No. 4-422

IN THE

Supreme Court of the United States

Jayne Austin,

Petitioner,

v.

United States of America,

Respondent.

BRIEF FOR THE PETITIONER

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STATEMENT OF THE ISSUES

1. Should an individual have standing to contest a search of a rental vehicle when the individual rented the vehicle on another's account without that other person's permission?

2. Should the acquisition of location data of a rental vehicle constitute a "search" within the meaning of the Fourth Amendment and *Carpenter v. United States*?

STATEMENT OF FACTS

Petitioner Jayne Austin is a naturalist and minimalist who prides herself on an immaterial lifestyle. R. at 1. However, she uses YOUBER, the relatively new car rental software application (app) available on mobile devices. R. at 2. YOUBER allows a person (*i.e.*, a user) to rent YOUBER-owned cars at a fixed hourly rate. R. at 23. The rental agreement between YOUBER and a user is made in the app. R. at 23. The YOUBER app is accessible via an individual's cellphone, which connects users to YOUBER cars via Global Positioning Services (GPS). R. at 2. Only YOUBER users may rent YOUBER cars. R. at 2.

Under their Corporate Privacy Policy, YOUBER directly collects information users provide. R. at 29. YOUBER also automatically collects information as users browse through YOUBER mobile applications, sites, and other services, and information from third parties. R. at 29. Automatically collected information includes a user's real-time GPS location. R. at 29.

To use the app, a user must accept YOUBER's monitoring terms. R. at 23. Only during the initial signup period, via their corporate privacy policy terms, is a user notified about YOUBER's real-time GPS location monitoring. R. at 23. YOUBER allows one user to use the login information of another user and does not notify the other party of the data YOUBER collects. R. at 24. Austin does not have a YOUBER account of her own; she uses the account of her on-and-off-again partner, Martha Lloyd. R. at 18.

During their relationship, Lloyd shared her YOUBER login information with Austin and allowed Austin to use her login for everything. R. at 18. Lloyd also authorized Austin as a user on her credit card and has not removed her from account access. R. at 19. Since their falling out, R. at 18, Lloyd has not given Austin express permission to use her information and Austin has not asked to continue using it. R. at 19. However, Lloyd has not changed any of her account

passwords and has not expressly rescinded permission. R. at 19-20. Although Lloyd switched over to a new ridesharing app and cancelled her credit card on YOUBER, she did not cancel Austin's authorized credit card attached to the YOUBER account. R. at 20.

On January 3, 2019, Officer Charles Kreuzberger stopped Austin, who was driving a rented YOUBER vehicle (a 2017 Black Toyota Prius, license plate number: R0LL3M), for failure to stop at a stop sign. R. at 2. Austin showed Officer Kreuzberger her license and the YOUBER app on her cell phone. R. at 2. Officer Kreuzberger noticed that the YOUBER rental agreement did not list Austin as the renter and, as such, Officer Kreuzberger told Austin that he did not need her consent to search the vehicle. R. at 2-3.

Upon a search of the vehicle's trunk, where Austin kept her personal effects, Officer Kreuzberger found a BB gun modeled after a .45 caliber handgun with the orange tip removed, a maroon ski mask, and a duffel bag containing $50,000 and blue dye packs. R. at 3. Officer Kreuzberger notated in his report that he believed the car to be "lived in," as there were additional items in the vehicle, such as clothes, an inhaler, three pairs of shoes, a collection of records, a cooler full of food and drink, bedding, and a pillow. R. at 3.

During the stop, Officer Kreuzberger received a dispatch to look out for 2017 Black Toyota Prius with a YOUBER logo that was being driven by a suspect who allegedly robbed a nearby bank. R. at 3. A surveillance camera caught a partial license plate number "R0L." R. at 3. Because the items found in Austin's vehicle seemingly matched the items the suspect was seen wearing and the partial match of the license plate, Officer Kreuzberger arrested Austin under suspicion of bank robbery. R. at 3.

Further investigation by Detective Boober Hamm revealed five open bank robbery cases occurring between October 15, 2018 and December 15, 2018 that matched the modus operandi

of the January 3, 2019 robbery. R. at 3. Because Detective Hamm saw that there was a YOUBER logo on the vehicle Austin used on the date of her arrest, he served a subpoena *duces tecum*, not a warrant, on YOUBER to obtain all the GPS information related to the account Austin used between October 3, 2018 and January 3, 2019. R. at 3.

Surveillance footage from the banks showed that a 2017 Black Toyota Prius was used at four of the five previous bank robberies. R. at 4. Records from YOUBER revealed that Lloyd's account was used to rent cars in the locations and at the times of each of the other five robberies. R. at 4. After reviewing all the mapping data sent by YOUBER, Detective Hamm recommended charges with the U.S. Attorney's Office to have Austin charged with six counts of bank robbery under 18 U.S.C. § 2113, Bank Robbery and Incidental Crimes. R. at 4.

SUMMARY OF THE ARGUMENT

This Court should reverse the District Court for the Southern District of Netherfield's holding that an individual cannot have a property interest in a vehicle fraudulently leased and has no reasonable expectation of privacy in a vehicle she shares with third parties. This Court should also reverse the holding that Austin, and other YOUBER users, have no property interest, nor reasonable expectation of privacy, in the data or information collected by a third party.

The lower courts erred in assessing Austin's lawful possession of the rental car and whether Austin had the right to exclude others. To be in lawful possession of a rental car, Austin must have received permission from Lloyd, the authorized user. Lloyd granted Austin lawful possession of any rental car she rented under Lloyd's YOUBER account because Lloyd allowed Austin's continued use without any express or implied revocation of permission.

