No. 17-781

In the Supreme Court of the United States

KENNETH M. ASBOTH, JR., PETITIONER,

v.

WISCONSIN

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court should graft onto the Fourth Amendment a per se requirement that the impoundment of a vehicle must always be conducted pursuant to standardized criteria.

2. Whether this case is the proper vehicle for deciding whether to adopt such a per se standardized-criteria requirement, given that the police here conducted the impoundment pursuant to standardized criteria stricter than those this Court specifically approved in *Colorado v. Bertine*, 479 U.S. 367 (1987).

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INTRODUCTION

In his arguments below and again in his Petition, Petitioner Kenneth M. Asboth requested that the courts adopt a per se rule found nowhere in the Fourth Amendment's text or history: community-caretaking impoundments of vehicles by police must always take place pursuant to standardized criteria. The Wisconsin Supreme Court declined to adopt this rule, correctly explaining that because the Fourth Amendment's touchstone is reasonableness, the existence or non-existence of standardized criteria is just one input in the all-things-considered analysis. While Petitioner urges this Court to review this conclusion based upon statements in several federal court of appeals and state supreme court cases discussing standardized criteria, a careful survey reveals that the vast majority of Petitioner's cases did not squarely address his Question Presented. In any event, even if this Court were inclined to consider whether to adopt or definitively reject Petitioner's per se rule, this case would be an exceedingly poor vehicle for conducting that inquiry, given that the police here impounded Petitioner's vehicle in full compliance with standardized criteria even stricter than those this Court approved in *Colorado v. Bertine*, 479 U.S. 367 (1987).

STATEMENT

A. In 2012, local police in Beaver Dam, Wisconsin, suspected Petitioner of committing an armed robbery.

App. 2a. Not long after the robbery, police received a tip that Petitioner was at a private storage facility outside of the city of Beaver Dam and outside of the jurisdiction of the Beaver Dam Police Department. App. 2a, 44a. A Dodge County Sheriff's Deputy arrived at the storage facility and saw Petitioner, alone, reaching into the back seat of a parked car and subsequently arrested Petitioner on an outstanding warrant for probation violation. App. 2a. Shortly thereafter, officers from the City of Beaver Dam Police Department arrived to assist. App. 2a. Together, the officers determined that Petitioner's car would need to be impounded. *See* App. 2a–3a. The car was parked in such a way as to block access to one storage unit entirely and multiple others partially, and to impede the flow of traffic through the facility. App. 2a–3a. Additionally, police discovered that the car was registered to someone other than Petitioner. App. 3a.

Given that a Dodge County officer made the arrest and the storage facility was within the Dodge County Sherriff's exclusive jurisdiction, the seizure was subject to Dodge County's written, standardized policy on impoundments. *See* App. 50a–51a, 68a. The Dodge County policy permitted impoundment in several circumstances, including "[w]hen the driver of a vehicle has been taken into custody by a deputy, and the vehicle would thereby be left unattended." App. 79a. The policy noted that, "[u]nless otherwise indicated, the deputy always has the discretion to

leave the vehicle at the scene and advise the owner to make proper arrangements for removal." App. 79a.[1]

Pursuant to the governing Dodge County standardized policy, police removed the car from the private facility. If abandoned, the car would have both interfered with the facility owner's use of his property and blocked access to several storage garages. Likewise, the car would have obstructed traffic through the facility because the car sat "in the middle of the alley" between two storage sheds. App. 2a. In addition, the police had run the car's plates and learned that it was registered to some person other than Petitioner. App. 2a–3a. Police towed the car to Beaver Dam's facility, as the Dodge County facility was full, and Beaver Dam Police inventoried its contents. App. 4a.

During the inventory search, police discovered, among other things, a pellet gun in the spare tire

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[1] The Beaver Dam police had a policy that, while not governing the seizure here, also would have permitted this impoundment. The Beaver Dam policy permitted police to impound vehicles when the officer had the "vehicle in lawful custody." App. 73a. Although there was some dispute below over the state-law question of whether the Dodge County policy or the arguably less stringent Beaver Dam policy governed the decision to impound here, App. 50a, 52a, 53a–54a, the Wisconsin Court of Appeals held that the County policy governed, App. 50a–51a, and the Wisconsin Supreme Court did not question that holding, *see* App. 23a n.7.

compartment that matched the gun used in the robbery. App. 4a.

B. The State subsequently charged Petitioner with armed robbery, App. 5a, and Petitioner moved to suppress the gun, *see* App. 71a. Petitioner first argued that the inventory search violated the Fourth Amendment because Beaver Dam police were investigating him for the armed robbery. App. 71a. The trial court denied the motion, App. 72a, and Petitioner moved for reconsideration, raising a new argument that the seizure violated the Fourth Amendment. App. 67a, 68a.

The trial court denied the motion for reconsideration, finding that "[t]he officers involved believed that the vehicle belonged to someone other than [Petitioner]," "[b]oth the Dodge County Sheriff's Department and the Beaver Dam Police Department's written policies favor impoundment in this scenario," "[t]he vehicle was parked on another individual's property, not legally parked on a public street," "[t]he vehicle was blocking access to more than one of the business's storage lockers and was impeding travel by other customers through the complex," and "[t]here were valuable items in the vehicle including electronics." App. 67a–68a. Thus, the trial court held that the impoundment was "a valid community caretaker function" and that the search had not been undertaken "for the sole purpose of investigation." App. 68a, 71a.

