

Case No: 20-1538, 20-1588

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

Alison Patricia Taylor,

Plaintiff - Appellant - Cross-Appellee,

v.

City of Saginaw and Tabitha Hoskins,

Defendants - Appellees - Cross-Appellants.

Appeal from the United States District Court of
Eastern Michigan – Northern Division
Hon. Thomas L. Ludington, District Judge

**BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN
SUPPORT OF APPELLANT AND REVERSAL**

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Other Authorities

Boyd, J. Bryan, *Arrested Development in Search Law: A Look at Disputed Consent Through the Lens of Trespass Law in a Post-Jones Fourth Amendment*, 46 Seton Hall L. Rev. 1 (2015)8

Brady, Maureen E., *The Lost “Effects” of the Fourth Amendment: Giving Personal Property Due Protection*, 125 Yale L.J. 946 (2016)9

Clancy, Thomas K., *The Fourth Amendment: Its History and Interpretation* 24-25, § 2.2 (2009)11

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Foster, Nancy, *Back to the Future: United States v. Jones Resuscitates Property Law Concepts in Fourth Amendment Jurisprudence*, 42 U. Balt. L. Rev. 445 (2013)8

IDENTITY AND INTEREST OF *AMICUS CURIAE*¹

Since 1973 PLF has worked to advance the principles of individual rights and limited government at all levels of state and federal courts, representing the views of thousands of supporters nationwide. In particular, PLF is known for its defense of private property rights, including *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019); *U.S. Army Corps of Engineers v. Hawkes Co., Inc.*, 136 S. Ct. 1807 (2016); *Koontz v. St. Johns River Water Management Dist.*, 570 U.S. 595 (2013); and *Sackett v. E.P.A.*, 566 U.S. 120 (2012).

PLF is also experienced in the area of the Fourth Amendment and administrative searches. See *Stavrianoudakis, et al. v. United States Fish & Wildlife Service, et al.*, No. 1:18-cv-01505 (E.D. Cal. filed Oct. 30, 2018); *Hotop v. City of San Jose*, 2018 WL 4850405, at *1 (N.D. Cal. 2018), *appeal docketed*, No. 18-16995 (9th Cir. Oct. 15, 2018) (*amicus curiae*) (motion for leave to file pending); *LMP Services, Inc. v. City of Chicago*, Dkt. No. 123123, 2019 WL 2218923 (Ill. May 23, 2019) (*amicus curiae*); *United States v. Spivey*, 870 F.3d 1297 (11th Cir. 2017), *cert. denied*, 138 S. Ct. 2620 (2018) (*amicus curiae*).

¹ In accordance with Fed. R. App. P. 29(a)(4)(E), *Amicus* affirms that no counsel for any party authored this brief in whole or in part, no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than the *Amicus*, its members, or its counsel have made a monetary contribution to this brief's preparation or submission.

Because of its experience and expertise on these issues, PLF believes that its perspective will aid this Court in considering the issues under consideration.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Fourth Amendment prohibits unreasonable government searches of persons, houses, papers, and effects. U.S. Const. amend. IV. Whether a search is reasonable is most easily determined by the issuance of a judicial warrant supported by sufficient cause. *Donovan v. Dewey*, 452 U.S. 594, 598 (1981). All ““searches conducted outside the judicial process . . . are *per se* unreasonable . . . subject only to a few specifically established and well delineated exceptions.”” *City of Los Angeles v. Patel*, 576 U.S. 409, 419 (2015).

This Court has already found that the City’s physical trespass on vehicle tires is a search under the Fourth Amendment. *Taylor v. City of Saginaw*, 922 F.3d 328, 332-33 (6th Cir. 2019). Nevertheless, the District Court below held that the City of Saginaw’s (Defendant) general regulatory power over vehicles places the burden on Appellants (Property Owners) to show the searches were unreasonable. *Taylor v. City of Saginaw*, No. 17-cv-11067, 2020 WL 3064448, at *5, *8 (E.D. Mich. June 9, 2020). On a finding that Property Owners did not meet this burden, it dismissed the case. *Id.* at *8-9. But these conclusions were error, and rest on three misconceptions.

First, the Fourth Amendment places the burden on the government to rebut the presumption that a warrantless search is unreasonable, not on the searched party to prove its unreasonableness. *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971). The traditional police power of states and municipalities to regulate for public health and safety is not a proxy for reasonableness or a license to conduct warrantless searches.

