & John T. Woolley, *Executive Orders*, THE AM. PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/statistics/data/executive-orders [https://perma.cc/GK5U-2TND] (last visited Mar. 31, 2026).

[3] Anna Hickey, *Trump Administration Litigation Tracker*, LAWFARE, https://www.lawfaremedia.org/projects-series/trials-of-the-trump-administration/tracking-trump-administration-litigation [https://perma.cc/AME2-6VDR] (last visited Mar. 31, 2026); *see also* Melissa Quinn, *Supreme Court's Upcoming Term Could Be Marked by Disputes over Trump Policies*, CBS NEWS (Sep. 12, 2025, at 6:00 ET), https://www.cbsnews.com/news/supreme-court-2025-2026-term-trump-policy-disputes/ [https://perma.cc/K5EN-ULB8] (noting that "[m]ore than 300 lawsuits challenging many of President Trump's second-term plans and his [A]dministration's actions have been winding through the federal courts over the past few months").

[4] *See* Dareh Gregorian & Gary Grumbach, *'Unconstitutional' and 'Unlawful': Judges Push Back on Trump's Expanding Power*, NBC NEWS (Sep. 5, 2025, at 17:34 ET), https://www.nbcnews.com/politics/trump-administration/trump-legal-losses-national-guard-tariffs-rcna228941 [https://perma.cc/X856-9DAB].

[5] Adam Feldman, *Rule by Lawsuit: Inside 2025's Executive-Order Wars*, LEGALYTICS (Sep. 15, 2025), https://legalytics.substack.com/p/rule-by-lawsuit-inside-2025s-executive [https://perma.cc/3WU4-FSZ7].

[6] *Supreme Court Emergency Orders Related to the Trump Administration, 2025-2026*, BALLOTPEDIA, https://ballotpedia.org/Supreme_Court_emergency_orders_related_to_the_Trump_administration,_2025-2026 [https://perma.cc/PC9V-2SE9] (last visited Mar. 31, 2026).

[7] Harry Isaiah Black, Alicia Bannon & Stephen Spaulding, *The Supreme Court "Shadow Docket" Explained*, BRENNAN CTR. FOR JUST. (Feb. 13, 2026), https://www.brennancenter.org/our-work/research-reports/supreme-court-shadow-docket [https://perma.cc/ZM93-PZB7]. There are, of course, emergency applications that the Court receives on the shadow docket other than requests for stays of injunctions. Most prominently, the shadow docket receives emergency requests *for* injunctions if the lower court refused to provide this relief.

The term "shadow docket" is itself controversial for purportedly carrying with it negative connotations or implications of political bias. *See, e.g.*, Katie Barlow, *Alito Blasts Media for Portraying Shadow Docket in "Sinister" Terms*, SCOTUSBLOG (Sep. 30, 2021), https://www.scotusblog.com/2021/09/alito-blasts-media-for-portraying-shadow-docket-in-sinister-terms/ [https://perma.cc/Z82X-HETE]. While this paper uses the term throughout as a matter of consistency, it does not intend to convey any political message or criticism regarding the use of this docket beyond the subject matter discussed herein.

[8] *See Supreme Court Shadow Docket Tracker — Challenges to Trump Administration Actions*, BRENNAN CTR. FOR JUST. (Mar. 17, 2026), https://www.brennancenter.org/our-work/research-reports/supreme-court-shadow-docket-tracker-challenges-trump-administration [https://perma.cc/B2DC-WPAV].

The Supreme Court's use of the shadow docket during President Trump's second term has received significant criticism.[9] In particular, there has been concern over the lack of clarity regarding the shadow docket's precedential effect.[10] In a 2025 opinion, Justice Gorsuch criticized district court judges for "defy[ing]" the Supreme Court by not applying shadow docket decisions as "precedent" in similar cases.[11] In response, one district court judge pointed out that shadow docket decisions frequently "[leave] many issues unresolved" and leave judges in a situation where "they must grapple with both existing precedent and interim guidance from the Supreme Court that appears to set that precedent aside without much explanation or consensus."[12] And on the Supreme Court itself, Justice Kagan stated in another shadow docket opinion that the "emergency docket should never be used . . . to permit what [the Court's] own precedent bars."[13]

This confusion primarily stems from the balancing test that the Court purportedly applies whenever it weighs whether or not to stay a lower court's injunction. In *Nken v. Holder*, the Court presented the four factors that must be considered in deciding whether or not to grant a stay:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.[14]

The Court may also sometimes apply other tests, but even these formulations will typically consider, at minimum, the likelihood of success on the merits and irreparable harm factors.[15] Whatever *Nken* may say, however, the Court seems to act differently when the government is a party. In such cases, courts have historically decided stay applications on the basis of just the merits factor.[16] By ignoring the other three factors, the purported "balancing" test instead collapses into a decision that previews the likelihood that the applicant will succeed on the merits.

However, stay balancing on the modern shadow docket has told a slightly different story. While decisions are still often made with no or little explanation and still rely heavily on the merits factor, the government has increasingly relied on the second factor in its briefings, arguing that a

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[9] *See, e.g.*, Erwin Chemerinsky, *Why The Shadow Docket Should Concern Us All*, SCOTUSBLOG (Aug. 4, 2025), https://www.scotusblog.com/2025/08/why-the-shadow-docket-should-concern-us-all/ [https://perma.cc/PM9U-94VN] (noting that many shadow docket decisions are made without any accompanying reasoning, and "without the benefit of full briefing, oral argument, and deliberation among the justices"); Lawrence Hurley, *In Rare Interviews, Federal Judges Criticize Supreme Court's Handling of Trump Cases*, NBC NEWS (Sep. 4, 2025, at 5:00 ET), https://www.nbcnews.com/politics/supreme-court/supreme-court-trump-cases-federal-judges-criticize-rcna221775 [https://perma.cc/PDN4-4FZA] (noting that federal judges are concerned about the lack of clarity and guidance in shadow docket decisions); *see also* President & Fellows of Harvard Coll. v. U.S. Dep't of Health & Hum. Servs., 798 F. Supp. 3d 77, 105 n.9 (D. Mass. 2025) ("[T]he Supreme Court's recent emergency docket rulings regarding grant terminations have not been models of clarity, and have left many issues unresolved.").

[10] *See, e.g.*, Trevor N. McFadden & Vetan Kapoor, *The Precedential Effects of the Supreme Court's Emergency Stays*, 44 HARV. J.L. & PUB. POL'Y 827, 835 (2021) (arguing that emergency decisions "can have significant precedential weight"); Chemerinsky, *supra* note 9 ("[A]lthough orders on the emergency docket should not be regarded as binding precedent . . . it is clear that the court is treating them that way.").

[11] Nat'l Insts. of Health v. Am. Pub. Health Ass'n, 145 S. Ct. 2658, 2663 (2025) (Gorsuch, J., concurring).

[12] *President & Fellows of Harvard Coll.*, 798 F. Supp. 3d at 105 n.9.

[13] Trump v. Slaughter, 146 S. Ct. 18, 19 (2025) (Kagan, J., dissenting).

[14] 556 U.S. 418, 426 (2009).

[15] *See infra* notes 24–27 and accompanying text.

[16] *See* Mila Sohoni, *Equity and the Sovereign*, 97 NOTRE DAME L. REV. 2019, 2039 (2022) ("[T]he final factor—whether the suit is likely to succeed on the merits—often winds up doing at least double and sometimes triple duty, as lower courts tend to mash it together with the other factors . . . .").

stay is warranted because the injunction itself causes the government irreparable harm.[17] Furthermore, the Court itself, on the occasions that it does provide an explanation for its decision, has explicitly mentioned irreparable harm to the government, even where the third and fourth factors have been ignored.[18] The upshot of this approach is that the Court considers the harm to the government without considering the harm to the party that sought the injunction or the public interest—tipping the scales in the government's favor and placing the burden on the respondent to prevail clearly on the merits.[19] Otherwise, even in a close case, the balancing test will inevitably tilt in the government's favor.

