Team R18

No. 4-422

IN THE

Supreme Court of the United States

JAYNE AUSTIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF FOR THE RESPONDENT

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. A person must have standing before contesting a search as unconstitutional under the Fourth Amendment. Although an unauthorized renter on a rental agreement generally has standing, one who fraudulently obtains a vehicle in order to commit crime does not. Petitioner did not have permission from the account holder to rent the vehicle used to commit her robberies. Does Petitioner have standing to contest the search of the YOUBER vehicle?

II. Traditionally, individuals lack Fourth Amendment protection in data possessed by a third party. However, the third-party doctrine alone cannot negate an individual's privacy interests in location data tracked passively through cell location points over an extended period of time. Here, the government obtained data outlining Petitioner's voluntarily disclosed locations from YOUBER for a narrow time period. Was the government's acquisition of the data a valid search under the Fourth Amendment?

STATEMENT OF CASE

I. STATEMENT OF FACTS

Apparently frustrated by perceived financial corruption in the banking industry, blogger and poet Jayne Austin (hereinafter "Petitioner") often called for the downfall of *Darcy and Bingley Credit Union*. R. at 1, 26-27. To travel to work and protest events, Petitioner used an app, YOUBER, which works much like a standard rental car; allowing a person to rent a vehicle for a maximum distance of 500 miles, or a time period of up to one week. R. at 2-4.

YOUBER connects to and tracks the vehicle via Bluetooth and GPS from the user's cellphone. R. at 3. This tracking is to safeguard against anyone other than the registered renter operating the vehicle. R. at 3. This tracking technology is only activated once the cell phone associated with the user's account is located within the vehicle. R. at 4. When signing up for YOUBER, a user is notified about the location monitoring function and must click a box to accept the Corporate Privacy Policy. R. at 23.

Given her tendency to stay "off the grid," Petitioner lived in cohabitation pods and refused to maintain an online presence apart from her outspoken blog. R. at 2, 18, 26-27. As follows, Petitioner does not have her own YOUBER account but rather uses that of her estranged partner, Martha Lloyd. R. at 2, 18.

On January 3, 2019, Petitioner rented a 2017 Black Toyota Prius YOUBER and was later pulled over by law enforcement for failure to stop at a stop sign. R. at 2. Upon giving her information and showing the officer the YOUBER rental agreement on her cell phone, the officer noticed Petitioner was not the authorized driver. R. at 2. The officer searched the trunk and found several pieces of incriminating evidence. R. at 3. He also believed the car to be "lived in" based on a number of everyday items found in the vehicle including a pillow and bedding. R. at 3.

While investigating Petitioner, the officer was informed over dispatch that a 2017 Black Toyota Prius with a YOUBER logo was involved in an alleged robbery of a nearby *Darcy and Bingley Credit Union.* R. at 3. The suspect of the robbery was seen with several of the items found in Petitioner's trunk. R. at 3. The suspected vehicle's license plate also partially matched Petitioner's YOUBER plate. R. at 2, 3. The officer then arrested Petitioner. R. at 3.

Further investigation by Netherfield detective, Detective Hamm, revealed five open bank robbery cases; one in Nevada and four in California. R. at 4. These robberies occurred between October 12, 2018, and December 15, 2018 and matched the modus operandi of the robbery on January 3, 2019. R. at 3. Detective Hamm then subpoenaed YOUBER to retrieve all GPS and Bluetooth information for the account Petitioner used between October 3, 2018 and January 3, 2018. R. at 3. This request revealed Ms. Lloyd's YOUBER account was being used to rent vehicles during the times and at the locations of the previous robberies. R. at 4. The 2017 Black Toyota Prius was associated with four of the bank robberies. R. at 4.

Ms. Lloyd testified that she and Petitioner had a falling out around September of 2018, but while they were dating, Ms. Lloyd allowed Petitioner to use her information to sign up for YOUBER. R. at 18. Ms. Lloyd had previously allowed Petitioner to be an authorized credit card user on her account but testified that she intended to withdraw her authorization. R. at 19. Ms. Lloyd did not realize Petitioner was still using her YOUBER account or credit card, as she had switched to a new ridesharing app and canceled her own credit card on YOUBER. R. at 20. Shortly before the robberies, Ms. Lloyd actively tried to distance herself from Petitioner, including writing letters demanding space. R. at 19.

II. PROCEDURAL HISTORY

On January 21, 2019, Petitioner was charged by indictment of six counts of Bank Robbery and Incidental Crimes in violation of 19 United States Code section 2113. R. at 4. Pre-trial, Petitioner filed two motions to suppress evidence: one regarding evidence gathered from her initial arrest, and another regarding her location data. R. at 1. On February 25, 2019, the United States District Court for the Southern District of Netherfield denied both motions. R. at 1. Thereafter, in April 2019, Petitioner appealed, and the United States Court of Appeals for the Thirteenth Circuit affirmed the District Court's denial of the motions. R. at 9. This Court subsequently granted certiorari of Petitioner's claims.

SUMMARY OF ARGUMENT

The Fourth Amendment protects the rights of individuals to be secure in their own property from unlawful intrusion by the government. The Amendment has been interpreted to require the government to obtain a warrant before intruding upon any protected property. However, if the individual does not have possessory or privacy interests in the searched property, the government is free to act without a warrant and the individual does not have standing to contest the government's actions. Petitioner did not have a possessory or privacy interest in the YOUBER vehicle, nor permission from the authorized renter to possess it. Thus, Petitioner did not have standing to contest the search of the vehicle that she rented using another's account.

