SUPREME COURT OF THE UNITED STATES

SHAWN_SCHMIDT *v.* DRIPFIZZ

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

No. 05–37. Decided May 4, 2018.

The petition for a writ of certiorari is 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. ___, ___ (2018) (opinion of HOLMES, C. J.) (slip op., at 1) (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 ___ (slip op., at 2), 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.