TEAM R5

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 RESPONDENT

Team R5

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The University of San Diego School of Law

31st Annual Criminal Procedure Tournament

November 1 – November 3, 2019

San Diego, CA

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QUESTIONS PRESENTED

I. Does the unauthorized driver of a rental vehicle, who rented the vehicle in another person's name without the person's knowledge or express permission, have standing to challenge the government's physical search of that vehicle?

II. Did the government conduct a Fourth Amendment search when it acquired location data records from YOUBER, when YOUBER collected the data only after Petitioner voluntarily rented vehicles through another person's YOUBER account?

STATEMENT OF FACTS AND PROCEEDINGS BELOW

Between October 2018 and January 2019, Petitioner Jayne Austin ("Petitioner") robbed six *Darcy and Bingley Credit Unions* across California and Nevada. R. at 1. Following a trial in the United States District Court for the Southern District of Netherfield, Petitioner was convicted of six charges of bank robbery, in violation of 18 U.S.C. § 2113, Bank Robbery and Incidental Crimes. R. at 10. The United States Court of Appeals for the Thirteenth Circuit affirmed. R. at 16.

Petitioner's Use of YOUBER Vehicle Rental Services

YOUBER provides vehicle rental services through a software application ("app") downloaded to a user's phone. R. at 2. Much like any standard car rental service, a user enters a rental agreement on the app and pays a fixed hourly rate. R. at 2. The user may drive a rented YOUBER vehicle for up to 500 miles or up to one week. R. at 2. To rent a YOUBER vehicle, the user connects her app to the vehicle through a GPS and Bluetooth interaction. R. at 2. YOUBER services are dependent on the network interactions between the app and vehicle. R. at 23.

YOUBER has several policies guiding the use of its services. First, only a *registered* user may rent a YOUBER vehicle. R. at 3. The user must register an account on the app when she initially signs up for YOUBER. R. at 23. During this sign-up process, the user must provide her name, e-mail address, phone number, postal information, and payment information. R. at 23, 29. She must also accept YOUBER's terms and conditions. R. at 3. One condition permits YOUBER to track the user's location while she operates the vehicle. R. at 4. When a user registers her account, a message appears on the user's phone providing notice of this condition, and each user must click "accept" to complete registration. R. at 23.

Second, only a *registered* user may operate a rented YOUBER vehicle. R. at 2. YOUBER enforces this policy by tracking every rented YOUBER vehicle to ensure that only the registered

user operates the vehicle. R. at 3. The Bluetooth and GPS interaction between the app and vehicle that enables a user to rent the vehicle also enables YOUBER to track the location of a vehicle while in use. R. at 22. Each registered YOUBER account is assigned an identification number, and YOUBER utilizes Smoogle satellite-mapping technology to track location in real time. R. at 22. YOUBER then compiles the location data for its business records. R. at 30.

Petitioner was not a *registered* user. R. at 2. Instead, she used the account of her "off-and-on again partner, Martha Lloyd." R. at 2. While Lloyd and Petitioner were together, Lloyd shared her YOUBER login information with Petitioner. R. at 19. The two broke up about one month before the first robbery occurred. R. at 18. After the breakup, Lloyd never explicitly told Petitioner to stop using her account, but Petitioner continued to use the account to rent vehicles. R. at 19, 20.

The Traffic Stop and Search of Petitioner's Vehicle

On January 3, Petitioner rented a black 2017 Toyota Prius (plate number: ROLL3M) through YOUBER. R. at 2. That day, a police officer pulled her over after failing to stop at a stop sign. R. at 2. During the stop, she showed the officer her license and the YOUBER rental agreement on her phone. R. at 2. After he examined the agreement, the officer told Petitioner that he did not need consent to search the vehicle because she was not the registered renter. R. at 2, 3. The officer opened the trunk and found a fake gun modeled after a .45 caliber handgun, a maroon ski mask, and a duffel bag containing $50,000 and blue dye packs. R. at 3.

During this interaction, the officer received a dispatch indicating that a nearby *Darcy and Bingley Credit Union* had been robbed by a suspect driving a black 2017 Toyota Prius with a YOUBER logo. R. at 3. The dispatch also indicated that the suspect wore a maroon ski mask, used a .45 caliber handgun, and that the suspect's license plate included "R0L." R. at 3. Based on the search, the dispatch, and the partial license plate match, the officer arrested Petitioner. R. at 3.

The Post-Arrest Investigation

The detective investigating the case discovered five other bank robbery cases with the same *modus operandi* of the January 3 robbery. R. at 3. After noting Petitioner's use of a YOUBER vehicle, the detective issued a subpoena duces tecum ("subpoena") on YOUBER. R. at 3. The subpoena requested the GPS and Bluetooth information from Lloyd's account, which Petitioner used each time she rented a YOUBER vehicle. R. at 3.

YOUBER complied with the subpoena, and its records showed that Lloyd's account was used to rent vehicles at the location and time of each of the other five robberies. R. at 4. Surveillance footage from four of the other banks showed the same vehicle that Petitioner drove on January 3. R. at 4. The detective then recommended that the United States Attorney's Office charge Petitioner with six counts of bank robbery under 18 U.S.C. § 2113. R. at 4.

