No. 21-_____

IN THE

SUPREME COURT OF THE UNITED STATES

TESFA CONNELL,

Petitioner,

v.

STATE OF NEW YORK,

Respondent.

On Petition for a Writ of Certiorari
to the New York Supreme Court,
Appellate Division, Second Department

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court has recognized a "community caretaking" exception to the Fourth Amendment's warrant requirement that permits officers to conduct warrantless inventory searches of vehicles that have been lawfully impounded for reasons unrelated to criminal investigations. To pass Fourth Amendment muster, such inventory searches must adhere to standardized criteria that limit an individual officer's discretion in conducting the search. *See Colorado v. Bertine*, 479 U.S. 367, 374 (1987).

The question presented is: Whether the Fourth Amendment likewise mandates that standardized criteria govern an officer's antecedent decision to impound a legally and safely parked car.

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Constitutional Provisions

INTRODUCTION

"[T]he central concern underlying the Fourth Amendment [is] the concern about giving police officers unbridled discretion to rummage at will among a person's private effects." *Arizona v. Gant*, 556 U.S. 332, 345 (2009). To prevent such abuses, this Court has held that searches and seizures conducted without a warrant are "*per se* unreasonable . . . subject only to a few specially established and well-delineated exceptions." *Id.* at 338 (internal quotation marks and citation omitted).

One such exception is the community caretaking exception. "Because of the extensive regulation of motor vehicles . . . [and] the frequency with which [they] can become disabled or involved in an accident," police officers frequently come into contact with vehicles while performing "community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973). The community caretaking exception permits officers to conduct a warrantless inventory search of a car they have lawfully impounded pursuant to their non-investigatory role. *South Dakota v. Opperman*, 428 U.S. 364, 375–76 (1976).

But this exception has limits. In particular, this Court has consistently emphasized that community caretaking inventory searches must be conducted according to "standardized criteria" that ensure "[t]he individual police officer" does not have "so much latitude that inventory searches are turned into 'a purposeful and general means of discovering evidence of crime.'" *Florida v. Wells*, 495 U.S. 1, 4 (1990) (quoting *Colorado v. Bertine*, 479 U.S. 367, 376 (1987) (Blackmun, J., concurring)); *see also Delaware v. Prouse*, 440 U.S. 648, 661 (1979) ("[S]tandardless and unconstrained discretion is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed, at least to some extent.").

This case presents the question whether discretion-limiting standards—which this Court expressly requires at the inventory stage—are likewise mandated at the impoundment stage. This Court's opinion in *Colorado v. Bertine* suggests as much. *Bertine* rejected a Fourth Amendment challenge to an inventory search of an impounded van where both the impoundment and the inventory conformed with police department regulations. *See* 479 U.S. at 375–76, 376 n.7. In reaching its holding, the *Bertine* Court observed that the Fourth Amendment permits

an officer some discretion in deciding whether to impound a vehicle pursuant to her community caretaking role "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.

There is nonetheless an entrenched split of authority on the question presented. The majority of courts, consistent with *Bertine*, hold that the Fourth Amendment requires that standardized criteria govern an officer's impoundment decision. But a minority—including the Appellate Division of the New York Supreme Court in the decision below—believe that it does not. Because police officers routinely impound vehicles pursuant to their non-investigatory community caretaking role, unconstrained police discretion regarding when, where, and how to impound a car presents the same "grave danger of abuse" as unconstrained police discretion in conducting the subsequent inventory search. *See Prouse*, 440 U.S. at 662 (internal quotation marks and citation omitted); *Cady,* 413 U.S. at 441. This Court should grant certiorari and reverse.

OPINIONS BELOW

The New York Court of Appeals' denial of Petitioner Tesfa Connell's application for leave to appeal (App. 1a) is reported at *People v. Connell*, 36 N.Y.3d 928, 159 N.E.3d 1092 (2020). The decision of the New York Supreme Court, Appellate Division, Second Department (App. 2a–3a), is reported at *People v. Connell*, 126 N.Y.S.3d 372, 185 A.D.3d 1048 (2020). The relevant judgment of the New York Supreme Court, Kings County (App. 32a–37a), is unpublished.

JURISDICTION

The New York Court of Appeals denied Mr. Connell's application for leave to appeal on November 19, 2020. Mr. Connell invokes this Court's jurisdiction under 28 U.S.C. § 1257(a), having timely filed this petition for a writ of certiorari within ninety days of the New York Court of Appeals' order denying discretionary review. *See* S. Ct. R. 13.1.

RELEVANT CONSTITUTIONAL PROVISION

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

STATEMENT OF THE CASE

Two New York Police Department (N.Y.P.D.) officers impounded Petitioner Tesfa Connell's legally parked car after arresting him for driving with a suspended license. A subsequent inventory search revealed evidence of an unrelated forgery offense, for which Mr. Connell was subsequently tried and convicted. This petition raises the question whether the officers' purely discretionary choice to conduct a warrantless impoundment of Mr. Connell's vehicle when it did not "jeopardize . . . the public safety and the efficient movement of vehicular traffic" violated the Fourth Amendment. *See Opperman*, 428 U.S. at 369.

