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Stays

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Stays

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After judges issue final orders and judgments, losing defendants often ask courts to make a determination that may seem to be a mere procedural technicality, but is, instead, a new battleground for injunctive litigation. These judges are deciding whether to grant a stay pending appeal—whether to prevent the enforcement of a court order or judgment until a court has decided the appeal. Because litigating and deciding an appeal can take years and because the issues at the heart of much of civil injunctive litigation are extremely time-sensitive, determining whether to grant or deny a stay is a momentous decision. By deciding requests for stays pending appeal, federal judges have decided if Texas could enforce health and safety regulations, or if clinics could provide abortions in the state; if 300,000 registered voters in Wisconsin would be able to vote, or if the state could enforce its duly-enacted provisions to regulate elections and prevent voter fraud; if states could determine requirements for marriage, or if same-sex couples could marry; if the President could enforce an Executive Order regarding national security, or if Muslims could enter the country regardless of religion; and, arguably, if the forty-third US President would be Al Gore or George W. Bush.

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The standard for stay determinations ostensibly includes four factors: (1) the likelihood of success on appeal; (2) the likelihood of irreparable harm pending appeal; (3) the balance of the hardships; and (4) the public interest. However, there is more idiosyncrasy than standard because courts vary so widely regarding what constitutes each prong and the manner in which courts should weigh each prong, if at all. Compounding the absence of a uniform stays standard, courts frequently give no reasoning or opinion for stay determinations. With life-changing (and potentially world-changing) issues on the line pending appeal, stays are a nearly law-free zone. The immense consequences of stay determinations, due to lengthy appeals and the time-bound nature of the underlying injunctions or orders, mean that courts need to make an effort to get stay decisions right.

The author argues that the purpose of a stay pending appeal is to protect a meaningful opportunity to appeal where guaranteed. The Article suggests different standards for stays, turning on whether review is guaranteed or discretionary. The author also asserts that courts should write reasoned opinions for stay decisions.

INTRODUCTION

When deciding a request for a stay pending appeal, a court determines whether to prevent the enforcement of a final order or judgment until an appellate court issues an opinion. It may seem that judicial decisions regarding stays pending appeal do not matter much within the civil injunctive landscape. After all, a stay pending appeal, or its absence, would only affect parties for a limited time because the mechanism is temporary by definition. What could happen in that time-bound period between injunctive order or judgment and appellate decision? A lot. Review by a court of appeals or the Supreme Court can take much longer than one might assume. During the often-lengthy appeals process, the real-world implications for civil injunctive parties can be of serious and irreversible consequence. This means that courts should make a serious attempt to get stay decisions "right." But they don't. Current judicial practice for stays pending appeal lacks transparency, uniformity, and accountability.

A stay pending appeal is the primary mechanism that allows a losing party[1] to prevent enforcement of a final judgment granting an injunction in a civil matter while appeal is pending.[2] The areas in which decisions on stays pending

1. This Article specifies that "a losing party" and, more specifically, a losing defendant, can request or possibly obtain a stay pending appeal because a winning party, or a winning plaintiff, would not request a stay of a judgment or order in their favor. *See* Daniel M. Gonen, *Judging in Chambers: The Powers of a Single Justice of the Supreme Court*, 76 U. CIN. L. REV. 1159, 1174 (2008) ("[O]ften where a lower court has denied an injunction, there is nothing to stay.").

2. Such appellants cannot obtain stays by supersedeas bond. FED. R. CIV. P. 62(d).

appeal are immensely consequential extend to nearly every corner of our social order. For example, courts that decided whether to stay an order or judgment pending appeal effectively determined who could marry, or whether states could define marriage requirements;[3] whether states could enforce health and safety provisions, or whether clinics could provide abortions;[4] whether registered voters could cast ballots in an election, or whether states could prevent voter fraud;[5] whether a high school could implement polices to promote child safety and prevent bullying, or whether a teenager could use the restroom in which they felt comfortable;[6] and whether the President could set immigration policies to ensure national security, or whether Muslims could enter the United States regardless of their religion.[7]

Even though these stay determinations did not decide the underlying issues finally and permanently, some impacts of stay determinations cannot be undone.[8] After an appellate court reviews the matter, a student may already have graduated and cannot go back in time to include prayer as a part of their education. Conversely, a school that allowed prayer during the interim cannot later undo the potential religious coercion that students may have been subjected to due to prayer in school. Likewise, doctors, states, or assault victims cannot go back in time to perform abortions, count or refuse ballots, or arm themselves in self-defense, respectively. After allowing people to carry certain types of guns in public spaces has led to a public shooting, a state cannot retroactively protect those who were already shot resulting in injury or death. Stay determinations are not just procedural technicalities; they are, instead, the new battleground of injunctive litigation.[9]

This Article primarily focuses on stays of final injunctive court orders or judgments pending appeal,[10] but courts can also stay many other types of orders

3. Strange v. Searcy, 135 S. Ct. 940 (2015) (mem.) (denying application for stay of injunction preventing the enforcement of Alabama law provisions limiting marriage to heterosexual couples).

4. Whole Woman's Health v. Lakey, 135 S. Ct. 399 (2014) (mem.) (vacating the Court of Appeals' stay of district court's order enjoining Texas requirements for clinics that provide abortions and denying the application in other respects).

5. Frank v. Walker, 135 S. Ct. 7 (2014) (mem.) (vacating the Court of Appeals' stay of the district court's permanent injunction preventing the enforcement of Wisconsin voter identification requirement). This Article often uses examples from recent Supreme Court terms (especially regarding marriage, abortion, and voting in elections), but this is also true of stay determinations in a more general sense.

6. Gloucester Cty. Sch. Bd. v. G.G., 136 S. Ct. 2442, 2442 (2016) (mem.) (granting stay of district court's preliminary injunction allowing a transgender student access to boys' restrooms at his high school).

7. Washington v. Trump, 847 F.3d 1151, 1152 (9th Cir. 2017) (denying emergency request for stay pending appeal of order enjoining the enforcement of Exec. Order No. 13769).

8. *See infra* Part I.

9. *See id.*

10. This Article leaves stays in the areas of criminal matters and habeas corpus appeals for future inquiry. *See id.* This Article also excludes from discussion various types of claims that have their own separate stay standards and procedure, including bankruptcy, copyright or patent, damages, habeas corpus, and criminal matters. *See infra* note 69.

or proceedings.[11] When federal courts determine stays of injunctive orders[12] pending appeal, courts ostensibly consider four factors: whether the movant has demonstrated a likelihood of success on the merits; whether the movant is likely to suffer irreparable harm if the court denies a stay; whether the balance of the hardships to the parties counsels in favor of issuing a stay;[13] and where the public interest lies.[14]

Nevertheless, courts' analyses vary so widely from case to case regarding what constitutes each prong and the manner in which courts should weigh each prong, if at all, that idiosyncrasy, not standard, reigns.[15] These are not circuit splits, with the courts of appeals divided into a few main camps on what constitutes each prong or how to weigh the factors. The variability of stay determinations is not within the normal range of outcomes that we would expect from typical discretionary determinations. Instead, the factors that courts use are arbitrary and vary unpredictably.[16] Compounding the absence of a uniform, principled stays standard, courts seldom offer reasoning or publish opinions for stay determinations.[17] This is nearly a law-free zone. These haphazard, sparse standards,[18] along with the dearth of written opinions on stays,[19] suggests that there is little rhyme or reason to support courts' stay determinations. Consequently, these inconsistencies regarding stays require critical examination.

Until now, scholars have not given serious consideration to the consequences of court decisions on stays pending appeal.[20] This Article sheds

11. Although this Article refers to some cases outside of civil stays of final orders pending appeal relied upon by courts for doctrinal standards, it largely sets aside stays of execution, stays of removal, and habeas proceedings for future investigation for reasons explained at *infra* note 69.

12. Federal Rule of Civil Procedure 62 differentiates between stays for injunctions and stays for damages. As discussed below, the substance and procedure of stay determinations in actions for damages is arguably clearer than that of those involving injunctive relief. For example, under Rule 62(d), the party appealing a judgment may obtain a stay by supersedeas bond except if the appeal is from an interlocutory or final judgment in an action for an injunction. FED. R. CIV. P. 62(d).

13. Courts often describe this as determining "whether issuance of the stay will substantially injure the other parties interested in the proceeding." *See* Nken v. Holder, 556 U.S. 418, 426 (2009); *infra* note 103.

14. *See* Hilton v. Braunskill, 481 U.S. 770, 776 (1987); *see also Nken*, 556 U.S. at 434 (citing and applying *Hilton* factors to a request for a stay of removal pending judicial review).

15. *See infra* Part III.A.

16. *See id.*

17. *See infra* Part III.B. Most stay requests to the Supreme Court are to individual circuit justices and thus are not even listed in the Supreme Court's orders list. Gonen, *supra* note 1, at 1226–27.

18. *See infra* Part III.A.

19. *See infra* Part III.B.

20. Other scholars have argued for reform of aspects of Supreme Court stay determinations. *See* William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J. L. & LIBERTY 1 (2015) (looking to the Supreme Court's October Term 2013 and arguing for more transparency in, and explanation of, stay and summary reversal orders); Josh Blackman & Howard M. Wasserman, *The Process of Marriage Equality*, 43 HASTINGS CONST. L.Q. 243 (2016) (documenting how stays, along with injunctions and mandamus proceedings, furthered and frustrated marriage equality cases); John Y. Gotanda, *The Emerging Standards for Issuing Appellate Stays*, 45 BAYLOR L. REV. 809 (1993) (arguing for a two-tier sliding scale in stays); Richard L. Hasen, *Reining in the* Purcell *Principle*, 43 FLA. ST. U.

light on the importance of stay pending appeal determinations. It argues that the primary purpose of granting a stay pending appellate review is to ensure a meaningful opportunity to appeal. That purpose is in tension with finality concerns, which require courts to enforce their orders and judgments. When courts decide requests for stays of court orders, courts must balance these two opposing values. Courts currently carry out this difficult task with very little precedent or procedure to guide them.[21]

Intuition might suggest that the best way to obtain uniformity in stay determinations is to have one cohesive standard across all stay requests regardless of the availability of appellate review. Yet the only way to obtain uniformity in stays pending appeal that fulfills their purpose is somewhat counterintuitive. The standard for stay determinations should differ and turn on the extent of the availability of review for the underlying order or judgment. Moreover, courts should more frequently write reasoned opinions for decisions on stays pending appeal requests, and courts should reform procedure for stays determinations.

This Article proceeds in five parts. Part I describes the stakes of stay determinations and situates those consequences within the temporal context of the appellate process. These temporary procedural decisions impose long-term outcomes. Part II describes stay procedures, discusses the stay standard, and compares stays pending appeal to other somewhat similar procedural mechanisms. Part III demonstrates that, despite the existence of a standard for stays, courts either apply the standard inconsistently or do not apply the standard at all. Part IV suggests that a potential reason for courts' inconsistency in applying the stay standard is that they do not make stay decisions according to any guiding purpose. This Part then proposes a principled basis for stay pending appeal determinations. Part V suggests a model for stays pending appeal that brings both the standard and procedures in line with this recommended primary

L. REV. 427, 464 (2016) (arguing that, when making stay determinations in cases involving voting rights and elections procedures, the Supreme Court should consider the implications of *Purcell v. Gonzalez*, 549 U.S. 1 (2006), as one factor among many); Alison M. Newman, *Doing the Public a Disservice: Behavioral Economics and Maintaining the Status Quo*, 64 DUKE L.J. 1173 (2015) (employing behavioral economics analysis and examples of marriage and abortion litigation to argue that the public interest counsels in favor of staying, or not granting, injunctions protecting individual rights); Lois J. Scali, Comment, *Prediction-Making in the Supreme Court: The Granting of Stays by Individual Justices*, 32 UCLA L. REV. 1020 (1985) (proposing elimination of the likelihood of success requirement for Supreme Court justices); Daniel C. Tucker, Note, *We Can't Stay This Way: Changing the Standard for Staying Injunctions Pending Appeal After* eBay, 79 GEO. WASH. L. REV. 1276 (2011) (proposes new standard for stays pending appeal in patent cases). In contrast, there is a vast literature on injunctions, especially preliminary injunctions and temporary restraining orders. *See, e.g.*, OWEN M. FISS, THE CIVIL RIGHTS INJUNCTION 11 (1978) [hereinafter FISS, INJUNCTION]; DOUG RENDLEMAN, CASES AND MATERIALS ON REMEDIES 156–312 (6th ed. 1999); Kevin J. Lynch, *The Lock-in Effect of Preliminary Injunctions*, 66 FLA. L. REV. 779 (2014) (discussing the effect of cognitive bias on judicial decision-making regarding injunctions).

21. *See infra* Part III.

purpose of stays. This Part also argues that courts should write reasoned opinions for many stay determinations.

The lessons from stays pending appeal also hold import for much more than the substantive standards and procedure of stays. Interrogating the procedure for stays is part of a larger conversation to systematize the study of procedure. While judges and courts generally have freedom to govern themselves and to determine their own procedures, procedure can still have significant and lasting substantive consequences—as is the case with stays of final orders pending appeal. This Article is part of a call to focus on the procedure of procedure: how procedure develops and what hinders or furthers procedural decision-making.

I.
THE STAKES OF STAYS

Stay decisions of civil injunctive orders are important because the matters at issue are often time sensitive, appeals can take years, and litigants can be seriously and irreversibly injured while appeal is pending. For judges, the predicament of stay pending appellate review requests is that judges must decide between giving effect to a court's reasoned decision or order and allowing for a meaningful appeal. Although both parties and the public are "generally entitled to the prompt execution of orders,"[22] giving effect to a court's order while review is pending can render an appeal null and cement a lower court's decision even if an appellate court will eventually find it erroneous or reverse it. On the other hand, it hardly seems fair or efficient to hold an order in abeyance, perhaps for years, while an appeal is pending, when a court already gave the matter full consideration. These orders are final, or at least not reached in a preliminary or ex parte manner. They are decided without limitations of time, evidence, or procedure. Quite the contrary, many are even the results of completed trials. Thus, when a court decides whether to stay an order or judgment pending appeal, the court may deny or irreparably delay justice to a party even though subsequent courts could find in his or her favor at every level of appeal.[23]

The procedural mechanism of stays pending appeal exists in the US judicial system because cases are often complicated. Much is at stake while an appeal is pending, and the passage of time allows events to transpire that become difficult to disentangle after parties begin to rely on, and make choices based on, present circumstances. Basic principles of justice—for example, that courts should treat similar cases in similar ways—require that legal standards limit discretion such that "[d]iscretion is not whim."[24]

22. *See* Nken v. Holder, 556 U.S. 418, 427 (2009); *see also* FED. R. CIV. P. 62(a) (providing that, generally speaking, executions may issue fourteen days after the entry of a judgment).

23. *See infra* Part II.A.

24. *See* Martin v. Franklin Capital Corp., 546 U.S. 132, 139 (2005) (citing Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 758 (1982)); *see also* Halo Elecs., Inc. v. Pulse

Although it is difficult to approximate the numbers of stays that defendants request from district courts, courts of appeals, and the Supreme Court per year, Supreme Court justices may receive 150 to 200 applications for stays per term,[25] and nearly all of the matters with applications for stays before the Supreme Court first requested stays from the district court or court of appeals.[26]

A circumstance that heightens the stakes of stay pending appeal decisions is the possibility that so much time can pass before a court of appeals or the Supreme Court concludes all review. This delay can cause a court's stay decision to allow an entity to fully implement an illegal law or prevent an entity from implementing lawful provisions, without any mechanism to reverse that afterward.

The different levels of federal courts receive numerous requests for stays on some of the most controversial public issues of the day.[27] By determining requests for stays pending appeal of injunctive orders and judgments, judges and justices can make irreversible decisions that have a significant impact on litigants and on society.[28] Below is a discussion of some of the real-life stakes of stay pending appeal decisions. There are innumerable examples of litigation where decisions regarding stays pending appeal could have, and sometimes have had, significant consequences.

Agency regulations. Full review of federal regulations may take years. If a court does not prevent implementation of agency rules pending review, the agency may implement the rules in the meantime such that it is impossible to undo implementation even if a court later invalidates the rule. This can result in extremely high costs for the regulated industries. Conversely, halting the implementation of something like the Clean Power Plan, pending review, could prevent the United States from fulfilling its commitment[29] to the United Nations

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Elecs., Inc., 136 S. Ct. 1923, 1926 (2016) (affirming that a court's judgment on a matter of discretion should be "guided by sound legal principles").

25. *See* Gonen, *supra* note 1, at 1172 (noting that, from 2001 to 2005, the Court received approximately 1,000 to 1,200 applications to individual justices each term and that nearly 20 percent of those applications are applications for stays).

26. *See infra* notes 72, 78.

27. *See supra* notes 3–7 and Part I.

28. *See* STEPHEN M. SHAPIRO, ET AL., SUPREME COURT PRACTICE 872 (10th ed. 2013) [hereinafter SUPREME COURT PRACTICE] (such "relief may be of the utmost importance, even to the point of life-or-death significance"); *see also* Gonen, *supra* note 1, at 1163–64:

> Because appellate review of a case can take months or years, the effect of a lower court's judgment while a case makes its way through the appellate process can have drastic implications for the parties. In some cases, . . . the decision of a single Justice will have the same effect as a decision on the merits.

29. White House, Fact Sheet: US Reports its 2025 Emissions Target to the UNFCCC (Mar. 31, 2015), https://www.whitehouse.gov/the-press-office/2015/03/31/fact-sheet-us-reports-its-2025-emissions-target-unfccc [https://perma.cc/LK8K-2FPB] (announcing how the Clean Power Plan would help achieve the U.S.'s commitments to the Paris Climate Accord). But the US may withdraw from the Paris Agreement, an agreement regarding greenhouse gas emissions mitigation within the United Nations Framework Convention on Climate Change. *See* U.S. Dep't of State, Communication

to combat global warming by reducing greenhouse gas emissions by 26 to 28 percent by 2025.

Michigan v. EPA[30] serves as an example of the stakes at play for stay determinations regarding injunctive orders of agency regulations generally and, more specifically, of environmental protections:

> The day after [the Supreme] Court ruled in Michigan [sic] that EPA had violated the Clean Air Act ("CAA") in enacting its rule regulating fossil fuel-fired power plants . . . , EPA boasted in an official blog post that the Court's decision was effectively a nullity. Because the rule had not been stayed during the years of litigation, EPA assured its supporters that "the majority of power plants are already in compliance or well on their way to compliance." Then, in reliance on EPA's representation that most power plants had already fully complied, the D.C. Circuit responded to this Court's remand by declining to vacate the rule that this Court had declared unlawful. In short, EPA extracted "nearly $10 billion a year" in compliance from power plants before this Court could even review the rule, and then successfully used that unlawfully-mandated compliance to keep the rule in place even after this Court declared that the agency had violated the law.[31]

Abortion. Whether a court stays an order holding abortion restrictions unconstitutional either significantly reduces the availability of abortions or prevents a state from regulating the procedures. Abortion regulations are one of the areas where court decisions regarding stays have obvious impacts while appeal is pending. If a court stays an order enjoining enforcement of abortion restrictions, women who may have otherwise received abortions may not. If a court does not stay such an order, it is likely that the public health or life-preserving purposes of the regulations will be thwarted in the interim.

Decisions on stays pending appeal of abortion-related injunctions have high stakes, both for states attempting to regulate abortion and for women trying to obtain abortions.[32] The effects of courts' stay determinations regarding Texas's

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Regarding Intent to Withdraw from Paris Agreement (Aug. 4, 2017), https://www.state.gov/r/pa/prs/ps/2017/08/273050.htm [https://perma.cc/TLD7-8QWF].

30. Michigan v. EPA, 135 S. Ct. 2699 (2015).

31. Application by 29 States and State Agencies for Immediate Stay of Final Agency Action During Pendency of Petitions for Review at 1–2, West Virginia v. EPA, 136 S. Ct. 1000 (2016) (No. 15A773) (internal citations omitted); *see also* Jonathan H. Adler, *Supreme Court Puts the Brakes on the EPA's Clean Power Plan*, WASH. POST (Feb. 9, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/02/09/supreme-court-puts-the-brakes-on-the-epas-clean-power-plan/ [http://perma.cc/PD8U-KJSG] (suggesting that the US Supreme Court granted a stay halting implementation of the Clean Power Plan in part because the Court was "concerned about a replay of *Michigan v. EPA*, in which the court invalidated another EPA rule to little practical effect").

32. *See* David S. Cohen, *What Constitutes an Emergency?: The Supreme Court Will Stay a Lower Court's Ruling Only for the Benefit of Politics, Not People*, SLATE (Oct. 18, 2014), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/10/supreme_court_stay_orders_politics_wins_out_in_gay_marriage_abortion_affordable.html [https://perma.cc/DHY4-4RPC].

abortion restrictions[33] are a fitting example of these potential risks to women seeking abortions. After plaintiffs sued to prevent enforcement of new abortion restrictions in Texas and courts' stay decisions[34] allowed for enforcement of the restrictions, the number of Texas abortion clinics decreased from forty-one to eighteen, and there was a 14 percent drop in the number of abortions performed in the state.[35]

Tobacco and Cigarette Industry. Stay decisions in litigation against tobacco companies and cigarette manufacturers can have unique financial and health ramifications. In *United States v. Philip Morris USA, Inc.*,[36] the district court enjoined the defendant cigarette manufacturers and tobacco-related trade organizations from certain marketing practices and ordered certain corrective statements and marketing disclosures. If the court had stayed that order, the stay would have arguably resulted in increased illnesses and deaths by cigarettes. Defendants argued that, if the court did not stay the order pending appeal, compliance could cost the defendants millions of dollars and could cause them, irrecoverably, to lose market share to companies not subject to the order.[37] The district court, however, denied the stay motion because "smokers, potential smokers, young people exposed to Defendants' extensive and ubiquitous advertising and marketing campaigns, and those exposed (particularly the very young and elderly) to environmental tobacco smoke ('ETS') will be directly and seriously harmed if a stay is granted."[38]

Marriage. Before the Supreme Court resolved the question of whether same-sex couples had the right to marry in *Obergefell v. Hodges*,[39] stay decisions either prevented states from determining marriage requirements and left tens of thousands of couples in limbo,[40] or risked preventing couples who could not

33. *See* H.B. No. 2, 83rd Leg., 2d Spec. Sess., (Tex. 2013) [hereinafter H.B. 2]; TEX. HEALTH & SAFETY CODE ANN. § 171.0031(a) (West Cum. Supp. 2015); *Id.* § 245.010(a).

