No. _____

In the
Supreme Court of the United States

TOMMY ZEKE MINCEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the U.S. Court of Appeals for the Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a driver who borrows a rental car with the renter's, but not the owner's, permission have a reasonable expectation of privacy in the car?

2. If so, can the rental company unilaterally and immediately extinguish the driver's reasonable expectation of privacy during a traffic stop by instructing the police not to release the car to the driver?

LIST OF PARTIES

United States of America

Tommy Zeke Mincey

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The court of appeals' opinion (App., *infra*, 1a – 21a) is available at 2008 WL 5063872. The district court's ruling from the bench on the suppression motion (App., *infra*, 22a – 24a) is unreported.

JURISDICTION

The court of appeals entered its judgment on November 24, 2008. On December 22, 2008 the court denied a timely petition for rehearing en banc (App., *infra*, 25a). On March 5, 2009, the Chief Justice extended the time within which to file this petition until May 21, 2009. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

The Fourth Amendment protects a person from unreasonable searches and seizures if he can "demonstrate that he personally has an expectation of privacy in the place searched, and that his

expectation is reasonable." *Minnesota* v. *Carter*, 525 U.S. 83, 88 (1998). An expectation of privacy is "reasonable" when it is consistent with "widely shared social expectations." *Georgia* v. *Randolph*, 547 U.S. 103, 111 (2006).

This case raises two issues: (1) whether a person enjoys a reasonable expectation of privacy in a rental car borrowed with the renter's, but not the owner's, permission, and (2) if so, whether the rental company can unilaterally and immediately extinguish that reasonable expectation of privacy by instructing the police during a traffic stop not to release the car to the driver.

Those issues have divided the lower courts. As the Fourth Circuit acknowledged below, there is a three-way split on the threshold question whether a driver who is not listed on a rental agreement has reasonable expectation of privacy in a rental car. App., *infra*, 13a – 15a. Three circuits and one state supreme court have held that a driver has a legitimate expectation of privacy in a rental car so long as the renter permitted him to drive it. Two other circuits, including the Fourth Circuit below, have held that a driver has a reasonable expectation of privacy in a rental car only if the rental company permitted him to drive it. Finally, one circuit and one state court of last resort have held that the reasonableness of an unlisted driver's expectation of privacy in a rental car depends on the totality of the circumstances.

That threshold question is tied to the related question—arising from the police practice of calling car rental companies during traffic stops to seek their permission to search rental cars—whether a

car rental company can telephonically extinguish a rental car driver's expectation of privacy during a traffic stop. The Eleventh Circuit has correctly held that those telephone calls do not extinguish the drivers' privacy interests because a property owner's latent right to retrieve its property cannot, particularly during a police encounter, negate the legitimate privacy interest of someone who possesses that property. The Fourth Circuit below and the Montana Supreme Court, however, have held otherwise. Their approach subjects the privacy interests of all rental car drivers to the instructions that companies give when telephoned by police.

Given that traffic stops of rental cars routinely lead to phone calls between police and car rental companies, the Fourth Circuit's subsidiary holding is virtually indistinguishable from its core holding that unlisted drivers cannot reasonably expect privacy in rental cars. For that reason, and because the lower courts' decisions concerning the privacy interests of unlisted drivers are hopelessly fractured, the two holdings at issue here should be considered, and reversed, in the same case.

A. Factual Background

1. On October 3, 2005, Tommy Zeke Mincey was driving a rental car on Interstate 77 near Statesville, North Carolina. App., *infra*, 3a. Sergeant Randy Cass stopped Mincey for following the vehicle ahead of him too closely. *Ibid.* Sergeant Cass asked Mincey for his driver's license and the car's registration. *Ibid.* Mincey knew that the car was not registered in his name: His girlfriend had rented the car from Armada Rental Company in her name, and she had given Mincey her explicit permission to drive it. *Id.*

at 7a n.3. Mincey gave the officer the rental agreement and explained that the name on it was his girlfriend's. *Id.* at 3a.

Sergeant Cass then called the rental company and explained that he had stopped one of its cars for a traffic violation and that the driver, the sole occupant, was not listed on the rental agreement. App., *infra*, 5a. Sergeant Cass, however, did not mention that Mincey claimed to have received permission to drive the car from the person whose name *did* appear on the agreement.

The company employee who answered Sergeant Cass's call confirmed that Mincey had not signed the agreement. App., *infra*, 5a. When Sergeant Cass then asked for the company's consent to search the car, the employee responded that someone would have to call Sergeant Cass back. *Ibid.* About five minutes later, a different employee—who, like the first one, was never told about Mincey's connection to the renter—called Sergeant Cass. *Ibid.* Although at the later suppression hearing the employee did not recall giving him permission to search the car, Sergeant Cass testified and the district court found that the employee consented to a search of the car and told Sergeant Cass not to release it to Mincey. *Id.* at 6a n.2.