This Note takes a closer look at the Trump Administration's emergency applications on the Supreme Court's shadow docket in his second term and finds that the Court is increasingly relying on "irreparable harm to the government" as a critical factor in its stay balancing—and is nearly exclusively assuming that the government would suffer irreparable harm absent the stay. It then explores the justifications underlying this inflexible view of irreparable harm to the government and evaluates their applicability to the kinds of emergency applications that the current Administration has been bringing. Finally, it reviews the Court's recent shadow docket decisions, focusing on two buckets of cases: the first, involving core constitutional executive powers, including removal of executive officials and foreign affairs; and second, those involving the enforcement of statutory schemes. It analyzes how the Court has weighed the irreparable harm to the government factor and to what extent it comports, or fails to comport, with the *Nken* balancing test. The takeaway is undeniable: the Court has placed a thumb on the scale in the government's favor, and the burden on parties challenging the government is even more insurmountable.

I. THE RISE, FALL, AND REBIRTH OF IRREPARABLE HARM TO THE GOVERNMENT

The Supreme Court's power to stay a lower court's injunction is derived from two sources.[20] The first is the All Writs Act, 28 U.S.C. § 1651, which allows the Court to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law," including both stays and injunctions of lower court decisions. The second is from 28 U.S.C. § 2101(f), which allows the Court to stay lower court judgments "for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court." Naturally, this means that the decision on whether or not to grant the stay must come before the case can be added to the merits docket. For these, and "to record everything other than the justices' formal rulings in argued

[17] The government frequently discusses the irreparable injury factor on its own, while collapsing its discussion of the third and fourth factors into one smaller section. *See, e.g.*, Application to Stay the Judgment of the United States District Court for the District of Maryland and Request for Administrative Stay at 18–20, Trump v. Boyle, 145 S. Ct. 2653 (2025) (No. 25A11) [hereinafter *Boyle* Application]; Application to Stay the Judgments of the United States District Court for the District of Massachusetts and Request for an Immediate Administrative Stay at 36–37, Nat'l Insts. of Health v. Am. Pub. Health Ass'n, 145 S. Ct. 2658 (2025) (No. 25A103); Application to Stay the Order Issued by the United States District Court for the District of California and Request for an Immediate Administrative Stay at 35–38, Noem v. Vasquez Perdomo, 146 S. Ct. 1 (2025) (No. 25A169) [hereinafter *Vasquez Perdomo* Application].

[18] *See, e.g.*, *Vasquez Perdomo*, 146 S. Ct. at 4 (Kavanaugh, J., concurring) (referring to the merits and irreparable harm factors as "the two most critical factors").

[19] *See* Erwin Chemerinsky, *The Shadow Docket Fails Again*, SCOTUSBLOG (Nov. 20, 2025), https://www.scotusblog.com/2025/11/the-shadow-docket-fails-again/ [https://perma.cc/HPD5-7DDN] (explaining that in one shadow docket decision, the Court "did not put the burden on the government to establish a strong showing that it was likely to succeed on the merits. Instead, the order put the burden on the plaintiffs . . . ").

[20] McFadden & Kapoor, *supra* note 10, at 835.

cases," the Supreme Court has had its shadow docket.[21] The Court has long held that this separate docket is necessary "[i]f the Court is to do its work,"[22] and considering stay applications has long been one of that docket's core uses.[23]

Stay balancing on the shadow docket has not been without criticism, especially following its "tru[e] explo[sion]" since 2017.[24] The actual standard of review for stays has come under particular scrutiny. In *Nken*, the Supreme Court described the four-factor test[25] as the "traditional" standard of review for determining whether or not to grant a stay.[26] However, while this standard is commonly used in the lower courts, it is not binding on the Court itself.[27] The Supreme Court has instead used multiple different tests and standards to consider stay applications, including a three-factor test[28] and other formulations.[29] No matter the standard, however, the Court is usually supposed to, at minimum, consider the merits and irreparable harm factors.[30]

The *Nken* factors for stay balancing mirror the similar test that the Supreme Court has adopted for determining if a preliminary injunction is warranted.[31] "[T]he concept of irreparable harm has always played a role of central importance" in equitable relief.[32] At its core, a party seeking an injunction would be irreparably injured without that relief because "the common law could not [otherwise] adequately address" the injury.[33] It is less clear, however, to what extent this same calculus applies in the *stay* context—put differently, it is unclear what a party seeking a stay is specifically required to show to establish that they would be irreparably injured without that stay.

The initial rise of the "irreparable harm to the government" factor was slow but consistent. The story actually begins in 1977, when then-Justice Rehnquist granted a stay of an injunction in a solo in-chambers opinion.[34] In that case, the district court enjoined enforcement of a state law regulating

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[21] Steve Vladeck, *Symposium: The Solicitor General, the Shadow Docket and the Kennedy Effect*, SCOTUSBLOG (Oct. 22, 2020), https://www.scotusblog.com/2020/10/symposium-the-solicitor-general-the-shadow-docket-and-the-kennedy-effect/ [https://perma.cc/A228-ZYUT].

[22] Maryland v. Baltimore Radio Show, 338 U.S. 912, 918 (1950).

[23] *See, e.g.*, Luther A. Huston, *Rosenbergs Gain a Stay; Review Set*, N.Y. TIMES, June 18, 1953, at A1 (reporting on Justice William O. Douglas's stay of the Rosenberg execution).

[24] *See* Vladeck, *supra* note 21; *see also supra* note 9 (collecting critiques).

[25] *See supra* text accompanying note 14.

[26] Nken v. Holder, 556 U.S. 418, 425–26 (2009).

[27] *See* McFadden & Kapoor, *supra* note 10, at 839.

[28] Hollingsworth v. Perry, 558 U.S. 183, 190 (2010) (per curiam) ("To obtain a stay pending the filing and disposition of a petition for a writ of certiorari, an applicant must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay.").

[29] *See* McFadden & Kapoor, *supra* note 10, at 839–40 (describing various formulations used by the Court across different emergency docket opinions); Kristen E. Parnigoni, *Shades of Scrutiny: Standards for Emergency Relief in the Shadow Docket Era*, 63 B.C. L. REV. 2743, 2760–66 (2022) (evaluating "four distinct tests" the Supreme Court uses for emergency remedies).

[30] McFadden & Kapoor, *supra* note 10, at 842 ("[T]here are good reasons to think the Supreme Court's own stay criteria are at least as demanding as *Nken*."). Discussion of the "reasonable probability of certiorari" factor from the *Hollingsworth* test, *see supra* note 28, is also typically included in stay applications. *See supra* note 17 (collecting motions that include these factors).

[31] *See* Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008) ("A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.").

[32] Anthony DiSarro, *A Farewell to Harms: Against Presuming Irreparable Injury in Constitutional Litigation*, 35 HARV. J.L. & PUB. POL'Y 743, 748 (2012).

[33] *Id.* at 749.

[34] New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co., 434 U.S. 1345, 1353 (1977) (Rehnquist, J., in chambers).

the establishment and relocation of franchised motor vehicle dealerships.[35] In granting the stay, Justice Rehnquist mentioned a number of ways in which the injunction harmed the state. For example, the injunction prevented the state from protecting other dealership owners and the public interest, and without the stay, any establishments and relocations that were completed would be difficult, if not impossible, to reverse in the future.[36] Finally, he added (almost as an afterthought) the following consideration: "It also seems to me 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."[37]

This concept lay dormant for decades. But then, in a 2012 in-chambers opinion, Chief Justice Roberts adopted this view while granting his own stay of a lower-court injunction that prevented the enforcement of a state statute.[38] He cited Justice Rehnquist's language, noting explicitly that "[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury."[39] Over the next six years, this same language was cited three times by the Court, after having been largely forgotten for nearly four decades. On two occasions, it was cited to justify the Court's granting of a stay;[40] and once, Justice Thomas cited it in a dissent from a denial of a state's stay application.[41] It seemed that the concept of irreparable harm to the government would be a critical consideration for emergency applications going forward.

