

ADMINISTRATIVE STAYS: POWER AND PROCEDURE

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Federal courts are often asked to issue various forms of expedited relief, including stays pending appeal. This Article explores a little examined device that federal courts employ to freeze legal proceedings until they are able to rule on a party's request for a stay pending appeal: the "administrative" or "temporary" stay. A decision whether to impose an administrative stay can have significant effects in the real world, as illustrated by recent high-profile litigation on topics including immigration and abortion. Yet federal courts have not endorsed a uniform standard for determining whether an administrative stay is warranted or clarified the basis for their power to issue such a stay. This Article draws attention to the administrative stay device and proposes standards to guide federal courts in determining when such a stay is appropriate. In so doing, the Article probes the bounds of federal courts' equitable authority and the interests underlying their decisions about whether to grant interim relief in response to claims of impending harm.

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INTRODUCTION

Federal courts issue “administrative” or “temporary” stays of litigation to freeze legal proceedings until the court can rule on a party’s request for expedited relief. Say that a party loses in district court and files an appeal. The appellant may seek a stay of the district court’s judgment pending appeal. The appellant may argue that the district court’s judgment will violate fundamental rights or destroy property that is difficult to value; thus, a stay pending appeal is needed to prevent “irreparable harm.” The court deciding whether to grant a stay pending appeal must consider factors such as the likelihood that the stay applicant will succeed on the merits and the prospect of irreparable harm to the stay applicant.¹ The judges may wish to spend some time considering these factors. Therefore, the court may issue an “administrative” or “temporary” stay of the district court’s judgment while the motion for a stay pending appeal is under review.

The decision whether to grant or deny an administrative stay has real-world stakes. During the coronavirus pandemic in the spring of 2020, for example, the Governor of Texas issued an executive order postponing various medical procedures without exempting abortion.² Abortion providers challenged the executive order in federal court as a constitutional violation, and the federal district judge twice blocked enforcement of the order as applied to abortion procedures.³ Each

1 Nken v. Holder, 556 U.S. 418, 426 (2009).

2 See *In re Abbott (Abbott I)*, 954 F.3d 772, 777–78 (5th Cir. 2020), cert. granted, judgment vacated sub nom. Planned Parenthood Ctr. for Choice v. Abbott (*Abbott V*), 141 S. Ct. 1261 (2021) (mem.).

3 For discussion of the procedural history of the litigation, see *In re Abbott (Abbott II)*, 800 F. App’x 293, 295 (5th Cir. 2020) (per curiam); *Abbott I*, 954 F.3d at 778.

time, Texas officials appealed to the U.S. Court of Appeals for the Fifth Circuit, seeking expedited relief overturning the district judge's order. The Fifth Circuit issued administrative stays of the district court's decisions.⁴ One such stay had a carve-out for women who would be pushed past the legal limit for abortion in Texas during pendency of the Governor's executive order.⁵ Portions of the Fifth Circuit's two administrative stays lasted nineteen days in total and, each time, preceded a grant of interim relief blocking or narrowing the district court's rulings.⁶ Ultimately, the case was mooted by issuance of a new executive order.⁷

Both supporters and detractors of the Fifth Circuit's administrative stays pointed to serious consequences of the decision whether to employ the device. Judge James L. Dennis, dissenting from a decision in which his colleagues voted to maintain an administrative stay, protested that the district court had "found that temporarily barring [abortion providers] from performing these procedures would permanently deny many people the fundamental bodily autonomy to which they are constitutionally entitled and subject many more to greatly increased financial costs and elevated risk to their health, safety, and general well-being."⁸ By contrast, the Texas officials argued that an administrative stay was needed "to preserve the State's power to combat the worst public-health emergency in over a century."⁹

The Texas executive order case is just one in which courts deciding whether to enter an administrative stay must confront arguments about the substantial practical effects of their rulings. The Ninth Circuit in September 2020, for example, declined to issue an administrative stay of a district court's injunction preventing the Trump administration from setting an earlier date for the end of data collection for the decennial census.¹⁰ "Given the extraordinary importance of the census," the Ninth Circuit explained, "it is imperative that the [Census] Bureau conduct the census in a manner that is most likely to produce a workable report in which the public can have confidence."¹¹ Judge Patrick Bumatay, in dissent, urged that

4 *Abbott I*, 954 F.3d at 781.

5 *Abbott II*, 800 F. App'x at 296. At one point during the litigation, the Fifth Circuit dissolved the administrative stay as applied to medication abortions. *See In re Abbott (Abbott IV)*, 809 F. App'x 200, 203 (5th Cir. 2020) (per curiam).

6 *See Abbott IV*, 809 F. App'x at 201.

7 *See Abbott V*, 141 S. Ct. 1261 (2021).

8 *In re Abbott (Abbott III)*, 800 F. App'x 296, 298 (5th Cir. 2020) (per curiam) (Dennis, J., dissenting).

9 Petitioners' Response to Respondents' Emergency Motion to Lift Temp. Admin. Stay at 1, *Abbott II*, 800 F. App'x 293 (No. 20-50296).

10 *Nat'l Urb. League v. Ross*, 977 F.3d 698, 700, 703 (9th Cir. 2020).

11 *Id.* at 702.

the Ninth Circuit should have issued an administrative stay to blunt the effects of a ruling by an “adventurous district court” that “injected itself into a sensitive and politically fraught arena: the 2020 census.”¹²

There is evidence that administrative stays are becoming both more common and more contentious, as they are applied in fast-moving cases involving topics such as election rules and pandemic restrictions.¹³ Perhaps the most high-profile recent controversy over the stakes of granting or denying an administrative stay comes from litigation over another Texas abortion-related law, S.B. 8. Passed in 2021, S.B. 8 bans physicians from performing abortions upon detection of a fetal heartbeat and authorizes private citizens to sue to enforce the law.¹⁴ After initially declining to enjoin the law, the Supreme Court, on October 22, 2021, set constitutional challenges to S.B. 8 for argument on November 1.¹⁵ Justice Sotomayor, dissenting in part, argued that the Court should have “stay[ed] administratively the Fifth Circuit’s order” while the case was being heard.¹⁶ In Justice Sotomayor’s view, S.B. 8’s presence was causing “irreparable harm” to women seeking abortions.¹⁷ “Whatever equities favor caution in staying a state law under normal circumstances,” Justice Sotomayor wrote, “cannot outweigh the total and intentional denial of a constitutional right to women while this Court considers the serious questions presented.”¹⁸

Despite the impact of federal courts’ decisions to grant or withhold an administrative stay, there is little scholarly or judicial discussion of the inquiry that courts should undertake when making these decisions. The Supreme Court has not provided much guidance on the conditions under which it will grant an administrative stay—and, with a few exceptions, neither have the federal courts of appeals.¹⁹ Although scholars have become more interested in emergency orders

12 *Id.* at 703, 712 (Bumatay, J., dissenting).

13 *See infra* text at note 116 (detailing uptick in incidence of references to administrative stays in federal courts in Westlaw research database).

14 *Whole Woman’s Health v. Jackson*, 142 S. Ct. 522, 530 (2021).

15 *United States v. Texas*, 142 S. Ct. 14, 14 (2021) (mem).

16 *Id.* (Sotomayor, J., concurring in part and dissenting in part).

17 *Id.*

18 *Id.* at 15–16. After holding oral argument, the Court issued an opinion concluding that a lawsuit by abortion providers might be able to proceed against certain defendants, but not others. *See Whole Woman’s Health v. Jackson*, 142 S. Ct. 522, 530 (2021).

19 For federal courts of appeals decisions featuring some explanation of the decision to grant or withhold an administrative stay, see, for example, *In re Abbott (Abbott II)*, 800 F. App’x 293, 295–96 (5th Cir. 2020) (per curiam); *Doe #1 v. Trump*, 944 F.3d 1222, 1223 (9th Cir. 2019); *Brady v. Nat’l Football League*, 638 F.3d 1004, 1005 (8th Cir. 2011).

and the Supreme Court's emergency or "shadow" docket,²⁰ they have not yet turned their attention to the approach that federal courts ought to take toward administrative stay requests.²¹

The issue of when federal courts should grant administrative stays raises both conceptual and practical questions. How exactly does an "administrative" stay differ from a "regular" stay pending appeal? To what extent should federal courts imposing administrative stays consider the factors that govern the entry of stays pending appeal in general—notably the likelihood of success on the merits?²² Sometimes administrative stays are described as devices meant simply to preserve the status quo for a brief period while the court adjudicates a motion for a stay pending appeal.²³ But that description is not straightforward. First, it is not always easy to ascertain what counts as the status quo.²⁴ Is it the state of affairs that would have existed absent the district court's judgment—for example, in the Texas pandemic case described above, the situation in which the Texas Governor's order barring certain abortions was effective? Or is it the state of affairs that exists in light of the district court's judgment? Second, the temporary aspect of administrative stays raises issues about how long they are to last. A recent Ninth Circuit administrative stay of a district court's order requiring Los Angeles to make significant changes to its homelessness policies lasted over four months;²⁵ another Ninth Circuit administrative stay, in a case involving federal officers' policing practices, lasted one-and-a-half months.²⁶ Is there a basis for suggesting that these administrative stays lasted too long?

20 See, e.g., William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1 (2015); Trevor N. McFadden & Vetan Kapoor, *The Precedential Effects of the Supreme Court's Emergency Stays*, 44 HARV. J.L. & PUB. POL'Y 827 (2021); Stephen I. Vladeck, Essay, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123 (2019).

21 In an illuminating article about stays in general, Portia Pedro briefly discusses administrative stay determinations. See Portia Pedro, *Stays*, 106 CALIF. L. REV. 869, 886 n.97 (2018). For another instructive article on stays, see Jill Wieber Lens, *Stays of Injunctive Relief Pending Appeal: Why the Merits Should Not Matter*, 43 FLA. ST. U. L. REV. 1319 (2016).

22 *Nken v. Holder*, 556 U.S. 418, 434 (2009). For divergent judicial views on whether to consider the merits in granting or denying an administrative stay, compare, for example, *Nat'l Urb. League v. Ross*, 977 F.3d 698, 701 (9th Cir. 2020) (administrative stay "only intended to preserve the status quo until the substantive motion for a stay pending appeal can be considered on the merits, and does not constitute in any way a decision as to the merits of the motion for stay pending appeal") (quoting *Doe #1 v. Trump*, 944 F.3d 1222, 1223 (9th Cir. 2019)), with *id.* at 705 (Bumatay, J., dissenting) ("We should have granted an administrative stay here because defendants are likely to succeed on the merits.").

23 See, e.g., *Ross*, 977 F.3d at 700–01 (citing *Doe #1 v. Trump*, 944 F.3d 1222, 1223 (9th Cir. 2019)).

24 See *infra* text at notes 102–13.

25 *L.A. All. for Hum. Rts. v. Cnty. of Los Angeles*, 14 F.4th 947, 955–56 (9th Cir. 2021).

26 *Index Newspapers LLC v. U.S. Marshals Serv.*, 977 F.3d 817, 824 (9th Cir. 2020).

All these questions raise the issue of whether administrative stay procedures lead to more contentious short-fuse litigation instead of lowering the temperature in emergency proceedings. The label “administrative” stay may be read to imply that these devices are ministerial, routine, or value-neutral. But administrative stays actually require courts to make significant and potentially value-laden choices in a short period of time.

Further, tied up with questions about the appropriate standard for granting or denying administrative stays are issues about federal courts’ *authority* for issuing such relief. Do federal courts have a statutory basis to impose administrative stays, or are they exercising inherent equitable or docket-management powers? The source of legal authority could affect the standard for granting an administrative stay. For example, if one views administrative stays as exercises of traditional equitable powers and takes a historical approach toward these powers,²⁷ then federal courts’ authority to grant administrative stays may be bounded by historical practice.

These kinds of questions are currently unanswered; indeed, they are rarely even asked. Accordingly, this Article’s first aim is to shed light on courts’ practices in the area of administrative stays.²⁸ The Article’s second aim is to explore the legal basis for administrative stays and the interests that should guide courts in exercising their authority in this area. Federal courts, the Article indicates, have the power to issue administrative stays under their inherent authority to control their dockets and the All Writs Act. The Article identifies interests that properly guide federal courts in wielding their power to grant administrative stays, including the promotion of judicial deliberation, the efficiency of litigation procedures, the consistency of court judgments, the legitimacy of court rulings, the practice of judicial reason-giving, and adherence to the “passive virtues.” Rulemaking bodies or courts drawing on these interests could create standards to guide decision-making with respect to administrative stays.

