No.

In the Supreme Court of the United States

GREGORY ROGERS, PETITIONER,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an individual sitting in the passenger seat of a borrowed and lawfully parked vehicle, which is being used with the standing permission of its owner, the passenger's romantic partner, has a subjective expectation of privacy under the Fourth Amendment.

2. Whether such an individual relinquishes any expectation of privacy, and thus his Fourth Amendment rights, by making truthful statements to officers about the car's ownership, whether he was driving, and whether he has a license.

RELATED PROCEEDINGS

United States Court of Appeals for the Sixth Circuit:

United States of America v. *Gregory Rogers*, No. 22-1432 & 22-1433 (April 10, 2024).

United States District Court for the Western District of Michigan:

United States of America v. *Gregory Rogers*, No. 1:20-CR-53 (Oct. 30, 2020, opinion denying defendant's motion to suppress) (May 12, 2022, judgment).

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PETITION FOR A WRIT OF CERTIORARI

Gregory Rogers respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, App., *infra*, 1a-22a, is reported at 97 F.4th 1038. The opinion of the District Court denying Petitioner's motion to suppress, App., *infra*, 25a-46a, is unreported but available at 2020 WL 6375399.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit issued its opinion on April 10, 2024. On June 14, 2024, the Sixth Circuit denied a timely petition for rehearing en banc. Justice Kavanaugh extended the deadline for filing a certiorari petition, up to and including November 8, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the U.S. 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

In this case, a sharply divided panel of the Sixth Circuit held that a person sitting alone in a borrowed,

lawfully parked car lacked Fourth Amendment "standing" to object to a warrantless search, simply because he was sitting in the passenger seat and not carrying identification. In particular, the panel held that Petitioner had failed to exhibit a "subjective expectation of privacy" in a car that he truthfully told officers he had his girlfriend's permission to use—as he "often" did. App., *infra*, 5a (majority), 10a (Stranch, J., dissenting). The panel sought to distinguish contrary precedent of this and other courts finding protected Fourth Amendment interests in this context, by suggesting that Petitioner had somehow "disclaimed" any privacy interest through his factually accurate statements that his girlfriend owned the car and that he had not been driving. *Id.* at 6a-7a. But that rationale cannot be reconciled with the legal standard applied by other courts. And it ignores the reality of the marked efforts Petitioner took to preserve his privacy during interactions with the police, including talking with officers initially only through a slight crack in his tinted car window, and then closing the window and stepping out of the car before engaging further. As the dissenting judge remarked, it is unclear what more Petitioner or anyone in his position "could have done" to more strongly protect a privacy interest in the vehicle. *Id.* at 16a-17a (Stranch, J., dissenting).

The published decision in this case has startling consequences for the millions of Americans nationwide who borrow a vehicle but happen not to be sitting in the driver's seat when police approach—from a non-driving spouse waiting for a significant other to finish running an errand, to friends on a road trip. And that is true even when a passenger has the owner's

permission to use a vehicle, and in practice exhibits joint control over and the right to exclude others from it. The holding is not only squarely wrong, but "incompatible with controlling precedent." App., *infra*, 18a (Stranch, J., dissenting).

The decision opens sharp conflicts with other circuits and state courts of last resort. Other courts have repeatedly confirmed what common sense suggests: that those who regularly borrow a car from a romantic partner, close relative, or friend, and have possession and control over the vehicle, naturally have a protected expectation of privacy in its contents. That expectation exists whether or not the person is driving at the time of a police encounter, and whether or not she informs police about the car's actual ownership. The panel erred in resolving an exceptionally important question in a manner that threatens core Fourth Amendment protections for virtually anyone who uses a borrowed car. Further review is urgently warranted.

STATEMENT

1. Legal Background

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects." U.S. Const. amend. IV. The "basic purpose" of this guarantee "is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *Carpenter* v. *United States*, 585 U.S. 296, 303 (2018) (quoting *Camara* v. *Mun. Court*, 387 U.S. 523, 528 (1967)). To this end, the Fourth Amendment prohibits "unreasonable searches and seizures." U.S. Const. amend. IV. "Ever mindful"

of the Framers' experience with the "indignities and invasions of privacy" wrought by "general warrants and warrantless searches" during the Founding Era, this Court has consistently "viewed with disfavor practices that permit police officers unbridled discretion to rummage at will among a person's private effects." *Byrd* v. *United States*, 584 U.S. 395, 402-403 (2018) (cleaned up).

