No. 16-1371

IN THE

# Supreme Court of the United States

TERRENCE BYRD,

*Petitioner*,

*v.*

UNITED STATES OF AMERICA,

*Respondent.*

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

## BRIEF FOR PETITIONER


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## QUESTION PRESENTED

The Fourth Amendment protects people from suspicionless searches of places and effects in which they have a reasonable expectation of privacy. Does a driver in sole possession of a rental vehicle reasonably expect privacy in the vehicle where he has the renter's permission to drive the vehicle but is not listed as an authorized driver on the rental agreement?

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The opinion of the Court of Appeals is not officially reported but may be found at 2017 WL 541405. Pet. App. 1a-8a. The district court's ruling on the suppression motion is not officially reported but may be found at 2015 WL 5038455. Pet. App. 9a-18a.

## JURISDICTION

The Court of Appeals entered judgment on February 10, 2017. Pet. App. 1a. The petition for a writ of certiorari was timely filed on May 11, 2017, and granted on September 28, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

## INTRODUCTION

When a person's fiancée hands him the keys to her car and tells him he may use it, he reasonably expects privacy in the car. She has given him both possession and control over the car, and he reasonably believes that he can exclude strangers and the government from intruding upon his private personal and family possessions stored in the car. He accordingly has a reasonable expectation of privacy that entitles him to the Fourth Amendment's protection against suspicionless searches of the vehicle. The foundation of the driver's reasonable expectation of privacy—his possession and control of the car with his fiancée's permission—and the resultant constitutional protections do not materially change if it turns out the car is a rental and his fiancée did not include him on the rental agreement as an authorized driver.

Here, Terrence Byrd's fiancée Latasha Reed rented a car. She was one of over 115 million people who do so annually. *See* Canadean, *Car Rental in the US to 2020: Databook* 24 (Published Aug. 2016, Reference Code: TT1972DB). Reed signed a rental agreement that listed her as the authorized driver and stated in boilerplate terms that her spouse and coworkers were authorized to drive the vehicle as well. Because rental companies know and expect that relatives and other third parties frequently operate rental vehicles with the permission of the renter (even though not authorized to drive by the rental company), the rental agreement informed Reed that she would bear all risk of loss if an unlisted driver took the wheel.

Byrd's fiancée gave Byrd the keys to the car and permitted him to drive it even though he was not listed as a driver on the rental agreement. Byrd drove the car and stored personal possessions in the car's locked trunk that he expected would remain private. Later, state troopers pulled Byrd over for a claimed minor traffic violation. They then searched the entire vehicle and rummaged through bags of personal possessions in the locked trunk.

The government contends, and the Third Circuit held, that the government need offer no justification for this search. The Third Circuit said that because Byrd was not listed as a driver on the rental agreement, he had no cognizable property interest in the car and therefore had no objectively reasonable expectation of privacy in the car's locked trunk and no Fourth Amendment protection from a suspicionless search. That position finds no support in this Court's precedents, the history of the Fourth Amendment, general principles of property law, or the terms of the rental agreement.

This Court has consistently recognized that a reasonable expectation of privacy arises out of societal understandings of privacy, which look to a person's possession and measure of control over a place in assessing privacy rights protected by the Fourth Amendment. *See Minnesota v. Olson*, 495 U.S. 91, 99 (1990); *Rakas v. Illinois*, 439 U.S. 128, 140 (1978); *Katz v. United States*, 389 U.S. 347, 352 (1967); *Jones v. United States*, 362 U.S. 257, 259 (1960). As the sole occupant of the rental car with the renter's permission, Byrd plainly had the requisite possession and control to reasonably expect privacy.

The rental agreement's terms and conditions are all about risk of loss and have nothing to do with the Fourth Amendment rights of the driver. Notably, the rental agreement did not prohibit Byrd from possessing the rental car or from storing private possessions in its locked trunk.

Tying a reasonable expectation of privacy to compliance with an authorized-driver provision would encourage the police to pull over every rental car they see, ask for the rental agreement, and if the driver is unlisted, freely engage in a full search of the car with zero suspicion of a crime. That police act on such incentives is not speculation. In the Third Circuit, the police are well aware of this Fourth Amendment loophole. Indeed, the troopers here explained they pulled Byrd over in no small part because he was driving a rental car, and they told him they could search anywhere in his car because he was not listed on the rental agreement.

In light of the over 115 million annual car rentals in the United States, the Third Circuit's rule would result in the government exercising the very type of "sweeping power … to search at large for [contraband]" that motivated the ratification of the Fourth Amendment. *United States v. Chadwick*, 433 U.S. 1, 7-8 (1977). It would authorize the type of exploratory suspicionless searching and dragnet policing that the founding generation intended the Fourth Amendment to prevent. This Court should not "entrust[] to the Executive, in the absence of any oversight from a coordinate branch, a tool so amenable to misuse." *United States v. Jones*, 565 U.S. 400, 416 (2012) (Sotomayor,

J., concurring). The decision of the Court of Appeals should be reversed.

## STATEMENT OF THE CASE

### *Byrd's Fiancée Rents A Car And Permits Him To Drive It*

Petitioner Terrence Byrd and his fiancée, Latasha Reed, have been together for over 17 years—longer than many marriages last. JA 180. They share a home. *Id*. And they have five children together. *Id.*

In September 2014, Reed rented a car at an Avis Budget (Budget) facility in Wayne, New Jersey.[1] Reed paid for the rental and signed a standard-form addendum to the rental agreement certifying, among other things, that she had a valid driver's license. JA 18-19; JA 20-25 (transcription). The agreement stated that "No additional drivers [are] allowed without prior written consent." JA 18. And the generic addendum provided that "the only ones permitted to drive the vehicle other than the renter are the renter's spouse, the renter's co-employee (with the renter's permission, while on company business), or a person who appears at the time of the rental and signs an Additional Driver Form." JA 19. The addendum spells out in all capital letters the consequences of permitting an unauthorized driver to operate the vehicle: doing so "MAY RESULT IN ANY AND ALL COVERAGE

[1] The rental agreement refers to a Budget rental car. JA 18. Budget is a subsidiary of the Avis Budget Group. At the certiorari stage, the parties referred to the rental company as Avis.

OTHERWISE PROVIDED BY THE RENTAL AGREEMENT BEING VOID" and the renter "BEING FULLY RESPONSIBLE FOR ALL LOSS OR DAMAGE, INCLUDING LIABILITY TO THIRD PARTIES." *Id.*

***State Troopers Pull Byrd Over For A "Left Lane" Traffic Violation***

After leaving Budget, Reed gave Byrd permission to drive the car and handed him the keys. JA 182. Byrd first drove to their home. *Id*. Later he left their home in the rental car, with Reed's consent, to drive to Pittsburgh, where he and Reed were considering relocating. JA 181.

While on Interstate 81 in Pennsylvania, Byrd passed Trooper David Long, who was parked on the median observing passing traffic. JA 36. As Byrd passed, Trooper Long thought Byrd was driving "suspicious[ly]." *Id*. Long gave three reasons for his suspicion. First, Long noticed that Byrd was driving with his hands at the recommended "10-and-2" position on the steering wheel. JA 36, 63. Second, Long said that Byrd was sitting far back from the steering wheel with his seatback positioned in such a way that Long could not clearly see him. JA 36. Third, Long noted that Byrd was driving a rental car. JA 89; *see* JA 63. Based on these observations, which could describe anyone driving a rental car and suggest no criminal conduct, Long decided to follow Byrd's car. JA 64.

Long pulled into the left lane and joined a long line of cars. JA 93. It was the evening rush hour, and traffic in the left lane was moving below the 65-miles-

per-hour speed limit. JA 89-91, 98. At the front of the line was a slow-moving truck. Byrd was a few cars behind the truck, and Long was a few cars behind Byrd. JA 36. Over the next two minutes, the truck leading the cars in the left lane pulled into the right lane. *Id.* Byrd then passed the truck and continued in the left lane for an additional two tenths of a mile to pass another slow-moving truck in the right lane. JA 65, 87-88, 111.

