No. 22-943

In The
Supreme Court of the United States

ANDRE VERDUN, ET AL.,

Petitioners,

v.

CITY OF SAN DIEGO, CALIFORNIA, ET AL.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the City of San Diego's non-discretionary practice of marking tires with chalk to enforce parking limits, if deemed a Fourth Amendment search, falls within the "administrative search" exception to the warrant requirement.

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INTRODUCTION

The Ninth Circuit held that the City of San Diego's practice of non-discretionary tire chalking for parking enforcement—which the City, like many other municipalities, has used for decades—does not violate the Fourth Amendment. Pet. App. 2a. "Even assuming the temporary dusting of chalk on a tire constitutes a Fourth Amendment search," the court of appeals explained, the City's practice "falls within the administrative search exception to the warrant requirement" because it is used for "traffic control," not "general crime control," and "its intrusion on personal liberty is de minimis at most." *Id.* at 2a-3a (internal quotation marks omitted). That conclusion required the Ninth Circuit to "part ways" from one aspect of the Sixth Circuit's outlier decision in *Taylor v. City of Saginaw*, 11 F.4th 483 (6th Cir. 2021), which held that tire chalking is not an administrative search. Pet. App. 25a. That subsidiary disagreement does not merit this Court's review.

To start, this case implicates (at most) the shallowest possible circuit split: a single decision from one circuit breaking new constitutional ground, and the Ninth Circuit's decision disagreeing (in part) with that novel approach. This Court does not ordinarily wade into such nascent squabbles at the first opportunity, instead allowing them to percolate—and perhaps resolve—in the courts of appeals. The reasons supporting percolation apply with full force here.

Petitioners identify a split only by eliding the overarching question whether tire chalking violates the Fourth Amendment, which the Sixth Circuit did

not decide, and the threshold question whether tire chalking is a Fourth Amendment search, which the Ninth Circuit assumed without deciding. The search question is not only logically antecedent, but also exactly the type that would benefit from development in the lower courts. As Judge Bress explained for the Ninth Circuit, "[i]t is not clear" whether a "physical touch *** as fleeting as tire chalking" is a search. Pet. App. 8a. Nor is it obvious whether other Fourth Amendment exceptions might apply, such as if "drivers impliedly license the chalking." *Id.* at 71a n.9. Time will resolve, or at least shed light on, these dispositive questions.

Even as to Petitioners' narrowly defined question whether tire chalking constitutes an *administrative* search, Petitioners offer little to justify this Court's review. With just two decisions addressing that issue, they ask this Court to short-circuit the usual process of adjudication among the courts of appeals because governments purportedly need clarity about tire chalking and the broader administrative search exception. Pet. 12-13. But noticeably absent from the petition are requests seeking such clarity (Petitioners muster only a 2011 law review article about administrative searches generally). *See id.* at 33-34. Petitioners suggest that the Ninth Circuit's reasoning has "opened the door" to diluting the warrant requirement by expanding the administrative search exception. *Id.* at 32-33. That unfounded speculation proves too much. To the extent Petitioners' fears come to pass, this Court will have ample opportunity to step in.

Review is especially unwarranted because the Ninth Circuit's decision is correct. Tire chalking is not a Fourth Amendment search because harmlessly touching another person's chattel is not a common-law trespass. Nothing in *United States v. Jones*, 565 U.S. 400 (2012), says otherwise. In any event, the City's practice is reasonable. The administrative search exception does not hinge on "precompliance review" or a court's freewheeling evaluation of whether the relevant government interest is sufficiently "grave." Pet. 2. Instead, it applies at least where the government pursues a purpose distinguishable from general crime control using a minimally intrusive practice and where requiring a warrant would be impracticable. This Court has approved far more intrusive searches for similarly straightforward purposes—including "checkpoints" to identify "unlicensed drivers." *Ashcroft v. al-Kidd*, 563 U.S. 731, 737 (2011). As the court of appeals observed, it would be "strange if tire chalking, of all things, were somehow a Fourth Amendment red line that cannot be crossed." Pet. App. 25a.

The petition should be denied.

