No. 19-1309

In The
Supreme Court of the United States

KARI JANAE PHIPPS,

Petitioner,

v.

STATE OF IDAHO,

Respondent.

On Petition For Writ Of Certiorari To The Idaho Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a limited detention of a non-parolee in the residence of a parolee during a parole search of that residence is reasonable under the Fourth Amendment in the same way such a detention is deemed reasonable during a search pursuant to a search warrant?

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INTRODUCTION

The Supreme Court of Idaho concluded that it was constitutionally reasonable for parole officers to detain Kari Janae Phipps while they conducted a parole search of Terry Wilson's apartment. In doing so, the Idaho court employed the analysis set forth in *Michigan v. Summers*, 452 U.S. 692 (1981), in which this Court held it was constitutionally reasonable to detain an occupant of a residence while that residence was being searched pursuant to a search warrant. The Supreme Court of Idaho held that *Summers* was not distinguishable on the basis that the search in this case was a parole search and thus did not involve a search warrant.

Phipps asserts two splits of authority as grounds for granting her writ: First, she asserts that courts are divided over whether the *Summers* analysis applies to parole searches, as opposed to searches conducted pursuant to warrants. This does not present a compelling reason to grant the writ because Phipps has shown, at best, a very shallow split. At this point only one federal circuit court of appeals and two state high courts have decided whether the *Summers* analysis applies to parole searches or is instead limited only to searches conducted pursuant to a search warrant.

Second, Phipps asserts that courts are divided on the scope of *Summers*, with some holding that it allows the detention of only residents of the house and others holding that it allows detention of anyone in the home during the execution of the search warrant. This case

is a poor vehicle to address this asserted split because the parties dispute whether the *Summers* analysis applies under the facts of this case, with Phipps asserting it has no application because the search here was pursuant to parole and not justified by a warrant. Thus, a case involving a detention of a visitor or other non-resident pursuant to a search warrant, where *Summers* undoubtedly applies, would present a better opportunity to address the question of whether *Summers* allows the detention only of residents of the house.

STATEMENT OF THE CASE

Idaho probation and parole officers conducted a routine (suspicionless) residence check of parolee Terry Wilson. Pet. App. 2a, 4a, 18a. As the officers entered they saw Phipps exit from the back bedroom of the apartment. Pet. App. 2a, 18a. The officers, for their own safety and to prevent the destruction of evidence, instructed Wilson and Phipps to sit on a couch in the living room while they did a protective sweep of the residence to ascertain if others were present. Pet. App. 2a-4a. At that time they did not suspect Phipps of any wrongdoing. Pet. App. 4a.

Once the protective sweep was accomplished, one of the officers informed Wilson and Phipps that they were bringing in a drug dog and asked if there was anything "in the apartment that they should know about." Pet. App. 2a, 18a. Phipps told the officers that

she had a methamphetamine pipe in a backpack on her person. Pet. App. 2a, 18a.

The parole search of Wilson's residence revealed two safes containing controlled substances in the back bedroom. Pet. App. 2a-3a. The probation and parole officers requested a law enforcement officer to respond to conduct a criminal controlled substances investigation. Pet. App. 3a. The law enforcement officer interviewed Phipps, and she confirmed that she had a methamphetamine pipe in her backpack. Pet. App. 3a. The officer cited Phipps for misdemeanor possession of drug paraphernalia. Pet. App. 3a.

Phipps moved to suppress evidence of the methamphetamine pipe and her statements regarding the pipe, asserting she was detained in violation of her Fourth Amendment rights. Pet. App. 3a. Applying Ninth Circuit precedent interpreting *Michigan v. Summers*, 452 U.S. 692 (1981), the magistrate judge denied the motion. Pet. App. 4a-5a, 42a. On intermediate appeal the district court reversed, holding that, in the absence of a search warrant or probable cause that she was involved in criminal activity, Phipps's detention violated her Fourth Amendment rights. Pet. App. 5a-6a, 12a, 32a.

