No. 4-422

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 2019

JAYNE AUSTIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the

United States Court of Appeals

for the Thirteenth Circuit

BRIEF FOR PETITIONER

Attorneys for Petitioner

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Does an individual have standing to contest an unconstitutional search of a vehicle rented under another's name when they are the sole occupant of the vehicle and owner of the effects searched?

II. Is the acquisition of an individual's location data gathered while they are using a rental vehicle a "search" within the meaning of the Fourth Amendment and *Carpenter v. United States*, 138 S. Ct. 2206 (2018)?

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

Background. Petitioner Jayne Austin is an activist and blogger dedicated to eliminating corruption and financial marginalization of lower-income patrons within the banking industry. R. at 1. She travels often to attend protests and leads a minimalist lifestyle, taking measures to stay as far off the "grid" as possible. R. at 1, 18. Consequently, Ms. Austin resides in short-term cohabitation facilities and uses YOUBER, a car rental software application ("app") for transportation. R. at 1–2.

To access a YOUBER rental vehicle, individuals must first download the app on their cell phone and create a profile. R. at 2. During this process, the user must acquiesce to a rental agreement that sets a fixed fee for each hour of vehicle use. R. at 2. The agreement includes terms and conditions stipulating that the app will use the cell phone's Bluetooth and GPS operations to track the individual's geographic location. R. at 3–4. The tracking information updates every two minutes a YOUBER rental vehicle is in use. R. at 2, 4. YOUBER gathers this location information for security purposes and processes the data by filtering it through the satellite mapping technology of SMOOGLE, a third-party search engine. R. at 4, 22. Consumers need not create a new profile for each mobile device; they may download the app and use an existing profile by entering the proper username and password. R. at 24. When an existing profile is accessed with another cell phone, the app does not disclose information about the rental agreement. R. at 24.

YOUBER makes its vehicles readily available to customers by placing them in bright pink mobile stalls on land acquired by the company in short-term leases. R. at 2. Once logged into the app, users may approach a stall and rent a vehicle for a maximum distance of 500 miles or a

maximum period of one week. R. at 2. When the rental term expires, users return the car to a designated YOUBER parking stall. R. at 2. YOUBER employees check on the car before or after the rental term, or during the term if a user submits a maintenance request. R. at 2.

Ms. Austin's Use of the YOUBER App. Ms. Austin's desire to remain off the "grid" includes a reticence for using her own information for online profiles. R. at 18. For that reason, Martha Lloyd, Ms. Austin's on-and-off-again partner, agreed to let Ms. Austin use her personal information to create a YOUBER profile. R. at 18. Ms. Austin would then reimburse the YOUBER expenses charged to Ms. Lloyd's credit card with cash. R. at 18. Ms. Lloyd distanced herself from Ms. Austin in September 2018 after issues arose in the relationship. R. at 18. Since the split, Ms. Austin has input her own credit card information into the YOUBER profile associated with Ms. Lloyd's name. R. at 20.

Ms. Austin's Interaction with Officer Kreuzberger. On January 3, 2019, Officer Charles Kreuzberger pulled Ms. Austin over for failure to stop at a stop sign. R. at 2. Ms. Austin was driving a 2017 black Toyota Prius with the license plate number "R0LL3M" that she rented through the YOUBER app. R. at 2. After discovering Ms. Austin's name was not on the YOUBER rental agreement, Officer Kreuzberger informed her he did not need her consent to search the car. R. at 2–3. Officer Kreuzberger found bedding and a pillow in the backseat of the vehicle before expanding the search into the trunk of the vehicle. R. at 3. Ms. Austin's trunk notably contained a BB gun modeled after a .45 caliber handgun, a maroon ski mask, and a duffel bag, along with personal effects such as food, clothing, and signed records. R. at 3. The duffel bag housed $50,000 and blue dye packs. R. at 3.

While searching the car, Officer Kreuzberger received a dispatch communicating that a 2017 black Toyota Prius allegedly robbed a nearby bank. R. at 3. The bank security cameras

caught the partial license plate number "R0L." R. at 3. The suspect was wearing a maroon ski mask and carrying a .45 caliber handgun. R. at 3. Officer Kreuzberger arrested Ms. Austin under suspicion of bank robbery based on the dispatch, the partial license plate match, and the items discovered in her trunk. R. at 3.

The Acquisition of Ms. Austin's Location Information. Detective Boober Hamm took over Ms. Austin's case. R. at 3. Detective Hamm discovered five open bank robbery cases matching the modus operandi of the robbery on January 3, 2018. R. at 3. The five cases spanned between October 15, 2018 and December 15, 2018. R. at 3. Because Ms. Austin drove a YOUBER vehicle on January 3, Detective Hamm served a subpoena on YOUBER seeking all location information pertaining to Ms. Lloyd's account October 3, 2018 and January 3, 2018. R. at 3. The data reflected that an individual using Martha Lloyd's account rented cars in locations and times corresponding to the other five robberies. R. at 4. Detective Hamm recommended the U.S. Attorney's Office charge Ms. Austin with all six crimes. R. at 4.

II. PROCEDURAL HISTORY

The Trial Court. Ms. Austin filed two motions to suppress evidence, arguing that the Fourth Amendment requires suppression of the evidence obtained from the warrantless searches. R. at 4. The first motion sought to suppress the evidence derived from Officer Kreuzberger's search of Ms. Austin's YOUBER vehicle on January 3, 2019. R. at 4. The second motion sought to exclude the YOUBER location data gathered by Detective Hamm. R. at 4. The parties stipulated that no exceptions to the warrant requirement apply to the evidence. The trial court denied both motions and convicted Ms. Austin of all six charges of bank robbery. R. at 4, 10.

