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CASES ADJUDGED
IN
THE SUPREME COURT
AT
FEBRUARY TERM, 2018

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TIMOTHY F. GEITHNER
REPORTER OF DECISIONS

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

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THURGOOD MARSHALL, ASSOCIATE JUSTICE.
NEIL M. GORSUCH, ASSOCIATE JUSTICE.
ROBERT H. BORK, ASSOCIATE JUSTICE.
SANDRA D. O'CONNOR, ASSOCIATE JUSTICE.
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KOLIBOB, ATTORNEY GENERAL.
JOHN D. ASHCROFT, ATTORNEY GENERAL.
PAPAIRISH, SOLICITOR GENERAL.

TABLE OF CASES REPORTED

NOTE: All undesignated references herein to the United States Code are to the 2018 edition.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

FEBRUARY TERM, 2018

IN RE UNITED STATES

APPLICATION FOR A GROUP-ARREST WARRANT

No. 05–14. Decided February 27, 2018

PER CURIAM.

The application for a group arrest warrant on the group TPR[1] is granted in accordance with the legal process set forth in the concurring opinion. See *post*, at 2 (joint opinion of HOLMES, C. J., and MARSHALL and GORSUCH, JJ.) ("we . . . ask whether objective information supports granting the warrant").

CHIEF JUSTICE HOLMES, JUSTICE MARSHALL, and JUSTICE GORSUCH, with whom JUSTICE GINSBURG, JUSTICE THOMAS, JUSTICE BORK, and JUSTICE O'CONNOR join, concurring.

The Constitution imposes three fundamental requirements on this Court in the exercise of its power to issue group arrest warrants. "[C]harges" must exist, a "trial" must occur within "seventy two hours" of the warrant's issuance, and the charges must be "actively pursued by the federal government" for the duration of the warrant. Art. III, § 5, cl. 1, 3. After extensive deliberation and in consideration of the nature of relief authorized, the Justices signing this joint opinion (the entirety of the Court) conclude the following:

First, that the remedy of a group arrest warrant is a preventative, not punitive, measure. It is not intended to replace criminal prosecution, which per our holdings must occur on an individ-

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[1] https://www.roblox.com/groups/group.aspx?gid=731626

ual basis (or consistent with lawful rules of joinder). See, *e. g.*, *CodyGamer100* v. *United States*, 2 U. S. 18 (2017). Thus, in the context of group arrest warrant proceedings, the "charges" required are not *criminal* charges—or, for lack of a better term, "Title 18" charges—but rather factual allegations which tend to show a need for preventative relief. These allegations must adequately demonstrate that the actions of group members are not isolated incidents, but rather part of some organized effort on the group's part to harm the peace of the United States and her cities.

Second, that in determining whether to grant the government's application for a warrant, we should consider that the affected group will not be able to defend itself against the charges until the "trial" opportunity occurring within 72 hours. Therefore, we should subject the government's allegations to appropriate scrutiny: Specifically, we should ask whether objective information supports granting the warrant.

Third, that the "trial" demanded by the Constitution is an opportunity for the affected group to challenge the quality of the charges presented by the government. Provided that having reached this stage of proceedings we would have already determined that objective information supported granting the warrant, the onus would be on the group to demonstrate why that is not the case. We should accord the group the benefit of all inferences.

Fourth, and finally, that if after the trial we resolve to maintain the warrant, we should request that the government provide an estimate of how much longer the warrant will be necessary as a preventative measure; we should accommodate that estimation to the maximum extent that objective information permits. The government may withdraw charges at any time during that period and we should thereupon dismiss the warrant. If the government determines the warrant will be needed longer, it may petition us to extend the warrant.

These conclusions are limited only to the context of group arrest warrants.

BANK OF AMERICA, INC. *v.* UNITED STATES

REVIEW TO THE UNITED STATES FEDERAL GOVERNMENT

No. 05–20. Decided March 10, 2018

PER CURIAM.

The writ of certiorari is dismissed as improvidently granted.

It is so ordered.

JUSTICE BORK, concurring.

I agree with the Court that dismissal of the writ is in order because the petitioner wishes to withdraw. Nonetheless, considering the import of the question presented and the shortage of answers available in previous opinions, I write to explain that had this matter proceeded to argument and decision, I would have voted in the government's favor. At the outset, I feel it necessary to disclaim that this statement constitutes no part of any holding of this Court and represents my own personal conclusions of law.

I

The powers of the President to protect the American people from both foreign invasion and domestic violence are well articulated in the Constitution. In addition to wielding the general "executive power," the President is tasked with ensuring the laws are "faithfully executed." To be sure, both clauses deal in generals and are intended to enable the executive to adapt to new situations as they arise. The Framers appreciated and embraced the idea of "energy in the executive"—they firmly believed it to be a "leading character in the definition of good government." The Federalist, No. LXX. This belief was common among the founding generation. The powers conferred by Article II and the Amendments should be read in context of this observation.

As far as seizing the Bank of America's Las Vegas location temporarily goes, the President finds strong support in the Con-

stitution of the United States. The President's decision to do so was adequately based in public exigency. The Court itself recognized the unusual and extraordinary threat of the "TPR" organization when it granted the government's application for an arrest warrant on the group. See *In re United States*, 5 U. S. 1 (2018) (*per curiam*). The President similarly recognized the threat of "TPR" and used the bank property's central location in the city to provide a shelter and safe house for the public in addition to a strategic headquarters for his men. I have little doubt that the bank was then "seized for a public use." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 680 (1952) (Vinson, C. J., dissenting).

The Court has consistently recognized the Federal Government's power of eminent domain in its decisions. See *Kohl* v. *United States*, 91 U. S. 367 (1876). The same goes for society by and large. The SuddenRush12G Administration's seizure of the roads leading to the federal prison in Las Vegas, for its security, went unchallenged by the general public. In fact, that seizure of property remains in effect and good standing even today. Yet in this case, a comparatively more modest (and temporary) measure, justified by a clear public exigency recognized by the Court, is challenged. Nonetheless, our precedents confirm what is obvious: unless the taking is otherwise unlawful, there is no cause for concern. See *United States* v. *Pewee Coal Co.*, 341 U. S. 114 (1951).

The Founders obviously did not create an "autocrat capable of arrogating any power unto himself at any time"; the President has not asserted any such power. *Youngstown Sheet & Tube Co.*, *supra*, at 682 (Vinson, C. J., dissenting). But as proven earlier, they assuredly did not create "an automaton impotent to exercise the powers of Government at a time" when necessary either. *Ibid*. The Constitution, we have observed, is "intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs." *McCulloch* v. *Maryland*, 4 Wheat. 415, 424 (1819). Fulfilling that objective would be a difficult task if the President was paralyzed to act without

express Congressional approval. Furthermore, such a paralysis would be inconsistent with the Framers' and founding generation's appreciation of "energy in the executive."

II

The President's power to "take care that the laws be faithfully executed" is substantial. "With or without explicit statutory authorization," he must carry out that duty under the Constitution. 343 U. S., at 683. "Presidents have … dealt with national emergencies by acting promptly and resolutely to enforce legislative programs, at least to save those programs until Congress could act." *Ibid.* Every time, both Congress and the courts have responded with "consistent approval." *Ibid.* John Marshall, before he became Chief Justice, explained the power of the President to determine the mode of executing the laws of the United States (specifically addressing a treaty) when Congress has not made provisions for the same (such as in the case of a public exigency):

> The treaty, which is a law, enjoins the performance of a particular object. The person who is to perform this object is marked out by the Constitution, since the person is named who conducts the foreign intercourse, and is to take care that the laws be faithfully executed. The means by which it is to be performed, the force of the nation, are in the hands of this person. Ought not this person to perform the object, although the particular mode of using the means has not been prescribed? Congress, unquestionably, may prescribe the mode, and Congress may devolve on others the whole execution of the contract; but, till this be done, it seems the duty of the Executive department to execute the contract by any means it possesses. See 10 Annals of Congress 596, 613–614 (1800).

The organization "TPR" deliberately and routinely violates the laws of the United States prescribed by Congress. The President, whose judgment on national security we do not

second-guess, concluded that they posed an exceptional and extraordinary threat to the national security of the United States. Congress did not outline a specific mode for the execution of the laws in the case of such a public exigency. The President's obligation to execute them nonetheless applied. I see no reason to challenge the mode he chose to do so.

Syllabus

ROEXPLO *v.* UNITED STATES

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

No. 05–07. Argued March 16, 2018—Decided March 20, 2018

On August 2, 2017, the Department of Justice began investigating RoExplo for multiple instances of murder and attempted murder. Soon, they decided to prosecute him, and he was convicted on all charges. The District Court sentenced him to a 150-day (or five-month) prison term, for the duration of which he would be subject to an arrest warrant.

Held: The 150-day sentence did not violate the Eighth Amendment, as construed in *CodyGamer100* v. *United States*, 2 U.S. 18, and was accordingly upheld by the Court.

(a) The Court's interpretation of the Eighth Amendment "must be firmly rooted in the original public meaning it carried at the time of its adoption."

(b) As originally understood, the Eighth Amendment's prohibition on "cruel and unusual punishment" was targeted at cruel innovations in punishment. That is, any entirely new punishment (or application of one), or one which fell out of use and was reintroduced, that—in the case of an application—is "incredibly severe" and "clearly out of proportion" such that it "shocks public sentiment and violates the judgment of reasonable people"; or—in the case of a mode of punishment—is "destitute of pity, compassion or kindness and has a separate tormenting element."

(c) The *CodyGamer100* rule against permanent exclusion as punishment for common crime is consistent with the original public understanding of the Eighth Amendment.

(d) A five-month sentence does not amount to "permanent exclusion" as contemplated in *CodyGamer100* and RoExplo's challenge to his sentence under that case exclusively accordingly must fail.

(e) Because RoExplo only invoked *CodyGamer100*, the Court only measured his sentence against the standard of "permanent exclusion" which it found was valid under the Eighth Amendment's original meaning. It did not apply its test directly to RoExplo's sentence.

3:18-bR0kAk1W, affirmed.

HOLMES, C. J., delivered the opinion for a unanimous Court. BORK, J., filed a concurring opinion, *post*, p. 33.

CHIEF JUSTICE HOLMES delivered the opinion of the Court.

Our interpretation of the Eighth Amendment must be firmly rooted in the original public understanding it carried at the time

of its adoption. Failing to do so risks creation of an "ineffectual and incoherent" line of decisions. Youngjae Lee, The Constitutional Right Against Excessive Punishment, 91 Va. L. Rev. 677, 684 (2005). In the present case, petitioner RoExplo challenges his 150-day sentence for murder and attempted murder on the grounds that it violates our finding in *CodyGamer100* v. *United States*, 2 U. S. 18 (2017), that the punishment of "permanent exclusion" cannot be imposed for common offenses (such as murder and attempted murder). *Id.*, at 23. Before turning to the question of whether his 5-month sentence qualifies as "permanent exclusion," we must first determine whether the relatively new rule of law announced in *CodyGamer100* is consistent with the original public understanding of the Eighth Amendment.[1]

I

The terms of the Eighth Amendment appear straightforward: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." In practice, however, that is not the case. Legal commentators from across the spectrum and several Justices have criticized this Court's approach to the Eighth Amendment for being contradictory, see *Walton* v. *Arizona*, 497 U. S. 639, 673 (1990) (opinion of Scalia, J.) ("*Woodson* and *Locket* are rationally irreconcilable with *Furman*"), a "mess,"[2] a "train wreck,"[3] and—in many cases—downright "embarrassing."[4] The cause has largely been the Court's long-time creed that "evolving standards of decency," and not original meaning, dictate the application of the Eighth Amendment. *Atkins* v. *Virginia*, 536 U. S. 304, 311 (2002). To

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[1] What follows is an extensive analysis of the legal and drafting history of the Amendment aimed at identifying its original public meaning. Those only interested in a summary of our findings on this question should skip to page 27.

[2] Tom Stacy, Cleaning Up the Eighth Amendment Mess, 14 Wm. & Mary Bill Rts. J. 475, 475 (2005).

[3] Benjamin Wittes, What Is "Cruel and Unusual"?, Pol'y Rev., Dec. 2005-Jan. 2006, at 15, 16.

[4] Robert Weisberg, Cruel and Unusual Jurisprudence, N.Y. Times, Mar. 4, 2005, at A2 1.

avoid repeating that confusion and to produce expectancy, we begin with the original understanding. Our analysis should not be taken to cast doubt on long-standing precedent.

A

The original meaning of the word "unusual" in the Cruel and Unusual Punishments Clause has been largely overlooked in this Court's jurisprudence. This is true not just of the prevailing non-originalist approach but also of the originalist approach announced in *Harmelin* v. *Michigan*, 501 U. S. 957 (1991). Both essentially ignore the word, either by treating it as meaningless, or as in the case of the latter, assigning it a weak meaning inconsistent with the history of the Clause. See, *e. g.*, *Trop* v. *Dulles*, 356 U. S. 86, 100 n. 32 (1958); *Harmelin*, *supra*, at 976 (1991) ("Wrenched out of its common law context, and applied to the actions of a legislature, the word 'unusual' could hardly mean 'contrary to law.' But it continued to mean (as it continues to mean today) 'such as [does not] occu[r] in ordinary practice,' '[s]uch as is [not] in common use' ") (citation omitted).[5] The result of this has been the transformation of the Cruel and Unusual Punishments Clause into a Cruel Punishments Clause, with the only difference between the originalist and non-originalist approach being the time-frame from which public opinion about cruelty is derived.

The meaning of the word "unusual" is crucial here. It cannot be presumed that it was intended to have no effect; we begin our analysis there because it necessarily informs the Clause's use of

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[5] The problem with *Harmelin*'s hypothesized original meaning of "unusual" is that it relies purely on abstract logic. After extensively analyzing the understanding of the term "unusual" during the drafting of the English Bill of Rights, the *Harmeltin* Court—moving from seventeenth century England to eighteenth century America—abandons that meaning without attempting to discern whether the founding generation shared it. It then asserts a new meaning out of almost thin air and does not attempt to justify it, quickly moving on. We are not convinced by the *Harmelin* Court's proposed original meaning of "unusual."

the word "cruel."

1

Unusual

In the seventeenth and eighteenth centuries, the term "unusual" had many of the meanings we currently attribute to it: "rare," "uncommon," "out of the ordinary." Oxford English Dictionary 249 (2d ed. 1989) (entry for "unusual"). The word also had a more specific meaning as a legal term of art: "contrary to long usage," or "immemorial usage." An analysis of seventeenth- and eighteenth-century legal and political history reveals that this last meaning is the *only* one plausibly attributed to the Eighth Amendment's Cruel and Unusual Punishments Clause.

Throughout the seventeenth and eighteenth centuries, in England and later America, the common law served as the primary (and most important) source of law. Blackstone explained it as the "first ground and corner stone of the laws of England." 4 William Blackstone, Commentaries (hereinafter Commentaries) at *73. Many today see the common law as a body of judge-made law where judges, acting in accordance with a voluminous framework of precedent, devise legal principles that apply to the changing circumstances of time. Common law judges, under that view, exercised a "legislative function," formulating legal rules, doctrine, and principles based on their views of "what is expedient for the community concerned." O. W. Holmes, Jr., The Common Law 35–36 (Boston, Little, Brown, & Co. 1881).

Practitioners of common law in the seventeenth and eighteenth centuries had a different perspective. Common law to them was not judge-made law, but rather the law of "long use" and "custom." Edward Coke, The Compleat Copyholder (1630) (hereinafter Copyholder) § 33, at 563, 563 ("Customes are defined to be a Law, or Right not written, which being established by long use, and the consent of our Ancestors, hath been, and is daily practised").[6] Judges at the time did not see them-

[6] Writings from as early as the fourteenth century express the belief that

selves as arbiters of public policy or makers of law; rather, they saw it as their job to identify long-standing customary rules and apply them to new cases. See, *e. g.*, Grant Gilmore, The Ages of American Law 5–7 (1977). The common law depended on "long use and custom" as a source of normative and actual authority. 1 The Works of James Wilson 186 (James DeWitt Andrews ed., Chicago, Callaghan & Co. 1896) (hereinafter Wilson).

Both English and American legal thought regarded the terms "custom" and "long use" as being closely tied together as a matter of logic and grammar. Today we say that we "follow" a custom; in the seventeenth and eighteenth centuries they would "use" a custom. For example, Edward Coke wrote: "And note that no custome is to bee allowed, but such custome as hath bin used by title of prescription, that is to say, from time out of minde." 1 Edward Coke, Institutes of the Lawes of England (1608) (hereinafter Institutes) § 170, at 701. More than a century later, Blackstone wrote that "in our law the goodness of a custom depends upon [its] having been used time out of mind; or, in the solemnity of our legal phrase, time whereof the memory of man runneth not to the contrary." 1 Commentaries at *67. James Wilson, an American and among the drafters of the Constitution, wrote: "[L]ong customs, approved by the consent of those who use them, acquire the qualities of a law." Wilson 435–36.

Long usage's binding authority was applied to private parties as well as the government. For private parties, long usage identified rights and duties.[7] For the government, on

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the common law is primarily a law of custom and long usage. See Thomas Usk, Testament of Love, bk. III, ch. 1, 11. 78–83 (R. Allen Shoaf ed., Medieval Inst. Pub. 1998) (c. 1380) ("But custome is a thyng that is accepted for right or for lawe, there as lawe and right faylen . . . . [C]ustome is of commen usage by length of tyme used, and custome nat writte is usage; and if it be writte, constitutyon it is ywritten and ycleped."); see also Oxford English Dictionary 167–68 (2d ed. 1989) (defining "custom" as "[a] habitual or usual practice; common way of acting; usage, fashion, habit (either of an individual or of a community)").

[7] For example, where the tenant of a farm had continuously crossed another's land by "immemorial usage," that tenant developed a right of way across the land. See 2 Commentaries at *36.

the other hand, long usage was the basis and justification for state action, such as the imposition of a given punishment for a given crime.[8] Actions that comported with long usage, for example the customary rules of royal succession, or the "usual course of descent," were said to be "usual." 1 Commentaries at *215. Following the same principle, actions that were contrary to long usage were described as "unusual." The Magna Carta disallowed the king from demanding an "unusual" fee for the issuance of a royal writ and a sheriff could be punished for holding a Torn in an "unusual" place. 3 Commentaries at *273; also 2 William Hawkins, A Treatise of the Pleas of the Crown 91 (John Curwood ed., London, S. Sweet 1824).

Americans in the late eighteenth and early nineteenth centuries similarly used the term "unusual" to refer to actions that were contrary to "long usage." In 1769, the Virginia House of Burgesses condemned Parliament's attempt to reinstate a long-defunct statute permitting trial of American protesters in England as "new, unusual, . . . unconstitutional and illegal." Journals of the House of Burgesses, 1766-1769, at 215 (John Pendleton Kennedy ed., 1906). The Declaration of Independence protested the recent English practice of convening colonial legislatures at "places unusual." The Declaration of Independence ¶ 6 (U.S. 1776). In 1788, George Mason worried that the lack of common law constraints in the new Constitution would enable Congress to create "new crimes, inflict unusual and severe punishments, and extend their powers." 2 The Records of the Federal Convention of 1787, at 637 (M. Farrand ed., 1911) (hereinafter Farrand). Patrick Henry similarly argued that absent common law constraint, the federal government would be a series of "new and unusual experiments." 3 The Debates in the Several State Conventions on the Adoption of the Federal Constitution, at 172 (Jonathan Elliott ed., Philadelphia, J. B. Lippincott & Co. 2d ed.

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[8] Blackstone explained that it was "ancient usage among the Goths" to punish murder by imposing a large fine (amercement) on the entire community where the murder occurred. 4 Commentaries at *195.

1881) (hereinafter Elliott's Debates).

These American examples are different from the cited English examples in that they utilize "unusual" to denote government actions that were not just contrary to long usage, but also fundamentally unjust. How this connotation developed will be discussed soon.

Edward Coke is oft-cited as the most important common law jurist in English history. One scholar proclaimed that "Coke's works have been to the common law what Shakespeare has been to literature, and the King James Bible to religion." Allen D. Boyer, Introduction to Law, Liberty, and Parliament: Selected Essays on the Writings of Sir Edward Coke xiii–xiv (Allen D. Boyer ed., 2004) (citing William Holdsworth). His writings on the common law, his judicial decisions, and his role in Parliament decisively shaped English thought about the nature and application of common law for centuries. Coke also heavily influenced American legal thought in the late eighteenth century.

Coke established several key principles that formed the common law basis invoked in the American Revolution as well as the drafting and adoption of the Bill of Rights. Pertinently, Coke argued the common law consisted of customary practices that enjoyed "long" or "immemorial usage," and were therefore inherently just and reasonable. Coke further argued that government actions that deviated from long usage—"unusual" actions—were dangerous and presumptively unjust. Lastly, Coke argued that acts of Parliament, and even the king, which deviated from fundamental common law principles were "void" because they contradicted "common right [and] reason." These principles helped set the terms of debate for the next 150 years, including in the American Revolution and drafting of the Bill of Rights.

In the seventeenth century, it was generally agreed that the foundation for law was an objectively real moral order that inhered in nature and was knowable by reason. See Harold J. Berman, The Origins of Historical Jurisprudence: Coke, Selden, Hale, 103 Yale L. J. 1651, 1653 (1993) ("Natural law theory treats

law essentially as the embodiment in rules and concepts of moral principles that are derived ultimately from reason and conscience"). Despite the law's unitary foundation, positive law was sourced from many places in England and sometimes conflicted: custom, statute, decisions of common law courts, civil law courts, etc. See Sir John Baker, The Common Lawyers and the Chancery: 1616, at 254–55. The question then was what should be done when there is conflict between royal will, common law, and statutory law. More generally, how was one to distinguish genuine law—law that conforms to basic principles of justice—from mere "violence?"[9]

This question would not truly be answered until nearly a century and a half after Coke's death. Nonetheless, he set forth the basic principles for solving the problem, in a manner that would be highly influential on the development of the English and American constitutions (one unwritten, one codified). His principles would have particular relevance to the meaning of the Cruel and Unusual Punishments Clause.

Coke started with the proposition that basic principles of justice were built into the natural order itself; he asserted the "law of nature is part of the law of England." 1 Coke, Selected Writings, at 166, 195. He then also agreed that the fundamental basis of law was reason as opposed to will, and that therefore laws that violate basic principles of justice may not properly be called "law" at all: "[N]othing that is contrary to reason, is consonant to Law." 1 Institutes, § 69, at 684. However, rather than identifying "reason" directly with universal and abstract principles of justice, Coke associated it with a specific set of historically and culturally situated legal rules, the common law of England: "[R]eason is the life of the Law, nay the common Law

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[9] Thomas Acquinas, Summa Theologica, pt. II-I, Q. 93, art. 3, reply 2 ("Human law has the nature of law in so far as it partakes of right reason; and it is clear that, in this respect, it is derived from the eternal. But in so far as it deviates from reason, it is called an unjust law, and has the nature, not of law, but of violence.")

it selfe is nothing else but reason." *Id.*, § 138, at 701.

The key to this was Coke's conception of the normative power of "long usage." If a given customary law was used over a long period of time, throughout the entire kingdom, Coke held that this process confirmed the law's goodness and eliminated from the law anything that was bad or unreasonable. He thus compared long usage to the refinement of gold: "[I]f all the reason that is dispersed into so many severall heads were united into one, yet could not make such a Law as the Law of England is, because by many successions of ages it hath been fined and refined by an infinite number of grave and learned men, and by long experience growne to such a perfection, for the government of this Realme." *Ibid.*

Coke considered long usage the most reliable means for determining the goodness of a law because it establishes both the reasonableness of the law and that it enjoys the consent of the people. Coke saw long usage as, like the previously cited quote shows, a process of legal development equivalent to the refinement of gold in a fire, reliably separating good from bad. As courts decide cases year after year, century after century, impractical and unjust practices fall away, while practical and just ones endure. Second, they must also enjoy the consent of the people, else they would fall out of usage. See, *e. g.*, Coke, Copyholder, § 33, at 563 ("Customes are defined to be a Law . . . which being established by long use, and the consent of our Ancestors, hath been, and is daily practiced"). This notion that long usage establishes both the reasonableness and the consensual nature of the law[10] was highly influential with, and repeated by, scholars

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[10] Coke also believed that innovations in the law are presumptively unreasonable. See 1 Institutes, § 723, at 740 ("[W]hen any innovation or new invention starts up, … trie it with the Rules of the common Law, … for these be true Touchstones to sever the pure gold from the drosse and sophistications of novelties and new inventions. And by this example you may perceive, That the rule of the old common Law being soundly … applied to such novelties, it doth utterly crush them and bring them to nothing.")

like William Blackstone, James Wilson, and many others.

As noted above, many sources of law coexisted in England during Coke's time. The common law was the oldest and most important. The common law, however, because it looked to long usage as opposed to sovereign will for its rules of decision, was remarkably protected from royal control. For this reason, numerous kings established special courts (the Star Chamber, the Court of High Commission, the Admiralty Court, among others) that followed continental European civil law practices instead of the common law. Coke sometimes practiced in those courts but came to see them as a means of undermining the liberty of English subjects protected by the common law. Coke said the first act of civil law proponents was to introduce a torture instrument—the "Rack"—into the Tower of London for use on prisoners:

> John Holland Earle of Huntingdon, [who] was by King [Henry VI] created Duke of Exeter … and William De la Poole Duke of Suffolk, and others, intended to have brought in the Civill Lawes. For a beginning whereof, the Duke of Exeter being Constable of the Tower first brought into the Tower the Rack or Brake allowed in many cases by the Civill Law; and thereupon the Rack is called the Duke of Exeters Daughter, because he first brought it thither.[11]

Here, we see most starkly the contrast Coke drew between the "reason" embodied in the common law's "usual" practices and the injustice and cruelty associated with efforts to introduce "unusual" or innovative practices, particularly those associated with the civil law. For the king, introduction of torture devices was a necessary first step toward adopting the machinery of civil law for the prosecution of criminal cases, thereby sidestepping many of the constraints imposed by the common law.

The Court of High Commission, for one, instituted civil law practices like trial by torture. See Anthony F. Granucci, "Nor Cruel and Unusual Punishments Inflicted": The Original Meaning, 57 Cal. L. Rev. 839, 848–49 (1969). Coke believed that the

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[11] 3 Institutes, ch. 2, at 1025.

inherent reasonableness of the common law—guaranteed by long use—was the sole obstacle to cruel innovations imposed by sovereign will, such as civil law torture practices.

Coke lived during a time of absolute claims to state power. The Tudors in England had bloated the powers of the monarchy over the preceding century, and when James I came to power in 1603, he explicitly claimed the power of absolute monarchy. See King James I, The True Law of Free Monarchies (1598), at 9–10. Coke never publicly disputed this claim, and agreed that the king did possess a sort of absolute power while sitting as head of the body politic represented in Parliament. See 4 Institutes, ch. 1, at 1067. When king and Parliament operated within the framework defined by the common law, with both working together towards the common good, Coke believed they possessed the same qualities of reasonableness attributed to the common law itself. Coke also acknowledged that Parliament had the power to change common law rules: "The Common Law hath no controller in any part of it, but the high Court of Parliament, and if it be not abrogated or altered by Parliament, it remaines still." 1 Institutes, § 170, at 711.

