No. 08-33

# In the Supreme Court of the United States

DEVON MONROE SMITH, PETITIONER

*v.*

UNITED STATES OF AMERICA

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

## BRIEF FOR THE UNITED STATES IN OPPOSITION

GREGORY G. GARRE
*Solicitor General*
*Counsel of Record*
MATTHEW W. FRIEDRICH
*Acting Assistant Attorney General*
WENDY WALDRON
*Attorney*
*Department of Justice*
*Washington, D.C. 20530-0001*
*(202) 514-2217*

## QUESTION PRESENTED

Whether the impoundment of a vehicle was unreasonable under the Fourth Amendment where the vehicle's occupants had both been arrested, the vehicle's owner was unknown, and the vehicle was obstructing traffic and a bus stop in its present location.

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 522 F.3d 305. The opinion of the district court (Pet. App. 25a-33a) is not published in the Federal Supplement but is available at 2005 WL 2746657.

## JURISDICTION

The judgment of the court of appeals was entered on April 9, 2008. The petition for a writ of certiorari was filed on July 3, 2008. 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 Eastern District of Pennsylvania, petitioner was convicted of possessing a firearm after having been convicted of a felony, in violation

of 18 U.S.C. 922(g)(1). He was sentenced to 192 months of imprisonment, to be followed by five years of supervised release. The court of appeals affirmed. Pet. App. 1a-24a.

1. On June 8, 2004, Lancaster, Pennsylvania, police officers Christopher Laser and Richard Heim were on routine patrol in a high-crime neighborhood. As the officers drove past a white Ford Taurus, Officer Heim recognized petitioner, the front-seat passenger, as someone for whom there was an outstanding arrest warrant. The officers stopped the Taurus. Pet. App. 3a, 26a, 32a.

The officers exited their patrol car and approached the Taurus. Officer Heim placed petitioner under arrest after receiving radio confirmation about the outstanding warrant, and escorted him back to the officers' patrol car. Gov't Supp. C.A. App. 63.

Officer Heim began conducting a search of petitioner's person and discovered a plastic baggie of crack in petitioner's right front pants pocket. Gov't Supp. C.A. App. 64. As he was continuing the search, Officer Heim realized that an altercation had broken out between Officer Laser and the driver of the Taurus. Pet. App. 26a; Gov't Supp. C.A. App. 64. Officer Heim ran to help Officer Laser, at which point petitioner and the driver both attempted to flee. Pet. App. 26a; Gov't Supp. C.A. App. 64-65. Officer Heim pursued the driver, tackled him, and placed him under arrest; Officer Laser and another officer apprehended petitioner some distance away. *Id.* at 65, 79. Neither petitioner nor the driver claimed to own the Taurus and the driver stated that he did not know who owned the vehicle or the location of any registration papers. Pet. App. 3a. Petitioner and the driver were taken to a police station. *Id.* at 26a-27a.

The Taurus had come to a stop between five and seven feet from the curb and was blocking traffic and obstructing a bus stop. Pet. App. 32a. Officer Heim, who had remained on the scene, decided to impound the Taurus and drove it to the police station. *Id.* at 3a, 27a. During a routine inventory search at the police station, Officer Laser found a loaded semi-automatic handgun in the Taurus's glove compartment. *Id.* at 4a. In an interview conducted after the handgun was found, petitioner waived his *Miranda* rights and admitted to loading the gun and placing it in the glove compartment. *Id.* at 27a. During that same interview, petitioner also admitted knowing that he was not permitted to possess a firearm. *Ibid.*

2. Petitioner was charged with one count of possessing a firearm after having been convicted of a felony. Petitioner moved to suppress the firearm and his post-arrest statements. The district court held a suppression hearing, at which it heard testimony from Officer Heim and Officer Laser. Pet. App. 4a, 27a.

The district court denied petitioner's motion to suppress. Pet. App. 25a-33a. The court noted that petitioner did not challenge the conduct of the inventory search itself but only the impoundment that had preceded it. *Id.* at 28a. The court "d[id] not address" whether the Lancaster Police Department had "a sufficient written policy" governing the impoundment of vehicles. *Id.* at 29a. Instead, the court concluded "that there is a 'standardized routine' that is followed by [Lancaster] officers" in conducting impoundments and that that "department policy * * * rises to a level of the sufficiently 'standardized routine' to pass muster under the Fourth Amendment." *Id.* at 29a-30a (citation omitted).

