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 NATIONAL ASSOCIATION FOR PUBLIC DEFENSE AND THE NATIONAL ASSOCIATION OF FEDERAL DEFENDERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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

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

DANIEL L. KAPLAN
DONNA F. COLTHARP
SARAH S. GANNETT
NATIONAL ASSOCIATION OF FEDERAL DEFENDERS
850 W. Adams St., Ste. 201
Phoenix, AZ 85007

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

Counsel for Amici Curiae

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INTEREST OF *AMICI CURIAE*

Amicus Curiae the National Association for Public Defense (NAPD) is an association of nearly 15,000 public defenders and other professionals who have sought to ensure that indigent clients secure their constitutional right to effective assistance of counsel.* NAPD members are advocates in jails, courtrooms, and communities, as well as experts in best practices and the practical, day-to-day representation of criminal defendants. Their collective expertise represents state, county, and local systems through full-time, contract, and assigned-counsel delivery mechanisms, dedicated juvenile, capital, and appellate offices, and a diversity of traditional and holistic practice models.

NAPD has a deep interest in the correct interpretation of laws and constitutional provisions affecting the rights of criminal defendants—particularly defendants who cannot afford to hire private counsel. To that end, NAPD has participated as *amicus curiae* in numerous criminal cases before this Court. *See*, *e.g.*, *Manuel* v. *City of Joliet, Ill.*, 137 S. Ct. 911 (2017); *Weaver* v. *Massachusetts*, 137 S. Ct. 1899 (2017); *McWilliams* v. *Dunn*, 137 S. Ct. 1790 (2017); *Bravo-Fernandez* v. *United States*, 137 S. Ct. 352 (2016); *Torres* v. *Lynch*, 136 S. Ct. 1619 (2016); *United States* v. *Bryant*, 136 S. Ct. 1954 (2016).

Amicus Curiae the National Association of Federal Defenders (NAFD) was formed in 1995. It is a nationwide, non-profit, volunteer organization whose

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* Pursuant to this Court's Rule 37, counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party, or any person other than *amici curiae* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented in writing to the filing of this brief.

membership is comprised of attorneys who work for federal public and community defender organizations authorized under the Criminal Justice Act. Each year, federal defenders represent tens of thousands of individuals in federal court, including thousands who are subject to searches and seizures.

NAFD has both particular expertise and interest in the subject matter of this litigation. It has submitted briefs as *amicus curiae* in a number of cases before this Court. *See*, *e.g.*, *Carpenter* v. *United States*, 137 S. Ct. 2211 (2017); *Navarette* v. *California*, 134 S. Ct. 1683 (2014); *United States* v. *Wurie*, 134 S. Ct. 999 (2014); *Bailey* v. *United States*, 133 S. Ct. 1031 (2013); *Maryland* v. *King*, 133 S. Ct. 1958 (2013).

NAPD and NAFD agree with petitioner that individuals have a constitutionally protected reasonable expectation of privacy when they drive rental cars with the permission of the renter, but not the owner. The Third Circuit's opinion in this case defies widely shared social expectations and misconstrues the historical property rights of third-party users. It also disproportionately affects individuals who lack the resources to own property in their own name. The decision should be reversed.

SUMMARY OF ARGUMENT

Our Founders knew that "[u]ncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government." *Almeida-Sanchez* v. *United States*, 413 U.S. 266, 274 (1973) (quoting *Brinegar* v. *United States*, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting)). To prevent such abuses, the Fourth Amendment has for more than 200 years played an "indispensable" role in ensuring the people's "full enjoyment of the rights of personal security, personal liberty, and private property." 3 Joseph Story, *Commentaries on the Constitution of the United States* 748 (1833). These protections are no less critical today than they were in prior centuries. Modern technological and societal developments do not render our rights "any less worthy of the protection for which the Founders fought." *Riley* v. *California*, 134 S. Ct. 2473, 2494–95 (2014). And it has been long-recognized that these privacy protections are just as essential for low-income persons as they are for those who are economically advantaged. *See Miller* v. *United States*, 357 U.S. 301, 307 (1958) ("The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement!") (quoting remarks by William Pitt, Earl of Chatham). Courts must therefore resist invitations to ease the Fourth Amendment's reins on government power.

This case offers the Court an opportunity to reaffirm the Fourth Amendment's vital role in protecting the privacy rights of all people—rich and poor alike. The boilerplate terms of rental agreements cannot

constrain or define the Fourth Amendment's protections, especially as these agreements function as contracts of adhesion for the significant number of low-income people who use car-sharing arrangements. The Third Circuit's contrary rule puts unlisted rental car drivers in a Fourth-Amendment-free zone, where police officers may search as they please without constitutional constraint. That rule is profoundly wrong and will negatively affect low-income communities. The Court should reverse.

I. The Fourth Amendment looks to "the everyday expectations of privacy that we all share" to determine those privacy interests society is prepared to recognize as reasonable. *Minnesota* v. *Olson*, 495 U.S. 91, 98 (1990). Under this standard, drivers of rental vehicles have a reasonable expectation of privacy, whether or not someone has listed them in the rental agreement.

The increasing use of rental vehicles and other car-sharing arrangements in today's society underscores the importance of Fourth Amendment protections. As of 2016, 40.6 million people in the United States live in poverty. *See* Jessica L. Semega et al., U.S. Census Bureau, *Income and Poverty in the United States: 2016* 12 & fig. 4 (Sept. 2017). While car usage has become a hallmark of modern life, a large number of these low-income people cannot afford to buy or lease one. In fact, 24% of those in poverty do not own a car. *See* National Household Travel Survey, *Mobility Challenges for Households in Poverty* 2 (2014), http://nhts.ornl.gov/briefs/PovertyBrief.pdf. At the same time, low-income communities regularly pool their resources to increase socioeconomic mobility and the efficient use of resources, and are therefore more likely to rely on car-sharing arrangements, including use of a vehicle that another person rented.