Second, where a warrantless search involves a trespass against a person, house, paper, or effect, a reasonable expectation of privacy is not required to establish a cause of action under the Fourth Amendment. *See, e.g., United States v. Jones*, 565 U.S. 400 (2012). Privacy interests, or the lack thereof, have no bearing on the reasonableness of a warrantless search premised on a property-based trespass claim.

Third, warrant exceptions rest on independent rationales and are to be considered intact and in turn. The District Court erred in mixing these distinct standards. Further, the “special needs” exception, on which the lower court predominately relied, only applies where a grave public concern requires dispensing with the warrant requirement. *See Patel*, 576 U.S. at 424 (noting absence of “clear and significant risk to the public welfare”); *Illinois v. Lidster*, 540 U.S. 419, 427 (2004) (describing public concern served by suspicionless checkpoint as “grave”). Cars parked in metered spaces beyond their allotted time limits do not present such

a menace. Nor did the lower court require Defendant to prove that individualized cause or the existence of any comprehensive legal framework limits officer discretion in the context of tire-chalking, as the “special needs” exception requires. *See infra* Part II.

For these reasons, the Court should find in favor of the Property Owners and reverse the decision of the District Court.

I. THE FOURTH AMENDMENT PLACES THE BURDEN ON GOVERNMENT TO PROVE THE “REASONABLENESS” OF A WARRANTLESS SEARCH

This Court has already found that a warrantless search occurred in this case because parking enforcement officers trespassed on vehicle tires, which are constitutionally protected “effects,” to obtain information. *Taylor v. City of Saginaw*, 922 F.3d at 332–33 (holding tire-chalking is a search). But the lower court, instead of proceeding on the presumption that warrantless searches are “unreasonable *per se*” as Supreme Court and Circuit case law mandate, flipped the standard by reasoning that because “[r]egulation of parking falls within the purview of a municipality’s police powers,” and “an ordinance which represents an exercise of the municipality’s police powers is presumed to be constitutionally valid,” “the burden of showing unreasonableness [is] cast upon those who challenge the ordinance.” *Taylor*, 2020 WL 3064448 at *5 (quoting *Curto v. City of Harper Woods*, 954 F.2d 1237, 1242 (6th Cir. 1992)).

Curto may exemplify the Sixth Circuit’s standard in evaluating a zoning ordinance for compliance with the Takings Clause, *Curto*, 954 F.2d at 1242, but it is not relevant to warrantless searches. *See Arizona v. Gant*, 556 U.S. 332, 338 (2009). It is not the source of power being exercised that determines the mode of scrutiny a court applies but the constitutional right at issue. At issue in this case is the right to be free of unreasonable searches, protected by the Fourth Amendment. In that context, unlike zoning and cases arising under the Takings Clause, the burden to prove any exemption from the Warrant Clause is placed on the government. *Id.*

Fourth Amendment jurisprudence *presumes* that warrantless searches are unreasonable. *See Gant*, 556 U.S. at 338. It then becomes the government’s burden to prove that (1) a particular warrant exception applies and, (2) it is satisfied. *See Coolidge*, 403 U.S. at 454–55. While the District Court mentioned this rule at the beginning of its opinion by stating that “[w]arrantless searches and seizures are presumptively unreasonable,” *Taylor*, 2020 WL 3064448 at *1, it did not apply this rule in its analysis that followed.

In holding that “the burden of showing unreasonableness [of a search is] cast upon those who challenge the ordinance,” *Taylor*, 2020 WL 3064448 at *5, the lower court departed from Fourth Amendment jurisprudence which presumes the reasonableness of a search only if it bears the imprimatur of a judge. *See Franks v. Delaware*, 438 U.S. 154, 171 (1978) (placing burden on party challenging a judicial

warrant); *Coolidge*, 403 U.S. at 454-55 (placing burden on government to establish warrant exception); *see also Terry v. Ohio*, 392 U.S. 1, 20 (1967) (noting the Fourth Amendment’s warrant preference and “that in most instances failure to comply with the warrant requirement can only be excused by exigent circumstances.”).

