Team No. P14

No. 4-422

IN THE

Supreme Court of The United States

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

Counsel for Petitioner
October 5, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court Cases

Federal Appellate Court Cases

Federal District Court Cases

Secondary Authorities

ISSUES PRESENTED

I. Whether a person has standing to contest an extensive, and warrantless, "search" of their rental vehicle when there was no illegality in the use of the vehicle, and they exercised complete dominion and control over the place searched?

II. Whether a "search" occurs when the Government forces a third-party to produce precise GPS location data of a citizen that spans a ninety-two-day time frame without a warrant or an applicable exception?

STATEMENT OF THE FACTS

Jayne Austin is a naturalist and a minimalist. R. at 1. She is also a vocal critic of the United States banking industry and often travels to protest financial corruption in that industry. *Id*. She does not own her own car or have a permanent residence due to her immaterial lifestyle, so she relies on YOUBER, a mobile car rental software application, for transportation. *Id*.

YOUBER works much like a standard car rental service. R. at 2. A user signs up within a mobile application (app) and signs a rental agreement accepting the terms and conditions, which includes a clause permitting YOUBER to track each user's location when renting a vehicle. R. at 3. However, YOUBER has a unique internal policy that allows individuals to use another's account so long as they have the login information to access the app. R. at 24. Ms. Austin took advantage of this policy by using the account of her partner, Martha Lloyd, with her permission. R. at 2.

On January 3, 2019, Ms. Austin rented a vehicle through the YOUBER app on her own phone while signed onto Ms. Lloyd's account. *Id*. Later that day, Officer Kreuzberger stopped Ms. Austin for failure to stop at a stop sign. *Id*. While verifying Ms. Austin's identity, Officer Kreuzberger noticed Ms. Austin's name was not listed as the renter on the rental agreement in the YOUBER app and proceeded to search Ms. Austin's car without her consent. *Id*. After searching Ms. Austin's entire vehicle, including the trunk, the Officer deduced that the car was "lived in" because he found clothes, an inhaler, bedding, a cooler filled with food, and a collection of signed records. R. at 3.

While the Officer was in the midst of sifting through Ms. Austin's livelihood, he received a dispatch to be on the lookout for the type of car that Ms. Austin was driving which was connected to a nearby robbery. *Id*. The Officer also found incriminating evidence in the vehicle that raised a concern that Ms. Austin may have committed the robbery. *Id*. Based on the items found in Ms.

Austin's car, the dispatch call, and a partial match of the license plate of Ms. Austin's car and a surveillance video, the Officer arrested Ms. Austin under suspicion of bank robbery. *Id*.

Detective Boober Hamm took over Ms. Austin's case and found five open bank robbery cases occurring between October 15, 2018 and December 15, 2018 which were all similar to the robbery committed on January 3, 2019. *Id*. He noticed the YOUBER sticker on the car Ms. Austin's used on the date of her arrest and filed a Subpoena Duces Tecum on YOUBER to obtain all GPS and Bluetooth information related to the account Ms. Austin allegedly used between October 3, 2018 through January 3, 2019. *Id*.

YOUBER tracks each and every YOUBER vehicle using GPS technology and Bluetooth signals from each user's cellphone. *Id*. Every two minutes, YOUBER tracks the GPS location of the vehicle, regardless of whether the vehicle is rented. R. at 4. Records from YOUBER revealed that Ms. Lloyd's account was used to rent cars in the locations and at the times of each of the other five robberies. *Id*. Based on the investigation, Ms. Austin was charged by an indictment of six counts of 18 U.S. Code § 2113 Bank Robbery and Incidental Crimes. R. at 1.

Prior to trial, Ms. Austin filed two motions to suppress evidence in the Trial Court. R. at 4. The first was to suppress the evidence gathered from the Officer's search of the rental car and the second was to suppress the location data obtained from YOUBER. *Id*. Both of these motions were denied by the United States District Court for the Southern District of Netherfield and that decision was affirmed by the United States Court of Appeals for the Thirteenth Circuit. *Id*.

SUMMARY OF THE ARGUMENT

Ms. Austin has been unjustly deprived of a meaningful opportunity to fairly face the Government in the adversarial process; the consequence of which being her wrongful conviction. It is always the Government's burden to show guilt, and it only met that burden in this case by

violating Ms. Austin's constitutionally protected rights. Therefore, Ms. Austin urges the Court to reverse the Thirteenth Circuit Court of Appeal's opinion. That opinion incorrectly held that Ms. Austin lacked standing to contest the warrantless search of her rental vehicle and that the collection of GPS data used to create a ninety-two-day itinerary of Ms. Austin's whereabouts did not constitute a "search" within the meaning of the Fourth Amendment.

Ms. Austin had a reasonable expectation of privacy in her rental car. The fact that Ms. Austin's name was not listed on the rental agreement, standing alone, is not enough to deprive her of that expectation. The Government was required to show that Ms. Austin's activity was illegal and that the illegal activity placed her in the searched premises. Examples of meeting this threshold have included an invalid driver's license, car theft, and criminal fraud. The circumstances surrounding Ms. Austin's relationship with the YOUBER account holder did not equate to criminal activity. Ms. Austin had permission to rent vehicles per YOUBER's policies and from Ms. Lloyd. It was the Government's burden to prove that Ms. Austin acted illegally to get behind the wheel of the car. Yet, even the Thirteenth Circuit used the term "possible illegality." That is not enough.

