No. 19-____

IN THE
Supreme Court of the United States

KARI JANAE PHIPPS,

Petitioner,

v.

STATE OF IDAHO,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Idaho

PETITION FOR A WRIT OF CERTIORARI

AMIR H. ALI
Counsel of Record
ELIZA J. MCDUFFIE*
RODERICK & SOLANGE
MACARTHUR JUSTICE CENTER
777 6th Street NW, 11th Fl.
Washington, D.C. 20001
(202) 869-3434
amir.ali@macarthurjustice.org

Counsel for Petitioner

**Admitted only in New York; not admitted in D.C. Practicing under the supervision of the Roderick & Solange MacArthur Justice Center*

QUESTION PRESENTED

Whether the "limited authority to detain" during the execution of a judicially approved search warrant for contraband, *Michigan v. Summers*, 452 U.S. 692 (1981), permits probation officers conducting a routine residence check to detain any visitor present, without any suspicion the visitor has done something unlawful or poses a danger?

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statutes

Other Authorities

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Kari Janae Phipps petitions for a writ of certiorari to review the Supreme Court of Idaho's judgment.

OPINIONS BELOW

The Supreme Court of Idaho's opinion (Pet. App. 1a-19a) is published at 454 P.3d 1084. The district court's opinion (Pet. App. 20a-32a) is unpublished. The magistrate judge's oral ruling (Pet. App. 33a-44a) is unpublished.

JURISDICTION

The Idaho Supreme Court entered its judgment on December 20, 2019. On March 9, 2020, Justice Kagan granted a 60-day extension to file this petition, to May 18, 2020. This Court has jurisdiction under 28 U.S.C. § 1257(a).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment provides:

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

U.S. Const. amend. IV.

STATEMENT OF THE CASE

1. As a condition of parole, Terry Wilson agreed to random searches of his person and residence. Pet. App. 2a, 7a. This mechanism for ensuring compliance with parole terms is common to all Idahoans who are released on parole and, indeed, to the millions of people across this country who are on parole or probation.[1]

On a Friday evening in 2016, probation officers conducted a residence check of Mr. Wilson's apartment, which they had done "a lot" of times before. Tr. 19.[2] The sole purpose of their visit was to ensure Mr.

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[1] *See* "Agreement of Supervision," *Idaho Department of Correction Reentry and Community Transition Guide* Appendix A ¶ 5 (11th ed. 2018), *available at* http://forms.idoc.idaho.gov/WebLink/0/edoc/384585/Pre-Release%20%20Manual.pdf; *see also*, *e.g.*, U.S. Sentencing Guidelines Manual §§ 5B1.3(c)(6), 5D1.3(c)(6) (setting this forth as a standard condition for all community supervision for federal offenders).

[2] "Tr. __" refers to the transcript of the February 13, 2017 suppression hearing.

Wilson's "[c]ompliance with his parole" and that he was "obeying all of the laws that [he] should." Tr. 23. The officers "had no suspicion of any criminal wrongdoing or parole violations when they arrived to perform the residence check." Pet. App. 4a, 20a.

At the time the officers arrived, petitioner was visiting Mr. Wilson. The officers recognized petitioner as a visitor from prior compliance checks of Mr. Wilson's home. Pet. App. 2a, 21a. Petitioner herself was not on probation or parole, and the officers did not have any reason to believe that she had committed or was committing a crime. Pet. App. 4a, 21a, 29a. The officers also did not have any reason to think petitioner posed any danger. *Id*. Nonetheless, upon entering the residence pursuant to the terms of Mr. Wilson's parole, the officers detained petitioner, informing her that she was not free to leave and must stay in the living room for the duration of their search of Mr. Wilson's apartment. Pet. App. 2a-3a, 21a. After detaining petitioner, the officers took her ID and confirmed she was not subject to parole, probation, or any arrest warrant. Pet. App. 36a, 38-39a. According to the officers, it was "not necessarily a policy" but was their standard practice to detain all people who happen to be present during a residence check for the full duration of their search. Tr. 12, 18, 28.

Upon searching Mr. Wilson's apartment, the officers found drugs in his back room. Pet. App. 2a-3a, 21a. The officers then called local law enforcement to complete the search. Pet. App. 3a. They announced that a K-9 was on the way that would "sniff out or detect" any contraband petitioner had on her, and asked petitioner whether she had anything they should know

about. Tr. 19-20, 32-33, 39; Pet. App. 2a, 21a. Petitioner responded that she had a methamphetamine pipe in her backpack. Pet. App. 2a, 21a. After local law enforcement arrived, they seized the pipe and issued petitioner a citation for possession of drug paraphernalia. Pet. App. 3a.