A moment later Sergeant Cass told Mincey to leave the car and handed him a warning citation. He also told Mincey that he had spoken to the rental company and that he could not release the car to him since Mincey was not listed on the rental agreement. App., *infra*, 6a – 7a. Sergeant Cass then offered to drive Mincey to the next exit on the interstate and told him that the police would search the car. *Id.* at

7a. Before the search began, Mincey asked to return to the car and retrieve his belongings. Sergeant Cass refused that request. *Ibid*. Several minutes into the ensuing search, Sergeant Cass pulled up the console around the car's gearshift and discovered a plastic bag containing 140 grams of heroin. *Id.* at 7a – 8a. Mincey was then arrested.

B. Proceedings In The District Court

Three weeks later Mincey was indicted for possession with intent to distribute at least 100 grams of heroin in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A) and 18 U.S.C. § 2. App., *infra*, 10a. He moved, on Fourth Amendment grounds, to suppress the evidence obtained from the search, on the theory that the warrantless search violated his reasonable expectation of privacy in the car. To establish that privacy interest, Mincey elicited his girlfriend's testimony, at the suppression hearing, that she rented the car for him because he did not have a credit card, and that she gave him permission to drive it. 6/6/06 Tr. 52-54. He also cited cases from the Fifth, Sixth, and Eighth Circuits holding that the renter's permission could ground a driver's reasonable expectation of privacy in a car even if the driver's name did not appear on the rental agreement. Br. in Supp. of Mot. to Suppress at 8.

At the close of the suppression hearing, the court ruled from the bench. It held that Mincey had no privacy interest that would permit him "to contest the search and seizure of the rental car," and that "the rental car agency gave permission for the search of the vehicle." App., *infra*, 24a.

Mincey was later convicted and sentenced to 150 months in prison and eight years of supervised release. App., *infra*, 11a.

C. Proceedings In The Court Of Appeals

Mincey appealed and the Fourth Circuit affirmed. The court of appeals first held that its precedent foreclosed Mincey's argument that his girlfriend's permission gave him a reasonable expectation of privacy in the car. In *United States* v. *Wellons*, 32 F.3d 117 (4th Cir. 1994), it noted, "we held definitively that an unauthorized driver of a rental vehicle has no legitimate privacy interest in the vehicle and therefore cannot contest a warrantless search of the vehicle on Fourth Amendment grounds." App., *infra*, 12a – 13a. It also noted that "[w]e further held in *Wellons* that this conclusion was not altered where, as here, the authorized lessee allows the unauthorized driver to drive the rental vehicle, as an unauthorized driver still does not have permission of the rental company, the owner of the vehicle." *Id.* at 13a.

The Fourth Circuit acknowledged that the issue had divided the courts of appeals. It asserted that three circuits—the Fifth, Tenth, and Eleventh—agreed with it; that two—the Eighth and Ninth—disagreed, holding that "an unauthorized driver of a rental vehicle may have a legitimate expectation of privacy in the vehicle * * * if he is able to establish that the authorized renter/driver gave him permission to drive the vehicle;" and that one—the Sixth—"has adopted a totality of the circumstances analysis on the issue, holding that permission of the lessee to drive a rental vehicle is but one of many factors to be considered in determining whether an

unauthorized driver has a legitimate privacy interest in a rental vehicle." App., *infra*, 13a – 15a. After reviewing those cases, however, the court of appeals saw "no persuasive reason to overturn or alter" *Wellons*. *Id.* at 13a.

In a footnote, the Fourth Circuit further held that the rental company, by instructing the police not to release the car to Mincey, unilaterally and immediately extinguished any reasonable expectation of privacy that Mincey might have enjoyed when the traffic stop began. The Fourth Circuit reasoned:

> Even assuming Mincey had the permission of the authorized renter to drive the rental vehicle in this instance, any such permission clearly terminated once the rental company affirmatively advised Sergeant Cass that Mincey, as an unauthorized driver under the rental contract, was not entitled to possess the vehicle and that the vehicle was not to be released to Mincey at the scene of the traffic stop. In other words, *at that moment*, any permission that had previously been extended to Mincey by the authorized driver of the rental vehicle was effectively extinguished by the rental company, the actual owner of the vehicle and issuer of the subject rental contract.

App., *infra*, 14a n.9 (emphasis added).

The Fourth Circuit thus rejected Mincey's argument on two grounds: (1) that only the owner's, not the renter's, permission could ground a reasonable expectation of privacy and (2) that the car rental company's instruction to the police not to release the car to Mincey terminated the actual

permission he had from his girlfriend, the renter, to drive it.

