RESPONSE

EMERGENCY RELIEF DURING EMERGENCIES[†]

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[†] An invited response to Kenny Mok & Eric A. Posner, *Constitutional Challenges to Public Health Orders in Federal Courts During the COVID-19 Pandemic*, 102 B.U. L. REV. 1729 (2022).

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INTRODUCTION

In January 2022, the Supreme Court resolved a pair of challenges to vaccination rules adopted by the Biden Administration during—and in response to—the COVID-19 pandemic. In the first case, captioned *National Federation of Independent Business v. Department of Labor*,[1] the Court blocked the Occupational Safety and Health Administration's ("OSHA") proposed requirement that all large employers mandate either COVID-19 vaccinations or regular testing for their employees.[2] In the second case, captioned *Biden v. Missouri*,[3] the Court unblocked the Center for Medicare and Medicaid Services' ("CMS") rule requiring vaccinations for medical personnel at healthcare facilities receiving federal funding.[4]

Neither case reached the Supreme Court the "usual" way—as fully litigated appeals of final judgments rendered by lower state or federal courts. Rather, the OSHA case came to the Supreme Court as fifteen different emergency applications to the Justices to directly block OSHA's vaccinate-or-test rule, at least ostensibly while challenges to it played out (the Court granted two of the applications and consolidated them). The CMS case likewise came as a pair of emergency applications from the Biden Administration—to stay preliminary injunctions issued by two different district courts, each of which had blocked the CMS health worker mandate on a nationwide basis.[5] In other words, all of these disputes reached the Supreme Court through its "shadow docket"—the term coined by University of Chicago law professor Will Baude to describe the unsigned (and usually unexplained) case-management orders that constitute the numerical bulk of the Supreme Court's workload.[6]

What's more, unlike every other shadow docket dispute to reach the Supreme Court in recent years, many of which raised questions of equal (if not greater) public significance, in the January 2022 vaccination cases, the Justices agreed to hold oral arguments—something the full Court does not appear to have done for an emergency application since the early 1970s.[7]

The distinction between emergency relief and the more traditional "plenary" review that the Justices conduct in every other case in which they hear argument

[1] 142 S. Ct. 661 (2022) (per curiam).

[2] *Id*. at 663.

[3] 142 S. Ct. 647 (2022) (per curiam).

[4] *Id*. at 654.

[5] For a list of all seventeen emergency applications, see Steve Vladeck (@steve_vladeck) TWITTER (July 21, 2022, 7:23 PM), https://twitter.com/steve_vladeck/status/1550260143568420865.

[6] *See generally* William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1 (2015).

[7] The latest example I'm aware of in which the full Court heard oral arguments on an emergency application is *Morton v. A Quaker Action Group*, 402 U.S. 926 (1971) (mem.). Individual Justices appear to have heard argument "in chambers" as late as 1980. *See* STEPHEN

is far more than semantic. On plenary review, the question before the Court is invariably about what the ultimate answer to the underlying legal question ought to be. On emergency relief, the question is, or is at least *supposed* to be, what rule should govern *while* the litigation runs its course. Thus, the traditional standard for granting or vacating a stay pending appeal requires the applicant to demonstrate

> (1) "a 'reasonable probability' that four Justices will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction"; (2) "a fair prospect that a majority of the Court will conclude that the decision below was erroneous"; and (3) a likelihood that "irreparable harm will result from the denial of a stay."[8]

Additionally, "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."[9] In other words, the merits are *part* of the calculus, but they are not the only consideration.

The traditional balancing of the equities ought to be especially significant in cases challenging government policies adopted during emergencies. After all, in that context, whatever the merits of the dispute, the government is likely to have strong arguments about the harms of preventing its policies from going into effect. As Chief Justice John Roberts put it in May 2020, courts should therefore be especially reluctant to intervene where "a party seeks emergency relief in an interlocutory posture, while local officials are actively shaping their response to changing facts on the ground."[10] The argument is not for judicial deference to the political branches during a public health emergency *in general*; it is for judicial deference to the political branches during a public health emergency in the specific context of emergency relief—deference as to the harm that might result from preliminarily blocking a policy, as opposed to deference to the policy itself.