The district court also rejected petitioner's contention that the officers had lacked "legal justification" to impound the Taurus. Pet. App. 30a-31a. The court explained that Pennsylvania law authorizes police officers to remove vehicles from public streets "in the interests of public safety and efficient movement of traffic." *Id.* at 32a; see *id.* at 31a-32a (citing 75 Pa. Cons. Stat. Ann. § 3352(c)(2) (West 2006) and decisions by Pennsylvania courts). The district court noted that both of the Taurus's occupants had been arrested; that the officers had no way of ascertaining the car's true owner; and that the vehicle had come to a stop in a place where it was blocking traffic and obstructing a bus stop and in a high-crime area where cars were frequently vandalized. *Id.* at 30a, 32a. The district court concluded that "[i]n these circumstances, removal of the vehicle [fell] within the statutory authority of the police under 75 Pa. Cons. Stat. § 3352(c)(2) and the authority derived from the community care-taking function of the police." *Id.* at 32a. Petitioner entered a conditional guilty plea pursuant to Federal Rule of Criminal Procedure 11(a)(2). See Pet. App. 5a.

3. The court of appeals affirmed. Pet. App. 1a-24a. Like the district court, it "focus[ed] on the validity of the impoundment rather than the validity of the actual search of the vehicle" because petitioner "d[id] not contend" that the inventory search was unlawful "if the impoundment was lawful." *Id.* at 6a. The court of appeals also did not consider whether petitioner had "standing to challenge the impoundment" because the government had not contested the issue and had agreed that petitioner, had he been called at the suppression hearing, would have testified that the car belonged to his girl-

friend and that she had lent it to him at the time of the impoundment. *Id.* at 8a n.5.

The court of appeal was "of the view that the [d]istrict [c]ourt's finding that [Officer] Heim acted pursuant to a standardized procedure when he impounded the vehicle" was "probably * * * erroneous." Pet. App. 12a. But it declined to "make a definitive determination on the point," *ibid.*, because, "even if the [district] court's finding was erroneous," it was "satisfied that the impoundment was lawful," *id.* at 7a. The court thus "assume[d]" for purposes of its decision "that the Lancaster Police Department did not have a standard policy regarding the impounding and towing of vehicles." *Ibid.*; see *id.* at 12a.[1]

The court of appeals stated that there was "no doubt" that the impoundment of the Taurus "was for community caretaking rather than investigative purposes." Pet. App. 22a n.9. The court further concluded that, in assessing the constitutionality of a community caretaking impoundment, the appropriate approach was to "directly apply[] the Fourth Amendment" and ask whether the impoundment was "reasonable" in light of the legitimate purposes for which vehicles may be impounded. *Id.* at 24a. And the court of appeals deter-

[1] The court of appeals also observed that the government had stated in its brief that "after the [d]istrict [c]ourt adjudicated this matter and [petitioner] appealed, the government itself discovered that the Lancaster Police Department has a written policy * * * regarding the impounding and towing of vehicles." Pet. App. 7a n.4. The court of appeals stated that neither party had asked it to remand the case to the district court for further consideration in light of that policy and it declined to "expland[] the record on [its] own motion to include the policy as [Officer] Heim cannot have relied on the policy when he impounded the vehicle as he was not aware of it." *Ibid.*

mined that, "[i]n view of the circumstances here," there was no "plausible argument that [Officer] Heim acted unreasonably in impounding and removing the vehicle." *Id.* at 22a; see *ibid.* (stating that "a legitimate argument could be made that" the officers would have acted "irresponsibly if [Officer] Heim had not removed the vehicle").

The court of appeals distinguished this Court's decisions in *Colorado* v. *Bertine*, 479 U.S. 367 (1987), and *Florida* v. *Wells*, 495 U.S. 1 (1990). The court described *Bertine* as establishing that "an impoundment decision made pursuant to standardized procedures will most likely, although not necessarily always, satisfy the Fourth Amendment," and it stated that "[c]onversely, it should follow 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. 16a-17a (quoting *United States* v. *Coccia*, 446 F.3d 233, 238 (1st Cir. 2006), cert. denied, 127 S. Ct. 1021 (2007)). The court of appeals also stated that *Wells* was "of little use here" because it involved the constitutional standards for the conduct of inventory searches rather than an initial impoundment. *Id.* at 14a n.7.