STATEMENT

A. Legal Framework

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. CONST. amend. IV. A Fourth Amendment search occurs when the government either "violate[s] a person's reasonable expectation of privacy" or commits a "common-law trespass" by "physically occup[ying] private property for the

purpose of obtaining information." *Jones*, 565 U.S. at 404-406 (internal quotation marks omitted). For a search to be reasonable, the Fourth Amendment "generally requires" a warrant supported by probable cause. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995). But "[a]s the text of the Fourth Amendment indicates, the ultimate measure of the constitutionality of a governmental search is 'reasonableness,'" and "a warrant is not required to establish the reasonableness of *all* government searches." *Id.*

Indeed, the warrant requirement is "riddled with exceptions." *California v. Acevedo*, 500 U.S. 565, 582 (1991) (Scalia, J., concurring). As relevant here, a warrant is not required "where special needs *** make the warrant and probable-cause requirement impracticable, and where the primary purpose of the searches is [d]istinguishable from the general interest in crime control." *City of Los Angeles v. Patel*, 576 U.S. 409, 420 (2015) (ellipsis and alteration in original) (internal quotation marks and citations omitted); *see also al-Kidd*, 563 U.S. at 736-737. This Court has referred to a wide range of practices fitting that description as "administrative" and/or "special needs" searches. *See, e.g.*, *Patel*, 576 U.S. at 420-423; *al-Kidd*, 563 U.S. at 736-737 (discussing "special-needs and administrative-search cases" together).

B. Factual Background

The City of San Diego has been "chalking tires for parking enforcement purposes *** since at least the 1970s." Pet. App. 7a. "Chalking consists of a City parking officer placing an impermanent chalk mark of no more than a few inches on the tread of one tire on a

parked vehicle." *Id.* at 3a. Officers "must place the chalk mark on every vehicle parked in a given area," and "do not single out particular vehicles." *Id.* Because a chalk mark "rubs off within a few tire rotations," "[i]f a vehicle's chalk mark is undisturbed after the parking limit has expired, this shows the vehicle has exceeded the time limit for the space." *Id.*

The City's "parking enforcement methods, including chalking, are intended to enhance public safety, improve traffic control, and promote commerce" by "increas[ing] parking space turnover." Pet. App. 4a. As the record reflects (and anyone who has searched for a parking spot can attest), parking turnover means fewer drivers "circling blocks in search of parking, *** double-park[ing] in lanes of traffic while waiting for spaces to become available, *** [and] illegally park[ing] in zones reserved for buses, disabled drivers, or emergency personnel." *Id.* Parking turnover thus makes it easier for everyone (including "public buses and emergency vehicles") to safely "navigate city streets," and it "encourages customers to visit, shop, and dine" in particular areas. *Id.*

Of course, there are various conceivable "ways of enforcing *** parking regulations." Pet. App. 5a. But there is also "considerable evidence that chalking is [the] most cost-effective method, and that it is more efficient and accurate than other methods." *Id.* Less intrusive, too: One increasingly common alternative, License Plate Reader (LPR) technology, would "require the City to maintain time-stamped photographs and Global Positioning System (GPS) data for vehicles parked in City parking spaces." *Id.*

C. Procedural History

1. Petitioners received citations after chalking revealed they had violated the City's publicly posted parking time limits. Pet. App. 3a, 6a. Petitioners filed a putative class action under 42 U.S.C. § 1983, alleging that the City had violated the Fourth Amendment when its employees chalked their tires. Pet. App. 6a. The district court granted the City summary judgment. *Id.* at 54a. The district court held that the City's tire chalking constitutes a Fourth Amendment search, but is reasonable under the administrative search exception to the warrant requirement. *Id.* at 61a-62a, 71a. Accordingly, the district court did not reach the City's alternative arguments that Petitioners had impliedly licensed the chalking and that tire chalking is reasonable under the community caretaker exception to the warrant requirement. *See id.* at 71a n.9.

2. The court of appeals affirmed.

a. At the outset, the court of appeals noted tire chalking's long (if uneventful) history. Pet. App. 7a. "[M]unicipalities have been chalking tires for parking enforcement purposes since at least the 1930s." *Id.* But Petitioners had "not cited any challenges, successful or otherwise, to the constitutionality of tire chalking" before 2012, when this Court ruled that attaching a GPS-tracking device to a car constituted a Fourth Amendment search. *Id.*; *see Jones*, 565 U.S. at 404. The court of appeals found "some reason to be skeptical of [an] effort to *** suddenly declare as violating the United States Constitution a rather innocuous parking management practice that has been commonly used without question for several

generations in localities across the country." Pet. App. 7a. But the court "put any such skepticism completely to the side and under[took] a full analysis under the Fourth Amendment." *Id.* at 8a.

b. The court of appeals began by "assum[ing] without deciding" that tire chalking is a Fourth Amendment search—but not without reservations. Pet. App. 8a. *Jones* relied on the principle that a search occurs under a common-law trespass theory when the government "physically occupie[s] private property for the purpose of obtaining information." 565 U.S. at 404. "It is not clear," however, that "*Jones* should be read to suggest that every physical touch that is designed to obtain information, even one as fleeting as tire chalking, rises to the level of a 'physical intrusion,' as required for a Fourth Amendment search." Pet. App. 8a (quoting *Jones*, 565 U.S. at 404).

c. The court of appeals did not resolve the predicate Fourth Amendment search question. Instead, it determined that the City's tire chalking practice—if a search at all—is reasonable under the administrative search exception to the warrant requirement. Pet. App. 2a-3a.