When an individual is in lawful possession of property, that individual possesses the attendant right to exclude others from the property. The right to exclude is one of the main rights

attached to property and, in that right, one who lawfully possesses or controls the property will likely have a legitimate expectation of privacy by virtue of the right. Here, the lower courts concluded that, given Austin's temporary and limited relationship with the rental car supplied to her by YOUBER, Austin did not have a property interest or expectation of privacy in the rental car. The lower court also concluded that Austin did not have a sufficiently sustained relationship with the vehicle to garner a legitimate property interest. These conclusions are patently false.

Lloyd was an authorized renter of YOUBER cars and provided Austin with unrestricted access to her account. Additionally, Austin's right to exclude did not depend on the amount of time she spent in the rented YOUBER car. Thus, Austin's motion to suppress the evidence obtained during Officer Kreuzberger's search of the rented YOUBER car should be granted.

The lower courts also erred in denying Austin's motion to suppress the location data YOUBER provided to Detective Hamm. The Fourth Amendment protects the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures. Under *Carpenter vs. United States*, the government's acquisition from a third party of an individual's historical location data was held a search under the Fourth Amendment. That the government obtained the information from a third party did not overcome the defendant's claim to Fourth Amendment protection. Here, the lower courts incorrectly concluded that Austin's exposure of her information to YOUBER for a "maintained period" served as a forfeiture of her reasonable expectation of privacy.

Similar to this Court's conclusion in *Carpenter*, Austin had a reasonable expectation of privacy in the whole of her physical movements. More precise than the CSLI in *Carpenter*, here, GPS monitoring of a vehicle tracks every movement a person makes, and generates a precise, comprehensive record of those movements. Even if Austin voluntarily turned over her GPS

location data to YOUBER through her voluntary use of the app, she maintained a legitimate expectation of privacy because the type of broad search Detective Hamm requested spanned over a prolonged period beyond the scope of what was actually necessary to solve the bank robberies. Any reservations the dissenting Justices in *Carpenter* had in expanding the reach of Fourth Amendment protections are nullified by Detective Hamm's unreasonable broad search unsupported by probable cause. Thus, Austin's motion to suppress the location data YOUBER provided to Detective Hamm should be granted.

STANDARD OF REVIEW

Standing is a question of law that this Court reviews de novo. *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1176 (9th Cir. 2011). De novo review means that this Court should view this case from the same position as the district court. *Lawrence v. DOI*, 525 F.3d 916, 920 (9th Cir. 2008). This Court must consider this matter anew, as if no decision previously had been rendered. *Freeman v. DirecTV, Inc.*, 457 F.3d 1001, 1104 (9th Cir. 2006). Review of the entire record is "independent," *Agyeman v. INS*, 296 F.3d 871, 876 (9th Cir. 2002), or "plenary," *Stilwell v. Smith & Nephew, Inc.*, 482 F.3d 1187, 1193 (9th Cir. 2007). No deference is given to the district court. *Barrientos v. Wells Fargo Bank, N.A.*, 633 F.3d 1186, 1188 (9th Cir. 2011).

To determine whether the acquisition of location data of a rental vehicle is a "search" within the meaning of the Fourth Amendment and *Carpenter* requires the consideration of legal concepts and the exercise of judgment about the values that animate the legal principles. *See Smith v. Commissioner*, 300 F.3d 1023 (9th Cir. 2002). This mixed question of law and fact is reviewed de novo. *Mathews v. Chevron Corp.*, 362 F.3d 1172, 1180 (9th Cir. 2004). A mixed question of law and fact exists when "primary facts are undisputed and ultimate inferences and legal consequences are in dispute." *Suzy's Zoo v. Comm'r of Internal Revenue*, 273 F.3d 875,

878 (9th Cir. 2001). Here, the parties have stipulated to the relevant facts. The lower courts' findings that the acquisition of location data of a rental vehicle does not constitute a "search" within the meaning of the Fourth Amendment and *Carpenter v. United States* is an ultimate inference from undisputed facts and, thus, is a mixed question of law and fact reviewed de novo.

ARGUMENT

I. AUSTIN HAS STANDING TO CHALLENGE DETECTIVE KREUZBERGER'S SEARCH BECAUSE SHE HAD LAWFUL POSSESSION OF THE CAR, WHICH GRANTED HER A REASONABLE EXPECTATION OF PRIVACY.

"The determination of a motion to suppress" may not be "materially aided by labeling the inquiry . . . as one of standing," but rather as a "substantive question of whether or not . . . Fourth Amendment rights [have been] infringed by the search and seizure." *Rakas v. Illinois*, 439 U.S. 128, 133-34 (1978). The traditional property-based understanding of one's Fourth Amendment right to be secure in one's "persons, houses, papers, and effects," U.S. Const. amend. IV, has come to attach when an individual has a "reasonable expectation of privacy." *Katz v. United States*, 389 U.S. 347, 360-61 (1967) (Harlan, J., concurring).

"Someone in otherwise lawful possession and control of a rental car has a reasonable expectation of privacy in it even if the rental agreement does not list him or her as an authorized driver." *Byrd v. United States*, 138 S. Ct. 1518, 1524 (2018). The two-part *Katz* test requires that the challenger demonstrate a subjective expectation of privacy in the place searched, and that the expectation be objectively reasonable. *United States v. Paulino*, 850 F.2d 93, 97 (2d Cir. 1988). This Court later clarified that the test "supplements rather than displaces, 'the traditional property-based understanding of the Fourth Amendment.' " *Byrd*, 138 S. Ct. at 1526 (2018) (quoting *Florida v. Jardines*, 569 U.S. 1, 11 (2013)). Here, Austin had lawful possession of the rental car and the right to exclude others, granting her a reasonable expectation of privacy.

