

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 CHUNON L. BAILEY, AKA POLO, :

4 Petitioner : No. 11-770

5 v. :

6 UNITED STATES :

7 - - - - - x

8 Washington, D.C.

9 Thursday, November 1, 2012

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11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States
13 at 11:04 a.m.

14 APPEARANCES:

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16 behalf of Petitioner.

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19 on behalf of Respondent.

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1 P R O C E E D I N G S

2 (11:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 next in Case 11-770, Chunon Bailey v. United States.

5 Mr. Shanmugam.

6 ORAL ARGUMENT OF KANNON K. SHANMUGAM

7 ON BEHALF OF THE PETITIONER

8 MR. SHANMUGAM: Thank you,
9 Mr. Chief Justice, and may it please the Court:

10 In Michigan v. Summers, this Court
11 established a categorical exception to the default
12 Fourth Amendment requirement of probable cause.

13 Under Summers, officers executing a search
14 warrant for contraband may detain individuals they
15 encounter at the scene while they are in the course of
16 executing the warrant.

17 This case presents the question whether the
18 Summers exception also permits officers to detain
19 individuals who have left the scene before the warrant
20 is executed. Because individuals who have left the
21 scene do not pose an immediate threat to the safe and
22 efficient completion of the search, the court of appeals
23 erred by permitting their detention absent probable
24 cause or even individualized suspicion. Its judgment
25 should therefore be reversed.

1 JUSTICE SOTOMAYOR: Counsel, the two tests,
2 yours seem to be the immediate vicinity test, and the
3 Second Circuit is as soon as practical test. Your
4 adversaries point out that the Second Circuit test
5 actually focuses on the police officer's conduct, which
6 should be the focus of reasonableness or
7 unreasonableness. Your test just creates an artificial
8 line that is subject to as much play as the other. Why
9 isn't the focus on police conduct the right focus?

10 MR. SHANMUGAM: Well, let me explain,
11 Justice Sotomayor, first, the sort of theoretical basis
12 for why we're offering this line, and, second, say a
13 word about the comparative merits of the two tests.

14 First of all, with regard to the theoretical
15 basis for the line, our fundamental submission to this
16 Court is that Summers does not create a police
17 entitlement; it is instead a rule of necessity and
18 should be confined to situations in which a detention
19 serves search-related purposes.

20 And in our view, the justifications for a
21 detention evaporate once an individual has left the
22 immediate vicinity of the premises. And, again, that's
23 because in those circumstances a detention serves no
24 interest in ensuring the safe and efficient completion
25 of the search because the individual poses no immediate

1 threat to the safe and efficient completion of the
2 search.

3 JUSTICE KAGAN: And what is the immediate
4 vicinity? How would you define that?

5 MR. SHANMUGAM: Well, ordinarily, the
6 immediate vicinity will be the physical bounds of the
7 property; but, there may be circumstances in which an
8 individual who is just outside the physical bounds of
9 the property should nevertheless be detained, so to
10 provide --

11 JUSTICE SCALIA: May be? There certainly
12 is. I mean, that was Summers, wasn't it?

13 MR. SHANMUGAM: Well, in Summers itself, the
14 individual was on the premises just outside the house
15 that was going to be searched, and the officers were, in
16 the government's words in that case, approaching the
17 property.

18 JUSTICE SCALIA: Yes. He wasn't on the
19 premises, he was on the sidewalk, right?

20 MR. SHANMUGAM: Well, he was actually on --
21 he was on the property because he was on a sidewalk that
22 connected the front steps to the public sidewalk in
23 front of the house. The officers were approaching the
24 house, about to effectuate entry.

25 JUSTICE SCALIA: He was in the curtilage of

1 the house.

2 MR. SHANMUGAM: He was pretty clearly within
3 the curtilage, Justice Scalia.

4 CHIEF JUSTICE ROBERTS: You said the
5 difference is there's no immediate threat to the
6 officers here. But there is a threat, I suppose, I
7 mean, if he finds out about the search and comes back,
8 if he sees the officers outside his dwelling, if there's
9 somebody in the dwelling who can notify him, send him a
10 message that the police are searching and he can get his
11 confederates and come back.

12 It seems to me that you're requiring that
13 there be a larger number of police present at the site
14 conducting the search, being lookouts for anybody that
15 might come back, being able to detain people who are
16 leaving as they approach. There's no immediate threat,
17 but there's certainly a threat.

18 MR. SHANMUGAM: If anything, it's the
19 government's approach that requires a greater number of
20 officers at the site because, under the government's
21 approach, you have the two officers who conduct the
22 detention while a separate group of officers execute the
23 search.

24 And it's really for that reason,
25 Justice Scalia --

1 CHIEF JUSTICE ROBERTS: Well, it requires
2 more unless they want the guy to get away, I guess,
3 right?

4 MR. SHANMUGAM: Well, let me say something
5 about this prospect that the individual will return. We
6 think that the appropriate analysis here is the analysis
7 that this Court set out in Arizona v. Gant.

8 And this Court, in Arizona v. Gant,
9 suggested that where a categorical rule is involved, you
10 have to look at the class of cases to which the rule
11 would be extended to see if the justifications apply.

12 Now, with regard to this class of
13 individuals who have left the scene, we believe that it
14 is simply unlikely either that such an individual who
15 has left the scene will be aware of the presence of
16 police, or that such an individual will return in an
17 effort to disrupt the search.

18 JUSTICE KAGAN: Well, what if he were aware,
19 or what if there was reason to think he might be aware,
20 would you then allow the police to do what the police
21 did here?

22 MR. SHANMUGAM: Well, we wouldn't. And
23 that's simply because we believe that this should be a
24 categorical analysis.

25 And so, again, you're looking at this entire

1 class of cases where individuals have left the scene to
2 determine whether the justifications for the Summers
3 rule apply.

4 Now, let me provide a --

5 JUSTICE KENNEDY: If -- if you think that
6 leaving the scene -- in Justice Kagan's hypothetical,
7 that he's leaving the scene with incriminating evidence,
8 at that point you have -- you have a Terry stop? And
9 he's right at the scene; he's just leaving the premises,
10 at the end of the driveway or something?

11 MR. SHANMUGAM: Well, the analysis under
12 Terry is whether there is reasonable suspicion, a
13 reasonable basis to believe that the individual is
14 engaged in criminal activity --

15 JUSTICE KENNEDY: What would you think
16 generally in my hypothetical? There'd be hundreds of
17 other facts, but --

18 MR. SHANMUGAM: Well, ordinarily, when an
19 individual is seen leaving the scene -- and suppose --
20 let me provide --

21 JUSTICE KENNEDY: Just -- just before the
22 search, yes.

23 MR. SHANMUGAM: Well, of course, the
24 individual who is leaving the scene doesn't necessarily
25 know that the search is about to take place.

1 JUSTICE KENNEDY: Right.

2 MR. SHANMUGAM: And so, to provide a
3 hypothetical that will hopefully put some meat on the
4 bones of this issue, suppose that an individual leaves a
5 house, and he actually sees police officers sitting in a
6 car, whether marked or unmarked, outside the house. And
7 it is clear that he has seen the officers. He waves at
8 the officers and then ambles down the street.

9 I don't think that there would be any doubt
10 but that that individual could not be detained unless he
11 did something more; unless, for instance, he engaged in
12 flight at that point, at which point he could perhaps be
13 detained under Terry.

14 And so we simply submit that the analysis
15 should be no different in a situation in which the
16 purpose -- the reason why the officers are sitting
17 outside the house is because another group of officers
18 is about to execute the search warrant.

19 Of course, that individual --

20 JUSTICE GINSBURG: But Terry -- Terry is an
21 open question in this case. It wasn't decided below,
22 but it was raised.

23 So -- so you're arguing we shouldn't extend
24 Summers, but that leaves this very case susceptible to
25 the assertion that this was a legitimate Terry stop.

