No. 17-781

In the Supreme Court of the United States

KENNETH M. ASBOTH, JR.,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court of Wisconsin

REPLY BRIEF FOR PETITIONER

ANDREW R. HINKEL
OFFICE OF THE STATE PUBLIC DEFENDER
Post Office Box 7862
Madison, WI 53707
(608) 267-1779

JOHN P. ELWOOD
JEREMY C. MARWELL
VINSON & ELKINS LLP
2200 Pennsylvania Ave., NW, Suite 500 West
Washington, DC 20037
(202) 639-6500

MARK T. STANCIL
Counsel of Record
MATTHEW M. MADDEN
ROBBINS, RUSSELL, ENGLERT, ORSECK, UNTEREINER & SAUBER LLP
1801 K Street, NW
Washington, D.C. 20006
(202) 775-4500
mstancil@robbinsrussell.com

DANIEL R. ORTIZ
UNIVERSITY OF VIRGINIA SCHOOL OF LAW SUPREME COURT LITIGATION CLINIC
580 Massie Road
Charlottesville, VA 22903

TABLE OF CONTENTS

Page

Table of Authorities ii

Argument

I. The Lower Courts Are Deeply Divided 1

II. Respondent's Defense Of The Decision Below Is Meritless 7

III. This Case Is An Ideal Vehicle 11

Conclusion 13

TABLE OF AUTHORITIES

Page(s)

Cases

Arizona v. *Gant*,
556 U.S. 332 (2009).....1

Cady v. *Dombrowski*,
413 U.S. 433 (1973).....9

Carroll v. *United States*,
267 U.S. 132 (1925).....11

Colorado v. *Bertine*,
479 U.S. 367 (1987).....1, 7, 8, 12

Fair v. *State*,
627 N.E.2d 427 (Ind. 1993).....2, 3

Florida v. *Wells*,
495 U.S. 1 (1990).....5, 11

Illinois v. *Lafayette*,
462 U.S. 640 (1983).....11

McGaughey v. *State*,
37 P.3d 130 (Okla. Crim. App. 2001) 7

Michigan v. *Summers*,
452 U.S. 692 (1981).....11

Miranda v. *City of Cornelius*,
429 F.3d 858 (9th Cir. 2005) 5

Riley v. *California*,
134 S. Ct. 2473 (2014).....10

Sammons v. *Taylor*,
967 F.2d 1533 (11th Cir. 1992).....2, 3

TABLE OF AUTHORITIES—Continued

Page(s)

South Dakota v. *Opperman*,
428 U.S. 364 (1976).....7, 11

United States v. *Barrios*,
374 Fed. Appx. 56 (2d Cir. 2010).....2, 6

United States v. *Cartrette*,
502 Fed. Appx. 311 (4th Cir. 2012) 5, 8

United States v. *Ceruti*,
827 F. Supp. 2d 1036 (W.D. Mo. 2011) 5

United States v. *Coccia*,
446 F.3d 233 (1st Cir. 2006) 9

United States v. *Duguay*,
93 F.3d 346 (7th Cir. 1996) 7

United States v. *Graham*,
2015 WL 4078299 (W.D. Tenn. July 6, 2015) 5

United States v. *Hockenberry*,
730 F.3d 645 (6th Cir. 2013) 5

United States v. *Jackson*,
682 F.3d 448 (6th Cir. 2012) 5

United States v. *Kornegay*,
885 F.2d 713 (10th Cir. 1989).....4

United States v. *Le*,
474 F.3d 511 (8th Cir. 2007) 5

United States v. *Martindale*,
2016 WL 4250240 (D. Idaho Aug. 11, 2016) 5

United States v. *Petty*,
367 F.3d 1009 (8th Cir. 2004).....5

TABLE OF AUTHORITIES—Continued

Page(s)