The Court of Appeals. Ms. Austin appealed the decisions of the trial court to the Court of Appeals for the Thirteenth Circuit, which affirmed the lower court's judgment. R. at 9, 10. The

court held that Ms. Austin has no reasonable expectation of privacy in a car shared with third parties or in the location information collected by YOUBER throughout her use. R. at 12, 15.

SUMMARY OF THE ARGUMENT

I.

The court of appeals improperly denied the motion to suppress the evidence seized from the rental car because Ms. Austin has standing to contest the search. Ms. Austin had a privacy interest in the property that precluded Officer Kreuzberger from searching it without her consent.

Ms. Austin has standing to contest the rental car search under the Fourth Amendment because she had a legitimate expectation of privacy. Legitimate privacy expectations may be shown through traditional property principles, such as a right to exclude. Ms. Austin's custody of the rental car keys allowed exclusion of others from the vehicle, creating a presumption that no others would be in the space.

Fourth Amendment standing is declined if the individual gains possession of the property searched unlawfully or when the individual is vicariously asserting the rights of another. Ms. Austin does not fall under either category. Ms. Austin gained possession of the car lawfully. Officer Kreuzberger's search targeted Ms. Austin as the sole occupant and driver of the vehicle, making the Fourth Amendment claim personal to her. Therefore, this Court should not refuse her Fourth Amendment standing. Finally, Ms. Austin has standing to contest the warrantless search of her personal property because her expectation of privacy in it is separate from the rental car.

II.

Acquiring Ms. Austin's location data collected by YOUBER constituted a search within the meaning of the Fourth Amendment because expectation of privacy was subjectively and objectively reasonable. Ms. Austin did not voluntarily share her location information, and society

would not find this invasion reasonable. The location information provided an intimate window into Ms. Austin's life, and Detective Hamm's choice to leer into that window, absent a warrant, clearly violated her Fourth Amendment rights.

Further, the third-party doctrine is inapplicable. Ms. Austin's location data was never published to a third party. The lower court erred by characterizing Smoogle as a third party, because it was only processing the location data and not keeping a record of it. Finally, even if Smoogle rose to third-party status, the doctrine may still not be applied under *Carpenter*. Due to the highly invasive nature of the data, the rationales which support the third-party doctrine do not support applying it today. Because there was nothing reasonable about the seizure of Ms. Austin's location data, the judgment of the lower courts must be reversed.

STANDARD OF REVIEW

This Court reviews a lower court's denial of a motion to suppress evidence by not disturbing factual findings unless they are clearly erroneous. *United States v. Rohrig*, 98 F.3d 1506, 1511 (6th Cir. 1996). This appeal implicates two legal questions, so a de novo review is necessary and appropriate. *United States v. Fillman*, 162 F.3d 1055, 1056 (10th Cir. 1998).

ARGUMENT AND AUTHORITIES

I. MS. AUSTIN HAS STANDING UNDER THE FOURTH AMENDMENT REGARDING THE UNLAWFUL SEARCH OF HER PERSONAL PROPERTY IN HER RENTAL CAR.

The first issue addresses Ms. Austin's motion to suppress the evidence gathered by Officer Kreuzberger. The search of Ms. Austin's laptop falls squarely within Fourth Amendment doctrine. The Fourth Amendment to the U.S. Constitution provides, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ." U.S. Const. amend. IV. This Amendment is the product of the strong American

resentment toward law enforcement techniques that originated during British rule.[1] The American Judiciary tried to protect its people from similar violations of privacy and security by upholding the ideal that "a man's house is his castle," and by affording individuals a "reasonable expectation of privacy." *Payton v. New York*, 445 U.S. 573, 593 (1980); *Katz v. United States*, 389 U.S. 347, 360 (1967).

This Court's recent cases *Byrd v. United States* and *Carpenter v. United States* adapted the Fourth Amendment to maintain freedoms in the face of modern technological advances. 138 S. Ct. 1518 (2018); 138 S. Ct. 2206 (2018). The lower court departed from the essential protections recognized in both cases. This Court should reverse.

A. Ms. Austin Has Standing Under the Fourth Amendment Because She Is the Sole Occupant of the Vehicle and the Owner of the Personal Property Searched.

Fourth Amendment standing turns on "whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded space." *Byrd*, 138 S. Ct. at 1526. Ms. Austin had a legitimate expectation of privacy in the space she was occupying because she was lawfully present there. Ms. Austin would not have a legitimate privacy expectation if she had stolen the vehicle or if her Fourth Amendment standing was being vicariously asserted by someone else. *Rakas v. Illinois*, 439 U.S. 128, 133–34 (1978).

Officer Kreuzberger directed his search against Ms. Austin and her lawfully possessed property. This Court should find that an individual in legitimate possession and control of a rental car has standing to contest a warrantless search of the car when she did not consent to the

[1] Examples of imperialist trespasses include: general warrants, that allowed for officer entry into homes without a pleading of specific facts, and writs of assistance, that did not require any warrant for lawful officer entry into a home. Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U. L. Rev. 925, 934 (1997).

search and no warrant exception applies. Finding otherwise would erode decades of Fourth Amendment jurisprudence and jeopardize liberties guaranteed by our Constitution. Further, this case would serve as a license for any law enforcement officer to search a citizen in a rental car who is not listed on the agreement, regardless of the circumstances creating the situation.

