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## How Should the Supreme Court Respond to the Combination of Political Polarity, Legislative Impotence, and Executive Branch Overreach?

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## Articles:

# How Should the Supreme Court Respond to the Combination of Political Polarity, Legislative Impotence, and Executive Branch Overreach?

Richard J. Pierce, Jr.\*

### ABSTRACT

In this Article, Professor Pierce discusses two related problems that the Supreme Court must address: (1) the large increase in nationwide preliminary injunctions issued by district judges to prohibit the executive branch from implementing major federal actions; and (2) the large increase in the number of cases in which the Supreme Court either stays or refuses to stay preliminary injunctions without providing an adequate explanation for its action. He first describes the sources of the two problems and the many ways in which they threaten our system of justice. He then urges the Court to issue an opinion in which it provides a clear legal framework that district courts, circuit courts, and the Supreme Court itself can use to identify the unusual circumstances in which a

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\* Lyle T. Alverson Professor of Law, George Washington University. I am grateful to the Center for the Study of the Administrative State for providing financial support for this paper and to the participants in a workshop at the Center for providing helpful comments on an earlier version of this Article. I am also grateful to my research assistant, Priyanka Mara, for providing valuable help on this project.

district court should issue a preliminary injunction that prohibits the executive branch from implementing an action.

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#### I. INTRODUCTION

The Supreme Court must address two unprecedented problems. First, the Court must end the flood of nationwide preliminary injunctions issued by district courts. Second, the Court must curtail the extraordinary increase in the number of major actions it takes on its emergency docket without briefing and without issuing an opinion that adequately explains the action. Neither of these closely-related problems have origins in the judicial branch. Rather, their roots lie primarily in the effects that the nation's extreme political polarity is having on the legislative and executive branches.

#### II. SOURCES OF THE PROBLEMS

Political polarity has led to legislative impotence.<sup>1</sup> Decades ago, when a president saw the need to take major steps to address a problem, he proposed a legislative solution and then engaged in hard bargaining with the leaders of both parties in the House and Senate. That bargaining process led to bipartisan compromises that were reflected in legislation. For instance, the Administrative Procedure Act and the Clean Air Act were both enacted unanimously after lengthy negotiations between the White House and the leaders of both political parties in the House and Senate.<sup>2</sup>

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1. For detailed discussions of legislative impotence, see generally Richard J. Pierce, Jr., *The Combination of Chevron and Political Polarity Has Awful Effects*, 70 DUKE L.J. ONLINE 91 (2021); Richard J. Pierce, Jr., *Delegation, Time and Congressional Capacity: A Response to Adler and Walker*, 105 IOWA L. REV. ONLINE 1 (2020).

2. See Evan D. Bernick, *Envisioning Administrative Procedure Act Originalism*, 70 ADMIN. L. REV. 807, 812 (2018); E. W. Kenworthy, *Tough New Clean-Air Bill Passed by Senate, 73 to 0*, N.Y. TIMES, (Sept. 23, 1970), <https://bit.ly/3ZuEPsw>; Jaime Fuller, *Environmental Policy is Partisan. It Wasn't Always.*, WASH. POST (June 2, 2014, 6:30 AM), <http://bit.ly/3YqzRLX>.

Those days are gone. Today, bi-partisan legislation is rare. When such legislation is proposed by members, the leaders of both parties usually oppose it. Occasionally, negotiated bi-partisan legislation emerges in contexts in which Congress can confer tangible benefits on every congressional district, e.g., the Infrastructure Investment and Jobs Act,<sup>3</sup> which paved the way for increased government spending in every congressional district. But bi-partisan legislation that addresses policy issues appears impossible to enact. Any member of Congress—regardless of party affiliation—who urges or supports compromise is likely to be punished by party leaders and defeated in a primary by an uncompromising adherent to the views of their party's base.

Legislative impotence creates an environment in which a president who sees a need to take major actions to address a problem receives the same advice from his political advisors on every occasion. They advise that it would be a waste of time and energy to propose a legislative approach to solving the problem. They offer this static, albeit well-supported, advice regardless of whether the problem is a massive influx of immigrants at the southern border, a banking crisis, a pandemic, or climate change. That advice leaves the president with a choice between two unattractive options: do nothing or take unilateral action.

In many cases, the president believes that the problem is so serious that he must take unilateral action, either directly—by issuing an executive order—or indirectly—by instructing the relevant agency to act. The president's legal advisors then tell him that the only statutory authority he or an agency can use to support such unilateral actions is a broadly-worded statute that was enacted 30 to 80 years ago, long before Congress was even aware of the problem. The legal advisors will also inform the president that there is a significant risk that a court will block the action that he believes to be imperative to address the problem effectively.