2. The State subsequently charged petitioner for possessing drug paraphernalia, and petitioner moved to suppress her statements and the pipe under the Fourth Amendment. Pet. App. 2a.

After hearing testimony at a suppression hearing, the magistrate judge found the following facts:

i. The residence check took place pursuant to Mr. Wilson's terms of parole. Pet. App. 35a, 41a.

ii. The probation officers detained Ms. Phipps upon entering the residence. Pet. App. 42a.

iii. The probation officers had "no belief that criminal activity was afoot" and no "suspicion of criminal activity of any kind." Pet. App. 35a, 41a.

iv. The probation officers also did not observe or believe that petitioner was armed or dangerous. Pet. App. 35a. "[N]othing that [the probation officers] observed" would have "justified a *Terry* detention at that time." *Id*.

The parties stipulated to these facts, Pet. App. 36a, and the magistrate judge accordingly recognized them as "clearly conceded facts by all parties," Pet. App. 42a.

The magistrate judge therefore recognized the dispositive issue as whether "a status search to check a

residence" carries with it the authority to detain "a person merely present" absent any belief that the person has committed "criminal wrongdoing of any kind." Pet. App. 41a. Adopting the Ninth Circuit's rule that "the same logic" controls whether officers are executing a search warrant or conducting a residence check, the magistrate judge concluded it was "clear that the United States Supreme Court case law and also the Ninth Circuit case law" authorized suspicionless detention of any person during a residence check. Pet. App. 42a (discussing *Sanchez v. Canales*, 574 F.3d 1169 (9th Cir. 2009)).

The magistrate judge explained he was "somewhat surprised by" this outcome. Pet. App. 42a. In particular, he "anticipated there being more of a distinction between" search warrant execution, "where there was at least a judicial finding of probable cause for criminal activity," and what was "just sort of a probation enforcement search." Pet. App. 41a. He concluded, however, that he was "bound obviously by United States Supreme Court precedent" and "controlling Federal precedent from the Ninth Circuit" that compelled this result. Pet. App. 42a-43a.

Petitioner entered a conditional plea, reserving the right to appeal her suppression motion. Pet. App. 20a.

3. Petitioner appealed to the district court, which reversed in a reasoned opinion.

The district court observed that under *Michigan v. Summers*, 452 U.S. 692 (1981), "[i]n the context of a search pursuant to a warrant issued by a neutral and detached judicial officer . . . police are allowed to detain individuals present during the search." Pet. App.

23a-24a (citing *Summers*, 452 U.S. at 705). The district court also observed that the Ninth Circuit has extended *Summers* to "detention of the occupants of a home during a parole or probation compliance search." Pet. App. 24a-25a (discussing *Sanchez*, 574 F.3d 1169).

However, the district court rejected the Ninth Circuit's expansion of the *Summers* rule. It explained that "[i]n the case of a valid search warrant, a judge has necessarily determined that there is probable cause to believe that evidence of criminal activity may be found in that location," which "provides a nexus between an individual's presence at the location and the suspected criminal activity, rendering detention of individuals present reasonable during the execution of the warrant." Pet. App. 25a. According to the court, "that same nexus between an individual's presence and suspected criminal activity does not exist when law enforcement arrives at a parolee's residence to perform a routine search pursuant to standard conditions of parole rather than pursuant to probable cause." Pet. App. 25a-26a.

The district court also revisited the three justifications identified in *Summers* and concluded that none justifies suspicionless detention of visitors for the duration of a routine parole compliance search. Pet. App. 28a-32a. According to the court, the Fourth Amendment allowed officers to "identify new persons arriving and remaining on the premises during a search." Pet. App. 30a. However, upon knowledge that the person is just a visitor, there was no valid government interest in "preventing a visiting person from leaving the premises" in the absence of some articulable suspicion. Pet. App. 30a. To rule otherwise would "subject

an individual to searches and seizures by law enforcement merely based on their association with a parolee." Pet. App. 26a.

4. The Idaho Supreme Court sided with the magistrate judge and Ninth Circuit, and reversed in a reasoned opinion.

Like the magistrate judge and district court, the Idaho Supreme Court recognized that the "facts essential to defining the scope of [its] analysis" were "undisputed":

i. The probation officers had "authority to enter and search the apartment" because Mr. Wilson "consented to suspicionless searches of his person and residence as a condition of his parole." Pet. App. 7a.

ii. The probation officers' immediate detention of petitioner "qualifie[d] as a seizure for the purposes of the Fourth Amendment." *Id.*

iii. The probation officers "did not have reasonable suspicion or probable cause" to believe petitioner was "armed or dangerous or involved in any wrongdoing." Pet. App. 8a.

