

BOOK REVIEW

THE FORESHADOW DOCKET

Philosophical Foundations of Precedent

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Imagine the Supreme Court issuing an emergency order that signals interest in departing from precedent, as if foreshadowing a change in the law. Seeing this, should the lower courts start ruling in ways that also anticipate the law of the future? They need not do so in their merits rulings. That much is clear. Such a signal does not create new binding precedent. Rather, it reflects the Justices' guess about the future of the law—and what if that guess is wrong?

Yet for a lower court ruling on a temporary stay or injunction, the task seems to call for a guess about a future decision and hence a future state of the law. And if the Justices have already made such a guess in a parallel case, doesn't the lower court have the answer it needs?

Not necessarily, this analysis shows. It looks closely at the architecture of stays and injunctions in the federal courts, while drawing upon ideas presented in a rich new compilation of essays, Philosophical Foundations of Precedent. Intriguing questions for theory arise, in turn. For instance, should an earlier judicial guess ever be deemed binding on a later guess? That would not be stare decisis, of course—but could there be such a thing as stare divinatis?

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INTRODUCTION

Imagine for a moment:

Scenario 1. A controversial case is moving through the federal courts toward possible review by the U.S. Supreme Court. Along the way, a lower court issues a preliminary injunction that is well grounded in existing precedent. The Supreme Court issues an emergency order staying that injunction, offering a brief explanation signaling that it might soon change the law. A year later, the Supreme Court grants certiorari and, in its eventual decision on the merits, does in fact overrule prior precedent.

Scenario 2. Same story. But contrary to the signal in its earlier emergency order, the Supreme Court’s decision on the merits actually reaffirms prior precedent.

Scenario 3. Same story. But the case never gets as far as a merits decision from the Supreme Court.

Now imagine the tricky questions faced by a lower court judge presiding over a parallel case. During that interim when the Supreme Court is signaling some interest in changing the law but has not yet done so through a decision on the merits,¹ what should this judge do? Should the Supreme Court’s emergency order be viewed as a sort of binding precedent? If not, does it carry information that the judge should still be expected to consider?

The difficulty is that this judge does not know how the story of the other case will end. What if the judge’s ruling is influenced by the Supreme Court’s signal—but then the Court’s merits decision goes the other way (Scenario 2)?² That is, what if the signal turns out to be wrong? Or what if

1. Consider Justice Elena Kagan’s observation, joined by Justice Stephen Breyer and Justice Sonia Sotomayor, about the Supreme Court’s emergency order in the recent Alabama redistricting case, *Merrill v. Milligan*:

Today’s decision is one more in a disconcertingly long line of cases in which this Court uses its shadow docket to signal or make changes in the law, without anything approaching full briefing and argument. Here, the District Court applied established legal principles to an extensive evidentiary record. Its reasoning was careful—indeed, exhaustive—and justified in every respect. To reverse that decision requires upsetting the way Section 2 plaintiffs have for decades—and in line with our caselaw—proved vote-dilution claims. That is a serious matter, which cannot properly occur without thorough consideration. Yet today the Court skips that step, staying the District Court’s order based on the untested and unexplained view that the law needs to change.

142 S. Ct. 879, 889 (2022) (Kagan, J., dissenting from grant of applications for stays). The concurrence by Justice Brett Kavanaugh, joined by Justice Samuel Alito, disavows signaling about the merits; however, it does address the merits-related “fair prospect” standard for relief. See *id.* at 881–82 & n.2 (Kavanaugh, J., concurring in grant of applications for stays) (“Even under the ordinary stay standard outside the election context, the State has at least a fair prospect of success on appeal—as do the plaintiffs, for that matter.”). Reading the signal in this order is complicated further by the apparent role of the *Purcell* principle and uncertainty about how it works. See *id.* at 880–82; *Purcell v. Gonzalez*, 549 U.S. 1, 4–6 (2006). In its eventual merits ruling, the Supreme Court upheld the lower court injunction that its emergency order had earlier blocked. See *Allen v. Milligan*, 143 S. Ct. 1487, 1502 (2023).

2. See, e.g., Amy Howe, *Divided Court Allows Biden to End Trump’s “Remain in Mexico” Asylum Policy*, SCOTUSblog (June 30, 2022), <https://www.scotusblog.com/2022/06/divided-court-allows-biden-to-end-trumps-remain-in-mexico-asylum-policy/> [https://perma.cc/543J-SARG] (describing a “major victory” for the government in a Supreme Court merits ruling in *Biden v. Texas*, one of the cases about the controversial Migrant Protection Protocol, after an earlier emergency ruling against the government); Amy Howe, *Texas and Louisiana Lack Right to Challenge Biden Immigration Policy, Court Rules*, SCOTUSblog (June 23, 2023), <https://www.scotusblog.com/2023/06/texas-and-louisiana-lack-right-to-challenge-biden-immigration-policy-court-rules/> [https://perma.cc/3V56-HKUB] (describing another “major victory” for the government in a Supreme Court merits ruling in *United States v. Texas*, an immigration policy case about prioritization, after an earlier emergency ruling against the government); see also Steve Vladeck, *Emergency Applications and the Merits, One First* (June 12, 2023), <https://stevevladeck.substack.com/p/31-emergency-applications-and-the> [https://perma.cc/V9L7-P6Q9] (discussing these examples as among “the meaningful (and growing) number of recent examples of cases in which the justices’ ruling at the emergency application stage did not presage their ruling on the merits” (emphasis omitted)).

the accuracy of the signal is never revealed (Scenario 3)?³ Given these possibilities, should the judge just decide the case without regard to the signal?

The problem facing this judge brings new twists into our usual ways of thinking about Supreme Court precedent. It introduces a curious sort of judicial utterance, a guess about the future of the law—and yet a guess that cannot be dismissed as dicta, for it underpins an actual ruling. It also highlights a liminal moment in judicial time, an interim period during which the terrain of existing precedent has been unsettled—and yet no new precedent has been laid down.

Fresh thinking about precedent would be most welcome in untangling this knotty problem, and indeed a new resource is at hand. A rich and wide-ranging volume of forty essays, *Philosophical Foundations of Precedent*, has now been collected by Professors Timothy Endicott, Hafsteinn Dan Kristjánsson, and Sebastian Lewis.⁴ Such a vast compilation defies a conventional book review. But what better way to honor the innovative spirit of these essays than to see how their insights fare in addressing a strange new phenomenon?

Our judge's problem is illuminated, first off, by Professor Nina Varsava's provocative book chapter.⁵ Her argument begins with Professor Ronald Dworkin's metaphor of the common law as a chain novel written by multiple authors in sequence, all of whom are trying to craft a coherent narrative. Her conceptually powerful point is that in serving this aim each author "should consider not only what has already been written before their turn to contribute but also what will be or is likely to be written subsequently."⁶ And in particular, an author who can already foresee a turn in the plot may wish to "foreshadow" it, thereby smoothing the path to those future chapters.⁷

3. See, e.g., Amy Howe, Court Dismisses Title 42 Case, SCOTUSblog (May 18, 2023), <https://www.scotusblog.com/2023/05/court-dismisses-title-42-case/> [<https://perma.cc/AN3J-PE38>] (noting the Supreme Court's dismissal of an immigration policy case as moot after having granted an emergency stay and set an expedited schedule for briefing and argument); Amy Howe, Justices Take Immigration Cases Off February Calendar, SCOTUSblog (Feb. 3, 2021), <https://www.scotusblog.com/2021/02/justices-take-immigration-cases-off-february-calendar/> [<https://perma.cc/G5H8-QZ25>] (noting mootness and dismissal of a different immigration policy case concerning the so-called "Remain in Mexico" asylum program).

4. *Philosophical Foundations of Precedent* (Timothy Endicott, Hafsteinn Dan Kristjánsson & Sebastian Lewis eds., 2023). The book is fondly dedicated to the memory of Professor Joseph Raz.

5. Nina Varsava, The Gravitational Force of Future Decisions, *in Philosophical Foundations of Precedent*, supra note 4, at 281, 286–87.

6. *Id.* The reason is that authors "ought to view their own contribution in the context of the novel as a whole, and not only in the context of the novel so far." *Id.*

7. As Professor Varsava puts it, vividly: "[S]uppose further that you know that your successor novelists have bleeding hearts and will ultimately seek to redeem Scrooge regardless of the content of your section. That reality ought to inform your contribution.

When the Supreme Court issues an emergency order that signals some interest in departing from precedent,⁸ as if preparing the public for legal change, we might say it is thus “foreshadowing” the possible future of the law. We might even call the set of such rulings the Supreme Court’s “foreshadow docket.”⁹

Upon noticing such foreshadowing by the high court, shouldn’t our lower court judge start ruling in ways that also anticipate the expected turn in the plot?¹⁰ A ready counterpoint is found in Professor Richard Fallon’s book chapter. Elaborating on Professor H.L.A. Hart’s notions of “rules of recognition” and “rules of change,” his chapter urges careful attention to how such rules differ across the layers of a judicial hierarchy.¹¹ At the Supreme Court, he observes, a present belief that prior precedent was wrongly decided implies a permission to either adhere to the precedent or else to change it. But such an option is the sole province of the Supreme Court. By contrast, “the rule in the lower courts is settled and categorical: lower courts must adhere to the Supreme Court’s . . . [precedents], however demonstrably erroneous they may be, until the Court reverses

Perhaps you should foreshadow Scrooge’s redemption—as in fact early sections of *A Christmas Carol* do . . .” *Id.* (citing Charles Dickens, *The Illustrated Christmas Carol* 32 (200th anniv. ed., SeaWolf Press 2020) (1843)). She continues: “In so doing, you would construct a sort of bridge between the cold, miserly, and mean Scrooge we see in the first pages of the novella and the warm, generous, and kind Scrooge that you predict we will see by the end.” *Id.*

8. As with preliminary injunctions or stays pending appeal ordered by the lower courts, the Supreme Court’s emergency orders are a form of temporary relief that sets a holding pattern for the parties as litigation continues. The standards for such relief, though varied, all call upon the issuing court to guess at the requesting party’s eventual chances of success on the merits, which in turn would seem to entail predicting what the governing law will be at the time of that future merits ruling. For examples of such standards for relief, see *infra* note 105.

9. Many emergency rulings from the Supreme Court do not signal any future change in the law, and the present analysis is not concerned with those. Emergency rulings such as stays and temporary injunctions are a subset of a much broader range of orders and rulings by the Supreme Court that do not undergo the standard merits process wherein cases are granted certiorari, briefed and orally argued, and decided in full-dress opinions disclosing the votes and views of individual Justices. For canonical commentary, see generally Stephen Vladeck, *The Shadow Docket: How the Supreme Court Uses Stealth Rulings to Amass Power and Undermine the Republic* (2023) [hereinafter Vladeck, *Shadow Docket*]; William Baude, *Foreword: The Supreme Court’s Shadow Docket*, 9 *N.Y.U. J.L. & Liberty* 1 (2015).

10. Varsava, *supra* note 5, at 292 (“A higher court might decide some type of case in a particular way in the future regardless of how lower courts decide similar cases today. For the sake of equity, then, lower courts ought to predict and follow the higher court’s future decisions.”).

11. See Richard H. Fallon, Jr., *Constitutionally Erroneous Precedent as a Window on Judicial Law-Making in the US Legal System*, in *Philosophical Foundations of Precedent*, *supra* note 4, at 405, 406–17, 413 (“The discontinuity between the Supreme Court and lower courts illustrates the need . . . for a friendly amendment to Hart’s account of the rule of recognition: it should be emphasized that different officials, including the judges of different courts, can be subject to different rules of recognition.”). To be clear, Professor Fallon’s and Professor Varsava’s chapters are presented in the book as independent contributions, not as responses to each other.

those decisions.”¹² As the chapter emphasizes, the Supreme Court has said to the lower courts: Don’t get out ahead of us.¹³

Now we start to see more clearly the conundrum that our judge faces. What would it mean to look ahead to the future, guided by the Supreme Court’s foreshadowing, if the judge’s rulings must also remain firmly rooted in the past?¹⁴

We can begin by eliminating the quickest way out of this dilemma, which would be to assume that such an emergency ruling does not merely foreshadow a future change in the law, but rather *is* a change in the law, creating new binding precedent in the conventional sense. This view seems untenable under the law of precedent,¹⁵ and Part I works through

12. *Id.* at 412. For further elaboration of the permissive and prohibitory aspects of precedent, see generally Richard M. Re, *Precedent as Permission*, 99 *Tex. L. Rev.* 907 (2021).