One claiming a Fourth Amendment violation must show that he "has had his own Fourth Amendment rights infringed by the search * * * which he seeks to challenge"—a requirement sometimes referred to as Fourth Amendment "standing." *Rakas* v. *Illinois*, 439 U.S. 128, 133 (1978).[1] "When an individual 'seeks to preserve something as private,' and his expectation of privacy is 'one that society is prepared to recognize as reasonable,'" this Court has held that "official intrusion into that private sphere generally qualifies as a search and requires a warrant supported by probable cause." *Carpenter*, 585 U.S. at 304 (quoting *Smith* v. *Maryland*, 442 U.S. 735, 740 (1979)). Or, as this Court put it in *Smith*, the Fourth Amendment protects an "'actual (subjective) expectation of privacy'" that is objectively "'reasonable.'" 442 U.S. at 740 (quoting *Katz*

[1] Of course, while "[t]he concept of standing in Fourth Amendment cases can be a useful shorthand for capturing the idea that a person must have a cognizable Fourth Amendment interest in the place searched before seeking relief for an unconstitutional search," it "should not be confused with Article III standing." *Byrd*, 584 U.S. at 410-411.

v. *United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)).[2]

"Although no single rubric definitively resolves which expectations of privacy are entitled to protection, the analysis is informed by historical understandings 'of what was deemed an unreasonable search and seizure when [the Fourth Amendment] was adopted.'" *Carpenter*, 585 U.S. at 304-305 (cleaned up). Similarly, although protected expectations of privacy "need not be based on a common-law interest in real or personal property, or on the invasion of such an interest," "property concepts are instructive in determining the presence or absence of the privacy interests protected by that Amendment." *Byrd*, 584 U.S. at 403 (cleaned up).

This case focuses on what has been characterized as the "subjective" prong of the analysis: i.e., whether a party in Petitioner's position can be said to have "preserve[d] * * * as private" the contents of a borrowed automobile. Under this Court's precedents, that inquiry turns on whether an individual, "by his conduct," has exhibited an "actual (subjective) expectation of privacy" in the place searched. *Smith*, 442 U.S. at 740; accord *id.* at 743 (addressing whether "petitioner's conduct" was "calculated to keep" relevant information

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[2] Several members of this Court have criticized the "reasonable expectation of privacy" test from *Katz* and urged a return to a property-focused understanding of the Fourth Amendment. *E.g.*, *Carpenter*, 585 U.S. at 342-361 (Thomas, J., dissenting); *id.* at 386-406 (Gorsuch, J., dissenting). Because Petitioner's Fourth Amendment claim can proceed under either the *Katz* framework or a property-based understanding, the Court need not resolve those broader issues here.

"private"). As part of this analysis, courts may examine whether a party "took normal precautions to maintain his privacy." *Rawlings* v. *Kentucky*, 448 U.S. 98, 105 (1980).

2. Factual Background

1. In January 2020, Petitioner Gregory Rogers borrowed his girlfriend's car, as he "often" did. App., *infra*, 2a-3a (majority), 10a (Stranch, J., dissenting). He was sitting in the passenger seat, with the car lawfully and safely parked in a line of parked cars along a residential street in Grand Rapids, Michigan. App., *infra*, 2a (majority), 10a (Stranch, J., dissenting). Police approached to ask about an unrelated incident elsewhere on the block. Petitioner rolled down his tinted window "a few inches" to respond to the officer's initial questions. He truthfully told police the car belonged to his girlfriend, and that he did not have identification with him. App., *infra*, 27a-28a.

After officers determined that Rogers had an outstanding warrant and expressed a desire to "check" him, Rogers "asked to get out of the car" so they could do so. App., *infra*, 28a. He rolled up his tinted window prior to stepping out of the car. Police promptly handcuffed and moved to secure him in the back of a police cruiser. Apparently confused about the basis for his detention, and in response to a bystander's question about why he was being arrested, Rogers "complained that he had not been driving." *Ibid.* Having secured him in the squad car, the officers took the keys from Rogers and ran the license plates, confirming that the car did in fact belong to Petitioner's girlfriend—as he had explained. An officer then searched the car,

finding marijuana and a gun. *Id.* at 28a-29a.[3] Although the searching officer initially defended his actions as a "cursory wingspan search," the government later conceded that theory could not sustain the search, given that Petitioner had already been arrested and secured in the patrol car before the search occurred. *Id.* at 29a, 41a. Instead, the government ultimately sought to justify having impounded the vehicle and conducted an inventory search under a "community caretaking" theory. *Id.* at 10a (Stranch, J., dissenting).

In April 2020, officers obtained an arrest warrant for Petitioner stemming from the January search. App., *infra*, 3a. In executing that warrant, the officers found Petitioner again sitting in the same parked car. The search yielded a handgun and marijuana. *Ibid.*

In connection with the January and April searches, a grand jury indicted Petitioner on counts of possession with intent to distribute marijuana; possession of a firearm in furtherance of a drug trafficking crime; and being a felon in possession of a firearm. App., *infra*, 3a.

2. Before trial, Rogers unsuccessfully moved to suppress the results of the search. The district court reasoned that Rogers was "neither the owner * * * nor the driver" of the car, and stated (incorrectly) that there was "no evidence" that Rogers had "permission from the owner to use the vehicle or be present inside it." App., *infra*, 4a, 31a-32a. "Wrongful" presence, the

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[3] Body-camera videos of the encounter are part of the record, and were filed with the Sixth Circuit. See ECF 48 (6th Cir. Mar. 31, 2023).

district court reasoned, does not allow a defendant to challenge a search. *Id.* at 32a. After a trial where the government relied heavily on the fruits of the January search, a jury convicted Rogers on several counts stemming from the drugs and firearm. *Id.* at 4a.