A. Austin's Possession and Control of the Rental Car Created a Property Interest in the Car Which Extended Her the Right to Exclude Others.

When an individual is in lawful possession of property, the right to exclude attaches, which comprises a legitimate expectation of privacy. *Byrd*, 138 S. Ct. at 1527. Standing to challenge the admissibility of evidence "must 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." *Rakas*, 439 U.S. at 145. But the two concepts—of property and understandings that are recognized by society—are often linked. *Byrd*, 138 S. Ct. at 1527. "One of the main rights attaching to property is the right to exclude others" and "one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of the right to exclude." *Rakas*, 439 U.S. at 145 (citing 2 W. Blackstone, Commentaries, ch. 1).

1. *Austin held the right to exclude despite Lloyd's status as a renter, opposed to an owner.*

This Court "sees no reason why the expectation of privacy that comes from lawful possession and control and the attendant right to exclude would differ depending on whether the car in question is rented or privately owned by someone other than the person in current possession of it." *Byrd*, 138 S. Ct. at 1528. In *Jones v. United States*, a petitioner had a legitimate expectation of privacy in an apartment that had been leased by a third party. *Jones v. United States*, 362 U.S. 257, 272-73 (1960). The petitioner in *Jones*, who had permission to use the apartment, had a key, held possessions there, and had "complete dominion and control over the apartment and could exclude others from it." *Rakas*, 439 U.S. at 149. Although the authorized user in *Jones* merely rented, not owned, the apartment, allowing the petitioner to stay

in the apartment also granted the petitioner the right to exclude from the apartment. *Byrd*, 138 S. Ct. at 1528.

Similarly, in *Byrd v. United States*, the authorized user of a rental, then transferred her right to exclude the petitioner when she permitted the petitioner to drive the rental car. *Id*. at 1524, 1528. This Court held that the petitioner's right to exclude could not be denied based on the fact that the authorized user rented instead of owned the car. *Id*. at 1528.

Here, as in *Byrd*, Lloyd was an authorized renter, not owner of the rental car, and provided Austin with access to rent cars through the YOUBER app. R. at 2, 18-19. With this permission, Lloyd's right to exclude others was transferred to Austin. *See Byrd*, 138 S. Ct. at 1528. Austin had sole possession and control of the rental car at the time of the search, R. at 2-3; therefore, she had the right to exclude others. *See Byrd*, 138 S. Ct. at 1523.

2. *Austin's possession, although temporary, included the right to exclude.*

While "legitimate presence on the premises, standing alone . . . creates too broad a gauge for measurement of Fourth Amendment rights," *Rakas,* 439 U.S. at 259, sole possession and control, however temporary, may be awarded a legitimate expectation of privacy. *See Katz v. United States*, 389 U.S. 347 (1967). In *Katz*, the petitioner occupied a phone booth, "shut[] the door behind him, and pa[id] the toll that permit[ted] him to place a call." *Id*. at 361. This created a "temporarily private place whose momentary occupants' expectations of freedom from intrusion [was] recognized as reasonable." *Id*. Consequently, an individual in temporary possession of a rental car, like someone temporarily in a phone booth, may also have the right to exclude, thus, may recognize a reasonable expectation of privacy.

Austin's right to exclude does not depend on the amount of time she spent in the car prior to the search. Here, the district court stated that Austin had a "temporary and limited relationship

with the rental car," so she did not have a "legitimate property interest or expectation of privacy." R. at 6. But in *Byrd*, the officer searched the petitioner's rental car " . . . three hours, or roughly [after driving] half the distance to Pittsburgh," after the petitioner obtained possession of the rental car. *Byrd*, 138 S. Ct. at 1524. In *Byrd*, this Court held that an unauthorized rental car driver may hold a reasonable expectation of privacy in a rental car, and did not establish a time requirement on the driver's possession in order to obtain the Fourth Amendment right. *Id*. at 1531. The search of Austin's rental car occurred "later" on the day that she rented the car. R. at 2. The district court erred by stating that Austin's length of possession indicated whether Austin had a legitimate expectation of privacy. R. at 6. Austin had possession and control of the rental car at the time of the search which afforded her the right to exclude.

B. Austin Had an Objectively Reasonable Expectation of Privacy in the Rental Car Because Austin Maintained *Lawful* Possession at the Time of the Search.

Even when the petitioner otherwise had possession and control of the car, "wrongful presence at the scene of a search," would not "enable a defendant to object to the legality of the search." *Byrd*, 138 S. Ct. at 1529. This Court's "cases make clear" that one with unlawful possession "lack[s] a legitimate expectation of privacy." *Id*. at 1524. If a petitioner has "no greater expectation of privacy than a car thief" then "he would lack a legitimate expectation of privacy" to challenge a Fourth Amendment violation. *Id*. Although the *Byrd* decision made clear that an individual in unlawful possession of a car would not have a reasonable expectation of privacy, this Court declined to review the question of whether Byrd's presence in the car was "wrongful" or "unlawful." *Id*. at 1529-30.