After the trial court denied his suppression motion and motion for reconsideration, Petitioner pleaded no contest to armed robbery and was sentenced to 10 years' confinement and 10 years of supervised release. App. 6a.

C. Petitioner appealed to the Wisconsin Court of Appeals, challenging only the impoundment as a violation of the Fourth Amendment. App. 43a. Petitioner argued that the policies governing the impoundment insufficiently limited officer discretion, such that the impoundment transgressed this Court's decision in *Colorado v. Bertine*, 479 U.S. 367 (1987), and that the police did not have a legitimate, non-investigatory reason to seize the car. App. 46a, 48a. The Court of Appeals assumed without deciding that standardized criteria are required for community-caretaking impoundments. App. 48a–49a. The court then held that Dodge County's policy governed the impoundment here, that the policy provided officers with sufficient guidance, and that the officers followed the policy in impounding the car. App. 50a–51a, 52a, 53a–54a. The Court of Appeals then analyzed the reasonableness of the impoundment under Wisconsin's community-caretaker doctrine and held that police did not impound the car "for the sole purpose of investigation," but instead had a legitimate, community-caretaking reason to impound the car. App. 54a–65a.

D. The Wisconsin Supreme Court accepted the case for review, limited to the issue of the

constitutionality of the impoundment. App. 7a. The court applied Wisconsin's three-step test for assessing the legality of community-caretaking actions: "(1) whether a search or seizure within the meaning of the Fourth Amendment has occurred; (2) if so, whether the police were exercising a bona fide community caretaker function; and (3) if so, whether the public interest outweighs the intrusion upon the privacy of the individual such that the community caretaker function was reasonably exercised." App. 9a (citation omitted). The court explained that the impoundment was clearly a seizure under the Fourth Amendment, so the case turned on the second and third steps of the test. App. 9a.

With regard to the "bona fide community caretaker function" step, the court explained that "this step ultimately turns on whether the officer can articulate an objectively reasonable basis for exercising a community caretaker function." App. 10a (citation omitted). The court then held that officers had an objectively reasonable community-caretaking basis for impounding the car: namely, that the car would have "inconvenienced" the private-property owner and his customers by making travel through the facility difficult, blocking several storage units, and costing the private-property owner to remove; that Petitioner was likely facing a lengthy detainment, making it likely that the car would remain where it was for some time and increasing the risk of theft or vandalism; and that Petitioner was not the registered owner of the car. App. 11a–13a. The

court further held that even if the officers also had an "investigatory interest" in the car, that interest did not render the seizure unconstitutional so long as a bona fide community-caretaking reason supported the seizure. App. 13a–14a.

With regard to the final step—balancing the public and private interests to determine if the seizure was reasonable—the court addressed whether community-caretaking impoundments must be conducted according to standard criteria in order to be constitutional. App. 14a. The court explained that federal courts of appeals have not always agreed on how standard criteria should affect a court's assessment of a community-caretaking impoundment, but ultimately held that "the fundamental question is the reasonableness of the seizure," not the existence of, or even adherence to, standardized procedures. App. 15a–18a. The court explained that its holding would not "imbue law enforcement officers with 'uncontrolled' discretion to impound vehicles," as any community-caretaking impoundment will be constrained by the bounds of totality-of-the-circumstances reasonableness and the need for a "reasonable community caretaking concern" to justify the impoundment. App. 18a–19a (citation omitted).

Ultimately, the court held that the impoundment here was reasonable under the circumstances. In reaching that conclusion, the court balanced the public and private interests at stake, considering: "(1)

the degree of the public interest and the exigency of the situation; (2) the attendant circumstances surrounding the seizure, including time, location, the degree of overt authority and force displayed; (3) whether an automobile is involved; and (4) the availability, feasibility and effectiveness of alternatives to the type of intrusion actually accomplished." App. 20a (citation omitted). Because this case involved an automobile, Petitioner had a lessened privacy interest at stake. App. 21a. The court explained that the car presented a potential hazard and inconvenience to the owner of the storage facility and its customers, and that officers are generally justified in "abating a nuisance." App. 21a–22a. The court also noted that the circumstances surrounding the seizure reinforced its reasonableness: Petitioner was already under arrest, so the officers "did not make an improperly coercive show of authority to effect the seizure," and the seizure complied with the written policies of both police departments. App. 22a–23a. Indeed, "the fact that both policies actually cabined the officers' exercise of discretion" further reinforced the reasonableness of the seizure. App. 23a–24a. Finally, the court explained that no realistic alternative to impoundment existed, as Petitioner had no companion who could take possession of the car and was not himself the registered owner. App. 24a–25a. The court also explained that "nothing required" the officers to "offer [Petitioner] the opportunity to make arrangements for moving [the] car after his arrest." App. 24a. Thus, the court concluded that the

impoundment "was constitutionally reasonable under the Fourth Amendment." App. 25a–26a.

