No. 03-1423

IN THE

Supreme Court of the United States

DARIN L. MUEHLER AND ROBERT BRILL,
Petitioners,

v.

IRIS MENA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

The police did not violate the Fourth Amendment when, in the process of executing a lawful search for weapons at a suspected gang safe house, they detained respondent at gunpoint, then handcuffed her and three other able-bodied occupants for the duration of the search. In ruling otherwise, the Ninth Circuit ignored this Court's holding, in *Michigan* v. *Summers*, 452 U.S. 692 (1981), that officers executing a search warrant may "exercise unquestioned command of the situation," *id.* at 703, especially where, as in this case, that situation is inherently dangerous. Recognizing the weakness of the lower court's reasoning, respondent repeatedly attempts to divert attention from the fundamental facts that justified her detention. Thus, she advocates complete deference to the jury's legal conclusions, accuses petitioners of seeking a categorical rule permitting the handcuffing of all *Summers* detainees in all circumstances, and distorts the record in an effort to paint a picture of police misconduct. These attempts to confuse matters are unavailing. When basic Fourth Amendment principles are applied to the indisputable facts of this case, it is clear that the respondent's detention was objectively reasonable, and violated no clearly established rule of law.

The Ninth Circuit also erred in ruling that the police violated respondent's Fourth Amendment rights simply by asking about her immigration status. Respondent's attempt to shield this alternative holding from review is baseless. That holding is necessary to the lower court's judgment, and the fact that it rests on a theory that was never presented to the jury or briefed below is a reason to reverse that holding summarily, not to dismiss the second question presented.

If the Court chooses not to reverse summarily, the alternative holding cannot be sustained on the basis of the new theories respondent and her *amici* now offer. There is no

"subject matter" scope restriction for *Summers* detentions. Even if there were, questioning that does not communicate that a response is necessary to end the detention cannot expand the scope of a *Summers* detention, and the questioning of respondent did not convey such a message. Moreover, the police had ample grounds beyond respondent's ancestry and appearance to suspect her immigration status, and they had the legal authority to pose questions based on that suspicion. In all events, posing such questions in the circumstances of this case did not violate any clearly established rule of law.

I. THE MANNER IN WHICH RESPONDENT WAS DETAINED DID NOT VIOLATE THE FOURTH AMENDMENT.

Based on the facts that were indisputably known to the police at the time they executed the search warrant, it was plainly reasonable for them to detain respondent at gunpoint, and then to restrain her and three other, able-bodied occupants in handcuffs. Tacitly conceding this, respondent seeks to defend the judgment below by mischaracterizing the record, petitioners' arguments and the law. These diversionary efforts provide no basis for affirmance of that judgment.

A. Respondent's Detention Was Reasonable In Light Of The Potential Dangers The Officers Confronted.

Seeking to pretermit all meaningful review, respondent argues that this Court must adopt the jury's conclusion "that there was no factual justification for maintaining Ms. Mena in handcuffs for the entire duration of this search," and that the Court cannot accept any justifications for the detention that the jury rejected. Br. at 18. But this Court, not a jury, must decide the fundamental constitutional questions at issue in this case, which will bind courts and law enforcement officers nationwide. The Court should therefore determine, on a *de novo* basis, whether petitioners' conduct was objectively

reasonable. *Ornelas* v. *United States*, 517 U.S. 690, 699 (1996).

Attempting to divert attention from the specific facts that justified petitioners' conduct, respondent accuses petitioners of seeking "a new bright line rule allowing routine handcuffing and interrogation of *Summers* detainees," Br. at 13. Respondent then devotes much of her brief to attacking this sweeping, categorical rule. Far from claiming that officers can handcuff *Summers* detainees in all circumstances, however, petitioners claim only that officers may handcuff such detainees where, as was true here, potentially dangerous circumstances warrant such restraints.

In *Summers*, this Court found that two significant factors justified detention of those found on premises where search warrants are executed. First, the warrant itself creates "an easily identifiable and certain basis" for suspecting criminal activity. *Summers*, 452 U.S. at 704. Second, significant law enforcement interests, such as the interest in preventing flight and the interest in minimizing the risk of harm to officers and others, justify detentions that would allow officers to "exercise unquestioned command of the situation." *Id.* at 703. Based on these interests, this Court in *Summers* announced a general rule that "a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted." *Id.* at 705 (footnote omitted).[1]

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[1] Contrary to respondent's repeated suggestion, Br. at 21, 23, *Summers* does not require officers to demonstrate the necessity of a detention in each case. Indeed, the court recognized that the general interest in "minimizing the risk of harm to the officers" supported the detention in that case even though "no special danger to the police [wa]s suggested by the evidence in this record." *Summers*, 452 U.S. at 702. Respondent's further claim that *Summers* did not approve "detention[s] without a showing of probable cause," Br. at 1, is likewise clearly wrong.

