

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN G. ROBERTS, JR.

July 18, 2018

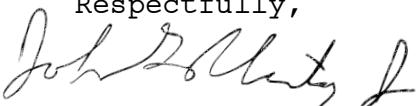
Re: No. 05-64 - Technozo v. United States

MEMORANDUM TO THE CONFERENCE

I concur in Justice Bork's memorandum, with one reservation. I disagree with the argument that while Clan Managers could be liable for actions as individuals, Pauljkl (hereinafter Paul) could not. I am less concerned with the reality before us -- that because Paul owns the group, his hypothetical "conviction" would be toothless and, therefore, meaningless -- than I am the possibility of a tacit endorsement of the notion that he is indeed above the law.

If Paul were to one day commit a crime that falls outside of a reasonable standard for what is to be considered "holder duties"^{/1}, I would rather we approach the case from the standpoint of the law as opposed to one that looks to the practical or prudential externalities posed. He may very well ignore an order to prison in that event, but we will have done our job in applying the Constitution and laws faithfully and equally.

Should we come to this issue in this case or a future one, I would prefer we firmly apply the necessities of the law to any conduct by Paul -- assuming he has not performed in an area reasonably construed to be one of his holder responsibilities -- in order to preserve a sense of rule of law. If we are truly a nation of law, then all citizens, including Paul, should answer to it.

Respectfully,


^{/1} If we are to jump into this issue as it relates to Clan Managers, we presumably will one day have to confront how Paul's role falls into this jurisprudence, too.

7/31/18

Notes 05-54 - Techops - US

Q Presented: Are CMs
liable for criminal
actions?

- 2 points to keep in mind: (1) must distinguish b/t when a CM is acting privately from when performing "administrative" duties
- situation will necessarily be different in latter scenario
- I believe, as a matter of practicality, they are not liable in latter, but are in former
- Must therefore decide when it is the first versus the second
- Test to do so should involve an historical inquiry — is claimed administrative practice reflected by history?
- Agree generally w/ Book except go to question of fam's liability — he should be treated no different.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN G. ROBERTS, JR.

August 1, 2018

Re: 05-54 - Technoz v. United States

Dear Robert,

I first wish you a happy first day of August -- the summer season is swiftly closing. I have chosen to not copy the conference to this letter, as it will at a point touch upon my tentative conversations regarding the yet-to-be-released opinion assignment here.

As you well know, Neil requested the assignment for this case, but I spoke with the Chief and he agreed with me that this case is one too important to leave as someone's (for all practical purposes) "inaugural opinion." I suggested therefore that it be assigned to either you, the Chief himself, or me; I added, however, that I would rather you be assigned it rather than myself since you have somewhat of a "gusto" for the merits that I simply do not. Perhaps I am just exhausted from the work I put into Kirkman. At any rate, with the Chief indicating it to you in private as well, I expect you will be given the public assignment. Given that this will be your first opinion for a case of this type of magnitude, congratulations are in order.

With this said, I wanted to discuss some of my tentative views on this case, and will attach my notes (so far) to this letter. Your memorandum to the conference of July 18 was welcomingly helpful and, in my opinion, laid out a path by which this Court could take in deciding this case. I agree with your views on principal-agent relationships and how they could provide a basis for opening the door to liability for private action. Although, I mark at the outset that we must be careful not to turn that door into a Pandora's box.

In regard to Byron's initial letter, which framed the question on whether a clan manager is presently a "citizen," I think we both agree that is at best nonsensical. (And so too was his "reply" to your letter -- how callus and unnecessary!) Clearly, clan managers, and Paul, are citizens just like you and I, and there would be no legal mechanism for a ruling that would say that in some situations they

are not citizens, and that in others they are. That to me seems far less textually committed than your approach would be.

I need only help from you on a few points. First, I again agree that the focus should turn to the type of action committed to discern whether it was done privately or administratively. My issue is that I am unsure of how best to curate a standard for doing so. I am inclined to follow one that looks to the history of the clan-manager function; that would mean those actions which are reflected by historical practice would be considered "administrative." This standard would allow us to be the arbiters of when a clan manager is acting as a clan manager and ensure that only those administrative functions traditionally exercised by clan managers enjoy immunity. But this approach would, necessarily and logically, foreclose an easy swallow of future-added functions (i.e. this standard would somewhat "close the door" to future developments in the clan-manager role, as those would not be "historically reflected"). The second, and less secure from my perspective, approach would involve an inquiry to Paul himself. But this would likely prove untenable, as it would allow Paul to simply proclaim any reasonably private action as an administrative one, and thus preclude liability.

Thus I prefer a historical-based inquiry, but I reckon it will need to be ironed out much better than I have done so here.

My only other concern, which I shared in my letter of July 18, relates to your proposition that Paul himself is always immune. I do not agree with that; I believe if we are to hold his agents as liable for private functions, then we are to hold their principal the same, too. I request therefore two possible actions on your part: (1) include Paul as liable under the same criteria for clan managers, or (2) avoid the group-holder issue altogether. Either would receive my full "join." But in the event that neither is reached, I will probably go the way of concurrence.

Regards,

A handwritten signature in black ink, appearing to read "John Bork". It is written in a cursive style with a horizontal line underneath the signature.

Justice Bork
Private

7/31/18

Notes 05-54 - Techops - US

Q Presented: One CMs
liable for criminal
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- 2 points to keep in mind: (1) must distinguish b/t when a CM is acting privately from when performing "administrative" duties
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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN G. ROBERTS, JR.

August 1, 2018

Re: 05-54 - Technozo v. United States

Dear Robert,

I apologize for the flurry of letters. Permit me to add one point which I overlooked to address earlier.

In the petitioner's merits brief, Technozo's counsel raises MythicOne v. National Security Agency, 3 U.S. 28 (2017), in furtherance of his argument that clan managers are outside of all jurisdiction. Brief of Petitioner 2, no. 2.; id., at 2 ("ROBLOX . . . has ramifications that do not allow for some real life things to be reflected here."). This raising of Mythic affords us a golden opportunity to reject Justice Souter's proclamation that ROBLOX circumstances "necessitate changing applications of constitutional principles." 3 U.S., at 31–32. Might you wish to use this opportunity to reject our holding there and effectively erase it from the United States Reports?

From my recollections we both agree it was a mistake.

Regards,



Justice Bork

Private

P.S. How silly of counsel to raise Mythic! It only opens the door to a very real possibility of overturning its holding's foundation.

Technoz Draft (Jorisch)

On May, 2018

In May of 2018, Clan Manager Technoz was brought up on charges by the United States Department of Justice and ~~was~~ undergoing criminal prosecution. The defense motioned for a dismissal for lack of jurisdiction; whence the court denied. Promptly thereafter, the defense filed a petition for a writ of certiorari to this court. We granted it.

The aspect of Clan Managers and their authority over ~~the~~ ^{other} ~~clans~~ is a debate that never ends. But most recently, it has reached our court: the constitutional question if any court of the United States ~~has~~ the jurisdiction over Clan Managers and their actions? The answer can be found in the terminology of the question: Do the courts have jurisdiction over the administrative actions of the Clan Managers? Do the courts have jurisdiction over the general actions of the Clan Managers? Terminology is the fundamental difference that this court was asked to interpret. "Isner petitions for an anytime review of the Federal Elections Commission, but we have no such jurisdiction to hear his case. The Federal Elections Commission is governed by Clan Managers, about whose actions we have repeatedly affirmed our lack of authority to hear cases on." (Justice Scalia, Statement respecting denial of certiorari, Isner v. Federal Elections Commission, 5 U. S. ___ (2017))

The administration functions of the Clan Managers are defined as actions that are essential to the enforcement of the group rules

We have a bond
nature, so this
situation is wrong

why? Says who? You need
to back this stuff up.

and the ROBLOX Terms of service. This includes demoting someone from their respective roles in the main NUSA group for abuse of shout policy, removal from the group entirely for breaches of the ROBLOX terms of service, and exploitation at our cities. Petitioner asks this court to interpret if the general actions of Clan Managers fall under the jurisdiction of the courts. The aforementioned case where the petitioner is being tried on is not through the administrative channel that this court has interpreted as out of jurisdiction. ^{at the interpretation} Act and omissions against congressional legislature are statutory requirements that all citizens of the United States ~~are mandated to obey~~. Clan Managers are citizens and denizens of the United States are subject to the repercussions of violation ^{of} said acts and omissions. ~~in the writing here~~

It is common sense and does not take a legal expert to render the discrepancy between general actions and administrative actions. This court has already defined the administrative actions as a "Domain that solely permits Clan Managers to resolve matters that are not appropriate to be solved by federal and municipal governments, or any court of law." (Justice Marshall, concurring in denial of cert., *Ex parte Sixman* 444 U.S. ____ (2018)). The aforementioned case ~~that the~~ ^{on which} petitioner ~~is appealing from~~ is directly under the appropriate channel that can resolve matters. The petitioner was not

*This citation style
is wholly incorrect*

he was He
performing administrative actions when they were indicted. They
~~were accused~~
~~were alleged~~ of committing crimes that are defined very well in
the United States Code. This court will not interpret committing
crimes as out-of-jurisdiction efforts for citizens based on
role.

Bob - I don't like this
opinion very much. I
don't think it tracks
along the correct lines.
I am in much more
agreement with Bob's
proposed approach & his
letter of July 14. It is
much more on settled
concept of law rather
than the fact that
CWS are at a practical
matter "administrative"

I also believe this partial
draft, in present form,
needs serious revision.

I apologize for my bluntness,
but honesty is the
best long-term path.

Regards,

JGD

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE ROBERT H. BORK

August 4, 2018

Dear John:

I have completed the first draft of my opinion for the Court in No. 05-54, Technozo v. United States. Before I send it to the Chief for circulation, would you be willing to read the draft and provide any feedback you think in order? The typescript is sent separately.



R.H.B.

Justice Roberts
Private

P.S. The repudiation of MythicOne begins on page 8 of my typescript.

DRAFT NO. 1 No. 05-54 Technozo v. United States

JUSTICE BORK delivered the opinion of the Court.

We are asked to consider whether, and to what extent, clan managers are immune from liability in federal court. We hold that clan managers may claim immunity only when they act pursuant to their prescribed duties in an area traditionally within the group holder's control. Because petitioner's alleged conduct in this case (common crime) does not fall within the scope of that narrow immunity, we affirm the District Court's denial of the motion to dismiss.

