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## Stays Pending Appeal: Why the Merits Should Not Matter

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# STAYS OF INJUNCTIVE RELIEF PENDING APPEAL: WHY THE MERITS SHOULD NOT MATTER

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## ABSTRACT

*In Nken v. Holder, the Supreme Court delineated the standards that must guide a court's discretion in deciding whether to stay injunctive relief pending appeal. A "critical" factor is whether the stay applicant has made a "strong showing" of her likelihood to succeed on the merits of the appeal. Because of the critical label, it is not surprising to see lower courts issue long decisions extensively predicting the decision of the appellate court on the merits. To preserve her interest in judicial review, the stay applicant must effectively show that she will win the appeal.*

*Stays play an important role in appellate judicial review but have received little academic commentary. This Article is the first to specifically argue against the evaluation of the merits within the decision to stay injunctive relief pending appeal. An evaluation of the merits, and the current emphasis on the merit factor, is not supported historically, theoretically, or practically. Instead courts should look to whether a stay is necessary—due to any potentially changing circumstances, harm to the parties, and the public interest, similar to the other three Nken factors. Courts must also explain their application of these stay factors. Otherwise, their decisions seem unjustified, inconsistent, and illegitimate.*

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## I. INTRODUCTION

Even though reversals on appeals are supposed to have the effect of undoing the lower courts' decisions, appellate courts do not actually have an "undo" button. Circumstances may change in the meantime, such that it doesn't really matter how the appellate court rules. Suppose a lower court determines that a state can enforce a law requiring every doctor who performs abortions to have admitting privileges at a local hospital. An appeal is filed, but circumstances change in the meantime—clinics close if their doctors cannot comply. The appellate court can reverse the lower court's judgment and cease enforcement of the law, but the clinics are already closed. And they have been closed for so long that they are unlikely to reopen. There is no undo button, and the practical circumstances, not the appellate court, controlled the outcome. Once the egg is scrambled, even a mighty appellate court can't unscramble it.<sup>1</sup>

Courts do have one remedy to stop the egg from becoming scrambled in the first place—a stay pending appeal. Stays have played a part in numerous, recent high-profile cases, even if they go unnoticed. There is a reason that same-sex marriages did not (usually) automatically begin even after a court had enjoined enforcement of a state's ban on same-sex marriage. That reason is a stay.

The Supreme Court has delineated the four factors that federal courts must use to evaluate requests for stays of injunctive relief pending appeal.<sup>2</sup> A "critical" factor is whether the stay applicant made a "strong showing" that it is likely to succeed on the ultimate merits of the appeal.<sup>3</sup> Thus, to obtain a stay—to maintain the usefulness of an appeal—an applicant has to show, strongly, that she is likely to win on appeal.

The emphasis and evaluation of the merits are inconsistent with the history behind, the theory underlying, and the practical circumstances of granting stays. English chancery court practice—the same authority the Supreme Court looked to when defining federal courts' power to issue a stay—did not include an evaluation of the merits of the appeal.<sup>4</sup> Additionally, a focus on the merits is not supported by the court-defined main purpose of stays, which is to enable meaningful judicial review, both for the appellate court and the parties. Last, practically, an evaluation of the merits makes little sense given the time frame and the unfortunate natural inclination to match the later ultimate merits decision to that initial merits prediction. Considering the merits can only get in the way of evaluating the factors that are consistent with history and theory: whether the circumstances could change in a way that would interfere

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1. *In re CGI Indus., Inc.*, 27 F.3d 296, 299 (7th Cir. 1994).

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

3. *Id.*

4. *See infra* Section III.A.

with the appellate court issuing meaningful relief, the harm to the parties with or without a stay, and the public interest.

Equally important to the application of the correct factors is the explanation of that application. All over the nation, injunctions prohibiting states from enforcing their bans on same-sex marriage were stayed because of a two-sentence (unexplained) stay issued by the Supreme Court;<sup>5</sup> yes, the same Court that cautioned the need to constrain a court's discretion in granting relief pending appeal frequently fails to explain how it applied the law in granting or refusing that relief.<sup>6</sup> Regardless, the stays on injunctions prohibiting states from enforcing their bans on same-sex marriage were likely appropriate. But without explanation, there is no justification for the Court's decision and no assurance that it complies with the governing law. The rule of law demands more.

Part II of this Article explains courts' inherent power to issue stays pending appeal and the *Nken* standard. It also explores two recent applications of *Nken* where the courts placed heavy importance on the merits. Part III argues that an emphasis on the merits is not historically, theoretically, or practically supported, and also delineates the factors that courts should consider. Part IV addresses the legitimacy of stay decisions and argues that explanation of decisions is needed.

## II. THE STANDARD FOR STAYING INJUNCTIVE RELIEF PENDING APPEAL

A court's inherent power to stay an injunction pending appeal is also codified in the Federal Rules of Civil and Appellate Procedure. The Supreme Court has separately clarified the factors courts must use to guide their discretion in determining whether to issue that stay under the Rules.

### A. *Power to Stay*

A federal court's inherent power to stay the judgment pending appeal ultimately derives from the All Writs Act, which "preserved in the grant of authority to federal courts [the power] to 'issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.'"<sup>7</sup>

The power has become more specific depending on whether the judgment below was legal, meaning for monetary damages, or equitable, including granting injunctive relief. This distinction is apparent in Federal

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5. See *infra* Section IV.A.

6. See *infra* Section IV.A.

7. *Nken*, 556 U.S. at 426; see also 28 U.S.C. § 1651(a) (2012). This authority originally appeared in the Judiciary Act of 1789. *Nken*, 556 U.S. at 426 (citing *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 10 n.4 (1942)). This power "ordinarily is exercised by the appellate court itself but also may be exercised by a single judge of the court of appeals in emergency circumstances." 11 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 2908, at 731 (3d ed. 2012).

Rule of Civil Procedure 62. Rule 62(a) provides an automatic fourteen-day stay on the execution of monetary judgments.<sup>8</sup> After those fourteen days, an appellant can “obtain a stay” by posting a “supersedeas bond.”<sup>9</sup> The stay will be effective “when the court approves the bond.”<sup>10</sup> Many courts describe this Rule as automatically entitling the applicant to a stay as a matter of “right” once the bond is posted.<sup>11</sup> Courts will even grant stays of execution of monetary judgments when the stay applicant is unable to post a bond for the full amount of the judgment or unable to post any bond.<sup>12</sup> In all, these provisions make obtaining a stay of execution of a legal, monetary judgment relatively easy.

None of these provisions apply, however, if the underlying judgment involves injunctive relief. No fourteen-day automatic stay exists.<sup>13</sup> Additionally, the provision allowing a stay based on the posting of a bond does not apply to such an appeal.<sup>14</sup> Rule 62 does recognize, however, that if the “appeal is pending from an interlocutory order or final judgment that grants, dissolves, or denies an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party’s rights.”<sup>15</sup>

8. FED. R. CIV. P. 62(a).

9. *Id.* at 62(d).

10. *Id.*

11. *See, e.g.,* Eurasia Int’l, Ltd. v. Holman Shipping, Inc., 411 F.3d 578, 585 (5th Cir. 2005) (“FED. R. CIV. P. 62(d) provides that a party is entitled to an automatic stay of proceedings to enforce a judgment upon appeal when it *posts a supersedeas bond.*”); Frommert v. Konkright, 639 F. Supp. 2d 305, 308 (W.D.N.Y. 2009) (“[T]he party posting the bond is entitled to a stay as of right; the court has no discretion to deny the stay itself, but only to fix the amount of (or to waive) the bond.”); New Access Commc’ns LLC v. Qwest Corp., 378 F. Supp. 2d 1135, 1138 (D. Minn. 2005) (“An appellant may request and obtain a stay of judgment pending appeal as a matter of right upon posting a supersedeas bond.”); Marcoux v. Farm Serv. & Supplies, Inc., 290 F. Supp. 2d 457, 485 (S.D.N.Y. 2003) (“[S]tay of the judgment pending appeal is automatic upon the posting of a supersedeas bond.”); *see also* 11 WRIGHT ET AL., *supra* note 7, § 2905, at 712-13 (“The stay issues as a matter of right in cases within Rule 62(d), and is effective when the supersedeas is approved by the court.” (footnote omitted)).

12. *See, e.g.,* Fed. Prescription Serv., Inc. v. Am. Pharm. Ass’n, 636 F.2d 755, 760-61 (D.C. Cir. 1980) (explaining that Rule 62(d) does not limit a district court’s power to issue unsecured stays through exercise of its sound discretion); *Marcoux*, 290 F. Supp. 2d at 485 (“Whether to grant a stay without a supersedeas bond is a matter that remains within this Court’s sound discretion.”); *Alexander v. Chesapeake, Potomac & Tidewater Books, Inc.*, 190 F.R.D. 190, 192 (E.D. Va. 1999) (“[T]his Rule leaves unimpaired a district court’s inherent, discretionary power to stay judgments pending appeal on terms other than a full supersedeas bond.”).

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

14. *Id.* at 62(d).

15. *Id.* at 62(c). This Rule also enables courts to issue affirmative injunctive relief pending appeal. *Id.* Different standards govern stays of injunctive relief and granting affirmative injunctive relief because “[t]here is . . . a considerable reluctance in granting an injunction pending appeal when to do so, in effect, is to give the appellant the ultimate relief being sought.” 11 WRIGHT ET AL., *supra* note 7, § 2904, at 702-03 (footnote omitted). Thus, standards different than *Nken* apply—requiring the applicant “to show a great likelihood that he will prevail when the case finally comes to be heard on the merits and that a denial of interim relief will result in irreparable injury.” *Id.* § 2904, at 703-04. Although many arguments in this Article may apply

Rule 62 also clarifies that it does not, in any way, limit the power of the appellate court to take similar action. Specifically, the appellate court or any of its judges or justices may still “stay proceedings—or suspend, modify, restore, or grant an injunction—while an appeal is pending,” or “issue an order to preserve the status quo or the effectiveness of the judgment to be entered.”<sup>16</sup> Moreover, Federal Rule of Appellate Procedure 8 specifically empowers an appellate court to grant a stay or injunction pending appeal.<sup>17</sup> Rule 8 clarifies that a party seeking such relief “must ordinarily move first in the district court.”<sup>18</sup> If denied there, the applicant can seek a stay from the appellate court.<sup>19</sup>

### B. Standard

Neither the statutory authority nor the Rules, however, indicate the factors courts should consider when determining whether to issue stays of injunctive relief. The Supreme Court introduced the factors in *Hilton v. Braunskill*<sup>20</sup> and more recently discussed them in *Nken v. Holder*.<sup>21</sup>

Stays are not available as a matter of right, even if irreparable injury will occur without the stay.<sup>22</sup> The issuance of a stay is left to the court’s discretion and will depend on the facts of each particular case.<sup>23</sup> Still, legal standards govern the exercise of that discretion. A motion to a court’s “discretion is a motion, not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles.”<sup>24</sup> Those sound legal principles, which a stay applicant will have the burden to show,<sup>25</sup> are:

- (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 sub-

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equally as well to the standards governing the granting of affirmative injunctive relief, this Article addresses stays of injunctive relief only.

16. FED. R. CIV. P. 62(g).

17. FED. R. APP. P. 8(a)(2).

18. *Id.* at 8(a)(1). A recognized exception is if the party seeking relief first from the district court “would be impracticable.” *Id.* at 8(a)(2)(A)(i).

19. *Id.* at 8(a)(2)(A)(ii). The United States Supreme Court has separate statutory authority to grant a stay pending the filing and review of a petition for writ of certiorari. *See* 28 U.S.C. § 2101(f) (2012).

20. 481 U.S. 770, 776-77 (1987).

21. 556 U.S. 418, 434 (2009).

22. *Id.* at 433 (quoting *Virginian Ry. Co. v. United States*, 272 U.S. 658, 672 (1926)). If stays were available as a matter of right, the number of appeals would likely increase. *Chafin v. Chafin*, 133 S. Ct. 1017, 1027 (2013). Stays from execution of monetary judgments are available as a matter of right, however. *See supra* notes 8-12 and accompanying text.

23. *Nken*, 556 U.S. at 433.

24. *Id.* at 434 (quoting *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 139 (2005)).

25. *Id.* at 433-34.

stantially injure the other parties interested in the proceeding; and (4) where the public interest lies.<sup>26</sup>

To clarify the factors a bit, the Court explained that the applicant must show more than some possibility of irreparable injury.<sup>27</sup> Additionally, factor three “calls for assessing the harm to the opposing party.”<sup>28</sup> When the party opposing the stay is the government, this third factor merges with the fourth because the government’s interest is the public interest.<sup>29</sup>

One thing the Court did not clarify, however, is the “strong showing” of likely success on the merits factor.<sup>30</sup> The Court did explain that “[i]t is not enough that the chance of success on the merits be ‘better than negligible.’”<sup>31</sup> But that seems inherent in the required strong showing; it is not possible to make a strong showing of a likelihood to succeed if the applicant shows only a better than negligible chance.

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26. *Id.* at 434 (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). As the Court noted, there is “substantial overlap” between the *Nken* factors and the factors used to issue preliminary injunctions. *Id.* Those factors are that the plaintiff is: “likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2008). There is disagreement about whether the Court allowed the factors to operate on a sliding scale in *Winter*. See, e.g., Jean C. Love, *Teaching Preliminary Injunctions After Winter*, 57 ST. LOUIS U. L.J. 689, 706-07 (2013); Rachel A. Weisshaar, *Hazy Shades of Winter: Resolving the Circuit Split over Preliminary Injunctions*, 65 VAND. L. REV. 1011, 1017 (2012); Bethany M. Bates, Note, *Reconciliation After Winter: The Standard for Preliminary Injunctions in Federal Courts*, 111 COLUM. L. REV. 1522, 1523 (2011).

The factors for stays and preliminary injunctions may overlap, but they still differ. The first factor differs regarding the apparent burden of proof—a stay applicant must make a “strong showing” of likely success, but a movant for a preliminary injunction need only show that he is likely to succeed. *Nken*, 556 U.S. at 434; *Winter*, 555 U.S. at 20. The language of the third factor also differs, but the considerations are similar. The *Nken* third factor looks to how the opposing party would be harmed by a stay, and balancing of the equities also looks to how the parties would be affected by the preliminary injunction. *Nken*, 556 U.S. at 434; *Winter*, 555 U.S. at 20.