Implicit in *Summers*' authorization of detentions is an authorization for police "to use some degree of physical coercion or threat thereof" to effect those detentions. *Graham* v. *Connor*, 490 U.S. 386, 396 (1989). The ability to use reasonable force is particularly critical because the execution of search warrants is so "inherently . . . perilous." *Ybarra* v. *Illinois*, 444 U.S. 85, 107 (1979) (Rehnquist, J., dissenting). Many officers have perished in the line of duty while executing warrants, to say nothing of the untold numbers who have been seriously injured. See Brief of the National League of Cities et al. at 10 n.2 (noting that at least seven officers were killed while executing warrants in 2001). Indeed, one purpose of *Summers* detentions is to alleviate the "risk of harm" and the possibility of "sudden violence" while search warrants are being executed. *Summers*, 452 U.S. at 702. It would be self-defeating to give officers the right to detain individuals for safety reasons while forbidding them from taking reasonable safety measures during those detentions. In *Summers* detentions, as elsewhere, the Fourth Amendment does not prevent officers from taking reasonable measures to protect themselves. See, *e.g.*, *Terry* v. *Ohio*, 392 U.S. 1, 23 (1968).

In this case, the facts indisputably known to the police at the time they executed the search warrant made it entirely reasonable for them to detain respondent through an initial show of force, and thereafter to restrain her and three other able-bodied adults in handcuffs while they conducted their search. Resolving all genuine factual disputes in respondent's favor, the evidence showed the following: petitioners knew that the suspected perpetrator of at least two gang shootings lived at 1363 Patricia Avenue, and that at least one of his fellow gang members lived or had recently lived there.[2] They

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[2] While respondent claims that the police knew that only alleged gang member Raymond Romero resided at the home, Br. at 8, the officers knew that a phone number at the house was listed in the name of member Genaro Gonzalez. JA 221. Nor did the Romero family's "belief" that

knew that the address had been the site of at least two violent incidents and that occupants had resisted police intervention. They discovered a group of four able-bodied occupants at the house, which created a much greater risk that the officers might lose control of the situation should one or more of the detainees resist. And, they had probable cause to believe that weapons used in gang-related shootings were on the premises, and in fact found multiple weapons, along with gang paraphernalia, during the search. In light of these facts, the decision to detain at gunpoint and handcuff all four occupants was well-founded and objectively reasonable.

Essentially conceding the propriety of her initial detention and restraint, respondent claims that the officers should have released her because they had no direct information that she was involved in criminal activity. Br. at 32. But the officers simply did not know who respondent was or what her connection with Romero or the other gang members might be. Her presence in a house where gang members lived, where police reasonably suspected weapons were hidden, and where weapons were actually discovered, gave the officers ample reason to be wary of her and the three other, able-bodied residents. An occupant's connection to premises subject to a search warrant is itself "an easily identifiable and certain basis for . . . suspicion of criminal activity." *Summers*, 452 U.S. at 703-04.

Similarly, respondent's suggestion that her apparent willingness to cooperate required her release is unavailing. The fact that she was cooperative did nothing to change the overall situation—one fraught with serious dangers.

Gonzalez had moved out dispel the strong possibility that he might still live there. *Id.* at 219-20. Indeed, even if the officers had known that Gonzalez had moved, his recent residence there justified the suspicion that the home was a gang safe house. *See id.* at 158. And the warrant itself refutes respondent's related claim, Br. at 35, that the warrant failed to identify any gang members other than Romero who may have lived at 1363 Patricia Avenue at the time of the search. *See* JA 219-21.

Petitioners had good reason to remain skeptical of seemingly cooperative occupants, for officers have been killed by suspects who feigned cooperation before attacking the police. See Br. of National League of Cities et al. at 14 n.3; see also *Summers*, 452 U.S. at 702 (noting risk of "sudden violence" when police execute search warrants). And, respondent fails to mention that during her detention the officers were recovering a small arsenal of weaponry from the bedrooms and common areas of the house, a discovery that would hardly dispel their legitimate concerns.

