No. 4-422

IN THE SUPREME COURT OF THE UNITED STATES

JAYNE AUSTIN,
Petitioner

V.

THE UNITED STATES OF AMERICA
Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT

BRIEF FOR PETITIONER

Counsel for Petitioner.
JAYNE AUSTIN

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1. Does an individual have standing to contest a warrantless search of a rental vehicle they are in possession of and have paid for through an account shared with another, even when their name is not on the rental agreement?

2. Is the warrantless acquisition of vast amounts of digital information, allowing government agents to precisely track a rental car's user over any period of time, an unconstitutional search in light of the decision in *Carpenter v. United States*, 138 S. Ct. 2206 (2018) and prior Fourth Amendment jurisprudence?

STATEMENT OF FACTS

I. FACTUAL HISTORY

Jayne Austin is a writer who is passionate about fighting injustice—in particular, unethical banking practices that marginalize low-income workers. R. at 1. Ms. Austin strives to live a simple, "off the grid" life. *Id*. While Ms. Austin now mainly lives in temporary co-habitation facilities, she formerly lived with her significant other, Martha Lloyd, and still relies on Ms. Lloyd to help her navigate a highly digitized society. R. at 1–2. Although she owns her own cell phone, Ms. Austin primarily accesses applications ("apps") and other internet services through the accounts she shares with Ms. Lloyd. R. at 2, 19. Ms. Austin is also an authorized user on Ms. Lloyd's credit card account. *Id.*

One of the accounts that Ms. Austin uses is a relatively new car rental app called YOUBER. R. at 1–2. YOUBER is a very popular app—having 75 million users around the world and 40 million users in the United States—which allows its users to rent a car at a fixed hourly rate. R. at 2, 22. Ms. Lloyd has had an account with YOUBER since July 27, 2018, and, like all her other accounts, gave Ms. Austin her YOUBER login information for Ms. Austin to use on her own personal cell phone. *Id*. Whenever Ms. Austin uses one of Ms. Lloyd's accounts such as YOUBER, and makes a transaction on their shared credit card, Ms. Austin pays Ms. Lloyd back in cash. R. at 18.

Recently, Ms. Austin and Ms. Lloyd have had something of an "on-again/off-again" relationship. R. at 2. Most recently, Ms. Austin and Ms. Lloyd went on a "break" in September 2018 because Ms. Lloyd disagreed with Ms. Austin's political beliefs. R. at 18. Ms. Lloyd described this break as temporary, and stated she "still love[s] [Ms. Austin]." *Id.* During this break, Ms. Lloyd has kept Ms. Austin as an authorized user on her credit card account, did not tell Ms.

Austin to stop using the credit card or any of her app accounts, including YOUBER, and did not change any of her passwords to prevent Ms. Austin from logging in. R. at 19–20.

On January 3, 2019, while driving a 2017 Black Toyota Prius YOUBER vehicle, Ms. Austin was pulled over by Netherfield Police Officer Charles Kreuzberger for failure to stop at a stop sign. R. at 2. When Officer Kreuzberger asked Ms. Austin for her license and registration, she showed him her YOUBER app rental agreement. R. at 2–3. When Officer Kreuzberger noticed Ms. Austin's name was not on the rental agreement, he proceeded to search her car without a warrant, telling her he did not need her consent to do so. R. at 3. While searching through the vehicle's trunk and Ms. Austin's personal belongings, including a pillow and blankets, Officer Kreuzberger received a call from dispatch about a 2017 Black Toyota Prius with a YOUBER logo driven by someone who allegedly robbed a nearby Darcy & Bingley Credit Union (DBCU). *Id*. Office Kreuzberger noticed that the vehicle's license plate, "R0LL3M," matched the partial license plate number "R0L" caught by a DBCU security camera. *Id*. Ms. Austin was arrested on suspicion of bank robbery. *Id*.

Two days after her arrest, one Detective Boober Hamm took the lead on Ms. Austin's case. *Id*. During his investigation, Detective Hamm learned of five open cases concerning bank robberies occurring between October 15 and December 15 of 2018. *Id*. Although the record is silent as to the specifics, the modus operandi in those robberies supposedly closely matched the January 3, 2019 robbery in Netherfield. *Id*. Remembering that Ms. Austin was driving a YOUBER vehicle at the time of her arrest, Detective Hamm subpoenaed YOUBER for location data from the account shared by Ms. Austin and Ms. Lloyd over the timespan of all six robberies. *Id*.

As with any other app or internet service, when a user creates a YOUBER account, they must accept the company's terms and conditions. R. at 23. While much of the language is

boilerplate, the terms include a clause allowing YOUBER to track a user's location while in a YOUBER vehicle. R. at 3–4. A user is only notified about this policy once, however, during the initial sign-up period when the user creates her account. R. at 23. After accepting these terms, a user is free to rent vehicles without agreeing. *Id.*

After the rental period begins, the company tracks the user's movement using GPS and Bluetooth signals from the user's cell phone. R. at 3. These features are only activated once the phone associated with the user's account is registered by YOUBER as being within the vehicle. R. at 22. The user is tracked constantly via GPS, and the location information is recorded in the company's database at two-minute intervals. *Id.*

Detective Hamm subpoenaed all GPS and Bluetooth information from the account in question between October 3, 2018, and January 3, 2019—three months' worth of precise, detailed location information. R. at 3. In doing so, the detective learned that Martha Lloyd's account was used to rent vehicles in the locations and at the times of the five other robberies. R. at 4. Based on this information, Detective Hamm recommended to the U.S. Attorney's Office six charges of bank robbery in violation of 18 U.S.C. § 2113. *Id.*

