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 OF THE AMERICAN CIVIL LIBERTIES UNION AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

DAVID D. COLE
RACHEL WAINER APTER
THE AMERICAN CIVIL LIBERTIES UNION
915 15th Street N.W.
Washington, D.C. 20005
(212) 549-2611

JEFFREY T. GREEN *
MICHAEL B. BUSCHBACHER
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
jgreen@sidley.com

Counsel for Amici Curiae

[Additional Counsel Listed on Inside Cover]

* Counsel of Record

November 20, 2017

JOSHUA L. DRATEL
CO-CHAIR AMICUS
COMMITTEE
NATIONAL ASSOCIATION
OF CRIMINAL DEFENSE
LAWYERS
29 Broadway, Suite 1512
New York, New York
10006
(212) 732-0707

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INTEREST OF *AMICI CURIAE*[1]

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with more than 1.5 million members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. In support of these principles, the ACLU has appeared before this Court in numerous Fourth Amendment cases, both as direct counsel and as *amicus curiae*. Because this case addresses an important Fourth Amendment question, its proper resolution is of substantial concern to the ACLU and its members.

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958, and has a nationwide membership of many thousands of direct members, and up to 40,000 members when affiliates are included. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. Each year,

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part, and that no entity or person aside from counsel for *amici curiae* made any monetary contribution toward the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.3(a), *amici curiae* state that counsel for all parties consented to the filing of this brief.

NACDL files numerous briefs as *amicus curiae* in the United States Supreme Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

SUMMARY OF ARGUMENT

Petitioner Terrence Byrd and his fiancée (Latasha Reed), have been together for 17 years, share a home, and have had five children together. J.A. at 180. In September 2014, Petitioner's fiancée signed a car rental agreement with an authorized driver addendum that imposed restrictions on who could operate the vehicle, but explained that the "renter's spouse" was "permitted to drive the vehicle." *Id.* at 24. Petitioner's fiancée handed Petitioner the car keys and gave him express permission to drive the rental car, which he was driving when he was pulled over on Interstate 81 in Pennsylvania. *Id.* at 36–37.

The Trooper who pulled him over stated that Petitioner was acting suspiciously because (1) he was driving with his hands at the "10 and 2" position, (2) he was sitting far back from the steering wheel, and (3) he was driving a rental car. *Id.* Petitioner was stopped for failing to move into the right lane after passing a slower-moving truck. *Id.* After being pulled over, the Troopers reviewed the rental agreement. They told Petitioner that they could search the rental vehicle without his consent and without any grounds for doing so because Petitioner had no expectation of privacy in the vehicle because he was not on the rental agreement. That is incorrect. The Fourth Amendment applies to and restricts the government's

ability to search a rental car operated by a person with permission from the renter.

The Fourth Amendment is first and foremost "an 18th-century guarantee against unreasonable searches" which provides "*at a minimum* the degree of protection it afforded when it was adopted." *United States* v. *Jones*, 565 U.S. 400, 411 (2012). Thus, the meaning of the Fourth Amendment when it was adopted provides a floor of protection against unreasonable searches and seizures of an individual's "effects," which include vehicles. When the Fourth Amendment was adopted, an individual who had been entrusted with goods by another (*i.e.*, a bailee) had a possessory interest in the goods recognized at common law that could be asserted against other parties. That property interest recognized at common law is sufficient to trigger the protections of the Fourth Amendment with regard to the rental vehicle operated by Petitioner with the express consent of his fiancée, who had lawful possession of the rental vehicle.

The Fourth Amendment likewise protects against unreasonable searches and seizures where an individual has demonstrated a reasonable expectation of privacy. *Katz* v. *United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). Here, Petitioner is protected by the Fourth Amendment because he had a reasonable expectation of privacy in the laundry bag that he had locked in the trunk of the rental car with the keys he obtained from his fiancée. Individuals indisputably have a reasonable expectation of privacy in the contents of a locked trunk of their vehicle. That expectation of privacy likewise applies when travelers store their luggage out of sight in the trunk of a rental vehicle. The failure to comply with all of

the terms of a rental agreement does not strip an individual of his or her reasonable expectation of privacy while operating the rental vehicle. The scope of Fourth Amendment rights does not and should not depend on the terms of private rental agreements, especially where those terms have little if any bearing on the reasonable privacy interests of individuals using rental vehicles.

Finally, adoption of the court of appeal's contrary view would severely curtail the scope of the Fourth Amendment. Motor vehicle travel is a necessity for effective participation in modern society. A restriction on the Fourth Amendment's scope with regard to rental car drivers would affect a broad swath of the population, especially individuals who have come to depend on rental cars for everyday travel because they cannot afford to purchase their own vehicles. It would also disproportionately harm people of color, who are more likely to rent cars than white drivers, more likely to be pulled over by police while driving, and more likely to be searched by police after being pulled over.

ARGUMENT

I. THE FOURTH AMENDMENT APPLIES TO THE SEARCH OF A RENTAL CAR OPERATED BY AN INDIVIDUAL WITH EXPRESS AUTHORIZATION TO OPERATE THE VEHICLE.

A. The Fourth Amendment Applies To Petitioner Because He Had A Property Interest In The Rental Vehicle At Common Law.

At common law, Petitioner had a property interest in the rental vehicle sufficient to trigger the protections of the Fourth Amendment because he was operating the rental car with the express consent of his fiancée, who rented the vehicle from the car rental company.

