No. 11-770

IN THE
Supreme Court of the United States

CHUNON BAILEY,
Petitioner,
v.
UNITED STATES,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

This brief is submitted on behalf of the National Association of Criminal Defense Lawyers ("NACDL") as *amicus curiae* in support of petitioner in *Bailey v. United States*, No. 11-770.[1]

NACDL is a nonprofit organization with a direct national membership of more than 12,500 attorneys, in addition to more than 35,000 affiliate members from all 50 states. Founded in 1958, NACDL is the only professional association that represents public defenders and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of justice. NACDL routinely files *amicus curiae* briefs in criminal cases in this Court and other courts.

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[1] Pursuant to Rule 37.6, counsel for *amicus curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief. *Amicus* timely notified each party of its intent to file this brief, and letters reflecting the consent of both sides are attached to the certificate of service.

INTRODUCTION AND SUMMARY

In *Michigan v. Summers*, 452 U.S. 692 (1981), this Court held that police officers executing a search warrant for contraband could detain all occupants of a dwelling while searching the premises. *Id.* at 705. Under the rule announced in *Summers*, an "officer's authority to detain incident to a search is categorical," and no individualized assessment of the reasonableness of the detention is needed. *Muehler v. Mena*, 544 U.S. 93, 98 (2005).

As the petition for certiorari in this case shows, a deep conflict has developed in the circuits regarding whether the *Summers* rule allows the seizure and detention of an individual who has left the immediate vicinity of the premises before the warrant is executed. *See* Pet. for Cert., No. 11-770 (filed Dec. 16, 2011). That conflict is substantial, pressing, and ripe for the Court's review.

Amicus NACDL writes to emphasize two points. First, the broad, categorical authorization of police conduct approved by *Summers* is far afield from the more typical Fourth Amendment reasonableness analysis exemplified in *Terry v. Ohio*, 392 U.S. 1 (1968). Courts apply the bright-line rule of *Summers* to permit lengthy and sometimes uncomfortable detentions without a warrant, without probable cause, and without any individualized showing of reasonable suspicion. Moreover, the *Summers* rule permits this detention even when there is no evidence of any potential risk to the police officer. Because of this broad scope, it is essential to ensure that the boundaries of the rule are clear and encompass only those circumstances where a search would indeed be "reasonable."

Second, in a few contexts other than *Summers* this Court has laid down bright-line rules permitting the police to engage in searches or seizures without any need for individualized suspicion. These categorical rules have historically expanded over time, however, as lower courts apply the rule to ever more divergent contexts. Indeed, police conduct authorized by a categorical rule often comes to be seen as a police entitlement rather than a carefully struck compromise of competing concerns. When faced with situations where a categorical authorization has been extended by lower courts beyond the core circumstances that supported the original rule, this Court has not hesitated to realign the scope of the rule with its justifications, ensuring that the contours of the rule adhere to the essential Fourth Amendment requirement that all seizures be reasonable.

The rule of *Summers* has expanded beyond its justifications. It is being applied by a number of courts of appeals, including the court of appeals below, in ways at odds with its original rationale. This case perfectly illustrates the problem, and thus is an ideal vehicle for clarifying and confirming the limits on the *Summers* rule. Certiorari should be granted.

ARGUMENT

In this case, defendant Chunon Bailey was pulled over by the police about a mile from an apartment where the police had a search warrant. Pet. App. 24a-25a. He was told to exit his car, was patted down, and had his keys, wallet, and other personal items confiscated. Pet. App. 25a. The officers had not seen him break any laws, and found nothing incriminating or suspicious in their search. Pet. App.

3a-4a, 24a-25a. He was nevertheless questioned, handcuffed, put in the back of a police vehicle, and driven back to the apartment to await the results of a search of the premises. Pet. App. 26a. Police officers also seized his car, and an officer drove it back to the apartment. Pet. App. 25a.