3. Petitioner's appeal focused on the validity of the search. The parties briefed Fourth Amendment "standing" around the question of whether Petitioner lawfully possessed his girlfriend's car at the time of the search. But by the time of oral argument, the government had conceded that the record showed Petitioner in fact had his girlfriend's permission to use the car at the time of the search—as he "often" did. App., *infra*, 9a; accord *id.* at 10a, 13a (Stranch, J., dissenting); ECF 64 (6th Cir. Dec. 4, 2023) (government Rule 28(j) letter (quoting R.22-1, Suppression Mot. Exhibits, PageID.79)).

A divided panel of the Sixth Circuit nonetheless held that Petitioner "failed to meet his burden of establishing his standing" to challenge the search. First, the panel concluded that Petitioner "never exhibited a subjective expectation of privacy" in the car, because he "was neither the owner nor driver," could not produce a license at the time of the search, and did not show "dominion and control" over the car. App., *infra*, 5a.

Second, the panel acknowledged precedent supporting "a passenger's legitimate expectation of privacy" in a borrowed vehicle when he has "joint access or control." App., *infra*, 6a (discussing *United States* v. *Matlock*, 415 U.S. 164, 171 n.7 (1974)). But the panel held that Petitioner had "disclaimed" any such privacy interest by having "accurately inform[ed] the police"

that his girlfriend owned the car, that he "wasn't * * * driving," and that he was not carrying identification. *Id.* at 6a-7a.

On these grounds, the panel attempted to distinguish *Byrd*, appearing to conclude that merely because Petitioner was not driving, and told officers he borrowed the car from his girlfriend, he could not prove "dominion and control" over the car. App., *infra*, 7a (distinguishing *Byrd* on the ground that Petitioner was sitting in the passenger seat, and told officers he was not driving). The panel held that Petitioner "had no legitimate expectation of privacy because he exhibited no subjective expectation of privacy in his girlfriend's car." *Ibid.*[4]

Judge Stranch dissented, emphasizing longstanding precedent under which "one who borrows a vehicle and stores 'personal belongings' in it has 'a legitimate expectation of privacy in the car and its contents,'" even if they are not driving. App., *infra*, 12a (Stranch, J., dissenting) (citation omitted). Given that Petitioner used his girlfriend's car "often," rolled down his tinted window only a few inches when first approached by police, and closed the window before stepping out of the car, it was "unclear * * * how [Petitioner] could have done more to exhibit an expectation of privacy in

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[4] Having disposed of Petitioner's Fourth Amendment claim on these grounds, the panel did not reach Petitioner's other challenges to the lawfulness of the search, including the government's reliance on the "community caretaking" exception. The court separately affirmed Petitioner's conviction arising from a second criminal case, which had been consolidated with this one for purposes of appeal; that aspect of the Sixth Circuit's ruling is not at issue here. See App., *infra*, 9a & n.2.

the vehicle." *Id.* at 10a, 16a-17a. In the dissent's view, Petitioner's truthful statements to officers that he did not own the car and had not been driving did not disclaim or abandon his privacy interest. *Id.* at 14a-17a. After surveying relevant case law, including decisions of this Court, Judge Stranch concluded that the majority's holding was "incompatible with controlling precedent." *Id.* at 18a. In her view, "[t]he regularity with which [Petitioner] used the vehicle, and the close personal relationship between [Petitioner] and its owner, * * * bolster the reasonableness of [Petitioner's] expectation of privacy." *Id.* at 13a.

The dissent also rejected the majority's conclusion that Petitioner had "disclaimed" any privacy interest. Given that a legitimate expectation of privacy can attach to "borrowed vehicles," Petitioner "could not have forfeited" his Fourth Amendment rights "by honestly communicating the arrangement [to borrow his girlfriend's car] to law enforcement." App., *infra*, 15a. Petitioner's statement that he had not been driving was "legally irrelevant," in light of this Court's admonition that "'a passenger lawfully in an automobile'" can retain "'an expectation of privacy.'" *Ibid.* (quoting *Byrd*, 584 U.S. at 406). And a failure to produce a driver's license was equally irrelevant given his status as passenger and the absence of any law "requiring him to possess [a license] in the first place." *Id.* at 16a.

Having found that Petitioner had a legitimate expectation of privacy in the car, Judge Stranch would have held that impounding and searching the vehicle without a warrant violated the Fourth Amendment. In her view, the government's "community caretaking" theory did not justify impounding and searching a car

"that was safely and legally parked on a residential street in line with other identically parked cars posing no threat to traffic or public safety." App., *infra*, 18a-22a (citing, *inter alia*, *Caniglia* v. *Strom*, 593 U.S. 194, 198 (2021)).