34. *See* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2299 (2016); Whole Woman's Health v. Cole, 790 F.3d 563, 567, 598 (5th Cir. 2015) (per curiam); Whole Woman's Health v. Lakey, 769 F.3d 285, 305 (5th Cir. 2014), *vacated in part*, 135 S. Ct. 399 (2014).

35. Erik Eckholm, *Texas Ruling on Abortion Leads to Call for Clarity*, N.Y. TIMES (June 10, 2015), https://www.nytimes.com/2015/06/11/us/clarity-sought-on-undue-burden-standard-for-abortion-laws.html [https://perma.cc/UP2Z-WKXB]; Daniel Grossman, Kari White, Kristine Hopkins & Joseph E. Potter, *Change in Distance to Nearest Facility and Abortion in Texas, 2012 to 2014*, 317 JAMA NETWORK 437 (2017); Paul J. Weber, *Study: Texas Abortions Declined as Clinics Got Farther Away*, ASSOCIATED PRESS (Jan. 19 2017), https://apnews.com/3a0c19143ef5493082ed4a2c520e44b2 [https://perma.cc/TRV9-GZ3Q].

36. United States v. Philip Morris USA, Inc., 566 F.3d 1095, 1150 (D.C. Cir. 2009).

37. United States v. Philip Morris USA, Inc., 449 F. Supp. 2d 988, 991 (D.D.C. 2006) (denying motion to stay the final judgment and remedial order pending appeal).

38. *Id.* at 990.

39. Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

40. *See, e.g.*, Bourke v. Beshear, 996 F. Supp. 2d 542, 557–58 (W.D. Ky. 2014), *rev'd sub nom.* DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014), *rev'd sub nom. Obergefell*, 135 S. Ct. at 2584 ("The Court has concerns about implementing an order which has dramatic effects, and then having that order reversed . . . . Under such circumstances, rights once granted could be cast in doubt."); Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 928 (N.D. Cal. 2010), *aff'd sub nom.* Perry v. Brown, 671 F.3d

marry from receiving marital benefits, including parental rights.[41] Stay decisions had potentially life-changing and society-changing significance.

States were unlikely to somehow "unmarry" same-sex couples who married while marriage was available to them while appeals or certiorari were pending.[42] Conversely, a same-sex couple could not have retroactively married if one member of the couple had become incompetent or passed away while appeal or certiorari were pending.

The "Muslim Ban" or "Travel Ban" and Presidential Executive Orders. The executive orders and federal agency actions[43] that have come, and may continue to come, out of Donald Trump's presidency highlight the import of stay determinations.[44] Some estimate that Trump's initial executive order banning

1052 (9th Cir. 2012); Garden State Equal. v. Dow, 79 A.3d 1036, 1041 (N.J. 2013) (rejecting state's argument that "once it grants marriage licenses to even a handful of same-sex couples, it is virtually impossible . . . to undo that action later" and commenting that "California's experience reveals the opposite"); Idaho Brief in Support of an Emergency Application of Governor C.L. "Butch" Otter to Stay Mandate Pending Disposition of Applications for Stay Pending Rehearing and Certiorari at 3–4, Otter v. Latta, 135 S. Ct. 344 (2014) (No. 14A374) ("A stay is also necessary to minimize the enormous disruption to the State and its citizens of potentially having to 'unwind' hundreds of same-sex marriages [pending the Ninth Circuit's decision] . . . .").

41. A same-sex couple could not have retroactively married if one member of the couple had become incompetent or passed away while appeal or certiorari were pending. *See* Cohen, *supra* note 32. But courts may find retroactive marriages in the eight states that recognize common law marriage. *See* Andrew Dys, *Same-Sex Legal Groundbreaker: Judge Says Rock Hill Couple Married in S.C. for Decades*, HERALD (Mar. 19, 2017 7:12 P.M.), http://www.heraldonline.com/news/local/article139540723.html#storylink=cpy [https://perma.cc/SY29-5T7Y] (South Carolina judge held that two women had been in a common law marriage for over thirty years); Stephanie Francis Ward, *Family Court Judge Rules* Obergefell *Applies Retroactively, and Women Had a Common-Law Marriage*, ABA J. (Mar. 20, 2017), http://www.abajournal.com/news/article/obergefell_applies_retroactively_says_family_law_court_judge#When:20:30:00Z [https://perma.cc/Q5ZQ-2BQB].

42. *See Bourke*, 996 F. Supp. 2d at 557–58; *Garden State Equal.*, 79 A.3d at 1041 ("[T]he State contends that 'once it grants marriage licenses to even a handful of same-sex couples, it is virtually impossible . . . to undo that action later'."). Idaho's brief in *Otter v. Latta,* supporting an emergency application to stay, noted that "allowing such marriages now will undercut this Court's unique role as final arbiter of the profoundly important constitutional questions surrounding the constitutionality of State marriage laws." Idaho Brief in Support of Emergency Application of Governor C.L. "Butch" Otter to Stay Mandate Pending Disposition of Applications for Stay Pending Rehearing and Certiorari, *supra* note 40, at 3–4.

43. *See* Pres. Memorandum, 83 Fed. Reg. 13367 (Mar. 23, 2018) ("Military Service by Transgender Individuals"); Proclamation No. 9645, 82 Fed. Reg. 45161 (Sept. 24, 2017) ("Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats"); Exec. Order No. 13,780, 82 Fed. Reg. 13209 (Mar. 6, 2017) ("Protecting the Nation From Foreign Terrorist Entry Into the United States"); Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017) ("Protecting the Nation from Foreign Terrorist Entry into the United States"); Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017) ("Enhancing Public Safety in the Interior of the United States"); Exec. Order No. 13,767, 82 Fed. Reg. 8793 (Jan. 25, 2017) ("Border Security and Immigration Enforcement Improvements").

44. This Article leaves detailed discussion of stays pending appeal of agency or executive orders and stays of removal for separate development. Portia Pedro, Staying Agency (2017) (unpublished manuscript) (on file with author). Stays of agency orders are in accordance with rules specific to agencies. *See* FED. R. APP. P. 18; 2d Cir. R. 18.

some travel from specified Muslim countries affected hundreds of people in the first three days[45] and would have affected more than 65,000 visas in total.[46] A number of federal district court judges issued nationwide preliminary stays of removals[47] that would have occurred pursuant to the order.[48] The decision to stay orders preventing enforcement of the travel bans could threaten public safety by letting likely terrorists into the country. After people are allowed into the country, it becomes increasingly complicated and difficult to remove them, and acts of violence that they commit while in the United States cannot be undone. The decision to grant stays of orders preventing the enforcement of the travel bans could result in US citizens being separated from their relatives, universities

45. *See* Lauren McGaughy and Holly K. Hacker, *Trump Travel Ban Affects Hundreds of Students, Faculty at Texas Universities*, DALL. MORNING NEWS (Jan. 31, 2017), https://www.dallasnews.com/news/higher-education/2017/01/30/ut-urges-immigrant-faculty-students-avoid-mexican-border-travel-overseas [https://perma.cc/ET5Q-5Y6N]; *see also* Laura King, Barbara Demick & James Queally, *Confusion Reigns at U.S. Airports as Protests of Trump Executive Order Enter Second Day*, L.A. TIMES (Jan. 29, 2017), http://www.latimes.com/nation/la-na-pol-trump-immigration-vetting-20170129-story.html [https://perma.cc/R45V-NW9P].

46. *See* Alicia A. Caldwell, *60,000 Visas Canceled by Trump Order*, BOS. GLOBE (Feb. 4, 2017), http://www.bostonglobe.com/news/nation/2017/02/03/visas-canceled-trump-order/D2d0kU0CwVXkpbCY2pLrrO/story.html [https://perma.cc/DZ85-42AY]; Kathryn Casteel & Andrea Jones-Rooy, *Trump's Latest Travel Order Still Looks a Lot Like a Muslim Ban*, FIVE THIRTY EIGHT (Sept. 28, 2017), https://fivethirtyeight.com/features/trumps-latest-travel-order-still-looks-a-lot-like-a-muslim-ban [https://perma.cc/U2SH-SBK2]; Glenn Kessler, *The Number of People Affected by Trump's Travel Ban: About 90,000*, WASH. POST (Jan. 30, 2017), https://www.washingtonpost.com/news/fact-checker/wp/2017/01/30/the-number-of-people-affected-by-trumps-travel-ban-about-90000/?utm_term=.e73b31a79803 [https://perma.cc/RM78-C9L8].

47. Stays of removals, and particularly emergency stays of removals, differ from other injunctive stays of final orders or judgments pending appeal in a number of ways. *See* discussion at *infra* note 70. Nevertheless, as the Trump administration issues more executive orders and opponents challenge the orders in court, there may be significant stay decisions regarding final injunctive orders during this presidency.

48. *See* Darweesh v. Trump, No. 17 CIV. 480 (AMD), 2017 WL 388504, at *1 (E.D.N.Y. Jan. 28, 2017) (granting emergency motion for stay of removal); Ariane de Vogue, Eli Watkins & Alanne Orjoux, *Homeland Security to Comply with Orders Not to Deport Travelers*, CNN (Jan. 29, 2017), http://www.cnn.com/2017/01/29/politics/ny-immigration-order-stay [https://perma.cc/V2S5-Z4WH] (reporting that federal district court judges in New York, Virginia, and Washington state temporarily prevented the enforcement of the executive order "for citizens of seven Muslim-majority countries who have already arrived in the US and those who are in transit, and who hold valid visas, ruling they cannot be removed from the US," and noting that two Massachusetts judges "went further, saying the government should notify travelers who would have been affected by the executive order that for the next seven days they are free to travel to Boston").

Although some of this litigation will not involve stays of final orders or injunctions, the development of the standard for injunctive stays pending appeal could be helpful for these types of emergency situations because various procedures share the same standards. *See, e.g.*, Washington v. Trump, No. C17-0141JLR, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017) (temporary restraining order preventing enforcement of several sections of Exec. Order No. 13,769); *see also Darweesh*, 2017 WL 388504, at *1 (granting emergency motion for stay of removal).

A district court noted that there are two potential tests for determining a temporary preliminary restraining order of provisions of an executive order, but a number of courts have held that the alternative test is inconsistent with a recent Supreme Court opinion. *See Washington*, 2017 WL 462040, at *2 (noting the traditional test and an alternative test, the "serious questions" test); *infra* note 156 and text accompanying notes 152–156.

unable to educate students, and employers without prospective employees in the country. At the time of writing, the matter is still very much in flux and conflicting predictions and pronouncements abound.[49]

Drinking Water. Whether a court grants or denies a stay can also mean the difference between safe drinking water for the public and $10.5 million in extra monthly costs to a city.[50] In 2016, a district court ordered city officials and operators of the Flint, Michigan water system to provide safe drinking water to residents.[51] Some defendants alleged that denying a stay would cost them $10.5 million per month to provide daily delivery of bottled water.[52] But, if a court had granted a stay, some residents would not have had access to safe drinking water.[53]

Elections and Voting. How a court rules on a stay motion for an order enjoining election regulations can decide who is eligible to vote, whether states can enforce regulations to prevent voter fraud, and, perhaps, even the outcome of the election. For stay determinations regarding election regulations, "there can be no do-over and no redress."[54]

In *Frank v. Walker,*[55] the Seventh Circuit decided whether to grant a stay of an order preventing enforcement of new Wisconsin voter identification requirements. Granting the stay would have resulted in 300,000 registered voters becoming ineligible to vote in the upcoming election,[56] and thousands of absentee ballots would not have met the necessary requirements.[57] As the dissent noted, the 2010 Wisconsin governor's race was decided by less than half of the number of registered voters who would be disenfranchised by a stay, and one-

49. *See, e.g.*, Erwin Chemerinsky, *The Travel Ban and the Supreme Court*, A.B.A. J. (Apr. 2, 2018), http://www.abajournal.com/news/article/chemerinsky_the_travel_ban_and_the_supreme_court [https://perma.cc/CBN2-XCTE] (noting that no other case on the Supreme Court's docket is likely to be more important than the travel ban case and that a decision is expected by late June 2018); Ariane de Vogue, *Supreme Court Sets Travel Ban Arguments for Final Day of Term*, CNN (Feb. 23, 2018), https://www.cnn.com/2018/02/23/politics/supreme-court-travel-ban/index.html [https://perma.cc/ER5U-DWRQ]; Proclamation No. 9645, 82 Fed. Reg. 45161 (Sept. 24, 2017) ("Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats"); *Federal Judge in Hawaii Expands Block on Trump Travel Ban*, REUTERS (Oct. 21, 2017), https://www.reuters.com/article/us-usa-immigration-court/federal-judge-in-hawaii-expands-block-on-trump-travel-ban-idUSKBN1CQ0MI [https://perma.cc/4QW7-TT77].

50. Concerned Pastors for Soc. Action v. Khouri, 844 F.3d 546, 549 (6th Cir. 2016) (calling the claim "disingenuous" and opining that the cost would be nowhere near that high).

51. Concerned Pastors for Soc. Action v. Khouri, 217 F. Supp. 3d 960, 980 (E.D. Mich. 2016).

52. *Concerned Pastors for Soc. Action*, 844 F.3d at 549 (calling the claim "disingenuous" and opining that the cost would be nowhere near that high).

53. Concerned Pastors for Soc. Action v. Khouri, 220 F. Supp. 3d 823, 829 (E.D. Mich. 2016).

54. Fla. Democratic Party v. Detzner, No. 4:16CV607-MW/CAS, 2016 WL 6090943, at *8 (N.D. Fla. Oct. 16, 2016) (preliminary injunction) (quoting League of Women Voters of N.C. v. North Carolina, 769 F.3d 224, 247 (4th Cir. 2014)).

55. Frank v. Walker, 769 F.3d 494 (7th Cir. 2014) (per curiam).

56. *Id.* at 498 (Williams, J., dissenting).

57. *Id.* at 499.

third of that number of registered voters decided the 2010 Wisconsin senatorial race.[58] Denying the stay would have enjoined the state from "preventing in-person voter-impersonation fraud and promoting public confidence in the integrity of the electoral process."[59] The decision to deny a stay could also have required "'last-minute change[s]' in election procedures," which would have lead to "chaos" and confusion in the voting process.[60]

In a controversial stay determination of particular relevance to this Article, the United States Supreme Court stayed the Florida Supreme Court order for the Florida recount in the 2000 presidential election,[61] which, some say, in effect, declared George W. Bush the winner.[62] *Bush v. Gore*[63] is, perhaps, the most well-known US stay opinion. In *Bush v. Gore*, the United States Supreme Court stayed[64] the Florida Supreme Court's order requiring a hand recount of approximately 9,000 Miami-Dade County ballots that the ballot-counting machines rejected, and the inclusion of any additional legal votes for Gore in the statewide vote certifications.[65] In dissent, Justice Stevens noted that the stay applicants failed to carry their burden because "[c]ounting every legally cast vote cannot constitute irreparable harm."[66] Justice Scalia, in his concurrence, countered that assertion. Scalia, first, noted that hand-counting the ballots that machines had rejected threatened irreparable harm to then-presidential candidate Bush because counting those questionable votes and then, later, ruling on the legality of those votes would not produce election results required by democratic stability.[67] Second, if the Court denied the stay and then later determined that the recount was unlawful, then the manual recount that may have already occurred in the interim would have degraded the ballots, rendering any subsequent lawful recount inaccurate.[68] Ultimately, the Court stayed the Florida Supreme Court's order for a manual recount, effectively deeming George W. Bush the winner of the election.

58. *Id.* at 498.

59. Frank v. Walker, 17 F. Supp. 3d 837, 899 (E.D. Wis.), *rev'd*, 768 F.3d 744 (7th Cir. 2014).

60. *Frank*, 769 F.3d at 496 (quoting plaintiffs' motion for reconsideration and citing Purcell v. Gonzalez, 549 U.S. 1, 1 (2006)).

61. Bush v. Gore, 531 U.S. 1046 (2000) (mem.).

62. *Id.* at 1047–48 (Stevens, J., dissenting) ("[T]he entry of the stay would be tantamount to a decision on the merits in favor of the applicants." (quoting Nat'l Socialist Party of Am. v. Skokie, 434 U.S. 1327, 1328 (1977) (Stevens, J., in chambers))).

63. *Id.* at 1046.

64. *Bush*, 531 U.S. at 1046.

65. Gore v. Harris, 772 So. 2d 1243, 1262 (Fla. 2000).

66. *Bush*, 531 U.S. at 1047 (Stevens, J., dissenting).

67. *Id.* at 1046 (Scalia, J., concurring).

68. *Id.*

II.
DEFINING STAYS

This Article focuses on stays pending appeal in civil matters. It reserves for future exploration discussion of various types of claims with separate stay doctrine, including bankruptcy, class actions, copyright or patent, damages, habeas corpus, criminal matters, stays of arbitration decisions, and stays of agency actions or decisions.[69] Numerous courts of appeals have separate rules for stays of death penalty executions.[70]

Unless there is a court order granting a stay, a final judgment in an action for an injunction is enforceable, even while an appeal is pending.[71] Despite the significant and irreversible outcomes for litigants and the public, courts either do not apply the stay standard or, when courts do apply the standard, they do not apply it consistently. This is a problem because the stakes are high and getting it "right" matters. Before explaining the near lawless nature of how courts determine whether to grant stays in Part III, this Part describes the standard and procedure that ostensibly guide courts as they decide requests for stays pending appeal.

A. Stay Mechanics

To obtain a stay of a district court's judgment or order pending appeal, typically a losing party must move, first, in the district court for a stay of that court's own order or judgment.[72] A party losing a stay determination can later

69. *See, e.g.*, Koninklijke Philips N.V. v. Zoll Med. Corp., 217 F. Supp. 3d 362, 365 (D. Mass. 2016) (patent); William A. Graham Co. v. Haughey, 794 F. Supp. 2d 566 (E.D. Pa. 2011) (copyright); Titan Tire Corp. of Bryan v. Local 890L, United Steelworkers of Am., 673 F. Supp. 2d 588, 590 (N.D. Ohio 2009) (arbitration); S.E.C. v. O'Hagan, 901 F. Supp. 1476 (D. Minn. 1995) (criminal); *In re* Neisner Bros., Inc., 10 B.R. 299, 300 (Bankr. S.D.N.Y. 1981) ("[T]he standards governing Rule 62(c) of the Federal Rules of Civil Procedure . . . are [not] applicable to a 'normal stay pending appeal' pursuant to Rule 805."); FED. R. CIV. P. 62(a)(1)–(2) (judgments or orders regarding an action for a receivership or that "direct[] an accounting in an action for patent infringement" are not stayed after being entered even if a party appeals); FED. R. BANKR. P. 8025 (bankruptcy); FED. R. CRIM. P. 38 (criminal); 9E AM. JUR. 2D, BANKRUPTCY § 3754 (2017).

This Article sets aside stays regarding criminal matters for future exploration in large part because of the differences in what is at stake and for whom between (non-habeas) civil and criminal matters. Separate rules may also govern stays pending appeals brought within a class action, under Civil Rule of Procedure 23(f). *See In re* Rail Freight Fuel Surcharge Antitrust Litig., 286 F.R.D. 88, 91 (D.D.C. 2012).

70. *See* 6TH CIR. R. 8; 3D CIR. R. 8.

71. FED. R. CIV. P. 62(a)(1).

72. *See* FED. R. APP. P. 8(a)(1). *But see* Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 734 F.3d 406, 410 (5th Cir. 2013) (state made initial stay request to court of appeals instead of district court because a stay motion before the district court was impracticable as a final injunction of state law would take effect the day after the district court order). A court could also "suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights" pending appeal. FED. R. CIV. P. 62(c). That mechanism is not the same as a stay. Nken v. Holder, 556 U.S. 418, 428–31 (2009); *see* Part II.C. A court can, *sua sponte*, stay its own injunctive order pending appeal, but reviewing courts may decline to affirm such a stay except in "extreme" circumstances. *See* Fletcher v. United States, No. 02-CV-427-GKF-PJC, 2016 WL 927196,

appeal that determination or submit a new stay request to the court of appeals.[73] Typically, a randomly assigned motions panel of appellate judges would decide the request de novo[74] by a majority of the panel.[75] A party who loses before the motions panel can request reconsideration either by the panel or en banc court of appeals, which would also typically be de novo.[76] To obtain a stay of a court of appeals' judgment or order pending reconsideration, rehearing en banc, or pending a writ of certiorari, typically a losing party can request de novo reconsideration by the panel or en banc consideration.[77]

Litigants who want the Supreme Court to stay a district court's or appeals court's injunctive judgment or order also must request a stay from a lower court first.[78] After that, any further request must go to the appropriate circuit justice[79] to prevent justice shopping.[80] A single justice can grant or deny the application for a stay, vacate a stay, or refer the application for a stay to the full Court.[81] Although the Court is not prone to insert itself in a matter that is still pending in a court of appeals unless there are "compelling and unusual circumstances,"[82] a single justice can grant, deny, reinstate, or vacate a stay for a matter that is pending court of appeal review and that is not pending a writ of certiorari. [83] A

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at *3–4 (N.D. Okla. Mar. 11, 2016) (amending judgment to eliminate "pre-granted" stay pending appeal).

73. FED. R. APP. P. 8(a)(2)(A).

74. *See, e.g.*, Frank v. Walker, 766 F.3d 755, 756 (7th Cir. 2014) (mem.) (appellate panel considered motion for a stay of the district court's order without referencing the district court opinion or deferring to it). *But see* Voting for Am., Inc. v. Andrade, 488 F. App'x 890, 906 (5th Cir. 2012) (reviewing district court's stay determination for abuse of discretion); Golden v. Kelsey-Hayes Co., 73 F.3d 648, 657 (6th Cir. 1996) (same).