The Supreme Court of Idaho reversed. Pet. App. 16a-17a, 19a. The issue addressed by the Supreme Court of Idaho was "the constitutionality of a suspicionless detention of a third party during a routine parole search." Pet. App. 8a.

The Supreme Court of Idaho first looked at the application of the holding in *Summers* to detentions during parole searches, "an issue of first impression for Idaho." Pet. App. 9a. In *Summers* the Court examined the "'character of the official intrusion and its justification'" and held that limited detentions of occupants during the course of searches conducted pursuant to a search warrant were reasonable. Pet. App. 10a-11a (quoting *Summers*, 452 U.S. at 700). The Supreme Court of Idaho determined there were "sound reasons" to apply the *Summers* rationale to the question of whether Phipps's detention incident to a parole search was constitutionally reasonable "'because the character of the additional intrusion caused by detention is slight and because the justifications for detention are substantial.'" Pet. App. 15a (quoting *Muehler v. Mena*, 544 U.S. 93, 98 (2005), citing *Summers*, 452 U.S. at 701-02).

First, the character of the intrusion "is generally the same whether the individual is detained during the execution of a search warrant or a parole search." Pet. App. 15a. Like a detention during execution of a warranted search, a detention during a parole search is "'surely less intrusive than the search itself,' is 'not likely to be exploited . . . because the information the officers seek normally will be obtained through the search and not through the detention,' and bears 'neither the inconvenience nor the indignity associated with a compelled visit to the police station.'" Pet. App. 15a (ellipsis original, quoting *Summers*, 452 U.S. at 701-02).

Second, "the governmental interests outlined 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. Those interests are preventing flight, minimizing the risk of harm, and facilitating the orderly completion of the search. Pet. App. 15a-16a (citing *Summers*, 452 U.S. at 702-03). As to flight, the Idaho court determined "there is always the possibility that an occupant will take flight in order to avoid any implication of wrongdoing" and detaining persons present "'prevents the search from being impeded by occupants leaving with the evidence being sought or the means to find it.'" Pet. App. 15a-16a (quoting *Bailey v. United States*, 568 U.S. 186, 198 (2013)). As to risk of harm, the Supreme Court of Idaho concluded that "officers visiting a parolee's home run a substantial risk of harm from unknown individuals leaving and reentering the home." Pet. App. 16a. Finally, as to facilitating an orderly search, "if occupants are permitted to wander around the residence, there is the possibility that they may interfere with the execution of the parole search by 'hid[ing] or destroy[ing] evidence, seek[ing] to distract the officers, or simply get[ting] in the way.'" Pet. App. 16a (brackets original, quoting *Bailey*, 568 U.S. at 197). "These risks are present in all residence searches, warrant or no warrant, and the government's interests in preventing these risks outweigh the slight intrusion associated with the detention." Pet. App. 16a.

Finding "no meaningful difference between the detention of occupants present during the execution of a

search warrant and the detention of occupants present during a routine parole or probation search," the Supreme Court of Idaho held that under the holdings of *Summers* and its progeny, the limited detention of Phipps during the parole search of the apartment was reasonable, reversed the district court's intermediate appellate decision, and reinstated the judgment. Pet. App. 16a-19a.

REASONS TO DENY THE PETITION

I. The Two-To-One Split On Whether The *Summers* Analysis Applies To Warrantless Parole And Probation Searches Is Not Sufficiently Developed To Present A Compelling Reason For Review By This Court

The question of whether the *Summers* analysis applies in warrantless probation and parole searches, the primary issue addressed by the Supreme Court of Idaho, has been addressed by few federal circuit courts of appeal or the high courts of states. Phipps cites a total of three courts, *including* the Supreme Court of Idaho, to decide this question: specifically, the Ninth Circuit, *Sanchez v. Canales*, 574 F.3d 1169 (9th Cir. 2009) (holding that "officers may constitutionally detain the occupants of a home during a parole or probation compliance search"), and the North Dakota Supreme Court, *State v. Kaul*, 891 N.W.2d 352 (N.D. 2017) (holding that the *Summers* analysis "does not apply to a seizure of a non-occupant incident to another individual's probationary search"). Pet. 5-6,

10-11, 14-15.[1] Idaho's entry into this split, with only the North Dakota Supreme Court on the other side, does not warrant this Court's review.