In light of those holdings, the Fourth Circuit stated that it was declining to decide whether, if Mincey actually had a reasonable expectation of privacy in the car when Sergeant Cass searched it, the rental company's consent validated the search. App., *infra*, 15a – 16a. It thus affirmed the district court's judgment.

REASONS FOR GRANTING THE PETITION

I. This Court Should Resolve The Deep And Acknowledged Three-Way Split Among The Circuits And States Concerning Whether A Driver Who Is Not Listed On A Rental Agreement Can Have A Reasonable Expectation Of Privacy In A Rental Car

A. The Courts of Appeals Are Deeply Divided As To Whether A Driver Who Drives A Rental Car With The Renter's, But Not The Owner's, Permission Has A Reasonable Expectation Of Privacy In It

As the court below expressly acknowledged, the circuits are divided as to whether a person driving a rental car—with the renter's, but not the owner's, permission—has a reasonable expectation of privacy in that car. App., *infra*, 13a – 15a; see also *United States* v. *Haywood*, 324 F.3d. 514, 516 (7th Cir. 2003) ("Several circuits have examined [this] issue, though they have failed to reach a consensus."). Six circuits, as well as two state courts of last resort, have addressed the question, and they have reached three different conclusions. The depth of this conflict and the pervasiveness of lower court confusion about this recurring question of constitutional law warrant this Court's review.

1. The Fifth, Eighth, and Ninth Circuits, as well as the Supreme Court of New Mexico, have held that a driver has a reasonable expectation of privacy in a rental car so long as he has the renter's permission to drive it. *United States* v. *Kye Soo Lee*, 898 F.2d 1034, 1038 (5th Cir. 1990); *United States* v. *Best*, 135 F.3d 1223, 1225 (8th Cir. 1998); *United States* v. *Muhammad*, 58 F.3d 353, 355 (8th Cir. 1995) (per curiam); *United States* v. *Thomas*, 447 F.3d 1191, 1199 (9th Cir. 2006); *State* v. *Van Dang*, 120 P.3d 830, 834 (N.M. 2005). These courts agree that a "driver who received permission to use a rental car and has joint authority over the car" has a legitimate expectation of privacy in that car "to the same extent as the authorized renter." *Thomas*, 447 F.3d at 1199; accord *Best*, 135 F.3d. at 1223, 1225 (ordering that if the defendant could prove he had received permission from the renter to drive the car, then he could be found to have had a legitimate expectation of privacy in the vehicle); *Muhammad*, 58 F.3d at 355 (whether a defendant has an objectively reasonable expectation of privacy turns on whether there is consent or permission from the renter of the car); *Kye Soo Lee*, 898 F.2d at 1038 (finding a legitimate expectation of privacy where, although defendants "did not rent the truck," they were operating it with the renter's permission).[1]

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[1] The decision below mistakenly said that the Fifth Circuit agreed with its view. App., *infra*, 13a & n.8. In two cases decided within two months, different panels of the Fifth Circuit took opposite positions on the issue. The earlier case, *Kye Soo Lee*, upheld the driver's reasonable expectation of privacy in the rental vehicle, and the later case held otherwise. See *United States* v. *Boruff*, 909 F.2d 111, 117 (5th Cir. 1990). The Fourth Circuit relied on *Boruff*, but the Fifth Circuit's strict "prior panel" rule makes *Kye Soo Lee* binding precedent.

Relying on this Court's statement in *Rakas* v. *Illinois* that "the protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place," 439 U.S. 128, 143 (1978), these courts reason that a legitimate expectation of privacy cannot depend "on a rental agreement to which the * * * driver was not a party." *Thomas*, 447 F.3d at 1198-1199; see also *Kye Soo Lee*, 898 F.2d at 1038 (quoting *Rakas*, 439 U.S. at 143).

Instead, applying this Court's command to consider social expectations, these courts hold that a legitimate privacy interest may be shown "'*either* by reference to concepts of real or personal property law *or* to understandings that are recognized and permitted by society.'" *Thomas*, 447 F.3d at 1197 (quoting *Carter*, 525 U.S. at 88) (emphasis added);

Goodman v. *Harris County*, 443 F.3d 464, 467-478 (5th Cir. 2006); see *United States* v. *Dortch*, 199 F.3d 193, 205 (5th Cir. 1999) (Garwood, J., dissenting) ("*Kye Soo Lee* predated *Boruff*, and if the two are in conflict we are bound by *Kye Soo Lee*.").

