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 *AMICUS CURIAE* RESTORE THE FOURTH, INC. IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

Restore the Fourth, Inc. ("Restore the Fourth") is a national, non-partisan civil liberties organization dedicated to the robust enforcement of the Fourth Amendment to the U.S. Constitution. Restore the Fourth believes that everyone is entitled to privacy in their persons, homes, papers, and effects and that modern changes to technology, governance, and law should foster—not hinder—the protection of this right.

To advance these principles, Restore the Fourth oversees a network of local chapters, whose members include lawyers, academics, advocates, and ordinary citizens. Each chapter devises a variety of grassroots activities designed to bolster political recognition of Fourth Amendment rights. On the national level, Restore the Fourth also files *amicus curiae* briefs in significant Fourth Amendment cases.[2]

[1] This *amicus curiae* brief is filed with the written consent of all parties in this case. No counsel for a party authored this brief in whole or in part; nor did any person or entity, other than Restore the Fourth, Inc. and its counsel, contribute money intended to fund the preparation or submission of this brief.

[2] *See*, *e.g.*, Brief of *Amicus Curiae* Restore the Fourth, Inc. in Support of Petitioners, *Hernandez v. Mesa*, No. 15-118 (U.S. filed Dec. 9, 2016); Brief of *Amicus Curiae* Restore the Fourth, Inc. in Support of Plaintiff-Appellee Araceli Rodriguez, *Rodriguez v. Swartz*, No. 15-16410 (9th Cir. filed May 7, 2016); Brief of *Amicus Curiae* Restore the Fourth, Inc. in Support of Defendant-Appellant Stavros M. Ganias, *United States v. Ganias*, No. 12-240-cr (2d Cir. filed July 29, 2015) (en banc).

SUMMARY OF THE ARGUMENT

The Court should reject the Third Circuit's sweeping holding in this case that "the sole occupant of a rental vehicle has [no] Fourth Amendment expectation of privacy when that occupant is not named in the rental agreement." *United States v. Byrd*, 679 F. App'x 146, 150 (3d Cir. 2017).

This holding is wrong for two main reasons.

First, the Third Circuit's bright-line rule rests on the false premise that it is a breach of contract for anyone not listed on a rental car agreement to operate or even occupy a rental car. In reality, many individuals who are not named in a rental car agreement are nevertheless authorized to drive the rental car either as a matter of state law or under the policy of the rental-car agency.

As such, requiring police officers to make substantive Fourth Amendment judgments based on a rental car agreement is an unworkable rule prone to constitutional error. That error will then fall disproportionately on minority communities who account for an outsized share of the rental-car market. Moreover, this error-prone rule will make life harder for the residents of disaster-ravaged regions like Puerto Rico, Florida, and Texas, where the destruction of countless private vehicles has left many residents entirely dependent on rental cars as their primary means of transportation.

Second, beyond the facts of this case, the Third Circuit's fundamental assumption that contracts can determine Fourth Amendment rights makes no sense. Contracts are negotiated for private, economic purposes, and are based on limited forms of consent to keep the wheels of commerce moving. The parties to a contract have no reason to expect that what they are agreeing to as between themselves alone might affect their rights as against the government. This is especially true of adhesion contracts, which make up the bulk of contracts entered into by a vast majority of Americans in order to secure the necessities of modern life.

The way out of this morass is a return to the core principle of reasonableness that has guided this Court's Fourth Amendment jurisprudence for over two centuries. It then becomes clear that only breaches of public laws—and not breaches of contract—should serve to impair a person's Fourth Amendment rights. This is because a legal violation affects the relationship between an individual and the government, while a contract violation merely affects the position of two or more private parties. Consequently, only a breach of law is germane to the question of whether it is reasonable for an individual to expect to be free from governmental intrusion.

ARGUMENT

I. Allowing private contracts to dictate Fourth Amendment rights is a recipe for chaos.

A. A contract-based approach to Fourth Amendment rights cannot be readily administered by the police.

This Court has recognized on numerous occasions that any Fourth Amendment standard must be "workable for application by rank-and-file, trained police officers." *Illinois v. Andreas*, 463 U.S. 765, 772 (1983). "A single familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront." *Dunaway v. New York*, 442 U.S. 200, 213–14 (1979).