1 MR. SHANMUGAM: That is correct,
2 Justice Ginsburg.

3 And just to be clear about how these two
4 doctrines work together, our submission to this Court is
5 that within the search zone, within the immediate
6 vicinity of the premises, the rule of Summers applies,
7 so that, if officers encounter an individual within that
8 zone while they are in the process of executing the
9 warrant, a detention is permissible absent probable
10 cause or individualized suspicion.

11 Outside that search zone, ordinary
12 Fourth Amendment principles apply. And, of course,
13 under the Fourth Amendment, detentions of persons have
14 to be justified by some degree of individualized
15 suspicion; probable cause for a full-fledged arrest,
16 individualized suspicion for a more limited detention
17 under Terry.

18 JUSTICE ALITO: Well, what would you think
19 of this situation? Officers have a no-knock warrant,
20 and they're -- they're at the house. They see somebody
21 come out the door and start to go down the steps,
22 doesn't look like that person has noticed their
23 presence.

24 Now, they have the choice, if you prevail,
25 of either rushing in and stopping the person within the

1 curtilage, in which case they could detain the person,
2 or they could allow the person to walk some distance
3 outside of the site of the house and then stop the
4 person, and that would allow them to execute the warrant
5 without endanger -- without enhancing the danger to them
6 from potentially armed people inside or allowing the
7 destruction of evidence.

8 What -- in that situation, what argues in
9 favor of your rule, that if they want to detain this
10 individual, they have to rush in and stop him before he
11 leaves the premises?

12 MR. SHANMUGAM: The justifications
13 articulated by this Court in *Summers*, Justice Alito, and
14 in particular what we really believe are the primary
15 justifications, first, minimizing the risk of harm to
16 officers executing the warrant; and, second,
17 facilitating the orderly completion of the search.

18 And let me say a word about --

19 JUSTICE ALITO: Well, without
20 interrupting -- in that situation, officer safety is
21 undermined by your rule because it requires them to stop
22 the person on the premises and, therefore, tip off those
23 inside, potentially, about their presence.

24 MR. SHANMUGAM: But they also have the
25 choice not to engage in a detention at all.

1 And I think the fundamental problem with the
2 court of appeals' rule and with the government's
3 submission to this Court is that it really entails the
4 conclusion that once officers see the individual leaving
5 the house, they have an entitlement to detain that
6 individual, with the only open question being where and
7 how they go about effectuating the detention.

8 But we simply believe that the
9 justifications for the detention don't attach to the
10 individual. They are search-based justifications. And
11 the mere fact that an individual is seen leaving a house
12 that is about to be searched in our view is insufficient
13 to give rise to reasonable suspicion.

14 JUSTICE KAGAN: Mr. Shanmugam, when you talk
15 about the justifications in your brief and just now, you
16 talk about two; but, there were, in fact, three, and the
17 third was flight. So how is it that that's dropped from
18 your understanding of Summers?

19 MR. SHANMUGAM: Well, we simply think,
20 Justice Kagan, that that justification is insufficient
21 standing on its own. And that is simply because the
22 justification in preventing flight is different in kind
23 from the other two justifications that we've been
24 discussing.

25 The other two justifications are truly

1 special law enforcement interests, to use this Court's
2 words in Summers. The interest in preventing flight, by
3 contrast, is an ordinary law enforcement interest.

4 And just as in my hypothetical, when the
5 officers are sitting outside and they see an individual
6 wander by, the mere fact that the individual saw the
7 police and perhaps would therefore conclude that the
8 police were on to him would not give rise to a basis for
9 detention simply because that individual could
10 subsequently flee.

11 So, too, we think that preventing flight in
12 and of itself is insufficient. That is the ordinary law
13 enforcement interest that requires individualized
14 suspicion.

15 JUSTICE SOTOMAYOR: Counsel, can I come back
16 to the facts that my colleagues have raised and break it
17 down implicating the Terry question?

18 Here, the officers had a report of something
19 in the house, and they saw the defendant -- two people
20 leaving.

21 I know Terry hasn't been decided, but why do
22 you think -- just the stop, not the detention, not the
23 bringing them back to the house, why do you think that
24 just stopping them was wrong?

25 MR. SHANMUGAM: Under Terry?

1 JUSTICE SOTOMAYOR: Under Terry.

2 MR. SHANMUGAM: Sure. Well, and first of
3 all, I should preface what I'm about to say by noting
4 that the court of appeals itself didn't reach the Terry
5 issue, and the government doesn't advance that issue in
6 its merits brief.

7 JUSTICE SOTOMAYOR: But the court below did.

8 MR. SHANMUGAM: So that would be an issue
9 that would be open on remand. And let me say why on
10 remand --

11 JUSTICE SCALIA: Excuse me. Just the
12 stop would be -- but -- but they did more than just stop
13 them. They --

14 MR. SHANMUGAM: Well, that's right. The
15 stop and the --

16 JUSTICE SCALIA: -- they handcuffed them.

17 JUSTICE SOTOMAYOR: Well, it goes back to if
18 a police officer saw an individual leaving the house and
19 was concerned about them tipping someone off, et cetera,
20 what would be the problem with the officer stopping the
21 person around the corner, holding them, making sure
22 people got in and then letting them go.

23 MR. SHANMUGAM: And just to be clear,
24 because there are the two separate issues. There's the
25 question of the stop and the question of the detention.

1 And there would be a separate question about whether
2 under Terry a detention of a particular length might or
3 might not be permissible.

4 But as to the stop, the argument that we
5 would make on remand if we were to prevail before this
6 Court would be that here what you have is insufficient
7 to meet the reasonable suspicion standard. And what I
8 assume that the government would argue is that the
9 combination of the search warrant and the fact that the
10 individual was seen leaving the premises that were about
11 to be searched, and as to which there was probable cause
12 to believe that contraband was present, and the fact
13 that my client met the extremely generic description
14 provided by the confidential informant, would be
15 sufficient to give rise to reasonable suspicion.

16 Now, clearly we don't think -- I was just
17 going to say, clearly we don't think that either of
18 those factors standing on its own would be sufficient.
19 The question would be whether that combination of
20 factors under the facts and circumstances of this case
21 would be sufficient, and we would submit that that
22 combination is insufficient as well.

23 JUSTICE GINSBURG: If they did do -- if they
24 did do a Terry stop, and in the process of that stop the
25 police officer got a call that said, we found lots of

1 contraband, guns in this house, at that point they could
2 have turned the Terry stop into an arrest, couldn't
3 they?

4 MR. SHANMUGAM: They could very well, with
5 one caveat, and that caveat is simply that the
6 circumstances under which the contraband is found might
7 be relevant to the analysis of whether or not there is
8 probable cause, because the question would be whether or
9 not there is probable cause to believe that the
10 individual constructively possessed the contraband at
11 issue.

12 JUSTICE SCALIA: Mr. Shanmugam, please help
13 me. I -- I don't understand why -- why the Terry stop
14 is at issue, inasmuch as there was not a Terry stop. I
15 mean, what occurred here went well beyond a Terry stop,
16 did it not? So what do you do? You -- you slice the
17 baloney that thin; you say well, the -- the first stop
18 is a Terry stop. Oh, yes, he later went on to detain
19 them for a long time and put handcuffs on them and take
20 them back to the premises. What -- what relevance does
21 the Terry stop have?

22 MR. SHANMUGAM: Well, that would be the
23 additional question, whether the detention in this case,
24 which did involve taking my client and the other
25 individual, putting them in handcuffs, putting them in

1 the patrol car, and then taking them back to the scene,
2 was permissible within the scope of a Terry stop. And I
3 think that would also be an open question, and that
4 would particularly be an open question in a number of
5 these cases in which the detention, pursuant seemingly
6 to Summers, occurs over a very lengthy period of time.
7 Under Terry, of course --

8 JUSTICE SCALIA: Well, I guess -- I guess, I
9 just didn't realize that it's an open question whether
10 you can do that much in -- in a mere Terry stop.

11 MR. SHANMUGAM: Well, under Terry officers
12 may detain an individual for the period of time it takes
13 for them to confirm or dispel the suspicion, and I think
14 that there would be an open question as to whether or
15 not when officers are executing a search warrant, for
16 the duration of the execution of the search warrant,
17 that falls within the scope of that Terry test.