To reach that conclusion, the court of appeals surveyed cases applying the administrative search exception. Pet. App. 8a-9a. At a high level, the exception encompasses "[s]earch regimes where no warrant is ever required" because "special needs *** make the warrant and probable-cause requirement impracticable, and where the primary purpose of the searches is [d]istinguishable from the general interest in crime control." *Id.* at 9a (alterations in original)

(internal quotation marks omitted) (quoting *Patel*, 576 U.S. at 420).

The exception has applied in various contexts. For example, this Court "has permitted various types of dragnets in which police indiscriminately stop motorists without individualized suspicion or a warrant, when the stops are not used for the primary purpose of detecting general criminal wrongdoing." Pet. App. 9a. "The administrative use or special needs exception has also been invoked to justify warrantless searches of certain closely regulated businesses for specified purposes," and of "particular types of persons thought to have reduced expectations of privacy, or persons in particular settings in which the same is true." *Id.* at 10a-12a (collecting cases).

The court of appeals concluded that "motorist dragnet cases" are most relevant because tire chalking is part of a "programmatic effort of maintaining the flow of traffic and monitoring the parking times of all visitors"—albeit one that is "much less intrusive *** as compared to a checkpoint." Pet. App. 15a-16a.

Drawing on the checkpoint cases, the court of appeals determined that a two-part analysis applies in this context. Pet. App. 16a. First, a search is "per se invalid" if its "primary purpose is to advance the general interest in crime control with respect to the drivers of the vehicles." *Id.* (internal quotation marks omitted). Second, "[i]f the search is not per se invalid," a court "determine[s] whether the search is reasonable." *Id.* at 17a. Assessing reasonableness requires "balanc[ing] the individual's privacy expectations against the Government's interest to determine whether it is impractical to require a

warrant or some level of individualized suspicion in the particular context." *Id.* at 13a-14a (quoting *National Treasury Empls. Union v. Von Raab*, 489 U.S. 656, 665-666 (1989)). That precludes arbitrarily limiting the administrative search exception to previously identified "contexts or factual scenarios," or "circumstances *** demanding immediate action in the face of dangerous conditions." *Id.* at 13a, 14a. But any administrative search "must be reasonable in its scope and manner of execution." *Id.* at 14a (quoting *Maryland v. King*, 569 U.S. 435, 448 (2013)).

Applying those principles, at the first step, the court of appeals had "little difficulty concluding that tire chalking does not have the impermissible 'primary purpose' of 'uncover[ing] evidence of ordinary criminal wrongdoing.'" Pet. App. 17a (alteration in original) (quoting *City of Indianapolis v. Edmond*, 531 U.S. 32, 41-42 (2000)). Analogizing to this Court's decisions upholding DUI checkpoints (which have the permissible purpose of "ensuring roadway safety"), the court of appeals explained that the purpose of tire chalking is the "overall management of vehicular traffic and the use of city parking spots," which (among other things) mitigates "safety risks to pedestrians, bicyclists, and motorists." *Id.* at 17a, 21a (quoting *Edmond*, 531 U.S. at 41-42). The "close connection between the chalking of tires and the harm it seeks to prevent" reinforces that targeted purpose. *Id.* at 19a (noting this Court has "upheld automobile checkpoints to look for intoxicated drivers, but *** struck down virtually identical checkpoints to look for drugs" (citations omitted)).

At the second step, the court of appeals concluded that "San Diego's practice of tire chalking is reasonable." Pet. App. 20a. "It does not take an advanced degree in urban planning to appreciate the significance of free-moving vehicular traffic and parking availability to the basic functioning of a municipality and the quality of life of its residents, businesses, and visitors." *Id.* Indeed, Petitioners "d[id] not dispute that such interests are significant." *Id.* at 21a (alteration in original). There is also "a tight nexus" between tire chalking and parking management. *Id.* at 22a. On the other side of the scale, and "[u]nlike other permitted administrative searches," tire chalking "has no apparent 'spillover' use outside of its stated purpose" because it cannot "yield evidence of any [other] law violation." *Id.* "[I]t is hard to imagine a 'search' that involves less of an intrusion." *Id.* at 23a.

