

No. 4-422

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IN THE  
**SUPREME COURT OF THE UNITED STATES OF AMERICA**

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Jayne Austin,  
*Petitioner*

v.

United States of America  
*Respondent*

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

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**BRIEF FOR PETITIONER**  
Team No. P10

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... iii

STATEMENT OF THE ISSUES..... iv

STATEMENT OF THE FACTS ..... 1

SUMMARY OF THE ARGUMENT ..... 3

STANDARD OF REVIEW ..... 5

ARGUMENT ..... 5

**I. MS. AUSTIN MAY CHALLENGE THE FOURTH AMENDMENT  
SEARCH OF THE RENTAL VEHICLE..... 5**

    A. Under *Byrd* An Unauthorized Driver With Lawful Possession And  
Control Has A Reasonable Expectation Of Privacy In A Rental Vehicle. ..... 7

        1. *An Unauthorized Driver Without Explicit Permission  
Has A Reasonable Expectation Of Privacy By Virtue Of The  
Right To Exclude.* ..... 9

        2. *Permission From The Rental Agreement’s Authorized  
Driver Is Not Determinative In Conferring A Reasonable  
Expectation Of Privacy.* ..... 10

        3. *Society Is Prepared To Recognize That An Unauthorized  
Driver Without Explicit Permission Has A Reasonable  
Expectation Of Privacy.* ..... 11

    B. Ms. Austin Cannot Be Characterized As A Car Thief Based On  
Her Lawful Possession And Control. ..... 12

    C. Basing The Scope Of The Fourth Amendment On Explicit Permission  
From An Authorized Driver Would Fail To Provide Clear Guidance  
To Law Enforcement. ..... 14

**II. THE ACQUISITION OF GPS LOCATION INFORMATION FROM A RENTAL  
VEHICLE COMPANY CONSTITUTES A SEARCH. .... 15**

    A. Fourth Amendment Jurisprudence Holds That An Individual Has A  
Reasonable Expectation Of Privacy In Their Physical Movements. ..... 16

        1. *Carpenter Revitalizes Fourth Amendment Protections  
In A Digital Age.* ..... 18

        2. *Ms. Austin Has A Reasonable Expectation Of Privacy In  
Her Physical Location While Using YUBER.* ..... 19

        3. *The Fourth Amendment Must Withstand Societal Advancements.* ..... 20

    B. The Pre-Digital Third Party Doctrine Does Not Govern This Case. ..... 21

    C. Implications Of This Decision Reach Beyond The Case At Hand. ..... 24

CONCLUSION..... 25

**TABLE OF AUTHORITIES**

	Page(s)
<u>United States Supreme Court</u>	
<i>Arizona v. Gant</i> , 556 U.S. 332 (2009) .....	6, 10, 15
<i>Boyd v. United States</i> , 116 U.S. 616 (1886) .....	6, 8
<i>Byrd v. United States</i> 138 S. Ct. 1518 (2018) .....	Passim
<i>Carpenter v. United States</i> , 138 S. Ct. 2206 (2018) .....	Passim
<i>Carrol v. United States</i> , 267 U.S. 132(1925) .....	16
<i>Coolidge v. New Hampshire</i> , 403 U.S. 443 (1971) .....	6, 8, 25
<i>Illinois v. Lidster</i> , 540 U.S. 419.....	21
<i>Jones v. United States</i> , 362 U.S. 257 (1960) .....	6, 12
<i>Katz v. United States</i> , 389 U.S. 347.....	6, 11, 12
<i>Knowles v. Iowa</i> , 525 U.S. 113 (1998) .....	6
<i>Kyllo v. United States</i> , 533 U.S. 27 (2001) .....	16, 17, 18
<i>Minnesota v. Carter</i> , 525 U.S. 83 (1998) .....	7
<i>Minnesota v. Olson</i> , 495 U.S. 91 (1990) .....	7
<i>Ornelas v. United States</i> , 517 U.S. 690 (1996) .....	5
<i>Rakas v. Illinois</i> , 439 U.S. 128 (1967) .....	Passim
<i>Riley v. California</i> , 573 U.S. 373 (2014) .....	15
<i>Rios v. United States</i> , 364 U.S. 253 (1960) .....	12
<i>Silverthorne Lumber Co. v. United States</i> , 251 U.S. 385 (1920) .....	12
<i>Smith v. Maryland</i> , 442 U.S. 735 (1979) .....	22
<i>United States v. Di Re</i> , 332 U.S. 581 (1948) .....	25

<i>United States v. Jones</i> , 565 U.S. 400 (2012) .....	Passim
<i>United States v. Knotts</i> , 480 U.S. 276 (1983) .....	23, 24
<i>United States v. Miller</i> , 425 U.S. 435 (1976) .....	23

United States Circuit Court of Appeals

<i>United States v. Cayman</i> , 404 F.3d 1196 (9th Cir. 2005) .....	13, 14
<i>United States v. Cuevas–Perez</i> , 640 F.3d 272 (C.A.7 2011) .....	25
<i>United States v. Davis</i> , 754 F.3d 1205 .....	19
<i>United States v. Johnson</i> , 584 F.3d 995 (10th Cir. 2009) .....	13, 14
<i>United States v. Lyle</i> , 919 F.3d 716 (2nd Cir. 2019) .....	5, 9, 11

Constitutional Provision

U.S. Const. amend. IV .....	5
-----------------------------	---

Other Authorities

<i>Ride Oversharing: Privacy Regulation Within The Gig Economy</i> , 36 CDZAJLJ 247 (2018) .....	17, 20
<i>Shared Mobility Current Practices and Guiding Principles</i> , U.S. Department of Transportation (2016) .....	16, 19

## **STATEMENT OF THE ISSUES**

1. Does an individual in sole possession of a rental vehicle have standing to challenge a Fourth Amendment search of the vehicle when the individual rented the vehicle on another's account without the account owner's explicit permission?
2. Does the acquisition of historical timestamped location data of rental vehicles constitute a "search" under the Fourth Amendment and *Carpenter v. United States*, 138 S. Ct. 2206 (2018)?

## STATEMENT OF THE FACTS

Jayne Austin is a naturalist, minimalist, poet, and activist. R. at 1. She is skeptical of the Government, big business, and digital technology. *Id.* She leads a life of privacy and structures her life so as to keep her personal information from any business or government record. *Id.* at 1, 18. Pursuant to her lifestyle and belief system, Ms. Austin does not have a permanent residence, vehicle, or much property at all. *Id.* at 1. This lifestyle poses significant challenges for Ms. Austin in the digital age where nearly every engagement in society accompanies some sharing of personal information. So, Ms. Austin relies on others to act as her liaison to the public sphere. *Id.* at 2, 18-20.

