No. 15AP2052

In The Supreme Court of Wisconsin

STATE OF WISCONSIN,
PLAINTIFF-RESPONDENT,

v.

KENNETH M. ASBOTH, JR.,
DEFENDANT-APPELLANT-PETITIONER.

On Appeal from the Dodge County Circuit Court,
The Honorable John R. Storck, Presiding,
Case No. 2012-CF-384

RESPONSE BRIEF OF THE STATE OF WISCONSIN

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Other Authorities

INTRODUCTION

After the police lawfully arrested Petitioner Kenneth Asboth at a private storage facility, they needed to decide what to do with his car. Under the community-caretaker doctrine of the Fourth Amendment, "[t]he authority of police to seize and remove . . . vehicles impeding traffic or threatening public safety and convenience is beyond challenge." *South Dakota v. Opperman*, 428 U.S. 364, 369 (1976). Here, the car was parked right in the middle of a lane between two rows of sheds, threatening to impede travel through the property. It also blocked access to several storage units, posing not only a major inconvenience to any renters of those units but also a risk of serious harm (for example, if a fire broke out, the car could get in the way of emergency vehicles). In addition, if left unattended, the car would be a potential target for vandalism and theft. On top of all of this, Asboth was likely to remain in police custody for some time, and there was no one else around to take responsibility for the car. Abandoning it would have only made it the property owner's problem. So the officers reasonably decided to impound the vehicle. Under this Court's jurisprudence, that seizure was a "bona fide community caretaker function," and "the public need" for the seizure outweighed any "intrusion upon [Asboth's] privacy." *State v. Kramer,* 2009 WI 14, ¶ 21, 315 Wis. 2d 414, 759 N.W.2d 598 (citation omitted).

Asboth's main objection is that the police in this case had not adopted, and so could not have complied with, a "standardized" impoundment policy, which *Colorado v. Bertine*, 479 U.S. 367 (1987), purportedly makes a per se requirement of any impoundment. But *Bertine* suggests at most only that, *if* a police department has adopted "standardized procedures" governing officers' discretion to impound, then any impoundment "made pursuant" to those procedures is more likely to be reasonable. *United States v. Coccia*, 446 F.3d 233, 238 (1st Cir. 2006). Consistent with this rule, courts around the country generally agree that "the absence of standardized procedures [does not] automatically render[ ] an impoundment unconstitutional." *United States v. Sanders*, 796 F.3d 1241, 1248 (10th Cir. 2015).

At any rate, the seizure here would have satisfied Asboth's proposed "standardized criteria" rule. Police from Dodge County arrested Asboth and directed the seizure of the car, with some help from Beaver Dam's city police. Whether the seizure is viewed (correctly) as a Dodge County impoundment or (incorrectly) as a Beaver Dam impoundment, both departments have, and here followed, standardized policies. Like the policy in *Bertine*, 479 U.S. at 368 n.1, the County procedures permit seizing a car when its driver is arrested and when not impounding would leave the car unattended, while the City policy allows impoundment if justified under the community-caretaker doctrine. The seizure here complied with both policies.

ISSUES PRESENTED

1. Was the impoundment of Asboth's car reasonable under the settled community-caretaker doctrine of the Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution?[1]

The circuit court and court of appeals answered yes.

2. Even if those constitutional provisions were read to require adoption of, and compliance with, "standardized" impoundment policies, would the seizure here have been constitutional?

The circuit court and court of appeals answered yes.

ORAL ARGUMENT AND PUBLICATION

By granting Asboth's petition for review, this Court has indicated that the case is appropriate for oral argument and publication.

STATEMENT OF THE CASE

In late 2013, Petitioner Kenneth Asboth was a wanted man. Police officers with the City of Beaver Dam suspected that he had robbed a bank at gunpoint. R.1:1–2. They had also put out a warrant for his arrest in light of a probation violation. A.102; R.38:37–38.

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[1] Wisconsin courts generally interpret Article I, Section 11 of the Wisconsin Constitution to "provide the same constitutional guarantees as the Supreme Court has accorded through its interpretation of the Fourth Amendment." *State v. Kramer*, 2009 WI 4, ¶ 18, 315 Wis. 2d 414, 759 N.W.2d 598. For simplicity, this brief refers to both of these constitutional provisions as the "Fourth Amendment."

Around a month after the robbery, the police heard that Asboth had driven to a public storage facility in Dodge County. R.38:60. Because the facility was within the Dodge County Sheriff's Department's jurisdiction and outside the Beaver Dam officers' jurisdiction, R.78:8 R38:62, a Dodge County Sheriff's deputy was sent to investigate, but he asked for some help from the Beaver Dam police, A.102–03 R.38:69. The deputy, who was the first to arrive, found Asboth reaching into the backseat of a parked car. R.38:60–62. At once, the deputy arrested him. R.38:62. Soon after, Beaver Dam police showed up and put Asboth in the back of one of their squad cars. R.38:62.

The officers needed to decide what to do with the car. Parked in front of one storage unit, it blocked access to several others as well. R.38:63; A.126 (pictures of car as police found it). It was also obstructing traffic through the facility, since it sat "right in the middle of the lane" between two rows of storage sheds. R.38:63. On top of that, its most recent operator had just been arrested, so the car was now abandoned. The police ran the car's plates and learned that it was registered to some person with a Madison address, so it seemed that the car was not even Asboth's. A.118–19; R.38:39, 63–64.

The officers all agreed that the car could not stay where it was, and, since no one else was around to move it, the car would have to be towed. R.38:39, 63–64. The Dodge County Sheriff's lot was full, so they asked Beaver Dam to house the

car. R.78:65–66. A tow truck hauled the car, and city police inventoried the car after it arrived. A.136. In accordance with their policy, the officers "removed and held for safekeeping all items of apparent value," A.103, including an Xbox 360, a Samsung cell phone, a Phillips MP3 player, a key, an orange bottle containing green leafy material, and a pellet gun. R.36:1–3; R.72–73. The gun resembled the one used in the recent robbery. A.103 n.2.