Respondent also contends "that petitioners had adequate personnel at their disposal to remove respondent's handcuffs," Br. at 8, and that the officers "essentially abandon[ed] the tactical plan." *Id.* at 35. But no evidence supports these conclusory claims. No witness testified that there were enough officers to secure the scene without the use of handcuffs. In fact, the total number of officers involved in the execution of the warrant is not an accurate reflection of the officers present at the scene at any one time, because the house was initially secured by the SWAT team alone, which left after securing the location. See JA 168. Nor was any evidence presented at trial that the tactical plan specified a time for occupants to be released. *Id.* at 147-48.[3]

Allowing police to protect themselves by handcuffing detainees in potentially dangerous circumstances does not permit the routine handcuffing "of children and the elderly or sick." Br. at 25. Respondent is a healthy adult who was detained along with three other healthy adults, all of whom were found at an address that was associated with gang members and was being searched for weapons used in a gang shooting. A ruling that the risks present in this case made

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[3] Even if "the officers failed to prepare the Field Identification Cards" for the occupants in accordance with the plan, Br. at 35—a claim Officer Brill disputed, JA 75—this fact has no bearing on the objective reasonableness of the handcuffing itself.

petitioners' use of handcuffs objectively reasonable would not render such use appropriate in the absence of such risks.[4]

Nor did the reasonable use of handcuffs in this case convert the detention into "the functional equivalent of an arrest" made without probable cause. *Id.* at 22. Neither *Dunaway* v. *New York*, 442 U.S. 200 (1979), nor any other case respondent cites stands for the proposition that use of handcuffs during a *Summers* detention is sufficient to create an arrest. If anything, *Dunaway* stands for the contrary proposition—that "trappings of a technical formal arrest" like handcuffs are matters of "form" that "must not be exalted over substance." *Id.* at 215 & n.17. Here, the substance of the police conduct was to use handcuffs to detain respondent and others in order to prevent harm, interference and flight—not to arrest anyone.[5] See *United States* v. *Newton*, 369 F.3d 659, 675 (2d Cir.) (detention in handcuffs during parole search was not a *de facto* arrest under Fourth Amendment), *cert. denied*, 125 S.Ct. 371 (2004).

Because the decision to detain and restrain respondent and the other occupants of the house was plainly reasonable, respondent embellishes and mischaracterizes the record in an effort to suggest that the totality of circumstances rendered her detention unreasonable. Not a single page of the transcript she cites, however, supports her repeated claims that the garage where she was held was "cold," "damp" or "dank." Br. at 2, 4, 9, 33-34. Similarly, her claim that she was taken outside in the "pouring" rain, *id.* at 2, 4, 34, is at odds with her own testimony that the rain was only "[m]edium." JA 103.

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[4] In fact, petitioner Muehler testified that he would have removed respondent's handcuffs if she had been "gravely disabled," "pregnant," "elderly," or had other "health concerns." JA 195.

[5] In all events, respondent expressly waived any claim that she had been arrested. *See* 6/15/01 Tr. 189; *Illinois* v. *McArthur*, 531 U.S. 326, 334 (2001).

More egregiously, respondent attempts to manufacture the claim that she was held in handcuffs for up to an hour after the search ended. See Br. at 2, 14. This claim rests on nothing more than her statement that she was held "like two to three hours." JA 192. This "evidence" cannot possibly sustain an inference that respondent was held in handcuffs for three hours, and thus a full hour after the search ended. Respondent's "guesstimate" concerning the length of her detention was inherently vague and entirely speculative.[6] More fundamentally, it contradicted her own prior testimony that she was held in the garage for two hours, *id.* at 116, a recollection that matched that of petitioners and that corresponded to the time-stamp on a videotape taken after the search, which showed that the search was over approximately two hours after it began. *Id.* at 74, 82-83, 156, 163. Indeed, these facts no doubt explain why the Ninth Circuit's decision was not based on any alleged post-search detention.[7]

Finally, respondent attempts to bolster her case with allegations that the officers detained her in handcuffs because of a supposed animus toward illegal aliens or as "payback" for some unspecified affront. Br. at 7 n.4. These allegations are both baseless and irrelevant. Tellingly, respondent cites no evidence substantiating this alleged improper motive.[8] Even if she could, the subjective intent of the officers does not affect the Fourth Amendment calculus; instead, the issue is "whether the officers' actions are *objectively* reasonable in

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[6] Respondent was not wearing a watch, and there was no clock in the garage. *See* JA 137-38.