Petitioner timely sought rehearing en banc, highlighting the conflict between the panel decision and authoritative precedent from other circuits and state courts of last resort on the threshold Fourth Amendment issue. The Sixth Circuit denied rehearing; Judge Stranch would have granted rehearing, for the reasons in her original dissent.

REASONS FOR GRANTING THE PETITION

This Court's review is urgently warranted to resolve entrenched splits of authority about the Fourth Amendment's application to vehicles. The Court should clarify that those who have lawful possession and joint control over someone else's car can invoke the Fourth Amendment's protections, and that such persons do not forfeit their constitutional rights by making truthful statements to police about the car's ownership and whether they were driving.

I. The Decision Below Deepens Splits of Authority on Important Fourth Amendment Questions.

A. The Sixth Circuit Adopted a Minority View By Denying Fourth Amendment Protections for Those Sitting in the Passenger Seat of a Borrowed Car.

The Sixth Circuit held that Petitioner "never exhibited a subjective expectation of privacy" because he (a) was sitting in the passenger seat of a borrowed car; (b)

accurately told police he did not own the car and had not been driving, although he had the owner's permission to use it; and (c) was not carrying a driver's license. App., *infra*, 5a-7a. On that basis, the majority held that Petitioner failed to demonstrate "dominion and control over," or a subjective expectation of privacy in, the vehicle, notwithstanding precedent from this Court and others holding that an automobile passenger can have a legitimate expectation of privacy in a borrowed car where he demonstrates lawful possession and control over the same. *Ibid.* In addition, the majority held that Petitioner had "disclaimed" any Fourth Amendment rights by truthfully responding to the officers' questions about the car's ownership and whether he was carrying a license. *Id.* at 6a-7a. As Judge Stranch explained in dissent, the majority's analysis of both issues ultimately "turns largely on [Petitioner's] role as a passenger." *Id.* at 17a-18a (Stranch, J., dissenting). In short, under the panel decision here, Fourth Amendment protections are largely and improperly limited to those sitting in the driver's seat.

In so holding, the Sixth Circuit aligned itself with a small minority of courts to reject Fourth Amendment standing in these circumstances. For instance, in *United States* v. *Dixon*, 901 F.3d 1322, 1338 (2018), the Eleventh Circuit held that a defendant lacked Fourth Amendment standing to challenge the search of his girlfriend's automobile, in which he was a passenger (without a driver's license) at the time of a search. In the court's view, the defendant lacked the requisite "possessory" interest in the vehicle—even though he had used the car on other occasions, had a spare key,

"le[ft] personal belongings in the car," paid to repair it, and sometimes purchased gas. *Id.* at 1338-1339. And with regard to the disclaimer analysis, the Seventh Circuit has held that a passenger's truthful statements that he did not own an automobile were sufficient to relinquish his Fourth Amendment rights, notwithstanding other evidence of his connection to the car. *United States* v. *Alexander*, 573 F.3d 465, 469-470, 473-474 (7th Cir. 2009).

B. The Majority of Jurisdictions Find a Subjective Expectation of Privacy for Passengers in Borrowed Cars in These Circumstances.

In contrast to this minority approach, the Third, Fifth, Seventh, Eighth, and Ninth Circuits, as well as the D.C. Court of Appeals and other state courts of last resort, have correctly upheld a passenger's expectation of privacy in a borrowed vehicle, in circumstances indistinguishable from those here.

United States v. *Montalvo-Flores*, 81 F.4th 339, 340-41, 343 (3d Cir. 2023), is illustrative. There, the Third Circuit found "no question" that a defendant had a subjective expectation of privacy in his girlfriend's rental car, where (as here) the girlfriend gave him permission to use it and he possessed the keys—even where the defendant did not have a valid driver's license and was not an authorized driver on the rental agreement. The court explained that defendant "possessed and controlled" and had "dominion" over the car for Fourth Amendment purposes where he held the keys and the car was parked outside his hotel room. *Id.* at 344. Indeed, given the intimate nature of the boyfriend-girlfriend relationship, the Third Circuit

found the expectation of privacy to be objectively reasonable. "Much like * * * a son is unlikely to be driving his mother's car without her permission," the defendant's possession of "his girlfriend's keys, not a stranger's," showed that he lawfully possessed the car. *Id.* at 343-344; accord *id.* at 343 (defendant "no doubt believed he had privacy in the car").

United States v. *Rose*, 731 F.2d 1337, 1343 (8th Cir. 1984), is to similar effect. There, the defendant "did not own" the car, which belonged to his sister, who gave him permission to drive it regularly. *Ibid.* "[N]or was [the defendant] driving it at the time it was stopped," despite possessing the ignition and trunk keys. *Ibid.* Although the defendant was a passenger at the time of the search, the Eighth Circuit had no difficulty concluding that he had control over the car sufficient to assert a Fourth Amendment claim. *Ibid.*

Similarly, in the Ninth Circuit, a "defendant may have a legitimate expectation of privacy in another's car if the defendant is in possession of the car, has the permission of the owner, holds a key to the car, and has the right and ability to exclude others, except the owner, from the car." *United States* v. *Thomas*, 447 F.3d 1191, 1198 (9th Cir. 2006); accord *United States* v. *Portillo*, 633 F.2d 1313, 1317 (9th Cir. 1980).