In terms of the contents of these standards, the Article considers various possibilities, ranging from “no administrative stays” to “administrative stays in every case.” The Article then makes the

27 See, e.g., *Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 318 (1999).

28 This article focuses largely on stays of district-court judgments imposing equitable relief. However, there are also procedures for appellants to secure stays of district-court money judgments by posting a bond. See FED. R. CIV. P. 62(b), (g); see also Lens, *supra* note 21, at 1322 (“Many courts describe this Rule as automatically entitling the applicant to a stay as a matter of ‘right’ once the bond is posted.”); Pedro, *supra* note 21, at 873 n.12 (“[T]he substance and procedure of stay determinations in actions for damages is arguably clearer than that of those involving injunctive relief.”).

following proposal. Courts should not undertake any significant analysis of the merits in deciding whether to grant an administrative stay; they should tie administrative stays directly to another form of emergency relief, usually a stay pending appeal; and they should issue a highly expedited briefing schedule for the stay pending appeal in the same order in which they grant an administrative stay. These steps would help to underscore that administrative stays are a docket-management device rather than an occasion for courts to opine on a controversial matter.

With respect to more specific standards, courts should focus on the impact on the parties during the brief period when an administrative stay is in effect. In particular, courts ought to weigh (a) the extent to which the administrative stay applicant would be able to benefit from a stay pending appeal were the administrative stay denied; and (b) the extent to which the party opposing an administrative stay would be able to benefit from the judgment under review were the administrative stay granted. The Article applies this proposal to concrete examples.

The proposed inquiry is not a mechanical one; it requires a degree of discretion. Yet the Article's proposal would create a more regularized inquiry for courts considering administrative stays. In the end, the goal is to start—not finish—a conversation about how federal courts should use their powers to grant administrative stays, particularly in the pressurized environment that motions for interim relief frequently involve.

Part I provides background on stays in general and explains courts' practices regarding administrative stays. Part II identifies sources for federal courts' authority to grant administrative stays. Part III discusses interests that should guide courts in issuing administrative stays and presents a proposal for courts' treatment of this device.

I. ADMINISTRATIVE STAYS: THE LAY OF THE LAND

This Part first provides context for the discussion of administrative stays by laying out the powers and standards that federal courts invoke in granting stays more broadly (Section I.A). The Part then summarizes federal courts' current practices with respect to administrative stays (Section II.B).

A. *Stays in General*

A stay, as the Supreme Court stated in the 2009 case *Nken v. Holder*, is a court order that “hold[s] a ruling in abeyance to allow” a tribunal

“the time necessary to review it.”²⁹ A court may stay its own judgments or those of tribunals it is charged with reviewing—including both lower courts and administrative agencies.

In terms of the basis for federal courts’ power to issue stays, the Supreme Court in *Nken* attributed to appellate courts an “inherent” power “to hold an order in abeyance while it assesses the legality of the order.”³⁰ The Court explained that this power had been “preserved in the grant of authority to federal courts to ‘issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.’”³¹ The “all writs” language is from the All Writs Act, which originated in the Judiciary Act of 1789 and is now codified at 28 U.S.C. § 1651(a).³²

Although *Nken* sometimes referred to the powers of federal *appellate* courts, federal district courts considering whether to stay their own judgments also cite *Nken*, and the Supreme Court has stated that “the factors regulating the issuance of a stay” by “district courts and courts of appeals” are “generally the same.”³³ Subject-specific statutes may also provide for stays in certain circumstances, such as the “automatic stay” in bankruptcy.³⁴

For federal district courts and courts of appeals, Federal Rule of Civil Procedure 62 and Federal Rule of Appellate Procedure 8(a) work in concert to govern the authority of these courts to stay district-court judgments.³⁵ Rule 62 specifies that actions seeking injunctions are not stayed “even if an appeal is taken” “[u]nless the court orders otherwise.”³⁶ Rule 8(a) provides that a party seeking a stay of a district court’s judgment pending appeal must “ordinarily” first seek such relief from the district court.³⁷ If moving first in the district court would be “impracticable,” or if the district court denies the motion for

29 *Nken v. Holder*, 556 U.S. 418, 421 (2009). Both courts and administrative agencies can issue stays. See L. Harold Levinson, *Interim Relief in Administrative Procedure: Judicial Stay, Administrative Stay, and Other Interim Administrative Measures*, 42 AM. J. COMPAR. L. 639, 639 (Supp. 1994). This Article concerns stays that courts issue.

30 *Nken*, 556 U.S. at 426 (quoting 28 U.S.C. § 1651 (2006)).

31 *Id.* (quoting 28 U.S.C. § 1651 (2006)).

32 See All Writs Act, ch. 231, §§ 234, 261–62, 36 Stat. 1156, 1156, 1162 (1911) (codified as amended at 28 U.S.C. § 1651 (2018)); *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 10 n.4 (1942) (quoting Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81–82 (codified as amended at 28 U.S.C. § 377 (1934))); *Lens*, *supra* note 21, at 1321 & n.7 (citing 28 U.S.C. § 1651(a) (2016)).

33 *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987).

34 See, e.g., 11 U.S.C. § 362 (2018).

35 See FED. R. CIV. P. 62(b); FED. R. APP. P. 8(a).

36 FED. R. CIV. P. 62(c). Rule 62 also preserves appellate courts’ authority to stay proceedings during the pendency of an appeal, or “to issue an order to preserve the status quo or the effectiveness of the judgment to be entered.” *Id.* at 62(g)(1)–(2).

37 FED. R. APP. P. 8(a)(1).

a stay, then the party may seek a stay of the district court's judgment from the court of appeals.³⁸ The advisory committee's notes to Rule 8(a) state that "[w]hile the power of a court of appeals to stay proceedings in the district court during the pendency of an appeal is not explicitly conferred by statute, it exists by virtue of the all writs statute."³⁹ Thus, as a leading treatise observes, Rule 8 "may even be regarded as a reiteration of the power that the All Writs Act already provides."⁴⁰

The U.S. Supreme Court's authority to stay lower court decisions, for its part, derives both from the All Writs Act and from 28 U.S.C. § 2101(f).⁴¹ The latter statute provides for either a lower-court judge or a Supreme Court justice to stay a judgment subject to review by the Supreme Court "for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court."⁴² The Supreme Court's Rules then specify that "[a] stay may be granted by a Justice as permitted by law."⁴³ What if the Justices wish for the stay to remain in effect while the Court decides the merits of a case in which it has granted certiorari? The Supreme Court Rules' proviso "as permitted by law" suggests that the Supreme Court has the power to stay cases pending resolution of the merits as far as is acceptable under another source of law, such as the All Writs Act. To the extent § 2101(f) does not already authorize the Supreme Court to stay cases pending resolution of a case on the merits—beyond resolution of the certiorari petition⁴⁴—the All Writs Act likely confers such authority.⁴⁵ Thus, the Supreme Court may issue a stay that remains in effect while the Court decides a case on the merits. Similar to Rule 8(a), Supreme Court rules require parties initially to seek a stay from the court that issued the relevant judgment except in "extraordinary" circumstances.⁴⁶

Both the lower federal courts and the Supreme Court have established more specific procedures for parties to seek stays pending appeal. These procedures are enshrined in the Federal Rules of Civil

38 *Id.* at 8(a) (2) (A) (i)–(ii).

39 FED. R. APP. P. 8(a) advisory committee's note to 1967 adoption.

40 11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2908 (3d ed. 2021).

41 See Daniel M. Gonen, *Judging in Chambers: The Powers of A Single Justice of the Supreme Court*, 76 U. CIN. L. REV. 1159, 1166–68 (2008); Lois J. Scali, *Prediction-Making in the Supreme Court: The Granting of Stays by Individual Justices*, 32 UCLA L. REV. 1020, 1023–24 (1985); Vladeck, *supra* note 20, at 129.

42 28 U.S.C. § 2101(f) (2018).

43 SUP. CT. R. 23.

44 See Gonen, *supra* note 41, at 1167.

45 See Scali, *supra* note 41, at 1025, n.30.

46 See SUP. CT. R. 23(3).

and Appellate Procedure;⁴⁷ in rules promulgated by each circuit court;⁴⁸ and in the Supreme Court's rules.⁴⁹ There are also rules governing stay procedures in more specific areas of law,⁵⁰ such as death penalty cases,⁵¹ bankruptcy,⁵² and class actions.⁵³

As to the substantive standards for issuing a stay, the most prominent case is again *Nken*. There, an immigrant sought to stay a Board of Immigration Appeals removal order pending a petition to the Fourth Circuit to review that order.⁵⁴ The Supreme Court held that the "traditional" standard for a stay applied and described that standard as one in which the court considers "four factors:"

(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.⁵⁵

"The first two factors . . . are the most critical."⁵⁶ As the Court noted, "[t]here is substantial overlap between these [*Nken* factors] and the factors governing preliminary injunctions,"⁵⁷ although a stay, "instead of directing the conduct of a particular actor, . . . operates on the judicial proceeding itself."⁵⁸

When it comes to the Supreme Court, the standard for that body to stay a lower court's ruling is that the stay applicant must show: "(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."⁵⁹ Further, "[i]n close cases the Circuit Justice or the Court will

47 See, e.g., FED. R. CIV. P. 62(g); FED. R. APP. P. 8(a).

48 See *infra* notes 66–68 and accompanying text.

49 See SUP. CT. R. 23.

50 See Pedro, *supra* note 21, at 883.

51 See, e.g., 3D CIR. R. 8.3.

52 See, e.g., FED. R. BANKR. P. 8025.

53 See FED. R. CIV. P. 23(f).

54 *Nken v. Holder*, 556 U.S. 418, 423 (2009).

55 *Id.* at 434 (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)).

56 *Id.*

57 *Id.* "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

58 *Nken*, 556 U.S. at 428. For discussion of the preliminary injunction standard, see, for example, John Leubsdorf, *Preliminary Injunctions: In Defense of the Merits*, 76 *FORDHAM L. REV.* 33 (2007).

59 *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam); see also *Little v. Reclaim Idaho*, 140 S. Ct. 2616, 2616 (2020) (Roberts, C.J., concurring in the grant of stay).

balance the equities and weigh the relative harms to the applicant and to the respondent.”⁶⁰ “A single justice can grant or deny the application for a stay . . . or refer the application for a stay to the full Court,”⁶¹ though in practice a single Justice will usually refer the stay application to the Court as a whole if the stay application raises “important or complex questions.”⁶²

To summarize: federal courts have an “inherent” power to issue stays that is grounded in the All Writs Act and governed by standards set out in court rules and judicial precedent. The most significant components of the standard for granting a stay are the likelihood of success on the merits and the prospect of irreparable harm.

B. *Administrative Stays*

“Administrative stay” does not have a precise definition in current doctrine, and the relationship between administrative and “regular” stays is not clear cut.⁶³ The Ninth Circuit recently characterized an administrative stay as a device that is “only intended to preserve the status quo until the substantive motion for a stay pending appeal can be considered on the merits,” and that “does not constitute in any way a decision as to the merits of the motion for stay pending appeal.”⁶⁴ Yet these characteristics of administrative stays are not uniform or uncontroversial—as this Section explains in detailing courts’ existing practices with respect to administrative stays.

1. Connection to Another Form of Emergency Relief

A key feature of administrative stays is that they are issued in connection with another form of emergency relief. In a common pattern, a court of appeals issues an administrative stay while it considers a motion for a stay of a district court’s judgment pending

60 *Hollingsworth*, 558 U.S. at 190.

61 Pedro, *supra* note 21, at 884.

62 See Gonen, *supra* note 41, at 1173 (quoting EUGENE GRESSMAN, KENNETH S. GELLER, STEPHEN M. SHAPIRO, TIMOTHY S. BISHOP, EDWARD A. HARTNETT, SUPREME COURT PRACTICE § 6.5, at 399 (9th ed. 2007)).

63 “Administrative stay” may be used to describe any stay of administrative action. See, e.g., *Novo Nordisk Inc. v. U.S. Dep’t of Health and Hum. Servs.*, No. 21-00806, 2021 WL 3668168, at *3 (D.N.J. June 1, 2021). Particularly in recent years, however, “administrative stay” has been used specifically to refer to court orders putting judgments on hold in a time-limited way. This Article focuses on the latter usage.

64 *Nat’l Urb. League v. Ross*, 977 F.3d 698, 701 (9th Cir. 2020) (quoting *Doe #1 v. Trump*, 944 F.3d 1222, 1223 (9th Cir. 2019)).

appeal.⁶⁵ The rules of some federal courts of appeals contemplate such procedures; for example, the Eighth Circuit's local rules state that "one judge of the court may order a temporary stay of any proceeding pending the determination of a stay application by a three-judge panel."⁶⁶ Some courts of appeals single out certain categories of cases—such as capital cases⁶⁷ and immigration cases in which an immigrant faces deportation⁶⁸—and provide for courts in those cases to grant a temporary stay while a motion for another form of emergency relief is pending.

Application of a two-step procedure for stays has engendered some controversy. For example, the Eighth Circuit in 2011 entered an administrative stay of a district court's ruling preliminarily enjoining the National Football League from "locking out" players.⁶⁹ The court of appeals explained that "[t]he purpose of this administrative stay is to give the court sufficient opportunity to consider the merits of the motion for a stay pending appeal."⁷⁰ However, Judge Bye dissented.⁷¹ He argued that the use of a two-step process—first an administrative stay, then a stay pending appeal—should be limited to "emergencies" such as capital or immigrant removal cases in which execution or deportation is imminent; the NFL situation, in his view, did not qualify.⁷²

Nonetheless, courts have not generally required a situation to be an "emergency" to warrant an administrative stay. Instead, they have largely viewed administrative stays as a kind of adjunct to another form of short-term relief, entered to aid the court in resolving a request for a stay pending appeal.

