RATIO DECIDENDI

The emergency docket's critics have it backwards

By **Stephanie Barclay**
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(Jonathan Newton/The Washington Post via Getty Images)

***Ratio Decidendi** is a recurring series by **Stephanie Barclay** exploring the reasoning – from practical considerations to deep theory – behind our nation's most consequential constitutional decisions.*

Last Monday, the Supreme Court issued two emergency orders in a single evening: ***Mirabelli v. Bonta***, vacating the U.S. Court of Appeals for the 9th Circuit's stay of a district court injunction protecting parents from California's gender-identity nondisclosure policies, and ***Malliotakis v. Williams***, staying a New York trial court order that would have redrawn a congressional district before the 2026 midterms. The rulings share little in common on the merits, but they have attracted a unified critique: that the court bypassed necessary procedural steps in a rush to reach preferred results.

Justice Elena Kagan's dissent in *Mirabelli* set the tone, complaining that the court resolved "novel legal questions" with "scant and, frankly, inadequate briefing," without oral argument, on a "short fuse." Justice Sonia Sotomayor's dissent in *Malliotakis* was more colorful – her opening line being that the 101-word unsigned order "can be summarized in just 7: 'Rules for thee, but not for me'" — but made a parallel point about premature federal intervention. The New York Times recently reported on other criticisms from court watchers (some of whom are friends and colleagues).

These are serious critics making arguments that deserve a serious answer. On examination, though, I don't think the procedural objections hold up in either case. In *Mirabelli*, the critics identify no rule

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the court violated – only a preference for more waiting. But that standard has never governed the emergency docket. What's novel here is not the court's practice. It's this objection. And in *Malliotakis*, the question is not just whether one more state court avenue technically existed, but whether it could have provided meaningful relief before the election calendar foreclosed federal review. The court has authority to act to protect *potential* future jurisdiction even before a case is in final appellate posture, precisely to prevent irreversible facts on the ground from mooting the constitutional question before the court can reach it.

California: the nonexistent en banc problem

One of Kagan's key complaints in *Mirabelli* is that the U.S. Court of Appeals for the 9th Circuit's en banc process was still actively pending when the court acted. Specifically, parents prevailed at the district court level, a 9th Circuit panel granted California's stay, and the parents then sought en banc rehearing – a petition that had been filed but not yet decided when the court granted relief. Again, Kagan's charge is that the court couldn't even wait for the 9th Circuit to resolve its own en banc consideration.

This objection would be a real problem if there were a rule requiring en banc exhaustion before seeking emergency relief from the Supreme Court. There is no such rule. The standard governing emergency applications is the four-factor framework outlined in the 2009 case of ***Nken v. Holder*** – likelihood of success on the merits, irreparable harm, balance of equities, public interest. En banc exhaustion appears nowhere in that analysis. The overwhelming majority of emergency applications are filed immediately after an adverse panel ruling, before the **14-day window** for seeking panel or en banc rehearing has even closed. Death penalty litigation wouldn't function as it does if the rule were otherwise. If Kagan's principle were accepted, emergency jurisdiction from the 9th Circuit – the nation's largest – would become effectively illusory in capital cases and many others.

But the court's willingness to act before en banc proceedings conclude is not new — and Kagan herself has treated it as unremarkable. In ***Husted v. Ohio State Conference of the NAACP***, an Ohio voting-rights case that came to her as circuit justice, Kagan noted "uncertainty about when the Sixth Circuit will act on the emergency petition for rehearing en banc" — and treated that uncertainty not as a reason to wait, but as a reason to expedite the response deadline and refer the matter promptly to the full court, which granted the stay over her dissent. The procedural posture was essentially identical to the one she now condemns: a live en banc petition, unresolved, pending in the circuit at the moment the Supreme Court granted emergency relief. If awaiting en banc resolution were a genuine precondition for Supreme Court intervention, Kagan had the opportunity to say so in *Husted* — as a matter of judicial administration if nothing else. She did not. The procedural concern she now elevates was, in 2014, simply a scheduling detail.