Likewise, the Seventh Circuit holds that one who rents a vehicle has standing to challenge a search even when he is a passenger at the time of the stop, lacks a valid driver's license, and allows someone else to drive, because the owner "handed him the keys," and he retained "the authority to exclude anyone from the vehicle." *United States* v. *Walton*, 763 F.3d 655, 664, 666 (7th Cir. 2014); accord *United States* v. *Griffin*, 729

F.2d 475, 483 n.11 (7th Cir. 1984) (holding that passenger in borrowed car had "legitimate expectation of privacy" in car loaned to him by a close relative, noting that with owner's permission, passenger "exercise[d] exclusive control" over the car).[5]

Decisions of other circuits are in accord. In *United States* v. *Martinez*, 808 F.2d 1050 (1987), the Fifth Circuit held that a passenger in a car borrowed from a romantic partner can challenge the search under the Fourth Amendment. There, a federal agent stopped a car on suspicion that its occupants were manufacturing drugs. *Id*. at 1051. The passenger demonstrated that she had permission from her boyfriend, the vehicle's owner, to use the car. *Id*. at 1056. The Fifth Circuit had no difficulty holding that, given the owner's permission to borrow a car, the defendant had Fourth Amendment standing "as lawful possessor" of the vehicle—even as a passenger. See *id*. at 1056 & n.19 (citing cases).

State courts understand and apply the Fourth Amendment the same way. In *United States* v. *Scott*, 987 A.2d 1180, 1185 (D.C. 2010), for instance, police found keys to a nearby car while searching a defendant, and then searched the car as well. The defendant initially told police that he did not even have a car, later clarifying that the vehicle in question "wasn't his" and instead belonged to his cousin—who had given him permission to use it "for the past several months." *Id*. at 1185-1186. The court held that where

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[5] The Seventh Circuit's analysis of the expectation of privacy issue in these cases is distinct from its disclaimer analysis in *Alexander*, 573 F.3d at 473-474.

a defendant's privacy interest is rooted in "something other than ownership, it may be unreasonable * * * to construe a mere denial of ownership as an abandonment of that expectation." *Id*. at 1190. Even where a defendant did not have "exclusive[]" use of the car and was not driving at the time, he had not "abandoned his reasonable expectation of privacy in the [car]." *Id*. at 1190-1191. On that basis, the court affirmed the suppression of evidence found in the search. *Id*. at 1193.

The court in *Matthews* v. *State*, 431 S.W.3d 596, 607-608 & nn.51-52 (Tex. Crim. App. 2014), catalogued state and federal authorities for the proposition that "a person who borrows a car with the owner's permission has a reasonable expectation of privacy," explaining that "[b]ecause he holds the keys to the car, he may control who enters it and who drives it, thus his dominion or control is superior to all others." Although a defendant can lose an expectation of privacy through abandonment, "the decision to abandon must be voluntary, and a defendant must intend to abandon the property," *id*. at 608-609.

So too in *Campos* v. *State*, 885 N.E.2d 590, 596 (Ind. 2008). There, a passenger sought to suppress drugs discovered in a search of a vehicle owned by, and used with the permission of, his brother. The Indiana Supreme Court held that "[w]here the defendant offers sufficient evidence indicating that he has permission of the owner to use the vehicle, the defendant plainly has a reasonable expectation of privacy in the vehicle and standing to challenge the search of the vehicle." *Id*. at 599 (citing *United States* v. *Rubio-Rivera*, 917 F.2d 1271, 1275 (10th Cir. 1990)).

Those decisions are hardly outliers. As one leading treatise explains, "[Fourth Amendment] [s]tanding will also most likely be granted for other categories of passengers who can demonstrate use of a vehicle on a regular basis—for instance, employees of the automobile owner or regular participants in a car pool, as well as the owner's family members." William E. Ringel, *Searches and Seizures, Arrests and Confessions* § 11:33 & n.18 (2d ed.) (Nov. 2024 Update). The panel's contrary holding here creates a split of authority and will generate disparate outcomes depending on where a Fourth Amendment claim is litigated.

C. The Panel's Separate "Disclaimer" Rationale Creates Another Split of Authority.

In holding that Petitioner had not exhibited a subjective expectation of privacy at the time of the search, the panel separately concluded that Petitioner "disclaimed" any Fourth Amendment rights by "accurately inform[ing] the police" that he did not own the car, that he was not carrying identification, and was not driving. App., *infra*, 6a-7a. The panel analogized to cases where a defendant had disclaimed or abandoned ownership of the property to be searched. *Ibid.* But in so doing, the panel again departed from the approach of other courts, which recognize that a non-owner can assert a privacy interest in borrowed property even when not driving, and that limit a "disclaimer" or abandonment theory to voluntary actions completely unlike those present here.