2. Temporal Aspect of Administrative Stays

Administrative stays are sometimes called "temporary" stays. To be sure, stays in general are temporary measures;⁷³ but administrative

65 See Pedro, *supra* note 21, at 886 n.97. For a few recent examples, see *Org. for Black Struggle v. Ashcroft*, 978 F.3d 603, 606 (8th Cir. 2020); *Valentine v. Collier*, 978 F.3d 154, 160 (5th Cir. 2020); *Hassoun v. Searls*, 976 F.3d 121, 130 n.5 (2d Cir. 2020).

66 See, e.g., 8TH CIR. R. 27A(b); see also, e.g., D.C. CIR. HANDBOOK OF PRACTICE AND INTERNAL PROCEDURES VIII.A (2021); 9TH CIR. GEN. ORD. 6.4(b).

67 E.g., 2D CIR. R. 47.1(c)(2); 6TH CIR. R. 22(c)(3)(B); 9TH CIR. R. 22-2(e).

68 E.g., 4TH CIR. STANDING ORD. 19-01; 9TH CIR. GEN. ORD. 6.4(c)(1).

69 See *Brady v. Nat'l Football League*, 638 F.3d 1004, 1005 (8th Cir. 2011).

70 *Id.*

71 *Id.* at 1005–06 (Bye, J., dissenting).

72 *Id.*

73 The "temporary" label can create terminological confusion. "Administrative stay" is sometimes used synonymously with "temporary stay." See, e.g., *Doe #1 v. Trump*, 944 F.3d 1222, 1223 (9th Cir. 2019). However, "temporary stay" is also used to refer to stays pending appeal in general. See, e.g., *Purkey v. United States*, 812 F. App'x 380 (7th Cir. 2020); *Veasey*

stays are often rapidly granted, and they last for a shorter period of time than “regular” stays. For example, in the leadup to the November 2020 election, a federal district court in Texas entered an injunction requiring Texas officials to adhere to certain procedures for mail-in voting.⁷⁴ The Texas Secretary of State appealed on September 9, 2020.⁷⁵ On September 10, the district court declined to stay its injunction; on September 11, the Secretary of State filed an “emergency motion for a stay pending appeal” at the Fifth Circuit.⁷⁶ The same day, a Fifth Circuit panel granted a “temporary administrative stay” of the district court’s injunction in order to consider the Secretary’s stay motion.⁷⁷ On October 19, the panel issued an opinion staying the district court’s injunction pending appeal.⁷⁸ In this and many other cases,⁷⁹ courts issue administrative stays that are in effect for a limited period of time.

Still, it is not clear what period of time counts as “brief” or “limited.”⁸⁰ After all, administrative stays have occasionally lasted for several weeks.⁸¹ The “especially temporary” aspect of administrative stays, then, might be viewed as a contingent feature of the device. The length of an administrative stay depends on how long courts take to decide a motion for a stay pending appeal; and courts might be inclined to take more time if an administrative stay is in place.

3. Relationship to the Traditional Stay Factors

Courts issuing administrative stays do not routinely undertake the full-fledged four-factor inquiry that the Supreme Court in *Nken* enumerated with respect to stays pending appeal—that is, the inquiry into likelihood of success on the merits, irreparable harm, balance of the equities, and the public interest (with the first two factors being most “critical”).⁸²

v. Abbott, 870 F.3d 387, 391 (5th Cir. 2017); *Wolfe v. Clarke*, No. 05CV432, 2013 WL 12363382, at *2 (E.D. Va. Jan. 3, 2013).

74 *Richardson v. Tex. Sec’y of State*, 978 F.3d 220, 227 (5th Cir. 2020).

75 *Id.*

76 *Id.*

77 *Id.* at 227–228.

78 *Id.* at 243.

79 For examples of short-term stays in litigation related to same-sex marriage, see Josh Blackman & Howard M. Wasserman, *The Process of Marriage Equality*, 43 HASTINGS CONST. L.Q. 244, 293–98 (2016).

80 See Transcript of Oral Argument at 92, *Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab.*, 142 S. Ct. 661 (2022) (per curiam) (Nos. 21A244, 21A247) (Chief Justice Roberts inquiring, with respect to a potential brief administrative stay, “Brief compared to what?”)

81 See *supra* notes 25–26 and accompanying text.

82 *Nken v. Holder*, 556 U.S. 418, 434 (2009).

In particular, some courts have stressed that an administrative stay does not reflect any position on the merits of the underlying judgment. For example, the Supreme Court in February 2019 justified an administrative stay that had the effect of keeping certain abortion clinics open by stating that “the filings regarding the application for a stay in this matter were not completed until earlier today and the Justices need time to review these filings This order does not reflect any view regarding the merits of the petition for a writ of certiorari that applicants represent they will file.”⁸³ Federal courts of appeals have on occasion made similar statements.⁸⁴

The relationship between administrative stays and the merits, however, is more complicated than may initially meet the eye. In fact, courts sometimes look at the merits in analyzing administrative stays. For example, a divided Ninth Circuit panel in 2020 considered the likelihood of success on the merits in granting the government’s request for an administrative stay of a district court order regulating the conduct of federal officers in Portland.⁸⁵

To take another example, the Fifth Circuit in November 2021 stayed enforcement of an Occupational Safety and Health Administration’s COVID-related mandate a day after the agency issued the mandate, “[b]ecause the petitions give cause to believe there are grave statutory and constitutional issues with the Mandate.”⁸⁶ Six days later, the Fifth Circuit issued an opinion that “reaffirm[ed]” its “initial stay” following “expedited review.”⁸⁷ The initial stay seemed to have been an administrative stay: it was entered right after the agency’s mandate issued and served as a placeholder pending a judicial review process that resulted in affirmation of the stay. Yet the initial stay

83 June Med. Servs., L.L.C. v. Gee, 139 S. Ct. 661, 661 (2019).

84 See, e.g., Doe #1 v. Trump, 944 F.3d 1222, 1223 (9th Cir. 2019); Cobell v. Norton, No. 03-5262, 2004 WL 603456, at *1 (D.C. Cir. Mar. 24, 2004) (per curiam).

85 Order, Index Newspapers LLC v. U.S. Marshals Serv., No. 20-35739, 2020 U.S. App. LEXIS 27408 (9th Cir. Aug. 27, 2020); see also, e.g., El Paso Cnty. v. Trump, 407 F. Supp. 3d 655, 667 (W.D. Tex. 2019), *rev’d in part on other grounds*, 982 F.3d 332 (5th Cir. 2020); Doe 1 v. Trump, No. 17-5267, 2017 WL 6553389, at *1 (D.C. Cir. Dec. 22, 2017). Courts may also analyze the likelihood of success on the merits and then deny a “motion for an administrative stay and a stay pending appeal” in the same breath, see, e.g., Craig v. Simon, 978 F.3d 1043, 1049, 1051 (8th Cir. 2020); Trump v. Vance, 481 F. Supp. 3d 161, 166 (S.D.N.Y. 2020), or deny a “regular” and administrative stay together while disclaiming any view on the merits, see, e.g., League of Women Voters of S.C. v. Andino, No. 20-2167, 2020 WL 6395498, at *1 (4th Cir. Oct. 29, 2020). These decisions leave unclear whether any distinctive analysis applies to *administrative* stays.

86 BST Holdings, L.L.C. v. OSHA, No. 21-60845, 2021 WL 5166656, at *1 (5th Cir. Nov. 6, 2021), *aff’d*, 17 F.4th 604 (5th Cir. 2021).

87 BST Holdings, 17 F.4th at 609.

appeared to be based on some assessment of the merits of the underlying mandate.⁸⁸

Indeed, some judges have argued that courts may not, or should not, enter an administrative stay without considering the *Nken* factors, including likelihood of success on the merits.⁸⁹ In the view of Ninth Circuit dissenter Judge Bress, later reiterated in a different dissent by Ninth Circuit Judge Bumatay, the request for an administrative stay “is part of the request for a stay pending appeal”; thus, “the usual stay factors” should apply.⁹⁰ Along similar lines, a magistrate judge in the Southern District of New York concluded that “‘an appellate court’s power to hold an order in abeyance’ pursuant to an administrative stay ‘while it assesses the legality of [an] order’ is constrained by the four factors that govern the issuance of a stay.”⁹¹ This view has not (yet) carried the day, but the debate nationwide is not settled.

The notion that administrative stays are a merits-free zone, then, cannot be taken for granted. On the flip side, courts do not always emphasize the merits in granting “regular” stays or related orders. District courts asked to stay their own judgments may emphasize stay factors other than the likelihood of success on the merits, given that a court may not wish to “confess to having erred in its ruling before issuing a stay.”⁹² In election litigation, courts following the *Purcell* principle may stay injunctions against state election laws soon before an election, without taking a position on the merits of the injunction.⁹³ In a case involving religious objections to a contraception mandate, the Supreme Court entered an injunction pending appeal while stating that its “order should not be construed as an expression of the

88 In January 2022, the Supreme Court stayed OSHA’s mandate. See *Nat’l Fed’n Indep. Bus. v. Dep’t of Lab.* 142 S. Ct. 661, 666 (2022) (per curiam).

89 See *Doe #1 v. Trump*, 944 F.3d 1222, 1225–26 (9th Cir. 2019) (Bress, J., dissenting); see also *Nat’l Urb. League v. Ross*, 977 F.3d 698, 705 (9th Cir. 2020) (Bumatay, J., dissenting) (quoting *Doe #1*, 944 F.3d at 1225).

90 *Doe #1*, 944 F.3d at 1226; see also *Ross*, 977 F.3d at 705 n.5 (quoting *Doe #1*, 944 F.3d at 1226).

91 *N.Y. Times Co. v. Dep’t of Health & Hum. Servs.*, No. 20 Civ. 3063, 2021 WL 235138, at *2 (S.D.N.Y. Jan. 25, 2021) (quoting *Hassoun v. Searls*, 976 F.3d 121, 130 n.5 (2d Cir. 2020)) (alteration in original). The district court’s statement may not have accurately reflected the quoted Second Circuit case, which emphasized that an administrative stay “in this case issued only to provide time for a motions panel to receive and to decide the government’s motion for a stay pending appeal” and “cannot be employed to grant a party effectual relief.” *Hassoun*, 976 F.3d at 130 n.5.

92 *Evans v. Buchanan*, 435 F. Supp. 832, 843 (D. Del. 1977); see *Meyer v. Kalanick*, 203 F. Supp. 3d 393, 395 (S.D.N.Y. 2016).

93 See *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006) (per curiam); *Merrill v. Milligan*, 142 S. Ct. 879, 880 (2022) (mem.) (Kavanaugh, J., concurring in grant of applications for stays); Richard L. Hasen, *Reining in the Purcell Principle*, 43 FLA. ST. U. L. REV. 427, 443 (2016).

Court's views on the merits."⁹⁴ These results might be explained by the circumstances of litigation involving hot-button issues; judges may wish to avoid taking a position on the merits but also seek to stave off disruptive real-world changes. The question remains, however, whether that kind of approach is consistent with *Nken* or normatively desirable.

As to the "critical" stay factor other than likelihood of success on the merits⁹⁵—irreparable harm—judicial decisions imposing administrative stays do not typically focus on this factor, at least by name.⁹⁶ This may seem surprising, as courts appear to grant administrative stays to ward off immediate negative consequences. Still, courts imposing administrative stays tend to cast the aim of avoiding negative consequences in terms of maintaining the status quo rather than preventing irreparable harm.⁹⁷ One possible explanation is practical: courts considering administrative stays may not have time to delve into any party's claims of injury to the extent needed to determine whether harm is irreparable. Another explanation is more prudential: administrative stays are designed to be routine and ministerial, and those features might be undercut if courts were to examine the potentially contested issue of whether a party had suffered irreparable injury.

As with likelihood of success on the merits, some judges have critiqued courts' apparent reluctance to examine irreparable injury before issuing an administrative stay.⁹⁸ Judge Bye of the Eighth Circuit, for example, argued in dissent that "some showing of irreparable harm must also be shown to justify the entry of a temporary stay pending

94 *Wheaton Coll. v. Burwell*, 573 U.S. 958, 959 (2014). For commentary on the Court's decision in *Wheaton*, see Baude, *supra* note 20, at 15; Hasen, *supra* note 93, at 435–37; Richard M. Re, *What Standard of Review Did the Court Apply in Wheaton College?*, RE'S JUDICATA (Jul. 5, 2014, 6:42 PM), <https://richardresjudicata.wordpress.com/2014/07/05/what-standard-of-review-did-the-court-apply-in-wheaton-college> [https://perma.cc//8AQS-LWJQ].

95 *Nken v. Holder*, 556 U.S. 418, 434 (2009).

