

No. 4-422

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IN THE  
SUPREME COURT OF THE UNITED STATES

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JAYNE AUSTIN

*PETITIONER,*

v.

THE UNITED STATES OF AMERICA

*RESPONDENT.*

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

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BRIEF FOR THE PETITIONER,  
MS. JAYNE AUSTIN

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Team P12  
*Counsel for Respondent*  
October 6, 2019

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## **QUESTIONS PRESENTED FOR REVIEW**

I. Fourth Amendment standing is afforded to those with possessory interests in vehicles or those with reasonable expectations of privacy in vehicles. Ms. Austin's rented vehicle was searched without a warrant even though she had authorization to use the credit card and account that rented the vehicle, and used the vehicle for normal uses. Does Ms. Austin's possessory interest in the vehicle, or her reasonable expectation of privacy in the vehicle, afford her Fourth Amendment standing?

II. The Fourth Amendment protects the privacy interests of all individuals against unreasonable searches and seizures. In his investigation of a string of robberies, Detective Hamm subpoenaed three months of Ms. Austin's GPS location and Bluetooth information from a third party, without first obtaining a warrant. Was Ms. Austin's Fourth Amendment right to privacy violated when Detective Hamm obtained her information?

## **STATEMENT OF CASE**

### **I. SUMMARY OF FACTS**

Jayne Austin is a passionate poet, blogger, and activist who focuses her activism on the corruption within the United States banking system. R. at 1. Ms. Austin finds the preference of higher-income members over lower-income members by *Darcy and Bingley Credit Union* to be particularly disturbing and worthy of protest. R. at 1.

Ms. Austin's lifestyle is very minimal and natural. R. at 1. Her immaterial lifestyle has resulted in her having no permanent residence and requiring her to live in co-habitation facilities for short periods of time before moving onto other places to live. R. at 1. Additionally, Ms. Austin does not own a vehicle and uses the mobile application ("app") YOUBER to rent a vehicle for short periods of time so she may drive from place to place. R. at 2.

The YOUNBER app allows users to sign rental agreements with the YOUNBER company enabling them to find YOUNBER vehicles at YOUNBER owned parking stalls and lots. R. at 2, 23. Users may rent a vehicle for a maximum of one week's time or 500 miles upon which the rental terminates and YOUNBER employees inspect the vehicle. R. at 2, 23. YOUNBER uses Bluetooth and GPS technology to track their vehicles and their users once the user is within the vehicle. R. at 2, 4, 22. The GPS information goes through the company's mainframe and is put through the Smoogle search engine using their satellite mapping technology. R. at 2, 4, 22. YOUNBER tracks the location of their vehicle in real time with updates appearing every two minutes. R. at 2, 4, 22. YOUNBER users must agree to this tracking by clicking a box, which only appears once when an account is first created. R. at 2, 23. A user is not notified again of the tracking at any time after initial registration. R. at 24.

When using the YOUNBER app, Ms. Austin used her partner, Martha Lloyd's account. R. at 2. Ms. Lloyd created her account in July 2018 and has also made Ms. Austin an authorized user on her credit card account. R. at 2. Ms. Lloyd gave Ms. Austin her YOUNBER login information so she may use it with the understanding that Ms. Austin reimburse Ms. Lloyd when using her account. R. at 2, 17-18. Ms. Lloyd loves Ms. Austin but from September 2018 to present their relationship has been at an intermission. R. at 18.

On January 3, 2019, Ms. Austin used the YOUNBER app to rent a 2017 Black Toyota Prius. R. at 2. Later that day, Officer Charles Kreuzberger pulled over Ms. Austin for failing to stop at a stop sign. R. at 2. Ms. Austin gave Officer Kreuzberger her license and showed him the YOUNBER app, which did not include her name on the rental agreement. R. at 2. Officer Kreuzberger informed Ms. Austin that because she was not listed on the agreement, he did not need her consent to search the vehicle. R. at 3. Officer Kreuzberger searched the car and found a

number of personal effects in the vehicle in addition to a BB handgun with the orange tip removed, a ski mask, a duffel bag containing \$50,000, and blue dye packs. R. at 3. During his search, Officer Kreuzberger received notice that a vehicle, with features similar to Ms. Austin's, allegedly robbed a *Darcy and Bingley Credit Union* while wearing a maroon ski mask and using a handgun. R. at 3.

Officer Kreuzberger arrested Ms. Austin on suspicion of bank robbery. R. at 3. Days later, upon further investigation, Detective Boober Hamm discovered five open bank robberies that occurred between October 15, 2018, and December 15, 2018 that had similar circumstances of the January 3, 2019, robbery. R. at 3. Because Ms. Austin used a YOUNBER vehicle the day of her arrest, Detective Hamm served YOUNBER with a subpoena duces tecum ("SDT") to obtain all the tracking information related to Ms. Lloyd's YOUNBER account. R. at 3.