The regularity with which rental cars are operated by unlisted drivers demonstrates how contrary the Third Circuit's rule is to the everyday practices and expectations of society. Indeed, many courts have recognized that use of a rental vehicle by an unlisted driver is eminently foreseeable and, in fact, routine. *See*, *e.g.*, *Mahaffey* v. *State Farm Mut. Auto. Ins. Co.*, 679 So. 2d 129, 132 (La. Ct. App. 1996). Unlisted persons who operate rental vehicles are acting in conformity with—not contrary to—those "everyday expectations of privacy that we all share." *Olson*, 495 U.S. at 98.

The Fourth Amendment protects the privacy of all people. But for those of lesser means, what is true in theory is not always true in fact. In many different contexts and for many different reasons, low-income individuals are already left with reduced privacy protections. A rule that conditions Fourth Amendment rights on the terms of a contract of adhesion will only exacerbate this harm. It is well understood that low-income people are uniquely susceptible to the harms posed by contracts of adhesion. As a result, such persons are often stuck with lengthy and detailed contract terms that they do not understand and over which they have no control. Enforceable or not, the widespread use of these types of contracts does not determine the reasonable expectations of those who sign them—much less the reasonable expectations of those who never see the rental-car contract because they did not rent the vehicle.

II. While the Fourth Amendment's protections are not *defined* by principles of property law, the Court has made clear that property interests remain vital to determining the reasonableness of privacy expectations for Fourth Amendment purposes. *See*, *e.g.*, *Florida* v. *Jardines*, 569 U.S. 1, 11 (2013). The Third Cir-

cuit's rule, however, disregards longstanding principles of property law that confer on bailees (and sub-bailees) a possessory interest in the bailed property.

Bailees (and sub-bailees) have historically had the authority to exclude third persons from use of the bailed property and the corresponding duty to care for the property on behalf of the bailor. These principles of bailment law remain in full force today and are no less worthy than other property law principles that trigger Fourth-Amendment protection. *See*, *e.g.*, *United States* v. *Jones*, 565 U.S. 400, 405–06 (2012). The fact that a third-party rental car driver does not hold title to the vehicle and is not listed in the rental agreement does not diminish the strength of the sub-bailee's property interest in the bailed property. That explains why courts have repeatedly acknowledged the possessory interests of sub-bailees, even while recognizing that they are not listed in the rental agreement. *See*, *e.g.*, *Hall* v. *State*, 477 S.E.2d 364, 366 (Ga. App. 1996).

The unlisted status of a rental car driver is no basis for disregarding that driver's reasonable expectation of privacy, nor is it a basis for discounting the driver's recognized property interest in the vehicle. And contrary to the Third Circuit's myopic focus on the wording of rental agreements, courts have repeatedly refused to enforce such provisions in the very context in which they are meant to have the most force: insurance coverage. *See*, *e.g.*, *Boudreaux* v. *ABC Ins. Co.*, 689 F.2d 1256, 1261 (5th Cir. 1982). The fact that a driver is not listed in the rental agreement is an exceedingly frail basis for withholding the Fourth Amendment's indispensable protections.

ARGUMENT

I. THE FOURTH AMENDMENT PROTECTS THE PRIVACY EXPECTATIONS OF THOSE WHO RELY ON RENTAL VEHICLES.

This case involves the scope of the Fourth Amendment's protections for drivers of rental cars who have the permission of the lessee but not the owner, a right defined by "reasonable expectation[s] of privacy." *Katz* v. *United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring). Whether an unlisted rental-car driver has a reasonable expectation of privacy hinges on what "society is prepared to recognize as 'reasonable,'" *id.* at 361, and on "the everyday expectations of privacy that we all share." *Minnesota* v. *Olson*, 495 U.S. 91, 98 (1990).

This inquiry does not give license to ignore the significant population that uses rental cars. A rule that removes Fourth Amendment protection for drivers whose names are left off rental agreements would ignore society's reasonable expectations and, in particular, the expectations of lower socioeconomic communities that rely on car-sharing arrangements.

A. THE FOURTH AMENDMENT RECOGNIZES THE REASONABLE EXPECTATIONS OF LOWER SOCIOECONOMIC COMMUNITIES WHO INCREASINGLY RELY ON A SHARING ECONOMY.

A rule that constrains Fourth Amendment protections to the terms of rental contracts would ignore the reasonable expectations of low-income communities that frequently use car-sharing services, including rental cars, to mitigate or escape the cycle of poverty.

1. PEOPLE OF LIMITED MEANS MAKE FREQUENT USE OF CAR-SHARING ARRANGEMENTS.

Cars are essential in our society. Unlike prior generations, the majority of the U.S. population—more than 85%—drives to work. U.S. Department of Transportation, Bureau of Transportation Statistics, *Table 1-41: Principal Means of Transportation to Work* (2016), https://www.rita.dot.gov/bts/sites/rita.dot.gov.bts/files/publications/national_transportation_statistics/html/table_01_41.html. Just as automobiles have transformed the way people travel, technological and cultural developments have changed the way people access automobiles. The "sharing economy"—in which assets are loaned between members of community networks—has played a key role in altering how individuals use cars. "Instead of buying and owning things, consumers want access to goods and prefer to pay for the experience of temporarily accessing them. Ownership is no longer the ultimate expression of consumer desire." Fleura Bardhi & Giana M. Eckhardt, *Access-Based Consumption: The Case of Car Sharing*, 39 J. Consumer Res. 881, 881 (2012) (citation omitted).

Rental cars and other car-sharing arrangements are a feature of this new economy, as Americans increasingly "rent their cars, instead of buying them." Matt Phillips, *Why More and More Americans Are Renting Cars Instead of Buying Them*, Quartz (June 2, 2014), https://qz.com/214922/why-more-and-more-americans-are-leasing-cars-instead-of-buying-them/. Revenues from car-sharing services, such as Zipcar, have grown from $253 million in 2009 to over $3 billion in 2016. *See* Bardhi & Eckhardt, *supra*, at 886. The number of cars being "shared" commercially has also grown significantly in the past decade. In 2006, there were 117,656 users of 3,337 vehicles in all of

North America. *See* Susan Shaheen & Adam Cohen, Transportation Sustainability Research Center, *Innovative Mobility Carsharing Outlook: Carsharing Market Overview, Analysis, and Trends* 3 (2016), http://innovativemobility.org/wp-content/uploads/2016/02/Innovative-Mobility-Industry-Outlook_World-2016-Final.pdf. By 2014, more than 1.6 million people were using over 24,000 vehicles in the same region. *Ibid*.