Ms. Austin established a reasonable expectation of privacy rooted in property interests. Her right to exclude others from the rental vehicle finds its source in an area of law outside of the Fourth Amendment, as is required to establish standing. It was the Government's burden to show sufficient evidence to strip her of that expectation. Ms. Austin clearly demonstrated that her Fourth Amendment rights protected the rental vehicle, which in turn, provided her standing to contest any violations of those rights.

Further, just because the Government invaded Ms. Austin's privacy by searching location records rather than a physical place does not mean a "search" did not occur. The Fourth Amendment protects people, not places. Ms. Austin had an expectation of privacy in her

movements because she had a subjective expectation of privacy in her whereabouts over the course of ninety-two days and those movements revealed the privacies of life which society is prepared to protect.

The GPS data obtained in this case is even more revealing of individual privacy than other data the Supreme Court has already extended Fourth Amendment protection to in the past. Combining precedent with the history and purpose of the Fourth Amendment, a "search" undoubtedly occurred when police subpoenaed Ms. Austin's location data from YOUBER. The Thirteenth Circuit failed to reach this conclusion because it relied on the third-party doctrine. However, that doctrine cannot be mechanically applied to every category of information. Further, it cannot be applied without a party knowingly revealing such information to a third party. Ms. Austin did not knowingly reveal her location data to YOUBER because she did not sign the terms and conditions.

The Government seeks to rely on the strength of Ms. Austin's relationship with Ms. Lloyd to impose constructive knowledge of YOUBER's terms and conditions on her, but then berates the weakness of that same relationship to further its standing argument. The Government cannot have its cake and eat it too. It failed to show any illegal activity that would strip Ms. Austin of her reasonable expectation of privacy in the rental vehicle and its reliance on the third-party doctrine is inapposite.

STANDARD OF REVIEW

A Court reviews *de novo* a district court's conclusions of law. *Husain v. Olympic Airways*, 316 F.3d 829, 835 (9th Cir. 2002)*, aff'd*, 540 U.S. 644 (2004). "De novo review tends to unify precedent and will come closer to providing law enforcement officers with a defined set of rules." *Ornelas v. United States*, 517 U.S. 690, 697 (1996).

ARGUMENT

I. Ms. Austin had standing to contest the warrantless search of the rental vehicle in which she was the driver and sole occupant.

The first issue presented may seem like an instance of first impression, however, it can be resolved by applying two previous Supreme Court decisions. In *Byrd v. United States*, this Court held that "the mere fact that a driver in lawful possession or control of a rental car is not listed on the rental agreement will not defeat his or her reasonable expectation of privacy." *Byrd v. United States*, 138 S. Ct. 1518, 1531 (2018). Further, in *Rakas v. Illinois*, this Court implied that "wrongful presence at the scene of a search would not enable a defendant to object to the legality of the search." *Rakas v. Illinois*, 439 U.S. 128, n.9 (1978). Therefore, absent a finding of wrongful presence in the place searched, something more than not being listed on the rental agreement is necessary to strip an individual of standing.

The district court never found that Ms. Austin was in possession of the rental car illegally, nor could it because Ms. Austin was never charged with such a crime and the Government failed to make this argument. Instead, the district court and the court of appeals relied on facts presented about Ms. Austin's intimate but rocky relationship with the account holder, Ms. Lloyd, to support the conclusion that Ms. Austin lacked standing.

Moreover, the court of appeals used the fact that Ms. Austin's name was not on the rental agreement to dispose of its standing analysis. R. at 11. However, *Byrd* expressly held that this fact is not enough to strip an individual of standing. *Byrd*, 138 S. Ct. at 1531. In *Byrd*, the cause was remanded for further factual determinations as to "whether the Government's allegations, if true, would constitute a criminal offense in the acquisition of the rental car under applicable law." *Id*. at 1530. The Court remanded this question because regardless of any established property right,

illegal presence, like that of a car thief, would vitiate any reasonable expectation of privacy, and consequently any standing argument. *Id*. at 1529.

However, remand is not an option in this case because Ms. Austin has already been convicted. The opportunity for the district court to find any express circumstances of illegality has passed. Additionally, Ms. Austin's conduct has only been equated to "possible illegality." R. at 11. Consequently, Ms. Austin's conviction must be reversed. Ms. Austin can show that she had a reasonable expectation of privacy in the rental vehicle and that expectation remains in-tact because there were never any express findings of illegality that would strip her of it.

Ms. Austin's Fourth Amendment rights were implicated when the Government intruded on that expectation of privacy and those rights were violated when the Government conducted a search of that protected space without a warrant or applicable exception. Most importantly, Ms. Austin was unjustly deprived of any appropriate remedy for that violation when the district court erroneously held, and the court of appeals affirmed, that Ms. Austin did not have standing to contest the fruit of a poisonous tree.

A. Ms. Austin has standing under the Fourth Amendment analysis that merges property rights and reasonable expectation of privacy.