I

In *Harlow v. Fitzgerald*, 457 U.S. 800, 806-807 (1982), this Court observed that the "common law ... recognize[s] immunity defenses of [at least] two kinds." Then, decades later, in *RoExplo v. United States*, 5 U.S. 7, 10 (2018), we identified clearly where to look, concluding: "Common law ... [is] the law of 'long use' and 'custom.'" Together, these cases stand for the proposition that a long-used custom of recognizing immunity (however limited) can support the invocation of such an immunity in a court of law. It is uncontested in this case that the group holder, since the beginning of this group, has been understood to have some form of immunity from liability arising from his actions in his

traditional areas of responsibility (presidential election administration, preventing the spread of obscene content, preventing wall spam, etc.). Cf. *Isner v. Fed. Elections Comm'n*, 3 U.S. 87, 88 (2017) (Scalia, J.) (presidential elections); *Ex parte Sixman*, 5 U.S. ____ (2018) (MARSHALL, J.) (obscene content). The same cannot be said for the clan managers because they are relatively new additions to the group. Nevertheless, clan manager immunity has been recognized in at least three separate cases.

In *Isner*, *supra*, Justice Scalia contended that because the "Federal Elections Commission is governed by Clan Managers," we "lack ... authority" to review its actions. Two things must be said of this statement. First, it cannot be read to suggest that clan manager conduct is absolutely immune; the statement was made in the context of an Anytime Review petition, which we are well aware extends only to the review of government actions—of which the clan managers are no part. See *Heave v. United States*, 5 U.S. ___, ___-___ (2018) (slip op., at 1-2); *id.*, at ___ (BORK, J., concurring in judgment); *George v. United States*, 5 U.S. ___, ___ (2018) (slip op., at 2). Second, insofar as the statement can be read to support a claim of immunity, the issues involved in *Isner* fell squarely within the scope of the group holder's traditional area of responsibility, and

thus the group holder's own immunity. It is therefore possible that any immunity which may have been relevant in *Isner* belonged to the group holder and not the clan managers being sued.

In *Sixman*, *supra*, JUSTICE MARSHALL, joined by THE CHIEF JUSTICE and JUSTICE GORSUCH, concluded that a certain petition for habeas corpus filed against a clan manager had to be denied because of a "profound 'lack of authority' to hear such matters" (citation omitted). But the petitioner there had been imprisoned by a clan manager for the spread of obscenities—again, issues within the group holder's traditional zone of responsibility. Of signal importance in *Sixman*, also, is JUSTICE MARSHALL'S emphasis that the clan manager had acted within a narrowly-defined "proper domain." Thus, *Sixman* also supports the possibility that clan managers possess no immunity of their own and merely vicariously exercise the immunity of the group holder when they act on his behalf.

Finally, in *Sawnberg v. Clan Managers*, although no opinions were filed, the public comments of THE CHIEF JUSTICE and Justice Scalia are illuminating. THE CHIEF JUSTICE emphasized that "[s]ince the formation of [the] group," courts had never stepped in to protect wall spam against group holder action. Moreover, to support the immunity argument, both he and Justice Scalia relied on

the Development Clause of the then-Constitution, which has been interpreted by this Court to do no more than "preserv[e] the traditional role of the [group holder]." *Leader v. Las Vegas*, 3 U.S. 18, 22 (2017). *Sawnberg*, too, thus supports the possibility that clan managers, while possessing no immunity of their own, may claim, in certain circumstances, the benefit of the group holder's limited immunity.

We consider next the group holder-clan manager relationship to determine if the clan managers may validly claim the benefit of the group holder's limited immunity, and, if so, under what circumstances.

II

The position of clan manager was established by the first group holder during the ROBLOX "clan wars," an event in which a group could establish within itself a "clan" (team) and then have that team participate in battles on its behalf in an admin-held game. Successful team members were awarded "Player Points" automatically by the game. A website-wide leaderboard ranked the users with the most Player Points and the groups with the highest "clan score" (the total of the Player Points held by team members in a given clan). The United States clan wars team was led by the first clan manager, IcySound—the rank was named to refer to the special permission given to it: the "manage the clan"

permission. Following the end of the clan wars event, the clan manager rank was, naturally, removed.

Almost a year later, the group had grown substantially and the group holder needed extra help to fulfill his traditional responsibilities of Presidential election management, development, wall spam prevention, and obscenity control, *inter alia*, so he established a group rank known as his "minions." Each of his "minions," we understand, were assigned some of his responsibilities and helped him to fulfill his obligations. Later, the rank would be renamed "clan manager" because his "minions" preferred the title. The substance of their role did not change and had nothing to do with "clan management" *per se*.

To put this arrangement in legal terms, the group holder "manifests assent to" a clan manager "that [they] shall act on [his] behalf and subject to [his] control, and [they] manifes[t] assent or otherwise consen[t] to act." Restatement (Third) of Agency §1.01 (2006) (hereinafter Restatement). In this arrangement, known as agency, the group holder acts as a principal and the clan managers as agents. And because in an agency relationship, the principal is "liable for the actions of the [agent]," *First Nat. City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 629 (1983) (citation omitted), it therefore is self-evident why a

clan manager may assert the group holder's limited immunity when acting as his agent.

But not every act of a clan manager is within the scope of their agency relationship and not every act would necessarily fall within the scope of the group holder's limited immunity either.

A

The group holder is only liable for clan manager conduct (and the clan manager is thus only potentially immune) when the clan manager acts with "actual authority." Restatement §2.01. An agent only has "actual authority to take action designated or implied in the principal's manifestations to the agent and acts necessary or incidental to achieving the principal's objectives." Restatement §2.02. More concisely put, when the agent "appears to be acting in the ordinary course of business confided to him." *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 772, n. 4 (1998) (citation omitted). This may mean that a clan manager acting beyond their prescribed duties may not be able to make a claim of immunity even if their conduct would fall within the bounds of the group holder's limited immunity because they would not have been acting within the scope of the agency relationship.

For example, a clan manager designated as an "Election Clan Manager" may assert agency in hopes of making

a limited immunity claim for reasonable conduct arising from the administration of a Presidential election. A clan manager designated solely as a "Community Clan Manager," however, may not be as successful in making the same claim because it would not be apparent that they were acting "in the ordinary course of business *confided to [them]*," *ibid.* (emphasis added), as their role typically does not involve Presidential election administration.

B

Not all conduct is within the bounds of the group holder's limited immunity, either; thus, even when a clan manager successfully establishes that their conduct was within the scope of their agency with the group holder, they may still not be entitled to immunity. As emphasized already, the group holder has immunity only for acts within "his traditional areas of responsibility." *Supra*, at _____. We have also been clear that this is not a self-defined category: it includes only those functions which historically have been left to (and performed by) him. See generally *Sixman*, *supra*, n. * (supporting this proposition); accord, *RoExplo*, *supra* (explaining the nature of the common law). Whether, as a practical matter, a judgment against the group holder may actually be executed is a different question, and one not before us, because we are considering only the

nature of the group holder's *de jure* limited immunity and vicarious assertions of that immunity by clan managers, whom the group holder has emphasized he would execute lawful court judgments against. See <https://imgur.com/a/BChHQnL>.

Congress is also free to modify, either by narrowing or enlarging, the scope of the group holder's immunity (or that which may be asserted by clan managers). Congress, in attempting to do so, should remember that statutes which "invade the common law" are "read with a presumption favoring the retention of long-established and familiar [legal] principles." *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 (1994). Therefore, unless an Act of Congress clearly alters the boundaries of the group holder's common law immunity or the clan managers' ability to invoke it per agency, it is unlikely that the Act will be read to effect such a result.

III

Petitioner has one final argument that the legal reasoning above may not be sufficient to decide the contours of the immunity which may be claimed by clan managers. To support this argument, petitioner relies on our mantra from *MythicOne v. National Security Agency*, 3 U.S. 28, 31-32 (2017), that "[t]he different circumstances in Roblox compared to real life necessitate changing applications of constitutional

principles." We reject this argument because, even assuming *MythicOne* as the baseline, there is no compelling Roblox-specific circumstance which could necessitate a departure from the law properly expounded in this case; we also conclude that even if that were not the case, the *MythicOne* rule of interpretation was wrongly decided and *stare decisis* considerations do not compel continued adherence to it.

A

MythicOne involved a challenge to the Revised Open Carry Act, which prohibited all open carry of a firearm. In a 5-to-4 decision, the Court concluded that while "[i]n real life, the open carry of a firearm is protected under the Second Amendment," the same language could not protect open carry on Roblox because the danger posed by open carry is heightened in light of the platform. *Id.*, at 30.

For petitioner's *MythicOne* argument to be successful under *MythicOne*'s terms, he must at least similarly show that applying the correct law would produce an untoward result. Petitioner merely states that "in real life" "nobody is above the law ... but we are all on a game, and this Court knows all too well that this game-Roblox-has ramifications that do not allow for some real life things to be reflected here." Reply Brief for Petitioner 2. Petitioner relies on the nature of the

clan manager role to support this position. *Ibid.* A proper legal analysis, however, also takes notice of the clan manager role, *supra*, at _____. Petitioner also does not attempt to address the group holder's statement that clan managers are not, by nature of their role, above the law. See <https://imgur.com/a/BChHQnL>.

For at least these reasons, *MythicOne* cannot provide the basis for recognizing a broader immunity which may be invoked by clan managers.

B

Even if petitioner met his burden under the *MythicOne* "changing applications" mantra, we would not apply it here. The *MythicOne* rule of interpretation is wrong and *stare decisis* does not require our continued adherence to that misguided doctrine.

1

MythicOne is predicated on the idea that this Court's job is to produce desirable results as opposed to merely those required by the law. *MythicOne*'s admission that the same Second Amendment protects open carry in real life but does not here, solely based on policy considerations, is proof of this. But as THE CHIEF JUSTICE and Justice Scalia ably explained at the time, *id.*, at 32-54 (Scalia, J., dissenting); *id.*, at 54-59 (HOLMES, C.J., dissenting), this belief misconstrues the proper function of the Court.

The Court is meant to exercise "neither force nor will but merely judgment." The Federalist No. 78, p. 465 (C. Rossiter ed. 1961) (A. Hamilton). Justice Scalia expressed the essence of this mandate when he said that this Court's duty was to see that "the law ... [is] interpreted and applied as it was understood by the People who ratified it." *MythicOne, supra*, at 53 (Scalia, J., dissenting). This may mean in some cases reaching an outcome different from our "preferred outcome," *ibid.*, but fidelity to that principle ensures we remain a "government of laws, and not of men." *Marbury v. Madison*, 1 Cranch 137, 163 (1803).

We see no sense in repeating the arguments from the *MythicOne* dissents, but it is basically for those reasons and those given here, that we conclude *MythicOne*'s "changing applications" mantra is erroneous.

There remains the question whether *stare decisis* counsels against overruling *MythicOne*'s mantra. It does not.

