# SUPREME COURT OF THE UNITED STATES

No. 05–22

UNITED STATES, PETITIONER *v.* TPR

ON APPLICATION FOR A WARRANT OF ARREST FOR MEMBERS OF TPR

[March 27, 2018]

JUSTICE THOMAS, with whom JUSTICE GORSUCH and JUSTICE BORK join, dissenting.

The Federal Government asks us to extend our warrant for the arrest of members of the most powerful and havoc-wreaking criminal organization in recent history known as "TPR." Faithful application of established precedents and common sense would have made this case easy to resolve. For reasons beyond me, however, the Court razes usage of both in opinions that, at best, represent interpretive hand-wringing and, at worst, an attitude so cavalier it ought to offend.

## I

The Fourth Amendment guarantees the right to be free from unreasonable government searches and seizures. In one way, it represents the right of a person to "retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman* v. *United States*, 365 U. S. 505, 511 (1961). In another, it reflects clearly that the Constitution neither tolerates nor allows for a police state to form. See generally, *e. g.*, *Davis* v. *United States*, 328 U. S. 582, 597 (1946) (Frankfurter, J., dissenting). Through this, the Fourth Amendment provides fundamentally important protections to the People.

One of those protections is the requirement of probable cause. Before the Government may arrest somebody or search a home, they must—outside of, for example, exigent circumstances, see *Missouri* v. *McNeely*, 569 U. S. ___ (2013)—obtain a warrant from a lawful authority. To do this, probable cause must be demonstrated. We have previously defined probable cause to mean "where the facts and circumstances within [the Government's] knowledge, and of which they have reasonably trustworthy information, are sufficient in themselves to warrant a belief by a man of reasonable caution that a crime is being committed." *Brinegar* v. *United States*, 338 U. S. 160, 175 (1949) (citation omitted). In constitutional challenges against arrests, "[t]he test for probable cause is not reducible to 'precise definition or quantification,' " *Florida* v. *Harris*, 568 U. S. ___, ___ (2013) (slip op., at 5) (citing *Maryland* v. *Pringle*, 540 U. S. 366, 371 (2003)), for "[f]inely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence . . . have no place in the [probable-cause] decision." *Illinois* v. *Gates*, 462 U. S. 213, 235 (1983). Instead, we turn to the totality of the circumstances. See *Pringle*, 540 U. S., at 371; *Gates*, 462 U. S., at 232; *Brinegar*, 338 U. S., at 176. By going for an all-things-considered approach, we are able to balance the competing interests of efficiency and fairness. Thus, if probable cause is adequately demonstrated, a Court has no place issuing a judicial veto as it does today. The Constitution requires that *all* warrants—whether for searches and seizures, arrests, etc.—be backed by probable cause. See Amdt. 4.

There are, however, certain unique protections related to arrest warrants: charges must exist, Art. III, §5, cl. 1, be "actively pursued" by the Government within 72 hours upon a warrant's issuance, see cl. 2, and only the Supreme Court may issue arrest warrants to groups of individuals. See cl. 3. We have construed these portions of Article III

to mean two things: (1) that issuing "charges" is synonymous with demonstrating *some* form of need for the warrant,[1] with a more restrictive standard for group arrests and (2) that "trial" means a judicial environment in which both the Government and the individual(s) accused may contest that showing of cause, with the onus of proving the Government wrong on the accused. See *In re United States Application for Arrest Warrant on TPR*, 5 U. S. ___, ___–___ (2018) (slip op., at 1–2) (joint concurring opinion).

All in all, the textual scheme of Article III in relation to the Fourth Amendment is simple. It reflects a check on the judiciary, members of which prior to the Constitution's ratification were able to routinely abuse the power of issuing arrest warrants. What it does not reflect, however, is the picture the majority and the concurring opinions paint: that to sustain a warrant to arrest a group of individuals, the Government must survive what can only be logically read to imply an incredibly strict review. The majority's mistake is their emphasis not on the *process by which* an arrest warrant is to be obtained and (if needed) extended, but instead in whom the Constitution vests the power to issue the warrant in the first place. Respectfully, this is a strategical way of dodging what is staring us in the face, so we may then claim to be the saviors of liberty and due process, brag about it through judicial opinion, and continue on the next day as though nothing is wrong. When a Court of Nine—comprising the top jurists of the Nation—cannot acknowledge the destruction caused by members of

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[1] I say, "*some* form of need" (emphasis present), because the Court describes "charges" to mean "factual allegations which tend to show the need for relief." *In re United States Application for Arrest Warrant on TPR*, 5 U. S. ___ (2018) (slip op., at 1) (joint concurring opinion). This is nothing more than a disastrous restyling of an otherwise obvious clause. See *infra*, at 4–7.

