No. 20-1745

# In the Supreme Court of the United States

RICHARD SYLVESTER, PETITIONER

*v.*

UNITED STATES OF AMERICA

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

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

BRIAN H. FLETCHER
*Acting Solicitor General*
*Counsel of Record*
KENNETH A. POLITE, JR.
*Assistant Attorney General*
THOMAS E. BOOTH
*Attorney*

*Department of Justice*
*Washington, D.C. 20530-0001*
*SupremeCtBriefs@usdoj.gov*
*(202) 514-2217*

## QUESTION PRESENTED

Whether the lower courts erred in declining to suppress evidence of drug distribution found in an SUV that was impounded after petitioner was arrested on an outstanding warrant, where petitioner was the driver and sole occupant of the SUV, it was parked on the shoulder of a busy highway where other cars had to swerve to avoid it, and no one else was on the scene to take possession of it.

## ADDITIONAL RELATED PROCEEDINGS

United States District Court (D. Me.):

*United States* v. *Sylvester*, No. 17-cr-94 (Oct. 30, 2019)

United States Court of Appeals (1st Cir.):

*United States* v. *Sylvester*, No. 19-2127 (Apr. 2, 2021)

## TABLE OF CONTENTS

Page


Opinion below ........ 1
Jurisdiction ........ 1
Statement ........ 1
Argument ........ 7
Conclusion ........ 21


## TABLE OF AUTHORITIES

Cases:


*Brigham City* v. *Stuart*, 547 U.S. 398 (2006) ........ 9, 18, 19
*Caniglia* v. *Strom*, 141 S. Ct. 1596 (2021) ........ 8
*City of Indianapolis* v. *Edmond*, 531 U.S. 32 (2000) ........ 19
*Colorado* v. *Bertine*, 479 U.S. 367 (1987) ........ 8, 9, 11
*Cooper* v. *California*, 386 U.S. 58 (1967) ........ 9, 12, 13
*Cutter* v. *Wilkinson*, 544 U.S. 709 (2005) ........ 21
*Florida* v. *Wells*, 495 U.S. 1 (1990) ........ 8, 10, 14
*Illinois* v. *Lafayette*, 462 U.S. 640 (1983) ........ 11
*Lyle* v. *United States*, 140 S. Ct. 846 (2020) ........ 7
*Miller* v. *United States*, 137 S. Ct. 2240 (2017) ........ 7
*Miranda* v. *City of Cornelius*, 429 F.3d 858 (9th Cir. 2005) ........ 13
*Moore* v. *United States*, 137 S. Ct. 2116 (2017) ........ 7
*Smith* v. *United States*, 555 U.S. 993 (2008) ........ 7
*South Dakota* v. *Opperman*, 428 U.S. 364 (1976) ........ *passim*
*United States* v. *Cartwright*, 630 F.3d 610 (7th Cir. 2010), cert. denied, 563 U.S. 969 (2011) ........ 13
*United States* v. *Coccia*, 446 F.3d 233 (1st Cir. 2006), cert. denied, 549 U.S. 1149 (2007) ........ 11
*United States* v. *Duguay*, 93 F.3d 346 (7th Cir. 1996) ........ 14, 16
*United States* v. *Knights*, 534 U.S. 112 (2001) ........ 12

Cases—Continued: Page

*United States* v. *Petty*, 367 F.3d 1009 (8th Cir. 2004)....... 13, 14, 16, 20
*United States* v. *Proctor*, 489 F.3d 1348 (D.C. Cir. 2007) ....... 14, 16
*United States* v. *Rodriguez-Morales*, 929 F.2d 780 (1st Cir. 1991), cert. denied, 502 U.S. 1030 (1992) ..... 12, 14
*United States* v. *Sanders*, 796 F.3d 1241 (10th Cir. 2015)....... 15
*United States* v. *Smith*, 522 F.3d 305 (3d Cir.), cert. denied, 555 U.S. 993 (2008) ....... 12
*United States* v. *Trujillo*, 993 F.3d 859 (10th Cir. 2021)....... 15, 20
*Virginia* v. *Moore*, 553 U.S. 164 (2008) ....... 9, 14
*Whren* v. *United States*, 517 U.S. 806 (1996)....... 8
*Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) ....... 21

Constitution and statutes:

U.S. Const. Amend. IV ....... *passim*
18 U.S.C. 924(c)(1)(A)....... 1, 3
21 U.S.C. 841(a)(1)....... 1, 3
21 U.S.C. 841(b)(1)(B) ....... 1, 3

# In the Supreme Court of the United States

No. 20-1745

RICHARD SYLVESTER, PETITIONER

*v.*

UNITED STATES OF AMERICA

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

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

## OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-7) is reported at 993 F.3d 16.

## JURISDICTION

The judgment of the court of appeals was entered on April 2, 2021. The petition for a writ of certiorari was filed on June 9, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a conditional guilty plea in the United States District Court for the District of Maine, petitioner was convicted of possessing methamphetamine, cocaine, and heroin with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(B), and possessing a firearm in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A). Judgment 1. The district

court sentenced petitioner to 72 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1-7.