The court thus understood the appeal to present "only the constitutionality of a suspicionless detention of a third party during a routine parole search." Pet. App. 8a.

The court recognized that although this question presented "an issue of first impression for Idaho," it "has been developing nationwide over the last four decades." Pet. App. 9a. After reviewing *Summers*, 452 U.S. 692, and *Muehler v. Mena*, 544 U.S. 93 (2005), the court rejected the propositions that (i) "*Summers*

only applies to the detention of an occupant when the search is conducted pursuant to a search warrant," and (ii) any detention of visitors "should be limited to identifying" persons on the premises, after which "any non-residents should then be permitted to leave." Pet. App. 9a-12a, 16a. The court concluded that although the district court's reasoning was "a logical reading of *Summers*," it had failed to "take into account" the decisions of other lower courts that extended *Summers* in both of these ways. Pet. App. 12a.

"Of most significance," the Idaho Supreme Court reasoned, was "the Ninth Circuit Court of Appeals' extension of the *Summers* rule to permit the limited detention of 'the occupants of a home during a parole or probation compliance search.'" Pet. App. 13a (quoting *Sanchez*, 574 F.3d at 1173). There, the Ninth Circuit rejected the proposition that *Summers* "did not authorize Officers to detain 'third parties' on the premises" and "clearly extend[ed] *Summers* to parole and probation searches." Pet. App. 13a-15a. Based on *Sanchez*, the Idaho Supreme Court concluded that the justifications in *Summers* "apply with the same force to parole and probation searches as they do with searches pursuant to a search warrant." Pet. App. 15a-16a. The court further made clear that the authority to detain under *Summers* would not "be limited to identifying new persons arriving and remaining on the premises during the parole search" such that visitors could "be permitted to leave." Pet. App. 16a.

The court summarized: "we conclude that based on the holdings in *Summers*, *Muehler*, and *Sanchez*, officers have the categorical authority to detain all occupants of a residence incident to a lawful parole or

probation search." Pet. App. 17a; *see also* Pet. App. 11a n.4 ("Our holding today not only extends *Summers* to parole and probation searches, but also reiterates that an officer's authority to detain incident to a search is categorical[.]"). The court accordingly held that the probation officers were permitted to detain petitioner for the full duration of their compliance search of Mr. Wilson's residence. Pet. App. 18a.

REASONS FOR GRANTING THE PETITION

I. The Lower Court's Twofold Expansion Of *Summers*—To Parole Searches And To Visitors—Is Subject To Conflicting Authority At Each Step.

The decision below was premised on resolving two conflicts of authority against petitioner: (i) the extension of *Summers* beyond the context of search-warrant operations to routine parole compliance checks; and (ii) the extension of *Summers* to allow suspicionless detention of visitors for the full duration of a search.

Each conflict is acknowledged. For the extension of *Summers* to visitors, *see, e.g.*, *Stanford v. State*, 727 A.2d 938, 942-44 (Md. 1999) (cataloging the split); 2 Wayne R. LaFave, *Search & Seizure* § 4.9(e) & nn. 143-144 (5th ed.) (collecting cases holding that *Summers* "is not to be loosely construed as covering anyone present" as well as the "many cases [that] have interpreted *Summers* otherwise"); Amir Hatem Ali, *Following the Bright Line of* Michigan v. Summers*: A Cause for Concern for Advocates of Bright-Line Fourth Amendment Rules*, 45 Harv. C.R.-C.L. L. Rev. 483, 497-99 & nn.124-125 (2010) (observing that "[o]ver the past thirty years there has been significant disa-

greement among the lower courts over whether *Summers* should apply to the visitors and guests of a premises" and collecting cases). For whether the "existence of a search warrant is essential" to application of the *Summers* rule, including whether "to extend the rule to probationary searches," *State v. Kaul*, 891 N.W.2d 352, 355-56 (N.D. 2017), *see, e.g.*, LaFave, *supra*, § 4.9(e) n. 140 (noting that although some courts apply *Summers* in the context of lawful residence searches that take place without a search warrant, "[s]ome courts say existence of a search warrant is essential, so that no comparable authority exists incident to a lawful but warrantless search of premises for contraband"); Ali, *supra*, at 496 & nn. 114-115 (collecting cases that have applied *Summers* to lawful searches not premised on a search warrant).