The fact that tire-chalking is done pursuant to a city’s police powers is not a basis for disregarding the warrant requirement. *See Patel*, 576 U.S. at 420-22, 426–27 (finding government failed to establish the closely regulated industry warrant exception); *Gant*, 556 U.S. at 338 (stating principle that starting point for evaluation of warrantless searches is that they are presumed unreasonable); *Camara v. Municipal Court*, 387 U.S. 523, 534-35 (1967) (requiring warrant even for administrative searches to enforce building codes). Indeed, since regulatory inspections and criminal investigations are both exercises of police powers, the District Court’s approach would render virtually *all* warrantless searches presumptively valid.

The placement of the burden of proof on the government to prove an exception to the warrant requirement has been repeatedly recognized by this Court. *See, e.g., Watson v. Pearson*, 928 F.3d 507, 511 (6th Cir. 2019) (recognizing government’s burden to prove warrant exception to justify per se unreasonable physical trespass search); *Liberty Coins, LLC v. Goodman*, 880 F.3d 274 (6th Cir. 2018) (holding government to its burden of satisfying the closely regulated industry exception);

McLaughlin v. Kings Island, 849 F.2d 990, 994-95 (6th Cir. 1988) (engaging in robust warrant exception analysis regarding a theme park inspection). Thus, the District Court erred at the most important juncture in Fourth Amendment analysis by placing a thumb on the scale for the government, rather than the opposite standard of presuming warrantless searches to be unreasonable.

II. PRIVACY-BASED EXCEPTIONS ARE INAPPLICABLE TO PROPERTY-BASED TRESPASS CLAIMS

The lower court conflated the two causes of action for a Fourth Amendment violation: invasions of privacy expectations and physical trespasses against property interests. From 1967 until 2012, the Supreme Court developed a jurisprudence that predominantly defined Fourth Amendment searches by weighing privacy interests under Justice Harlan’s concurrence from *Katz v. United States*, 389 U.S. 347, 361 (1967) (the reasonable expectation of privacy test). But in *United States v. Jones*, 565 U.S. 400 (2012), the Court declared that “the *Katz* reasonable-expectation-of-privacy test has been added to, not substituted for, the common-law trespassers test.” *Id.* at 409. A Fourth Amendment search thus also occurs when the government trespasses on a protected property interest to collect information, no matter the privacy interests involved. *Id.* at 404; *see also Florida v. Jardines*, 569 U.S. 1, 11 (2013) (recognizing Fourth Amendment property protection extends to curtilage).²

² Three Supreme Court opinions since *Jardines* have relied upon or discussed this property-based Fourth Amendment approach. *See Collins v. Virginia*, 138 S. Ct.

Federal courts have recognized *Jones* as a “sea change” in Fourth Amendment jurisprudence. *E.g.*, *United States v. Richmond*, 915 F.3d 352, 357 (5th Cir. 2019); *see also United States v. Ackerman*, 831 F.3d 1292, 1307 (10th Cir. 2016) (Gorsuch, J.) (“*Jones* held that the *Katz* formula is but one way to determine if a . . . ‘search’ has taken place.”); *United States v. Sweeney*, 821 F.3d 893, 899 (7th Cir. 2016) (“[T]he Supreme Court has revived a ‘property-based approach’ to identify unconstitutional searches.”); *United States v. Katzin*, 769 F.3d 163, 181 (3d Cir. 2014) (en banc) (“*Jones* fundamentally altered [the] legal landscape by reviving—after a forty-five year hibernation—the Supreme Court’s prior trespass theory.”). This shift was also widely noted across legal academia. *See, e.g.*, J. Bryan Boyd, *Arrested Development in Search Law: A Look at Disputed Consent Through the Lens of Trespass Law in a Post-Jones Fourth Amendment*, 46 Seton Hall L. Rev. 1, 11 (2015) (“With one swift blow, Justice Scalia introduced a “new” test under the Fourth Amendment: a search occurs when the government commits a trespass into a constitutionally protected area.”); Nancy Foster, *Back to the Future: United States v. Jones Resuscitates Property Law Concepts in Fourth Amendment Jurisprudence*, 42 U. Balt. L. Rev. 445 (2013).

1663, 1670 (2018); *Byrd v. United States*, 138 S. Ct. 1518, 1526 (2018); *Carpenter v. United States*, 138 S. Ct. 2206, 2235 (2018) (Thomas, J., dissenting); *id.* at 2267–68 (Gorsuch, J., dissenting).