13. See, e.g., *Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016) (per curiam) (chastising the lower court for partial implicit overruling and reiterating that “[i]t is this Court’s prerogative alone to overrule one of its precedents” (internal quotation marks omitted) (quoting *United States v. Hatter*, 532 U.S. 557, 567 (2001))); *Am. Tradition P’ship v. Bullock*, 565 U.S. 1187, 1188 (2012) (Ginsburg, J., respecting grant of application for stay) (“Because lower courts are bound to follow this Court’s decision until they are withdrawn or modified, however, I vote to grant the stay.” (citation omitted)); *Hohn v. United States*, 524 U.S. 236, 252–53 (1998) (“Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality.”); *Agostini v. Felton*, 521 U.S. 203, 237–38 (1997) (“We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent. . . . [The trial court was] correct to recognize that the motion had to be denied unless and until this Court reinterpreted the binding precedent.”); *Rodriguez de Quijas v. Shearson*, 490 U.S. 477, 484 (1989) (“If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.”).

14. Professor Lawrence Solum has argued: “Predictions about what the Supreme Court will do are not law and deciding on the basis of such prediction is improper. The shadow docket, by encouraging this predictive approach, has resulted in a serious breach of judicial duty by the lower courts.” Mike Fox, *Supreme Court Shadow Docket Leaves Reasoning in the Dark*, Professors Say, *Univ. Va. L. Sch.* (Sept. 22, 2021), <https://www.law.virginia.edu/news/202109/supreme-court-shadow-docket-leaves-reasoning-dark-professors-say> [<https://perma.cc/MYR9-6A25>] (quoting Professor Solum). Other scholars, however, have suggested that it may be permissible or even useful—for example, in resolving novel questions or ambiguities—for lower courts to rule in alignment with certain signals from the Justices when doing so does not overrule or depart from existing Supreme Court precedent. See, e.g., Richard M. Re, *Narrowing Supreme Court Precedent From Below*, 104 *Geo. L.J.* 921, 943–45, 950 (2016) [hereinafter Re, *Narrowing Precedent*] (proposing a “signals model” in which lower courts attend to signals that come from a majority of the Supreme Court and are reasonably consistent with conventional precedent, including stay decisions and other preliminary rulings).

15. See *infra* Part I. As of now, there seems to be no Supreme Court decision fully addressing this question, though lately a number of Justices have issued statements emphasizing that emergency rulings are not decisions on the merits and indicating an aversion to even allowing “previews” of the merits through emergency rulings. See *infra* notes 41, 64. In the voice of the Court, there seems to be only one brief reference to stay denials. *Ind. State Police Pension Tr. v. Chrysler LLC*, 556 U.S. 960, 960 (2009) (per curiam) (“A denial of a stay is not a decision on the merits of the underlying legal issues.”).

why, focusing on the contrast between emergency rulings and certiorari review: The very purpose of an emergency stay or injunction is to set a temporary holding pattern for the parties so that the contested legal question need not be settled right away.¹⁶ Such a ruling turns upon law-prediction rather than law-declaration, and this guess can be modified at any time by the issuing court. It is no more “the law” than a draft opinion would be.¹⁷ Indeed, every emergency ruling anticipates its own erasure.

Even in the absence of stare decisis effect, however, do any lower court decisions nonetheless entail taking note of the Supreme Court’s foreshadowing?¹⁸ It turns out that for particular stays and injunctions, the lower court’s task seems to require predicting its own future merits ruling—and hence guessing at a future state of the law. If the Justices have also expressed such a guess in an emergency ruling in a parallel case, must not this lower court take heed? Not necessarily, as Part II details—not unless the lower court expects that by the time of its own merits ruling, the Justices will already have changed the law through a merits ruling of their own.¹⁹ Even then, a simpler judicial approach that avoids any such guesswork may be available to the lower court.²⁰

16. One potential source of confusion should be cleared up at the outset: Sometimes a higher court will exercise appellate review over a preliminary injunction or a stay by a lower court and, in doing so, choose to settle the contested question of law (even when reviewing for abuse of discretion rather than *de novo*). See *infra* note 25. That is *not* the same thing as the higher court deciding whether to issue a stay or temporary injunction itself, though at times these functions will coincide.

17. Accordingly, Part I also argues that the Justices should make amply clear that if they ever wished to lay down binding precedent through a case arising in an emergency posture, they would do so by granting certiorari (possibly certiorari before judgment, as recently seen) and setting the case for briefing and oral argument (possibly on an expedited schedule). See *infra* section I.B.

18. The present analysis is limited to whether taking heed of the foreshadowing in the Supreme Court’s emergency rulings is arguably *required* by the task at hand for the lower court. It does not address whether lower courts *should* do so, as a matter of prudence or good judging, even when doing so is not required. It also does not address other sorts of signals, such as questions asked at oral argument, speeches by the Justices, and the like. For a rich discussion of whether lower courts can and should attend to this broader range of signals, see *Re, Narrowing Precedent*, *supra* note 14, at 943–45, 950. For empirical research about lower courts following certain kinds of signals, see, e.g., Thomas B. Bennett, Barry Friedman, Andrew D. Martin & Susan Navarro Smelcer, *Divide & Concur: Separate Opinions & Legal Change*, 103 *Cornell L. Rev.* 817, 820–22 (2018) (showing that lower courts often give weight to a category of concurrences that should not be seen as controlling opinions); David Klein & Neal Devins, *Dicta, Schmicta: Theory Versus Practice in Lower Court Decision Making*, 54 *Wm. & Mary L. Rev.* 2021, 2041 (2013) (showing that lower courts give great weight to dicta in higher court opinions).

19. As Part II observes, a second, distinct situation in which the lower court may need to take heed of the Supreme Court’s signal is in ruling on a stay *pending certiorari* (as opposed to pending appeal). Note that initial consideration by a lower court is typically required before the Supreme Court itself will consider a request for emergency relief pending certiorari. See *Sup. Ct. R.* 23 (“Except in the most extraordinary circumstances, an application for a stay will not be entertained unless the relief requested was first sought in the appropriate court or courts below or from a judge or judges thereof.”).

20. See *infra* section II.B.4.

The informational value of the Supreme Court's signal, in any event, is capped by a basic constraint: An earlier judicial guess made at a lower threshold of confidence does not supply the answer for a later guess (on the same question) that requires a higher threshold of confidence. This limitation matters because stays and temporary injunctions throughout the judiciary are governed by standards for relief that set varying thresholds of confidence (such as "fair prospect") for the guesswork required.²¹

The role of confidence thresholds and the possibility of mistaken guesses remain novelties in the theoretical study of precedent, which has yet to focus much attention on judicial utterances that are guesses rather than declarations of law. Part III ventures into this inquiry, asking: What would it mean to deem one court's guess about the future of the law to be "binding" on another court's guess? That would not be *stare decisis*, of course. No new law is *decisis* yet—only *divinatis*. But could there be such a thing as *stare divinatis*? How would it work? And when, if ever, would it be needed?

The practical dilemma faced by our judge thus presents an occasion to think afresh on foundational questions about precedent. For a theorist of precedent, the foreshadow docket must seem like a bizarre thought experiment come to life. Theory has something new here to ponder and may well have something new to learn.

I. AN EMERGENCY RULING IS NOT BINDING PRECEDENT

Are the Supreme Court's emergency stays and injunctions considered binding precedent for the lower courts in the usual sense? That is, do they settle a contested question of law, with the full force of *stare decisis*? According to a singularly authoritative treatise on the law of precedent—one with many state and federal judges among its authors (two of whom are now Justices)—such a preliminary ruling does not even create law of the case, never mind creating law for any other cases.²² Thus the answer seems to be a simple "no."²³

21. See *infra* section III.A. For examples of such standards for relief, see *infra* note 105. As of now, however, the meanings of these standards in practice seem to be highly fluid and inconsistent—making it hard to know whether an earlier court's guess was made at a higher or lower threshold of confidence than is required for a later court's guess. See *infra* notes 105–107, 110.

22. Bryan A. Garner, Carlos Bea, Rebecca White Berch, Neil M. Gorsuch, Harris L. Hartz, Nathan L. Hecht, Brett M. Kavanaugh, Alex Kozinski, Sandra L. Lynch, William H. Pryor, Jr., Thomas M. Reavley, Jeffrey S. Sutton & Diane P. Wood, *The Law of Judicial Precedent* 230–32 (2016); see also Adam Liptak, Alito Responds to Critics of the Supreme Court's 'Shadow Docket', *N.Y. Times* (Sept. 30, 2021), <https://www.nytimes.com/2021/09/30/us/politics/alito-shadow-docket-scotus.html> (on file with the *Columbia Law Review*) (last updated Oct. 4, 2021) (noting that, in a speech, Justice Alito denied that emergency rulings have precedential value about questions of law).

23. In practice, even judges who choose in a given ruling to follow the Supreme Court's signal will sometimes offer a disclaimer that it is not because they are conflating the signal

Because the reasons for this answer are rarely worked out in detail, however, this Part devotes some space to doing so.²⁴ Some spelling out is useful because the contrary view may also be very appealing, grounded in this intuition: If the Supreme Court says something that matters for a decision, don't those utterances become the law?

This Part responds by focusing on how emergency rulings differ from certiorari review at the Supreme Court.²⁵ The point of an emergency ruling is to set a temporary holding pattern so that the contested question of law can be sorted out later, not right now.²⁶ Hence its nonfinality²⁷—the emergency ruling can be revised or withdrawn at any time, without anyone calling that an “overruling.” And it comes with a limited shelf life, anticipating its own expiration.²⁸

Altogether, then: A temporary, revisable guess about the future state of the law is all that has been necessarily decided in an emergency ruling.²⁹

with binding precedent. See, e.g., *CASA de Md., Inc. v. Trump*, 971 F.3d 220, 230 (4th Cir. 2020) (Wilkinson, J.) (“We may of course have the technical authority to hold that, notwithstanding the Supreme Court’s view, the plaintiffs are likely after all to succeed on the merits of their challenge. But every maxim of prudence suggests that we should decline to take [that] aggressive step”); *Navy SEAL 1 v. Austin*, 600 F. Supp. 3d 1, 8 (D.D.C. 2022) (Kollar-Kotelly, J.) (“[A] majority of the Supreme Court has already held (in a nonbinding, shadow docket decision), that the Government is likely to succeed on the merits [in a parallel case] Although this decision is nonbinding, it is the most persuasive authority on which a District Court may rely.”).

24. To be fair, explanatory commentary may be sparse because, to some, the conclusion seems obvious. See, e.g., Lisa Schultz Bressman, *The Rise and Fall of the Self-Regulatory Court*, 101 *Tex. L. Rev.* 1, 56 (2022) (“Treating shadow docket orders as precedential, and expecting lower courts to do so as well, compounds the effect of circumventing the merits process and the Court’s rules governing it. It also makes no sense.”).

25. The key distinction here is the posture of the Supreme Court’s ruling, not the lower court’s ruling. A higher court can exercise appellate review over a preliminary injunction or a stay by a lower court and, in doing so, choose to issue a merits ruling settling the contested question of law. See, e.g., *Munaf v. Geren*, 553 U.S. 674, 691 (2008) (“Adjudication of the merits is most appropriate [on appellate review of a preliminary injunction] if the injunction rests on a question of law and it is plain that the plaintiff cannot prevail.”).

26. For statements from the Justices to this effect, see *infra* notes 31, 41. For a lower-court example, see *Cook County v. Wolf*, 962 F.3d 208, 233–34 (7th Cir. 2020) (Wood, C.J.) (“The Court’s stay decision was not a merits ruling. . . . There would be no point in the merits stage if an issuance of a stay must be understood as a *sub silentio* disposition of the underlying dispute.”).

27. See *Garner et al.*, *supra* note 22, at 231 (explaining that “interlocutory orders may be reconsidered and modified”).

28. *Id.* at 230 (stating that nonfinal decisions are “by . . . nature interlocutory, tentative, and impermanent” (alteration in original) (internal quotation marks omitted) (quoting *Madison Square Garden Boxing, Inc. v. Shavers*, 562 F.2d 141, 144 (2d Cir. 1977))). If the case settles or otherwise disappears, so does any emergency stay or injunction.

29. See Thomas P. Schmidt, *Orders Without Law*, 122 *Mich. L. Rev.* (forthcoming 2024) (manuscript at 20), <https://ssrn.com/abstract=4630015> [<https://perma.cc/853S-MK86>] (“Any such statement is an equitable prediction that will govern the legal status of the parties while a case is pending and nothing more.”).

Moreover, that guess is made only to meet a confidence threshold set by the standard for relief. Thus, the lower courts should view any statements accompanying the ruling in this limited light. All this is quite the opposite of a typical merits ruling on certiorari review, in which a “question presented” has been taken up because the time and occasion are right for trying to settle that question for good.