The resulting disparity in the treatment of like defendants is blatant. The court below rejected the propositions that (i) "*Summers* only applies to the detention of an occupant when the search is conducted pursuant to a search warrant," and (ii) any detention of visitors "should be limited to identifying" persons on the premises, after which "any non-residents should then be permitted to leave." Pet. App. 12a, 16a. As the court recognized, the Ninth Circuit is one of the jurisdictions that has similarly resolved both issues against petitioner. In the context of a search warrant, it has "rejected attempts to distinguish *Summers* based on the facts that a detainee has no ownership interest in the property being searched." *United States v. Davis*, 530 F.3d 1069, 1080 (9th Cir. 2008). And in *Sanchez v. Canales*, 574 F.3d 1169 (9th Cir. 2009), *abrogated on other grounds*, *United States v. King*, 687 F.3d 1189 (9th Cir. 2012), the Ninth Circuit

extended *Summers* to detention "during a parole or probation compliance search," reasoning that the justifications for *Summers* are "present in every valid home search, whether or not the search is supported by a warrant" and "equally present in warrantless probation and parole compliance searches." *Id.* at 1173-74.

But consider how petitioner would have fared in one of the jurisdictions that resolves one (or both) of the conflicts in petitioner's favor. For instance, as the authorities above have documented, lower courts are divided into three camps just on *Summers*' application to visitors:

i. Like the court below and the Ninth Circuit, some jurisdictions extend *Summers*' authority to detain for the full duration of a search "to include those visiting the residence to be searched." *Stanford*, 727 A.2d at 943-44 (collecting cases); Ali, *supra*, at 499 & n.125.[3]

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[3] *E.g.*, *United States v. Sanchez*, 555 F.3d 910, 918 (10th Cir. 2009) ("[T]he authority to detain [under *Summers*] relates to all persons present on the premises."); *Davis*, 530 F.3d at 1080 (9th Cir.) (same); *United States v. Bohannon*, 225 F.3d 615, 617 (6th Cir. 2000) (holding that the "justifications for detaining residents" apply equally to someone who "was not a resident of the premises being searched" (citing *United States v. Fountain*, 2 F.3d 656, 663 (6th Cir. 1993))); *United States v. Pace*, 898 F.2d 1218, 1239 (7th Cir. 1990) (holding that the fact defendants were "not occupants or residents" of the residence searched is not a "distinction [that] changes the result" under *Summers*); *see also State v. Phipps*, 528 N.W.2d 665, 668 (Iowa Ct. App. 1995) (holding that the justifications for *Summers* "apply equally to nonresident visitors" and collecting cases).

ii. Like the district court here, some jurisdictions hold that a visitor may be detained without suspicion only "to ascertain the visitor's identity," after which detention may continue only "if the police can point to reasonably articulable facts that associate the visitor with the residence or . . . criminal activity." *Stanford*, 727 A.2d at 943 (collecting cases); Ali, *supra*, at 499 & n.133 (describing this as the "visitor-plus" rule).[4]

iii. Other jurisdictions "categorically limit *Summers* to actual residents of the place to be

[4] *E.g.*, *Baker v. Monroe Township*, 50 F.3d 1186, 1192 (3d Cir. 1995) (holding that *Summers* applies only to "a resident of the house under warrant," but that "police may stop people coming to or going from the house if police need to ascertain whether they live there"); *People v. Glaser*, 902 P.2d 729, 737 (Cal. 1995) (same); *State v. Broadnax*, 654 P.2d 96, 103 (Wash. 1982) (under *Summers* "persons not directly associated with the premises and not named in the warrant cannot be detained or searched without some independent factors tying those persons to the illegal activities being investigated"), *overruled on other grounds by Minnesota v. Dickerson*, 508 U.S. 366 (1993); *see also State v. Lopez*, No. 50919-9-II, 2019 WL 2448262, at *3 (Wash. Ct. App. June 11, 2019) (recognizing that Washington has adopted a "presence-plus requirement" for detention under *Summers*); *State v. Graves*, 888 P.2d 971, 974 (N.M. Ct. App. 1994) ("hold[ing] that the police cannot detain a non-resident unless they have a reasonable basis to believe that the non-resident has some type of connection to the premises or to criminal activity"); *State v. Schultz*, 491 N.E.2d 735, 739 (1985) (restricting *Summers* to people with a "reasonable connection" to the property).

searched." *Stanford*, 727 A.2d at 942 (collecting cases); Ali, *supra*, at 498 & n.124.[5,6]

These differing approaches also reflect the express points of disagreement between the district court and Idaho Supreme Court. The district court held that officers may "identify new persons arriving and remaining on the premises during a search," but then could not "prevent[] a visiting person from leaving the premises." Pet. App. 30a. Thus, given the officers' familiarity with petitioner as a visitor, the district court would