75. FED. R. APP. P. 8(a)(2)(D).

76. *See, e.g.*, Frank v. Walker, 769 F.3d 494, 495 (7th Cir. 2014) (per curiam).

77. *Id.*

78. *See* SUP. CT. R. 23(3); *see also* FED. R. CIV. P. 62(c) (governing requests for civil stays of judgments pending appeal in federal district courts); FED. R. APP. P. 8(a) (outlines procedures for stays of district courts' orders or judgments pending appeal.). The Supreme Court procedures for stays pending appeal to the Court are the same as those for stays pending writs of certiorari. SUP. CT. R. 23; SUPREME COURT PRACTICE, *supra* note 28, at 881.

79. *See* SUP. CT. R. 22(3); SUPREME COURT PRACTICE, *supra* note 28, at 872; Gonen, *supra* note 1, at 1172.

80. Gonen, *supra* note 1, at 1173 ("These rules are mainly intended to prevent litigants from filing an application with whichever Justice they think will be most likely to rule favorably on their application—a practice referred to as 'Justice shopping.'").

81. *See* SUP. CT. R. 23(1); 28 U.S.C. § 2101(f) (2012); All Writs Act, 28 U.S.C. § 1651(a) (2012); *see also* Nken v. Holder, 556 U.S. 418, 426 (2009) (the All Writs Act authorized federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law"); SUP. CT. R. 22(5) ("A Justice to whom an application for a stay or for bail is submitted may refer it to the Court for determination."); SUPREME COURT PRACTICE, *supra* note 28, at 872–73, 893–94; Gonen, *supra* note 1, at 1166–68 (2008) (discussing the sources of the Supreme Court's power to grant stays pending appeal).

82. SUPREME COURT PRACTICE, *supra* note 28, at 883; *see* Heckler v. Lopez, 463 U.S. 1328 (1983) (Rehnquist, J., in chambers).

83. SUPREME COURT PRACTICE, *supra* note 28, at 881–82; SUP. CT. R. 23.

justice can also refer an application regarding a stay pending court of appeal review to the full Court.[84]

Justices give great deference to district court and court of appeals stay determinations when the matters are still pending before a court of appeals.[85] Referrals to the full Court are typically reserved only for specific complex or controversial questions, and the Court makes stay determinations by majority decision.[86] Deciding as individuals, justices often put aside their own views and, instead, predict or find out through informal means the view of the full Court.[87] If the circuit justice denies the request for a stay, the applicant can renew the application by reapplying to another justice.[88] At this point, justice shopping could be the norm,[89] but the Court disfavors renewals,[90] and typically individual justices refer renewals to the full Court.[91] The Court almost never grants a renewed application for a stay.[92]

84. SUPREME COURT PRACTICE, *supra* note 28, at 881–84 (citing to instances of individual Justices referring such requests to the full Court).

85. *See* Fargo Women's Health Org. v. Schafer, 507 U.S. 1013, 1014 (1993) (O'Connor, J., concurring) (mem.) ("When a matter is pending before a court of appeals, it long has been the practice of members of this Court to grant stay applications only 'upon the weightiest considerations.'" (quoting O'Rourke v. Levine, 80 S. Ct. 623, 624 (1960) (Harlan, J., in chambers))); Ruckelshaus v. Monsanto Co., 463 U.S. 1315, 1316 (1983) ("[A] district court's conclusion that a stay is unwarranted is entitled to considerable deference.").

86. Gonen, *supra* note 1, at 1173. Circuit justices referred to the full Court many, if not all, of the most controversial stay determinations of the past few terms. *See supra* Part II.A.

87. *See* Holtzman v. Schlesinger, 414 U.S. 1304, 1313 (1973) (Marshall, J., in chambers); SUPREME COURT PRACTICE, *supra* note 28, at 873 ("[T]he practice and procedure are largely in terms of individual action by the various Justices. . . . A number of the Justices have emphasized that when they act in their capacity as Circuit Justices they act primarily as a spokesperson or 'surrogate' for the entire Court."); *Id.* at 896 ("[A] Justice may contact other members of the Court who are available in person or by telephone and ascertain their views without formally submitting or referring the application to the entire Court, particularly when the Court is not in session."); Gonen, *supra* note 1, at 1174.

88. SUP. CT. R. 22(4).

89. Because parties can submit their renewed application to any justice of their choosing, it follows that parties would aim to submit renewed applications to the justice most likely to grant their request.

90. SUP. CT. R. 22(4); *see* SUPREME COURT PRACTICE, *supra* note 28, at 891 ("[T]he Justices are reluctant to encourage such shopping around by granting what has already been denied, and rarely grant such applications.").

91. SUPREME COURT PRACTICE, *supra* note 28, at 876 ("The general policy is to refer the renewed application to the full Court for action unless time does not permit . . . ."); *Id.* at 892 ("[I]t is also the present practice for the Justice to whom a resubmission has been transmitted to refer the application to the entire Court for action.").

92. *See id.* at 892 ("Almost uniformly the reapplications have been denied."); Gonen, *supra* note 1, at 1177; *see also* SUPREME COURT PRACTICE, *supra* note 28, at 897 (noting that the Court is unlikely to review or reverse an individual Justice's stay determination except "in the most extraordinary circumstances").

Justices usually decide stays solely on the submitted papers.[93] Individual justices, acting as circuit justices, typically consider stay determinations to be "in-chambers" work.[94] Yet justices very rarely write in-chambers opinions.[95]

Because parties may ordinarily enforce injunctive orders or judgments immediately, courts often try to decide motions for stays pending appeal rather quickly. Justices often review stay applications for only a matter of minutes and decide even more complex applications within twenty-four hours.[96] Circuit and district court judges also often review and decide motions for stays within a short period of time.[97]

Stays pending appeal typically terminate when a court completes its review.[98] For example, a stay granted by an individual justice typically has effect only until the Court decides whether to grant certiorari.[99] If the Court does grant certiorari, then any stay would typically end with the Court's decision on the case.[100]

B. The Standard for Determining Stays

When determining stays of injunctive orders[101] pending appeal, federal courts ostensibly consider the factors enumerated in *Hilton v. Braunskill*:[102]

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93. SUPREME COURT PRACTICE, *supra* note 28, at 876 (Court rules do not provide for oral argument for stay applications; the last hearing on a stay application was in 1980). Courts of Appeals may hold hearings on stay motions more often than the Supreme Court does, but still usually decide stay motions on the papers. *See supra* notes 74 and 79. *But see, e.g.*, Frank v. Walker, 769 F.3d 494, 495 (7th Cir. 2014) (per curiam) (noting that the court heard oral argument).

94. SUPREME COURT PRACTICE, *supra* note 28, at 873–74.

95. *Id.* at 874.

96. *See* Gonen, *supra* note 1, at 1173 n.95 (citing ROBERT L. STERN ET AL., SUPREME COURT PRACTICE § 17.2, at 850 (9th ed. 2007) ("Justices often deny applications within 24 hours after they are filed.")).

97. *See, e.g.*, Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 748 F.3d 583, 588 (5th Cir. 2014) (court responded to emergency stay motion "[w]ithin forty-eight hours"); Russell v. Lundergan-Grimes, 769 F.3d 919, 920 (6th Cir. 2014) (deciding motion for stay three days after district court issued injunction against enforcing an electioneering statute three weeks before election).

Federal courts sometimes employ a two-stage strategy for making stay determinations. This strategy typically entails granting a "temporary stay" or "administrative stay" until the court has time to receive or review briefs or to hold oral argument on the motion. *See, e.g.*, *In re* Chevron Corp., 650 F.3d 276, 286 (3d Cir. 2011) (granting a temporary stay before hearing oral arguments on the motion for a stay pending appeal); Brady v. Nat'l Football League, 638 F.3d 1004, 1005 (8th Cir. 2011) (granting a "temporary" or "administrative stay" in order "to give the court sufficient opportunity to consider the merits of the motion for a stay pending appeal") (internal citations omitted). *But see Brady*, 638 F.3d at 1005 (Bye, J., dissenting) (opining that courts do not employ a two-step temporary administrative stay process for non-emergency stays in the circuit).

98. SUPREME COURT PRACTICE, *supra* note 28, at 895–97.

99. *Id.*; *see, e.g.*, Gloucester Cty. Sch. Bd. v. G.G., 136 S. Ct. 2442, 2442 (2016) (mem.).

100. SUPREME COURT PRACTICE, *supra* note 28, at 897.

101. Procedure differs with respect to stays of damages orders. FED. R. CIV. P. 62(a), (d).

102. *See* Hilton v. Braunskill, 481 U.S. 770, 776 (1987); *see also* Nken v. Holder, 556 U.S. 418, 434 (2009) (applying four *Hilton* factors). Courts consider these same, or very similar, factors when determining whether to grant a preliminary injunction. *See infra* Part II.C.

(1) whether the movant has demonstrated a likelihood of success on the merits;

(2) whether the movant is likely to suffer irreparable harm if the court denies a stay;

(3) whether the balance of the hardships to the parties counsels in favor of issuing a stay;[103] and

(4) where the public interest lies.

When determining applications for stays pending certiorari, Supreme Court justices consider factors that largely accord with those that lower federal courts use when determining stays pending appeal requests. For the Supreme Court to grant a stay pending certiorari, an 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";

(3) "a likelihood that irreparable harm will result from the denial of a stay"; and

(4) "in close cases it may be appropriate to 'balance the equities'—to explore the relative harms to applicant and respondent, as well as the interests of the public at large."[104]

The Supreme Court's approach for determining stays pending certiorari, however, differs in at least two key respects from lower federal courts' approach for determining stays pending appeal. First, in contrast to lower federal courts, Supreme Court justices consider the probability that the full Court will vote to grant certiorari. Second, unlike the standard for stays pending appeal, the Court's

103. Federal courts often use language such as "whether issuance of the stay will substantially injure the other parties interested in the proceeding" when describing the third factor. *See Nken*, 556 U.S. at 426; *see also* Chafin v. Chafin, 133 S. Ct. 1017, 1027 (2013); June Med. Servs., LLC v. Gee, 814 F.3d 319, 323 (5th Cir. 2016), *vacated on other grounds*, 136 S. Ct. 1354 (2016); Campaign for S. Equal. v. Bryant, 773 F.3d 55, 57 (5th Cir. 2014); *In re* World Trade Ctr. Disaster Site Litig., 503 F.3d 167, 170 (2d Cir. 2007); Republic of Phil. v. Westinghouse Elec. Corp., 949 F.2d 653, 658 (3d Cir. 1991); Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977); Garcia-Mir v. Meese, 781 F.2d 1450, 1453 (11th Cir. 1986).

Determining whether a stay will injure other parties and balancing the hardships are ostensibly different tasks. Despite using language that only refers to whether there would be harm to nonmoving parties if the court were to issue a stay pending appeal, federal courts likely intend this factor to also include balancing the equities. *See Nken*, 556 U.S. at 438 (Kennedy, J., concurring) ("Under the Court's four-part standard, the [movant] must . . . establish[] that the interests of the parties [] weigh in his or her favor."); Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20, 26–27 (2008) (preliminary injunction) (discussing the third factor as whether "the balance of equities tips in [the movant's] favor" and noting "the importance of assessing the balance of equities" while discussing the third factor).

104. Hollingsworth v. Perry, 558 U.S. 183, 190 (2010) (citing Lucas v. Townsend, 486 U.S. 1301, 1304 (1988) (Kennedy, J., in chambers)); Rostker v. Goldberg, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers); *see Hollingsworth*, 558 U.S. at 199 (Breyer, J., dissenting) (suggesting a correction to the Court's description of the fourth consideration for in-chambers stay determinations by saying "(4) the balance of the equities (including, the Court should say, possible harm to the public interest) favors issuance"); SUPREME COURT PRACTICE, *supra* note 28, at 898–99.

standard for stays pending certiorari calls for balancing the relative harms to the applicant and respondent, and to the public interest, only in a "close case."[105] Like lower federal courts, however, the Court has not stated in a stay decision that it will *not* consider these two factors.

While parties moving for stays pending appeal or certiorari have the burden of demonstrating that the four factors warrant granting a stay,[106] two factors stand out as particularly important. First, courts consider the likelihood of success to be one of the two "most critical" factors in determining stays pending appeal.[107] To demonstrate likelihood of success upon review, the movant must make "a strong showing that he is likely to succeed."[108] It is not enough for a movant to show that the chance of success is only a "mere 'possibility'" or "better than negligible."[109]

Irreparable harm represents the second critical factor for deciding stay requests.[110] A movant must show that, absent a stay, he or she likely will be irreparably injured pending appeal. A harm is irreparable if any other available remedy, such as compensatory or corrective relief, will be insufficient.[111]

105. *Rostker*, 448 U.S. at 1308 (Brennan, J., in chambers).

106. *See Hollingsworth*, 558 U.S. at 190; Latta v. Otter, 771 F.3d 496, 498 (9th Cir. 2014) (per curiam) (marriage); Bos. Taxi Owners Ass'n, Inc. v. Boston, 187 F. Supp. 3d 339, 341–42 (D. Mass. 2016); Rosenbrahn v. Daugaard, 61 F. Supp. 3d 862, 876–77 (D.S.D. 2015), *aff'd*, 799 F.3d 918 (8th Cir. 2015); Nat. Res. Def. Council, Inc. v. U.S. Food & Drug Admin., 884 F. Supp. 2d 108, 122 (S.D.N.Y. 2012).

107. *Nken*, 556 U.S. at 434 ("The first two factors of the traditional standard are the most critical."); Barber v. Bryant, 833 F.3d 510, 511 (5th Cir. 2016); Candelario-Del Moral v. UBS Fin. Servs. Inc. of P.R., 290 F.R.D. 336, 345 (D.P.R. 2013), *as corrected* (May 8, 2013), *aff'd sub nom. In re* Efron, 746 F.3d 30 (1st Cir. 2014); *Nat. Res. Def. Council, Inc.*, 884 F. Supp. 2d at 122; Friendship Edison Pub. Charter Sch. Collegiate Campus v. Nesbitt, 704 F. Supp. 2d 50, 51–52 (D.D.C. 2010); KSTU, LLC v. Aereo, Inc., No. 14-4020, 2014 WL 1687749, at *1 (10th Cir. Mar. 7, 2014).

108. *Nken*, 556 U.S. at 426 (2009) (quoting Hilton v. Braunskill, 481 U.S. 770, 776 (1987)).

109. *Id.* at 434 ("It is not enough that the chance of success on the merits simply be 'better than negligible. . . . [M]ore than a mere 'possibility' of relief is required." (quoting Sofinet v. INS, 188 F.3d 703, 707 (C.A.7 1999))); Brady v. Nat'l Football League, 779 F. Supp. 2d 1043, 1046–47 (D. Minn. 2011) (stay of preliminary injunction) (declining to adopt the "not wholly without doubt" standard for the likelihood of success factor, the court noted that the National Football League urged a "not wholly without doubt" standard, under which applicants meet the likelihood of success requirement if there is "*any possibility of success* on the merits").

110. *See Nken*, 556 U.S. at 434 (describing irreparable harm as one of the two "most critical" factors).

111. *See, e.g.*, Reynolds v. Int'l Amateur Athletic Fed'n, 505 U.S. 1301, 1302 (1992) (Stevens, J.) (preliminary injunction) (granting stay where "a decent respect for the incomparable importance of winning a gold medal in the Olympic Games convinces me that a pecuniary award is not an adequate substitute for the intangible values for which the world's greatest athletes compete").

The third factor that courts consider is balancing the harm to the movants against any harm to other parties.[112] Courts compare and "determine on which side the risk of irreparable injury weighs most heavily."[113]

Finally, federal courts consider the impact that the stay, or lack thereof, will have on people beyond the parties while appeal is pending.[114] Courts have recognized many public interests relevant to this fourth factor, such as public health and safety and notice of voting procedures.[115] In practice, however, courts do not always consider the public interest when determining stays.[116]

C. Stays Pending Appeal in Context and in Comparison

Although the procedural posture of stays pending appeal differs significantly from that of preliminary injunctions and temporary restraining orders, federal courts treat these three procedural mechanisms similarly. This difference in procedural postures between stays pending appeal and preliminary mechanisms suggests that, even if courts use similar factors for evaluating each mechanism, courts should weigh those factors differently when determining stays.[117] To stay a fully informed and reasoned order or judgment pending appeal, courts should require a showing at least as strong as what they require for a preliminary mechanism such as preliminary injunctions or temporary restraining orders.[118] Perhaps the import of this difference in procedural postures

112. *See* SUPREME COURT PRACTICE, *supra* note 28, at 900 ("Even if the applicant can demonstrate irreparable injury, that harm must be balanced against the injury to other parties to the case . . . .").

113. Holtzman v. Schlesinger, 414 U.S. 1304, 1309 (1973) (Marshall, J., in chambers). Balancing the hardships to the parties also played a key role in the *Bush v. Gore* stay determination. The dissent noted that the applicants did not demonstrate the likelihood of irreparable harm, but that there was "a danger that a stay may cause irreparable harm to respondents . . . because of the risk that 'the entry of the stay would be tantamount to a decision on the merits in favor of the applicants.'" Bush v. Gore, 531 U.S. 1046, 1047–48 (2000) (mem.) (Stevens, J., dissenting) (quoting National Socialist Party of Am. v. Skokie, 434 U.S. 1327, 1328 (1977) (Stevens, J., in chambers)).

114. *See* Nken v. Holder, 556 U.S. 418, 434 (2009) (characterizing inquiry as "where the public interest lies" (quoting Hilton v. Braunskill, 481 U.S. 770, 776 (1987))).

115. *See, e.g.*, Purcell v. Gonzales, 549 U.S. 1, 5 (2006) (recognizing public interest in avoiding "voter confusion"); United States v. Philip Morris USA, Inc., 449 F. Supp. 2d 988, 990 (D.D.C. 2006) (recognizing public interest in knowledge of health risks associated with smoking).

116. *See* Rostker v. Goldberg, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers) (the Supreme Court's standard for in-chambers determinations of applications for stays pending appeal or certiorari notes only that it "may be appropriate" to consider the public interest "in a close case"). *But see* SUPREME COURT PRACTICE, *supra* note 28, at 900 (suggesting that the Court does seem to consider the public interest when an applicant demonstrates irreparable harm).

117. *See* United States v. Omega Sols., LLC, 889 F. Supp. 2d 945, 948 (E.D. Mich. 2012) ("Though the factors are the same for both a preliminary injunction and a stay pending appeal, the balancing process is not identical due to the different procedural postures." (citing Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog, 945 F.2d 150, 153 (6th Cir. 1991))).

118. *See* Ohio Valley Envtl. Coal., Inc. v. U.S. Army Corps of Eng'rs, 890 F. Supp. 2d 688, 692–93 (S.D. W. Va. 2012) ("At this point, the merits of Plaintiffs' case have already been considered, and Plaintiffs have lost. . . . With this in mind, it would be problematic and unfair to allow Plaintiffs to further delay based on a showing much lower than that required for them to have received a preliminary injunction in the first place."); Gotanda, *supra* note 20, at 812 ("The rationale for imposing on the

for stays as opposed to preliminary injunctions and temporary restraining orders has gone unnoticed because courts and scholars have yet to evaluate the purposes, standards, and stakes of stays pending appeal, despite vast scholarly literatures on injunctions and temporary restraining orders.[119]

Stays are similar to injunctions and restraining orders in some respects. For example, stays, injunctions, and restraining orders can have comparable effects—"preventing some action before the legality of that action has been conclusively determined."[120] The mechanisms also share similar standards.[121]

Despite these similarities, the mechanisms differ in meaningful ways.[122] First, stays differ functionally from injunctions or restraining orders.[123] By issuing injunctions—whether preliminary or final—courts employ their coercive powers to tell a party "what to do or not to do."[124] Conversely, by issuing stays—largely regardless of the type of stay—courts do not tell any actor what to do, but, instead, temporarily suspend the enforceability of an order.[125] As a result, to

movant a heavier burden is that the motion for a stay has already received full consideration by the trial judge.").

119. *See, e.g.*, RENDLEMAN, *supra* note 20, at 528; FISS, INJUNCTION 11, *supra* note 20; Lynch, *supra* note 20, at 779.

120. Nken v. Holder, 556 U.S. 418, 428 (2009).

121. *Compare* eBay Inc. v. MercExchange, LLC, 547 U.S. 388, 391 (2006) ("[A] plaintiff seeking a permanent injunction must . . . demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction."), *with Nken*, 556 U.S. at 434 (noting that the issuance of a stay requires consideration of 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") (quoting Hilton v. Braunskill, 481 U.S. 770, 776 (1987)); *see also supra* Part II.C (explaining that courts often decide preliminary or interlocutory injunctions based on the four stay factors).

122. *See* Turner Broad. Sys., Inc. v. FCC, 507 U.S. 1301, 1302 (1993) ("[A]pplicants are not merely seeking a stay of a lower court's order, but an injunction against the enforcement of a presumptively valid Act of Congress. Unlike a stay, which temporarily suspends 'judicial alteration of the status quo,' an injunction 'grants judicial intervention that has been withheld by the lower courts.'" (citing Ohio Citizens for Responsible Energy, Inc. v. NRC, 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers))); FED. R. APP. P. 8(a)(1) (separating out "a stay of the judgment or order of a district court pending appeal" as a type of relief apart from "an order suspending, modifying, restoring, or granting an injunction while an appeal is pending"); FED. R. CIV. P. 62(b) and (c) (separating out "Stay Pending the Disposition of a Motion . . . for relief from a judgment or order" from "Injunction Pending an Appeal").

123. *See, e.g.*, *Nken*, 556 U.S. at 430–31 (distinguishing between stays and injunctions in the removal context because, among other reasons, Congress limited the availability of injunctions in 8 U.S.C. § 1252(f) (2012), titled "Limit on injunctive relief," and treated stays separately in § 1252(b)(3)(B), titled "Stay of order").

124. *Nken*, 556 U.S. at 428 ("defining 'injunction' as '[a] court order prohibiting someone from doing some specified act or commanding someone to undo some wrong or injury'" (quoting BLACK'S LAW DICTIONARY 784 (6th ed.1990))). *See also id.* ("[T]he order is directed at someone, and governs that party's conduct.").

