No. 07- 08-33 JUL 03 2008

IN THE
Supreme Court of the United States

DEVON MONROE SMITH,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Fourth Amendment requires that the decision to impound a vehicle for community caretaking purposes without a warrant be made in accordance with standardized police procedures.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Devon Smith respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Third Circuit in *United States v. Smith*, No. 06-3112.

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit (Pet. App. 1a-24a) is published at 522 F.3d 305. The district court's opinion explaining the denial of petitioner's motion to suppress (Pet. App. 25a-33a) is not published but is available at 2005 WL 2746657.

JURISDICTION

The judgment of the court of appeals was entered on April 9, 2008. This Court has jurisdiction pursuant to 28 USC § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The Fourth Amendment to the United States Constitution 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."

STATEMENT OF THE CASE

This case presents an important Fourth Amendment issue over which the federal courts of appeals and state courts of last resort are openly and intractably divided: whether a warrantless impoundment of a vehicle violates the Fourth Amendment when police do not conduct it pursuant to standardized procedures. In this case, the Third Circuit held that an impoundment decision need *not* be made pursuant to standardized procedures, further exacerbating the split of authority on that issue.

1. On June 8, 2004, at approximately 4:19 in the afternoon, Lancaster police officers Christopher Laser and Richard Heim recognized petitioner Devon Smith in the passenger seat of a white Ford Taurus driven by Danny Santiago. Officer Heim was aware of an outstanding bench warrant for petitioner, so the officers pulled the vehicle over. Petitioner got out of the car and fled, but Officer Heim pursued him and arrested him. The officers also arrested Santiago for engaging in a physical altercation with Officer Laser. Officer Laser transported both arrestees to the police station, while Officer Heim stayed behind at the scene.

Officer Heim did not know who owned the car in which the arrestees had been riding, and no one else at the scene was immediately available to take possession of it. He presumably could have parked and locked the car on the side of the road or in a nearby parking lot. Instead, Officer Heim elected –

without seeking or obtaining a warrant – to impound the vehicle. He accordingly drove it to the police station.

In deciding to impound the car, Officer Heim was unaware of any standard procedure or policy his police department had regarding the impoundment of vehicles. Instead, as he later testified, "[i]n this situation this vehicle was impounded by my discretion." Pet. App. 10a. He explained that he decided to impound the vehicle "because neither the driver nor [petitioner] was the owner of the vehicle and we were going to try and contact the registered owner." Heim Dep. at 28-29. Officer Heim said that he was concerned that, if left on the street, someone with a "duplicate[] key" might use the car "for drugs." *Id.*

Officer Laser, who likewise was unable to point to any departmental policy governing when officers should take vehicles into custody, gave a different reason for the decision to impound the vehicle. He testified that the police impounded the vehicle in order to prevent "damage and vandalism." Tr. of Suppression Hrg. at 30.

At the station, during a warrantless inventory search of the vehicle, Officer Laser found a loaded semi-automatic handgun in the glove compartment. After waiving his *Miranda* rights, petitioner told police detectives that the gun was his and that he was aware that, as a convicted felon, he could not lawfully possess the weapon.

2. On May 3, 2005, a grand jury indicted petitioner on one count of unlawful possession of a firearm by a convicted felon in violation of 18 U.S.C. §§ 922(g) and 924(e). Following the indictment, petitioner filed a motion to suppress the handgun evidence. He argued that the warrantless impoundment of the vehicle, which led to the search and then the confession, was unconstitutional in part because it was not done pursuant to any standardized procedures.[1]

The U.S. District Court for the Eastern District of Pennsylvania denied the motion. The court did not dispute the premise that impoundments need to be conducted pursuant to standardized procedures. *See* Pet. App. 29a-30a. But even though the officers did not know of any standardized impoundment policy and even though Officer Heim acknowledged acting solely at his own discretion, the district court held that the Lancaster City Bureau of Police actually had a standardized impoundment policy because both officers testified that "they impounded the vehicle because both occupants had been taken into custody." Pet. App. 29a (quotation omitted). The district court further concluded that the impoundment was "not arbitrary or unreasonable" because the vehicle obstructed traffic and "was

[1] Petitioner's girlfriend was the owner of the vehicle. Pet. App. 3a n.1. Because petitioner would have testified that his girlfriend had lent him the vehicle, the government did not contest petitioner's standing to challenge the constitutionality of the impoundment. Pet. App. 8a n.5.

located in a high-crime area and the officers sought to maintain the safety of the vehicle and its contents." Pet. App. 31a-32a.