Using contract terms to determine whether an individual has a reasonable expectation of privacy does not yield such a workable standard. This is due to a myriad of variations among contracts and state laws governing contracts. The present case is a perfect example. The Third Circuit held that a "sole occupant" of a rental vehicle lacks an expectation of privacy if that person is not named in the rental agreement. *See Byrd*, 679 F. App'x at 150. This tracks the Third Circuit's analysis in *United States v. Kennedy*, which holds that a driver "who is not listed on the rental agreement as an authorized driver lacks a legitimate expectation of privacy in the car." 638 F.3d 159, 165 (3d Cir. 2011). In both cases, the Third Circuit conflated "unauthorized

drivers" with drivers who are "not listed on the rental agreement as an authorized driver." *Id.*

Major rental car agencies like Hertz and Thrifty, construe their rental agreements differently. These agencies have declared that every employee of a company that has a corporate account with them may drive their rental cars, regardless of whether each employee is named on a given rental car agreement.[3] By contrast, Enterprise—the nation's largest car rental car company—has no similar provision in its corporate rental policies.[4]

Now consider that in eight states—California, Iowa, New York, Wisconsin, Missouri, Illinois, Nevada, and Oregon—a renter's spouse is deemed by law to be an authorized driver of a rental car, regardless of whether the spouse happens to be named in the rental car agreement. *See* Cal. Civ. Code § 1939.01(e)(2) (2017); Iowa Code § 516D.3(1)(c) (2017); N.Y. Gen. Bus. Law § 396-z(1)(a)(ii) (2017); Wis. Stat. § 344.57(2)(a) (2017); Mo. Ann. Stat. § 407.730(2)(b) (2017); 625 Ill. Comp. Stat. 27/10 (2017); Nev. Rev. Stat. § 482.31515(2) (2017); Or. Rev. Stat. § 646A.140(1)(b) (2017); *cf.* Mass. Gen. Laws ch. 90, § 32E½ (2017).

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[3] *See Hertz Rental Qualification & Requirements*, HERTZ, http://bit.ly/2z2HzoG (last visited Nov. 15, 2017); *General Policies*, THRIFTY, http://bit.ly/1StJpQ0 (last visited Nov. 15, 2017); *cf.* Cal. Civ. Code § 1939.01(e)(3) (2017) (making employers and employees of the renter authorized drivers by law).

[4] *See Additional Driver Policies*, ENTERPRISE, http://bit.ly/2iuWQDI (last visited Nov. 15, 2017); *see also* 2016 U.S. CAR RENTAL MARKET, AUTO RENTAL NEWS (2016), http://bit.ly/2srAc3K (last visited Nov. 15, 2017).

This contractual and statutory morass leaves no administrable standard that police officers in the field can readily employ to know with precision who is authorized to drive a rental car and who is not. The fact that rental cars are frequently operated across state lines raises further complications, since the law governing a rental car agreement is the law of the state where the car is rented. The end result is that, to the extent the police rely on the Third Circuit's rule that a driver "not named in the rental agreement" has no expectation of privacy in the vehicle, 678 F. App'x at 150, the police are bound to violate the Fourth Amendment rights of countless drivers who are in fact authorized drivers under governing state law or a rental-car-agency policy. *Cf. Virginia v. Moore*, 553 U.S. 164 (2008). These aggrieved drivers are then likely to have little or no recourse for the violation of their constitutional rights given the qualified-immunity doctrine, which immunizes police violations of constitutional rights that are not clearly established. *See White v. Pauly*, 137 S. Ct. 548, 551 (2017).

By contrast, the Fourth Amendment's general rule of reasonableness for all searches and seizures affords police officers a "single, familiar standard" to determine Fourth Amendment rights in dealing with rental cars. *Dunaway*, 442 U.S. at 213–14. Such a requirement would also be a relief to the tens of millions of Americans who get behind the wheel of a rental car every year.

B. A contract-based approach to Fourth Amendment rights will inordinately prejudice the rights of minorities.

Minority communities in America account for a disproportionate share of the car rental market.[5] If the police may search any rental vehicle whose driver is not listed on the rental contract, this will incentivize unwarranted police stops and searches of a class of vehicles more likely to be driven by minorities. At the same time, this constitutional rule will strip the affected drivers of the standing they need to challenge this unwarranted police conduct.[6]

These harms are bound to be especially acute in the wake of natural disasters like hurricanes. Usage rates for rental cars skyrocket following such disasters given the massive damage that these disasters inflict upon private vehicles and public transit services.[7] Hurricane Harvey, for example, is estimated to have destroyed "as many as a million cars in the Houston

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[5] *See* KEVIN NEELS, THE BRATTLE GROUP, EFFECTS OF DISCRIMINATORY EXCISE TAXES ON CAR RENTALS: IMPACTS ON MINORITIES, LOW INCOME HOUSEHOLDS, INSURANCE COSTS, & AUTO PURCHASES 1–7 (2009).

