No. 19-1309

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

BRIEF FOR IDAHO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE* [1]

The **Idaho Association of Criminal Defense Lawyers** (IACDL) is a nonprofit voluntary organization of lawyers in Idaho whose members work exclusively in criminal defense. IACDL's objective is to promote the integrity and fairness of the judicial system and the advancement of criminal defense practice. IACDL's leadership accomplishes the organization's mission by encouraging study and research in the field of criminal law, disseminating knowledge of criminal defense practice and procedure, and providing a forum for defense lawyers to exchange information regarding the administration of criminal justice. Membership in IACDL includes state public defenders from around the state of Idaho, in addition to private counsel, Federal Public Defenders, and defense investigators. IACDL also advocates for criminal justice by actively participating as an *amicus curiae* in cases throughout the country.

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[1] Pursuant to Supreme Court Rule 37.6, the *amicus curiae* represents that this brief was not authored in whole or in part by any party or counsel for any party. No person or party other than the *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for all parties received timely notice of the *amicus curiae*'s intent to file this brief pursuant to Rule 37.2 and each has consented to its filing.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents the Court with the opportunity to bring uniformity and clarity to an ever-growing split among state and federal courts. One side of that split—culminating in the decision of the Idaho Supreme Court below—has opened a gaping hole in the Fourth Amendment by permitting officers effectuating routine, warrantless parole or probation compliance searches to detain *all* individuals present during such a search for its duration, without probable cause and in the absence of any exigency. This expansive rule (the "*Phipps* Rule") permits warrantless detention of friends and neighbors of a parolee who happen to be visiting the parolee's residence, or even—given similar decisions on the same side of the split—of fellow patrons at a retail location at which a probationer is eating or shopping.[2]

This Court's review is particularly warranted because the decision below, combined with similar rulings in the Ninth Circuit and elsewhere, will yield

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[2] *See* Pet. 10-12 (citing, *inter alia*, *Sanchez v. Canales*, 574 F.3d 1169, 1171 (9th Cir. 2009) (allowing detention of probationer's family during suspicionless search of probationer's home, even while probationer was incarcerated), *overruled on other grounds by United States v. King*, 687 F.3d 1189 (9th Cir. 2008)); *see also Leaf v. Shelnutt*, 400 F.3d 1070, 1086-88 (7th Cir. 2005) (permitting "protective sweep" of residence entered without a warrant); *State v. Vorburger*, 648 N.W.2d 829 (Wis. 2002) (allowing detention of motel visitors); *Burchett v. Kiefer*, 310 F.3d 937, 943-44 (6th Cir. 2002) (permitting detention of neighbor who approached property line of residence being searched and fled).

extreme, adverse practical consequences, not only for the enormous number of people on parole and probation (together, "community supervision"), but also for the many millions more friends or family members who associate with them. Under the lower court's rule, Americans must make the impossible choice between visiting, sheltering, or even casually associating with a loved one on community supervision and retaining their own Fourth Amendment rights. *See infra* Pt. I.A. Given the massive number of people on community supervision in the United States—a number that only appears to be growing in the COVID-19 era[3]—and the frequency of routine compliance searches, such an outcome will significantly erode Fourth Amendment protections, subject millions to suspicionless detentions without judicial check, and invite confusion and abuse in its application. *See infra* Pt. I.B; *cf. Maryland v. King*, 567 U.S. 1301 (2012) (finding reasonable probability that this Court would grant certiorari to resolve a "split implicat[ing] an important feature of day-to-day law enforcement practice"). Such a broad expansion of government power, moreover, impedes former offenders' successful reintegration into society by unnecessarily extending the harsh limitations on their privacy to every individual who associates with them. *See infra* Pt. I.B.

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[3] *See* Sadie Gurman & Zusha Elinson, *Coronavirus-Driven Prisoner Releases Spur Debate Over Public Health Versus Public Safety*, Wall St. J. (Apr. 14, 2020), https://www.wsj.com/articles/prisoner-release-orders-spur-debate-pitting-public-health-against-public-safety-11586862003.

