1   IN THE SUPREME COURT OF THE UNITED STATES

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3 CHUNON L. BAILEY, AKA POLO,   :

4   Petitioner   : No. 11-770

5   v.   :

6 UNITED STATES   :

7 - - - - - - - - - - - - - - - - - x

8   Washington, D.C.

9   Thursday, November 1, 2012

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11   The above-entitled matter came on for oral

12 argument before the Supreme Court of the United States

13 at 11:04 a.m.

14 APPEARANCES:

15 KANNON K. SHANMUGAM, ESQ., Washington, D.C.; on

16   behalf of Petitioner.

17 JEFFREY B. WALL, ESQ., Assistant to the Solicitor

18   General, Department of Justice, Washington, D.C.;

19   on behalf of Respondent.

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1   C O N T E N T S

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

2   (11:04 a.m.)

3   CHIEF JUSTICE ROBERTS: We'll hear argument

4   next in Case 11-770, Chunon Bailey v. United States.

5   Mr. Shanmugam.

6   ORAL ARGUMENT OF KANNON K. SHANMUGAM

7   ON BEHALF OF THE PETITIONER

8   MR. SHANMUGAM: Thank you,

9   Mr. Chief Justice, and may it please the Court:

10   In Michigan v. Summers, this Court

11   established a categorical exception to the default

12   Fourth Amendment requirement of probable cause.

13   Under Summers, officers executing a search

14   warrant for contraband may detain individuals they

15   encounter at the scene while they are in the course of

16   executing the warrant.

17   This case presents the question whether the

18   Summers exception also permits officers to detain

19   individuals who have left the scene before the warrant

20   is executed. Because individuals who have left the

21   scene do not pose an immediate threat to the safe and

22   efficient completion of the search, the court of appeals

23   erred by permitting their detention absent probable

24   cause or even individualized suspicion. Its judgment

25   should therefore be reversed.

1   JUSTICE SOTOMAYOR: Counsel, the two tests,

2   yours seem to be the immediate vicinity test, and the

3   Second Circuit is as soon as practical test. Your

4   adversaries point out that the Second Circuit test

5   actually focuses on the police officer's conduct, which

6   should be the focus of reasonableness or

7   unreasonableness. Your test just creates an artificial

8   line that is subject to as much play as the other. Why

9   isn't the focus on police conduct the right focus?

10   MR. SHANMUGAM: Well, let me explain,

11   Justice Sotomayor, first, the sort of theoretical basis

12   for why we're offering this line, and, second, say a

13   word about the comparative merits of the two tests.

14   First of all, with regard to the theoretical

15   basis for the line, our fundamental submission to this

16   Court is that Summers does not create a police

17   entitlement; it is instead a rule of necessity and

18   should be confined to situations in which a detention

19   serves search-related purposes.

20   And in our view, the justifications for a

21   detention evaporate once an individual has left the

22   immediate vicinity of the premises. And, again, that's

23   because in those circumstances a detention serves no

24   interest in ensuring the safe and efficient completion

25   of the search because the individual poses no immediate

1   threat to the safe and efficient completion of the

2   search.

3   JUSTICE KAGAN: And what is the immediate

4   vicinity? How would you define that?

5   MR. SHANMUGAM: Well, ordinarily, the

6   immediate vicinity will be the physical bounds of the

7   property; but, there may be circumstances in which an

8   individual who is just outside the physical bounds of

9   the property should nevertheless be detained, so to

10   provide --

11   JUSTICE SCALIA: May be? There certainly

12   is. I mean, that was Summers, wasn't it?

13   MR. SHANMUGAM: Well, in Summers itself, the

14   individual was on the premises just outside the house

15   that was going to be searched, and the officers were, in

16   the government's words in that case, approaching the

17   property.

18   JUSTICE SCALIA: Yes. He wasn't on the

19   premises, he was on the sidewalk, right?

20   MR. SHANMUGAM: Well, he was actually on --

21   he was on the property because he was on a sidewalk that

22   connected the front steps to the public sidewalk in

23   front of the house. The officers were approaching the

24   house, about to effectuate entry.

25   JUSTICE SCALIA: He was in the curtilage of

1   the house.

2   MR. SHANMUGAM: He was pretty clearly within

3   the curtilage, Justice Scalia.

4   CHIEF JUSTICE ROBERTS: You said the

5   difference is there's no immediate threat to the

6   officers here. But there is a threat, I suppose, I

7   mean, if he finds out about the search and comes back,

8   if he sees the officers outside his dwelling, if there's

9   somebody in the dwelling who can notify him, send him a

10 message that the police are searching and he can get his

11 confederates and come back.

12   It seems to me that you're requiring that

13 there be a larger number of police present at the site

14 conducting the search, being lookouts for anybody that

15 might come back, being able to detain people who are

16 leaving as they approach. There's no immediate threat,

17 but there's certainly a threat.

18   MR. SHANMUGAM: If anything, it's the

19 government's approach that requires a greater number of

20 officers at the site because, under the government's

21 approach, you have the two officers who conduct the

22 detention while a separate group of officers execute the

23 search.

24   And it's really for that reason,

25 Justice Scalia --

1   CHIEF JUSTICE ROBERTS: Well, it requires

2   more unless they want the guy to get away, I guess,

3   right?

4   MR. SHANMUGAM: Well, let me say something

5   about this prospect that the individual will return. We

6   think that the appropriate analysis here is the analysis

7   that this Court set out in Arizona v. Gant.

8   And this Court, in Arizona v. Gant,

9   suggested that where a categorical rule is involved, you

10   have to look at the class of cases to which the rule

11   would be extended to see if the justifications apply.

12   Now, with regard to this class of

13   individuals who have left the scene, we believe that it

14   is simply unlikely either that such an individual who

15   has left the scene will be aware of the presence of

16   police, or that such an individual will return in an

17   effort to disrupt the search.

18   JUSTICE KAGAN: Well, what if he were aware,

19   or what if there was reason to think he might be aware,

20   would you then allow the police to do what the police

21   did here?

22   MR. SHANMUGAM: Well, we wouldn't. And

23   that's simply because we believe that this should be a

24   categorical analysis.

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

1   class of cases where individuals have left the scene to

2   determine whether the justifications for the Summers

3   rule apply.

4   Now, let me provide a --

5   JUSTICE KENNEDY: If -- if you think that

6   leaving the scene -- in Justice Kagan's hypothetical,

7   that he's leaving the scene with incriminating evidence,

8   at that point you have -- you have a Terry stop? And

9   he's right at the scene; he's just leaving the premises,

10   at the end of the driveway or something?

11   MR. SHANMUGAM: Well, the analysis under

12   Terry is whether there is reasonable suspicion, a

13   reasonable basis to believe that the individual is

14   engaged in criminal activity --

15   JUSTICE KENNEDY: What would you think

16   generally in my hypothetical? There'd be hundreds of

17   other facts, but --

18   MR. SHANMUGAM: Well, ordinarily, when an

19   individual is seen leaving the scene -- and suppose --

20   let me provide --

21   JUSTICE KENNEDY: Just -- just before the

22   search, yes.

23   MR. SHANMUGAM: Well, of course, the

24   individual who is leaving the scene doesn't necessarily

25   know that the search is about to take place.

1   JUSTICE KENNEDY: Right.

2   MR. SHANMUGAM: And so, to provide a

3   hypothetical that will hopefully put some meat on the

4   bones of this issue, suppose that an individual leaves a

5   house, and he actually sees police officers sitting in a

6   car, whether marked or unmarked, outside the house. And

7   it is clear that he has seen the officers. He waves at

8   the officers and then ambles down the street.

9   I don't think that there would be any doubt

10   but that that individual could not be detained unless he

11   did something more; unless, for instance, he engaged in

12   flight at that point, at which point he could perhaps be

13   detained under Terry.

14   And so we simply submit that the analysis

15   should be no different in a situation in which the

16   purpose -- the reason why the officers are sitting

17   outside the house is because another group of officers

18   is about to execute the search warrant.