Two Justices dissented, preferring to follow what they understood to be the Tenth Circuit's holding in *United States v. Sanders*, 796 F.3d 1241 (10th Cir. 2015), that vehicles located on private property not obstructing traffic or constituting a threat to public safety can be impounded only if seized pursuant to standardized criteria and based on a reasonable community-caretaking rationale. App. 27a, 29a–32a, 41a. In this case, the dissent argued, Petitioner's vehicle "neither obstructed traffic nor created an imminent threat to public safety," and so standardized criteria needed to govern the impoundment. App. 27a–28a. And because the dissent found that "the standardized policies here fail to place any meaningful limits on police discretion" and "the asserted rationale for the community caretaker impoundment is unreasonable," the dissent would have suppressed the evidence discovered during the inventory search. App. 28a, 32a–35a, 36a–39a.

REASONS FOR DENYING THE PETITION

I. There Is No Direct Division Of Lower-Court Authority On Whether The Absence Of Standardized Procedures Automatically Renders An Impoundment Unconstitutional

A. The Fourth Amendment protects against "unreasonable searches and seizures" and provides that "no Warrants shall issue, but upon probable cause." U.S. Const. amend. IV. This Court has explained that "the ultimate touchstone of the Fourth Amendment is 'reasonableness,'" and thus the Fourth Amendment's "warrant requirement is subject to certain exceptions." *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006). One of these exceptions is the community-caretaker doctrine, under which police may conduct searches or seizures as part of their role as "caretak[er]" of the community. *See Cady v. Dombrowski*, 413 U.S. 433, 441 (1973). These community-caretaking functions are "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Id.* In discharging these functions, police will "frequently" take automobiles into custody. *South Dakota v. Opperman*, 428 U.S. 364, 368 (1976). Even vehicles that simply violate parking ordinances are subject to impoundment under the community-caretaker doctrine. *Id.* at 368–69. Indeed, the authority of police to impound vehicles "impeding traffic or threatening public safety and convenience is beyond challenge." *Id.* at 369.

This Court's principal community-caretaker precedents focus on the relationship between this doctrine and inventory searches. In *Opperman*, this Court held that inventory searches of already-impounded vehicles conducted "pursuant to standard police procedures are reasonable." 428 U.S. at 372. Standard procedures in inventory searches, this Court stated, "tend[ ] to ensure that the intrusion [is] limited in scope." *Id.* at 375. In *Illinois v. Lafayette*, 462 U.S. 640 (1983), this Court assessed the reasonableness of an inventory search of an arrestee's personal effects done as part of the booking and jailing process. *Id.* at 643. This Court held that an inventory search of an arrestee to be jailed "is an entirely reasonable administrative procedure," *id.* at 646, and a search conducted "in accordance with established inventory procedures" is not unreasonable, *id.* at 648. In *Colorado v. Bertine*, 479 U.S. 367 (1987), yet another inventory-search case, this Court made clear that "reasonable police regulations relating to inventory procedures administered in good faith satisfy the Fourth Amendment," and that there is a constitutional "requirement" that "inventories be conducted according to standardized criteria." *Id.* at 374 & n.6. In *Florida v. Wells*, 495 U.S. 1 (1990), this Court explained that inventory searches must be "designed to produce an inventory," and "standardized criteria" or "established routine" are required to prevent an inventory search from becoming "a ruse for a general rummaging in order to discover incriminating evidence." *Id.* at 4.

Of those cases, only *Bertine* addressed—and even then only obliquely—the relevance of "standard criteria" to impoundments, while declining to resolve definitively whether impoundments must comply with such criteria. In the second-to-last paragraph of its opinion, the *Bertine* Court considered the defendant's alternate argument "that the inventory search of his van was unconstitutional because departmental regulations gave the police officers discretion to choose between impounding his van and parking and locking it in a public parking place." 479 U.S. at 375. The Court rejected that contention, stating that "[n]othing in *Opperman* or *Lafayette* prohibits the exercise of police discretion so long as that discretion is exercised according to standard criteria and on the basis of something other than suspicion of evidence of criminal activity." *Id.* at 375–76.

B. Petitioner's primary argument is that lower courts are directly and intractably divided over whether the Fourth Amendment imposes a per se "require[ment]" that every community-caretaking impoundment be done in accordance with standardized procedures or routines. Pet. 11. Contrary to this bold claim, and conceding that there is certainly variance in the language that lower courts have used to describe the importance of standardized procedures to the reasonableness analysis, no state supreme court and "no circuit has held . . . that the absence of standardized procedures automatically renders an impoundment unconstitutional"—as

Petitioner's lead case points out. *Sanders*, 796 F.3d at 1248. Accordingly, to the extent there is a division of authority on Petitioner's Question Presented, that division is far from square.

1. Petitioner begins by purporting to show that 15 jurisdictions—constituting the alleged "majority" position of the split—make standardized criteria a per se "require[ment]" of any impoundment. Pet. 11. However, a closer examination of those cases reveals that all but one fall into one of three distinguishable categories, and that no holding directly adopts Petitioner's preferred rule:

Category 1: Cases requiring standardized impoundment policies only *for vehicles not obstructing traffic or threatening public safety*. At least three of the 15 jurisdictions on which Petitioner relies for his across-the-board impoundment requirement have adopted a far narrower, more nuanced rule. In those courts, "the absence of standardized procedures [does not] automatically render[ ] an impoundment unconstitutional." *Sanders*, 796 F.3d at 1248.