This Court should also grant certiorari because the *Phipps* Rule conflicts with core Fourth Amendment principles and Supreme Court precedent. *See* U.S. Supreme Ct. R. 10 (considerations governing review on certiorari include that a "state court . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court"). The *Phipps* Rule contravenes the original meaning of the Fourth Amendment by inviting officers to exercise near-unlimited discretion in searching homes and seizing all those who happen to be present—without a warrant—during routine compliance searches. The Founders would be aghast. The Fourth Amendment was designed to prevent law enforcement officers from wielding such vast discretionary search-and-seizure authority. *See infra* Pt. II.A.

In *Michigan v. Summers*, 452 U.S. 692 (1981), this Court held that an "occupant" of a dwelling can be detained during a search of that dwelling conducted pursuant to a valid search warrant. As Justice Scalia later explained, "*Summers* embodies a categorical judgment that in *one narrow circumstance*—the presence of occupants during the execution of a search warrant—seizures are reasonable despite the absence of probable cause." *Bailey v. United States*, 568 U.S. 186, 204-05 (2013) (Scalia, J., concurring) (emphasis in original).

The *Phipps* Rule strays beyond *Summers's* boundaries by (i) permitting detention of those present during a search *not* conducted pursuant to a valid search warrant, and (ii) construing the word "occupant" to include not just residents of a dwelling but every person who happens to be present during the search. When lower courts have similarly

stretched *Summers* too far in the past, this Court has not hesitated to intervene. *See id.* at 202 (majority opinion*); see also infra* Pt. II.B. This Court should settle the important and recurring constitutional issue the *Phipps* Rule presents.

The *Phipps* Rule has considerable implications for the future of criminal defense practice and affects the ability of IACDL's members and other defense counsel to secure fair trials for their clients. Given the millions of people affected by the rule and the growing split, leaving this issue unresolved will render Americans' Fourth Amendment rights subject to the vagaries of where their homes fall within that split. This Court should grant the petition, resolve the split, and hold that the *Phipps* Rule is irreconcilable with *Summers* and indefensible under the Fourth Amendment.

ARGUMENT

I. THIS CASE PRESENTS AN IMPORTANT CONSTITUTIONAL ISSUE WITH FAR-REACHING CONSEQUENCES FOR THE FOURTH AMENDMENT RIGHTS OF MILLIONS OF AMERICANS.

A. The *Phipps* Rule Would Vitiate The Fourth Amendment Rights Of Millions Of Americans By Subjecting Them To Suspicionless Seizures At Officers' Discretion.

This Court reached its holding in *Summers* by balancing the intrusion into a detainee's privacy—an intrusion already blessed by a neutral and detached magistrate, as the Founders envisioned in adopting

the Fourth Amendment's Warrants Clause—against the State's interests in effectuating the detention, including: (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. Pet. 22 (citing *Summers*, 452 U.S. at 702-03). In *Summers*, allowing the detention at issue hinged primarily on the presence of a search warrant and suspicion of criminal activity, each of which limited the severity of the intrusion and heightened officers' interests in preventing flight and promoting safety. *See* Pet. 21-22. By contrast, neither condition exists in the context of the *Phipps* Rule. Those very searches and detentions are by their nature suspicionless and seek to confirm only that *no* criminal activity is afoot.

Combined with similar decisions in the Ninth Circuit and elsewhere, the *Phipps* Rule will have immense consequences. The size of the parole and probation community alone means that this rule could affect a large swath of the United States population. But the rule goes further, paring back Fourth Amendment protections not only for everyone under community supervision, but also for everyone who happens to live with or visit them. Taken together, these twin expansions of *Summers* threaten to curtail the Fourth Amendment protections of an astounding number of Americans.

Parolees and probationers must comply with "a laundry list" of conditions to avoid incarceration. Ronald P. Corbett, Jr., *The Burdens of Leniency: The Changing Face of Probation*, 99 Minn. L. Rev. 1697, 1722 (2015). Probationers, for instance, must typically comply with 18 to 20 requirements each day

to remain in good standing with the probation department. *Id.* at 1710. To bolster the investigative powers of parole and probation officers, many jurisdictions also impose broad "search conditions" on parolees and probationers. *See* Fiona Doherty, *Obey All Laws and Be Good: Probation and the Meaning of Recidivism*, 104 Geo. L.J. 291, 317 (2016). If a parolee or probationer is subject to a search condition (known colloquially as a "Fourth Amendment waiver" or "Fourth waiver"), he must submit to suspicionless searches during the entire term of his parole or probation. Because standard search conditions are so broad, and because officers "can use them to enforce any of the myriad conditions of probation" and parole, *id.* at 321, probation and parole searches occur on a regular basis, *see* Pet. 17.