19   Of course, that individual --

20   JUSTICE GINSBURG: But Terry -- Terry is an

21   open question in this case. It wasn't decided below,

22   but it was raised.

23   So -- so you're arguing we shouldn't extend

24   Summers, but that leaves this very case susceptible to

25   the assertion that this was a legitimate Terry stop.

1   MR. SHANMUGAM: That is correct,

2   Justice Ginsburg.

3   And just to be clear about how these two

4   doctrines work together, our submission to this Court is

5   that within the search zone, within the immediate

6   vicinity of the premises, the rule of Summers applies,

7   so that, if officers encounter an individual within that

8   zone while they are in the process of executing the

9   warrant, a detention is permissible absent probable

10   cause or individualized suspicion.

11   Outside that search zone, ordinary

12   Fourth Amendment principles apply. And, of course,

13   under the Fourth Amendment, detentions of persons have

14   to be justified by some degree of individualized

15   suspicion; probable cause for a full-fledged arrest,

16   individualized suspicion for a more limited detention

17   under Terry.

18   JUSTICE ALITO: Well, what would you think

19   of this situation? Officers have a no-knock warrant,

20   and they're -- they're at the house. They see somebody

21   come out the door and start to go down the steps,

22   doesn't look like that person has noticed their

23   presence.

24   Now, they have the choice, if you prevail,

25   of either rushing in and stopping the person within the

1   curtilage, in which case they could detain the person,

2   or they could allow the person to walk some distance

3   outside of the site of the house and then stop the

4   person, and that would allow them to execute the warrant

5   without endanger -- without enhancing the danger to them

6   from potentially armed people inside or allowing the

7   destruction of evidence.

8   What -- in that situation, what argues in

9   favor of your rule, that if they want to detain this

10   individual, they have to rush in and stop him before he

11   leaves the premises?

12   MR. SHANMUGAM: The justifications

13   articulated by this Court in Summers, Justice Alito, and

14   in particular what we really believe are the primary

15   justifications, first, minimizing the risk of harm to

16   officers executing the warrant; and, second,

17   facilitating the orderly completion of the search.

18   And let me say a word about --

19   JUSTICE ALITO: Well, without

20   interrupting -- in that situation, officer safety is

21   undermined by your rule because it requires them to stop

22   the person on the premises and, therefore, tip off those

23   inside, potentially, about their presence.

24   MR. SHANMUGAM: But they also have the

25   choice not to engage in a detention at all.

1   And I think the fundamental problem with the

2   court of appeals' rule and with the government's

3   submission to this Court is that it really entails the

4   conclusion that once officers see the individual leaving

5   the house, they have an entitlement to detain that

6   individual, with the only open question being where and

7   how they go about effectuating the detention.

8   But we simply believe that the

9   justifications for the detention don't attach to the

10   individual. They are search-based justifications. And

11   the mere fact that an individual is seen leaving a house

12   that is about to be searched in our view is insufficient

13   to give rise to reasonable suspicion.

14   JUSTICE KAGAN: Mr. Shanmugam, when you talk

15   about the justifications in your brief and just now, you

16   talk about two; but, there were, in fact, three, and the

17   third was flight. So how is it that that's dropped from

18   your understanding of Summers?

19   MR. SHANMUGAM: Well, we simply think,

20   Justice Kagan, that that justification is insufficient

21   standing on its own. And that is simply because the

22   justification in preventing flight is different in kind

23   from the other two justifications that we've been

24   discussing.

25   The other two justifications are truly

1   special law enforcement interests, to use this Court's

2   words in Summers. The interest in preventing flight, by

3   contrast, is an ordinary law enforcement interest.

4   And just as in my hypothetical, when the

5   officers are sitting outside and they see an individual

6   wander by, the mere fact that the individual saw the

7   police and perhaps would therefore conclude that the

8   police were on to him would not give rise to a basis for

9   detention simply because that individual could

10   subsequently flee.

11   So, too, we think that preventing flight in

12   and of itself is insufficient. That is the ordinary law

13   enforcement interest that requires individualized

14   suspicion.

15   JUSTICE SOTOMAYOR: Counsel, can I come back

16   to the facts that my colleagues have raised and break it

17   down implicating the Terry question?

18   Here, the officers had a report of something

19   in the house, and they saw the defendant -- two people

20   leaving.

21   I know Terry hasn't been decided, but why do

22   you think -- just the stop, not the detention, not the

23   bringing them back to the house, why do you think that

24   just stopping them was wrong?

25   MR. SHANMUGAM: Under Terry?

1   JUSTICE SOTOMAYOR: Under Terry.

2   MR. SHANMUGAM: Sure. Well, and first of

3 all, I should preface what I'm about to say by noting

4 that the court of appeals itself didn't reach the Terry

5 issue, and the government doesn't advance that issue in

6 its merits brief.

7   JUSTICE SOTOMAYOR: But the court below did.

8   MR. SHANMUGAM: So that would be an issue

9 that would be open on remand. And let me say why on

10 remand --

11   JUSTICE SCALIA: Excuse me. Just the

12 stop would be -- but -- but they did more than just stop

13 them. They --

14   MR. SHANMUGAM: Well, that's right. The

15 stop and the --

16   JUSTICE SCALIA: -- they handcuffed them.

17   JUSTICE SOTOMAYOR: Well, it goes back to if

18 a police officer saw an individual leaving the house and

19 was concerned about them tipping someone off, et cetera,

20 what would be the problem with the officer stopping the

21 person around the corner, holding them, making sure

22 people got in and then letting them go.

23   MR. SHANMUGAM: And just to be clear,

24 because there are the two separate issues. There's the

25 question of the stop and the question of the detention.

1   And there would be a separate question about whether

2   under Terry a detention of a particular length might or

3   might not be permissible.

4   But as to the stop, the argument that we

5   would make on remand if we were to prevail before this

6   Court would be that here what you have is insufficient

7   to meet the reasonable suspicion standard. And what I

8   assume that the government would argue is that the

9   combination of the search warrant and the fact that the

10   individual was seen leaving the premises that were about

11   to be searched, and as to which there was probable cause

12   to believe that contraband was present, and the fact

13   that my client met the extremely generic description

14   provided by the confidential informant, would be

15   sufficient to give rise to reasonable suspicion.

16   Now, clearly we don't think -- I was just

17   going to say, clearly we don't think that either of

18   those factors standing on its own would be sufficient.

19   The question would be whether that combination of

20   factors under the facts and circumstances of this case

21   would be sufficient, and we would submit that that

22   combination is insufficient as well.

23   JUSTICE GINSBURG: If they did do -- if they

24   did do a Terry stop, and in the process of that stop the

25   police officer got a call that said, we found lots of

1   contraband, guns in this house, at that point they could

2   have turned the Terry stop into an arrest, couldn't

3   they?

4   MR. SHANMUGAM: They could very well, with

5   one caveat, and that caveat is simply that the

6   circumstances under which the contraband is found might

7   be relevant to the analysis of whether or not there is

8   probable cause, because the question would be whether or

9   not there is probable cause to believe that the

10   individual constructively possessed the contraband at

11   issue.

12   JUSTICE SCALIA: Mr. Shanmugam, please help

13   me. I -- I don't understand why -- why the Terry stop

14   is at issue, inasmuch as there was not a Terry stop. I

15   mean, what occurred here went well beyond a Terry stop,

16   did it not? So what do you do? You -- you slice the

17   baloney that thin; you say well, the -- the first stop

18   is a Terry stop. Oh, yes, he later went on to detain

19   them for a long time and put handcuffs on them and take

20   them back to the premises. What -- what relevance does

21   the Terry stop have?

22   MR. SHANMUGAM: Well, that would be the

23   additional question, whether the detention in this case,

24   which did involve taking my client and the other

25   individual, putting them in handcuffs, putting them in

1   the patrol car, and then taking them back to the scene,

2   was permissible within the scope of a Terry stop. And I

3   think that would also be an open question, and that

4   would particularly be an open question in a number of

5   these cases in which the detention, pursuant seemingly

6   to Summers, occurs over a very lengthy period of time.