Upon review of the data, Detective Hamm discovered that Ms. Lloyd's YOUNBER account rented vehicles in the same location and times as the other five robberies. R. at 4. Detective Hamm then recommended that the prosecution team charge Ms. Austin with six counts of bank robbery under 18 U.S.C. § 2113, Bank Robbery and Incidental Crimes. R. at 1, 4.

## **II. PROCEDURAL HISTORY**

On January 21, 2019, the prosecution team formally charged Ms. Austin with six counts of bank robbery under 18 U.S.C. § 2113, Bank Robbery and Incidental Crimes. R. at 1, 4. Ms. Austin timely filed two motions: (1) to suppress the evidence obtained during Officer Kreuzberger's search of the rental car; and (2) to suppress the location data provided by YOUNBER to Detective Hamm. R. at 4. On February 25, 2019, the United States District Court for the Southern District of Netherfield denied both of Ms. Austin's motions to suppress. R. at 1, 8. Ms. Austin timely appealed to the United States Court of Appeals for the Thirteenth Circuit.

R. at 9. On April 1, 2019, the United States Court of Appeals for the Thirteenth Circuit affirmed the district court's order denying Ms. Austin's motions to suppress. R. at 16.

Ms. Austin appealed to this Court which granted her petition for writ of certiorari.

### **SUMMARY OF ARGUMENT**

Individuals have Fourth Amendment standing to challenge violations of their Fourth Amendment privacy rights, including freedom from warrantless searches. Ms. Austin drove a vehicle that she rented with a credit card she had authorization to use, from an account she had access to. She drove the vehicle for normal use including to go to cohabitation facilities where she often spent her nights. When she was pulled over for a traffic infraction, the officer searched Ms. Austin's vehicle without a warrant. Ms. Austin's attempt to challenge the search was denied for lack of Fourth Amendment standing. Moreover, individuals have Fourth Amendment standing if they can show a possessory, property-based interest in the vehicle or if they have a reasonable expectation of privacy in the vehicle. Ms. Austin rented the vehicle herself and was in sole control of it. Additionally, her expectation of privacy in the vehicle she drove and controlled is reasonable. Hence, she has Fourth Amendment standing to challenge the search.

The Fourth Amendment protects the privacy interests of all individuals. When Detective Hamm subpoenaed Ms. Austin's GPS location and Bluetooth information from a third party, he violated Ms. Austin's privacy interest and conducted a search within the meaning of the Fourth Amendment and *Carpenter*. Moreover, Detective Hamm's search was unreasonable under the circumstances because he did not obtain a warrant. The Third-Party Doctrine Cases are inapplicable because they do not analyze the sensitive nature of information involved here. Detective Hamm was investigating six different robberies that occurred on six different days, yet he subpoenaed three months of Ms. Austin's records. Detective Hamm had the option of

subpoenaing Ms. Austin's records for only the six dates he was investigating, but because he did not do this, he violated Ms. Austin's privacy interest in those records.

### **STANDARD OF REVIEW**

This Court reviews appeals of motions to suppress in two ways: factual findings are reviewed for clear error, while legal determinations are reviewed *de novo*. *Ornelas v. United States*, 517 U.S. 690, 699 (1996). Moreover, constitutional questions are questions of law. *I.N.S. v. St. Cyr*, 533 U.S. 289, 290 (2001). Questions of law are subject to *de novo* review and no deference is given to the lower court. *Pierce v. Underwood*, 487 U.S. 552, 558-59 (1988). As such, this Court will review the lower court's decision *de novo*.

## **ARGUMENT**

### **I. JAYNE AUSTIN HAD STANDING TO CONTEST THE SEARCH OF HER RENTAL VEHICLE BECAUSE SHE HAD A LEGITIMATE POSSESSORY INTEREST IN THE VEHICLE AND SHE HAD A REASONABLE EXPECTATION OF PRIVACY IN THE VEHICLE**

The Fourth Amendment guarantees people “be secure in their . . . effects, against unreasonable searches” without a warrant. U.S. Const. amend. IV. “[A]utomobiles are ‘effects’ and thus within the reach of the Fourth Amendment.” *South Dakota v. Opperman*, 428 U.S. 364, 367 (1976). In order to seek relief for a Fourth Amendment violation, a person must have “standing” to assert “a cognizable Fourth Amendment interest.” *Byrd v. United States*, 138 S. Ct. 1518, 1530 (2018). In deciding *Byrd*, this Court found an individual may assert Fourth Amendment when he has either a legitimate possessory interest in a vehicle or, if that fails, a reasonable expectation of privacy. *United States v. Thomas*, 447 F.3d 1191, 1197 (9th Cir. 2006); quoting *Minnesota v. Carter*, 525 U.S. 83, 88 (1998). Ms. Austin had a legitimate possessory interest in the YOUNBER vehicle because she had authorization to rent the vehicle. In the alternative, Ms. Austin had a reasonable expectation of privacy while in the vehicle because she still had control and authority over the vehicle.