In an effort to bolster her claim that this issue is of great import despite the paucity of appellate courts to address it, Phipps cites to statistics about the percentage of Americans on community supervision and asserts that expanding *Summers* to allow the detention of persons on the scene of a parole or probation search would be "staggering." Pet. 16. As noted above, the Ninth Circuit is the only federal circuit court and the Supreme Court of Idaho is the only state high court to have specifically brought non-parolees within the ambit of the legal holding Phipps wishes to challenge, so much of Phipps's concern is, at this point, theoretical. More importantly, however, Phipps's statistics in no wise support her argument.

Phipps argues that "[o]ver 4.5 million people" nationwide, including "approximately one in 33 adults" in Idaho, are "subject to supervision." Pet. 16. She then contends this means that "for each of these people, residence checks are conducted on a regular basis, even weekly, and without limit." Pet. 17. Although Phipps's

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[1] In addition to these cases, the Georgia Court of Appeals has applied *Summers* to authorize the detention of persons present during a probation search. *Harrison v. State*, 444 S.E.2d 354, 355 (Ga. App. 1994) (probation officers "are authorized to detain occupants of the residence while the premises are being secured"). In *State v. Yule*, 905 So. 2d 251, 255 (Fla. App. 2005), the court found the detention of a person in the home of a probationer during a probation search reasonable, but only the concurrence relied on *Summers* in support of that position.

statistical claims regarding the number of people convicted of crimes being supervised in the community are supported, her conclusion from those statistics that probation and parole searches are pervasive is not. To the contrary, her conclusion is deeply flawed.

First, the statistical analysis Phipps cites shows that her conclusion is wrong. According to the data compilation Phipps relies on, only 75% of the community supervision cases nationwide involve active supervision.[2] Moreover, only 59% of community supervision is for felonies, with the remainder relating to misdemeanors and even infractions.[3] It is unlikely that persons on community supervision while they pay off infraction fines and fees, those on misdemeanor probation, and those who are not being actively supervised are subject to "regular," much less "weekly," home searches as claimed by Phipps, if they are subject to such searches at all.

Second, Phipps's claims about the frequency and extent of home searches is exaggerated, certainly when it comes to Idaho. In Idaho there are four probation and parole supervision categories for *felonies*, with additional standards applicable for sex offenders and probationers assigned to Problem Solving Courts.[4] For

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[2] U.S. Dep't of Justice, Bureau of Justice Statistics, *Probation and Parole in the United States, 2016*, p. 17 (Apr. 2018), available at https://www.bjs.gov/content/pub/pdf/ppus16.pdf.

[3] *Id.*

[4] Idaho Department of Correction, *Standard Operating Procedure 701.04.02.001*, p. 3 (Oct. 1, 2004) (hereinafter "*SOP 701.04.02.001*"), available at http://forms.idoc.idaho.gov/WebLink/

those felony offenders deemed the highest risk and placed on Level 4 supervision, standard operating procedures require the "assigned PPO [probation and parole officer]" to conduct a "home contact every 30 days" unless the offender changes addresses.[5] Level 3 requires a home contact "every 60 days," Level 2 requires a home contact once per year, and Level 1 does not require any home contact.[6] Phipps's assertion that being placed on probation or parole will result in residence checks "on a regular basis" is true only for a limited number of probationers and parolees, and the claim that such regular basis would be "even weekly" finds no support at all.

