No. 11-770

IN THE

Supreme Court of the United States

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

v.

UNITED STATES OF AMERICA,
Respondent.

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

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION, THE CATO INSTITUTE, AND THE NEW YORK CIVIL LIBERTIES UNION AS AMICI CURIAE IN SUPPORT OF PETITIONER

STEVEN R. SHAPIRO
EZEKIEL R. EDWARDS
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
125 Broad Street
New York, NY 10004
(212) 549-2500

ILYA SHAPIRO
TIMOTHY LYNCH
CATO INSTITUTE
1000 Massachusetts Ave., NW
Washington, DC 20001
(202) 842-0200

CATHERINE M.A. CARROLL
Counsel of Record
MADHU CHUGH
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
catherine.carroll@wilmerhale.com

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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INTEREST OF AMICI CURIAE[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with approximately 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. In furtherance of that mission, the ACLU has participated in numerous cases before this Court raising Fourth Amendment issues, both as direct counsel and as amicus curiae, including *Michigan* v. *Summers*, 452 U.S 692 (1981), which is central to the issues presented here. The New York Civil Liberties Union (NYCLU) is a statewide affiliate of the national ACLU.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums, and publishes the annual Cato Supreme Court Review. This case is of central concern to Cato because the protections of the Fourth Amendment are part of the bulwark for liberty that the Framers set out in the Constitution.

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[1] Letters consenting to the filing of this brief have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person, other than amici, their members, or their counsel, made any monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

This Court has long recognized "the general rule that every arrest, and every seizure having the essential attributes of a formal arrest, is unreasonable unless it is supported by probable cause." *Michigan* v. *Summers*, 452 U.S. 692, 700 (1981). As applied to both searches and seizures, the probable cause requirement serves as a critical safeguard against "rash and unreasonable interferences with privacy." *Brinegar* v. *United States*, 338 U.S. 160, 176 (1949).

Given the historical importance of the probable cause requirement in protecting individual liberty, *Summers*, 452 U.S. at 697, this Court has recognized exceptions to that requirement in only a "few specifically established and well-delineated" situations, *Arizona* v. *Gant*, 556 U.S. 332, 338 (2009) (internal quotation marks omitted). And it has carefully policed the boundaries of those exceptions to "ensure that the[ir] scope … is commensurate with [their] purposes." *Id.* at 339; *see id.* at 348; NACDL Br. 13-14. In *Summers*, the Court thus recognized only a "*limited* authority to detain the *occupants* of the premises while a proper search is conducted." 452 U.S. at 705 (emphasis added); *see Muehler* v. *Mena*, 544 U.S. 93, 98 (2005).

In this case, as Petitioner has explained (Br. 21-34), the court of appeals extended *Summers* to uphold a far more intrusive seizure without probable cause in circumstances where the justifications supporting *Summers* do not apply. More disturbingly, as discussed below, the court's reasoning places no limit on the reach of police authority to detain. If accepted, the court's analysis would authorize countless unreasonable seizures without probable cause, no matter how embarrassing or intrusive—in effect converting a search warrant

describing one "place to be searched," U.S. Const. amend. IV, into a roving "general warrant" to detain any former occupant associated with that place, anywhere.

Perhaps recognizing the breadth of its holding, the court of appeals posited that a seizure should occur "as soon as practicable" after the occupant has left the premises to be searched. Nothing in that formulation, however, supplies the effective limiting principle that is lacking in the court's analysis. The "as soon as practicable" standard is riddled with substantive flaws: it has no principled basis, cannot be squared with *Summers*, and serves none of the interests underlying the Fourth Amendment. And as a practical matter, it provides no guidance to or constraint on law enforcement and no administrable rule for courts to apply. It thus cannot be relied on to prevent the limitless range of detentions that would be justified under the court of appeals' reasoning.

Nor is the court's expansive reading of *Summers* necessary to protect any legitimate law enforcement interest. Police have ample tools at their disposal to secure "unquestioned command" of any house being searched, *Summers*, 452 U.S. at 702-703, and seizing an individual somewhere else merely because he previously occupied that house does nothing to further that end. At the same time, police have no legitimate interest in detaining a presumptively innocent person pending a search merely because they suspect or hope the search might yield evidence of crime. The Court should reverse the judgment below to ensure that the narrow exception recognized in *Summers* does not swallow the probable cause requirement or provide an entitlement for police to detain based on nothing more than anticipation of probable cause that does not yet exist.