Moreover, the Fourth Amendment also protects individual's privacy interests in things other than physical property, including location data. This Court has held that records of an individual's every movement over an extended period of time is protected when the individual has a reasonable expectation of privacy in the data. However, an individual lacks a privacy expectation in voluntarily disclosed location data, especially if that data is held by a third party. The

government here obtained only voluntarily disclosed and limited location data from when Petitioner used the YOUBER app. Thus, Petitioner did not have any privacy expectations in the data and the government's actions were not a search under the Fourth Amendment, nor *Carpenter v. United States*.

STANDARD OF REVIEW

This Court reviews appeals of motions to suppress by first reviewing factual findings for clear error, and second, determining the reasonableness of the government's warrantless actions. *Ornelas v. United States*, 517 U.S. 690, 697 (1996); *Johnson v. Williams*, 568 U.S. 289, 297 (2013). Here, the factual findings are not in dispute. The determination of reasonableness is a mixed question of law and fact which is reviewed *de novo*. *Ornelas*, 517 U.S. at 698.

ARGUMENT

I. PETITIONER DID NOT HAVE STANDING TO CONTEST THE SEARCH BECAUSE SHE LACKED BOTH A REASONABLE EXPECTATION OF PRIVACY AND A PROPERTY INTEREST IN THE VEHICLE

The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ." U.S. Const. amend IV. The essential purpose of the Amendment is to "safeguard the privacy and security of [people] against arbitrary invasions by [the] government[]." *Carpenter v. United States,* 138 S. Ct. 2206, 2213 (2018) (quoting *Camara v. Municipal Court of City and County of San Francisco,* 387 U.S. 523, 528 (1967)). In fact, the foundations of the Fourth Amendment can be traced to the colonial era, where British officers were entitled to "rummage through homes . . . unrestrained" to search for evidence. *Carpenter,* 138 S. Ct. at 2213. The need to protect against these arbitrary and unchecked searches helped to spark the American Revolution itself. *Id.* As follows, the protection

of the Fourth Amendment is central to our American values. However, its extensive reach should be balanced with the also-important need for enforcement of the law.

An individual has standing to contest actions of the government under the Fourth Amendment if they have a reasonable expectation of privacy and a legitimate property interest in the property seized or searched. *Byrd v. United States*, 138 S. Ct. 1518, 1524 (2018). *See also Rawlings v. Kentucky*, 448 U.S. 98, 104 (1980); *United States v. Lyle*, 919 F.3d 716, 727 (2nd Cir. 2019). Traditionally, an individual always has a reasonable expectation of privacy in property they own, lawfully possess, or are authorized to use. *Byrd*, 138 S. Ct. at 1524. Further, one has privacy interests in property of another, as long as they are given permission by either the owner or the authorized user. *Id*. at 1531. As follows, if an individual does *not* have permission to possess the property of another, they cannot claim any Fourth Amendment protection. *Id.*

This argument will address first, how Petitioner lacked a reasonable expectation of privacy, both subjectively and objectively, in the rental vehicle; and second, how Petitioner did not have a property interest given she was not the lawful possessor, nor did she have the right to exclude.

A. Petitioner Did Not Have a Subjective Expectation of Privacy in the YOUBER Vehicle and Society Would Not Accept This Expectation as Reasonable

The traditional understanding of the Fourth Amendment centered around trespassing and property interests. *See Olmstead v. United States*, 277 U.S. 438, 463 (1928). *See also Goldman v. United States*, 316 U.S. 129, 135 (1942). However, in *Katz v. United States*, this Court presented a new test focusing on whether the individual has a legitimate expectation of privacy in order to afford Fourth Amendment protections. 389 U.S. 347, 353 (1967) (superseded in part by statute on other grounds) ("We conclude that the underpinnings of *Olmstead* and *Goldman* have been so eroded by our subsequent decisions that the "trespass" doctrine there enunciated can no longer be regarded as controlling."). This Court has since clarified that the legitimate expectation of privacy

test supplements the property interest test rather than displaces it. *Byrd*, 138 S. Ct. at 1526; *Florida v. Jardines*, 569 U.S. 1, 11 (2013).

A legitimate expectation of privacy in a vehicle exists if the defendant exhibits a subjective expectation of privacy and the expectation is one that society is prepared to recognize as reasonable. *Katz,* 389 U.S. at 360; *United States v. Carlisle,* 614 F.3d 750, 756-57 (7th Cir. 2010). Further, to the objective prong of the test, an expectation of privacy must also have "a source outside the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." *United States v. Kennedy*, 638 F.3d 159, 164 (3d Cir. 2011).

In 2014, this Court first addressed the issue of standing regarding an unauthorized driver of a rental car. *Byrd,* 138 S. Ct. at 1524. There, Latasha Reed rented a car for her boyfriend, Terrence Byrd, likely because he would have been ineligible to rent in his name given his criminal record. *Id.* Despite him not being on the rental agreement, Reed handed the keys to Byrd and he took control of the vehicle. *Id.* Later, Pennsylvania State Troopers pulled Byrd over after witnessing suspicious behavior and a traffic violation. *Id.* at 1525. The State Troopers insisted they did not require his consent to search the vehicle because Byrd was not an authorized driver on the rental agreement. *Id.* Subsequently, the authorities proceeded to warrantlessly search Byrd's trunk which revealed incriminating evidence. *Id.*

Justice Kennedy, writing for the majority, rejected the government's argument that the violation of the rental agreement was enough to deny Byrd of his Fourth Amendment protections. *Id.* at 1528. Instead, this Court decided that violating rental policies is common and often inconsequential and does not by itself eliminate an expectation of privacy. *Id*.

