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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

This case comes down to whether violating a contract term negates the Fourth Amendment rights a driver ordinarily has against suspicionless searches of a car. Typically, a person with sole possession and practical control over a car would have Fourth Amendment protection regarding searches of the car. The government, however, posits that violating a rental agreement negates any reasonable expectation of privacy and permits a suspicionless search of the car and its locked trunk.

But not all contract violations are equal in the eyes of the government. A renter who fails to return a car on time, uses a cell phone while driving, or violates any of a rental agreement's myriad other use restrictions maintains Fourth Amendment protection regarding searches of the car. But an unlisted driver, operating the car with the renter's permission, has none.

The government tries to justify this odd result—where neighboring contract provisions with the exact same remedies specified in the contract have dramatically different constitutional ramifications—by equating the unlisted driver with a car thief. As state and federal courts have held, however, the contract violation is just that—a contract violation. Neither the renter nor the unlisted driver violates any criminal law when the unlisted driver takes possession of the car. The contract adds additional risk of loss in such circumstances, but that risk of loss does not include the risk of losing the fundamental Fourth

Amendment right against arbitrary searches by the government.

If the government prevails, it will have the power to conduct suspicionless searches, whenever it stops a rental car driven by an unlisted driver for a routine traffic violation. The government embraces this power, contending that the requirement that it justify a search of rental car would impede public safety. And the government does not stop there. It argues that non-owner passengers *never* reasonably expect privacy in the trunks of cars, no matter their connection to the car or the driver. It likewise believes that people subleasing apartments have no Fourth Amendment rights in their residence if the sublease violated the terms of the master lease. As with the unlisted driver, the government says the contract violation negates any reasonable expectation of privacy and permits suspicionless searches. Trust us, the government says, we won't abuse the power to search without justification.

The government raises misguided policy arguments in favor of a power to perform suspicionless searches any time it finds an unlisted driver. It offers no justification, however, for deviating from the general test for determining whether a person reasonably expects privacy, which looks to possession and control. Put in those terms, the answer here is obvious. Mr. Byrd was in sole possession of the car with the permission of his fiancée who rented the car, he had the key to the car and the locked trunk, and he could exclude strangers from the car. He therefore may challenge the search of the locked trunk.

Finally, though a property right is not necessary to invoke the Fourth Amendment, it can be sufficient. The government is wrong that Byrd had no property rights in the car. Because Reed granted him possession of the car, under longstanding bailment principles, Byrd was a bailee and had the right to exclude strangers.

Thus, Byrd may challenge the search based on both a reasonable expectation of privacy and a property right. A government's power to engage in suspicionless and arbitrary searches is anathema to a free country. *See Brinegar v. United States*, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting) ("Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government."). This Court should reject the government's invitation to grant police that power based on violation of a term of a rental agreement.

I. A Person Who Possesses And Controls A Car, With The Renter's Permission, Has A Reasonable Expectation Of Privacy In The Car's Locked Trunk.

A. The proper standard looks to possession, control, and the renter's permission.

A person has a reasonable expectation of privacy in a place or effect—like the locked trunk of a car—that he possesses and controls, provided that he does not come into possession by violating criminal law. OB 20-24, 35. The government mostly agrees. It acknowledges that "one who … lawfully possesses or

controls property will in all likelihood have a legitimate expectation of privacy by virtue of th[e] right to exclude." GB 36 (quoting *Rakas v. Illinois*, 439 U.S. 128, 143 n.12 (1978)). And the government does not dispute that Byrd possessed and controlled the car with the renter's permission when the officers searched the car or that he could have lawfully prevented strangers from rummaging through the car's trunk.