United States v. *Proctor*,
489 F.3d 1348 (D.C. Cir. 2007).....2, 6

United States v. *Sanders*,
796 F.3d 1241 (10th Cir. 2015).....1, 2, 3, 4, 6

United States v. *Smith*,
522 F.3d 305 (3d Cir. 2008).....2, 6

United States v. *Torres*,
828 F.3d 1113 (9th Cir. 2016).....5

REPLY BRIEF FOR PETITIONER

The brief in opposition presents no credible basis for denying review. The lower courts—including the majority and dissenting opinions below—openly acknowledge the widespread conflict. Respondent denies what is obvious to those courts, and succeeds only in demonstrating the disarray requiring this Court's review. Respondent's defense of the merits largely ignores those portions of this Court's prior decisions that do not square with its proffered "totality-of-the-circumstances" test, and trivializes *Arizona* v. *Gant*, 556 U.S. 332 (2009). Respondent's assertion that the seizure here would pass muster under the standardized criteria approved in *Colorado* v. *Bertine*, 479 U.S. 367 (1987), is belied by *Bertine*'s relevant text (which respondent conspicuously overlooks). This case is an ideal vehicle for deciding this concededly important and recurring question.

I. The Lower Courts Are Deeply Divided

1. Respondent's denials notwithstanding, the split among the circuits and state high courts is widely acknowledged. "A split exists," the Wisconsin Supreme Court recognized (Pet. App. 15a), rejecting respondent's similar denials below (S.Ct. Br. 26). "Several circuits agree with [petitioner]," the court explained, but "three federal circuits do not." Pet. App. 15a–16a. That frank admission that petitioner's case would have come out differently in other jurisdictions refutes respondent's position.

The Tenth Circuit recognized the same "clear divide." *United States* v. *Sanders*, 796 F.3d 1241, 1248 (2015). The Third Circuit acknowledged "the

two lines of cases." *United States* v. *Smith*, 522 F.3d 305, 314 (2008). The Second Circuit concluded that "there is a split among the circuits on this question," *United States* v. *Barrios*, 374 Fed. Appx. 56, 57 (2010), as did the D.C. Circuit, *United States* v. *Proctor*, 489 F.3d 1348, 1353 (2007).

2. The lower courts' repeated acknowledgement of their own disagreement matters far more than respondent's attempt to minimize it as mere "variance" in "language." Opp. 12. In any event, respondent's effort to subdivide the decisions on petitioner's side of the split only confirms the lower courts' confusion.

a. As an initial matter, respondent agrees that the First, Third, and Fifth Circuits hold that standardized criteria are *never* required for the warrantless seizure of an arrestee's vehicle. Opp. 21–22. Respondent also does not dispute that two other state high courts have adopted that rule. See Pet. 17 n.4.

b. "*Category 1*." Respondent admits that the Tenth Circuit, Eleventh Circuit, and Indiana Supreme Court "requir[e]" that "standardized impoundment policies" govern the warrantless seizure of an arrestee's vehicle, at least when it is not threatening public safety or blocking traffic. Opp. 13 (citing *Sanders*, *Sammons* v. *Taylor*, 967 F.2d 1533 (11th Cir. 1992), and *Fair* v. *State*, 627 N.E.2d 427 (Ind. 1993)). Those courts' ***undisputed*** adoption of a standardized-criteria requirement conflicts with the decision below, and other decisions, which *never* require standardized criteria.

Respondent nevertheless attempts to distinguish *Sanders* and the other "Category 1" decisions, because they purportedly take a "more nuanced" approach to cars threatening public safety or obstructing traffic. Opp. 13.[1] The court below, however, recognized *Sanders* was squarely on point, listing the Tenth Circuit among circuits that "agree with [petitioner]." Pet. App. 15a; see also *id.* at 15a n.4 (including *Fair* among petitioner's 14 state-court decisions). And the dissenting justices would have applied "the *Sanders* test" to rule for petitioner. *Id.* at 27a.