II. PROCEDURAL HISTORY

In January 2019, Ms. Austin was charged in the United States District Court for the Southern District of Netherfield by an indictment of six counts of 18 U.S.C. § 2113. R. at 1. Ms. Austin filed two motions to suppress evidence in the District Court. *Id.* Her first motion regarded the evidence obtained by Officer Kreuzberger when he searched Ms. Austin's YOUBER vehicle upon learning she was not on the rental agreement. R. at 1–2. The District Court denied Ms. Austin's first motion under the theory that she lacked standing, rationalizing that she was not listed on the rental agreement and unconvinced that she had "adequate" permission from Ms. Lloyd. R.

at 1, 6. Ms. Austin's second motion concerned the location data police subpoenaed from YOUBER. R. at 1. The District Court recognized that "technology has garnered easier access for the Government's ability to intrude upon the personal life and information of private citizens" and that GPS information "provide[s] a detailed window into a private person's life." R. at 7. Nevertheless, the court failed to see that Ms. Austin's location data rose to the level of privacy in *Carpenter v. United States*, 138 S. Ct. 2206 (2018), and denied Ms. Austin's motion based on the third-party doctrine. R. at 7–8.

As a result of the District Court's denial of her two motions, Ms. Austin was convicted, and timely appealed to the Court of Appeals for the Thirteenth Circuit. R. at 10. In regard to Ms. Austin's motion to suppress the evidence obtained through the search of her YOUBER rental car, the Thirteenth Circuit affirmed the District Court's finding that Ms. Austin did not have standing to contest the search. R. at 10. The Thirteenth Circuit also found that Ms. Austin lacked a valid property interest because she did not have Ms. Lloyd's "explicit permission" and thus fraudulently leased the YOUBER vehicle. R. at 12. However, the Thirteenth Circuit did not elaborate on how Ms. Austin's possession of the YOUBER vehicle was fraudulent, while at the same time concluding that the YOUBER vehicle was not stolen. R. at 12. Regarding the second issue, the Thirteenth Circuit was similarly unconvinced that Ms. Austin had either an established property interest or a reasonable expectation of privacy in her location data. R. at 14. The Thirteenth Circuit further affirmed the District Court's finding that the third-party doctrine controlled, and that Ms. Austin had no privacy expectation in information willingly given to YOUBER. R. at 14.

Ms. Austin petitioned the Supreme Court, and this Court granted certiorari.

SUMMARY OF ARGUMENT

All Ms. Austin seeks is the most "comprehensive" and "valued" of Fourth Amendment rights—the right to be let alone. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). This right grows ever more tenuous as society and technology advance, and law enforcement information-gathering techniques advance along with them. As American society evolves, so too must the constitutional boundaries that protect us from government overreach.

The Fourth Amendment protects "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. As its language suggests, the touchstone of the Fourth Amendment is *reasonableness*: a concept often analyzed in the context of a privacy expectation, but no less crucial when assessing government action. In short, the lower courts' denial of standing to contest the initial search of Ms. Austin's car, and the government's rationale for acquiring vast amounts of her location data without a warrant, are both premised on outmoded and obsolete applications of the law to today's world. Respondents here rest on mid-twentieth century legal principles that have already been reshaped, updated, and in some instances, completely overruled by twenty-first century case law—an unreasonable position if there ever was one.

First, Ms. Austin was improperly found to have lacked standing by both the trial court and the Thirteenth Circuit. Although her name was not on the rental agreement, Ms. Austin's expectation of privacy in the YOUBER vehicle was a reasonable one: she had paid for the right to rent it, which brought with it a right to exclude others from its use; she was the sole driver during the rental period, so her temporary possessory interest inherent in the rental was shared with no one else; and she kept her personal belongings locked in the vehicle's trunk, further indicating a

desire for privacy. This reasonable expectation of privacy should have been enough to establish that she had a right to contest the vehicle's search.

Moreover, denying Ms. Austin standing insists on an extremely narrow view of property ownership and control—a view increasingly out of touch with modern society. Ms. Austin and Ms. Lloyd's relationship, although perhaps unconventional by the standards of previous eras, brought with it a fluid sharing arrangement wholly typical of a modern relationship. Ms. Austin and Ms. Lloyd shared both a credit card, and the access to the internet services credit card ownership allows. Ms. Austin's presence in a YOUBER vehicle rented using Ms. Lloyd's account cannot be considered unlawful, even without Ms. Lloyd's explicit permission, since Ms. Austin had every reason to believe Ms. Lloyd consented to her being there. What's more, insisting on common-law property ownership as a prerequisite to asserting standing fails to account for Americans' shifting attitudes toward property in general. Indeed, the success of a company like YOUBER is contingent on an increasingly large social belief in, and consumer reliance on, the availability of easy short-term property rentals—lodging, transportation, and entertainment alike— in a twenty-first century economy. Denying Ms. Austin standing was erroneous at both the trial court and appellate court levels, and this Court should reverse.

