Docket 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

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TABLE OF CONTENTS

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

STATEMENT OF ISSUES PRESENTED vi

STATEMENT OF FACTS 1

SUMMARY OF ARGUMENT 3

STANDARD OF REVIEW 4

ARGUMENT 4

I. AUSTIN HAS FOURTH AMENDMENT STANDING TO CONTEST THE GOVERNMENT'S ILLEGAL SEARCH OF THE YOUBER BECAUSE SHE HAD A LEGITIMATE EXPECTATION OF PRIVACY 5

A. Austin Had an Actual, Subjective Expectation of Privacy in Her YOUBER Rental Vehicle. 6

B. Austin's Expectation of Privacy in the YOUBER Rental Vehicle is One that Society Recognizes as Reasonable 8

i. Society is prepared to recognize Austin's ownership interests and her legitimate presence and control over the rental vehicle 8

ii. The Supreme Court has held that unauthorized presence in a rental vehicle is not wrongful 9

iii. A case study: the expectation of privacy 11

iv. Application: Austin had a legitimate expectation of privacy 13

II. WHEN THE GOVERNMENT ACQUIRED THE LOCATION DATA OF AUSTIN'S RENTAL VEHICLE, IT CONSTITUTED A SEARCH 15

A. When the Government Obtained Austin's Location Data, it Was a Search Because Austin Had a Reasonable Expectation of Privacy in Her Physical Movements 16

B. When the Government Acquired the Location Data from YOUBER, it Constituted a Search Because the Location Data Falls Outside the Scope of the Third-Party Doctrine 19

i. The third-party doctrine is inapplicable because Austin did not voluntarily give the location data to YOUBER 20

ii. The third-party doctrine is inapplicable to the location data because its nature allows the Government to track Austin's previous movements 22

CONCLUSION.. 25

TABLE OF AUTHORITIES

Cases

Byrd v. United States, 138 S. Ct. 1518 (2018) ....6: 8, 9, 10, 11, 12 , 13, 14

Camara v. Mun. Ct. of City and County of S.F., 387 U.S. 523 (1967) 5

Carpenter v. United States, 138 S. Ct. 2206 (2018) 5, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25

Florida v. Jardines, 569 U.S. 1 (2013) …..6

Jones v. United States, 362 U.S. 257 (1960) 6, 9, 11, 13, 15

Katz v. United States, 389 U.S. 347 (1967): 5, 6, 7, 8, 11, 13, 16, 19, 21

Minnesota v. Carter, 525 U.S. 83 (1998) 10, 11, 12, 13, 14

Minnesota v. Olson, 495 U.S. 91 (1990) 9, 11, 12, 13, 15

Rakas v. Illinois, 439 U.S. 128 (1978) 6, 9, 10, 11, 12, 13, 14, 15

Riley v. California, 573 U.S. 373 (2012) 20

Smith v. Maryland, 442 U.S. 735 (1979) 16, 19, 21, 23, 24

United States. v. D'Andrea, 648 F.3d 1 (1st Cir. 2011) 4

United States v. Di Re, 332 U.S. 581 (1948) 5

United States v. Diggs, 385 F. Supp. 3d 648 (N.D. Ill. 2019) (mem. op.)...............................23, 24

United States v. Hood, 920 F.3d 87 (1st Cir. 2019) 21, 22

United States v. Jones, 565 U.S. 400 (2012) 17, 18, 19, 23, 24

United States v. Knotts, 460 U.S. 276 (1983) 18

United States v. Miller, 425 U.S. 435 (1976) 19, 20, 2, 23, 24

Statute

18 U.S. Code § 2113 1

Other Authorities

U.S. Const. amend. IV 7

Grace Manning, *Alexa: Can You Keep a Secret? The Third-Party Doctrine in the Age of the Smart Home*, 56 Am. Crim. L. Rev. Online 25 (2019) 20

STATEMENT OF ISSUES PRESENTED

I. Does an individual have a legitimate expectation of privacy sufficient to have Fourth Amendment standing when they rented a vehicle in another's name with their permission?

II. Is the acquisition of previous location data of a rental vehicle for a four-month period that registers the driver's physical movements every two minutes a "search" under the Fourth Amendment and *Carpenter v. United States*, 138 S. Ct. 2206 (2018)?

STATEMENT OF FACTS:

This case illustrates the importance of Fourth Amendment protection. Jayne Austin ("Austin") is an avid poet and blogger who writes about financial corruption in the United States banking industry. R. at 1. She focuses on *Darcy and Bingley Credit Union's* series of fees and decreasing interest rates, which marginalize lower-income members and prioritize higher-income members. R. at 1. Additionally, Austin prides herself on living an immaterial lifestyle. R. at 1.

On January 21, 2019, the United States of America (the "Government") charged Austin with six counts of 18 U.S. Code § 2113 Bank Robbery and Incidental Crimes based on information obtained without a warrant. R. at 1–4. Because the evidence was obtained without a warrant, Austin filed two motions to suppress regarding (1) evidence gathered from her rental car after a traffic stop, and (2) location data obtained from a private company. R. at 1.

Because Austin does not own a car, she uses a popular car rental software application ("app") available on mobile devices, YOUBER, which has more than 40 million users across the United States. R. at 2. Its users can rent YOUBER-owned cars at a fixed rate through the app, using authorized payment methods. R. at 2. The app is accessible by the user's cellphone that connects to the vehicle though Bluetooth and GPS. R. at 2. Austin does not have a personal account with YOUBER, but uses that of her partner, Martha Lloyd ("Lloyd") with her permission. R. at 18. Once Lloyd created her account on YOUBER and accepted the terms and conditions, including a voluntary disclosure of tracking information and an additional authorized driver option, Austin was able to use the app on her own. R. at 2, 18, 23. Austin has the app on her personal cell phone and uses it as her primary means of transportation and often shelter. R. at 2. While Lloyd is the named user, she shares her login and personal information with Austin to grant her access to

the app, and lists Austin as an authorized user on her credit card so that Austin can autonomously use the app and subsequently reimburse Lloyd in cash. R. at 18.