1. On a Friday evening in May 2017, a special agent with the Maine Drug Enforcement Agency (MDEA) was driving along Route 1A in Dedham, Maine, when he passed a black Cadillac Escalade driven by petitioner, who was the sole occupant. Pet. App. 1. The MDEA agent recognized petitioner and was aware of a federal warrant for his arrest. *Ibid.* After the MDEA agent confirmed that the warrant was still active, he contacted the Hancock County Sheriff's Department, which dispatched several officers to arrest petitioner. *Id.* at 2. The officers stopped the Escalade along Route 1A. *Ibid.*

Route 1A is "a well-trafficked, two-lane highway," and "the parked Escalade was sticking out into the traffic lane so that the cars passing by had to swerve into the oncoming traffic lane to avoid it." Pet. App. 2. The officers told petitioner to get out of the Escalade and then arrested him. *Ibid.* The officers searched petitioner and found two knives, a pair of brass knuckles, and $2799 in cash on his person. *Ibid.* Petitioner stated that he had been "headed 'up the road' to meet" the mother of the vehicle's owner at a McDonald's. *Ibid.*

The officers asked the Maine State Police to dispatch a K-9 unit to conduct a sniff test of the Escalade with a drug-detection dog, but the officers were told that the K-9 unit was in a different county, some distance away. Pet. App. 2. The officers authorized a towing service to "remove the car from the side of the highway." *Ibid.* One of the officers transported petitioner to the Hancock County Jail while other officers remained at the scene to wait for the towing service. C.A. App. 34. The

towing service arrived and took the Escalade to an impound facility in Hancock. Pet. App. 2.

The Maine State Police K-9 unit arrived at the impound facility, and a drug-detection dog sniffed the outside of the Escalade. Pet. App. 3. The dog did not alert to any contraband. *Ibid.* The officers from the Sheriff's Department then conducted an inventory search of the Escalade. *Ibid.* Inside a backpack in the front passenger area, the officers found a loaded handgun and plastic bags containing what they suspected was cocaine and heroin. *Ibid.* At that point, the officers stopped their inventory search so that the MDEA agent could obtain a search warrant. *Ibid.*

Two days later, petitioner made a recorded phone call from the Hancock County Jail in which he told "a woman that 'he had 10 grand in the vehicle and it would be good if [the Escalade's owner] could get the vehicle out of impound.'" Pet. App. 3. After listening to that phone call, the MDEA agent applied for and obtained a search warrant for the vehicle. *Ibid.* Officers executed the warrant and found the loaded handgun, ammunition, methamphetamine, heroin, cocaine, drug paraphernalia, and suspected drug ledgers. *Id.* at 4.

2. A federal grand jury in the District of Maine indicted petitioner on one count of possessing methamphetamine, cocaine, and heroin with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(B), and one count of possessing a firearm in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A). C.A. App. 11-12.

Petitioner moved to suppress the evidence found inside the Escalade on the theory that its initial impoundment had violated the Fourth Amendment. D. Ct. Doc. 22, at 1-4 (Sept. 1, 2017). Petitioner argued that the

officers violated the Sheriff's Department's written impoundment and inventory policies by not giving petitioner an opportunity to have a third party take possession of the Escalade before it was impounded. *Id.* at 3. Petitioner also asserted that "the full purpose of impounding [the] vehicle was investigative in nature." *Id.* at 4.

The district court denied petitioner's suppression motion. D. Ct. Doc. 78, at 16 (Feb. 22, 2018). The court determined that the officers permissibly impounded the vehicle pursuant to the community caretaking exception to the Fourth Amendment's warrant requirement. *Id.* at 4-10. The court explained that the officers' decision to impound the car was "reasonable," *id.* at 10, given that the vehicle had been stopped "on a busy highway in the breakdown lane"; the vehicle's driver had been arrested; and "[t]here was no other driver on the scene," *id.* at 4. The court also found that those same "circumstances on the highway" gave the officers "solid non-investigatory reasons for moving the car." *Id.* at 8.