Equally troubling is the government's insistence here that full participation in modern society must be conditioned on citizens' forfeiture of their Fourth Amendment protections. Only last year, in *Carpenter v. United States*, 138 S. Ct. 2206 (2018), this Court stated that citizens have a reasonable expectation of privacy in their physical movements, and the government may not subvert that expectation by aggregating vast amounts of location data generated by cell phones without a warrant. Digital information of the sort collected by the government is highly specific, highly personal, and ultimately revealing of more than just one's location. Indeed, such

information could allow government actors to deduce a wealth of detail about a person's "familial, political, professional, religious, and sexual associations." *Carpenter,* 138 S. Ct. at 2217 (quoting *United States v. Jones*, 565 U.S. 400, 415 (2012) (Sotomayor, J., concurring)). Whether by applying the classic "reasonable expectation of privacy" test, or by viewing one's digital information as the "effects" protected by the Fourth Amendment, a warrantless search plainly occurred—and accordingly, a gross invasion of Ms. Austin's constitutional rights.

Nor, as the government claims, does the third-party doctrine insulate this search from scrutiny. The doctrine is premised on the voluntary disclosure of non-sensitive information to third parties negating any inherent privacy expectation. But digital information, particularly cell phone location information, is not only highly private, but not meaningfully "volunteered" to third parties. In a country where 96% of the population owns a cell phone, and over four-fifths of those phones are smartphones capable of accessing apps like YOUBER, cell phones have become necessary to participate in the most basic aspects of society: they are essential for engaging in commerce, maintaining social connections, and engaging in civic participation, among countless other functions. This new reality was wholly outside the realm of imagination when the third-party doctrine was established, and renders that doctrine meaningless in the context of twenty-first century digital information. The lower courts' ruling should be overturned.

STANDARD OF REVIEW

Both questions presented should be accorded de novo review. Generally, questions of law raised by a trial court ruling are reviewed de novo. *Pierce v. Underwood*, 487 U.S. 552, 558 (1998). Regarding the first question, circuit courts are in agreement that standing is a question of law requiring de novo review. *See, e.g., Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1176 (9th Cir. 2011); *Shain v. Ellison*, 356 F.3d 211, 214 (4th Cir. 2004). Similarly, this Court has stated that legal questions regarding warrantless searches also merit de novo review. *See, e.g., Ornelas v. United States*, 517 U.S. 690, 697–98 (1996); *New York v. Belton*, 453 U.S. 454, 458 (1981).

ARGUMENT

I. MS. AUSTIN HAS STANDING TO CHALLENGE THE WARRANTLESS SEARCH OF THE YOUBER VEHICLE UNDER THE FOURTH AMENDMENT.

The concept of standing in Fourth Amendment cases is often considered a "shorthand for capturing the idea that a person must have a cognizable Fourth Amendment interest" in order to assert their rights had been violated. *Byrd v. United States*, 138 S. Ct. 1518, 1530 (2018). Implicit in the question of standing under the Fourth Amendment is a reflection of what Americans value: not only traditional "property-based" interests, but also new "privacy-based" interests the Amendment ought to protect.

In *Katz v. United States*, the Court fundamentally reframed Fourth Amendment analysis in finding that "the Fourth Amendment protects people, not places." 389 U.S. 347, 351 (1967). While previously, the Fourth Amendment was largely confined to a property-based analysis—i.e., whether the government trespassed against an existing property interest in one's house, papers, or

effects—*Katz* added that the Fourth Amendment also protects a person's privacy interests, an approach which has allowed the Amendment to adapt more easily to modern society.

While property-based principles, including possession, control, use, and the right to exclude—"one of the most essential sticks in the bundle commonly characterized as property," *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)—still largely influence the expectations of privacy society deems reasonable, *Katz* cleared the necessary blockage that would have prevented emerging expectations of privacy from achieving constitutional muster. Specifically, Ms. Austin's case represents a shift in modern values towards short-term possessory interests over long-term ownership. In the "temporary-access" revolution, monthly subscriptions to services like Netflix enhance the availability of new and diverse entertainment, while rental car apps like YOUBER provide transportation services at the tap of a cell phone screen.

While this new era of convenience undoubtedly shapes American life for the better, some aspects also pose difficult issues for the Fourth Amendment—namely, protecting the most basic expectations of privacy from becoming diluted in the Digital Age. Although the Framers could not have imagined the technological advancements presented to the Court today, mindfulness of the dangers unbridled police discretion poses to individual liberty informs modern analysis. The lower courts' holdings that Ms. Austin lacked standing because she was not listed on the rental agreement, or explicitly authorized by Ms. Lloyd to rent YOUBER vehicles, create a perilous exception to the Fourth Amendment principle protecting an individual's expectation of privacy while driving a rented car. Fourth Amendment concepts, both old and new, well-inform why this exception cannot persist.

A. Ms. Austin had a recognized expectation of privacy in the YOUBER vehicle.

A privacy interest based in the right to exclude others is nearly universally held. Ms. Austin has standing to contest the search of the YOUBER rental under the *Katz* recitation for two reasons. First, because Ms. Austin rented the YOUBER vehicle through the app on her cell phone and paid the rental fee, she was empowered to exclude others. Second, Ms. Austin drove the car, had complete control of the car and its locked compartments, and locked her personal effects in the trunk. This Court has repeatedly found those facts determinative of standing to contest unreasonable searches, and should lead the Court to the same finding here.

1. Ms. Austin had the right to exclude others, the talisman of property rights, because the YOUBER app was downloaded on her cell phone and she paid the rental fees with her credit card.

