No. 20-7210

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

PETITIONER'S REPLY BRIEF

ERICA J. HASHIMOTO
Counsel of Record
GEORGETOWN LAW CENTER
APPELLATE LITIGATION
PROGRAM
111 F STREET, NW
WASHINGTON, D.C. 20001
(202) 662-9555
eh502@georgetown.edu
Counsel for Petitioner

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The State does not dispute that there is an entrenched and deepening split of authority over whether a police officer's decision to impound a safely and lawfully parked car pursuant to her community caretaking function violates the Fourth Amendment unless the decision is guided by standardized criteria. Nor does it dispute that this split raises an important question worthy of this Court's resolution. Instead, the State rests its argument principally on the claim that this case does not implicate the issue. That claim is simply wrong.

The State admits that Petitioner Tesfa Connell's car was safely and lawfully parked when a New York police officer decided to impound it and that nothing beyond the officer's own discretion guided her impoundment decision. The State instead attempts to muddy the waters by noting that Mr. Connell's car might eventually have impeded street cleaning *sixty hours later* and that a state statute requires impoundment in *other* situations this case undisputedly does not present. But neither of these irrelevant facts entitles the State to prevail if the question presented is resolved in Mr. Connell's favor—which is likely why the State has never before in this case's nine-year history disputed Mr. Connell's consistent

position that the question presented is dispositive. Nor does the State fare better by cherry-picking factual distinctions between Mr. Connell's case and cases that have required standardized criteria. It is those cases' *holdings* that squarely conflict with the decision below and, as additional cases confirm, the factual distinctions the State identifies in no way suggest otherwise.

The State is thus left to argue that the decision below correctly resolved the question presented. But a majority of courts, following this Court's own guidance in *Colorado v. Bertine*, 479 U.S. 367 (1987), would beg to differ. The State chiefly contends that requiring impoundment to be objectively reasonable under the circumstances sufficiently constrains officer discretion. This argument, though, overlooks the unique potential for overreach the community caretaking exception creates, insofar as it can permit warrantless seizures even absent exigency or any reasonable suspicion of wrongdoing. Besides, the State's arguments only underscore that the question presented is a source of sharp disagreement among lower courts. This Court should grant certiorari, receive merits briefing and argument, and finally resolve this important, divisive issue.

I. The State's Arguments that This Case Is Not a Good Vehicle Rest on Facts Irrelevant to the Question Presented and on Immaterial Distinctions Between This Case and Others.

Without even attempting to deny that the question presented has produced a stark division of authority on an important federal question, the State chiefly argues that this case presents a bad vehicle for resolving it. It makes two such arguments. First, it argues that the answer to the question presented is irrelevant to the outcome in Mr. Connell's case. Resp't Br. 11–16. Second, it argues that the decision below does not conflict with a handful of the cases that have, favorably to Mr. Connell, recognized the need for standardized criteria in guiding impoundment decisions. Resp't Br. 23–26. Neither argument holds up.

A. The State's Belated Claim that the Question Presented Is Not Implicated Here Is Unsupportable.

The State first claims that Mr. Connell's case does not truly present the issue of whether the Fourth Amendment requires impoundment of a safely and lawfully parked car to be guided by standardized criteria. The State points to two facts that, in its view, would have caused it to prevail even had the lower court resolved the question presented in Mr. Connell's favor: (1) Mr. Connell's car, "if not moved, would have created a traffic nuisance," Resp't Br. 11, and (2) New York Vehicle and Traffic Law

§ 511-b supplies criteria "relevant" to this case, Resp't Br. 14. These arguments, raised for the first time in this Court, are unpersuasive.

Start with the idea that this case falls into a "nuisance" exception to the standardized criteria requirement. While the State quotes this Court's observation that police may seize "vehicles impeding traffic or threatening public safety and convenience," Resp't Br. 11 (quoting *South Dakota v. Opperman*, 428 U.S. 364, 369 (1976)), it is ultimately forced to concede that Mr. Connell's car was lawfully parked and created no obstruction or hazard, Resp't Br. 12–13. But the State nonetheless claims that this principle "might" govern here because street cleaning nearly *sixty hours* following Mr. Connell's arrest might eventually have required his car to be moved. Resp't Br. 13. Never mind that the impounding officer herself did not think to offer this justification when questioned. *See* App. 51a–52a. Never mind that, in the two and a half days following Mr. Connell's arrest, he could have paid the $50 fee to have his driver's license reinstated or had someone else move his car. And never mind that, in a worst-case scenario, the street cleaners could simply have had the car towed, as they do with countless others.

