No. 4-422

IN THE

Supreme Court of the United States

October TERM 2019

Jayne Austin,

Petitioner,

— against —

UNITED STATES OF AMERICA,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Thirteenth Circuit

BRIEF FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

U.S. SUPREME COURT CASES

U.S. COURT OF APPEALS CASES

SECONDARY SOURCES

CONSTITUTIONAL PROVISIONS

FEDERAL RULES

ISSUES PRESENTED

I. Under the Fourth Amendment, does the unauthorized driver of a rental car have a reasonable expectation of privacy so as to confer standing on the individual to contest the rental car's search when the driver rented it on another individual's account without their permission; paid for it with someone else's credit card; and rented from a highly monitored short-term car rental phone application?

II. Does the government perform an unconstitutional "search" under the Fourth Amendment when a car rental company complies with a subpoena requesting location data for cars rented on an account over a short period of time after that customer voluntarily authorized the collection of such data and the rentals were driven on public roads exposing their location to anyone who wanted to know?

SUMMARY OF THE FACTS

Petitioner Jayne Austin (the Defendant) has been charged under 18 U.S.C. § 2113 with six counts of bank robbery. R. at 4. Surveillance footage from the banks and records from a rental company place a rental car that she was driving at the scene of the crimes at the exact time of the robberies. R. at 4. Surveillance also revealed that the robber was using a .45 caliber handgun and wearing a maroon ski mask. R. at 3. Police found both of these items along with a bag containing $50,000 in cash and blue dye packs in the Defendant's rental car. R. at 2.

The Defendant frequently blogs about corruption in the banking industry, focusing mostly on the bank that was robbed: Darcy and Bingley Credit Union (DBCU). R. at 1. In her blog posts, she encourages rebellion against this particular bank to effectuate its downfall. R. at 1.

The Defendant claims to live an "immaterial lifestyle," tries to stay off the "grid," and denounces all property ownership in her writings. R. at 1, 18, 26. As such, she uses a car rental app called YOUBER instead of possessing her own car. R. at 2. The problem is, the Defendant does not even possess her own YOUBER account. R. at 1. Instead, she secretly uses her ex-girlfriend, Lloyd's, account without permission. R. at 2, 19–20. This violates YOUBER's corporate policies and procedures. R. at 3.

For general safety, record keeping, and to prevent unauthorized users from operating one of its cars, YOUBER tracks the location of its rentals. R. at 3, 29. YOUBER fully informs authorized users of this policy when they create an account, and the users must consent before renting a car. R. at 29–30. YOUBER tracks the location with GPS and Bluetooth through its app, but location tracking only activates when the car is in use. R. at 2. YOUBER policy also limits the length of each rental to one week or 500 miles. R. at 2.

In January 2019, the Defendant rented a black 2017 Toyota Prius using Lloyd's account. R. at 2. During a traffic stop later in the day, Officer Kreuzberger (the Officer) noticed that the

Defendant was not an authorized renter according to the rental agreement. R. at 2. As a result, the Officer informed the Defendant that this meant he did not need her consent to search the rental. R. at 3. During the search, the officer found the robbery items previously mentioned along with other miscellaneous belongings. R. at 3. Because of the personal items in the car, the Officer suspected the Defendant may have slept in the car, which also violates YOUBER policy. R. at 23.

During the stop, dispatch informed the Officer that a black 2017 Toyota Prius with a YOUBER logo and a license plate that seemed to match the Defendant's had just been used in the robbery of a DBCU. R. at 3. Dispatch also included that the robber had worn a maroon ski mask and used a .45 caliber handgun, both of which had been found in the Defendant's rental, along with a bag containing $50,000 and blue dye packs. R. at 3. Based on this evidence, the Officer arrested the Defendant for bank robbery. R. at 3.

Later, Detective Hamm (the Detective) noticed that five recent, unsolved bank robberies matched the Defendant's motives. R. at 3. So the Detective subpoenaed YOUBER for the location records of Lloyd's account over the short period during which the robberies occurred. R. at 3. YOUBER complied, and the records placed cars rented from Lloyd's account at the time and place of each of the five unsolved robberies. R. at 4.

This led the US Attorney's office to charge the Defendant with six counts of bank robbery. The Defendant, seeking a loophole, filed two motions to suppress, which both the district court and the circuit court denied. R. at 4.

SUMMARY OF THE ARGUMENTS

Both the district court and the Thirteenth Circuit ruled correctly in denying the Defendant's motions to suppress. The Defendant did not have standing to contest the search of the rental car, nor did she have a reasonable expectation of privacy in its location.

The Thirteenth Circuit properly denied the Defendant's first motion to suppress because the Defendant did not have a reasonable expectation of privacy in the rental car so as to confer standing on her to contest the rental car's search. The Defendant had no property interest in the car she fraudulently rented because she had no right to exclude others from the highly monitored vehicle nor did she lawfully possess it since she did so unbeknownst to the rental company and the rightful renter. Accordingly, she did not subjectively expect to have privacy in the rental car which is why she took such measures to conceal her identity when procuring it by obtaining it on her estranged girlfriend's account and credit card. This Court's holding in *Byrd* does not control this case because it only confers a reasonable expectation of privacy on lawful users of rental cars that are not listed in the rental agreement. The Defendant was not a lawful user of the rental car; therefore, she did not have a reasonable expectation of privacy in it.

