No. 11-770

In the Supreme Court of the United States

CHUNON L. BAILEY, A/K/A POLO, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

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 before the warrant is executed.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 652 F.3d 197. The court of appeals' order denying rehearing (Pet. App. 21a) is unreported. The order of the district court denying petitioner's motion to suppress (Pet. App. 22a-57a) is reported at 468 F. Supp. 2d 373.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 2011. A petition for rehearing was denied on September 20, 2011 (Pet. App. 21a). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

In *Michigan* v. *Summers*, 452 U.S. 692 (1981), the Court adopted the categorical rule that officers executing a search warrant for contraband may detain the occupants of the premises while the search is conducted. This case presents the question whether the rule of *Summers* extends to the detention of a former occupant who has left the immediate vicinity of the premises before the warrant is executed.

In this case, officers followed petitioner from the apartment to be searched and detained him approximately a mile away. During the detention, the officers discovered a key to the apartment on petitioner's person, and petitioner made statements linking himself to the apartment. In the course of the search, officers found guns and drugs, and petitioner was later charged with various federal offenses. The district court denied petitioner's motion to suppress the fruits of his detention, Pet. App. 22a-57a, and petitioner was convicted. The court of appeals affirmed, holding that the rule of *Summers* extends to the detention of a former occupant who has left the immediate vicinity of the premises. *Id.* at 1a-20a. The court of appeals' holding was incorrect, and its judgment should be reversed.

1. At 8:45 p.m. on Thursday, July 28, 2005, Officer Richard Sneider of the Suffolk County, New York, police department obtained a warrant to search the basement apartment of a house at 103 Lake Drive in the hamlet of Wyandanch. The warrant identified a .380-caliber handgun as the principal object of the search. The warrant application was based entirely on a tip provided a few hours earlier by a confidential informant, a serial offender who had been picked up for driving a stolen car. The informant claimed that he had seen the gun the previous weekend, when he had been at the apartment to purchase drugs from "a heavy set black male with short hair" known as "Polo." J.A. 16-26, 81-83, 186-187; Pet. App. 3a, 23a.

Shortly before the warrant issued, two other officers, Daniel Fischer and Richard Gorbecki, arrived at the house in an unmarked car. They parked nearby and began surveilling the property. After obtaining the warrant, Officer Sneider arrived on the scene and swapped places with Fischer. All search warrants in Suffolk County are executed by an Emergency Services Unit, the functional equivalent of a Special Weapons and Tactics (SWAT) team. While Sneider and Gorbecki continued to surveil the property, Fischer met with the Emergency Services Unit and an additional team of officers on hand to conduct the actual search. J.A. 34-45, 61-67, 82-84, 95-100, 121-125; Pet. App. 3a, 24a.

Around 9:56 p.m., Officers Sneider and Gorbecki observed two men coming out from a gate at the top of stairs to the basement (through which there was access both to the basement apartment and, via a connecting door, to the upstairs portion of the house). The two men were petitioner and another individual, Bryant Middleton; both men fit the generic description of "Polo" provided by the informant. The officers watched as the men

got into a car and drove away, with petitioner behind the wheel. There is no indication that the men were aware of the officers' presence at the time they left the scene; Middleton later told the police that petitioner was driving him home because he was subject to a 10 p.m. parole curfew. J.A. 45-47, 55, 66-69, 83-85, 99-103; Pet. App. 3a-4a, 24a.

Officers Sneider and Gorbecki called Officer Fischer to inform him that they intended to follow and detain the men. Shortly after getting the call, Fischer led the entry and search teams from the staging area to execute the warrant. After the car was a couple hundred yards down the street, Sneider and Gorbecki began following it. In order to avoid alerting the men to their presence, the officers initially did not turn on their headlights. The officers followed the men for approximately a mile; during that time, they observed the car proceeding through two traffic lights and two stop signs, and making multiple turns, without any traffic infractions. J.A. 46-50, 68-72, 85-86, 101-105, 126-127; Pet. App. 4a, 24a.

About five minutes after leaving the scene, the officers pulled over the car in a well-lit area next to the Wyandanch fire station. The officers ordered the men to get out of the car and conducted a pat-down search of each man. Although the officers found no weapons or contraband, they found and seized petitioner's keys, which, according to the officers, he had placed in his pants pocket after the initial stop. Officer Sneider proceeded to question petitioner; when Sneider asked petitioner where he was coming from, he said he was coming from his house at 103 Lake Drive. But when Sneider asked for identification, petitioner produced a driver's license with an address in Bay Shore, a hamlet several miles away. J.A. 48-56, 72-76, 86-89, 105-111; Pet. App. 4a, 25a.

The men were then handcuffed. When petitioner asked why they were being arrested, Officer Gorbecki told him that they were not under arrest, but instead were being detained incident to the execution of a search warrant at 103 Lake Drive. In response, petitioner said: "I don't live there. Anything you find there ain't mine, and I'm not cooperating with your investigation." J.A. 56-58, 75-79, 90-91, 110-111; Pet. App. 4a-5a, 26a.

Officers Sneider and Gorbecki then called for backup; additional officers arrived in a marked police car and transported petitioner and Middleton back to 103 Lake Drive. Sneider drove the unmarked car back, and Gorbecki drove petitioner's car. By the time the cars returned to the scene, the Emergency Services Unit had entered and secured the apartment and observed a gun and drugs in plain view. Petitioner and Middleton were then formally placed under arrest. Officers later found two additional guns in the apartment, along with ammunition and drug-related paraphernalia; none of the guns was a .380-caliber handgun. Officers also discovered that one of the keys seized from petitioner during the detention opened the door of the apartment. J.A. 27-28, 58-60, 72, 91-93, 111-115, 132-165; Pet. App. 5a, 26a-27a.

2. On April 6, 2006, a grand jury in the Eastern District of New York indicted petitioner on one count of possessing at least five grams of cocaine base with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(B)(iii); one count of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2); and one count of possessing a firearm in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A)(i). Petitioner moved to suppress the key and his statements on the ground, *inter alia*, that they constituted the fruits of an invalid detention under the Fourth Amendment.

The district court denied petitioner's motion to suppress. Pet. App. 22a-57a. As is relevant here, the court held that, although petitioner had been detained after leaving the immediate vicinity of the apartment, his detention was justified under *Summers* as a valid detention incident to the execution of a search warrant. *Id.* at 28a-35a. The court determined that, "because [petitioner] was observed leaving the basement apartment at 103 Lake Drive that was about to be searched pursuant to a warrant, the police had the legal authority under *Summers* to detain [him] for a reasonable period during the execution of the search." *Id.* at 28a.

The district court rejected petitioner's contention that *Summers* was "inapplicable to the instant case because [he] was not detained at the residence, but rather was followed a few blocks by police from the residence before he was detained." Pet. App. 28a-29a. In the court's view, "the holding and rationale of [*Summers*] apply with equal force when, for officer safety reasons, police do not detain the occupant on the curbside, but rather wait for him to leave the immediate area and detain him as soon as practicable." *Id.* at 34a n.4.