Tenth Circuit precedent is illustrative. *Sanders*, Petitioner's lead case, holds that an impoundment must be "justified by . . . a standardized policy" *only* with respect to a "[1] vehicle located on private property [2] that is neither obstructing traffic [3] nor creating an imminent threat to public safety." 796 F.3d at 1248. The virtue of this approach, *Sanders* states, is that it recognizes that *Bertine*—even if read

to require standardized procedures in certain cases—"did not purport to overrule *Opperman*, and *Opperman* envisioned a situation in which an impoundment is immediately necessary, *regardless of any other circumstances*, in order to facilitate the flow of traffic or protect the public from an immediate harm." *Sanders*, 796 F.3d at 1249 (emphasis added). Consistent with this rule, *Sanders* quoted approvingly its post-*Bertine* holding in *United States v. Kornegay*, 885 F.2d 713 (10th Cir. 1989). *E.g.*, *Sanders*, 796 F.3d at 1245–47, 1251. Two features of *Kornegay* are important. First, the Tenth Circuit upheld a warrantless impoundment in circumstances that closely resemble the present case: (1) the arrested driver had been "alone," with no one else around "who could be asked to care for the car"; (2) the officers "did not know where the vehicle was from"; (3) "the vehicle was not parked on [the driver's] property"; (4) "the agents had every reason to believe that [the driver] would not be returning anytime soon to the [private-property owner's] lot to care for [the vehicle] himself"; and (5) "to have left the vehicle in the [private-property owner's] parking lot—a lot open to the public—could have subjected it to vandalism or theft." *Kornegay*, 885 F.2d at 716. Second, although it cited *Bertine* repeatedly, the *Kornegay* court did not once consider whether the seizure had complied with a standardized impoundment policy—even though the court discussed at length whether the subsequent *inventory search* had complied with police procedures. *Id.* at 716–17.

The Eleventh Circuit and the Indiana Supreme Court appear to adopt similar approaches. In a qualified-immunity case, the Eleventh Circuit concluded that, in "light of *Opperman* and *Bertine*," the "contours" of the Fourth Amendment "appear to be" that, with respect to "an arrestee's vehicle [that] is not impeding traffic or otherwise presenting a hazard, a law enforcement officer may impound the vehicle, so long as the decision to impound is made on the basis of standard criteria . . . ." *Sammons v. Taylor*, 967 F.2d 1533, 1543 (11th Cir. 1992). Similarly, although the Indiana Supreme Court has used language suggesting that a "departmental routine or regulation" is required in all impoundment cases, *Fair v. Indiana*, 627 N.E.2d 427, 433 (Ind. 1993), it also has concluded that community-caretaking impoundments are "sometimes warranted" by, and are "clearly proper" in, circumstances not addressed in a state statute or policy, *id.* at 431; *see also id.* at 432 (invoking *Opperman* and concluding "that, as a matter of federal constitutional law, the police may discharge their caretaking function whenever circumstances compel it").

Category 2: Cases in which there were standardized criteria, with unreasoned dicta purporting to "require" such criteria. Petitioner quotes language from a number of decisions seeming to conflict with the position of the Wisconsin Supreme Court below adopting no per se rule requiring standardized criteria, but he fails to explain the

circumstances of those cases or the arguments pressed therein. Those are telling omissions. After all, differences in mere language do not produce meaningful divisions of authority—only divisions in holdings do. *See* Stephen M. Shapiro, et al., *Supreme Court Practice* 479 (10th ed.); *see also* Stephen G. Breyer, *Reflections on the Role of Appellate Courts: A View from the Supreme Court*, 8 J. App. Prac. & Process 91, 96 (2006). As it turns out, the vast majority of cases allegedly in Petitioner's "majority" position have not directly grappled with Petitioner's Question Presented and so cannot be read definitively to endorse or reject the proposition that the absence of standardized procedures invariably renders an impoundment unconstitutional.

Consistent with the Tenth Circuit's observation in *Sanders* that "no circuit has held . . . that the absence of standardized procedures automatically renders an impoundment unconstitutional," 796 F.3d at 1248, several of the federal court of appeals cases that Petitioner invokes involved standardized impoundment policies or routines, so the courts in those cases had no need to consider whether adopting and complying with such policies or routines is a Fourth Amendment mandate. *See United States v. Torres*, 828 F.3d 1113, 1118 (9th Cir. 2016) ("The . . . officers' decision to impound . . . was consistent with [departmental] policy and served legitimate caretaking purposes."); *United States v. Jackson*, 682 F.3d 448, 455 (6th Cir. 2012) ("Officer Meech's action conformed to the [applicable] Policy."); *United States*

v. Hockenberry, 730 F.3d 645, 660 & n.3 (6th Cir. 2013) (officers "authorized to impound" under the circumstances by both local ordinance and standard custom); *United States v. Cartrette*, 502 F. App'x 311, 317 (4th Cir. 2012) (unpublished) ("[officers] understood and followed [a standard] procedure"); *Miranda v. City of Cornelius*, 429 F.3d 858, 861, 865 (9th Cir. 2005) (vehicle towed per a "city ordinance"; question was "not whether the search (or seizure) was authorized by state law," but "rather whether the search was reasonable under the Fourth Amendment"); *United States v. Petty*, 367 F.3d 1009, 1012 (8th Cir. 2004) (officer followed "standard police policy to tow a vehicle when there [was] no one available to drive it"); *United States v. Le*, 474 F.3d 511, 514 (8th Cir. 2007) ("Trooper Vance acted according to standard procedures when he decided to impound the SUV . . . .").