The Thirteenth Circuit properly denied the Defendant's second motion to suppress because the Defendant did not have a reasonable expectation of privacy in the location of the rental car. Because cars operate on public roadways, their location is readily apparent to the public. As such, one cannot reasonably maintain an expectation of privacy in the location of a car regularly driven on public roads. Also, the third-party doctrine applies when the location of a rental car is shared with the rental company through a cell phone app. This Court's holding in *Carpenter* does not affect the application of the third-party doctrine to this case because rental car location data does not raise the same concerns as CSLI data. *Carpenter* declined to apply the third-party doctrine because CSLI data essentially creates a comprehensive record of every cell

phone user's exact location over the last five years. Rental car location data on the other hand is much more limited in terms of locational reach, duration of data collection, and number of people affected. Also, unlike CSLI data, which generates automatically for anyone carrying a cell phone, people have a legitimate choice in whether to expose themselves to rental car location tracking. Therefore the Defendant did not have a reasonable expectation of privacy in the location of the rental car.

As such, this Court should affirm the Thirteenth Circuit and deny the motions to suppress.

STANDARD OF REVIEW

This Court reviews Fourth Amendment issues de novo. *Ornelas v. United States*, 517 U.S. 690, 699 (1996). Both of the Defendant's motions to suppress rest on Fourth Amendment issues. Therefore the standard of review in this case is de novo.

ARGUMENT

I. THE DEFENDANT DOES NOT HAVE STANDING TO CONTEST THE SEARCH OF THE CAR SHE FRAUDULENTLY RENTED

The Defendant does not have standing to contest the search of the rental vehicle that she fraudulently possessed because she had no legitimate expectation of privacy or possessory interest in the car. The Fourth Amendment of the Constitution mandates that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. CONST. amend. IV. The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State. *Schmerber v. California*, 384 U.S. 757, 767 (1966). If a defendant believes his or her Fourth Amendment rights have been violated, one solution is to file a motion to suppress the damaging evidence the police found during a potentially illegal search. *Rakas v. Illinois*, 439 U.S. 128, 129–30 (1978).

An individual must have standing in order to contest a search's legality. *Jones v. United States*, 362 U.S. 257, 261 (1960). A defendant must demonstrate standing before trial unless the court allows otherwise upon a showing of good cause. Fed. R. Crim. P. 12(b)(3)(C). A defendant has standing to make a motion to suppress only if the defendant's own constitutional rights were violated. *United States v. Salvucci*, 448 U.S. 83, 85 (1980). This Court held that "the concept of standing in Fourth Amendment cases can be a useful shorthand for capturing the idea that a person must have a cognizable Fourth Amendment interest in the place searched before seeking relief for an unconstitutional search." *Byrd v. United States*, 138 S. Ct. 1518, 1530 (2018). A defendant bears the burden of establishing standing to challenge a search under the Fourth Amendment by showing that she has a property or privacy interest that is sufficient to justify a reasonable expectation of privacy. *United States v. Pierce*, 959 F.2d 1297, 1303 (5th Cir. 1992).

A. THE DEFENDANT DID NOT HAVE A PROPERTY INTEREST IN THE RENTAL CAR

The Defendant did not have a property interest in the rental car because she had no right to exclude others from the vehicle and did not lawfully possess it. Courts generally require "that the movant claim either to have owned or possessed the seized property or to have had a substantial possessory interest in the premises searched." *Jones*, 362 U.S. at 361. The owner of a vehicle has a sufficient possessory interest in the car and any property inside it to challenge the lawfulness of a search conducted upon it. *See generally Utah v. Strieff*, 136 S. Ct. 2056 (2016). The Court's resolution of *Byrd* was guided by concepts of property interests. *Byrd*, 138 S. Ct. at 1527. The two concepts the Court references come from *Rakas*: "One of the main rights attaching to property is the right to exclude others," and, in the main, "one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of the right to exclude." *Rakas*, 439 U.S. at 141 n.9.

With rental vehicles, whether the rental agreement expressly authorizes an individual to drive it has been considered highly probative of the existence of a possessory or property interest. Nonetheless, *Byrd* held that "as a general rule, someone in *otherwise lawful possession and control* of a rental car has a reasonable expectation of privacy in it even if the rental agreement does not list him or her as an authorized driver." *Byrd*, 138 S. Ct. at 1530 (emphasis added). In this case, the Defendant did not have standing because she did not have lawful possession of the rental vehicle and lacked any right to exclude others.

1. The Defendant Did Not Have a Right to Exclude Others from the Rental Car

In its vague explanation of property interests, *Byrd* prioritizes a person's right to exclude others from the searched property in determining an individual's standing to bring a Fourth Amendment claim. *See Byrd*, 138 S. Ct. at 1527. In *Rakas*, the Court distinguished car passengers from sole occupants with two illustrations: (1) a person who is allowed to stay in a friend's apartment while the friend is away temporarily, and (2) a person using a telephone booth. *Rakas*,

439 U.S. at 149. The person that is staying at a friend's apartment "has complete dominion and control over the apartment and could exclude others from it," and the person using the phone booth is able "to exclude all others." *Id.* Both of these individuals' rights to exclude give them standing to raise Fourth Amendment challenges according to the Court. *Id.* at 143 n.12.