To begin, insofar as the panel suggested that Petitioner abandoned his Fourth Amendment rights merely by informing police that his girlfriend owned

the car and he was not driving, that approach takes flight from this Court's cases. In *Rakas* v. *Illinois*, 439 U.S. 128 (1978), this Court explained that "one who owns *or* lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of [the] right to exclude." *Id.* at 143 n.12 (emphasis added). Applying that standard, the Court analyzed whether the party asserting a Fourth Amendment claim in that case had asserted *either* "a property" or "a possessory" interest in the automobile. And in *Byrd* v. *United States*, 584 U.S. 395, 407 (2018), this Court made clear, again in the context of the Fourth Amendment's application to vehicles, that "the expectation of privacy that comes from lawful possession and control" does not depend on whether the object is "rented or privately owned."[6] Accord *United States* v. *Perea*, 986 F.2d 633, 639-640 (2d Cir. 1993) ("[o]ne need not be the owner of the property for his privacy interest to be one that the Fourth Amendment protects, so long as he has the right to exclude others from dealing with the property"). The Sixth Circuit departed from these principles, and ignored the relevance of *possession* and control, by holding that truthful statements that a defendant does not *own* a car constituted a disclaimer of Fourth Amendment rights.

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[6] *Byrd* also underscored that in *Rakas*, this Court had "disclaimed any intent to hold 'that a passenger lawfully in an automobile may not invoke the exclusionary rule and challenge a search of that vehicle unless he happens to own or have a possessory interest in it.'" 584 U.S. at 406 (quoting *Rakas*, 439 U.S. at 149 n.17).

The panel's suggestion that Petitioner disclaimed his Fourth Amendment rights through accurate statements about ownership, his lack of identification, and whether he had been driving, also departs from rulings of other circuits and state courts of last resort. In *Scott*, for instance, the court noted that where privacy interests are grounded in something other than formal ownership (like physical possession), "it may be unreasonable * * * to construe a mere denial of ownership as an abandonment of that expectation." 987 A.2d at 1190. In that case, the defendant had initially denied having a car in the vicinity, but then "retracted" his disclaimer and clarified that the nearby car he was using belonged to his cousin. The court held that "police were not entitled to conclude that he had abandoned" the car. *Id.* at 1190-1191; accord *United States* v. *Jackson*, 638 F. Supp. 3d 622, 638 (E.D. Va. 2022) (where defendant "derived his reasonable expectation of privacy from his ownership of the item," statement denying ownership might constitute abandonment; but where defendant "derived his reasonable expectation of privacy from the owner's standing permission to use the item," "denying ownership is simply stating a fact of vehicle registration" and not forfeiting Fourth Amendment rights).

Similarly, in *Hardy* v. *Commonwealth*, the court held that a defendant's statement that he never drove the car was not a disclaimer of a privacy interest in that vehicle. 440 S.E.2d 434, 436 (Va. Ct. App. 1994). To the contrary, the court concluded that the defendant had exhibited a subjective expectation of privacy by objecting to a search of the car's trunk, by handing

the keys to his girlfriend, and by instructing his girlfriend not to give the keys to the police. *Ibid.*

Other cases reach the same conclusion where a defendant's statements about property ownership were not incompatible with a privacy interest derived from possession. In *United States* v. *Liu*, 180 F.3d 957, 960-962 (1999), the Eighth Circuit analyzed whether a defendant had "abandoned" searched property (a suitcase) by examining not only whether he had disclaimed formal ownership, but also whether he voluntarily "physically relinquished" the property. To similar effect, the Fifth Circuit in *United States* v. *Colbert* found a defendant to have abandoned a privacy interest where he "voluntarily discarded, left behind, or otherwise relinquished his interest in the property." 474 F.2d 174, 176 (5th Cir. 1973) (en banc) (citations omitted); accord *United States* v. *Thomas*, 864 F.2d 843, 846 (D.C. Cir. 1989) (evaluating abandonment by focusing on the defendant's intent); *United States* v. *Hawkins*, 681 F.2d 1343, 1346 (11th Cir. 1982) ("disclaimer of ownership * * * is not necessarily the hallmark for deciding" whether a defendant can "claim the protection of the [F]ourth [A]mendment"); *United States* v. *Jackson*, 544 F.2d 407, 409 (9th Cir. 1976) (voluntary physical relinquishment).