125. *Id.* ("defining 'stay' as 'a suspension of the case or some designated proceedings within it.'" (quoting BLACK'S LAW DICTIONARY 1413)).

the extent courts require different levels of justification for the mechanisms, justices have noted that a request for an injunction "demands a significantly higher justification" than a request for a stay.[126]

Stays of final orders or judgments pending appeal also differ notably from preliminary injunctions and temporary restraining orders in terms of the requirements imposed on the court and parties. As noted above, courts consider similar factors in determining whether to grant a preliminary injunction or a stay.[127] Yet, the federal rules prescribe different requirements for stays pending appeal than they do for preliminary injunctions and temporary restraining orders.[128] For example, whenever a court issues a temporary restraining order without notice to a party, the order must "describe the injury and state why it is irreparable,"[129] but a court need not describe a stay decision.[130] In fact, "[e]very order granting an injunction and every restraining order must . . . state the reasons why it issued."[131] No federal court ever has to state the reasons why it granted or denied a motion or application for a stay.[132] In addition, a court may issue a preliminary injunction or a temporary restraining order only if the movant gives security,[133] but movants may not obtain stays of injunctive judgments pending appeal by posting a bond.[134]

Last, the procedural posture of stays differs significantly from that of preliminary injunctions and temporary restraining orders. Once a non-interlocutory appeal is pending, "the merits of the underlying case [to the extent that they are relevant to a final order or judgment] have already been decided upon by a court, unlike when a party is seeking a preliminary injunction" or temporary restraining order.[135] "[T]here is a reduced probability of error, at least with respect to a court's findings of fact, because the district court had the benefit

126. *See* Respect Me. PAC v. McKee, 131 S. Ct. 445, 445 (2010) (mem.) (quoting *Ohio Citizens*, 479 U.S. at 1313 (Scalia, J., in chambers)). Individual justices have historically echoed this view. *See* SUPREME COURT PRACTICE, *supra* note 28, at 879.

127. *See Nken*, 556 U.S. at 434 (noting "substantial overlap" between stay and preliminary injunction factors); Gotanda, *supra* note 20, at 812.

128. *Compare* FED. R. CIV. P. 62(c) (prescribing procedures for injunctive stays pending appeal), *and* FED. R. APP. P. 8(a) (same), *with* FED. R. CIV. P. 65 (prescribing procedures for preliminary injunctions and temporary restraining orders).

129. FED. R. CIV. P. 65(b)(2).

130. *See* FED. R. CIV. P. 62(c); FED. R. APP. P. 8(a). This difference may be due to the potential ex parte nature of the temporary restraining order, but it is a difference nonetheless.

131. FED. R. CIV. P. 65(d)(1)(A).

132. *See* FED. R. CIV. P. 62(c); FED. R. APP. P. 8(a); SUP. CT. R. 22–23.

133. FED. R. CIV. P. 65(c) (excluded from this requirement are the "United States, its officers, and its agencies").

134. FED. R. CIV. P. 62(a), (d).

135. Ohio Valley Envtl. Coal., Inc. v. U.S. Army Corps of Eng'rs., 890 F. Supp. 2d 688, 691 (S.D. W. Va. 2012) (citing Blackwelder Furniture Co. of Statesville v. Seilig Mfg. Co., 550 F.2d 189, 194 (4th Cir.1977)); *see also* United States v. Omega Sols., LLC, 889 F. Supp. 2d 945, 948 (E.D. Mich. 2012) ("A motion for stay pending appeal is made after significant factual development and after the court has fully considered the merits." (citing Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog, 945 F.2d 150, 153 (6th Cir. 1991))).

of a complete record . . . ."[136] In contrast, motions for preliminary injunctions or temporary restraining orders are "supported only by limited discovery," at which point, it "seem[s] almost inimical to good judging to hazard a prediction about which side is likely to succeed."[137] In sum, courts treat stays pending appeal similarly to how they treat preliminary injunctions and temporary restraining orders. But the unique procedural posture of stays, to prevent the enforcement of a final order or judgment, and their significant irreversible consequences suggest that stays require different treatment by courts.

III.
A NEARLY LAW-FREE ZONE

Although there is a standard for stays pending appeal, the area of stays pending appeal is a nearly law-free zone. Despite the stays standard and the immense consequences that stay decisions can pose for parties, courts apply the stay standard inconsistently, if at all.

A. *Inconsistencies in Courts' Consideration of Stay Factors*

When courts write opinions on stay determinations, the manner in which they consider the relevant factors varies widely enough to make prediction of future determinations difficult. This leads to uncertainty and potential unfairness for parties and less guidance for courts, rendering stays a nearly law-free zone.

Courts use several approaches for weighing the stay factors, and distinctions among the approaches are often less than clear. At least one court of appeals requires a stay movant to demonstrate each of the four traditional factors.[138] Other courts use a balancing approach, weighing the factors "such that a stronger showing on some of these prongs can make up for a weaker showing on others."[139] The Fourth Circuit applies a "balance-of-hardships" standard,

136. *Griepentrog*, 945 F.2d at 153.

137. Diné Citizens Against Ruining Our Env't v. Jewell, 839 F.3d 1276, 1286 (10th Cir. 2016) (quoting All. for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1139–40 (9th Cir. 2011) (Mosman, J., concurring)); *see also* Univ. of Tex. v. Camenisch, 451 U.S. 390, 395 (1981):

> The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held. Given this limited purpose and the haste that is often necessary to preserve those positions, a court customarily grants a preliminary injunction on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits.

138. *See* Feldman v. Ariz. Sec'y of State's Office, 843 F.3d 366, 375 (9th Cir. 2016) ("A plaintiff must make a showing as to each of these elements . . . .").

139. *Ohio Valley Envtl. Coal., Inc.*, 890 F. Supp. 2d at 692 (citing 16A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3954 (4th ed. 2012)); *see also* Concerned Pastors for Soc. Action v. Khouri, 844 F.3d 546, 548–49 (6th Cir. 2016) (denying stay of preliminary injunction based primarily on the relative risk of irreparable harm to each party); Davis v. Pension Benefit Guar. Corp., 571 F.3d 1288, 1291–92 (D.C. Cir. 2009) (affirming denial of preliminary injunction); Hoosier Energy Rural Elec. Coop. v. John Hancock Life Ins., 582 F.3d 721, 725 (7th Cir. 2009); Concerned Pastors for Soc. Action v. Khouri, 220 F. Supp. 3d 823, 827 (E.D. Mich. 2016)

which is, perhaps, a version of the balancing approach.[140] This requires "that the likelihood-of-success requirement be considered, if at all, only *after* a balancing of hardships is conducted and then only under the relaxed standard of showing that 'grave or serious *questions* are presented' for litigation."[141]

Perhaps yet another variation of the balancing approach is a "sliding scale" between the first two factors such that "a strong showing that the applicant is likely to succeed [on the merits] excuses a weaker showing of irreparable injury"[142] and vice versa.[143] Some courts hold that the movant must always demonstrate that both factors are satisfied;[144] others do not require both factors,[145] and still others are unsure what they should require.[146]

There is yet another approach, often called the "serious questions" approach, under which a court may grant a stay where a movant is not likely to succeed on the merits of the appeal, if the movant demonstrates "serious questions going to the merits."[147] Some courts use what is perhaps a subset of

(denying stay of preliminary injunction); *Omega Sols., LLC*, 889 F. Supp. 2d at 948. *See generally Gotanda*, *supra* note 20, at 819–22 (identifying four approaches for weighing stay factors).

140. *Ohio Valley Envtl. Coal., Inc.*, 890 F. Supp. 2d at 691–93.

141. Real Truth About Obama, Inc. v. Fed. Election Comm'n, 575 F.3d 342, 346 (4th Cir. 2009), *vacated*, 559 U.S. 1089 (2010), and *aff'd in part*, 607 F.3d 355 (4th Cir. 2010) (per curiam) (quoting Blackwelder Furniture Co. of Statesville v. Seilig Mfg. Co., 550 F.2d 189, 195–96 (4th Cir.1977)).

142. *See* Nat. Res. Def. Council, Inc. v. U.S. Food & Drug Admin., 884 F. Supp. 2d 108, 122 (S.D.N.Y. 2012); *see also* Hizam v. Clinton, No. 11 CIV. 7693 JCF, 2012 WL 4220498, at *7 (S.D.N.Y. Sept. 20, 2012) (citing Mohammed v. Reno, 309 F.3d 95, 101 (2d Cir. 2002)).

143. *See* Thapa v. Gonzales, 460 F.3d 323, 334–35 (2d Cir. 2006) (citing *Mohammed*, 309 F.3d at 101; Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog, 945 F.2d 150, 153 (6th Cir. 1991)); Cuomo v. U.S. Nuclear Regulatory Comm'n, 772 F.2d 972, 974 (D.C. Cir. 1985); Frank v. Walker, 17 F. Supp. 3d 837, 890 (E.D. Wis. 2014), *rev'd on other grounds*, 768 F.3d 744 (7th Cir. 2014) (citing *In re* A & F Enters., Inc. II, 742 F.3d 763, 766 (7th Cir. 2014)). Some courts allow demonstration of "serious questions going to the merits" as a weaker, but acceptable, showing of likelihood of success when "the balance of hardships tips sharply in the applicant's favor." CTIA-The Wireless Ass'n v. Berkeley, 158 F. Supp. 3d 897, 900 (N.D. Cal. 2016) (quoting Stormans Inc. v. Selecky, 526 F.3d 406, 412 (9th Cir. 2008)); *see also* Leiva-Perez v. Holder, 640 F.3d 962, 966 (9th Cir. 2011) (quoting All. for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1131–32 (9th Cir. 2011)); Standard Havens Prod., Inc. v. Gencor Indus., Inc., 897 F.2d 511, 512–13 (Fed. Cir. 1990); Turner Const. Co. v. United States, 94 Fed. Cl. 586, 590 (Fed. Cl. 2010) (quoting *Standard Havens Prods.*, 897 F.2d at 513); Akiachak Native Cmty. v. Jewell, 995 F. Supp. 2d 7, 12–13 (D.D.C. 2014) (citing Sherley v. Sebelius, 644 F.3d 388, 392 (D.C. Cir. 2011); Guttenberg v. Emery, 26 F. Supp. 3d 88 (D.D.C. 2014); Kingman Park Civic Ass'n v. Gray, 956 F. Supp. 2d 230 (D.D.C. 2013); All. for the Wild Rockies v. Kruger, 35 F. Supp. 3d 1259, 1266 (D. Mont. 2014) (quoting *Cottrell*, 632 F.3d at 1134–35). *But see, e.g.*, Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs., No. 13-1144, 2013 WL 1277419, at *1–2 (3d Cir. Feb. 8, 2013) (declining to adopt the sliding scale approach).

144. *See, e.g.*, *Nat. Res. Def. Council*, 884 F. Supp. at 122; *Hizam*, 2012 WL 4220498, at *3; *Turner Const. Co.*, 94 Fed. Cl. at 590.

145. *See, e.g.*, Lair v. Bullock, 697 F.3d 1200, 1204 (9th Cir. 2012) (quoting *Leiva-Perez*, 640 F.3d at 966, 968).

146. *See, e.g.*, League of Women Voters of United States v. Newby, 838 F.3d 1, 7 (D.C. Cir. 2016); Klayman v. Obama, 957 F. Supp. 2d 1, 25 n.31 (D.D.C. 2013), *vacated on other grounds*, 800 F.3d 559 (D.C. Cir. 2015); *Akiachak Native Cmty.*, 995 F. Supp. 2d at 12–13; *Kingman Park Civic Ass'n*, 956 F. Supp. 2d at 241; *Guttenberg*, 2014 WL 1100982, at *8–9.

147. *See Griepentrog*, 945 F.2d at 154 (quoting *In re* DeLorean Motor Co., 755 F.2d 1223, 1229 (6th Cir. 1985)); *see also Leiva-Perez*, 640 F.3d at 966 (concluding that the "serious questions" approach

the "serious questions" analysis, noting that the stay movant need not "show a 'probability' of success on the merits" if the movant demonstrates that "the balance of the equities weighs heavily in favor of granting the stay" on appeal of a "serious legal question."[148] This means that it is possible that a movant may only need to demonstrate "the three 'harm' factors": irreparable harm, balance of the hardships, and the public interest.[149]

Understandably, some courts are confused about how to consider the four factors.[150] This confusion is not due to benign circuit splits or federal courts

survives *Winter* in the context of stays of removal); Dodds v. U.S. Dep't of Educ., 845 F.3d 217, 221 (6th Cir. 2016) (granting a stay of preliminary injunction for restrooms for transgender student); Bos. Taxi Owners Ass'n, Inc. v. Boston, 187 F. Supp. 3d 339, 341–42 (D. Mass. 2016) ("Defendant 'need not persuade the court that is it [*sic*] likely to be reversed on appeal,' but the appeal must 'raise serious and difficult questions of law in an area where the law is somewhat unclear.'" (quoting Canterbury Liquors & Pantry v. Sullivan, 999 F.Supp. 144, 150 (D.Mass.1998)); *Concerned Pastors for Soc. Action*, 220 F. Supp. 3d at 827 (drinking water); United States v. Omega Sols., LLC, 889 F. Supp. 2d 945, 948 (E.D. Mich. 2012) (noting that a "a stay may be granted with . . . serious questions going to the merits and 'irreparable harm which decidedly outweighs any potential harm to the defendant if a stay is issued" (quoting Ohio ex rel. Celebrezze, 812 F.2d 228, 290 (6th Cir. 1987)); Rosenbrahn v. Daugaard, 61 F. Supp. 3d 862, 876–77 (D.S.D. 2015), *aff'd*, 799 F.3d 918 (8th Cir. 2015) (marriage); Sweeney v. Bond, 519 F. Supp. 124, 132 (E.D. Mo. 1981), *aff'd*, 669 F.2d 542 (8th Cir. 1982) ("[T]rial courts have issued or stayed injunctions pending appeal . . . where the legal questions were substantial and matters of first impression." (citing Mesabi Iron Co. v. Reserve Mining Co., 268 F.2d 782, 783 (8th Cir. 1959))).

148. United States v. Transocean Deepwater Drilling, Inc., 537 F. App'x 358, 360–61 (5th Cir. 2013) (quoting Ruiz v. Estelle (*Ruiz I*), 650 F.2d 555, 562 (5th Cir. 1981) (per curiam)); *see also* Campaign for S. Equal. v. Bryant, 773 F.3d 55, 57 (5th Cir. 2014) (staying preliminary injunction) (marriage); CRAssociates, Inc. v. United States, 103 Fed. Cl. 23, 24–25 (Fed. Cl. 2012); Loving v. Internal Revenue Serv., 920 F. Supp. 2d 108, 110 (D.D.C. 2013) (quoting CREW v. Office of Admin., 593 F.Supp.2d 156, 160 (D.D.C. 2009)); Patino v. Pasadena, 229 F. Supp. 3d. 582, 585 (S.D. Tex. 2017) (discussing election redistricting after *Shelby County*); Cowan v. Bolivar Cty Bd. of Educ., No. 2:65-CV-00031-DMB, 2016 WL 5462820, at *3 (N.D. Miss. Sept. 29, 2016) (discussing desegregation in schools); *In re* Bracha Found., No. 2:15-MC-748-KOB, 2015 WL 6828677, at *1 (N.D. Ala. Nov. 6, 2015) (noting that a stay movant may "have his motion granted upon a lesser showing of a 'substantial case on the merits' when 'the balance of the equities [identified in factors 2, 3, and 4] weighs heavily in favor of granting the stay'" (quoting Garcia-Mir v. Meese, 781 F.2d 1450, 1453 (11th Cir. 1986) (quoting Ruiz v. Estelle, 650 F.2d 555, 565 (5th Cir. 1981)))); Searcy v. Strange, No. CIV.A. 14-0208-CG-N, 2015 WL 328825, at *1 (S.D. Ala. Jan. 25, 2015) (marriage) (quoting Garcia-Mir v. Meese, 781 F.2d 1450, 1453 (11th Cir. 1986)).

149. *See* FTC v. Mainstream Mktg. Servs., Inc., 345 F.3d 850, 852–53 (10th Cir. 2003) (allowing a "relaxed" review of "probability of success" when the other harm factors "decidedly" weigh in the moving party's favor).

150. *See infra* note 155. Also consider, for example, the Fourth Circuit and its district courts, in which some judges use a "balance-of-hardship" test. *See, e.g.*, *supra* notes 147–149; Real Truth About Obama, Inc. v. Fed. Election Comm'n, 575 F.3d 342, 346 (4th Cir. 2009) (holding that *Winter* precludes the use of the "balance-of-hardship" test for preliminary injunctions). Yet, other opinions in the same circuit hold that neither the "balance-of-hardships" test nor *Winter* apply to stays pending appeal. *See infra* notes 156-158; Ohio Valley Envtl. Coal., Inc. v. U.S. Army Corps of Eng'rs., 890 F. Supp. 2d 688, 692 (S.D. W. Va. 2012). It is somewhat puzzling that the *Ohio Valley Environmental Coal* court held that stays pending appeal do not require an independent showing of each of the four factors even though the court noted that, under *Blackwelder* (which Fourth Circuit judges recognize as the source of the "balance-of-hardships" test) the standard for granting a stay pending appeal is *more* demanding than that for granting a preliminary injunction and, pursuant to *Winter*, preliminary injunctions require independent showings of each of the four factors. *See Ohio Valley Envtl. Coal. Inc.*, 890 F. Supp. 2d at

serving as laboratories of democracy.[151] Instead, this confusion can lead to courts continuing to employ approaches for years that the Supreme Court has held impermissibly deviate from the "frequently reiterated standard."[152] The risk that courts' approaches conflict with the stays standard is particularly high for courts that use a sliding scale or serious-questions analysis to analyze the standard for stays after *Winter v. Natural Resources Defense Council*.[153] In *Winter*, the Court overruled the Ninth Circuit's preliminary injunction test under which courts grant preliminary injunctions to movants with a strong likelihood of prevailing even if they demonstrate only a possibility of irreparable harm.[154] Although many courts note that stays pending appeal and preliminary injunctions share the same standard, some courts have not yet determined whether the sliding scale or serious-questions approaches, as applied in determining stays pending appeal, survive *Winter*.[155]

Adding confusion to chaos, a number of courts have held that the serious-questions approach, the serious legal questions plus balance of equities approach, and maybe any sliding scale approach, do not survive *Winter*.[156] And some courts use two or three terms out of the terms "sliding scale," "serious questions," and

690–92 (identifying the critical quandary about "how the 'likelihood of success' factor is applied: is it a literal requirement or may a stay be granted where success on appeal is unlikely but the other factors are met?").

151. *See generally* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (noting the Court's important role in preserving the states' power to "remould, through experimentation, our . . . institutions to meet changing social and economic needs").

152. *See* Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20, 22 (2008).

153. *Id.*

154. *Id.*

155. *See, e.g.*, League of Women Voters of United States v. Newby, 838 F.3d 1, 7 (D.C. Cir. 2016) (noting that the court "has not yet needed to decide" whether *Winter* requires abandoning the "sliding-scale" approach); Revel AC, Inc. v. IDEA Boardwalk LLC, 802 F.3d 558, 569–71 (3d Cir. 2015) (noting that the court views the sliding scale approach favorably); Lair v. Bullock, 697 F.3d 1200, 1204 n.2 (9th Cir. 2012) (noting overlap between factors for stays and preliminary injunctions, but not deciding whether *Winter* applies to stays pending appeal); CTIA-The Wireless Ass'n v. Berkeley, 158 F. Supp. 3d 897, 900 (N.D. Cal. 2016) (applying sliding scale approach after *Winter* without mentioning *Winter*); Klayman v. Obama, 957 F. Supp. 2d 1, 25 n.31 (D.D.C. 2013), *vacated on other grounds*, 800 F.3d 559 (D.C. Cir. 2015) ("[O]ur Circuit 'has suggested, without deciding, that Winter should be read to abandon the sliding-scale analysis in favor of a 'more demanding burden' requiring Plaintiffs to independently demonstrate both a likelihood of success on the merits and irreparable harm.'" (quoting Smith v. Henderson, 944 F.Supp.2d 89, 95 (D.D.C. 2013) (internal citations omitted))); Akiachak Native Cmty. v. Jewell, 995 F. Supp. 2d 7, 12–13 (D.D.C. 2014) ("Before the Supreme Court decided Winter v. Natural Res. Def. Council, Inc., the four factors for a stay and injunctive relief were analyzed on a sliding scale. Since Winter, however, it is unclear whether the likelihood of success on the merits factor is a threshold inquiry that must be addressed before the other factors." (citing and quoting numerous cases in support) (citing Sherley v. Sebelius, 644 F.3d 388, 392 (D.C. Cir. 2011))).

156. *See, e.g.*, Diné Citizens Against Ruining Our Env't v. Jewell, 839 F.3d 1276, 1282 (10th Cir. 2016); Pashby v. Delia, 709 F.3d 307, 320–21 (4th Cir. 2013).

"balancing" interchangeably[157] even though there are significant differences in how other courts define those tests.[158]

Some courts decide stays while disregarding at least one of the four traditional factors.[159] Other courts decide stays based on factors that are arguably outside of the four-prong standard altogether.[160] Courts have also articulated stay standards that are either difficult to decipher at best or internally inconsistent at worst.[161]

Such a hazy legal standard for stay determinations by district court and circuit judges is deeply troubling, given that the courts often make such determinations hastily and that they pose such serious consequences for litigants.[162] This confusing collection of weights, or lack thereof, that courts give to the traditional stay factors means, in some ways, that there is no standard for stays.

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157. *See League of Women Voters*, 838 F.3d at 7 (equating sliding scale and balancing); Standard Havens Prod., Inc. v. Gencor Indus., Inc., 897 F.2d 511, 512–13 (Fed. Cir. 1990) (equating sliding scale, serious questions, and balancing); *Akiachak Native Cmty.*, 995 F. Supp. 2d at 12–13 (equating sliding scale analysis with serious question analysis); Friendship Edison Pub. Charter Sch. Collegiate Campus v. Nesbitt, 704 F. Supp. 2d 50, 51–52 (D.D.C. 2010) (equating sliding scale with balancing).