Next, this Court turned to the question of lawful possession. *Id.* In ruling that unauthorized drivers do not automatically lack a reasonable expectation of privacy, the majority emphasized that *unauthorized* does not mean *without permission*. *Id.* at 1531. Instead, a driver not in lawful possession, as interpreted by this Court, means unauthorized and lacking permission from the rightful possessor. *Id.* In fact, this Court discussed the potential that upon remand that Byrd's conduct would be found wrongful because he intentionally used his girlfriend to mislead the rental company and procure the vehicle for crime. *Id.* Essentially, procuring the vehicle for crime may be no different than outrightly stealing it. *Id.*

Similarly, Petitioner used her estranged girlfriend's name and money, without permission, to rent a shared vehicle in order to commit crime. R. at 2. Thus, Petitioner's use of the YOUBER vehicle is no different than outright theft.

i. *Petitioner had no subjective expectation of privacy in the YOUBER vehicle*

This Court has stated a subjective expectation of privacy is established in what a person seeks to preserve as private. *See Katz*, 389 U.S. at 351. The intent of the claimant and the precautions the claimant takes to seclude their activities from others are primary considerations. *Katz*, 389 U.S. at 352 (Defendant went into a phone booth, paid a fee, closed the door, and therefore was entitled "to assume that the words he [uttered] . . . [would] not be broadcast to the world."). *See also United States v. Crisp*, 542 F. Supp. 2d 1267, 1281 (M.D. Fla. 2008) (holding that even though defendant took *"some"* normal precautions to protect his privacy such as parking his car at a private residence and closing the car doors, this only minimally supports his alleged legitimate expectation of privacy) (emphasis omitted).

Here, Petitioner repeatedly demonstrated how little she valued personal property and therefore lacked any desire for "claim[ing] [] property" of her own or subjectively expecting

privacy. R. at 26. First, Petitioner elected to rent a vehicle from an extremely popular rental vehicle sharing app where multiple people use the same vehicle in one day. R. at 2. Further, YOUBER employees frequently check on the vehicles at least once a day. R. at 2. Surely, if Petitioner wished to preserve her personal items as private, she would not have chosen a vehicle-sharing app which allows multiple users to access one vehicle in a single day.

Second, and the most telling of Petitioner's subjective expectation of privacy, is her poem: "THEY ALL FALL DOWN!" written during the period of time in which the crimes were committed. R. at 26-27. Petitioner's poem contains language including:

> I have no home, I claim no home
> I claim no property
> I've had no opportunity to claim any property.
> ***
> I'll show you that property is NOTHING
> Ownership is NOTHING, you are NOTHING

R. at 26-27.

Petitioner was clearly of the subjective view that she did not claim any property. Despite writing that "property is nothing" and that she did not claim any property, Petitioner argued she had a reasonable expectation of privacy and a property interest in the YOUBER vehicle. R. at 6, 11. Petitioner's rejection of ownership of property was also demonstrated in her living situation; Petitioner lived in transient cohabitation facilities where she lacked privacy or ownership in the space. R. at 1.

Petitioner will likely argue that because she kept personal items in the YOUBER (including pillows and a blanket) she demonstrated a subjective expectation of privacy. However, this argument is unfounded given her written words and conduct clearly rejecting any privacy expectations in property of any kind. R. at 26, 27. Additionally, courts have held that keeping personal items in a vehicle and perhaps even staying in the vehicle overnight does not conclusively

demonstrate an expectation of privacy. *See, e.g.*, *United States v. Jefferson,* 925 F.2d 1242, 1251 (10th Cir. 1991) (Although appellants challenging a search under Fourth Amendment pointed out that they took turns sleeping in the car, "We do not believe that the Supreme Court intended that any time an accused takes a long distance road trip in a car, the car is to be treated like a home . . ." such that the occupant subjectively expects privacy.). Further, although *some* of the incriminating evidence was found in the trunk of the YOUBER rental vehicle, this only "minimally supports" Petitioner's alleged subjective expectation of privacy. *Crisp*, 542 F. Supp. 2d at 128. Therefore, considering the totality of the circumstances, Petitioner did not demonstrate a subjective expectation of privacy in the rented YOUBER vehicle.

ii. ***Society is not prepared to accept Petitioner's purported expectation of privacy in the vehicle as reasonable***

When courts are urged to "grant standing to a[n] [individual] . . . not of h[er] own constitutional rights but of someone else's," it presents enormous practical difficulties. *Rakas v. Illinois,* 439 U.S. 128, 137 (1978). Every single alleged violation of rights would require administrative processes and lengthy hearings to determine the person violated, the rights infringed upon, and the appropriate remedy. *Id.* This arduous judicial burden would weigh far too heavy on the courts to be a realistic option.

Society also has legitimate interests in promoting judicial economy and constitutional values. Backlog in the courts is detrimental to the workings of society; individuals cannot "have their day in court" if the court cannot accommodate them. Thus, from a judicial efficiency perspective, society would not recognize Petitioner's purported privacy expectations in a vehicle she acquired through wrongful means.