The Defendant is not like the friend or telephone booth user. *Cf. id.* at 149. Unlike the individual who got permission to crash at a friend's apartment when the friend was away, the Defendant operated through her estranged girlfriend's account to rent the car. *Cf. id.*; R. at 2. The Defendant did not make any contact with the rental company or Lloyd, which would be necessary to rightfully preside over and exclude others from that space. The quality of being in complete dominion over a unit is counteracted by its deceitful procurement.

Similarly, the Defendant is not comparable to a person using and excluding others from a phone booth. *Rakas*, 439 U.S. at 149. A telephone booth is a public amenity that anyone can step into without paying a fee. There are no rules dictating who can use the booth, how they can use it, and when they can use it. YOUBER has rules dictating all of these things. Only YOUBER users are allowed to rent cars on the app. R. at 2. Cars are rented at a fixed hourly rate and can only be rented for up to one week or 500 miles. R. at 2. YOUBER employees come and check on the car every twenty-four hours or at the end of the rental period. R. at 2. Therefore, the Defendant does not fit into the mold that this Court prescribes for an individual who obtains property rights through the right to exclude others. *See Rakas*, 439 U.S. at 149. The Defendant may have arbitrarily excluded others from the vehicle, but she did not have authority to. Therefore, this Court should find that the Defendant did not have the right to exclude others from the rental vehicle.

2. The Defendant Did Not Have "Lawful" Possession of the Rental Car

The Defendant was not in "lawful" possession of the rental vehicle because she purposely used an unknowing third party to fraudulently obtain a vehicle to commit crimes. This Court

determined that someone who "lawfully" possesses a vehicle has a reasonable expectation of privacy in it without defining what "lawful" possession is. *Byrd,* 138 S. Ct. at 1529. Black's Law Dictionary defines lawful possession as "possession based on a good faith belief in and claim of ownership" or "possession granted by the property owner to the possessor." *Lawful Possession*, *Black's Law Dictionary* (10th ed. 2014). On the other hand, this Court in *Rakas* gave examples of unlawful possession by analogy. It held, "A burglar plying his trade in a summer cabin during the off season, for example, may have a thoroughly justified subjective expectation of privacy, but it is not one which the law recognizes as legitimate." *Rakas,* 439 U.S. at 143 n.12. It continued, "Likewise, a person present in a stolen automobile at the time of the search may [not] object to the lawfulness of the search of the automobile. No matter the degree of possession and control, the car thief would not have a reasonable expectation of privacy in a stolen car." *Id.* at 143 n.9.

In this case, the Defendant did not "lawfully" possess the rental vehicle because her possession did not conform to any concept of the word "lawful." She could not have believed in good faith that she rightfully owned or even rented the property at issue because she purposely wanted to stay off of the "grid" and did not use her own account or credit card to obtain the rental car. R. at 2, 18. It has also been established that her possession was not granted by the property's owner (YOUBER) or its rightful possessor (Lloyd). Therefore, the Court should rule that the Defendant did not lawfully possess the rental car that she surreptitiously secured for the commission of crime.

B. THE DEFENDANT DID NOT HAVE A LEGITIMATE PRIVACY INTEREST IN THE RENTAL CAR

The Defendant did not have a legitimate expectation of privacy because she did not subjectively expect to have privacy in the vehicle she fraudulently procured, and even if she did, a subjective expectation of privacy is not reasonable under the circumstances. The burden of

proving a privacy interest includes showing that they had "a reasonable expectation of privacy in the property searched . . . and that he [or she] manifest a subjective expectation of privacy in the property searched." *Rakas*, 439 U.S. at 143. A person "has a lesser expectation of privacy in a motor vehicle because . . . it travels public thoroughfares where both its occupants and its contents are in plain view." *New York v. Class*, 475 U.S. 106, 112–13 (1986). This Court held that there is not "a single metric or exhaustive list of considerations" to determine whether one has a reasonable expectation of privacy. *Byrd*, 138 S. Ct. at 1527. Consequently, courts look at various factors to determine whether a defendant's expectation of privacy was reasonable under the circumstances.

1. The Defendant Did Not Have a Subjective Expectation of Privacy in the Rental Car

The Defendant did not have a subjective expectation of privacy because: she was not an authorized renter or user on the YOUBER app; she did not have permission to use the YOUBER car from anyone; and she did not pay for the rental car with her own credit card. R. at 2. Correspondingly, courts hold that drivers do not have a subjective expectation of privacy in a rental car when the driver is not the vehicle's proper renter, authorized user, purchaser, or possessor of interest in it. *See United States v. Castellanos*, 716 F.3d 828, 833–34 (4th Cir. 2013); *United States v. Davis*, 430 F.3d 345, 359–60 (6th Cir. 2005); *United States v. Seeley*, 331 F.3d 471, 472 (5th Cir. 2003). The Fifth Circuit found that an individual had no subjective expectation of privacy in a rented car when the sole occupant of the vehicle was neither a renter nor an authorized user. *Seeley*, 331 F.3d at 472. The Fourth Circuit held that a defendant had no subjective expectation of privacy in a car that the defendant had not purchased and did not have permission to use. *Castellanos*, 716 F.3d at 833–34. The Sixth Circuit held that a defendant did not have a subjective expectation of privacy in a third party's car or contents because the defendant had no property or possessory interest in either. *Davis*, 430 F.3d at 359–60.