The court of appeals stated that "it may be desirable that the police execute impoundments for community caretaking purposes pursuant to standardized procedures" and it emphasized that it "d[id] not suggest that police departments should not adopt standard impoundment policies." Pet. App. 22a-23a. But the court reasoned that "the Fourth Amendment * * * does not have an equal protection component" and it concluded that "a reasonable impoundment does not become unreasonable merely because the police do not impound all

vehicles found in similar circumstances any more than an unreasonable impoundment becomes reasonable merely because all vehicles in similar circumstances are impounded." *Id.* at 23a. The court also stated that a "requirement that a community caretaking impoundment be made pursuant to a standard police procedure could lead to untoward results." *Ibid.* It cited examples such as situations where "standards may have been set forth in regulations that have expired and, perhaps through oversight, not have been renewed," "standards [that] might not deal with all the situations that could arise," and "jurisdiction[s] in which impoundments are so rare that the authorities * * * quite reasonably [have] never have seen any need to adopt impoundment standards." *Ibid.*

**ARGUMENT**

Petitioner contends (Pet. 17-28) that the impoundment of the Taurus violated his rights under the Fourth Amendment. The court of appeals correctly rejected that claim, and there is no direct conflict between its decision in this case and any of the other lower court decisions cited by petitioner. In any event, this case would not be an appropriate vehicle for resolving any tension among the lower courts about the role of standardized impoundment procedures in assessing the constitutionality of impoundments that are justified for purposes other than investigating crime.

1. The issue presented by this petition for a writ of certiorari is a narrow one. Petitioner does not challenge the initial stop of the Taurus. He does not challenge his own arrest and he does not attempt to challenge the arrest of the driver. Petitioner likewise does not dispute that if the initial impoundment was lawful, the resulting

inventory search complied with the Fourth Amendment. Instead, petitioner's sole claim is that it was constitutionally unreasonable for Officer Heim to impound the Taurus unless "the decision to impound [it was] made in accordance with standardized police procedures." Pet. i. That claim lacks merit.

"The ultimate standard touchstone set forth in the Fourth Amendment is reasonableness." *Cady* v. *Dombrowski*, 413 U.S. 433, 439 (1973); accord *Brigham City* v. *Stuart*, 547 U.S. 398, 403 (2006). This Court has long noted that "[p]assengers, no less than drivers, possess a reduced expectation of privacy" when traveling in cars. *Wyoming* v. *Houghton*, 526 U.S. 295, 303 (1999). An automobile "seldom serves as one's residence or as the repository of personal effects," and it "travels public thoroughfares where both its occupants and its contents are in plain view." *New York* v. *Class*, 475 U.S. 106, 112-113 (1986) (citation omitted). A person's reasonable expectation of privacy in a car is further diminished by the government's "pervasive regulation" of automobiles, *id.* at 113, and by the possibility of "traffic accidents that may render all [of a car's] contents open to public scrutiny," *Houghton*, 526 U.S. at 303.

In addition, the Court has explained that police officers are often called upon to perform "community caretaking functions" with respect to automobiles that are "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Dombrowski*, 413 U.S. at 441. "[A]utomobiles are frequently taken into police custody" in order to protect "both the public safety and the efficient movement of vehicular traffic," and this Court has described "[t]he authority of police to" do so as "beyond chal-

lenge." *South Dakota* v. *Opperman*, 428 U.S. 364, 368-369 (1976).

