No. 16-1371

IN THE

Supreme Court of the United States

TERRENCE BYRD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF OF PETITIONER

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INTRODUCTION

The government does not dispute that a huge number of drivers are affected by the answer to the question whether a driver has a reasonable expectation of privacy in a rental car when he has the renter's permission to drive the car but is not listed on the rental agreement. Nor does it dispute that the question recurs frequently. The question has divided the courts of appeals and cries out for this Court's immediate review. The government's attempts to show otherwise are meritless.

The government acknowledges a split but argues that some of the conflicting decisions are merely dicta. The government is wrong—the relevant statements are necessary to the outcomes of each of the decisions cited in the petition. That is why seven federal Circuits agree with our assessment of the split's depth. *Infra* 3 n.1.

The government then erroneously suggests that this case is not a clean vehicle for resolving the split, arguing the search here was justified by Mr. Byrd's consent or by probable cause. The legal arguments are wrong, but more importantly, the decision below addressed neither issue. So as presented to this Court, this case turns exclusively on the question presented. There is no vehicle problem.

Finally, the government errs in defending the Third Circuit's rule that, save for "extraordinary circumstances," an unlisted driver cannot have a reasonable expectation of privacy in a rental car. That rule means the police may conduct a search whenever they

encounter an unlisted driver of a rental car, whether or not the police have a warrant or probable cause or, indeed, any suspicion at all. That breathtakingly capacious vision of police authority would give "officers unbridled discretion to rummage at will among a person's private effects," *Arizona v. Gant*, 556 U.S. 332, 345 (2009), in derogation of basic Fourth Amendment principles. The government's position also contravenes this Court's cases by focusing the Fourth Amendment inquiry on the terms of individual car-rental contracts rather than on "widely shared social expectations" of privacy. *Georgia v. Randolph*, 547 U.S. 103, 111 (2006). The petition should be granted.

I. The Government Acknowledges A Split Of Authority And Fails To Minimize Its Depth.

The government does not dispute that the Third Circuit's decision below, along with decisions of the Fourth, Fifth, and Tenth Circuits and the high courts of Montana and Arkansas, directly conflicts with the decisions of the high courts of Oklahoma and Nebraska. BIO 4. Nor does the government dispute that the Sixth Circuit follows a third approach that produces different outcomes. BIO 9-10. Those concessions alone acknowledge the circuit split and the intra-jurisdictional conflict in Oklahoma, where unlisted drivers have standing to challenge the search of a rental car in state court but not in federal court. *Compare State v. Bass*, 300 P.3d 1193, 1196 (Okla. Crim. App. 2013) *with United States v. Worthon*, 520 F.3d 1173, 1183 (10th Cir. 2008).

The government instead goes straight for the capillaries, contending that the 6-2-1 split it acknowledges is "relatively shallow." BIO 4. The government argues in particular that certain statements in the decisions of the Eighth and Ninth Circuits and the New Mexico Supreme Court were not "required" for the outcomes of those cases. BIO 11. The government badly mischaracterizes those decisions. Indeed, seven Circuits have recognized a deep split.[1] Correctly counted, the split is 6-6-1.

In *United States v. Best*, 135 F.3d 1223 (8th Cir. 1998), the record was unclear whether the renter had given the defendant permission to drive the rental car. The Eighth Circuit concluded that the defendant "would have a privacy interest giving rise to standing" if the renter "had granted [the defendant] permission to use the rental automobile." *Id.* at 1225. That language was necessary to the outcome and was therefore not "dicta," BIO 12, because it was the court's *only* basis for vacating the district court's denial of the

[1] *See* Pet. App. 8a ("A circuit split exists."); *United States v. Lyle*, 856 F.3d 191, 200 (2d Cir. 2017) ("This question has divided … circuit courts."); *United States v. Kennedy*, 638 F.3d 159, 165-66 (3d Cir. 2011) (canvassing the split); *United States v. Houston*, No. 16-4340, 2017 WL 1957474, *2 n.2 (4th Cir. May 11, 2017) ("[Our rule] … conflict[s] with … decisions … of our sister circuits"); *United States v. Smith*, 263 F.3d 571, 583-86 (6th Cir. 2001) (canvassing the split); *United States v. Sanford*, 806 F.3d 954, 958 (7th Cir. 2015) (noting "the existence of a circuit split"); *United States v. Thomas*, 447 F.3d 1191, 1196 (9th Cir. 2006) (canvassing the split); *United States v. Gayle*, 608 F. Appx. 783, 788 (11th Cir. 2015) ("The circuits … are split.").

suppression motion and remanding for further findings.