"*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). Thus, we will not

overturn a past decision or doctrine unless there are strong grounds for doing so. *United States v. International Business Machines Corp.*, 517 U.S. 843, 855-856 (1996); *Citizens United v. Fed. Elections Comm'n*, 558 U.S. 310, 377 (Roberts, C.J., concurring). It is also important to recognize at the outset, however, that *stare decisis* is not an "inexorable command." *Pearson v. Callahan*, 555 U.S. 223, 233 (2009).

On top of that, the doctrine is at its weakest "when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions." *Agostini v. Felton*, 521 U.S. 203, 235 (1997). MythicOne undoubtedly involved an interpretation of the Constitution; beyond that, it created a rule of constitutional interpretation which, left intact, could bear on future constitutional interpretations as well. *Stare decisis* is therefore at its absolute weakest in this case. Our cases identify which factors are relevant to this analysis. Five are important here: "the quality of its reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision." *Janus v. State, County, and Municipal Employees*, 585 U.S. ___, ___-___ (2018) (slip op., at 34-35). After analyzing these factors, we conclude that

stare decisis does not compel us to retain *MythicOne's* mantra.

a

One of the most important factors in deciding whether to overrule a precedent is the quality of its reasoning. See *Citizens United*, 558 U.S., at 363-364; *id.*, at 382-385 (Roberts, C.J., concurring); *Lawrence v. Texas*, 539 U.S. 558, 577-578 (2003). *MythicOne* was poorly reasoned as a whole, and the justifications for its mantra we consider here were particularly lacking.

MythicOne, in making the expansive pronouncement that “[t]he different circumstances in Roblox compared to real life necessitate changing applications of constitutional principles,” relied on none of our cases, cited none of our Nation’s history, did not refer to the Constitution, did not rely on any other authorities, and did not engage in any of the analysis which would typically accompany such a major pronouncement. 3 U.S., at 31-32. Instead, the *MythicOne* mantra was introduced in an entirely conclusory manner in the final part of the opinion.

To say the least, *MythicOne* was not well reasoned.

b

Another relevant consideration in the *stare decisis* calculus is the workability of the precedent. *Montejo v. Louisiana*, 556 U.S. 778, 192 (2009). “*Stare*

decisis reflects a policy judgment that in most matters it is more important that the applicable rule of law be settled than that it be settled right." *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997). But if the precedent is unworkable or provides no clear guidance, then it does not really "settl[e]" anything. *Ibid.*

MythicOne's mantra provides no clear guidance because, as illustrated by our earlier analysis under *MythicOne, supra*, at ___-___, it does not explain with any precision what Roblox circumstances justify departures from the law or what that departure entails. All *MythicOne* provides is an unsound template for judicial lawmaking.

MythicOne is therefore unworkable.

C

Legal developments since *MythicOne* have "eroded" the decision's "underpinnings" and leave it an outlier among our cases involving constitutional interpretation. *United States v. Gaudin*, 515 U.S. 506, 521 (1995).

In *RoExplor*, a decision following *MythicOne*, we explained the critical importance of interpreting the Constitution in a manner consistent with its original public meaning: "Failing to do so risks creation of an 'ineffectual and incoherent' line of decisions." *RoExplor*, 5 U.S., at 8. Nobody could seriously argue that this directly undermines the assumptions which

predicated *MythicOne*: that changing circumstances could justify departures from the letter of the law. It is also signally important that in *RoExplo* and other cases following it, the Court ignored invitations to extend *MythicOne* beyond its factual context. Compare *Rager v. United States*, 5 U.S. 52 (2018), with Brief for Justice Institute as *Amicus Curiae* in No. 05-25 (arguing for *MythicOne*-based departure from *RoExplo*). These decisions, along with the fact it contradicted the decisions before it, leave *MythicOne* an "anomaly in our ... jurisprudence." *Janus, supra*, at ____ (slip op., at 43) (citation and quotation marks omitted).

d

Reliance interests often provide compelling reasons for continued adherence to established law. *Hilton v. South Carolina Public Railways Comm'n*, 502 U.S. 197, 202-203 (1991). Reliance interests, however, cannot justify retaining *MythicOne* because none exist. While "'considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved; the opposite is true in cases ... involving procedural and evidentiary rules' that do not produce such reliance." *Pearson*, 555 U.S., at 816 (quoting *Payne*, 501 U.S., at 828). Rules of interpretation similarly produce no reliance except where they have already been applied. *MythicOne*

has been applied only where it arose—in the Second Amendment context, dealing with open carry. As that *MythicOne* holding is not before us, and as we only consider the rule of interpretation it announced, we need not consider reliance interests stemming from its open carry holding.

Reliance interests, thus, cannot save *MythicOne*.

* * *

All these reasons—that the rule of interpretation *MythicOne* announced was patently erroneous; it was not well reasoned; it has proven unworkable; its underpinnings have been eroded by subsequent developments; it failed to consider, and conflicted with, prior precedent; and engendered no reliance interests—provide the “special justification” for overruling *MythicOne*. *Kimble v. Marvel Entertainment, LLC*, 576 U.S. ___, ___ (2015) (slip op., at 8)).

We overrule *MythicOne v. National Security Agency* as to its rule of interpretation.

IV

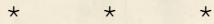
Because *MythicOne* cannot provide a basis for expanding the immunity which may be invoked by clan managers, we consider the application of the immunity we recognized in Parts I and II to this case.

Petitioner is charged with two counts of trespassing, two counts of unlawfully discharging a taser, two counts of murder, two counts of attempted murder, and one count of conspiracy to commit murder. As is evident, these crimes are on their face what this Court has previously described as "common crime." *RoExplo*, 5 U.S., at 31. As a general matter, common crime is not something which is understood to be within the scope of the clan manager role. The "business confided," *supra*, at ___, to petitioner as a Community Clan Manager is community engagement and stream management. This does not include committing common crime at Las Vegas.

We conclude that petitioner was not acting within the scope of his agency relationship with the group holder and has no claim to his limited immunity.

B

Even if petitioner could claim the protection of the group holder's limited immunity in this case, committing common crime is not one of the group holder's traditional functions. It is also not even something group holders have historically ever done. Petitioner would therefore be unable to rely on the protection of the group holder's limited immunity even if he were able to claim it in this case.



The judgement of the District Court denying petitioner's motion to dismiss is

Affirmed.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN G. ROBERTS, JR.

August 4, 2018

Re: 05-54 - Technozo v. United States

Dear Robert,

Thank you for the opportunity to have a prior look at the draft of your opinion.

My preliminary opinion is that it is well written and will take its proper footnote in our history. Well done. I have attached a copy with my annotations, as well as my more comprehensive views on your work.

I may end up writing a few lines of my own, but I assure you if that happens they will not in any way conflict -- if anything, they will praise. I look forward to joining.

Sincerely,



Justice Bork

Private

file

DRAFT NO. 1 No. 05-54 Technozzo v. United States

JUSTICE BORK delivered the opinion of the Court.

We are asked to consider whether, and to what extent, clan managers are immune from liability in federal court. We hold that clan managers may claim immunity only when they act pursuant to their prescribed duties in an area traditionally within the group holder's control. Because petitioner's alleged conduct in this case *the committing of* (common crime) does not fall within the scope of that narrow immunity, we affirm the District Court's denial of the motion to dismiss.

I

In *Harlow v. Fitzgerald*, 457 U.S. 800, 806-807 (1982), this Court observed that the "common law ... recognize[s] immunity defenses of [at least] two kinds." Then, decades later, in *RoExplo v. United States*, 5 U.S. 7, 10 (2018), we identified clearly where to look, concluding: "Common law ... [is] the law of 'long use' and 'custom.'" Together, these cases stand for the proposition that a long-used custom of recognizing immunity (however limited) can support the invocation of such an immunity in a court of law. It is uncontested in this case that the group holder, since the beginning of *this Nation*, ^{our} *group*, has been understood to have some form of immunity from liability arising from his actions in his

traditional areas of responsibility (presidential election administration, preventing the spread of obscene content, preventing wall spam, etc.). Cf. *Isner v. Fed. Elections Comm'n*, 3 U.S. 87, 88 (2017) (Scalia, J.) (certainly denied) (presidential elections); *Ex parte Sixman*, 5 U.S. ___ (2018) (MARSHALL, J.) (obscene content). The same cannot be said for the clan managers because they are relatively new additions to the group. Nevertheless, clan-manager immunity has been recognized in at least three separate cases.

In *Isner*, *supra*, Justice Scalia contended that because the "Federal Elections Commission is governed by Clan Managers," we "lack ... authority" to review its actions. Two things must be said of this statement. First, it cannot be read to suggest that clan manager conduct is absolutely immune; the statement was made in the context of an Anytime Review petition, which we are well aware extends only to the review of governmental actions—of which the clan managers are no part. See *Heave v. United States*, 5 U.S. __, __ (2018) (slip op., at 1-2); *id.*, at BORK, J., concurring in judgment); *George v. United States*, 5 U.S. __, __ (2018) (slip op., at 2). Second, insofar as the statement can be read to support a claim of immunity, the issues involved in *Isner* fell squarely within the scope of the group holder's traditional area of responsibility, and

thus the group holder's own immunity. It is therefore possible that any immunity which may have been relevant in *Isner* belonged to the group holder and not the clan managers being sued.

In *Sixman*, *supra*, JUSTICE MARSHALL, joined by THE CHIEF JUSTICE and JUSTICE GORSUCH, concluded that a certain petition for habeas corpus filed against a clan manager had to be denied because of a "profound 'lack of authority' to hear such matters" (citation omitted). But the petitioner there had been imprisoned by a ~~clan manager~~ ^{an issue} ~~and proper area~~ for the spread of obscenities—again, ~~issues~~ within

Also ~~special~~ ^{of signal} importance in *Sixman*, ~~also~~, is JUSTICE MARSHALL's emphasis that the clan manager had acted within a narrowly-defined "proper domain." Thus, *Sixman* also supports the possibility that clan managers possess no immunity of their own and merely vicariously exercise the immunity of the group holder when they act on his behalf.

Finally, in *Sawnberg v. Clan Managers*, although no opinions were filed, the public comments of THE CHIEF JUSTICE and Justice Scalia are illuminating. THE CHIEF JUSTICE emphasized that "[s]ince the formation of [the] group," courts had never stepped in to protect wall spam against group holder action. Moreover, to support the immunity argument, both he and Justice Scalia relied on

the Development Clause of the then-Constitution, which ~~was~~ ~~has been~~ interpreted by this Court to do no more than "preserv[e] the traditional role of the [group holder]." *Leader v. Las Vegas*, 3 U.S. 18, 22 (2017). *Sawnberg*, too, thus supports the possibility that clan managers, while possessing no immunity of their own, may claim, in certain circumstances, the benefit of the group holder's limited immunity.

We consider next the group holder-clan manager relationship to determine if the clan managers may validly claim the benefit of the group holder's limited immunity, and, if so, under what circumstances.

