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

REPLY BRIEF FOR THE PETITIONER

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In its brief, the government takes the position that the Fourth Amendment permits officers executing a search warrant for contraband to detain any individual who has a "connection" to the premises to be searched, as long as "officers effect the detention in a reasonable manner." Br. 28, 34. Applying that proposed rule to this case, the government contends that, where officers seek to detain an individual who has left the immediate vicinity of the premises before the warrant is executed, the detention is valid if it "is conducted as soon as reasonably practicable." Br. 14.

The government's proposed rule would require a radical reconceptualization of *Michigan* v. *Summers*, 452 U.S. 692 (1981), and constitute a breathtaking expansion of law-enforcement authority. In *Summers*, this Court

held that officers executing a search warrant for contraband may detain the "occupants" of the premises while the search is being conducted. The government cannot come close to bearing its burden of showing that the justifications for the *Summers* rule apply with similar force when a former occupant has left the immediate vicinity of the premises to be searched—much less whenever an individual simply has a "connection" to the premises. Tellingly, the government seeks to support its expansion of the *Summers* rule by articulating additional justifications for detentions that take place away from the scene—justifications that are nowhere to be found in *Summers* and are in any event invalid.

By proposing a rule that permits the detention of any individual who has a "connection" to the premises to be searched, the government advocates a freestanding right to seize persons that accompanies the warrant-conferred right to search for and seize contraband. Such a rule cannot be reconciled either with *Summers* or with the original understanding of the Fourth Amendment. As it did in *Arizona* v. *Gant*, 556 U.S. 332 (2009), this Court should reject the government's efforts to extend a Fourth Amendment categorical rule beyond its original justifications. The Court should clarify the proper bounds of the *Summers* rule and reverse the judgment below.

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 the government correctly notes, "[t]he ultimate touchstone of the Fourth Amendment is 'reasonableness.'" Br. 16 (citation omitted). This Court, however, has articulated a number of familiar principles that flesh out the "reasonableness" standard. Perhaps fore-

most among them is a principle the government all but ignores: the "general rule" that a seizure of a person is valid only if it is based on probable cause. *Dunaway* v. *New York*, 442 U.S. 200, 213 (1979). Where probable cause exists, an officer has broad authority to conduct the seizure and ensuing detention, free of any temporal or geographic limits.

A seizure based on something less than probable cause is ordinarily unreasonable. But in the exceptional circumstances where such a seizure is permitted, there are strict limits on an officer's authority to conduct the seizure and ensuing detention—limits that correspond with the justifications for permitting the seizure. Thus, where an officer conducts a seizure based on reasonable suspicion pursuant to *Terry* v. *Ohio*, 392 U.S. 1 (1968), there are limits on both the scope and the duration of the detention: the officer must act "diligently" to "confirm or dispel [his] suspicions." *United States* v. *Sharpe*, 470 U.S. 675, 686 (1985). Those limits naturally follow from the justification for a *Terry* detention: namely, to afford an officer who already has individualized suspicion a brief opportunity to determine whether probable cause exists to support a full-fledged arrest. See, *e.g.*, *Adams* v. *Williams*, 407 U.S. 143, 146 (1972).

2. Like *Terry*, *Summers* establishes a rule that permits detention in the absence of probable cause. The government faults petitioner for characterizing *Summers* as a "narrow exception to usual Fourth Amendment doctrine." Br. 24. If petitioner errs, however, he is in good company: in cases going back to *Summers* itself, this Court has repeatedly characterized the *Summers* rule as an "exception" to the default probable-cause (or warrant) requirement. See *Illinois* v. *McArthur*, 531 U.S. 326, 330 (2001); *Wilson* v. *Layne*, 526 U.S. 603, 611

(1999); *United States* v. *Place*, 462 U.S. 696, 702-703 (1983); *Summers*, 452 U.S. at 700.