1. Ms. Austin's right to exclude others coupled with her lawful presence within the vehicle creates a reasonable expectation of privacy.

At its inception, the Fourth Amendment was a ward against physical trespass by law enforcement into a home. *Olmstead v. United States*, 277 U.S. 438, 467 (1928). A constitutional violation was only found where a governmental trespass occurred in a space in which the individual had a proprietary interest. *Id.* at 457. As technology developed, however, this Court broadened the Fourth Amendment to include violations where the trespass encroached upon an intangible space.

For example, in *Katz v. United States*, this Court extended Fourth Amendment protection to the government wiretapping phones without a warrant. *Katz* fortified the underlying premise of the Fourth Amendment: to protect "people, not places." 389 U.S. at 351. This idea was reinforced by the explicit statement that the underpinnings of previous cases "had been so eroded by its subsequent decisions that the 'trespass' doctrine there enunciated could no longer be regarded as controlling." *Id.* at 353. Instead of focusing on the physical invasion of the wiretapped phone booth, the Court instead evaluated whether the government had violated the privacy "upon which [Katz] justifiably relied." *Id.*

Justice Harlan's concurrence explained how warrantless wiretapping violates an individual's "reasonable expectation of privacy." *Id.* at 360. This Court later operationalized this language as a test that subsumed a trespassory analysis. Timothy Casey, *Electronic Surveillance and the Right to Be Secure*, 41 U.C. Davis L. Rev. 977, 989 (2008). Courts instead were to

evaluate whether the privacy interest at question a) was subjectively expected by the individual and b) is objectively reasonable. *Id.* at 988. But showing physical trespass, as characterized by traditional property law, remains a meritorious method of proving the existence of a reasonable expectation of privacy. *Id.* at 987.

a. Ms. Austin's possession of the rental car's keys lent control over the property and created a right for her to exclude others.

Perhaps the most important right of a property owner is the right to exclude others. *Rakas*, 439 U.S. at 149. This fundamental principle developed into a factor for Fourth Amendment analysis in *Jones v. United States*. 367 U.S. 257 (1960). There, the defendant appealed the finding he did not have standing to challenge the warrantless search of his friend's apartment. *Id.* at 258. The apartment owner left town and let the defendant use the space in his absence. *Id.* at 259. This Court reversed and found the defendant had standing, reasoning that his possession of the apartment keys, which conferred control over the property and a resulting power to exclude all the world except the owner, created a reasonable expectation of privacy. *Id.* at 265.

Similarly, Ms. Austin's possession of car keys granted her the right to exclude all persons from the vehicle, save an employee of the owner, YOUBER. This exertion of control created a reasonable expectation of privacy later vitiated by Officer Kreuzberger's misguided view of criminal procedure. The violation was then compounded by the Court of Appeals for the Thirteenth Circuit's reasoning that sharing Ms. Austin's rental vehicle with third parties—an inevitable consequence of all rental property—precluded her from asserting such expectations. R. at 12. This line of reasoning would deny constitutional protections to car renters and dwelling lessees alike. This Court should find that Ms. Austin's exclusive access to the vehicle, subject only to YOUBER's ownership, created a privacy expectation upon which she justifiably relied.

b. Ms. Austin was legitimately on the premises.

The reasonableness of Ms. Austin's privacy expectation is heightened by her presence in the vehicle. Ms. Austin's lawful possession of the car again reflects this Court's discussion in *Jones*. 367 U.S. at 267. There, this Court also based its decision on the apartment owner consenting to the defendant's presence. *Id.* Defendants "legitimately on premises where a search occurs may challenge its legality by way of a motion to suppress, when its fruits are proposed to be used against him." *Id.* Justice Frankfurter, writing for the Court, noted this contour of Fourth Amendment doctrine addressed persons whose "wrongful presence" in a place inherently denied them an invocation of privacy. *Id.*

Since *Jones*, this Court expanded on the phrase "legitimately on the premises." In *Rakas v. Illinois*, an officer stopped a car suspected of armed robbery. 439 U.S. at 130. A search of the vehicle revealed a rifle and rifle shells that matched the weapon used to commit the crime. *Id.* at 129. The three people in the car moved to suppress the arms evidence as the fruit of a warrantless search. *Id.* at 130. The district court found the driver of the car had standing to suppress the evidence under the exclusionary rule because she was also the owner of the car; her custody and ownership created an expectation of privacy. *Id.* But the court denied Fourth Amendment standing to the passengers in the car. *Id.*

On appeal, the passengers argued their lawful presence within the vehicle created a privacy expectation under *Jones*. *Id.* at 133. The *Rakas* Court rejected this assertion and refused to interpret *Jones* as a bright-line rule that granted standing to any person whose presence is lawful. *Id.* at 145. The result would be a vicarious assertion of the right that was personal to the individual who owned the car. *Id.* at 137. Instead, the Court reasoned that true fidelity to the

Amendment is achieved by an understanding that a legitimate presence on premises is not "irrelevant to one's expectation of privacy, but cannot be deemed controlling." *Id.* at 148.

Ms. Austin's lawful acquisition of the YOUBER vehicle supports the conclusion that her privacy expectation was reasonable. She rented the car for her personal use through the YOUBER app and paid for the service with her authorized credit card. Though Officer Kreuzberger believed Ms. Austin obtained the vehicle unlawfully, even the lower court recognized he had insufficient evidence to support this.[2] R. at 12. The point of *Rakas* was to prevent vehicle passengers from bringing claims under the auspices of an owner's violation.

