

Bonus 214: Emergency Relief from State Courts

At a moment in which the Supreme Court's emergency docket is *already* busier than ever, Monday's stay grant in the *Malliotakis* case wrongly expands it to encompass countless state-court rulings, too.



STEVE VLADECK

MAR 05, 2026 · PAID



172



45



25

Share



Welcome back to the weekly bonus content for “One First.” Although [Monday’s regular newsletter](#) (and unscheduled issues like [the one I dropped Monday night](#)) will remain free for as long as I’m able to do this, I put much of the weekly “bonus” issue behind a paywall as an added incentive for those who are willing and able to support the work that goes into putting this newsletter together every week. I’m grateful to those of you who are already paid subscribers, and I hope that those of you who aren’t will consider a paid subscription—both to have full access to the bonus content and to more broadly support these efforts—if and when your circumstances permit:

I wanted to follow up on the Court’s grants of emergency relief Monday night in [the *Malliotakis* redistricting cases](#) (and [on my Monday night post about the decision](#)) by taking a deeper dive into the jurisdictional issue the applications presented. ¹ [I’ve written before](#) about how the Supreme Court’s formal jurisdictional relationship with state courts *differs* in some pretty significant respects from its relationship with the lower federal courts. Here, those differences *should* have meant—as Justice Sotomayor’s dissent argued—that the Court lacked the power to intervene. By nevertheless granting the stays, the *Malliotakis* majority has necessarily set a precedent for litigants in state courts to seek emergency relief from the justices in circumstances in which it shouldn’t be (and has never previously been) available.

The majority, of course, did nothing to explain why it had jurisdiction; it didn't say anything at all. But perhaps the most galling aspect of Monday night's ruling is Justice Alito's concurrence—which rests the Court's jurisdiction on a remarkably deceptive (if not deliberately misleading) sleight-of-hand about the timing and sequencing of the state courts' rulings. With the record properly clarified, the Court's exercise of jurisdiction in *Malliotakis* notwithstanding the availability of further review from New York's highest court is in direct conflict with a 2022 ruling; and, more fundamentally, risks throwing open the emergency docket floodgates to encompass a potentially limitless number of state-court rulings, as well.



The New York Court of Appeals during a 2009 oral argument.

For those who are not paid subscribers, we'll be back (no later than) Monday with our regular coverage of the Supreme Court. For those who are, please read on.

The Supreme Court's Jurisdiction Over State Courts

Let me start with the basics. Unlike its power to review lower federal courts (which kicks in as soon as a case is “in” a court of appeals, *i.e.*, as soon as the appeal is docketed), the Supreme Court's power to review state courts is—and always has been—far more narrowly circumscribed.

Without going back over what I wrote two years ago, there are two key points here: The Supreme Court has jurisdiction to review state courts **only when** there has been a (1) “final” decision on a question of federal law from (2) the highest state court from which a decision *could* be had. To be sure, the justices **have long taken a functional, not formal, approach to “finality”** (so that what matters is whether the federal issue being *appealed* has been fully resolved below, not whether the underlying litigation has fully concluded). But the requirement that litigants “exhaust” their state court appeals (by going all the way to the highest possible court within the state court system) is one that has jurisdictional implications under **28 U.S.C. § 1257**—meaning, it can't be waived or bypassed no matter how strong the arguments for doing so might be. That constraint, which dates all the way back to the Judiciary Act of 1789, was meant to protect state courts from undue federal interference.

To illustrate how these principles limit the Supreme Court's power to grant emergency relief, consider an application the Court denied in September 2022, *Yeshiva University v. YU Pride Alliance*. In that case, a state trial court had held that Yeshiva University's refusal to recognize an LGBTQ+ student group violated New York's Human Rights Act, and entered a permanent injunction ordering the University to treat such groups the same way it treated other groups with respect to its student-group recognition process. The University appealed (asserting a federal First Amendment objection), and sought emergency relief (a stay of the injunction) from New York's intermediate state court—the “Appellate Division.”²

The Appellate Division denied the request for a stay on August 23, 2022. Under New York's (complicated) procedural law, the next thing Yeshiva

University should've done was seek permission from the Appellate Division to appeal its denial of a stay to New York's highest court—the "Court of Appeals." But its attempt to do so—filing the same request simultaneously in the Court of Appeals and the Appellate Division—was rejected on *procedural* grounds because it didn't come in the proper form. (Had it been rejected on substantive grounds, that arguably *would* have been a final decision by the highest state court from which relief could have been had.) Rather than correct the clerical error and re-file, Yeshiva went straight to the U.S. Supreme Court.