18 JUSTICE ALITO: Could you explain what you
19 mean by the immediate vicinity? Is it based on -- on
20 property line? Is it some absolute distance from the --
21 the entrance to the premises? Is it based on how far
22 you could see from the -- the site of the search?

23 MR. SHANMUGAM: I think ordinarily it will
24 be within the physical bounds of the property. So --
25 but -- but if, for instance, officers saw an individual

1 coming out of his house and he walked out and he just
2 happened to step -- step off the curb into the road
3 before the officers got to them, we would say that that
4 would satisfy the immediate vicinity standard.

5 JUSTICE SCALIA: Well, physical bounds of
6 the property is -- is too much. I mean, you know, what
7 if it's a farm and it's a 50-acre farm?

8 MR. SHANMUGAM: Well, and the point of --

9 JUSTICE SCALIA: I think you are much better
10 off, I think your submissions sometimes say immediate
11 vicinity.

12 MR. SHANMUGAM: Well, we -- we proposed to
13 this Court the immediate vicinity standard in large part
14 because it really is comparable to similar limits this
15 Court has adopted for other Fourth Amendment --

16 JUSTICE SCALIA: I like that much better
17 than boundaries of the property.

18 MR. SHANMUGAM: Well -- and to provide a
19 couple of examples, under Maryland v. Buie, the case
20 that permits officers to conduct a protective sweep
21 incident to an arrest, the Court permits officers to
22 search the area immediately adjoining the place where
23 the arrest occurs and that has not proven to be a
24 difficult standard to apply in practice.

25 JUSTICE BREYER: What is the actual

1 difference? I mean, you have two officers or three. If
2 they go into the property and somebody's there, they can
3 detain him, and Summers gives three reasons: One, as
4 Justice Kagan pointed out, preventing flight in the
5 event that incriminating evidence is found. We are
6 considering now the case where, instead of going and
7 detaining the people, the people inside the house walk
8 out and there are two officers in a patrol car or an
9 unmarked car outside waiting to go in. Okay. That
10 seems to me identical, as you said.

11 The last one is facilitating orderly
12 completion of the search. That seems to me identical.
13 You want the person there so that he can open a drawer,
14 so he can unlock a closet, et cetera, okay. Identical.

15 The third one, where there is the only place
16 for difference, it seems to me, is minimizing the risk
17 of harm to the officers. Now, the harm, risk of harm to
18 the officers I guess if he goes into the house is that,
19 well, if they leave, they might come back, goodness
20 knows, and they've seen they are looking for the drugs,
21 da, da, da. Or maybe they will rush out, or maybe there
22 will be a -- well, any, goodness knows what.

23 Now here I can see a slight difference, but
24 maybe not. I don't know. Maybe they will come back.
25 Maybe they noticed the people in the car outside. Maybe

1 they didn't. Certainly the policemen don't know. And
2 they might go in quicker, and then the others will be
3 alerted. I mean, when you talk generally about a risk
4 of harm to the police, it seems to me pretty close, if
5 not identical.

6 MR. SHANMUGAM: Well -- well, let me --

7 JUSTICE BREYER: So what am I missing?

8 MR. SHANMUGAM: Let me address each of those
9 three.

10 JUSTICE BREYER: You already said the first
11 one's identical. I don't see how the third one could
12 change, and what about the second?

13 MR. SHANMUGAM: Well, I actually don't think
14 that even the first one is identical. But look, we
15 think that first and foremost, the interest in ensuring
16 officer safety is really the paramount interest here,
17 and we simply think that it is unlikely that an
18 individual who is seen leaving the scene is either going
19 to be aware of the presence of police or return to
20 disrupt the search.

21 JUSTICE BREYER: How do you know that? They
22 are sitting outside in the car.

23 MR. SHANMUGAM: The government has not
24 identified a single example of an individual who is seen
25 leaving the scene who has returned to disrupt the search

1 in that fashion. Indeed, the government makes a much --

2 JUSTICE SOTOMAYOR: I thought your better
3 answer was the risk of somebody coming back to a house
4 exists whether the person just left it or left it an
5 hour after or before or 2 hours or 24.

6 MR. SHANMUGAM: Well, and that was going to
7 be --

8 JUSTICE SOTOMAYOR: When the police walk in,
9 they always have to guard against reentry.

10 MR. SHANMUGAM: Well, and that was going to
11 be my next point, Justice Sotomayor; and the government
12 really tries to make a broader and more ambitious
13 argument. The government tries to make the argument
14 that an individual with a connection to the place to be
15 searched could arrive at the scene while the search is
16 ongoing, really regardless of whether that individual
17 was aware of the presence of police, and then seek to
18 disrupt the search.

19 Now, we think even as to that broader
20 category of cases the government hasn't made a
21 sufficient showing that those sorts of confrontations
22 are a common occurrence, particularly in light of the
23 routine precautions --

24 JUSTICE BREYER: It's not just that. It's
25 that they might want to get in quicker to stop this

1 person from leaving because he's the one who knows where
2 the drugs are. At least that's what they think. Or
3 they start to shout, and alert the others. Or -- I
4 mean, I have never conducted such a search, you know, so
5 I don't know the risks involved there, but I can see the
6 possibilities. And probably you might have conducted
7 them, but I don't know. So how am I supposed to answer
8 this question?

9 MR. SHANMUGAM: I haven't personally
10 conducted any searches, Justice Breyer. But I can say
11 that with regard to categorical rules it is really
12 incumbent on the government to make a showing as to why
13 an extension of a categorical rule is required. Because
14 after all --

15 CHIEF JUSTICE ROBERTS: We talked about --
16 we talked about officer safety. What about the safety
17 of others? Suppose the place being searched is adjacent
18 to a playground and there are, you know, dozens of
19 children playing in the playground. The police are
20 worried there would be a shootout and they want to
21 detain the person, so they say: Well, let's wait until
22 he gets a block down the street and detain him there for
23 the safety of the kids. That has -- they can't do that?

24 MR. SHANMUGAM: Officers will naturally take
25 precautions in situations like that. They will go in

1 with --

2 CHIEF JUSTICE ROBERTS: Yes, the precaution
3 is let's wait until he's a block down the street because
4 it will be a lot safer. Can they do that and be covered
5 by Summers or not?

6 MR. SHANMUGAM: They cannot be covered by
7 Summers, but what they can do is either follow the
8 individual for the period of time during which they are
9 executing the warrant, or they can detain that
10 individual if he returns to the scene.

11 And again, all of the examples that the
12 government cites -- and there aren't that many of
13 them -- but the examples that the government cites are
14 examples of individuals who arrive at the scene and when
15 they realize that their place of residence is being
16 searched, they become obstreperous; and to the extent
17 that there is a concern about the threat posed to the
18 safety of officers in those circumstances, we would
19 submit that the obvious solution is to make clear that
20 Summers permits the detention of individuals who arrive
21 at the scene; and officers routinely do establish
22 perimeters when they are executing search warrants. And
23 so when they --

24 JUSTICE GINSBURG: So if he came back -- I
25 mean, the scenario here is he was supposed to be driving

1 his friend home, and he would have come back while the
2 search was ongoing, but the police could apprehend
3 anyone while the search -- if that's what you're saying,
4 while the search is ongoing --

5 MR. SHANMUGAM: Well, if he were to return
6 to the scene while the search is ongoing, we believe
7 that he could be detained pursuant to Summers, and we
8 cite a number of court of appeals cases that have so
9 held.

10 What the government is really arguing for
11 here is an even more ambitious rule, an additional layer
12 of Fourth Amendment prophylaxis, if you will, that
13 permits officers to detain an individual who is seen
14 leaving the scene based on the possibility that they are
15 going to return. The government has not come even close
16 to making an empirical case as to why that additional
17 layer of prophylaxis is required.

18 JUSTICE ALITO: Well, what if the person
19 comes out the door and walks -- and has walked 50 feet
20 down the block within sight of the entrance at the time
21 when the police are entering to make the arrest? Would
22 that person be in the immediate vicinity?