Likewise, revenues from U.S.-based car rental operations exceeded $28 billion in 2016—up approximately $1.3 billion from the prior year. *See* Auto Rental News, *2016 U.S. Car Rental Market: Fleet, Locations, and Revenue* (2017), http://www.autorentalnews.com/fc_resources/pdf/u-s-car-rental-market-data.pdf. And the number of rental cars in operation nationwide has increased dramatically as well, rising from 1.5 million vehicles to 2.3 million over the past two decades. *See* Auto Rental News, *U.S. Rental Car Market, 1995–2005* (2005), http://www.autorentalnews.com/fc_resources/2005uscarrentalfleet.pdf; Auto Rental News, *2016 U.S. Car Rental Market*, *supra*.

This trend has magnified economically disadvantaged communities' reliance on rental cars and the sharing economy more generally. As of 2016, 40.6 million people in the United States live in poverty. Jessica L. Semega et. al., U.S. Census Bureau, *Income and Poverty in the United States: 2016* 12 & fig. 4 (Sept. 2017). Yet, despite the dominant role of cars in today's society, 24% of households in poverty do not own a car. *See* National Household Travel Survey, *Mobility Challenges for Households in Poverty* 2 (2014), http://nhts.ornl.gov/briefs/PovertyBrief.pdf. The need for cars, especially for those in poverty, has only increased over time. "More U.S. households in poverty live in suburbs than in big cities or rural com-

munities." *See* National Household Travel Survey, *supra*, at 3. But suburban neighborhoods "have fewer [transportation] options compared to more densely populated urban areas" and require farther travel to work, school, daycare, and other life activities. *Ibid.* Those who cannot afford a car and are outside public transportation networks face long daily commutes and few ways to travel.

Members of low-income communities actively participate in the sharing economy by renting cars or "borrowing them from neighbors, friends, or relatives." John Pucher & John L. Renne, *Socioeconomics of Urban Travel: Evidence from the 2001 NHTS*, 57 Transport. Q. 49, 57 (2003). Low-income people are twice as likely to travel in multi-occupant vehicles, through car sharing and carpooling. National Household Travel Survey, *supra*, at 1–2. And empirical data show that low-income individuals and families who do not own a car are more likely to use rental car services to meet life's basic demands. *See* Kevin Neels, *Effects of Discriminatory Excise Taxes on Car Rentals: Unintentional Impacts on Minorities, Low Income Households, and Auto Purchases* 4–5 & tbl. 2 (2010). Thus, rental vehicles and other car-sharing arrangements offer transportation for low-income people who cannot afford large single payments and do not want (or are unable) to take on long-term debt. *See* Business Leadership for an Inclusive Economy, *An Inclusive Sharing Economy: Unlocking Opportunities to Support Low-Income and Underserved Communities* 5 (Sept. 2016) ("[P]oorer populations benefit more from the sharing economy simply because the cost of ownership for things like cars and vacation homes is so high.").

The collective use of property at the heart of the sharing economy is central to enabling low-income people to leverage networks to increase socioeconomic

mobility and to break the cycle of poverty. *See generally* Silvia Dominguez & Celeste Watkins, *Creating Networks for Survival and Mobility: Social Capital Among African-American and Latin-American Low-Income Mothers*, 50 Soc. Probs. 111 (2003). By aggregating resources, individuals can leverage networks to increase social mobility. *Id*. at 124. "Low-income communities frequently pool resources in order to maximize them. Anchored in strong social networks and the collective mindset of low-income individuals, this practice is at the core of collective assets and casual lending with relaxed reciprocity." Edna R. Sawady & Jennifer Tescher, *Financial Decision Making Processes of Low-Income Individuals* 9 (2008), http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/ucc08-2_sawady_tescher.pdf.

Thus, the rise of the sharing economy, together with the existing importance of rental cars to lower-income individuals, has resulted in the proliferation of shared rental cars among low-income and minority households. Among those who increasingly rely on rental cars and car-sharing arrangements are many members of society's most disadvantaged groups.

2. UNLISTED DRIVERS HAVE A REASONABLE EXPECTATION OF PRIVACY IN THE RENTAL CARS THEY DRIVE.

The role of cars in society, the growing prevalence of the sharing economy, and the expectations and experiences of the numerous low-income persons who rely on rental cars and other car-sharing arrangements inform which privacy expectations society is willing to recognize as reasonable. The Fourth Amendment relies on these expectations, granting protection to "customary social understanding[s]," *Georgia* v. *Randolph*, 547 U.S. 103, 121 (2006), and the "expectations of privacy . . . that are recognized

and permitted by society." *Rakas* v. *Illinois*, 439 U.S. 128, 143 n.12 (1978). These privacy expectations remain reasonable whether or not the driver is listed in the rental agreement.

Third-party usage of rental vehicles is established and predictable. "Even when there has been an express prohibition against third[-party] drivers," many courts have recognized that it is "reasonably foreseeable that the initial permittee would allow another to use the car." *Mahaffey* v. *State Farm Mut. Auto. Ins. Co.*, 679 So. 2d 129, 132 (La. Ct. App. 1996). Courts have described strict bans on third-party drivers as "clearly unrealistic," *ibid.*, "unreasonable," *Roth* v. *Old Republic Ins. Co.*, 269 So. 2d 3, 6 (Fla. 1972), and "run[ning] counter to the recognized realities" of rental-car driving. *Motor Vehicle Acc. Indem. Corp.* v. *Continental Nat'l Am. Grp. Co.*, 319 N.E.2d 182, 185 (N.Y. 1974); *see also Chandler* v. *Geico Indem. Co.*, 78 So. 3d 1293, 1299 (Fla. 2011) ("[A] bailee or lessee of a rented automobile, similarly as its owner, may permit another to operate it (and often does)."). Unforeseen circumstances can arise that require third-party use of a rental vehicle, such as where a driver rents a car "for the ultimate purpose of driving [a] family to a funeral" and then unexpectedly authorizes another driver "because of a last minute work conflict." *Motor Vehicle Acc. Indem. Corp.*, 319 N.E.2d at 183.