96 *In re Sealed Case*, 148 F.3d 1079, 1079 (D.C. Cir. 1998) (no showing of irreparable harm, but administrative stay would be continued to give government opportunity to seek relief from Supreme Court). *But see In re Red Mountain Mach. Co.*, 451 B.R. 897, 909 (Bankr. D. Ariz. 2011) ("[E]ven if there were a sufficient showing of likelihood of success on appeal, it does not justify a stay pending appeal in the absence of any showing of a likelihood of irreparable injury.").

97 *See supra* notes 95–102 and accompanying text.

98 *E.g.*, *Nat'l Urb. League v. Ross*, 977 F.3d 698, 712 (9th Cir. 2020) (Bumatay, J., dissenting); *Doe #1 v. Trump*, 944 F.3d 1222, 1228 (9th Cir. 2019) (Bress, J., dissenting); *Brady v. Nat'l Football League*, 638 F.3d 1004, 1006 (8th Cir. 2011) (Bye, J., dissenting); *see also Order*, *supra* note 85, at 3 (McKeown, J., dissenting) ("[T]he government has failed to meet its burden to demonstrate either an emergency or irreparable harm to support an immediate administrative stay.").

review of the motion for a stay,” as a “necessary extension” of the principle that the stay applicant had to show irreparable harm “to justify the granting of the stay itself.”⁹⁹ Justice Sotomayor’s partial dissent in the S.B. 8 litigation arguing that the Court should have administratively stayed the Fifth Circuit’s judgment cited “continued and irreparable harm to women seeking abortion care and providers of such care in Texas.”¹⁰⁰ The Ninth Circuit in 2020 cited irreparable harm in granting an administrative stay.¹⁰¹ The die may not yet be cast, then, on whether irreparable harm can be a relevant consideration in administrative stay determinations.

4. Preserving the Status Quo

If the *Nken* factors do not consistently apply to administrative stay determinations, then what is the guidepost for these determinations? A goal that courts often cite is the need to *preserve the status quo*.¹⁰² On this account, an administrative stay is a device that courts can use to preserve the status quo without taking any position on the merits of an appeal.

Courts have wrestled, however, with what counts as the “status quo.”¹⁰³ Litigation involving the 2020 decennial census provides an example. In August 2020, the Census Bureau moved up a data collection deadline to September 30, 2020 (from October 31, 2020).¹⁰⁴ On September 24, a federal district court in California preliminarily enjoined the Census Bureau’s schedule change.¹⁰⁵ The Trump administration appealed and sought a stay pending appeal; on September 30, the Ninth Circuit denied an administrative stay.¹⁰⁶ The court of appeals explained that “the status quo would be seriously disrupted by an immediate stay of the district court’s order.”¹⁰⁷ In the Ninth Circuit’s view, the district court’s orders—blocking the data-collection scheduling change—“preserve the status quo because they maintain the [Census] Bureau’s data-collection apparatus pending

99 *Brady*, 638 F.3d at 1006.

100 *United States v. Texas*, 142 S. Ct. 14, 15 (2021) (mem.) (Sotomayor, J., concurring in part and dissenting in part).

101 Order, *supra* note 85, at 2 (majority order).

102 *See, e.g., Ross*, 977 F.3d at 702 (majority opinion); *Doe #1*, 944 F.3d at 1223 (majority opinion).

103 For discussion in the context of S.B. 8 litigation, see Mark Tushnet, *Some Not Very Focused Preliminary Thoughts About the Shadow Docket (but Leading up to Some Fundamentals About Constitutional Law)*, BALKINIZATION (Sept. 10, 2021), <https://balkin.blogspot.com/2021/09/some-not-very-focused-preliminary.html> [<https://perma.cc/4RS7-KCCV>].

104 *Ross*, 977 F.3d at 700.

105 *Id.*

106 *Id.* at 698, 703.

107 *Id.* at 701.

resolution of the appeal.”¹⁰⁸ Judge Bumatay, in dissent, contended that “the status quo here, to the extent that’s relevant, is the legal landscape that would have existed prior to the district court’s judicial misadventure.”¹⁰⁹

Is the status quo, then, the world as it existed before the district court entered judgment blocking the data-collection scheduling change? That position would be in harmony with the Supreme Court’s statement in *Nken* that a stay pending appeal “suspend[s] judicial alteration of the status quo.”¹¹⁰ But there are multiple features of the world preexisting the district court’s judgment that a court might wish to preserve. The Ninth Circuit majority sought to preserve the Census Bureau’s data-collection apparatus, which was still mobilized to some degree before the district court’s judgment.¹¹¹ Dissenting Judge Bumatay, by contrast, sought to preserve the “legal landscape” that would have existed before the district court’s judgment.¹¹² The “legal landscape” might refer to the Census Bureau’s being under legally binding orders to meet the earlier data-collection deadline; or it might refer to the “correct” view of executive authority that the district court’s order erroneously (in the eyes of Judge Bumatay) contravened. Another position might be that the status quo is the world as it exists following the district court’s judgment. In this case, that would be the world in which the Census Bureau was not legally required to meet the earlier data-collection deadline.

Different definitions of the status quo would lead to different results in the administrative stay analysis. In other words, courts that take the “need to preserve the status quo” as the “touchstone” of an administrative stay determination¹¹³ face the challenge of defining the status quo.

5. Political Context of Administrative Stays

A final observation regarding the current use of administrative stays relates to their social and political context. Administrative stays are not a new phenomenon,¹¹⁴ and they have long been applied in

108 *Id.*

109 *Id.* at 712 (Bumatay, J., dissenting) (citing *Doe #1 v. Trump*, 944 F.3d 1222, 1229 (9th Cir. 2019) (Bress, J., dissenting)).

110 *Nken v. Holder*, 556 U.S. 418, 429 (2009) (alteration in original) (quoting *Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regu. Comm’n*, 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers)).

111 *See Ross*, 977 F.3d at 701.

112 *See id.* at 712 (Bumatay, J., dissenting).

113 *See id.* at 702 (majority opinion).

114 *See, e.g., Deaver v. Seymour*, 822 F.2d 66, 68 (D.C. Cir. 1987) (describing an administrative stay).

certain disputes, such as death penalty and immigration removal cases.¹¹⁵ However, administrative stays seem to have been discussed more frequently in recent years, at least in judicially reported litigation. The trend is visible through, for example, a Westlaw search of federal court cases for (“administrative stay” /100 “pending appeal”).¹¹⁶ The search yielded four hits for the first four months of 2022, 23 hits for 2021, 56 for 2020, and 113 for the five years 2017 to 2021. By contrast, the search yielded 43 hits total for the years 1980 through 2016. The largest uptick occurred between 2016 (2 hits) and 2017 (13 hits).

One reason for increased references to administrative stays—in opinions that appear on Westlaw—may be two situations that gave rise to a great deal of emergency litigation: the November 2020 election and COVID-19. At least 12 of the relevant cases for 2020 were related to the election.¹¹⁷ Yet the references to administrative stays in these contexts appears to be part of a broader trend since 2017, involving litigation against Trump administration policies in a variety of areas, including immigration, the census, and constitutional rights. Commentators have pointed both to nationwide injunctions and an administration more likely to seek stays of lower-court opinions as reasons for litigation seeking emergency relief.¹¹⁸

The upshot is that administrative stays seem to be sought and granted more frequently in politically salient litigation, especially lawsuits against government actors who wish to alter policy in significant ways. Although courts have not yet engaged in much discussion of the standards for issuing administrative stays, the few opinions addressing the matter—primarily from the Fifth and Ninth

115 See *supra* notes 67–68 and accompanying text.

116 I last carried out this search on May 24, 2022. These search terms are meant to weed out administrative stays that do not fit into the mold of stays issued by courts to provide time to consider a motion for a stay of injunctive relief. For example, the search terms are aimed at excluding stays that agencies enter.

117 See *League of Women Voters of S.C. v. Andino*, No. 20-2167, 2020 WL 6395498 (4th Cir. Oct. 29, 2020); *Mi Familia Vota v. Abbott*, No. 20-50907, 2020 WL 6334374 (5th Cir. Oct. 28, 2020) (per curiam); *Richardson v. Tex. Sec’y of State*, 978 F.3d 220 (5th Cir. 2020); *Tex. Democratic Party v. Abbott*, 961 F.3d 389 (5th Cir. 2020); *Tex. League of United Latin Am. Citizens v. Hughs*, 978 F.3d 136 (5th Cir. 2020); *A. Philip Randolph Inst. of Ohio v. Larose*, 831 F. App’x 188 (6th Cir. 2020); *Thompson v. Dewine*, 959 F.3d 804 (6th Cir. 2020); *Org. for Black Struggle v. Ashcroft*, 978 F.3d 603 (8th Cir. 2020); *Miller v. Thurston*, 967 F.3d 727 (8th Cir. 2020); *Craig v. Simon*, 978 F.3d 1043 (8th Cir. 2020); *Mi Familia Vota v. Hobbs*, 977 F.3d 948 (9th Cir. 2020); *Common Sense Party v. Padilla*, 469 F. Supp. 3d 951 (E.D. Cal. 2020).

118 Vladeck, *supra* note 20, at 132–52. Vladeck suggests that nationwide injunctions should not be viewed as the “principal” cause of the uptick in applications for emergency relief. See *id.* at 153–55.

Circuits—have emerged largely in the last few years.¹¹⁹ Perhaps there is an increasing amount of litigation engendering controversy about whether to put government action on hold even for a brief period. The elevated judicial attention to administrative stays suggests that it will be useful to engage in further discussion of the appropriate standard for employing this device.

II. AUTHORITY TO ISSUE ADMINISTRATIVE STAYS

This Part examines the legal bases for administrative stays. First, the Part identifies the All Writs Act and courts' inherent docket-management powers as grounds for courts to issue administrative stays. Second, it analyzes the relationship between administrative stays and the federal equity power.

A. *Legal Bases for Administrative Stays*

There are two main sources of authority for federal courts to grant administrative stays: (1) the powers either conferred by, or preserved in, the All Writs Act, and (2) federal courts' inherent power to manage their dockets. This Section describes these sources of authority; the next Section considers the relationship between these sources of authority and equitable powers.

1. The All Writs Act

The All Writs Act, enacted as part of the Judiciary Act of 1789,¹²⁰ authorizes federal courts to “issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.”¹²¹ The Supreme Court explained in *Nken* that the All Writs Act “preserve[s]” “[a]n appellate court’s power to hold an order in abeyance while it assesses the legality of the order.”¹²² The Supreme Court’s language of “preservation” might suggest that the All Writs Act confirmed—rather than granted—federal courts’ power to issue stays. On this account, the “judicial Power of the United States” that Article III of the Constitution vests in federal courts¹²³ incorporates the preexisting power to issue stays.

119 See, e.g., *In re Abbott* (*Abbott III*), 800 F. App’x 296 (5th Cir. 2020) (per curiam); *Doe #1 v. Trump*, 944 F.3d 1222 (9th Cir. 2019).

120 See All Writs Act, ch. 231, §§ 234, 261–62, 36 Stat. 1156, 1156, 1162 (1911) (codified as amended at 28 U.S.C. § 1651 (2018)); Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81–82 (codified as amended at 28 U.S.C. § 1651 (2018)).

121 28 U.S.C. § 1651(a) (2018).

122 *Nken v. Holder*, 556 U.S. 418, 426 (2009).

123 U.S. CONST. art. III.

The *Nken* decision did not specifically mention administrative stays, and it is not clear whether the *Nken* Court's reference to the "power to hold an order in abeyance while it assesses the legality of the order" encompasses the power to grant administrative stays.¹²⁴ Thus, *Nken* does not directly identify the legal basis for federal courts to issue administrative stays. There are nonetheless strong reasons, some of them related to the Court's analysis in *Nken*, to read the All Writs Act to authorize courts to grant administrative stays. An administrative stay may be "necessary . . . in aid of" a court's "jurisdiction[]"¹²⁵ in the sense that denying an administrative stay could moot an appeal—for example, in a capital case.¹²⁶ Even if an administrative stay is not essential to preserve jurisdiction, the All Writs Act authorizes courts to issue writs "appropriate in aid of . . . jurisdic[tio]n[.]"¹²⁷ An administrative stay is a kind of adjunct to a stay pending appeal; it allows courts to offer temporary relief while the stay decision is being made. In fact, an administrative stay (as noted below) may greatly influence a party's ability to benefit from a stay pending appeal.¹²⁸ Therefore, an administrative stay is an "appropriate" mechanism to "aid" federal courts in exercising their jurisdiction to issue a stay pending appeal.

Is an administrative stay "agreeable to the usages and principles of law" within the meaning of the All Writs Act?¹²⁹ The Supreme Court in 1901, upholding an appellate court's stay, explained that "[t]ested by the principles and rules which relate to chancery proceedings, the power of the appellate court to render its jurisdiction efficacious, the court below refusing to do so, is unquestionable."¹³⁰ An administrative stay, as just observed, can be a mechanism to render the jurisdiction of the appellate court efficacious. Further, the Court in a 1942 case described stays of "the enforcement of a judgment pending the outcome of an appeal" as part of a court's "traditional equipment for

124 *Nken*, 556 U.S. at 426. An administrative stay holds an order in abeyance while the court decides whether to grant a different form of emergency relief. Does that decision-making process involve "assessing the legality" of the judgment under review? If not, then administrative stays might not be covered by *Nken*. But it may not be advisable to read too much into the language of *Nken*; the Supreme Court has cautioned, after all, that "the language of an opinion is not always to be parsed as though we were dealing with language of a statute." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 341 (1979).