Petitioner entered a conditional plea of guilty, but reserved his right to appeal from the denial of his suppression motion. The district court accepted the plea and sentenced petitioner to a term of 192 months in prison, followed by five years of supervised release, and also levied a $2000 fine.

3. The Third Circuit affirmed on a different ground. The court of appeals observed that "the District Court's finding that [Officer] Heim acted pursuant to a standardized procedure when he impounded the vehicle probably is erroneous." Pet. App. 12a. But the Third Circuit upheld the district court's judgment, ruling as a matter of law that the Fourth Amendment does not require standardized impoundment procedures in the first instance.

In so holding, the Third Circuit acknowledged that cases from other federal circuits "reflect[] a conflict" over this issue, and it recognized that it had to "decide which of . . . two lines of cases to follow." Pet. App. at 17a, 21a. The First Circuit recently held that, even absent standardized procedures, "impoundments of vehicles for community caretaking purposes are consonant with the Fourth Amendment so long as the impoundment decision was reasonable under the circumstances." Pet. App. 19a (quoting *United States v. Coccia*, 446 F.3d 233, 239 (1st Cir. 2006)). By contrast, the D.C. Circuit recently held

that "a community caretaking impoundment must be based on (1) a reasonable standard police procedure governing decisions on whether to impound vehicles and (2) and the police must follow the procedure in the case involved." Pet. App. 21a (discussing *United States v. Proctor*, 489 F.3d 1348, 1353-54 (D.C. Cir. 2007)).

The Third Circuit ultimately agreed with the First Circuit. Pet. App. 22a. The Third Circuit recognized this Court's holding in *Florida v. Wells*, 495 U.S. 1 (1990), that warrantless inventory searches – which typically are directly linked to warrantless impoundments – must be conducted according to standardized procedures. Pet. App. 14a n.7. The court of appeals further acknowledged that standardized procedures "tend to encourage the police to avoid taking arbitrary action." *Id.* at 23a. But the Third Circuit dismissed *Wells* (in a footnote) as "of little use here" because it focused on inventory searches. *Id.* at 14a n.7. And, like the First Circuit, it read this Court's statement in *Colorado v. Bertine*, 479 U.S. 367. 375-76 (1987), that police may impound cars without warrants "so long as that discretion is exercised according to standard criteria" as merely suggesting, but not requiring, such regulation. Pet. App. 19a, 22a.

Freed from the compass of this Court's precedent, the Third Circuit's concluded that all that is necessary to uphold a warrantless impoundment is a court's *post hoc* judgment – which it made here – that the police's impoundment decision reasonably

advanced community caretaking functions. Pet. App. 22a-23a.

REASONS FOR GRANTING THE WRIT

Warrantless inventory searches of vehicles consist of two steps: first, the police gain custody of the vehicle by seizing and impounding it; second, they search the impounded vehicle. This Court has squarely held that the Fourth Amendment requires that the second step be done according to standardized procedures. *See, e.g.*, *Florida v. Wells*, 495 U.S. 1, 4 (1990). But this Court has never definitively resolved whether failing to conduct the first step in accordance with standardized procedures likewise violates the Fourth Amendment. And in the absence of such clear guidance, federal courts of appeals and state courts of last resort have become deeply divided over the issue.

This Court should resolve this conflict of authority now. The question of how the Fourth Amendment operates in the context of impounding vehicles is a recurring and important one to the criminal justice system. It is squarely presented by this case. And the Third Circuit decision that no such procedures are necessary contravenes this Court's repeated admonition that standardized procedures are necessary to guard against officers invoking "community caretaking" interests as a ruse for impermissibly conducting investigatory searches without first seeking and obtaining warrants.

A. The State and Federal Courts Are Intractably Divided over Whether the Fourth Amendment Requires Police to Follow Standardized Procedures in Impounding Vehicles

It is a fundamental Fourth Amendment principle that a warrantless search or seizure of private property is constitutionally "unreasonable" unless it falls within one of "certain carefully defined classes of cases." *Camara v. Municipal Court*, 387 U.S. 523, 528-29 (1967). One such class of cases involves impounding and inventorying vehicles when necessary for "community caretaking." *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973).