Most recently, Ms. Austin relied on Martha Lloyd. *Id.* According to Ms. Lloyd, the two know each other because they “are dating[.]” *Id.* at 18. Although, the two were recently “kind of on a break[.]” Ms. Lloyd still loves her. *Id.* The two continued to communicate through letters. *Id.* at 19. Ms. Austin wrote Ms. Lloyd several letters detailing what she was doing, where she was, and that she was sorry. *Id.* Ms. Lloyd wrote back and explained she needed some time to heal before they could get back together. *Id.*

While they were dating, Ms. Lloyd gave permission to Ms. Austin to use her login and credit card information for services such as social media, YOUNBER, or YOUNBEREATS. *Id.* at 18. Ms. Austin is an authorized user on Ms. Lloyd’s credit card. *Id.* As of the trial, Ms. Lloyd had not removed Ms. Austin from any accounts. *Id.* at 19. Ms. Lloyd understood Ms. Austin’s position and that she relied on the accounts for everyday living. *Id.* at 18.

To travel to work and protests, Ms. Austin rents a vehicle through YOUNBER with Ms. Lloyd’s account. *Id.* at 2. YOUNBER is a new car rental company that allows a person to rent a YOUNBER-owned vehicle through a software application (“app”). *Id.* The Bluetooth in a user’s

cell phone connects to the GPS of the vehicles to initiate a rental period through the app. *Id.* at 4. A YOUNBER user may pick up or drop off a vehicle at any YOUNBER facility across the city. *Id.* at 2. The vehicles are also identified by a small, bright pink YOUNBER logo on the bottom corner of the passenger side of the windshield. *Id.* YOUNBER has gained immense popularity in a short period of time with over 75 million users worldwide and 40 million users in the United States. *Id.* at 22.

All YOUNBER users must agree to the company's privacy policies when registering an account or forgo their services. *Id.* at 30. YOUNBER's privacy policy indicates they collect and store location information from a user's device and their vehicles. *Id.* at 29. YOUNBER collects this timestamped location information every two minutes. *Id.* Ms. Lloyd agreed to YOUNBER's privacy policies at the initial sign up period. *Id.* at 23. Once a YOUNBER account is set up, any person may use that account and access YOUNBER vehicles if given the username and password. *Id.* at 24. Any subsequent person granted access to a user's account and login information does not receive notification of the data YOUNBER collects or its privacy policies. *Id.* Ms. Austin did not receive notification of the data YOUNBER collects or its privacy policies. *Id.*

On January 3, 2019, Ms. Austin rented a vehicle using the YOUNBER app on her phone. *Id.* at 2. That same day, Officer Kreuzberger stopped Ms. Austin for failure to stop at a stop sign. *Id.* Ms. Austin showed Officer Kreuzberger her license and the YOUNBER app on her phone. *Id.* Because Ms. Austin's name was not on the YOUNBER rental agreement, Officer Kreuzberger specifically told Ms. Austin that he did not need her consent to search the vehicle. *Id.* at 2-3. He did not ask Ms. Austin if she had permission to use the vehicle. *Id.* Without anyone's consent, Officer Kreuzberger conducted a warrantless search that revealed a BB gun, a ski mask, and a duffel bag with money and blue dye packs. *Id.* at 3. Officer Kreuzberger also noted in his report

that he believed the car to be “lived in” because it had many personal items within the car. *Id.* These personal items included food, bedding, an inhaler, and music records. *Id.*

Based on the evidence found and a corroborating tip received during the search, Officer Kreuzberger arrested Ms. Austin. *Id.* Two days later, Officer Boober Ham took over the investigation of Ms. Austin. *Id.* He discovered five open bank robberies that matched the modus operandi of the bank robbery that occurred on the day Ms. Austin was arrested. *Id.* Without obtaining a warrant, he acquired all of the timestamped location information related to the account Ms. Austin used from October 3, 2018, through January 3, 2019, by serving a subpoena duces tecum (“SDT”) on YOUNBER. *Id.* The mapped data showed Ms. Lloyd’s account rented vehicles in the locations of the other five robberies. *Id.* at 4.

Ms. Austin was subsequently charged with six counts of bank robbery under 18 U.S. Code § 2113, Bank Robbery and Incidental Crimes. *Id.* Before trial, Ms. Austin filed two motions to suppress evidence. *Id.* The first motion moved to suppress the evidence seized during Officer Kreuzberger’s warrantless search of the YOUNBER vehicle. *Id.* The second motion moved to suppress YOUNBER’s locational data obtained by Officer Hamm without a warrant. *Id.* The district court denied both motions. *Id.* at 8. The Thirteenth Circuit affirmed. *Id.* at 16. This Court granted Ms. Austin’s petition for certiorari.

### **SUMMARY OF THE ARGUMENT**

The Fourth Amendment protects individuals from unwarranted and unreasonable government intrusion into the privacies of life. To claim Fourth Amendment protection, an individual must have standing. Standing is present when an individual has a reasonable expectation of privacy within the area searched. This Court declared in *Byrd v. United States* that a driver not listed on the rental agreement who has lawful possession and control of the vehicle has a reasonable



expectation of privacy. 138 S. Ct. 1518, 1524 (2018). As the sole occupant of the YOUNBER, Ms. Austin had lawful possession and control of the YOUNBER at the time of the warrantless search. The YOUNBER was not stolen and Ms. Austin had previous permission to use the YOUNBER account. Additionally, Ms. Austin had the right to exclude third parties who had no property interest in the YOUNBER vehicle, which bolstered her reasonable expectation of privacy. Under Fourth Amendment jurisprudence, explicit permission to be on the premises is not dispositive on whether an individual has a reasonable expectation of privacy. The fact that Ms. Austin did not have explicit permission from the account owner does not remove her constitutional protection against unreasonable governmental intrusions into her privacies of life.

