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United States Court of Appeals
Tenth Circuit

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Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

EVAN JAMON WOODARD,

Defendant - Appellant.

No. 20-5004

Appeal from the United States District Court
for the Northern District of Oklahoma
(D.C. No. 4:18-CR-00209-GKF-1)

Shira Kieval, Assistant Federal Public Defender, Districts of Colorado and Wyoming, Denver, Colorado (Virginia L. Grady, Federal Public Defender, Denver, Colorado, with her on the briefs), on behalf of the Defendant-Appellant.

Victor A.S. Régal, Assistant United States Attorney, Office of the United States Attorney, Northern District of Oklahoma, Tulsa, Oklahoma (R. Trent Shores, United States Attorney, with him on the brief), on behalf of the Plaintiff-Appellee.

Before **BACHARACH**, **BRISCOE**, and **EID**, Circuit Judges.

BACHARACH, Circuit Judge.

The police stop cars for many reasons, often to issue a traffic citation or investigate a possible crime. But the police might need to stop

a car for other reasons, like serving a protective order or executing a warrant.

Whatever the reason for the stop, the police sometimes need to arrest the driver. When the driver is arrested, the police must decide what to do with the car. Leaving the car where it is might sometimes lead to its vandalism or theft. *South Dakota v. Opperman*, 428 U.S. 364, 369 (1976). So impoundment may sometimes be necessary for public safety. *Id.* at 368. But when a car is impounded, the police must account for the contents. *United States v. Tueller*, 349 F.3d 1239, 1243 (10th Cir. 2003). So we typically allow the police to determine what's inside the car before it's impounded. *Opperman*, 428 U.S. at 372–74.

But the authority to impound a car is susceptible to abuse. *Florida v. Wells*, 495 U.S. 1, 5 (1990) (Brennan, J., concurring). For example, the police might impound a car as a pretext to search for evidence of a crime. When the police use pretext to impound the car, the Fourth Amendment typically prohibits introduction of the evidence obtained from the search. *United States v. Sanders*, 796 F.3d 1241, 1251 (10th Cir. 2015).

Today's case involves a pretextual search, where the police impounded a car simply as an excuse to look inside for evidence of a crime.

1. The police look for Mr. Woodard to serve a protective order and execute a warrant for a misdemeanor.

The appeal stems from the denial of a motion to suppress evidence found in the car, and the search itself stemmed from a call complaining to the police about Mr. Evan Jamon Woodard. The caller said that Mr. Woodard was fighting a huge drug case, may have smoked PCP, had three previous gun cases, and violated a protective order. After talking to the caller, the police discovered that Mr. Woodard had an outstanding warrant for misdemeanor public intoxication. With this information, the police looked for Mr. Woodard, planning to serve him with the protective order and execute the warrant.

2. The police stop Mr. Woodard's car in front of a Tulsa store, decide to impound the car, and find evidence of drug-and-gun crimes.

Police officers found Mr. Woodard in Tulsa, Oklahoma, at about 8:00 a.m. and initiated a traffic stop. Mr. Woodard pulled into a parking lot at a QuikTrip convenience store and stopped there. The police told Mr. Woodard to get out of the car, arrested him based on the warrant, and took his cellphone. Mr. Woodard then asked if he could call someone to pick up the car. One of the police officers responded "I don't think so," and the police decided to impound the car. Defendant's Mot. to Suppress Exh. 3 (body camera).

Two officers then opened the front doors and began to search the car. One officer looked in the panel on the driver's side door and on the floor under the driver's seat, saying that Mr. Woodard was "fighting a huge drug case." Defendant's Mot. to Suppress, Exh. 4 (body camera). The other officer replied that Mr. Woodard liked PCP. As the officer replied, he opened the center console.

One officer commented that he was looking for verification of car insurance, expressing doubt that Mr. Woodard had insured the car. After seeing no verification in the center console, he eventually found proof of an old insurance policy in the glove compartment. By then, however, another officer had found marijuana, cocaine, a digital scale, and a gun.

With that evidence, the police obtained a warrant allowing access to text messages on Mr. Woodard's cellphone. Those text messages provided evidence of drug dealing.

3. The evidence of drug dealing leads to criminal charges, including possession with an intent to distribute the drugs found during an earlier traffic stop.

As the police officers investigated, they discovered an earlier traffic stop of Mr. Woodard in Bartlesville, Oklahoma. In that stop, the police had found cocaine, marijuana, heroin, a firearm, and ammunition.

With the benefit of the messages found on the cellphone, the government charged Mr. Woodard with crimes growing out of both traffic stops. Based on the Tulsa stop, Mr. Woodard was charged with (1)

possessing cocaine and marijuana with intent to distribute these drugs, (2) possessing a firearm and ammunition after a felony conviction, and (3) possessing a firearm in furtherance of a drug crime. Based on the Bartlesville stop, Mr. Woodard was charged with possessing cocaine, marijuana, and heroin with intent to distribute.

In district court, Mr. Woodard moved to suppress evidence found during the Tulsa stop, including the drugs, the gun, his cellphone, and a digital scale. In moving for suppression, he argued that

- the Tulsa Police Department's policy had not authorized impoundment of his car and
- the police officers had ordered impoundment as a pretext to investigate suspected crimes.

The district court denied Mr. Woodard's motion to suppress. He was then tried and convicted on all charges.

4. The police invoke Tulsa's impoundment policy as a pretext to search the car.

The police had authority to stop the car in order to serve Mr. Woodard with the protective order and execute the warrant for public intoxication. Once Mr. Woodard pulled in front of the QuikTrip store, however, the police had to decide what to do with the car. They could

leave the car there, impound it, or let Mr. Woodard call someone to pick it up. Among these options, the police chose impoundment.

The Fourth Amendment imposes "heightened requirements on police who seize vehicles from private property." *United States v. Sanders*, 796 F.3d 1241, 1249 (10th Cir. 2015).[1] These heightened requirements allow impoundments from private property, like the impoundment of Mr. Woodard's car, only when (1) the car is blocking traffic, (2) the car is posing an imminent threat to public safety, or (3) the impoundment is justified by a standardized policy and a reasonable, non-pretextual rationale of community caretaking. *Id.* at 1248.

Applying the third basis for impoundment, the district court concluded that the officers had relied on a standardized policy and a reasonable, non-pretextual rationale of community caretaking.

A. The police department's standardized policy does not authorize impoundment of the car.

Though police officers can perform community-caretaking functions, they have no "open-ended license" to impound cars from "anywhere."

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[1] Mr. Woodard characterizes the parking lot as private property, rather than a public way, and the government does not disagree with this characterization. *See Robinson v. City of Bartlesville Bd. of Educ.*, 700 P.2d 1013, 1015 (Okla. 1985) (stating that a "school parking lot is not a public way" because a "'way' is defined as '[a] passage, path, road or street'" (footnote omitted)).