Similarly, in *Thomas*, 447 F.3d 1191, the Ninth Circuit "reject[ed] the government's contention that a defendant not listed on a lease agreement lacks standing to challenge a search." *Id.* at 1198. The court instead concluded that "an unauthorized driver who received permission to use a rental car and has joint authority over the car may challenge [a] search." *Id.* at 1199. The court then affirmed the denial of suppression on the ground that the defendant had "failed to show that he received [the renter's] permission to use the car." *Id.* Were it not for the conclusion that an unlisted driver has standing to challenge a search if he has the renter's permission to drive the vehicle, the court's opinion would contain no reasoned basis for affirming the denial of suppression. That conclusion was necessary to the decision and was therefore not dicta. The Ninth Circuit itself views that conclusion as *Thomas*'s "holding," *Lyall v. City of Los Angeles*, 807 F.3d 1178, 1189 (9th Cir. 2015), as do the district courts in the Ninth Circuit, *see United States v. Pinex*, 129 F. Supp. 3d 982, 990 (D. Mont. 2015); *United States v. King*, 560 F. Supp. 2d 906, 914 (N.D. Cal. 2008).

Likewise, in *State v. Van Dang*, 120 P.3d 830 (N.M. 2005), the New Mexico Supreme Court held that an unlisted driver must "present evidence of consent … from the … renter … in order to establish standing to challenge a search of the vehicle." *Id.* at 834. As in *Thomas*, the New Mexico Supreme Court affirmed the denial of suppression on the ground that

the defendant had not established the renter's consent. *Id.* The statement quoted above is therefore a holding because, without it, the opinion would contain no reasoned basis for the court's decision.

Finally, the government argues (BIO 13) that *Parker v. State*, 182 S.W.3d 923 (Tex. Crim. App. 2006), is distinguishable because the defendant there was unaware that "the agreement did not list him as an authorized driver," *id.* at 927, whereas, here, Byrd had possession of the rental agreement. That purported "distinction" does not diminish the split's depth. Indeed, the government does not dispute that, in Texas, "society … recognize[s] as reasonable [a defendant's] expectation of privacy in the use of his girlfriend's rental car with her permission even though he was not listed as an authorized driver on the rental agreement." *Id*. That holding, like the holdings of the Eighth and Ninth Circuits and the high courts of New Mexico, Oklahoma, and Nebraska, directly contradicts decisions of the Third, Fourth, Fifth, and Tenth Circuits and the high courts of Montana and Arkansas.

This case involves a deep and established split, as the courts themselves have recognized. It pits the federal Circuits against one another and creates internally inconsistent Fourth Amendment law in five states. Pet. 20-21. As the government notes, over the past several years, this Court has denied certiorari in cases purporting to present the same question. BIO 4 n.2. Our petition explained, however, that each previous case has been hampered by insuperable vehicle problems not present here: that the rental company

had consented to the search or seizure or that the defendant had failed to establish that he had the renter's permission to drive the vehicle. Pet. 25-26. Thus, despite the frequency with which this issue arises, *see* Pet. 22-23 nn.7-10 (citing 35 cases raising the issue in addition to those counted in the split), this case presents the first viable opportunity this Court has had to resolve this divisive and ever-deepening conflict. This is the opportunity the Court has been waiting for, and it should take it.