Although the *Summers* rule resembles the *Terry* rule in that respect, it differs in several others. Most importantly, the *Summers* rule is "categorical" in the sense that it applies regardless of the "quantum of proof justifying detention." 452 U.S. at 705 n.19; see *Muehler* v. *Mena*, 544 U.S. 93, 98 (2005). The government suggests (Br. 24-26) that, where officers have probable cause to believe that contraband will be found on the premises, it necessarily follows that they have reasonable suspicion that any individual with a connection to the premises is engaged in criminal activity. In *Summers*, however, the Court ultimately did not ground its rule on that proposition. And for good reason: it is simply not the case that any individual who is found on (or otherwise connected to) the premises to be searched can reasonably be suspected of involvement in criminal activity. Cf. *Ybarra* v. *Illinois*, 444 U.S. 85, 94 (1979) (holding that an individual's mere presence at a tavern being searched did not justify a search of the individual). As both of this Court's cases applying *Summers* reflect, officers executing a warrant routinely encounter individuals with no apparent connection to the criminal activity being investigated. See *Los Angeles County* v. *Rettele*, 550 U.S. 609, 613 (2007) (per curiam) (upholding the detention of white occupants, when the suspects were black); *Muehler*, 544 U.S. at 95, 98 (upholding the detention of a female occupant, when the suspect was a male gang member).

Instead, as the government acknowledges (Br. 25), the Court ultimately based the rule of *Summers* on "special law enforcement interests," including the interests in promoting the safe and efficient completion of the search. 452 U.S. at 700; see *Rettele*, 550 U.S. at 613-614; *Muehler*, 544 U.S. at 98. The question presented by this

case is whether those "special" justifications apply with similar force to detentions that do not occur in the course of executing the warrant, but instead take place away from the immediate vicinity of the premises to be searched.

B. The Government Proposes A Dramatic Expansion Of The *Summers* Rule

The government contends that the court of appeals in this case did not "extend[] the *Summers* rule" by "permitting detention a short distance away from the premises." Br. 24 (citation omitted). But even the court of appeals repeatedly recognized that this case involves an "extension" of *Summers*. See, *e.g.*, Pet. App. 10a, 12a. And in *Summers* itself, this Court unquestionably did not adopt the rule the government now proposes: namely, that the Fourth Amendment permits the detention of any individual with a "connection" to the premises to be searched, as long as officers effect the detention in a reasonable manner.

1. a. In *Summers*, the Court noted on at least six occasions that it was establishing a rule governing the detention of the "occupants of the premises" while officers are executing a search warrant for contraband. See 452 U.S. at 701-705. The Court did not extend the rule to all "residents" or "inhabitants" of the premises, or all persons associated with the premises, as one would expect if the Court had adopted the government's proposed rule. And at least in the text of the relevant section of the opinion, the Court gave no indication that its rule extended not just to persons who are presently occupying the premises, but also to persons who have formerly occupied them and since departed. See *ibid.* Instead, the Court explained that "it is constitutionally reasonable to require [a] citizen to *remain* while officers of the law ex-

ecute a valid warrant to search his home," *id.* at 705 (emphasis added), and that it was a person's status as an "occupant" that provided the requisite "connection" to justify the detention, *id.* at 703-704.

The government correctly notes (Br. 20) that "[t]his Court has frequently relied on *Summers* in later Fourth Amendment decisions." But the government does not dispute that, in the nearly two dozen decisions that have cited *Summers*, this Court has *not once* suggested that a search warrant for a particular location justifies a detention that occurs away from that location. See Pet. Br. 19. Instead, in applying the rule of *Summers*, the Court has stated that the rule is triggered when the detained individual "was an occupant of [the premises] *at the time of the search*." *Muehler*, 544 U.S. at 98 (emphasis added).

b. In arguing that *Summers* "dispatched with a geographic limit" on detentions incident to the execution of a search warrant (Br. 30), the government relies entirely on a single footnote in the Court's opinion—which it proceeds to cite at least thirteen times. See Br. 6, 12, 13, 20, 27, 28, 29 n.2, 30, 47 (citing *Summers*, 452 U.S. at 702 n.16). Like Congress, however, this Court does not "hide elephants in mouseholes." *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). In the cited footnote, moreover, the Court did not extend its categorical rule to any situation in which a former occupant has left the scene—much less to any situation in which an individual simply has a "connection" to the place to be searched. Instead, the Court at most implied that, on the facts of the case before it—where officers "encountered [the defendant] descending the front steps" as they were preparing to go in, 452 U.S. at 693, and the initial seizure took place just outside the house to be searched—the justifications for a detention applied with similar force as when the detention occurs entirely inside the house. *Id.*

at 702 n.16.[1] As the government ultimately concedes, therefore, the footnote at best provides that "the justifications for detention do not instantly dissipate when an occupant steps out of a house or apartment into the 'immediate vicinity.'" Br. 49. That is nothing more than a *de minimis* exception to the rule stated in the text; it is certainly not a wholesale expansion of it.