Caniglia v. Strom, 141 S. Ct. 1596, 1600 (2021).[2] To constrain the officers' discretion, the Tulsa Police Department adopted a standardized impoundment policy.

The government concedes that this policy

- generally restricts impoundment to removal of vehicles from a public way and
- creates a limited exception, allowing impoundment from private property when the traffic stop follows an offense committed on a public way.

R. vol. 2, at 55–56; Government's Resp. Br. at 16. For the sake of argument, we may assume that the government has correctly interpreted the policy.

Mr. Woodard argues that the policy did not authorize impoundment of his car because he had not committed an offense on a public way. We agree.[3]

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[2] The Supreme Court recently stated in *Caniglia v. Strom* that caretaking duties do not "create[] a standalone doctrine" justifying warrantless searches of a home. 141 S. Ct. 1596, 1598 (2021). In *United States v. Sanders*, 796 F.3d 1241 (10th Cir. 2015), we arguably recognized a stand-alone doctrine authorizing impoundments on private property that would otherwise have been impermissible. *See United States v. Trujillo*, 993 F.3d 859, 871 (10th Cir. 2021) (stating that "*Sanders* was not considering an impoundment authorized by *Opperman*"). Interpreted this way, *Sanders* could conceivably run afoul of *Caniglia*. But none of the parties has questioned the continued viability of *Sanders*.

[3] Mr. Woodard also argues that the impoundment policy did not apply because the vehicle wasn't highly susceptible to damage or vandalism. We need not consider this argument.

The police stopped Mr. Woodard to serve a protective order and execute an arrest warrant for public intoxication. The protective order and warrant were pieces of paper, not offenses. The only offense was public intoxication, and the intoxication did not take place on a public way.

The government contends that Mr. Woodard was stopped for a continuing offense: failing to pay costs for his charge of public intoxication. But failing to pay court costs is not a continuing offense. *See United States v. Sullivan*, 255 F.3d 1256, 1263 (10th Cir. 2001) (failure to file a tax return is not a continuing offense); *United States v. Morrison*, 938 F.2d 168, 170 (10th Cir. 1991) (the offenses of failing to pay taxes occurred on the dates of the filing deadlines). And even if the offense had been continuing, the failure to pay costs would have occurred where the payment was to be made or received, not on a public way. *See United States v. Crawford*, 115 F.3d 1397, 1406 (8th Cir. 1997).[4]

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[4] In *Crawford*, the court stated:

> [I]f the crime of failing to pay child support obligations occurs anywhere, it is fair to say that it occurs where there is an absence of the required payment. Thus, the crime occurs not only at the place where the payment was to be deposited, but also the place where it was ultimately to be received by the would-be intended recipient.

Crawford, 115 F.3d at 1406.

The government also contends that the Tulsa policy applied because the police had initiated the stop on a public way. But the policy authorizes impoundment "when the *offense* the vehicle was initially stopped for occurred on a public way," not when the stop itself occurred on a public way. Supp. R., Exh. 6 at p. 1 of 5 (emphasis added). The term "offense" typically refers to "a violation of the law; a crime, often a minor one." *United States v. Collins*, 859 F.3d 1207, 1212 (10th Cir. 2017) (quoting *Black's Law Dictionary* (10th ed. 2014)). The stop of Mr. Woodard was not an offense. Because no offense took place on a public way, the policy did not allow impoundment.

The dissent concludes that the impoundment policy allowed the police to impound a car from anywhere to prevent a traffic hazard or vandalism. Dissent at 2–5. Under the dissent's view, the policy authorizes impoundment even if no offense had occurred on a public way and no stop has been initiated there. This interpretation conflicts with the policy language and deviates from the views of the parties.

The policy statement unambiguously limits impoundment to removal of vehicles from a public way:

> **POLICY:**
>
> Officers will impound vehicles only when necessary. Officers are authorized to move or cause to be removed any vehicle from a street, highway, shoulder, or other public way to the nearest garage designated or maintained by the City of Tulsa that meets the criteria for vehicle impoundment. State statute prohibits

> officers from using the insurance database as the primary reason for a traffic stop. Officers shall use discretion when impounding vehicles based on the lack of compulsory insurance.

Supp. R., Exh. 6 at p. 1 of 5. The dissent does not mention this provision even though it constitutes the entirety of the policy statement for impoundment of vehicles. *Id.*

Indeed, the policy defines "vehicle impoundment" by reference to a "public way":

> VEHICLE IMPOUNDMENT - to remove or cause to be removed a vehicle from a street, highway, shoulder, or other public way by an officer, and stored in a designated facility contracted by the City of Tulsa.

Id.

The dissent ignores both the policy statement and the definition of "vehicle impoundment," focusing instead on a separate section under the heading "Procedures":

> **PROCEDURES:**
>
> 1. Officers may impound vehicles in the following situations:
>
> . . .
>
> b. [Sentence 1] A vehicle has been abandoned or the driver was arrested and the vehicle is left unattended in a location that would constitute a traffic hazard or is highly susceptible to damage or vandalism. [Sentence 2] This includes private property open to the public when the offense the vehicle was initially stopped for occurred on a public way.

Id. As part of the broader policy, the first sentence proceeds from the general rule that the vehicle must be on a public way. So a car on a public way may be impounded if (1) it was abandoned or the driver was arrested and (2) a traffic hazard would otherwise exist or the car would be highly susceptible to damage or vandalism. The second sentence adds that a vehicle left on private property may be impounded if the traffic stop had been based on an offense occurring on a public way.

The dissent focuses solely on the first sentence (without reference to the policy statement), arguing that whenever a driver is arrested, the police can impound the vehicle even in the absence of any connection to a public way. Neither party has interpreted the policy to allow impoundment of vehicles despite the absence of any connection to a public way.

Indeed, the dissent acknowledges that its interpretation of the policy differs from the government's. *See* Dissent at 3. Unlike the dissent, the government recognizes the policy's restriction to offenses committed on a public way. The government thus characterized the arrest warrant and the failure to pay costs as "offenses on public ways" to justify the impoundment of a car parked on private property. Appellee's Resp. Br at 16–18. At oral argument, the government's counsel even referred to the restriction to a public way as "the jurisdictional hook" for applying the policy. Oral Argument at 18:00–18:12.

