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Brief of the National Association for Public Defense as Amici Curiae Supporting Petitioner, Byrd v. U.S. (U.S. June 12, 2017) (No. 16- 1371).

Janet Moore
University of Cincinnati College of Law, janet.moore@uc.edu

No. 16-1371

IN THE

Supreme Court of the United States

TERRENCE BYRD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF THE NATIONAL ASSOCIATION FOR PUBLIC DEFENSE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

JANET MOORE
CO-CHAIR, *AMICUS* COMMITTEE,
NATIONAL ASSOCIATION FOR
PUBLIC DEFENSE
For identification purposes only:
ASSOCIATE PROFESSOR
UNIVERSITY OF CINCINNATI
COLLEGE OF LAW
2540 Clifton Avenue
Cincinnati, OH 45221

DAVID DEBOLD
Counsel of Record
LOCHLAN F. SHELFER
KEVIN J. BARBER
MONICA L. HAYMOND
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 955-8500
ddebold@gibsondunn.com

ANDREW P. LEGRAND
GIBSON, DUNN & CRUTCHER LLP
2100 McKinney Avenue
Suite 1100
Dallas, TX 75201

Counsel for Amicus Curiae

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INTEREST OF *AMICUS CURIAE*

The National Association for Public Defense (NAPD) is an association of more than 14,000 public defenders and other professionals who have sought to ensure that indigent clients secure their constitutional right to effective assistance of counsel.* NAPD members are advocates in jails, courtrooms, and communities, as well as experts in best practices and the practical, day-to-day representation of criminal defendants. Their collective expertise represents state, county, and local systems through full-time, contract, and assigned-counsel delivery mechanisms, dedicated juvenile, capital, and appellate offices, and a diversity of traditional and holistic practice models. The NAPD has a deep interest in the correct interpretation of laws and constitutional provisions affecting the rights of criminal defendants—particularly defendants who cannot afford to hire private counsel.

As a national organization, the NAPD is committed to ensuring that the Fourth Amendment is interpreted correctly and consistently throughout the United States. It agrees with petitioner that courts in state and federal jurisdictions across the country, like the Third Circuit in this case, have erred in denying individuals their constitutional right to a reasonable

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* Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party, or any person other than *amicus curiae* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.2, counsel for *amicus curiae* states that counsel for petitioner and respondent received timely notice of intent to file this brief. All parties have consented in writing to the filing of this brief.

expectation of privacy merely because they are not listed as authorized drivers on rental-car agreements. Pet. 15–18, 27–34. This approach both defies widely shared social expectations and misconstrues state law. It also disproportionately affects Americans who lack the resources to own property in their own names. Certiorari should be granted.

SUMMARY OF ARGUMENT

More than two centuries after it was ratified, the Fourth Amendment continues to protect the "right of the people to be secure" from "unreasonable searches." U.S. Const. amend. IV. Modern technological advances and social developments do not render our rights "any less worthy of the protection for which the Founders fought." *Riley* v. *California*, 134 S. Ct. 2473, 2494–95 (2014). This Court plays an essential role in ensuring that the Fourth Amendment retains its vitality as an indispensable safeguard of liberty, even as Americans dramatically change the ways they organize their everyday affairs.

This case calls for the Court to play that role once again. The lower courts have sharply diverged over whether a driver of a rental car whose name is not listed on the rental agreement can have a reasonable expectation of privacy in the car—a frequently recurring issue, because police commonly treat a driver's use of a rental car as a basis for reasonable suspicion to justify a traffic stop. *See*, *e.g.*, *State* v. *Adan*, 886 N.W.2d 841, 847 (N.D. 2016). As a result of this split, the location where a person is driving at the time of a traffic stop could determine whether he has a Fourth Amendment right to privacy in a rental car. This Court has provided little guidance to date on the scope

of the Fourth Amendment rights of those who use property that someone else has rented. This case offers an opportunity to clear away the confusion about the Fourth Amendment's scope in a society that uses rental cars with increasing frequency.

I. The rising reliance of Americans (especially the economically disadvantaged) on car rentals supports this Court's review. The ascendance of the "sharing economy" has highlighted that more people than ever rent rather than own the key instrumentalities of life, whether out of personal preference or financial necessity. This case presents an opportunity to provide needed guidance to the deeply divided lower courts on the Fourth Amendment rights of non-owners—particularly rental-car drivers whose names have not been added to rental contracts. As the petition ably explains, this issue recurs with great frequency, and it has sharply divided state and federal courts nationwide. Pet. 19–24. The Court should not allow the Fourth Amendment rights of rental-car drivers to depend on jurisdictional happenstance, especially in light of the inherent mobility of motor vehicles. *See*, *e.g.*, *Whren* v. *United States*, 517 U.S. 806, 815 (1996).