1. Shortly before 1:00 a.m. on November 28, 2012, two N.Y.P.D. officers stopped Petitioner Tesfa Connell for running a red light in Brooklyn. App. 47a–48a, 50a. Mr. Connell parked his Mercedes Benz in a legal curbside parking spot. *Id.* at 41a, 60a. After learning that Mr. Connell's license was suspended, the officers arrested him.[1] They did not give him an opportunity to have someone pick up the car and, instead,

[1] Specifically, Mr. Connell was charged with third-degree aggravated unlicensed operation of a motor vehicle. App. 100a. Mr. Connell's license had been suspended less than three months earlier because he failed to pay a $50 reinstatement fee associated with a charge of driving without a seatbelt. *Id.* at 88a.

impounded it. *Id.* at 54a. An inventory search revealed cash, credit cards, and a driver's license under a different name. *Id.* at 45a. Based on this evidence, the State of New York charged Mr. Connell with criminal possession of a forged instrument. *Id.* at 2a.

2. Mr. Connell moved to suppress the items discovered during the inventory search, contending that the impoundment violated the Fourth Amendment because no established statutory or departmental operating procedures guided the officers' decision to seize his car. App. 13a, 16a–17a. He testified at the suppression hearing that he "wanted to leave [his] car" in its parking spot because it was in "a very safe neighborhood and . . . on a good residential block." *Id.* at 64a. But the arresting officer testified that she personally impounded a vehicle whenever it belonged to the arrestee. *Id.* at 52a. When asked to provide an N.Y.P.D. policy governing her impoundment decision, she maintained that the "patrol guide says that you have to safeguard a vehicle" following the owner's arrest. *Id.* at 51a. The State, though, presented no evidence of such an impoundment policy—in the patrol guide or elsewhere. Pressed for evidence at the hearing, the officer pointed only to a patrol guide provision about conducting inventory searches *after* a vehicle had

already been impounded. *Id.* at 52a; *see id.* at 88a. Ultimately, the officer denied that she could have left the car where it was, explaining:

> We have to keep, have his car for safekeeping. We can't just leave his personal property on the street . . . . Anything could happen to it. That is why we take it in for safekeeping.

Id. at 51a.

The trial court denied the motion to suppress. In so doing, it rejected Mr. Connell's argument that standardized criteria must govern both how to conduct an inventory search and the threshold question of whether to impound. *Id.* at 13a. The court instead asked only whether the impoundment was "reasonable," and deemed it "patently unreasonable" to "ask the police department to leave a white Mercedes Benz on a Brooklyn street after midnight in the absence of a request." *Id.* at 34a–35a. The court further opined that leaving Mr. Connell's car where he had parked it could have subjected the police to "unduly burdensome steps" and "significant liability." *Id.* at 35a.

A jury subsequently convicted Mr. Connell of criminal possession of a forged instrument.

3. Mr. Connell appealed the denial of his suppression motion, arguing that "the [State] failed to meet [its] burden of establishing a

standardized policy regarding impoundment." App. 101a. Accordingly, he contended that the community caretaking exception to the Fourth Amendment's warrant requirement could not justify the seizure and subsequent search of his car. *Id.*

The State did not dispute that the car was parked safely and legally. It also recognized that neither the patrol guide nor any statute provided standardized criteria that governed the officer's impoundment decision. *See id.* at 137a, 142a. It parted company with Mr. Connell, however, on the issue of whether the Fourth Amendment required a standardized impoundment policy at all. The State urged the court instead to examine the impoundment decision, "just like the [trial] court did in this case, under the general rubric of reasonableness given the totality of the circumstances." *Id*. at 139a–40a.

On July 29, 2020, the New York Appellate Division, Second Judicial Department, affirmed the denial of Mr. Connell's suppression motion. *Id.* at 2a. Performing the reasonableness analysis the State had urged, the court held that "police officers properly impounded [Mr. Connell's] vehicle after his arrest for driving with a suspended license since there was no

other licensed driver present who could take possession of the vehicle." *Id.* at 3a.

4. Mr. Connell timely applied for leave to appeal to the New York Court of Appeals. He urged the court to clarify whether the State "must establish the existence of and compliance with a standardized departmental policy regarding impoundment" to satisfy the Fourth Amendment or whether, consistent with the appellate court's ruling, "no such requirement exists so long as the impoundment is 'reasonable.'" App. 149a. The State countered that there was "no reason for the Court of Appeals to 'clarify'" whether a standard impoundment policy is needed because "such a rule . . . is plainly anathema to Fourth Amendment jurisprudence." *Id.* at 158a.

On November 19, 2020, the New York Court of Appeals denied Mr. Connell's application for leave to appeal. *Id.* at 1a.