The district court determined that the officers "did not violate" the Sheriff's Department's policies "in actually removing the vehicle" from the highway. D. Ct. Doc. 78, at 7. And although the court concluded that the officers did violate the Sheriff's Department's policies "by not trying to reach out to [the owner of the vehicle]" and "giv[ing] her the choice of taking the vehicle if she could before they left the scene," *ibid.*, the court reasoned that "law enforcement officials are not required [under the Fourth Amendment] to give arrestees the opportunity to make arrangements for their vehicles when deciding whether impoundment is appropriate," *id.* at 8. The court also found that, in the circumstances of this particular case, the violation of the Sheriff's

Department's policies was not "serious," *id.* at 13, because the vehicle's owner was "not immediately available" and "there was no other obvious person to take custody of the vehicle before law enforcement left the scene," *id.* at 10.

The district court also rejected petitioner's contention that the officers' motives "irreparably taint[ed] the impound." D. Ct. Doc. 78, at 12. The court explained that, although it perceived "an investigatory motive for the impoundment," the "co-existence of investigatory and caretaking motives will not invalidate the seizure" of the vehicle. *Id.* at 12-13. The court further determined that the inventory search itself "was according to policy and was reasonable," *id.* at 14, and that even if it was not, the officers had probable cause to search the vehicle by the time that they executed the search warrant, *id.* at 14-16.

Petitioner entered a conditional guilty plea to both counts of the indictment, reserving the right to appeal the denial of his suppression motion. C.A. App. 99, 102. The district court sentenced petitioner to 72 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3.

3. The court of appeals affirmed. Pet. App. 1-7.

The court of appeals first determined that the district court "did not err in holding that the officers clearly had a legitimate community caretaking justification for moving the car." Pet. App. 6. The court of appeals emphasized that "[t]here were no other passengers nor anyone else immediately available to remove the car"; that petitioner had "never asserted that the owner of the car was nearby or that anyone else could immediately retrieve the car"; and that "[l]eaving the car on the shoulder of a heavily trafficked highway was

an obvious hazard to other drivers, especially on a Friday night with darkness approaching." *Ibid.*

The court of appeals further determined that, although the district court "found that the officers were motivated in part by an investigatory purpose," the "presence of both investigatory and community caretaking motives" did "not render unlawful [their] objectively reasonable decision to impound." Pet. App. 6. The court of appeals explained that "the officers were not constitutionally required to 'select the least intrusive way of fulfilling their community caretaking responsibilities'" and that their "failure to fully comply with the Impound and Inventory Policies with respect to the impoundment does not change this result." *Ibid.* (citation omitted). And the court rejected petitioner's contention that a specific policy violation—not notifying petitioner "that he could request a third party to immediately remove" the Escalade—showed that "the sole purpose of the impound was investigatory." *Ibid.*

The court of appeals explained that petitioner "did not ask the district court to make a specific finding about why the officers did not comply with those aspects of the policies and none was made, thus precluding any such argument from having merit, even if [the court of appeals] were to assume that it otherwise might." Pet. App. 6. The court of appeals further explained that, because of petitioner's failure to ask for such a finding, "the plain error standard of review" applies and "there was no plain error." *Ibid.* The court also found "no need to address who has the burden of proving pretext in this context." *Id.* at 7 n.6.

Finally, the court of appeals determined that "the district court did not err in concluding that the subsequent inventory search of the car was lawful." Pet. App.

7. In particular, the court of appeals saw no clear error in the district court's "finding that, once the car was impounded, the inventory search of the car was conducted in accordance with the Hancock County Inventory Policy." *Ibid.*

**ARGUMENT**

Petitioner contends (Pet. 15-19) that the impoundment of the vehicle was not reasonable under the Fourth Amendment. The court of appeals correctly rejected that contention; the asserted conflict in the courts of appeals is stale and overstated; and in any event, this case would be a poor vehicle for further review of any of the issues that petitioner raises. Further review is unwarranted.