Nonetheless, the government argues that the police may search the locked trunk of a car driven by an unlisted driver, without justifying the search to any court and even if they lack probable cause to believe the trunk contains evidence of a crime. According to the government, Byrd's violation of the rental agreement's authorized-driver provision means that he was not "legitimately present" in the car and therefore had no Fourth Amendment rights in it. GB 13-16. To be "legitimately present," the government contends, Byrd needed to demonstrate a connection to the car greater than possession and control, and that connection must be "legitimate," which in the government's view means consistent with the terms of the rental agreement. GB 15. The government claims this greater connection is necessary to distinguish Byrd from a passenger who, in the government's view, can have no reasonable expectation of privacy in the trunk of a car. *Id.*

The government's position cannot withstand scrutiny for four reasons: (1) it is entirely divorced from the everyday expectations of privacy the Fourth Amendment protects; (2) its overly broad "legitimate presence" requirement finds no support in this

Court's precedent; (3) it depends on the incorrect assertion that passengers can never have a reasonable expectation of privacy in the trunk of a car; and (4) it ignores the significance of familial relationships.

1. Possession and control, not compliance with contractual terms of use, reflect society's understanding of a reasonable expectation of privacy. A person who controls a space, and can exclude most others, reasonably believes that his effects will not be scrutinized by strangers or subject to suspicionless searches by the government. *See United States v. Chadwick*, 433 U.S. 1, 11 (1977). Indeed, the government does not dispute that possession and control have been the determinative factors in this Court's Fourth Amendment jurisprudence. GB 36; OB 21.

Looking to whether a person has possession and control answers the question the reasonable-expectation-of-privacy inquiry asks: was the search an intrusion with respect to the person seeking to challenge it? A search of a car's trunk is plainly not an intrusion into the privacy of a person who has never used or accessed the trunk. *See Rakas*, 439 U.S. at 130, 148. In contrast, here, a person with sole possession and control over a car, with the renter's permission, who elects to store personal possessions in the car's locked trunk, has both practical dominion and possession of the car and its trunk, fully supporting a reasonable expectation of privacy. *See id.* at 142 (distinguishing a defendant who had never been in the basement from a houseguest who had a measure of possession and

control over it).[1] The privacy intrusion caused by opening a locked trunk and riffling through its contents, where the unlisted driver has the key and sole possession of the car, is certainly greater than the intrusion from patting the outside of a bag placed on a bus's luggage storage rack. *See Bond v. United States*, 529 U.S. 334, 338-39 (2000) ("[A] bus passenger clearly expects that his bag may be handled. He does not expect that other passengers or bus employees will, as a matter of course, feel the bag in an exploratory manner.").

An unlisted rental-car driver stands in the same legal position as an apartment subletter where the rental agreement between the landlord and the initial tenant prohibits subleasing. OB 37. In that scenario, the subletter possesses the key, has sole practical control over the apartment, and has the initial tenant's permission to live there. Yet the government asserts that the subletter has no reasonable expectation of privacy in her home because she would not be "legitimately present to begin with." GB 20. Same with a family of five that rents a vacation apartment contractually capped at four people. According to the government, the police may freely come and go in these apartments, without any justification whatsoever.

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[1] The government incorrectly suggests that when the troopers asked Byrd to again take sole possession of the car and move it to another location, they did not know he was an unlisted driver. GB 16. But Trooper Long testified that he learned that Byrd was not listed on the rental agreement at the very outset of their interaction, before he asked Byrd to take control of the car and move it. JA 69, 71.

In those contexts, as here, allowing suspicionless searches degrades the commonsense notion of privacy embedded in the Fourth Amendment.

2. The government relies on a footnote in *Rakas* to argue that a driver who violates an authorized-driver provision "cannot invoke the privacy of the premises searched" because his presence is "wrongful." GB 14 (citing *Rakas*, 439 U.S. at 141 n.9). But *Rakas* nowhere suggests that a person's right to challenge a search requires compliance with the contractual restrictions a rental company places on use of its property. *Rakas* refers only to *criminal* conduct—a "burglar" who has no connection to the premises other than his criminal act, *id.* at 143 n.12, and "a person present in a stolen automobile," *id.* at 141 n.9.