3. The case proceeded to trial. There, the central issue was whether petitioner had been in possession of the guns and drugs that were the subject of the indictment. In attempting to link petitioner to those items, the prosecution presented no forensic evidence, nor any evidence concerning the registration of the guns. Instead, the prosecution heavily relied on the fruits of the detention—the key and petitioner's statements—as evidence that petitioner was living at the apartment. See, *e.g.*, Tr. 26-28, 36-38 (Nov. 6, 2006). For its part, the defense presented the testimony of the house's owner, who testified that, at the time, she was renting the apartment not to petitioner but to another man. See *id.* at 77-78.

After three days of deliberation—in the course of which the jury asked the judge to reread the instructions defining reasonable doubt and possession, Tr. 857 (Nov. 7, 2006)—the jury found petitioner guilty on all three counts. The district court sentenced petitioner to 30 years of imprisonment, to be followed by five years of supervised release. Pet. App. 1a-2a.

4. The court of appeals affirmed petitioner's conviction, rejecting the contention that his detention was invalid under *Summers*. Pet. App. 1a-20a.[1]

At the outset, the court of appeals correctly noted that, under *Summers*, "the detention of 'occupants' even without individualized suspicion during the execution of a valid search warrant is reasonable under the Fourth Amendment." Pet. App. 9a. In addition, the court of appeals correctly recognized that this case presented a question not answered by *Summers*: namely, "whether the same authority pursuant to which police officers may detain an occupant *at* the premises during the execution of a search warrant permits them to detain an occupant who *leaves* the premises during or immediately before the execution of a search warrant and is detained a few blocks away." *Id.* at 10a.

After cataloguing a circuit conflict on the question, the court of appeals sided with those courts that "ha[d] extended *Summers* on facts similar to those of this case." Pet. App. 10a. According to the court of appeals, "[t]he

[1] After petitioner was convicted, he filed a motion to vacate sentence under 28 U.S.C. 2255, raising a single claim of ineffective assistance of counsel. The district court denied that motion, and petitioner appealed. The court of appeals consolidated that appeal with petitioner's direct appeal and, in the decision under review, affirmed the denial of the Section 2255 motion. See Pet. App. 17a-19a. Petitioner is not challenging that aspect of the court of appeals' decision.

guiding principle behind the requirement of reasonableness for detention in such circumstances is the *de minimis* intrusion characterized by a brief detention in order to protect the interests of law enforcement in the safety of the officers and the preservation of evidence." *Id.* at 13a. "[I]t is the very interests at stake in *Summers*," the court suggested, "that permit detention of an occupant nearby, but outside of, the premises." *Id.* at 14a.

The court of appeals contended that a contrary rule "would put police officers executing a warrant in an impossible position." Pet. App. 14a. The court explained that, when officers observed someone leaving a place to be searched, "they would be required either to detain him immediately (risking officer safety and the destruction of evidence) or to permit him to leave the scene (risking the inability to detain him if incriminating evidence was discovered)." *Ibid.*

The court of appeals acknowledged that "*Summers* imposes upon police a duty based on both geographic *and* temporal proximity." Pet. App. 15a. Like the district court, however, the court of appeals refused to draw a "bright line" around the premises to be searched. *Id.* at 13a. Instead, it concluded that "*Summers* authorizes law enforcement to detain the occupant of premises subject to a valid search warrant when that person is seen leaving those premises and the detention is effected *as soon as reasonably practicable*." *Id.* at 19a.[2]

5. The court of appeals subsequently denied rehearing. Pet. App. 21a.

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[2] In light of its holding that petitioner's detention was justified under *Summers*, the court of appeals expressly declined to consider whether the detention could alternatively be justified under *Terry* v. *Ohio*, 392 U.S. 1 (1968). See Pet. App. 16a n.7.

SUMMARY OF ARGUMENT

The court of appeals in this case erred when it extended the categorical rule of *Michigan* v. *Summers*, 452 U.S. 692 (1981), to the detention of a former occupant who has left the immediate vicinity of the premises to be searched before the warrant is executed.

A. The *Summers* rule constitutes a narrow exception to the default Fourth Amendment principle that the seizure of a person is valid only if it is based on probable cause. In *Summers*, the Court held that officers executing a search warrant for contraband have the authority to detain the occupants of the premises while the search is being conducted. The Court articulated two primary justifications for that rule: first, that such detentions are necessary to minimize the risk of harm to the officers executing the warrant, and second, that such detentions serve to facilitate the orderly completion of the search.

B. In this case, the court of appeals extended the *Summers* rule. The Court repeatedly emphasized in *Summers* that it was establishing a rule that governed the detention of the occupants of the premises—not the detention of a former occupant who has left the scene entirely before the search begins. As this case illustrates, the latter type of detention meaningfully differs from the former; in fact, it cannot comfortably be said to be incident to the execution of the search warrant at all. One set of officers followed petitioner from the apartment to be searched for approximately a mile, and then detained him at the same time as different teams of officers executed the search warrant back at the apartment. In addition, whereas *Summers* involved the detention of an individual in the privacy of his own home, the officers in this case detained petitioner in full public view for several minutes before handcuffing him and

transporting him in a marked police car back to the apartment.

C. The court of appeals' extension of the *Summers* rule to this case was erroneous. Under the methodology set out in cases such as *Arizona* v. *Gant*, 556 U.S. 332 (2009), the relevant inquiry is whether the justifications supporting the categorical rule of *Summers* apply with the same or similar force to detentions that occur away from the immediate vicinity of the premises to be searched. They do not. Most notably, an individual who has left the premises before the warrant is executed presents minimal risk, if any, to the officers executing the warrant. An individual who is not present at the scene poses no threat of sudden violence to the officers; indeed, as in this case, such an individual will ordinarily have no reason to know that a search is imminent. Similarly, the detention of such an individual does not materially advance the interest in facilitating the orderly completion of the search. An individual who is not present cannot interfere with the search by destroying or concealing evidence or distracting officers from the task at hand.

The government's contrary argument relies on the possibility that an individual who has left the premises will be tipped off about the search and come storming back to thwart it. That highly speculative possibility does not justify extension of the *Summers* categorical rule. And the government's argument proves far too much, because it would seemingly justify the detention of any persons associated with the premises to be searched, on the theory that they could learn about the search—regardless of whether those persons have been seen leaving the scene and regardless of where they are found. *Summers* does not create a police entitlement to

conduct detentions under any circumstances. Yet that is the inevitable implication of the government's position.

In *Summers*, the Court also noted that the government has a legitimate interest in preventing flight in the event that incriminating evidence is found. Standing alone, that interest cannot support extension of the *Summers* rule. A contrary understanding would authorize detentions based simply on the hope that the ensuing search will *produce* probable cause, notwithstanding the default rule that detentions *require* probable cause. In any event, the probability that an individual who has left the scene will learn of the search is slight, and officers have less intrusive means at their disposal for ensuring that such an individual will not flee. The mere fact that it may be convenient to have persons associated with the premises close at hand in the event incriminating evidence is found does not justify a detention in the absence of individualized suspicion; the Fourth Amendment does not authorize anticipatory arrests based on officer convenience.

D. In addition, the detention of a former occupant who has left the immediate vicinity of the premises to be searched is more intrusive than a detention covered by the *Summers* rule. Where the initial seizure occurs in a public place away from the premises, it produces almost all of the indignity of a full-fledged arrest. The individual is likely to be detained in full public view for at least several minutes, and, where officers decide to return the individual to the scene, he is likely to be subjected to the additional indignities of being placed in handcuffs and being transported in a police car. The potential for exploitative questioning is also far greater, because the officers conducting the detention will inevitably be focused on the detained individual rather than on the search.