Standing in the context of the Fourth Amendment is entirely different than traditional standing analysis under Article III of the Constitution. *Id*. at 1530. In *Rakas*, the Court held that under Fourth Amendment standing analysis the question to be answered is whether the person claiming a constitutional violation "has had his own Fourth Amendment rights infringed by the search and seizure which he seeks to challenge?" *Rakas*, 439 U.S. at 133. Thus, the issue in this case is whether Ms. Austin's own Fourth Amendment rights were infringed upon by Officer Kreuzberger's search of the rental car in Ms. Austin's possession on January 3, 2019. R. at 2. This Court's opinion in *Byrd* is informative on how to answer that question; it "requires examination of

whether the person claiming the constitutional violation had a 'legitimate expectation of privacy in the premises' searched." *Byrd*, 138 S. Ct. at 1526.

The court of appeals undertook this standing analysis from twin perspectives. R. at 11. However, it has been more properly articulated that one of those perspectives, the test for legitimate expectations of privacy, supplements, rather than displaces, the other perspective, traditional property-based understandings of Fourth Amendment standing. *Id*. at 1526. Therefore, in order to have a legitimate expectation of privacy, the expectation must be rooted in either a reference to concepts of real or personal property law, or to understandings that are recognized and permitted by society. *Id*.

Under the first alternative, the interest is not required to be based on common-law property interests, but courts have found those property concepts to be instructive in "determining the presence or absence of the privacy interest protected by [the Fourth] Amendment." *Id*. The property concept of "possessory interest" is defined as "[t]he present right to control property, including the right to exclude others, by a person who is not necessarily the owner." *Possessory Interest*, Black's Law Dictionary (10th ed. 2014); *see also*, *United States v. Dixon,* 901 F.3d 1322, 1338 (11th Cir. 2018). Under the second alternative, it must be one that an individual seeks to preserve as private and one that society is prepared to recognize as reasonable. *Katz v. United States*, 389 U.S. 347, 361 (1967). Ms. Austin is only required to establish an expectation of privacy rooted in the first alternative because it supplements the second.

i. Ms. Austin's right to exclude others from her rental vehicle gives her the property right necessary to comply with the Fourth Amendment standing requirement.

Ms. Austin's expectation of privacy was rooted in her right to exclude others, the same general property concept that guided resolution of the case in *Byrd*. This Court held that "one who

owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of the right to exclude." *Byrd*, 138 S. Ct. at 1527. In *Jones v. United States*, this Court used that same guiding principal to find standing for the defendant. *Jones v. United States*, 362 U.S. 257, 265 (1960).

In *Jones*, the defendant was present at the time of the search of an apartment which was owned by his friend. *Id.* at 259. The friend had given Jones permission to use the apartment and a key with which Jones admitted himself to the apartment on the day of the search. *Id*. He had a suit and shirt at the apartment and had slept there at least one night. *Id*. At the time of the search, Jones was the only occupant of the apartment because his friend, the lessee, was away for a period of several days. *Id*.

The facts in *Jones* are comparable to those of this case. Ms. Austin was present at the time of the search of the rental vehicle at issue which was under a rental agreement in her partner, Ms. Lloyd's, name. R. at 2. Ms. Lloyd had given Ms. Austin implied permission to obtain the car by providing Ms. Austin with authorization on Ms. Lloyd's credit card as well as Ms. Lloyd's login information for the YOUBER app through which the car was rented. R. at 19. Ms. Austin had many personal effects in the vehicle and Officer Kreuzberger reported the car appeared to be "lived in." R. at 3. At the time of the search, Ms. Austin was the only occupant and driver of the vehicle, just as the defendants were in *Jones* and in *Byrd*. R. at 2.

The driver in sole possession of a vehicle and the only occupant of an apartment both have the expectation of privacy that comes with the right to exclude others from the protected space. If Ms. Austin did not have the right to exclude, who else besides the driver in sole possession of a rental car would be permitted to exclude third-parties, like a car-jacker, from the vehicle? Just like the defendant in *Jones*, Ms. Austin had a reasonable expectation of privacy because she "had

complete dominion and control over [the place searched] and could exclude others from it." *Byrd*, 138 S. Ct. at 1528.

This Court has already held that there is "no reason why the expectation of privacy that comes from lawful possession and control and the attendant right to exclude would differ depending on whether the place searched is rented or privately owned by someone other than the person in current possession of it." *Id*. Consequently, it did not matter whether the friend of the defendant in *Jones* owned or leased the apartment that he permitted the defendant to use in his absence, nor whether the car in *Byrd* was rented or owned by person granting the defendant permission of its use. *Id*.

This same principle applies to Ms. Austin. True ownership does not matter for Fourth Amendment standing purposes in the sense that it is not dispositive. "A defendant's expectation of privacy in a place may exceed his or her contractual or proprietary rights to the place searched." *United States v. Williams*, 347 F. Supp. 3d 312, 315 (E.D. Mich. 2018). But what does matter is that the individual had complete dominion and control over the place being searched and with that the ability to exercise their right to exclude others. Ms. Austin's right to exclude is the property interest that gives her a reasonable expectation of privacy.

B. Once someone has established standing under the Fourth Amendment, they cannot be stripped protection of those rights unless there has been a finding of illegality.