158. As mentioned above, courts often define "balancing" as weighing the "interrelated considerations" of all four factors, Concerned Pastors for Soc. Action v. Khouri, 844 F.3d 546, 548–49 (6th Cir. 2016) (quoting *In re* EPA, 803 F.3d 804, 806 (6th Cir. 2015)); "sliding scale" as only balancing between the likelihood of success on the merits and irreparable harm. Frank v. Walker, 17 F. Supp. 3d 837, 890 (E.D. Wis. 2014), *rev'd on other grounds*, 768 F.3d 744 (7th Cir. 2014); and the "serious questions" test much more narrowly as only requiring that the appeal "'raise serious and difficult questions of law in an area where the law is somewhat unclear'" to demonstrate likelihood of success. Bos. Taxi Owners Ass'n, Inc. v. Boston, 187 F. Supp. 3d 339, 341–42 (D. Mass. 2016) (quoting Canterbury Liquors & Pantry v. Sullivan, 999 F. Supp. 144, 150 (D. Mass.1998)).

159. *See, e.g.*, Frank v. Walker, 769 F.3d 494, 495–96 (7th Cir. 2014) (not mentioning the second or third traditional stay factors); Meyer v. Kalanick, 203 F.Supp.3d 393, 396–97 (S.D.N.Y. 2016) (finding no reason to consider the last factor, the public interest.); Wolf v. Walker, 26 F. Supp. 3d 866, 873 (W.D. Wis. 2014) (disregarding traditional factors in attempt to follow Supreme Court decisions without opinions). There is a question regarding whether sliding scale or serious questions analyses are, in essence, courts determining stays without requiring movants to meet one or more of the traditional stay factors. *See supra* text accompanying notes 147–156.

160. *See, e.g.*, *Frank*, 769 F.3d at 496 ("A second important consideration is the public interest in using laws enacted through the democratic process, until the laws' validity has been finally determined."); *Meyer*, 203 F. Supp. 3d at 396 (considering an additional factor, the need for appellate clarification on a particular issue); Rosenbrahn v. Daugaard, 61 F. Supp. 3d 862, 877 (D.S.D. 2015), *aff'd*, 799 F.3d 918 (8th Cir. 2015) (staying a judgment because of the "public interest in having stable marriage laws[,] avoiding uncertainty produced by a decision that is issued and subsequently stayed by an appellate court or overturned," and maintaining "uniformity and stability of the law"); Brenner v. Scott, 999 F. Supp. 2d 1278, 1292 (N.D. Fla. 2014), *order clarified*, No. 4:14CV107-RH/CAS, 2015 WL 44260 (N.D. Fla. 2015) (considering an additional "substantial public interest in stable marriage laws").

161. *See* Ohio Valley Envtl. Coal., Inc. v. U.S. Army Corps of Engineers, 890 F. Supp. 2d 688, 692 (S.D. W. Va. 2012) ("It may be possible that showing somewhat less than a 'strong showing' or 'likelihood' of success on the merits can suffice if the harm to the moving party without a stay is great enough; however, that showing must be more than merely pointing to 'serious questions.'").

162. *See supra* Part I.

B. *Courts Do Not Write*

Most often, federal courts do not write opinions for stay determinations.[163] There were no written opinions explaining the Supreme Court's decisions or clarifying the stay standards in any of the most pressing stay determinations of the past few Court terms.[164] The Court is not necessarily more likely to write an opinion explaining its stay decision when it reaches a different outcome than the district court or court of appeals did after a long and seemingly exhaustive discovery process, trial, and opinion on the underlying order.[165] On the rare occasion that a Justice issues a reasoned opinion in a stay determination, moreover, it is most typically in dissent,[166] or sometimes in concurrence.[167] Sometimes as many as three or four justices would deny a stay, but none write a dissenting opinion explaining their differences in reasoning from the majority.[168]

Similarly, courts of appeals tend not to write reasoned, reported, or published opinions on stay determinations.[169] Compared to the Supreme Court,

163. *See* Bush v. Gore, 531 U.S. 1046 (2000) (mem.) (Scalia, J., concurring) ("[I]t is not customary for the Court to issue an opinion in connection with its grant of a stay . . . ."); Republic of Phil. v. Westinghouse Elec. Corp., 949 F.2d 653, 658 (3d Cir. 1991) ("Because this court ordinarily grants or denies a stay pending appeal without opinion, there is little reported authority discussing the standard we apply in entering such orders."); SUPREME COURT PRACTICE, *supra* note 28, at 874 ("The Justices write in-chambers opinions only sporadically and selectively. . . . It is rare for more than a handful [of in-chambers opinions] to be written during any one term.").

164. *See, e.g.*, Ariz. Sec. of State v. Feldman, 137 S. Ct. 446 (2016) (mem.), *staying*, 843 F.3d 366 (9th Cir. 2016) (Arizona law that made it a felony for someone to collect another's early voting ballot); Gloucester Cty. School Bd. v. G.G., 136 S. Ct. 2442, 2442 (2016) (mem.), *staying*, 822 F.3d 709 (4th Cir. 2016) (transgender student access to restrooms); Strange v. Searcy, 135 S. Ct. 940 (2015) (mem.), *denying stay*, No. 14-0208, 2015 WL 328825 (S.D. Ala. Jan. 25, 2015) (Alabama marriage provisions); Frank v. Walker, 135 S. Ct. 7 (2014) (mem.), *vacating*, 766 F.3d 755 (7th Cir. 2014) (Wisconsin voter identification requirement); Husted v. Ohio State Conference of the NAACP, 135 S. Ct. 42 (2014) (mem.), *staying*, 768 F.3d 524 (6th Cir. 2014) (Ohio early voting days); North Carolina v. League of Women Voters, 135 S. Ct. 6 (2014) (mem.), *staying*, 769 F.3d 224 (4th Cir. 2014) (North Carolina same-day voter registration and counting of certain provisional ballots); Veasey v. Perry, 135 S. Ct. 9 (2014) (mem.), *denying app. to vacate stay*, 769 F.3d 890 (5th Cir. 2014) (Texas voter identification requirement); Whole Woman's Health v. Lakey, 135 S. Ct. 399 (2014) (mem.), *granting in part and denying in part app. to vacate stay*, 769 F.3d 285 (5th Cir. 2014) (Texas abortion provider requirements); Herbert v. Kitchen, 134 S. Ct. 893 (2014) (mem.), *staying*, 961 F. Supp. 2d 1181 (D. Utah 2013) (Utah marriage amendment); Brown v. Plata, 570 U.S. 938 (2013) (mem.), *denying stay*, 960 F. Supp. 2d 1057 (E.D. Cal. 2013) (California prison population reduction).

165. *See Plata*, 570 U.S. at 938. Plaintiffs convened the *Plata* three-judge court below after years of litigation failed to remedy the constitutional violations in mental health care and medical care, then the three-judge court issued its order after a fourteen-day trial in a 184-page opinion. Coleman v. Brown, 960 F. Supp. 2d 1057, 1060 (E.D. Cal. 2013).

166. *See Strange*, 135 S. Ct. at 940–41 (Thomas, J., dissenting); *Veasey*, 135 S. Ct. at 10–12 (Ginsburg, J., dissenting); *League of Women Voters*, 135 S. Ct. at 6–7 (Ginsburg, J., dissenting); *Frank*, 135 S. Ct. at 7 (Alito, J., dissenting); *Plata*, 570 U.S. at 938 (Scalia, J., dissenting).

167. *See Gloucester Cty. School Bd.*, 136 S. Ct. at 2442 (2016) (mem.) (Breyer, J., concurring).

168. *See Whole Woman's Health*, 135 S. Ct. at 399; *Husted*, 135 S. Ct. at 42.

169. A Westlaw search in the Third Circuit and the courts within it for recent, reported, civil opinions that seem likely to discuss the traditional stay standards for stays pending appeal (using search terms "adv: ("stay!" /p ("factor!" or "prong!" or "standard" or "consider!")) and ATLEAST4("stay") and ("stay" /p "pending appeal") and DA(aft 11-12-2008) % debtor % patent % bankruptcy %

however, courts of appeals do seem more likely to write reasoned opinions explaining their decisions in the most controversial stay determinations of the past few years.[170] Like the Supreme Court, though, courts of appeals are not necessarily more likely to write opinions when their stay decision differs from the district court's after a long and seemingly exhaustive discovery process, trial, and opinion on the underlying order.[171] Similarly, district courts do not have any common practice of writing opinions for decisions regarding stay pending appeal requests.

Courts frequently do not provide reasoning for their stay determinations, and when they do, they do not consider the traditional stays factors in a consistent manner.[172] Court justifications for determining stays pending appeal are often in tension with other explanations and, together, the justifications do not fit any coherent, purposive theory.[173] Despite the potential serious, irreversible consequences to injunctive plaintiffs and defendants, stay request outcomes are difficult to predict and arbitrary.

IV.
A PRINCIPLED BASIS FOR INJUNCTIVE STAYS PENDING APPEAL

Perhaps courts apply the stay standard inconsistently, if at all, because, at present, courts do not have a set of values guiding stay pending appeal decisions. For numerous public law issues, a court's decisions on a stay pending appeal request may essentially decide the matters finally.[174] Because this context means that the stakes are often high and getting it "right" matters, it is important to articulate a coherent vision for stays pending appeal.

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interlocutory") provided only ten results on Apr. 2, 2018. A similar Westlaw search with no date limitations ("adv: ("stay!" /p ("factor!" or "prong!" or "standard" or "consider!")) and ATLEAST4("stay") and ("stay" /p "pending appeal") % debtor % patent % bankruptcy % interlocutory") provided only sixty-five results on Apr. 2, 2018. *See* Concerned Pastors for Soc. Action v. Khouri, 217 F. Supp. 3d 960 (E.D. Mich. 2016).

The same searches in the Tenth Circuit and the courts within it provided only two results and only twenty-six results on Apr. 2, 2018. The same searches in the Eleventh Circuit and the courts within it provided only nine results and only fifty-one results on Apr. 2, 2018. The same searches in the Federal Circuit and the courts within it provided only six results and only sixteen results on Apr. 2, 2018.

170. *See* Frank v. Walker, 769 F.3d 494 (7th Cir. 2014) (per curiam); Veasey v. Perry, 769 F.3d 890 (5th Cir. 2014); Kitchen v. Herbert, No. 2:13-CV-217, 2013 WL 6834634 (D. Utah Dec. 23, 2013); Whole Woman's Health v. Lakey, 769 F.3d 285, 288 (5th Cir. 2014), *vacated in part*, 135 S. Ct. 399 (2014); Ohio State Conference of N.A.A.C.P. v. Husted, 769 F.3d 385 (6th Cir. 2014). *But see* G.G. v. Gloucester Cty. Sch. Bd., 654 F. App'x 606 (4th Cir. 2016) (mem.); Frank v. Walker, 766 F.3d 755 (7th Cir. 2014) (mem.).

171. *See* United States v. Philip Morris USA Inc., No. 06-5267, 2006 WL 4608645 (D.C. Cir. Nov. 1, 2006) (per curiam). The D.C. Circuit granted the stay less than two months after the trial court denied a stay, which followed a nine month trial and a 1,700-page opinion on the merits. *See* United States v. Philip Morris USA, Inc., 449 F. Supp. 2d 988 (D.D.C. 2006) (mem.); United States v. Philip Morris USA, Inc., 449 F. Supp. 2d 1 (D.D.C. 2006).

172. *See supra* Part III.A.

173. *See infra* Parts IV.A and B.

174. *See supra* Part I.

This Part, descriptively and normatively, suggests a purpose for stays pending appeal within which principles of finality limit the exercise of stays. The purpose of stays pending appeal should turn on the availability of the right to appeal. The standard for stays pending appeal ought to lean toward allowing for meaningful appeal where appeal is guaranteed and against staying judgments or orders where there is little chance of review.

This Part describes and then critiques existing potential purposes of stays pending appeal. Next, this Part proposes a purpose for stays pending appeal, and, to further that purpose, suggests differing standards for stays pending guaranteed appeal to lower federal courts versus stays pending petition for discretionary review. Finally, this Part proposes that courts should write reasoned opinions for stay determinations more often and suggests changes to the substantive standard and procedure for stays.

A. Potential Purposes for Stays Pending Appeal

Legislators, courts, and commentators have largely left the purpose of stays pending appeal for future explication.[175] The determination of requests for stays needs a purpose, but a four-prong test, without more, does not meet that need. Scholars and courts should articulate explicitly the vision of finality and appellate hierarchy within which stays operate, just like the vision courts and scholars have already articulated for preliminary injunctions.[176] To the extent that judges or scholars have discussed purposes for preliminary injunctions, purposes which could be informative of the purpose of stays, scholars and judges have divided into two camps: maintaining the status quo and minimizing costs due to error. This Section describes those two potential purposes of stays.

175. Like all rules of federal civil procedure, the Supreme Court officially promulgates rules for federal stays pending appeal. *See* James C. Duff, *Overview for the Bench, Bar, and Public: The Federal Rules of Practice and Procedure*, U.S. COURTS, http://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works/overview-bench-bar-and-public [https://perma.cc/7EE5-WMHV]. The rules for stays pending appeal or certiorari do not contain any specific references to their purposes. *See* FED. R. CIV. APP. P. 8; FED. R. CIV. P. 62(a)(1); SUP. CT. R. 22, 23. The only legislative history on the federal rules regarding stays merely states that the rules were intended to codify the informal practice of the circuit courts. *See* 20 JAMES WILLIAM MOORE ET AL., MOORE'S FEDERAL PRACTICE § 308 app.100 (3d. ed. 2016) ("Appellate Rule 8 codified the former informal practice of the circuit courts (*see* Committee Note to Appellate Rule 8, set out at § 308App.01[1])."); *id.* at § 308 app.01 (describing an appellate court's Rule 8 power to stay as part of its "traditional equipment for the administration of justice"); *see also id.* (making no further mention of the purpose of Rule 8). There is no discussion of the purpose in the legislative history of Rule 62. *See* 12 MOORE'S FEDERAL PRACTICE § 62 app.01–07 (describing history of Rule 62).

176. *See, e.g.*, FISS, INJUNCTION 11, *supra* note 20; RENDLEMAN, *supra* note 20; Lynch, *supra* note 20.

1. Maintaining the status quo

Some courts have cited an interest in maintaining the status quo as a guiding principle to determine requests for stays pending appeal.[177] The primary purpose of maintaining the status quo is typically to preserve the disputed matter and limit judicial meddling until the court has time to hold a hearing or issue an order.[178]

2. Minimizing error costs

For preliminary injunctions, which are analogous to stays pending appeal in some ways, Judge Richard A. Posner and Professor John Leubsdorf have proposed that courts analyze the factors in a way that minimizes error costs.[179] Under this analysis, a court should estimate the likelihood that the movant will prevail as a numerical probability and estimate the total irreparable harm to each party depending on whether the court grants or denies the preliminary injunction.[180] By multiplying the likely irreparable harm to the movant by the movant's probability of success and doing the same for the opponent, the court can choose to grant or deny the stay based on which determination is most likely to cause the least irreparable harm, and, therefore, minimize the cost of error.[181] Posner presented this analysis in a formula:

$P \times H_d > (1 - P) \times H_g$,[182]

In other words, a court should grant a preliminary injunction if and only if the movant's likelihood of success at trial or in final judgment (P) multiplied by the irreparable harm to the movant if the preliminary injunction is denied (H_d) is greater than the opponent's likelihood of success at trial or in final judgment ($1 - P$) multiplied by the irreparable harm to the opponent if the preliminary injunction is granted (H_g).[183]

B. Critiques of Potential Purposes for Stays Pending Appeal

This Section critiques the two proposed purposes of stays: maintaining the status quo and minimizing costs due to error.

Maintaining the status quo. Many suggest preserving the status quo as the primary purpose for preliminary injunctions, which courts issue before a trial

177. *See, e.g.*, Veasey v. Perry, 769 F.3d 890, 892 (5th Cir. 2014) (discussing the high value of preserving the status quo for a stay pending appeal motion in "a voting case decided on the eve of the election").

178. *See* Gloucester Cty. Sch. Bd. v. G.G., 136 S. Ct. 2442, 2442 (2016) (mem.) (Breyer, J., concurring); John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525, 535–36, 546 (1978) (describing a "reluctance to decree burdensome relief without a full hearing that was pervading judicial thought on interlocutory remedies").

179. Am. Hosp. Supply Corp. v. Hosp. Prod. Ltd., 780 F.2d 589, 593 (7th Cir. 1986) (Posner, J. opinion); Leubsdorf, *supra* note 178, at 535–36, 546.

180. *Am. Hosp. Supply Corp.*, 780 F.2d at 593; Leubsdorf, *supra* note 178, at 540–41.

181. *Am. Hosp. Supply Corp.*, 780 F.2d at 593; Leubsdorf, *supra* note 178.

182. *Am. Hosp. Supply Corp.*, 780 F.2d at 593.

183. *Id.*

court has made final determinations.[184] However, when a court is determining a stay of a permanent order or judgment pending appeal, a court has already made its final disposition on the merits and, thus, has already met this purpose. Moreover, scholars and courts suggest that preserving the status quo is not the purpose of preliminary injunctions either.[185] Although maintaining the status quo may often preserve the matter for appeal, "[i]t must not be thought . . . that there is any particular magic in the phrase 'status quo.'"[186] Maintaining the status quo could run counter to what some argue is actually the primary purpose of a preliminary injunction: to "prevent irreparable injury so as to preserve the court's ability to render a meaningful decision."[187] Depending on what the primary purpose of a stay is, preserving the status quo could run counter to that purpose as well. In addition, preserving the status quo is not a practical or desirable purpose for stay determinations because it is often unclear what the status to be preserved is,[188] and, even if the ex ante status is clear, "a court interferes just as much when it orders the status quo preserved as when it changes it."[189]

Minimizing error costs. In the area of preliminary injunctions, scholars have challenged the goal of minimizing error costs or, perhaps more specifically, the suggestion that courts should employ the Posner-Leubsdorf analysis or formula.[190] Some criticize the difficulty or futility of attempting to quantify the

184. *See, e.g.*, Univ. of Tex. v. Camenisch, 451 U.S. 390, 395 (1981) ("The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held."); DeNovellis v. Shalala, 135 F.3d 58, 74 (1st Cir. 1998) (noting that the purpose of a preliminary injunction is "to preserve the status quo until the rights of the parties can be fairly and fully investigated and determined" (quoting Wetzel v. Edwards, 635 F.2d 283, 286 (4th Cir. 1980))).

185. *See, e.g.*, Leubsdorf, *supra* note 178, at 534, 540, 546 (noting that the roots of the doctrine in the 1800's were to protect the status of possession at common law and to rely on the "undisputed exercise of patent rights as prima facie evidence of their validity," and arguing that preserving the status quo in preliminary injunctions is "a habit without a reason" because doing so may inflict irreparable injury on the parties); Part IV.B (discussing the judicial and scholarly argument that minimizing error costs is the purpose of preliminary injunctions).

186. Canal Auth. of State of Fla. v. Callaway, 489 F.2d 567, 576 (5th Cir. 1974).

187. *See* Golden Gate Rest. Ass'n v. San Francisco, 512 F.3d 1112, 1116 (9th Cir. 2008) ("Maintaining the status quo is not a talisman."). *See also Callaway*, 489 F.2d at 576.

> The purpose of a preliminary injunction is always to prevent irreparable injury so as to preserve the court's ability to render a meaningful decision on the merits. It often happens that this purpose is furthered by preservation of the status quo, but not always. If the currently existing status quo itself is causing one of the parties irreparable injury, it is necessary to alter the situation so as to prevent the injury[.] The focus always must be on prevention of injury by a proper order, not merely on preservation of the status quo.

Id.

188. For example, in *Whole Woman's Health*, a party could have raised a legitimate question about whether preserving the status quo would have meant allowing Texas to enforce its newly enacted requirements or allowing abortion providers to continue providing abortions without meeting the requirements. 135 S. Ct. 399 (2014) (mem.).

189. Leubsdorf, *supra* note 178, at 546.

190. *See, e.g.*, The Honorable David W. Lannetti, *The "Test"—Or Lack Thereof—for Issuance of Virginia Temporary Injunctions: The Current Uncertainty and a Recommended Approach Based on Federal Preliminary Injunction Law*, 50 U. RICH. L. REV. 273, 291–92 (2015) ("This quantitative analysis is neat and compact, but it arguably is simplistic and, in any case, the difficulty—or

harms to the parties, including irreparable harms depending on whether a stay is granted or denied.[191]

Setting the quantification difficulty aside for the sake of argument, there is little reason to think that the Posner-Leubsdorf approach for preliminary injunctions is a good fit for stays of final civil injunctive orders pending appeal. Leubsdorf himself contends that the model to minimize error costs should be limited to preliminary injunctions and perhaps other forms of interlocutory relief, but should not apply to final injunctions.[192] This is due to the procedural posture of preliminary injunctions and interlocutory relief, where courts may issue "hasty decision[s]" on the basis of "rudimentary hearings":[193]

> The dilemma, of course, exists only because the court's interlocutory assessment of the parties' underlying rights is fallible in the sense that it may be different from the decision that ultimately will be reached. The danger of incorrect preliminary assessment is the key to the analysis of interlocutory relief. It requires investigating the harm an erroneous interim decision may cause and trying to minimize that harm. And it decisively distinguishes the preliminary from the final injunction.[194]

The procedural posture of stays of final orders or judgments pending appeal is distinct in at least two ways from that of preliminary injunctions. The first difference is that stays of final orders or judgments already have "a reduced probability of error"[195] because the court issuing the underlying judgment or

impossibility—of assigning numeric values to harms greatly reduces its practical value."); Linda S. Mullenix, *Burying (With Kindness) the Felicific Calculus of Civil Procedure*, 40 VAND. L. REV. 541 (1987); Linda J. Silberman, *Injunctions by the Numbers: Less Than the Sum of Its Parts*, 63 CHI.-KENT L. REV. 279 (1987) (noting that the Posner formula adds to the "confusion and frustration about the appropriate substantive standard for the issuance of preliminary injunctions"). *But see* James L. Robertson, *Variations on a Theme by Posner: Facing the Factual Component of the Reliability Imperative in the Process of Adjudication*, 84 MISS. L.J. 471, 598 (2015) (describing Posner's formula as an attempt to fix the reliability problems that follow from unweighted multifactor tests).