ARGUMENT

I. THE COURT OF APPEALS' EXTENSION OF *SUMMERS* WOULD PERMIT DETENTION WITHOUT PROBABLE CAUSE IN AN UNACCEPTABLY BROAD RANGE OF CASES

With "roots that are deep in our history," *Michigan* v. *Summers*, 452 U.S. 692, 697 (1981) (quoting *Henry* v. *United States*, 361 U.S. 98, 100 (1959)), the Fourth Amendment was adopted in part as a repudiation of the pre-Revolutionary practice of "general warrants"—roving authorizations to arrest or search anyone suspected of wrongdoing. *Henry*, 361 U.S. at 100-101; *see Boyd* v. *United States*, 116 U.S. 616, 624-626 (1886), *abrogated on other grounds by Warden, Md. Penitentiary* v. *Hayden*, 387 U.S. 294 (1967). The Fourth Amendment establishes the general rule that "an official seizure of the person must be supported by probable cause, even if no formal arrest is made." *Summers*, 452 U.S. at 696; *see also, e.g.*, *Whren* v. *United States*, 517 U.S. 806, 809-810 (1996). Probable cause is established only when the inferences that may be made in a "particular factual context[]" justify the specific search in question, *Illinois* v. *Gates*, 462 U.S. 213, 232 (1983), and must be determined, at some point, by a neutral judicial officer, *Terry* v. *Ohio*, 392 U.S. 1, 21-22 (1968); *McDonald* v. *United States*, 335 U.S. 451, 455-456 (1948). These requirements play a vital role in protecting individual liberty and privacy from unreasonable government intrusion.

In light of the important values underlying the probable cause requirement, this Court has insisted that the scope of any exception should be commensurate with, and limited by, the justifications for the exception. *Arizona* v. *Gant*, 556 U.S. 332, 339 (2009). And it has steadfastly declined to extend any exception

when doing so would "untether the rule from [its] justifications," *id.* at 343, or permit such "intrusive" seizures as "would threaten to swallow the general rule that Fourth Amendment seizures are 'reasonable' only if based on probable cause," *Dunaway* v. *New York*, 442 U.S. 200, 213 (1979); *see* NACDL Br. 13-14.

Contrary to these tenets, the court of appeals' reasoning in this case lacks any limiting principle that would maintain an outer boundary on the *Summers* exception. To the contrary, the open-ended rationales on which the court relied in extending *Summers* to the facts of this case would equally justify its extension to any number of situations far more egregious than this case, in which detention without probable cause would be patently unreasonable.

The court of appeals found that "[a]t least two" of the law enforcement interests identified in *Summers* justified Petitioner's detention: "prevention of flight" and "minimizing the risk of harm to the officers" conducting the search. Pet. App. 14a n.6 (internal quotation marks omitted). In particular, the court reasoned that letting Petitioner drive away would have "risk[ed] the inability to detain him if incriminating evidence was discovered," *id.* at 14a, while detaining Petitioner at the house would have risked "alerting other possible occupants" to the police presence, potentially precipitating violence or destruction of evidence, *id.* at 15a. To this reasoning, the government adds that detaining a former occupant and returning him to the scene may help "facilitate the 'orderly completion of the search.'" Opp. 9. And the government speculates that even though Petitioner was unaware of the imminent search when he left, "anyone on the premises or nearby could readily alert [him] to the search by placing a call to his cell phone or sending him a text message," prompting him

either to flee or to "suddenly return—possibly armed and with the assistance of others—to obstruct the search." *Id.* at 11-12.

Once the interests in preventing flight and securing officer safety are thus construed to support the detention of persons who are neither present for nor aware of the search, they cease to limit the *Summers* exception in any meaningful way. The analysis offered by the government and the court of appeals would permit police to detain a man seen leaving his home on his way to the supermarket, even if he were unaware of any police presence, merely because he was seen leaving a house that the police intended to search. Such a detention would be justified under that reasoning by the law enforcement interests in preventing flight (if he were tipped off to the search), minimizing the risk of harm to the officers (if he returned to the house to attack the police or disrupt the search), and aiding in the orderly conduct of the search (if he were brought back home and forced to assist).