E. Finally, the court of appeals' standard, under which the detention of a former occupant who has left the scene would be permissible as long as it is effected "as soon as reasonably practicable," suffers from several additional flaws. That standard negates the advantage of the *Summers* bright-line rule and creates administrability problems, because it invites judicial second-guessing about whether departing occupants could have been pulled over more quickly. And there is no correlation between any of the potential justifications for a detention incident to the execution of a search warrant and the speed with which it occurs. Any extension of the *Summers* rule would also create an incongruity with other Fourth Amendment categorical rules, which contain limitations closely analogous to the "immediate vicinity" limitation embodied in *Summers* itself. And any such extension would be difficult to reconcile with the original understanding of the Fourth Amendment, because it would threaten to create a freestanding right to seize persons that flows from, yet operates independently of, the warrant-created right to search for and seize contraband at a particular location.

A detention incident to the execution of a search warrant is not an end in itself; it is a means of enabling the safe and effective completion of the search. The detention of a former occupant who has left the immediate vicinity of the premises to be searched does little or nothing to facilitate the execution of the warrant. This Court should clarify the rightful bounds of the *Summers* rule and reverse the court of appeals' erroneous judgment.

ARGUMENT

PETITIONER'S DETENTION INCIDENT TO THE EXECUTION OF A SEARCH WARRANT WAS INVALID UNDER THE FOURTH AMENDMENT

In relevant part, the Fourth Amendment of the Constitution guarantees that "[t]he right of the people to be secure in their persons * * * against unreasonable * * * seizures[] shall not be violated," and further provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. Amend. IV. The court of appeals in this case erred by holding that petitioner was validly seized and detained incident to the execution of a search warrant.

A. In *Michigan* v. *Summers*, The Court Held That Officers Executing A Search Warrant For Contraband May Detain The Occupants Of The Premises Without Individualized Suspicion

1. As this Court has recognized, the "general rule" under the Fourth Amendment is that the seizure of a person is valid only if it is based on probable cause. *Dunaway* v. *New York*, 442 U.S. 200, 213 (1979). The requirement of probable cause "has roots that are deep in our history," *Henry* v. *United States*, 361 U.S. 98, 100 (1959), and "reflects the benefit of extensive experience accommodating the factors relevant to the 'reasonableness' requirement of the Fourth Amendment," *Dunaway*, 442 U.S. at 213. A neutral magistrate must pass on the existence of probable cause either in advance of the seizure (by issuing an arrest warrant) or promptly thereafter. See, *e.g.*, *County of Riverside* v. *McLaughlin*, 500 U.S. 44, 55-57 (1991).

In *Terry* v. *Ohio*, 392 U.S. 1 (1968), this Court recognized that an officer may also conduct a seizure of a person based on reasonable suspicion—a "less demanding standard" than probable cause. *Alabama* v. *White*, 496 U.S. 325, 330 (1990). When an officer has only reasonable suspicion, however, the Fourth Amendment imposes corresponding limits on the scope and duration of the ensuing detention: the officer must "diligently pursue[] a means of investigation that [is] likely to confirm or dispel [the officer's] suspicions quickly," *United States* v. *Sharpe*, 470 U.S. 675, 686 (1985), and the detention may not be "prolonged beyond the time reasonably required to complete that mission," *Illinois* v. *Caballes*, 543 U.S. 405, 407 (2005).

2. In *Michigan* v. *Summers*, 452 U.S. 692 (1981), this Court held that officers executing a search warrant for contraband have the authority to detain the occupants of the premises while the search is being conducted. *Id.* at 705. The Court emphasized that, in conducting such a detention, officers were "not required to evaluate either the quantum of proof justifying detention or the extent of the intrusion to be imposed by the seizure." *Id.* at 705 n.19. The Court has since made clear that the rule of *Summers* is a "categorical" one: it applies whenever the detained individual is "an occupant of [the premises] at the time of the search," regardless of whether the officer has any particular reason to believe that the individual is involved in the criminal activity that is the subject of the warrant. *Muehler* v. *Mena*, 544 U.S. 93, 98 (2005).

Like other categorical rules this Court has recognized, the rule of *Summers* thus stands as an exception to the default mode of Fourth Amendment analysis, which requires case-by-case review of the justifications for, and intrusiveness of, a particular search or seizure.

Among those categorical rules, however, the *Summers* rule is the only one that supports the detention of an individual, solely for ordinary law-enforcement purposes, without any degree of individualized suspicion. Cf. *City of Indianapolis* v. *Edmond*, 531 U.S. 32, 40-47 (2000) (explaining that ordinary law-enforcement purposes are insufficient to justify vehicle checkpoints).[3]

One other preliminary point bears noting. Although the Court emphasized in *Summers* that a detention incident to the execution of a search warrant is only incrementally more intrusive than the search itself, see 452 U.S. at 701-702, such a detention nevertheless imposes significant restrictions on an individual's liberty. In some respects, those restrictions can actually be more burdensome than those permitted in a *Terry* stop, and more closely resemble those permitted in a full-fledged arrest. Officers need not take any additional action to confirm or dispel an individual's involvement in the criminal activity being investigated, but instead may detain the individual until the search is completed—which can take several hours. See *Muehler*, 544 U.S. at 100. During that time, officers may detain the individual in appropriate restraints, such as handcuffs. See *ibid.* And while the search is being conducted, officers may question the individual not only about the criminal activity being investigated, but also about unrelated topics (subject only to any constraints imposed by the Fifth Amendment). See *id.* at 101.[4]

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[3] Although this Court recently stated that officers may "ordinarily" detain the passenger of a car for the duration of a traffic stop, it stopped short of announcing a categorical rule. See *Arizona* v. *Johnson*, 555 U.S. 323, 333 (2009).

[4] Lower courts have taken divergent approaches in determining whether a detention pursuant to *Summers* is custodial for purposes

3. In adopting the categorical rule of *Summers*, the Court articulated three specific rationales. Because this case concerns the scope of the *Summers* rule, those rationales merit detailed examination.

a. Most importantly, the *Summers* Court cited an interest in "minimizing the risk of harm to the officers" executing the warrant. 452 U.S. at 702. As the Court correctly recognized, "the execution of a warrant to search for [contraband] is the kind of transaction that may give rise to sudden violence." *Ibid.* Occupants may react unfavorably to the initial entry of officers executing a warrant. And if the occupants are permitted to roam the premises while the search is being conducted—and, in the process, to access any weapons that may be found there—the possibility of violence will remain.

