

**Testimony of Edmund G. LaCour Jr.\***

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**Hearing before the United States Senate Committee on the Judiciary**

**“Texas’s Unconstitutional Abortion Ban and the Role of the Shadow Docket”**

**September 29, 2021**

Mr. Chairman, Ranking Member Grassley, and distinguished members of this Committee, thank you for inviting me to testify about the U.S. Supreme Court’s emergency proceedings. I am honored to be here.

My name is Edmund LaCour, and I am the Solicitor General of Alabama. In that capacity, I litigate before federal and state courts on behalf of the State. Many of our cases involve time-sensitive matters and requests for emergency relief made either by the State or by our opponents. And many of these cases have gone before the Supreme Court. I thus have firsthand experience with the High Court’s non-merits docket and, in particular, its emergency proceedings.

In my short time before you this morning, I would like to make three points. First, the term “shadow docket,” while evocative, is inapt, concealing more than it reveals. Second, the Court’s decisions in emergency proceedings—though often offering less guidance for non-parties than most merits opinions—typically serve the parties well given the difficulties inherent in emergencies. And third, the recent emergency-docket decisions from the Supreme Court that have garnered attention from the Committee are less remarkable than some have suggested. Most notably, the Court’s recent decision in the Texas S.B. 8 litigation to deny the plaintiffs’ request for an injunction was an entirely ordinary ruling. After all, one thing most everyone agrees on about S.B. 8 is that it raises unprecedented and difficult jurisdictional questions. It thus would have been extraordinary had the Court granted an injunction against the defendants in *Whole Woman’s Health v. Jackson* when it was entirely unclear whether it even had authority to act.

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Turning first to the term “shadow docket.” As the Committee is aware, this phrase was coined by law professor Will Baude in a 2015 paper. Professor Baude used the term to refer to the Supreme Court’s non-merits decisions. To be clear, the Court makes thousands of these decisions every single term; the non-merits cases Professor Baude focused on in his paper, however, were those that altered decisions below, and the majority of the paper focused on the Court’s evolving summary-reversal jurisprudence. Current conversation

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\* I am very grateful to Alabama Deputy Solicitor General Thomas Wilson for assisting me in preparing this testimony. Any errors are mine.

about the so-called “shadow docket” has further narrowed in scope to refer almost entirely to the Court’s emergency proceedings.

But emergency proceedings hardly warrant such a nefarious moniker; they are a critical piece of any court’s business. Congress recognized as much, so it provided federal courts with the ability to do something about the emergencies they would unavoidably face. In the late-eighteenth century, Congress authorized individual Justices or the entire Supreme Court to issue injunctions pending appeal. Congress has also provided emergency-relief powers to the federal courts of appeal and district courts. And state legislatures too have provided their courts with similar powers.

Far from lurking in the shadows, the Supreme Court’s entire docket is freely searchable online, and the Court’s emergency proceedings usually provide enough time for litigants in non-merits cases to respond and for *amici* to be heard. By contrast, many district courts simply rule on emergencies from the bench, without any transcript or online access, while offering only a one- or two-line decision. But most importantly, the Supreme Court, like all courts, sometimes faces drastic circumstances demanding relief on an expedited basis. When the Court faces an emergency concerning the fundamental rights of one (or thousands) of people and mere days (or hours) to act, it is often understandable that its decision is not accompanied by a lengthy opinion.

Which brings me to my second point: based on my experience litigating emergency proceedings before the Supreme Court, it is my view that the process generally works well for litigants in emergency situations. A pair of Alabama’s recent cases illustrates the point. The first case, *People First of Alabama v. Merrill*, required the State to seek emergency relief when federal courts twice changed Alabama voting laws while absentee ballots were already being cast and we were just weeks away from elections—first the 2020 primary and then later the general election. Amidst the pandemic, the State broadly expanded absentee voting, but the safeguards that had previously applied to absentee voting continued to apply: a voter needed to submit a photo ID with her absentee ballot application, and she needed either two witnesses or a notary to witness her sign a voter affidavit. Weeks into absentee voting and shortly before the primary election, a federal district court preliminarily enjoined these measures and also ordered that curbside voting be allowed for the first time in State history. A few months later, the court entered a similar permanent injunction weeks before the general election. The Eleventh Circuit denied Alabama’s application to stay the preliminary injunction and, when the permanent injunction issued, partially denied Alabama’s request for a stay. But both times, the Supreme Court ultimately vindicated Alabama and reinstated the State’s election requirements.

The briefing that followed each district-court decision moved quickly, working through the Eleventh Circuit and receiving a decision from the Supreme Court in less than a month. The Court’s orders were perfunctory, which, as critics have noted, is not uncommon for non-merits decisions. But while more analysis would have been welcome, and perhaps helpful for other States facing similar challenges, it was unnecessary to resolve the State’s

emergency. The Supreme Court's decisions in *People First* followed from the Court's 2006 decision, *Purcell v. Gonzalez*, which advised that courts should exercise caution before changing voting rules on the eve of an election, lest the court create confusion among voters and do more harm than good. Considering that the district court had altered Alabama's voting laws after voting had already begun, potential for confusion was clear, and the Court's emergency proceedings operated as they should have.

