No. 22-943

In the Supreme Court of the United States

ANDRE VERDUN AND IAN ANOUSH GOLKAR, ON BEHALF OF THEMSELVES AND A CLASS OF ALL OTHERS SIMILARLY SITUATED, PETITIONERS

v.

CITY OF SAN DIEGO AND SAN DIEGO POLICE DEPARTMENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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INTRODUCTION

San Diego's brief underscores the need for this Court's review. Conceding the split between the Ninth and Sixth Circuits, Opp. 1, 11-14, the City tries to minimize it. But the Ninth Circuit here, over Judge Bumatay's dissent, acknowledged that it was "part[ing] ways with the Sixth Circuit's" decision in *Taylor v. City of Saginaw*, 11 F.4th 483 (6th Cir. 2021) (*Taylor II*), in holding that tire-chalking is constitutional under the administrative-search exception. App. 25a. The courts of appeals thus openly disagree on an outcome-determinative constitutional question, and this is an ideal case for resolving it. Whether San Diego can chop the Fourth Amendment inquiry into discrete propositions on which courts are *not* split is beside the point. Opp. 13-19. The City's approach confirms that declining review will only let the circuit conflict deepen and its scope broaden.

San Diego fares no better on the merits. The City argues that tire-chalking isn't a Fourth Amendment search, and even if it is, it falls under the administrative-search exception. Those arguments fail for the reasons Judge Bumatay and the Sixth Circuit have explained. Under the common-law trespass inquiry the Court articulated in *United States v. Jones*, 565 U.S. 400 (2012), and *Florida v. Jardines*, 569 U.S. 1 (2013), tire-chalking is a Fourth Amendment search because it is a trespass on a constitutionally protected space for the purpose of gathering information. And contrary to the Ninth Circuit's and San Diego's arguments, that search was unreasonable under the Fourth Amendment. It flunks this Court's longstanding precedent that a warrantless, suspicionless administrative search is constitutional only if it advances serious, clear, and specific government

interests. Nor does it fit the community-caretaking or other exceptions. *See Taylor v. City of Saginaw*, 922 F.3d 328, 334-35 (6th Cir. 2019) (*Taylor I*).

The City claims that refusing to recognize tire-chalking under the administrative-search exception would "dramatically expand[]" the Fourth Amendment's "scope." Opp. 25. But that's not true, either. San Diego's argument ignores the Court's repeated warning against expanding the "jealously and carefully drawn" exceptions to the Fourth Amendment's warrant requirement, *Jones v. United States*, 357 U.S. 493, 499 (1958), to prevent those exceptions from "swallow[ing] the rule," *City of Los Angeles v. Patel*, 576 U.S. 409, 424-25 (2015). The City's and the Ninth Circuit's fluid reasonableness test does just that, licensing municipalities to conduct indiscriminate searches so long as they can point to *some* reason. The Framers did not countenance such an approach, and neither should this Court.

The Court should grant review.

ARGUMENT

I. The Ninth and Sixth Circuits have split over whether tire-chalking is a constitutional administrative search, as San Diego concedes, and this case is an ideal vehicle for resolving the disagreement.

A. San Diego acknowledges "[t]he disagreement between the Sixth and Ninth Circuits" about whether tire-chalking is constitutional under the administrative-search exception to the Fourth Amendment warrant requirement. Opp. 13. In *Taylor II*, the Sixth Circuit held that tire-chalking is a warrantless search that cannot be justified under the administrative-search exception. 11 F.4th at 489. That holding leaves

tire-chalking presumptively unconstitutional in the Sixth Circuit, which held in *Taylor I* that the automobile and community-caretaking exceptions to the warrant requirement cannot justify tire-chalking, either. *See* 922 F.3d at 334-35; Pet. 22. But the Ninth Circuit here, over Judge Bumatay's dissent, expressly "part[ed] ways with the Sixth Circuit's" decision in *Taylor II*, holding that tire-chalking is constitutional under the administrative-search exception. App. 25a.

This case is an ideal vehicle for resolving the conflict. Pet. 34-35. The City doesn't dispute that (a) both the court of appeals and the district court held that tire-chalking is constitutional under the administrative-search exception; (b) those holdings were dispositive; and (c) there are no alternative holdings. The result is that tire-chalking is not a constitutionally permissible administrative search in Saginaw, but it is in San Diego.

B. Having conceded the split, the City tries to downplay it. The City claims that the conflict is limited, and that there are *other* questions on which the courts of appeals are *not* split. But none of that changes the key point: the Sixth and Ninth Circuits are split on a discrete, outcome-determinative constitutional question, and this case is an ideal vehicle for resolving it. The Sixth and Ninth Circuits won't resolve the conflict on their own, and the possibility that future court of appeals decisions could deepen the split or broaden its scope only underscores the need for this Court's review. None of the City's arguments suggests otherwise.