Proceedings Below

The United States Attorney's Office charged Petitioner with six counts of bank robbery, in violation of 18 U.S.C. § 2113. R. at 1. Petitioner filed motions to suppress: (1) the evidence obtained during the officer's physical search of the vehicle on January 3; and (2) the location information YOUBER provided in response to the subpoena. R. at 4. In each motion, Petitioner argued that the government conducted an unconstitutional search in violation of the Fourth Amendment and requested suppression of evidence discovered by each search. R. at 4.

The district court denied both motions. R. at 8. First, the court ruled that Petitioner lacked standing to challenge the physical search of the YOUBER vehicle. R. at 6. Because she "did not own the vehicle, the vehicle was not rented in her name, and she did not have a sufficiently sustained relationship with the vehicle to garner a legitimate property interest," the court concluded that Petitioner did not have a "legitimate property interest or expectation of privacy in the vehicle"

sufficient to support standing. R. at 6. Second, the court rejected Petitioner's second argument that, under *Carpenter v. United States*, 138 S. Ct. 2206 (2018), she maintained a legitimate expectation of privacy in the location information she shared with YOUBER. R. at 7. The court distinguished *Carpenter*, and concluded that Petitioner "willingly exposed the data she wishe[d] to suppress to a third party." R. at 8. The court explained that Petitioner had "no reasonable expectation of privacy in information [she] exposed to a third party," and ruled the government therefore did not conduct a search when it acquired the location information from YOUBER. R. at 7, 8.

The court of appeals affirmed. R. at 10. The court agreed that Petitioner lacked standing to challenge the search of the vehicle. R. at 10. Because Petitioner rented the vehicle through Lloyd's account without "explicit permission," the court held that she lacked a reasonable expectation of privacy in the vehicle and therefore lacked standing. R. at 12. The court also held that Petitioner lacked a sufficient property interest in the vehicle to confer standing because she "cannot have a valid property interest in a vehicle she has fraudulently leased." R. at 12.

The court of appeals also affirmed the district court's holding that the government did not conduct a search when it acquired the location information from YOUBER. R. at 15. The court found that Petitioner was "constructively aware of the collection of the data, and that she voluntarily gave up such information to a third party." R. at 15. Under the third-party doctrine, the court explained, "individuals have no Fourth Amendment interest in records which are possessed, owned, and controlled by a third party." R. at 15. The court acknowledged that *Carpenter* limited the doctrine, but held that the government's acquisition did not constitute a search because Petitioner's "exposure of her information to a third party for such a maintained period serves as a forfeiture of a reasonable expectation of privacy." R. at 15.

This Court granted Petitioner's petition for a writ of certiorari on both issues.

SUMMARY OF THE ARGUMENT

First, Petitioner lacks standing to challenge the government's January 3 search of the vehicle she rented on Martha Lloyd's YOUBER account. Petitioner cannot establish that the maintained a "legitimate expectation of privacy," *Byrd v. United States*, 138 S. Ct. 1518, 1524 (2018), in a rental vehicle she rented on Lloyd's account without Lloyd's permission to do so. Petitioner's argument relies on *Byrd* and the false assumption that she maintained a legitimate expectation of privacy because she was "the driver and sole occupant of [the] rental vehicle." *See id.* at 1528. The Court held in *Byrd* that a person could have standing "even if the rental agreement does not list him or her as an authorized driver." *Id.* at 1524. But the fatal difference between *Byrd* and this case is that the *Byrd* defendant had *permission* to operate the rental vehicle. *Id.* at 1524 ("With the rental keys in hand, [the authorized renter] returned to the parking lot and gave them to Byrd."). Indeed, precedent from the Court strongly suggests that permission is a prerequisite to standing. *See Rakas v. Illinois*, 439 U.S. 128, 148 (1978) (recognizing defendants were "in the car with the permission of its owner"); *Jones v. United States*, 362 U.S. 257 (1960) (finding a privacy interest in friend's apartment when the defendant was there with "permission"); *see also Byrd*, 138 S. Ct. at 1528 (recognizing permission in *Jones* and "legitimate presence" in *Rakas*).

Here, Petitioner rented the vehicle in Lloyd's name, R. at 2, and without Lloyd's express permission. R. at 18, 19. Even though Petitioner *previously* had permission to rent vehicles in Lloyd's name, she cannot show that she had permission to rent the vehicle she operated on January 3. Petitioner rented the vehicle in Lloyd's name, without Lloyd's permission and in violation of YOUBER policy, then used that vehicle to commit a crime. R. at 2, 3. Her presence is sufficiently "wrongful" to absolutely preclude assertion of any privacy or property interest in the vehicle, *see Byrd*, 138 S. Ct. at 1529, and therefore cannot challenge the government's search.

Second, the government's acquisition of the location records YOUBER collected when Petitioner rented YOUBER vehicles did not constitute a Fourth Amendment search. Under the third-party doctrine, Petitioner "lacks a reasonable expectation of privacy in information [s]he voluntarily turns over to third parties." *See Carpenter*, 138 S. Ct. 2206, 2216 (2018) (citation omitted). In *Carpenter*, the Court declined to apply the doctrine to justify the government's acquisition of cell-site location information ("CSLI"). *Id.* at 2220. But the "novel circumstances" of *Carpenter* are not present here, and Petitioner's argument cannot prevail. *See id.* at 2217.