2. In arguing for its untenably broad reading of *Summers*, the government elides the qualitative distinction between the detention in *Summers* and the detention at issue here. Petitioner was not encountered by officers in the immediate vicinity of the premises as they were in the course of executing the warrant. Instead, the evidence suggests, and the government does not dispute, that the search was specifically timed to justify the detention—with one set of officers conducting the detention away from the premises and another set of officers simultaneously executing the search warrant at the premises. See J.A. 126-127. The question presented by this case is whether the justifications for the *Summers* rule apply with similar force to the category of cases where the detention and the search occur discretely and in different locations. As we will now explain, the government has failed to show that they do.

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[1] The government repeatedly notes that the detention in *Summers* occurred on the "sidewalk" outside the house. See Br. 12, 20, 28, 29 n.2, 30, 47. But at oral argument, counsel explained that the defendant was detained on a walk that ran from the front steps of the house down to the public sidewalk running along the street—*i.e.*, on his own property. See Oral Arg. Tr. at 41-42, *Summers*, *supra* (No. 79-1794), *available at* 1981 U.S. Trans. LEXIS 81.

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

The appropriate analytical framework for this case is supplied by the Court's recent decision in *Gant*, *supra*. There, the 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." 556 U.S. at 339. *Gant* therefore makes clear that, in determining whether to extend the categorical rule of *Summers* to detentions that occur away from the scene of the search, the Court should analyze the applicability of the justifications that it articulated in adopting that rule. It naturally follows that the government, as the party seeking to extend the categorical rule, bears the burden of showing that the justifications are applicable in the mine run of cases to which the rule would be extended.

Remarkably, the government does not so much as cite Gant *in its brief.* It is unclear whether the government's omission is attributable to some unstated theory as to why *Gant* is distinguishable, or merely to a sense of discomfort at the closeness of the analogy. But whatever the reason, the government does not dispute that *Gant* provides the correct analytical framework here. And that framework compels a comparable result here as well. Because the government has failed to demonstrate that the justifications articulated by this Court in *Summers* apply with similar force when a former occupant has left the scene, much less when an individual simply has a "connection" to the place to be searched, the government's proposed extension of the *Summers* rule should be rejected.

1. Most importantly, the detention of an individual who has left the immediate vicinity of the premises to be searched does not materially advance the two primary justifications for the *Summers* rule: minimizing the risk of harm to the officers executing the warrant and facilitating the orderly completion of the search. See *Rettele*, 550 U.S. at 614; *Muehler*, 544 U.S. at 102 (Kennedy, J., concurring).

a. At the certiorari stage, the government contended that the detention of an individual whom officers see leaving the scene is justified on the ground that such an individual could subsequently learn of the search and then return to disrupt it. See Br. in Opp. 11-12. The government, however, fails to identify a single case presenting such a scenario. That is unsurprising. When officers encounter an individual in the course of executing a search warrant (whether inside the premises or in the immediate vicinity), that individual will naturally be aware of the officers' presence—and their intentions. But when an individual has left the immediate vicinity of the premises to be searched, he will ordinarily be unaware of the presence of police, because officers do not usually advertise their presence before executing the warrant (as the government does not dispute). And even if the individual later learns of the ensuing search, it would be the rare and foolhardy individual who deliberately returns in an attempt to overpower an entire search team.