Asboth was charged with the armed robbery. R.1:1. He moved to suppress the gun, arguing that both the seizure of the car (the impoundment) and its later search (the inventory) were unreasonable under the Fourth Amendment. R.39:1–3. Although Asboth did not appear to be the registered owner of the car, the State stipulated to Asboth's Fourth Amendment standing to avoid delaying the suppression proceeding. R.38:27–28.

After hearing from all of the officers involved, the trial court denied Asboth's motion. It found, among other things, that "[t]he officers involved believed that the vehicle belonged to someone other than [Asboth]," A.123, that "[b]oth the Dodge County Sheriff's Department and the Beaver Dam Police Department's written policies favor impoundment in this scenario," "[t]he vehicle was parked on another individual's property, not legally parked on a public street," "[t]he vehicle was blocking access to more than one of the business's storage lockers and was impeding travel by other customers through the complex," and "[t]here were valuable

items in the vehicle including electronics." A.125. The court also "agree[d] with the State that, 'when the police arrest a person who has driven a vehicle onto private property other than their own, leaving that vehicle behind and making its removal the property owner's problem is unreasonable.'" A.125. The impoundment was therefore an exercise of "a valid community caretaker function." A.125. The court also upheld the inventory search, concluding that it had not been undertaken "for the sole purpose of investigation." A.124–25 (citation omitted). His motion having failed, Asboth pleaded no contest and was sentenced to 10 years of confinement and 10 years of supervised release. R.175.

On appeal, Asboth narrowed his Fourth Amendment argument, contending only that the seizure of the car (and not the inventory) was unconstitutional. *See* Pet. Br. 7. Thus, "no aspect of the inventory search itself was at issue in th[e] appeal." A.102. Asboth urged the Court of Appeals to hold that *Colorado v. Bertine*, 479 U.S. 367 (1987), imposes a requirement that all impoundments be "conducted pursuant to a law enforcement policy setting forth standardized, sufficiently detailed guidelines limiting officer discretion in seizing vehicles," and that the impoundment here failed that test. A.104. Instead, the court held that Asboth's case did not even present those questions. Accepting for the sake of argument that impoundments are reasonable only if they follow a "standardized policy," the court held that the seizure here was constitutional. A.109–10. Rejecting Asboth's

assertion that Beaver Dam's impoundment policy, and not the County's, was the relevant one, the court explained that the unchallenged findings of the trial court established that the storage unit was within Dodge County's jurisdiction and that officers from Dodge County not only made the arrest but directed that the car be seized. A.108. Turning to the policy itself, the court concluded without difficulty that it set forth sufficient "standards governing seizure"—authorizing impoundments when, for example, "(1) the driver of a vehicle is taken into police custody; and (2) as a result, that vehicle would be left unattended." A.108. The court concluded that "law enforcement followed those standards in seizing the car here." A.110.

The court proceeded to hold the seizure constitutional under the well-established community-caretaker test, concluding that it was a "bona fide community caretaker activity" and that it passed the doctrine's balancing test. A.112 (citation omitted). Asboth identified "no reason to upset the implicit factual finding of the circuit court that the police did not seize the car . . . for the sole purposes of investigation." A.114 (citation omitted). Accordingly, the court "reject[ed] the only argument Asboth makes that the seizure here does not satisfy . . . the community caretaker doctrine," and it affirmed. A.114, 121.

STANDARD OF REVIEW

When reviewing the denial of a motion to suppress, this Court adheres to a circuit court's findings of fact unless they are clearly erroneous and it "independently appl[ies] constitutional principles" to the facts. *State v. Matalonis*, 2016 WI 7, ¶ 28, 366 Wis. 2d 443, 875 N.W.2d 567.

SUMMARY OF ARGUMENT

Under the community-caretaker doctrine of the Fourth Amendment, "[t]he authority of police to seize and remove . . . vehicles impeding traffic or threatening public safety and convenience is beyond challenge." *Opperman*, 428 U.S. at 369. Under this Court's doctrine, impounding a vehicle is reasonable when it is a "bona fide community caretaker activity" and when "the public need" for the seizure outweighs any "intrusion upon the privacy of the individual." *Kramer*, 315 Wis. 2d at 427. An abandoned car might "imped[e] traffic." *Opperman*, 428 U.S. at 369. It might also "constitute[ ] a nuisance in the area in which it was parked." *United States v. Brown*, 787 F.2d 929, 932 (4th Cir. 1986). In addition, whether the car is parked on the street or in "a [private] lot open to the public," it is at risk of "vandalism or theft." *United States v. Kornegay*, 885 F.2d 713, 716 (10th Cir. 1989). By seizing the car and "placing it in protective custody," not only do officers protect the vehicle, but they also "avoid [ ] claims" of liability for any damage. *State v. Callaway*, 106 Wis. 2d 503, 513, 317 N.W.2d 428 (1982). And

there is further reason to impound when the just-arrested driver is likely to "be indisposed for an indeterminate, and potentially lengthy, period," especially when "there is no one *immediately* on hand to take possession" of the car. *Coccia*, 446 F.3d at 240 (citation omitted). Finally, it is relevant whether, if a police department has adopted standardized procedures governing officers' discretion to seize vehicles, the impoundment complied with those procedures. *Id.* at 238.