That well-supported legal advice makes the president's choice between doing nothing effective to address the problem or taking legally-fragile unilateral action more difficult. In many cases, however, the president will decide that the problem is so serious that he will take his chances in court rather than allow the problem to persist and grow because of the government's failure to act.

As soon as the president takes the essential, unilateral action to address the problem, political polarity manifests itself in another form. The president's actions produce a firestorm of criticism from the leaders of the opposing party. One subset of those leaders—typically, state

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3. See Infrastructure Investment and Jobs Act, Pub. L. No. 117–58, 135 Stat. 429 (codified as amended in scattered sections of 23 U.S.C.).

attorneys general—immediately file a motion for the issuance of a nationwide preliminary injunction in federal court. If granted, the nationwide injunction bars the executive branch from taking the enjoined, unilateral action during the multi-year process required to obtain a final judicial resolution of the dispute.

In most cases, permissive jurisdiction and venue rules provide the state attorneys general the opportunity to choose which of the hundreds of district judges will rule on their preliminary injunction motion. Unsurprisingly, they choose a district judge who is most likely to be sympathetic to their views and hostile to the views underlying the executive action. Notably, in the 2007 case of *Massachusetts v. EPA*, the Supreme Court softened the standing requirements for states seeking to challenge an executive action, rendering such challenges easier to launch.<sup>4</sup>

The district judge usually grants the motion to issue a nationwide preliminary injunction. The judge is likely to take that action for two primary reasons. First, the judge strongly disagrees with the executive action and is sympathetic to the arguments made by the state attorneys general. Second, the judge is encouraged by the way that the Supreme Court has acted in similar cases. These two reasons have produced a massive increase in the number of nationwide preliminary injunctions issued by district courts. During the past decade, the number of nationwide preliminary injunctions issued by district courts has increased from three per year to 18 per year.<sup>5</sup>

In some cases, the Supreme Court has allowed nationwide preliminary injunctions to remain in effect without issuing any opinion in which it explained its decision in any way.<sup>6</sup> Even when the Court decides to write an opinion on the decision, it is often brief, consisting only of a few conclusory statements.<sup>7</sup> Additionally, if the Court accompanies its action with an opinion, the opinion never applies the four-factor test that the Court traditionally required lower courts to apply when they consider motions for preliminary injunctions or stays.

Until recently, the Court required the party seeking a preliminary injunction or a stay to demonstrate that (1) the issuance of the injunction or stay is in the public interest, (2) a decision not to enjoin or stay the action will cause irreparable harm, (3) that irreparable harm will exceed the irreparable harm that a decision to enjoin or stay the action will

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4. See *Massachusetts v. EPA*, 549 U.S. 497, 518–21 (2007).

5. See Jeffrey A. Rosen, Deputy Att’y Gen., U.S. Dep’t of Just., Opening Remarks at Forum on Nationwide Injunctions and Federal Regulatory Programs (Feb. 12, 2020), <https://bit.ly/3lim7ow>.

6. See, e.g., *West Virginia v. EPA*, 577 U.S. 1126 (2016).

7. See, e.g., *Trump v. Sierra Club*, 140 S. Ct. 1 (2019).

create, and (4) the moving party is likely to prevail on the merits of the dispute.<sup>8</sup> As recently as 2008, the Court reminded lower courts that stays and preliminary injunctions are extraordinary remedies.<sup>9</sup> In doing so, the Court also emphasized the importance of the four-factor test and urged lower courts to exercise caution before they enjoin or stay an agency action.<sup>10</sup>

Problematically, the Court's more recent opinions suggest that lower courts should ignore or discount the first three factors,<sup>11</sup> leaving the judge's prediction of the likely outcome of the dispute on the merits as the only factor the judge needs to consider. The district judge usually predicts that the moving party will prevail on the merits. That is not at all surprising considering that the state attorney general chose the judge because of their well-supported belief that the judge would agree with them on that issue.

The Supreme Court also signaled its receptivity to motions for nationwide preliminary injunctions to block executive actions when it took the unprecedented step of barring the Environmental Protection Agency (EPA) from implementing the Clean Power Plan in 2016.<sup>12</sup> Notably, the Court did so before any lower court had considered the merits of the plan, and the Court did not issue any opinion explaining its action.<sup>13</sup> This action was almost certainly triggered by the Court's realization that its decisions on the merits of executive actions come so long after the action was taken that they often have no effect.

The Justices got a rude awakening to that reality immediately after they issued their 2015 opinion in *Michigan v. EPA*.<sup>14</sup> There, the Court held that an EPA rule was invalid because EPA did not adequately consider the costs that the rule would impose on electric utilities.<sup>15</sup> Immediately after the Court issued its opinion, the head of EPA declared that the decision was irrelevant on the ground that the utilities that bore the costs of the rule had already taken the actions required by the rule.<sup>16</sup>

When the D.C. Circuit held oral argument to decide what action it should take on remand, the lawyer for the utilities corroborated the head

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8. *See, e.g., Weinberger v. Romero-Barcela*, 456 U.S. 305, 311–12 (1982); *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 500 (1941).