In contrast, courts find that drivers do have a subjective expectation of privacy in rental cars when they: paid to use the car with their own money; obtained explicit consent from the authorized user to use it; or were authorized to use the car in the rental agreement. *United States v. Walton*, 763 F.3d 655, 666 (7th Cir. 2014); *United States v. Thomas*, 447 F.3d 1191, 1198–99 (9th Cir. 2006); *United States v. Smith*, 263 F.3d 571, 586–87 (6th Cir. 2001). The Sixth Circuit held that an individual had a subjective expectation of privacy in his rental car, even though he was not an authorized driver in the rental contract, only because the driver reserved the car in his wife's name, paid for the car using his credit card, and obtained consent from his wife to drive it. *Smith*, 263 F.3d at 586–87. The Seventh Circuit found that someone had a subjective expectation of privacy in a rental car when illegal activity breached a car rental contract, but the driver was the one solely authorized for the vehicle. *Walton*, 763 F.3d at 666. The Ninth Circuit decided that a non-renter had a subjective expectation of privacy in a rental car only because he received explicit permission from the renter who was authorized to use the car. *Thomas*, 447 F.3d at 1198–99.

In the case at hand, Austin could not have a subjective expectation of privacy in the vehicle she deceptively procured through her ex-girlfriend's account. *See* R. at 2. Like the defendant in *Seeley*, the Defendant here had no subjective expectation of privacy because she occupied a rental car that she did not rent or have any valid authorization to use either from the app or account owner. *Compare Seeley*, 331 F.3d at 472 *with Thomas*, 447 F.3d at 1198–99. YOUBER has a policy of only letting the correct and authorized YOUBER user rent its cars, and it strictly enforces this by tracking YOUBER usage. R. at 3. The Defendant's estranged girlfriend, Lloyd, set up the YOUBER account and was the only person authorized to use it to rent cars. R. at 2. The Defendant did not have permission from Lloyd or YOUBER, nor did she obtain the car with her own money. *Compare Castellanos*, 716 F.3d at 833–34 *with Smith*, 263 F.3d at 586–87. On the contrary, the

Defendant took drastic measures to maintain a secret identity in her usage of the vehicle and avoid having any direct relationship with the YOUBER app or its authorized user. R. at 18. The Defendant "prides herself on her immaterial lifestyle." R. at 1. Accordingly, the Defendant did not make her own account with YOUBER but obtained her estranged girlfriend's log in credentials to obtain a short-term rental car to commit crimes with. *See* R. at 2. The Defendant did not use her name anywhere on the app or in the rental agreement for the car. R. at 2. She also refused to use her own card to rent the vehicle even though she was financially capable of paying for it on her own. *See* R. at 2. Therefore, this Court should recognize that the Defendant's intentional misdirection is evidence that she subjectively expected *not* to have privacy in the vehicle.

2. The Defendant Did Not Have a Reasonable Expectation of Privacy in the Rental Car

The *Byrd* ruling that otherwise lawful drivers who are not authorized in a rental agreement still typically have a legitimate expectation of privacy has no bearing on this case because the Defendant was not an otherwise lawful driver. Even though *Byrd* deviated from the majority of circuit courts and ruled that a driver not authorized in a rental agreement can have standing to challenge a search of the rental vehicle, this does not mean that he or she will. *See Byrd*, 138 S. Ct. at 1530. The *Byrd* opinion appeared to be a win for defendants since courts can't determine legitimate expectations solely based off of a rental agreement, but courts have been judging expectations of privacy using additional factors for decades. *See, e.g.*, *id.*; *United States v. Wellons*, 32 F.3d 117, 119 (4th Cir. 1994); *United States v. Boruff*, 909 F.2d 111, 117 (5th Cir. 1990); *United States v. Obregon*, 748 F.2d 1371 (10th Cir. 1984).

The majority rule, adhered to by the Fourth, Fifth, and Tenth Circuits, has been that an unauthorized driver of a rental vehicle, i.e., one who has not rented the vehicle and is not listed on the rental agreement as an authorized driver, lacks a legitimate expectation of privacy in the car protected by the Fourth Amendment. *See, e.g.*, *Wellons*, 32 F.3d at 119; *Boruff*, 909 F.2d at 117;

Obregon, 748 F.2d at 1371. In *Byrd*, the Court held that when the driver of a rental vehicle is not listed in the rental agreement this does not disrupt the driver's standing to challenge a search in court *if* the driver is in otherwise lawful possession and control of the vehicle. *Byrd*, 138 S. Ct. at 1530. The contingency of this ruling leaves much uncertainty as to its ramifications and warrants a further analysis of its reasoning and other applicable precedent.