If an expectation of privacy in a public phone booth for two minutes is protected, then Ms. Austin's expectation of privacy in a rental car for several days must also be. In *Katz v. United States*, the government argued that petitioner Katz could not contest a wiretap "search" of the public phone booth in which he placed an incriminating call because he lacked a property interest in a public phone booth and, regardless, there was no "trespass." 389 U.S. 347, 351(1967). Overturning the requirement of a trespass, the Court held that "the Fourth Amendment protects people, not places" and protected Mr. Katz's expectation that his call would not be intercepted. *Id.* at 352. In his concurring opinion, Justice Harlan emphasized, "[t]he point is not that the booth is 'accessible to the public' at other times," but that when Mr. Katz closed the door and paid the toll, the phone booth was a "temporarily private place whose momentary occupants' expectations of freedom from intrusion are recognized as reasonable." *Id.* at 361 (Harlan, J., concurring) (internal citations omitted). Justice Harlan's concurring opinion is recognized as the rule from *Katz*, and

established that an individual expectation of privacy may be reasonable and warrant Fourth Amendment protection by virtue of the right to exclude, even if only for a moment. *Id.*

The facts of Ms. Austin's case mirror those in *Katz*. Like a public phone booth, YOUBER vehicles remain parked on a public street and available to the general public. R. at 2. Any number of people could have conceivably used the YOUBER vehicle in the same day. R. at 23. *Katz* informs that when an individual enters a phone booth, closes the door, and pays for the call, the individual has a "momentary" right to exclude others, and reasonably believes none will enter. *Katz*, 389 U.S. at 361 (Harlan, J., concurring). The *Katz* holding is equally relevant to Ms. Austin's case because when she entered the vehicle using the YOUBER app on her cell phone and paid the rental fee, she similarly acquired a temporary right to exclude others and justifiably expected the area was private. R. at 3, 18; *Katz*, 389 U.S. at 361 (Harlan, J., concurring). In fact, because the YOUBER software enabled her to lock the car, walk away, and still maintain exclusive use of it during the rental period, Ms. Austin has an even stronger privacy expectation the YOUBER vehicle than Katz did, and this expectation further supports her claim to standing, R. at 23.

2. Ms. Austin had complete control and possession of the YOUBER vehicle as its driver, and owned the personal effects locked in the trunk.

Ms. Austin had a legitimate expectation of privacy in the YOUBER vehicle even without explicit authorization because as the driver, she had complete control and dominion over the vehicle. In *Rakas v. Illinois*, the Court first established that permissive presence "cannot be deemed controlling" in a Fourth Amendment standing inquiry. 439 U.S. 128, 148 (1978) (passengers who were legitimately present in the car did not have standing because they lacked control and possession of the car and items in its locked compartments). In *Byrd*, this Court expanded on that holding and established that a driver in sole possession and control of a rental vehicle has standing even though they are not authorized by the rental agreement. 138 S. Ct. at 1524.

In *Byrd*, Torrance Byrd was driving a car rented in his girlfriend's name when he was stopped by a police officer for a traffic infraction. *Id.* After discovering that Byrd was not on the rental car agreement, the police officers searched the vehicle. *Id.* As a result of the search, the officers obtained evidence Byrd was transporting narcotics and arrested him. *Id.* Byrd filed a motion to suppress the evidence, but it was denied for lack of standing. *Id.* The government argued Byrd lacked standing solely because he lacked explicit authorization from the rental company to drive the car. *Id.* at 1527. This Court disagreed: "[that] *per se* rule rests on too restrictive a view of the Fourth Amendment's protections." *Id.* Instead, the Court found that because Byrd drove the car, had complete control and possession of it, and kept personal effects in the trunk, he had a substantial possessory interest. *Id.* at 1527–29. This Court explained, that even an "unauthorized driver in sole possession of a rental car would be permitted to exclude third parties from it, such as a carjacker." *Id.*

Ms. Austin's case is exactly like Mr. Byrd's. Like *Byrd*, Ms. Austin was in complete control of the rental car and of the locked compartments where she kept personal effects. R. at 3, 18; *Byrd*, 138 S. Ct. at 1528. Unlike the mere passengers in *Rakas*, Ms. Austin drove the car and was its sole occupant. R. at 3; *Rakas,* 439 U.S. at 154. Further, Ms. Austin had a possessory interest in the clothes, shoes, pillows, blankets, and other personal effects found in the YOUBER vehicle and locked in the trunk. R. at 3. But fundamentally, Ms. Austin had the right to exclude others by virtue of the YOUBER software. R. at 23. Based on those facts, there is "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 1528–29.

B. Ms. Austin reasonably believed that her use of the YOUBER account was legitimate and, regardless, her presence was objectively lawful.

This Court has well-established that drivers in complete possession and control of a vehicle and its locked compartments have a strong claim to standing, regardless of whether they have explicit permission from the owner. *Byrd*, 138 S. Ct. at 1528; *Rakas,* 439 U.S. at 154. Only if the driver's presence in the vehicle itself was "wrongful" will an otherwise legitimate expectation of privacy be defeated. *Byrd*, 138 S. Ct. at 1524; *Rakas,* 439 U.S. at 154. The Court's decisions in *Rakas* and *Byrd* jointly stand for the proposition that "wrongful" means "unlawful" when the defendant's presence itself is a violation of the law—not whether the defendant's presence was affirmatively authorized by some civil arrangement. *Byrd*, 138 S. Ct. at 1524; *Rakas,* 439 U.S. at 154. Breaking a contract, even if materially, is not a violation of law. *Byrd*, 138 S. Ct. at 1524. While in some cases, it is true, that a civil dispute may become criminal —i.e., property allegedly acquired by fraud—courts require much more than a lack of explicit permission. Here, Ms. Lloyd gave Ms. Austin the "keys" by sharing her password to her YOUBER account. R. at 18. Moreover, the Thirteenth Circuit already found that Ms. Austin did not steal the vehicle. R. at 12. Even if Ms. Lloyd no longer wished for her to use it, absent explicit revocation, Ms. Austin reasonably believed that she could use the YOUBER account. R. at 19. Because there is simply no other evidence that Ms. Austin's presence itself was unlawful, her expectation of privacy is legitimate.