Long pulled Byrd over. He posited that Byrd committed a traffic violation by failing to move into the right lane immediately after passing the first truck, which he maintained was a violation of a Pennsylvania law prohibiting driving in the left lane except when passing other vehicles. *See* 75 Pa. Cons. Stat. § 3313(d)(1) (requiring drivers to merge right unless passing or traveling faster than traffic flow). According to Long, it made no difference that Byrd was only in the left lane for two tenths of a mile: "every time that you pass a car, you have to immediately get over to the right." JA 106, 115-16.[2]

### *Troopers Detain Byrd For An Hour And Search The Trunk Of The Car Without Probable Cause*

After Long pulled Byrd over, his partner, Trooper Martin, arrived at the scene. JA 38, 60-61. Long then approached Byrd's car. JA 68. Byrd handed Long a

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[2] In his police report, Trooper Long reported that Byrd had "traveled in the left lane for approximately 2 miles without overtaking another vehicle." C.A. App. 46. At the district court hearing, however, Long admitted that Byrd was in fact in the left lane for only two tenths of a mile. JA 88; *see also* JA 111.

temporary driver's license and the Budget rental agreement. JA 69, 112-14, 124-25. Byrd explained that his name was not on the rental agreement because a "friend" had rented the car. JA 69. The troopers did not inquire further and did not call the rental company. JA 48. Long returned to his police car to process the information on Byrd's license. JA 70.

Long verified Byrd's identity and confirmed that Byrd was a licensed driver. JA 37-38, 125. In the process of doing so, Long discovered that Byrd had an outstanding arrest warrant from New Jersey for a minor probation violation. JA 38. Long contacted New Jersey officials and learned that the warrant was "in-state only," meaning that New Jersey did not want Long to arrest Byrd and extradite him. *Id.*

For safety reasons, the troopers decided to move to a location further down the highway. JA 37. The troopers asked Byrd to drive the rental car (even though they knew he was not listed on the agreement) to the new designated location. JA 71. The troopers agreed that when Byrd drove to the safer location, he was in "complete control of his car." *Id.*

At the new location, the troopers discussed searching the car. They speculated that Byrd had marijuana in the vehicle, C.A. App. Vol. 3, 21:10-14,[3] even though they smelled no marijuana, JA 77. One

[3] Volume 3 of the Court of Appeals' Appendix is a video recording from Trooper Long's patrol car of the stop and search of Byrd's car. Hereafter, the video recording is denoted by "C.A. App. Vol. 3" followed by the time as reflected on the video counter in minutes and seconds.

of the troopers stated that they could search the car without any grounds because Byrd "ha[d] no expectation of privacy" as "he [was] not on the renter agreement." C.A. App. Vol. 3, 21:40. Instead of searching immediately, however, the officers decided to seek Byrd's consent to a search of the car. JA 143.

The troopers asked Byrd to exit the vehicle, JA 136-37, and conducted a pat down, JA 145. The pat down revealed nothing. The officers then issued Byrd a written warning for driving in the left lane. JA 45.

With the warning done, the troopers "moved on to additional questions." *Id*. They peppered Byrd with questions about criminal activity. Is "anything illegal in the car?" C.A. App. Vol. 3, 41:56. Do you have "marijuana in the center console"? C.A. App. Vol. 3, 42:00. C.A. App. Vol. 3, 42:02. Do you "smoke weed"? C.A. App. Vol. 3, 42:16. Three times, Byrd said no. C.A. App. Vol. 3, 41:56-2:20.

The troopers then asked for permission to search the car. JA 77; C.A. App. Vol. 3, 42:38. Byrd responded that he might have a "blunt" in the car. JA 77. The troopers replied that they were not concerned about that. C.A. App. Vol. 3, 43:00. Byrd said he had nothing else. One of the troopers then asserted without foundation, "so you're giving us permission to search your car." C.A. App. Vol. 3, 43:21. Byrd asked if he could simply retrieve the blunt because "I don't

want you to search" the car. C.A. App. Vol. 3, 43:35; Pet. App. 12a.[4]

Nonetheless, the troopers proceeded to search the car. They told Byrd they did not need his consent because, among other things, he wasn't on the rental agreement and therefore had "no expectation of privacy" protected by the Fourth Amendment. C.A. App. Vol. 3, 44:17; *see also* JA 48 (Long testifying: "I may have actually explained to him that I didn't need his consent because he's an unauthorized driver of the vehicle. I may have explained to him I don't need his consent."). Long later explained that the "consent" consisted solely of Byrd's offer to retrieve the blunt; "after that, he never gave … consent." JA 162. Long also testified that it was standard procedure to secure consent with a written-consent form. JA 47. But despite having forms at the scene, the troopers never asked Byrd to sign one. *Id.*

The troopers searched the passenger compartment of the car and found no marijuana or any other evidence of a crime. JA 147. They then opened the locked trunk and found a large, opaque laundry bag. C.A. App. Vol. 3, 48:30-35. They emptied the bag and found a flak jacket and heroin. C.A. App. 47.

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[4] Byrd's answers over the passing traffic in this part of the video are difficult to hear. With the audio slowed down and the treble reduced, however, Byrd's responses can be clearly understood.

### *The District Court Rules That Byrd Had No Reasonable Expectation Of Privacy In The Rental Car*

Byrd was initially charged in Pennsylvania state court. Those charges were dismissed after a federal grand jury returned a two-count indictment charging Byrd with distributing and possessing heroin with the intent to distribute, 21 U.S.C. § 841(a), and possession of body armor by a prohibited person, 18 U.S.C. § 931(a)(1). C.A. App. 27-29.

Byrd moved to suppress the evidence obtained from the search under the Fourth Amendment because the troopers lacked probable cause to search the car's trunk. C.A. App. 30-36 (motion to suppress). The government contended that Byrd should not be permitted to raise a Fourth Amendment challenge to the search because, as an unlisted driver, he had no reasonable expectation of privacy in the rental car, and therefore the Fourth Amendment simply did not apply.

At the suppression hearing, Byrd testified that Reed had rented the car for them to share. JA 180. He explained that he and Reed lived together and "[were] about to get married" and that "[s]he is the mother of … [his children]." *Id*. He also explained that they "shared vehicles all the time." JA 181.

The district court denied the motion to suppress. Applying Third Circuit precedent, the court ruled that Byrd lacked a reasonable expectation of privacy in the rental car because he "was merely given permission by Reed to drive the car," "he was not a party to the

rental agreement," and "he did not pay for the rental." Pet. App. 13a. Byrd then entered a conditional guilty plea, preserving the right to appeal the denial of his suppression motion. C.A. App. 221-23. The district court sentenced Byrd to ten years in prison. C.A. App. 13-14.

### *The Third Circuit Agrees That Byrd Had No Reasonable Expectation Of Privacy In The Rental Car*

The Third Circuit affirmed. Pet. App. 1a-8a. Following its earlier decision in *United States v. Kennedy*, 638 F.3d 159 (3d Cir. 2011), the court held that Byrd had no reasonable expectation of privacy in the rental car because the rental agreement did not authorize him to drive it.

In *Kennedy*, the Third Circuit held that drivers of rental cars who are not listed on the rental agreement generally have no right under the Fourth Amendment to challenge a vehicle search. The court reasoned that while listed drivers expect privacy because they can exclude others from accessing the car, unlisted drivers have "no cognizable property interest … and therefore no accompanying right to exclude." *Id.* at 165. Unlike someone who borrows a friend's or relative's car with permission, the court concluded that "an individual who borrows a rental car without the permission or knowledge of the owner … deceives the owner of the vehicle while increasing the risk that the property will be harmed or lost." *Id.* The court did not explain what increasing the risk of harm to a rental car had to do with the privacy interests society recognizes as reasonable. Nor did the court explain why the

rental company's authorization to drive a rental car was necessary for a person using the car with the renter's permission to have the right to exclude others.

Relying on *Kennedy*, the Third Circuit upheld the district court's denial of Byrd's suppression motion. Pet. App. 8a.