First, the City contends (Opp. 13) that there's no disagreement about whether tire-chalking violates the Fourth Amendment. That's wrong, because—as

the City acknowledges—tire-chalking is a presumptively unconstitutional warrantless search in the Sixth Circuit but a constitutional administrative search in the Ninth. And it can't be justified in the Sixth Circuit, which has rejected not just the administrative-search exception, but the automobile and community-caretaking exceptions, as well. *Supra* pp. 2-3; Pet. 17-19. That's why the district court on remand from *Taylor II* declared tire-chalking unconstitutional. *Taylor v. City of Saginaw*, No. 1:17-CV-11067, 2022 WL 3160734, at *8 (E.D. Mich. Aug. 8, 2022). San Diego's nearly identical scheme would have met the same fate in Cincinnati.

Second, the City claims that there's no conflict over whether tire-chalking "implicates *other* potentially applicable exceptions to the warrant requirement." Opp. 13 (emphasis added). But that makes no difference, because, again, tire-chalking is a presumptively unconstitutional search that doesn't fall within the administrative-search, automobile, or community caretaking exceptions in the Sixth Circuit, but a constitutional administrative search in the Ninth. As Judge Bumatay's dissent explains, tire-chalking "fails to fit *any* Fourth Amendment exception," App. 45a (emphasis added), because under the original meaning of the Fourth Amendment, the City's "generalized and commonplace" "interests in reducing traffic congestion" can't overcome the Amendment's individualized-suspicion requirement, App. 51a. The City doesn't explain how further percolation could resolve the outcome-determinative disagreement between the Sixth and Ninth Circuits.

Finally, the City contends (Opp. 13) that there's no conflict over whether tire-chalking is a Fourth Amendment search, because the Ninth Circuit only

assumed it is one. But the circuit split would be just as certworthy even if the Ninth Circuit had *agreed* with the Sixth Circuit on that point and *held* that tire-chalking is a search, because the outcome-determinative disagreement is about whether the administrative-search exception can justify tire-chalking. The Ninth Circuit's assumption that tire-chalking is a search merely preserves the possibility of *broader* disagreement if the court later decides to hold otherwise. Either way, the split over the administrative-search exception, and thus over tire-chalking's constitutionality, remains. And in any event, tire-chalking "easily constitutes a 'search' subject to Fourth Amendment protections," App. 32a-33a (Bumatay, J., dissenting), under the common-law trespass inquiry articulated in *Jones*, 565 U.S. at 404-11, and *Jardines*, 569 U.S. at 5-6, so disagreement on that point is unlikely. *See* Pet. 28; *infra* pp. 5-7. Indeed, the Ninth Circuit itself has cited *Taylor I* as an example of a case in which a "physical intrusion constitutes a search." *United States v. Dixon*, 984 F.3d 814, 821 (9th Cir. 2020).

II. The decision below is wrong.

A. The Ninth Circuit's decision is wrong. Pet. 23-32. Tire-chalking is an unconstitutional warrantless, suspicionless Fourth Amendment search. Pet. 28; *supra* pp. 1-2. The administrative-search exception can't justify it, because tire-chalking doesn't give vehicle owners an opportunity for precompliance review, and it's not tied to any serious, clear, and specific public health or safety risk. Pet. 27-30. Nor does tire-chalking fall within any other exceptions to the warrant requirement. Pet. 30.

The Ninth Circuit erred in devising an anything-goes reasonableness test to justify tire-chalking rather than keeping the administrative-search exception narrow. Pet. 31. Rather than require serious, clear, and specific concerns to justify an administrative search, as this Court's precedent requires, the court of appeals permitted commonplace, generalized concerns to justify tire-chalking. Pet. 32.

B. San Diego's counterarguments fail.

1. The City argues that tire-chalking isn't a search because a "harmless or trivial contact with personal property" isn't necessarily a trespass. Opp. 20. That is incorrect.

As explained, a trespass need not cause damage to be a search. Pet. 28; *see Jones*, 565 U.S. at 404-07; App. 33a, 35a (Bumatay, J., dissenting). And *Jones* doesn't suggest that the degree of contact with personal property is a relevant consideration. After all, the government conducted a trespassory search in *Jones* by attaching to a car "a small, light object that [did] not interfere in any way with the car's operation." 565 U.S. at 424-25 (Alito, J., concurring in the judgment). That makes sense. Contrary to the City's argument, when the Fourth Amendment was adopted, a common-law trespass suit "could be maintained if there was a violation of 'the dignitary interest in the inviolability of chattels,'" even without resulting damage. *Id.* at 419 n.2; *see also United States v. Richmond*, 915 F.3d 352, 358 (5th Cir. 2019); *United States v. Ackerman*, 831 F.3d 1292, 1307 (10th Cir. 2016) (Gorsuch, J.).