#### **A. If Ms. Austin’s Use of the YOUNBER Vehicle Was A Violation of the YOUNBER Rental Agreement, The Violation Does Not Diminish Ms. Austin’s Expectations of Privacy**

The Fourth Amendment standing of an unauthorized driver of a rental vehicle does not diminish based on an alleged violation of the rental agreement. *United States v. Thomas*, 447 F.3d 1191, 1198 (9th Cir. 2006). A mere technical violation of a leasing contract does not defeat an individual’s closely guarded privacy interests. *Id.* The renter of a rental vehicle whose lease expired but still had control over the rental vehicle still maintains his expectation of privacy even

though he has violated his agreement. *United States v. Henderson*, 241 F.3d 638, 647 (9th Cir. 2001); *see also United States v. Cooper*, 133 F.3d 1394, 1398-1402 (11th Cir. 1998).

Additionally, this Court has recognized that there are justified instances where an unauthorized driver of a rental vehicle violates the rental agreement when he takes the wheel of the vehicle. *Byrd v. United States*, 138 S. Ct. 1518, 1529 (2018). While this Court notes that the violation of the rental agreement may be a serious one, it alone does not eliminate an individual's expectation of privacy. *Id.*

Here, Ms. Austin was only an unlisted driver in the rental agreement, even though she had consent to use the YOUBER account and authorization to use the credit card tied to the account. R. at 2-3. Chad David, an information specialist for YOUBER, has stated that one user can use the log in information of another user. Ex. B, R. at 24. Ms. Austin's partner, Martha Lloyd, gave Ms. Austin consent and authorization to use her YOUBER log in information and the credit card tied to the account. R. at 2-3, Ex. A, R. at 18-19. Since users can log into the accounts of others, the next authorization needed was use of the credit card tied to the account; Ms. Lloyd authorized Ms. Austin to use this card and thus proceed with the rental. Ex. A, R. at 18-19.

Therefore, Ms. Austin was able to use the rental vehicle and was authorized to use the account, showing she was likely not in breach of the rental agreement. However, even if she was an unauthorized user, she would not lose her expectations of privacy.

**B. Ms. Austin Had A Legitimate Possessory Interest in the Vehicle Because She Had Control and Authority Over the YOUBER Vehicle**

An individual who "possesses a car, like one who owns and possesses a house, almost always has a reasonable expectation of privacy in it." *Byrd*, 138 S. Ct. at 1530. An unauthorized driver of a rental vehicle generally maintains a possessory interest in that vehicle if they can

show “joint control” or a “common authority” over the vehicle. *United States v. Thomas*, 447 F.3d 1191, 1198 (9th Cir. 2006). With cases involving rental vehicles, control and authority over said vehicles is often tied to the right to exclude. *Byrd*, 138 S. Ct. at 1528.

In *Byrd*, police stopped and searched a vehicle that Byrd’s friend rented and gave to Byrd to drive. *Id.* at 1524. Byrd put his belongings in the vehicle and began to drive from New Jersey to Pennsylvania. *Id.* En route to his destination, an officer pulled Byrd over and asked Byrd for his identification and the rental agreement of the vehicle. *Id.* at 1525. The rental agreement did not have Byrd’s name, so the officer searched Byrd’s vehicle without a warrant and discovered body armour and heroin in trunk of the vehicle. *Id.* Byrd attempted to challenge the search but was unsuccessful because he lacked Fourth Amendment standing. *Id.*

After granting certiorari, this Court concluded that an individual who is in lawful control of a rental vehicles but not listed on the agreement maintains their privacy rights. *Id.* at 1530. This Court reasoned that an individual—who had possession and control over a vehicle—had a right to exclude others from the vehicle. *Id.* at 1528.

The right to exclude is often tied to ownership of the home or effect where the expulsion is taking place. *Id.* *Byrd* found “no reason why the expectation of privacy that comes from lawful possession and control . . . 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 . . . .” *Id.* The Court even pointed to the Government’s own admission that an unauthorized driver would have the right to exclude a carjacker from the vehicle they are an unauthorized driver of. *Id.*

In *Byrd*, this Court sought to draw clarity amongst a circuit split as to the Fourth Amendment standing of unauthorized drivers of rental vehicles. *Id.* at 1525. Amongst those cited

by the Court, *United States v. Smith* shares many commonalities with the case here. *United States v. Smith*, 263 F.3d 571, 575 (6th Cir. 2001)..