These conditions apply to millions of people. In 2016, the most recent year for which data is available, more than 4.53 million adults were on parole or probation in the United States—1 in every 55, nearly twice the number of people who are incarcerated in jails and prisons combined.[4] From 1980 to 2007, the number of people under community supervision in the United States nearly quadrupled. *See* Justice Lab,

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[4] *See* U.S. Dep't of Justice, Bureau of Justice Statistics, *Probation and Parole in the United States, 2016*, at 1 (Apr. 2018); Pew Charitable Trusts, *Probation and Parole Systems Marked by High Stakes, Missed Opportunities*, at 6 (Sept. 2018), https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2018/09/probation-and-parole-systems-marked-by-high-stakes-missed-opportunities; *see also* Alexi Jones, *Correctional Control 2018: Incarceration and Supervision By State*, Prison Policy Initiative (Dec. 2018), https://www.prisonpolicy.org/reports/correctionalcontrol2018.html.

Columbia University, *Too Big to Succeed: The Impact of the Growth of Community Corrections and What Should Be Done About It*, at 2 (Jan. 29, 2018), https://justicelab.columbia.edu/sites/default/files/content/Too_Big_to_Succeed_Report_FINAL.pdf. Social scientists have described this phenomenon as "mass probation," akin to mass incarceration. *See, e.g.*, Michelle S. Phelps, *Mass Probation and Inequality: Race, Class, and Gender Disparities in Supervision and Revocation*, *in Handbook on Punishment Decisions: Locations of Disparity* 45 (Jeffery T. Ulmer & Mindy S. Bradley, eds., 2018).[5]

Given the significant number of Americans under community supervision, expanding *Summers* to parolees and probationers alone affects millions. Expanding *Summers* to family, friends, and casual acquaintances of parolees and probationers, as the *Phipps* Rule does, affects many millions more. Polls have found that on average, Americans have nine close friends. Joseph Carroll, *Americans Satisfied With Number of Friends, Closeness of Friendships*, Gallup (Mar. 5, 2004), https://news.gallup.com/poll/10891/americans-satisfied-number-friends-closeness-friendships.aspx. Under the *Phipps* Rule, every one of these friends—as

[5] Rates of supervision are deeply skewed by race, *see* Pew Charitable Trusts, *supra*, at 1, 7 (noting that "African-Americans make up 30 percent of those on community supervision but just 13 percent of the U.S. adult population"), and economic class, *see* Mack Finkel, *New Data: Low Incomes—But High Fees—for People on Probation*, Prison Policy Initiative (Apr. 9, 2019) (noting that 66 percent of people on probation make less than $20,000 per year and 38 percent make less than $10,000 per year).

well as anyone else who might visit a parolee—would forfeit his or her Fourth Amendment right to be free from unreasonable seizures simply by stepping though a parolee's door. These wide-ranging impacts are far from hypothetical, as third parties are in fact frequently present during supervision searches. *See* H.R. Rep. No. 115-112, at 8 (2017) (noting that, in 2016, at least one third party was present at more than half of searches conducted by federal probation officers "pursuant to a court-ordered search condition or with consent").

Nor does the *Phipps* Rule stop at family and friends. Officers in Idaho, for example, routinely "search through bars for the presence of probationers because probationers are banned from entering bars as a standard condition of their probation." Doherty, *supra*, at 321. The *Phipps* Rule permits these officers to detain not only the probationer but also *anyone present in the bar* for the entire duration of the search. "[A]s the permissible applications of *Summers* have expanded—covering broader searches and a greater number of detentions—so has the potential for abuse." *Perez Cruz v. Barr*, 926 F.3d 1128, 1143 (9th Cir. 2019) (internal citations omitted).