Coke nonetheless, having identified long usage so closely with fundamental principles of justice, attributed an effectively dual status to the common law in his writings. First, as a source of positive law (which could be altered by Parliament) and second, as fundamental law (which could not, or at least should not, be altered). Coke argued that abrogating the common law (in its aspect as fundamental law) would threaten to destroy the kingdom itself: "So dangerous a thing it is, to make or alter any of the rules or fundamentall points of the Common law, which in truth are the maine pillars, and supporters of the fabrick of the Common-wealth." 2 Institutes, ch. 35, at 907.

As a source of *fundamental* law, the common law had the potential to limit the arbitrary exercise of state power. Coke asserted that the common law, reflected in the Magna Carta and elsewhere, was the font of numerous rights and liberties of citizens. Although Coke found those rights in the Magna Carta

and other ancient statutes, he made clear that the written laws merely affirmed the existence of rights developed through long usage. He said the Magna Carta was "but a confirmation or restitution of the Common Law." 1 Institutes, § 108, at 697.

Coke upheld the long usage of the common law against the absolutist Stuart kings. He did so cautiously at first, but became more bold towards the end of his career. As noted earlier, Coke never expressly denied the claims of James I to absolute monarchy, but he did emphasize the following principle:

> The King is under no man, but onely God and the Law, for the Law makes the King: Therefore let the king attribute that to the Law, which from the law he hath received, to wit, power and dominion: for where will, and not law doth sway there is no King.[12]

Just as he had warned that Parliament could endanger the "fabrick of the Commonwealth" by changing fundamental common law rules, here Coke warned that the king endangers the very fact of kingship if he fails in subjecting himself to the laws and customs of the English people.

As a member of Parliament, Coke led the effort to pass the Petition of Right, seeking to enforce the fundamental law of England against the king. He was ultimately successful and the resulting law would serve as a model for the English Bill of Rights in 1689 and the American Declaration of Independence.

Approximately a century and a half would pass between the adoption of the Petition of Right and the Continental Congress' issuance of the Declaration of Independence. During that period, great political upheaval occurred. The English Civil War occurred in response to the claim of the Stuart kings to suspend laws by royal prerogative, followed by the Long Parliament, which abolished the monarchy and House of Lords, taking absolute power for itself, and then the Restoration brought about a milder form of Stuart absolutism, including a renewed claim of the power to suspend laws. Finally, the Glorious Revolution returned England to a system of parliamentary supremacy, set-

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[12] Edward Coke, Preface, at 102.

ting the stage for the American Revolution.

Throughout that period, two views of the nature of government power struggled for dominance. The first view held that some institution, whether it be the monarch or Parliament, must hold absolute, arbitrary sovereign power, and therefore must be itself above the law. The second followed Coke in holding that sovereign power was limited by the rule of law, specifically the fundamental rules of the common law embodied in long usage. See J. W. Gough, Fundamental Law in English Constitutional History 88 & n. 4 (1955) (citing Charles Herle, A Fuller Answer to a Treatise Written by Dr. Ferne 3, 8 (1642)). Conflicts between those two views of government tended to arise when the holder of sovereign power (whether the monarch or Parliament) tried to innovate in one of three ways: by changing the longstanding structure of the government itself, by taxing English citizens without proper authorization, or by trying and punishing English citizens in a manner contrary to common law. In each case, the innovation was protested on the ground that it was contrary to long usage, and therefore contrary to reason and destructive of the fabric of society. For example:

- In 1628, Parliament issued the Petition of Right which declared that King Charles I did not possess the power to impose taxes absent parliamentary approval or imprison subjects without cause, because such actions violated certain rights expressed in the Magna Carta and established through long usage.[13]
- In 1641, the Long Parliament voted to make itself perpetual; royalists and radical democrats objected on the grounds that the action was contrary to long usage. See David Jenkins, Discourses Touching the In-

[13] See Edward Coke, Selected Writings, at 1288–89 ("Your subjects have inherited this freedom, that they should not be compelled to contribute to any tax, tallage, aid, or other like charge not set by common consent in parliament … And … also, by the statute called, 'The Great Charter of the Liberties of England,' it is declared and enacted, that no freeman may be taken or imprisoned … but by the lawful judgment of his peers, or by the law of the land.")

convenience of a Long-Continued Parliament 123 (1647)

• When Parliament moved toward abolishing the monarchy in the 1640s, David Jenkins argued that Parliament did not possess that power because the monarchy had existed since before there were written records and "usage so practiced makes therein a fundamental law." David Jenkins, Lex Terrae; or Laws of the Land (1647).

Also during that time period, several prominent English judges affirmed and applied Coke's assertion that acts of Parliament which violated fundamental common law principles were void. In *Day* v. *Savadge*, 80 Eng. Rep. 235 (1614) (K. B.), Chief Justice Hobart of the Court of King's Bench repeated Coke's assertion that "even an Act of Parliament, made against Natural Equity … is void in it self." *Id.*, at 237. Similarly, in *Thomas* v. *Sorrell*, 124 Eng. Rep. 1098 (1673) (C. P.), Chief Justice John Vaughan of the Court of Common Pleas asserted that both the king and Parliament were without power to legal actions that were *malum in se*, like "murder, stealing, perjury, trespass." *Id.*, at 1102. Any law that sought to legalize such actions "would be a void law in itself," for "the same thing, at the same time, would be both lawful and unlawful." *Ibid.* In *City of London* v. *Wood*, 88 Eng. Rep. 1592 (1701) (K.B.), Chief Justice John Holt of the Court of King's Bench held that a lawsuit brought by the Mayor of London in the mayor's court to enforce a fine against a defendant must be dismissed on the ground that the mayor would be—at least nominally—both judge and party in the case:

> And what my Lord Coke says in *Dr. Bonham's* case … is far from any extravagancy, for it is a very reasonable and true saying, That if an act of parliament should ordain that the same person should be party and judge, or which is the same thing, judge in his own cause, it would be a void act of parliament; for it is impossible that one

should be judge and party.[14]

As these cases illustrate, by the eighteenth century Coke's ideas regarding the inherent reasonableness of the common law had achieved a great deal of acceptance in the English legal and political communities. Coke's reasoning served as the primary basis for the notion that government power was limited by an unwritten constitution whose principles were embodied by long usage. Nonetheless, in the case of direct conflict between those principles and an act of a state power-holder—whether Parliament or the king—the power-holder invariably won out, at least in the short term. There was accordingly a growing divergence between the normative power of the common law and the actual power of the government.

While Coke was the most important expositor of the common law in the seventeenth century, William Blackstone assumed that mantle in the eighteenth and nineteenth centuries, particularly in America. His Commentaries on the Laws of England have been described as the "handbook of the American revolutionary," and the "bible of American jurisprudence in the 19th century." Robert Allen Rutland, The Birth of the Bill of Rights 11 (1991); Robert Lowry Clinton, God and Man in the Law: The Foundations of Anglo-American Constitutionalism 92 (1997). Blackstone's description of common law rights and liberties was among the key resources which Americans relied on in formulating their reasons for independence from England.

Blackstone exalted Coke's vision of the common law, emphasizing the inherent reasonableness and liberty assured by "long usage." Blackstone also importantly was a harsh critic of parliamentary deviation from the reason of the common law in the area of criminal punishment.

Blackstone believed in the supreme power of Parliament, but not in the supreme wisdom of all its acts. Much like Coke, he distinguished the normative power of the common law from the actual power of Parliament. Nowhere is this distinction

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[14] *Id.*, at 1602.

more clear than in his discussion of the English criminal justice system. In England, he explained, comparing its system with those of continental Europe, "crimes are more accurately defined, and penalties less uncertain and arbitrary; . . . all our accusations are public, and our trials in the face of the world; . . . torture is unknown, and every delinquent is judged by such of his equals, against whom he can form no exception, nor even a personal dislike." 4 Commentaries, at *3–4. He also praised the English system of criminal punishment because "the nature, though not always the quantity or degree, of punishment is ascertained for every offense; and … it is not left in the breast of any judge, nor even of a jury, to alter that judgment, which the law has beforehand ordained, for every subject alike, without respect of persons." *Id.*, at *377. Although English judges had discretion in sentencing, "[their] discretion is regulated by law. For the bill of rights has particularly declared, that excessive fines ought not to be imposed, nor cruel and unusual punishments inflicted: (which had a retrospect to some unprecedented proceedings in the court of king's bench, in the reign of king James the second)." *Id.*, at *378. Lastly, though the law permitted horrific punishments for crimes such as treason, including burning at the stake, drawing and quartering, and disembowelment, "the humanity of the English nation has authorized, by a tacit consent, an almost general mitigation of such part of these judgments as savour of torture or cruelty." *Id.*, at *376. In other words, they were falling out of usage by the middle of the eighteenth century.

While Blackstone celebrated the relative fairness of the English common law system of criminal justice, he harshly criticized the fact that over the course of the eighteenth century, Parliament had deviated from the common law and transformed a whole 160 crimes into capital offenses. *Id.*, at *18 ("It is a melancholy truth, that among the variety of actions which men are daily liable to commit, no less than an hundred and sixty have been declared by act of parliament to be felonies without benefit of clergy; or, in other words, to be worthy of instant

death"). Blackstone criticized Parliament for failing to make any distinction between greater and lesser offenses in assigning capital punishments, even insinuating that Parliament's approach to this issue revealed it to be incompetent and tyrannical:

> [S]anguinary laws are a bad symptom of the distemper in any state … It is moreover absurd and impolitic to apply the same punishment to crimes of different malignity. A multitude of sanguinary laws (besides the doubt that may be entertained concerning the right of making them) do likewise prove a manifest defect in the wisdom of the legislative, or the strength of the executive power. It is a kind of quackery in government, and argues a want of solid skill, to apply the same universal remedy, the *ultimum supplicium*, to every case of difficulty. It is, it must be owned, much *easier* to extirpate than to amend mankind: yet that magistrate must be esteemed both a weak and a cruel surgeon, who cuts off every limb, which through ignorance or indolence he will not attempt to cure.[15]

According to Blackstone, Parliament had departed from the rule of reason represented by the common law tradition by arbitrarily expanding the scope of capital punishment to include major and minor offenses without reference to customary notions of proportionality and desert, and had thus begun to exercise power in a tyrannical manner. He even implied that Parliament may have *exceeded* its legitimate power in designating those 160 offenses capital: "I would not be understood to *deny* the right of the legislature in any country to inforce it's own laws by the death of the transgressor, though persons of some abilities have *doubted* it." *Id.*, at *11. To recap, Blackstone seems to accuse Parliament of deviating from the long usage of common law in enacting these laws contrary to basic principles of justice. The

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[15] *Id.*, at *17.

laws were thus—for lack of a better term—"cruel and unusual."

The American Revolution was unique in that those who executed it saw themselves as fighting to preserve, rather than throw off, the legal traditions of the government against which they rebelled. Gordon Wood wrote that American devotion to English legal tradition was "what made their Revolution seem so unusual, for they revolted not against the English constitution but on behalf of it." Gordon Wood, The Creation of the American Republic, 1776–1781, at 10. John Adams expressed mainstream American opinion when he wrote that "the liberty, the unalienable, indefeasible rights of men, the honor and dignity of human nature, the grandeur and glory of the public, and the universal happiness of individuals, were never so skillfully and successfully consulted as in that most excellent monument of human art, the common law of England." John Adams, On Private Revenge, Boston Gazette, Sept. 5, 1763.

The period from 1760 to 1776 was a time of conflict between the American colonies and the British Parliament. This conflict resembled England's seventeenth-century constitutional conflicts in at least two ways. First, as in seventeenth-century England, the holder of state power—in this case, Parliament—claimed absolute power unconstrained by fundamental common law limitations. Second, American protesters, like their seventeenth-century English counterparts, argued Parliament did not hold absolute power because it could not abrogate fundamental common law rules represented in long use.

As an example, take the Declaratory Act of 1766, wherein Parliament announced that it had "full power and authority to make laws and statutes of sufficient force and validity to bind the colonies and people of America … in all cases whatsoever." The Declaratory Act, 1766, 6 Geo. 3, c. 12 (Gr. Brit.), available at http://www.yale.edu/lawweb/avalon/amerrev/parliament/declaratoryact_766.htm.

Americans who opposed Parliament's actions during this period claimed that Parliament's power was limited by the rights held by American colonists through their status as British sub-

jects. These rights, in turn, were based on the long usage of the common law. Richard Henry Lee argued that American rights "are built upon a fourfold foundation, namely natural law, the British constitution, the charters of the several colonies, and 'immemorial usage.'" Letters of Delegates to Congress, 1774–1789, at 46 (Paul H. Smith ed., 1976). Roger Sherman similarly asserted that American rights were based on the common law: "The Colonies adopt the common Law, not as the common Law, but as the highest Reason." *Id.*, at 47. The Continental Congress shared that view, and affirmed that American rights were based on "the immutable laws of nature, the principles of the English constitution, and the several charters or compacts" of the various colonies. Declaration and Resolves of the First Continental Congress (Oct. 14, 1774), available at http://www.yale.edu/lawweb/avalon/resolves.htm.

Americans invoked Coke's vision of the common law in order to protest the acts of Parliament they saw as violating their rights. Take the issue of taxation. Americans argued that the common law forbade Parliament from taxing them because they were not represented in Parliament. John Dickinson thus wrote in his infamous Letter From a Farmer in Pennsylvania that Parliament's claim of power to tax the colonies was "an innovation; a most dangerous innovation." Sources & Documents Illustrating the American Revolution 1764–1788, at 34, 40 (Samuel Eliot Morison ed., 1967).

Ultimately, the Continental Congress resolved to sever ties with England; in doing so, it relied on common law principles in justifying its decision. Most relevantly, and as briefly discussed earlier, the Declaration of Independence complained that the Crown had disrupted the legislative process by "call[ing] together legislative bodies at places unusual, uncomfortable, and distant from the repository of their public records, for the sole purpose of fatiguing them into compliance with his measures." It is worth reiterating the point from earlier that under English common law it was prohibited for a sheriff to hold a Torn in an "unusual" location. The Continental Congress's use

of the word "unusual" in the Declaration of Independence indicates that at the moment America formally separated itself from all legal ties to England, it saw long usage as a relevant source of standards for judging government actions.

There are two primary points to retain from the above historical analysis. First, that in articulating the basis for their rights, the American colonists used the terms "immemorial usage," "common law," "constitution," "reason," and "natural equity" virtually interchangeably. Second, and similarly, when complaining about Parliament's violations of their rights, the colonists used the terms "innovation," "usurpation," "unconstitutional," and "unusual" virtually interchangeably. Because American rights were based on long usage, parliamentary acts that deviated from it—"innovative" or "unusual" acts—were presumptively unconstitutional. Americans saw such innovations as a precursor to the introduction of the cruel practices of the civil law, including trial by torture.

In the summer of 1787, around eleven years after the Declaration of Independence, delegates of the thirteen former colonies (now states) were sent to Philadelphia to amend and strengthen the Articles of Confederation. Instead, they decided to adopt a new constitution with a stronger federal government. The new government would not replace the states; rather, it would be one of limited, enumerated powers whose authority would be supreme within its proper sphere but would not exist at all outside of it. However, because the Constitution gave the federal government direct power to regulate the lives of Americans, and to prosecute violators of its laws, it vastly expanded its powers. Cf. Alexander Hamilton, The Federalist No. 21, at 130 (noting that under the Articles of Confederation, "the United States afford the extraordinary spectacle of a government, destitute even of the shadow of constitutional power to enforce the execution of its own laws").

From the instant of the Constitution's adoption, it faced heavy criticism for its failure to include a bill of rights or acknowledgement of the federal government's common law lim-

itations. George Mason, a delegate to the Philadelphia convention, led that charge. In the convention's final week, he had proposed attaching a bill of rights. See Farrand, at 587. Ultimately, after the other delegates—weary from the long effort of the drafting the Constitution—voted down his proposal, he declined to vote to adopt the Constitution. See *id.*, at 649. He then published a series of "Objections to this Constitution of Government," where he complained,

> [t]here is no Declaration of Rights, and the laws of the general government being paramount to the laws and constitution of the several States, the Declaration of Rights in the separate States are no security. Nor are the people secured even in the enjoyment of the benefit of the common law which stands here upon no other foundation than its having been adopted by the respective acts forming the constitutions of the several States. *Id.*, at 637–40.

Mason also feared that without a bill of rights, and without the constraints of the common law, the federal government would be given license to claim for itself unlimited and tyrannical powers. He worried that the Necessary and Proper Clause, for example, would allow "Congress [to] grant monopolies in trade and commerce, constitute new crimes, *inflict unusual and severe punishments*, and extend their powers as far as they think proper." *Id.*, at 640 (emphasis added).

To be fair, the Constitution *did* contain several common law protections in its original form: the privilege of habeas corpus, see art. I, § 9, cl. 2, the right to criminal trial by jury, see art. III, § 2, cl. 3, and the invalidity of ex post facto laws, see art. I, § 9, cl. 3, to name a few. Antifederalists, however, believed these protections could be easily circumvented in the future. Recalling the cruelty of the European civil law system, they warned against guaranteeing jury trials only in the context of criminal proceedings. They believed that such right must also be applied in civil proceedings. Moreover, they pointed out that this Court's appellate jurisdiction applies "both as to Law and

Fact," so they argued jury acquittals would not necessarily be safe. During Massachusetts's ratifying convention, Abraham Holmes, a prominent Antifederalist, gave a colorful vision of the future tyranny that the Constitution's gaps in common law protection might permit:

> On the whole, when we fully consider this matter, and fully investigate the powers granted, explicitly given, and specially delegated, we shall find Congress possessed of powers enabling them to institute judicatories little less inauspicious than a certain tribunal in Spain, which has long been the disgrace of Christendom: I mean that diabolical institution, *the Inquisition*.
>
> What gives an additional glare of horror to these gloomy circumstances is the consideration, that Congress have to ascertain, point out, and determine, what kind of punishments shall be inflicted on persons convicted of crimes. They are nowhere restrained from inventing the most cruel and unheard-of punishments, and annexing them to crimes; and there is no constitutional check on them, but that racks and gibbets may be amongst the most mild instruments of their discipline. Elliott's Debates, at 111 (italics in original).

Underlying all of these Antifederalist arguments was a deep distrust of governmental power unrestrained by specific, enforceable, fundamental rights. They accordingly proposed amending the Constitution to include a bill of rights binding the federal government against the violation of common law rights, particularly in the judicial process. Among those amendments was the Eighth Amendment and its Cruel and Unusual Punishments Clause.

Ultimately, the most significant evidence we have regarding the publicly understood meaning of the word "unusual" in the Eighth Amendment comes from Virginia ratifying convention. In that debate, the term "unusual" was used primarily to signify Antifederalist concerns that the federal government would not be limited by common law constraints and would thus

be able to exercise new and tyrannical powers. In the context of criminal punishment, "unusual" represented the danger that the federal government might innovate or experiment in criminal punishment—an occurrence known to lead to cruelty in the past and which might be repeated in the future. The Framers shared Coke's belief that innovation in punishment often led to torture and barbarity. See *ibid.* The word "unusual" in the Eighth Amendment was meant to be a check on the federal government's ability to innovate in punishment. That is the only plausible meaning of the word as used in the Eighth Amendment.

Early legal applications of the term "cruel and unusual punishments" (by state courts, concerning analogous state provisions and in some cases the federal provision itself) confirm the definition of "unusual" we settle upon today. For example, the Supreme Court of New York held "[t]he disenfranchisement of a citizen is not an unusual punishment; [at common law] it was the consequence of treason, and of infamous crimes, and it was altogether discretionary in the legislature to extend that punishment to other offenses." *Barker* v. *People*, 20 Johns 457, 459 (N. Y. Sup. Ct. 1823).[16] The General Court of Virginia similarly upheld the infliction of whipping as a criminal punishment against Eighth Amendment challenge because it was supported by "long usage." *Commonwealth* v. *Wyatt*, 27 Va. 694, 701 (Va. Gen. Ct. 1828). The same happened respecting the punishment of "banishment" in *People* v. *Potter*, 1 Edm. Sel. Cas. 235 (N. Y. Sup. Ct. 1846). In each case, the punishment was upheld because it was "usual"; that is, it was consistent with the long usage of common law.

It must be recognized, though, that a punishment may in fact *become* unusual if it falls out of usage. Recall Coke's observation that long usage is reliable because it is proof of both reasonableness and the people's consent as unreasonable practices and

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[16] A later opinion clarified that the Eighth Amendment challenge was also rejected on the grounds that it applied only to the federal government and not the states.

those which do not enjoy the people's consent would presumably fall out of use. He wrote explicitly: "Custome … lose[s its] … being, if usage faile." Copyholder, at 564. American courts similarly made the observation in the first half of the nineteenth century that when a traditional common law punishment falls out of use, it loses the presumption of validity that comes with being usual. See, *e. g.*, *James* v. *Commonwealth*, 12 Serg. & Rawle 220 (Pa. 1825).

* * *

The original public meaning of the term "unusual" in the Cruel and Unusual Punishments Clause was "contrary to long usage." A punishment which once enjoyed the presumption of validity which accompanies long usage loses that benefit when it falls out of usage. If it is reintroduced, it is therefore immediately suspect under the Eighth Amendment; the same applies for any other new punishment.

2

Cruel

Our analysis of the original public meaning of "cruel" should be much shorter than that of "unusual" as an extensive body of precedent is already available here. We are most persuaded by certain elements of the analysis of "cruel" provided in Justice Scalia's opinion for *Harmelin* and thus refer to it, and other cases it cited, only.

In his *Harmelin* opinion, Justice Scalia cited a few early cases interpreting proscriptions on "cruel" (just cruel, not "cruel and unusual") punishment. 501 U. S., at 985 (opinion of Scalia, J.). One proposed the "power of the courts to intervene 'in very extreme cases, where the punishment proposed is so severe and out of proportion to the offense as to shock public sentiment and violate the judgment of reasonable people.'" *Ibid.* (quoting *State* v. *Becker*, 3 S. D. 29, 41, 51 N. W. 1018, 1022 (1892)). Moreover, although he rejected a general proportionality concept under the Eighth Amendment, Justice Scalia referenced a footnote from *Rummel* v. *Estelle*, 445 U. S. 263, 173 n.

11 which explained that "a proportionality principle [may] come into play in the extreme example mentioned by the dissent, . . . if a legislature made overtime parking a felony punishable by life imprisonment."

In general, however, the Eighth Amendment applies to modes of punishment and only to a very narrow extent, their application to certain offenses. The *application* component comes into play only when the punishment is incredibly "severe" and *clearly* "out of proportion" and thus can be definitively taken to "shock public sentiment and violate the judgment of reasonable people." With respect to modes, however, a punishment is "cruel" if it is "destitute of pity, compassion or kindness" and has a separate "tormenting" element. 1 Noah Webster, American Dictionary of the English Language (1828).

B

With a suitable conception of the Cruel and Unusual Punishments Clause's original public meaning in hand, we can now properly address the question of whether "permanent exclusion" for common crime is prohibited, as the *CodyGamer100* Court found in dicta. From the mentioned meaning, we have identified three specific guidelines to consider:

> (1) The punishment, as a mode or application, whichever relevant, is either a new innovation or one of old which fell out of use.
>
> (2) The mode of punishment is "destitute of pity, compassion or kindness and has a separate tormenting element."
>
> (3) The application of the punishment (which in itself is "incredibly severe") to a certain offense is "clearly out of proportion" and "shock[s] public sentiment and violate[s] the judgment of reasonable people."

These guidelines are helpful but do not always provide us with bright-line distinctions. In order for an Eighth Amendment challenge to be successful under its original public meaning, however, the first guideline must always be met. The second or third guideline must also be substantially met, of course de-

pendent on whichever one relates to the claim.

Permanent exclusion, both as a mode of punishment and in its application to common crimes, is not supported by long usage. Never has it been *commonly* applied in our group and it eventually fell out of use entirely. The *CodyGamer100* instance was the punishment's first use in a long time, and likely its first application at all to common crime in the group's history. It was thus an attempt to reintroduce a punishment which fell out of use and an attempt to introduce it for the first time as punishment for common crime. The first guideline is clearly met in all respects for permanent exclusion.

We do not address the application of the second factor to permanent exclusion at this time because our petitioner has referenced a constitutional bar on permanent exclusion *for common crime* only. Similarly, *CodyGamer100* only had to do with common crime. We therefore look to the third guideline, which we conclude is clearly met by the application of permanent exclusion to common crime. Permanent exclusion is undoubtedly an "incredibly severe" punishment (the most severe at a court's disposal). Common crime is often seen by the public as so trivial that the application of such a severe punishment to it would "shock public sentiment and violate the judgment of reasonable people." Moreover, the punishment would be "clearly out of proportion."

* * *

We approve of the *CodyGamer100* Court's dicta finding that the use of permanent exclusion as punishment for common crime is cruel and unusual under the Eighth Amendment and affirm it as a holding of this Court.

II

With the fact in mind that permanent exclusion for common crime is cruel and unusual, we now consider whether the petitioner's five-month sentence for murder and attempted murder fits that definition. Obviously, a five-month sentence is not equal to permanent exclusion. Petitioner, however, argues that

the gravity of such a sentence, and its practical effect, has the purpose and effect of permanent exclusion. We reject this argument for a few reasons.

First, we recognize that such a line of thinking is an inherently slippery slope which extends a reviewing court's power to determine the acceptability of a sentence far beyond that which was originally conceived by the Framers. Second, as we emphasized earlier: holding the *application* of a specific sentence unconstitutional requires the meeting of a very high bar, which we are not convinced can be met with a five-month sentence. And finally, if we were to invalidate petitioner's sentence on the asserted grounds, there would be no logical endpoint. Where would we draw a line in the application of a "purpose and effect" test for permanent exclusion?

* * *

For the foregoing reasons, the sentence imposed by the District Court is accordingly

Affirmed.

JUSTICE BORK, concurring.

I join the Court's opinion because I agree with its decision on the merits that *CodyGamer100* v. *United States*, 2 U. S. 18 (2017), does not apply to the 150-day sentence received by petitioner. *Ante*, at 7–33. I write separately to explain that I conclude res judicata generally precludes petitioner's Eighth Amendment claim.

I

Some time after petitioner first commenced his appeal, the President—aware for the first time of petitioner's plight (neither petitioner nor his counsel made any effort, of which I am aware, to obtain clemency)—granted him an unconditional pardon. The Court may take notice of that pardon because it was "brought regularly into the cause" through the Government's motion to dismiss. *United States* v. *Wilson*, 32 U. S. 151, 161 (1833); see also Motion to Dismiss. While the Court denied the

motion because there is "no power to force" a pardon recipient to avail himself of the pardon's benefit,[1] *Ibid.*, it is still relevant to the case and constitutes part of the record.

Petitioner, after receiving the Presidential pardon, could have at any time eliminated his sentence—the one he believed was unconstitutional. In that way, he "carr[ied] the keys of [his] prison in [his] own pockets." *Hicks* v. *Feiock*, 485 U. S. 624, 633 (1988). Nevertheless, he *chose* not to use that option and instead continued his appeal.

Even by just thinking about this situation logically does it appear nonsensical. Petitioner is alleging that he's being inflicted cruel and unusual punishment prohibited by the Constitution; however, because of his pardon, he may end that punishment at any time. What is the need for the appeal then? Is any punishment being "inflicted" which he does not himself allow (or invite)?