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[5] *E.g.*, *United States v. Reid*, 997 F.2d 1576, 1579 (D.C.Cir.1993) ("[U]nlike Summers, Reid was *not* a resident of the apartment which was to be searched under the warrant, and the trial did not disclose that he had any proprietary or residential interest in the suspected premises."); *Lippert v. State*, 664 S.W.2d 712, 720-21 (Tex. Crim. App. 1984) (declining to apply *Summers* to individual in living room because there was "no showing that the appellant was an owner or occupant of the residence" and *Summers* cannot be "be extended to a non-occupant"); *see also State v. Williams*, 665 So.2d 112, 115 (La. Ct. App. 1995) (affirming motion to suppress because defendant "was not a resident of the house to be searched, nor was she even a known suspect"); *People v. Burbank*, 358 N.W.2d 348, 349 (Mich. Ct. App. 1984) (distinguishing Summers because defendant "did not live in the house that the police were searching"); *State v. Carrasco*, 711 P.2d 1231, 1234 (Ariz. Ct. App. 1985) (holding *Summers*' "limited exception to the probable cause requirement cannot reasonably be extended to those merely present on the premises").

[6] Since cataloging the split in *Stanford*, the Maryland Court of Appeals has observed that the split has deepened further. *See Cotton v. State*, 872 A.2d 87, 92 (2005) (noting "at least three Federal appellate courts and one State Supreme Court" joined the split). In a divided opinion, it held that until "further instruction from [this] Court," it would apply "some synthesis" of other courts' rules. *Id.*; *id.* at 101 (Battaglia, J., dissenting) (criticizing "the Majority's so-called 'hybrid' test under *Summers*").

have granted relief.[7] The Idaho Supreme Court explicitly rejected that limitation on *Summers*, making clear that an officer's authority to detain would not "be limited to identifying new persons arriving and remaining on the premises during the parole search" such that visitors could then "be permitted to leave." Pet. App. 16a.

Petitioner would also be entitled to relief if the conflict of whether "existence of a search warrant is essential," LaFave, *supra*, § 4.9(e) n.140, were resolved in her favor, rejecting the Ninth Circuit and Idaho rule that *Summers* extends to "a parole or probation compliance search." Pet. App. 14a (quoting *Sanchez*, 574 F.3d at 1173). This is best demonstrated by the Supreme Court of North Dakota's decision in *Kaul*, which held that evidence must be suppressed on facts materially identical to this case. There, probation officers were carrying out a residence check and, upon encountering a visitor, "told [the visitor] he was going to be detained because they were doing a probation search." 891 N.W.2d at 353. When the visitor refused a request to search his backpack, officers held him until a K-9 unit arrived and alerted the officers to drugs. *Id.* As here, it was undisputed that the visitor "was seized immediately after coming into contact with officers" and the district court found "no reasonable and articulable suspicion" that might otherwise have justified the detention. *Id.* at 354, 357. The issue was

[7] The magistrate judge additionally found that the officers had ID'd petitioner before conducting their search and calling local law enforcement to arrive. *See* Pet. App. 36a, 38a; *see also* Pet. App. 3a n.1 (acknowledging that the magistrate judge's findings "regarding the timeline of events" controls).

thus "whether the seizure was unreasonable under the Fourth Amendment." *Id.* at 354.

The North Dakota Supreme Court held unambiguously that "the *Summers* rule does not apply to a seizure of a non-occupant incident to another individual's probationary search." *Id.* at 357. It recognized that for *Summers* to justify the suspicionless detention, the court would have to (i) "expand the meaning of 'occupants' under *Summers*" to mere visitors present; and (ii) "extend the rule to probationary searches." *Id.* at 356. Upon revisiting "the three factors delineated by *Summers*," the court concluded that none justified probation officers detaining someone during a residence check who was "not an occupant of the residence" and "[a]t most, . . . a frequent visitor." *Id.*; *see also id.* at 355-56 (recognizing its decision was consistent with other courts that have "said existence of a search warrant is essential" and "the word 'occupants' is not to be loosely construed as covering anyone present"). The court thus concluded that suspicionless detention of someone present during a residence check "cannot be justified by another individual's probation conditions." *Id.* at 356.

The outcome of the criminal process and meaning of the Fourth Amendment should not turn on whether someone is detained in Idaho, detained in North Dakota, or detained one of the many states that, like the district court, would conclude *Summers* never authorized "preventing a visiting person from leaving the premises" in the first place. Pet. App. 30a.

II. The Practical Consequence Of Expanding *Summers* To Anyone Present During An Everyday Parole Search Is Staggering.

Since *Summers*, this Court has twice recognized the importance of delineating the boundaries of its rule. *See Muehler v. Mena*, 544 U.S. 93, 98-99 (2005) (whether *Summers* authorizes force to effectuate detention); *Bailey v. United States*, 568 U.S. 186, 192 (2013) (whether the *Summers* authorizes detention "beyond the immediate vicinity of the premises covered by a search warrant"). That is not surprising given that the issue is one of constitutional dimension, which demarcates the line between law enforcement's authority and the rights of citizens in a frequently recurring circumstance. *Cf.* Pet. App. 2a (recognizing that this appeal calls upon the court "to delineate the authority of parole officers to detain a non-parolee while performing a routine parole search of a parolee's residence").