Then came the fall, a period of time in which this broad understanding of irreparable harm to the government was generally not applied by the Supreme Court in most of its shadow docket cases, especially during the Biden Administration. For example, in two shadow docket cases seeking stays of lower court injunctions on federal vaccine mandates during the COVID-19 pandemic, the Court "focused exclusively on the merits" to make its decisions.[42] In fact, in *NFIB v. OSHA*, the per curiam opinion stated that it was "not [the Court's] role" to balance the equities.[43]

There are two interpretations of how this one-factor merits preview comports with the four-factor balancing test. Some courts have held that if the merits preview concludes that the challenged action is unlawful, then "the government cannot be said to 'suffer harm from an injunction that merely ends [the] unlawful practice.'"[44] Alternatively, if the merits preview concludes that the challenged action is *lawful*, then it can be assumed that the government suffered irreparable harm. "In practice, this understanding means that whenever a governmental party seeks a stay of a lower court ruling enjoining a governmental policy, the only variable that will typically be at issue is the government's likelihood of success on the merits."[45] "The upshot has been that

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[35] *Id.*
[36] *See id.* at 1351.
[37] *Id.*
[38] *See* Maryland v. King, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers). *See* discussion of case *infra* Section II.A.
[39] *King*, 567 U.S. 1303 (alteration in original) (quoting *New Motor Vehicle Bd. of Cal.*, 434 U.S. at 1351 (Rehnquist, J., in chambers)).
[40] *See* Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 134 S. Ct. 506, 506 (2013) (Scalia, J., concurring); Abbott v. Perez, 585 U.S. 579, 602 n.17 (2018).
[41] *See* Strange v. Searcy, 574 U.S. 1145, 1145 (2015) (Thomas, J., dissenting).
[42] Parnigoni, *supra* note 29, at 2771–73 (discussing Biden v. Missouri, 595 U.S. 87 (2022), and Nat'l Fed'n of Indep. Bus. v. Dep't. of Lab., Occupational Safety & Health Admin., 595 U.S. 109 (2022)).
[43] 595 U.S. 109, 120 (2022).
[44] Sohoni, *supra* note 16, at 2039–40 (quoting R.I.L-R v. Johnson, 80 F. Supp. 3d 164, 191 (D.D.C. 2015), and Rodriguez v. Robbins, 715 F.3d 1127, 1145 (9th Cir. 2013)).
[45] Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123, 155 (2019).

in suits against the federal sovereign, the 'four factor' test in lower courts often becomes just a one-factor, or at most a two-factor, inquiry: Is the government likely to be held on the merits to be acting unconstitutionally or illegally?"[46]

This lack of consideration for the other three factors is inconsistent with both the *Nken* test and the common law history of equitable relief,[47] and was at least partly responsible for creating the confusion over whether the decision creates precedent on the underlying legal issue.[48] However, if there was one upside for parties challenging the government, it was that they still had an advantage: all else being equal, the government, under the first *Nken* factor, had to "ma[k]e a strong showing that [it was] likely to succeed on the merits."[49]

But in June 2025, irreparable harm to the government was reborn. The Supreme Court decided *Trump v. CASA*, limiting the powers of district courts to impose universal injunctions.[50] The Court held that the government was entitled to a stay of the particular universal injunction at issue because it "show[ed] a likelihood that it will suffer irreparable harm" without the stay.[51] Because "[w]hen a federal court enters a universal injunction against the Government, it 'improperly intrudes' on a 'coordinate branch of the Government' and prevents the Government from enforcing its policies against nonparties," the government had established a likelihood of irreparable harm, and the stay was justified.[52] In dissent, Justice Sotomayor argued that "it strains credulity to treat the Executive Branch as irreparably harmed by injunctions that direct it to continue following settled law."[53]

What is interesting about *CASA* is that both the majority and the dissent actually collapsed the *Nken* inquiry into the one-factor merits analysis.[54] The majority, adopting the approach described by Stephen Vladeck, first assumed that the injunction irreparably harmed the government, and then granted the stay because the government showed that it was likely to succeed on the merits of the universal injunction/complete relief question.[55] The dissent, adopting the approach described by Mila Sohoni, held that the government was unlikely to succeed on the merits, and it was therefore not irreparably harmed by an injunction preventing unlawful activity.[56] But in either approach, the

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[46] Sohoni, *supra* note 16, at 2040.

[47] *See* Edward L. Pickup & Hannah L. Templin, *Emergency-Docket Experiments*, 98 NOTRE DAME L. REV. REFLECTION 1, 18–19 (2022).

[48] *See supra* note 10. *See generally* Jill Wieber Lens, *Stays of Injunctive Relief Pending Appeal: Why the Merits Should Not Matter*, 43 FLA. ST. U. L. REV. 1319 (2016) (discussing other critiques of merits-focused review of stay applications, and their disputed role as precedent).

[49] Nken v. Holder, 556 U.S. 418, 426 (2009). Or, under the *Hollingsworth* test, the government would have to show a "fair prospect" of eventual reversal. 558 U.S. 183, 190 (2010). Either way, the burden would be on the government.

[50] 606 U.S. 831, 842–45 (2025). *CASA* and universal injunctions are discussed in further detail in Section II.B, *infra*.

[51] *CASA*, 606 U.S.at 859.

[52] *Id.* (citation modified) (quoting I.N.S. v. Legalization Assistance Project of Los Angeles Cnty. Fed'n of Lab., 510 U.S. 1301, 1306 (1993) (O'Connor, J., in chambers)).

[53] *Id.* at 894 (Sotomayor, J., dissenting).

[54] It is worth noting that the majority and dissent came out differently on the merits analysis in large part because they answered distinct merits questions. The majority confined the merits analysis to the universal injunction question: "The question before us is whether the Government is likely to suffer irreparable harm from the District Courts' entry of injunctions that likely exceed the authority conferred by the Judiciary Act. The answer to that question is yes." *Id.* at 860 (majority opinion). Meanwhile, the dissent treated the underlying birthright citizenship question as the merits issue: "[T]he Government . . . seeks to undo a fundamental and clearly established constitutional right. The Citizenship Order's patent unlawfulness is reason enough to deny the Government's applications." *Id.* at 891 (Sotomayor, J., dissenting).

[55] *See* Vladeck, *supra* note 45, at 155.

[56] *See* Sohoni, *supra* note 16, at 2039–40.

outcome of the case ultimately turned on the outcome of the merits analysis—and placed the burden on the government to prevail on the merits analysis.

Nevertheless, since June 2025, *CASA*'s newer and broader view of irreparable harm to the government has been cited regularly by the Administration in shadow docket stay applications on a wider variety of merits questions, including the inability to enforce immigration/foreign policy[57] and removal of Executive Branch officers.[58] The Administration has also quoted the language from *Maryland v. King* in a number of recent applications related to foreign policy,[59] among other issues.[60] But across all of these cases, the language was applied as a categorical *presumption* that the government had been irreparably harmed under the standards set forth in one or both of those cases. The harm alleged by the Administration was not predicated on the action being lawful on the merits—it was a mere fact of the injunction. Or, as Justice Sotomayor put it, "the President is harmed, irreparably, whenever he cannot do something he wants to do."[61]

II. IRREPARABLE HARM TO THE GOVERNMENT: THE PRECARIOUS PRECEDENT

Should the *King* and *CASA* standards automatically be applied to any injunction against the government? Since June 2025, whenever the government has claimed that it has been irreparably harmed by an injunction, it has cited to one or both of *Maryland v. King* and *Trump v. CASA*.[62] The consistent reliance on these two cases raises a fundamental question: Is it appropriate to apply them to *all* injunctions on the Executive? This Part takes a closer look at these two doctrinal sources of "irreparable harm to the government" and evaluates, in turn, their applicability to the Administration's more recent applications that have relied upon this factor.