Contextual considerations buttressed the court of appeals' reasonableness analysis. "There is already a reduced expectation of privacy for vehicles," especially those "parked on city streets." Pet. App. 23a. And non-discretionary tire chalking "does not present the risks of government abuse or overreach that may be present in other contexts." *Id.* at 23a-24a. In short, "what says 'administrative search' more than a discretion-free program of lightly chalking tires to monitor how long vehicles have stayed in parking spaces?" *Id.* at 24a.

3. Judge Bumatay dissented. He would have held that tire chalking is a Fourth Amendment search and that the administrative search exception does not apply. Pet. App. 35a, 50a. He appeared to suggest that, aside from certain searches of "commercial

establishments" and "places of public accommodation," *any* administrative search is inconsistent with the original meaning of the Fourth Amendment because "our Founding generation had a deep-seated aversion to suspicionless searches." *Id.* at 41a, 45a. Because "the colonists would have vigorously opposed warrantless searches exhibiting the same characteristics" as "general warrants and writs," he reasoned that the administrative search exception should be cabined to "limited contexts involving extraordinary and immediate government interests." *Id.* at 46a-47a, 52a (internal quotation marks and emphasis omitted). Because Judge Bumatay viewed the City's interests here as "pedestrian," he would have held that the City's practice violates the Fourth Amendment. *Id.* at 50a.

REASONS FOR DENYING THE PETITION

The Ninth Circuit's decision creates a one-to-one circuit split as to only a subsidiary issue: whether tire chalking, if a Fourth Amendment search at all, falls within the administrative search exception to the warrant requirement. This Court should decline to resolve that issue, or the overall constitutionality of tire chalking, on the basis of such a shallow and novel conflict. The Ninth Circuit's sound reasoning makes this Court's review all the more unnecessary.

I. THE CIRCUIT SPLIT IS NARROW, SHALLOW, AND UNDEVELOPED

A. The Sixth And Ninth Circuits Alone Are Divided On The Subsidiary Administrative Search Question

As Petitioners acknowledge, the Sixth Circuit is the only other court of appeals to have addressed whether and how tire chalking implicates the Fourth Amendment. *See Taylor v. City of Saginaw*, 922 F.3d 328 (6th Cir. 2019) (*Taylor I*); 11 F.4th 483 (*Taylor II*). But the Sixth Circuit has not done so comprehensively, diminishing the brunt of any conflict with the Ninth Circuit.

In *Taylor I*, the Sixth Circuit reversed an order granting the City of Saginaw's motion to dismiss a Fourth Amendment tire chalking challenge. 922 F.3d at 336. The Sixth Circuit held that tire chalking is a search because it entails "intentional physical contact with [the] vehicle." *Id.* at 333. The court then held that the motor vehicle exception to the warrant requirement did not apply. *Id.* at 334. And the court held that the "community caretaker" exception did not apply because Saginaw had "fail[ed] to demonstrate how [chalking] bears a relation to public safety." *Id.* at 335 (assuming that Saginaw's only purpose was "to raise revenue, and not to mitigate public hazard"). But the court expressly did not hold "that chalking violates the Fourth Amendment." *Id.* at 336. Once past "the pleadings stage," Saginaw would be "free to argue anew that one or both of those exceptions do apply, or that some other exception to the warrant requirement might apply." *Id.* at 336.

In *Taylor II*, the Sixth Circuit reversed the district court's subsequent order granting Saginaw summary judgment. 11 F.4th at 489. This time, the court considered only whether "tire chalking constitutes a valid administrative search," and held that it does not. *Id.* at 486, 489. Once again, the court "express[ed] no opinion" regarding other potentially applicable "exceptions to the warrant requirement." *Id.* at 489. On remand, the district court took the Sixth Circuit's rulings "one step further" and held that tire chalking violates the Fourth Amendment. 620 F. Supp. 3d 655, 668 (E.D. Mich. 2022). Saginaw did not appeal, as the parties reached a settlement concluding the *Taylor* litigation. *See* No. 1:17-cv-11067-TLL-PTM (E.D. Mich. Sept. 20, 2022), ECF No. 131.

The disagreement between the Sixth and Ninth Circuits is thus a limited one. There is no conflict about whether (i) tire chalking violates the Fourth Amendment (as the Sixth Circuit declined to hold), (ii) tire chalking constitutes a Fourth Amendment search (as the Ninth Circuit only assumed), or (iii) tire chalking implicates other potentially applicable exceptions to the warrant requirement (as both circuits expressly or implicitly left open).

