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Senator Richard J. Durbin
Chair, Committee on the Judiciary
United States Senate
Washington, D.C. 20510-6275

Re: Questions for the Record — September 29, 2021 Committee Hearing

Dear Mr. Chairman,

Further to the Senate Judiciary Committee's hearing on September 29, 2021, titled "Texas's Unconstitutional Abortion Ban and the Role of the Shadow Docket," and to your written request of August 24, 2022, I am providing the following answers to the Questions for the Record to which you have asked me to respond. For ease of reference, I have included the questions below before each of my answers.

1. Throughout the hearing, Republican members of the Judiciary Committee and some of your fellow witnesses suggested that the Supreme Court's decision in *Whole Woman's Health* v. *Jackson* was "entirely ordinary," "normal," "consistent with its emergency-docket jurisprudence," and "predictable."

   a. Do you agree with these characterizations? Why or why not?

I do not agree with these characterizations. As I've written at some length elsewhere, the Supreme Court's September 1, 2021 decision in *Whole Woman's Health* was problematic at least largely because it was **inconsistent** with its recent practices on the shadow docket — especially its willingness to overlook procedural and jurisdictional obstacles in cases in which it was asked to directly enjoin state COVID restrictions on the ground that they violated the Free Exercise Clause of the First Amendment. In *Tandon* v. *Newsom*, 141 S. Ct. 1294 (2021) (per curiam), for example, the same 5-4 majority that refused to block the Texas abortion law in *Whole Woman's Health* because of open procedural **questions** had reached out to block California's restriction on in-home gatherings notwithstanding a **fatal** procedural defect — the fact that the right at issue was not "indisputably clear."

For a Court that repeatedly brushed aside similar procedural roadblocks to vindicate **new** constitutional rights to hide behind procedural **uncertainty** to refuse to protect a clearly established right is neither "entirely ordinary," "normal," or "consistent." And insofar as it is "predictable," that's only because, by that point, the Court's inconsistent behavior in such cases **had**, unfortunately, become all-too predictable. *See generally* Stephen I. Vladeck, *The Most-Favored Right: COVID, the*

Supreme Court, and the (New) Free Exercise Clause, 15 N.Y.U. J.L. & LIBERTY 699 (2022).

b. Are these characterizations accurate descriptions of the Court's recent shadow docket jurisprudence in general?

As my above answer suggests, the only one of these characterizations that accurately describes the Court's recent shadow docket jurisprudence in general is that the **results** have become all-too predictable. It now seems beyond question, however, that the Supreme Court's recent behavior on the shadow docket is radically **inconsistent** with its historical approach to such unsigned and (usually) unexplained orders — as Justice Kagan has argued in a series of dissents, first in the September 2021 Texas abortion case, and more recently in the February 2022 Alabama redistricting case, and the April 2022 clean water act case.

2. Defenders of the Court's approach to shadow docket decisionmaking have argued that there are no issues with transparency because all shadow docket decisions are public and "freely searchable online." In your opinion, is the Court's shadow docket decisionmaking as transparent and accessible to the public as its merits docket decisions?

The September 1, 2021 decision in *Whole Woman's Health* ran 401 words. The June 2022 ruling in *Dobbs*, in which the Court overruled *Roe* v. *Wade*, ran 108 pages. There's just no argument that shadow docket rulings are "as transparent and accessible to the public." The best that can be said about this claim is that it is **formally** true that, once the Justices have handed down an unsigned and unexplained ruling on the shadow docket, that ruling can be **found** by the public on the Supreme Court's website. But (1) such rulings can be posted to any one of four different pages on the Court's website; and (2) even once the ruling has been located and the file opened, a cryptic, one-sentence order that an application for a stay has been granted is neither "transparent" nor "accessible" under almost any understanding of those terms.

3. Some academics have suggested that the shadow docket's rise in prominence is attributable to a recent rise in nationwide injunctions issued by lower courts. You have called that argument a "myth."

a. Why are nationwide injunctions an insufficient explanation for current trends with the Supreme Court's shadow docket?

