No. 11-770

In the Supreme Court of the United States

CHUNON BAILEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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In the decision under review, the Second Circuit carefully catalogued a preexisting circuit conflict on the question whether, pursuant to *Michigan* v. *Summers*, 452 U.S. 692 (1981), police officers may detain an individual incident to the execution of a search warrant when the individual has left the immediate vicinity of the premises to be searched. See Pet. App. 10a-13a. And after extensive analysis, the Second Circuit came down on one side of that conflict, holding that such a detention is permissible. See *id.* at 13a-16a.

In the face of the Second Circuit's opinion, the government does not seriously dispute that a conflict exists. The government nevertheless contends that the conflict does not warrant the Court's review at this time and in this case. But the government offers no valid reason

why the Court should abstain from resolving the conflict at this time. And the purported vehicle problems the government identifies with this case are illusory and pose no obstacle to the Court's resolution of the question presented. For the reasons stated in the petition, this case is a straightforward and compelling candidate for certiorari.

1. a. In its brief in opposition, the government essentially concedes the existence of a conflict. See, *e.g.*, Br. in Opp. 12 (acknowledging that "some tension exists over the reach of *Summers*"); *id.* at 13 (contending that decisions of the Eighth, Ninth, and Tenth Circuits "appl[y] *Summers* in a way that * * * is incorrect"). That concession was wise, because not only the Second Circuit in this case, but numerous other courts—and even the government itself in its brief below—have acknowledged the conflict. See, *e.g.*, *United States* v. *Montieth*, 662 F.3d 660, 666-667 (4th Cir. 2011); *United States* v. *Bullock*, 632 F.3d 1004, 1019-1020 (7th Cir. 2011); Gov't C.A. Br. 29. To be sure, the government picks at the edges of the cases on petitioner's side of the conflict. See Br. in Opp. 13-15, 17-18. But the government ultimately does not dispute that, under the legal standards established in each of those cases, a detention of the type that occurred here would be invalid under *Summers*. That is all that is required to establish a conflict satisfying the criteria for certiorari.

b. The government instead advances two prudential reasons why, in its opinion, the conflict does not "currently" warrant the Court's review. Br. in Opp. 8; see *id.* at 15-17. Both of those reasons are unavailing.

First, seemingly inspired by a footnote in an unpublished opinion, the government contends that further review would be premature in light of the Court's decision in *Muehler* v. *Mena*, 544 U.S. 93 (2005). See Br. in Opp.

15-17. Even if all of the decisions on petitioner's side of the conflict had predated *Muehler* (and none of the state-court decisions do, see Pet. 10-11), *Muehler* does not bear, even tangentially, on the question presented here.

The actual holding of *Muehler* was that, *during* a valid *Summers* detention, the police may detain the occupants of the premises in appropriate restraints and question them even on unrelated subjects. See 544 U.S. at 100, 101. In the passing statement on which the government relies, by contrast, *Muehler* merely clarified what *Summers* had already established: *viz.*, that the rule that officers executing a search warrant may detain the occupants of the premises is a "categorical" one. *Id.* at 98; see *Summers*, 452 U.S. at 703-704, 705 n.19. In so stating, the Court in no way altered the approach courts should follow in determining the *reach* of that categorical rule—and, specifically, in considering whether to extend the rule beyond the circumstances presented in *Summers* (where the detention occurred within the immediate vicinity of the premises to be searched).

Both before and after *Muehler*, the correct methodology is to analyze the applicability of the rationales that justified the categorical rule in the first place. That is the methodology this Court used in *Arizona* v. *Gant*, 556 U.S. 332 (2009), when it declined to extend the analogous categorical rule of *New York* v. *Belton*, 453 U.S. 454 (1981). See NACDL Br. 10-14. That is the methodology the government itself uses in arguing that the Second Circuit's holding in this case was correct. See Br. in Opp. 8-12. And that is the methodology the courts on petitioner's side of the conflict have used in holding that detentions are invalid under *Summers*—even if there has inevitably been some variation in emphasis in those courts' analyses of the *Summers* rationales. See, *e.g.*, *United States* v. *Sherrill*, 27 F.3d 344, 346 (8th Cir.)

(noting that the occupant was unaware of the search warrant when he was stopped), cert. denied, 513 U.S. 1048 (1994); *Commonwealth* v. *Charros*, 824 N.E.2d 809, 816 (Mass.) (observing that the location of the stop had no connection to the premises to be searched), cert. denied, 546 U.S. 870 (2005).

Second, the government resorts to the last refuge of a party opposing certiorari: a suggestion that the conflict in the lower courts will eventually resolve itself. See Br. in Opp. 15-17. That may be a valid justification for denying certiorari where the petitioner is relying on the decision of an outlying circuit in a lopsided conflict, especially if that decision predates the conflicting decisions. But it carries little weight where, as here, there are *three* circuits (and at least three state courts of last resort) that have held *Summers* inapplicable when the detained individual has left the immediate vicinity of the premises to be searched—and where all but one of those decisions *postdate* at least one of the conflicting decisions. See *United States* v. *Cochran*, 939 F.2d 337 (6th Cir. 1991), cert. denied, 502 U.S. 1093 (1992).