II

The position of clan manager was established by the first group holder during the ROBLOX "clan wars," an event in which a group could establish within itself a "clan" (team) and then have that team participate in battles on its behalf in an admin-held game. Successful team members were awarded "Player Points" automatically by the game. A website-wide leaderboard ranked the users with the most Player Points and the groups with the highest "clan score" (the total of the Player Points held by team members in a given clan). The United States clan wars team was led by the first clan manager, IcySound—the rank was named to refer to the special permission given to it: ~~to~~ the "manage the clan"

permission. Following the end of the clan-wars event, the clan manager rank was, naturally, removed.

Almost a year later, the group had grown substantially and the group holder needed extra help to fulfill his traditional responsibilities of Presidential election management, development, wall spam prevention, and obscenity control; inter alia, so he established a group rank known as his "minions." Each of his "minions," we understand, were assigned some of his responsibilities and helped him to fulfill his obligations. Later, the rank would be renamed "clan manager" because his "minions" preferred the title. The substance of their role did not change and had nothing to do with "clan management" itself per se.

To put this arrangement in legal terms, the group holder "manifests assent to" a clan manager "that [they] shall act on [his] behalf and subject to [his] control, and [they] manifest assent or otherwise consent to act." Restatement (Third) of Agency §1.01 (2006) (hereinafter Restatement). In this arrangement, known as agency, the group holder acts as a principal and the clan managers as agents. And because in an agency relationship, the principal is "liable for the actions of the [agent]," *First Nat. City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 629 (1983) (citation omitted), it therefore is self-evident why a

Why?

clan manager may assert the group holder's limited immunity when acting as his agent.

But not every act of a clan manager is within the scope of ~~their~~ agency relationship, ~~and not~~ every act would necessarily fall within the scope of the group holder's limited immunity, either.

A

The group holder is only liable for clan manager conduct (and ^a the clan manager is thus only potentially immune) when the clan manager acts with "actual authority." Restatement §2.01. An agent only has "actual authority to take action designated or implied in the principal's manifestations to the agent and acts necessary or incidental to achieving the principal's objectives." Restatement §2.02. More concisely, ~~put~~, when the agent "appears to be acting in the ordinary course of business confided to him." *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 772, n. 4 (1998) (citation omitted). This may mean that a clan manager acting beyond ~~their~~ prescribed duties may not be able to make a claim of immunity even if ~~their~~ conduct would fall within the bounds of the group holder's limited immunity because ~~they~~ would not have been acting within the scope of the agency relationship.

For example, a clan manager designated as an "Election Clan Manager" may assert agency in hopes of making

Put these in our appendix instead

nature of the group holder's *de jure* limited immunity and vicarious assertions of that immunity by clan managers, whom the group holder has emphasized he would execute lawful court judgments against. See <https://imgur.com/a/BChHQnL>.

We have argued

Congress is also free to modify, either by narrowing or enlarging, the scope of the group holder's immunity (or that which may be asserted by clan managers). Congress, in attempting to do so, should remember that statutes which "invade the common law" are "read with a presumption favoring the retention of long-established and familiar [legal] principles." *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 (1994). Therefore, unless an Act of Congress clearly alters the boundaries of the group holder's common law immunity or the clan managers' ability to invoke it per agency, it is unlikely that the Act will be read to effect such a result.

III

Petitioner has one final argument that the legal reasoning above may not be sufficient to decide the contours of the immunity which may be claimed by clan managers. To support this argument, petitioner relies on our *stare decisis* from *MythicOne v. National Security Agency*, 3 U.S. 28, 31-32 (2017), that "[t]he different circumstances in Roblox compared to real life necessitate changing applications of constitutional

principles." We reject this argument because, even assuming *MythicOne* as the baseline, there is no compelling *Roblox* specific circumstance which could necessitate a departure from the law properly expounded in this case; we also conclude that even if that were not the case, the *MythicOne* rule of interpretation was wrongly decided and *stare decisis* considerations do not compel continued adherence to it.

A

Stare decisis does not compel continued adherence to it.

MythicOne involved a challenge to the Revised Open Carry Act, which prohibited all open carry of a firearm. In a 5-to-4 decision, the Court concluded that while "[i]n real life, the open carry of a firearm is protected under the Second Amendment," the same language could not protect open carry on *Roblox* because the danger posed by open carry is heightened in light of the platform. *Id.*, at 30.

For petitioner's *MythicOne* argument to be successful under *MythicOne*'s terms, he must at least similarly show that applying the correct law would produce an untoward result. Petitioner merely states that "in real life" "nobody is above the law ... but we are all on a game, and this Court knows all too well that this game-*Roblox* has ramifications that do not allow for some real life things to be reflected here." Reply Brief for Petitioner 2. Petitioner relies on the nature of the

clan-manager role to support this position. *Ibid.* A proper legal analysis, however, also takes notice of the clan-manager role, *supra*, at _____. Petitioner also does not attempt to address the group holder's statement that clan managers are not, by nature of their role, above the law. See <https://imgur.com/a/BChHQnL>.

For at least these reasons, *MythicOne* cannot provide the basis for recognizing a broader immunity which may be invoked by clan managers.

B

Even if petitioner met his burden under the *MythicOne* "changing applications" mantra, we would not apply it here. The *MythicOne* rule of interpretation is wrong and *stare decisis* does not require our continued adherence to that misguided doctrine.

1

MythicOne is predicated on the idea that this Court's job is to produce desirable results as opposed to merely those required by the law. *MythicOne*'s admission that the same Second Amendment protects open carry in real life but does not here, solely based on policy considerations, is proof of this. But as THE CHIEF JUSTICE and Justice Scalia ably explained at the time, *id.*, at 32-54 (Scalia, J., dissenting); *id.*, at 54-59 (HOLMES, C.J., dissenting), this belief misconstrues the proper function of the Court.

*put into
appendix*

The Court is meant to exercise "neither force nor will but merely judgment." The Federalist No. 78, p. 165 (C. Rossiter ed. 1961) (A. Hamilton). Justice Scalia expressed the essence of this mandate when he said that this Court's duty was to see that "the law . . . [is] interpreted and applied as it was understood by the People who ratified it." *MythicOne*, *supra*, at 53 (~~Justice Antonin~~ Scalia, J., dissenting). This may mean in some cases reaching an outcome different from our "preferred outcome," *ibid.*, but fidelity to that principle ensures we remain a "government of laws, and not of men." *Marbury v. Madison*, 1 Cranch 137, 163 (1803).

We see no sense in repeating the arguments from the *MythicOne* dissents, but it is ~~barely~~ for those reasons and those given here~~x~~ that we conclude *MythicOne*'s "changing applications" mantra is erroneous.

There remains the question whether *stare decisis* counsels against overruling *MythicOne*'s mantra. It does not.

"*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). Thus, we will not

overturn a past decision or doctrine unless there are strong grounds for doing so. *United States v. International Business Machines Corp.*, 517 U.S. 843, 855-856 (1996); *Citizens United v. Fed. Elections Comm'n*, 558 U.S. 310, 377 (Roberts, C.J., concurring). It is also important to recognize at the outset, however, that *stare decisis* is not an "inexorable command." *Pearson v. Callahan*, 555 U.S. 223, 233 (2009).

Stare decisis in constitutional law is at its weakest "when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions." *Agostini v. Felton*, 521 U.S. 203, 235 (1997). *MythicOne* undoubtedly involved an interpretation of the Constitution; beyond that, it created a rule of constitutional interpretation which, if left intact, could bear on future constitutional interpretations as well. *Stare decisis* is therefore at its absolute weakest in this case. Our cases identify which factors are relevant to this analysis. Five are important here: "the quality of its reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision." *Janus v. State, County, and Municipal Employees*, 585 U.S. , - (2018) (slip op., at 34-35). After analyzing these factors, we conclude that

stare decisis does not compel us to retain *MythicOne's* mantra.

a

One of the most important factors in deciding whether to overrule a precedent is the quality of its reasoning. See *Citizens United*, 558 U.S., at 363-364; *id.*, at 382-385 (Roberts, C.J., concurring); *Lawrence v. Texas*, 539 U.S. 558, 577-578 (2003). *MythicOne* was poorly reasoned as a whole, and the justifications for its mantra we consider here were particularly lacking.

MythicOne, in making the expansive pronouncement that "[t]he different circumstances in Roblox compared to real life necessitate changing applications of constitutional principles," relied on none of our cases, cited none of our Nation's history, did not refer to the Constitution, did not rely on any other authorities, and did not engage in any of the analysis which would typically accompany such a major pronouncement. 3 U.S., at 31-32. Instead, the *MythicOne* mantra was introduced in an entirely conclusory manner in the final part of the opinion.

To say the least, *MythicOne* was not well reasoned.

b

Another relevant consideration in the *stare decisis* calculus is the workability of the precedent. *Montejo v. Louisiana*, 556 U.S. 778, 192 (2009). "Stare

decisis reflects a policy judgment that in most matters it is more important that the applicable rule of law be settled than that it be settled right." *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997). But if the precedent is unworkable or provides no clear guidance, then it does not really "settl[e]" anything. *Ibid.*

MythicOne's mantra provides no clear guidance because, as illustrated by our earlier analysis under *MythicOne*, *supra*, at ___, it does not explain with any precision what ~~Roblox~~ circumstances justify departures from the law or what that departure entails. All *MythicOne* provides is an unsound template for judicial lawmaking.

MythicOne is therefore unworkable.

c

Furthermore, legal developments since *MythicOne* have "eroded" the decision's "underpinnings" and leave it an outlier among our cases involving constitutional interpretation. *United States v. Gaudin*, 515 U.S. 506, 521 (1995).

In *RoExplo*, a decision following *MythicOne*, we explained the critical importance of interpreting the Constitution in a manner consistent with its original public meaning: "Failing to do so risks creation of an 'ineffectual and incoherent' line of decisions." *RoExplo*, 5 U.S., at 8. Nobody could seriously argue that this directly undermines the assumptions which

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has been applied only where it arose—in the Second Amendment context, dealing with open carry. As that *MythicOne* holding is not before us, and as we only consider the rule of interpretation it announced, we need not consider reliance interests stemming from its open carry holding.

Reliance interests, thus, cannot save *MythicOne*.



All these reasons—that the rule of interpretation *MythicOne* announced was patently erroneous; it was not well reasoned; it has proven unworkable; its underpinnings have been eroded by subsequent developments; it failed to consider, and conflicted with, prior precedent; and engendered no reliance interests—provide the “special justification” for overruling *MythicOne*. *Kimble v. Marvel Entertainment, LLC*, 576 U.S. ___, ___ (2015) (slip op., at 8)).

