No. 22-943

# In the Supreme Court of the United States

ANDRE VERDUN, *et al.*,

*Petitioners*,

v.

CITY OF SAN DIEGO, CALIFORNIA, *et al.*,

*Respondents.*

**On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit**

**BRIEF OF *AMICUS CURIAE* RESTORE THE FOURTH, INC. IN SUPPORT OF PETITIONERS**

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## INTEREST OF THE *AMICUS CURIAE*[1]

Restore the Fourth, Inc. is a non-partisan nonprofit dedicated to robust enforcement of the Fourth Amendment and related due-process rights. Restore the Fourth oversees local chapters whose membership includes lawyers, academics, advocates, and ordinary citizens. Restore the Fourth also files amicus briefs. *E.g.,* Brief of *Amicus Curiae* Restore the Fourth, Inc. in Support of Petitioners, *Culley v. Marshall*, No. 22-585 (U.S. filed Feb. 16, 2023), *cert. granted* (U.S. Apr. 17, 2023); Brief of *Amicus Curiae* Restore the Fourth, Inc. in Support of Petitioner, *Torres v. Madrid*, 141 S. Ct. 989 (2021).

Restore the Fourth is concerned about *Verdun* because the Ninth Circuit's decision fails to "take the long view, from the original meaning of the Fourth Amendment forward." *Kyllo v. United States*, 533 U.S. 27, 40 (2001). Recognizing "unconstitutional practices get their first footing" in small ways, the Fourth Amendment bars *all* unreasonable searches—even searches one might deem the "mildest and least repulsive." *Boyd v. United States*, 116 U.S. 616, 635 (1886). The Ninth Circuit nevertheless holds the Fourth Amendment poses no bar to the suspicionless use of tire chalking because of its "administrative" and "de minimis" nature. *See* Pet. App. 2a.

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[1] This amicus brief is filed with timely notice to all parties. S. Ct. R. 37.2(a). No counsel for a party wrote this amicus brief in whole or in part; nor has any person or any entity, other than Restore the Fourth and its counsel, contributed money intended to fund the preparation or submission of this amicus brief.

## SUMMARY OF THE ARGUMENT

For more than 20 years, the Framers struggled against suspicionless Crown searches. To ensure that government would not treat future generations this way—no matter how beneficient or administrative a given search might seem to be—the Framers adopted the Fourth Amendment. This bulwark rises and falls, however, on the willingness of courts to recognize the Fourth Amendment protects "that degree of privacy against government **that existed when the Fourth Amendment was adopted**." *Kyllo v. United States*, 533 U.S. 27, 34–35 (2001) (bold added).

The Court should thus grant review in *Verdun* to address the Fourth Amendment validity of tire chalking, which cities use to enforce parking limits. The Ninth Circuit upheld this practice under the administrative search exception, stressing the utility of tire chalking as a law enforcement tool. Absent from the Ninth Circuit's analysis is any examination of "the founding era to determine the norms that the Fourth Amendment was meant to preserve." *Virginia v. Moore*, 553 U.S. 164, 168–69 (2008).

As a result, the Ninth Circuit ends up approving an "insidious disguise[]" of the suspicionless Crown searches that the founding era "so deeply abhorred." *Boyd v. United States,* 116 U.S. 616, 630 (1886). The panel also lights the way for the administrative search exception and its rational-basis standard to swallow the Fourth Amendment whole. Without this Court's intervention, the Ninth Circuit's decision puts in grave doubt whether the Fourth Amendment's original meaning lives on today.

## ARGUMENT

### I. The Court should grant review to reaffirm the central place of original meaning when courts apply the Fourth Amendment.

*Verdun* concerns tire chalking: the enforcement of parking limits by "placing an impermanent chalk mark of no more than a few inches on the tread of one tire on a parked vehicle." Pet. App. 3a. "If a vehicle's chalk mark is undisturbed after the parking limit has expired," this goes to show "the vehicle has exceeded the time limit for the [parking] space." *Id.* The police may then cite and fine the vehicle owner for violating the relevant parking ordinance. *Id.*

Faced with a vehicle owner's argument that tire chalking violates a person's Fourth Amendment right "to be secure . . . against unreasonable searches," one's first reaction may well be: what's the big deal? With a few chalk marks, cities and the police are able "to enhance public safety, improve traffic control, and promote commerce." Pet. App. 4a. Surely the Fourth Amendment is concerned with more grave intrusions upon an individual's privacy than this.