While acknowledging that the risk of violence will vary from case to case, the Court concluded in *Summers* that, as a categorical matter, the risk presented by the execution of search warrants for contraband justified the adoption of a categorical rule for detaining occupants of the premises. See 452 U.S. at 702. In that regard, the Court's reasoning tracks its reasoning in other cases that rely on officer safety as the primary justification for adopting similar categorical rules—most notably, the

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of *Miranda* v. *Arizona*, 384 U.S. 436 (1966). Compare, *e.g.*, *United States* v. *Burns*, 37 F.3d 276, 281 (7th Cir. 1994) (stating that, "in the usual case, a person detained during the execution of a search warrant is not 'in custody'"), cert. denied, 515 U.S. 1149 (1995), with *United States* v. *Davis*, 530 F.3d 1069, 1081 (9th Cir. 2008) (requiring *Miranda* warnings for questioning that goes "beyond a brief *Terry*-type inquiry") (citation omitted). Petitioner contended before the district court that he should have received *Miranda* warnings, but the district court rejected that contention. See Pet. App. 42a-52a.

rules authorizing various forms of searches incident to arrest. See, *e.g.*, *New York* v. *Belton*, 453 U.S. 454, 460 (1981) (search of car); *United States* v. *Robinson*, 414 U.S. 218, 225 (1973) (search of person); *Chimel* v. *California*, 395 U.S. 752, 763 (1969) (search of house).

b. In addition, the *Summers* Court cited an interest in "facilitat[ing]" "the orderly completion of the search." 452 U.S. at 703. If occupants are permitted to wander around the premises, their very presence has the potential to interfere with the efficient execution of the warrant—whether because they "conceal or destroy evidence," *id.* at 702; seek to throw officers off the scent; or simply get in the way. Conversely, if the occupants are detained, officers can more safely solicit their assistance in completing the search—for example, by "open[ing] locked doors or locked containers to avoid the use of force" that would otherwise be necessary. *Id.* at 703.

c. Since *Summers*, this Court has seemingly recognized safety and efficacy as the primary justifications for the *Summers* rule. See *Los Angeles County* v. *Rettele*, 550 U.S. 609, 614 (2007) (per curiam) (noting that, under *Summers*, "officers may take reasonable action to secure the premises and to ensure their own safety and the efficacy of the search"); see also *Muehler*, 544 U.S. at 102 (Kennedy, J., concurring) (emphasizing that "[t]he safety of the officers and the efficacy of the search are matters of first concern").

In *Summers* itself, the Court also cited a third justification: "preventing flight in the event that incriminating evidence is found." 452 U.S. at 702. In so doing, however, the Court did not suggest that, standing alone, the interest in preventing flight would serve as a sufficient basis for a detention. Were it otherwise, officers could use that interest as a bootstrap, advancing the point at which a detention is permissible from when of-

ficers actually have probable cause to when they begin a search that they *hope* will produce probable cause. Cf. *id.* at 709 (Stewart, J., dissenting) (reasoning that, "[i]f the police, acting without probable cause, can seize a person to make him available for arrest in case probable cause is later developed to arrest him, the requirement of probable cause for arrest has been turned upside down").

Instead, the interest in preventing flight is better understood as overlapping with, and thereby reinforcing, the other interests supporting the *Summers* rule. If occupants are permitted to remain free while the search is being conducted, it will impede the efficient completion of the search, because officers will have to conduct the search while keeping an eye on the occupants. And if the occupants attempt to flee once incriminating evidence is found, it will obviously threaten the safety of the officers (and the safety of the occupants themselves). So understood, the interest in preventing flight validly supports the *Summers* rule.

B. The Court Of Appeals Extended The *Summers* Rule

As the court of appeals correctly recognized, see Pet. App. 10a, this case involves a potential extension of *Summers*, both beyond the facts of that case and beyond the rule of that case as it was framed and has since been understood.

1. In *Summers*, the Court repeatedly emphasized that it was establishing a rule that governed the detention of the "occupants of the premises" while officers are executing a search warrant for contraband. See, *e.g.*, 452 U.S. at 705. In justifying that rule, moreover, the Court explained that "it is constitutionally reasonable to require [a] citizen to *remain* while officers of the law execute a valid warrant to search his home." *Ibid.* (empha-

sis added). In ordinary usage, the phrase "occupants of the premises" more naturally refers to persons who are presently occupying the premises than to persons who have formerly occupied them and since departed. As one commentator has noted, "one would consider the audience members in a concert hall to be 'occupants of the premises,' but one would not consider those same members to be 'occupants of the premises' after they walk out of the building or as they are on their way home." Amir Hatem Ali, Note, *Following the Bright Line of 'Michigan v. Summers,'* 45 Harv. C.R.-C.L. L. Rev. 483, 500 (2010).

In subsequent cases, the Court has reinforced the foregoing understanding of the scope of the *Summers* rule. In the nearly two dozen decisions that have cited *Summers*, the Court has never suggested that a search warrant for a particular location justifies a detention that occurs away from that location. To the contrary, when invoking *Summers*, the Court has noted time and again that the rule governs detentions that occur at the premises to be searched. See, *e.g.*, *Muehler*, 544 U.S. at 98 (noting that *Summers* applies when "a warrant existed to search [the premises]" and the detained individual "was an occupant of [the premises] *at the time of the search*") (emphasis added); *Wilson* v. *Layne*, 526 U.S. 603, 611 (1999) (citing *Summers* for the proposition that "[not] every police action *while inside a home* must be explicitly authorized by the text of the warrant") (emphasis added); see also *Kolender* v. *Lawson*, 461 U.S. 352, 364 n.2 (1983) (Brennan, J., concurring) (describing the *Summers* rule as providing that "[a] suspect may be detained *in his own home* without probable cause for [the] time necessary to search the premises pursuant to a valid warrant supported by probable cause") (emphasis added).

To be sure, in *Summers* itself, officers initially seized the individual in question not inside the house, but rather in the immediate vicinity: officers encountered the individual coming down the front steps of the house, apparently as they were already in the course of executing the warrant, and brought him inside as soon as they gained entry. See 452 U.S. at 693 & n.1. In the analysis leading to its adoption of the categorical rule, however, the Court addressed the circumstances of the initial seizure only in a footnote, stating that "[w]e do not view the fact that respondent was leaving his house when the officers arrived to be of constitutional significance." *Id.* at 702 n.16. Although the Court did not meaningfully elaborate on that statement, it appears to have applied the principle of *de minimis non curat lex*, concluding that the rationales supporting a detention when it occurs entirely inside the premises operated with similar force when the initial seizure occurs on the doorstep. *Ibid.*

2. The detention in this case differs in kind from the detention in *Summers*. Most significantly, petitioner was not initially seized in the immediate vicinity of the premises as officers were in the process of executing the warrant. Instead, one set of officers followed petitioner from the apartment to be searched for approximately a mile, and then detained him at the same time as different teams of officers executed the search warrant back at the apartment. Although preparations for the search were well underway, the evidence raises the possibility that the search was specifically timed to justify the detention: shortly after the surveilling officers informed the supervising officer on the scene of their intention to follow and detain petitioner, the supervising officer led the entry and search teams to execute the warrant. See

J.A. 126-127.[5] In addition, the officers detained petitioner in full public view for several minutes—frisking him and questioning him about his connection with the apartment—before handcuffing him and transporting him in a marked police car back to the apartment. In those respects, the facts of this case vary dramatically from the facts of *Summers*. And as explained below, the court of appeals' extension of the rule of *Summers* to this case cannot be justified.