A. MARYLAND V. KING: LAWS AND ORDERS?

The first source for "irreparable harm to the government" comes from a line of cases in which the Court granted stays of lower court injunctions that prevented a state from acting in accordance with a statute. This Section finds that this justification has since grown far beyond these modest roots.

Maryland v. King dealt with a criminal appeal in Maryland state courts. The Maryland legislature had passed the "DNA Collection Act," which "authorize[d] law enforcement officials to collect DNA samples from individuals charged with but not yet convicted of certain crimes."[63] Respondent Alonzo King was convicted of rape following the collection of DNA evidence pursuant to this Act; on appeal, he challenged the statute as violating the Fourth Amendment.[64]

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[57] *See Vasquez Perdomo* Application, *supra* note 17, at 35–36; Application for a Stay of the Injunction Issued by the United States District Court for the District of Massachusetts at 33–34, Trump v. Orr, 146 S. Ct. 44 (2025) (No. 25A319) [hereinafter *Orr* Application].

[58] *See Boyle* Application, *supra* note 17, at 18–19.

[59] *See Orr* Application, *supra* note 57, at 33–34; Application to Stay the Judgment Issued by the United States District Court for the Northern District of California and Request for an Administrative Stay at 23–25, Noem v. Nat'l TPS All., 146 S. Ct. 23 (2025) (No. 25A326); Application to Stay the Order Issued by the United States District Court for the District of Massachusetts at 23–24, Noem v. Doe, 145 S. Ct. 1524 (2025) (No. 24A1079).

[60] *See, e.g.*, Reply in Support of Application for a Stay at 15–16, Nat'l Insts. of Health v. Am. Pub. Health Ass'n, 145 S. Ct. 2658 (2025) (No. 25A103) (regarding disbursement of appropriated funds, and also citing *CASA*).

[61] Trump v. CASA, 606 U.S. 831, 893 (2025) (Sotomayor, J., dissenting).

[62] *See, e.g.*, *supra* notes 57–60.

[63] Maryland v. King, 567 U.S. 1301, 1301 (2012) (Roberts, C.J., in chambers).

[64] *See id.* at 1301–02.

The Maryland Court of Appeals held that the Act was unconstitutional and overturned the conviction, and the state applied for a stay from the Supreme Court.[65]

In an in-chambers opinion, Chief Justice Roberts granted the stay[66] after applying the three-factor *Hollingsworth* test.[67] After discussing the other two factors (probability that the Court would grant certiorari and fair prospect of reversing on the merits),[68] the Chief Justice turned to the irreparable harm factor. Citing an in-chambers opinion by then-Justice Rehnquist from 1977, the Chief stated that "[a]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury."[69]

Before President Trump's second term, the Supreme Court had only cited this language from *King* in three cases. In *Planned Parenthood v. Abbott*, the district court had enjoined enforcement of new abortion laws, and the circuit court stayed that injunction.[70] The Court declined to vacate that stay, noting that the state would suffer irreparable injury if its statute were not enforced.[71] In *Labrador v. Poe*, the Court itself stayed an injunction that prevented enforcement of a statute prohibiting some forms of gender-affirming therapy, once again noting that the state would suffer irreparable injury from not being able to enforce the statute.[72] And in *Abbott v. Perez*, the Court cited *King* to hold that a state suffers irreparable harm if it is unable to proceed with its redistricting plan.[73]

This view, that the government is irreparably harmed whenever it is enjoined from enforcing a policy that has been passed by the legislature, has received some skepticism. At its core, "it substitutes an abstract injury to sovereignty that requires no proof and that may be given substantial weight in the balancing process."[74] Additionally, it was unclear, at least initially, if the mere inability to enforce the laws was itself an irreparable injury, or if the actual harm was the underlying concern that any inconsistency could cause "chaos" until a decision was reached on the merits.[75] This idea that there must be an additional form of "accompanying" harm has been a popular critique,[76] especially since Chief Justice Roberts pointed to other reasons that the state would suffer irreparable injury, beyond just the inability to enforce the laws, in *King* itself.[77]

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[65] *Id.* at 1302.
[66] *Id.* at 1302–04.
[67] Hollingsworth v. Perry, 558 U.S. 183, 190 (2010); see *supra* note 28 for the test.
[68] *King*, 567 U.S. at 1302–03 (Roberts, C.J., in chambers).
[69] *Id.* at 1303 (emphasis added) (quoting New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co., 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)).
[70] *See* Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 134 S. Ct. 506, 507–08 (2013) (Breyer, J., dissenting).
[71] *Id.* at 506–07 (Scalia, J., concurring).
[72] *See* Labrador v. Poe by & through Poe, 144 S. Ct. 921, 923–24 (2024) (Gorsuch, J., concurring).
[73] 585 U.S. 579, 602 n.17 (2018) ("[T]he inability to enforce its duly enacted plans clearly inflicts irreparable harm on the State.").
[74] Vladeck, *supra* note 45, at 131–32; *see also* Veasey v. Abbott, 870 F.3d 387, 394 (5th Cir. 2017) (Graves, J., dissenting) ("It cannot be that the single statement from *King* has the result that a state automatically suffers an irreparable injury when a court blocks any law it has enacted—regardless of the content of the law or the circumstances of its passing.").
[75] *See* Josh Blackman & Howard M. Wasserman, *The Process of Marriage Equality*, 43 HASTINGS CONST. L.Q. 243, 285 (2016).
[76] *See, e.g.*, Carolyn Shapiro, *Whose Irreparable Harm?*, SCOTUSBLOG (July 10, 2025), https://www.scotusblog.com/2025/07/whose-irreparable-harm/ [https://perma.cc/4YPZ-W9BC]; Matt Ford, *How the Supreme Court Stacked the Shadow Docket Deck for Trump*, NEW REPUBLIC (Sep. 12, 2025), https://newrepublic.com/article/200358/supreme-court-shadow-docket-trump [https://perma.cc/HK9Q-N3RA].
[77] Maryland v. King, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers).

Concerns have also been raised that "too generous[]" a definition of irreparable injury might exacerbate some of the problems with the shadow docket itself, by "placing unnecessary time pressure" and treating "too many cases" as emergencies.[78]

These critiques aside, however, there is a fundamental policy justification underlying this view of irreparable harm to the government: because the statute has been passed by the legislature, it represents the will of the people, and it therefore harms the entire State to enjoin its enforcement.[79] Because the courts generally treat statutes with a "presumption of constitutionality," this "weigh[s] in favor of a stay on the merits," and is also "itself a basis for concluding that a lower court injunction against enforcement of a putatively unconstitutional statute or policy irreparably harmed the government, without almost any regard to the other equities involved in the particular case."[80] But the key is that this view must be limited in its application only to instances where the government has been enjoined from enforcing a statute, a product of the democratic process in the legislature.

This has not been the case as of late. So far in President Trump's second term, the Supreme Court has cited *King* in two of its opinions, each of which dealt with challenges pursuant to executive actions, rather than statutes. In *Trump v. CASA*, as will be discussed in the next Section, the citation to *King* was not the dispositive reason for the finding of irreparable injury—but the fact that it was cited at all is noteworthy, since the underlying issue was the President's Executive Order on birthright citizenship, not a statute.[81] As noted, Justice Sotomayor's dissent pushed back against the idea that *King*'s view of irreparable harm to the government was relevant to the instant case.[82]

The other example comes from Justice Kavanaugh's concurrence in *Noem v. Vasquez Perdomo*, a shadow docket case, in which he argued that the government would be irreparably harmed by an injunction on investigative immigration stops.[83] Justice Kavanaugh tied the use of this language to the Administration's statutory authority pursuant to the Immigration and Nationality Act, which allows the government to make such stops.[84] But as the dissent pointed out, the injunction did not prevent the government from effectuating that statute—it simply prevented immigration officers from making particular kinds of stops that were arguably unconstitutional, and most importantly, that were not required by the statute.[85] In essence, Justice Kavanaugh's reasoning was grounded in the assumption that the government had been irreparably harmed by an injunction against an executive action, rather than a statute. The citation to *King* in support of this outcome is therefore fundamentally flawed.