REASONS FOR GRANTING THE WRIT

Federal circuit courts and state courts of last resort are deeply divided about whether "community caretaking" impoundments, like the inventory searches that typically follow them, must be governed by standardized criteria to satisfy the Fourth Amendment. Six federal

courts of appeals have said yes; four have said no. State courts are likewise split. The minority view leaves citizens vulnerable to "indiscriminate official interference," *United States v. Brignoni-Ponce*, 422 U.S. 873, 883 (1975), such that disfavored individuals or groups may be forced to bear the severe, disproportionate consequences of capricious or pretextual impoundment decisions. This case is an ideal vehicle for this Court to reaffirm the necessary Fourth Amendment limits on police discretion. The State has never disputed the key facts, and the parties have repeatedly pressed the question presented at every stage of this litigation. This Court should grant certiorari and reverse the erroneous decision below.

I. The Question Presented Concerns an Intractable Split of Authority on a Recurring Question Only This Court Can Resolve.

This Court has yet to directly resolve whether the Fourth Amendment requires that standardized statutory or departmental criteria limit an officer's discretion to impound a vehicle without a warrant. Despite *Bertine*'s observation that discretionary impoundments are permitted only "so long as that discretion is exercised according to standard criteria," 479 U.S. at 375, courts differ on whether the

established "requirement that *inventories* be conducted according to standardized criteria," *id.* at 374 n.6 (emphasis added), extends to the predicate impoundment decision.

Federal courts of appeals and state courts of last resort have both acknowledged the "conflict," with some expressly "decid[ing] which of the two lines of cases to follow." *United States v. Smith*, 522 F.3d 305, 312, 314 (3d Cir. 2008); *see, e.g.*, *United States v. Lyle*, 919 F.3d 716, 728 (2d Cir. 2019) ("The question of whether *Bertine* and similar Supreme Court precedent require an officer's decision to impound a car to be made pursuant to standardized criteria . . . has created a split among the circuits."); *United States v. Sanders*, 796 F.3d 1241, 1245 (10th Cir. 2015) ("Assessing when [warrantless] impoundments are constitutional has generated controversy both within our circuit and among other circuits."); *State v. Asboth*, 898 N.W.2d 541, 548 (Wis. 2017) ("A split exists among the federal courts of appeals regarding *Bertine*'s impact on impoundments by officers performing community caretaker functions."); *see also* Wayne A. Logan, *Constitutional Cacophony: Federal Circuit Splits and the Fourth Amendment*, 65 Vand. L. Rev. 1137, 1198 (2012) (noting a federal circuit split over "[w]hether impoundment of auto per

'community caretaking' doctrine, resulting in inventory, must be based on standardized procedure").

Notwithstanding subtle distinctions in their analyses, six circuits—the Seventh, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits—as well as at least five state high courts, require that officers' discretion to impound vehicles as part of their community caretaking functions adhere to standardized criteria, whether in the form of state law, municipal ordinance, or local department policy. By contrast, four circuits—the First, Second, Third, and Fifth Circuits—together with Wisconsin's Supreme Court, assess the general "reasonableness" of the impoundment decision regardless of whether any standardized impoundment criteria exist.

A. The Seventh, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits, as Well as At Least Five State High Courts, Require That Impoundments Be Governed by Standardized Criteria When the Vehicle Poses No Safety Hazard or Traffic Nuisance.

On one side of the split sit the Seventh, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits, as well as the state high courts of Ohio, Colorado, Iowa, Oklahoma, and North Dakota. These jurisdictions have concluded that, to satisfy the Fourth Amendment, standardized criteria

must govern warrantless impoundments that—like the one at issue here—do not address immediate safety hazards and traffic nuisances.

The Seventh, Tenth, and Eleventh Circuits have all squarely held that the lack of standardized criteria supporting a warrantless community caretaking impoundment is fatal to the impoundment's constitutionality. In *United States v. Duguay*, for example, the Seventh Circuit invalidated an impoundment specifically because the court was "not satisfied that the . . . Police Department employ[ed] a standardized impoundment procedure." 93 F.3d 346, 351 (7th Cir. 1996). The Tenth Circuit, like "a majority of circuits," has similarly recognized that "the existence of standardized criteria [is] the touchstone of the inquiry into whether an impoundment is lawful," *Sanders*, 796 F.3d at 1248–49, and has found an impoundment from a private lot unconstitutional "because the officers were not guided by standardized criteria."[2] *Id.* at 1250 (noting that the "municipal code explicitly authorize[d] the impoundment of vehicles from *public* property in a list of enumerated circumstances"

[2] The Tenth Circuit has observed that standardized criteria may not be required when a vehicle is "obstructing traffic []or creating an imminent threat to public safety." *See Sanders*, 796 F.3d at 1248. Such exigencies are not raised in this case because it is undisputed that Mr. Connell's vehicle was lawfully and safely parked.

but "nowhere mention[ed] impoundment from *private* lots"). And the Eleventh Circuit is in accord. *See, e.g.*, *Sammons v. Taylor*, 967 F.2d 1533, 1543–45 (11th Cir. 1992) (denying qualified immunity due to a factual dispute over whether a standard policy governed FBI agents' decision to impound a vehicle).