On January 3, 2019, Austin rented a 2017 Black Toyota Prius with the license number R0LL3M through the YOUBER app on her phone. R. at 2. Later that day, Officer Charles Kreuzberger (the "Officer") stopped Austin for running a stop sign. R. at 2. Austin complied with the Officer and turned over all required documentation. R. at 2. Because Austin's name did not match the one on the rental agreement, the Officer told her "that he did not need her consent to search the car," and did so without a warrant. R. at 2–3. Thereafter, he found a BB gun modeled after a .45 caliber handgun, a maroon ski mask, and a duffle bag containing money and blue dye packs. R. at 3. The Officer also believed the car to be "lived in," because of the immense number of personal items including bedding, a pillow, clothes, an inhaler, three pairs of shoes, a collection of signed Kendrick Lamar records, and a cooler full of tofu, kale, and kombucha. R. at 3. The Officer subsequently arrested Austin based on a dispatch report to look out for the same model car with a partial license plate number "R0L." R. at 3. There was also information regarding a maroon ski mask and a .45 caliber handgun used in a robbery of *Darcy and Bingley Credit Union*. R. at 3.

Two days later, Detective Boober Hamm (the "Detective") took on Austin's case. R. at 3. The Detective found five open robbery cases occurring between October 15, 2018, and December 15, 2018, involving similar facts. R. at 3. The Detective then served a subpoena duces tecum on YOUBER to obtain all of the GPS and Bluetooth information related to the account Austin allegedly used for a period of four months between October 3, 2018, and January 3, 2019. R. at 3.

This subpoena was only possible because of YOUBER's extensive tracking of its vehicles, which involves recording a user's movements every two minutes as part of its corporate policies and procedures. R. at 3–4, 29–30. Every YOUBER vehicle uses GPS technology and Bluetooth

signals that activate once the cellphone with the user's account is located within the vehicle. R. at 4. The GPS information is then transferred through the company's mainframe and filtered by the search engine, Smoogle, using satellite mapping technology. R. at 4. It was this extensive information used that put Lloyd's account near the location of the other five robberies. R. at 4.

SUMMARY OF ARGUMENT

This Court should overrule the Thirteenth Circuit's denials of Austin's motions to suppress evidence because Austin has Fourth Amendment standing to contest the Government's illegal search of her rental vehicle and the Government's acquisition of Austin's location data constituted a search under the Fourth Amendment.

The Fourth Amendment closely guards individual's rights against unreasonable searches and seizures by law enforcement. The warrant requirement exists to safeguard those rights, and any violation of such is presumed unreasonable. Because there are no exceptions to this requirement, the Officer's warrantless search of Austin's rental vehicle was of the very infringement the Constitution and this Court seek to protect. Austin has sufficient Fourth Amendment cognizable interests to have standing to contest the Government's illegal search because she had a clear, subjective expectation of privacy in her rental vehicle that society recognizes as reasonable. Society recognizes that Austin had sufficient possessory interests, was legitimately present, and had complete dominion and control such that she could expect to exclude all others from the vehicle. Further, her acquisition of and presence in the vehicle was lawful. Accordingly, Austin clearly enjoyed an expectation of privacy protected by this Court and the Fourth Amendment such that she has standing to contest the Officer's illegal search.

Additionally, this Court should overrule the circuit court's denial of Austin's motion to suppress regarding the location data obtained from her YOUBER rental vehicle for two main

reasons. First, Austin had a reasonable expectation of privacy in the whole of her physical movements based off of this Court's precedent set forth in *Carpenter v. United States*, and *United States v. Jones*. When law enforcement uses advanced GPS technology to track an individual's movements and locations, it constitutes a search under the Fourth Amendment. Second, the location data of Austin's rental vehicle falls outside the scope of the third-party doctrine because Austin did not voluntarily provide YOUBER any information regarding her movements and locations. Austin did not take any affirmative steps to do so. All Austin did was use a popular rental car service, with over 40 million users, for transportation. Without any action on Austin's part, except drive the rental vehicle, YOUBER recorded her location every two minutes. Additionally, even if this Court finds that Austin voluntarily gave YOUBER her location data, the third-party doctrine is still inapplicable. This is because the uniqueness of location data makes the doctrine ill-suited for the digital age because it allows law enforcement to travel back in time and track an individual's movements.

STANDARD OF REVIEW

When reviewing a lower court's decision of a motion to suppress, the "factual findings are reviewed for clear error and its legal conclusions, including ultimate constitutional determinations, are reviewed de novo." *United States. v. D'Andrea*, 648 F.3d 1, 5 (1st Cir. 2011).

ARGUMENT

The Thirteenth Circuit incorrectly denied both of Austin's motions to suppress evidence because (1) Austin has Fourth Amendment standing to contest the illegal search of her rental vehicle, and (2) the Government's acquisition of Austin's location data constituted a "search" under the Fourth Amendment. The Fourth Amendment protects "[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. The Amendment's purpose "is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *Carpenter v. United States*, 138 S. Ct. at 2213 (quoting *Camara v. Mun. Ct. of City and County of S.F.*, 387 U.S. 523, 528 (1967)). With this purpose in mind, the Framers intended the Fourth Amendment "to place obstacles in the way of a too permeating police surveillance." *Id.* at 2214 (quoting *United States v. Di Re*, 332 U.S. 581, 595 (1948)).

This Court should reverse the Thirteenth Circuit's decision to deny both of Austin's motions to suppress evidence for two reasons. First, Austin has Fourth Amendment standing to contest the Government's warrantless search of the YOUBER vehicle because Austin had a subjective, actual expectation of privacy in the vehicle, which society is prepared to recognize as reasonable. And second, the Government's acquisition of Austin's location data from her rental vehicle constituted a search because Austin had a reasonable expectation of privacy in the whole of her physical movements and because the data falls outside the scope of the third-party doctrine.