The government notes that in *Rakas* this Court observed that the passengers were "legitimately on the premises in the sense that they were in the car with the permission of the owner." *Id.* at 148 (internal quotation marks and alterations omitted). But the Court made that observation in the course of *rejecting* the "legitimately on the premises" test. *Id. Rakas* simply described a context where the owner was the driver. Nowhere did this Court suggest that the owner's, as opposed to the renter's, permission was *necessary* to have a reasonable expectation of privacy. Indeed, in *Jones v. United States*, 362 U.S. 257, 267 (1960), which *Rakas* reaffirmed, the defendant reasonably expected privacy despite having only the *renter's* permission to spend the night. OB 22. There is no reason to believe the result in *Jones* would have been different if the landlord barred overnight guests; the friend's privacy expectation came from the social

understanding that a houseguest expects privacy when spending the night in another's home, not from the landlord's permission.

The *Rakas* footnote has no application here. Unlisted drivers are not car thieves. The government does not dispute that Byrd entered the car legally or that Budget and Reed permitted him to "possess, store possessions in, or exclude others from" the car. *See* GB 15 (alterations omitted). Indeed, a driver given permission by the renter to drive the car does not even deprive "the rental company of any short-term use to which it otherwise would have been entitled." *Commonwealth v. Campbell*, 59 N.E.3d 394, 402 (Mass. 2016). Violating the authorized-driver provision may result in additional civil liability if the car is damaged, but "it does not also result in a violation of criminal law." *Id.*; *see also United States v. Smith*, 263 F.3d 571, 587 (6th Cir. 2001) ("It was not illegal for Smith to possess or drive the vehicle, it was simply a breach of the contract with the rental company.").[2] Indeed, courts consider unlisted driving so common and foreseeable that many refuse to enforce authorized-driver provisions. OB 33; NAPD Br. 26-29.

The line *Rakas* drew at criminal possession comports with societal understandings of privacy—that a

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[2] The government asserts that in some other "jurisdictions …, the unauthorized driver of a rental car could be prosecuted for a crime, such as theft or unauthorized use of a vehicle." GB 26-27. But the cases it cites bear little resemblance to this one. *Wade v. State*, 29 S.W.2d 377, 378-79 (Tex. Crim. App. 1930), did not involve an unauthorized driver. And in *State v. Pinkston*, No. 103833, 2016 WL 4399396, at *2 (Ohio Ct. App. Aug. 18, 2016), the renter reported the vehicle stolen.

person cannot claim a right to privacy where his only connection to the place is his criminal act. 439 U.S. at 141 n.9. The criminal has invaded the occupant's privacy against the occupant's wishes. The same cannot be said in regard to someone invited by the renter. *See Jones*, 362 U.S. at 266-67 (a person invited by the renter may assert Fourth Amendment rights).

The government concedes that a person's presence in a rental car does not become "wrongful" when he violates the rental company's terms of use. GB 19. The government recognizes, for instance, that an authorized driver's presence remains legitimate when he violates terms that prohibit driving the car while talking on a cell phone or using the car for towing. GB 19; OB 36-37. The government has no sound basis to treat the authorized-driver provision differently. It cannot be because disregarding an authorized-driver provision might harm the rental company, GB 30—many breaches of contract might do that. OB 36. Nor can it be because the authorized-driver provision limits who may legitimately possess the car, GB 19 (distinguishing between restrictions that "are not inherently directed at" possession and those that are)—the government does not dispute that unlisted drivers may, consistent with the contract terms, possess rental cars and store possessions in the locked trunk. GB 15.