[6] *See* Lisa J. Zigtermann, *Live & Let Drive: The Struggle for Unauthorized Drivers of Rental Cars in Attaining Standing*, 2009 U. ILL. L. REV. 1655, 1674 (2009).

[7] *See* Sonari Glinton, *Rental Firms' Disaster Readiness May Help Usher the Age of Self-Driving Cars*, NPR, Sept. 25, 2017, https://n.pr/2yon4OG (rental car companies have proactively redistributed the 2.2 million vehicles in the U.S. rental fleet to cope with increased demand after natural disasters).

metro area."[8] The consequences of this reality for disaster victims are staggering. "Reliable transportation is a daily, fundamental need, almost more so in the wake of a disaster."[9] *Cf. Krimstock v. Kelly*, 306 F.3d 40, 44 (2d Cir. 2002) (Sotomayor, J.) ("A car or truck is often central to a person's livelihood or daily activities.").

Affirming the Third Circuit's decision in this case would thus mean that anyone who briefly borrows a rental car from the contracting renter in hurricane-ravaged Houston or San Juan must be ready to sacrifice their Fourth Amendment rights to get where they need to go. That outcome is inconsistent with the vision of the Framers, who rejected "indiscriminate searches and seizures conducted under the authority of general warrants." *Payton v. New York*, 445 U.S. 573, 583 (1980) (punctuation omitted). That outcome is also inconsistent with the conscience of our free nation—one that is more than prepared to recognize that the borrower of a rental car has a reasonable expectation of privacy in the car even if his or her name is not on the rental car agreement.

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[8] Alex Davies, *[Hurricane] Harvey Wrecks Up to a Million Cars in Car-Dependent Houston*, WIRED, Sept. 3, 2017, http://bit.ly/2iTaCmZ.

[9] *Id.*

C. A contract-based approach to Fourth Amendment rights opens a Pandora's box of digital privacy problems.

If contract provisions are relevant to Fourth Amendment analysis, then this will have a profound impact on digital privacy. This may be seen in recent cases involving cloud service providers (CSPs). Nearly all CSPs include consent-to-search provisions in their terms of service. Through these provisions, CSPs retain the right to search a user's data at all times notwithstanding the fact that most users have never read these provisions. Federal district courts have since reached very different conclusions about the Fourth Amendment rights of similarly-situated criminal defendants based on these consent-to-search provisions.

In *United States v. DiTomasso*, a federal district court held that an individual does not waive their Fourth Amendment rights merely by agreeing to a consent-to-search term in an adhesion contract. 56 F. Supp. 3d 584, 592 (S.D.N.Y. 2014). The defendant created accounts with Omegle, a chat service, and AOL, an email service. *Id.* at 596. The defendant agreed to adhesion contracts that allowed Omegle to search his chats and AOL to search his emails. *Id.* The court held that the defendant *did not* vitiate his reasonable expectation of privacy under Omegle's Terms of Service. *Id.* at 579. But the court then found that the defendant *did* vitiate his reasonable expectation of privacy under AOL's Terms of Service, because these terms contemplated AOL as a government agent. *Id.*

In *United States v. Stratton*, a federal district court held that a defendant had a reduced expectation of privacy in an online account due to boilerplate contract terms. 229 F. Supp. 3d 1230, 1242 (D. Kan. 2017). The court reached this conclusion despite the fact that the defendant had no opportunity to negotiate the contract; in fact, he testified that he had not even read it. *See id.* This is unsurprising given the contract's length at 6,086 words.[10] In short, by merely clicking a box, the defendant lost his expectation of privacy.