1. *Lloyd's grant of YOUBER access to Austin rendered Austin's possession lawful.*

"To mount a challenge to a search of a vehicle, defendants must show, among other things, a legitimate basis for being in it, such as permission from the

owner." *United States v. Lyle*, 919 F.3d 716, 729 (2019) (quoting *United States v. Ponce*, 947 F.2d 646, 649 (2d Cir. 1991)). In *Byrd*, this Court suggested, but did not directly state, that an individual must receive permission from the authorized user in order to hold lawful possession of a vehicle. *Byrd*, 138 S. Ct. at 1528-30 (discussing *Jones*, in which the renter of a home granted possession to a third party and the Court held that the third party had a reasonable expectation of privacy). *Byrd* utilizes *Jones* to demonstrate one way in which an unauthorized user may obtain lawful possession, but does not use *Jones* to establish a permission requirement.

Here, the lower courts reasoned that Austin did not have a reasonable expectation of privacy in the rental car because Lloyd did not explicitly grant Austin authorization to rent the car which was searched on January 3, 2019. R. at 2, 6, 12. While explicit permission from Lloyd to rent the car certainly would have transferred a legitimate expectation of privacy to Austin, a lack of explicit permission does not destroy Austin's right to exclude. There are several facts here that imply Lloyd granted permission to Austin. Lloyd shared her YOUBER login information with Austin so that she could freely access and use Lloyd's YOUBER account to rent vehicles at her discretion. R. at 18-19. Additionally, Lloyd made no attempt to restrict Austin's use from her YOUBER account, before, at the time, or even after the traffic stop that occurred on January 3, 2019. R. at 20. Furthermore, although Lloyd removed her credit card from the YOUBER app, Lloyd was aware that Austin's authorized credit card was already attached to the app, which granted Austin continued access to YOUBER cars. R. at 19-20.

The lower court stated that Austin's "relationships with the vehicle and the YOUBER account" are "suspect in nature" because the actual renter was Austin's "on-and-off-again partner." The holding in *Byrd* did not acknowledge the significance of the relationship between authorized and unauthorized drivers as an indicator of whether the unauthorized driver had

lawful possession. *See Byrd*, 138 S. Ct. 1518 (2018). Whether a parent, friend, or a city owned phone booth, this Court has not indicated that the relationship between the authorized user who transferred possession and control to a third party, has any impact on the third party's reasonable expectation of privacy. *See Byrd*, 138 S. Ct. 1518; *Katz*, 389 U.S. 347; *Rakas*, 429 U.S. 145; *Jones*, 362 U.S. 257. While a close relationship between the authorized user and third party may be a factor in favor of the transfer of lawful possession, such a relationship is not required.

Here, the significance of Austin's connection with the car and YOUBER app is not deterred by her "on-and-off again" relationship with Byrd. The nature of Austin's access to the YOUBER app and her freedom, control, and access to YOUBER cars at anytime, adequately granted Austin lawful possession. The YOUBER app creates a rental agreement within the app when a user reserves a car. R. at 2. Austin, with login information granted by Lloyd, acted completely alone when she reserved the car, paid for the car, and picked up the car. R. at 2, 20. Lloyd easily could have updated her login information and denied Austin access to YOUBER, but she neglected to do so. R. at 19-20. Although Lloyd and Byrd were "kind of on a break" on January 3, 2019, this fact had no impact on Austin's access to the car. Her ability to access, control, and possess YOUBER cars remained the same. R. at 2, 18-10. Under *Byrd*, Lloyd's grant of access to Austin, paired with Austin's independent actions to gain access to the car, are sufficient to grant Austin lawful possession of the car.

2. *A violation of the rental agreement did not render Austin's possession unlawful.*

"[F]or Fourth Amendment purposes there is no meaningful difference between [an] authorized-driver provision and . . . other provisions . . . [that] do not eliminate an expectation of privacy." *Byrd*, 138 S. Ct. at 1529. "Few would contend that violating [rental car] provisions" like prohibitions on using one's cell phone or driving on certain roads "has anything to do with a

driver's reasonable expectation of privacy in [a] rental car." *Id*. *Byrd* demonstrates that "there may be countless innocuous reasons why an unauthorized driver might get behind the wheel of a rental car and drive it." *Id*. For example, if the authorized driver is drowsy and a friend, an unauthorized driver, drives the authorized driver to his destination. *Id*. A rental provision violation like this may lead to additional fees or loss of insurance coverage, but that "risk allocation has little to do with whether one would have a reasonable expectation of privacy in [a] rental car." *Id*.

Here, a violation of the YOUBER authorized user agreement does not equate to unlawful possession of the rental car. The YOUBER agreement states that only YOUBER users may rent YOUBER cars. R. at 2. Austin may have been in violation of the YOUBER agreement in renting and using the YOUBER car on January 3, 2019, but the violation had no impact on Austin's lawful possession of the YOUBER car or her right to exclude others.

3. *Absent fraud or intent to commit a crime, Austin's possession remained lawful*.

"[I]t may be that there is no reason that the law should distinguish between one who obtains a vehicle through subterfuge . . . and one who steals the car outright." *Byrd*, 138 U.S. at 1530. While this Court has held a "burglar playing his trade in a summer cabin during the off season" and car thief have no reasonable expectation of privacy, *Byrd* did not determine whether deceit or fraud would also destroy a possessor's Fourth Amendment standing. *Id*. at 1529-30 (citing examples provided in *Rakas*, 439 U.S. at 141).