1. Because Ms. Austin systematically resisted life on the "grid," Ms. Lloyd shared all of her electronic accounts with Ms. Austin, including explicit permission to use her YOUBER account.

This is not a case where some stranger stole another person's identity without their permission, forged a signature, and fraudulently rented a car. Ms. Austin is, to date, an authorized user on Ms. Lloyd's credit card and, as Ms. Lloyd herself testified, initially received permission to

use the YOUBER app. R. at 18–19. Although the record is unclear when Ms. Lloyd actually decided that she no longer wished Ms. Austin to use these accounts, she never told Ms. Austin or changed her passwords. R. at 19–20. In fact, Ms. Lloyd's only communication was a reassurance that she "still loved her." *Id.* Thus, unless Ms. Austin was able to read Ms. Lloyd's mind, Ms. Austin justifiably believed that she had Ms. Lloyd's permission to use the YOUBER app.

Although the lower courts were unconvinced that Ms. Austin had "adequate" permission, a poll of modern society would likely reveal that Ms. Austin's belief was reasonable. "Sharing login credentials to subscription-based streaming TV services is a widespread phenomenon"[1]—approximately forty-nine percent of viewers aged eighteen to twenty-nine share at least one account with someone outside of their home.[2] In fact, this phenomenon is already recognized in the courts. *United States v. Nosal*, 844 F.3d 1024, 1038 (9th Cir. 2016) (no just reason to criminalize password sharing among friends and family, who have little reason to suspect that they are committing a federal crime). Moreover, in fraudulent use of a password cases, persons receiving initial permission are entitled to rely on it. *Id.* The onus is on the authorized user to prove a lack of authorization by *explicitly revoking* permission, not on the other to prove explicit permission was continuously given. *Id.* Thus, when Ms. Lloyd shared her password with Ms. Austin, she entitled Ms. Austin to use the YOUBER app until explicitly told otherwise.

Strangely enough, password sharing is actually endorsed by the CEOs of Netflix, HBO, and Hulu because it ultimately "hooks" those who initially share an account into eventually signing

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[1]Adam Epstein, *The Complete Guide to Netflix Password-Sharing Etiquette*, Quartz (Mar. 15, 2016) (https://qz.com/639726/the-complete-guide-to-netflix-password-sharing-etiquette/).

[2] Christina Cauterucci, *Ex Flix: Do Couples Need Prenups for their Shared Streaming Passwords?*, Slate (Oct. 26, 2015) (https://slate.com/human-interest/2015/10/what-happens-when-your-ex-is-still-using-your-netflix-password.html).

up for their own.[3] *Byrd* similarly recognized that rental companies have incentives to create terms users are likely to break. 138 S. Ct. at 1529. The insinuation that Ms. Austin is "no better than a car thief" because she only used Ms. Lloyd's account to rent cars for crimes is equally without merit. YOUBER is well-aware that its users share accounts, yet seems to care little about it. R. at 29. Moreover, purchases made by an "authorized" user on a credit card are—by definition—not fraudulent.[4] Thus, under both civil and criminal law, Ms. Austin's use of the YOUBER account was not only lawful, but arguably protected. If the Court holds otherwise, millions of Americans could lose their Fourth Amendment rights solely because the account holder secretly revoked permission.

2. Only an unlawful presence could defeat Ms. Austin's reasonable expectation of privacy and, under the law, Ms. Austin was rightfully present in the YOUBER vehicle.

Ms. Austin had a reasonable expectation of privacy because she was lawfully present in the YOUBER vehicle. While a lack of authorization from the rental company is not controlling, an individual cannot reasonably expect constitutional protection when they are "wrongfully" present. *Byrd*, 138 S. Ct. at 1528. All courts applying this rule under comparable facts have stated that "wrongful" presence is when the person's presence is in itself a crime, and unequivocally stated that breach of contract between parties is not criminal. *Id. See* 1 Corbin on Contracts § 1.1 (2017) (laws govern an individual's relationship with the government while contracts govern the private interactions of individuals with each other).

[3] Perez, Sarah, *Netflix CEO Says Account Sharing is OK*, Tech Crunch (Jan. 11, 2016, 9:47am) (https://techcrunch.com/2016/01/11/netflix-ceo-says-account-sharing-is-ok/).
[4] *See e.g.*, *What You Should Know About Being an Authorized User on a Credit Card*, CreditKarma.com (Oct. 1, 2019) (https://www.creditkarma.com/credit-cards/i/authorized-user-credit-card/).

For instance, in *United States v. Lyle*, the court concluded that the defendant's presence in the vehicle itself was unlawful, because he drove a rental vehicle, which he was not authorized by the rental company to drive, on a suspended license. 919 F.3d 716, 729–30 (2nd Cir. 2019). But in the present case, there is no evidence that Ms. Austin violated the law simply by being present in the YOUBER vehicle. There is similarly no evidence in the record that Ms. Austin did not have a valid driver's license. Moreover, the Court of Appeal conceded that there was no evidence that Ms. Austin stole the vehicle. R. at 12. Nor is there any evidence that Ms. Lloyd took any legal action to prevent Ms. Austin from using the YOUBER account. R. at 19. Whether Ms. Austin had permission from Ms. Lloyd to rent YOUBER vehicles is unimportant because Ms. Austin was lawfully present. The level of permission from Ms. Lloyd, like a rental agreement, is a civil matter and not criminal because whether the owner of the car gives permission is not held in high regard, whether a licensee gives permission is not either.