The Eighth and Ninth Circuits take the same view. For example, the Eighth Circuit requires that "[s]ome degree of 'standardized criteria' or 'established routine' must . . . ensure that impoundments . . . are not merely 'a ruse for general rummaging in order to discover incriminating evidence.'" *United States v. Petty*, 367 F.3d 1009, 1012 (8th Cir. 2004) (quoting *Wells*, 495 U.S. at 4); *see id.* (finding department impoundment policy "sufficiently 'standardized'" even though it gave officers "*some* 'latitude' and 'exercise of judgment'" in deciding, for example, whether a vehicle was "abandoned" (emphasis added)). And the Ninth Circuit has held that "[t]he decision to impound must be guided by conditions which 'circumscribe the discretion of individual officers' in a way that furthers the caretaking purpose." *Miranda v. City of Cornelius*, 429 F.3d 858, 866 (9th Cir. 2005) (quoting *Bertine*, 479 U.S. at 376 n.7); *see United States v. Torres*, 828 F.3d 1113, 1119 (9th Cir. 2016) (upholding impoundment

where a departmental policy manual "enumerate[d] a limited set of [caretaking] circumstances in which a vehicle may be towed").[3]

The D.C. Circuit also reads *Bertine* to "suggest[] that a reasonable, standard police procedure must govern the decision to impound." *See United States v. Proctor*, 489 F.3d 1348, 1353 (D.C. Cir. 2007) (citing *Bertine*, 479 U.S. at 375–76). In *Proctor*, the court concluded that the impoundment at issue was unlawful because the police did not follow their department's standard impoundment procedure. *Id.* at 1356. Specifically, the D.C. Circuit rejected the arresting officer's justification for impoundment, namely that the arrestee "was not the owner and no

[3] While standardized criteria are *necessary* to establish the constitutionality of a community caretaking impoundment in the foregoing circuits, they are not independently *sufficient* to do so. *See Torres*, 828 F.3d at 1119 (requiring that impoundments also "comport with the police's role as 'caretakers' of the streets"); *Duguay*, 93 F.3d at 353 (suggesting policy requiring impoundment "regardless of . . . any traffic congestion, parking violation, or road hazard" would be "inconsistent with 'caretaking' functions"); *Petty*, 367 F.3d at 1012 (upholding impoundment conducted "pursuant to . . . standard policy" only where "exercise of the community caretaking function was warranted"); *United States v. Gaines*, 918 F.3d 793, 801 (10th Cir. 2019) (noting that, even with standardized criteria, "the police could impound the car only upon proof of a community-caretaking rationale"); *Sammons*, 967 F.2d at 1539 (asking whether the asserted caretaking rationale "was a pretext concealing an investigatory police motive" (quoting *Opperman*, 428 U.S. at 375–76)).

one else was present to take custody of the vehicle," *id.* at 1350, because the police department's written procedures mandated "provid[ing] the arrestee with the opportunity to arrange for [the vehicle's] removal." *Id.* at 1354.[4]

Likewise, several state high courts hold that the Fourth Amendment requires that standardized criteria govern community caretaking impoundments. In *State v. Leak*, for example, the Ohio Supreme Court invalidated the impoundment of a "legally parked car . . . just prior" to the arrest of a passenger believed to be the owner where "[n]othing in the record . . . indicate[d] any of the [codified] circumstances justifying the impoundment of a vehicle existed." 47 N.E.3d 821, 825, 829 (Ohio 2016). There was "no evidence . . . of a department procedure

[4] Although *Proctor* could be read to hold only that "*if* a standard impoundment procedure exists, a police officer's failure to adhere thereto is unreasonable and violates the Fourth Amendment," 489 F.3d at 1354 (emphasis added), courts inside and outside the D.C. Circuit understand the decision to require standardized criteria. *See, e.g.*, *Olaniyi v. District of Columbia*, 763 F. Supp. 2d 70, 105 (D.D.C. 2011) ("In this circuit, a community caretaking impoundment must be based on . . . a reasonable standard police procedure governing decisions on whether to impound . . . ." (internal quotation marks and citation omitted)); *see also Smith*, 522 F.3d at 314 ("[W]e understand *Proctor* to require . . . a reasonable standard police procedure governing decisions on whether to impound . . . .").

requiring impoundment of a vehicle upon its owner's arrest," and it was "undisputed that the car . . . was legally parked and not impeding traffic or obstructing the roadway." *Id.* at 828 n.2, 829.

Similarly, the Colorado Supreme Court recently "conclud[ed] that [a] seizure and subsequent inventory . . . violated . . . the Fourth Amendment" where the State neither "present[ed] any evidence . . . to establish that the officers [impounded the vehicle] in accordance with any written or oral standardized criteria or policies" nor "introduce[d] any evidence that such criteria or policies existed." *People v. Allen*, 450 P.3d 724, 729–30 (Colo. 2019) (emphasizing that "the existence of standardized criteria or policies is a necessary condition of the community caretaking exception to the warrant requirement").