9. *See Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 24 (2008).

10. *See id.* at 27–31.

11. *See, e.g., Trump*, 140 S. Ct.

12. *See West Virginia v. EPA*, 136 S. Ct. 1000, 1000 (2016).

13. *See id.*

14. *See generally Michigan v. EPA*, 576 U.S. 743 (2015).

15. *See id.* at 759–60.

16. *See Emily Holden, Jeffrey Tomich & Edward Klump, Mercury Regs Ruling Emboldens Clean Power Plan Critics, but Few Changes Seen for Utilities*, E&E NEWS (June 30, 2015, 8:10 AM), <https://bit.ly/3HYm2PZ>.

of EPA's statement.<sup>17</sup> The utilities that had originally joined several states in challenging the rule urged the court not to vacate the rule because the utilities had already complied with the rule and persuaded their state regulators to allow them to recover the costs of compliance in their rates.<sup>18</sup> They further expressed concern that their state regulators might change their minds and refuse to allow them to recover the costs of complying with the rule in their rates if the court vacated the rule.<sup>19</sup> The D.C. Circuit then left the rule—which the Supreme Court held to be unlawful—in effect.<sup>20</sup>

In 2000, the Supreme Court increased the likelihood that a district court would grant a nationwide preliminary injunction in another way: the major questions doctrine.<sup>21</sup> That doctrine bars the government from taking some “extraordinary” actions based on an old, broadly-worded statute.<sup>22</sup> The Court greatly augmented the scope and effect of the major questions doctrine in four opinions issued during its 2021–2022 Term.<sup>23</sup> Three of those opinions were issued in the context of preliminary injunctions to block executive branch actions.<sup>24</sup> Those opinions will further embolden district judges to grant motions for preliminary nationwide injunctions to block the implementation of important executive actions.

The scope and effect of the new version of the major questions doctrine are far from clear, but every important executive action is now a candidate for rejection through the doctrine's application. District judges who are skeptical about the legality of any important executive action can rely on the major questions doctrine to support their decisions to grant motions for nationwide preliminary injunctions. State attorneys general will use forum shopping to select judges with ideological inclinations that predispose them to rely on the major questions doctrine to grant the motions. Unsurprisingly, this is exactly the result of the Court's recent decisions.

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17. See Richard J. Pierce, Jr., *The Supreme Court Should Eliminate Its Lawless Shadow Docket*, 74 ADMIN. L. REV. 1, 14 (2021) [hereinafter Pierce, *Shadow Docket*].

18. See *id.*; see also Jimmy Hoover, *Power Plants Ask DC Circ. To Save EPA Mercury Rule*, LAW360 (Dec. 4, 2015, 2:35 PM), <http://bit.ly/3ZPEsZ8>.

19. See Pierce, *Shadow Docket*, *supra* note 17, at 14–15.

20. See Timothy Cama, *Court Refuses to Overturn Air Pollution Rule Despite Supreme Court Defeat*, THE HILL (Dec. 15, 2015, 9:50 AM), <http://bit.ly/3DM6Kv7>.

21. See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000).

22. *Id.*; see also *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001).

23. See Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 263–67 (2022) (analyzing the effect of *Nat'l Fed'n of Bus. v. Dep't of Lab.*, 142 S. Ct. 661 (2022); *Biden v. Missouri*, 142 S. Ct. 647 (2022); *West Virginia v. EPA*, 142 S. Ct. 2587 (2022); *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Res.*, 141 S. Ct. 2485 (2021)).

24. See *Nat. Fed. of Bus.*, 142 S. Ct. at 661; *Biden*, 142 S. Ct. at 651–52; *Ala. Ass'n of Realtors*, 141 S. Ct. at 2486.

District judges began using the major questions doctrine for that purpose right after the Supreme Court issued its opinions that expanded the scope and effect of the doctrine. For example, a district judge immediately relied on the major questions doctrine to enjoin EPA from acting in response to President Biden's directive to estimate the social cost of carbon.<sup>25</sup> Carbon combustion emits carbon dioxide—the most important cause of climate change.<sup>26</sup> Once EPA estimates the social cost of carbon, it and other agencies can decide whether to use that estimate to assess the costs and benefits of any action that will reduce carbon dioxide emissions.