Expanding *Summers* from search-warrant execution to everyday parole or probation checks is an increase by *orders of magnitude*. Over 4.5 million adults in this country are subject to compliance with probation or parole terms.[8] The Ninth Circuit alone accounts for over 670,000 of those people.[9] In Idaho, approximately one in 33 adults is subject to supervision, nearly twice the national rate and the second highest

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[8] U.S. Dep't of Justice, Bureau of Justice Statistics, *Probation and Parole in the United States, 2016* 1 (Apr. 2018) available at https://www.bjs.gov/content/pub/pdf/ppus16.pdf.

[9] *See id.* at 11-12.

rate *per capita* in the country.[10] And for each of these people, residence checks are conducted on a regular basis, even weekly, and without limit.

The rule below further compounds the scale because it applies not only to parolees themselves, but authorizes the indefinite, suspicionless detention of all who happen to be with them at the time. As the State contended below, probation officers who opt to conduct their residence check over dinnertime on Thanksgiving could prevent the whole table from going home or catching their flights while the officers search every room of the residence, and then longer if the officers call for a K-9 to complete the search.[11] Indeed, as the State argued, the rule below would make it *per se* reasonable for probation officers to detain a "hapless Amway salesman" who finds himself "in the wrong place at the wrong time" for the full duration of the search.[12]

Such intrusions on liberty are far from trivial. The detention in *Sanchez* itself lasted "about an hour," Pet. App. 13a, and residence checks are upheld as reasonable even if they span several hours, *e.g.*, *State v. LaFromboise*, 542 N.W.2d 110, 113 (N.D. 1996) (upholding three-hour residence check). These compliance checks, by design, occur at random times and are therefore not possible for visitors to avoid. And, if *Summers* truly authorizes this scale of suspicionless

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[10] Jake Horowitz, *1 in 55 U.S. Adults Is on Probation or Parole*, Pew Charitable Trusts (Oct. 2018), available at https://www.pewtrusts.org/en/research-and-analysis/articles/2018/10/31/1-in-55-us-adults-is-on-probation-or-parole.

[11] Oral Argument at 5:07 to 6:37, 10:15 to 11:05, 25:50 to 26:40 (Idaho Sup. Ct. June 12, 2019).

[12] Appellant's Opening Br. at 10.

detention, it would presumably also authorize the use of force, including subjecting the parolee's guests to "detention in handcuffs for the length of the search." *Muehler*, 544 U.S. at 95.

The friend, Thanksgiving company, and hapless salesman are exposed to this intrusion on their liberty not based on any suspicion that they have done something wrong or pose a danger. Even calling this "guilt by association" would be too generous—at the time the officers here detained petitioner, they did not have any suspicion that Mr. Wilson himself had engaged in "any criminal wrongdoing or parole violations." Pet. App. 4a, 20a. Under the rule below, the friends and family of anyone who has committed a past offense resulting in community supervision would lose their Fourth Amendment rights at the parolee's front door.

It is difficult to imagine this Court intended the "limited authority" it recognized in *Summers* to be so limitless; such transformative consequences justify this Court's review.

III. This Was The Only Issue At All Levels, And The Facts Are Settled.

This case is an unusually good vehicle to resolve the question presented. In fact, every one of the courts below acknowledged the question presented was the "only" question before them. Pet. App. 8a ("[T]he dispute now before this Court involves only the constitutionality of a suspicionless detention of a third party during a routine parole search."); Pet. App. 23a ("This appeal raises the issue of whether law enforcement may detain individuals found on the premises where a lawful parole (or probation) search is conducted pursuant to the parolee's condition of parole requiring the

parolee to consent to searches by law enforcement."); Pet. App. 41a (describing the sole issue as whether "a status search to check a residence" carries with it the authority to detain "a person merely present" absent any belief that the person has com-mitted "criminal wrongdoing of any kind.").[13]

And as each court below recognized, all of the facts "essential to defining the scope of" *Summers* are "undisputed." Pet. App. 7a-8a; *see also* Pet. App. 20a-21a (district court recounting the stipulated facts); Pet. App. 35a-36a, 41a-42a (magistrate judge doing the same). As in *Summers* itself, all agree that petitioner's detention "constituted a 'seizure' within the meaning of the Fourth Amendment." 452 U.S. at 696; Pet. App. 7a-8a. It is undisputed that the officers' sole authority for conducting their search of the residence was Mr. Wilson's parole terms. Pet. App. 7a. It is undisputed that petitioner "was a visitor to the residence" and that the officers recognized her as such from prior visits. Pet. App. 20a-21a. And it is undisputed that, at the time the officers seized petitioner, they had no reasonable suspicion or probable cause to believe she had done anything wrong or posed any danger. Pet. App. 8a.