What is more, *the Tenth Circuit* understood *Sanders* to conflict with other circuits. "[T]o hold, as have the First, Third, and Fifth Circuits, that standardized criteria are never relevant," the court concluded, "is to ignore the plain language of *Bertine*." *Sanders*, 796 F.3d at 1249. The Tenth Circuit instead recognized that *Bertine* made "the existence of standardized criteria the touchstone of

---

[1] No case squarely embraces that nuance. *Sanders* required standardized criteria, and did not involve a public-safety threat or traffic obstruction. 796 F.3d at 1250. *Sammons* held that officers could seize a car without a warrant "*[e]ven if* an arrestee's vehicle is not impeding traffic or otherwise presenting a hazard * * * *so long as* the decision to impound is made on the basis of standard criteria." 967 F.2d at 1543 (emphasis added). And *Fair* limited warrantless seizures to when "the vehicle posed some threat or harm to the community" *and* the seizure "was in keeping with established departmental routine or regulation." 627 N.E.2d at 433.

the inquiry." *Id.* at 1248–1249. That holding and the decision below are squarely at odds.[2]

In any event, Category 1's purported "nuance[]" is of no moment. When a car threatens public safety or blocks traffic its "impoundment is *immediately necessary*." *Sanders*, 796 F.3d at 1249 (emphasis added). That immediate necessity may limit discretion in the way that standardized criteria do in other contexts. Respondent does not argue—nor could it—that it was immediately necessary to seize petitioner's car. Petitioner's car indisputably posed no public-safety threat and other cars could "maneuver around" it. See Pet. 4; Pet. App. 2a.

c. "*Category 2*." Respondent's "Category 2" comprises cases in four circuits and six states also "purporting to 'require' [standardized] criteria." Opp. 15–18 (citing cases). Respondent contends that those decisions have no bearing on the question presented because they concluded that police *had* followed standardized criteria. *Id.* at 16. That is nonsense.

For starters, these courts do more than merely "purport" to require standardized criteria. Opp. 15. They demand it. The Ninth Circuit requires officers to seize cars only "in conformance with the standardized procedures of the local police department."

---

[2] Respondent is wrong (at 14) that *Sanders* held otherwise by quoting *United States* v. *Kornegay*, 885 F.2d 713 (10th Cir. 1989). *Kornegay* did not address the question presented, and *Sanders* quoted it during a survey of circuit law that had not "precisely defined" the "contours of when an impoundment is permissible." 796 F.3d at 1245.

United States v. *Torres*, 828 F.3d 1113, 1118 (2016); see also *Miranda* v. *City of Cornelius*, 429 F.3d 858, 863 (2005). The Sixth Circuit held that discretionary warrantless seizures are "permissible so long as that discretion is exercised according to standard criteria." *United States* v. *Hockenberry*, 730 F.3d 645, 658 (2013) (quoting *United States* v. *Jackson*, 682 F.3d 448, 454 (2012)). The Fourth Circuit concluded that "*Bertine* requires standard criteria for impounding vehicles." *United States* v. *Cartrette*, 502 Fed. Appx. 311, 317 (2012). And the Eighth Circuit requires that "'standardized criteria' or 'established routine' must regulate" warrantless vehicle seizures. *United States* v. *Petty*, 367 F.3d 1009, 1012 (2004) (quoting *Florida* v. *Wells*, 495 U.S. 1, 4 (1990)); see also *United States* v. *Le*, 474 F.3d 511, 514 (2007).[3]

Respondent dismisses those holdings as "dicta" (Opp. 15) because police had properly adhered to standardized criteria. But compliance with a court's express directive does not render the directive *dicta*. No police department or judge in these jurisdictions could reasonably ignore these courts' standardized-criteria requirement merely because it was *met* in the cases pronouncing it. Courts in these jurisdictions evidently agree. See, *e.g.*, *United States* v. *Martindale*, 2016 WL 4250240, at *2 (D. Idaho Aug. 11, 2016); *United States* v. *Graham*, 2015 WL 4078299, at *10 n.30 (W.D. Tenn. July 6, 2015); *United States* v. *Ceruti*, 827 F. Supp. 2d 1036, 1046

[3] The state high courts that respondent puts in this category have been similarly clear. See Pet. 14–15.