The district court decision was absurdly premature. The executive order that the court enjoined did not come close to satisfying the doctrines of finality and ripeness that are prerequisites for judicial review. At the time the district court prohibited EPA from estimating the social cost of carbon, neither EPA nor any other agency had taken any action that would give such an estimate any legal effect. The Fifth Circuit reversed the district court's decision 33 days later, but the preliminary injunction had already severely disrupted a wide variety of ongoing regulatory actions by the time it was reversed.<sup>27</sup>

Political polarity has also created conditions in which judges see a need to act immediately to stop the implementation of an executive branch action that they believe to be unlawful rather than wait until courts can address the merits of the case. By the time the courts can consider the merits of an executive action that has immediate effects, the dispute about the legality of the action often becomes moot because of an intervening election; the newly elected president often withdraws or reverses the action taken by the prior administration. For instance, EPA in the Trump administration replaced the Clean Power Plan ("CPP"), which had been issued by EPA during the Obama administration, with a plan that was inconsistent with the CPP before the courts could address the merits of the CPP.<sup>28</sup> And President Biden announced that he would not continue to use the funds that President Trump had reallocated from other uses to build the border wall before the courts could address the merits of the dispute about the legality of President Trump's action.<sup>29</sup>

When a district court temporarily bars the executive branch from implementing a major action, the government almost invariably files a

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25. See *Louisiana v. Biden*, 585 F. Supp. 3d 840, 863–65 (W.D. La. 2022).

26. See *Causes and Effects of Climate Change*, UNITED NATIONS, <https://bit.ly/3yhLWbI> (last visited Mar. 7, 2023).

27. See *Louisiana v. Biden*, No. 22-30087, 2022 WL 866282, at \*3 (5th Cir. Mar. 16, 2022).

28. See facts recited in *West Virginia v. EPA*, 142 S. Ct. 2578, 2602–06 (2022); see also *Pierce*, *Shadow Docket*, *supra* note 17, at 6–10.

29. See generally Proclamation No. 10142, 86 Fed. Reg. 7225 (Jan. 27, 2021).



motion for an emergency stay of the injunction in the Supreme Court. The Court must then decide whether to grant or deny the motion and whether to issue an opinion explaining its decision. The number of cases in which the Court must decide whether to allow a nationwide preliminary injunction to remain in effect has soared in recent years. The Court now must make many such decisions every term. For instance, the Trump administration sought emergency relief from preliminary injunctions 41 times in four years, while the government sought emergency relief only eight times in the prior 16 years.<sup>30</sup>

Many of the decisions the Court makes on its emergency docket have significant long-term effects. And in many cases, the effects are permanent. By way of example, the Court's decision to stay the preliminary injunction that barred President Trump from reallocating funds from other purposes to build a wall on the southern border enabled the Trump administration to spend most of the reallocated funds to build the wall.<sup>31</sup> And the Court's decision to uphold the temporary injunction that barred the Occupational Safety and Health Administration in the Biden administration from implementing its COVID-19 vaccine mandate outlasted the pandemic that necessitated the mandate.<sup>32</sup>

In many cases, the Court either provides no opinion explaining why it granted or denied the motion to stay, or it provides an opinion in which it ignores three of the four factors that the Court has required lower courts to consider when it acts on a motion for stay. The Court's decision to act without writing an opinion that addresses the issues raised by a motion to stay a preliminary injunction is understandable, given the number of cases the Court must now decide on its emergency docket and the time required to write a well-reasoned opinion that addresses the many complicated issues that are usually raised in a motion for stay. That decision has significant adverse effects, however.

### III. THE ADVERSE EFFECTS OF NATIONWIDE INJUNCTIONS AND SUPREME COURT DECISIONS WITHOUT ADEQUATE OPINIONS

The problems created by the common practice of issuing nationwide preliminary injunctions and the problems created by the Supreme Court's practice of deciding whether to stay those injunctions without issuing an explanatory opinion are closely related. The adverse effects of nationwide preliminary injunctions that ban the government from implementing actions taken by the executive branch are obvious. It seems inappropriate to allow a single district judge to stop the executive

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30. See Stephen I. Vladeck, *The Supreme Court Needs to Show Its Work*, THE ATLANTIC (Mar. 10, 2021, 9:35 AM), <http://bit.ly/3YKOF91>.

31. See *Trump v. Sierra Club*, 140 S. Ct. 1, 1 (2019).

32. See *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab.*, 142 S. Ct. 661, 662–63 (2022).

branch from implementing an important action, particularly when the judge has been selected by the moving party because of the likelihood that he or she is opposed to the action.

The adverse effects of the Supreme Court's practice of deciding whether to stay a preliminary nationwide injunction without adequately explaining its decision are more complicated. The first adverse effect is on the Court's reputation. The Court's standing with the public is at its lowest point in history.<sup>33</sup>

Some of the reasons for the Court's poor reputation are beyond its power to avoid or to correct. Thus, for instance, the Court played no role in the decision of then-Senate Majority Leader Mitch McConnell to refuse to consider President Obama's nominee for a seat on the Supreme Court. Other reasons—like the unpopularity of the Court's decision to overrule *Roe v. Wade*—could only be avoided if some Justices sacrificed their sincere beliefs with respect to an important legal issue in the interest of preserving the Court's standing with the public. That is a high price to pay.