The arguments on both sides of the question presented have been fully aired by the courts below, the dozens of lower court decisions entrenched in conflict, and the authorities which have acknowledge the conflicts. *See supra* Part I. This disparate state of affairs is the result of law that has "develop[ed] nationwide

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[13] The State did not raise any other justification for its seizure or any alternative ground for admissibility at any level of this proceeding.

over the last four decades." Pet. App. 9a. No reasonable argument can be made for further percolation.

IV. The Rule Below Extends *Summers* Far Beyond Its Constitutional Moorings.

As this Court has recognized, the "general rule" under the Fourth Amendment is that the seizure of a person is valid only if it is based on probable cause. *Dunaway v. New York*, 442 U.S. 200, 213 (1979). This requirement "has roots that are deep in our history," *Henry v. United States*, 361 U.S. 98, 100 (1959), and "reflects the benefit of extensive experience accommodating the factors relevant to the 'reasonableness' requirement of the Fourth Amendment," *Dunaway*, 442 U.S. at 213.

This Court has recognized a small number of carefully limited exceptions to that general rule. In *Terry v. Ohio*, 392 U.S. 1 (1968), for instance, this court held that a police officer may justify a brief investigative stop on the lesser showing of reasonable suspicion. In *Summers*, this Court recognized an additional exception to the requirement of probable cause: "[A] warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted." 452 U.S. at 705 (footnote omitted). As in *Terry*, the Court justified the exception on the understanding that it encompassed "limited intrusions that [were] justified by special law enforcement interests." *Summers*, 452 U.S. at 700. Unlike *Terry*, however, the *Summers* rule operates as a "categorical" one, which applies regardless of whether an officer has any suspicion that the individual detained is involved in criminal activity. *Muehler*, 544 U.S. at 98.

Because *Summers* represents an "exception to the general rule requiring probable cause," this Court "has been careful to maintain its narrow scope." *Dunaway*, 442 U.S. at 210. In particular, the Court has said that *Summers* "must not diverge from its purpose and rationale" and therefore any extension to new circumstances must remain consistent with "the reasons for the rule explained in *Summers*." *Bailey*, 568 U.S. at 194. The Court has further cautioned that *Summers*' "far-reaching authority" to detain individuals for the duration of a search, and to even use force in doing so, "counsels caution before extending [such] power." *Bailey*, 568 U.S. at 195.

The extension of that power to any person who happens to be present at the time of a routine parole compliance check betrays that caution. Every time this Court has articulated and revisited the justification for *Summers*, it has explicitly connected it to the presence of a judicially approved search warrant. In first announcing the rule, the Court unambiguously identified the warrant as the source of the authority it was recognizing: "[W]e hold that *a warrant to search for contraband founded on probable cause* implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted." *Summers*, 452 U.S. at 705 (footnote omitted). Twenty years later, the Court again articulated the rule as a qualified exception for "officers executing a search warrant for contraband." *Muehler*, 544 U.S. at 98. And most recently, in *Bailey*, the Court again described the "important category of cases in which detention is allowed without probable cause" as the circumstance of "officers executing a search warrant." 568 U.S. at 193.

Moreover, the Court explained that the authorization of a search warrant, and the corresponding intrusion for the "residents" of the premises to be searched was "[o]f prime importance" to viewing detention as a limited intrusion. *Summers*, 452 U.S. at 699, 701. In particular, "[a] neutral and detached magistrate had found probable cause to believe that the law was being violated in that house and had authorized a substantial invasion of the privacy of the persons who resided there." *Id.* at 701. And the Court reasoned that "[t]he detention of one of the residents while the premises were searched, although admittedly a significant restraint on his liberty, was surely less intrusive than the search itself." *Id.* The presence of a warrant to search the individual's home was essential to concluding that detention for the duration of the search would be merely an "incremental intrusion." *Muehler*, 544 U.S. at 98. Indeed, the Court noted that most residents would voluntarily "elect to remain in order to observe the search of their possessions." *Summers*, 452 U.S. at 701.

None of this reasoning makes sense in the context of a visitor who is merely present at the time of a parole compliance check. For that person, indefinite detention is not "incremental" to any greater intrusion authorized against his person or property—indeed, there has been no authorization of any intrusion whatsoever against the visitor's person or property.