What is most remarkable about the January 2022 vaccination cases is that this traditional balancing was nowhere to be seen. As I've written elsewhere, there is lots of evidence that the Court had already silently moved away from these considerations in resolving other emergency applications in recent years.[11] But

M. SHAPIRO, KENNETH S. GELLER, TIMOTHY S. BISHOP, EDWARD A. HARTNETT & DAN HIMMELFARB, SUPREME COURT PRACTICE § 17.2 (11th ed. 2019).

[8] Conkright v. Frommert, 556 U.S. 1401, 1402 (Ginsburg, Circuit Justice 2009) (quoting Rostker v. Goldberg, 448 U.S. 1306, 1308 (1980)).

[9] *Id*. at 1402 (quoting *Rostker*, 448 U.S. at 1308).

[10] S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1614 (2020) (Roberts, C.J., concurring).

[11] *See generally, e.g*., STEPHEN VLADECK, THE SHADOW DOCKET: HOW THE SUPREME COURT USES STEALTH RULINGS TO AMASS POWER AND UNDERMINE THE REPUBLIC (forthcoming 2023) [hereinafter VLADECK, STEALTH RULINGS]; Stephen I. Vladeck, *The Supreme Court, 2018 Term—Essay: The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123 (2019).

in the OSHA case, the unsigned majority opinion said the quiet part out loud. Toward the end of the brief opinion, the Court summarized the argument of the challengers to the policy—"that OSHA's mandate will force them to incur billions of dollars in unrecoverable compliance costs and will cause hundreds of thousands of employees to leave their jobs."[12] It also noted the federal government's response—"that the mandate will save over 6,500 lives and prevent hundreds of thousands of hospitalizations."[13] But then it concluded, "It is not our role to weigh such tradeoffs. In our system of government, that is the responsibility of those chosen by the people through democratic processes."[14]

This statement, in context, is stunning. On applications for emergency relief, "weigh[ing] such tradeoffs" is *precisely* the Supreme Court's job. That's true not just as a matter of precedent and principle, but as a matter of statute—because the Court's power to grant emergency relief (indeed, its authority to even *hear* applications for such relief) stems from Acts of Congress.[15] Abandoning the equities, as the Court at least appeared to be doing in the OSHA case, would be lawless enough even if it were fully acknowledged and defended. But to do so without any further discussion was simply mind-boggling; Richard Re even wondered if the Court had "overrule[d] equity?"[16] The answer, of course, is no; in subsequent rulings on emergency applications, the Justices have paid at least lip-service to traditional equitable analyses—and, as importantly, have not suggested that the OSHA case upended those considerations. But this passage was still a significant admission by the six (or five) Justices in the majority—that something meaningful had changed in how they were approaching challenges to COVID-19-inspired government policies, if not *all* applications for emergency relief.[17]

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In reading Kenny Mok and Eric Posner's new article, *Constitutional Challenges to Public Health Orders in Federal Courts During the COVID-19 Pandemic*,[18] I kept coming back to this inherent contradiction in the Supreme

[12] Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin., 142 S. Ct. 661, 666 (2022) (per curiam).

[13] *Id*.

[14] *Id*.

[15] *E.g.*, 28 U.S.C. §§ 1651, 2101(f).

[16] Richard M. Re, *Did the Supreme Court Overrule Equity?*, RE'S JUDICATA (Jan. 14, 2022, 6:01 AM), https://richardresjudicata.wordpress.com/2022/01/14/did-the-supreme-court-overrule-equity/ [https://perma.cc/2KZU-QSDZ].

