CHAMBERS OF
JUSTICE JOHN JAY

Supreme Court of the United States
Washington, D. C. 20543

October 31, 2020

MEMORANDUM TO JUSTICE IN CHAMBERS

Re: 10-9 – Armed Forces Ass'n v. United States[1]

I have few reservations about how we would dispose of this case. I agree that we should apply the doctrine of standing in Anytime Review cases, but on a different rationale. While the Court has long held that the requirement of standing is by its convention, the Constitution says otherwise. I will explain below, while also offering arguments you could supplement within your opinion should any of them arise.

To start, Article III, § 2 restricts our judicial power to "cases and controversies." Our decisions have recognized that limitation. See *Ultiman* v. *United States*, 6 U. S. 19 (2018); see also *Kirkman* v. *Nevada Highway Patrol*, 5 U. S. 62 (2018) (*per curiam*) ("The judicial power is a power to decide not abstract questions but real, concrete Cases and Controversies"), *Camreta* v. *Greene*, 563 U. S. 692, 701 (2011) ("Article III of the Constitution grants this Court authority to

[1] Consistent with my notification to Justice Stewart as his clerk, I am only empowered to write a memorandum on whether the doctrine of standing applies to Anytime Review cases. This is due to my previous participation in the attempted challenge of the statute in the United States District Court for the District of Columbia. As such, I have a major conflict of interest on the other questions presented.

adjudicate legal disputes only in the context of "Cases" or "Controversies"); *Clapper* v. *Amnesty Int'l USA*, 568 U. S. 398, 408 (2012), *Kingdomware Technologies, Inc.* v. *United States*, 579 U. S. ___, ___ (2016) (quoting *Already, LLC* v. *Nike, Inc.*, 568 U. S. 81, 90-91 (2013)) ("Article III of the Constitution limits federal courts to deciding Cases and Controversies, and an actual controversy must exist not only at the time the complaint is filed, but through all stages of the litigation") (internal quotation marks omitted). In the past, Justice Bork has agreed with this holding for mootness, but not for standing. His problem is that the doctrine of standing when applied to 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." *George* v. *United States, mot. to dismiss denied,* 5 U. S. 124 (2018) (Bork, J., concurring). "Even more frequently, it is used to avoid answering difficult questions." *Id.,* note 1. I view this as the mere byproduct of inconsistent application and confusion of the doctrine, an inconsistency that can be easily recognized by a forthwith declaration of the requirement. My guess is that the Supreme Court has dithered on whether to use the true standing doctrine or its self-described "relaxed standing." I will deal with this issue below. In the

meantime, one thing is clear. The Constitution requires that we entertain the doctrine of standing.

First, if the cases or controversies clause does apply to cases under the Anytime Review clause, then standing must do so. "One element of the case-or-controversy requirement" is that plaintiffs "must establish that they have standing to sue." *Clapper, supra,* see also *Bank of America, Corp.* v. *Miami,* 581 U. S. ——, —— (2018) ("To satisfy the Constitution's restriction of this Court's jurisdiction to "Cases" and "Controversies" ... a plaintiff must demonstrate constitutional standing"). The general doctrine of standing determines whether a litigant is entitled to "have the court decide the merits of the dispute or of particular issues." *United States* v. *Incels Union,* 10 U. S. ___, ___ (2020) (slip op. at 8) (quoting *Warth* v. *Seldin*, 422 U. S. 490, 498 (1975)), see also *Arizona State Legislature* v. *Arizona Independent Redistricting Comm'n,* 576 U. S. 787, 799 (2015) (holding that the standing doctrine is "[t]rained on "whether the plaintiff is a proper party to bring a particular lawsuit") (brackets omitted).[2]

[2] This contrasts with the mootness doctrine (also part of the Article III cases and controversies requirement), which "ensures that the litigant's interest in the outcome continues throughout the life of the lawsuit." *Ultiman,* 6 U. S. at 19. We have upheld the requirement that cases not be moot in the Anytime Review context. See *George* v. *United States,* 5 U. S. 66, 67 (2018) (plurality opinion) (*George*

Demonstrating standing is simple: a litigant need only present a harm suffered by the plaintiff that is concrete and actual or imminent, not conjectural or hypothetical; that is fairly traceable to the defendant's challenged action; and can be redressable by a favorable ruling. *Monsanto Co.* v. *Geertson Seed Farms*, 561 U. S. 139, 149 (2010); *Incels Union*, 10 U. S. at ___ (slip op. at 8); *Lexmark Int'l Inc.* v. *Static Control Components, Inc.*, 572 U. S. 118, 125 (2014). If all three prongs return "yes," then a petitioner has standing. If even one is a "no," however, their case must be dismissed. *Tools* v. *United States*, 9 U. S. 113, 128 (2020) (Bork, J., dissenting).