Byrd has been interpreted as drawing a clear distinction between "possession of a rental vehicle that is not 'authorized' by the rental agreement and possession that is sufficiently 'wrongful' to warrant depriving the driver of possession of the rental vehicle." *United States v. Davis*, 326 F. Supp. 3d 702, 724 (N.D. Iowa 2018). Although it is not a distinction without a difference, *Byrd* has created uncertainty. Doubt exists in this grey area between what is sufficiently and insufficiently wrongful, and consequently, courts have resorted to resolving Fourth

Amendment claims on any grounds other than standing. *See United States v. Moss*, 936 F.3d 52, 58 (1st Cir. 2019), *United States v. Glenn*, 931 F.3d 424, 428 (5th Cir. 2019), *United States v. Drummond*, 925 F.3d 681, 688 (4th Cir. 2019).

A bright line rule can be drawn that will aid in resolving these ambiguities, by resorting to the unlawful possessory rule in *Rakas*. Relying on that holding, an individual that has established a reasonable expectation of privacy cannot be deprived of that interest unless the individual's unlawful conduct generated that interest in the first place. Possible illegality, like that alleged against Ms. Austin, is not enough. This point is supported by the string of cases following *Byrd*.

The Ninth Circuit held that *Byrd* reaffirmed the *Rakas* reasoning that "a defendant whose presence on a premises violates the law may not 'object to the legality of [the premises] search." *United States v. Schram*, 901 F.3d 1042, 1046 (9th Cir. 2018). The court further held that an individual does not lose their reasonable expectation of privacy simply by engaging in illegal acts, but a defendant is prevented from contesting a search when those illegal acts prevented the individual from being on the premises searched in the first place. *Id*. at 1045.

The Third Circuit faced an identical issue in *United States v. Cortez-Dutrieville*, where it held that "'like a trespasser, a squatter, or any individual who occup[ies] a piece of property unlawfully,' an individual whose presence in a home is barred by a court no-contact order lacks 'any expectation of privacy' in such place 'that society is prepared to recognize as reasonable.'" *United States v. Cortez-Dutrieville*, 743 F.3d 881, 884–85 (3rd Cir. 2014).

When the sole driver and occupant of a rental car did not have a valid driver's license, the Second Circuit held his presence behind the wheel of any car was unlawful, including the one searched. *United States v. Lyle*, 919 F.3d 716, 729 (2d Cir. 2019). The court further held that, "[w]hile the absence of a valid license alone may not destroy an unauthorized driver's expectation

of privacy, Lyle's possession and control of the car was unlawful the moment he started driving it." *Id.*

These cases illustrate the clear distinction between questionable conduct and illegal conduct. *Byrd* is a generous decision in the area of standing for those who can manage an appropriate modicum of possession or control. *United States v. Oakes*, 320 F. Supp. 3d 956, 960 (M.D. Tenn. 2018). *Byrd* protects individuals who can establish a reasonable expectation of privacy, and those individuals are not deprived of that protection until their conduct meets the threshold of *Rakas*. This bright-line rule is supported by the rational of *Byrd* and *Rakas* as well as the majority of circuit court opinions interpreting them. Ms. Austin's expectation of privacy was never compromised because her conduct did not meet the threshold of *Rakas*, consequently, she had standing to contest the Government's warrantless search of her rental vehicle.

C. A bright-line rule supports the delicate balance between order and liberty because the Government has other safeguards in place to defeat Fourth Amendment claims.

Although courts typically treat Fourth Amendment standing as a threshold question, the analysis is "more properly placed within the purview of substantive Fourth Amendment law than that of standing." *Rakas*, 439 U.S. at 140. Meaning standing, whether a defendant has a reasonable expectation of privacy, does not have to be addressed before other aspects of the merits of a Fourth Amendment claim because it is not a jurisdictional question. *Byrd*, 138 S. Ct. at 1530.

Although the trial court chose to dispose of Ms. Austin's case in this manor, it was not required to do so. R. at 6. The trial court could have analyzed any other arguments raised by the Government that supported the denial of Ms. Austin's motion to suppress. If there is obvious presence of an applicable exception to the warrant requirement, courts are free undertake that analysis first and to dispose of a Fourth Amendment claim on those grounds. They are not required to undertake a more difficult analysis of standing first, just because the Government raised it. Many

courts have done just that and exercised their discretion to dismiss on other grounds, in light of the *Byrd* decision.[1]

Since standing is so different and distinct from Article III standing, the Government has ample opportunities to challenge any Fourth Amendment claims. The Government could argue to apply one of the numerous exceptions to the warrant requirement, the inevitable discovery exception, or the good faith exception, to name a few. Moreover, the burden of establishing any reasonable expectation of privacy is already on Ms. Austin. *United States v. Stevenson*, 396 F.3d 538, 547 (4th Cir. 2005). If the Fourth Amendment does not provide protection to those similarly situated to Ms. Austin, the balancing scale of order and liberty will be unjustly tipped in favor of the Government. This would lead to an irrational result when this Court has already held that "few protections are as essential to individual liberty as the right to be free from unreasonable searches and seizures." *Byrd*, 138 S. Ct. at 1526.