The Fourth Amendment’s language, in extending its protection to persons, houses, papers, and effects “reflect[s] its close connection to property.” *Carpenter v. United States*, 138 S. Ct. 2206, 2239 (2018) (Thomas, J., dissenting) (quoting *Jones*, 565 U.S. at 405). These four categories were derived from state constitutions that made clear that “effects” and “personal property” are considered as one and the same. See Maureen E. Brady, *The Lost “Effects” of the Fourth Amendment: Giving Personal Property Due Protection*, 125 Yale L.J. 946, 985 (2016). Time and again the United States Supreme Court has recognized that effects and personal property are equivalent under the Fourth Amendment. See, e.g., *United States v. Place*, 462 U.S. 696, 716 (1983); *United States v. Chadwick*, 433 U.S. 1, 8 (1977). These items of personal property include footlockers, *id.* at 12, personal luggage, *Place*, 462 U.S. at 705–06, letters and sealed packages, *United States v. Jacobsen*, 466 U.S. 109, 114 (1984), cell phones, *Riley v. California*, 134 S. Ct. 2473, 2485, 2491 (2014), and specifically applicable to this case, vehicles, see *Jones*, 565 U.S. at 404 (“It is *beyond dispute* that a vehicle is an ‘effect’ as that term is used in the Amendment.”) (citing *Chadwick*, 433 U.S. at 12) (emphasis added).

Since a physical trespass against a person, house, paper, or effect is a separate cause of action from a *Katz* claim, no consideration of the presence or strength of privacy expectations is necessary. A physical invasion, even a minimal one, is always unreasonable without judicial approval, subject only to a few exceptions that

had developed from the common law tradition at the time of the Founding. *See Jones*, 565 U.S. at 411 (guaranteeing “*at a minimum* the degree of protection [the Amendment] afforded when it was adopted”) (emphasis in original). The administrative search line of cases leaned on by the lower court is inapposite because it justifies searches based on privacy, not property rights.

In the balancing test for general administrative searches, the government’s “special needs” are weighed against an individual’s expectation of privacy. *See, e.g., New Jersey v. T.L.O.*, 469 U.S. 325, 352–52 (1985) (warrantless search of high school student’s purse reasonable because of reduced expectation of privacy). Likewise for the narrow “heavily regulated industry” exception: Under the test articulated in *New York v. Burger*, 482 U.S. 691, 710 (1987), certain industries “have such a history of government oversight that no reasonable expectation of privacy . . . could exist for a proprietor over the stock of such an enterprise,” *Patel*, 576 U.S. at 424 (quoting *Marshall v. Barlow’s, Inc.*, 436 U.S. 307, 313 (1978)). But like the test for special needs, the *Burger* analysis does not fit the trespass claims brought by Property Owners.

As this Court has already recognized, chalking a tire is a physical act that transgresses against the right of a property owner to the exclusive control of his vehicle. *Taylor*, 922 F.3d at 333 (“[a]n actor may . . . commit a trespass by so acting upon a chattel as intentionally to cause it to come in contact with some other object.”)

(quoting Restatement (Second) of Torts § 217, cmt. e (Am. Law Inst. 1965)). Chalking a tire is thus like attaching a tracking device to a car, *Jones*, 565 U.S. at 404, or briefly lifting a turntable to view its serial number, *Arizona v. Hicks*, 480 U.S. 321, 324 (1987). Just as the attachment of a GPS device to the vehicle in *Jones* left behind a physical item that revealed information to the government, so too does the leaving behind of chalk residue on a tire inform the government of information pertaining to the chalked vehicle, i.e. whether it moved.

This Court’s previous judgement holds that tire-chalking is a search, *Taylor*, 922 F.3d at 332–33, so the operative question in this case is whether any trespass-based exception to the Warrant Clause applies. Since no such exception applies,³ the lower court’s inquiry should have ended there with a finding that tire-chalking is an

³ Since the doctrines of hot pursuit, search-incident-to-arrest, the automobile exception, and warrantless arrest are inapplicable, tire-chalking is an unreasonable search. See Thomas K. Clancy, *The Fourth Amendment: Its History and Interpretation* 24-25, § 2.2 (2009) (discussing hot pursuit); Laura K. Donohue, *The Original Fourth Amendment*, 83 U. Chi. L. Rev. 1181, 1222–23 (2016) (discussing the common law “hue and cry”); *United States v. Robinson*, 414 U.S. 218, 224-29 (1973) (examining the historical and traditional justifications for the search incident to arrest doctrine); *Carroll v. United States*, 267 U.S. 132, 153–54 (1925) (citing historical evidence from the Founding era that rendered the automobile exception consistent with the Fourth Amendment); *United States v. Watson*, 423 U.S. 411, 418 (1976) (“The cases construing the Fourth Amendment thus reflect the ancient common-law rule that a peace officer was permitted to arrest without a warrant for a misdemeanor or felony committed in his presence as well as for a felony not committed in his presence if there was reasonable ground for making the arrest.”).

unreasonable search. This is one of the benefits of the *Jones* trespass doctrine: “[I]t keeps easy cases easy.” *Jardines*, 569 U.S. at 11.