7   Under Terry, of course --

8   JUSTICE SCALIA: Well, I guess -- I guess, I

9   just didn't realize that it's an open question whether

10   you can do that much in -- in a mere Terry stop.

11   MR. SHANMUGAM: Well, under Terry officers

12   may detain an individual for the period of time it takes

13   for them to confirm or dispel the suspicion, and I think

14   that there would be an open question as to whether or

15   not when officers are executing a search warrant, for

16   the duration of the execution of the search warrant,

17   that falls within the scope of that Terry test.

18   JUSTICE ALITO: Could you explain what you

19   mean by the immediate vicinity? Is it based on -- on

20   property line? Is it some absolute distance from the --

21   the entrance to the premises? Is it based on how far

22   you could see from the -- the site of the search?

23   MR. SHANMUGAM: I think ordinarily it will

24   be within the physical bounds of the property. So --

25   but -- but if, for instance, officers saw an individual

1   coming out of his house and he walked out and he just

2   happened to step -- step off the curb into the road

3   before the officers got to them, we would say that that

4   would satisfy the immediate vicinity standard.

5   JUSTICE SCALIA: Well, physical bounds of

6   the property is -- is too much. I mean, you know, what

7   if it's a farm and it's a 50-acre farm?

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

9   JUSTICE SCALIA: I think you are much better

10   off, I think your submissions sometimes say immediate

11   vicinity.

12   MR. SHANMUGAM: Well, we -- we proposed to

13   this Court the immediate vicinity standard in large part

14   because it really is comparable to similar limits this

15   Court has adopted for other Fourth Amendment --

16   JUSTICE SCALIA: I like that much better

17   than boundaries of the property.

18   MR. SHANMUGAM: Well -- and to provide a

19   couple of examples, under Maryland v. Buie, the case

20   that permits officers to conduct a protective sweep

21   incident to an arrest, the Court permits officers to

22   search the area immediately adjoining the place where

23   the arrest occurs and that has not proven to be a

24   difficult standard to apply in practice.

25   JUSTICE BREYER: What is the actual

1   difference? I mean, you have two officers or three. If

2   they go into the property and somebody's there, they can

3   detain him, and Summers gives three reasons: One, as

4   Justice Kagan pointed out, preventing flight in the

5   event that incriminating evidence is found. We are

6   considering now the case where, instead of going and

7   detaining the people, the people inside the house walk

8   out and there are two officers in a patrol car or an

9   unmarked car outside waiting to go in. Okay. That

10   seems to me identical, as you said.

11   The last one is facilitating orderly

12   completion of the search. That seems to me identical.

13   You want the person there so that he can open a drawer,

14   so he can unlock a closet, et cetera, okay. Identical.

15   The third one, where there is the only place

16   for difference, it seems to me, is minimizing the risk

17   of harm to the officers. Now, the harm, risk of harm to

18   the officers I guess if he goes into the house is that,

19   well, if they leave, they might come back, goodness

20   knows, and they've seen they are looking for the drugs,

21   da, da, da. Or maybe they will rush out, or maybe there

22   will be a -- well, any, goodness knows what.

23   Now here I can see a slight difference, but

24   maybe not. I don't know. Maybe they will come back.

25   Maybe they noticed the people in the car outside. Maybe

1 they didn't. Certainly the policemen don't know. And

2 they might go in quicker, and then the others will be

3 alerted. I mean, when you talk generally about a risk

4 of harm to the police, it seems to me pretty close, if

5 not identical.

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

7   JUSTICE BREYER: So what am I missing?

8   MR. SHANMUGAM: Let me address each of those

9 three.

10   JUSTICE BREYER: You already said the first

11 one's identical. I don't see how the third one could

12 change, and what about the second?

13   MR. SHANMUGAM: Well, I actually don't think

14 that even the first one is identical. But look, we

15 think that first and foremost, the interest in ensuring

16 officer safety is really the paramount interest here,

17 and we simply think that it is unlikely that an

18 individual who is seen leaving the scene is either going

19 to be aware of the presence of police or return to

20 disrupt the search.

21   JUSTICE BREYER: How do you know that? They

22 are sitting outside in the car.

23   MR. SHANMUGAM: The government has not

24 identified a single example of an individual who is seen

25 leaving the scene who has returned to disrupt the search

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

2   JUSTICE SOTOMAYOR: I thought your better

3   answer was the risk of somebody coming back to a house

4   exists whether the person just left it or left it an

5   hour after or before or 2 hours or 24.

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

7   be --

8   JUSTICE SOTOMAYOR: When the police walk in,

9   they always have to guard against reentry.

10   MR. SHANMUGAM: Well, and that was going to

11   be my next point, Justice Sotomayor; and the government

12   really tries to make a broader and more ambitious

13   argument. The government tries to make the argument

14   that an individual with a connection to the place to be

15   searched could arrive at the scene while the search is

16   ongoing, really regardless of whether that individual

17   was aware of the presence of police, and then seek to

18   disrupt the search.

19   Now, we think even as to that broader

20   category of cases the government hasn't made a

21   sufficient showing that those sorts of confrontations

22   are a common occurrence, particularly in light of the

23   routine precautions --

24   JUSTICE BREYER: It's not just that. It's

25   that they might want to get in quicker to stop this

1 person from leaving because he's the one who knows where

2 the drugs are. At least that's what they think. Or

3 they start to shout, and alert the others. Or -- I

4 mean, I have never conducted such a search, you know, so

5 I don't know the risks involved there, but I can see the

6 possibilities. And probably you might have conducted

7 them, but I don't know. So how am I supposed to answer

8 this question?

9   MR. SHANMUGAM: I haven't personally

10 conducted any searches, Justice Breyer. But I can say

11 that with regard to categorical rules it is really

12 incumbent on the government to make a showing as to why

13 an extension of a categorical rule is required. Because

14 after all --

15   CHIEF JUSTICE ROBERTS: We talked about --

16 we talked about officer safety. What about the safety

17 of others? Suppose the place being searched is adjacent

18 to a playground and there are, you know, dozens of

19 children playing in the playground. The police are

20 worried there would be a shootout and they want to

21 detain the person, so they say: Well, let's wait until

22 he gets a block down the street and detain him there for

23 the safety of the kids. That has -- they can't do that?

24   MR. SHANMUGAM: Officers will naturally take

25 precautions in situations like that. They will go in

 1   with --

 2   CHIEF JUSTICE ROBERTS: Yes, the precaution

 3   is let's wait until he's a block down the street because

 4   it will be a lot safer. Can they do that and be covered

 5   by Summers or not?

 6   MR. SHANMUGAM: They cannot be covered by

 7   Summers, but what they can do is either follow the

 8   individual for the period of time during which they are

 9   executing the warrant, or they can detain that

10   individual if he returns to the scene.

11   And again, all of the examples that the

12   government cites -- and there aren't that many of

13   them -- but the examples that the government cites are

14   examples of individuals who arrive at the scene and when

15   they realize that their place of residence is being

16   searched, they become obstreperous; and to the extent

17   that there is a concern about the threat posed to the

18   safety of officers in those circumstances, we would

19   submit that the obvious solution is to make clear that

20   Summers permits the detention of individuals who arrive

21   at the scene; and officers routinely do establish

22   perimeters when they are executing search warrants. And

23   so when they --

24   JUSTICE GINSBURG: So if he came back -- I

25   mean, the scenario here is he was supposed to be driving

1 his friend home, and he would have come back while the

2 search was ongoing, but the police could apprehend

3 anyone while the search -- if that's what you're saying,

4 while the search is ongoing --

5   MR. SHANMUGAM: Well, if he were to return

6 to the scene while the search is ongoing, we believe

7 that he could be detained pursuant to Summers, and we

8 cite a number of court of appeals cases that have so

9 held.

10   What the government is really arguing for

11 here is an even more ambitious rule, an additional layer

12 of Fourth Amendment prophylaxis, if you will, that

13 permits officers to detain an individual who is seen

14 leaving the scene based on the possibility that they are

15 going to return. The government has not come even close

16 to making an empirical case as to why that additional

17 layer of prophylaxis is required.