To evaluate a defendant's expectation of privacy the Eighth and Ninth Circuits would look to see if the renter or authorized driver had given permission to the defendant to use the car. *United States v. Parks*, 285 F.3d 1133, 1141–42 (9th Cir. 2002); *United States v. Muhammad*, 58 F.3d 353, 355 (8th Cir. 1995). The Sixth Circuit was the first to recognize a lenient "totality of the circumstances" test to determine whether an unauthorized driver has a legitimate expectation of privacy in a rental car for Fourth Amendment purposes. *Smith*, 263 F.3d at 571. In *Smith*, the Sixth Circuit used the totality of the circumstances test to evaluate whether a defendant had standing to challenge the search of a rental car when he was not an authorized driver. *Id.* at 586. The district court relented that the defendant had standing to challenge the search of the vehicle based on the unique facts of the case, which showed the defendant had personally contacted the rental car company and reserved the vehicle in his name with his own credit card. *Id.* at 582. His wife picked up the vehicle and signed the rental agreement. *Id.* The wife, "the lawful renter of the vehicle," gave the defendant "permission to drive the vehicle." *Id.* While he was driving the car, the police stopped him. *Id.* at 575. The court on appeal acknowledged that, normally, "an unauthorized driver of a rental vehicle does not have a legitimate expectation of privacy in the vehicle, and therefore does not have standing to contest the legality of a search of the vehicle." *Id.* at 586. Nonetheless, the court believed that the facts of the case were so extraordinary that the defendant had an expectation of privacy in the rental vehicle. *Id.*

In *Byrd*, the defendant had been driving a rental car and was pulled over for a traffic violation. *Byrd*, 138 S. Ct. at 1524. He produced a driver's license and the rental agreement, but the rental agreement did not list the defendant as the renter or as a permissive driver. *Id.* at 1525–26. The officers then told Byrd they did not need his consent to search his vehicle and conducted a search. *Id.* at 1525. Subsequently, the officers found forty-nine bricks of heroin and body armor in the trunk of the car and arrested the defendant. *Id.* The federal authorities charged Byrd with distribution and possession of heroin with intent to distribute and possession of body armor by a prohibited person. *Id.* at 1523. The district court denied the defendant's motion to suppress, holding that the sole occupant of a rental car lacked any expectation of privacy to object to a search when the occupant was not named in the rental agreement. *Id.* at 1525. The court of appeals affirmed. *Id.*

This Court granted cert in *Byrd* to consider whether it was proper for the lower court to deny the defendant's standing to bring a motion to suppress based on the fact that he was not in the rental agreement. *Id.* at 1526. Byrd argued that the sole occupant of a car always has an expectation of privacy in the car based on mere possession and control. *Id.* at 1528. The Supreme Court promptly rejected this contention, noting that this rule would include thieves and those who otherwise would not have a reasonable expectation of privacy. *Id.* Instead, the Court adopted the rule that "someone in *otherwise lawful possession and control* of a rental car has a reasonable expectation of privacy in it even if the rental agreement does not list him or her as an authorized driver." *Id.* at 1524.

The government correctly argued in *Byrd* that the defendant should have had "no greater expectation of privacy than a car thief because he intentionally used a third party as a strawman in a calculated plan to mislead the rental company from the very outset, all to aid him in committing

a crime." *Id.* at 1530. The Court reversed and remanded the case to the lower court so that they could decide this very issue. *Id.* at 1531. Most importantly, the Court stated in the end of its decision that "it may be that there is no reason that the law should distinguish between one who obtains a vehicle through subterfuge of the type the Government alleges occurred here and one who steals the car outright." *Id.* at 1530. Therefore, the Supreme Court has already expressed favor towards the position that the Defendant's fraudulent procurement of the rental car to commit crimes equates her expectation of privacy to that of a car thief. In light of this, the Court should recognize that the Defendant had no legitimate expectation of privacy in the rental vehicle and consequently no standing to challenge the search of the vehicle.

In summary, the Defendant does not have standing to contest the search of the rental car because she did not have a possessory interest or a reasonable expectation of privacy in the car. Therefore, this Court should affirm the Thirteenth Circuit and deny the motion to suppress.

II. THE LOCATION OF A RENTAL CAR IS NOT PROTECTED BY THE FOURTH AMENDMENT

The Thirteenth Circuit properly denied the Defendant's motion to suppress because the location of a rental car is not protected by the Fourth Amendment. As stated, the Fourth Amendment guards against unreasonable searches and seizures of "persons, houses, papers, and effects." U.S. CONST. amend. IV. The founding fathers enacted the Fourth Amendment to abolish "general warrants," which the British used to "rummage through homes in an unrestrained search for evidence of criminal activity." *Carpenter v. United States*, 138 S. Ct. 2206, 2213 (2018). Until recently, Fourth Amendment jurisprudence had adhered to that purpose by "focus[ing] on whether the Government obtains information by physically intruding on a constitutionally protected area." *Id.* (internal quotations omitted).

But after nearly two centuries of this "exclusive property-based approach," the Fourth Amendment has been expanded. *United States v. Jones*, 565 U.S. 400, 405 (2012) (discussing *Katz v. United States*, 389 U.S. 347, 351 (1967)). *Katz* created a new Fourth Amendment standard based on whether a defendant has a "reasonable expectation of privacy." *Katz*, 389 U.S. at 360 (Harlan, J., concurring). A defendant does not have a reasonable expectation of privacy unless the defendant "seek[s] to preserve something as private" and "society is prepared to recognize [that expectation] as reasonable." *Carpenter*, 138 S. Ct. at 2213. Here, the Defendant did not have reasonable expectation of privacy in the location of her rental car.