The Fourth Circuit also noted that *Kye Soo Lee* "does not even address the fact that the hired rental truck drivers were not listed as authorized drivers on the subject rental agreement." App., *infra*, 14a n.8. But *Kye Soo Lee* did not address the rental agreement because it made no difference. As the Fifth Circuit explained, "[the defendants] were operating the truck with [the renter's] permission" and had been "entrusted [with] the vehicle and its contents." 898 F.2d at 1038. Those facts alone, in the court's view, supported the district court's finding that the defendants had a reasonable expectation of privacy in the car. *Ibid.* But see *United States* v. *Seeley*, 331 F.3d 471, 472 (5th Cir. 2003) (distinguishing *Kye Soo Lee* on the same ground as the Fourth Circuit).

see also *Muhammed*, 58 F.3d. at 355 (equating objective legitimacy of privacy expectations with "evidence of consent or permission of the lawful owner/renter"). As Judge O'Scannlain explained for the Ninth Circuit in *Thomas*, "the question [is] whether an unauthorized driver has a possessory * * * interest in the car," 447 F.3d at 1197, but that interest does not hinge on whether the driver has "an ownership interest," *id.* at 1198. Instead, the driver need only show "'joint control' or 'common authority,'" *ibid.*, which arises whenever the driver "has received permission to use the car," *id*. at 1199.

2. Two circuits—the Fourth and the Tenth—take the opposite view.[2] App., *infra*, 12a – 13a; *United States* v. *Roper*, 918 F.2d 885, 887-88 (10th Cir. 1990); *United States* v. *Obregon*, 748 F.2d 1371, 1375 (10th Cir. 1984).

Notwithstanding this Court's admonition that Fourth Amendment reasonableness is "not controlled by" property law, *Randolph*, 547 U.S. at 111 (citing *Rakas*, 439 U.S. at 144 n.2), these courts have held that the reasonableness of a driver's privacy interest

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[2] The Fourth Circuit mistakenly described the Eleventh Circuit as also "in accord" with its position. App. *infra*, 13a (citing *United States* v. *McCulley*, 673 F.2d 346 (11th Cir. 1982)). *McCulley* stands for the quite different proposition that *potential passengers* have no reasonable expectation of privacy in a rental car. *Id*. at 352. In 1998, the Eleventh Circuit referenced the circuit split over the first question presented here but did *not* claim to have chosen sides. *United States* v. *Cooper*, 133 F.3d 1394, 1400 & n.13 (11th Cir. 1998); see also *United States* v. *Crisp*, 542 F. Supp. 2d 1267, 1276 (M.D. Fla. 2008) (noting that the issue "has not been decided by the Eleventh Circuit").

depends entirely on whether the person who authorized the driver's use of the car was the car's *legal owner*. See *Roper*, 918 F.2d at 888 (holding that a driver who had received the lessee's permission to drive had no reasonable expectation of privacy in the rental car because "[h]e was not the owner nor was he in lawful possession or custody of the vehicle [and] was [not] listed as an additional driver in the rental contract."); *Wellons*, 32 F.3d at 119 n.2. (holding that someone driving with the lessee's permission had no reasonable expectation of privacy in the rental car because "[he] did not have the permission of Hertz Corporation, the owner of the automobile," to drive it). Under this reasoning, only the permission of the lessor, not the lessee, can ground a reasonable expectation of privacy in the car.

The Fourth Circuit has taken the property-based view of the Fourth Amendment to extraordinary lengths. It has twice held, including as recently as this month, that an unlisted driver has no legitimate expectation of privacy in a rental car even if *the driver's wife* rented the car. *United States* v. *Luster*, No. 08-4793, 2009 WL 1178527, at *1 (4th Cir. May 4, 2009) (unpublished; per curiam); *United States* v. *Hannah*, 168 F.3d 483 (Table), No. 96-4005, 1998 WL 911709, at *3-4 (4th Cir. Dec. 31, 1998). It has also held that a rental agreement's mere *silence* regarding unlisted drivers cuts against an assertion of privacy by anyone but the renter. *United States* v. *Rollack*, 173 F.3d 853 (Table), No. 98-4272, 1999 WL 104806, at *5 (4th Cir. Mar. 1, 1999) (holding that a passenger did not have a reasonable expectation of privacy in a van, in part because the lease did not "explicitly permit" him to drive it).

3. The Sixth Circuit and the Texas Court of Criminal Appeals take an intermediate approach. They apply a "totality of the circumstances" test to determine whether a driver not listed on a rental contract has a legitimate expectation of privacy in a rental car. *United States* v. *Smith*, 263 F.3d 571, 586 (6th Cir. 2001); *Parker* v. *State*, 182 S.W.3d 923, 927 (Tex. Crim. App. 2006).

In *Smith*, the Sixth Circuit expressly rejected a "bright line test." It reasoned that a legitimate expectation of privacy cannot be "based solely on whether the driver of a rental vehicle is listed on the rental agreement as an authorized driver." 263 F.3d at 586. The court explained that illegal possession of a vehicle should be treated differently from a mere breach of a rental contract. *Id*. at 587.