The community-caretaker doctrine authorized the seizure in this case. Parked "right in the middle of the lane" between two rows of storage units, R.38:63; *see* A.126, Asboth's car threatened to obstruct traffic through the storage facility. *See United States v. Cartwright*, 630 F.3d 610, 615 (7th Cir. 2010). The car also blocked several storage sheds, R.38:63; A.126, creating not only an inconvenience for the renters of those units but also a risk to public safety, since the car was potentially obstructing emergency vehicles as well, *see Brown*, 787 F.2d at 932. The car was also a target for vandalism and theft. *Kornegay*, 885 F.2d at 716. In addition, Asboth was likely to be in police custody for a while, and there was no one else around to take the car. Anyway, it would not have been reasonable to make the car "the property owner's problem." A.119. Finally, the impoundment was justified under the officers' standardized policy, *Coccia*, 446 F.3d at 238, because its driver had just been arrested and the vehicle would otherwise have been left unattended. Thus, impounding the car was plainly a "bona fide community

caretaker function" and reasonable under this Court's balancing test. *Kramer*, 315 Wis. 2d 414, ¶ 23. Whether the police might have secretly hoped that the car would contain evidence of crime does not alter that conclusion. *Id.* ¶ 30.

Citing *Bertine*, 479 U.S. 367, Asboth urges this Court (1) to adopt a Fourth Amendment requirement that police departments enact and comply with standardized impoundment policies and (2) to hold that the seizure here was per se unreasonable under that rule. But *Bertine*, which mostly had to do with inventory searches, suggests at most that, *if* a police department has adopted "standardized procedures" governing officers' discretion to impound, then any impoundment "made pursuant" to those procedures is more likely to be reasonable. *Coccia*, 446 F.3d at 238. Hence, courts are not excused from considering whether, even "*absent any police department policies*," a given impoundment is reasonable under the community-caretaker doctrine. *State v. Clark*, 2003 WI App 121, ¶ 18, 20, 265 Wis. 2d 557, 666 N.W.2d 112 (emphasis added). While some post-*Bertine* cases from other jurisdictions differ over how relevant "standardized procedures" are to the reasonableness analysis, there is widespread agreement that, contrary to Asboth's view, "the *absence* of standardized procedures [does not] automatically render[ ] an impoundment *unconstitutional*." *Sanders*, 796 F.3d at 1248 (emphases added).

Even if the Fourth Amendment were read to mandate adoption of, and compliance with, "standardized"

impoundment policies, the seizure here was constitutional. One of the cases cited by Asboth shows, for example, that a policy directing officers to impound a vehicle whenever there is no one else immediately available to take responsibility is "sufficiently 'standardized,'" vesting officers with "residual judgment [to seize a vehicle] based on legitimate concerns related to the purposes of an impoundment." *United States v. Petty*, 367 F.3d 1009, 1012 (8th Cir. 2004); Pet. Br. 8 (citing *Petty*). Even less stringent, the policy approved in *Bertine* permitted officers to impound anytime the driver "is taken into custody." 479 U.S. at 368 n.1. Here, like the policy in *Petty*, but stricter than the one in *Bertine*, the Dodge County rules (which govern, since County officers made the arrest and directed the seizure) allow police to "arrange for towing of motor vehicles" "[w]hen the driver of a vehicle has been taken into custody by a deputy," and (2) as a result, "the vehicle would thereby be left unattended." A.133. Even if it applied, Beaver Dam's policy would pass muster as well, since it permits impoundments whenever the vehicle is in the officers' "lawful custody," A.129, tying officers' discretion to the standardized criteria of the community-caretaker doctrine.

ARGUMENT

I. The Community-Caretaker Doctrine Justified The Seizure Of Asboth's Car

A. Impounding Asboth's Car Was Reasonable Because, If Abandoned, It Would Have Threatened Public Safety And Convenience

1. The Fourth Amendment protects against "unreasonable searches and seizures" and provides that "no Warrants shall issue, but upon probable cause." U.S. Const. amend. IV. But it "does not specify when a [ ] warrant must be obtained," *Kentucky v. King*, 563 U.S. 452, 459 (2011), and "because the ultimate touchstone of the Fourth Amendment is 'reasonableness,' the warrant requirement is subject to certain exceptions," *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006).

One exception covers searches and seizures authorized under the "community caretaker" doctrine. *State v. Pinkard*, 2010 WI 81, ¶ 14, 327 Wis. 2d 346, 785 N.W.2d 592. "Police officers wear many hats." *Matalonis*, 366 Wis. 2d 443, ¶ 29 (citation omitted). Enforcing the law and investigating crime are not their only duties. They also must see to the many needs of their communities, protecting people and property "not just from criminals" but "from all types of losses"—sometimes "even those occasioned by our own [wrongdoing]." *Id.* (citation omitted). Since those tasks are "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal state," *Pinkard*, 327 Wis.

2d 346, ¶ 16 (quoting *Cady v. Dombrowski,* 413 U.S. 433, 441 (1973)), an officer "serving as a community caretaker to protect persons and property may . . . perform warrantless searches and seizures" without offending the Fourth Amendment, *Id.* ¶ 14.

The community-caretaking test has three steps. First, a court asks whether a Fourth Amendment "search" or "seizure" has occurred.[2] Second, it considers whether the police carried out an objectively "bona fide community caretaker function." *Id.* ¶ 31. If it did, a court considers next "whether the public need and interest outweigh the intrusion upon the privacy of the individual." *Kramer*, 315 Wis. 2d 414, ¶ 21 . On the third step, a court generally looks to four factors: "(1) the degree of the public interest and the exigency of the situation; (2) the attendant circumstances surrounding the [intrusion], including time, location, the degree of overt authority and force displayed; (3) whether an automobile is involved; and (4) the availability, feasibility and effectiveness of alternatives to the type of intrusion actually accomplished." *Pinkard*, 327 Wis. 2d 346, ¶ 41 (citation omitted). In all, the "ultimate touchstone" of community caretaking is "reasonableness . . . in light of the facts and circumstances of the case." *State v. Anderson*, 142 Wis. 2d 162, 168, 417 N.W.2d 411 (Ct. App. 1987).