1. By its terms, the Fourth Amendment guarantees that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. Const. amend. IV. In *Jones*, this Court held that the Fourth Amendment prohibited the government from placing a tracking device on "a target's vehicle," and using "that device to monitor the vehicle's movements." 565 U.S. at 404. The Court reconfirmed "that a vehicle is an 'effect' as that term is used in the Amendment." *Id.* at 404 (citing *United States* v. *Chadwick*, 433 U.S. 1, 12 (1977)). In doing so, the Court assumed that the vehicle was "[Jones's] vehicle" even though it was "registered to Jones's wife." *Id.* at 404 n.2. The Court explained that even if Jones were "not the owner he had at least the property rights of a bailee." *Id.* Because the government had not challenged the lower court's determination

that the vehicle's registration did not affect Jones's ability to raise a Fourth Amendment objection, the Court declined to rule on "the Fourth Amendment significance of Jones's status." *Id.*

2. The question whether a party's "status" with respect to an "effect" is sufficient to trigger the Fourth Amendment's protections—an issue left unresolved in *Jones*—is presented squarely here. To resolve that question, under *Jones*, this Court first looks to "the original meaning of the Fourth Amendment." *Id*. at 406 n.3.

As relevant here, Petitioner was given express permission to possess and use the rental car by his fiancée, who had lawful possession of the vehicle by virtue of her car rental agreement. Under these circumstances, Petitioner would have had the property rights of a bailee, *i.e.*, "one to whom goods are entrusted by a bailor." *Bailee*, Black's Law Dictionary (6th ed. 1990). As explained by Blackstone, "[b]ailment . . . is a delivery of goods in trust, upon a contract, expressed or implied, that the trust shall be faithfully executed on the part of the bailee." 2 Blackstone, *Commentaries on the Laws of England* *451. More simply, it is the "delivery of goods to another person for a particular use." *Id.* at *396. "[I]n all classes of bailment" there "is a special qualified property transferred from the bailor to the bailee, together with the possession." Joseph Story, *Commentaries on the Law of Bailments with Illustrations from the Civil and the Foreign Law* § 93, at 71 (London, John Richards & Co. 1839) (quoting 2 Blackstone, *Commentaries on the Laws of England* *452). Neither the bailor nor the bailee has an "absolute property" right because (i) the bailor lacks "immediate possession" (that is, the bailee has "the possession"), and

(ii) the bailee's possession is "only a temporary right." 2 Blackstone, *Commentaries on the Laws of England* *396. Nevertheless, the "bailee has a sufficient interest" in a bailment "to sue in trover." Story, *supra*, § 93, at 73.

Put simply, at common law, a bailee had a legal right over the bailment *vis-a-vis* the outside world. That conclusion remains the case here even if possession of the rental car was transferred to Petitioner in a manner inconsistent with restrictions in the rental agreement. Non-compliance with a contractual requirement in the rental agreement would *not* have destroyed Petitioner's possessory interest in the rental car as to outsiders. Indeed, the common law recognized that bailees could themselves transfer goods to "sub-bailees." Frederick Pollock & Robert Samuel Wright, *An Essay on Possession in the Common Law* 169 (Oxford, Clarendon Press 1888). Thus, a sub-bailment made contrary to the original bailment agreement might trigger the owner's right to recover the bailment. *Id.* But that sub-bailment would *not* affect the sub-bailee's property interest with respect to outsiders. As Justice Holmes explained,

> [T]he common law has always given the possessory remedies to all bailees without exception. The right to these remedies extends not only to pledgees, lessees, and those having a lien, who exclude their bailor, but to simple bailees, as they have been called, *who have no interest in the chattels, no right of detention as against the owner, and neither give nor receive a reward.*

O.W. Holmes, *The Common Law* 211 (Boston, Little Brown & Co. 1881) (emphasis added). Thus, even if the rental car company could have repossessed the

vehicle under the rental agreement, petitioner still would have had a possessory interest, and would have had a legal remedy against all other parties "who have no interest in the chattel[]." *Id.*

The conclusion that a bailee has a property right in a bailment likewise is consistent with the prevailing rule at common law—before, during, and after adoption of the Fourth Amendment—that possession conveyed a property right to an "effect" that allowed the possessor to exclude all private persons who did not have better title to the property. For example, in *Armory* v. *Delamirie*, the Court explained that "the finder of a jewel, though he does not by such finding acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against all but the rightful owner." 93 Eng. Rep. 664, 664; 1 Strange 505 (K.B. 1722) (Pratt, C.J.). Likewise, in *Wilbraham* v. *Snow*, the court ruled that "possession with an assertion of title, *or even possession alone*, gives the possessor such a property as will enable him to maintain [an] action against a wrong-doer; for possession is *primâ facie* evidence of property." 85 Eng. Rep. 624, 628; 2 Wms. Saund. 47 (K.B. 1699) (emphasis added); see also *Basset* v. *Maynard*, 78 Eng. Rep. 1046, 1047; Cro. Eliz. 819, 821 (K.B. 1601) ("[A]dmitting the grant to the plaintiff had been void, yet . . . the action was maintainable; because by the cutting down of [the trees] he had possession, and a good title against the defendant and every stranger."); *Rackham* v. *Jesup*, 95 Eng. Rep. 1084, 1086; 3 Wils. 332, 334 (K.B. 1722) ("[S]upposing . . . [plaintiff] had not any lawful right to cut rushes upon the common; yet as he claimed such right . . . and gave some evidence thereof at the trial, that was sufficient . . . [since, by] claim[ing] a right to cut rushes,