This detention constituted a seizure within the meaning of the Fourth Amendment. *Summers*, 452 U.S. at 696; *Terry*, 392 U.S. at 16. The court of appeals held this seizure was categorically justified solely because the police had a valid warrant to search for contraband in the apartment where Bailey allegedly lived. Pet. App. 13a-16a. That ruling was incorrect, and illustrates a broader trend of decisions failing to enforce critical limits on police authority to detain persons ostensibly incident to a lawful premises search.

I. AT A MINIMUM, THE FOURTH AMENDMENT REQUIRES THAT ALL SEIZURES BE REASONABLE

A. Warrantless Seizures Are Generally Permitted Only After An Individualized Assessment Of Reasonableness

The Fourth Amendment prohibits "unreasonable searches and seizures." U.S. Const. amend. IV. For centuries, this Court has applied a "familiar threshold standard of probable cause for Fourth Amendment seizures," a standard that "reflects the benefit of extensive experience accommodating the factors relevant to the 'reasonableness' requirement of the Fourth Amendment, and provides the relative simplicity and clarity necessary to the implementation of a workable rule." *Summers*, 452 U.S. at 697.

The determination of whether probable cause exists must generally be made by a neutral and detached magistrate, rather than a police officer on the scene. *Terry*, 392 U.S. at 20. "[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967).

Terry v. Ohio is the classic example of an exception to the warrant requirement. Recognizing the safety concerns faced by police officers confronting unknown perils, the Court concluded that there was "a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual." *Terry*, 392 U.S. at 27.

This detention and search may be justified based on reasonable suspicion rather than probable cause, but the infringement on an individual's liberty must be "justified at its inception" based on a careful examination of the facts giving rise to reasonable suspicion. *Terry*, 392 U.S. at 20; *accord id.* at 27 ("[I]n determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience."). The suspicion must be specifically directed at the person being detained. *Ybarra v. Illinois*, 444 U.S. 85, 94 (1979). That is, based on the all the facts of the case, "a reasonably prudent man

in the circumstances [must] be warranted in the belief that his safety or that of others was in danger" from the subject of the detention and search. *Terry*, 392 U.S. at 27.

In addition to being justified at inception, any detention and search under *Terry* must be "reasonably related in scope to the circumstances which justified the interference in the first place." *Terry*, 392 U.S. at 20. Thus, an officer patting down a suspect must confine his search "to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer." *Terry*, 392 U.S. at 29. A search that seeks evidence rather than weapons is not permitted in this context, because the justification for the stop and frisk is officer safety. *Sibron v. New York*, 392 U.S. 40, 64-65 (1968). Notably, it is the government that bears the "burden to demonstrate that the seizure it seeks to justify on the basis of a reasonable suspicion was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure." *Florida v. Royer*, 460 U.S. 491, 500 (1983) (plurality opinion).

B. Unlike *Terry*, *Summers* Sets Out A Categorical Rule That Eliminates Any Particularized Inquiry Into Reasonableness

In many Fourth Amendment contexts, as in *Terry* searches, the Court has focused on the need for a fact-specific inquiry and "eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry." *Ohio v. Robinette*, 519 U.S. 33, 39 (1996) (quotation marks omitted). "The distinguishing feature of our criminal justice system is its insistence on principled, accountable decisionmaking in individual cases. If a person is to be

seized, a satisfactory explanation for the invasive action ought to be established by an officer who exercises reasoned judgment under all the circumstances of the case." *Maryland v. Wilson*, 519 U.S. 408, 422 (1997) (Kennedy, J., dissenting).

In a limited number of situations, however, the Court has adopted categorical rules, suggesting that they provide consistency and guidance for police officers on the street. *See Maryland v. Wilson*, 519 U.S. 408, 413 n.1 (1997) (fact that "we typically avoid per se rules concerning searches and seizures does not mean that we have always done so"); *Dunaway v. New York*, 442 U.S. 200, 219-20 (1979) (White, J., concurring).