Therefore
We overrule *MythicOne v. National Security Agency* as to its rule of interpretation.

IV

Because *MythicOne* cannot provide a basis for expanding the immunity which may be invoked by clan managers, we consider the application of the immunity we recognized in Parts I and II to this case.

A

18.

The judgement of the District Court denying petitioner's motion to dismiss is

Affirmed.

I good opinion, but
I am not sure it
is appropriate to devote
so much time to
the Myltrie issue, as
it was only referenced
in passing. I think
it better to reject
~~their evidence~~
reliance on it
briefly and throw
some "shade" its way
in the course of doing
so. We can save
a full rejection
for a letter &
more appropriate
day, in my opinion.

Otherwise a fine job
and I am happy to
join.

-John

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE ROBERT H. BORK

August 5, 2018

Re: No. 05-54, Technozo v. United States

Dear John:

I have revised my opinion in this case according to your suggestions. I agree that we should leave the total overrule of Mythic for another day, when the question is squarely before us. I have taken your advice and simply refuse to extend Mythic to this context and cast some "shade" on it.

Let me know what you think. I hope to begin the circulation process today.



R.H.B.

Justice Roberts

Private

DRAFT NO. 2 No. 05-54 Technozo v. United States

JUSTICE BORK delivered the opinion of the Court.

We are asked to consider whether, and to what extent, clan managers are immune from liability in federal court. We hold that clan managers may claim immunity only when they act pursuant to their prescribed duties in an area traditionally within the group holder's control. Because petitioner's alleged conduct in this case (the committing of common crime) does not fall within the scope of that narrow immunity, we affirm the District Court's denial of the motion to dismiss.

I

In *Harlow v. Fitzgerald*, 457 U.S. 800, 806-807 (1982), this Court observed that the "common law ... recognize[s] immunity defenses of [at least] two kinds." Then, decades later, in *RoExplo v. United States*, 5 U.S. 7, 10 (2018), we identified clearly where to look, concluding: "Common law ... [is] the law of 'long use' and 'custom.'" Together, these cases stand for the proposition that a long-used custom of recognizing immunity (however limited) can support the invocation of such an immunity in a court of law. It is uncontested in this case that the group holder, since the beginning of our Nation, has been understood to have some form of immunity from liability arising from his actions in his

traditional areas of responsibility (presidential election administration, preventing the spread of obscene content, preventing wall spam, etc.). Cf. *Isner v. Fed. Elections Comm'n*, 3 U.S. 87, 88 (2017) (Scalia, J., respecting the denial of certiorair) (presidential elections); *Ex parte Sixman*, 5 U.S. ____ (2018) (MARSHALL, J., respecting the denial of certiorari) (obscene content). The same cannot be said for the clan managers because they are relatively new additions to the group. Nevertheless, clan-manager immunity has been recognized in at least three separate cases.

In *Isner*, *supra*, Justice Scalia contended that because the "Federal Elections Commission is governed by Clan Managers," we "lack ... authority" to review its actions. Two things must be said of this statement. First, it cannot be read to suggest that clan manager conduct is absolutely immune; the statement was made in the context of an Anytime Review petition, which we are well aware extends only to the review of governmental actions—of which the clan managers are no part. See *Heave v. United States*, 5 U.S. ___, ___-___ (2018) (slip op., at 1-2); *id.*, at ___ (BORK, J., concurring in judgment) (slip op., at 1); *George v. United States*, 5 U.S. ___, ___ (2018) (slip op., at 2). Second, insofar as the statement can be read to support a claim of immunity, the issues involved in *Isner* fell squarely within

the scope of the group holder's traditional area of responsibility, and thus the group holder's own immunity. It is therefore possible that any immunity which may have been relevant in *Isner* belonged to the group holder and not the clan managers being sued.

In *Sixman*, *supra*, JUSTICE MARSHALL, joined by THE CHIEF JUSTICE and JUSTICE GORSUCH, concluded that a certain petition for habeas corpus filed against a clan manager had to be denied because of a "profound 'lack of authority' to hear such matters" (citation omitted). But the petitioner there had been imprisoned by a clan manager for the spread of obscenities—again, an issue within the group holder's traditional zone of responsibility. Also of special importance in *Sixman* is JUSTICE MARSHALL's emphasis that the clan manager had acted within a narrowly-defined "proper domain." Thus, *Sixman* also supports the possibility that clan managers possess no immunity of their own and merely vicariously exercise the immunity of the group holder when they act on his behalf.

Finally, in *Sawnberg v. Clan Managers*, although no opinions were filed, the public comments of THE CHIEF JUSTICE and Justice Scalia are illuminating. THE CHIEF JUSTICE emphasized that "[s]ince the formation of [the] group," courts had never stepped in to protect wall spam against group holder action. Moreover, to support the

immunity argument, both he and Justice Scalia relied on the Development Clause of the then-Constitution, which was interpreted by this Court to do no more than "preserv[e] the traditional role of the [group holder]." *Leader v. Las Vegas*, 3 U.S. 18, 22 (2017). *Sawnberg*, too, thus supports only the possibility that clan managers, while possessing no immunity of their own, may claim, in certain circumstances, the benefit of the group holder's limited immunity.

We consider next the group holder-clan manager relationship to determine if the clan managers may validly claim the benefit of the group holder's limited immunity, and, if so, under what circumstances.

II

The position of clan manager was established by the first group holder during the ROBLOX "clan wars," an event in which a group could establish within itself a "clan" (team) and then have that team participate in battles on its behalf in an admin-held game. Successful team members were awarded "Player Points" automatically by the game. A website-wide leaderboard ranked the users with the most Player Points and the groups with the highest "clan score" (the total of the Player Points held by team members in a given clan). The United States clan wars team was led by the first clan manager, IcySound—the rank was named to refer to the special

permission given to it: the "manage the clan" permission. Following the end of the clan wars event, the clan manager rank was, naturally, removed.

Almost a year later, however, the group had grown substantially and the group holder needed extra help to fulfill his traditional responsibilities of Presidential election management, development, wall spam prevention, and obscenity control; so he established a group rank known as his "minions." Each of his "minions," we understand, were assigned some of his responsibilities and helped him to fulfill his obligations. Later, the rank would be renamed "clan manager" because his "minions" preferred the title. The substance of the role did not change and had nothing to do with "clan management" itself.

To put this arrangement in legal terms: The group holder "manifests assent to" a clan manager "that [they] shall act on [his] behalf and subject to [his] control, and [they] manifes[t] assent or otherwise consen[t] to act." Restatement (Third) of Agency §1.01 (2006) (hereinafter Restatement). In this arrangement, known as agency, the group holder acts as a principal and the clan managers as his agents. And because in an agency relationship, the principal is "liable for the actions of the [agent]," *First Nat. City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 629 (1983)

(citation omitted), it therefore is self-evident why a clan manager may assert the group holder's limited immunity when acting as his agent.

But not every act of a clan manager is within the scope of his agency relationship; nor would every act necessarily fall within the scope of the group holder's limited immunity.

A

The group holder is only liable for clan-manager conduct (and a clan manager is thus only potentially immune) when the clan manager acts with "actual authority." Restatement §2.01. An agent only has "actual authority to take action designated or implied in the principal's manifestations to the agent and acts necessary or incidental to achieving the principal's objectives." Restatement §2.02. To put it more concisely, when the agent "appears to be acting in the ordinary course of business confided to him." *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 772, n. 4 (1998) (citation omitted). This may mean that a clan manager acting beyond his prescribed duties may not be able to make a claim of immunity even if his conduct would fall within the bounds of the group holder's limited immunity because he would not have been acting within the scope of his agency relationship.

For example, a clan manager designated as an "Election Clan Manager" may assert agency in hopes of making a limited immunity claim for reasonable conduct arising from the administration of a Presidential election. A clan manager designated solely as a "Community Clan Manager," however, may not be as successful in making the same claim because it would not be apparent that they were acting "in the ordinary course of business confided to [them]," *ibid.* (emphasis added), as their role typically does not involve Presidential election administration.

B

Not all conduct is within the bounds of the group holder's limited immunity, either; thus, even when a clan manager successfully establishes that his conduct was within the scope of his agency with the group holder, he may still not be entitled to immunity. As emphasized already, the group holder has immunity only for acts within "his traditional areas of responsibility." *Supra*, at ___. We have also been clear that this is not a self-defined category: it includes only those functions which *historically* have been left to (and performed by) him. See generally *Sixman*, *supra*, n. * (supporting this proposition); accord, *RoExplo*, *supra* (explaining the nature of the common law). Whether, as a practical matter, a judgment against the group holder

may actually be executed is a different question, and not one before us, because we are considering only the nature of the group holder's *de jure* limited immunity and vicarious assertions of that immunity by clan managers, whom the group holder has, regardless, emphasized he would execute lawful court judgments against. See <https://imgur.com/a/BChHQnL>.

Congress is also free to modify, either by narrowing or enlarging, the scope of the group holder's immunity (or that which may be asserted by clan managers). Congress, in attempting to do so, should remember that statutes which "invade the common law" are "read with a presumption favoring the retention of long-established and familiar [legal] principles." *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 (1994). Therefore, unless an Act of Congress clearly alters the boundaries of the group holder's common law immunity or the clan managers' ability to invoke it per agency, it is unlikely that the Act will be read to effect such a result.

III

Now comes the task of applying this immunity to the case at hand. Petitioner is charged with two counts of trespassing, two counts of unlawfully discharging a taser, two counts of murder, two counts of attempted murder, and one count of conspiracy to commit murder. These allegations, if true, amount to what we often

describe as "common crime." *RoExplo*, 5 U.S., at 31.

Committing common crime is not the "business confided to" petitioner as a clan manager, so he cannot make the threshold showing of vicarious liability. Committing common crime is also not one of the group holder's historic responsibilities, so even if petitioner could make that showing, his immunity claim would nonetheless fail.

A

The analysis of any vicarious immunity claim must, naturally, begin with a determination whether any such vicarious liability exists. Ultimately, it is the group holder's immunity which is being invoked and it is incumbent on the court to scrutinize the record to decide whether the party invoking it has any proper claim to it.

In this case, petitioner asserts that he is a "Community Clan Manager." We see no reason to second-guess this assertion. Commonsense suggests a "Community Clan Manager" is tasked with engaging the community with streams of gameplay and other methods. Petitioner's briefs do not suggest a more expansive understanding of his duties and it is not our role to make his immunity case for him. On their face, it is not apparent that these duties involve the commission of common crime; surely, if that was the nature of the position, it would be explicitly stated somewhere.

Committing common crime is not among petitioner's clan-manager duties. As such, he fails to sufficiently establish the group holder's vicarious liability and cannot make a claim under his limited immunity.