There are three data points that conclusively refute claims that the rise of nationwide injunctions has caused the material uptick in the Court's shadow docket behavior. **First**, even within the dataset of emergency applications filed by the Trump administration (which typically form the basis for this claim), fewer than **half** of the 41 applications seeking emergency relief from the Supreme Court sought stays of injunctions that were nationwide in their scope. In one especially prominent example, after a January 2020 ruling in which the Justices stayed a nationwide injunction against the Trump administration's public charge rule, the Court

followed up just a few weeks later with a stay of an Illinois-specific injunction against the same rule. So even within the Trump-specific cases, the nationwide scope of relief did not explain all, or even most, of the story.

Second, the Court's problematic behavior on the shadow docket, as I documented in my testimony to the Committee, has regularly (and increasingly) involved challenges to **state** policies (where nationwide injunctions are, quite obviously, not on the table). During Chief Justice Roberts's first 15 years on the Court, for instance, the Justices issued emergency writs of injunction — directly blocking government policies pending appeal when lower courts had refused to do so — only four times. During the October 2020 Term alone, the Justices issued **seven** such injunctions, all of which were directed to COVID mitigation measures in either California or New York. Whatever else may be said about these shadow docket rulings, they had absolutely nothing to do with nationwide injunctions.

Third, if the rise of nationwide injunctions were nevertheless a factor in the rise of the shadow docket, one would expect the Court to be similarly aggressive in pausing nationwide injunctions against Biden administration policies. But in the first case in which the Biden administration sought a stay of a nationwide injunction (the MPP case in August 2021), the Court refused, over public dissents from Justices Breyer, Sotomayor, and Kagan. Some of the very same Justices who had been publicly critical of nationwide injunctions against Trump policies (especially Justices Thomas and Gorsuch) now seemed to be willing to leave such coercive relief intact when it was a Biden policy, instead. And the only ruling to date in which the Court has *stayed* a nationwide injunction against a Biden administration policy was the January 2022 ruling in the CMS vaccine mandate case — from which Justices Thomas and Gorsuch (joined by Justices Alito and Barrett) dissented.

Thus, the rise of nationwide injunctions never adequately explained the Supreme Court's behavior even in the subset of cases in which the claim is most potent; and with every day that passes, it provides even **less** of an explanation for the Court's newfound behavior on the shadow docket.

b. What other factors do you think are responsible for these current trends?

As I wrote at some length in my testimony to the Committee, my own view is that these trends can be traced to a culmination of factors — including shifts in how a majority of the Justices apply the traditional factors for emergency relief; shifts in the composition of the Court; and shifts in litigation strategy by parties to take advantage of those first two developments. The result, as Justice Kagan pointed out in her April 2022 dissent in *Louisiana v. American Rivers* (which Chief Justice Roberts, along with Justices Breyer and Sotomayor) joined, is that the new conservative majority is increasingly using the shadow docket for what are, in effect, front-loaded merits decisions. It's no surprise, given the current composition of the Court, that those decisions tend to skew in one direction. But as the continuing dissents of Chief Justice Roberts underscore, that's because those same

Justices seem increasingly comfortable ignoring or flouting procedural and jurisdictional norms and rules to reach those quasi-merits results on the shadow docket.

4. On September 30, 2021, in a speech at the Notre Dame Law School, Justice Alito criticized those who have raised concerns about the Supreme Court's use of its shadow docket. He stated: "The real critique is they disagree on the merits. Attempting to disguise the critique as about sinister procedures is unworthy."

   a. Are your concerns with the Court's use of the shadow docket based only on disagreement with the substance of the Court's decisions?

I've done my best to be very clear, including in my testimony to the Committee, that the answer is an emphatic **no**. I've regularly identified shadow docket rulings in which I thought the Court acted by the book even though I disagreed with the bottom line (a prominent example is the August 2021 ruling blocking the CDC's eviction moratorium). And I've been critical of shadow docket rulings that failed adequately to explain and defend the Court's action even when I agreed with the result it produced (such as the March 2022 ruling staying a district court injunction that would have required the Navy to deploy 26 Navy SEALs who refused to comply with the military's vaccine mandate). As lawyers, we ought to understand that the process matters even (if not especially) when we disagree with the substantive result. If anything, claims that critics like me are simply hiding our substantive opposition behind procedural objections may be more revealing in what they say about those who level them.

   b. Justice Alito also suggested that the Court should not be criticized for considering more emergency applications in recent years and equated such criticism to "complaining about the emergency room for treating too many accident victims." Do you agree with Justice Alito's characterization? Why or why not?

