Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

# SUPREME COURT OF THE UNITED STATES

Syllabus

## HEAVE *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES GOVERNMENT

No. 05–41. Argued May __, 2018—Decided May 26, 2018

After Congress passed the National Voter Registration Act (NVRA), Dry_Heave filed suit with this Court requesting a writ of certiorari to the United States Government to review the constitutionality of §3001(a)(1) of the 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 certiorari 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., filled a concurring opinion, in which KAGAN, J., joined. BORK, J., filed an opinion concurring in the judgment. ROBERTS, J., took no part in the consideration or decision of this case.

# SUPREME COURT OF THE UNITED STATES

No. 05–41

DRY_HEAVE, PETITIONER *v.* UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES GOVERNMENT

[May 26, 2018]

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. ___, ___ (2018) (plurality opinion) (slip op., at 2).

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 certiorari is dismissed.

*It is so ordered.*

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

# SUPREME COURT OF THE UNITED STATES

No. 05–41

DRY_HEAVE, PETITIONER *v.* UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES GOVERNMENT

[May 26, 2018]

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 3, suggests "maximally limit[ing] our discretion [in anytime review cases] by cutting out discretional 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." *Ibid*. 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. ___, ___ (2018) (HOLMES, C. J., concurring) (slip op., at 3).

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. ___, ___ (2018) (opinion of KAGAN, J., joined by HOLMES, C. J. and MARSHALL, J.) (slip op., at 2). Those considerations, applied consistently, would both assure that we do not overstep our bounds and simultaneously reduce our discretion.

# SUPREME COURT OF THE UNITED STATES

No. 05–41

DRY_HEAVE, PETITIONER *v.* UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES GOVERNMENT

[May 26, 2018]

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. ___, ___ (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. ___, ___ (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 recasted 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 ___ (statement of BORK, J.) (slip op., at 1) (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 ___ (THOMAS, J., dissenting) (slip op., at 2) (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*. 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 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] deem[] necessary' . . . [to] 'review the [acts] of the Executive or Legislative branches' so [we] can 'overturn . . . [those which are] unconstitutional or unlawful.'" *George II*, *supra* (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 discretional choices which have nothing to do with the constitutional merits of an argument.