Moreover, rental agreements generally do not distinguish between restrictions on who may drive the car and restrictions on how the car may be driven. Indeed, rental companies' standard terms and conditions prohibit unlisted drivers in the *same paragraph* that they prohibit driving while talking on a cell

phone and using the car for towing. OB 36. And the terms and conditions specify the *same consequence* for breach of these terms—the risk of loss shifts to the driver, and the rental company may terminate the rental. *Id.*[3]

3. The government contends that no one can reasonably expect privacy in the trunk of a car unless they own the car or are *driving* the car with the owner's consent. GB 11-14. That argument is premised on the government's flawed "legitimate presence" theory (*see supra* 6-10), and a faulty supposition that passengers may never reasonably expect privacy in a car's trunk. As to the latter, the government cites *Rakas*. But *Rakas* expressly disclaimed any intention to hold "that a passenger lawfully in an automobile may not invoke the exclusionary rule and challenge a search of [a] vehicle unless he happens to own or have a possessory interest in it." *Rakas*, 439 U.S. at 149 n.17 (internal quotation marks omitted).

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[3] The government cites the testimony of an Avis-Budget representative, who had no involvement in the rental here. He testified that, in his view, breach can "void" the rental agreement and can permit the rental company to "repossess" the car. The contract in the record here, however, does *not* say that violation of the authorized-driver provision voids the agreement. JA 19. The word "void," as used in the contract addendum, refers only to the insurance coverage provided. JA 24. And even in cases where rental agreements say that a violation would void the contract, such language would apply equally to the myriad other use restrictions, and would not implicate the driver's reasonable expectations of privacy. *See United States v. Walton*, 763 F.3d 655, 664-65 (7th Cir. 2014) (reliance on the rental contract's voiding language for restricted uses "proves too much").

The passengers in *Rakas* were found to lack a reasonable expectation of privacy not because they were "passengers *qua* passengers," but because they failed to establish that they had possession and control over the search area. The defendants, who had been in the car only briefly, "did not claim that they had any legitimate expectation of privacy in the areas of the car which were searched." *Id.* at 149 n.17. Had a passenger in that case made such a showing—by, for example, demonstrating that the passenger had permission to use the glovebox and held the key to it—*Rakas* would have been a very different case.

Rakas simply stands for the commonsense proposition that passengers in a car, much like guests in a house, may have Fourth Amendment protection in the car so long as they establish that they reasonably expected privacy in the part of the car that was searched. Under that standard, Byrd plainly had a reasonable expectation of privacy in the locked trunk—he had sole possession, the key, and the practical ability to exclude others.

Even the government concedes that Budget's rental agreement permitted Byrd, with the renter's consent, to "possess, store possessions in, or exclude others from the vehicle." GB 15 (quoting OB 34-35 (alterations omitted)). That authority, by itself, is sufficient to consider Byrd "legitimately present" for Fourth Amendment purposes.

4. Byrd's reasonable expectation of privacy is further buttressed by his familial connection to the renter—his fiancée. OB 26-28. Byrd's close relationship to Reed enabled Reed to "share … h[er] privacy

with hi[m]." *Minnesota v. Olson*, 495 U.S. 91, 99 (1990).

The government's response brushes off the "importance of the family" and the privacy expectations families share, asserting that personal connections to the renter are irrelevant unless they are memorialized in rental agreements or state law, GB 40. But the privacy of the family is the default—it needs no affirmative legislation or contract to be entitled to respect. And that is true whether Reed was Byrd's fiancée (as he testified) or "merely" his long-term girlfriend and the mother of his children (as the government contends).[4] *See Stanley v. Illinois*, 405 U.S. 645, 651 (1972) ("Nor has the law refused to recognize those family relationships unlegitimized by a marriage ceremony.").[5]

B. Policy considerations do not support deviation from a standard based on possession and control.

The opening brief explained that society recognizes as reasonable an unlisted driver's use of a rental

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[4] The government misleadingly cites the Presentence Report to suggest that Reed was Byrd's "former girlfriend." GB 39. That report was completed over a year after the traffic stop during which time Reed and Byrd split up.