General JMP bases his theory of relaxed standing on *United States Parole Comm'n* v. *Geraghty*, 445 U. S. 388 (1975). But that belief is erroneous. Our cases have established that the "irreducible constitutional minimum" of standing consists of the three elements discussed above. *Spokeo Inc.* v. *Robins*, 578 U. S. ___, ___ (2018) (slip op. at 6). The personal stake that *Geraghty* discusses (and JMP believes is part of the relaxed standing test) is the collection of the three elements we referred to in *Incels Union*. See *Camreta*

I) (holding that the Anytime Review clause "is no exception" to the Article III cases and controversies clause to moot a case); *Heave* v. *United States*, 5 U. S. 85 (2018) (same); *Ultiman*, 6 U. S. at 19 (acknowledging the tenets of *George I* and *Heave*).

v. *Greene*, 563 U. S. at 701 ("[W]e demand that litigants demonstrate a "personal stake" in the suit... [t]he party invoking the Court's authority has such a stake when [the three elements of standing] are satisfied..."). The so-called relaxed standing doctrine is actually nonexistent.

I look now towards whether petitioners would satisfy the "irreducible constitutional minimum" of standing.

Armed Forces Association fails the first prong. They have not elaborated on any concrete injury, or at least any imminent ones, instead claiming that under Anytime Review we should review the law by itself. But this runs smack into our holdings that merely claiming that the bill is unconstitutional is insufficient to establish Article III standing. Federal courts, outside of anytime review, do not have a freestanding power to review and annul acts of Congress on the ground that they are unconstitutional. "That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act." *Incels Union*, 10 U. S. at ___ (slip op. at 9-10) (quoting *Massachusetts* v. *Mellon*, 263 U. S. 447, 488 (1926)). The party who invokes the power must be able to show not only that "the statute is invalid but that he has sustained or is immediately in danger of sustaining

some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally." *Id.*

They also attempt to substitute the idea of "capable of repetition, yet evading review." The Supreme Court's precedents recognize an exception to the mootness doctrine for a controversy that is "capable of repetition, yet evading review." *Kingdomware Technologies, Inc.* v. *United States*, 581 U. S. ___, ___ (2016) (internal quotation marks omitted). That exception applies "only in exceptional situations," where (1) "the challenged action [is] in its duration too short to be fully litigated prior to cessation or expiration," and (2) "there [is] a reasonable expectation that the same complaining party [will] be subject to the same action again." Id. (brackets in original). The problem is that Armed Forces Association didn't challenge an application of the law in *wartime powers,* but the application of the statute in times of *peace.*[3]

In sum:

I would reject respondent's idea of relaxed standing for Anytime Review cases as establishing the personal

[3] If Armed Forces Association had challenged the statute based on its applications in a time of war, I would hold that the case was subject to "capable of repetition, yet evading review" analysis. I would have held that they had demonstrated standing as well if they had filed suit here on behalf of s_uperknight, but only to the fourth question regarding § 102(e) of Pub. L. 81-15.

stake in *Geraghty* has been explicitly defined as satisfying the three elements for the doctrine of standing. Having to establish all three elements guts the entire point of relaxing our standards for standing. This will also alleviate Justice Bork's concerns.

Armed Forces Association has not suffered a personal injury-in-fact due to operation of Public Law 81-15. A litigant raising only a "generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy." *Incels Union*, 10 U. S. at ___ (slip op. at 9), *Lujan*, 504 U. S. at 573–574; see also *Hollingsworth* v. *Perry*, 570 U. S. 693, 706 (2013) ("[A]n asserted right to have the Government act in accordance with law is not sufficient, standing alone[.]"). Even the claim against § 102(e) would be insufficient in this case, which is unfortunate because they were challenging it in the District Court.

Justice Bork's concern about our inconsistent application of Anytime Review standing can be easily rectified if we announce that the standing doctrine is to be applied in Anytime Review cases forthright. His idea that the word "any" in Art. III, § 4 of the

Constitution means we can adjudge anytime review cases without analyzing standing, however, is erroneous. First, while 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, note that it says "at any time it deems necessary," which would effectively include the substance that the Supreme Court can impose limitations when hearing anytime review cases. Also note that our past precedent has held that the cases or controversies requirement extends to all cases under its judicial power. To uphold one section of the Constitution but to refuse to do so for another while hearing a case is not within our power, nor is the case one of "a Judiciary nature." *DaimlerChrysler Corp.* v. *Cuno,* 547 U. S. 332, 342 (2006).

With these points in mind, I wish you luck as you draft your opinion for the Court.

Sincerely,

Lewis F. Powell, Jr.

Justice Jay