In *Summers*, this Court considered whether police searching for contraband under a valid warrant could detain an occupant of the premises for the duration of the search. In answering in the affirmative, the Court's opinion weighed the justifications for detention against the infringement on individual liberty, concluding that the law enforcement interests in "preventing flight in the event that incriminating evidence is found," "minimizing the risk of harm to the officers," and facilitating "the orderly completion of the search" by having an occupant to assist in unlocking spaces outweighed a detention that was "'substantially less intrusive' than an arrest." *Summers*, 452 U.S. at 702-03 (citations omitted).

As the Court later made clear, the *Summers* rule is categorical—when it applies there is no need for an individualized determination of the reasonableness of the detention. *Muehler v. Mena*, 544 U.S. 93, 98 (2005). Rather, police searching for contraband

under a valid warrant may detain *all* occupants of the premises for the duration of the search even absent any individualized reason to think any of them poses a danger to the police. *Muehler*, 544 U.S. at 98.

Because of this categorical approach, *Summers* is often applied to permit more significant curtailments on personal liberty than would be authorized under the more typical Fourth Amendment inquiry tailored to individualized circumstances.

First, *Summers* permits the detention of occupants for the entire duration of a search, which sometimes takes hours. A two- to three-hour detention has been deemed "plainly permissible" under the *Summers* categorical rule. *Muehler*, 544 U.S. at 98, 100. Applying this rule, courts have upheld substantially prolonged detentions. *E.g.*, *Unus v. Kane*, 565 F.3d 103, 110 (4th Cir. 2009), cert. denied, 130 S. Ct. 1137 (2010) (detention longer than four hours "reasonable" and not false imprisonment); *Croom v. Balkwill*, 645 F.3d 1240, 1251-52 (11th Cir. 2011) (two hour detention of elderly and infirm woman reasonable under *Summers* and *Muehler*).

Second, *Summers* permits the use of reasonable force to effect the detention. *Muehler*, 544 U.S. at 98-99. Occupants accordingly are often shackled and left that way for hours as the search proceeds. *Muehler*, 544 U.S. at 100 (woman left in handcuffs for several hours, despite requests that they be removed because of pain); *Unus*, 565 F.3d at 110 (two women handcuffed in their residence and not permitted to wear their head scarves or pray outside presence of male officers); *Croom*, 645 F.3d at 1252-53 ("Though we are skeptical that the force alleged

was truly necessary under the circumstances, we cannot find a constitutional violation based on its usage.").

Third, some lower courts apply the *Summers* rule to permit the automatic detention of visitors to the premises—i.e., not just permanent residents of the dwelling. *See* 2 Wayne LaFave, *Search and Seizure* § 4.9 nn.123-26 (West 4th ed. 2011) (collecting cases showing wide disagreement and confusion on how to apply "occupant" requirement of *Summers*). *Summers* permitted the detention of all "occupants" of the premises but did not define that term, and many courts have construed *Summers* to authorize detention of "all persons present on the premises." *United States v. Sanchez*, 555 F.3d 910, 918 (10th Cir.), cert denied, 129 S. Ct. 1657 (2009); *see United States v. Bullock*, 632 F.3d 1004 (7th Cir. 2011) (detention of defendant allowed under *Summers* even though police knew defendant did not live in building).

Finally, as in this case, a number of courts have extended *Summers* to permit the detention of individuals who have left the immediate vicinity of the property. Here, for instance, the police had been surveying the house but had not begun the search when Bailey left the premises; the Second Circuit held that the police could search an occupant seen leaving the premises as long as he was "detained as soon as reasonably practicable thereafter." Pet. App. 3a-4a, 19a; *see United States v. Montieth*, 662 F.3d 660, 666-67 (4th Cir. 2011); *Bullock*, 632 F.3d at 1011; *United States v. Cavazos*, 288 F.3d 706, 712 (5th Cir. 2002); *United States v. Cochran*, 939 F.2d 337, 339 (6th Cir. 1991). Other courts have rejected this extension, concluding that the justifications un-

derlying *Summers* do not allow the seizure of those who have left the immediate vicinity of the premises to be searched. *E.g.*, *United States v. Edwards*, 103 F.3d 90, 93-94 (10th Cir. 1996); *United States v. Sherrill*, 27 F.3d 344, 345-46 (8th Cir. 1994).