[17] The uncertainty of the vote count in the OSHA case is another byproduct of the shadow docket. Because the dispositions are unsigned (even when accompanied by a majority opinion), the only way to know the vote count for sure is if four Justices publicly dissent. That said, it certainly seems *likely* that the vote in the OSHA case was 6-3.

[18] Kenny Mok & Eric A. Posner, *Constitutional Challenges to Public Health Orders in Federal Courts During the COVID-19 Pandemic*, 102 B.U. L. REV. 1729 (2022).

Court's OSHA decision—that the Justices granted emergency relief in the midst of a public health emergency *without* the traditional balancing of the equities that's supposed to govern the issuance of emergency relief in such cases. Mok and Posner have compiled immensely useful data on how courts ruled across wide swaths of COVID-19-related litigation (including the OSHA case)—leading to their core normative thesis that, in general, courts showed insufficient deference to the political branches as the latter attempted to respond to the public health emergency caused by the COVID-19 pandemic.[19]

In this response, I offer what I hope is a friendly amendment to Mok and Posner's thesis. From my perspective, one of the *causes* of the lack of deference to the political branches that has characterized so many of the rulings Mok and Posner studied is the same category error that the Supreme Court made in the OSHA case—blurring what ought to be the legally (and politically) critical distinction between the *merits* of judicial decisions during a public health emergency and the status quo courts tolerate when considering requests for preliminary or interim relief. After all, looking just at the Supreme Court, every single one of its decisions relating to COVID-19-related public health policies has come on an application for emergency relief—not plenary review. Mok and Posner's work acknowledges the difference between those two postures but suggests that it is irrelevant.[20] My own view is that such a move obscures the true substantive shortcomings of these rulings.

Put another way, I disagree with Mok and Posner that, in general, courts should give greater deference to public health orders issued during emergencies. As Lindsay Wiley and I wrote in 2020, courts should give both no *more* deference to the merits of policies adopted by the political branches during public health emergencies *and* no *less* deference.[21]

To me, the lesson of the COVID-19 cases surveyed by Mok and Posner, and exemplified by how COVID-19 policies have fared in the Supreme Court, is that courts ought to focus much more on carefully balancing the equities when parties seek emergency relief during public health emergencies—and that, *if* courts were to do so, they might leave a larger number of government policies intact at least temporarily even when they have concerns about the legality of those policies on the merits. A public health emergency doesn't make an otherwise unlawful policy lawful, but it might justify leaving at least some policies in place while litigation challenging them proceeds—rather than blocking those same policies ab initio. Thus, Mok and Posner and I end up in much the same place in looking back at the COVID-19-related litigation of the past two-and-a-half years

[19] *Id.* at 1769.

[20] *Id.* at 1739.

[21] *See generally* Lindsay F. Wiley & Stephen I. Vladeck, *Coronavirus, Civil Liberties, and the Courts: The Case Against "Suspending" Judicial Review*, 133 HARV. L. REV. F. 179 (2020).

and thinking about how courts should behave in the future; we just see very different roads that led us to this point.

I. EMERGENCY RELIEF AND THE EQUITIES

It's axiomatic that preliminary injunctions are all about the equities. When a plaintiff asks a court to block the defendant's challenged conduct before conclusively adjudicating its lawfulness, the analysis necessarily turns on more than just the merits. Instead, the question for the court is which alternative is preferable: blocking the defendant's conduct for the duration of the litigation, or allowing it to continue unfettered? The merits are hardly irrelevant to that analysis, but they're also not (always) dispositive. The whole point of the enterprise is to balance the "likelihood" of the plaintiff succeeding *against* the harms that the plaintiff, the defendant, and the public would all face from either of the available alternatives.