(W.D. Mo. 2011). Respondent stands alone in treating these holdings as mere *dicta*.

d. "*Category 3*." Respondent claims that D.C. Circuit and Oklahoma cases do not "even indirectly" require standardized criteria. Opp. 18. Not so.

The petition did not include the D.C. Circuit among the seven circuits squarely on petitioner's side. See Pet. 14 (discussing *Proctor*, 489 F.3d 1348). There are what the Tenth Circuit called "subtle differences" between *Proctor* and holdings of the Fourth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits. *Sanders*, 796 F.3d at 1248. *Proctor* held that failing to follow *existing* standardized criteria renders a warrantless vehicle seizure unconstitutional (contra Pet. App. 18a), but did not decide whether police must *have* standardized criteria in the first place. See 489 F.3d at 1354.

But respondent is wrong that *Proctor* does not "even indirectly" support a standardized-criteria requirement. Circuits on both sides of the split have concluded otherwise. See *Sanders*, 796 F.3d at 1247–1248; *Smith*, 522 F.3d at 312; *Barrios*, 374 Fed. Appx. at 57. Indeed, the D.C. Circuit acknowledged that it was wading into the circuits' disagreement, and declined to adopt the approach taken below. See 489 F.3d at 1354. *Proctor* thus confirms the wide-

spread division, even if it stopped short of fully joining the fray.[4]

e. Finally, respondent struggles to distinguish *United States* v. *Duguay*, 93 F.3d 346 (7th Cir. 1996). Opp. 19–21. *Duguay*, respondent concedes, "faulted the police for not employing a sufficiently 'standardized impoundment procedure.'" Opp. 19. The Seventh Circuit held that was a sufficient and "independent" Fourth Amendment violation. 93 F.3d at 351. Respondent has no serious answer to that holding.

II. Respondent's Defense Of The Decision Below Is Meritless

Respondent's defense of the decision below consists largely of ignoring or summarily dismissing those portions of this Court's decisions with which it disagrees. But respondent offers no basis to jettison decades of precedent for its flawed "totality-of-the-circumstances" test, which would allow a narrow exception to the Fourth Amendment's probable-cause and warrant requirements to swallow the rule.

1. Although *Bertine* lies at the center of the conflict among the lower courts, respondent says precious little about it. Instead, respondent dismisses and mischaracterizes this Court's holding.

---

[4] *McGaughey* v. *State*, 37 P.3d 130, 142 n.67 (Okla. Crim. App. 2001), cited *Bertine* and *South Dakota* v. *Opperman*, 428 U.S. 364, 369 (1976), as consistent with Oklahoma cases.

Respondent's first plea is simply to disregard the passages of *Bertine* that contradict its position. While conceding that *Bertine* addressed whether a vehicle seizure was unconstitutional because officers had discretion whether to seize the car or leave it behind (Opp. 12), respondent suggests that this Court "only obliquely" upheld the seizure because it had been conducted according to standardized criteria. *Ibid.* Respondent even implies that this Court's holding can be given short shrift because it appears "[i]n the second-to-last paragraph of its opinion." *Ibid.* That's not how precedent works.

Respondent next attempts to distort *Bertine*'s text. As respondent would have it:

> 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."

Opp. 23–24 (quoting 479 U.S. at 375). This is mere sleight of hand. By breaking *Bertine*'s holding into four separate quotations, respondent omits the "so long as" language crucial to its meaning. *Bertine* held that police may invoke the community-caretaking exception "***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." 479 U.S. at 375 (emphases added). That is why numerous lower courts have held that "*Bertine* ***requires*** standard criteria for impounding vehicles." *Cartrette*, 502 Fed. Appx. at 317 (emphases added).