Affirming the previous holdings of Ms. Austin's case sets a dangerous precedent. If she is found to lack standing, all others in her situation will also be subject to the arbitrary invasion of Government power with no meaningful way to hold the Government accountable for its actions. If instead the Court reverses, the Government will merely be required to prove it was reasonable in conducting the search of a rental car; whether that be founded in obtaining a warrant, exigent circumstances, or probable cause. The effect of siding with the Government on this issue is that

[1] *See Glenn*, 931 F.3d at 428-29 (declining to answer the close issue of standing when resolution of the merits was simpler); *Drummond*, 925 F.3d at 688 (choosing not to address standing because the court determined probable cause existed; *Moss*, 936 F.3d at 58 (opting to exercise this discretion and address the constitutionality of the searches rather than standing).

police can act now and ask questions later, granting a form of unfettered discretion and authority that directly contradicts inalienable rights protected by the Constitution. Ever mindful of the Fourth Amendment and its history, the Court has viewed with disfavor practices that permit "police officers unbridled discretion to rummage at will among a person's private effects." *Arizona v. Gant*, 556 U.S. 332, 345 (2009).

The police officer in this case, Officer Kreuzberger, "noticed Ms. Austin's name was not listed as the renter on the rental agreement" and accordingly "told Ms. Austin that he did not need her consent to search the car." R. at 2-3. From this statement, it is implied that Officer Kreuzberger assumed Ms. Austin did not have any reasonable expectation of privacy in the rental vehicle, therefore not requiring her consent, simply because she was not on the rental agreement.

However, *Byrd* was handed down almost a year before the search in question was conducted. Siding with the Government on this issue is retroactively condoning Officer Kreuzberger's conduct. The record does not indicate Officer Kreuzberger ever inquired into whether the rental vehicle was reported stolen nor asked the account holder if Ms. Austin had permission to drive the car before conducting his search. Yet, taking either of those reasonable steps would have provided the Officer insight as to which side of the Fourth Amendment line his conduct stood. If police are not required to make these further inquiries, they have the power to arbitrarily search the exact rental vehicles that *Byrd* was articulated to protect. This Court cannot simply hope there are facts presented in the future that can be contorted to reach an undefined line of "possible illegality" that prevent the individual from contesting an officer's unreasonable conduct.

Drawing a bright-line rule between legal and illegal possession of a rental car, strikes the perfect balance between order and liberty. It educates officers on the proper steps required to obtain

evidence that can be presented at trial without fear of suppression and it protects individual's Fourth Amendment rights from unreasonable searches of spaces in which they have a reasonable expectation of privacy.

It is the Government's burden to prove any individual guilty beyond a reasonable doubt and it is any defendant's fundamental right to hold the Government accountable when doing so. All Ms. Austin asks is that she be afforded standing so that she, and any other defendant in her situation, can contest unreasonable conduct on behalf of the Government and its police force.

II. The acquisition of location data of a rental vehicle is a "search" because it intrudes on the precise privacy values the Framers intended the Fourth Amendment to protect.

The United States Supreme Court has recognized that the basic purpose of the Fourth Amendment is to "safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *Camara v. Mun. Court of S.F.*, 387 U.S. 523, 528 (1967). The Government acted in direct contradiction to the Framer's privacy concerns when it arbitrarily invaded Ms. Austin's privacy by obtaining a detailed map of her past movements. The Supreme Court has never held that the "Government may subpoena third parties for records in which the suspect has a reasonable expectation of privacy." *Carpenter v. United States*, 138 S. Ct. 2206, 2221 (2018). The third-party doctrine only acts to vitiate any reasonable expectation of privacy and its application to this case is inapposite. Consequently, a "search" occurred when the Government obtained the location data of Ms. Austin over the course of ninety-two days.

A. The third-party doctrine does not provide a shield for the Government to hide behind when it violates Fourth Amendment protections.

The third-party doctrine should not be extended to allow the Government to blatantly violate constitutional protections. The rationale behind the doctrine is that "an individual has a reduced expectation of privacy in information knowingly shared with another," but this logic

should not apply to GPS data that creates a comprehensive record of a person's movement. *Carpenter*, 138 S. Ct. at 2219. The retrospective GPS location data, in this case, is outside the purview of the type of information that the third-party doctrine covers. Therefore, as the Court declined to do in *Carpenter*, the holdings of *Smith* and *Miller* should not be broadened to incorporate these novel circumstances. *Id*. at 2217.

i. The revealing nature of GPS location data makes the third-party doctrine inapplicable.

A Subpoena Duces Tecum ("SDT") that demands records which create a comprehensive chronicle of a person's past movements constitutes a "search." The GPS data collected in this case presents even greater privacy concerns than the subpoena of the cell-site location information (CSLI) that the Court held constituted a "search" in *Carpenter. Carpenter*, 138 S.Ct. at 2218. It is, therefore, more imperative than it was in *Carpenter* that Fourth Amendment protections are implicated by this case.

In *Carpenter*, the Court held that due to the "deeply revealing nature of CSLI, its depth, breadth, and comprehensive reach, and the inescapable and automatic nature of its collection" that "the fact that such information is gathered by a third party does not make it any less deserving of Fourth Amendment protection." *Id*. at 2223. Similarly, in this case, the third-party doctrine should not be allowed to provide a workaround to Fourth Amendment protections and provide the Government unfettered power to track a person's every move for a three-month period.

Justice Kennedy dissented in *Carpenter* and discussed at length the imprecision of CSLI compared to GPS information. He attempted to persuade the majority that this imprecision should be determinative in ruling that a Government "search" did not occur when a third-party proffered this data. *Id*. at 2225. However, the Court rejected that contention and stated that CSLI is "rapidly approaching GPS level precision." *Id*. at 2219. It held that when the Government accessed CSLI

it invaded Carpenter's reasonable expectation of privacy in the whole of his physical movements, and, therefore, constituted a "search." *Id*. at 2220.