[2] This threshold inquiry is not at issue here, since the parties agree that Asboth's car was seized. *See* A.112.

Community caretaking "frequently" requires police officers to seize vehicles, and their authority to do so to remove a threat to "public safety and convenience" is "beyond challenge." *Opperman*, 428 U.S. at 369. This is for several reasons. An abandoned car might "imped[e] traffic." *Id.* It might also "constitute[ ] a nuisance in the area in which it was parked," when, for example, it inconveniences a business by blocking access to a lot. *Brown*, 787 F.2d at 932. In addition, whether the car is parked on the street or in "a [private] lot open to the public," it is at risk of "vandalism or theft." *Kornegay*, 885 F.2d at 716; *see also Coccia*, 446 F.3d at 240. So, by seizing the car and "placing it in protective custody," not only do officers protect the vehicle, but they also "avoid [ ] claims" of liability for any damage. *Callaway*, 106 Wis. 2d at 513; *see also United States v. Staller*, 616 F.2d 1284, 1289–90 (5th Cir. 1980) (reasonable to impound vehicle legally parked in commercial lot for this reason). Making each of these concerns more pressing, the likelihood that the driver will "be indisposed for an indeterminate, and potentially lengthy, period" often will leave the officers practically no choice, especially when "there is no one *immediately* on hand to take possession" of the car. *Coccia*, 446 F.3d at 240 (citation omitted). Finally, it is relevant whether, if a police department has adopted "standardized procedures" governing officers' discretion to impound vehicles, the impoundment was "made pursuant" to those procedures. *Id.* at 238.

2. The community-caretaker doctrine easily justified the seizure of the car in this case. Parked "right in the middle of the lane" between two rows of storage units, R.38:63, *see also* A.126, Asboth's car threatened to obstruct traffic through the storage facility, *see Opperman*, 428 U.S. at 369; *accord United States v. Cartwright*, 630 F.3d 610, 615 n.1 (7th Cir. 2010) (officers not "obliged to leave the car where it was—stopped between two rows of parking spaces"). The car also blocked access to several storage sheds, R.38:63, A.126, creating not only a serious inconvenience for the renters of those units but also a risk to public safety, since the car was potentially in the way of emergency vehicles as well, *see Brown*, 787 F.2d at 932; *see also*, *e.g.*, Fox6 News, "Fire Destroys Portion of Elkhorn Storage Facility, Cause Being Investigated" (Aug. 16, 2016) *available at* goo.gl/p1FPQw. Third, the car was a potential target for vandalism and theft, *Kornegay*, 885 F.2d at 716; A.126. In any event, the officers were short on alternatives: they were likely to have Asboth for an indeterminate period (since he was suspected of armed robbery), and there was no one else around to take the car. R.78:20–22; *see Callaway*, 106 Wis. 2d at 512–13. That the car was registered to someone else, a Madison resident, did not *in the moment* make the prospect of alternative arrangements any simpler. A.118–19 (owner lived "a somewhat long drive away"); R.38:39; *see, e.g.*, *Petty*, 367 F.3d at 1012–13 (vehicle owned by rental company); *United States v. Smith*, 522 F.3d 305, 314 (3d Cir. 2008). And it would not

have been reasonable to make the car "'the property owner's problem.'" A.119. Finally, the impoundment was justified under the officers' standardized policy, because its driver had just been arrested and the vehicle would otherwise have been left unattended. *See infra* p. 20 (explaining this in more detail). Given these objective indicia of reasonableness, impounding the car was plainly a "bona fide community caretaker function." *Kramer*, 315 Wis. 2d 414, ¶ 23.

For many of the same reasons, application of the community-caretaker doctrine's balancing inquiry is equally straightforward here. On the public-interest side, the seizure here served "strong[ ] . . . public need[s]," *id.* ¶ 41: it secured the owner's car and removed an obvious source of potential harm and inconvenience to the lot's owner, renters, and other members of the public to whom the facility was open. For those individuals, the unattended car would have threatened an "exigency." *Id.* ¶ 42 (citation omitted); *see Pinkard*, 327 Wis. 2d 346, ¶ 26 n.8 (making clear that identifying an "exigency" for these purposes is far less demanding than showing an exigency under the exigent-circumstances or "emergency" exception to the warrant requirement).

At the same time, the seizure imposed hardly any "restriction" on Asboth's "liberty interest." *Kramer*, 315 Wis. 2d 414, ¶ 40. Asboth did not seem to be the car's registered owner, *see Smith*, 522 F.3d at 314; *Petty*, 367 F.3d at 1012–13, so his interests in avoiding its prolonged impoundment appeared to be limited. Regardless, the "attendant

circumstances surrounding" the seizure, *Pinkard*, 327 Wis. 2d 346, ¶ 41, show that, if anyone's liberty interests were at stake, it was those of the lot's owner and the public, to whom the abandoned car was a potential peril and nuisance, *see United States v. Arrocha*, 713 F.3d 1159, 1163 (8th Cir. 2013); *Kornegay*, 885 F.2d at 716. Further, there was no "overt authority and force displayed" to accomplish the seizure, *Pinkard*, 327 Wis. 2d 346, ¶ 41; Asboth already had been arrested and was sitting in the back of a police car. *Supra* p. 4. Additionally, the seizure was of an automobile, a fact that significantly reduces any reasonable "expectation of privacy." *Pinkard*, 327 Wis. 2d 346, ¶ 56 (citation omitted). Finally, the "availability, feasibility and effectiveness of [any] alternatives" to the seizure here did not make it any more intrusive, *id.* ¶ 57, for the simple reason that the officers *did not have* any effective, practicable alternatives that the law required them to consider. *See supra* pp. 15–16; *Arrocha*, 713 F.3d at 1164 ("Nothing in the Fourth Amendment requires a police department to allow an arrested person to arrange for another person to pick up his car to avoid impoundment and inventory.") (citation omitted); *Bertine*, 479 U.S. at 373 (police not required to offer a motorist an alternative to impoundment).