Once the trial court grants or denies a preliminary injunction, the equities again play a central role if whoever loses seeks to immediately appeal, which, at least in the federal courts, is their right.[22] Although the "merits" of such an appeal focus on whether the district court was correct to grant or deny the injunction, it is increasingly common for the appealing party to ask for "emergency" relief pending the court of appeals' resolution of those merits—to ask the appeals court to stay an injunction that the district court granted or to issue an injunction directly if the district court demurred. In practice, this means that courts of appeals (and, increasingly, the Supreme Court) can be asked to issue emergency relief within weeks—if not days—of when a lawsuit is filed. At that stage, the only record on which these appellate courts can rely is whatever record the district court was able to create in its ruling on the preliminary injunction. And emergency intervention at that stage should be reserved for extreme cases in which it is just not reasonable to allow the litigation in the lower courts to run its course.

Until recently, all of these propositions would have been completely uncontroversial. But as the Supreme Court has become far more active in issuing particular types of rulings through its shadow docket, we have also seen mounting evidence that, in the process, the Justices have given increasingly short shrift to the equities. To take just one example of many, consider an April 2022 ruling in which the Court, by a 5-4 vote, stayed a district court's injunction of a Trump-era environmental regulation. The applicants could not possibly make out a case for irreparable harm—because the injunction had been in place for more than five months, and yet they could point to no injury they had suffered during that period. That led Justice Elena Kagan, in a dissent joined not only by

[22] *See* 28 U.S.C. § 1292(a).

Justices Stephen Breyer and Sonia Sotomayor but also Chief Justice Roberts, to suggest that the Court had left out the equities. As she wrote, the majority

> provides a stay pending appeal, and thus signals its view of the merits, even though the applicants have failed to make the irreparable harm showing we have traditionally required. That renders the Court's emergency docket not for emergencies at all. The docket becomes only another place for merits determinations—except made without full briefing and argument.[23]

In other words, the problem with the majority's decision was not (necessarily) the bottom line it reached, but the fact that it failed to account for the traditional equities-balancing that should have been a prerequisite to any kind of emergency relief. I've documented that this phenomenon appears to predate cases arising out of the COVID-19 pandemic.[24] But the litigation the pandemic precipitated brought what had been a subtle shift in the Court's (or, at least, a majority of the Justices') approach to the forefront.

II. THE COVID-19 CASES

I've written elsewhere at some length about the Supreme Court's handling of cases related to the COVID-19 pandemic, both in the specific context of religious liberty disputes and more generally.[25] For present purposes, three points seem especially salient. First, every single case of this nature came to the Supreme Court through the shadow docket. Even though there has now been more than enough time for the Court to conduct plenary review in many of the challenges to COVID-19-related public health regulations, the Justices have yet to do so in a single case. Instead, the Court's COVID-19 jurisprudence has come entirely through unsigned (and usually unexplained) orders.

Second, many of those rulings have come in defiance of the settled rules and understandings of the Court's power to issue them. I've already noted cases in which the Justices seem to have neglected the standard for granting a stay pending appeal, but the Court has also granted emergency writs of injunction—a form of relief that is only available to vindicate rights that are "indisputably clear"—in cases in which it has established *new* legal principles.[26] It's difficult to imagine that a lower court could have failed to protect rights that are

[23] Louisiana v. Am. Rivers, 142 S. Ct. 1347, 1349 (2022) (Kagan, J., dissenting).

[24] *See generally* VLADECK, STEALTH RULINGS, *supra* note 11.

[25] In addition to the sources cited *supra* note 11, see generally Stephen I. Vladeck, *The Most-Favored Right: COVID, the Supreme Court, and the (New) Free Exercise Clause*, 15 N.Y.U. J.L. & LIBERTY 699 (2022).