1. Petitioner first contends (Pet. i) that the officers' decision to impound the vehicle in this case violated the Fourth Amendment because, in his view, the officers did not "comply with established impound policies and procedures." That contention does not warrant this Court's review. The Court has previously denied review of similar issues, see *Lyle* v. *United States*, 140 S. Ct. 846 (2020) (No. 19-5671); *Miller* v. *United States*, 137 S. Ct. 2240 (2017) (No. 16-7855); *Moore* v. *United States*, 137 S. Ct. 2116 (2017) (No. 16-7471); *Smith* v. *United States*, 555 U.S. 993 (2008) (No. 08-33), and the same result is warranted here.

a. The court of appeals correctly determined that any "failure to fully comply with the Impound and Inventory Policies" did not render unlawful the officers' "objectively reasonable decision to impound" the vehicle. Pet. App. 6.

i. In *South Dakota* v. *Opperman*, 428 U.S. 364 (1976), this Court observed that, in performing their community caretaking functions, police officers will "frequently

remove and impound automobiles which violate parking ordinances and which thereby jeopardize both the public safety and the efficient movement of vehicular traffic." *Id.* at 369; see *Caniglia* v. *Strom*, 141 S. Ct. 1596, 1598 (2021) (noting this Court's previous observation that "police officers who patrol the 'public highways' are often called to discharge noncriminal 'community caretaking functions,' such as responding to disabled vehicles or investigating accidents") (citation omitted). The Court recognized that the authority of police to seize such vehicles without a warrant "is beyond challenge." *Opperman*, 428 U.S. at 369.

The Court has additionally held that, once a vehicle has been impounded, officers may conduct an inventory of its contents without a warrant. *Colorado* v. *Bertine*, 479 U.S. 367, 371-373 (1987). Recognizing that "an inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence," the Court has stated that such searches must be conducted pursuant to "standardized criteria" or "established routine" and that "[t]he policy or practice governing inventory searches should be designed to produce an inventory." *Florida* v. *Wells*, 495 U.S. 1, 4 (1990). Standard inventory procedures "serve to protect an owner's property while it is in the custody of the police, to insure against claims of lost, stolen, or vandalized property, and to guard the police from danger." *Bertine*, 479 U.S. at 372; see *Whren* v. *United States*, 517 U.S. 806, 811 n.1 (1996). Based on those interests, as well as the diminished expectation of privacy in automobiles, see *Opperman*, 428 U.S. at 367-368, this Court has "accorded deference to police caretaking procedures

designed to secure and protect vehicles and their contents within police custody," *Bertine*, 479 U.S. at 372.[1]

ii. In this case, petitioner does not challenge the reasonableness of the inventory search following the impoundment of the vehicle. See Pet. C.A. Reply Br. 17 n.4 (acknowledging that "the inventory itself was conducted in accordance with policy"); Pet. App. 7 (determining that the "district court did not clearly err in finding that, once the car was impounded, the inventory search of the car was conducted in accordance with the Hancock County Inventory Policy"). Rather, petitioner challenges only the reasonableness of the impoundment

---

[1] In an earlier case, this Court upheld an inventory search without requiring standardized criteria, explaining that, once a car has been impounded, such a search was reasonable and served valid interests. See *Cooper* v. *California*, 386 U.S. 58, 61 (1967). In *Cooper*, the Court reasoned that, since the officers had to maintain the car in their custody for a forfeiture proceeding, they had the right to search it "for their own protection"—even if state law provided no authority for the inventory search. *Id.* at 61-62. *Cooper*'s approach better comports with this Court's contemporary Fourth Amendment jurisprudence. Once objective justifications exist for an intrusion, Fourth Amendment standards are satisfied, regardless of whether the intrusion violates state law. See *Virginia* v. *Moore*, 553 U.S. 164, 173-176 (2008) (so holding for arrests based on probable cause). When a search serves community protection goals rather than law enforcement interests, it is sufficient to point to circumstances objectively justifying the search, rather than asking whether the intrusion was pretextual. See *Brigham City* v. *Stuart*, 547 U.S. 398, 403-404 (2006) (so holding for the emergency aid doctrine). While the purpose of a state-created standardized-criteria rule is to avoid pretextual inventory searches, see *Bertine*, 479 U.S. at 376 (Blackmun, J., concurring), that purpose is better served by simply asking (as in *Cooper*) whether the objective circumstances made the search a reasonable one. If they did, "whether state law authorized the search [i]s irrelevant." *Moore*, 553 U.S. at 171 (discussing *Cooper*).

of the vehicle in the first place. The court of appeals correctly rejected that challenge, finding that "the officers clearly had a legitimate community caretaking justification" for impounding the vehicle. Pet. App. 6.