This Court has closely regulated such "community caretaking" actions to ensure that this exception does not become an end-round the general warrant requirement. In particular, this Court has repeatedly and unanimously held that warrantless inventories of impounded vehicles must be conducted according to "standard police procedures." *South Dakota v. Opperman*, 428 US. 364, 372 (1976); *see also, e.g.*, *Florida v. Wells*, 495 U.S. 1, 4 (1990). Such established procedures help ensure that inventory searches are not merely "a ruse for a general rummaging in order to discover incriminating evidence" without a search warrant. *Wells*, 495 U.S. at 4; *see also Cady*, 413 U.S. at 441 (community caretaking actions must be "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute").

This Court has indicated that the same principles apply equally to the antecedent decision to impound a vehicle. In *Colorado v. Bertine*, 479 U.S. 367 (1987), a police officer impounded the defendant's van after arresting him for drunk driving and discovered narcotics in an inventory search of the impounded vehicle. In the course of upholding that inventory search, this Court also noted that the officers' decision to impound the van satisfied the Fourth Amendment because it was done according to sufficiently standardized criteria: "Nothing in [the Court's precedents] prohibits the exercise of police discretion *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 (emphasis added).

But because the officers in *Bertine* acted according to standardized criteria, this Court did not need explicitly to say whether the impoundment would have violated the Fourth Amendment if the police officer had *not* acted according to such criteria. That is the question here – a question over which the federal courts of appeal and state supreme courts have become deeply divided.

1. After "assuming . . . that the Lancaster Police Department did not have a standard policy regarding the impounding and towing of vehicles," the Third Circuit held in this case that "a decision to impound a vehicle contrary to a standardized procedure or even *in the absence of a standardized procedure* should not be a per se violation of the Fourth

Amendment." Pet. App. 7a, 17a (emphasis added). So long as a court determines that the police officer's discretionary decision to impound the vehicle reasonably served community caretaking purposes, the police action, in the Third Circuit's view, is consistent with the Fourth Amendment.

The First Circuit and Ohio Supreme Court likewise deem a warrantless impoundment to be constitutional as long as reviewing judges believe that it reasonably serves the government's community caretaking interests. Like the Third Circuit, the First Circuit construes *Bertine* narrowly to merely recommend — but not require — standardized police procedures to guide impoundment decisions. The police, in the First Circuit's view, "cannot sensibly be expected to have developed, in advance, standard protocols running the entire gamut of possible eventualities." *United States v. Coccia*, 446 F.3d 233, 239 (1st Cir. 2006) ((quotation omitted). Thus, impoundments may be "consonant with the Fourth Amendment so long as the impoundment decision was reasonable under the circumstances," even in the absence of standard police impoundment procedures. *Id.* at 239.

The Ohio Supreme Court reasoned simply that "*Bertine* requires standardized procedures with regard to inventory searches, not impoundment." *City of Blue Ash v. Kavanagh*, 862 N.E.2d 810, 813 (Ohio 2007). Accordingly, police in Ohio are permitted expansive, unregulated discretion in determining whether to impound vehicles.

2. In direct contrast to the Third Circuit's holding and the other cases in agreement with it, four federal courts of appeals and five state high courts have adopted a more structured approach to assessing impoundments under the Fourth Amendment. Specifically, these courts interpret *Bertine*'s acceptance of impoundment decisions "so long as . . . exercised according to standard criteria," 479 U.S. at 375, as requiring that impoundment decisions be made according to reasonable and standardized police procedures, rather than as a product of purely discretionary and unguided assessments of community caretaking interests.

Two federal courts of appeals and two state supreme courts have held that impoundments violated the Fourth Amendment because they were not done in accordance with established procedures. In *United States v. Proctor*, 489 F.3d 1348 (D.C. Cir. 2007), the D.C. Circuit expressly rejected the First Circuit's holding in *Coccia* that a community caretaking impoundment is reasonable even if it does not follow standardized procedures. The D.C. Circuit read *Bertine* as "suggest[ing] that a reasonable, standard police procedure *must* govern the decision to impound." *Id.* at 1353 (emphasis added). Because the officers in the case before it did not follow the procedures that were in place, the court of appeals held that the impoundment violated the Fourth Amendment. *Id.* at 1354-55.