But is this nonprecedential status merely a presumption that can be overridden? After reviewing some experimentation by the Supreme Court in recent years, this Part concludes that the proper way to indicate stare decisis effect is to grant certiorari and bring the case within both the posture and the process of full appellate review.

A. *It Is a Guess About the Law of the Future*

When deciding an emergency application, the Justices’ inner monologue should go something like this: *We are not faced with deciding this legal question yet, and maybe we’ll never get to it. But if we’re likely to take up this case later, here is a guess at what we might say when the case comes back. Informed both by this guess and by the equities of the moment, we will now set an interim holding pattern for the parties.*³⁰ By its very nature, such a guess is just good enough for setting that temporary holding pattern, which is all that’s at stake until a proper merits ruling takes over.³¹

1. *The Opposite of Final.* — As with any federal court’s preliminary injunctions or stays,³² the Supreme Court can modify or dissolve its own order at any point while the case works its way toward certiorari.³³ It would be most unusual for someone to say that in altering its own emergency stay

30. This thought process reflects the typical articulations of the standards for emergency relief at the Supreme Court. For example, the Court stated the standard for a stay pending certiorari in *Hollingsworth v. Perry* as requiring

(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay. In close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent.

558 U.S. 183, 190 (2010). For a temporary injunction pending certiorari, the “applicant must demonstrate that ‘the legal rights at issue are “indisputably clear.”” *Lux v. Rodrigues*, 561 U.S. 1306, 1307 (2010) (quoting *Turner Broadcasting Sys., Inc. v. Fed. Comm’n’s Comm’n*, 507 U.S. 1301, 1303 (1993) (Rehnquist, C.J., in chambers)).

31. See, e.g., *Merrill v. Milligan*, 142 S. Ct. 879, 879 (2022) (Kavanaugh, J., concurring in grant of applications for stays) (“The stay order is not a ruling on the merits, but instead simply stays the District Court’s injunction *pending a ruling on the merits.*”).

32. See John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 Harv. L. Rev. 525, 541 (1978) (“[T]he court’s interlocutory assessment of the parties’ underlying rights is fallible in the sense that it may be different from the decision that ultimately will be reached.”).

33. For insightful scholarship on the mechanics, purpose, and history of stays, see generally Rachel Bayefsky, *Administrative Stays: Power and Procedure*, 97 Notre Dame L. Rev. 1941 (2022); Portia Pedro, *Stays*, 106 Calif. L. Rev. 869 (2018).

or injunction, the Supreme Court is thereby “overruling precedent.”³⁴ This makes perfect sense. A guess about the future is, by its very nature, unstable.³⁵ Consider: For those cases in which the foreshadowing turns out to be wrong, whatever the Justices were guessing about the merits ruling must have changed somewhere along the way.

Contrast this with the finality of a merits ruling on full appellate review, which at the Supreme Court normally occurs through a certiorari process that includes briefing and oral argument. This process also specifies at least one carefully vetted question of law (a “question presented”) that the Court has curated with the intention to answer for good.³⁶ The resulting answer is a durable one, fixed as law of the case within the litigation—and beyond the present case, of course, sustained by the doctrine of stare decisis.

It is possible for an emergency ruling of the Supreme Court to become its last word on the issue, but this should not be conflated with finality. Such a ruling is usually made not only before any of the briefing, argument, and opinion-writing that attends the Supreme Court’s merits review, but even before certiorari.³⁷ It remains preliminary even if the case

34. Saying so would sound just as strange if the Supreme Court were to reach a merits result that does not match its earlier guess in that same case, or if it were to guess differently in a later emergency ruling in another case.

35. As Justice Alito put it, “[A]s is almost always the case when we decide whether to grant emergency relief, I do not rule out the possibility that further briefing and argument might convince me that my current view is unfounded.” *Ritter v. Migliori*, 142 S. Ct. 1824, 1824 (2022) (Alito, J., dissenting from denial of application for stay).

36. It is true that the Justices may end up dropping that “question presented” and decide on other grounds. See Bert I. Huang, *A Court of Two Minds*, 122 *Colum. L. Rev. Forum* 90 (2022), https://columbialawreview.org/wp-content/uploads/2022/05/Huang-A_Court_Of_Two_Minds.pdf [<https://perma.cc/V28M-WGVC>] [hereinafter Huang, *A Court of Two Minds*] (describing ways for the Justices to avoid answering a “question presented”). But that is rare. The general expectation remains that the curated question will be answered for good—that is, subject to overruling only when the force of stare decisis is overcome for good reason.

37. Several Justices have recently emphasized that ruling on emergency relief involves predicting whether the Supreme Court will likely grant certiorari. In a pandemic-related case, Justice Amy Coney Barrett, joined by Justice Kavanaugh, explained:

When this Court is asked to grant extraordinary relief, it considers, among other things, whether the applicant “is likely to succeed on the merits.” I understand this factor to encompass not only an assessment of the underlying merits but also a discretionary judgment about whether the Court should grant review in the case. Were the standard otherwise, applicants could use the emergency docket to force the Court to give a merits preview in cases that it would be unlikely to take—and to do so on a short fuse without benefit of full briefing and oral argument.

Does 1–3 v. Mills, 142 S. Ct. 17, 18 (2021) (Barrett, J., concurring in denial of application for injunctive relief) (citations omitted) (quoting *Nken v. Holder*, 556 U.S. 418, 434 (2009)). Justice Kavanaugh, joined by Justice Barrett, later elaborated that relief might therefore be denied if the case turned out to be a bad vehicle for deciding the question presented and hence not certworthy. *Griffin v. HM Florida-ORL, LLC*, 144 S. Ct. 1, 2 (2023) (Kavanaugh, J., respecting denial of application for stay). Likewise, Justice Alito, joined by Justices

never gets as far as a grant of certiorari. An emergency ruling does not morph into a merits ruling just because the case disappeared.

As a benchmark, consider that even *after* the Supreme Court grants certiorari, the operative law in lower courts remains unchanged until the merits decision comes down months later. If a granted case disappears—say, due to mootness—nothing is considered to have changed in the law.³⁸ Any circuit split remains as it was. Any cases held in abeyance carry on as if nothing happened.

One does not say, on the day after the Supreme Court holds oral argument in the case, that the law of the land has already changed. And think about the leak of the *Dobbs* draft, after which there was still hope in some quarters that at least one vote might yet switch.³⁹ Even after a draft opinion is circulated, with at least five Justices tentatively signing on, the law is not said to have changed. The effective date of a future ruling does not start when a prediction about it is deemed to be accurate enough.

2. *Not “Law for Now.”*— Yet, one might respond, an emergency order differs from other signals in that it is an actual ruling. Even if such a ruling has a short shelf life and can be altered at any time without anyone sensibly calling that an “overruling,” why not have the lower courts view it as declaring a sort of interim law?

Such a characterization might sound odd. But recall Professor Varsava’s proposal of a Dworkinian obligation to bridge the law of the past with the law of the future.⁴⁰ In such a model, isn’t the law of the present always serving as a kind of interim law, and properly so? One might further suggest that this is an especially useful notion when an emergency ruling seems to be smoothing the path toward an anticipated future state of the world.

The answer is that setting a “status quo for now” during litigation does not entail laying down any “law for now.” To the contrary, the emergency ruling, by setting an equitable holding pattern informed by law-prediction, obviates the need for actual law-declaration—for now.⁴¹

Clarence Thomas and Neil Gorsuch, observed straightforwardly that “[a] stay pending certiorari is appropriate only if the Court is likely to grant review.” *Ritter*, 142 S. Ct. at 1824 (Alito, J., dissenting from denial of application for stay).

38. Likewise, if the Court ends up evenly divided in a 4-4 vote, or if it chooses not to answer the question of law for whatever reason, the law is considered unchanged.

39. This is not to ignore the realities on the ground, as lawmakers and the public began to prepare for a post-*Dobbs* world. For scholarship about the effects of such anticipation, which began well before the leak of the draft, see *infra* note 115. For coverage of the leak, see generally Jodi Kantor & Adam Liptak, *Behind the Scenes at the Dismantling of Roe v. Wade*, N.Y. Times (Dec. 15, 2023) (on file with the *Columbia Law Review*).

40. Varsava, *supra* note 5, at 285–90.

41. As Justice Kavanaugh, writing about the grant of stays in *Milligan*, emphasized: The stay will allow this Court to decide the merits in an orderly fashion—after full briefing, oral argument, and our usual extensive internal deliberations—and ensure that we do *not* have to decide the merits on the

3. *More Like a Rough Draft*. — Nevertheless, one might insist, isn't an emergency ruling still an utterance from the high court? Whether it takes up five words or five pages, shouldn't it be seen as authoritative by lower courts within a judicial hierarchy?⁴² Even Supreme Court dicta sometimes weighs heavily on the lower courts,⁴³ and this utterance may deserve greater weight than dicta.

These are worthy points to consider, although they speak more to the informative value of such a ruling for lower courts making similar *guesses*, which is the subject of Parts II and III. This Part addresses only the narrower question of whether such utterances should be considered binding precedent that settles the contested question of law.⁴⁴

emergency docket. To reiterate: The Court's stay order is not a decision on the merits.

Merrill v. Milligan, 142 S. Ct. 879, 879 (2022) (Kavanaugh, J., concurring in grant of applications for stays); see also, e.g., Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 72 (2020) (Kavanaugh, J., concurring in grant of application for injunctive relief) ("Importantly, the Court's orders today are not final decisions on the merits. Instead, the Court simply grants *temporary* injunctive relief until the Court of Appeals in December, and then this Court as appropriate, can more fully consider the merits.").

42. The most thorough articulation of such a position comes from Judge Trevor McFadden and Vetan Kapoor, who in sum propose the following:

When the full Supreme Court grants a stay application, lower courts should accord that decision great weight, unless there is compelling reason not to do so. This is true even if the stay grant features little legal reasoning, and may well be true even when there is no reasoning. Of course, any discussion of the merits of a question increases the confidence with which a lower court can act. But a statement by the full Court about the movant's likelihood of success on the merits ought not to be simply ignored or cast aside.

Trevor N. McFadden & Vetan Kapoor, *The Precedential Effects of the Supreme Court's Emergency Stays*, 44 Harv. J.L. & Pub. Pol'y 827, 882 (2021). The set of rulings included in this proposal are those "in which a majority of the Supreme Court has clearly indicated that the applicant is likely to succeed on the merits of the question(s) presented." *Id.* at 832. The proposal excludes denials of stay applications and decisions issued by a single Justice, though the latter may gain persuasive value if the Justice presents a view of the merits in a written opinion. *Id.* at 831.

43. *Id.* at 847 (comparing signals in emergency rulings with dicta); see also Randy J. Kozel, *Settled Versus Right: A Theory of Precedent* 70–83, 145–57 (2017) (observing variation in the judicial treatment of Supreme Court dicta, including by the Court itself); Klein & Devins, *supra* note 18 (empirically demonstrating lower courts' tendency to follow dicta from higher courts), at 2032–42; Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. Rev. 1249, 1268–74 (2006) (lamenting that courts appear overeager to create and rely on dicta); cf. Charles W. Tyler, *The Adjudicative Model of Precedent*, 87 U. Chi. L. Rev. 1551, 1556–74 (2020) (assessing the competing "adjudicative" and "necessity" models for drawing the holding–dicta distinction).

44. This analysis sets aside statements that relate to how a preliminary ruling works—such as articulations of the standards for an emergency stay or injunction—as these statements have a stronger claim to be law-declaration. They are not predictions, to begin with; and besides, emergency orders may be the best or only occasions for certain law-declaration about how emergency orders work. See Pedro, *supra* note 33, at 919 ("[W]riting more opinions [in stay orders] would allow federal courts to build stays doctrine to ensure

Recall that in such preliminary rulings, the entire explanatory writing is in service of a guess that is temporary and revisable. Even the most confident-sounding statements within it are subject to change at any time as the case progresses and, more importantly, are meant to be replaced by the eventual merits ruling (or otherwise expire). Thus, one might view such a writing as akin to a rough draft of a possible future opinion.⁴⁵

The occasion for that future opinion may not materialize, however, for a host of reasons: Certiorari may yet be denied;⁴⁶ the case may become moot;⁴⁷ or the Supreme Court may punt the question.⁴⁸ Or, after further briefing and oral argument, the Justices may go a different way on the merits than some of them had predicted—in effect, tossing aside the old draft.⁴⁹

B. *Certiorari as the Bright Line*

Still, what if the Justices *want* to use a case arising in an emergency posture to lay down new precedent? Should the nonprecedential nature of an emergency ruling be seen as a presumption that can be overridden? Suppose the Justices issued a per curiam opinion, for an emergency ruling, formatted to look like a merits opinion and chock-full of declarative sentences about the law. And what if such an opinion were preceded by extra briefing and oral argument?