C. Requiring Ms. Austin to have a common-law property interest in order to assert standing defeats the vital role that short-term rentals play in the advancement of society.

Denying Fourth Amendment rights based on a limited or brief relationship with property would deny a large subset of Americans protection from unreasonable government intrusion. This Court's holding in *Katz* recognized that the Fourth Amendment protects Ms. Austin's reasonable expectation of privacy, she need not have a common-law property interest in the YOUBER vehicle. *Katz*, 389 U.S. at 352. Following *Katz*, this Court should recognize the vital role rental car apps play in modern society. *Id.* Although the "temporary-interest" economy is taking over essentially every industry—fashion, food, entertainment—it has become extremely common for

Americans to enter into short-term rentals rather than long-term ownership, of cars specifically.[5] There are approximately 40 million Americans who use the YOUBER app alone. R. at 22. If whether the relationship was short-term is given any significance, this Court would be ignoring the vital role that ride share apps like YOUBER play in the modern American-way-of-life.

II. MS. AUSTIN'S GPS LOCATION DATA IS PROTECTED BY THE FOURTH AMENDMENT AND POLICE ACQUSITION OF IT CONSTITUTED A SEARCH UNDER *CARPENTER*.

Until recently, this Court had not articulated the degree to which information concerning an individual's whereabouts, recorded digitally over a lengthy span of time, might be subject to Fourth Amendment restrictions. This question was finally addressed in *Carpenter v. United States*, 138 S. Ct. 2206 (2018), a case in which the Court was largely concerned with two questions: first, whether the government's acquisition of a defendant's location data was a search under the Fourth Amendment, and second, whether the third-party doctrine insulated government actors from violating that defendant's Fourth Amendment protections. *Carpenter,* 138 S. Ct. at 2216–17.

The answers arrived at in *Carpenter* are equally instructive here. When the government subpoenaed Ms. Austin's cell phone location records, it was a Fourth Amendment search as understood by the Court in *Carpenter*, which unequivocally held that a person has a reasonable expectation of privacy in their digitally recorded location data. *Id.* at 2217. Alternatively, viewed through the lens of common-law trespass which traditionally informed Fourth Amendment

[5] Matt Phillips, *Why More and More Americans are Renting Cars Instead of Buying Them*, Quartz (Jun. 2, 2014) (https://qz.com/214922/why-more-and-more-americans-are-leasing-cars-instead-of-buying-them/) ("Some argue that the American swing toward auto leasing is part of a much bigger societal shift away from the traditional concept of ownership …. home ownership rates have plummeted. Just 64.8% of American families owned houses at the end of 2013, the lowest level since 1995.").

jurisprudence, Ms. Austin also retained a property interest in her location data—her "effects"—and the government's acquisition of it, without a warrant, violated that interest. Additionally, the government's reliance on the third-party doctrine cannot be allowed to control here, as *Carpenter* firmly stated that the constant recording of a user's cell phone location data presents "novel circumstances" beyond the contemplation of the Court when that doctrine was first articulated. *Id.* Accordingly, the Fourth Amendment protected Ms. Austin's location data and police acquisition of her data was a "search." As such, the Thirteenth Circuit's decision denying Ms. Austin's Motion to Suppress Evidence should be reversed, and Ms. Austin's conviction must be vacated.

A. The government's acquisition of GPS location data from YOUBER violated Ms. Austin's reasonable expectation of privacy in her physical movements.

The parallels between the facts of Ms. Austin's case and those in *Carpenter* are uncanny. In *Carpenter*, the petitioner was arrested on suspicion of having robbed several Radio Shack and T-Mobile stores in Detroit. *Carpenter*, 138 S. Ct. at 2212. In order to build their case against him, law enforcement directed Carpenter's wireless carriers via court order to disclose the cell-site location information (CSLI) taken at the origination and termination of any phone activity occurring over the several months the robberies occurred. *Id.* In doing so, government agents were able to pinpoint Carpenter's phone at the time and location of the robberies, leading to his conviction. *Id.* at 2213. The Supreme Court reversed the conviction based upon two key rationales. *Id.* at 2223. First, the Court recognized that a person has a reasonable expectation of privacy in their physical movements, and the government violates that expectation when it acquires enough data to exactly track a person's movements over a period of several months. *Id.* at 2217–18. Second, the Court found that acquiring this information gives the government too much investigative power. *Id.* at 2218. By tracking an individual's location through their cell phone, the

investigator "achieves near perfect surveillance," and cannot be allowed to "call upon the results of that surveillance without regard to the constraints of the Fourth Amendment." *Id*.

Both rationales are equally useful here. First, Ms. Austin was entitled to a reasonable expectation of privacy in her physical movements just as much as Carpenter was. Additionally, the government used the location data acquired from YOUBER to construct a precise portrait of Ms. Austin's whereabouts in exactly the same manner, but to an even greater degree of accuracy than in *Carpenter*. As a result, law enforcement essentially constructed a retroactive tail on Ms. Austin, and pursuant this Court's holding in *Carpenter*, violated her Fourth Amendment rights.