2. Respondent's discussion of *Cady* v. *Dombrowski*, 413 U.S. 433 (1973), is similarly misguided. *Cady* made clear that a legitimate community-caretaking rationale is "totally divorced from the detection, investigation, or acquisition of evidence." *Id.* at 441. The decision below, however, held that a community-caretaking seizure passes muster if it rests "not exclusively on" investigatory motives. Pet. App. 18a (quoting *United States* v. *Coccia*, 446 F.3d 233, 239 (1st Cir. 2006)). "Totally divorced from" is not the same as "based only in part on."

Unable to square that circle, respondent dismisses *Cady* as "merely defin[ing] community-caretaking activities." Opp. 25. But that is exactly our point: *Cady* explained that legitimate exercises of community-caretaking functions have *nothing* to do with investigation. That is why the Court emphasized that the officers had acted only out of "concern for the safety of the general public" when they were "ignorant" of any potential criminal activity. 413 U.S. at 447.

Moreover, the purpose of requiring standardized criteria is to achieve *Cady*'s objective of "totally divorc[ing]" community-caretaking functions from investigatory motives. If police must decide whether to seize based on meaningful standards aimed at whether a vehicle presents a safety threat or other hazard, then they are unlikely to invoke that warrant exception for illegitimate ends. But where, as here, officers have unfettered discretion, the community-caretaking exception is essentially limitless.

3. Respondent's attempt to reconcile the decision below with *Gant* falls flat. As explained in

the petition (at 20–22), *Gant* strictly tethered warrantless vehicle searches incident to arrest to officer-safety and evidence-preservation concerns. The decision below eviscerates those restrictions, however, because police may simply seize (then search) arrestees' vehicles under the community-caretaking exception. Respondent contends that police must still have a "community-caretaking reason to impound the vehicle." Opp. 25. But that is no meaningful limitation, since respondent defines such reasons to include anytime "someone [is not] present to take custody of the vehicle" ***or*** the car is not "properly parked on private property." Opp. 26. Respondent thus leaves *Gant* to apply only where there are multiple licensed and authorized drivers in the vehicle, or its driver is arrested after first parking between the lines. The number of driver arrests effected under such pristine circumstances must be vanishingly small.

Indeed, the seizure here illustrates just how malleable respondent's supposed limitations are. Petitioner's car was parked on private property, but, in respondent's view, might have "inconvenienced" other customers' access to storage units. Pet. App. 11a. If maintaining convenient access to old furniture is a profound enough community interest to justify ignoring the warrant requirement, then respondent's view has few limits.

Rather than acknowledge the absence of meaningful constraints, respondent embraces the shop-worn "totality-of-the-circumstances" mantra. Opp. 23. This Court, however, has repeatedly stressed the value of clear rules and specific, *ex ante* guidance. See *Riley* v. *California*, 134 S. Ct. 2473,

2491–2492 (2014); *Michigan* v. *Summers*, 452 U.S. 692, 705 n.19 (1981); *Carroll* v. *United States*, 267 U.S. 132, 159 (1925). To that end, the Court has acknowledged that standardized criteria are an essential Fourth Amendment safeguard against warrantless searches and seizures becoming "a ruse * * * to discover incriminating evidence." *Wells*, 495 U.S. at 4 (closed containers during inventory search); see also *Illinois* v. *Lafayette*, 462 U.S. 640, 646 (1983) (stationhouse search of arrestee's bag); *Opperman*, 428 U.S. at 374–376 (vehicle inventory search). Respondent would jettison that precedent—and decades of experience showing that it works—in favor of a sprawling "reasonableness" inquiry that will yield more litigation, more uncertainty for police, and more intrusions on the rights of citizens.

III. This Case Is An Ideal Vehicle

1. Respondent cannot seriously dispute that the question is squarely presented. The trial court decided the issue on a fully developed record, and it was undisputed that its answer was dispositive of petitioner's suppression motion. The question was then analyzed by the intermediate appellate court and in two lengthy opinions by the Wisconsin Supreme Court. This Court seldom encounters issues framed as comprehensively and neatly as this one. Nor does respondent dispute that the frequency of vehicle seizures, and the burdens they impose, make the issue recurring and important. Pet. 26–28.