Lacking standing in the traditional sense presents serious societal roadblocks, here, however, Petitioner's claims go far further. "A burglar plying his trade in a summer cabin during

the off season . . . may have a thoroughly *subjective* expectation of privacy, but it is not one which the law [or society] recognizes as 'legitimate.'" *Byrd,* 138 S. Ct. at 1529 (emphasis added). It is nonsensical to think that a common car thief would have the same privacy rights in their stolen goods as the rightful owner who paid for and maintained their vehicle. Here, Petitioner came into possession of the vehicle through deceitful means, and thus, her privacy expectations should be treated no differently than a car thief. R. at 12; *Byrd,* 138 S. Ct. at 1530 (reasoning there may be no difference between one who uses a straw man to obtain a vehicle for crime and one who steals the car outright).

Moreover, enlarging the class of persons who can invoke standing will create an unworkable standard not only at the judicial level, but also on the ground level of law enforcement. Affording Petitioner standing here would begin a slide down a slippery slope; would the rule then apply further down the line of possession? For instance, under this rule, one who steals a car from a car thief would also have standing to contest a governmental search. The more attenuated the individual is from the rightful owner, the more unrealistic the rule's application becomes and the public's distrust in the Fourth Amendment grows.

Although courts have recognized exceptional situations in which to grant standing based on certain relationships, these situations do not apply to Petitioner. *See United States v. Smith*, 263 F.3d 571, 587 (6th Cir. 2001) (defendant's "business relationship with the rental company and his intimate relationship with his wife, the authorized driver of the vehicle, are relationships which are recognized by law and society" such that standing was proper). Petitioner's estranged relationship with Ms. Lloyd and Ms. Lloyd's undeniable indication that she wished to be distant from Petitioner is not a relationship recognized by law and society which warrants standing. R. at 19.

In sum, Petitioner did not demonstrate a subjective expectation of privacy in the YOUBER vehicle both through her poems or conduct. Further, society is not prepared to recognize any of Petitioner's purported privacy expectations as reasonable. Granting standing to Petitioner would create an unworkable and unrealistic rule that conflicts with judicial efficiency and societal reasoning.

B. Petitioner Did Not Have Any Property Rights in The Vehicle Given She Was Not in Lawful Possession and Did not Have the Right to Exclude Others

Although expectations of privacy need not be based on a common-law interest in property, "property concepts" are nonetheless instructive in determining one's rights. *Byrd*, 138 S. Ct. at 1526. "Legitimation of expectations of privacy by law *must* have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." *Id.* at 1527 (citing *Rakas,* 439 U.S. at 144 n.12) (emphasis added). Requiring privacy expectations to be tethered to property law reinforces the existence and importance of the right to exclude. The right to exclude is one of the main rights attaching to property and one who lawfully controls and excludes others from property will likely have a legitimate expectation of privacy. *Byrd*, 138 S. Ct. at 1526 (citing *Rakas*, 439 U.S. at 133). An individual *not* in lawful possession does not have the right to exclude and therefore no property interests. *Byrd*, 138 S. Ct. at 1526.

As stated, the Fourth Amendment protects people in *their own* effects, or those they are in lawful possession of. U.S. const. amend. IV. After analyzing the legitimate expectation of privacy argument in *Byrd*, this Court then turned to the question of lawful possession. *Byrd,* 138 S. Ct. at 1526. Despite ruling that unauthorized drivers—in otherwise lawful possession of vehicles—do not automatically lack standing, this Court highlighted the narrow application of this rule. *Id.* at 1531. "[I]n otherwise lawful possession," has been defined by this Court to mean having

permission of the authorized driver on the rental agreement. *Id.* ("No matter the degree of possession and control, the car thief would *not* have a reasonable expectation of privacy in a stolen car[,]" and therefore, no standing to bring a Fourth Amendment challenge.). This Court also expressed grave concern for the way in which Byrd acquired the rental vehicle. *Byrd*, 138 S. Ct at 811. In fact, the matter was remanded to the Third Circuit to ask the question of whether Byrd was more like a car thief than a licensee of the lessee. *Byrd*, 138 S. Ct at 818.

Ms. Reed and Byrd drove together to the rental car site, where Ms. Reed rented a car, and physically handed the keys over to Byrd. *Id.* at 1524. Similarly, in *United States v. Jeffers*, the defendant's aunts, who lawfully rented the hotel room, handed their room key to the defendant. 342 U.S. 48, 50 (1951). This Court held that Jeffers had a property interest in the hotel room as he was in lawful possession given the explicit permission from the renters. *Id.* Lawful possession is demonstrated by the unambiguous act of handing over the key. *Id.* This act can be clearly understood as giving permission to another to use one's property lawfully. *Id.*

Here, that is not the case. While publicly calling for the downfall of *Darcy and Bingley Credit Union*, Petitioner was driving YOUBER vehicles without the consent of the account holder and committing robberies. R. at 1, 3. Ms. Lloyd testified that she was unaware Petitioner was using her YOUBER account as she had switched to a new ride-sharing app. R. at 20. Worse, Ms. Lloyd testified she was not asked for permission by, nor would she have granted permission to, Petitioner to use her account or funds for the rental. R. at 19-20. Moreover, Ms. Lloyd ended her relationship with Petitioner by forcing her to move out of her apartment and sending a letter demanding space. R. at 19. With this information, Petitioner was reasonably aware she no longer had permission from Ms. Lloyd to use her YOUBER account, or to continue to use her credit card information. Once the relationship ended, the only way Petitioner could be in lawful possession of

the YOUBER vehicle was with Ms. Lloyd's explicit permission. Distinguishable from *Byrd* and *Jeffers*, Petitioner was not handed a key by the true owner or renter and was in no other way given any explicit permission.