TPR, something is very wrong, and it shows to everyone but the majority.

## II

The Court not only misapplies the warrant provisions of Article III: It steps all over them. In reaching the conclusion to deny the Government's request for an extension of the warrant, it reasons that the text and history surrounding those provisions suggest a never-before-seen standard for group-arrest warrants. This departs from both what we know the text suggests and the history that surrounds it. Because the majority fails to take these factors into account, I shall do so for them.

### A

As we should always do when interpreting the Constitution, a statute, or a regulation, we begin with the text itself. There are two separate "additions" in Article III to the general warrant requirements housed within the Fourth Amendment. I have already demonstrated that these provisions—"charges" and a "trial" requirement—bear, as a matter of new precedent, synonymous meanings with some type of showing of need and a fair, judicial environment in which the merits of extending a warrant may be debated. The problem, however, with this reading is that it eviscerates the answer to what should be a very easy question to resolve.

The majority forgets that the Article III provisions relating to arrest warrants are *ancillary* to the Fourth Amendment, which governs all general warrants. The Court in holding and continuing to apply the decision that the Article III "charges"—and arrest warrants overall—demand a showing of need for preventative relief turns long-understood notions of the warrant process and the Fourth Amendment on their heads, while also ignoring the very makeup of Article III. I fear that today, much like in

*British2004* v. *Ozzymen*, 3 U. S. 60 (2018), the Court has yet again violated "an interpreter's ability to give uniform meaning across every word and clause of a law," *id.*, at 79 (opinion of Scalia, J.). It has been and continues to be my understanding that lawmakers try to avoid using words that "have no operation at all." *Marbury* v. *Madison*, 1 Cranch 137, 174 (1803); it hardly "require[s] a constitutional scholar," *Safford Unified School Dist.* v. *Redding*, 557 U.S. 364, 380 (2009), to realize such a truth.

The problem with the Court's analysis of "charges" is that it ignores, crucially so, that "charges" is used twice—both in the second and third clauses of section 5 of Article III. Understand, Article III simply prescribes a general process for arrest warrants and then, for group-arrest ones, confines that process to our Court. So it seems rather silly to me that the Court's basis for its reading of "charges" is the "context of group arrest warrant proceedings," *In re United States Application for Arrest Warrant on TPR*, 5 U. S., at ___ (slip op., at 1) (joint concurring opinion). Why note the context at all when the procedures are the exact same? This is the procedure for individual-arrest warrants: "a trial occurs within seventy two hours of the issuance of the Warrant and charges have been actively pursued . . . ." And then for group-arrest warrants: "a trial occurs within seventy two hours of the issuance of a Warrant and charges have activity been pursued . . . ." Without these obvious-to-everyone-but-the-majority facts resolved, the Court purports to rely on the straightforward meaning of "charges" to find its reading, but it would be more accurate to say that it does so by applying the appearance of a straightforward meaning of "charges."

I accept, though, that the meaning of "charges" is not necessarily plain. While judges should always to ordinary words apply their plain meaning, when doing so "would produce an absurd and arguably unconstitutional result,"

a Court is permitted to give an "unusual (though not unheard-of) meaning to a word," *United States* v. *X-Citement Video*, 513 U. S. 64, 82 (1994); see *Green* v. *Bock Laundry Machine Co.*, 490 U. S. 504, 527 (1989). The Court, however, relying on a non-existent context to define "charges," has declared that the group-arrest warrant is a preventative measure—they continue that today. That is fairly incongruous with the very *point* of a warrant for arrest as well as why we arrest in the first place.

In society, arrests are not made to prevent crime; they are made to detain for already committed actions and then—if convicted—punish the sentenced. The group-arrest warrant, therefore, is the same—just applied to a ROBLOX group of individuals rather than individuals themselves. And because we have already acknowledged that the Constitution makes no distinction whatsoever between individual and group arrests besides vesting the authority to issue them in two different original bodies, the substantive requirements for regular arrest warrants should logically apply to group-arrest ones, too. Nor is point of an arrest to prevent a crime; if that were the point, then the entire requirement of probable cause would make no sense, for it hinges on showing that illegal conduct *already happened* to justify the arrest, not on whether it *will* happen. And in circumstances where a quasi-preventative strategy is to be required, statutes fill the gaps. See, *e. g.*, 18 U. S. C. §371; 18 U. S. C. §1349. Regardless, even those are not preventative; the Government, to be given a warrant to arrest based on such a type of crime, would still have to show that it was *already committed*. Respectfully, the idea that warrants for arrest—and thus arrests themselves—have ever been preventative rather than to detain for crimes already completed turns the *entire* criminal justice system into nothing more than a system in which one may be arrested and detained not for committing crime,

but for the possibility of committing crime. Such a system has its place in a banana republic, not the United States of America.