The lower courts' expansions of *Summers* have already impacted the privacy rights of a substantial portion of the country, underscoring the need for this Court to take up this issue now. As mentioned above, the Ninth Circuit has already extended *Summers* to those under community supervision. *See Sanchez,* 574 F.3d at 1173-75. There are 333,000 probationers and parolees in California alone, while the nine states that make up the Ninth Circuit—including California—contain a total of "65 million people (or

about 20 percent of the nation)." Ilya Shapiro & Nathan Harvey, *Break Up The Ninth Circuit*, 26 Geo. Mason L. Rev., 1299, 1304-05 (2019). All of these people are now at risk of being subjected to suspicionless searches because of routine interactions with individuals under community supervision.

Considered together, the ripple effects of the *Phipps* Rule are too extreme for this Court to ignore.

B. The *Phipps* Rule Compounds Parolees' And Probationers' Existing Burdens, Harming Societal Reintegration.

Expanding *Summers* to allow for the warrantless, suspicionless detention of parolees, probationers, and their acquaintances during routine compliance searches also imposes severe burdens on parolees and probationers, who already struggle to reintegrate into society and must abide by severe privacy limitations. Probationers and parolees must agree to uphold a long list of conditions as part of their supervision agreements. *See supra* Pt. I.A. These conditions are not only numerous but, often, also vague and expansive: Many jurisdictions broadly require probationers to comply with all laws (including civil laws), to avoid "injurious and vicious habits," to maintain "suitable employment," and to avoid associating with "disreputable" persons. Doherty, *supra*, at 300-15.[6] Officers conducting parole

[6] "Of those who had experienced both prison and probation, the consensus was that probation was worse due to the unpredictable, seemingly capricious enforcement" of the many rules to which probationers are subject. Corbett,

and probation compliance checks, therefore, are not necessarily seeking evidence of criminal activity.

In light of the broad range of potential justifications for supervision searches, the *Phipps* Rule can easily be misused. Although supervision searches may be conducted for many reasons unrelated to criminal activity, such searches are often conducted by law enforcement officers who are in the business of investigating crime. *See* Thomas H. Cohen, Prob. & Pretrial Servs. Office, *An Empirical Overview of Searches and Seizures for Persons on Federal Post-Conviction Supervision*, 83 Fed. Prob. 14, 25 (2019). By broadening permissible detentions during these searches, the *Phipps* Rule may tempt police officers to act as "stalking horses," utilizing the comparatively low standards required to justify a supervision search "to conduct stops of individuals whom the officers have 'hunches' about[] but would not otherwise be able to detain." John F. Sliney, Comment, People v. Matelski*: You Better Know Whom Your Friends Are; They Just May Be Waiving Your Rights!*, 28 W. St. U. L. Rev. 231, 255 (2001); *see* H.R. Rep. No. 115-112, at 10-11 (2017) (recognizing "the potential for police officers to take advantage of the reduced standards [parole and probation officers] enjoy to justify a search as pretext to circumvent the need to establish probable cause for police-initiated searches").

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supra, at 1721; *see also* Phelps, *Mass Probation and Inequality*, *supra*, at 47 ("In a surprising moment of transparency, a local probation officer in Texas recently told reporters that if he were faced with the choice between probation and prison, he would pick prison.").

Further, the *Phipps* Rule compounds already significant limitations on parolees' and probationers' privacy. As discussed *supra* Part I.A, most parolees and probationers are also subject to wide-reaching search conditions. Because parole and probation terms often last for years—sometimes even for the probationer's lifetime, *see* Michael P. Jacobson et al., Harvard Kennedy School, *Less Is More: How Reducing Probation Populations Can Improve Outcomes*, at 3 (Aug. 2017)—expansive search conditions can present a particularly long-lasting burden.