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[78] Andrew J. Wistrich, *Secret Shoals of the Shadow Docket*, 23 NEV. L.J. 863, 933 (2023). On the other hand, at least one legal scholar has argued that this time pressure is caused by the litigation itself, not by the emergency stay application: "[T]he [E]xecutive [B]ranch only has a particular amount of time to advance its priorities, and if litigants or others can run out the clock and prevent things from happening, then the [E]xecutive [B]ranch doesn't get to do what the [E]xecutive [B]ranch should be allowed to do as a result of elections." Rachel Reed, *Shedding Light on the Supreme Court's Shadow Docket*, HARV. L. TODAY (Mar. 4, 2026), https://hls.harvard.edu/today/shedding-light-on-the-supreme-courts-shadow-docket/ [https://perma.cc/HK9Q-N3RA] (quoting Jonathan H. Adler).

[79] *See* Ford, *supra* note 76 ("[T]he *King* line is a purportedly democratic principle that exalts the legislative process.").

[80] Vladeck, *supra* note 45, at 131.

[81] *See* Trump v. CASA, 606 U.S. 831, 860–61 (2025).

[82] *See id.* at 893–94 (Sotomayor, J., dissenting).

[83] 146 S. Ct. 1–2, 4 (2025) (Kavanaugh, J., concurring).

[84] *Id.* at 1.

[85] *Id.* at 16 n.12 (Sotomayor, J., dissenting).

Most recently, in *Trump v. Orr*, the Court stayed a lower court's injunction on a change to State Department policy that would require passports to state the holder's sex at birth, rather than the gender with which they identified.[86] The Court did not cite to *King*—perhaps because there is no statute at issue here at all—but found that the government would be irreparably harmed by the injunction.[87] In a vigorous dissent, Justice Jackson provided the most forceful criticism of *King*'s language yet:

> While we have suggested that the government suffers "a form of irreparable injury" when it is enjoined from effectuating a duly enacted statute, an executive order lacks the force of a statute, and an injunction barring such an order does not generate the same sovereign injury. To think it always does would be to endorse the "facially absurd" proposition that the President is irreparably harmed any time he is temporarily prevented from doing something he wants to do.[88]

Justice Jackson's criticism of how the government and the Court have been applying and arguing *King* cuts right to that case's core justification: that the state is irreparably harmed when it cannot enforce the will of the people, as determined through the democratic process—not just when it cannot do whatever it wants to do.

This criticism echoes one of the more general concerns over the President's use of executive orders as lawmaking tools and stand-ins for statutes: the idea that executive orders, because they are not passed or adopted through the constitutionally-mandated legislative process, are not enacted by representatives of the people.[89] Additionally, it is extremely difficult for Congress to exercise any oversight or control over executive orders that may not represent the will of the people.[90] Taken together, this means that executive orders, even those made pursuant to statutory authority—such as in *Vasquez Perdomo*—cannot be taken seriously as products of the legislative process. Because *King*'s doctrinal underpinnings do not apply to executive orders, its language should not extend that far.

This takeaway is also important because the concern remains valid even if the particular order at issue is a lawful exercise of executive authority.[91] As such, even if the Executive Order is constitutional—that is, even if the government prevails on the merits factor—it should be precluded from establishing categorical irreparable harm under *King* alone. Even in *King* itself, Chief Justice Roberts pointed to the "ongoing and concrete harm to Maryland's law enforcement and public safety interests" from enjoining DNA collection, especially because "[c]rimes for which

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[86] 146 S. Ct. 44, 46 (2025).
[87] *See id.*
[88] *Id.* at 50 n.5 (Jackson, J., dissenting) (citations omitted).
[89] *See, e.g.*, Tara L. Branum, *President or King? The Use and Abuse of Executive Orders in Modern-Day America*, 28 J. LEGIS. 1, 2 (2002) ("[P]residential directives have been increasingly used . . . to promulgate laws and to support public policy initiatives in a manner that circumvents the proper lawmaking body, the United States Congress.").
[90] *See* Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 J.L. ECON. & ORG. 132, 134–35 (1999).
[91] *See* Andrew Haffner, *Trump's Executive Orders: How Do They Work—and What's Their Legal Basis?*, U. CHI. NEWS (Sep. 15, 2025), https://news.uchicago.edu/story/trumps-executive-orders-how-do-they-work-and-whats-their-legal-basis [https://perma.cc/ESH9-LFFF] ("In his second term, President Trump has signed a huge range of executive orders, in part because Congress has enacted so few new laws. Some of them are lawful orders that may be good policy; some of them clearly exceed his powers; and some of them attempt to use valid presidential powers for invalid purposes. A lot of these are being challenged in the courts." (quoting William Baude)).

DNA evidence is implicated tend to be serious, and serious crimes cause serious injuries."[92] Instead of a baseline assumption that the government *must* have suffered irreparable harm, the government should bear the burden of establishing that it *actually* has suffered, or would suffer, irreparable harm, for some reason other than the mere fact of the injunction itself. This idea's significance will be discussed in further detail in Part III.

Even if *King* is inapplicable, however, that does not automatically mean that the government cannot suffer irreparable harm when an executive action is enjoined. *CASA* recognizes another form of irreparable harm that is caused by an injunction: impermissible judicial intrusion into the Executive Branch, in violation of the Constitution's separation of powers. The next Section explores the applicability of this newer, and potentially broader, view of irreparable harm to the government.

B. *TRUMP V. CASA*: INJUNCTIONS, BIG AND SMALL?

By citing to *King* in its recent decisions granting stays to the Executive Branch, the Supreme Court has, in effect, applied a narrow principle broadly, with the result that *any* injunction against the government can be said to have caused irreparable harm. As this Section shows, it has done the same with *Trump v. CASA*.

Trump v. CASA was decided against the backdrop of President Trump's Executive Order redefining birthright citizenship and universal injunctions that multiple district courts had entered against its enforcement.[93] The government applied for a stay of these universal injunctions, and the Supreme Court granted certiorari to answer a specific question: "whether, under the Judiciary Act of 1789, federal courts have equitable authority to issue universal injunctions."[94] The Court held that federal courts have this authority only when it is necessary to afford "complete relief to the plaintiffs before the court."[95] Because the universal injunctions in this case exceeded the scope of such relief, "[t]he Government [was] likely to succeed on the merits of its argument" under the first of the *Nken* factors.[96] The Court then turned to the irreparable harm factor and introduced the new standard: "When a federal court enters a universal injunction against the Government, it 'improperly intrudes' on 'a coordinate branch of the Government' and prevents the Government from enforcing its policies against nonparties."[97] The Court ultimately granted the stay of the universal injunctions.[98]

Based on this language, this view of irreparable harm should arguably be confined only to situations when the injunction is inappropriate *because* the scope of the relief is too broad. This justification comes down to the separation of powers: the judiciary "improperly intrude[d]" on the Executive Branch by preventing them from acting when they did not need to. It is reminiscent of the "multiple chancellors" critique popularized by Samuel Bray many years before *CASA*.[99] Bray argued that nationwide injunctions were a departure from common-law practice, where a party