At some point on the continuum of mimicry, a nonmerits ruling may closely resemble the real thing. One might then feel awkward arguing against following it based on process values, depth of explanation, or intended durability.⁵⁰

Doubts remain, however. By its very nature, an emergency ruling requires only a guess at a given threshold of confidence (such as a “fair

that stays are not unreasoned or poorly reasoned procedural decisions that preempt underlying orders.”). Supposing that such process-related utterances do form binding precedent, they offer a useful contrast to the merits-related guessing that is our focus. See Edward L. Pickup & Hannah L. Templin, *Emergency-Docket Experiments*, 98 *Notre Dame L. Rev.* 1, 31 (2022) (arguing that emergency-docket opinions are “precedential in so far as they show lower courts how to balance the stay factors, illustrating harms significant enough to warrant emergency relief,” but that “[t]hey are not precedential as to the *merits*”).

45. Notably, this preliminary ruling is made far earlier—and with far less information—than any actual draft opinion.

46. This may still occur even if one of the criteria for an emergency stay is that the case and the contested legal question seem certworthy. See *supra* note 37.

47. For examples, see *supra* note 3.

48. See Huang, *A Court of Two Minds*, *supra* note 36, at 104–09 (describing off-ramps and other ways for the Justices to avoid answering the “question presented”).

49. See *supra* notes 2, 35.

50. The greater the resemblance between an emergency ruling and a full-dress merits process, however, the greater the risk of “role confusion” for the Supreme Court. See Schmidt, *supra* note 29 (manuscript at 22 & n.103) (discussing and citing commentary about a striking example of “role confusion,” the Supreme Court’s emergency ruling in a vaccine mandate case, *NFIB v. OSHA*, in which the Court seemed to disavow weighing the equities—as if forgetting that the ruling was about a stay).

prospect” of future success on the merits). Thus, even if such a ruling were asserted to have binding effect, in principle its relevance should be limited only to other rulings that require the same threshold of confidence (or a lower one).⁵¹ For the Supreme Court to use an emergency ruling to lay down all-purpose precedent instead—to bind *all* future rulings by the lower courts on the same legal question—would require overcoming this epistemic constraint.

At the very least, then, a broadly accepted marker of such an intent is needed. It will not do to toggle the absolute force of vertical stare decisis using only mushy indicia.⁵² But exactly where along that continuum of mimicry, as an emergency ruling looks more and more like a merits ruling, would the lower courts all agree that the stare decisis switch has been flipped?

A universally understood indicator is at hand, of course: granting certiorari for full-dress merits review. And the Justices have shown that they can set expedited briefing and oral argument and issue a merits opinion very quickly, sometimes granting “certiorari before judgment” in cases that have not yet run their course in the lower courts.⁵³

One obvious advantage is that bringing a case into full-dress merits review will usually improve the quality of that decision.⁵⁴ Drawing a bright line at certiorari may benefit the nonprecedential emergency rulings, too, if the Justices feel more free to offer explanations without worrying that

51. This logic is explored more fully in Part III.

52. Confident-sounding words are not enough. They can still be later modified or withdrawn even within the same litigation—and everyone knows it. True, some embarrassment may result, but again, this leaves the mushiest of mind-reading indicia: Just how much risk of such embarrassment would be enough for the lower courts to universally agree that the Justices must really, really mean it?

53. See, e.g., *Trump v. Hawaii*, 138 S. Ct. 923, 924 (2018) (mem.) (granting certiorari on a case arising in an emergency posture and specifying which exact “questions presented” were to be argued and briefed). Certiorari before judgment is not usually available, however, for cases still proceeding through a state court system. There may also be some instances when certiorari before judgment is not available even after a case has arrived at a federal court of appeals: Consider the OSHA vaccine mandate case, in which the Supreme Court issued a per curiam opinion that seemed to be mimicking a merits opinion, after also holding oral argument. See *NFIB v. Occupational Health & Safety Admin.*, 142 S. Ct. 661 (2022) (per curiam). It seems quite possible the Court might have granted certiorari before judgment in the OSHA case had there not been a procedural quirk that raised some doubt about its jurisdiction to take the case up on appellate review via certiorari. See Response in Opposition to the Applications for a Stay at 85–86, *NFIB*, 142 S. Ct. 661 (No. 21A244), 2021 WL 8945197. The existence of jurisdictional limits on the availability of certiorari should counsel against (not for) the use of mimicry of a merits ruling.

54. Given the still-hurried process, however, this benefit ought not be overstated. Even with briefing and oral argument, such an expedited process might still be viewed as lying somewhere in between standard merits-docket review and summary dispositions—and thus better suited for reinforcing or adjusting existing precedent than for crafting truly novel precedent. On summary dispositions, see generally Baude, *supra* note 9; Richard C. Chen, *Summary Dispositions as Precedent*, 61 *Wm. & Mary L. Rev.* 691 (2020); Edward A. Hartnett, *Summary Reversals in the Roberts Court*, 38 *Cardozo L. Rev.* 591 (2016).

lower courts might view them as binding.⁵⁵ Think of “unpublished” opinions in the circuit courts.⁵⁶

Another advantage is that this solution not only relies upon but also reinforces accepted rules of recognition and rules of change. This benefit is highlighted by considering Professor Katharina Stevens’s analytically rich book chapter on “precedent slippery slopes.”⁵⁷ The chapter’s core insight is that a judge who cares about being perceived as upholding rule-of-law values may feel compelled to follow a prior decision even though there are good and valid reasons not to follow it. This may occur if those reasons are too subtle or complicated to be legible to the broader public audience of legal subjects.⁵⁸

55. See Pickup & Templin, *supra* note 44, at 32 (noting that “the Court might feel free to write more frequently” if it has made clear that emergency rulings are not binding precedent). But if there is not a broadly shared understanding that emergency rulings are not binding precedent, then strong arguments in favor of minimal merits-related explanation apply. See, e.g., Pedro, *supra* note 33, at 922 (arguing that “there is almost no benefit from the Court issuing reasoning for likelihood to grant writs of certiorari or likelihood of success[,]” given the risk of “unintentionally influen[ing]” the lower courts through “smoke signals[,]” even if lower courts might try to read the “tea leaves” anyway). On the risk of such a “scarecrow” effect, see Schmidt, *supra* note 29 (manuscript at 20) (“Even the Court’s single sentence on the cause of action question—belying the complexity of the issue—may have a scarecrow effect going forward.”).

56. See, e.g., 2d Cir. R. 32.1.1(a) (“Rulings by summary order do not have precedential effect.”); 7th Cir. R. 32.1 (“Every order bears the legend: ‘Nonprecedential disposition. . . .’”). On the variation across the circuits in their usage of nonprecedential opinions, see, e.g., Allison Orr Larsen & Neal Devins, *Circuit Personalities*, 108 Va. L. Rev. 1315, 1327–29 (2022) (discussing the rates of unpublished opinions); Marin K. Levy, *The Mechanics of Federal Appeals: Uniformity and Case Management in The Circuit Courts*, 61 Duke L.J. 315, 322, 360–64 (2011) (discussing various circuit approaches to nonprecedential opinions); Merritt E. McAlister, “Downright Indifference”: Examining Unpublished Decisions in the Federal Courts of Appeals, 118 Mich. L. Rev. 533, 549–60 (2020) (assessing the widespread use of nonprecedential opinions).

57. Katharina Stevens, *Precedent Slippery Slopes*, in *Philosophical Foundations of Precedent*, *supra* note 4, at 459, 459–74.

58. See *id.* at 473 (“Judges are usually concerned with rule-of-law values, or at least they have good reason to appear concerned with them. If judges want to avoid seeming activist, they may be overly hesitant to distinguish surprisingly, and they may overestimate what will surprise legal subjects.” (footnote omitted)). Professor Stevens elaborates that even for an “amazing” judge who can always distinguish a precedent when appropriate, no matter how complex the argument, there may yet be a set of cases

where the judge realizes that while *she* can see why distinguishing is warranted, a reasonable legal subject would probably not. The legal subject would *fail to distinguish* because the successful argument is too complex for her, or the required background knowledge too hard to acquire. For this subset of cases, the amazing judge sees that the distinction between precedent and the present case is reasonable but, with respect to the *audience of reasonable legal subjects*, not effective. Therefore, distinguishing would undermine the predictability of the law and the legal subject’s confidence that they are being judged by the law, not the judge.

Id. at 472. The upshot, in Professor Stevens’s account, is that such a prior precedent should not have been set in the first place. As adapted for the present context, the analogous point

The risk for the judge, Professor Stevens observes, is to be mistakenly viewed by that audience as politically or personally biased for declining to follow the prior ruling—here, the Supreme Court’s emergency ruling.⁵⁹ This would be an unnecessary hit to public perceptions of the credibility of lower court judges.⁶⁰ It may also invite potential distortions in their rulings, especially if other judges in parallel cases *do* follow the Supreme Court’s signal without clarifying that it is not binding precedent.⁶¹ Averting such risks for their lower court colleagues is further reason for the Justices to emphasize that their emergency stays and temporary injunctions are not binding precedent on the underlying merits.

As of this writing, the Justices seem to be shifting toward this cleaner solution.⁶² As close observers have surmised,⁶³ it appears that a majority of the Justices now look back warily at their pandemic-era experimentation with using emergency orders to send precedent-ish signals to the lower courts.⁶⁴ There was a stretch of months when the Supreme Court acted as

is that emergency rulings should be clearly understood as nonprecedential on the merits of the underlying legal issue.

59. The mirror-image risk that comes with declining to follow existing precedent (by following the foreshadowing instead) will be addressed in Part II.

60. See Bert I. Huang, *Judicial Credibility*, 61 *Wm. & Mary L. Rev.* 1053, 1080–82 (2020) (discussing lower court credibility and legitimacy in light of findings from a survey experiment). On the relationship between the complexity of rulings and judicial legitimacy, see Erin F. Delaney, *Analyzing Avoidance: Judicial Strategy in Comparative Perspective*, 66 *Duke L.J.* 1, 22 n.101 (2016) (“If complexity may serve to enhance legitimacy, there is nevertheless bound to be a point when complexity begins to undermine legitimacy.”). For various meanings of judicial legitimacy, see Richard R. Fallon, Jr., *Law and Legitimacy in the Supreme Court* 20–46 (2018) (discussing sociological, moral, and legal legitimacy); see also Tara Leigh Grove, *The Supreme Court’s Legitimacy Dilemma*, 132 *Harv. L. Rev.* 2240, 2250–72 (2019) (book review) (discussing potential practical tensions among these categories).

61. For examples of judges both following such a signal while also clarifying that it is not binding precedent, see *supra* note 23.

62. The shift can be seen in the decreasing use of per curiam opinions accompanying emergency rulings relative to several years ago as well as the increasing use of granting certiorari in cases arising in an emergency posture. See Vladeck, *Shadow Docket*, *supra* note 9, at 250–55 (providing examples of these changing practices).

63. See, e.g., Bressman, *supra* note 24, at 7 (noting that Chief Justice Roberts and Justices Barrett and Kavanaugh have “joined the liberal Justices to prevent the court from providing a ‘merits preview’ in a case the Court is unlikely to take”); cf. Vladeck, *Shadow Docket*, *supra* note 9, at 191–92 (suggesting a change in approach by Justices Barrett and Kavanaugh); Josh Blackman, *A Deeper Dive on Justice Barrett’s Concurrence in Does v. Mills*, Reason: Volokh Conspiracy (Oct. 30, 2021), <https://reason.com/volokh/2021/10/30/a-deeper-dive-on-justice-barretts-concurrence-in-does-v-mills/> [https://perma.cc/J2BN-P3QB] (“Ironically enough, two Justices have significantly curtailed the shadow docket on the shadow docket with only a few sentences.”).

64. Consider how assiduously the Justices have been disavowing signals or previews of the merits. See, e.g., *Robinson v. Ardoin*, 144 S. Ct. 6, 6 (2023) (Jackson, J. concurring in denial of applications for stays) (“I concur in the denial of emergency relief. I write separately to emphasize . . . [that] nothing in our decision not to summarily reverse the Fifth Circuit should be taken to endorse the practice of issuing an extraordinary writ of mandamus in these or similar circumstances.”); *Merrill v. Milligan*, 142 S. Ct. 879, 879–82 (2022) (Kavanaugh, J., concurring in grant of applications for stays) (disavowing sending any “signal” about a

if some of its emergency orders should have been treated as binding precedent.⁶⁵ Ample criticism followed, including from several Justices, about the confusion that resulted.⁶⁶ The present course correction is well advised.⁶⁷ Future confusion about what counts as a change in the law can be avoided by reinforcing a bright line based on certiorari.