This Court has stated that, once a vehicle has been impounded, officers may conduct an inventory of its contents so long as they do so pursuant to "standardized criteria or established routine." *Florida* v. *Wells*, 495 U.S. 1, 4 (1990) (citing *Opperman*, 428 U.S. at 372, and *Illinois* v. *Lafayette*, 462 U.S. 640, 648 (1983)); see *Colorado* v. *Bertine*, 479 U.S. 367, 374 n.6 (1987). The purposes of an inventory search are to "protect[] * * * the owner's property while it remains in police custody," "protect[] * * * the police against claims or disputes over lost or stolen property," and "[p]rotect[] * * * the police from potential danger" from items in the vehicle. *Id.* at 382; accord *Whren* v. *United States*, 517 U.S. 806, 811 n.1 (1996). The Court has justified looking to "standardized criteria" "based on the principle that an inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence"; the criteria thus must be designed to ensure that an "individual police officer [does] not [have] so much latitude that inventory searches are turned into 'a purposeful and general means of discovering evidence of crime.'" *Wells*, 495 U.S. at 4 (quoting *Bertine*, 479 U.S. at 376 (Blackmun, J., concurring)).[2]

[2] In an earlier case, this Court upheld an inventory search without requiring standardized criteria, explaining that such a search was reasonable to serve valid interests once a car has been impounded. See *Cooper* v. *California*, 386 U.S. 58, 61-62 (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. *Ibid.* *Cooper*'s approach better comports with this Court's contemporary Fourth Amendment jurisprudence. Once objective justifications exist for an intrusion, Fourth Amendment standards are

As the court of appeals correctly explained (Pet. App. 14a n.7), this Court's decision in *Wells* (see Pet. 18, 20, 21) dealt exclusively with the validity of an inventory search and did not say anything about the standards governing the initial impoundment. See *Wells*, 495 U.S. at 4-5. This Court's decision in *Bertine* (see Pet. 19-21) was also "concerned primarily with the constitutionality of an inventory search." *United States* v. *Coccia*, 446 F.3d 233, 238 (1st Cir. 2006), cert. denied, 127 S. Ct. 1021 (2007); see *Bertine*, 479 U.S. at 371-375; *id.* at 376-377 (Blackmun, J., concurring). In the penultimate paragraph of its opinion, the *Bertine* Court considered the defendant's alternate claim "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." *Id.* at 375. The Court rejected that argument. It stated that "[n]othing 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 activ-

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satisfied regardless of whether the intrusion violates state law. See *Virginia* v. *Moore*, 128 S. Ct. 1598 (2008) (so holding for arrests based on probable cause). And even 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*, 547 U.S. at 403-404 (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 do, "whether state law authorized the search [i]s irrelevant." *Moore*, 128 S. Ct. at 1604 (discussing *Cooper*).

ity," and it concluded that both of those criteria were satisfied in the case before it. *Id.* at 375-376.

*Bertine*'s discussion does not definitively resolve the impoundment issue. The cases it cited, *Opperman* and *Lafayette*, had addressed the circumstances under which officers may inventory the contents of an item; they did not address the constitutional restrictions on when an item may be taken into custody for community caretaking purposes. See *Lafayette*, 462 U.S. at 641 (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 vehicle as "lawfully impounded"); see also *Coccia*, 446 F.3d at 238 (stating that "*Opperman* does not * * * concern impoundments"). Accordingly, the Court's conclusion that the impoundment at issue in *Bertine* satisfied the standards that its previous decisions had established for the conduct of inventory searches made it unnecessary for the Court to decide whether impoundments must invariably satisfy those requirements as well. See Pet. 9 (recognizing that "this Court did not need explicitly to say [in *Bertine*] whether the impoundment would have violated the Fourth Amendment if the police officer had *not* acted according to [standardized] criteria"). In addition, reading *Bertine* as establishing a minimum constitutional threshold for impoundment decisions would be "at odds with the thrust of * * * the opinion of the Court in that case," *Wells*, 495 U.S. at 3, which, as noted previously, was concerned principally with the constitutional restrictions on inventory searches and did not consider whether impoundment decisions should be subject to precisely the same ones.