To my knowledge, no one **has** criticized the Court for "considering" more emergency applications in recent years. The criticisms center on the facts that the Court is (1) **granting** far more of these applications; (2) failing to adequately explain its reasons for granting them; and (3) increasingly treating its unexplained or cryptic rulings granting such relief as precedents that lower courts are bound to follow. To borrow Justice Alito's awkward metaphor, the problem isn't that the emergency room is treating too many accident victims; it's that it's putting too many casts on legs that aren't actually broken.

   c. Do you have any other comments in response to Justice Alito's speech and his comments regarding your concerns with the shadow docket?

I'm grateful that Justice Alito took the time to publicly **engage** with some of these criticisms, even if, as my above response suggests, he may have misdescribed

some of them. To me, the far better response to Justice Alito's speech is not anything I could say, but rather what the Court itself has done. Just a few weeks after the hearing (and Justice Alito's speech), the Court turned away a request for emergency relief from health care workers in Maine (who sought to challenge the state's vaccination mandate for such medical professionals). In a short but significant concurrence, Justice Barrett (joined by Justice Kavanaugh) explained not only why she wasn't voting to grant emergency relief in that case, but suggested, perhaps implicitly, that the Court had been too willing to grant emergency relief in prior cases. (Justice Alito was one of the three Justices to publicly dissent in that case; he **would** have granted an emergency injunction.) Likewise, during the October 2021 Term, the Court kicked several disputes from the shadow docket to the merits docket. In January 2022, it held oral argument on emergency applications (in the OSHA and CMS vaccine mandate cases) for the first time since the early 1970s. And in March 2022, the Justices proposed amending their own procedural rules to account, for the first time, for friend-of-the-Court briefs respecting emergency applications — tacitly conceding that these had become sufficiently common to warrant formal rules.

To be sure, I don't think the Court has gone nearly far **enough** to assuage the concerns that I raised in my testimony to the Committee, and that others have raised both at last September's hearing and since. But these are just a few of the many data points suggesting that at least **some** of the Justices — and the Court as a whole — seem to have adjusted their/its behavior in response to these criticisms. Indeed, given all that has happened since his speech, I think it would be very difficult for Justice Alito to deliver the same defense of the Court's shadow docket behavior in September 2022.

Finally, the one point in Justice Alito's speech that truly disappointed me was his suggestion that those (like me) who have been publicly critical of the Court's increasing use (and abuse) of the shadow docket are doing so "to portray the Court as having been captured by a dangerous cabal that resorts to sneaky and improper methods to get its ways," and "to intimidate the Court or damage it as an independent institution." I can't speak for others, but at least for me, the problem with the shadow docket is not the terminology; it is the behavior that the term captures. And the "damage" to the Court "as an independent institution" is not a result of the criticisms of the Court; it's a result of the Justices' continued willingness to hand down significant rulings affecting millions of Americans with insufficient — if any — explanation. For decades, the Court has operated under the understanding that its legitimacy is a function of its ability to provide principled explanations for its rulings, and that "a decision without principled justification would be no judicial act at all." The rise of the shadow docket is fundamentally anathema to that principle. And the **implications** of its growing use and abuse for the Court as an institution ought to be far more concerning to the Justices than the terminology itself — which Justice Kavanaugh criticized as "catchy but worn-out rhetoric" in a February 2022 concurrence.

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I hope these answers are satisfactory — and would be delighted to provide whatever additional information may be of use to you and your colleagues on the Committee. Thank you again for the invitation to testify, and for the opportunity to follow up on that testimony here.

Sincerely yours,

Stephen I. Vladeck