According to the Court, the overlap makes sense because “similar concerns arise whenever a court order may allow or disallow anticipated action before the legality of that action has been conclusively determined.” *Nken*, 556 U.S. at 434; see also *Ohio v. Nuclear Regulatory Comm’n*, 812 F.2d 288, 290 (6th Cir. 1987); *Busboom Grain Co. v. Interstate Commerce Comm’n*, 830 F.2d 74, 75 (7th Cir. 1987) (discussing preliminary injunction cases and explaining that “the same considerations should inform the disposition of applications for stays of administrative decisions”); *Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983) (“The standard for evaluating stays pending appeal is similar to that employed by district courts in deciding whether to grant a preliminary injunction.”). With a preliminary injunction, the trial court must make that decision at the very beginning of the lawsuit, well before it determines the merits. With a stay, the court must make that decision at the very beginning of the appeal, well before it determines the merits of the appeal. Although preliminary injunctions and stays share these concerns, the two mechanisms work differently. See *infra* note 165 and accompanying text.

27. *Nken*, 556 U.S. at 434.

28. *Id.* at 435.

29. *Id.*

30. *Id.* at 434.

31. *Id.*

The plain language of strong showing appears to be a much higher burden than “better than negligible.” It also seems higher than the burden for a preliminary injunction, which requires the movant to show only that he is likely to succeed on the merits.<sup>32</sup> Some have interpreted this preliminary-injunction burden “to imply that the plaintiff must show that success is more likely than not,” which is the same burden of proof the plaintiff has on the ultimate merits in a civil proceeding.<sup>33</sup> Applied to *Nken*, then, the movant must make a strong showing of more likely than not, which is arguably even more difficult than the ultimate burden on appeal (the more likely than not burden). Regardless, even if the burden of proof to obtain a stay is equal to the burden of proof at the merits stage, the request for the stay is resolved long before the appellate briefs and oral arguments are completed.

Maybe the Court did not mean to impose such a difficult burden on the stay movant; maybe it meant something less. But it is difficult to reach that conclusion when the Court used the word “strong,” which automatically seems like a more difficult burden than what is required for a preliminary injunction.<sup>34</sup>

Another thing the Court could have clarified is its classification of the merits and irreparable injury factors as “the most critical.”<sup>35</sup> Does that mean a stay applicant can never succeed if she cannot show both of the two critical factors? Or, does the stay applicant need only show one of these two critical factors, meaning an applicant can obtain a stay without that strong showing on the merits?<sup>36</sup> Is it possible to obtain a stay without showing either of those critical factors? The answers are unknown.

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32. *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 19 (2008).

33. Kevin J. Lynch, *The Lock-In Effect of Preliminary Injunctions*, 66 FLA. L. REV. 779, 797 (2014).

34. *See* *Friendship Edison Pub. Charter Sch. Collegiate Campus v. Nesbitt*, 704 F. Supp. 2d 50, 53 (D.D.C. 2010) (rejecting a possibility of success standard because of its ease in that “[t]here is, after all, always some possibility of a successful appeal”); *Hubbard v. United States*, 496 F. Supp. 2d 194, 198 (D.D.C. 2007) (“It is particularly important for the movant to demonstrate a substantial likelihood of success on the merits.”); *Am. Cetacean Soc’y. v. Baldrige*, 604 F. Supp. 1411, 1414 (D.D.C. 1985) (“The first, and *most* important, hurdle which the petitioners must overcome is the requirement that they present a strong likelihood of prevailing on the merits of their appeal.” (emphasis added)).

The Court also does not use the word “strong” when describing the showing necessary to obtain a stay pending the Court’s review of a certiorari petition. The factors relevant to the merits in that context require the applicant to show “(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari” and “(2) a fair prospect that a majority of the Court will vote to reverse the judgment below.” *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010).

35. *Nken*, 556 U.S. at 434.

36. Thus, it is unclear whether the factors operate on a sliding scale, the same question that exists for the application of preliminary injunction factors. *See, e.g., Mazurek v. United States*, No. 99–2003 C/W 99–2229, 2001 WL 260064, at \*1 (E.D. La. Jan. 11, 2001) (refusing to apply the factors for granting a stay “in a mechanical fashion”).



### C. High-Profile Recent Applications

The Court required a “strong showing” of likely success on the merits and called the same factor “critical.”<sup>37</sup> Not surprisingly, lower courts have emphasized this factor. Two recent applications of *Nken* by the Fifth Circuit Court of Appeals demonstrate this emphasis.

#### 1. Planned Parenthood of Greater Texas Surgical Health Services v. Abbott<sup>38</sup>

On October 28, 2013, a federal district court found certain Texas restrictions on abortions unconstitutional.<sup>39</sup> Specifically, the district court permanently enjoined enforcement of the required hospital admitting privileges and the limitations on the provision of medication abortions.<sup>40</sup> Part of the district court’s finding of unconstitutionality was based on the conclusion that the restrictions would cause abortion clinics to close.<sup>41</sup> “The record reflects that 24 counties in the Rio Grande Valley would be left with no abortion provider because those providers do not have admitting privileges and are unlikely to get them.”<sup>42</sup>

The State appealed that decision to the Fifth Circuit Court of Appeals and also asked for a stay of the district court’s opinion.<sup>43</sup> Days later, the Fifth Circuit applied *Nken* and granted that stay.<sup>44</sup> All but four pages of the opinion were devoted to the State’s “strong showing that it is likely to succeed on the merits”—that the State would likely be able to establish the constitutionality of its laws.<sup>45</sup> In the last paragraph of the opinion, the Fifth Circuit mentioned that the State had “made an adequate showing as to the other factors.”<sup>46</sup> Specifically, if the State was enjoined, “the State necessarily [would suffer] the irreparable harm of denying the public interest in the enforcement of its laws.”<sup>47</sup> Also, because the State was a party, “its interest and harm merge[d] with that of the public.”<sup>48</sup> The Fifth Circuit acknowledged that the plaintiffs’ “interests would be harmed by staying the injunction, [but held that] given the State’s likely

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37. *Nken*, 556 U.S. at 434.

38. 134 S. Ct. 506 (2013).

39. *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 951 F. Supp. 2d 891 (W.D. Tex. 2013).

40. *Id.* at 909.

41. *Id.* at 900. This conclusion is specific to the admitting privileges requirement. *Id.*

42. *Id.*

43. *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 409 (5th Cir. 2013).

44. *Id.* at 419.

45. *Id.* at 411-19.

46. *Id.* at 419.

47. *Id.*

48. *Id.*

success on the merits, this [was] not enough, standing alone, to outweigh the other factors.”<sup>49</sup>

Because of the stay, the hospital admitting privileges and medication abortion restrictions went into effect immediately. “As a practical matter, the Fifth Circuit’s decision to stay the injunction meant that abortion clinics in Texas whose physicians do not have admitting privileges . . . were forced to cease offering abortions.”<sup>50</sup> And, almost half of the forty abortion clinics in Texas closed.<sup>51</sup> “[W]omen who were planning to receive abortions at those clinics were forced to go elsewhere—in some cases 100 miles or more—to obtain a safe abortion, or else not to obtain one at all.”<sup>52</sup>

Planned Parenthood sought relief from the Supreme Court, filing an application to vacate the stay with Justice Scalia, who presided over emergency motions from the Fifth Circuit. Justice Scalia referred the application to the entire Court, which denied it, finding no error in the Fifth Circuit’s opinion.<sup>53</sup> Most of Justice Scalia’s majority opinion recounted the Fifth Circuit’s conclusions on the four *Nken* factors.<sup>54</sup> He also criticized the dissent for believing a stay to be inappropriate despite the State’s showing of the factors.<sup>55</sup> It would be inappropriate to grant a stay of the law “without asserting that [it] is even *probably* unconstitutional.”<sup>56</sup>

Four Justices dissented. Justice Breyer emphasized that a stay was improper because keeping the district court’s injunction in place “would maintain that status quo pending the decision of this case by the Court of Appeals.”<sup>57</sup> The stay, on the other hand, would “seriously disrupt[] that status quo” by causing numerous clinics to close, possibly “substantially reduc[ing] access to safe abortions elsewhere in Texas.”<sup>58</sup> And “[t]he longer a given facility remains closed, the less likely it is ever to reopen” even if the law is ultimately held unconstitutional.<sup>59</sup>

In March 2014, the merits panel of the Fifth Circuit ultimately found the Texas abortion laws at issue in *Abbott* constitutional.<sup>60</sup>

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49. *Id.*

50. *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 134 S. Ct. 506, 508 (2013) (Breyer, J., dissenting).

51. Tony Mauro, *Appeals Court Silent on Texas Abortion Clinic Law*, NAT’L L.J. ONLINE, Sept. 1, 2014.

52. *Abbott*, 134 S. Ct. at 508 (Breyer, J., dissenting).

53. *Id.* at 506 (“We may not vacate a stay entered by a court of appeals unless that court clearly and ‘demonstrably’ erred in its application of ‘accepted standards.’”).

54. *Id.* at 506-07.

55. *Id.* at 507.

56. *Id.*

57. *Id.* at 509 (Breyer, J., dissenting).

58. *Id.*

59. *Id.*

60. *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 748 F.3d 583, 604-05 (5th Cir. 2014).

## 2. Whole Woman's Health v. Lakey<sup>61</sup>

Deja vu happened soon after *Abbott*. On August 29, 2014, the same federal district court found Texas's requirement that abortion clinics meet the standards for ambulatory surgical centers unconstitutional.<sup>62</sup> The court enjoined enforcement of that requirement.<sup>63</sup> Two days later, the State asked the Fifth Circuit for a stay.<sup>64</sup>

After hearing oral argument on September 12, 2014, the Fifth Circuit issued a partial stay of the district court's injunction on October 2, 2014.<sup>65</sup> The Fifth Circuit found that the State was likely to succeed on appeal in showing that the ambulatory surgical center requirements were facially constitutional,<sup>66</sup> but that the State would be unlikely to show that the same requirements were constitutional as applied to a clinic in El Paso, Texas.<sup>67</sup> The Fifth Circuit cited its stay opinion in *Abbott* to show that the State would suffer irreparable harm if unable to enforce its law while appeal was pending, and that the public interest would similarly suffer if the law went unenforced.<sup>68</sup> After the Fifth Circuit granted the stay, thirteen abortion clinics in Texas closed overnight.<sup>69</sup>

The plaintiffs asked for emergency relief from the Supreme Court. This time, the plaintiffs were successful. On October 14, 2014, the Supreme Court vacated the stay with respect to the ambulatory surgical center requirements.<sup>70</sup> Thus, while the appeal was pending before the Fifth Circuit, the State of Texas could not enforce those requirements. The opinion lacked explanation.<sup>71</sup> It did note, however, that "Justice Scalia, Justice Thomas, and Justice Alito would deny the application [to vacate the stay] in its entirety."<sup>72</sup>

In June 2015, the Fifth Circuit merits panel found the Texas abortion restrictions at issue facially constitutional, but unconstitutional as ap-

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61. 135 S. Ct. 399 (2014).

62. *Whole Woman's Health v. Lakey*, 46 F. Supp. 3d 673, 676 (W.D. Tex. 2014). The court also enjoined the enforcement of the admitting privileges requirement as applied to specific clinics. *Id.* at 677.

63. *Id.*

64. Emergency Motion to Stay Final Judgment Pending Appeal and Motion for Expedited Consideration, *Whole Women's Health v. Lakey*, 769 F.3d 285 (5th Cir. 2014) (No. 14-50928), 2014 WL 4346480.

65. *Lakey*, 769 F.3d at 305.

66. *Id.* at 294-300.

67. *Id.* at 303-04.

68. *Id.* at 305.

69. Laura Bassett, *Situation in Texas Is 'Urgent' After 13 Abortion Clinics Close Overnight*, HUFFINGTON POST (Oct. 3, 2014), [http://www.huffingtonpost.com/2014/10/03/texas-abortion-clinics\\_n\\_5927698.html](http://www.huffingtonpost.com/2014/10/03/texas-abortion-clinics_n_5927698.html).

70. *See generally* *Whole Woman's Health v. Lakey*, 135 S. Ct. 399 (2014) (vacating the Court of Appeals' stay order).

71. *See generally id.*

72. *Id.*

plied to one clinic in McAllen, Texas.<sup>73</sup> The plaintiffs asked the Fifth Circuit to stay its mandate while they filed a petition for writ of certiorari with the Supreme Court.<sup>74</sup> The Fifth Circuit denied that request, with one judge dissenting.<sup>75</sup> The plaintiffs then asked for the same relief from the Supreme Court. Justice Scalia referred the request to the entire Court, which granted the requested relief without explanation.<sup>76</sup> Chief Justice Roberts and Justices Scalia, Thomas, and Alito voted to deny the requested relief.<sup>77</sup> In September 2015, the plaintiffs filed their petition for writ of certiorari with the Court.<sup>78</sup> The Court granted that petition in November 2015.<sup>79</sup>

### III. QUESTIONING THE EVALUATION OF LIKELY SUCCESS ON THE MERITS

The Court was very clear in *Nken* that the stay applicant must make a “strong showing” of its likely success on appeal, and that the merits is one of the two most critical factors considered by courts. There is little support for this clarity, however. More specifically, there is little historical, theoretical, or practical support for the evaluation of the merits of the appeal as part of a stay decision, especially not to the extent of its current importance.

#### A. Lack of Historical Support

When the U.S. Supreme Court first addressed whether federal courts had the power to stay injunctive relief pending appeal, it looked to English practice.<sup>80</sup> A court’s power to stay in such cases is governed “by those principles and rules which relate to chancery proceedings exclusively. It depends upon the effect which, according to the principles and usages of a court of equity, an appeal has upon the proceedings and decree of the court appealed from.”<sup>81</sup>

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73. *Whole Woman’s Health v. Lakey*, 46 F. Supp. 3d 673 (W.D. Tex. 2014), *rev’d in part sub nom.* *Whole Woman’s Health v. Cole*, 790 F.3d 563, 567 (5th Cir. 2015). The case name changed because at the time of this decision, David Lakey was no longer the Commissioner of the Texas Department of State Health Services. The new Interim Commissioner is Kirk Cole.

74. *Whole Woman’s Health v. Cole*, 790 F.3d 563 (5th Cir.), *modified sub nom.* *Cap Holdings Inc. v. Lorden*, 790 F.3d 599, 599 (5th Cir. 2015).

75. *Id.* The opinion also clarified that the injunction prohibiting enforcement of the restrictions on the McAllen, Texas clinic would remain in effect until October 29, 2015. *Id.*

76. *Whole Woman’s Health v. Cole*, 135 S. Ct. 2923 (2015).

77. *Id.*

78. *Whole Woman’s Health v. Cole*, 790 F.3d 563 (5th Cir. 2015), *petition for cert. filed*, 193 L. Ed. 2d 364 (U.S. Sept. 4, 2015) (No. 15-274).

79. *Whole Woman’s Health v. Cole*, 790 F.3d 563 (5th Cir. 2015), *cert. granted*, 84 U.S.L.W. 31111 (U.S. Nov. 3, 2015) (No. 15-274).