That explains why Petitioners have narrowed the question presented to whether tire chalking constitutes an administrative search. As a result, the question presented is of diminished importance. It would make little sense for this Court to opine on the applicability of one potential exception to the warrant requirement, rather than the overarching constitutionality of tire chalking. Even as to the isolated administrative search question, the conflict

Petitioners cite is as shallow as can be, with just one court of appeals on each side. And, despite the underlying practice having been in use for decades, these limited decisions have arisen only recently. This Court does not ordinarily weigh in on such incipient and underdeveloped conflicts.

B. This Court Should Allow The Various Fourth Amendment Issues To Mature

The shallow conflict presents another reason this Court should deny review: to allow other courts to consider the question presented and any related issues. For multiple reasons, this Court should follow its usual practice of awaiting further adjudication before stepping in, if it needs to at all.

1. Allowing tire chalking challenges to percolate may well either eliminate or sharpen a conflict among the courts of appeals. For example, the Sixth Circuit may clarify its view as to whether tire chalking violates the Fourth Amendment. *See Dobbins v. University of Wis., Madison Transp. Servs.*, No. 19-cv-869-wmc, 2021 WL 5141294, at *2 (W.D. Wis. Nov. 4, 2021) ("[T]he Sixth Circuit's decision leaves open the question whether tire chalking could be justified[.]"). Other circuits may take positions on either side and provide helpful reasoning along the way.

2. Further percolation would be particularly helpful on the threshold question whether tire chalking constitutes a Fourth Amendment search. *See, e.g.*, *Czyewski v. Jevic Holding Corp.*, 580 U.S. 451, 471-472 (2017) (Thomas, J., dissenting) (it is "unwise" for this Court to decide a "novel and important" question that is "not the subject of a circuit conflict" because "[e]xperience shows that [the Court]

would greatly benefit from the views of additional courts of appeals on th[e] question"). The Sixth Circuit is the only court of appeals to have decided that question. In doing so, it did not consider the common law's distinction between trespasses to land and chattels, or cite *any* common-law cases indicating that chalking a moveable chattel (or analogous conduct) would have been considered a trespass. *See* pp. 20-22, *infra*. Meanwhile, the Ninth Circuit, while noting the "meaningful differences between chalking a parked car and the GPS device at issue in *Jones*," declined to delve into the issue. Pet. App. 8a. Nor did either court address in any detail whether, in these circumstances, "[a] license may be implied from the habits of the country." *Florida v. Jardines*, 569 U.S. 1, 8 (2013) (quoting *McKee v. Gratz*, 260 U.S. 127, 136 (1922) (Holmes, J.)); *see also Taylor I*, 922 F.3d at 333 n.3 (noting in a footnote that Saginaw had raised the license question "[f]or the first time on appeal" and "fail[ed] to establish a common practice among private citizens" of tire chalking). Further litigation in the lower courts could help develop a more robust body of reasoning as to the threshold question whether tire chalking is an unlicensed search.

3. The administrative search question—the only question presenting an actual conflict—itself warrants further percolation. Only two circuits have weighed in. This Court typically "let[s] tolerable conflicts go unaddressed until more than two courts of appeals have considered a question." *E.g.*, STEPHEN M. SHAPIRO, KENNETH S. GELLER, TIMOTHY S. BISHOP, EDWARD A. HARTNETT & DAN HIMMELFARB, SUPREME COURT PRACTICE 247 (10th ed. 2013) (citation omitted). Petitioners suggest that the Court should

depart from that practice here for two reasons—both of which are illusory and easily refuted.

a. First, Petitioners argue that "[c]ourts need guidance for assessing government searches, governments need guidance on how to implement their administrative programs, and members of the public need clarity on their Fourth Amendment rights." Pet. 12-13.

In the abstract, those sweeping propositions are uncontroversial. But they are hardly specific to this case. To the extent Petitioners suggest that courts need help determining whether a search has occurred, there is no circuit conflict on that question. *See* Pet. i. And to the extent Petitioners suggest that courts need help determining whether tire chalking is an administrative search, they point to nothing but their disagreement with the Ninth Circuit's reasoning.