Such a sweeping "nuisance" exception would effectively engulf the standardized criteria requirement, and it is telling that the State has cited no case endorsing one. The State chiefly relies on *United States v. Sanders*, 796 F.3d 1241 (10th Cir. 2015), which held that impoundment need not be guided by standardized criteria if a car is "obstructing traffic []or creating an imminent threat to public safety," *id.* at 1248. But *Sanders* limited this exception to situations where "impoundment is *immediately* necessary," *id.* at 1249 (emphasis added), and nothing in the opinion supports applying the exception on the basis of a hypothetical risk that, sixty hours down the road, a car might possibly impede street cleaning. And the only other case the State cites for its nuisance theory, *United States v. Lyle*, 919 F.3d 716 (2d Cir. 2019), is even less relevant. *Lyle*, like the court below, rejected a standardized criteria rule altogether. *Id.* at 731. *Lyle*'s totality-based reasonableness analysis says nothing about the scope of a possible exception to a rule the case never adopted.

The State's claim that New York Vehicle and Traffic Law § 511-b offers sufficient criteria is no better. That statute requires impoundment in connection with certain first- or second-degree "crime[s] of aggravated unlicensed operation of a motor vehicle." N.Y. Veh. & Traf. Law § 511-b.

But, as the State ultimately gets around to admitting, that statute does not govern here because Mr. Connell was arrested for a "lesser" *third*-degree offense about which the statute says nothing at all. Resp't Br. 14.

The State's argument that the statute is nonetheless "relevant" is nonsensical. *Id.* In the State's view, the statute's silence about cases like Mr. Connell's shows the legislature wanted to "leave[] the impoundment decision in the police officer's discretion" in every case the statute does not cover. *Id.* But even if the State is right, giving officers unlimited discretion to choose impoundment is exactly what the standardized criteria requirement prohibits. In any event, the State's interpretation rests on tenuous inference. Perhaps the legislature intended to leave impoundment entirely up to officer discretion, but perhaps it expected local police departments to create discretion-constraining standards. What is certain, though, is that the State has pointed to no case embracing its counterintuitive view that total silence can satisfy the Fourth Amendment's demand for standardized criteria to channel an officer's decision as to when impoundment is appropriate.[1]

[1] The State's claim that the criteria set forth in New York's statute are "comparable" to the criteria held sufficient to support an impoundment

If these theories were remotely persuasive, the State surely would have raised them at some prior point in this case's nine-year history. But it did not. The State never disputes that the parties have "consistently argued competing sides of the question presented" from day one, Pet. 26, and the State has never before argued it should prevail *even if* the question presented is resolved in Mr. Connell's favor, whether because Mr. Connell's car posed a potential nuisance or because state law offers sufficient criteria. Instead, the State's consistent position until now has been that "no . . . showing" of standardized criteria "was required because . . . based on the totality of the circumstances, the decision to impound [Mr. Connell's] vehicle was reasonable." App. 137a; *see* Pet. 25 (noting without rebuttal that "[t]he State has never contested . . . that no standardized criteria existed"). That the State itself never before thought its new theories were worth raising only highlights their lack of merit.

The State's arguments ultimately should not distract from the posture in which this case reaches this Court. Mr. Connell has

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decision in *Bertine*, Resp't Br. 15 n.2, is plainly incorrect. In *Bertine*, a municipal ordinance expressly authorized the challenged impoundment. *See Bertine*, 479 U.S. at 368 & n.1. Here, the New York statute affirmatively *excluded* the challenged impoundment from its scope.

consistently argued one side of the question presented, the State has consistently argued the other, and the court below resolved this case on the basis of its agreement with the State. This Court can and should reverse that error of law. To the extent the State has now belatedly cobbled together a handful of unpersuasive arguments as to why it should win even if the question presented is resolved against it, those arguments—if preserved—can be considered and rejected on remand.

B. The State's Observation that Some Cases Upholding a Standardized Criteria Requirement Are Factually Distinguishable from This One Is Irrelevant.

Despite never disputing that there is an entrenched split of authority over the question of whether standardized criteria must govern the decision to impound a safely and lawfully parked car, the State next claims that the decision below—which answered "no"—is somehow consistent with a few of the cases that have answered "yes." Resp't Br. 23–26. The State chiefly rests this argument on factual distinctions between this case and the others. But the State never explains why those factual distinctions matter, and precedent from the jurisdictions that have upheld a standardized criteria requirement confirms they do not.