I. AUSTIN HAS FOURTH AMENDMENT STANDING TO CONTEST THE GOVERNMENT'S ILLEGAL SEARCH OF THE YOUBER BECAUSE SHE HAD A LEGITIMATE EXPECTATION OF PRIVACY.

This Court should reverse the Thirteenth Circuit's denial of Austin's motion to suppress and hold that Austin has standing to contest the Government's warrantless, unconstitutional search because she had a legitimate expectation of privacy in the YOUBER rental vehicle.

Under the Fourth Amendment, warrantless searches, without probable cause, are presumed unreasonable and invalid unless an exception applies. *Katz v. United States*, 389 U.S. 347, 357 (1967). Here, it is undisputed that there are no exceptions to this warrant requirement. R at 31. Therefore, the only issue before this Court is whether Austin has Fourth Amendment standing to contest the Government's search of the YOUBER rental car. Based on the facts and this Court's

precedent, it is clear that Austin has standing to contest the search. *See Byrd v. United States*, 138 S. Ct. 1518, 1530 (2018); *Katz*, 389 U.S. at 357.

To claim standing, under the Fourth Amendment, the individual must have a legitimate expectation of privacy in the premises searched. *Byrd*, 138 S. Ct. at 1530 ("The concept of standing in Fourth Amendment cases can be a useful shorthand for capturing the idea that a person must have a cognizable constitutional Fourth Amendment interest in the place searched before seeking relief for an unconstitutional search."); *Rakas v. Illinois*, 439 U.S. 128, 140 (1978). Here, Austin had such an expectation of privacy.

The test most often associated with the legitimate expectation of privacy is derived from the second Justice Harlan's concurrence in *Katz v. United States*. *See Byrd*, 138 S. Ct. at 1522–24; *Katz*, 389 U.S. at 361 (Harlan, J., concurring). The inquiry embraces two questions: "first that a person ha[s] exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" *Katz*, 389 U.S. at 361 (Harlan, J., concurring). This test supplements "the traditional property-based understanding of the Fourth Amendment." *Byrd*, 138 S. Ct. at 1526 (quoting *Florida v. Jardines*, 569 U.S. 1, 11 (2013)). Here, under the two-pronged *Katz* analysis, Austin clearly has a legitimate expectation of privacy in her YOUBER rental car. *See id.* To adopt the lower court's holding would necessarily either overturn this Court's precedent or ignore the facts of Austin's case. *See Jones v. United States*, 362 U.S. 257, 259 (1960); *Byrd* 138 S. Ct. at 1522–24. For the foregoing reasons, this Court should grant Austin's motion to suppress.

A. Austin Had an Actual, Subjective Expectation of Privacy in Her YOUBER Rental Vehicle.

Because Austin believed that she rightfully possessed the YOUBER rental vehicle and did, actually possess and control it exclusively, she had a subjective expectation of privacy. This Court

has long interpreted the Constitution to grant individuals an expectation of privacy in places they reasonably expect to have it. *See Katz*, 389 U.S. at 361 (Harlan, J., concurring). Moreover, "[w]hat a person knowingly exposes to the public, even in his own home or office, is not subject to Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Id.* at 351–52 (majority opinion) (citations omitted).

Here, Austin had a subjective expectation of privacy in her rental vehicle under the Fourth Amendment because it is clear that she sought to preserve the privacy of the YOUBER vehicle she believed to rightfully, exclusively possess. Austin used the vehicle as her exclusive means of transportation and shelter, keeping in it her most personal items including bedding, a pillow, clothes, medicine, and her entire food supply. R. at 3. This evidence, obtained through the Officer's warrantless search, was not visible until the officer violated Austin's Fourth Amendment rights in going through the vehicle, indicating her actual, subjective expectation to exclude all others from her "effects". *See* U.S. Const. amend. IV; R. at 3.

Any claims by the Government that Austin was in wrongful possession of the vehicle are irrelevant to this inquiry to the extent that it asks whether she had a subjective expectation of privacy, not a rightful or lawful one. *See Rakas*, 439 U.S. at 142. Even if Austin did not have actual consent by Lloyd, the record is clear that Austin *believed* that she could continue to use the app in Lloyd's name, that she was herself able to rent a car through Lloyd's account, and that the YOUBER was hers for the term of the rental. R. at 2–3. Austin was the only person with actual access to and control of the YOUBER vehicle, and, treating the rental as her own, intended privacy to the extent that she could exclude all others from it, arguably including Lloyd. R. at 2–3.

The Government may attempt to use Austin's writings in the record to posit that she cannot have a subjective expectation of privacy anywhere by virtue of claiming no possessions. R. at 26–

27. These writings, however, are simply expressive works intended to energize a partisan following and are proven as such by her storing her own, actual personal belongings in the vehicle. *See* R. at 2–3. Here, Austin believed that the YOUBER vehicle she rented in Lloyd's name would be free from unwarranted government searches and seizures. By definition, she expected privacy in the vehicle she believed to rightfully, exclusively possess for the term of her rental.

B. Austin's Expectation of Privacy in the YOUBER Rental Vehicle is One that Society Recognizes as Reasonable.

Austin's constitutional and common law interests in the YOUBER vehicle give her an expectation of privacy that society recognizes as reasonable. Accordingly, the Government's illegal intrusion was a violation of her cognizable Fourth Amendment rights such that she has standing to contest the warrantless search.