Petitioner here is more like a thief than a licensee of the lessee. The true lessee, Ms. Lloyd, was completely unaware that Petitioner was using her name and money to rent vehicles to commit robberies. R. at 18. Although Petitioner was an authorized credit card user on Ms. Lloyd's account, this did not mean she had permission to rent the YOUBER in Ms. Lloyd's name. R. at 18-20. Ms. Lloyd's prior generosity in no way implied that she intended to grant permission to Petitioner to be the licensee for the vehicle rented in Ms. Lloyd's name.

In addition to lawful possession, another component of property rights is the right to exclude others. *Byrd,* 138 S. Ct at 1524. For instance, this Court has considered the right to exclude as a main factor in determining whether the guest has a property interest to contest a search of another's home. *Minnesota v. Olson*, 495 U.S. 91, 96 (1990) (holding that since the defendant was in lawful possession and had the right to exclude, he had a property interest in the home, and thus standing to challenge the government's warrantless entry).

Any property right Petitioner believes she maintained in the YOUBER vehicle is nonexistent. The right to exclude cannot extend to a criminal who has procured a car through a third party in order to commit crime. Despite the estranged relationship between Petitioner and the authorized driver, Ms. Lloyd, Petitioner and a car thief are almost entirely alike. If not for the weak link to the authorized driver, Petitioner would no doubt be a car thief. Ms. Lloyd testified that she wished she had taken Petitioner off of her account sooner and, had she known been asked by Petitioner, she likely would not have given her permission to use her YOUBER account and funds. R. at 19.

Even as an authorized driver, the nature of the YOUBER rental system further decreases one's right to exclude. YOUBER employees check on the cars at least once every 24 hours. R. at 2. Additionally, the app has more than forty million users and often multiple users drive the same vehicle in a single day. R. at 2. Thus, the right to exclude third parties from a YOUBER vehicle is weak even for those who are authorized drivers. Here, given Petitioner was driving the YOUBER vehicle without the consent of the authorized driver, Petitioner rationally did not have a right to exclude others, and thus no property interests.

Petitioner did not subjectively expect privacy in the YOUBER vehicle, nor would society have been willing to recognize any privacy interest as reasonable. Moreover, Petitioner entirely lacked any property interest in the vehicle given she was not in lawful possession, nor able to exclude others. The societal implications of validating Petitioner's manipulative and unlawful actions outweigh any of Petitioner's claims of possession. Legitimizing a car thief's standing to contest under the Fourth Amendment would create an unworkable and inefficient standard for this Court and law enforcement to apply. In sum, enlarging the class of persons afforded standing will inevitably undermine the public's confidence in their Fourth Amendment protections.

II. THE ACQUISITION OF PETITIONER'S LOCATION DATA WAS NOT A SEARCH BECAUSE PETITIONER DID NOT HAVE AN EXPECTATION OF PRIVACY IN THE DATA AND THE DATA WAS HELD BY A THIRD PARTY

Although the Fourth Amendment has historically only protected individuals from physical intrusion onto constitutionally protected areas, this Court has recognized that property rights are not the *sole* focus of Fourth Amendment protections. *Soldal v. Cook County,* 506 U.S. 56, 64 (1992). Instead, the reach of Fourth Amendment protections also extends to information in which individuals have a reasonable expectation of privacy. *Katz,* 389 U.S. at 351. However, this privacy expectation can be limited by voluntary disclosure of information or if the information is held by

a third party. *Smith v. Maryland.,* 442 U.S. 735, 740 (1979). This Court's Fourth Amendment jurisprudence relating to privacy expectations in information culminates in *Carpenter v. United States*, where it held the acquisition of extensive cell site location information constituted a search under the Fourth Amendment. 138 S. Ct. at 2213.

The following argument will address first, how this case is materially distinguishable from the majority holding of *Carpenter* because Petitioner did not have an expectation of privacy in the government-acquired data; and second, how the third-party doctrine further vitiates Petitioner's claim of privacy expectations. Although the Thirteenth Circuit's ultimate judgement was correct regarding this issue, the argument herein explores a more nuanced analysis of the case at hand, as compared directly to *Carpenter v. United States.*

A. Unlike *Carpenter,* The Government's Actions Were Not a Search Because Petitioner Did Not Have a Reasonable Expectation of Privacy in the Acquired Location Data

While it is true that a person does not surrender all Fourth Amendment protection by "venturing into the public sphere," one only has a legitimate privacy interest in information (1) they subjectively believe to be private, and (2) society deems as reasonable. *Carpenter,* 138 S. Ct. at 2217; *Katz,* 389 U.S. at 351. Thus, an individual has a reasonable expectation of privacy in the whole of their physical movements; meaning, it is reasonable to expect the government not to "secretly monitor and catalogue *every single movement* of an individual[] . . . for a very long period [of time]." *Carpenter,* 138 S. Ct. at 2217 (citing *United States v. Jones*, 565 U.S. 400, 430 (2012)) (emphasis added).

