

UNITED STATES
REPORTS

3

MAY TERM 2017

UNITED STATES REPORTS
VOLUME 3

CASES ADJUDGED
IN
THE SUPREME COURT
AT

MAY TERM, 2017

MAY 15, 2016 THROUGH AUGUST 14, 2017

TOGETHER WITH OPINION OF INDIVIDUAL JUSTICE IN CHAMBERS

END OF TERM

ANTONINGSCALIA
REPORTER OF DECISIONS

JUSTICES
OF THE
SUPREME COURT
DURING THE TIME OF THESE REPORTS

KOTWARRIOR, CHIEF JUSTICE.
MRYOSEMITE, ASSOCIATE JUSTICE.
ANIMATEDDANNYO, ASSOCIATE JUSTICE.
SAMUELKING22, ASSOCIATE JUSTICE.
BOB561, ASSOCIATE JUSTICE.
ANTONINGS CALIA, ASSOCIATE JUSTICE.
SUDDENRUSH12G, ASSOCIATE JUSTICE.
SUFFERPOOP, ASSOCIATE JUSTICE.
RYAN_REVAN, ASSOCIATE JUSTICE.

RETIRED

JUSTYOURDAILYNOOB, ASSOCIATE JUSTICE.
KOLIBOB, ASSOCIATE JUSTICE.
MINDY_LAHIRI, ASSOCIATE JUSTICE.
QOLIO, ASSOCIATE JUSTICE.

OFFICERS OF THE COURT

QOLIO, ATTORNEY GENERAL.
KOLIBOB, ATTORNEY GENERAL (retired).
TWITTERED, SOLICITOR GENERAL.

SAM4219, SOLICITOR GENERAL (retired).
ANTONIN SCALIA, REPORTER OF DECISIONS.

CASES ADJUDGED
IN THE
**SUPREME COURT OF THE UNITED
STATES**
AT
MAY TERM, 2017

NORMAN_PAPERMAN, PETITIONER *v.* UNITED
STATES MILITARY

ON BILL OF COMPLAINT

No. 03–01. Decided May 16, 2017

PER CURIAM.

This Court is authorized to “issue all writs necessary or appropriate in aid of [its] . . . jurisdiction.” 28 U. S. C. § 1651(a). Consistent with both its authorization, and this Court’s convention and practice, the case is remanded to the District Court of D. C./Web for initial trial on the merits.

It is so ordered.

Syllabus

**SIGMAHD, PETITIONER v. UNITED STATES
MARSHALS SERVICE****CERTIORARI TO THE UNITED STATES FEDERAL
GOVERNMENT**

No. 03–04. Argued June 4, 2017—Decided June 6, 2017.

Respondent (United States Marshals Service) fired SigmaHD after conducting a background check and finding a uniform belonging to the infamous criminal organization PS–35. SigmaHD informed his employer he bought the uniform in December 2016 to troll and make a political statement regarding the abuses of the law enforcement community at Las Vegas. His explanations were ignored and service with the USMS ended. SigmaHD petitioned for a writ of certiorari to challenge his termination, claiming it was both discriminatory and violated his First Amendment rights.

Held: In order for the Government to terminate somebody for conduct, they must show it “adversely affect[ed] the performance of the employee or applicant or the performance of others,” 5 U. S. C. § 2302(b)(10). P. 3. If the Government cannot do this, then it cannot terminate somebody for conduct done off-duty. Furthermore, the Government cannot discriminate against employees for speech expressed off duty without showing a substantial interest in curbing that expression. Pp. 4–11.

USMS termination, reversed.

ANTONI SCALIA (SCALIA), J., delivered the opinion of the Court, in which MRYOSEMITE (GINSBURG), SAMUEL KING22 (MARSHALL), BOB561 (GORSLUCH), QOLIO (SOTOMAYOR), and SUDDENRUSH12G (ALITO), JJ., joined. KOTWARRIOR (HOLMES), C. J., filed a dissenting opinion, in which ANIMATEDDANNY0 (FRANKFURTER), J., joined. SUFFERPOOP (REHNQUIST), J., took no part in the consideration or decision of the case.

Daniel (pro hac vice) argued the cause for the petitioner.

Deputy Solicitor General Parzal argued the cause for the respondent.

JUSTICE SCALIA delivered the opinion of the Court.

Under Title V of the United States Code, various responsibilities and prohibitions outline the role of Government organization and its employees. The Government as an employer may not discriminate against an employee or applicant “on the basis of conduct which does not adversely affect the performance of the employee or applicant or the

Opinion of the Court

performance of others,” 5 U. S. C. § 2302(b)(10). We must decide whether the ownership of uniforms used by illicit organizations by a government employee is merit for employment termination without violating this section or the petitioner’s First Amendment rights.

I

Respondent, the United States Marshals Service (hereinafter USMS), is a law enforcement agency, see 28 U. S. C. § 37 *et seq.*, whose primary mission is to “provide for the security and to obey, execute, and enforce all orders of the . . . [c]ourts . . . , as provided by law,” § 566(a). The Director of the USMS, Tom Dailey (hereinafter Tom), saw a marked uptick in rogue marshals from the criminal organization PS-35 upon confirmation by the Senate to his position. See Brief in Opposition 1.¹ Consistent with their priority to weed out rogue agents, the USMS conducts reviews through refreshed background checks to ensure loyalty is to the agency and to the United States as a whole.

SigmaHD (hereinafter Sigma) is an American citizen who, for years, has served in various roles throughout the country—most of them involve service in either law enforcement or the military. In December 2016, Sigma purchased a PS-35 uniform off the ROBLOX catalog to “avoid being attacked by [PS-35] and troll [law enforcement] who arres[t] individuals based on clothing and appearance,” App. to Pet. for Cert. B-10. Tom found it to be suspicious, *ibid.*, and ultimately fired him over it. Brief in Opposition 1. Sigma petitioned for a writ of certiorari to review the USMS’s actions and seek reinstatement to his position as a marshal. He claimed his termination violates his First Amendment right to political expression and that his ownership of the uniform in no way affected his job performance, a crucial factor for employment

¹ According to the Director, the leaders of PS-35 claimed they had “many marshals . . . in the USMS.” *Ibid.*

Opinion of the Court

termination to be valid under 5 U. S. C. § 2302(b)(10). We granted certiorari. 3 U. S. ____ (2017).

II

There is no debate as to whether the Government can “condition public employment on a basis that infringes the employee’s constitutionally protected interest in freedom of expression.” *Connick v. Meyers*, 461 U. S. 138, 142 (1983). They cannot. For many years the Court reinforced “the unchallenged dogma . . . that a public employee had no right to object to conditions placed upon the terms of employment—including those which restricted the exercise of constitutional rights.” *Id.*, at 143. And while that principle has been upheld in certain respects, see *id.*, at 144–145, we’ve also impressed that employees do not surrender all of their First Amendment rights by virtue of their employment with the Government; the First Amendment “protects a public employee’s right, in certain circumstances, to speak as a citizen addressing matters of public concern.” *Garcetti v. Ceballos*, 547 U. S. ___, ___ (2006) (slip op., at 5); see also *Pickering v. Board of Education*, 391 U. S. 563, 568 (1968); *Connick, supra*, at 147; *Rankin v. McPherson*, 483 U. S. 378, 384 (1987); *United States v. Treasury Employees*, 513 U. S. 454, 466 (1995). In the case before us today, the issue is whether the ownership and wearing of a criminal organization’s uniform qualifies as expression under the First Amendment, and whether the Government had a substantial interest in curbing that expression. The Court has on numerous occasions affirmed that clothing worn to express a message is indeed speech. See, e.g., *Tinker v. Des Moines Indep. School Dist.*, 393 U. S. 503 (1969); *Cohen v. California*, 403 U. S. 15 (1971).

In *Tinker*, a group of students decided to wear black armbands during the holiday season at school to protest the United States’ involvement in the Vietnam War. The school administration adopted a policy to suspend any student who refused to take off the armband until they complied with the

Opinion of the Court

school. 393 U. S., at 503. Because the students' speech in question was a "silent, passive expression of opinion, unaccompanied by any disorder or disturbance," the speech did not "intrud[e] upon the work of the schools or the rights of other students." *Id.*, at 508. In our system, "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Ibid.* Accordingly, the Court ruled in favor of the students and upheld their protest through wearing of the armbands as protected speech under the First Amendment. *Id.*, at 514.

In similar style to *Tinker*, we dealt with in *Cohen* the question of whether an individual could be imprisoned for wearing a jacket styled plainly with the words "Fuck the Draft" to protest our country's draft policy during the Vietnam War. 403 U. S., at 16. The Court found the California court's decision to uphold Cohen's imprisonment to be based on a rationale reflecting an "undifferentiated fear or apprehension of disturbance [which] is not enough to overcome the right to freedom of expression." *Id.*, at 23 (quoting *Tinker*, 393 U. S., at 508) (internal quotation marks omitted). The *Cohen* Court also expressed the crucial link between the prohibition on speech and the risk of suppression of ideas in the process—such risk is untenable under the First Amendment. *Cohen, supra*, at 26.

A crucial balance emerged through decades of cases to do with weighing the importance of government employee speech against the employer's interest in suppressing it. "The problem in any case," the *Pickering* Court stated, "is to arrive *at a balance* between the interests of the . . . citizen, in commenting upon matters of public concern and the interest of the [Government], as an employer, in promoting the efficiency of the public services it performs through its employees." 391 U. S., at 568 (emphasis added). Furthermore, the Court found because the employee's speech under review in *Pickering* "neither [was] shown nor can be presumed to have in any way

Opinion of the Court

either impeded the . . . proper performance of his daily duties . . . or to have interfered with . . . regular operation,” *id.*, at 572–573 (footnote omitted), the interest of the employer in “limiting . . . opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the public.” *Id.*, at 573.

Thus *Pickering* guides our Court with a two-pronged test to determine whether an employee’s First Amendment rights have been infringed on by their employer. First, there must be a determination as to whether the employee’s speech was spoken as a private citizen on a matter of public concern. See *Garcetti*, 547 U. S., at ___ (slip op., at 6) (citing *Pickering*, 391 U. S., at 568). If the answer to the first prong is no, then “the employee has no First Amendment cause of action based on his or her employee’s reaction to the speech.” *Garcetti, supra*, at ___ (slip op., at 6). See also *Connick*, 461 U. S., at 147. If the answer is yes, then there is ground for a First Amendment claim to be valid. The question then becomes whether the Government employer had an adequate justification in treating the employee differently from a normal citizen. See *Pickering, supra*, at 568. This “consideration reflects the importance of the relationship between the speaker’s expressions and employment.” *Garcetti, supra*, at ___ (slip op., at 6). If the Government cannot show that its restriction is directed at speech that has potential to adversely affect the entity’s operations, then that restriction cannot stand muster under 5 U. S. C. § 2302(b)(10). But not all speech is protected speech; this has been a constant throughout our jurisprudence covering a large variety of First Amendment cases. When citizens enter Government service, it is necessary for them to accept certain limitations on their freedom. See, e.g., *Waters v. Churchill*, 511 U. S. 661, 671 (1994) (plurality opinion) (“[T]he Government as employer indeed has far broader powers than does the Government as sovereign.”). Like private employers, government employers need a “significant

Opinion of the Court

degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services." *Garcetti*, 547 U. S., at ___ (slip op., at 7).²

Despite this reality, citizens working for the Government are still citizens. The First Amendment protects an employee's status with the Government from being leveraged to "restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens." *Ibid.*; see also *Perry v. Sindermann*, 408 U. S. 593, 597 (1972). This protects employees from being punished for speech about matters of public concern given as private citizens; only restrictions necessary for the employers and their entities to operate effectively are constitutionally sound. See *Connick*, 461 U. S., at 147 ("Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government"). Before we can apply the *Pickering* test, we first must decide whether Sigma's ownership and wearing of the uniform as a private citizen qualifies as expressive conduct.

III

To invoke the First Amendment in challenging one's termination, an employee must show that their conduct was expressive. See, e.g., *Spence v. Washington*, 418 U. S. 405, 409–411 (1974); *Texas v. Johnson*, 491 U. S. 397, 403 (1989). If his or her conduct was indeed expressive, then we may apply the *Pickering* test.

The First Amendment, see Amdt. 1, "literally forbids the abridgement only of 'speech,' but we have long recognized that its protection does not end at the spoken or written word." *Johnson*, 491 U. S., at 404. Though our jurisprudence has consistently rejected the idea that an "apparently limitless variety," *United States v. O'Brien*, 391 U. S. 367, 376 (1968), of

² Cf. *Connick*, 461 U. S., at 143 ("[G]overnment offices could not function if every employment decision became a constitutional matter.").

Opinion of the Court

conduct is “speech” under the First Amendment simply because the person engaging in the conduct intends to express any kind of idea. However, conduct may be “sufficiently imbued with elements of communication to fall within the scope” of the First Amendment. *Spence, supra*, at 409. To decide if conduct possesses “communicative elements,” *Johnson, supra*, at 404, required to qualify as speech protected by the First Amendment, we ask whether “[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.” *Spence, supra*, at 410–411. Under this jurisprudence, we have recognized that the wearing of black armbands in protest of the Vietnam war, *Tinker*, 393 U. S., at 505; a sit-in by African Americans in a “whites only” area to protest segregation, *Brown v. Louisiana*, 383 U. S. 131, 141–142 (1966); the wearing of military uniforms to criticize American involvement in Vietnam, *Schacht v. United States*, 398 U. S. 58 (1970); and of picketing about a wide variety of causes, see, e.g., *Food Employees v. Logan Valley Plaza, Inc.*, 391 U. S. 308, 313–314 (1968); *United States v. Grace*, 461 U. S. 171, 176 (1983) all qualify as expressive speech protected under the First Amendment.

The Government moreover has a “freer hand in restricting expressive conduct than it has in restricting the written or spoken word.” *Johnson*, 491 U. S., at 406. See also *O’Brien, supra*, at 376–377; *Clarke v. Community for Creative Non-Violence*, 468 U. S. 288, 293 (1984); *Dallas v. Stanglin*, 490 U. S. 19, 25 (1989). However, it cannot ban certain conduct *because* of its expressive nature. “[W]hat might be termed the more generalized guarantee of freedom of expression makes the communicative nature of conduct an inadequate basis for singling out that conduct for proscription.” *Community for Creative Non-Violence v. Watt*, 227 U. S. App. D. C. 19, 55–56, 703 F. 2d 586, 622–623 (1983) (Scalia, J., dissenting) (emphasis in original), rev’d *sub nom. Clarke v. Community for Non-*

Opinion of the Court

Violence, supra. Simply put, it is the government interest at stake that determines whether the restriction or punishment on that expression is valid. *Johnson, supra*, at 406–407.

Sigma bought and wore the PS-35 uniform with an intent to highlight abuses within the law enforcement community.³ He believes the ownership of the clothing on its own constitutes a form of expression akin to wearing it. We agree insofar as to say the reality is owning items like a PS-35 uniform can stand alone to express a message. The question is whether a *reasonable* person would understand the message itself. We believe they would. The organization PS-35 made a mark for itself in our country; its name and history are well-known and ill-taken by the populace at large. Furthermore, it is an all-to-often reality that citizens experience abuses by law enforcement officers at Las Vegas. The expression of protesting this conduct—in whatever form it may take—is undoubtedly easy to understand by the general populace: by *reasonable* Americans. With it decided that his conduct was expressive, “it does not necessarily follow” that it is “constitutionally protected activity.” *O’Brien*, 391 U. S., at 376. We consider now whether the Government had a justified interest in terminating Sigma for this expression.

IV

The Court over the years has used “employed a variety of descriptive terms.” *Ibid.* Terms like “compelling,” *NAACP v. Button*, 371 U. S. 415, 438 (1693); see also *Sherbert v. Verner*, 374 U. S. 398, 403 (1963), “substantial,” *NAACP*, 371 U. S., at 444; *NAACP v. Alabama ex rel. Patterson*, 357 U. S. 449, 464 (1958), “subordinating,” *Bates v. Little Rock*, 361 U. S. 516, 524 (1960), “paramount,” *Thomas v. Collins*, 323 U. S. 516, 530 (1945); see also *Sherbert, supra*, at 406, “cogent,” *Bates, supra*,

³ Petitioner’s counsel argued the uniform was bought to “expres[s] his political ideology that individuals should not be arrested based on what they wear.” Tr. of Oral Arg. 3.

Opinion of the Court

at 524, and “strong,” *Sherbert, supra*, at 408. Regardless the meaning of these terms, *O’Brien* provides a framework for us to decide if the Government had a justified interest in terminating Sigma. Under *O’Brien*:

“[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial government interest; if the government interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.” 391 U. S., at 377.

The issue with the Government’s position is that it failed to argue in any form whatsoever how regulating Sigma’s expression furthered a state interest. We cannot insert reasoning for the USMS, and thus are bound by the argument they presented to the Court—they argued it was justified because to them ownership of the uniform constitutes membership of the gang. See Brief in Opposition 1; see also Tr. of Oral Arg. 6–7 (“it may be the only way to tell.”). We reject this view completely.

There is no construction we can support that says ownership of the uniform is sufficient evidence to believe one is a member of a criminal organization. Given the nature of ROBLOX’s catalogue, anyone and everyone can buy clothing at their leisure in a relatively easy fashion. Without a doubt, one could sift through the inventories of many, many Americans ranging from citizen all the way to President of the United States and find articles of clothing which are facially eyebrow-raising. However, the appropriate response, especially for a law enforcement agency like the USMS, would be to investigate further: not to carry out a final action. We cannot find a substantial Government interest in terminating Sigma’s employment within the USMS, and find the Government infringed on his First Amendment right to free expression.

HOLMES, C. J., dissenting

V

One could argue the wearing of this uniform while on duty would be merit for termination. They would be correct; agencies are free to regulate *within reason* the clothes their employees wear *on duty*. But Sigma's conduct was not done while on duty. It was carried out as a private citizen, and without a showing that it "adversely affect[ed] the performance of the employee or applicant or the performance of others," 5 U. S. C. § 2302(b)(10), the Government has no cause to terminate his employment. Respondent failed to show effectively how it adversely affected his performance, and thus the termination under § 2302(b)(10) fails the constitutional sniff test.

* * *

We do not dispute the Government has interest in weeding out rogue agents in the law enforcement community. We simply require that interest be substantiated by a process that is rigid and thorough—in this case, it was neither. Accordingly, petitioner's termination is

Reversed.

CHIEF JUSTICE HOLMES, with whom JUSTICE FRANKFURTER joins, dissenting.

Eleven years ago, this Court affirmed the long-standing rule that disagreements between the government and its employees should not be unnecessarily "constitutionalize[d]." *Garcetti v. Ceballos*, 547 U. S. 410, 420 (2006) (quoting *Connick v. Myers*, 461 U. S. 138, 154 (1983)). Today—in spite of that rule—it does just that. The majority stakes its decision on two separate assertions. First, that Sigma's termination from the United States Marshals Service runs afoul of federal antidiscrimination laws. See *ante*, at 2. And second—despite having already (incorrectly) resolved the case on statutory grounds—the majority says that by terminating his

HOLMES, C. J., dissenting

employment, the government “infringed on his First Amendment right to free expression.” *Ante*, at 10.

I

On May 30, 2017, SigmaHD lost his job at the United States Marshals Service following an internal review ordered by the Director. The review followed numerous rogue incidents within the agency. Because many of the agents who had gone rogue were later identified as “PS-35s” (members of the notorious crime organization, PS-35), the review was aimed at identifying any potential links the agency’s remaining employees may have had with the organization. Brief in Opposition 1. Both parties agree that this was an appropriate response to the incidents. The point of disagreement, however, is on whether the petitioner’s identification as a potential member of the organization, and subsequent termination, was lawful.

II

Federal antidiscrimination laws prohibit the government from “discriminat[ing] for or against any employee . . . on the basis of conduct which does not adversely affect the performance of the employee . . . or the performance of others.” 5 U. S. C. §2302(b)(10). This, the majority says, means that the government cannot even *consider* conduct unrelated to job performance when it makes a personnel decision. This reading, as I will explain, is foreclosed by the text of the law. More troubling, though, is the majority’s conclusion that the ownership of a criminal organization’s uniform by a law enforcement officer doesn’t affect their job performance *at all*.