[7] Respondent's assertion that Officer Brill "admitted" that she was not released until 10 to 15 minutes after the search ended, Br. at 9, is baseless. In fact, Officer Brill did not recall whether she had been held for this period after the search. *See* JA 75.

[8] Respondent implies that the officers characterized 1363 Patricia Avenue as a "poor house" because of hostility toward the residents. *See* Br. at 7 n.4. But the term "poor house" was used by Anthony Romero to describe 1363 Patricia Avenue. *See* JA 219.

light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Graham*, 490 U.S. at 397 (internal quotation marks omitted) (emphasis added). "[E]vil intentions," even if proven, "will not make a Fourth Amendment violation out of an objectively reasonable use of force." *Id.* Here, the historical facts confronted by the officers provided an objective justification for using handcuffs to restrain the detainees—whether the officers acted with good will or with ill will is legally irrelevant.

B. Petitioners Are Entitled To Qualified Immunity.

Even if this Court concludes that the manner in which respondent was detained violated her Fourth Amendment rights, petitioners are entitled to qualified immunity because there was no clearly established law that restraining *Summers* detainees in handcuffs was unconstitutional.[9] At the time petitioners acted, no court had suggested that their actions could violate the Constitution, a fact recognized by the Ninth Circuit itself. See *Meredith* v. *Erath*, 342 F.3d 1057, 1063 (9th Cir. 2003). Respondent points to only two cases which supposedly warned that handcuffing *Summers* detainees violated the Constitution. The first, *Franklin* v. *Foxworth*, 31 F.3d 873 (9th Cir. 1994), was a case about the "wanton[] and callous[]" abuse of a severely disabled man, not about the appropriateness of handcuffing able-bodied detainees. *Id.* at 878. Indeed, the *Franklin* court's focus was on the officers' inexplicable failure to give any sort of clothing or covering to the semi-nude plaintiff. See *id.* at 877. The court tellingly had no comment about the handcuffing of the plaintiff's two able-bodied companions, making it clear that the opinion was

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[9] While she cites Supreme Court Rule 14.1(a), Br. at 36 n.23, respondent offers no substantive response to petitioners' showing, Ptrs. Br. at 36-37 n.9; *id.* at 26 n.8, that the questions of qualified immunity are "fairly subsumed" in the questions presented in the petition. Her citation to the United States' brief on this point is mystifying; the United States addresses the immunity issues on the assumption that they are subsumed. U.S. Br. at 22 n.7; *id.* at 29 n.13.

based upon the officers' overall callous treatment and not upon the use of handcuffs. See *id.* at 875. Respondent also points to *United States* v. *Taylor*, 716 F.2d 701, 707 (9th Cir. 1983), but that case is completely inapposite. The *Taylor* court found only that *Summers* did not apply to an individual detained "some distance" from a home while it was being searched—nothing in *Taylor* addresses the appropriateness of using handcuffs in a *Summers* detention. *Id.* And respondent's claim that *Summers* itself provided some kind of warning against handcuffing detainees is without merit. If anything, *Summers* clearly established that officers could act reasonably to "exercise unquestioned command of the situation." 452 U.S. at 703.

II. THE NINTH CIRCUIT ERRED IN HOLDING THAT RESPONDENT'S FOURTH AMENDMENT RIGHTS WERE VIOLATED WHEN SHE WAS QUESTIONED ABOUT HER CITIZENSHIP.

The Ninth Circuit also held that respondent's Fourth Amendment rights were violated when she was asked about her immigration status. Contrary to respondent's claims, this holding is an independent basis for the judgment below and thus properly before this Court. Respondent's attempts to defend that alternative holding are unavailing.

A. The Constitutional Propriety Of Respondent's Questioning Is Properly Before This Court.

Rehashing arguments she offered unsuccessfully in opposing the petition for a writ of certiorari, respondent contends that the Ninth Circuit did not "hold that the questioning of Ms. Mena about her immigration status was by itself a seizure in violation of the Fourth Amendment," Br. at 41, and that, because the issue was never briefed below, this Court should not address it now. Br. at 40-41. Both arguments are flatly wrong.