Carpenter was one of a group of defendants accused of robbing several electronic stores. *Carpenter,* 138 S. Ct. at 2212. During its investigation, the government acquired Carpenter's personal cell phone number and used it to subpoena records from his cell carriers. *Id.* The

government obtained 12,898 data points of cell site location information outlining the entirety of Carpenter's movements over a four-month period. *Id.* This data placed Carpenter at the scenes of the crimes and led to his conviction. *Id.*

To better understand an individual's privacy interests in cell site location data, this Court looked to the intersection of two sets of previous cases: (1) those addressing a person's expectations of privacy in his physical movements, and (2) those addressing voluntary disclosure of information. *Id.* at 2215-16.

First, this Court focused on an individual's privacy interests in their physical movements and location and expressed concern over the "sweeping mode[] of surveillance" of tracking an individual's every move. *Id.* at 2215 (citing *United States v. Knotts*, 460 U.S. 276, 278 (1983)); *Jones,* 565 U.S. at 404-5. It reasoned that the extensive nature of the location data provided an "intimate window into [an individual's] life, revealing not only his particular movements, but through them his . . . associations" and "privacies of life." *Carpenter,* 138 S. Ct. at 2217. Allowing the government to warrantlessly infiltrate the intimate details of an individual's life posed too great a privacy risk for this Court to allow. *Id.*

Second, this Court focused on the distinction between what an individual keeps to himself, and what he voluntarily shares with others. *Id.* at 2216. It determined that a person has "no legitimate expectation of privacy in information . . . voluntarily turn[ed] over to third parties." *Id.* (citing *Smith*, 442 U.S. at 743). *See also United States v. Morel*, 922 F.3d 1, 9 (1st Cir. 2019); *United States v. Hood*, 920 F.3d 87, 90 (1st Cir. 2019) (holding an individual has no reasonable expectation of privacy in IP addresses voluntarily disclosed through the internet). This holding remains true even if the revealed information is provided under the assumption that it will only be used for a limited purpose. *Carpenter*, 138 S. Ct. at 2217. However, this Court prudently held that

employing the traditional third-party doctrine to Carpenter's cell site location data would not be a simple application, but an extension to an entirely new type of information. *Id.*

Combining the reasoning of these two holdings, this Court held that although Carpenter voluntarily disclosed his data to a third party, that *alone* did not allow the government to warrantlessly obtain his cell site location information. *Id.* at 2217. Further, to abide by "society's expectation . . . that law enforcement agents and others would not . . . secretly monitor and catalogue every single movement of an individual . . . for a very long period [of time]", this Court held Carpenter's particular cell site records required a warrant to access. *Id.* (citing *Jones,* 565 U.S. at 430). This case, however, involves much less worrisome and pervasive location data than that of *Carpenter.*

i. *The obtained location data here is much narrower in scope than that of Carpenter*

This Court drew a sharp distinction between the limited types of personal information previously addressed by the third-party doctrine, and the "exhaustive chronicle" of location information collected by Carpenter's cell carriers. *Id.* at 2220. Previously, the personal information held by third parties had been limited to dialed phone numbers or non-confidential bank transactions. *Id.* at 2219. Now, however, cell carriers have the ability to track an individual's movements in a far more pervasive and extensive form. *Id.* Thus, considering the omnipresent nature of Carpenter's location data, long-term monitoring of one's detailed location constitutes a search. *Id.; Jones,* 565 U.S. at 430. Here, however, the data was far less in breadth and duration.

After Detective Hamm noticed the YOUBER logo on the vehicle Petitioner used on the date of her arrest, he subpoenaed location records for three months (ninety-two days): October 3, 2018 through January 3, 2018. R. at 3. Compared with the 160 days of records subpoenaed in *Carpenter,* this time duration is far less worrisome. *Carpenter,* 138 S. Ct. at 2212. Although, the

majority of this Court seemingly held that seven days of acquired data constituted a search, this Court explicitly declined to impose a bright line rule and instead considered only the time period before the Court. *Carpenter,* 138 S. Ct. at 2217 n.3 (stating that the Court need not decide whether there is a limited period for which the government may obtain historical location information, but only for its purposes in the present case to mark seven days as a cutoff).

This rule, however, seemingly only accounts for breadth of information, and not the varying depths of information the government can acquire. *See,* Melody J. Brannon, *Feature, Carpenter v. United States: Building a Property-Based Fourth Amendment Approach to Digital Data,* 33 CRIM. JUST. 20, 26 (Winter 2019) (Seven days was the marker in *Carpenter,* but only because those were the facts before the Court. Instead, data can be quantified in different ways.). Consider, for instance, acquisition of seven days of data, but only one location point for each day. Comparatively, one day of data could include one thousand location points. The rule previously implied by this Court does not account for this variation, and thus should not be applied here.

Further, YOUBER only tracks users' locations while using a YOUBER vehicle, and not an exhaustive chronicle of their every location. R. at 4. The YOUBER tracking feature only initiates when the user's account registers as being within the rented vehicle. R. at 22. This is quite distinguishable from that of *Carpenter*, where the defendant's location was tracked as if the government had "attached an ankle monitor to [him]." *Id.* at 2218 (Carpenter's wireless carrier logged his location whenever he made or received calls on the phone). Thus, the narrow time and scope of the data acquired by Detective Hamm is distinct from that in Carpenter and does not rise to the same level of concern. As follows, since Petitioner's data differed so drastically in scope, it is distinguishable from the facts of *Carpenter*.

ii. *Petitioner voluntarily exposed her location data through using the YOUBER app*