However, the Court's practice of making important decisions without issuing a complete opinion is a self-inflicted wound. I cannot improve on Justice Barrett's description of the critical relationship between opinions and the Court's reputation. On April 4, 2022, she made an important speech in which she referred to the increasing tendency of the public to think of the Justices as politicians in robes who make political decisions that are poorly disguised as legal decisions.<sup>34</sup> She urged members of the public who believe that the Court made a political decision to "read the opinion."<sup>35</sup> By reading the Court's opinion explaining the basis for a decision, any member of the public should be able to determine whether the opinion was based on politics or law. Ironically, a few days after she made that important speech, Justice Barrett joined the majority in making an important decision in which it upheld a nationwide preliminary injunction that barred the executive branch from implementing a major decision without issuing an opinion, thereby inviting the public to draw the inference that the decision was motivated by politics rather than law.<sup>36</sup>

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33. See Jeffrey M. Jones, *Confidence in the U.S. Supreme Court Sinks to Historic Low*, GALLUP: POLITICS (June 23, 2022), <http://bit.ly/3Ye2r3V>.

34. See Justice Amy Coney Barrett, U.S. Sup. Ct. Just., Remarks at the Reagan Library (April 4, 2022), <http://bit.ly/3YtYVIO>.

35. *Id.*

36. See *Louisiana v. Am. Rivers*, 142 S. Ct. 1347, 1347–48 (2022); see also Richard Pierce, *Justice Barrett Says: "Read the Opinion"—Justice Kagan Says: "Where Is the Opinion?"*, YALE J. ON REGUL.: NOTICE & COMMENT (Apr. 12, 2022), <http://bit.ly/3DKf3HE>.

Comparative law scholars identify the duty to engage in reasoned decision making as a core component of due process in every legal system.<sup>37</sup> The Court has long emphasized the importance of reasoned decision making in every other context.<sup>38</sup> It does not tolerate unreasoned decision making by other courts or by agencies. Even in the context of a decision that an agency must make quickly to respond to an emergency, the Court still demands that the agency explain its decision in detail.<sup>39</sup> The Court should not engage in the same behavior that it refuses to tolerate from other institutions.

If the Supreme Court blocks or declines to block an executive branch action without writing an opinion that adequately explains its decision, no one has any way of knowing why the Court acted as it did. That lack of knowledge makes it impossible for the president, agencies, or lower courts to know how to do their jobs in ways that are consistent with the rule of law. The president and agencies have no way of knowing what they can and cannot do, and lower courts have no way of knowing how to review executive branch actions that raise some of the many issues that might or might not have been the basis for the Court's action.

Three cases illustrate the adverse effects of Supreme Court decisions that either allow or block the implementation of executive branch actions without providing adequate explanations for its decisions.<sup>40</sup>

In *Trump v. Sierra Club*,<sup>41</sup> a five-Justice majority stayed the injunction that would have barred President Trump from relying on his power to declare a national emergency to reallocate \$2.5 billion in funds that were appropriated for other purposes to fund a wall across the southern border after Congress had refused to provide the requested

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37. See, e.g., the six-part symposium described in *Administrative Law in Comparative Perspective*, THE REGUL. REV. (Oct. 31, 2022), <http://bit.ly/3HFvV3K>; SUSAN ROSE-ACKERMAN, DEMOCRACY AND EXECUTIVE POWER: POLICYMAKING ACCOUNTABILITY IN THE US, THE UK, GERMANY, AND FRANCE 244–74 (2021); GIANCINTO DELLA CANANEA, DUE PROCESS OF LAW BEYOND THE STATE: REQUIREMENTS OF ADMINISTRATIVE PROCEDURE 85–102 (2016).

38. See Benjamin Eidelson, *Reasoned Explanation and Political Accountability in the Roberts Court*, 130 YALE L. J. 1748, 1751, 1758–61 (2021); Richard J. Pierce, Jr., *Reason Trumps Pretext*, THE REGUL. REV. (July 30, 2020), <http://bit.ly/3RRfYMF>.

39. See cases discussed in KRISTIN E. HICKMAN & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 5.10 (6th ed. 2019); see also Kristin Hickman & Mark Thomson, *Open Minds and Harmless Errors: Judicial Review of Postpromulgation Notice and Comment*, 101 CORNELL L. REV. 261 (2014).

40. See generally *Trump v. Sierra Club*, 140 S. Ct. 1 (2019); Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661 (2022); *West Virginia v. EPA*, 142 S. Ct. 2587 (2022).