For these reasons, the seizure served a bona fide community-caretaker function, and the balancing inquiry supports the conclusion that the impoundment was reasonable.

3. Offering below "no serious argument that the seizure of the car" here "was not [a] bona fide community caretaker activity" under settled doctrine, A.112, Asboth makes three contentions here. Each of them fails.

First, Asboth argues that, before the police decide whether to seize a vehicle left on private property, they generally should "contact[ ] the owner" of the property "to determine whether it want[s] it removed." Pet. Br. 19. But the Fourth Amendment imposes no such requirement. *See, e.g., Cartwright*, 630 F.3d at 615 n.1 ("[T]he Fourth Amendment did not require the officers to explore [ ] alternatives [to impoundment] with the store owner."). To the contrary, "[p]olice may take protective custody of a vehicle when they have arrested its occupants, even if it is lawfully parked and poses no public safety hazard." *United States v. Martin*, 982 F.2d 1236, 1240 (8th Cir. 1993) (citation omitted) (upholding impoundment of car on private lot that did not follow a consultation with lot's owner). In *Kornegay*, for example, it was enough that leaving the abandoned vehicle "in the auction company's parking lot—a lot open to the public—could have subjected it to vandalism or theft." 885 F.2d at 716. It did not matter that the "auction company [had not] requested its removal." *Id.* And in *Staller*, the impoundment of a car on a private lot was held reasonable even though the "record [was] silent" regarding the lot owner's wishes. 616 F.3d at 1290 & n.9.

The cases that Asboth cites, Pet. Br. 19, are distinguishable. In *Sanders*, the court regarded the lack of evidence of a consultation with the owners of the private lot—which would have been much easier to arrange than here, since the car was parked at a Goodwill store—to be *just one factor* in assessing whether the community-caretaking act was reasonable. 796 F.3d at 1251; *see also Oregon v. Thirdgill*, 613 P.2d 44 (Or. Ct. App. 1980) (similar). Likewise, in *United States v. Pappas*, 735 F.2d 1232 (10th Cir. 1984), the police impounded the defendant's vehicle even though his friends were there and available to take the car, and the owner of the private lot was nearby. *Id.* at 1234. In *Georgia v. Lowe*, 480 S.E.2d 611 (Ga. Ct. App. 1997), the court "was authorized though not required to" hold the seizure unreasonable not solely because the property owner did not request removal but also because (for example) the car was legally parked in a secure spot. *Id.* at 230. And in *McGaughey v. Oklahoma*, 37 P.3d 130 (Okla. 2001), the problem was that the officers had failed to comply with a local ordinance permitting private-property impoundments "only where requested by the property owner." *Id.* at 143 & n.75 (citation omitted).

Asboth next contends that police should not impound a vehicle unless the arrestee is unable to make alternative arrangements. Pet. Br. 20. But the Supreme Court of the United States has already rejected this precise argument: "[W]hile giving [an arrestee] an opportunity to make

alternative arrangements [is] undoubtedly . . . *possible*," it is neither "require[d]" nor even especially relevant to the question of reasonableness. *Bertine*, 479 U.S. at 374 (citation omitted) (emphasis added); *accord United States v. Cherry*, 436 F.3d 769, 775 (7th Cir. 2006). What is more, Asboth gives no reason to think that he *was* able "to provide for the speedy and efficient removal of [the] car," Pet. Br. 20 (quoting a pre-*Cherry* Seventh Circuit case), much less that the officers should have understood that this was a realistic option. Anyway, the car was not registered to Asboth, and the registered owner "was not present" to make his wishes known. *United States v. McKinnon*, 681 F.3d 203, 209 (5th Cir. 2012) (per curiam); *see also* A.118 n.8 (explaining that although Asboth may have been the actual owner of the car at the time, this fact was not apparent to the police).

Third, Asboth asserts that the unattended car created no true "exigency" in the sense of an emergency. Pet. Br. 19. But, as the Court of Appeals correctly pointed out, A.116, and as noted *supra* p. 16, Asboth is confusing the meaning of "exigency" in community-caretaker doctrine with the exigency or "emergency" exception to the warrant requirement. As this Court has made clear, they are "not one and the same." *Pinkard*, 327 Wis. 2d 346, ¶ 26 n.8. The community-caretaker doctrine's conception of the term, which is far less narrow, comfortably fits this case. *See* A.116 ("[T]here was an appreciable degree of exigency here, in the sense of necessity.").

Finally, Asboth suggests that a community-caretaking impoundment is unreasonable if motivated even in part by a desire to investigate crime. Pet. Br. 17. That is not the law. This Court has made clear that, when the totality of the circumstances shows an "objectively reasonable basis" for a community-caretaking seizure, that "determination is not negated by the officer's subjective law enforcement concerns," such as a desire to investigate possible criminal activity. *Kramer*, 315 Wis. 2d 414, ¶ 30. So while "a court may consider an officer's subjective intent in evaluating whether the officer was acting as a bona fide community caretaker," "if the court concludes that the officer has articulated an objectively reasonable basis under the totality of the circumstances for the community caretaker function, he has met the standard." *Id.* ¶ 36.