2. Respondent instead devotes much of its brief to claiming that the officers who seized petitioner's car followed a policy "even stricter" than the standardized criteria approved in *Bertine*. Respondent

claims that this case is therefore a poor vehicle for deciding the question presented. Respondent's premise and conclusion are false.

Respondent's premise rests on a cherry-picked reading of *Bertine*. Respondent claims that the Dodge County policy invoked here is "indisputably *more stringent* than those governing the officers' discretion in *Bertine*." Opp. 27. Respondent cites footnote 1 of *Bertine*, which in turn cites Boulder Revised Code Section 7-7-2(a)(4)'s authorization of police officers' seizure of vehicles whenever drivers are "taken into custody." Opp. 27–28 (citing 479 U.S. 367, 368 n.1). Respondent then recites *Bertine*'s holding that "the officers' discretion had been exercised 'according to standard criteria.'" Opp. 28 (citing 479 U.S. at 375–376). The implication is that Section 7-7-2(a)(4) was the "standard" criteria that adequately constrained the officers' discretion.

But respondent conspicuously omits *Bertine*'s very next sentence: "[T]he discretion afforded the Boulder police was exercised in light of standardized criteria, *related to the feasibility and appropriateness of parking and locking a vehicle rather than impounding it*." 479 U.S. at 375–376 (emphasis added). Boulder's restrictions on parking-and-locking arrestees' vehicles, the Court explained, "establishe[d] several conditions that * * * circumscribe[d] the discretion of [the] officers." 479 U.S. at 376 n.7. "For example, police may not park and lock the vehicle where there is reasonable risk of damage or vandalism to the vehicle or where the approval of the arrestee cannot be obtained." *Ibid*. Those criteria forbade leaving a car in place (and thus required seizure) whenever there was a risk of

property damage or the driver could not consent to leaving it.

That is far more "stringent" than Dodge County's policy, which gave officers unfettered discretion to leave or seize petitioner's car at their option. See Pet. App. 78a–79a. Indeed, it is undisputed that officers did not ask petitioner or the storage-facility owner for permission to leave the car, nor was there any damage risk to the car (which, to the contrary, was parked inside a private storage facility). In short, respondent's contention that the seizure of petitioner's vehicle would have passed muster under the criteria at issue in *Bertine* is just plain wrong.[5]

Tellingly, the Wisconsin Supreme Court did not believe that Dodge County's policy measured up to the standardized criteria in *Bertine*. That is why that court squarely decided the question without any suggestion that it was not properly presented.

CONCLUSION

The petition for a writ of certiorari should be granted.

---

[5] Respondent's assertion (Opp. 30) that Dodge County's policy mirrors standardized criteria approved by other courts is misguided. *Petty* and *Cartrette*, for example, involved standard procedures *always* to tow an arrestee's unattended car. Dodge County, however, afforded officers total discretion.

Respectfully submitted.

ANDREW R. HINKEL
OFFICE OF THE STATE PUBLIC DEFENDER
Post Office Box 7862
Madison, WI 53707
(608) 267-1779

JOHN P. ELWOOD
JEREMY C. MARWELL
VINSON & ELKINS LLP
2200 Pennsylvania Ave., NW, Suite 500 West
Washington, DC 20037
(202) 639-6500

MARK T. STANCIL
Counsel of Record
MATTHEW M. MADDEN
ROBBINS, RUSSELL, ENGLERT, ORSECK, UNTEREINER & SAUBER LLP
1801 K Street, NW
Washington, D.C. 20006
(202) 775-4500
mstancil@robbinsrussell.com

DANIEL R. ORTIZ
UNIVERSITY OF VIRGINIA SCHOOL OF LAW SUPREME COURT LITIGATION CLINIC
580 Massie Road
Charlottesville, VA 22903

February 2018