B

Even if petitioner did establish the group holder's vicarious liability, his immunity claim would still inevitably fail because the commission of common crime, whatever relevance it may have to his role "Community Clan Manager," is not one of the group holder's traditional functions. There is no long-used custom of the group holder committing common crimes in the cities, or one that is at least publicly known.

Our analysis of the group holder's immunity, and thus by consequence what clan managers may vicariously assert, is history-driven. Whatever immunity petitioner may seek to assert here is unsupportable by history and does not exist.

IV

Petitioner makes one last-ditch effort to establish immunity in this case. He argues that under *MythicOne v. National Security Agency*, 3 U.S. 28, 31-32 (2017), "[t]he different circumstances in ROBLOX compared to real life necessitate changing applications of constitutional principles." This, he says, means we can disregard all of the law expounded above and recognize

that the meaning of the law yields to "different circumstances." See Reply Brief for Petitioner 2. We reject this argument entirely.

Whatever value *MythicOne*'s rule of interpretation may have in the Second Amendment context where it arose, our cases do not mandate that we extend it to its logical limits in *every other context*. For present purposes, it suffices to say that *MythicOne*'s rule of interpretation was unreasoned and conclusory, lacks any basis in history, and provides no guidance where the Court hasn't already explicated the effect of its application (*i.e.*, only the Second Amendment context). Since *MythicOne*, we have refused invitations to extend it to other contexts and have emphasized the importance of adherence to original meaning. See *RoExplo*, 5 U.S., at 7-8; compare *Rager v. United States*, 5 U.S. 52 (2018), with Brief for Justice Institute as *Amicus Curiae* in No. 05-25 (arguing for *MythicOne* based departure from *RoExplo*). We therefore reject petitioner's invitation to extend *MythicOne* to the immunity context.

* * *

For the foregoing reasons, the judgment of the District Court is

Affirmed.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN G. ROBERTS, JR.

August 5, 2018

Re: 05-54 - Technozo v. United States

Dear Robert,

I agree.

Sincerely,

A handwritten signature in black ink, appearing to read "John". It is written in a cursive style with a horizontal line underneath it.

Justice Bork

Private

dpc 08/06/18

BENCH MEMORANDUM

From: Daniel

Re: Technozo v. United States, No. 05-64

Petr argues that he – as a Clan Manager – is exempt from all court actions against him, whether they be administrative ones such as ranking people Federal Prisoner for spamming the group wall or committing murder.

This Court has held on multiple occasions that clan managers administrative actions are exempt from court review, see e.g., Isner v. Federal Elections Commission, 3 U.S. 87, 88 (2017); Ex Parte Sixman 444, 5 U.S. ____ (2018). The Court has however never had a case like this one, a case in which a clan manager violates a law unrelated to Clan Manager actions. As such, we need to look at this from a different perspective than we have done in the past.

From a simple-minded perspective, it would seem as though Clan Managers actions would be immune from review and conviction by dct. Even if those actions would in turn be a violation of law. But, just as Justice Bork has stated in his previous memorandum to the conference, we should look at this case more as a principal-agent relationship one rather than just a jurisdictional one. I completely agree with Justice Bork on this

matter, the group holder and clan managers should be looked upon as a principal-agent relationship.

If we treat this case as such then the question at hand would be easy to answer. Immunity would be thrown out the window as the actions committed by Petr would not be administrative ones as held in Sixman⁴⁴⁴ and Isner. The group holder, as principal "may be held liable for the actions of the [agent]."
First Nat. City Bank v. Banco Para el Comercio Exterior de Cuba, 462 U.S. 611, 629 (1983). This would however only apply to ones which the group holder is responsible for. The group holder is not responsible for committing crimes and may not be liable for those actions. Petr claims that if a clan manager wishes to commit crime while doing their job, then they would be totally immune from any consequences brought upon them. I see this as monstrous, trying to overstep the line way too far with the whole "immunity" thing. If Petr were to have merely deleted someone's post on the group wall, then yes, they would be completely fine from legal actions. But, when they commit murder and break multiple other laws then nothing can really make them immune from such.

Petr also tries to make the claim that Justice Scalia when concurring in denial of cert. in Isner meant that as all actions done by clan managers. I believe that Justice Scalia was referring only to the action at question, administering the

presidential elections which would fall under the jurisdiction of clan managers. Petr tries to twist words of Justice Scalia in their favor, but it will backfire onto Petr as the court is now going to look further into Isner and soon realize that Scalia's concurrence would and should only apply to administrative actions such as handling the presidential elections.

As such, the main cases Petr bases its arguments upon are debunked and would not work in this case. As such, we should keep looking at this as a principal-agent relationship case where Petr would therefore not be immune from prosecution for violating any law at cities as his actions were not administrative ones. It is therefore my recommendation for a ruling in favor of the respondent, holding that clan managers are not immune from prosecution if their actions violate law and if their actions are not administrative ones required to be done as a part of the Clan Manager job.

Future cases may establish more of a clearer line of what is and what is not an administrative action, but that is not what this case is about. It is merely a question whether Clan Managers are immune to laws or not. This case should only hold that there is a line between what is and what is not administrative actions. I believe Justice Bork or Justice Roberts would deliver the opinion well as they both have good points to their sides, while however I agree more with Justice

Roberts view on group holders not being immune to laws, contrary to Justice Bork's belief that they are.

To: The Chief Justice
Justice Marshall
Justice Gorsuch
Justice O'Connor
Justice Kagan
Justice Roberts
Justice White
Justice Stewart

From: **Justice Bork**

Circulated: AUGUST 8 2018

1st DRAFT

Recirculated: _____

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 05–64

TECHNOZO, PETITIONER *v.* UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF NEVADA

[August —, 2018]

JUSTICE BORK delivered the opinion of the Court.

We are asked to consider whether, and to what extent, clan managers are immune from liability in federal court. We hold that clan managers may claim immunity only when they act pursuant to their prescribed duties in an area traditionally within the group holder's control. Because petitioner's alleged conduct in this case (the committing of common crime) does not fall within the scope of that narrow immunity, we affirm the District Court's denial of the motion to dismiss.

I

In *Harlow v. Fitzgerald*, 457 U. S. 800, 806–807 (1982), this Court observed that the “common law . . . recognize[s] immunity defenses of [at least] two kinds.” Then, decades later, in *RoExplo v. United States*, 5 U. S. 7, 10 (2018), we identified clearly where to look, concluding: “Common law . . . [is] the law of ‘long use’ and ‘custom.’” Together, these cases stand for the proposition that a long-used custom of recognizing immunity (however limited) can support the invocation of such an immunity in a court of law. It is uncon-

Opinion of the Court

tested in this case that the group holder, since the beginning of our Nation, has been understood to have some form of immunity from liability arising from his actions in his traditional areas of responsibility (presidential election administration, preventing the spread of obscene content, preventing wall spam, etc.). Cf. *Isner v. Fed. Elections Comm'n*, 3 U. S. 87, 88 (2017) (Scalia, J., respecting the denial of certiorari) (presidential elections); *Ex parte Sixman*, 5 U. S. ___, ___ (2018) (MARSHALL, J., respecting the denial of certiorari) (slip op., at 1) (obscene content). The same cannot be said for the clan managers because they are relatively new additions to the group. Nevertheless, clan-manager immunity has been recognized in at least three separate cases.

In *Isner, supra*, Justice Scalia contended that because the “Federal Elections Commission is governed by Clan Managers,” we “lack . . . authority” to review its actions. Two things must be said of this statement. First, it cannot be read to suggest that clan-manager conduct is absolutely immune; the statement was made in the context of an Anytime Review petition, which we are well aware extends only to the review of governmental actions—of which the clan managers are no part. See *Heave v. United States*, 5 U. S. ___, ___–___ (2018) (slip op., at 1–2); *id.*, at ___ (BORK, J., concurring in judgment) (slip op., at 1); *George v. United States*, 5 U. S. ___, ___ (2018) (slip op., at 2). Second, insofar as the statement can be read to support a claim of immunity, the issues involved in *Isner* fell squarely within the scope of the group holder’s traditional area of responsibility, and thus the group holder’s own immunity. It is therefore possible that any immunity which may have been relevant in *Isner* belonged to the group holder and not the clan managers being sued.

In *Sixman, supra*, JUSTICE MARSHALL, joined by THE CHIEF JUSTICE and JUSTICE GORSUCH, concluded that a

Opinion of the Court

certain petition for habeas corpus filed against a clan manager had to be denied because of a “profound ‘lack of authority’ to hear such matters” (citation omitted). But the petitioner there had been imprisoned by a clan manager for the spread of obscenities—again, an issue within the group holder’s traditional zone of responsibility. Also of special importance in *Sixman* is JUSTICE MARSHALL’s emphasis that the clan manager had acted within a narrowly-defined “proper domain.” Thus, *Sixman* also supports the possibility that clan managers possess no immunity of their own and merely vicariously exercise the immunity of the group holder when they act on his behalf.

Finally, in *Sawnberg v. Clan Managers*, although no opinions were filed, the public comments of THE CHIEF JUSTICE and Justice Scalia are illuminating. THE CHIEF JUSTICE emphasized that “[s]ince the formation of [the] group,” courts had never stepped in to protect wall spam against group holder action. Moreover, to support the immunity argument, both he and Justice Scalia relied on the Development Clause of the then-Constitution, which was interpreted by this Court to do no more than “preserv[e] the traditional role of the [group holder].” *Leader v. Las Vegas*, 3 U. S. 18, 22 (2017). *Sawnberg*, too, thus supports only the possibility that clan managers, while possessing no immunity of their own, may claim, in certain circumstances, the benefit of the group holder’s limited immunity.

We consider next the group holder-clan manager relationship to determine if the clan managers may validly claim the benefit of the group holder’s limited immunity, and, if so, under what circumstances.

II

The position of clan manager was established by the first group holder during the ROBLOX “clan wars,” an event in which a group could establish within itself a “clan” (team) and then have that team participate in battles on its behalf

Opinion of the Court

in an admin-held game. Successful team members were awarded “Player Points” automatically by the game. A website-wide leaderboard ranked the users with the most Player Points and the groups with the highest “clan score” (the total of the Player Points held by team members in a given clan). The United States clan wars team was led by the first clan manager, IcySound—the rank was named to refer to the special permission given to it: the “manage the clan” permission. Following the end of the clan wars event, the clan manager rank was, naturally, removed.

Almost a year later, however, the group had grown substantially and the group holder needed extra help to fulfill his traditional responsibilities of Presidential election management, development, wall spam prevention, and obscenity control; so he established a group rank known as his “minions.” Each of his “minions,” we understand, were assigned some of his responsibilities and helped him to fulfill his obligations. Later, the rank would be renamed “clan manager” because his “minions” preferred the title. The substance of the role did not change and had nothing to do with “clan management” itself.