As the Fourth Circuit acknowledged, the Sixth Circuit views the rental company's permission to drive a rental car as "but one of many factors to be considered," on a case-by-case basis, in determining whether a driver has a legitimate expectation of privacy in the car. App, *infra*, 15a (citing *Smith*). In *Smith* itself, the Sixth Circuit examined five factors before concluding that the driver's subjective expectation of privacy was reasonable: (1) the driver was licensed and was thus driving the car legally; (2) he provided officers with the rental agreement and "sufficient" information about the car; (3) he was married to the lessee; (4) he had received permission from her to drive the car; and (5) he had called the company himself to reserve the car and had paid for the car himself. 263 F.3d at 586-87.

4. The conflict on this issue is not only clear, deep, and thoroughly entrenched, it is also untenable. This Court has recognized the importance of establishing clear Fourth Amendment rules that are "readily understood by police." *Thornton* v. *United States*, 541 U.S. 615, 623 (2004). "A single, familiar standard is essential," this Court has said, because police "have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront." *Dunaway* v. *New York*, 442 U.S. 200, 213-214 (1979).

The present conflict does just the opposite: In some states, officers will know whether a search would be valid only if they can successfully predict whether any prosecution would take place in state or federal court. Federal and state law enforcement officers in New Mexico, for instance, must decide whether to obey the state supreme court's rule that unauthorized drivers enjoy an expectation of privacy or the Tenth Circuit's contrary rule. Compare *Van Dang*, 120 P.3d at 834, with *Roper*, 918 F.2d at 887-88. This choice presents particular difficulties in joint federal-state criminal investigations where law enforcement officers know from the start that prosecutions could occur in either court system. As the Commonwealth of Virginia recently argued before this Court, disagreements between state and federal circuit courts as to what triggers the Fourth Amendment's protections present practical difficulties for law enforcement. Petition for Writ of Certiorari at 13, *Virginia* v. *Moore*, No. 06-1082 (Feb. 1, 2007).

The conflict is also untenable for interstate drivers subject to arbitrary fluctuations in their

Fourth Amendment rights. As of now, the reasonableness of an unlisted driver's expectation of privacy varies significantly from place to place. An unauthorized driver entering the Tenth Circuit from any one of the nine adjoining states, for example, will suddenly lose the Fourth Amendment protection he enjoyed when he began his trip. These variations conflict with this Court's admonition that the "search and seizure protection of the Fourth Amendment" should not "vary from place to place and time to time." *Whren* v. *United States*, 517 U.S. 806, 815 (1996). To offer clarity both to interstate travelers and state law enforcement, this Court's review is necessary.

B. The Fourth Circuit's Rule Overlooks Everyday Expectations of Privacy

The Fourth Circuit's rule that "an unauthorized driver of a rental vehicle has no legitimate privacy interest in the vehicle," App., *infra*, 13a, is wrong. This Court has repeatedly stressed the importance of "the everyday expectations of privacy that we all share" in defining reasonableness under the Fourth Amendment. *Minnesota* v. *Olson*, 495 U.S. 91, 98 (1990). Instead of focusing on what "society is prepared to recognize as 'reasonable,'" *Katz* v. *United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring), however, the Fourth Circuit's approach threatens to reduce Fourth Amendment jurisprudence to a species of contract law.

Allowing the terms of a standard-form contract to determine the reasonableness of a driver's privacy expectation ignores *Rakas*'s admonition that "arcane distinctions developed in property and tort law * * * ought not to control" Fourth Amendment rights. 439

U.S. at 143. Although "th[is] Court has not *altogether* abandoned use of property concepts in determining the presence or absence of the privacy interests protected by that Amendment," *id.* at 143 n.12 (emphasis added), its decision in *Rakas* relied far more heavily on informal social notions of "dominion," "control," and the right to exclude, *id.* at 148-49.

The Court thus distinguished *Rakas*, in which the passengers had "neither a property nor a possessory interest in the automobile," from cases involving possessory interests grounded in social understandings. *Rakas*, 439 U.S. at 148-149. It reiterated that callers in public phone booths and social guests have no legal interest in the premises—which they "neither own[] nor lease[]," *id.* at 140—but have reasonable expectations of privacy because they control the area and can "exclude all others" except for the owner, *id.* at 149 (citing *Katz*, 389 U.S. 347; *Jones* v. *United States*, 362 U.S. 257 (1960)); see also *Olson*, 495 U.S. at 99 ("[G]uests * * * are entitled to a legitimate expectation of privacy despite the fact that they have no legal interest in the premises and do not have the legal authority to determine who may or may not enter the household.").