## SUMMARY OF THE ARGUMENT

**I. A.** The Fourth Amendment's "central concern" is to constrain "police officer[s'] unbridled discretion to rummage at will among a person's private effects." *Arizona v. Gant*, 556 U.S. 332, 345 (2009). A person may assert his Fourth Amendment right to be free from unjustified searches if that person has an objectively reasonable expectation of privacy in the area searched. *See Rakas v. Illinois*, 439 U.S. 128, 140 (1978). A reasonable expectation of privacy does not require ownership of the area searched. *Id.* Rather, this Court looks to the degree of possession and control over the area searched. *Id.* at 143 n.12; *see Minnesota v. Olson*, 495 U.S. 91, 99 (1990) (overnight guest has reasonable expectation of privacy in friend's duplex); *Katz v. United States*, 389 U.S. 347, 352 (1967) (phone booth patron has reasonable expectation of privacy in a phone booth); *Jones v United States*, 362 U.S. 257, 259 (1960) (man with key to friend's apartment and who spent a night there has reasonable expectation of privacy in apartment). Society recognizes that a person with possession and control over a space has a reasonable expectation of privacy because the person can exclude others from the space and therefore reasonably believes that his

personal effects stored there will not be open to the public or governmental inspection. *Olson*, 495 U.S. at 99.

In this case, Byrd had possession and control over the rental vehicle, with the renter's permission, and could be confident that strangers could not access the contents of the car's locked trunk. Thus, when the troopers invaded the locked truck and rummaged through his possessions, without consent, they violated Byrd's reasonable expectation of privacy.

**B.** Byrd's expectation of privacy in the rental car is all the more reasonable because his fiancée, the mother of his five children, allowed him to use it. This Court has frequently emphasized the importance of the family, and the privacy interests inherent in the family unit. *See Stanley v. Illinois*, 405 U.S. 645, 651 (1972). Society recognizes that family members expect the contents of a shared family car to remain private and free from unwarranted intrusion. At a minimum, a person reasonably expects privacy in a car rented by a close family member. Thus, Byrd's close familial relationship to the renter further establishes his reasonable expectation of privacy in the car.

**II. A.** That Byrd was not listed as an approved driver on the rental agreement has no bearing on his reasonable expectation of privacy in the locked trunk of his fiancée's rental car, which he possessed and controlled with her permission at the time of the search. Reasonable expectations of privacy do not generally depend on the terms of commercial contracts because such contracts are not intended to reflect, effectuate, or alter societally recognized privacy interests. Thus,

this Court has recognized that neither a hotel's right to enter a guest's room nor a landlord's right to inspect a tenant's apartment on demand changes the reasonable expectation of privacy society recognizes in both places. *O'Connor v. Ortega*, 480 U.S. 709, 730 (1987) (Scalia, J., concurring); *Stoner v. California*, 376 U.S. 483, 489 (1964). Such commercial contracts serve business purposes wholly extraneous to privacy considerations.

The particular authorized-driver provision at issue here is no exception. Rental companies include authorized-driver provisions in rental agreements to collect additional fees and to shift liability for damage to the vehicle to the renter and away from the rental company. Contractual terms regarding allocation of risk of loss do not purport to have any bearing on a driver's expectation of privacy. Further, the rental agreement did not prohibit Byrd from possessing the car or from excluding others from it.

The mere fact that Reed may have breached a rental contract term by allowing Byrd to drive the car also did not strip Byrd of his reasonable expectation of privacy in the locked trunk. The breach did not turn Byrd into a car thief and make his possession "wrongful." *Rakas*, 439 U.S. at 141 n.9. Moreover, widespread noncompliance with authorized-driver provisions is an open secret. Rental companies expect that unlisted drivers will drive their vehicles, which is why their agreements often specify that the renter will carry greater risk of loss when an unlisted driver operates the vehicle. A rule that would render expectations of privacy in rental cars unreasonable when a term of the rental contract is breached would mean

that virtually no rental-car driver has a reasonable expectation of privacy in the car, as rental agreements are full of material terms that renters frequently breach. And such a rule would inescapably call into question the privacy expectations that apartment dwellers have in their homes.

**B.** The Third Circuit's rule creates incentives for police officers to stop all rental cars so that they can check whether the driver is on the rental agreement and then proceed to search every inch of the car without any suspicion or justification, if the driver is not listed. Giving police carte blanche to run this gambit is contrary to the Fourth Amendment's fundamental purpose of preventing police officers from having "unbridled discretion to rummage at will among a person's private effects." *Gant*, 556 U.S. at 345. It would also have far-reaching effects, which will only increase as rental cars and car sharing become more and more prevalent.

**C.** A rule that would limit the scope of the Fourth Amendment's protections based on the terms of standard-form rental contracts would also fail to provide clear and administrable guidance to trained officers in the field. Applying such a rule would require an officer in the field to have access to the full set of terms and conditions governing the rental transaction, to have sufficient legal training to determine the legal ramifications of those terms and conditions, and to determine whether the particular driver qualifies under one of the categories of authorized drivers specified in the agreement or under background state law. But the officer will often not be able to do any of these

things at the scene. The far clearer rule is that a person driving the car, with the permission of the owner or renter, has an objectively reasonable expectation of privacy in a vehicle.

**III.** Byrd's cognizable property interest in the rental car further supports reversal of the Third Circuit's ruling. When Reed rented the car, she became a bailee and obtained property rights in the car, including the right to possess the car and exclude others from it. Similarly, when Byrd borrowed the car from Reed with her permission, he became Reed's bailee and obtained a bailee's accompanying property rights. That property interest afforded Byrd Fourth Amendment protection against unjustified searches of the car like the one that occurred here.

## ARGUMENT

### I. Byrd May Challenge The Search As Unlawful Because He Had A Reasonable Expectation Of Privacy In The Rental Car.

The Fourth Amendment grants the people a right to be free from unreasonable searches and seizures by law enforcement. U.S. Const. amend. IV. The Amendment guards against the founders' abhorrence of a government empowered to conduct general suspicionless searches. As this Court has recognized, the Amendment "grew in large measure out of the colonists' experience with the writs of assistance and their memories of the general warrants … [which] granted sweeping power to customs officials and other agents of the King to search at large for smuggled goods." *United States v. Chadwick*, 433 U.S. 1, 7-8

(1977). The Amendment's "central concern" is thus to constrain "police officer[s'] unbridled discretion to rummage at will among a person's private effects." *Arizona v. Gant*, 556 U.S. 332, 345 (2009).

In today's world, one of the most basic and ubiquitous "effects" is the automobile. *See United States v. Jones*, 565 U.S. 400, 404 (2012); *Delaware v. Prouse*, 440 U.S. 648, 662 (1979). This Court has emphasized that an "individual operating or traveling in an automobile does not lose all reasonable expectation of privacy simply because the automobile and its use are subject to government regulation." *Prouse*, 440 U.S. at 662. To the contrary, "a motorist's privacy interest in his vehicle" is "important and deserving of constitutional protection." *Gant*, 556 U.S. at 345 (citation omitted).

The Amendment's warrant and probable cause requirements shield individual privacy from arbitrary exercises of intrusive executive power by requiring the government to justify searches and seizures. To search an automobile, an officer typically does not need a warrant, but must have probable cause to believe the vehicle contains evidence of criminal activity. *United States v. Ross*, 456 U.S. 798, 824 (1982). Further, the officer must limit the search to the areas of the vehicle where "there is probable cause to believe that [the object of the search] may be found." *Id.* This ensures that a search remains "tailored to its justifications" and "will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit." *Maryland v. Garrison*, 480 U.S. 79, 84 (1987).

The troopers in this case conducted just such an "exploratory" search of the car, including the locked trunk, without a warrant or probable cause. Indeed, the government did not even argue to the district court or to the Court of Appeals that the search of the trunk was justified by probable cause.