Carpenter does not apply here for two reasons. First, the data collection is far more limited in this case. CSLI provides a "detailed chronicle of a person's physical presence compiled every day, every moment, over several years." *Id.* at 2217. Thus, there are virtually "no limitations on the revealing nature of CSLI." *Id.* at 2219. But YOUBER only collected location information while Petitioner operated YOUBER vehicles, and this duration never exceeded one week. R. at 22. Accordingly, YOUBER's collection simply does not rise to the level of "near perfect surveillance" demonstrated in *Carpenter*. 138 S. Ct. at 2218. Second, and further distinguishing *Carpenter*, Petitioner took "affirmative act[s]" each time she shared her location. *See id.* at 2220. Each time she availed herself of YOUBER's services, she voluntarily connected her phone to the vehicle through the YOUBER app. R. at 2, 23. The *Carpenter* Court recognized that cell phone companies collect CSLI "without any affirmative act on the part of the user," 138 S. Ct. at 2220, but Petitioner took purposeful and voluntary action each time she rented and operated a YOUBER vehicle.

Because of the inherent differences between *Carpenter* and this case, the third-party doctrine must apply. Petitioner therefore cannot assert a legitimate expectation of privacy in the location information she shared when she voluntarily rented YOUBER vehicles, and the government's acquisition of the location data did not constitute a Fourth Amendment search.

STANDARD OF REVIEW

The Court reviews questions of law *de novo* and questions of fact for clear error. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011).

ARGUMENT

I. PETITIONER LACKS STANDING TO CHALLENGE THE SEARCH OF A VEHICLE SHE WAS NOT AUTHORIZED TO RENT OR OPERATE

The Fourth Amendment provides in relevant part that "[t]he 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. A defendant challenging a search must first establish standing – she must have "had [her] own Fourth Amendment rights infringed by the search and seizure which he seeks to challenge." *Byrd v. United States*, 138 S. Ct. 1518, 1526 (2018) (quoting *Rakas v. Illinois*, 439 U.S. 128, 133 (1978)). A defendant lacks standing unless she "had a legitimate expectation of privacy in the premises searched." *Id.* Thus, Petitioner cannot challenge the January 3 vehicle search unless she maintained a legitimate expectation of privacy in that vehicle. *See id.*

A defendant lacks standing the challenge the legality of a search if her presence at the scene of the search is "wrongful," such as in a stolen car or in a house where she has no right to be. *Id.* at 1529 (quoting *Rakas*, 439 U.S. at 141 n.9). The Court in *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." *Id.* at 1524 (emphasis added). The defendant in *Byrd* was an unauthorized driver, but importantly, had permission from the authorized renter to operate the vehicle. *See id.* at 1524. Here, however, Petitioner was an unauthorized driver *and* lacked permission from the authorized renter to operate the vehicle. R. at 12, 19, 20. She rented and operated the vehicle without the permission of the account holder, in violation of YOUBER's terms of use, and used the vehicle to commit a crime. R. at 3, 12. As a result of her wrongful possession and lack of permission, Petitioner has no cognizable Fourth Amendment interest in the vehicle, and cannot challenge the government's search.

A. Petitioner Has Standing Only If She Had A Legitimate Expectation Of Privacy In The Rental Vehicle.

The Fourth Amendment protects members of the public only from "unreasonable searches and seizures." U.S. Const. amend. IV. The government conducts a search if it "violates a subjective expectation of privacy that society recognizes as reasonable." *Kyllo v. United States*, 533 U.S. 27, 33 (2001). If the defendant lacks a reasonable expectation of privacy, or if that expectation is not reasonable, then no Fourth Amendment search occurred. Similarly, to determine whether standing exists, the Court must decide "whether the person claiming the constitutional violation had a 'legitimate expectation of privacy in the premises' searched." *Byrd*, 138 S. Ct. at 1526 (quoting *Rakas*, 439 U.S. at 143). When answering that question, "property concepts are instructive in determining the presence or absence of the privacy interests protected." *Id.* (internal citation and quotation marks omitted). Together, the privacy and property concepts capture the requirement that the defendant "have a cognizable Fourth Amendment interest in the place searched before seeking relief for an unconstitutional search." *Id.* at 1530.

The Court has long recognized that "for the purposes of the Fourth Amendment there is a constitutional difference between houses and cars." *Cady v. Dombrowski*, 413 U.S. 433, 439 (1973); *see also South Dakota v. Opperman*, 428 U.S. 364, 367 (1976) (stating that "the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office."). For instance, the automobile exception to the warrant requirement permits officers to search a vehicle if probable cause exists because vehicles confer "a lesser degree of [Fourth Amendment] protection." *California v. Carney*, 471 U.S. 386, 390-92 (1985). The automobile exception rests on two justifications. First, a suspect can quickly drive a vehicle out of the investigating officer's jurisdiction while the officer seeks a search warrant. *Id.* at 390. Second,

individuals have a lower expectation of privacy in vehicles because, unlike houses, vehicles are subject to a "compelling governmental need for regulation." *Id.* at 392.

