Per Curiam

SUPREME COURT OF THE UNITED STATES

No. 07–17

ICY_ANTLER, PETITIONER *v.* JOHNNIELCUCHRAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

[July 9, 2019]

PER CURIAM.

The writ of certiorari is dismissed as improvidently granted.

It is so ordered.

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JUSTICE BORK, concurring.

The Court today dismisses this case as improvidently granted, an appropriate response to petitioner's endless stream of vacillatory requests.[1] In so ordering, the Court declines to reach the merits of petitioner's substantive claim (that a court's contempt authority for misbehavior does not ever extend to private DMs with a presiding judge).[2] That legal question will have to remain unresolved for now.

I agree with all of the Court's actions in this case, especially its decision not to address petitioner's claim in any measure. Answering a close legal question in a case which has become "unnecessarily complicated" by procedural shenanigans would be unwise.[3] Because the Court sees fit to dismiss the case, it properly does not address the "meat" of the dispute. Courts "must respect the limits of [their] unique authority" and engage in "[j]udicial exposition . . . only when necessary to decide definite issues between litigants."[4] Having decided specifically *not* to decide the dispute at bar, the Court is correct (indeed required) to abstain

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[1] When a petitioner on one day asks that their case be dismissed, changes their mind the very next, and then performs the same routine for a full week, merits analysis becomes unnecessarily complicated.

[2] Compare App. ¶ 9, with *Antlers* v. *Cuchran*, 7 F. 4d ___, ___ (2019) (statement of Hudson, J.).

[3] *Supra*, n. 1.

[4] *Public Workers* v. *Mitchell*, 330 U. S. 75, 90 (1947).

from considering its underlying legal content.

Individual Justices, however, are not similarly bound.[5] I write separately to memorialize some of my thoughts on the legality of contempt orders like the kind challenged here.

I

The relevant part of the contempt statute states that a court "shall have power to punish . . . such contempt of its authority . . . as . . . [m]isbehavior of any person in its presence or so near thereto as to obstruct the administration of justice."[6] This type of contempt, known as division (1) contempt, is one of three forms identified by the statute—the other two are not relevant to this case. Under the statute, a court may punish "n[o] other" forms of contempt.[7]

Petitioner argues that private DMs sent to a judge, even those sent while the judge is presiding over a case involving the sender, can never provide the basis for division (1) contempt because private DMs are neither in the courtroom or in the judge's chambers and therefore not in the court's "presence." The court of appeals, for its part, disagreed. Judge Hudson, joined by two other judges, argued that the "'presence of the court' also comprises, for the purposes of the [U. S.] judicial system, direct messages and messages in *any* chat, either on Discord or other off-site and/or on-site communication" provided a sufficient nexus to judicial proceedings.[8] To determine the existence of a sufficient nexus, Judge Hudson proposed looking to three criteria: (1) the communication's connection with an "active or inactive case

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[5] See *Federal Election Comm'n* v. *Raps*, 6 U. S. 42, 45 (2018) ("Statements of individual Justices, though not binding, can be particularly helpful in discerning the law.").

[6] 18 U. S. C. §401(1).

[7] *Ibid.*

[8] *Antlers*, *supra*, at ___ (pp. 2–3) (emphasis in original).

in which the [j]udge presided"; (2) whether the cited individual had been "advised to cease their misbehavior"; and (3) the attachment of a satisfactory explanation to the contempt citation.[9]

Neither position seems to me all that persuasive.

A

Take petitioner's argument first. His position is unmistakably absolutist and would prohibit any division (1) citations outside the physical confines of the courtroom or the digital confines of a judge's chamber. But this Court is often "hesitant" to find legal violations on a "*per se*" basis.[10] The approach taken, especially in the contempt context, is usually far more sensitive to the particular circumstances of a particular case.[11] Caution, not absolutism, usually carries the day. I therefore approach petitioner's position with a critical gaze.

Petitioner argues that the use of the word "presence" in division (1) limits its scope to only misbehaviors committed in the *areas* controlled by the court (for example, its chambers or the courtroom it presides in). But this reductive analysis does not take account of the analogy drawn by the district court. The district court compared sending a DM to a presiding judge while physically present in the courtroom to whispering in that judge's ear.[12] If that is correct, then petitioner's objection fails on its own terms because such a whisper would be an act in the court's physical "presence." Granted, this Court has in the past said that conduct on discord is *not* comparable to "in-game" conduct, so the district court's analogy is not a precise fit.[13] Even

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[9] *Id.*, at ___ (p. 3).

[10] *Troxel* v. *Granville*, 530 U. S. 57, 73–75 (2000) (citing *Fairbanks* v. *McCarter*, 330 Md. 39, 49–50 (1993); *Williams* v. *Williams*, 501 S. E. 2d 417, 418 (1998)).