Asboth responds that *Kramer* should not apply to community-caretaker *impoundments*, because impoundments are like inventories, which are unconstitutional if "pretextual." Pet. Br. 17. But he points to nothing in *Kramer* that would justify this drastically limited reading. In fact, courts generally apply the same investigatory-motive rule to both impoundments and inventories, and that rule is consistent with *Kramer*: "[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," *Petty*, 367 F.3d at 1013, and investigation is

not the officer's "*sole* purpose," *Bertine*, 479 U.S. at 373 (emphasis added); *accord Coccia*, 446 F.3d at 241 ("A search or seizure [including an impoundment] undertaken pursuant to the community caretaking exception is not infirm merely because it may also have been motivated by a desire to investigate crime."); *United States v. Rodriguez-Morales*, 929 F.2d 780, 787 (1st Cir. 1991). Asboth cites out-of-state impoundment decisions for the uncontroversial proposition that "pretextual" impoundments are unconstitutional, *see* Pet. Br. 18, but that principle is entirely in accord with this Court's decision in *Kramer*.

As explained *supra* pp. 15–17, the seizure of the car was not driven by a desire to investigate crime but instead by several independently sufficient community-caretaking rationales. Asboth's principal response is that unspecified "[e]vidence adduced at the hearing shows that the police had a substantial investigatory interest in Mr. Asboth's car, as he was suspected of a bank robbery." Pet. Br. 18. But while the officers surely did have an "investigatory interest" in Asboth *himself* (after all, the very purpose of the deputy's trip to the storage unit was to arrest him), their reasons for seizing the car were altogether different and not investigatory, as the officers' consistent testimony shows. R.38:39, 63–64; R.78:13–14. Even if the officers also may have harbored secret hopes of searching the car for evidence, that would "not negate[ ]" the seizure's reasonableness under the community-caretaker doctrine. *Kramer*, 315 Wis. 2d 414, ¶ 30.

B. The Fourth Amendment Does Not Require Police To Adopt "Standardized Policies" Governing Community-Caretaker Impoundments

1. Asboth asks this Court to graft onto the community-caretaker test a new requirement, which he purports to derive from *Bertine*: that, even when an impoundment otherwise satisfies this Court's community-caretaking jurisprudence, it is reasonable under the Fourth Amendment *only if* the seizure was governed by, and performed in accordance with, a police-adopted impoundment policy with "standardized criteria." Pet. Br. 8–11. The Court should decline to adopt such a rule.

First, Asboth's assertion that *Bertine* imposes a "standardized criteria" requirement on impoundments is simply incorrect. In the first place, *Bertine* was "concerned primarily with the constitutionality of an inventory search," not an impoundment. *Coccia*, 446 F.3d at 238; *see Pinkard*, 327 Wis. 2d 346, ¶ 98 (explaining that *Bertine* concerns "inventory searches of vehicles"). That is important because the Fourth Amendment judges the reasonableness of those separate intrusions separately. *See Callaway*, 106 Wis. 2d at 511. While litigants sometimes "commingle[ ] the issues in their briefs, the decision to impound (the 'seizure') is properly analyzed as distinct from the decision to inventory (the 'search')." *United States v. Duguay*, 93 F.3d 346, 351 (7th Cir. 1996). And the rationales for impoundments and inventories often differ. *Id.*

The Supreme Court has held that *inventory searches* "[must] be conducted according to standardized criteria," *Bertine*, 479 U.S. at 374 & n.6, or "established routine," *Florida v. Wells*, 495 U.S. 1, 4 (1990). Such procedures "tend[ ] to ensure that the intrusion [is] limited in scope," *Opperman*, 428 U.S. at 375, and that an inventory search is "designed to produce an inventory" and is not "a ruse for a general rummaging in order to discover incriminating evidence," *Wells*, 495 U.S. at 4.

But the Supreme Court has not held *impoundments* to the same rule. Rather, it has suggested only that, *if* a police department has adopted "standardized procedures" governing officers' discretion to impound, then any impoundment "made pursuant" to those procedures is more likely to satisfy the Fourth Amendment. *Coccia*, 446 F.3d at 238 (interpreting *Bertine* and collecting cases). This principle derives from the penultimate paragraph in *Bertine*, which addressed the defendant's contention "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 374. The Court "reject[ed]" this argument. *Id.* It explained that its inventory-search precedents do not "prohibit[ ] 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.* As to the case before it, "the discretion

afforded the [ ] police was exercised in light of standardized criteria, related to the feasibility and appropriateness of parking and locking a vehicle rather than impounding it." *Id.* Anyway, "[t]here was no showing that the police chose to impound Bertine's van in order to investigate suspected criminal activity." *Id.* In other words, that the police in *Bertine* had adopted "standardized criteria" governing their discretion to impound, and had exercised their discretion pursuant to the policy, only reinforced the reasonableness of the vehicle's seizure.

The Wisconsin Court of Appeals has taken a similar position. In *State v. Clark*, 2003 WI App 121, 265 Wis. 2d 557, 666 N.W.2d 112, the State argued that impounding the defendant's car was reasonable because it had been done pursuant to a police-adopted impoundment policy. *Id.* ¶¶ 11–12. The court disagreed. First, it held that "compliance with [a standardized policy] does not, in and of itself, guarantee the reasonableness of a search or seizure." *Id.* ¶¶ 13–14. Instead, "the constitutionality" of an impoundment "will, generally, depend upon its own individual facts." *Id.* ¶ 14. Concluding that the policy in that case did not support the State's position, the court proceeded to "determine, *absent any police department policies*, whether the seizure satisfied the reasonableness requirement" of the Fourth Amendment, including by considering whether the impoundment was valid under this Court's community-caretaker test. *Id.* ¶¶ 18, 20 (emphasis added).