41. See generally *Trump*, 140 S. Ct.

funding.<sup>42</sup> The majority stated only that the government had made a sufficient showing that Sierra Club and the other petitioners had “no cause of action to obtain review.”<sup>43</sup> It did not provide any explanation for that conclusion and did not even refer to the requirement that a party who requests a stay must show that the irreparable harm caused by denial of the motion for stay exceeds the irreparable harm caused by grant of the stay, nor did the Court refer to the requirement that a grant of the stay is in the public interest.<sup>44</sup>

Subsequently, President Trump spent the reallocated funds on construction of the wall.<sup>45</sup> The district court then dismissed the case as moot after President Biden announced that he would not spend any reallocated funds on construction of the wall and the government announced that it would no longer defend the reallocation of funds in court.<sup>46</sup>

As a result of the Court’s action, we will never know: (a) why the majority made no reference to irreparable harm or the public interest when it granted the stay; (b) why it concluded that the petitioners probably had no cause of action; and (c) why it did not invoke the major questions doctrine to bar the president from taking this unprecedented action. Moreover, we do not know what—if any—limits exist on the president’s power to reallocate appropriated funds after Congress refuses the president’s request to appropriate funds for a project. These are all important questions that Congress, presidents, and lower courts will have to answer on their own in future cases with no guidance from the Court.

The second illustrative case is *National Federation of Independent Businesses v. Department of Labor*.<sup>47</sup> There, a six-Justice majority relied on the major questions doctrine as the basis for a stay of the emergency rule that compelled all employers to require that their employees either obtain a COVID-19 vaccine or submit to regular COVID-19 testing.<sup>48</sup> The majority stated reasons for its prediction that the petitioners were

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42. See Jessica Gresko, *Supreme Court: Trump Can Use Pentagon Funds for Border Wall*, ASSOCIATED PRESS (Jul. 27, 2019), <http://bit.ly/3IXM4IF>.

43. *Trump*, 140 S. Ct. at 1.

44. These points were only briefly discussed in the concurrence/dissent. See *Trump*, 140 S. Ct. at 1–2 (Breyer, J. concurring in part and dissenting in part).

45. See Claire Hansen, *How Much of Trump’s Border Wall Was Built?*, U.S. NEWS (Feb. 7, 2022, 1:37 PM), <https://bit.ly/3IVtsTf>.

46. See Amy Howe, *Biden Administration Asks Justices to Take Immigration Cases off February Calendar*, SCOTUSBLOG (Feb. 1, 2021, 11:55 PM), <http://bit.ly/3IVzBPr>; Order (as Modified) Withdrawing Pending Cross-Motions for Partial Summary Judgment, Referring Cases to Magistrate Judge to Facilitate Settlement Discussions, and Staying Proceedings, *California v. Biden*, No. 4:19-cv-00872 (N.D. Cal. Sept. 13, 2021) (Casetext).

47. See generally *Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab.*, 142 S. Ct. 661 (2022).

48. *Id.* at 665–66.

likely to prevail on the merits, but it referred to the other three factors only in brief, dismissive passages.<sup>49</sup> It disposed of the public interest criterion with a brief conclusory sentence: “The equities do not justify withholding . . . relief.”<sup>50</sup> Its only reference to the need to compare the irreparable harm caused by a denial of the stay with the irreparable harm caused by a grant of the stay was perfunctory and dismissive: “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.”<sup>51</sup> That is a non sequitur in the context of an order issued by unelected Justices that overruled a decision made by the politically-accountable president. This opinion heightens the suspicion that the Court has abandoned the four-factor test for deciding whether to issue a stay that it emphasized as recently as 2008.

The third illustrative case is *West Virginia v. EPA*.<sup>52</sup> That is the case in which a five-Justice majority stayed the Clean Power Plan (“CPP”) without issuing any opinion. The parties who requested the stay made six arguments in support of their motion.<sup>53</sup> In the absence of an opinion, it was impossible to know which of the six arguments persuaded the Court to issue the stay. We finally got the answer to that important question. Six years later, the Court devised a way of overcoming the reality that the case had become moot and wrote an opinion in which it invoked the major questions doctrine as the basis for its holding that EPA lacked the authority to adopt the CPP.<sup>54</sup>

During the six-year delay between the Supreme Court’s decision to stay the CPP and its opinion that explained that decision, the president, agencies, and lower courts had no way of knowing why the Court stayed the CPP. The D.C. Circuit illustrated one of the costs of that lack of knowledge when it rejected the replacement for the CPP that EPA attempted to implement during the Trump administration.<sup>55</sup> EPA acknowledged that its replacement would be far less effective in mitigating climate change than the CPP.<sup>56</sup> It based its decision to replace the CPP with a less effective rule solely on its conclusion that the CPP was invalid.<sup>57</sup> The D.C. Circuit rejected all six of the arguments EPA

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49. *See id.*

50. *Id.* at 666.