In sum, *Summers* allows detention without an individualized finding of reasonable suspicion, and allows a far broader scope of detention than would be allowed under *Terry*. In this case, for example, the detention, handcuffing, and transportation in the police car in this case could not qualify as a valid investigatory detention under *Terry*. *See, e.g.*, *Royer*, 460 U.S. at 504-05 (holding scope of valid *Terry* stop exceeded when officers required suspect to move to a different room to await the results of a search of the suspect's luggage); *Terry*, 392 U.S. at 20 (stop must be "reasonably related in scope to the circumstances which justified the interference in the first place"); *cf. Croom*, 645 F.3d at 1251 n.15 (unlike a *Terry* stop, *Summers* allows detention for longer than the time necessary to dispel the officer's suspicions). Because *Summers* authorizes seizures undertaken without any individualized consideration that may too easily exceed the limits of reasonableness, the boundaries of the rule must be clearly drawn and strictly enforced.

II. THIS COURT HAS NOT HESITATED TO IMPOSE LIMITS ON BRIGHT-LINE RULES WHEN THEY EXPAND BEYOND THEIR JUSTIFICATIONS

Summers is not the only context in which this Court has applied a categorical rule permitting certain police conduct under the Fourth Amendment. The most notable other example is the rule that, in-

cident to a custodial arrest, the police have categorical authority to search the arrestee without the need to analyze whether it is reasonably likely that evidence or weapons would be found. *Chimel v. California*, 395 U.S. 752 (1969); *United States v. Robinson*, 414 U.S. 218 (1973). As a corollary of this rule, this Court held that "when a policeman has made a lawful custodial arrest of the occupant of an automobile he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." *New York v. Belton*, 453 U.S. 454, 460 (1981).

As history shows, however, the bright-line rules set out by this Court inevitably expand as lower courts struggle to apply them to a host of different factual situations. The rule permitting a search incident to custodial arrest provides a useful illustration of this process of expansion over time—an expansion similar to the courts' improper inflation of the *Summers* rule in this case.

After years of applying this Court's *Belton* decision authorizing a search of the passenger compartment of a vehicle, "lower court decisions seem[ed] to treat the ability to search a vehicle incident to the arrest of a recent occupant as a police entitlement rather than as an exception justified by the twin rationales" on which the rule was based. *Thornton v. United States*, 541 U.S. 615, 624 (2004) (O'Connor, J., concurring in part); *see Arizona v. Gant*, 556 U.S. 332, 129 S. Ct. 1710, 1715 (2009) ("When asked at the suppression hearing why the search was conducted, [the police officer] responded: 'Because the law says we can do it.'"); *cf. Chimel*, 395 U.S. at 767 (under earlier broad categorical rule, police could

take "the opportunity to engage in searches not justified by probable cause, by the simple expedient of arranging to arrest suspects at home rather than elsewhere.").[2]

The decision in *Belton* had been grounded in earlier holdings, notably *Chimel v. California*, 395 U.S. at 763, which concluded that an exception to the warrant requirement was justified in the case of a custodial arrest because of concerns for officer safety and evidence preservation, *viz.*, the fear than an arrestee might grab a gun or destroy evidence within his reach. *Chimel*, 395 U.S. at 763. These concerns lead the *Chimel* Court to find categorical justification "for a search of the arrestee's person and the area 'within his immediate control'—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence." *Id.*

Despite the fact that *Belton* had rested on this earlier rule and relied on the same safety and evidentiary justifications, the opinion did not specifically limit the permissible vehicle search to only those areas within the arrestee's immediate control. *Belton*, 453 U.S. at 460. The opinion thus became "widely understood to allow a vehicle search incident to the arrest of a recent occupant even if there is no