Although some post-*Bertine* cases from other jurisdictions differ over just how relevant "standardized procedures" are to an assessment of an impoundment's reasonableness under the community-caretaker doctrine, courts overwhelmingly (and correctly) agree that, just as "the *existence* of standardized procedures [does not] automatically render[ ] an impoundment *constitutional*," "the *absence* of standardized procedures [does not] automatically render[ ] an impoundment *unconstitutional*." *Sanders*, 796 F.3d at 1248 (emphases added) (collecting cases and concluding that "no [federal] circuit" holds otherwise); *accord Coccia*, 446 F.3d at 238 ("[W]e do not understand *Bertine* to mean that an impoundment decision made without the existence of standard procedures is per se unconstitutional."). In other words, there is no constitutional "requirement" that police adopt standardized impoundment procedures before seizing a vehicle. The fact of such procedures, while relevant, is not dispositive. *Id.* "[T]he Fourth Amendment, not federal rules or state law, governs the admissibility of evidence," *United States v. Clyburn*, 24 F.3d 613, 616 (4th Cir. 1994), and "the ultimate touchstone of the Fourth Amendment is 'reasonableness,'" *Stuart*, 547 U.S. at 403 (2006).

Avoiding a per se rule here makes sense. While there may be good reasons for police departments to adopt standardized impoundment policies (perhaps to avoid arbitrary seizures and to discourage investigative fishing expeditions), there are especially compelling reasons not to

make the reasonableness of community-caretaker impoundments depend on them. "Virtually by definition, the need for police to function as community caretakers arises fortuitously, when unexpected circumstances present some transient hazard which must be dealt with on the spot." *Coccia*, 446 F.3d at 239 (citation omitted). And those unexpected circumstances add up to "a multitude of activities fall[ing] within the community caretaking function." *Pinkard*, 327 Wis. 2d 346, ¶ 20 (emphasis removed). Officers "cannot sensibly be expected to have developed, in advance, standard protocols running the entire gamut of possible eventualities." *Coccia*, 446 F.3d at 239 (citation omitted). To burden police departments with that task would be to "ignore the multifaceted nature of police work" and to risk "preclud[ing] police officers" from discharging their community-caretaking responsibilities when the circumstances call for it. *Kramer*, 315 Wis. 2d 414, ¶¶ 33–34. "This result is neither sensible nor desirable." *Id.* ¶ 34. Rather, as in other community-caretaking contexts, officers "must be free to follow sound police procedure," *Coccia*, 446 F.3d at 239 (citation omitted), in light of the circumstances that they confront, with their discretion "sufficiently cabined by the requirement that the decision to impound be based, at least in part, on a reasonable community caretaking concern and not exclusively on 'the suspicion of criminal activity,'" *id.* (quoting *Bertine*, 479 U.S. at 375); *see also Smith*, 522 F.3d at 315.

Asboth cites a number of federal and state cases in support of his proposed rule—that police "must" adopt "standardized criteria" to "govern vehicle impoundments." Pet. Br. 8–9. But his reliance on the vast majority of those cases is misplaced.

Although Asboth's federal cases acknowledge some disagreement in this area, none holds that a standardized impoundment procedure is across-the-board *mandatory*. The Seventh Circuit in *Duguay* faulted police for not employing a sufficiently "standardized impoundment procedure," yet the court reiterated *Opperman*'s holding that impoundments are reasonable if justified by community-caretaker interests, and the court ultimately concluded that "[t]he touchstone of Fourth Amendment analysis" in impoundment cases "is reasonableness." *Duguay*, 93 F.3d at 352, 353 (citation omitted); *see Smith*, 522 F.3d at 312 (agreeing with this reading of *Duguay*). In *Petty*, the police already "had a standard policy," and, consistent with it, the officer's decision to impound had been "based on legitimate concerns related to the purposes of an impoundment." 367 F.3d at 1012. Likewise, *Miranda v. City of Cornelius*, 429 F.3d 858 (9th Cir. 2005), confirmed that the reasonableness of an impoundment under the community-caretaker doctrine "depends upon the facts and circumstances of each case." *Id.* at 863–64 (citations omitted). And *United States v. Proctor*, 489 F.3d 1348 (D.C. Cir. 2007), dealt with a situation in which there was an impoundment procedure, but the officers did not follow it. *Id.*

at 1354. Finally, the Tenth Circuit in *Sanders* applied a "standardized criteria" rule only to impoundments of vehicles not obstructing traffic or threatening public safety. 489 F.3d at 1248–49. Just as important, *Sanders* carefully reviewed the same federal cases that Asboth cites here and concluded that none adopts his preferred rule: "No [federal] circuit has held . . . that the absence of standardized procedures automatically renders an impoundment unconstitutional." *Id.* at 1248.

Asboth next cites a string of state-court cases, Pet. Br. 9, but most do not help him. Some are irrelevant. *See Massachusetts v. Oliveira*, 47 N.E.3d 395 (Mass. 2016) (no mention of standardized criteria or *Bertine*); *Nebraska v. Filkin*, 494 N.W.2d 544 (Neb. 1993) (no impoundment). Others appear not to accurately reflect the law of the relevant jurisdiction. *Compare* Pet. Br. 9 (citing *Ohio v. O'Neill*, 29 N.E.3d 365, 374 (Ohio Ct. App. 2015)), *with City of Blue Ash v. Kavanagh*, 862 N.E.2d 810, 813 (Ohio 2007) ("*Bertine* requires standardized procedures with regard to inventory searches, not impoundment."). One focuses on a question different from the one presented here. *See Illinois v. Ferris*, 9 N.E.3d 1126, 1137 (Ill. Ct. App. 2014) (considering whether the police "unreasonably prolonged" a car seizure). And another recognizes that community-caretaking impoundments are "sometimes warranted" by circumstances not addressed in "state statutes" or, by extension, local policies. *Fair v. Indiana*, 627 N.E.2d 427, 431 (Ind. 1993).