A

Congress’ purpose in enacting 5 U. S. C. § 2302(b)(10) was to “nullif[y] . . . the doctrine” of at-will employment. *Engquist v. Oregon Dept. of Agriculture*, 553 U. S. 591, 614 (2008) (Stevens, J., dissenting). It sought to do this by requiring that a personnel action taken by the government be sufficiently

HOLMES, C. J., dissenting

grounded in some legitimate system of merit (barring discrimination based on conduct unrelated to job performance). And, that the government have a “rational basis” for taking action against one of its employees. *Ibid.* Before the statute, this wasn’t necessarily the case. The government had long operated under the theory that a person had no constitutional right to work for the government, and therefore could be fired for any reason, even on a basis which would infringe upon their exercise of constitutional rights. See *Adler v. Board of Education*, 342 U. S. 485, 492 (1952). And although that understanding of the Constitution has long since been extinct, see, e. g., *Connick, supra*, at 142 (concluding that public employment may not be conditioned on “a basis that infringes upon the employee’s constitutionally protected interest in freedom of expression.”), the statute has remained.

On its face, there seems to be no connection between the ownership of an article of clothing and the performance of law enforcement functions. The majority ended its review there. Noting that the petitioner did not wear the uniform “on duty”, they concluded that it therefore had no connection to the performance of his duties. *Ante*, at 8. There are, however, several other factors to consider here. The majority, first of all, elected to substitute the basis presented by the government for the petitioner’s termination, that being the suspicion that he was affiliated with the PS-35 gang, see Tr. of Oral Arg. 7, with its own: That he was fired for his mere ownership of an article of clothing. The statute doesn’t ask this Court to look beyond the basis presented by the government. Our job is to merely determine if that basis actually relates to the “performance of the employee.” 5 U. S. C. § 2302(b)(10). Given context, it does. Because, despite the majority’s desire to avoid this truth, an active criminal organization’s uniform is not a mere “article of clothing” the petitioner happened to own. See *ante*, at 8. A uniform is “the distinctive clothing worn by members of the same organization.” Oxford Dictionary (2017). Perhaps

HOLMES, C. J., dissenting

realizing there is indeed a bona fide cause for concern with a law enforcement officer owning a criminal organization's uniform, the majority once again substitutes the judgment of the government for its own, saying its preferred course of action would've been a suspension and investigation as opposed to a termination. See *ante*, at 8. How the majority found a mandate for all that in the simple text of 5 U. S. C. § 2302(b)(10) evades me.

When the majority acknowledged that there was a genuine basis for the government to be concerned about potential criminality, they should've accepted the decision as valid under the statute. There is no demand for investigation or anything else they offered as an alternative within its texts.

B

Although the termination should've been sustained under the majority's reading of 5 U. S. C. § 2302(b)(10), it's worth pointing out that their reading is incorrect. At its core, the provision is a prohibition on *discrimination*. It provides that the government may not "discriminate for or against any employee ... on the basis of conduct which does not adversely affect the performance of the employee ... or the performance of others." *Ibid.* (emphasis added). The majority reads the provision as an absolute prohibition on basing a personnel action on "conduct which does not adversely affect the performance of the employee ... or the performance of others." This would've been a potentially justifiable reading of the statute had it not actually made several, direct absolute prohibitions. In cases where the statute makes an absolute prohibition, it plainly says the government may not "take, or fail to take" a certain "personnel action." 5 U. S. C. § 2302(b)(9). As we know, when Congress "uses particular language in one section of a statute but omits it in another", it "generally acts intentionally." *Department of Homeland Security v. MacLean*, 574 U. S. ___, ___ (2015) (slip op., at 7) (citing

HOLMES, C. J., dissenting

Russello v. United States, 464 U. S. 16, 23 (1983)). Therefore, Congress, when it decided to use “discriminate” as opposed to “take, or fail to take”, it didn’t intend to create an absolute prohibition. Instead, as the language provides, it is a ban on *discrimination*.

Absent a statutory definition of discrimination, we assume lawmakers use words in “their natural and ordinary signification.” *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U. S. 1, 12 (1878). In general, discrimination means “unfair treatment or denial of normal privileges to persons.” Black’s Law Dictionary 467 (6th ed. 1990). In this case, therefore, the statute proscribes “unfair treatment” “on the basis of conduct which does not adversely affect the performance of the employee . . . or the performance of others.”

If we accept the majority’s finding (assumption) that the petitioner’s ownership of the PS-35 uniform does not affect his job performance, then the only question left is: Was it completely unfair of the USMS to assume that because he owned a PS-35 uniform, he may have been previously (or still was) affiliated with the organization? That, as I’m sure everyone will agree, is not an unfair assumption to make, and so the decision to fire him based on that assumption was valid under 5 U. S. C. § 2302(b)(10).

III

Although the majority concluded that the determination was improper under 5 U. S. C. § 2302(b)(10), it proceeded to consider the First Amendment claims raised by the petitioner even though they would not be outcome determinative. To justify this foray into the unnecessary, the Court explains that the petitioner had purchased the uniform months earlier to “highlight abuses within the law enforcement community.” *Ante*, at 6. This, they explain, was a form of protest, and that protest was constitutionally-protected speech. The majority’s conclusion that the decision to terminate the petitioner’s

HOLMES, C. J., dissenting

employment violated the First Amendment does not immediately follow from that finding. If, indeed, the petitioner had been fired *exclusively* because he had engaged in that protest and the government didn't have a "justified interest", *ante*, at 7, in terminating him because of that conduct then yes, it would run contrary to the First Amendment. But the majority conveniently ignores three important things: The petitioner did not prove (and yes, the onus is on him) that he purchased the uniform for, and actually engaged in, that protest; the government did not even know about this supposed protest, and therefore did not fire him on that basis; and finally, the government does indeed have a justified interest in deterring rogues.

Absent clear and convincing evidence to the contrary, a court should accept a facially legitimate reason for termination presented by the government. If that was not the rule, courts would expect the government to prove that the alternative theory proposed by the former employee is incorrect, and as we know, it is in most cases very difficult—if not impossible—to prove a negative. See *Zeyad567 v. SteffJonez*, 2 U. S. 70, 74 (2017) (opinion of HOLMES, C. J.) (citing *Smith v. United States*, 568 U. S. ___, ___ (2013) (slip op., at 7), in turn citing 9 J. Wigmore, Evidence §2486, p. 288 (J. Chadbourne rev. 1981)). Proper respect for a co-ordinate branch demands as much.

Here, the petitioner has offered no evidence to dispute the government's position that he was fired based on the suspicion that he was affiliated with PS-35. Furthermore, he has not adequately demonstrated *his own claim* that he was fired for participating in a protest, which he also says happened months before he was ever hired (he also did not demonstrate that he ever told the Service about his "protest"). Indeed, it is not sufficient for him to merely disprove the basis provided by the government (and he has not done that either) to seek relief under the First Amendment. He must prove—beyond a preponderance of evidence—that his public employment was

HOLMES, C. J., dissenting

actually conditioned on “a basis that infringes upon [his] constitutionally protected interest in freedom of expression.” *Connick*, 461 U. S., at 142. Where the government’s presented reason deals with public safety or national security, there is no room for doubt in holding to the contrary.

* * *

The majority certainly relies on quite a bit of precedent to reach their decision. What they fail to do, however, is consider the situation logically. Presented with the government’s basis for terminating the petitioner’s employment—that being its reasonable suspicion that he could be affiliated with the PS-35 organization—the majority decides that because the government arrived at that suspicion based on him owning its uniform, they could be potentially interfering with his right to free expression. They bolster that position by claiming (without evidence) that he only purchased and wore the uniform to protest injustices by law enforcement.

What the majority forgets is that we are not considering this issue *de novo*. We are not here to say whether we personally would’ve fired him, we’re here to say whether the law precludes the government from making the reasonable assumption that it did. Simply put: it does not. Because the majority’s decision here fails the logical “sniff test”, *ante*, at 11, I respectfully dissent.

Per Curiam

IDIOTIC_LEADER, ET AL., PETITIONERS *v.* CITY OF
LAS VEGAS

CERTIORARI TO THE MUNICIPAL GOVERNMENT OF LAS VEGAS

No. 03-05. Decided July 4, 2017.

PER CURIAM.

We held in *United States v. City of Las Vegas*, 2 U. S. 24 (2017) that a city government has no power to “pass laws” absent statutory or constitutional authority to that effect. *Id.*, at 29. And subsequently, in *Ryan_Revan v. United States*, 2 U. S. 34 (2017), we concluded that Congress could not make any explicit grant of that legislative power to the city councils. See *id.*, at 39. Nonetheless, the Las Vegas City Council enacted the Business Limits Act (BLA). This case concerns the constitutionality of that bill.

I

The BLA was passed unanimously by the Las Vegas City Council on March 21, 2017, and the Mayor signed it into effect the following day. It prohibits a person from holding a position of leadership (the four highest ranks) “in more than [two] businesses *approved to operate in Las Vegas.*” § 2(a) (emphasis added). In the event that a person is found to be in violation of that rule, the bill provides that they “shall be notified by the Las Vegas City Council” of that violation and then must either “resign”, or be “dismissed by their superiors.” *Ibid.* To ensure compliance with these rules, it provides that a business which does not comply runs the risk of their city team being “removed by the City Council.” § 2(c).

The petitioner, Idiotic_Leader, is Vice President of both the Las Vegas Taxi Service, and Koala Café. The Taxi Service is currently implemented into Las Vegas and the Koala Café was approved by the city council but has not yet been implemented. Because he held one of the four highest ranks in two businesses “approved to operate in Las Vegas”, he was in violation of the

Per Curiam

BLA. He filed suit to prevent the city council from enforcing the regulation against him or his affiliated businesses.

II

City councils derive their authority from two distinct sources. First, from the Federal Infrastructure Reform Act (FIRA), which assigns them certain regulatory duties, and second, their inherent development powers. We now turn to the first.

A

FIRA was passed by Congress in response to our decision in *Ryan_Revan*. In that case, we overturned the Home Rule Act on the basis that it violated the doctrine of nondelegation. That law broadly granted city governments the power to “enact laws” on three subjects: “[T]raffic and road safety”; “possession or use of [drugs]”; and the “possession or use of firearms.” § 2. Perhaps learning from our decision, Congress chose to limit its grants of authority to the cities to the performance of specific regulatory functions, as opposed to the fulfilment broad, legislative mandates.

As relevant, Title I of FIRA empowers city councils to “issue city licenses to businesses”, which allow them to operate within that city (without a federal license) and employ “up to forty workers”. § 104(b). If a business wishes to employ more than forty people, it must secure a federal license, which is issued by the Department of Commerce and Labor. FIRA also allows the city councils to “prescribe such regulations as are necessary to carry out their functions under” Title I. § 106. The issuance of city licenses to businesses under section 104 is undoubtedly one of the functions referred to in section 106. The question then is whether the BLA was a permissible exercise of section 106 authority.

Per Curiam

institutions on what is “necessary” to the fulfillment of their duties. For example, with respect to Congress’ authority under the Necessary and Proper Clause, we said: “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.” *McCulloch v. Maryland*, 4 Wheat. 316, 421 (1819). That deference is due because “members of this Court … possess neither the expertise nor the prerogative to make policy judgments.” National Federation of Independent Business v. Sebelius, 567 U. S. ___, ___ (2012) (slip op., at 6) (opinion of Roberts, C. J.). For those reasons, we will presume—for the purposes with which we are concerned—that the city council’s judgment that the regulation was “necessary” is correct unless it is facially illegitimate.

The Las Vegas City Council was not discrete with its reasoning for the passing of the BLA. In fact, it dedicated an entire section of the regulation to explaining its purpose in enacting it. It begins by saying that it is “well known” that “certain persons are in charge of many businesses by being Presidents of other high ranks.” § 3. It continues, that the situation presents a “major issue within Las Vegas” because “[o]ne player” should not control “the entire business sector.” *Ibid.* Therefore, the council concludes, the bill is “necessary” to “create more variety and have different people lead the [private] sector.” *Ibid.* On its face, this is a justified basis for a few reasons. First, the regulation is aimed at promoting a competitive (and diverse) private sector. The Federal Infrastructure Reform Act itself states that “reform[ing] the private sector” is one of its principle goals. Promoting competition and diversity within the private sector is in furtherance of that goal. And second, the council also expresses its belief that absent the regulation, new investors and entrepreneurs will have a difficult time getting their

Per Curiam

“businesses approved.” *Ibid.* This is directly related to the licensing duties performed by the council under section 104.

2

In most cases, where there is a statutory ambiguity which concerns the scope of a regulator’s authority to regulate, its interpretation of that authority deserves deference under *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984). This deference is premised on a general understanding that when Congress leaves “ambiguity in a statute” which is administered by a regulator, it expects that “the ambiguity [will] be resolved” by the regulator, “rather than [by] the courts.” *Smiley v. Citibank (South Dakota)*, N. A., 517 U. S. 735, 740–741 (1996). What this presumption (Chevron deference) does is it allows Congress to easily determine what level of discretion will be left to a regulator. “Congress knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion.” *Arlington v. FCC*, 569 U. S. ___, ___ (2013) (slip op., at 5). In this case, Congress has done the former.

Section 104 is very clear with its meaning: City governments will have the ability to license small businesses. When acting in that capacity, section 106 permits them to make regulations governing that process, and setting requirements for eligibility and the like. What the BLA does cannot be said to fall within that authority because it goes well beyond the act of granting a license. Instead, it makes rules which it says all businesses approved to operate in Las Vegas (importantly not making a distinction between federally licensed and city licensed businesses) must abide by. That has the makings of a law more so than it does a regulation. For those reasons, the BLA cannot be construed to be a proper exercise of the city council’s regulatory power under FIRA. Next, we turn to its constitutional development power.

Per Curiam

B

The Constitution reserves to the developers—and the Founder—full control over “development work.” U. S. Const. art. I, § 1. This reservation applies to all powers associated with development (such as creation of cities, making updates, adjusting teams, etc.), but also preserves the traditional role of developers in our society.¹ The developers delegated certain development-related functions to the various city councils. This power is referred to as the “development power.” *Supra*, at ___ (slip op., at 2). Each city has a city council which wields the “development power”, and each is constituted at the pleasure of the city’s sitting developers, and the Founder. The development power, possessed by the cities, is similar in many respects, to the spending power possessed by Congress (in real life).

In real life, Congress serves a much narrower purpose than it does here. It is, of course, the national legislature, but is one of many such institutions which possesses the legislative power. In real life, there are 50 sovereign states, each with its own legislature. There, Congress legislates under roughly 20 enumerated powers, which follow—

“To lay and collect Taxes, Duties, Imposts and Excises,
to pay the Debts and provide for the common Defence

¹ In reality, article 1, section 1, which vests in Congress “all legislative powers”, does not actually grant any authority to the developers. It merely excepts “development work which requires the developers or Founder” from the powers granted to Congress. This has the effect of merely preserving the traditional role of the developers, and does not grant any new, free-standing powers. For example, the developers—as the clause specifically denotes—are responsible for “development work” (namely, as mentioned, creating and updating cities), but they also traditionally are responsible for, among other things, administering the federal Presidential elections. See *Isner v. Federal Elections Commission*, 3 U. S. 88 89 (2017) (SCALIA, J., statement respecting denial of certiorari) (explaining that the “Federal Elections Commission”—which administers Presidential elections—is “governed by the Clan Managers.”)

Per Curiam

and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States; To borrow Money on the credit of the United States; To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States; To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures; To provide for the Punishment of counterfeiting the Securities and current Coin of the United States; To establish Post Offices and post Roads; To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries; To constitute Tribunals inferior to the supreme Court; To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations; To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water; To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years; To provide and maintain a Navy; To make Rules for the Government and Regulation of the land and naval Forces; To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress; To exercise exclusive

Per Curiam

Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings; And To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." Art. I, § 8 (real).

The first of those clauses, which provides Congress with the authority "to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States", U. S. Const. art. I, § 8, cl. 1 (real), is referred to as the Taxing and Spending Clause. The Taxing and Spending Clause is utilized by Congress to enact programs which often go beyond its own authority. It does this by incentivizing states to implement the program on its behalf using its spending power. Similarly, the city councils (here) may incentivize private institutions to comply with rules it sets through its development power. However, because the city councils have no power to "pass laws" with the effect of those rules, *City of Las Vegas*, 2 U. S., at 39, similar to Spending Clause legislation, these offers by the city, if accepted, should be "characterized . . . as 'much in the nature of a contract.'" *Barnes v. Gorman*, 536 U. S. 181, 186 (2002) (quoting *Pennhurst State School and Hospital v. Halderman*, 451 U. S. 1, 17 (1981)) (emphasis deleted). The legitimacy, then, of that exercise of development power rests upon whether the private institution "voluntarily and knowingly accepts the terms of the 'contract'" offered by the city council. *Pennhurst*,

Per Curiam

supra, at 17. The application of undue pressure, therefore, would reduce the decision by a private institution to accept those terms from “voluntary” and “knowing” to mandatory and enforced (much like a law). Accordingly, we should scrutinize development power legislation to be sure that the city councils do not use development decisions to exert a “power akin to undue influence.” *Steward Machine Co. v. Davis*, 301 U. S. 548, 590 (1937). And certainly, city councils do possess the authority to apply some pressure, but where “pressure turns to compulsion”, *ibid.*, we must intervene. We now consider whether the BLA applies undue pressure—through its use of development power—upon private institutions (or persons) to give it the effect of a law.

1

The first criterion we should look to in cases such as these is what the rule actually asks of a private institution. In this case, it ‘asks’ them to enforce a ban on an individual holding high ranks in multiple businesses. This, aside from being strikingly similar to federal *laws* from the past barring employment in greater than some number of agencies, doesn’t just ask a business to slightly change a policy it has, or modify its structure, or anything like that: It **deputizes** the businesses to enforce a limitation it places on individuals, who are not parties to the “contract”. That certainly has the makings of a law.

A law is “a rule . . . prescribed by the . . . state to its subjects, for regulating their actions.” N. Webster, An American Dictionary of the English Language (1828). A law comes in one (or as a mix) of three general forms: “imperative” (commanding what shall be done), “prohibitory” (restraining certain actions), or “permissive” (declaring what may be done without recourse). *Ibid.* The regulation laid down by the city council is a mix of the first and second variety: imperative and prohibitory. It commands the businesses to enforce the prohibition it places upon individuals. For those reasons, the

Per Curiam

BLA has the makings of a law and is subject to review under the second criterion.

2

As we have already established, a city council may not leverage its development power to impose “undue pressure”, *supra*, at ___ (slip op., at 8), on a private institution (or person)² to bring them into compliance with a regulation or program it has enacted. The decision to accept the “contract”, *ibid.*, must be made by the private institution “voluntarily and knowingly”, *ibid.*, and through their “unfettered will.” *Steward Machine*, *supra*, at 590. This should not be taken to mean that a city cannot apply some pressure to a private institution. Indeed, it can. It could, for example, condition continued access to a tool, or vehicle on compliance. In this case, however, it goes quite a few steps further than that.

Here, the city council threatens that a noncompliant business runs the risk of their team being removed from the city. See *supra*, at ___ (slip op., at 1). A city team is perhaps the most valuable asset a private institution may have access to. To threaten revocation of a city team is to essentially leave them with no choice but to either comply with the regulation or close down. Truly, that is no choice at all.

* * *

The Business Limits Act is not a valid exercise of section 106 authority under the Federal Infrastructure Reform Act because it goes beyond the issuance of city small business licenses (which the council’s do not have statutory authority to revoke) and enters the realm of their actual operation. That being said, the Business Limits Act is not a proper exercise of the Las Vegas City Council’s development power, either.

A city council has the authority to offer benefits or special

² And they may not apply any pressure at all in the case of a federal institution (agency, department, or branch).