[5] The significance of Byrd's relationship to the driver is properly presented. Byrd raised his relationship with Reed four times in the petition for writ of certiorari, Pet. 2, 5, 14-15. Moreover, this argument was foreclosed before the Third Circuit because that court held that a man who drove his "girlfriend's" rental car had no reasonable expectation of privacy in the car. *See United States v. Kennedy*, 638 F.3d 159, 161 (3d Cir. 2011).

car because the circumstances in which drivers take the wheel of rental cars are commonplace and reasonably foreseeable by rental companies. OB 32; NAPD Br. 11-13. The government disputes none of this. Rather, it argues on policy grounds that this Court should carve out a judicial exception to everyday notions of privacy for unlisted drivers. None of its policy arguments support deviating from a standard based on possession and control.

1. The possession-and-control test is necessary to avoid incentivizing suspicionless searches and to provide clear guidance.

a. The government contends that prohibiting suspicionless searches of rental vehicles driven by unlisted drivers, operating the car with the renter's permission, would "frustrate[]" law enforcement. GB 33-34. But what is most expedient for law enforcement is not the test. *Georgia v. Randolph*, 547 U.S. 103, 115 n.5 (2006) ("A generalized interest in expedient law enforcement cannot, without more, justify a warrantless search.").

Moreover, it does not materially impair lawful police work to acknowledge that an unlisted driver, who possesses the car with the renter's permission, reasonably expects privacy in the locked trunk of the rental car. If the police have reasonable suspicion that a person driving a rental vehicle is engaged in criminal activity, they may stop the car. And if, after the stop, they have probable cause to believe the trunk contains evidence of a crime, they may search the trunk.

Exempting rental cars driven by unlisted drivers from the ordinary constitutional rules "creates a serious and recurring threat to the privacy of countless individuals"—"giving police officers unbridled discretion to rummage at will among a person's private effects." *Arizona v. Gant*, 556 U.S. 332, 345 (2009). It is hardly theoretical that the police will exercise that power, or that their decision to do so may be arbitrary. The troopers here admitted that they tailed Byrd until they could pull him over for a minor traffic violation largely because he was driving a rental car. OB 39.

The troopers also explained that they knew they could search the car without cause if it turned out that Byrd was not listed on the rental agreement. OB 39. And, of course, as soon as they stopped the car, they immediately checked to see if Byrd was on the rental agreement. JA 69. The government's proposed rule would condone and incentivize this gambit and would thus authorize arbitrary and standardless searches resembling general warrants. OB 4; Restore the Fourth Br. 8.[6]

The government and its amici blink reality by insisting otherwise. GB 34-35; States Br. 4-15. They contend that the reasonable-suspicion requirement

[6] In another notable example, Maryland state police stopped Judge Robert Wilkins (then a public defender) and his family while they were returning from a funeral because they were driving a rental car. Robert L. Wilkins et al., *Addressing Declining Rights in an Era of Declining Crime*, 9 J.L. & Pol'y 215, 232-35 (2001). After Judge Wilkins refused to consent, the officers searched the car anyway.

for an investigatory stop is a substantial bulwark against arbitrary searches. GB 34; States Br. 4-8.[7] But they do not dispute that it is nearly impossible to drive a car for any length of time without committing a minor traffic violation. This case—where the troopers identified a rental car, followed it, and then pulled it over when it stayed in the left lane for 0.2 miles too long —vividly illustrates that reality.[8]

b. The opening brief explained that a rule tying reasonable expectations of privacy to the terms of the rental agreement will be difficult to administer. OB 40-43. The government's response simply misstates the problem officers face. GB 18-19. The government is wrong that officers need only check whether the driver's name is on the rental agreement. An author-

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[7] In seeking to minimize the number of times the police have unjustifiably searched cars driven by unlisted drivers, the state amici ignore that most car searches do not discover evidence of a crime and do not end up on Westlaw. *See* Jeff Guo, *Police are searching black drivers more often, but finding more illegal stuff with white drivers*, Washington Post (Oct. 27, 2015), https://tinyurl.com/ybbsrqs4.