Precisely the same law enforcement interests would be served if, instead of detaining the man on his way to the supermarket, the police detained him while he was shopping *at* the supermarket. Just as if he were detained a block or two from home, detaining him at the grocery store, shielded from view of the house to be searched, would minimize the risk that his detention might precipitate violence or the destruction of evidence by any person remaining at the house. At the supermarket, he would be equally likely (or unlikely) as when he was driving away from the house to learn of the search and leave town. He would be equally likely (or unlikely) to return home during the search and try to obstruct it or threaten officers' safety. And he would

be equally able (or unable) to assist in the search if he were forcibly returned.

This example begets countless others. The same rationale would justify the police in seizing the man in broad daylight in the public square, at a friend's home, in a classroom, or at his place of business—in front of members of his community, clients, coworkers, customers, or the boss.[2] A person can be alerted that his home is being searched and then flee, or go into hiding, wherever he is. He can "obstruct the search" (Opp. 11) from nearly anywhere, too—either by returning to the premises himself or by arranging some other disruption. Indeed, it is hard to imagine a scenario in which the court of appeals' capacious understanding of *Summers* would *not* authorize the detention of a person associated with a home being searched to prevent his flight, protect officer safety, or facilitate execution of the search. And the astonishing breadth of this detention authority is only heightened by the fact that the police would be permitted to "use reasonable force to effectuate the detention," including physical coercion. *Muehler* v. *Mena*, 544 U.S. 93 98-100 (2005).

The reasoning adopted by the court below and advanced by the government would thus entitle the police to conduct severely intrusive and embarrassing detentions without probable cause in circumstances far re-

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[2] In *United States* v. *Reinholz*, for example, the police detained the occupant of a home to be searched who was "at work and … unaware of the warrant." 245 F.3d 765, 777-778 (8th Cir. 2001) (declining to apply *Summers*). Similarly, in *Whitaker* v. *Commonwealth*, the police detained a former occupant of a home to be searched who had already "reach[ed] his apparent destination"—namely, the driveway of someone else's home. 553 S.E.2d 539, 543-545 (Va. Ct. App. 2001) (declining to apply *Summers*).

moved from those of *Summers* or even from the facts of this case—in effect, converting a warrant describing a particular "place to be searched," U.S. Const. amend. IV, into a roving license to arrest any person thought to be associated with that place. This turns the probable cause requirement on its head. "The central importance of the probable-cause requirement to the protection of a citizen's privacy afforded by the Fourth Amendment's guarantees cannot be compromised in this fashion." *Dunaway*, 442 U.S. at 213.

II. REQUIRING THE DETENTION TO OCCUR "AS SOON AS PRACTICABLE" DOES NOT SUPPLY A SOUND OR WORKABLE LIMIT

In extending *Summers* to uphold the detention here, the court of appeals purported to require officers to "identify an individual *in the process of leaving* the premises subject to search and detain him *as soon as practicable* during the execution of the search." Pet. App. 15a. Presumably, the court viewed this rule as supplying an adequate limit on police detention authority that would prevent the broad range of intrusive seizures described above. In fact, the court's standard provides no such protection. The "as soon as practicable" approach is defective in substance because it has no principled basis and cannot be squared with *Summers* or the values underlying the Fourth Amendment. And it fails in practice because it provides virtually no guidance to law enforcement officials and poses substantial challenges to courts, which would find themselves engaged in difficult and fact-intensive line-drawing exercises to determine whether a particular detention was accomplished "as soon as practicable." In short, this purported limit cannot adequately deter or preclude the broad array of unreasonable seizures

that are otherwise permitted under the court of appeals' holding.

A. The "As Soon As Practicable" Rule Has No Basis In Logic, Precedent, Or Fourth Amendment Values

1. As an initial matter, the court of appeals' approach should be rejected because it has no principled basis. It is not supported by any of the justifications this Court relied on in *Summers*, and it fails to draw a sensible line between those detentions that should be permitted and those that should not. As shown above, for example, there is no distinction for purposes of the *Summers* justifications between someone who is detained "as soon as practicable" after leaving the premises to be searched and someone who is detained farther down the street or even miles away at the supermarket or his office. Whether or not a seizure takes place "as soon as practicable" after the occupant left the house, the same reasoning that the court of appeals relied on to uphold the seizure in this case would authorize any seizure that could be said to reduce the risk of a potentially dangerous confrontation or destruction of evidence or to enhance officers' ability "to detain [the occupant] if incriminating evidence [is] discovered." Pet. App. 14a-15a.