Adhesion contracts like the ones at issue in *DiTomasso* and *Stratton* are commonplace. Dropbox and Apple's iCloud, two popular file-hosting services, both have Terms of Service retaining each company's right to examine user files for compliance with their Acceptable Use Policy.[11] Many popular dating apps, such as Tinder, also have these provisions.[12]

These examples accordingly illuminate the high stakes of this case. If a rental car agreement can dictate the extent of a person's Fourth Amendment rights, a CSP adhesion contract may well do the same. And if that is true, then a vast trove of private data will no longer be protected from government intrusion under

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[10] *See Playstation Network Terms of Service & User Agreement, Version 3.0*, PLAYSTATION (SONY), July 15, 2008, http://bit.ly/2zLXYv2.

[11] *See Dropbox Terms of Service*, DROPBOX, Feb. 10, 2017, http://bit.ly/1r1LYHN; *Apple iCloud Terms & Conditions*, APPLE, Sept. 19, 2017, http://apple.co/2jqRfT3.

[12] *See Tinder Terms of Use*, TINDER, Oct. 26, 2017, http://tinde.rs/1BFSEEc.

the Fourth Amendment. That state of affairs should give the Court pause, if only because "the Cyber Age is a revolution of historic proportions, [and] we cannot appreciate yet its full dimensions and vast potential to alter how we think, express ourselves, and define who we want to be." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1736 (2017). The future of this digital revolution depends not only on the protection of free speech but also on the protection of individual privacy—and that value cannot be preserved if a person's Fourth Amendment rights can evaporate based on a consent-to-search provision in a CSP adhesion contract that one may never have read.

II. Private contracts should not be used to delineate Fourth Amendment rights.

A. Private parties use contracts to order their rights as against each other—not as against the government.

Private parties enter into contracts for the purpose of ordering their relationships with each other—not with the government. The specific terms of a contract between private parties thus are not fit to gauge an individual's reasonable expectation of privacy *as against the government*. *See Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (explaining that the Framers "conferred, as against the government, the right to be let alone").

The quintessential purpose of a contract is to enable private parties to order their economic rights by

allocating risks and costs while making their mutual expectations binding on each other. *See* 1 WILLISTON ON CONTRACTS § 1:1 (4th ed. 2017). The parties have no reason to expect that their private contract terms may also entail a waiver of their Fourth Amendment rights when the police wish to conduct a search. After all, the government is not a party to the contract. It makes no sense, then, to allow private contract terms to control an individual's Fourth Amendment rights in whatever she has contracted for, be it a rental car, a hotel room, a storage locker, or cloud data storage. The prevalence of adhesion contracts in every aspect of modern life only furthers this point.

In *Jones v. United States*, this Court cautioned against allowing Fourth Amendment rights to turn on arcane distinctions in property law. 362 U.S. 257, 266 (1960); *see also Rakas v. Illinois*, 439 U.S. 128, 143 (1978) ("[A]rcane distinctions developed in property and tort law . . . ought not to control."). Fourth Amendment rights likewise should not turn on arcane distinctions in contract law. Of course, contract terms might shed some light on *the parties'* expectations of privacy *as against each other*. But they cannot control what is reasonable from a societal perspective under the Fourth Amendment. *See Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

To put this in concrete terms, consider a hotel guest's "implied or express permission" for "maids, janitors, or repairmen to enter his room in performance of their duties." *Stoner v. California*, 376 U.S. 483, 489 (1964). This grant of permission does not waive the

guest's right to keep his door shut when the police come knocking. *See id.* The same goes for a person's contracts with housekeepers, dog walkers, valets, computer technicians, or anyone else. All of these private arrangements simply have no bearing on how the guest—or anyone else—expects to be treated by the government.

B. Consent to a private contract may be found based on conditions that fall well short of those needed to waive Fourth Amendment rights.

In *Florida v. Jimeno*, this Court held that the "standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness." 500 U.S. 248, 251 (1991). There is nothing objectively reasonable about concluding that an individual has consented to a police search when the purported evidence of consent is a purely private contractual arrangement and, in many cases, a plain contract of adhesion.

Indeed, the common law establishes that consent to a contract may be based on a variety of mere legal fictions. An individual may consent to a contract by a change in conduct, *see Galloway v. Santander USA, Inc.*, 819 F.3d 79, 87 (4th Cir. 2016), inaction, *see Schnabel v. Trilegiant Corp.*, 697 F.3d 110, 120 (2d Cir. 2012), and even silence, *see* RESTATEMENT (SECOND) OF CONTRACTS § 19 (AM. LAW INST. 1981).