[26] *See, e.g.*, Tandon v. Newsom, 141 S. Ct. 1294 (2021) (per curiam); *see also* Stephen I. Vladeck, *The Supreme Court is Making New Law in the Shadows*, N.Y. TIMES (Apr. 15, 2021), https://www.nytimes.com/2021/04/15/opinion/supreme-court-religion-orders.html.

indisputably clear if it's only a new Supreme Court decision that articulates them.[27]

Third, and related, many of those same rulings have come in defiance of the record that district courts were able to generate—including, in some cases, detailed factual findings about the justifications for the public health restrictions and the risks to which the relevant government actors were responding. Especially in a context in which the briefing tends to be rushed, there is little opportunity for participation by amici curiae, and there is almost never oral argument, the Justices end up substituting their own anecdotal judgments for detailed factual findings by district courts—typically without even acknowledging as much.[28]

Against that backdrop, the first thing to say about Mok and Posner's article is that I think it radically undercounts the Supreme Court's work in this space. Mok and Posner focus on the four non-election-related, non-religious-liberty-related rulings in which the Justices handed down an opinion of the Court. I understand the argument for carving out the election cases,[29] but not the religious liberty cases. Not only have those represented the overwhelming majority of cases in which the Supreme Court has intervened during the COVID-19 pandemic, but they also provide powerful examples of the precise phenomenon at issue here—the disappearance of the equities in the Court's analysis of emergency applications.

But even if one carves out those categories, there's also the problem of looking only at those rulings that produced a majority opinion from the Supreme Court. Even when the Justices *grant* emergency relief, the norm is for there to *not* be an opinion of the Court. Reasonable minds might disagree on how many of these unsigned orders ought to also be part of the analysis, but it seems to me that the answer has to be *some* of them, at the very least.

Debate over the appropriate denominator aside, Mok and Posner also do very little to account for the procedural posture in which these decisions have arisen. To be sure, they *note* that, "[g]iven the emergency nature of the pandemic, most merit opinions involved a motion for a temporary restraining order ("TRO") or a motion for preliminary injunction."[30] And yet, they breezily assert that, "[a]lthough these are technically not merit rulings, they nonetheless reflect judges' merit judgments because one of the four factors weighed is 'likelihood

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[27] *See* Vladeck, *supra* note 25, at 731-38.

[28] *See, e.g.*, S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 721-23 (2021) (Kagan, J., dissenting).

[29] The COVID-19 pandemic dramatically increased the number of late changes to election rules, but courts considering those challenges tended to apply the so-called "*Purcell* principle." *See* Richard L. Hasen, *Reining in the* Purcell *Principle*, 43 FLA. ST. U. L. REV. 427, 428 (2016). For better or worse (and my own view is strongly the latter), *Purcell* does not include traditional equities balancing in its analysis.

[30] Mok & Posner, *supra* note 18, at 1739.

of success on the merits.'"[31] In other words, Mok and Posner assume that we can divine deeper merits principles from these equities-balancing rulings because the merits are *part* of the analysis.

Respectfully, I think that not only miscodes the cases, but it collapses the very distinction that the difference between *true* "merits rulings" and these decisions is supposed to reflect. And by collapsing that distinction, Mok and Posner miss the point that I think most accurately ties these cases together—that they give insufficient deference to governmental assessments of the *harm* that blocking COVID-19 public health policies could cause.

Consider one of the cases in their dataset—the Supreme Court's August 2021 ruling putting back into effect a district court injunction against the Centers for Disease Control and Prevention's ("CDC") eviction moratorium.[32] Although the Court *did* offer a majority opinion, the discussion of the equities was . . . cursory. On the applicants' side, the Court asserted (without factual support) that "[t]he moratorium has put the applicants, along with millions of landlords across the country, at risk of irreparable harm by depriving them of rent payments with no guarantee of eventual recovery."[33] Note the inclusion of *non*parties in the analysis of the irreparable harm to the applicants. On the government's side, the Court moved the goalposts—focusing not on the harm that would result from *blocking* the moratorium, but on the time the government had had to mitigate those harms. Thus, the Court concluded, "It is indisputable that the public has a strong interest in combating the spread of the COVID-19 Delta variant. But our system does not permit agencies to act unlawfully even in pursuit of desirable ends."[34] In other words, there were *no* equitable considerations that, in the Court's view, would have justified leaving the moratorium in place while the litigation challenging it proceeded; the unlawfulness of the policy took precedence over all other considerations.