A vehicle *owner* might have a legitimate expectation of privacy in her vehicle by virtue of her property interest in that vehicle. *See Rakas*, 439 U.S. at 131. This is so because "property concepts" are instructive in determining whether a legitimate expectation of privacy exists. *Byrd*, 138 S. Ct. at 1526; *see also Rakas*, 439 U.S. at 143 n.12 ("[E]xpectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property or to understandings that are recognized and permitted by society."). Because it confers the "right to exclude," a vehicle owner's possessory interest is typically sufficient to support a legitimate expectation of privacy. *Rakas*, 439 U.S. at 143 n.12. Consequently, lack of a sufficient property or possessory interest in the vehicle precludes a legitimate expectation of privacy. *See id.* at 148 (holding petitioners lacked standing when "[t]hey asserted neither a property nor a possessory interest in the automobile, nor an interest in the property seized").

B. Petitioner Cannot Assert A Legitimate Privacy Interest In The Rental Vehicle.

Under the Court's Fourth Amendment standing jurisprudence, Petitioner cannot show that she maintained a legitimate expectation of privacy in the rental vehicle. In *Byrd v. United States*, the Court held "that the mere fact that a driver in *lawful* possession or control of a rental car is not listed on the rental agreement will not defeat his or her *otherwise reasonable* expectation of privacy." 138 S. Ct. 1518, at 1531 (emphasis added). There, Latasha Reed entered a car-rental facility to rent a vehicle while Byrd waited outside. *Id.* at 1524. Reed filled out the paperwork and received the keys, but did not list any additional drivers. *Id.* She then gave the keys to Byrd, and he left the facility in the car alone. *Id.* Byrd was later stopped by an officer. *Id.* at 1524-25. The officers searched the vehicle and justified the search, at least in part, based on the fact that Byrd

was "not on the renter agreement." *Id.* at 1525. Thus, Byrd was an unauthorized driver, but had permission from the authorized renter to operate the vehicle. *Id.* at 1524.

The *Byrd* decision was narrow, as the Court held only that being an unauthorized driver "not listed on the rental agreement" will not defeat one's "otherwise reasonable expectation of privacy." *Id.* at 1531. The Court did not provide a clear standard for determining whether an unauthorized driver, with or without permission, has standing. Justice Alito's concurrence, however, explained:

> [r]elevant questions bearing on the driver's ability to raise a Fourth Amendment claim may include: the terms of the particular rental agreement; the circumstances surrounding the rental; the reason why the driver took the wheel; any property right that the driver might have; and the legality of his conduct under the law of the State where the conduct occurred.

Id. at 1531-32 (Alito, J., concurring) (internal citations omitted). Further, the *Byrd* Court reaffirmed the principle "that legitimate presence on the premises of the place searched, standing alone, is not enough to accord a reasonable expectation of privacy." *Id.* at 1527 (quoting *Rakas*, 439 U.S. at 142). And finally, the *Byrd* Court made sure to recognize an "important qualification" to the decision – that a defendant can have standing to challenge a vehicle search only when her possession is lawful. *Id.* at 1529. If the defendant's presence is "wrongful," then she cannot maintain a legitimate expectation of privacy in the vehicle. *Id.* ("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.") (internal citation and quotation marks omitted).

The Court's decision in *Rakas* is also instructive as to whether Petitioner has standing to challenge the vehicle search. In *Rakas*, the Court held that passengers in a vehicle lacked standing to challenge the search of the vehicle because they "neither owned nor leased" the vehicle and "asserted neither a property nor a possessory interest in the automobile, nor an interest in the

property seized." 439 U.S. at 148. The Court found that the passengers "made no showing that they had any legitimate expectation of privacy in the glove compartment or area under the seat of the car in which they were merely passengers." *Id.* at 148. And importantly, the Court "rejected the argument that legitimate presence alone was sufficient to assert a Fourth Amendment interest." *Byrd*, 138 S. Ct. at 1528 (discussing *Rakas*, 439 U.S. at 150 n.17).

1. *Petitioner's lacks standing because she did not have permission from the authorized renter.*

Petitioner cannot assert a legitimate expectation of privacy in the rental vehicle because she was an unauthorized driver and lacked permission to rent or operate the vehicle. Although the Court has not expressly recognized permission as a *requirement* for standing in this type of case, the Court's discussion of permission in *Byrd* and *Rakas* suggests that a defendant must have permission, at the very least, in order to establish standing.

The *Byrd* Court, in rejecting the government's argument that "only authorized drivers of rental cars have expectations of privacy in those vehicles," found the fact that the defendant was "the driver and sole occupant of [the] rental car" to be significant. 138 S. Ct. at 1528. As a result, the Court found the facts of *Byrd* similar to *Jones v. United States*, 362 U.S. 257 (1960), where the Court held that the defendant "had a reasonable expectation of privacy in his friend's apartment because he 'had complete dominion and control over the apartment and could exclude others from it.'" *Id.* (quoting *Rakas*, 439 U.S. at 149 (discussing *Jones*)). Importantly, the *Byrd* Court then recognized the existence of permission in *Jones*. *Id.* (explaining that the "friend of the defendant in *Jones* . . . permitted the defendant to use [the apartment] in his absence").