The Government conducted a search within the meaning of the Fourth Amendment when it acquired timestamped location data from YOUNBER. This Court recognizes that tracking a vehicle for an extended period of time generates extremely sensitive and private information society wishes to protect. *Carpenter v. United States*, 138 S. Ct. 2206, 2215 (2018) (citing *United States v. Jones*, 565 U.S. 400, 430 (2012) (Alito, J., concurring)). To allow law enforcement to contravene this expectation of privacy by acquiring YOUNBER's records would dramatically reduce the level of privacy protected at the time of the Framing. *Carpenter v. United States* recognized that sharing location information to a third party does not waive all privacy protections but is a factor in determining whether an individual has a reasonable expectation of privacy. *Id.* at 2217. Ms. Austin maintains her reasonable expectation of privacy in her physical movements because she was not constructively aware of the location data YOUNBER collected and did not voluntarily convey her location information in a meaningful way. The warrant requirement strikes the appropriate balance between the interests of the Government and the intrusion on an individual's privacy interests.

For these reasons, this Court should reverse the Thirteenth Circuit’s ruling and find that Ms. Austin has standing to challenge the legality of the search of the rental vehicle and that the government’s acquisition of location data was a search under the Fourth Amendment.

### **STANDARD OF REVIEW**

The issue of whether an individual has standing under the Fourth Amendment is mixed questions of law and fact; questions of law are reviewable de novo, while questions of fact are reviewable for clear error. *United States v. Lyle*, 919 F.3d 716, 727 (2nd Cir. 2019) (citations omitted). Here, there are no disputed facts, therefore this Court’s review is de novo. The issue of whether a search occurred under the Fourth Amendment is a question of law that is reviewable de novo. *Ornelas v. United States*, 517 U.S. 690, 696 (1996).

### **ARGUMENT**

#### **I. MS. AUSTIN MAY CHALLENGE THE FOURTH AMENDMENT SEARCH OF THE RENTAL VEHICLE.**

The Fourth Amendment guarantees individuals the “right ... to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures” and states that “and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” U.S. Const. amend. IV. An individual must have “standing” to claim this constitutional protection. “The concept of standing in Fourth Amendment cases can be useful shorthand for capturing the idea that a person must have a cognizable Fourth Amendment interest in the place searched before seeking relief for an unconstitutional search.” *Byrd*, 138 S. Ct. at 1530 (quoting *Rakas v. Illinois*, 439 U.S. 128, 139 (1967)). Fourth Amendment rights are personal and more properly defined “within the purview of substantive Fourth Amendment law than that of standing.” *Rakas*, 439 U.S. at 140.

The primary purpose of the Fourth Amendment is to protect individuals from unbridled governmental intrusion into the privacies of life. *Carpenter*, 138 S. Ct at 2214 (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)). This Court has repeatedly emphasized that “a motorist’s privacy interest in his vehicle” is “important and deserving of constitutional protection.” *Arizona v. Gant*, 556 U.S. 332, 345 (2009) (citing *Knowles v. Iowa*, 525 U.S. 113, 117 (1998)). If the Court were to accept that Ms. Austin does not have standing, law enforcement could conduct warrantless investigatory searches of rental vehicles if the driver not listed on the rental agreement could not prove explicit permission. “It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.” *Coolidge v. New Hampshire*, 403 U.S. 443, 454 (1971) (citing *Boyd*, 116 U.S. at 635).

Under the Fourth Amendment, a person must have a legitimate expectation of privacy to challenge the legality of an unwarranted search and seizure. *Byrd*, 138 S. Ct at 1526 (quoting *Rakas*, 439 U.S. at 143). A person’s expectation of privacy is legitimate if it is “one that society is prepared to recognize as reasonable.” *Katz v. United States*, 389 U.S. 347, 361 (Harlan, J., concurring). A reasonable expectation of privacy does not require ownership of the invaded property. *Jones v. United States*, 362 U.S. 257, 263 (1960) (holding that an individual in a friend’s apartment has standing). Rather, an individual who has lawful possession and control of the area searched “will in all likelihood have a legitimate expectation of privacy by virtue of the right to exclude, whether or not he has a property right in the space.” *Rakas*, 439 U.S. at 143 n.12.

A vehicle is one of society’s most widely used effects protected by the Fourth Amendment. *Jones*, 362 U.S. at 404. This Court’s jurisprudence has effectively created three types of drivers in the context of rental vehicle searches: an authorized driver, an unauthorized driver, and a car thief. *See generally Byrd*, 138 S. Ct. at 1521-31. Because Ms. Austin is not listed on the YOUNBER

account, she falls within the category of an unauthorized driver. This Court in *Byrd v. United States* declared that an unauthorized driver may challenge a Fourth Amendment search. *Id.* at 1524.

As the sole possessor of the YOUBER vehicle, Ms. Austin had a reasonable expectation of privacy through her lawful possession and control. Therefore, Ms. Austin has standing to challenge the warrantless search of the YOUBER vehicle.

A. Under *Byrd* An Unauthorized Driver With Lawful Possession And Control Has A Reasonable Expectation Of Privacy In A Rental Vehicle.

In *Byrd*, a unanimous decision by this Court declared that “as a general rule, someone in otherwise lawful possession and control of a rental car has a reasonable expectation of privacy in it even if the rental agreement does not list him or her as an authorized driver.” *Byrd*, 138 S. Ct at 1524. Fourth Amendment jurisprudence through property concepts supports this emphasis on possession and control to confer a reasonable expectation of privacy. *See Minnesota v. Carter*, 525 U.S 83, 90-91 (1998) (holding that an individual who only conducted business in a house and did not have any possession or control of the area did not have a reasonable expectation of privacy); *see also Minnesota v. Olson*, 495 U.S. 91, 99 (1990) (holding that an overnight guest has a reasonable expectation of privacy in an area that he shared with the host because he exercised a degree of possession and control over the area). Ms. Austin had a reasonable expectation of privacy in the YOUBER vehicle as an unauthorized driver in lawful possession and control.

*Byrd* held that an unauthorized driver may have standing because “few protections are as essential to individual liberty as the right to be free from unreasonable searches and seizures.” *Byrd*, 138 S. Ct. at 1526. In *Byrd*, the defendant’s fiancée rented the vehicle under her name and immediately gave the defendant the keys. *Id.* at 1524. Under the requirements of the rental agreement, the defendant would not have been able to rent the vehicle himself because of his criminal record. *Id.* at 1530. Three hours after the rental, law enforcement stopped the defendant

and noticed that he was not on the rental agreement. *Id.* at 1524. Defendant told law enforcement that his “friend” gave him permission to drive the vehicle. *Id.* at 1524-25. Regardless, law enforcement conducted a warrantless search and found 49 bricks of heroin. *Id.* at 1525. This Court held that the defendant had standing to challenge the warrantless search because he had lawful possession of the vehicle. *Id.* at 1531. *Byrd* explained that the terms of the rental agreement have no bearing on whether an unauthorized driver has a reasonable expectation of privacy. *Id.* at 1529.