II. This Case Is An Ideal Vehicle For Resolving The Split.

The government asserts that this case is not a good vehicle because the government may prevail *on remand* on other grounds—that the search was justified by Mr. Byrd's consent and by probable cause. Neither blocks this Court's review—and the government does not say otherwise—because the decision below did not address either issue.[2] In fact, the government did not even assert its probable-cause argument below. If this Court answers the question presented in the affirmative, it should reverse and remand to the Third Circuit for consideration of the issues that court did not reach. And if it answers the question in the negative, the judgment should be affirmed. In either event, the question presented will be dispositive.

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[2] This case is therefore unlike *United States v. Goode*, 550 F. Appx. 84, 84 (3d Cir. 2013), where the district court found, and the Third Circuit agreed, that the defendant had consented to the search and that the police had probable cause to search the vehicle.

The possibility that a respondent might prevail on remand has never been a basis for denying certiorari. And in this case, it is also wrong. The record does not show that the troopers obtained Mr. Byrd's valid consent. Trooper Long's brief and equivocal testimony is the only evidence bearing on the government's assertion that Mr. Byrd purportedly consented to the search. True, Long claimed on direct examination that Byrd said, "yeah, you can search the vehicle." C.A. App. 102. But on recross examination, Long clarified that what Byrd *actually* said was, "I'll get [the 'blunt'] for you," and did not otherwise "consent." C.A. App. 174.

Even assuming that Mr. Byrd signaled acquiescence in the search, it is far from clear that any statement he may have made constituted valid consent. Consent to a search is valid only if "freely and voluntarily given," *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968), which requires more than "mere submission to a claim of lawful authority," *Florida v. Royer*, 460 U.S. 491, 497 (1983). The government must show that Mr. Byrd's consent was voluntary under the totality of the circumstances, and "one factor to be taken into account" is his "knowledge of the right to refuse consent." *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973). According to Trooper Long, Byrd said nothing indicating his supposed approval of the search until Long told him that the troopers did not require his consent. C.A. App. 159-60. On this record, it is hardly a foregone conclusion that the Third Circuit will rule on remand that Mr. Byrd voluntarily consented to the search of the car and its trunk. There is certainly nothing in the Third Circuit's decision suggesting that it would reach that conclusion.

The government's probable-cause argument is equally meritless. The government waived the argument by failing to make it in either court below. And that failure is unsurprising since there is no evidence supporting probable cause to search the car's trunk. Police officers may search a vehicle without a warrant if "there is probable cause to believe a vehicle contains evidence of criminal activity," but they may only search "area[s] of the vehicle in which" they have probable cause to believe "the evidence might be found." *Gant*, 556 U.S. at 347. That is why "[p]robable cause to believe … the trunk of a taxi contains contraband or evidence does not justify a search of the entire cab," *United States v. Ross*, 456 U.S. 798, 824 (1982), and it is why "probable cause to believe that [a] paper bag in the … trunk contain[s] marijuana …. d[oes] not [establish] probable cause to believe that contraband was hidden in any other part of the automobile," *California v. Acevedo*, 500 U.S. 565, 580 (1991). Here, Trooper Long claimed that Mr. Byrd had said he had "smoked marijuana" in the car. C.A. App. 168; *see also* C.A. App. 161 (Trooper Long testifying that Byrd said "there was a blunt in the car").[3] Even assuming *arguendo* that the district court had credited that testimony and even assuming that such a remark would have given the troopers probable cause to search the car's *passenger compartment*, the troopers still did not have probable cause to search the car's *trunk*.

[3] In fact, the troopers found no marijuana in the car. Pet. App. 4a.

III. The Third Circuit's Rule Authorizes Unbridled Rummaging And Ignores Everyday Expectations Of Privacy.

An unlisted driver in the Third Circuit cannot have a reasonable expectation of privacy in a rental car, except in "extraordinary circumstances" not applicable here. Pet. App. 13a. Thus, officers in the Third Circuit may search a rental vehicle whenever the driver is not listed on the rental agreement, whether or not they have a warrant or probable cause—or, indeed, any suspicion of a crime whatsoever.