C. Even If The Fourth Amendment Were Read To Mandate Adoption Of, And Compliance With, "Standardized" Impoundment Policies, The Seizure Here Would Pass Muster

1. In Asboth's view, Pet. Br. 8–11, the Fourth Amendment requires that police adopt and follow impoundment policies with "standardized criteria" addressing "the circumstances in which a car may be impounded," *Duguay*, 93 F.3d at 351; *see* Pet. Br. 8 (approving of *Duguay*). Under this rule, a policy directing officers to impound a vehicle whenever there is no one else immediately available to take responsibility for it would impose "sufficiently 'standardized'" criteria, reasonably vesting officers with "residual judgment [to seize a vehicle] based on legitimate concerns related to the purposes of an impoundment." *Petty*, 367 F.3d at 1012; *see* Pet. Br. 8 (approving of *Petty*). Likewise, a policy conferring discretion to impound whenever the driver "is under custodial arrest for any charge" also would be "sufficiently standardized." *Cartwright*, 630 F.3d at 615 (citation omitted). In fact, the police in *Bertine* had precisely such a policy: Although there were "several conditions that [had to] be met before an officer" could "park and lock" a car rather than have it towed, the officers could opt to impound the vehicle anytime the driver "[was] taken into custody." 479 U.S. at 368 n.1, 375–76 & n.7 (describing the policy); *id.* at 378–79 (Marshall, J., dissenting) (same); *see* 3 Wayne R. LaFave, *Search and Seizure* § 7.3(c)

(5th ed. 2012) (explaining that, for this reason, *Bertine* makes any standardized-criteria analysis "none too demanding").

2. The Dodge County policy in this case easily clears Asboth's "standardized criteria" bar. It authorizes deputies to "arrange for towing of motor vehicles" "[w]hen the driver of a vehicle has been taken into custody by a deputy," and as a result, "the vehicle would thereby be left unattended." A.133. As in *Petty*, this policy gives officers some room to assess whether the circumstances of the driver's arrest would cause the car (if not impounded) to be "left unattended," but that criterion is "sufficiently 'standardized' to satisfy the reasonableness requirement of the Fourth Amendment." 367 F.3d at 1012. What is more, the Dodge County criteria are even stricter than the procedures approved in *Cartwright* and *Bertine*, which allowed impoundments whenever the driver is taken into custody, *regardless* of whether the arrest causes the car to become abandoned. Here, because the Dodge County deputy took Asboth into custody, and the vehicle otherwise would have been left unattended, the impoundment complied with the County's reasonable policy.[3]

Asboth claims that the County policy falls short because it confers too much discretion. Pet. Br. 15 (citation omitted). Not only do cases like *Petty* and *Cartwright* reject this

[3] Asboth identifies (but does not rely upon) a provision of the County's policy supposedly making it the property owner's problem anytime a vehicle would be left unattended on his or her lot because of an arrest. In fact that provision does not apply when the Dodge County police have taken the driver of the vehicle into custody. R.78:22.

critique, but *Bertine* forecloses it altogether. *See supra* p. 11. Asboth addresses *Bertine*, but he simply misreads the policy in that case to impose specific conditions on the officers' decision to impound. Pet. Br. 12. In fact, the policy imposed conditions only on the decision to "lock and park." Whether to impound after an arrest was left entirely to the officers' discretion. *Supra* pp. 11, 31.

3. Asboth responds that it was Beaver Dam's policy—not Dodge County's—that governed the seizure, and that the City's policy is insufficiently standardized. Pet. Br. 11–13. He is wrong on both counts. Although the car was ultimately towed to the city police department and the city police undertook the inventory search, the trial court found (and Asboth does not dispute) that the county deputy made the arrest and that the storage facility was within the County's (and not the City's) jurisdiction. *Supra* pp. 4, 7. So the Sheriff's Department—which called on the Beaver Dam police only for assistance, R.38:69—"primarily directed" the decision to seize, A.108, a decision analytically separate from the later call to store the seized vehicle in Beaver Dam's lot, *see* R.38:39, 63–64; R.78:65–66; *cf. California v. Hodari D.*, 499 U.S. 621, 624–25 (1991) (suggesting that "[a] seizure is a single act," accomplished the moment an officer takes "possession" of the effect (citation omitted)). Accordingly, it is only the County's policy that matters here.

But even if the City's policy governed the seizure, it too is "sufficiently standardized," and the impoundment here

satisfied it. The City's policy describes six "Classes of Vehicles" that could come into police custody, including vehicles seized as evidence and as forfeitures, vehicles impounded as "[t]raffic impoundments" or "[o]ther non-criminal impoundments" or "[a]bandonments." A.129. But the policy requires that a police officer first have "lawful custody" of the vehicle before impounding. A.129. And the police have "lawful custody" of a vehicle in a non-criminal setting if there is a bona fide community-caretaking reason to take possession of it. *See Kramer*, 315 Wis. 2d 414, ¶ 23. So, because officers under the City's policy have "residual judgment" to seize a vehicle "based on legitimate concerns related to the purposes of an impoundment," *Petty*, 367 F.3d at 1012, and since there were such "legitimate concerns" in this case, *supra* pp. 15–17, the impoundment would have been reasonable under the City's procedure as well.[4]

Asboth faults the City's policy for "amount[ing] to no policy at all." Pet. Br. 12. To the contrary, it permits police to impound only when they have "lawful custody" of the vehicle, *supra* pp. 11, 33—a rule arguably even more demanding than the County's, since it is possible that an impoundment would not be "lawful" under the community-caretaker doctrine even after the driver's arrest. That

[4] The City policy also makes clear that officers have discretion not to impound when "there is a reasonable alternative," but that "the existence of an alternative does not preclude the officer's authority to impound." A.129.

question, like the issue in this case, would turn on the totality of the circumstances, not on per se rules.

CONCLUSION

The decision of the court of appeals should be affirmed.

Dated this 28th day of March, 2017.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 7,933 words.

Dated this 28th day of March, 2017.

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