As an initial matter, the State does not even attempt to argue that *all* of the cases recognizing a standardized criteria requirement are reconcilable with the decision below. *Compare* Pet. 13–19 (citing, *e.g.*, *United States v. Duguay*, 93 F.3d 346 (7th Cir. 1996); *Sammons v. Taylor*, 967 F.2d 1533 (11th Cir. 1992); and *State v. Pogue*, 868 N.W.2d 522 (N.D. 2015)), *with* Resp't Br. 23–26 (ignoring these and other cases). So even if *some* of the cases upon which Mr. Connell relies could be meaningfully distinguished, his case remains a strong vehicle because Mr. Connell's constitutional claim undisputedly would have been resolved differently had his case arisen in any number of other jurisdictions.

More to the point, the State cannot persuasively harmonize the decision below with even those cases it *does* see fit to mention. The State argues primarily that several of the cases upholding a standardized criteria requirement dealt with cars that, unlike Mr. Connell's, were on private property when they were impounded. Resp't Br. 24–25. But none of the cited cases held that standardized criteria are required *only* for impoundments on private property. *See, e.g.*, *United States v. Petty*, 367 F.3d 1009, 1012 (8th Cir. 2004) (holding only that "[s]ome degree of 'standardized criteria' or 'established routine' must regulate" community

caretaking impoundments); *People v. Allen*, 450 P.3d 724, 729 (Colo. 2019) (holding an impoundment unconstitutional because, categorically, "the existence of standardized criteria or policies is a necessary condition of the community caretaking exception to the warrant requirement"); *McGaughey v. State*, 37 P.3d 130, 142 (Okla. Crim. App. 2001) (requiring "some specific law, ordinance, or police department policy authoriz[ing] [an] impound" that occurs "on a public street"). Admittedly, after Mr. Connell filed his petition for certiorari, the Tenth Circuit held the standardized criteria requirement to be "specific to private property impoundments." *United States v. Venezia*, 995 F.3d 1170, 1178 (10th Cir. 2021). But none of the other cited jurisdictions have so held and, indeed, cases out of those jurisdictions faithfully apply the standardized criteria requirement to impoundments on public property. *See, e.g.*, *United States v. Green*, 929 F.3d 989, 995 (8th Cir. 2019); *United States v. Cervantes*, 703 F.3d 1135, 1140–43 (9th Cir. 2012); *People v. Thomas*, No. 17CA2132, 2021 WL 727663, at *3–4 (Colo. Ct. App. Feb. 25, 2021); *State v. Arellano*, 863 N.W.2d 36 (Iowa Ct. App. 2015) (table decision).

Finally, the State's attempts to cast *State v. Leak*, 47 N.E.3d 821 (Ohio 2016), as consistent with the decision below are particularly

befuddling. The State claims on the one hand that *Leak* "did not hold that a vehicle impoundment would be unconstitutional in the absence of standardized criteria" but then goes on to explain, as it must, that *Leak* held an impoundment unlawful precisely because no law or departmental policy governed it.[2] Resp't Br. 25–26. To be sure, the Ohio Supreme Court has recognized that as long as "standard police practice" defines the conditions under which impoundment is allowed, it need not take the further step of establishing "standardized procedures" to govern the particulars of how an "expressly authorized" impoundment is conducted. *Blue Ash v. Kavanagh*, 862 N.E.2d 810, 812–13 (Ohio 2007). But that is irrelevant here. Mr. Connell challenges the *fact*, not the *manner*, of impoundment. Just as Ohio's high court held the lack of any affirmative authority fatal to impoundment in *Leak*, so too would it have done here.[3]

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[2] *Leak* "also consider[ed]" evidence of pretext. *Leak*, 47 N.E.3d at 830. But it did so only after observing that the prosecution had not established the impoundment to be lawful because the impounding officer "did not testify to any impoundment policy and no such policy was entered into the record." *Id.* at 829.

[3] The State also briefly attempts to cast *United States v. Proctor*, 489 F.3d 1348 (D.C. Cir. 2007), as consistent with the decision below. Resp't Br. 25. Mr. Connell has already explained that the State's reading of *Proctor* conflicts with how courts inside and outside the D.C. Circuit understand the opinion, Pet. 17 n.4, and the State has offered no response.