This holding did not limit the circumstances in which an unauthorized driver could be in lawful possession and control to only situations where the driver has explicit permission from the authorized driver. Ms. Austin’s privacy protections should not fall on law enforcement’s, or the courts’, determination of either the status of her romantic relationship or whether she had explicit permission to use YOUNBER. Car rental services are becoming increasingly popular and requiring proof of explicit permission would permit law enforcement to conduct suspicionless “exploratory rummaging” that the Fourth Amendment was designed to prevent. *Coolidge*, 403 U.S. at 467 (citing *Boyd*, 116 U.S. at 624-30).

Under *Byrd*, the fact that Ms. Austin’s name was not on the rental agreement does remove her guaranteed constitutional protection. *Byrd*, 138 S. Ct. at 1524. Ms. Austin has lawful possession of the rental vehicle because her use of the vehicle does not violate any laws. Further, Ms. Austin’s use of YOUNBER with past permission from her on-and-off again girlfriend, Martha Lloyd, fortifies her reasonable expectation of privacy. *See R.* at 18-20. Ms. Lloyd never explicitly revoked permission, even though she knew that Austin did not own a vehicle and repeatedly used the YOUNBER app for transportation. *Id.* Based on her lawful interaction with YOUNBER and the lack of withdrawal of permission from Ms. Lloyd, Ms. Austin had a reasonable expectation of

privacy within the YOUBER vehicle. *Byrd* stands for the proposition that this privacy protection did not disappear when she rented the vehicle under Ms. Lloyd's account. *Byrd*, 138 S. Ct. at 1531.

An unauthorized driver in lawful possession is differentiated from an unauthorized driver whose possession and control of the vehicle violates state law. *Lyle*, 919 F.3d at 729. For example, the Second Circuit maintained support for *Byrd*'s emphasis on property concepts when it found that an unauthorized driver in unlawful possession was not protected by the Fourth Amendment. *Id.* The defendant in *United States v. Lyle* had a suspended license and the rental company would not have given him permission to drive its car nor allowed a renter to let him drive the vehicle. *Id.* at 723. The court concluded that the defendant's unlawful operation of the car with a suspended license—coupled with the fact that he was an unauthorized driver—defeated his reasonable expectation of privacy. *Id.* at 730. Ms. Austin's operation of the vehicle was not made unlawful by state laws or rental requirements unlike the defendant in *Lyle*. *Id.* at 729. There is no indication that Austin could not have rented the vehicle herself. Rather, she chose not to use her name in order to avoid "The Man." R. at 18.

*1. An Unauthorized Driver Without Explicit Permission Has A Reasonable Expectation Of Privacy By Virtue Of The Right To Exclude.*

There is not a single metric or exhaustive list of considerations to determine if a person has a reasonable expectation of privacy. *Byrd*, 138 S. Ct. at 1527. However, Fourth Amendment jurisprudence has continuously held that a person who has the right to exclude based on lawful possession and control "will in all likelihood have a legitimate expectation of privacy." *Id.* (quoting *Rakas*, 439 U.S. at 144 n.12 (citing 2 W. Blackstone, Commentaries on the Laws of England, ch. 1)). Because Ms. Austin had lawful possession and control over the YOUBER vehicle, she had the right to exclude, bolstering her reasonable expectation of privacy. *Byrd* explained, "an unauthorized driver in sole possession of a rental car would be permitted to exclude

third parties from it, such as a carjacker.” *Id.* at 1528-29. After Ms. Austin booked the rental vehicle and YOUNBER surrendered control of the vehicle to her, she had the right to exclude third parties including the carjacker illustration. *Id.* If a third-party stranger wanted to enter the vehicle, Ms. Austin could lock the car and prevent them from doing so.

At the time of the warrantless search, Austin was in sole possession of the vehicle and had the right to exclude law enforcement from unwarranted government intrusion. *Byrd*, 138 S. Ct. at 1522. Law enforcement did not seek consent from any party with possessory and privacy interests in the vehicle before conducting a warrantless search. Law enforcement was not relying on any permission contemplated in *Byrd* because they did not even ask Ms. Austin if she had permission to be operating the vehicle. *Id.* at 1524. The Fourth Amendment’s purpose is to protect an individual’s privacy interests within the vehicle and to prevent “police officer[s]’ unbridled discretion to rummage at will among a person’s private affects.” *Gant*, 556 U.S. at 345.

*2. Permission From The Rental Agreement’s Authorized Driver Is Not Determinative In Conferring A Reasonable Expectation Of Privacy.*

This Court does not rely on explicit permission to create a reasonable expectation of privacy. *Rakas*, 439 U.S. at 138 (“The fact that they were ‘legitimately on [the] premises’ in the sense that they were in the car with the permission of its owner is not determinative of whether they had a legitimate expectation[.]”) *Byrd* does not stand for the proposition that the only way an unauthorized driver may have lawful possession is if he or she has explicit permission from the authorized driver. *Id.* at 1524. Moreover, when the Second Circuit applied *Byrd*’s emphasis on property concepts, it concluded that an authorized renter’s permission is not determinative of whether the unauthorized driver has a reasonable expectation of privacy. *Lyle*, 919 F.3d at 730 (citing *Byrd*, 138 S. Ct. at 1527).

Ms. Austin's reasonable expectation of privacy came from her lawful possession and control of the car using the YOUNBER app on her personal phone, not from her romantic relationship. No language in *Byrd* required the driver to maintain a relationship with the authorized user for the unauthorized driver to have a reasonable expectation of privacy. *Byrd*, 138 S. Ct. at 1521-31. In fact, Justice Kennedy did not mention the fact that the authorized driver of the car was the defendant's current fiancée in his analysis. *Id.* The couple here may have been on a break, but the record indicates that Ms. Lloyd still loves Ms. Austin. R. at 18. When Ms. Lloyd was asked how she knew Ms. Austin, she responded, "[w]e *are* dating, but recently we've been *kind of* on a break." *Id.* (emphasis added). Ms. Lloyd and Ms. Austin still have a form of a relationship and in this relationship, Ms. Lloyd permissively allowed Ms. Austin to use her YOUNBER and credit card accounts. This dynamic further supports Ms. Austin's reasonable expectation of privacy in the YOUNBER vehicle. It would be unworkable for the Fourth Amendment to require a court to make a post hoc determination of the driver's relationship with the authorized user before extending Fourth Amendment protection against a warrantless search.