51. *Id.*

52. *See generally* *West Virginia v. EPA*, 577 U.S. 1126 (2016).

53. *See generally* Brief for Petitioners, *West Virginia*, 577 U.S. (No. 15A773).

54. *See* *West Virginia v. EPA*, 142 S. Ct. 2587, 2614–16 (2022).

55. *See generally*, *Am. Lung Ass’n. v. EPA*, 985 F.3d 914 (D.C. Cir. 2020).

56. *See id.* at 937–40.

57. *See id.* at 945.

made in support of that conclusion and held that EPA had the authority to issue the CPP.<sup>58</sup>

The Supreme Court's decision in *West Virginia v. EPA* made it clear that the D.C. Circuit was wrong, but the D.C. Circuit had no way of knowing that the Supreme Court majority had stayed the CPP because of its application of the major questions doctrine. The Court's unexplained and unprecedented decision to stay the CPP preceded its announcement of the new, much stronger version of the major questions doctrine by six years. For all the D.C. Circuit knew, the Court had stayed the CPP for a reason that was no longer relevant, e.g., that the moving parties had shown that a decision not to stay the CPP would cause more irreparable harm than a decision to stay the CPP.

Unless something major changes, these interrelated problems will continue for the indefinite future. District judges will continue to issue nationwide preliminary injunctions that block the federal government from taking any significant action to address a new problem. And the Supreme Court will decide whether or not to stay those injunctions without adequately explaining its decisions. These problems are a product of conditions that are unlikely to change. They are as likely to arise in Republican administrations as in Democratic administrations. They are inconsistent with a core requirement of due process, and they create practical problems for the Supreme Court, lower courts, presidents, agencies, and ultimately the country. The Court must address these problems and reduce their costs.

#### IV. POTENTIAL WAYS OF REDUCING THE COSTS OF THE PROBLEMS

There are many potential ways to reduce the costs of the related problems of the large number of nationwide preliminary injunctions issued by district courts and Supreme Court decisions to grant or deny motions to stay those injunctions without adequately explaining the decision. Some are promising but beyond the Court's control and unlikely to happen in a timely manner. By the time they are implemented and have their desired effects, we will already have experienced costs in the form of severe adverse effects on the Court's reputation and on the ability of the president, agencies, and lower courts to make decisions based on a clear legal framework provided by the Court.

For example, we could reduce the adverse effects of extreme political polarity on the legislative process by replacing party-based primaries with open primaries. Over time that would change the composition of Congress to make it more representative of the views of the people. It would also change the incentives of members of Congress

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58. *See id.* at 944, 966.

by eliminating the constant threat of being primaried if a member departs from the views of the extremists who dominate party-based primaries.

Those changes would allow Congress to return to the business of compromising to enact bi-partisan legislation. That, in turn, would gradually decrease the need for presidents to test the boundaries of the power of the executive branch to address unexpected problems by taking unilateral actions based on old, broadly-worded statutes. I remain convinced that such a change in the methods that we use to choose candidates for office is essential to the long-term survival of our form of government.<sup>59</sup> But it is beyond the power of the Court, and it would not have its desired effect for many years.

Similarly, we could change the jurisdiction and venue provisions of statutes that authorize courts to review agency actions. That is another promising route to beneficial change. We could reduce substantially the number of nationwide preliminary injunctions and have greater confidence that the injunctions that are issued are well-founded by authorizing only courts comprised of three judges who are chosen at random to issue such an injunction. That kind of beneficial change is also beyond the power of the Court, however, and Congress is unlikely to implement it in the conditions of legislative impotence that have been created by extreme political polarization.

The Court could address the problems by taking the step that Justices Gorsuch and Thomas have urged:<sup>60</sup> holding that a district court does not have the power to issue a nationwide injunction.<sup>61</sup> However, there are two problems with that method of addressing the problems. First, such a holding would be contrary to the law. Professor Mila Sohoni has argued persuasively that the Administrative Procedure Act empowers a district court to issue a nationwide injunction.<sup>62</sup> The absence of support for the views expressed by Justices Gorsuch and Thomas from the other seven Justices suggests that the latter share Professor Sohoni's view of the law.

Second, prohibiting district courts from issuing nationwide injunctions would be more likely to compound the problems than reduce them. It is easy to predict the results of such an action by looking at the situation that was created by the confusing combination of inconsistent

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59. See Richard J. Pierce, *Legislative Impotence—An Existential Threat*, THE FEDERALIST SOC'Y (July 22, 2020), <http://bit.ly/3X7ghnq>.

60. See *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 600–01 (2020) (Gorsuch, J., concurring) (Justice Thomas joined Justice Gorsuch in his concurrence.).