In departing from the views of the parties, the dissent sheds the "heightened requirements" applicable when officers seize vehicles on private property. *United States v. Sanders*, 796 F.3d 1241, 1249 (10th Cir. 2015); *see* p. 6, above. Indeed, the dissent's view would broadly allow impoundment from private property even when a car has never even entered a public way.[5]

The dissent observes that this Court "may affirm on any basis that the record adequately supports." Dissent at 3 (quoting *High Desert Relief, Inc. v. United States*, 917 F.3d 1170, 1181 (10th Cir. 2019)). But not at the expense of the doctrine of party presentation, long considered a fundamental premise of our adversary system. *See United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020). Based on this doctrine, we count "on the parties to frame the issues" so that courts can serve "the role of neutral arbiter of matters the parties present." *Id* (quoting *Greenlaw v. United States*, 554 U.S. 237, 243 (2008)).

Given our role as arbiter of the parties' arguments, we don't typically "craft[] arguments for affirmance completely *sua sponte* and,

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[5] This approach not only deviates from the policy language but also fails to provide the "standardized criteria" required under our precedent. *See United States v. Venezia*, 995 F.3d 1170, 1176 (10th Cir. 2021) ("The standardized criteria prong 'ensures that police discretion to impound vehicles is cabined rather than uncontrolled.'" (quoting *Sanders*, 796 F.3d at 1249).

more specifically, without the benefit of the parties' adversarial exchange." *United States v. Chavez*, 976 F.3d 1178, 1203 n.17 (10th Cir. 2020). In the best of circumstances, we consider it "imprudent" to craft arguments sua sponte to affirm on alternate grounds. *Id.* Here, though, the dissent would go even further and affirm based on an interpretation that the government has disavowed.

We should instead follow the policy language and the framing of issues by the parties. The government bore the burden to justify the search, *United States v. Sanders*, 796 F.3d 1241, 1244 (10th Cir. 2015), and failed to satisfy this burden by showing the commission of an offense on a public way. We thus conclude that the Tulsa policy did not authorize impoundment of the car.

B. The police use the policy as a pretext to impound the car and search for evidence of a crime.

Even if the policy had allowed impoundment from the QuikTrip parking lot, the police could not impound the car as a pretext to search for evidence of a crime. *Sanders*, 796 F.3d at 1248.

The district court concluded that the police had not engaged in a pretextual impoundment and search. In analyzing this conclusion, we review the district court's factual findings for clear error and view the evidence in the light most favorable to the government. *United States v. Venezia*, 995 F.3d 1170, 1175 (10th Cir. 2021).

The relevant facts are not in dispute in this case. So we apply each of the pretext factors and weigh them de novo. *Id.* at 1178.

1. We consider five factors bearing on pretext.

An impoundment is pretextual when the police are seeking evidence of a criminal violation rather than acting to safeguard the car or its contents to promote public safety or convenience. *See United States v. Sanders*, 796 F.3d 1241, 1251 (10th Cir. 2015); *see also United States v. Taylor*, 592 F.3d 1104, 1108 (10th Cir. 2010) (stating that officers must not impound a car "in bad faith or for the sole purpose of investigation") (internal quotation marks omitted). We have identified five factors bearing on the possibility of pretext:

1. Whether the car is on private or public property
2. Whether the property owner has been consulted
3. Whether an alternative to impoundment exists (especially the availability of someone else to drive the car)
4. Whether the car is implicated in a crime
5. Whether the driver or owner has consented to the impoundment

Sanders, 796 F.3d at 1250.

In reviewing these factors de novo, we conclude that every factor points to pretext.

a. The car was on private property.

First, the car was on private property, where "[p]ublic safety and convenience are less likely to be at risk." *United States v. Venezia*, 995 F.3d 1170, 1178 (10th Cir. 2021). So the first factor points to pretext.

b. The officers did not consult the property owner.

Second, the officers did not consult the QuikTrip employees to see if they wanted the car impounded. R. vol. 1, at 32 (Government's Resp. to Defendant's Mot. to Suppress) (conceding that "[Tulsa Police Department] officers did not consult QuikTrip before making the decision to impound").

A corporate representative later expressed a preference for the police to remove abandoned cars from QuikTrip parking lots. But there was no evidence that any of the police officers had known of QuikTrip's preference.

For the officers, QuickTrip's preference didn't matter. The senior officer explained the reason for impoundment: "[W]e tow on the instance where we believe it's a high crime area." R. vol. 2, at 47. He did not mention QuikTrip's preference. So the second factor also points toward pretext. *See United States v. Venezia*, 995 F.3d 1170, 1179 (10th Cir. 2021) (reasoning that "the officers could not have impounded [the] vehicle based on the motel owner's objection, because the officers failed to even consult the motel owner, or anyone who could speak for the owner");

United States v. Sanders, 796 F.3d 1241, 1251 (10th Cir. 2015) (noting that this factor points to pretext because "there is no evidence in the record that the police consulted the owners of the parking lot about the vehicle remaining where it was").

The dissent disagrees, concluding that this factor favors the government. The dissent relies on testimony that QuikTrip's corporate office preferred removal of abandoned vehicles, concluding that a factfinder could reasonably assume that the officers had inferred QuikTrip's preference. But this reasoning deviates from *Sanders*. There we said that courts should consider whether the officers had consulted the property owner and learned of the property owner's preference, not whether the officers had correctly inferred the property owner's preference. *Sanders*, 796 F.3d at 1251.

c. The police could have let Mr. Woodard call someone to move the car.

Third, the police had an alternative to impoundment: letting Mr. Woodard call someone to get the car. He had asked, and the police refused. *See* Part 2, above. Given the unexplained refusal of Mr. Woodard's request, the third factor also points to pretext.

The dissent concludes that this factor favors the government because the police were concerned with the lack of current insurance, uncertainty over who owned the car, and Mr. Woodard's lack of a current driver's

license. But the police didn't decide to impound the car for any of these reasons.

i. The police didn't impound the car based on concern over insurance.

The dissent states that the car was uninsured, relying on the presence of an old insurance card in the car. Dissent at 8–9. But the police never asked Mr. Woodard for his car insurance, and the presence of an old insurance card does not bear on the existence of a current policy. So the record does not show whether the car was insured.

Regardless of whether the car was insured, the police found the old insurance card after they had already decided to impound the car. When they decided to impound, they hadn't even asked Mr. Woodard if the car was insured. So the eventual discovery of an old insurance card doesn't bear on why the officers decided to impound the car.

ii. The police didn't impound the car based on concern over ownership.

The dissent also argues that Mr. Woodard denied ownership of the car. Dissent at 8–9. But the government *never* argued that the police had impounded the car even in part because of questions about the car's ownership. Nor did the district court rely on a concern as to ownership.

In relying for the first time on doubt as to ownership, the dissent points out that when asked who owned the car, Mr. Woodard said: "Say what now, sir?" But by that time, the senior officer had already announced

his intent to search the car and "friggin' light [Mr. Woodard] up with whatever we can." Mot. to Suppress, Exh. 4 (body camera); *see* p. 22, below.

iii. The police didn't impound based on Mr. Woodard's lack of a driver's license.