Indeed, upon closer inspection, the court's arbitrary standard in fact amounts to no limit at all. Requiring police first to "identify an individual *in the process of leaving* the premises subject to search" has the veneer of a meaningful and administrable limit (although, in practice, even that standard may be highly malleable, *infra* p. 15). But marrying that requirement to a rule that police must then detain the individual "as soon as practicable" erases any geographic or temporal

boundary. The point at which it is first "practicable" to detain an individual might arrive long after (or far away from) the point at which police saw the individual "in the process of leaving." Any clarity or force provided by the "process of leaving" requirement is thus undercut by the "as soon as practicable" limitation. *See, e.g.*, *United States* v. *Castro-Portillo*, 211 F. App'x 715, 721 (10th Cir. 2007) (recognizing that detaining an individual "as soon as practicable after [he] depart[s] the premises" will "'not necessarily[] result in detention … in close proximity to his residence'" (quoting *United States* v. *Cochran*, 939 F.2d 337, 339 (6th Cir. 1991))).

2. The court of appeals' approach also fails to account for the intrusiveness of a detention that occurs in public, where it can be observed by others entirely unconnected to the event, rather than in the relative privacy of a home being searched. On the court of appeals' reasoning, so long as a seizure occurs "as soon as practicable" after the occupant leaves the premises, the seizure is permissible without regard to the degree of embarrassment or intrusion involved—which, as shown, can be substantial.

Exceptions to the probable cause requirement, however, have been permitted only where "the intrusion on the citizen's privacy 'was so much less severe' than that involved in a traditional arrest that 'the opposing interests in crime prevention and detection and in the police officer's safety' could support the seizure as reasonable." *Summers*, 452 U.S. at 697-698 (quoting *Dunaway*, 442 U.S. at 209); *see id.* at 699-700. Thus, in *Summers* itself, the Court emphasized that the detention at issue in the category of cases under consideration—requiring the occupant of a house simply to remain at home—was only incrementally more intrusive than the search of the house itself. *See* 452 U.S. at 701-702. Holding someone

at his residence, the Court explained, "could add only minimally to the public stigma associated with the search itself," *id.* at 702, and the detention would "not likely … 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," *id.* at 701.

In contrast, the "as soon as practicable" standard is blind to the degree of "public stigma" and would permit even the most intrusive or exploitive tactics. Whether it occurs four blocks from the premises or four miles, a detention effectuated in public, outside the privacy of the home, can subject the seized person to humiliation in front of his neighbors, coworkers, or other passers-by as police stop him, question him, and even handcuff him or use other reasonably necessary force to detain him. *See United States* v. *Sherrill*, 27 F.3d 344, 346 (8th Cir. 1994) ("[B]ecause Sherrill had already exited the premises, the intrusiveness of the officers' stop and detention on the street was much greater."). Indeed, although the court of appeals dismissed it without explanation as "*de minimis*" (Pet. App. 13a), the intrusion here was substantial in itself and certainly far more intrusive than the search of the house.[3]

The degree of intrusion involved in any of the scenarios discussed above, *supra* pp. 6-8, would be even more extreme. A detention in the public street on the

[3] Petitioner was detained and handcuffed outside his car approximately a mile from the premises being searched. And although Petitioner told police after they stopped him that he would not cooperate with their investigation (*see* Pet. Br. 5)—as was his right—the police exploited the detention by questioning and frisking him.

way to work would cause significant embarrassment; a detention after the person has arrived at the office would not only cause embarrassment, but also potentially disrupt his business or livelihood. Yet the "as soon as practicable" standard would permit such seizures without any regard for the degree of intrusion—even though that consideration is, or ought to be, central to any "reasonableness" inquiry. The court's rule thus fails to give effect to basic Fourth Amendment values.

3. Finally, the court of appeals' approach should be rejected because it incorporates a case-specific factual inquiry into the bright-line rule this Court adopted in *Summers*. Ordinarily, "[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application," but "requires careful attention to the facts and circumstances of each particular case." *Graham* v. *Connor*, 490 U.S. 386, 396 (1989) (internal quotation marks omitted). In *Summers*, the Court opted instead to "balanc[e] … the competing interests" on a "categorical basis." 452 U.S. at 705 n.19; *see* 2 LaFave, *Search and Seizure* § 4.9(e), at 726 (4th ed. 2004). *Summers* thus affords law enforcement officials categorical authority to detain an occupant incident to a search that "does not depend on the 'quantum of proof justifying detention or the extent of the intrusion to be imposed by the seizure.'" *Muehler*, 544 U.S. at 98 (quoting *Summers*, 452 U.S. at 705 n.19).