A. THE DEFENDANT DID NOT HAVE A REASONABLE EXPECTATION OF PRIVACY IN HER PUBLIC MOVEMENTS ON PUBLIC ROADWAYS

The Defendant did not have a reasonable expectation of privacy in the public movements of her rental car on public roadways. "A person travelling in an automobile on public thoroughfares has no reasonable expectation in [her] movements from one place to another." *United States v. Knotts*, 460 U.S. 276, 281 (1983).

In *Knotts*, this Court declined to find a Fourth Amendment violation in the use of a radio-transmitting beeper to track the location of a defendant's car. *Id.* at 277. With "consent" from a chemical company, officers placed the beeper inside a barrel of chloroform that the Defendant later purchased for the production of methamphetamine. *Id.* at 278. Officers then followed the defendant's car using a combination of beeper signals and visual surveillance. *Id.* This did not violate the Fourth Amendment because when the defendant "travelled over the public streets he voluntarily conveyed to anyone who wanted to look the fact that he was travelling over particular roads in a particular direction, the fact of whatever stops he made, and the fact of his final destination." *Id.* at 281–82. So the defendant had "no reasonable expectation of privacy." *Id.* at 281. Even though the officers relied on beeper signals to track the car's location, "scientific

enhancement of this sort raises no constitutional issues which visual surveillance would not also raise." *Id.* at 285.

In *Jones*, the Court addressed whether the government violated the Fourth Amendment by physically installing a GPS device on a defendant's personal vehicle. *Jones*, 565 U.S. at 402. *Jones* found a violation did occur, but relied on the government's "physical intrusion" on the defendant's property. *Id.* at 404–05. The Court specifically declined to address whether the defendant had a reasonable expectation of privacy in the location data obtained. *Id.* at 406.

In the case at hand, the Defendant had no reasonable expectation of privacy in her rental car's "movements from one place to another." *See Knotts*, 460 U.S. at 281. As in *Knotts*, the YOUBER account holder, Ms. Lloyd, had "consented" to the use of "scientific enhancement" to track the location of the car before the Defendant rented it. *See id.* at 278, 285; R. at 24. Even without the use of "scientific enhancement," the Defendant "voluntarily conveyed to anyone who wanted to look the fact that [s]he was travelling over particular roads in a particular direction" as well as "whatever stops [s]he made." *See id.* at 281–82.

Also, unlike *Jones*, the government did not "physically intrude" on the defendant's personal property. *Cf. Jones* 565 U.S. at 404–05. In fact, the rental car did not even belong to the Defendant. R. at 2. Rather than track the car's location by physically installing a GPS device on the car itself, the government merely subpoenaed information from YOUBER that the Defendant had voluntarily conveyed to the company. *Cf. Jones*, 565 U.S. at 404; R. at 3.

Under *Knotts*, the Defendant had no reasonable expectation of privacy in her rental car's location. *See Knotts*, 460 U.S. at 281. But even without *Knotts*, the Defendant's voluntary conveyance of the rental car's location to YOUBER implicates the third-party doctrine.

B. THE THIRD-PARTY DOCTRINE APPLIES TO THE LOCATION OF THE RENTAL CAR

The location of the rental car falls under the third-party doctrine because the Defendant voluntarily conveyed this information to YOUBER. Under the third-party doctrine, "the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by [the third party] to Government authorities." *United States v. Miller*, 425 U.S. 435, 443 (1976). Even if a defendant has "some subjective expectation" of privacy in that information, it is "not one that society is prepared to recognize as reasonable." *Smith v. Maryland*, 442 U.S. 735, 743 (1979) (internal quotations omitted). *Miller* and *Smith* stand as pillars of the third-party doctrine and govern the case at hand. *Carpenter*, on the other hand, stands as a narrow, case-specific outlier that does not disturb the doctrine's application to this case.

1. *Miller* and *Smith* Govern the Facts at Hand

In *Miller*, the defendant had no "legitimate expectation of privacy" in his "checks, deposit slips, . . . financial statements, and . . . monthly statements" that had been "conveyed" to a bank and "exposed" to its employees "in the ordinary course of business." *Miller*, 425 U.S. at 438, 442. Agents had subpoenaed bank officials for these "business records" while investigating the defendant for tax evasion. *Id.* at 436, 440. The Court explained that a defendant "takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government." *Id.* at 443. The defendant lacks a reasonable expectation of privacy "even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed." *Id.*

Likewise in *Smith*, the defendant had no "legitimate expectation of privacy" in numbers dialed from his telephone. *Smith*, 442 U.S. at 744. Officers had installed a pen register[1] at the phone

[1] "A pen register is a mechanical device that records the numbers dialed on a telephone by monitoring the electrical impulses caused when the dial on the telephone is released. It does not overhear oral communications and does not indicate whether calls are actually completed." *Smith*, 442 U.S. at 736 n.1.

company to track numbers called by the defendant. *Smith*, 442 U.S. at 737. First, the Court held that the defendant had no subjective expectation of privacy. *Id.* at 742. People "typically know" that their "phone company has facilities for recording this information; and that the phone company does in fact record this information for a variety of legitimate business purposes." *Id.* Next, the Court held that even if the defendant did have a subjective expectation of privacy, it was not one that society would "recognize as 'reasonable.'" *Id.* at 743. The defendant had "voluntarily conveyed" the numbers dialed to the phone company by "expos[ing] that information to its equipment in the ordinary course of business." *Id.* at 744. In doing so, the defendant "assumed the risk" that "the company would reveal to police" the information they sought. *Id.*