Here, a warrantless, and therefore presumptively unreasonable, search occurred. The state asserts this search did not violate Ms. Austin's rights, but there is no one else whose rights could have been violated. YOUBER, as lessor of the property, only reserved authority to access the car when summoned by a user's submission of a maintenance request—a clear recognition of Ms. Austin's privacy. Ms. Lloyd was ignorant of the renting of the car and could not be said to expect privacy in a vehicle that was, to her awareness, nonexistent. A reasonable review of the facts shows Ms. Austin is harmed—but, more exactly, that she is the *only* one harmed.

Jones and *Rakas* limit Fourth Amendment standing to prevent two categories of people from seeking the privileges of the exclusionary rule. The first category involves an individual who gained presence in a space wrongfully. The second category involves an individual trying to assert the personal rights of another vicariously. Because Ms. Austin does not fall within either

[2] The Court of Appeals for the Thirteenth Circuit contradicted this statement in the same breath by referring to Ms. Austin's acquisition of the car as fraudulent. R. at 12. But consent given to use a car must be withdrawn expressly. *See Standard Accident Ins. Co. v. Gore*, 109 A.2d 566, 569 (N.H. 1954). Ms. Lloyd granted Ms. Austin access to her YOUBER account and did not withdraw it, thereby creating a legitimate presence within the YOUBER vehicle. R. at 19–20.

category, this Court should find she has standing to challenge the wrongful search of the YOUBER vehicle.

2. Ms. Austin had a separate privacy expectation in her searched personal property.

Even if Ms. Austin does not have standing to contest the search of the rental car, she has standing to contest the search of her personal property. In *Rakas*, this Court also declined the car passengers Fourth Amendment standing because they did not own the searched rifle and shells. 439 U.S. at 131. The Courts of Appeals for the First, Fifth, and Ninth Circuits recognize this distinction between a passenger's standing to contest a car search and her standing to contest the search of her personal property within the car. *State v. Friedel*, 714 N.E.2d 1231, 1243 (Ind. Ct. App. 1999). For example, in *United States v. Infante-Ruiz* a car's driver consented to its search. 13 F.3d 498, 500 (1st Cir. 1994). Infante, a passenger, did not consent to a search of his suitcase found in the trunk. *Id.* The Court of Appeals for the First Circuit held the pistol found in Infante's suitcase could not be presented against him in court because his privacy interest in the personal property was not subject to the consensual search of the car. *Id.* at 505.

Officer Kreuzberger did not believe he needed Ms. Austin's consent to search her rental car. This notion stems from the presumption that Ms. Austin acquired the vehicle improperly. Improper acquisition implies an individual other than Ms. Austin has a superior right to the car. The same misconception cannot be feigned toward her personal property. Ms. Austin owned everything in the car, creating a reasonable expectation of privacy in the property. This Court should hold she has standing to contest the search under the Fourth Amendment.

B. The Denial of Standing to Ms. Austin Would Contradict This Court's Holding in *Byrd v. United States*.

This Court's most recent encounter with privacy interests in rental vehicles affirms the principles discussed above. In *Byrd*, Terrence Byrd asked his girlfriend to rent a car in her name. 138 S. Ct. at 1524. He then put 49 bricks of heroin in the trunk and set off for Pittsburg, Pennsylvania, while his girlfriend drove his car back to their apartment. *Id.* Halfway through the trip, an officer stopped Byrd for a traffic violation. *Id.* After discovering Byrd was not listed on the rental agreement, the officer concluded Byrd had no expectation of privacy and searched the car. *Id.* at 1525. When the heroine was offered against him, Byrd moved to suppress it under the Fourth Amendment. *Id.* The district denied the motion because Byrd had no standing to contest the search of the car. The court of appeals affirmed, noting there was a circuit split on whether the sole occupant of a rental vehicle has Fourth Amendment standing when he is unlisted on the rental agreement. *Id.* This Court granted certiorari to resolve the split. *Id.* at 1526.

Writing for the Court, Justice Kennedy found Byrd had standing to contest the search and reversed the judgment of the lower courts. *Id.* at 1531. The Court explained a *per se* rule that declined to extend Fourth Amendment protection to unlisted rental drivers is too restrictive. *Id.* at 1522. In the same spirit of reasonableness, the Court observed that the rule set forth is not *per se* for the drivers either. *Id.* at 1527. Merely operating a vehicle does not automatically afford you Fourth Amendment protection—such an interpretation of the Fourth Amendment would protect car thieves. *Id.* at 1528.

The facts here are similar to the facts of *Byrd*. Ms. Austin was operating a rental vehicle that listed another person's name on the agreement. R. at 2. An officer pulled her over for a traffic violation. R. at 2. After discovering Ms. Austin's status as an unlisted driver, the officer searched the entirety of her car without consent. R. at 3. Absent evidence that the car was stolen,

this act is blatantly unlawful. The fruits of that search were then presented against Ms. Austin in court and led to her conviction. Further, the parties stipulate no warrant exceptions apply. The record contains no justification for disrupting this Court's holding and analysis in *Byrd*. Thus, this Court should find that Ms. Austin has standing to contest the warrantless search of her car.