[8] Nor is it any assurance that reasonable suspicion is required to further extend a stop's duration. The permissible duration of a traffic stop without reasonable suspicion of a crime includes numerous inquiries, such as "checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration." *See Rodriguez v. United States*, 135 S. Ct. 1609, 1615 (2015). During that time one officer can engage in a suspicionless search of the car while the other undertakes the allowed inquires. Further, some courts treat being an unlisted driver as a potential factor that may support extending a traffic stop. *Smith*, 263 F.3d at 592.

ized driver's name might *not* appear on the agreement. In particular, the officer needs to know what categories of people (e.g., spouses or employees) are authorized by operation of law to drive a rental car irrespective of what the rental terms. OB 41-42. And the officer needs to assess whether the driver qualifies under one of the categories of authorized drivers specified in the agreement. OB 42. And some rental companies do not even issue paper contracts. *See* Nat'l Motorists Ass'n Br. 7. Thus, a rule that turns on contract restrictions is both wrong and not easily administrable.

2. Rental companies' commercial interests are protected by contract law.

In arguing against affording Fourth Amendment rights to the unlisted driver, the government cites "the important interests that the breached contractual provisions seek to preserve." GB 29-30. But the reasonable-expectation-of-privacy inquiry does not call for balancing the significance of privacy interests against commercial interests. Contract law fully defines and protects the commercial interests the rental agreement serves. The rental companies know that unlisted drivers often drive rental cars, and they draft contracts to anticipate that issue and provide the chosen remedy: shifting additional risk of loss onto the renter. JA 24.[9]

[9] The government suggests that recognizing that unlisted drivers reasonably expect privacy in rental cars would allow

3. Potential tort or contract liability does not render a driver's expectation of privacy unreasonable.

The government maintains that an unlisted driver cannot have a reasonable expectation of privacy in a rental car because he might be liable for a tort or guilty of a crime. GB 29. But, as explained *supra* 7-8, an unlisted driver, who operates a rental car with the renter's permission, does not commit a crime. And even if Byrd has potential tort or contract liability, that does not make his expectation of privacy unreasonable. The renter would also incur contract or tort liability by driving the rental car in violation of many other terms, such as the prohibition on cellphone use, OB 36, or by returning the car a day late. But the government concedes that a renter who violates these terms would still have a reasonable expectation of privacy in the car. GB 10, 19-20.

Finally, the government misleadingly suggests that, if possession and control with the renter's permission suffices to establish a reasonable expectation of privacy in a rental car, then an unlisted driver could reasonably expect privacy in a rental car for an indefinitely long period after the termination of the rental agreement. GB 37. That does not follow. After

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someone who borrowed the car from an unlisted driver to claim a Fourth Amendment right as well. GB 37. Of course, this case only raises the question of possession and control with the *renter's* permission, not the permission of a third party. But, in any event, it is not clear why the government thinks this consequence is absurd.

the rental agreement expires, state law at some point will deem the car stolen. The same is true in regard to the renter. *See United States v. Miller*, 821 F.2d 546, 548 (11th Cir. 1987). None of that supports treating the renter and an unlisted driver differently for Fourth Amendment purposes.

II. Byrd May Also Challenge The Search Because He Had A Property Interest In The Rental Car.

Although a reasonable expectation of privacy does not require a property interest, a property interest is a second sufficient basis to establish a Fourth Amendment right in the car. OB 43-44. Here, Byrd also satisfies this second route because he had the property interest of bailee, which includes the right to exclude strangers from the car. OB 46-48.