[11] See generally *Kirkman* v. *United States*, 5 U. S. 110, 112 (2018).

[12] See J. A. 4.

[13] *Cursive* v. *United States*, 7 U. S. ___, ___ (2019) (slip op., at 10).

still, other analogies may more accurately depict these circumstances.

One could wonder: if a real-life criminal defendant had access to a phone and sent a text to the presiding judge mid-trial, would that be considered an act in the court's "presence"? Or what if a member of the gallery illegally recorded audio of the trial and later published it online? In both examples, the conduct of the potential contemnor is digital in nature, but may still implicate the interests of the court. I do not attempt to address these specific examples, but they do serve to show that the distinction drawn by petitioner does not hold up. Mere reference to a bright-line rule like the one proposed by petitioner cannot resolve this "close legal question."[14]

B

While I am not persuaded by petitioner's argument, the position taken by the court of appeals does not seem to me that much more persuasive.

Judge Hudson begins by suggesting that *any* communication involving a judge counts as in the court's "presence."[15] But this cannot be right. Interpreting "presence" in this way would strip it of any meaning. Courts usually try to avoid an interpretation of a statutory text which would make it redundant.[16] Not to mention that this interpretation of "presence" would broaden the reach of the contempt power far beyond where it ever existed at common law, which would be incompatible with the basic purposes of the

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[14] *Supra*, at 1.

[15] *Antlers*, *supra*, at ___ (p. 2).

[16] See*, e.g.*, *Republic of Sudan* v. *Harrison*, 587 U. S. ___, ___ (2019) (slip op., at 10); *Dastar Corp.* v. *Twentieth Century Fox Film Corp.*, 539 U. S. 23, 35 (2003); *Mackey* v. *Lanier Collection Agency & Service, Inc.*, 486 U. S. 825, 837 (1988); A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 174–179 (2012); W. Eskridge, Interpreting Law: A Primer on How to Read Statutes and the Constitution 112–114 (2016).

statute. Recognizing this, Judge Hudson qualifies his previous assertion by requiring a sufficient nexus to judicial proceedings. But even this does little to fix the original problem.

For starters, the way the court of appeals sought to define the nexus strikes out on all three points of its three-part formulation. The first criterion asks for a connection with an "active or inactive case in which the judge presided."[17] While this criteria is right to a point, I fail to see how a connection with an "*inactive*" case can be useful in showing a nexus to "presence" in a court.[18] Plainly put, it does not. Second, the court of appeals asks whether the contemnor had been "advised" to cease their misbehavior. This does sound like a responsible step for a judge to take before holding an individual in contempt, and it may even be legally necessary, but I see no possible justification for making it a criterion needed to show a nexus to court "presence." Third, and finally, the court of appeals asks whether a statement of reasoning accompanied the contempt citation. Again, this is a responsible step for a judge,[19] but it has no relevance to determining a contemnor's "presence."

Even if the test worked, however, it could not possibly salvage the court of appeals' conclusion. As explained already, the court of appeals' starting position gave rise to serious superfluity concerns. Logical steps, even legally correct ones, which proceed from a flawed premise will more likely than not produce the wrong result.

II

But both petitioner and the court of appeals go wrong by

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[17] *Supra*, at 2–3.

[18] See cf. https://knowyourmeme.com/memes/they-had-us-in-the-first-half ("They had us in the first half, I'm not gonna lie.").

[19] See *Hudson* v. *House of Representatives*, 7 U. S. ___, ___ (2019) (BORK, J., concurring in the denial of review) (slip op., at 2) (observing that "the very purpose of an opinion is to 'make a judgment credible to a diverse audience of readers.'").

placing such great weight on figuring out the meaning of "presence." While there is great ambiguity in that phrase, there is only room for debate over how to resolve that ambiguity when the statute itself does not explicitly supply an answer. This is one of those rare cases where the statute's own terms definitively settle the ambiguity in favor of one side.

Division (1), of course, says courts can punish misbehavior in their "presence." But it also says they may punish misbehavior which is *not* ultimately in their presence but is nevertheless sufficiently "near thereto as to obstruct the administration of justice."[20] Therefore whenever there is a *reasonable* argument that someone has misbehaved in a court's "presence," that person may be held for division (1) contempt even if it turns out they weren't actually in the court's "presence," merely close. In this case I think the arguments are pretty reasonable that petitioner was in the court's presence when he misbehaved so it seems clear that he was at least sufficiently "near thereto."

* * *

I concur in the dismissal for the reason stated in the Court's terse order. This case, it turns out, was "improvidently granted."[21] As a final matter, the legal question presented in this case will remain unresolved for now. When the question presents itself again, as I am sure it will, I hope this opinion will be useful to the Court in discerning the law of contempt.

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[20] *Supra*, n. 6.

[21] *Ante*, at 1.