Similarly, the Court in *Rakas* stated that a showing of permission, alone, is "not determinative of whether they had a legitimate expectation of privacy" in the vehicle searched. 439 U.S. at 148. In fact, the *Rakas* Court ultimately found that the passengers did not have standing

even though they were "'legitimately on [the] premises' in the sense that they were in the car with the *permission* of the owner" because they "made no showing that they had any legitimate expectation of privacy." *Id.* In doing so, the Court recognized that, in *Jones*, the defendant "not only had permission to use the apartment of his friend, but also had a key to the apartment with which he admitted himself on the day of the search and kept possessions in the apartment." *Id.* at 149 (discussing *Jones*, 362 U.S. at 259).

Thus, the Court's discussions of permission in *Byrd*, *Rakas*, and also *Jones*, suggest that having permission from the authorized owner or renter of the premises searched is a prerequisite to establishing standing. In *Byrd*, the defendant had permission. 138 S. Ct. at 1524 ("With the rental keys in hand, Reed returned to the parking lot and gave them to Byrd."). In *Rakas*, the Court held that the passengers did not have standing *even though* they had permission. 439 U.S. at 148-49. And in *Jones*, the defendant had permission to use the apartment, kept a key to the apartment, and kept belongings there. 362 U.S. at 259. Accordingly, the Court should hold here that failure to obtain permission from the authorized owner or renter automatically precludes standing and bars the defendant from challenging the government's physical search of that area.

Petitioner cannot show that she had sufficient permission to rent and operate the rental vehicle. She bore the burden of showing "she had the permission of the authorized driver." *See United States v. Thomas*, 447 F.3d 1191, 1197 (9th Cir. 2006) (internal citations omitted). As an unauthorized driver, Petitioner "only has standing to challenge the search of a rental automobile if [s]he received permission to use the rental car from the authorized renter." *Id.* at 1199; *see also United States v. Muhammad*, 58 F.3d 353, 355 (8th Cir. 1995) (holding that the defendant must "make some additional affirmative showing of *consensual* possession to satisfy the standing requirements") (emphasis added); *United States v. Gomez*, 16 F.3d 254, 256 (8th Cir. 1994)

(suggesting that lack of evidence of "direct authority from the owner" precludes standing); *United States v. Sanchez*, 943 F.2d 110, 114 (1st Cir. 1991) (holding that the defendant must show "a more intimate relationship with the car's owner or a history of regular use of the [car]").

The record in this case supports the finding that Petitioner lacked permission to rent the vehicle she drove on the day of the search. Although Lloyd did not expressly revoke Petitioner's authority to rent vehicles on Lloyd's account, *see* R. at 20, the record makes clear that she failed to obtain "permission to use the rental car from the authorized renter." *See Thomas*, 447 F.3d at 1199 (emphasis added). At best, Petitioner can show only that she previously had permission to rent vehicles on Lloyd's account during their relationship. R. at 18-19. But when the relationship ended, so too did her authority to rent vehicles on Lloyd's account. *See* R. at 20 ("I told her I tried to distance myself from her in that letter."). Fatal to her claim, Petitioner cannot show that she had permission to continue renting vehicles after the relationship ended. Nor can she show "direct authority from [Lloyd]" permitting her to rent the January 3 vehicle. *See Gomez*, 16 F.3d at 256. The decisions of the district court and court of appeals both support this conclusion. The district court stated that it was "unconvinced that [Petitioner] had adequate permission from Ms. Lloyd to rent cars in Ms. Lloyd[']s name." R. at 6. The court of appeals directly concluded that Petitioner "did not get explicit permission from the holder of the rental agreement to rent vehicles through the holder's account." R. at 11.

The Court's decisions in *Byrd* and *Rakas* suggest that a defendant, at the very least, must have permission to possess the rental car in order to establish standing. Because Petitioner cannot show that she obtained permission to rent the vehicle she operated on January 3, the Court should hold that Petitioner lacks standing to challenge the government's search of the vehicle.

2. Petitioner lacks standing because her presence was "wrongful."

In addition to Petitioner's failure to obtain permission, her presence in the rental vehicle was "wrongful" and therefore cannot confer standing. The Court in *Byrd* recognized an "important qualification" – that a defendant can only have standing if her presence at the scene of the search was legitimate. 138 S. Ct. at 1529. A defendant lacks standing to challenge a search if her presence is "wrongful," such as a burglar in a house where she has no right to be or a car thief's presence in a stolen car. *Id.* (quoting *Rakas*, 439 U.S. at 141 n.9). The *Byrd* Court, however, remanded the question of whether one who "intentionally uses a third party to procure a car by a fraudulent scene for the purpose of committing a crime is no better situation than a car thief." *Id.* at 1522-23.

The Court should recognize here that Petitioner's fraudulent acts defeat her assertion of standing. Courts of appeals recognize that a person has no legitimate privacy interest in property obtained by theft or fraud. *See United States v. Johnson*, 584 F.3d 995, 1002 (10th Cir. 2009) (finding subjective expectation of privacy in a storage unit obtained by fraud was "not a legitimate expectation that society is prepared to honor") (internal citation omitted); *United States v. Caymen*, 404 F.3d 1196, 1201 (9th Cir. 2005) ("[O]ne who takes property by theft or fraud cannot reasonably expect to retain possession and exclude others from it once he is caught."). Similarly here, Petitioner obtained the rental car through a fraudulent transaction: she used Lloyd's YOUBER account to rent a vehicle in Lloyd's name, without Lloyd's permission and in violation of YOUBER policy, and then used that vehicle to commit a crime. R. at 3, 12, 19. As such, Petitioner "is no better situated than a car thief." *See Byrd*, 138 S. Ct. at 1531. The Court should hold that Petitioner had no reasonable expectation of privacy in the rental vehicle, and therefore lacks standing to challenge the government's search.