First, the Ninth Circuit plainly did not treat the questioning of respondent as merely one of "many factors that rendered

the detention unreasonable." *Id.* at 41. Emphasizing its view "that the officers unduly invaded Mena's privacy by inquiring unnecessarily into her citizenship status" when they had "no reason . . . to be suspicious," the lower court held that, "*[o]n these facts alone*, . . . Mena has alleged a violation of a constitutional right." Pet. App. 10a (emphasis added). It likewise stated that "[t]he officers simply did not have the particularized reasonable suspicion the Fourth Amendment requires to justify (1) questioning Mena regarding her citizenship status or (2) searching her purse for immigration documentation without her consent. Therefore, *just on these facts alone*, we note that Mena alleges a Fourth Amendment violation." *Id.* at 14a (emphasis added).[10]

Indeed, because the validity of a *Summers* detention does not turn on a particularized showing of reasonable suspicion, the lower court's lengthy analysis of this issue, Pet. App. 10a-14a, makes clear that it viewed the questioning as a discrete Fourth Amendment event, and not just one of many factors bearing on the reasonableness of her detention. Accordingly, unlike respondent, the en banc dissenters plainly and correctly understood the panel to have held "that the inquiry into citizenship *by itself* violated a constitutional right, by unduly invading [respondent's] privacy." *Id.* at 26a (Kleinfeld, J., dissenting) (emphasis added); see also *id.* at 34a (Gould, J., dissenting) (disagreeing with the panel that there was a "violation of the Constitution in regard to the questions posed to Ms. Mena on her citizenship").

As respondent admits, the lower court rendered this ruling without the benefit of any briefing, and the jury instructions did not permit the jury to premise a verdict on the questioning

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[10] Respondent does not dispute that her purse was covered by the search warrant and that the jury rejected her claim that the search was overbroad. *See* Ptrs. Br. at 16 n.4; U.S. Br. at 27 n.11. Thus, the lower court's statement on page 14a of its opinion, like its prior statement on page 10a, can only be understood as a conclusion that the questioning alone violated respondent's Fourth Amendment rights.

alone. Br. at 40-41. These facts, however, do not shield the lower court's ill-considered alternative holding from review. This Court reviews judgments, *Bowen* v. *American Hospital Ass'n*, 476 U.S. 610, 625 n.11 (1986) (plurality), and the judgment below rests on the alternative holding that the questioning violated respondent's Fourth Amendment rights. See *Union Pac. R.R.* v. *Mason City & Fort Dodge R.R.*, 199 U.S. 160, 166 (1905) (where an appellate court sustains a trial court decision on two grounds, "each is the judgment of the court, and of equal validity with the other"). Because respondent's detention was constitutionally proper, the judgment can be sustained only on the basis of the alternative ruling. Thus, unless this Court chooses to reverse that ruling outright on the ground that a verdict cannot be sustained on a theory never presented to the jury, *McCormick* v. *United States*, 500 U.S. 257, 270 n.8 (1991), it must address the validity of that ruling. Respondent's suggestion, Br. at 43, that the Court dismiss the writ as to the second question—and thereby leave intact a judgment that rests on an improperly rendered holding—is legally untenable.

Review of the Ninth Circuit's alternative holding in favor of respondent is not at all unfair to her. *Id.* at 42-43. She failed to argue that the questioning violated her constitutional rights. Accordingly, if the Court holds that questioning her did not violate her rights, then she has lost nothing to which she is entitled. Only if the Court were to allow that ruling to remain in place could there be any prejudice—and the prejudice would be to petitioners.

B. Respondent's Questioning Was Constitutionally Permissible.

The lower court plainly erred in concluding that the police violated respondent's Fourth Amendment rights by asking about her immigration status without reasonable suspicion. As petitioners and the United States have shown, police questioning is not a Fourth Amendment "search" or "seizure" that must be justified by reasonable suspicion. This is true

even if the person is unable, for reasons independent of the questioning itself, to move about freely or to avoid the police. Ptrs. Br. at 17-23; U.S. Br. at 23-27. Rather, police questioning is a discrete Fourth Amendment event only when it extends an otherwise permissible detention. The lower court's conclusion that the questioning in this case violated respondent's rights simply because the police lacked particularized reasonable suspicion that she was an illegal immigrant was thus wrong as a matter of law.

Tacitly conceding this, respondent and her *amici* offer alternative rationales for the lower court's alternative holding. They contend that where an individual is detained without probable cause, even questioning that does not prolong the detention must be related to the justification for the detention. Alternatively, respondent claims that the questioning here was coercive and lengthened the duration of her detention. None of these claims has merit.