Likewise, in most of Petitioner's state-court cases, because the officers involved were operating under some form of standardized impoundment policy or routine, the courts had no need to (and so did not) squarely analyze whether such a policy or routine is a per se requirement of the Fourth Amendment. *See Maine v. Fox*, 157 A.3d 778, 785 (Me. 2017), *as corrected* (July 27, 2017) ("[T]he officer's failure to comply with his department's protocol does not require a suppression of evidence."); *Benson v. Arkansas*, 30 S.W.3d 731, 734 (Ark. 2000) ("We hold that the impoundment did not violate applicable police procedures."); *Iowa v. Huisman*, 544 N.W.2d

433, 438 (Iowa 1996) ("Huisman asserts the police did not follow their departmental policy."); *Michigan v. Toohey*, 475 N.W.2d 16, 27 (Mich. 1991) ("The police officer complied with the mandates of the departmental impoundment policy when he decided that the vehicle was unattended after the driver was arrested and that impoundment was the appropriate avenue to protect it."); *Missouri v. Milliorn*, 794 S.W.2d 181, 186 (Mo. 1990) ("[State law] establishes [a] standardized criterion for the decision to impound a vehicle.").[2]

Category 3: Cases that do not even purport, either in holdings or dicta, to require standardized policies. Two cases that Petitioner appears to lump together with the alleged "majority" view do not even indirectly support his position.

In *United States v. Proctor*, 489 F.3d 1348 (D.C. Cir. 2007), the D.C. Circuit specifically avoided Petitioner's Question Presented. Although *Proctor* read *Bertine* to "suggest[ ] that a reasonable, standard police procedure must govern the decision to impound," *id.* at 1353, the court's ultimate holding was far narrower, governing only those cases in which standardized impoundment policies exist: "*if* a

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[2] *North Dakota v. Pogue*, 868 N.W.2d 522 (N.D. 2015), is similarly distinguishable, since it merely held, on a "limited record," that the State failed to present evidence to overcome "the district court['s] specific[ ]" finding that the "vehicle was not impounded to further a caretaking function." *Id.* at 531.

standard impoundment procedure exists, a police officer's failure to adhere thereto is unreasonable and violates the Fourth Amendment," *id.* at 1354 (emphasis added). *Proctor* has nothing to say about cases where such policies do not exist.

The Oklahoma Supreme Court's decision in *McGaughey v. Oklahoma*, 37 P.3d 130 (Okla. 2001), is similarly distinguishable. In that case, police seized a vehicle found on private property without having first received a request from the property owner that the car be towed. *Id.* at 143–44. The Court held that action unreasonable under what appears to be an Oklahoma-specific rule providing that "[t]he decision to impound on private property does not properly rest with the police officer. It is incumbent upon the owner of the private property to request removal of a car if he deems it a nuisance or a trespass." *Id.* at 143 (citation omitted).

The Seventh Circuit's decision in United States v. Duguay. That leaves *United States v. Duguay*, 93 F.3d 346 (7th Cir. 1996), which does not fit into any of the three prior categories. Still, like the other cases, *Duguay* is also best read as not adopting a hard-and-fast standardized-policy requirement. For one thing, although *Duguay* faulted the police for not employing a sufficiently "standardized impoundment procedure," the court reiterated *Opperman*'s holding that impoundments are reasonable if "supported by probable cause, or . . . consistent with the police role as 'caretaker' of the streets and completely unrelated

to an ongoing criminal investigation." *Id*. at 352. In addition, the court largely focused its inquiry on the general unreasonableness of the impoundment decision in that case. *See id.* at 353 ("[t]he touchstone of Fourth Amendment analysis" in impoundment cases "is reasonableness"; concluding that a "policy of impounding the car without regard to whether the defendant can provide for its removal is patently unreasonable if the ostensible purpose for impoundment is for the 'caretaking' of the streets"); *see also id.* at 353–54 (indicating that the impoundment may have violated state law). And of course, the facts of *Duguay* are "hardly . . . helpful to" Petitioner. *See United States v. Smith*, 522 F.3d 305, 312 (3d Cir. 2008) (concluding likewise about the defendant in that case). Indeed, the case for impoundment in *Duguay* was extremely weak: the car's driver had not been arrested and so could have driven the car away herself, and the officers also understood that another passenger, also not under arrest, was the son of the car's owner. *Smith*, 522 F.3d at 312 (pointing out these facts). For these reasons, the Third and Tenth Circuits have reasonably concluded that "*Duguay* arguably, at least, supports a determination that [an] impoundment" unsupported by a standardized policy could be "lawful under the Fourth Amendment." *Smith*, 522 F.3d at 312; *see Sanders*, 796 F.3d at 1248 (concluding that "no circuit"—including the Seventh Circuit in *Duguay*, which *Sanders* discussed at length—"has held . . . that the absence of

standardized procedures automatically renders an impoundment unconstitutional").

2. The lower courts that *have* focused on Petitioner's Question Presented—whether the Fourth Amendment always and invariably mandates that impoundments comply with standardized policies—have agreed with the Wisconsin Supreme Court.