18   JUSTICE ALITO: Well, what if the person

19 comes out the door and walks -- and has walked 50 feet

20 down the block within sight of the entrance at the time

21 when the police are entering to make the arrest? Would

22 that person be in the immediate vicinity?

23   MR. SHANMUGAM: Well, I think that the

24 natural limit on the immediate vicinity rule is imposed

25 by the underlying justification, namely, that officers

1   should have the authority to encounter individuals -- to

2   detain individuals they encounter while they are in the

3   course of executing the warrant.

4   And so if in your hypothetical,

5   Justice Alito, the search team is marching up to the

6   house, and they encounter the individual 50 feet away

7   from the door or the property line while they are in the

8   course of doing so, the justifications of Summers kick

9   in at that point. That individual is aware of the fact

10   that the police are about to search his house, and, as

11   such, that individual poses a threat to the safe and

12   efficient completion of the search.

13   JUSTICE ALITO: Well, does that mean that if

14   the person is within sight of the entrance to the

15   premises at the time when the police enter, then that

16   person can be searched --

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

18   JUSTICE ALITO: -- and be detained.

19   MR. SHANMUGAM: We don't think that that's

20   necessarily a line of sight rule. So if you had an

21   individual who was sitting out in front of a house six

22   doors down, we don't think that that individual could be

23   detained. Of course, in this case, my client was

24   detained at least seven-tenths of a mile away --

25   JUSTICE BREYER: But that's the problem.

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

2   JUSTICE BREYER: That's the problem. The

3   police have to know what they're supposed to do when

4   they go in to search a house, all right? And they know

5   that sometimes they can keep the people there, and you

6   are saying, but they can't stop them from leaving if

7   they're not -- all of a sudden, I'm a policeman, and I

8   don't know what to do exactly because I don't know how

9   to fill in that blank. And therefore, I might rush

10   in -- I don't know -- I see a recipe for a mess, and

11   that's what -- and the mess could involve physical harm,

12   and --

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

14   JUSTICE SCALIA: You're not saying that they

15   can't stop them from leaving. Have you said that; they

16   can't stop them from leaving?

17   JUSTICE BREYER: They can't stop them from

18   leaving if, blank.

19   MR. SHANMUGAM: They -- they could always

20   proceed to execute the warrant when they see an

21   individual leaving; and, if they are in the course of

22   executing the warrant, a detention is permissible.

23   But let me say just one word about the issue

24   of the administrability of the rule because, after all,

25   what we're talking about here is a bright-line rule.

1   And the very purpose of a Fourth Amendment bright-line

2   rule is to provide guidance to courts and officers

3   alike.

4   It is true that one can posit difficult

5   hypotheticals under our immediate vicinity standard;

6   but, it is also true that it is even easier to posit

7   difficult hypotheticals under the as soon as reasonably

8   practicable standard that the government advances, which

9   really reintroduces the very case-by-case analysis that

10 bright-line rules are designed to avoid.

11   And, in addition, it is entirely unclear to

12 us what Fourth Amendment purpose that limitation serves

13 because it is not clear to us why it matters for Fourth

14 Amendment purposes how quickly officers effectuate the

15 detention.

16   And just one last point that I'd like to

17 make before reserving the balance of my time for

18 rebuttal.

19   The rule that the government seems to be

20 advocating before this Court is really a much more

21 ambitious rule than we've even been discussing this

22 morning. The government seems to suggest that the

23 government has the authority to detain any individual

24 with a connection to the place to be searched. And I

25 think that that is out of recognition that an individual

1   who happens to be at their workplace could just as

2   easily return to the place to be searched as an

3   individual who is seen leaving.

4   In our view, that is an astonishing

5   extension of the rule that this Court announced in

6   Summers.

7   And I would like to reserve the balance of

8   my time.

9   CHIEF JUSTICE ROBERTS: Thank you, counsel.

10   Mr. Wall.

11   ORAL ARGUMENT OF JEFFREY B. WALL

12   ON BEHALF OF THE RESPONDENT

13   MR. WALL: Mr. Chief Justice, and may it

14   please the Court:

15   JUSTICE SOTOMAYOR: Mr. Wall, would you

16   answer -- direct your first response to that last issue

17   because, as I read your brief, you seem not to be

18   accepting the Second Circuit's rule at all. You seem to

19   be proposing what appears to me to be a much broader

20   rule that says -- at one point in your brief you state

21   that it is the occupant's observed connection to a home

22   subject to a valid warrant, not his physical location at

23   the time that he is detained, that makes him subject to

24   detention.

25   Now, I know police when they're executing

1   warrants often have an advance team that has been

2   surveilling a home, sometimes for days. And they've got

3   one officer sitting there, and they see who they think

4   is the occupant leave, and the team doesn't arrive till

5   12 hours later.

6   Is it your position that in that

7   circumstance the officers are authorized to go to

8   wherever the defend -- wherever the occupant is, the

9   office, the -- wherever he might be, his mother's home,

10   and effect an arrest there?

11   MR. WALL: No, Justice Sotomayor. I

12   appreciate the opportunity to start there because I

13   think Petitioner's reply brief and much of his argument

14   today is devoted to a position the government's not

15   taking.

16   So let me be very clear. In the

17   government's view, Summers is about current and recent

18   occupants, people whom police, when they are executing

19   the warrant, find at the home or see leaving the home in

20   the process of executing a warrant.

21   And the question here is do the

22   justifications apply equally as a departing occupant

23   steps away from the home and onto a sidewalk, a yard, a

24   couple blocks away.

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

1 wonderfully abstract quality to it that doesn't engage

2 any of the realities on the ground.

3   Justice Alito, your hypothetical is anything

4 but. It comes very close to the facts of the Cochran

5 case out of the Sixth Circuit. Police arrive at the

6 scene. The occupant is known to carry a gun, and he has

7 a guard dog. So, rather than walk up to the door, they

8 wait for him to leave; but, by the time they can catch

9 up to him, he's off of the bounds of the property, but

10 he's still very close to the residence. They stop him.

11 They take him back to the residence. He lets the

12 officers in. He secures the dog, and they complete the

13 search.

14   I think that is a model law enforcement

15 practice, and it is indistinguishable in any important

16 respect from what went on in Summers.

17   The justifications for detention apply

18 equally to departing occupants when they are seen by

19 officers leaving in the process of executing the

20 warrant.

21   But no, Justice Sotomayor, the government is

22 not contending that other connections to the residence,

23 other than that kind of observed connection by the

24 officers, could justify a detention under Summers.

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

1   anything like that in this case. We have them getting

2   into a car, driving almost a mile away and being stopped

3   at that point.

4   MR. WALL: Well, we do have, though, the

5   officers seeing him departing the residence as they're

6   executing the warrant. It's a no-knock warrant for a

7   gun. And rather than stop him right outside the house

8   because they don't know who else would be inside --

9   CHIEF JUSTICE ROBERTS: As they're executing

10   the warrant, I don't remember, was the -- did the

11   individual know that they were executing the warrant in

12   this case?

13   MR. WALL: No.

14   CHIEF JUSTICE ROBERTS: Oh, okay.

15   MR. WALL: They had obtained the warrant.

16   They had -- the team had --

17   CHIEF JUSTICE ROBERTS: So the danger to

18   them is not at all like the situation with the dog and

19   the armed guy just off the property.

20   MR. WALL: Mr. Chief Justice, I respectfully

21   disagree. And the government would be happy to have

22   this case decided by having the Court look at the

23   Federal and state cases, look at the risks that are

24   present in those cases, and deciding whether the

25   interests of Summers are served in those cases.

1   What we see in the cases is that -- take

2   this very case, for instance. Petitioner is driving his

3   friend home to meet a court-imposed probation curfew,

4   and he is then returning to the house. I think the

5   reasonable inference in the record is that he'll be back

6   in a matter of minutes. So he --

7   JUSTICE GINSBURG: And then Mr. Shanmugam

8   says they could stop him. They could stop anybody. The

9   search is ongoing. Somebody approaches the house; the

10   police can stop that person.