II. THE GOVERNMENT DID NOT CONDUCT A SEARCH WHEN IT ACQUIRED YOUBER'S LOCATION RECORDS

The Fourth Amendment protects an individual from a warrantless government search under two legal frameworks. The government conducts a search if it "violates a subjective expectation of privacy that society recognizes as reasonable." *Kyllo v. United States*, 533 U.S. 27, 33 (2001). The government also conducts a search if it engages in "government trespass" and "obtains information by physically intruding on a constitutionally protected area." *United States v. Jones*, 565 U.S. 400, 406 n.3 (2012). Petitioner commonly used another person's YOUBER account to rent vehicles, and on multiple occasions used those vehicles "to commit crimes." R. at 2, 12. Each time she voluntarily rented a vehicle, YOUBER collected a record of her location information while she operated the vehicle. R. at 29. The government's acquisition of those location records did not constitute a Fourth Amendment search under either legal framework.

The third-party doctrine provides that an individual "lacks a reasonable expectation of privacy in information [s]he voluntarily turns over to third parties." *Carpenter v. United States*, 138 S. Ct. 2206, 2216 (2018) (quoting *Smith v. Maryland*, 442 U.S. 735, 744 (1979)). Petitioner would have this Court expand its "narrow" holding in *Carpenter*, where the Court declined to apply the doctrine to justify the government's acquisition of cell-site location information ("CSLI"). *See id.* at 2220. Because the "novel circumstances" and "unique nature" of CSLI are not present here, *see id.* at 2217, the third-party doctrine controls the outcome of this case. Petitioner cannot claim a legitimate expectation of privacy in the location data she shared with YOUBER each time she used another person's account, voluntarily connected her phone to the vehicle, then used the vehicle to commit a crime. Nor did the government "physically occup[y] private property for the purpose of obtaining information." *Jones*, 565 U.S. at 404. Accordingly, the government did not conduct a Fourth Amendment search when it acquired YOUBER's location records.

A. Petitioner Has No Legitimate Expectation of Privacy In The Location Data.

Each time Petitioner rented a YOUBER vehicle, she purposely and voluntarily connected her phone to the vehicle through Bluetooth and GPS. R. at 2, 23. Because she undertook a voluntary action, the third-party doctrine controls the outcome of this case. Moreover, she rented each vehicle from another person's account in violation of YOUBER policy. R. at 3. Petitioner therefore maintains no legitimate expectation of privacy in the location data YOUBER collected, and the government's acquisition of those records does not constitute a Fourth Amendment search.

1. The third-party doctrine cases establish that Petitioner generally lacks a legitimate expectation of privacy in information she shared with a third-party.

"This Court consistently has held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." *Smith*, 442 U.S. at 744-45. Where, as here, an individual voluntarily shares information with a third-party, "the Government is typically free to obtain such information from the recipient without triggering Fourth Amendment protections." *Carpenter*, 138 S. Ct. at 2216. The Court in *Carpenter* declined to apply the third-party doctrine to the government's acquisition of CSLI, but did so because cell phones are "indispensable to participation in modern society" and cell phone companies collect CSLI "without any affirmative act on the part of the user." *Id.* at 2220. Because those "novel circumstances" are not present here, *id.* at 2217, the third-party doctrine controls the outcome of this case.

The Court established in *United States v. Miller* that an individual "takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government." 425 U.S. 435, 443 (1976). There, the Court invoked the third-party doctrine to conclude that the defendant could not claim Fourth Amendment protection against the government's acquisition of banking information "voluntarily conveyed to the banks and exposed . . . in the ordinary course of business." *Id.* at 442. The banking records were not the defendant's

"private papers," the Court explained, because he could "assert neither ownership nor possession" of the records. *Id.* Rather, they were "the business records of the banks." *Id.* Similarly here, Petitioner cannot assert "ownership" or "possession" of the location records YOUBER collected. For one, they are business records YOUBER collected to ensure the security of its vehicles. R. at 29. For another, even if someone other than YOUBER *could* assert ownership of the records, that person would be Martha Lloyd, not Petitioner, because each vehicle was rented in Lloyd's name. R. at 2. Thus, even under an expansive reading of *Miller*, Petitioner's argument fails.

Further supporting the conclusion that Petitioner has no legitimate expectation of privacy in the location information she shared with YOUBER, the Court in *Smith v. Maryland* held that an individual had no expectation of privacy in the records of telephone numbers he "voluntarily conveyed . . . to the telephone company." 442 U.S. 735, 744 (1979). When the defendant used his phone and "exposed that information" to the telephone company, the Court explained, he "assumed the risk that the company would reveal to the police the numbers he dialed." *Id.* (internal quotation marks omitted). In this case, YOUBER was equally "free to record" the location information Petitioner disclosed each time she availed herself of YOUBER's services. *See id.* at 745. Petitioner assumed the risk YOUBER would share that information with law enforcement, and cannot claim Fourth Amendment protection against the government's acquisition of that information.