The Idaho Supreme Court has reached the same conclusion. Reasoning that *Bertine* requires police discretion concerning whether to impound vehicles to be "exercised according to standard criteria and on the basis of something other than suspicion of evidence of criminal activity," the court held that an impoundment violated the Fourth Amendment because readily available information would have revealed that the officers lacked authority under the police department's standardized criteria governing impoundments of vehicles. *State v. Weaver*, 900 P.2d 196, 199-200 (Idaho 1995).

The Seventh Circuit held in *United States v. Duguay*, 93 F.3d 346 (7th Cir. 1996), that a vehicle impoundment violated the Fourth Amendment because it was not done pursuant to an impoundment policy that was "sufficiently standardized under *Wells*." *Id.* at 352. The court reasoned that although an impoundment policy need not be "written," police officers "must" act according to criteria that "standardiz[e] . . . the circumstances in which a car may be impounded." *Id.* at 351.[2]

Reaching the same result in another case, the Indiana Supreme Court held that in order to justify a

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[2] The Third Circuit suggested that *Duguay* did not squarely conflict with its decision here because *Duguay* also held that the impoundment of the vehicle was unreasonable even apart from the lack of any standardized policy. Pet. App. 15a-17a. But *Duguay* made clear that this discussion was a second, entirely "independent reason[]" for finding that the Fourth Amendment had been violated. 93 F.3d at 351

warrantless impoundment in terms of community caretaking, "the prosecution must demonstrate . . . that the decision [to impound] was in keeping with established departmental routine or regulation." *Fair v. State*, 627 N.E.2d 427, 433 (Ind. 1993). Even though the officers there testified that they impounded the car because they had arrested the driver and they were worried it would "be exposed to theft or vandalism or might otherwise become a nuisance," the court held that the impoundment violated the Fourth Amendment because it was done in "the absence of evidence about any departmental procedures." *Id.* at 433, 435.

A number of other courts have recognized, in the course of upholding searches because they complied with standardized impoundment procedures, the constitutional necessity of having such procedures. *See United States v. Petty*, 367 F.3d 1009, 1012 (8th Cir. 2004) ("Some degree of 'standardized criteria' or 'established routine' must regulate [decisions to impound vehicles], which may be conducted without the safeguards of a warrant or probable cause, to ensure that impoundments and inventory searches are not merely 'a ruse for general rummaging in order to discover incriminating evidence.'") (quoting *Wells*, 495 U.S. at 4); *Miranda v. City of Cornelius*, 429 F.3d 858, 863 (9th Cir. 2005) ("[W]hile the Supreme Court was not prepared to mandate any particular rules as to when impoundment incident to arrest for a traffic violation was permissible, impoundment is *not* a matter which can simply be left to the discretion of the individual officer.") (quoting 3 Wayne R. LaFave, Search and Seizure: A

Treatise On The Fourth Amendment § 7.3, at 624 (4th ed. 2004) (emphasis in original)); *Thompson v. State*, 966 S.W.2d 901, 904 (Ark. 1998) ("[T]he police may impound a vehicle and inventory its contents *only if* the actions are taken in good faith and in accordance with standard police procedures or policies.") (emphasis added); *State v. Huisman*, 544 N.W.2d 433, 437 (Iowa 1996) ("[P]olice may lawfully choose to impound a vehicle *so long as* that decision is made 'according to standardized criteria . . . .'") (emphasis added) (quoting *Bertine*, 479 U.S. at 375); *People v. Toohey*, 475 N.W.2d 16, 25 (Mich. 1991) (Because "[t]he public policy concerns and the purpose for impounding an arrested person's automobile are similar to those for conducting inventory searches[,] . . . it is appropriate to apply the same standard for determining the constitutionality of the initial impoundment of an automobile as for a subsequent inventory search, *i.e.*, an established set of procedures which the police must follow in making the determination whether to impound and not used as a pretext for conducting a criminal investigation.").