III. TIRE-CHALKING TO DISCOVER PARKING VIOLATIONS DOES NOT SATISFY ANY EXCEPTION TO THE WARRANT CLAUSE

The decision below should be reversed because the court picked out elements of several inapplicable warrant-exception rationales and fused them into a new test that is neither recognized nor permitted by any precedent. Although it said the decision was grounded in “the administrative search doctrine,” the lower court’s analysis excluded important safeguards against arbitrary power that these warrant exceptions apply in the administrative context.

A. The District Court Improperly Combined Warrant Clause exceptions

With its insistence on sworn oaths, a judicial process, and a writ granting only specific searches and seizures of strictly limited scope, the Warrant Clause is “[t]he bulwark of Fourth Amendment protection,” *Franks v. Delaware*, 438 U.S. at 164. To this end, “[t]he exceptions to the rule that a search must rest upon a search warrant have been jealously and carefully drawn.” *Jones v. United States*, 357 U.S. 493, 498 (1958). The Supreme Court’s instructions for applying warrant exceptions thus mirror the cautious warning from Dr. Egon Spangler to his fellow paranormal investigators in *Ghostbusters* regarding their proton packs: “Don’t cross the streams.” *Ghostbusters* (Columbia Pictures 1984).

There is sound reason for this rule, as each warrant exception rests upon a separate, carefully reasoned rationale. The District Court thus erred when it briefly surveyed multiple warrant exceptions, drawing support from portions of the reasoning for each, and applied these disparate rationales to craft a new and unjustified exception. *See Taylor*, 2020 WL 3064448 at *7–8. Without a yardstick against which to measure the city’s tire-chalking searches for reasonableness, other than the desirability of more efficient parking enforcement, it is no wonder the court sided with the government.

While the court justified its ruling under the so-called “administrative search exception” to the Warrant Clause, *id.* at *7 (“Defendants’ chalking of tires falls within the administrative search exception”), it failed to apply the relevant legal test for any particular type of administrative search, instead mixing rationales for warrantless searches that Supreme Court decisions deliberately treat as separate and distinct. *See id.* In other words, the court crossed the streams. The consequence was an improper expansion of the administrative search exception, with no clear legal test and a thumb on the scale for the government.

1. The District Court drew support from the *Terry* exception without applying its individualized suspicion component

First, the court quoted from *Brown v. Texas*, 443 U.S. 47 (1979), noting that “[d]etermining whether the exception applies requires the ‘weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure

advances the public interest, and the severity of the interference with individual liberty.” *Taylor*, 2020 WL 3064448 at *7 (quoting *Brown*, 443 U.S. at 51).

But *Brown* was an application of the *Terry* rule, not an administrative search case. *See Brown*, 443 U.S. at 50. And in fact, the detention in *Brown* was ruled unreasonable by the Supreme Court because the officers who detained Mr. Brown lacked reasonable suspicion. *Id.* at 51. This is not the standard for administrative searches but part of the rationale that renders brief investigatory detentions reasonable where specific and articulable suspicion is present under *Terry v. Ohio*, 392 U.S. 1 (1968). The lower court never took up the individualized-suspicion requirement of *Terry*, relying instead on the interest-balancing language alone.

It is true this language crops up from time to time in federal case law bearing on exceptions other than the *Terry* stop and frisk doctrine. *E.g. Michigan Dep’t of State Police v. Sitz*, 496 U.S. 444, 451–52 (1990). This is likely because *Terry v. Ohio*, from where *Brown v. Texas* drew this language, was one of the very first cases in which the Supreme Court recognized the reasonableness of a warrantless search or seizure. But the balancing of interests alone does not render a search reasonable. It was merely one link in the Court’s chain of reasoning that led it to accept the stop and frisk as an exception from the Warrant Clause. *Terry*, 392 U.S. at 21 (considering both the balance of interests *and* the role of individualized suspicion).