C. The Justifications For The *Summers* Rule Do Not Support The Detention Of A Former Occupant Who Has Left The Immediate Vicinity Of The Premises To Be Searched

In *Arizona* v. *Gant*, 556 U.S. 332 (2009), this Court explained that, in "defin[ing] the boundaries of" a Fourth Amendment categorical rule, it should "ensure[] that the scope of [the rule] is commensurate with its purposes." *Id.* at 339. Thus, the Court rejected lower courts' broad reading of its earlier decision in *Belton*, under which "a vehicle search would be authorized incident to every arrest of a recent occupant." *Id.* at 343. Reasoning that such an interpretation of the search-incident-to-arrest rule would "untether the rule from the justifications underlying [it]"—namely, officer safety and the preservation of evidence—the Court held that such a search is permissible only when the arrestee is within reaching

[5] In fact, in grand jury testimony that was produced to the defense pursuant to the Jencks Act and used at trial (but apparently not admitted into evidence), Officer Sneider suggested that it is the practice of Suffolk County police officers, while they are preparing to execute a search warrant, to "surveil the house just in case someone leaves so that we can hold onto them until we actually do execute the warrant." App., *infra*, 2a.

distance of the car or the officer has reason to believe that the car contains relevant evidence. *Ibid.*

This Court should conduct a similar analysis here—and reach a similar result. In determining whether to extend the categorical rule of *Summers* to detentions that occur away from the immediate vicinity of the premises to be searched, the Court should analyze the applicability of the rationales that originally justified the rule. And the government bears the burden of showing that those rationales are applicable in the mine run of cases to which the rule would be extended.

When the requisite analysis is conducted, this is not a close case. Each of the three rationales articulated in *Summers* applies with little or no force when a former occupant is detained after leaving the scene. As in *Gant*, permitting such detentions would "untether" the categorical rule from its underlying justifications. And it would potentially authorize the detention of anyone who is a resident of, or otherwise associated with, the premises to be searched, regardless of where that individual is found. This Court should reaffirm the limited scope of the *Summers* rule and reject the court of appeals' proposed extension.

1. a. When an individual has left the immediate vicinity of the premises to be searched, the individual poses minimal risk, if any, to the officers executing the warrant. To state the obvious, an individual who has departed the scene poses no threat of "sudden violence" to the officers. *Summers*, 452 U.S. at 702. And because the police have no incentive to advertise their presence before executing a search warrant, such an individual will ordinarily have no reason to know that a search is imminent—and thus no reason to alert others who may still

be inside and have the potential to compromise officer safety.[6]

b. In its brief at the certiorari stage, the government posited a hypothetical scenario in which an individual who has departed could still pose a threat to officer safety. According to the government, after an individual has left the scene, "anyone on the premises or nearby could readily alert a departing occupant to the search by placing a call to his cell phone or sending him a text message," and the individual could then "suddenly return—possibly armed and with the assistance of others—to obstruct the search." Br. in Opp. 11-12.

As a preliminary matter, it is worth reflecting on the implausibility of the government's scenario. When officers execute search warrants today—particularly warrants for contraband and other warrants deemed to be "high-risk"—they typically do so with overwhelming force, precisely out of concern for officer safety. See, *e.g.*, *Muehler*, 544 U.S. at 96 (describing use of SWAT team to execute warrant for weapons).[7] In this case, the

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[6] In this case, there is no indication that either petitioner or Bryant Middleton, the other detained individual, was aware of the officers' presence at the time they left the scene. If officers have reason to believe that an individual has learned of their presence—for example, if they see him suddenly fleeing the scene at a high rate of speed—they may have a justification for detaining him. Cf. *Illinois* v. *Wardlow*, 528 U.S. 119, 124-125 (2000) (holding that, in some circumstances, flight from police justifies a *Terry* stop).

[7] For example, the Boston Police Department requires that SWAT teams be used whenever the presence of firearms is "reasonably suspected," and ordinarily requires that search warrants be executed by a team consisting of at least one supervisor and six officers. See Boston Police Department, *Rules and Procedures*, Rule 334, § 3 (June 14, 2006) <tinyurl.com/bostonrule334>.

supervising officer on the scene testified that, in Suffolk County, all search warrants are executed by an Emergency Services Unit, the functional equivalent of a SWAT team. See J.A. 124-125.[8] Where, as here, a large team of well-armed officers executes the warrant—and where the officers take basic precautions, such as erecting barricades or posting someone on the perimeter or at the door while the search is ongoing—it is highly unlikely that an individual will "return with an army" to disrupt the search. Albert W. Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. Pitt. L. Rev. 227, 270 (1984); cf. *Leveto* v. *Lapina*, 258 F.3d 156, 171 (3d Cir. 2001) (Alito, J.) (noting the reduced risk of disruption where a "large group of agents" had executed the warrants at issue).[9]

Unsurprisingly, the government fails to cite a single case in which its scenario has actually come to pass. And even if it could, it would still be unable to justify an extension of the *Summers* categorical rule, because the

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[8] Even relatively small police departments have SWAT teams or comparable units that are available to assist in the execution of search warrants. See Peter B. Kraska & Victor E. Kappeler, *Militarizing American Police: The Rise and Normalization of Paramilitary Units*, 44 Soc. Probs. 1, 6 (1997) (reporting that, as of 1995, 89% of cities with populations over 50,000 had their own paramilitary police unit); Peter B. Kraska & Louis J. Cubellis, *Militarizing Mayberry and Beyond: Making Sense of American Paramilitary Policing*, 14 Just. Q. 607, 611-612 (1997) (same for 65% of cities with populations between 25,000 and 50,000).

[9] Where an individual returns to (or arrives at) the premises while the search is ongoing, lower courts have consistently held that the individual can be detained under the rule of *Summers*. See, *e.g.*, *United States* v. *Jennings*, 544 F.3d 815, 818-819 (7th Cir. 2008); *United States* v. *Bohannon*, 225 F.3d 615, 617 (6th Cir. 2000); *Baker* v. *Monroe Township*, 50 F.3d 1186, 1191-1192 (3d Cir. 1995).

government must show that the officer-safety rationale is implicated in the mine run of cases to which the rule would be extended. Cf. *Thornton* v. *United States*, 541 U.S. 615, 625-626 (2004) (Scalia, J., concurring in the judgment) (rejecting officer safety as a justification for a broad reading of *Belton* where a handcuffed arrestee would have to be "possessed of the skill of Houdini and the strength of Hercules" to threaten officers) (citation omitted).

In addition, the government's scenario proves too much: it would seemingly justify detaining not only a current or recent "occupant" of the premises, but any individual who officers have reason to believe is a resident of, or otherwise associated with, the premises—regardless of where that individual is found. The resident of a house that is being searched could just as easily receive a call or a text message from a neighbor when he is at work as he could when he is leaving the house on the way to work; in either instance, he could theoretically return to the house to disrupt the search. It would make no sense to permit a detention based on that threat only in the latter instance, but not in the former. Yet a rule that would detach the ability to detain an individual incident to the execution of a search warrant from the individual's status as a current or recent "occupant" could not easily be reconciled with *Summers* itself.[10]

Finally on this point, a rule that permitted officers to conduct detentions away from the scene would create

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[10] Lower courts have consistently held that the *Summers* rule cannot be used to justify detentions of individuals who are not at or leaving the premises to be searched. See, *e.g.*, *United States* v. *Reinholz*, 245 F.3d 765, 777-778 (8th Cir.), cert. denied, 534 U.S. 896 (2001).

risks of its own. When an individual leaves the scene by car, officers would have to conduct the equivalent of a traffic stop in order to seize that individual—an encounter that would present risks comparable to, if not greater than, the risks presented by the execution of a search warrant.[11] And the very act of following an individual away from the premises would itself eventually alert the individual to the police's presence—which, in turn, could cause him to warn others still on the premises of the police's impending arrival. Given those countervailing risks, it is impossible to say with any confidence that a rule permitting officers to conduct detentions away from the scene actually minimizes the risk to officers executing the warrant—much less that it does so sufficiently to support an extension of the *Summers* categorical rule.

c. At the suppression hearing, the surveilling officers testified that they detained petitioner approximately a mile away because they believed it was safer to detain him there than it would have been to detain him right outside the apartment. See J.A. 48-51, 68-72, 85-86, 103-105; Pet. App. 4a n.3, 24a. Specifically, the officers raised the possibility that conducting the detention right outside would have alerted others who may still have been inside as to the imminent search, thus potentially compromising the safety of the searching officers. See J.A. 48-49, 85. In adopting its extension of the *Summers* rule, the court of appeals expressed a similar concern. See Pet. App. 14a-15a.