[he] had gained a property therein by cutting the same."); *Webb* v. *Fox*, 101 Eng. Rep. 1037, 1040; 7 T.R. 391, 397 (1797) (holding that a bankrupt person had a title against all the world but his assignees; to do otherwise would be "an invitation to all the world to scramble for the possession of" the bankrupt person's goods); *Graham* v. *Peat*, 102 Eng. Rep. 95, 96; 1 East 244, 246 (1801) (Lord Kenyon, C.J.) ("'Any possession is a legal possession against a wrong-doer.'").

This doctrine found continued acceptance in the years leading up to and following the ratification of the Fourteenth Amendment. As the Massachusetts Supreme Court explained, "It is a leading principle that bare possession constitutes sufficient title to enable the party enjoying it to obtain a legal remedy against a wrongdoer; and accordingly it is held that a bailee without interest has a title arising s*imply from his possession*." *Harrington* v. *King*, 121 Mass. 269, 271 (1876) (emphasis added); see also *Rogers* v. *Arnold*, 12 Wend. 30, 36–37 (N.Y. Sup. Ct. 1834) (describing as a "sound and incontrovertible principle" the rule that, since "the possession of a chattel is *prima facie* evidence of right, a mere stranger could not deprive the party of that possession without showing some authority or right derived from the true owner to justify the taking"); *Kennington* v. *Williams*, 30 Ala. 361, 362 (1857); *Summons* v. *Beaubien*, 36 Mo. 307, 309 (1865) ("An actual possession [of a chattel], which is a lawful one, is evidence against any one who does not show a better title."); *Burke* v. *Savage*, 95 Mass. (1 Allen) 408, 409 (1866) ("The plaintiff's possession of the property sued for was sufficient to sustain this action against any one who did not show a better title."); *Odd Fellows' Hall Ass'n* v. *McAllister*, 26 N.E. 862, 863 (Mass. 1891) (Holmes,

J.) ("[O]ne who has possession of goods is entitled to keep them as against any one not having a better title."); *Anderson* v. *Gouldberg*, 51 Minn. 294, 295–96 (1892) ("[P]ossession is good title against all the world except those having a better title."); see also Pollock & Wright, *supra*, at 93 (explaining that possession "confers more than a personal right to be protected against wrongdoers; it confers a qualified right to possess, a right in the nature of property which is valid against every one who cannot show a prior and better right").

Petitioner's possession of the rental vehicle under the express authorization received from his fiancée, who possessed the rental vehicle pursuant to a rental agreement, conveyed a property interest to Petitioner sufficient to trigger protection under the original meaning of the Fourth Amendment.

B. The Officers' Search Intruded Upon Petitioner's Reasonable Expectation of Privacy.

Petitioner likewise had a reasonable expectation of privacy in the locked trunk of the rental car that his fiancée authorized him to operate, thereby triggering the protections of the Fourth Amendment.

1. In *Katz* v. *United States*, this Court held that the government's "activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment." 389 U.S. at 353. In his concurring opinion, Justice Harlan set forth his understanding of the governing Fourth Amendment rule, that is, a "twofold requirement, first that a person have exhib-

ited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" *Id.* at 361; see, *e.g.*, *Smith* v. *Maryland*, 442 U.S. 735, 740–741 (1979) (applying twofold requirement set forth in Justice Harlan's concurring opinion).

The Court's cases confirm that a reasonable expectation of privacy often is strongest in the home. "'At the very core' of the Fourth Amendment 'stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" *Kyllo* v. *United States*, 533 U.S. 27, 31 (2001) (quoting *Silverman* v. *United States*, 365 U.S. 505, 511 (1961)). That societal expectation of privacy extends not only to those who *own* a home, but also to houseguests who themselves are exercising dominion over the home. *Jones* v. *United States*, 362 U.S. 257 (1960).

The reasonable expectation recognized by society likewise extends to vehicles, which are "effects" protected under the Fourth Amendment. *Jones*, 565 U.S. at 400, 411. As is the case with a home, a reasonable expectation of privacy in a vehicle does not depend on vehicle ownership. To be sure, societal expectations of privacy do not extend to "a person present in a stolen automobile at the time of a search," *Rakas* v. *Illinois*, 439 U.S. 128, 141 n.9 (1978), but the Fourth Amendment has been held to protect the privacy interests of passengers in taxicabs and commercial buses. See *Katz*, 389 U.S. at 352 ("No less than an individual in . . . a taxicab, a person in a telephone booth may rely upon the protection of the Fourth Amendment") (citing *Rios* v. *United States*, 364 U.S. 253 (1960)); *Bond* v. *United States*, 529 U.S. 334, 338–39 (2000) ("When a bus passenger places a bag in an overhead bin . . . [h]e does not expect that

other passengers or bus employees will, as a matter of course, feel the bag in an exploratory manner.").

2. Petitioner had a reasonable expectation of privacy in the rental car that he was operating with express permission and authorization from his fiancée.