The facts of this case are also distinguishable regarding the second rationale underlying this Court's reasoning in *Carpenter*: voluntary exposure of the data. *See Id.* at 2220. This Court reasoned that cell phone location information is not "shared" in the normal sense of the word. *Id.* Instead, this Court implies that an individual is somewhat forced to share this information or risk being "virtually . . . exil[ed] from society." *Id. See also Riley v. California,* 134 S. Ct. 2473, 2475 (2014); *United States v. Eaglin*, 913 F.3d 88, 91 (2nd Cir. 2019). Moreover, cell phones share the user's location passively when making and receiving phone calls without any affirmative action on the user's part, and so there is no real way to avoid leaving a "trail of location data." *Carpenter,* 138 S. Ct. at 2220. Thus, a typical user making phone calls does not "'voluntarily assume[] the risk' of turning over a comprehensive dossier of his physical movements." *Id.* (quoting *Smith,* 442 U.S. at 745). However, again, Petitioner's circumstances are materially different.

Although it is true that cell phones continuously generate cell site location information for making and receiving phone calls, Petitioner's challenge is not based on that data. Instead, the data acquired here was only from a voluntarily downloaded and utilized app. R. at 4, 23. Petitioner *chose* to download the YOUBER app for her transportation, and therefore *chose* to provide her location information to the app. R. at 2. Although her cell phone likely recorded her location while not in the app—whenever she made or received a phone call—that was not the data acquired by the government. R. at 4. Contrary to the passive location sharing this Court is concerned with, Petitioner here took affirmative action to leave her trail of location data. R. at 4.

Petitioner will likely argue that she was not the party to affirmatively accept YOUBER's Corporate Privacy Policy (R. at 20) and therefore did not voluntarily disclose her location information. However, a commonsensical understanding of the YOUBER app implies Petitioner

had, at the very least, constructive knowledge that her location was being shared, and thereby was voluntarily provided by using the app.

The appeal of YOUBER is premised on location; a user is able to open the app and see the nearest YOUBER parking stall in relation to their location. R. at 2, 23. Location sharing is necessary for this feature. R. at 2, 23. Further, the YOUBER rentals are limited to a 500-mile range. R. at 2, 23. The app also needs to share and track location for those purposes and ensure that a user does not exceed the mileage limit. R. at 2, 23. Finally, a YOUBER user can return a vehicle to any YOUBER stall, but the app still needs to keep track of which vehicle is located where. R. at 2, 23. Again, location data is necessary for this purpose as well. Thus, a reasonable YOUBER user would understand that YOUBER tracks their location (1) initially, to show the user the available vehicles and locations; (2) to ensure the user does not exceed the mile limitation; and (3) to track the vehicle's return location. Based on the nature of the app's basic features, this knowledge is equally known by users like Petitioner who did not initially set up their YOUBER account.

Petitioner has demonstrated she is a technologically savvy woman; she maintains an online-blog post and has shown familiarity of social media. R. at 18, 26-27. As follows, she understood the nature of the YOUBER app and that her location was necessarily being shared while using it.

It is incontrovertible how dependent our society is on our cell phones. In fact, ninety-six percent of Americans own a cell phone of some kind (increased from thirty five percent in 2011), and one in five Americans are "smartphone dependent." PEW RESEARCH CENTER MOBILE FACT SHEET, https://www.pewinternet.org/fact-sheet/mobile/ (last visited September 31, 2019). Meaning, they have a smartphone but do not have a traditional home internet device such as a

laptop or desktop computer. *Id.* Unsurprisingly, the rise in technology is not declining anytime soon. PEW RESEARCH CENTER, *About Three-In-Ten U.S. Adults Say They are 'Almost Constantly Online,'* https://www.pewresearch.org/fact-tank/2019/07/25/americans-going-online-almost-constantly/ (last visited September 31, 2019) (studies show one in five Americans live in a home with three or more smartphones, and a quarter of Americans say they are online with their smartphone "almost constantly").

This Court's holding in *Carpenter* recognized the serious privacy implications technology introduces yet seems to evade the also-important needs of law enforcement. *Carpenter,* 138 S. Ct. at 2230 (Kennedy J., dissenting) ("Th[is] Court's newly conceived constitutional standard will . . . undermine traditional and important law enforcement practices; and . . . allow the cell phone to become a protected medium that dangerous [people] will use to commit serious crimes."). With the technological evolution of our society, law enforcement and investigatory techniques need to evolve accordingly.

Reversal here would stymie the government's ability to perform its essential duties in our ever complex and cell phone-dependent world. The dauting future of a world saturated with technology should not deter this Court from imposing limits on government surveillance, but instead encourage it to provide contemporary guidelines which balance individual freedom and government oversight.

In sum, the holding of *Carpenter* should be limited to its facts. This Court notes that its holding is a narrow one; it stated that when faced with new technological applications it must "tread carefully . . . to ensure [it] do[es] not 'embarrass the future.'" *Id.* at 2220. Thus, the Thirteenth Circuit's holding should be affirmed as to the government's acquisition of location data because it did not constitute a search under the Fourth Amendment.

B. Moreover, The Third-Party Doctrine Negates Any Privacy or Property Interest Petitioner May Have in Her Location Data

An individual has no reasonable expectation of privacy in information willingly exposed to a third party. *United States v. Miller,* 425 U.S. 435, 442 (1976); *Smith*, 442 U.S. at 737. This doctrine, commonly referred to as the third-party doctrine, states that an individual cannot assert either ownership or possession of information that is a record of a third party. *Miller,* 425 U.S. at 440. This Court's adjusted its interpretation and application of the third-party doctrine in *Carpenter*, where it held that, given the nature of cellular location data, the third-party doctrine *alone* cannot allow the government to act without a warrant. *Carpenter,* 138 S. Ct. at 2217.