Permission is given to unlisted drivers with such frequency that courts have been hesitant to give full force to contractual provisions that purport to ban such arrangements. Some courts find that lessors "knew or should have known that the probabilities of the car coming into the hands of another person were exceedingly great," and thus they "constructive[ly] consent." *Motor Vehicle Acc. Indem. Corp.*, 319 N.E.2d at 184. And when courts do recognize the validity of

authorized-driver clauses between the rental-car company and the parties to the contract, they have resisted allowing such clauses to affect the rights of those outside the contractual relationship. *See*, *e.g.*, *Roth*, 269 So. 2d at 5 (noting that the "validity or effect of restrictions on [the use of a rental vehicle], as between the parties, is a matter totally unrelated to the liabilities imposed by law"); *Allstate Ins. Co.* v. *Travelers Ins. Co.*, 350 N.E.2d 616, 617 (N.Y. 1976) ("[T]he legal relationship between the lessor and the lessee is discrete and independent of the obligations of the insurer under the policy of insurance."); *Commonwealth* v. *Campbell*, 59 N.E.3d 394, 402 (Mass. 2016) ("A renter's decision to allow a person who is not a permitted driver according to the rental agreement to drive a rental vehicle may be a breach of that agreement, but it does not also result in a violation of criminal law.").

The Fourth Amendment looks to those "everyday expectations of privacy that we all share." *Olson*, 495 U.S. at 98. The prevalence of cars in our society, the significant reliance of low-income persons on cars and the sharing economy, and the great frequency with which unlisted persons use rental vehicles all confirm the reasonableness of the privacy expectations of unlisted rental-car drivers. Contrary to the Third Circuit's rule, unlisted drivers of rental vehicles are acting in conformity with—not contrary to—the "expectations of privacy . . . that are recognized and permitted by society." *See Rakas*, 439 U.S. at 143 n.12.

B. THE TERMS OF RENTAL CONTRACTS DO NOT DICTATE WHICH PRIVACY EXPECTATIONS ARE REASONABLE.

The Fourth Amendment equally protects all "persons, houses, papers, and effects" against unreasonable searches and seizures. U.S. Const. Amend. IV.

But low-income neighborhoods experience diminished protections—due to modest living conditions, high crime rates that draw increased law enforcement intrusions, and an inability to afford privacy enhancements available to those with greater means. A rule that ties the rights of rental-car drivers to the terms of contracts of adhesion would only exacerbate this disparity.

1. Low-income individuals "regularly experience privacy deprivations related to their personal information, bodies and homes, and decision making," Michele E. Gilman, *The Class Differential in Privacy Law*, 77 Brook. L. Rev. 1389, 1396 (2012), due in part to more intrusive policing tactics in low-income neighborhoods. Residents in high-crime neighborhoods are more likely to be questioned when walking down the street, to be subjected to stop-and-frisk tactics, to have their homes invaded by police, and to be pulled over. *See* Amelia L. Diedrich, *Secure in Their Yards? Curtilage, Technology, and the Aggravation of the Poverty Exception to the Fourth Amendment*, 39 Hastings Const. L.Q. 297, 316–17 (2011).

Poor neighborhoods are also populated by those least able to afford privacy enhancements to keep out unwarranted intrusions. Residents cannot always pay to live in a gated neighborhood or a building with a 24-hour doorman, buy land with a spacious yard, build fences around their property, or ensure soundproof walls. Instead, low-income communities often consist of "crowded apartment complexes in close proximity to others" and "poorly constructed structures that do not adequately conceal noises or activities within." Kami C. Simmons, *Future of the Fourth Amendment: The Problem with Privacy, Poverty and Policing*, 14 U. Md. L.J. Race Relig. Gender & Class 240, 250 (2015). Poverty is not solely an urban phe-

nomenon, but close-quartered living conditions in cities put more people on the street as pedestrians, or in cars where the opportunities for intrusions on privacy are greater. William J. Stuntz, *The Distribution of Fourth Amendment Privacy*, 67 Geo. Wash. L. Rev. 1265, 1272 (1999).

2. Restricting Fourth Amendment protections to the terms of rental-car contracts would compound this burden. Low-income individuals are more likely to engage in transactions with no opportunity to negotiate, to have fewer alternatives if they wish to take their business elsewhere when they discover onerous conditions, and to be unable to afford fees for services—mislabeled as mere "conveniences"—that are part of daily life.

These "widespread disparities in bargaining power" often lead to contracts of adhesion that fail to serve as reliable measures of the parties' reasonable expectations of privacy. *See* Burt Neuborne, *Ending Lochner Lite*, 50 Harv. C.R.-C.L. L. Rev. 183, 197 (2015). Contract law may "attempt[] the realization of reasonable expectations," 1 Arthur L. Corbin, *Corbin on Contracts* 2 (Joseph M. Perillo rev. ed. 1993), but courts have long recognized that boilerplate agreements rarely reflect the "reasonable expectations" of both sides. *See Gaunt* v. *John Hancock Mut. Life Ins. Co.*, 160 F.2d 599, 602 (2d Cir. 1947) (Hand, J.) (rejecting the plain reading of an insurance contract because "the ordinary applicant . . . would not by the remotest chance understand the clause as leaving him uncovered").

Standard form contracts have only grown in frequency and complexity. Routine transactions now come with fine-print clauses waiving warranty coverage or "consenting" to limited remedies for defective products. Rental contracts are no different. "We are

given forms to sign when we rent an automobile or an apartment," but "[m]ost of us don't read them, and most of us wouldn't understand them if we did." Margaret J. Radin, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* 7–8 (2013).