Given that these provisions merely are subsidiaries of the general warrant requirements of the Fourth Amendment, "charges" should, rather than require the Government to show a "need" for preventative relief (whatever that means), just mean what the word in *full* context naturally suggests: the Government must show probable cause to be granted an issuance of an arrest warrant—be it for an individual or for a group.

B

The Court can find no basis for its reading of "charges" in the text of the Constitution, nor can it in the history surrounding its text. These Article III provisions were not implemented to establish a procedure whose substantive components depart from the Fourth Amendment's requirements; they were implemented to require through more forceful writing what is generally required in real life. This corrective measure is one of many in the Constitution, written with the failings of the previous one fresh in the mind. Some are found in amendments; others in the original five Articles. The most obvious example of this would be the Eleventh Amendment, which constitutionalized the prohibition on employment in more than one civil office at once, while providing a simple procedure for how civil offices are to be defined—thereby avoiding the pitfall that I shall now describe.

A downfall of our virtual environment is that details often fall through the cracks in day-to-day work. For instance, take a look at our very own Court. In real life, dozens of briefs fill individual cases, each full of elaborate legal arguments to which the Justices confine themselves when drafting their opinions; here, however, we often either (a) do not receive briefs or (b) receive them sparingly,

and often they lack the elements that, well, would constitute them as proper legal "briefs." For us, the parties, and the thousands of Americans affected by our decisions, this shortfall does not present a concern worth stressing. But some process failures prove fatal. This cannot be demonstrated better than by looking to the history of arrest warrants in our country.

Before the present Constitution was ratified, there was no specific textual scheme outside of the general requirements of the Fourth Amendment to establish constitutional guarantees sufficient enough in light of the abovementioned shortfall to ensure a fair process. Judges, by virtue of being teenagers, were not (and often still are not) capable of employing the proper legal methods used in real life on ROBLOX. That is so because, simply, most here are teenagers; they do not possess a law degree, nor do they study it like some. They are, after all, here to have fun, so the, to many, tedious steps of the arrest-warrant process—from both the perspective of the Government and the courts—deterred their very operation.

Thus, instead of the Government going in front of a judge, showing probable cause, and the judge issuing an appropriate warrant for arrest, judges would instead issue *sua sponte* arrest warrants for individuals they thought were criminals or members of groups they thought constituted criminal enterprises. One need not think long and hard to come to the understanding that such a practice would be hit or miss—and the misses, given the very subject, always hit hardest those who deserve such a beating least. In light of this shortfall, the Constitution includes those Article III provisions to *constitutionalize* those basic steps, not to create some new standard set apart from what is applied for all other warrant requests.

Concerning the group-arrest portion, there is one simple reason why the power to issue those types of warrants is

vested solely in the Supreme Court: the history and struggles of the federal court worried the Constitution's drafters.[2] It was not to add a *third* (on top of an already unnecessarily added second) tier of scrutiny to the arrest-warrant process. One would think if that was the goal in mind, the text would reflect that instead of bearing the exact same wording as the preceding clause does.

## III

While I reject the Court's overall reading of the Article III provisions in tandem with the Fourth Amendment, I will, for the sake of argument, show that when applying the current circumstances of the case to its framework, there should have been no question as to whether the warrant should have been extended. I wish to, in doing this, note that it is at this point that the majority and those in concurrence take a turn from expounding bad to downright offensive law.

The Court's framework demands that the Government, in showing a need for preventative relief, demonstrate that the actions of a group's members are not merely coincidental, but deliberate, organized, and consistent. TPR's actions more than satisfy all three factors and then some. But in opinions and oral-argument transcripts reflecting truly how out of touch our Court is with the everyday American—and what will look like almost deliberate ignorance to readers—the Court, in putting out the candle, sends a much more worrying sentiment: It might just not care. We Justices spend almost all of our time in Discord-based chatrooms and using word-processor applications. We do not see the things regular Americans do at our cities. We do not bear the brunt of TPR's actions; everyday

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[2] By vesting it in the Supreme Court, the Constitution requires group-arrest warrants to have the assent of a majority of this Court, rather than individual judges at the federal-court level.

Americans do. This backwards ruling puts on bright display why we ought to get out of the business entirely of arbitrarily judging whether a crime is severe enough to warrant an arrest. That has never been the question (until now). We arrest those who commit crimes because they committed crimes; we thus ask the Government to show that there was probable cause to believe that they were committed.

I also write, briefly, to respond directly to some of the ideas peddled by JUSTICE O'CONNOR, joined by THE CHIEF JUSTICE. Much of what JUSTICE O'CONNOR writes is a broad (but curiously short) rejection of the Government's assertions as to the criminal conduct and nature of TPR's members and actions.