In *United States v. Coccia*, 446 F.3d 233 (1st Cir. 2006), the First Circuit explained that "[n]either *Opperman* nor *Bertine* holds that the impoundment of a vehicle conducted in the absence of standardized protocols is a per se violation of the Fourth Amendment." *Id.* at 238. The court read *Bertine*'s language "to mean that an impoundment decision made pursuant to standardized procedures will most likely, although not necessarily always, satisfy the Fourth Amendment." *Id.* Indeed, the Fourth Amendment "reasonableness analysis does not hinge solely on any particular factor." *Id.* at 239. Additionally, "police cannot sensibly be expected to have developed, in advance, standard protocols running the entire gamut of possible eventualities," and likewise such "protocols have limited utility in circumscribing police discretion" given "the numerous and varied circumstances in which impoundment decisions must be made." *Id.* (citation omitted). Thus, the First Circuit held that, regardless of the existence of standardized criteria, the constitutionality of a community-caretaking impoundment turns on

reasonableness, "based on all the facts and circumstances of a given case." *Id.* at 239–40.

Similarly, the Third Circuit has held that standardized criteria are not dispositive of Fourth Amendment reasonableness. *United States v. Smith*, 522 F.3d 305, 312 (3d Cir. 2008). Rather, "the adoption of a standardized impoundment procedure merely supplies a methodology by which reasonableness can be judged." *Id.* And while "it may be desirable that police execute [community-caretaking impoundments] pursuant to standardized procedures," "the Fourth Amendment cannot be the foundation for an equal protection requirement that police must have standardized procedures" such that they treat all similarly situated vehicles equally. *Id.* at 315.

The Fifth Circuit also has explained that "[s]ince *Opperman* and *Bertine*, we have focused our inquiry on the reasonableness of the vehicle impoundment." *United States v. McKinnon*, 681 F.3d 203, 208 (5th Cir. 2012). The "constitutional analysis hinges upon the reasonableness of the 'community caretaker' impound viewed in the context of the facts and circumstances encountered by the officer." *Id.*

II. The Wisconsin Supreme Court Correctly Rejected Petitioner's Request That The Court Graft A Bright-Line Standardized-Policy Mandate On The Fourth Amendment Seizure Analysis

Because "the ultimate touchstone of the Fourth Amendment is 'reasonableness,'" *Brigham City*, 547 U.S. at 403, Wisconsin courts make a totality-of-the-circumstances reasonableness determination when assessing the constitutionality of community-caretaking activities. In order to determine whether a community-caretaking impoundment was reasonable under the Fourth Amendment, Wisconsin courts engage in a three-step analysis. *See Wisconsin v. Kramer*, 759 N.W.2d 598, 605 (Wis. 2009). First, the court determines if a seizure took place. *Id.* If so, the court then determines whether the seizure was a "bona fide" community-caretaking activity. *Id.* If it was, then the court will weigh the public and private interests involved to determine if the action taken was ultimately reasonable. *Id.*

The Wisconsin Supreme Court correctly concluded that the absence or presence of standardized criteria governing impoundments is not dispositive for Fourth Amendment purposes. This Court in *Bertine* merely explained that, if a community-caretaking impoundment is undertaken "according to standard criteria" and based on "something other than suspicion of evidence of criminal activity," "[n]othing" in this Court's previous

decisions regarding inventory searches "prohibits the exercise of police discretion." 479 U.S. at 375. This Court did not hold that a community-caretaking impoundment can never be constitutional unless it is undertaken in accordance with standardized criteria. Indeed, it would be counterintuitive, to say the least, to suggest that an otherwise entirely reasonable impoundment for the sake of protecting the public was "unreasonable" under the Fourth Amendment simply because no local provision or established routine specifically authorized it. *See Smith*, 522 F.3d at 315. As the Wisconsin Supreme Court explained, the "Fourth Amendment 'reasonableness analysis does not hinge solely on any particular factor,'" including the existence of standard criteria. App. 17a (quoting *Coccia*, 446 F.3d at 239); *see also Virginia v. Moore,* 553 U.S. 164, 172 (2008) (explaining that "the Fourth Amendment's meaning" does not turn on "local law enforcement practices—even practices set by rule").

Petitioner raises several objections to the Wisconsin Supreme Court's decision, but these objections are meritless.

First, Petitioner takes issue with the Wisconsin Supreme Court's holding that a community-caretaking impoundment can satisfy the Fourth Amendment even if officers also have an "investigatory interest" in the vehicle. App. 13a. Petitioner argues that this Court in *Cady* held that community-caretaking functions "must be '*totally*

divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute,'" Pet. 18 (quoting *Cady*, 413 U.S. at 441 (emphasis added by Petitioner)), and that therefore any investigatory motive automatically invalidates any community-caretaking activity, Pet. 19–20. But this Court in *Cady* did not hold that community-caretaking functions "must be," Pet. 18, 20, "totally divorced" from criminal investigation in order to be valid, *Cady*, 413 U.S. at 441; rather, the Court merely defined community-caretaker activities as those unrelated to acquiring evidence for criminal investigations, *id.* And courts around the country are in accord that, so long as there exists a legitimate, non-investigatory reason for a community-caretaking action, the Fourth Amendment is not offended simply because police also have a subjective investigatory motive or suspicion of criminal activity. *See, e.g.*, *Petty*, 367 F.3d at 1013; *Coccia*, 446 F.3d at 240–41; *Huisman*, 544 N.W.2d at 439.