The Supreme Court, by a 5-4 vote, [denied the application](#)—because of the jurisdictional defect. As the Court's brief order explained:

The application is denied because it appears that applicants have at least two further avenues for expedited or interim state court relief. First, applicants may ask the New York courts to expedite consideration of the merits of their appeal. Applicants do not assert, nor does the Appellate Division docket reveal, that they have ever requested such relief. Second, applicants may file with the Appellate Division a corrected motion for permission to appeal that court's denial of a stay to the New York Court of Appeals, as the Appellate Division clerk's office directed applicants to do on August 25. Applicants may also ask the Appellate Division to expedite consideration of that motion.

Indeed, the majority added, "If applicants seek and receive neither expedited review nor interim relief from the New York courts, they may return to this Court." In other words, the Court denied emergency relief because it was still possible for Yeshiva University to seek further emergency relief (and expedited review) from the state courts, and the Court of Appeals hadn't yet held otherwise.

In his dissent (which was joined by Justices Thomas, Gorsuch, and Barrett), Justice Alito argued that the Court *could* issue a stay even without waiting for the New York Court of Appeals, citing the Supreme Court's 1977 ruling in

National Socialist Party of America v. Skokie. (I'll come back to why *Skokie* presents materially different facts from both *YU Pride Alliance* and *Malliotakis* below.) But he never disputed that Yeshiva University *could have* sought further emergency relief from the New York state courts; all he argued was that such a move would likely be fruitless.

The State Court Proceedings in *Malliotakis*

Against that backdrop, let's turn to the (remarkably similar) sequencing and timing of the litigation in *Malliotakis*—to illustrate the jurisdictional problem with the applications, and with the Court's granting of them.

The trial-court decision at the heart of the dispute—a preliminary injunction holding that the current map for New York's 11th Congressional District violates the New York state constitution by diluting the votes of Black and Latino voters—was issued on January 21, 2026. The defendants, including Rep. Nicole Malliotakis (who intervened in the trial court), appealed that ruling to the Appellate Division. While that appeal was pending, Malliotakis herself and other defendants separately sought stays from *both* the Appellate Division and the Court of Appeals, even though the latter move was procedurally improper under New York law.

On February 11, the Court of Appeals [transferred the stay applications to the Appellate Division](#)—explaining that it was inappropriate to seek emergency relief from the highest court *before* doing so from the Appellate Division. Eight days later (on February 19), [the Appellate Division denied the stay applications](#). At *that* point, Malliotakis and the other defendants were free to seek further review *within* the New York state courts—by seeking permission from the Appellate Division to appeal its denial of emergency relief in the Court of Appeals. They never asked for that.

Instead, on February 12 (the day after the Court of Appeals transferred the applications for emergency relief to the Appellate Division), Malliotakis and the other defendants went directly to the U.S. Supreme Court—asking for stays of the trial-court injunction. In other words, at the time the defendants

applied for relief from the Supreme Court, no state appellate court had even ruled on their applications for stays. And when the Appellate Division subsequently denied those applications on February 18, the defendants didn't pursue any further relief in the state courts—even though they absolutely could (and, thus, should) have.

[Justice Sotomayor's dissent](#) is exactly right about what this should've meant: Just like in *YU Pride Alliance*, there was no “final” decision by the highest state court from which a decision could be had for the Supreme Court to review. As she explained, “[i]n every other case in which this Court has granted emergency relief from a state-court decision, the State's highest court either denied it first or failed to act promptly on a request for it.” Here, the New York Court of Appeals hadn't denied the applications on the merits; it ruled only that the applicants had to go to the Appellate Division first. *If* the Court of Appeals had dragged its feet, that would be one thing. But recall, again, that after the Appellate Division denied the applications, Malliotakis and the other defendants didn't even ask. It's hard to drag your feet by not ruling on a stay application that hasn't been filed.

Justice Alito's (Deeply Troubling) Response

As noted above, the majority's 107-word order had nothing to say about this—or about why *YU Pride Alliance* was remotely distinguishable. (Never mind that this is the same Supreme Court [that held, last summer](#), that, “[a]lthough our interim orders are not conclusive as to the merits, they inform how a court should exercise its equitable discretion in like cases.” Apparently, they inform how *lower* courts should act in “like cases,” but not the Supreme Court.)