Petitioner himself acknowledged below that "the car needed to be removed from the shoulder of a busy thoroughfare." Pet. C.A. Reply Br. 3; see Pet. C.A. Br. 29 ("Without question, the Escalade needed to be removed from the side of the road."). And as the court of appeals observed, "[t]here were no other passengers nor anyone else immediately available to remove the car," and petitioner "never asserted that the owner of the car was nearby or that anyone else could immediately retrieve the car." Pet. App. 6; see D. Ct. Doc. 78, at 10 (finding that petitioner "couldn't drive," that the vehicle's owner "was not immediately available," and that "there was no other obvious person to take custody of the vehicle before law enforcement left the scene"). The officers' decision to impound the vehicle was thus an "objectively reasonable" one. Pet. App. 6.

Petitioner argues (Pet. 15-19) that the impoundment of the vehicle was unreasonable because, in his view, the impoundment did not follow standardized procedures. This Court, however, has never held that the "standardized procedure" requirement for inventory searches applies to the decision whether to impound a car in the first place. The Court's decision in *Florida* v. *Wells*, *supra*, dealt exclusively with the validity of an inventory search and did not discuss the standards governing the initial impoundment. See 495 U.S. at 4-5. *Opperman* likewise dealt with the reasonableness of a routine inventory search. See 428 U.S. at 369-376. In determining that the police had "engaged in a caretaking search of a lawfully impounded vehicle," *id.* at 375, the Court

effectively applied a pure reasonableness standard to the impoundment, treating as "beyond challenge" the "authority of police to seize and remove from the streets vehicles impeding traffic or threatening public safety and convenience"—without regard to the existence of an established policy, *id.* at 369.

Petitioner relies (Pet. 15, 17) on this Court's decision in *Bertine*, but that decision was likewise "concerned primarily with the constitutionality of an inventory search." *United States* v. *Coccia*, 446 F.3d 233, 238 (1st Cir. 2006), cert. denied, 549 U.S. 1149 (2007); see *Bertine*, 479 U.S. at 371-375; *id.* at 376-377 (Blackmun, J., concurring). In the penultimate paragraph of *Bertine*, the Court also considered the defendant's alternative argument "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." 479 U.S. at 375. In rejecting that argument, the Court stated that "[n]othing in *Opperman* or [*Illinois* v.] *Lafayette*[, 462 U.S. 640 (1983),] 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," and it concluded that both of those criteria were satisfied in the case before it. 479 U.S. at 375; see *id.* at 375-376.

That discussion in *Bertine*, however, does not mean that the absence of standardized criteria necessarily renders an impoundment unreasonable. The decisions it cited, *Opperman* and *Lafayette*, did not impose any constitutional restrictions on when an item may be taken into custody for community caretaking purposes, because those decisions took as given that the seizures were lawful. See *Lafayette*, 462 U.S. at 641-642 (stating

that the item whose contents the officers inventoried was a shoulder bag that an arrestee had brought with him to the police station); *Opperman*, 428 U.S. at 365 (describing the vehicle as "lawfully impounded"). Thus, although *Bertine* concluded that the impoundment in that case satisfied the standards that its previous decisions had established for the conduct of inventory searches, it did not consider—and had no reason to address—whether an impoundment must invariably do so. Cf. *United States* v. *Knights*, 534 U.S. 112, 117 (2001) (finding "dubious logic" in the argument "that an opinion upholding the constitutionality of a particular search implicitly holds unconstitutional any search that is not like it").

A per se rule that police officers may not impound a vehicle unless they do so under standardized procedures is unwarranted. The requirement that impounding a vehicle be objectively reasonable requires a determination that depends on "the facts and circumstances of each case," *Opperman*, 428 U.S. at 375 (quoting *Cooper* v. *California*, 386 U.S. 58, 59 (1967)), and cannot prospectively be reduced to writing. Although the police may anticipate some commonly recurring situations, "[v]irtually by definition, the need for police to function as community caretakers arises [in] unexpected circumstances," and they "cannot sensibly be expected to have developed, in advance, standard protocols running the entire gamut of possible eventualities." *United States* v. *Rodriguez-Morales*, 929 F.2d 780, 787 (1st Cir. 1991), cert. denied, 502 U.S. 1030 (1992); see, *e.g.*, *United States* v. *Smith*, 522 F.3d 305, 315 (3d Cir.) (explaining that "the requirement that a community caretaking impoundment be made pursuant to a standard police procedure could lead to untoward results"

because, among other reasons, "the standards might not deal with all the situations that could arise"), cert. denied, 555 U.S. 993 (2008); *United States* v. *Petty*, 367 F.3d 1009, 1012 (8th Cir. 2004) ("It is not feasible for a police department to develop a policy that provides clear-cut guidance in every potential impoundment situation, and the absence of such mechanistic rules does not necessarily make an impoundment unconstitutional.").