Petitioner's expectation of privacy is thus akin to that of the houseguest protected by the Fourth Amendment in the watershed case of *Jones* v. *United States*. As this Court subsequently explained in *Rakas*, the expectation of privacy of the houseguest in *Jones* was reasonable because (1) he "had permission to use the apartment of his friend," (2) he had "a key to the apartment with which he admitted himself on the day of the search and kept possessions in the apartment," and (3) "[e]xcept with respect to his friend, [the houseguest] had complete dominion and control over the apartment and could exclude others from it." *Rakas*, 439 U.S. at 149.

The same analysis applies to Petitioner's reasonable expectation of privacy in the rental car. As in *Jones*, petitioner had permission to use the rental vehicle of his fiancée. See J.A. at 182. Petitioner was given express permission to operate the car by his fiancée, who had possession and control of the vehicle by virtue of an agreement with the rental car company. *Id.* at 18–19, 182. Further, as in *Jones*, petitioner was given a key so that he could operate the vehicle and lock his possessions in the trunk beyond the view of third parties. See *id.* at 182. Finally, as in *Jones*, with the exception of his fiancée and the rental company, petitioner "had complete dominion and control" over the rental vehicle and thus "could exclude others from it." *Rakas*, 439 U.S. at 149. As in *Jones*, Petitioner had a reasonable expectation of privacy in

a vehicle that he did not own, but over which he exercised lawful dominion and control.

3. Petitioner's expectation of privacy is not rendered unreasonable because he did not meet the definition of an authorized driver under the terms of the rental agreement signed by his fiancée. Indeed, if the scope of the Fourth Amendment were made to depend on the terms of private contracts, an individual's Fourth Amendment rights would become a patchwork that varies from state-to-state.

For example, under state law in Illinois, Iowa, Missouri, Nevada, New York, Oregon, and Wisconsin, spouses automatically are authorized drivers regardless of whether they are listed on the rental car contract.[2] Under Wisconsin law, authorized drivers automatically include the renter's employer, employee and coworker, any unlisted driver operating the rental car during an emergency, and valet parking attendants.[3] Illinois law allows for the renter's employer, employee, and coworker to be authorized drivers, while Iowa, Nevada and Oregon account only for an *employer* or coworker, and Missouri only for an *employee* or coworker.[4] Illinois, Missouri, New York and Oregon make unlisted individuals into authorized drivers in emergency situations, but New York speci-

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[2] *See* 625 Ill. Comp. Stat. § 27/10 (1997); Iowa Code § 516D.3(1)(c) (2016); Mo. Rev. Stat. § 407.730(2)(b) (2007); Nev. Rev. Stat. § 482.31515(2) (1989); N.Y. Gen. Bus. Law § 396-z(1)(a)(ii) (Gould 2018); Or. Rev. Stat. § 646A.140(1)(b) (2015); Wisc. Stat. § 344.57(2)(a) (2005).

[3] Wisc. Stat. § 344.57(2)(c)-(d).

[4] 625 Ill. Comp. Stat. § 27/10; Iowa Code § 516D.3(1)(d); Nev. Rev. Stat. § 482.31515(3); Or. Rev. Stat. § 646A.140(1)(c); Mo. Rev. Stat. § 407.730(2)(c).

fies that the driver must be heading "to a medical facility," and Illinois requires the individual to be "driving directly to a medical or police facility."[5]

For these classes of individuals, the Court of Appeals' approach makes the Fourth Amendment's protections turn entirely on the law of the particular state in which the search occurred. For example, in New York, the renter's spouse and any emergency driver heading to a *medical* facility enjoy Fourth Amendment rights even if unlisted on the rental car contract, but not the renter's employer, employee, or coworker, nor an emergency driver heading to a *police* facility.[6] But the spouse and the emergency driver would lose Fourth Amendment protections in other states.

This Court, however, has made clear that distinctions among the laws of different states cannot control the scope of the Fourth Amendment's protections. *California* v. *Greenwood*, 486 U.S. 35, 36 (1988). In *Greenwood*, respondent argued that the scope of the Fourth Amendment's protections should be governed by the requirements of California law, which, at the time, made warrantless search and seizure of an individual's garbage illegal. *Id.* at 43. This Court disagreed and expressly rejected the notion that "whether or not a search is reasonable within the meaning of the Fourth Amendment depends on the law . . . in which the search occurs." *Id.* In doing so, this Court ruled that the scope of the Fourth Amendment does

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[5] 625 Ill. Comp. Stat. § 27/10; Mo. Rev. Stat. § 407.730(2)(d); N.Y. Gen. Bus. Law § 396-z(1)(a)(iii); Or. Rev. Stat. § 646A.140(1)(d).