Unlike the Sixth Circuit's approach here, these other jurisdictions would not treat Petitioner's truthful factual statements—that his girlfriend owned the car, that he was not carrying identification, and that he was not driving—as constituting abandonment, given his extensive efforts to maintain privacy in the borrowed vehicle during the police encounter. To the contrary, precedent from those courts supports the

conclusion that Petitioner exhibited and maintained an expectation of privacy: he "chose a vehicle with tinted windows, rolled his window down only a crack when officers engaged him, sought permission to exit the car when officers asked to 'check' him, and rolled his window back up before stepping out of the car." App., *infra*, 12a-13a (Stranch, J., dissenting). Far from voluntarily relinquishing his possessory interest in the vehicle, cf. *Liu*, 180 F.3d at 962, Petitioner "never willingly left the vehicle, separating from it only when he was arrested and taking steps to preserve his privacy throughout the encounter." App., *infra*, 17a (Stranch, J., dissenting). As Judge Stranch pointedly observed, it is unclear "how [Petitioner] could have done more" to exhibit and maintain an expectation of privacy in the vehicle. *Id*. at 16a-17a.

II. The Decision Below Is Wrong.

A. Petitioner Exhibited a Subjective Expectation of Privacy in the Regularly Borrowed Vehicle

Under a straightforward application of *Byrd*, 584 U.S. at 407, 410, Petitioner had a "cognizable Fourth Amendment interest" in his girlfriend's car because he had "lawful possession and control [of the vehicle] and the attendant right to exclude." Indeed, this Court emphasized in *Byrd* that a defendant who "lawfully possesses" a car "will in all likelihood have a legitimate expectation of privacy by virtue of the right to exclude." *Id*. at 405 (citation omitted). And the Court saw "no reason" why the expectation of privacy "that comes from lawful possession and control" would differ "depending on whether the car in question is rented or

privately owned by someone other than the person in current possession of it." *Id.* at 407.

To illustrate the point, this Court in *Byrd* discussed examples of parties who would have the requisite *subjective* expectation of privacy—including the extreme examples of "[a] burglar plying his trade in a summer cabin during the off season," or a car thief driving a stolen car. 584 U.S. at 409 (citation omitted). To be sure, those subjective expectations would not ultimately support a Fourth Amendment claim because they are not objectively "reasonable." *Ibid.* But the Court had no difficulty concluding that those defendants would exhibit a "thoroughly justified *subjective* expectation of privacy," *ibid.* (emphasis added; citation omitted). That rationale sharply undercuts the Sixth Circuit's contrary conclusion in this case as to Petitioner's subjective expectations—since Petitioner, unlike the hypothetical burglar or car thief, in fact had permission to use the car.

Here, the record showed that Rogers had lawful possession of the car, which he "often" drove with his girlfriend's permission, and of which he was the sole occupant, holding the keys—implicating the right and ability to exclude others. App., *infra*, 10a (Stranch, J., dissenting), 32a; D.Ct. R.22-1, Suppression Mot. Exhibits, pgID.79; accord *Byrd*, 584 U.S. at 407 (noting with approval government's concession that even an "unauthorized driver in sole possession of a rental car would be permitted to exclude third parties from it"). Rogers opened the window only a crack when officers approached to speak, and closed the window before exiting the car. App., *infra*, 12a-13a (Stranch, J., dissenting). Under *Byrd*, that ability to exclude

underscored the validity of Rogers's subjective expectation of privacy. 584 U.S. at 405.

That Petitioner had a protected Fourth Amendment interest in his girlfriend's car follows also from "concepts of real or personal property law." *Rakas*, 439 U.S. at 143 & n.12. At the time of the search, Petitioner had legal rights in the borrowed car—i.e., "the property rights of a bailee," *United States* v. *Jones*, 565 U.S. 400, 404 n.2 (2012); see also Black's Law Dictionary 169 (10th ed. 2014) (*bailment* is the "delivery of personal property by one person (the bailor) to another (the bailee) who holds the property for a certain purpose"); accord 8 C.J.S. *Bailments* § 1. The resulting possessory interest includes the "right to exclude." 8 C.J.S. *Bailments* § 21 (bailee has "the right to exclusive use and possession of the item for the period of the bailment"); *Perea*, 986 F.2d at 640 ("A bailee has the right—and often the duty—to exclude others from possession of the property entrusted to him."). The common law has long protected these property rights. See 2 William Blackstone, *Commentaries on the Laws of England* *452-453 (by virtue of interest in bailed property, bailee "may * * * maintain an action against such as injure or take away these chattels"). Given his girlfriend's permission to use the car, Petitioner's property rights included the right to possess and use the car and to exclude others from it.

Thus, even under a property-rights understanding of the Fourth Amendment, when officers impounded and searched the car here, they infringed Petitioner's property rights as a bailee, implicating the Fourth Amendment. See *Rakas*, 439 U.S. at 143 n.12 ("[O]ne 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.").