The Fourth Amendment protects people from unreasonable government intrusion wherever that individual may harbor a reasonable expectation of privacy. *Katz*, 389 U.S. at 361 (Harlan, J., concurring). Under current American jurisprudence, an objective expectation of privacy can be determined in many ways. *See Byrd*, 138 S. Ct. at 1522 (explaining there is no "single metric or exhaustive list of relevant considerations" in determining whether a legitimate expectation of privacy exists). Any one of this Court's holdings establish that society recognizes Austin's expectation of privacy in the YOUBER vehicle as reasonable. As such, Austin clearly has standing to contest the Government's warrantless search.

i. Society is prepared to recognize Austin's ownership interests and her legitimate presence and control over the rental vehicle.

Common-law property interests "are instructive in 'determining the presence or absence of the privacy interests protected by [the Fourth] Amendment'" *Byrd*, 138 S. Ct. at 1526. More specifically, "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." *Id.* at 1528 (quoting *Rakas*, 439 U.S. at 144). Further, "[o]ne who owns and possesses a car, like one who owns and possesses a house, almost always has a reasonable expectation of privacy in it." *Id.* at 1527.

Although ownership existed, it is well settled that ownership is not required. *Byrd,* 138 S. Ct. at 1527 ("[A] person need not always have a recognized common-law property interest in the place searched to be able to claim a reasonable expectation of privacy in it."). To the contrary, "it is also clear that legitimate presence on the premises of the place searched, standing alone, is not enough to accord a reasonable expectation of privacy, because it 'creates too broad a gauge for measurement of Fourth Amendment rights.'" *Id.* (citing *Rakas,* 439 U.S. at 142).

Time and time again, this Court grants Fourth Amendment protections to individuals who have no ownership interests in a searched premises but who are legitimately present and exercise some level of control over the property. *See Jones v. United States*, 362 U.S. at 259*; Minnesota v. Olson*, 495 U.S. 91, 98 (1990). In *Olson*, this Court reiterated that society recognizes the expectation of privacy of an overnight household guest through his dominion and control over the host's home and his right to exclude others from it. 495 U.S. at 98. In so holding, this Court noted that we stay in others' homes when we travel, visit family, live with our parents, are in between jobs or homes, or when we house-sit, and emphasized that "the expectation of privacy those individuals enjoy is a longstanding social custom." *See id.* at 99–00. The lawful presence of the type Austin enjoyed is of the very kind this Court seeks to protect.

ii. The Supreme Court has held that unauthorized presence in a rental vehicle is not wrongful.

The Rule established in *Byrd* further informs the proper holding here. Ending a circuit split on the issue, this Court held that, "as a general rule, someone in otherwise lawful possession and control of a rental car has a reasonable expectation of privacy in it even if the rental agreement

does not list him or her as an authorized driver." *Byrd*, 138 S. Ct. at 1524. This Court saw "no reason why the expectation of privacy that comes from lawful possession and control and the attendant right to exclude would differ depending on whether the car in question is rented or privately owned by someone other than the person in current possession of it." *Id.* at 1528–29. Further, this Court established that lawful possession *or* control of a rental vehicle will override any violation of a rental car agreement in determining Fourth Amendment protections. *Id* at 1529. To contend that violating a common provision in a rental agreement, "like prohibitions on driving the car on unpaved roads or driving while using a handheld cellphone . . . has anything to do with a driver's reasonable expectation of privacy in the rental car" would undermine Fourth Amendment protections. *Id*. Stated simply, for Fourth Amendment purposes, violation of a rental agreement does not alone constitute wrongful presence such that it eliminates any reasonable expectation of privacy. *See id.*

Exclusively wrongful, temporary presence at a searched premise would not enable an individual to object to the legality of a search of that premises. *See Rakas*, 439 U.S. at 142. A criminal does not have an expectation of privacy in a premises whose acquisition was the nature of the criminal act. *See id.* at 143 n.12 (stating that a burglar's subjective expectation of privacy in a broken-into cabin is not one society recognizes); *Id.* at 141 n.9 (a carjacker may not object to the lawfulness of a search in the stolen automobile). Additionally, if an individual's temporary presence in a premises they seek to protect was solely for an illegal purpose, this presence does not give rise to an expectation of privacy. *See Minnesota v. Carter*, 525 U.S. 83, 91 (1998).

In *Byrd*, however, the Government recognized the very distinction establishing Austin's expectation. There, the Government conceded that an unauthorized driver in sole possession of a rental car would be permitted to exclude third parties from it, such as a carjacker. *Byrd*, 138 S. Ct.

at 1528–29. There, the Court distinguished Austin (one who violates a rental agreement) and someone procuring the rental car solely to commit a criminal act (Byrd), and a person whose criminal act was procuring the premises (a carjacker), concluding that Austin has a legitimate expectation of privacy, where the latter two do not. *Id.*

iii. A case study: the expectation of privacy.

The lower court relies on the *Rakas* line of cases to contend that Austin's occupation of her YOUBER rental vehicle was fraudulent, illegal, or wrongful, akin to a thief, and was therefore unprotected. R. at 12. According to the factual precedent this Court established in *Katz, Jones, Byrd, Olson, Carter*, and *Rakas*, the record clearly demonstrates that Austin's lawful presence and possessory interests granted her a reasonable expectation of privacy. For example, in *Katz*, this Court recognized Katz' expectation of privacy where he occupied a telephone booth, shut the door behind him to exclude all others, and paid the toll. 389 U.S. at 352. This "entitled [Katz] to assume that the words he utter[ed] into the mouthpiece [would] not be broadcast to the world." *Id.*

Jones and subsequent case law firmly establish that guests with control over premises and the right to exclude others, like Austin, have an expectation of privacy. *See Jones*, 362 U.S. at 259. There, Jones had permission to use his friend's apartment for a single night, was given a key, and brought possessions like clothing to keep there. *Id.* Jones paid nothing and had a home elsewhere, but by simply having complete dominion and control over the friend's apartment such that he could exclude others from it, he could accordingly enjoy an expectation of privacy in it. *See id.* In *Byrd*, this Court emphasized that whether the friend of Jones owned or rented the apartment did not affect Jones's—or his friend's—ability to challenge the illegal search. 138 S. Ct. at 1528–29. Similarly, in *Olson*, this Court affirmed this expectation when they granted Olson, who was staying in a friend's duplex, the same expectation of privacy by virtue of his complete dominion and his right

to exclude others. *Olson*, 495 U.S. at 98. In contrast, the Court found in *Carter* that when individuals with no connection to the premises were temporarily present for the exclusive purpose of a drug transaction, those individuals did not have an expectation of privacy sufficient to contest the search. 525 U.S. at 119.