In Idaho, parolees and probationers are subject to one of the broadest Fourth Amendment waivers in the country. Standard supervision agreements in Idaho require parolees and probationers to "consent to the search of my person, residence, vehicle, personal property, and other real property or structures owned or leased by me," and to "waive my rights under the Fourth Amendment and the Idaho constitution concerning searches," as a condition of being on parole or probation. Idaho Dep't of Correction ("IDOC"), Agreement of Supervision (Apr. 1, 2015), available at http://forms.idoc.idaho.gov/WebLink/0/edoc/327873/Agreement%20of%20Supervision.pdf; *see also* Doherty,

supra, at 317-19, 321.[7] This condition "seems to allow for suspicionless searches." Doherty, *supra*, at 321.[8]

As noted, the *Phipps* Rule exacerbates existing burdens on parolees and probationers by stifling their ability to associate with friends and family. In doing so, it undermines the key aims of parole and probation: to "help individuals reintegrate into society." *Morrissey v. Brewer*, 408 U.S. 471, 477 (1972); *see also Roman v. State*, 570 P.2d 1235, 1243 (Alaska 1977) (quoting Note, *Striking the Balance Between Privacy and Supervision: The Fourth Amendment and Parole and Probation Officer*

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[7] The IDOC Standard Supervision Agreement is the only supervision agreement listed on its "Offender Resources" page, applicable to both parolees and probationers. IDOC's "Offender Resources" page states that "[a]ll offenders have a responsibility to comply with supervision agreements." *Offender Resources*, IDOC, https://www.idoc.idaho.gov/content/probation_parole/offender_resources (last visited May 25, 2020).

[8] Defense attorneys in Idaho routinely defend cases in which this overbroad search condition creates misunderstandings between law enforcement officers and parolees or probationers regarding its proper scope. *See, e.g.*, Brief in Support of Motion to Suppress at 3, 19-21, *Idaho v. Hansen*, CR 28-18-0015354 (1st Dist. Kootenai Cty. 2018) (misunderstanding regarding police officer's permission to search parolee); Brief in Support of Motion to Suppress at 2, 6, *Idaho v. Straw*, CR 28-18-0015314 (1st Dist. Kootenai Cty. 2019) (officer's awareness of parole search terms); Brief in Support of Motion to Suppress at 7-8, *Idaho v. Lamont*, CR-19-0010886 (1st Dist. Kootenai Cty. 2019) (whether probation agreement permitted vehicle search); *see also State v. Gouge*, No. 45403, 2018 WL 4344687 (Idaho Ct. App. Sept. 12, 2018) (unpublished) (finding search unlawful when defendant's probation agreement did not contain valid search clause).

Searches of Parolees and Probationers, 51 N.Y.U. L. Rev. 800, 816 (1976)). In IACDL's and its members' experience, the conditions imposed on parolees and probationers already present imposing barriers to forming constructive relationships with law-abiding citizens. The *Phipps* Rule augments those challenges by discouraging third parties from associating—let alone sharing a home—with parolees and probationers, which "may prevent [them] from finding suitable housing and forming close relationships." Rachael A. Lynch, Note, *Two Wrongs Don't Make a Fourth Amendment Right:* Samson *Court Errs in Choosing Proper Analytical Framework, Errs in Result, Parolees Lose Fourth Amendment Protection*, 41 Akron L. Rev. 651, 691-92, 692 n.169 (2008) (quoting Brief for the Petitioner at 9, *Samson v. California*, 547 U.S. 843 (2006)). Formerly incarcerated individuals already face substantial obstacles to securing stable housing, which is essential to their reintegration in society. In fact, parolees and probationers are ten times as likely as the general population to become homeless. *See* Lucius Couloute, *Nowhere to Go: Homelessness Among Formerly Incarcerated People*, Prison Policy Initiative (Aug. 2018), https://www.prisonpolicy.org/reports/housing.html.

In light of the sheer number of people on parole and probation in the United States, the practical consequences of the decision below are stunning. "*Summers* itself foresaw that without clear limits its exception could swallow the general rule" that seizures are reasonable only if based on probable cause. *Bailey*, 568 U.S. at 205 (Scalia, J., concurring). While any expansion of *Summers's* narrow rule

invites caution, the lower court's decision here (and others like it) has particularly far-reaching and severe implications that deserve this Court's attention.

II. THE *PHIPPS* RULE IS IRRECONCILABLE WITH THE ORIGINAL MEANING OF THE FOURTH AMENDMENT AND WITH THIS COURT'S FOURTH AMENDMENT JURISPRUDENCE.