125 *Nken*, 556 U.S. at 426.

126 *See Pedro*, *supra* note 21, at 874 ("[T]he primary purpose of granting a stay pending appellate review is to ensure a meaningful opportunity to appeal.").

127 28 U.S.C. § 1651(a).

128 *See infra* subsection III.C.2.

129 28 U.S.C. § 1651(a).

130 *In re McKenzie*, 180 U.S. 536, 551 (1901).

the administration of justice.”¹³¹ An administrative stay is not, strictly speaking, entered “pending the outcome of an appeal.” But it is entered to provide time for a court to decide whether to issue a stay pending the outcome of an appeal, and so it bears sufficient resemblance to a stay pending appeal to be “agreeable to the usages and principles of law.” All in all, administrative stays plausibly fall within the ambit of the All Writs Act.

2. Inherent Docket-Management Power

Another source of the power to issue an administrative stay is federal courts’ inherent authority to manage their dockets. This source of authority may not be entirely separate from the All Writs Act, as that Act could be understood to preserve courts’ preexisting docket-management powers. Moreover, the fact that a court has inherent authority to control its own docket could help explain why an administrative stay is “agreeable to the usages and principles of law”¹³² within the meaning of the All Writs Act. Whether the docket-management power stands on its own or is to be read in conjunction with the All Writs Act, courts issuing administrative stays can draw on their inherent docket-management authority.

“[T]he power to stay proceedings,” the Supreme Court stated in the 1936 case *Landis v. North American Co.*, “is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.”¹³³ True, the statement from *Landis* relates to a court’s power to stay *proceedings*, as when a court puts a hold on discovery, rather than the power to stay a judgment that it issued or the judgment of another court. But the *Nken* Court—which dealt with a motion to stay another court’s judgment—cited *Landis* in describing the burden on a party seeking a stay.¹³⁴ More generally, the rationales that courts use to explain their inherent powers to control their dockets apply to administrative stays. The Supreme Court has indicated, for instance, that “[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution,” powers “which cannot be dispensed with in a Court, because they are necessary to the exercise of all others.”¹³⁵ These powers include authority to admit attorneys,

131 *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 9–10 (1942).

132 28 U.S.C. § 1651(a).

133 *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936).

134 *Nken v. Holder*, 556 U.S. 418, 433–34 (2009) (citing *Landis*, 299 U.S. at 255).

135 *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (quoting *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812)); *see also* *United States v. Tsarnaev*, 142 S. Ct. 1024 (2022) (Barrett, J., concurring) (“Article III’s grant of ‘[t]he judicial Power’ imbues each federal court with the inherent authority to regulate its *own* proceedings.” (alteration

impose contempt sanctions, mandate decorum, and vacate a court's own judgment in cases of fraud.¹³⁶ The Court has also explained inherent powers by referencing the "control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases."¹³⁷

The power to issue an administrative stay is part of a court's ability to manage its affairs to dispose of cases in an orderly manner. Administrative stays may not be necessary to the exercise of *all* judicial powers, but they operate as a meaningful adjunct to the power to issue a stay pending appeal. Administrative stays enable courts considering whether to grant stays pending appeal to take more time to analyze the *Nken* factors without permitting practical consequences the court deems unwarranted or unacceptable. The result is likely to be a more regimented process for examining the likelihood of success on the merits and irreparable harm, both factors that engender substantial difficulty and controversy. Administrative stays, then, are part of the procedures that courts use to structure their internal affairs to advance the orderly and effective administration of justice.¹³⁸

Accordingly, the authority to issue administrative stays can be grounded in both federal courts' powers under the All Writs Act and their inherent power to manage their dockets. When it comes to the Supreme Court's power to impose an administrative stay, an additional source of authority is 28 U.S.C. § 2101(f). That provision, as earlier noted, provides for justices to stay a judgment subject to review by the Supreme Court "for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court."¹³⁹ An administrative stay reasonably falls within this grant of power. As to a stay beyond the period of a certiorari petition—that is, a stay pending resolution of the merits of a case—the Supreme Court would be

in original) (quoting U.S. CONST. art. III, § 1)); Amy Coney Barrett, *The Supervisory Power of the Supreme Court*, 106 COLUM. L. REV. 324, 338 (2006) ("[I]t is generally recognized that Article III vests every federal court with some degree of 'inherent authority' to regulate procedure by adjudication.").

136 *Chambers*, 501 U.S. at 43–44. For further discussion of "inherent judicial authority," see, for example, Charles M. Yablon, *Inherent Judicial Authority: A Study in Creative Ambiguity*, 43 CARDOZO L. REV. 1035 (2022).

137 *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630–31 (1962).

138 For discussions of federal courts' exercises of "managerial" or administrative authority, see, for example, Aziz Z. Huq, *Judicial Independence and the Rationing of Constitutional Remedies*, 65 DUKE L.J. 1, 53–63 (2015); Marin K. Levy, *Judicial Attention as a Scarce Resource: A Preliminary Defense of How Judges Allocate Time Across Cases in the Federal Courts of Appeals*, 81 GEO. WASH. L. REV. 401 (2013); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

139 28 U.S.C. § 2101(f); see *supra* notes 41–46 and accompanying text.

covered by the All Writs Act and would possess its own docket-management power.

A final point relating to federal courts' authority to grant administrative stays: administrative stays of judicial orders granting injunctions could be conceived as modifications to the injunction.¹⁴⁰ In that event, an administrative stay would operate on the injunction by delaying its effective date. This way of thinking about administrative stays could have the effect of downplaying merits considerations, as the administrative stay order would change the timing of the injunction rather than its substance. Of course, delaying an injunction could have significant consequences on the ground. But the notion of downplaying the merits is compatible with the proposal for administrative stays proposed below.¹⁴¹

B. *Administrative Stays and Federal Equity Power*

What is the relationship between administrative stays and federal equity power? At the outset, stays in general do not have an entirely straightforward relationship with equity. On the one hand, as Samuel Bray has observed, “[a] stay pending judicial review is not exactly an equitable remedy, being neither traditionally limited to equity nor a remedy even in the broad sense of what ‘the court can do *for* you if you win’ or what it ‘can do *to* you if you lose.’”¹⁴² After all, courts can issue stays in suits seeking both damages and injunctions.¹⁴³

On the other hand, as Bray has also noted, stays are “conventionally treated alongside the preliminary injunction,” and “injunctions and stays have affected each other’s doctrinal development.”¹⁴⁴ Judges exercising equitable authority frequently consider irreparable harm,¹⁴⁵ and they are often afforded a measure of discretion to achieve a more equitable outcome.¹⁴⁶ Stays share these characteristics. Although the Supreme Court in *Nken* rejected the view that a stay was a form of injunction within the meaning of the relevant immigration statute, the Court acknowledged that “[a] stay pending appeal certainly has some functional overlap with an injunction,

140 I thank Sam Bray for this suggestion.

141 See *infra* Section III.C.

142 Samuel L. Bray, *The Supreme Court and the New Equity*, 68 VAND. L. REV. 997, 1033 n.203 (2015) (quoting Douglas Laycock, *How Remedies Became a Field: A History*, 27 REV. LITIG. 161, 165 (2008)).

143 *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 721 (1996).

144 Bray, *supra* note 142, at 1033 n.203; see also, e.g., *Hill v. McDonough*, 547 U.S. 573, 584 (2006) (“[A] stay of execution is an equitable remedy.”).

145 *Nken v. Holder*, 556 U.S. 418, 434 (2009).

146 *Id.* at 433.

particularly a preliminary one.”¹⁴⁷ James Fischer puts the point this way: stays are “not an equitable remedy per se,” but they are “a form of extraordinary relief that are often discussed in terms that mirror the providing of temporary equitable relief.”¹⁴⁸

On the whole, stays invite judges to make determinations that are typical of courts exercising equitable power. The question whether *administrative stays* are also exercises of equitable power depends at least partially on the nature of the inquiry that courts undertake in issuing administrative stays. To the extent courts weigh the equities or balance harms in deciding whether to issue an administrative stay, they engage in activities that are characteristic of equity.

The idea that equitable power undergirds administrative stays is not an *alternative* to the view that the All Writs Act or inherent docket-management authority provides a basis for federal courts to issue administrative stays. The All Writs Act itself is reasonably read to confer equitable power on federal courts or to confirm preexisting equitable powers.¹⁴⁹ Federal courts’ inherent power to manage their own proceedings may also emanate from equitable authority. As Robert Pushaw has observed, “Federal courts have long asserted equitable power to manage their affairs to ensure the orderly, expeditious, and efficient administration of justice.”¹⁵⁰ Thus, administrative stays could constitute exercises of equitable power if the authority to grant such stays is grounded in the All Writs Act or in federal courts’ inherent docket-management powers.

To the extent administrative stays are instances in which federal courts employ their equitable authority, they may be subject to principles applicable to federal courts’ exercise of equitable powers more generally. For instance, if one views equity as a “safety valve” for

147 *Id.* at 428. Justice Alito, in dissent, adduced numerous instances in which courts have referred to “stay” orders as “injunctions.” *Id.* at 442–43 (Alito, J., dissenting).

148 JAMES M. FISCHER, UNDERSTANDING REMEDIES 259 (2006).

149 *See, e.g.*, *Clinton v. Goldsmith*, 526 U.S. 529, 537 (1999) (“The All Writs Act invests a court with a power essentially equitable and, as such, not generally available to provide alternatives to other, adequate remedies at law.” (citing *Carlisle v. United States*, 517 U.S. 416, 429 (1996))).

150 Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 Iowa L. Rev. 735, 760 (2001); *see also* Jeffrey C. Dobbins, *The Inherent and Supervisory Power*, 54 GA. L. REV. 411, 431 (2020) (“In its modern form, then, the inherent power of courts to exercise control over litigants is partly ‘rooted in the notion that a federal court, sitting in equity, possesses all of the common law equity tools of a Chancery Court . . . to process litigation to a just and equitable conclusion.’”) (quoting *ITT Cmty. Dev. Corp. v. Barton*, 569 F.2d 1351, 1359 (5th Cir. 1978)). *But see* *Chambers v. NASCO, Inc.*, 501 U.S. 32, 46 (1991) (“The imposition of sanctions in this instance transcends a court’s equitable power concerning relations between the parties and reaches a court’s inherent power to police itself . . .”).

the unfairness that would result in its absence,¹⁵¹ then administrative stays should issue when they serve the “safety valve” role. Another possibility, and an influential one, is to view equity as historically bounded. The Supreme Court has stated that “[s]ubstantially, . . . the equity jurisdiction of the federal courts is the jurisdiction in equity exercised by the High Court of Chancery in England at the time of the adoption of the Constitution and the enactment of the original Judiciary Act, 1789.”¹⁵² On this account, the authority to grant equitable remedies is limited by history. This raises the question whether administrative stays are compatible with historical equity jurisdiction and whether, if so, history furnishes standards for courts to apply in adjudicating requests for administrative stays.

I have not yet encountered much evidence of a distinctive historical approach toward *administrative* stays (or functionally similar orders), as opposed to stays in general. The Supreme Court has highlighted the solid historical foundation of stays in general; according to *Nken*, “[t]he power to grant a stay pending review” is “part of a court’s ‘traditional equipment for the administration of justice,’ . . . ‘firmly imbedded in our judicial system,’ ‘consonant with the historic procedures of federal appellate courts,’ and ‘a power as old as the judicial system of the nation.’”¹⁵³ Moreover, the category of internal docket-management powers—to which the authority to grant administrative stays plausibly belongs—has a strong historical pedigree.¹⁵⁴ But it is not clear that historical practice furnishes specific standards for courts to follow in adjudicating administrative stay requests, though further research on this topic would be fruitful.

With respect to stays in general, Jill Wieber Lens has argued that historical practice, including English equity practice, provides little basis for courts to consider the merits of an appeal when evaluating a

151 See, e.g., Henry E. Smith, *Equity as Meta-Law*, 130 YALE L.J. 1050, 1080 (2021); see also *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946) (referring to “[t]he great principles of equity” as “securing complete justice”) (quoting *Brown v. Swann*, 35 U.S. (10 Pet.) 497, 503 (1836)).

152 *Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 318 (1999) (quoting ARMISTEAD M. DOBIE, HANDBOOK OF FEDERAL JURISDICTION AND PROCEDURE 660 (1928)). For critical analysis of the Supreme Court’s view, see, for example, Stephen B. Burbank, *The Bitter with the Sweet: Tradition, History, and Limitations on Federal Judicial Power—A Case Study*, 75 NOTRE DAME L. REV. 1291, 1297–33 (2000); Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L.J. 223, 234–49 (2003); Mila Sohoni, *The Lost History of the “Universal” Injunction*, 133 HARV. L. REV. 920, 1003 (2020).