II

Res judicata—or "claim preclusion," as it is more commonly known—is a "bedrock principle of our legal system." *Whole Woman's Health* v. *Hellerstedt*, 579 U. S. ——, —— (2016) (Alito, J., dissenting) (slip op., At 3). Primarily, it serves the "public policy" purpose of ensuring there is "an end to litigation . . . once [matters have been] settled." *Baldwin* v. *Iowa State Traveling Men's Assn.*, 283 U. S. 522, 525 (1931). Courts exist to ensure the "conclusive resolution of disputes." *Montana* v. *United States*, 440 U. S. 147, 153 (1979). If that has been accomplished already, a court has no business continuing to insert itself into the affairs of parties. Other objectives are also fulfilled by adherence to the rules of res judicata: Doing so "protects . . . adversaries from the . . . vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." *Id.*, At 154. These are "vital public interests" that

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[1] I disagree with this reasoning but for the purposes of this opinion, I will accept it as valid because it is not relevant to the claim preclusion.

should be "'cordially regarded and enforced.'" *Federated Department Stores, Inc.* v. *Moitie*, 542 U. S. 394, 401 (1981) (internal quotation marks omitted).

An unconditional pardon is considered an irrevocable grant of clemency. Once the President issues an unconditional pardon, "it is presumed to be in [the recipient's] custody, and the property of it belongs to him." *Wilson*, *supra*, at 162 (internal quotation marks omitted) (citing Hawkins, b. 2, ch. 37, § 65). Because the issuance of an unconditional pardon inasmuch effects a definitive grant of power to a convict to end their punishment, the dispute which may have once existed between the Government and the convict over the Eighth Amendment validity of punishment ceases to exist and the convict is precluded from raising any such dispute before a court. The matter is "settled." *Baldwin*, *supra*.

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For the reasons stated in this opinion and the Court's, I concur with the affirmation of the sentence imposed by the District Court.

Syllabus

UNITED STATES *v.* TPR

APPLICATION FOR A GROUP-ARREST WARRANT

No. 05–22. Argued March 1, 2018—Decided April 6, 2018

On February 27, 2018, the Court granted an arrest warrant for the criminal street gang TPR at the Government's application. Soon after, a constitutionally required trial took place. Upon completion, the Court conducted a vote on whether to extend the warrant beyond its original 72-hour time frame.

Held: The warrant must not be extended beyond its original 72-hour time frame.

(a) There is very little precedent addressing the specific matter of group-arrest warrants. The "lack of [outlined] procedure" has been an issue "since the Court's duty [over group arrest warrants] was first outlined in the Constitution. *Post*, at 31.

(b) The Court must exercise discretion in deciding whether the specific facts support extending the warrant and should specifically consider real-world "necessity."

(c) The size of a group is one of the factors which may be considered in the analysis of whether to continue the warrant.

GINSBURG, J., delivered the opinion of the Court, in which HOLMES, C. J., and MARSHALL and O'CONNOR, JJ., joined. HOLMES, C. J., filed a concurring opinion, in which MARSHALL and O'CONNOR, JJ., joined *post*, p. 37. O'CONNOR, J., filed a concurring opinion, in which HOLMES, C. J., and MARSHALL, J., joined, *post*, p. 43. THOMAS, J., filed a dissenting opinion, in which GORSUCH and BORK, JJ., Joined, *post*, p. 44.

JUSTICE GINSBURG delivered the opinion of the Court.

United States v. *TPR*, 5 U. S. 30 (2018) brings forth a series of contemporary circumstances that have been recorded numerous times on paper—not once in a physical practice. The Court's preeminent proceedings respecting the warrant ordered on the 26th of February, 2018, are principally unique due to the absence of precedent within our court—a miscellany of cases never held. This lack of procedure has been overlooked since the Court's duty was first outlined in the Constitution, where the Court's authority to act upon the matter of a collective "group" arrest warrant (group AOS, AOS hereinafter) has rarely ever been questioned. The trial phase of the order in

question established a "new" mode of procedure: the same, consistent pugnacious proceedings (with innumerable interjections by the Court), and the traditional hold-and-go refutation allowance. Throughout the defending counsel's arguments, one question was regularly prevalent: "Why is the necessity for the approval of a group AOS expected when there an overwhelming imbalance between two parties?" The (as a collective) law enforcement bodies have (roughly) a threefold advantage over a meager street gang fueled only by notoriety, where the common federally funded law enforcement agency (or department) will have two, perhaps three assault rifles, a taser, and have been militarized with other crime-prevention equipment. Article III of the United States Constitution ensures no constraint for a trial concerning a group AOS, however, the United States is permitted to continue with the proceedings. Throughout the arguments, the preceding information has proven critical for fundamental contentious support, however, the texts are vague to a point of little clarity: What are the procedures for this practice? Is this case pursued ordinarily?

Law enforcement individuals should have easily been able to pursue the crimes committed by individuals of the amalgamation, not the collective itself. The warrant has no need to continue, as the organization is, and always has been outnumbered.

* * *

We therefore deny the Court's question of warrant continuance.

It is so ordered.

CHIEF JUSTICE HOLMES, with whom JUSTICE MARSHALL and JUSTICE O'CONNOR join, concurring.

I write briefly to respond to the dissenters.

Legal Standard

Despite JUSTICE THOMAS's fifteen pages of opinion, the legal standard required by the Constitution in group arrest warrant trials is actually quite clear. We have already held that

what the Constitution requires is a weighing of "objective information." *In re United States*, 5 U. S. 1, 2 (2018) (unanimous concurring opinion). We have also emphasized that the Government carries the burden of establishing the need for a warrant. See *ibid.* Moreover, because we err on the side of protecting associational liberty against potentially arbitrary Government impositions, we must "accord the [affected] group the benefit of all inferences." *Ibid.*

JUSTICE THOMAS would disregard those constitutional principles and instead apply Fourth Amendment *pretrial* standards to the group arrest warrant *trial* phase.[1] Namely, he wishes to require a mere showing of probable cause for the Government to be successful at trial. That suggestion contradicts his admonition that special rules cannot be made applicable to the group arrest warrant context. See *post*, at 49. If the same rules were applicable, then the Government's burden at a group arrest warrant trial would be "proof beyond a reasonable doubt" of the group's guilt of a crime as is the case in an individual criminal trial, not the lesser showing of probable cause JUSTICE THOMAS has selected. *In re Winship*, 397 U. S. 358, 364 (1970). The reasonable doubt standard, however, cannot be the correct standard. See generally *CodyGamer* v. *United States*, 2 U. S. 8 (2017) (holding that groups cannot be collectively responsible for a crime: individuals are). JUSTICE THOMAS, realizing he does not wish to embrace the logical conclusion of his original argument, then argues that "criminal-trial requirements" are not necessarily what would be applicable. (Why? Because JUSTICE THOMAS says so.) *Post*, at 53. We agree with him on that point: they are not. But it is odd for JUSTICE THOMAS, despite

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[1] Our *TPR Application* decision makes clear that Article III is the appropriate law to apply to group arrest warrant proceedings. JUSTICE THOMAS's out-of-thin-air assertion that the Fourth Amendment is controlling makes little sense and is based entirely on a silent legislative record. Our decisions make clear though that "silence in the legislative record, 'no matter how clanging,' cannot defeat . . . the text." *Encino Motorcars, LLC* v. *Navarro*, 584 U. S. ——, —— (2018) (slip op., at 11) (quoting *Sedima, S. P. R. L.* v. *Imrex Co.*, 473 U. S. 479, 495, n. 13 (1985)).

all his harping about there being "no distinction whatsoever" between the two contexts (group arrest warrant and individual arrest warrant), *post*, at 49, to turn around in the second half of his opinion and disavow his original premise in order to protect his hand-picked result against its many constitutional flaws. That exercise in gymnastics insults the intelligence of the reader.

JUSTICE THOMAS is correct in noting that the group arrest warrant provisions of Article III cannot be read in isolation. It is axiomatic that "proper interpretation of . . . the Constitution . . . requires paying attention to the whole." *British* v. *Ozzymen*, 3 U. S. 60, 76 (2017) (opinion of Scalia, J.) (internal quotation marks and citation omitted). But while JUSTICE THOMAS inexplicably consults the Fourth Amendment for ascertaining the standard to be applied at the trial phase, I look to more related clauses. The Venue Clause, for instance, provides that "the trial of all crimes … shall be held in a federal district court." Art. III, § 2, cl. 3. Because Article III also requires that *this Court* (not a district court) hold a trial for continuation of a group arrest warrant, it is obvious that the trial required is not a *criminal* trial. From there, we have found that group arrest warrants are necessarily preventative. *In re United States*, *supra*, at 1–2. That is, they are meant to aid the Government in preventing "organized effort[s] . . . to harm the peace of the United States." *Id.*, at 2. If objective information does not support need for that type of relief, it must be refused as a matter of prudence and law.[2]

Analysis of the Facts Here

The Court's opinion and JUSTICE O'CONNOR's concurrence both provide excellent reasons, all things considered, for why the warrant should be declined. I offer two others.

First, during our consideration of this case, the President's chosen czar to coordinate the Executive Branch response to

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[2] In responding to this conclusion, JUSTICE THOMAS's argument transforms from "somewhat engaging with the law," *post.*, at 53, into hilariously self-defeating. Maintaining that probable cause is the correct standard to apply, JUSTICE THOMAS argues with a straight-face that limiting group ar-

TPR (while he was still on the job) tweeted the following statement:

> Yet another successful two days of repelling TPRs raids. Pictures were taken from the responses last night (DHS/FPS, SWAT, FBI, NSA and SF) and from today (FBI, SWAT, SF, DHS, DOD and help from LVPD and EMS). **Attacks are becoming rarer** and **we are more prepared each time**. See Statement of SirReginaldII (2018), available at https://twitter.com/sirregii/status/970075389111357440 (emphasis added).

I'm not sure about JUSTICE THOMAS, but I would not say that the statements "[a]ttacks are becoming rarer" and "we are more prepared each time" really convey any urgent need for preventative relief. They also contradict his unsupported claim that TPR continues to turn cities into "warzones." *Post*, at 56.

The most recent evidence in the public record—the second reason for refusing extension of the warrant—however, confirms the need for refusing the Government's requested extension of the warrant: TPR was shut down. The group's description now reads, "Shut down by the Federal Government on April 1, 2018"

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rest warrants to circumstances where objective evidence shows not only that a group *previously* organized crime, but that it continues to do so, and *will* continue to do so, and that the Government will need aid in stopping it—a standard he described in the beginning of his opinion as "an incredibly strict review," *post*, at 46—now is a threat to individual liberty because it allows "one [to] be arrested and detained not for committing a crime, but for the possibility of committing crime." *Post*, at 49. But probable cause is a lesser standard which requires only a relaxed form of the first showing which is required by *In re United States* that I just described: that the group previously organized crime. Next.

JUSTICE THOMAS predicates his opposition to *In re United States*' finding that group arrest warrants are preventative (a finding Article III's Venue Clause compels) on the basis that it would mean that the "requirement of probable cause would make no sense." *Post*, at 49. But we have not asked for probable cause, we have asked for objective evidence. Group arrest warrants are not a substitute for criminal prosecution of individuals: they are solely for helping the Government deal with the problem of gang violence in a proactive way.

and the group's only member is the White House Chief of Staff (who holds the group on the Government's behalf). See Appendix, *infra*.[3]

* * *

There is absolutely no reason to continue the arrest warrant against TPR. I join the Court's opinion and judgment.

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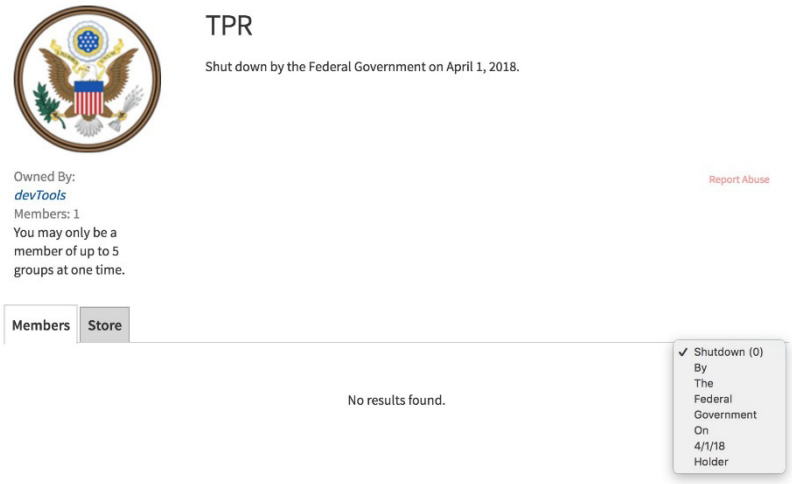
[3]JUSTICE THOMAS criticizes me for considering TPR's shutdown in my opinion. That criticism is illogical. The standards we adopted in *TPR Application*—those the Constitution requires in the group arrest warrant context—make clear that we must draw all inferences in the affected group's favor. Making an inference requires consideration of both "evidence" and "known facts." Merriam-Webster Dictionary (2018), available at https://www.merriam-webster.com/dictionary/inferences. In other words, the evidence submitted by the parties must be considered in light of general knowledge. TPR's shutdown was widely publicized and is thus general knowledge.

Utilizing all facts leading up to our final date of decision, April 6, 2018, does not make me a "time travel[er]." *Post*, at 53. It simply makes me prudent. JUSTICE THOMAS's suggestion that we decided this case against extending the warrant on March 1, 2018, see *post*, at 54, is just plain wrong. We concluded a *straw vote* on March 1st. Interestingly, the result of that vote was to *grant* that extension, not to deny it. The warrant was removed only because we did not reach a final decision within 72 hours from the warrant's issuance. Our final decision came on April 6th with the release of the opinions.

APPENDIX



(Retrieved from https://twitter.com/realTimGeithner/status/980611049924767745)

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE and JUSTICE MARSHALL join, concurring.

I join the opinion and judgment of the Court. I write separately here to express my doubts about the Government's position as to the facts surrounding the gang situation in which we find ourselves entangled. Customarily, warrants for arrest are issued by federal-court judges. Whether these are in accordance with an ongoing sentence or as punishment for a contempt of court, they have—outside of contempt proceedings—been only used on those who have been tried and convicted of a crime under our criminal justice system. Regardless the reason, they are issued to arrest individuals. The ability to take down organized crime, however, necessitates the existence of group arrest warrants, too. Recognizing such a warrant could be easily abused by lower courts, our Constitution's framers confined the power to issue group arrest warrants to the Supreme Court. By requiring our Court to be the only one capable of issuing these warrants, the Constitution ensures a safe process. It has not always been efficient; but it has always been fair.

The historical nature of issuing any group arrest warrant, though, should not be overlooked by this Court. It has been over a year since an arrest warrant for a group was issued; that is precisely because of the significance of doing so. Bold times demand bold action. Here, the United States asks this Court to extend its arrest warrant for the criminal gang known as "TPR." TPR has, for the last two months, engaged in what can be accurately described as a total ground war against the United States at the city of Las Vegas. With its leaders' blood lust growing, TPR soon moved beyond just drive-by shootings; it began to mechanically infiltrate federal agencies and departments. All in all, the Government's argument for an extension boils down to this: "Gang" violence must be stopped.

This leads to, what seems to me, an obvious question: Can a gang comprising 29 members (as is the case with TPR) really cause the Government—and the Nation—enough strife to warrant an extension on the warrant? The Government has yet to show sufficient evidence that such an environment exists. And

upon further inspection the Government's position weakens even more. One need only look at our law-enforcement community. With 224 on-duty officers from the Federal Bureau of Investigation, Federal Protective Service, U. S. Marshals Service, Las Vegas Police Department, and the National Highway Patrol, one would think that forcing TPR to bear the brunt for their actions would be easier than the Government claims.

The Government can easily handle the threat of gang violence at American cities—just as it has done for years and will continue to do for all coming time. And the ground itself paints a far more peaceful picture than does the Government's telling of the facts; there has not been a coordinated attack on an American city by TPR for days. The White House, on March 14, 2018, returned Bank of America's Las Vegas location, seeming to suggest that the extenuating circumstances that warranted such an action have since decayed. See Natl. Security Presidential Memorandum No. 3 of President Geithner (2018).

Thus, if TPR truly is the threat the Government makes it out to be—if TPR really can continually best a police force that has it outnumbered by over 10 to 1—then I find it hard to believe that there exists any solution to the problem. If 250 men and women armed with the weapons of the State cannot dispatch a band of rabble-rousers with glorified handguns, I doubt that an extended arrest warrant by this Court would be anything more than what was a Bill of Rights in Soviet-era Russia: a parchment guarantee.

JUSTICE THOMAS, with whom JUSTICE GORSUCH and JUSTICE BORK join, dissenting.

The Federal Government asks us to extend our warrant for the arrest of members of the most powerful and havoc-wreaking criminal organization in recent history known as "TPR." Faithful application of established precedents and common sense would have made this case easy to resolve. For reasons beyond me, however, the Court razes usage of both in opinions that, at

best, represent interpretive handwringing and, at worst, an attitude so cavalier it ought to offend.

I

The Fourth Amendment guarantees the right to be free from unreasonable government searches and seizures. In one way, it represents the right of a person to "retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman* v. *United States*, 365 U. S. 505, 511 (1961). In another, it reflects clearly that the Constitution neither tolerates nor allows for a police state to form. See generally, *e. g.*, *Davis* v. *United States*, 328 U. S. 582, 597 (1946) (Frankfurter, J., dissenting). Through this, the Fourth Amendment provides fundamentally important protections to the People.

One of those protections is the requirement of probable cause. Before the Government may arrest somebody or search a home, they must—outside of, for example, exigent circumstances, see *Missouri* v. *McNeely*, 569 U. S. —— (2013)—obtain a warrant from a lawful authority. To do this, probable cause must be demonstrated. We have previously defined probable cause to mean "where the facts and circumstances within [the Government's] knowledge, and of which they have reasonably trustworthy information, are sufficient in themselves to warrant a belief by a man of reasonable caution that a crime is being committed." *Brinegar* v. *United States*, 338 U. S. 160, 175 (1949) (citation omitted). In constitutional challenges against arrests, "[t]he test for probable cause is not reducible to 'precise definition or quantification,'" *Florida* v. *Harris*, 568 U. S. ——, —— (2013) (slip op., at 5) (citing *Maryland* v. *Pringle*, 540 U. S. 366, 371 (2003)), for "[f]inely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence . . . have no place in the [probable-cause] decision." *Illinois* v. *Gates*, 462 U. S. 213, 235 (1983). Instead, we turn to the totality of the circumstances. See *Pringle*, 540 U. S., at 371; *Gates*, 462 U. S., at 232; *Brinegar*, 338 U. S., at 176. By going for an all-things-considered approach, we are able to balance the competing interests of efficiency and fairness. Thus, if probable

cause is adequately demonstrated, a Court has no place issuing a judicial veto as it does today. The Constitution requires that *all* warrants—whether for searches and seizures, arrests, etc.—be backed by probable cause. See Amdt. 4.

There are, however, certain unique protections related to arrest warrants: charges must exist, Art. III, § 5, cl. 1, be "actively pursued" by the Government within 72 hours upon a warrant's issuance, see cl. 2, and only the Supreme Court may issue arrest warrants to groups of individuals. See cl. 3. We have construed these portions of Article III to mean two things: (1) that issuing "charges" is synonymous with demonstrating *some* form of need for the warrant,[1] with a more restrictive standard for group arrests, and (2) that "trial" means a judicial environment in which both the Government and the individual(s) accused may contest that showing of cause, with the onus of proving the Government wrong on the accused. See *In re United States*, 5 U. S. 1, 1–2 (2018) (joint concurring opinion).

All in all, the textual scheme of Article III in relation to the Fourth Amendment is simple. It reflects a check on the judiciary, members of which prior to the Constitution's ratification were able to routinely abuse the power of issuing arrest warrants. What it does not reflect, however, is the picture the majority and the concurring opinions paint: that to sustain a warrant to arrest a group of individuals, the Government must survive what can only be logically read to imply an incredibly strict review.[2] The majority's mistake is their emphasis not on the *process by which* an arrest warrant is to be obtained and (if

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[1] I write, "*some* form of need," *supra* (emphasis present), because the Court describes "charges" to mean "factual allegations which tend to show the need for relief." *In re United States*, 5 U. S. 1 (2018) (joint concurring opinion); see *ante*, at 36 (majority opinion). This is nothing more than a disastrous restyling of an otherwise obvious clause. See *infra*, at 47–52.

[2] While the text of the majority's framework is not in and of itself strict, the fact that the Court rejects an extension of a group-arrest warrant for a gang as active, dangerous, and damaging as TPR is leads me to one conclusion (while implying it to future litigants before us): The Government will *never* satisfy the majority's framework's expectations.

needed) extended, but instead in whom the Constitution vests the power to issue the warrant in the first place. Respectfully, this is a strategical way of dodging what is staring us in the face, so we may then claim to be the saviors of liberty and due process, brag about it through judicial opinion, and continue on the next day as though nothing is wrong. When a Court of Nine—comprising the top jurists of the Nation—cannot acknowledge the destruction caused by members of TPR, something is very wrong, and it shows to everyone but the majority.

II

The Court not only misapplies the warrant provisions of Article III: It steps all over them. In reaching the conclusion to deny the Government's request for an extension of the warrant, it reasons that the text and history surrounding those provisions suggest a never-before-seen standard for group-arrest warrants. This departs from both what we know the text suggests and the history that surrounds it. Because the majority fails to take these factors into account, I shall do so for them.

A

As we should always do when interpreting the Constitution, a statute, or a regulation, we begin with the text itself. There are two separate "additions" in Article III to the general warrant requirements housed within the Fourth Amendment. I have already demonstrated that these provisions—"charges" and a "trial" requirement—bear, as a matter of new precedent, synonymous meanings with some type of showing of need and a fair, judicial environment in which the merits of extending a warrant may be debated. The problem, however, with this reading is that it eviscerates the answer to what should be a very easy question to resolve.

The majority forgets that the Article III provisions relating to arrest warrants are ancillary to the Fourth Amendment, which governs all general warrants. The Court in holding and continuing to apply the decision that the Article III "charges"—and arrest warrants overall—demand a showing of need for preven-

tative relief turns long-understood notions of the warrant process and the Fourth Amendment on their heads, while also ignoring the very makeup of Article III. I fear that today, much like in *British2004* v. *Ozzymen*, 3 U. S. 60 (2018), the Court has yet again violated "an interpreter's ability to give uniform meaning across every word and clause of a law," *id.*, at 79 (opinion of Scalia, J.). It has been and continues to be my understanding that lawmakers try to avoid using words that "have no operation at all." *Marbury* v. *Madison*, 1 Cranch 137, 174 (1803); it hardly "require[s] a constitutional scholar," *Safford Unified School Dist.* v. *Redding*, 557 U. S. 364, 380 (2009), to realize such a truth.

The problem with the Court's analysis of "charges" is that it ignores, crucially so, that "charges" is used twice—both in the second and third clauses of section 5 of Article III. Understand, Article III simply prescribes a general process for arrest warrants and then, for group-arrest ones, confines that process to our Court. So it seems rather silly to me that the Court's basis for its reading of "charges" is the "context of group arrest warrant proceedings," *In re United States*, 5 U. S., at 1–2 (joint concurring opinion). Why note the context at all when the procedures are the exact same? This is the procedure for individual-arrest warrants: "a trial occurs within seventy two hours of the issuance of the Warrant and charges have been actively pursued . . . ." And then for group-arrest warrants: "a trial occurs within seventy two hours of the issuance of a Warrant and charges have activity been pursued . . . ." Without these obvious-to-everyone-but-the-majority facts resolved, the Court purports to rely on the straightforward meaning of "charges" to find its reading, but it would be more accurate to say that it does so by applying the appearance of a straightforward meaning of "charges."

I accept, though, that the meaning of "charges" is not necessarily plain. While judges should always to ordinary words apply their plain meaning, when doing so "would produce an absurd and arguably unconstitutional result," a Court is permitted to give an "unusual (though not unheard-of) meaning to a word,"

United States v. *X-Citement Video*, 513 U. S. 64, 82 (1994); see *Green* v. *Bock Laundry Machine Co.*, 490 U. S. 504, 527 (1989). The Court, however, relying on a non-existent context to define "charges," has declared that the group-arrest warrant is a preventative measure—they continue that today. That is fairly incongruous with the very *point* of a warrant for arrest as well as why we arrest in the first place.

In society, arrests are not made to prevent crime; they are made to detain for already committed actions and then—if convicted—punish the sentenced. The group-arrest warrant, therefore, is the same—just applied to a ROBLOX group of individuals rather than individuals themselves. And because we have already acknowledged that the Constitution makes no distinction whatsoever between individual and group-arrest warrants besides vesting the authority to issue them in two different original bodies, the substantive requirements for regular arrest warrants should logically apply to group-arrest ones, too. Nor is point of an arrest to prevent a crime; if that were the point, then the entire requirement of probable cause would make no sense, for it hinges on showing that illegal conduct *already happened* to justify the arrest, not on whether it *will* happen. And in circumstances where the arrest would be arresting for the *anticipation* of a crime, statutes fill the gaps. See, *e. g.*, 18 U. S. C. § 371; 18 U. S. C. § 1349. Regardless, even those are not truly preventative in the majority's sense of the word; the Government, to be given a warrant to arrest based on such a type of crime, would still have to show that the planning to commit a crime—the planning being a crime itself—was *already committed*. Respectfully, the idea that warrants for arrest—and thus arrests themselves—have ever been preventative rather than to detain for crimes already completed turns the *entire* criminal justice system into nothing more than a system in which one may be arrested and detained not for committing crime, but

for the possibility of committing crime. Such a system has its place in a banana republic, not the United States of America.

Given that these provisions merely are subsidiaries of the general warrant requirements of the Fourth Amendment, "charges" should, rather than require the Government to show a "need" for preventative relief (whatever that means), just mean what the word in *full* context naturally suggests: the Government must show probable cause to be granted an issuance of an arrest warrant—be it for an individual or for a group.

B

The Court can find no basis for its reading of "charges" in the text of the Constitution, nor can it in the history surrounding its text. These Article III provisions were not implemented to establish a procedure whose substantive components depart from the Fourth Amendment's requirements; they were implemented to require through more forceful writing what is generally required in real life. This corrective measure is one of many in the Constitution, written with the failings of the previous one fresh in the mind. Some are found in amendments; others in the original five Articles. The most obvious example of this would be the Eleventh Amendment, which constitutionalized the prohibition on employment in more than one civil office at once, while providing a simple procedure for how civil offices are to be defined—thereby avoiding the pitfall that I shall now describe.

A downfall of our virtual environment is that details often fall through the cracks in day-to-day work. For instance, take a look at our very own Court. In real life, dozens of briefs fill individual cases, each full of elaborate legal arguments to which the Justices confine themselves when drafting their opinions; here, however, we often either (a) do not receive briefs or (b) receive them sparingly, and often they lack the elements that, well, would constitute them as proper legal "briefs." For us, the parties, and the thousands of Americans affected by our decisions, this shortfall does not present a concern worth stressing. But some process failures prove fatal. This cannot be demonstrat-

ed better than by looking to the history of arrest warrants in our country.

Before the present Constitution was ratified, there was no specific textual scheme outside of the general requirements of the Fourth Amendment to establish constitutional guarantees sufficient enough in light of the above-mentioned shortfall to ensure a fair process. Judges were not (and often still are not) capable of employing the proper legal methods used in real life on ROBLOX. That is so because, simply, most here are teenagers; they do not possess a law degree, nor do they study judicial opinions like some. They are, after all, here to have fun, so the, to many, tedious steps of the arrest-warrant process—from both the perspective of the Government and the courts—deterred their very operation.