23 MR. SHANMUGAM: Well, I think that the
24 natural limit on the immediate vicinity rule is imposed
25 by the underlying justification, namely, that officers

1 should have the authority to encounter individuals -- to
2 detain individuals they encounter while they are in the
3 course of executing the warrant.

4 And so if in your hypothetical,
5 Justice Alito, the search team is marching up to the
6 house, and they encounter the individual 50 feet away
7 from the door or the property line while they are in the
8 course of doing so, the justifications of Summers kick
9 in at that point. That individual is aware of the fact
10 that the police are about to search his house, and, as
11 such, that individual poses a threat to the safe and
12 efficient completion of the search.

13 JUSTICE ALITO: Well, does that mean that if
14 the person is within sight of the entrance to the
15 premises at the time when the police enter, then that
16 person can be searched --

17 MR. SHANMUGAM: Well, we don't think --

18 JUSTICE ALITO: -- and be detained.

19 MR. SHANMUGAM: We don't think that that's
20 necessarily a line of sight rule. So if you had an
21 individual who was sitting out in front of a house six
22 doors down, we don't think that that individual could be
23 detained. Of course, in this case, my client was
24 detained at least seven-tenths of a mile away --

25 JUSTICE BREYER: But that's the problem.

1 MR. SHANMUGAM: -- so the issue --

2 JUSTICE BREYER: That's the problem. The
3 police have to know what they're supposed to do when
4 they go in to search a house, all right? And they know
5 that sometimes they can keep the people there, and you
6 are saying, but they can't stop them from leaving if
7 they're not -- all of a sudden, I'm a policeman, and I
8 don't know what to do exactly because I don't know how
9 to fill in that blank. And therefore, I might rush
10 in -- I don't know -- I see a recipe for a mess, and
11 that's what -- and the mess could involve physical harm,
12 and --

13 MR. SHANMUGAM: You're missing the --

14 JUSTICE SCALIA: You're not saying that they
15 can't stop them from leaving. Have you said that; they
16 can't stop them from leaving?

17 JUSTICE BREYER: They can't stop them from
18 leaving if, blank.

19 MR. SHANMUGAM: They -- they could always
20 proceed to execute the warrant when they see an
21 individual leaving; and, if they are in the course of
22 executing the warrant, a detention is permissible.

23 But let me say just one word about the issue
24 of the administrability of the rule because, after all,
25 what we're talking about here is a bright-line rule.

1 And the very purpose of a Fourth Amendment bright-line
2 rule is to provide guidance to courts and officers
3 alike.

4 It is true that one can posit difficult
5 hypotheticals under our immediate vicinity standard;
6 but, it is also true that it is even easier to posit
7 difficult hypotheticals under the as soon as reasonably
8 practicable standard that the government advances, which
9 really reintroduces the very case-by-case analysis that
10 bright-line rules are designed to avoid.

11 And, in addition, it is entirely unclear to
12 us what Fourth Amendment purpose that limitation serves
13 because it is not clear to us why it matters for Fourth
14 Amendment purposes how quickly officers effectuate the
15 detention.

16 And just one last point that I'd like to
17 make before reserving the balance of my time for
18 rebuttal.

19 The rule that the government seems to be
20 advocating before this Court is really a much more
21 ambitious rule than we've even been discussing this
22 morning. The government seems to suggest that the
23 government has the authority to detain any individual
24 with a connection to the place to be searched. And I
25 think that that is out of recognition that an individual

1 who happens to be at their workplace could just as
2 easily return to the place to be searched as an
3 individual who is seen leaving.

4 In our view, that is an astonishing
5 extension of the rule that this Court announced in
6 Summers.

7 And I would like to reserve the balance of
8 my time.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.
10 Mr. Wall.

11 ORAL ARGUMENT OF JEFFREY B. WALL
12 ON BEHALF OF THE RESPONDENT

13 MR. WALL: Mr. Chief Justice, and may it
14 please the Court:

15 JUSTICE SOTOMAYOR: Mr. Wall, would you
16 answer -- direct your first response to that last issue
17 because, as I read your brief, you seem not to be
18 accepting the Second Circuit's rule at all. You seem to
19 be proposing what appears to me to be a much broader
20 rule that says -- at one point in your brief you state
21 that it is the occupant's observed connection to a home
22 subject to a valid warrant, not his physical location at
23 the time that he is detained, that makes him subject to
24 detention.

25 Now, I know police when they're executing

1 warrants often have an advance team that has been
2 surveilling a home, sometimes for days. And they've got
3 one officer sitting there, and they see who they think
4 is the occupant leave, and the team doesn't arrive till
5 12 hours later.

6 Is it your position that in that
7 circumstance the officers are authorized to go to
8 wherever the defend -- wherever the occupant is, the
9 office, the -- wherever he might be, his mother's home,
10 and effect an arrest there?

11 MR. WALL: No, Justice Sotomayor. I
12 appreciate the opportunity to start there because I
13 think Petitioner's reply brief and much of his argument
14 today is devoted to a position the government's not
15 taking.

16 So let me be very clear. In the
17 government's view, Summers is about current and recent
18 occupants, people whom police, when they are executing
19 the warrant, find at the home or see leaving the home in
20 the process of executing a warrant.

21 And the question here is do the
22 justifications apply equally as a departing occupant
23 steps away from the home and onto a sidewalk, a yard, a
24 couple blocks away.

25 And I think my friend's answer to that has a

1 wonderfully abstract quality to it that doesn't engage
2 any of the realities on the ground.

3 Justice Alito, your hypothetical is anything
4 but. It comes very close to the facts of the Cochran
5 case out of the Sixth Circuit. Police arrive at the
6 scene. The occupant is known to carry a gun, and he has
7 a guard dog. So, rather than walk up to the door, they
8 wait for him to leave; but, by the time they can catch
9 up to him, he's off of the bounds of the property, but
10 he's still very close to the residence. They stop him.
11 They take him back to the residence. He lets the
12 officers in. He secures the dog, and they complete the
13 search.

14 I think that is a model law enforcement
15 practice, and it is indistinguishable in any important
16 respect from what went on in Summers.

17 The justifications for detention apply
18 equally to departing occupants when they are seen by
19 officers leaving in the process of executing the
20 warrant.

21 But no, Justice Sotomayor, the government is
22 not contending that other connections to the residence,
23 other than that kind of observed connection by the
24 officers, could justify a detention under Summers.

25 CHIEF JUSTICE ROBERTS: Well, we don't have

1 anything like that in this case. We have them getting
2 into a car, driving almost a mile away and being stopped
3 at that point.

4 MR. WALL: Well, we do have, though, the
5 officers seeing him departing the residence as they're
6 executing the warrant. It's a no-knock warrant for a
7 gun. And rather than stop him right outside the house
8 because they don't know who else would be inside --

9 CHIEF JUSTICE ROBERTS: As they're executing
10 the warrant, I don't remember, was the -- did the
11 individual know that they were executing the warrant in
12 this case?

13 MR. WALL: No.

14 CHIEF JUSTICE ROBERTS: Oh, okay.

15 MR. WALL: They had obtained the warrant.
16 They had -- the team had --

17 CHIEF JUSTICE ROBERTS: So the danger to
18 them is not at all like the situation with the dog and
19 the armed guy just off the property.

20 MR. WALL: Mr. Chief Justice, I respectfully
21 disagree. And the government would be happy to have
22 this case decided by having the Court look at the
23 Federal and state cases, look at the risks that are
24 present in those cases, and deciding whether the
25 interests of Summers are served in those cases.

1 What we see in the cases is that -- take
2 this very case, for instance. Petitioner is driving his
3 friend home to meet a court-imposed probation curfew,
4 and he is then returning to the house. I think the
5 reasonable inference in the record is that he'll be back
6 in a matter of minutes. So he --

7 JUSTICE GINSBURG: And then Mr. Shanmugam
8 says they could stop him. They could stop anybody. The
9 search is ongoing. Somebody approaches the house; the
10 police can stop that person.