The dissent points out that Mr. Woodard admitted that he had no driver's license. Dissent at 8. But he was not asking for an opportunity to drive the car away *himself*; he was asking for an opportunity to have *someone else* move the car from the parking lot.

iv. The dissent's denial of a "duty" is irrelevant to the third pretext factor.

The dissent argues that "a long line of cases" states that the police have no duty to let an arrestee call someone to move a car. Dissent at 9–10. For this "long line of cases," the dissent cites one published opinion of ours and two unpublished opinions:

- *United States v. Trujillo*, 993 F.3d 859, 870 (10th Cir. 2021);
- *United States v. Walker*, 81 F. App'x 294, 297 (10th Cir. 2003) (unpublished); and
- *United States v. Moraga*, 76 F. App'x 223, 227–28 (10th Cir. 2003) (unpublished).

Dissent at 9.

We express no opinion on whether the police have a duty to let someone else pick up a car when the driver is arrested. Neither the parties nor the district court has addressed the possibility of such a duty, and for

good reason: It has nothing to do with the third pretext factor, which addresses the existence of alternatives to impoundment. Regardless of whether the police have a duty to let someone else pick up or move a car, the police either have alternatives or they don't.

The dissent's cited authorities illustrate their irrelevance, for none even purport to address the third pretext factor (the existence of alternatives to impoundment).

For example, in *Trujillo*, we never applied *any* of the pretext factors. There a car was impeding traffic at 2:30 a.m., which we noted "was not a good time of day to look for help from friends." *United States v. Trujillo*, 993 F.3d 859, 869–70 (10th Cir. 2021). We concluded that the impoundment was reasonable without the need to consider any of the pretext factors. *Id.* So *Trujillo* does not bear on the existence of alternatives to impoundment.

The dissent also points to two unpublished opinions from 2003, decided over a decade before *Sanders*: *United States v. Walker*, 81 F. App'x 294, 297 (10th Cir. 2003) (unpublished), and *United States v. Moraga*, 76 F. App'x 223, 227–28 (10th Cir. 2003) (unpublished). Not surprisingly, these unpublished opinions did not address any of the five pretext factors adopted over a decade later.

The dissent also relies on three out-of-circuit opinions:

- *United States v. Agofsky*, 20 F.3d 866 (8th Cir. 1994)

- *United States v. Cherry*, 436 F.3d 769 (7th Cir. 2006)
- *United States v. Jackson*, 682 F.3d 448 (6th Cir. 2012).

Dissent at 9–10. Nowhere in these opinions is there any mention of a pretext factor involving alternatives to impoundment.

Do the police have a duty to allow an arrestee to contact someone else to pick up or move the car from property? The parties haven't raised this question, and it has nothing to do with the third pretext factor. That factor is whether alternatives exist to impoundment. After thorough briefing, oral argument, and a dissent, we have no idea why the police would have rejected Mr. Woodard's request—out-of-hand—to contact someone else to pick up or move the car.

It might have been different if Mr. Woodard were insisting on an opportunity to drive the car away himself. He admittedly didn't have a current driver's license. But he didn't ask to drive the car home; he simply wanted to ask someone else to come pick up the car. *See* Part 2, above.

The police refused out-of-hand, but why? The car was in a high-crime area? It wouldn't be for long if the police had let Mr. Woodard ask someone to pick up the car. And at roughly 8:00 in the morning, there was nothing to suggest an imminent risk of vandalism. *See United States v. Venezia*, 995 F.3d 1170, 1174, 1180 (10th Cir. 2021) ("[E]ven though the motel parking lot was in a 'high-crime area,' the risk of theft or vandalism

was not so imminent as to foreclose alternatives to impoundment" when the arrested driver had no driver's license, registration, title or insurance.)

Though the officers didn't consider letting someone pick up the car, the dissent argues that "[l]eaving the car in the lot indefinitely was not a reasonable alternative." Dissent at 10. But the officers decided to impound the car without asking about ownership or insurance. So the officers had no reason to question Mr. Woodard's ability to get someone to drive the car away.

As the dissent says, the officers need not "take every measure possible" to avoid a finding that an impoundment is a pretext for a criminal investigation. Dissent at 13.[6] But here, the officers' failure to consider reasonable alternatives shows the actual motive for the impoundment: The police wanted an excuse to search the car.

d. The car was not impounded as evidence of a crime.

Fourth, the government concedes that the car was not implicated in a crime. So the police had no need to preserve evidence by impounding the car. *See United States v. Venezia*, 995 F.3d 1170, 1182 (10th Cir. 2021) (concluding that "the fourth [pretext] factor weighs against impoundment

[6] In the dissent's view, we are suggesting that the police had a duty to ask Mr. Woodard if the car was insured. Dissent at 12. Not so. We're just saying that without asking about insurance or ownership before deciding to impound the car, the police could not rely on those concerns to justify a decision that they had already made.

because impounding [the] vehicle would not have provided further evidence of the traffic violations or the outstanding warrant for which [the defendant] was arrested").[7] So the fourth pretext factor also points to pretext.

e. No consent existed for the impoundment.

Fifth, Mr. Woodard did not consent to impoundment, which again points to pretext.

The dissent suggests that consent does not matter here because Mr. Woodard did not own the car. Dissent at 11 n.1. But when the police decided to impound the car, they hadn't even asked about ownership.

2. The police officers' comments and actions show pretext.

Not only does every factor point toward pretext, but other powerful evidence of pretext exists. Before searching the car, the police officers discussed how to proceed and the senior officer declared his intent to "friggin' light [Mr. Woodard] up with whatever we can." Mot. to Suppress, Exh. 4 (body camera); *see* p. 18, above.

At oral argument, the government surmised that the officer might have meant only that he wanted to cite Mr. Woodard for whatever violations could be proven at the time of the decision to impound the car.

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[7] The city's policy allows impoundment of a vehicle that constitutes evidence of a crime. Supp. R., Exh. 6 at p. 1 of 5. The government hasn't invoked this provision to justify the impoundment.

Oral Argument at 23:38–23:54. This explanation is new and illogical. The explanation is new because the government never suggested in district court that this is what the officer had meant. The explanation is also illogical. The command to "light [Mr. Woodard] up with whatever we can" shows that the officer wanted to look for new evidence. The phrase cannot plausibly be interpreted to mean that the officer wanted only to bolster the public intoxication charge and serve the protective order.