Nor do Petitioners substantiate their conclusory argument that governments and citizens need this Court's immediate input. Petitioners cite no examples of governments or citizens crying out for clarity on tire chalking questions. Instead, Petitioners rely on a law review article that pre-dates *any* constitutional challenge to tire chalking—and that argues this Court should overrule multiple administrative search decisions to address "costs to privacy" that do not exist here. *See* Pet. 33-34; E. Brensike Primus, *Disentangling Administrative Searches*, 111 COLUM. L. REV. 254, 312 (2011). Maybe that lack of real-world attention is why Petitioners repeatedly cast tire chalking as a "stealthy encroachment[]" on the Fourth Amendment. *E.g.*, Pet. 22. But whether a stealthy violation or (actually) none at all, tire chalking

presents no reason to depart from this Court's usual practice.

b. Second, Petitioners argue that the Ninth Circuit's decision has "opened the door for any generalized, commonplace government interest to serve as the basis for a warrantless administrative search." Pet. 32. To the contrary, the Ninth Circuit's decision is simply a fact-specific application of this Court's established administrative search framework. The court of appeals emphasized that (1) "the 'primary purpose' of tire chalking is *not* a general interest in crime control, but to assist the City in its overall management of vehicular traffic and the use of city parking spots," (2) Petitioners failed to even "dispute that such interests are significant," (3) tire chalking bears a uniquely "tight nexus to parking management" because "the *only* information that tire chalking could reveal is how long a vehicle remained parked," (4) "it is hard to imagine a 'search' that involves less of an intrusion on personal liberty," and (5) there is a "reduced expectation of privacy for vehicles *** parked on city streets." Pet. App. 17a, 18a, 21a, 22a, 23a (first emphasis added).

None of that factbound analysis tacitly expanded the administrative search doctrine to other scenarios, and Petitioners do not point to a single decision suggesting otherwise. Their speculative concerns about an expanded administrative search doctrine appear rooted in a purported "grave and immediate danger[]" requirement that does not exist. *See* Pet. 29; pp. 23-25, *infra*. And once again, those concerns prove too much. If the Ninth Circuit's decision is indeed the first step towards further intrusions on the Fourth

Amendment's protections, this Court will have ample opportunity to intervene if and when those predictions come to pass.

4. Further percolation would also enable the courts of appeals to address additional issues potentially implicated by Fourth Amendment tire chalking challenges. For example, the "community caretaking" exception applies when government agents engage in "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). This Court has held that local governments' authority to "remove and impound automobiles which violate parking ordinances and which thereby jeopardize both the public safety and the efficient movement of vehicular traffic" is "beyond challenge." *South Dakota v. Opperman*, 428 U.S. 364, 369 (1976). Not only that: Police can conduct suspicionless inventory searches of those impounded vehicles. *See id.* Petitioners seek to arbitrarily cabin community caretaking to that precise scenario. *See* Pet. 30. But it is not obvious why municipalities can use "standard procedures *** tending to ensure that the intrusion [is] limited in scope to the extent necessary to carry out the caretaking function" when dealing with impounded cars but not parked ones. *Opperman*, 428 U.S. at 375 (emphasis omitted).

No circuit has meaningfully addressed whether the community caretaking exception applies to the tire chalking context on a developed record. In *Taylor I*, the Sixth Circuit rejected the exception at the pleading stage because the City of Saginaw had not

demonstrated any "relation to public safety," leaving the court to conclude "on the[] facts and on the arguments the City proffer[ed]" that Saginaw's only purpose was "to raise revenue." *Taylor I*, 922 F.3d at 335-336. The Sixth Circuit did not revisit that issue in *Taylor II*. But as San Diego has shown, municipalities are likely to substantiate significant public safety (and other) interests in future tire chalking cases. *See* Pet. App. 4a-5a, 20a-21a; *see also Opperman*, 428 U.S. at 369 (acknowledging "public safety" and other interests served by parking enforcement). In such cases, *Taylor I*'s rationale is inapplicable.

At a minimum, lower courts should have the chance to address these and any other pertinent issues before this Court steps in.

II. THE DECISION BELOW IS CORRECT

This Court should deny review for the additional reason that the Ninth Circuit got it right: Even ignoring other potential justifications, the City's tire chalking practice comports with the Fourth Amendment because (i) tire chalking is not a search, and (ii) if it were a search, it would be reasonable.

A. Tire Chalking Is Not A Fourth Amendment Search

"No reasonable person would argue that something as trivial and transitory as chalk on a tire offends a reasonable expectation of privacy." *Taylor*, 620 F. Supp. 3d at 667. Petitioners seem to agree. They argue only that tire chalking is a common-law trespass. Pet. 28. But *Jones* and *Jardines* do not

compel that conclusion, and Petitioners point to no common-law authority that supports it.