11 MR. WALL: But think how formalistic and odd
12 that is, Justice Ginsburg, that the police see someone
13 leaving, but, if they can't catch up to them on the
14 bounds of the property, which has no reasonable
15 relationship to the warrant here, which was for the
16 premises, not for the -- for that property --

17 JUSTICE GINSBURG: But --

18 JUSTICE SCALIA: The threat is from anybody
19 coming back to the house, not just the person who just
20 left.

21 MR. WALL: Oh, assuming --

22 JUSTICE SCALIA: And surely the police, when
23 they're conducting a search, post guards to prevent
24 people from coming in.

25 MR. WALL: They often do, Justice Scalia,

1 but --

2 JUSTICE SCALIA: I assume they always do.
3 It seems to me there's no special threat from the person
4 who -- who left the house. There's always a threat of
5 somebody else coming into the house.

6 MR. WALL: Justice Scalia, certainly in
7 urban areas they do. I think it's more difficult where
8 you have smaller police departments in rural areas.

9 But the government's not disputing that
10 posting sentries is a good idea. That doesn't begin to
11 take care of the most serious cases, where people
12 outside of the area of the search fire on or assault
13 officers.

14 So, for instance, in 2008 --

15 JUSTICE SOTOMAYOR: You're missing the
16 point, which is that's going to happen regardless,
17 meaning that risk exists whether the person left the
18 minute you got there or a minute before or an hour
19 before or two hours before. That's the whole point,
20 which is the risk is extant no matter what.

21 MR. WALL: Justice Sotomayor, there is no
22 question that executing a warrant is dangerous, and
23 people can come onto the scene at any time.

24 The question is, do we want to increase that
25 risk to officers? Here, Petitioner is leaving, he'll be

1 back in a matter of minutes, and they're searching for
2 guns.

3 JUSTICE SOTOMAYOR: But you didn't know --
4 you don't know that in any search, meaning any time you
5 do a search you have no idea when the -- whether the
6 occupant -- sometimes you know whether the occupant is
7 inside. You'll hear the TV or something else. But
8 often you don't, and you don't know if someone will come
9 back and when.

10 MR. WALL: Justice Sotomayor, I completely
11 agree, although I think that --

12 JUSTICE SOTOMAYOR: So why is seeing someone
13 leaving increasing that risk?

14 MR. WALL: Because we know that some
15 percentage of those people will come back. Some
16 percentage will flee, which is one of the interests in
17 Summers, which I think Petitioner does not take
18 seriously. But some percentage of them will come back
19 and some percentage of those returning occupants will
20 harm officers. And unfortunately --

21 JUSTICE SCALIA: If -- if you have a large
22 enough force that you can afford to send two of them in
23 a car chasing this fellow for a mile, why can't you just
24 post those two outside the house, just in case somebody,
25 whether it's this person who's just left or anybody

1 else, comes back? I mean, it -- it seems to me that --
2 that what your positing is -- is -- is unlikely, namely,
3 having -- having sufficient personnel to follow these
4 persons, but not having sufficient personnel to defend
5 the premises against somebody entering.

6 MR. WALL: Justice Scalia, first, that isn't
7 even arguably going to serve two of the three Summers
8 interests, preventing people from fleeing or garnering
9 their assistance in the orderly completion of the
10 search. But even if we --

11 JUSTICE SOTOMAYOR: Can you tell me what
12 constitutional right entitles you to stop someone from,
13 using the word, "fleeing"? You certainly are entitled
14 to stop someone with whom you have reasonable suspicion.
15 But what constitutional right entitles you to stop a
16 person who's just leaving in the normal act, without
17 reasonable suspicion?

18 MR. WALL: Justice Sotomayor, I think your
19 question fills in the answer. What the Court said in
20 Summers is when you see someone -- when you find someone
21 at a home or you see them leaving at a time when a
22 neutral magistrate has determined there's probable cause
23 to believe a crime is being committed inside, you have,
24 in the words of the Summers Court, "articulable and
25 individualized suspicion" to believe that that person is

1 linked to the criminal activity inside the home.

2 JUSTICE KAGAN: Well, Mr. Wall, you have
3 that, too, about the person in her workplace, and you
4 said that your argument didn't apply to the person in
5 her workplace. So you have to come up with something
6 better than that. And I guess the question is your rule
7 would seem to encompass, you know, a whole set of people
8 who are leaving their houses for ordinary reasons: I'm
9 going to work in the morning.

10 And the question is whether the police can
11 stop this person who's going to work in the morning,
12 who's given no indication that he's seen the police
13 officers at the scene, no indication that he's coming
14 back immediately or, you know, in any amount of time
15 that it will take you to complete the search.

16 And that's not an outlier case. It seems to
17 me that the hypothetical I just gave you might very well
18 be the more common case than the hypothetical that you
19 gave me. So, you know, why isn't this just too broad a
20 categorical rule?

21 MR. WALL: Well, Justice Kagan, let me break
22 that up into both parts. First, you know, as far as
23 detaining people who have other connections to the home,
24 I think you're right that some of the arguments that the
25 Court adopted in *Summers* and that the government is

1 making here could translate. And I think when those
2 cases come to the Court, the Court will have to decide
3 whether to recognize doctrines analogous to Summers or
4 Terry in those contexts. But that's not what Summers is
5 about. The connection that Summers discusses and
6 approves is seeing someone leaving a home subject to a
7 valid warrant for contraband. That's the only
8 connection at issue here.

9 JUSTICE BREYER: But is it in the process?
10 Does Summers apply and does this apply only when the
11 police are in the process of executing a valid search
12 warrant?

13 MR. WALL: Yes, Justice Breyer. Even
14 Petitioner, the way I read his briefs, concedes that if
15 police had caught him outside the basement apartment or
16 somewhere within the property bounds --

17 JUSTICE BREYER: If -- if the police
18 executing the valid search warrant walked through the
19 gate and at that moment the individual emerging from the
20 house had not yet passed through the gate, then under
21 Summers the police would have the right to detain him.

22 All right. So the question here is he's
23 walked through the gate. All right. Now, I guess the
24 police -- all right, I see. The police objection is: I
25 don't know. These things are complicated and we might

1 not want to push him back. I don't know what the
2 neighborhood is like and maybe somebody will get killed.
3 I mean, that's the kind of argument --

4 MR. WALL: Justice Breyer, that is
5 absolutely right. The government's central --

6 JUSTICE BREYER: I know you'd say that was
7 right.

8 MR. WALL: I mean, I -- the government's
9 central contention is there's nothing magical about the
10 gate for Fourth Amendment purposes. When he steps
11 through the gate, he's just as much of a flight risk, a
12 danger to officers and just as able to assist in the
13 orderly completion of a search.

14 JUSTICE SCALIA: There is something magical
15 about the gate or at least about the immediate facility
16 of the house. What we're trying to apply here is an
17 absolute rule to make it unnecessary for the officers to
18 guess whether they can do this or that. And the rule
19 you propose is, well, you know, a mile away. What's
20 your test, a reasonable --

21 MR. WALL: As soon as reasonably
22 practicable.

23 JUSTICE SCALIA: As soon as reasonably
24 practicable. You consider that an absolute test? I
25 thought that the test we invented here was meant to help

1 officers, to say this is the rule and you can do it.
2 And you want to do anything else, use Terry or use --
3 use normal probable cause principles, but this is an
4 absolute rule governing the -- the search of a home.

5 MR. WALL: Justice Scalia, it is an absolute
6 rule and it tells you who, it gives you a who, who is
7 detainable. People we find --

8 JUSTICE SCALIA: It doesn't give you a
9 where. You need more than a who. You need a who and a
10 where.

11 MR. WALL: Well, the who is categorical.
12 People you find on the premises or you see leaving the
13 premises at a time when a magistrate has determined
14 there's probable cause to believe a crime is being
15 committed inside. The where, the location. Just like
16 duration, just like use of force in the Muehler and
17 Rotelli cases, those are subject to the general
18 requirement of reasonableness under the Fourth
19 Amendment.