The Court of Appeal for the Thirteenth Circuit's approach not only ratifies Officer Kreuzberger's conduct, but also constricts constitutional rights impermissibly. The consequences of such a stringent application of the Fourth Amendment to persons in automobiles is articulated by Justice White in *Delaware v. Prouse*:

> Automobile travel is a basic, pervasive, and often necessary mode of transportation to and from one's home, workplace, and leisure activities. Many people spend more hours each day traveling in cars than walking on the streets. . . . Were the individual subject to unfettered governmental intrusion every time he entered an automobile, the security guaranteed by the Fourth Amendment would be seriously circumscribed.

440 U.S. 648, 662–63 (1979). Justice White's reasoning explains why reasonable Fourth Amendment protections should be extended to Ms. Austin.

II. DETECTIVE HAMM'S ACQUISITION OF MS. AUSTIN'S LOCATION INFORMATION GATHERED BY YOUBER IS A SEARCH UNDER THE MEANING OF THE FOURTH AMENDMENT.

The second issue addresses Ms. Austin's motion to suppress the location information gathered by Officer Kreuzberger. The Court of Appeals for the Thirteenth Circuit allowed this evidence to be presented at trial because it improperly found this invasion did not constitute a "search."

Justice Harlan's concurrence in *Katz* set forth a bifurcated analysis to determine whether a "search" has occurred within the meaning of the Fourth Amendment. *Smith v. Maryland*, 442 U.S. 735, 739 (1979). First, a court must ask whether Ms. Austin subjectively expected privacy. *Id.* Second, the court must decide whether her expectation of privacy is objectively reasonable.

Id. Because Ms. Austin's expectation is reasonable under both prongs, intrusion into that "private sphere" generally constitutes a search and requires a warrant. *Id.* at 740. An individual's privacy expectation in information is considered unreasonable if she publishes the information to a third party. *See On Lee v. United States*, 343 U.S. 747 (1952). This doctrine may be overcome where the uniquely invasive nature of a violation justifies heightened protection. *Carpenter*, 138 S. Ct. at 2223.

A. The Historical Location Information Acquired Is a Search Because Ms. Austin Could Reasonably Expect That It Would Remain Private.

Ms. Austin satisfies the first prong of the *Katz* analysis because she sought to keep the information private. *Smith*, 442 U.S. at 739. Further, her expectation of privacy in this data is objectively reasonable because society recognizes the need for judicial procedure to warrant longer term tracking of an individual. This Court should find the lower courts erred in allowing the government to present Ms. Austin's historical location information against her at trial.

1. Ms. Austin sought to preserve the privacy of her personal information because she tried to maintain online anonymity and discretion.

Courts traditionally look to an individual's actions surrounding an intrusion to verify her subjective expectation of privacy. The Court of Appeals for the Thirteenth Circuit found Ms. Austin did not think her location was private, but this conclusion is improper under *Rawlings v. Kentucky*. 448 U.S. 98, 100 (1980). In *Rawlings*, this Court found a defendant had no subjective expectation of privacy when he placed drugs in an acquaintance's purse. *Id.* When six officers entered a home with an arrest warrant, the individual named on the warrant could not be found. *Id.* Nevertheless, the officers smelled and saw marijuana within the home. *Id.* Two officers left to get a search warrant while four remained to detain the visitors found on premises. *Id.* After the warrant was obtained, the search of a detainee's purse revealed 1800 tablets of LSD. *Id.* at 101.

When questioned, the woman explained the drugs belonged to the defendant. *Id.* The defendant, also a detainee, admitted he put the contraband in her purse earlier that day. *Id.* He was indicted for possession with intent to sell. *Id.*

The trial court denied the defendant's motion to suppress the evidence. *Id.* at 102. On appeal, this Court upheld the trial court's ruling partially because he had no subjective privacy expectation in the purse.[3] *Id.* at 105. This conclusion greatly stemmed from the defendant stating at his suppression hearing he did not believe the purse would be free from intrusion. *Id.* at 104. But this Court also looked to his having only known the purse owner for "a few days" at the time of his arrest, and that he did not have a right to exclude anyone from the purse. *Id.* at 105.

Here, Ms. Austin did what the defendant in *Rawlings* did not do. The record recognizes her intention to stay off the "grid," and the steps taken to enact her intention. She lives a nomadic lifestyle, which precludes association of her identity with a specific location. Further, Ms. Austin refused to use her own name to create digital profiles because she did not want her personal information to be published. These affirmative efforts at anonymity reflect that Ms. Austin subjectively expected privacy.

The district court erred on this point by finding Ms. Austin "constructively aware" of the collection of the data. Constructive awareness is not a factor used to evaluate subjectivity because the principle is an alternative to actual, or subjective, awareness. *Medina v. City & County of Denver*, 960 F.2d 1493, 1496 (10th Cir. 1992). These concepts are sufficiently distinct to preclude conflation into one. Here, there is no evidence the Ms. Austin did not expect privacy—it instead boasts facts that point to a contrary finding. This Court should hold she subjectively expected privacy regarding her historical location information.

[3] The denial of the motion was compounded by the existence of the warrant that specifically authorized a search of the purse. *Id.*

2. Ms. Austin's privacy expectation is objectively reasonable.

To satisfy the *Katz* test's second prong, a defendant's expectation must be objectively reasonable. *Smith*, 442 U.S. at 740. A privacy expectation is objectively reasonable if it is "one that society is prepared to recognize as 'reasonable.'" *Id.* (quoting *Katz*, 389 U.S. at 361). Courts look to the nature of the intrusion into an individual's private spheres to determine what society would recognize as reasonable. *Id.* at 741. For example, this Court held in *Riley v. California* the examination of a phone is a "search" because modern cell phone is such a "pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy." 573 U.S. 373, 385 (2014).