In applying *Summers* to warrantless, suspicionless searches, the *Phipps* Rule undermines the text and original meaning of the Fourth Amendment. In *Summers* and its progeny, the "fact that the police had obtained a warrant" was "of prime importance" to the Court's reasonableness analysis. *See* Pet. 21-22; *Summers*, 452 U.S. at 701; *see also Muehler v. Mena*, 544 U.S. 93, 98 (2005); *Bailey*, 568 U.S. at 193. *Summers's* reasoning is therefore based on a foundational premise inherent in the Fourth Amendment's text and history—consistent with IACDL's and its members' experience: that, subject to limited and well-justified exceptions, a neutral magistrate's finding of probable cause is needed to restrain uncontrolled officer discretion. The *Phipps* Rule threatens to erode this key premise.

A. The *Phipps* Rule Is Inconsistent With the Fourth Amendment's Original Meaning.

As this Court has long recognized, "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Arizona v. Gant*, 556 U.S. 332,

338 (2009) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)); *see also Dunaway v. New York*, 442 U.S. 200, 213 (1979); Pet. 20. The search warrant requirement mitigates the risk that law enforcement officers will justify unreasonable searches *ex post facto* on the basis of evidence found, and ensures that determinations about constitutional requirements are not made by those "engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States*, 333 U.S. 10, 14 (1948). Indeed, "'the procedure of antecedent justification . . . is central to the Fourth Amendment,'" *Katz*, 389 U.S. at 359 (internal citations omitted), because "the detached scrutiny of a neutral magistrate [] is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer," *United States v. Chadwick*, 433 U.S. 1, 9 (1977), *abrogated on other grounds by California v. Acevedo,* 500 U.S. 565 (1991).

Concern about unfettered officer discretion is as old as the Fourth Amendment itself. Courts and scholars recognize that "the larger purpose for which the Framers adopted the text [was] to curb the exercise of discretionary authority by officers" in searching homes and detaining occupants without cause. Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 556 (1999); *see, e.g., Collins v. Virginia*, 138 S. Ct. 1663, 1676 (2018) (citing William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning* 743 (2009)) ("At the founding . . . house searches required a specific warrant."). "[T]he framers said with all the clarity of the gloss of history that a search is 'unreasonable' unless a warrant authorizes it, barring only exceptions justified by absolute necessity."

United States v. Rabinowitz, 339 U.S. 56, 70 (1950) (Frankfurter, J., dissenting), *overruled in part by Chimel v. California*, 395 U.S. 752 (1969).

Framing-era sources underscore the historical importance of search warrants as a measure to limit officers' discretionary authority. The Fourth Amendment was a reaction to writs of assistance, which gave administrative officers broad authority to sweep homes for evidence of violations. *See State v. Ochoa*, 792 N.W.2d 260, 271 (Iowa 2010) (citing Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U. L. Rev. 925, 946 (2011)). James Otis, whose famous oration in Paxton's Case inspired John Adams to campaign against unreasonable searches, emphasized the importance of specific warrants and the need to safeguard homes against officials' ability to enter "when they please . . . and whether they break through malice or revenge, no man, no court, can inquire." Parker P. Simmons, *James Otis' Speech on the Writs of Assistance* 17 (Albert B. Hart & Edward Channing eds., 1906); *see* David E. Steinberg, *The Uses and Misuses of Fourth Amendment History*, 10 U. Pa. J. Const. L. 581, 585 (2008).[9] State judges who refused to authorize general writs in connection with the Townshend Act of 1767 expressed similar concerns. *See* Davies, *supra*, at 581 (citing Oliver M. Dickerson, *Writs of Assistance as a Cause of the Revolution, in*

[9] Adams stated of Otis' oration, "[t]hen and there the child Independence was born." Letter from John Adams to William Tudor (Mar. 29, 1817), *in The Works of John Adams, Second President of the United States* 248 (Charles F. Adams ed., 1856).

The Era of the American Revolution 60-61, 64, 69 (Richard B. Morris ed., 1939)).