That is certainly how the Ninth Circuit viewed Petitioner's Fourth Amendment challenge to San Diego's use of tire chalking. Pet. App. 3a–8a. The panel majority states there is "reason to be skeptical" the Fourth Amendment forbids "a rather innocuous parking management practice" used by "localities across the country." Pet. App. 7a. But the majority's ensuing Fourth Amendment analysis of tire chalking shows that this law enforcement practice is no small

matter. Rather, tire chalking and the Ninth Circuit's approval of it bears out Justice Brandeis's sage warning nearly a century ago that "[t]he greatest dangers to liberty lurk in insidious encroachment by men of zeal, [who are] well-meaning but without understanding." *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

The panel majority begins by singing the praises of tire chalking and the beneficent administrative purposes that tire chalking advances. The majority stresses "[i]nsufficient parking enforcement can lead to widespread noncompliance" with parking limits, which in turn "impacts public safety." Pet. App. 4a. "Cruising, double parking, and illegal parking all lead to increased traffic congestion that makes it more difficult for . . . emergency vehicles to navigate city streets." *Id.* The panel majority even highlights the commercial benefits of tire chalking: "[e]nforcing parking time limits by chalking tires improves parking turnover and encourages customers to visit, shop, and dine within a reasonable time." *Id.*

The panel majority next attempts to cast tire chalking as legally uncontroversial. The majority reports "[t]here is evidence that municipalities have been chalking tires for parking enforcement purposes since at least the 1930s." Pet. App. 7a. The majority then pronounces that for "most" of this "history," it "appears" that tire chalking "went unchallenged on constitutional grounds."[2] *Id.* Coupling these points,

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[2] The *Verdun* panel majority elides two obvious historical reasons for the absence of Fourth Amendment challenges to the local use of tire chalking between the 1930s and today. First, it was not until 1961 that the Court finally ruled that the Fourth

the majority reasons the Fourth Amendment validity of tire chalking may be gauged (and affirmed) under this Court's determination in *NLRB v. Noel Canning* that "three-quarters of a century of settled practice is long enough to entitle a practice to great weight in a proper interpretation" of a constitutional provision. 573 U.S. 513, 533 (2014) (punctuation omitted).

The panel majority omits *Noel Canning*'s careful limitation of its "settled practice" determination to "provisions **regulating the relationship between Congress and the President**." *Id.* at 524 (bold added). The panel also ignores that in *Noel Canning*, the Court's analysis of the practice in dispute—recess appointments by the President during intra-session Senate recesses—started with a systematic review of the practice's history and the applicable constitutional text *going back to the founding era. See, e.g., id.* at 527 ("The Founders themselves used the word ["recess"] to refer to intra-session, as well as to inter-session, [legislative] breaks.").

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Amendment applies to states and localities. *See Mapp v. Ohio*, 367 U.S. 643 (1961), Second, from 1967 forward, the Court limited Fourth Amendment coverage to government practices that invade a reasonable expectation of privacy—a test that would have naturally suppressed Fourth Amendment claims against tire chalking, as one would have to prove a privacy interest in vehicle tires when parked on the street. *Katz v. United States,* 389 U.S. 347, 360 (1967) (Harlan, J., concurring). Against this landscape, the *Verdun* panel majority's description of tire chalking as "unchallenged" calls to mind Justice Robert Jackson's observation that there are "many unlawful searches of . . . automobiles of innocent people which turn up nothing incriminating, in which no arrest is made, about which courts do nothing, and about which we never hear." *Brinegar v. United States*, 338 U.S. 160, 181 (1949) (Jackson, J., dissenting).

By contrast, the *Verdun* panel majority does not ask what the founding generation's response would have been to a Crown practice like tire chalking. The founding era was replete with horses, carts, wagons, and ships. How would the Framers have reacted if Crown agents chalked every horse in a given area to ensure full administrative compliance with boarding rules or taxes (i.e., with a marked horse's continued presence proving a violation)? *Cf. Maryland v. King*, 569 U.S. 435, 481–82 (2013) (Scalia, J. dissenting) (expressing "doubt" that the people who "wrote the charter of our liberties would have been so eager to open their mouths for royal inspection").

To ask the question is almost to answer it. The Fourth Amendment was "the founding generation's response to the reviled 'general warrants' . . . of the colonial era." *Riley v. California*, 573 U.S. 373, 403, (2014). Against these suspicionless Crown searches—many serving administrative purposes, like customs collection—the founding generation held fast to the common-law principle that "[n]o man can set his foot upon my ground without my license" and trespassers were "liable to an action" even if "the damage be nothing." *Boyd*, 116 U.S. at 627. "Eighteenth century Americans who fought against British customs officers expected more from constitutional principle than a simple utterance that judges defer to rational and pragmatic search and seizure practices."[3]

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[3] Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 228 (1993); *see Carpenter v. United States*, 138 S. Ct. 2206, 2264 (2018) (Gorsuch, J., dissenting) ("[T]he framers chose not to protect privacy in some ethereal way dependent on judicial intuitions.").

