

# Justices Must Apply Law Evenly In Shadow Docket Rulings

By **David Hopkins** (April 4, 2022)

In recent months, the country has seen the rise of the so-called shadow docket. For the uninitiated, this refers to a series of decisions from the U.S. Supreme Court reaching a significant ruling, often on a controversial issue, at the preliminary stage of injunctive relief.

This has the effect of resolving hot-button legal and policy issues without the general slog of briefing and oral argument.

The recent critique of the shadow docket has the nation focused on a legal nuance that has rarely made its way to the forefront of our public discourse.



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Specifically, what's the big deal about deciding these issues at an early stage, rather than waiting for the hallmarks of appellate practice to play out?

This deviation from the norm is significant because injunctive relief is relatively rare. In order to get an injunction, one has to meet a steep burden.

Courts are reluctant to use their power to prevent an action from taking place before the resolution of a case on the merits.

Among other factors, a requirement for injunctive relief that has shaped the shadow docket is that of irreparable harm.

Essentially, Supreme Court precedent requires that the party seeking injunctive relief demonstrate that they will suffer irreparable harm in the absence of that relief. This refers to harm that cannot be reduced to money damages and cannot otherwise be repaired following the completion of the litigation.

Yet the Supreme Court has been notably lax on finding irreparable harm in ruling on recent shadow docket cases affecting issues of nationwide importance.

One need look no further than the case of *National Federation of Independent Business v. U.S. Department of Labor*, in which the court on Jan. 13 stayed the implementation of the Biden administration's regulation requiring employers over a certain size to have a mandatory vaccination-or-testing policy in place to combat the spread of COVID-19.[1]

Whatever one may think about this decision and the issues involved, most would agree that the applicable legal doctrines and tests should be consistently applied to determine such an important issue.

Yet the court's decision to keep the regulation from moving forward is virtually devoid of the analysis of irreparable harm required to grant that sort of relief.

In fact, the dissent was quick to note the absence of this analysis, specifically stating that "[n]one of these requirements [including the requirement for irreparable harm] is met here."

The same is true of the court's holding last December in *Whole Woman's Health v. Jackson*, in which the court declined to enjoin Texas' S.B. 8, the law that grants a right of action to private parties against individuals involved in the process of a woman obtaining an abortion.[2]

While this decision reflected a number of other important issues, it similarly lacks an irreparable harm analysis while allowing a law to go into effect.

But the court does not appear to be completely blind to the requirement that irreparable harm be demonstrated in order to obtain injunctive relief. Rather, whether this analysis becomes significant appears to depend on how closely it is related to the decision that the court wishes to reach.

This is far from an isolated issue. One of the most important Supreme Court decisions of the COVID-19 era came in *Roman Catholic Diocese of Brooklyn, New York v. Cuomo*.[3]

In that case, the court in November 2020 struck down the state of New York's COVID-19-related restrictions on in-person gatherings over a certain size due to their impact on in-person religious services.

In that case, the court performed a significant analysis of exactly why then-Gov. Andrew Cuomo's restriction on in-person gatherings would constitute irreparable harm to the religious organization seeking injunctive relief, as well as others similarly situated.

That robust examination of irreparable harm bolstered the court's finding that the restriction should be enjoined pending the resolution of the case on the merits.

Specifically, the court found that

[t]here can be no question that the challenged restrictions, if enforced, will cause irreparable harm. ... If only 10 people are admitted to each service, the great majority of those who wish to attend Mass on Sunday or services in a synagogue on Shabbat will be barred.[4]

This selective decision making regarding the application of irreparable harm to threshold issues of injunctive relief is problematic for two separate but related reasons.

First, it strongly suggests the presence of outcome-based ruling, which should concern anyone with an interest in having a judicial system guided by precedent and a cautious, reasoned judiciary.

Second, it suggests that crucial portions of the law, particularly those concerning the extreme remedy of injunctive relief, are tossed to the side when contentious, politicized issues are brought before the court.

It is no coincidence that the increased scrutiny on the shadow docket comes as increasingly polarizing issues are submitted to the court for judicial review.

It is also arguably no coincidence that the shadow docket is playing an increasing role in judicial decision making as the court itself is becoming increasingly politically polarized in the eyes of the American public.

The way around these perceptions and problems is relatively straightforward: Apply the

generally accepted tests for extreme remedies as they are written.

With great power comes great responsibility. The U.S. Supreme Court is the most powerful court in the land and, as a result, bears the greatest responsibility for getting fundamental questions of law right.

This is especially true when considering issues of grave importance without the benefit of full briefing and argument on the merits.

However one may feel about the particular results the court should reach on polarizing issues, we can and should all agree that we want a consistent, steady, predictable process to govern the court's decisions.

In a world with increasingly unstable political and social institutions, some things are worth fighting for.

Judges and justices who consistently apply the law as it is written make sustainable progress possible and worthwhile.

Without that steady hand on the proverbial wheel, there is no telling what kind of havoc could be wrought in the name of parties seeking cheap political victories. That, itself, would be irreparable harm.

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[1] National Federation of Independent Business v. OSHA, 595 U.S. \_\_\_\_ (2022).

[2] Whole Woman's Health v. Jackson, 594 U.S. \_\_\_\_ (2021).

[3] Roman Catholic Diocese of Brooklyn, New York v. Cuomo, 141 S.Ct. 63 (2020).

[4] Id.