153 *Nken v. Holder*, 556 U.S. 418, 427 (2009) (quoting *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 9–10, 13, 17 (1942)).

154 See, e.g., *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991).

stay request.¹⁵⁵ In Lens's view, English and early American courts emphasized irreparable harm and only sporadically considered the merits in making stay determinations.¹⁵⁶ According to Lens, the merits became a significant factor in stay determinations only as a consequence of a 1958 D.C. Circuit case.¹⁵⁷ If one agrees with Lens and also takes a historical approach toward federal equitable power, the logical conclusion is that *Nken*—which deems the likelihood of success one of the “most critical” factors in a stay determination—rests on shaky ground. In terms of the consequences for administrative stays, one might take the view that courts making these determinations should not consider the merits. Such a conclusion would be largely consistent with the analysis of administrative stays offered below,¹⁵⁸ which downplays merits considerations.

This Article does not seek to resolve the debate over the role of history in federal equity. It does not adopt a purely historical approach in the sense of searching for close historical analogues to administrative stays and identifying the standards that courts used in those instances. Instead, the approach to administrative stays outlined in the next Part draws on fundamental interests that ought to underlie courts' determinations in fast-moving litigation, including deliberation, consistency, and efficiency. Considering these interests could be compatible with a historical view of federal equity at least at a high level.¹⁵⁹ Historical practice may support the use of federal courts' inherent powers “so as to achieve the orderly and expeditious disposition of cases”; and “orderly and expeditious disposition” is consistent with interests such as deliberation, consistency, and efficiency.¹⁶⁰ Moreover, one reason to turn to historical practice could be to constrain federal courts in exercising equitable power.¹⁶¹ Yet interests such as deliberation, consistency, and efficiency can also help to direct judicial discretion, even if not to the same extent as an inquiry into precise historical analogues. Overall, the Article's approach to

155 See Lens, *supra* note 21, at 1329–36.

156 *Id.*

157 *Id.* at 1335 (citing *Va. Petroleum Jobbers Ass'n v. Federal Power Comm'n*, 259 F.2d 921 (D.C. Cir. 1958)).

158 See *infra* Section III.C.

159 The debate over how broadly to interpret the notion of federal courts' historical equity powers figured in the back-and-forth between the majority and dissent in *Grupo Mexicano*. Compare *Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 318 (1999), with *id.* at 336 (Ginsburg, J., dissenting).

160 See *Chambers v. NASCO, Inc.*, 501 U.S. 32, 49 (1991) (quoting *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630–31 (1962)).

161 See *Grupo Mexicano*, 527 U.S. at 322 (“We do not question the proposition that equity is flexible; but in the federal system, at least, that flexibility is confined within the broad boundaries of traditional equitable relief.”).

administrative stays is not guided by the search for close historical analogues, but it reflects some concerns that may be associated with a historically grounded understanding of federal equity.

III. ADMINISTRATIVE STAYS: A PROPOSAL

How, then, should courts approach administrative stays? This Part first identifies interests that courts should aim to advance. The Part then analyzes options for administrative stay standards in terms of how effectively they promote these interests. The Part ultimately endorses one of these options, but the broader goal is to encourage debate about how courts should address requests for administrative stays.

A. *Interests to Guide Administrative Stay Determinations*

Here are some interests to guide administrative stay determinations. They are distilled from values that courts and commentators often describe as significant in time-pressured litigation and in civil procedure more generally.

1. *Deliberation.* This is the interest in creating and fostering the conditions conducive to judges' thoughtful consideration of cases. Deliberation is valuable because it may produce results that are more legally sound, in the sense that they conform more closely to the applicable legal framework. Deliberation is also valuable because it gives parties and the public the sense that cases are taken seriously.¹⁶²

2. *Efficiency.* Efficiency is an important value in litigation, as suggested by the instruction in the Federal Rules of Civil Procedure that the rules "should be construed . . . to secure the just, speedy, and inexpensive determination of every action and proceeding."¹⁶³ Time is frequently of the essence in litigation in which parties seek administrative stays, and a court's ability to decide motions expeditiously can have an outsized impact in these settings.

3. *Consistency.* This is the interest in "treating like cases alike"—in granting administrative stays when they have been granted in similar situations, and in denying administrative stays when they have been denied in similar situations. Consistency has several positive effects, including impartiality (judges should grant or deny administrative stays without respect to their sympathy for the parties) and predictability (parties and the public should be able to predict, at least roughly, when courts are likely to grant administrative stays).

162 For discussion of the importance of process in influencing citizens' views of the law, see, for example, Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283 (2003).

163 FED. R. CIV. P. 1.

4. *Legitimacy.* This is the interest in maintaining public trust that judges are judging fairly. The extent to which judges should act with a view toward public perception is a subject of controversy.¹⁶⁴ I refer here to legitimacy that arises not from public agreement with substantive legal outcomes, but with public views as to the fairness and impartiality of the process that judges used to reach their conclusions. In practice, public agreement with substantive legal outcomes and public views regarding procedural fairness may overlap; but, on the account presented here, it is the latter that primarily ought to be valued.

5. *Reason-giving.* Reason-giving is frequently cited as a significant value in litigation,¹⁶⁵ and with justification. The process of producing reasons may lead to more legally sound outcomes, as judges must confront the broader impact of their rulings and deal with counterarguments. Reason-giving may also assure parties and the public that cases are being judged in an attentive and just way.

6. *The “passive virtues.”* When judges exercise the “passive virtues,”¹⁶⁶ they avoid issuing bold rulings on the merits of a legal question in favor of narrower or less interventionist forms of judging. Judges may exercise these virtues by applying such doctrines as standing, ripeness, and political questions.¹⁶⁷ The aim of applying the passive virtues could be to avoid instigating social conflict or to encourage “percolation” of legal issues before a higher court needs to step in. The merits of the passive virtues may, of course, be debated. Administrative stays are an area in which the passive virtues are particularly useful, given that judges do not have much time to consider the long-term consequences of their rulings.

The interests just mentioned are not the only possible ones, and they may be in tension with one another in certain circumstances. But they provide guideposts against which various approaches to administrative stays can be measured.

B. *Options for Administrative Stays*

This Section evaluates various approaches to administrative stays with respect to their propensity to promote various interests discussed

164 For discussion of the value of various types of judicial legitimacy, see Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787 (2005); Tara Leigh Grove, *The Supreme Court’s Legitimacy Dilemma*, 132 HARV. L. REV. 2240 (2019) (reviewing RICHARD H. FALLON, JR., *LAW AND LEGITIMACY IN THE SUPREME COURT* (2018)).

165 See, e.g., Ashley S. Deeks, *Secret Reason-Giving*, 129 YALE L.J. 612, 620 (2020); Robin J. Effron, *Reason Giving and Rule Making in Procedural Law*, 65 ALA. L. REV. 683 (2014).

166 See Alexander M. Bickel, *The Supreme Court 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961).

167 See *id.* at 43, 47.

above. For current purposes, administrative stays can be defined as court orders temporarily preventing a judgment from being carried out while the court resolves a motion for another form of emergency relief, often a stay pending appeal. The current Section considers (and ultimately rejects) three potential approaches; the next Section presents this Article's proposal for administrative stay standards.

1. *No administrative stays.* One possibility is not to permit any administrative stays. Federal courts could still issue stays in the sense of orders temporarily blocking a judgment from taking effect. However, these stays would require a full analysis of the *Nken* factors, including likelihood of success on the merits and irreparable harm.¹⁶⁸ This option would have the advantage of promoting consistency; courts would apply the uniform rule of no administrative stays. But this option would be detrimental in terms of deliberation. It might induce judges to resolve stay motions in a more compressed period, because they could not rely on an "administrative stay" to prevent the judgment under review from being carried out. The result would be less considered decision-making concerning the *Nken* factors, including the likelihood of success on the merits. And judges might be reluctant later to depart from their initial views of the merits even if they are not formally bound by these views.¹⁶⁹ Similar difficulties might result if courts issue orders that are called "administrative stays" but that are subject to the same *Nken* factors applicable to "regular" stays. In that event, parties might begin to request "administrative stays of administrative stays," and a problem of recursion would arise.

2. *Administrative stays in every case.* At the opposite pole, courts could enter an administrative stay whenever they are considering a motion for a stay pending appeal. This option would be valuable from a consistency perspective. It could also advance deliberation and reason-giving in some cases: judges who are content with the situation prevailing during the administrative stay could take more time to decide whether to grant a stay pending appeal and to justify their views. Administrative stays do not, however, simply "buy time" with no cost; they can significantly change facts on the ground. In the Ninth Circuit census case discussed earlier, an administrative stay could have made the difference between winding down or continuing census

168 See *Nken v. Holder*, 556 U.S. 418, 435–36 (2009).

169 See *McFadden & Kapoor*, *supra* note 20, at 876 ("[W]hile it is true that the Justices themselves are not bound by their preliminary views on a case, a decision to grant a stay is at least . . . a signal of their views."); Richard M. Re, *Personal Precedent at the Supreme Court*, 136 HARV. L. REV. (forthcoming 2022) (manuscript at 2), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4068518 ("Justices view their own past rulings as evidence of how they should rule today, and they also have strong incentives to remain personally consistent.").

operations, with a potentially large impact on government decisions about funding and political representation.¹⁷⁰ A rigid “administrative stay in every case” rule would not permit courts to consider whether such consequences were warranted. This kind of inflexibility could well harm legitimacy and would not be consonant with the “passive virtues.”

In addition, there are efficiency costs to granting administrative stays in every case. Parties would be incentivized to seek stays pending appeal, no matter how meritless; and courts might take more time to resolve requests for stays pending appeal. There would also be a shift with respect to the power of district courts and the finality of their judgments, as district court judgments would not take effect until any motion for a stay pending appeal were resolved.

3. *Administrative stays for certain types of plaintiffs or legal claims.* A third option would be to reserve administrative stays for certain types of cases, that is, those involving specific kinds of plaintiffs or legal claims. For instance, district court judgments ruling against the exercise of constitutional rights might be administratively stayed pending appeal.¹⁷¹ Such an approach, however, would seem arbitrary unless it were connected to a more general framework explaining the differential treatment of certain disputes or rights. As explained below, it is reasonable to suggest that specific types of cases be treated in procedurally distinct ways at the administrative stay stage.¹⁷² In particular, automatic administrative stays could be essential in death penalty cases to preserve the court’s ability to rule on an inmate’s appeal.¹⁷³ But the interest in preserving that ability should be considered as part of a broader analysis of the effects of an administrative stay determination. The next Section presents a proposal that endorses such a broader analysis.

170 Nat’l Urb. League v. Ross, 977 F.3d 698, 700, 703 (9th Cir. 2020). After the 2020 census results were tabulated, New York lost a seat in the House of Representatives after coming up 89 residents short. Shane Goldmacher, *New York Loses House Seat After Coming Up 89 People Short on Census*, N.Y. TIMES (Aug. 12, 2021), <https://www.nytimes.com/2021/04/26/nyregion/new-york-census-congress.html> [<https://perma.cc/U43D-L9M9>].

171 Such an approach would be reminiscent of the view that “[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (citing *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam)).

172 See *infra* subsection III.C.1.

173 For discussion of the value of preserving a “meaningful opportunity to appeal,” see Pedro, *supra* note 21, at 909; see also *infra* subsection III.C.2.

C. Proposed Standards for Administrative Stays

This Section presents the Article's proposal for procedures and standards to govern administrative stays. As an initial matter, there are several avenues for courts and other legal actors to promulgate standards for administrative stays. One is by congressional statute; Congress has previously set out subject-specific standards for courts to apply in issuing stays.¹⁷⁴ Another is court rules—either court rules applying across the federal judicial system, such as the Federal Rules of Appellate Procedure, or rules adopted by individual courts to govern their proceedings.¹⁷⁵ Systemwide court rules, as distinct from circuit-specific judicial opinions or rules, promote uniformity and reduce the kind of forum shopping that has been criticized in the context of nationwide injunctions.¹⁷⁶ Beyond court rules, judges in their opinions could weigh in on the standards for administrative stays. Recent Ninth Circuit opinions have undertaken this task to some extent,¹⁷⁷ and further percolation on the issue would be beneficial.

However standards for administrative stays are promulgated, the promulgating body should take into account both procedural and substantive features of administrative stay determinations.

1. Procedural features.

Certain procedural features of administrative stays would help to advance the interests discussed above.

First, administrative stays should be granted for a limited time frame, and courts ought to set a highly expedited briefing schedule for the stay pending appeal at the same time as they issue an administrative stay. These practices would advance consistency and legitimacy, as courts would not implement greatly divergent schedules for administrative stays in different contexts and would thus invite fewer charges of partiality. To the extent rulemaking bodies are creating rules to govern administrative stays, they may wish to consider setting a presumptive time limit for these stays (say, five business days), subject

174 See, e.g., 11 U.S.C. § 362 (authorizing automatic stay in bankruptcy); *Nken v. Holder*, 556 U.S. 418, 424 (2009) (describing a past statute providing for automatic stay of removal order while judicial review was pending).

