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

## REPLY BRIEF IN SUPPORT OF CERTIORARI

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## TABLE OF CONTENTS

**Page(s)**

## TABLE OF AUTHORITIES

**Page(s)**

**Cases**



**Other Authorities**

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## REPLY BRIEF IN SUPPORT OF CERTIORARI

The question presented, to borrow the words of the court below, is "the constitutionality of a suspicionless detention of a third party during a routine parole search." Pet. App. 8a; Pet. i. Respondent does not contest that the court's decision to uphold such suspicionless detention depended on two extensions of *Michigan v. Summers*, 452 U.S. 692 (1981). First, the court had to extend *Summers* from the detention of the resident of the premises to be searched to the detention of "third parties on the premises"— that is, the detention of "a non-resident." Pet. App. 7a; *see also* Pet. App. 16a-17a ("declin[ing] to limit *Summers*" to the detention of residents because it "defeats the underlying justifications of the *Summers* rule"). Second, the court had to extend *Summers* from the execution of a judicially approved search warrant "to parole and probation searches." Pet. App. 12a, 15a.

The BIO concedes that each extension is the subject of a conflict. And the BIO does not contest that petitioner prevails if either conflict is resolved in her favor—that is, if *Summers*' categorical rule applies only to residents of a premises or applies only to search warrant execution.

At the same time, the expansion of *Summers* from the limited context of search warrant execution to the suspicionless detention of family, friends, and acquaintances during everyday community supervision checks is one of enormous magnitude. To be sure, the overwhelming majority of these detentions will never give rise to a court case, precisely *because* they are not founded upon any reasonable suspicion of wrongdoing and because even lengthy detention generally will not justify the cost of bringing a civil action. These intrusions will, however, be fixtures in the lives of the hundreds of thousands of people on community supervision in affected jurisdictions, and lead to persistent intrusion for the many millions more who are connected to those people.

The Court should not turn away this opportunity to correct the scope of its categorical rule. Each court below viewed the relevant facts as settled and identified the scope of *Summers* as the sole, dispositive issue. Respondent does not contest a single fact or point to *any* additional fact needed to resolve the relevant legal issues.

The Court should grant certiorari.

## I. Respondent Concedes There Is A Conflict On Both Extensions of *Summers*.

Respondent concedes lower courts are entrenched in a deep conflict over whether *Summers*' categorical

rule authorized the detention of visitors in the first place. *See* BIO 12-13 & n.8 (spending two pages recounting the disagreement between 10 lower courts that "have concluded the *Summers* analysis allows the detention of all persons present at the time of the search" and others that "have concluded that *Summers* justifies only the detention of a person who lives at the residence or has some other significant connection thereto"); Pet. 11-13 & nn.3-6. And respondent concedes lower courts are split over whether *Summers* applies to routine residence checks. *See* BIO 6-7; Pet. 14-15.

Respondent does not contest that both extensions were necessary aspects of the decision below. The court below rejected petitioner's argument that *Summers* does not apply "when the detainee is a non-resident." Pet. App. 7a. In fact, it had to address that issue because the district court had held that *Summers* "should be limited to identifying new persons arriving and remaining on the premises" so that "any non-residents should then be permitted to leave." Pet. App. 16a. Reversing, the Idaho Supreme Court "decline[d] to limit *Summers* in such a way," reasoning that distinguishing between "whether each occupant is a resident or non-resident will be cumbersome, time consuming, distracting, and ultimately lead to prolonging the period of detention" and "defeats the underlying justifications of the *Summers* rule." Pet. App. 16a-17a. The court also agreed with respondent and the Ninth Circuit that *Summers* "extends . . . to parole and probation searches," reasoning that "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.

In response, the BIO calls the extension to visitors a "secondary" issue in this case, and refers to the extension to parole searches as the "core" or "primary issue." BIO 6, 11. At the outset, this is just semantics since both "issues" are subsumed within the question presented—whether the *Summers* rule should be extended to the facts of this case. Pet i. And whatever the rhetorical significance of these labels, respondent does not contest that petitioner would prevail if *either* issue were resolved in her favor. To the extent the BIO argues certiorari should be denied simply because the petition implicates two issues, that argument does not go very far. This Court routinely grants certiorari in cases that raise related issues—indeed, it has repeatedly done so for this particular rule. *Summers* itself implicated "three interrelated issues" on which the Court could have ruled and where it was "not clear that the Court [would] have to address all of them." Michigan v. Summers Supreme Court Case Files Collection, Box 77, at 13, Powell Papers, Lewis F. Powell Jr. Archives, Wash. & Lee U. Sch. of L., Virginia. And when the Court later revisited the scope of the rule in *Muehler v. Mena*, 544 U.S. 93 (2005), it did so in a case that raised "two recurring constitutional questions." Petition for Writ of Certiorari at 2, *Muehler*, 544 U.S. 93 (No. 03-1423), 2004 WL 831358.