A. As a bailee, Byrd had the right to exclude strangers from the car.

The transfer of the rental car from Reed to Byrd made Byrd a bailee. OB 46-47; *see also* 8 C.J.S. *Bailments* § 1 ("A bailment is created upon delivery of possession of goods and acceptance of their delivery"); *Price v. Brown*, 680 A.2d 1149, 1151 (Pa. 1996); *Tomko v. Sharp*, 94 A. 793, 793 (N.J. 1915). As a bailee, Byrd was obligated to exercise the requisite "degree of care to protect the property from loss." 8 C.J.S. *Bailments* § 55; OB 45-47. And as a bailee, he had the right to exclude strangers from the car and sue those who damage the car for trespass. OB 45.

The government acknowledges that the renter of a car has "property rights in the car, including the right to sue for a trespass to chattels." GB 23. But it contends Byrd had "no such rights," *id.*, because Reed was not authorized to transfer the car to Byrd. At most, however, violating that contract term merely increased Reed's potential liability for damage to the car. *See* 8A Am. Jur. 2d *Bailments* § 123. It did not invalidate Byrd's status a bailee, or his related right to exclude strangers from the car. OB 47-48; *see United States v. Little*, 945 F. Supp. 79, 83 (S.D.N.Y. 1996) ("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); *Moreno v. Idaho*, No. 15-cv-342, 2017 WL 1217113, at *5 (D. Idaho March 31, 2017); *Siverson v. Martori*, 581 P.2d 285, 288 (Ariz. Ct. App. 1978); *Revillon Freres v. Cassell Trucking Co.*, 264 N.Y.S.2d 24, 25 (App. Div. 1965); N.E. Palmer, *Bailment* 786 (1979).[10]

The government's support for the contrary view rests on a lone citation to an irrelevant Restatement

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[10] The government attempts to distinguish *Moreno* on the ground that it "addressed only the property rights of the bailee." GB 24. But the government ignores that the defendant had "constructive possession" only by virtue of the *bailment* between him and the driver-subbailee, whom the owner had not authorized to drive the car. *See Moreno*, 2017 WL 1217113, at *5. The government also attempts to distinguish *Siverson* and *Revillon Freres* on the ground that "the authority of the bailee to transfer the property to a third person was not questioned." GB 24. But nothing in those cases suggests that the bailee had the bailor's consent to subbail the property, and the "general rule" is that the bailor has not so consented. GB 22.

comment, which states that a "transaction" where one person delivers chattel to another without the owner's permission is "ineffectual." GB 24 (quoting Restatement (Second) of Torts § 229 cmt. d (Restatement)). But that section concerns only putative transfers of a "proprietary interest" in chattel, Restatement, § 229, which is a "right of *ownership* … which would entitle the actor to retain its possession permanently," *id.* cmt. a (emphasis added). Thus, the comment's statement that the "transaction" is "ineffectual" means that a transferee can acquire no interest against a party with a *superior* interest unless he has that party's permission. But Byrd has never suggested that he had a property interest enforceable against Budget or Reed; rather, he had a limited property right to exclude *strangers* from the car.

The Restatement confirms Byrd's position. Section 222 explains that anyone "who dispossesses another of a chattel is subject to liability in trespass for the damage done." *Id.*, § 222. And that is true "irrespective of [the dispossessed party's] right to such possession." *Id.* cmt. e. Here, Byrd did not "dispossess" Budget of the car it loaned to his fiancée. But even if he had, as the person in possession, he would "have the right to retain the possession of the chattel as against the [intruder]." *Id.*

The rule that "possession is good title against all the world except those having a better title," *Anderson v. Gouldberg*, 53 N.W. 636, 636 (Minn. 1892), has a long history, *see, e.g.*, *Odd Fellows' Hall Ass'n v. McAllister*, 26 N.E. 862, 863 (Mass. 1891) ("[a possessor] of goods is entitled to keep them as against any one not having a better title."). The government urges

the Court to turn this common-law principle on its head.