11   MR. WALL: But think how formalistic and odd

12   that is, Justice Ginsburg, that the police see someone

13   leaving, but, if they can't catch up to them on the

14   bounds of the property, which has no reasonable

15   relationship to the warrant here, which was for the

16   premises, not for the -- for that property --

17   JUSTICE GINSBURG: But --

18   JUSTICE SCALIA: The threat is from anybody

19   coming back to the house, not just the person who just

20   left.

21   MR. WALL: Oh, assuming --

22   JUSTICE SCALIA: And surely the police, when

23   they're conducting a search, post guards to prevent

24   people from coming in.

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

1   but --

2   JUSTICE SCALIA: I assume they always do.

3   It seems to me there's no special threat from the person

4   who -- who left the house. There's always a threat of

5   somebody else coming into the house.

6   MR. WALL: Justice Scalia, certainly in

7   urban areas they do. I think it's more difficult where

8   you have smaller police departments in rural areas.

9   But the government's not disputing that

10   posting sentries is a good idea. That doesn't begin to

11   take care of the most serious cases, where people

12   outside of the area of the search fire on or assault

13   officers.

14   So, for instance, in 2008 --

15   JUSTICE SOTOMAYOR: You're missing the

16   point, which is that's going to happen regardless,

17   meaning that risk exists whether the person left the

18   minute you got there or a minute before or an hour

19   before or two hours before. That's the whole point,

20   which is the risk is extant no matter what.

21   MR. WALL: Justice Sotomayor, there is no

22   question that executing a warrant is dangerous, and

23   people can come onto the scene at any time.

24   The question is, do we want to increase that

25   risk to officers? Here, Petitioner is leaving, he'll be

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

2   guns.

3   JUSTICE SOTOMAYOR: But you didn't know --

4   you don't know that in any search, meaning any time you

5   do a search you have no idea when the -- whether the

6   occupant -- sometimes you know whether the occupant is

7   inside. You'll hear the TV or something else. But

8   often you don't, and you don't know if someone will come

9   back and when.

10   MR. WALL: Justice Sotomayor, I completely

11   agree, although I think that --

12   JUSTICE SOTOMAYOR: So why is seeing someone

13   leaving increasing that risk?

14   MR. WALL: Because we know that some

15   percentage of those people will come back. Some

16   percentage will flee, which is one of the interests in

17   Summers, which I think Petitioner does not take

18   seriously. But some percentage of them will come back

19   and some percentage of those returning occupants will

20   harm officers. And unfortunately --

21   JUSTICE SCALIA: If -- if you have a large

22   enough force that you can afford to send two of them in

23   a car chasing this fellow for a mile, why can't you just

24   post those two outside the house, just in case somebody,

25   whether it's this person who's just left or anybody

1   else, comes back? I mean, it -- it seems to me that --

2   that what your positing is -- is -- is unlikely, namely,

3   having -- having sufficient personnel to follow these

4   persons, but not having sufficient personnel to defend

5   the premises against somebody entering.

6   MR. WALL: Justice Scalia, first, that isn't

7   even arguably going to serve two of the three Summers

8   interests, preventing people from fleeing or garnering

9   their assistance in the orderly completion of the

10 search. But even if we --

11   JUSTICE SOTOMAYOR: Can you tell me what

12 constitutional right entitles you to stop someone from,

13 using the word, "fleeing"? You certainly are entitled

14 to stop someone with whom you have reasonable suspicion.

15 But what constitutional right entitles you to stop a

16 person who's just leaving in the normal act, without

17 reasonable suspicion?

18   MR. WALL: Justice Sotomayor, I think your

19 question fills in the answer. What the Court said in

20 Summers is when you see someone -- when you find someone

21 at a home or you see them leaving at a time when a

22 neutral magistrate has determined there's probable cause

23 to believe a crime is being committed inside, you have,

24 in the words of the Summers Court, "articulable and

25 individualized suspicion" to believe that that person is

1   linked to the criminal activity inside the home.

2   JUSTICE KAGAN: Well, Mr. Wall, you have

3   that, too, about the person in her workplace, and you

4   said that your argument didn't apply to the person in

5   her workplace. So you have to come up with something

6   better than that. And I guess the question is your rule

7   would seem to encompass, you know, a whole set of people

8   who are leaving their houses for ordinary reasons: I'm

9   going to work in the morning.

10   And the question is whether the police can

11   stop this person who's going to work in the morning,

12   who's given no indication that he's seen the police

13   officers at the scene, no indication that he's coming

14   back immediately or, you know, in any amount of time

15   that it will take you to complete the search.

16   And that's not an outlier case. It seems to

17   me that the hypothetical I just gave you might very well

18   be the more common case than the hypothetical that you

19   gave me. So, you know, why isn't this just too broad a

20   categorical rule?

21   MR. WALL: Well, Justice Kagan, let me break

22   that up into both parts. First, you know, as far as

23   detaining people who have other connections to the home,

24   I think you're right that some of the arguments that the

25   Court adopted in Summers and that the government is

1   making here could translate. And I think when those

2   cases come to the Court, the Court will have to decide

3   whether to recognize doctrines analogous to Summers or

4   Terry in those contexts. But that's not what Summers is

5   about. The connection that Summers discusses and

6   approves is seeing someone leaving a home subject to a

7   valid warrant for contraband. That's the only

8   connection at issue here.

9   JUSTICE BREYER: But is it in the process?

10   Does Summers apply and does this apply only when the

11   police are in the process of executing a valid search

12   warrant?

13   MR. WALL: Yes, Justice Breyer. Even

14   Petitioner, the way I read his briefs, concedes that if

15   police had caught him outside the basement apartment or

16   somewhere within the property bounds --

17   JUSTICE BREYER: If -- if the police

18   executing the valid search warrant walked through the

19   gate and at that moment the individual emerging from the

20   house had not yet passed through the gate, then under

21   Summers the police would have the right to detain him.

22   All right. So the question here is he's

23   walked through the gate. All right. Now, I guess the

24   police -- all right, I see. The police objection is: I

25   don't know. These things are complicated and we might

1   not want to push him back. I don't know what the

2   neighborhood is like and maybe somebody will get killed.

3   I mean, that's the kind of argument --

4   MR. WALL: Justice Breyer, that is

5   absolutely right. The government's central --

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

7   right.

8   MR. WALL: I mean, I -- the government's

9   central contention is there's nothing magical about the

10   gate for Fourth Amendment purposes. When he steps

11   through the gate, he's just as much of a flight risk, a

12   danger to officers and just as able to assist in the

13   orderly completion of a search.

14   JUSTICE SCALIA: There is something magical

15   about the gate or at least about the immediate facility

16   of the house. What we're trying to apply here is an

17   absolute rule to make it unnecessary for the officers to

18   guess whether they can do this or that. And the rule

19   you propose is, well, you know, a mile away. What's

20   your test, a reasonable --

21   MR. WALL: As soon as reasonably

22   practicable.

23   JUSTICE SCALIA: As soon as reasonably

24   practicable. You consider that an absolute test? I

25   thought that the test we invented here was meant to help

1   officers, to say this is the rule and you can do it.

2   And you want to do anything else, use Terry or use --

3   use normal probable cause principles, but this is an

4   absolute rule governing the -- the search of a home.

5   MR. WALL: Justice Scalia, it is an absolute

6   rule and it tells you who, it gives you a who, who is

7   detainable. People we find --

8   JUSTICE SCALIA: It doesn't give you a

9   where. You need more than a who. You need a who and a

10 where.

11   MR. WALL: Well, the who is categorical.

12 People you find on the premises or you see leaving the

13 premises at a time when a magistrate has determined

14 there's probable cause to believe a crime is being

15 committed inside. The where, the location. Just like

16 duration, just like use of force in the Muehler and

17 Rotelli cases, those are subject to the general

18 requirement of reasonableness under the Fourth

19 Amendment.

20   JUSTICE GINSBURG: Mr. Wall, the Summers

21 case was an exception. The main rule is you have

22 probable cause. So you are taking the exception, which

23 was tied tightly to the house. You want him to stay on

24 the premises so he can -- there won't be any risk that

25 he's going to disrupt the search, but it was -- it was

1   an exception to the main Fourth Amendment rule, and now

2   you are asking to have that exception spread.