In *Smith*, the defendant, Smith, ordered and purchased a rental vehicle but Smith's wife picked up the vehicle, making her an unauthorized driver of the vehicle. *Id.* An officer pulled Smith over for a minor traffic infraction when the officer became suspicious based on Smith's nervousness, demeanor, and smell. *Id.* at 576. The officer then asked Smith and his passenger to exit the vehicle where the officer's drug-sniffing dog began a warrantless search of Smith's vehicle that uncovered drugs and weapons. *Id.* After his arrest, Smith attempted to file a motion to suppress the evidence as the fruit of a warrantless search. *Id.* at 577. The lower court affirmed Smith's motion and the Government appealed, claiming he had no Fourth Amendment standing to challenge the search. *Id.*

While the Sixth Circuit Court of Appeals generally held that an unauthorized driver of a rental vehicle does not have expectations of privacy, they did not adapt a simple "bright line" test and instead choose to focus on the totality of the circumstances. *Id.* at 586. The Court of Appeals considering the following: (1) he presented a valid driver's license, (2) he presented a valid rental agreement and explained his relationship to it, (3) his wife rented the vehicle and not an unknown or unrelated third party, (4), Smith had permission from his wife to drive the vehicle, and (5) Smith developed a business-like relationship with the rental company because he personally called and ordered the vehicle. *Id.* Looking at the totality of these case-specific circumstances, the Sixth Circuit affirmed Smith had a property-based, possessory interest in the rental vehicle and thus had Fourth Amendment standing. *Id.* at 594.

*Smith* is most comparable to the case here. Like Smith, Ms. Austin was able to produce her driver's license and the YOUBER rental agreement for the officer. R. at 2. Like Smith, Ms.

Austin rented the vehicle under Martha Lloyd's name, her loving partner, who gave her the YOUNBER account information Ms. Austin used. Ex. A, R. at 18-19. Ms. Austin is also an authorized user on Ms. Lloyd's credit card which is used on the YOUNBER account. Ex. A, R. at 18-19. Similar to Smith's wife knowing he was going to drive the vehicle she signed for, Ms. Lloyd knew Ms. Austin used her YOUNBER account and never told her she no longer had permission to use them, nor did she ever remove Ms. Austin as an authorized user of her credit card. Ex. A, R at 18-19.

Lastly, it was Ms. Austin herself who went through the process of opening the YOUNBER app on her phone, ordering the vehicle, going to the vehicle, and beginning to drive it. R. at 1-2. Like Smith's wife, other than her name being on the account, Ms. Lloyd was never involved in the business transaction between YOUNBER and Ms. Austin.

Therefore, Ms. Austin's possessory, property-based control and authority over the rental vehicle allows her Fourth Amendment standing to challenge Officer Kreuzberger's search of the vehicle.

**C. If Ms. Austin Did Not Have A Legitimate Possessory Interest in the Vehicle, She Still Maintained a Reasonable Expectation of Privacy**

Even if this Court finds that Ms. Austin does not have a legitimate possessory interest in the vehicle, she would still have Fourth Amendment standing under reasonable expectations of privacy. "The Fourth Amendment protects people, not places." *Katz v. United States*, 389 U.S. 347, 351 (1967). Additionally, a reasonable expectation of privacy is twofold: (1) the individual has an actual expectation of privacy; and (2) that expectation is one that society recognizes as reasonable. *Id.* at 361 (Harlan, J., concurring). This Court has recognized that simply being on the premise where a search is occurring, does not guarantee reasonable expectations of privacy. *Rakas v. Illinois*, 439 U.S. 128, 148 (1978).

In *Rakas*, police stopped and searched a suspected getaway car of a robbery where Petitioner Rakas was a passenger and the vehicle's owner was driving. *Id.* at 129-130. Police pulled the vehicle over and proceeded to search the vehicle; ultimately uncovering a sawed-off rifle under the front passenger seat and rifle shells in the glove compartment. *Id.* at 130. At trial, Rakas attempted to suppress the evidence found during the warrantless search arguing that as a passenger in the vehicle, and therefore on the premises of the vehicle, he had Fourth Amendment standing to challenge the search. *Id.* at 131.

Ultimately, this Court held that simply being present on the premises does not control whether one has an expectation of privacy. *Id.* at 138. Even though Rakas was in the vehicle, his mere presence did not give him privacy dominion over the glove compartment and under the seat where the officer found the evidence against him. *Id.* at 139. This Court used the analogy of a “burglar plying his trade in a summer cabin during the off season” to show that burglar may have an actual expectation of privacy in his cabin, but it is not legitimate because he used his presence there to plan burglaries. *Id.* at 143, n.12. Therefore, mere presence alone at the searched areas, was the basis for which this Court denied automatic Fourth Amendment standing and required more than just mere presence. *Id.* at 139.

*Rakas* is distinguishable from the case here. Ms. Austin was not merely a passenger in the vehicle, with a mere presence in the vehicle, like Rakas was. She was the sole user and occupant of the vehicle. R. at 1-2. Ms. Austin's unique lifestyle meant she often used YOUNBER vehicles for her travels as she did not own her own vehicle. R. at 2. Among the places she would travel to in YOUNBER vehicles is the various co-habitation facilities she resided in on a non-permanent basis. R. at 1. Ms. Austin exclusively used the account log in information her partner, Martha Lloyd, gave to her. Ex. A, R. at 17-18. The account was also tied to Ms. Lloyd's credit card

account for which Ms. Austin was an authorized user. Ex. A, R. at 18. Ms. Austin had a valid driver's license that she presented to the officer and was driving, thus in control, of the vehicle. R. at 2. Hence, Ms. Austin's Fourth Amendment standing does not need to come from mere presence but comes from actual, reasonable expectations of privacy.