[6] N.Y. Gen. Bus. Law § 396-z(1)(a).

not depend on "concepts of privacy under the laws of each State." *Id.* at 44

Nor should societal expectations of privacy depend on the specific terms in individual rental car agreements. A typical rental car contract contains multiple pages of complex terms and conditions that are not subject to negotiation. These contracts may contain a list of restrictions which will "automatically terminate" the renter's agreement upon violation of a single restriction, thereby converting the renter into an unauthorized driver.[7] These restrictions are wide ranging and vary from prohibitions on texting and making cell phone calls while driving to prohibitions on driving on unpaved roads or off-road.[8]

Although a violation of one or more of these contractual provisions may affect the relationship between the renter and the rental company, such a violation should not control or negate the scope of privacy interests that society affords to individuals lawfully operating rental vehicles. For example, under the court of appeals' approach, a driver who violates a rental agreement by using a cellphone while driving would no longer have a reasonable privacy interest in the rental car and the rental car could be searched, without any particular suspicion of criminal activity

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[7] *E.g.,* Avis, *Rental Term and Conditions United States and Canada* (Apr. 20, 2016), https://www.avis.com/car-rental/html/global/en/terms/AV_Preferred_Rental_Terms_R1_4.20.16.pdf; Budget, *Fastbreak Terms and Conditions United States & Canada* (Apr. 28, 2017), https://www.budget.com/budgetWeb/html/en/terms/BudgetFastbreaktnc.pdf.

[8] *E.g.,* Avis, *supra* note 7; Alamo, *Alamo Online Check-In Terms*, https://www.alamo.com/en_US/car-rental/checkin/terms-and-conditions.html.

and without a court-issued warrant. The driver's Fourth Amendment rights would be extinguished the moment the driver makes the cell phone call.[9] But "giv[ing] police the power to conduct such a search" whenever they perceive a violation of a rental restriction would "creat[e] a serious and recurring threat to the privacy of countless individuals" and "implicat[e] the central concern underlying the Fourth Amendment—the concern about giving police officers unbridled discretion to rummage at will among a person's private effects." *Arizona* v. *Gant,* 556 U.S. 332, 345 (2009).

More fundamentally, an approach based almost entirely on the four corners of a private contract would not be faithful to the Fourth Amendment. The restrictions in modern private contracts do not control society's "widely shared social expectations" of privacy. *Georgia* v. *Randolph*, 547 U.S. 103, 111 (2006). Instead of reflecting social norms of privacy, the unlisted-driver restriction reflects the rental car industry's efforts to address liability risk relating to their vehicles. 1 Irvin E. Schermer & William Schermer, Automobile Liability Insurance § 6:18 (4th ed. 2008). In fact, the car rental industry might prohibit such conduct precisely because the industry anticipates that many renters will inevitably engage in the conduct. See *Allstate Ins. Co.* v. *Travelers Ins. Co.*, 370 N.Y.S.2d 675, 677 (1975).

Indeed, for purposes of insurance coverage, a substantial number of courts have ruled that the use of a rental car by a permittee, with express authorization

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[9] Budget, *Fastbreak Terms and Conditions United States & Canada* (Apr. 28, 2017), https://www.budget.com/budgetWeb/html/en/terms/BudgetFastbreaktnc.pdf.

from the renter, renders the permittee an authorized user. *E.g.*, *Boudreaux* v. *ABC Ins. Co.*, 689 F.2d 1256, 1261 (5th Cir. 1982) (per curiam) (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"). Other courts have deemed the renter to have implied permission to allow an unlisted individual to operate the rental car on the basis of the renter's right to unrestricted use of the vehicle. *E.g.*, *State Farm Mut. Auto. Ins. Co.* v. *Liberty Mut. Ins. Co.*, 883 S.W.2d 530, 532–33 (Mo. Ct. App. 1994); *BATS, Inc.* v. *Shikuma*, 617 P.2d 575, 577–78 (Haw. Ct. App. 1980). In a related vein, multiple courts have explained that use by unauthorized persons is a *foreseeable* aspect of rental, and they have declined to allow rental companies to exempt themselves from operation of insurance law through contract provisions. See, *e.g.*, *Enter. Leasing Co.* v. *Allstate Ins. Co.*, 671 A.2d 509, 514 (Md. Ct. App. 1996) ("[I]t is foreseeable that unauthorized permittees will drive rental vehicles and that they will be involved in accidents."); *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."); *Motor Vehicle Accident Indemnification Corp.* v. *Cont'l Nat'l Am. Grp. Co.*, 319 N.E.2d 182, 184 (N.Y. 1974).

In short, the scope of the Fourth Amendment is not dependent upon the restrictions in a private contract, but on the circumstances surrounding the use of the rental and on what society recognizes to be reasonable and worthy of protection.

II. THE RULING BELOW DISPROPORTIONATELY HARMS LOW-INCOME INDIVIDUALS AND PEOPLE OF COLOR.

A. The Ruling Below Restricts Fourth Amendment Protections For A Ubiquitous Part Of The Economy That Is Critically Important To Low-Income Individuals.

The ruling by the court of appeals severely limits the scope of the First Amendment in a critically important area, and, if affirmed, would harm low-income individuals who rely on rental cars to function in our car-dependent society.