3   And so today you say, oh, well, we're not --

4   we're not asking if the person gets to her workplace,

5   but that the police, but maybe why -- why not? I mean,

6   you -- it's one thing to confine Summers to the house,

7   the immediate premises, and another to say seven-tenths

8   of a mile away, that's okay, too.

9   MR. WALL: Justice Ginsburg, I think the

10   reason Summers carved out the rule is it said, look,

11   for -- for current and recent occupants as a class,

12   we -- officers see, they find or see them at a residence

13   where there's probable cause to believe a crime is

14   committed, so across the board we've got reasonable

15   suspicion, and that's why we draw a rule so that we're

16   not going to rebalance every time.

17   JUSTICE KAGAN: Right. But the

18   across-the-board is a set of people who are at the house

19   when you want to search the house. And of course,

20   Summers makes perfect sense. You want to search the

21   house, you can't have these people roaming around,

22   right? So you have to detain the people.

23   But what you're now saying is: Well,

24   there's another class of people, they're going to work

25   in the morning. And we've -- there's -- there is no

1   indication that they've seen the police officers;

2   they're going to work. But we get to detain them, too,

3   just because we have a warrant to search the house. And

4   the question is why?

5   MR. WALL: Justice Kagan, as far as we know,

6   George Summers was going to work. I mean, George

7   Summers was detainable, as was Petitioner here, on his

8   view if we had caught him within the physical bounds of

9   the property. The question is not, you know, how to

10   apply it in that circumstance. It's does something

11   meaningfully -- meaningful change when he hits the

12   sidewalk or the neighbor's yard?

13   JUSTICE KAGAN: I mean, something meaningful

14   very -- very much changes. Before, you're dealing with

15   a problem of a person on the premises while you're

16   trying to search the premises. And now you're talking

17   about a person who is going to work, leaving the

18   premises, letting you search the premises without any

19   interference.

20   MR. WALL: Justice Kagan, I don't think that

21   explains why you couldn't let George Summers go on his

22   way, and it doesn't explain why the Court in Summers

23   didn't say, look, rather than roam the house, if it

24   really is true that once we let you outside the front

25   door or the front gate, you are no longer a danger and

1 are likely only to be a hindrance, why not give you the

2 option to leave. Turn them out, because on Petitioner's

3 view, they're safe to go. And what the Court in Summers

4 recognized is, no, important interests are served by

5 detaining people in that circumstance.

6   JUSTICE GINSBURG: You have to draw a line

7 someplace. When he is descending the steps to his

8 house, he is still associated with the house. And once

9 he steps over that line, the Summers rationale it seems

10 to me doesn't apply.

11   But there's a curiosity about this case,

12 maybe you can explain it to me. They stop him

13 seven-tenths of a mile away. By that time, the search

14 is ongoing. They have found guns and contraband. They

15 take -- why do they take him back to the house? What

16 was the reason for taking? There was nothing there that

17 he could -- he couldn't obstruct the search. He was in

18 handcuffs.

19   MR. WALL: I think --

20   JUSTICE GINSBURG: He couldn't point out

21 anything in drawers because they'd found it all.

22   MR. WALL: I mean, I think at that point

23 they had probable cause; they could have arrested him

24 and I think they could have taken him down to the

25 station house. They returned him to the scene instead.

 1   And I don't think there's any evidence in the record

 2   about why they took him back to the scene rather than --

 3   than straight to the station house.

 4   But, Justice Ginsburg, I do want to fight

 5   the premise a little bit. All -- all that the

 6   government is asking for is for the Court to look

 7   through the Federal and state cases, because we see the

 8   exact same interests that were served in Summers.

 9   JUSTICE SOTOMAYOR: Counsel --

10   JUSTICE KENNEDY: I think -- I think we have

11   to take the case on the assumption -- I agree with you

12   there probably was probable cause -- but I think you

13   have to take the case on the assumption that there was

14   no probable cause to arrest, because they didn't -- they

15   did not rely on that authority.

16   MR. WALL: Justice Kennedy, in

17   that -- assuming that's true, then they took him back to

18   the scene to complete the search, by which time they had

19   found the drugs and the guns, and then they did arrest

20   him. And he has not claimed that at that point there

21   wasn't probable cause for an arrest. But these risks

22   are real, and they do play themselves out in the cases,

23   Justice Kagan --

24   JUSTICE SOTOMAYOR: Counsel, the problem

25   with absolute rules like we did in Summers is that

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

2   Go back to the question you were asked by

3   one of my colleagues earlier, why wouldn't Terry give

4   you all of the rights that you're seeking on the

5   absolute rule, but subject your police conduct to the

6   question of reasonableness, which is the normal standard

7   of the Fourth Amendment?

8   MR. WALL: Of course. A very brief Terry

9   stop could allow a departing occupant to go on his way

10   long before the search is completed, and now he's fully

11   aware of the police presence. So now --

12   JUSTICE SOTOMAYOR: I'm -- I'm litigating

13   for you.

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

15   JUSTICE SOTOMAYOR: So I could very easily

16   imagine that what the fight's going to be like below is,

17   we stopped them because we saw them coming out of the

18   house, and all we want to do is make sure that they

19   don't return. So we're just going to hold them in

20   place. We don't have to drag them in a car back to a

21   place they just left. We're just going to stop them in

22   place to get a phone call that everything's all clear.

23   MR. WALL: Well, I take one of the

24   differences between Terry and Summers to be that in

25   Terry the seizure is tied to the officer's brief

1   investigation, and in Summers it's tied to the execution

2   of the warrant.

3   Now, if what you're talking about is a Terry

4   stop that could last for the duration of the warrant, I

5   don't know that there is much of a difference, then,

6   between Terry and Summers.

7   JUSTICE SOTOMAYOR: Well, we don't know, but

8   why don't we let that develop.

9   MR. WALL: Well, because I think the danger

10   is that courts will apply Terry the way that they have,

11   and we don't want to dilute one doctrine with another.

12   A brief Terry stop could allow occupants to

13   go on their way, but now they're aware of the police

14   presence. Now, they are much more of a risk to flee or

15   harm officers.

16   JUSTICE GINSBURG: Explain -- explain to

17   me -- the police, they have the informant's tip, and

18   they see them coming out of the house. So it seems to

19   me it's a good case that that would be reasonable

20   suspicion. Coming out of the house, he looks like what

21   the informant says.

22   Then they -- can they -- they pat him down

23   and they find his keys, and the keys are to the house.

24   MR. WALL: Justice Ginsburg, that's

25   certainly true here. I was only saying to

1   Justice Sotomayor, you can imagine a case where they

2   execute the warrant, and it takes them a while to find

3   something. And, in the meantime, they stop a departing

4   occupant, he's not carrying a gun, he answers the

5   questions and does not arouse the officer's suspicion,

6   and now he is on his way. And he is on his way while

7   the search is ongoing, and now he knows about it.

8   JUSTICE SCALIA: So what? What's he going

9   to -- he's going to phone them and say, hey, you know,

10 you're going to be searched. The cops are crawling all

11 around the house already.

12   So the only realistic additional threat is

13 that he is going to voluntarily go back to where the

14 police are in the house? I mean, you know --

15   MR. WALL: Well, that is --

16   JUSTICE SCALIA: -- this is so implausible.

17 What -- what harm --

18   MR. WALL: Justice Scalia --

19   JUSTICE SCALIA: -- what threat to the

20 policemen can possibly exist?

21   MR. WALL: I think the Texas officers in the

22 Valdez case, which we cite in our briefs, would find it

23 surprising, where they did let someone go from the

24 scene, and she came back with an individual and started

25 fighting with police.