In accordance with the first element of *Katz*, Ms. Austin had an actual expectation of a privacy because an occupant of a vehicle has an expectation of privacy in that vehicle. *Katz*, 389 U.S. at 361 (Harlan, J., concurring); *see also South Dakota v. Opperman*, 428 U.S. 364, 367 (1976). Ms. Austin was the sole occupant of a vehicle she often drove and relied on as part of her normal lifestyle. R. at 1-3.

In accordance with the second element of *Katz*, society recognizes Ms. Austin had an expectation of privacy in the vehicle because it was her vehicle for all her own personal uses. R. at 3. Ms. Austin used the car to take her from place to place and those places were often the various habitation areas she resided in. R. at 1. Ms. Austin was not like the burglar "plying his trade in a summer cabin." *Rakas*, 439 U.S. at 143, n.12. Ms. Austin's use of the vehicle was just like anyone else in society. She did not use the vehicle particularly for any specific purposes that may justify a search. Her use of multiple vehicles through the YOUNBER app exemplifies her reliance on the app, and the vehicles owned by the app, to live her everyday life. R. at 2.

Therefore, should this Court find Ms. Austin does not have a legitimate possessory interest in the vehicle, she still maintains a reasonable expectation of privacy because she used the YOUNBER vehicles like any other user or member of society might. Moreover, because she was the sole occupant and user of the vehicle, her expectation of privacy ran throughout the vehicle.

To conclude, Ms. Austin has Fourth Amendment standing to challenge the search of the vehicle that she rented for her own personal, daily, normal uses using a credit card Ms. Lloyd authorized her to use and an account Ms. Lloyd willfully gave her access to.

**II. DETECTIVE HAMM CONDUCTED A SEARCH WITHIN THE MEANING OF THE FOURTH AMENDMENT AND *CARPENTER* WHEN HE ACQUIRED MS. AUSTIN’S LOCATION DATA WITHOUT A WARRANT**

The Fourth Amendment states in relevant part, “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . .” U.S. Const. amend. IV. A search occurs when a government actor violates a person’s subjective reasonable expectation of privacy. *Kyllo v. United States*, 533 U.S. 27, 33 (2001); *see also United States v. Karo*, 468 U.S. 705, 712 (1984). A search also occurs if the government physically intrudes on a constitutionally protected area in a way that suggests a “common-law trespass.” *United States v. Jones*, 565 U.S. 400, 405, 407 (2012). Detective Boober Hamm violated Ms. Austin’s Fourth Amendment right when he served a SDT on YOUBER to obtain the GPS location and Bluetooth information related to Ms. Austin’s account between October 3, 2018 and January 3, 2019. This information was not accessible via the Third-Party Doctrine and Ms. Austin’s privacy interest heavily outweighs the government’s interest, making the search unreasonable.

**A. Ms. Austin Had a Reasonable Expectation of Privacy in Her Long-Term GPS and Bluetooth Information**

The government violates the Fourth Amendment when it intrudes on what society recognizes as a reasonable expectation of privacy. *Kyllo v. United States*, 533 U.S. 27, 33 (2001); *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). The standard for determining the reasonableness of an expectation of privacy is to look at “the everyday expectations of privacy that we all share.” *Minnesota v. Olson*, 495 U.S. 91, 98 (1990). The

drafters of the Constitution intended the Fourth Amendment to “place obstacles in the way of a too permeating police surveillance.” *Unites States v. Di Re*, 332 U.S. 581, 595 (1948). Because new technology has increased the government’s access to private information while lowering its cost of surveillance, this Court has emphasized that the inquiry into what a reasonable expectation of privacy is must preserve the same degree of privacy against government intrusion that existed *before* the introduction of the new technology. *United States v. Jones*, 565 U.S. 400, 406 (2012); *Kyllo*, 533 U.S. at 34; *see also Riley v. California*, 573 U.S. 373, 395 (2014) (requiring a warrant to search the contents of cell phones seized incident to arrest to preserve a degree of privacy enjoyed before invention of cell phones).

Five Justices from this Court agreed that people have a reasonable expectation of privacy in “longer term GPS monitoring in investigations of most offenses.” *Jones*, 565 U.S. at 430 (Alito, J., concurring in the judgment); *Id.* at 415 (Sotomayor, J., concurring). Justice Alito noted that GPS monitoring of a car tracks “every movement” a person makes in that vehicle. *Id.* at 430 (Alito, J., concurring in the judgment). Justice Sotomayor expanded on this and stated that this type of tracking generates extremely sensitive and private information that allows the “[g]overnment to ascertain . . . political and religious beliefs, sexual habits, and so on.” *Id.* at 416 (Sotomayor, J., concurring).