80. *In re Slaughter-house Cases*, 77 U.S. (10 Wall.) 273, 296 (1869) (“[T]he rule is well settled in the English courts that an appeal in chancery does not stop the proceedings under the decree from which the appeal was taken without the special order of the subordinate court.”).

81. *Hovey v. McDonald*, 109 U.S. 150, 160 (1883).

The principles and rules governing English chancery proceedings are most clearly explained in an order from the English House of Lords issued in 1807. The "very ancient practice" prior to 1807 was that an appeal automatically stayed proceedings in the courts of equity.<sup>82</sup> But courts of equity had not followed the practice for "a very long course of years" and the House of Lords knew it.<sup>83</sup> Instead, courts of equity allowed cases to proceed despite the pending appeal. The only exception was for "cases, in which [a court of equity's] judicial discretion has induced them upon the application of parties interested to stay . . . on account of such Appeals."<sup>84</sup> In the order, the House of Lords expressly rejected the purported ancient practice of an automatic stay<sup>85</sup> and adopted the rule that courts of equity already followed: an appeal of a judgment from a court of equity would not stay proceedings unless the court of equity or House of Lords ordered such a stay.<sup>86</sup>

The order from the House of Lords also elaborates on when a stay is appropriate. Generally, a stay is inappropriate without evidence of "consequences the most oppressive to the suitors in Courts of Equity, and the utmost inconvenience in the administration of justice in such Courts."<sup>87</sup>

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82. *Huguenin v. Baseley* [1808] 33 Eng. Rep. 722 (HL) 723.

83. *Id.* at 724.

84. *Id.*

85. *Id.*; *see, e.g., The Warden and Minor Canons of St. Paul's v. Morris* [1804] 32 Eng. Rep. 624 (HL) 625 ("In deciding upon this petition I consider myself acting under the authority of the House of Lords. The clear understanding of that House is, that the proceedings in the Court of Chancery are not staid by an appeal.").

86. *Huguenin v. Baseley* [1808] 33 Eng. Rep. 722 (HL) 724.

87. *Id.* at 724. A Treatise on the Practice of the High Court of Chancery further explained:

The Courts, however, are very unwilling to suspend the execution of decrees, and will not do so except in cases where there is danger of the object of the appeal being defeated, before the appeal can be heard. Where that is the case, the Court will suspend the execution of a decree or order pending an appeal; thus where the object of a demurrer is to take the opinion of the Court upon the liability of a party to make the discovery required by the bill, the Court will suspend proceedings to enforce an answer pending the appeal from an order over-ruling the demurrer.

So also, where there would be danger of irreparable mischief. In cases of injunctions, for instance, and still more in orders dissolving injunctions, an appeal ought almost always to be permitted to stay execution; upon this ground, likewise, where the Court has directed the sale of property, it will suspend the sale, or where property of a perishable nature is ordered to be delivered up, it will direct security to be given for the amount of the property. And so where a specific performance of an agreement for a sale has been decreed, it will suspend the execution of the conveyance till after the appeal, although it will not suspend the other proceedings in the Master's Office.

It is, however, only in cases where the mischief of allowing the proceedings to go on will be irreparable, or will defeat the object of the appeal, that it will interfere; and, therefore, although the Court will, as we have seen above, suspend the execution of process to compel an answer, pending an appeal from an order over-ruling a demurrer, the Court will not suspend the execution of an order for the production of documents pending an appeal from that order; because, although by the operation of the order, the evidence afforded by the documents produced will be disclosed, yet, if it is

Thus, courts of equity and the House of Lords were directed to consider harm to the party seeking a stay, and the effect of the lack of a stay within the administration of justice.

Although not always citing the House of Lords order expressly, courts appear to have followed this directive. The Lord Chancellor Eldon once explained that “[t]here are very few cases of applications to stay proceedings under a Decree, unless irreparable mischief may be the consequence of proceeding[] until the Appeal shall be heard.”<sup>88</sup>

Sometimes courts discussed both harm to the applicant and whether the appeal would be useful without a stay. The uselessness of the appeal without a stay relates both to harm to the stay applicant—because an appeal may become useless due to irreparable harm—and to the administration of justice—because an appellate court is wasting its time deciding an appeal without meaningful effect. Examples include *Wood v. Milner*,<sup>89</sup> where the Lord Chancellor granted a stay, finding that “all the benefit of the appeal would be gone[] if the proceedings be not stayed pending the appeal.”<sup>90</sup> In *Garcias v. Ricardo*,<sup>91</sup> the Lord Chancellor denied a stay and distinguished *Wood*, finding that denial of a stay would not render the appeal useless and would not irreparably injure the defendant.<sup>92</sup> The Lord Chancellor also denied the stay because the harm to the plaintiff, if a stay were issued, outweighed the harm to the defendant without a stay.<sup>93</sup> In *Storey v. Lord John George Lennox*,<sup>94</sup> the Lord Chancellor similarly considered both the usefulness of the later appeal and the balance of the harms. The Lord Chancellor reasoned that when “the appeal will be useless if the execution of the order is not stayed, a very strong ground for staying the execution is, no doubt, laid.”<sup>95</sup> This factor, combined with the fact that the delay from the stay would affect the defendant more than the plaintiff, prompted the court to issue the stay pending appeal.<sup>96</sup>

Consistent with the sentiment in the House of Lords order that stays were to be the exception, English courts often attempted to discourage

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afterwards decided that the evidence ought not to have been produced, it will go for nothing.

3 EDMUND ROBERT DANIELL, A TREATISE ON THE PRACTICE OF THE HIGH COURT OF CHANCERY WITH SOME PRACTICE OBSERVATIONS ON THE PLEADINGS IN THAT COURT 63 (London ed. 1846).

88. *Wood v. Griffith* [1815] 34 Eng. Rep. 620 (HL) 620.

89. [1820] 37 Eng. Rep. 510 (HL).

90. *Id.* at 511.

91. [1845] 60 Eng. Rep. 462 (HL).

92. *Id.* at 463.

93. *Id.*

94. [1836] 40 Eng. Rep. 539 (HL).

95. *Id.* at 540.

96. *Id.*

applications for stays. In *Huguenin v. Baseley*,<sup>97</sup> the Lord Chancellor Eldon granted the stay but expressed doubt regarding the wisdom of the practice because “giving much encouragement to such applications will palsy the arm of Justice.”<sup>98</sup> In *Walburn v. Ingilby*,<sup>99</sup> the Lord Chancellor cited *Huguenin* and explained that in certain cases, stays pending appeals “would really amount to deciding the matter the other way” if a stay would really “be a reversal of the decision under the form of staying execution.”<sup>100</sup> For this reason, applications for stays are to be “uniformly discouraged.”<sup>101</sup> Although inclined to grant the stay in *Walburn*, the Lord Chancellor did not want to “giv[e] encouragement to vexatious appeals upon a large portion of the business which occupies these Courts.”<sup>102</sup> The Lord Chancellor also lamented that stays would generally be appropriate if appellate courts were able to “give instantaneous dispatch,” but whether that would ever be possible while still ensuring “full confidence for its decisions” was “another and more serious question.”<sup>103</sup>

The 1807 House of Lords order did not direct consideration of the merits, and some courts expressly rejected consideration of the merits. In *Wood v. Milner*, the Lord Chancellor Eldon specifically noted the appropriateness “of not hearing the merits of appeals on motions.”<sup>104</sup> He also noted the difficulty of predicting the merits: “[t]here have been so many cases in which I have, when at the bar, succeeded when I thought I was not entitled, and *vice versa*.”<sup>105</sup> Somewhat similarly, in *Walburn v. Ingilby*,<sup>106</sup> the Lord Chancellor denied a stay of an order of production of documents against the defendant even though he accepted that the plaintiff would not ultimately succeed on the merits of his claim.<sup>107</sup>

The U.S. Supreme Court cited to this English chancery practice when describing the power of federal courts to issue stays:

[I]t seems to be well settled everywhere, in suits in equity, that an appeal from the decision of the court denying an application for an injunction does not operate as an injunction or stay of the proceedings pending the appeal. Neither does an appeal from an order dissolving an injunction.<sup>108</sup>

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97. [1808] 33 Eng. Rep. 722 (HL).

98. *Id.* at 723.

99. [1832] 47 Eng. Rep. 96 (HL).

100. *Id.* at 99.

101. *Id.*

102. *Id.* at 100.

103. *Id.*

104. [1820] 37 Eng. Rep. 510 (HL) 510.

105. *Id.* at 511.

106. [1832] 47 Eng. Rep. 96 (HL).

107. *Id.* at 99.

108. *In re Slaughter-house Cases*, 77 U.S. (10 Wall.) 273, 297 (1869).

Soon after, the Court recognized the same exception developed by English courts of equity, allowing courts to grant a stay “if the purposes of justice required it.”<sup>109</sup> “This power undoubtedly exists, and should always be exercised when any irremediable injury may result from the effect of the decree as rendered; but it is a discretionary power.”<sup>110</sup> This description mirrors English practice—instructing courts to issue a stay if irremediable injury may occur without one.<sup>111</sup> Just as English chancery practice did not look to the merits in deciding whether justice requires a stay, the Court similarly did not mention the merits as relevant to the determination.

State courts’ interpretations of English chancery practice similarly did not emphasize the merits in evaluating the propriety of stays of judgments of injunctive relief pending appeal. In *Tulare Irrigation District v. Superior Court*,<sup>112</sup> the California Supreme Court discussed English chancery practice extensively. An appeal would not stay the lower court’s grant of injunctive relief without a finding that “irreparable damage will be done to the appellant in the meantime.”<sup>113</sup> The need for irreparable damage relates to the purpose of stays: “to protect [an] appellant from having his right of appeal rendered nugatory or merely nominal if he should succeed.”<sup>114</sup> Relying again on English practice, the California Supreme Court declined evaluation of the merits of the appeal.<sup>115</sup> To the contrary, it explained that it “of course, express[es] no opinion as to the merits of the appeal.”<sup>116</sup>

The Court of Errors and Appeals of New Jersey similarly refused to evaluate the merits of an appeal when evaluating a stay.<sup>117</sup> It explained that the decision to issue a stay “must rest with the sound discretion of the court.”<sup>118</sup> In exercising that discretion, a court “must look not to the merits of the appeal so much as the circumstances of the case and the situation of the property.”<sup>119</sup> The dissenting opinion further explained, “the merits ought *not* to be heard upon this summary motion. The practice will lead unavoidably either to a decision upon a partial hearing, or to a prejudging of the case upon its merits, in contravention of the rules and practice of the court.”<sup>120</sup>

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109. *Hovey v. McDonald*, 109 U.S. 150, 161 (1883).

110. *Id.*

111. In this specific case, the Court discussed that a stay “would have been eminently proper” because “[i]t would have protected all parties and produced injury to none.” *Id.* at 162.

112. 242 P. 725 (Cal. 1925).

113. *Id.* at 730-31.

114. *Id.* at 731.

115. *Id.* at 735.

116. *Id.*

117. *See Doughty v. Somerville & Easton R.R. Co.*, 7 N.J. Eq. 629, 632 (N.J. 1848).

118. *Id.*

119. *Id.*

120. *Id.* at 636 (Green, J., dissenting) (emphasis added).



This is not to suggest that the merits never crept into the evaluation—both in English chancery courts and federal courts. For instance, although the Lord Chancellor ignored the ultimate merits of the case in *Walburn*, he did mention the relevance of the merits of the specific issue on appeal: “unless there seems strong ground for supposing that the judgment will be reversed, and a suggestion be made of remediless mischief, the execution ought not to be suspended.”<sup>121</sup> In *Gwynn v. Lethbridge*,<sup>122</sup> the Lord Chancellor Eldon similarly explained: “[T]he Court must give a certain degree of credit to the Decree; supposing it to be right; unless a strong ground is shewn [sic] for the contrary conclusion: more than the mere dissatisfaction of the party appealing.”<sup>123</sup> He also considered that that the appealing party had dragged its feet, not taking a prompt appeal,<sup>124</sup> implying a lack of irreparable injury. And in *Lord v. Colvin*,<sup>125</sup> the Vice Chancellor explained that “[w]here the Court has no judicial doubt upon the decree, it will not in general stay proceedings.”<sup>126</sup> The Court thus must “consider the nature or the question decided and the grounds of [its] decision, and whether the case is one on which [it] might judicially entertain a reasonable doubt.”<sup>127</sup> Still, the merits of the appeal do not appear to have ever been incorporated as a formal consideration in English chancery practice.

Similarly, the merits crept into the evaluation in U.S. federal courts. Even as far back as 1897,<sup>128</sup> a federal trial court noted the “great and irreparable loss” that one party would suffer without a stay,<sup>129</sup> and explained that “[u]nder such circumstances . . . it is the right and duty of the trial court to maintain, if possible, the status quo pending an appeal, if the questions at issue are involved in doubt.”<sup>130</sup> The Supreme Court also mentioned the merits sporadically. In 1968, Justice Douglas explained that “it is a federal policy to grant stays where a substantial question is presented and denial of the stay will do irreparable harm to the applicant.”<sup>131</sup>

However, as with the English chancery courts, formal consideration was not given to the merits of an appeal in U.S. courts. In 1942, in

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121. *Walburn v. Ingilby* [1833] 39 Eng. Rep. 604, 613.

122. [1808] 33 Eng. Rep. 645 (HL).

123. *Id.*

124. *Id.*

125. [1861] 62 Eng. Rep. 460 (HL) (appeal taken from Scot.).

126. *Id.* at 460.

127. *Id.* at 461.

128. *Cotting v. Kan. City Stock-Yards Co.*, 82 F. 850 (D. Kan. 1897).

129. *Id.* at 857.

130. *Id.*

131. *Smith v. Ritchey*, 89 S. Ct. 54, 54 (1968); see also *Winters v. United States*, 89 S. Ct. 57, 59 (1968) (“In federal law, a stay is granted if substantial questions are presented and if denial of a stay may result in irreparable damage to the applicant.”).

*Scripps-Howard Radio, Inc. v. FCC*,<sup>132</sup> the Court declined to delineate “the criteria which should govern the Court in exercising that power” to stay injunctive relief pending appeal,<sup>133</sup> but irreparable injury seemed to be the most important consideration. The Court described that the power to stay necessarily existed to “prevent irreparable injury to the parties or to the public resulting from the premature enforcement of a determination which may later be found to have been wrong.”<sup>134</sup> Forty years later, the same held true. In 1981, Justice Powell explained that “[t]o prevail on an application for stay, an applicant must make a showing of a threat of irreparable injury to interests that he properly represents.”<sup>135</sup> Within this analysis, the judge must “‘balance the equities . . . and determine on which side the risk of irreparable injury weighs most heavily.’”<sup>136</sup> Justice Powell denied the stay finding no showing of irreparable injury—despite also acknowledging that the applicants “raised interesting and substantial questions on the merits.”<sup>137</sup>

How, then, did the merits become a “critical” *Nken* factor? It can ultimately be traced back to a 1958 D.C. Circuit case, *Virginia Petroleum Jobbers Ass’n v. Federal Power Commission*.<sup>138</sup> *Virginia Petroleum* involved a request for a stay pending appeal.<sup>139</sup> Without citing to any authority, the D.C. Circuit listed four factors to evaluate when granting a stay of injunctive relief pending appeal, the same factors that later became the *Nken* factors.<sup>140</sup> The lack of authority is not surprising. There was no Supreme Court precedent supporting these four factors. And the D.C. Circuit’s emphasis on the merits of the appeal was inconsistent with English practice,<sup>141</sup> which the Court formerly found to be governing.