The government, however, is unperturbed. It contends that it need offer no justification at all for the search because Byrd did not "'personally ha[ve] an expectation of privacy in the place searched.'" BIO at 5 (quoting *Minnesota v. Carter*, 525 U.S. 83, 88 (1998)). More generally, the government posits that a person driving a rental car has no reasonable expectation of privacy in the car, if the rental agreement restricts driving to listed drivers and the person driving, with the renter's express permission, is not listed. In the government's view, the rental company's decision to include a contractual provision designed to shift the additional risk of loss from the company to the renter means that an unlisted driver has no reasonable expectation of privacy and that the police, therefore, can undertake suspicionless searches of the entire car.[5]

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[5] Before *Rakas v. Illinois*, 439 U.S. 128 (1978), this Court analyzed an individual's ability to claim Fourth Amendment protections under the rubric of "standing." In *Rakas*, the Court clarified that the inquiry "is more properly placed within the purview of substantive Fourth Amendment law than within that of standing," *id.* at 140, and that ultimately "[t]he inquiry under either approach is the same," *id.* at 139. Subsequent decisions have therefore asked whether a defendant had a "legitimate expectation of privacy" in the area searched. *Carter*, 525 U.S. at 88. "Standing," however, continues to be used as a shorthand for having a sufficient interest to challenge a search or seizure. *See,*

That position finds no support in this Court's precedents or in societal expectations of privacy. It is, instead, an unconstitutional power grab that would permit suspicionless "exploratory rummaging" with respect to a large swath of automobiles traveling on today's highways, *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971) (plurality opinion), exactly the kind of untrammeled exercise of government authority that the Fourth Amendment was intended to constrain.

### A. Byrd had a reasonable expectation of privacy in the rental car because he had possession and control of the car with the renter's permission.

This Court has recognized that having possession of and control over a closed space establishes an objectively reasonable expectation of privacy protected by the Fourth Amendment. When the troopers pulled Byrd over, he had his fiancée's express permission to use the car, and he had sole possession and control over it. When the troopers began rummaging through the locked trunk, they invaded *Byrd's* objectively reasonable expectation of privacy and impinged upon *his* Fourth Amendment rights.

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*e.g.*, *Arizona v. Johnson*, 555 U.S. 323, 332 (2009). However phrased, Byrd may challenge the search in this case because it contravened *his* privacy interests and infringed upon *his* Fourth Amendment rights.

### 1. Possession and control over a closed space establishes a reasonable expectation of privacy.

The touchstone for the protections the Fourth Amendment provides is whether a person has an objectively reasonable expectation of privacy in the area or thing searched. *California v. Greenwood*, 486 U.S. 35, 39 (1988).[6] An expectation of privacy is objectively reasonable if it has a source in "understandings that are recognized and permitted by society." *Carter*, 525 U.S. at 88.

This Court has consistently recognized that a person who lawfully possesses and exercises control over a closed space "will in all likelihood have a legitimate expectation of privacy by virtue of [his] right to exclude" others, whether or not he has a property right in the space. *Rakas*, 439 U.S. at 143 n.12.[7] That reflects how society thinks about privacy. A person who has control over a space and can exclude most others has an objectively reasonable belief that his effects will not be open to public scrutiny or subject to suspicionless searches by the government.

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[6] The government has not contended that Byrd had no subjective expectation of privacy—nor could it. Byrd "took normal precautions to maintain his privacy" in the car by storing his possessions in the trunk and out of plain view. *Rawlings v. Kentucky*, 448 U.S. 98, 105 (1980).

[7] As discussed below (*infra* 35-37), there is a limited exception to this rule where the property is stolen. *See Rakas*, 439 U.S. at 141 n.9. Violating the terms of a rental agreement does not constitute theft.

This Court's cases illustrate the centrality of possession and control to the privacy analysis. In *Jones v. United States*, 362 U.S. 257 (1960), this Court held that a person, who had a key to a friend's apartment, who was not on the lease, and who slept in the apartment for a night, reasonably expected privacy in the apartment. *Id.* at 259. It made no difference that the visitor had no "possessory interest … greater than … an 'invitee or guest,'" *id.* at 263, or that his host was the renter, and not the owner of the apartment, *see* Brief for the United States at 26, *Jones v. United States*, 362 U.S. 257 (1960), 1959 WL 101485 (noting that the host was a "tenant"). All that mattered was that the visitor had some measure of "dominion and control over the apartment and could exclude others from it." *Rakas*, 439 U.S. at 149 (discussing *Jones*, 362 U.S. at 259).

The Court applied the same approach in *Minnesota v. Olson*, 495 U.S. 91 (1990). There, this Court held that the overnight guest had a legitimate expectation of privacy in a duplex. It did not matter that the guest "was never left alone in the duplex or given a key." *Id.* at 98. Instead, what mattered was that he reasonably expected that "he and his possessions w[ould] not be disturbed by anyone but his host," *id.* at 99, and he "w[ould] have a measure of control over the premises" when the host was away, *id.*

The same governing principles apply beyond the residence as well. A person in a shared office space has a reasonable expectation of privacy in the space because he reasonably believes he "w[ill] not be disturbed except by personal or business invitees." *Mancusi v. DeForte*, 392 U.S. 364, 369-70 (1968). So too a

person reasonably expects privacy in a public telephone booth, *Katz v. United States*, 389 U.S. 347, 352 (1967), and in the portions of a taxi within a passenger's control, *id.* at 351-52; *Rios v. United States*, 364 U.S. 253, 262 n.6 (1960). In each of these scenarios, a person reasonably expects privacy in the space over which he has possession and control because he can prevent strangers from accessing it.

To confer a reasonable expectation of privacy, one's possession and control over the space may be limited and need not be exclusive or "absolute." *Mancusi*, 392 U.S. at 370. The overnight guest reasonably expects privacy in his host's home, even though the host has superior legal dominion over the home. *See Rakas*, 439 U.S. at 149 (discussing *Jones*, 362 U.S. at 259); *Olson*, 495 U.S. at 99 ("That the guest has a host who has ultimate control of the house is not inconsistent with the guest having a legitimate expectation of privacy."). And a person "enjoys Fourth Amendment protection in his home … even though … his landlord [may] ha[ve] the right to conduct unannounced inspections at any time." *O'Connor v. Ortega*, 480 U.S. 709, 730 (1987) (Scalia, J., concurring).[8]

The limited circumstances in which this Court has found a person's expectation of privacy to be objectively unreasonable further prove the point—that

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[8] *See also Olson*, 495 U.S. at 99-100 ("If the untrammeled power to admit and exclude were essential to Fourth Amendment protection, an adult daughter temporarily living in the home of her parents would have no legitimate expectation of privacy because her right to admit or exclude would be subject to her parents' veto.").

reasonable expectations of privacy generally turn upon the concepts of possession and control. In *Rakas*, for example, this Court held that mere passengers in an automobile without a close relation to the driver lacked an objectively reasonable expectation of privacy in the portions of the car that passengers ordinarily do not access—the "locked" glove compartment and the area under the seat. 439 U.S. at 148-49. Likewise, in *Carter*, an individual, who visited a house for only a few hours to conduct business and who did not know the owner, could not reasonably expect privacy in the house. 525 U.S. at 90-91. And in *Rawlings*, a defendant could claim no objectively reasonable privacy interest in the purse of a woman he barely knew, which he did not possess, and from which he could not exclude others. 448 U.S. at 104-05.

**2. Byrd had sole possession and control over the rental car when the troopers searched it.**

Byrd's possession and control of his fiancée's rental car, which he drove with her permission, afforded him a reasonable expectation of privacy in the car not materially different from the houseguests in *Jones* and *Olson*. Just as the overnight guest in *Jones* "had permission to use the apartment," "had a key to the apartment," and "kept possessions in [it,]" *Rakas*, 439 U.S. at 149, Byrd had the keys to and the renter's permission to drive the car; he kept possessions in the car; and he exercised control over the car before the search. The troopers acknowledged as much when midway through the stop they had Byrd drive the car to a nearby location and conceded that Byrd was in "complete control of his car." JA 71. Byrd was nothing

like the "casual visitor" who just happens to be in an area he's never previously been "one minute before a search … commences." *Rakas*, 439 U.S. at 142.

Indeed, Byrd's expectation of privacy is even more reasonable than the privacy expectations held reasonable in *Jones*, *Olson*, *Mancusi*, and *Katz*. In *Jones,* the defendant had far less control over the area searched. Jones's friend could have surprised him by coming home early and with others in tow. Likewise, the defendants in *Olson* and *Mancusi* shared the searched premises with others who came and went. And the phone booth did not necessarily protect Katz from others who might open the door and enter.