Other statements also point toward pretext. As the police started the search, one officer said that Mr. Woodard was fighting a big drug case and facing three gun charges. *See* Part 2, above. The other officer said that Mr. Woodard liked PCP, adding that he had been "digging around" the center console area, and the officer began his search there. Defendant's Mot. to Suppress, Exh. 4 (body camera), Exh. 5 (body camera); *see* Part 2, above. These statements and actions showed the officers' intent to look for drugs, not to safeguard the car and its contents.

The officers' discussion of car insurance also shows pretext. The senior officer repeatedly said that he was looking for proof of car insurance. Defendant's Mot. to Suppress, Exh. 5 (body camera); *see* Part 2, above. The availability of current insurance could affect the officers' decision of what to do with the car. But the officers weren't allowed to look for proof of insurance in order to decide whether to impound the car. They could conduct the search to identify the contents only *after* deciding

to impound the car. *See United States v. Edwards*, 632 F.3d 633, 644 (10th Cir. 2001) (stating that "the decision to impound the car was not made until after the search revealed incriminating evidence against [the defendant], which makes it exceedingly difficult to believe that this was an inventory search conducted to protect the police from liability after the decision was made to impound the car").

The officers eventually found a card showing that Farmers Insurance had insured the car a few years earlier. Defendant's Mot. to Suppress, Exh. 5 (body camera) at 9:42–9:57. But the officers didn't ask Mr. Woodard for an updated card or contact Farmers Insurance. The senior officer instead continued to search the entire car for an updated insurance card despite expressing doubt that it even existed. *See* Part 2, above.

By looking for a non-existent insurance card, of course, the senior officer would be able to search the entire car. The stated effort to look for the elusive proof of updated insurance—without asking Mr. Woodard or checking an available database—bears only one plausible explanation: The senior officer was searching the car to find evidence of a crime rather than to safeguard the car and its contents.

* * *

Because the Tulsa Police Department's standardized policy did not apply and the stated rationale for impoundment was pretextual, the district

court erred in denying the motion to suppress evidence of the drugs, digital scale, gun, and cellphone found in the Tulsa search.[8]

5. The error requires reversal of all the counts.

Three of the counts involved the Bartlesville search that had preceded the Tulsa search. In the Bartlesville search, the police found cocaine, marijuana, and heroin. The presence of these drugs could have supported a conviction for drug possession. But the government didn't charge Mr. Woodard just with possessing these drugs; they charged him with possessing these drugs with an intent to distribute them.

On these charges, the government needed to prove not only possession but also an intent to distribute. *United States v. Woodard*, No. 4:18-cr-00209-GKF-1 (N.D. Okla. 2019), ECF No. 96, Instruction Nos. 21, 26. How could the government prove intent? The drugs themselves could have been intended for Mr. Woodard's own use rather than for distribution. The government overcame that hurdle by using the text messages on Mr. Woodard's cellphone, which the police had retrieved in the Tulsa search. Those text messages suggested drug dealing. But the

[8] The government argues that the district court shouldn't suppress the evidence if the police impounded the vehicle for dual motives, one proper (to comply with the standardized policy) and one improper (to investigate for criminality). But here, the police lacked a proper motive because the standardized policy did not apply. So the police did not harbor dual motives, and we need not address what the outcome would have been if they had.

government learned of these text messages only by seizing the cellphone and obtaining a warrant to search it based on the evidence discovered in the Tulsa search.

Given the government's reliance on the text messages, Mr. Woodard urges reversal of the Bartlesville counts as well as the Tulsa counts. In oral argument, the government argued for the first time that the district court's error was harmless as to the Bartlesville counts. Oral Argument at 32:18–33:10. But the government didn't argue harmlessness in its response brief, and oral argument was too late. *See United States v. Gaines*, 918 F.3d 793, 800–01 (10th Cir. 2019) ("We typically decline to consider an appellee's contentions raised for the first time in oral argument."); *see also Adamschek v. Am. Family Mut. Ins. Co.*, 818 F.3d 576, 588 (10th Cir. 2016) (rejecting an appellee's contention to affirm on an alternative ground because the contention was raised for the first time at oral argument).

Even if we were to consider the government's new argument, we would reject it. The government would have the burden of proving harmlessness beyond a reasonable doubt. *United States v. Mikolon*, 719 F.3d 1184, 1188 (10th Cir. 2013).

In the Bartlesville search, the drug quantities were small enough that Mr. Woodard could have intended to use them rather than to distribute them. These quantities were

- 2.04 grams of heroin,
- 34.25 grams of marijuana, and
- 11.98 grams of cocaine.

2d Supp. R., vol. 2 at 137. One police officer acknowledged the possibility that these quantities could have been intended for Mr. Woodard's use rather than distribution. *Id.* at 137–39. To counter that possibility and show an intent to distribute, the government relied on the text messages.[9] Those text messages surfaced only because of the evidence

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[9] In closing argument, the prosecutor stated:

> I want to talk to you about the amount of drugs that were found. Now, you didn't hear the judge instruct you, and when you look at the instructions again you're going to find that there's nothing in there about amount of drugs, all right? Determining whether somebody had the intent to distribute has nothing to do with math. It has nothing to do with a certain number, whether it's five, ten, fifteen grams. It has nothing to do with that. It has only to do with a particular state of mind. What do you intend to do with the drugs you have, however much it is you have?
>
> Well, we can't read someone's mind but we can do the next best thing, which is that we can read their text messages. Mere users of drugs are not going to have text messages like this, Government's Exhibit 16, which says on the left-hand side of the screen, "Hey bro you think I can get a full oz of that exact s**t you brought me?"
>
> Mr. Woodard says, "Yes sir."
>
> "$11350?"
>
> "Yes."

discovered in the Tulsa search. Given these circumstances, we reverse the convictions on the Bartlesville counts as well as the Tulsa counts.[10] The Clerk shall issue the mandate forthwith.

> "Has to be the exact same s**t tho you feel me because im poly goin to acetone wash it I don't wanna lose a bunch again."
>
> What in the world are they talking about here, if not a drug deal?

2d Supp. R., vol. 2 at 379–80.

[10] Mr. Woodard also challenges the sentence. We need not address this challenge.

United States v. Woodard, No. 20-5004

EID, J., dissenting.

The majority concludes that the impoundment in this case was neither supported by a standardized policy nor justified by a non-pretextual community-caretaking rationale. I disagree on both counts. In particular, I take issue with the way in which it handles pretext, setting forth numerous actions that the police officers could have taken to avoid impoundment but did not—thus demonstrating, in the majority's view, their pretextual motive. But police officers are not required to exhaust all avenues before impounding a vehicle. They must act reasonably. *United States v. Taylor*, 592 F.3d 1104, 1108 (10th Cir. 2010). Because the officers did so in this case, I respectfully dissent.

I.