3. Because this conflict over the necessity of standardized police procedures is deeply entrenched and turns on how to interpret this Court's precedent, this Court is the only institution that can resolve the dispute. The need to do so is particularly pressing here where the circuit split has been widely acknowledged. *See, e.g.*, Pet. App. 21a (noting that "[i]n the face of the precedent that we have cited we must decide which of the two lines of cases to follow"); *Proctor*, 489 F.3d at 1353, 1354 (contrasting the

views of "[a]t least two of our sister circuits" and "[o]n the other hand, the First Circuit," before siding with the former).

B. The Question Presented Arises Frequently and Is Extremely Important

Even three decades ago, the police practice of impounding and searching vehicles for non-investigatory purposes was considered "increasingly common." *United States v. Piatt*, 576 F.2d 659, 661 (5th Cir. 1978). As inventory searches "have become a matter of standard police procedure," the decision to impound has emerged as "the more important step." Mary Elisabeth Naumann, Note, *The Community Caretaker Doctrine: Yet Another Fourth Amendment Exception*, 26 Am. J. Crim. L. 325, 352 (1999). Today, police impoundments of vehicles occur with great frequency, particularly when an occupant of the vehicle has been arrested. *See generally* 3 Wayne R. LaFave, Search and Seizure: A Treatise On The Fourth Amendment § 7.3, at 612-13 (4th ed. 2004). Since impoundments routinely lead to inventory searches, and inventory searches often lead to evidence introduced in criminal trials, the admissibility of core pieces of evidence at numerous criminal trials is directly affected by the Fourth Amendment standard applicable to warrantless impoundments.

The question of how to apply the community caretaking exception to the Fourth Amendment's warrant and probable cause requirement is therefore a recurring and important one to the criminal justice

system. To leave the law unresolved on an issue that regularly arises is to leave police officers hazarding guesses as to whether their actions are lawful under the Fourth Amendment. Prosecutors, defense lawyers, and courts also need to know whether evidence obtained as the result of impoundments can be used to pursue criminal prosecutions.

Finally, the current confusion in the law may soon lead to the anomalous scenario of one jurisdiction being faced with two competing Fourth Amendment standards. For example, the supreme courts of Michigan and Ohio have split on this issue, and when the Sixth Circuit decides the matter, its resolution will necessarily be inconsistent with the prevailing law in one of those states. As a result, conflicting signals will be sent to local police departments, which will face different regulatory regimes depending on whether a prosecution is in state or federal court. It is thus imperative that this Court resolve the split in authorities and clarify the Fourth Amendment principles that govern vehicular impoundments.

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

This case presents a perfect opportunity for this Court to resolve the split of authority over whether the Fourth Amendment requires the police to follow standardized procedures in deciding to impound a vehicle without a warrant and without probable cause. The sole issue decided by the court of appeals was whether Officer Heim's impoundment decision

was unconstitutional because it was not based on standardized procedures. The factual backdrop for this claim was Officer Heim's testimony that "this vehicle was impounded by my discretion." Pet. App. 10a. Accordingly, the Third Circuit – following the government's suggested order of analysis – expressly decided the case "on the premise on which Smith presents it, *i.e.*, the Lancaster Police Department did not have a standard policy regarding the impoundment and towing of vehicles." Pet. App. 12a.

Furthermore, the question presented is outcome determinative here. Officer Heim's decision to impound the vehicle in which petitioner had been riding led directly to the police finding the gun that supports the felon-in-possession conviction here. If the impoundment violated the Fourth Amendment, the gun would have to be suppressed and petitioner's conviction would need to be reversed.

D. The Third Circuit's Decision Is Inconsistent with This Court's Impoundment and Inventory Search Jurisprudence

This Court's precedent dictates, contrary to the Third Circuit's holding, that just as a post-impoundment inventory search must be conducted pursuant to standardized procedures, so too must an initial warrantless impoundment. And even if this issue were a completely open one, the Third Circuit's analysis would still incorrectly assess the competing interests at stake.