*3. Society Is Prepared To Recognize That An Unauthorized Driver Without Explicit Permission Has A Reasonable Expectation Of Privacy.*

YOUNBER is an extremely popular app with 75 million users worldwide. R. at 22. People rent vehicles for extended periods of time for a variety of reasons. The Thirteen Circuit erroneously concluded that Ms. Austin's situation is not one that *Katz v. United States* and society intended to protect. *Katz*, 389 U.S. at 361. *Katz* declared that an individual has standing in a public telephone booth because an individual has a reasonable expectation that the content of their conversations will be free from unwarranted governmental intrusion. *Id.* at 360. "The Fourth Amendment protects people, not places." *Id.* at 351. YOUNBER and rental car users have a reasonable



expectation that when they pay for and use the rental vehicle their belongings will stay safe and they will be free from unwarranted governmental intrusion.

As *Byrd* emphasizes, “there may be countless innocuous reasons why an unauthorized driver might get behind the wheel of a rental car and drive it—perhaps the renter is drowsy or inebriated.” *Byrd*, 138 S. Ct. at 1529. Since an unauthorized driver can still be in lawful possession and control without explicit permission from the authorized driver, society is prepared to recognize this privacy interest as reasonable. Ms. Austin is entitled to Fourth Amendment protection, “no less than an individual in a business office, in a friend’s apartment, ... in a taxicab,” or in a telephone booth. *Id.* at 352 (citing *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920); *Jones*, 362 U.S. at 264; *Rios v. United States*, 364 U.S. 253, 262 (1960)).

**B. Ms. Austin Cannot Be Characterized As A Car Thief Based On Her Lawful Possession And Control.**

Unlike Ms. Austin, an individual with unlawful possession and control of the property has no standing. *Byrd*, 138 S. Ct. at 1529. As the lower court conceded, Ms. Austin was not a car thief and the rental vehicle was not stolen. *R.* at 12. A car thief does not have standing to challenge a Fourth Amendment search. *Byrd*, 138 S. Ct. at 1529. An individual who has a “wrongful” presence on the scene cannot invoke Fourth Amendment protection. *Rakas*, 439 U.S. 143 n.9 (citing *Jones*, 362 U.S. at 267). “No matter the degree of possession and control, the car thief would not have a reasonable expectation of privacy in a stolen car.” *Byrd*, 138 S. Ct. at 1529. Likewise, “[a] burglar plying his trade in a summer cabin during the off season may have a thoroughly justified subjective expectation of privacy, but it is not one which the law recognizes as ‘legitimate.’” *Rakas*, 439 U.S. at 143 n.12. Conversely, Ms. Austin’s use of the YUBER vehicle was lawful and should maintain protection, unlike persons whose presence is maintained through unlawful means.

Ms. Austin rented the vehicle with her authorized credit card through YOUNBER on her personal cell phone. R. at 2. Ms. Lloyd granted Ms. Austin access to her YOUNBER account and knew Ms. Austin relied on the account for transportation indispensable to her everyday life activities, such as traveling to work. *Id.* at 18. Ms. Lloyd did not take any actions to exclude or stop Ms. Austin from using her YOUNBER account. Further, YOUNBER maintained ultimate control and ownership over the vehicle. YOUNBER relinquishes possessory interests in a vehicle to any user whose cellphone is given access to a registered account. *Id.* at 22. YOUNBER maintains that anyone given a username and password to an account may access YOUNBER vehicles. *Id.* at 24. Ms. Austin did not deceive nor break any state law when Ms. Lloyd gave Ms. Austin access to the YOUNBER account and YOUNBER relinquished possession to Ms. Austin.

Thus, the case before us does not answer the question left open by *Byrd* of whether “one who intentionally uses a third party to procure a rental car by a fraudulent scheme for the purpose of committing a crime is no better situated than a car thief.” *Byrd*, 138 S. Ct. at 1531. Ms. Austin’s daily relationship and permissive use of the YOUNBER vehicles and account cannot be described as a fraudulent scheme curated for the purpose of committing a crime. Her daily relationship with YOUNBER rental vehicles is largely innocuous and consistent with societal expectations.

Circuit courts have declined to extend Fourth Amendment protection over fraudulent schemes when the defendant procured the premises through an illegal means such as identity theft or stolen credit cards. *See United States v. Johnson*, 584 F.3d 995, 1004 (10th Cir. 2009); *see also United States v. Cayman*, 404 F.3d 1196, 1120 (9th Cir. 2005) (holding that a defendant has no Fourth Amendment protection in a computer that he bought with a stolen card). Notably, the Tenth Circuit distinguished between the use of an alias and the use of a stolen or fraudulent identity to rent property. *Id.* at 1002. In *United States v. Johnson*, the court emphasized that the latter is illegal

and causes harm to third parties. *Id. Johnson* found that the innocent party ultimately had the right of access to the property obtained with their stolen identity, therefore, the defendant did not have the right to exclude. *Id.* at 1003-04. Under those circumstances, the defendant did not have a reasonable expectation of privacy. *Id.* The Tenth Circuit concluded that a defendant who used an alias and not a stolen identity could have a reasonable expectation of privacy. *Id.* at 1002.

Ms. Austin had permissive use of the account and she did not obtain the vehicle using unlawful means of a stolen identity or a stolen credit card. *Rakas* equates “wrongful” with illegal by explaining that a burglar would not have a reasonable expectation of privacy in a house he was burglarizing because he would have an illegal presence in the home. *Rakas*, 439 U.S. at 143. Here, Ms. Austin had a reasonable expectation of privacy because her possession of the vehicle was not illegal and she did not have a “wrongful” presence. Ms. Austin’s use of Ms. Lloyd’s account does rise to level of illegal activity required to eliminate her Fourth Amendment protection. Thus, she maintained a reasonable expectation of privacy in the area searched.

C. Basing The Scope Of The Fourth Amendment On Explicit Permission From An Authorized Driver Would Fail To Provide Clear Guidance To Law Enforcement.

*Byrd* does not stand for a bright-line rule that an unauthorized driver must have explicit permission of the person listed on the rental agreement. *Byrd*, 138 S. Ct. at 1524, 1531. Such an interpretation of *Byrd* would result in the government exercising the type of “sweeping power ... to search at large [for contraband]” that the Fourth Amendment was designed to prevent. *United States v. Chadwick*, 433 U.S.1, 7-8 (1977). This case cannot be decided upon a determination of whether Ms. Lloyd’s implicit ongoing permission was revoked, unbeknownst to Ms. Austin.