1. Ms. Austin's reasonable expectation of privacy in her physical movements was violated by the government.

In *Carpenter*, the Court articulated a crucial concept from the decision in *Katz*: "what [one] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Katz,* 389 U.S. at 351–52. The Court stressed that "a person does not surrender all Fourth Amendment protection while venturing into the public sphere." *Carpenter*, 138 S. Ct. at 2217. A log of a person's physical movements is about more than just a body's placement in space and time—it can reveal endless amounts of information concerning a person's "familial, political, professional, religious, and sexual associations." *Id.* at 2217 (quoting *Jones*, 565 U.S. at 415 Sotomayor, J., concurring)). Knowledge of an individual's whereabouts, aggregated over a few months' time, provide "an intimate window into a person's life" around which a person has a reasonable expectation of privacy. *Id.* at 2217–18.

The principle remains valid here. Similar to Carpenter's wireless carriers, YOUBER began tracking Ms. Austin's location the second her phone registered to the YOUBER vehicle. R. at 22. For the entirety of each rental period, YOUBER continually logged Ms. Austin's location data and created a precise roadmap of her whereabouts while driving the vehicle—an exact analogue to the

government tracking Carpenter's physical movements. R. at 3. Citizens have an expectation "that law enforcement... would not—and indeed, in the main, simply could not—secretly monitor and catalogue every single movement" they might make. *Jones*, 565 U.S. at 430 (Alito, J., concurring). That is exactly what occurred here, and as *Carpenter* illustrates, it was an unreasonable violation of Ms. Austin's rights.

2. Ms. Austin's location data was more accurate, and therefore even more worthy of Fourth Amendment protection, than in *Carpenter*.

Of further concern to the Court in *Carpenter* was the degree to which "the retrospective quality of the data... gives police access to a category of information otherwise unknowable." 138 S. Ct. at 2218. The CSLI in *Carpenter* was collected by cell phone carriers literally any time a phone is used. *Id.* "This newfound tracking ability," the Court warned, "runs against everyone"—not just criminal defendants. *Id.* "Only the few without cell phones," the Court continued, "could escape this tireless and absolute surveillance." *Id.*

However, those concerns are even more pronounced here than in *Carpenter*. The accuracy of CSLI as discussed in *Carpenter* depends on the concentration of cell towers nearby: the more cell towers around, the more accurately a user's location can be pinpointed. *Id.* Law enforcement therefore used Carpenter's CSLI data to create an approximate sketch of his whereabouts. *Id.* at 2212–13. Conversely, YOUBER gathers a user's location data when a user's phone communicates with a series of satellites called the Global Positioning System (GPS). R. at 4. Whereas CSLI is dependent on the relative proximity of cell sites to one another, GPS-enabled phones communicate with GPS satellites individually, and a user's location can be determined with incredible accuracy—"to within a 4.9 m (16 ft.) radius under open sky."[6] If Carpenter's location information

[6] U.S. Air Force, *GPS Accuracy,* http://gps.gov/systems/gps/performance/accuracy (all internet materials last visited September 28, 2019).

based on CSLI was deemed worthy of Fourth Amendment protection, it follows that the far *more* accurate GPS information collected by the government in this case would be just as, if not more, protected. Even Justice Kennedy's dissent in *Carpenter* supports this logic: in his view, GPS information was more deserving of protection than CSLI because, among other reasons, *it was more accurate*. 138 S. Ct. at 2225.

B. Alternatively, the warrantless search was unreasonable because it violated Ms. Austin's property rights in her "effects."

When the Thirteenth Circuit declared that Ms. Austin did not have an established property interest in her location information, it declined to explain why. R. at 14. Supreme Court precedent, however, and the plain language of the YOUBER user agreement, suggest the opposite: that Ms. Austin's location data were indeed "effects" protected by the Fourth Amendment and the government trespassed upon them by acquiring them. As such, this Court should also find that the government trespass unto her "effects" was presumptively unreasonable without a warrant.

The common-law property-based approach to the Fourth Amendment, essentially dormant since Katz, was resurrected by the Court in *United States v. Jones*, a case that incidentally involved GPS location information. 565 U.S. 400 (2012). In *Jones*, government agents placed a GPS tracking device on the petitioner's car without a warrant, and tracked his movements for nearly a month. *Id.* at 403. In affirming reversal of his conviction, the Court found that the petitioner's car was an "effect" and that the warrantless placement of a GPS device on the "effect" was an unlawful search for Fourth Amendment purposes. *Id.* at 404.

This Court recently established that, much like vehicles, digital information on a cell phone should be considered "effects" worthy of Fourth Amendment protection. In *Riley v. California*, the Court held that a person's cell phone was an "effect" for Fourth Amendment purposes. 575 U.S. 373, 386 (2014). But the Court also rejected the idea that a cell phone was simply equivalent

to a "container whose contents may be searched" when government actors seek to access either information stored on the phone itself, or accessible remotely via the cloud. *Id.* at 397. In other words, not only are phones "effects" deserving of Fourth Amendment protection, but the files and materials they both physically hold, and generate to be held elsewhere, are "effects" too.