1. In *Florida v. Wells*, 495 U.S. 1 (1990), this Court held unanimously that when an inventory search of an impounded vehicle is not conducted pursuant to a standardized procedure, it is "not sufficiently regulated to satisfy the Fourth Amendment." *Wells*, 495 U.S. at 4-5. Summarizing a series of decisions that developed this rule, the Court explained that the need for "standardized criteria" or "established routine . . . is based on the principle that an inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence. . . . The individual police officer must not be allowed so much latitude that inventory searches are turned into a purposeful and general means of discovering evidence of crime." *Id.* at 4 (internal quotations and citations omitted); *see also South Dakota v. Opperman*, 428 U.S. 364, 374-76 (1976); *Cady v. Dumbrowski*, 413 U.S. 433, 441 (1973).

This principle applies with equal force to impoundment decisions. Decisions to impound and take inventory of vehicles are components of a single process that result in officers conducting warrantless and suspicionless searches. In fact, they are often discussed as one doctrine with two steps – "the automobile impoundment and inventory doctrine." *See, e.g., Laney v. State*, 117 S.W.3d 854, 860 (Tex. Crim. App. 2003). And both steps present the same risk that officers might attempt to subterfuge the warrant requirement. So it would make little sense to require that one step be conducted according to regularized procedures while allowing individual

police officers free reign with respect to the other step.

Indeed, in *Bertine*, this Court anticipated the precise set of facts presented here and indicated that a warrantless impoundment, like a warrantless inventory search, should be conducted in accordance with standardized procedures. Specifically addressing the constitutionality of an impoundment (and by extension the resulting inventory search), this Court explained:

> Bertine finally argues that the inventory search of his van was unconstitutional because departmental regulations gave the police officers discretion to choose between impounding his van and parking and locking it in a public parking place. The Supreme Court of Colorado did not rely on this argument in reaching its conclusion, and we reject it. Nothing in *Opperman* or *Lafayette* prohibits the exercise of police discretion *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. Here, the discretion afforded the Boulder police was exercised in light of standardized criteria, related to the feasibility and appropriateness of parking and locking a vehicle rather than impounding it.

479 U.S. 367, 375-76 (1987) (emphasis added).

The Third Circuit, however, was unmoved by this Court's precedent. It dismissed *Wells* in a footnote, asserting that its reasoning "is of little use here" because it focused on an inventory search instead of an impoundment decision. Pet. App. 14a n.7. And it construed *Bertine* as merely *recommending* that standardized procedures govern impoundment decisions. Pet. App. 19a, 22a (quotation omitted). The court of appeals then reasoned that because the Fourth Amendment's ultimate touchstone is reasonableness, a purely discretionary impoundment decision is constitutional so long as a court views it as substantively reasonable. Pet. App. 16a, 24a.

This is all obfuscation and avoidance. As other courts have recognized, "[t]he public policy concerns and the purpose for impounding an arrested person's automobile are similar to those for conducting inventory searches." *Toohey*, 475 N.W.2d at 25. The Third Circuit did not even claim to the contrary. So *Wells* cannot be cast aside simply because it dealt with the inventory phase of impoundments and inventory searches. If anything, *Wells'* standardized-procedures rule requires that impoundment decisions be similarly regulated, lest police departments circumvent *Wells'* protection against pretextual investigative searches by adopting rote inventory policies but leaving it entirely up to officers whether to impound cars in the first instance.

Furthermore, when *Bertine* pronounced that police may exercise impoundment discretion "*so long*

as that discretion is exercised according to standard criteria," 479 U.S. at 375 (emphasis added), this Court did not merely "suggest" that police follow standardized criteria; it mandated it. That is what "so long as" means.

Finally, the Fourth Amendment's overarching reasonableness test is just as applicable to inventories as it is to impoundments – or, if one prefers, just as applicable to seizures as it is to searches. And this Court has held that warrantless inventory searches are "unreasonable" if they are done at the sole discretion of individual police officers. *See Wells,* 495 U.S. at 4.[3] Accordingly, resort to the ultimate touchstone of the Fourth Amendment does nothing to explain why warrantless impoundments – as opposed to warrantless inventory searches – need not be governed by standardized criteria.