II. The rule applied by the court of appeals below is wrong and systematically underprotects the privacy rights of rental-car drivers. To assert an expectation of privacy that "society is prepared to recognize as 'reasonable,'" it is not necessary to have a formal property interest in the area searched. *Katz* v. *United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring); *see* Pet. 32–34. Even if such an interest were required, it is far from obvious that the Third Circuit applied such a requirement correctly. In many jurisdictions, an unlisted rental-car driver who has the

renter's permission has a property or possessory interest in the car, along with the rights and duties accompanying that interest. And many courts routinely decline to enforce the prohibitions on unlisted drivers contained in many rental-car contracts. The court of appeals' rule is therefore unsound regardless of how one tests the reasonableness of a driver's expectation of privacy.

ARGUMENT

This case poses the question whether a rental-car driver who has the renter's, but not the owner's, permission to use the car can have a reasonable expectation of privacy in the vehicle. Pet. i. This question is plainly suitable for certiorari under this Court's traditional standards, as the petition explains, because it is the subject of an entrenched disagreement among several federal courts of appeals and state courts of last resort. *See* Sup. Ct. R. 10(a). But it also demands resolution in light of the increasing prevalence of car rentals in the United States, as well as their particular importance in poorer communities.

I. THE EVOLUTION OF OUR NATION'S RENTAL ECONOMY SUPPORTS CERTIORARI.

Car and other property rentals play an increasingly important role in our economic and social life. Although rentals are nothing new, in recent years Americans have been renting cars, housing, and other property at increasing rates and under arrangements that were not even possible just 10 or 20 years ago. Economically disadvantaged individuals in particular frequently use rentals and similar arrangements to mitigate or escape the cycle of poverty. Merits aside, this case calls for review to clarify the privacy rights

of the many millions of Americans who now rely on rented cars and other property—even if they are not formally listed as drivers or other users in the relevant rental agreements.

A. Car Rentals Play a Critical and Increasingly Prominent Role in American Life.

We are a car-dependent society. In sharp contrast to our pre-automobile ancestors, who would rarely venture more than a handful of miles beyond their homes, today more than 86 percent of U.S. workers commute by car. U.S. Census Bureau, *Who Drives to Work? Commuting by Automobile in the United States: 2013*, at 2 (2015), https://goo.gl/ND5QSy.

Just as automobiles changed the way commuters and others get where they need to go, technological and cultural developments have changed the way people access automobiles. In large part due to the rise of the modern "sharing economy," Americans increasingly "rent their cars, instead of buying them." Matt Phillips, *Why More and More Americans Are Renting Cars Instead of Buying Them*, Quartz (June 2, 2014), https://goo.gl/sDUWVP. This trend is emblematic of a broader social shift. "Instead of buying and owning things, consumers want access to goods and prefer to pay for the experience of temporarily accessing them. Ownership is no longer the ultimate expression of consumer desire." Fleura Bardhi & Giana M. Eckhardt, *Access-Based Consumption: The Case of Car Sharing*, 39 J. Consumer Res. 881, 881 (2012) (citation omitted). "Collaborative Consumption is not a niche trend, and it's not a reactionary blip to the 2008 global financial crisis. It's a growing movement with millions of

people participating from all corners of the world." Rachel Botsman & Roo Rogers, *What's Mine Is Yours: The Rise of Collaborative Consumption* xvi (2010).

For example, "car sharing" allows consumers to "temporarily gain access to cars," often using a mobile-phone or online application, "in return for a membership fee." Bardhi & Eckhardt, *supra*, at 881. Over the past decade or so, car sharing has led to a dramatic increase in the number of Americans using cars that they do not own. *See id.* at 886 ("car sharing is a popular alternative to car ownership and has grown systematically in the United States, where the revenue from car-sharing programs is expected to be $3.3 billion in 2016, up from $253 million in 2009").