As mentioned previously, the right to exclude others is considered a fundamental component of property ownership. A core question here, then, is whether Ms. Austin actually "owned" the "effects" in question—her cell phone location data—for the purposes of the Fourth Amendment. YOUBER's own corporate privacy policy suggests precisely that. The section of the policy relevant here is entitled "DISCLOSURE OF YOUR INFORMATION." R. at 29. Use of the second-person pronoun implies that YOUBER recognizes a user's continued property interest in *their* information. Nowhere does the policy state, or even suggest, that a YOUBER user relinquishes all property rights inherent in information she either directly gives to YOUBER, such as payment information, or information automatically generated by the app, such as location data. *Id.*

Additionally, this section describes only two possible reasons for disclosure. The first is to "third-party service providers" [7] who "perform functions on our behalf," including the use of "satellite-mapping" and "analytics." *Id.* The second is disclosure for purposes of accounting, "record keeping and legal functions," and other "general business operations." R. at 30. Notably absent is any clause authorizing YOUBER to grant the government unfettered access to a user's information; indeed, the policy makes no mention of sharing user information with the government at all. R. at 29–30. The fact that the very possibility was not contemplated by the policy means that

[7] YOUBER relies on the search engine Smoogle for processing and analyzing the vast amounts of location data generated by its users. R. at 23.

Ms. Austin had not consented, nor should have expected, to relinquish any of her constitutional rights by using YOUBER. Thus, the search was an unreasonable intrusion into Ms. Austin's property interest in her effects.

C. The third-party doctrine does not apply when the government collects vast amounts of a person's location information generated by a cell phone.

An additional question raised by *Carpenter* was the extent to which the third-party doctrine controls in cases where government agents request cell phone location data. The third-party doctrine was traditionally understood as the absence of a legitimate expectation of privacy in information voluntarily turned over to third parties. This doctrine is derived largely from two Supreme Court cases: *United States v. Miller,* 425 U.S. 435 (1976) and *Smith v. Maryland*, 442 U.S. 735 (1979). *Miller* concerned government agents subpoenaing bank records, including checks and deposit slips. *Miller*, 425 U.S. at 437. The Court held that bank customers lack a reasonable expectation of privacy in information willingly given to a bank, since the records were never intended to be private and were easily observable by bank employees. *Id.* at 440–43. In *Smith*, the Court found that the record of outgoing calls generated by a pen register—a simple device tracking the numbers associated with incoming and outgoing calls—enjoyed no reasonable expectation of privacy, because the phone company itself already kept similar records when calculating a subscriber's monthly long-distance phone bill. *Smith,* 442 U.S. at 737, 742.

The Court rejected this argument in *Carpenter*, and it should do the same here. First, *Carpenter* made clear that the Court's prior rulings in *Smith* and *Miller* did not hinge exclusively on whether the documents were simply held by a third party—it was the *type* of information being sought that was ultimately dispositive. *Carpenter*, 138 S. Ct. at 2219. As previously mentioned, the Court had already foreshadowed this shift in thinking in *Riley v. California*, 573 U.S. 373, 386 (2014), finding that both cell phones, and the information they generate, are

"effects" around which a strong privacy expectation exists. There is unquestionably "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." *Carpenter,* 138 S. Ct. at 2219.

The same standard should apply to Ms. Austin here. The information Detective Hamm acquired, as previously mentioned, amounts to nothing less than a retroactive tail, through which government agents could compile "a detailed chronicle of a person's physical presence." *Carpenter*, 138 S. Ct. at 2220. In other words, Ms. Austin's case illustrates that the potential for government abuse—and indeed, the actual invasion Ms. Austin has already suffered—is exponentially greater than that contemplated in *Smith* or *Miller*. Without the Fourth Amendment to check police power to summon a person's entire digital footprint, the government could have unfettered access to the whole of our private lives, merely hidden for now on corporate servers. This Court was not willing to accept that as a lamentable cost of twenty-first century life in *Carpenter*, and it should not accept it here.

But another aspect informed the Court's rationale in declining to extend the third-party doctrine in *Carpenter*: in everyday use, "cell phone location information is not truly 'shared' as one normally understands the term." 138 S. Ct. at 2220. The Court recognized that in 21st century society, cell phone use can hardly be deemed voluntary, in the way that making calls from a private land line may have been in *Smith*, or using paper checks to conduct business was in *Miller*. *Id.* Research bears out this conclusion: 96% of Americans "own a cell phone of some kind," and the share of Americans who own a smartphone capable of accessing apps like YOUBER is estimated to be 81%. Pew Research Center, *Mobile Fact Sheet*.[8]

[8] http://pewinternet.org/fact-sheet/mobile (June 12, 2019).

In fact, the federal government already recognizes the daily necessity of cell phones through a variety of programs and initiatives. For instance, the Federal Communications Commission operates a program known as Lifeline, designed to subsidize internet services, including cell phone data plans, for low-income individuals. Federal Communications Commission, *Lifeline Support for Affordable Communications*.[9] The legislative branch has sought to improve access as well: Congress recently passed the Connected Government Act, which instructs all federal websites to be "mobile friendly." Pub. L. No. 115-114, 131 Stat. 2278 (2018). These and dozens of other programs demonstrate that the federal government has a vested interest in aligning government services with broad public internet access via cell phone.

Surely the government does not wish to condition this technological innovation on the wholesale forfeiture of our Fourth Amendment rights. Extension of the third-party doctrine to Ms. Austin's case would eviscerate citizens' Fourth Amendment protections in the Digital Age—a time in which the ubiquity of cell phones in our culture renders the protection against unreasonable government intrusion especially critical. Ms. Austin urges this Court to uphold its precedent from *Carpenter*, and hold here that the expectation of privacy an individual has in their cell phone information remains beyond the reach of the third-party doctrine.

CONCLUSION

In a society where technology is ever-evolving, "the right to be let alone" is more crucial than ever, and the Fourth Amendment has always been the most important tool in asserting this right. For the foregoing reasons, Ms. Austin respectfully asks this Court to overturn the Thirteenth Circuit's decision.

[9] http://fcc.gov/consumers/guides/lifeline-support-affordable-communications.