The high courts of Iowa, Oklahoma, and North Dakota also understand the Fourth Amendment to require standardized criteria. *See State v. Huisman*, 544 N.W.2d 433, 437 (Iowa 1996) (declining to "examine the reasonableness of [an] officer's decision to impound" because *Bertine* had "shifted" the analysis "from the reasonableness of the officer's decision to the existence of reasonable standardized policies" (citing *Bertine*, 479 U.S. at 375)); *id.* at 438 (upholding impoundment of

arrestee's vehicle because the written "policy allow[ed] an officer to exercise judgment regarding whether to impound a vehicle when the officer arrests the operator"); *McGaughey v. State*, 37 P.3d 130, 143 (Okla. Crim. App. 2001) (holding an impoundment unconstitutional where the prosecution did not "offer any law, ordinance, or police department policy authorizing the impound"); *State v. Pogue*, 868 N.W.2d 522, 528 (N.D. 2015) ("The impounding of a vehicle passes constitutional muster so long as the decision to impound is guided by a standard policy—even a policy that provides officers with discretion as to the proper course of action to take . . . ." (citing *United States v. Le*, 474 F.3d 511, 514 (8th Cir. 2007)).

Any one of these jurisdictions would have held the impoundment in Mr. Connell's case unlawful under the Fourth Amendment.

B. The First, Second, Third, and Fifth Circuits, as Well as Wisconsin's Supreme Court, Uphold Warrantless Impoundments Absent Any Standardized Criteria.

By contrast, the First, Second, Third, and Fifth Circuits—as well as Wisconsin's highest court—do not interpret *Bertine* or the Fourth Amendment to require standardized criteria that limit an officer's discretion to impound a vehicle for community caretaking purposes, even

when the vehicle does not implicate concerns of public safety and traffic control.

Disagreeing with the premise "that the absence of standardized criteria invalidates [an] impoundment," the First Circuit has held that whether a decision to impound is reasonable under the Fourth Amendment is based on "all the facts and circumstances of a given case" and "does not hinge solely on any particular factor." *See United States v. Coccia*, 446 F.3d 233, 238–39 (1st Cir. 2006). Specifically, "the existence of (and adherence to) standard procedures" is not "the sine qua non of a reasonable impound decision." *Id.* at 239; *see also United States v. Del Rosario-Acosta*, 968 F.3d 123, 127 (1st Cir. 2020) (listing nine factors that "might justify application of the [community caretaking] exception even with no explicit, standardized protocol for noninvestigatory seizures").

Other federal courts of appeals have followed suit. The Third Circuit expressly adopted the First Circuit's view and declined to follow "the more structured approach . . . requiring that there be standardized police procedures governing impoundments." *Smith*, 522 F.3d at 314. The Fifth Circuit has similarly "focused [the] inquiry on the reasonableness of the vehicle impoundment for a community caretaking

purpose without reference to any standardized criteria." *United States v. McKinnon*, 681 F.3d 203, 208 (5th Cir. 2012). And most recently, the Second Circuit further deepened the existing split by "declin[ing] to adopt a standardized impoundment procedure requirement," and instead using the "totality of the circumstances analysis" that is "in line with the First, Third, and Fifth Circuits." *Lyle*, 919 F.3d at 731.

The Wisconsin Supreme Court similarly "agree[d] with the First, Third, and Fifth Circuits," expressly declining to adopt the view of the circuit in which it sits. *Asboth*, 898 N.W.2d at 550 (holding that "the absence of standard criteria does not by default render a warrantless community caretaker impoundment unconstitutional under the Fourth Amendment reasonableness standard"); *see id.* at 548–49 (placing the Seventh Circuit on the other side of the "split").

II. This Issue Is Recurring and Exceedingly Important to Fourth Amendment Protections.

The question presented has persistently divided courts since at least 2008. *See Smith*, 522 F.3d at 314. Now, over a decade later, courts continue to acknowledge the need for resolution. *See Lyle*, 919 F.3d at 728. Nearly every federal circuit has reached a determination on this

issue, and many state courts of last resort have done the same. *See supra* Part I.