In this case, the Defendant did not have a reasonable expectation of privacy in the location of her rental car under the third-party doctrine. First, like the numbers dialed in *Smith*, people "typically know" that car-related apps record location data for numerous "legitimate business purposes." *Id.* at 742. No customer could reasonably claim ignorance that YOUBER "has facilities for recording this information" and "does in fact record this information." *Id.*

Even if the Defendant did have some subjective expectation of privacy in the location of the rental car, society would not recognize it as reasonable. The Defendant "voluntarily conveyed" the location of the rental by "exposing that information" to YOUBER's equipment "in the ordinary course of business." *See id.* at 744; R. at 3. In doing so, the Defendant "assumed the risk" that YOUBER could someday reveal that information to police. *See Smith*, 442 U.S. at 744; R. at 2. If the third-party doctrine applies to such sensitive and personal information as bank records, checks, financial statements, and numbers dialed, it applies to the location of a rental car on a public roadway. *See Miller*, 425 U.S. at 438, 442; *Smith*, 442 U.S. at 744.

2. *Carpenter*'s Limited Holding Does Not Apply to This Case

In *Carpenter*, the Court recognized a single, limited exception to the third-party doctrine that does not apply to the facts at hand. *Carpenter*, 138 S. Ct. at 2223. *Carpenter* considered the application of the third-party doctrine to CSLI data[2] and acknowledged that despite this information being compiled by cell phone providers, the defendant had a reasonable expectation of privacy in "an all-encompassing record of [his] whereabouts." *Id.* at 2217. In so holding, *Carpenter* distinguished the unique, pervasive nature of CSLI data from vehicle location data as well as other cases applying the third-party doctrine. *Id.* at 2216–19. But *Carpenter* made clear that its holding "is a narrow one" that does not "address other business records that might incidentally reveal location information." *Id.* at 2221.

a. Cell phone location records differ from vehicle location records

First, *Carpenter* highlighted the contrast between cell phone location records and vehicle location records before even reaching the third-party doctrine. *See id.* at 2218 (distinguishing *Knotts*, 460 U.S. at 276 and *Jones*, 565 U.S. at 400). CSLI data soars above the constraints imposed by vehicle tracking—namely locational reach, duration, and number of people affected. *See Carpenter*, 138 S. Ct. at 2218.

Regarding locational reach, *Carpenter* explained that "when the Government tracks the location of a cell phone it achieves near perfect surveillance, as if it had attached an ankle monitor to the phone's user." *Id.* This is because cell phones have nearly become a "feature of human anatomy." *Id.* (quoting *Riley v. California*, 573 U.S. 373, 385 (2014)). On the other hand, "individuals regularly leave their vehicles," which eliminates the possibility of surveilling "the whole of [their] physical movements." *Id.* at 2218, 2219. Unlike vehicles, an individual's "cell

[2] "Most modern devices, such as smartphones, tap into the wireless network several times a minute whenever their signal is on, even if the owner is not using one of the phone's features. Each time the phone connects to a cell site, it generates a time-stamped record known as cell-site location information (CSLI)." *Carpenter*, 138 S. Ct. at 2211.

phone faithfully follows its owner beyond public thoroughfares and into private residences, doctor's officers, political headquarters, and other potentially revealing locales." *Id.* at 2218.

Regarding duration, *Carpenter* noted that CSLI data allows the government to "travel back in time to retrace a person's whereabouts, subject only to the retention policies of the wireless carriers, which currently maintain records for up to five years." *Id.* Combined with the constant physical presence of cell phones, the nearly limitless duration of CSLI tracking "provides an all-encompassing record of the holder's whereabouts." *See id.* at 2217. The effect is that any given suspect "has effectively been tailed every moment of every day for five years." *Id.* at 2218.

The amount of people for whom CSLI data is available compounds the constitutional concerns. *Carpenter* explained that "because location information is continually logged for all of the 400 million devices in the United States—not just those belonging to persons who might happen to come under investigation—this newfound tracking capacity runs against everyone." *Id*. "Only the few without cell phones could escape this tireless and absolute surveillance." *Id.*

In the case at hand, the data at issue differs significantly from CSLI data in terms of locational reach, duration, and number of people affected. First, YOUBER only records the location of the vehicle when the renter is in the car. R. at 4. And while an individual's destination can occasionally be gleaned from the location of their car, oftentimes a single parking spot serves numerous possible destinations. Tracking the location of a person's cell phone raises far greater concerns than tracking the location of a rental car.

Also, YOUBER's rental limits place a major constraint on the duration of the information being recorded. Unlike CSLI data, which is recorded and retained on a continual basis for an average of five years, YOUBER has a maximum rental window of 500 miles or one week. *Carpenter*, 138 S. Ct. at 2218; R. at 2. YOUBER location data provides a brief snapshot of a rental

car's journey. CSLI data "provides an all-encompassing record" of a person's whereabouts, as if they had "been tailed every moment of every day for five years." *Carpenter*, 138 S. Ct. at 2217–18. The reach of CSLI data is simply unprecedented.