132. 316 U.S. 4 (1942).

133. *Id.* at 17.

134. *Id.* at 9.

135. *Graddick v. Newman*, 453 U.S. 928, 933 (1981).

136. *Id.* (quoting *Holtzman v. Schlesinger*, 414 U.S. 1304, 1308-09 (1973)).

137. *Id.* at 935.

138. 259 F.2d 921 (D.C. Cir. 1958); see *Hilton v. Braunskill*, 481 U.S. 770, 776-77 (1987) (citing *Va. Petroleum*, 259 F.2d at 925). Actually, the Court cited four cases in total, two of which—*Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, and *Accident Fund v. Baerwaldt*—also cited *Virginia Petroleum*. See *Wash. Metro. Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 842-44 (D.C. Cir. 1977); *Accident Fund v. Baerwaldt*, 579 F. Supp. 724, 725 (W.D. Mich. 1984). The fourth case cited in *Hilton* was *Garcia-Mir v. Meese*, 781 F.2d 1450 (11th Cir. 1986). Notably, *Garcia-Mir* described the merits factor as requiring a showing that “the movant is likely to prevail on the merits on the appeal,” which may very well be a lesser standard than a strong showing. *Id.* at 1453. The *Hilton* Court also cited *Wright & Miller’s treatise on Federal Practice & Procedure*, which includes these four factors. The treatise explains that the “original source of this formulation is” *Virginia Petroleum*. 11 WRIGHT ET AL., *supra* note 7, § 2904, at 501.

139. *Va. Petroleum*, 259 F.2d at 923.

140. *Id.* at 925.

141. Current English Civil Procedure Rule 52.7 continues the traditional rule—that “unless the appeal court or the lower court orders otherwise[,] . . . an appeal shall not operate as a stay of any order or decision of the lower court.” CPR 52.7. Current practice is to apply this rule to

Regardless, the D.C. Circuit created these four factors in *Virginia Petroleum*. The Supreme Court later cited *Virginia Petroleum* and the four factors in *Hilton v. Braunskill*,<sup>142</sup> and re-affirmed them as controlling in *Nken*.

Put simply, where did the *Nken* “strong showing that he is likely to succeed on the merits” factor come from?<sup>143</sup> Not from anywhere authoritative.

### B. Lack of Theoretical Support

Although there has been little academic commentary about the purposes of stays pending appeal, courts have described their purposes. The theoretical purposes have all related to providing meaningful judicial review. There is no need for courts to evaluate the merits to provide that meaningful judicial review, much less to evaluate whether the applicant has made a “strong showing” of likely success on the merits of the appeal.<sup>144</sup>

The Supreme Court has extensively discussed the need for stays to ensure meaningful judicial review. In 1942, in *Scripps-Howard Radio, Inc. v. FCC*,<sup>145</sup> the Supreme Court explained:

No court can make time stand still. The circumstances surrounding a controversy may change irrevocably during the pendency of an appeal, despite anything a court can do . . . . It has always been held, therefore, that as part of its traditional equipment for the administra-

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any type of judgment, legal or equitable. “Whether the court should exercise its discretion to grant a stay will depend upon all the circumstances of the case, but the essential question is whether there is a risk of injustice to one or other or both parties if it grants or refuses a stay. In particular, if a stay is refused what are the risks of the appeal being stifled?” *Hammond Suddard Solicitors v. Agrichem Int’l Holdings Ltd.* [2001] EWCA (Civ) 2065.

142. 48 U.S. 770, 776 (1987).

143. *Id.* To be fair, it seems that the merits had been announced formally as relevant to stays pending certiorari review prior to 1987. The standards used by the individual Justices are not defined and have had to be pieced together from in-chambers opinions, which were not even published until 1926. Lois J. Scali, *Prediction-Making in the Supreme Court: The Granting of Stays by Individual Justices*, 32 UCLA L. REV. 1020, 1030-31 (1985). Generally speaking, the individual Justices used the factors delineated by Justice Brennan in 1980. *Rostker v. Goldberg*, 448 U.S. 1306 (1980). He described the merits as relevant—requiring the applicant to show a “‘reasonable probability’ that four Justices will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction,” and showing “a fair prospect that a majority of the Court will conclude that the decision below was erroneous.” *Id.* at 1308 (quoting *Graves v. Barnes*, 405 U.S. 1201, 1203-04 (1972)). Even after *Rostker* though, some opinions by individual Justices “address all four prongs of the *Rostker* test, while others focus on only one.” Scali, *supra*, at 1032. The full Court later cited to the *Rostker* test for “obtain[ing] a stay pending the filing and disposition of a petition for a writ of certiorari” in *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). Presumably, after *Hollingsworth*, there should be less variation in the standards used for emergency motions to stay pending certiorari review.

144. This Article addresses only the *Nken* standards for relief pending appeal, not the standards for relief pending review of petition for certiorari. Some of the arguments in this Section would likely not apply as well if a petition for certiorari were pending. Changing circumstances may be a reason the Court wants to deny certiorari. Also, review via certiorari is discretionary, meaning the litigant does not have the same interest in judicial review as she does in a direct appeal.

145. 316 U.S. 4 (1942).

tion of justice, a federal court can stay the enforcement of a judgment pending the outcome of an appeal.<sup>146</sup>

Without a stay, review on appeal “would be an idle ceremony if the situation were irreparably changed before the correction could be made.”<sup>147</sup>

The Court repeated the same sentiment in *Nken*. “It takes time to decide a case on appeal.”<sup>148</sup> But “if a court takes the time it needs, the court’s decision may in some cases come too late for the party seeking review.”<sup>149</sup> Because of the time delay, stays are “justified by the perceived need ‘to prevent irreparable injury to the parties or to the public’ pending review.”<sup>150</sup> It is impossible to make time stand still to prevent that irreparable injury. But it is possible to issue a stay to “hold a ruling in abeyance to allow an appellate court the time necessary to review it.”<sup>151</sup> Indeed, “[t]he *whole* idea is to hold the matter under review in abeyance because the appellate court lacks sufficient time to decide the merits.”<sup>152</sup>

146. *Id.* at 9-10 (footnote omitted).

147. *Id.* at 10; *see also* *Doughty v. Somerville & Easton R.R. Co.*, 7 N.J. Eq. 629, 630 (1848) (“It would be worse than useless for us to hear the merits of the appeal argued, and to decide thereon three or six months after the evil complained of has been suffered to be committed, and has become irremediable or the injury irreparable.”).

148. *Nken v. Holder*, 556 U.S. 418, 421 (2009).

149. *Id.*

150. *Id.* at 432 (quoting *Scripps-Howard Radio*, 316 U.S. at 9).

151. *Id.* at 421. This described purpose of stays also relates to the originating authority for courts to issue stays, to issue writs to maintain jurisdiction. *See supra* note 7 and accompanying text; *see also, e.g.*, *Whitney Nat’l. Bank in Jefferson Parish v. Bank of New Orleans & Tr. Co.*, 379 U.S. 411, 426 (1965) (explaining that the lower court of appeal’s power to issue a stay and “protect its jurisdiction is beyond question”); *Mesabi Iron Co. v. Reserve Mining Co.*, 268 F.2d 782, 783 (8th Cir. 1959) (“[I]t is unnecessary to stay proceedings in this case, pending these appeals, in aid of or to protect the jurisdiction of this Court or to insure the effectiveness of whatever judgments may eventually be entered.”); *Plomb Tool Co. v. Fayette R. Plumb, Inc.*, 171 F.2d 945, 946-47 (9th Cir. 1949) (issuing a stay “to preserve defendant’s benefits and fruits of appeal and to preserve this court’s appellate jurisdiction”). If the circumstances make the situation irrevocable, the appeal is moot and the appellate court loses its jurisdiction. *See, e.g.*, *S.F. Residence Club, Inc. v. 7027 Old Madison Pike, LLC*, 583 F.3d 750, 756 (11th Cir. 2009) (dismissing appeal as moot because appellant failed to seek a stay precluding payment of funds to a third-party creditor); *In re AOV Indus.*, 792 F.2d 1140, 1147 (D.C. Cir. 1986) (discussing that if a stay is not secured, it is likely that an appeal will become moot); *Am. Grain Ass’n v. Lee-Vac, Ltd.*, 630 F.2d 245, 248 (5th Cir. 1980) (dismissing appeal as moot because property had been disbursed when appellant failed to secure a stay pending appeal); *Providence Journal Co. v. FBI*, 595 F.2d 889, 890 (1st Cir. 1979) (“Appellants’ right of appeal here will become moot unless the stay is continued pending determination of the appeals.”).

152. *Nken*, 556 U.S. at 432 (emphasis added). Courts often equate providing time and maintaining the status quo as necessary to enable the appellate court to decide the appeal. *See, e.g.*, *In re CGI Indus.*, 27 F.3d 296, 299 (7th Cir. 1994) (“The request for a stay of the sale order is not simply another formality to be observed in perfecting an appeal. A stay serves to maintain the status quo pending appeal, thereby preserving the ability of the reviewing court to offer a remedy and holding at bay the reliance interests in the judgment that otherwise militate against reversal of the sale.”); *Mesabi Iron Co.*, 268 F.2d at 783 (“This Court, in view of Rule 62(g) of the Federal Rules of Civil Procedure, 28 U.S.C.A., has, we think, power to stay proceedings pending appeal and ‘to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered.’” (quoting FED. R. CIV. P. 62(g))); *Al-*

Stays are essentially “a means of ensuring that appellate courts can responsibly fulfill their role in the judicial process.”<sup>153</sup> Without a stay, judicial review could become practically meaningless. The appellate court may reverse the trial court, but the circumstances have already changed to the extent that the reversal has little effect. But with a stay, the circumstances cannot change and the reversal can have a meaningful, practical effect. Without that meaningful effect, the appellate court’s role in the judicial process is denigrated.

Meaningless appellate decisions not only denigrate the appellate court’s role, but also the individual’s right to judicial review. “The interest of the [stay applicant] is largely the same as that of the general public in having legal questions decided on the merits, as correctly and expeditiously as possible”;<sup>154</sup> the Supreme Court said the same in *Nken*.<sup>155</sup> The interest in having “cases independently reviewed by an appellate tribunal” is derived both from “the Constitution and laws.”<sup>156</sup> That interest is only fulfilled, however, if the appellate review is meaningful, meaning that the appellate court can “take a fresh look at the decision of the trial court before [the decision] becomes irrevocable.”<sup>157</sup> Denying a stay and allowing the circumstances to become irrevocable is “to deny the right of appeal in the case; for if we have no power to protect the subject matter of the appeal, then is the right nugatory.”<sup>158</sup>

Individuals value the process of meaningful review itself. Obviously, the parties wish to win the appeal, but there is also “value in permitting individuals to directly participate in the adjudication of their rights.”<sup>159</sup> Similarly, participation in full judicial review “‘generate[s] the feeling, so important to a popular government, that justice has been done.’”<sup>160</sup> Justice has not been done if rights are practically adjudicated by circum-

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Shareef v. Bush, No. 05-2458, 2006 WL 3544736, at \*1 (D.D.C. Dec. 8, 2006) (“A primary purpose of a stay pending resolution of issues on appeal is to preserve the status quo among the parties.”).

153. *Nken*, 556 U.S. at 427.

154. Wash. Metro. Area Transit Comm’n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977).

155. *Nken*, 556 U.S. at 427 (comparing the public’s interest in judicial review to the public’s interest in the enforcement of laws).

156. Providence Journal Co. v. Fed. Bureau of Investigation, 595 F.2d 889, 890 (1st Cir. 1979).

157. *Id.*; see also *id.* (“Failure to grant a stay will entirely destroy appellants’ rights to secure meaningful review.”).

158. Doughty v. Somerville & Easton R.R. Co., 7 N.J. Eq. 629, 630 (1848).

159. Martin H. Redish & William J. Katt, Taylor v. Sturgell, *Procedural Due Process, and the Day-in-Court Ideal: Resolving the Virtual Representation Dilemma*, 84 NOTRE DAME L. REV. 1877, 1889 (2009).

160. Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 483 (1986) (quoting Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring)).

stances changing within the (usually long) time it takes the appellate court to decide the appeal.

Given these purposes of stays pending appeal—ensuring meaningful review to protect the courts' role and the parties' interests—it is not appropriate to evaluate the likely result on the merits in issuing a stay, especially not to the extent contemplated by *Nken*.<sup>161</sup> It matters little who will actually win the appeal. What matters is that the appellate court's ruling will have meaning for society and the individuals.

Is there any purpose for or theory of stays supporting consideration of the merits? It is difficult to know from the case law. Although courts eagerly explain the purposes of stays, they do not explain why consideration of the merits is consistent with those purposes. The D.C. Circuit came close in *Virginia Petroleum*: "Without such a substantial indication of probable success, there would be no justification for the court's intrusion into the ordinary processes of administration and judicial review."<sup>162</sup> True, stays disrupt the ordinary process of injunctive judgments being immediately enforceable. But stays do not disrupt the ordinary processes of judicial review, that is, appellate judicial review. To the contrary, stays are necessary to ensure the ordinary process of judicial review—to ensure the appellate court's ability to conduct meaningful judicial review without the circumstances irrevocably changing in the meantime.

Another possible reason why consideration of the merits might be proper is borrowed from academic literature concerning preliminary injunctions. Professor John Leubsdorf first presented the now dominant theory guiding the factors used to evaluate preliminary injunctive relief: "to minimize the probable irreparable loss of rights caused by errors incident to hasty decision."<sup>163</sup> Given the theoretical purpose, Professor

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161. Daniel M. Gonen, *Judging in Chambers: The Powers of a Single Justice of the Supreme Court*, 76 U. CIN. L. REV. 1159, 1187 (2008) ("[T]he likelihood of reversal should not factor in at all" when the purpose of interim relief is to "keep[] a case in a posture in which it may be reviewed by an appellate court.").