Under this Court's decision in *Jones*, a Fourth Amendment search occurs when the "government trespass[es] upon the areas *** enumerate[d]" in the Fourth Amendment, including a person's "effects." 565 U.S. at 406. *Jones* concluded that "the Government's installation of a GPS device on a target's vehicle" fit the bill because "[t]he Government physically occupied private property for the purpose of obtaining information." *Id.* at 404. But *Jones* did not hold that "such a physical intrusion" occurs every time a government agent touches a person's vehicle. *Id.* And it does not follow from *Jones* that *any* uninvited but "harmless or trivial contact with personal property" constitutes a trespass. *Id.* at 425 (Alito, J., concurring) (citing W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON, & DAVID G. OWEN, PROSSER & KEETON ON LAW OF TORTS § 14, at 87 (5th ed. 1984) ("Prosser & Keeton"); DAN B. DOBBS, THE LAW OF TORTS § 60, at 124 (2000)).

Such a sweeping rule would be inconsistent with governing common-law principles. When it comes to real property, no one doubts that a person "is a trespasser" if he "set[s] his foot upon his neighbour's [land] without *** leave." *Jones*, 565 U.S. at 405 (quoting *Entick v. Carrington*, 95 Eng. Rep. 807, 817 (C.P. 1765)); *see Jardines*, 569 U.S. at 7. But "[t]he strict liability which persisted for so long in the case of trespass to land did not seemingly survive to the same extent in the case of trespass to chattels." Prosser & Keeton § 14, at 86 (footnote omitted).

To the contrary, William Blackstone, "the oracle of the common law in the minds of the American Framers," *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 381 n.14 (1974), divided injuries to "moveable chattels" into two categories: "deprivation of possession" and "abuse or damage," 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *144-*145 (Thomas P. Gallanis ed., 1st ed. 2016). Neither appears to have embraced anything like tire chalking, which does not involve dispossession or any "injur[y] to another's property." *See id.* at *152-*153; *accord, e.g.*, *Marentille v. Oliver*, 2 N.J.L. 379, 380 (1808) (Pennington, J.) (plaintiff could not bring trespass action against defendant who struck plaintiff's horse without showing "an injury done to the horse, whereby the plaintiff suffered damage"); *see also* Orin S. Kerr, *The Curious History of Fourth Amendment Searches*, 2012 SUP. CT. REV. 67, 92 & n.140 (2012) (noting scholarly criticism of claim that common-law trespass did not require damage to chattel).

To be sure, *Jones* indicates that a common-law trespass occurs when there has been an "attachment to or penetration of personal property." Kerr, *supra*, at 91-92. But attachment and penetration are forms of physical dispossession. *See* BLACKSTONE, *supra* at *151-*152 (possessory use of goods without owner's consent can give rise to a trover action that emerged from an earlier form of trespass action). Tire chalking is not. Nor does tire chalking reveal a "treasure trove of information," Pet. App. 8a, that, as a historical matter, law enforcement agents could "secretly monitor" only by trespassing, *see Jones*, 565 U.S. at

430 (Alito, J., concurring); *see also Kyllo v. United States*, 533 U.S. 27, 40 (2001).

B. Non-Discretionary Tire Chalking Is A Reasonable Administrative Search

Even assuming that tire chalking is a common-law trespass and thus a search, the City's practice is reasonable. The court of appeals correctly identified the applicable legal standard—pulled directly from this Court's administrative search case law. A straightforward application of that standard compels the conclusion that the City's tire chalking practice does not violate the Fourth Amendment.

1. First, there is no dispute that "administrative searches must bear a sufficient connection to the governmental interests they serve and cannot advance as their 'primary purpose' 'uncover[ing] evidence of ordinary criminal wrongdoing.'" Pet. App. 13a (alteration in original) (quoting *Edmond*, 531 U.S. at 41-42). Here, as in cases upholding motorist checkpoints, the City's "program[] *** was designed primarily to serve purposes closely related to the *** necessity of ensuring roadway safety." *Edmond*, 531 U.S. at 41-42. And unlike a checkpoint to detect narcotics, the nexus between tire chalking and traffic control could not be tighter, because tire chalking does not incidentally reveal evidence of *any* non-parking violation. *See id.*; Pet. App. 22a.

2. Second, as this Court has explained, "where a Fourth Amendment intrusion serves special government needs, *** it is necessary to balance the individual's privacy expectations against the government's interests to determine whether it is impractical to require a warrant or some level of

individualized suspicion in the particular context." Pet. App. 13a-14a (quoting *Von Raab*, 489 U.S. at 665-666). Here, "there is a diminished expectation of privacy in automobiles." *Byrd v. United States*, 138 S. Ct. 1518, 1526 (2018). "That is even more so when the vehicle is parked on city streets, where drivers frequently find fliers affixed to their windshields and can also reasonably expect greater administrative scrutiny for compliance with parking laws[.]" Pet. App. 23a.