A common theme across warrant exceptions, and a component required in most of them, is an insistence on specific, individualized cause. While the quantum of evidence required to establish that cause may vary from exception to exception, it is an important element of the reasonableness analysis because the Fourth Amendment's primary concern is the elimination of arbitrary discretion in the hands of law enforcement officers. *Camara*, 387 U.S. at 527 (“The basic purpose of this Amendment . . . is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.”).

This is reflective of the Fourth Amendment's historical roots as a response to the Writs of Assistance under colonial rule. *Cf. Boyd v. United States*, 116 U.S. 616, 624–27 (1886) (discussing the Writs of Assistance and the role of the Amendment in prohibiting arbitrary, suspicionless searches). As the author of a leading treatise on Fourth Amendment law has recounted, “The core complaint of the colonists . . . was the general, suspicionless nature of the searches and seizures. . . . As they sought to regulate searches and seizures, the framers held certain principles to be fundamental, of which particularized suspicion was in the first rank.” Thomas K. Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 U. Memphis L. Rev. 483, 528 (1995) (footnotes and citations omitted).

While *Terry* upheld brief detentions without a warrant, it still insisted on individualized suspicion to render them reasonable. *Terry*, 392 U.S. at 21–22. It likewise insisted on *further* suspicion that a suspect is armed before he is subjected to the further intrusion of a search for weapons. *Id.* at 27. Even the *Brown* case quoted by the lower court recognizes that either individualized suspicion or enforceable limits on officer discretion is a necessary element of a reasonable warrantless search. *Brown*, 443 U.S. at 47 (“The Fourth Amendment requires that such a seizure be based on specific, objective facts indicating that society's legitimate interests require such action, or that the seizure be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers.”) (citing *Delaware v. Prouse*, 440 U.S. 648, 663 (1979)). The court below did not require the government to prove either individualized suspicion or regulatory limitations on officer discretion.

2. The District Court drew on the exigent circumstances doctrine without applying its legal test

Second, the court drew upon the exigent circumstances doctrine, *Taylor*, 2020 WL 3064448 at *7, another discrete Warrant Clause exception that allows law enforcement officers to search and seize in the absence of a warrant where (1) acquiring a warrant would be impracticable, and (2) the officers must act quickly to (a) prevent the imminent destruction of evidence, (b) catch a fleeing suspect, or (c)

render emergency aid. *Kentucky v. King*, 563 U.S. 452, 460 (2011). None of these rationales is implicated by parking enforcement.

The opinion of the lower court leans briefly on this Court's ruling from *United States v. Rohrig*, 98 F.3d 1506 (6th Cir. 1996), which upheld the warrantless entry of a home by police officers in order to abate an ongoing nuisance caused by excessive noise under this exigent circumstances exception. *Taylor*, 2020 WL 3064448 at *7; *Rohrig*, 98 F.3d at 1519. But the court did not *apply* the test from *Rohrig*, which requires the need for immediate action. 98 F.3d at 1518 (“[W]e must consider whether an ongoing and highly intrusive breach of a neighborhood's peace in the middle of the night constitutes ‘exigent circumstances,’ and therefore justifies a warrantless entry.”).

Had the lower court applied the *Rohrig* test, it would have found that both specific cause and the need for immediate action were entirely absent with respect to a parking attendant's “need” to chalk a tire. It would be a stretch to consider a car parked past the expiration of a metered space a “public nuisance.” But even if this were so, the cars at issue in this litigation were chalked *to discover* whether they would remain past the allotted time, not in *response* to a finding that they already were. The chalking of a tire also does nothing to abate the nuisance of an illegally parked car.

3. The District Court incorrectly drew support for its administrative search ruling from the closely-regulated-industry exception

Third, the lower court adopted reasoning from the administrative search exception in its citation to *New York v. Burger, Taylor*, 2020 WL 3064448 at *7, but only to say “that the warrantless search of a commercial business was reasonable because ‘the privacy interests of the owner are weakened and the government interests in regulating particular businesses are concomitantly heightened.’” *Id.* (quoting *Burger*, 482 U.S. at 702). Of course, there is no business involved here. The lower court’s citation to *Burger* also bypasses the default rule that requires a warrant for regulatory searches. *See Patel*, 576 U.S. at 420, 424–25 (recognizing warrantless inspections of hotel records served “special need” but insisting on a warrant process).