162. *Va. Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958). Numerous other courts have used this same language. See, e.g., *Ambach v. Bell*, 686 F.2d 974, 987-88 (D.C. Cir. 1982); *Friendship Edison Pub. Charter Sch. Collegiate Campus v. Nesbitt*, 704 F. Supp. 2d 50, 52 (D.D.C. 2010); *Advanta Bank v. FDIC*, 684 F. Supp. 2d 17, 25 (D.D.C. 2010); *Citizens for Responsibility & Ethics in Wash. v. Office of Admin.*, 593 F. Supp. 2d 156, 160 (D.D.C. 2009); *Goss v. Martin (In re Goss)*, No. 05-70378, 2008 WL 824303, at \*2 (E.D. Okla. Mar. 26, 2008); *Hubbard v. United States*, 496 F. Supp. 2d 194, 198 (D.D.C. 2007); *Apotex Inc. v. FDA*, 508 F. Supp. 2d 78, 82 (D.D.C. 2007). In *Nken*, the Supreme Court agreed that a stay is "an 'intrusion into the ordinary processes of administration and judicial review.'" *Nken v. Holder*, 556 U.S. 418, 427 (2009) (quoting *Va. Petroleum*, 259 F.2d at 925). It used this language, however, to explain why stays are not available as a matter of right—not to explain why the merits must be evaluated.

163. John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525, 540-41 (1978); see also Thomas R. Lee, *Preliminary Injunctions and the Status Quo*, 58 WASH. & LEE L. REV. 109, 154 (2001) (explaining that Professor Leubsdorf's approach has "emerged as the triumphant, dominant theory of preliminary injunctions"); *id.* at 157 (explaining that the conceptual goal of minimizing the harm that could result from an erroneous decision is "now

Leusdborf specifically criticized the idea of disregarding the merits. “[I]f courts dispense injunctions without regard to the merits, plaintiffs who are in the wrong will be just as likely to secure relief as those who have rights.”<sup>164</sup> The same could be true for stays pending appeal<sup>165</sup>—a state may be able to still enforce a law pending appeal, even though the law may likely be unconstitutional, hurting citizens’ rights. Stays, however, are not really about the parties’ legal rights in the meantime; a stay order actually says nothing about the parties’ legal rights. Instead, a stay “operates upon the judicial proceeding itself” by “temporarily suspending the source of authority to act—the order or judgment in question.”<sup>166</sup>

Regardless, both of the possible reasons why consideration of the merits might be proper are inconsistent with the purposes of stays. They overlook the need to preserve the appellate court’s role to decide the appeal (regardless of which way the court rules). They also overlook the importance of providing meaningful judicial review to parties (again, regardless of which way the court rules). In order to fulfill these purposes, an appellate court must be able to disrupt the ordinary processes of the appeal and to risk the improper deprivation of rights in the meantime. Without this disruption and deprivation, the appellate court’s ultimate ruling will likely have limited practical effect. The merits panel in *Abbott* declared Texas’s abortion restrictions constitutional.<sup>167</sup> That merits ruling should be the reason clinics in Texas closed—because the appellate court declared the laws constitutional after providing the opponents meaningful judicial review. But the clinics had practically closed, and

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prevalent in the courts’ opinions” and “finds almost no detractors or competitors in the academy or in federal jurisprudence”).

164. Leusdborf, *supra* note 163, at 547.

165. Professor Leusdborf did not apply his theory to stays pending appeal. *Id.* at 527.

166. *Nken*, 556 U.S. at 428-29. The Court explained how a preliminary injunction functions differently: it “is a means by which a court tells someone what to do or not to do” and it “directs the conduct of a party.” *Id.* at 428. This difference also likely relates to the different originating authorities for stays and preliminary injunctions. Compare Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73 (basing power to stay pending appeal in the need to maintain a court’s jurisdiction), with *id.* § 11 (providing authority to decide “all suits . . . in equity,” which creates the power to issue preliminary injunctions, without referring to the need to preserve a court’s jurisdiction).

Some of these arguments about the purposes of stays pending appeal in this section also apply to preliminary injunctions, thus providing an argument that the merits should not be considered in granting preliminary injunctive relief either. See, e.g., *In re Microsoft Corp. Antitrust Litig.*, 333 F.3d 517, 525 (4th Cir. 2003) (“The traditional office of a preliminary injunction is to protect the status quo and to prevent irreparable harm during the pendency of a lawsuit ultimately to preserve the court’s ability to render a meaningful judgment on the merits.”); *Republic of Phil. v. Marcos*, 818 F.2d 1473, 1480 (9th Cir. 1987) (“The purpose of a preliminary injunction is to preserve the court’s power to render meaningful relief after a trial on the merits.”); *Matzke v. Block*, 542 F. Supp. 1107, 1113 (D. Kan. 1982) (“The purpose of a preliminary injunction is two-fold: it protects the plaintiff from irreparable injury and it preserves the court’s ability to decide the case on the merits.”). This Article, however, takes no position on the propriety of evaluating the merits within the preliminary injunction context.

167. *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 748 F.3d 583, 604-05 (5th Cir. 2014).

were unlikely to reopen, long before the merits decision was released. Really, it did not matter what the merits panel decided.

### C. Practical Problems

History and theory do not support the extent to which courts currently evaluate the merits when deciding stay applications, nor is the evaluation practical. It is awkward for district courts to evaluate the merits a second time. Further, all courts may have the natural tendency to determine the merits consistent with the initial prediction, even though the initial prediction was not made under circumstances conducive to accurate decisionmaking.

#### 1. General Awkwardness

With some exceptions, the Federal Rules require an applicant to first ask the district court for a stay.<sup>168</sup> Applying *Nken* means evaluating whether the applicant is likely to be successful on appeal, which is the same as asking the district court whether it is likely to get reversed on appeal. Hopefully, no district court will likely think that the decision it just made, and that it dwelled on, is likely to be reversed.<sup>169</sup> Even if the district court has some thought that the decision could be reversed, surely it believes that its decision is correct to the extent that it would be unable to conclude that the applicant has made a “strong showing” of its likelihood of success on the merits of the appeal.<sup>170</sup>

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

169. For this reason, the Fifth Circuit explained that the Rules do not require the movant “to establish that the appeal would probably be successful.” *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. 1981). If that was what is required, “the Rule would not require—as it does—a prior presentation to the district judge whose order is being appealed. That judge has already decided the merits of the legal issue.” *Id. But see Nken*, 556 U.S. at 434 (requiring a strong showing of a likelihood of success on the merits).

170. *See, e.g., Frank v. Walker*, 17 F. Supp. 3d 837, 890-91 (E.D. Wis. 2014) (“[T]he law applicable to such claims is unsettled, and thus I acknowledge that the defendants have some likelihood of success on the merits. However, . . . I conclude that their likelihood of success on the merits is low.”). Plus, even if the district court believes that it could be reversed on appeal, it is still awkward for the district court to admit so. As Judge Posner revealed, “‘judges are not comfortable’ writing opinions that reveal doubt.” Michael L. Wells, “*Sociological Legitimacy*” in *Supreme Court Opinions*, 64 WASH & LEE L. REV. 1011, 1038 (2007) (quoting Richard A. Posner, *Judges’ Writing Styles (And Do They Matter?)*, 62 U. CHI L. REV. 1421, 1441 (1995)). Courts may also be motivated by a desire to achieve public acceptance, a phenomenon called “sociological legitimacy.” Scholars have suggested “the Justices [may] try to tamp down controversy and encourage public acceptance by making the outcome seem ineluctable rather than problematic, no matter how close the case may be.” *Id.* at 1039.

Despite the awkwardness, some district courts obviously do issue stays pending appeal. But when they do, it may very well be for a reason other than genuinely believing that it decided the merits incorrectly. *See infra* Section IV.C (arguing that the courts that stayed enjoinder of various states’ bans on same-sex marriage likely did not believe that the state would prevail on the merits).



## 2. Lock-in Effect

Another reason exists why the district court is unlikely to change its mind when evaluating the likely merits for the purposes of the stay. That reason is an economic and psychological concept called the “lock-in effect.” Generally, the lock-in effect “refers to the extent that the decision maker is less likely to change her decision . . . than she would have been if she never were asked to make the initial decision.”<sup>171</sup> The reason for this natural inclination is “the tendency to want to justify the initial allocation of resources by confirming that the initial decision was correct.”<sup>172</sup> Obviously, an initial decisionmaker “can and does change her mind some of the time,” but the self-justification motivation, along with other cognitive processes, create the natural inclination to make the later decision match the initial one.<sup>173</sup>

Professor Kevin J. Lynch recently explored how lock-in could affect a court’s decision on the merits after deciding a preliminary injunction.<sup>174</sup> He concluded that the district court may be inclined to make its ultimate ruling on the merits match the preliminary injunction to justify the preliminary injunction.<sup>175</sup> More specifically, if a district court declines to enter preliminary relief, enabling purported irreparable injury to occur, the district court will be inclined to make the decision on the merits match the preliminary decision—to justify the irreparable harm that occurred in the meantime.<sup>176</sup> The effect of this may be that a plaintiff is more likely to ultimately succeed on the merits if it sought no preliminary relief, as opposed to unsuccessfully seeking preliminary relief.<sup>177</sup>

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171. Lynch, *supra* note 33, at 783. Professor Lynch explained that the idea of lock-in “originated in the literature on investment decisions, but the effect has also been studied in relation to hiring decisions, performance appraisal, auctions, technology formats, and policy decisions. Some other names for the lock-in effect include escalating commitment, entrapment, or sunk costs.” *Id.* at 784 (footnotes omitted).

172. *Id.* at 783.

173. *Id.* Professor Lynch further explores the cognitive processes that cause lock-in. *Id.* at 784-89. Two of these include confirmation bias, which is the tendency to interpret new evidence consistent with a prior decision, and cognitive dissonance, which is the natural inclination to reduce any inconsistencies between what is known and what is later learned. *Id.* at 788.

174. *Id.* at 804-05.

175. *Id.* Professor Leubsdorf was less concerned about the possible lock-in effect. “That judges do not change their views during the course of a case may demonstrate only that the same judge will decide the same case in the same way. To the extent that prejudice is a danger, encouraging judges to announce the plaintiff’s chances of success without thoroughly considering the merits may actually enhance it. More detailed analysis at the interlocutory stage would help the losing party avoid or rebut the judge’s tentative views at the final trial.” Leubsdorf, *supra* note 163, at 547.

176. Lynch, *supra* note 33, at 804; *see also id.* at 806 (“The judge is under significant pressure to justify the earlier decision that allowed the irreparable harm to occur.”).

177. *Id.* at 804; *see also id.* at 806 (“[A]ccording to lock-in theory, a judge might be less likely to ultimately find for a plaintiff after allowing some irreparable harm to occur.”). Notably, Professor Lynch did not advocate eliminating consideration of the merits, as this Article does. *See id.* at 810-11 (explaining that the likelihood of success should still be considered, but that the extent of success a movant would need to show should be a “low level”).

Professor Lynch's main focus was preliminary injunctions, but he also mentioned that lock-in could occur within a stay of a decision pending appeal.<sup>178</sup> That is especially true at the district court level, where the effect could happen between the initial merits decision to issue injunctive relief and the later decision whether to stay that injunction pending appeal. The district court obviously has "psychological connectedness" to the initial decision because *it* made it. The district court is unlikely to find that the stay applicant is likely to succeed on the merits of the appeal simply to justify the time and resources spent in reaching the initial decision on the merits.

If the district court decides the merits and the appellate court decides the stay, the concerns about lock-in diminish greatly. Plainly, the appellate judges did not decide the merits. There is still some level of psychological connectedness given the appellate court's natural inclination to affirm if possible (and thus conclude that the stay applicant is not likely to succeed on the merits of the appeal).<sup>179</sup> But "[a]ppellate judges are familiar with reviewing trial court decisions for error, and they would not be expected to face the same self-justification pressures as the judge who initially decided the merits."<sup>180</sup>

The concern about lock-in re-emerges at the appellate level, however, between the appellate court's decision on the stay and the appellate court's later decision on the merits of the appeal. A motions panel of appellate judges decides the stay and a merits panel of appellate judges later decides the merits. The merits appellate judges could feel the economic and psychological need to make the merits decision match whatever the motions panel concluded regarding the likelihood of reversal. More specifically, if the motions panel denied the stay and allowed some irreparable injury to occur in the meantime, the merits panel would be inclined to agree with the motions panel's prediction of the merits to justify that irreparable injury.

One might think that the concern about lock-in should diminish because different judges could decide the stay and the merits. No federal appellate circuit prohibits judges who serve on the motions panel for a case from also serving on the merits panel of the same case.<sup>181</sup> Some cir-

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178. *Id.* at 795-96. In fact, a quote about preliminary injunctions to which Professor Lynch often refers was actually directed to stays pending appeal. In discussing the time pressures and difficulty of deciding the merits before the case is fully developed, Professor Lynch quoted from the Supreme Court: "[t]he choice for a reviewing court should not be between justice on the fly or participation in what may be an 'idle ceremony.'" *Id.* at 800 (quoting *Nken v. Holder*, 556 U.S. 418, 427 (2009)). The Supreme Court originally said this in *Scripps-Howard* and repeated it in *Nken*, both of which were obviously about stays pending appeal.

179. *Id.* at 819 n.173.

180. *Id.* at 819.

181. The circuits generally have different rules about how judges are assigned to merits and motions panels. The Ninth Circuit, for example, assigns judges to motions panels for a one-month term on a rotating basis. CIR. ADVISORY COMM., NINTH CIR. R. APP. P., 27-1 § 3(b) (2015).

cuits actually encourage it. In the Fourth Circuit, for example, “[e]very effort is made to assign cases for oral argument to judges who have had previous involvement with the case on appeal through random assignment to a pre-argument motion,” although such an assignment is not guaranteed.<sup>182</sup> A similar provision exists in the D.C. Circuit’s Rules and Operating Procedures:

From time to time in deciding motions, the special [motions] panel may have considered in great detail a matter that is closely related to the merits of a case; this consideration may have included oral argument. If that panel determines that judicial efficiency would be served by the panel retaining the case, it will so advise the Clerk. The special panel then controls the case from that point on to disposition.<sup>183</sup>

Thus, not only do federal appellate circuits lack rules to prevent lock-in, some circuits have rules that facilitate the same judges deciding both a motion for stay and the merits.

In *Abbott*, two of the same Fifth Circuit judges who served on the motions panel also served on the case’s merits panel.<sup>184</sup> As *Nken* dictates, the motions panel evaluated the likelihood that the State would succeed on appeal in showing that the abortion laws at issue were constitutional. In fact, almost three-fourths of the twenty-page opinion focused on the merits.<sup>185</sup> Although the *Abbott* motions panel clarified that its determinations “do not bind the merits panel,”<sup>186</sup> the merits panel frequently cited the motions panel’s findings on the merits.<sup>187</sup> The motions panels and

Judges are assigned to merits panels randomly by computer. *Id.* But see generally Adam S. Chilton & Marin K. Levy, *Challenging the Randomness of Panel Assignment in the Federal Courts of Appeals*, 101 CORNELL L. REV. 1 (2015) (questioning the untested assumption that federal judges are randomly assigned to panels).