The only defense of the Court's behavior came, not surprisingly, from Justice Alito. I'm going to quote his relevant discussion in full, and bold the sentence where he certainly at least appears to affirmatively misrepresent what happened below:

After [the trial court's] highly questionable injunction was issued, the applicants filed appeals in both the Appellate Division (the State's intermediate appellate court) and the Court of Appeals (its highest court) challenging the trial court's order on federal constitutional grounds. At the same time, applicants asked both courts to stay the trial court's order. **The Appellate Division refused to issue a stay, and by order issued on February 11, the Court of Appeals sent the appeal filed in that court to the Appellate Division and dismissed applicants' motions for a stay.** With nowhere else to turn, the applicants asked us to issue a stay, and we have jurisdiction to entertain their application.

Ordinary grammar would dictate that, in the bolded sentence, the reader expects that the Court of Appeals' February 11 order came *after* the Appellate Division refused to issue a stay (with "and" being used to convey chronology)—leaving the impression that the Court of Appeals had already acted on the *substance* of the stay, thereby clearing the way for the Supreme Court to step in. But as noted above, it didn't. The Court of Appeals' February 11 order was *about the procedural flaw in the applications*—and the Appellate Division denied them *on the merits eight days later*. In other words, whereas Alito leads readers to believe that the applicants really *did* have "nowhere else to turn" because the Court of Appeals turned them down, the reality is that they *did* have a means of getting the Court of Appeals to actually rule on the stay, and chose not to pursue it—a fact that Alito's portrayal of the timeline necessarily obfuscates. ³

Indeed, Alito *relies* upon this sleight of hand to analogize *Malliotakis* to *Skokie*. In that case, the district court had issued an injunction barring the American Nazi Party from marching in Skokie, Illinois. The Illinois Court of Appeals and Illinois Supreme Court denied emergency applications to stay the injunction; and the Illinois Supreme Court denied leave for an expedited appeal on the merits. Because the event would've come and gone before the state courts conducted any further proceedings, the U.S. Supreme Court treated the

Illinois Supreme Court's twin denials as an effectively final ruling on the plaintiffs' First Amendment claim, granted certiorari, and reversed.

Critically, though, the Illinois Supreme Court in that case had received and denied a stay application *on the merits*—not because of some procedural defect that left open the availability of further emergency relief. In other words, *Skokie* is easily distinguishable from both *YU Pride Alliance* and *Malliotakis* because, in *Skokie*, the state's highest court *had* received—and had denied on the merits—an application for emergency relief. And it showed no sign of moving quickly on the appeal, either.

Of course, it may not be a big surprise that the *YU Pride Alliance* dissenters continue to read *Skokie* as applying to facts that can be easily distinguished. But (1) that doesn't excuse Justice Alito's distortion of the factual record to make the *Malliotakis* case look like *Skokie*; and (2) it doesn't remotely explain the inconsistent votes of one or both of Chief Justice Roberts and/or Justice Kavanaugh. Both were *clearly* in the majority in *YU Pride Alliance* (where we know the ruling was 5-4); and at least one of them had to be in the majority in *Malliotakis* (and my own guess is that both were). There is no obvious legal principle or fact that differentiates those two cases, and no explanation for how they're different, either.

Okay, But Why Does This Matter?

It is, alas, hardly news that Justice Alito is inconsistent. Or that the Court sometimes plays fast and loose with the facts to make two cases that are easily distinguishable look more like each other. It may also seem, at first blush, like dancing on the head of a pin to condition the Supreme Court's ability to grant emergency relief to a state court on whether the state's highest court had a chance to rule substantively on a stay request.

But it's worth underscoring why these problematic moves produce an *especially* problematic result here—not just with respect to this one dispute over a single congressional district in New York (where, surprise surprise, the ruling directly benefits a Republican member of Congress), but with respect to

the Supreme Court's ability to grant emergency relief from state-court rulings going forward.