Conversely, an impoundment that conforms to standardized procedures will not necessarily be reasonable under the circumstances. See, *e.g.*, *United States* v. *Cartwright*, 630 F.3d 610, 614 (7th Cir. 2010) ("The existence of a police policy, city ordinance, or state law alone does not render a particular search or seizure reasonable or otherwise immune from scrutiny under the Fourth Amendment."), cert. denied, 563 U.S. 969 (2011); *Miranda* v. *City of Cornelius*, 429 F.3d 858, 864 (9th Cir. 2005) ("[T]he decision to impound pursuant to the authority of a city ordinance and state statute does not, in and of itself, determine the reasonableness of the seizure under the Fourth Amendment."). In short, whether an impoundment decision is reasonable will turn on the objective facts that are known to the officials that make the decision—irrespective of whether *other* officials foresaw those precise circumstances and established standardized criteria for dealing with them. See *Cooper*, 386 U.S. at 61 ("Just as a search authorized by state law may be an unreasonable one under [the Fourth Amendment], so may a search not expressly authorized by state law be justified as a constitutionally reasonable one.").[2]

---

[2] The justifications for requiring standardized procedures in the inventory search context also apply with significantly less force to impoundments. As this Court explained in *Opperman*, conducting

b. Petitioner contends (Pet. 17-19) that the court of appeals' decision conflicts with the decisions of four other circuits, but the asserted conflict is stale and overstated. The decision below therefore does not implicate any disagreement in the circuits that would warrant this Court's review.

As an initial matter, three of the four decisions that petitioner cites (Pet. 18-19) as requiring compliance with a standardized impoundment policy—*United States* v. *Petty*, *supra*; *United States* v. *Duguay*, 93 F.3d 346 (7th Cir. 1996); and *United States* v. *Proctor*, 489 F.3d 1348 (D.C. Cir. 2007)—were decided before this Court's decision in *Virginia* v. *Moore*, 553 U.S. 164 (2008). This Court in *Moore* held that the Fourth Amendment is satisfied when objective justifications exist for an intrusion, regardless of whether the intrusion violates state law. See p. 9 n.1, *supra*. *Moore* thus upheld as "constitutionally reasonable" the arrest of a motorist whom police had probable cause to believe had violated Virginia law, even though state law itself would have authorized only a citation rather than an arrest. 553 U.S. at 171. The Court explained that, because the arrest was "reasonable," it was permissible under the Constitution, and "state restrictions d[id] not alter the" calculus. *Id.* at 176; see *id.* at 172 ("We thought it obvious that the Fourth Amendment's meaning did not change with local

---

an inventory search in accordance with standard procedures helps "ensure that the intrusion [is] limited in scope to the extent necessary to carry out the caretaking function." 428 U.S. at 375. But unlike an inventory search, the seizure of a car cannot be limited in scope: "A car is either impounded or it is not." *Rodriguez-Morales*, 929 F.2d at 787 n.3. And the concern that police will "rummag[e] in order to discover incriminating evidence," *Wells*, 495 U.S. at 4, is best addressed by imposing limitations on the search itself, rather than the impoundment.

law enforcement practices—even practices set by rule."). *Moore*'s reasoning indicates that the objective circumstances confronting officers, rather than their strict adherence to state-created policies, should be the touchstone in deciding whether an impoundment is reasonable and hence constitutional.

The only post-*Moore* decision that petitioner cites (Pet. 18) is *United States* v. *Sanders*, 796 F.3d 1241 (10th Cir. 2015). In that case, the Tenth Circuit concluded that "impoundment of a vehicle located on private property that is neither obstructing traffic nor creating an imminent threat to public safety is constitutional only if justified by both a standardized policy and a reasonable, non-pretextual community-caretaking rationale." *Id.* at 1248. The court emphasized, however, that "if a vehicle is obstructing or impeding traffic on public property, it can be impounded regardless of whether the impoundment is guided by standardized procedures." *Id.* at 1249. The Tenth Circuit would therefore, like the court below, have found the impoundment here to be constitutional, given that the Escalade was obstructing and impeding traffic on public property. See Pet. App. 2 (explaining that "the parked Escalade was sticking out into the traffic lane so that the cars passing by had to swerve into the oncoming traffic lane to avoid it"); *id.* at 6 (explaining that "[l]eaving the car on the shoulder of a heavily trafficked highway was an obvious hazard to other drivers, especially on a Friday night with darkness approaching"). Indeed, the Tenth Circuit has upheld the impoundment of a vehicle in circumstances similar to those here, without regard to whether the impoundment was executed pursuant to standardized procedures. See *United States* v. *Trujillo*, 993 F.3d 859, 869 (2021) (upholding officers' decision to