This characterization of phones proved instrumental to this Court's confrontation with cell-site location information (CSLI). CSLI is information gathered by cellular service providers by gauging a phone's geographic proximity to the service towers used in triangulation. *Carpenter v. United States*, 138 S. Ct. at 2211. Essentially, it tracks and time-stamps the movements an individual makes, assuming she has her phone. *Id.*

In *Carpenter v. United States*, a defendant convicted of six armed robberies challenged this standard. He argued that, absent a warrant supported by probable cause, the CSLI acquired and presented against him in trial was unreasonable. *Id.* at 2212. This Court agreed and reversed. Chief Justice Roberts, writing for the Court, stated two basic recognitions necessary to the analysis. *Id.* at 2214. First, the Amendment seeks to secure life's privacies against "arbitrary power." *Id.* (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)). Second, the Framers intended "to place obstacles in the way of too permeating a police force." *Id.* (quoting *United States v. Di Re*, 332 U.S. 581, 595 (1948)).

This Court distinguished CSLI from permissible forms of surveillance by illustrating concerns that naturally follow the practice. *Carpenter*, 138 S. Ct. at 2217–19. CSLI acquisition is a discreet, prolonged, and intimate intrusion. *See* Susan Freiwald & Stephen Wm. Smith, *The* Carpenter *Chronicle: A Near-Perfect Surveillance*, 132 Harv. L. Rev. 205, 208 (2018). The discretion and scope of CSLI surveillance is not something an individual would reasonably expect. *Carpenter*, 138 S. Ct. at 2218. Unlike a tracking device, that is observable by the target of the search, a CSLI target cannot discover her vulnerability. *Id.* Further, the ability to acquire CSLI retrospectively lends invisibility an officer by allowing him to "travel back in time to retrace a person's whereabouts, subject only to the five-year retention policies of most wireless carriers." *Id.* at 2210. Addressing the intimacy of CSLI, this Court noted the prosecutor presented 12,898 "points" of Carpenter's movements over 127 days, averaging a location update every 14.2 minutes. *Id.* at 2212.

Similarly, acquiring YOUBER's location information is a search because the intrusion is prolonged, discreet, and intimate. Detective Hamm's surveillance spanned over 91 days and was employed retrospectively, which kept Ms. Austin from learning of the intrusion. Moreover, GPS is more accurate than CSLI, and YOUBER updates the data every two minutes, making the intrusions seven times more frequent than CSLI. *Carpenter*, 138 S. Ct. at 2219. Though YOUBER limits user tracking to the times they occupy a rental car, Ms. Austin's circumstances highlight the intimacy of the space invaded. The food, bedding, and valuables found in the car imply her location information communicates where she drove, ate, and slept.[4] Further, the

[4] YOUBER's data and information specialist testified that users are informed they may not sleep in the rental vehicle when creating their profile. R. at 23. However, the rental agreement set forth in Exhibit D of the record does not have such a provision. R. at 28–30. Further, violation of rental agreement provisions, where they exist, will typically not have bearing on a Fourth Amendment analysis. *Byrd*, 138 S. Ct. at 1529.

mechanics of YOUBER's mobile app allows enforcement officers to gather intimate information about more than one person. The app does not have identity verification, which allows more than one user to access a single profile; the location information of the target's family or friends who share a YOUBER account are indiscriminately subject to intimate violations.

Considered together, these factors provide "an intimate window into a person's life" for the government to peer into. *Carpenter*, 138 S. Ct. at 2217. Warrantless access to this information restructures privacy and, thus, puts citizens at the mercy of not only advancing technology but also arbitrary police power. Society would not recognize this as reasonable. This Court should find that Ms. Austin's expectation of privacy in her location information was objectively reasonable.

B. The Lower Courts Erred in Applying the Third-Party Doctrine to YOUBER's Collection of Historical Location Information.

The district court and the court of appeals found that Smoogle's role in YOUBER's gathering of location information constitutes publication of the data to a third party. R. at 15. This is incorrect because the third-party doctrine only applies to scenarios where a third-party service provider retains the information sought. Here, Smoogle satellites aid in the processing of GPS data YOUBER records. Ms. Austin directly transmitted her location to YOUBER, and YOUBER's storage of the data resulted in Detective Hamm's acquisition of it. This two-party communication defies the reaches of the third-party doctrine. Additionally, allowing the government to prevail under a third-party theory belies this Court's holding in *Carpenter*.

1. A third-party theory is inapplicable because a third party did not store Ms. Austin's personal data.

The third-party doctrine grew out of law enforcement's use of confidential informants. Because Ms. Austin did not communicate the information in a way that risks governmental

interception, she did not destroy her privacy expectation. In *On Lee v. United States*, a drug dealer made incriminating statements to an agent wearing a wire. 343 U.S. at 749. This Court found the statements admissible at trial because On Lee risked government interception when he consented to the exchange of information. *Id.* at 756. In the years following *On Lee*, courts upheld the doctrine when confronted with confidential informant issues. Laura K. Donohue, *The Fourth Amendment in a Digital World*, 71 N.Y.U. Ann. Surv. Am. L. 553, 559 (2017). In *Katz*, Justice White specified the present holding left the body of informant cases undisturbed. 389 U.S. at 363. He reasoned the Fourth Amendment did not serve as protection against "unreliable associates." *Id.*