Thus, instead of the Government going in front of a judge, showing probable cause, and the judge issuing an appropriate warrant for arrest, judges would instead issue *sua sponte* arrest warrants for individuals they thought were criminals or members of groups they thought constituted criminal enterprises. One need not think long and hard to come to the understanding that such a practice would be hit or miss—and the misses, given the very subject, always hit hardest those who deserve such beatings least. In light of this shortfall, the Constitution includes those Article III provisions to *constitutionalize* those basic steps, not to create some new standard set apart from what is applied for all other warrant requests.

Concerning the group-arrest portion, there is one simple reason why the power to issue those types of warrants is vested solely in the Supreme Court: the history and struggles of the federal court worried the Constitution's drafters.[3] It was not to add a *third* (on top of an already unnecessarily added second) tier of scrutiny to the arrest-warrant process. One would think

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[3] By vesting it in the Supreme Court, the Constitution requires group-arrest warrants to have the assent of a majority of this Court, rather than individual judges at the federal-court level. Art. III, § 5, cl. 3.

if that was the goal in mind, the text would reflect that instead of bearing the exact same wording as the preceding clause does.

III

While I reject the Court's overall reading of the Article III provisions in tandem with the Fourth Amendment, I will, for the sake of argument, show that when applying the current circumstances of the case to its framework, there should have been no question as to whether the warrant should have been extended. I wish to, in doing this, note that it is at this point that the majority and those in concurrence take a turn from expounding bad to downright offensive law.

The Court's framework demands that the Government, in showing a need for preventative relief, demonstrate that the actions of a group's members are not merely coincidental, but deliberate, organized, and consistent. TPR's actions more than satisfy all three factors and then some. But in opinions and oral-argument transcripts reflecting truly how out of touch our Court is with the everyday American—and what will look like almost deliberate ignorance to readers—the Court, in putting out the candle, sends a much more worrying sentiment: It might just not care. We Justices spend almost all of our time in Discord-based chat rooms and using word-processor applications. We do not experience things regular Americans do at our cities. We do not bear the brunt of TPR's actions; they bear it for us. This backwards ruling puts on bright display why we ought to get out of the business entirely of arbitrarily judging whether a crime is severe enough to warrant an arrest. That has never been the question (until now). We arrest those who commit crimes because they committed crimes; we thus ask the

Government to show that there was probable cause to believe that they were committed.

IV

I also write to respond first to THE CHIEF JUSTICE's discovery of time travel, and second to JUSTICE O'CONNOR's newfound expertise on criminal-organization strategy.

A

THE CHIEF JUSTICE's concurrence gives one prevailing reason why the majority's opinion is correct: "the legal standard required by the Constitution in group arrest warrant trials ['charges' require a showing of preventative need] is quite clear." *Ante*, at 37 (HOLMES, C. J. concurring). According to THE CHIEF JUSTICE, however, the reason for this is that the Court proclaimed it to be so. *Ante*, at 37–38 (citing *In re United States Application for Arrest Warrant on TPR*, 5 U. S.). The problem with that is the Court's justification then for its reading was as empty as THE CHIEF JUSTICE's is now. If the test applied to our precedents' validity is to ascertain their mere existence, rather than their contents' validity, then there is no test applied at all. Moreover, it is worth nothing that, of course, the Government "carries the burden of establishing the need for a warrant." *Ibid.* But what exactly that burden entails is probable cause, see *supra*, at 47–51, not a showing that a group of individuals is dangerous enough to scare Members of this Court stiff.

THE CHIEF JUSTICE then says that unless the majority's reading is accepted, then criminal-trial requirements and standards would have to apply to the process of procuring a warrant. See *ante*, at 38 (quoting *In re Winship*, 397 U. S. 358, 364 (1970)). This is hard to follow, given that the avenue that the text naturally suggests would require a showing of probable cause, not need for preventative relief based on level of dan-

ger. Wherever THE CHIEF JUSTICE found this assertion, it was certainly incorrect.

THE CHIEF JUSTICE devotes the remainder of the page to arguing why trials of Article III are not criminal. I apologize to this Court's printing staff; your ink was wasted. Neither this dissent nor the Court's opinion asserts that they are criminal and require criminal elements of procedure. Where disagreement is found is at the point of deciding what is required *at* the "trial" phase.

At this point, THE CHIEF JUSTICE's concurrence evolves from somewhat engaging with law into traveling into the future. Before I explain, I wish to remind readers that this case is about deciding whether the arrest warrant granted for TPR should be extended. The Court, siding with TPR, ruled against the Government, and denied the extension on March 1, 2018. Thus, the relevant law and record to this case is what existed up to that moment. THE CHIEF JUSTICE, however, discards that established-for-centuries judicial rule. He says that the denial of the warrant extension was justified because TPR, on April 1, 2018, was shut down by the Government, so *ipso facto* the extension denial was based on good law. *Ante*, at 40–41. I was unaware that TPR had been shut down when we sat for oral argument in this matter on March 27, 2018; or that good news of a recent-but-not-final win against a grouped enemy, *ibid.*, was the equivalent of an all-out victory worthy of celebration. And these two reasons proposed still rest on the faulty assumption that arrests are made to prevent crime rather than to detain for crime committed either for the duration of a trial or for imprisonment. The very test of deciding how dangerous a group is, and how dangerous need be "dangerous," inherently disregards the very purpose and meaning of warrants and the Fourth Amendment. But regardless of how misguided the legal theory espoused by THE

CHIEF JUSTICE's concurrence may be, it pales in comparison to that of JUSTICE O'CONNOR's.

B

Much of what JUSTICE O'CONNOR writes is a broad (but curiously short) rejection of the Government's assertions as to the criminal conduct and nature of TPR's members and actions.

JUSTICE O'CONNOR begins with a titillating explanation of what exactly arrest warrants are in the first place.[4] Then, recognizing that a group-arrest warrant has not been issued in nearly a year, see *ante*, at 43–44, JUSTICE O'CONNOR decides that was because such an issuance would require "significan[t]" circumstances." JUSTICE O'CONNOR and I agree: Significant circumstances would seem to correlate with and cause the need for a group-arrest warrant. JUSTICE O'CONNOR acknowledges this much, writing: "Bold times demand bold action." *Ante*, at 44. (Not too bold an action, however.)

JUSTICE O'CONNOR, attempting to faithfully apply the Court's erred framework, subjects the Government's argument to her very nuanced test: comparing the number of federal and municipal law-enforcement agents with TPR's member count. See

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[4]JUSTICE O'CONNOR writes, "warrants for arrest . . . have . . . been only used on those who have been tried and convicted of a crime under our criminal justice system." *Ante*, at 43. The problem with such a definition is that arrest warrants are issued before the trying and conviction of a defendant—issuing a warrant for the arrest of someone only after trying them seems to beg the question: How is one to compel attendance to court? JUSTICE O'CONNOR sprinkles in a contempt-citation exemption in her definition, yet this, too, makes little sense; how is one to get to the stage where a contempt citation would even arise if one cannot arrest the offender to bring him to be tried in the first place? Perhaps, I might dare surmise, JUSTICE O'CONNOR has confused "arrest"—which is reasonably defined as, "[t]o deprive a person of his liberty by legal authority . . . for the purpose of holding or detaining him to *answer a criminal charge or civil demand*," Black's Law Dictionary 100 (8th ed. 2004)—with "serving out a prison sentence," where defendants who have been found guilty by a jury of their peers and have been sentenced fairly under the law by a judge are incarcerated in a federal-prison center.

ibid. I am no statistician, but I think it is safe to say there are some missing factors in JUSTICE O'CONNOR's analysis.

JUSTICE O'CONNOR mistakenly assumes personnel count to be the sole and final determinate factor in resolving questions like this. The argument that the higher count of heads will predict the battle has been historically, professionally, and logically rejected—but apparently not by JUSTICE O'CONNOR. JUSTICE O'CONNOR, marching forward, puts on her lack-of-awareness hat in then stating (without even a modicum of evidence or a citation to such), to further back her erroneous conclusion, that there must be no conflict because "there has not been a coordinated attack on an American city by TPR for days." *Ibid.* I am sure that a few strolls on the streets of Las Vegas would change JUSTICE O'CONNOR's outlook; any seriously proposed idea that the attacks have stopped should concern more than surprise, for they lack even the thinnest façade of an honest and competent analysis—legal or otherwise.

But even that is not what is most offensive about JUSTICE O'CONNOR's assumptions. JUSTICE O'CONNOR makes the argument, *ante*, at 44, that if the Government cannot handle TPR as it currently functions, then a group-arrest warrant would serve no purpose—it would amount to nothing more than a "parchment guarantee" against an unbeatable enemy. *Ibid.* JUSTICE O'CONNOR believes the Government has *not* shown that the circumstances surrounding TPR necessitate a group-arrest warrant. This, however, is a fairly mystifying argument, for one then would wonder how JUSTICE O'CONNOR believes the Government *should* be dispatching with society's criminals if JUSTICE O'CONNOR at the same time would deny the Government the ability to *arrest* and *detain* those individuals under a warrant; JUSTICE O'CONNOR, I presume, must instead think that turning cities into first-person-shooter warzones is how crime is fought efficiently and safely, and that warrantless arrests will ink the remaining dry spots. Except this ignores—while again exposing the majority's troubled logic—the fact that arrests are made *after* crimes are committed. Had JUSTICE O'CONNOR

and the rest of the majority understood that warrants for arrest are not preventative measures—no one arrest warrant is—but tools for dealing with crime and detaining and trying criminals, perhaps such a concurrence that insults hundreds of law-abiding citizens would not have been written.

* * *

No single word summarizes the Fourth Amendment better than does "reasonableness." That is because principles governing procedure and substance in criminal justice require it. But reasonableness has been thrown out the window in now two cases establishing what is none other than a very troubling trend line. By turning Article III's bolded guarantees of the rights already afforded within the Fourth Amendment into an unrecognizable, tiered, and confusing system imposed through judicial fiat, the Court has taken the side of neither society nor criminals. Today, the Court—with THE CHIEF JUSTICE's and JUSTICE O'CONNOR's helping hands—sides with itself, placing with a wildly out-of-touch perspective a new doctrine that has no textual, historical, or logical support from the Constitution above that of the safety of law-abiding citizens.

I respectfully dissent.

CODE_RAGER *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 05–25. Decided April 8, 2018

PER CURIAM.

Petitioner Code_Rager was convicted almost two years ago of perpetrating an admin attack against the United States Court Process Trello board. For his crimes* he was sentenced to 200 years of federal imprisonment and arrest on sight. In other words, he was issued the sentence of "permanent exclusion," *CodyGamer* v. *United States*, 2 U. S. 18, 23. See also *RoExplo* v. *United States*, 5 U. S. 7, 31–32 (2018). Following our holding in *RoExplo*, Code_Rager appealed his sentence, alleging violation of the Eighth Amendment. We granted certiorari. 5 U. S. 121 (2018).

Not long after we granted certiorari, however, the President issued Code_Rager a "full and unconditional pardon." See Appendix, *infra*. Consistent with the process this Court articulated in *United States* v. *Wilson*, 32 U. S. 150 (1833) for the use of an issued pardon, Code_Rager moved us to vacate his sentence. For the reasons stated below, we grant that motion. Both Code_Rager and the United States, however, also requested that—despite the fact that the underlying sentence no longer exists—we decide the merits of this case anyways. That is something we are unable to do, and we therefore dismiss the writ of certiorari as improvidently granted for the reasons provided below.

Vacating the Sentence

The motion to vacate the sentence imposed by the District Court is straightforward enough. If we are satisfied that the

* He was charged with 96 counts of violating 18 U. S. C. §1361, which punishes anyone who "willfully injures or commits any depredation against any property of the United States" and with committing treason under 18 U. S. C. §2381.

President indeed granted the asserted pardon and that Code_Rager indeed wishes to avail himself of its benefit, we must grant the motion. *Id.*, at 163.

Firstly, we are satisfied that the President granted the asserted pardon for two distinct reasons. For starters, the pardon was first brought to our attention by the Attorney General, an officer of the President. Furthermore, the President himself confirmed the pardon's legitimacy upon direct inquiry by the Court. Second, we are equally convinced that Code_Rager wishes to avail himself of the pardon's benefit. The fact that he moved this Court to vacate his sentence is enough proof of that. If it were not, his continued insistence on it suffices. We thus grant the motion to vacate his sentence.

Dismissing the Case

Both parties have asked this Court to decide this case on the merits despite us already having vacated the sentence on account of the Presidential pardon. Both the United States and Code_Rager's counsel impress upon us the magnitude of the constitutional question presented and insist that for that reason, the case should proceed. But the judicial power, exercised by the courts under Article III, is a power "to decide not abstract questions but real, concrete 'Cases' and 'Controversies.'" *United States* v. *Windsor*, 570 U. S. ——, —— - —— (2013) (Scalia, J., dissenting) (slip op., at 1–2). Our ordinary Article III powers (Anytime Review excluded) are confined to "determin[ing] the outcome of a lawsuit." *Id.*, at —— (slip op., at 3). In so doing, we address constitutional questions which are necessary to the disposition of a case.

We frequently refrain from addressing questions which are not "outcome determinative." *British* v. *Ozzymen*, 3 U. S. 60, 66 (2017) (citing *Sigma* v. *United States Marshals Service*, 3 U. S. 2, 15 (2017) (HOLMES, C. J., dissenting)). That practice

very much has to do with the limits imposed by Article III on the exercise of our powers.

We agree with the parties that the question presented is of great consequence. This case, however, is not its answer.

* * *

The sentence imposed on Code_Rager is vacated and the case is dismissed.

It is so ordered.

Appendix to the per curiam opinion of the Court

APPENDIX

Executive Grant of Clemency

Timothy F. Geithner

President of the United States of America

To All to Whom These Presents Shall Come, Greeting:

Be It Known, That This Day, I, Timothy F. Geithner, President of the United States, Pursuant to My Powers under Article II, Section 2, Clause 1, of the Constitution, Have Granted Unto

Code_Rager

A Full and Unconditional Pardon

For His Conviction of Section 1361 and 2381, Title 18, United States Code in the United States District Court for the District of Nevada, of which he was convicted on August 24, 2016, and for which sentencing is currently set for August 24, 2216.

In Testimony Whereof, I have hereunto signed my name and caused the seal of the Department of Justice to be affixed.

Done at the City of Washington this thirtieth day of March, in the year of our Lord two thousand and eighteen, and of the Independence of the United States of America the two hundred and forty-first.

Timothy F. Geithner
President

Syllabus

JACOB KIRKMAN *v.* NEVADA HIGHWAY PATROL

CERTIFICATE FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 05–33. Decided April 11, 2018

PER CURIAM.

Petitioner Jacob_Kirkman brought a civil suit against the United States State Police (hereinafter the Nevada Highway Patrol) as a result of his arrest by a Nevada Highway Patrol officer at Las Vegas, Nevada. On April 7, 2018, the Federal District Court, pursuant to this Court's Rule 19, certified a question of law to us. The question inquired:

> Does the United States State Police have the authority to act as law enforcement and conduct arrests or traffic stops on citizens within the jurisdiction of the District of Columbia?

The question certified does not have a standing privy to the case that the question originates from. The originating case[1] revolves around an injury done at Las Vegas, not the District of Columbia. The "judicial power . . . is a power to decide not abstract questions but real, concrete Cases and Controversies." *Rager* v. *United States*, 5 U. S. 52, 53 (2018) (*per curiam*) (internal quotation marks and citation omitted). Question certification is a constitutionally legitimate judicial process under which a district court may "certify to this Court a question or proposition of law on which it seeks instruction for the proper decision of a case." But the legitimacy of that process in a given case hinges on the fact that the question certified is part and parcel to a resolution of a controversy before the District Court. As explained already, the controversy in this case arises from an incident at Las Vegas. There is therefore no reason to decide the powers of the Nevada Highway Patrol at the District of Columbia.

For those reasons, the Court has dismissed the certified ques-

[1] *Kirkman* v. *United States Police*, 3:18–2292 (DCDC 2018).

tion.

It is so ordered.

JUSTICE SOUTER dissents from the judgment.

JUSTICE BORK, concurring in part and concurring in the judgment.

While I concur in the judgment of the Court and in much of its opinion, I write separately because I do not think the petitioner has adequately demonstrated that the certified question is "narrow, debatable, and important." *United States* v. *Senate*, 558 U. S. 985, 986 (2009). I consider all three components mandatory for our Rule 19 jurisdiction and therefore would dismiss the petition.

I

The powers of the Nevada Highway Patrol in the District of Columbia are contentious and the arguments against them are several. But for the most part, those arguments are political by nature. Political debate, this Court knows, "present[s] a hotbox of emotion." *Isner* v. *Federal Elections Comm'n*, 3 U. S. 87, 88 (2017) (statement of Scalia, J., respecting the denial of certiorari). Though it would be "easy . . . for our Court to wave [its] wand and participate," *ibid.*, better judgment counsels against entering that "political thicket." *Colegrove* v. *Green*, 328 U. S. 549, 556 (1946). So does the Constitution. As Chief Justice Marshall proclaimed two centuries ago, "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803). Sometimes, however, "the law is that the judicial department has no business entertaining the claim of unlawfulness . . . because the question is entrusted to one of the political branches." *Vieth* v. *Jubelirer*, 541 U. S. 267, 277 (2004) (plurality opinion).

Six independent tests were established in *Baker* v. *Carr*, 369 U. S. 186 (1962), for determining the existence of a political question:

> "[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of the government; or [5] an unusual need for questioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Id.*, At 217.

The tests are "probably listed in descending order of both importance and certainty." *Vieth*, *supra*, at 278. The fourth test is implicated by the certified question now before the Court. We are instructed to consider whether it is possible for a court to independently resolve the question without failing to give one of the other two branches (or both) the respect it is due. The answer to that question in relation to this case is clearly "no."

The last time the question of the Nevada Highway Patrol's power in Washington, D. C. came before the Court was in *Snowbleed* v. *Nevada Highway Patrol*, 4 U. S. 20 (2018). I explained in my concurring opinion in that case that due to D. C.'s NHP Recognition Act, which empowers the agency to function as law enforcement in the city, Congress was primarily responsible for deciding whether that facially legitimate law was in another way illegitimate. *Id.*, at 20. See also, *e. g.*, *Pacific States & Telegraph Co.* v. *Oregon*, 223 U. S. 118 (1912) (claims under the Guaranty Clause of Article IV are nonjusticiable).

I am confident that the specific question before us is one which falls comfortably within Congress's domain. I do not believe it is possible for this question to be answered by a court without failing to afford Congress the respect it is due.

II

Certified questions are held to an even more exacting stan-

dard than are regular cases because they break from the usual hierarchy. At minimum, a certified question must be "narrow, debatable, and important." *Seale*, 558 U. S., at 986. Each component is mandatory of every certified question and should be applied without fail. I argue that in addition to the specific tenets of each component, they together reinforce the principles of caution underlying our political question jurisprudence.

I pursuantly conclude that the general indication that the certified question is a political question on its own requires dismissal. Part I of my opinion shows that this indication is present in the certified question before us. On that understanding, I join the Court's opinion insofar as it does not conflict with mine.

Syllabus

GEORGE *v.* UNITED STATES

REVIEW TO THE UNITED STATES FEDERAL GOVERNMENT

No. 05–35. Argued May 4, 2018—Decided May 16, 2018

After Sufferpoop resigned from the Senate, President Geithner appointed Connor Russo (hereinafter Russo) to complete his tenure. Russo at the time of his appointment, however, had not been a citizen for a continuous period of two months. HHPrinceGeorge filed this lawsuit to invalidate Russo's appointment under Article I, § 3, cl. 3, which sets eligibility requirements for Senators. While the case was pending, Russo resigned as a Senator.

Held: The status quo is affirmed.

JUSTICE KAGAN, joined by THE CHIEF JUSTICE and JUSTICE MARSHALL, concluded that the case was moot because Russo was no longer a Senator and rules of mootness apply to anytime-review cases. They would therefore take no action.

JUSTICE BORK, joined by JUSTICE GORSUCH, concluded that the case was not moot, and that there was an injury, but that Russo's appointment was constitutionally valid. Consequently, they would let his appointment stand.

JUSTICE THOMAS concluded that the case should be dismissed because no injury existed.

Affirmed.

KAGAN, J., announced the judgment of the Court and delivered an opinion, in which HOLMES, C. J., and MARSHALL, J., joined. BORK, J., filed an opinion concurring in the judgment, in which GORSUCH, J., joined, *post*, p. 68. THOMAS, J., filed an opinion concurring in the judgment, *post*, p. 70. GINSBURG, O'CONNOR, and SOUTER, JJ., dissented from the judgment.

JUSTICE KAGAN announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE and JUSTICE MARSHALL join.

In his petition submitted to this Court on April 16, 2018, HHPrinceGeorge sought to invalidate Connor Russo's appointment to the United States Senate. Due to the fact that Russo's term as a Senator has since expired, we must decide whether HHPrinceGeorge's petition is now moot.

I

On April 15, President Geithner decided to exercise his article I, § 3, clause 2 power in the Constitution to appoint an American

citizen to the Senate seat vacated by Sufferpoop. Concerned by this appointment, Senator HHPrinceGeorge filed a petition with this Court challenging it. He argued that since Russo had recently been naturalized on April 11, 2018, he was not eligible to be a Senator under Article I, §3, clause 3 of the Constitution. Because of this, he also contended that, as a sitting Senator, his vote was diluted by what he saw as an illegal appointment.

II

Article III requires a "case-or-controversy . . . [at] all stages of federal judicial proceedings." *Lewis* v. *Continental Bank Corp.*, 494 U. S. 395, 401 (1975). Anytime review is no exception. The Constitution gives this Court the power to—"at any time it deems necessary"—"review . . . the [acts] of the Executive or Legislative branches" so it can "overturn . . . [those which are] . . . unconstitutional or unlawful." Art. III, §4. As broad as that power is, it has never been applied retrospectively. The Court has previously held that "[w]e are not in the business of pronouncing that past actions which have no demonstrable continuing effect were right or wrong." *Spencer* v. *Kemna*, 532 U. S. 1, 18 (1998).

Furthermore, "mootness, however it may have come about, simply deprives us of our power to act." *Ibid.* "Through the mere passage of time, the [petitioner] has obtained all the relief they sought." *Lane* v. *Williams*, 455 U. S. 631, 633 (1982). Through this principle, we can apply it to Senator HHPrinceGeorge's case. Through the passage of time, dilution of the petitioner's vote has dissolved due to the expiration of Russo's Senate term. Taking both of the principles from *Lane* and *Kemna*, the petitioner has received his relief and our power to act is rendered useless due to the petition being moot.

* * *

For the foregoing reasons, the status quo is affirmed.

It is so ordered.

JUSTICE GINSBURG, JUSTICE O'CONNOR, and JUSTICE SOUTER dissent from the judgment.

JUSTICE BORK, with whom JUSTICE GORSUCH joins, concurring in the judgment.

A decision holding Connor Russo's Senate appointment unconstitutional would be an unprecedented and uninvited excess of this Court's discretion. If grounds exist to affirm the status quo, we should—our job is to "say what the law is," not what the parties think it should be. See *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803). No amount of poor argumentation from either side can ever justify a wrong entry by this Court. Luckily in this case, we need not worry about that; we benefit from strong points raised on both sides, both in the briefs and during oral argument.

Throughout this case, respondents have emphasized one point which I must agree with (and which petitioner also seems to concede):

> "The Constitution does not have a consecutive citizenship requirement but instead an accumulative conservative requirement of citizenship." Tr. of Oral Arg. 8. See also *id.*, at 2, 3, 4, 5.

Indeed, talk of the Senate Eligibility Clause's citizenship requirement as an "accumulative" requirement appeared on almost every page of our oral argument transcript and was emphasized by *both* sides. I am inclined to agree and must countenance that fact of law as not only significant but dispositive of these proceedings. The record, undisputed, shows that Russo was a citizen many months ago. Petitioner did not (and cannot) prove that he renounced his citizenship before reaching the Senate Eligibility Clause's threshold and his claim therefore must fail.

I

Before delving into the precise law at issue in this case, I must respond to the plurality's assertion that the case is moot. Even a slight examination of the United States Reports would do well

to show that the plurality's position is untenable. We have repeatedly emphasized, in case after case, that when the seamless "termination" of an existent controversy would "effectively den[y] . . . [a litigant] review" of an act "capable of repetition," mootness does not take hold. *Roe* v. *Wade*, 410 U. S. 113, 125 (1973); *Southern Pacific Terminal Co.* v. *ICC*, 219 U. S. 498, 515 (1911). See *Moore* v. *Ogilvie*, 394 U. S. 814, 816 (1969); *Carroll* v. *Princess Anne*, 393 U. S. 175, 178–179 (1968); *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 632–633 (1953). How could it? If in this case mootness applied simply because Russo resigned, then—although *he* is eligible to serve—it would open the door to future illegal Senate appointments which could escape review by resignation and then reappointment after dismissal.

In the analogous case of *Honig* v. *Doe*, 484 U. S. 305 (1988), Justice Rehnquist explained in a concurring opinion that the "capable of repetition, yet evading review" exception to mootness simply recognizes that if a controversy is "alive" when a corresponding lawsuit is filed, regardless of whether "supervening events" change that fact, courts have "authority to hear the case." *Id.*, at 329–330. And after a thorough examination of the original basis for the mootness doctrine, which I see no value in repeating, he suggested "go[ing] still further" and "relaxing the test of mootness where the events giving rise to the claim of mootness have occurred after our decision to grant certiorari or to note probable jurisdiction." *Id.*, At 330. The plurality's claim of mootness in this case, in contrast, is *ipse dixit*. All would agree, and none could seriously dispute, that the events which render this case technically (but not in fact) "moot" occurred well after we granted certiorari. In the intervening time, we accepted briefs, held oral arguments, disposed of motions, and conducted a vote on the merits. I am left wondering, then, what the real reason is for the plurality's mootness decision.

II

Alas, the merits of this case lead me to the same judgment as the plurality and so I join its judgment but not its opinion.

The Senate Eligibility Clause states, in relevant part, that "[n]o person shall be a Senator who shall not have . . . been two Months a citizen of the United States." Art. I, §3, cl. 3. In regards to this, I do not understand the hoopla. Few provisions of the Constitution are as clear as this one. If you have been a citizen for at least two months, you can be a Senator. Nowhere does any part of this text connote a requirement of consecutivity. A few analogies should do the trick:

- "Have you been to Italy?"—This obviously means that if you have *ever* been to Italy, you should respond, "yes." By petitioner's and the dissenters' logic, unless you just got back from Italy, your answer should be, "no." 'Nuff said.
- "Where have you been to?"—A list of places you have visited, not just the ones which you have visited on your last vacation.
- "How long have you been an attorney?"—If you served multiple stints as an attorney but served as a teacher in between (3 years as an attorney, 1 as a teacher, and then 2 more as an attorney), your answer might be more nuanced than someone who just served a consecutive 3 years as an attorney, but your answer ultimately would still be 5 (if you can do proper addition).

Since the law unequivocally embraces an accumulative citizenship requirement and because petitioner has not proven that Russo's previous period of citizenship ended before two months, I would affirm his appointment.