The Third Circuit, in short, had no justification for cabining off *Wells* to only one phase of the two-step impoundment and inventory process. Indeed, prior to its change of course in *Coccia*, the First Circuit, in an opinion by then-Chief Judge Breyer,

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[3] This holding is not undermined by this Court's decision in *Virginia v. Moore*, 128 S. Ct. 1598 (2008). *Moore* reaffirms the longstanding principle that merely violating a state or local law cannot violate the Fourth Amendment. Here, by contrast, the very Fourth Amendment rule at issue is that officers must act according to some set of standardized procedures. *See* Br. for United States as *Amicus Curiae*, *Virginia v. Moore*, 128 S. Ct. 1598 (2008), at 12 n.3.

noted that "[t]he Supreme Court itself has held that police may impound a car [to prevent theft and vandalism], *provided they make their impoundment decision 'according to standard criteria* and on the basis of something other than suspicion of evidence of criminal activity.'" *United States v. Ramos-Morales*, 981 F.2d 625, 626 (1st Cir. 1992) (emphasis added) (quoting *Bertine*, 479 U.S. at 375). This precedent is well explicated in the U.S. Reports, and it is not for the federal courts of appeals or state courts to second-guess this requirement.

2. The Court of Appeals sought to justify its decisions to limit *Wells* and to push aside the guidance in *Bertine* based largely upon its own conception of good policy. Even if it were appropriate for the Third Circuit to decide this case on policy grounds untethered to this Court's prior precedent, its policy arguments would still fail on their merits.

a. According to the Third Circuit, it does not make sense to require the police to act according to standardized procedures when the circumstances indicate that a vehicle is "subject to being damaged, vandalized, or stolen," and no private person is available to move it. Pet. App. 22a. In other words, there is no reason, in the Third Circuit's view, to require police to act according to standardized procedures when their decision to impound a vehicle is substantively reasonable on its own terms. *Id.*

This argument proves far too much. "The point of the Fourth Amendment" is that, absent exigent

circumstances, police officers do not get to decide for themselves whether they are justified in searching or seizing private property. *Johnson v. United States*, 333 U.S. 10, 13-14 (1948). If officers wish to conduct a search, they must secure approval from a neutral and detached magistrate, no matter how justified the officers' proposed actions might be. *Id.* at 14. Similarly, if officers want to arrest someone, they may do so only if that person is violating (or has violated) a duly enacted law, no matter how "objectively" wrong the person's conduct may be. Police may no more disregard these basic principles and act based on their own conceptions of reasonableness than they may impound vehicles without warrants simply because the facts indicate that they would be justified in doing so. That is part of what it means to operate a government according to the rule of law.

Indeed, this case vividly illustrates why several courts have decided that impoundments done in the absence of standardized procedures violate the Fourth Amendment, even when facts suggested that the impoundments may have been substantively justified. In *Duguay,* the Seventh Circuit noted that two officers involved in a warrantless impoundment not governed by any standardized procedures offered "inconsistent" testimony regarding their impoundment practices, giving rise to the inference that the officers' warrantless actions were really investigative in nature. 93 F.3d at 352. Other courts have noted similar concerns. *See Fair,* 627 N.E.2d at 435 (noting the "indicia of pretext which litter[ed] the record" in the case of a warrantless impoundment done in the absence of standardized procedures);

Ramos-Morales, 981 F.2d at 627 (Breyer, C.J.) ("The existence and uniform application of such standard procedures can help prevent" officers from using "'theft-prevention impoundment' (and the inventory search that usually follows) as a pretext for initiating searches for evidence of criminal activity.")

That precise concern is implicated here. When asked in pretrial proceedings why they impounded the vehicle in which petitioner had been riding, the two officers here gave two different explanations. Officer Heim testified that he decided to impound the vehicle in order to contact the registered owner, and because he feared the car might be stolen or later used in a drug transaction. Heim Dep. at 28-29. Officer Laser, by contrast, testified that the police impounded the vehicle in order to prevent damage and vandalism. Tr. of Suppression Hrg at 30. These are just the kind of questionable *post hoc* justifications for seemingly investigative searches that the standardized-procedures rule is designed to avoid.