Consider, for example, the government's proposed reading of *U.S. Fire Insurance Co. v. Paramount Fur Service, Inc.*, 156 N.E.2d 121 (Ohio 1959). In that case, the owner of a coat delivered it to Goldman Fur Company, making Goldman a bailee. *Id.* at 123-26; *U.S. Fire Ins. Co. v. Paramount Fur Serv., Inc.*, 145 N.E.2d 844, 846 (Ohio Ct. App. 1957). Goldman then deposited the coat with the defendant, Paramount, which ultimately lost the coat. 145 N.E.2d at 846. The Ohio Supreme Court observed that—whether or not Goldman was authorized to enter into a subbailment—Paramount served as a bailee, with a "duty of ordinary care" to Goldman with respect to the coat. 156 N.E.2d at 129. By the government's reckoning, however, Paramount had an obligation to Goldman to exercise ordinary care in protecting the coat from damage yet had no duty or right to prevent *strangers* from putting their paws all over the coat. That makes no sense; it would deprive Paramount—the holder of the duty of care—of the common law's most effective means of complying with that duty—the right to exclude strangers who might damage the chattel.

B. Byrd possessed the car and retained the right to exclude strangers from the car.

The government also contends that Byrd lacked the right to exclude strangers from the rental car because the transfer of the car "may amount to a tort," such as conversion. GB 25. The government never actually explains how potential tort liability relates to the right to exclude, but it appears to suggest that a

tortfeasor cannot have a right to exclude strangers from property he possesses. That argument fails for several reasons.

As an initial matter, Byrd's possession of the rental car did not "seriously interfere" with Budget's title and ultimate right to control the car and therefore did not constitute conversion. Restatement, § 222A(1) (requiring serious interference with property); *id.*, § 228 cmt. d (similar). Byrd drove the car within the rental period, caused no damage, and never acted in "defiance of" Budget's title. *Id.*, § 227 cmt. b. These actions, the Restatement explains, are not "enough for a conversion." *Id.* Small wonder, then, that the government cites only cases holding that violating an authorized-driver provision does *not* constitute conversion. GB 26 (citing *Dockery v. Enterprise Rent-A-Car Co.*, 796 So.2d 593, 596-99 (Fla. Dist. Ct. App. 2001); *Kender v. Auto-Owners Ins. Co.*, 793 N.W.2d 88, 95 (Wis. Ct. App. 2010)).

Moreover, the government's unstated premise—that a person who commits conversion loses any property interest in the chattel—is incorrect. While violating the terms of a bailment or committing a property tort may expand the scope of the bailee's liability, numerous cases establish that a tortfeasor in possession of chattel retains a property right to exclude strangers from the chattel and to sue for damages while the chattel remains in his possession. *See, e.g.*, *New England Box Co. v. C & R Const. Co.*, 49 N.E.2d 121, 128-29 (Mass. 1943) (observing that a tortious possessor of land may maintain action against trespasser); *Anderson*, 53 N.W. at 636 ("When it is said that to maintain replevin the plaintiff's possession must have

been lawful, it means merely that it must have been lawful as against the person who deprived him of it."); *Bartlett v. Hoyt*, 29 N.H. 317, 320 (1854) (plaintiff's possession, even after contract for sale became void, was sufficient basis for trover).

Finally, the government contends that Byrd did not have the right to exclude strangers from the rental car because the rental company could have potentially terminated the agreement and sought to repossess the car. GB 27-28. But by that reasoning anyone who is late on a car payment or who borrows a friend's car would have no right to exclude strangers from the car because he would be under the "constant threat," GB 28, of a potential repossession. Similarly, a person renting an apartment who is late in paying rent would be under threat of eviction. But no one would say that the renter behind in her rent lacks any interest in the apartment and has no Fourth Amendment rights. Again, the government's own brief demonstrates the fallacy of its arguments.

CONCLUSION

This Court should reverse the judgment of the Court of Appeals.

Respectfully submitted,

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