JUSTICE THOMAS, concurring in the judgment.

I agree with the plurality's decision to dismiss this case. In doing so, however, the plurality endorses the argument proposed by my BROTHER BORK that Senator HHPrinceGeorge's "vote was diluted" by a so-called illegal appointment. *Ante*, at 61. I will not crowd the United States Reports with a second rendition of my argument for why this proposition should truly puzzle the

minds of even the most inexperienced in the legal profession.

Thus, I agree insofar as to say that this case is rightly dismissed, but not for the reasons offered by JUSTICE KAGAN. This case, instead, should have been dismissed for the same reason it should not have been taken in the first place: No valid injury ever existed. For if one is to assume that dilution occurred, then one must logically accept that every Senator will have an injury to assert; the "dilution" caused by Connor Russo would be present regardless of who filled his seat. And so my colleagues, both in the plurality and concurrence above, appear to wish to take up a new responsibility: Firing every new Senator. Indeed, had Russo not resigned his seat, this Court may have very well been prepared to rob him of his office; and such a robbery would have been predicated on the notion that the injury to be relieved was dilution. Though, one must *also* wonder where the nexus lies between the injury of vote dilution—and our role would have been to relieve that injury, had we ruled for the petitioner—and the merits of the respondent's qualifications to serve. The Court, sadly, leaves unanswered that question, in both its analysis here and its original granting of the case. (I surmise this is so because the answer would be plainly untenable.) Nevertheless, I must concur in the dismissal.

EX PARTE UNITED STATES

APPLICATION FOR STAY

No. 05–43. Decided May 19, 2018

PER CURIAM.

We are asked to stay numerous criminal prosecutions brought by the District of Columbia. We resolve that question without expressing any view on whether the District has the inherent power to enforce its criminal statutes in federal court without Congressional authorization. We instead determine that the prosecutions should be stayed pending our final decision on the petition because there is a fair prospect that this case will ultimately be decided in the United States' favor and in the meanwhile the equities tip sharply in that direction.

* * *

This lawsuit, still in a preliminary stage, challenges the authority of the District of Columbia to prosecute violations of its municipal code in federal court. That is, without Congressional authorization to do so. The United States seeks a writ of mandamus instructing the District Court that is lacks jurisdiction to hear the following cases:

- *District of Columbia* v. *Okmangeez*, 3:18–4742 (DCDC 2018);
- *District of Columbia* v. *Vonotige*, 3:18–1241 (DCDC 2018);
- *District of Columbia* v. *MinderMastI*, 3:18–7939 (DCDC 2018);
- *District of Columbia* v. *CommanderFikri*, 3:18–6111 (DCDC 2018);
- *District of Columbia* v. *SemperBeyond*, 3:18–1713 (DCDC 2018);
- *District of Columbia* v. *SinisterFriggus*, 3:18–2352 (DCDC 2018);
- *District of Columbia* v. *DarrenJMatthews*, 3:18–

1324 (DCDC 2018).

While the mandamus petition is pending, the United States has requested that the referenced cases be stayed. In its view, a stay is "necessary . . . to protect the interests of the United States . . . [and its] power to prosecute individuals within the District of Columbia." App. for Stay 2–3. The United States believes, that by prosecuting offenses in federal court, the District has deprived the United States of its ability to do so.

At present, the only question before us is whether we should grant the stay. We do not presume to decide the entire matter in controversy at this stage. Our role at this point is primarily equitable.

I

To obtain a stay, the United States must have a fair prospect of success on the merits and be threatened by irreparable harm if the stay is denied. In close cases, the Court must balance the equities and weigh the relative harms to each affected party. *Lucas* v. *Townsend*, 486 U. S. 1301, 1304 (1988) (Kennedy, J., in chambers); *Rostker* v. *Goldberg*, 448 U. S. 1306, 1308 (1980) (Brennan, J., in chambers). In a mandamus case, the merits demonstration must be a "fair prospect that a majority of the Court will vote to grant mandamus." *Hollingsworth* v. *Perry*, 558 U. S. 183, 190 (2010) (per curiam). The bar for receiving a writ of mandamus is, of course, a very high one. Mandamus is, perhaps more than anything else, a "break from the usual hierarchy," *Kirkman* v. *Nevada Highway Patrol*, 5 U. S. 62, 65 (opinion of Bork, J.). Under mandamus, not only does this Court utilize extraordinary jurisdiction, it gives binding direction to another court in the exercise of *its* jurisdiction.

In mandamus cases, therefore, we have traditionally asked whether (1) "no other adequate means [exist]" for the petitioning party to obtain relief; (2) if the party's "right to issuance of the writ is clear and indisputable"; and (3) whether "the writ is appropriate under the circumstances." *Cheney* v. *United States Dist. Court for D. C.*, 542 U. S. 367, 380–381 (2004) (internal quotation marks omitted). As mentioned earlier, to obtain

a stay, the United States need only establish a "fair prospect" of success on each of these points. The greater question is about the relative harms to each party presented by the granting of denial of a stay. We address each issue in turn.

A

The United States has a fair prospect of success on the merits because no other adequate means exist for them to obtain relief, it is reasonably likely that their entitlement to the writ is clear, and the writ is obviously appropriate under the circumstances.

1

Our cases well recognize that the "remedy of mandamus is a drastic one." *Kerr* v. *United States Dist. Court for Northern Dist. of Cal*, 426 U. S. 394, 402 (1976); see also *Will* v. *United States*, 389 U. S. 90, 95 (1967); *Bankers Life & Cas. Co.* v. *Holland*, 346 U. S. 379, 382–385 (1953); *Ex parte Fahey*, 332 U. S. 258, 259 (1947). This Court will therefore only issue the writ to a federal district court "where a question of public importance is involved, or where the question is of such a nature that it is peculiarly appropriate that such action by this Court should be taken." *Ex parte United States*, 287 U. S. 241, 248–249 (1932). Together, these cautionary principles are the basis of *Cheney*'s first prong: That we should only intervene if there are no other options available to the petitioning party. That would seem to be the case here. The sheer number of criminal prosecutions brought by the District of Columbia and the ease with which they can bring more would make it very difficult—if not impossible—for the United States to obtain relief elsewhere. It is neither plausible nor reasonable that they should have to seek intervention as a party in interest in all seven of the criminal cases already filed by the District. Not to mention the numerous others there is a *potential* for the District to file.

It also is not a given that the District Court will grant all intervention motions. There are several judges who sit on that court and any one of them could be assigned the prosecutions. There is sure to be disagreement among them about whether the Unit-

ed States is a sufficiently interested party as to warrant intervention. And that is only the threshold question. The more difficult matter of whether the cases should actually be dismissed is not one we can be certain will be decided by the various District Court judges in the United States' favor.

No other adequate means exist for the United States to obtain relief.

2

The second prong of *Cheney* is eminently tied to the final decision of the case; for that reason—as we do not decide the entire case at this stage—we discuss the arguments on both sides and the strengths of each.

a

For a litigant to succeed in proving a "clear and indisputable" entitlement to the writ, they must be correct in showing that the challenged matter is not "committed to discretion." *Will* v. *Calvert Fire Ins. Co.*, 437 U. S. 655, 666 (1978) (plurality opinion); *Allied Chemical Corp.* v. *Daiflon, Inc.*, 449 U. S. 33, 36 (1980). That is, when a decision is "confided almost entirely to the exercise of discretion on the part of the trial court," *ibid.*, there are no grounds for seeking the writ. This issue, however, is jurisdictional; and if the District Court lacks jurisdiction, it has no discretion in deciding whether to dismiss. See *Ex parte McCardle*, 7 Wall. 506, 514 (1869) ("Without jurisdiction the court cannot proceed at all in any cause . . . and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause."); accord *Steel Co.* v. *Citizens for Better Environment*, 523 U. S. 83, 94 (1998). Naturally, the jurisdictional question here is whether the court is able to hear criminal prosecutions by the District of Columbia's municipal government.

It could be argued reasonably that without a Congressional conferral of jurisdiction, courts lack authority to hear criminal prosecutions by municipalities. Cf. 28 U. S. C. §516 (giving the Department of Justice authority to prosecute criminal cases,

inter alia, in federal court). This argument would seem to be supported by precedent. For instance, we have recently rejected the notion of implied causes of action except in the limited circumstances established by *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388, and its progeny. See generally *Ziglar* v. *Abbasi*, 582 U. S. ——, —— (2017) (slip op., at 9). Some Justices have explained that "'*Bivens* [and its progeny are] a relic of the heady days in which this Court assumed common-law powers to create causes of action.'" *Wilkie* v. *Robbins*, 551 U. S. 537, 568 (2007) (Thomas, J., concurring) (quoting *Correctional Services Corp.* v. *Malesko*, 534 U. S. 61, 75 (2001) (Scalia, J., concurring)). There is therefore a strong school of thought and substantial legal authority behind the idea that courts lack power to create causes of action. That logic could apply here as well.

"Creating a cause of action" is exactly what authorizing criminal prosecutions by municipalities—assuming the Constitution does not itself authorize them—in the absence of statutory authority would require. But *Ziglar* limited both *Bivens* and its progeny to their facts. So a court cannot create a cause of action; that power belongs to Congress.

The appropriate question, therefore (the argument goes), is whether the Constitution itself grants jurisdiction to courts to hear criminal prosecutions by municipalities. There is a strong case to be made for "no." While it is indisputable that the Constitution requires "due process of law in a federal district [court]," Amdt. XIV, before a municipality can criminally punish someone, it does not immediately follow that the municipality is assured access to those courts. The Constitution does include within the "judicial power" cases between a municipality and its citizens, but also states (because a municipality is a party) that this Court "shall have original jurisdiction, . . . with such exceptions, and under such regulations as the Congress shall make." Art. III, § 2, cl. 2. This would seem to run contrary to the position that the District Court can hear municipal prosecutions without Congressional authorization. The Venue Clause provides that the "trial of all crimes . . . shall be held in a fed-

eral district court." Art. III, §2, cl. 3. From that, it is easily established that trials occurring in this Court cannot be criminal. *United States* v. *TPR*, 5 U. S. 36, 39 (2018) (HOLMES, C. J., concurring). So while a municipality could conceivably pursue civil actions (in this Court) without Congressional authorization, it would—under this argument—need Congress to authorize municipal prosecutions in a federal district court.

b

On the other hand, there are arguments for why the Constitution *does* give federal district courts jurisdiction over municipal prosecutions. Those arguments, naturally, focus more on the Tenth Amendment, principles of dual sovereignty, and the already cited provisions (the Fourteenth Amendment and the Venue Clause) relating to criminal prosecutions.

The municipalities, under the Tenth Amendment, possess an "inherent police power . . . 'to safeguard the vital interests of [their] people.'"[1] *Energy Reserves Group Inc.* v. *Kansas Power & Light Co.*, 459 U. S. 400, 410 (1983) (quoting *Home Bldg. & Loan Assn.* v. *Blaisdell*, 290 U. S. 398, 434 (1934)). Included in that power is the power to prosecute violations of its laws. As the argument goes, the Venue Clause and the Fourteenth Amendment's Due Process Clause implicitly confer jurisdiction on the federal district courts to hear those prosecutions. This is so because, if that were not the case, the municipalities would become dependent on the federal government for the use of their police powers, threatening the basic concept of dual sovereignty. See generally *Murphy* v. *National Collegiate Athletic Assn.*, 584 U. S. —— (2018).

c

Both positions undoubtedly have their strengths and flaws. But in the case of constitutional interpretation, only one can be correct. We do not, at this stage, have to resolve that question. We can, however, recognize that the first position is more deeply rooted in textual commands than the second, which

[1] In our particular constitutional order, the federal government possesses a very similar power represented in a series of enumerated ones.

focuses on abstract principles and powers. At the very least, there is a fair prospect of the first being correct.

3

The third prong of *Cheney* focuses on the appropriateness of the writ under the circumstances. As mentioned earlier, this part of the analysis greatly has to do with whether "a question of public importance is involved, or [the] question is of such a nature that it is peculiarly appropriate that such action by this Court should be taken." *Ex parte United States*, 287 U. S., at 248–249. This question is one of public importance because, if the United States is correct, failure to issue the writ (*i. e.*, stay the proceedings below) would result in District prosecutions interfering with federal ones. See *id.*, at 249 ("Undoubtedly . . . the writ may well issue from this Court . . . in furtherance of the general policy of a prompt trial and disposition of criminal cases").

B

Both federal and municipal interests are at stake here. The present application requires us to weigh the relative harms to each done by the denial or granting of the requested stay.

The purpose of criminal prosecution, fundamentally, is to achieve one of three goals: "rehabilitation, deterrence, [or] retribution." *Kennedy* v. *Louisiana*, 554 U. S. 407, 420 (2008). Deciding this motion either way will result in the limiting of one of the sovereign's ability to prosecute and we must be mindful of that fact. We must look to whether those purposes are still adequately fulfilled if a ruling is made in either direction. We must also be mindful of the fact that the Constitution's Supremacy Clause effectively makes federal interests supreme over municipal ones, so they must be allowed to take precedence.

That standard in mind, it is relatively clear that the harms tip in the United States' favor. While denying the stay would allow municipal prosecutions to go forward, it would hinder federal ones. Federal interests cannot possibly yield to municipal ones except when the municipal interests would be completely defeat-

ed in one case, and the federal ones only marginally in another. Here, both sovereigns seek to prosecute the same cases so a granting of the stay, while it would make whole the United States, would impose no actual harm on the District of Columbia. The purposes of prosecution, shared by both the municipal and federal governments, described in *Kennedy*, will still be adequately served. The swing of the equities is quite clear.

II

We grant the United States' requested stay and direct the District Court to freeze[2] the seven cases references earlier, *infra* at 72–73, until further order by this Court. We also direct the District Court to freeze any additional criminal cases filed by the District of Columbia while this case is pending, until further ordered by this Court. For clerical reasons, we direct that all such cases be moved to the "On Hold" section of the court-processing system.

It is so ordered.

[2] Freezing the case means postponing any hearings, motions (including motions by the District of Columbia for leave to drop charges), conferences, etc. indefinitely.

Syllabus

NUINIK *v.* UNITED STATES

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

No. 05–27. Decided May 22, 2018

After a Las Vegas jury convicted Nuinik of false arrest, he appealed because the District Court had failed to accommodate his request to depose three witnesses. He sought a new trial where he would be able to fully present his case to the jury.

Held: The District Court violated the Compulsory Process Clause by failing to accommodate his intended witness depositions.

(a) The defendant's right to compulsory process is designed to vindicate the principle that the ends of "criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts." *United States* v. *Nixon*, 418 U. S. 683, 709. The District Court should have allowed the defendant to "compe[l] the attendance of favorable witnesses at trial and . . . put before [the] jury evidence that might influence the determination of guilt." *Pennsylvania* v. *Ritchie*, 480 U. S. 39, 56.

3:18–9262, vacated.

KAGAN, J., delivered the opinion of the Court, in which HOLMES, C. J., and GINSBURG, MARSHALL, GORSUCH, THOMAS, and O'CONNOR, JJ., joined. BORK, J., filed an opinion concurring in part and dissenting in part, *post*, p. 81. SOUTER, J., dissented from the judgment.

JUSTICE KAGAN delivered the opinion of the Court.

In his petition submitted to the Court on March 21, 2018, Nuinik sought to appeal the District Court's decision in *United States* v. *Nuinik*, 3:18–9262 (DCNV 2018).

I

On March 16, the United States brought charges against the petitioner, Nuinik, for one count of false arrest. Five days later, the petitioner was found guilty and sentenced to five days of being arrest-on-sight. Believing the District Court's ruling to be wrong, he appealed to this Court under the circumstances that the presiding judge had not complied with the defense's request to depose three witnesses.

II

The Fifth and Fourteenth Amendments to the Constitution articulate that all citizens of the United States are subject to due process under the law. "[O]ur cases establish, at a minimum, that criminal defendants have the right to the government's assistance in compelling the attendance of favorable witnesses at trial and the right to put before a jury evidence that might influence the determination of guilt." *Pennsylvania* v. *Ritchie*, 480 U. S. 39, 56 (1987). Under this precedent, the Court must decide whether the District Court's decision to not hear the deposition of the petitioner's witnesses violated his due process rights. "There is a significant difference between the Compulsory Process Clause weapon and the other rights protected by the Sixth Amendment—its availability is dependent entirely on the defendant's initiative." *Taylor* v. *Illinois*, 484 U. S. 400, 410 (1988).

The defendant's right to compulsory process is itself designed to vindicate the principle that the "ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts." *United States* v. *Nixon*, 418 U. S. 683, 709 (1974).

A judge whose decision is based on a partial representation of the facts is neglecting his duty to carry out the rule of law. Furthermore, for a defendant's right to depose witnesses to aid his case to be infringed is a travesty and detriment to our judicial system.

* * *

We vacate the conviction and remand this case back to the District Court for a new trial.

It is so ordered.

JUSTICE SOUTER dissents from the judgment.

JUSTICE BORK, concurring in part and dissenting in part.

In this case a jury convened by the United States District

Court for the District of Nevada found Nuinik guilty of making a false arrest. See *United States* v. *Nuinik*, 3:18–9262 (DCNV 2018). On that conviction, the District Court sentenced him to five days Arrest on Sight. The trial, Nuinik however argues, was rife with "negligen[ce]." Brief for Petitioner 2. According to Nuinik, the District Court replaced his original counsel who had provided clear notice of intended witness depositions with one who had no knowledge of his case. As a result, Nuinik says, the defense he received was incomplete. Nuinik's telling of events raises clear questions under the Compulsory Process Clause (which guarantees the right to call defense witnesses) and the Assistance of Counsel Clause (which guarantees the effective assistance of counsel). See, *e. g.*, *Pennsylvania* v. *Ritchie*, 480 U. S. 39, 56 (1987) ("Our cases establish, at a minimum, that criminal defendants have the right . . . to put before a jury evidence that might influence the determination of guilt"); *Strickland* v. *Washington*, 466 U. S. 668 (1984) (establishing the ineffective-assistance-ofcounsel standard). The majority, without question, buys the version of events described by Nuinik. I, however, am not so sure—how can I be? In this case, there is no transcript or other documentation of the trial which would allow me to verify any of what Nuinik has alleged to be true. Of course, that is not his fault: it is the duty of the District Court, not him, to maintain careful documentation of its proceedings. Nuinik should not be punished because the District Court failed to do so. Luckily, the law doesn't say he should be.

Congress passed the Court Proceedings Act to guard the People—to whom they are accountable—against Government invasions of their rights which previously would go un-remedied because of an absence of documentation. As such, they declared that "[a]ll . . . cases shall be documented, and the documentation shall be publicly accessible on the case file." Court Proceedings Act, Pub. L. 57–3, Dec. 9, 2017 (hereinafter CPA), §3(a). When an appeals court comes across a case which lacks appropriate documentation, it "shall be deemed void." CPA, §4(a).

*

Congress laid out two forms of acceptable documentation. The first is a "recording" and the second is a "transcript." CPA, §3(b). Neither is present here.

Some of my colleagues are reluctant to invalidate Nuinik's conviction on CPA grounds because neither party raised them. The language of the CPA, however, is mandatory. See *Board of Pardons* v. *Allen*, 482 U. S. 369, 374 (1987) (explaining the "significan[ce] [of] mandatory language—the use of the word 'shall'"); *Greenholtz* v. *Inmates of the Nebraska Penal and Correctional Complex*, 442 U. S. 1, 11–12 (1987); *Lexecon Inc.* v. *Milberg Weiss Bershad Hynes & Lerach*, 523 U. S. 26, 35 (1998). When a statute uses the word "shall," it has been traditionally understood to impose a duty impervious to judicial discretion. *Anderson* v. *Yungkau*, 329 U. S. 482, 485 (1947). Accordingly, when a CPA violation is palpable, we must apply the remedy chosen by Congress—we must void the lower court decision.

Applying CPA to this case requires us to void Nuinik's conviction. The majority does just this, but not on CPA grounds. Instead, the majority invalidates Nuinik's conviction on Compulsory Process Clause grounds. Doing so is inconsistent with our past cases which have uniformly recognized the need for restraint in addressing constitutional questions. We have said that "[t]he Court will not pass upon a constitutional question [even if] properly presented in the record, if there is also present some other ground upon which the case may be disposed of." *Ashwander* v. *TVA*, 297 U. S. 288, 347 (1936). Questions of "statutory construction or general law" are among those other grounds. *Ibid.* See also *Siler* v. *Louisville & Nashville R. Co.*, 213 U. S. 175, 191 (1909); *Light* v. *United States*, 220 U. S. 523, 538 (1911). The majority errs in basing its decision today on the Sixth Amendment when there are perfectly available statutory grounds (to wit: the CPA) which it could have used. Moreover, the CPA entitles Nuinik to greater relief than what the majority grants him under the Sixth Amendment because we do not know, in the case of a CPA violation—due to

the trial court's conduct (or lack thereof)—whether or not a "bad faith" error occurred prohibiting retrial. *United States* v. *Dinitz*, 424 U. S. 600, 611 (1976). The CPA would give the benefit of that uncertainty to Nuinik. Accordingly, so would I.

*

I would reverse the judgment of the District Court.

Syllabus

HEAVE *v.* UNITED STATES

REVIEW TO THE UNITED STATES FEDERAL GOVERNMENT

No. 05–41. Decided May 26, 2018

After Congress passed the National Voter Registration Act (NVRA), Dry_ Heave filed suit with this Court, requesting a writ of review to the Federal Government to assess the constitutionality of § 3001(a)(1) of NVRA, arguing that the dates and times prescribed under it for when federal and municipal elections were to occur violated Article I, § 4, cl. 4 of the Constitution.

Held: The writ of review is dismissed.

MARSHALL, J., delivered the opinion of the Court, in which HOLMES, C. J., and GORSUCH, THOMAS, O'CONNOR, SOUTER, and KAGAN, JJ., joined. HOLMES, C. J., filed a concurring opinion, in which KAGAN, J., joined. *Post*, at 86. BORK, J., filed an opinion concurring in the judgment. *Post*, at 87. ROBERTS, J., took no part in the consideration or decision of this case.

JUSTICE MARSHALL delivered the opinion of the Court.

"Mootness is a jurisdictional question because the Court is not empowered to decide moot questions or abstract propositions . . . [as] the exercise of judicial power depends upon the existence of a case or controversy." *North Carolina* v. *Rice*, 404 U. S. 244, 246 (1971) (internal quotation marks omitted). We have applied that rule to anytime review cases. See *George* v. *United States*, 5 U. S. 66, 67 (2018) (plurality opinion).

After we granted certiorari, Congress moved to amend the provision in question so that it would be aligned with the Constitution. S. 23, 64th Congress (2018). Shortly after the passage of the amendment, the United States filed a motion to dismiss the suit on the grounds of mootness due to lack of a present controversy. This Court has previously held that a case becomes moot when the issue that was presented is no longer "live." *Powell* v. *McCormack*, 395 U. S. 486, 496. The issue that was presented before this Court by the Petitioner, which was the uncertain constitutionality of §3001(a)(1) from the NVRA, ceased to exist when Congress amended the provision. This action causes the

case to lose "its character as a present, live controversy," and removes this Court's jurisdiction to hear it thereby making it moot. *Hall* v. *Beals*, 396 U. S. 45, 48 (1969).

* * *

For the reasons above, the writ of review is dismissed.

It is so ordered.

JUSTICE ROBERTS took no part in the consideration or decision of this case.

CHIEF JUSTICE HOLMES, with whom JUSTICE KAGAN joins, concurring.

I join the Court's opinion in full. I write separately to respond to JUSTICE BORK's concerns regarding our prudential requirements of standing and injury in anytime review cases.

JUSTICE BORK, in his concurring opinion, *post*, at 90 suggests "maximally limit[ing] our discretion [in anytime review cases] by cutting out discretionary choices which have nothing to do with the constitutional merits of an argument." In other words, forgoing all prudential elements of anytime review jurisdiction. To make this point, he cites the origin of prudential considerations and invokes the more abstract anytime review "duty." *Id.*, at 89. To be sure, one could plausibly argue that prudential considerations have no place in anytime review cases. But doing so would require ignoring the first half of the Anytime Review Clause. The Clause states in full:

"The supreme Court shall have the power at any time *when it deems necessary* to exercise a Review of the Executive or Legislative branches, and through this exercise may overturn any Law, executive Order, or other action if it finds it to be unconstitutional or unlawful." See Art. III, § 4 (emphasis added).

The emphasized part of the Clause is clear that discretion is part of the equation: We should only exercise reviews when

we "deem it necessary." Certainly, as a policy matter, JUSTICE BORK's position has undeniable appeal. Limiting discretion is an important part of keeping with our proper judicial role. His solution is, however, foreclosed by the text of the Anytime Review Clause. The error in JUSTICE BORK's reasoning is his assumption that no middle ground exists between unfettered discretion and no discretion. I have previously explained, however, that when an exercise of discretion is required, "objective information" and objective factors are the most effective means of constraining it. *United States* v. *TPR*, 5 U. S. 36, 39 (2018) (HOLMES, C. J., concurring).

Various objective factors can and should guide our discretion in anytime review cases, *e. g.*, standing, adverseness, and the existence of a case or controversy. See *United States* v. *City of Las Vegas*, 4 U. S. 1, 3, n. * (2017) ("[T]he longstanding tradition of this Court has been to—absent *extraordinary* circumstances—incorporate [cases and controversies clause] requirements into Anytime Review jurisprudence.") (citing *Psychodynamic* v. *Technozo*, 2 U. S. 77 (2017) (HOLMES, C. J., respecting denial of certiorari)); *George* v. *United States*, 5 U. S. 66, 67 (2018) (opinion of KAGAN, J., joined by HOLMES, C. J. and MARSHALL, J.). Those considerations, applied consistently, would both assure that we do not overstep our bounds and simultaneously reduce our discretion.

JUSTICE BORK, concurring in the judgment.

Earlier this Term, three Justices held that "Anytime [R]eview [was] no exception" to Article III's "case-or-controversy" requirements. *George* v. *United States*, 5 U. S. 66, 67 (2018) (*George II*) (plurality opinion). I take that as an endorsement of JUSTICE THOMAS's theory that Case or Controversy requirements apply to Anytime Review cases as consequence of a "prudential rule," *George* v. *United States*, 5 U. S. 124, 127 (2018) (*George I*) (THOMAS, J., dissenting), because any indication that the *text* requires such an application would be clearly wrong. I agree with the plurality in *George II* insofar as it concluded the

doctrine of mootness was applicable to Anytime Review cases; I do not agree that the Cases or Controversies Clause is the reason why. I therefore concur in today's judgment dismissing the writ of certiorari for mootness.

I write separately to address my growing concern with this Court's "prudential rule" of importing Case or Controversy requirements for use in Anytime Review cases.

I

The origin of "prudential" constraints on jurisdiction should spell their downfall. As a starting point, they never had any basis in the Constitution as originally understood. The first case of ours to establish a "prudential" constraint on jurisdiction came in 1968 and is not remembered as a symbol of judicial restraint—it was a "power-grabbing decision." *United States* v. *Windsor*, 570 U. S. ——, —— (2013) (Scalia, J., dissenting) (slip op., at 8). Indeed, *Flast* v. *Cohen*, 392 U. S. 83, 98–101 (1968), did not *create* limits on jurisdiction, rather it recast standing as merely a "prudential" element of it. It proceeded to disregard standing because, well, it could with its new labeling.