JUSTICE O'CONNOR begins with a titillating explanation of what exactly arrest warrants are in the first place.[2] Then, recognizing that a group-arrest warrant hasn't been issued in nearly a year, see *post*, at ___–___ (slip op., at 1–2), JUSTICE O'CONNOR decides that was because such an issuance would require "significan[t]" circumstances.

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[3] JUSTICE O'CONNOR writes, "warrants for arrest . . . have . . . been only used on those who have been tried and convicted of a crime under our criminal justice system." *Post*, at ___ (slip op., at 1). The problem with such a definition is that arrest warrants are issued before the trying and conviction of a defendant—issuing a warrant for the arrest of someone only after trying them seems to beg the question: How is one to compel attendance to court? JUSTICE O'CONNOR sprinkles in a contempt-citation exemption in her definition, yet this, too, makes little sense; how is one to get to the stage where a contempt citation would even arise if one cannot arrest the offender to bring him to be tried in the first place? Perhaps, I might dare surmise, JUSTICE O'CONNOR has confused "arrest"—which is reasonably defined as, "[t]o deprive a person of his liberty by legal authority . . . for the purpose of holding or detaining him to *answer a criminal charge or civil demand*," Black's Law Dictionary 100 (8th ed. 2004)—with "serving out a prison sentence," where defendants who have been found guilty by a jury of their peers and have been sentenced fairly under the law by a judge are incarcerated in a federal-prison center.

JUSTICE O'CONNOR and I agree: Significant circumstances would seem to correlate with and cause the need for a group-arrest warrant. JUSTICE O'CONNOR acknowledges this much, writing: "Bold times demand bold action." *Post*, at ___ (slip op., at 2). (Not too bold, however.)

JUSTICE O'CONNOR, attempting to faithfully apply the Court's erred framework, subjects the Government's argument to her very nuanced test: comparing the number of federal and municipal law-enforcement agents with TPR's member count. See *ibid.* I do not claim to be a statistician, but I believe it difficult to argue that there are not some missing factors in such an analysis.

JUSTICE O'CONNOR makes the mistake of assuming personnel count to be the sole and final determinate factor in resolving questions like this. Assuming that the mere count of heads decides the battle is historically, professionally, and logically rejected—but apparently not by JUSTICE O'CONNOR. JUSTICE O'CONNOR puts on her lack-of-awareness hat in then stating (without even a modicum of evidence or a citation to such), to further back her erroneous conclusion, that there must be no conflict because "there has not been a coordinated attack on an American city by TPR for days." *Ibid.* I am sure that a few strolls on the streets of Las Vegas would change JUSTICE O'CONNOR's outlook; any seriously proposed idea that the attacks have stopped should concern more than surprise, for it lacks even the thinnest façade of an honest and competent analysis—legal or otherwise.

But even that is not what is most offensive about her assumptions. JUSTICE O'CONNOR makes the argument, *post*, at ___ (slip op., at 3), that if the Government cannot handle TPR as it currently functions, then a group-arrest warrant would serve no purpose—it would amount to nothing more than a "parchment guarantee" against an unbeatable enemy. *Ibid.* JUSTICE O'CONNOR believes the

Government has *not* shown that the circumstances surrounding TPR necessitate a group-arrest warrant. This, however, is a fairly mystifying argument, for one then would wonder how JUSTICE O'CONNOR believes the Government *should* be dispatching with society's criminals if JUSTICE O'CONNOR at the same time would deny the Government the ability to *arrest* and *detain* those individuals under a warrant; JUSTICE O'CONNOR, I presume, must instead think that turning cities into first-person-shooter warzones is how crime is fought efficiently and safely, and that warrantless arrests will ink the remaining dry spots. Except this ignores—while again exposing the majority's troubled logic—the fact that arrests are made *after* crimes are committed. Had JUSTICE O'CONNOR and the rest of the majority understood that warrants for arrest are not preventative measures—no one arrest warrant is—but tools for dealing with crime and detaining and trying criminals, perhaps such a concurrence that insults hundreds of law-abiding citizens would not have been written.

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No single word summarizes the Fourth Amendment better than does "reasonableness." That is because principles governing procedure and substance in criminal justice require it. But reasonableness has been thrown out the window in now two cases establishing what is none other than a very troubling trend line. By turning Article III's bolded guarantees of the rights already afforded within the Fourth Amendment into an unrecognizable, tiered, and confusing system imposed through judicial fiat, the Court has taken the side of neither society nor criminals. Today, the Court—with JUSTICE O'CONNOR's helping hand—sides with itself, placing with a wildly out-of-touch perspective a new doctrine that has no textual, historical, or logical support from the Constitution above that of the safety of law-abiding citizens.

I respectfully dissent.