Finally, YOUBER's data implicates a fraction of the amount of people as CSLI data. Only ten percent of cell phones even have the YOUBER app installed. *Compare Carpenter*, 138 S. Ct. at 2218 ("400 million devices in the United States") *with* R. at 2:3–4 ("40 million users across the United States"). That number becomes even smaller when considering the amount of people actually sitting in a YOUBER rental at a given time. With CSLI, "[o]nly the few without cell phones could escape this tireless and absolute surveillance." *Id.* With YOUBER, only the few actually in a YOUBER rental car are even under surveillance. *See* R. at 4.

The location data collected by YOUBER offers a limited glimpse into the location of a rental car while in use. It simply does not compare to the unparalleled abilities of CSLI data.

b. Carpenter only exempts CSLI data from the third-party doctrine

Given the unparalleled abilities of CSLI data and the involuntary nature by which phone companies collect it, *Carpenter* declined to apply the third-party doctrine. But the decision was "a narrow one" that did not revoke the third-party doctrine for "other business records that might incidentally reveal location information." *Carpenter*, 138 S. Ct. at 2220–21.

First, *Carpenter* distinguished the "personal information addressed in *Smith* and *Miller*" from the "exhaustive chronicle of location information casually collected by wireless carriers" in the form of CSLI data. *Id.* at 2219. The "personal information" in *Smith* and *Miller* had "limited capabilities," while CSLI data has "no comparable limitations." *Id.* As discussed above, CSLI data does not just reveal "a person's movement at a particular time." *Id.* at 2220. Instead, CSLI data provides "a detailed chronicle of a person's physical presence compiled every day, every moment,

over several years." *Id.* "Such a chronicle implicates privacy concerns far beyond those considered in *Smith* and *Miller*." *Id.*

Next, *Carpenter* looked at the voluntary exposure component of the third-party doctrine and determined that this rationale does not "hold up when it comes to CSLI." *Id.* The Court explained that, for two reasons, "cell phone location information is not truly 'shared' as one normally understands the term." *Id.* First, cell phones are "such a pervasive and insistent part of daily life that carrying one is indispensable to participation in modern society." *Id.* (internal quotations omitted). And second, cell phones create CSLI data by merely operating—"without any affirmative act on the part of the user beyond powering up." *Id.* Together, these two facts negate any "meaningful sense" that cell phone users "voluntarily assume the risk" of creating "a comprehensive dossier of [their] physical movements." *Id.* (internal quotations omitted). Due to the "unique nature" of CSLI data, *Carpenter* declined to apply the third-party doctrine. *Id.*

The Court's rationale in *Carpenter* does not support rejecting the third-party doctrine in this case. By calling the decision "a narrow one," which does not "express a view on matters not before us," *Carpenter* made clear that the third-party doctrine remains undisturbed outside of extreme circumstances like CSLI data. *Id.* This case does not present extreme circumstances.

First, YOUBER location data, like the information in *Smith* and *Miller*, has "limited capabilities." *See id.* at 2219. Even though location data has the ability to reveal intimate details of a person's life, so do checks, bank records, financial statements, and phone numbers dialed. *Cf. id.* at 2217. YOUBER location data merely reveals "a person's movement at a particular time." *Cf. id.* at 2220. It certainly does not provide "a detailed chronicle of person's physical presence compiled every day, every moment, over several years." *Cf. id.* So, unlike CSLI data, it does not "implicate privacy concerns far beyond those considered in *Smith* and *Miller*." *Id.*

YOUBER data also falls short of CSLI data because people have a legitimate choice in whether to expose their location. *Cf. id.* People can, and the vast majority do, choose not to use YOUBER. *See* R. at 2. It is far from "indispensable to participation in modern society." *Cf. Carpenter*, 138 S. Ct. at 2220. Also, YOUBER does not record location data unless a person performs an "affirmative act"—driving a YOUBER rental car. So even without contractually consenting to such tracking, YOUBER customers "voluntarily assume the risk" that their location could be recorded while driving a rental car. *Cf. id.*

None of the reasons the Court relied on in *Carpenter* warrant rejecting the third-party doctrine in this case. Stretching *Carpenter* to cover the facts at hand would strike a devasting blow to the third-party doctrine. While some may applaud such an outcome, the third-party doctrine is necessary to ensure "technological neutrality of the Fourth Amendment." Orin S. Kerr, *The Case for the Third-Party Doctrine*, 107 MICH. L. REV. 561, 561 (2009).

The Court is correct in trying to prevent technology from allowing law enforcement to gain an unfair advantage. But technology is also a powerful tool for criminals. The holding petitioner seeks would place law enforcement outside an electric fence within which criminal activity is allowed to flourish. *See id.* at 573.

In summary, the Fourth Amendment does not protect the location of a rental car. The Defendant did not have a reasonable expectation of privacy in that information, especially in light of the third-party doctrine. And *Carpenter* does not warrant rejecting the third-party doctrine in a case like this. As such, this Court should affirm the Thirteenth Circuit and deny the motion to suppress.

CONCLUSION

In conclusion, the Defendant did not have standing to contest the search of the rental car, nor did she have a reasonable expectation of privacy in its location. As such, this Court should affirm the Thirteenth Circuit's denial of the Defendant's motions to suppress.