From the start, "prudential" requirements were not about curbing judicial overreach, but rather picking-and-choosing when the law should apply—expanding judicial discretion. They were meant to stack the deck in favor of causes judges supported and against those they didn't. They invited judges to make, as a threshold matter, "policy determination[s] of a kind clearly for nonjudicial discretion." *Baker* v. *Carr*, 369 U. S. 186, 217 (1962). I explained this dynamic in *George I*, warning that prudential constraints on Anytime Review jurisdiction were merely a vehicle for expanding judicial power to a point where "judges not only interpret the Constitution but pick and choose when those interpretations should apply." *George I*, *supra*, at 124 (statement of BORK, J.) (citing *Zuni Public School Dist. No. 89* v. *Department of Education*, 55 U. S. 81, 108 (2007) (Scalia, J., dissenting)). JUSTICE THOMAS, though he disagreed with me on how best to prevent it, was equally concerned with the potential for abuse of our prudential-constraints jurisprudence:

> "It appears the Court wishes to keep [A]nytime [R]eview hostage—after all, one may not know when one may need it. When members of this Court, sitting surrounded by marble columns and security guards, prefer a political action—or any policy for that matter—anytime review will be relegated back to its cage, restricted by chain *to our standing jurisprudence*." *Id.*, at 126 (THOMAS, J., dissenting) (emphasis added; citation omitted).

"Our standing jurisprudence," since it is predicated on the flexible theory of prudential constraints, is untenable. Justice Scalia explained that when a jurisdictional constraint is termed "prudential," it enables "courts to ignore [it] whenever they believe it 'prudent'—which is to say, a good idea," *Windsor*, *supra*, at —— (Scalia, J., dissenting) (slip op., at 8). To the point, standing can be nothing more than "prudential" in Anytime Review cases since the Constitution doesn't require it. At that point, it begs asking: does our Anytime Review standing jurisprudence do more harm than good?

II

A second problem exists with our Anytime Review standing jurisprudence and that is its purported justification. Some suggest it keeps this Court within its proper judicial role by providing the deference to elected officials that society expects. But "[s]uch a philosophy ignores We the People's decision to vest in our Court the power" of Anytime Review. *British* v. *Ozzymen*, 3 U. S. 60, 82 (2017) (opinion of Scalia, J.). That is, the power "'at any time [we] dee[m] necessary' . . . [to] 'review the [acts] of the Executive or Legislative branches' so [we] can 'overturn . . . [those which are] unconstitutional or unlawful.'" *George II*, *supra*, at 67 (quoting Art. III, §4). Society, in vesting us with that power, bestowed on us a duty to use it in appropriate cases. We cannot shrink from that duty based on our own unsubstantiated perceptions of what society would want because society has instructed us to consider the Constitution, the law, and nothing more.

I would maximally limit our discretion by cutting out discre-

tionary choices which have nothing to do with the constitutional merits of an argument.

Syllabus

GEORGE *v.* TROYAN

CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 05–49. Decided June 8, 2018

After a public altercation on Twitter in which HHPrinceGeorge referred to VadymTroyan as a "fit pig" and "liar," Troyan filed a lawsuit alleging, *inter alia*, defamation. Soon after, the District Court issued judgment in his favor. George appealed on various grounds.

Held: The petition for a writ of certiorari is granted, the judgment is vacated, and the case is remanded for a new trial.

(a) The Court Proceedings Act (CPA) requires documentation of a trial (*i. e.*, a recording or transcript) be made "publicly accessible on the case file." If that is not present, the appropriate remedy is to vacate the judgment and send the case back for a new trial.

(b) This Court must "intelligent[ly] resol[ve]" the cases before it and the CPA lawfully uses mandatory language ("shall") when requiring appeals courts to void non-compliant lower-court rulings. Therefore, this Court may rule on CPA grounds whenever a CPA violation "becomes apparent from the usual review of an appeal."

3:18–6149, vacated.

BORK, J., delivered the opinion for a unanimous Court.

JUSTICE BORK delivered the opinion of the Court.

On May 12, 2018, petitioner accused respondent of "lying" and referred to him as a "fat pig" in a public Twitter altercation. Respondent retaliated by filing a defamation lawsuit in Federal District Court; after a short trial, the lower court awarded him judgment. Petitioner appealed. In his petition, petitioner cited statements made during the trial by the judge and invited us to look to the "recording of the trial" as proof of them. ¶8. But no such recording is "publicly accessible on the case file." Court Proceedings Act, Pub. L. 57–3, Dec. 9, 2017 ("CPA"), §3(a). In consequence, we grant the petition for certiorari, vacate the judgment below, and remand for further proceedings consistent with this opinion.

I

The CPA establishes a liberal policy in favor of transparency in the lower courts. A few requirements are incident. First, a trial court must "documen[t]" trials either with a "recording" or a "transcript." *Id.*, at §3(a–b). And second, it must make that documentation "publicly accessible on the case file." *Id.*, at §3(a). The law then directs that appeals courts are to set aside noncompliant lower court rulings. *Id.*, at §4(a).

Typically, courts do not base their decisions on arguments not raised by a party or which cannot be derived from ones they do but that prudential consideration does not operate as a bar to the "intelligent resolution" of a case. *Ohio* v. *Robinette*, 519 U. S. 33, 38 (1996); *e.g.*, *George* v. *United States*, 5 U. S. 66, 68 (2018) (BORK, J., concurring in judgment) ("No amount of poor argumentation from either side can ever justify a wrong entry by this Court."). Moreover, as some Justices have noted earlier, "[t]he language of the CPA . . . is mandatory." *Nuinik* v. *United States*, 5 U. S. 80, 83 (2018) (BORK, J., concurring in part and dissenting in part) (citation omitted).

Mandatory language, lawfully used, must be obeyed. See *Board of Pardons* v. *Allen*, 482 U. S. 369, 374 (1987); *Greenholtz* v. *Inmates of the Nebraska Penal and Correctional Complex*, 442 U. S. 1, 11–12 (1987); *Lexecon Inc.* v. *Milberg Weiss Bershad Hynes & Lerach*, 523 U. S. 26, 35 (1998). Therefore, if a CPA violation becomes apparent from the usual review of an appeal, even if not raised by any party, it must be remedied according to the "remedy chosen by Congress [meaning] we must void the lower court decision." *Nuinik*, *supra*, at 83.

II

In this case, the CPA violation is elucidated by reference. That is to say the petitioner's reference to something required by the CPA (documentation either as a video or transcript) directs our attention to the violation. By natural consequence of our search for the record evidence cited by the petitioner, we must realize that it is not included in the public "case file." CPA §3(a).

If it is not in the case file, it does not satisfy the CPA. So even if the documentation *exists*, we are not in a position now to decide if it meets CPA standards. We leave that question for another day.

* * *

The petition for a writ of certiorari is granted, the judgment is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

DOMINATOR *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 05–55. Decided June 24, 2018

PER CURIAM.

Because the "usual review of [this] appeal" causes us to recognize that the District Court failed to preserve trial documentation (as a video or a transcript) on the "public 'case file,'" *George* v. *Troyan*, 5 U. S. 91, 92 (2018), in violation of the Court Proceedings Act, we must set aside its judgment. On remand, the District Court should order a new trial and treat whatever time already served of petitioner's sentence as credit towards any sentence which may later be imposed in the event of a conviction.

The petition for a writ of certiorari is granted, the judgment is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Syllabus

UNITED STATES *v.* DISTRICT OF COLUMBIA, ET AL.

MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 05–43. Argued June 16, 2018—Decided July 17, 2018

After the District of Columbia adopted a criminal code, it began prosecuting violators in a federal district court. The United States objected, arguing that without an authorizing Act of Congress, Municipalities could not prosecute violations of their laws in federal court; they also argued that, even if the Municipalities had or did not need such authorization from Congress, federal supremacy meant that they could not prosecute offenses which are also criminal acts at the federal level (*e. g.*, murder). The United States felt that allowing such prosecutions would, among other things, prevent federal prosecution of the same acts due to the Double Jeopardy Clause. After failing to obtain relief in the District Court, the United States petitioned this Court for a writ of mandamus directing the District Court to dismiss seven municipal prosecutions and enjoin the District Court from hearing new ones. This Court noted probable jurisdiction.

Held:

(a) Municipalities may prosecute violations of their criminal laws in federal district courts without congressional authorization.

(1) The Tenth Amendment reserves to the Municipalities a "police power . . . 'to safeguard the vital interests of [its] people.'" *Energy Reserves Group, Inc.* v. *Kansas Power & Light Co.*, 459 U. S. 400, 410 (citation omitted). The power to make and enforce criminal laws including by prosecution, is certainly among those powers.

(2) Article III disallows Municipalities from creating courts of their own and the Fourteenth Amendment's Due Process Clause requires Municipalities to provide "due process of law in a federal district Court." The Article III Venue Clause states that the "trial of all crimes . . . shall be held in a federal district court." These facts, together, create a strong presumption that Municipalities may prosecute in federal court.

(3) None of the Federal Government's remaining arguments are strong enough to rebut the presumption.

(b) Federal supremacy does not preempt Municipalities from prosecuting criminal violations of their laws which also constitute federal criminal violations.

(1) There is no express preemption claim here.

(2) There is a "presumption against the pre-emption of [Municipal] police power regulations." *Cipollone* v. *Liggett Group, Inc.*, 505 U. S. 504, 518. Also, since the United States Code is adopted nearly wholesale from real life, where no such preemption has been inferred or expected from

the general criminal laws of the Federal Government, field preemption is implausible. Unique federal interests in our platform are not sufficiently dominant to justify inferring non-express field preemption, either.

(3) The municipal laws clearly do not conflict with federal law. Because we reject the Federal Government's asserted Double Jeopardy Clause problem, they do not impose a substantial obstacle to the execution of federal laws, either.

(c) Municipal prosecution of an offense under the laws of a Municipality would not, by consequence of the Double Jeopardy Clause, prevent federal prosecution of the same act under federal law.

HOLMES, C. J., delivered the opinion of the Court, in which MARSHALL, GORSUCH, O'CONNOR, and KAGAN, JJ., joined. BORK, J., filed a dissenting opinion, *post*, p. 106. ROBERTS, WHITE, and STEWART, JJ., took no part in the consideration or decision of this case.

CHIEF JUSTICE HOLMES delivered the opinion of the Court.

In our constitutional structure, there are Federal institutions and Municipal institutions. While the latter are operated by several different Municipalities, there is only one Federal Government and so it is "incontestible that the Constitution establishe[s] a system of 'dual sovereignty'" in which one type of sovereign has nationwide jurisdiction, and the other local. *Printz* v. *United States*, 521 U. S. 898, 918–919 (1997) (quoting *Gregory* v. *Ashcroft*, 501 U. S. 452, 457 (1991)).[1] This case concerns the relationship between (and the powers of) two sovereigns: the United States and the District of Columbia.[2] The present controversy began when the District adopted a criminal code. Upon doing so, the District sought to begin prosecuting violators of its laws. Under the Constitution, however, "court[s cannot] be established by a Municipality." Art. III, § 2, cl. 1. So the District brought its prosecutions in federal court instead.

The Federal Government soon objected. Allowing Municipal

[1] See also *Tafflin* v. *Levitt*, 493 U. S. 455, 458 (1990) (reciting the "axiom that, under our federal system, the [Municipalities] possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy [Doctrine].").

[2] The District of Columbia, though originally the seat of government, was admitted as a Municipality with the adoption of the D. C. City Charter, Pub. L. 63–3 (2018).

prosecutions in federal court, the Federal Government reasoned, would deprive the Federal Government of its ability to prosecute those same offenses. *Ex parte United States*, 5 U. S. 72, 73 (2018). The Federal Government thus contends that, without an authorizing Act of Congress, Municipalities may not prosecute Municipal offenses in federal court and that even with such authorization, they may not prosecute offenses which are also covered by federal criminal law based on federal supremacy. We noted probable jurisdiction. 5 U. S. 129 (2018).

I

Before reaching the arguments in this case, it is necessary to go over some key procedural points. This case specifically involves seven Municipal prosecutions[3] and an unlimited number of potential future ones. All have been stayed pending resolution of this dispute. *Ex parte United States*, *supra*, at 79. This case is before us as a petition for a writ of mandamus, and in granting the aforementioned stay, we already conclusively resolved two components of the three-part mandamus analysis in favor of the Federal Government. The only part remaining has to do with the merits. Therefore, in order to issue the writ, we must here find that the Federal Government's "right to issuance of the writ is clear and indisputable." *Cheney* v. *United States Dist. Court for D. C.*, 542 U. S. 367, 380–381 (2004). That is a high bar to meet, and that is so because it is meant to be. We have time and time again reaffirmed the extraordinary nature of mandamus relief. The remedy of mandamus "is a drastic one, to be invoked only in extraordinary situations." *Kerr* v. *United States Dist. Court for Northern Dist. of Cal.*, 426 U. S. 394, 402 (1976). See also *Will* v. *United States*, 389 U. S. 90, 95 (1967); *Bankers Life & Cas. Co.* v. *Holland*, 346 U. S. 379,

[3] *District of Columbia* v. *Okmangeez*, 3:18–4742 (DCDC 2018); *District of Columbia* v. *Vonotige*, 3:18–1241 (DCDC 2018); *District of Columbia* v. *MinderMastI*, 3:18–7939 (DCDC 2018); *District of Columbia* v. *CommanderFikri*, 3:18–6111 (DCDC 2018); *District of Columbia* v. *SemperBeyond*, 3:18–1713 (DCDC 2018); *District of Columbia* v. *SinisterFriggus*, 3:18–2352 (DCDC 2018); *District of Columbia* v. *DarrenJMatthews*, 3:18–1324 (DCDC 2018).

382–385 (1953); *Ex parte Fahey*, 332 U. S. 258, 259 (1947).

As we have oft-stated, the writ "has traditionally been used in the federal courts only 'to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.'" *Will*, *supra*, at 95 (quoting *Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21, 26 (1943)). If we conclude today federal courts lack jurisdiction to hear Municipal prosecutions without an authorizing Act of Congress, it would not immediately follow that the writ must issue. On the other hand, if we find that federal courts *do* possess such jurisdiction, we must deny the petition in that respect. Likewise, the same goes for the second issue before us: whether Municipalities may criminalize conduct also criminalized at the federal level. If we answer that question "yes," we will deny the petition in that respect; if we answer it "no," it is still not a given that we will issue the writ of mandamus.[4] In seeking this extraordinary relief, the Federal Government appropriately faces a steep climb.

Which is not to say that its technical victory is impossible, or even unlikely: only that it is immensely difficult based on the present stature of the case. Even so, if we do resolve the immediate questions of law in the Federal Government's favor, our reasoning will be binding on the lower courts by virtue of *stare decisis*.[5] This holds true even if the petition ends up being denied on procedural grounds. With this procedural information in hand, we turn now to the case at hand.

II

A

At the heart of this case is the Tenth Amendment, which reserves to the Municipalities many powers. Among those, we

[4] As we have repeatedly emphasized, "it is important to remember that issuance of the writ is in large part a matter of discretion with the court to which the petition is addressed." *Kerr*, *supra*, at 403 (citing *Schlagenhauf* v. *Holder*, 379 U. S. 104, 112 n. 8 (1964)).

[5] Kastellec, The Judicial Hierarchy 4 (2016) ("Vertical *stare decisis* exists when courts are bound by the decisions of courts above them. In the U. S. federal system, there exists strict vertical *stare decisis*.").

have long understood, is a "police power . . . 'to safeguard the vital interests of [the Municipality's] people.'" *Energy Reserves Group, Inc.* v. *Kansas Power & Light Co.*, 459 U. S. 400, 410 (1983) (quoting *Home Bldg. & Loan Assn.* v. *Blaisdell*, 290 U. S. 398, 434 (1934)). This power is broad. It also certainly includes the power to make criminal laws and enforce them, including by prosecution. Prosecution, after all, is meant to serve "the interests of all people in our society."[6]

The question, therefore, is not whether Municipalities may prosecute, it is whether they may do so in federal court. We approach this question mindful of the fact that Municipalities are constitutionally barred from creating courts of their own, *supra*, at 2, so denying them access to federal court would also mean preventing them from prosecuting altogether.[7] This fact, combined with the separate fact that Article III's Venue Clause "provides that the 'trial of all crimes . . . shall be held in a federal district court,'" *Ex parte United States*, *supra*, at 76–77 (citation omitted; alteration in original), creates a strong presumption that Municipalities may prosecute violations of their laws in federal court. To overcome this presumption, there must be a clear contrary command in the Constitution's text. We now address that issue.

B

The Federal Government and supporting briefs make three arguments in hopes of overcoming the strong presumption in favor of allowing Municipal prosecutions in federal court. None, however, are availing.

1

The first issue raised is the Constitution's statement that in all cases "in which a Municipality shall be Party, the supreme Court

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[6] Vinegrad, The Role of the Prosecutor, 28 Hofstra L. Rev. 895, 903 (2000) (hereinafter Vinegrad).

[7] We further recognize that the Fourteenth Amendment prohibits a Municipality from "depriv[ing a] person of life, liberty, or property, without due process of law *in a federal district Court*." §1 (emphasis added). Many Municipal powers hinge on access to federal court.

shall have original Jurisdiction." Art. III, §2, cl. 2. This, it is suggested, means Municipalities cannot prosecute in federal court without Congressional approval[8] because otherwise they would be violating the Venue Clause. Cf. *United States* v. *TPR*, 5 U. S. 36, 39 (2018) (HOLMES, C. J., concurring) (slip op., at 3). This argument must fail for two reasons.

First, it is wrong on its face. When a Municipality acts as prosecutor, it is not "vindicat[ing] its own . . . interests" as it would in a civil proceeding. Tr. of Oral Arg. 9. The disposition of a criminal case will have no pecuniary effect on the Municipality, nor will it implicate the Municipality's sovereignty. Rather, when a Municipality acts as prosecutor, it is representing a "'client,' so to speak."[9] That client "is the public."[10] Properly speaking, the Municipality is no more "Party" to a criminal prosecution than a lawyer is "Party" to a case he conducts.

A second supporting reason also renders this argument untenable. In sum, it would leave the Municipalities "legally dependent on national oversight" from Congress, contrary to the clearly defined structure of the American government.[11] As noted earlier, "[m]any Municipal powers hinge on access to federal court," *supra*, at 4, n. 7. It would be shocking in a federalist system for the basic powers of one sovereign to depend on the permission of another.

2

The next argument is that it would require creation of a federal cause of action by Congress for Municipalities to prosecute violations of their laws in federal court. In granting the stay application in this case, we acknowledged there is in fact a "strong school of thought and substantial legal authority" behind that proposition. *Ex parte United States*, *supra*, at 76. At the same time, however, we recognized that this argument only

[8] Congress has the power to create exceptions to our "original Jurisdiction" and can direct that certain of those cases first be heard in a district court.

[9] Vinegrad 897.

[10] *Ibid.* (emphasis deleted).

[11] Rakove, Original Meanings 170 (1997).

works "assuming the Constitution does not itself authorize" prosecutions by Municipalities in federal court. *Ibid.* For that reason, it cannot refute the strong presumption already recognized; it could only work in its absence.

Moreover, the second reason refuting the previous argument applies here as well. If the Municipalities were wholly dependent on the Federal Government for access to federal court, they would be prevented from exercising much of their powers and there would be none of the federalism clearly contemplated in the Constitution.

3

The last plausible argument is that federal courts, even with Congressional authorization, could not hear cases under Municipal law because it would exceed the jurisdiction given under Article III. As an initial matter, it is indubitably clear that "Article III . . . set[s] forth the *exclusive* catalog of permissible federal-court jurisdiction." *Pennsylvania* v. *Union Gas Co.*, 491 U. S. 1, 39 (1989) (Scalia, J., dissenting). It does not follow from there, however, that federal courts are categorically barred from hearing Municipal cases.

It has long been accepted that federal court jurisdiction can be extended to claims under Municipal law. See, *e. g.*, 28 U. S. C. §1455; 28 U. S. C. §1442; *Seminole Tribe of Fla.* v. *Florida*, 517 U. S. 44, 76, n. 18 (1996). In real life, also, federal courts often sit in diversity and exercise jurisdiction to resolve State law claims. *Klaxon* v. *Stentor Elec. Mfg. Co.*, 313 U. S. 487, 496 (1941). We think it irrelevant for our present purposes that this is done with Congressional authorization. *Supra*, at 6. What it shows is that Article III jurisdiction (which Congress has no power to *expand*) can tolerate claims under law other than federal law, such as Municipal law. This argument therefore does not rebut the strong presumption already recognized.[12]

C

[12] Our analysis should not be taken to mean what it does not say. We simply recognize that Article III jurisdictional limits do not refute the presumption heretofore recognized.

For the foregoing reasons, we hold that Municipalities may prosecute violations of their laws in federal court.

III

We next address the Federal Government's preemption claims. To recap, the Federal Government essentially argues that Municipalities may not prosecute offenses also criminalized at federal law due to federal supremacy. And to be sure, within our "constitutional design, [federalism] adopts the principle that both the National and [Municipal] Governments have elements of sovereignty the other is bound to respect." *Arizona* v. *United States*, 567 U. S. 387, 398 (2012) (citing *Gregory* v. *Ashcroft*, 501 U. S. 452, 457 (1991); *U. S. Term Limits, Inc.* v. *Thornton*, 514 U. S. 779, 838 (1995) (Kennedy, J., concurring)). Moreover, the very "existence of two sovereigns [impels] the possibility that laws can be in conflict or at cross-purposes." *Id.*, at 398–399. In the case of such conflicts, naturally, federal law must prevail. After all, "[i]n our system of government, the federal authority, by virtue of its sovereignty, holds supremacy over the [Municipal] governments constituted within its jurisdiction." *United States* v. *City of Las Vegas*, 2 U. S. 4 (2016).

It is therefore clear that "Congress has the power to pre-empt [Municipal] law." *Arizona*, *supra*, at 399 (citing *Crosby* v. *National Foreign Trade Council*, 530 U. S. 363, 372 (2000); *Gibbons* v. *Ogden*, 9 Wheat. 1, 210–211 (1824)). Congress, of course, may do so by enacting a statute containing an express preemption provision. See, *e. g.*, *Chamber of Commerce of United States of America* v. *Whiting*, 563 U. S. 582, 592 (2011). Or it may do so in at least two other ways.

The first area of non-express preemption precludes Municipalities from "regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance." *Arizona*, *supra* (citing *Gade* v. *National Solid Wastes Management Assn.*, 505 U. S. 88, 115 (1992) (Souter, J., dissenting)). This intent can be inferred in multiple ways; first, from a regulatory framework "so pervasive . . . that Congress left no room for the [Municipalities] to sup-

plement it"; and second, where there is a "federal interest . . . so dominant that the federal system will be assumed to preclude enforcement of [Municipal] laws on the same subject." *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947). We call this area of non-express preemption "field preemption."

Second, Municipal laws are non-expressly preempted when they conflict with federal law. *Crosby*, *supra*, at 372. The primary form of this preemption targets Municipal laws where "compliance with both federal and [Municipal] regulations is a physical impossibility." *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S. 132, 142–143 (1963). This type of preemption, however, also goes after Municipal laws which "stan[d] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U. S. 52, 67 (1941). This second type of non-express preemption is called "conflict preemption."

In its case today, the Federal Government alleges both field preemption and conflict preemption. See Tr. of Oral Arg. 4, 5. We address each in turn.

A

When considering any preemption claim, we start with recognition of the longstanding "presumption against the pre-emption of [Municipal] police power regulations." *Cipollone* v. *Liggett Group, Inc.*, 505 U. S. 504, 518 (1992). This presumption is at its strongest when dealing with a claim of non-express preemption. See *Florida Lime*, *supra*, at 146–152; *Rice*, *supra*, at 236–237. We proceed with this understanding in mind.

First, it is hard to characterize the Federal Criminal Code (Title 18 of the U. S. Code) as "leav[ing] no room" for supplemental regulation. Also, given the fact that it was written in real life, where most criminal prosecution is done at the State level and where crime definitions—based on Model criminal laws—substantially "overla[p]" between jurisdictions,[13] and adopted largely wholesale by our Congress,[14] without significant revision, it

[13] Wright, Sorting as a Sentencing Choice 1 (2006).

[14] The only major exception to wholesale adoption is Congress' direction

is difficult to infer Congressional intent to reserve exclusive government in this area. The aforementioned presumption against non-express preemption of Municipal police power statutes accentuates these facts.

Naturally, the Federal Government's field preemption case focuses more on the second method of establishing such Congressional intent: by asserting strong federal interests in prosecution of federally criminalized offenses. The Federal Government argues that permitting Municipal prosecution of analogous crimes would inhibit the Federal Government's ability to prosecute. Perhaps, for instance, crime victims would direct their complaints to City Attorneys instead of United States Attorneys; maybe federal time would be wasted investigating crimes which Municipalities decide to prosecute; possibly, City Attorneys would choose to prosecute offenses that United States Attorneys decide to exercise discretion not to. There are, however, checks on all of these things; and to the extent they remain problems, they are problems necessitated by federalism. One of the most crucial checks is the fact that a substantial number of crime complaints received by the Federal Government are complaints of misconduct by federal officers. Municipalities cannot prosecute those offenses.

Furthermore, field preemption requires more than strong federal interests: they must be *dominant* over Municipal ones. That is not the case here so the field preemption claim must fail.

B

The next claim is one of conflict preemption. As the Federal Government noted, for a conflict preemption claim to be successful, there must actually be a "conflict" between Federal and Municipal law. Tr. of Oral Arg. 5. When two laws require the same thing, as is the case with these "overlapping" criminal statutes, there can be no facial conflict. It is certainly possible (in fact, quite easy) to comply with both Federal and Municipal law in those circumstances.

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that this Court invalidate inapplicable provisions of the U. S. Code.

The only question remaining is if the "overlapping" Municipal laws stand as an obstacle to the execution of their Federal counterparts. The Federal Government says that they do because of the Double Jeopardy Clause. Resolving this argument requires unpacking it first.

The Double Jeopardy Clause provides that "[n]o person shall be subject for the same offense twice." Amdt. V. However, we have long recognized that when a "defendant in a single act violates the 'peace and dignity' of two sovereigns by breaking the laws of each, he has committed two distinct 'offences.'" *Heath* v. *Alabama*, 474 U. S. 82, 88 (1985) (quoting *United States* v. *Lanza*, 260 U. S. 377, 382 (1922)). The Federal Government contends that this principle is inapplicable if both sovereigns prosecute in the same court. That, however, ignores the basis for the dual sovereignty doctrine. The dual sovereignty doctrine, in real life, does not focus on the fact that different *courts* are holding a person subject for an offense: it focuses on the fact that the person has committed "two distinct offences." *Ibid.* (internal quotation marks omitted; citation omitted). The doctrine applies in the same way here. Nothing in the Double Jeopardy Clause would prevent the Federal Government from prosecuting an offense analogous to one also being (or which already has been) prosecuted by a Municipality.[15] The conflict preemption argument thus fails.

* * *

Because we hold that the "Municipalities may prosecute violations of their laws in federal court," *supra*, at 7, that federal supremacy does not prevent Municipalities from prosecuting violations of their laws which are also criminalized at the Federal level (such as murder), and that the Double Jeopardy Clause does not prohibit the Federal Government from simultaneously or later also prosecuting those offenses under its laws, we deny the petition for a writ of mandamus.