Second, Petitioner argues that the Wisconsin Supreme Court's decision creates a "loophole" for police to "evade" this Court's decision in *Arizona v. Gant*, 446 U.S. 332 (2009), which limited the scope of vehicle searches incident to arrest. Pet. 20–22. But Petitioner ignores the fact that, in order to effectuate a community-caretaking impoundment, police must have a legitimate community-caretaking reason to impound the vehicle. *See* App. 10a. Police cannot, as Petitioner suggests, simply write a driver a citation for a seatbelt violation and then impound his vehicle,

Pet. 22, as such an impoundment would clearly be unreasonable absent additional circumstances justifying the impoundment. And even if police arrest the driver rather than simply citing him, police cannot always impound the vehicle where such an impoundment would be unreasonable. For example, if there is someone present to take custody of the vehicle, *Sanders*, 796 F.3d at 1251; *Duguay*, 93 F.3d at 353, or if the vehicle is properly parked on private property, *Sanders*, 796 F.3d at 1251; *Fair*, 627 N.E.2d at 434–35, an impoundment of the vehicle may well be unreasonable.

Finally, Petitioner claims that permitting police to impound cars under the community-caretaker doctrine in the absence of standardized criteria will lead to indiscriminate seizures and abuse of authority. Pet. 22. But as the Wisconsin Supreme Court aptly noted, police are necessarily constrained by the Fourth Amendment and the requirement that their actions be *reasonable* community-caretaking functions in light of the circumstances. App. 18a–19a. And while Petitioner takes issue with the Wisconsin Supreme Court's fact-bound reasonableness determination here, claiming that an "inconvenience" for private-property owners is insufficient to justify a community-caretaking impoundment, *see* Pet. 24–25; 27–28, the Wisconsin Supreme Court's reasonableness determination was correct and based on a number of additional factors, *see infra* pp. 31–32.

III. This Case Is A Poor Vehicle For Deciding Petitioner's Question Presented Because The Officers Here Followed A Standardized Policy That Is Even Stricter Than The Policy This Court Approved In *Bertine*

A. Petitioner argues that this case presents the opportunity to decide "[w]hether standardized criteria," as defined by *Bertine*, "must guide police discretion to seize a vehicle" in the circumstances present here. Pet. i. But here there *were* standardized criteria governing the Dodge County officers' discretion to seize, as Petitioner concedes, Pet. 1–3, 29–30, and as the Wisconsin Court of Appeals held as a matter of state law. And those standardized criteria are indisputably *more stringent* than those governing the officers' discretion in *Bertine*, which criteria the *Bertine* Court explicitly held to be sufficiently standardized. Accordingly, this case is an exceedingly poor vehicle for deciding Petitioner's Question Presented.

Petitioner suggests that *Bertine* indicates what constitute sufficiently "standardized criteria" for an impoundment. *See* Pet. 19. The written impoundment policy in that case was straightforward. Although there were "several conditions that [had to] be met before an officer" could "park and lock" a car rather than have it towed, the officers could opt to impound the vehicle anytime the driver "[was] taken into custody." 479 U.S. at 368 n.1, 375–76 & n.7 (describing the policy); *id.* at 378–79

(Marshall, J., dissenting) (same); 3 Wayne R. LaFave, *Search and Seizure* § 7.3(c) (5th ed. 2012).

Although Justice Marshall's dissenting opinion contended that the impoundment policy in *Bertine* imposed "*no* standardized criteria [that] limit a Boulder police officer's discretion," 479 U.S. at 379[3]—a position echoed by Petitioner here—this Court swiftly rejected that argument as having no merit, *id.* at 375–76 (majority op.). Far from permitting the police to seize a vehicle whenever they so desired, the Boulder policy permitted seizure only after the driver's arrest. Thus the officers' discretion had been exercised "according to standard criteria and on the basis of something other than suspicion of evidence of criminal activity." *Id.*

Given that the policy in *Bertine* imposed sufficiently "standardized criteria," the Dodge County policy here *a fortiori* passes muster. That is because the impoundment policy that authorized the seizure here is *more* demanding than the one upheld in *Bertine*. Whereas the *Bertine* policy authorized impoundment whenever the driver was taken into custody *regardless* of whether the arrest would cause the car to become abandoned, 479 U.S. at 368 n.1, the Dodge County policy permits deputies to "arrange for towing of motor vehicles" "[w]hen the driver of a

[3] *See also* LaFave, *supra*, § 7.3(c) (agreeing with Justice Marshall that *Bertine* makes any standardized-criteria analysis "none too demanding").

vehicle has been taken into custody by a deputy," *and*, as a result, "the vehicle would thereby be left unattended." App. 79a. Here, Dodge County police took Petitioner into custody, and if not impounded the vehicle would otherwise have been left unattended. Thus the impoundment complied with the County's reasonable policy.