The only affirmative indication the government cites for the proposition that any of those courts are backing away from their position is an unpublished decision of the Tenth Circuit. See Br. in Opp. 15-16 (citing *United States* v. *Castro-Portillo*, 211 Fed. Appx. 715, cert. denied, 552 U.S. 829 (2007)).[*] If unpublished decisions are relevant to the analysis, however, two can play that

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[*] The government also cites *United States* v. *Davis*, 530 F.3d 1069 (9th Cir. 2008). See Br. in Opp. 17. But *Davis* is inapposite because it involved the detention of an individual who came to the premises while the search was ongoing (and was in the driveway when detained). See 530 F.3d at 1075.

game. See, *e.g.*, *United States* v. *Chambers*, 132 Fed. Appx. 25, 31-32 (5th Cir. 2005) (per curiam) (suggesting that one of the cases on the government's side of the conflict—*United States* v. *Cavazos*, 288 F.3d 706 (5th Cir.), cert. denied, 537 U.S. 910 (2002)—should be limited to its facts). In the two decades the conflict has existed, no court on either side has actually reversed course. The odds that *all* of the courts on petitioner's side will do so—a process that would require en banc review in three federal circuits—are longer than those of drawing to an inside straight.

2. Perhaps recognizing the existence of a conflict otherwise warranting this Court's review, the government uncharacteristically begins its cert-stage brief with an extended discussion of the merits. See Br. in Opp. 8-12. For present purposes, it should suffice to note that the parties' sharply contrasting views about the applicability of the *Summers* rationales underscore the need for this Court's review. Compare *ibid.* with Pet. 13-17. But one point demands a response here.

The government contends (Br. in Opp. 9, 11-12) that the detention of an individual away from the immediate vicinity of the premises to be searched is justified by the interests in preventing flight and minimizing the risk of harm to officers, even where the individual has no reason to know that a search is imminent. To begin with, it is worth reflecting on the relative implausibility of the scenario that such an individual would subsequently learn of the search and then return to the scene in an attempt to overpower the police. But even leaving that aside, the government's approach would seemingly justify detaining any individual believed to be an occupant of the premises to be searched, regardless of where the detention occurs—whether at the individual's workplace, at the supermarket, or in the next town over. Under such an ap-

proach, the issuance of a search warrant would justify the functional equivalent of a pre-search arrest of anyone associated with the place to be searched—even though the very point of a search warrant will ordinarily be to establish probable cause to *justify* an arrest in the first place. That cannot be the law, and it illustrates why clarification of the boundaries of the *Summers* rule is sorely needed.

3. The government briefly identifies two purported vehicle problems with this case. See Br. in Opp. 18-20. Those problems are illusory and pose no obstacle to the Court's resolution of the question presented.

First, the government contends (Br. in Opp. 18-19) that petitioner's detention could be justified under *Terry* v. *Ohio*, 392 U.S. 1 (1968), based solely on the fact that petitioner (like the other man in the car) matched a sketchy description of a suspect provided by a confidential informant. But as the government acknowledges (Br. in Opp. 8), the court of appeals expressly declined to consider that basis for the detention. See Pet. App. 16a n.7. And as the government also acknowledges (Br. in Opp. 18), any argument that *Terry* justifies the detention is in no way logically antecedent to, or dependent upon the resolution of, the question presented here. Should this Court hold that the rule of *Summers* does not extend to petitioner's detention, therefore, it could readily leave the discrete *Terry* issue for the court of appeals on remand in the event of a reversal—as it has previously done in materially identical circumstances. See, *e.g.*, *Michigan* v. *Long*, 463 U.S. 1032, 1053 (1983).

Second, the government contends (Br. in Opp. 19-20) that any error in admitting the fruits of the detention was harmless. The government made that argument only in passing below, see Gov't C.A. Br. 34-35, and for good reason. The government does not dispute that the

central issue at petitioner's trial was whether the prosecution could link petitioner to the guns and drugs found in the apartment. See Pet. 5. Nor does it dispute that, in attempting to do so, the prosecution heavily relied on the fruits of the detention—*viz.*, the key to the apartment and the statements made by petitioner seeming to identify the apartment as his residence. See *ibid.*; Pet. C.A. Br. 24 n.5, 25 n.6 (quoting the prosecution's extensive statements at trial regarding that evidence). In light of the centrality of that issue and that evidence, it is certainly not clear *beyond a reasonable doubt* that petitioner would have been convicted on the basis of the much more circumstantial evidence on which the government relies (including the testimony of an ex-convict)—particularly given the testimony of the building's owner that she had rented the apartment not to petitioner but to another man. See Pet. C.A. Br. 21, 22-24. And as with the *Terry* issue, this Court could readily leave any harmless-error inquiry for the court of appeals on remand in the event of a reversal—as the Court has indicated it prefers to do. See, *e.g.*, *Rose* v. *Clark*, 478 U.S. 570, 584 (1986).

* * * * *

At bottom, the case for certiorari here is a simple one. There is a deep, longstanding, and widely recognized conflict on the reach of the *Summers* rule. And if the Court is interested in resolving that conflict, it will never have a better opportunity to do so than it does in this case. The Court should grant review and decide once and for all an important question of Fourth Amendment law.

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The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 2012