The "impoundment of a vehicle located on private property that is neither obstructing traffic nor creating an imminent threat to public safety"—like the vehicle in this case—"is constitutional only if justified by both a standardized policy and a reasonable, non-pretextual community-caretaking rationale." *United States v. Sanders*, 796 F.3d 1241, 1248 (10th Cir. 2015). I would hold that both prongs of the *Sanders* test have been met in this case.

A.

The Tulsa Police Department ("TPD") had a policy in place when the officers impounded the vehicle that Woodard was driving. The policy authorized impoundment when:

> A vehicle has been abandoned or the driver was arrested and the vehicle is left unattended in a location that would constitute a traffic hazard or is highly susceptible to damage or vandalism. This includes private property open to the public when the offense the vehicle was initially stopped for occurred on a public way.

Supp. ROA Vol. I, Ex. 6 at 2.

According to Woodard, the second sentence of the policy creates a limited exception for private-property impoundment that permits impoundment only when the offense was committed on a public way. In other words, the second sentence is a limitation on the first. Woodard argues that the offense for which he was pulled over—an outstanding warrant on a public intoxication charge—did not occur on a "public way." Therefore, he concludes, the impoundment of the vehicle he was driving fell outside the scope of the exception. I reject Woodard's proposed reading of the policy.

The policy's second sentence begins with the language: "This includes." This language indicates that the second sentence acts an example of rather than an exception to what the policy permits. It is well-established that the word "includes" signals a rule's non-exhaustive nature. The word "is not one of all-embracing definition, but connotes simply an illustrative application of the general principle." *Fed. Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941) (defining "including"); *see also United States v. Porter*, 745 F.3d 1035, 1046–47 (10th Cir. 2014) (applying that definition); *see also*

Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 226 (2012) ("When a definitional section says that a word 'includes' certain things, that is usually taken to mean that it may include other things as well."). Extending these principles to the language at issue here, I read the second sentence of the TPD policy as an example, and I read the first sentence as containing the elements that must be met for impoundment.

While it is true that the government does not take this position on appeal, "we may affirm on any basis that the record adequately supports." *High Desert Relief, Inc. v. United States*, 917 F.3d 1170, 1181 (10th Cir. 2019). The principle of party presentation does not limit our discretion. As we have held time and again, we may affirm based on the record "even if it requires ruling on arguments not reached by the district court or *even presented to us on appeal*." *Jordan v. U.S. Dep't of Justice*, 668 F.3d 1188, 1200 (10th Cir. 2011) (emphasis added) (quoting *Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1130 (10th Cir. 2011)). We have explained "such a decisional approach is particularly acceptable and proper when . . . the matter at issue involves construing the plain terms of statutes—a quintessentially legal undertaking." *Id*. (citing *Cox v. Glanz*, 800 F.3d 1231, 1246 n.7 (10th Cir. 2015)). Similarly, this case requires us to construe the plain terms of a police department policy. "[I]t is beyond peradventure" that we may affirm the district court on any basis supported by the record. *Id*. And in this case, the record supports my reading.

The district court heard and accepted my reading of the TPD policy. ROA Vol. II at 74, 91; Supp. ROA Vol. III at 38. At the hearing on Woodard's suppression motion,

the court directly asked the government's lawyer about the "includes" language. The dialogue went as follows:

> THE COURT: Now, I understand it's not possible to draft a policy that will apply perfectly in every situation. To be fair, the language says that this includes private property open to the public when the offense the vehicle was initially stopped for occurred on a public way. It's not limited to, it simply includes those situations; right?
>
> MR. REGAL: Yes, Your Honor.
>
> THE COURT: All right. . . .

ROA Vol. II at 74.

Subsequently, when the district court issued its findings, it read the first sentence as containing the requirements for impoundment and considered the second sentence as an example. In its oral ruling, the court stated: "The government has shown that TP[D] has a standardized policy which justifies the impoundment. The vehicle had been driven by an individual who was arrested and was to be left unattended in a location that was highly susceptible to damage or vandalism." *Id*. at 91. And when issuing its written explanation, the court wrote: "There was some discussion at the hearing as to whether the language of the policy contemplated impoundments on private property where the traffic stop was initiated on a public way for an offense that occurred elsewhere, but the court agreed with the government that the policy is not limited to those situations where the initiating offense occurred on a public way." Supp. ROA Vol. III at 38 (citation omitted).

I agree with the district court that the second sentence of the TPD impoundment policy is merely an example of what is permitted, not an exception to what is permitted. Under this interpretation, the impoundment in this case must meet the two requirements

contained in the first sentence, namely that: (1) the vehicle was "abandoned or the driver was arrested," and (2) "the vehicle [was] left unattended in a location that would constitute a traffic hazard or is highly susceptible to damage or vandalism." Supp. ROA Vol. I, Ex. 6 at 2. Both requirements are satisfied here.

Woodard does not dispute that he left the vehicle unattended upon his arrest. He contests only the district court's finding that the vehicle was highly susceptible to damage or vandalism. We must accept the district court's finding about the vehicle's susceptibility to damage or vandalism unless it is clearly erroneous. Clear error can be shown only if the factual finding "is without factual support in the record," or where we are "left with a definite and firm conviction that the district court erred" after reviewing all the evidence. *United States v. Chavez*, 734 F.3d 1247, 1250 (10th Cir. 2013). Additionally, we review the evidence "in the light most favorable to the district court findings." *United States v. Ibarra*, 955 F.2d 1405, 1409 (10th Cir. 1992). Here there is no clear error.

Officer Douglas's testimony provides ample factual support for the court's finding. The officer testified that the car was parked in "a high-crime area," specifying that he encounters "lots of larcenies, lots of burglary-from-vehicle calls, auto thefts, [and] things like that" there. ROA Vol. II at 35.

Woodard points to other factors he believes should offset the neighborhood's crime statistics—expressly, that the stop occurred during daylight and that the vehicle was left in front of a QuikTrip, where people frequently walk by. Aplt. Br. at 29–30. However, the impounding officers had no way of knowing how long the vehicle would

be there, especially given the issues surrounding the vehicle's ownership, insurance, and Woodard's driver's license, as discussed below. *See* Supp. ROA Vol. II, Ex. 3 at 05:49–51, 04:41–45; *id*. at Ex. 5 at 07:34, 09:40–57. Woodard's argument about the time of day is thus not persuasive. Similarly, foot traffic would likely diminish as the day went on. And while being parked at QuikTrip may have lessened the vehicle's susceptibility to damage or vandalism, the vehicle's location at QuikTrip did not erase such susceptibility. In my view, the district court's factual conclusion that the vehicle was susceptible to damage or vandalism is well supported and should not be disturbed.