Byrd offers a bright-line rule here. In *Byrd*, Byrd's girlfriend went inside to rent the car for him as Byrd waited outside in his own car, knowing that his prior convictions would prevent him from doing so himself. 138 S. Ct. at 1528–29. The rental agreement contained a nearly identical provision to that one here, and Byrd's girlfriend listed no additional authorized drivers in signing before turning the keys over to Byrd for his sole use. *Id.* After Byrd was later pulled over, searched, and arrested for the content the officer found in his trunk, he attempted to suppress the evidence. *Id*. There, this Court held that Byrd's use of the rental vehicle his girlfriend rented for him, as against the rental agreement, did not make his presence wrongful or eliminate his expectation of privacy. *Id.* Rather, it was that he and his girlfriend fraudulently procured the rental car exclusively so Byrd could transport drugs in it, knowing he would have been unable to rent the car on his own, that made his presence wrongful. *Id.*

Byrd relied on *Rakas* in concluding that a violation of a rental agreement does not constitute wrongful presence in the rental, but that fraudulent acquisition of the vehicle for sole execution of a criminal act may. *Id.* In *Rakas,* the petitioners were passengers in a vehicle arrested after the driver was pulled over and the officer found contraband. 439 U.S. at 130–31. There, the petitioners conceded that they had no ownership interest in either the vehicle or anything in it, and that they were merely passengers with no dominion or control. *Id.* Their presence was therefore entirely wrongful and they claimed no possessory interests, and they could therefore not enjoy an expectation of privacy in the vehicle. *Id.*

iv. Application: Austin had a legitimate expectation of privacy.

In the instant case, Austin has an expectation of privacy in the YOUBER because she has sufficient possessory interests in it, was legitimately present, had complete dominion and control to the extent that she could exclude all others, and treated the vehicle as her primary means of transportation and shelter. Austin's expectation of privacy in the rental is akin to those of Katz, Jones, and Olson's expectations and clearly more legitimate than those of Rakas, Byrd, and Carter.

The Government will attempt to paint Austin's presence as wrongful by virtue of her violation of the rental agreement, her alleged lack of consent from Lloyd in using the vehicle, and/or her alleged use of the vehicle to commit criminal acts. In determining Austin's expectation of privacy, though, one must analyze her overall use of and connections to the premises, rather than any single use or interest. *See Byrd*, 138 S. Ct. at 1529. Because Austin used the vehicle as her primary means of transportation and residence, she had a legitimate expectation of privacy in it. *See id.*; R. at 3.

Austin had complete control and dominion over the YOUBER vehicle to the extent that she could exclude all others from it including the named renter. R. at 2. It can be inferred that she was the only person with a key to the vehicle and was the only one that used the vehicle. R. at 2. She also had shared ownership interests in the vehicle to the extent that she shared the YOUBER account with Lloyd, was authorized on the app's payment method, and contributed financially for her rentals. R. at 18–19. Austin was in the same position as a sublessee, whose name does not appear on a lease and who is given permission by the named renter (often as against lease provisions) to assert dominion over the premises. *See generally Byrd*, 138 S. Ct. at 1529. Surely, the Government would not argue that a sublessee does not have an expectation of privacy in his home by virtue of his lack of ownership and violation of a lease provision. *See id.*

Unlike the petitioners in *Byrd* and *Carter,* Austin's presence was not exclusively unlawful. *See id.*; *Carter*, 525 U.S. at 119. Because Austin did not own a car or a home, she was using the vehicle as her primary means of transportation and shelter. R. at 2. As fruits of his unlawful search, the Officer revealed clothes, an inhaler, three pairs of shoes, Kendrick Lamar records, bedding, a pillow, her entire food supply, and the Officer stated that the car looked "lived in." R. at 3. These legitimate uses eliminate the possibility that she acquired the car exclusively for the commitment of a criminal act. *See Carter*, 525 U.S. at 119. Nor did Lloyd and Austin acquire the rental car through a fraudulent scheme for the sole purpose of committing alleged criminal acts, but rather, Austin autonomously acquired the car as a means of transportation and shelter. *See Byrd*, 138 S. Ct. at 1529. Nor was Austin's acquisition, itself, criminal. *See Rakas,* 439 U.S. at 130–31. Contrasting the situation in *Byrd,* Austin, despite her desire to stay off the grid, had the ability to rent a car with YOUBER, and did so through the app to have transportation and shelter, rather than for the exclusive purpose of committing any criminal acts. R. at 1–2.

The record clearly indicates that Austin not only had ongoing consent to use the YOUBER app, but also had shared possessory interests in its use such that she could access it from her device, was authorized on the payment method, and contributed financially by giving Lloyd cash for her use. R. at 18–20. Even if Austin concedes that Lloyd desired to eliminate such consent, she never actually did so. R. at 18. Lloyd admits that the women are still dating, still share login information for electronic services, is an authorized user on her credit card, and, most importantly that Lloyd never expressed a desire for Austin to stop nor did she make any simple efforts to deny Austin access, as Lloyd had the ability to do. R. at 18–20.

Austin's consent to use Lloyd's information, in addition to the fact that violation of a rental agreement does not constitute wrongful presence, is nearly identical to the property owners

handing over a key to their houseguests in *Jones* and *Olson,* who enjoyed an expectation of privacy in those homes. *See Jones v. United States*, 362 U.S. at 259*; Olson*, 495 U.S. at 98. Even ignoring her financial ownership interests in the YOUBER, at a minimum, Austin's possessory interests were similar to those of Jones and Olson because of her legitimate, lawful dominion and control over the vehicle.