The Court's recent decision in *Carpenter v. United States*, 138 S. Ct. 2206 (2018), does not support Petitioner's argument. The *Carpenter* Court declined to invoke the third-party doctrine because of the "novel circumstances" and "unique nature" of CSLI. *Id.* at 2217. CSLI is a "time-stamped record" generated "[e]ach time the phone connects to a cell site." *Id.* at 2211. "Virtually any activity on the phone generates CSLI," the Court explained, "including incoming calls, texts, or e-mails and countless other data connections that a phone makes when checking for news,

weather, or social media updates." *Id.* at 2220. The government had acquired a 127-day record of CSLI, which the Court characterized as "near perfect surveillance" and "an all-encompassing record of the holder's whereabouts." *Id.* at 2217, 2218. The Court held that government acquisition of the CSLI constituted a search because it "invaded Carpenter's reasonable expectation of privacy in the *whole* of his physical movements." *Id.* at 2219 (emphasis added).

The *Carpenter* Court made sure to recognize that its decision was "a narrow one." *Id.* The Court did not express a view on other forms of location data, such as "real-time CSLI or 'tower dumps.'" *Id.* Nor did it "disturb the application of *Smith* and *Miller*" or the application of the third-party doctrine to "other business records that might incidentally reveal location information." *Id.* Accordingly, the *Carpenter* holding does not apply to cases, like this one, that do not involve similarly "novel circumstances." *See id.* at 2217.

2. Carpenter *does not apply because the "novel circumstances" and "unique nature" of CSLI are not present here.*

Petitioner would have the Court broadly expand the *Carpenter* holding to apply to location data voluntarily and affirmatively shared with YOUBER. In *Carpenter*, the Court declined to apply the third-party doctrine for two key reasons: (1) CSLI provides a "continuous" and "all-encompassing record of the holder's whereabouts"; and (2) cell phone companies collect CSLI "without any affirmative act on the part of the user." *Id.* at 2219-20. But neither of those "novel circumstances" apply to YOUBER's collection of location data. *See id.* at 2217. Accordingly, the third-party doctrine applies here, and Petitioner cannot claim Fourth Amendment protection in the location data she shared with YOUBER.

The first reason the location data in differs from CSLI and *Carpenter* is that YOUBER's collection of location data does not reveal an "all-encompassing" record of the user's location. *See id.* at 2217. The *Carpenter* Court heavily relied on the inherently "revealing nature" of CSLI in

distinguishing *Miller* (bank records) and *Smith* (dialed telephone numbers). *Id.* After all, cell phone carriers "continuously" collect CSLI, and this record reveals a "detailed chronicle of a person's physical presence compiled every day, every moment, over several years." *Id.* at 2216, 2220. Here, however, YOUBER collects location information only while a user's phone is connected to the vehicle and only for the duration of the rental period. R. at 22. This period never exceeds seven days, the maximum length of time for which a person may rent a YOUBER vehicle. R. at 23. Thus, while there are virtually "no limitations on the revealing nature of CSLI," *Carpenter*, 138 S. Ct. at 2219, YOUBER's limited collection of location data is distinguishable and does not rise to the level of "near perfect surveillance" that the petitioner demonstrated in *Carpenter*. *Id.* at 2218.

The limited nature of YOUBER's data collection exemplifies why Petitioner's reliance on *Carpenter*'s holding is misguided. The *Carpenter* Court held: "[W]hen the Government accessed CSLI from the wireless carriers, it invaded Carpenter's reasonable expectation of privacy in the **whole of his physical movements**." *Id.* at 2219 (emphasis added). Here, YOUBER simply did not collect location data revealing the "whole of [Petitioner's] physical movements." *See id.* Her argument fails because YOUBER's records only revealed *some* of her movements, captured only when she operated YOUBER vehicles on public roads, and never for more than seven days. R. at 4, 22, 23.

The Court has already held that "[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." *United States v. Knotts*, 460 U.S. 276, 281 (1983). Granted, the Court has also suggested that "with more pervasive tracking, . . . longer term GPS monitoring of even a vehicle traveling on public streets constitutes a search." *Carpenter*, 138 S. Ct. at 2220 (citations omitted). Even still, "relatively short-term monitoring of a person's movements on public streets accords with

expectations of privacy that our society recognize[s] as reasonable." *Jones*, 565 U.S. at 430 (Alito, J., concurring in judgment). Because no rental period exceeded seven days, the Court should find that YOUBER engaged in "short-term monitoring" consistent with Fourth Amendment principles.

The second reason *Carpenter* is inapplicable is that Petitioner took "affirmative act[s]" to connect her phone to each vehicle before sharing her location. *See Carpenter*, 138 S. Ct. at 2220. The *Carpenter* Court relied on the fact that individuals do not *voluntarily* expose CSLI to carrier companies. *Id.* After all, cell phones are so prevalent today "that carrying one is indispensable to participation in modern society," and cell phone companies record CSLI "without any affirmative act on the part of the user beyond powering up." *Id.* The location data in this case, however, is far different. Petitioner's choice to rent a YOUBER vehicle certainly was not "indispensable to participation in modern society." *See id.* Nor did YOUBER collect her location data "without any affirmative act on the part of [Petitioner]." *See id.* Instead, she made the active choice to rent and operate a YOUBER vehicle, each time voluntarily connected her phone to the vehicle, and only then did YOUBER collect her location data. R. at 2, 22.