Courts have also upheld the enforceability of "clickwrap" contracts formed over the internet, in which a user clicks a box agreeing to dozens of pages of terms and conditions that they manifestly have not read. *See Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 238–39 (2d Cir. 2016). Such abbreviated forms of consent may keep the wheels of commerce turning, but they cannot deprive individuals of Fourth Amendment rights meant to protect them from the government (not Amazon).

Of course, in the civil context, constitutional rights may be waived through a contract. *E.g.*, *Nat'l Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 316 (1964) (parties may by contract waive their right to notice of litigation). But in the criminal context, the bar for waiver is much higher: "[w]aiver of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. 742, 748 (1970).

The Court has applied this more demanding standard to: (1) waiving one's right to a trial, *see id.*; (2) waiving one's right to be present at trial, *Illinois v. Allen*, 397 U.S. 337, 342–43 (1970); (3) waiving one's rights to remain silent and to the presence of an attorney, *Miranda v. Arizona*, 384 U.S. 436, 444 (1966); and (4) waiving one's right to counsel in a criminal case, *Johnson v. Zerbst*, 304 U.S. 458, 465 (1938). It would contravene *Brady* and its progeny to conclude that private contract terms—i.e., terms meant to order private

economic relationships—could waive or decide one's Fourth Amendment rights against the government.

C. Adhesion contracts are particularly ill-suited to delineating Fourth Amendment rights.

As noted above, adhesion contracts put front and center many of the biggest problems with allowing contract terms to dictate Fourth Amendment rights. To this end, it bears repeating that most of the contracts that we all deal with on a day-to-day basis are adhesion contracts. Public utilities, banks, and cellular providers all use "standard-form contract[s]" that they prepare "to be signed by the party in [the] weaker position, usually a consumer, who adheres to the contract with little choice about the terms." *Quilloin v. Tenet HealthSystem Phila., Inc.*, 673 F.3d 221, 235 (3d Cir. 2012).

State-level variation in enforcing adhesion contracts, in turn, indicates the substantial likelihood for chaos if Fourth Amendment rights are tethered to contract provisions. In Pennsylvania, "contracts of adhesion are *per se* procedurally unconscionable."[13] *Antkowiak v. TaxMasters*, 455 F. App'x 156, 160 (3d Cir. 2011). The same is true in New Mexico, Nevada,

[13] Courts have reached this conclusion because of the "lack of meaningful choice" that adhesion contracts entail. *Quilloin*, 673 F.3d at 235. Just so. Adhesion contracts do not embody any kind of "haggle or cooperative process"; they are more akin to "a fly and flypaper." Arthur Alan Leff, *Contract as Thing*, 19 AM. U. L. REV. 131, 143 (1970).

California, Tennessee, and Ohio.[14] As a result, if contract enforcement and Fourth Amendment rights go hand in hand, the same rental car agreement[15] may vitiate an unauthorized driver's Fourth Amendment rights in all those states where adhesion contracts are enforceable, but not in states like Pennsylvania, where adhesion contracts are *per se* unconscionable. *See Antkowiak*, 455 F. App'x at 159–60.

III. A path forward.

A. Public laws, not private contracts, should control analysis of Fourth Amendment rights.

Laws govern an individual's relationship with the government while contracts govern the private interactions of individuals with each other. *See* 1 CORBIN ON CONTRACTS § 1.1 (2017). Violating a law affects a person's relationship with the government and may

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[14] *See THI of New Mexico at Hobbs Center, LLC v. Spradlin*, 532 F. App'x 813, 818 (10th Cir. 2013); *Ting v. AT&T*, 319 F.3d 1126, 1148 (9th Cir. 2002); *Guerra v. Hertz Corp.*, 504 F. Supp. 2d 1014, 1021 (D. Nev. 2007); *Berent v. CMH Homes Inc.*, 466 S.W.3d 740, 754–55 (Tenn. 2015); *Williams v. Aetna Fin. Co.*, 700 N.E.2d 859, 872 (Ohio 1998).