At the same time, each of the countervailing law enforcement interests in *Summers*—(1) "preventing flight in the event that incriminating evidence is found"; (2) "minimizing the risk of harm to the officers"; and (3) "facilitating the orderly completion of the search," *id.* at 702-03—also assumed a connection to

the home under a narcotic search warrant. *See Bailey*, 568 U.S. at 194 (identifying these as the "three important law enforcement interests" underlying *Summers*); *Meuhler*, 544 U.S. at 98 (same). As the district court found below, none of the justifications apply to the person who happens to be visiting a parolee at the time of a random compliance check.

The first justification—flight—makes little sense in this context. In contrast to a search warrant, which serves the specific purpose of authorizing a search for "incriminating evidence" at the target location, the authority to conduct a parole compliance is not premised on suspicion of a crime, a parole violation or that any "incriminating evidence" will be found. Indeed, here, it is undisputed the officers had no such suspicion. Pet. App. 4a, 20a. Moreover, as the district court explained, it is simply unreasonable to assume that a person who happens to be present at the time of a random compliance check would be the owner of "incriminating evidence" found within the parolee's home. Pet. App. 29a. There is not "any reason to believe" law enforcement has an interest in preventing that visitor's flight. Pet. App. 29a.

The second justification—risk of harm—fares no better. This justification was, again, expressly tied to the presence of a warrant to search the person's home: After "[a] judicial officer has determined that police have probable cause to believe that someone in the home is committing a crime," then "[t]he connection of an occupant to that home gives the police officer an easily identifiable and certain basis for determining that suspicion of criminal activity justifies a detention." 452 U.S. at 703-04. But in the case of a parole compliance check, there need not be "suspicion of any

criminal activity by the parolee or by [the visitor]," let alone a judicial finding of probable cause to believe a crime has been committed. Pet. App. 30a. A compliance check in the absence of any reason to think a crime has been committed stands in stark contrast to operations to carry out a narcotics search-warrant, where officers could reasonably encounter "sudden violence or frantic efforts to conceal or destroy evidence." *Summers*, 452 U.S. at 702.[14]

The third justification—facilitating orderly completion of the search—is also inapplicable. While the resident of a home subject to search may be driven by "self-interest" to "open locked doors or locked containers to avoid the use of force," *Summers*, 452 U.S. at 703, a visitor cannot do those things. Detaining a visitor therefore "serve[s] no purpose in ensuring the efficient completion of the search." *Bailey*, 568 U.S. at 198; *see* Pet. App. 31.

In contrast to a judicial finding of "probable cause to believe that someone in the home is committing a crime," *id.* at 703, authorization for a parole compliance search is premised simply on a parolee's reduced expectation of privacy, *see Samson v. California*, 547 U.S. 843, 847 (2006) (upholding parole searches on the basis that "a condition of release can so diminish or eliminate a released prisoner's reasonable expectation of privacy that a suspicionless search by a law enforce-

[14] No one disputes officers may detain a visitor "where there are grounds to believe the [visitor] is dangerous, or involved in criminal activity." *Bailey*, 568 U.S. at 196. In that circumstance, "police will generally not need *Summers* to detain him . . . as they can rely instead on *Terry*." *Id.* at 196-97.

ment officer would not offend the Fourth Amendment"). The mere fact that a person has associated with someone who has reduced privacy rights obviously does not furnish any "objective justification" that would substitute for "articulable and individualized suspicion." *Summers*, 452 U.S. at 703-04. To the contrary, exposing people to arbitrary, indefinite detention for associating with parolees would undermine one of the chief purposes of parole, to "promot[e] reintegration and positive citizenship." *Samson*, 547 U.S. at 853. It would be "a sadly ironic result" for friends and loved ones of parolees to be taxed their Fourth Amendment rights for providing support given that parole is "designed to encourage reintegration into society." Pet. App. 26a-27a (citations omitted).

Thus, neither the logic for construing detention as a limited intrusion nor any of the law enforcement interests identified in *Summers* "applies with the same or similar force" to the detention of a person who is merely present at the time of a random parole compliance check. *Bailey*, 568 U.S. at 199. By extending the *Summers* rule (i) to visitors and (ii) beyond search-warrant operations, to everyday parole searches, the Idaho Supreme Court has "abandoned [the rule's] constitutional moorings." *Thornton v. United States*, 541 U.S. 615, 628-29 (2004) (Scalia, J., concurring).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

AMIR H. ALI
Counsel of Record
ELIZA J. MCDUFFIE*
RODERICK & SOLANGE
MACARTHUR JUSTICE CENTER
777 6th Street NW, 11th Fl.
Washington, D.C. 20001
(202) 869-3434
amir.ali@macarthurjustice.org

Counsel for Petitioner

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