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[2] The decision below, like other decisions extending the *Summers* rule to individuals who have left the premises, similarly treats a *Summers* detention as a police "right." *E.g.*, Pet. App. 13a ("There is no basis for drawing a 'bright line' test under *Summers* at the residence's curb and finding that the authority to detain under *Summers* always dissipates once the occupant of the residence drives away." (alteration and internal quotation marks omitted)).

possibility the arrestee could gain access to the vehicle at the time of the search." *Gant*, 129 S. Ct. at 1718. Thus, many lower courts permitted the police to engage in a full vehicle search even when the arrestee was handcuffed or had already left the scene. *Thornton*, 541 U.S. at 628; *Gant*, 129 S. Ct. at 1718 & nn.2-3.

Just two years ago, this Court in *Gant* stepped in to realign the *Belton* rule with its underlying justifications. In seeking to uphold a broad reading of *Belton*, the state argued that its "expansive rule correctly balances law enforcement interests, including the interest in a bright-line rule, with an arrestee's limited privacy interest in his vehicle." *Gant*, 129 S. Ct. at 1720. The Court disagreed. The state's analysis "seriously undervalues" the individual privacy concerns, the Court explained, and at the same time "exaggerates the clarity that its reading of *Belton* provides." *Id.* Observing that lower courts had split on several issues in applying *Belton*, the Court noted that the rule "has thus generated a great deal of uncertainty, particularly for a rule touted as providing a 'bright line.'" *Gant*, 129 S. Ct. at 1720-21.

Rather than the broad reading of *Belton* adopted by lower courts, the *Gant* Court concluded that "[t]o read *Belton* as authorizing a vehicle search incident to every recent occupant's arrest would . . . 'untether the rule from the justifications underlying the *Chimel* exception.'" 129 S. Ct. at 1719. After detailed analysis of the underlying justifications for the rule, the Court concluded that a search incident to arrest is allowed "only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search." *Id.*

This same series of events—this Court setting out a categorical authorization of specific police conduct, which then expanded over time in the lower courts until the scope of the rule became unmoored from its justifications—has been repeated time and again. For instance, lower courts applying the rule set out by the Court allowing a search incident to arrest, *see Chimel*, 395 U.S. at 763, extended this rule to uphold searches incident to a mere citation when the suspect was not taken into custody. In *Knowles v. Iowa*, 525 U.S. 113 (1998), this Court rejected the expansion of the rule as inconsistent with its underlying rationales. *Id.* at 114.

Similarly, this Court long ago suggested that officers could search a house if arresting one of its occupants. *E.g.*, *Agnello v. United States*, 269 U.S. 20, 30 (1925). Over time, however, lower courts began to expand the doctrine of search incident to arrest to justify the search of the inside of a house when an occupant of that house was arrested outside. That doctrinal expansion was restricted by this Court in *Vale v. Louisiana*, 399 U.S. 30, 35 (1970). In *Vale*, the Court emphasized that the mere fact the police thought evidence might be inside the house was an insufficient basis for limiting Fourth Amendment rights. *Id.* at 33-34. The Court noted that the officers had been able to procure warrants for the arrest of the individual, and had information that he was resided at the address where they found him, and there was "thus no reason, so far as anything before us appears, to suppose that it was impracticable for them to obtain a search warrant as well." *Id.* at 35.

* * *

A conclusion that the *Summers* rule does not extend to those in the petitioner's situation would not mean that the police can never search an occupant who leaves the premises shortly before a search warrant is executed. The police have a substantial arsenal of tools available to ensure the detention of suspects when the facts justify it. *Cf. Chimel*, 395 U.S. at 764 n.9 (noting that rule limiting scope of categorical search does not exclude other potential justifications under Fourth Amendment for broader search). But when the facts do *not* justify detention, there should be no detention. Lower courts have too often failed to appreciate the boundaries of the *Summers* category—boundaries that are critical to minimizing the infringement on personal liberty a *Summers* detention represents. The Court should grants certiorari to reiterate those boundaries, and it should reverse the decision below to enforce them.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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