In resolving the second issue presented, the Court is once again faced with the GPS data it cautioned of in *Carpenter* – GPS data that would have given even the dissent pause when considering Fourth Amendment implications. The GPS technology in this case is more intrusive than CSLI because the record indicates that "every two minutes, YOUBER tracks the timestamped location of the vehicle for security purposes, regardless of whether the vehicle is rented." R. at 4. This location tracking is not dependent on receiving or making a call or receiving an e-mail to ping a cell tower, as it was in *Carpenter*, rather it is automatic at two-minute intervals. Given the unique and revealing nature of YOUBER's location data records, the fact that the information is held by a third-party does not by itself overcome Ms. Austin's claim to Fourth Amendment protection.

Moreover, in *Carpenter*, the orders to compel the disclosure of the phone records were issued by neutral and detached Federal Magistrate Judges. *Carpenter*, 138 S. Ct. at 2212. In this case, the record indicates that Detective Hamm served the STD on YOUBER. R. at 3. There was no review by a judicial body of the SDT to determine the particularity and validity of the "search." Therefore, Carpenter had even more protection for his constitutional rights than Ms. Austin, yet the Court still held that a "search" had occurred. It is apparent from the record, that the constitutional violations of Ms. Austin's privacy surpassed those of the defendant in *Carpenter*. Consequently, a "search" has occurred within the meaning of the Fourth Amendment.

Justice Sotomayor has specifically warned against applying the third-party disclosure rational in this digital age, "where so much of our personal data is necessarily conveyed to third-parties." *United States v. Jones*, 565 U.S. 400, 417 (2012). With the growing use of transportation applications on phones, the Court has the opportunity to heed to this warning today and properly

extend protection to individual's constitutional rights. Specifically, this Court has the ability to extend protection to Ms. Austin's privacy from an all-seeing governmental eye.

ii. The holdings of *Smith* and *Miller* are distinguishable because Ms. Austin did not knowingly share her location information and the type of information collected was drastically different.

In both *Smith* and *Miller*, the Court did not look only to the act of sharing information but also to the "nature of the particular documents sought" to determine whether there was a legitimate expectation of privacy concerning their contents. *United States v. Miller*, 425 U.S. 435, 442 (1976). In *Smith*, the pen register at issue had limited capabilities of revealing "identifying information" because it only revealed a set of phone numbers to the Government. *Smith v. Maryland*, 442 U.S. 740, 742 (1979). Furthermore, in *Miller*, the checks at issue were held to not be inherently private because they were not only seen by the bank's employees but were used in commercial transactions with various involved parties. *Miller*, 425 U.S. at 442.

However, the facts of this case are more similar to those in *Carpenter* in that there is a "world of difference between the types of" minimally invasive "personal information addressed in *Smith* and *Miller* and the exhaustive chronicle of location information casually collected by" YOUBER. *Carpenter*, 138 S. Ct. at 2219. Simply applying these cases mechanically as binding precedent when the factual circumstances differ produces irrational results. The Government obtained a detailed chronicle of Ms. Austin's physical presence compiled every two minutes on the days she was using YOUBER, over the course of three months. R. at 29. Such a chronicle implicates privacy concerns far beyond those considered in *Smith* and *Miller*. Consequently, the third-party doctrine should not be extended to the GPS data that provided the Government with an intimate narration of Ms. Austin's protected privacy.

Additionally, even if the Court holds that the third-party doctrine applies generally to the collection of GPS data from YOUBER, it does not apply to Ms. Austin because the justifications for doing so are not present. *Smith* and *Miller* focused in part on the act of "sharing" and that sharing being "voluntary." *Smith*, 442 U.S. at 749; *Miller*, 425 U.S. at 4422. Ms. Austin never voluntarily shared her location information with YOUBER, nor did she ever agree to the terms and conditions. R. at 20.

Ms. Lloyd is the only one who agreed to YOUBER's terms and conditions, and even if Ms. Lloyd voluntarily shared her location data with YOUBER, her personal choice to do so should not overcome the individual privacy expectations of Ms. Austin. R. at 20. Simply because YOUBER's practice is to allow any person to use an account if they have the log-in information, this does not necessitate the conclusion that Ms. Austin signed her privacy interests away to a third-party. R. at 24.

B. The Subpoena Duces Tecum infringed on Ms. Austin's subjective expectation of privacy and that expectation is one that society recognizes as reasonable.

While property rights used to be the sole measure of Fourth Amendment violations, Justice Harlan's concurrence in *Katz v. United States* provided a two-part analysis that courts apply today in determining if Government action constituted a "search," regardless of whether there was a physical intrusion. *Katz*, 389 U.S. at 361. The analysis first requires that an individual exhibit an actual (subjective) expectation of privacy; and second, that expectation must be one that society is prepared to recognize as 'reasonable.' *Id*. The Fourth Amendment's protections and restrictions are implicated by a Government "search" when the two-prong analysis from *Katz* is satisfied.

i. Ms. Austin has a subjective expectation of privacy in the whole of her physical movements.