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[11] See Federal Bureau of Investigation, *Law Enforcement Officers Killed and Assaulted* tbl. 19 (2010) <tinyurl.com/fbi2010table> (reporting that, from 2001 to 2010, 95 police officers were killed in traffic stops, compared with 43 killed in investigative or tactical activities).

"The weakness of this argument is that it assumes that, one way or another, the [detention] must take place." *Thornton*, 541 U.S. at 627 (Scalia, J., concurring in the judgment). For purposes of the *Summers* categorical rule, the appropriate focus is not on the safest way to detain a recent occupant of a house—as if officers have a freestanding entitlement to conduct a detention and the only question is where and how the detention takes place. Instead, the appropriate focus is on the safest way to *execute the search warrant*: specifically, whether it materially promotes the safety of the officers executing the warrant to permit the detention of a former occupant who has left the scene. As explained above, it does not.

To be sure, a rule that permits detentions only within the immediate vicinity of the premises to be searched requires an officer to exercise his authority or risk losing it. But that is simply because the justifications for a detention incident to the execution of the search warrant evaporate once the occupant leaves the scene.[12] Common sense and experience do not teach that an occupant who has left the scene ordinarily poses a threat to the officers executing the warrant. For that reason, the officer-safety rationale does not support an extension of the *Summers* rule.

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[12] It bears emphasizing that *Summers* merely *permits* detentions within the immediate vicinity of the premises to be searched; it does not *require* them. If officers see an occupant on the doorstep but are concerned that a detention there would present safety issues, they have other options besides proceeding to detain the occupant and execute the warrant. For example, they can wait to execute the warrant until the occupant leaves (keeping tabs on the occupant if desired) or until the occupant returns (detaining the occupant on the premises).

2. As the lower courts in this case implicitly acknowledged, the detention of an individual who has left the immediate vicinity of the premises to be searched also does not materially advance the interest in facilitating the orderly completion of the search. See Pet. App. 14a n.6, 30a (citing only the other *Summers* rationales). Again, the reason is obvious: an individual who is not present at the scene cannot interfere with the efficient execution of the search by destroying or concealing evidence or distracting officers from the task at hand.

Nor is there any reason to believe that detaining an individual who has left the scene and returning him to the premises will facilitate the search. To the contrary, because it occurs away from the premises to be searched, the seizure of such an individual will necessarily divert officers who might otherwise be involved in conducting the search. And once the officers return the individual to the scene, the individual's presence may complicate the search by increasing the number of people at the site and creating a distraction that would not otherwise have existed.

In its brief at the certiorari stage, the government suggested that a returning individual may be willing to assist the searching officers by "opening any locked doors or containers." Br. in Opp. 9 (citing *Summers*, 452 U.S. at 703). But the officers will not need such assistance in every case; they cannot compel an unwilling individual to provide that assistance;[13] and any assistance is likely to advance the completion of the search only modestly. The better view, therefore, is that the reference in *Summers* to opening locks was "not * * * crit-

[13] In this case, petitioner made clear to the officers that he was "not cooperating with [their] investigation." J.A. 57, 90.

ical" to the Court's analysis. *United States* v. *Sanchez*, 555 F.3d 910, 917 (10th Cir.), cert. denied, 556 U.S. 1145 (2009).

3. a. The only remaining rationale from *Summers* is the interest in preventing flight in the event that incriminating evidence is found. As a preliminary matter, should the Court conclude that the interests in ensuring safety and efficacy do not support an extension of the *Summers* rule, the interest in preventing flight cannot sustain such an extension on its own. As discussed above, a contrary understanding would permit detentions based not on probable cause, but rather on the mere hope that probable cause will later develop. See pp. 17-18, *supra*.

Any debate about the propriety of relying on the interest in preventing flight is ultimately academic, however, because that interest is served here only slightly, if at all. When an individual is detained on the premises (or in the immediate vicinity when officers are in the course of executing the warrant), the individual will naturally be aware of the ongoing search—and will therefore have the incentive to flee if he is aware that the premises contain incriminating evidence. By contrast, an individual who has left the scene will ordinarily have no reason to know that a search is imminent—and will therefore have no reason to flee. See pp. 22-23, *supra*.

b. In its brief at the certiorari stage, the government asserted that the same scenario that could present a risk of harm to officers could also present a risk of flight: another party could alert an individual who has left the scene, thus prompting the individual to flee. See Br. in Opp. 11.

The government's scenario carries little more weight in the context of flight risk than it does in the context of officer safety. For starters, it again proves too much.

The resident of a house that is being searched could just as easily receive a call or a text message from a neighbor when he is at work, at the supermarket, or in the next town over. And in those circumstances, the resident would have no less an incentive to flee than if he happens to be driving away from the house when the call or text message comes. Again, the government's scenario would seemingly justify the detention of any individual who officers have reason to believe is a resident of, or otherwise associated with, the premises to be searched, regardless of where that individual is found—a dramatic expansion of the categorical rule of *Summers* that this Court cannot possibly have envisioned.

Furthermore, officers have less intrusive means at their disposal for ensuring that an individual leaving the scene does not flee—and for finding the individual in the event that he does. Officers can follow an individual who has left the scene and then detain him in the event that incriminating evidence is uncovered during the search. And if officers prefer not to divert resources from the search for that purpose, they can readily gather identifying information that will help them to track down the individual. When an individual leaves the scene by car, officers can record the car's license plate and model information, run a computer check, and use the resulting information to locate him if the search turns up incriminating evidence.[14] In short, the full panoply of traditional law-enforcement tactics remain available to the police, up until the point they develop the requisite level of individualized suspicion necessary to justify a detention under ordinary Fourth Amendment principles.

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[14] In this case, the officers did not run a check of the car's license plate until sometime after the detention. See J.A. 226-227.

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Given the inapplicability of the rationales articulated in *Summers* to a situation in which a former occupant is detained after leaving the scene, one is left with the sense that detentions of this type are driven primarily by considerations of officer convenience: specifically, the desire to have persons associated with the premises close at hand in the event that incriminating evidence is found. That desire is understandable, but it does not render ensuing detentions constitutional. This Court has repeatedly explained that officer convenience cannot justify dispensing with the ordinary requirements of the Fourth Amendment. See, *e.g.*, *Gant*, 556 U.S. at 349; *Trupiano* v. *United States*, 334 U.S. 699, 706 (1948); *Johnson* v. *United States*, 333 U.S. 10, 15 (1948). *A fortiori*, officer convenience cannot justify the broadening of a categorical exception to those requirements. This Court should thus limit the categorical rule of *Summers* to the circumstances for which it was originally intended, and hold that it applies only to detentions that occur within the immediate vicinity of the premises.