[15] If John Doe committed murder in Washington, D. C., in violation of the laws of the United States and the Municipality, both sovereigns would be able to separately prosecute him in federal court. It is an open question whether Congress can require consolidation of those proceedings.

It is so ordered.

JUSTICE ROBERTS, JUSTICE WHITE, and JUSTICE STEWART took no part in the consideration or decision of this case.

JUSTICE BORK, dissenting.

This case requires us to decide whether federal courts have jurisdiction, absent Congressional authorization, to hear Municipal prosecutions. A person reading the majority opinion would not know that. They would think that "[a]t the heart of this case is the Tenth Amendment." *Ante*, at 4. They would think the question was simply whether "Municipalities may prosecute violations of their laws in federal court." *Ante*, at 5. That re-framing of the question is meant to turn our attention to the Municipality when our focus should really be on the federal court. This is a jurisdictional case and it should begin and end with Article III. I respectfully dissent.

I

I begin with some history.

Cities, although their affairs now seem ubiquitous, were not always seen in such a positive light. As recently as February, 2017, this Court itself wrote: "The entire concept of states and local municipalities has plagued our country for years." *United States* v. *Las Vegas*, 2 U. S. 24 (2018). That was no exaggeration, either. City and State governments in this country have a long history of conflict with the Federal Government. The court system was no exception to this conflict. One need look no further than our archives to see what I am talking about.

In *HelloAlex50* v. *Nevada*, No. 04P10 (2015), this Court was asked to enforce an order issued by the Federal District Court[1] concerning the Nevada Judicial System. The State of Nevada had created its own courts and its allies had begun transferring federal cases to Nevada court for trial. This was in clear defiance of the then-Constitution's rule that "the trial of all crimes . . . shall be held in the Federal Court." In response to the fed-

[1] See https://archive.froast.io/forum/168372977

eral court order, Nevada officials declared they would continue to defy the Constitution until the Supreme Court told them to stop. A senior State official said the "State isn't gonna listen to you."[2] State judges accused the federal court judges of being "afraid of losing power" and said "you have no power over us as other judges."[3] Some even went so far as to say that they were not bound by the "U. S. Constitution"[4] and to threaten a "judicial war."[5]

The Nevada Secretary of State "proclaimed" the federal court order "void until the Supreme Court has voted"[6] and the Nevada Attorney General called it "tyranny[,] . . . corrupt and illegitimate."[7] She also claimed the power "as the Attorney General of Nevada . . . [to] voi[d the order]." Many other District Court orders issued.

The conflict reached its apex when Justice Sutherland of the Supreme Court issued an in-chambers order[8] to enforce the District Court injunctions. After State officials failed to comply, Justice Sutherland ordered the imprisonment of the State judicial leaders, Attorney General, Secretary of State, and Governor,[9] triggering the immediate collapse of the Nevada State. Congress then repealed the statutes allowing for State governments.

Two years later, when a new Constitution was ratified, reflecting a change in attitude, the American people authorized new political subdivisions: Municipalities. But, remembering well the conflict which caused the State system to fail, they chose specifically to prohibit Municipalities from creating courts of their own. Art. III, §2, cl. 1. This was purely a limitation on Municipal power and was not understood to form part of any "presumption[s]" benefiting them. *Ante*, at 5. Further, the

[2] *Id.*, at 168374071.
[3] *Id.*, at 168374110.
[4] *Id.*, at 168374126.
[5] *Id.*, at 168374290.
[6] *Id.*, at 168374441.
[7] *Id.*, at 168375269.
[8] See https://archive.froast.io/forum/169768709
[9] See *id.*, at 169861464.

requirement that all criminal trials take place in federal court was simply retained from the previous Constitution, under which there were no Municipalities. The provision was, as such, not understood to create a "presumption" that Article III jurisdiction included Municipal prosecutions, either.

II

Having dispelled the presumption which the majority builds its argument on, I believe it is now appropriate to consult the correct starting point: the Cases and Controversies Clause. Article III, § 2 announces that the

> "judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States will be a party;—to Controversies between two or more Municipalities;—between a Municipality and Citizens of another Municipality;—between Citizens of different Municipalities;—between Citizens of the same Municipality claiming Lands under Grants of different Municipalities, and between a Municipality, or the Citizens thereof, and foreign States, Citizens or Subjects."

Nothing in there includes cases between a Municipality and its own Citizens because those cases are not *federal* questions. *Congress* could make it a federal question, a "Cas[e] . . . arising under . . . the Laws of the United States," by enacting authorizing legislation. It has not done so, however.

III

The Court's holding leaves many questions unanswered. Which rules apply to Municipal prosecutions: the Federal Rules of Criminal Procedure, or can the Municipalities pass their own rules which federal courts sitting for Municipal purposes have to apply? Are federal Sentencing Guidelines ap-

plicable? Does the Court Proceedings Act apply? These are all questions which we will have to answer now without any clear guidance from the text because the text did not contemplate this Court's holding. If we had left it to Congress to pass authorizing legislation, as the text *does* contemplate, we wouldn't have to worry about that.

I would grant the writ of mandamus; because the Court chooses not to, I respectfully dissent.

Syllabus

JACOB KIRKMAN *v.* UNITED STATES, ET AL.

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

No. 05–63. Argued July 17, 2018—Decided August 3, 2018

Petitioner Jacob Kirkman was counsel for the defendant in *United States* v. *Manslaughter_Ian*, 3:18–2591. Due to having no other technology available, he attended the trial on his cellphone. But because of an update to the ROBLOX mobile application, he disconnected multiple times. Ultimately, he stopped attempting to reconnect and notified the judge of his difficulty. He was held in contempt of court for obstructing the administration of justice. Kirkman appealed.

Held:

(a) A person cannot be held in criminal contempt for involuntarily disconnected from a trial due to technological issues outside of his control including if he decided to use a cellular device..

(1) Intent, outside of situations where a defendant acted in a contemptuous manner so far outside the scope of appropriate behavior, is a requirement for criminal contempts.

(i) *McComb* v. *Jacksonville Paper Co.*, 336 U. S. 187, 191, suggested that some level of willful contempt is required in criminal contempts. Because criminal contempt is a crime in the ordinary sense, the common-law requirement of intent automatically attaches.

(ii) The requirement of intent, at the least, means a person cannot be held liable for criminal contempt due to things outside of his control.

(2) Technological issues, in particular those issues which arise from the ROBLOX software, are beyond a person's control. The fact that ROBLOX provides access to its platform via a cellular device removes the possibility that a person may be punished simply for choosing to use that type of device, unless they clearly intended to cause an obstruction.

(b) Federal Rule of Criminal Procedure 42 requires that criminal contempts be certified with a full accounting of the facts and grounds for their issuance.

3:18–fGcIcPlq, reversed.

ROBERTS, J., delivered the opinion of the Court, in which HOLMES, C. J., and MARSHALL, GORSUCH, BORK, O'CONNOR, KAGAN, and STEWART, JJ., joined. WHITE, J., filed a dissenting opinion, *post*, p. 117.

JUSTICE ROBERTS delivered the opinion of the Court.

Under 18 U. S. C. § 401(1), judges are empowered to punish

individuals in their vicinity for misbehavior that "obstruct[s] the administration of justice." Under this backdrop, petitioner was cited with contempt after leaving midway through his trial. We are called upon to decide whether, under § 401(1), an individual can be cited for his technology breaking down mid-trial.

I

This case may at first glance seem odd, but at its core is an important and relevant issue. Petitioner, Jacob Kirkman, represented a defendant as a court-appointed attorney in the trial of *United States* v. *Manslaughter_Ian*, 3:18–2591 (DCNV 2018). On June 12, 2018, the parties went to trial. The judge ordered that the trial be held in game rather than on discord; Kirkman therefore attended to the best of his ability—this time, on a phone.[1] In the middle of the trial, Kirkman began to disconnect. He attempted to rejoin, but his efforts proved fruitless; his phone ended up disconnecting three times. So he left. After warning the judge that his "phone keeps crashing," Pet. for Cert. 3, App. A, he was cited with contempt. The citation was due to last for seven days. Kirkman filed a petition for certiorari to contest the validity of the citation. We granted certiorari and stayed the citation. 5 U. S. 137 (2018).

II

Contempt of court is criminal where the citation issued is penal and to "ensure the authority of the court," *Seaborn* v. *Lukassie*, 4 U. S. 5, 8 (2018); it is civil where the end goal is to coerce compliance with a court's order or authority. *Ibid.* Neither of the parties before us contests that the contempt is civil. We therefore must resolve whether, given that before us is a criminal contempt citation, petitioner obstructed the administration of justice—the required action for criminal contempt under 18 U. S. C. § 401(1). Petitioner argues that he could not possibly have obstructed justice; the statute requires that "misbehavior," *ibid.*, accompany the obstruction of the administration of

[1] In addition to desktop- and laptop-based computers, individuals are able to now play ROBLOX on phones, tablets, and gaming modules (*e. g.* the popular "Microsoft X-BOX One").

justice. In contrast, respondent, the United States, rebuttals with a stricter standard: The petitioner knew the risks of using a phone to play ROBLOX games, and, therefore, his phone's crashing is the dispositive element here. The United States' argument rests on the assumption that intent, plainly, does not matter as it relates to contemptuous acts. But we have suggested before that some level of willful contempt is required in criminal contempts. See *McComb* v. *Jacksonville Paper Co.*, 336 U. S. 187, 191 (1949). See also, *e. g.*, *United States* v. *Bernardine*, 237 F.3d 1279, 1282 (2001); *United States* v. *Maynard*, 933 F.2d 918, 920 (1991); *Telegram Newspaper Co.* v. *Commonwealth*, 172 Mass. 294 (1909).

Our ruling in *McComb* distinguished the requirement of intent in criminal contempts from civil ones. Because civil contempt, as opposed to criminal contempt, is a "sanction to enforce compliance with an order of the court or to compensate for losses or damages sustained by reason of noncompliance," *ibid.* (citing *United States* v. *United Mine Workers*, 330 U. S. 258, 303–304 (1947); *Penfield Co.* v. *Securities & Exchange Commission*, 330 U. S. 585, 590 (1947)), the intent with which a defendant carried in committing the act is unrequired. But criminal contempt is a "crime in the ordinary sense," *Bloom* v. *Illinois*, 391 U. S. 194, 201 (1968). The common-law requirement of intent, therefore, attaches itself to criminally contemptuous acts. See generally *Morissette* v. *United States*, 342 U. S. 246, 250–252 (footnotes omitted) (emphasis added) ("The contention that an injury can amount to a crime only when inflicted by intention *is no provincial or transient notion*. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.").[2]

[2] The United States objects. At oral argument, the Solicitor General posited a different mode of analysis. Rather than relying on the intent of the defendant, this Court should look to the level of blameworthiness involved. Thus, regardless of intent, so long as an action could reasonably be blamed on a defendant, a criminal contempt citation should be upheld. See Tr. of Oral Arg. 3–4, 6. This reading, however, would eviscerate the line

We therefore hold and strengthen the intimation in *McComb* that intent, outside of situations where a defendant acted in a contemptuous manner so far outside of the scope of appropriate behavior, is a requirement for criminal contempts.

III

We now must decide whether Kirkman's actions fell into the latter category—where the action is so stark and negligent that intent is not obligatory. At the outset, it is important to note that the issues of technology in our virtual world are well recognized. On computers, a wide array of issues can cause a "system shut down." Corrupted files, malicious software (or "viruses," as they are more commonly known), unavailable "memory" (*e. g.* "RAM" or "Random Access Memory"), and overheating are just some of the situations that cause crashes. And phones and tablets only add to the complications of our technology. Add wireless-connection problems and a user could face any number of problems outside of his control.

In this case Kirkman used a phone to attend his trial. On other platforms, like social-media applications or other "mobile games," Kirkman's phone worked for him without delay.[3] But

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between reasonable accidents and unreasonable negligence. We prefer a standard that protects an individual from being punished for issues outside of his control.

[3] JUSTICE WHITE contends that the petitioner's device has failed him before. *Post*, at 117. From this, he concludes the petitioner should have known that he would disconnect because he experienced it before." *Post*, at 118. But nothing in the record supports JUSTICE WHITE's colorful narration. Indeed, at oral argument, the United States made no charge that Kirkman disconnected multiple times in a prior trial; and Kirkman affirmed that he never experienced multiple disconnections until during the case before us. Tr. of Oral Arg. 17–18.

JUSTICE WHITE uses this innovative retelling of the facts below to argue that Kirkman therefore had the intent to obstruct the administration of justice. Yet even if this were true it would change none of our analysis. JUSTICE WHITE's solution comprises a short list of actions *he* believes the petitioner could have taken to mitigate the possibility of contempt. Assuming his fiction to be truth, JUSTICE WHITE admonishes the petitioner for either not rejecting the case or refusing to schedule the trial on the district court's terms. *Post*, at 118. We find this difficult to understand, as one wonders

with ROBLOX's new update for their mobile platforms, he ran into trouble. His phone crashed. And it crashed some more—all during trial. We cannot know the true reason for the crashes; but we can say with reasonable certainty that the disconnecting was outside of his control.[4]

The United States suggests that the petitioner should have known that his phone was unstable. The record, however,

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why JUSTICE WHITE's solution for his understanding of the contempt citation's validity would involve an actually contemptuous act.

[4] JUSTICE WHITE, much like the United States, disregards the fact that the so-called conduct for which petitioner was punished was outside of his control. He would instead ascertain whether the petitioner could reasonably be blamed. *Post*, at 118. Notwithstanding that there is nothing in the record supporting the notion that the petitioner *could have foreseen* his phone breaking down, *infra*, at 115, no. 5, JUSTICE WHITE misunderstands when that standard controls. He cites *Offutt* v. *United States*, 232 F.3d 69 (1956), but misapplies its contents entirely. *Offutt* concerned whether a defendant was appropriately held in criminal contempt for uttering "insolent, insulting, and offensive" remarks at the court during a trial. *Id.*, at 71. The court there considered whether the defendant's actions constituted a "gross discourtesy." *Ibid.*

The *Offutt* court distinguished between contempt situations where clear intent is required and where an action committed is so violative that the intent is inherent in the conduct itself. *Id.*, at 72 ("It may be true that a finding of *contumacious* intent is not always a prerequisite to a contempt conviction under 18 U. S. C. § 401(1); absence of such intent may go only to mitigation.") (citation omitted). This was explained by showing that one could not be cited with criminal contempt for asking incompetent questions without intent, but one could be cited for "gross discourtesy." *Id.*, at 72.

There are, therefore, two points to address. First, the *Offutt* court concerned whether a willful action by the defendant there—the utterance of offensive and inappropriate comments—constituted contempt. It thus hinged around actions committed by the individual—not actions outside of his control. Second, it found that the willful action was so grossly outside of decorum that it satisfied criminal contempt. To the first, we know that the petitioner here did not disconnect from the trial; his phone did. The action, therefore, could not be "clearly blameworthy," *ibid.* To the second, we reject a reading and application of 18 U. S. C. § 401(1) that would, in effect, place technological disruptions in the same category of shouting obscenities at a judge mid-trial. To accept it would be to endorse "an absurd … result." *United States* v. *TPR*, 5 U. S. 36, 48 (2018) (Thomas, J., dissenting) (quoting *United States* v. *X-Citement Video*, 513 U. S. 64, 82 (1994)).

does not support that argument. Petitioner's phone worked for him on ROBLOX prior to an update, and it has worked for him with other uses without delay. We accordingly do not accept an argument that, in plainspoken terms, says he "should have known."[5] Adding to the matter is the fact that petitioner's *only* device available to him at the time of the trial was his phone. He does not own a computer. Tr. of Oral Arg. 18. The United States in response argues, in quite brazen terms, that the petitioner should simply "stop practicing law" because he does not have a computer. *Id.*, at 9. We reject this argument for two reasons. First, there has never in our history been a requirement that one use a computer to advocate in the legal profession. To say so would be arbitrary and restrictive. Second, we are not in the business of punishing individuals for using platforms that ROBLOX as a company allows. In many ways ROBLOX requires things that run counter to our Constitution and laws. One comes to mind rather easily: An individual can be banned from the game itself for speech ROBLOX's terms of use find offensive. Our Constitution protects that speech, but ROBLOX does not. Because ROBLOX has made its game accessible to mediums other than the computer, we dismiss the approach of tacitly proscribing those same mediums.

IV

[5] In his dissent, JUSTICE WHITE turns from arguing that the petitioner somehow should have predicted the future of his device's stability—without any reasoning or evidence to suggest this would even be possible—to assuming *arguendo* that the petitioner "conscious[ly], willful[y] and intentional[ly]" committed contempt against the court. *Post*, at 118. We do not know from where JUSTICE WHITE found this conclusion, but it certainly is not in accord with the law. Because criminal contempt is a crime, and because intent is required, the question of intent turns on the actual willfulness of the actor, not whether an action could be attributed to him in the strictest of the sense. That is so because while "it is not unusual to punish individuals for the unintended consequences of their *unlawful* acts," it is absolutely "unusual to impose criminal punishment for the consequences of purely accidental conduct." *Dean* v. *United States*, 556 U. S. 568, 575 (2009). Here, it can hardly be argued that the petitioner's phone glitching was an "unlawful ac[t]", *ibid.* (emphasis deleted), in and of itself.

There remains one more issue to address—albeit briefly. Under Rule 42 of the Federal Rules of Criminal Procedure, judges when summarily issuing contempt must adequately certify with the court the contemptuous conduct. Here, nothing of the sort was accomplished. The order simply says that Kirkman left and "disrupt[ed] trial." We find this explanation to be incompatible with the requirements of Rule 42. It cannot be gainsaid that such a certification is one that inadequately "recite[s] the facts," Fed. Rule Crim. Proc. 42(b). Contempts, especially summary contempts, must be justified; the certification process serves an important goal: It ensures that individuals are given requisite information as to the justification for their punishment.

Given this, we further hold that contempt orders must be certified with a full accounting of the facts and grounds for their issuance. Without such due diligence, the risk of arbitrary and abusive contempts would remain capacious.[6]

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[6] In an emotive crying out, JUSTICE WHITE lectures us for considering the procedural question. Invoking grandiose themes of the need for judicial restraint and respecting "the *People*," *post*, at 119 (emphasis present), JUSTICE WHITE claims that the addressing of the procedural faults in this case is inappropriate because they have apparently "not been posed to the Court." *Ibid.* A brief study of the record, however, shatters that creative fiction. During oral argument, JUSTICE STEWART asked the petitioner whether the district court below certified the citation. The petitioner argued that he did not do so adequately, and therefore violated 28 U. S. C. § 636(e)(2) ("The order of contempt *shall* be issued under the Federal Rules of Criminal Procedure." (emphasis added)). Kirkman's assertion, of a fault in the procedure, "raises [a] clear questio[n]" for us to answer; and because § 636(e)(2), in tandem with Rule 42(b), employs compulsive language, a "duty impervious to judicial discretion" has been imposed. *Nuinik* v. *United States*, 5 U. S. 80, 83 (2018) (BORK, J., concurring) (citing *Anderson* v. *Yungkau*, 329 U. S. 482, 485 (1947)). See *Lexecon Inc.* v. *Milberg Weiss Bershad Hynes & Lerach*, 523 U. S. 26, 35 (1998). When reading the statutory authority of the federal contempt power in its entirety, we are required to "give effect to . . . plain command[s]." See *Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U. S. 469, 476 (1992).

A fortioari, our analysis of the procedural question is neither a "self-servin[g] pursu[it]" of our own interests, *post*, at 119, nor a "spit[ting] in the face of . . . judicial independence," *Ibid.*, but rather the carrying out of judicial due diligence.

* * *

Our holding today will indirectly impose new challenges on courts when confronting technological issues. Our holding, however, leaves unaltered the power of judges to sanction derisive individuals. Nor does it change the framework of the contempt power more broadly. We simply affirm that the power of contempt does not extend to actions by defendants that were entirely outside of their control. Accordingly, the judgment of the District Court of Nevada is

Reversed.

JUSTICE WHITE, dissenting.

While I write in dissent, I also, briefly, write to express agreement with the majority on the question: We must, indeed, decide whether the District Court's contempt issuance in *United States* v. *Manslaughter_Ian*, 3:18–2591 (DCNV 2018) was in alignment with 18 U. S. C. § 401. And my answer to that question is yes: the District Court's issuance of contempt in *Manslaughter was* in accordance with § 401.

I

What the majority *doesn't* acknowledge is the trial of *United States* v. *Ryphen*, 3:18–9161 (DCNV 2018). In such case the appellant served as counsel for the defense. And it's important to note that the trial was convened "before" the trial of *Manslaughter_Ian*. See Tr. of Oral Arg. 19. This is a vital part of the case because appellant, when trying *Ryphen*, operated from a cellular device—just as he did in the case being appealed before us. And during that trial, he disconnected multiple times, which ultimately forced him to leave—just as it occurred in the case being appealed before us.

And because the *Ryphen* trial was completed well before the case that is now being appealed to us, appellant—because he experienced it in *Ryphen*—knew, prior to the trial in question, of the adverse effects that trying a case from a cellular device would have. So, accordingly, one must ask himself: Why would

he try a case from a cellular device a second time (in *Manslaughter*), when it went horribly the first time? The simple answer is that appellant did not care; he couldn't have. Because if he did, he either would have (a) rejected the case (which would have been the responsible thing to do if he did not have access to a stable device) or (b) simply not agreed to the scheduling of the trial and requested a later date in which he *would* have access to a stable device. But he did not do either of those things, instead choosing to partake in the scheduling of the trial (knowing that he would not have access to a stable device) and subsequently decided to attend trial (knowing that he would disconnect—because, again, he experienced it before).

Appellant's conscious, willful, and intentional decision not to warn the judge *prior* to trial of the complications that would present itself during trial and to attend trial on his cellular device (knowing what would happen) caused a mistrial, and thus the obstruction of the administration of justice.

Now, with all of those willful (and albeit negligent) decisions made by appellant in mind, how could it possibly be that he did not obstruct the administration of justice in accordance with §401? For his conduct, as asserted in *Offutt* v. *United States*, 232 F. 2d 69, 72 (D. C. Cir. 1956), was "clearly blameworthy."

II

I concede on the front that we do not have a blanket mandate for the usage of computers. But there is **a consensus**—which I doubt that the majority would deny—that one must have the tools prudent to the effective execution of his duties at his disposal—especially if you're an attorney. In this case, appellant didn't. And because he was, knowingly, unprepared—without the necessary tools to effectively serve as defense counsel—in the appealed case, he is directly responsible for the blatant hindrance of the administration of justice.

III

Lastly, I write further to express concern about the majori-

ty's decision to hold that the District Court's contempt citation "inadequately recite[d] the facts." *Ante*, at 5. See also Fed. Rule Crim. Proc. 42(b). Now, not only do I disagree with the holding, but I also think that it's inappropriate for this Court to answer to the adequacy of the certification. For if the question has not been posed to the Court, it ought not be answered. And the question of adequacy of certification has *not* been posed to this Court, yet it has been answered. Such decision by the majority—as I see it—is a sheer product of judicial overreach.

Members of this Court must remember that we are here to adjudicate the *People's* "cases" and "controversies," not our own. See U. S. Const. Art. III, § 2, cl. 1. One of the bedrocks of the judiciary is that judges are not political actors; we don't decide to answer questions that *we* believe to be present, simply because the question is compelling. Instead, the *People* come before the Court, and the Court remedies *their* legal questions, disputes or controversies; the Court doesn't self-servingly pursue its own interests by answering questions of its own. At least, that's what the Founders intended for the Judiciary. But that seems not to matter to the majority because, today, it has decided to spit in the face of the judicial independence that I speak of, by deciding to answer an irrelevant, non-petitioned question.

For those reasons, I dissent from the Court's decision today.

ORDERS FOR FEBRUARY 15
THROUGH AUGUST 14, 2018

FEBRUARY 15, 2018

Certiorari Denied

No. 05–06. INTRISIC *v.* SKIZZO. Certiorari denied.

Certiorari Granted

No. 05–07. ROEXPLO *v.* UNITED STATES. Certiorari granted.

FEBRUARY 21, 2018

Certiorari Denied

No. 05–08. IN RE SHAWN SCHMIDT. Certiorari denied.

No. 05–09. TAHAEEDUN7OMAR *v.* FEDERAL BUREAU OF INVESTIGATION. Certiorari denied.

Certiorari Granted

No. 05–10. 9KILL9 *v.* XSONICRAINBOOM. Certiorari granted.

FEBRUARY 23, 2018

Certiorari Denied

No. 05–11. THESAUDIONE *v.* DRALIAN. Certiorari denied.

FEBRUARY 24, 2018

Miscellaneous Orders

No. 05–14. IN RE UNITED STATES. Application for stay entered.

FEBRUARY 25, 2018

Certiorari Denied

No. 05–12. MRARABMAYHAM *v.* UNITED STATES. Certiorari denied.

No. 05–13. BULUISHI11 *v.* TRISTANULIXESNOVIUS. Certiorari denied.

Miscellaneous Orders

No. 05–14. IN RE UNITED STATES, having granted the application for stay, briefs are ordered.

FEBRUARY 27, 2018

Certiorari Denied

No. 05——. AIRMAVERICK *v.* MELISSA666666GIRL. Certiorari denied.

FEBRUARY 28, 2018

Certiorari Denied

No. 05——. TROYEEEESIVAN *v.* TIMOTHY GEITHNER. Certiorari denied.

No. 05–17. IN RE FEDERATEDCOMMANDER. Certiorari denied.

MARCH 2, 2018

Review Denied

No. 05–18. SIXMAN444 *v.* CLAN MANAGERS. Review denied.

MARCH 3, 2018

Review Denied

No. 05–19. FEDERATEDCOMMANDER *v.* NEVADA HIGHWAY PATROL. Review denied.

No. 05–21. FIGSOUP *v.* TIMOTHY GEITHNER. Review denied.

Review Granted

No. 05–20. BANK OF AMERICA, INC. *v.* UNITED STATES. Review granted.

MARCH 13, 2018

Certiorari Denied

No. 05–23. RYPHEN *v.* NEVADA HIGHWAY PATROL. Certiorari denied.

MARCH 17, 2018

Review Denied

No. 05–23. JOHN DOE *v.* CLAN MANAGERS. Review denied.

Certiorari Granted

No. 05–25. CODE_RAGER *v.* UNITED STATES. Certiorari granted.

MARCH 22, 2018

Review Denied

No. 05–26. NUINIK *v.* PAPAIRISH. Review denied.

Certiorari Granted

No. 05–27. NUINIK *v.* UNITED STATES. Certiorari granted.

Miscellaneous Orders

No. 05–27. NUINIK *v.* UNITED STATES, having granted the application for stay, briefs are ordered.

MARCH 23, 2018

Certiorari Denied

No. 05–26. NINJAKILLER0432 *v.* UNITED STATES. Certiorari denied.

MARCH 26, 2018

Review Denied

No. 05–30. LAS VEGAS POLICE DEPARTMENT *v.* WILHELM-VONKEITH. Review denied.

MARCH 31, 2018

Certiorari Denied

No. 05–29. FIGSOUP *v.* FIGSOUP. Certiorari denied.

CHIEF JUSTICE HOLMES, respecting the denial of certiorari.