In *Katz*, the Court expanded its conception of the Fourth Amendment to protect certain expectations of privacy. *Carpenter*, 138 S. Ct. at 2213. According to the *Katz* majority, what a person seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. *Katz*, 389 U.S. at 351. The Fourth Amendment, therefore, "protects people, not places." *Id*.

A central aim of the Framers in adopting the Fourth Amendment was "to place obstacles in the way of a too permeating police surveillance." *United States v. Di Re*, 332 U.S. 581, 595 (1948). With modern technology advancing at a rapid rate, police surveillance has started to encroach upon areas normally guarded against inquisitive eyes. The Court's growing concern with this practice is evidenced by the evolution in the case law leading up to *Carpenter* that has continued to extend protection to privacy interests.

In 1983, the Court stated in *United States v. Knotts* that traveling in a car on public thoroughfares does not give a person a reasonable expectation of privacy because they are willingly exposing themselves to the public. *United States v. Knotts*, 460 U.S. 276, 281 (1983). *Knotts,* however, reserved the question of whether "different constitutional principles may be applicable if twenty-four-hour surveillance of any citizen…[were] possible." *Id*. at 283-84. The Court started formulating an answer to that question 30 years later when it unanimously ruled that the use of a much more sophisticated GPS tracking device installed on a vehicle's undercarriage constituted a "search." *United States v. Jones*, 565 U.S. 400, 412 (2012).

Although the questioned was nearly resolved in *Jones*, that holding was limited to the Government's physical trespass of the vehicle. However, the concurrence expressed concerns that the tracking occurred over the course of twenty-eight days and concluded "longer term GPS

monitoring…impinges on expectations of privacy" regardless of whether those movements were disclosed to the public at large. *Id*. at 430. The circumstances surrounding Ms. Austin's entanglement with Government actors provide this Court the opportunity to definitively answer the question reserved in *Knotts*.

The Government, in this case, tracked Ms. Austin's every move for not only twenty-eight days but for *three times* that long. For ninety-two days the Government had access to trail every movement that Ms. Austin made in a YOUBER vehicle. Under such permeating observations, this long-term and intensely close GPS surveillance, even without a trespass, should constitute a "search" within the meaning of the Fourth Amendment.

Even though the GPS data is generated for commercial purposes by a third-party, that does not negate Ms. Austin's anticipation of privacy in her physical location. *Carpenter*, 138 S. Ct. at 2217. Mapping Ms. Austin's location for ninety-two days gives the Government an all-encompassing record of her whereabouts. *Id*. It provides the Government with an "intimate window" into Ms. Austin's personal life, "revealing not only [her] particular movements, but through them, [her] familial, political, professional, religious, and sexual associations." *Id*. These location records hold for Ms. Austin the 'privacies of life' that are at the heart of her Fourth Amendment protections and she rightfully retained a subjective expectation that they be respected.

ii. A majority of the Court has already suggested in Jones v. United States that a person's subjective expectation of privacy in the whole of their physical movements is reasonable.

The second half of the *Katz* analysis means that given the societal importance of the privacy interest at stake, if the unregulated use of the Government surveillance technique at issue diminishes society's realm of privacy to an intolerable degree, then it constitutes a "search" under

the Fourth Amendment. This is inherently a value judgment that must be guided by Supreme Court precedent.

Society is prepared to recognize that there is a reasonable expectation of privacy in the whole of a person's physical movements. *Jones*, 565 U.S. at 430. This was made clear by the Court in *Jones* when it stated that "society's expectation has been that law enforcement agents and others would not – and indeed, in the main, could not - secretly monitor and catalog every single movement of a person's car for a very long period." *Id*. By distinguishing short term versus long term monitoring, the Court reasoned that long-term GPS monitoring of a vehicle is a degree of governmental intrusion that a reasonable person would not have anticipated and thus impinged on reasonable expectations of privacy. *Id*.

GPS monitoring is "easy, cheap, and efficient compared to traditional investigative tools." *Carpenter*, 138 S. Ct. at 2218. With just the click of a button, the Government can access detailed information about Ms. Austin's movements at practically no expense. *Id*. Allowing the Government to track Ms. Austin's location for ninety-two days contravenes society's expectations about a reasonable government intrusion into one's privacy. It would be extremely difficult, if not impossible, for the Government to track Ms. Austin for this long without the data obtained from YOUBER. Thus, in a sense, the Government has explored details about Ms. Austin's life that would have been unknowable were it not for the GPS data ascertained from YOUBER. *Kyllo v. United States*, 533 U.S. 27, 40 (2001).

The Court has never held that the Government may subpoena third-parties for records in which the suspect has a reasonable expectation of privacy. *Carpenter*, 138 S. Ct. at 2221. Therefore, when the Government acquired the location data of the rental vehicle, a "search" was

conducted within the meaning of the Fourth Amendment and is presumptively unreasonable without a warrant or an applicable exception.

C. If the Government's conduct is not considered a "search" then it is granted unregulated power to invade an individual's expectation of privacy.

The Fourth Amendment warrant requirement is not merely for a requirement for a piece of paper. Its protections were adopted as a safeguard against the recurrence of abuse so deeply felt by the colonists that acted as one of the justifications for initiating the Revolutionary War. *United States v. Rabinowitz*, 339 US 56, 69 (1950). The ramifications of granting the Government unconstrained access to subpoena unlimited third-party information undermines the purpose of the Fourth Amendment that is so deeply rooted in the history of our nation.

i. The delicate history of the Fourth Amendment requires extreme caution when removing its protections and mindful observation of the potential ramifications.