D. The Detention Of A Former Occupant Who Has Left The Immediate Vicinity Of The Premises To Be Searched Is More Intrusive Than A Detention Covered By The *Summers* Rule

The detention in this case is invalid under *Summers* for an additional reason. In *Summers*, the Court weighed the rationales for the detention against "the character of the official intrusion." 452 U.S. at 701. Not only do the rationales articulated in *Summers* apply with considerably lesser force when an individual is detained away from the immediate vicinity of the premises to be searched, but the resulting detention is correspondingly more intrusive.

1. In adopting the categorical rule of *Summers*, the Court heavily relied on the proposition that the detention of an *occupant* of the premises to be searched is only incrementally more intrusive than the search itself. See 452 U.S. at 701-702. The Court explained that, "because the detention in this case was in [the individual's] own residence, it could add only minimally to the public stigma associated with the search itself and would involve neither the inconvenience nor the indignity associated with a compelled visit to the police station." *Id.* at 702. In its footnote addressing the fact that the individual had initially been seized as he was coming down the front steps of the house, the Court observed that "[t]he seizure of [the individual] on the sidewalk outside was no more intrusive than the detention of those residents of the house whom the police found inside." *Id.* at 702 n.16.

Where, as here, the initial seizure occurs in a public place away from the immediate vicinity of the premises, the intrusiveness of the seizure and ensuing detention is far greater. An individual who is seized away from the scene is likely to be detained in full public view for at least several minutes, as petitioner was in this case. And where officers decide to return the individual to the scene, the individual is likely to be subjected to the additional indignities of being placed in handcuffs and being transported in a police car, as petitioner also was in this case. See *Leveto*, 258 F.3d at 169 (citing *Summers* for the proposition that "a seizure is more intrusive if it involves moving the suspect to another locale") (internal quotation marks and citation omitted). In short, a detention of this type is hardly an incremental intrusion: it "produce[s] all the indignity of an arrest in full view of the public," *Commonwealth* v. *Charros*, 824 N.E.2d 809, 816 (Mass.), cert. denied, 546 U.S. 870 (2005)—save for

the fact that it ends at a house, rather than the stationhouse.

2. In support of its conclusion that a detention incident to the execution of a search warrant was only minimally intrusive, the *Summers* Court also reasoned that "the type of detention imposed here is not likely to be exploited by the officer or unduly prolonged in order to gain more information, because the information the officers seek normally will be obtained through the search and not through the detention." 452 U.S. at 701.

Where, as here, the initial seizure occurs in a public place away from the immediate vicinity of the premises, the potential for exploitative questioning is far greater. In the typical situation covered by the rule of *Summers*, any detention will be truly incidental to the search: the officers executing the warrant will be the ones encountering the individual and conducting the detention, and they will likely be too preoccupied with effectuating the search to take unfair advantage of the individual. Indeed, a central premise of the *Summers* rule is that such detentions are necessary to *enable* officers to maintain a single-minded focus on conducting and completing the search. See 452 U.S. at 702-703. Where the detention of a former occupant and the execution of the search warrant occur at entirely separate locations, however, different officers will necessarily be required to carry out both tasks, and the focus of the officers conducting the detention will inevitably be on the detained individual, rather than on the search itself. That is exactly what occurred here, with petitioner being subjected to questioning that was seemingly designed to elicit responses connecting him with the premises being searched—responses that proved to be central to the prosecution's case at trial.

Indeed, if this Court were to embrace the court of appeals' extension of the *Summers* rule, it would exacerbate the incentives for officers to conduct detentions of this type precisely for the purpose of facilitating questioning of potential suspects—questioning that ordinarily would not be permissible in the absence of individualized suspicion. The detaining officers could engage in that questioning at leisure, secure in the knowledge that the Fourth Amendment imposes no restriction on their ability to conduct questioning for the potentially multi-hour duration of the search. See *Muehler*, 544 U.S. at 101. Such an exploitative practice would in no way serve the primary purpose of the *Summers* rule: to enable the safe and efficient completion of the search by the officers executing the warrant. The potential for exploitation underscores the intrusiveness of a detention that occurs away from the scene, and it provides another reason to reaffirm the limited scope of the *Summers* rule.

E. The Court Of Appeals' Extension Of The *Summers* Rule Is Deeply Flawed

In the decision under review, the court of appeals held that "*Summers* authorizes law enforcement to detain the occupant of premises subject to a valid search warrant when that person is seen leaving those premises and the detention is effected *as soon as reasonably practicable*." Pet. App. 19a. That standard for detention incident to the execution of a search warrant suffers from several additional flaws.

1. In holding that the detention of a former occupant who has left the premises to be searched is permissible as long as the detention occurs "as soon as reasonably practicable," the court of appeals seemingly sought to glue a veneer of "reasonableness" onto its extension of the *Summers* categorical rule. The whole point of

Fourth Amendment categorical rules, however, is that they *avoid* the default mode of case-by-case reasonableness analysis, establishing bright lines and standardized procedures based on empirical judgments about the necessity of certain types of police conduct. See 2 Wayne R. LaFave, *Search and Seizure* § 4.9(e), at 726 (4th ed. 2004) (LaFave).

A standard that requires courts to assess whether detentions occurred "as soon as reasonably practicable" would open a new front of *post hoc* litigation and undermine the chief advantage of the *Summers* categorical rule, as officers are subjected to second-guessing by courts armed with Google Maps speculating about whether departing occupants could have been pulled over more quickly. Such a standard would provide little guidance to officers and "generate[] a great deal of uncertainty, particularly for a rule touted as providing a 'bright line.'" *Gant*, 556 U.S. at 346. By contrast, a rule that permits detentions only in the immediate vicinity of the premises is far clearer and easier to administer, even if it is possible to hypothesize close cases at the margin.

In addition, if officers are permitted to detain a former occupant who has left the premises, it is hard to see why it matters how quickly they effectuate the detention. There is no correlation between any of the potential justifications for the detention and the speed with which it occurs; if the mere fact that an individual is seen leaving the premises provides a basis for the detention (for example, on the theory that the individual could storm back to the scene and threaten officer safety), it matters not whether officers seize the individual a few blocks or a few miles away. Indeed, as discussed above, if it is true that the rationales articulated in *Summers* support an extension of the categorical rule in this case, it is hard to see why they would not support the detention of any in-

dividual who officers have reason to believe is a resident of, or otherwise associated with, the premises to be searched—not simply any individual whom officers happen to have seen leaving the premises. The court of appeals' "as soon as reasonably practicable" limitation is thus merely an arbitrary bound that disguises the expansiveness of the court's underlying reasoning.