The driver of a borrowed car, no matter his contractual rights, has a reasonable expectation of privacy in the car for the same reasons. Cf. *Rakas*, 439 U.S. at 154 (Powell, J., concurring) (distinguishing "between the Fourth Amendment rights of passengers and the rights of an individual who has exclusive control of an automobile."). Just as the overnight guest in *Jones* "had permission to use the apartment of his friend," "had a key to the

apartment," and "kept possessions in [it]," *Rakas*, 439 U.S. at 149 (citing *Jones*), Mincey had the renter's permission, used a key, and kept possessions in the rental car. Mincey also exercised near-exclusive dominion and control over the car because his girlfriend rented it specifically for his use. Cf. *Smith*, 263 F.3d at 586 ("Smith had an intimate relationship with Tracy Smith, the authorized driver of the vehicle who gave him permission to drive it.").

Moreover, that Mincey lacked the owner's permission to drive the rental car did not make his possession "wrongful" as this Court has defined that term. See *Rakas*, 439 U.S. at 141 n.9, 143 n.12; *Jones*, 362 U.S. at 267. *Rakas* defined "wrongful" using examples involving criminal trespasses, not breaches of private law. 439 U.S. at 141 n.9 (stolen car); *id.* at 143 n.12 (burglarized house). By contrast, driving a rental car with the renter's, but not the rental company's, permission, is no crime. *E.g.*, *Smith*, 263 F.3d at 587; *United States* v. *Cooper*, 133 F.3d 1394, 1402 (11th Cir. 1998); cf. *United States* v. *McClendon*, 86 Fed. Appx. 92, 95 (6th Cir. 2004) (unpublished) (holding that a tenant's "violation of her lease in subletting [a] bedroom * * * did not deprive [her sublessee] of a reasonable expectation of privacy.").

More fundamentally, a rental contract is not a useful proxy for what "society is prepared to accept as 'reasonable.'" *Katz*, 389 U.S. at 361 (Harlan, J., concurring). In fact, a company's take-it-or-leave-it contract might prohibit certain conduct partly *because* society endorses it. Instead of reflecting common social expectations, for example, contractual requirements that every rental car driver be "authorized" more accurately represent the

industry's efforts to limit its insurance exposure and to extract additional rents from customers.[3]

Precisely because rental contracts are not proxies for social norms, making them dispositive of the reasonableness of a driver's privacy expectation would yield absurd results. Those contracts often purport to extinguish a driver's right to operate the car upon *any* breach of the contract's terms. *E.g.*, Budget Fastbreak Service Terms and Conditions ¶ 8 (effective Jan. 15, 2009), http://www.budget.com/budgetWeb/html/en/profile/master_printable.html ("We may repossess the car anytime it is found illegally parked, being used to violate the law or this Agreement, or appears to be abandoned."); *State* v. *$129,970,000*, 161 P.3d 816, 821 (Mont. 2007) (quoting similar language from an Avis contract). Budget's standard contract, for instance, terminates a rental agreement whenever the vehicle is used: "1) by anyone other than an authorized driver[;] * * * 2) to carry passengers or property for hire[;] 4) on unpaved roads; * * * [or] 7) recklessly or while overloaded." *Ibid.*

Consequently, if "an unauthorized driver of a rental vehicle has no legitimate privacy interest"

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[3] See, *e.g.*, Federal Trade Commission, FTC Facts for Consumers, *Renting A Car* (Feb. 2003), at http://www.ftc.gov/bcp/edu/pubs/consumer/autos/aut07.pdf (cautioning consumers about "additional-driver fees"); Irvin E. Schermer & William Schermer, 1 *Automobile Liability Insurance* § 6:18 (4th ed. 2008) (explaining that car rental companies rely on unlisted-driver prohibitions "as a basis for negating the omnibus coverage which otherwise would have been available to the lessee or his forbidden permittees," and noting that "a substantial number of courts" have rejected that method of limiting the industry's insurance exposure).

merely because he "does not have permission of the rental company," App., *infra*, 13a, then a great many authorized drivers may lack reasonable expectations of privacy as well. Taken to its logical conclusion, the Fourth Circuit's reasoning would allow a contract *alone* to extinguish a renter's permission to drive a rental car, and thus his reasonable expectation of privacy in it, the moment he lends the car to a friend, drives on an unpaved road, or even "tow[s] or push[es] anything." Budget Fastbreak Service Terms and Conditions, *supra*, ¶ 9.