Further, tire chalking is almost "*sui generis*" as an "investigative procedure *** so limited both in the manner in which the information is obtained and in the content of the information revealed." *United States v. Place*, 462 U.S. 696, 707 (1983) (discussing canine drug sniffs, which likewise reveal only one type of information). For that reason, any *de minimis* intrusion does not outweigh the City's interests, making the City's non-discretionary tire chalking program "reasonable in its scope and manner of execution." Pet. App. 14a (quoting *King*, 569 U.S. at 448).

3. Petitioners nevertheless paint the court of appeals' decision as "expand[ing]" the administrative search exception. Pet. 27. Not so. Although Petitioners gesture at the need for an administrative search to serve some "clear" and "specific" purpose, they do not explain why the City's interests in "maintain[ing] traffic flow" and "manag[ing] use of city parking spaces" are unclear or unspecific. *Id.* at 28. Instead, Petitioners' position boils down to their view that such interests are not "serious" or "grave" enough. *Id.* at 28, 29. But Petitioners conceded below that the

City's interests are "significant." Pet. App. 21a. And this Court has recognized that parking violations "jeopardize both the public safety and the efficient movement of vehicular traffic." *Opperman*, 428 U.S. at 369.

Petitioners' "dangerous conditions" requirement, even if administrable, would "be inconsistent with various administrative search exception cases." Pet. App. 14a-15a. To give just a few examples, this Court has approved checkpoints aimed at determining the immigration status of roadway travelers, *United States v. Martinez-Fuerte*, 428 U.S. 543, 552, 562 (1976), and gathering information about a recent hit-and-run accident, *Illinois v. Lidster*, 540 U.S. 419, 428 (2004); *see also, e.g.*, *New Jersey v. T.L.O.*, 469 U.S. 325, 343 (1985) (warrantless search of a student's purse for cigarettes). If the presence or absence of immediate danger were determinative, it would be difficult to square (i) *Edmond*'s holding that a traffic checkpoint aimed at intercepting narcotics was impermissible with (ii) *Edmond*'s acknowledgment that a checkpoint aimed at "verifying drivers' licenses and vehicle registrations would be permissible." 531 U.S. at 38; *see also al-Kidd*, 563 U.S. at 737. What explains the difference is the existence (or not) of a "close connection to roadway safety." *Edmond*, 531 U.S. at 43.

While Petitioners accuse the Ninth Circuit of "mixing and matching" concepts, it is Petitioners who pluck quotes about "danger[]" out of context to support their invented rule. Pet. 32. For example, Petitioners rely on *Chandler v. Miller*, where this Court noted a lack of "danger" in the sense that the politician drug-

use "hazards respondents broadly describe[d]" were "simply hypothetical," not "real," and the challenged "statute was not enacted *** in response to [them]." 520 U.S. 305, 318-319 (1997); *see* Pet. 27. Here, no one disputes that parking violations cause significant hazards. Pet. App. 21a. In any event, Petitioners' myopic focus on the purported seriousness of the City's interests ignores half of the equation: the indisputably minimal intrusion on Petitioners' privacy.

4. Nothing about the history or original meaning of the Fourth Amendment supports dramatically expanding its scope to prohibit minimal intrusions like tire chalking. Lacking support from this Court's case law, Petitioners liken tire chalking to the "general warrants and writs of assistance" that "afforded [colonial] officers the power to 'rummage' 'unrestrained' and without individualized suspicion through peoples' belongings 'for evidence of criminal activity.'" Pet. 24 (quoting *Riley v. California*, 573 U.S. 373, 403 (2014)). That analogy, as the Ninth Circuit put it bluntly, "is obviously inaccurate." Pet. App. 27a. Royal officials could "search and seize whatever and whomever they pleased while investigating crimes or affronts to the Crown." *al-Kidd*, 563 U.S. at 742. By contrast, tire chalking is non-discretionary and reveals only one piece of information: whether a car has moved from a public parking spot. *See Place*, 462 U.S. at 707.

Petitioners' logic "appears grounded in the belief that the entire administrative search doctrine is an affront to the original meaning of the Fourth Amendment and should therefore be extremely limited in its application" to the facts of a subset of

prior cases. Pet. App. 27a. "But the Supreme Court has never said this," and Petitioners' "high-level historical overview certainly does not prove it." *Id.*

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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July 21, 2023