To require permission from an authorized driver for an unauthorized driver to have lawful possession would be an unworkable and impractical rule for the police to adequately implement in the field. This Court has “a general preference to provide clear guidance to law enforcement

through categorical rules.” *Riley v. California*, 573 U.S. 373, 398 (2014). When an unauthorized driver in sole possession of the rental vehicle is stopped by law enforcement, it would be difficult to definitively prove that the authorized driver gave explicit permission. At the time of the stop, an officer would not have the resources or capabilities to conduct a full investigation into the unauthorized driver’s status of explicit permission. If the Court holds that Ms. Austin does not have standing, any unauthorized driver who could not prove that they received permission from the authorized driver could be subjected to a warrantless, unreasonable search of their rental vehicle. “A rule that gives police the power to conduct such a search whenever an individual is caught committing a traffic offense, when there is no basis for believing evidence of the offense might be found in the vehicle, creates a serious and recurring threat to the privacy of countless individuals.” *Gant*, 556 U.S. at 345.

Ms. Austin may challenge the legality of the warrantless search of the YOUBER. As an unauthorized driver in lawful possession and control, the Fourth Amendment protected her reasonable expectation of privacy. This Court should extend Fourth Amendment protection to Ms. Austin because she has standing to challenge this warrantless governmental intrusion that the Fourth Amendment was designed to prevent.

## **II. THE ACQUISITION OF GPS LOCATION INFORMATION FROM A RENTAL VEHICLE COMPANY CONSTITUTES A SEARCH.**

The Thirteenth Circuit held—and the Government argues—that the Fourth Amendment does not restrict access to historical location information from rental vehicles because it does not constitute a “search.” R. at 15. The circuit court mechanically applied the Third-Party Doctrine, holding that Ms. Austin had no reasonable expectation of privacy to the YOUBER location data because she “was constructively aware of the collection of the data, and... voluntarily gave up such information to a third party.” *Id.* However, *Carpenter v. United States* requires analysis of the qualitative differences between the digital information shared and the pre-digital records shared in *Smith v. Maryland* and *United States v. Miller*. *Carpenter*, 138 S. Ct. at 2219. This Court found

that sharing information to a third party is not dispositive, but rather a factor in determining whether a person has a reasonable expectation of privacy. *See id.* at 2220.

If the Court were to hold that no search occurs when the government acquires GPS logs of rental vehicles, the government could use this tool to monitor the whereabouts of anyone using a rental vehicle service. Such a holding affects everyone, from ordinary citizens to prominent businesspersons to leaders of social movements. The use of rental services has skyrocketed in recent years with the advent of smartphone applications connecting individuals with rental vehicles, bikes, scooters, drivers, and carpools. U.S. Department of Transportation, Shared Mobility Current Practices and Guiding Principles, 5 (2016), <https://ops.fhwa.dot.gov/publications/fhwahop16022/fhwahop16022.pdf>. The Government effectively argues for access to every American's location history detailing their movements using such rental services, with no measure of suspicion or judicial oversight.

A. Fourth Amendment Jurisprudence Holds That An Individual Has A Reasonable Expectation Of Privacy In Their Physical Movements.

At issue here is the antecedent question to all Fourth Amendment inquiries: whether or not a “search” occurred within the meaning of the Fourth Amendment. A search occurs when the Government obtains information by either physically trespassing upon private property, or intruding upon a sphere where an individual has a reasonable expectation of privacy. *Carpenter*, 138 S. Ct. at 2213; *See Jones*, 565 U.S. at 411 (“[W]e do not make trespass the exclusive test.”). The Government's surveillance of Ms. Austin through YUBER data intruded upon her reasonable expectation of privacy in her physical movements.

This Court has repeatedly held that Fourth Amendment protections should track the level of privacy afforded to individuals at the time the Fourth Amendment was adopted. *Carpenter*, 138 S. Ct. at 2214. (citing *Carroll v. United States*, 267 U.S. 132, 149(1925)); *Kyllo v. United States*,

533 U.S. 27, 43 (2001); *Jones*, 565 U.S. at 404, 411. Further, the People are not at the “mercy of advancing technology[.]” See *Carpenter*, 138 S. Ct. at 2214 (quoting *Kyllo*, 533 U.S. at 35). Nor must they surrender all privacy protections when entering the public sphere. *Carpenter*, 138 S. Ct. at 2217. Traditionally, individuals have a protected expectation of privacy in their physical location and movements. *Id.* at 2217; *Jones*, 565 U.S. at 430.

The digital age significantly eroded this protection due to mechanical applications of the Third-Party Doctrine: that when an individual shares information with a third party, she surrenders any Fourth Amendment protection. *Carpenter*, 138 S. Ct. at 2219. This interpretation of the Third-Party Doctrine is irreconcilable with deeply rooted Fourth Amendment principles. *Id.* at 2219-2220. Indeed, ninety-one percent of Americans believe that consumers have lost control of how companies use their personal information. Casey Thomas, *Ride Oversharing: Privacy Regulation Within The Gig Economy*, 36 CDZAJELJ 247, 255 (2018) (citing Lee Rainie, *The State of Privacy in Post-Snowden America*, PEW RESEARCH CTR (Sept. 21, 2016), <http://www.pewresearch.org/fact-tank/2016/09/21/the-state-of-privacy-in-america/>). Younger Americans are increasingly privacy assertive but largely powerless absent sufficient constitutional and legislative protections. *Id.* Third parties facilitate nearly every interaction in modern communications and transactions. Individuals increasingly share data with companies while carrying out daily activities indispensable to participation in modern society. Through wide application of the Third-Party Doctrine, individuals lose true choice in maintaining traditional privacy protections because every engagement in digital technology risks an unrestrained government search. See *Carpenter*, 138 S. Ct. at 2220.

*I. Carpenter Revitalizes Fourth Amendment Protections In A Digital Age.*

This Court recognizes such aggressive expansion of governmental power inimical to democratic government. *See id.* at 2214, 2218; *Jones*, 565 U.S. at 416. In *Carpenter v. United States*, the Court reconciled modern technology and shared information “to apply the Fourth Amendment to a new phenomenon: the ability to chronicle a person’s past movements through the record of his cell phone signals.” *Carpenter*, 138 S. Ct. at 2216. At the intersection of cases concerning location tracking and the Third-Party Doctrine, this Court directed Fourth Amendment jurisprudence toward a modern, post-digital framework. *Id.* at 2215-16.