To the extent the Court viewed its "departure from the usual probable cause requirement" in *Summers* as "eliminat[ing]" "the risks of ad hoc decisionmaking," 2 LaFave, *Search and Seizure* § 4.9(e), at 726, the court of appeals' approach in this case would frustrate that purpose. Rather than turning simply on whether or not a detention occurred at the premises to be searched, the permissibility of a detention would depend on the

answers to such indeterminate questions as: "How soon is 'as soon as practicable'?" "For how long is a person 'in the process of leaving'?" Whatever the wisdom of the bright line drawn in *Summers*, it makes no sense to extend the bounds of that category in reliance on an "as soon as practicable" rule that defeats any benefits associated with the categorical approach.

B. The "As Soon As Practicable" Requirement Is Unworkable In Practice

Apart from these substantive defects, the "as soon as practicable" rule also fails as a practical matter because it does not adequately cabin police authority to detain without probable cause. As discussed, determining when a person may be subject to seizure based on probable cause ordinarily requires a case-specific inquiry. Where, as here, courts recognize a categorical exception to that requirement allowing detention in the absence of probable cause, such a departure from core Fourth Amendment principles can be tolerated, if at all, only where clearly defined rules leave minimal discretion to the police and are not easily subject to manipulation or abuse. The rule adopted by the court of appeals does precisely the opposite. It provides no clear guidance to police as to when they may detain an individual, but instead leaves them with unfettered discretion to make difficult, on-the-spot judgment calls as to when a detention on less than probable cause may "practicably" be effectuated, or whether they have missed the permissible window of opportunity to stop an occupant who has left the premises.

At the same time, by failing to delineate clearly the scope of police authority to detain without probable cause, the "as soon as practicable" standard invites manipulation by officers who perceive it as an entitlement

rather than a limit. *See, e.g.*, *Gant*, 556 U.S. at 347 ("Construing *Belton* broadly to allow vehicle searches incident to any arrest would serve no purpose except to provide a police entitlement."); *id.* at 342 ("[L]ower court decisions seem now to treat the ability to search a vehicle incident to the arrest of a recent occupant as a police entitlement rather than as an exception." (internal quotation marks omitted)); *Thornton* v. *United States*, 541 U.S. 615, 628 (2004) (Scalia, J., concurring in the judgment) (noting that decisions allowing the search of a car when "a motorist [is] handcuffed and secured in the back of a squad car … are legion"). If granted authority to detain individuals without probable cause or prior judicial approval, police officers would likely perceive a significant advantage in pushing the boundaries of this authority. *See McDonald*, 335 U.S. at 456. The flexible terms of the court of appeals' standard would easily lend themselves to such manipulation, as police could easily explain why any of numerous contingencies—rush hour traffic, the presence of bystanders, or poor lighting—made it "impracticable" to detain an individual any sooner or in any less intrusive way.

Courts in turn would be naturally reluctant to second-guess these exercises of police discretion and would likely defer to police judgments about "practicability" and officer safety. *See, e.g.*, *United States* v. *Foster*, 376 F.3d 577, 587 (6th Cir. 2004) ("[I]t is inappropriate, in the quietude of our chambers, to second-guess standard police procedure and … on-the-scene judgment." (internal quotation marks omitted)); *United States* v. *Blount*, 123 F.3d 831, 838 (5th Cir. 1997) ("If reasonable minds may differ the courts should not second-guess the judgment of experienced law enforcement officers concerning the risks of a particular situation." (internal quotation marks omitted)). Thus, one

court upheld a detention "ten to fifteen blocks from the residence," deferring to officers' judgment in the absence of evidence "suggest[ing] that the vehicle was not pulled over as soon as practicable." *United States* v. *Bullock*, 632 F.3d 1004, 1020 (7th Cir. 2011).

By the same token, those courts that do seek to enforce limits on police authority under the "as soon as practicable" standard will find themselves faced with difficult, if not impossible, line-drawing problems as they attempt to determine the point at which detention becomes impermissible. Have police identified an individual "in the process of leaving" if he has already pulled out of the driveway? What if he is a block away from his house but has not exited a gate surrounding his neighborhood? If police encounter the former occupant of a house subject to search on the highway on his way to the airport to leave town, is he not "in the process of leaving"? And what if it does not become "practicable" to detain him until well after he has completed "the process of leaving"?