Per Curiam

features to private institutions and require compliance with certain terms as a precondition. They may even, within reason, apply pressure to secure that compliance. They may not, however, apply so much pressure that there is no real choice available to the private institution. To hold otherwise would be to acknowledge an inherent authority to make laws possessed by the city councils, which we have already resolved does not exist. See *City of Las Vegas*, 2 U. S., at 39.

For the reasons here stated, we hold the Business Limits Act invalid in its entirety.

It is so ordered.

Syllabus

MYTHICONE, PETITIONER *v.* NATIONAL SECURITY AGENCY, ET AL.

CERTIORARI TO THE UNITED STATES FEDERAL GOVERNMENT

No. 03–06. Argued July 5, 2017—Decided August 2, 2017.

The Revised Open Carry Act (ROCA), as written, prohibits the open carrying of firearms in a threatening manner. See ROCA §II(a)(1). Petitioner, MythicOne, was arrested by Respondent, National Security Agency, for violation of the Act. Petitioner alleges both the arrest and the law violate the Second Amendment and filed suit with this Court requesting a writ of certiorari to the United States Government to review the actions taken by the National Security Agency.

Held: The Revised Open Carry Act, and arrests made pursuant to it, are not in violation of the Second Amendment. The Act puts in place reasonable limits, pursuant to the Court’s decision in *District of Columbia v. Heller*, 554 U. S. 570 that the Second Amendment protects a right to bear arms, but not an unlimited right to bear arms in any manner.

Arrest of MythicOne and ROCA, affirmed.

RYAN REVAN (SUTHERLAND), J., delivered the opinion of the Court, in which GINSBURG, FRANKFURTER, GORSUCH, and REHNQUIST, JJ., joined. SCALIA, J., filed a dissenting opinion, in which HOLMES, C. J., and MARSHALL and ALITO, JJ., joined. HOLMES, C. J., filed a dissenting opinion, in which MARSHALL and SCALIA, JJ., joined.

Twittered argued the cause for the petitioner.

Solicitor General Sam4219 argued the cause for the respondent.

JUSTICE SUTHERLAND delivered the opinion of the Court.

The Revised Open Carry Act (ROCA) prohibits the open carry of firearms by citizens. The question presented by Petitioner MythicOne is whether either the Act or the arrest made pursuant to it constitutes a violation of the Second Amendment.

A simple retelling of the context in which this case occurred is necessary to understand the conclusion reached. The United States Congress in November 2016 passed the Revised Open Carry Act. Open carry in the United States has been a contentious issue in recent history. Three laws exist on the

Opinion of the Court

Congressional Record regarding it; the Revised Open Carry Act which prohibits it and was introduced and passed in November 2016, the Repeal Open Carry Act which repealed the Open Carry Act was introduced and passed in August 2015, and the Open Carry Act which allowed it was introduced and passed in July 2015.

This debate, until now, has been held almost exclusively in the legislative and wider political arena. *Caxk v. Open Carry* was denied certiorari in June 2016 due to lack of standing. *Ichigo5Kurosaki v. Las Vegas Open Carry Rule* was similarly denied certiorari in November 2015 due to a lack of proper case formatting. The Courts have widely allowed the political process to decide this question until now.

Thus, the debate reached its penultimate stage with the filing of this case. Mythic was arrested by an agent of the Agency for being in violation of the Act, and filed suit under a claim that both the Act and the arrest made pursuant to it constituted violation of the Second Amendment. Respondent, represented by Sam4219, as the Counsel of Record, filed a merits brief arguing “because of the nature of this game,” ROBLOX is unable to preserve open carry. Oral argument was filed in the Court’s record on July 6th.

I

The arrest, as performed, was constitutional. The defendant was repeatedly informed by both the arresting officer and a bystander that there was no robbery, and that the vault was glitched. Petitioner’s Exhibit A, at 3:40 and 3:43. Petitioner refused to holster his weapon after this was told to him “based on his belief it would be necessary for imminent defensive action.” This belief, when contrasted with the information provided to Petitioner by the arresting officer and bystander, is hard if not impossible to uphold rationally.

It is difficult to believe that an officer’s priority, if there was an armed robbery commencing, would be to take issue with a citizen’s open carry of his firearm. There were three law

Opinion of the Court

enforcement officers and one bank security officer in the immediate vicinity of the bank. Petitioner's Exhibit A, 3:43. The petitioner's belief that they were in imminent danger, when put into the light of the situation they were in, is not rationally defensible.

Even so, the Court does not extend Second Amendment protections merely to those who believe they are in danger. The wider question put to the Court is whether the arrest would have been viable in any circumstance, danger or no danger. To evaluate whether there is a constitutional protection of open carry in ROBLOX requires a decision on what manners are permissible in ROBLOX to use a firearm. As was decided in this Court prior, "... the right is not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *District of Columbia v. Heller*, 554 U. S. 570, 626 (2008).

To decide how far Second Amendment protections extend, one must analyze the manner in which firearms are used in both Las Vegas and the District of Columbia. In both of these places, "open carry" is defined as the equipping of a weapon from one's personal inventory. When a weapon is equipped and therefore being openly carried, it can be fired instantaneously. These weapons are capable of firing at, and potentially killing, any person in a 360-degree line of sight from the person holding the firearm. In real life, the open carry of a firearm is protected under the Second Amendment. However, if you were to aim your firearm at another person and turn the safety off, depending on your jurisdiction you would be arrested for either assault or threatening behavior.

It is this conclusion that is detrimental to the argument of Petitioner that "a handgun being pointed outwardly does not create any threat." Tr. of Oral Arg. 3–6. Openly carrying your firearm in ROBLOX—even with no ill intent—is just as dangerous as behavior that is in real life not protected by the Second Amendment. The result is the same in that you are able

Opinion of the Court

to immediately kill or seriously harm an individual.

II

The secondary argument presented by the petitioner is a belief the Act “infringes upon his core Second Amendment right to self-defense of the home and person.” Pet. for Cert. 3-5. However, a reading of the Act displays protections for certain manners of open carry. For example, “anyone who uses open carry illegally to put a law enforcement agent or officer at risk may be detained and arrested without warning.” Revised Open Carry Act (2017), Section IV. The use of the word illegally is a clear implication that is a legal manner of open carry, which is expanded upon in an earlier section; “Open carry shall be recognized as a life-endangering threat and when used illegally using any sort of weapon in a protective way against it shall be deemed legal.”

This application is in obeisance to the Second Amendment’s guarantee of the ability to be “ready for offensive or defensive action in a case of conflict with another person.” *Heller, supra*, at 584. If a person is threatened, then they can near instantaneously equip their weapon and fire it. There is no semblance of aiming except moving a mouse pointer, and there is no safety to turn off.

The Act creates clear exemptions for individuals who are exercising their Second Amendment right to self-defense, and does not impede their ability to exercise that right. If a person could visibly see a person with a weapon out, or assuredly know that one exists, then they could openly carry their firearm and be exempted from the law’s provisions. That is not what occurred in the Petitioner’s situation, and as such he was arrested under the terms of the act. A belief, no matter sincerely held, does not override the Government’s interest in public safety unless such belief is grounded in rational fact.

* * *

The different circumstances in ROBLOX compared to real

SCALIA, J., dissenting

life necessitate changing applications of constitutional principles. Respondent's application of laws in the interest of public safety is constitutional. The Revised Open Carry Act is
Affirmed.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE, JUSTICE MARSHALL, and JUSTICE ALITO, join, dissenting.

I write mostly to call attention to this Court's dangerous disregard for *stare decisis*, for “[l]iberty finds no refuge in a jurisprudence of doubt.” *Lawrence v. Texas*, 539 U. S. 558, 586 (2003) (Scalia, J., dissenting) (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U. S. 833, 844 (1992)). Today's decision casts aside the holdings of our Court less than just one decade ago in *District of Columbia v. Heller*, 554 U. S. 570, 635–636 (2008) (the Second Amendment protects an individual right to keep and bear arms for the purpose of self-defense) and *McDonald v. City of Chicago*, 561 U. S. 742, 791 (2010) (the Second Amendment, being a “fundamental” right, is incorporated to the States through the Fourteenth Amendment). Make no mistake: my Court's decision today is not merely legal wish-wash. My Court's decision today holds that the—for all practical purposes (a recurring “theme” used to buttress their conclusion)—blanket ban by the Federal Government on the open carry of firearms in public is permissible. Do not be pacified by the opinion's “technical language,” *Utah v. Strieff*, 579 U. S. ___, ___ (2016) (Sotomayor, J., dissenting) (slip op., at 1): The holding today recklessly moves our jurisprudence in a direction that affronts our decisions in both *Heller* and *McDonald*. The inevitable policy outcome of today's decision is not of immense importance to me; Americans are free to regulate, through their legislators, what reasonable restrictions on the carry and use of firearms should exist in their country. Where we come to an important crossroad is how they get there, and whether such restrictions run afoul the Second Amendment. The

SCALIA, J., dissenting

restrictions upheld in today’s opinion, as I will explain, violate without question the Second Amendment in current form—should our People wish to enact such barriers to the carrying of firearms, I gladly will supply pen and paper myself for them to write to their legislators urging them to construct a constitutional amendment to enact the changes they may wish to have; it is not the place of this Court to decide for them. However, as it stands today, the Amendment’s meaning must reign supreme, and should a change be felt needed by the People, it certainly ought not be instated by a group of nine elitists appointed not to be policymakers, but arbiters of fair justice. So, it is not of incredible importance to me whether the law restricts open carry so long as it is created in a proper avenue of law-making. Today’s ruling upholds a law in clear contravention to the Second Amendment in current form, and does so for 160 thousand Americans by a panel of nine. I and my dissenting colleagues believe the Second Amendment, in line with our previous decisions, protects a right to public, open carry. Because the Court decides otherwise, I dissent.

I

The history of open carry in the United States has been one of revision over the years. In 2015, the Congress promulgated legislation to declare that open carrying of firearms was “legal in [all] public areas in . . . cities in America.” Open Carry Act of 2015, § 1. In August of that same year, without criminalizing open carrying, Congress repealed the Open Carry Act of 2015, citing “mayhem” and “more violence than ever” as its rationale. Repeal of the Open Carry Act of 2015, § 1. After its passage on August 30, most officers of the Executive Branch and local law enforcement approached open carrying as an illegal act, despite no legislation existing to confirm its status as criminal. In November 2016, over a year later, Congress enacted its current affirmative ban on all forms of open carrying on “public property” and prescribed that should any individual feel threatened by the display of a firearm that too would be illegal.

SCALIA, J., dissenting

ROCA, §§ II(a)(1), III(b); see also Pet. for Cert. 4.

Petitioner MythicOne is an American citizen who routinely visits the City of Las Vegas. Pet. for Cert. 2. On June 6, 2017, he visited the Bank of America and found himself, upon the sounding of the bank’s alarm, embroiled in-between law enforcement and thieves; a robbery ensued. Acting on his own assumption that most robbers carry firearms, and believing they presented an “immediate threat to the safety of his person,” *id.*, at 3, MythicOne remained outside and brandished his own gun, a .44 Magnum acquired from the city’s illegal dealer. Centerless, an agent of the National Security Agency, under his authority to “make arrests for crimes committed in [his] presence,” Arrest Powers Act of 2016, Pub. L. 16–12, § 2, commanded MythicOne to holster his firearm. MythicOne protested, “repeatedly emphasiz[ing] his interest in protecting himself against armed robbers,” Pet. for Cert. 3. Under the conjoined authority of ROCA and the Arrest Powers Act of 2016, Centerless arrested MythicOne for openly carrying a firearm. On June 7, 2017, MythicOne petitioned to this Court for an Anytime Review of ROCA and the acts of the National Security Agency and Executive Branch as a whole. On June 8, we granted certiorari. 3 U. S. ____ (2017). MythicOne and counsel argue ROCA “prescribes an absolute . . . ban on the open carrying of firearms in public places.” Brief for Petitioner 5; see also Tr. of Oral Arg. 2 (“The Revised Open Carry Act strikes at the heart of the Second Amendment.”). In contrast, the Government rebuttals with a series of explanations to defend ROCA, that the rights extended by the Second Amendment are not unlimited; that without ROCA, American cities will fall into violent chaos; and that ROCA’s ban on open carry is the least restrictive mean available to the Government. Brief for Respondents 1–2; Tr. of Oral Arg. 19. Legal briefs were submitted, oral arguments heard, and now, after deliberation, a majority of this Court rules in favor of the Government.

SCALIA, J., dissenting

II

Tempting it is for courts to proceed in directions they personally prefer, turning a blind eye to the judicial decisions of the past. However, the doctrine of *stare decisis* provides that today's Court should stand by yesterday's decisions. And while application of that doctrine is by no means "an inexorable command," it is the "preferred course." *Payne v. Tennessee*, 501 U. S. 808, 828, 827 (1991). Overruling a case—or parts of it—must always require "special justification," which ought to be accompanied by not only a firm belief "that the precedent was wrongly decided," *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U. S. ___, ___ (2013) (slip op., at 4), but also a "special justification," *Dickerson v. United States*, 530 U. S. 428, 443 (2000) (internal quotation marks omitted). And while the Court's opinion claims to be based on our findings in *Heller* and *McDonald*, do not be fooled: the legalese—or what passes for legalese by some of my colleagues—lacks "even a thin veneer of law." *Obergefell v. Hodges*, 576 U. S. ___, ___ (2015) (Scalia, J., dissenting) (slip op., at 4). Entombed underneath the hogwash authored by JUSTICE SUTHERLAND is an assertion that should send all Americans running: Regardless of *what* the People understood the Second Amendment to mean at the time of its passage, and ignoring the instructed approach to gun cases we outlined in *Heller*, the Federal Government may place an outright ban on the public carry of handguns.¹ That is so because in *Heller* the Court "dealt with

¹ With a fashion most devoid of any dignity, the Government argues that ROCA somehow "restore[s] the People's right to bear arms," Brief for Respondents 4 (capitalization altered). First, the Government asserts that it allows "citizens to carry a gun openly," but then argues that the ban on all open carry in public places somehow would not "hinder [Americans] from bearing [an] arm," *ibid.* Understand, ROCA deems open carry to *always* be "illegal when committed on all public property," § III(b), and illegal on private property "unless the owner of the property consents to open carry." § III(a).

SCALIA, J., dissenting

much different circumstances” than those of this case. Commentary of JUSTICE FRANKFURTER, Cert. Pet., at 5. So, in the Court’s ever-growing wisdom and need to expand its reach, what are those different circumstances? In essence, because we function through computers, rather than as humans in the “real world,” the logical conclusion of the majority is to for all intents and purposes throw out our direction from *Heller*. In style much like our Court’s decision in *Obergefell*, “rather than focusing on *The People’s* understanding of [The Second Amendment]—at the time of ratification or even today—the majority focuses on,” 576 U. S., at __ (Scalia, J., dissenting) (slip op., at 5), an interest-balancing inquiry similar to the narrowly tailored prong of strict scrutiny which demands Government use the least restrictive means available when curbing a constitutional right.

This process by which the Court finds itself upholding ROCA is a blatant neglect of the teachings in *Heller* regarding how courts ought to interpret Second Amendment challenges. Because the Court fails to understand what both *Heller* and *McDonald* instruct us to do, I shall walk it through both cases since they refuse to do so themselves—either that or they are wilfully oblivious.

Our decisions in both *Heller*, 554 U. S., and *McDonald v. City of Chicago*, 561 U. S., were the first cases in which our Court shifted—rightfully so—to an interpretation supporting an individual right to keep and bear arms under the Second Amendment.

The only *practical* (much like the reasoning of the majority, the Government’s arguments for ROCA all rest on ignorance of law in favor of what they believe is necessary) situation in which open carry is allowed is to deter someone else from doing the same, see § IV(a), effectively placing into the hands of American citizens the job of enforcing the legislation—a job I once thought rested with law enforcement. With these facts in mind, the idea that ROCA is somehow the least restrictive mean available is difficult to follow.

SCALIA, J., dissenting

A

We in *Heller* directly confronted the question of whether a District of Columbia law that “totally ban[ned] handgun possession in the home” and “require[d] that any lawful firearm in the home be disassembled or bound by trigger lock,” *Heller, supra*, at 603, 628–629, violated the Second Amendment. Our decision rested on if the Second Amendment extends, as plaintiff Dick Heller contended, an individual right or, as the government insisted, a collective right. To come to a decision, we consulted the Amendment’s text as it was understood at the time of its ratification by the People, and concluded that it codified a pre-existing, individual right to keep and bear arms, whose “central component” is self-defense. *Id.*, at 592, 599.

The Second Amendment reads:

“A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”

At the heart of confusion around the Second Amendment was the relationship between its two clauses: the prefatory and the operative. “The former does not limit the latter grammatically, but rather announces a purpose.” *Id.*, at 577. Indeed, one could rephrase the text to read: “Because a well regulated Militia is necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed.” *Heller, supra*, at 577 (internal quotation marks omitted). See also J. Tiffany, A Treatise on Government and Constitutional Law § 585, p. 394 (1867); Brief for Professors of Linguistics and English as *Amicus Curiae* in *District of Columbia v. Heller*, O. T. 2008, No. 07–290, p. 3. This announcement of a purpose is by no means unusual nor limited to our Constitution; one can find similar clauses in other state constitutional provisions of the founding era granting individual rights. See generally Volokh, The Commonplace Second Amendment, 73 N. Y. L. R.

SCALIA, J., dissenting

Rev. 793, 814–821 (1998); see also *Heller, supra*, at 577 (“Although this structure of the Second Amendment is unique in our Constitution, other legal documents of the founding era” carried prefatory statements of purpose.). So, while the prefatory can clarify a function of the operative, *Heller*, 554 U. S., at 578, it “does not limit or expand [its] scope,” *ibid.* (citing F. Dwarris, *A General Treatise on Statutes* 268–269 (P. Potter ed. 1871); T. Sedgwick, *The Interpretation and Construction of Statutory and Constitutional Law* 42–45 (2d ed. 1874)).²

We first began our textual analysis with the operative clause, which includes the phrase, “the people.” Nowhere in the Constitution does a provision granting “the people” rights refer to collective, rather than individual, ones. Thus, “the people” did not point to a “specific subset,” *Heller, supra*, at 580, but rather to all members of a political community. See *United States v. Verdugo-Urquidez*, 494 U. S. 259 (1990).³ This contrasts with the phrase, “a well regulated Militia” in the prefatory clause, which facially would lead one to assume the

² See *Heller, supra*, at 578, n. 3 (“As Sutherland explains, the key 18th-century English case on the effect of preambles, *Copeman v. Gallant*, 1 P. Wms. 314, 24 Eng. Rep. 404 (1716), stated that ‘the preamble could not be used to restrict the effect of the words used in the purview.’ 2A N. Singer, *Sutherland on Statutory Construction* § 47.04, pp. 145–146 (rev. 5th ed. 1992). This rule was modified in England in an 1826 case to give more importance to the preamble, but in America ‘the settled principle of law is that the preamble cannot control the enacting part of the statute in cases where the enacting part is expressed in clear, unambiguous terms.’ *Id.*, at 146.”).

³ *Verdugo-Urquidez, supra*, states: “[T]he people’ seems to have been a term of art employed in select parts of the Constitution. . . . [Its uses] sugges[t] that ‘the people’ protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.” *Id.*, at 265.

SCALIA, J., dissenting

right guaranteed by the Second Amendment to keep and bear arms extends only to members of the “Militia” that—in colonial America—consisted of male adults considered fit to serve. However, reading the text under this presumption “fits poorly with the operative clause’s description of the holder of that right as ‘the people.’” *Heller, supra*, at 581. Owing to these distinctions, our Court began its analysis in *Heller* “with a strong presumption that the Second Amendment right is exercised individually and belongs to all Americans.” *Ibid.* Moving from the question of who holds the “right,” we transitioned to what exactly the substance of that right decrees.

Looking to the definition of “Arms” as it was understood by ordinary citizens at the time of ratification, the *Heller* Court consulted with various dictionaries—both used by the general population and lawyers of the era. For example, “The 1773 edition of Samuel Johnson’s dictionary defined ‘arms’ as ‘[w]eapons of offence, or armour of defence,’ *Heller*, 554 U. S., at 581 (quoting 1 *Dictionary of the English Language* 106 (4th ed.) (reprinted 1978)). Cunningham’s 1771 legal dictionary also defined “Arms” as “any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another.” 1 *A New and Complete Law Dictionary*; see also N. Webster, *American Dictionary of the English Language* (1828) (reprinted 1989) (hereinafter Webster) (similar). These definitions confirmed the meaning of “Arms” to be weapons used by ordinary citizens not designed in a military capacity.⁴

⁴ A common basis offered by members in support of the so-called anti-gun agenda is that today’s firearms are not the firearms of 1791, and so they surely must not enjoy substantial protections by the Second Amendment. An ironic interpretation, indeed, that is more akin to a strict constructionist reading of the Amendment than anything else. Certainly, an interpretation I would never expect to hear from those in the “living Constitution” jurisprudence camp. Then again, those who interpret the Constitution as “living” also seem to pick and choose which rights they wish to see as protected; after all, the right to an abortion *now is popular*, so the

SCALIA, J., dissenting

And while certainly a flintlock from the 18th-century is hard to compare to an automatic assault rifle of today, Second Amendment protections still extend. The majority by virtue of their decision today must (though they will not admit it) adopt a position that modern weapons constituting the traditional definition of Arms do not enjoy the same protections as those existing when the Amendment was ratified. Such is a consequence of the majority's jiggery-pokery that disregards the Amendment's meaning of Arms because we wield them on a virtual game. See *ante*, at 31–32. This is incompatible with fundamental canons of jurisprudence. “Just as the First Amendment protects modern forms of communications, *e. g.*, *Reno v. American Civil Liberties Union*, 521 U. S. 844, 849 (1997), and the Fourth Amendment applies to modern forms of search, *e. g.*, *Kyllo v. United States*, 533 U. S. 27, 35–36 (2001), the Second Amendment extends, *prima facie*, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.” *Heller, supra*, at 582. Thus, it is irrefutably bad jurisprudence to pretend a .44 Magnum used at Pauljk’s Las Vegas should be considered a different class of weapon than one used at Las Vegas in real life. Even were it so (it is not), it would not be the place of this Court to make those definitions. An absence of explanation and definition on behalf of the Congress on an issue does not imply authority to our body to fill the gap; yet the majority continues to satisfy its forever-unpacified hunger to legislate.

Confirming that the Amendment protects the weapons of today just as it does the weapons of 1791, we turned to the

Constitution *must* protect it (despite it being not “so rooted in the traditions and conscience of our people as to be ranked as fundamental,” *Roe v. Wade*, 410 U. S. 113, 174 (1973) (Rehnquist, J., dissenting) (quoting *Snyder v. Massachusetts*, 291 U. S. 97, 105 (1934)))! But guns? We *don’t like* those, so let us casually excise their meaning under normal interpretation from the record.

SCALIA, J., dissenting

meaning of the phrases “keep arms” and “bear arms.” The *Heller* majority, as it did to understand the definition of “Arms,” consulted various dictionaries and dictum of the times. Definitions for “keep as” included “[t]o retain; not to lose,’ and ‘[t]o have in custody’; . . . [t]o hold; to retain in one’s power or possession.’” *Ibid.* (citations omitted). The most natural understanding of the phrase “keep arms” is to “have weapons.” They could be kept in the home, see 4 Commentaries on the Laws of England 55 (1769), or in manners of travel, hunting, and other activities outside the home, T. Wood, A New Institute of the Imperial or Civil Law 282 (civil ed. Corrected 1730) (“Those are guilty of *publick* Force, who keep Arms in their Houses, and make use of them otherwise than upon Journeys or Hunting, or for Sale . . . ”); A Collection of All the Acts of Assembly, Now in Force, in the Colony of Virginia 596 (1733) (“Free Negros, Mulattos, or Indians, and Owners of Slaves, seated at Frontier Plantations may obtain Licence from a Justice of Peace, for keeping Arms, &c.”); J. Ayliffe, A New Pandect of *Roman* Civil Law 195 (1734) (“Yet a Person might keep Arms in his House, or on his Estate, on the Account of Hunting, Navigation, Travelling, and on the Score of Selling them in the way of Trade or Commerce, or such Arms as accrued to him by way of Inheritance”); Some Considerations on the Game Laws 54 (1796) (“Who has been deprived by [the law] of keeping arms for his own defence? What law forbids the veriest pauper, if he can raise a sum sufficient for the purchase of it, from mounting his Gun on his Chimney Piece . . . ?”); *Heller*, 554 U. S., at 583–584, no. 7. And the phrase “to bear” Arms at the time of the founding “meant to carry.” As it does now. *Id.*, at 584 (internal quotation marks omitted); see T. Sheridan, A Complete Dictionary of the English Language (1796); 2 Oxford English Dictionary 20 (2d ed. 1989). And when conjoined with “arms,” to bear “has a meaning that refers to carrying for a particular purpose—confrontation.” *Heller*, *supra*, at 584. Indeed, to bear an Arm must mean to “wear,

SCALIA, J., dissenting

bear, or carry . . . upon the person . . . for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person.” *Muscarello v. United States*, 524 U. S. 125, 143 (1999) (Ginsburg, J., dissenting) (internal quotation marks and citations omitted). Despite it established that the “carrying of the weapon is for the purpose of ‘offensive or defensive action,’ it in no way connotes participation in a structured military organization,” *Heller, supra*, at 584, either: Again, we in *Heller* reaffirmed that the terms “keep” and “bear” are not exclusive to a militia.

By confirming the meanings of the operative clause, the Court then had to discern its relationship to the prefatory; did the former limit the later? It is quite simple, really. The prefatory announces “the purpose for which the right was codified: to prevent elimination of the militia.” *Heller*, 554 U. S., at 599. But it “does not suggest that preserving the militia was the only reason Americans valued the ancient right; most undoubtedly thought it even more important for self-defense and hunting. But the threat that the new Federal Government would destroy the citizens’ militia by taking away their arms was the reason that right—unlike some other English rights—was codified in a written Constitution.” *Ibid.* To ease the doubts of many, let me give you an analogy. Let us pretend for a moment that the First Amendment, which reads “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances,” began with a prefatory clause saying “A free, educated workforce, being necessary to the wellbeing of the economy, Congress . . .” One could assume that this fictional prefatory clause would then limit the First Amendment’s protections to only those in the American workforce; that this hypothetical version was only written to protect American workers’ speech and ability to be

SCALIA, J., dissenting

educated by real debate and grievance against their Government. Would anyone actually believe that, though? Of course not! So, while in this fictional America the First Amendment might have been codified for the purpose of ensuring an efficient and skilled class of laborers, its protections would doubtless extend to *all* Americans. The same line of thought must, and was in *Heller*, be applied to the Second.

After exploring the *meaning* of the Second Amendment, the *Heller* Court dove into *how far* its protections actually go. The answer was straightforward: “Like most rights, the right secured by the Second Amendment is not unlimited.” *Heller, supra*, at 626. The right to keep and bear an arm is not one to “keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.” *Ibid.* And we laid forth clear principles in which certain prohibitions certainly remain constitutional, despite refusing to “undertake an exhaustive historical analysis . . . of the full scope of the Second Amendment.” *Ibid.* “[N]othing in our opinion should be taken to cast doubt on the longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.” *Id.*, at 626–627. Nor could prohibitions on the carrying of “dangerous and unusual weapons,” *id.*, at 627, be considered unreasonable. But when a law places a prohibition on a regular class of arms and or its use for that lawful purpose of self-defense, it cannot survive under any constitutional scrutiny. See *id.*, at 628. However, we refused to outline a specific test for future Second Amendment cases: Instead, we are (well, now, *were*) instructed to undertake a historical analysis for future cases to rule on issues such as the one before us today.

Heller was clear in that the Second Amendment protects a right to keep and bear arms for—among other things—the

SCALIA, J., dissenting

core purpose of self-defense. We in it made clear that it's protections today are its protections of the 18th-century, and that they cannot be subject "to a freestanding 'interest-balancing' approach" as Justice Breyer contended in his dissenting opinion. *Id.*, at 634. Thus, *Heller*'s precedent, in sum, is that the Second Amendment's explicit right to keep and bear arms is "enshrined with the scope [it was] understood to have when the people adopted [it], whether or not future legislatures or (yes) even future judges think that scope too broad." *Id.*, at 634–635. And most importantly, *Heller* "elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Id.*, at 635.

B

Heller is the precedent I primarily rely on today, but *McDonald* holds relevance to this case as well. While it incorporated the Second Amendment to the States under the Due Process Clause of the Fourteenth Amendment and thus is inapplicable to us (because we have no States), the process by which it came to that conclusion is no less relevant. The majority's decision to completely ignore it is a mistake.

Our task in *McDonald* was to decide two things: (1) whether the right to keep and bear arms is "fundamental to our scheme of ordered liberty," 561 U. S., at 767 (citing *Duncan v. Louisiana*, 391 U. S. 145, 149 (1968)), and (2) whether "this right is 'deeply rooted in this Nation's history and tradition,'" *McDonald*, *supra*, at 767 (quoting *Washington v. Glucksberg*, 521 U. S. 702, 721 (1997)). Our *Heller* decision pointed the *McDonald* plurality to an "unmistakable," *McDonald*, *supra*, at 767, answer. Because the right to self-defense is "a basic right, recognized by many legal systems from ancient times to present day," and is the "central component" of the Second Amendment right, *ibid.* (internal quotation marks and citations omitted), the *McDonald* Court's answer was clear: The right to keep and bear arms *is* fundamental.

SCALIA, J., dissenting

Furthermore, *Heller*'s exploration of the right's origins only further confirmed that it indeed passes the *Glucksberg* standard; that it is "deeply rooted in this Nation's history and tradition," *Glucksberg, supra*, at 721.

Why does this have relevance to the case before the Court today? Because *McDonald* was a reinforcement of *Heller*'s process in deciding a Second Amendment claim. The *McDonald* Court, just like the *Heller* Court, took a historical analysis approach to decide the controversy before it. The majority does no such thing today; rather, it prefers a course involving an interest-balancing inquiry—does ROCA impermissibly infringe on the right of an individual to openly carry a firearm? This framework ignores *Heller*'s instructions, and the majority must admit so, even if they refuse to explicitly.

III

"The different circumstances in ROBLOX compared to real life necessitate changing applications of constitutional principles." *Ante*, at 31–32. If ever I joined an opinion exclaiming this Court's newfound ability to change our jurisprudential approaches for . . . reasons, I would expect to be impeached for sheer incompetence.⁵ A malleable Court is

⁵ The majority claims the primary question before the Court is whether the arrest of MythicOne violated the Second Amendment, see *ante*, at 28–30. Regardless the merits of the arrest, the majority's framing of the issue is inherently erroneous. Unless JUSTICE SUTHERLAND has read a Constitution unknown to me, an arrest is never made under the authority of . . . "the right of the people to keep and bear Arms." Even were it so, that is *not* the primary issue to be decided here: It is whether ROCA's violations on open carry can stand constitutional muster. JUSTICE SUTHERLAND spends the majority of his 4-page opinion on whether the arrest was legal, conveniently brushing over the real question of the case. Is there a constitutional right to open carry? Why does he do this? Because were he to be forced to make an actual argument on those merits, rather than spend a page and a half opining about the restrictions of playing a computer game, his argument would be turned on its head.

SCALIA, J., dissenting

not a Court at all, for rigidity must always be our preferred jurisprudential course. Failure to adhere to the precedents of the past in favor of a *modus operandi* of ignoring some parts of *stare decisis* because interpretation might be harder due to the nature of the game is a dangerous, and wholly inappropriate, path for our Court to proceed on—yet proceed it does. It is important to understand that unlike many rotation judiciaries, our Supreme Court has consistently relied on *real life* precedent to decide our cases; that is why we applied procedural due process precedent from *Matthews v. Eldridge*, 424 U. S. 319 (1976) in a case to do with whether a district court preemptively entered judgement disqualifying an individual from a 2017 Senate election ballot. See *DonaldJTrump v. United States*, 2 U. S. 57 (2017) (per curiam). Or, take for example *Bob561 v. Mindy_Lahiri*, 2 U. S. 44 (2017), a case involving whether an individual was liable for criminal contempt for misconduct on a *trello case proceeding*. Relying on *real life precedent*, we ruled that although the misconduct appeared outside of the physical courtroom, and instead on a platform we on the game uniquely use that is absent in real life, it was still “undeniably out of line and out of procedure,” *id.*, at 54, and thus liable for contempt.⁶ It is oft tempting for judges to conflate their own preferences with the demands of the law; but we have been reminded throughout our history that the Constitution “is made for people of fundamentally differing views.” *Lochner v. New York*, 198 U. S. 45, 76 (1905) (Holmes, J., dissenting). Courts cannot be “concerned with the wisdom or policy of legislation.” *Id.*, at 69 (Harlan, J., dissenting). The majority, in no

⁶ The judiciary of our American counterpart, Exercist’s United States, does not defer to real precedent in the decisions of its cases. Such a practice has resulted in national crises for them, not limited to the entire exile of their Supreme Court. I fear ramifications similar to those (albeit on a much smaller scale) should we continually nod in an approach ignoring precedent for what we instead prefer.

SCALIA, J., dissenting

mistakable terms, throws out that approach in favor of what it feels “necessitate[s] changing applications of constitutional principles.” *Ante*, at 32. It “neglects that restrained conception of the judicial role.” *Obergefell*, 576 U. S., at ___ (Roberts, C. J., dissenting) (slip op., at 3).

The Court opts for an approach deciding “what manners are permissible in ROBLOX to use a firearm.” *Ante*, at 30. Rather than using *Heller*’s primary guidance which stipulates we ought to undergo a historical analysis, the Court relies on a brief sentence in the 60-plus page opinion which states that the Second Amendment right “is not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.” *Heller*, 554 U. S., at 626. From this sentence, the majority believes it prudential to “analyze the manner in which firearms are used in both Las Vegas and the District of Columbia.” *Ante*, at 30. I do not disagree with the majority’s defining of open carry being “the equipping of a weapon from one’s personal inventory.” *Ibid.* We do agree there. However, the majority believes that because the definition of open carry is different on ROBLOX than in real life, that it certainly cannot be protected under the Second Amendment. This approach is the majority’s way of picking and choosing when it wishes to blur or not blur the lines between game and reality. The majority acknowledges that openly carrying a firearm is protected in real life, but protests at it being protected here on our platform. But that conclusion cannot stand under *Heller*, which commands that “modern developments . . . cannot change our interpretation of the [Second Amendment] right.” *Heller, supra*, at 627–628. The majority erred in neglecting to undergo a historical approach to the case. I will do it for them.

Heller is clear in that the Second Amendment right to keep and bear arms has and will always be oriented towards self-defense. See *id.*, at 616. Any contrary interpretation of the right is wrong. Period. Thus, my historical analysis will focus

SCALIA, J., dissenting

on two authorities: (1) those that understand bearing arms for self-defense to be an individual right, and (2) those that understand bearing arms for a purpose other than self-defense to be an individual right. Why I do this is because a source on bearing arms during the 18th-century that is predicated on a collective, rather than individual, right is of no help to me; it would belong with Justice Breyer's dissent in *Heller*. Nor will I place much emphasis on sources focusing on the right for purposes *other than* self-defense, for they consist mostly of individuals aiming to deter a tyrannical Government—one need not carry a handgun with them to their local Whole Foods in order to keep his Government in check, which is why *Heller* places a premium on self-defense as the right's core focus.

I first look to *Bliss v. Commonwealth*, 2 Litt. 90 (Ky. 1822). This decision was important because (a) it was close to the founding era, and (b) “the state court assumed (just as [Heller] does) that the constitutional provision . . . codified a preexisting right.” Nelson Lund, The Second Amendment, *Heller*, and Originalist Jurisprudence, 56 U. C. L. A. L. Rev. 1343, 1360 (2009). In *Bliss*, the State supreme court interpreted its own Second Amendment variant (“the right of the citizens to keep and bear arms in defense of themselves and the state, shall not be questioned”) as invalidating a ban on concealed carrying of weapons. *Bliss, supra*, at 90. The State had argued that although their constitution outlawed a blanket ban on the right itself, it permitted regulations thereon. *Id.*, at 91. However, the court disagreed. It held that an act did not have to amount to a “complete destruction” of the right to be “forbidden by the explicit language of the constitution,” since any statute that “diminish[ed] or impair[ed] the right] as it existed when the constitution was formed” would be void. *Id.*, at 92. This holds relevance to the case today because the court in *Bliss* held that the mere restriction on *concealed* carry amounted to an unconstitutional burden; banning *open* carry then, logic

SCALIA, J., dissenting

demands, would amount to an “entire destruction” of that right. *Ibid.*

In similar fashion to *Bliss*, the Tennessee court held in *Simpson v. State*, 5 Yer. 356 (Tenn. 1833) that a law making it a crime to appear in public with weapons in a “warlike manner” was unconstitutional. *Id.*, at 361–362. It explained that the right to keep and bear arms most often trumped a State’s interest in keeping public order. *Id.*, at 360. It goes without saying that these rulings point to an era understanding bearing arms to include the right to carry operable weapons in public. Indeed, in 1871, the same Tennessee court held an act that proscribed openly carrying a pistol “publicly or privately, without regard to time or place, or circumstances” went too far, even though the statute exempted from its prohibitions the carrying of long guns. See *Andrews v. State*, 50 Tenn. 165, 187. Furthermore, if one was denied an ability to carry arms openly, they would not be able to carry them at all. *Aymette v. State*, 21 Tenn. 154 (1840). Even Courts of the time which interpreted the right more narrowly still held public carry to be protected. See, e.g., *State v. Reid*, 1 Ala. 612, 615 (1840) (an Alabamian must be permitted to carry a weapon in public in some fashion). In *State v. Chandler*, 5 La. Ann. 489 (1850), a Louisiana court held a prohibition on *concealed* carry was “absolutely necessary to counteract a vicious state of society, growing out of the habit of carrying concealed weapons, and to prevent bloodshed and assassinations committed upon unsuspecting persons.” *Id.*, at 489–490. But a ban on *open* carry? That was held to be *unconstitutional*. The court said:

“[The Act] interfered with no man’s right to carry arms (to use its words) ‘in full open view,’ which places men upon an equality. This is the right guaranteed by the Constitution of the United States, and which is calculated to incite men to a manly and noble defence of themselves, if necessary, and of their country,

SCALIA, J., dissenting

without any tendency to secret advantages and unmanly assassinations.” *Id.*, at 490.

See also *Heller*, 554 U. S., at 613 (citing *Chandler*’s holding that “citizens had a right to carry arms openly” favorably). Nine years after *Chandler*, the Texas Supreme Court declared the right of citizens to keep and bear arms to be “absolute,” permitting even the wielding of weapons like the Bowie knife, “the most deadly of all weapons in common use” at the time. *Cockrum v. State*, 24 Tex. 394, 403 (1859). And while it held the Texas legislature could use measures to *deter* open carry, it could not outright ban it. *Ibid.*⁷

I turn now to one Civil War-era case to further prove my point that open carry must be allowed. While I primarily rely on cases from the founding era, this case still offers insight. Our infamous decision in *Dred Scott v. Sandford*, 60 U. S. 393 (1856) decided that black slaves and their descendants “had no rights which the white man was bound to respect,” *id.*, at 407. So, what were some of these rights? Well, a primary one was the right to openly “carry arms wherever they went.” *Id.*, at 417 (emphasis added). Resting on the logic of *Dred Scott*, the Black Codes of the post-Civil War South that aimed to restrict newly freed blacks as much as possible took aim at the most fundamental right of keeping and bearing arms. See Clayton E. Cramer, The Racist Roots of Gun Control, 4 Kan. J. L. & Pub. Pol'y 17, 20 (Winter 1995) (“The various Black Codes adopted after the Civil War required blacks to obtain a license before carrying or possessing firearms or bowie knives. . . . These restrictive gun laws played a part in provoking Republican efforts to get the Fourteenth Amendment

⁷ Although the *Cockrum* court rested its findings on an interpretation that Texas’ Second Amendment analogue had a core purpose of preventing tyranny rather than just promoting self-defense, its holding nonetheless retains probative value in that it points to a antebellum jurisprudence protecting open carry rights, even with weapons as potent as the Bowie knife was at the time.

SCALIA, J., dissenting

passed.”); see also Stephen P. Halbrook, Personal Security, Personal Liberty, and “The Constitutional Right to Bear Arms”: Visions of the Framers of the Fourteenth Amendment, 5 Seton Hall Const. L. J. 341, 348 (1995) (“One did not have to look hard to discover state ‘statutes relating to the carrying of arms by negroes’ and to an ‘act to prevent free people of color from carrying firearms.’” (citations omitted)); *Heller, supra*, at 614 (“[t]hose who opposed these injustices frequently stated that they infringed blacks’ constitutional right to keep and bear arms.”).⁸

What all of these sources have in common is that restrictions on the Second Amendment that deter an individual’s ability to carry out that core purpose of self-defense are incompatible with the Constitution—a consequence of these rulings is the protection of open carry. The real question is whether ROBLOX’s open carry fits under these interpretations—it does, even if the majority refuses to face that inquiry.

IV

The common theme, reinforced by *Heller*, across founding era jurisprudence is that the Second Amendment’s core purpose is self-defense, and open carry is a natural byproduct of one’s ability to enjoy that purpose. Why is it so? Because it is the most natural method of having a handgun at one’s ready in a reasonable fashion. There is a reason laws requiring firearms to be kept in trigger-lock fail judicial scrutiny: Because they burden that need to properly enjoy self-defense. Even so, the majority stakes its entire holding on the

⁸ A perfect example of these race-focused laws was Mississippi’s 1865 “Act to Regulate the Relation of Master and Apprentice Relative to Freedman, Free Negroes, and Mulattoes,” which in part provided that “no freedman, free negro or mulatto . . . shall keep or carry fire-arms of any kind, or any ammunition, dirk or bowie knife” and that “any freedman, free negro or mulatto found with any such arms or ammunition” was subject to arrest. 1866 Miss. Laws ch. 23 §§ 1, 165.

SCALIA, J., dissenting

differences between real life and ROBLOX, see *ante*, at 29, 31. But here is where their primary mistake lies. Not only can open carry as defined on ROBLOX be applied to the jurisprudence of real life, when done it only confirms that it is protected under our Second Amendment. Had the majority applied our version of open carry to how the Second Amendment's protections were understood at the time of the 18th-century, it would have arrived at a different conclusion. The Amendment's core purpose is self-defense, that much is clear. On ROBLOX, there is no such thing as concealed carry—not at our cities, at least. There is either open carry (having the tool “clicked”), or no carry at all. The Petitioner makes a reasoned argument that in order to protect himself, he ought to be able to have his weapon out. I agree with this line of thought and wonder why the majority does not. If we accept as true that the reason the decisions I referenced *supra* upheld open carry as protected was because it is the most sensible process by which citizens protect themselves (absent the actual firing of their weapon(s)), then we must apply that same rationale to today's case. A function of open carry is determent; the idea is that somebody seeing your weapon will make them think twice about attacking you. Another function is easy accessibility to the weapon. Both apply under “our” version. Without the handgun tool “clicked,” nobody would know you have it under your possession, and clicking to “hold” it is equivalent to pulling it out of one's holster in real life. Because open carry is about determent in real life, and that determent is what made it valued in the precedents I cited, it follows that our version of open carry must be protected under the Second Amendment as well: For it is the *only* way one has of exercising that core purpose of self-defense without actually firing the weapon. Just as *Heller*, once it established what the Amendment's core purpose is, refused to make an end-sum holding, my framework could not hold that the only protected way that one bears and keeps an arm is through firing it. The

SCALIA, J., dissenting

only way one “carr[ies]” an arm under the Second Amendment on ROBLOX is by having that tool clicked—it stands to reason that it *must* be a protected action. The majority, by refusing to undergo this entire historical process, has ducked the question. Yet even under the majority’s interest-balancing inquiry (one I would never in good faith take), ROCA still violates the Second Amendment. As I explained in my first footnote, *supra*, ROCA is by no means the least restrictive mean available to the Government. Regardless the excuses the Government and her new mistress—the majority—make, ROCA places an *effective* ban on open carry. Any argument pretending otherwise is either deceitful or signals that someone does not know how to comprehend the basics of English.

* * *

If you are a citizen who has a distaste for the “gun culture,” or you support—or even helped write—ROCA, by all means celebrate today’s decision. But be aware: “The legitimacy of this Court ultimately rests ‘upon the respect accorded to its judgements.’” *Obergefell*, 576 U. S., at ___ (Roberts, C. J., dissenting) (slip op., at 24) (quoting *Republican Party of Minn. v. White*, 536 U. S. 765, 793 (2002) (Kennedy, J., concurring)). Such respect must hinge on the presumption that we exercise “humility and restraint in deciding cases according to the Constitution and law.” *Ibid.* The Founders would not recognize the Supreme Court given its decision today, for it rests on what five judges feel is favored rather than what the letter of the law says. Continue JUSTICE SUTHERLAND does this Court’s long-running crusade against what was once the accepted notion of jurisprudence: That regardless of what may be the *preferred* outcome, the law ought to be interpreted and applied as it was understood by the People who ratified it. Feel empowered to celebrate today’s decision, but do not thank the Constitution: It had *nothing* to do with it. By formally declaring that ROBLOX circumstances

HOLMES, C. J., dissenting

warrant the tossing aside of *stare decisis*, the majority arms well those who will wish to use this *Court* as a mean to enact change they cannot get from where change ought to originate: The Congress. Henceforth these social warriors shall lead from their gates brandished with this Court’s declaration that “different circumstances in ROBLOX compared to real life necessitate changing applications of constitutional principles.” *Ante*, at 31–32. And even more worrisome is that the Court offers no assurance to the Americans who long for a judiciary that will once again carry out its role properly—such will be the foundation on which there will be judicial distortion of issues ranging from the meaning of the Second Amendment (as done today) to whether polygamous marriage shall be considered a constitutional right (face it, we know this Court is heading in that direction).

We had the chance to cover ourselves with honor today and provide fidelity to our precedents from *Heller* and *McDonald*—and thus protect the Second Amendment’s original meaning. And in doing so we might have let the People decide on whether a constitutional amendment would be warranted had we come to the (right) decision that open carry is protected under the current Constitution. But that the majority will not do. And while many will rejoice, and many will despair (such “is the nature of a controversy that matters so much to so many,” *United States v. Windsor*, 570 U. S. ___, ___ (2013) (Scalia, J., dissenting) (slip op., at 26)), the Court has robbed of both sides the opportunity to come to a final—and constitutional—ending through their legislature. We should know better. I dissent.

CHIEF JUSTICE HOLMES, with whom JUSTICE MARSHALL and JUSTICE SCALIA join, dissenting.

I join JUSTICE SCALIA’s opinion in full. I write separately (and briefly) to condemn this Court’s abdication of judicial responsibility. It is our duty (and mandate) to exercise

HOLMES, C. J., dissenting

“neither force nor will but merely judgment.” The Federalist No. 78, p. 465 (C. Rossiter ed. 1961) (A. Hamilton) (capitalization altered). The majority has forgotten that—I seek to remind them.

The Second Amendment, as we explained in *District of Columbia v. Heller*, 554 U. S. 570 (2008), protects, *inter alia*, the right of a law-abiding citizen to “wear, bear, or carry [a firearm] . . . for the purpose of being armed and ready for . . . defensive action in a case of conflict with another person.” *Id.*, at 584 (quoting *Muscarello v. United States*, 524 U. S. 125, 143 (1998) (Ginsburg, J., dissenting)) (internal quotation marks omitted). But that is not merely an incidental guarantee made by chance: It is the Second Amendment’s central protection. See *McDonald v. Chicago*, 561 U. S. 742, 780 (2010) (plurality opinion). And so the majority’s decision today is not merely a step backwards in our jurisprudence on the subject, it is an *evisceration* of the Second Amendment at large. To a slim majority of this Court, being “ready” to respond to a “case of conflict” means to do absolutely nothing until that conflict arrives. To the 160,000 Americans who *don’t* work “in marbled halls, guarded constantly by a vigilant and dedicated police force,” being ready for conflict means something very different. *Peruta v. California*, 582 U. S. ___, ___ (2017) (slip op., at 8) (Thomas, J., dissenting from denial of certiorari). But this Court’s decision today, once you peel through the many layers of rubbish which surround it (as JUSTICE SCALIA’s opinion does at great length), denies them that right.

I

The beauty of the Second Amendment is not in its content. The right to keep and bear arms is a contentious (and often inconvenient) one—and, it was not until 2008 that this Court, through its decision in *Heller*, finally (and truly) recognized its existence. Its beauty instead lies in its simplicity. In a rather explicit manner, it prescribes: “[T]he

HOLMES, C. J., dissenting

right of the people to keep and bear arms, shall not be infringed.” This is the same Second Amendment contained in the real Constitution. So then a reader could be forgiven for wondering, given all the precedent on the issue and the general obviousness of the question, just what are we doing here. Is the issue not settled? As a matter of precedent, it is (was). *Heller* was rather clear in its endorsement of open—or some other form of public—carry. But the majority, relying on what is properly termed as the “law of feelings”, says that a mere two sentences of dicta from the *Heller* opinion (which, by the way, are shown by context to not even be relevant to this case) leads—no, *commands*—them to their judgment that open carry is not protected.

I begin this discussion with a reality check for the majority: “[T]his Court is not bound by dicta, especially dicta that ha[s] been repudiated by the holdings of our ... cases.” *Kerry v. Din*, 576 U. S. ___, ___ (2015) (slip op., at 7) (plurality opinion). The observation that “the right secured by the Second Amendment is not unlimited” and that it is “not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose”, *Heller*, *supra*, at 626, constitutes merely the opening to Part III of the Court’s opinion. Part III dealt only with *types* of weapons protected, and not their actual use. To treat those sentences as not just persuasive but determinative of a completely unrelated issue is ludicrous. It’s also worth noting that the Part ends with an assurance that “modern developments ... cannot change our interpretation of the right”, which happens to be exactly what the majority has sought to do. *Id.*, at 627–28. The *Heller* Court approvingly cited several instances of open, public carry being held protected under the Second Amendment. For example, *Nunn v. State*, 1 Ga. 243 (1846). There, the Georgia Supreme Court “struck down a ban on carrying pistols openly” and, in the *Heller* Court’s words, “perfectly captured” what the Second Amendment was about. *Heller*, *supra*, at 612. It did the same

HOLMES, C. J., dissenting

with respect to an early Louisiana ruling; in the case *State v. Chandler*, 5 La. Ann. 489 (1850), their Supreme Court concluded that the “United States Constitution” protected a right to “carry arms openly.” *Heller, supra*, at 613. To work around this clear (and rather large) obstacle in the path to their desired result, the majority says that the circumstances of open carry here are different: There is no safety on the firearm (a “modern development”), the weapon can be fired instantaneously (again, a “modern development”), and it has a “360-degree line of sight” (not accurate, but alright). *Ante*, at 30. But as we discussed earlier, “modern developments ... cannot change our interpretation” of the Second Amendment. *Heller, supra*, at 627–28. It is not our job to keep the Constitution up-to-date: It is Congress’s. See U. S. Const. art. V, §1, cl. 1.

II

Much of the Court’s opinion is premised on the idea that the Constitution is a perfect document: that it is complete. It is not complete and the Framers knew that; that is the very reason they included the power of amendment. *Ibid.* They knew society would change and the Constitution would eventually need to as well to reflect that. But it is not the role of this Court to enact that change on its own. Our job is to enforce the Constitution as it stands, and with rigid rules of interpretation. The mere fact that there are (perhaps) unintended consequences to what was ratified does not mean this Court should correct them.

Unless there is a textual discrepancy between the real-life Constitution and ours, the text operates the same way. A man named Jeffrey could make a pledge saying that he “will take out the trash at 6:30 pm”; that pledge would operate the same way if it were a lady named JUSTICE SUTHERLAND who made it. So it makes no difference here that our Constitution was ratified on ROBLOX: The Second Amendment is unchanged.

HOLMES, C. J., dissenting

The Court relies heavily on its assertion that open carry on ROBLOX is “just as dangerous” as activities which *aren’t* protected under the Second Amendment in real life. *Ante*, at 30. But the Second Amendment doesn’t draw any distinctions based on the potential for danger. The fact that conduct is “dangerous” does not have any bearing on whether the Second Amendment protects it. After all, *Heller* specifically chose not to apply a standard of judicial scrutiny which would permit such distinctions to be made. See *ante*, at 53 (opinion of SCALIA, J.).

III

To exercise “force” or “will” is to go beyond what the law says (and plainly means) and to defy precedent. The majority has done both today. It is a basic rule of interpretation that the “[a]uthorization of an act also authorizes a necessary predicate act.” A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 192 (2012) (discussing the “predicate-act canon”). So when the Second Amendment guarantees the right of a law-abiding citizen to be “ready for . . . defensive action in a case of conflict with another person”, it authorizes all activities necessary to do so. *Supra*, at 1. To be ready, one must be permitted to prepare. Preparation, however, is not in order when there is no perceivable threat. A citizen arbitrarily equipping a handgun at a time when no reasonable person would assume a threat is not a necessary predicate act to being ready for conflict. However, if, say, they have good reason to believe a robbery were occurring, then they would be justified in drawing their handgun because it could then be reasonably considered a necessary predicate act. The majority, in a single sentence, dismisses the idea that circumstance (despite that being the entire basis of its argument) plays any role in a Second Amendment analysis. They say that “the Court does not extend Second Amendment protections merely to those

HOLMES, C. J., dissenting

who believe they are in danger.” *Ante*, at 2 (majority opinion). Based on what? Blindness?

The majority errs in immediately dismissing the notion that circumstance should factor into our assessment here. It is entirely conceivable that the Second Amendment protects the right to open carry under certain conditions, but not others. What is “necessary” depends entirely on those conditions. It is not “necessary” to draw a weapon when there is no possibility of conflict; it, however, may be “necessary” to do so when there is danger.

I respectfully dissent.

Syllabus

BRITISH2004, PETITIONER v. OZZYMEM, SPEAKER
OF THE HOUSECERTIORARI TO THE UNITED STATES FEDERAL
GOVERNMENT

No. 03–07. Argued August 10, 2017—Decided August 14, 2017.*

On August 1, 2017, an expulsion resolution was begun in the House of Representatives against the respondent, Speaker of the House Ozzymen. After the resolution received four votes in opposition, respondent closed the proceeding, believing his abstention to lower the quorum required before votes may be closed. On August 2, 2017, respondent proposed the House Resolution on Proposals; after receiving nine votes in the affirmative, with ten cast in total, he closed it. Then, a second expulsion on August 8 was presented against the respondent. After several hours of being opened, with only one vote in opposition (but many in abstention), the respondent closed the vote. Petitioners British2004 and AntonioMPicarelli make several charges: (1) that the Speaker may not vote on resolutions and (2) that the respondent illegally closed votes.

Held: The Speaker of the House may not vote on expulsions and proceedings requiring 2/3rds majorities in the House but may vote on resolutions of simple nature, and illegally closed the proceedings at issue.

(a) The Constitution mandates that the Speaker of the House “shall not vote on any bill unless the Representatives are equally divided.” Art. I, § 2, cl. 4. However, context in other clauses shows that the author of the Constitution meant for “bill” to incorporate expulsion votes and those requiring 2/3rds majorities. Pp. 65–72.

(b) The Speaker of the House is bound by the rules of the House itself, which require that resolutions remain open for at least twenty-four hours unless a majority of the *entire* body has voted and that expulsions be open for at least forty-eight hours. By closing both votes prematurely, he acted illegally. Pp. 72–73.

(c) Because “The Constitution “employ[s] words in their natural sense,” sense,” unless context expressly dictates otherwise, *Gibbons v. Ogden*, 9 Wheat. 1, 71 (1824), simple resolutions cannot be included in the meaning of “bill” as used in the Constitution. Accordingly, as a Member of the House, the Speaker is allowed to vote on them. Pp. 73–74.

Vote of Speaker of the House Ozzymen on the August 1 expulsion, vacated. Speaker of the House Ozzymen’s closing of the August 1 expulsion, reversed.

* Together with No. 3–10, *AntonioMPicarelli v. Ozzymen*, also on certiorari to the same federal organ.

Syllabus

Vote of Speaker of the House Ozzymen on the House Resolution on Proposals, affirmed. Speaker of the House Ozzymen's closing of the August 8 expulsion, reversed.

HOLMES, C. J., delivered the opinion of the Court with respect to Parts I and II, in which FRANKFURTER, MARSHALL, GORSUCH, and SUTHERLAND, JJ., joined, an opinion with respect to Part III, in which FRANKFURTER, MARSHALL, GORSUCH, SCALIA, ALITO, REHNQUIST, and SUTHERLAND, JJ., joined, and an opinion with respect to Part IV, in which FRANKFURTER, MARSHALL, GORSUCH, SCALIA, ALITO, and REHNQUIST, JJ., joined. SCALIA, J., filed an opinion concurring in part, concurring in the judgement in part, and dissenting in part, in which ALITO and REHNQUIST, JJ., joined. SUTHERLAND, J., filed an opinion concurring in part, concurring in the judgement in part, and dissenting in part. GINSBURG, J., took no part in the consideration or decision of the cases.

Bakerley argued the cause for the petitioners.

YoutubeDizzle100 argued the cause for the respondent.

CHIEF JUSTICE HOLMES delivered the opinion of the Court with respect to Parts I and II, in which JUSTICE FRANKFURTER, JUSTICE MARSHALL, JUSTICE GORSUCH, and JUSTICE SUTHERLAND join, an opinion with respect to Part III, in which JUSTICE FRANKFURTER, JUSTICE MARSHALL, JUSTICE GORSUCH, JUSTICE SCALIA, JUSTICE ALITO, JUSTICE REHNQUIST, and JUSTICE SUTHERLAND join, and an opinion with respect to Part IV, in which JUSTICE FRANKFURTER, JUSTICE MARSHALL, JUSTICE GORSUCH, JUSTICE SCALIA, JUSTICE ALITO, and JUSTICE REHNQUIST join.

These cases involve several challenges made against actions taken by Speaker of the House Ozzymen. For the reasons discussed below, we vacate the vote he cast on his first expulsion, reverse his decision to close the vote on that expulsion, reverse his decision to close the vote on the House Resolution on Proposals, affirm his vote on the House Resolution on Proposals, and reverse his decision to close the vote on his second expulsion.

Opinion of the Court

A

On August 1, 2017, Representative Bernard Caldwell introduced a resolution to strip respondent of his position as Speaker. Under the Constitution, that resolution was an “expulsion” and required a two-thirds majority. Art. I, § 11, cl. 2. The resolution argued that he was no longer fit to serve in his role because of his inability to properly execute its duties and a poor working relationship with much of the House. It charged that he had “violated [the] First Amendment” when he kicked Representatives from the House Discord server and that he had defamed and impugned the dignity of other Representatives through comments he had made both in public and private. For example, he told Representative Caldwell that he was “shit at making bills” and said he would “expose his ass.” As a third charge, the resolution claimed he had interfered with the business of the House Judiciary Committee (of which he is not a member) by firing its advisors merely for “disagreeing with him.” Then the resolution turned to his activity as Speaker, saying he had not hosted a “session in over a week and a half” even though the Constitution requires that each House “assemble at least once every week.” Art. I, § 4. Finally, the resolution charged that he only “won the Speaker election by promising jobs to Representatives” (namely the role of Speaker pro tempore) and therefore did not deserve to retain the role.

In light of those many charges, the House Judiciary Committee voted almost unanimously to report the Speaker’s expulsion to the House floor. It then went to vote before the House. Despite the strong showing in committee, the expulsion quickly received four votes in opposition. Hoping to avoid a prolonged threat to his leadership the Speaker closed the vote, arguing a two-thirds majority was no longer plausible because of his own abstention. For this, petitioner British2004 filed suit on the basis that both the House Expulsions Resolution and the Constitution denied him a vote on those

Opinion of the Court

proceedings. This, he said, meant a two-thirds majority was still achievable and the Speaker could not close the vote. To preserve the status quo, this Court stayed the resolution's vote, barring him from reopening it. We granted certiorari on this question, 3 U. S. ____ (2017).

B

A day after his expulsion was introduced, on August 2nd, the respondent presented a rule-making resolution entitled the "House Resolution on Proposals." He commenced voting on the same, and a few Representatives (himself included) voted in favor of adopting it. Mere hours after the vote began, the respondent closed the vote to ensure its passage. At the time of vote closure, ten Representatives had voted on the matter. There are twenty-one currently serving. Of the ten who had voted within the three-and-a-half hours voting was open, two voted against the measure. Petitioner British2004 identified several potential improprieties which occurred during voting. Firstly, he believes that the respondent, Speaker Ozzymen, is not entitled to a vote on rule-making resolutions "unless the Representatives are equally divided." U. S. Const., Art. I, § 2, cl. 4. He also posits that the Speaker may not close the vote on a rule-making resolution unless either a "majority of the House has voted" (which was not the case) or "24 hour[s]" had passed since voting was commenced. Brief for Petitioners 6.

The Resolution on Proposals, if passed, would have codified existing House precedent which limits how often a proposal may be introduced, by requiring that "a complete seven days has passed" since the item last failed. It also empowers the Speaker to enforce the rule unilaterally. Believing that the resolution was not properly adopted, petitioner British2004 filed suit; this Court stayed the resolution's vote to preserve the status quo. Certiorari was granted on the questions discussed above, 3 U. S. ____ (2017).

Opinion of the Court

C

Because of several actions taken by the respondent after his first expulsion was denied, a second was brought before the House. This one passed committee unanimously. The charges, too, were far more severe this time around.

Firstly, the Speaker was accused of falsely passing the House Resolution on Proposals despite it not having acquired a simple majority in favor. The expulsion attributed this either to corruption or incompetence, neither of which (it says) render him fit to serve. Secondly, the expulsion claimed he had violated House rules by appointing more than one Clerk and multiple Speakers pro tempore. Then, it reiterated the point from the first expulsion about him removing Representatives from official House communications. It says that in doing so he was “obstructing the duties of Representatives.” “Communication,” it goes on, “provide[s] efficient announcements, information, and overall better . . . debates and discussions.” And so “petty arguments” do not justify removal from a channel which is (apparently) designated for “just that.” But removal of *Representatives* is not all he was targeted for. He was also accused of improprieties stemming from his removal of “*visitors*” and overall “disrespect towards American citizens” over the House communications channel. Again, his disrespect towards other Representatives was raised. His inability to “control his anger” resulted in him “belittling [and insulting] Representative Caldwell in a public chat,” viewable not just by “Representatives,” but by the “American public.”

The fact that he counted his own vote on his first expulsion was mentioned in the second. He also, apparently, was not able to “control sessions . . . [or] Representatives” and could not keep the House in order. The respondent had also removed Representative Caldwell from both “official committee communications” and its “voting terminal” even though he was a member thereof. He was also accused of “deleting votes” on

Opinion of the Court

the committee “voting terminal,” and himself voting in violation of House rules.

This expulsion attempt garnered far more support than the previous one. By the time the Speaker decided to close the vote, it had only a single vote in opposition. It did, however, also have many abstentions. House rules require that every forum vote be open for 48 hours before they may be closed, so petitioner AntonioMPicarelli disagrees that it was no longer conceivable that the expulsion could be passed only three hours in, when abstentions could still be changed within that period. He accordingly filed suit, asking that the vote be resumed. We granted certiorari on that question as well, 3 U. S. ____ (2017).

II

The first question at hand is whether the Speaker of the House may vote on his own expulsion. The petitioners raise two points in support of their position that he may not. First, that the House Expulsions Resolution would restrain him from voting because the expulsion is against him—and, second, that the Constitution itself prevents him from voting on *any* expulsion.

It is important to note that the Expulsions Resolution is constitutionally suspect; denying a Representative their ability to vote on House business presents a host of concerns. Passing on the constitutionality of another branch’s actions, however, is “the gravest and most delicate duty that this Court is called upon to perform.” *Blodgett v. Holden*, 275 U. S. 142, 147–148 (1927) (Holmes, J., concurring). We address those questions only when absolutely necessary to rule on the particular claims before us. See *Ashwander v. TVA*, 297 U. S. 288, 346–348 (1936) (Brandeis, J., concurring). In this case, because of the latter point raised by the petitioners (that the Constitution, too, bars the Speaker from voting on the expulsion), we need not consider the constitutionality of the Expulsions Resolution

Opinion of the Court

unless we find that the Constitution doesn't restrain the Speaker from voting. It would not be "outcome determinative." *SigmaHD v. United States Marshals Service*, 3 U. S. 215 (2017) (HOLMES, C. J., dissenting).

The relevant clause of the Constitution says the Speaker of the House "shall not vote on any bill unless the Representatives are equally divided." Art. I, § 2, cl. 4. Initially, the meaning of the clause is relatively clear: The Speaker shall not vote on any *bill*, and a bill is a "draft of a law presented to a legislature for enactment." Merriam-Webster's Dictionary (2017). The answer would then be clear in that an expulsion does not qualify as a "bill." But see Black's Law Dictionary 164 (6th ed. 1990) (Black's) ("[T]his word has many meanings and applications."); see also U. S. Const., Art. I, § 3, cl. 10 ("The President pro tempore shall not vote on any bill *that is not an expulsion or 2/3rds vote* unless the Senators are equally divided.") (capitalization altered) (emphasis added). To further complicate things, usage elsewhere indicates that the term is meant to have its ordinary meaning. See U. S. Const., Art. I, § 6 ("Every *bill* which shall have passed the House of Representatives and the Senate, shall, before it becomes a law, be presented to the President of the United States.") (emphasis added). There is therefore a certain degree of ambiguity involved with the interpretation of the clause, and so we turn to the ordinary canons of legal interpretation to find our answer.

Three canons are of particular importance in interpreting the clause: The surplusage canon, the canon of defeasance in consistent usage, and the harmonious reading canon. We now consider all three in turn.

A

The surplusage canon is a basic presumption that the legislature does not waste words. "[W]ords cannot be meaningless, else they would not have been used." *United*

Opinion of the Court

States v. Butler, 297 U. S. 1, 65 (1936). This canon is relevant here because the respondent's argument that the Speaker is not precluded from voting on expulsions is plainly at odds with the limitations placed on the Senate President pro tempore in its sister clause. Would not the exception of "bills" that are "expulsion[s] or [two-thirds] votes" in the sister clause be rendered meaningless if the Speaker's clause did not prevent him from voting on them to begin with? The respondents argue that the phrasing is just a product of unartful drafting and that the Framers meant nothing by it. They instead say we should defer to the ordinary meaning of "bill," which does not include expulsions and the like.

Thomas M. Cooley once said, "courts must ... lean in favor of a construction which will render every word operative, rather than one which may make some idle and nugatory." Thomas M. Cooley, *A Treatise on Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union* 58 (1868) (Cooley). But, in the view of the dissenters, by adopting the reading proposed by the petitioners, we would be doing just that: We would render the term "bill" meaningless. They argue that if the Framers intended for expulsions to be included as part of the prohibition, they would have simply said so. Perhaps they would have retained a prohibition similar to the one in the real-life Constitution for the President of the Senate, and would have simply denied the Speaker a "vote." But the term "bill" does not have as rigid a meaning as the dissenters proclaim. See Black's 164. There are a multitude of applications of the term, and it is this Court's job to find the one which gives every word in the Constitution its effect.

"Whenever a reading arbitrarily ignores linguistic components or inadequately accounts for them, the reading may be presumed inoperable." E.D. Hirsch, *Validity in Interpretation* 236 (1967). It is therefore a "cardinal rule of ... interpretation that no provision should be construed to be

Opinion of the Court

entirely redundant.” *Kungys v. United States*, 485 U. S. 759, 778 (1988) (plurality opinion). That is not to say it would be inappropriate for a court to disregard “grammatical and ordinary sense of the words” if not doing so would “lead to some absurdity.” *Grey v. Pearson*, 6 H.L. Cas. 61, 106 (1857) (per Lord Wensleydale). Blackstone explained that if “words bear … a very absurd signification, if literally understood, we must a little deviate from the received sense of them.” William Blackstone, *Commentaries on the Laws of England* § 2, at 60 (4th ed. 1770). But both respondent and the dissenters advocate disregarding the meaning of not one, but eight, words, and there is no “absurd signification” which should justify doing so. *Ibid.* What, however, is absurd is the proposition that the Framers meant literally nothing when they granted an exception relating to “expulsion[s] and [two-thirds] votes” for the President pro tempore.

Words occasionally take on slightly “unnatural meaning[s]” to fit with the rest of a law. *Moskal v. United States*, 498 U. S. 103, 120–121 (1990) (Scalia, J., dissenting). While this is usually not necessary, see *ibid.*, when it is, it is evident from the context. For example, as was discussed in *Moskal*, a statute (18 U. S. C. § 2314) prohibits a person from, “with unlawful or fraudulent intent, transports in interstate … commerce any falsely made, forged, altered or counterfeited securities …, knowing the same to have been falsely made, forged, altered or counterfeited.” *Moskal*, a used car salesman, had fabricated odometer readings on several of those cars in order to obtain titles with those readings. Upon his conviction under the statute, he argued on appeal that the titles (obviously not forged or counterfeited) were not “falsely made” because the people who made them believed them to be accurate. The Court soundly rejected that idea because it would make “falsely made” synonymous to the terms “forged” and “counterfeited.” Because it should be presumed that the term was not intended to be redundant, it must have a different

Opinion of the Court

meaning. Any other reading would “violat[e] the established principle that a court should give effect, if possible, to every clause or word of a statute.” *Moskal, supra*, at 109 (internal quotation marks omitted). And though this reading did indeed cause “falsely made” to take on an unnatural meaning, the surplusage canon nonetheless required it.

It would not then be improper for the term “bill” to assume an unnatural meaning if both text and context require it. The question then is if they do.

This Court has expressed “deep reluctance” to interpret provisions of the law in such a way that would “render superfluous other provisions in the same” law. *Pa. Dep’t of Pub. Welfare v. Davenport*, 495 U. S. 552, 562 (1990). We have simultaneously recognized that the “canon that a court should give effect to every provision” of a law may be defeated if it is sufficiently demonstrated that it was “unlikely that” a clause was “intended … to carry the … meaning” the canon gives it. *Landgraf v. USI Film Prods.*, 511 U. S. 244, 257–261 (1994). The use of the word “bill” is of critical importance here in this consideration. We must now determine whether usage elsewhere in the Constitution of the term would override the surplusage canon.

B

The Constitution uses the term “bill” in many other areas. For example, aside from the clause of concern and its sister clause relating to the President pro tempore, there is an identical clause applicable to the Vice President, in his capacity as Senate President. It also provides that “[e]ach House shall keep a database of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy; and yeas and nays of the members of either House on any question shall be recorded in such database; as well as the vote on that particular *bill*.” U. S. Const., Art. I, § 5, cl. 2 (emphasis added). This clause

Opinion of the Court

seemingly supports, rather than contradicts, the interpretation offered by the surplusage canon. If “any question” is a “bill” in this context, then it is conceivable that expulsions and two-thirds votes are properly considered “bills” in another.

There is a clause which provides that “[e]very bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a law, be presented to the President of the United States; if he approves he shall sign it, but if not, he shall return it with his objections to that House in which it shall have originated. If after such reconsideration; two thirds of that House shall agree to pass the bill, it shall be sent, to the other House. If approved by two thirds of that House, it shall become a law.” U. S. Const., Art. I, § 6. In another place, the Constitution speaks about referendums to veto “bill[s].” U. S. Const., amend. XX. These, however, are likely used in a different context. And as Chief Justice Marshall once wrote, “the same words have not necessarily the same meaning attached to them when found in different parts of the same instrument: their meaning is controlled by context.” *Cherokee Nation v. Georgia*, 30 U. S. (5 Pet.) 1, 19 (1831). For example, take an example provided by Henry Campbell Black: There is a statute which says that anyone who, “being married, ... marr[ies] any other person during the life of the former husband or wife” has committed a felony. While the first use of the term “marry” refers to a valid marriage, the second time refers merely to a marriage ceremony (although without effect). See Henry Campbell Black, *Handbook on the Construction and Interpretation of the Laws* 146–147 (2d ed. 1911). The statute would not make sense otherwise. Similarly, when read in context, the usage of the term “bill” is different in those other contexts. In the pertinent clauses, “bill” has a broader meaning than it does in some others specifically because of the modifier the Constitution itself attaches to them. The final question to be

Opinion of the Court

answered, though, is if it at all makes sense, in terms of harmonious reading, for “bill,” modifier and all, to have a uniform meaning throughout the Constitution. In short: It does not.

C

“[O]ne part is not to be allowed to defeat another, if by any reasonable construction they can be made to stand together.” Cooley 58. The harmony between the provisions of the Constitution is to be presumed. If “bill” has a uniform meaning throughout the Constitution, and includes both expulsions and two-thirds votes as we’ve found, there would be a plethora of conflicts which would occur. The first of which is obvious. Expulsions are incorporated into the meaning of “bill” by article I, section 3. If that then is a “bill,” within the meaning of article I, section 6 as well, then it would have to go through the Senate and receive the President’s signature as well. But see U. S. Const., Art. I, § 11, cl. 1. The two parts of the Constitution would not be compatible under that reading. And there is the matter of impeachment. Impeachment requires two-thirds in both the House and Senate. It would then be incorporated into the meaning of “bill” by article I, section 3, and if that too is subject to Presidential signature, it would conflict with clause 7 of that same section.

Then there is the case of Vice Presidential appointment. The process, as is, provides that “the President shall nominate a Vice President who shall take office upon confirmation by a [two-thirds] vote of both Houses of Congress.” U. S. Const., Amend. XV, § 2. If it was subject to the incorporated meaning, it would also require Presidential signature and the nominee would not simply “take office upon confirmation.” Not to mention, the President made the nomination to begin with, so a further signature would be redundant.

In light of all that, it is clear the incorporated meaning is

Opinion of the Court

limited only to the context under which it exists: the clause with which we are concerned, and its sister clauses pertaining to the Senate President and pro tempore.

III

The second question relates to the Speaker's closing of votes in violation of House rules. This question is far more straightforward than the previous one. Each House of Congress is vested with the power to "determine the rules of its proceedings." U. S. Const., Art. I, § 5. Not its presiding officer, the House as a whole. So when the Speaker operates in derogation of those rules, he violates not just the rules, but the Constitution; and when such a violation is egregious enough, it warrants judicial enforcement of the same.

First, the respondent is accused of closing the vote on the House Resolution on Proposals without either "24 hours" passing or the resolution receiving the "backing of a majority." Brief for Petitioners 4. The House Resolution to Clarify Leadership requires that one of those standards be met before a vote may be closed. It is clear that neither requirement was met, which means that the Speaker was without authority, under the resolution, to end the vote.

As a second matter, the Speaker closed the vote on his expulsion and declared it failed after only a single vote was cast against it. The House Resolution on Forum Votes provides a vote may only be closed forty-eight hours after it began. The petitioner therefore argues that none of the many abstentions cast were final, and so the expulsion could still possibly have been successful. We agree. The resolution is clear: forty-eight hours must elapse before the vote may be closed.

IV

Finally, the petitioner believes the respondent is not entitled to a vote on rule-making resolutions in the House. This argument is fallacious for a few reasons. First, the respondent is, in addition to being Speaker, a regular member of the House

Opinion of the Court

of Representatives. It goes without saying that ordinary members of the House are entitled to vote on its rule-making resolutions. What, then, would be the reason the respondent cannot as well? Petitioner's claim that because he is barred from voting on expulsions and two-thirds votes, he must therefore also be prevented from voting on rulemaking resolutions.

The Constitution "employ[s] words in their natural sense" unless context expressly dictates otherwise. *Gibbons v. Ogden*, 9 Wheat. 1, 71 (1824). Indeed, "every word employed in the Constitution is to be expounded in its plain, obvious, and common sense, unless the context furnishes some ground to control, qualify, or *enlarge* it." Joseph Story, *Commentaries on the Constitution of the United States* 157–158 (1833). Although the context may enlarge the meaning of "bill" in its usage in the relevant clause insofar as to include expulsions and two-thirds votes, there is no indication it provides that it is to be enlarged further to include that which is not mentioned explicitly.

"Interpreters should not be required to divine arcane nuances or to discover hidden meanings." A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 69 (2012). The notion that rule-making resolutions are included in the limitations on the Speaker is one such "hidden meaning" we are asked to discover. Because there is no contextual exception which would include rule-making resolutions, we should consider the alternative proposition: That "bill" in its usage here has a "technical meaning" that "diverges from everyday usage." *Id.*, at 73.

Based on a review of all available "technical meanings" for the term "bill," none would definitively include simple rule-making resolution. For that reason, given there is no contextual exception which benefits the petitioner's position on this question, we must conclude that the Speaker, if a member of the House, is permitted to vote on rule-making resolutions.

Opinion of SCALIA, J.

* * *

For the foregoing reasons, we vacate the vote he cast on his first expulsion, reverse his decision to close the vote on that expulsion, reverse his decision to close the vote on the House Resolution on Proposals, affirm his vote on the House Resolution on Proposals, and reverse his decision to close the vote on his second expulsion.

It is so ordered.

JUSTICE SCALIA, with whom JUSTICE ALITO and JUSTICE REHNQUIST join, concurring in part, concurring in the judgement in part, and dissenting in part.

I agree with the Court insofar as to say the Speaker of the House may not close proceedings at-will, see *ante*, at 72, and may vote on resolutions of a “simple” nature, see *ante*, at 72–73. However, the Court holds that when the Constitution mentions “bills” it actually includes proceedings of non-legislative weight (*i. e.* resolutions)—but only certain kinds in some clauses. *Ante*, at 61–72. That of course makes no sense, and the majority’s 12 pages of explanation make it no less harebrained than it really is.

I

The Constitution mandates that “[t]he Speaker of the House shall *not* vote on any bill; unless the Representatives are equally divided, and shall not be counted as a Representative to achieve quorum at a session.” Art. I, § 2, cl. 4 (emphasis added). A separate pair of clauses, laying out the authority of the Senate’s leadership, also prescribe rules pertaining to bills. The first states: “The President of the Senate shall not vote on any bill; unless the Senators are equally divided, and shall not be counted as a Senator to achieve quorum at a session.” Art. I, § 3, cl. 9. And the second: “The President Pro Tempore shall not vote on any bill that is not an expulsion or a 2/3rds vote; unless the Senators are equally divided, and shall not be

Opinion of SCALIA, J.

counted as a Senator to achieve quorum at a session.” Art. I, § 3, cl. 10. These three clauses provide a textual scheme for when Congress’ leaders are allowed to exercise their votes.

Aside from the matter of improperly closing votes, this case requires us to decide if “bill” as used in the Constitution incorporates items of non-legislative weight. You would think the answer would be clear as day—but no. The Speaker of the House voted on a resolution he proposed, the House Resolution on Proposals. The Constitution prohibits the Speaker from voting “*on any bill*” (emphasis added). Resolutions carry no legislative weight, and thus are not bills. The House Resolution on Proposals, being a resolution, is not a bill—which means the Speaker was allowed to vote on it. So why then does the Court rule that expulsion proceedings and votes requiring 2/3rds majorities—types of resolution which are not bills—are bills and thus cannot be voted on by the Speaker?¹ Because they want it to be so. In spite of their desires, THE CHIEF JUSTICE’s opinion is (it must be said) claptrap at its finest.

Words cannot have meaning if bills now include non-bills, because that is what the majority decrees today. One would think “the plain, obvious, and rational meaning of [the text] is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover.” *Lynch v. Alworth-Stevens Co.*, 267 U. S. 364, 370 (1925) (internal quotation marks omitted). Under “usual rules of interpretation,” *King v. Burwell*, 576 U. S. ___, ___ (2015) (Scalia, J., dissenting) (slip op., at 2), the petitioners should lose this case. But we are no longer operating in normal territory; no, we must yield to the predominant creed of the Court: A

¹ THE CHIEF JUSTICE, knowing the absurdity of his argument, draws a middle-line: Only *some* kind of resolutions are now bills, *e. g.* resolutions such as expulsion votes. *Ante*, at 72–73. This strategic play to placate both parties, to me, is worse than just coming out and proclaiming that all resolutions are bills.

Opinion of SCALIA, J.

group of nine Members must fix the Constitution where they feel it is broken.

II

The Court interprets “bill” as used in the Constitution to include expulsions and resolutions requiring 2/3rds approval in Congress. It believes that is so because in context, the Constitution incorporates those two items into the fold of what “bill” means. And thus we arrive at the anvil on which the majority pounds its legal gavel: context. Somehow, a clause relating to the President pro tempore of the Senate (no less a different one from the President of the Senate clause, which is almost an exact replica to the clause at issue today) affects the powers of the Speaker of the House. Context is important, yes, but the majority pulls this context out of thin air.

I agree that proper interpretation of either the Constitution or a statute requires “paying attention to the whole . . . , not homing in on isolated words or even isolated sections.” 576 U. S., at ___ (Scalia, J., dissenting) (slip op., at 3). But context exists to help us judges understand a law and its terms, not to rewrite them. Without even the slightest showing of restraint, rewrite the Constitution today five Justices do.

To interpret law, judges must “accept and apply the presumption,” *ibid.*, that lawmakers use words in their “natural and ordinary signification.” *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U. S. 1, 12 (1878). And while doing so will not always prevail, the more unnatural or obscure the interpretation of the text, the more compelling the contextual evidence should be to support it. The majority today defines “bill” in a way unheard of: who ever dreamt of bills being anything other than drafts of laws in a legislative body? Unless the Constitution expressly defines them as such (it does not), I see no way we can hold the definition to include resolutions. But I thought to myself: “What if I am wrong?” Indeed, maybe there is some source that could justify the

Opinion of SCALIA, J.

majority's definition. Except there is not. I consulted various dictionaries. Henry Campbell Black defined bills, in the sphere of legislative proceedings, as: "The draft of a proposed law from the time of its introduction in a legislative house through all the various stages in both houses." Black's Law Dictionary 152 (5th ed. 1979) (hereinafter Black). Noah Webster's definition is parallel: "A form or draft of a law, presented to a legislature, but not enacted." N. Webster, An American Dictionary of the English Language 88 (2nd ed. 1841) (reprinted 1866). And we know that a law is, in the generic sense, a body of "rules of action or conduct prescribed by a controlling authority, and having binding legal force," *United States Fidelity and Guaranty Co. v. Guenther*, 281 U. S. 34 (1930); see also Black 795. Indeed, even the most widely-used online dictionary today's definition of a bill comports with those cited *supra* (on the meaning of "bill": "a draft of a law presented to a legislature for enactment," Definition of Bill, Merriam-Webster Dictionary (August 12, 2017), <https://www.merriam-webster.com/dictionary/bill>). These definitions expressly contradict the majority's redefining of the word.²

² The majority references Black's Law Edition, *ante*, at 66, to pretend that the term bill's multiple definitions somehow allow them to change it and begin a poetical dive into the surplusage canon, *ante*, at 67 ("the term 'bill' does not have as rigid a meaning as the dissenters proclaim" (citing Black's Law Dictionary 164 (6th ed. 1990)). They are right; bill has plenty of meanings. See, e.g., *id.*, at 165 (defining "bill obligatory" as "a bond absolute for the payment of money"); *ibid.* (defining "bill of attainder" as "Legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial."); *id.*, at 167 (defining "bill of sight" as a "[c]ustomhouse document, allowing a cosigner to see the goods before paying duties."). But we are not talking here about contract law (bill obligatory), criminal law (bill of attainder), or maritime law (bill of sight): We are talking about legislation. In the sphere of legislation, the term bill has an ordinary, *uniform* meaning: "The draft of a proposed law from the time of its introduction in a legislative body through all the various stages in both

Opinion of SCALIA, J.

The majority relies on one clause to be that compelling context requisite in cases like these. The Constitution touches on three Congressional leaders and their powers of the vote; they are—in order of appearance—the Speaker of the House, the Vice President (as President of the Senate), and the Senate’s President pro tempore. The majority focuses on the part to do with the President pro tempore, which states that he “shall not vote on any bill *that is not an expulsion or a 2/3rds vote.*” I could see how facially one could assume this means resolutions containing expulsions or ones requiring a 2/3rds majority are bills. But even were it so, they *extend* this clause’s exemptions to the Speaker of the House. Why? Your guess is as good as mine. Of course, it is a well-known fact that the principal author of the Constitution, Fruitsz, has no claim to being a good writer; many clauses in the Constitution are obscure and difficult to understand. But bad writing does not give us permission to redefine words used. Even were it so, the context my colleagues rely on is not even pertinent to the Speaker clause. Had they done their homework, they would have found the Vice President clause, which says: “The President of the Senate shall not vote on any bill; unless the Senators are equally divided, and shall not be counted as a Senator to achieve quorum at a session.” Substitute “Speaker of the House” for “President of the Senate,” “Representatives” and “Representative” for “Senators” and “Senator,” and you

houses . . . An ‘Act’ is the appropriate term for it after it has been acted on by, and passed by, the legislature,” *ibid.* The majority choosing to lay their laurels for the doctrine of surplusage on a statement as misleading as this is balderdash.

Furthermore, the Court’s strict adherence to the principle that in statutory construction, every word should be given some effect, *United States v. Menasche*, 348 U. S. 528, 538–539 (1955), ignores the principle’s limitation; “[i]t should not be used to *distort ordinary meaning,*” *Moskal v. United States*, 498 U. S. 103, 120 (1990) (Scalia, J., dissenting) (emphasis added). That the Court does here—and its justifications are as a result disingenuous and wrong. We ought to be ashamed of ourselves.

Opinion of SCALIA, J.

arrive at the Speaker clause; so what exactly are we doing here? Assume for a moment that the majority's conclusion is correct (it certainly is not). Using their "apply one clause to another" scheme, then it would only make sense to apply this exemption to the House's Speaker pro tempore—not the Speaker himself. Even so, why would the Constitution only provide this exemption in the President pro tempore clause if it was meant to extend to other congressional officers like the Speaker? Under normal canons of logic, this interpretation cannot stand.

The majority choosing to include resolutions (but only *certain* ones, which only exposes how little their decision is based on proper interpretive law) in the definition of a bill does not merely give the word a peculiar meaning; it removes its operative effect entirely. This reading cuts away at an interpreter's ability to give uniform meaning across every word and clause of a law, *Montclair v. Ramsdell*, 107 U. S. 147, 152 (1883), and violates the presumption that lawmakers do not tend to use words that "have no operation at all." *Marbury v. Madison*, 1 Cranch 137, 174 (1803). The majority's clinging onto this one clause as the foundation of their argument is quickly undermined when one looks to other instances in which "bills" are mentioned in the Constitution—their reading throws these clauses into new territory for what they mean. Here are some of those instances:

- "Every **bill** which shall have passed the House of Representatives and the Senate, shall, **before it becomes a law**, be presented to the President of the United States; if he approves he shall sign it, but if not he shall return it with his objections to that House in which it shall have originated. If after such reconsideration; two thirds of that House shall agree to pass the bill, it shall be sent, to the other House. If approved by two thirds of that House, **it shall become a law.**" Art. I, § 6.
- "If any **bill** shall not be returned by the President within

Opinion of SCALIA, J.

ten days after it shall have been presented to him, the same **shall be a law**, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it **shall not be a law.**" *Ibid.*

Certainly the President cannot sign expulsion threads, or resolutions requiring 2/3rds vote majorities. The only resolutions the President is entitled to sign are joint resolutions that carry the effect of a law. See, *e.g.*, the War Powers Resolution, 50 U. S. C. § 1541, *et seq.* (vetoed by President Nixon in 1973 and then overridden by the Congress). But today, five Justices change that. They are lucky that expulsions only go through individual Houses of Congress, otherwise their ruling today would require the President to approve those, too.

Their redefining of the word, taken from a singular—and horribly written—clause is a cocktail of absurdity. Would anyone think “resolution” when hearing “bill in Congress”? Would anyone equate “expulsion” with “bill”? Of course not. The Constitution using a poorly-fitted phrase, “bill that is not an expulsion or a 2/3rds vote” (in a clause entirely separate from the Constitution’s focus on the Speaker no less), does not help the majority one whit. The Court fails to make a compelling contextual case for their decision to depart from the ordinary meaning of the law; conversely, the *actual* context only undermines their findings. Reading the Constitution in its entirety confirms what should have been the obvious: Bills in the Congress are drafts of laws.³

³ The majority also relies on and upholds *JedBartlett v. Ryan_Revan ex rel. House of Representatives*, 1 U. S. ___ (2016), in which this Court decided that the Constitution “barred the Speaker of the House from voting on expulsions.” *Id.*, at ___ (slip op., at 4). The Court in that case relied then on the argument of THE CHIEF JUSTICE, who repeats it today. While I recognize the importance of adhering to *stare decisis*, see, *e.g.*, *MythicOne v. National Security Agency*, 3 U. S. 28, 32, 35 (2017) (SCALIA, J., dissenting), it is by no means “‘a universal, inexorable command,’ especially in cases involving the interpretation of the . . . Constitution.” *Planned*

Opinion of SCALIA, J.

III

While I have written primarily to combat the majority’s *de facto* insertion of “divine Creators of new language” into our Article III responsibilities, I also write to briefly respond to the opinion of JUSTICE SUTHERLAND below. In his view, the Court did not go *far enough*; he would have it so that *all* resolutions are included in the definition of a “bill” as used in the Constitution. *Post*, at 84–85. He doth proclaim to be an originalist with a penchant for minor judicial activism, but his opinion today lays bare his true beliefs: This Court ought to change the Constitution and laws wherever and whenever it believes it can make a difference. That, of course, cannot be taken seriously. Nor can be the rest of his opinion that bills now mean anything proposed in a House of Congress—which he broadcasts from atop the Supreme Court’s building clothed in the robes of Augustus Caesar.

IV

The majority does well in its finding that the respondent

Parenthood of Southeastern Pa. v. Casey, 505 U. S. 833, 954 (Rehnquist, C.J., dissenting) (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U. S. 393, 405 (1932)). Because erroneous decisions involving the Constitution are near-impossible to remedy through legislative action, the Court has a duty to reconsider constitutional interpretations that “depar[t] from a proper understanding” of the Constitution. *Garcia v. San Antonio Metropolitan Transit Authority*, 437 U. S. 528, 557 (1985); see *United States v. Scott*, 437 U. S. 82, 101 (1978) (“[I]n cases involving the . . . Constitution, . . . [t]he 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” (quoting *Burnet*, *supra*, at 406–409 (Brandeis, J., dissenting))); *Smith v. Allwright*, 321 U. S. 649, 665 (1994). Our job in reviewing the Constitution does not end simply because we have once spoken on an issue, especially if an interpretation of ours is constitutionally unsound. See, e.g., *West Virginia Bd. of Ed. v. Barnette*, 319 U. S. 624, 642 (1943); *Erie R. Co. v. Tompkins*, 304 U. S. 64, 64–78 (1938).

Opinion of SCALIA, J.

illegally closed proceedings in the House. That we agree on without debate. On its decision that simple resolutions are not bills, we agree as well. However, I should have known better than to instinctively expect sound, uniform jurisprudence from this Court. The majority does not reject the petitioners' view that resolutions are bills because of the reasons I have laid out *supra*, they do so—even if they do not admit it—sensing how skeletal their argument truly is that items of non-legislative weight are drafts of laws (also known as bills!).

The majority's decisions in Part I and II of their opinion reflect a philosophy that judges ought to undergo any degree of interpretive hand-wringing in order to arrive at a desired result. Such a philosophy ignores We the People's decision to vest in our Court not the power to make law, but to decide "cases . . . [and] controversies," Art. III, § 2. The American public vested in *Congress*—not this Court—"all legislative powers" mentioned in the Constitution. Art. I, § 1. Our job is to articulate the Constitution and laws of the United States as Congress and the People enacted them, not to play wordsmith in order to arrive at conclusions we feel are best. Our job is simply to "apply the text," *Pavelic & LeFlore v. Marvel Entertainment Group Div. of Cadence Industries Corp.*, 493 U. S. 120, 126 (1989). Furthermore, while it cries out the intention and will of the authors of the Constitution in buttressing its conclusion, the Court forgets that we are a government of laws not desires. I do not give a hoot what the intention of the lawmakers is; one poorly-written clause does not change a word's definition as clearly used throughout the rest of the Constitution.

Perhaps one day the People will pass an amendment clarifying parts of the Constitution they feel are unclear, or maybe add a clause with definitions into the document. I welcome them to do so and would have no qualms with such actions. But instead the majority arrives at the conclusion for the People, and does so with exhaustive strides of

Opinion of SUTHERLAND, J.

interpretation. That interpretation will be cited by litigants across this country at the expense of honest jurisprudence, and will serve as a footnote in history producing the regrettable truth that this Court believes it knows better than the People. At this rate, we ought to call the Constitution of the United States the Constitution of the Supreme Court.

I dissent.

JUSTICE SUTHERLAND, concurring in part, concurring in the judgement in part, and dissenting in part.

In Parts I, II, and III of Court's opinion, *ante*, at 1–12, I find the majority to be correct in both their evaluation of the legal situation, and the methods for remedying it. The one reservation I have is with Part IV of the opinion, pertaining to the ability of the Speaker to vote on simple resolutions. THE CHIEF JUSTICE's understanding, while reasonable, sets to me a dangerous precedent. This Court was never asked if the Speaker had the ability to vote on simple resolutions—that was never pertinent to the case in the slightest. We were asked, in the merits brief for the petitioner, three simple questions:

1. Does the Speaker of the House of Representatives have the right to vote on their own expulsion?
2. Does a Representative have the right to vote on their own expulsion?
3. Does the Speaker of the House of Representatives have the right to close forum votes at-will, in cases where either: (1) a majority of representatives have not voted yet, or (2) the required threshold for passing or failing a proposal which requires 2/3rds approval has not been reached?

We were asked, in the merits brief for the respondent, another three simple questions:

1. Does the Speaker of the House of Representatives have the constitutional right to vote on any proposal, in

Opinion of SUTHERLAND, J.

cases where Representatives are not equally divided?

2. Does a Representative have the right to vote on their own expulsion?
3. When does the Speaker of the House of Representatives have the right to close forum votes?

In the interest of brevity, I will not go into the fullest detail of these questions. Suffice to say, they were all *as applied* challenges—the Respondent argued that the Court was not able to adjudicate issues of the House Rules. Nowhere was it intimated, by any side in this case, that the constitutionality of the rules themselves was in question. We were asked whether the Speaker's votes on them were valid.

What we *were* asked is to put forward an interpretation of the word *bill*. This word, in real life and in ROBLOX, has drastically different common interpretations. This Court must come to terms with the fact that we operate in a government staffed and representing teenagers, not university alumni public servants. Words are watered down to their most elementary meaning. One can easily look at the Congressional Trello and find many resolutions titled Acts. In real life, Acts are legislation—the same is not on ROBLOX. Our Court must level our interpretations with that of the laymen of *our* United States, not the real life United States. That said, the Court should not become a dictionary. When we reach impasses in terms of definition and conflicting clauses, we look to tradition predating the Constitution for clarity. Much the same way we look to the Federalist Papers for clarity, we must look to the legislative history of the Speaker's ability to vote on resolutions. Prior to the passage of the Constitution—and, by extension, prior to the inclusion of the edited language—Speakers did not vote on resolutions. It is difficult to think that Fruitsz specifically crafted the language to bar the Speaker from voting on only certain proposals: It is a much shorter

Opinion of SUTHERLAND, J.

logical jump to say that bill, in this context, meant any legislative proposal.

Reasonable people will disagree on this issue. So be it. This Court, in the actual controversy, ruled correctly. On the issue of how to interpret a monkey's utterings, I dissent.

ORDERS FOR MAY 20 THROUGH AUGUST 10

MAY 20, 2017

Certiorari Denied

No. 03–02. HELLEOH v. FEDERAL ELECTIONS COMMISSION. Certiorari denied.

Statement of JUSTICE SCALIA respecting the denial of certiorari.

On May 14, 2017, the Federal Elections Commission (hereinafter FEC) under devGralius hosted regular elections for the Speakership of the House of Representatives. JasonNiamus won the election with twelve votes to Helleoh’s two. Helleoh contends that this election is illegal because he was not able to serve a 2-month term. The Constitution provides that “When there are vacancies in the House of Representatives; special elections shall be held to fill those vacancies.” Art. I, §2, cl. 2.

Helleoh succeeded JUSTICE SUDDENRUSH12G following his resignation in mid-April from the Speakership in a special election organized by the FEC. Helleoh argues convention of the House and constitutional law dictate he be given a full 2-month term despite succeeding his predecessor in a specially-organized election. In his petition for a writ of certiorari, he fails to attach any citations or even include a constitutional question for the Court to answer. We do not entertain cases without these crucial elements. Given the lack of required materials in Helleoh’s petition for a writ, we decline to hear the case. However, our “denial of a writ of certiorari imports no expression of opinion upon the merits of the case,” *United States v. Carver*, 260 U. S. 482, 490 (1932), by our Court.

MAY 24, 2017

June 29, 2017

3 U. S.

Certiorari Denied

No. 03–03. MEGUMIN_PAPERCHAN v. LAS VEGAS POLICE DEPARTMENT. Certiorari denied.

Statement of CHIEF JUSTICE HOLMES respecting the denial of certiorari.

The petitioner would have us grant certiorari based on the concept of ‘prior failure’ anytime review jurisdiction. As I have previously explained, that expansive theory of jurisdiction is inconsistent with both this Court’s “constitutional mandate” and its own “convention and policy.” *AdamStratton v. Technozzo*, 2 U. S. 88, 91–92 (2017) (HOLMES, C. J., dissenting). Accordingly, the writ was properly denied.

JUNE 29, 2017

Certiorari Denied

No. 03–12. ISNER v. FEDERAL ELECTIONS COMMISSION. Certiorari denied.

Statement of JUSTICE SCALIA respecting the denial of certiorari.

Petitioner Isner was a main contender for the summer 2017 presidential election. He contends that during the election, the Federal Elections Commission (hereinafter FEC) failed to properly enforce its rules and regulations on both his and his opponent’s campaign. Isner would have us do one or all of several things; he’d have us create new, binding precedent requiring the FEC to be more involved in electoral processes; promulgate from our Bench new ways for the FEC to enforce its rules; or, if we see a widely damaging violation, invalidate the election itself. To all three, we decline.

Our Court, being a part of the federal judiciary, is guided by Article III of the Constitution, which prescribes the situations in which we are exercised to issue rulings and solve disputes. Indeed, no principle “is more fundamental to the judiciary’s

3 U. S.

August 2, 2017

proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.” *Daimler Chrysler Corp. v. Cuno*, 547 U. S. 332, 441 (2006). Further upon the cases and controversies clause requirement, see U. S. Const., Art. III, § 1, is our anytime review capability outlined in § 4 (“The Supreme Court shall have the power to review any action of the legislative and executive branch at any time by a majority vote of the Justices, they may overturn any law, executive order, or other action if they find it illegal, unconstitutional, or unlawful.”). 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. See, e.g., *Sawnberg v. Clan Managers*, 2 U. S. ____ (2017) (cert. denied); *Lincere v. Clan Managers*, 2 U. S. ____ (2017) (same).