This conclusion—that an impoundment policy like Dodge County's sufficiently constrains officer discretion—is correct, settled, and splitless. Echoing Justice Marshall's dissent, Petitioner's objection is little more than a back-door invitation to relitigate a dispute in *Bertine*. Because *Bertine* definitely settles that an impoundment policy permitting seizure when the driver has been arrested and the vehicle otherwise would be left unattended is sufficiently standardized, it is unsurprising that Petitioner cannot point to a division of lower-court authority on this question.[4]

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[4] Petitioner argues that the Beaver Dam impoundment policy also improperly affords officers "unfettered discretion." Pet. 3. But, as noted *supra* pp. 3 n.1, 27, the Wisconsin Court of Appeals held as a matter of state law that the Dodge County policy, and *not* the Beaver Dam policy, governed this impoundment (given that Dodge County police made the arrest, and the storage facility was within the County's jurisdiction). That state-law holding, which was not unsettled by the Wisconsin Supreme Court's affirmance, is not in dispute here, and this Court is powerless to review it, *Martinez v. Ryan*, 566 U.S. 1, 10 (2012); *Murdock v. Memphis,* 87 U.S. (20 Wall.) 590

Indeed, far from there being division on this question, courts around the country—including some allegedly within Petitioner's "majority" camp—uniformly approve of impoundment policies materially identical to, or even less restrictive than, the County's. In *Petty*, the Eighth Circuit upheld an impoundment executed under a policy that permitted the police simply to impound any abandoned car, reasoning that this policy properly vested officers with "residual judgment [to seize a vehicle] based on legitimate concerns related to the purposes of an impoundment." 367 F.3d at 1012. Likewise, in *United States v. Cartwright*, 630 F.3d 610 (7th Cir. 2010), the Seventh Circuit upheld an impoundment undertaken pursuant to a policy that—like that in *Bertine*—permitted police to impound whenever a driver was "under custodial arrest for any charge." *Id.* at 614–15 (citation omitted). Similarly, in *Cartrette*, the Fourth Circuit upheld a seizure where, as in Dodge County, police policy permitted impounding a vehicle when the driver was arrested and there was no one present to take custody of the vehicle. 502 F. App'x at 312. Finally, in *Toohey*, 475 N.W.2d 16, the Michigan Supreme Court also upheld an impoundment undertaken pursuant to criteria that permitted officers to impound when the driver

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(1875). In any event, as the State pointed out below, the Beaver Dam impoundment policy—while seemingly more open-ended than the County's—also sufficiently constrained officer discretion by keying the officers' decision to seize to the community-caretaker doctrine.

was taken into custody and the vehicle would otherwise be left unattended. *Id.* at 18 n.1.

Another case relied upon by Petitioner turned *not* on the question whether an alleged standardized policy *sufficiently constrained* discretion—the core of Petitioner's objection to the policy here—but on the question whether there was a sufficiently *standardized* policy in the first place. In *Duguay*, the Seventh Circuit held that there was no standard criteria that were uniformly applied by officers in the first place, not that the alleged criteria failed to cabin police discretion. 93 F.3d at 351–52.

B. Making this case an even worse vehicle, the Wisconsin Supreme Court's analysis on the ultimate "touchstone" question of reasonableness in light of the circumstances is exceptionally strong. First, the officers learned that Petitioner was not the registered owner of the car, App. 3a—indeed, for all they knew, the car was stolen. Courts around the country have found it reasonable for police to impound a vehicle when no occupant owns it. *See Petty*, 367 F.3d at 1012–13 (vehicle owned by rental company); *Smith*, 522 F.3d at 314 (ownership in question). Second, leaving the car where it was would have constituted a nuisance for the private-property owner and for customers of the storage facility. The car blocked access to multiple storage units and impeded the flow of traffic through the facility. App. 2a–3a. As this Court noted in *Opperman*, police have authority that is "beyond challenge" to remove vehicles that are

"impeding traffic" or otherwise "threatening public safety or convenience." 428 U.S. at 369. And courts around the country are in accord that removing an abandoned vehicle that would otherwise constitute a nuisance is a reasonable community-caretaking function, even when that vehicle is located on private property. *See Cartwright*, 630 F.3d at 615 n.1 (officers not "obliged to leave the car where it was—stopped between two rows of parking spaces"); *Torres*, 828 F.3d at 1120 (impoundment justified when vehicle in parking lot "was positioned in a manner that could impede emergency services" and was "blocking other vehicles from accessing or exiting the parking stalls on either side of it"); *Jackson*, 682 F.3d at 455; *United States v. Brown*, 787 F.2d 929, 932 (4th Cir. 1986); *Massachusetts v. Ellerbe*, 723 N.E.2d 977, 982–83 (Mass. 2000) ("it is appropriate for the police to spare the private parking lot owner the burden of dealing with the vehicle's presence"); *compare McGaughey*, 37 P.3d at 142–43. Finally, Petitioner was likely to be detained for a significant period of time, and so could not be counted upon to make timely arrangements for the vehicle's removal. App. 12a. Courts generally find impoundments reasonable when the driver is facing a lengthy detention and will thus be abandoning the vehicle for an indefinite period of time, making the vehicle—which again, in this case, apparently did not even belong to the arrestee—a target for theft or vandalism. *See Coccia*, 446 F.3d at 240; *see also Torres*, 828 F.3d at 1120; *McKinnon*, 681 F.3d at 209; *Huisman*, 544 N.W.2d at 437;

Massachusetts v. Oliveira, 47 N.E.3d 395, 399 (Mass. 2016).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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