This trend has magnified economically disadvantaged communities' preexisting reliance on rental cars. Despite the importance of automobiles to life and livelihood, many Americans simply cannot afford to purchase a car. Twenty-four percent of households in poverty do not own a vehicle, and low-income populations are twice as likely to travel in multi-occupant vehicles, through car sharing and carpooling. National Household Travel Survey, *Mobility Challenges for Households in Poverty* 2 (2014), https://goo.gl/U7PBwn. Frequently, members of low-income households rent cars or "borrow[] them from neighbors, friends, or relatives." John Pucher & John L. Renne, *Socioeconomics of Urban Travel: Evidence from the 2001 NHTS*, 57 Transport. Q. 49, 57 (2003). Indeed, empirical data show that minorities tend to rent cars at higher rates. Kevin Neels, *Effects of Discriminatory Excise Taxes on Car Rentals: Unintentional Impacts on Minorities, Low Income Households, and Auto Purchases* 4–5 & tbl. 2 (2010).

These patterns are a critical part of the sharing economy, which consists largely of social networks that low-income individuals use to survive and eventually break the cycle of poverty. *See*, *e.g.*, Silvia Dominguez & Celeste Watkins, *Creating Networks for Survival and Mobility: Social Capital Among African-American and Latin-American Low-Income Mothers*, 50 Soc. Probs. 111 (2003). By pooling resources and support, individuals can leverage their networks to increase socioeconomic mobility. *Id.* at 124. "Low-income communities frequently pool resources in order to maximize them. Anchored in strong social networks and the collective mindset of low-income individuals, this practice is at the core of collective assets and casual lending with relaxed reciprocity." Edna R. Sawady & Jennifer Tescher, *Financial Decision Making Processes of Low-Income Individuals* 9 (2008), https://goo.gl/d6jJOq.

The rise of the sharing economy, together with the existing importance of rental cars to poorer Americans, has resulted in the proliferation of shared rental cars among low-income and minority households. Thus, among the Americans who increasingly rely on rental cars today are many members of our society's most disadvantaged groups.

Whether they realize it or not, people who sign agreements with traditional rental-car companies or who click "accept" on their mobile phone when presented with the terms of modern car-sharing services have bought into restrictions on who may drive the car. *See*, *e.g.*, Zipcar, *Rules of Vehicle Use* § 1 (Jan. 1, 2017), https://goo.gl/ftvGXC ("Non-Members are expressly prohibited from driving a Zipcar vehicle at any

time."). But "[f]ew people actually read" these provisions. Irma S. Russell, *Got Wheels?: Article 2A, Standardized Rental Car Terms, Rational Inaction, and Unilateral Private Ordering*, 40 Loy. L.A. L. Rev. 135, 136 (2006). As detailed below, contractual restrictions about who may operate rental cars have resulted in a conflict among the lower courts on the proper application of the Fourth Amendment.

B. The Court Should Clarify the Fourth Amendment Rights of Users of Rented Vehicles.

The dramatic social trend toward the use of rentals and the increased reliance on the sharing economy make it especially important that the Court clarify the Fourth Amendment rights of non-owners. The Court should grant certiorari to resolve a deep lower-court split over whether a rental-car driver may challenge an unlawful vehicle search when it turns out that the renter did not add the driver's name to the rental agreement. *See* Pet. 11–19.

The Court plays a critical role in clarifying how the Fourth Amendment applies to new technologies, having repeatedly enforced the Fourth Amendment in light of new technological developments. *See*, *e.g.*, *Kyllo* v. *United States*, 533 U.S. 27 (2001) (holding that the use of "sense-enhancing technology" to view the interior of a home invades a reasonable expectation of privacy); *City of Ontario* v. *Quon*, 560 U.S. 746 (2010) (holding that there is no reasonable expectation of privacy in text messages sent through a city department–issued pager); *United States* v. *Jones*, 565 U.S. 400 (2012) (holding that attaching a GPS tracker to the bottom of a car constitutes a search);

Riley v. *California*, 134 S. Ct. 2473 (2014) (holding that police must have a warrant before accessing cell phone data).

The Court has also ensured that its Fourth Amendment jurisprudence keeps pace with new social developments. *See*, *e.g.*, *Safford Unified Sch. Dist. No. 1* v. *Redding*, 557 U.S. 364 (2009) (holding that a middle school's strip search of a student suspected of possessing contraband violated the Fourth Amendment); *Florida* v. *Riley*, 488 U.S. 445 (1989) (holding that helicopter surveillance 400 feet above a defendant's greenhouse did not constitute a search in part because the aircraft's flight was in compliance with FAA regulations). The Court has accordingly stressed the importance of "the everyday expectations of privacy that we all share," *Minnesota* v. *Olson*, 495 U.S. 91, 98 (1990), and focused on what "society is prepared to recognize as 'reasonable,'" *Katz* v. *United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