Not only is this split long-standing, but the issue of whether an officer's decision to impound a vehicle violates the Fourth Amendment also arises frequently. In just the last year, this issue has arisen in both federal and state courts numerous times. *See, e.g.*, *United States v. Isaac*, No. 19-11239, 2021 WL 405561, at *6–7 (11th Cir. Feb. 5, 2021); *United States v. Chavez*, No. 19-2123, 2021 WL 191660, at *6 (10th Cir. Jan. 20, 2021); *United States v. Wilson*, 979 F.3d 889, 910 (11th Cir. 2020); *United States v. Kelly*, 827 F. App'x 538, 540–42 (6th Cir. 2020); *Hawthorne ex rel. Hawthorne v. County of Putnam*, No. 19-cv-742, 2020 WL 5946989, at *8–9 (S.D.N.Y. Oct. 6, 2020); *Jones-Bey v. Conrad*, Civ. A. No. 3:16-cv-723, 2020 WL 2736436, at *3 (W.D. Ky. May 26, 2020); *Farris v. State*, 144 N.E.3d 814, 822–23 (Ind. Ct. App. 2020); *State v. Allen*, No. 28450, 2020 WL 1231393, at *3–4 (Ohio Ct. App. Mar. 13, 2020).[5]

[5] While the constitutionality of impoundments is frequently challenged, many cases, unlike Mr. Connell's, do not squarely present the question whether standardized criteria are required. The question has already been decided in many jurisdictions, so cases arising in those jurisdictions either focus on the adherence to established impoundment procedures, *see*, *e.g.*, *Isaac*, 2021 WL 405561, at *6–7 (addressing the contention that

And the total number of impoundments goes far beyond just cases litigated in the courts. While no national statistics are available, cities in the United States routinely impound tens of thousands of cars every year. *See, e.g.*, Elliott Ramos, *Chicago Police Impounded 250,000 Vehicles Since 2010. Here's Why City Hall's Rethinking That*, WBEZ Chicago, (July 13, 2020), https://perma.cc/V575-AWD3 [hereinafter "Ramos"] (reporting Chicago impounded an average of 22,000 cars per year from 2010–2020); Tami Abdollah, *LA Cops Don't Have to Impound Unlicensed Drivers' Cars, Judge Rules*, NBC Los Angeles (Dec. 27, 2014), https://perma.cc/6JE6-3SES (reporting Los Angeles impounded 16,242 cars in 2012).

The burdens resulting from these thousands of impoundments are not borne equally. Police in Chicago, for example, impound a disproportionate number of vehicles in majority Black neighborhoods, and some offenses with accompanying impoundments were "almost exclusively enforced" in these areas. Ramos, *supra*. An officer's decision to impound has stark consequences for those arrested, and "daily fees can

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the impounding officer "failed to follow the police department's procedures"), or consider the overall reasonableness of the officer's decision to impound, *see, e.g.*, *Del Rosario-Acosta*, 968 F.3d at 127.

pile up into the thousands."[6] *Id.*; *see also City of Chicago v. Fulton*, 141 S. Ct. 585, 593–94 (2021) (Sotomayor, J., concurring) (describing the "vicious cycles" impoundment imposes on "[d]rivers in low-income communities across the country . . . , disproportionately burdening communities of color"). Without standardized criteria to restrain officer discretion, every impoundment decision is an opportunity for abuse or discrimination.

III. This Case Is an Ideal Vehicle for This Court to Resolve the Question Presented.

Mr. Connell's case presents this Court with an ideal vehicle to finally resolve the persistent split of federal and state authority on the question presented. The key facts are uncontested, and resolution of the question presented would be determinative of the case's outcome.

[6] The case of Wesley Fannings is illustrative. *See* Ramos, *supra*. Mr. Fannings owes "$10,000 dollars for a single traffic stop" resulting from driving with an expired registration. *Id.* He was arrested because officers smelled marijuana in his vehicle, but his charges were later dropped because Chicago had decriminalized possession of small amounts of marijuana three years before his arrest. *Id.* But Mr. Fannings could not pay the administrative fees associated with the impoundment, and he lost his job after his arrest caused him to spend a night in jail. *Id.* With storage fees and interest, Mr. Fannings' original debt of $2,000 to retrieve his car from the impound lot ballooned to nearly $10,000. *Id.*

Additionally, the question has been squarely presented and developed via argument at every stage of the litigation.

The factual record in this case is uncontested, and resolution of the Fourth Amendment question presented is thus dispositive. Mr. Connell's vehicle was legally and safely parked. App. 60a. There was no contraband visible inside, and all the evidence underpinning Mr. Connell's forged instrument charge was found during the inventory search conducted after the impoundment. *See id.* at 53a, 56a–57a. The record is also clear that no standardized criteria governed the decision to impound Mr. Connell's vehicle. The impounding officer could not cite any N.Y.P.D. policy providing standardized criteria for impoundment decisions, *id.* at 51a–52a, and New York state law provides none,[7] *id.* at 17a, 23a–24a. The State has never contested Mr. Connell's showing that no standardized criteria existed. *See, e.g.*, *id.* at 137a (arguing only that standardized criteria are not necessary). Ultimately, the impounding

[7] The State has never disputed that New York's statutory impoundment scheme, "which mandates impoundment for . . . first- and second-degree offenses, *does not also do so for the third-degree crime*" for which Mr. Connell was arrested. App. 142a (emphasis added) (citing N.Y. Veh. & Traf. Law § 511-b).

officer's sole stated justification for seizing the vehicle was her own belief that she needed to safekeep Mr. Connell's property. *Id.* at 52a.