The prevalence of one-sided boilerplate does nothing to change people's reasonable expectations of privacy. Blue-collar workers are still surprised to discover that "one in five employees [are] bound by a [non-compete] clause" in their employment contract. *See* Conor Dougherty, *How Noncompete Clauses Keep Workers Locked In*, N.Y. Times (June 9, 2017), https://www.nytimes.com/2017/05/13/business/non-compete-clauses.html. And consumers are often "surprised to discover that their rights [have been] severely restricted by the contract they agreed to"—like a cruise line that requires passengers to file suit in a faraway court or a recreational business that can no longer be held responsible even for its own negligence. *See* Alina Tugend, *Those Wordy Contracts We All So Quickly Accept*, N.Y. Times (July 12, 2013), http://www.nytimes.com/2013/07/13/your-money/novel-length-contracts-online-and-what-they-say.html.

In short, there is no basis to conclude that society's reasonable expectations of privacy are controlled by the terms of contracts of adhesion. Most people—and poor people in particular—are in no position to negotiate (or simply walk away from) the terms of these contracts, but are instead compelled to accept them. Boilerplate language in contracts "cannot control the paramount constitutional question" whether a person has a reasonable expectation of privacy sufficient to trigger Fourth Amendment protections. *United States* v. *Owens*, 782 F.2d 146, 150 (10th Cir. 1986).

II. DRIVERS WHO OPERATE RENTAL CARS WITH A LESSEE'S PERMISSION ENJOY A POSSESSORY INTEREST PROTECTED BY THE FOURTH AMENDMENT.

Since *Katz*, this Court's Fourth Amendment analysis has focused on the reasonableness of an asserted privacy expectation. At the same time, the Court has clarified that "[t]he *Katz* reasonable-expectations test has been *added to*, not *substituted for*, the traditional property-based understanding of the Fourth Amendment[.]" *Florida* v. *Jardines*, 569 U.S. 1, 11 (2013) (internal quotation marks omitted). So, while a property interest is not necessary for the Fourth Amendment's protection, property rights remain vitally important to discerning the full breadth of those protections. *See Jardines*, 569 U.S. at 5 (explaining that "though *Katz* may add to the baseline, it does not subtract anything" from the Fourth Amendment's connection to property rights); *see also Rakas*, 439 U.S. at 143 n.12 ("[T]he Court has not altogether abandoned use of property concepts in determining the presence or absence of the privacy interests protected by [the Fourth Amendment].").

Under longstanding principles of property law, an unlisted driver of a rental car holds a possessory interest in the rental vehicle. This property interest underscores the objective reasonableness of an unlisted driver's expectation of privacy and demonstrates the need for Fourth Amendment protection. This need is particularly salient for lower-income persons who often cannot afford to own property outright and who depend on a sharing economy.

A. THE FOURTH AMENDMENT PROTECTS PROPERTY-BASED PRIVACY INTERESTS.

This Court often looks to principles of property law to determine the full scope of the Fourth Amendment. In *United States* v. *Jones*, for example, the Court held that the government conducted a search by attaching a GPS device to a person's car because there was "no doubt that such a physical intrusion would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted." 565 U.S. 400, 405–06 (2012) ("[F]or most of our history, the Fourth Amendment was understood to embody a particular concern for government trespass upon the areas . . . it enumerates."). So too in *Jardines*, where the Court applied the common law of trespass to hold that the use of a drug-sniffing dog within the curtilage of a home was a Fourth Amendment search. *Jardines*, 569 U.S. at 7; *see also Rakas*, 439 U.S. at 148 (concluding that passengers in a car did not have a reasonable expectation of privacy because the passengers "asserted neither a property nor a possessory interest in the automobile"); *Kyllo* v. *United States*, 533 U.S. 27, 31 (2001) (observing that "well into the 20th century, our Fourth Amendment jurisprudence was tied to common-law trespass"); *United States* v. *Ackerman*, 831 F.3d 1292, 1307 (10th Cir. 2016) (Gorsuch, J.) ("[T]he warrantless opening and examination of (presumptively) private correspondence" amounted to "exactly the type of trespass to chattels that the framers sought to prevent when they adopted the Fourth Amendment.").

The Fourth Amendment has been held to apply where a person lacks full (or even partial) ownership of an item—a situation often true of low-income persons with respect to homes, vehicles, and other life necessities. *See Chapman* v. *United States*, 365 U.S. 610, 616 (1961) (holding that the Fourth Amendment

protects a leaseholder from a search by the police that was consented to by the landowner); *Minnesota* v. *Carter*, 525 U.S. 83, 95 (1998) (Scalia, J., concurring) ("Of course this is not to say that the Fourth Amendment protects only the Lord of the Manor who holds his estate in fee simple. People call a house 'their' home when legal title is in the bank, when they rent it, and even when they merely occupy it rent free—so long as they actually live there.") (emphasis omitted).

Thus, overnight guests enjoy Fourth Amendment protection in the home or apartment in which they stay. *See Olson*, 495 U.S. at 98 (holding that an overnight guest has a reasonable expectation of privacy without having absolute control over the home); *Jones* v. *United States*, 362 U.S. 257, 259, 266–67 (1960) (holding that a guest with keys to an apartment, permission to sleep there, and control over the premises when the host was not present had a reasonable expectation of privacy). And the same is true of hotel occupants. *See Stoner* v. *California*, 376 U.S. 483, 484–86, 490 (1964) (holding that a hotel clerk could not consent to the warrantless search of a guest's room); *Hoffa* v. *United States*, 385 U.S. 293, 301 (1966) ("A hotel room can clearly be the object of Fourth Amendment protection as much as a home or an office."); *see also City of Los Angeles* v. *Patel*, 135 S. Ct. 2443, 2451 (2015) (holding that a city code requiring hotel operators to provide information about hotel guests to police was invalid under the Fourth Amendment).

Underlying this Court's jurisprudence is a recognition that the Fourth Amendment protects the most essential stick in the property-rights bundle: the right to exclude. *See Kaiser Aetna* v. *United States*, 444 U.S. 164, 176 (1979) (concluding that "the right to exclude others" is "one of the most essential sticks in the bun-

dle of rights that are commonly characterized as property"); *see also* Thomas W. Merrill, *Property and the Right to Exclude*, 77 Neb. L. Rev. 730, 730 n.1 (1998) (collecting cases); Felix S. Cohen, *Dialogue on Private Property*, 9 Rutgers L. Rev. 357, 374 (1954) (same); Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 Mich. L. Rev. 801, 813 (2004) (describing the right to exclude as "the very essence of the property right").