Even assuming that the closely-regulated-industry exception from *Burger* applied, it would require the government to satisfy a demanding three-pronged test by proving that (1) a compelling government interest informed a comprehensive regulatory scheme under which the warrantless search took place,⁴ (2) warrantless

⁴ Here, there must again be some grave public danger, a nuisance, or other greatly deleterious externality that the government seeks to curb. *See Burger*, 482 U.S. 691 (rapid proliferation and disappearance of stolen auto parts); *Donovan v. Dewey*, 452 U.S. 594 (1981) (hazardous conditions of underground mines); *United States v. Biswell*, 406 U.S. 311 (1972) (firearms); *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970) (intoxicating liquors); *Camara*, 387 U.S. 523 (unsafe buildings, fire prevention, and the spread of disease). Catching drivers who park past their allotted time on public streets is no such danger.

searches are indispensable to enforcement of the regulatory scheme, and (3) the regulatory scheme placed sufficient restrictions on officer discretion to serve as an adequate substitute for a warrant. *Patel*, 576 U.S. at 432. The court below applied no such test, instead selecting only the reduced-privacy-interest language from *Burger* to support its application of deference to the search powers and discretion that Saginaw’s parking ordinance places in the hands of its enforcement officials.

Warrant exceptions are not intended to be mixed, as they are “few,” “specifically established,” and “well-delineated.” *Arizona v. Gant*, 556 U.S. at 338. The lower court committed reversible error by mixing exceptions piece by piece rather than considering them intact and in turn. It then grafted all of the above onto the “special needs” doctrine, a vague area of Fourth Amendment law into which cases that do not clearly fit other, more specific warrant exceptions are often improperly forced.

B) The warrantless searches in this case do not satisfy the requirements of the “special needs” test

The District Court referred to the broader “special needs” doctrine, and specifically that doctrine’s checkpoint cases, without employing the concomitant legal test of (1) a “grave” public concern, and (2) sufficient limits on officer discretion. *Lidster*, 540 U.S. at 427; *see, e.g., Skinner v. Railway Labor Executives’ Ass’n*, 489 U.S. 602, 622 (1989) (marking “the minimal discretion vested in those charged with administering the [suspicionless drug testing] program”); *Sitz*, 496 U.S.

at 452-53 (identifying the limitations placed on officer discretion by guidelines governing the operation of a DUI checkpoint); *see Taylor*, 2020 WL 3064448 at *8. This was reversible error.

The special needs test weighs the asserted government interest in conducting warrantless searches against an individual's expectation of privacy. *See, e.g., T.L.O.*, 469 U.S. at 325. Below, the District Court focused on *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, and *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), which upheld suspicionless vehicle checkpoints. In these cases, the special needs exception only applied because there existed very strong government needs unrelated to law enforcement. In *Martinez-Fuerte*, that was border security. In *Sitz*, it was the dangers posed by drunk drivers. And in *Illinois v. Lidster*, it was gathering information in the wake of a hit-and-run fatality. No interest of this magnitude justifies a warrantless search in this case. This should have ended the lower court's inquiry.

Instead, it went on to hold that promoting "the circulation of people who can frequent businesses" and preventing "increased effort and resources by the City to issue parking tickets" justified the warrantless searches. *Taylor*, 2020 WL 3064448 at *8. If such an anemic government interest could satisfy the "special needs" exception, it would reduce Fourth Amendment scrutiny to mere rational basis

review. Indeed, the court’s language reveals this similarity: “Chalking *may* lead to more effective parking regulation . . .” *Id.* (emphasis added).

But a grave threat to the public is merely the first prong in a “special needs” analysis. The next prong requires either (1) individualized suspicion, as in the cases of school discipline searches and the *Terry* frisk for weapons, or (2) some enforceable limits on officer discretion, as in the cases of closely-regulated-industry searches, the checkpoint cases, and the inventory search exception, among others. *See Brown*, 443 U.S. at 51 (citing *Prouse*, 440 U.S. at 663). The insistence on safeguards against arbitrary search powers is an important component of special needs analysis “[b]ecause the individual’s interest in privacy and personal security ‘suffers whether the government’s motivation is to investigate violations of criminal laws or breaches of other statutory or regulatory standards,’” *T.L.O.*, 469 U.S. at 335 (quoting *Barlow’s*, 436 U.S. at 312–13).