20 JUSTICE GINSBURG: Mr. Wall, the Summers
21 case was an exception. The main rule is you have
22 probable cause. So you are taking the exception, which
23 was tied tightly to the house. You want him to stay on
24 the premises so he can -- there won't be any risk that
25 he's going to disrupt the search, but it was -- it was

1 an exception to the main Fourth Amendment rule, and now
2 you are asking to have that exception spread.

3 And so today you say, oh, well, we're not --
4 we're not asking if the person gets to her workplace,
5 but that the police, but maybe why -- why not? I mean,
6 you -- it's one thing to confine Summers to the house,
7 the immediate premises, and another to say seven-tenths
8 of a mile away, that's okay, too.

9 MR. WALL: Justice Ginsburg, I think the
10 reason Summers carved out the rule is it said, look,
11 for -- for current and recent occupants as a class,
12 we -- officers see, they find or see them at a residence
13 where there's probable cause to believe a crime is
14 committed, so across the board we've got reasonable
15 suspicion, and that's why we draw a rule so that we're
16 not going to rebalance every time.

17 JUSTICE KAGAN: Right. But the
18 across-the-board is a set of people who are at the house
19 when you want to search the house. And of course,
20 Summers makes perfect sense. You want to search the
21 house, you can't have these people roaming around,
22 right? So you have to detain the people.

23 But what you're now saying is: Well,
24 there's another class of people, they're going to work
25 in the morning. And we've -- there's -- there is no

1 indication that they've seen the police officers;
2 they're going to work. But we get to detain them, too,
3 just because we have a warrant to search the house. And
4 the question is why?

5 MR. WALL: Justice Kagan, as far as we know,
6 George Summers was going to work. I mean, George
7 Summers was detainable, as was Petitioner here, on his
8 view if we had caught him within the physical bounds of
9 the property. The question is not, you know, how to
10 apply it in that circumstance. It's does something
11 meaningfully -- meaningful change when he hits the
12 sidewalk or the neighbor's yard?

13 JUSTICE KAGAN: I mean, something meaningful
14 very -- very much changes. Before, you're dealing with
15 a problem of a person on the premises while you're
16 trying to search the premises. And now you're talking
17 about a person who is going to work, leaving the
18 premises, letting you search the premises without any
19 interference.

20 MR. WALL: Justice Kagan, I don't think that
21 explains why you couldn't let George Summers go on his
22 way, and it doesn't explain why the Court in Summers
23 didn't say, look, rather than roam the house, if it
24 really is true that once we let you outside the front
25 door or the front gate, you are no longer a danger and

1 are likely only to be a hindrance, why not give you the
2 option to leave. Turn them out, because on Petitioner's
3 view, they're safe to go. And what the Court in Summers
4 recognized is, no, important interests are served by
5 detaining people in that circumstance.

6 JUSTICE GINSBURG: You have to draw a line
7 someplace. When he is descending the steps to his
8 house, he is still associated with the house. And once
9 he steps over that line, the Summers rationale it seems
10 to me doesn't apply.

11 But there's a curiosity about this case,
12 maybe you can explain it to me. They stop him
13 seven-tenths of a mile away. By that time, the search
14 is ongoing. They have found guns and contraband. They
15 take -- why do they take him back to the house? What
16 was the reason for taking? There was nothing there that
17 he could -- he couldn't obstruct the search. He was in
18 handcuffs.

19 MR. WALL: I think --

20 JUSTICE GINSBURG: He couldn't point out
21 anything in drawers because they'd found it all.

22 MR. WALL: I mean, I think at that point
23 they had probable cause; they could have arrested him
24 and I think they could have taken him down to the
25 station house. They returned him to the scene instead.

1 And I don't think there's any evidence in the record
2 about why they took him back to the scene rather than --
3 than straight to the station house.

4 But, Justice Ginsburg, I do want to fight
5 the premise a little bit. All -- all that the
6 government is asking for is for the Court to look
7 through the Federal and state cases, because we see the
8 exact same interests that were served in Summers.

9 JUSTICE SOTOMAYOR: Counsel --

10 JUSTICE KENNEDY: I think -- I think we have
11 to take the case on the assumption -- I agree with you
12 there probably was probable cause -- but I think you
13 have to take the case on the assumption that there was
14 no probable cause to arrest, because they didn't -- they
15 did not rely on that authority.

16 MR. WALL: Justice Kennedy, in
17 that -- assuming that's true, then they took him back to
18 the scene to complete the search, by which time they had
19 found the drugs and the guns, and then they did arrest
20 him. And he has not claimed that at that point there
21 wasn't probable cause for an arrest. But these risks
22 are real, and they do play themselves out in the cases,
23 Justice Kagan --

24 JUSTICE SOTOMAYOR: Counsel, the problem
25 with absolute rules like we did in Summers is that

1 they're an exception, and they're absolute.

2 Go back to the question you were asked by
3 one of my colleagues earlier, why wouldn't Terry give
4 you all of the rights that you're seeking on the
5 absolute rule, but subject your police conduct to the
6 question of reasonableness, which is the normal standard
7 of the Fourth Amendment?

8 MR. WALL: Of course. A very brief Terry
9 stop could allow a departing occupant to go on his way
10 long before the search is completed, and now he's fully
11 aware of the police presence. So now --

12 JUSTICE SOTOMAYOR: I'm -- I'm litigating
13 for you.

14 MR. WALL: Sure. Okay. Imagine that --

15 JUSTICE SOTOMAYOR: So I could very easily
16 imagine that what the fight's going to be like below is,
17 we stopped them because we saw them coming out of the
18 house, and all we want to do is make sure that they
19 don't return. So we're just going to hold them in
20 place. We don't have to drag them in a car back to a
21 place they just left. We're just going to stop them in
22 place to get a phone call that everything's all clear.

23 MR. WALL: Well, I take one of the
24 differences between Terry and Summers to be that in
25 Terry the seizure is tied to the officer's brief

1 investigation, and in Summers it's tied to the execution
2 of the warrant.

3 Now, if what you're talking about is a Terry
4 stop that could last for the duration of the warrant, I
5 don't know that there is much of a difference, then,
6 between Terry and Summers.

7 JUSTICE SOTOMAYOR: Well, we don't know, but
8 why don't we let that develop.

9 MR. WALL: Well, because I think the danger
10 is that courts will apply Terry the way that they have,
11 and we don't want to dilute one doctrine with another.

12 A brief Terry stop could allow occupants to
13 go on their way, but now they're aware of the police
14 presence. Now, they are much more of a risk to flee or
15 harm officers.

16 JUSTICE GINSBURG: Explain -- explain to
17 me -- the police, they have the informant's tip, and
18 they see them coming out of the house. So it seems to
19 me it's a good case that that would be reasonable
20 suspicion. Coming out of the house, he looks like what
21 the informant says.

22 Then they -- can they -- they pat him down
23 and they find his keys, and the keys are to the house.

24 MR. WALL: Justice Ginsburg, that's
25 certainly true here. I was only saying to

1 Justice Sotomayor, you can imagine a case where they
2 execute the warrant, and it takes them a while to find
3 something. And, in the meantime, they stop a departing
4 occupant, he's not carrying a gun, he answers the
5 questions and does not arouse the officer's suspicion,
6 and now he is on his way. And he is on his way while
7 the search is ongoing, and now he knows about it.

8 JUSTICE SCALIA: So what? What's he going
9 to -- he's going to phone them and say, hey, you know,
10 you're going to be searched. The cops are crawling all
11 around the house already.

12 So the only realistic additional threat is
13 that he is going to voluntarily go back to where the
14 police are in the house? I mean, you know --

15 MR. WALL: Well, that is --

16 JUSTICE SCALIA: -- this is so implausible.
17 What -- what harm --

18 MR. WALL: Justice Scalia --

19 JUSTICE SCALIA: -- what threat to the
20 policemen can possibly exist?

21 MR. WALL: I think the Texas officers in the
22 Valdez case, which we cite in our briefs, would find it
23 surprising, where they did let someone go from the
24 scene, and she came back with an individual and started
25 fighting with police.