This rule would "give[] police limitless discretion to conduct exploratory searches," *Arizona* v. *Gant*, 129 S. Ct. 1710, 1720 n.5 (2009), whenever they perceive a breach of a rental agreement. By precluding many rental car drivers from objecting to police searches, that rule would "create[] a serious and recurring threat to the privacy of countless individuals." *Id.* at 1720. The court of appeals' reasoning thus implicates what this Court recently called "the central concern underlying the Fourth Amendment—the concern about giving police officers unbridled discretion to rummage at will among a person's private effects." *Ibid.*

The logic of the Fourth Circuit's rule ignores the distinction between expectations of privacy that society is prepared to accept as reasonable, on one hand, and conduct that the car rental industry is prepared to endorse, on the other. But renters surely and reasonably expect their constitutional privacy interests to be more enduring than perfect compliance with standard-form contracts. A more faithful approach to the Fourth Amendment looks beyond the four corners of a rental agreement.

II. The Fourth Circuit's Holding That a Car Rental Company May Immediately Extinguish a Driver's Reasonable Expectation of Privacy by Instructing the Police Not to Release the Car to Him Also Deepens a Split Among the Lower Courts and Is Seriously Flawed

Purporting to provide an alternative basis for its decision, the Fourth Circuit held that a driver's subjective expectation of privacy in a rental car is not reasonable if, *after* the police have stopped the car, the rental company instructs officers that the car is "not to be released" to its driver. App., *infra*, 14a n.9. That holding conflicts with the rule followed in the Eleventh Circuit and cannot be correct.

One state court of last resort has taken the Fourth Circuit's position. The Montana Supreme Court has held that a renter immediately loses his reasonable expectations of privacy when the rental company, upon learning that he has breached his contract, instructs the police to impound the vehicle. *State* v. *$129,970,000*, 161 P.3d 816, 821 (Mont. 2007). That decision, like the decision below, reasons that the rental company's unilateral decision not to release the car back to the driver—even if triggered by a police phone call after a stop—immediately nullifies the driver's expectation of privacy.

In contrast, the Eleventh Circuit has held that while a rental company's "repossession *prior to* the presence of law enforcement" might extinguish a driver's expectation of privacy, repossession *after* the police stop the driver and call the rental company does not. *Cooper*, 133 F.3d at 1401 (emphasis added). Fourth Amendment protections, it reasoned, should

not turn on "the rental company's dormant right of repossession" triggered by a police phone call. *Ibid.* Accordingly, the court ruled that a driver of an overdue rental car had a reasonable expectation of privacy in the car because the rental company had not "attempt[ed] to enforce any of its contractual or legal rights at any time prior to the [police's] phone call." *Ibid.*; see also *United States* v. *Kelly*, 414 F. Supp. 1131, 1146 (W.D. Mo. 1976), *rev'd on other grounds*, 547 F.2d 92 (8th Cir. 1977) ("[T]he automobile had not been repossessed by the rental agency at the time of defendant's arrest, and therefore defendant had a reasonable expectation of privacy with respect to the interior of the automobile.").

The Eleventh Circuit's view is certainly correct. An *expectation* of privacy is necessarily forward-looking; it cannot be negated after the police get involved. Cf. *Stoner* v. *California*, 376 U.S. 483, 490 (1964) (holding that a hotel guest's protection against unreasonable searches "would disappear if it were left to depend upon the unfettered discretion of an employee of the hotel" to grant a police request to search the guest's room); *Chapman* v. *United States*, 365 U.S. 610, 617 (1961) (explaining that upholding a search based on a landlord's decision to invite officers into leased premises "'would reduce the (Fourth) Amendment to a nullity and leave (tenants') homes secure only in the discretion of (landlords).'" (quoting *Johnson* v. *United States*, 333 U.S. 10, 14 (1948))); *State* v. *Thomale*, 317 N.W.2d 147, 149 (S.D. 1982) (holding that an unlisted driver lacked a legitimate expectation of privacy in a rental car, where, three days before the police searched the car, the rental company sent a letter to the renter

terminating his lease). The Fourth Circuit and the Montana Supreme Court, however, take the opposite view. They hold that a telephone call made during a traffic stop can transform a driver's reasonable expectation of privacy into an unreasonable one—which is tantamount to holding that the driver's expectation was illusory from the start.