In its merits brief, the government tries a different, and more ambitious, tack: it seeks to justify the detention of any individual who has a "connection" to the place to be searched on the ground that "[i]ndividuals who come upon police searching their residence" will often confront them. Br. 38. To begin with, the government points to no statistical evidence to support its premise, as

it has previously done in advocating broad readings of analogous categorical rules. See, *e.g.*, U.S. Br. at 10-11, *Gant*, *supra* (No. 07-542). And what statistical evidence does exist suggests that violent confrontations between officers and individuals arriving at the scene are relatively rare. See Pet. Br. 26 n.11; NAFD Br. 9-14. The government cites only four anecdotal examples from the last fifteen years, most of which are facially distinguishable from the scenario the government posits. See Br. 38-39.

To be sure, the execution of a search warrant more generally is a dangerous enterprise; it was for that reason, among others, that the Court adopted the *Summers* rule in the first place, and it is for that reason that officers typically execute warrants with overwhelming force. But to the extent individuals who arrive at the scene pose a specific threat to officers executing the warrant, the government does not dispute that officers can and do mitigate that risk by taking routine precautions, such as erecting barricades or posting someone on the perimeter or at the door. And to the extent some residual risk persists, the more immediate and obvious solution would be to make clear that the rule of *Summers* applies to individuals *when they arrive at the scene*—as lower courts have consistently done. See Pet. Br. 24 n.9.

The government offers no justification for an additional, prophylactic extension that would permit officers to detain any individual who is seen leaving the scene—much less any individual who has a "connection" to the place to be searched—based on the mere *possibility* that the individual would return while the search is ongoing, evade any precautions, and commit acts of violence against the executing officers. Cf. *Griffin* v. *Wisconsin*, 483 U.S. 868, 873 (1987) (noting that exceptions to default Fourth Amendment principles are permissible only when "special needs * * * make the warrant and

probable-cause requirement impracticable") (citation omitted). Nor does the government account for the offsetting risks of carrying out such a detention. See Pet. Br. 25-26.

The government shows its true colors when it contends that officers should be permitted to effectuate detentions pursuant to *Summers* "where [they] decide that a departing occupant is a continuing threat, or where they foresee the potential for a confrontation." Br. 37. The Constitution does not permit the government to detain an individual just because an officer does not like the look of him, or has a hunch he may later become violent. In the absence of articulable suspicion, the government's interest in minimizing the risk of harm to officers executing a search warrant does not justify such an expansive power to detain.

b. The detention of an individual who has left the scene also does not materially advance the related interest in facilitating the orderly completion of the search. The government does not contest the self-evident proposition that an individual who is not present at the scene cannot interfere with the efficient execution of the search. Instead, the government disputes the collateral proposition that the detention of an individual who has left the scene will divert police resources from the completion of the search. See Br. 43. In so doing, however, the government once again ignores the qualitative distinction between the detention in *Summers* and a detention of the type at issue here. Where the detention does not occur in the course of executing the warrant but instead occurs away from the premises to be searched, a different set of officers will necessarily effectuate the initial seizure—officers who might otherwise assist in conducting the search. And where officers do not encounter the detained individual at the scene but rather return

him there, they create a distraction that would not otherwise have existed.

Citing *United States* v. *Montieth*, 662 F.3d 660 (4th Cir. 2011), the government contends that the detention of an individual who has left the scene is justified because such an individual may choose to "cooperate" by consenting to the manner of executing the warrant. Br. 43-44. But the government cites no authority for the perverse notion that the Fourth Amendment permits the involuntary detention of an individual for the purpose of obtaining his consent, and we are aware of none. The unusual facts of *Montieth* aside, one might well doubt the likelihood that a detention would lead to a genteel parley between officer and detainee culminating in consent. And the government's contention that a detention is justified by the possibility of cooperation is difficult to square with its contention that a detention is justified because any individual with a "connection" to the place to be searched poses a potential threat to officers. See pp. 9-11, *supra*.

2. The government additionally relies on the remaining interest articulated in *Summers*: the interest in preventing flight in the event that incriminating evidence is found. Br. 31-35. But apart from reciting the holding of *Summers* (Br. 33), the government offers no answer to the fundamental flaw with relying on preventing flight as a freestanding basis for detention. Unlike the interests in promoting the safe and efficient completion of the search, the interest in preventing flight is not a "special" law-enforcement interest; it is a decidedly ordinary one. As such, it alone cannot justify an exception to the default requirement of probable cause. Permitting a detention to be based on an interest in preventing flight would allow officers to advance the point of detention from the point at which they *have* probable cause to the

point at which they begin a search that they *hope will produce* probable cause.