182. 4TH CIR. INTERNAL OPERATING P. 34.1 (2015). Similarly, in the Seventh Circuit, if a motions panel determines that an appeal should be decided on an expedited basis, “it may recommend to the chief judge that the matter be assigned for argument and decision to the same panel.” 7TH CIR. INTERNAL OPERATING P. 6(d) (2014).

183. D.C. CIR. HANDBOOK OF PRACTICE AND INTERNAL P. X.E.1 (2016).

184. *Compare* *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 409 (5th Cir. 2013) (before Circuit Judges Owen, Elrod, and Haynes), *with* *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 748 F.3d 583, 586 (5th Cir. 2014) (before Circuit Judges Jones, Elrod, and Haynes). Judge Owen wrote the motions panel opinion. *Abbott*, 734 F.3d at 409. Judge Jones wrote the merits panel opinion. *Abbott*, 748 F.3d at 586.

Only one judge overlapped on the motions and merits panel in *Lakey*. *Compare* *Whole Woman’s Health v. Lakey*, 769 F.3d 285, 288 (5th Cir. 2014) (before Circuit Judges Smith, Elrod, and Higginson) *with* *Whole Woman’s Health v. Cole*, 790 F.3d 563, 566 (5th Cir. 2015) (before Circuit Judges Prado, Elrod, and Haynes). Judge Elrod wrote the motions panel stay decision. *Lakey*, 769 F.3d at 288. The merits panel decision does not indicate its author. *Cole*, 790 F.3d at 566.

185. See *supra* notes 45-46 and accompanying text.

186. *Abbott*, 734 F.3d at 419.

187. For instance, the merits panel cited to the motions panel’s findings that traveling 150 miles to obtain an abortion is not an undue burden, doctors would be able to obtain admitting privileges, and other factors reduced abortion access in the Rio Grande Valley. See *Abbott*, 748 F.3d at 598-99.

merits panels in *Whole Woman's Health* even referred and cited to the *Abbott* stay decision as “*Abbott I*” and the *Abbott* merits decision as “*Abbott II*,” as if they had the same stature.<sup>188</sup> Regardless, consider what had occurred between *Abbott I* and *Abbott II*—after the Fifth Circuit granted the stay, almost half of all abortion clinics closed in Texas. The later finding of the merits panel, which did reverse the lower court as the motions panel predicted, justified those (early) closures.

Lock-in would be less concerning if there was little chance of error in the initial decision by the motions panel. But the chance of error is significant simply due to the circumstances. Those circumstances include a lack of familiarity with the case,<sup>189</sup> less than full appellate briefing, and possibly no hearing, all within a “compressed timeframe not conducive to deliberate decision-making.”<sup>190</sup> Procedural mechanisms, like briefing and oral argument, empower the “individual’s opportunity to argue his case effectively,”<sup>191</sup> and help ensure “the substantively correct outcome actually issues.”<sup>192</sup> These mechanisms are not in place for stays, but a motions panel must still determine whether the stay applicant made a “strong showing” that he is likely to succeed on the merits of the appeal.<sup>193</sup> Further complicating the decision are the many appellate cases that “raise tough issues, turn on choices between conflicting social goals, and could go either way.”<sup>194</sup> But *Nken* requires that the appellate court decide who is likely to succeed in the appeal—and do so quickly.<sup>195</sup> These conditions and the complexity of the issues increase the chances of error in the stay decision, which makes it all the more problematic that the merits panel

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188. *Lakey*, 769 F.3d at 290; *Cole*, 790 F.3d at 580.

189. *See* *Cumberland Tel. & Tel. Co. v. La. Pub. Serv. Comm’n*, 260 U.S. 212, 219 (1922) (“[T]he court which is best and most conveniently able to exercise the nice discretion needed to determine this balance of convenience is the one which has considered the case on its merits, and therefore is familiar with the record.”).

190. *Lynch*, *supra* note 33, at 800.

191. *Redish & Marshall*, *supra* note 160, at 476.

192. Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 244 (2004).

193. Again, this is a high burden, possibly akin to the same ultimate burden of proof on appeal. *See Lynch*, *supra* note 33, at 782.

194. *Wells*, *supra* note 170, at 1037.

195. One solution would be to extend the timeframe. That does not work so well, however, when irreparable harm could be occurring in the meantime. Numerous things could happen while the appellate court takes the time to decide the stay that would preclude the later decision on the merits from having meaning. A longer timeframe would also create other questions about the timing of appeals. In *Lakey*, the state first requested a stay on August 31, 2014, and the court ruled on this request on October 2, 2014. *Supra* notes 64-65. Before the court’s ruling, the parties filed briefs and the court held oral argument. The Fifth Circuit’s opinion was over thirty pages, and the vast majority of it focused on the merits. Is it judicially inefficient to allow such an extensive motions procedure that ultimately turns on the merits and then later, again decide the merits? Secondly, the *Lakey* motions panel’s timeframe may have been long for a motion to stay, but it was much quicker than the usual timeframe for an appellate court’s decision on the merits. If the motions panel in *Lakey* is able to evaluate the merits so (relatively) quickly, why do merits panels take so long to decide the merits?

may be naturally inclined to agree with it to justify any irreparable injury that occurred in the meantime.<sup>196</sup>

None of this is to suggest that merits panels have never ruled differently than the motions panels initially predicted; this Article does not purport to present empirical findings about the rates at which motions and merits panels disagree.<sup>197</sup> Certainly, even if the same judges sit on both panels, they can change their minds.<sup>198</sup> But, the natural inclination will be for the merits panel's decision to match the motions panel's prediction. And thus, a litigant who does *not* seek a stay may be better off at the merits stage than a litigant who unsuccessfully seeks a stay (even though the appeal may also be moot at that point).

#### D. *So What Should Be Considered?*

History, theory, and practicalities do not support the consideration of the merits of the appeal when determining whether to stay injunctive relief pending that appeal. Based on history, theory, and practicality, what then should be considered? The answer is basically the other three *Nken* factors with some minor alterations.

The first factor should be whether the circumstances could change in such a way as to render the appeal useless. This was an important con-

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196. The procedural safeguards of a full appellate record, complete briefing, and oral arguments would still exist at the merits stage of the appeal. Still, that natural tendency to agree with the motions panel will be present. And "procedural safeguards are of no real value . . . if the decisionmaker bases his findings on factors other than his assessment of the evidence before him." Redish & Marshall, *supra* note 160, at 476.

197. Only one such empirical study appears to exist. See Fatma Marouf et al., *Justice on the Fly: The Danger of Errant Deportations*, 75 OHIO ST. L.J. 337 (2014). After analyzing the defined immigration case sample data, the authors concluded "when we view the circuit courts as a whole, those who win their appeal are almost as likely to have had their stay request denied as granted." *Id.* at 382. The authors caution that "[j]ust because a court denies a stay to a petitioner who ultimately prevails does not mean that court made an error in adjudicating the motion for stay." *Id.* at 384. The prediction of the merits is only one of the four *Nken* factors, but it is an important one. *Id.* The authors conclude: "[W]hile denying a stay . . . to a petitioner who ultimately prevails is not necessarily an 'error' in light of the four-part test, we believe that a pattern of consistently denying stays to a large number of petitioners who ultimately prevail flags a problem with the process and raises serious questions about judges' abilities to predict, with a reasonable level of accuracy, which cases are likely to succeed." *Id.* at 385.

198. An obvious example of this is panel rehearings. Federal Rule of Appellate Procedure 40 allows parties a rehearing by the same three judges who made the initial merits decision. FED. R. APP. P. 40. To seek this, the litigant must "state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended." *Id.* at (a)(2). Judge Arnold of the Eighth Circuit once explained that judges do not like petitions for rehearing for one "obvious" reason: "People don't like to be told that they are wrong." Richard S. Arnold, *Why Judges Don't Like Petitions for Rehearing*, 3 J. APP. PRAC. & PROCESS 29, 37 (2001). Still, "[o]nce in a great while, however, people, including judges, can be brought to admit that they were wrong." *Id.* The chances of obtaining panel rehearing are low: "The Federal Circuit, for example, from its inception in 1982 through 1998, granted an average of about 3.1% of petitions for panel rehearing." *Id.* at 29. So, very few judges vote to grant panel rehearing. Importantly, even if rehearing is granted, it does not mean the judges will change their ultimate ruling. So, panel rehearings are not a perfect example of a practice inconsistent with lock-in.

sideration for English courts. It is also consistent with the predominant purpose of stays—maintaining appellate courts’ abilities to render decisions that are meaningful to the parties. This factor may not be all that much different than the current consideration of irreparable injury; usually injury is irreparable because it cannot be undone on appeal. At the same time, it may not be useful to think of this solely as traditional irreparable injury given current, defined precedent on what constitutes irreparable injury. For example, many courts have held that denial of constitutional rights constitutes irreparable injury.<sup>199</sup> Regardless of whether this is true, continued deprivation of constitutional rights does not automatically mean the circumstances would change in such a way as to render an appeal meaningless. A stay pending appeal of injunctive relief precluding enforcement of a ban on same-sex marriage is a good example. Gay people who are unable to marry are likely deprived of a constitutional right pending appeal. But, that continued deprivation does not interfere with the appellate court’s ability to release a decision with meaningful consequences. Another example worth considering is *Abbott*. The Fifth Circuit found the State irreparably injured in its inability to enforce its law. But that purported irreparable injury would not interfere with the Fifth Circuit’s ability to decide the merits meaningfully.<sup>200</sup> Current notions of irreparable injury are less important to stays. Instead, the focus should be on whether the circumstances would (irreparably) change in a way that would interfere with the appellate court’s ability to make a decision meaningful to the parties.

Courts should also still consider the harm to the parties in the meantime, with or without a stay. English courts expressly looked at the harm to the parties in determining whether to issue a stay pending appeal.<sup>201</sup> This factor is also relevant to the purposes of stays, which concern maintaining the judicial review process for the parties. If staying injunctive relief pending appeal affects the parties in some way relevant to their interests in judicial review, courts should take that into consideration.

Last, courts should still consider the public interest. English courts did not specifically mention this factor, but they did address how a stay, or lack thereof, would affect the administration of justice.<sup>202</sup> This factor is

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199. See, e.g., *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (“The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”); *Ezell v. City of Chi.*, 651 F.3d 684, 699 (7th Cir. 2011) (“[F]or some kinds of constitutional violations, irreparable harm is presumed.”); *Adams By & Through Adams v. Baker*, 919 F. Supp. 1496, 1505 (D. Kan. 1996) (“A deprivation of a constitutional right is, itself, irreparable harm.”).

200. What would preclude a meaningful decision is if the clinics, unable to meet the admitting privileges requirement, closed in the meantime. If so, any opinion by the Fifth Circuit would be almost advisory because the closed clinics are unlikely to reopen even if the law is found unconstitutional.

201. See *supra* notes 88-96 and accompanying text.

202. *Id.*

also relevant to the purposes of stays. Courts should consider if a stay is necessary to prevent disruption in the legal system or the administration of laws, or if the stay is necessary to ensure the courts can fulfill their roles in the judicial system. This is a necessarily broad factor as there are many ways that relief pending appeal, or lack thereof, could have some negative consequence on the legal system or on society in general. Again, same-sex marriage bans are a good example. If a lower court finds the ban unconstitutional, there is still always the chance that the appellate court may reverse. The courts would then have to deal with the legal statuses of any marriages that occurred in the meantime.

Considering the merits has led to the granting of stays that should not have been granted under these three factors. Again, *Abbott* is an example. The Fifth Circuit motions panel was thoroughly convinced of the State's ability to win on the merits of the appeal.<sup>203</sup> So, it granted the stay.<sup>204</sup> By doing so, it rendered the merits panel's decision practically meaningless—the stay caused the closure of clinics, which were unlikely to reopen regardless of the merits decision. The Fifth Circuit should have denied a stay, ensuring that the clinics would not close and the later merits decision would be meaningful. Consideration of the merits led the Fifth Circuit astray.

Considering the merits has also led to the denial of stays that should have issued under these three factors. For example, when a district court enjoins enforcement of a state's same-sex marriage ban. Even before *Obergefell v. Hodges*,<sup>205</sup> the overwhelming majority of courts presented with the question concluded that same-sex marriage bans were unconstitutional,<sup>206</sup> meaning it was unlikely that the state would prevail on the merits of the appeal. If the merits are a critical factor, then likely no stay should have been granted. But granting a stay was appropriate because of the public interest. On the off chance that the state is successful, what would be the legal status of the marriages that occurred in the meantime? It's a close call, as a stay would undoubtedly harm gay couples while the appeal is pending. But the potential legal mess is likely just large enough to overwhelm that harm. Again, the merits led to inappropriate conclusions on the propriety of stays.

None of the three factors to be considered—possible changed circumstances rendering the appeal meaningless, harm to the parties, and the public interest—is more important than the others, and they need not all

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203. *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 411-19 (5th Cir. 2013) (using all but four pages of the opinion to describe the state's likelihood of succeeding on the merits of the appeal).

204. *Id.* at 419.

205. 135 S. Ct. 2584 (2015) (declaring Michigan's, Ohio's, Kentucky's, and Tennessee's bans on same-sex marriage unconstitutional).

206. *See infra* note 231 (discussing how many courts found same-sex marriage bans unconstitutional).

be present to justify a court's discretionary decision to issue a stay.<sup>207</sup> Any fear that these standards are too favorable, leading to increased appeals, is likely exaggerated.<sup>208</sup> True, the strong showing on the merits factor likely helps negate the chance of a stay,<sup>209</sup> possibly making the appeal less attractive. But these three factors also have that threshold function. This is especially true with the suggested alterations to the irreparable injury and public interest factors. It is not a rubber stamp granting the stay simply because a constitutional deprivation is alleged or because the state is unable to enforce a law. Instead, the court must truly analyze whether a stay is necessary to preserve meaningful judicial review or to prevent some undesirable consequence. Requiring explanation of the reason for the grant or denial of the stay will help ensure that honest analysis occurs.

#### IV. LEGITIMACY CONCERNS

Although *Nken's* emphasis on the merits has led many courts to extensively discuss the merits, it has not motivated every court. Most notably, the Supreme Court rarely explains the reasons for stays it grants or denies. Without explanation, it is impossible to know if the Court even evaluated the merits. The Supreme Court's vacation of the stay entered by the Fifth Circuit in *Whole Woman's Health* is just one example.<sup>210</sup> The lack of explanation and resulting impossibility of knowing the Court's reasoning hurts the legitimacy of stay decisions.