This Court later expanded the doctrine to include historical data published to third parties. In *Miller v. United States*, a defendant asserted a Fourth Amendment violation when the Bureau of Alcohol, Tobacco, and Firearms served his bank with a subpoena. 425 U.S. 435, 436 (1976). This Court found the evidence was lawfully obtained because the information was voluntarily shared with the bank. *Id.* at 442. By patronizing a company required to make accounting records, Miller risked conveyance of the information to the government. *Id.*

Following *Miller*, this Court upheld the third-party doctrine when applied to pen register information. In *Smith v. Maryland*, a defendant repeatedly called a woman from whom he stole a car. 442 U.S. at 737. To prove the harassment, law enforcement acquired the defendant's pen register information, which listed the calls he made from his phone. *Id.* This Court found no Fourth Amendment violation because Smith voluntarily relinquished his privacy by publishing the information to a phone company that maintains the records historically. *Id.* at 744.

In *Smith* and *Miller*, both defendants used a service that facilitated and documented an interaction between two private parties. The third-party service provider created historical

records of the customer's interactions. When seeking the records, law enforcement served subpoenas to the third party. Ms. Austin did not undertake the same risk because no third party plays a comparable role. Here, the location information is communicated directly between a user and YOUBER for security purposes. Smoogle is present in a processing capacity and relates to the data in a transitory fashion. Detective Hamm could not lawfully obtain Ms. Austin's historical records under a third-party theory because the only potential "third party" was not keeping a history.

The distinction is constitutionally necessary. A judgment allowing the government to prevail under a third-party doctrine where there is no third party runs counter to the Fourth Amendment's underlying principles. This Court emphasizes that arbitrary invasions of privacy are unlawful, and there is nothing more arbitrary than groundless justifications. The police conduct before the Court is the government presence Justice Frankfurter anticipated the third-party doctrine would inevitably create when he dissented to its inception. He feared the ratification of duplicitous techniques, particularly in the face of developing technology, "puts a premium on force and fraud." *On Lee*, 343 U.S. at 761 (Frankfurter, J., dissenting). Further, Justice Frankfurter emphasized the type of officer who uses shortcuts in investigations: "[t]here is a great deal of laziness to it. It is far pleasanter to sit comfortably in the shade rubbing red pepper into a poor devil's eyes than to go about in the sun hunting up evidence." *Id.* (quoting 1 James Fitzjames Stephen, *A History of the Criminal Law of England* 442 n.1 (1883)).

2. Ms. Austin's legitimate privacy expectation overcomes the third-party doctrine under *Carpenter*.

Even if Smoogle constitutes a valid third party for the purposes of the third-party doctrine, Ms. Austin may still assert Fourth Amendment rights to the data. Under *Carpenter*, the third-

party doctrine does not overcome her legitimate privacy claim. Additionally, an adverse judgment for Ms. Austin is counter to the interests of the American public.

Carpenter recognized that CSLI acquisition facially falls under the third-party doctrine. 138 S. Ct. at 2210. But this Court declined to apply it, explaining the two rationales supporting the doctrine were not relevant to the facts. *Id.* The doctrine is justified first by the voluntariness in conveying the information to the third party, and second by the nature of the documents sought. *Id.* This Court held that the conveyance of CLSI is essentially involuntary because cell phone use is "indispensable to participation in modern society." *Id.* Further, the documents sought communicated nearly limitless information on the subject. *Id.* When applying the doctrine "mechanically . . . to this case, the Government fails to appreciate the lack of comparable limitations on the revealing nature of CSLI." *Id.* The Court noted this exception to the third-party doctrine is narrow, and does not include business records that "incidentally reveal location information." *Id.*

Ms. Austin's circumstances fall under this same exception. The data provided by YOUBER fits into the narrow scheme that departs from the third-party doctrine because location information is not incidental to the gathering of business records; tracking users is the primary function. And, like in *Carpenter*, the traditional rationale of the third-party doctrine do not justify application to Ms. Austin's location information.

First, Ms. Austin communicated her location involuntarily. *Riley* recognized the involuntariness of cell phone use. This holding is rendered moot if a similar recognition is then declined to the parts of the phone that make it necessary. 573 U.S. at 385. The conveyances required for app use is not the communication with an unreliable associate addressed by the doctrine, but disclosures to a "detached and disinterested entity" essential to participation in

modern life. *Miller*, 425 U.S. at 451. Moreover, Ms. Austin did not voluntarily convey her location information to a third party because YOUBER did not disclose to her the provision regarding SMOOGLE.

Second, the data presented at trial lacked reasonable limitations. Unlike the documents sought in *Smith* and *Miller* that reflect one facet of an individual's dealings, longer term GPS monitoring of a vehicle impinges on privacy regardless if those movements were disclosed to the public. *Carpenter*, 138 S. Ct. at 2215. Here, Detective Hamm reviewed her movements for three months. This information painted a dimensional picture of her life when viewed over such a period. The third-party doctrine has never allowed for a comparably expansive invasion.

The lower court erred on this matter because it misunderstood the role *Carpenter* played regarding the third-party doctrine. Asserting that *Carpenter* breathed "new life into the doctrine stated in *Smith* and *Miller*," the court of appeals upheld the denial of Ms. Austin's motion to suppress. R. at 14. The court then cited Justice Gorsuch's dissent to support this reading of the case.[5] R. at 14. *Carpenter* states it does not overturn *Smith* and *Miller* but creates a narrow exception to the doctrine under which Ms. Austin's facts fall. 138 S. Ct. at 2210.