The government's reliance on the interest in preventing flight suffers from an additional flaw. The government does not dispute that, when an individual has left the immediate vicinity of the premises to be searched, he will ordinarily, if not always, be unaware of the presence of police. Nor does the government dispute that officers can take other steps to ensure that an individual who is leaving the scene does not flee—such as following that individual and then detaining him if incriminating evidence is uncovered during the search. Instead, the government primarily argues that, because of "the ubiquity of cellular telephones," an individual who has left the scene may be alerted to the presence of officers by another party, thus prompting the individual to flee. Br. 35. But the problem with that hypothetical is that it proves too much: the resident of a house that is being searched could just as easily receive a call when he is at work as when he is leaving the house on the way to work. See, *e.g.*, Pet. Br. 29-30; ACLU & Cato Br. 6-7.

Faced with this slippery slope, the government slides to the bottom of it. The government proposes a rule under which any individual who has a "connection" to the premises to be searched may be detained pursuant to *Summers*—including, but concededly not limited to, individuals who are seen leaving the scene. See, *e.g.*, Br. 34 (stating that the requisite connection will "typically" arise because an individual has been found at the scene or seen leaving it). That rule has the virtue of theoretical consistency but the vice of astonishing overbreadth. And it would constitute a dramatic expansion of the rule that this Court adopted in *Summers*. The Court should reject the government's proposal. When properly understood, the justifications articulated by the Court for the

original *Summers* rule do not apply with similar force when a former occupant has left the scene—much less when an individual simply has a "connection" to the place to be searched.

3. Perhaps recognizing the difficulty in relying on the existing justifications for the *Summers* rule, the government articulates two additional justifications not found in *Summers* itself. Those justifications are equally unavailing.

a. The government first contends that it has an interest in "avoid[ing] alerting anyone still inside the premises to [officers'] presence." Br. 44. To the extent the government invokes that interest here, however, it argues only that detaining an individual who has left the scene is less likely to alert anyone still inside *than detaining that individual at the scene*. *Ibid.*

That argument is nothing more than a repackaged version of the "Hobson's choice" argument advanced by the court of appeals. See Pet. App. 14a. And it suffers from the same flaw: "it assumes that, one way or another, the [detention] must take place." *Thornton* v. *United States*, 541 U.S. 615, 627 (2004) (Scalia, J., concurring in the judgment). If officers are concerned about alerting others who may still be inside as to the imminent search, they have an obvious additional option: they can choose not to detain the departing individual at all. For purposes of assessing whether a detention away from the scene is justified under *Summers*, that option, rather than a detention at the scene, is surely the relevant point of comparison.

Contrary to the government's characterization, moreover, detention under petitioner's proposed rule is not a "now-or-never" proposition; instead, it is merely a now-or-later one. Br. 45. If officers wish to execute the warrant before a departing individual returns, they can

simply keep tabs on him in the meantime, thereby facilitating a subsequent detention in the event that incriminating evidence is found. In the alternative, officers can wait to execute the warrant until the individual returns, thus ensuring that they will be able to detain him on the premises under *Summers*. The government's contrary argument rests on the premise that officers have a free-standing entitlement to detain anyone with a "connection" to the premises to be searched—a premise that *Summers* does not support and this Court should reject.

b. The government next contends that it has an interest in "avoid[ing] forcing officers to commence the search prematurely." Br. 45. But once officers initiate a detention pursuant to *Summers*, they cannot bide their time before executing the warrant. Instead, they must do so simultaneously, because *Summers* authorizes officers to detain only for the duration of the search; it does not authorize them to detain first and search later. See 452 U.S. at 705. Indeed, the evidence suggests that the police may have *accelerated* the search in this case, if only modestly, precisely in order to provide a justification for the detention. See J.A. 126-127.