The lower court’s truncated analysis thus ignores one of the principal safeguards the “special needs” doctrine employs in place of a judicial warrant. It insists on enforceable limits to officer discretion. “[W]here [the Supreme Court does] not require probable cause or a warrant, [it] ha[s] consistently emphasized the need for such set procedures” because “standardless and unconstrained discretion is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed, at least to some extent.”

Colorado v. Bertine, 479 U.S. 367, 378 (Marshall, J., dissenting) (quoting *Prouse*, 440 U.S. at 661); *see also, e.g., Skinner*, 489 U.S. at 622 (marking “the minimal discretion vested in those charged with administering the [suspicionless drug testing] program”); *Sitz*, 496 U.S. at 452-53 (identifying the limitations placed on officer discretion by guidelines governing the operation of a DUI checkpoint).

The absence of any limitations on officer discretion for suspicionless search programs invalidates them.⁵ *See Florida v. Wells*, 495 U.S. 1 (1990) (unanimously striking down the Florida Highway Patrol’s inventory search where it had no policy in place to limit officer discretion regarding the opening of containers found in vehicles); *see also Western States Cattle Co., Inc. v. Edwards*, 895 F.2d 438 (8th Cir. 1990) (evaluating the presence of enforceable limits on the scope of officers’ search powers under closely-regulated-industry exception of “special needs” doctrine); *McLaughlin*, 849 F.2d 997 (regulations did not provide sufficient limits on officers’ regulatory search powers to “provide an adequate substitute for a warrant.”); *Hansen v. Illinois Racing Bd.*, 534 N.E.2d 658 (Ill. App. 1989) (inspection standard of statute regulating horse racing did not sufficiently limit officer discretion); *State v. VFW Post 3562*, 525 N.E.2d 773 (Ohio 1998)

⁵ The restrictions on officer discretion in suspicion-based “special needs” programs are typically delivered by the application of individualized suspicion. *See Clancy, supra*, 25 U. Mem. L. Rev. at 533–41 (discussing the “traditional approach” to limiting officer discretion under warrant exceptions is the employment of an individualized suspicion requirement).

(invalidating warrantless inspection by liquor enforcement because law did not sufficiently restrain time, scope, and manner of search); *State v. McClure*, 74 S.W.3d 362 (Tenn. Crim. App. 2001) (invalidating searches of regulated motor carriers because statute allowed officers too much discretion). Thus, the lower court should have applied this requirement if it wished to consider the “special needs” exception while eschewing the typical safeguard of individualized suspicion.⁶ Failure to do so was reversible error.

The lower court’s discussion of the “special needs” exception excludes the elements that justify it. First, the enforcement of parking regulations does not serve a purpose of such import that the warrant requirement should be dispensed with. Second, there is no imminent necessity that requires the chalking of tires—no time-bomb is ticking and no nuisance demands immediate abatement. Third, the court did not require any limits on the scope of officers’ discretion through an individualized suspicion requirement or regulations that limit the time, manner, or scope of tire-chalking practices. The District Court overlooked these crucial factors in Fourth

⁶ It would not likely have been satisfied in any event. Indeed, the District Court’s opinion relates from the deposition of Tabitha Hoskins, a parking enforcement officer, “that when she saw a vehicle in a timed parking spot, she would note the time on a paper form” and that “[s]ometimes she would place a small chalk mark on the tire of the vehicle, but sometimes she would not.” *Taylor*, 2020 WL 3064448 at *4 (citing ECF No. 64-3 at Page ID. 1084-86). Further proof that limits are not placed on officer discretion.

Amendment doctrine in the name of “more efficient parking regulation[.]” *Taylor*, 2020 WL 3064448 at *8.

CONCLUSION

A city’s regulatory police power is not a license to violate constitutional rights. Property rights and the law of trespass provide the baseline consideration for determining whether a search within the meaning of the Fourth Amendment has occurred, *Jones*, 565 U.S. at 411, not “some abstract ‘expectation of privacy’ whose contours are left to the judicial imagination.” *Carpenter v. United States*, 138 S. Ct. at 2264 (Gorsuch, J., dissenting). By inverting the burden of proof in warrantless Fourth Amendment claims, mashing incompatible warrant exceptions together, and failing to hold the government to its burden under any applicable legal standard, the lower court committed reversible error. This Court should find in favor of the Property Owners and reverse the decision of the District Court.

DATED: October 14, 2020.

Respectfully submitted,

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