In *United States v. Jones*, a unanimous Court held a search occurred when the Government attached a GPS to a vehicle and tracked the defendant’s movements for 28 days without a warrant. *Jones*, 565 U.S. at 404. At a minimum, the Government trespassed upon the property of the defendant through attaching the GPS. *Id.* at 42. Further, five Justices found that even if the Government had not physically trespassed, the Government intruded upon a person’s reasonable expectation of privacy in their longer-term physical movements. *Id.* at 426, 428.

The Court relied on the reasoning of the five concurring Justices in *Jones* to hold in *Carpenter* that tracking a person through Cell Site Location Information (CSLI) contravenes society’s expectation that law enforcement could not secretly monitor and catalogue a person’s physical location for a long period of time. *Carpenter*, 138 S. Ct. at 2214-19. This expectation of privacy is not eliminated when the individual is in the public sphere or shares location information to a third party in exchange for a particular service. *Id.* at 2217. The “seismic shifts in digital technology” created “a world of difference between the limited types of personal information addressed in *Smith* and *Miller* and the exhaustive chronicle of location information casually collected by wireless carriers today.” *Id.* at 2219. Absent a warrant, the Government cannot

circumvent the *Jones* holding by tracking someone through an independent technology company. *Id.* at 2220.

2. *Ms. Austin Has A Reasonable Expectation Of Privacy In Her Physical Location While Using YOUNBER.*

For the same reasons that there is a reasonable expectation of privacy in CSLI records and GPS data from a car, there is a reasonable expectation of privacy in the timestamped location records of a YOUNBER account. GPS tracking of a car generates extremely sensitive and private information that “enables the Government to ascertain, more or less at will, [people’s] political and religious beliefs, sexual habits, and so on.” *Jones*, 565 U.S. at 416 (Sotomayor, J., concurring). Data collected by carsharing companies “can reveal not just where people go—which doctors, religious services, and stores they visit—but also the people and groups they choose to affiliate with and when they actually do so.” *Id.* People use these services to “visit a gynecologist, a psychiatrist, a bookie, or a priest,” visits they typically assume are private. *United States v. Davis*, 754 F.3d 1205, 12156 (11th Cir. 2014) (Sentelle, J.) *rev’d en banc*, 785 F.3d 498 (11th Cir. 2015). Because Ms. Austin’s seemingly sole mode of transportation is YOUNBER, her locational data offers an intimate chronicle of her daily life.

As the “shared economy” has boomed, so has “shared mobility”, defined by the Department of Transportation as the shared use of a motor vehicle, bicycle, or other low-speed transportation mode. U.S. Department of Transportation, *supra*, at 5. Shared mobility has become an omnipresent part of the urban transportation network resulting from the rise in use of smartphones and internet-based technologies. *Id.* at 7. Society encourages individuals to choose these intelligent transportation systems because they increase efficiencies, alleviate congested roadways, and provide environmental and social benefits. *Id.* at 8. Individuals appreciate carsharing because they may gain the benefits of private vehicle use without the costs and



responsibilities of ownership. *Id.* But juxtaposed to the societal benefits of shared mobility is the resulting accumulation of business records detailing citizen's habits and whereabouts, which the Government argues may be acquired without a warrant.

The leading ridesharing platform, Uber, for example, collects data that provides the company with extremely detailed surveillance of its vehicles. Thomas, *supra*, at 256. Uber collects and stores personal contact information, location data, text messages sent to drivers, and riders' personal address books. *Id.* Uber has confessed to using the data not only for the business of ridesharing, but also social science studies. *Id.* For example, Uber used its historical location data of users to determine which nights "one-night-stands" were most prevalent. *Id.* An Uber user consents to this broad data collection in exchange for Uber's services. *Id.* at 254. The only restriction on Uber, YOUBER, and other similar companies is their privacy policies which require a consumer to agree or forgo the service, failing to provide the consumer any meaningful choice. *See id.*

Ms. Austin structured her life with appreciation for the Government's continual efforts to encroach upon citizens' privacies of life. R. at 1-2. She made deliberate decisions in every day to protect her right to privacy. *Id.* She attempted the nearly impossible feat of living "off the grid" in today's digital society. *Id.* But even someone as deliberate as Ms. Austin could not live completely free of a digital footprint. Someone should not have to live such an inconvenient and unconventional lifestyle to preserve privacies the Fourth Amendment was intended to protect.

### *3. The Fourth Amendment Must Withstand Societal Advancements.*

Allowing law enforcement to obtain YOUBER records free from Fourth Amendment restrictions would dramatically reduce the level of privacy protection afforded at the time of the Framing. Such a reduction of privacy protections is contrary to this Court's holding in *Carpenter*.

138 S. Ct. at 2217. Historically, law enforcement would not and could not “secretly monitor and catalogue every single movement of an individual’s car for a very long period.” *Id.* (quoting *Jones*, 565 U.S. at 430). Law enforcement cannot circumvent Fourth Amendment protections offered by the Framers. *Id.* YOUTER’s records similarly provide law enforcement with tracking capabilities unobtainable until the digital age and thus prohibited by *Carpenter*.

Through the GPS in YOUTER vehicles, the Government was able to effectively tail Ms. Austin for three months in at least six different vehicles that she picked up from YOUTER owned parking facilities across the city. R. at 3. To follow a suspect to each vehicle and subsequently tail each vehicle would be costly and nearly impossible using conventional surveillance techniques. With just a click of a button, the Government surreptitiously obtained this information without “the ordinary checks that constrain abusive law enforcement practices: ‘limited police resources and community hostility.’” *Jones*, 565 U.S. at 416 (opinion of Sotomayor, J.) (quoting *Illinois v. Lidster*, 540 U.S. 419, 426).

Further, the “retrospective quality of the data here gives police access to a category of information otherwise unknowable.” *Carpenter*, 138 S. Ct. at 2218. At the time of the Framers, the Government could not have obtained detailed records of Ms. Austin’s *past* whereabouts within the YOUTER vehicles. With access to Smartphone application data such as YOUTER, and larger GPS analytics providers like Smoogle, “the Government can now travel back in time to retrace a person’s whereabouts, subject only to the retention policies” of the service provider. *Id.* Without any measure of suspicion, the Government uses private companies to wade through location information of every citizen engaged with the digital service.