C. Regulation of Electronic Privacy Is Necessary to Govern Modern Life.

The touchstone of the Fourth Amendment is reasonableness. *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006). This Court has repeatedly emphasized warrantless searches, without prior "approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment." *Katz*, 389 U.S. at 358. Having a judicial officer between citizen and police protects against an officer

[5] Justice Gorsuch, in his first year on the bench, rejected both the third-party doctrine and a *Katz* analysis, arguing instead for a return to ancient property principles. *Id.* at 2265.

acting in his "own, unchecked discretion upon information too vague and from too untested a source." *Wong Sun v. United States*, 371 U.S. 471, 481–82 (1963).

The same dangers exist in officer access to personal information. Outside of *Carpenter* and *Riley*, the judiciary is not the only branch of government that emphasizes procedural protections for the compulsion of electronic records. Congress, in writing the Electronic Communications and Privacy Act, recognized government acquisition of similar types of data is a rights violation. Casey, *supra*, at 997. The existence of a statutory scheme that regulates issues like the one before this Court indicates a lack of limitations carries dangerous implications that society found unreasonable. *Id.* Commentators believe Congress wrote this act in response to two phenomena. *Id.* First, the cases upholding the government's right to surveil its citizens included numerous firm dissents. *Id.* Second, this Court's cases governing privacy brought the issues to the forefront of public attention. *Id.* Fear of electronic surveillance is not a new issue, but the nearly limitless opportunities for law enforcement to exploit citizen use of electronics is.

Ms. Austin's facts illustrate what happens when an officer is supported by sophisticated surveillance yet unburdened with procedure. Detective Hamm served YOUBER a subpoena requesting all information relevant to Ms. Austin's account from October 3, 2018 to January 3, 2019. The robberies relevant to Detective Hamm's investigation fell between October 15, 2018 and December 15, 2018. This is problematic for two reasons.

First, the window of dates Detective Hamm surveilled falls outside the dates of the robberies. This first robbery occurred on October 15; Detective Hamm requested Ms. Austin's location information starting October 3. There is no justification for acquiring Ms. Austin's location information from October 3, 2018 to October 14, 2018. Second, Detective Hamm did not request Ms. Austin's location information from the six specific days the robberies occurred,

but from a disproportionately large window of time spanning the dates of the robberies. If Ms. Austin rented a YOUBER every day throughout the period, Detective Hamm received deeply intrusive information from 85 days irrelevant to the investigation. Essentially, Detective Hamm's invasions were arbitrary. If this approach to investigation goes unregulated, other citizens will be similarly subject to the authority of "zealous" officers engaged in "the often competitive enterprise of ferreting out crime." *Johnson v. United States*, 333 U.S. 10, 14 (1948).

The dangers attached to an adverse judgment for Ms. Austin exist on a large scale, and the advent of the digital personal assistants demonstrate this. Apple Computer, Inc. sells products that include a digital personal assistant named "Siri."[6] Users can activate Siri in several ways, but accidental activation occurs regularly. Hern, *supra*. Once initiated, user interactions with Siri are recorded. Apple transfers a percentage of these recordings to a third-party contractor for a "grading" of Siri's comprehension. Hern, *supra*. In 2019, employees of the contracting third party warned the audio reviewed includes accidentally recorded drug deals, communications between doctors and patients, and intimate relations between partners. Hern, *supra*.

Amazon and Google, companies with comparable digital assistants, sell products that allow users to refuse the seller the right to use their recorded interactions. Hern, *supra*. Halting the third-party exception at *Carpenter* means law enforcement access to conversations recorded by analogous products hinge on the ethics of the seller. Hern, *supra*. The American people deserve judicial intervention. This Court should not passively observe the erosion of the Fourth Amendment, but preemptively regulate the dangerous issue of law enforcement access to disturbingly personal data. Hern, *supra*.

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[6] Alex Hern, *Apple Contractors 'Regularly Hear Confidential Details' on Siri Recordings*, TheGuardian.com (July 26, 2019), https://www.theguardian.com/technology/2019/jul/26/apple-contractors-regularly-hear-confidential-details-on-siri-recordings.

Consequently, allowing Ms. Austin to claim Fourth Amendment protection is not an extension of constitutional guarantees, but an exercise of routine maintenance. The test created in *Katz* calls for a normative approach to privacy analyses, which is why it prevails five decades later. But its applicability to advancing technology has a natural consequence: satisfaction of the test is a moving target. This Court should not balk at extending protections to its citizens simply because the protections required to uphold the Amendment inevitably change.

Without reasonable and modern safeguards, the status quo shifts to a world where citizens are at the mercy of sophisticated and sweeping espionage in the hands of an unchecked police force. Justice Bostick of the Supreme Court of Florida illustrated the inevitable development of this phenomena when addressing difficult law enforcement issues:

> Roving patrols, random sweeps, and arbitrary searches or seizures would go far to eliminate such crime in this state. . . . Yet we are not a state that subscribes to the notion that ends justify means. History demonstrates that the adoption of repressive measures, even to eliminate a clear evil, usually results only in repression more mindless and terrifying than the evil that prompted them. Means have a disturbing tendency to *become* the end result.

Bostick v. State, 554 So. 2d 1153, 1158–59 (Fla. 1990), *rev'd on other grounds*, 501 U.S. 429 (1991).

CONCLUSION

This Court should reverse the judgment of the United States Court of Appeals for the Thirteenth Circuit.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER