SUPREME COURT OF THE UNITED STATES

No. 05–35

HHPRINCEGEORGE, PETITIONER *v.* UNITED STATES

ON CERTIORARI TO THE UNITED STATES GOVERNMENT

[April 21, 2018]

The motion to dismiss the writ of certiorari is denied.

Statement of JUSTICE BORK respecting denial of the motion to dismiss.

The Court's policy of requiring standing (even relaxed) in Anytime Review cases has no footing in the Constitution. JUSTICE THOMAS's dissent illuminates the danger of that judge-made doctrine because if he had his way we would kick this pressing constitutional question down the road for no good reason at all. My problem with asking for standing in Anytime Review cases is that it is too often used by Justices as an excuse for sidelining merited constitutional claims to protect a preferred status quo.[1] Surely all can agree that a "judge-empowering proposition" like that, where judges not only interpret the Constitution but pick and choose when those interpretations should apply, is wrong. *Zuni Public School Dist. No. 89* v. *Department of*

[1] Even more frequently, it is used to avoid answering difficult questions. But the Constitution tasks us with "say[ing] what the law is." *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803). "Prudence" is no good reason for abdicating from that duty. Sometimes the law is "the judicial department has no business entertaining the claim of unlawfulness." *Its_Jacob* v. *Nevada Highway Patrol*, 5 U. S. ___, ___ (2018) (BORK, J., concurring in part and concurring in judgment) (slip op., at 2). But the deliberately capacious wording of the Anytime Review Clause empowers the Court to address the lawfulness of *any* final action of the political branches, making that rule irrelevant to Anytime Review cases.

Education, 55 U. S. 81, 108 (2007) (Scalia, J., dissenting).

But even assuming the standing policy as the baseline, this case still should not be dismissed. Contrary to what JUSTICE THOMAS has said, HHPrinceGeorge meets any standing requirement which can be asked of him under our precedents. Because the "relaxed standing" standard our cases instruct us to apply is not clearly defined anywhere, I will instead demonstrate that he has normal Cases and Controversies standing and therefore, *a fortiori*, Anytime Review standing.

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The root of the standing requirement is the Cases and Controversies Clause. *Raines* v. *Byrd*, 521 U. S. 811, 818 (1997). At its core, standing is a doctrine which limits the category of litigants who are able to maintain a lawsuit in federal court to seek redress to a legal wrong. See *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U. S. 464, 473 (1982); *Warth* v. *Seldin*, 422 U. S. 490, 498–499 (1975). It is understood as "prevent[ing] the judicial process from being used to usurp the powers of the political branches." *Clapper* v. *Amnesty Int'l USA*, 568 U. S. ___, ___ (2013) (slip op., at 9); *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 576–577 (1992). It confines the federal courts to a proper judicial role. *Warth*, *supra*, at 498.

In lawsuits under the Cases and Controversies Clause, the "irreducible constitutional minimum of standing" is established by proving three elements. *Lujan*, *supra*, at 560. The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct, and (3) that is likely to be redressed by a favorable judicial decision. *Id*., at 560–561; *Friends of the Earth, Inc.* v. *Laidlaw Environmental Services, Inc.*, 528 U. S. 167, 180–181 (2000). The facts alleged by the plaintiff must establish the three elements. *Worth*, *supra*, at 518. Even though the *Lujan*

standard is much higher than what we usually ask for in Anytime Review cases, this case easily satisfies the three elements of *Lujan* standing analysis.[2]

Injury in fact is the "'first and foremost' of standing's three elements." *Spokeo, Inc.* v. *Robins*, 578 U. S. ___, ___ (2016) (slip op., at 7) (quoting *Steel Co.* v. *Citizens for a Better Environment*, 523 U. S. 83, 103 (1998)). To establish injury in fact, a plaintiff must show that he suffered "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan*, *supra*, at 560 (internal quotation marks omitted). This element of standing is easily established from the facts alleged by HHPrinceGeorge. He stated in his submission that he is a "sitting Senator," a fact easily corroborated. The effect of the Senate appointment challenged in this case on HHPrinceGeorge is clear to see. More members in the Senate means his vote there is worth less than it is with fewer members. The Court has recognized vote dilution (admittedly in different contexts) as a concrete and particularized injury in the past. *E.g.*, *Ala. Legislative Black Caucus* v. *Alabama*, 575 U. S. ___, ___ (2015) (slip op., at 6). Other courts have been even more explicit in their holdings, for instance holding that "vote dilution" clearly establishes an "injury in fact." *Shapiro* v. *McManus*, 203 F. Supp. 3d 579, 596 (D. Md. 2016); accord *Benisek* v. *Lamone*, 266 F. Supp. 3d 799, 802 (D. Md. 2017). The same logic applies to this case.

The second and third *Lujan* elements are quite simple. The vote dilution suffered by HHPrinceGeorge was a direct result of the Senate appointment challenged in this case. It

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[2] *E.g.*, *NinjaKiller0432* v. *United States*, 5 U. S. ___ (2018) (cert. denied); *Bakerley* v. *SurpriseParty*, 4 U. S. ___ (2017) (cert. denied); *United States* v. *City of Las Vegas*, 4 U. S. ___ (2017); *Ex parte VinexyRaps*, 4 U. S. ___ (2017) (cert. denied); *Psychodynamic* v. *Technozo*, 2 U. S. 77 (2017) (cert. denied); *HHPrinceGeorge* v. *Swordmaker*, 1 U. S. ___ (2016); *Ex parte HHPrinceGeorge*, 2 U. S. 30, 33 (2017) (Scalia, J., concurring).

is therefore plain that his injury is "traceable to the challenged conduct." *Supra*, at 2. It is also plain that a "favorable judicial decision" from this Court nullifying the appointment would "redress[ ]" that injury, *ibid*.

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Under the *Lujan* standard, HHPrinceGeorge has Cases and Controversies standing to bring this action.[3] It follows, *a fortiori*, that he has Anytime Review relaxed standing (a requirement I continue to believe is unsupported by the Constitution) to bring this action. Nothing in this opinion should be taken to prejudice or support the arguments of either party on the merits.

[3] If this were a Cases and Controversies Clause lawsuit, the political question doctrine would present an obstacle to a court's jurisdiction. As I explained earlier, that doctrine does not apply to Anytime Review cases. *Supra*, at 1 n. 1.

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JUSTICE THOMAS, with whom JUSTICE GINSBURG joins, dissenting from the denial of the motion to dismiss.

I hope, one day, we will be able to clarify our position on anytime review—we certainly reversed course today. Petitioner HHPrinceGeorge claims that the President's appointee to the Senate fails to qualify under Art. I, § 3, cl 3. We granted certiorari. 5 U. S. ___ (2018). Respondent, the United States, then moved to dismiss, citing standing concerns. See Brief of Respondents 2–3. When another tried to do this one year ago, we dismissed his petition. See *Psychodynamic* v. *Technozo*, 2 U. S. 77 (2017).[1] But today, faced with a litigant just as lacking in standing, a majority of my colleagues has decided to move forward.

It appears that the Court instead wishes to keep anytime review hostage—after all, one may not know when one may need it. When Members of this Court, sitting surrounded

[1] In *Psychodynamic*, the petitioner challenged that a candidate running for a seat in the Senate would not qualify under Article I to serve had he won. We rejected that petition for standing concern, see *id.*, at 80. While in this case the target is a sitting Senator, that changes none the fact that HHPrinceGeorge has as little standing here as Psychodynamic did then. HHPrinceGeorge has yet to lay out how he is personally injured in a way that is "concrete, particularized and actual or imminent," *Monsanto Co.* v. *Geertson Seed Farms*, 561 U. S. ___, ___ (2018) (slip op., at 7).

by marble columns and security guards, prefer a political action—or any policy for the matter—anytime review will be relegated back to its cage, restricted by chain to our standing jurisprudence. See *Ex parte HHPrinceGeorge*, 2 U. S. 30, 33 (2017). But when they do not like something a political actor does, anytime review will be released with a vengeance, ready to devour any action this Court dislikes.

I

In addition, I write to respond to JUSTICE BORK's concurrence. JUSTICE BORK devotes the first section of his opinion to the proposition that the Constitution does not inherently require standing for anytime-review challenges. *Ante*, at 1–2. I have never claimed the Constitution requires textually a linkage between cases-and-controversies requirements and anytime-review cases. Our precedents, however, carve out a clear prudential rule: Standing is to be required in both types of cases. Nor do I entirely understand why JUSTICE BORK asserts that if I were to have "[my] way," the Court would "kick this pressing constitutional question down the road for no good reason at all." *Ante*, at 1. There is no constitutional question to delay; we made clear through application of a consistent jurisprudence that standing—outside of extremely pressing circumstances—is a necessary element in anytime-review cases. See, *e. g.*, *Psychodynamic*, 2 U. S. JUSTICE BORK also seems to at least somewhat support this proposition, acknowledging that there is some type of "'relaxed standing' standard our cases instruct us to apply," though it remains to be "clearly defined anywhere." *Ante*, at 2. (Except, for example, in the following: *Bakerley* v. *SurpriseParty*, 4 U. S. ___ (2017) (cert. denied); *United States* v. *City of Las Vegas*, 4 U. S. ___ (2018) (cert. dismissed); *Ex parte HHPrinceGeorge*, 2 U. S. 30 (2017) (cert. denied); *AdamStratton* v. *Technozo*, 2 U. S. 88, 92 (2017) (HOLMES, C. J., dissenting) ("this [Court] … requires that a person have standing to bring a petition for

anytime review").

JUSTICE BORK also warns readers that any conclusion—others than the majority's—will lead to judges "pick[ing] and choos[ing]" between different standards in cases to achieve their desired outcomes. I agree that such ought to be avoided, which is why I wonder why JUSTICE BORK has filed a concurrence; to "pick" and to "choose" are exactly what the Court has done today by uprooting a long-settled standing requirement. And, surely, we can at least agree that doing so eliminates "any semblance of expectancy or order," *AdamStratton*, 2 U. S., at 93, to which litigants are accustomed.

II

JUSTICE BORK, after omitting a year's worth of this Court's precedent, then makes a proposition that "taxes the credulity of the credulous," *Maryland* v. *King*, 569 U. S. ___, ___ (2013) (slip op., at 1) (Scalia, J., dissenting): "HHPrince-George meets any standing requirement which can be asked of him under our precedents." *Ante*, at 2. I can only assume that JUSTICE BORK feels compelled to argue with the merits of this dissent and is therefore faced with quite the challenge: How to argue that someone who does not have standing has standing.

The three requirements for standing are clear. First, a plaintiff must suffer an injury in fact that is judicially cognizable. Second, that injury must be fairly traceable to the alleged conduct. And third, it must be likely that a favorable decision by a court of law will provide redress. *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 560–561 (1992); see also *Allen* v. *Wright*, 468 U. S. 737, 751 (1984).

JUSTICE BORK claims that because HHPrinceGeorge is a "sitting Senator," *ante*, at 3 (internal quotation marks omitted), ConnerRusso's existence as a Senator establishes an "injury in fact." *Ibid*. He reasons that ConnerRusso, by joining the Senate, has increased the member count of the

Senate and thus rendered HHPrinceGeorge's "vote … worth less than it is with fewer members." *Ibid*. This analysis is absurd.

The idea that ConnerRusso, by filling a seat that would be otherwise held, "dilutes" HHPrinceGeorge's vote makes no sense. Regardless of whether ConnerRusso is a Senator, his seat will be filled by *someone* who will exercise the same voting power. Thus, the only difference between any other Senator and ConnerRusso in this case is that one might not be qualified to sit in the first place. Any Senator under Justice Bork's analysis, therefore, injures another: Whenever a new Senator is sworn in, *every other Senator* will have a valid injury to assert. Furthermore, *vote dilution* as an injury requires that the voting strength of a class of people—often minorities—has been drastically reduced or cancelled out when compared with that of the general majority. Nothing of the sort has occurred with HHPrinceGeorge, and the idea that it has insults the intelligence of the reader.

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In an age when our Court's "power lies … in its legitimacy, a product of substance and perception," surely the "'substance' part of the equation demands that plain error be acknowledged and eliminated." *Planned Parenthood of Southeastern PA* v. *Casey*, 505 U. S. 833, 983 (opinion of Scalia, J.). Here, however, the "plain error" has been denied and empowered.

I respectfully dissent.