Presidential elections present a hotbox of emotions and conduct; feelings run high and individuals oft get hurt. There are winners and there are losers—such is to be expected in politics. No doubt more citizens are exasperated with the FEC than happy, and it would be an “easy” solution for our Court to wave our wand and participate in what couldn’t be coined as anything other than egregious legislating from the bench to “fix” the problems. Such solutions, in line with the “proper rule of the judiciary,” *Henson v. Santander Consumer USA Inc.*, 582 U. S. ___, ___ (2017) (slip op., at 11), lay with the People’s representatives in Congress, not a panel of nine.

AUGUST 2, 2017

Miscellaneous Order

No. 03–07. BRITISH2004 *v. OZZY MEN*. Application for stay order on August 1, 2017 expulsion proceeding against the

incumbent Speaker of the House and the House Resolution on Proposals granted.

PER CURIAM.

This case involves challenges to a House of Representatives expulsion proceeding against the incumbent Speaker of the House, Ozzymen, and the process by which the House Resolution on Proposals was passed.

On August 1, 2017, Congressman BernardCaldwell proposed a resolution to expel Ozzymen from his position as Speaker of the House. Resolutions in either House of Congress to expel members from either leadership positions or membership in Congress itself require a 2/3rds majority to pass. The resolution in question received six nays, one of which was submitted by Ozzymen himself. Once Congressman Uncle_Ferry voted nay, Ozzymen closed the vote because under the Constitution, the resolution could no longer receive enough votes to satisfy that 2/3rds threshold. The next day, Ozzymen proposed the House Resolution on Proposals, which, *inter alia*, orders that legislation proposed in the House that fails cannot be re-submitted for a vote until one week has passed since its previous submission. §I(a). Ozzymen closed the vote on his resolution and submitted it as passed legislation once it received eight ayes, one of which was his own.

Petitioner British2004 filed a petition for a writ of certiorari under this Court’s “anytime review” jurisdiction, arguing that (1) Respondent illegally voted on and closed his own expulsion resolution, and (2) Respondent voting on the House Resolution on Proposals to reach a required threshold to pass and closing it before 24 hours commenced invalidates the resolution itself. We grant the petition for certiorari to resolve several constitutional questions. First, whether the fourth clause of Section 2 of Article I of the Constitution (“[T]he Speaker of the House shall not vote on any *bill*; unless the Representatives are equally divided, and shall not be counted as a Representative to achieve quorum at a session.”) (emphasis

3 U. S.

Per Curiam

added)) incorporates congressional resolutions into its provisions concerning when the Speaker can and cannot vote on House proceedings. And second, whether Article I's first clause of Section 5, which stipulates that each "House may determine the rules of its proceedings," prohibits the Speaker from closing proceedings at-will.

JUSTICE SUTHERLAND, upon the granting of certiorari, motioned to stay the two resolutions of concern for the duration of the case. We recognize that crafting a preliminary stay is an exercise of discretion and judgement, often dependent as much on the equities of a given case as the substance of the legal issues it presents." *Trump v. International Refugee Assistance Project*, 582 U.S. ___, ___ (2017) (per curiam) (slip op., at 9) (citing *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20, 24 (2008); 11A C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* §2948 (3d ed. 2013)). Interim relief in the form of a stay by the Court is given not to determine the rights of the parties involved, *University of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981), "but to balance the equities as the litigation moves forward." *Trump, supra*, at ___ (slip op., at 9). We also, of course, consider the "overall public interest" when deciding whether to issue preliminary relief of any kind. *Winter, supra*, at 26. In sum, before issuing a stay, "[i]t is ultimately necessary . . . to balance the equities—to explore the relative harms to applicant and respondent, as well as the interests of the public at large." *Barnes v. E-Systems, Inc. Group Hospital Medical & Surgical Ins. Plan*, 501 U.S. 1301, 1305 (1991) (Scalia, J., in chambers) (internal quotation marks omitted). Because the conclusion of the expulsion proceeding and the process by which the House Resolution on Proposals was passed are under constitutional scrutiny—and because they carry significant weight if "in operation"¹—JUSTICE

¹ By "significant weight," we mean that the expulsion proceeding itself has caused a relative implosion inside the House of Representatives, with those

August 7, 2017

3 U. S.

SUTHERLAND’s application for a stay on the two pieces of legislation is accordingly granted.

* * *

The petition for certiorari and application for a stay are granted.

It is so ordered.

AUGUST 7, 2017

Miscellaneous Order

No. 03–07. BRITISH2004 *v.* OZZYMEM. Motion to recuse, referred to JUSTICE SCALIA, and by him denied.

Memorandum of JUSTICE SCALIA.

The respondent in this case is the incumbent Speaker of the House, Ozzymen. He and counsel motion for me to recuse. My career has travelled me to a wide variety of positions across the Federal Government, often ones that involved working with—or “against”—the Speaker. Because of those entanglements, I have contemplated to great length whether these interactions compel me to recuse myself from the matters before the Court in this case. After reviewing my history with Ozzymen, examining legal authorities on the matter, and consulting with my colleagues (most comprehensively with THE CHIEF JUSTICE), I have decided that recusing from this case would be inappropriate and unnecessary.

I

Decisions regarding whether a judge should recuse himself from a case rest on the facts as they existed. See *Microsoft Corp. v. United States*, 530 U. S. 1301, 1302 (2001) (Rehnquist,

who voted in favor crying foul and those against responding in kind; and that the House Resolution on Proposals contains significant requirements for how legislation is passed and cannot reasonably be kept in effect while we decide if its enactment was illegitimate.

3 U. S.

Memorandum of SCALIA, J.

C. J.) (opinion respecting recusal). These are the facts of my history with the respondent:

My career in the United States has been comprehensive and wide-spanning, to say the least. In March 2016, I was hired—based upon referral from the then-White House Chief of Staff AdamStratton—as a political consultant by President SuddenRush12G. I was charged with devising a general “rollout” plan for the President’s re-election campaign that summer. I worked primarily with PatrickRusso (who was the President’s Press Secretary at the time), Senator TerenceWalsh, and AdamStratton. Shortly thereafter, the President nominated me to a vacant seat on this very Court; the Senate denied my appointment and I—beyond a short stint as the Deputy Secretary of Defense to BigDaddyTmane—went “dark,” so to speak.

In May 2016, the President fired BigDaddyTmane due to a scandal involving deploying troops at Las Vegas: The position was wide-open. AdamStratton, having begun his career in rotations with me in my France in early 2013, referred me to the President for the job. I was nominated, confirmed, and began working early that month. Here is where my first interactions within the United States occurred with the respondent. Ozzymen served as the Secretary of Defense before BigDaddyTmane until his termination following a debilitating admin attack on the Armed Forces group. He was not keen on my appointment to a post he once held, and made so clear after privately messaging me on Twitter. This would be the first of several verbal altercations between me and the Speaker over the course of half a year. A constant theme of attack on me by the respondent while I was the Secretary had to do with how he could do the job better than I, and was vastly more qualified and capable. To every charge like this, I kept my head high, refused to “fire back” in an inappropriate manner (because of the nature of my job), and continued to do the duties I was assigned.

Memorandum of SCALIA, J.

3 U. S.

After my time as Secretary of Defense concluded in June 2016, I was appointed to the Senate by the President to serve in Congress with the goal of ultimately being appointed to fill TerenceWalsh's shoes as Vice President (he had just resigned due to a scandal involving improper counting of Senate votes). With Vice President TerenceWalsh out the door, several people began angling for the position. Two of the primary individuals invested were HHPrinceGeorge and Ozzymen. Ozzymen campaigned publicly with vigor, and hoped to politically "box in" the President, and force his hand into appointing him. To attempt this, he launched political attacks on my character and ability to do the job (knowing I was who the President wanted most). In the end, the President decided to go with HHPrinceGeorge, and wait for me to assume the role through the democratic process (I was his running-mate for the summer election). We won the election in July of that year, and assumed office on the 21st. Ozzymen, now without a chance to be Vice President, angled for the Secretary of Homeland Security position. The President decided to go with him. However, the administration faced pushback from the Senate (which I was the President of), and ultimately Ozzymen was unpassable. TheySinned got the job after Ozzymen failed the approval process two times. The President then decided to nominate him as a Federal Judge; again, Ozzymen faced pushback from the Senate, and failed. Following this, Ozzymen released conversational records between he and the President which showed the President believing the Democratic Party's congressional members to be under his thumb. A severe political attack was launched on the President and I, and we responded in kind—as any embattled politicians in our positions would. I personally placed pressure on the Republican Party leadership to disavow Ozzymen for conduct that I felt at the time was racially-charged and inappropriate. Beyond this, our interactions were those you would expect from political rivals in different circles. I had my following and

3 U. S.

Memorandum of SCALIA, J.

group, and he had his; sometimes we found ourselves “in the same room,” but often we kept to ourselves.

In September 2016, Ozzymen worked with Congressman CalvinRomero to impeach me from my position of Vice President. Pouncing on a political weakness that I opened myself up to at the time, the two worked with a group of Democratic congressmen (including the Speaker of the House Swordmaker and his Chief of Staff PatrickRusso) to effectively force me to resign my post. I was Nixon-barred from holding future office until it was overturned in December 2016.

My next primary interaction with the respondent was during the winter presidential campaign. I had served as President TheySinned’s campaign chairman and chief strategist. As the primary founder of the campaign and the one in charge of its operations top-down, I devised a strategy to attempt to force Ozzymen out of the race by highlighting to the electorate offensive conduct of his. Ozzymen appealed to TheySinned for a campaign merge. Much to my ire at the time, TheySinned decided to bring him on as his running-mate. From the get-go, friction existed between Ozzymen and TheySinned, as well as between our staff and those we hired from his campaign. A month into the arrangement, TheySinned felt he had made the wrong decision, and—against my advice—kicked Ozzymen off of his ticket. Ozzymen took the experience as a personal slight against him, and (to my knowledge) still harbors a grudge over it. At the time, I did my best to communicate that the decision to remove him was not personal—it was just politics.

From what I recall, from December 2017 to May 2017 I had no real interactions with the respondent. In June 2017, after briefly launching my own campaign for President, I sought out Ozzymen and informed him that I would be interested in having him serve as my Secretary of Defense should I win. I made sure to impress that an appointment to the post would not be contingent on him voting for me—I told him that whether he voted for me or not was irrelevant: I would make

Memorandum of SCALIA, J.

3 U. S.

him the Secretary of Defense if I won regardless of his personal candidate preference. However, I dropped out shortly after I entered. Since then, I have not had significant interactions with the respondent.

II

The respondent's main charge is that because of my previous history of political battle with him, I must recuse myself. In considering this request, I look to the law involved. Recusal is governed by 28 U. S. C. § 455. This statute is divided into two subsections, § 455(a) and § 455(b). Section 455(b) outlines specific instances in which a judge would be required to recuse, including ones where he "has a personal bias or prejudice concerning a party" or personal knowledge of disputed facts concerning the proceeding, § 455(b)(1), served as a government-employed counsel, advisor, or material witness to the proceeding, § 455(b)(3), or has a personal and *substantial* interest in the outcome of the proceeding, § 455(b)(4). Sections 455(b)(1) and 445(b)(4) have possible relation to the matter before our Court. Never have I gone out of my way to harm Ozzymen in any form, nor have I displayed a prejudice toward him; our conflicts have occurred as politicians often at opposite sides, and nothing more. Notwithstanding the fact that I have no prejudice toward Ozzymen, I do not have facts of the case personal to me. The facts I have reviewed and will review regarding this matter are of public record, and are the same ones available to my eight other colleagues: § 445(b)(1) is inapplicable. Regarding § 445(b)(4), I have no personal interest in the outcome of this case. Whether Ozzymen is allowed to vote on resolutions or whether the expulsion vote against Ozzymen is constitutionally valid is of no importance to me; his career is his own, and his success (or failure) as Speaker bears no consequences on me as a Member of the Supreme Court. There is no interpretation that could argue I will be "substantially affected by the outcome," § 445(b)(4), of this

3 U. S.

Memorandum of SCALIA, J.

case. Furthermore, asking me to consider whether the *political* ramifications of the case will impact me in any way is asking me to do precisely what judges should not do: To take account the political consequences of their decisions. Asking me to do so seems quite wrong.

Section 445(a) encompasses a much broader declaration that any “justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.” This Court has stated, in relation to § 445(a), that what is relevant “is not the reality of bias or prejudice but its appearance.” *Liteky v. United States*, 510 U. S. 540, 548 (1994). This question is resolved by a reasonable observer informed by the surrounding facts and circumstances. See *ibid.*; *Microsoft*, 530 U. S., at 1302; *In re Drexel Burnham Lambert Inc.*, 891 2 F 2d. 1307, 1309 (CA2 1988). I have already explained my personal history with the respondent, and impressed that I harbor no personal agenda or ill-will against him. My disagreements with him both in public and private have all related to government affairs. Have harsh words been exchanged? Certainly, but this is by no means a standard which should require recusal by a judge. If I was to recuse myself based on inflammatory remarks between me and the respondent in the past, I would set in motion a precedent that would utterly disable this Court’s ability to function. As a country of 160,000 Americans, of which only about 1000 are active (of which only a few hundred of those are active in government), those in all three branches of our Government are intertwined more than would be usual in real life. Many of the Justices, past and present, have been career politicians like me. See, e.g., JUSTICE SUDDENRUSH12G and JUSTICE SUFFERPOOP (Presidents of the United States); JUSTICE BOB561 (various roles in the Department of Homeland Security); JUSTICE RYAN_REVAN (President pro tempore of the Senate); Justice SecretlyJacob (Secretary of Homeland

Memorandum of SCALIA, J.

3 U. S.

Security); Justice Bonnie Bennett (Attorney General); Justice Patrick Russo (Senator). Many of us have had political, and very public, altercations with each other and others in the political arena. If I gave credence to this standard that because I have had public, heated disagreements with a party to a case in the past I ought to recuse myself, then the Court would be hard-pressed to find a case that it could take where enough Justices could participate to even satisfy our quorum of six.

III

While I believe my impartiality cannot be reasonably questioned, it is not the only concern governing my consideration process. It is my opinion, and the opinion of many Justices on this Court who have declined recusal in the past, that stepping away from this case unnecessarily would harm the Court. Unlike a District Court, there is no way to replace a recused Justice. With the Court deprived of one of its nine Members (which alone would be disconcerting), the even number of eight remaining Justices runs the risk of a hung decision, where no conclusion is reached. Furthermore, the People must have confidence in their Supreme Court to be able to adjudicate properly in an environment where members of all three branches of the Government work closely with one another. The Court cannot survive “in a system that assumes them to be corruptible by the slightest friendship or favor,” *Cheney v. United States Dist. Court for D.C.*, 541 U.S. 913, 928 (2004) (Scalia, J.) (opinion denying recusal).

The issue is because I have sparred with Ozzymen in the past whether I would be able to decide this case impartially. I firmly believe that I can—and I know I will. This is not the only case I have decided that involves an individual with whom I have combatted politically. In this Court’s current Term, I authored the opinion denying certiorari in *Isner v. Federal Elections Commission*, 3 U. S. 87 (2017) (SCALIA, J., statement respecting denial of certiorari). I could have very

3 U. S. August 9, 10, 2017

well argued in favor of granting certiorari in an attempt to halt SurpriseParty's path to the presidency: I did no such thing. Regardless of what my political opinions of him are, I believed our Court had no jurisdiction to hear the case, *id.*, at 87, and even if we had jurisdiction, I did not believe it to be our place to effectively throw out an election (and inevitably hurt SurpriseParty in the process), *id.*, at 88.

Because of the aforementioned facts, I do not believe there is a basis for my recusal. As such, the motion is

Denied.

AUGUST 9, 2017

Certiorari Granted

No. 03–10. ANTONIOMPICARELLI *v.* OZZY MEN. Certiorari granted. Joined with No. 03–07.

Miscellaneous Orders

No. 03–07. BRITISH2004 *v.* OZZY MEN. The motion to stay the August 8, 2017 expulsion proceeding against the incumbent Speaker of the House is granted.

No. 03–07. BRITISH2004 *v.* OZZY MEN. The motion to stay the incumbent Speaker of the House's powers is denied.

AUGUST 10, 2017

Summary Disposition

No. 03–08. AESCIA *v.* CONGRESS. The motion for summary disposition in favor of the petitioner is granted.

JUSTICE SCALIA, dissenting.

The Court today wades itself into a simple discrepancy between the constitutionally mandated Senate term length of three months and the start dates of a new election calendar set forth in the Electoral Reform Act of 2017, Pub. L. 18–8. It is

true, Section 201(b) of the law prescribes a list of concrete dates for future Senate elections year-to-year in a manner constitutionally suspect. However, I do not believe our Court to be a venue appropriate to resolve the matter before it. While the Constitution requires that each Senator shall be “elected for three months at a time,” Art. I, § 3, I believe it is the place of the Legislature to resolve any over- or under-extensions of its members’ term lengths—it is not our Court’s. Indeed, issues like this, in my opinion, involve questions of a “demonstrable constitutional commitment of the issue to a coordinate political department,” and lack a conclusion “without an initial policy determination of a kind clearly for non judicial discretion,” *Baker v. Carr*, 369 U. S. 186, 217 (1962). The Congress, overwhelmingly, decided that the non-uniform set of election dates over the years by the Federal Elections Commission was untenable, and passed this law. In passing it, the idea that the lawmakers responsible could not realize there would be a brief shortening and lengthening of current terms affected is hard to swallow. This issue is minor, and would have resolved itself over time: without our Court needing to hammer down its fattening-by-the-day gavel of “justice.” Even were it an issue not to be automatically resolved by the simple passing of time, I still feel it would be out of our hands. While the Constitution vests in our Court an ability to review legislative action and resolve lower court disputes, and while it is easily argued that the shortening of a constitutional term by a statute is unconstitutional in of itself, it does not necessarily vest in our Court the power to *resolve those contentions*. My colleagues even admit that this case is one taken not out of judicial necessity, but out of discretion—boredom, even. Were our docket bloated, as many of us hope it to be (more cases equal more things for us old men to do), they would have perhaps denied certiorari. Telling it is that they place not a premium on the constitutional issue at hand when deciding to grant certiorari, but on whether they think they have time to focus

3 U. S.

SCALIA, J., dissenting

on a—self-admittedly—minor issue. To put it plainly: They would have denied this case had our docket been fuller. What, then, are we *doing* here? I dissent.

AMENDMENTS TO
RULES OF FEDERAL COURT PROCEDURE

The following amendment to the global Rules of Federal Court Procedures was prescribed by the Supreme Court of the United States on June 4, 2017, and was reported to the public by THE REPORTER OF DECISIONS on the same date.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

JUNE 4, 2017

To the American public:

§ 6 of the Admissible Evidence Rule has been amended by the Court to now be: “Off-site evidence must contain reliable proof that an online account indeed belongs to the subject and is not a fraudulent account, such as through verifying a Skype profile with a Gyazo gif, unless both parties agree to its validity. Witness testimony verifying the authenticity of an account may be used during extenuating circumstances.” This rule is an important change in the way courts will now approach pieces of evidence submitted in the form of screenshots (gyazos, prntscreens, standard screenshots, etc.) in that they will no longer have to be gifs should neither party in a case dispute their validity. Whereas before all evidence had to be in gif form, that will only apply should a party dispute the validity of a standard screenshot not in gif form.

Sincerely,

(Signed) ANTONIN G. SCALIA
Associate Justice of the United States

SUPREME COURT OF THE UNITED STATES

JUNE 4, 2017

ORDERED:

1. That section 6 of the Admissible Evidence Rule be, and it hereby is, amended by changing the following:

~~“§ 6. Off site evidence must contain reliable proof that an online account indeed belongs to the subject and is not a fraudulent account, such as through verifying a Skype profile with a Gyazo gif. Witness testimony verifying the authenticity of an account may be used under extenuating circumstances.”~~

‘§ 6. Off-site evidence must contain reliable proof that an online account indeed belongs to the subject and is not a fraudulent account, such as through verifying a Skype profile with a Gyazo gif, unless both parties agree to its validity. Witness testimony verifying the authenticity of an account may be used under extenuating circumstances.’”