The Justices went on to reason that the advancement of technology has created a reasonable expectation of privacy in GPS data. Prior to the digital age, the government would need to send a team of agents to tail a suspect to acquire this kind of information, recognizing that doing this for a long period of time was expensive and time consuming. *Id.* at 429 (Alito, J., concurring in the judgment). In the alternative, the government could try to piece together a person’s movements by collecting employee timecards, store receipts, or commercial

surveillance camera footage. *Id.* at 431 (Alito, J., concurring in the judgment). Even so, the government could never have successfully assembled a minute-by-minute transcript of a person's movements for a period of months or even weeks. *Id.* Therefore, society expects law enforcement would not secretly monitor and keep records of every movement an individual makes in his car for a long period of time. *Id.* at 430.

Similar to the reasonable expectation of privacy in long-term cell phone location records, individuals have a reasonable expectation of privacy in other cell phone data. This Court decided that police officers have a right to search a person and the area immediately surrounding him to prevent the suspect from illegally disposing of evidence, but that government officials *did not* have a right to search a suspect's cell phone because it is too private. *Riley*, 573 U.S. at 394. "According to one poll, nearly three-quarters of smart phone users report being within five feet of their phones most of the time, with 12% admitting that they even use their phones in the shower." *Id.* at 395. The Court further reasoned that what makes a home so private now is that a home is where people have their cell phones with them. *Id.* at 397.

Ms. Austin had a reasonable expectation of privacy in her GPS location and Bluetooth information. Like Justice Alito and Justice Sotomayor pointed out in *Jones*, individuals have a reasonable expectation of privacy in long-term GPS location data. Here, Detective Hamm obtained three months of Ms. Austin's location data from YUBER. R. at 3. He did so in relation to his ongoing investigation of six open bank robbery investigations. R. at 3. Like the majority in *Jones* noted, it would have been nearly impossible for Detective Hamm to obtain this information prior to the digital age. Moreover, YUBER timestamps a user's location every two minutes. R. at 4. Like Justice Alito write in his concurrent in *Jones*, it would have been impossible for Detective Hamm to compile this sort of comprehensive record prior to the digital

age. Because Detective Hamm heavily relied on this subpoenaed information in his investigation against Ms. Austin, he violated Ms. Austin's Fourth Amendment reasonable expectation of privacy.

While the reasoning from *Jones* protects Ms. Austin's GPS location, the reasoning from *Riley* protects her Bluetooth data. Detective Hamm not only subpoenaed Ms. Austin's GPS location, but he also subpoenaed her Bluetooth information. R. at 3. Ms. Austin's Bluetooth information provides private information about Ms. Austin's life, such as, the kind of music she likes to listen to. Obtaining three months of Ms. Austin's Bluetooth information without a warrant gave Detective Hamm a peak into Ms. Austin's private life and violated Ms. Austin's reasonable expectation of privacy in that data.

Overall, Ms. Austin had a reasonable expectation of privacy in her GPS and Bluetooth information and Detective Hamm would have been unable to obtain this information without the current advancements in technology.

#### **B. Detective Hamm's Search Was Unreasonable Without a Warrant**

If an individual has a reasonable expectation of privacy in a searched item or searched location, the search of that item or location is unreasonable under the Fourth Amendment *unless* conducted pursuant to a warrant supported by probable cause. *Arizona v. Gant*, 556 U.S. 332, 338 (2009). Warrants require a particular description of the areas the officer will search and the items the officer intends to seize. *Stanford v. Texas*, 379 U.S. 476, 485 (1965). In doing so, it prevents the seizure of one thing under a warrant describing another thing and leaves no discretion to the officer executing the warrant. *Id.* However, courts have allowed many exceptions to the warrant requirement. *See Warrantless Searches and Seizures*, 40 Geo. L.J. Ann. Rev. Crim. Proc. 44, 44-45 (2011) (The exceptions include investigatory stops,

investigatory detentions of property, warrantless arrests, searches incident to valid arrests, seizures of items in plain view, searches and seizures justified by exigent circumstances, consensual searches, searches of vehicles, searches of containers, inventory searches, border searches, searches at sea, administrative searches, and searches relating to the special needs of law enforcement). Because no exception applies here, Detective Hamm’s search of Ms. Austin’s GPS location and Bluetooth information was unreasonable without a warrant.

Even when balancing the government’s interest with Ms. Austin’s privacy interests, Ms. Austin’s privacy interests prevail. Detective Hamm’s interest in obtaining Ms. Austin’s GPS and Bluetooth information was to investigate a string of robberies. R. at 3. Detective Hamm was merely seeking evidence to inculcate Ms. Austin and eventually convict her at trial. R. at 3. Detective Hamm knew that a black Toyota Prius was used in five robberies but that another robbery involved a yellow Volkswagen Beetle. R. at 4. Moreover, these robberies took place in two different states. R. at 3. Detective Hamm did not have enough evidence pointing to Ms. Austin as the suspect and decided to subpoena her YOUTUBE records—without a warrant—to build a case against her. After receiving the records, Detective Hamm merely discovered that Ms. Austin was in the vicinity of the robbed areas at the times they were robbed but could not prove that she was the individual who rented the same black Toyota Prius each time. R. at 4. Furthermore, Detective Hamm could not prove that it was in fact Ms. Austin who was present in the robbed areas, and not Ms. Lloyd, because Ms. Austin and Ms. Lloyd share a YOUTUBE account. R. at 2. In cases like these, this Court has explained 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 v. New Hampshire*, 403 U.S. 442, 481 (1971)).