175 For discussion of court rules that currently govern issuance of stays, see *supra* notes 35–40 and accompanying text.

176 For discussion of forum-shopping and nationwide injunctions, see, for example, Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 457–61 (2017); Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065, 1104–06 (2018); Zayn Siddique, *Nationwide Injunctions*, 117 COLUM. L. REV. 2095, 2143 (2017).

177 See *Nat'l Urb. League v. Ross*, 977 F.3d 698, 700–01 (9th Cir. 2020); *Doe #1 v. Trump*, 944 F.3d 1222, 1223 (9th Cir. 2019).

to alteration if a particular motion for a stay pending appeal requires especially intensive deliberation. Another option would be to set an inflexible time limit for administrative stays, and to permit parties to reapply for an administrative stay after the time expires. Either way, issuing an order with a set time frame for the administrative stay helps to send the message that the stay is a regularized part of judicial practice.¹⁷⁸ The message that courts operate according to orderly and consistent procedures is conducive to public trust in the judicial system.

Second, courts need not write detailed opinions justifying their decisions to grant or deny administrative stays. Indeed, judges should be discouraged from doing so. Here the interests in reason-giving and the “passive virtues” are in tension. On the one hand, the parties and the public have an interest in understanding the basis for courts’ decisions. On the other hand, an overly detailed explanation can cause judges to make more law. Judges may take legal positions at the administrative stay stage that they may later feel pressure to sustain, and other courts may treat administrative stay pronouncements as precedential to some extent.¹⁷⁹ In other words, extensive reasoning provided within a short time frame runs the risk of creating overbroad or detrimental guidance. This is not to say judges need to be silent in granting or denying administrative stays. Judges could indicate the considerations on which their decisions rest in a couple of sentences—perhaps one sentence to cover the appellant’s ability to benefit from a stay pending appeal, and one sentence to cover the appellee’s ability to benefit from the district court’s judgment. The court could then provide a more extensive analysis at the stage of the “regular” stay pending appeal.

Third, for certain categories of cases, it makes sense for court rules to provide for imposition of an automatic administrative stay, with no need for judges to consider each case individually. This approach may be suitable for death penalty and deportation cases, in which failing to enter a stay could well undercut the possibility of a practically effective appeal (as discussed further below).¹⁸⁰ The main rationale behind this suggestion is efficiency. If it is highly likely that an administrative stay should be granted, the court would be better off implementing that result without individualized judicial consideration, unless a party brings an extraordinary circumstance to the court’s attention.

178 For discussion of the role of remedies in expressing messages, see, for example, Rachel Bayefsky, *Remedies and Respect: Rethinking the Role of Federal Judicial Relief*, 109 GEO. L.J. 1263, 1305–11 (2021).

179 See *supra* note 20.

180 See *infra* subsection III.C.2.

Fourth, in non-capital or deportation cases, courts should ordinarily impose an administrative stay only when the party seeking to appeal asks for such relief.¹⁸¹ Administrative stays delay the effectiveness of district court rulings, and courts should not generally incur that cost when a party has not even requested a stay. To be sure, the judges themselves may wish to take more time to decide the “regular” stay motion, independent of the parties’ requests. As earlier noted, however, an administrative stay does not merely “buy time”; it temporarily nullifies the effect of another court’s judgment in a way that may have substantial real-world impact. Courts should not generally take this step when a party has not even requested it (unless, perhaps, not granting an administrative stay would have drastic and uncontroversially negative results).

2. Substantive standards.

Here are substantive standards that courts could apply to administrative stays to further the interests in deliberation, efficiency, consistency, legitimacy, reason-giving, and the passive virtues.

First, courts should try to separate administrative stays from the merits as much as possible. Doing so would advance deliberation, as judges would not be faced with the pressure to make a decision about the likelihood of success on the merits in a highly compressed time frame.

Nonetheless, courts could appropriately decline to grant an administrative stay if they determined on the basis of the materials before them that the appeal is frivolous, in the sense that “the result is obvious or the appellant’s arguments are wholly without merit.”¹⁸² To gauge frivolousness, courts could draw on the body of law interpreting Federal Rule of Appellate Procedure 38 (on frivolous appeals)¹⁸³ and Federal Rule of Civil Procedure 11 (on frivolous litigation).¹⁸⁴ An *appeal* may be frivolous even if the case, as originally filed, was not; for example, the lower court’s factfinding may be unassailable on a deferential appellate standard of review. Still, “nonfrivolous” is a low bar. It functions to weed out clearly meritless requests for administrative stays without requiring courts to opine in any substantial way on the merits. Reducing merits analysis will help to convey to

181 See *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020) (Courts generally “rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present.” (quoting *Greenlaw v. United States* 554 U.S. 237, 243 (2008))).

182 *Blixseth v. Yellowstone Mountain Club, LLC*, 796 F.3d 1004, 1007 (9th Cir. 2015) (quoting *Glanzman v. Uniroyal, Inc.*, 892 F.2d 58, 61 (9th Cir. 1989)).

183 FED. R. APP. P. 38.

184 FED. R. CIV. P. 11(b)(2).

parties and the public that the court is not hastily deciding a contentious issue, thereby bolstering legitimacy.

Second, courts should consider the impact of granting or denying an administrative stay on the parties. In particular, courts ought to weigh (a) the extent to which denying an administrative stay would limit an applicant's ability to benefit from a stay pending appeal, should the court ultimately choose to grant it, against (b) the extent to which granting an administrative stay would limit the opposing party's ability to benefit from the judgment under review, should the court ultimately choose to uphold it. The thrust of the proposal is to focus attention on the specific effects of the administrative stay determination during pendency of the motion for a stay pending appeal. This approach is in keeping with the view that administrative stays are adjuncts to stays pending appeal.

To elaborate, one side of the balance involves the degree to which denying an administrative stay would diminish the stay applicant's ability to secure the benefits of a stay pending appeal. Portia Pedro has suggested that "preserving the opportunity for a meaningful appeal" is a critical feature of stays in general.¹⁸⁵ In the context of administrative stays, the question would be whether an administrative stay is needed to ensure that the stay applicant remains able to secure the benefits that a "regular" stay pending appeal would provide.

Capital cases present the clearest instances in which denial of an administrative stay would eliminate the stay applicant's ability to gain the benefits of a stay pending appeal; if an administrative stay were denied, the inmate would presumably be executed. Immigration-removal cases furnish another such instance; if an administrative stay were denied and the immigrant removed from the country, it might be quite difficult to bring the person back (and, in the case of certain immigrants, to bring the person back unharmed). But there are other examples as well. Say a city seizes private property on the basis that activities on the property will result in the illegal release of highly toxic chemicals. A district court enters judgment enjoining the seizure as a due process violation. The city seeks to appeal; it also seeks a stay of the district court's judgment pending appeal and an administrative stay. To the extent the city can demonstrate that denial of an administrative stay would likely result in the immediate release of toxic chemicals, the city's interest in preserving the ability to benefit from a stay pending appeal weighs in favor of an administrative stay.

The interests of the stay applicant, however, are not the only ones that courts should take into consideration. The party that secured a ruling in its favor (the "prevailing party") has an important interest in

185 See Pedro, *supra* note 21, at 903.

being able to maintain the benefit of that ruling. In deciding whether to issue an administrative stay, therefore, courts should take into account the extent to which the administrative stay would undercut the prevailing party's capacity to derive benefit from the ruling in its favor.

For example, say an agency issues a regulation requiring changes in the design of polluting products. The district court holds the regulation invalid; the agency appeals and seeks a stay pending appeal, in addition to an administrative stay. The manufacturers challenging the agency decision oppose an administrative stay on the ground that delaying production any longer would force them to restructure their operations substantially. Such a showing by the manufacturers should cut against an administrative stay, because the manufacturers' ability to benefit from the district-court ruling in their favor would be significantly reduced were an administrative stay granted.

There will be intermediate cases; for example, administratively staying a district court's ruling greenlighting a new immigration policy may affect the government's ability to carry out its immigration procedures with respect to a certain group of immigrants but would not eliminate this ability in perpetuity. But benefit to the prevailing party is a consideration for courts evaluating requests for administrative stays to take into account.

The harm-weighting analysis just described is meant to create greater consistency while preserving courts' flexibility to consider a range of consequences. Focusing attention on the impact of an administrative stay on the parties' ability to benefit from a "regular" stay or from the judgment below is designed to advance a more regularized examination than currently exists. Nonetheless, courts can exercise a degree of discretion within those parameters.

The proposed approach would also help to facilitate judicial deliberation on the case. Denial of an administrative stay could restrict deliberation if it undermines the meaningfulness of a "regular" stay or the appeal more generally; that prospect would count in favor of granting an administrative stay in the harm-weighting analysis. With respect to efficiency, the harm-weighting analysis consumes judicial resources, but not to the same extent as a full-blown inquiry into likelihood of success on the merits.

The balancing task would not be a mechanical endeavor. It is certainly possible for merits-driven reasoning to creep in, posing potential difficulties in terms of legitimacy. At the same time, the proposed approach seeks to constrain courts by focusing attention on marginal effects on the parties for the specific period of the administrative stay. Such constraint would be useful in terms of promoting legitimacy, as well as the passive virtues.

The proposal advanced here does not *explicitly* invoke three doctrinal concepts that are often incorporated into administrative or “regular” stay determinations—namely, the status quo, irreparable harm, and the public interest. The principles underlying these doctrinal concepts are likely to figure into the proposed analysis of the harms that each party stands to incur should an administrative stay be granted or denied. Nonetheless, the proposal does not treat the status quo, irreparable harm, or the public interest in terms of boxes that courts must check off before granting or denying an administrative stay.

To elaborate: take first the status quo. This is an elusive concept that could refer to the world as it existed before the district court entered judgment (either the empirical “facts on the ground” or the “legal landscape”), or the world as it existed following the district court’s judgment.¹⁸⁶ If courts defined the status quo on a case-by-case basis, they would create inconsistency and undercut legitimacy. Courts could apply one definition across the board, but they would jeopardize appropriate contextual sensitivity. For example, courts might decide to grant administrative stays to restore the “facts on the ground” prior to the district court judgment. But the effect of restoring those facts would depend on the speed with which the defendant happened to implement the action challenged in the litigation. If the defendant swiftly effectuated the challenged actions prior to the district court’s judgment, the “facts on the ground” would favor the defendant. It is not clear why the administrative stay determination should hinge on the defendant’s alacrity. More generally, underlying the interest in preserving the status quo seem to be concerns about the harms that each party would incur with or without an administrative stay. It would be more advisable for courts to confront these harms directly, instead of relying on the idea of the status quo.

A related point applies to the concept of irreparable harm, one of the traditional stay factors.¹⁸⁷ On the one hand, the idea of irreparable harm has intuitive purchase in administrative stay determinations. If the harm could be fully redressed after the fact, then the need for an administrative stay would be less acute. On the other hand, binary judgments about whether harm is repairable or irreparable are not straightforward or value-free determinations. A great many harms cannot literally be repaired.¹⁸⁸ As Douglas Laycock has argued, courts applying the “irreparable injury” rule weigh various costs and benefits of imposing injunctive relief, including factors related to interference

186 See *supra* subsection I.B.4.

187 See *supra* subsections I.B.3.

188 See, e.g., John C.P. Goldberg & Benjamin C. Zipursky, *Torts As Wrongs*, 88 TEX. L. REV. 917, 961 (2010).

with the authority of another tribunal, the practicability of supervising compliance, mootness, and ripeness.¹⁸⁹ The question of whether a stay applicant stands to suffer irreparable harm requires a sensitive and complex judgment. Regardless of the advisability of undertaking this inquiry in the context of “regular” stay decisions, there is little reason to extend the irreparable harm analysis into the even more time-pressured frame of administrative stays. To be sure, courts will examine the harm litigants stand to incur as part of this Article’s proposal. But the *irreparability* of the harm, as an on-off switch, should not be treated as a precondition for an administrative stay.

As to the “public interest,” this is another traditional stay factor,¹⁹⁰ and one might ask whether courts granting administrative stays should take this factor into account. On the one hand, a “public interest” analysis allows courts to account for the broader implications of their rulings. A public interest analysis may be viewed as especially appropriate when federal courts are sitting in equity; as the Supreme Court has stated, “Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.”¹⁹¹

On the other hand, a “public interest” analysis introduces a further degree of discretion into courts’ decision-making processes. Take the Ninth Circuit decision denying an administrative stay of a district-court decision allowing the census count to proceed.¹⁹² Where would the public interest lie—in allowing the census count to continue, or in accepting the federal government’s view that an earlier halt to operations was needed to satisfy congressional deadlines for completing the census? *Nken* might suggest that the government represents the public interest,¹⁹³ but some courts might be inclined to interpret the public interest more broadly. Delving into the public interest at the administrative stay stage would seem to embroil courts in contentious reasoning that would be detrimental along the consistency and legitimacy axes.