It is no surprise, then, that the *Verdun* panel majority whistles past "the norms that the Fourth Amendment was meant to preserve." *Virginia v. Moore*, 553 U.S. 164, 168–69 (2008). Only Judge Bumatay, in dissent, analyzes whether tire chalking constitutes a "search" and is "unreasonable" under "the original understanding of the Amendment," ultimately answering 'yes' on both points. Pet. App. 32a. Meanwhile, the panel majority proclaims it to be "grandiose" to suggest that the suspicionless Crown searches of the founding era bear any relevance to "the benign practice of lightly dusting chalk" on tires today. Pet. App. 27a. At every turn, the majority manifests its discontent with this Court's decisions clarifying that the Fourth Amendment provides *"at a minimum* the degree of protection it afforded when it was adopted." *United States v. Jones*, 565 U.S. 400, 411 (2012) (plurality op.) (italics in original).

The panel majority's enmity toward the Court's "reorientation" of the Fourth Amendment runs so deep that the majority is willing only to assume—not hold—that tire chalking is a search. Pet. App. 6a. In enforcing the Fourth Amendment's original meaning, the Court has ruled that a "search" occurs when the police "physically occup[y] private property for the purpose of obtaining information." *Jones*, 565 U.S. at 404 (plurality op.); *see Florida v. Jardines*, 569 U.S. 1, 11 (2013). On this basis, the Court held in *Jones* that a search occurred when police officers physically occupied a truck's undercarriage to attach a GPS device. 565 U.S. at 403. This ruling leaves "no doubt" that a search also occurs when officers physically occupy a vehicle's tires (by applying chalk) to learn about parking-limit violations. *Id.* at 404.

Yet the *Verdun* panel majority refuses to reach this conclusion, declaring instead: "[i]t is not clear *Jones* should be read to suggest that every physical touch . . . designed to obtain information [is a search], even one as fleeting as tire chalking." Pet. App. 8a; *contra Arizona v. Hicks,* 480 U.S. 321, 325 (1981) ("A search is a search, even if it happens to disclose nothing but the bottom of a turntable."); *cf. Kyllo v. United States*, 533 U.S. 27, 37 (2001) ("no exception to the warrant requirement for the officer who barely cracks open the front door and sees nothing but the nonintimate rug on the vestibule floor").

That is reason enough for the Court to review *Verdun*. The Ninth Circuit purports to "undertake a full [Fourth Amendment] analysis" of tire chalking. Pet. App. 8a. In reality, the Ninth Circuit sends the message that courts may cast aside a central part of this analysis—a search for original meaning—so long as the court deems a challenged practice beneficial and lacking in controversy. That is not the way the Fourth Amendment is meant to work, and vehicle tires are no "less worthy of the protection for which the Founders fought." *Riley*, 573 U.S. at 403.

## II. The Court should grant review to dial back the administrative-search exception.

The Ninth Circuit's validation of tire chalking in *Verdun* does more than undermine the central place of original meaning in Fourth Amendment review: it also confirms the administrative search exception's present ability to swallow up the Fourth Amendment. As Fourth Amendment scholar Eve Primus explains, the exception is "an enormously broad license for the

government to conduct searches free from constitutional limitations."[4] Establishing definitive "boundaries and requirements" for administrative searches is thus of fundamental importance—yet, the Court's rules for when the administrative search exception applies "are notoriously unclear."[5]

*Verdun* shows that courts have opted to fill this gap by evaluating administrative searches through a mere balancing of "the government's interest in conducting the search against the degree of intrusion on the affected individual's privacy."[6] The result is an empty kind of "rational basis review" that is "very deferential to the government."[7] Put another way, in its current form, the administrative search exception "tacitly mark[s]" Fourth Amendment freedoms "as secondary rights" that courts may freely "relegate[] to a deferred position." *Brinegar v. United States*, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting).

The Court should grant review to redress this state of affairs. "[E]very unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment." *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting). It does not matter how minor a search seems to be (here, chalk on a tire) or how noble the government's motives are (here, parking enforcement). Experience teaches the importance of being "most on our guard to protect

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4 Eve B. Primus, *Disentangling Administrative Searches*, 111 COLUMBIA L. REV. 254, 257 (2011).

5 *Id.*

6 *Id.* at 296.

7 *Id.* at 256.

liberty when[ever] the Government's purposes are beneficent." *Id.* at 479. Experience also teaches "any privilege of search . . . without warrant" that courts sustain, officers "will push to the limit." *Brinegar*, 338 U.S. at 180 (Jackson, J., dissenting).

## CONCLUSION

"One cannot wrench 'unreasonable searches' from the text and context and historic content of the Fourth Amendment." *United States v. Rabinowitz,* 339 U.S. 56, 70 (1950) (Frankfurter, J., dissenting). The Ninth Circuit's validation of tire chalking under the Fourth Amendment does exactly this, weakening an "irreducible constitutional minimum" that guards "privacy expectations inherent in items of property that people possess or control." *United States v. Jones*. 565 U.S. 400, 414 (Sotomayor, J., concurring). A grant of review is essential to ensure that "[r]ights declared in words" are not "lost in reality." *Weems v. United* States, 217 U.S. 349, 373 (1910).

Respectfully submitted,

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