2. Any extension of the *Summers* rule would also create an incongruity with other Fourth Amendment categorical rules—most notably, the rules governing searches incident to arrest. One leading commentator has noted the doctrinal "consanguinity" between the rule of *Summers* on the one hand, and the rules of cases involving searches incident to arrest on the other: whereas *Summers* involved "a seizure that was 'piggy-backed' onto a search," the latter cases involved searches piggybacked onto seizures. Wayne R. LaFave, *Being Frank About the Fourth*, 85 Mich. L. Rev. 427, 455, 457 (1986).

In developing the rules governing searches incident to arrest, the Court has adopted limitations on the permissible reach of those searches. For example, in *Chimel*, the Court overruled its earlier decision in *United States* v. *Rabinowitz*, 339 U.S. 56 (1950), and held that officers conducting a search incident to arrest within a home were permitted to search only "the area within [the arrestee's] immediate control"—*i.e.*, "the area from within which he might gain possession of a weapon or destructible evidence." 395 U.S. at 763 (internal quotation marks omitted).[15] In adopting that limitation, the

[15] Similarly, in *Maryland* v. *Buie*, 494 U.S. 325 (1990), the Court held that, in conducting a protective sweep incident to arrest, officers were categorically permitted to search only those areas "immediately adjoining the place of arrest from which an attack could be immediately launched." *Id.* at 334.

Court explained that the justifications for a search incident to arrest "are absent where a search is remote in time or place from the arrest." *Id.* at 764 (citation omitted). The same is true with regard to the justifications for a detention incident to the execution of a search warrant where the detention is remote in time or place from the search. The "immediate control" limitation of *Chimel* is therefore closely analogous to the "immediate vicinity" limitation embodied in a proper understanding of the *Summers* rule.

3. Last but not least, any expansion of the *Summers* rule would be difficult to reconcile with the original understanding of the Fourth Amendment. As this Court has noted, the adoption of the Fourth Amendment was in large part motivated by a disdain for British use of general warrants. See, *e.g.*, *Chimel*, 395 U.S. at 761; *Henry*, 361 U.S. at 100-101. In the words of James Otis, the routine issuance of general warrants placed "the liberty of every man in the hands of every petty officer." 2 *The Works of John Adams* 524 (Charles Francis Adams ed. 1850). The Fourth Amendment addressed that concern through its particularity requirement, which provides that a warrant must "particularly describ[e] the place to be searched, and the persons or things to be seized." U.S. Const. Amend. IV; see, *e.g.*, *Coolidge* v. *New Hampshire*, 403 U.S. 443, 467 (1971).

In the course of adopting its categorical exception to the default probable-cause requirement for seizures of persons, the *Summers* Court reasoned that any warrant to search a particular place for contraband "implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted." 452 U.S. at 705. The Court did not elaborate on how that rule could be squared with the Warrant Clause's particularity requirement. Nor did the Court

cite any historical evidence (whether from the time of the founding or thereafter) indicating that officers executing search warrants engaged in the practice of detaining the occupants of the premises. To the contrary, the historical evidence more generally suggests that "prearrest searches and seizures played a small role in the investigation of ordinary crimes." William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 Yale L.J. 393, 401 (1995).

In light of the foregoing considerations, any expansion of the *Summers* rule would be of questionable validity, because it would effectively create a freestanding right to seize persons that flows from, yet operates independently of, the warrant-conferred right to search for and seize contraband. The detention would cease to constitute a means of better effectuating the search; it would become an end in itself. And once the initial seizure occurs, other Fourth Amendment doctrines would enable officers to conduct a frisk of the detained individual, engage in questioning, and provide the fruits of their efforts to prosecutors for subsequent use at trial.

If this Court were to adopt the court of appeals' approach, therefore, there would be a very real risk that officers will use search warrants as a mechanism for detaining individuals they do not have probable cause to arrest—resulting in a practice that is "indistinguishable from what might be done under a general warrant." *United States* v. *Kirschenblatt*, 16 F.2d 202, 203 (2d Cir. 1926) (Hand, J.); cf. *Chimel*, 395 U.S. at 767 (noting that a broader view of the search-incident-to-arrest doctrine would "give law enforcement officials 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").[16] It is hard to imagine that the Framers would have countenanced that result.

As was true with searches incident to arrest under *Belton*, officers have come to view the ability to conduct a detention incident to the execution of a search warrant as a "police entitlement," rather than as "an exception justified by [its underlying] rationales." *Thornton*, 541 U.S. at 624 (O'Connor, J., concurring in part). Like in *Gant*, this Court should correct that mistaken understanding, and reaffirm the limited scope of the *Summers* rule.

* * * * *

As noted at the outset, categorical rules are the exception, rather than the norm, under the Fourth Amendment. And whether the question presented involves recognition of a new categorical rule or expansion of an existing one, it is incumbent on the government to make the case for why the categorical rule is necessary. Because the justifications for the original *Summers* rule do not adequately support the detention of a former occupant who has left the immediate vicinity of the premises to be searched, the court of appeals' extension of that rule should be rejected.

That is not to say that detentions of former occupants will invariably be improper. For example, officers remain free to conduct a detention when they possess the requisite level of individualized suspicion, provided the detention is appropriate in scope and duration.[17] Be-

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[16] The potential for abuse is of particular concern in light of the dramatic increase in the issuance of search warrants in recent years. See, *e.g.*, 1 LaFave § 1.2(b), at 33.

[17] In the lower courts, the government argued that petitioner's detention could be justified under *Terry*, based on the additional fact

cause detentions of former occupants do not categorically promote the safe and efficient completion of searches, however, they cannot be justified under *Summers*. The court of appeals' contrary conclusion "abandon[s] [the] constitutional moorings" of the *Summers* rule. *Thornton*, 541 U.S. at 628 (Scalia, J., concurring in the judgment) (citation omitted). That conclusion, and the judgment below, should be reversed.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case remanded for further proceedings.

Respectfully submitted.

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that petitioner (like Bryant Middleton, the other man in the car) matched the generic description of a suspect provided by the confidential informant. The court of appeals expressly declined to consider that issue. See Pet. App. 16a n.7. Should this Court agree that petitioner's detention cannot be justified under *Summers*, the government remains free to renew its *Terry* argument on remand.

APPENDIX

TRANSCRIPT OF GRAND JURY PROCEEDINGS
(Apr. 6, 2006)

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[4]

Whereupon,

RICHARD SNEIDER,

having been first duly sworn by the Grand Jury Foreperson, took the stand and testified as follows:

*****

[20]

(The witness re-enters the Grand Jury chamber at 12:10 p.m.)

EXAMINATION BY

MR. KELLY:

Q. You understand you continue to be under oath?

A. Yes.

Q. In terms of the timing of the search, you said you were surveilling it and you saw two people left.

Were you waiting for the two people to leave before you executed the warrant?

A. No.

Q. Tell the grand jurors what the situation was.

A. At that time the emergency services personnel were forming up and getting ready to hit the house. That takes them probably half-hour, 45 minutes to

do after we get the warrant. They won't do that until we actually have a judge sign the warrant.

And during that time period while we were setting up, we surveil the house just in case someone leaves so that we can hold onto them until we actually do execute the warrant.

In this case, probably five minutes before we executed the warrant, they left the house.

Q. So that was a coincidence of timing?

A. Yes.

Q. You weren't waiting for people to leave to execute the [21] warrant?

A. No.

Q. Thank you. If there are any more questions, I will bring you back.

(The witness was excused from the Grand Jury chamber.)