Unlike the defendants in those cases, all of whom nevertheless had constitutionally recognized privacy interests, Byrd could be confident that others would not enter the space in question without his permission because he had sole possession of the car with the permission of his fiancée (the renter). If a stranger attempted to enter, he had the keys and could keep them from doing so, giving him "dominion and control over" the car before the search. *Rakas*, 439 U.S. at 149.

It makes no difference in this context that Byrd claims a privacy interest in a car and that some of these cases (*Jones* and *Olson*) involved homes. "A search… of an automobile is a substantial invasion of privacy," *United States v. Ortiz*, 422 U.S. 891, 896 (1975) (punctuation omitted), and the Constitution prohibits suspicionless searches of cars as well as homes, *Ross*, 456 U.S. at 824. People plainly expect

privacy in the sealed and locked compartments of automobiles that are hidden from plain view and inaccessible to others. *Cf. Rakas*, 439 U.S. at 154 (noting that mere passengers rarely access sealed compartments). Indeed, acknowledging the substantial privacy that society expects in the trunk of a car, car manufacturers create special "valet keys" that start the engine, but do not open the trunk. Under the circumstances, Byrd had dominion and control and the right to exclude, and thus enjoyed a reasonable expectation of privacy protected by the Fourth Amendment.

### B. Byrd's expectation of privacy in the rental car is all the more reasonable because his fiancée rented it and allowed him to use it.

Byrd's possession and control of the car with the renter's permission is sufficient to establish his reasonable expectation of privacy in the car. But his expectation of privacy is underscored here by his close familial connection to the renter. Byrd was not driving a car rented by a stranger or a mere acquaintance; he was driving a car rented by his fiancée, the mother of his five children, and with her permission.

This "Court has frequently emphasized the importance of the family" in society. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). "The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Ninth Amendment." *Id.* (citations omitted). And from the common law to the present, it has informed the scope

of who is entitled to claim Fourth Amendment protection in a place.

Since the founding era, courts have recognized that family members may share in each other's expectations of privacy. *See Carter*, 525 U.S. at 95-96 (Scalia, J., concurring) (discussing *Oystead v. Shed*, 13 Mass. 520 (1816)). That acknowledgement respects the sanctity of the "private realm of family life which the state cannot enter." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). That sanctity also extends to the family car, which today plays a central role in the lives of many Americans. *Prouse*, 440 U.S. at 662 ("Many people spend more hours each day traveling in cars than walking on the streets. Undoubtedly, many find a greater sense of security and privacy in traveling in an automobile than they do in exposing themselves by pedestrian or other modes of travel."). People reasonably expect the privacy inherent in their family unit to extend to their vehicle, especially the closed and locked spaces such as the glove compartment and trunk. When immediate family members share a car, they share that expectation of privacy in the vehicle as well.

Rental cars are no different. Families rent vehicles, often for sustained periods of time, in a wide range of circumstances. They can put rental cars to all the same uses as their privately owned vehicles. A family may rent a car, for example, when an owned vehicle is being repaired or while the family is on vacation. And when they do so, society generally accepts that they are entitled to privacy in that shared space to the same degree as if they owned the car or leased it on a long-term basis. Thus, a driver's close familial

connection to the renter supports finding that the driver reasonably expected privacy in a rental car. *See, e.g.*, *United States v. Smith*, 263 F.3d 571, 586 (6th Cir. 2001) (that an unlisted driver "was given the vehicle by his wife" is relevant to whether he had a reasonable expectation of privacy in a rental vehicle).

Byrd's close familial relationship to the renter further establishes his reasonable expectation of privacy in the car. Latasha Reed, Byrd's fiancée and the mother of their five children, rented the car for their shared use. JA 179-81. Society recognizes that family members expect the contents of a shared family car to remain private and free from unwarranted intrusion. Indeed, the government presumably would admit that Byrd would have enjoyed full Fourth Amendment rights in a vehicle owned by Reed, given his close familial relationship to her. Its insistence that Byrd had no Fourth Amendment rights here then stems *solely* from the fact that Reed rented the car and did not own it. That position is wholly insensitive to the "private realm of family life," which is too important to turn on whether a family rents a car or owns one.

## II. The Authorized-Driver Provision Did Not And Should Not Render Byrd's Expectation Of Privacy In The Locked Trunk Of The Rental Car Objectively Unreasonable.

The Court of Appeals reached the wrong outcome in this case because it focused upon the authorized-driver provision in the rental company's standard-form rental agreement, instead of the core privacy

concepts of possession and control. Without explanation, that court concluded that a driver who is not listed in the rental agreement "has no cognizable property interest in the rental vehicle and therefore no accompanying right to exclude." *Kennedy*, 638 F.3d at 165; *see* Pet. App. 8a. And on the basis of that initial conclusion, the Court of Appeals held that an unlisted driver necessarily lacks an objectively reasonable expectation of privacy in a rental car.

The Court of Appeals misapprehended both the content of the rental agreement and its significance to the privacy analysis.[9] This Court has never pinned its determination of whether particular expectations of privacy are reasonable to the terms of a private agreement. And for good reason: standard-form commercial contracts rarely, if ever, are meant to reflect and effectuate societally recognized privacy interests. Indeed, the agreement here did not purport to prohibit an unlisted party from *possessing* the car or *excluding others* from it, which is what matters for the Fourth Amendment.

Nor does the mere fact that a renter breaches the rental agreement by allowing an unlisted person to drive the car strip the driver of an otherwise reasonable expectation of privacy. The rental companies know and expect that unlisted persons will drive rental vehicles. That is why the agreement addresses that situation and makes clear that the renter incurs the risk of loss when an unlisted driver operates the vehicle.

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[9] As explained *infra* § III, the Court of Appeals also erred in assuming that Byrd had no property rights in the rental car.

Finally, a rule that would base the Fourth Amendment analysis on the terms of standard-form rental contracts would create incentives for police officers to engage in general searches of rental cars. And it would fail to provide clear and administrable guidance to trained officers in the field.

### A. Byrd's reasonable expectation of privacy in the rental car did not depend on compliance with the authorized-driver provision.

#### 1. The terms of private agreements generally do not negate otherwise objectively reasonable expectations of privacy.

This Court has never held that the terms of a private agreement, setting out the terms of a commercial transaction, negate an otherwise objectively reasonable expectation of privacy under the Fourth Amendment. That is because the terms of boilerplate commercial contracts typically serve business purposes wholly extraneous to privacy considerations.

A hotel, for example, may opt to provide in its generic terms and conditions that it retains the right to access a guest's room for safety reasons or to provide services to guests. Despite such a provision, a guest retains his reasonable expectation that neither the public nor the police will intrude upon his private effects without justification while he stays at the hotel. *See Stoner*, 376 U.S. at 490 ("No less than a tenant of a house, or the occupant of a room in a boarding house … a guest in a hotel room is entitled to constitutional

protection against unreasonable searches and seizures.... That protection would disappear if it were left to depend upon the unfettered discretion of an employee of the hotel.").

Similarly, a tenant of a rental apartment maintains a reasonable expectation that his residence will be free from unwarranted third-party intrusion "even though … his landlord [may] ha[ve] the right to conduct unannounced inspections at any time." *O'Connor*, 480 U.S. at 730; *see also Chapman v. United States*, 365 U.S. 610, 617-18 (1961). And there is no reason to believe this Court would have reached a different result in *Katz* if the phone company had posted terms of use prohibiting use of its phone booth for placing gambling bets. A reasonable person's expectation of privacy generally does not depend on the terms of commercial contracts. It instead rests on "longstanding social custom." *Olson*, 495 U.S. at 98.

### 2. Authorized-driver provisions have nothing to do with reasonable expectations of privacy in rental cars.

Nothing about the specific rental agreement in this case bears on a driver's reasonable expectation of privacy. Rental agreements are about allocation of the risk of loss, not privacy. And the rental agreement in this case did not bar Byrd from possessing the car and excluding others from it.