191. *See, e.g.*, Lannetti, *supra* note 190, at 291–92; Mullenix, *supra* note 190; Silberman, *supra* note 190.

The case examples noted in Part I raise several questions about quantifying harm. How could a judge quickly monetize the harms from Texas being unable to enforce stricter abortion regulations, or the harms that women in Texas would likely suffer from fewer and more distant abortion providers? Is it the additional cost of transportation to a clinic that is further away? Is it the emotional and financial cost of carrying an unwanted pregnancy to term and raising a child?

Similarly, what is the cost to couples being unable to marry, or to a state unable to enforce marriage regulations? What are the costs to a state unable to enforce voter identification provisions, or to voters without required identification unable to vote? What is the cost of a school's inability to restrict bathroom use based on sex listed on birth certificate, or of a transgender student's multiple suicide attempts? *See supra* Part I.

192. Leubsdorf, *supra* note 178, at 540–41.

193. *Id.*

194. *Id.*

195. Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog, 945 F.2d 150, 153 (6th Cir. 1991).

injunction had the benefit of all necessary time and information from a full process or trial, unlike courts issuing preliminary injunctions.[196]

The second difference is that, unlike an injunction, a stay does not direct the action of any party.[197] Instead, a motion for a stay is asking a second-order question. When deciding a motion for a stay, a court has already reached a final judgment or order and has decided whether to issue an injunction. In the words of Leubsdorf, this "decisively distinguishes" a preliminary injunction from a stay pending appeal.[198] This distinction is decisive because, by deciding whether to grant a preliminary injunction, a judge is making a first-order decision, and one without the benefit of a trial or complete hearings or briefings. But a judge deciding whether to grant a stay should not revisit the first-order question of whether the court should issue a final order or a judgment because a court has already made that decision with the benefit of all of the information that a court determining a preliminary injunction does not have. Instead, a court deciding a stay has the benefit of a fully informed prior decision on the outcome of the case. Thus, minimizing error cost clearly is not the only or the primary goal of a stay pending appeal.

The absence of an articulated purpose for stays leads to a mish-mashed medley of oft-contradictory axioms that can serve as trump cards in stay determinations. As a result, federal stays standards are inconsistent and unpredictable.[199] Because each individual judge may have his or her own way of determining stays (and hopefully in each case a judge has reasons for granting or denying a stay request), there is little rhyme or reason to how courts decide motions for stays pending appeal, even though stays can be irreversibly outcome determinative.

C. A Meaningful Opportunity for Appellate Review

When courts decide requests for stays pending appeal, they face two competing considerations—giving effect to the final order or judgment and preserving the opportunity for a meaningful appeal. This is because, even though there is a final order or judgment, the litigants are also in the process of a non-interlocutory appeal. Whether the ability to appeal is required by the Constitution or is statutory and pragmatic exceeds the scope of this Article. Regardless, the US federal court system provides an opportunity for review at least once in every federal civil case.

196. *See supra* Part II.C and text accompanying notes 135–137.

197. *See supra* Part II.C and text accompanying notes 124–125.

198. Leubsdorf, *supra* note 178, at 540–41.

199. *See* SUPREME COURT PRACTICE, *supra* note 28, at 899 (noting that it is "essential" that lawyers drafting applications for stays are aware of how the different justices treat the stays factors in in-chambers opinions, and that "the application for a stay must frankly and fully address them," even though in-chambers opinions may not even discuss the factors); *supra* Part III.A and B.

The goal of a stay pending appeal is to preserve this ability to obtain review. Stay determinations should not make this ability to appeal meaningless. A party requests a stay pending appeal (or a stay pending application for a writ of certiorari) only *after* any filings, hearing, trials, deliberation, and consideration have concluded, and after the court has issued a non-preliminary order or judgment that the party is appealing.[200] Thus, the primary purpose of stays pending appeal should be linked to appellate review of a non-preliminary order or judgment.

1. The civil right to appeal

The opportunity to have a meaningful appeal, where appeal is guaranteed, matters. For federal civil matters, there is generally at least one appeal as of right,[201] most often from a district court decision to a court of appeals.[202] Historically, courts have guaranteed access to appellate review due to fundamental fairness concerns[203] and to give courts of appeals an opportunity to

200. *See supra* Part II.

201. *See* ROBERT LEFLAR, INTERNAL OPERATING PROCEDURES OF APPELLATE COURTS 4, 9–10 (1976); Harlon Leigh Dalton, *Taking the Right to Appeal (More or Less) Seriously*, 95 YALE L.J. 62, 62 (1985); Geoffrey Hazard, *After the Trial Court—the Realities of Appellate Review*, *in* THE COURTS, THE PUBLIC, AND THE LAW EXPLOSION 60, 78 (Harry W. Jones ed., 1965) (discussing "settled procedural rights or opportunities, such as the generally accorded right to at least one appeal"); Cassandra Burke Robertson, *The Right to Appeal*, 91 N.C. L. REV. 1219, 1222 (2013).

202. *See* Dalton, *supra* note 201, at 62 n.5 ("Justice Rehnquist floated the suggestion that perhaps 'the time has come [in the federal system] to abolish appeal as a matter of right from the district courts to the courts of appeals, and allow such review only where it is granted in the discretion of a panel of the appellate court.'"). There are two other notable circumstances of guaranteed review. There is a special procedure for certain claims involving the Voting Rights Act, certain types of campaign finance claims, and redistricting claims. 42 U.S.C. §§ 1973aa-2, 1973c (2006); 28 U.S.C. § 2284(a) (2012); Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 403, 116 Stat. 81, 113–14. For these claims, a party can obtain Supreme Court direct review of a three-judge district court's decision. §§ 1973aa-2, 1973c; § 2284(a); § 403, 116 Stat. 81, 113–14. Approximately half of the election law cases on the Supreme Court docket have reached the Court through this procedure. Shapiro v. McManus, 136 S. Ct. 450, 452 (2015); Joshua A. Douglas, *The Procedure of Election Law in Federal Courts*, 2011 UTAH L. REV. 433, 458 (2011).

The other special procedure is for specific campaign finance claims and energy conservation claims. For these challenges, after a district court judge has issued an order or judgment, judges must give these claims direct certification to a court of appeals, sitting en banc. 2 U.S.C. § 437h (2006); 42 U.S.C. § 8514(a)(2) (2006); Douglas, *supra*, at 469. Any party who wishes for Supreme Court review of the en banc order or judgment must petition for a writ of certiorari.

203. *See* Mathews v. Eldridge, 424 U.S. 319, 348–49 (1976); Malcolm v. Nat'l Gypsum Co., 995 F.2d 346, 350 (2d Cir. 1993); ABA Comm. on Standards of Judicial Administration, Standards Relating to Appellate Courts § 3.10 cmt.18 (1994) [hereinafter ABA STANDARDS]. The standards state that:

> The right of appeal, while never held to be within the due process guaranty of the United States Constitution, is a fundamental element of procedural fairness as generally understood in this country. That right should be accorded an aggrieved party to a trial court proceeding. To maintain the integrity of trial court proceedings and to prevent their interruption by piecemeal appellate review, appeal of right should be available only from final judgments.

Id. See also ABA STANDARDS, *supra* note 203, § 3.10 (a party "should be entitled to one appeal of right from a final judgment"); Robertson, *supra* note 201, at 1245–50 (examining "how the right to appeal has become ensconced among the procedures required to ensure basic fairness").

correct any errors made by district courts.[204] Formally, the right of civil litigants to at least one appeal is statutory in nature.[205] Although the Supreme Court has opined repeatedly that there is no constitutional right to appeal,[206] appellate review of civil matters seems essential to fundamental due process.

It is difficult to pin down the Court's reasoning for holding that constitutional due process does not require the right to appeal.[207] The Court has stated that there is no constitutional right to appeal as fact, with no reasoning to support the assertion.[208] At other times, the Court has offered examples in which courts do not grant, or historically have not granted, a right of review to argue that the Due Process Clause does not require a right of review.[209]

The Court's repeated repudiations of a constitutional due process right to appellate review might be more a function of pragmatism than anything else. Nearly every jurisdiction statutorily grants a right to appeal in all civil and criminal litigation.[210] There is little cause for the Supreme Court to hold that

204. *See* Ryan v. Gonzales, 568 U.S. 57, 75 (2013) ("ordinary error correction through appeal"); Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 111 (2009) (noting that certain types of review serve as "'safety valve[s]' for promptly correcting serious errors" (quoting Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 883 (1994)); Planned Parenthood League of Mass., Inc. v. Operation Rescue, 406 Mass. 701, 706 (1990) (noting the power of the Supreme Judicial Court of Massachusetts "to correct and prevent errors"); PAUL D. CARRINGTON, DANIEL J. MEADOR & MAURICE ROSENBERG, JUSTICE ON APPEAL 2–4 (1976); Paul D. Carrington, *A Critical Assessment of the Cultural and Institutional Roles of Appellate Courts*, 9 J. APP. PRAC. & PROCESS 231, 235 (2007) ("The indispensable task of the appellate court is to correct error, or perhaps more precisely, to convince the parties and their counsel that the possibility of incorrect application of the law has been seriously considered by judges of rank and security."); Chris Guthrie, *Misjudging*, 7 NEV. L.J. 420, 444 (2007) ("Courts of appeals exist in large part to remedy judicial error."); Chad M. Oldfather, *Error Correction*, 85 IND. L.J. 49 (2010) (examining the error correction role of courts of appeals). *But see* Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 1047 n.257 (2005) ("[E]rror correction is not a sufficient basis" for the Supreme Court to take a case); Kermit Roosevelt III, *Light from Dead Stars: The Procedural Adequate and Independent State Ground Reconsidered*, 103 COLUM. L. REV. 1888, 1916 (2003) ("[T]he Supreme Court does not ordinarily engage in error-correction.").

205. *See* Dalton, *supra* note 201, at 62 n.4 ("It has long been clear that the right to appeal is statutory."); Robertson, *supra* note 201, at 1222.

206. *See, e.g.*, M.L.B. v. S.L.J., 519 U.S. 102, 131 (1996) (Thomas, J., dissenting) (noting the Court's "oft-affirmed view that due process does not oblige States to provide for any appeal . . . ."); Griffin v. Illinois, 351 U.S. 12, 18 (1956) (plurality opinion) ("[A] State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all." (citation omitted)); Cobbledick v. United States, 309 U.S. 323, 325 (1940) ("[T]he right to a judgment from more than one court is a matter of grace and not a necessary ingredient of justice . . . ."); Reetz v. Mich., 188 U.S. 505, 508 (1903) ("Neither is the right of appeal essential to due process of law."); *see also* Dalton, *supra* note 201, at 63; Robertson, *supra* note 201, at 1233–34.

207. *See* Dalton, *supra* note 201, at 69. When presented with the issue of whether there is a constitutional right to appeal, the Roberts Court most often denies those questions certiorari. Robertson, *supra* note 201, at 1235.

208. *See, e.g.*, *M.L.B.*, 519 U.S. at 131 (Thomas, J., dissenting); *Griffin*, 351 U.S. at 18; *Cobbledick*, 309 U.S. at 325.

209. *See, e.g.*, *Reetz*, 188 U.S. at 508; *see also* McKane v. Durston, 153 U.S. 684, 687 (1894).

210. Dalton, *supra* note 201, at 62–63 n.2 (arguing that the right to appeal is "nearly universal" because, at most, two states do not technically grant the right to appeal in all matters); Robertson, *supra* note 201, at 1234. In Virginia—one of the two jurisdictions that does not statutorily grant a right to appeal in all cases—the state supreme court's procedure for determining whether to grant review bears

there is a constitutional due process source for the right to appeal, especially in civil cases, because the only functional difference for the Court would be to give criminal defendants convicted in just one state, West Virginia, a right to appeal without first filing a petition for review.[211] The question of a constitutional right to appeal comes before the Court so rarely that nearly all Court precedent on the subject is dicta.[212]

Despite arguments to the contrary, constitutional due process may require the right to at least one appeal in civil matters. Both the fundamental fairness and the error-correction justifications for the right to appellate review are tied to constitutional due process. The Due Process Clause provides that neither the federal government nor any state shall deprive a person "of life, liberty or property without due process of law."[213] Guaranteeing parties at least one opportunity to obtain review in order to correct any errors by a lower court is an integral part of avoiding wrongful deprivation of due process. In one study of federal court cases, parties who lost at trial appealed in approximately 30 percent of cases.[214] Courts of appeals reversed the trial court decisions in up to 33 percent of appealed cases.[215] The percentage of appealed cases that appellate courts

an exceptionally strong likeness to other states' appellate review procedures. Dalton, *supra* note 201, at 63 n.2. The other jurisdiction, West Virginia, falls short of statutorily granting a right to appeal solely because convicted criminal defendants have the right to petition for review but not the right to appeal. *See* Carrico v. Griffith, 272 S.E.2d 235, 239 (W. Va. 1980); State v. Legg, 151 S.E.2d 215, 218 (W. Va. 1967); *see also* Dalton, *supra* note 201, at 63 n.2.

211. *See infra* note 222.

212. Robertson, *supra* note 201, at 1234.

213. U.S. CONST. amend. V; *id.* amend. XIV.

214. Kevin M. Clermont & Theodore Eisenberg, *Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ from Negotiable Instruments*, 2002 U. ILL. L. REV. 947, 951–52 (2002) [hereinafter Clermont & Eisenberg, *Plaintiphobia in the Appellate Courts*] (analysis of all cases terminated in federal courts 1988-1997); *see also* C. K. ROWLAND & ROBERT A. CARP, POLITICS AND JUDGMENT IN FEDERAL DISTRICT COURTS 8 (1996) (parties appeal twenty percent of district court cases); Theodore Eisenberg, *Appeal Rates and Outcomes in Tried and Nontried Cases: Further Exploration of Anti-Plaintiff Appellate Outcomes*, 1 J. EMPIRICAL LEGAL STUD. 659, 685 (2004) [hereinafter Eisenberg, *Appeal Rates*] (noting that parties appeal approximately twenty percent of cases with definitive trial court judgments, and that parties appeal tried cases at approximately twice the rate of untried cases).

215. Clermont & Eisenberg, *Plaintiphobia in the Appellate Courts*, *supra* note 214; *see also* Daniel C. Tucker, *We Can't Stay This Way: Changing the Standard for Staying Injunctions Pending Appeal After* eBay, 79 GEO. WASH. L. REV. 1276, 1289 (2011). In some jurisdictions, appellate courts reverse the judgments in one-third to one-half of appealed, civil cases. *See* Note, *Courting Reversal: The Supervisory Role of State Supreme Courts*, 87 YALE L.J. 1191, 1198 n.30 (1978) (38.5% reversal rate); Robertson, *supra* note 201, at 1243 (48.0% reversal rate). *But see* Chris Guthrie, *supra* note 204, at 444 n.160 (showing that appeals seldom lead to reversal); Chris Guthrie & Tracey E. George, *The Futility of Appeal: Disciplinary Insights into the "Affirmance Effect" on the United States Courts of Appeals*, 32 FLA. ST. U. L. REV. 357, 358 & n.2, n.3 (2005) (noting that, although the Supreme Court reversed over 60 percent of the cases that it heard in the last decade, "[a]ffirmances are a defining feature of the courts of appeals: the courts of appeals affirmed 90% of the cases they decided during the same period").

reverse is likely much higher when limited to civil matters.[216] As others have argued, even if the ability to appeal was not previously essential to due process,[217] current procedural limitations may mean that due process requires the ability to appeal. Some argue that the current decreased availability of many traditional procedural safeguards leaves parties even more dependent on appellate review to obtain fundamental due process.[218]

2. The role of stays pending appeal in the opportunity for review

The stays standard needs a guiding principle that will aid judges in making these important decisions in short timeframes. Even if the right to appeal is only statutory or is not required by constitutional due process, the federal court system effectively provides a right to appeal for all civil injunctive orders or judgments. Courts should use procedure to preserve that ability to appeal, wherever it exists, and to allow plaintiffs to enforce final orders or judgments where no appeal opportunity exists. Accordingly, decisions on stays pending appeal should tend to protect the opportunity to appeal, where guaranteed, and protect enforceability of final orders and judgments, where appeal is only discretionary.

This guiding purpose will help courts balance competing principles in light of the practical realities of stay determinations. Stay decisions have significant consequences because the matters at issue are often extremely time-sensitive, and appeals can take years. Yet these decisions, which essentially decide substantive outcomes for parties and the public, fall into a forgotten, irregular, law-free zone. When the stakes are high and irreversible, it matters to litigants that courts get stay decisions right. Bringing stays standards and procedures in line with protecting appellate review, where likely, and protecting finality, where review is only discretionary, will increase institutional legitimacy, predictability, fairness, and accuracy. As discussed above, there is no better-suggested guiding principle.[219] Courts should not employ an undertheorized procedural mechanism to choose between plaintiffs' ability to enforce a final order and defendants' ability to obtain meaningful opportunity to appeal.

To prevent the availability of appeal from becoming a mere formality, some procedural safeguards are necessary. Along with the right to appeal (wherever present and whether statutory or constitutional in source) should come an

216. *See* Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 952 (1984) (discussing the "norms of affirmance" and low reversal rates in most criminal appeals); *see generally Courting Reversal*, *supra* note 215, at 1200–10.

217. But there is support for the argument that there has historically been constitutional due process protection of the ability to appeal civil cases at common law or, at least, beginning with the adoption of the Fourteenth Amendment. Robertson, *supra* note 201, at 1237.

218. *See id.* at 1256–57. Both the Court and scholars have noted that "what process is due" can change over time and can depend on context. Mathews v. Eldridge, 424 U.S. 319, 333 (1976). The Court has previously used the *Mathews* test and turned to contemporary practice to determine "what process is due." *Id.* at 333; Robertson, *supra* note 201, at 1240–43.

219. *See supra* Part IV.

auxiliary right generally not to have a judgment enforced before an appellate court considers the appeal. Absent such a protection, the right to appeal would essentially be meaningless in some cases. Because notions of fundamental fairness counsel in favor of guaranteed appellate review of district court civil judgments by courts of appeals, a presumption of stays of district court judgments or orders is necessary for guaranteed appellate review to be effective.

Stay determinations have decision costs because they entail striking a compromise between enforcing a final judgment or order and preserving the opportunity for meaningful appeal. The principles of protecting finality and preserving the ability to obtain meaningful review serve as limitations on each other in stay determinations. The competition between finality and preserving meaningful appeal functions similarly to attempts to minimize error costs. Where review of a judgment or order is discretionary, there is no right to appeal to protect, which decreases the decision cost of denying a stay. Where irreparable harm pending review is unlikely, there is no threat to the appeal being meaningful, which decreases the decision cost of denying a stay. Conversely, where review for a judgment or order is guaranteed, there *is* a right to appeal to protect, which increases the decision cost of denying a stay. Where irreparable harm pending review is likely, there is a threat to the appeal being meaningful, which increases the decision cost of denying a stay.

In the federal court system, as in many three-tiered court systems, there is typically no right of appeal to the highest court and appeal is guaranteed to the intermediate appellate court.[220] The circuit courts and Supreme Court play different roles in the judicial system, as demonstrated by the difference between appeals as of right to circuit courts and the discretionary Supreme Court certiorari system. This difference suggests that fundamental fairness does not require a second level of review and counsels in favor of treating stays pending appeal differently between these courts. After all, unlike courts of appeals, the Supreme Court does not see itself as a court of error correction.[221] When availability of appeal is discretionary and, thus, much more limited,[222] there is far less need, or no need at all, for a presumption of a stay to effectuate a

220. Dalton, *supra* note 201, at 64. *But see supra* note 202 (noting that some cases go from a three-judge district court to nondiscretionary Supreme Court review).

221. *See* Abramowicz & Stearns, *supra* note 204, at 1047 n.257 (noting that "error correction is not a sufficient basis" for the Supreme Court to take a case); Roosevelt III, *supra* note 204, at 1916 ("[T]he Supreme Court does not ordinarily engage in error-correction.").

222. The Supreme Court generally grants and hears oral argument in approximately 1 percent of the cases for which the Court receives petitions for writs of certiorari. *See Frequently Asked Questions (FAQs)*, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/about/faq_general.aspx [https://perma.cc/YX8T-D9Q4]; Jeffrey O. Cooper & Douglas A. Berman, *Passive Virtues and Casual Vices in the Federal Courts of Appeals*, 66 BROOK. L. REV. 685, 718 (2001); Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487, 1493, 1515 (2008); Robert H. Mnookin & Robert B. Wilson, *Rational Bargaining and Market Efficiency: Understanding* Pennzoil v. Texaco, 75 VA. L. REV. 295, 298 n.17 (1989).

meaningful right of appeal before a court has granted review. Therefore, courts should employ a presumption against stays pending writs of certiorari to the Supreme Court and pending discretionary review before other courts. The next Part proposes such a model.

V.
PROPOSALS TO IMPROVE STAYS PENDING APPEAL DECISIONS

A. *Aligning the Stays Standard*

To bring the substantive standard of stay determination in line with the purpose of stays—to protect a meaningful opportunity to appeal, where guaranteed, and to protect the enforceability of orders where appeal is discretionary—requires both major and minor changes to the stays standard. Courts should use different presumptions depending on whether the request for a stay is pending guaranteed or discretionary review. This Part also queries whether courts should stop considering the balance of the hardships and the public interest when making stay determinations.

1. Different Standards for Stays Pending Appeal Depending on Availability of Review

As discussed above, the opportunity to seek judicial review has been guaranteed historically due to fundamental fairness concerns and to give courts of appeals an opportunity to correct errors.[223] This Article argues that, along with this meaningful opportunity to appeal should come an auxiliary right[224] generally not to have the underlying judgment or order enforced such that a party who lost below, but who is likely to win on appeal, would be irreparably harmed before a court of appeals reviews the underlying order. A standard that does not protect the auxiliary right to a stay where there is a guaranteed opportunity to appeal would essentially render the opportunity to appeal meaningless. Moreover, to best navigate the tension between the value of finality and due process concerns, courts should harmonize the standard and procedures for deciding stay requests with this purpose. When determining a request for a stay pending review of a civil injunctive order, the court should first assess whether review is guaranteed.