That might explain why the Fourth Circuit relegated its alternative rationale to a footnote: it represents no alternative at all. The only difference between it and the court's primary holding is that the police must, before beginning a search, first call and obtain the rental company's instruction not to release the car. As this case demonstrates, the police typically make those calls, and rental companies typically give the desired instruction. See 6/6/06 Tr. 91-92 (officer's testimony about the practice of obtaining consent from car rental companies to impound cars driven by unlisted drivers).[4]

While a car rental company might in some case decline to give that instruction, the general practice in favor of giving it could undermine the security of all drivers—authorized and unauthorized alike. A driver's protection from an unreasonable search would depend completely on the whim, discretion, or business judgment of the rental company, not on Fourth Amendment considerations. Under the Eleventh Circuit's rule, by contrast, drivers have

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[4] For other references to this police practice and the industry's typical response, see *United States* v. *Worthon*, 520 F.3d 1173, 1177 (10th Cir. 2008); *United States* v. *Eden*, 190 Fed. Appx. 416, 417 (6th Cir. 2006) (unpublished); *People* v. *Edmunds*, No. 237579, 2003 WL 1387138, *1 (Mich. Ct. App. Mar. 18, 2003) (per curiam).

meaningful Fourth Amendment protection that does not evaporate during a traffic stop.

III. The Questions Presented Here Are Recurring And Important, And This Is An Ideal Case In Which To Address Them

Whether an unlisted driver lacks a reasonable expectation of privacy in a rental car—either automatically or due to the rental company's request, after a police phone call, that the police not release the vehicle to the driver—is a recurring and important issue. Under the Fourth Circuit's approach, Fourth Amendment protections are nonexistent whenever someone drives a rental car with the renter's, but not the owner's, permission. This is a common occurrence, given that there are nearly two million rental cars in the United States at any given time. [5]

Indeed, use of a rental car by an unlisted driver is "[i]n the very nature of modern automobile use." *Roth* v. *Old Republic Ins. Co.*, 269 So. 2d 3, 6-7 (Fla. 1972). The likelihood that an unauthorized driver will take the wheel of a rental car is both "foreseeable," *id.*, and "exceedingly great," *Motor Vehicle Acc. Indemn. Corp.* v. *Continental Nat. Am. Group Co.*, 35 N.Y.2d 260, 264-265 (1974). In fact, "[t]he parking or garaging of these rental vehicles often *requires* the lessee to give a hotel, restaurant, or other valet permission to operate the vehicle." *Enterprise Leasing Co.* v. *Allstate Ins. Co.*, 671 A.2d 509, 514-15 (Md. 1996) (emphasis added).

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[5] See Auto Rental News, 2008 U.S. Car Rental Market, http: //www.autorentalnews.com/t_inside.cfm?action=statistics, last visited May 17, 2009.

It is therefore unsurprising that, beyond the cases constituting the federal and state splits, courts face myriad cases involving this issue. In fact, the Fourth Circuit has reached this issue twice in the last six months. App. *infra*, 11a – 15a; *Luster*, 2009 WL 1178527; see also *State* v. *Henderson*, No. 07COA031, 2008 WL 4408594, *3, 4 (Ohio Ct. App. Sept. 26, 2008); *United States* v. *Kennedy*, No. 06-23, 2007 WL 1740747, *4 (E.D. Pa. June 15, 2007); *State* v. *Cutler*, 159 P.3d 909, 912 (Idaho Ct. App. 2007); *Commonwealth* v. *Jones*, 874 A.2d 108, 120 (Pa. Super. Ct. 2005); *State* v. *Webber*, No. 90,899, 105 P.3d 279, 2005 WL 283585, *4 (Kan. Ct. App. 2005) (Table); *State* v. *Hill*, 94 P.3d 752, 758 (Mont. 2004); *Littlepage* v. *State*, 863 S.W.2d 276, 279-80 (Ark. 1993); *Thomale*, 317 N.W.2d at 149. These cases show extreme confusion and inconsistency in the lower courts. Compare *United States* v. *Little*, 945 F. Supp. 79, 83, 83 n.2 (S.D.N.Y. 1996) (renter's permission does create a reasonable expectation of privacy), with *United States* v. *Taddeo*, 724 F. Supp. 81, 83-84 (W.D.N.Y. 1989) (no expectation of privacy even with the renter's permission). The pervasive confusion over this important and recurring issue of constitutional law calls for this Court's guidance. See *Colorado* v. *Bertine*, 479 U.S. 367, 370 (1987) ("We granted certiorari to consider [an] important and recurring question of [Fourth Amendment] law * * * .").

Moreover, this petition presents both questions in a manner particularly well-suited for this Court's review. If this Court decides the first question presented here—whether Mincey had a legitimate expectation of privacy in the rental car—in his favor, it can then consider the next logical question:

whether the police can defeat that expectation simply by calling the rental company and obtaining an instruction not to release the car.

If, by contrast, this Court were to consider, in some other case, only the first question presented here, the Court would (if the issue were decided in the driver's favor) quickly face the prospect of having to decide, in yet another case, the second question. Moreover, a ruling that unlisted drivers have privacy interests in rental cars would have little practical effect unless the Court also rules that those privacy interests survive the routine phone calls in which rental companies instruct police officers not to release the rental cars they have stopped. The logical interconnection of both questions argues strongly for review in a single case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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