1. The Fourth Amendment Is Not Implicated By Questions That Do Not Prolong A *Summers* Detention.

Citing cases involving *Terry*-type stops, not *Summers* detentions, respondent and *amicus* the National Association of Criminal Defense Lawyers ("NACDL") argue that "seizures made on less than probable cause must be limited in both duration and *scope*" to the purpose of such stops. Br. at 47; see also NACDL Br. at 10. In fact, any "scope" requirement for *Terry*-type stops is essentially derivative of the "durational" limit that governs such stops. When officers ask questions unrelated to the purpose of a *Terry* stop—for example, by asking about drugs during a border patrol stop—the detention is prolonged beyond the "brief[]" period needed to "investigate the circumstances that provoke[d] suspicion" of illegal activity. *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 881 (1975). As a practical matter, therefore, seizures

permitted without probable cause are governed by a temporal, or durational, limit.[11]

But even if *Terry* stops are subject to a "scope" limitation, the same is not true of *Summers* detentions. When police ask questions about matters unrelated to the suspicions that justify *Terry* stops, the purposes of such stops are, by definition, not being served. Questions about the presence of drugs, for example, do not serve the purpose of a stop to investigate suspicions of illegal immigration. But a *Summers* detention "is categorically different from" a *Terry* stop. 452 U.S. at 706-07 (Stewart, J., dissenting).

> [T]he requirement that the scope of the intrusion be reasonably related to its justification *does not provide a limiting principle* for circumscribing the detention. If the purpose of the detention is to help police make the search, the detention can be as long as the police find it necessary to . . . search.

Id. at 712 (Stewart, J. dissenting) (emphasis added).

Thus, in contrast to *Terry* stops, the underlying purposes of a *Summers* detention continue to be served even when police ask questions unrelated to the search. During such questioning, detainees remain unable to interfere with the search, harm the officers or other residents, or flee. Indeed, this difference between *Summers* and *Terry* detentions demonstrates that the rationale for a strict scope requirement—*i.e.*, concern over pretextual stops—has far less salience in *Summers* detentions. Because *Terry* stops are initiated by officers in the field, there is an inherent danger that some overzealous officers will invoke the authority to

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[11] A "scope" limitation for such detentions appears to be derived from *Terry* v. *Ohio*, 392 U.S. 1 (1968), which involved a seizure and a search, an activity more logically associated with a scope requirement. *See id.* at 19-20. Although *Brignoni-Ponce* refers to the "'scope'" of the "inquiry" in a border patrol stop, 422 U.S. at 881, inquiries unrelated to suspicions of illegal immigration would, as just noted, improperly prolong the stop.

detain an individual for one purpose when the real purpose of the detention is entirely different. *Summers* detentions, however, cannot be initiated unless a neutral magistrate issues a search warrant based on probable cause. This requirement, and the fact that *Summers* detentions are "not likely to be exploited by the officer or unduly prolonged . . . because the information the officers seek normally will be obtained through the search and not through the detention," *Summers*, 452 U.S. at 701, make pretextual *Summers* detentions highly unlikely.[12]

Thus, the fundamental interests the Fourth Amendment serves are not protected by artificial "scope" restrictions on *Summers* detentions. Unless it prolongs a detention, the questioning of a person who has already been seized cannot cause a new or additional "seizure" that implicates the Fourth Amendment.[13] By contrast, questioning that prolongs a detention can cause such a "seizure," by restraining a detainee's liberty beyond the period of time she would otherwise be detained.

Respondent's claim that the questioning here prolonged her detention, Br. at 46, is frivolous. The questioning itself was indisputably brief, JA 106, 138-39, and did not extend the length of a detention that the police were entitled to maintain for the duration of a search that took approximately two hours. Because the officer who questioned respondent was

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[12] Indeed, the suggestion that petitioners prepared a lengthy affidavit for a search warrant, JA 209-22, then met daily for over a week to plan the search, *id.* at 54, 145-46, just so they could engage in "immigration control," NACDL Br. at 9, is fanciful—particularly since the officers could have posed the same questions to respondent simply by approaching her in front of her house. As Officer Muehler testified, the officers were executing a search warrant, not engaging in an "investigation." JA 165.