A. Stays Pending Guaranteed Opportunity for Appellate Review

With guaranteed opportunity for review comes the possibility of a court of appeals reversing a district court's order or judgment, and the presumption of a stay protects the auxiliary right to that appeal. The substantive standard for stays should reflect both the importance of enforcing court judgments and orders and

223. *See supra* Part IV.C.
224. *Id.*

guaranteed appeal, where it exists, which necessarily includes the possibility that a court may reverse or vacate the judgment or order.

To prevent the right of appeal from being hollow, when review is guaranteed[225] and a losing defendant[226] requests a stay,[227] courts should have a presumption in favor of granting stays for final judgments and orders. When a defendant applies for a stay pending guaranteed review of a final order or judgment, federal courts should grant such applications unless the plaintiff[228] demonstrates that there is little likelihood of success on appeal *and* that the plaintiff is likely to suffer irreparable harm if the court grants a stay.[229] If a plaintiff demonstrates both of those considerations, then meaningful appellate review no longer warrants a stay.

Furthermore, protecting the right to meaningful appeal does not require staying judgments or orders that have little chance of being overturned when a stay would cause the plaintiff irreparable harm. A court should deny a stay only if a winning plaintiff meets both of these thresholds. To prevent a stay, winning plaintiffs should demonstrate that defendants are not likely to succeed on appeal *and* that granting a stay pending appeal is likely to cause irreparable harm to plaintiffs. Because a court has already ruled against the defendants, it should not be difficult for plaintiffs to persuade the court that the defendants are unlikely to win on appeal. Plaintiffs should be able to enforce the judgment or order pending appeal only if they would otherwise suffer irreparable harm.

Requiring only that plaintiffs demonstrate one of these considerations—either that defendants are not likely to succeed on appeal *or* that granting a stay pending appeal is likely to cause irreparable harm—when the court has already

225. Review is guaranteed for appeals from federal district courts to courts of appeals and for certain other claims. *See supra* note 202.

226. This Article specifies defendants and plaintiffs because only losing defendants, not losing plaintiffs, can have orders or judgments that they can request a court to stay pending appeal. When plaintiffs lose, there is no order or judgment that they can request a court to stay while review is pending. Plaintiffs appeal precisely because the court did not issue an order or judgment in their favor. What plaintiffs seek in such instance is some type of preliminary injunction, which is different in nature from a stay substantively and procedurally.

227. This Article does not suggest that courts stay orders or judgments automatically. Courts should still only consider staying orders and judgments when requested to do so by a party. If no party requests a stay, a court should not consider holding the order or judgment in abeyance. Further, this model does not suggest any default rule to govern the relationship either between the parties or between the rule of law, finality, and the right to appellate review. *See, e.g.*, Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 93 (1989). Instead, this model offers rebuttable presumptions that turn on the availability of review.

228. For discussion of plaintiff bearing this burden, *see infra* Part V.A.2.

229. This test is conjunctive, as discussed below. This Article refrains from suggesting how courts should consider the balance of the hardships or the public interest when making stay determinations because it questions whether courts should consider these two factors at all. *See infra* Part V.A.3. If, pending guaranteed review, a party requests that a Supreme Court Justice vacate, modify, or grant a stay that was previously granted or denied by a district court, a three-judge district court, or a court of appeals, the Supreme Court should employ the same standard as a district court or court of appeals should have employed, according to this model.

ruled in favor of the plaintiffs, is not a high enough standard. When the court already thinks that it is likely that defendants will lose on appeal, as will often be the case when the court rules in favor of the plaintiffs, a plaintiff also should have to show that they would likely suffer irreparable harm pending appeal in order for a court to deny a defendant's application for a stay. Because a stay in these circumstances would protect defendants' meaningful opportunity to appeal, a court should deny a defendant's stay request only if a plaintiff is both likely to win again in the appellate court *and* likely to suffer irreparable harm if the order is stayed pending appeal.

B. Stays Pending Discretionary Review

In most federal cases, however, there is no guarantee of a right to more than one appeal of a final judgment or order.[230] It is within the Court's discretion to deny petitions for writs of certiorari, which it does in the vast majority of cases.[231] Thus, for nearly all petitions for writs of certiorari, this auxiliary right to the presumption of a stay is lacking. In such cases pending discretionary review, there is much less need, or no need at all, for a stay because there is no guaranteed appeal to protect, and review is extremely unlikely.[232] Thus, there is no competing concern for appeal running counter to the value of finality. Moreover, preventing the enforcement of the judgment or order pending the writ could irreparably harm the party who won below even though the Court may decline to hear the case.

The Supreme Court, or any other court with discretionary review, should have a rebuttable presumption against requests for stays if the reviewing court has not yet granted review. Generally, winning parties should be able to enforce final civil injunctive orders and judgments pending discretionary review for finality purposes. In such circumstances, a court has already made a reasoned judgment prior to an application for a stay pending appeal, and parties generally have already had the benefit of one guaranteed appeal.[233] A stay of a judgment pending certiorari or review should remain an extraordinary remedy due to the discretionary nature of the review. Parties are generally entitled to the prompt execution of orders, and stays are an intrusion into that ordinary process.[234] Guaranteed appeals merit this intrusion, but discretionary review often does not because a stay is generally only required to protect guaranteed review. In certain circumstances, however, stays pending appeal may be a necessary tool for a court providing discretionary review to ensure the administration of justice.

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230. *See supra* Part IV.C.

231. *Id.*

232. *See supra* note 222.

233. An exception regarding direct appeals to the Supreme Court from three-judge courts is discussed at *supra* note 202.

234. *See supra* Part II.A.

If review is discretionary, as it is for cases pending writs of certiorari from the Supreme Court, and the reviewing court has not yet granted review or certiorari, then a court should deny a stay request unless the petitioner[235] demonstrates that: (1) the court is likely to grant review,[236] (2) there is a likelihood of success on appeal, *and* (3) the petitioner is likely to suffer irreparable harm pending review, absent a stay. This will allow for prompt enforcement of the lower court's order or judgment unless denying a stay is likely to irreparably harm an applicant who is likely to succeed on appeal and where review is likely to occur.

If an applicant for a stay demonstrates likelihood of a court granting review or certiorari or likelihood of success upon review, but does not demonstrate likelihood that the applicant will suffer irreparable harm pending disposition, then the Court should deny the motion for a stay. Even if the party applying for a stay is likely to win upon review, there is not sufficient reason to delay enforcement of a court order or judgment if the losing party will not suffer irreparable harm pending discretionary review. Similarly, if an applicant for a stay demonstrates the likelihood of irreparable harm pending disposition, but does not demonstrate likelihood of success *and* that the Court will grant review, the Court should deny the motion for a stay. Even if the moving party may suffer irreparable harm, there is insufficient reason to delay enforcement of a court order or judgment if the moving party is likely to lose on appeal.

If the Supreme Court has granted a writ of certiorari (or after another court has granted review), the court should determine a request for a stay based on the standard outlined above for appeals with guaranteed review.[237] In such circumstances, courts should have a presumption in favor of granting stays because, at that point, the case enters into the rare area of obtaining review from a court of discretion. For that now-guaranteed review to be meaningful, considerations should run in much the same way as when a losing defendant requests a stay from a district court order pending guaranteed appeal to a court of appeals.[238]

2. Rethinking the Burden for the Four-Prong Standard for Stays Pending Appeal

For a stay request pending guaranteed review, courts should have a rebuttable presumption in favor of granting a stay unless the plaintiff

235. For discussion of the losing defendant bearing this burden, see *supra* Part V.A.2.

236. Only the court with discretionary review, most often the Supreme Court, should assess this factor: whether the court is likely to grant review or certiorari. Lower courts determining requests for a stay pending discretionary review should determine whether to grant a stay based on only the other two factors. A standard should not require lower federal courts to predict likelihood of the Supreme Court granting certiorari nor should the opportunity for meaningful review turn on a lower federal court's prediction of whether another court will choose to assert jurisdiction.

237. *See supra* Part V.1.a.

238. *Id.*

demonstrates that the losing defendant is unlikely to succeed on appeal and that the plaintiff is likely to suffer irreparable harm.[239] In a change from current procedure,[240] the stay movant should not bear the burden in these circumstances because the presumption of a stay, when requested, should protect the movant's right to a meaningful appeal.[241] Currently, in practice, each party tries to show that its side is likely to suffer irreparable harm pending review, that the other side is not, and that, even if the other side would, its own irreparable harm is comparatively worse. This proposal cuts back on the number of factors that both parties must show and that judges are supposed to consider.

For a stay request pending discretionary review, courts should have a rebuttable presumption against granting a stay unless the movant, or defendant, demonstrates that the court is likely to grant review,[242] that there is a likelihood of success on appeal, and that the petitioner is likely to suffer irreparable harm pending review, absent a stay. Keeping with current procedure,[243] the stay movant should bear the burden in these circumstances because it should be harder for the movant to obtain a stay when appeal is not even guaranteed.[244]

3. Questioning Consideration of the Public Interest and the Balance of the Hardships

Decisions on stays pending appeal occur after a court has already entered a reasoned judgment, but these decisions often take place with relatively little additional information and often in a very short timeframe. The safeguard of a court already having issued a non-preliminary underlying order without time limitations, along with the practical constraints of limited guidance and time, may warrant or even require a simplified standard for stays pending appeal. When determining requests for stays pending appeal, perhaps courts should consider only the factors that are essential to stay decisions — the likelihood of success and irreparable harm.[245] It may seem intuitive to consider the public interest and the balance of the hardships in stay determinations, but considering these factors may undo precedent or careful compromises in procedure or substance. Although it merits more discussion than space allows here, perhaps courts should question whether to continue to consider these factors when determining stays.[246]

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239. For either of these two requirements, courts should also accept demonstrations of the inverse—that the plaintiff is likely to win on appeal or that the losing defendant is unlikely to suffer irreparable harm pending appeal.

240. *See supra* note 106.

241. *See supra* Part IV.C.

242. *See supra* note 239.

243. *See supra* note 106.

244. *See supra* Part V.A.1.b.

245. *See supra* text accompanying notes 107–111.

246. For a full treatment of this possibility, see Portia Pedro, Shadow Procedure: When Equity Undermines Law (Nov. 2017) (unpublished manuscript) (on file with author).

Considering the balance of the hardships and the public interest may help courts temporarily account for third-party interests and navigate potential harms to the state, parties, and the public in preliminary decisions until courts can give the matter full consideration. But considering those factors after courts have already issued final decisions might unnecessarily waste time, increase the influences of arbitrary makeweights and cognitive biases, and increase risks of irreparable harm to litigants likely to succeed on appeal.

Deciding stays pending appeal under the current standard that includes the public interest and balancing the hardships is necessarily more complicated and difficult to assess than deciding the underlying order. Determining whether to grant a request for a stay pending appeal requires some assessment of the underlying judgment, but it also occurs in a more rushed timeframe and requires gauging the likelihood of success on appeal and irreparable harm pending appeal. Perhaps the inquiry should simply stop there.[247] A standard that includes more complicated factors or factors that are more susceptible to becoming arbitrary makeweight will result in poorer decision-making and more arbitrary, unpredictable decisions.

Some may hope to retain consideration of the public interest and balancing the hardships in stay determinations because it gives judges and justices more flexibility and discretion, but more discretion is not always better. Factors should be included in a standard because they are functional.[248] Equitable discretion permits judges to make decisions "appropriate to the justice of the particular case,"[249] but it can also be "mere personal whim"[250] and a "cloak for arbitrary judicial policymaking."[251] The equitable discretion in the public interest and balancing the hardship factors allows for "a rectification of law where it fails through generality,"[252] but it is not clear that law has failed when a court is determining whether to grant a stay pending appeal. Equity tends to be the discretion of the decision-maker that is inherent and complete, such that the power includes disregarding or overriding applicable law or precedent.[253] In

247. There are some similarly simplified standards for preliminary injunctions, which historically use the same four-prong tests as some courts rely on in stay determinations, for statutory or constitutional claims. *Id.* (some courts do not require a showing or irreparable harm or do not consider the balancing of the hardships).

248. *See* Samuel L. Bray, *The Supreme Court and the New Equity*, 68 VAND. L. REV. 997, 1011–12 (2015).

249. *Id.* at 1041.

250. *Id.* (citing John Selden, *Equity*, *in* TABLE-TALK: BEING THE DISCOURSES OF JOHN SELDEN, ESQ. 43, 43–44 (1689)); Daniel A. Farber, *Equitable Discretion, Legal Duties, and Environmental Injunctions*, 45 U. PITT. L. REV. 513, 526–27 (1984); John Choon Yoo, *Who Measures the Chancellor's Foot? The Inherent Remedial Authority of the Federal Courts*, 84 CALIF. L. REV. 1121, 1162–65 (1996)).

251. Bray, *supra* note 248, at 1041.

252. Doug Rendleman, *The Triumph of Equity Revisited: The Stages of Equitable Discretion*, 15 NEV. L.J. 1397, 1399 (2015) (quoting ARISTOTLE, NICOMACHEAN ETHICS 172 (J.E.C. Welldon trans., Macmillan 1912) (c. 384 B.C.E.)).

253. Lannetti, *supra* note 190, at 288.

order to avoid disregarding or overriding applicable law and precedent, perhaps the only stay determinations in which courts should consider the public interest or balance the hardships are when these factors are included in the underlying law, statute, or likelihood of success analyses. Because stays pending appeal determine whether to hold final judgments and orders in abeyance, unfettered discretion in stays might allow personal whims or arbitrary judicial policy-making to subvert the law.[254]

Eliminating consideration of these two factors would save time in decision-making and eliminate the risk of adding arbitrary makeweights to stay determinations. Especially given the rushed nature of stay determinations, it is worrisome that courts may rely on arbitrary and amorphous values to nullify the right to appeal or prevent the enforcement of a reasoned court order.

B. *Courts Should Write*

As discussed above, more often than not, courts do not give reasons for stays pending appeal determinations.[255] Yet the justifications for courts writing opinions for stay determinations are almost too numerous and apparent to mention.[256] Stay decisions deserve explanations because, if left unexplained, these procedural decisions can change litigants' lives and public law.[257] For stays pending appeal to fulfill their purpose and allow courts to comport with institutional design, this Section lays out suggestions for when courts should and should not give reasons for stay pending appeal decisions.

Although courts' resources are limited, courts are also expected to give reasons[258] for decisions.[259] This expectation arises, in part, because giving reasons helps the resource-constrained court system maximize "'correct' answers."[260] Courts regularly give reasons for decisions.[261] Because giving reasons uses resources, including time, courts must navigate a tension in deciding when to give reasons and when to refrain.

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254. *See* Susan H. Black, *A New Look at Preliminary Injunctions: Can Principles from the Past Offer Any Guidelines to Decisionmakers in the Future?*, 36 ALA. L. REV. 1, 4 (1984) (common law judges "charged the Chancellor with attempting to subvert the whole law of England by substituting conscience for definite rule").

255. *See supra* Part III.B.

256. *See* notes 257–265.

257. *See supra* Part I.

258. This Article uses the term "reasons" as any item offered as an explanation for a decision, even if it is a poor justification for that decision. *See* Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 635–36 (1995).

259. *See id.* at 633 n.2 (noting that issuing a decision without giving reasons for the decision is often a decisional deficiency).

260. *See* Lewis Kornhauser, Adjudication by a Resource-Constrained Team: Hierarchy and Precedent in a Judicial System, 68 S. CAL. L. REV. 1605, 1606 (1995) (proposing a model of the judiciary as a "judicial team," which aims to maximize "'correct' answers" regardless of what definition of "correct" it chooses to adopt).

261. *See* Robin J. Effron, *Reason Giving and Rule Making in Procedural Law*, 65 ALA. L. REV. 683, 715, 723–24 (2014) (acknowledging an "existing norm of justificatory opinion writing").

Additionally, institutional design is relevant for determining when courts should provide reasons. A primary purpose of appeals is "to correct errors; to develop legal principles; and to tie geographically dispersed lower courts into a unified, authoritative legal system,"[262] so reason giving is commonly associated with, and expected of, appellate opinions.[263] In the tiered US system, federal courts of appeals and the Supreme Court have a "harmonizing and law-giving function."[264] Giving reasons can remedy areas where judges may have, in effect, unreviewable discretion and may help to fill in some of the "interstices of procedural doctrines."[265]

Deciding whether and when courts should give reasons for procedural decisions entails balancing regulating procedure with rules and giving courts flexibility through discretion.[266] Strict rules simplify coordination among courts and promote consistency and predictability.[267] Flexibility and discretion in procedural rules allow judges to play a managerial role in guiding cases.[268] In procedural areas for which there is often no meaningful review, the purpose of appeals is lacking and "difficulties emerge in the way that procedural rules are promulgated, interpreted, and applied."[269] For decisions on procedural mechanisms that courts would implement best with a mix of a strict rule and discretion and that may otherwise be insulated from meaningful review, Professor Robin J. Effron argued that courts should have discretion, have clear lists of factors to consider, and provide reasoning.[270]

This Section discusses these concerns for district courts, courts of appeals, and the Supreme Court and recommends when each judicial level should offer reasoning for stay determinations.

1. District Courts

District courts are uniquely situated in that the only stay determinations that these courts make are almost always of their own underlying orders.[271] These courts typically have the most information regarding the circumstances of the cases for which they may be asked for stays. Additionally, because district court judges generally issue stay orders individually and, thus, do not need to strategize to gain other judges' votes, they have fewer strategic reasons to avoid writing opinions for stays pending appeal than might courts of appeals or the Supreme

262. *See id.* at 704–05 (quoting Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 662 (1994)); *supra* note 215.
263. Schauer, *supra* note 258, at 638.
264. *See* Effron, *supra* note 261, at 705–06.
265. *Id.* at 704–05.
266. *See id.* at 688.
267. *See id.* at 690–95.
268. *See id.* at 695–98.
269. *Id.* at 705.
270. *Id.* at 715–16.
271. *See supra* Part II.**A**.

Court. Writing opinions could improve the quality of decision making for underlying stay determinations and could encourage judges to apply the appropriate standard.[272] Thus, writing opinions for stays may decrease the risk of denying a meaningful opportunity to guaranteed appeal or of subjecting a party that is likely to win on appeal to suffer irreparable harm in the meanwhile. Giving reasons for stay determinations also helps to ensure fundamental fairness to parties.[273] Opinions allow parties to know the bases for a decision that could irreparably affect their rights or their ability to meaningfully appeal.

The primary cost to district courts for reason giving for stays of their own orders is that reason giving will use limited time that a court otherwise could spend on other tasks and that writing could delay a court's stay decisions on time-sensitive matters. But every task draws time and resources from other tasks. If a court is already deciding according to the standard, the additional time it takes to explain verbally that thought process should be reasonably short and, at least, should not be the dispositive factor for a court determining whether to write. Federal rules require courts to write a reasoned opinion every time that courts issue a preliminary injunction.[274] In comparison, it does not seem overly burdensome to suggest that courts should write reasoned opinions more frequently for stay determinations. A stay decision runs the risk of preventing plaintiffs who have won, and who may win again on appeal, from enforcing their permanent injunctive orders, with the result that they will suffer irreparable harm of denying defendants a meaningful opportunity to appeal even where defendants have appeal as of right and are likely to win on appeal. There is no length requirement; judges can give reasons from the bench or write short opinions. Courts can grant or deny a temporary stay[275] according to the presumption based on availability of review[276] before giving reasons with the stay determination in the second stage. Courts could also issue stay orders first and write the opinion for the decision later. Parties and the judicial system will still benefit even if courts write opinions sometime after issuing the stay order. There will still likely be an increase in reasoned consideration if a judge knows that they will need to give reasons in the future.[277]

A court writing a stay opinion about its own underlying order could worry that indicating that the defendant may be likely to succeed would undermine their underlying order and highlight potential weaknesses of the merits of their decision for reviewing courts. However, under the current standard, whether a court grants a stay or not in effect already reveals something about likelihood of success even if the court does not write about that factor. Additionally, courts

272. *See supra* notes 255–268.
273. *Id.*
274. *See supra* note 132; *see also supra* note 130 (same for temporary restraining orders).
275. *See supra* note 97.
276. *See supra* Part V.A.1.
277. *See supra* notes 255–267.

can give reasons for stay determinations while avoiding this risk. Courts can write stay opinions without ever writing about the likelihood of success factor, or they can write about this factor while only discussing the minimum threshold needed to demonstrate likelihood of success, which should be lower for a court determining a request to stay its own underlying order.

Courts should find that a party has demonstrated likelihood of success wherever a party demonstrates that the chance of such success is probable, strong, substantial, or greater than 50 percent. Because the goal of stays pending appeal is to protect meaningful appellate review wherever it is guaranteed,[278] and because courts are probably inclined to underestimate a losing party's likelihood of success, the required showing for likelihood of success on appeal should not be especially high. Yet requiring only that the chance of success is "better than negligible" would include all but the most frivolous of appeals even where there is extremely little likelihood of success on appeal.[279] That seems too low of a threshold. A threshold so low that likelihood of success need only be "not wholly without doubt," "more than a mere possibility," or "better than negligible" would render the requirement meaningless as nearly every stay movant would meet such a low threshold.[280]

Some may worry that this threshold is too high, because a party requests a stay after already losing and, often, the court weighing the losing party's success may be the same court that ruled against the losing party in the underlying order or judgment. Thus, there may be some sort of *lock-in effect* where courts underestimate likelihood of success.[281] Presumably, if a court believed that the losing party would have a probable, strong, substantial, or greater than 50 percent chance of success on appeal, the court probably would not have ruled against that party. Thus, it is fitting that courts have a lower likelihood of success requirement for stays of their own orders or judgments. Thus, although the terms may have slightly different meanings, likelihood of success that is "reasonable," a "serious legal question," and a question serious enough to constitute "a fair ground for litigation" seem to avoid frivolity, but also counter the potential of lock-in effect or the almost negligible likelihood that a court would hold that a party it declared as losing had a greater than 50 percent chance of succeeding on

278. *See supra* Part IV.C.