More to the point, the dissenters' own practice undercuts their procedural objection. Justices Sonia Sotomayor, Kagan, and Ketanji Brown Jackson have spent years arguing, in dissent after dissent in capital cases, that irreversible harm justifies immediate emergency intervention without waiting for further proceedings below. And it's not just capital cases. When the court took up the Trump administration's emergency application in ***Department of State v. AIDS Vaccine Advocacy Coalition*** – intervening at the district court level, well before any appellate proceedings were complete – the dissenters joined the prevailing side without a word about prematurity. They were right both times: the court can and should act when the harm is irreversible and the need is urgent. That is the nature of the *emergency* docket. The majority applied that same logic in *Mirabelli*. What has changed is not the court's practice. It is whose interests that practice now serves.

The deeper answer, though, is that the panel's error in *Mirabelli* was the kind of clear misreading of controlling precedent that makes en banc self-correction particularly unlikely – and emergency intervention particularly appropriate. Justice Amy Coney Barrett's concurrence identified the problem precisely: the 9th Circuit panel's **opinion** in *Mirabelli* had characterized the Supreme Court's ruling in the case of ***Mahmoud v. Taylor*** as a "narrow decision" and limited it to curricular contexts, a reading with no basis in *Mahmoud*'s reasoning. Rather, the court's holding in *Mahmoud* was that government action "substantially interfer[ing] with the religious development" of children triggers strict scrutiny (the highest standard of review) – a standard not anchored to classroom instruction, and plainly satisfied by a policy of active concealment of a child's social transition from parents. When a panel demonstrably misconstrues a recent and controlling precedent, waiting for en banc

review has no principled advantage over prompt correction.

Finally, the harm calculus mattered independently of any sequencing question. The record in *Mirabelli* included accounts of parents who learned their child had been socially transitioning at school only after a mental health crisis involving a suicide attempt – and even then "school administrators continued to withhold information about the student's gender identification." That harm accrues daily and cannot be undone retroactively. En banc timelines are measured in months. The *Nken* factors – irreparable harm and likelihood of success – provided the court with independent justification for prompt intervention.

New York: the finality problem that isn't

Sotomayor's **dissent** in *Malliotakis* rests on two related claims: that the court lacked jurisdiction (the ability to hear the case) because New York's highest court had not yet ruled, and that even if jurisdiction existed, longstanding principles of federal deference to state courts in election disputes should have counseled restraint. As quoted earlier, her opening line – that the unsigned 101-word order "can be summarized in just 7: 'Rules for thee, but not for me'" – captures the dissent's animating charge: that the majority weaponized the emergency docket to hand a Republican incumbent a partisan victory before the state courts could finish their work.

The procedural sequence deserves some careful assessment. After the trial court's Jan. 21 order that a new congressional map be drawn to prevent the dilution of Black and Latino voting power, applicants sought relief in both the Appellate Division and Court of Appeals (the highest court in New York) simultaneously. Following the Appellate Division's refusal to stay the district court's order, the Court of Appeals transferred the appeal and dismissed the stay motion on Feb. 11. Applicants filed at the Supreme Court the very next day — before the Appellate Division had ruled on the merits, and after it had denied the stay. Sotomayor is thus right that a procedural path in the state courts remained open.

That said, the critique falters on three grounds.

First, Sotomayor's invocation of ***Purcell v. Gonzalez***, which prohibits courts from disrupting election administration close to an election, proves too much. According to Sotomayor, "the majority's decision to grant relief" in *Malliotakis* was "irreconcilable with its repeated admonishing of lower federal courts not to interfere with state election laws on the 'eve of an election.'" But the legislatively enacted map was the status quo. The trial court's redistricting mandate was the 11th-hour intervention. Staying that order restores stability; it does not undermine it. Sotomayor's argument would recast *Purcell*'s equitable logic — that late judicial disruption of settled election rules harms candidates, voters, and administrators — as a reason to permit exactly that disruption, so long as it originates in a state court rather than a federal one. That is not what *Purcell*'s rationale supports, even if its formal doctrine has not been extended to state tribunals.