[13] As the government explains, where questions that do not prolong a detention are coercive, they may implicate the Due Process Clause's voluntariness standard, the Fifth Amendment's Self-Incrimination Clause, or, in some cases, the Sixth Amendment. U.S. Br. at 25-26.

guarding the detainees, *id.* at 162, the scant time he spent questioning her would not otherwise have been used to speed the search itself. Thus, the questioning in this case did not implicate respondent's Fourth Amendment rights.

2. Respondent's Questioning Was Not Coercive.

Even if the Court were to enforce a scope requirement for *Summers* detentions, questioning that is not "coercive"—*i.e.*, that does not tie a person's freedom to a response—does not expand the "scope" of a detention. In *Terry*, this Court stated that a search and a seizure not based on probable cause should be "reasonably related in scope to the circumstances which justified the interference in the first place." 392 U.S. at 19-20. This Court has subsequently held, however, that no seizure occurs when police ask questions of an individual, even one who is not free to leave or to avoid the question, as long as the questioning is not "so intimidating as to demonstrate that a reasonable person would have believed he was *not free to leave if had not responded*," *INS* v. *Delgado*, 466 U.S. 210, 216 (1984) (emphasis added); see also *Florida* v. *Bostick*, 501 U.S. 429, 437 (1991). Questioning that does not lead a reasonable person to conclude that she must respond to gain her freedom cannot broaden the "scope" of the interference occasioned by an otherwise lawful detention, because it adds no additional, constitutionally cognizable "interference" to that detention.

The questioning in this case does not meet that standard. While respondent was handcuffed, the fact that a person is unable, for reasons independent of the questioning itself, to leave does not automatically communicate to a reasonable person that she will not be freed unless she answers police questions. *Bostick*, 501 U.S. at 436; *Delgado*, 466 U.S. at 218. Nor did the other circumstances surrounding respondent's questioning communicate such a message.

The record shows (JA 106, 137-39) that respondent was questioned by a single officer, who did not touch her, "point

guns at [her] or otherwise threaten [her]." *Bostick*, 501 U.S. at 437. The questioning itself was very brief, was not preceded by any accusations, and was conducted in the presence of three housemates. JA 106, 138-39*;* cf. *Florida* v. *Royer*, 460 U.S. 491, 502-03 (1983) (plurality) (no consent where suspect was questioned alone with two officers who accused him of criminal acts). The questions themselves—about identity and citizenship—were not inherently threatening. See *Hiibel* v. *Sixth Judicial Dist. Ct. of Nev.*, 124 S. Ct. 2451, 2458 (2004) (identification request does not implicate the Fourth Amendment); *Delgado*, 466 U.S. at 220 (same with respect to questions about citizenship and immigration papers). And the questioning occurred in respondent's home, which minimized, rather than increased, its coerciveness. See *Summers*, 452 U.S. at 702 (detention at home involves "neither the inconvenience nor the indignity" of a compelled visit to the police station); cf. *Delgado*, 466 U.S. at 217 n.5 (when agents are lawfully admitted to otherwise non-public premises, "the same considerations attending contacts between the police and citizens in public places should apply").

Most critically, although respondent was not shown the warrant or told why she was being detained, Br. at 6, 45, she was never told that her freedom depended upon answering the questions, *Delgado*, 466 U.S. at 216. Nor did she claim that she harbored any such misgivings.[14] Where, as here, a detainee makes no attempt to show that she believed compliance with the officer's requests was necessary to gain her freedom, questioning during a lawful *Summers* detention should not be deemed unconstitutional simply because the detainee was handcuffed at the time. It would be particularly unfortunate in an era of heightened concern over terrorism to

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[14] There is absolutely no support for respondent's purely speculative assertion that she "likely would have been arrested" had she not answered the questions. Br. at 46. In fact, a refusal to cooperate is not a basis for an arrest. *Bostick*, 501 U.S. at 437.

impose artificial restrictions on the ability of law enforcement officers to ascertain the immigration status of an individual who is otherwise lawfully detained.

3. The Officer Had Reasonable Suspicion To Ask Respondent About Her Immigration Status.

Even if the Court concludes that the police must have reasonable suspicion to ask a *Summers* detainee about her citizenship status, the officers had such a suspicion here. While petitioners have never suggested that respondent's Latino ancestry and accent were alone sufficient to create such a suspicion, this Court has held that those are relevant, if not dispositive, factors. *Brignoni-Ponce*, 422 U.S. at 886-87. The officers also knew that at least two members of a gang of predominantly illegal aliens lived or had lived at 1363 Patricia Avenue and, based on their knowledge of gangs, surmised that the residence may have been a gang safe house.