In addition, the lack of cases addressing this issue also undercuts Phipps's assertion that applying the *Summers* rationale to parole and probation searches increases the number of detentions "by *orders of magnitude*." Pet. 16 (emphasis original). As stated, since *Summers* was decided in 1981, only one federal circuit court of appeals and two state high courts have directly addressed its application in the parole/probation search context. The Ninth Circuit's *Sanchez* decision concluding the *Summers* reasoning applied to parole and probation searches has been cited 17 times for this

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0/edoc/281944/Probation%20and%20Parole%20Supervision%20Strategies%20-%20SOP.pdf. Misdemeanor probation in Idaho is supervised by the counties. Idaho Code § 31-878.

[5] *SOP 701.04.02.001*, p. 6.

[6] *Id.*

proposition in the decade since it was decided.[7] Although the number of persons detained does not correlate one-to-one with criminal or civil rights cases brought, the paucity of cases addressing this issue belies Phipps's claim that hapless salesmen and innocent bystanders are being ubiquitously detained in the homes of probationers and parolees.

Although there are many people on some form of community supervision in the United States and the State of Idaho, only 75% of those are being actively supervised, active supervision does not necessarily involve home contacts (e.g., Level 1 supervision in Idaho), over 40% of community supervision is for misdemeanors or infractions (which will generally not involve home searches), and, if Idaho is representative, even the most at-risk probationers and parolees are subject to regular (suspicionless) searches on only a monthly basis. Moreover, even in that fraction of cases where community supervision involves home searches, although persons sharing a residence with a parolee or probationer will regularly be present for the search, the odds of house guests such as an Amway salesman or Thanksgiving revelers being present for a monthly, bi-monthly, or annual home contact is much smaller.

Phipps's argument about the importance of this issue is unsupported by the statistics she cites or the

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[7] Citations indicated by Westlaw headnote 5, stating, "Law enforcement officers may constitutionally detain the occupants of a home during a parole or probation compliance search." *Sanchez*, 574 F.3d at 1169.

number of cases where the issue has arisen. The two-to-one split does not merit review at this time.

II. Because The Primary Issue Addressed By The Supreme Court Of Idaho Was Whether The *Summers* Analysis Applies In The Parole Search Context, This Case Is A Poor Vehicle To Address Differences Regarding How The *Summers* Analysis Applies In Its Original Context Of A Detention Incident To Execution Of A Search Warrant

In this case the Supreme Court of Idaho addressed the issue of "the constitutionality of a suspicionless detention of a third party during a routine parole search." Pet. App. 8a. As set forth above, this specific issue of whether the *Summers* analysis applies to detentions incident to parole searches has been addressed by only two state high courts and one federal court of appeals. Phipps also promotes this case as a candidate to address how *Summers* applies to non-residents of homes, asserting that courts are split on whether and what type of detention of non-residents is reasonable. Pet. 9-15. Those cases, however, address the scope of *Summers* in its original context of a detention incident to a search warrant. A case in that context, addressing the detention of a non-resident pursuant to execution of a search warrant, would be a better vehicle to address the general scope of the *Summers* analysis than this one where that issue was, at best, secondary.

In *Michigan v. Summers*, 452 U.S. 692, 705 (1981), this Court held that officers executing a search