II. WHEN TO APPLY THE LAW OF THE FUTURE

If the Supreme Court's emergency rulings do not create binding precedent in the usual sense, when might a lower court ever need to heed such foreshadowing? And how can it do so while also fulfilling a duty to follow existing precedent?

These questions arise because a lower court is sometimes tasked with making an equitable call that seems to require looking into the future—for instance, when ruling on a preliminary injunction or a stay pending

change in the law); *Does 1–3 v. Mills*, 142 S. Ct. 17, 18 (2021) (Barrett, J., concurring in denial of application for injunctive relief) (expressing an aversion to giving a “merits preview”).

65. See, e.g., Vladeck, *Shadow Docket*, supra note 9, at 179–92 (detailing these “eleven months” between the first indication that the Supreme Court might be expecting lower courts to give great or even binding precedential weight to its emergency rulings about COVID-19 restrictions, and the apparent end of this stretch when the Supreme Court finally “balked”).

66. See *id.*; Pickup & Templin, supra note 44, at 7–9, 31–32; Cole Waldhauser, *Unprecedented Precedent: The Case Against Unreasoned “Shadow Docket” Precedent*, 37 *Const. Comment.* 149, 154–62 (2022). Consider, too, the criticism in Justice Kagan's dissent, joined by Justices Breyer and Sotomayor, in the Alabama redistricting case. See supra note 1. Another example is Justice Kagan's dissent, joined by Chief Justice Roberts and Justices Breyer and Sotomayor, criticizing the Court's emergency stay in a Clean Water Act case:

[The Court] 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.

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

67. To note one more sign of this change of heart: The Supreme Court's majority opinion in *Fulton*, a fully briefed and argued merits decision, pointedly ignored the *Tandon* emergency ruling that had been issued with a per curiam opinion only two months earlier. See *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021); see also Josh Blackman, *The Precedential Value of Shadow Docket Cases, Reason: Volokh Conspiracy* (July 6, 2022), <https://reason.com/volokh/2022/07/06/the-precedential-value-of-shadow-docket-cases/> [<https://perma.cc/R43J-HSVD>] (observing that “*Fulton* quite deliberately did not cite *Tandon v. Newsom* or *Roman Catholic Diocese*” (citing *Fulton*, 141 S. Ct. 1868; *Tandon v. Newsom*, 141 S. Ct. 1294 (2021) (per curiam); *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) (per curiam))). For a sense of the confusion created by uncertainty about the precedential effect of the *Tandon* ruling, see Alexander Gouzoules, *Clouded Precedent: Tandon v. Newsom and Its Implications for the Shadow Docket*, 70 *Buff. L. Rev.* 87, 107–20 (2022) (detailing the widely varying ways in which lower courts have treated the *Tandon* emergency ruling—ranging from citing it as if binding precedent, to citing it while ignoring part of its reasoning, to ignoring it altogether).

appeal.⁶⁸ And if in a parallel case, the Supreme Court has already made its own guess about the law of the future, then it might seem that the lower court has the answer it needs.⁶⁹

But the matter is not so simple. This Part looks closely at the architecture of stays and temporary injunctions across the judicial hierarchy, asking: What is each preliminary ruling meant to achieve? How long is it meant to last? What future ruling will displace it? What other ruling is it overriding, for now? Seeing how the lower courts' various tasks fit together reveals that only a limited set of such rulings seems to call for heeding the Supreme Court's signals.

A. *On the Architecture of Stays and Injunctions*

It will help to begin by distinguishing among three categories of lower court rulings: First, and most familiar, is a court's ruling on the merits of a contested legal question. Second, this court may have made an earlier ruling setting a temporary holding pattern for the parties until it rules on the merits.⁷⁰ Third, upon ruling on the merits, this same court may set another temporary holding pattern, one that lasts until a *higher* court makes a ruling on appeal.⁷¹

These three categories of rulings are repeated at each level of the judicial hierarchy, and the way they link up with one another is highly instructive. The overarching architecture of these rulings illuminates when a

68. A clarifying word is in order here, given the various jurisprudential meanings of "prediction": The present analysis focuses on the *formal* tasks facing the lower courts—some of which seem to entail predicting a future ruling and hence a future state of the law. It does not address the legal realist's expectation that judges may try to predict higher courts' views to avoid being reversed nor the premise that law is merely a prediction of how courts will rule. Finally, it plainly does *not* endorse a general predictive approach to adjudication wherein lower courts are supposed to mind-read the Justices at all times. (For that debate, see the sources listed in note 78, *infra*.) To the contrary, this analysis shows how the presence of *specific* formally predictive tasks also implies that other tasks—most notably merits rulings—are *not* formally predictive.

69. See McFadden & Kapoor, *supra* note 42, at 876 (arguing that "while it is true that the Justices themselves are not bound by their preliminary views on a case . . . [a]bsent compelling reasons, it will typically be prudent for lower courts to address these signals when considering the same merits question"). As Judge Jeffrey Sutton put it, in dissenting from the Sixth Circuit's denial of a stay after the Supreme Court had granted a similar stay: "Ours is a hierarchical court system, one that will not work if the junior courts do not respect the lead of the senior court." *Dodds v. U.S. Dep't of Educ.*, 845 F.3d 217, 222–23 (6th Cir. 2016) (Sutton, J., dissenting). For more on the specific context in which Judge Sutton made this comment, see *infra* note 86.

70. For a federal district court, this would be a ruling that grants or denies a preliminary injunction. See Fed. R. Civ. P. 65. For a circuit court, this would be a ruling on a stay or injunction pending appeal. See Fed. R. App. P. 8. The Supreme Court's equivalent would be its emergency ruling on a stay or injunction pending certiorari (and maybe also pending further proceedings in the lower court before the certiorari stage). See Sup. Ct. R. 23.

71. For a district court, this would be a ruling on a stay or an injunction pending appeal. See Fed. R. Civ. P. 62; Fed. R. App. P. 8. For a circuit court, this would be ruling on a stay pending certiorari. See Fed. R. App. P. 41; Sup. Ct. R. 23.

court's task is to decide for itself, when its task is to anticipate its own future decision, and when its task is to anticipate *another* court's future decision.

FIGURE 1. PREDICTING WHICH RULING?

This ruling sets a holding pattern anticipating and lasting until this ruling
District court's preliminary injunction <i>Informed by prediction about district court's future merits ruling</i>	District court's future merits ruling
A stay or injunction "pending appeal" <i>Issued by district court or circuit court as temporary override of district court's merits ruling</i> <i>Informed by prediction about circuit court's future merits ruling</i>	Circuit court's future merits ruling
A stay or injunction "pending certiorari" <i>Issued by circuit court or Supreme Court as temporary override of circuit court's merits ruling</i> <i>Informed by prediction about Supreme Court's future rulings on certiorari and possibly merits</i>	Supreme Court's future rulings on certiorari and possibly merits

1. *Guessing About Whom?* — First, notice that the precise function of each temporary injunction or stay tells the court which future ruling ought to be predicted. That is, the purpose of each holding pattern should determine what the "likelihood of success on the merits" (or similar notion) is referring to, in the governing standard for relief.

A district court's ruling on a preliminary injunction, which sets a holding pattern meant to last only until it is displaced by this same court's merits ruling, should therefore be predicting how its *own* ruling will come out. By contrast, a district court's ruling on a stay or injunction pending appeal, which sets a holding pattern meant to last until it is displaced by the circuit court's ruling on appellate review, should be predicting what that *other* court's ruling will be.⁷²

72. Reinforcing this distinction is the fact that the moment a district court's preliminary injunction ends—upon the arrival of its merits decision—is typically also the point when a stay or injunction pending appeal would begin. Note that the ruling being appealed can also be the preliminary injunction itself; for ease of exposition, the discussion refers only to a district court's merits ruling being appealed, but the analysis of stays or injunctions pending appeal also extends to an interlocutory appeal of a district court's preliminary injunction.

Similarly, a circuit court's stay or injunction pending appeal is looking ahead at its own future appellate ruling on the merits, and so that is the ruling to be predicted as part of the standard for relief.⁷³ By contrast, a circuit court's stay pending certiorari (as opposed to pending appeal) is looking ahead at the Supreme Court's future certiorari decision and possible ruling on the merits—and so this particular task requires the circuit court to guess at what the Supreme Court might do.⁷⁴

2. *When Not to Guess.* — Whether a court should be deciding something for itself—or instead guessing at a higher court's views—is also revealed by how these rulings link up with each other.

For example, a circuit court's merits ruling occurs at essentially the same time as its additional decision on whether to stay that merits ruling pending certiorari. These are different tasks. That is why they are not redundant. The stay pending certiorari is not a do-over but rather a way for the circuit court to override its own merits ruling temporarily.⁷⁵ It turns on the circuit court's guess about what *another* court might do—namely, what the Supreme Court might do at the certiorari stage.

Conversely, this need for the circuit court to make a guess about the Supreme Court when ruling on a stay pending certiorari does *not* imply that the circuit court should also have based its own merits ruling on such a guess in the first place. Quite the opposite. The possibility of such a temporary override frees up the circuit court to make its merits ruling based on its own best reading of existing precedent, laid down by past Justices, *without* any need to read the minds of the current Justices.⁷⁶ If the circuit court suspects that the Supreme Court may later take a different view of existing precedent or even overrule it, that prediction should influence not the circuit court's merits ruling but only the stay that temporarily overrides it.

73. The circuit court's ruling on a stay or injunction pending appeal follows shortly after the district court's ruling about the same thing. Likewise, shortly after a circuit court rules on a stay pending certiorari (as opposed to pending appeal), the Supreme Court may also make a ruling about the same thing. The repetition seems to draw on both courts' relative advantages in institutional competence—the lower court being closer to the equities on the ground and the higher court being better at reading its own mind.

74. Reinforcing this distinction is the fact that the moment when a circuit court's stay or injunction *pending appeal* dissolves—with the arrival of its merits decision—is typically also the point when a stay *pending certiorari* would begin.

75. Notably, it is distinct from a motion to reconsider, which is already provided for as a separate corrective device. See Fed. R. App. P. 27(b). When a stay pending certiorari blocks a merits ruling from going into effect, it does not undo the merits ruling.

76. A similar logic repeats at the level of the district courts: A district court making any appealable ruling (whether final or interlocutory) is similarly freed up to decide for itself about the best understanding of existing precedent—without regard to guessing at what the circuit court might do on appeal. It, too, has a temporary override mechanism available in the form of a stay or injunction pending appeal—and this is the ruling that entails anticipating what the circuit court will do.

B. *Existing Law or Future Law?*

This architecture of stays and injunctions thus informs when a lower court's task might entail taking account of the Supreme Court's foreshadowing in an emergency ruling in a parallel case. Let's proceed from the easier to the trickier categories.

1. *Merits Rulings.* — First, an easy “no”: For a merits ruling, as noted, it is clear that the lower court can decide based on its best understanding of existing precedent without regard to the current Justices' apparent views.⁷⁷ If there is any need to set a different holding pattern for the parties because it seems like the Supreme Court might reverse, that is the job of the stay pending certiorari—and not a consideration for the merits ruling.

This structure reinforces a principle ingrained in the current rules of recognition and rules of change in our federal courts, one which Professor Fallon's book chapter emphasizes: Lower courts are *not* to get out ahead of the Supreme Court in overruling or departing from prior precedent.⁷⁸ The Supreme Court has repeatedly reminded the lower courts of this constraint.⁷⁹ Although it may be intuitive to think that the judicial hierarchy requires a lower court judge to ask what the current Justices would do, prevailing doctrine says that the judge must abide instead by what *past* Justices have said in opinions laying down precedent. No amount of signaling by the Supreme Court—whether in an emergency ruling, comments during oral argument, concurrences or other separate writings, speeches, or even leaks of actual drafts—would allow a judge to displace

77. As detailed in Part I, an emergency ruling does not create binding precedent in the conventional sense. The lower courts remain free to consider these signals (or not) in reaching their best understanding of *existing* precedent. For scholarship on this topic, see *supra* note 18.

78. See *supra* notes 11–13 and accompanying text. For academic debate about this constraint, the classic sources are Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 *Tex. L. Rev.* 1 (1994); Michael C. Dorf, *Prediction and the Rule of Law*, 42 *UCLA L. Rev.* 651 (1995); and Pauline T. Kim, *Lower Court Discretion*, 82 *N.Y.U. L. Rev.* 383 (2007).