Despite the rise of the rental economy, the Court has provided little guidance on the Fourth Amendment rights of non-owners. To be sure, the reasoning in the Court's most relevant cases helps demonstrate that the Third Circuit's decision here is wrong. In cases involving the Fourth Amendment rights of overnight houseguests and hotel guests, for example, the Court has established that a person can have a reasonable expectation of privacy in a place even in the absence of any formal ownership interest. *See*, *e.g.*, *Olson*, 495 U.S. at 100 (holding that an overnight guest has a reasonable expectation of privacy without needing absolute control over the home); *Stoner* v. *California*, 376 U.S. 483, 490 (1964) (holding that a

warrantless search of a defendant's hotel room without consent was unlawful even if the hotel clerk consented). These cases only go so far, however, in clarifying whether an unlisted rental-car driver has a reasonable expectation of privacy.

As a result of the extensive lower-court split on the question presented, Pet. 11–19, a motorist's Fourth Amendment rights can vary depending on which State she happens to be driving in. For example, a resident of Colorado City, Arizona can borrow a friend's rental car without sacrificing her expectation of privacy, but only if she takes care to avoid driving over the line that splits her town between Arizona and Utah. In some jurisdictions, the applicable rule even depends on whether the driver is charged by federal or state prosecutors in the event wrongdoing is uncovered. Pet. 20–21. "[P]olice enforcement practices" may "vary from place to place and from time to time," but this Court has refused to "accept that the search and seizure protections of the Fourth Amendment are so variable and can be made to turn upon such trivialities." *Whren* v. *United States*, 517 U.S. 806, 815 (1996); *accord Virginia* v. *Moore*, 553 U.S. 164, 171–72 (2008). Particularly when a case involves automobiles, which can and do move from place to place with ease, national uniformity in the interpretation of the Fourth Amendment is critical to ensuring fair treatment and upholding the rule of law.

This lack of clarity is especially problematic because, as discussed above, rental cars are critically important to underprivileged communities. As Justice Sotomayor explained last Term, a more restrictive view of the Fourth Amendment's protections has a disproportionately harmful effect on minorities and other

disadvantaged groups. *Utah* v. *Strieff*, 136 S. Ct. 2056, 2068–71 (2016) (dissenting opinion); *see also*, *e.g.*, Amelia L. Diedrich, *Secure in Their Yards? Curtilage, Technology, and the Aggravation of the Poverty Exception to the Fourth Amendment*, 39 Hastings Const. L.Q. 297, 317 (2011) ("Residents of poor neighborhoods are more frequently subject to searches of their person in the form of overly aggressive stop and frisk tactics."). Car rentals' increasing popularity and prominent place in economically disadvantaged communities give this case added urgency, amplifying its suitability for certiorari under this Court's traditional standards.

* * *

This case would be an ideal candidate for review in any context: It squarely presents an important, recurring question of constitutional law that has divided the lower courts. Certiorari is particularly appropriate, however, in light of the important function rental cars serve in today's society.

II. THE THIRD CIRCUIT'S DECISION MISAPPLIES THE FOURTH AMENDMENT AND MISCONSTRUES PROPERTY LAW.

This case is also an ideal vehicle because the Third Circuit's approach exemplifies how numerous lower courts have erroneously denied unlisted rental-car drivers the opportunity to assert their Fourth Amendment rights. First, the court of appeals' approach contravenes this Court's Fourth Amendment case law by erroneously making a boilerplate rental-car contract almost entirely dispositive of whether a driver has a reasonable expectation of privacy in the vehicle. Sec-

ond, even if this inquiry could be distilled to an analysis of the driver's formal legal rights in the vehicle, the Third Circuit's reasoning rests on a mistaken view of the common law of property. Third, courts commonly decline to enforce rental-agreement restrictions on unlisted drivers, revealing the illogic of conditioning constitutional rights on contractual provisions that often have no effect.

A. The Third Circuit's Rule Runs Afoul of Core Fourth Amendment Principles.

This Court's Fourth Amendment jurisprudence eschews bright-line rules to determine whether a person has a reasonable expectation of privacy, particularly rules that depend on the arcana of state law. But one would never know it from reading the Third Circuit's opinions on the privacy rights of unlisted rental-car drivers.