James Madison—who drafted the provision that became the Fourth Amendment—sought to prohibit the use of general warrants, which gave officers authority to search places and seize all those present without suspicion of criminal activity. *See, e.g.*, Davies, *supra*, at 696-723 (arguing that James Madison's draft of the Fourth Amendment reflected a concern with general warrants); Steinberg, *supra*, at 592-93 (citing Va. Const. art. X (1776)) (describing general warrants). While courts and scholars debate the specific contours of the Fourth Amendment's mandate, one thing is clear: In drafting the Amendment, the Framers sought to prevent officers from effectuating home searches and seizures wholly at their discretion—exactly what the *Phipps* Rule permits.

B. The *Phipps* Rule Conflicts With *Summers*.

The *Phipps* Rule also contravenes *Summers* itself, untethering this Court's reasoning from its constitutional moorings. While the Court in *Summers* permitted the "detention of an occupant of premises being searched for contraband pursuant to a valid warrant," 452 U.S. at 702, it explained—consistent with the Fourth Amendment history set out above—that it was doing so only in the limited circumstance where, because a warrant had been issued, governmental interests in preventing flight, minimizing risk of harm to officers, and ensuring orderly completion of searches outweighed the "incremental intrusion on personal liberty" involved,

id. at 703. None of these factors supports expanding *Summers* to cover parolee and probationer searches. As it has in past cases, this Court should grant certiorari to prevent conflict with settled Supreme Court precedent. *See, e.g.*, *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe,* 498 U.S. 505, 509 (1991); *Mattz v. Arnett,* 412 U.S. 481, 485 (1973); *Wilkinson v. United States,* 365 U.S. 399, 400-01 (1961); *Johnson v. United States*, 333 U.S. 46, 47 (1948); *see also* U.S. Supreme Ct. R. 10.

Detaining all visitors for the duration of a parole or probation search does not constitute only a "slight" or "incremental" intrusion into visitors' privacy interests. *Contra* Pet. App. 15a. To the contrary, the detentions permitted under the *Phipps* Rule represent substantial invasions into the Fourth Amendment rights of unwitting third parties. *See supra* Pt. I.A. Visitors' privacy interests are not "eviscerate[d]" simply because they set foot in another's home, *cf. United States v. Grandberry*, 730 F.3d 968, 982 (9th Cir. 2013), and "cannot be waived by a third party's consent to a general search of the premises," *United States v. Gillis*, 358 F.3d 386, 391 (6th Cir. 2004). In this context, a search of any length would be invasive, but the detentions contemplated by the court below may also be extensive and even forceful. *See* Pet. 17-18. Detaining a visitor in someone else's home for hours on end, without suspicion and with force, while officers search the home is not a "slight" intrusion in any sense of the term.

Nor do the speculative law enforcement interests in detaining third parties counterbalance the constitutional rights at stake. *Summers* found

that the presence of a search warrant and accompanying potential for criminal activity tipped the balance in favor of the State. Absent a warrant, law enforcement has no more interest in detaining everyone present during a routine parole and probation search than in "all residence searches, warrant or no warrant." Pet. App. 16a. Detaining everyone present could make *any* search more efficient and maximize officer convenience. But the Fourth Amendment does not countenance significant intrusions on privacy simply for convenience's sake: "[T]he mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment." *Mincey v. Arizona*, 437 U.S. 385, 393 (1978).

Unlike the warrant-based search in *Summers*, moreover, parole and probation searches are not necessarily based on any suspicion of criminal activity. *See supra* Pt. I.B. While search warrants are issued to investigate the probable past or future commission of a crime, supervision searches are meant to confirm the *absence* of criminal activity. In this context, the justifications underlying *Summers* are fundamentally inapplicable—law enforcement has no reasonable basis to expect that those present in the home will flee or destroy evidence to avoid arrest. Moreover, as discussed *supra*, the *Phipps* Rule contravenes the purposes of parole and probation generally; indeed, the State has an interest *against* detaining visiting friends and family to promote rehabilitation.