Since *Byrd*, several opinions have demonstrated situations in which an unauthorized user has unlawful possession of car; all which may be distinguished from the facts here. *See Lyle*, 919 F.3d at 716. For example, in *Lyle*, the petitioner did not have a valid driver's license, so the court found he was in violation of the law by operating the vehicle. *Id*. at 729. This unlawful

possession destroyed the petitioners otherwise reasonable expectation of privacy. Also, in *United States v. Murray*, the court found that the petitioner was unlawfully on the premises because of the violation of a protection order. *United States v. Murray*, 352 F.Supp.3d 327, 333 (S.D. N. Y. 2019). Even in *Byrd*, though less severe than *Lyle* and *Murray*, the facts established that the authorized and unauthorized users arrived at the rental car place together with the intention to rent the car solely for the unauthorized driver's use without the knowledge or permission of the rental car company, *Byrd*, 138 S. Ct. at 1524, which could be characterized as fraud or deceit.

Here, the lower court stated the "possibility of illegality" of Austin's claims "deter standing," and the court paused due to the "suspect nature" of Austin's relationship to the car and the YOUBER account. R. at 11. Although the lower court acknowledged that Austin did not steal the car; nonetheless, the court held Austin was not entitled to a reasonable expectation of privacy. R. at 12. The lower court held that "an individual cannot have a valid property interest in a vehicle she has fraudulently leased" yet provided no evidence of fraud involved in Austin's process of renting the YOUBER car. *Id*. The court failed to demonstrate that the facts here, distinguished from the intentional deception in *Byrd*, rise to the level of fraud or deceit.

To the contrary, the evidence shows that Austin had no intent to mislead YOUBER. In *Byrd*, the unauthorized user waited outside while a friend rented the car for him. *Byrd*, 138 S. Ct. at 1524. The friend intentionally did not list the petitioner as an authorized driver and then immediately handed the keys over to the peritioner after signing the agreement. *Id.* Here, Austin rented the car through the YOUBER app, with Lloyd's account, not because YOUBER would not permit her to rent on her own account, but out of preference and convenience. R. at 1, 18. As a "naturalist and minimalist," Austin "prides herself on her immaterial lifestyle," which is

achieved by minimizing the use of modern devices such as credit cards and online accounts. R. at 1. Austin's YOUBER use through Lloyd's account does not indicate an intent to mislead YOUBER or fraudulently obtain a car.

There is also no evidence that Austin rented the car for the purpose of committing criminal activity. Austin rented YOUBER cars "in order to travel to work and protests." R. at 2. The officer noted that the car appeared to be "lived in" because the car contained personal effects such as a one of a kind record collection, food, and clothing. R. at 3. Austin had also lost access to her previous residence when Austin and Lloyd had a falling out. R. at 18. Austin did not rent the car for the purpose of criminal or fraudulent activity.

Austin maintained lawful possession of the car at the time of the search; therefore, Lloyd's right to exclude others from the car, transferred to Austin, which in turn, provided Austin with a reasonable expectation of privacy. Austin has standing to contest the search of her YOUBER car as a violation of her Fourth Amendment rights.

C. Remand is Necessary to Determine Whether Officer Kreuzberger Had Probable Cause.

"It is necessary to remand . . . to determine whether, even if [petitioner] had a right to object to the search, probable cause justified it in any event." *Byrd*, 138 S. Ct. at 1524. Fourth Amendment standing is not distinct from the merits and "is more properly subsumed under substantive Fourth Amendment doctrine." *Rakas*, 439 U.S. at 139. Unlike Article III standing, standing here is not a jurisdictional question and need not be discussed before addressing the merits of a Fourth Amendment claim." *Byrd*, 138 S. Ct. at 1530. In *Byrd*, the lower courts "deemed it unnecessary to consider whether the troopers had probable cause to search the car," and, on review, this Court concluded remand was necessary to make the probable cause

determination. *Byrd*, 138 S. Ct. at 1524. *Byrd* leaves discretion to the lower court to determine the order "in which these questions are best addressed." *Byrd*, 138 S. Ct. at 1531.

Here, the lower courts failed to address whether the officer had probable cause to search Austin's rental car. R. at 5-6, 10-11. Under *Byrd*, probable cause is indiscernible from the issue at hand—whether Austin had a reasonable expectation of privacy to exclude the officer from an unreasonable search. On remand, the probable cause determination may be made before the question of standing, in the order determined to be best by the reviewing court, so long as the matter is remanded, consistent with the holding in *Byrd*.

Austin has standing to challenge the admissibility of evidence obtained during the search of her rental car because she was in lawful possession and control of the rental car at the time of the search. Holding Austin's possession as unlawful in this instance would grant "police officers unbridled discretion to rummage at will among a person's private effects." *Byrd*, 138 S. Ct. at 1526 (quoting *Arizona v. Gant*, 556 U.S. 332, 345 (2009)).

II. THE BROAD ACQUISITION OF A VEHICLE'S LOCATION DATA IS A "SEARCH" WITHIN THE MEANING OF THE FOURTH AMENDMENT AND *CARPENTER*.

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. This Court has countlessly recognized that the "basic purpose of this Amendment . . . is to safeguard that privacy and security of individuals against arbitrary invasions by government officials." *Camara v. Mun. Court of S.F.*, 387 U.S. 523, 528 (1967). Our Founding Fathers crafted the Fourth Amendment as a "response to the reviled 'general warrants' and 'writs of assistance' of the colonial era, which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity." *Riley v. California*, 573 U.S. 373, 403 (2014). The Fourth Amendment gives "concrete expression to a right of the people which 'is

basic to a free society.' " *Camara*, 387 U.S. at 528. Here, law enforcement is infringed upon Austin's fundamental right by conducting a broad search of Austin's GPS location data obtained from a YOUBER car she rented.