Mr. Connell and the State have consistently argued competing sides of the question presented. They first did so at the suppression hearing. *Compare id.* at 13a (Mr. Connell arguing standardized criteria must guide "the threshold question of whether the vehicle was lawfully impounded"), *with id.* at 27a (State admitting "there [was] no patrol guide [section] for the seizure of [a] car," but maintaining impoundment was "reasonable" nonetheless). Despite the undisputed absence of standardized criteria, the New York Supreme Court agreed with the State that the decision to impound the car was reasonable. *See id.* at 34a–36a. The parties then reprised their arguments before the Appellate Division. *Compare id.* at 97a (Mr. Connell arguing the State had not "credibly establish[ed] the existence of any departmental policy governing impoundment"), *with id.* at 137a (State arguing "no such showing was required"). But the Appellate Division sided with the State, holding that, "[c]ontrary to [Mr. Connell's] contention, police officers properly impounded [his] vehicle." *Id.* at 3a. Finally, the parties yet again raised the question presented before New York's highest court,

compare id. at 150a–52a, *with id.* at 157a–58a, which summarily denied leave to appeal, *id.* at 1a.

For these reasons, Mr. Connell's case is the ideal vehicle to resolve the question presented. There are no factual disputes to interfere with this Court's resolution of the Fourth Amendment issue, and the parties have developed the arguments on both sides of the question presented over three stages of litigation, adding depth to the arguments at each stage.

IV. The Decision Below Is Wrong.

This decision below also merits review because it is wrongly decided in light of this Court's Fourth Amendment precedents, which have recognized the risk that the community caretaking exception could impermissibly be used as a tool to search for evidence of crimes. *See Wells*, 495 U.S. at 4. To prevent this result, this Court requires that inventory searches of impounded vehicles be conducted according to standard policy. *Id.* It has further suggested that police discretion in deciding whether to carry out a caretaking impoundment in the first place must similarly be "exercised according to standard criteria."

Bertine, 479 U.S. at 375. The decision below, upholding an officer's unconstrained, discretionary decision to impound, is therefore erroneous.

This Court requires that inventory searches following impoundments be performed according to standardized criteria because such criteria "tend[] to ensure that the [search's] intrusion would be limited in scope to the extent necessary to carry out the caretaking function." *Opperman*, 428 U.S. at 375. In *Florida v. Wells*, this Court unanimously held that standardized criteria are necessary to limit an officer's discretion in how an inventory search is conducted, preventing a non-investigatory search from being used as "a ruse for a general rummaging in order to discover incriminating evidence."[8] 495 U.S. at 4. By limiting officer discretion, standardized criteria keep the community

[8] This holding had deep roots in this Court's Fourth Amendment jurisprudence. *See, e.g.*, *Bertine*, 479 U.S. at 374 n.6 ("Our decisions have always adhered to the requirement that inventories be conducted according to standardized criteria." (citations omitted)); *Opperman*, 428 U.S. at 372 ("The decisions of this Court point unmistakably to the conclusion . . . that inventories pursuant to standard police procedures are reasonable."); *Illinois v. Lafayette*, 462 U.S. 640, 647 (1983) (upholding an inventory search and noting that "standardized inventory procedures are appropriate to serve legitimate governmental interests"); *see also Wells*, 495 U.S. at 5 (Brennan, J., concurring) ("Our cases have required that inventory searches be sufficiently regulated . . . so as to avoid the possibility that police will abuse their power to conduct such a search." (internal quotation marks and citations omitted)).

caretaking function tailored to its non-investigatory purpose and prevent officers from abusing the function to act on individualized suspicion or bias in cases where they lack the probable cause necessary to secure a warrant. *See id.*; *Opperman*, 428 U.S. at 375.

Impoundment decisions and inventory searches are two steps of a single caretaking process because inventory searches are "routine practice" after an impoundment. *Opperman*, 428 U.S. at 369. In *Bertine*, this Court therefore emphasized the importance of standardized criteria in impoundment decisions *and* inventory searches. 479 U.S. at 374–76, 376 n.7. Courts correctly interpreting *Bertine* require standardized criteria at every step of the caretaking process, from the initial decision to impound to the completion of the inventory search. *See, e.g.*, *Sanders*, 796 F.3d at 1245 ("[T]he *Bertine* decision establishes that [certain] warrantless impoundments are unconstitutional; namely, those justified by police discretion that is . . . not exercised according to standardized criteria."); *Torres*, 828 F.3d at 1120 (interpreting *Bertine* as "sanctioning routine impoundments where authorized by standardized police procedures" (citing 479 U.S. at 375)).

This Court should now reaffirm that *Bertine* and *Wells* require that standardized criteria govern impoundments. Because police performing community caretaking functions have frequent opportunities to seize a vehicle without a warrant, *see supra* Part II, the decision to impound presents the same "grave danger of abuse of discretion" as the warrantless inventory searches that generally follow impoundment as a matter of course. *See Prouse*, 440 U.S. at 662 (internal quotation marks and citation omitted). Standardized criteria can limit an officer's discretion to impound a vehicle against an arrestee's will to situations where urgent community caretaking rationales justify immediate seizure of the vehicle. *See, e.g.*, *Torres*, 828 F.3d at 1118–19 (police policy allowed arrestee to "leave his vehicle parked" where certain safety criteria were met); *see also Opperman*, 428 U.S. at 368–69.