**a.** Rental-car contracts generally, and authorized-driver provisions specifically, have nothing to do with the privacy interests that a reasonable person has

when driving a rental car with the permission of the renter. As discussed (*supra* 21-24), a driver's reasonable expectation of privacy in a car comes from society's recognition that people expect privacy in places within their control, sheltered from public view. That expectation is no different for an unlisted driver, who controls the car and stores private possessions in the car's locked compartments. Unlisted drivers are commonplace. People take the wheel of rental cars they did not anticipate driving for myriad reasons every day. They may do so if the renter has had one too many drinks; if the renter unexpectedly tires or falls ill; if the renter does not feel comfortable driving in the dark or in the rain; or if the parent who rented the car is sick and cannot drive her child to school that morning. When an unlisted driver takes the wheel under those conditions or at any other time with the renter's permission, that driver exercises the same possession and control over the car that society generally regards as sufficient for her reasonably to expect privacy in the vehicle.[10]

Rental companies craft their terms and conditions to protect their capital investment in their vehicles, minimize risk of loss and insurance costs, and collect additional fees. *See* JA 19 (linking authorized-driver

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[10] A person may also be an unlisted driver simply because he was confused as to whether a person in a long term cohabitation/engagement relationship would be considered a "spouse" under the rental contract. Courts in New Jersey have treated cohabiting couples as having similar rights as married couples. *In re Estate of Roccamonte*, 808 A.2d 838, 842 (N.J. 2002) ("[W]e recognize[] that unmarried adult partners, even those who may be married to others, have the right to choose to cohabit together in a marital-like relationship … .").

provision and insurance coverage). They do not concern themselves with—let alone attempt to regulate—the privacy of a third-party driver.

Authorized-driver provisions, like the one here, are representative of the terms of rental contracts more generally. The rental companies *know* that it is commonplace for unlisted drivers to operate a rental vehicle. Numerous courts have recognized that an unlisted driver operating a rental vehicle is a "common scenario." *Thrifty Car Rental, Inc. v. Crowley*, 677 N.Y.S.2d 457, 459 (Sup. Ct. Albany Cty. 1998). Indeed, it is such a common occurrence that courts have held it to be "reasonably foreseeable," *Mahaffey v. State Farm Mut. Auto. Ins. Co.*, 679 So. 2d 129, 132 (La. Ct. App. 1996), and "exceedingly" likely. *Motor Vehicle Accident Indemnification Corp. v. Cont'l Nat'l Am. Grp. Co.*, 319 N.E.2d 182, 184 (N.Y. 1974); *see also Fin. Indem. Co. v. Hertz Corp.*, 38 Cal. Rptr. 249, 252, 254 (Cal. Dist. Ct. App. 1964) (rental companies and others have no "reasonable basis for believing that" these sorts of generic restrictions will necessarily "be complied with").

Because they know and expect unlisted drivers to operate rental vehicles, rental companies include provisions addressing risk of loss in that context. Here, for example, the agreement anticipates the possibility of an unlisted driver and spells out in all caps that permitting an unlisted driver to drive "MAY RESULT IN ANY AND ALL COVERAGE OTHERWISE PROVIDED BY THE RENTAL AGREEMENT BEING VOID" and the renter "BEING FULLY RESPONSIBLE FOR ALL LOSS OR DAMAGE, INCLUDING LIABILITY TO THIRD PARTIES." JA 19. Rental

companies may have sound business justifications for including such a provision in their standard-form terms and conditions. But the inclusion of such a provision does not transform the vehicle into a Fourth-Amendment-free zone whenever an unlisted driver takes the wheel.

**b.** The Third Circuit reasoned that unlisted drivers lack a reasonable expectation of privacy in rental cars because persons who are not listed as drivers lack a contractual right to possess the car and exclude others from it. Pet. App. 8a (citing *Kennedy*, 638 F.3d at 165). That is irrelevant to Byrd's reasonable expectation of privacy for the reasons just explained, *supra* 32-34, but it is also not what the agreement says. The authorized-driver provision here limits only the persons who are "permitted to *drive* the vehicle." JA 19 (emphasis added). It nowhere prohibits a third party from possessing, storing possessions in, or excluding others from the vehicle—in other words, the uses of a rental car that people typically associate with privacy. *Supra* 21-24.

With the renter's permission, people expect freedom to ride in the vehicle; sit in it, alone, for as long as they want; retreat to the vehicle to have a personal phone call they don't want others to overhear; store private effects in the vehicle; and even, if need be, sleep in it. And when people have the right to do these things, they also reasonably expect the right to exclude others. Had Byrd elected to sit in the car listening to the radio while Reed went into a store to do some shopping, he could of course have denied entrance to any loiterer in the parking lot who approached the car seeking to get in. Byrd would have

had "dominion and control" over the car and he "could [have] exclude[d] others from it." *See Rakas*, 439 U.S. at 149. The fact that he was not authorized by the contract to *drive* the car is beside the point.

The rental agreement accordingly did not prohibit Byrd's possession and control of the car with the renter's permission. That possession and control gave rise to an objectively reasonable expectation of privacy protected by the Fourth Amendment.

### 3. Breach of a rental agreement does not terminate one's reasonable expectation of privacy in a rental car.

This Court has recognized only one circumstance where a person who has possession of and control over a closed space lacks a reasonable expectation of privacy—where the person stole the property. *See Rakas*, 439 U.S. at 141 n.9. That exception has no application here. The unlisted driver who takes the wheel of a rental car with the renter's permission is not a car thief. He does not commit a theft merely because the rental agreement prohibits unlisted driving. *See Smith*, 263 F.3d at 587. Indeed, after learning that Byrd was an unlisted driver, the troopers at the scene even permitted him (indeed, directed him) to drive the rental car further down the highway. *Supra* 8.

A rule that the Fourth Amendment's protections cease the moment that a rental agreement is breached would naturally extend to other terms in the rental agreement regarding operation of the vehicle.

Boilerplate rental contracts include numerous restrictions on use that rental-car drivers frequently ignore. For example, in some rental agreements, the very same paragraph that prohibits unlisted driving also provides that driving or operating the "car while using a hand-held wireless communication device or other device that is capable of receiving or transmitting telephonic communications, electronic data, mail or text messages shall be deemed a breach of this contract." Budget, *Terms and Conditions United States & Canada* 10 (Apr. 28, 2017), http://tinyurl.com/y8wqrnlu (Budget Agreement). Under the language of that provision, the renter breaches the contract, if the driver (even the listed driver) uses his smartphone to run Google Maps to obtain directions while driving. Likewise, it would violate that agreement to drive on a gravel road. *Id.* (prohibiting operation of the rental car "on unpaved roads"). And just as with the authorized-driver provision here, that agreement makes clear that these contractual violations result in the renter bearing any additional risk of loss. *Id.* at 9-10. Such risk-allocation provisions do not turn a driver violating the technical terms of a private agreement into a car thief.

If the breach of the rental agreement is what matters, then there is no significant distinction between an unlisted driver, on one hand, and a renter who answers a phone call without the help of a hands-free device, on the other. In either case, the rental agreement is materially breached and the rental company can, at least in theory, terminate the contract. But no one would think that such a breach, standing alone, affects whether a person's expectation of privacy in the car is objectively reasonable. An authorized driver

surely does not lose his reasonable expectation of privacy in a rental car simply because he forgets to wear his seatbelt or inadvertently pumps the car with diesel fuel in derogation of the rental contract's conditions. *See United States v. Walton*, 763 F.3d 655, 665 (7th Cir. 2014) (observing that the rental agreement in that case made it a material breach to fail to wear a seatbelt or to fill the car with the wrong kind of fuel).

Further, a rule tying privacy interests to compliance with the terms of a boilerplate commercial contract will have far-reaching consequences, and cannot be cabined to the rental-car context. Like rental-car contracts, residential leases can be full of material boilerplate provisions that tenants frequently disregard. An apartment lease might prohibit pets, for example, or it might prohibit subletting. Violating those provisions may give the landlord the right to terminate the lease and repossess the space. But no court would believe that a tenant's expectation of privacy in her home is unreasonable simply because she has taken in a Yorkshire terrier or that a subletter has no reasonable expectation of privacy in his home because the lease prohibits subletting. And the reason is that neither of these material breaches of the lease agreement has anything to do with whether a person can reasonably expect privacy from unexpected and unwanted intrusions into the apartment.