79. The Supreme Court has said, in various articulations, that the lower courts are bound by prior precedent until it is “reconsider[ed],” “reinterpreted,” or “overruled” by the Supreme Court; and Justice Ruth Bader Ginsburg, joined by Justice Breyer, has also used the term “modified.” See *supra* note 13. Even implicit partial overruling is barred. See *Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016) (*per curiam*). Certain Justices have chastised a lower court for basing its own ruling on a prediction that the Supreme Court might overrule prior precedent, even when the prediction is correct. See, e.g., *Rodriguez de Quijas v. Shearson*, 490 U.S. 477, 484 (1989) (“We do not suggest that the Court of Appeals on its own authority should have taken the step of renouncing [*Wilko v. Swan*, 346 U.S. 427 (1953)].”); *id.* at 486 (Stevens, J., dissenting) (calling it “an indefensible brand of judicial activism”). The Supreme Court holds the prerogative not only for altering precedent but also for choosing when to do so. *Hohn v. United States*, 524 U.S. 236, 252–53 (1998) (“Our decisions remain binding precedent until we see fit to reconsider them . . .”). It remains possible, of course, that at times the Justices may tolerate or even agree with a lower court's departure from prior precedent and thus not call it out.

existing precedent with guesswork about the views of the Supreme Court of today, much less of the future.

2. *Stays or Injunctions Pending Certiorari*. — Second, an easy “yes”: A circuit court ruling on a stay pending certiorari (as opposed to pending appeal) ought not ignore a Supreme Court ruling on a stay or injunction pending certiorari in a parallel case with the same contested legal issue. These are the only rulings that expressly call upon a lower court to read the minds of the *current* Justices, asking: “Will these Justices likely grant certiorari, and if so, how might the case come out?” One might see this task as an extension of the traditional role of an individual Circuit Justice in guessing at other Justices’ views, when ruling in chambers on a stay pending certiorari.⁸⁰

3. *Preliminary Injunctions and Stays Pending Appeal*. — Third, and trickiest, are those temporary rulings by a lower court made in anticipation of a future merits ruling by a court that is *not* the Supreme Court. Think of a district court ruling on a preliminary injunction. Or think of a circuit court making a ruling about a stay or injunction pending appeal (as opposed to pending certiorari).⁸¹ And suppose that this court is aware of an emergency ruling in a parallel case that has not yet reached a final merits decision from the Supreme Court.

In principle, the task for such a lower court in assessing the “likelihood of success on the merits” is to make a prediction about its own future ruling. This entails asking: What will the law be when that moment arrives? In particular, will the Supreme Court have already changed the law by then? Or will prior precedent still be governing law?

If the lower court’s own merits ruling is expected to occur first, then its task is to use prior precedent to make its guess about the likelihood of success on the merits. This is because that prior precedent is also expected to be governing law for its own merits ruling later.⁸² If, however, the lower court expects its own future merits decision to come *after* a new Supreme Court ruling on point, then in theory it must guess at that future state of the law in order to make its preliminary ruling now. It is as if the predictive task facing the lower court introduces a touch of time travel into the familiar rules of recognition and rules of change.⁸³

80. See, e.g., Dorf, *supra* note 78, at 690–94. For a remarkable historical example, see *infra* note 125.

81. The analysis for this category is easily adapted to a district court’s ruling on a stay or injunction pending appeal—which is in anticipation not of its own merits ruling but of the circuit court’s ruling on appellate review. For ease of exposition, these adaptations will be addressed here in the notes rather than in the text.

82. The lower court’s own merits ruling would occur earlier, most obviously, if the Supreme Court never gets to a relevant merits ruling. But it could also happen earlier due simply to the relative pace of the parallel litigation.

83. See *supra* notes 11–13 and accompanying text.

How is the lower court supposed to manage this extra guesswork about timing?⁸⁴ The task may be easier if certiorari has already been granted in the other case, thus allowing some sense of the Supreme Court's timeframe and also more clarity about the legal question to be answered. The lower court might then hold its own case in abeyance. Because this option would nearly ensure that the Supreme Court will rule first,⁸⁵ the lower court would set a holding pattern informed by a guess about that future merits ruling from the Supreme Court.⁸⁶

Or to the contrary, the lower court might choose to proceed apace, with the expectation that it will reach a merits ruling before the Supreme Court does. The lower court should then set the holding pattern based on a guess about its own future ruling under existing precedent.⁸⁷ There would be no need to take heed of any foreshadowing. Meanwhile, if the Justices saw fit to put this lower court's proceedings on pause, or to set a different holding pattern, they could do so themselves.⁸⁸

The latter approach should be the default for the lower court, of course, if certiorari has *not* yet been granted in the parallel case. A Supreme Court merits ruling (if any) would still be a ways off; moreover,

84. For a recent example of a district judge working through the possible timing of a parallel case (one that may or may not eventually get Supreme Court review) to decide whether to hold her own case in abeyance, see *Chelius v. Becerra*, No. 17-00493 JAO-RT, 2023 WL 5041616, at *4–7 (D. Haw. Aug. 8, 2023).

85. *Id.* at *4 (discussing the district court's power to hold a case in abeyance to await the outcome of a related parallel case). Recall, however, that the case in which the Supreme Court made an emergency ruling may never reach the merits stage at the Supreme Court or the relevant legal question might not get answered. This is why holding a case in abeyance does not completely guarantee that there will be new precedent to consider by the time of the lower court's own merits ruling.

86. Cf. *Dodds v. U.S. Dep't of Educ.*, 845 F.3d 217, 222 (6th Cir. 2016) (Sutton, J., dissenting) (“The only material difference between this stay request and the stay requests in [a parallel case] is that the Supreme Court has now *granted* the school board's certiorari petition [in the parallel case] . . . [This] distinction makes a stay *more* appropriate in our case.”); *supra* note 69. The stay being requested would have matched the one the Supreme Court granted in the parallel case. Judge Sutton's rationale is that “[j]ust as the plaintiff in [the parallel case] must wait for Supreme Court review before changing the status quo, so should the plaintiff in our case be required to wait for that decision before changing the status quo.” *Id.*

87. After its merits ruling, however, the lower court may be asked to temporarily override it with a stay or injunction pending appellate review by the next court up in the hierarchy. For a district court ruling on a stay or injunction pending appeal, there is the new timing question: “Will the *circuit court* reach its merits ruling before the Supreme Court does?”

88. One way for the Supreme Court to put this lower court's case on pause would be to construe an emergency application as a petition for certiorari and to grant it; this case could then be consolidated with or held for eventual “GVR” in light of the parallel case already on the merits docket. On the GVR process, see Aaron-Andrew P. Bruhl, *The Supreme Court's Controversial GVRs—And an Alternative*, 107 Mich. L. Rev. 711, 712 (2009) (providing an overview of GVR orders—“the [Supreme Court's] procedure for summarily *granting* certiorari, *vacating* the decision below without finding error, and *remanding* for further consideration by the lower court”).

it may be unclear what legal question (if any) will be taken up. Holding one's own case in abeyance in light of a nonexistent Supreme Court merits case may well be seen as shirking or gamesmanship.

This flowchart of guesswork for the lower court may seem convoluted, but it should be workable in most cases. Even so, a general problem remains: The compounding of prediction upon prediction may make any result seem iffy or arbitrary to the broader legal audience. And lower courts may very sensibly wish to avoid such an appearance. But how?

4. *A Simpler Approach.* — One might imagine a far simpler alternative. Most of the messy guesswork would vanish if a lower court were to adhere to existing precedent—always—in assessing the “likelihood of success on the merits” for its own temporary ruling. How might such an approach work?

The judge could set the initial holding pattern based on prior precedent, with the understanding that as soon as new precedent appears, the holding pattern can be adjusted accordingly.⁸⁹ The judge could explain that guessing about future law change and its timing would all be just too speculative to serve as principled grounds for decision. The upshot would be that the holding pattern, even if it evolves over time, would always remain grounded in precedent that already exists.

This avoids any extraneous disruptions, for the parties and for conditions on the ground, based on mistaken guesses about what a higher court might do. As Professor Varsava's book chapter recognizes in working out how judges might bridge the past and the future of the law: If the available information about the future is thin or speculative, then its consideration deserves little weight.⁹⁰

A further benefit, focusing on the legibility of a judge's decisions, draws once more on the logic in Professor Stevens's book chapter.⁹¹ Even

89. This discussion excludes stays pending certiorari, which as part of the standard for relief require guessing what the Supreme Court might do on certiorari—and hence also guessing about a possible change in the law. The analysis can, however, be adapted for a district court's ruling on a stay or injunction pending appeal: Even if it eschews any guesswork about future law change coming from the Supreme Court's parallel case, the district court would still need to guess how the circuit court might rule *under existing precedent*—as this might not be how the district court itself has just ruled on the merits under existing precedent.

90. Professor Varsava's book chapter observes:

For example, if a judge has a mere inkling that courts will depart from some line of precedent in the coming years, that prediction should not play much of a role in their adjudication of a present dispute, whereas if the judge is relatively certain in their prediction then it should have greater force. If a judge has no reasonable basis whatsoever on which to predict how future judges will handle a past line of cases, then speculation about the future of those cases should probably have no bearing at all on the present decision.

Varsava, *supra* note 5, at 293.

91. See *supra* note 58.

if a judge has good reason to guess that a later merits ruling will need to depart from prior precedent—because it will be governed by a future Supreme Court ruling that will have modified or rejected that precedent—such reasoning may not be easily conveyed to the broader audience of legal subjects. It may be tricky to say that a quirk of timing seemingly allows a judge to escape the bounds of existing precedent. The explanatory difficulty is amplified by the layers of guesswork involved, especially if the judge is not confident about those guesses.

The primary risk to such a judge is being perceived as making unprincipled decisions or undermining rule-of-law values, even when the choice is valid.⁹² This risk may be amplified if the quirk of timing is seen as manipulable by the judge. There may also be a risk that in areas of legal ambiguity, the judge's internalization of the signal from the Supreme Court's emergency ruling may be misunderstood as dubiously suggesting that the signal is faithful to, rather than departing from, prior precedent.

The irony here is that this inexpressibility concern is itself not readily expressible to the broader legal audience. But the adjust-as-needed approach is simple enough to convey and justify, on its own terms, to anyone.

5. *A Conceptual Shortcut?*— There is another approach a lower court might take that also implies applying only existing precedent without regard to foreshadowing: The judge might adopt the view that assessing the “likelihood of success on the merits” is not about guessing about a future merits ruling—despite how it sounds—but rather about guessing who would win if the merits had to be decided right now. And hypothetically deciding the merits “right now” would mean following existing precedent.⁹³ As a practical matter, this approach is nearly equivalent to the adjust-as-needed method described above. The conceptual difference is that the judge here would be assuming that the future state of the law is irrelevant, not just too speculative. There is some dissonance with the fact that the judge must still look into the future when assessing the interim hardships for the parties as part of the standard for granting relief. But there is no logical inconsistency.

Taking this “right now” perspective might also seem at odds with what the Supreme Court has done in foreshadowing a possible departure from existing precedent—looking to the future—in its own emergency ruling.

92. Notice that the present concern (about perceptions of the judge not following prior precedent) is the mirror image of the one raised in Part I (about perceptions of the judge not following the emergency ruling). This double-bind for the judge is, of course, the product of the very nature of such an emergency ruling—the foreshadowing has already happened (and thus is available to follow) and yet the prior precedent is also still good law (and thus is also available to follow). These concerns are not equivalent, however; one concern involves following prior precedent, which is the law, and the other concern involves following a signal, which is not the law.

93. For reasons given above, *supra* note 89, again this analysis excludes stays pending certiorari; and again, a district court ruling on a stay or injunction pending appeal will still need to guess how the circuit court might rule.

But this is reconcilable if the Supreme Court can also be imagined to be adopting a “right now” perspective. Again, as Professor Fallon notes in his book chapter, there are far-reaching implications to how the rules of recognition and rules of change differ across the layers of the judiciary.⁹⁴ Here is one of them: The Supreme Court gets to say, “If we were to decide the merits *right now*, we would do so based on new precedent that we would craft *right now*, departing from prior precedent”—even though a lower court cannot say the same.