1 Look, I take Petitioner's point --

2 JUSTICE SCALIA: Very unusual.

3 MR. WALL: Justice Scalia --

4 JUSTICE SCALIA: Very unusual.

5 MR. WALL: -- it is true that only a
6 foolhardy person would do it, but, unfortunately, that
7 is a perfect description of many criminals who do not
8 tend to be level-headed, rational actors.

9 JUSTICE SCALIA: You don't adopt absolute
10 rules to cover foolhardy people. I mean, we -- absolute
11 rules are designed to cover the mine run of cases, the
12 generality of cases, not the oddball case. That's not
13 what you use an absolute rule for.

14 MR. WALL: That's absolutely right, Justice
15 Scalia. And in the mine run of cases, what we know is
16 that these people are leaving a home where there's
17 probable cause to believe a crime is being committed.
18 Police are detaining them a short distance away, and
19 they are doing it in cases where people are fleeing or
20 they -- we can reasonably believe they would flee once
21 they've seen officers, if they were not detained.

22 They are violent. They are aggressive.
23 Some number of them can come back, and we can make
24 reasonable predictions about what they would do, and
25 they provide very valuable assistance.

1 They secured guard dogs, like in the Head
2 and Cochran cases, where there were pit bulls and
3 Dobermans. They allow police to -- they give them keys
4 so they don't have effect forceable entry --

5 CHIEF JUSTICE ROBERTS: That's an argument
6 in Summers I just don't understand. The argument is you
7 can detain the people because they might want to give
8 the officers assistance. Well, if they want to give
9 them assistance, they don't have to be detained.

10 MR. WALL: Well --

11 CHIEF JUSTICE ROBERTS: It seems odd, you
12 know, we're going to tie -- we're not going to tie you
13 up -- we're going to keep you here, you can't leave
14 because we think you might tell us where the drugs are.

15 MR. WALL: Mr. Chief Justice, I mean, I
16 think it is one of three legitimate law enforcement
17 interests where you have someone for whom there is
18 articulable and individualized suspicion to believe that
19 they are connected to criminal activity.

20 And I think that this Court in Summers was
21 absolutely right. You do find people securing guard
22 dogs, moving families out of harm's way, providing keys
23 so that officers don't have to break in and harm
24 property or jeopardize third parties. You find them
25 handing over contraband rather than endanger officers.

1 CHIEF JUSTICE ROBERTS: If they want to do
2 that, they can. The question is whether you can detain
3 them in the hope that they will decide to help you --

4 MR. WALL: Well, and --

5 CHIEF JUSTICE ROBERTS: -- to give you the
6 key to the cabinet.

7 MR. WALL: -- and the argument in Summers is
8 you can detain them because you've got reasonable
9 suspicion. The question is, what are the interests
10 served by the detention? And that is an interest served
11 by detention.

12 Now, we're not saying it's an independent
13 basis to support it. These are people for whom, as a
14 class, there's reasonable suspicion, which is why
15 Summers carved out the rule that it did.

16 Now, this -- the situation in this case and
17 the Federal cases that we're seeing are not meaningfully
18 distinguishable from Summers. You've got the same
19 reasonable suspicion, same law enforcement interests,
20 same minimal intrusion. There is no -- along no
21 dimension is there a meaningful difference between this
22 case and Summers.

23 JUSTICE KENNEDY: Justice Kagan had the
24 hypothetical of the person leaving to go to work, the
25 9:00 to 5:00 person. Suppose the warrant's going to be

1 executed at 5:00. Can they detain him at his office so
2 that he doesn't go back --

3 He always goes right home. He takes the
4 Number 3 bus, and he will be there in 20 minutes. Can
5 you detain him at the office under your rule?

6 MR. WALL: Justice Kennedy, no, not under
7 Summers.

8 Now, whether they can --

9 JUSTICE KENNEDY: No, under the rule you're
10 proposing.

11 MR. WALL: I don't think so. I mean, when
12 that case --

13 JUSTICE KENNEDY: I don't know -- I don't
14 know why not, under the rule that's proposed.

15 MR. WALL: -- when that case comes to the
16 Court, the Court will have to decide whether to
17 recognize a doctrine analogous to Summers and Terry.
18 And I will honestly admit that some of the arguments
19 that the government's making here and that the Court
20 adopted in Summers will translate.

21 But Summers is not about that. Summers is
22 about current and recent occupants. And those, as a
23 class, have reasonable suspicion.

24 Now, I think these other cases get harder.
25 They will turn much more on what the connection was in

1 the facts of a specific case.

2 JUSTICE SOTOMAYOR: Counsel, my -- I remain
3 with my question, which is, we have a
4 circumstance-driven power, Terry. Your power is really
5 going much more broadly, because you're basically saying
6 if that -- if probable cause exists to search a premise,
7 it exists without being tied to an individual because
8 anybody who leaves the house, whether or not they have
9 been tied to a crime in that house in the past or not,
10 is now subject to being detained.

11 So we have evidence that only a husband is
12 involved in a fraud, and his wife is leaving for work.
13 Because she was observed leaving the house, she can now
14 be stopped a mile away.

15 MR. WALL: Justice Sotomayor, to be clear,
16 that's not the government's rationale. That's the
17 rationale of the Court in Summers.

18 Maybe the wife is aiding and abetting. We
19 don't have any idea. Maybe the wife, you know, is
20 implicit in the -- the husband's crime in some way. The
21 Court's point --

22 JUSTICE SOTOMAYOR: So your -- your view is
23 that Summers gave you -- entitled you to hold people
24 merely for purposes of investigation --

25 MR. WALL: I --

1 JUSTICE SOTOMAYOR: -- without any
2 reasonable suspicion? That's really what your rule is
3 saying.

4 MR. WALL: My view is with the Court's on
5 Summers. It's appropriate to consider the nature of the
6 articulable and individualized suspicion on which the
7 police based the detention of the occupant of a home
8 subject to a search warrant.

9 And what the Court said is, whether you're
10 inside or whether you're on the front steps or the
11 sidewalk, like George Summers, that reasonable suspicion
12 exists. The police have placed you in the home at a
13 time when a neutral magistrate has determined there's
14 probable cause.

15 And to be clear, we're not trying to blow
16 the doors off of this exception. This is a very narrow
17 exception. What we see time and again in the Federal
18 cases is the same fact pattern: Someone leaves the
19 house; the police catch up to them within a mile, but
20 usually just within a few blocks; and, they return them
21 to the scene.

22 The police are not treating this as a sort
23 of entitlement. This is not Gant, where the results are
24 outstripping the rationale.

25 JUSTICE SCALIA: The -- the procedure has to

1 be reasonable under the Fourth Amendment, right? Now --
2 now, the requirements for a warrant are not the outer
3 bounds of -- of what's reasonable, but nonetheless, what
4 -- it seems to me that what's reasonable under the
5 Fourth Amendment can be estimated from what the Fourth
6 Amendment requires a warrant to contain, and what a
7 warrant must contain is a description of the place to be
8 searched, and the persons or things to be seized.

9 And what you're arguing for is a special
10 rule which says once you have a warrant that this place
11 can be searched, you can seize anybody -- you can seize
12 not only anybody there in order to protect the police,
13 but anybody connected with the -- with the place. And
14 that -- that is so contrary to what -- what seems to me
15 the theory of -- of the Fourth Amendment that I am very
16 reluctant to -- to extend our cases any further than
17 they already exist.

18 MR. WALL: Justice Scalia, we're not here
19 asking for the Court to extend Summers. We are just
20 asking for a faithful application of what the Court said
21 in Summers. And I understand that, you know, it would
22 seem troubling would -- were it not for the fact that
23 the Court in Summers, I think, really walked through why
24 as a class, when you're inside the home or you're
25 leaving the home, we've got reasonable suspicion that

1 you're connected, and there are a number of good reasons
2 why police can detain you while they execute the
3 warrant.

4 You're right, the Fourth Amendment does
5 require reasonableness, and what the officers did here
6 was eminently reasonable. They are executing a no-knock
7 warrant at a drug stash house for a gun; they see
8 someone leave who fits the description of the drug
9 dealer; and rather than stop him right on the threshold
10 inside the curtilage and risk alarming his confederates,
11 they let him drive a short distance away and they return
12 him to the scene.