A. *Carpenter* is Binding on Law When the Government Performs a Broad Search of an Individual's Location Data that is Obtained from a Third Party.

The government's installation of a GPS device on a target's vehicle, and its use to track the vehicle's movements constitutes a "search" within the Fourth Amendment. *United States v. Jones*, 565 U.S. 400, 404 (2012). By installing a GPS device, the government is physically occupying private property for the purpose of obtaining information. *Id*. In *Jones*, this court stated that "[w]e have no doubt that such a physical intrusion would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted." *Id*. at 404-05. However, whether the government employs its surveillance technology as in *Jones* or leverages the technology of a wireless carrier, this Court has held that an individual maintains a legitimate expectation of privacy in the record of his physical movements. *Carpenter v. United States*, 138 S. Ct. 2206, 2217 (2018).

In *Carpenter*, this Court was asked to determine whether the government conducted a search under the Fourth Amendment when it accessed historical cell phone records that provide a comprehensive chronicle of the user's past movements. *Carpenter*, 138 S. Ct. at 2211. There, police officers arrested four men suspected of robbing a series of Radio Shack and T-Mobile stores in Detroit. *Id*. at 2212. One of the men confessed that, over the previous four months, the group had robbed nine different stores in Michigan and Ohio. *Id*. The suspect identified 15 participating accomplices and gave the FBI some of their cell phone numbers. *Id*. The FBI then reviewed his call history to identify additional numbers that the suspect had called around the

time of the robberies. *Id*. Based on that information, the prosecutors applied for court orders to obtain cell phone records for the defendant and several other suspects. *Id*.

The government subpoenaed a third party cell service provider to obtain the cell-site sector information and cell-site location information (CSLI) for defendant's telephone, both at call origination and at termination for incoming and outgoing calls, during the four months when the string of robberies occurred. *Id*. at 2212. This data provided the actual physical location of the cell-site towers to which the defendant's cell phone would connect whenever the phone made or received a call. *Id*. Altogether, the government obtained 12,898 location points cataloging the defendant's movements, providing 127 days' worth of an "all-encompassing" record of the cell phone holder's whereabouts. *Id*.

This Court held that the government invaded the defendant's "reasonable expectation of privacy in the whole of his physical movements" when it accessed the defendant's CSLI from the wireless carriers. *Id*. at 2219. This Court recognized that, because an individual maintains a reasonable expectation of privacy "in the whole of his physical movements," the government must first obtain a search warrant for such data. *Id*. at 2221.

Much like GPS tracking of a vehicle, cell phone location information is "detailed, encyclopedic, and effortlessly compiled." *Carpenter*, 138 S. Ct. at 2216. GPS monitoring of a vehicle tracks "every movement" a person makes in that vehicle. *Id*. at 2215. As Justice Sotomayor pointed out in her concurrence in *Jones*, "GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations." *Jones*, 565 U.S. at 415; *see*, *e.g.*, *People v. Weaver*, 12 N.Y.3d 433, 441-442 (2009) ("Disclosed in [GPS] data . . . will be trips the indisputably private nature of which takes little imagination to conjure: trips to the psychiatrist,

the plastic surgeon, the abortion clinic, the AIDS treatment center, the strip club, the criminal defense attorney, the by-the-hour motel, the union meeting, the mosque, synagogue or church, the gay bar and on and on."). Justice Sotomayor stressed that "[a]warness that the government may be watching chills associational and expressive freedom," and that the net result is that GPS monitoring "may 'alter the relationship between citizen and government in a way that is inimical to democratic society.' " *Jones*, 565 U.S. at 416 (quoting *United States v. Cuevas-Perez*, 640 F.3d 272, 285 (7th Cir. 2011)).

The facts here are a hybrid of those in *Jones* and *Carpenter*, making them the perfect combination to warrant Fourth Amendment protections under *Carpenter*. The facts in *Jones* mirror those here in that they both deal with the more precise and comprehensive GPS monitoring. *See Jones*, 565 U.S. at 403; R. at 22. However, in *Jones*, the government physically occupied private property by installing the GPS tracking device on the vehicle. *Id*. Here, YOUBER tracks each user through their app using GPS technology from user's cell phones. R. at 22. The facts in *Carpenter* mirror those here in that they both deal with the government's acquisition of location data from a third party that provided an all-encompassing record of an individual's whereabouts. *See Id*. at 2218; R. at 3-4. However, in *Carpenter*, the location data generated by CSLI was less precise than the GPS location data here. *See Id*. at 2218. The combination of the similarities this case takes from both *Jones* and *Carpenter* more narrowly focuses this Court's attention on the excess data Detective Hamm obtained and the more precise nature of he data sought.

Broad searches of an individual's location data is exactly the kind of unreasonable search that the Fourth Amendment sought to protect against. Technology has progressed to the point where a person who wishes to partake in social, cultural, and political affairs of our society has no realistic choice but to expose to others a broad range of conduct that would previously have been

deemed private. *In re United States Order Authorizing the Release of Historical Cell-Site Info.*, 736 F. Supp. 2d 578, 582 (E.D.N.Y. 2010); *see also United States v. Pineda-Moreno*, 617 F.3d 1120, 1126 (9th Cir. 2010) (Kozinski, C.J., dissenting) ("There is something creepy and un-American about such clandestine and underhanded [continuous surveillance] . . . We are taking a giant leap into the unknown, and the consequences for ourselves and our children may be dire and irreversible."). Here, this Court should deem unreasonable under the Fourth Amendment any information obtained above and beyond what was actually necessary to solve alleged crimes.