Again, if officers are concerned about commencing the search before they are ready, they have an additional option: they can choose not to detain the departing individual and wait to execute the warrant. But it is nonsensical to say that a proposed rule that would have the effect of requiring the immediate execution of the warrant as a condition for detention serves an interest in avoiding premature execution. Because the government cannot identify any valid justification for the categorical authority to detain a former occupant who has left the scene, much less an individual who simply has a "connection" to the place to be searched, this Court should reject its proposed expansion of the *Summers* rule.

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

Even if the government could identify a valid justification for its proposed expansion of the *Summers* rule, such a justification would be outweighed by the correspondingly more intrusive nature of a detention that takes place away from the scene.

1. The government does not dispute that, where an individual is initially seized away from the immediate vicinity of the premises to be searched, he will likely be detained in full public view for at least several minutes—as petitioner was here. Nor does the government dispute that, where officers decide to return the individual to the premises, he 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 here. Such a detention will almost always be more intrusive than the detention that took place in *Summers*, where the public component of the seizure just outside the house was *de minimis*. A detention of the type at issue here "produce[s] all the indignity of an arrest"—but without the justification of probable cause. *Commonwealth* v. *Charros*, 824 N.E.2d 809, 816 (Mass.), cert. denied, 546 U.S. 870 (2005).

The government contends that "it is quite odd to think that detaining someone away from the premises *in front of probable strangers* would be more intrusive than detaining him at the premises *in front of loved ones, friends, or neighbors*." Br. 47. But that contention is at war with *Summers*. There, the Court heavily relied on the proposition that a detention that occurs inside the premises "could add only minimally to the public stigma associated with the search itself." 452 U.S. at 702. And

many detentions, like petitioner's, will involve *both* an initial detention away from the premises *and* a subsequent detention at the premises. Although an initial detention away from the premises did lead to a consensual entry in one case, see *Montieth*, 662 F.3d at 662-663, that hardly supports the government's assertion that a detention away from the premises "will be far less intrusive and far more respectful of personal dignity" more generally, Br. 47—especially because the initial detention in that case was just as intrusive as the detention here. See *Montieth*, 662 F.3d at 663 (noting that the defendant was pulled over, placed in handcuffs, and transported back to the scene in a police car).

2. The government disputes petitioner's contention that the potential for exploitative questioning is greater where the initial seizure occurs away from the scene. See Br. 48-49. In so doing, however, the government does not directly challenge the premise for that contention: namely, that, where the detention of a former occupant and the execution of the search warrant occur at entirely different locations, different officers will necessarily be required to carry out both tasks, with the result that the officers conducting the detention will from the outset focus solely on the detained individual.

It is true that this Court's decision in *Muehler* permits officers effecting *Summers* detentions to conduct questioning for the duration of the search. See 544 U.S. at 101. The government's proposed rule, however, creates a far greater potential for officers to "exploit[]" *Summers* detentions "in order to gain more information," rather than to promote the safe and efficient com-

pletion of the search. *Summers*, 452 U.S. at 701.[2] The intrusiveness of a detention that occurs away from the scene, and the potential for exploitation, provide additional reasons to reject the government's proposed rule and reaffirm *Summers*' limited scope.

E. The Government's Expansion Of The *Summers* Rule Is Flawed For Additional Reasons

Having spent most of its brief resisting the application of a geographic limit to the *Summers* rule, the government ultimately proposes a similar limit of its own. The government contends that the Fourth Amendment permits the detention of any individual who has a "connection" to the premises to be searched, as long as "officers effect the detention in a reasonable manner." Br. 28, 34. Applying that general rule to the detention of a former occupant who has left the scene, the government contends that the detention is valid as long as it "is conducted as soon as reasonably practicable." Br. 14. The government's standard suffers from several additional flaws.