##### A. *Failing to Explain: Kitchen v. Herbert*<sup>211</sup>

On December 20, 2013, a Utah federal district court found Utah's ban on same-sex marriage unconstitutional and enjoined the State from enforcing that law. Days later, the State asked the district court to stay that injunction pending appeal, or at least temporarily stay the injunction to allow the Tenth Circuit to evaluate a stay.<sup>212</sup> The district court denied the request using *Nken*.

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207. Although the merits should not be relevant to whether the applicant is entitled to a stay, the non-applicant also always has the option to move to dismiss the appeal as frivolous. See *Pillay v. INS*, 45 F.3d 14, 17 (2d Cir. 1995) ("[The] court has inherent authority . . . to dismiss an appeal or petition for review as frivolous when the appeal or petition presents no arguably meritorious issue for our consideration."). This motion can occur well before the merits are decided, limiting the effect of a stay.

208. It is difficult to take this fear too seriously, as stays pending appeal of monetary judgments are available, almost as a matter of right. See *supra* notes 8-12 and accompanying text (discussing the ease of obtaining a stay of a monetary judgment).

209. But see *infra* notes 234-36 (discussing Justice Thomas's description of the State's ease in obtaining a stay in cases where a federal district court enjoins enforcement of a state law).

210. See *supra* Section II.C.2.

211. 134 S. Ct. 893 (2014) (mem.).

212. *Kitchen v. Herbert*, No. 2:13-cv-217, 2013 WL 6834634, at \*1 (D. Utah Dec. 23, 2013).



The district court first found that the State was unlikely to succeed on appeal:

[T]he majority of the State's assertions in support of its argument are the same assertions the State made in its Motion for Summary Judgment. For the same reasons the court denied that motion, the court finds that the State has not submitted any evidence that it is likely to succeed on its appeal.<sup>213</sup>

Second, the district court found no irreparable harm to the State because "its interest in preserving its previous laws about marriage" was not valid,<sup>214</sup> and because no general public interest in enforcing legislature-passed laws existed.<sup>215</sup> Last, the district court dismissed any claim of irreparable harm based on possible uncertainty for any same-sex couples who marry while appeal is pending because it would not result in harm to the State.<sup>216</sup>

The district court concluded its analysis finding that the last two *Nken* factors did not weigh in favor of a stay.<sup>217</sup> There was no doubt that gay couples would face harm if not allowed to marry immediately; more delay could seriously harm couples "facing serious illness or other issues that do not allow them the luxury of waiting for such a delay."<sup>218</sup> And finally, although the State has an interest in enforcing its laws, the public also has an interest in upholding gay couples' constitutional rights to marry.<sup>219</sup>

After being denied a stay pending appeal from the district court, the State then petitioned the Tenth Circuit.<sup>220</sup> Two judges of the Tenth Circuit denied the motion.<sup>221</sup> The opinion cites the *Nken* factors,<sup>222</sup> noting that the likelihood of success on the merits and irreparable injury are the most critical,<sup>223</sup> but contains no analysis. Instead, it states: "Having considered the district court's decision and the parties' arguments concerning the stay factors, we conclude that a stay is not warranted."<sup>224</sup>

After the Tenth Circuit's denial, the State of Utah turned to the U.S. Supreme Court for relief pending appeal. And there, it was successful.

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213. *Id.* at \*2.

214. *Id.*

215. *Id.* at \*3. If that were true, any decisions invalidating state law would be automatically stayed. *Id.* at \*2.

216. *Id.* at \*3.

217. *Id.*

218. *Id.*

219. *Id.*

220. *Kitchen v. Herbert*, No. 13-4178, 2013 U.S. App. LEXIS 26181, at \*12 (10th Cir. Dec. 24, 2013).

221. *Id.* at \*13.

222. *Id.*

223. *Id.*

224. *Id.* The judges did, however, "direct expedited consideration" of the appeal. *Id.*

On Monday, January 6, 2014, the Court released the following two-sentence order: “[The] application for stay presented to Justice Sotomayor and by her referred to the Court is granted. Permanent injunction issued by the United States District Court . . . [is] stayed pending final disposition of the appeal by the United States Court of Appeals for the Tenth Circuit.”<sup>225</sup>

Because of the lack of substance, it is impossible to know why the Court granted the stay after the two lower courts denied it. Was it convinced that the State would likely succeed on the merits? Or did it believe that the State would somehow be irreparably harmed? These questions about *Nken*’s two critical factors cannot be answered. The Court provided no explanation regarding why its stay was appropriate under *Nken*.

Many thought that the stay signaled that the Supreme Court would eventually grant certiorari and overrule any Tenth Circuit finding that Utah’s ban on same-sex marriage was unconstitutional.<sup>226</sup> But that did not happen. Instead, months after the Tenth Circuit also found the ban unconstitutional,<sup>227</sup> the Court denied multiple petitions for writ of certiorari in same-sex marriage cases, including *Herbert*.<sup>228</sup> Technically, the denial of certiorari says nothing about the merits of the case.<sup>229</sup> At the same time, denial of certiorari makes little sense if the Court disagrees with the merits of the lower court’s conclusion that the ban was unconstitutional.<sup>230</sup> Given the denial of certiorari, it does not appear that the Court could have thought, months before, that the State of Utah made a “strong showing” on its likelihood of succeeding on appeal to the Tenth Circuit.<sup>231</sup> Then, of course, in June 2015, the Court declared state bans on

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225. *Herbert v. Kitchen*, 134 S. Ct. 893, 893 (2014) (mem.) (alteration of original typeface). Eight months later, the Court also stayed the Fourth Circuit’s injunction precluding enforcement of Virginia’s ban on same-sex marriage “pending the timely filing and disposition of a petition for a writ of certiorari.” *McQuigg v. Bostic*, 135 S. Ct. 32, 32 (2014).

226. See, e.g., Adam Liptak, *Supreme Court Delivers Tacit Win to Gay Marriage*, N.Y. TIMES (Oct. 6, 2014), <http://www.nytimes.com/2014/10/07/us/denying-review-justices-clear-way-for-gay-marriage-in-5-states.html> (“The nearly universal consensus from Supreme Court observers had been that the stays issued by the [J]ustices indicated that they wanted the last word before federal courts transformed the landscape for same-sex marriage.”).

227. *Kitchen v. Herbert*, 755 F.3d 1193, 1229-30 (10th Cir. 2014).

228. *Herbert v. Kitchen*, 135 S. Ct. 265 (2014); *McQuigg v. Bostic*, 135 S. Ct. 314 (2014); *Bogan v. Baskin*, 135 S. Ct. 316 (2014); *Walker v. Wolf*, 135 S. Ct. 316 (2014); *Schaefer v. Bostic*, 135 S. Ct. 308 (2014); *Smith v. Bishop*, 135 S. Ct. 271 (2014).

229. See *United States v. Carver*, 260 U.S. 482, 490 (1923) (“The denial of a writ of certiorari imports no expression of opinion upon the merits of the case.”).

230. See Peter Linzer, *The Meaning of Certiorari Denials*, 79 COLUM. L. REV. 1227, 1255 (1979) (explaining that “it is hard to believe that the Justices almost always shut their minds to the justness of a petitioner’s case” in evaluating the petition for certiorari).

231. The pure volume of federal courts finding bans on same-sex marriage unconstitutional also did not bode well for Utah’s chances of succeeding. See, e.g., *Hamby v. Parnell*, 56 F. Supp. 3d 1056, 1064 (D. Alaska 2014) (listing the four federal appellate circuit courts that had found bans on same-sex marriage unconstitutional); *Condon v. Haley*, 21 F. Supp. 3d 572, 582 (D.S.C. 2014) (“[A] clear majority of federal district courts that have addressed this issue have found

same-sex marriage unconstitutional, also negating the chance that the Court could have genuinely thought in January 2014 that the State of Utah had made a “strong showing” it was likely to establish that Utah’s ban was constitutional. But the Court still granted the stay in *Herbert*.<sup>232</sup>

Maybe the Court now believes the merits to be less important than it indicated in *Nken*. Justice Thomas’s recent dissent to the Court’s denial of a stay in another (pre-*Obergefell*) same-sex marriage case, *Strange v. Searcy*,<sup>233</sup> indicates so. After a federal district court ruled Alabama’s ban on same-sex marriage unconstitutional, Alabama’s Attorney General asked for a stay of the injunction precluding enforcement pending appeal. Unlike in *Herbert*, where the Court granted the stay without explanation, this time, the Court denied the stay without explanation.<sup>234</sup> Justice Thomas dissented. He explained that the Court’s “ordinary practice” is to stay injunctions pending appeal when lower federal courts enjoin enforcement of a state law found to be unconstitutional.<sup>235</sup> He explained this is so because states are often able to meet their burdens in

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state same sex marriage bans unconstitutional.”); Campaign for S. Equal. v. Bryant, 64 F. Supp. 3d 906, 951 (S.D. Miss. 2014) (explaining that since *Windsor*, no fewer than twenty state bans on same-sex marriage had been found unconstitutional); see also Rosenbrahn v. Daugaard, 61 F. Supp. 3d 862, 870 (D.S.D. 2015) (“The majority of courts that have addressed the issue of the constitutionality of same-sex marriage bans after *Windsor* have found that same-sex marriage bans deprive homosexual couples of their fundamental constitutional right to marriage.”).

232. An educated guess on why the Court granted the stay was its desire to avoid later possible administrative issues if the ban on same-sex marriage were later held constitutional. See Burns v. Hickenlooper, No. 14-cv-01817-RM-KLM, 2014 WL 3634834, at \*3 (D. Colo. July 23, 2014) (“[F]ederal courts have largely skipped a methodical assessment of those four factors in favor of entering a stay due to the ‘unsettled’ nature of the constitutional questions regarding same-sex marriage and the ‘confusion, potential inequity, and high costs’ that would likely result if the decision granting injunctive relief were reversed on appeal.”).

The Court’s stay decisions in same-sex marriage cases have been scattered since the certiorari denials in October 2014. Three days after those denials, without explanation, Justice Kennedy issued a stay on the Ninth Circuit’s injunctive relief precluding enforcement of Idaho’s ban on same-sex marriage. Otter v. Latta, 135 S. Ct. 345 (2014). Two days later, again without explanation, the Court vacated Justice Kennedy’s prior order, allowing same-sex marriages to begin immediately in Idaho. *Id.* In November 2014, without explanation, Justice Sotomayor stayed a district court’s injunction precluding enforcement of Kansas’s ban on same-sex marriage. Moser v. Marie, 135 S. Ct. 511 (2014). The Court vacated that stay days later, again, without explanation. *Id.* Without reasoning, there’s no way to know what motivated the granting of the stays in the first place. It appeared to almost be a courtesy—to allow the state a few days to prepare. That courtesy later disappeared, though, as the Court began to deny stays, still without explanation. See, e.g., *Strange v. Searcy*, 135 S. Ct. 940 (2015) (denying Alabama’s request for a stay of a district court injunction pending the Court’s review of the constitutionality of bans in Kentucky, Ohio, Tennessee, and Michigan, with Justices Scalia and Thomas dissenting); Wilson v. Condon, 135 S. Ct. 702 (2014) (denying South Carolina’s request for a stay of a district court injunction pending review by the Fourth Circuit Court of Appeals and, ultimately, the Supreme Court, but noting that Justices Scalia and Thomas would have granted the stay); Parnell v. Hamby, 135 S. Ct. 399 (2014) (denying Alaska’s request for a stay of a district court injunction pending review by the Ninth Circuit Court of Appeals and, ultimately, the Supreme Court).

233. 135 S. Ct. at 940.

234. *Id.*

235. *Id.* (Thomas, J., dissenting).

these types of cases: “Because States are required to comply with the Constitution, and indeed take care to do so when they enact their laws, it is a rare case in which a State will be unable to make *at least some showing* of a likelihood of success on the merits.”<sup>236</sup> At least *some* showing? And it’s *ordinary practice* to require only this minimal showing? Maybe the merits do not matter nearly as much as *Nken* states. Without explanation, we cannot know.

### B. No Reason for the Lack of Explanation

The failure to explain the denial or grant of a stay is even more curious given the ease of explanation.<sup>237</sup> The three factors advocated for consideration in this Article—a possible change in circumstances precluding the appellate court from issuing a meaningful decision to the parties, the harm to the parties, and the public interest—are similar to the factors courts use to evaluate preliminary injunctive relief. The Federal Rules of Civil Procedure obligate courts to provide reasoning in decisions granting or rejecting preliminary injunctive relief.<sup>238</sup> Courts should similarly be able to provide a statement of reasons for granting or denying a stay pending appeal.

A court can easily explain why the circumstances could change in a way that would affect the usefulness of the result of the appeal. The dissent to the Supreme Court’s refusal to vacate the stay in *Abbott* did exactly that. Justice Breyer explained that vacation of the stay was necessary because otherwise abortion clinics would close and be unlikely to reopen<sup>239</sup>—negating the usefulness of the appeal. Any difficulty in explaining the changed circumstances suggests there is no such situation and perhaps no need for a stay.

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236. *Id.* (emphasis added). Justice Thomas’s dissent is also interesting in how he compares the stay issued in *Herbert*, but denied in *Strange*. He claimed that the stay in *Herbert* showed that the Court should have also issued a stay in *Strange*. *Id.* The later denials of the petitions of certiorari in *Herbert*, however, imply that the Court did not believe that the State had a meritorious appeal. Thus, under *Nken*, no stays should have been issued in either case. In *Strange*, the Court may have actually considered the merits as *Nken* dictates, concluding that the State of Alabama could not establish a “strong showing” of its likelihood to succeed on the merits, and thus properly denied the stay. *See id.* at 941 (criticizing the Court’s failure to grant a stay as a “signal of the Court’s intended resolution of” the constitutionality of bans on same-sex marriage).

237. This argument applies even if the merits are still considered. A stay in a case like *Herbert* or *Strange* would have required the Court to evaluate Fourteenth Amendment law to determine whether the state had made a strong showing that it was likely to succeed on appeal. However, even if the Court undertook the equal protection analysis, it should have been able to explain its decision, just like the merits panel would eventually explain its analysis.

238. FED. R. CIV. P. 65(d) (“Every order granting an injunction . . . must: (A) state the reasons why it issued.”). If a court granted affirmative injunctive relief pending appeal, the court would have to comply with 65(d) and “set forth the reasons for its issuance.” 11 WRIGHT ET AL., *supra* note 7, § 2904, at 707.

239. *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 134 S. Ct. 506, 509 (2013) (Breyer, J., dissenting).