warrant at a residence could detain an "occupant" of the house. Since *Summers* was decided, some federal courts of appeals and state high courts have concluded the *Summers* analysis allows the detention of all persons present at the time of the search. *See*, *e.g.*, *United States v. Bohannon*, 225 F.3d 615, 616-17 (6th Cir. 2000); *United States v. Pace*, 898 F.2d 1218, 1239 (7th Cir. 1990); *United States v. Davis*, 530 F.3d 1069, 1080 (9th Cir. 2008) (*Summers* not distinguishable because "a detainee has no ownership interest in the property being searched"); *United States v. Sanchez*, 555 F.3d 910, 918 (10th Cir. 2009) (*Summers* "authority to detain relates to all persons present on the premises"); *State v. Wilson*, 821 S.E.2d 811, 812 (N.C. 2018) ("the term 'occupant' can most reasonably be interpreted as a resident of the searched premises or a person physically on the premises that are the subject of the search warrant at the time the search is commenced"); *State v. Vorburger*, 648 N.W.2d 829, 841 (Wis. 2002).[8] Other federal courts of appeals and state high courts have concluded that *Summers* justifies only the detention of a person who lives at the residence or has some other significant connection thereto. *See*, *e.g.*, *Baker v. Monroe Twp.*, 50 F.3d 1186, 1192 (3d Cir. 1995); *People*

[8] Idaho applies the *Summers* analysis to non-residents. *State v. Davis*, 353 P.3d 1091, 1095-96 (Idaho App. 2015) (permitting detention of non-resident relative to execution of search warrant); *State v. Pierce*, 47 P.3d 1266, 1268 (Idaho App. 2002) ("Although the factual posture in *Summers* involved the detention of a resident of the home searched, the *Summers* opinion does not suggest that the rule cannot be applied to persons found on the premises to be searched who are not readily ascertainable as residents or occupants.").

v. Glaser, 902 P.2d 729, 737 (Cal. 1995) ("*Summer*'s blanket rule allowing detention . . . applies only to 'occupants' of the residence being searched" and "the word 'occupants' is not to be loosely construed as covering anyone present" (internal quotations omitted)); *State v. Broadnax*, 654 P.2d 96, 103 (Wash. 1982), *abrogated by Minnesota v. Dickerson*, 508 U.S. 366 (1993) (stating that, 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."). At least some of the courts that limit the *Summers* analysis to only residents have, however, allowed a more limited bright-line detention of all present at the residence to ascertain their connection with the residence and illegal activities within. *See*, *e.g.*, *Baker*, 50 F.3d at 1192 ("Although *Summers* itself only pertains to a resident of the house under warrant, it follows that the police may stop people coming to or going from the house if police need to ascertain whether they live there."); *Glaser*, 902 P.2d at 737-40 (although *Summers* analysis does not apply to non-occupants, a limited detention of persons to ascertain identity and connection to property being searched pursuant to warrant is reasonable).

This case is not an appropriate vehicle for resolving whether and how the *Summers* analysis applies to non-residents. As cited above and in the petition, Pet. 9-13, the different approaches articulated by courts arise in the context of cases involving detentions incident to execution of search warrants. There is no

question that *Summers* applies to such searches. The core issue in this case, however, is whether *Summers* even applies to the type of search conducted, and Phipps argues it does not. A case where the detention of the non-resident was pursuant to a search warrant (where *Summers* undoubtedly applies to the search) would make a better vehicle for addressing whether nonresidents may be detained during the execution of a search warrant.

III. The Idaho Supreme Court Did Not Decide This Case In A Way That Conflicts With Decisions Of This Court

Phipps claims that the decision of the Supreme Court of Idaho conflicts with *Summers* and its progeny. Pet. 20-25. To the contrary, the Supreme Court of Idaho's application of the *Summers* analysis in the context of parole and probation searches is consistent with constitutional standards as articulated by this Court, and does not merit review for potential error.

In *Summers* this Court stated the general Fourth Amendment rule that seizures must be supported by probable cause, but that under the reasonableness requirement of the Fourth Amendment there is an "exception" for "limited intrusions" that are "justified by special law enforcement interests." *Summers*, 452 U.S. at 699-700. Deciding whether a case is "controlled by the general rule" or is reasonable under the exception requires an examination of "the character of the official intrusion and its justification." *Id.* at 700-01. The Court

balanced the character of the intrusion against the governmental interests of preventing flight, minimizing the risk of harm to the officers and the occupants of the residence, and completing the search in an orderly fashion. *Id.* at 701-03. The Court held 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." *Id.* at 705 (footnote omitted).