Even if the Court finds that Austin violated the rental agreement, lacked Lloyd's consent, and used the vehicle to commit alleged criminal acts, she was still legitimately present and in possession and control of the vehicle to have a legitimate expectation of privacy. Dissimilar to a car thief and the stolen car, or to a burglar and the trespassed home, Austin's acquisition of the car by she and Lloyd was in no way a criminal act nor was it done for the exclusive purpose of committing a crime. *See Rakas*, 439 U.S. at 143 n.12.

Here, because Austin had a legitimate possessory interests in the car, was legitimately present, had complete control over and dominion in the car, and used the car as her exclusive means of transportation and shelter, she clearly had an expectation of privacy that society recognizes as reasonable. Further, because Austin had both an actual, subjective expectation of privacy as well as a legitimate expectation of privacy that society clearly protects, she has standing to contest the warrantless, illegal search executed by the Government. Therefore, this Court should grant Austin's motion to suppress evidence procured from her rental vehicle.

II. WHEN THE GOVERNMENT ACQUIRED THE LOCATION DATA OF AUSTIN'S RENTAL VEHICLE, IT CONSTITUTED A SEARCH.

The acquisition of the location data from Austin's rental vehicle constituted a search under the Fourth Amendment and recent Supreme Court precedent, *Carpenter v. United States*, 138 S. Ct. 2206 (2018). As with Fourth Amendment standing, whether a search has occurred largely finds its basis in the two-pronged *Katz* test. *Katz*, 389 U.S. at 361 (Harlan, J., concurring) ("[F]irst that

a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"). This test, however, becomes more complicated when law enforcement is obtaining information from third parties. *See Smith v. Maryland*, 442 U.S. 735, 743–44 (1979).

In *Carpenter*, this Court announced that "personal location information maintained by a third party" did not fit neatly under previous precedent. 138 S. Ct. at 2214. As is the case here, requests for location data recorded using advanced technology "lie at the intersection of two lines of cases." *Id.* at 2214–15. These cases involve a person's expectation of privacy in their own physical location and in the information shared with others. *Id.* Here, the Government's acquisition of the location data from Austin's rental vehicle constitutes a search because (1) Austin had a reasonable expectation of privacy in the whole of her physical movements, and (2) the location data falls outside the scope of the third-party doctrine.

A. When the Government Obtained Austin's Location Data, it Was a Search Because Austin Had a Reasonable Expectation of Privacy in Her Physical Movements.

The Government's acquisition of location data from Austin's rental vehicle constituted a search because Austin had a legitimate expectation of privacy in the whole of her physical movements. This is because a "person does not surrender all Fourth Amendment protection by venturing into the public sphere." *Carpenter*, 138 S. Ct. at 2217. "[T]his Court has already recognized that individuals have a reasonable expectation of privacy in the whole of their physical movements." *Id.* Thus, when an individual has a subjective expectation of privacy in the whole of their physical movements that society is prepared to recognize as reasonable, the acquisition of location data will constitute a search under the Fourth Amendment. *See id.* at 2213.

Law enforcement's use of advanced GPS technology to track an individual's movements constitutes a search when it results in near-perfect surveillance that would be impossible without

such technology. *See Carpenter*, 138 S. Ct. at 2218.; *United States v. Jones*, 565 U.S. 400, 404 (2012). This Court held in *Carpenter* that when the police obtained cell-site location information ("CSLI") from the wireless carriers, it invaded the defendant's "reasonable expectation of privacy in the whole of his physical movements." 138 S. Ct. at 2219. Specifically, this Court held that a warrant is required for acquiring CSLI for any time period over six days. *Id.* at 2224 (Kennedy, J., dissenting). CSLI is produced whenever a cell phone connects to a cell site, which occurs several times a minute whenever the phone's signal is activated. *Id.* at 2211. In *Carpenter*, the police sought to obtain the defendant's CSLI to obtain his physical movements for a total of 154 days producing 12,898 location points to show the defendant's connection to a series of robberies. *Id.* at 2212. This Court, based on a series of cases addressing "a person's expectation of privacy in his physical location and movements," held that the law enforcement's acquisition of the CSLI constituted a search. *Id.*

Similarly, in *United States. v. Jones*, this Court found that "the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, [also] constitute[d] a 'search.'" 565 U.S. at 404. Even though the holding was based on a trespass theory, the majority and concurring opinions posed serious privacy concerns about using "electronic means" to substitute for "traditional surveillance." *Id.* at 412. Specifically, "[t]he surveillance at issue in [*Jones*]—constant monitoring of the location of a vehicle for four weeks—would have required a large team of agents, multiple vehicles, and perhaps aerial assistance." *Id.* at 429 (Alito, J., concurring). GPS devices have made "monitoring relatively easy and cheap," which creates new Fourth Amendment concerns. *Id.*

Unlike the case at bar, courts find that there is no search when the government uses a combination of electronic tracking devices and traditional human surveillance to investigate a

crime. *See United States v. Knotts*, 460 U.S. 276, 282 (1983). This Court held that the use of a "beeper" to track the defendant's movements was not a search when supplemented with human surveillance. *Id.* It also noted that "[n]othing in the Fourth Amendment prohibited the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them in this case." *Id.* This Court, however, reserved the right to decide if "different constitutional principles" would apply if "twenty-four hour surveillance of any citizen of this country [were] possible." *Id.* at 283–84.