1   Look, I take Petitioner's point --

2   JUSTICE SCALIA: Very unusual.

3   MR. WALL: Justice Scalia --

4   JUSTICE SCALIA: Very unusual.

5   MR. WALL: -- it is true that only a

6   foolhardy person would do it, but, unfortunately, that

7   is a perfect description of many criminals who do not

8   tend to be level-headed, rational actors.

9   JUSTICE SCALIA: You don't adopt absolute

10   rules to cover foolhardy people. I mean, we -- absolute

11   rules are designed to cover the mine run of cases, the

12   generality of cases, not the oddball case. That's not

13   what you use an absolute rule for.

14   MR. WALL: That's absolutely right, Justice

15   Scalia. And in the mine run of cases, what we know is

16   that these people are leaving a home where there's

17   probable cause to believe a crime is being committed.

18   Police are detaining them a short distance away, and

19   they are doing it in cases where people are fleeing or

20   they -- we can reasonably believe they would flee once

21   they've seen officers, if they were not detained.

22   They are violent. They are aggressive.

23   Some number of them can come back, and we can make

24   reasonable predictions about what they would do, and

25   they provide very valuable assistance.

1   They secured guard dogs, like in the Head

2   and Cochran cases, where there were pit bulls and

3   Dobermans. They allow police to -- they give them keys

4   so they don't have effect forceable entry --

5   CHIEF JUSTICE ROBERTS: That's an argument

6   in Summers I just don't understand. The argument is you

7   can detain the people because they might want to give

8   the officers assistance. Well, if they want to give

9   them assistance, they don't have to be detained.

10   MR. WALL: Well --

11   CHIEF JUSTICE ROBERTS: It seems odd, you

12   know, we're going to tie -- we're not going to tie you

13   up -- we're going to keep you here, you can't leave

14   because we think you might tell us where the drugs are.

15   MR. WALL: Mr. Chief Justice, I mean, I

16   think it is one of three legitimate law enforcement

17   interests where you have someone for whom there is

18   articulable and individualized suspicion to believe that

19   they are connected to criminal activity.

20   And I think that this Court in Summers was

21   absolutely right. You do find people securing guard

22   dogs, moving families out of harm's way, providing keys

23   so that officers don't have to break in and harm

24   property or jeopardize third parties. You find them

25   handing over contraband rather than endanger officers.

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1   CHIEF JUSTICE ROBERTS: If they want to do

2   that, they can. The question is whether you can detain

3   them in the hope that they will decide to help you --

4   MR. WALL: Well, and --

5   CHIEF JUSTICE ROBERTS: -- to give you the

6   key to the cabinet.

7   MR. WALL: -- and the argument in Summers is

8   you can detain them because you've got reasonable

9   suspicion. The question is, what are the interests

10   served by the detention? And that is an interest served

11   by detention.

12   Now, we're not saying it's an independent

13   basis to support it. These are people for whom, as a

14   class, there's reasonable suspicion, which is why

15   Summers carved out the rule that it did.

16   Now, this -- the situation in this case and

17   the Federal cases that we're seeing are not meaningfully

18   distinguishable from Summers. You've got the same

19   reasonable suspicion, same law enforcement interests,

20   same minimal intrusion. There is no -- along no

21   dimension is there a meaningful difference between this

22   case and Summers.

23   JUSTICE KENNEDY: Justice Kagan had the

24   hypothetical of the person leaving to go to work, the

25   9:00 to 5:00 person. Suppose the warrant's going to be

1   executed at 5:00. Can they detain him at his office so

2   that he doesn't go back --

3   He always goes right home. He takes the

4   Number 3 bus, and he will be there in 20 minutes. Can

5   you detain him at the office under your rule?

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

7   Summers.

8   Now, whether they can --

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

10   proposing.

11   MR. WALL: I don't think so. I mean, when

12   that case --

13   JUSTICE KENNEDY: I don't know -- I don't

14   know why not, under the rule that's proposed.

15   MR. WALL: -- when that case comes to the

16   Court, the Court will have to decide whether to

17   recognize a doctrine analogous to Summers and Terry.

18   And I will honestly admit that some of the arguments

19   that the government's making here and that the Court

20   adopted in Summers will translate.

21   But Summers is not about that. Summers is

22   about current and recent occupants. And those, as a

23   class, have reasonable suspicion.

24   Now, I think these other cases get harder.

25   They will turn much more on what the connection was in

1   the facts of a specific case.

2   JUSTICE SOTOMAYOR: Counsel, my -- I remain

3   with my question, which is, we have a

4   circumstance-driven power, Terry. Your power is really

5   going much more broadly, because you're basically saying

6   if that -- if probable cause exists to search a premise,

7   it exists without being tied to an individual because

8   anybody who leaves the house, whether or not they have

9   been tied to a crime in that house in the past or not,

10   is now subject to being detained.

11   So we have evidence that only a husband is

12   involved in a fraud, and his wife is leaving for work.

13   Because she was observed leaving the house, she can now

14   be stopped a mile away.

15   MR. WALL: Justice Sotomayor, to be clear,

16   that's not the government's rationale. That's the

17   rationale of the Court in Summers.

18   Maybe the wife is aiding and abetting. We

19   don't have any idea. Maybe the wife, you know, is

20   implicit in the -- the husband's crime in some way. The

21   Court's point --

22   JUSTICE SOTOMAYOR: So your -- your view is

23   that Summers gave you -- entitled you to hold people

24   merely for purposes of investigation --

25   MR. WALL: I --

1   JUSTICE SOTOMAYOR: -- without any

2   reasonable suspicion?   That's really what your rule is

3   saying.

4   MR. WALL: My view is with the Court's on

5   Summers.   It's appropriate to consider the nature of the

6   articulable and individualized suspicion on which the

7   police based the detention of the occupant of a home

8   subject to a search warrant.

9   And what the Court said is, whether you're

10   inside or whether you're on the front steps or the

11   sidewalk, like George Summers, that reasonable suspicion

12   exists.   The police have placed you in the home at a

13   time when a neutral magistrate has determined there's

14   probable cause.

15   And to be clear, we're not trying to blow

16   the doors off of this exception.   This is a very narrow

17   exception.   What we see time and again in the Federal

18   cases is the same fact pattern: Someone leaves the

19   house; the police catch up to them within a mile, but

20   usually just within a few blocks; and, they return them

21   to the scene.

22   The police are not treating this as a sort

23   of entitlement.   This is not Gant, where the results are

24   outstripping the rationale.

25   JUSTICE SCALIA: The -- the procedure has to

1   be reasonable under the Fourth Amendment, right? Now --

2   now, the requirements for a warrant are not the outer

3   bounds of -- of what's reasonable, but nonetheless, what

4   -- it seems to me that what's reasonable under the

5   Fourth Amendment can be estimated from what the Fourth

6   Amendment requires a warrant to contain, and what a

7   warrant must contain is a description of the place to be

8   searched, and the persons or things to be seized.

9   And what you're arguing for is a special

10   rule which says once you have a warrant that this place

11   can be searched, you can seize anybody -- you can seize

12   not only anybody there in order to protect the police,

13   but anybody connected with the -- with the place. And

14   that -- that is so contrary to what -- what seems to me

15   the theory of -- of the Fourth Amendment that I am very

16   reluctant to -- to extend our cases any further than

17   they already exist.

18   MR. WALL: Justice Scalia, we're not here

19   asking for the Court to extend Summers. We are just

20   asking for a faithful application of what the Court said

21   in Summers. And I understand that, you know, it would

22   seem troubling would -- were it not for the fact that

23   the Court in Summers, I think, really walked through why

24   as a class, when you're inside the home or you're

25   leaving the home, we've got reasonable suspicion that

1 you're connected, and there are a number of good reasons

2 why police can detain you while they execute the

3 warrant.

4   You're right, the Fourth Amendment does

5 require reasonableness, and what the officers did here

6 was eminently reasonable. They are executing a no-knock

7 warrant at a drug stash house for a gun; they see

8 someone leave who fits the description of the drug

9 dealer; and rather than stop him right on the threshold

10 inside the curtilage and risk alarming his confederates,

11 they let him drive a short distance away and they return

12 him to the scene.