impound a vehicle as reasonable under the Fourth Amendment because the vehicle was left in a position that "prevented other cars from passing by to enter [a] gated community").

Petitioner thus does not identify any conflict among post-*Moore* decisions on whether an impoundment must comply with standardized procedures to be reasonable under the Fourth Amendment. Moreover, even among the pre-*Moore* decisions that petitioner cites (Pet. 18-19), the asserted conflict is overstated. In *United States* v. *Petty*, *supra*, the Eighth Circuit mentioned the officers' compliance with standardized procedures in the course of *upholding* an impoundment. See 367 F.3d at 1012 ("The police had a sufficient basis to conclude that the rental car should be impounded pursuant to their standard policy."). And in both *United States* v. *Duguay*, *supra*, and *United States* v. *Proctor*, *supra*, the failure to comply with standardized procedures was only one of multiple independent grounds for the court's decision, suggesting that a future panel could potentially decline to rely on that portion of the opinion—particularly in light of its tension with *Moore*. See *Duguay*, 93 F.3d at 352-353 (concluding that the impoundment was unreasonable for the independent reason that the officers "did not articulate a constitutionally legitimate rationale for impounding [the] car," particularly where the car's driver, who was not the defendant, "was prepared to remove the car from the street"); *Proctor*, 489 F.3d at 1355-1356 (concluding that the evidence had to be suppressed for the independent reason that the inventory search itself was unconstitutional).

c. In any event, this case is a poor vehicle for further review of this issue, because the officers' decision to impound the vehicle complied with the Sheriff's Depart-

ment's established policies. See Gov't C.A. Br. 19 n.7 (contending that the impoundment "arguably" complied with the Sheriff's Department's established policies); C.A. App. 88 (arguing that because the vehicle "need[ed] to be impounded for a safety reason"—namely, that it was "obstructing and impeding the potential flow of traffic"—the Sheriff's Department's policies did not require the officers to advise petitioner that he could release the vehicle to a third party).

The Sheriff's Department's policies state:

> Where the owner or operator in possession of a vehicle is arrested for a traffic violation or for some other offense * * * , and the vehicle is not required as evidence and need not be impounded for any other reason, the law enforcement officer will * * * [a]dvise the owner or operator that they may release the vehicle to a licensed driver who is willing to assume full responsibility for the vehicle and all property contained therein. This person must be at the scene or be able to arrive prior to the law enforcement officer leaving.

C.A. App. 20-21.

Petitioner contends (Pet. 19) that because the vehicle was "not required as evidence" in this case, the officers violated the Sheriff's Department's policies by not advising him that he could release the vehicle to a third party. But the Sheriff's Department's policies require an officer to advise the driver that he may release the vehicle to a third party only where "the vehicle is not required as evidence *and need not be impounded for any other reason*." C.A. App. 20-21 (emphasis added). Here, the vehicle did "need" to "be impounded for" another "reason," *ibid.*—namely, that the vehicle was "[i]mpeding or [e]ndangering [t]raffic." *Id.* at 25; see Pet. App. 2, 6.

As the Sheriff's Department's policies make clear, "[n]o vehicle shall be stopped or left unattended in such a manner as to impede or render dangerous the use of the highway by others." C.A. App. 25; see *ibid.* (providing that if such a vehicle "is not promptly removed," an officer "may order the vehicle towed"). Thus, contrary to the district court's conclusion, the officers did not violate the relevant policies by not giving petitioner the "option" of "try[ing] to reach out to" the "owner" of the vehicle to have her retrieve it. D. Ct. Doc. 78, at 7. The policies are most naturally understood not as a mandate to leave a vehicle in a hazardous situation while an arrested driver tries to make arrangements for someone to retrieve it, but instead to require advising the driver of a retrieval option only where there is no "need" to remove the vehicle. C.A. App. 20. And because such a need existed here, the officers did not violate the Sheriff's Department's policies by ordering the vehicle towed without advising petitioner of the possibility of waiting for a third party to arrive.