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[92] *See* Maryland v. King, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers).
[93] 606 U.S. 831, 838–39 (2025).
[94] *Id.* at 839.
[95] *Id.* at 852 (emphasis removed).
[96] *Id.* at 841.
[97] *Id.* at 859 (citation modified) (quoting I.N.S. v. Legalization Assistance Project of Los Angeles Cnty. Fed'n of Lab., 510 U.S. 1301, 1306 (1993) (O'Connor, J., in chambers)).
[98] *See id.* at 861.
[99] *See generally* Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417 (2017).

could only seek equitable relief from a single "Chancellor."[100] Although this structure was initially imitated in colonial and early America, the gradual growth of the federal judiciary created a situation where parties could now seek equitable relief in multiple states and districts—and from multiple Chancellors.[101] The result was a system where plaintiffs could "[s]hop 'til the statute drops" and bring cases in any forums that had jurisdiction, forcing the defendant to have to win everywhere, because even one loss would have nationwide effects.[102] Suits seeking and receiving such relief against the government in particular became increasingly common in recent years.[103]

The complete relief principle cited by the *CASA* majority echoed these concerns. Beyond the universal injunction's lack of historical pedigree, it also "embrace[s] an imperial Judiciary": "No one disputes that the Executive has a duty to follow the law. But the Judiciary does not have unbridled authority to enforce this obligation."[104] The universal injunction exceeded the scope of relief the judiciary is constitutionally or statutorily authorized to provide—and because the government was thereby enjoined from enforcing the Order *anywhere*, it was irreparably harmed.

As a result of *CASA*, district courts have largely been limited to granting party-specific injunctions. And based on *CASA*'s reasoning, one might assume that the government must show more to establish irreparable harm when faced with such limited injunctions. On the contrary, the Supreme Court has since cited this view of irreparable harm to the government in two shadow docket cases, *Vasquez Perdomo* and *Orr*—both cases in which the plaintiff was not seeking universal relief. In *Vasquez Perdomo*, the plaintiffs sought an injunction that would only prevent immigration officers in Los Angeles from making certain police stops;[105] and in *Orr*, the plaintiffs were bringing a class action lawsuit and were only seeking class-wide relief.[106] To be clear, the potential scopes of these injunctions were broad, but they were not the result of forum shopping through multiple chancellors; they granted relief that was available at common law; and the scopes were appropriate to the relief sought by the specific parties. In short, none of the concerns with universal injunctions raised in *CASA* were implicated by these party-specific injunctions. And although the Court implied, in both cases, that the government would prevail on the merits, that the injunction was inappropriate, "an apparent likelihood of success on the merits never suffices on its own to justify this Court's intervention."[107]

The upshot is that, just like with *King*, the Court has taken a narrow principle—that the judiciary's unlawful encroachment into the Executive Branch through non-party-specific relief causes the government irreparable harm—and applied it broadly for the proposition that *any* injunction causes the government irreparable harm. In other words, just as Justice Sotomayor warned, the Court has "endorse[d] the radical proposition that the President is harmed, irreparably, whenever he cannot do something he wants to do."[108]

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[100] *Id.* at 446–47.
[101] *Id.* at 447–48.
[102] *Id.* at 460; *see* Hayden D. Presley, *A Universal Problem: The Universal Injunction*, 81 LA. L. REV. 627, 658–59 (2021).
[103] *See* William Baude & Samuel L. Bray, *Proper Parties, Proper Relief*, 137 HARV. L. REV. 153, 173–74 (2023); Rachel Reed, *Do Universal Injunctions Lead to National Rule by One Judge?*, HARV. L. TODAY (Feb. 8, 2024), https://hls.harvard.edu/today/do-universal-injunctions-lead-to-national-rule-by-one-judge/ [https://perma.cc/X4LH-ZK34].
[104] Trump v. CASA, 606 U.S. 831, 858 (2025).
[105] *See* Noem v. Vasquez Perdomo, 146 S. Ct. 1, 2 (2025).
[106] *See* Trump v. Orr, 146 S. Ct. 44, 46 (2025).
[107] *CASA*, 606 U.S. at 892 (Sotomayor, J., dissenting).
[108] *Id.* at 893 (Sotomayor, J., dissenting).

III. THE SUPREME COURT'S BOTHERSOME BALANCING BEHAVIOR

The "irreparable harm to the government" factor, however construed, is just one of the considerations that a court must weigh when deciding whether or not to grant a stay. Under the *Nken* test, the other factors include: the likelihood the applicant will succeed on the merits; if the stay would substantially injure the other parties; and where the public interest lies.[109] Although the Supreme Court is not itself forced to use this test in all circumstances, any analysis it conducts must be at least as rigorous as the test used by the lower courts.[110] As such, it is fair to use the *Nken* test as the baseline against which the Court's own analysis is scrutinized.

As noted, the Court has treated the merits and irreparable harm factors as "the two most critical factors" in stay balancing[111]—but that does not mean that the other two factors are to be completely disregarded. The third factor, whether a stay would cause substantial injury to the other party, derives from a similar factor in the injunction-balancing test that requires courts to "balance of equities": courts must consider what an injunction would mean for *both* parties, weigh the respective harms and benefits, and proceed from there.[112] The third factor plays the same role in stay balancing: to make sure that the court does not just consider irreparable harm to the applicant, but that it does so while also considering potential harm to the respondent.

The fourth factor, where the public interest lies, is a bit more abstract, but there is no reason why it *necessarily* must merge with another factor any time that the government is a party.[113] This is especially salient when the government action at issue is an executive order rather than a statute. As noted previously, executive orders are not products of the legislative process, and as such have not been "enacted by representatives of the people."[114] So, even if the factors might merge when a statute has been enjoined, the same logic does not extend to executive orders. An action taken by a single executive is far more likely to be contrary to the public interest than a statute debated by, voted on, and passed by two houses of Congress.

This Part explores how the Supreme Court has conducted the *Nken* balancing in some of its recent shadow docket decisions, and the incommensurate weight that "irreparable harm to the government" has been given in the process. It sorts the cases into two broad analytical buckets: the first includes disputes over the removal of executive officials and foreign policy, areas of core executive power; and the second includes cases where the President's role is merely to enforce statutory schemes. In both buckets, the "irreparable harm to the government" factor was granted far more weight, compared to the third and fourth factors, than it deserved—an error that was crucial to the case's disposition.

A. EXERCISES OF EXECUTIVE POWERS

One of the constitutional questions that has been raised most often in this Administration's shadow docket applications is the power to remove executive officials. In May 2025, the Supreme Court issued a stay, accompanied by a brief explanation, in *Trump v. Wilcox*, a case dealing with the President's removal (without cause) of a member of the National Labor Relations Board

[109] Nken v. Holder, 556 U.S. 418, 426 (2009).
[110] *See* McFadden & Kapoor, *supra* note 10, at 839, 842.
[111] *See* Noem v. Vasquez Perdomo, 146 S. Ct. 1, 3–4 (2025) (Kavanaugh, J., concurring).
[112] *See* Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 20 (2008).
[113] *Nken*, 556 U.S. at 435 ("[The third and fourth] factors merge when the Government is the opposing party."). It follows that the second and fourth factors can merge when the Government is the applicant.
[114] *See supra* notes 89–90.

(NLRB) and a member of the Merit Systems Protection Board (MSPB).[115] The bulk of the explanation, and of Justice Kagan's dissent, dealt with the merits question: whether the removal violated *Humphrey's Executor v. United States*,[116] a 1935 case that upheld for-cause removal protections for members of the Federal Trade Commission, and that has since been recognized as permitting for-cause removal protections as permissible "for multimember expert agencies that do not wield substantial executive power."[117]

The majority and dissent in *Wilcox* primarily disagreed over whether or not the NLRB and MSPB fell within this exception, but they also disagreed over the application and balancing of the irreparable harm factor. The majority argued, "that the Government faces greater risk of harm from an order allowing a removed officer to continue exercising the executive power than a wrongfully removed officer faces from being unable to perform her statutory duty."[118] In other words, harm rooted in the Constitution was more concerning than harm rooted in a statute—but as the dissent pointed out, that is not how the second *Nken* factor interacts with the third and fourth factors. Applying the second factor here, it is difficult to see how any harm to the government is actually "irreparable." After all, if Wilcox were to eventually lose on the merits, she could be removed at that time. "[C]an it really be said . . . that the President has a crying need to discharge independent agency members right away"?[119] And while it is certainly possible that there are other harms that could arise from enjoining these removals—for example, the officers' ability to make decisions on behalf of the agencies—neither the government nor the Court advanced any of these. Although the majority did not cite to *King* or *CASA*, their influence is clear: the harm to the government was categorically irreparable because of the mere fact that an executive action had been enjoined.