To put this arrangement in legal terms: The group holder “manifests assent to” a clan manager “that [they] shall act on [his] behalf and subject to [his] control, and [they] manifest[] assent or otherwise consen[t] to act.” Restatement (Third) of Agency § 1.01 (2006) (hereinafter Restatement). In this arrangement, known as agency, the group holder acts as a principal and the clan managers as his agents. And because in an agency relationship, the principal is “liable for the actions of the [agent],” *First Nat. City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U. S. 611, 629 (1983) (citation omitted), it therefore is self-evident why a clan manager may assert the group holder’s limited immunity when acting as his agent.

But not every act of a clan manager is within the scope of his agency relationship; nor would every act necessarily fall

Opinion of the Court

within the scope of the group holder's limited immunity.

A

The group holder is only liable for clan-manager conduct (and a clan manager is thus only potentially immune) when the clan manager acts with "actual authority." Restatement §2.01. An agent only has "actual authority to take action designated or implied in the principal's manifestations to the agent and acts necessary or incidental to achieving the principal's objectives." Restatement § 2.02. To put it more concisely, when the agent "appears to be acting in the ordinary course of business confided to him." *Burlington Industries, Inc. v. Ellerth*, 524 U. S. 742, 772, n. 4 (1998) (citation omitted). This may mean that a clan manager acting beyond his prescribed duties may not be able to make a claim of immunity even if his conduct would fall within the bounds of the group holder's limited immunity because he would not have been acting within the scope of his agency relationship.

For example, a clan manager designated as an "Election Clan Manager" may assert agency in hopes of making a limited immunity claim for reasonable conduct arising from the administration of a Presidential election. A clan manager designated solely as a "Community Clan Manager," however, may not be as successful in making the same claim because it would not be apparent that they were acting "in the ordinary course of business *confided to [them]*," *ibid.* (emphasis added), as their role typically does not involve Presidential election administration.

B

Not all conduct is within the bounds of the group holder's limited immunity, either; thus, even when a clan manager successfully establishes that his conduct was within the scope of his agency with the group holder, he may still not be entitled to immunity. As emphasized already, the group holder has immunity only for acts within "his traditional

Opinion of the Court

areas of responsibility.” *Supra*, at 2. We have also been clear that this is not a self-defined category: it includes only those functions which *historically* have been left to (and performed by) him. See generally *Sixman*, *supra*, n. * (supporting this proposition); accord, *RoExpl*, *supra* (explaining the nature of the common law). Whether, as a practical matter, a judgment against the group holder may actually be executed is a different question, and not one before us, because we are considering only the nature of the group holder’s *de jure* limited immunity and vicarious assertions of that immunity by clan managers, whom the group holder has, regardless, emphasized he would execute lawful court judgments against. See <https://imgur.com/a/BChHQnL>.

Congress is also free to modify, either by narrowing or enlarging, the scope of the group holder’s immunity (or that which may be asserted by clan managers). Congress, in attempting to do so, should remember that statutes which “invade the common law” are “read with a presumption favoring the retention of long-established and familiar [legal] principles.” *Fogerty v. Fantasy, Inc.*, 510 U. S. 517, 534 (1994). Therefore, unless an Act of Congress *clearly* alters the boundaries of the group holder’s common law immunity or the clan managers’ ability to invoke it per agency, it is unlikely that the Act will be read to effect such a result.

III

Now comes the task of applying this immunity to the case at hand. Petitioner is charged with two counts of trespassing, two counts of unlawfully discharging a taser, two counts of murder, two counts of attempted murder, and one count of conspiracy to commit murder. These allegations, if true, amount to what we often describe as “common crime.” *RoExpl*, 5 U. S., at 31. Committing common crime is not the “business confided to” petitioner as a clan manager, so he cannot make the threshold showing of vicarious liability. Committing common crime is also not one of the group

Opinion of the Court

holder's historic responsibilities, so even if petitioner could make that showing, his immunity claim would nonetheless fail.

A

The analysis of any vicarious immunity claim must, naturally, begin with a determination whether any such vicarious liability exists. Ultimately, it is the *group holder*'s immunity which is being invoked and it is incumbent on a court faced with such an invocation to closely scrutinize the record to decide whether the party invoking it has any proper claim to it.

In this case, petitioner asserts that he is a "Community Clan Manager." We see no reason to second-guess this assertion. Commonsense suggests a "Community Clan Manager" is tasked with engaging the community with streams of gameplay and other methods. Petitioner's briefs do not suggest a more expansive understanding of his duties and it is not our role to make his immunity case for him. On their face, it is not apparent that these duties involve the commission of common crime; surely, if that was the nature of the position, it would be explicitly stated *somewhere*.

Committing common crime is not among petitioner's clan-manager duties. As such, he fails to sufficiently establish the group holder's vicarious liability and cannot make a claim under his limited immunity.

B

Even if petitioner did establish the group holder's vicarious liability, his immunity claim would still inevitably fail because the commission of common crime, whatever relevance it may have to his role "Community Clan Manager," is not one of the group holder's traditional functions. There is no long-used custom of the group holder committing common crimes in the cities, or one that is at least publicly known.

Our analysis of the group holder's immunity, and thus by

Opinion of the Court

consequence what clan managers may vicariously assert, is history-driven. Whatever immunity petitioner may seek to assert here is unsupportable by history and does not exist.

IV

Petitioner makes one last-ditch effort to establish immunity in this case. He argues that under *MythicOne v. National Security Agency*, 3 U.S. 28, 31–32 (2017), “[t]he different circumstances in ROBLOX compared to real life necessitate changing applications of constitutional principles.” This, he says, means we can disregard all of the law expounded above and recognize that the meaning of the law yields to “different circumstances.” See Reply Brief for Petitioner 2. We reject this argument entirely.

Whatever value *MythicOne*’s rule of interpretation may have in the Second Amendment context where it arose, our cases do not mandate that we extend it to its logical limits in *every other context*. For present purposes, it suffices to say that *MythicOne*’s rule of interpretation was unreasoned and conclusory, lacks any basis in history, and provides no guidance where the Court hasn’t already explicated the effect of its application (*i.e.*, only the Second Amendment context). Since *MythicOne*, we have refused invitations to extend it to other contexts and have emphasized the importance of adhering to original meaning. See *RoExpl0*, 5 U.S., at 7–8; compare *Rager v. United States*, 5 U.S. 52 (2018), with Brief for Justice Institute as *Amicus Curiae* in No. 05–25 (arguing for *MythicOne*-based departure from *RoExpl0*). We therefore reject petitioner’s invitation to extend *MythicOne* to the immunity context.

* * *

For the foregoing reasons, the judgment of the District Court is

Affirmed.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN G. ROBERTS, JR.

August 8, 2018

Re: 05-64 - Technozo v. United States

Dear Robert,

Please join me. I shall also try my hand at a brief concurrence.

Respectfully,

A handwritten signature in black ink, appearing to read "John". It is written in a cursive style with a horizontal line underneath it.

Justice Bork

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN G. ROBERTS, JR.

August 8, 2018

Re: 05-64 - Technozo v. United States

Dear Daniel,

I have read your bench memo. It is decent, but still lacks those contents which I have in previous annotations flagged as particularly pertinent to the memo-writing process. Allow me, therefore, to state my expectations more clearly here.

The bench memorandum is the tool by which a Justice's clerk presents the arguments (on the merits -- not of whether a petition is cert. worthy) of both parties in the case, while summarizing the facts and record below and offering your personal views on the points of law involved, while attempting to accommodate what you would predict my preferences would be. You have, in some manner, done so in your recent memoranda; but you have not gone far enough. Nor have you split your memoranda into organized sections as I have instructed you to do.

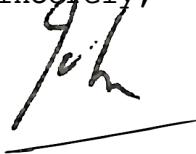
A bench memorandum should be split into the following parts, in order: Question(s) Presented, Background (or, alternatively, "Facts (or History) Below"), Discussion, and Conclusion. The first should present the questions the Court has submitted to answering in the process of granting cert. The second should discuss and summarize the facts and decision(s) below, including the legal rationale(s) used. The third should represent your personal analysis and should be the "meatiest" section. I obviously need not qualify the last -- a conclusion is fairly straightforward.

Without this organized presentation, you run the risk of writing something that is poorly thought out and lacking in substance. This brings me to my next point. You have done a fine job of telling me your thoughts; you have done a poor job, however, of showing me why those thoughts are legitimate under the law. In the legal profession, authority is key. You would be remiss to find an opinion of mine, the Chief's, or Justice Bork's that is not rife with authority. In the future, please do more research and incorporate it into your analyses. It will help you as much as it does me.

If you feel you do not know how to research properly or where to look, please reach out. The only thing worse than needing help is needing help but not asking for it.

You have done a good job so far, but we are now two to three weeks into this new dynamic. The time, now, is to see some new improvement from you (and me, as well).

Sincerely,

A handwritten signature consisting of stylized initials "J" and "H" followed by a horizontal line.

dpc

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN G. ROBERTS, JR.

August 8, 2018

Re: 05-54 - Technozo v. United States

MEMORANDUM TO THE CONFERENCE

I would like to direct our attention toward AcidRapss v. FEC, 3:18-2147 (D.C. 2018), which says, in effect, that the Federal Elections Commission stepped outside of its constitutional power to disqualify presidential candidates. See id., at 4-3. Notwithstanding that this opinion is rather poorly written (it is full of blatant plagiarism and one-dimensional analysis), I believe it also will conflict with the ruling we are about to hand down in Technozo.

I believe we should bring this case up to our court and list it with the Technozo case, with Technozo serving as "the lead." In any event, it will necessarily be overturned and overshadowed by Technozo.

Respectfully,



The Conference

No. 05-64 TECHNOZO v. UNITED STATES

JUSTICE ROBERTS, concurring.

I join the opinion of the Court.

I write separately to address what is often the lynchpin behind claims like the one made before us today. On August 2, 2017, this Court proclaimed, in a swanky oration, that "[t]he different circumstances in ROBLOX compared to real life necessitate changing applications of constitutional principles." *MythicOne v. National Security Agency*, 3 U.S. 28, 31–32. The Court today correctly recognizes that *MythicOne*'s holding invites litigants to "disregard . . . the law . . . and recognize that the meaning of the law yields to 'different circumstances.'" *Ante*, at 8 (quoting Reply Brief for Petitioner 2). Such an observation is quite fitting. As Justice Scalia succinctly noted in his dissent there, the majority's invocation of changing-principles jurisprudence "arms well those who will wish to use this Court as a [means] to enact change they cannot get from where change ought to originate"; it invites "these social warriors [to] lead from their gates brandished with" the musings of the *MythicOne* majority. 3 U.S., at 54 (emphasis deleted). Because of this shortcoming, *MythicOne*, when the time is most appropriate, should be overturned.