Minor or even merely constructive intrusions into areas from which the owner may exclude others—such as attaching a GPS device to a vehicle or using a drug-sniffing dog to scour the curtilage of a home—are therefore "searches" under the Fourth Amendment. *See Jones*, 565 U.S. at 402, 413; *Jardines*, 569 U.S. at 11–12; *see also Kyllo*, 533 U.S. at 40 (holding that the use of a thermal-imaging device that did not physically invade a home was nonetheless a search). And this Court has generally allowed warrantless surveillance of constitutionally protected areas only if the search does "not invade the individual's right to exclude others[.]" Kerr, *supra*, at 813.

B. AN UNLISTED DRIVER OF A RENTAL CAR HOLDS A POSSESSORY INTEREST IN THE VEHICLE THAT IS PROTECTED BY THE FOURTH AMENDMENT.

Traditional principles of property law demonstrate that unlisted drivers of rental cars have a possessory interest in the vehicles and a corresponding right to exclude anyone but the owner and lessee from their use. Though not necessary for the Fourth Amendment's protections to apply, the existence of this property interest underscores the need for Fourth Amendment protection.

1. The Constitution refers to state law to define the parameters of the property rights it protects. *See Bd. of Regents of State Colls.* v. *Roth*, 408 U.S. 564, 577 (1972) ("Property interests, of course, are not created by the Constitution. Rather they are created . . . from an independent source such as state law."); Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 80 (1998) ("[S]tate law typically defines the property rights given constitutional protection against federal officials.").

Bailment law governs the rights and obligations of persons who receive possession of an item from another—whether it be the owner or one who has possession with the owner's permission. A bailment (or sub-bailment) is generally created by (1) the delivery of personal property from one person to another for a specific purpose, (2) the acceptance by the transferee of delivery, (3) an agreement that the purpose will be fulfilled, and (4) an understanding that the property will be returned to the transferor or dealt with as the transferor directs. *See* 8 C.J.S. *Bailments* § 18 (2017). By virtue of this arrangement, the bailee acquires "lawful possession or custody of the thing bailed . . . and a special property or possessory interest in the subject matter of the bailment, which is equivalent to, or in the nature of, actual ownership against anyone other than the bailor" and which "entitles the bailee to hold the property bailed as against third persons." *Id*. § 34. In other words, the bailee (or sub-bailee) acquires a possessory interest in the property and a right to exclude others—a right inferior to the true owner, but superior to others. *See* Joseph Story, *Commentaries on the Law of Bailments* 55 (4th ed. 1846) ("Nay, even a person, who holds property by wrong and without title, may lawfully deposit the same; and he will be entitled to recover back the same against every one but the rightful owner.").

The strength of the bailee's (or sub-bailee's) possessory interest is underscored by the corresponding duty to safeguard the bailed property and the liability to the bailor if this duty is breached. "[O]nce a bailment contract is created between a bailor and bailee[,] . . . the bailee is charged with a duty of care to protect the bailed property from damage or loss." 46 Am. Jur. Proof of Facts 3d 361 (1998); *see also* 8 C.J.S. *Bailments* § 55 (2017) ("The duty of a bailee to protect the bailed property is a legal one arising out of the relationship created by the contract of bailment."). And if the bailee violates this duty—for example, by not taking reasonable measures to prevent third parties from appropriating or damaging the bailed property—then the bailee is "liable for damage to the property," or for its loss. 8 C.J.S. *Bailments* § 58 (2017).

The rights and obligations of bailees have deep roots in the common law. Indeed, "all bailees from time immemorial have been regarded by the English law as possessors, and entitled to the possessory remedies." *See* Oliver Wendell Holmes, Jr., *The Common Law* 175 (1881).[1] As far back as the 18th century, it was understood that "there is a special qualified property transferred from the bailor to the bailee, together with the possession," and "on account of this qualified property of the bailee, he may . . . maintain an action against any such as injure or take away these chattels." 2 William Blackstone, *Commentaries on the Laws of England* 453 (1766). And, at common law, if a person acquired possession of an item without the owner's permission, he was still required "to be diligent, to keep the chattel as his own," or be liable to the

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[1] *See also* Holmes, *supra*, at 221 ("If a bailee intends to exclude strangers to the title, it is enough for possession under our law, although he is perfectly ready to give the thing up to its owner.").

owner. Samuel Stoljar, *The Early History of Bailment*, 1 Am. J. Legal Hist. 5, 22 (1957).

Consistent with these longstanding principles of property law, courts have recognized that a third-party operator of a vehicle is a sub-bailee and therefore holds a legally protected possessory interest in the vehicle. *See*, *e.g.*, *Moreno* v. *Idaho*, No. 4:15-cv-342, 2017 WL 1217113, at *5 (D. Idaho Mar. 31, 2017) (concluding that a third-party driver was a "sub-bailee" vis-à-vis the person borrowing the vehicle from the owner); *State* v. *Sanders*, 614 P.2d 998, 1000, 1004 (Kan. Ct. App. 1980) (recognizing that a sub-bailee who has possession with the permission of the initial bailee "[stands] in the place of the owner"). Indeed, *Jones* itself applied the Fourth Amendment's protections to an automobile bailee while recognizing the bailee's property interest in the vehicle. *See Jones*, 565 U.S. at 404 n.2 ("If Jones was not the owner he had at least the property rights of a bailee."). And courts have acknowledged the property interests of rental-car sub-bailees, even if they were not listed in the rental agreement. *See*, *e.g.*, *Hall* v. *State*, 477 S.E.2d 364, 366 (Ga. App. 1996) (stating that an unauthorized driver's "use of the [rental] car created a bailment" under state law); *State* v. *Webber*, No. 90,899, 2005 WL 283585, at *1, *4 (Kan. Ct. App. 2005) (holding that an unlisted driver had "a possessory interest in the vehicle" supporting a reasonable expectation of privacy); *United States* v. *Little*, 945 F. Supp. 79, 83 (S.D.N.Y. 1996) (noting that "if the [unauthorized] driver of a rental car has the permission of the lessee to drive the vehicle, then he has a legitimate possessory interest" in the vehicle).