In *United States* v. *Kennedy*, 638 F.3d 159 (3d Cir. 2011)—the case that governed the outcome here—the Third Circuit held that a driver not listed on a rental agreement almost always lacks a reasonable expectation of privacy in the rental car. The court held that "as a general rule," an unlisted driver "lacks a legitimate expectation of privacy in the car unless there exist extraordinary circumstances suggesting an expectation of privacy." *Id.* at 165. It reasoned that "the lack of a cognizable property interest in the rental vehicle and the accompanying right to exclude make[] it generally unreasonable for an unauthorized driver to expect privacy in the vehicle." *Id.* at 167. Indeed, the Third Circuit has never found the "extraordinary circumstances" proviso applicable. In this case and others, it has instead treated *Kennedy*'s holding as akin

to a per se rule, applying it with scant analysis of the factual circumstances. *See*, *e.g.*, Pet. App. 13a–14a; *United States* v. *Mebrtatu*, 543 F. App'x 137, 139 (3d Cir. 2013); *United States* v. *Norman*, 465 F. App'x 110, 116 n.9 (3d Cir. 2012). The only circumstances it has recognized as an exception are "truly unique" and extremely narrow—such as when the unlisted driver is married to the renter, "personally contacted the rental car company" to make the reservation, *and* "reserved the vehicle in his name, using his own credit card." *Kennedy*, 638 F.3d at 165, 168 (internal quotation marks omitted) (discussing *United States* v. *Smith*, 263 F.3d 571 (6th Cir. 2001)).

This is not how the Fourth Amendment is supposed to work. "[F]or the most part *per se* rules are inappropriate in the Fourth Amendment context." *United States* v. *Drayton*, 536 U.S. 194, 201 (2002); *see also*, *e.g.*, *Oliver* v. *United States*, 466 U.S. 170, 177 (1984) ("No single factor determines whether an individual legitimately may claim under the Fourth Amendment that a place should be free of government intrusion not authorized by warrant."). Although courts are inclined to provide clear guidance, they must be careful in this area not to devise rigid rules that disregard meaningful differences among cases. *See*, *e.g.*, *Sibron* v. *New York*, 392 U.S. 40, 59 (1968) ("The constitutional validity of a warrantless search is preeminently the sort of question which can only be decided in the concrete factual context of the individual case."); *Go-Bart Importing Co.* v. *United States*, 282 U.S. 344, 357 (1931) ("There is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances.").

Furthermore, a person's "capacity to claim the protection of the Fourth Amendment" does not depend on his ability to assert a formal "property right in the invaded place." *Rakas* v. *Illinois*, 439 U.S. 128, 143 (1978). Instead, "[l]egitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, *either* by reference to concepts of real or personal property law *or* to understandings that are recognized and permitted by society." *Id.* at 143 n.12 (emphases added); *see also*, *e.g.*, *Jones*, 565 U.S. at 414 (Sotomayor, J., concurring) ("[E]ven in the absence of a trespass, a Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable." (internal quotation marks omitted)). The Court has therefore recognized that people can have a reasonable expectation of privacy in areas they have no legal right to control. *See*, *e.g.*, *Olson*, 495 U.S. at 100 (overnight guest).

The approach of the Third Circuit (and the other courts aligned with it) is inconsistent with these principles. For one, this approach glosses over consequential differences among cases by dismissing the privacy expectations of almost any rental-car driver who lacks the rental company's permission. The Third Circuit's rule treats people who use rental cars with the renters' permission—an exceedingly common practice in society—the same way it treats those who use rental cars with no permission at all. *See* Pet. 33–34 (noting that petitioner's operation of the rental car was not wrongful in any criminal sense); *see also*, *e.g.*, *Commonwealth* v. *Campbell*, 59 N.E.3d 394, 402 (Mass. 2016) ("A renter's decision to allow a person who is not a permitted driver according to the rental

agreement to drive a rental vehicle may be a breach of that agreement, but it does not also result in a violation of criminal law."). In fact, the Third Circuit has relied on *Kennedy* in holding that "the possessor of a stolen vehicle lacks standing to challenge a search of the vehicle." *United States* v. *White*, 504 F. App'x 168, 171–72 (2012).