In sum, I would hold that the first prong of the *Sanders* test—that the officers acted pursuant to a standardized impoundment policy—is satisfied in this case.

B.

The second prong of the *Sanders* test directs courts to ascertain whether the impoundment was justified by a "reasonable, non-pretextual community-caretaking rationale." 796 F.3d at 1248. This inquiry is guided by the following "non-exclusive list" of factors:

> (1) Whether the vehicle is on public or private property;
> (2) If on private property, whether the property owner has been consulted;
> (3) Whether an alternative to impoundment exists (especially another person capable of driving the vehicle);
> (4) Whether the vehicle is implicated in a crime; and
> (5) Whether the vehicle's owner and/or driver have consented to the impoundment.

Id. at 1250. The district court in this case expressly considered each factor and found "the officers had a reasonable, non-pretextual community-caretaking rationale for impounding the vehicle." Supp. ROA Vol. III at 39. The majority correctly notes that

we review the court's finding only "for clear error and view the evidence in the light most favorable to the government." Maj. Op. at 13 (citing *United States v. Venezia*, 995 F.3d 1170, 1175 (10th Cir. 2021)). But such deference is absent from its analysis.

No one disputes that the car was on private property (the first factor) or that the officers failed to consult the property owner, QuikTrip (the second factor). However, the district court found persuasive testimony from Charles Michael Thornbrugh, QuikTrip's manager of public and governmental affairs, that QuikTrip prefers abandoned vehicles due to arrests to be removed. Thornbrugh explained the store prefers their removal because "space is very valuable to [QuikTrip], it denies a customer a potential parking spot," and "if it's around for awhile, it could also invite criminal – further criminal activity." ROA Vol. II at 54. For those reasons, Thornbrugh testified that if a car is abandoned in a prime spot, QuikTrip wants it removed within an hour. *Id*. He also said QuikTrip previously communicated that preference to the police, even though QuikTrip was not consulted in this particular instance.

It is true there is no direct evidence showing the impounding officers knew of QuikTrip's preference. However, there is sufficient evidence in the record for a factfinder to assume the officers inferred it. "Courts are to view the officer's conduct through a filter of common sense and ordinary human experience." *United States v. Alvarez*, 68 F.3d 1242, 1244 (10th Cir. 1995) (quotations omitted). Especially given our duty to consider the facts favorably for the government, I see no reason to disturb the district court's finding that "Officer Douglas was under the correct impression that Quik[T]rip wished [the] vehicle removed." Supp. ROA Vol. III at 5 n.6. An officer

exercising common sense would have realized that if he did not impound Woodard's car, the car would be sitting abandoned in QuikTrip's small parking lot, taking up a prime parking location and remaining vulnerable to crime for an unknowable length of time. These circumstances, in addition to QuikTrip's previously disclosed impoundment preference, provided ample reason for the officers to impound Woodard's vehicle. Woodard cannot show the district court clearly erred in its analysis of this factor. Thus, I would find it cuts in favor of the government.

As for the third factor, the district court weighed the government's position that there was no one else on hand to move the car against Woodard's argument that he could have returned to retrieve his car after posting bond. The court found that it was reasonable for the police to impound the vehicle because it was left in a high-crime area, and even if Woodard could quickly return, there were issues surrounding the vehicle's insurance status.

The majority maintains it is inappropriate to rely on vehicle's lack of insurance because it was not until after the officers decided to impound the car that they found the expired insurance card and began questioning the car's status. Maj. Op. at 17. However, even without the insurance issue, the district court's conclusion on this factor is amply supported by additional questions surrounding the car's ownership and Woodard's license to drive. Woodard admitted that he did not have a driver's license. Supp. ROA Vol. II, Ex. 3 at 04:41–45. And when asked whether he owned the vehicle, Woodard answered, "Say what now, sir." *Id*. at 06:00–04. He also stated, "It's not my car." *Id*. at 05:49–52. Those discussions happened *before* the inventory search. Thus, even without

discovering the expired insurance card, the officers knew that Woodard had no driver's license and did not own the vehicle. Additionally, there was no alternate driver on the scene. These facts—coupled with the vehicle being left in a high-crime area for an unknown period of time—well support the district court's conclusion that the third factor favors the government because Woodard could not have retrieved it later.

The majority finds otherwise, holding "the police had an alternative to impoundment: letting Mr. Woodard call someone to get the car." Maj. Op. at 16. That holding conflicts with a long line of cases in which this court and our sister circuits have held that officers have no such duty. *See United States v. Trujillo*, 993 F.3d 859, 870 (10th Cir. 2021) ("The deputies were not required to allow Defendant to call someone to come pick up the [vehicle] and then, assuming he was successful, wait around for the new driver to arrive."); *United States v. Walker*, 81 F. App'x 294, 297 (10th Cir. 2003) (unpublished) (holding impoundment was reasonable because the defendant "was alone at the time of his arrest, [so] there was no one immediately available to move his car to a safe location"); *United States v. Moraga*, 76 F. App'x 223, 227–28 (10th Cir. 2003) (unpublished) (finding impoundment was reasonable even though arrestee's mother could "come and pick up the car" in "an hour"); *United States v. Jackson*, 682 F.3d 448, 454–55 (6th Cir. 2012) (holding officers acted reasonably when impounding a vehicle from a private driveway and rejecting the argument that they should have first contacted the property owner or the vehicle's owner); *United States v. Cherry*, 436 F.3d 769, 775 (7th Cir. 2006) ("[T]he Fourth Amendment [does not] demand that police offer a motorist an alternative means of removing his vehicle that will avoid the need to

tow it and conduct an inventory search."); *United States v. Agofsky*, 20 F.3d 866, 873 (8th Cir. 1994) ("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."); *see also Colorado v. Bertine*, 479 U.S. 367, 374 (1987) ("The real question is not what could have been achieved, but whether the Fourth Amendment requires such steps . . . [.] The reasonableness of any particular governmental activity does not necessarily or invariably turn on the existence of alternative less intrusive means." (alterations and quotations omitted)).

The majority claims that these cases have no relevance here because they were decided before *Sanders* and therefore do not address "the pretext factors." Maj. Op. at 19. Although *Sanders* was decided after most of the cases discussed above, it did not purport to overrule them. Under *Sanders*, the availability of someone else to take custody of a vehicle may sometimes provide proof of pretext when an officer impounds a vehicle. 796 F.3d at 1251. However, the majority's haste to find pretext here—where Woodard was unaccompanied by an alternate driver and the officers did not know who owned the vehicle—effectively imposes a duty on officers to allow an arrestee to call another driver. If the officers do not make such an allowance, a court will ascribe to them a pretextual motive for the impoundment. While the majority may have "no opinion on whether the police have a duty to let someone else pick up a car when the driver is arrested," Maj. Op. at 18, its holding in effect resolves the issue.