B. The Government Does Not Have an Unrestrained Power to Request Location Data from a Third Party.

The "third party doctrine" provides that "if information is possessed or known by third parties, then, for purposes of the Fourth Amendment, an individual lacks a reasonable expectation of privacy in the information." Peter C. Ormerod & Lawrence J. Trautman, *A Descriptive Analysis of the Fourth Amendment and the Third-Party Doctrine in the Digital Age*, 28 Alb. L.J. Sci. & Tech. 73, 110 (2018). Historically, this Court consistently held that "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." *Smith v. Maryland*, 442 U.S. 735, 743-44 (1979); *see*, *e.g.*, *United States v. Miller*, 425 U.S. 435, 442-44 (1976). For example, in *Miller*, this Court held that a bank depositor has "no legitimate 'expectation of privacy' " in financial information "voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business." *Miller*, 425 U.S. at 442. This Court reasoned that a depositor "takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the government." *Id*. at 443. Because the

depositor "assumed the risk" of disclosure, this Court concluded that it was unreasonable for the depositor to expect his financial records to remain private. *Id*. 444-45.

The third party doctrine and this Court's historical reasoning is flawed, and it is "necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties." *Jones*, 565 U.S. at 417 (Sotomayor, J., concurring); *see*, *e.g.*, *Smith*, 442 U.S. at 742; *Miller*, 425 U.S. at 435. Although "[w]hat a person knowingly exposes to the public, even in his home or office, is not a subject of Fourth Amendment protection . . . what he seeks to preserve as private, even in an area accessible to the public may be constitutionally protected." *Katz v. United States*, 389 U.S. at 351-52. More recently however, " '[i]n considering whether something is "exposed" to the public as that term was used in *Katz* [this Court] ask[s] not what another person can physically and may lawfully do but rather what a reasonable person expects another might actually do.' "

United States v. Maynard, 615 F.3d 544, 559 (2010). In applying the principle, the court wrote,

> [T]he whole of a person's movements over the course of a month is not actually exposed to the public because the likelihood a stranger would observe all those movements is not just remote, it is essentially nil. It is one thing for a passerby to observe or even follow someone during a single journey as he goes to the market or returns home from work. It is another thing entirely for that stranger to pick up the scent again the next day and the day after that, week in and week out, dogging his prey until he has identified all the places, people, amusements, and chores that make up that person's hitherto private routine.

Id. at 560.

"Privacy comes at a cost." *Riley*, 573 U.S. at 40. And in an era of increasing mass surveillance and rapidly advancing technology, upholding the third party doctrine's historical privacy notions renders citizens vulnerable to systematic and pervasive infringement of privacy rights by the government. *See Jones*, 565 U.S. at 416 (Sotomayor, J., concurring) ("Awareness that the government may be watching chills associational and expressive freedoms. And the

government's unrestrained power to assemble data that reveal private aspects of identity is susceptible to abuse."). "[T]he fact that the information is held by a third party does not itself overcome the user's claim to Fourth Amendment protection." *Carpenter*, 138 S. Ct. at 2217. Governmental access to cell-site records contravenes " 'society's expectation . . . that law enforcement agents and others would not . . . secretly monitor and catalogue [an individual's] every single movement.' " *Id*.; quoting *Jones*, 565 U.S. at 430.

The *Carpenter* decision narrowly encompasses "a download of information on all the devices connected to a particular cell site during a particular interval." *Carpenter*, 138 S. Ct. at 2220. This Court has recognized that information revealed by cell-site records is "imprecise" and usually reveals "the location of a cell phone user within an area covering between around a dozen and several hundred city blocks." *Id*. at 2225. In contrast, GPS "can reveal an individual's location within around 15 feet." *Id*. If the *Carpenter* holding is to be narrowly construed and applied, it naturally follows that the production of data that is narrower in scope should also fall within the holding.

Admittedly, the government has substantial interest in accessing information held by third parties. Austin understands that " '[o]ne has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects.' " *United States v. Knotts*, 460 U.S. 276, 281 (1983) (quoting *Cardwell v. Lewis*, 417 U.S. 583, 590 (1974)). However, as this Court alluded to in *Carpenter*, there is a "seismic shift[] in digital technology that made possible the tracking of . . . location . . . not for a short period but for years and years." *Carpenter*, 138 S. Ct. at 2219. Here, Detective Hamm obtained Austin's GPS location data from YOUBER not for a period of years and years, but for months and months. These months and months of location data were beyond what was

necessary to determine Austin's whereabouts on the six specific days of the bank robberies he was investigating. Austin believes that it is this type of broad search that this Court was concerned about when it discussed the shift in digital technology and the ability to obtain an infinite amount of an individual's personal and private routine.

Austin does not deny that YOUBER should be able to keep record of the real-time location of its users in order to track its vehicles. However, when the government subpoenas location data from YOUBER, over a prolonged period and well beyond the scope of what is actually needed, it must show something more than a generalized suspicion of criminal conduct. Rather than subpoenaing *all* the GPS location data for the period between October 3, 2018 and January 3, 2019 related to Austin's account, Detective Hamm should have, and could have, obtained a subpoena for the specific dates of the six open robberies without violating Austin's Fourth Amendment rights or invoking the third party doctrine. Austin does not question the government's interest in solving crimes. However, it is not an entitlement for law enforcement to sift through months of an individual's personal location data to find six specific data points.