On balance, it is prudent for courts not to treat the public interest as an independent factor in determining whether to grant an administrative stay. Yet courts need not ignore the impact of an administrative stay on the world beyond the parties to the case. In the kind of litigation that has recently provoked debate over administrative

189 Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687, 692 (1990).

190 *Nken v. Holder*, 556 U.S. 418, 435–36 (2009); see *supra* subsection I.B.3.

191 *Virginian Ry. Co. v. Sys. Fed’n No. 40*, 300 U.S. 515, 552 (1937).

192 *Nat’l Urb. League v. Ross*, 977 F.3d 698, 703 (9th Cir. 2020).

193 *Nken*, 556 U.S. at 435.

stays in high-profile cases, the parties frequently include federal and state governments, or public interest organizations—parties with interests that extend more broadly than those of individuals. Courts could consider these interests in determining whether a stay applicant would be able to benefit from a stay pending appeal were an administrative stay denied, or whether a prevailing party would be able to secure the benefit of the ruling in its favor were an administrative stay granted. For example, an organization that represents asylum applicants has an interest in rolling back restrictive immigration rules for the benefit of numerous individuals, beyond the parties to the case. A state government has an interest in enforcing its laws for the benefit of the state’s citizenry. Courts could draw on doctrine concerning organizational standing¹⁹⁴ and *parens patriae* standing¹⁹⁵ to elucidate the nature of the interests that parties before the court can protect.

Therefore, the proposed inquiry does not include an admonition to preserve the status quo, to act only to prevent irreparable harm, or to consider the public interest explicitly. As noted, the principles underlying these doctrinal concepts will likely bleed into the proposed analysis of the marginal impact on each party should an administrative stay be granted or denied. But the Article’s proposed framework involves a more general inquiry into the effects of granting or denying an administrative stay on the parties’ ability to benefit from a stay pending appeal or from the judgment.

D. *Application to Examples*

This Section applies the administrative stay proposal described above to concrete examples. The aim is not to produce a single response on whether or not an administrative stay should have been granted, but to show how courts could reason through these decisions.

I. Asylum Eligibility Case

One example comes from a Ninth Circuit case in which the court declined to grant an administrative stay in an asylum-related case.¹⁹⁶ In 2018, the Trump administration adopted a policy that effectively “[made] asylum unavailable to any alien who seeks refuge in the United States if she entered the country from Mexico outside a lawful port of entry.”¹⁹⁷ Organizations representing asylum applicants sued,

194 See *Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333, 342 (1977).

195 *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982).

196 Order at 1, *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742 (9th Cir. 2018) (No. 18-17274) [hereinafter *East Bay Order*].

197 *E. Bay Sanctuary Covenant*, 932 F.3d at 755.

and the district court entered a temporary restraining order against the policy.¹⁹⁸ The Trump administration appealed to the Ninth Circuit, seeking a stay pending appeal and an administrative stay.¹⁹⁹ The Ninth Circuit, in an unexplained order, denied an administrative stay;²⁰⁰ six days later, it issued an opinion denying the motion for a stay pending appeal.²⁰¹

Applying the administrative stay proposal discussed above: the Ninth Circuit's order denying an administrative stay, though it did not explain the court's decision, issued a briefing schedule for the stay pending appeal.²⁰² The briefing schedule was highly expedited, calling for briefing on the stay pending appeal to be completed within three days.²⁰³ These features of the Ninth Circuit's procedures were salutary, as they publicly conveyed that the denial of an administrative stay was a temporary decision and that a fuller hearing was forthcoming. Further, the Trump administration requested an administrative stay, so that criterion was satisfied.

The "nonfrivolity on the merits" standard was met as well. Without diving deeply here into the legality of the asylum policy, I note that the Ninth Circuit panel decision included a partial dissent,²⁰⁴ and that when the case reached the Supreme Court on an emergency stay application, four Justices stated they disagreed with the Supreme Court's decision not to grant a stay.²⁰⁵ These points do not demonstrate that the district court was incorrect to block enforcement of the asylum policy; but they provide some evidence that the appeal was not frivolous on the merits.

The next step is to consider whether the stay applicant, the federal government, would still have been able to benefit from a stay pending appeal were an administrative stay denied. The answer to this question depends on the nature of the benefit to the federal government. One potential benefit—suggested by the government's arguments—was vindication of the separation of powers and the principle of executive prerogative.²⁰⁶ The government would have been able to recoup this benefit from a stay pending appeal to a significant extent even if an administrative stay were denied, as separation-of-powers principles

198 *Id.* at 755. Although a temporary restraining order is ordinarily not appealable, the Ninth Circuit treated the order as an appealable preliminary injunction. *See id.* at 762.

199 *Id.* at 762.

200 *East Bay Order*, *supra* note 196, at 1.

201 *E. Bay Sanctuary Covenant*, 932 F.3d at 780.

202 *East Bay Order*, *supra* note 196, at 1.

203 *Id.*

204 *E. Bay Sanctuary Covenant*, 932 F.3d at 780 (Leavy, J., dissenting in part).

205 *Trump v. E. Bay Sanctuary Covenant*, 139 S. Ct. 782 (2018) (mem.).

206 *E. Bay Sanctuary Covenant*, 932 F.3d at 778.

could ultimately have been vindicated.²⁰⁷ Another possible benefit—also reflected in the government’s arguments—consisted in stopping individuals from entering the United States illegally.²⁰⁸ The government’s ability to secure that benefit notwithstanding denial of an administrative stay would depend on the facts. The government might be able to explain why the short period between the administrative-stay and stay-pending-appeal stages would importantly affect immigration patterns. But absent such evidence, the government would still be able to benefit substantially from a stay pending appeal even if an administrative stay were denied.

The “flip side” is the extent to which the party that secured a ruling in its favor—the organizations representing asylum applicants—would be able to maintain the benefit of the ruling were an administrative stay granted. Here again the analysis is factually specific. To the extent that asylum applicants could wait to apply for asylum until after the stay-pending-appeal stage, the case for granting an administrative stay (and allowing the new asylum rules to go into effect) would become stronger. But the organizations might be able to make a showing that the government’s policy endangered asylum applicants even during a short period. If courts were inclined to consider only harm to the organizational plaintiffs instead of harm to asylum applicants, then the organizations’ case would become harder. The organizations contended that they would be required to divert resources in response to the government’s policy.²⁰⁹ To undermine the case for an administrative stay, the organizations would need to show that they would have to divert sufficient resources for the period of the administrative stay to weaken their ability to benefit from the district court’s ruling in their favor.

Overall, neither party in the asylum case had a clear-cut case as to why an administrative stay should have been granted or denied. The proper outcome depends on factually specific issues. The considerations discussed above, however, provide a way to structure the inquiry. In particular, they suggest the need to focus on the consequences for parties during the specific period that an administrative stay would be in effect.

2. Abortion Restrictions during the Pandemic

A second example brings us back to a case discussed in the introduction: the Fifth Circuit case regarding restrictions on medical procedures, including abortion, during the beginning of the

207 *See id.*

208 *See id.*

209 *Id.*

coronavirus pandemic.²¹⁰ To recap, the Texas Governor issued an order in March 2020 postponing “non-essential surgeries and procedures” for three weeks, without excluding abortion.²¹¹ A district court entered temporary restraining orders as to certain categories of abortion procedures; Texas officials appealed, and the Fifth Circuit granted an administrative stay, albeit a partial one with a carve-out as to women who would be past the legal limit for an abortion in Texas by the time the Governor’s order expired.²¹²

Texas officials requested an administrative stay,²¹³ so that criterion was satisfied. The Fifth Circuit, in granting a partial administrative stay, set a briefing schedule for the broader stay proceedings that called for a response and reply within three days.²¹⁴ In doing so, the court conveyed that the administrative stay was short-term in nature. In response to a motion to dissolve the administrative stay, the court issued an opinion—a day after granting the administrative stay—explaining its conclusion to maintain the stay.²¹⁵ The opinion stated that “[e]ntering temporary administrative stays so that a panel may consider expedited briefing in emergency cases is a routine practice in our court.”²¹⁶ Although the reference to “routine practice” did not fully account for the measure of discretion that a court has in deciding whether to grant an administrative stay,²¹⁷ the panel appropriately linked the administrative stay to another form of emergency relief. As to the merits, the Texas officials’ appeal appears to clear the bar of nonfrivolity given the public health crisis and uncertainty about the pandemic in the spring of 2020, regardless of whether the appeal was likely to succeed on the merits.

Would Texas officials still be able to benefit from a stay pending appeal were an administrative stay denied? The answer to this question depends substantially on factual questions—specifically, the nature of the pandemic-related harms the Texas officials alleged. The more they could show that abortion procedures would cause significant public-health problems in the few days before a stay pending appeal was granted, the more likely they could demonstrate the need for an administrative stay. A general assertion that the public health would suffer if abortion procedures were permitted would not be enough.

210 *In re Abbott (Abbott II)*, 800 F. App’x 293 (5th Cir. 2020) (per curiam).

211 *In re Abbott (Abbott I)*, 954 F.3d 772, 777–778 (5th Cir. 2020), cert. granted, judgment vacated sub nom. Planned Parenthood Ctr. for Choice v. Abbott (*Abbott V*), 141 S. Ct. 1261 (2021) (mem.).

212 *See supra* notes 3–6 and accompanying text.

213 *Abbott II*, 800 F. App’x at 296.

214 *Id.*

215 *In re Abbott (Abbott III)*, 800 F. App’x 296, 298 (5th Cir. 2020) (per curiam).

216 *Id.*

217 *See id.* (Dennis, J. dissenting).

On the flip side, would the plaintiffs challenging the Texas policy still be able to benefit from the district court's ruling in their favor were an administrative stay granted? If the administrative stay had blocked the district court's ruling with respect to women who would have crossed the legal limit for abortion in Texas during the pendency of the administrative stay, then the answer would be "no." The Fifth Circuit's administrative stay, however, excluded "women who would be past the legal limit for abortion in Texas" during the pendency of the Governor's order.²¹⁸ That does not end the inquiry into the consequences of granting an administrative stay. Judge Dennis observed, dissenting from the Fifth Circuit's decision to maintain an administrative stay, that the district court had made findings with respect to increased difficulties that women who would not cross the legal limit would nonetheless face in seeking an abortion.²¹⁹ It would be advisable for a court to train attention on the extent to which women would encounter these difficulties during the specific period of the administrative stay. In other words, a court should consider the prospect that a few days could make a difference in terms of women's access to abortion even if it did not render abortion completely illegal for those women.

Weighing that prospect against the public-health issues the Texas officials referenced requires discretion. More generally, the issue of how to apply the administrative stay factors discussed here is not amenable to mechanical calculation and is heavily fact dependent. But the standards discussed above provide guidance as to the types of questions that courts should be asking.

CONCLUSION

The administrative stay mechanism has become a generally used tool for federal courts to manage emergency litigation, with little analysis of the standards that courts should apply or the source of their authority to issue such stays. This Article has aimed to bring administrative stays into the light. It has highlighted trends and ambiguities in courts' treatment of administrative stays; analyzed sources of authority for federal courts to issue administrative stays; and offered a proposal as to the factors that courts should consider in deciding whether to impose administrative stays. Beyond the specifics of the proposal, the aim is to illuminate the choices and tradeoffs that courts face when considering which administrative stay standards to adopt.

218 *Id.* at 297 (per curiam opinion).

219 *Id.* at 298 (Dennis, J., dissenting).

The topic of administrative stays has broader implications for federal-court theory and practice. First, judicial functions that might appear to be purely ministerial or routine actually call on courts to exercise discretion and can have a significant impact on the ground. Case management might seem to be a mundane topic, but it raises important issues about judicial decisionmaking, including in situations that do not receive much public attention. Second, administrative stays highlight the balance between flexibility and consistency that courts confront in exercising their equitable authority. On the one hand, the decision about whether to issue an administrative stay calls on courts to be nimble and to respond quickly to changed circumstances. On the other hand, decisionmaking that is too *ad hoc* runs the risk of undercutting impartiality and reducing legitimacy.

Third, administrative stays underscore the difficulty of devising value-neutral mechanisms for guiding courts' exercise of their discretion. The call to "preserve the status quo," for example, is not as mechanical and uncontested as it may initially seem. The standards proposed here are meant to limit the influence of merits-based reasoning in the decision whether to grant an administrative stay. Yet decisionmakers will take different views of factors such as the ability of a stay applicant to secure a benefit from a stay pending appeal, or the ability of a prevailing party to maintain the benefit of a district court's ruling in its favor. The procedural benefits of regularizing the inquiry into administrative stay decisions do not eliminate that issue, but they represent a step forward.

None of this is to say that procedure or transparency is an unalloyed good. At times, an interest in compromise or in the passive virtues may lead judges to act summarily, including with administrative stays. That practice may sometimes be preferable to setting bold precedent, especially when courts are acting under time pressure. But the decision about how to approach administrative stays should be a considered one, made after assessing the benefits and drawbacks of various possibilities. This Article has analyzed current and potential practices with respect to administrative stays in order to advance the conversation about how federal courts should wield this tool.