The need to limit discretion is especially essential where, as here, no public safety concerns justify immediate seizure of a vehicle. While this Court has, in some cases, accepted the seizure of vehicles that are "impeding traffic or threatening public safety and convenience" without specifying whether standardized criteria are required, such exigencies are not present in this case. *See Opperman*, 428 U.S. at 369. Mr.

Connell's vehicle was lawfully parked; it was not "disabled or damaged" or "jeopardiz[ing] . . . the public safety [or] the efficient movement of vehicular traffic." *See id.* at 368–69; App. 60a; *see also Cady*, 413 U.S. at 442–43 (warrantless seizure of vehicle that "was disabled . . . and constituted a nuisance along the highway" did not violate the Fourth Amendment). When these safety concerns are absent, the only remaining non-investigatory community caretaking purpose this Court has recognized is the safekeeping of property. *Cf. Bertine*, 479 U.S. at 372. This is the same purpose that this Court deemed susceptible to abuse in the inventory search context, and so the same protections—standardized criteria—are required.[9] *See Wells*, 495 U.S. at 4.

[9] Indeed, it is far from clear whether safekeeping an arrestee's safely and lawfully parked vehicle, in the absence of any request, provides a valid community caretaking rationale for impoundment in the first place. The safekeeping obligation in the inventory search context is triggered by the fact that "the police ha[ve] exercised a form of custody or control" over an arrestee's property. *Cady*, 413 U.S. at 442–43. But "[t]he state owes no legal duty to protect things outside its custody from private injury," and an impoundment decision based on "[t]he suggestion that the police [are] obliged . . . 'to protect [the vehicle]' from theft or vandalism" overlooks that "[t]he police do not owe a duty to the general public to remove vulnerable automobiles from high-crime neighborhoods." *Duguay*, 93 F.3d at 352–53.

Without standardized criteria, officers have considerable discretion to probe for evidence of crimes—or simply harass disfavored drivers—under the guise of community caretaking. Imagine a scenario where an officer suspects an individual of selling drugs but lacks the probable cause necessary to secure a warrant. The officer tails the individual until the individual commits a minor traffic infraction justifying a traffic stop. *See Whren v. United States*, 517 U.S. 806, 814 (1996) (holding an officer's pretextual motives for making a stop are irrelevant to the stop's reasonableness). The officer plans to arrest the driver for the traffic infraction and search the vehicle for evidence of the drug sales she believes will be present. *See Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001) (holding that when an individual has "committed a crime in [an officer's] presence" the officer has probable cause to arrest). But the officer knows that the arrest alone cannot support a full search of the vehicle. *See Gant*, 556 U.S. at 335 (holding that the permissible scope of a warrantless search incident to arrest is limited to "the space within an arrestee's immediate control" (internal quotation marks omitted)). Luckily for the officer, if she can impound the car, her department's guidelines for "routine" inventory searches will allow her access to the

trunk and other private areas. *See Opperman*, 428 U.S. at 369. Unlike in *Opperman*, the individual's vehicle poses no danger to the public and is lawfully parked. *See id.* at 368–69. But departmental policies do not regulate when a vehicle should be impounded. So, despite the lack of any public safety threat, the officer arrests the driver and impounds the vehicle under her sole discretion, citing only a vague threat of vandalism as justification.

The officer's decision to impound is the same "purposeful and general means of discovering evidence of crime" that this court rejected in *Wells*. *See* 495 U.S. at 4 (quoting *Bertine*, 479 U.S. at 376 (Blackmun, J., concurring)). The discretion has simply shifted from the inventory search itself to the antecedent decision to impound. "[A] central aim of the Framers [in crafting the Fourth Amendment] was to place obstacles in the way of a too permeating police surveillance." *See Carpenter v. United States*, 138 S. Ct. 2206, 2214 (2018) (internal quotation marks and citation omitted). Standardized criteria provide such an obstacle by ensuring impoundments are guided by a set of neutral policies, rather than the hunches or biases of individual officers "engaged in the often competitive enterprise of ferreting out crime." *Mitchell v. Wisconsin*, 139

S. Ct. 2525, 2543 (2019) (Sotomayor, J., dissenting) (internal quotation marks and citation omitted). Without these protections, officers are free to act on their own discretion, allowing for the kind of "unfettered governmental intrusion" fatal to the "security guaranteed by the Fourth Amendment." *Prouse*, 440 U.S. at 663.

Resolution of the question presented is thus critical to reaffirming the necessary limits *Bertine* and *Wells* place on police discretion.

CONCLUSION

This Court should grant certiorari.

Respectfully submitted,

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