Illustrating these difficulties, courts that have upheld detentions incident to execution of a search warrant away from the place being searched have struggled with the geographic reach of this extension of *Summers*, ultimately proving unwilling or unable to identify its boundary. *See, e.g.*, *United States* v. *Montieth*, 662 F.3d 660, 666 (4th Cir. 2011) ("We therefore decline to delineate a geographic boundary at which the *Summers* holding becomes inapplicable."); *United States* v. *Cavazos*, 288 F.3d 706, 711-712 (5th Cir. 2002) ("The [geographic] proximity between an occupant of a residence and the residence itself may be relevant in deciding whether to apply *Summers*, but it is by no means controlling."); *Cochran*, 939 F.2d at 339 ("*Summers* does not impose upon police a duty based on

geographic proximity[.]"). Similar questions arise with respect to the rule's temporal boundary. Courts would have to grapple with whether "practicability" should be assessed solely in light of the time that has elapsed or whether other contextual factors should be considered, such as the reasonableness of waiting to detain an occupant at a secure location—*e.g.*, a neighborhood road versus a busy highway or a church parking lot versus a high-crime neighborhood. And courts may be asked to determine how long an occupant can be "in the process of leaving," and whether police actually saw the occupant depart during that time frame.

In light of this unworkability, the "as soon as practicable" standard cannot provide an enforceable boundary on the court of appeals' extension of *Summers*.

III. Extending *Summers* Is Not Necessary To Enable Police To Secure "Unquestioned Command" Of The Premises Or To Protect Legitimate Law Enforcement Interests

The extension of *Summers* adopted by the court of appeals is as unnecessary as it is unwise. The essential purpose of *Summers* was to permit officers to secure "unquestioned command" of the premises to be searched. 452 U.S. at 702-703. No extension of *Summers* is required to achieve that end. Courts have afforded police significant authority in executing a search warrant to "take reasonable action to secure the premises and to ensure their own safety and the efficacy of the search." *Los Angeles County* v. *Rettele*, 550 U.S. 609, 614 (2007). Not least among those tools is the ability to restrain all occupants of the house for the duration of the search, using aggressive physical force if necessary. *Muehler*, 544 U.S. at 98-100.

The government offers no basis to believe that the daunting authority police already enjoy under *Summers* and other cases has proven insufficient to assert "unquestioned command" of any premises. Here, for example—as is commonly the case—a team of officers secured the premises using SWAT tactics and equipment, after surveilling the property from a staging area to assess the situation and plan their approach. Pet. Br. 3-4, 23-24.[4] Detaining someone at some other location merely because he previously occupied a house subject to search simply has nothing to do with the officers' "command" of the situation at that house. The government speculates (Opp. 11-12) that a former occupant of a house to be searched might learn the search was underway, arm himself, and return to the scene undetected to attack police. That hypothesis is far-fetched, to say the least, in light of the aggressive steps and surveillance tactics police routinely use to execute

[4] Any suggestion that existing tools are insufficient to allow police to exercise "unquestioned command" of a place to be searched is belied by the facts of cases upholding police officers' seemingly limitless leeway to use aggressive tactics in executing a search warrant. *See Rettele*, 550 U.S. at 615-616 (finding no Fourth Amendment violation where police forced occupants to stand unclothed briefly during a search); *Muehler*, 544 U.S. at 95-96 (finding no Fourth Amendment violation where SWAT team members executing a search warrant ordered occupants of the home out of their beds at gunpoint and detained them in handcuffs for hours); *United States* v. *Allen*, 618 F.3d 404, 409-410 (3d Cir. 2010) (holding that SWAT team acted reasonably in executing search of a bar in a high-crime area by detaining bar patrons at gunpoint and ordering customers outside to lie face down on the ground); *Jama* v. *City of Seattle*, 446 F. App'x 865, 867 (9th Cir. 2011) (holding that SWAT team officers executing a search warrant acted reasonably in pointing guns at one occupant, handcuffing her, and forcing her onto the floor).

searches in potentially dangerous situations. *See also* NAFD Br. 8-14. In any event, the exceedingly remote possibility that a presumptively innocent person who is not subject to arrest would, if informed of the police presence, acquire weapons and return with confederates to attack the police is far too speculative to justify extended detention under the Fourth Amendment, which was adopted in large part out of "[h]ostility to seizures based on mere suspicion," *Dunaway*, 442 U.S. at 213; *see Henry*, 361 U.S. at 104.