It is also relatively easy to explore how a stay could cause harm to parties. The District of Utah did exactly that in denying a stay after it found Utah's ban on same-sex marriage unconstitutional.<sup>240</sup> The court explained that a stay would preclude the State of Utah from enforcing its law (although harm was discounted by the fact that the law was likely unconstitutional).<sup>241</sup> The court also explored how a stay would continue to preclude same-sex couples from getting married.<sup>242</sup> These are factors that should be weighed in determining whether to grant relief pending appeal.

Last, it is not difficult to explain why the public interest favors a stay. The Southern District of Ohio was able to find the necessary words when staying its injunction precluding enforcement of Ohio's ban on same-sex marriage. If the State was successful on appeal, "the absence of a stay as to this Court's ruling of facial unconstitutionality is likely to lead to confusion, potential inequity, and high costs. These considerations lead the Court to conclude that the public interest would best be served by the granting of a stay."<sup>243</sup>

Specific explanation of the bases for granting or denying a stay of injunctive relief pending appeal is possible.<sup>244</sup> And it is necessary if stay decisions are going to maintain any semblance of legitimacy.

### C. *How Lack of Explanation Hurts the Legitimacy of Stay Decisions*

To be legally legitimate, a court decision must be lawful.<sup>245</sup> Thus, legitimacy turns on whether the decision complies with the law.<sup>246</sup> To demon-

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240. *Kitchen v. Herbert*, No. 2:13-cv-217, 2013 WL 6834634, at \*2-3 (D. Utah Dec. 23, 2013).

241. *Id.*

242. *Id.* at \*3.

243. *Henry v. Himes*, No. 1:14-cv-129, 2014 WL 1512541, at \*1 (S.D. Ohio Apr. 16, 2014). Notably, the court denied the stay for the as-applied findings of unconstitutionality for the eight individual plaintiffs who had "demonstrated that a stay will irreparably harm them individually due to the imminent births of their children and other time-sensitive concerns, (as well as due to the continuing Constitutional violations)." *Id.*

244. The Supreme Court has recently been criticized for its failure to explain its decisions denying certiorari in same-sex marriage cases. See, e.g., Robert Barnes, *Supreme Court's Actions Are Monumental, but the Why of Its Reasoning Is Often Missing*, WASH. POST (Oct. 12, 2014), [http://www.washingtonpost.com/politics/courts\\_law/supreme-court-actions-aremonumental-but-the-why-of-its-reasoning-is-often-missing/2014/10/12/ca1ccc9c-4fca-11e4-8c24-487e92bc997b\\_story.html](http://www.washingtonpost.com/politics/courts_law/supreme-court-actions-aremonumental-but-the-why-of-its-reasoning-is-often-missing/2014/10/12/ca1ccc9c-4fca-11e4-8c24-487e92bc997b_story.html); Adam Liptak, *Justices Drawing Dotted Lines with Terse Orders in Big Cases*, N.Y. TIMES (Oct. 27, 2014), <http://www.nytimes.com/2014/10/28/us/supreme-court-with-terse-orders-has-judges-and-lawyers-reading-tea-leaves.html>; Dahlia Lithwick, *Injunction Junction: What Is the Supreme Court Thinking Behind its Unfathomable Silence?*, SLATE (Oct. 16, 2014), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2014/10/supreme\\_court\\_unsigned\\_orders\\_stays\\_and\\_injunctions\\_no\\_explanations\\_in\\_voter.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2014/10/supreme_court_unsigned_orders_stays_and_injunctions_no_explanations_in_voter.html). "Review on a writ of certiorari," however, is purely a matter of "judicial discretion." SUP. CT. R. 10. There are no specific factors the Court is supposed to consider when deciding to grant review. *Id.* The Court's Rules include a list of reasons that are "neither controlling nor fully measuring the Court's discretion" for which the Court may grant review, including factors like a circuit split. *Id.* But there is no set, governing standard. *Id.* And if that is true, there is really nothing for the Court to explain in the denial.

strate legal legitimacy, the Court need only explore the legal reasons for the decision; “the opinion must consist of a full and candid exposition of the Court’s reasoning.”<sup>247</sup> Without the reasoning, the decision is legally illegitimate because there is no assurance “that the Court’s ruling complies with the law.”<sup>248</sup>

Legitimacy is also important because it justifies the ruling. “Justification is the primary way the Court can influence other participants in the legal system. There is a strong connection between reasons and rules, and decisions without reasons generally cannot constrain future actors.”<sup>249</sup> In more practical terms, the consequences of failing to explain are that “no one would take the opinions seriously, briefs could not credibly cite them as authority, lower court judges would lack guidance, and doctrinal scholarship would be useless.”<sup>250</sup>

These consequences are evident in lower courts’ treatment of the Court’s stay in *Herbert*. In *Wolf v. Walker*,<sup>251</sup> Judge Crabb of the Western District of Wisconsin considered the *Nken* factors. If she was “considering these factors as a matter of first impression, [she] would be inclined to agree with plaintiffs that defendants have not shown that they are entitled to a stay.”<sup>252</sup> Although “[i]t is impossible to know the Court’s reasoning for issuing the stay,” other courts have followed it and Judge Crabb felt obligated to do the same.<sup>253</sup>

Judge Moore of the District of Colorado refused to give *Herbert* some sort of precedential effect because of its lack of legal legitimacy:

[I]t appears to the Court that it may well be that a message is being sent by the Supreme Court. But this Court is not some modern day haruspex skilled in the art of divination. This Court cannot—and, more importantly, it will not—tell the people of Colorado that the access to this or any other fundamental right will be delayed because it “thinks” or “perceives” the subtle—or not so subtle—content of a message not directed to this case. The rule of law demands more.<sup>254</sup>

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245. Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1794 (2005).

246. Wells, *supra* note 170, at 1020.

247. *Id.* at 1020-21.

248. *Id.* at 1020.

249. Eric J. Segall, *Justice O'Connor and the Rule of Law*, 17 U. FLA. J.L. & PUB. POL'Y 107, 111 (2006) (footnote omitted).

250. Wells, *supra* note 170, at 1021.

251. 26 F. Supp. 3d 866 (W.D. Wis. 2014).

252. *Id.* at 873.

253. *Id.*

254. *Burns v. Hickenlooper*, No. 14-cv-01817-RM-KLM, 2014 WL 3634834, at \*5 (D. Colo. July 23, 2014). Judge Moore did grant a temporary stay of his preliminary injunction precluding enforcement of Colorado’s same-sex marriage ban to enable the parties to seek a stay from the Tenth Circuit or the Supreme Court. *Id.* He also stayed all future proceedings in the case pend-

Judge Moore's mention of the rule of law is also related to the legal legitimacy of court decisions. The classic conception of the rule of law is that "something other than the mere will of the individuals deputized to exercise government powers must have primacy"; the government should be a "government of laws" and not a "government of men."<sup>255</sup> Also part of the rule of law concept is that law must be external so that each public official is bound by it. Then, a result should not change even if the decisionmaker is different.

A failure to explain is inconsistent with the rule of law because it promotes the perception that we have a government of men—not of laws. Without an explanation, maybe the law did not govern, maybe the judge did. And if a different judge was presented with the same motion for a stay, he may have found differently because of a different whim. "A requirement that judges give reasons for their decisions—grounds of decision that can be debated, attacked, and defended—serves a vital function in constraining the judiciary's exercise of power."<sup>256</sup> This constraint is necessary even when the decision is equitable. Stay decisions can and should comply with the rule of law because discretion is guided and constrained by external law.<sup>257</sup>

The failure to explain the basis of a stay decision also hurts the opinion's legal legitimacy because it creates the perception of inconsistency.<sup>258</sup> Why in one case would the possibility of changed circumstances justify a stay, but a similar possibility of changed circumstances be insufficient in another case? Or, using actual cases, why was the State of Texas's injury in its inability to enforce abortion restrictions enough to help justify the Court's refusal to vacate the stay in *Abbott*, but not in *Whole Woman's Health*?

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ing the resolution of *Kitchen v. Herbert* in the Tenth Circuit and possibly in the United State Supreme Court. *Id.*

255. RONALD A. CASS, *THE RULE OF LAW IN AMERICA* 3 (2001) (quoting MASS. CONST. (1780)).

256. David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 737 (1987).

257. *Nken v. Holder*, 556 U.S. 418, 434 (2009) (explaining that a decision to issue a stay is discretionary, but it is not a motion to the court's "inclination, but to its judgment; and its judgment is to be guided by sound legal principles" (quoting *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 139 (2005))).

258. Professor Richard Hasen recently explored the appearance of inconsistency resulting from four Supreme Court opinions released in the month before the 2014 election. Richard L. Hasen, *Reining in the Purcell Principle*, 43 FLA. ST. U. L. REV. (forthcoming 2016). The orders included: 1) staying an order, precluding enforcement of North Carolina's voter registration law; 2) vacating a stay of an order, allowing Wisconsin's voter identification law to go into effect; 3) refusing to vacate a stay, allowing Texas's voter identification law to go into effect; and 4) staying an order, precluding enforcement of Ohio election laws. *Id.* Professor Hasen explains that, obviously, "[t]he orders appeared contradictory." *Id.* (*manuscript* at 1) (on file with author). He also argues that had the Court applied the standards for emergency stays appropriately, there are strong arguments that the Court concluded incorrectly in the Texas and North Carolina cases. *Id.*

Because of the equitable nature of the decisions, some inconsistency is inevitable. But experience with preliminary injunctions also shows that consistency is possible and desirable. There should be similarities in how much circumstances must change so as to preclude an appellate court from issuing a decision meaningful to the parties. There should also be similarities in how courts weigh the harms to both parties resulting from a stay and in courts' conclusions regarding what kind of public interests weigh in favor of a stay. It is, of course, possible that due to other circumstances, a stay might be appropriate for one stay applicant but not another even with similar harms. But there should be some explanation of why. Otherwise, the decisions just seem inconsistent and illegitimate.

On a related note, explanation is needed to increase legitimacy despite possibly limited precedential effect. Admittedly, some stay decisions will have limited precedential effect because of particularity to factual circumstances. The same could be said of preliminary injunction decisions, however, which are required to be explained, are appealable, and provide the bases for arguments in other motions for preliminary injunctions. Regardless, not all stay decisions will be limited to their facts.<sup>259</sup> One need look no further than *Abbott* or *Herbert* to see that. Numerous states could pass abortion laws similar to the ones at issue in *Abbott* or *Whole Woman's Health*. Legitimate decisions on stays in *Abbott* and *Whole Woman's Health* could then have far-reaching consequences. The vast majority of states had same-sex marriage bans similar to the one at issue in *Herbert*. If the Court's stay in *Herbert* lacked precedential value because of its particularity to facts, many, many courts erroneously felt obligated to follow it.<sup>260</sup>

Strict precedential value aside, explanation would improve legitimacy and provide better guidance for lower courts. Would the stay in *Whole Woman's Health* have closed too many abortion clinics while appeal was pending? Did that result impose too much harm on women—is that the relevant difference between *Whole Woman's Health* and *Abbott*? However the Court quantified that conclusion, it would be helpful for lower courts to know because they could follow it. The Fifth Circuit noted as

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259. See *Ornelas v. United States*, 517 U.S. 690, 698 (1996) (concluding that even though precedent in reasonable-suspicion and probable-cause decisions will have limited value because of the specificity to facts, “there are exceptions” where one decision will control another); see also *id.* (“And even where one case may not squarely control another one, the two decisions when viewed together may usefully add to the body of law on the subject.”).

260. See, e.g., *Latta v. Otter*, 771 F.3d 496, 499 (9th Cir. 2014); *Bishop v. Smith*, 760 F.3d 1070, 1096 (10th Cir. 2014); *Kitchen v. Herbert*, 755 F.3d 1193, 1230 (10th Cir. 2014); *Jernigan v. Crane*, 64 F. Supp. 3d 1260, 1287-88 (E.D. Ark. 2014); *Condon v. Haley*, 21 F. Supp. 3d 572, 588-89 (D.S.C. 2014); *Marie v. Moser*, 65 F. Supp. 3d 1175, 1205-06 (D. Kan. 2014); *Brenner v. Scott*, 999 F. Supp. 2d 1278, 1292 (N.D. Fla. 2014); *Wolf v. Walker*, 26 F. Supp. 3d 866, 873 (W.D. Wis. 2014); *De Leon v. Perry*, 975 F. Supp. 2d 632, 666 (W.D. Tex. 2014); *Bourke v. Beshear*, 996 F. Supp. 2d 542, 558 (W.D. Ky. 2014); *Bishop v. United States ex rel. Holder*, 962 F. Supp. 2d 1252, 1296 (N.D. Okla. 2014).



much in its merits decision in *Whole Woman's Health*: “[N]o guidance can be gleaned from the Supreme Court’s vacating portions of the stay without explanation, as we cannot discern the underlying reasoning from the one-paragraph order.”<sup>261</sup> If lower courts had more guidance, it could affect their decisions and maybe ultimately reduce the need for parties to later seek relief pending appeal from the Supreme Court. Similarly, in *Herbert*, what was it that justified the stay? Was it the possible later problem of the legal status of marriages that would occur while appeal was pending? If so, it would have been helpful for lower courts to know so they could prevent that from occurring. Being clear about the reasons a stay is necessary would also have reduced the need for parties to later seek relief pending appeal from the Supreme Court.

## V. CONCLUSION

Even while litigation and appeals are proceeding, life continues. This creates a difficult dilemma. As the Court put it in *Nken*, what should courts do “when there is insufficient time to resolve the merits and irreparable harm may result from [the] delay”?<sup>262</sup> Oddly, a “critical” part of the solution in *Nken* is to still attempt to resolve the merits within that insufficient time. Thus, within a matter of days, and with less than complete information, the court must determine whether the applicant made a “strong showing” on the merits of his claim that the trial court erred in its decision. This solution makes one wonder why a panel could effectively decide the merits so quickly, but the ultimate decision on the merits of the appeal may often take a year or more.

Regardless, *Nken*’s emphasis on the merits is not supported historically, theoretically, or practically. Really, the merits just get in the way of the factors that should govern stays. Those are the factors consistent with historical practices and theoretical purposes—whether circumstances could change in a way that would render the appellate court unable to issue a decision meaningful to the parties, how the parties might be harmed by the relief, or lack thereof, and the public interest.

Necessarily, courts must also explain how these factors led them to either grant or deny a stay. Without explanations, stay decisions look random and unjustified—illustratively, staying the enforcement of some abortion restrictions, but not others, or staying the enforcement of some same-sex marriage bans, but not others. Although overlooked, stays play an important part in judicial review, both for courts and parties. Every effort should be made to ensure that stay decisions are legitimate.

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261. *Whole Woman's Health v. Cole*, 790 F.3d 563, 580 (5th Cir. 2015).

262. *Nken*, 556 U.S. at 432. Besides the Court’s listing of the four *Nken* factors, this is really the only substantive mention of the relevance of the merits in *Nken*.