As the court of appeals correctly recognized (Pet. App. 22a), the circumstances of this case "demonstrate why" a per se rule that police officers may not impound vehicles unless there are standardized procedures governing such impoundments is unwarranted. When Officer Heim decided to drive the Taurus to the police station, both of the vehicle's occupants had been arrested and the officers' attempts to identify its lawful owner had failed. *Id.* at 22a, 32a. The vehicle could not be left in its present location, which was "five to seven feet from the curb" and in a spot where it was "blocking traffic" and "obstructing a bus stop." *Id.* at 32a. The Taurus was also in a high-crime area where Officer Heim knew that vehicles left on the street were frequently stolen or vandalized. *Id.* at 30a, 32a. Those objective facts made the impoundment decision reasonable, whether or not other police officials had anticipated those circumstances and established standardized criteria.[3] Cf. *Virginia* v. *Moore*, 128 S. Ct. 1598, 1605 (2008) (stating that this Court has generally "thought it obvious that the Fourth Amendment's meaning did not change with local law enforcement practices—even practices set by rule"). Accordingly, Officer Heim's decision to impound the Taurus was constitutional, regardless of whe-

[3] Petitioner's observation (Pet 24) that "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" is true but irrelevant. When officers encounter a car parked lawfully on the side of the road, the natural inference is that the owner has decided to park it there and to assume any risk of vandalism or theft that may result. Here, in contrast, the Taurus was stopped where it was because of the officers' traffic stop and they had no reason to believe that the car's then-unknown owner would have wanted to leave it there. At any rate, the issue is not whether Officer Heim had other alternatives but whether the course he chose was constitutionally reasonable.

ther the Lancaster County Police Department had a standardized policy addressing vehicle impoundments.[4]

2. Petitioner fails to identify any "deep[]" (Pet. 9) or "[i]ntractabl[e]" (Pet. 8) conflict among the lower courts with respect to the question presented here. The specific claim that the court of appeals rejected was that a police officer invariably violates the Fourth Amendment when he impounds a vehicle for community caretaking purposes in a situation where "there [a]re *no* standard policies or procedures which circumscribe[] or otherwise limit[] [the officer's] discretion" to do so. Pet. App. 5a (quoting Pet. C.A. Br. 12) (emphasis added). As petitioner acknowledges (Pet. 10), the court of appeals' rejection of that claim accords with the decisions of the First Circuit and the Supreme Court of Ohio. See *Coccia*, 446 F.3d at 238-239; *City of Blue Ash* v. *Kavanagh*, 862 N.E.2d 810, 813 (Ohio 2007).

There is no direct conflict between the decision below and any of the other decisions cited by petitioner. In *United States* v. *Proctor*, 489 F.3d 1348 (2007) (see Pet. 11), the D.C. Circuit concluded that the Washington, D.C., police department had standardized procedures

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[4] The court of appeals also stated that "[t]here is no doubt that" the decision to impound the Taurus "was for community caretaking rather than investigative purposes." Pet. App. 22a n.9. In *Brigham City*, this Court reiterated that "[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.'" 547 U.S. at 404 (quoting *Scott* v. *United States*, 436 U.S. 128, 138 (1978)). Accordingly, it "does not matter here—even if [his] subjective motives could be so neatly unraveled"—what subjective motives Officer Heim had for impounding Taurus. *Id.* at 405. The Fourth Amendment's protection against arbitrary action comes from the requirement of objective facts justifying the police action—not from an inquiry into subjective motives or a scripted set of criteria in a particular jurisdiction.

governing impoundments and that the officers in that case had violated those standards by impounding a vehicle. See *id.* at 1354-1355. Although the D.C. Circuit characterized this Court's decision in *Bertine* as "suggest[ing] that a reasonable, standard police procedure must govern the decision to impound," *id.* at 1353, the court's more narrow holding was that "*if* a standard impoundment procedure exists, a police officer's failure to adhere thereto is unreasonable and violates the Fourth Amendment," *id.* at 1354 (emphasis added). *Proctor*'s holding therefore does not reach the facts of this case. In addition, *Proctor* was decided before this Court's decision in *Virginia* v. *Moore*, *supra*, and the court of appeals thus had no opportunity to consider whether *Moore*'s rationale indicates that the objective circumstances confronting the officers, rather than state-created rules, should be the touchstone of reasonableness in deciding whether an impoundment is constitutional.

The same is true of *State* v. *Weaver*, 900 P.2d 196 (Idaho 1995). As petitioner acknowledges (Pet. 12), *Weaver* involved a situation in which the relevant police department had policies governing impoundments, and the court's conclusion that there had been a Fourth Amendment violation was expressly based on the fact that the officer should have known that his decision to impound the car violated those policies. See 900 P.2d at 199-200.