61. See *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 600–01 (2020) (Gorsuch, J., concurring).

62. Mila Sohoni, *The Power to Vacate a Rule*, 88 GEO. WASH. L. REV. 1121, 1191–92 (2020).

opinions that the Court issued in *Rapanos v. United States*.<sup>63</sup> After the 2006 opinion, district courts began adopting inconsistent interpretations of the law that was created by the 4-1-4 division among the Justices and issued inconsistent injunctions that required EPA and the U.S. Army Corps of Engineers to implement definitions of the critically important jurisdictional term “waters of the United States” that differed significantly from one region to another.<sup>64</sup>

The Court could also address the problems by overruling the 2007 precedent, *Massachusetts v. EPA*, which provides state attorneys general with an easy path to obtaining an injunction by conferring standing on states when any federal action has an adverse effect on a state’s sovereign interests.<sup>65</sup> If the Court coupled such an overruling decision with other decisions that reduce the ability of any party to satisfy the standing requirement in the context of attempts to challenge executive branch actions, the result would significantly reduce the number of cases in which district courts can enjoin federal actions. That, in turn, would reduce the number of cases in which the Court would need to decide whether to stay such an injunction.

If the Court had to make only a few decisions granting or denying stays of temporary injunctions each term, it would be in a better position to allocate its scarce resources in a way that enables it to write an opinion in each such case in which it explains in detail why it made each decision. Unfortunately, however, such a narrowing of standing doctrine would create a situation in which the president could take actions that clearly exceed his power without any concern that a court might interfere with his lawless conduct.

With standing unavailable to petitioners who suffer injuries that are shared by the many,<sup>66</sup> the contexts of spending and taxation would provide any president many opportunities to engage in outrageous violations of law and constitutional norms. A president could reallocate billions of dollars from appropriations made for other purposes, spend billions of dollars that were never appropriated, forgive unlimited amounts of debt to the government, or decline to collect capital gains taxes, all with no fear that a court could keep him within the constitutional and statutory boundaries of his power. Each of those actions is a realistic possibility in the future. Powerful Democratic politicians have urged President Biden to use his emergency powers to

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63. See generally *Rapanos v. United States*, 547 U.S. 715 (2006).

64. See Kristen Clark, *Navigating Through the Confusion in the Wake of Rapanos: Why a Rule Clarifying and Broadening Jurisdiction Under the Clean Water Act is Necessary*, 19 WM. & MARY ENVTL. L. & POL’Y REV. 295, 306–08 (2014).

65. See *Massachusetts v. EPA*, 549 U.S. 497, 518–21 (2007).

66. See, e.g., *Frothingham v. Mellon*, 262 U.S. 447, 488–89 (1923).



spend over a trillion dollars in unappropriated funds to mitigate climate change and to forgive over a trillion dollars in student loans, while Professor Jonathan Adler has suggested that the next Republican president might refuse to collect capital gains taxes.<sup>67</sup> The Court should not limit standing to review the actions of the executive branch in ways that invite presidents to take irresponsible and lawless actions.

In the end, the most promising way in which the Court can reduce the costs of these two related problems is to issue an opinion that establishes clear, explicit boundaries on the power of a district court to issue a preliminary injunction or a stay that has the effect of prohibiting executive branch action. The opinion should emphasize that preliminary injunctions and stays of executive branch actions are extraordinary remedies that should only be used in extraordinary circumstances. The opinion should also include a clarification of the major questions doctrine that discourages courts from using the doctrine as the basis for a preliminary injunction except in extreme cases. Ultimately, the Court needs to establish clear boundaries on both the application of the major questions doctrine and on the use of preliminary injunctions to prohibit executive branch action until a court can address the merits of the action based on a complete record, briefing, and a well-reasoned opinion.

Such an opinion would significantly reduce the number of cases in which district courts issue preliminary injunctions, and it would provide a legal framework in which circuit courts could reverse many district court decisions granting preliminary injunctions. Those two effects of the opinion would reduce the number of cases in which the Court must decide whether to grant or deny a stay of a preliminary injunction. The opinion also would provide a legal framework that the Court could use as the starting point for each opinion in which it grants or denies such a stay. The Court could then allocate its scarce resources to the important task of writing a detailed opinion in each of the few cases in which it grants or denies a stay.

An opinion in which the Court announces and creates clear boundaries on the circumstances in which a district court can issue a preliminary injunction would help to restore the Court's reputation as a politically neutral source of law. It would also significantly reduce the risk that a single district court judge who was chosen because of the judge's near-certain inclination to block an executive branch action would be able to act on the basis of his or her ideological priors. And such an opinion would, overall, render applying the law much easier for the executive branch and lower courts in their decision making processes.

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67. See @jadler1969, TWITTER (Oct. 20, 2022, 10:26 PM), <https://bit.ly/3J1tkBG>.