This newfound tracking capacity concerns everyone, not just suspects of police investigations. *Id.* The Government effectively argues that they do not need to identify in advance

a particular individual or particular time to track him or her if that individual shares the information with a third party. Any person that peaks an eyebrow of the Government has effectively already been tailed through each interaction with an application that stores location data. The Government is asking to “call upon the results of that surveillance without regard to the constraints of the Fourth Amendment.” *Id.* Only the few without smartphones or modern technology could escape this tireless surveillance, but even someone as “off the grid” as Ms. Austin could not escape.

B. The Pre-Digital Third Party Doctrine Does Not Govern This Case.

This Court in *Carpenter* rejected the mechanical application of the Third-Party Doctrine that the Government advances. *Id.* at 2219. The CSLI records presented greater privacy risks than the phone and bank records at issue in *Smith* and *Miller*. Effectively, *Carpenter* considered the act of sharing information a factor in determining whether a person has a reasonable expectation of privacy in the information. *See id.* at 2219-20. This factor is not dispositive. *See id.* Similarly, the historical location information from YOUTER is far more sensitive than phone and bank records involved in *Smith* and *Miller*, and unlike those records, is not voluntarily conveyed.

In *Smith*, this Court held that the Government did not conduct a search when using a pen register to acquire the telephone numbers a person dialed. *Smith v. Maryland*, 442 U.S. 735, 745-46 (1979). This Court held that a caller did not have a reasonable expectation of privacy because users must realize that when dialing a phone number, the company records the numbers to complete the calls and conduct billing. *Id.* at 742. Customers see a list of their long-distance calls on monthly bills and therefore must know of the existence of the records. *Id.* Further, this Court noted the “pen register’s limited capabilities” and that “a law enforcement official could not even determine from the use of a pen register whether a communication existed.” *Id.* at 741-42.

*Miller* similarly concluded that a bank customer did not have a protected privacy interest in several months' worth of canceled checks, deposit slips, and account statements held by a bank. *United States v. Miller*, 425 U.S. 435, 438, 440 (1976). The checks were "not confidential communications but negotiable instruments[.]" *Id.* at 440. Because the customer voluntarily conveyed to the banks the information in the documents obtained, he lacked any reasonable expectation of privacy in their contents. *Id.* at 444.

Here, an average YOUNBER consumer would not intuitively understand that the company collects and stores timestamped location information. The users understand that vehicles are identified with the bright pink YOUNBER logo and may be found at YOUNBER facilities. R. at 2. Unlike a phone bill and bank statements, which illustrate the records kept by these companies, the use of YOUNBER services does not reveal their use of location records. It is not obvious YOUNBER would need to use timestamped location data throughout the use of the vehicle. The most thoughtful consumer may surmise the company might use the vehicle's GPS to locate vehicles after a rental period, or in a case of a lost vehicle, but it is not inherent in the transaction that the company continually records a user's location every two minutes throughout the rental period.

Further, while *Carpenter* did not overturn *Smith* and *Miller*, the Court acknowledged that Fourth Amendment jurisprudence already recognized that information shared with a third-party does not negate protections. *Carpenter*, 138 S. Ct. at 2219-20 (citing *Jones*, 565 U.S. at 430; *United States v. Knotts*, 480 U.S. 276, 281 (1983)). The Court doubled down on *Jones*, holding that "[t]he Court has in fact already shown special solitude for location information in the third-party context." *Id.* CSLI records chronicled more location information than the vehicle GPS monitoring in *Jones*. *Id.* at 2220. Therefore, the third-party records revealing greater location surveillance implicated an intrusion within the scope of the Fourth Amendment. *Id.*

The location data from YOUNBER is also beyond the threshold of *Jones* and therefore protected. Unlike *Jones* where the Government identified one vehicle to follow for 28 subsequent days, the Government here was able to obtain with the click of a button detailed historical location information on every YOUNBER vehicle used across the city. Further, location information is not voluntarily conveyed by YOUNBER users in a meaningful way. Ms. Austin never consented to the privacy policy nor did YOUNBER provide notice to her of the privacy policy. R. at 23-24. As explained at trial by YOUNBER's data and information specialist, the privacy agreement is only assented to at initial registration of an account. *Id.* Once an account is set up, anyone may access the account if given the respective username and password. R. at 24. Any subsequent login is not informed of or asked to agree to the privacy policies. *Id.* When Ms. Lloyd created the shared account, she accepted the take it or leave it privacy policy in order to use YOUNBER. This type of contract of adhesion is not a meaningful choice on the part of the consumer. A user should not have to risk sacrificing their Fourth Amendment protections. And once Ms. Austin was given permission to use the account, download the app on her personal phone, and gain access to YOUNBER services, she did not have the opportunity to voluntarily consent to waiving her Fourth Amendment protections.

### C. Implications Of This Decision Reach Beyond The Case At Hand.

Finally, the warrant requirement strikes an appropriate Fourth Amendment balance between the interests of the Government and the intrusion on an individual's privacy interests. The government's general interest in gathering evidence does not pose a need to circumvent the general warrant requirement. The Government was seeking evidence to inculcate Ms. Austin and eventually convict her at trial. This Court holds that 'the warrant requirement is "an important working part of our machinery of government," not merely "an inconvenience to be somehow

‘weighed’ against the claims of police efficiency’” *Riley*, 573. U.S. at 401 (quoting *Coolidge*, 403 U.S. at 481).

In sum, Justice Sotomayor provides an appropriate admonishment:

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. The net result is that GPS monitoring—by making available at a relatively low cost such a substantial quantum of intimate information about any person whom the Government, in its unfettered discretion, chooses to track—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 (C.A.7 2011)).

Ms. Austin seeks to maintain the level of privacy the Founding generation intended to establish through creating the Fourth Amendment. History and this Court’s jurisprudence sustain that the Amendment seeks to protect the people’s privacies from arbitrary power and “place obstacles in the way of a too permeating police surveillance.” *Carpenter*, 138 S. Ct. at 2214 (quoting *United States v. Di Re*, 332 U.S. 581, 595 (1948)). Analogous to *Carpenter*, the warrantless acquisition of YOUBER location data circumvents fundamental Fourth Amendment protections through an arbitrary application of the Third-Party Doctrine.

### **CONCLUSION**

For the foregoing reasons, Ms. Austin respectfully requests that the Supreme Court of the United States reverse the judgement of the Thirteenth Circuit Court of Appeals.

Dated: October 6, 2019

Respectfully submitted,

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