13   There's no meaningful difference between

14 that and if they had stopped him right outside the

15 house. The only thing they would have been --

16   JUSTICE GINSBURG: In this case, you

17 couldn't think of a reason why they took him back to the

18 scene.

19   JUSTICE BREYER: Maybe he had a key to

20 the -- to the place where they keep the drugs, the

21 basement or something.

22   JUSTICE SCALIA: He might have wanted to

23 help in the search.

24   JUSTICE BREYER: Is that fanciful? Is it

25 fanciful that people who are searched open doors or --

1   MR. WALL: It's far from being fanciful.

2   The Sherrill case out of the Eighth Circuit, the Sears

3   case out of the Eleventh Circuit, they came back and

4   they unlocked doors so the police wouldn't have to make

5   forcible entry. In Montieth out of the Fourth

6   Circuit --

7   CHIEF JUSTICE ROBERTS: Yes, but the

8   question is whether you have to detain them to do

9   something you're saying they'd want to do.

10   MR. WALL: Mr. Chief Justice, we're not here

11   saying that every time somebody could be helpful in a

12   search you could go out and detain them. It is an

13   exception to the normal probable cause requirement, but

14   it's an exception analogous to Terry because you've got

15   reasonable suspicion. And the question is there, okay,

16   as a categorical rule, you know you've got reasonable

17   suspicion for this entire group of people, current and

18   recent occupants; what reasons do police have to detain

19   them?

20   And there are really good reasons. One,

21   they tend to flee. And we see that in Cavazos out of

22   the Fifth Circuit. Two, they provide assistance in the

23   search; and three, they are often violent or aggressive

24   individuals.

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

1 majority of search warrants for contraband are for guns

2 and drugs, and you see a number of amici states in here

3 saying: Look, this is a legitimate and important law

4 enforcement practice for officers in a very dangerous

5 and volatile situation in executing these warrants.

6   And I think Petitioner takes those risks way

7 too lightly, and will not -- steadfastly refuses to

8 engage the realities on the ground that we see in the

9 cases. Judges and the Federal and state courts are

10 grappling with this every day, and what these opinions

11 reveal is that these risks cannot be so easily

12 dismissed. They are serious and they are real, and we

13 see them play themselves out across this entire set of

14 cases.

15   And what we don't see noticeably is the

16 kinds of things that the Court tends to be worried about

17 in Fourth Amendment cases: Abuse and police

18 entitlement. Again and again, you see police detaining

19 departing occupants a very short distance from a

20 residence, returning them, not prolonging the detention,

21 not engaging in exploitative questioning, and actually

22 serving the three interests that the Court identified in

23 Summers.

24   And to be clear, Petitioner's solution is

25 more than just a solution in search of a problem; it

1 carries its own problem. It is severely

2 under-inclusive. It will not capture any number of

3 cases where there are valuable law enforcement interests

4 to be served. And it will produce very silly results in

5 a number of cases where police can't catch up to a

6 departing occupant for one reason or another until after

7 he's crossed some magical gate, and they will have to

8 sit on their hands until he returns so that they can do

9 exactly what they would have done minutes or hours

10 earlier if they'd been able to detain him.

11   JUSTICE GINSBURG: They can follow him.

12   MR. WALL: They can, but, Justice Ginsburg,

13 tailing is a risky proposition, particularly in an urban

14 area. And that doesn't even arguably begin to serve the

15 interest in avoiding flight or facilitating efficient

16 and orderly --

17   JUSTICE SCALIA: All law enforcement would

18 be a lot easier if we didn't have the doggone Fourth

19 Amendment. I mean, the Fourth Amendment is an

20 impediment to law enforcement. Of course it is.

21 There -- there's no doubt about that.

22   MR. WALL: Justice Scalia, if you start from

23 the premise that the Fourth Amendment doesn't permit

24 this, then I lose. But I think what the Court said in

25 Summers is, what we -- this Court has already drawn a

1   number of exceptions to the probable cause requirement

2   in reasonable suspicion cases. This is another, and it

3   serves very valuable interests in this case and others.

4   CHIEF JUSTICE ROBERTS: Thank you, counsel.

5   Mr. Shanmugam, you have 3 minutes left.

6   REBUTTAL ARGUMENT OF KANNON K. SHANMUGAM

7   ON BEHALF OF THE PETITIONER

8   MR. SHANMUGAM: Thank you, Mr. Chief

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

10   First of all, having suggested in its brief

11 that the police may detain any individual with a

12 connection to the place to be searched under Summers,

13 the government today falls back to the view that the

14 police may detain any individual with an observed

15 connection, suggesting that this Court can leave for

16 another day the question of whether to detain people

17 with a certain but non-observed connection.

18   Leaving that aside, the government suggests

19 on at least five occasions today that that observed

20 connection is sufficient to give rise to reasonable

21 suspicion. That was not the basis on which this Court

22 adopted its categorical rule in Summers. If it had

23 been, the discussion of the special law enforcement

24 interests supporting the rule would have been entirely

25 superfluous.

1   And it's for that reason we would

2   respectfully submit that the Court made clear in

3   footnote 19 that Summers permits officers to detain

4   individuals regardless of the quantum of proof

5   justifying the detention of specific individuals.

6   And this Court's subsequent cases applying

7   Summers have made clear that Summers permits the

8   detention of individuals with no apparent connection to

9   the criminal activity being investigated.

10   And that leads into my second point, which

11 is that Terry will serve as a fallback in many of these

12 cases to permit detentions of individuals who are seen

13 leaving the premises, where there is a sufficient

14 additional basis to give rise to reasonable suspicion.

15 In fact, it may very well be the exception to the rule

16 that you have a case in which there aren't sufficient

17 additional articulable facts to give rise to reasonable

18 suspicion.

19   We would respectfully submit that this case

20 falls within that exceptional category, but it really

21 underscores why the expansion of Summers that the

22 government is seeking is really unnecessary.

23   I would just note, in response to a point

24 that Justice Scalia made, that the fundamental flaw with

25 the government's position is that it really can't be

1   reconciled with any original understanding of the Fourth

2   Amendment. There's no historical evidence suggesting

3   that officers at the time of the founding or thereafter,

4   when executing search warrants, detained the occupants

5   of the premises.

6   And the problem with the government's

7   approach is that it really would convert any search

8   warrant into a search and seizure warrant. It would

9   really would suggest that there is a freestanding right

10   to detain anyone with a connection or an observed

11   connection to the place to be searched that operates

12   alongside the warrant-conferred right to conduct the

13   search.

14   JUSTICE ALITO: What -- would you say the

15   same thing about the exact situation in Summers?

16   MR. SHANMUGAM: No, we wouldn't,

17   Justice Alito.

18   JUSTICE ALITO: You think the original

19   understanding was that what happened in Summers was

20   okay, but if you get out of the immediate vicinity,

21   that's where they drew the line?

22   MR. SHANMUGAM: We're not challenging the

23   rule of Summers itself. We're simply suggesting that

24   there's no historical basis for that rule, and for that

25   reason we think that any expansion of Summers would

1 really be of questionable validity. In Summers itself,

2 the detention was truly incident to the execution of the

3 warrant because, after all, the officers were

4 approaching the house and literally just about to

5 effectuate entry when the detention took place.

6   JUSTICE SCALIA: Well, you can say there was

7 a historical basis for the rule, in that officers have

8 always been allowed to take necessary action to protect

9 themselves. And that's the principal justification.

10   MR. SHANMUGAM: Perhaps, but we have been

11 unable to find any examples of detentions of occupants

12 of the premises until at least 1880. And our point is

13 simply that the detention ceases to be truly incident to

14 the search where the individual has left the scene. The

15 justifications for the detention evaporate at that

16 point.

17   Thank you.

18   CHIEF JUSTICE ROBERTS: Thank you, counsel.

19   The case is submitted.

20   (Whereupon, at 12:04 p.m., the case in the

21 above-entitled matter was submitted.)

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