Nor is there any direct conflict between the court of appeals's decision in this case and the Seventh Circuit's pre-*Moore* decision in *United States* v. *Duguay*, 93 F.3d 346 (1996) (see Pet. 12). Although the *Duguay* court cited the lack of a standardized impoundment policy as one of "two independent reasons" warranting suppression in that case, 93 F.3d at 351, the court's analysis

largely focused on the unreasonableness of the decision to impound the vehicle. See *id.* at 353 (stating that a "policy of impounding the car without regard to whether the defendant can provide for its removal is patently unreasonable if the ostensible purpose for impoundment is for the 'caretaking' of the streets"); see also *id.* at 353-354 (suggesting that the impoundment may have violated state law). In addition, as the court of appeals explained (Pet. App. 17a), the facts of *Duguay* are "hardly * * * helpful to [petitioner]," because in that case the car's driver had not been arrested and could have driven the car away herself, and the officers knew that another passenger, who had also not been arrested, was the son of the car's owner.

Finally, there is no conflict between the decision below and *Fair* v. *State*, 627 N.E.2d 427 (Ind. 1993) (see Pet. 12-13). The defendant in *Fair* argued that the police may impound a vehicle for community caretaking purposes only if the decision to do so is "specifically authorized by statute." *Id.* at 432. The Indiana Supreme Court rejected that view, holding that "[w]hile impoundment pursuant to [motor vehicle or forfeiture statutes] is clearly proper," *id.* at 431, police officers may, "as a matter of federal constitutional law, * * * discharge their caretaking function whenever circumstances compel it," *id.* at 432. The court nonetheless determined that the impoundment in that case had violated the Fourth Amendment because: (1) "the State ha[d] made no effort to demonstrate that any Indiana statute authorized" the impoundment; (2) it was not clear that "reasons of public safety dictated that the car be towed"; (3) the record was "litter[ed]" with "indicia of pretext"; and (4) there was an "absence of evidence about any departmental procedures against which [the court] might

[have] evaluate[d] the[] significance" of the evidence of pretext. *Id.* at 433, 435. Here, in contrast, Pennsylvania law authorized impoundment of the Taurus (Pet. App. 31a-32a), considerations of public safety clearly justified moving it (*id.* at 32a), and "[t]here is no doubt that * * * the impoundment was for community caretaking rather than investigative purposes" (*id.* at 22a n.9). Cf. note 4, *supra*.[5]

3. Even if there were a direct post-*Moore* conflict among the lower courts about the constitutionality of impounding a car in the absence of any standardized procedures, which there is not, this case would not be a suitable vehicle for addressing it. After hearing testimony from both Officer Heim and Officer Laser, the district court expressly found "that there *is* a 'standardized routine' that is followed by the officers of the Lancaster City Bureau of Police." Pet. App. 29a (emphasis added). Although the court of appeals was "of the view that" that finding was "probably * * * erroneous," it did not "make a definitive determination" on that point, *id.* at 12a, and it likewise did not address the government's argument that the appropriate standard of review with respect to that issue was for clear error. See Gov't C.A. Br. 28-32; see also *Easley* v. *Cromartie*, 532 U.S. 234, 242 (2001) (stating that, under the clear error standard, a reviewing court may "not reverse a lower court's finding of fact simply because [it] 'would have decided the case differently'" (quoting *Anderson* v. *Bessemer City*, 470 U.S. 564, 573 (1985)). Accordingly, even

[5] As petitioner acknowledges (at 13) the statements he cites from various other lower-court decisions are all dicta because they were made in cases where the impoundments "complied with standardized impoundment procedures" and the courts rejected the defendants' Fourth Amendment claims.

if this Court were to hold that a community caretaking impoundment is per se unreasonable under the Fourth Amendment unless it is done pursuant to standardized procedures, petitioner would not obtain any relief unless either this Court or the court of appeals, applying the appropriate standard of review, were also to conclude that the district court erred with respect to its actual basis for denying petitioner's suppression motion. See also note 1, *supra* (noting that evidence that was not presented to the district court indicates that Lancaster City has a written policy governing vehicle impoundments).

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

GREGORY G. GARRE
*Solicitor General*
MATTHEW W. FRIEDRICH
*Acting Assistant Attorney General*
WENDY WALDRON
*Attorney*

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