C. *The Problem of Coordination*

But what about the problem of consistency—“treating like cases alike”—across parallel cases while they are all working their way through the courts? If some judges follow existing precedent while others follow the foreshadowing, won’t contradictory rulings be likely to result? Isn’t the Supreme Court’s emergency ruling a salient “focal point” around which all other judges can coordinate theirs?⁹⁵

Let’s untangle these questions. First, there may be a concern about inconsistency for its own sake. But in principle, for multiple courts to rule differently in parallel cases need not imply a failure to “treat like cases alike.” Even parallel cases may be distinguishable on the facts or the equities; if anything, one might be skeptical of complete uniformity in outcomes as perhaps too much of a coincidence.⁹⁶ Moreover, any inconsistency among preliminary rulings in parallel cases would be fleeting relative to the usual durational tolerance for circuit splits. And what better occasion is there for percolation among the lower courts than in the period after the Supreme Court foreshadows a potential change in the law and before it makes that call for real?⁹⁷ One might see this as a crucial moment for a sort of “judicial notice and comment.”

Second, there may be a distinct concern about clashing injunctions. Or there may be a special urgency in achieving uniform holding patterns in parallel cases involving the federal government. To address such concerns, the Supreme Court will often be able to step in with its own stay or injunction pending certiorari—if it sees fit to impose such uniformity.⁹⁸

94. Fallon, *supra* note 11, at 412.

95. See Bert I. Huang, *Coordinating Injunctions*, 98 *Tex. L. Rev.* 1331, 1336–45 (2020) [hereinafter Huang, *Coordinating Injunctions*] (examining “focal points” for the coordination problem in which lower courts with parallel cases are trying to avoid clashing injunctions).

96. See Bressman, *supra* note 24, at 58 (finding it highly questionable that the Supreme Court expected so many COVID-19 emergency orders to come out the same way, given factual differences in the regulations and in their impact). Professor Bressman’s view is that this shows the Court was only looking at these cases superficially.

97. See Schmidt, *supra* note 29 (manuscript at 20) (“It can, after all, be quite helpful to the Supreme Court for lower courts to give their full and honest analyses of the pending case measured against current law.”).

98. Presumably, such a situation would very often satisfy the governing standard for at least a stay (though maybe not a temporary injunction) pending certiorari. See *infra* note 105.

Other coordination devices can also avoid inconsistency or relieve conflicts. As deployed in a recent set of cases that led to a high-profile emergency ruling at the Supreme Court,⁹⁹ a formal process exists for the multicircuit consolidation of cases that challenge the same federal agency action.¹⁰⁰ At the level of the federal district courts, there is also the more widely known multidistrict litigation device.¹⁰¹ The limitation is that these devices can consolidate cases only in the federal courts.

Even without such consolidation, however, courts with parallel cases may be able to coordinate among themselves.¹⁰² Consider a circuit court's ruling on a stay pending appeal: In part of the opinion, the court says what it thinks about applicable law and what this means for setting a suitable holding pattern. But if the court's intended order would create a clash with the holding pattern in another case, it can fully or partially stay its order to avoid the conflict.¹⁰³ This solution encourages candor by decoupling the judges' legal analyses from the task of coordinating the operative holding patterns on the ground.

III. COULD THERE BE *STARE DIVINATIS*?

Let's now try to imagine more fully how a lower court might take heed of the Supreme Court's foreshadowing when doing so is called for. Further practical and theoretical questions rapidly appear.

Notice, first, that if the signal in an emergency ruling from the Supreme Court were to be deemed authoritative in some sense for the lower courts, any such constraint would not look like *stare decisis*. For one thing, there cannot be horizontal *stare decisis* here,¹⁰⁴ as it would be incoherent to say that the Supreme Court somehow binds itself to not

99. See *NFIB v. Occupational Health & Safety Admin.*, 142 S. Ct. 661, 664 (2022).

100. 28 U.S.C. § 2112 (2018) (providing for consolidation of multicircuit petitions for review).

101. *Id.* § 1407 (providing for consolidation of multidistrict litigation in federal courts).

102. See Huang, *Coordinating Injunctions*, *supra* note 95 (detailing and proposing ways for both district courts and circuit courts to coordinate their preliminary rulings so as to avoid clashing injunctions).

103. As parallel cases accumulate, these courts may continue to adjust their stays or underlying orders as needed. See *id.* at 1352–53 (describing the adjustment process). This includes the Supreme Court.

104. The term “horizontal” here refers to the *stare decisis* effect of the Supreme Court's past decisions on its own future decisions. For more on the distinction between vertical and horizontal *stare decisis* (or horizontal and vertical precedent), see, e.g., Garner et al., *supra* note 22, at 27–43; Barry Friedman, Margaret H. Lemos, Andrew D. Martin, Tom S. Clark, Allison Orr Larsen & Anna Harvey, *Judging in a Hierarchical System*, in *Judicial Decision-Making: A Coursebook* 434–37 (2020); Kozel, *supra* note 43, at 7–8, 19–21, 157–59; John C.P. Goldberg & Benjamin C. Zipursky, *A Precedent-Based Critique of Legal Positivism*, in *Philosophical Foundations of Precedent*, *supra* note 4, at 299–302; Sebastian Lewis, *On the Nature of Stare Decisis*, in *Philosophical Foundations of Precedent*, *supra* note 4, at 36–48; Frederick Schauer & Barbara A. Spellman, *Precedent and Similarity*, in *Philosophical Foundations of Precedent*, *supra* note 4, at 240–42.

change its mind when guessing about its own future rulings. Moreover, for temporary stays and injunctions, the whole point is to not have to settle the contested question of law right away. The legal answer is not yet *decisis*—only *divinatis*.

So one might ask: Can there be such a thing as a doctrine of *stare divinatis*? What would it mean for a higher court’s guess to “bind” a lower court’s guess? When would such a limitation be needed? What sorts of information should be allowed to overcome it?

This Part highlights such questions while venturing only a few tentative answers. It begins, though, with one fundamental point: Any authoritative influence of the Supreme Court’s guess must be limited to only those lower court guesses (on the same question) that require the same or a lesser degree of confidence.

A. *An Inherent Limitation*

For courts making rulings about temporary stays or injunctions, the embedded guesses about the future of the law have a built-in level of confidence specified by the standard for relief. For example, a stay pending appeal might require a “strong showing that [the requesting party] is likely to succeed on the merits,” whereas a stay pending certiorari might require a “fair prospect” of eventual reversal after certiorari has been granted.¹⁰⁵

An earlier guess made at a lower threshold of confidence does not supply the answer for a later guess (on the same question) that requires a higher threshold of confidence. Consider a familiar analogy found in the law of preclusion: A factual finding from a case with a lower burden of proof (“preponderance of the evidence”) cannot be preclusive in a case with a higher burden of proof (“beyond a reasonable doubt”). Here, the same logic applies.

105. See, e.g., *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (articulating the merits-related component of the standard for a stay pending certiorari as showing “(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari” and “(2) a fair prospect that a majority of the Court will vote to reverse the judgment below”); *Nken v. Holder*, 556 U.S. 418, 434 (2009) (articulating the merits-related component of the standard for a stay pending appeal in the circuit courts as “whether the stay applicant has made a strong showing that he is likely to succeed on the merits” (internal quotation marks omitted) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987))). Due to the variation across circuits in how the *Nken* standard is understood, there is no simple answer to whether it demands greater confidence about the merits-related guess than does the *Hollingsworth* standard (even if one views the latter as the Supreme Court’s adaptation of the former for a stay pending certiorari). See *infra* note 110. As for injunctions: For a preliminary injunction in the lower courts, a typical articulation is that the requesting party must show a “likelihood of success on the merits.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). For a temporary injunction (as opposed to a stay) pending certiorari, a typical articulation is that the “applicant must demonstrate that ‘the legal rights at issue are ‘indisputably clear.’” *Lux v. Rodrigues*, 561 U.S. 1306, 1307 (2010) (quoting *Turner Broadcasting Sys., Inc. v. Fed. Comm’n Comm’n*, 507 U.S. 1301, 1303 (1993) (Rehnquist, C.J., in chambers)).

Thus, for example, foreshadowing in a Supreme Court stay issued based on a “fair prospect” level of confidence should not count as authoritative guidance for any lower-court rulings that might call for a higher likelihood of success on the merits.¹⁰⁶ By contrast, foreshadowing in a Supreme Court injunction issued based on an “indisputably clear” level of confidence would presumably inform a wider range of future guesses.¹⁰⁷

One new question for the theory of precedent is how best to conceptualize such an (un)certainly-based constraint on informational value. At first glance, it may bear a passing resemblance to the holding–dicta distinction. But calling it dicta is unsatisfying. As noted in the Introduction, what is special about this kind of judicial guess is that it has the quality of a holding because the outcome of a ruling does turn upon it.¹⁰⁸ Still, what is necessarily relied upon is a guess made at a given threshold of confidence. Thus, any intimation of greater certainty by the earlier court would be extraneous, and any inference of greater certainty by the later court would be unsound. Might this limitation, then, point to an unexplored interaction between the strength and the scope of a precedent?¹⁰⁹

106. The “fair prospect” threshold appears to be lower than a fifty-fifty chance of success on the merits. See *Merrill v. Milligan*, 142 S. Ct. 879, 881 n.2 (2022) (Kavanaugh, J., concurring in grant of applications for stays) (“Even under the ordinary stay standard outside the election context, the State has at least a fair prospect of success on appeal—as do the plaintiffs, for that matter.”). If so, then an express statement that there is *not even* a “fair prospect” of a certain outcome might be read as a signal that there is a better-than-even chance of the opposite outcome. Such an inference may be unsound, however, if the reason for denial is that the requesting party failed to produce enough information to demonstrate a “fair prospect.” That shortcoming would not necessarily imply that the other side has any particular chance of winning. Moreover, it also must be emphasized that an unexplained stay denial by the Supreme Court allows no useful inference about the underlying merits, because other reasons (including the lack of certworthiness) may be partly or wholly responsible for the denial. See *supra* note 37.

107. But see *infra* note 111. Also, to be clear, the foreshadowing in a *denial* of such an injunction would be quite uninformative for a lower court. Even setting aside the possibility that the equities account for the denial, the failure of an asserted legal position to be “indisputably clear” does *not* imply that the opposite position is likely to be correct. To draw again on the analogy of proof: When an allegation has not been proved “beyond a reasonable doubt”—or even if there is an express finding of reasonable doubt—this does *not* imply that it is likely to be false.

108. In this sense, it resembles other nondefinitive yet dispositive assertions, such as the Supreme Court saying that a right is not “clearly established” in a qualified immunity case. For incisive analyses of such standards, see Leah Litman, *Remedial Convergence and Collapse*, 106 *Calif. L. Rev.* 1477, 1481, 1483–92 (2018) (examining the Supreme Court’s use of the “clearly established” rubric in qualified immunity and habeas corpus cases); Richard M. Re, *Clarity Doctrines*, 86 *U. Chi. L. Rev.* 1497, 1509, 1522–31, 1540–47 (2019) (discussing usages of the “clearly established” rubric in light of a conceptual distinction between first-person and third-person perspectives on clarity).

109. On the distinction between the strength and the scope of a precedent, see Kozel, *supra* note 43, at 21–25.

Recognizing this constraint also raises a practical, doctrinal challenge: For the Supreme Court’s emergency rulings to have any well-defined degree of influence on preliminary rulings by the lower courts in parallel cases, there would also need to be a clear hierarchy among the confidence thresholds embedded in the varying standards for relief. And this would require greater doctrinal precision about these standards—most of which are vaguely phrased, some of which are worded or understood differently across circuits,¹¹⁰ and some of which may in practice fail to reflect their seeming verbal meaning.¹¹¹ Wiggle words won’t do.

B. A “Binding” Guess?

Suppose, though, that the confidence thresholds are clarified and do line up properly between a Supreme Court emergency ruling and the decision that a lower court faces. Should the high court’s guess then be adopted by the lower court as its own, as if it were “binding”?¹¹²

For a circuit court ruling on a stay pending certiorari (as opposed to pending appeal), the Supreme Court’s earlier emergency ruling will usually enjoy a natural epistemic superiority. Recall that this is the sole kind of lower court ruling that expressly calls for reading the minds of the current Justices; and it also comes closest to what the Supreme Court has just done in the parallel case, which is similarly ruling on a stay or injunction pending certiorari. By contrast, the overlap is not so neat for a district court ruling on a preliminary injunction or a circuit court ruling on a stay pending appeal: There, the predictive task is not to guess what the Justices will do, but what the law of the future will be. Still, a similar epistemic advantage may apply, given that the Supreme Court determines the future of the law.

But then why would such a signal ever need to be deemed “binding”? If its informational value is so dominant, wouldn’t the lower court

110. See Pedro, *supra* note 33, at 892–96 (showing differences across circuits). For a clear-eyed account of the doctrinal murkiness about which standards for stays or injunctions pending appeal might be more demanding than others, see Jill Wieber Lens, *Stays of Injunctive Relief Pending Appeal: Why the Merits Should Not Matter*, 43 Fla. St. U. L. Rev. 1319, 1322–25 (2016).