I have stated in the past, and maintain, that this Court *primarily* exists as "a forum for [all appeals] to be sufficiently argued" irrespective of "the[ir] merits." *OriginalGlo* v. *United States*, 4 U. S. —— (2017) (concurring opinion). I therefore will always vote to grant certiorari to hear any properly filed appeal. If a petition conveys with sufficient clarity what can be construed as an argument, that argument may be developed further with the aid of a Bar member at the briefing stage. However, where (as here) it is entirely unclear even *what case* is being appealed,[1] it cannot be legitimately said that anything has been conveyed with "sufficient clarity."

In the above-referenced cases, see *infra*, at 122 n. 1, petitioner may very well have grounds for appeal. Our denial of certiorari should not be taken to express any opinion on the specific matters there at issue. See *OriginalGlo*, *supra*; *United States* v. *Carver*, 260 U. S. 482, 490 (1923) ("The denial of a writ of certiorari imports no expression of opinion upon the merits of the case").[2] In a petition where he has not named himself as both parties and has

[1] Petitioner only tells us that this "case was dismissed with prejudice." My own independent research has identified two separate cases of petitioner's which have been dismissed in the lower courts: *Figsoup* v. *Department of Justice*, 3:18–1913 (DCNV 2018) (relating to malicious prosecution) and *Figsoup* v. *Puppyloftus18*, 3:18–Lx5V6kbp (DCDC 2018) (alleging libel and defamation). No information provided by petitioner will aid me in narrowing down which of the two cases specifically is being appealed. Regardless, the petition obviously leaves far too much room for both myself and my fellow Brethren to speculate and it could not be taken as a given that we would all be voting to grant certiorari for *the same case* if we did in fact vote to grant certiorari. Petitioner, if he decides to refile, is urged to include the necessary identifying information.

[2] Accord *Evans* v. *Stephens*, 544 U. S. 942 (2005) (statement of Stevens, J., respecting denial of certiorari); *Equality Foundation of Greater Cincinnati, Inc.* v. *Cincinnati*, 525 U. S. 943 (1998) (same); *Brown* v. *Texas*, 522 U. S. 940, 942 (1997) (same); *Barber* v. *Tennessee*, 513 U. S. 1184 (1995) (same); *Darr* v. *Burford*, 339 U. S. 200, 227 (1950) (Frankfurter, J., dissenting) ("Nothing is more basic to the functioning of this Court than the understanding that denial of certiorari is occa-

provided us with a sufficiently clear argument, we would have greater occasion to address his actual argument. There are valid reasons for denying certiorari here unrelated to the merits and so I therefore agree with the decision to do so because "[o]ur role is limited to decided cases and controversies in a manner agreeable with our Article III powers." *Ex parte VinexyRaps*, 4 U. S. 27 (2017) (statement of Scalia, J.) (citing *Lawrence* v. *Texas*, 539 U. S. 558, 605 (Thomas, J., dissenting).

APRIL 7, 2018

Review Denied

No. 05–31. EX PARTE SIXMAN444. Review denied.

Statement of JUSTICE MARSHALL, with whom THE CHIEF JUSTICE and JUSTICE GORSUCH join, respecting the denial of review.

For years, the Clan Managers have maintained broad discretion when adopting and enforcing policies that govern group-based administrative functions. This Court, on numerous occasions, has denied review of those actions due to having a profound "lack of authority" to hear such matters. *Isner* v. *Federal Elections Comm'n*, 3 U. S. 87, 88 (2017) (statement of Scalia, J., respecting denial of review). See also *Lincere* v. *Clan Managers*, 2 U. S. —— (2017) (review denied). While the Constitution provides many fundamental rights to the People, and prohibits the Federal Government from encroaching upon such rights, it simply does not provide protection from the actions committed by Clan Managers when they pertain to the enforcement of their policies adopted within their proper domain.*

For these reasons, I respectfully concur in the denial of the petition.

APRIL 11, 2018

Certificate Dismissed

No. 05–33. JACOB KIRKMAN v. NEVADA HIGHWAY PATRIOL. Certificate dismissed.

APRIL 14, 2018

Certiorari Denied

No. 05–32. VERTILLIAN v. UNITED STATES. Certiorari denied.

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sioned by a variety of reasons which precludes the implication that were the case here the merits would go against the petitioner"); *Maryland* v. *Baltimore Radio Show*, 338 U. S. 912, 917–918 (1950) (opinion of Frankfurter, J., respecting denial of certiorari).

* This domain solely permits Clan Managers to resolve matters that are neither suitable nor appropriate to be resolved by the federal and local governments, or by any court of law. Such matters stem from the flooding of the group wall with obscenities to the disclosure of personal information of citizens.

APRIL 16, 2018

Review Granted

No. 05–35. GEORGE v. UNITED STATES. Review granted.

APRIL 20, 2018

Review Denied

No. 05–32. SIXMAN444 v. JODY7777. Review denied.

APRIL 21, 2018

Motion Denied

No. 05–35. GEORGE v. UNITED STATES. The motion to dismiss the case is denied.

Statement of JUSTICE BORK, respecting the 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 Education*, 555 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, HHPrince-George meets any standing requirements 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 hs 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

[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 reason for abdicating from that duty. Sometimes the law is "the judicial department has no business entertaining the claim of unlawfulness." *Kirkman* v. *Nevada Highway Patrol*, 5 U. S. 62, 63 (2018) (BORK, J., concurring in part and concurring in judgment). 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.

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. *Warth*, 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. See, *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

[2] See, *e. g.*, *NinjaKiller0432* v. *United States*, 5 U. S. 122 (2018) (cert. denied); *Bakerley* v. *Party*, 4 U. S. 21 (2018) (cert. denied); *United States* v. *City of Las Vegas*, 4 U. S. 1 (2017); *Ex parte VinexyRaps*, 4 U. S. 27 (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).

challenged in this case. It is therefore plain that his injury is "traceable" to the challenged conduct." 504 U. S., at 2. It is also plain that a "favorable judicial decision" from this Court nullifying the appointment would "redres[s]" that injury, *ibid.*

*

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.

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 review. 5 U. S. 124 (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). 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 based on 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). 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 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 Con-

[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, however, that doctrine does not apply to Anytime Review cases. See *supra*, at 124.

stitution does not *inherently* require standing for anytime-review challenges. *Ante*, at 124. 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." *Ibid.* 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 124. (Except, for example, in the following: *Bakerley* v. *Party*, 4 U. S. 21 (2017) (cert. denied); *United States* v. *City of Las Vegas*, 4 U. S. 1 (2018) (cert. dismissed); *Ex parte HH-PrinceGeorge*, 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—other 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): "HH-PrinceGeorge meets any standing requirement which can be asked of him under our precedents." *Ante*, at 124. 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 125 (internal quotation marks omitted), Connor Russo's existence as a

Senator establishes an "injury in fact." *Ibid.* He reasons that Connor Russo, 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 Connor Russo, by filling a seat that would otherwise be held, "dilutes" HHPrinceGeorge's vote makes no sense. Regardless of whether Connor Russo 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 Connor Russo 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 canceled 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.

* * *

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.

APRIL 28, 2018

Certiorari Denied

No. 05–38. SIRISINISTER v. UNITED STATES. Certiorari denied.

MAY 1, 2018

Certiorari Denied

No. 05–37. SHAWN_SCHMIDT v. DRIPFIZZ. Certiorari denied.

CHIEF JUSTICE HOLMES, with whom JUSTICE MARSHALL joins, dissenting from the denial of certiorari.

There are multiple reasons we should have granted certiorari in this case. I have explained it in the past: "This Court primarily exists as 'a forum for all appeals to be sufficiently argued' irrespective of 'their merits.'" *Figsoup* v. *Figsoup*, 5 U. S. 122 (2018) (opinion of HOLMES, C. J.) (quoting *OriginalGlo* v. *United States*, 4 U. S. —— (2017) (concurring opinion)) (emphasis deleted). In this case, however, it is precisely because of the merits that the Court's decision to deny certiorari troubles me. Not only does this case present a "sufficiently clear argument," *id.*, at 123, it presents one with a fair shot at winning. Allow me to explain.

Our petitioner (and plaintiff below) filed a motion with the District Court for summary judgment in his favor. Dripfizz, the defendant below, did not file any cross-motion seeking summary judgment for himself. The District Court, however, granted summary judgment *sua sponte* for the defendant. The case record makes a few things clear. As relevant, the District Court's decision to award summary judgment to Dripfizz came as a total surprise to our petitioner. We have held in the past that "district courts . . . possess the power to enter summary judgment *sua sponte* . . . [only] so long as the losing party was on notice." *Celotex Corp.* v. *Catrett*, 477 U. S. 317, 326 (1986) (emphasis added). See also *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144, 159 (1970). District courts are "to give clear and express notice before granting summary judgment, even against parties who have themselves moved for summary judgment." *Bridgeway Corp.* v. *Citibank*, 201 F. 3d 134, 139 (2d Cir. 2000) (emphasis added). Where, as here, the losing party did not even know the District Court was considering judgment for the other party, it cannot be genuinely said that they were "on notice." I am not saying that this failure alone constitutes "reversible error." *Ibid.* I am, however, saying that it does raise questions about reversibility which can only be answered with certiorari and full briefing from the parties.

The Court sees it differently. I respectfully dissent.

MAY 3, 2018

Certiorari Denied

No. 05–36. INTRISIC v. UNITED STATES. Certiorari denied.

MAY 10, 2018

Certiorari Denied

No. 05–39. CARZZON1 v. UNITED STATES. Certiorari denied.

No. 05–40. XRAY1492 v. UNITED STATES. Certiorari denied.

MAY 12, 2018

Review Granted

No. 05–41. HEAVE v. UNITED STATES. Review granted.

MAY 14, 2018

Certiorari Granted

No. 05–42. SHAWN_SCHMIDT v. DRIPFIZZ. Certiorari granted.

MAY 16, 2018

Certiorari Granted

No. 05–43. UNITED STATES v. DISTRICT OF COLUMBIA. Certiorari

granted.

MAY 28, 2018

Certiorari Denied

No. 05–46. HELOXUS v. SCUZZTWITTLY. Certiorari denied.

Review Denied

No. 05–44. PROCEED101 v. UNITED STATES. Review denied.

Statement of JUSTICE GORSUCH, respecting the denial of review.

Petitioner asks us to consider whether an in-game arrest is synonymous with a legal conviction. Never before has one attempted to ask us this, as it has generally been understood that an arrest, as opposed to a conviction, represents a temporary detention under the law.

Thus, an arrest is not a conviction, and a conviction is not an arrest; they are, necessarily, separate from each other. But petitioner claims that the records of his arrest, compiled and accessible on a Trello-based online board, represent convictions. Under this reasoning, he charges that he has been unconstitutionally convicted in violation of due process. Unfortunately for him, that is simply wrong. The petitioner has yet to be convicted by a jury of his peers in a court of law, and his lawful arrest and recorded detention do not a conviction make.

While I understand that individuals in the general public come to us with questions of all nature, it is not our place to entertain notions of outlandish fantasy regarding the criminal justice system. Nor would hearing this case, even if there were a meritorious claim before us, be appropriate, as an avenue for proper legal dispute begins in the district courts, not our Court of Nine.

I therefore concur in the denial of review.

JUSTICE BORK, concurring in the denial of review.

This case is a petition for Anytime Review. I have already made clear where I stand on the threshold inquiry due those petitions. See, *e. g.*, *Heave* v. *United States*, 5 U. S. 85, 87 (2018) (BORK, J., concurring in judgment); *George* v. *United States*, 5 U. S. 124 (2018) (statement of BORK, J.). My reply to JUSTICE GORSUCH's statement will thus be short.

In *Heave*, I observed that our threshold inquiry should only consist of an analysis of the "constitutional merits of [an] argument" presented; if it is debatable and important, we should hear it. 5 U. S., at 90; see *Jacob* v. *Nevada Highway Patrol*, 5 U. S. 62, 63 (2018) (opinion of BORK, J.). In his statement above, JUSTICE GORSUCH appears to navigate along this line, but it is at the end where his opinion veers off course. He argues that "even if there were a meritorious claim before us," the case should "begi[n] in the district court." *Ante*, same page. Respectfully, I disagree. I see no point in repeating my analysis from *Heave* and *George* but suffice it to say, "[w]e cannot shrink from [the

Anytime Review] duty based on our own unsubstantiated perceptions of what society would want." *Ibid.*

If the claim is meritorious, debatable, and important; falls within the scope of Anytime Review; and was brought to us properly, we should take it up. As that is not the case here, I concur in the denial of certiorari.

MAY 29, 2018

Certiorari Denied

No. 05–45. CHEXBURGER v. UNITED STATES. Certiorari denied.

No. 05–47. JACOB KIRKMAN v. UNITED STATES. Certiorari denied.

Statement of JUSTICE ROBERTS, with whom JUSTICE BORK joins, respecting the denial of certiorari.

We held in *Nye* v. *United States*, 313 U. S. 33, 52 (1941), that conduct proscribed by 18 U. S. C. § 401 includes "misbehavior in the vicinity of the court disrupting to quiet and order or actually interrupting the court in the conduct of its business." Leading up to this development, however, was a long march toward a limitation on the Judiciary's originally unfettered contempt powers. Because the "power of courts to punish for contempt . . . was considered essential to the proper and effective functioning of the courts and to the administration of justice," *Bloom* v. *Illinois*, 391 U. S. 194, 196 (1968), the power to punish criminal contempt without jury trials or other protections was often upheld. See, *e. g.*, *Eilenbecker* v. *District Court of Plymouth County*, 123 U. S. 31, 36–39 (1890); *I.C.C.* v. *Brimson*, 154 U. S. 447, 488–489 (1894).[1]

Bloom rolled back some of these spacious freedoms on the contempt power. Its most important change to the contempt jurisprudence was the requirement of jury trials of "contempts subjected to severe punishment." *Bloom*, *supra*, at 198.

The *Bloom* Court felt the lack of protections around *all* criminal contempts represented "an unconstitutional assumption of powers by the [courts] which no lapse of time or respectable array of opinion [should have made us] hesitate to correct." *Black & White Taxicab & Transfer Co.* v. *Brown & Yellow Taxicab & Transfer Co*, 276 U. S. 518, 533 (1928) (Holmes, J., dissenting). This power, being "liable to abuse," *Ex parte Terry*, 128 U. S. 289, 313 (1888), justified such a shift.

The problem, however, with *Bloom* is that the Court failed to specify what constitutes a "serious" contempt offense.[2] Though, we can look to its reliance

[1] In these cases, the Due Process Clause and "inclusive language of Article III and the Sixth Amendment," *Bloom*, *supra*, at 196, were read to enable summary trials in contempt cases. This stemmed from the common-law view that contempts were tried without juries, with a premium focus again being placed on the importance of a functioning judiciary.

[2] In *DeStefano* v. *Woods*, 392 U. S. 631, 633 (1968), the Court, relating to *Bloom* v. *Illinois*, 391 U. S., wrote, "[b]oth *Duncan* and *Bloom* left open the question of whether a contempt punished by imprisonment one year is, *by virtue of the sentence*, a sufficiently serious matter to require that a request for jury trial be honored" (emphasis added). The suggestion, of course, being that whether a contempt under *Bloom* requires jury protections rests on the length of the sentence

on *Cheff* v. *Schnackenberg*, 384 U. S. 373 (1966), for possible guidance. In *Scheff*, the Court held that a punishment of six months constituted the punishment of a "petty offense," and, therefore, sentences "exceeding six months for criminal contempt may not be imposed . . . absent a jury trial or waiver thereof." *Id.*, at 379–380.

At the present case petitioner requests a writ of mandamus to challenge his three-day sentence for contempt of a district court. Petitioner shouted obscenities in the vicinity of the judge, was told to stop, yet continued. Petitioner argues that his conduct falls outside of the scope of 18 U. S. C. § 401. Section 401(3), however, makes it an offense of contempt to be disobedient toward or resist a "lawful writ, process, order, rule, decree, or command" of a court. Petitioner's conduct certainly falls under the definition; he was asked to cease, yet continued. That would appear, to me, to foreclose this matter. And it has been long understood that "guarantees of jury trial found in Article III and the Sixth Amendment do not apply to petty offenses," Bloom, 391 U. S., at 210, especially when they occur in the direct presence of the judge. See *ibid.*; Fed. Rules of Crim. Proc. 42(a). Serious offenses, and thus serious sentences, requiring jury trials surely do not comprise six-day sentences. I, therefore, would see no merit in the granting of the petition.

MAY 31, 2018

Certiorari Denied

No. 05–48. POOPMANSOMEOE v. UNITED STATES. Certiorari denied.

JUNE 5, 2018

Certiorari Granted

No. 05–49. GEORGE v. VADYM TROYAN. Certiorari granted.

JUNE 8, 2018

Review Denied

No. 05–50. GEORGE v. HOUSE OF REPRESENTATIVES. Review denied.

JUNE 12, 2018

Review Denied

No. 05–52. GEORGE v. UNITED STATES CONGRESS. Review denied.

JUSTICE KAGAN and JUSTICE BORK, concurring in the denial of certiorari.

We concur in the denial of certiorari. We write separately to note that this case is not the end of the line for HHPrinceGeorge.

I

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imposed.

In his original submission to the Court, HHPrinceGeorge appeared to assume that his impeachment and resulting conviction totally "restricted" his "right to be a public servant." ¶7. This assumption, while it is reasonable, is not accurate. As a matter of fact, impeachment hardly restricts his ability to serve the public at all.

The Constitution gives the Senate the "sole power to try all impeachments," art. I, §3, cl. 6, and sets out that the available punishments for conviction thereof are "removal from office and disqualification to hold and enjoy any office of honor, trust or profit under the United States." *Id.*, at cl. 7. HHPrinceGeorge, impeached and convicted for multiple instances of voter fraud, received both punishments. Many assume that means he may not serve again in any public office. That is not the case. He is merely disqualified from serving in any "office of *honor, trust or profit under the United States.*" (Emphasis added). It goes without saying that this is a broad category of offices. But it is not all-inclusive, else the Framers would not have carefully delineated the types of offices actually included. They would have, instead, perhaps just said "disqualification to hold and enjoy any office." They did use that language, for example, in the same clause when they allowed for the punishment of "removal from office" to be imposed. It is therefore plain that the phrase "office of honor, trust or profit under the United States" encompasses only a subset of "offices."

So which "offices," specifically, are "of honor, trust or profit under the United States"? Other uses of similar language in the Constitution can lend a helping hand. The Constitution elsewhere uses the term "office under the United States" in what is typically known as the Ineligibility Clause, art. I, §6, cl. 2. There it provides that "no person holding *any* office under the United States, shall be a Member of either House during his continuance in office" (emphasis added). The Ineligibility Clause explicitly distinguishes "office[s] under the United States" and members of Congress. The use of the word "any" also conveys that all "offices under the United States" fall within the clause's scope. See https://www.merriam-webster.com/dictionary/any. As such, if the phrase "office under the United States" were still somehow conceivably read to include members of Congress, it would produce an absurd result: members of Congress would be disallowed from being members of Congress while members of Congress. No reasonable jurist could endorse that result. This analysis tells us one thing: members of Congress, though they serve in an "office" subject to impeachment, do not fall into the narrower subcategory of "office[s] under the United States"; *a fortiori*, they do not occupy "office[s] of honor, trust or profit under the United States," service in which can be disqualified by impeachment. A person who is disqualified as punishment in impeachment is still eligible to run and serve as a member of Congress.

In case any doubt remains, further support for this proposition is found in the Fourteenth Amendment which also expressly distinguishes members

of Congress from offices under the United States, holding "[n]o person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any Municipality" who betrayed the United States after taking the oath of office. §2. The prohibition against being a "Senator or Representative in Congress" would be surplusage if the phrase "office … under the United States" included it. The Fourteenth Amendment also illustrates that municipal offices are not "offices under the United States," so HHPrinceGeorge, despite his disqualification, may pursue those as well.

II

There are many offices which do fall within the scope of the Disqualification Clause. We would interpret the clause to include all offices which the text does not clearly distinguish (such as members of Congress and municipal offices).

That being said, we concur in the denial of certiorari because petitioner's actual claims are meritless.

June 19, 2018

Review Denied

No. 05–51. Destroyer6236 v. United States. Review denied.

June 20, 2018

Certificate Received

No. 05–56. Ryphen v. District of Columbia. Certificate received.

June 24, 2018

Certiorari—Granted, Vacated, and Remanded

No. 05–55. Dominator v. United States. The petition for certiorari is granted, the judgment is vacated, and the case is remanded for further proceedings.

June 25, 2018

Certiorari Denied

No. 05–53. PuppyLoftus18 v. Jtport. Certiorari denied.

Review Granted

No. 05–54. Paul v. District of Columbia. Review granted.

June 29, 2018

Certiorari Denied

No. 05–57. Heloxus v. United States. Certiorari denied.

Statement of JUSTICE BORK, respecting the denial of certiorari.

The case before us is styled as an appeal but it is not one. Heloxus, the petitioner, bears absolutely no relation to the proceeding purportedly being "appealed," *United States* v. *Rapturing*, 3:18–6172 (DCDC 2018). And the proceeding, properly construed, is not "appealable" at all. Rather, it ended with the Government's invocation of *nolle prosequi*. This Court's precedent makes it crystal clear that a "district attorney . . . may enter a *nolle prosequi* at any time before the jury is empaneled." *Confiscation Cases*, 74 U. S. 454, 457 (1869). Moreover, any limits on the *nolle prosequi* power must come from "act[s] of Congress" because the Constitution imposes none. *Ibid.*

However, the Constitution assigns a power to this Court separate from its primary power (the "judicial power"), which is relevant here. This power, called the Anytime Review power, empowers us to review the official acts of the political branches and strike down those which are unconstitutional or unlawful. *Heave* v. *United States*, 5 U. S. 85, 89–90 (2018) (BORK, J., concurring in judgment). *Nolle prosequis* which contravene Acts of Congress are "unlawful" official acts and are thus reviewable.

In *Heave*, I set out the appropriate standard to apply in deciding whether to hear an Anytime Review case based on the Constitution's original meaning. *Ibid.*; Accord, *Proceed* v. *United States*, 5 U. S. 130, 130–131 (BORK, J., concurring in the denial of certiorari). More specifically, I suggested that we ask "[if] the claim is meritorious, debatable, and important." *Id.*, at 131. These factors may point in opposite directions in a given case and it is important to carefully and fairly weigh each of them. In this petition, the petitioner failed to identify any Act of Congress which the Government is bound by (much less, violated) when issuing a *nolle prosequi* so the claim demonstrably lacks merit and is not debatable. The claim is also clearly unimportant because petitioner has not suggested that the exercise of *nolle prosequi* in this case implicates any serious public interests. The petitioner's lackof standing, one should observe, is irrelevant to this analysis and has no bearing on our jurisdiction. *George* v. *United States*, 5 U. S. 124 (2018) (statement of BORK, J.).

On these grounds alone, I join in the denial of certiorari.

JUSTICE ROBERTS, concurring in the denial of certiorari.

Often there are winners and losers in criminal proceedings. But sometimes there are only losers. It seems here that petitioner believes the case before us represents the latter. How dare the accused individual be effectively released—cut loose? Does the Federal Government not have a duty to ensure that criminals remain off of the streets?

Whatever the arguments in favor and against the issuance of *nolle prosequi* may be in this case, what we can agree on is whether there was merit behind it. And what we can further agree on is whether the argument posed by petitioner here has merit: The answer is in the negative. See *ante*, at 1. But is that agreement the proper route for dismissing the petition? Are we not

missing something here? So I write not to expand on the lack of validity behind petitioner's core argument; I instead do so to provide an alternative to JUSTICE BORK's judge-empowering estimations above. JUSTICE BORK would deny the petition not for lack of standing, but for the presentation of an argument without merit. I am compelled to agree with him, but in my estimation this case's dismissal is not really about its merits—or, at least, it shouldn't be. I would not therefore deny the petition based on the argument alone posed by JUSTICE BORK; I see a different course available.

This petition was submitted by Heloxus, the President's Deputy Secretary of Homeland Security. I find it difficult to link Heloxus to an injury that is "concrete and particularized" as a result of this case. *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 560 (1992); see also *ibid.*, n. 1 ("By particularized, we mean that the injury must affect the plaintiff in a *personal* and *individual* way.") (emphasis added). In line with our actual precedents, see, *e. g.*, *United States* v. *City of Las Vegas*, 4 U. S. 1, 2 (2017); *Bakerley* v. *Party*, 4 U. S. 21 (2017) (cert. denied), Heloxus has no standing to challenge the validity (or lack thereof) of the Department of Justice's decision to withhold Rapturing's prosecution. I would deny on this basis, and this one alone.

JULY 4, 2018

Certiorari Denied

No. 05–58. DEDUARDO v. STEFF JONES. Certiorari denied.

JUSTICE STEWART, concurring in the denial of certiorari.

This case follows a strange path. Petitioner deduardo9 appeals the dismissal and the reversal of said dismissal by the district court below. The matter was originally dismissed by the presiding judge, finding that the respondent was protected by "Clan Manager immunity" recognized in various cases of the Court. The dismissal was soon reversed due to "judicial error" and the judge recused himself.

Appellate courts have the powers to hear appeals from a "final decision" of a court of original jurisdiction. "A 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin* v. *United States*, 324 U. S. 229, 233 (1945) (punctuation altered) (citing *St. Louis, I. M. & S. R. Co.* v. *Southern Express Co.*, 108 U. S. 24, 28 (1883)). There has been no final decision here. The original dismissal would have constituted final judgment; however, the reversal does not. The reversal allows litigation on the merits to proceed and still leaves the court to adjudicate such. Petitioner contends that the district court reversing its own ruling, however, would is "illogical." Pet. for Cert. 2. But such is permitted under Federal Rules of Civil Procedure 59 and 60. For this Court to determine whether those have been followed would violate those very Rules.

The question that the petitioner presents is a significant one: Are Clan Managers immune from suit regardless of any circumstance? However, the Court

lacks jurisdiction to answer that at this time. I concur in the denial of certiorari.

Certiorari Granted

No. 05–59. BillyBobHow1 v. Flammavir. Certiorari granted.

July 6, 2018

Dismissed

No. 05–59. BillyBobHow1 v. Flammavir. Dismissed for mootness.

July 9, 2018

Review Denied

No. 05–60. JasonThePianist v. DiabloTigre. Review denied.

July 11, 2018

Certiorari Granted

No. 05–62. United States v. Faries. Certiorari granted.

July 14, 2018

Certiorari Granted

No. 05–62. Jacob Kirkman v. United States. Certiorari granted.

July 18, 2018

Certiorari Granted

No. 05–64. Technozo v. United States. Certiorari granted.

July 24, 2018

Certiorari Denied

No. 05–67. NinjaKiller0432 v. United States. Certiorari denied.

July 27, 2018

Certiorari Denied

No. 05–65. FederatedCommander v. United States. Certiorari denied.

No. 05–68. Nuinik v. United States. Certiorari denied.

Certiorari Granted

No. 05–66. NinjaKiller0432 v. United States. Certiorari granted.

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AUGUST 3, 2018

Certiorari Granted

No. 05–71. SNOWBLEED v. LIBRES. Certiorari granted.

AUGUST 6, 2018

Review Granted

No. 05–72. ULTIMAN1 v. UNITED STATES. Review granted.

AUGUST 8, 2018

Review Denied

No. 05–73. FRUITS v. UNITED STATES. Review denied.

AUGUST 11, 2018

Certificate Received

No. 05–75. BENDA587 v. UNITED STATES. Certificate received.

No. 05–76. OFFSET v. DISTRICT OF COLUMBIA. Certificate received.