C. The Justices Dissenting from the Majority in *Carpenter* Should be Less Concerned on the Facts at Issue Here.

Justice Kennedy, in his dissent, pointed out that "[c]ustomers do not create the records" and, therefore, cell phone customers do not have any meaningful interest in cell-site records. *Carpenter*, 138 S. Ct. at 2229. This assertion is patently false. Location data is a "detailed, encyclopedic, and effortlessly compiled" amalgamation of an individual's movements over time. In the specific instance of location data, a company does not have records without tracking the movement of its customers. This symbiotic relationship should provide both the customer and

the company with certain rights as it relates to the collection and storage the customer's movements for the company's business purposes.

Justice Kennedy explained that when the government uses a subpoena to obtain "bank records, telephone records, and credit card statements from the businesses that create and keep these records, the Government does not engage in a search of the business's customers within the meaning of the Fourth Amendment." *Carpenter*, 138 S. Ct. at 2223-24. However, the Fourth Amendment "provides protection against a grand jury subpoena *duces tecum* too sweeping in its terms 'to be regarded as reasonable.' " *United States v. Dionisio*, 410 U.S. 1, 11 (1973) (quoting Hale v. Henkel, 201 U.S. 43, 76 (1906)).

Justice Thomas, in his dissent, focused too narrowly on the founding era idea of property, and not on reframing the idea of property to accommodate for modern day technology. *See Carpenter*, 138 S. Ct. at 2241. In an age of rapidly developing technology, this Court should look to *Carpenter* to guide modern-day Fourth Amendment principles as it pertains to tangible and intangible privacy rights. Justice Thomas argued that, at our founding, a " 'search' did not mean a violation of someone's reasonable expectation of privacy," but " ' "[t]o look over or through for the purpose of finding something; to explore; to examine by inspection; as, to *search* the wood for a thief." ' " *Carpenter*, 138 S. Ct. at 2238.

Justice Alito, in his dissent, noted that, in *Okla. Press Pub. Co. v. Walling*, this Court held that "a showing of probable cause was not necessary so long as 'the investigation is authorized by Congress, if for a purpose Congress can order, and the documents sought are relevant to the inquiry.' " *Carpenter*, 138 S. Ct. at 2254 (quoting *Okla. Press Pub. Co. v. Walling*, 327 U.S. 186, 209 (1946)). Here, the first two prongs are satisfied. However, serving a subpoena *duces tecum* on YOUBER to obtain *all* the GPS location data related to Austin's

account for a three months' period was too sweeping in its terms to be held reasonable under the Fourth Amendment. The entirety of the "documents" sought was not relevant to Detective Hamm's inquiry into the robberies; there was a total of six open bank robberies that occurred on or between October 15, 2018 and January 3, 2019 with similar modus operandi. R. at 3.

Detective Hamm did exactly what Justice Thomas described in his dissent—"searched the wood for a thief." It is unreasonable for Detective Hamm to subpoena three months' worth of Austin's GPS information when its only concern was solving bank robberies occurring on six specific days. Detective Hamm should have, and could have, obtained a subpoena for the specific dates of the six open robberies without violating Austin's Fourth Amendment rights or invoking the third party doctrine. This type of broad search Detective Hamm requested was a fishing expedition primarily unrelated to the open bank robbery cases at issue. This is exactly the type of unreasonable search the Fourth Amendment is written to protect. This Court should not allow the government's reach to extend beyond what is reasonably necessary to solve the crime or crimes they immediately face and should hold that an individual maintains a privacy right in the information when the government does so.

A subpoena *duces tecum* "permits a subpoenaed individual to conduct the search for the *relevant* documents himself, without law enforcement officers entering his home or rooting through his papers and effects." *Carpenter*, 138 S. Ct. at 2252 (italics added). Austin agrees with this Court, as stated in *Carpenter*, that these subpoenas "avoid many of the incidental invasions of privacy that necessarily accompany any actual search." *Id*. However, the Fourth Amendment protects against *unreasonable* searches and seizures, and any searches and seizures that violate the right of the people must be supported by upon probable cause. U.S. Const.

amend. IV. Here, Detective Hamm's search of Austin's GPS location data far exceeded what was reasonable and the entire length of time searched not supported by probable cause.

Unfortunately, in the absence of legislative guidance, this Court is relegated to "judicial decisionmaking" and "judicial guesswork." In Justice Gorsuch's dissent, he points out that "the States and federal government are actively legislating in the area of third party data storage and the rights they enjoy." *Carpenter*, 138 S. Ct. at 2270. Justice Gorsuch notes that State law, specifically, creates rights in both tangible and intangible things. Austin agrees.

Legislation is better suited to provide guidance on whether third party data storage enjoys a privacy right under the Fourth Amendment. However, positive law has yet to catch up to rapidly evolving technology, which leaves the judiciary in a difficult position to interpret the modern, more freeform notion of privacy against the archaic tangible notion of "persons, houses, papers, and effects." *Carpenter's* narrow holding is a prime example of "judicial guesswork" attempting to reconcile these notions. Working within precedent and with the facts at issue, the majority in *Carpenter* correctly concluded that the governmental search of an individual's location data, even if obtained through a third party, is protected under the Fourth Amendment.

CONCLUSION

The motions to suppress evidence, finding Austin had no standing in the rental car and the data collected by YOUBER did not rise to the level of infringement as mentioned by this Court in *Carpenter*, should be granted.