Officer safety concerns are similarly minimal. Probationers and parolees themselves rarely present threats to officers during routine searches. *See, e.g.*,

Thomas H. Cohen, *supra*, at 22 ("Officers reported . . . dealing with safety incidents in 2 percent of searches."). Indeed, according to FBI data, no police officers were killed while effectuating a routine, suspicionless parole or probation search during the last five years. *See* Fed. Bureau of Investigation, *Law Enforcement Officers Killed and Assaulted, Summaries of Officers Feloniously Killed*, https://ucr.fbi.gov/leoka.[10] Law enforcement data demonstrates that visitors are even less likely to pose a safety risk than parolees and probationers, as may be expected given their attenuation from any criminal activity. *See* H.R. Rep. No. 115-112, at 8 (2017) (data compiled by the Federal Law Enforcement Officers Association indicates that third parties are "uncooperative" at approximately 5% of the searches at which they are present, and only about 1% are arrested). And, contrary to the lower court's reasoning, third-party interference or aggression could be avoided by simply permitting visitors to leave the premises rather than subjecting them to an unexpected and forcible detention. *Compare Bailey*, 568 U.S. at 196 (applying *Summers*, noting that resident of home to be searched "posed little risk to the officers at the scene" after he left the premises), *with* Pet. App. 16a (reasoning that "officers visiting a parolee's home run a substantial risk of harm from unknown individuals leaving" the home).

Further, the inability to detain categorically all individuals present during a routine compliance search does not prevent officers from effectively

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[10] This Court has previously relied on FBI data to assess risks to officer safety. *See, e.g.*, *Maryland v. Wilson*, 519 U.S. 408, 413 (1997).

responding to any threats that may arise. An officer who reasonably suspects criminal activity is always permitted to conduct a *Terry* stop; if an officer reasonably suspects that a visitor is armed, she may easily deploy a pat-down search. *See Terry v. Ohio,* 392 U.S. 1, 30 (1968)*; Ybarra v. Illinois,* 444 U.S. 85, 92-93 (1979). These targeted remedies provide adequate protection during routine supervision searches, where—unlike in the *Summers* context—the police have no reasonable suspicion that *any* crime has occurred or is occurring on the premises. A refusal to extend *Summers* here would not prohibit law enforcement from detaining third parties, but would merely uphold the bedrock Fourth Amendment principle that such seizures must be justified.

Finally, while parolees and probationers consent to some warrantless searches as a condition of their probation, the consent rationale has no plausible application to third parties like the Petitioner or other visitors.[11] Even the most expansive search terms do not contain language waiving visitors' Fourth Amendment rights, nor likely could they. The standard search condition in Idaho—one of the broadest in the country, *see supra* Pt. I.B—

[11] Courts have recognized that the consent parolees and probationers give to warrantless searches is not truly voluntary. *See, e.g.*, *United States v. Mitsubishi Int'l Corp.*, 677 F.2d 785, 788 (9th Cir. 1982) (describing "choice" between consent and incarceration as "illusory"); *see State v. Baldon*, 829 N.W.2d 785, 793-94 (Iowa 2013) (collecting cases in which supervision agreements were found insufficient to confer voluntary consent). The only way parolees and probationers can "opt out" of search provisions is to "insist on incarceration, even if no one else would be incarcerated for the same crime." Doherty, *supra*, at 297.

requires parolees and probationers to permit all searches of their home and property and to "waive [their] Fourth Amendment Rights," but makes no mention of visitor searches or seizures. Nor do search conditions in other states in the Ninth Circuit, where the *Sanchez* rule applies. *See, e.g.*, Or. Rev. Stat. Ann. § 137.540(1)(i); Alaska Dep't of Corr., General Conditions of Probation ¶ 11; Mont. Admin. R. 20.7.1101; Cal. Dep't of Corr. & Rehabilitation, General Parole Conditions, available at https://www.cdcr.ca.gov/parole/parole-conditions/. Without more, officers conducting a parole or probation search have no basis for assuming consent from visitors. *See Bumper v. North Carolina*, 391 U.S. 543, 548-49 (1968) (holding that consent to search cannot be satisfied by mere acquiescence to a claim of lawful authority), *abrogated on other grounds by Gant*, 556 U.S. at 332.

In sum, the detention of everyone present during the search of a parolee or probationer's home—without a warrant and where no crime need be suspected, any threat to officer safety is minimal, the detainee has not waived her Fourth Amendment rights, and there is a significant risk of intrusion on the constitutional rights of innocent third parties—cannot be justified under *Summers*. Such a detention plainly conflicts with *Summers* and this Court's subsequent decisions applying it.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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