[15] Courts have generally held that rental car contracts are adhesion contracts. *See*, *e.g.*, *Phila. Indem. Ins. Co. v. Barerra*, 21 P.3d 395, 404 (Ariz. 2001); *Kinkel v. Cingular Wireless LLC*, 857 N.E.2d 250, 266 (Ill. 2006); *Budget Rent-A-Car Sys., Inc. v. State Farm Mut. Auto Ins. Co.*, 727 So.2d 287, 291 (Fla. 2d Dist. App. 1999). Some courts have noted, though, that there may be certain provisions within rental car contracts that are not adhesive. *See Budget Rent-A-Car Sys., Inc. v. Crawford*, 185 F.3d 866 (9th Cir. 1999) (table decision).

therefore compromise a person's reasonable expectation of privacy under certain circumstances. Violating a contract, on the other hand, is rarely a breach of law. The two are analytically distinct, and a breach of contract is insufficient on its own to abrogate Fourth Amendment rights. *See United States v. Smith*, 263 F.3d 571, 586 (6th Cir. 2001) (an unauthorized driver of a rental car had a reasonable expectation of privacy in the vehicle because "it was not *illegal* for [the defendant] to possess or drive the vehicle, it was simply a breach of contract with the rental company").

A breach of contract may sometimes overlap with a breach of law. For example, a renter who never returns his rental car is both breaching his contract with the rental company and stealing the car. Only the theft, however—not the contract breach—vitiates the renter's reasonable expectation of privacy in the car. *Cf. United States v. Lyle*, 856 F.3d 191, 201 (2d Cir. 2017) (holding that an unauthorized driver of a rental car lacked a reasonable expectation of privacy in the car because his driver's license was suspended and thus he could not lawfully possess the car).

This makes sense. The purpose of the Fourth Amendment is to regulate the government's conduct when investigating suspected breaches of the law, as opposed to breaches of contract. Therefore, unless the violation of private contract terms gives rise to conduct that violates the law, a mere breach of contract should not in itself determine the presence or absence of a reasonable expectation of privacy.

B. Any contract-based analysis of Fourth Amendment rights should steer clear of non-parties to a contract.

Assuming *arguendo* that a contract may determine a person's Fourth Amendment rights, it does not then follow that contracts may also decide the Fourth Amendment rights of persons who are not a party to the contract. The rental-car context demonstrates why. The renter of a car cannot assign their contractual right to drive the car to a third party. *See* RESTATEMENT (SECOND) OF CONTRACTS § 317(2)(c) (AM. LAW. INST. 1981). Hence, when a renter lends that car to someone not authorized to drive it, the renter's possible breach of contract should not be said to impair the Fourth Amendment rights of the unauthorized driver who, by definition, is a non-party to the rental agreement.

The Ninth Circuit's decision in *United States v. Thomas* cements this point: "[W]e cannot base constitutional standing entirely on a rental agreement to which *the unauthorized party was not a party* and *may not capture the nature of the unauthorized driver's use of the car*." 447 F.3d 1191, 1199 (9th Cir. 2006) (emphasis added). The Eighth Circuit has reached the same conclusion, finding that an unauthorized driver may have a reasonable expectation of privacy in a rental vehicle given his relationship with the renter—and regardless of the absence of the unauthorized driver's name on the rental agreement. *See United States v. Best*, 135 F.3d 1223, 1225 (8th Cir. 1998).

In the end, the touchstone of the Fourth Amendment is *reasonableness*. *Katz*, 389 U.S. at 361 (Harlan, J., concurring). There are many factors that may be germane in deciding whether an individual possesses a reasonable expectation of privacy in a place or a vehicle. This is because society recognizes that reasonable expectations of privacy may emerge in a multitude of different ways—it is not just a matter of contract law. *Compare Minnesota v. Carter*, 525 U.S. 83, 90 (1998) (guest on premises for commercial purposes has no legitimate expectation of privacy), *with Minnesota v. Olson*, 495 U.S. 91, 100 (1990) (overnight guest has legitimate expectation of privacy); *see also Rakas*, 439 U.S. at 152–53. That means in cases like this one, reasonableness—and not the terms of a car rental agreement—should be the final measure for determining a person's Fourth Amendment rights.

CONCLUSION

The Court should reject the Third Circuit's bright-line rule that contractually-unauthorized drivers of rental cars have no reasonable expectation of privacy in these vehicles. "This is not an area of the law in which any 'bright line' rule would safeguard both Fourth Amendment rights and the public interest in a fair and effective criminal justice system." *Rakas v. Illinois*, 439 U.S. 128, 155–56 (1978) (Powell, J., concurring). Instead, as always, the Fourth

Amendment's general command of reasonableness should prevail.

Respectfully submitted,

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