By contrast, Ms. Austin's privacy interests are high. Long term GPS tracking can reveal a great deal of private information. Detective Hamm obtained three months of information without adequate cause. R. at 3. He was investigating six burglaries on six different dates and could have obtained a warrant for only those days. R. at 3. Instead, he obtained a range of three months of data, and Detective Hamm lacked probable cause to believe criminal activity occurred on a vast majority of those days. R. at 3. Furthermore, because Ms. Austin and Ms. Lloyd share a YOUTUBE account, Detective Hamm also obtained Ms. Lloyd's GPS location and Bluetooth information when he subpoenaed YOUTUBE records linked to Ms. Lloyd's account for the three-month period, therefore, he intruded on Ms. Lloyd's reasonable expectation of privacy as well as Ms. Austin's reasonable expectation of privacy. R. at 3.

As such, requiring law enforcement officers to obtain a warrant for location records where there is probable cause will harmonize law enforcement's interest in investigating crimes and the searched individual's reasonable expectation of privacy in her location history. The warrant requirement protects records that are not pertinent to the investigation that reveal private information about a person's private life.

### **C. The Third-Party Doctrine is Inapplicable Here**

The Third-Party Doctrine provides that individuals do not have a reasonable expectation of privacy in information they voluntarily disclose to third parties. *Smith v. Maryland*, 442 U.S. 735, 743-44 (1979), *United States v. Miller*, 425 U.S. 435, 443 (1976). As such, an individual cannot invoke the Fourth Amendment to prevent the government from obtaining information, evidence, or records from a third party when the individual has *voluntarily* disclosed information to that third party. *SEC v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 743 (1984). Moreover, this Court, rather than relying on the fact that information has been shared with a third party, has also

looked to what privacy interest a person has in the information the records divulge. *See, e.g., Ferguson v. City of Charleston*, 532 U.S. 67, 78 (2001) (individual had a reasonable expectation of privacy in his hospital records); *Stoner v. California*, 376 U.S. 483, 485, 489-90 (1964) (holding the Fourth Amendment protects an individual’s privacy interest in a hotel room even though maids and janitors have implied permission to enter the room). Moreover, federal law protects the confidentiality of cell phone location data because it prohibits cell phone service providers from divulging private customer information without *express* prior consent from the customer. 47 U.S.C. §§ 222(c)(1), (h)(1)(A), (f). Additionally, the cases that define the Third-Party Doctrine were decided prior to the digital age and do not take into account the sensitive information contained in a person’s cell phone. This Court emphasized that “any extension of [pre-digital] reasoning to digital data has to rest on its own bottom.” *Riley*, 573 U.S. at 393.

In *Miller*, the government subpoenaed several months of records from a defendant’s bank account. 425 U.S. at 436-38. The defendant argued these records were copies of his personal records that the bank had limited purpose to use, awarding him a reasonable expectation of privacy. *Id.* at 442. The Court held that by acquiring those records, the government did not intrude into an area in which the defendant had a protected Fourth Amendment interest. *Id.* at 440. The Court reasoned that the defendant neither owned nor possessed the records, and that the records were property of the bank. *Id.* The defendant *voluntarily* disclosed the records the government obtained to the bank and exposed this information to the bank’s employees within the ordinary course of business. *Id.* at 442-43. Therefore, the defendant took the risk that the bank would convey the information in the records to the government. *Id.*

Similar to *Miller*, the Court applied the same Third-Party Doctrine principles to telephone company records in *Smith*. In *Smith*, police officials asked a telephone company to install a pen

register to record the numbers the defendant dialed from his home phone. 442 U.S. at 737. The defendant argued this action was a search that violated his Fourth Amendment right to a reasonable expectation of privacy. *Id.* at 741-42. The Court reasoned that people cannot expect privacy in the numbers they dial because all telephone users must *voluntarily* convey their phone numbers to the telephone company to complete their calls. *Id.* at 742. Moreover, the phone company must record information such as dialed numbers for legitimate business purposes, such as, billing the customer. *Id.* at 743.

In its decisions in *Miller* and *Smith*, the Supreme Court concluded that acquiring a business's records does not rise to the level of a Fourth Amendment search of an individual, even when the records contain private information about that individual. The reason for this was because the customers *voluntarily* divulged their information to the businesses.