Moreover, Petitioner used Martha Lloyd's account to rent each vehicle, and was not the registered renter of any vehicle she operated. R. at 2. In *Carpenter*, the cell phone service accounts belonged to the defendant. 138 S. Ct. at 2212. Here, however, Petitioner effectively borrowed Lloyd's account. R. at 2. Her argument attempts to advance a theory that she should maintain a legitimate expectation of privacy in anything she picks up, borrows, or otherwise uses – as if *Carpenter* had held that a person has a legitimate expectation of privacy in CSLI from a cell phone borrowed from a friend. But *Carpenter* did not hold so, and Petitioner cannot claim Fourth Amendment protection in the location data shared through Lloyd's account. The government's acquisition of that information therefore did not constitute a search.

3. *Petitioner cannot claim a legitimate expectation of privacy in the location data.*

The government did not conduct a Fourth Amendment search when it acquired YOUBER's collection of location data because Petitioner lacked a subjective expectation of privacy in that data. And even if she did maintain a subjective expectation of privacy, the third-party doctrine makes clear that such an expectation would not be objectively reasonable. *See Smith*, 442 U.S. at 743-44 ("This Court consistently has held that a person has no legitimate expectation of privacy in information [s]he voluntarily turns over to third parties.").

Petitioner maintained no subjective expectation of privacy in the location data she shared with YOUBER. It is true that Petitioner did not initially register the YOUBER account she regularly used, meaning that she never expressly accepted YOUBER's term of release permitting YOUBER to track her location while she operated a YOUBER vehicle. At the evidentiary hearing, Lloyd testified that she, not Petitioner, registered the account and accepted YOUBER's terms and conditions. R. at 20. Even still, the court of appeals found that Petitioner was "constructively aware of the collection of the data, and that she voluntarily gave up such information to a third party." R. at 15. The court of appeals was correct. Petitioner rented each vehicle by "activating the GPS and Bluetooth functions on [her] cellular device." R. at 14. Thus, she knew that renting a YOUBER vehicle required location-tracking functions on her phone, and nothing in the record indicates that she subjectively expected that these records were her private property or would remain private.

Nor would any subjective expectation be *objectively reasonable*. The third-party doctrine makes clear that Petitioner "has no reasonable expectation of privacy in information [s]he voluntarily turns over to third parties." *Smith*, 442 U.S. at 743-44. Although the Court declined to apply the doctrine in *Carpenter*, those "novel circumstances" are not present in this case. 138 S. Ct. at 2217. *Carpenter* was an outlier, not the norm, and it did not "disturb the application of *Smith*

and *Miller*." *Id.* at 2220. Because Petitioner used Lloyd's account to rent each vehicle and voluntarily connect her phone to each vehicle through GPS and Bluetooth interactions, she cannot claim a reasonable expectation of privacy in the location data she shared. R. at 2, 14.

The third-party doctrine is necessary "to maintain the technological neutrality of the Fourth Amendment." Orin Kerr, *The Case for the Third-Party Doctrine*, 107 MICH. L. REV. 561, 564 (2009). Without it, "savvy wrongdoers could use third-party services in a tactical way to enshroud the entirety of their crimes in zones of Fourth Amendment protection." *Id.* The doctrine thus serves as a necessary safeguard against wrongdoers, like Petitioner here, seeking to take advantage of technology for the purpose of furthering criminal endeavors. The Court, therefore, should hold that Petitioner lacked a legitimate expectation of privacy in the location data she shared with YOUBER, and that the government's acquisition of that data did not constitute a Fourth Amendment search.

B. The Government Did Not Conduct A Search Under The Property Framework.

The Government also did not conduct a "search" under the property-analysis because the government did not "obtain[] information by physically intruding on a constitutionally protected area." *See Jones*, 565 U.S. at 406 n.3. In *Jones*, the government "installed a GPS tracking device on the undercarriage of [the defendant's] Jeep while it was parked in a public parking lot." *Id.* at 403. The government then remotely monitored the vehicle for four consecutive weeks. *Id.* The *Jones* Court held that the government conducted a Fourth Amendment "search" because it "physically occupied private property for the purpose of obtaining information." *Id.* at 404.

A property-based argument fails for two reasons. First, Petitioner lacks any property interest in the location information she shared with YOUBER. In *Miller*, the Court decided the case on privacy grounds, but stated that "respondent can assert neither ownership nor possession" of the banking records at issue. 425 U.S. at 440. "Instead," the Court explained, "the[y] are the

business records of the banks." *Id.* Similarly here, Petitioner cannot assert any property interest in YOUBER's business records, and a property-based Fourth Amendment argument necessarily fails.

Second, Petitioner's argument fails because the government did not "physically occupy [Petitioner's] property for the purpose of obtaining information." *See Jones*, 565 U.S. at 404. The government's acquisition of YOUBER's location information was the result of YOUBER's compliance with a subpoena, *see* R. at 3, not the government's physical intrusion of any constitutionally protected area. Accordingly, Petitioner cannot assert property-based Fourth Amendment protection from the government's acquisition of that information.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully Submitted,

Team R5

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October 6, 2019