111. See, e.g., Richard M. Re, *Must SCOTUS Injunctions Abide by Precedent?*, Re’s *Judicata* (Sept. 27, 2021), <https://richardresjudicata.wordpress.com/2021/09/27/must-scotus-injunctions-abide-by-precedent/> [<https://perma.cc/DWW2-F55H>] (doubting whether the Supreme Court has been consistently applying the “indisputably clear” standard for temporary injunctions, given its issuance of such relief when the apparent rationale is highly contestable or even at odds with existing precedent).

112. One might think of an analogous question raised by federal appellate rulings that make *Erie* guesses about state law: Should federal district judges within that circuit nonetheless be free to make their own *Erie* guesses in later cases, or must they adopt the federal appellate court’s earlier guess as their own? What if new information has become available? See, e.g., Garner et al., *supra* note 22, at 591–92 (in making an *Erie* guess, “if state law shifts after a federal circuit court has issued its decision, a district court on remand must still conform its interpretation to the law of the state”).

naturally give it the great weight that it deserves? This question is a variation on the “paradox” of precedent. As elaborated in the opening book chapter by Professors Endicott, Kristjánsson, and Lewis, as well as in the chapter by Professor Stevens,¹¹³ here is the paradox: The bindingness of a precedent only matters when all other information combined calls for a different result—that is, when the precedent is pushing the wrong way.

This paradox is not, on its own, an argument against binding effect. But it highlights a principal cost—that of forcing mistaken decisions by excluding other information. The paradox thus calls for either a strong justification for allowing such an imposition of mistakes; or a safety valve that allows a court to avoid being bound, at least when it would force certain kinds of wrong results; or both.

The usual justifications for binding effect, however, seem to do little work in the context of preliminary rulings. To begin with, as Part II has observed, there is less oomph in the standard rationale about “treating like cases alike” across parallel cases. But what about the proposal from Professor Varsava’s book chapter about trying to “treat like cases alike” across past, present, and future?¹¹⁴ Can’t it be applied to stays and injunctions, too? As adapted to rulings that turn on guesses, though, the proposal translates into giving weight both to the earlier guess (in the emergency ruling) and to imagined later guesses (which may evolve up to the moment of the merits ruling). This weighing process amounts to using the best available information to anticipate how future guesses might change as the merits ruling approaches. It does not confer epistemic dominance on the earlier guess—quite the opposite.

Rationales grounded in reliance or predictability also seem weak, for what is there to rely upon but a guess? And it is a guess, no less, about a future *change* in the law. Such a signal itself unsettles expectations. The resulting sense of instability may already be diminishing reliance.¹¹⁵ After

113. Timothy Endicott, Hafsteinn Dan Kristjánsson & Sebastian Lewis, Introduction to Philosophical Foundations of Precedent, *supra* note 4, at 1–4 (exploring this “pragmatic paradox” and noting that a “precedent, you might say, can only have independent force when it was decided incorrectly, and then today’s court should depart from it”); Stevens, *supra* note 57, at 464–65 (addressing an articulation of the paradox attributed to Professor Frederick Schauer and noting that “precedent-setting decisions can *make* a later decision correct by existing” but “surely the mere performance of an otherwise all-things-considered-wrong action should not make that action *less wrong* in the future”).

114. See Varsava, *supra* note 5, at 285–90; see also *supra* text accompanying note 40.

115. For example, there is some debate about whether reliance interests were already eroding before *Dobbs* in a way that matters for the force of stare decisis. See Nina Varsava, Precedent, Reliance, and *Dobbs*, 136 Harv. L. Rev. 1845, 1902–06 (2023) (assessing arguments about changes in reliance interests before *Dobbs*, based both on evidence about public perceptions and on a rule-of-law conception of reliance and predictability). There is also the further question, in this context, of the unsettling of reliance on “precedent on precedent”; for incisive analysis, see Melissa Murray & Katherine Shaw, *Dobbs* and Democracy, 137 Harv L. Rev. 728, 749–56 (2024) (tracing changes in the Supreme Court’s approach to precedent in the years leading up to *Dobbs* as well as in *Dobbs* itself).

all, isn't that the very point of foreshadowing?¹¹⁶ Moreover, even confident guesses about the future will generally not do better than existing precedent in fostering predictability and reliance. If anything, it seems that lower courts might better serve these values just by following existing precedent and ignoring the signal altogether.

Maybe stronger justifications can be called to mind. But it appears more promising to turn now to the second option, asking: How might one design a safety valve that allows a lower court to avoid being made to repeat certain kinds of mistakes? The way this is supposed to work in the doctrine of *stare decisis* (concerning mistakes about the law) may be familiar, but how should it work in a new doctrine of *stare divinitatis* (concerning mistaken guesses)? A good place to start is to imagine how lower courts might assess the informational value of the Supreme Court's guesses.

C. *Second-Guessing*

When a lower court does take heed of the Supreme Court's foreshadowing, how should it assess the informative value of that signal? What other information should it allow in—or not?¹¹⁷

The characteristics of the emergency ruling itself will matter. If it offers no explanation at all, the informational value is vanishingly small.¹¹⁸ But if a written explanation accompanies the emergency ruling, then a lower court has something to work with; and all the more so if certiorari has already been granted in the other case with specific “questions presented” drawn up.

And what about the vote count? Doesn't an apparent 5-4 vote on an emergency application foretell a future 5-4 vote on the merits ruling? Not

116. One might see the foreshadowing as suggesting that easy cases under prior precedent are turning into hard cases. And as the book chapter by Professor Hillary Nye observes:

[A]s many have acknowledged, in hard cases we may worry *less* about predictability. In such cases, the judge's decision does not cause uncertainty, because there is *already* uncertainty in the law The decision can only go one way, and one or the other party is going to have their expectations upset. But both parties know this, so we might think uncertainty is not really the key worry here.

Hillary Nye, *Predictability and Precedent*, in *Philosophical Foundations of Precedent*, supra note 4, at 445–46 n.18 (citation omitted).

117. For a thoughtful sorting of various kinds of signals from the Supreme Court, grounded in norms of judging with integrity, see *Re, Narrowing Precedent*, supra note 14, at 943–45.

118. But see McFadden & Kapoor, supra note 42, at 864 (noting that in their proposed approach, “even a decision with little or no reasoning can be authoritative if it is clear from the decision that the Supreme Court has expressed a view on the merits of a question”). Yet without *any* reasoning expressed for the emergency ruling, even for a grant of relief, how often will it be clear what exact legal question was guessed about—and what exact answer was guessed—as the grounds for decision for a majority of the Justices? Cf. Jeremy Waldron, *Stare Decisis and the Rule of Law: A Layered Approach*, 111 *Mich. L. Rev.* 1, 10 (2012) (“[Suppose a judge] hears a case and then just points silently to one of the parties, indicating who has won. Is it possible, on this basis, for anyone beyond the two litigants in the case to form expectations about how the courts will reach their decisions in the future?”).

necessarily, if the interim equities are driving the result.¹¹⁹ And if the Justices vote 9-0 to deny relief because they expect certiorari to be denied, that certainly does not imply 9-0 agreement on the underlying legal issue.¹²⁰ In practice, of course, individual Justices can—and often do—choose to convey their own views through separate statements or noted dissents.¹²¹ Yet they need not. One might even imagine (if only in theory) the Justices granting emergency relief without dissent because each can already see that, after a grant of certiorari, the requesting party will win 5-4 on the merits.¹²²

What about information drawn from outside the ruling itself? For example, what if the judge knows that the Supreme Court’s foreshadowing sometimes turns out to be wrong? Or what if the judge knows that the Supreme Court will never get to a merits ruling because its case has become moot? Or what if a related merits ruling from the Supreme Court has appeared in the meantime? These seem to be not only allowable but essential reasons for discounting an emergency ruling’s informative value.

Or what if a pivotal Justice has been replaced since the emergency ruling—and the new Justice, known to see things differently, is expected to participate in the future merits ruling?¹²³ Such “nose-counting” seems generally taboo.¹²⁴ Yet it also seems to be what a single Justice traditionally did when deciding an emergency ruling alone “in chambers” as the

119. See, e.g., Pickup & Templin, *supra* note 44, at 8 (observing that in an emergency ruling about the federal eviction moratorium during the pandemic, “even though Justice Kavanaugh thought the moratorium was unlawful, he voted to keep it in place for prudential reasons”). Even such an express reliance on the equities, however, may not always be internalized by the lower courts. See *id.* (noting further that “when another version of the moratorium was challenged, lower courts did not feel free to grant a stay, even though they knew that Justice Kavanaugh would flip his vote when the issue returned to the Court”).

120. Recall that Justice Kavanaugh’s statement explaining his vote to deny relief in *Griffin*, joined by Justice Barrett, expressly highlights this possibility. See *supra* note 37; see also McFadden & Kapoor, *supra* note 42, at 849–50 (explaining why denials of stays receive no precedential weight, in their proposed system, emphasizing the possibility that a lack of certworthiness may be the reason).

121. On the tendency of some Justices to maintain public-facing consistency across cases in their votes and in the positions they take, see generally Richard M. Re, *Personal Precedent at the Supreme Court*, 136 *Harv. L. Rev.* 824 (2023).

122. If you were to ask a class of students whether there are probably more right-handed or left-handed people in the room, you will get total agreement that there are probably more right-handed people—including agreement about this among all the left-handed students in the class. See Huang, *Coordinating Injunctions*, *supra* note 95, at 1347–48 (presenting this illustration).

123. Or what if this new Justice is expected to participate in the certiorari decision? See Tejas N. Narechania, *Certiorari in Important Cases*, 122 *Colum. L. Rev.* 923, 976–84 (2022) (demonstrating empirically the impact of the arrival of new Justices on certiorari decisions at the Supreme Court).

124. See, e.g., *People v. Lopez*, 286 P.3d 469, 485 (Cal. 2012) (Liu, J., dissenting) (“[N]ose-counting is a job for litigators, not jurists. . . . [O]ur role is not simply to determine what outcome will likely garner five votes on the high court. Our job is to render the best interpretation of the law in light of the legal texts and authorities binding on us.”).

assigned Circuit Justice on behalf of the Supreme Court.¹²⁵ And now counting votes is expressly mentioned in the standard for a stay pending certiorari.¹²⁶ So how can a lower court look away?

The range of information that seems essential for a lower court to consider, to avoid following inapt or obsolete signals, would seem to be quite broad. Would a well-crafted safety valve for a new doctrine of *stare divinitatis* just end up swallowing the rule?

CONCLUSION

What might it mean for lower courts to take heed of the foreshadowing in the Supreme Court's emergency rulings? Such signals do not create binding precedent in the conventional sense. Rather, they reflect guesses about the future of the law. Strange but intriguing questions thus arise: When, if ever, would it make sense to deem an earlier court's guess to be "binding" on a later court's guess? Why should new information, tending to make guessing more accurate, ever be excluded? Recall too the core epistemic constraint: An earlier guess made at a lower threshold of confidence cannot provide the answer for a later guess requiring a higher threshold of confidence. How does this limitation map onto familiar notions of the bounds of precedential force? Or does it hint at a dimension yet to be explored? As theory pursues these newfound questions, more will emerge, it's fair to guess.

125. For a lively account of a historic example of this expectation being variously observed and flouted by different Justices, see Vladeck, *Shadow Docket*, *supra* note 9, at 1–10. As then-Justice William H. Rehnquist put it, in *Board of Education v. Superior Court*:

[A]s has been noted before in many Circuit Justices' opinions, the Circuit Justice faces a difficult problem in acting on a stay. The Justice is not to determine how he would vote on the merits, but rather forecast whether four Justices would vote to grant certiorari when the petition is presented, predict the probable outcome of the case if certiorari were granted, and balance the traditional stay equities. All of this requires that a Justice cultivate some skill in the reading of tea leaves as well as in the process of legal reasoning.

Bd. of Educ. v. Super. Ct. of Cal., 448 U.S. 1343, 1347 (1980); see also Joseph Avery, *Predicting Up and Down: A Framework for Legal Prediction*, 24 J. Const. L. 480, 495 (2022) (describing Justice William Brennan counting votes, as the Circuit Justice, in ruling in chambers on a stay). Cf. *id.* at 491–93 (describing the Third Circuit counting votes of state court justices to make an *Erie* guess about state law in a diversity jurisdiction case).

126. See *supra* note 105 (citing the *Hollingsworth* standard as asking whether there is "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari" and "(2) a fair prospect that a majority of the Court will vote to reverse the judgment below").