1. America is a nation of drivers. More than 87.5 percent of Americans aged 16 and older reported driving sometime during the past year.[10] Each year, these drivers spend, on average, the equivalent of seven 40-hour work weeks behind the wheel. Tefft, s*upra* note 10, at 14. These statistics come as no surprise because, for the vast majority of Americans, cars are indispensable for everyday life. According to the National Household Travel Survey, over 83 per-

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[10] Brian Tefft et al., AAA Found. for Traffic Safety, *American Driving Survey 2014–2015* at 7 (2016), https://www.aaafoundation.org/sites/default/files/AmericanDrivingSurvey2015.pdf.

cent of our travel occurs in household cars and other privately owned vehicles.[11]

We use cars to buy groceries, go to the post office, visit our accountants, attend weddings and funerals, participate in community meetings, and accomplish countless other day-to-day tasks. In 2009—the most recent year for which the National Household Travel Survey has data—we made 146 billion trips for these types of family or personal errands. Fed. Highway Admin., *supra* note 11, at 19. We also made 83 billion trips for social and recreational purposes, 56 billion trips to and from work, and 27 billion trips to school or church. *Id.* We drive 28.97 miles per day and own 1.86 vehicles per household. *Id.* at 10, 34. We are, in every respect, "largely dependent on the automobile."[12]

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[11] *See* Fed. Highway Admin., U.S. Dep't of Transp., *Summary of Travel Trends*: *2009 National Household Travel Survey* 19 (2011), http://nhts.ornl.gov/2009/pub/stt.pdf. The National Household Travel Survey is a national survey conducted by the U.S. Department of Transportation every 6 to 8 years to collect data on travel and transportation patterns in the United States. It was last completed in 2009. The survey found that in 2009, 83.4% of "person trips" were made by privately owned vehicle, where "person trip" is defined as "a trip from one address to another by one or more persons . . . . For example, four persons traveling together in one auto are counted as four person trips." *Id.* at A–10. The 2016 National Household Travel Survey was recently completed and the results are scheduled for release in 2018. *See* Fed. Highway Admin., U.S. Dep't of Transp., *National Household Travel Survey*, http://nhts.ornl.gov/.

[12] *See* Adie Tomer, *America's Commuting Choices: 5 Major Takeaways from 2016 Census Data*, Brookings (Oct. 3, 2017), https://www.brookings.edu/blog/the-avenue/2017/10/03/americans-commuting-choices-5-major-takeaways-from-2016-census-data/.

Rental cars serve a critical function in our car-dependent society. Hand-in-hand with our dependence on cars comes our dependence on rental cars. Demand for rental cars is exemplified by the size and strength of the rental car industry. Both fleet size and industry revenue have climbed steadily over the last ten years.[13] As of 2016, there were 2,313,027 rental cars in service in the United States, operating at 20,469 locations, and bringing in revenue of $28 billion.[14] America is not only a nation of car owners, but also a nation of rental car users.

The 2.3 million rental cars currently in service are called on for a multitude of purposes. Of course, rental cars are often rented by deplaning passengers looking for a car to drive while travelling away from their home city. But approximately half of the rental car industry's revenue is earned at "neighborhood locations" in the renter's home city for reasons unrelated to air travel.[15] Would-be drivers rent from neighborhood locations to attend special occasions, transport unwieldly objects, to move houses. In addition, car owners often use rental cars as replacement vehicles while their own cars are in the auto shop. Given that there are millions of car accidents each

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[13] *See* Auto Rental News, *U.S. Car Rental Revenue and Fleet Size Comparisons*, http://www.autorentalnews.com/fileviewer/2452.aspx.

[14] *See* Auto Rental News, *2016 U.S. Car Rental Market: Fleet, Locations and Revenue*, http://www.autorentalnews.com/fileviewer/2451.aspx.

[15] *Vacation Nation: How Tourism Benefits Our Economy: Hearing Before the Subcomm. on Commerce, Mfg., and Trade of the H. Comm. on Energy & Commerce*, 133th Cong. 4 (2013) (statement of Brian D. Rothery, Assistant Vice President of Government & Public Affairs for Enterprise Holdings, Inc.).

year and the average collision repair takes two weeks, replacement rentals can be indispensable for individuals who own a car that they depend on for their daily routine.[16]

The modern car-sharing phenomenon portends an even greater role for rental cars in our society going forward. Car-sharing programs allow people to rent cars 24 hours a day, seven days a week, typically on an hourly, daily, or overnight basis.[17] Renters pay a membership fee in exchange for access to the company's fleet of cars, which are parked in designated places around the city. *Supra* note 17. Members reserve cars online and use their membership cards to unlock the car and access the keys. *Id.* According to Zipcar, this type of carsharing is ideal for people who, among other things, "want to save money," "need a second car," "need a big car for a big job," or "take public transit, but need a car sometimes."[18] Americans are heeding this call: as of 2014, there were estimated to be about 19,115 car-sharing cars in the United States, shared by about 996,000 members, and the carsharing industry was estimated to have an annual revenue of approximately $400 million.[19]

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[16] *See* Enterprise, *Rent After an Accident*, https://www.enterprise.com/en/car-rental/rent-a-car-after-an-accident.html.

[17] *See* Enterprise, *Enterprise CarShare Frequently Asked Questions*, https://www.enterprisecarshare.com/us/en/faq.html.

[18] Zipcar, *Is Zipcar for me?*, http://www.zipcar.com/is-it.

[19] Susan A. Shaheen & Adam Cohen, *Innovative Mobility Carsharing Outlook: Carsharing Market Overview, Analysis, & Trends*, Berkeley–Transp. Sustainability Res. Ctr. (2014), http://76.12.4.249/artman2/uploads/1/Fall_2014_Carsharing_Outlook_Final_1.pdf; Chris Brown, *CarSharing: State of the Market and Growth Potential*, Auto Rental News (Mar./Apr. 2015),

Car rental, just like car ownership, plays a critical role in our society and serves millions of Americans every year—millions of Americans whose lives will be affected by a ruling that the Fourth Amendment applies to rental car users only if the terms of the rental car agreement have been satisfied.