So too with the rental car. When a driver places his effects in the trunk of a rental car and gets behind the steering wheel, the driver borrowing the car with the permission of the renter reasonably believes that the items placed in the locked trunk are safe from prying eyes and the intrusions of the general public and

the police. The breach of the rental agreement in no way undermines that reasonable expectation of privacy.

### B. Basing the scope of the Fourth Amendment on rental agreements creates incentives to stop rental cars and engage in suspicionless searches.

Linking reasonable expectations of privacy in rental cars to compliance with the authorized-driver provisions of rental agreements would skew police incentives toward conducting widespread suspicionless searches of rental cars. If unlisted drivers have no Fourth Amendment protection in the car, law enforcement officers would have a significant incentive to pull over rental cars whenever the driver commits a technical traffic infraction; check whether the driver is on the rental agreement; and then, if it turns out the driver is unlisted, proceed to search every inch of the car without probable cause to believe that the car contains evidence of a crime. That conduct mirrors the type of suspicionless "search[es] at large for [contraband]" that the founding generation intended the Fourth Amendment to prohibit. *Chadwick*, 433 U.S. at 7-8.

Authorizing such suspicionless searches of rental cars will have far-reaching effects. Even apart from the increasingly popular car-sharing services, like Zipcar, traditional rental-car companies alone have over 2.3 million cars in their fleets. *See* Auto Rental News, *2016 U.S. Car Rental Market*, http://tinyurl.com/loeucnj. In 2015 alone, people rented cars over *115 million* times. *See* Canadean, *Car Rental in*

*the US to 2020: Databook* 24 (Published Aug. 2016, Reference Code: TT1972DB).

The facts of this case illustrate all too starkly that each of those 115 million car rentals may be targeted for suspicionless searches if the Third Circuit's rule that unlisted drivers have no Fourth Amendment rights is affirmed. The troopers admitted that Byrd's driving a rental car was one of the reasons that they followed him and pulled him over. Indeed, they explained that, with their training and experience, they could identify the car as a rental car from prominent barcode stickers that they observed and knew to look for. JA 63. And the troopers admitted that they were well aware of the Third Circuit's rule. They knew that if Byrd was not listed on the rental agreement, they would be able to search the car without probable cause or any other degree of suspicion because in the Third Circuit an unlisted driver has no Fourth Amendment protection in the car. JA 48, 142.

And the incentive to engage in suspicionless searches would not necessarily be limited to rental cars with unlisted drivers. As discussed above (*supra* 36-38), driving without a seat belt, using the wrong kind of gas, or operating a smartphone equally violate rental agreements. Moreover, many, if not most, rental agreements (both automobile and residential) prohibit using the rented premises for criminal activity and deem such activity a material breach. *See* Budget Agreement, *supra*, at 10. That means that a person who has used a rental car to engage in criminal activity will be in material breach of the lease. Thus, if a material breach of a rental agreement eliminates any reasonable expectation of privacy, then the

police would have little reason not to search every rental car they pull over, regardless of who is driving it. If the officers find contraband, no one in the car would have the necessary expectation of privacy to object, as the possession of contraband would constitute a material breach of the agreement.

This Court should not endorse the Third Circuit's rule, which elevates contractual risk-of-loss terms over objectively reasonable privacy expectations and opens the door to suspicionless searches of millions of cars every year.

### C. Basing the scope of the Fourth Amendment on rental agreements would fail to provide clear guidance to officers in the field.

In addition to its other failings, the Third Circuit's rule is impractical to apply. This Court's "general preference" is to "provide clear guidance to law enforcement." *Riley v. California*, 134 S. Ct. 2473, 2491-92 (2014); *see New York v. Belton*, 453 U.S. 454, 458 (1981); *Thornton v. United States*, 541 U.S. 615, 623 (2004). As explained, the Third Circuit's approach hinges the scope of the Fourth Amendment's limits on law enforcement on whether a rental-car driver is authorized by the rental agreement. While that approach is relatively easy to state, its application depends on numerous factors that often cannot be readily ascertained at the scene.

First, an officer in the field will often not have access to the full set of terms and conditions governing

the particular rental transaction. While rental companies typically provide customers with a hard copy of a one-to-two page addendum, which serves as the functional equivalent of the car's registration in the event that a customer interacts with law enforcement, that agreement often does not set out all of the terms and conditions that apply to the transaction. For example, some customers are members of a loyalty program, which has its own terms and conditions that govern all covered rentals. *See, e.g.*, *Spotswood v. Hertz Corp.*, No. CV WMN-16-1200, 2016 WL 6879938, at *1 (D. Md. Nov. 22, 2016). In other cases, the addendum may reference a larger, master agreement, whose generic terms "might be supplied at the time of rental," *see Bradley v. Hertz Corp.*, No. 15-cv-00652-NJR-RJD, 2017 WL 4365956, at *2 (S.D. Ill. Sept. 29, 2017), or may otherwise be accessible on the internet. In any particular instance, the officer at the scene therefore may not be aware of all of the terms and conditions relevant to the question of who is authorized to drive the vehicle.

Second, even if the officer has the entire rental agreement at her disposal, she will not necessarily have sufficient legal training to determine all of the agreement's ramifications. For one thing, rental contracts, like virtually all contracts of adhesion, are densely worded documents that even trained lawyers and judges would find tedious to parse. For another, often not all of the rental agreement's legal ramifications will be evident merely from what the document says. Contracts create obligations between parties against the backdrop of state law. And state law can—and sometimes does—impose terms not expressly

stated in the contract. For example, statutes in several states authorize by operation of law licensed drivers to operate cars that their spouses or co-workers rent, irrespective of the rental contract's terms. *See, e.g.*, Cal. Civ. Code § 1939.01 (defining "authorized driver" as including "the renter's spouse" and "co-worker"); Mo. Rev. Stat. § 407.730; Indiana Code § 24-4-9-1. Thus, an officer's determination of whether a driver is authorized to drive the vehicle must take into account background state law—sometimes, as in this case, the law of a neighboring state in which the car was rented—of which she may or may not be fully and currently aware.

Third, even if the rental agreement fully specifies each category of person permitted to drive the vehicle, it will not necessarily be clear to an officer whether the *particular* driver at the scene qualifies under a particular category. For example, the addendum to the rental agreement here permitted the renter's "co-employee[s]" to drive the rental. JA 19. But who qualifies as a "co-employee"? If an employee of Google rents a vehicle, may only other employees of Google have reasonable expectations of privacy in the vehicle, or do employees of Google's parent corporation—Alphabet—also count? What about a co-worker whose terms of employment specify he is an independent contractor? If such a person does not count, is the officer supposed to apply the common law's multifactor right-to-control test to determine whether the driver is an employee or a private contractor before undertaking a search of the vehicle?

In short, using rental-company authorization as a proxy for societal expectations of privacy is not only a

legally misguided endeavor sanctioning widespread suspicionless searches of cars, but it would also be highly impractical for police officers to apply in the field. The far clearer rule—and the one that society generally accepts and that is rooted in settled principles—is that a person has a reasonable expectation of privacy in a vehicle, if she has possession and control over it with the renter's permission. Unlike the Third Circuit's authorized-driver test, the considerations relevant to possession and control will tend to be readily apparent to an officer at the scene, and thus will likely lead to fewer unlawful searches and fewer cases in which evidence of a crime must be suppressed.

## III. The Third Circuit Also Erred In Suggesting That Byrd Had No Constitutionally Protected Property Interest In The Car.

We have shown that the Court of Appeals erred in holding that Byrd had no objectively reasonable expectation of privacy in the rental car that he was driving. That showing by itself compels reversal. In addition, the court also erred in concluding that unlisted drivers have "no cognizable property interest in … rental vehicle[s]." *Kennedy*, 638 F.3d at 165; *see* Pet. App. 8a. Byrd *did* have a property interest in the rental car, and he may raise a Fourth Amendment challenge to the search because, in conducting the search, the officers violated that property interest.