At the same time, courts have held that a rental car bailee (or sub-bailee) is liable to the bailor whether or not the bailee or sub-bailee was authorized by the owner to have possession. *See Grossman Chevrolet*

Co. v. *Enockson*, 86 N.W.2d 644, 645–47 (N.D. 1957) ("May a bailor maintain an action, against a stranger to the bailment, for damages to a bailed chattel caused by a stranger's negligence? Unquestionably such an action may be maintained."). And, at least in some contexts, a bailee may be held liable for injuries caused by the negligent use of the vehicle by an unauthorized driver. *See Pabon* v. *InterAmerican Car Rental, Inc.*, 715 So. 2d 1148, 1149–50 (Fla. Ct. App. 1998).

2. Under these longstanding principles of property law, an unlisted operator of a rental vehicle—though not owning or holding title to the vehicle—has a cognizable possessory interest in it. *See* Holmes, *supra*, at 175 ("[A]ll bailees from time immemorial have been regarded by the English law as possessors, and entitled to the possessory remedies."). That property interest entitles the sub-bailee of a rental car to exclude others from using the vehicle and obligates the sub-bailee to prevent others from damaging or appropriating it. *See*, *e.g.*, 8 C.J.S. *Bailments* § 34 (2017) (a bailee holds a "special property or possessory interest" in the bailed property and is entitled "to hold the property bailed against third persons"). No less than the property rights involved in *Jones* or *Jardines*, those implicated here are worthy of Fourth Amendment protection. Indeed, the property interest here is the *same* interest present in *Jones*, which applied the Fourth Amendment's protections to an automobile bailee while recognizing the bailee's property interest in the vehicle. *See Jones*, 565 U.S. at 404 n.2 ("If Jones was not the owner he had at least the property rights of a bailee."). Acknowledging the Fourth Amendment's protection of these property interests adheres to deeply rooted principles of property law while at the same time ensuring that the Fourth Amendment's protection of property benefits all members of society,

whether or not they have the financial means to own a vehicle. *See United States* v. *Pineda-Moreno*, 617 F.3d 1120, 1123 (9th Cir. 2010) (Kozinski, C.J., dissenting from denial of rehearing en banc) ("[T]he Constitution doesn't prefer the rich over the poor[.]").

C. THE TERMS OF RENTAL CAR AGREEMENTS CANNOT NULLIFY FOURTH AMENDMENT PROTECTIONS.

Courts that have held that the Fourth Amendment does not protect unlisted rental car drivers have done so largely because of the rental contract's prohibition on unlisted drivers. *See*, *e.g.*, *United States* v. *Kennedy*, 638 F.3d 159, 165 (3d Cir. 2011) ("[A]n unauthorized driver [of a rental vehicle] has no cognizable property interest in the rental vehicle and therefore no accompanying right to exclude."); *United States* v. *Roper*, 918 F.2d 885, 886–88 (10th Cir. 1990) (finding no reasonable expectation of privacy for an unlisted driver because "[t]he rental contract provided that the car could only be driven by the lessee"). But while these provisions might show that the *lessee* violated the terms of the rental agreement, that fact does not negate the *sub-bailee's* well-established possessory interest in the vehicle. Nor does it undermine the reasonableness of the sub-bailee's expectation of privacy. This is particularly true given that courts have consistently refused to enforce authorized-driver clauses in the very context in which they are meant to apply: insurance coverage. This non-enforcement underscores the inability of such clauses to impair well established property rights or to dictate which privacy expectations society deems reasonable.

Rental-car companies use unlisted driver prohibitions "as a basis for negating omnibus [insurance] coverage which otherwise would have been available to the lessee or his forbidden permittees." Irvin E.

Schermer & William J. Schermer, 1 *Automobile Liability Insurance* § 6:18 (4th ed. 2008). Yet many courts have "refused to permit a violation of the prohibition" to negate insurance coverage. *Ibid.*; *see also "Permissive" Use of Automobile—Delegation of Permission to Second Permittee*, 17 Am. Jur. Proof of Facts 3d 409 (1992) ("[C]ourts in many jurisdictions tend to ignore express prohibitions against delegation."); *Boudreaux* v. *ABC Ins. Co.*, 689 F.2d 1256, 1261 (5th Cir. 1982) (holding that an 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).

Courts have relied on a variety of theories to reject unauthorized-driver clauses as a basis to negate coverage. Legal doctrines like "implied consent," "lawful possession," and "initial permission" have been employed to "defang" the contractual prohibition on unlisted drivers in the insurance coverage context. Schermer & Schermer, *supra*, § 6:18.

Some courts have refused to allow authorized driver clauses to bar coverage by reasoning that a contrary rule would effectively nullify a central "purpose" of the rental agreement. *See BATS, Inc.* v. *Shikuma*, 617 P.2d 575, 577 (Haw. Ct. App. 1980) (insured was still "using" the rental vehicle even when it was being driven by an unlisted driver, despite the rental contract's unlisted driver prohibition). These courts have recognized that "[r]ental of an automobile is for a broad, almost unfettered use," including allowing unlisted drivers to operate the vehicle. *See State Farm Mut. Auto. Ins. Co.* v. *Liberty Mut. Ins. Co.*, 883 S.W.2d 530, 533 (Mo. Ct. App. 1994).

