Per Curiam

SUPREME COURT OF THE UNITED STATES

No. 05A431

EX PARTE UNITED STATES

ON APPLICATION FOR STAY

[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 criminal 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 it lacks jurisdiction to hear the following cases:

- *District of Columbia* v. *Okmangeez*, 3:18–4742 (USDC 2018).
- *District of Columbia* v. *Vonotige*, 3:18–1241 (USDC 2018).
- *District of Columbia* v. *MinderMastI*, 3:18–7939 (USDC 2018).
- *District of Columbia* v. *CommanderFikri*, 3:18–6111

(USDC 2018).

- *District of Columbia* v. *SemperBeyond*, 3:18–1713 (USDC 2018).
- *District of Columbia* v. *SinisterFriggus*, 3:18–2352 (USDC 2018).
- *District of Columbia* v. *DarrenJMatthews*, 3:18–1324 (USDC 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," *Jacob* v. *Nevada Highway Patrol*, 5 U. S. ___,

___ (2018) (opinion of BORK, J.) (slip op., at 3). 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 or 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 or 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 United 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 it—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 [c]ourt," 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. Which 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 federal 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. ___, ___ (2018) (HOLMES, C. J., concurring) (slip op., at 3). 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. 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 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*

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

States, *supra*. This question is one of public importance because if the United States is correct, failure to issue the writ (or 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 defeated 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 referenced earlier, *infra*, at 1–2, 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 order 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.