This fact pattern is not an infrequent occurrence. In 2015 alone, over 115 million separate car-rental transactions occurred in the United States. Pet. 19. And as amicus explains, it is commonplace for unlisted drivers to get behind the wheel of these vehicles. Brief of National Association for Public Defense as Amicus Curiae at 14-15; *see also* Pet. 30-31. In light of the frequency with which this situation arises, the Third Circuit's rule is an affront to the Fourth Amendment's "central concern" that police officers not be given "unbridled discretion to rummage at will among a person's private effects." *Gant*, 556 U.S. at 345; Pet. 27. Correcting the government's astonishingly broad assertion of discretionary authority, and the Third Circuit's acquiescence in it, provides further reason to grant the petition.

The Third Circuit arrived at its sweeping view of police authority by training its Fourth Amendment analysis on the terms of rental contracts. Pet. 15. Rental contracts, however, are adopted for reasons

wholly unrelated to social norms of privacy. Pet. 29. Those contracts are therefore not useful proxies for "widely shared social expectations" of privacy. *Randolph*, 547 U.S. at 111.

The government endorses the Third Circuit's analysis, but it too fails to provide any reason for hinging the Fourth Amendment's scope on the terms of standard-form rental contracts. Instead, the government changes the subject to why nondelegation clauses in rental contracts are reasonable. BIO 8 ("Rental car companies require information about the identities of all drivers in order to reduce the risk of damage to the vehicle or to third parties ...."). The reasonableness of terms in rental-car contracts, however, tells us nothing about the privacy expectations of rental-car drivers, just as the reasonableness of an apartment owner's prohibition on pets tells us nothing about the privacy expectations of her residential tenants.

Under the proper analysis, outlined in *Rakas*, a person has a reasonable expectation of privacy in property, including in a rental car, if he "lawfully possesses or controls" the property. *Rakas v. Illinois*, 439 U.S. 128, 143 n.12 (1978); BIO 6 (agreeing with that analysis). The government does not dispute that Mr. Byrd had exclusive possession and control of the rental car—or that Mr. Byrd would therefore have expected that he could exclude others from rummaging through the car while it was in his possession. Instead, the government contends that Mr. Byrd's possession of the car was not "lawful[]" and that his expectation of privacy was not reasonable because

Avis's rental contract "expressly advised that 'permitting an unauthorized driver to operate the vehicle is a violation of the rental agreement.'" BIO 6-7 (quoting C.A. App. 73). In other words, the government contends that "lawful[] possess[ion]" of a rental car requires strict compliance with the conditions that the owner places on the car's use—including conditions contained in standard-form rental contracts. That view is wrong for at least three independent reasons.

First, the government's position leads to absurd consequences. Pet. 30. Under that position, for example, many drivers would lose Fourth Amendment standing to challenge a search as soon as they "refuel[] the [rental] vehicle with the wrong kind of gas" or forget to "wear[] a seatbelt." Pet. 30 (quoting *United States v. Walton*, 763 F.3d 655, 665 (7th Cir. 2014)). The government suggests no means of avoiding these incongruous results.

Second, the government's position is difficult to apply and therefore fails to give officers "a fair prospect of surviving judicial second-guessing months and years after a[] … search is made." *Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001). Officers in the field will often not know whether a suspect has violated conditions that the car's owner has placed on the car's use. They will not necessarily know, for example, whether the suspect has exceeded the rental contract's geographical or temporal limits or filled the car with the wrong type of fuel. But under the government's rule, the scope of the Fourth Amendment's protections depends on compliance with such conditions. Officers confronting non-owner drivers will

therefore not know whether they require a warrant or probable cause to conduct a search.

Third, the government's position contravenes *Rakas*. There, this Court explained that "wrongful" possession meant possession in violation of the criminal law, while "lawful[] possess[ion]" meant the opposite. *See* Pet. 33-34 (citing *Rakas*, 439 U.S. at 141 n.9, 143 n.12). Thus, here, Mr. Byrd had lawful possession of the rental car because the government does not contend that he committed a crime in coming into possession of it. While the renter may have breached her contract with Avis, that fact has no bearing on whether Mr. Byrd has a Fourth Amendment right not to be subject to a search in the absence of a judicial warrant or probable cause.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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