The officers' suspicion that respondent might be an illegal alien, therefore, was not based on her "mere propinquity to" others suspected of criminal activity. *Ybarra*, 444 U.S. at 91. Unlike Ybarra, respondent was not in a public establishment by sheer chance when it was raided. Rather, she was found asleep in a residence known to house illegal alien gang members; she was the same general age as those gang members; and she had the same ancestry and foreign accent as those members. These facts are sufficient to give rise to a reasonable suspicion that respondent might have been an associate of the gang, and thus an illegal alien herself.

Nor is it true, as the ACLU claims, that the officer could not act on that suspicion. The ACLU cites no case that holds that federal immigration laws bar state officers from even asking lawfully detained persons about their immigration status. In fact, the Tenth Circuit has squarely rejected the very *expressio unius* preemption argument the ACLU makes here with respect to 8 U.S.C. § 1252c. See *United States* v.

Vasquez-Alvarez, 176 F.3d 1294 (10th Cir. 1999).[15] And, as petitioners have shown (Ptrs. Br. at 25), Ninth Circuit authority (which the ACLU dismisses as outdated) and an opinion by the Department of Justice Office of Legal Counsel (which the ACLU simply ignores), confirm that state police do possess this modest authority—a position the United States has again endorsed in its brief in this case.[16] U.S. Br. at 26-27 n.10.

In all events, the lower court based its alternative holding on lack of reasonable suspicion, not lack of authority, see Pet. App. 13a n.15 (declining to decide latter issue). The former ruling is erroneous, and this Court need not reach out to sustain the alternative holding on a theory respondent never raised below. See, *e.g.*, *Reno* v. *Koray*, 515 U.S. 50, 55 n.2 (1995) (argument by *amicus* not properly before Court where not made by a party and not relied on by lower court).[17]

4. Petitioners Are Entitled To Qualified Immunity.

Finally, even if the Court concludes that the questioning violated respondent's Fourth Amendment rights, petitioners

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[15] The ACLU misleadingly claims that the court upheld a state arrest that § 1252c authorized. ACLU Br. at 18 n.10. In fact, the court agreed that § 1252c did not authorize the arrest, but rejected the claim that the statute's specification of state authority to make certain arrests impliedly precluded them from making other immigration-related arrests. *Vasquez-Alvarez*, 179 F.3d at 1296-1300.

[16] Indeed, whether or not the officers possessed statutory authority to arrest has no effect at all on the Fourth Amendment question of whether they had reasonable suspicion. *Cf. United States* v. *Di Re*, 332 U.S. 581, 584 n.4 (1948).

[17] Contrary to the claims of *amici* National Latino Officers Ass'n, *et al.*, Br. at 5-6, recognizing the authority of state police to question those reasonably suspected of being illegal aliens will not ineluctably harm local police efforts. State officers are not required to undertake such investigations, and can decline to do so for the very reasons *amici* advocate.

are entitled to qualified immunity. While *Brignoni-Ponce* requires reasonable suspicion to *stop* someone to investigate an immigration violation, it says nothing about the propriety of questioning one already lawfully detained. Contrary to respondent's claim (Br. at 50), moreover, it was not settled that questions posed to *Summers* detainees must relate to the purpose of the seizure; indeed, she cites no authority applying a scope restriction to *Summers* detentions, which are "categorically different from" *Terry* stops, and which three Justices have said are *not* subject to such a restriction. *Summers*, 452 U.S. at 706-07, 712 (Stewart, J., dissenting). Nor does she cite any case that gave "fair warning" that the brief questioning of an already lawfully detained person could be deemed sufficiently "coercive" to give rise to an additional "seizure" that must be justified by reasonable suspicion.

The lower court's qualified immunity ruling suffers from yet another infirmity. Even if the questioning required reasonable suspicion of an immigration offense, no case gave fair warning that police searching a home known to house illegal alien gang members could not form such a suspicion about a woman who was asleep in that home, and was the same general age and had the same ancestry and foreign accent as such gang members. While a case need not involve identical facts in order to provide fair warning, the lower court here simply presumed a violation of *Brignoni-Ponce*, see Pet. App. 13a, when the relevant facts were materially different.

CONCLUSION

For the foregoing reasons, and those stated in petitioners' opening brief, the judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

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