This analysis applies with equal force to detentions in the course of probation and parole searches. Like in *Summers*, the intrusion involved in detaining someone on the premises of a parole search is "'much less severe' than that involved in a traditional arrest." *Bailey*, 568 U.S. at 193 (quoting *Summers*, 452 U.S. at 697-98). The intrusion of a limited detention during a parole search is the same intrusion as a detention during a search authorized by warrant. Moreover, the governmental interests justifying the detention in *Summers* are "present in every valid home search." *Sanchez*, 574 F.3d at 1174.

The only difference—that a warrant is issued upon a magistrate's finding of probable cause—is not a distinction requiring a different result. A parole search is reasonable without a warrant. *Samson v. California*, 547 U.S. 843, 850 (2006). That the legal justification for the search is different does not change the character of the intrusion. *Sanchez*, 574 F.3d at 1174. Likewise, the lack of a judicial finding of probable cause does not change the government interest in an effective and safe search. Although a parole officer *may* lack

probable cause to believe evidence of a crime is present when she or he conducts a search, one of the reasons for parole searches is that "'parolees . . . are more likely to commit future criminal offenses.'" *Samson*, 547 U.S. at 853 (quoting *Pennsylvania Bd. of Probation and Parole v. Scott*, 524 U.S. 357, 365 (1998)). Neither the nature of the seizure nor the governmental interests in (1) preventing flight, (2) minimizing the risk of harm to the officers and the occupants of the residence, and (3) completing the search in an orderly fashion are meaningfully different in parole searches than in searches pursuant to a search warrant.

Phipps first contends the reasoning of *Summers* does not make sense "in the context of a visitor who is merely present at the time of a parole compliance check" because there is no "incremental" intrusion on her liberty. Pet. 22.[9] However, a parole search certainly intrudes on a third party's freedom of movement in the same way a search pursuant to warrant does. Unless Phipps is asserting that non-parolees are free to come and go while the parole search is conducted, move about the house, and even accompany the parole officer going room-to-room to identify potential threats, there

[9] As this quote suggests, Phipps's argument is primarily directed at the split in lower courts over whether *Summers* applies to persons present at the time of the search or only to those actually living at the residence. As stated above, a case that addresses that question only would be a better vehicle for addressing that split. As presented, Phipps's argument is a mélange of why *Summers* does not apply to her because she is a non-resident and why *Summers* does not apply to her because it was a warrantless parole search. Pet. 22-25.

is an intrusion of some sort on that person's liberty. If an officer can constitutionally instruct Phipps that she must spend the duration of the search anywhere but the house, it is indeed an "incremental" intrusion to tell her she has to spend the time of the search on a couch in the living room.[10] The detention at issue is limited, is much less severe than arrest, and is incremental to the officers' control of the place of the search.

Phipps next argues that the governmental interests of preventing flight, minimizing risk of harm, and facilitating an orderly search do not "apply to the person who happens to be visiting a parolee." Pet. 22-23. However, the risks associated with searches justified by parole are the same risks as are associated with searches authorized by a search warrant. *Sanchez*, 574 F.3d at 1174 (the "three justifications" for detention "appear to be present in every valid home search"). That the parole officers in this case did not know how or to what extent those risks applied to Phipps in particular is irrelevant. *Mena*, 544 U.S. at 98 ("An officer's authority to detain incident to a search is categorical. . . .").

There is no meaningful distinction between warranted searches and parole searches that would justify concluding that controlling the scene by detaining the persons present is reasonable in the former but is unreasonable in the latter. The character of the intrusion and the reasons therefore are the same. Phipps's

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[10] Or in the front yard, which were the facts of *Sanchez*, 574 F.3d at 1171-72.

argument fails to show error, much less that her case is deserving of error correction by this Court.

CONCLUSION

The petition for writ of certiorari should be denied.

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