The City also says (Opp. 21) that tire-chalking isn't a search because it doesn't dispossess the owner of her vehicle. But whatever dispossession might have

to do with *seizure*, it's not relevant to whether there was a *search*. *Jones* involved a search because the government physically intruded on a car to gain information by attaching a GPS device. 565 U.S. at 404-05. The government didn't need to boot the car's tires as well to trigger Fourth Amendment scrutiny.

2. The City next claims (Opp. 22-23) that tire-chalking is a reasonable administrative search because it's closely connected to making roadways safe; ensuring roadway safety outweighs the minimal expectation of privacy in a car parked on city streets; and tire-chalking reveals only limited information. Those arguments are unpersuasive.

Tire-chalking might advance generalized, "ever-present," and "pedestrian" governmental interests, App. 50a-51a (Bumatay, J., dissenting), like efficient traffic flow and use of city parking spaces, compliance with parking regulations, and general roadway safety. App. 20a-21a (majority). But the Court has never "approved of an administrative search for such pedestrian concerns," App. 50a (Bumatay, J., dissenting), which don't involve grave, clear, and specific, threats to public health or safety, Pet. 27-30. The City's interests thus can't justify departing from the warrant requirement, regardless of the degree of privacy interests in a parked car or how much information tire-chalking reveals. *Contra* Opp. 22-23.

3. The City argues that the administrative-search exception doesn't require "immediate danger," and that it's enough that the City's interests are "significant." Opp. 23-24. That's wrong, as the Court's administrative-search cases show. The highway checkpoints the Court has upheld address serious, specific, and immediate concerns, like drunk driving,

Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 452-55 (1990), the flow of illegal aliens at the border, *United States v. Martinez-Fuerte*, 428 U.S. 543, 556-59 (1976), and an at-large perpetrator of a fatal hit-and-run accident, *Illinois v. Lidster*, 540 U.S. 419, 421-22 (2004). San Diego's generalized interests in roadway safety stemming from proper traffic flow and compliance with parking restrictions might be "significant," but they come nowhere close to the specific, pressing interests that constitutional highway checkpoints serve. They thus can't override the core Fourth Amendment concerns with suspicionless searches.

Contrary to the City's argument (Opp. 24), neither *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), nor *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), suggests otherwise. *T.L.O.* involved a school employee's search of a student's purse on individualized suspicion that the student was violating school rules by smoking cigarettes at school, 469 U.S. at 328, 342 n.8, 346, thus presenting specific, immediate, and serious health and safety concerns, *see id.* at 352-53 (Blackmun, J., concurring in the judgment). But the City chalks tires both without individualized suspicion and without addressing those same kinds of concerns.

Edmond, for its part, held a law enforcement practice *unconstitutional*. To be sure, *Edmond* said that in *Delaware v. Prouse*, 440 U.S. 648 (1979), the Court had "suggested" that a checkpoint to "verify[] drivers' licenses and vehicle registrations would be permissible." 531 U.S. at 37-38. But that kind of program wasn't at issue in *Prouse* or *Edmond*. Instead, *Prouse* held "only" that the practice of "stopping an automobile and detaining the driver" to check his license and registration is unconstitutional absent "articulable and reasonable suspicion that a motorist is unlicensed

or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law." 440 U.S. at 663. And *Edmond* made clear that "generalized and ever-present" governmental concerns—like the City's here—can't justify warrantless checkpoints. 531 U.S. at 44; *see* App. 48a-49a (Bumatay, J., dissenting).

4. Finally, San Diego asserts that neither the Fourth Amendment's history nor its original meaning "supports dramatically expanding its scope to prohibit minimal intrusions like tire chalking." Opp. 25. But the City has it exactly backwards: it's the Ninth Circuit's approach that "dramatically expand[s]" the administrative-search exception "beyond anything this Court has recognized." *Caniglia v. Strom*, 141 S. Ct. 1596, 1599 (2021); *see* Pet. 6, 32. And it does so despite this Court's repeated admonition not to allow "narrow exception[s] to swallow the rule" that searches require a warrant. *Patel*, 576 U.S. at 424-25; *see* Pet. 6, 26-27.