In *Miller*, the defendant was convicted of operating an unregistered still with the intent to defraud the government of whiskey tax. *Id.* at 436. During its investigation, the government subpoenaed records from the banks where the defendant maintained accounts. *Id.* at 437. The defendant challenged the action under the Fourth Amendment, but this Court disagreed. *Id.* at 440. It found that there was no "intrusion into any area in which [defendant] had a fourth amendment interest." *Id.* Miller could not assert "ownership nor possession" of the records because they were "business records of the banks." *Id.* at 440. Thus, an individual cannot assert a legitimate expectation of privacy in third-party data. *Id.*

Several years later, this Court applied the same principles to information conveyed to a telephone company. *Smith,* 442 U.S. at 737. There, the police installed a pen register—a device that records all outgoing phone numbers dialed—on the defendant's home phone. *Id.* This Court rejected the defendant's claim to Fourth Amendment protection in the numbers he dialed from the tapped phone. *Id.* at 742-46. "[E]ven if [the defendant] did harbor some subjective expectation that the phone numbers he dialed would remain private, this expectation is not one that society is prepared to recognize as reasonable." *Id.* at 743 (citation and internal quotation marks omitted).

This Court reasoned that by using the phone, the defendant had voluntarily conveyed the numerical information to the telephone operating company, thereby assuming the risk that the company's records would be "divulged to police." *Id.* at 745.

Although this Court declined to extend this duet of holdings to the data in *Carpenter,* it explicitly stated that its holding does not disrupt the application of *Smith* and *Miller. Carpenter*, 138 S. Ct. at 2220. Moreover, it clarified that the third-party doctrine *by itself* could not negate Carpenter's Fourth Amendment interest his location data. *Id.* Thus, though not determinative, a third party's control over location data further undermines a defendant's claim of Fourth Amendment protection. However, as discussed previously in this argument, Petitioner cannot claim a reasonable expectation of privacy in the location data. Combining Petitioner's lack of privacy rights with the fact that the data is held by a third party further negates Petitioner's claim to Fourth Amendment protection in the data.

In addition to the privacy rationale behind the third-party doctrine (already discussed herein), there is a property-based rationale as well. The first rationale asks whether the claimant had a privacy interest in the searched content, whereas the second rationale asks whose content was searched. Orin S. Kerr, *Article: The Case For the Third-Party Doctrine,* 107 MICH. L. REV. 561, 562 (2009). *See also Carpenter,* 138 S. Ct. at 2235. (In his *Carpenter* dissent, Justice Thomas succinctly stated that a case such as this should "not turn on 'whether' a search occurred [but,] instead, on *whose* property was searched."). Carpenter did not create the location records, nor could he maintain, control, or destroy them, thus the records were not his property to claim an interest in. *Carpenter,* 138 S. Ct. at 2235. Similarly, Petitioner did not create or maintain a log of her location data, nor could she control or destroy it.

This property-based approach, also noted by the Thirteenth Circuit, echoes much of the dissent in *Carpenter*, where the unifying doctrinal theme is that the Court should revert to its traditional property-based approach to the Fourth Amendment. R. at 14-15; *Carpenter,* 138 S. Ct. at 2239 (Thomas, J., dissenting) ("The word 'privacy' does not appear in the Fourth Amendment (or anywhere else in the Constitution for that matter)"). *See also* Brannon, *supra*, at 22 (discussing why the privacy approach to the Fourth Amendment should be abandoned because it has no basis in the history or text of the Amendment).

The Thirteenth Circuit, along with this Court, expressed concern over the applicability of its holdings to future societies. R. at 14, *Carpenter,* 138 S. Ct. at 2220. This case presents a perfect example of how the *Carpenter* holding is unworkable and unclear. YOUBER's data collection is quite different than that of Carpenter, yet increasingly common in the market. Jennifer Valentino-DeVries, Natasha Singer, Michael H. Keller, Aaron Krolik, *Your Apps Know Where You Were Last Night, and They're Not Keeping It Secret,* N.Y. Times, Dec. 10, 2018, https://www.nytimes.com/interactive/2018/12/10/business/location-data-privacy-apps.html (one thousand of the most popular downloadable apps utilize this type of location logging). This type of data logging—where location tracking is limited to when the app is in use—presents a new question for this Court, and an opportunity to clarify its rule. Allowing the government to access the limited type of data in this case preserves an important tool for law enforcement, as well as the privacy of cell phone users who unwittingly disclose their more expansive location data.

The location data at issue here is materially distinguishable from *Carpenter* both in time and scope. Thus, unlike Carpenter, Petitioner did not have a reasonable expectation of privacy in her location data. Moreover, although the third-party doctrine alone does not negate Petitioner's privacy interest, the fact that the location data was voluntarily disclosed to and held by a third party

further supports the government's actions. In sum, the government's action was not a search under the Fourth Amendment.

CONCLUSION

For the foregoing reasons, Respondent asks this Court to affirm the holding of the Thirteenth Circuit. Petitioner did not have standing to contest the search of the rental vehicle, nor did the government's access of location data constitute a search under the Fourth Amendment or *Carpenter v. United States.*

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Respectfully submitted,

/s/ Team R18
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