In any event, the government's contention that "the police were obliged to impound the vehicle 'to protect it' from theft or vandalism" effectively "mak[es] up new police obligations after the fact where none existed before." *Duguay*, 93 F.3d at 352. The police do not, as a matter of course, impound all vehicles in "high crime" neighborhoods for which they cannot locate the owners at any given time. If they did, police departments in each of our Nation's major cities would impound tens of thousands of

vehicles per day. Accordingly, something else must have been driving the officers here. The requirement of standardized procedures ensures that this "something else" is an objectively legitimate factor, unrelated to investigatory goals. This requirement should not be dispensed with.

b. The Third Circuit, echoing the First Circuit in *Coccia*, also asserted that requiring compliance with standardized procedures in making impoundment decisions would render police forces unable to respond to unanticipated circumstances. Pet. App. 23a; *see also Coccia*, 446 F.3d at 239. This assertion likewise lacks merit.

This Court has explained in the context of inventory searches that there is no conflict between requiring police to follow a set of standardized procedures designed to prevent arbitrary or improper behavior and allowing officers to respond to unforeseen circumstances: "[I]n forbidding uncanalized discretion to police officers conducting inventory searches, there is no reason to insist that they be conducted in a totally mechanical 'all or nothing' fashion. . . . A police officer may be allowed sufficient latitude to determine whether a particular container should or should not be opened in light of the nature of the search and characteristics of the container itself." *Wells*, 495 U.S. at 4. Requiring police to conduct inventory searches according to standardized procedures, in other words, does not eliminate law enforcement's ability to exercise professional

judgment concerning unforeseen events. It simply channels and regularizes the use of that judgment.

So, too, with impoundment decisions. Nothing about a set of guidelines designed to guide discretionary decisions to impound vehicles necessarily forecloses officers from responding to unforeseeable circumstances when necessary to protect public safety. At the same time, it must be acknowledged that *most* reasons why officers would need to impound a vehicle without obtaining a warrant *can* be anticipated. Certainly, nothing is unusual about officers arresting people who were driving a car and being concerned about the car's safety if left unattended in "high crime area." One court, in fact, has described the concern that a vehicle, left unattended as a result of a custodial arrest, "will be exposed to vandalism or might otherwise become a nuisance" as a "typical" fact pattern. *Fair*, 627 N.E.2d at 433. Accordingly, there can be no doubt that the police department here, as in most cases, could have promulgated a set of guidelines that would have covered the situation the officers faced.

Indeed, the vast majority of police departments across the country appear already to have done just that. In case after case involving scenarios similar to the one here, officers have decided whether to impound cars – just as they are required to decide whether to conduct inventory searches – in accordance with standardized policies. *See, e.g.*,

supra at 13-14.[4] The Third Circuit never gave any reason – nor has the government ever suggested any – why the officers here could not have done so too.

The reality is that following standardized policies when deciding to impound cars not only protects individual privacy but also fosters effective law enforcement. As this Court repeatedly has stated, "[a] single familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront." *Illinois v. Lafayette*, 462 U.S. 640, 648 (1983) (alteration in original and quotation omitted); *accord Bertine*, 479 U.S. at 375 (same). Standardized criteria provide such a resource for the police, relieving officers of the need for guesswork and insulating their ultimate decisions

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[4] Many police departments have written motor vehicle impoundment guidelines or policies, which are often contained in the departments' official policy manuals. *See, e.g.*, Denver Police Dept. Operations Manual, Series 206, *available at* http://www.denvergov.org/Portals/326/documents/206.pdf; Minneapolis Police Dept. Policy Manual 7-701 to -708, *available at* http://www.ci.minneapolis.mn.us/mpdpolicy/7-700/7-700.asp; Madison Police Policy Manual § 7-400, *available at* http://www.ci.madison.wi.us/police/PDF_Files/PolicyandProcedureManual.pdf; Peoria Police Dept. Policy and Procedure Manual, Policy 6.05, *available at* http://www.peoriaaz.gov/PoliceDepartment/administration/docs/policy_manual/6_05.pdf; San Jose Police Dept. Duty Manual 2007, L-5210, *available at* http://www.sjpd.org/Records/Duty_Manual_2007_Electronic_Distribution.pdf. In February 1997, the International Association of Chiefs of Police (IACP) published a model policy on Motor Vehicle Impoundment, which is available for purchase on the organization's website, http://theiacp.org/.

against subsequent attack. This Court should review the Third Circuit's decision, lest it improperly provide cover for police departments whose lack of standardized policies, perhaps unwittingly, subvert the public good in myriad ways.

CONCLUSION

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

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