In the present case, Austin possessed a reasonable expectation of privacy in her physical movements and it was therefore a search when the Government acquired the location data from Austin's rental vehicle. Like the CSLI in *Carpenter*, the location data was created through Austin's use of her cell phone while driving the YOUBER rental car. *See Carpenter*, 138 S. Ct. at 2212; R. at 3. Further, the satellite mapping technology tracked and timestamped Austin's location every two minutes. R. at 3. Unlike what the lower court stated, this information clearly provides an "intimate window into a person's life, revealing not only [Austin's] particular movements, but through them [her] 'familial, political, professional, religious, and sexual associations.'" *Carpenter*, 138 S. Ct. at 2217 (quoting *United States v. Jones*, 565 U.S. at 415). Through Austin's physical movements, the Government was able to see everywhere she traveled during a set period of time once it obtained the location data. This "intimate window into a person's life" is distinct from cases, like *Knotts*, where police officers could launch an investigation using minimal technology and manpower. *See Carpenter*, 138 S. Ct. at 2219. Further, *Carpenter* stated that obtaining CSLI for over a period of six days would require a warrant. *Id.* at 2224 (Kennedy, J., dissenting). Here, the subpoena requested information data for a period of four months, which is significantly beyond the limit established in *Carpenter*. *See id.*; R. at 3. Therefore, this Court

should overrule the Thirteenth Circuit's denial of Austin's motion to suppress the location data from the rental vehicle because Austin had a reasonable expectation of privacy in the whole of her physical movements.

B. When the Government Acquired the Location Data from YOUBER, it Constituted a Search Because the Location Data Falls Outside the Scope of the Third-Party Doctrine.

The location data of Austin's rental vehicle falls outside the third-party doctrine's scope because Austin did not voluntarily provide YOUBER with the location data and its uniqueness is ill-suited for the original understanding of the doctrine. The third-party doctrine goes towards the second prong of the *Katz* test on whether an individual's expectation of privacy was objectively reasonable. *Smith*, 442 U.S. at 743–44. The original understanding of the doctrine is that "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." *Id.* The rationale for this rule is that the defendant "takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government." *United States v. Miller*, 425 U.S. 435, 443 (1976).

The third-party doctrine, however, "is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks." *United States v. Jones*, 565 U.S. at 417 (Sotomayor, J., concurring). Further, this Court's decision in *Carpenter* severely limited the scope of the third-party doctrine by holding that the acquisition of CSLI from an individual's cell provider is not protected under the doctrine and constitutes a search. *See* 138 S. Ct. at 2214. Like *Carpenter*, the present case is outside the scope of the third-party doctrine for two reasons: (1) Austin did not voluntarily give the data to a third party, and (2) the GPS and Bluetooth technology used by YOUBER to track its user is unique and ill-suited for the doctrine.

i. The third-party doctrine is inapplicable because Austin did not voluntarily give the location data to YOUBER.

The location data from Austin's rental vehicle falls outside the scope of the third-party doctrine because Austin did not voluntarily give YOUBER any information related to her physical movements. Whether a person voluntarily gives a third party information lies "at the heart of the third-party doctrine," because it goes towards whether a person's subjective expectation of privacy is legitimate. *See* Grace Manning, *Alexa: Can You Keep a Secret? The Third-Party Doctrine in the Age of the Smart Home*, 56 Am. Crim. L. Rev. Online 25, 26 (2019). The doctrine "stems from the notion that an individual has a reduced expectation of privacy in information knowingly shared with another." *Carpenter*, 138 S. Ct. at 2219. On the other hand, a citizen who does not provide a third party with information voluntarily, does not have this "reduced expectation of privacy" that the information may be turned over to law enforcement. *See Miller*, 425 U.S. at 443.

When an individual does not make an affirmative decision to give its location data to a third party, the third-party doctrine is inapplicable. *See Carpenter*, 138 S. Ct. at 2220. This Court recently held in *Carpenter* that CSLI is not subject to the third-party doctrine because a cell phone user does not voluntarily give her cellular provider the data. 138 S. Ct. at 2220. This Court provided two rationales for its holding. *Id.* First, "cell phones and the services they provide are 'such a pervasive and insistent part of daily life' that carrying one is indispensable to participation in modern society.'" *Id.* (quoting *Riley v. California*, 573 U.S. 373, 385 (2012)). Second, " a cell phone logs a cell-site record by dint of its operation, without any affirmative act on the part of the user beyond powering up." *Id.* Importantly, "[v]irtually any activity on the phone generates CSLI, including incoming calls, texts, or e-mails and countless other data connections that a phone automatically makes when checking for news, weather, or social media updates." *Id.* Because CSLI is created without user input, "in no meaningful sense does the user voluntarily 'assume[ ]

the risk' of turning over a comprehensive dossier of his physical movements." *Id.* (citing *Smith*, 442 U.S. at 745).

In contrast, the third-party doctrine applies when an individual takes an affirmative step to give information to a third party. *See Smith*, 442 U.S. at 742; *Miller*, 425 U.S. at 437; *United States v. Hood*, 920 F.3d 87, 92 (1st Cir. 2019). In *United States v. Miller*, this Court held there was no protectable Fourth Amendment interest in the defendant's bank account records because the defendant voluntarily conveyed the information to his banks. 425 U.S. at 437. Specifically, this Court emphasized that the documents were "the business records of the banks," which were voluntarily "exposed to their employees in the ordinary course of business." *Id.* at 440–42.