The State's arguments, in other words, represent another attempt to sow confusion around the margins while doing nothing to rebut Mr. Connell's core point: lower courts are split on an important constitutional question, the decision below joined one side of the split over the other, and only this Court can finally determine which side is correct.

II. The State's Merits Arguments Ignore the Community Caretaking Exception's Unique Potential for Overreach.

Failing to offer any sound reason why this Court should not use this case to resolve the question presented, the State is left to argue that the decision below was correct. Resp't Br. 16–23. Some courts have sided with the State, and its merits arguments should of course be developed in full briefing. But the majority of courts that have ruled on the question presented disagree with the State's position, *see* Pet. 11–21, and it is not hard to see why. The State's view that a deferential reasonableness standard is the only necessary check on an officer's discretion to impound a vehicle under her non-investigatory community caretaking role invites the risk that she will use that discretion to conduct criminal investigation without the reasonable suspicion the Constitution requires.

The State's view that an impoundment's constitutionality rests on its reasonableness under all the circumstances, Resp't Br. 20, fails to

assuage this Court's concern that an officer might abuse her community caretaking role. As the cases the State cites make clear, a reasonableness inquiry does not account for an officer's "improper subjective motive" as long as she can muster some objective *post hoc* justification for her actions. *United States v. Del Rosario-Acosta*, 968 F.3d 123, 128 (1st Cir. 2020); *see also Ashcroft v. al-Kidd*, 563 U.S. 731, 736 (2011) (approving an objectively reasonable act "'*whatever* the subjective intent' motivating the relevant officials" (quoting *Whren v. United States*, 517 U.S. 806, 814 (1996))). But in lifting the protections of "probable cause (and warrant)" for police action serving purposes of "administrative regulation," *Whren*, 517 U.S. at 811–12, this Court has made clear that officers are not allowed to use their broad administrative authority as "a ruse" to circumvent the constitutional guarantees afforded to targets of police investigation, *Florida v. Wells*, 495 U.S. 1, 4 (1990). That is precisely why this Court has consistently required police departments or municipalities to develop some form of advance guidance that serves to limit the "uncanalized discretion" of individual officers in performing non-investigatory municipal functions. *Id.* And, despite what the State says, there is simply no reason to think officers are less apt to slide

impermissibly into an investigatory role when making "a binary choice" of whether to impound a car than when deciding the scope of the subsequent inventory search. Resp't Br. 22.

Nor is the State right to say that requiring objective standards to guide officer discretion is unduly burdensome. Resp't Br. 19. In fretting that requiring such standards could hamstring officers from responding to unexpected emergencies, the State ignores that police can lawfully respond to true exigencies regardless of whether the community caretaking exception applies. *See Caniglia v. Strom*, 141 S. Ct. 1596, 1599–1600 (2021) (distinguishing responding to "exigent circumstances" from performing run-of-the-mill "civic tasks" under a caretaking role); *Sanders*, 796 F.3d at 1248 (permitting impoundment whenever a car is "obstructing traffic []or creating an imminent threat"). And the State has presented no evidence that the need for standardized criteria has inhibited police activity in the many jurisdictions that require them.

Ultimately, one need look no further than this case to see why standard practice is vital to an impoundment's legitimacy. Mr. Connell, a Black man driving a Mercedes Benz in Brooklyn after midnight, was pulled over for a traffic infraction and arrested for driving on a suspended

license. He parked his car safely and legally, and the arresting officer had no grounds for suspecting him of anything further. No ordinance or official policy established impoundment as a permissible option under these circumstances. But the officer impounded anyway, justifying the choice first on the basis of personal habit, *see* App. 51a–52a, and now on the basis of facilitating street cleaning sixty hours later, *see* Resp't Br. 11–13. One cannot know what truly motivated the choice. But requiring the choice to comport with a set of neutral guidelines promulgated in advance would—as many courts have recognized—go a long way toward dispelling the sort of doubt that has troubled this Court in the past.

CONCLUSION

For the foregoing reasons and the reasons presented in Mr. Connell's petition, this Court should grant certiorari.

Respectfully submitted,

ERICA J. HASHIMOTO
Counsel of Record
GEORGETOWN LAW CENTER
APPELLATE LITIGATION
PROGRAM
111 F STREET, NW
WASHINGTON, D.C. 20001
(202) 662-9555
eh502@georgetown.edu
Counsel for Petitioner