The government's interest in seeking an extension of *Summers* is thus less about ensuring the safe and unfettered execution of a search warrant than about enabling the detention of suspects pending the discovery of probable cause. The court of appeals captured this concern when it reasoned that enforcing the limits of *Summers* as this Court has articulated them "would put police officers executing a warrant in an impossible position:

> [W]hen they observe a person of interest leaving a residence for which they have a search warrant, 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).

Pet. App. 14a (emphasis added). As Petitioner has explained, however, the choice described by the court of appeals poses a dilemma only if one forgets that "the appropriate focus is on the safest way to *execute the search warrant*," not on the "safest way to detain a recent occupant of a house." Pet. Br. 27. Police have no authority to detain a suspect merely because of his association with a house to be searched in the hope that

probable cause will eventually materialize. However convenient it may be for police to detain a person of interest at the outset of a search in which they hope to find probable cause, the Fourth Amendment prohibits the government from detaining an individual in anticipation of probable cause that it has not yet obtained. Just as a warrantless search cannot be justified retroactively by the subsequent discovery of contraband, *e.g.*, *Florida* v. *J.L.*, 529 U.S. 266, 271 (2000), a seizure that is unsupported by probable cause at the outset is not permissible merely because police might later find evidence establishing that requisite foundation, *Henry*, 361 U.S. at 104; *Johnson* v. *United States*, 333 U.S. 10, 16-17 (1948).

Accordingly, if police do not wish to detain an occupant at the premises during a search for any reason, they can and must simply let him go—perhaps continuing to surveil him if they believe the fruits of the search might establish probable cause for an arrest, or if they truly fear he might flee or return to the scene to threaten officer safety.[5] If he does flee after leaving the premises, police might then have authority to stop and detain him briefly to investigate the reason for his flight. *See Illinois* v. *Wardlow*, 528 U.S. 119 (2000).

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[5] *See, e.g.*, *United States* v. *Dessesaure*, 429 F.3d 359, 361-362 (1st Cir. 2005) (police officers surveilled and followed suspect until the fruits of a search of the suspect's confederate at another location established probable cause for arrest); *United States* v. *Buggs*, 904 F.2d 1070, 1072 (7th Cir. 1990) (helicopter surveillance of suspect's car); *United States* v. *Weinrich*, 586 F.2d 481, 493 (5th Cir. 1978) (police vessels surreptitiously followed suspect's boats for several hours); *Castillo-Garcia* v. *United States*, 424 F.2d 482, 483-484 (9th Cir. 1970) (customs agents followed vehicle believed to contain large quantities of marijuana for several hours).

"[E]rratic driving or obvious attempts to evade officers can support a reasonable suspicion" justifying brief detention and questioning. *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 885 (1975). And police may stop someone upon a reasonable, articulable "suspicion that he may be connected with criminal activity" or upon information that he may be armed and dangerous to police officers or others. *Terry*, 392 U.S. at 10; *Adams* v. *Williams*, 407 U.S. 143, 146-147 (1972).

The exceptions to the probable cause requirement that this Court has already recognized thus provide several avenues by which law enforcement might detain an individual upon reasonable suspicion once he has left the premises of a house to be searched. And if execution of the search warrant does yield evidence of crime, police might then have the probable cause required for arrest. No boundless extension of *Summers* is necessary to achieve these legitimate law enforcement objectives. And there *is* no legitimate law enforcement interest in detaining a presumptively innocent person in anticipation of probable cause that does not yet exist.

CONCLUSION

The court of appeals' judgment should be reversed.

Respectfully submitted.

STEVEN R. SHAPIRO
EZEKIEL R. EDWARDS
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
125 Broad Street
New York, NY 10004
(212) 549-2500

ILYA SHAPIRO
TIMOTHY LYNCH
CATO INSTITUTE
1000 Massachusetts Ave., NW
Washington, DC 20001
(202) 842-0200

CATHERINE M.A. CARROLL
Counsel of Record
MADHU CHUGH
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
catherine.carroll@wilmerhale.com

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