2. Petitioner also contends (Pet. i) that the existence of "an investigatory motive when impounding [a] vehicle" in itself renders that impoundment unlawful. That contention likewise does not warrant this Court's review.

The "ultimate touchstone of the Fourth Amendment is 'reasonableness,'" *Brigham City* v. *Stuart*, 547 U.S. 398, 403 (2006) (citation omitted), and "[a]n action is 'reasonable' under the Fourth Amendment, regardless of the individual officer's state of mind, 'as long as the circumstances, viewed *objectively*, justify the action,'" *id.* at 404 (brackets and citation omitted). Thus, just as an "officer's subjective motivation is irrelevant" to the applicability of the emergency aid doctrine (which allows police to enter a home without a warrant if intervention

is reasonably necessary to respond to an emergency), *ibid.*, an officer's subjective motivation is irrelevant to the applicability of the community caretaking doctrine (which allows police to "seize and remove" vehicles without a warrant if the vehicles are "impeding traffic or threatening public safety and convenience," *Opperman*, 428 U.S. at 369). The court of appeals therefore correctly determined that "[t]he presence of both investigatory and community caretaking motives does not render unlawful an objectively reasonable decision to impound." Pet. App. 6.

The decisions on which petitioner relies (Pet. 20) are not to the contrary. This Court's decision in *City of Indianapolis* v. *Edmond*, 531 U.S. 32 (2000), "held in the context of programmatic searches conducted without individualized suspicion—such as checkpoints to combat drunk driving or drug trafficking—that 'an inquiry into *programmatic* purpose' is sometimes appropriate." *Brigham City*, 547 U.S. at 405 (quoting *Edmond*, 531 U.S. at 46). As this Court explained in *Brigham City*, that inquiry—"directed at ensuring that the purpose behind the *program* is not 'ultimately indistinguishable from the general interest in crime control' "—"has nothing to do with discerning what is in the mind of the individual officer" conducting a search or seizure. *Ibid.* (quoting *Edmond*, 531 U.S. at 44). In accord with that approach, petitioner's quotations (Pet. 20) from *Opperman* and *Wells* are merely passing mentions of pretextual *procedures* for an inventory search; they do not indicate that the validity of an initial impoundment turns on an officer's subjective mindset.

Petitioner does not identify any disagreement in the courts of appeals on whether the impoundment of a vehicle may be consistent with the Fourth Amendment if

the officer has an investigatory motive in impounding the vehicle. See, *e.g.*, *Petty*, 367 F.3d at 1013 (explaining that the fact "[t]hat an officer suspects he might uncover evidence in a vehicle * * * does not preclude the police from towing a vehicle and inventorying the contents, as long as the impoundment is otherwise valid"); *Trujillo*, 993 F.3d at 871 (explaining that "even if the district court had found that [the defendant] was motivated in part by an investigatory motive" in impounding a vehicle, "that would still be insufficient ground to require suppression"). And in any event, this case would be a poor vehicle for further review of whether the officers' subjective motivations rendered the impoundment unlawful.

Petitioner asserts (Pet. 23) that an investigatory motive can be inferred from the fact that the officers "ordered that the vehicle be impounded" "instead of offering [him] the opportunity to have a third-party remove the car." But as the court of appeals explained, petitioner "did not ask the district court to make a specific finding about why the officers" did "not notify[] him that he could request a third party to immediately remove the car." Pet. App. 6. The court of appeals therefore applied a "plain error standard of review" and found "no plain error." *Ibid.* Thus, the record lacks any finding that the officers acted with investigatory motive when they allegedly "violated aspects of the Hancock County Impound and Inventory Policies." *Ibid.*

3. Finally, petitioner argues (Pet. 23-25) that the government should bear the burden of establishing the officers' subjective motivations. Petitioner, however, did not make that argument below, and the court of appeals expressly declined to address "who has the burden of proving pretext in this context." Pet. App. 7 n.6.

Because the issue was not raised or addressed below, no further review is warranted. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (explaining that this Court is "a court of review, not of first view"); *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.") (citation omitted).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

BRIAN H. FLETCHER
*Acting Solicitor General*
KENNETH A. POLITE, JR.
*Assistant Attorney General*
THOMAS E. BOOTH
*Attorney*

SEPTEMBER 2021