Maintaining the limits on the administrative-search exception also aligns with the Framers' understanding that government searches would be unreasonable under the Fourth Amendment without a particularized warrant or a specific exigency. *See* Laura K. Donohue, *The Original Fourth Amendment*, 83 U. Chi. L. Rev. 1181, 1185, 1193 (2016); App. 37a-38a, 41a-45a (Bumatay, J., dissenting); *accord Patel*, 576 U.S. at 420; *United States v. Carloss*, 818 F.3d 988, 1004-05 (10th Cir. 2016) (Gorsuch, J., dissenting). Tire-chalking doesn't present those circumstances, making it unconstitutional given the Fourth Amendment's original meaning. *See* Pet. 24, 33; App. 37a-45a, 51a-52a (Bumatay, J., dissenting). Courts shouldn't expand the administrative-search

exception to save tire-chalking just because cities have been doing it "since at least the 1970s." Opp. 4 (quoting App. 7a).

III. The question presented is important.

A. The question presented is important. Pet. 33-34. The Ninth Circuit improperly expanded a "jealously and carefully drawn" exception to the warrant requirement, *Jones*, 357 U.S. at 499, paving the way for governments to invoke generic and ubiquitous interests to justify suspicionless, warrantless searches. That consequential error, combined with this Court's recognition that a trespass to gather information is a search as the Framers would have understood it, heightens the need for this Court's intervention to settle the bounds of the administrative-search exception. *See* Pet. 33-34.

B. In the City's view, the Court nonetheless should allow an assortment of Fourth Amendment questions to percolate, like whether tire-chalking is a search, whether it falls within the administrative-search exception, whether it implicates other exceptions to the warrant requirement; and whether it is unconstitutional. That view makes little sense.

First, there's no reason to wait for further decisions addressing whether tire-chalking is a search. A straightforward application of *Jones* and *Jardines* shows that it is, as Judge Bumatay and the Sixth Circuit explained. *Supra* pp. 5-7. San Diego nonetheless suggests (Opp. 15) that there might be an implied license to chalk tires, and thus no search. But the Sixth Circuit correctly rejected that argument in *Taylor I*, explaining that there is no "common practice among private citizens to place chalk marks on other individual[s'] tires—much less to obtain evidence of

wrongdoing—that would amount to the type of 'customary invitation' described in *Jardines*." 922 F.3d at 333 n.3. Percolation won't shed more light on the issue. Other circuits are unlikely to disagree with the Sixth, and more time won't resolve the circuit split.

Second, the City argues that the Court should wait and see if a court of appeals might hold that the community-caretaking exception justifies tire-chalking, or whether there are "additional issues potentially implicated" by the practice. Opp. 18-19. But the Sixth Circuit already correctly rejected the community-caretaking exception, *Taylor I*, 922 F.3d at 335-36, and San Diego's half-hearted argument (Opp. 18) that parked cars are like impounded cars both is nonsensical and ignores governments' "three distinct needs" regarding cars "in police custody," *South Dakota v. Opperman*, 428 U.S. 364, 369 (1976)—that is, "already under police control," *Caniglia*, 141 S. Ct. at 1599.

Third, San Diego argues that "the Sixth Circuit may clarify its view as to whether tire chalking violates the Fourth Amendment." Opp. 14. But as explained, tire-chalking is constitutional under the administrative-search exception in the Ninth Circuit, but presumptively unconstitutional in the Sixth Circuit—and the City cannot rebut that presumption. *Supra* pp. 2-3; Pet. 22. Only this Court can resolve the conflict.

Fourth, the City claims (Opp. 15-18) that the Court shouldn't grant review because the split is only 1–1. But the Court often grants review to resolve 1–1 splits. *See, e.g.*, *Bittner v. United States*, 143 S. Ct. 713, 717 (2023); *Cummings v. Premier Rehab Keller, P.L.L.C.*, 142 S. Ct. 1562 (2022); *Rotkiske v. Klemm*,

140 S. Ct. 355, 359-60 (2019); *PPL Corp. v. Commissioner*, 569 U.S. 329, 334 (2013). And the question presented is an "unsettled and important" Fourth Amendment question. Stephen M. Shapiro et al., Supreme Court Practice 4-36 (11th ed. 2019). Because the Ninth Circuit, Judge Bumatay, and the Sixth Circuit have carefully analyzed the question, further percolation will produce only harmful delay, not helpful guidance.

Finally, San Diego tries to minimize the Ninth Circuit's decision as "a fact-specific application" of the Court's administrative-search precedent. Opp. 17. But that characterization doesn't eliminate the circuit conflict, and it's wrong anyway. As explained (at 5-10), the Ninth Circuit expanded a limited exception that this Court has repeatedly declined to enlarge. If the judiciary abdicates its "duty … to safeguard against even 'stealthy encroachments' on the Fourth Amendment," there's no telling what other "indiscriminate searches for such an ordinary government enterprise" Americans might suffer. App. 31a (Bumatay, J., dissenting) (quoting *Boyd v. United States*, 116 U.S. 616, 635 (1886)).

CONCLUSION

The petition for a writ of certiorari should be granted.

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