B. Petitioner's Truthful Statements to Police Did Not Abandon or Relinquish His Fourth Amendment Rights

Nor did Petitioner relinquish his Fourth Amendment rights through his truthful statements to police that his girlfriend owned the vehicle and that he was not driving or carrying a driver's license. Although warrantless searches of abandoned property do not violate the Fourth Amendment, see *Abel* v. *United States*, 362 U.S. 217, 241 (1960), the question is "whether the relinquishment occurred under circumstances indicating [the defendant] retained no justified expectation of privacy in the object." 1 Wayne R. LaFave, *Search & Seizure: A Treatise on the Fourth Amendment* § 2.6(b) (6th ed. 2020). A defendant's efforts to continue to protect the privacy of an area or effect can foreclose a finding of relinquishment.

Thus, in *Smith* v. *Ohio*, 494 U.S. 541, 542 (1990), the defendant tossed a grocery bag he was carrying onto the hood of his car in response to a police officer's inquiry, and then attempted to protect the bag from the officer's inspection. In rejecting the State's argument that the defendant had abandoned the bag, this Court held that "a citizen who attempts to protect his private property from inspection" in that manner—even after throwing it onto the hood of a car—"clearly has not abandoned that property." *Id.* at 543-544. Similarly, in *Rios* v. *United States*, 364 U.S. 253, 262 n.6 (1960), this Court explained that "[a] passenger who lets a package drop to the floor of the taxicab in which he is riding can hardly be said to have

'abandoned' it" for purposes of relinquishing Fourth Amendment rights. Thus, in deciding whether a party has abandoned property in a manner that relinquishes Fourth Amendment protection, courts consider not only whether that party has "denied ownership," but also whether he voluntarily and "physically relinquished the property." *Liu*, 180 F.3d at 960; accord *United States* v. *Easley*, 911 F.3d 1074, 1083 (10th Cir. 2018).

To start, the Sixth Circuit's relinquishment analysis proceeds from a fundamental error, by treating truthful and descriptive factual statements about car ownership, lack of a driver's license, and that Petitioner was not driving, as an affirmative abandonment of Fourth Amendment rights. In so doing, the panel effectively collapsed the distinction between the existence of a privacy interest, and potential relinquishment of the same, by relying on the same core facts for both holdings. The panel's approach here bears no resemblance to circumstances where other courts have found relinquishment, for instance where a defendant falsely denied ownership of property or took actions to relinquish physical possession of the same. *E.g.*, *Colbert*, 474 F.2d at 175, 177-178 (defendants verbally disclaimed ownership of briefcases they had been carrying, set briefcases down on sidewalk, and walked away from them). While statements or actions of that nature may constitute forfeiture of Fourth Amendment protections, the panel here could point to nothing of the sort.

To the contrary, the record here forecloses any suggestion that Petitioner verbally disclaimed or voluntarily abandoned his possessory interest in his

girlfriend's vehicle. Petitioner "chose a vehicle with tinted windows, rolled his window down only a crack when officers engaged him, sought permission to exit the car when officers asked to 'check' him, and rolled his window back up before stepping out of the car." App., *infra*, 12a-13a (Stranch, J., dissenting). Far from voluntarily relinquishing his interest in the parked car, Petitioner "never" voluntarily left the vehicle, "separating from it only when he was arrested and [after] taking steps to preserve his privacy throughout the encounter." *Id.* at 17a. In this context, Petitioner's truthful statements that he did not own the car, had not been driving, and did not possess a driver's license were "legally irrelevant," *id.* at 15a, to a disclaimer analysis, and do not meet the high standard for abandonment of Fourth Amendment rights.

III. The Questions Presented Are Important and Recurring.

1. The Fourth Amendment "seeks to secure the privacies of life against arbitrary power." *Carpenter*, 585 U.S. 296, 304 (2018) (cleaned up). The questions presented here are important and frequently recurring. One recent official study found that in a single year, at least 3.5 million people in the United States were stopped by police while parked in their vehicle along the street or in a public area. See Erika Harrell & Elizabeth Davis, U.S. Dep't of Justice, *Contacts Between Police and the Public, 2018 – Statistical Tables* 4 tbl.2 (2020), https://perma.cc/NBP8-VM6Y. Given the prevalence of such stops, and the frequency with which passengers may sit alone in a borrowed car, it is no exaggeration to say that the question presented in this

case implicates the Fourth Amendment rights of millions of people nationwide.

2. This case is a clean and attractive vehicle to resolve the conflicts among federal circuit courts and state courts of last resort. The Sixth Circuit held that Petitioner failed to show a subjective expectation of privacy in his girlfriend's car, and that his statements constituted a relinquishment of Fourth Amendment rights. It upheld the denial of his motion to suppress on that ground alone. See App., *infra*, 9a. The key facts are undisputed and uncomplicated—indeed, by the time of oral argument below, even the government had conceded the key fact that Petitioner had his girlfriend's permission to use the car at the time of the search. *Ibid.* The expectation-of-privacy issue was outcome-determinative below, with the panel declining to reach other issues. Nor is there any basis to delay resolving the question to allow further percolation; numerous circuits and state high courts have explored the relevant legal arguments, and the contours of the doctrinal disagreement are clear. See *supra* Parts I.A-I.C.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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