*

"Fidelity to precedent—the policy of *stare decisis*—is vital to the proper exercise of the judicial function." *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 377 (2010). *Stare decisis* is important, for it represents "the means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion." *Vasquez v. Hillary*, 474 U.S. 254, 265 (1986). See also *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) ("*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process."). Thus, absent a "special justification," *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984), yesterday's decision should remain today's.

Stare decisis, however, is no "inexorable command," *Vasquez, supra*, at 266. It is, instead, a "principle of policy and not a mechanical formula of adherence to the latest decision." *Helvering v. Hallock*, 309 U.S. 106, 119 (1940). This is especially true in constitutional cases. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406–408 (1932) (Brandeis, J., dissenting):

"[I]n cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions. The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function."

See also *United States v. Scott*, 437 U.S. 82, 101 (1978). *Stare decisis*, therefore, is at its weakest "when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions." *Agostini v. Felton*, 521 U.S. 203, 235 (1997). The doctrine commands consistency; but it does not shield those decisions which have been consistently decided wrongly.

Because *stare decisis* represents a "principle of policy," *Helvering, supra*, at 119, the Court is bound to balance the "the importance of having constitutional questions *decided* against the importance of having them *decided right*." *Citizens United, supra*, at 378 (emphasis present). With the understanding that *stare decisis* exists to supplement the rule of law, see *ibid.*, when fidelity to a precedent causes more harm than it does good, the Court must revisit

its decision. To decide whether to overturn a past decision, the Court turns to a plethora of factors. *Janus v. State, County, and Municipal Employees*, 585 U.S. —, — (2018) (slip op., at 34). These include: "the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned." *Montejo v. Louisiana*, 556 U.S. 778, 792–793 (2009) (citing *Pearson v. Callahan*, 555 U.S. 223, 234–235 (2009)).

A

In regard to the first two, the answers are rather self-evident. *MythicOne* is only a year old, nor would "eliminating it . . . upset expectations." *Id.*, at 793. Indeed, developments since *MythicOne* have "eroded" the decision's "underpinnings" and have left it an outlier among our cases which involve constitutional interpretation. *United States v. Gaudin*, 515 U.S. 506, 521 (1995). For example, in *RoExplor v. United States*, 5 U.S. 7, 7–8 (2018), we discussed the importance of resting our interpretations on the original understanding of the Constitution—not on changing circumstances caused by ROBLOX itself ("Our interpretation of the [Constitution] must be firmly rooted in the original public understanding it carried at the time of its adoption."). Underscoring the importance

of traditional and historically based interpretation, we explained that failing to do so—that answering questions through a *MythicOne*-based approach—"risks creation of an 'ineffectual and incoherent' line of decisions." *Id.*, at 8 (quoting Lee, *The Constitutional Right Against Excessive Punishment*, 91 Va. L. Rev. 677, 684 (2005)). To the extent that *MythicOne* rested its conclusion on a changing-principles mantra, it has "fallen far out of step with our current strong endorsement" of original-meaning interpretation. *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 481 (1989). See *Andrews v. Louisville & Nashville R. Co.*, 406 U.S. 320 (1972). Because neither the antiquity of the precedent nor its reliance interests can save it, the next question to address is the quality of its reasoning.

B

The quality of its reasoning is crucial to sustaining a previous decision. *Lawrence v. Texas*, 539 U.S. 558, 577–578 (2003). *MythicOne* is, to say the least, lacking in reasoning altogether; it was "wrong at the start," *Janus, supra*, at — (slip op., at 35), when it proclaimed that constitutional principles could be changed at will in the face of ROBLOX circumstances. Without mention of even one authority,

historical foundation, or Constitutional provision, *MythicOne* failed to engage in any due diligence that would ordinarily accompany such a major pronouncement. 3 U.S., at 31–32. Rather, the mantra of changing principles was ushered forth in an irresponsible and conclusory manner. Dozens of pages need not be devoted to show how a reasonless decision was made without attention to dotting its i's and crossing its t's. *MythicOne* was not just poorly reasoned—it was not reasoned at all.

*

In short, the relatively short history since *MythicOne* was decided, the uncertainty of its relevance in light of our more recent decisions, and the lack of any reasoning in reaching its conclusion all weigh against retaining the decision. These factors convince me that, when the time comes, *MythicOne* should be overturned and cast aside into history.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN G. ROBERTS, JR.

August 16, 2018

Re: 05-64 - Technozo v. United States

Dear Chief,

Attached is the printed draft of my concurring opinion in the above. Please circulate it as soon as possible. I do not expect to make further changes.

As for my plan to concur in part in Ryphen, I have decided, in the interest of time, to abandon that effort. Please have the syllabus and opinion end-line reflect that I join the majority except as to paragraph one of section II, as indicated in my letter to Elena of August 8.

Respectfully,



The Chief Justice

No. 05-64 - Technozo v. United States

File

JUSTICE ROBERTS, concurring.

I join the opinion of the Court.

I write separately to address what is often the lynchpin behind claims like the one made before us today. On August 2, 2017, this Court proclaimed, in a swanky oration, that “[t]he different circumstances in ROBLOX compared to real life necessitate changing applications of constitutional principles.” *MythicOne v. National Security Agency*, 3 U. S. 28, 31–32. The Court today correctly recognizes that *MythicOne*’s holding invites litigants to “disregard . . . the law . . . and recognize that the meaning of the law yields to ‘different circumstances.’” *Ante*, at 8 (quoting Reply Brief for Petitioner 2). Such an observation is quite fitting. As Justice Scalia succinctly noted in his dissent there, the majority’s invocation of changing-principles jurisprudence “arms well those who will wish to use this Court as a [means] to enact change they cannot get from where change ought to originate”; it invites “these social warriors [to] lead from their gates brandished with” the musings of the *MythicOne* majority. 3 U. S., at 54 (emphasis deleted). Because of this shortcoming, *MythicOne*, when the time is most appropriate, should be overturned.

MythicOne
The Roberts

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“Fidelity to precedent—the policy of *stare decisis*—is vital to the proper exercise of the judicial function.” *Citizens United v. Federal Election Comm’n*, 558 U. S. 310, 377 (2010). *Stare decisis* is important, for it represents “the means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion.” *Vasquez v. Hillary*, 474 U. S. 254, 265 (1986). See also *Payne v. Tennessee*, 501 U. S. 808, 827 (1991) (“*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and

consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.”). Thus, absence a “special justification,” *Arizona v. Rumsey*, 467 U. S. 203, 212 (1984), yesterday’s decision should remain today’s.

Stare decisis, however, is no “ineluctable command,” *Vasquez, supra*, at 266. It is, instead, a “principle of policy and not a mechanical formula of adherence to the latest decision.” *Helvering v. Hallock*, 309 U. S. 106, 119 (1940). This is especially true in constitutional cases. *Burnet v. Coronado Oil & Gas Co.*, 285 U. S. 393, 406–408 (1932) (Brandeis, J., dissenting).

“[I]n cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions. The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function.”

See also United States v. Scott, 437 U. S. 82, 101 (1978). *Stare decisis*, therefore, is at its weakest “when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions.” *Agostini v. Felton*, 521 U. S. 203, 235 (1997). The doctrine commands consistency; but it does not shield those decisions which have been consistently decided wrongly.

Because *stare decisis* represents a “principle of policy,” *Helvering, supra*, at 119, the Court is bound to balance the “the importance of having constitutional questions *decided* against the importance of having them *decided right*.” *Citizens United, supra*, at 378 (emphasis present). With the understanding that *stare decisis* exists to supplement the rule of law, see *ibid.*, when fidelity to a precedent causes more harm than it does good, the Court must revisit its decision. To decide whether to overturn a past decision, the Court turns to a

plethora of factors. *Janus v. State, County, and Municipal Employees*, 585 U. S. —, — (2018) (slip op., at 34). These include: “the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned.” *Montejo v. Louisiana*, 556 U. S. 778, 792–793 (2009) (citing *Pearson v. Callahan*, 555 U. S. 223, 234–235 (2009)).

A

In regard to the first two, the answers are rather self-evident. *MythicOne* is only a year old, nor would “eliminating it . . . upset expectations.” *Id.*, at 793. Indeed, developments since *MythicOne* have “eroded” the decision’s “underpinnings” and have left it an outlier among our cases which involve constitutional interpretation. *United States v. Gaudin*, 515 U. S. 506, 521 (1995). For example, in *RoExplor v. United States*, 5 U. S. 7, 7–8 (2018), we discussed the importance of resting our interpretations on the original understanding of the Constitution—not on changing circumstances caused by ROBLOX itself (“Our interpretation of the [Constitution] must be firmly rooted in the original public understanding it carried at the time of its adoption.”). Underscoring the importance of traditional and historically based interpretation, we explained that failing to do so—that answering questions through a *MythicOne*-based approach—“risks creation of an ‘ineffectual and incoherent’ line of decisions.” *Id.*, at 8 (quoting Lee, *The Constitutional Right Against Excessive Punishment*, 91 Va. L. Rev. 677, 684 (2005)). To the extent that *MythicOne* rested its conclusion on a changing-principles mantra, it has “fallen far out of step with our current strong endorsement” of original-meaning interpretation. *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U. S. 477, 481 (1989). See *Andrews v. Louisville & Nashville R. Co.*, 406 U. S. 320 (1972). Because neither the antiquity of the precedent nor its reliance interests can save it, the next question to address is the quality of its reasoning.

B

The quality of its reasoning is crucial to sustaining a previous decision. *Lawrence v. Texas*, 539 U. S. 558, 577–578 (2003). *MythicOne* is, to say the least, lacking in reasoning altogether; it was “wrong at the start,” *Janus, supra*, at — (slip op., at 35), when it proclaimed that constitutional principles could be changed at will in the face of ROBLOX circumstances. Without mention of even one authority, historical foundation, or Constitutional provision, *MythicOne* failed to engage in any due diligence that would ordinarily accompany such a major pronouncement. 3 U. S., at 31–32. Rather, the mantra of changing principles was ushered forth in an irresponsible and conclusory manner. Dozens of pages need not be devoted to show how a reasonless decision was made without attention to dotting its i’s and crossing its t’s. *MythicOne* was not just poorly reasoned—it was not reasoned at all.

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In short, the relatively short history since *MythicOne* was decided, the uncertainty of its relevance in light of our more recent decisions, and the lack of any reasoning in reaching its conclusion all weigh against retaining the decision. These factors convince me that, when the time comes, *MythicOne* should be overturned and cast aside into history.

Daniel & Sheldon—

What do you think?
I feel this case is
a good place to
begin a long-term
assault on Mythic.

How is the opinion?

- John

*Mythic
decided by
any update
will do*