Leaving the car in the lot indefinitely was not a reasonable alternative in this case, either. We recently explained in *Venezia* that "[t]he risk of theft or vandalism to a

particular vehicle is greater where . . . overnight parking is unusual, or where the vehicle would be out of place or conspicuous." 995 F.3d at 1181. We were persuaded in *Venezia* that it was safe for the officers to leave the defendant's car in a motel parking lot because "doing so would have been no different than what the motel's guests do on a regular basis." *Id*. In fact, we distinguished the car in *Venezia* from a car that *was* reasonably impounded from a night club parking lot in *United States v. Johnson*, 734 F.2d 503, 504 (10th Cir. 1984) (per curiam), because, "[s]o far as we are aware, motel guests are less likely to park for a few hours at night, and more likely to stay overnight at the premises, than night club patrons." *Venezia*, 995 F.3d at 1182 n.9. The car in this case is closer to the car in *Johnson* than the one in *Venezia*. Woodard abandoned it in QuikTrip's parking lot, which is not a place where cars are typically left overnight or even after the store's business hours. I read *Venezia* to further support the district court's finding that the officers in this case acted reasonably by choosing not to indefinitely leave the car at QuikTrip—an unusual place to leave cars overnight, especially when the store is closed.

Finally, the government does not challenge that the remaining two factors—that the vehicle was not implicated in a crime and that Woodard did not consent to impoundment—favor Woodard.[1]

[1] I question the value of the government's concession that Woodard did not consent to impoundment. *See Venezia*, 995 F.3d at 1182 ("[Defendant] acknowledges that since the officers could not determine at the time of his arrest that [he] owned the vehicle, his consent or lack thereof was not terribly relevant to the impoundment decision. . . . The fifth factor therefore weighs in favor of finding the impoundment was justified." (quotations omitted)).

Considering the factors as a whole, the district court found that the impoundment and accompanying search satisfied the Fourth Amendment's reasonableness requirement as articulated by *Sanders*. It found "the officers exercised reasonable discretion in assessing impoundment, especially given that there was no one on hand to drive the car, the defendant was under arrest, and the car was located in a high-crime area. Further, the officers correctly understood that the private owner would prefer the car to be removed rather than abandoned." Supp. ROA Vol. III at 40. Since I see no justification for inferring facts against the district court's findings or reweighing the district court's balancing of the *Sanders* factors, I would agree with its conclusion that the officers had a reasonable, non-pretextual community-caretaking rationale for impounding the vehicle.

The majority instead finds pretext. It arrives at this conclusion by pointing out a number of actions the police officers could have taken to avoid impoundment, and concludes that, by not doing these things, the officers must have been motivated by pretext. For example, according to the majority, the officers should have gone into the QuikTrip to speak with the employees to see if they wanted the vehicle impounded. Their failure to do so, the majority concludes, suggests pretext. The majority also suggests that the police could have just left the vehicle where it was and permitted Woodard to call someone to come to get the vehicle. Their failure to do so, the majority concludes, suggests pretext.

The majority goes further to impose additional duties regarding investigating proof of insurance. When officers found an expired Farmers insurance card, they could have asked Woodard if he had an unexpired one. Or, they could have "check[ed] an available

database." Maj. Op. at 24. Again, according to the majority, their failure to take these actions suggests pretext. *Id.* ("The stated effort to look for the elusive proof of updated insurance [in the vehicle]—without asking Mr. Woodard or checking an available database—bears only one possible explanation: The senior officer was searching the car to find evidence of a crime rather than to safeguard the car and its contents.").

The majority's approach to pretext in this case is troubling because it suggests that the officers must take every measure possible (or at least those identified by the majority) in order to avoid a finding of pretext. There is no exhaustion requirement when it comes to the decision to impound a vehicle. There is reasonableness. *Taylor*, 592 F.3d at 1108. The question is thus not whether the officers took every conceivable action to avoid impoundment, but rather whether they acted reasonably under the circumstances. The vehicle's location, QuikTrip's preference for impoundment, the fact that Woodard had no license, the uncertain ownership of the vehicle, the absence of another driver on the scene to take the vehicle, and the unpredictable amount of time it would take for Woodard to return—when reviewed for clear error and in the light most favorable to the government—lead me to the conclusion that the officers acted reasonably. *See e.g., United States v. Walker,* 81 F. App'x 294 (10th Cir. 2003) (unpublished) (upholding impoundment of vehicle under a community-caretaking rationale where defendant's driver's license was suspended, the vehicle was located in an area where it would be subject to theft or vandalism, and there was no one immediately available to drive the vehicle).

Lastly, the officers' statements would not disturb my conclusion. The majority points to one officer's statement that he wanted to "friggin' light [Woodard] up with whatever [he] can" as evidence that the search was pretextual. Maj. Op. at 22 (quoting Supp. ROA Vol. II, Ex. 3 at 00:50–58). It also points to other statements the officers made while searching the car, which according to the majority reveal "the officers' intent to look for drugs, not to safeguard a car and its contents." Maj. Op. at 23. That intent, the majority concludes, was the "one plausible explanation" for why the officers searched the car for proof of insurance. *Id*. at 24.

As demonstrated above, however, there were many reasonable grounds for removing the vehicle from the QuikTrip lot that would lead an officer to impound it in the absence of any improper motive. These grounds support the district court's finding that the officers impounded the vehicle pursuant to a reasonable, non-pretextual community-caretaking rationale. Accordingly, I would affirm the district court's denial of the motion to suppress. *See United States v. Sanchez,* 720 F. App'x 964, 970 (10th Cir. 2018) (unpublished) (rejecting defendant's argument that an officer's "subjective intent to uncover evidence of a crime invalidated the search" on the ground that discovery of criminal activity was not the "*sole* purpose of investigation." (quoting *Bertine*, 479 U.S. at 372) (emphasis added)).[2]

[2] According to the majority, the officers could not have possibly acted with a proper purpose given that they did not act pursuant to a standardized policy under the first prong of *Sanders*. Maj. Op. at 13. This raises the question of why the majority analyzes the officers' actions under the second prong, given that, in its view, the *Sanders* test could not be met after its analysis of the first prong.

II.

For these reasons, I would affirm the district court's order denying Woodard's motion to suppress the evidence from the inventory search of the impounded vehicle.[3] I respectfully dissent.

[3] Because I would affirm the district court's denial of the suppression motion, I would not disturb Woodard's convictions on either the Tulsa or Bartlesville counts. *Compare* Maj. at 28 (reversing both). I would, however, remand the case for resentencing under *U.S. v. Cantu*, 964 F.3d 924 (10th Cir. 2020), an issue that the government concedes.