After all, imagine a case in which a state trial court issues an injunction against a defendant, and the defendant *immediately* files a procedurally improper request for emergency relief from the state supreme court—jumping the ordinary rules for such relief in just about every state court system in the country. *Malliotakis* now seems to stand for the proposition that the state supreme court's rejection of a procedurally improper request for emergency relief (versus a denial of emergency relief on the merits, as in *Skokie*) is enough to trigger the Supreme Court's jurisdiction—which would allow any litigant in that scenario to leapfrog the entire state appellate process by filing a bogus (and premature) request for emergency relief from the state supreme court. Once the state's highest court denies the request on procedural grounds, the applicant can use that denial as a basis for going right to the U.S. Supreme Court. It's almost the textbook definition of bootstrapping—all to get hot-button legal questions, at least where federal law is implicated, in front of the U.S. Supreme Court as soon as possible.

Suffice it to say, such analysis opens the door, at least jurisdictionally, to tons of new emergency applications to the Supreme Court—applications that would previously have been barred by, and over which the Supreme Court really *doesn't* have jurisdiction under, 28 U.S.C. § 1257. Maybe the justices genuinely believe that the New York courts were slow-walking things (which is hard to swallow given that the New York Court of Appeals was never given a meaningful opportunity to grant or deny emergency relief). Maybe the justices genuinely think that they can police the line between cases like *Malliotakis* and my hypothetical. Maybe they just don't care about receiving even *more* emergency applications on questions on which they're likely to divide.

But there are two points that really ought not to be controversial here. The first is that limits on the Supreme Court's jurisdiction are supposed to mean something. It's striking that none of the right-wing commentators defending

the *Malliotakis* ruling have actually explained why the Court clearly *did* have jurisdiction; to them, apparently, we shouldn't let pesky things like a lack of power to issue a ruling get in the way of a ruling we like.

Second, and more generally, if the Court *is* going to undertake a quiet but undeniable expansion in its power to grant emergency relief in cases coming from *state* courts, it should've said so—and it should have committed to providing a more convincing rationale for such a shift than one based upon Justice Alito's ... casual ... relationship with the facts. It may be hard for non-lawyers (or even lawyers) to get worked up about the Court exercising jurisdiction in a class of cases in which it doesn't *have* jurisdiction. But it's a pretty radical expansion of the Court's ability to grant emergency relief at a time in which applications are *already* dominating the justices' docket; and it's a pretty shameless aggrandizement of the judicial power of state courts—and the limits on the Supreme Court's jurisdiction over those tribunals that Congress has consistently imposed since 1789.

Maybe it's no wonder that the majority didn't write...

We'll be back Monday (if not sooner) with our continuing coverage of the Court. Until then, stay safe out there.

-
- 1 I'm using the plural because the Court actually granted two *separate* (but overlapping) applications in *Malliotakis*.
 - 2 Technically, New York has an "Appellate Division" for each of its four (geographically divided) Judicial Departments. In both *YU Pride Alliance* and *Malliotakis*, it was the Appellate Division for the First Department that was at issue.
 - 3 **[Update (3/5/26, 2:13 p.m. ET):** A savvy reader pointed out, in response to the original post, that, even *if* one treated the Court of Appeals' February 11 order as "final" for purposes of § 1257, that wouldn't actually *solve* the jurisdictional defect—because the Court of Appeals' procedural ruling transferring the application to the

Appellate Division would be insulated from the Supreme Court's review by what's known as the "adequate and independent state grounds" doctrine. So even Alito's (misleading) version of events doesn't actually solve the jurisdictional problem.]



172 Likes · 25 Restacks

Discussion about this post

Comments Restacks



Write a comment...



Jeff Jude  Mar 5



Oh, are the the Shades of Chief Justice Marshall and the Marbury decision to be thus poluted??!

I will never be able to teach Constitutional Law uncynically again. It was a struggle since Dobns. Now, after the destruction of standing, the decisiin that all state laws not allowed to go into effect are harm to that state, ignoring fact finding in District Courts, and even jurisdiction itself -- it is a hopeless endeavor.


But I got a fortune cookie once that said, "Do not despair, but if you do, work on in despair."

 LIKE (4)  REPLY

 SHARE

1 reply



Brooks White  Brooks's Substack Mar 5



So a plaintiff in a red state should try the same tactic and watch the Scotus majority impersonate a pretzel.

 LIKE (4)  REPLY

 SHARE

3 replies

43 more comments...

© 2026 Steve Vladeck · [Privacy](#) · [Terms](#) · [Collection notice](#)
[Substack](#) is the home for great culture