The problem with this view extends into the treatment of the third and fourth factors. The majority summarily disposed of any injury to Wilcox by treating it as a statutory injury that was outweighed by the President's constitutional injury.[120] The dissent pushed back: "[T]he relevant interest is not the wrongfully removed officers, but rather Congress's and, more broadly, the public's . . . the interest at stake is in maintaining Congress's idea of independent agencies."[121] By categorically assuming that the President would suffer an irreparable constitutional injury, the majority failed to fully and properly weigh injuries to the other parties. As to the public interest, it could reasonably be argued that the public interest in the Constitution outweighs the public interest in effectuating unconstitutional statutes—but that is only one part of the inquiry. Indeed, if the reasoning behind *King* is that there is irreparable harm when a statute is not effectuated, then the fact that the statutory for-cause provision here was not effectuated would actually cut in Wilcox's favor, not the President's. In any case, the Court should have fully weighed and balanced all four factors, and not merely relied on the first two. Nevertheless, the Court has since doubled down on its holding in *Wilcox*, continuing to grant stays in removal cases without fully engaging in the required balancing analysis.[122]

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[115] 145 S. Ct. 1415, 1416 (2025).
[116] 295 U.S. 602, 626 (1935).
[117] Seila Law LLC v. CFPB, 591 U.S. 197, 218 (2020).
[118] *Wilcox*, 145 S. Ct. at 1416–17.
[119] *Id.* at 1420 (Kagan, J., dissenting).
[120] *Id.* at 1416–17 (majority opinion).
[121] *Id.* at 1420 (cleaned up) (Kagan, J., dissenting).
[122] *See* Trump v. Boyle, 145 S. Ct. 2653, 2654 (2025) (holding that this case, regarding the removal of a member of the Consumer Products Safety Commission, was "squarely controlled" by *Wilcox*); Trump v. Slaughter, 146 S. Ct. 18 (2025) (allowing the removal of a member of the Federal Trade Commission, apparently in direct contradiction to *Humphrey's Executor*, without any analysis of the stay factors).

Outside of the removal context, the Administration has also cited broad foreign affairs and national security powers in its applications for stays. *Orr* is one such example that also showcases the deficiencies in the Court's balancing.[123] In its brief opinion, the majority focused almost exclusively on the merits of the respondents' claims, specifically stating that "respondents have failed to establish" any constitutional violation.[124] The only other factor that received any play was irreparable harm to the government: "the District Court's grant of class-wide relief enjoins enforcement of an Executive Branch policy with foreign affairs implications concerning a Government document. In light of the foregoing, the Government will 'suffer[ ] a form of irreparable injury' absent a stay."[125] The third and fourth factors never even received a mention.

There are two main issues here. First, and most obviously, the Court did not even pay lip service to balancing the equities, as they at least did in *Wilcox*. As the dissent pointed out, "the balance-of-the-equities factor requires weighing the harm to the Government from not being able to proceed immediately with its allegedly unlawful policy against the harm to the individuals who would be subjected to that policy."[126] The dissent cited the District Court's findings of several credible harms: inability to obtain passports that match their gender identity; risk of suicidal ideation and severe psychological distress; increased violence, harassment, and discrimination; and "significant anxiety and fear for their safety."[127] Not only were these harms already established in the record, but they are also concrete harms with tangible real-world impacts—not just the abstract and ambiguous idea of "irreparable harm to the government."

Furthermore, any harms advanced by the government—an unexplained foreign policy interest and an unsubstantiated concern of confusion at airports—could reasonably have been repaired by prevailing on the merits.[128] The only *irreparable* injury was the fact that the President could not enforce this rule immediately—in other words, the mere fact of the injunction itself. But even if this harm *was* irreparable, the Court's failure to consider the harms to the other party and to fully balance these equities exemplifies the deficiencies with the Court's shadow docket balancing, and the danger of its current view of "irreparable harm to the government." When the government categorically wins on one of the two "most critical factors," and the Court does not even consider the other two factors, a party challenging the government has little chance, if any, of avoiding a stay.

The second issue is, perhaps, even more insidious. In its discussion of the merits factor, the majority stated that the *respondents* had failed to establish a likelihood of prevailing on the merits. But, looking back to *Nken*, "[t]he party *requesting* a stay bears the burden of showing that the circumstances justify an exercise of that discretion."[129] The *Orr* majority impermissibly shifted that burden to the respondents instead.[130] This, combined with the government's categorical ability to satisfy the second factor, and the Court's ignoring the third and fourth factors, makes the

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[123] Trump v. Orr, 146 S. Ct. 44 (2025). For factual background, see *supra* text accompanying note 86.
[124] *Orr*, 146 S. Ct at 46.
[125] *Id.* (quoting Trump v. CASA, 606 U.S. 831, 861 (2025)).
[126] *Id.* at 46–47 (Jackson, J., dissenting).
[127] *Id.* at 51.
[128] *Id.* at 50–51.
[129] Nken v. Holder, 556 U.S. 418, 433–34 (2009) (emphasis added); *see also id.* at 439 (Kennedy, J., concurring) ("[T]he applicant must meet a heavy burden of showing not only that the judgment of the lower court was erroneous on the merits, but also that the applicant will suffer irreparable injury if the judgment is not stayed pending his appeal." (citations omitted)).
[130] *See* Chemerinsky, *supra* note 19.

outcome of any stay application by the government a *fait accompli*—and renders challenges seeking preliminary injunctions to executive actions meaningless.

Still, considering this Court's concern with judicial encroachment into core executive powers,[131] its treatment of irreparable harm to the government in such cases may have some inherent merit—in other words, a categorical view of irreparable harm to the government may be justified when the President is exercising his core constitutional powers. The next Section investigates whether the same deficiencies in balancing creep into the Court's stays of injunctions on executive actions that are simply political priorities, rather than exercises of constitutional authority.

B. POLITICAL PRIORITIES—NOT POWERS

The power to appropriate funds unquestionably lies with the Legislative Branch,[132] and while the President has certain abilities to delay spending,[133] it is difficult to argue that this is a "core executive power" like removal or national security. Yet, this year, the Supreme Court has twice stayed an injunction requiring the distribution of appropriated funds.

One of these cases, *Department of State v. AIDS Vaccine Advocacy Coal.*, concerned an injunction directing the release of funding that had been appropriated for foreign aid.[134] The Court stayed that injunction, stating both that the government had made a sufficient showing that it would prevail on the merits, and that "the asserted harms to the Executive's conduct of foreign affairs appear to outweigh the potential harm faced by respondents."[135] The majority gave no further explanation of how it balanced the equities, but the dissent argued that the Administration's stated interest, that it might have to "advocate against its own objectives," "'undermin[ing]' its real view that the expenditures are 'contrary to U.S. foreign policy,'" was "just the price of living under a Constitution that gives *Congress* the power to make spending decisions through the enactment of appropriations laws" and not a harm to be weighed in the balancing.[136] On the other hand, other parties did have cognizable harms: an appropriations action taken by Congress would not be given the force of law, and the intended recipients, of course, would never receive their obligated funds.[137]

In the other case, *NIH v. APHA*, the Court dealt with injunctions that had been placed on the Administration's termination of research grants from the National Institutes of Health, the executive body charged by statute with making funding decisions.[138] While this is slightly different from the previous case, it is another example of an executive action in the funding/appropriation realm, rather than in the exercise of a core executive power. In a fractured decision, the Court

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[131] *See, e.g.*, John Kruzel, *'Unitary Executive' Theory May Reach Supreme Court as Trump Wields Sweeping Power*, REUTERS (Feb. 14, 2025, at 6:16 ET), https://www.reuters.com/legal/unitary-executive-theory-may-reach-supreme-court-trump-wields-sweeping-power-2025-02-14/.