2. The rental car exemption adopted by the court of appeals would create a substantial void in the protections afforded by the Fourth Amendment that would disproportionately affect low-income individuals.

Even though car usage is critical to functioning in American society—especially in suburban and rural communities—many low income people do not own a car. Just 76% of households in poverty own a car, compared to 98% of households earning over $100,000 per year.[20] The correlation between low income and low car ownership makes sense: for many, owning a car is prohibitively expensive. The average cost to own and operate a car in 2014— which includes costs for vehicle purchase, gasoline, insurance, maintenance, and repairs—was $8,698.[21] "[T]he high sticker price of vehicles [and] increased prices at the

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http://www.autorentalnews.com/article/story/2015/03/carsharing-state-of-the-market-and-growth-potential.aspx.

[20] Fed. Highway Admin., U.S. Dep't of Transp., *Mobility Challenges for Households in Poverty: 2009 National Household Travel Survey* 2 (2014), http://nhts.ornl.gov/briefs/PovertyBrief.pdf.

[21] Bureau of Transp. Statistics, U.S. Dep't of Transp., *Passenger Travel Facts and Figures 2016* at 66, https://www.rita.dot.gov/bts/sites/rita.dot.gov.bts/files/PTFF%202016_full.pdf.

pump . . . pose a financial burden to the mobility of all households, especially those in poverty."[22]

A lack of resources to purchase a car has far-reaching consequences. "Many people without access to a personal vehicle, especially people who are poor, have difficulty reaching stores, services, and workplaces outside of their immediate neighborhoods."[23] The problem is compounded because more U.S. households in poverty live in suburbs, where "fewer transit options" mean fewer alternatives to using a car.[24] One study found that "nearly all zero-vehicle households live in neighborhoods with transit service, but those routes only connect them to 40 percent of jobs within 90 minutes."[25] Car rentals offer a solution for low-income individuals who cannot afford to maintain a car but who need to use a car from time-to-time.

Contrary to the "commonly held misconception that car rental is a luxury reserved for the wealthiest individuals," low-income individuals comprise a significant portion of the rental car market.[26] A rule re-

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[22] *See* Fed. Highway Admin., *supra* note 20, at 1.

[23] Bureau of Transp. Statistics, U.S. Dep't of Transp., *Transportation Statistics Annual Report 2016* at 49, https://www.rita.dot.gov/bts/sites/rita.dot.gov.bts/files/TSAR_2016_rev.pdf.

[24] *See* Fed. Highway Admin, *supra* note 20, at 3.

[25] Adie Tomer & Joseph Kane, *Car Remains King and Barrier to Economic Opportunity*, Brookings (Oct. 23, 2014), https://www.brookings.edu/blog/the-avenue/2014/10/23/cars-remain-king-and-barrier-to-economic-opportunity/.

[26] *See* Kevin Neels, The Brattle Grp., *Effects of Discriminatory Excise Taxes on Car Rentals: Unintentional Impacts on Minorities, Low Income Households, and Auto Purchases* 3 (2010),

stricting the Fourth Amendment's scope as applied to rental cars would leave those low-income individuals, who are disproportionately unable to purchase a car and thus must depend on rentals cars, with less Fourth Amendment protection than their more affluent, car-owning neighbors. Likewise, low-income people also are more likely to be second unpermitted drivers. For example, many rental car agencies require a credit or debit card at the start of a rental, and may limit the locations that accept debit cards or impose additional restrictions when a debit card is used.[27] But low-income individuals are less likely to own a credit card than those who are more affluent, and many of the poorest households do not have any bank account at all.[28] Low-income individuals who

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http://www.brattle.com/system/publications/pdfs/000/004/845/original/Effects_of_Discriminatory_Excise_Taxes_on_Car_Rentals_Neels_June_10_2010.pdf?1378772134 (concluding that households earning less than $25,000 per year paid 7% of rental excise taxes in 2008, and houses earning $25,000 to $49,999 paid another 12%).

[27] *See, e.g.,* Hertz, *Rental Qualifications and Requirements: Forms of Payment*, https://www.hertz.com/rentacar/reservation/reviewmodifycancel/templates/rentalTerms.jsp?KEYWORD=PAYMENT&EOAG=LAX ("When a debit card is accepted as form of payment, at the start of the rental, two (2) forms of identification must be presented."); Avis, *Avis Car Rentals FAQs: Forms of Payment*, https://www.avis.com/en/customer-service/faqs/usa/requirement-for-renting ("[S]ome Avis locations do not accept debit cards as a form of payment.").

[28] Fed. Deposit Insurance Corp., *2011 FDIC National Survey of Unbanked and Underbanked Households* 14, https://www.fdic.gov/householdsurvey/2012_unbankedreport.pdf ("Almost three in ten households (28.2 percent) with annual income below $15,000 do not have a bank account, while about one in ten households (11.7 percent) with income between $15,000 and $30,000 are unbanked."); Daniel Indiviglio, *What Credit*

cannot satisfy the charge card prerequisite to renting may be forced to ask friends or family to rent on their behalf, and thus may be unable to comply with the requirements imposed in rental contracts to obtain authorization to operate a rental vehicle.