279. *See* Brady v. Nat'l Football League, 779 F. Supp. 2d 1043, 1046–47 (D. Minn. 2011) (declining to adopt the "not wholly without doubt" standard for the likelihood of success factor).

> The "not wholly without doubt" standard urged by the [National Football] League cannot be reconciled with the Supreme Court's requirement of a "*strong showing* on the merits," and appears to be an effort by the League to convert the showing to the low hurdle of "'*any possibility of success* on the merits'" or a "'more than merely negligible'" chance of success. There are few issues in the law that one could characterize as so beyond any dispute as to be deemed "not wholly without doubt." Perhaps this is why the Supreme Court has ruled that "[i]t is not enough that the chance of success on the merits simply be 'better than negligible.'" '[M]ore than a mere possibility' of relief is required.'"

Id. (quoting Nken v. Holder, 556 U.S. 418, 434 (2008) (internal citations omitted)).

280. *See id.*

281. *See* Lynch, *supra* note 20 (discussing lock-in effect).

appeal. If the court that issued the underlying order or judgment, or any circuit court, denies a stay, however, the losing party can almost immediately request a stay from a panel, a court sitting en banc, or a higher court, none of which have the same predisposition against the losing party.[282]

A district court giving reasons in stay determinations aids review and can lead to a more uniform stays standard as courts of appeals and the Supreme Court better identify and understand inconsistencies when courts explain decisions.[283] Courts writing opinions for stay determinations will also better facilitate appeals of stay applications to, and reviews of stay applications by, higher courts. Finally, writing more opinions would allow federal courts to build stays doctrine to ensure that stays are not unreasoned or poorly reasoned procedural decisions that preempt underlying orders.

The current shortage of written stays precedent prevents courts from finding useful guidance. It is difficult to treat similar circumstances in similar ways absent any reasoned opinions for stays determinations. When there are extremely few written opinions, courts cannot build on the precedent of earlier decisions. District courts giving reasons for stay determinations will give future district courts more doctrine, even if not precedent, from which to draw. This could shorten the time future courts need to decide stays and improve the quality of those decisions.[284] This also better allows parties and federal courts to engage in conversations about the stays standard.

In summary, due to the low costs of giving reasons compared to its benefits, district courts should almost always give reasons for stay determinations. If doing so would take too long given a court's or case's constraints, a court can give reasons from the bench, do a two-part stay determination, or issue its decision first and then write the opinion later as time is available. If even that is still too difficult for district courts, courts should at least give reasons whenever they depart from the presumption[285] based on availability of review. At a minimum, district courts should explain their decisions when they deny a stay for a guaranteed appeal and when they grant a stay for a discretionary appeal.

2. Courts of Appeals

As the middle level in the federal court system, courts of appeals play dual roles in stay determinations. Panels or a court sitting en banc may issue underlying orders, for which litigants can request stays from the court of appeals,

282. *See id.*

283. *See supra* note 276. For a full discussion of the level of deference that reviewing courts should give to a district court and court of appeals's stay determinations, please see *infra* Part. V.C.5. This includes a discussion of how reviewing courts should consider the possible influence of lock-in bias and the perverse incentive that courts that issued the underlying order may have to deny stays because they do not want to undermine their final judgment by acknowledging a losing defendant's likelihood of success on appeal. *See infra* Part V.C5.

284. *See supra* notes 260–268.

285. *See supra* Part V.A.1.

and for which litigants can request vacatur, modification, or grant of stays from the Supreme Court.[286] Litigants may also call upon panels or a court sitting en banc to serve in an appellate role as arbiters of requests for vacatur, modification, or grant of stays from district courts.[287]

When a court of appeals, by panel or en banc, gives reasons for a stay determination for which it also issued the underlying order or judgment, the benefits for the decision, court, and litigants are largely the same as they are for district courts.[288] While the court of appeals shares district courts' disincentives for giving reasons, the court of appeals has some additional deterrents.

In comparison to district court judges,[289] courts of appeals judges may have strategic reasons to avoid writing stays opinions because they decide by panel or en banc.[290] When multiple judges decide a request for a stay, they may not coalesce around any one explanation for the decision. Not giving reasons, orally or in writing, may be a way to maintain a majority or plurality of judges. But the same could be true for every other decision that panels or courts sitting en banc make, such as the underlying and substantive decisions for which they routinely write reasoned opinions. Similar to other types of opinions, at times judges should agree with, or dissent from, the reasoning behind stay determinations.

For future stay determinations, many of the incentives and disincentives for courts of appeals writing stay determinations are the same as for the district court.[291] Yet, for courts of appeals, many of the costs of giving reasons for stay determinations are slightly lower while the benefits are greater in relation to the district courts. Because courts of appeals typically make stay determinations by panel,[292] and only for the cases on appeal[293] for which a losing litigant requests a stay,[294] there is a smaller universe of court of appeals stay determinations. Additionally, each courts of appeals judge would likely only be responsible for writing approximately one of every three stay decisions, as the panel would share those duties. Because courts of appeals decisions are binding, appeals courts' reasoned stay opinions give needed precedent to district courts in the circuit and to other circuit judges. Court of appeals' written opinions can highlight inconsistencies and unresolved questions for the Supreme Court,[295] which could help the Court clarify stays standards.

One additional disincentive for a court of appeals judge to give reasons for a stay determination is if, in doing so, the court could preview how it will decide

286. *See supra* Part II.A.
287. *See supra* note 74.
288. *See infra* Part V.B.1.
289. *See supra* note 73.
290. *See supra* notes 76–77.
291. *See supra* Part V.B.1.
292. *See supra* Part II.A.
293. *Id.*
294. *See supra* note 226.
295. *See supra* notes 152, 161–166.

the appeal of the underlying order in a way that could impact decisions in other district courts. Some recent opinions, however, show that not writing opinions for stays can lead to even more confusion in lower federal courts.

For instance, in *Frank v. Walker*,[296] Seventh Circuit judges held confusingly dissimilar views of the Supreme Court's reasoning for one stay determination, arguably, because the Supreme Court had not written an opinion giving reasons for its decision. The Seventh Circuit per curiam opinion noted that the Supreme Court had granted the stay because the Court had adopted the view that the public interest is best served by enforcing democratically enacted laws until the Court has finally determined the validity of the law.[297] Dissenting Seventh Circuit judges noted that "of course there is no presumption against enjoining unconstitutional state laws pending appeals,"[298] and presented a competing rationale for the stay—that the Court wanted to avoid uncertainty.[299] The Seventh Circuit per curiam and dissenting opinions were able to have diametrically opposed views of the Supreme Court's rationale for granting the stay because no Supreme Court justice issued a written opinion justifying the stay determination.[300] Both per curiam and dissenting opinions cited a Supreme Court summary order with no reasoning. That confusion about presumptions and reasoning for stay determinations became further compounded when the Supreme Court issued no written opinion justifying its decision when the Court eventually heard largely the same arguments regarding a stay in *Frank v. Walker*[301] as the Seventh Circuit had heard below. That left lower federal courts with no explanation of why the Court had granted the earlier stay or of why the Court vacated the Seventh Circuit's stay of the injunction in *Frank v. Walker*. Furthermore, not writing stay opinions has resulted in lower federal courts trying to read between the lines of nonexistent stay opinions.

Courts of appeals should write opinions for stay determinations to clarify the stays standard, to highlight a question of stays doctrine for the Supreme Court, and to justify departures from the presumption based on availability of review.[302] As time requires, courts of appeals can delay giving reasons for stay determinations, similarly to district courts.[303]

296. Frank v. Walker, 769 F.3d 494 (7th Cir. 2014) (per curiam) (deciding whether to grant a stay of an order enjoining enforcement of Wisconsin voter identification requirements).

297. *Id.* (citing Herbert v. Evans, 135 S. Ct. 16 (2014)) (mem.) (denying motion for reconsideration).

298. *Frank*, 769 F.3d at 501 (Williams, J., dissenting).

299. *Id.*

300. Strange v. Searcy, 135 S. Ct. 940 (2015) (mem.); *Herbert*, 135 S. Ct. 16 (mem.). The only *Strange v. Searcy* stay opinion is Justice Thomas's dissent. *Strange*, 135 S. Ct. at 940 (Thomas, J., dissenting).

301. *See* Frank v. Walker, 135 S. Ct. 7 (2014) (mem.) (vacating the Court of Appeals' stay of the district court's permanent injunction preventing the enforcement of Wisconsin voter identification requirement).

302. *See supra* Part V.A.1.

303. *See supra* Part V.B.1.

3. Supreme Court

At the other end of the institutional hierarchy from the district court, the Supreme Court almost never determines stays of its own underlying final orders or judgments because, as the highest court in the land, its judgments are not appealable. Although the Court itself might benefit less than other federal courts might from writing stay opinions, its reasoning might benefit the *parties* and *lower courts* even more than would reasons for stay determinations from lower courts.[304] Justices, more than other federal court judges, might feel pressure to avoid writing opinions on stay determinations for the purpose of garnering or maintaining support for the order. The Court disfavors renewals of stay applications so much so that circuit justice stay decisions are very rarely reconsidered.[305] Additionally, because there is so much discussion among the justices about a stay determination before them[306] and because the full Court rarely reconsiders its own stay determination, there is almost no reconsideration benefit to the justices to explaining their stay determinations in the first place. Yet lower federal courts could benefit significantly from the Court giving written explanations resolving potential inconsistencies in, and confusion with, the stays standard.

On the other hand, there is almost no benefit from the Court issuing reasoning for likelihood to grant writs of certiorari or likelihood of success. To the contrary, the Court could unintentionally influence future lower courts' substantive decisions by writing opinions that analyze the likelihood of success and the likelihood of granting certiorari, which is one of the primary disincentives for the Court giving reasons for stay determinations. If the Court writes stay opinions, lower federal courts might interpret those opinions as smoke signals on upcoming merits decisions. However, whether the Court grants a stay or not in effect tips its hand as to the likelihood of granting certiorari and ultimately success. Additionally, justices can give reasons for stay determinations while avoiding this risk. Moreover, the Court's current custom[307] of not writing stay opinions does not seem to decrease the risk that the Court unintentionally influences lower court decisions. When the justices do not give reasons for their decisions, lower courts may attempt to read the unwritten tea leaves.[308]

When the Court majority or plurality refrains from giving reasons for stay determinations, dissenters still can discuss reasoning and, perhaps, cast the majority's reasoning as a straw man argument or misconstrue it in order to advance their own reasoning. This could result in confusion for lower courts searching for precedent if they only have dissenting or concurring opinions to

304. *See supra* Part III.
305. *See supra* notes 90–92.
306. *See supra* note 87.
307. *See supra* note 166.
308. *See supra* text accompanying notes 298–303.

try to discern the majority or plurality reasoning. Thus, the general Court practice of not writing opinions for stay determinations may lead to dissents and concurrences with even less accurate descriptions of the majority and plurality decisions because their authors write such opinions knowing that it is highly unlikely that any other justice will later clarify the mischaracterization.

Although the Supreme Court has the greatest justification for not writing stay opinions, failure to do so forces lower courts to read between the nonexistent lines of the Court's stay decisions in search of guidance. By issuing more stay opinions, the Court can help fill out the interstices of stay doctrine to ensure that stays are fulfilling their purpose and to provide lower courts with relevant reasoned precedent.

At times, circuit justices or the Court majority or plurality may have to refrain from writing in order to maintain a majority or plurality, or for the sake of expediency. Justices should nevertheless write opinions for stay determinations when needed to clarify the stays standard or if there is a written dissent. Lower federal courts should not have to resort to reading unwritten tea leaves. The opinion need not assess every stays factor in writing and, most likely, should avoid discussing the likelihood of the Court granting certiorari and the likelihood of success on appeal.

C. *Decision-Making Power and Procedures for Stays Pending Appeal*

Changing the substantive standard and writing expectations for stays pending appeal will best promote fairness, predictability, and the purpose of stays. Below are recommendations for stays procedure and allocations of decision-making power on a number of topics that range from who should consider a party's initial stay application to if and how a court should be able to overturn prior stay determinations. Although some of the proposals may increase judicial workload, courts could also simplify stay determinations by eliminating two factors from the standard.[309]

1. Initial Stay Application

The requirement that parties generally must apply first to the district court—or to the court that issued the underlying order—for stays of judgments or orders pending appeal seems fitting, especially given the time constraints of stay determinations. Even though the issuing judge probably is more likely than another judge to deny a motion for a stay that would prevent the enforcement of his or her own order,[310] the issuing judge's familiarity with the case and the order or judgment probably still leave that judge in the best position to quickly assess a motion for a stay.

309. *See supra* Part V.A.3.

310. *See* Lynch, *supra* note 20 (discussing lock-in effect).

Procedural safeguards can mitigate the risk of issuing courts systematically denying stays in a way that works counter to the purpose of stays pending appeal. As discussed above, the court that issued the underlying order usually should not blindly deny the request for a stay without also issuing an opinion explaining its stay determination according to the substantive standard.[311] When judges give reasoning for their decisions, especially in writing, the decisions tend to be more considered and less arbitrary.[312]

Additionally, the stay determination of the issuing court is not the final decision on a stay pending appeal. A court of appeals panel, a circuit sitting en banc, or the Supreme Court (whichever court is not "locked in"[313] by already having issued the underlying opinion) can suspend, modify, grant, or restore an injunction on terms that secure the losing party's right to a meaningful appeal.[314] A party could also make a motion before a court that is not "locked in" to any decision yet if moving first in the issuing court would be impracticable or if the lower court already denied a motion for a stay.[315] If a party demonstrates that impracticability, then there need not be any delay before a party can move a court of appeals for a stay.[316] And, if a party cannot demonstrate that moving for a stay in the issuing court would be impracticable, such that the party must wait to make the motion in another court until after the first court denies the motion, the ability to request a stay from another court still somewhat mitigates the risk of the potentially "locked-in" court incorrectly determining the motion for a stay.

2. Number of Judges

Keeping with current procedure,[317] if a district court judge individually issued the underlying order or judgment, that same individual judge should review the initial motion for a stay. As briefly described above, the issuing court is uniquely situated to assess quickly a motion for a stay due to the court's familiarity with the case and the judgment or order. Review by panels of district court judges of every initial motion for a stay would dilute the efficiency benefits of the issuing judge's familiarity with the matter. There would be little additional benefit of group deliberation.

Similarly, courts of appeals judges and Supreme Court justices should also continue[318] to individually determine motions for stays in most circumstances. The benefits of improved decision quality and accountability due to group decision-making do not justify the extra time that would be required for a panel

311. *See supra* Part V.B.
312. *See supra* notes 254–267.
313. *See, e.g.*, Lynch, *supra* note 20 (discussing the effect of cognitive bias on judicial decision-making regarding injunctions).
314. *See supra* notes 73, 82.
315. *See supra* notes 73, 79.
316. *Id.*
317. *See id.*
318. *Id.*

of judges or for the entire Court to become familiar enough with each case to decide a request for a stay and then to discuss and decide. When a single judge issues, or could have issued, the underlying order or judgment, it would seem odd and a waste of limited resources to require multiple judges or Justices to make stay determinations in concert. To guard against arbitrariness and idiosyncrasies, a losing party should continue to[319] be able to request reconsideration from a court en banc, but a court can also deny the request for reconsideration.[320] Generally, a party should not be able to request reconsideration from an individual judge or Justice, as reconsideration by one individual is akin to the same type of forum shopping that would be problematic if parties could pick the initial judge or justice reviewing their stay applications.[321]

Finally, as justices have done on many occasions, a justice can refer any stay request to the full court.[322] A court of appeals judge or panel should be able to do the same, referring the stay request to a panel or to the court en banc, as seems fit.

3. Assigned Judge or Randomly Assigned

As discussed above, under the current process, for stay requests beyond those to the issuing court, assignment of stay requests to appellate panels is random,[323] but stay applications to the Supreme Court go to the appropriate circuit justice.[324] After the circuit justice has decided the petition, the applicant can, next, request any justice of their own choosing.[325] This process seems unfairly arbitrary. Unless and until the Court clarifies some more uniform stays doctrine, it seems problematic that every stay request from a given circuit is always determined by the same justice who might have a specific leaning substantively or a unique perspective on when the Court should and should not grant stays. Additionally, always having the circuit justice consider an initial request for a stay does seem to require that the applicant should be able to pick a justice of their own choosing for a renewed application for a stay. Nevertheless, because justices are highly averse to overturning another justice's stay determination,[326] the ability to select the justice for a renewal application is not really a safeguard against the circuit justice practice. This aversion, in effect, creates a dynamic whereby circuit justices enjoy almost complete and unquestioned control over whether stays are granted in their circuits or not.[327]

319. *See supra* notes 76, 78, 91.
320. *Id.*
321. *See supra* note 81.
322. *See supra* notes 82, 83, 86.
323. *See supra* note 76.
324. *See supra* note 80.
325. *See supra* note 89.
326. *See supra* notes 90, 92.
327. *Id.*

Although this current assignment of circuit justices is unlikely to affect stays of extremely time-sensitive, highly controversial issues—such as voting rights cases shortly before election day[328]—there are no such protections from the whims of a circuit justice for litigants in seemingly run-of-the-mill cases.[329]

The Supreme Court should randomly assign all initial requests for stays to individual justices. Circuit justices, though, may be more familiar with some of the cases within the circuit in a way that could save time on some stay determinations more than if applications for stays were assigned to justices randomly. Yet, while familiarity and efficiency are important considerations, they are insufficient to justify the current procedure given that a circuit justice is not likely to deviate from the determination of the initial justice, rendering the process ineffective, particularly in cases that warrant such deviation. Assigning stay requests to justices randomly instead of by circuit may promote fairness in stay determinations even though it could cause a slight increase in time for the randomly assigned justice to gain familiarity with the case that the respective circuit justice may already have. This raises the question whether there may be other instances where the employment of circuit justices could be irrelevant and, perhaps, unfairly arbitrary.

4. Overturning Prior Stay Determinations within the Same Court

Existing mechanisms[330] for lower federal courts and for the Supreme Court to enable a court, en banc, to reconsider a stay request previously decided by a member or panel of the court should remain in place. Even though courts will likely only very rarely assert this reconsideration power,[331] this procedure can provide a stopgap to ensure that a full court can debate any highly controversial issue even if an individual judge or justice does not refer it to the full court. This also allows for new consideration by a larger group when circumstances important to the stay request change. In the very rare case of reconsideration,[332] the full court should consider the request de novo instead of giving a high level of deference to the earlier determination by a member of the court. Although a court will probably be highly unlikely, essentially, to overturn the earlier determination,[333] this at least allows for that chance, albeit in rare circumstances.

328. Circuit justices typically refer such applications to the full Court or informally find out how the full Court would vote and decide accordingly, so no one circuit justice individually decides such controversial stays in a way with which the majority of justices would disagree. *See* supra notes 86, 87.

329. *See supra* Part II.

330. *See supra* notes 76, 78, 91.

331. *See supra* note 72.

332. *Id.*

333. *Id.*

5. Level of Deference to Lower Court Stay Determinations

The ability to request that a court of appeals or the US Supreme Court vacate a stay pending appeal granted by a lower court or grant a stay that the lower court denied is an important safeguard for ensuring that guaranteed appellate review is meaningful. That courts also promptly enforce judgments and orders where preserving the right to appeal does not counsel otherwise. Currently, a number of jurisdictions give lower courts' stay determinations great deference.[334] There are efficiency savings if a higher court defers to a lower court's stay determination where the lower court issued a reasoned opinion following a clear standard where there is not clear error. Under the current circumstances of the nearly law-free zone of stays,[335] however, the potential cost to the purpose of stays pending appeal is too high for appellate courts and the Supreme Court to defer to lower court stay determinations.

Even where a lower court issued a reasoned opinion and followed the correct standard, appellate courts should consider requests to grant, vacate, or modify stays pending appeal de novo. Although the appellate court will expend time familiarizing itself with the case, the time is well spent as the appellate court is better positioned than the lower court to assess a party's likelihood of success on appeal. This is truer for requests for a stay pending a writ of certiorari. It makes little sense for a justice to defer to a court of appeals's guess as to the likelihood of success before the Supreme Court when the justice is much more likely to be able to ascertain whether certiorari is likely *and* whether success is likely, since the justice is on the Court and is one of the nine or fewer people who will be deciding.

Appellate courts should be actively involved in guiding lower courts in determining what constitutes irreparable harm and likelihood of success on appeal. As noted above, an appellate court granting (or vacating) a stay where the lower court may have done the opposite is a procedural failsafe to protect parties from lower court judges who may be predisposed to enforce their opinions at the cost of a party's right to meaningful appeal. Because the ability to have a meaningful appeal even where appeal is guaranteed is at risk, along with irreparable harm pending appeal, appellate courts should not defer to lower court determinations of stays pending appeal.

CONCLUSION

There is much work to be done to better understand and evaluate the workings of stays, including in areas beyond civil injunctive matters, like stays of agency decisions and rules and stays regarding habeas corpus and criminal matters. This Article describes the immense import of stay pending appeal determinations and argues that the primary purpose of granting a stay pending

334. *See supra* note 85.
335. *See supra* Part III.

appellate review is to ensure a meaningful opportunity to appeal. To navigate the tension between defendants' meaningful opportunity to appeal and plaintiffs' ability to enforce final judgments or orders, this Article suggests that the standard for stay determinations should differ and turn on the extent of the availability of review for the underlying order or judgment.

The reforms to stays standards and procedures proposed here are not about process solely for the sake of process. Instead, when aggregated, the problems obscured in these procedural decisions have significant impacts on litigants and on our legal system. If we do not seriously engage and address the problems lurking in unstandardized procedural decisions, particularly when those decisions have political valences, there will be serious consequences for parties and the public. The importance of these ideas extends well beyond stays pending appeal and any other seeming procedural technicality. Courts and judges have a great deal of freedom with which to govern themselves and to figure out their own procedures. We must turn our eyes away from the substantive, material outcomes of cases and appeals and instead look at the procedure of procedure to see where, when viewed as a whole, the power of individual judges in different sets of lawless procedural decisions allows the federal appellate system's tail to wag the dog with immense consequence.