The Third Circuit also ignores how society views innocuous usage of rental cars by unlisted drivers. Numerous courts have recognized how common it is for individuals not listed on rental agreements to drive rental cars. *See*, *e.g.*, *Mahaffey* v. *State Farm Mut. Auto. Ins. Co.*, 679 So. 2d 129, 132 (La. Ct. App. 1996) ("[W]hen there is a general, broad admonition not to let anyone else drive the car" or even an "express prohibition against third drivers," it is "reasonably foreseeable" that "the permittee would allow someone else to drive the car."). Many have acknowledged that the likelihood of unlisted drivers using rental cars is "exceedingly great," calling the practice "foreseeable," *Motor Vehicle Accident Indem. Corp.* v. *Cont'l Nat'l Am. Grp. Co.*, 319 N.E.2d 182, 184 (N.Y. 1974), and a "common scenario," *Thrifty Car Rental, Inc.* v. *Crowley*, 677 N.Y.S.2d 457, 459 (Sup. Ct. Albany Cty. 1998); *see also Chandler* v. *Geico Indem. Co.*, 78 So. 3d 1293, 1299 (Fla. 2011) ("a bailee or lessee of a rented automobile, similarly as its owner, may permit another to operate it (and often does)." (internal quotation marks omitted)); *State* v. *Cutler*, 159 P.3d 909, 912 (Idaho Ct. App. 2007) (noting "the increasingly common utilization of rental vehicles for a myriad of purposes"). Use of a rental car by an unlisted driver is "in the very nature of modern automobile use." *Roth* v. *Old Republic Ins. Co.*, 269 So. 2d 3,

6–7 (Fla. 1972). *Kennedy* thus got it exactly backwards when it characterized sharing of rental cars as a sinister, "deceptive" act rather than what it really is: "a largely harmless and even expected occurrence that can be easily managed by the owner." 638 F.3d at 167 (seeking to draw contrast with renters who return their vehicles late).

The fine print of a private contract of adhesion "cannot control the paramount constitutional question" whether a person has a reasonable expectation of privacy. *United States* v. *Owens*, 782 F.2d 146, 150 (10th Cir. 1986). Although they can certainly be a relevant factor, a defendant's formal legal rights in relation to a given location are rarely dispositive of whether he reasonably expects that place to be open for "public inspection." *California* v. *Greenwood*, 486 U.S. 35, 41 (1988); *see also*, *e.g.*, *United States* v. *Chaves*, 169 F.3d 687, 690 (11th Cir. 1999) ("lack of ownership is not dispositive"). The Third Circuit's approach conflicts with this Court's Fourth Amendment precedent and cannot be sustained.

B. Unlisted Drivers Can Have Cognizable Property Interests in Rental Cars.

The Court has warned that Fourth Amendment protections should not hinge on "arcane distinctions developed in property" law, *Rakas*, 439 U.S. at 143, but the Third Circuit's test is even worse: It hinges on a *misunderstanding* of property law. Under the common and statutory law of many jurisdictions, it is simply untrue that "an unauthorized driver has no cognizable property interest in the rental vehicle." *Kennedy*, 638 F.3d at 165. To the contrary, in a number of States a person who drives a rental car with the

renter's permission has legal rights and duties that arise from that temporary control of the car. *See*, *e.g.*, *Hall* v. *State*, 477 S.E.2d 364, 366 (Ga. Ct. App. 1996) (unlisted rental-car driver's "use of the car created a bailment"). When it comes to the question of who is an "authorized" driver, the property law in these States does what the Third Circuit's approach does not—it accounts for the substantial difference between a driver who has the renter's permission to use the car and someone who has no permission at all.

State law often defines the contours of property interests protected by the Constitution. *See Bd. of Regents of State Colls.* v. *Roth*, 408 U.S. 564, 577 (1972) ("Property interests, of course, are not created by the Constitution. Rather they are created … from an independent source such as state law."); Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 80 (1998) ("[S]tate law typically defines the property rights given constitutional protection against federal officials."). Bailment law governs the rights and obligations of persons who receive possession of an item, such as a car, from someone who has permission to use the item from the owner. Such persons are referred to as "permittees," "sub-permittees," "bailees," or "sub-bailees."

At common law, anyone who acquired possession of an item, whether with the ultimate owner's permission or not, was required "to be diligent, to keep the chattel as his own," or be liable to the owner. Samuel Stoljar, *The Early History of Bailment*, 1 Am. J. Legal Hist. 5, 22 (1957). Further, anyone who acquired such liability also had the corresponding right to exclude others and, for a limited period, obtained sole custody and control of the item. Albert S. Thayer, *Possession*,

18 Harv. L. Rev. 196, 206 (1905) ("If a bailee intends to exclude strangers to the title, it is enough for possession under the law, although he is perfectly ready to give the thing up to its owner at any moment." (citation omitted)); *see also*, *e.g.*, *State* v. *Sanders*, 614 P.2d 998, 1000, 1004 (Kan. Ct. App. 1980) (recognizing a sub-permittee's possessory interest in a car). Accordingly, some States hold a sub-bailee, a bailee, and the owner all equally liable for negligence. *See*, *e.g.*, *Pabon* v. *InterAmerican Car Rental, Inc.*, 715 So. 2d 1148, 1150 (Fla. Ct. App. 1998).