Second, the charge of partisan manipulation is difficult to sustain against the court's actual redistricting record. The majority's consistent principle across terms has been to preserve existing or legislatively enacted maps against last-minute judicial alteration – a principle applied regardless of which party benefits. California's Democratic-drawn maps and Texas' Republican-drawn maps have **both been** allowed to proceed on the emergency docket under this framework. The New York case fits the same pattern: the court stayed a trial court's alteration of an existing map. Indeed, when the court denied emergency relief in the California case earlier this term — leaving California's Democratic-drawn map undisturbed — that denial drew no objection from the conservative majority, a fact that sits awkwardly alongside the narrative of systematic partisan manipulation. If the majority were selectively intervening to entrench Republican incumbents, one would expect asymmetric outcomes. The record shows something more principled, and less dramatic, than Sotomayor's seven-word summary suggests.

Third, the jurisdictional analysis holds, though the issue requires some untangling. The Court of Appeals' Feb. 11 transfer and stay dismissal — issued on state jurisdictional grounds — raises a threshold problem: decisions resting on adequate and independent state grounds are ordinarily insulated from federal review, which undermines the claim that the dismissal constitutes a reviewable "final judgment" under **28 U.S.C. § 1257**. Sotomayor presses this point, and it has some force.

But Justice Samuel Alito's concurrence invokes a separate jurisdictional basis: the **All Writs Act, 28 U.S.C. §1651**, which authorizes writs "necessary or appropriate in aid of jurisdiction." Under the 1970 case of ***Atlantic Coast Line v. Engineers*** and 1966's ***FTC v. Dean Foods Co.***, that standard can be satisfied when a stay is needed to prevent state court proceedings from interfering with the court's authority to decide a federal question — a condition Alito found met when the election clock threatened to moot the constitutional issue before certiorari review became available. In the past, the Supreme Court has used its discretion under the All Writs Act authority with respect to a state-court order prior to final judgment to "maintain the status quo by injunction pending review." Following this reasoning, in cases like ***CBS, Inc. v. Davis***, or ***Volkswagenwerk A.G. v. Falzon***, the Supreme Court issued stays before the state high court had ruled on the stay request, much less the merits, where such action was necessary to protect the court's potential jurisdiction. Alito was thus following this same sort of approach when he said that type of reasoning applies here.

Finally, Sotomayor's characterization of the case as a state-law dispute the federal courts should leave alone is question-begging. Alito's position is that the trial court's order is racially discriminatory under the 14th Amendment. If he is right, this was always a federal constitutional case. The premise that the court intruded on a purely state law matter collapses the moment the equal protection clause is implicated, and the dissenters notably decline to offer even a tentative defense of the trial court order's constitutionality.

What the critiques actually establish

None of this is to say the procedural critics have no important questions to raise. Kagan is right that a full merits opinion with proper briefing, oral argument, and conference deliberation would have produced a more carefully developed analysis. These are real costs of the emergency docket, and Barrett's concurrence in *Mirabelli* acknowledged them candidly.

But the critics have conflated a policy disagreement about the emergency docket with a principled procedural objection to these specific orders. There is no rule or long-established practice requiring en banc exhaustion before emergency relief; the court has never consistently required it; and the liberal justices raising the objection have not applied it symmetrically. The finality objection in *Malliotakis* identifies a real gap where the case had not been fully resolved below. But the All Writs Act arguably provides jurisdictional grounds for the court to take up the case in such a posture, and Alito addressed this justification in writing, which is more transparency than many emergency orders provide.

The emergency docket exists because some harms cannot wait for the ordinary appellate process to run its course. That is not a Republican or Democratic principle. It is a structural feature of emergency jurisdiction.

Applied to these cases, it means that parents who are being actively deceived about their children's gender transitions at school, and applicants facing a likely unconstitutional redistricting on the eve of an election, can seek relief without waiting for a process whose timeline would swallow the remedy.

And it is worth asking, in cases like these, which court is actually behaving aggressively. What generates a Supreme Court emergency application is almost always a lower court that has already disturbed the status quo — issuing an injunction, overriding a legislative map, blocking a policy already in effect. Viewed in that light, the court's intervention looks less like overreach than like a restoration of equilibrium pending full appellate review, consistent with the ordinary four-factor stay analysis. What is called judicial aggression at One First Street is often just a response to judicial aggression one floor down — the correction, not the disruption.

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