Other courts have reasoned that an unauthorized-driver clause cannot negate coverage because the unauthorized driver operated the vehicle with the permission of the lessee. Thus, courts have concluded that "[a] person may be in lawful possession" of a rental vehicle "if he is given possession by someone using the automobile with the express permission of the owner even though the permission granted by the owner [does] not include the authority to permit others to operate the automobile." *Ins. Co. of N. Am.* v. *Aetna Life & Cas. Co.*, 362 S.E.2d 836, 839–40 (N.C. Ct. App. 1987). In California, for example, even a "specific admonition not to permit anyone else to drive [a vehicle]" is ineffective because such a prohibition "do[es] not negate the fact that [the vehicle] is being used with the owner's permission." 8 Cal. Jur. 3d *Automobiles* § 529 (2017). Other jurisdictions have adopted similar rules. *See Williams* v. *Am. Home Assurance, Co.*, 297 A.2d 193, 197–98 (N.J. Super. Ct. App. Div. 1972) (holding that insurance coverage extends to an unauthorized driver who is given permission to use the vehicle by an authorized driver because "if a person is given permission to use a motor vehicle in the first instance, any subsequent use, though not within the contemplation of the parties, is a permissive use within the standard omnibus clause"); *State Farm Mut. Auto. Ins. Co.* v. *Budget Rent-A-Car*, 359 N.W.2d 673, 676 (Minn. Ct. App. 1984) (holding that a rental company's insurance policy covered a third party even though he was "an unlisted additional driver" because "subsequent use short of actual conversion or theft" is permissive); *see also Campbell*, 59 N.E.3d at 400 (holding that "authorization to use a rental vehicle may be provided by renters as well as by the rental company in at least some circumstances" regardless of an unlisted driver prohibition).

And still other courts have reasoned that an unauthorized driver's use of a rental vehicle cannot preclude coverage because it is entirely "foreseeable and inevitable that rental vehicles . . . will be operated in violation of a restrictive lease agreement." *Allstate Ins. Co.* v. *Travelers Ins. Co.*, 49 A.D.2d 613, 614 (N.Y. App. Div. 1975), *modified*, 350 N.E.2d 616 (N.Y. 1976). As a consequence, rental car companies do "not have a reasonable basis for believing that" unlisted driver restrictions will "be carried out," and so they are "deemed to have given implied permission to the use of the subject automobile without the said restriction." *Fin. Indem. Co.* v. *Hertz Corp.*, 38 Cal. Rptr. 249, 250, 254 (Cal. Dist. Ct. App. 1964) (affirming district court's findings); *Motor Vehicle Acc. Indem. Corp.*, 319 N.E.2d at 184 (concluding that the rental car company "knew or should have known that the probabilities of the car coming into the hands of another person were exceedingly great"); *Unisun Ins. Co.* v. *Hertz Rental Corp*., 436 S.E.2d 182, 185 (S.C. Ct. App. 1993) (same).

The predictability of unlisted drivers using rental cars has led courts to conclude that rental companies "implied[ly] consent" to unauthorized use of their rental vehicles, despite unlisted driver prohibitions in rental agreements. *See Roth*, 269 So. 2d at 5–7 (noting that "a bailee or lessee of a rented automobile . . . may permit another to operate it (*and often does*)") (emphasis added).[2] Because rental-car companies "kn[ow] or should . . . know[] that the probabilities of the car coming into the hands of another person [are]

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[2] *See also Chandler*, 78 So. 3d at 1297 (noting that rental car companies "in actuality intrust[] th[e] automobile to the renter for all ordinary purposes for which the automobile is rented" and "[t]he fact that the owner had a private contract . . . with the renter" does not change this fact).

exceedingly great," they are "charged with constructive consent." *Motor Vehicle Acc. Indem. Corp.*, 319 N.E.2d at 184.

Contrary to the Third Circuit's rule, the fact that a driver is not listed in the rental agreement is an exceedingly frail basis for withholding the Fourth Amendment's "indispensable" protections. *See* 3 Joseph Story, *Commentaries on the Constitution of the United States* 748 (1833). The courts' repeated refusal to enforce these provisions shows that they are a poor metric for determining which privacy expectations society deems reasonable. And the fact that courts routinely acknowledge the possessory rights of rental-car bailees and sub-bailees not listed in the rental agreements confirms that unlisted-driver provisions cannot annul a bailee's (or sub-bailee's) existing property interest. *See supra* at 23 (collecting cases). It makes little sense to hinge a driver's Fourth Amendment protections on the fine print of a contractual provision that courts routinely bypass, few people follow, and to which the driver is not a party. At the same time, reliance on these often ignored clauses is particularly unwarranted because it disregards the privacy expectations of low-income persons who make up a significant portion of those who use rental cars and other car-sharing arrangements, and who frequently rely on these services to meet life's basic needs.

* * *

The Fourth Amendment is a guarantee of privacy for all—rich and poor. That guarantee must therefore take account of the circumstances and conditions that define and shape the privacy expectations of all classes of people. "[P]oor people are entitled to privacy, even if they can't afford all the gadgets of the wealthy for ensuring it. . . . [T]he man who parks his car next to his trailer is entitled to the same privacy and peace

of mind as the man whose urban fortress is guarded by the Bel Air Patrol." *Pineda-Moreno*, 617 F.3d at 1123 (Kozinski, C.J., dissenting from denial of rehearing en banc).

The Third Circuit's rule fails to live up to this guarantee. By conditioning Fourth Amendment protections in the rental car context on the terms of contracts of adhesion, the Third Circuit's rule relegates the privacy expectations of low-income persons to second-class status—even as low-income persons already endure reduced Fourth Amendment protections. And by ignoring the firmly established property interests of unlisted users of rental vehicles, the Third Circuit's rule forecloses Fourth Amendment protection for those lacking the means to own their own vehicle. *Cf. Carter*, 525 U.S. at 95 (Scalia, J., concurring). Moreover, the Third Circuit's rule does all of this based on provisions in rental agreements that are rarely followed and which courts have repeatedly held unenforceable. That rule does not remotely "implement the high office of the Fourth Amendment to protect privacy." *Randolph*, 547 U.S. at 127 (Roberts, C.J., dissenting).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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

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

DANIEL L. KAPLAN
DONNA F. COLTHARP
SARAH S. GANNETT
NATIONAL ASSOCIATION OF FEDERAL
DEFENDERS
850 W. Adams St., Ste. 201
Phoenix, AZ 85007

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

Counsel for Amici Curiae

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