With the development of automobiles and rental vehicles, States have built an array of doctrines on top of this common-law background to regulate sub-bailees. Several jurisdictions treat undisclosed drivers of rental cars as foreseeable contingencies and permit additional drivers to retain possessory interests in rental cars while they are driving them. In New York, for example, rental-car agencies are considered to have "constructively" consented to additional drivers for certain purposes despite contractual provisions restricting use of the vehicle to the renter and his immediate family. *Motor Vehicle Accident Indem. Corp.*, 319 N.E.2d at 184. These jurisdictions reason that rental-car companies "kn[o]w or certainly should … know[] that the probabilities [of] vehicles coming into the hands of another person are entirely too great" to treat an unlisted driver as a legal nonentity. *Ibid.*; *cf. United States* v. *Little*, 945 F. Supp. 79, 83 (S.D.N.Y. 1996) (agreeing "that if the driver of a rental car has the permission of the lessee to drive the vehicle, then he has a legitimate possessory interest"). Similarly, in California, "specific admonition[s] not to permit anyone else to drive" are inapplicable where "the owner

has committed the general use of the car to the permittee," as in the case of rentals. 8 Cal. Jur. 3d Automobiles § 529 ("The owner of a motor vehicle is responsible for negligent or wrongful acts or omissions by a subpermittee even though the subpermittee operated the owner's vehicle with authorization only from the permittee … ."). Florida law is similar. *See*, *e.g.*, *Chandler*, 78 So. 3d at 1297 (rental-car companies "in actuality intrust[] th[e] automobile to the renter for all ordinary purposes for which an automobile is rented," and unauthorized drivers do not change this relationship regardless of "[t]he restrictions agreed upon"); *see also Campbell*, 59 N.E.3d at 400 ("authorization to use a rental vehicle may be provided by renters as well as by the rental company in at least some circumstances").

These States' recognition of unlisted drivers' possessory interests coheres with the property-law analysis in other contexts. In a recent Fourth Amendment case, for example, the Ninth Circuit held that the organizers of an event at a warehouse had a cognizable possessory interest (and thus a reasonable expectation of privacy) in the warehouse because they received the permission of the sublessee to use the facility. *Lyall* v. *City of Los Angeles*, 807 F.3d 1178, 1189 (2015).

The Third Circuit's blithe assertion that "an unauthorized driver has no cognizable property interest in the rental vehicle," *Kennedy*, 638 F.3d at 165, ignores the property-law principles governing sub-bailments and similar arrangements. So even if formal property rights were dispositive of a person's reasonable expectation of privacy, the court of appeals' approach is on unsteady ground.

C. The Rental-Contract Terms Forming the Basis for the Third Circuit's Ruling Have Been Rejected as Unenforceable.

Courts that do not recognize the reasonableness of an unlisted rental-car driver's expectation of privacy base their conclusion largely on the rental contract's prohibition of unlisted drivers. *See*, *e.g.*, *United States* v. *Roper*, 918 F.2d 885, 886 (10th Cir. 1990) (no reasonable expectation of privacy for an unlisted driver because "[t]he rental contract provided that the car could only be driven by the lessee"). But courts consistently refuse to enforce those clauses in the very context in which they are intended to apply—insurance coverage.

Rental-car companies rely on unlisted-driver prohibitions "as a basis for negating omnibus [insurance] coverage which otherwise would have been available to the lessee or his forbidden permittees." Irvin E. Schermer & William J. Schermer, 1 *Automobile Liability Insurance* § 6:18 (4th ed. 2008). But "a substantial number of courts" have "refused to permit a violation of the prohibition" to negate that insurance coverage. *Ibid*.; *see also Boudreaux* v. *ABC Ins. Co*., 689 F.2d 1256, 1261 (5th Cir. 1982) (unlisted driver "was covered" by the contract's insurance clause because "he had permission from the named" driver "to drive the automobile," despite the rental contract's prohibition of unlisted drivers); *Allstate Ins. Co.* v. *Travelers Ins. Co.*, 350 N.E.2d 616, 617 (N.Y. 1976) (per curiam) ("recogniz[ing]" the "realities and exigencies of commercial automobile rentals"); *"Permissive" Use of Automobile—Delegation of Permission to Second Permittee*, 17 Am. Jur. Proof of Facts 3d 409, § 11 (1992)

("courts in many jurisdictions tend to ignore express prohibitions against delegation").

Legal doctrines like "implied consent," "lawful possession," and "initial permission" "defang" the contractual prohibition on unlisted drivers in the insurance-coverage context. Schermer & Schermer, *supra*, § 6:18 (internal quotation marks omitted). Thus, courts have held that a "person may be in lawful possession of an automobile if he is given possession by someone using the automobile with the express permission of the owner, even though" the rental contract prohibits unlisted drivers. *Ins. Co. of N. Am.* v. *Aetna Life & Cas. Co.*, 362 S.E.2d 836, 840 (N.C. Ct. App. 1987). And when a renter gives permission to an unlisted driver to operate the rental car, "subsequent use short of actual conversion or theft" is "permissive." *State Farm Mut. Auto. Ins. Co.* v. *Budget Rent-A-Car Sys., Inc.*, 359 N.W.2d 673, 676 (Minn. Ct. App. 1984) (internal quotation marks omitted).

Courts have reasoned that prohibiting unlisted drivers from operating rental cars with the renter's permission would nullify an essential "purpose" of the rental car for which the renter had bargained. *BATS, Inc.* v. *Shikuma*, 617 P.2d 575, 577 (Haw. Ct. App. 1980) (per curiam) (insured was still "using" the rental vehicle even when an unlisted driver was returning it, despite the rental contract's unlisted-driver prohibition). "Rental of an automobile is for a broad, almost unfettered, use," including having unlisted drivers operate the vehicle. *State Farm Mut. Auto. Ins. Co.* v. *Liberty Mut. Ins. Co.*, 883 S.W.2d 530, 533 (Mo. Ct. App. 1994).

Some courts have concluded that rental-car companies must anticipate that unlisted drivers will operate their rental cars, and so must not actually intend to enforce the prohibition. It is "foreseeable and inevitable" that some rental vehicles "will be operated in violation of a restrictive lease agreement." *Allstate Ins. Co.* v. *Travelers Ins. Co.*, 49 A.D.2d 613, 614 (N.Y. App. Div. 1975), *modified*, 350 N.E.2d 616 (N.Y. 1976). Rental-car companies do "not have a reasonable basis for believing that" driver restrictions will "be carried out," and therefore are "deemed to have given implied permission to the use of the subject automobile without the said restriction." *Fin. Indem. Co.* v. *Hertz Corp.*, 38 Cal. Rptr. 249, 254 (Cal. Dist. Ct. App. 1964) (affirming district court's findings).

This widespread rejection of unlisted-driver restrictions in rental-car contracts further undermines the Third Circuit's already wobbly rule. Courts often refuse to enforce such provisions, largely on the basis that rental companies are well aware that renters routinely allow unlisted persons to drive the rental vehicle. There can be no basis for inferring that those same, largely null contract clauses deprive unlisted drivers of their constitutionally protected expectation of privacy.

* * *

As this Court made clear in *Rakas*, Fourth Amendment protections do not depend on "arcane distinctions developed in property" law. 439 U.S. at 143. And this makes good sense: Courts take a variety of often conflicting approaches in the context of rental vehicles. Americans' reasonable expectations of privacy do not hinge on which property test a given court

might use. Instead, social conceptions of reasonableness can establish an expectation of privacy protected by the Constitution. Here, the Third Circuit—following the lead of several other courts—erred in holding that neither strand of this Court's Fourth Amendment jurisprudence permitted petitioner to challenge the search at issue.

CONCLUSION

This Court's review is warranted to clarify the Fourth Amendment rights of unlisted rental-car drivers.

Respectfully submitted.

JANET MOORE
CO-CHAIR, *AMICUS* COMMITTEE,
NATIONAL ASSOCIATION FOR
PUBLIC DEFENSE
For identification purposes only:
ASSOCIATE PROFESSOR
UNIVERSITY OF CINCINNATI
COLLEGE OF LAW
2540 Clifton Avenue
Cincinnati, OH 45221

DAVID DEBOLD
Counsel of Record
LOCHLAN F. SHELFER
KEVIN J. BARBER
MONICA L. HAYMOND
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 955-8500
ddebold@gibsondunn.com

ANDREW P. LEGRAND
GIBSON, DUNN & CRUTCHER LLP
2100 McKinney Avenue
Suite 1100
Dallas, TX 75201

Counsel for Amicus Curiae

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