The Supreme Court further discussed the Third-Party Doctrine in its landmark decision in *Carpenter v. United States*, 138 S. Ct. 2206 (2018). This case did not overrule the decisions in *Miller* and *Smith*, but rather refused to extend the Third-Party Doctrine to meta data. In *Carpenter*, the government suspected the defendant was a ringleader of a string of robberies. *Id.* at 2212. The government went to the defendant's cell phone carrier and got a judicial order to obtain his cell phone site data pursuant to a federal statute (the Stored Communications Act, 18 U.S.C. § 2703 (d)). *Id.* at 2226. The government obtained 12,898 location points of the defendant's movements, which is about 101 data points per day. *Id.* at 2212. The Court held that this was a search because the tracking over a period of months was too invasive and the defendant had a reasonable expectation of privacy in his physical movements. *Id.* at 2223.

Other cases have recognized that short term monitoring of a person's cell phone information may be free from Fourth Amendment scrutiny if the duration is too brief to implicate

the individual's reasonable privacy interest. *Jones*, 565 U.S. at 430 (Alito, J., concurring in the judgment); *see, e.g., United States v. Gaskins*, 690 F.3d 569, 574, 577 (D.C. Cir. 2012) (holding weeks of surveillance of numerous locations using vans, cars, and cameras was not a search); *United States v. Gramlich*, 551 F.2d 1359, 1360-62 (5th Cir. 1977) (holding the government's surveillance of defendant's activities for more than three weeks was not a search), cert. denied.

The degree of sensitivity in the information obtained here is sufficient to distinguish *Smith* and *Miller*. Unlike the cases of *Smith* and *Miller*, where the Court concluded that people lack a reasonable expectation of privacy in dialed telephone numbers and banking records, here, the detailed and pervasive location records are much more comprehensive and sensitive than discrete telephone or bank information. Detective Hamm obtained three months of Ms. Austin's GPS location and Bluetooth information. R. at 3. YOUBER timestamps each of its vehicle's location every two minutes. R. at 4. This means Detective Hamm was able to obtain 720 location points for every twenty-four-hour period. Moreover, location data is not *voluntarily* conveyed by a phone user in the same way the information was conveyed in *Smith* and *Miller*. Moreover, Ms. Lloyd was the only one who agreed to the YOUBER's terms that YOUBER will track the user's information. Ex. B, R. at 23. This waiver only comes up once and Ms. Austin never signed the waiver allowing YOUBER to track her location. Ex. B, R. at 23.

Even though individuals voluntarily possess cell phones, they do not knowingly and intentionally disclose their minute-by-minute location information. Extending *Smith* and *Miller* to cover Ms. Austin's GPS location information and Bluetooth information would lead to unacceptable consequences. This would lead to the conclusion that people do not have a reasonable expectation of privacy in the contents of their cell phones no matter where they are and what they are doing. Comparing a comprehensive composition of an individual's cell phone

location records with a few days of dialed phone numbers or even several months of bank records is “like saying a ride on horseback is materially indistinguishable from a flight to the moon.” *Riley*, 573 U.S. 373, 393 (2014). Both are records in the possession of a third party, but “little else justifies lumping them together.” *Id.*

Like *Carpenter* noted, long-term GPS information is so personally sensitive and so unlikely to have been obtained in the pre-digital era that it triggers a reasonable expectation of privacy. This Court should follow its reasoning from one year ago and refuse to extend the Third-Party Doctrine to the meta data stored in Ms. Austin’s phone. Like *Carpenter*, where the government officials sought the defendant’s cell phone data to inculcate him in a string of robberies, here, Detective Hamm sought three months of Ms. Austin’s GPS location and Bluetooth information to inculcate her in six different robberies. R. at 3. In doing so, Detective Hamm also violated Ms. Lloyd’s reasonable expectation of privacy because Ms. Austin and Ms. Lloyd share a YOUBER account. R. at 2. To aid his investigation, Detective Hamm could have simply subpoenaed Ms. Austin’s GPS location and Bluetooth information for the six day that the robberies occurred on. By tracking Ms. Austin for a period of months, like the government officials in *Carpenter* did, Detective Hamm violated Ms. Austin’s reasonable expectation of privacy.

As such, this Court should not apply the reasoning of *Smith* and *Miller* to Ms. Austin’s case because those cases do not account for the sensitive nature of information that is involved here. Rather, this Court should follow its reasoning from *Carpenter*, a case much more recent than *Smith* and *Miller*, because the GPS location and Bluetooth information involved is more comparable to the cell phone site location in *Carpenter*.

## **CONCLUSION**

Ms. Austin had possessory control and authority over the rental vehicle she had authorization to order and had reasonable expectations of privacy in that vehicle, therefore, allowing her Fourth Amendment standing. Moreover, Detective Hamm violated Ms. Austin's Fourth Amendment privacy interest when he obtained three months of Ms. Austin's GPS location information and Bluetooth data without a warrant because the Third-Party Doctrine cases are inapplicable to the sensitive nature of information involved here. For the forgoing reasons, Ms. Austin respectfully requests this Court reverse the ruling of the Court of Appeals for the Thirteenth Circuit.

Dated: October 6, 2019

Respectfully Submitted,

**P12**  
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Team P12  
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