[132] U.S. CONST. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.").

[133] *See* Scott Bomboy, *Can a President Refuse to Spend Funds Approved by Congress?*, NAT'L CONST. CTR. (Feb. 4, 2025), https://constitutioncenter.org/blog/can-a-president-refuse-to-spend-funds-approved-by-congress [https://perma.cc/X29C-CM6Z].

[134] 146 S. Ct. 19 (2025).

[135] *Id.* at 19.

[136] *Id.* at 23 (Kagan, J., dissenting) (emphasis in original).

[137] *See id.*

[138] 145 S. Ct. 2658, 2667 (Aug. 21, 2025) (Jackson, J., concurring in part).

stayed the injunction that would have released the grant money, while denying a stay for the injunction on certain guidance documents.[139]

Only two of the five opinions discussed any factors other than the merits. Justice Kavanaugh acknowledged that "the harms and equities are weighty on both sides. But in my view, they tilt toward the Government because plaintiffs have not represented that they would return the grant money if the Government were to ultimately prevail in the merits litigation."[140] Similar to *Orr*, Justice Kavanaugh shifted the burden to the respondents to prove that the government would *not* be irreparably harmed. And similar to *Wilcox*, the Court allowed the President to disregard a statute, despite this cutting strongly against *Maryland v. King*, one of the fundamental justifications for "irreparable harm to the government" in the first place.

Justice Jackson alone fully balanced the equities to explain why she would deny a stay of the grant-termination injunctions. She recognized the government's "*only* asserted harm" as the fact that "it might have to keep paying out grants it has already committed to paying for the few months it will take to appeal the District Court's decision."[141] On the other hand,

> The harm that the plaintiffs and the public will suffer from a stay plainly dwarfs the purportedly irreparable injury to the Government if a stay is denied. For the Government, the incremental expenditure of money is at stake. For the plaintiffs and the public, scientific progress itself hangs in the balance—along with the lives that progress saves.[142]

Justice Jackson concluded that the equities favored denying the stay.

Not only is this opinion an excellent example of how the stay balancing should be conducted—because it considers *all four* factors and balances them to determine if a stay is warranted—it also perfectly encapsulates the severe deficiencies with, and the additional difficulties presented by, the Court's categorical "irreparable harm to the government" approach. As Justice Jackson points out, both here and in other cases like *Orr*, the Court frequently ignores the very real harms that other parties or the public may face. Does the Court ignore these factors because it automatically assumes that the irreparable harm the injunction causes the government always outweighs any harms to the other parties?[143] Or does the logic go the other way: that because the third and fourth factors are not critical, the irreparable harm to the government from the injunction automatically tips the balance of the equities in its favor? Either way, the outcome is the same: the government will always prevail on the second factor, and the third and fourth factors are no counterbalance.

CONCLUSION

During his four years in office, President Biden made 17 applications to the Supreme Court's shadow docket and won 53% of them.[144] So far in President Trump's second term, he has made

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[139] *See id.* at 2661 (Barrett, J., concurring).
[140] *Id.* at 2666 (Kavanaugh, J., concurring in part).
[141] *Id.* at 2676 (Jackson, J., concurring in part) (emphasis in original).
[142] *Id.*; *see also id.* at 2677 ("The harm is not just to researchers who will lose their livelihoods; vulnerable members of our society will also lose the benefits of their research.").
[143] *See, e.g.*, Trump v. Wilcox, 145 S. Ct. 1415, 1416–17 (2025) ("[T]he Government faces greater risk of harm from an order allowing a removed officer to continue exercising the executive power than a wrongfully removed officer faces from being unable to perform her statutory duty.").
[144] *See* Adam Liptak, *On the Supreme Court's Emergency Docket, Sharp Partisan Divides*, N.Y. TIMES (Sep. 14, 2025), https://www.nytimes.com/2025/09/14/us/politics/supreme-court-emergency-docket-partisan.html.

25 such applications and won 80% of them.[145] Whatever the reasons may be for this sharp discrepancy,[146] the Trump Administration will continue to bring stay applications on the shadow docket; they will likely continue to win; and the legal rationale the Court will give for ruling in their favor will continue to rely, in large part, on the idea that the government would be irreparably harmed without the stay.

As this Note shows, the "irreparable harm to the government" factor—the idea that any injunction on an executive action categorically causes the Administration irreparable injury—has played an increasingly pivotal role in both the government's shadow docket arguments and the Court's shadow docket decisions. It has done so based on questionable applications of the precedents that created the categorical approach: *Maryland v. King*, which found that the government was irreparably harmed only when a statute created as a product of the legislative process was enjoined; and *Trump v. CASA*, which found that the government was irreparably harmed only when the judiciary impermissibly encroached on executive authority by granting universal relief. Although neither of these cases support the idea that party-specific injunctions on executive actions categorically cause the government irreparable harm, the Court has used these cases for precisely that takeaway.

As a result, the Administration has a foolproof recipe to win any stay application. First, the Court relies on the idea that the merits and harm to the applicant factors are the most critical, and ignores, or is indifferent to, the harm to other parties and public interest factors. Then, the Court categorically assumes that the Administration is harmed when there is an injunction placed against *any* executive action—and, as Justice Kavanaugh did in *NIH v. APHA*, places the burden on the respondent to prove otherwise. That leaves the respondents one pathway to victory, to prevail on the merits factor—but as in *Trump v. Orr*, the Court incorrectly places *that* burden on the respondent as well. There is only one possible outcome: the Administration wins.

The issues with the Court's stay balancing on the shadow docket run deeper than just their misplaced view of the "irreparable harm to the government" factor, but that view plays a key role in ensuring that the Administration succeeds on so many of its stay applications and incentivizes the Administration to seek stays of *any* injunctions placed on it by lower courts. As President Trump continues to challenge lower-court injunctions on the shadow docket, and as his Administration continues to advance "irreparable harm to the government" as a crucial variable in the calculus, the Court needs to reevaluate its view on irreparable harm to the government and reconsider its approach to balancing the equities. Otherwise, it will cause harm to other parties and to the public—harms that will be very real, and very, very difficult to repair.

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[145] *See Supreme Court Shadow Docket Tracker*, *supra* note 8.

[146] *Compare* Liptak, *supra* note 144 ("When the justices are moving fast, without a chance to forge consensus, legal experts said, partisanship may be more apt to influence outcomes."), *and* Ian Millhiser, *The Overwhelming Evidence that the Supreme Court is on Donald Trump's Team*, VOX (Sep. 5, 2025, at 6:30 ET), https://www.vox.com/scotus/460270/supreme-court-republican-partisan-hacks-donald-trump [https://perma.cc/V2AE-M6XN] ("This Court, in other words, has favored Trump by giving him broad exemptions from normal procedures, while simultaneously erecting new barriers in front of anyone who challenges him."), *with* Jonathan H. Adler, *Looking for Partisan Patterns in the Shadow Docket*, REASON: VOLOKH CONSPIRACY (Sep. 14, 2025, at 15:41 ET), https://reason.com/volokh/2025/09/14/looking-for-partisan-patterns-in-the-shadow-docket/ [https://perma.cc/W253-NDRD] ("It seems to me rather clear that the primary reason the Trump Administration has seen such success on the interim docket is because it has been very selective in deciding which cases to bring to the justices.").