1. a. The government's "as soon as reasonably practicable" limit would be far less administrable than petitioner's "immediate vicinity" limit, because it would introduce the very case-by-case analysis that a categorical rule seeks to avoid. In his opening brief, petitioner predicted that such a standard would lead to litigation in which parties armed with Google Maps would contest whether a departing occupant could have been pulled over more quickly. See Pet. Br. 35. But petitioner could

[2] At the suppression hearing, Officer Gorbecki testified that the officers' motivation in detaining petitioner and Bryant Middleton was "[t]o identify them and see what their purpose was for being at the residence." J.A. 47.

not have guessed how quickly his prediction would come to pass. In its brief, the government asserts that the officers in this case followed petitioner's car "for a total distance of approximately seven-tenths of a mile" and did not pull him over sooner because the road he was driving on is a "five-lane highway." Br. 4. *Those factual assertions do not appear in the record.* And even assuming, *arguendo*, that the officers *in this case* conducted petitioner's detention as soon as was reasonably practicable, there can be no doubt that the government's standard will 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.[3]

The government contends that petitioner's "immediate vicinity" limit is "anything but [a] bright one[]." Br. 50. But the government fails to cite a single actual case in which application of the "immediate vicinity" limit would be difficult. And while clever lawyers can conjure up tough hypotheticals with regard to almost any facet of a bright-line rule, the "immediate vicinity" limit is closely analogous to the geographic limits this Court has incorporated in other Fourth Amendment categorical rules. See, *e.g.*, *Gant*, 556 U.S. at 346 (permitting a vehicle search incident to arrest only where, *inter alia*, the arrestee is within "reaching distance" of the passenger compartment); *Maryland* v. *Buie*, 494 U.S. 325, 334 (1990) (categorically permitting a protective sweep incident to arrest only of the area "immediately adjoining the place of arrest"); *Chimel* v. *California*, 395 U.S. 752,

[3] Throughout its brief, the government notes that the officers detained petitioner a "short distance" from the apartment. But the government does not explain what that means, and it does not appear to be advocating that as the appropriate legal standard.

763 (1969) (permitting a search incident to arrest only of the area "within [the arrestee's] immediate control").

b. In advancing its "as soon as reasonably practicable" limit, the government makes no effort to explain why it matters for Fourth Amendment purposes how quickly officers effectuate a detention *after* a former occupant has left the scene. Indeed, if officers may detain an individual incident to the execution of a search warrant as long as the individual simply has a "connection" to the premises to be searched, where officers seize the individual would seem to be entirely irrelevant. Unlike other limits on the manner in which a detention is effectuated (such as the prohibition on the use of excessive force), a limit on the speed with which officers effectuate the detention serves no identifiable Fourth Amendment value. By contrast, a rule that permits officers to detain only those individuals they encounter inside the premises or in the immediate vicinity strikes an appropriate balance between the need to provide clear guidance, on the one hand, with the need to tailor the applicable categorical rule to the justifications that underpin it, on the other.

2. When the window dressing of the "as soon as reasonably practicable" limit is stripped away, it bears underscoring that the government's proposed rule would authorize the detention, incident to the execution of a search warrant, of any individual who has a "connection" to the premises to be searched. The government makes no effort to reconcile its rule with the original understanding of the Fourth Amendment, and for good reason. The government's rule would effectively create a police entitlement to seize persons that accompanies the warrant-conferred right to search for and seize contraband—notwithstanding the Fourth Amendment's requirement that a warrant "particularly describ[e] the

place to be searched, and the persons or things to be seized." The ensuing detentions would no longer be "incident" to the execution of the search warrant in any meaningful sense; every search warrant would effectively be transformed into a search-and-seizure warrant, only without probable cause to support the seizure.

Given the absence of any founding-era evidence that officers executing search warrants *ever* engaged in the practice of detaining the occupants of the premises, much less the practice of detaining individuals who were simply known to be associated with the premises, this Court should be loath to confer upon officers such expansive authority to conduct suspicionless detentions. Like the rule for vehicle searches incident to arrest, the *Summers* rule should be treated not as a "police entitlement," but as an "exception" of limited scope that must be "justified by [its underlying] rationales." *Thornton*, 541 U.S. at 624 (O'Connor, J., concurring in part).

In short, the government's expansive approach would "untether the [*Summers*] rule from the justifications underlying [it]," *Gant*, 556 U.S. at 343, and "abandon[] [its] constitutional moorings," *Thornton*, 541 U.S. at 628 (Scalia, J., concurring in the judgment) (citation omitted). The court of appeals erred by sustaining the detention in this case under *Summers*, and its judgment should be reversed.

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

Respectfully submitted.

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