This Court has recently reiterated that the Fourth Amendment establishes a "simple baseline": that "[w]hen 'the Government obtains information by physically intruding' on persons, houses, papers, or effects, 'a search within the original meaning of the

Fourth Amendment' has 'undoubtedly occurred.'" *Florida v. Jardines*, 569 U.S. 1, 5 (2013) (quoting *Jones*, 565 U.S. at 406 n.3). In other words, the *Katz* reasonable-expectation-of-privacy framework did not displace the "18th-century guarantee" against "physical intrusion[s]" by the government into places in which a person has a property interest. *Jones*, 565 U.S. at 407, 411. Indeed, cases applying the *Katz* framework recognize that an objectively reasonable expectation of privacy may be grounded in "concepts of real or personal property law," in addition to societal understandings of privacy. *Rakas*, 439 U.S. at 143 & n.12.

At the time of the search, Byrd had property rights in the trunk of the rental car—namely, "the property rights of a bailee." *Jones*, 565 U.S. at 404 n.2. Such property rights have long been protected at common law. *See* 2 William Blackstone, *Commentaries* *452-53 (explaining that a bailee has "a special qualified property transferred from the bailor … together with the possession" and that "on account of this qualified property of the bailee, he may … maintain an action …. against any stranger or third person" that may "injure or take away these chattels"). As a bailee, Byrd's property rights included the right to possess the car and to exclude others from it, limited only by Budget's and Reed's superior rights of possession. The troopers in this case violated Byrd's property rights, and therefore conducted a "search" within the meaning of the Fourth Amendment with respect to Byrd, by "physically intruding" into the trunk for the purpose of obtaining information. *Jardines*, 569 U.S. at 5; *Jones*, 565 U.S. at 406 n.3.

When Reed took possession of the car from Budget, she became a bailee. *See* 8 C.J.S. *Bailments* § 1 ("A bailment is created upon delivery of possession of goods and acceptance of their delivery by the bailee."). As a bailee, Reed had a duty of care in safekeeping the bailed property for the bailor. *Rodgers v. Reid Oldsmobile, Inc.*, 156 A.2d 267, 269 (N.J. Super. Ct. App. Div. 1959) (bailment requires "reasonable care"); *Lear Inc. v. Eddy*, 749 A.2d 971, 974 (Pa. Super. Ct. 2000) (bailment requires "ordinary diligence"); *Ferrick Excavating & Grading Co. v. Senger Trucking Co.*, 484 A.2d 744, 749 (Pa. 1984) (bailment requires "great care"). And she became liable to the bailor for damage to the bailed property resulting from any negligence. *Rodgers*, 156 A.2d at 269; *Lear*, 749 A.2d at 974; *Ferrick Excavating*, 484 A.2d at 749.

The bailment also conferred on Reed a possessory property interest in the bailed property—an interest that entails the "right to exclude." *McPherson v. Belnap*, 830 P.2d 302, 303 (Utah Ct. App. 1992); *Lawrence v. State*, 501 S.E.2d 254, 255 (Ga. 1998) ("a bailee has a possessory interest in the bailed property"); *Flagg v. Johansen*, 12 A.2d 374, 376 (N.J. 1940) (a bailee has a "possessory interest" in the bailed property); *United States v. Benitez-Arreguin*, 973 F.2d 823, 831 (10th Cir. 1992) ("A bailment may give 'the bailee the sole custody and control of the article bailed'"); *see generally* 8 C.J.S. *Bailments* § 21 (a bailee has "the right to exclusive use and possession

of the item for the period of the bailment").[11] This makes sense; the law imposes on the bailee a duty to protect the bailed property from damage and thus, as a corollary, confers on the bailee the authority to exclude those who might damage it. *See Godfrey v. Pullman Co.*, 69 S.E. 666, 669 (S.C. 1910) ("the rule is that a bailee has such special property or right in the thing bailed as entitles him to protect it against wrongdoers. As against third persons, he may sue for and recover damages for its injury, loss, or destruction caused by their negligence.").

When Reed transferred the car to Byrd, he too became a bailee.[12] *See U.S. Fire Ins. Co. v. Paramount Fur Serv., Inc.*, 156 N.E.2d 121, 126 (Ohio 1959) (noting that a third-party became a "bailee" even though the initial bailee had no "power or authority to make any subcontract of bailment"); *Siverson v. Martori*, 581 P.2d 285, 288 (Ariz. Ct. App. 1978) (referring to a third-party who borrowed a motorcycle from an initial bailee as a "sub-bailee"); *Revillon Freres v. Cassell Trucking Co.*, 24 A.D.2d 846, 846 (N.Y. App. Div. 1965) (referring to third party that took control of fur

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[11] *Cf. Lockhart v. Western & Atlantic R.R.*, 73 Ga. 472, 473-74 (1885) ("In all cases of bailment, where the property is in possession of the bailee, and a trespass is committed during the continuance of the bailment, this gives the bailee a right of action for interference with his special property, and a concurrent right to the owner or bailor for the interference with his general property.").

[12] The transfer created a subsidiary bailment, sometimes called a "subbailment," in which Reed became a bailor (or "subbailor") to Byrd.

garments as a "subbailee"); *see generally* 8 C.J.S. *Bailments* § 111. And as with the bailment between Budget and Reed, Byrd, as the bailee to Reed, had a duty of care in safekeeping the car and had a possessory property interest necessary to carry out that duty. *Kirchner v. Allied Contractors, Inc.*, 131 A.2d 251, 253 (Md. 1957). The bailment thus afforded Byrd the right to exclude all the world (except Budget and Reed), including, as relevant here, the troopers.

The fact that Budget (the initial bailor) did not give Reed (the initial bailee) permission to lend the car to Byrd does not affect Byrd's status as a bailee. A subbailment is created between the initial bailee and a third party when the third party knowingly accepts the bailed good, even if the bailor did not give the bailee permission to subbail the property. *U.S. Fire Ins. Co.*, 156 N.E.2d at 126 ("Where, otherwise than by a mutual contract of bailment, one person has lawfully acquired the possession of personal property of another, the one in possession is, by operation of law, generally treated as a bailee of such property and may therefore reasonably be referred to as a constructive bailee."); *Moreno v. Idaho*, No. 4:15-CV-00342-BLW, 2017 WL 1217113, at *5 (D. Idaho Mar. 31, 2017) (where owner did not authorize subbailment, driver was a gratuitous sub-bailee); *see also* Kurt Philip Autor, *Bailment Liability: Toward A Standard of Reasonable Care*, 61 S. Cal. L. Rev. 2117, 2120 n.4 (1988) ("A sub-bailment arises when a bailee delivers possession of the bailed goods to a third party, either with or without the original bailor's authority."); N.E. Palmer & J.R. Murdoch, *Defining the Duty of the Sub-Bailee*, 46 Mod. L. Rev. 73 (1983); N.E. Palmer, *Bailment* 786 (1979) ("sub-bailment" is "that relationship which

arises whenever a bailee of goods, *with or without the authority of his bailor* transfers possession to a third party" (emphasis added)). And that's a good thing *for Budget* because the subbailment obligated Byrd to take care of the car, return it to Reed or Budget, and pay for any damage to the car he caused.[13] And the accompanying right to exclude gave Byrd the legal authority to protect the car against those who might damage it.

Thus, when the troopers physically invaded the locked trunk of the car to conduct a search for evidence of criminal activity, they infringed a property right that Byrd had as a bailee. Since the Founding, that sort of police undertaking—violating a person's property rights for the purpose of obtaining information—has been deemed a search that entitles the holder of the property to full Fourth Amendment protection. Byrd is therefore entitled to challenge the search under the Fourth Amendment. Indeed, that is, again, what this Court effectively said in *Rakas*: "One who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of [his] right to exclude." 439 U.S. at 143 n.12.

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[13] Indeed, some rental contracts expressly provide, for example, that it is a violation of the rental agreement for an unauthorized driver to "fail to promptly report any damage to or loss of the car when it occurs, or when you learn of it and provide [the rental company] with a written accident/incident report." Budget Agreement, *supra*, at 10.

## CONCLUSION

This Court should reverse the judgment of the Court of Appeals.

Respectfully submitted,

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