Another case the State litigated earlier this year further illustrates the emergency docket's role. In *Dunn v. Smith*, a death-row inmate, Willie Smith, asserted that the State's execution safety protocol violated his religious liberty rights under the Religious Land Use and Institutionalized Persons Act because the protocol did not allow for his pastor to accompany him into the execution chamber during Smith's execution. Alabama and the district court disagreed with Smith. But twenty-four hours before his scheduled execution, a divided Eleventh Circuit panel granted Smith an injunction. The State filed an emergency application with the Supreme Court, seeking to stay the Eleventh Circuit's decision.

We were able to brief our arguments and submit to the Court the crucial information it needed to issue a thoughtful ruling given the emergency posture of the case. While I think we presented a strong case, a majority of the Justices rejected it. But I hardly view that as an indictment of emergency proceedings themselves. And while a lengthy majority opinion would have been helpful to Alabama and other States trying to satisfy RLUIPA's requirements in the execution context, we could hardly have expected such a writing in less than a day. In any event, the stay made clear that the State would either need to alter its execution protocol or delay Smith's execution while pressing on through the normal appellate process. And a thoughtful opinion from Justice Kagan that issued with the Court's order improved the State's understanding of the burdens it would likely need to satisfy going forward. Many of the Supreme Court's emergency-docket decisions fit this mold.

Finally, a few words about the emergency-docket rulings that spurred this hearing. The hearing announcement highlighted three recent decisions that purportedly constituted "abuse" of the Supreme Court's emergency docket. First, the Court's decision not to stay a district-court order rejecting the Biden Administration's decision to repeal President Trump's Migrant Protection Protocols, or "MPP"; second, the Court's decision to vacate a stay of the CDC's second COVID-19 eviction moratorium after a district court had held that moratorium (and its predecessor) to be unlawful; and third, the Supreme Court's decision not to stay Texas's recently enacted S.B. 8. None of these decisions was extraordinary, and each could have been predicted based on recent precedent.

First, the Court's decision not to stay a lower court's enjoinder of the Biden Administration's MPP repeal was consistent with very recent Supreme Court precedent. When the Trump Administration tried to repeal DACA, the Supreme Court, in *DHS v. Regents*, ultimately determined that the Administration's action was arbitrary and capricious based in part on a failure to adequately consider important reliance interests implicated by the repeal. When the Biden Administration tried to repeal MPP, the district court repeatedly cited *Regents* and ultimately concluded that the Administration's decision

to rescind its predecessor’s policy suffered flaws similar to those that doomed the Trump Administration’s attempt to repeal DACA. The Supreme Court’s decision not to stay a lower court order applying recent Supreme Court precedent was unsurprising.

And the Court’s most recent eviction-moratorium decision was even less surprising. A district court had previously held the first moratorium unlawful, but had stayed its order pending appeal. When property owners asked the Supreme Court to vacate that stay, the Court by a 5-4 vote declined. Justice Kavanaugh concurred on the ground that the moratorium would soon expire, but cautioned that the moratorium “exceeded [the CDC’s] existing statutory authority” and should not be renewed absent congressional approval. Congress, in turn, declined this invitation to legislate. That left President Biden to decide whether to order a new moratorium that he himself admitted would likely be deemed unlawful. When he pushed forward, the district court that had held the initial moratorium unlawful reached the same conclusion about its replacement. The district court stayed its judgment, but when the Supreme Court confronted the question whether the new moratorium should remain in effect during a new round of appeals, the Court did just what Justice Kavanaugh had explained it would, vacating the district court’s stay so that the district court’s judgment against the moratorium would take effect. The decision surprised no one.

Now for S.B. 8. As every legal commentator has observed, this law is novel in its design and application. Chief Justice Roberts, joined by Justices Breyer and Kagan, stated that the law was “not only unusual, but unprecedented.” And its unusual design creates serious questions about how a federal court may obtain jurisdiction to review and potentially enjoin it. This thorny issue of what it means for a federal court to exercise its constitutional authority was sparsely briefed at the time *Whole Woman’s Health v. Jackson* reached the Supreme Court. Indeed, as Justice Kagan explained, the Court received virtually no “guidance from the Court of Appeals,” and “reviewed only the most cursory party submissions, and then only hastily.”

Everyone agrees that the law presents a jurisdictional question the Supreme Court has never addressed. Based on the thin record Justice Kagan described, overturning the law would have constituted an extraordinary use—and likely an unprecedented expansion—of judicial power. The Court was faced with the decision to either exercise jurisdiction where it may not have had any or allow the fate of the state law to work its way through other state or federal proceedings where a court’s authority to act would likely be far clearer. The Supreme Court’s decision to take the latter path was consistent with its emergency-docket jurisprudence and with the way we generally expect federal courts to act.

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In closing, the emergency docket provides an important release valve for litigants when the Court determines that relief is clearly warranted in drastic circumstances. And recent emergency-docket decisions that sparked this hearing are largely consistent with Court

precedent and have been largely predictable. There is little shadowy about the Supreme Court's emergency docket.

Thank you again for the opportunity to offer testimony on this important and often misunderstood subject. I hope that what I have offered is useful, and I am happy to answer any questions members of the Committee may have for me.