As in those cases, this case presents the Court with flexibility in determining whether, and to what circumstances, the *Summers* rule may extend. If the Court agrees that the justifications for *Summers* "limit [the rule] to actual residents of the place to be searched," Pet. 12-13; BIO 12, the Court can choose to

start and/or end its analysis there. If the Court concludes the "existence of a search warrant is essential" to *Summers* and its rule therefore does not extend to routine residence checks, the Court can choose to start and/or end its analysis there. Pet. 14. And if the Court chooses to address both subsidiary issues or rules in respondent's favor, it can resolve both conflicts. That this case provides a multitude of options for the Court is a feature of the petition, not a bug.

## II. This Case Presents An Ideal Vehicle.

Respondent does not contest that petitioner preserved the question presented. The question was acknowledged and resolved as the sole, dispositive issue at every stage below. Pet. 18-19 (citing Pet. App. 8a, 23a, 41a). Respondent has never asserted any alternative basis for upholding the search, and does not now either.

Respondent also does not contest that the relevant facts are settled. It is undisputed that Phipps was a visitor. It is undisputed that the sole justification for detaining petitioner was the terms of someone else's parole agreement, which authorized residence checks. And it is undisputed that the probation officers lacked reasonable suspicion of any wrongdoing at the time they entered the premises and detained petitioner.[1] The courts below explicitly recognized these facts as "undisputed" and "conceded," Pet. App. 7a, 42a, and respondent does not suggest otherwise.

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[1] Everyone agrees that there would be a basis for detention insofar as it is supported by reasonable suspicion. The only question here is whether to allow detention devoid of any suspected wrongdoing.

In fact, respondent does not identify *any* potential obstacle to resolving the question presented, including either or both of the related lower court conflicts. The closest respondent comes is undeveloped assertions that "[t]his case is not an appropriate vehicle" to decide whether the *Summers* rule extends to detention of people who are not residents in the premises to be searched, and that a case arising in the context of a search warrant "would be a better vehicle" for that question. BIO 11, 13. It is of course true that many (but not all) of the cases considering whether the *Summers* rule authorizes detention of non-residents have arisen in the context of search warrants. But respondent does not dispute that if the *Summers* rule does not justify seizure of non-residents in the first place, it would be dispositive of this case. Nor does respondent argue (nor could it) that the factual record here is somehow undeveloped or ill-suited to allowing this Court to resolve the question.

That is because the very notion of a categorical rule is that its scope does not change from case to case. As stated in *Summers* itself, the scope of the rule "does not depend upon . . . an ad hoc determination"; rather, "the balancing of the competing interests. . . 'must in large part be done on a categorical basis.'" *Summers*, 452 U.S. at 705 n.19. As Justice Scalia wrote separately to "crucially" emphasize in *Bailey v. United States*, 568 U.S. 186 (2013), "whether *Summers* authorizes a seizure *in an individual case* does not depend on any balancing, because the *Summers* exception, within its scope, is 'categorical.'" *Id.* at 203 (Scalia, J., concurring) (emphasis in original) (quoting *Muehler*, 544 U.S. at 98). That is precisely how the Idaho Supreme Court understood the question: asking

simply whether "the underlying justifications of the *Summers* rule" turn on "whether the occupant is a resident or not." Pet. App. 16-17a. The question of whether a visitor is an "occupant" within the meaning of *Summers*, 452 U.S. at 702-05, is a purely legal question and respondent does not point to any additional fact needed to resolve it.

## III. The Question Presented Is Of Immediate Importance To Hundreds Of Thousands Of People, And The Millions Of Friends And Family Who Associate With Them, Yet Will Often Evade Review.

The petition explained that expanding *Summers* to authorize the detention of family, friends, and acquaintances present at the time of routine residence checks from the narrow, and comparatively rare, context of detaining a resident whose home is subject to a judicially approved search warrant, increases the *Summers* "exception" by a massive scale. In the Ninth Circuit alone, the number of people on community supervision is huge—over 670,000—and Idaho itself subjects people to supervision at twice the national rate, and the second highest per capita in the country. Pet. 16-17. The rule here has consequences not only for this "enormous number of people," but also "the many millions more friends or family members who associate with them." Amicus Br. of Idaho Association of Criminal Defense Lawyers 2-3. On top of that, it subjects these people to suspicionless detention on a recurring basis, unlike the one-off execution of a warrant. These intrusions are anything but "theoretical" to the people who regularly experience them. BIO 7.