Justice Breyer's dissent, which was joined by Justices Sotomayor and Kagan, made this point directly—outlining in painstaking detail the numerous harms that the government argued would result from a stay of the moratorium, and including numerous citations that appeared to substantiate the government's claims.[35] In other words, while the majority waved its hands at the equities it purported to be balancing, the dissenters showed in both argumentative and factual detail why those equities weighed strongly in favor of keeping the moratorium in place. If this case was an outlier, it was only in how *much* the majority explained its reasoning.

In my view, all of this matters because the structural problem in how courts handled litigation challenging public health restrictions enacted in response to

[31] *Id*. (quoting Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008)).

[32] Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485 (2021) (per curiam).

[33] *Id*. at 2489.

[34] *Id*. at 2490.

[35] *Id*. at 2490-94 (Breyer, J., dissenting).

the COVID-19 pandemic is *not* that they were insufficiently deferential on the merits. It's that they were insufficiently deferential on the equities. Taking the CDC eviction moratorium case, specifically, Mok and Posner's article appears to suggest that the Court ought to have been more tolerant of the federal government's *merits* arguments in defense of the eviction moratorium—that it was a permissible exercise of the CDC's statutory authority under the Public Health Service Act. But the moratorium could have been left in place for months—if not years—if the Court had instead given more complete consideration to *balancing* the equities, a balance that, as the dissent pointed out, strongly supported leaving the moratorium in place, even temporarily. And although Mok and Posner do not include the religious liberty cases, I believe that they provide even more powerful evidence of this point. To take one example, consider *Tandon v. Newsom*,[36] in which the Justices granted emergency injunctive relief against California's limit on the size of in-home gatherings because, in the majority's view, it violated the religious free exercise rights of those who wished to conduct Bible study or other religious observances in their homes.[37] Measured against the impact of relaxing those restrictions on a statewide basis in the midst of the Delta surge in mid-2021, it's not hard to see how *any* deference on the balance of harms might have augured in favor of a different result.[38]

CONCLUSION

At first blush, this response might seem to be splitting hairs—endorsing Mok and Posner's central claim that courts have been a bit too aggressive in blocking COVID-19-related public health restrictions but on technical, even nerdy grounds. But there's more at stake here than just a debate over which is the fairer critique of the courts' approach to COVID-19 cases since March 2020. The debate over how courts should handle emergencies long predates the COVID-19 pandemic, and the problems posed by each of the conventional answers to that question will persist long after the current public health emergency has subsided.

My goal is not to relitigate that debate. Rather, it's to suggest that the COVID-19 cases provide a uniquely useful window into one feature of litigation *during* emergencies—the extent to which much of that litigation is characterized by requests for emergency relief. So far as I can tell, we have not historically paid much attention to the unique confluence of emergency relief and (public health) emergencies. But we ought not waste the opportunity that COVID-19 has provided us.

One need not quote Justice Robert Jackson's dissenting opinion in *Korematsu v. United States*[39] to understand its basic thrust—that courts ought to be

[36] 141 S. Ct. 1294 (2021) (per curiam).

[37] *Id.* at 1297.

[38] *See id.* at 1298-99 (Kagan, J., dissenting).

[39] 323 U.S. 214 (1944).

especially wary of lending their imprimatur to policies adopted during exigencies.[40] Governments overreach during emergencies (it's often better than the alternative); and courts shouldn't compound their mistakes. But my own view is that the optimal way to account for the unique considerations raised by emergencies in general, and public health emergencies in particular, is to take seriously the impact that those circumstances do and should have on the broader equities courts are supposed to balance when parties seek both interim and emergency relief. Not only would such an approach better reflect what's really *happening* in these cases (where prudential arguments for leaving unlawful policies in place, at least temporarily, may be relatively strong), but it would avoid the risk of the alternatives—courts allowing governments too much, or too little, leeway on the merits.

[40] *See id*. at 242-48 (Jackson, J., dissenting).