The Fourth Amendment reflects one of the fundamental grievances that American colonists had against the English crown – Writs of Assistance. Robert M. Bloom & Mark S. Brodin, Criminal Procedure: The Constitution and the Police 11 (Erwin Chemerinsky et al. eds., 8th ed. 2016). These writs allowed open-ended licenses to search by being issued with minimal judicial supervision and without a demonstration of specific justification for the search. *Id*. The royal customs officers armed with such writs had virtually unconstrained discretion to search whenever, wherever, and whomever they chose. *Id*.

By adopting the Fourth Amendment, the Framers sought to avoid these abuses by providing for security against "unreasonable" searches, instituting that there be verified demonstration of "probable cause" before a warrant could issue, and requiring that the warrant "particularly" describe, and thus limit, the scope of the permissible search. *Id*. The Fourth Amendment seeks to secure the "privacies of life" against "arbitrary power" and a central aim of

the framers was "to place obstacles in the way of a too permeating police surveillance." *Id*. The Government action in the case at bar treads to closely to the abhorred writs of assistance; creating a slippery slope for reversion to the exact suppression the Founders fought to extinguish through the protections of the Fourth Amendment.

If the Government is allowed to subpoena any location data it wants from a third-party, they could track every one of the 40 million YOUBER users for indefinite periods of time if man-power allowed. They would not need probable cause to conduct the "search." If the Court holds that a "search" has not occurred through the Government action in this case, it will open the floodgates for more subpoenas to be issued on a fishing expedition for criminal activity. Ms. Austin, all 40 million users of YOUBER, and the millions more using similar applications will all be ripe for this type of abuse.

Carpenter explicitly details that "if the choice to proceed by subpoena provided a categorical limitation on Fourth Amendment protection, no type of record would ever be protected by the warrant requirement." *Carpenter*, 138 S. Ct. at 2222. Any personal information reduced to document form will be accessible for no reason other than official curiosity, just as *Carpenter* warned. *Id*. If Ms. Austin's argument is considered unpersuasive, the Government will have the power, backed by the possibility of punitive consequences, to force third-parties to deliver intimate information simply by issuing an SDT. This circumvention of the warrant requirement should be avoided at all costs because it creates a slippery slope for reversion to the days of writs of assistance. Allowing open-ended searches, with no review by a judicial figure and no neutral determination, grants "unrestrained searches" for evidence of criminal activity and disregards a charter of our own existence. *Carpenter*, 138 S. Ct. at 2213.

While techniques such as hailing GPS data records from third-parties may optimize the ability of police to investigate and solve crimes, they clearly come at the expense of privacy that lies at the core of the Fourth Amendment. Since the parties have stipulated that there are no exceptions to the warrant requirement, the "search" that took place was unreasonable and consequently violated Ms. Austin's Fourth Amendment rights.

ii. Even if a Subpoena Duces Tecum is a valid way to circumscribe the Fourth Amendment's demands, the subpoena at issue is too sweeping in its demands and thus constitutes a "search".

Even if this Court finds that an SDT is a valid alternative to the warrant requirement, in the case at bar the SDT is too broad and is therefore constitutes a "search" that impinges on Ms. Austin's privacy interests. The Court in *Hale v. Henkel* noted three requirements to be met for a subpoena to be a valid means of acquiring evidence. Courts have sought to ensure that a subpoena 1) commands production only of documents relevant to the investigation being pursued, 2) specifies the documents to be produced with reasonable particularity, and 3) includes records covering only a reasonable period of time. *Hale v. Henkel*, 201 U.S. 43, 76 (1906).

The SDT, in this case, violates all three of the "reasonableness" prongs outlined in *Henkel*. The subpoena commanded all of the YOUBER data from a three-month period to be handed over. This ninety-two-day span tracking Ms. Austin's every move was not relevant to the investigation being pursued. There was a less intrusive alternative of simply requesting data for the days when the Government knew the robberies occurred that could have achieved the same result. Instead, the Government went on a fishing expedition to try to find out as much about Ms. Austin's private life as possible.

There is no justifiable excuse on the part of the Government to have not obtained a search warrant in this case. "A warrant assures a citizen that the intrusion is authorized by law, and that

it is narrowly limited in its objectives and scope. A warrant also provides the detached and neutral scrutiny of a neutral magistrate, and thus ensures an objective determination whether an intrusion is justified in any given case." *Skinner v. Railway Labor Executives Ass'n*, 489 US 602, 621-22 (1989). Without these protections, Ms. Austin's personal life has been impermissibly exposed to Government actors.

Even if subpoenaing a third-party does not automatically implicate the Fourth Amendment, in this case, the SDT violated Ms. Austin's Fourth Amendment rights by sweeping too far. The sweeping character of this subpoena could have been avoided if the Government had done what it was required to do under the protections of the Fourth Amendment.

CONCLUSION

The solution in this case can be found in the words of Justice Thomas in the majority opinion of *Carpenter*, "the Government's obligation is a familiar one – get a warrant." *Carpenter*, 138 S. Ct. at 2221. Therefore, the Court should reverse the conviction of Jayne Austen because her rights have been unconstitutionally violated by overreaching Government actors.