B. The Ruling Below Disproportionately Harms People Of Color, Who Are More Likely To Be Pulled Over By Police While Driving And To Be Searched After Being Pulled Over.

The court of appeals' restriction of Fourth Amendment rights for rental car drivers likewise would have a disproportionate impact on Black and Hispanic drivers because they are much more likely to rent cars than white drivers. "African Americans generate over *four times* as many retail rental transactions as otherwise comparable Caucasian[s]." Kevin Neels, The Brattle Grp., *Effects of Discriminatory Excise Taxes on Car Rentals: Unintentional Impacts on Minorities, Low Income Households, and Auto Purchases* 4–7 & tbls. 2, 4 (2010), http://www.brattle.com/system/publications/pdfs/000/004/845/original/Effects_of_Discriminatory_Excise_Taxes_on_Car_Rentals_Neels_June_10_2010.pdf?1378772134. And Hispanics are also "substantially more likely to rent [cars] than Caucasian[s]." *Id.*

Moreover, Black drivers are more likely to be stopped by the police than white drivers. According to data from the Department of Justice's Bureau of

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Cards Cost the Poor, The Atlantic (July 27, 2010), https://www.theatlantic.com/business/archive/2010/07/what-credit-cards-cost-the-poor/60505/ ("It's fairly well-known that less affluent people have trouble getting credit cards, and when they do they often are forced to pay higher interest rates").

Justice Statistics, "Relatively more black drivers (13%) than white (10%) and Hispanic (10%) drivers were pulled over in a traffic stop during their most recent contact with police." Lynn Langton & Matthew Durose, Bureau of Justice Statistics, U.S. Dep't of Justice, *Police Behavior During Traffic and Street Stops, 2011* at 1 (2013), https://www.bjs.gov/content/pub/pdf/pbtss11.pdf. Specifically, a black driver is about 30 percent more likely to be pulled over than a white driver. Moreover, Black drivers are more likely to be pulled over for amorphous reasons like "record check[s]"—14 percent of Black drivers were pulled over for record checks according to the DOJ data, versus only 9 percent of white drivers who were pulled over for that reason. *Id.* at 4. And officers "did not give [any] reason for the stop" at all for 4.7 percent of Black drivers, but that number was only 2.6 percent for white drivers. *Id.*

The problem is pervasive and consistent across the United States. A group of scholars at Stanford University studied 60 million state patrol stops conducted in 20 U.S. states between 2011 and 2015, using data collected by state law enforcement agencies. *See* Emma Pierson et al., *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States* 1–2, https://5harad.com/papers/traffic-stops.pdf.[29] They found that "black drivers are stopped more often than white drivers relative to their share of the driving-age population." *Id.* at 1.

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[29] The twenty states are Arizona, California, Colorado, Connecticut, Florida, Illinois, Maryland, Massachusetts, Missouri, Montana, Nebraska, New Jersey, North Carolina, Ohio, Rhode Island, South Carolina, Texas, Vermont, Washington and Wisconsin. *See id.* at 3.

Specifically, "[a]fter controlling for gender, age, location, and year, . . . blacks are stopped at 1.4 times the rate at which whites are stopped." *Id.* at 5.

And both Black and Hispanic drivers are more likely to be searched when they are stopped by police. According to the Department of Justice data, only 2.3% of white drivers who were stopped by police were searched, compared to 6.3% of Black drivers and 6.6% of Hispanic drivers. Langton, *supra*, at 9. The Stanford analysis of 60 million traffic stops found that across jurisdictions "black and Hispanic motorists are consistently searched at higher rates than white drivers." Pierson, *supra*, at 6. Aggregating across all states, white drivers were searched in 2.0% of stops, compared to 3.5% of stops for Black drivers and 3.8% for Hispanic drivers. *Id.* Thus, "[a]fter controlling for stop location, date and time, and driver age and gender," the study found "black and Hispanic drivers have approximately twice the odds of being searched relative to white drivers." *Id.* See also Frank R. Baumgartner et al., *Racial Disparities in Traffic Stop Outcomes*, 9 Duke F. L. Soc. Change 21, 37, 39 (2017) (analyzing over 55 million traffic stops across thirteen states and finding that Black drivers were 2.51 times as likely to be searched than white drivers and Hispanic drivers were 3.14 times as likely to be searched as white drivers).

Thus, any ruling that limits the Fourth Amendment's application to rental-car drivers will disproportionately harm people of color, who are significantly more likely to be pulled over by the police while driving and more likely to be searched by the police after they have been pulled over.

CONCLUSION

For these reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

DAVID D. COLE
RACHEL WAINER APTER
THE AMERICAN CIVIL LIBERTIES UNION
915 15TH STREET N.W.
WASHINGTON, D.C. 20005
(212) 549-2611

JEFFREY T. GREEN *
MICHAEL B. BUSCHBACHER
SIDLEY AUSTIN LLP
1501 K STREET, N.W.
WASHINGTON, D.C. 20005
(202) 736-8000
jgreen@sidley.com

JOSHUA L. DRATEL
CO-CHAIR AMICUS COMMITTEE
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
29 Broadway, Suite 1512
NEW YORK, NEW YORK 10006
(212) 732-0707

Counsel for Amici Curiae

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* Counsel of Record