13 There's no meaningful difference between
14 that and if they had stopped him right outside the
15 house. The only thing they would have been --

16 JUSTICE GINSBURG: In this case, you
17 couldn't think of a reason why they took him back to the
18 scene.

19 JUSTICE BREYER: Maybe he had a key to
20 the -- to the place where they keep the drugs, the
21 basement or something.

22 JUSTICE SCALIA: He might have wanted to
23 help in the search.

24 JUSTICE BREYER: Is that fanciful? Is it
25 fanciful that people who are searched open doors or --

1 MR. WALL: It's far from being fanciful.
2 The Sherrill case out of the Eighth Circuit, the Sears
3 case out of the Eleventh Circuit, they came back and
4 they unlocked doors so the police wouldn't have to make
5 forcible entry. In Montieth out of the Fourth
6 Circuit --

7 CHIEF JUSTICE ROBERTS: Yes, but the
8 question is whether you have to detain them to do
9 something you're saying they'd want to do.

10 MR. WALL: Mr. Chief Justice, we're not here
11 saying that every time somebody could be helpful in a
12 search you could go out and detain them. It is an
13 exception to the normal probable cause requirement, but
14 it's an exception analogous to Terry because you've got
15 reasonable suspicion. And the question is there, okay,
16 as a categorical rule, you know you've got reasonable
17 suspicion for this entire group of people, current and
18 recent occupants; what reasons do police have to detain
19 them?

20 And there are really good reasons. One,
21 they tend to flee. And we see that in Cavazos out of
22 the Fifth Circuit. Two, they provide assistance in the
23 search; and three, they are often violent or aggressive
24 individuals.

25 I don't think it's irrelevant that the vast

1 majority of search warrants for contraband are for guns
2 and drugs, and you see a number of amici states in here
3 saying: Look, this is a legitimate and important law
4 enforcement practice for officers in a very dangerous
5 and volatile situation in executing these warrants.

6 And I think Petitioner takes those risks way
7 too lightly, and will not -- steadfastly refuses to
8 engage the realities on the ground that we see in the
9 cases. Judges and the Federal and state courts are
10 grappling with this every day, and what these opinions
11 reveal is that these risks cannot be so easily
12 dismissed. They are serious and they are real, and we
13 see them play themselves out across this entire set of
14 cases.

15 And what we don't see noticeably is the
16 kinds of things that the Court tends to be worried about
17 in Fourth Amendment cases: Abuse and police
18 entitlement. Again and again, you see police detaining
19 departing occupants a very short distance from a
20 residence, returning them, not prolonging the detention,
21 not engaging in exploitative questioning, and actually
22 serving the three interests that the Court identified in
23 *Summers*.

24 And to be clear, Petitioner's solution is
25 more than just a solution in search of a problem; it

1 carries its own problem. It is severely
2 under-inclusive. It will not capture any number of
3 cases where there are valuable law enforcement interests
4 to be served. And it will produce very silly results in
5 a number of cases where police can't catch up to a
6 departing occupant for one reason or another until after
7 he's crossed some magical gate, and they will have to
8 sit on their hands until he returns so that they can do
9 exactly what they would have done minutes or hours
10 earlier if they'd been able to detain him.

11 JUSTICE GINSBURG: They can follow him.

12 MR. WALL: They can, but, Justice Ginsburg,
13 tailing is a risky proposition, particularly in an urban
14 area. And that doesn't even arguably begin to serve the
15 interest in avoiding flight or facilitating efficient
16 and orderly --

17 JUSTICE SCALIA: All law enforcement would
18 be a lot easier if we didn't have the doggone Fourth
19 Amendment. I mean, the Fourth Amendment is an
20 impediment to law enforcement. Of course it is.
21 There -- there's no doubt about that.

22 MR. WALL: Justice Scalia, if you start from
23 the premise that the Fourth Amendment doesn't permit
24 this, then I lose. But I think what the Court said in
25 Summers is, what we -- this Court has already drawn a

1 number of exceptions to the probable cause requirement
2 in reasonable suspicion cases. This is another, and it
3 serves very valuable interests in this case and others.

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.

5 Mr. Shanmugam, you have 3 minutes left.

6 REBUTTAL ARGUMENT OF KANNON K. SHANMUGAM

7 ON BEHALF OF THE PETITIONER

8 MR. SHANMUGAM: Thank you, Mr. Chief

9 Justice. Just -- just a couple of points.

10 First of all, having suggested in its brief
11 that the police may detain any individual with a
12 connection to the place to be searched under Summers,
13 the government today falls back to the view that the
14 police may detain any individual with an observed
15 connection, suggesting that this Court can leave for
16 another day the question of whether to detain people
17 with a certain but non-observed connection.

18 Leaving that aside, the government suggests
19 on at least five occasions today that that observed
20 connection is sufficient to give rise to reasonable
21 suspicion. That was not the basis on which this Court
22 adopted its categorical rule in Summers. If it had
23 been, the discussion of the special law enforcement
24 interests supporting the rule would have been entirely
25 superfluous.

1 And it's for that reason we would
2 respectfully submit that the Court made clear in
3 footnote 19 that Summers permits officers to detain
4 individuals regardless of the quantum of proof
5 justifying the detention of specific individuals.

6 And this Court's subsequent cases applying
7 Summers have made clear that Summers permits the
8 detention of individuals with no apparent connection to
9 the criminal activity being investigated.

10 And that leads into my second point, which
11 is that Terry will serve as a fallback in many of these
12 cases to permit detentions of individuals who are seen
13 leaving the premises, where there is a sufficient
14 additional basis to give rise to reasonable suspicion.
15 In fact, it may very well be the exception to the rule
16 that you have a case in which there aren't sufficient
17 additional articulable facts to give rise to reasonable
18 suspicion.

19 We would respectfully submit that this case
20 falls within that exceptional category, but it really
21 underscores why the expansion of Summers that the
22 government is seeking is really unnecessary.

23 I would just note, in response to a point
24 that Justice Scalia made, that the fundamental flaw with
25 the government's position is that it really can't be

1 reconciled with any original understanding of the Fourth
2 Amendment. There's no historical evidence suggesting
3 that officers at the time of the founding or thereafter,
4 when executing search warrants, detained the occupants
5 of the premises.

6 And the problem with the government's
7 approach is that it really would convert any search
8 warrant into a search and seizure warrant. It would
9 really would suggest that there is a freestanding right
10 to detain anyone with a connection or an observed
11 connection to the place to be searched that operates
12 alongside the warrant-conferred right to conduct the
13 search.

14 JUSTICE ALITO: What -- would you say the
15 same thing about the exact situation in *Summers*?

16 MR. SHANMUGAM: No, we wouldn't,
17 Justice Alito.

18 JUSTICE ALITO: You think the original
19 understanding was that what happened in *Summers* was
20 okay, but if you get out of the immediate vicinity,
21 that's where they drew the line?

22 MR. SHANMUGAM: We're not challenging the
23 rule of *Summers* itself. We're simply suggesting that
24 there's no historical basis for that rule, and for that
25 reason we think that any expansion of *Summers* would

1 really be of questionable validity. In Summers itself,
2 the detention was truly incident to the execution of the
3 warrant because, after all, the officers were
4 approaching the house and literally just about to
5 effectuate entry when the detention took place.

6 JUSTICE SCALIA: Well, you can say there was
7 a historical basis for the rule, in that officers have
8 always been allowed to take necessary action to protect
9 themselves. And that's the principal justification.

10 MR. SHANMUGAM: Perhaps, but we have been
11 unable to find any examples of detentions of occupants
12 of the premises until at least 1880. And our point is
13 simply that the detention ceases to be truly incident to
14 the search where the individual has left the scene. The
15 justifications for the detention evaporate at that
16 point.

17 Thank you.

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.

19 The case is submitted.

20 (Whereupon, at 12:04 p.m., the case in the
21 above-entitled matter was submitted.)

22

23

24

25

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