Respondent's superficial attempts to downplay the number of people presently affected by its rule are

telling. Respondent concedes that petitioner's statistics are accurate, but disputes the conclusion that "probation and parole searches are pervasive." BIO 8. The BIO observes that many of the people on probation or parole—"over 40%"—committed only misdemeanors and other minor offenses. BIO 10. Respondent appears to concede that in Idaho and elsewhere these people are subject to routine residence checks under the terms of their parole or probation, and does not contest that the rule below would categorically authorize the suspicionless detention of their family, friends, and acquaintances. In response to this vast expansion of government power, respondent offers an unsubstantiated assurance that the government is "unlikely" to subject misdemeanants and other minor offenders to regular supervision. *Id.* at 8. That assurance contradicts the data itself, which shows that over 82% of all adult parolees and 75% of all adult probationers—*including misdemeanants*—are subject to active supervision.[2]

Respondent's other answer is to cite *the minimum number* of residence checks *required by law* and imply that they reflect the actual frequency of residence checks. BIO 9. In practice, residence checks occur with far more frequency—indeed, even on the record here

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[2] The percentage of people subject to active supervision is roughly 95% if you exclude only people who are not being actively supervised, as opposed to people who have absconded or are being supervised by other jurisdictions. U.S. Dep't of Justice, Bureau of Justice Statistics, *Probation and Parole in the United States, 2016* 17, 24 (Apr. 2018) ("DOJ Statistics Report"), available at https://www.bjs.gov/content/pub/pdf/ppus16.pdf. Respondent selectively and misleadingly cites only the probation number. BIO 8.

the officers testified that they would go to the parolee's house "quite often" and "a lot," so much that they "were familiar with petitioner from prior visits." Tr. 19, 22; Pet. App. 3a, 21a; *see also* Amicus Br. of Idaho Association of Criminal Defense Lawyers 7 (explaining that standard search conditions imposed on parolees and probationers are sufficiently broad as to allow residence checks on a regular basis). And even if one accepts respondent's "minimum-required-by-law" frequency of every 30 or 60 days, we are talking about *tens of millions* of residence checks per year in the Ninth Circuit alone at which family, friends, and others would be open to suspicionless detention.

According to respondent, the other reason its rule has only "theoretical" consequences is that "the Ninth Circuit is the only federal circuit court and the Supreme Court of Idaho is the only state high court" that has extended the rule to routine residence checks. *Id.* Respondent presumably would not make this argument if, say, four or five circuits had adopted this rule. Yet, when it comes to the number at issue—people under community supervision—the Ninth Circuit has *200,000 more* than the First, Second, Tenth and D.C. Circuits *combined*.[3] This number has grown substantially in recent history,[4] and has ballooned as commu-

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[3] DOJ Statistics Report at 11-12 (showing a total of 677,100 people on probation or parole in jurisdictions governed by the Ninth Circuit, and a total of 487,300 in jurisdictions governed by the First, Second, Tenth and D.C. Circuits).

[4] California's parole population, for instance, "was a remarkable eight times larger in 2010 than it was in 1980." Sarah Lawrence, Chief Justice Earl Warren Institute on Law & Social Policy, *California in Context: How Does California's Criminal Justice System Compare to Other States?* 3 (Sept. 2012), available at

nity supervision is adopted as an alternative to imprisonment because of COVID-19.[5]

Respondent's description of one of the two splits as "shallow" should and in the past has offered little solace. These detentions, by their nature, almost never end up in court. Detentions generally do not produce evidence. That is all the more true here because the detentions at issue take place, by definition, without any suspicion of wrongdoing. And even prolonged detentions are unlikely to justify the cost and burdens of bringing a civil action.

Thus (and on top of the fact that this case also presents a concededly deep split, *see supra* at 3-4), this Court has granted certiorari in Fourth Amendment cases when presented with a good vehicle, even when only shallow splits have emerged. *See, e.g.*, Reply to Brief in Opposition at 1, 3, *City of Los Angeles v. Patel*, 576 U.S. 409 (2015) (No. 13-1175), 2014 WL 4216034 (conceding that both of the Fourth Amendment issues implicated in the case were based on 1-1 splits, including one split between the Ninth Circuit and the Massachusetts Supreme Court); Petition for Writ of Certiorari at 13-14, *Muehler*, 544 U.S. 93 (No. 03-1423), 2004 WL 831358 (explaining that only the Ninth Circuit "directly conflicts" with the Seventh Circuit on whether questions regarding immigration status may

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https://www.law.berkeley.edu/files/bccj/CA_in_Context_Policy_Brief_Sept_2012_Final.pdf.

[5] California alone, for instance, will have released 18,000 prisoners by the end of August. Rebecca Salamacha, *California to Release 8000 Prisoners due to COVID-19*, JURIST, July 12, 2020, available at https://www.jurist.org/news/2020/07/california-to-release-8000-prisoners-due-to-covid-19/.

be posed to a lawfully detained individual without reasonable suspicion); Reply to Brief in Opposition at 2, *Carpenter v. United States*, 138 S. Ct. 2206 (2018) (No. 16-402), 2017 WL 4481641 (conceding that the conflict involves only two courts, "the Sixth Circuit . . . in conflict with the Third Circuit on the central Fourth Amendment questions").[6]

## CONCLUSION

For the foregoing reasons and those in the petition, certiorari should be granted.

Respectfully submitted,

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[6] The parties' divergent views on the underlying justifications for *Summers*, and whether they justify application of its categorical rule to this case, only underscore the need for this Court's review. *Compare* Pet. 20-25 *with* BIO 14-18.