Likewise, in *Smith v. Maryland*, this Court held that a telephone user has no reasonable expectation of privacy in telephone numbers dialed and recorded by pen registers. 442 U.S. at 742–46. This Court held that there can be no subjective expectation of privacy in numbers dialed because "[a]ll telephone users realize that they must 'convey' phone numbers to the telephone company" in order to complete their call. *Id.* at 742. Further, this Court stated that "even if [the defendant] did harbor some subjective expectation that the phone numbers he dialed would remain private, this expectation is not 'one that society is prepared to recognize as reasonable.'" *Id.* at 743 (quoting *Katz*, 389 U.S. at 361). This is because when the defendant "used his phone, [he] voluntarily conveyed numerical information to the telephone company" because the switching equipment is the modern counterpart of an operator who would personally complete calls for the caller. *Id.* at 744. Additionally, in *United States v. Hood*, the First Circuit held that law enforcement's acquisition of location data from IP addresses used to obtain child pornography was not a search. 920 F.3d at 92. The First Circuit distinguished the case from *Carpenter* because the individual must make an affirmative decision to access *each* individual website or app. *Id.* Whereas

in *Carpenter*, every time the cell phone receives a message from another person, the CSLI pings to a cell tower and records the user's location. *Id.*

In the present case, like *Carpenter*, Austin did not make any affirmative decision to turn over her location data to YOUBER. *See Carpenter*, 138 S. Ct. at 2212; R. at 22. YOUBER only seeks permission to track the user's location data upon initial sign up, which was completed by Lloyd and not Austin. *See* R. at 20. However, even if this Court finds that Austin had constructively agreed to YOUBER's terms and conditions when Lloyd signed up, it is still insufficient to show that Austin took an affirmative step to give up her location data. *See Hood* 920 F.3d at 92. As stated in *Hood*, the reason the First Circuit found the IP addresses were voluntarily turned over to a third party is because the defendant affirmatively made the decision to search *each* individual website to obtain child pornography. *See id.* Here, however, Austin did not take any affirmative step to provide YOUBER with her location data. Instead, all Austin did was use an immensely popular rental car service to get from place to place while carrying her cell phone. R. at 2. This type of technology, with over 40 million users, is the kind of "pervasive and insistent part of life" that this Court was concerned about in *Carpenter*. *See* 138 S. Ct. at 2220. Therefore, Austin did not voluntarily give YOUBER her location data and the third-party doctrine is inapplicable.

ii. The third-party doctrine is inapplicable to the location data because its nature allows the Government to track Austin's previous movements.

Even if this Court finds that Austin voluntarily provided her location data to YOUBER, the third-party doctrine is still inapplicable because the nature of the location data allowed the Government to travel back in time to track Austin's movements. Even though there is a reduced expectation of privacy in information knowingly shared with another, "the fact of 'diminished privacy interests does not mean that the Fourth Amendment falls out of the picture entirely.'" *Carpenter*, 138 S. Ct. at 2219. A court must therefore consider "'the nature of the particular

documents sought' to determine whether 'there is a legitimate expectation of privacy concerning their contents.'" *Id.* (quoting *Miller*, 425 U.S. at 442) (internal quotations omitted).

The third-party doctrine does not apply to data that allows law enforcement to track an individual's previous locations and movements without limitation. *See id.; United States v. Diggs*, 385 F. Supp. 3d 648, 653–54 (N.D. Ill. 2019) (mem. op.). In *Carpenter*, this Court specifically held that "[g]iven the unique nature of [CLSI], the fact that the Government obtained the information from a third party does not overcome [defendant's] claim to Fourth Amendment protection." 138 S. Ct. at 2220. This Court distinguished the location data by stating "[t]here is a world of difference between the limited types of personal information addressed in *Smith* and *Miller* and the exhaustive chronicle of location information collected by wireless carriers today." *Id.* at 2219. *Carpenter* was not about "'using a phone' or even a person's movement at a particular time," but rather "a detailed chronicle of a person's physical presence compiled every day, every moment, over several years." *Id.* "Such a chronicle implicates privacy concerns far beyond those considered in *Smith* and *Miller*." *Id.* Even more problematic is that the Government "can now travel back in time to retrace a person's whereabouts, subject only to the retention policies" of private third parties. *Id.*

Based on this Court's decisions in *Jones* and *Carpenter*, the United States District Court for the Northern District of Illinois held that law enforcement's acquisition of GPS data from a Lexus vehicle was a search despite the fact that the information was obtained from a third party. *Diggs*, 385 F. Supp. 3d at 653–54. The district court stated that "even where an individual voluntarily provides information to a third party, courts must 'consider[ ] the nature of the particular documents sought to determine whether there is a legitimate expectation of privacy concerning their contents." *Id.* at 653 (quoting *Carpenter*, 138 S. Ct. at 2219). When looking at

the nature of the GPS location of the Lexus, the district court found that the tracking capacity was more precise than that of the CSLI in *Carpenter*. *Id.* Further, unlike in *Jones*, law enforcement need not "know in advance whether they want to follow a particular individual, or when," because the police can look at previous GPS data. *Id.* Ultimately "the 'detailed and comprehensive record of [the defendant's] movements' captured by the Lexus's GPS tracker," put the information outside the scope of the third-party doctrine. *Id.*

In contrast, the third-party doctrine applies to business records in possession of a third party when there are necessary limits on the information. *See Smith*, 442 U.S. at 742; *Miller*, 425 U.S. at 442. This Court, in *Carpenter*, stated that "*Smith* and *Miller*, after all, did not solely rely on the act of sharing. Instead, they considered 'the nature of the particular documents sought' to determine whether 'there is a legitimate 'expectation of privacy' concerning their contents." 138 S. Ct. at 2219. For example in *Smith*, this Court pointed out the "limited capabilities" of a pen register. 442 U.S at 742. Further, in *Miller*, this Court emphasized that the bank records were "not confidential communications but negotiable instruments to be used in commercial transactions." 425 U.S. at 442.

Here, the location data from Austin's rental vehicle clearly falls outside the third-party doctrine because of its unique nature. Just like the CSLI in *Carpenter*, the location data is collected by a third party based off Austin's cell phone. *See Carpenter*, 138 S. Ct. at 2212; R. at 3–4. Even though the location data is only recording Austin's movements in the rental vehicle, this does not change the ultimate result as held in *Diggs* with regards to the Lexus's GPS. *See Diggs*, 385 F. Supp. 3d at 653; R. at 4. Most importantly, the Detective subpoenaed location data records from a previous four-month time period when Austin was not even a criminal suspect. R. at 3. This is the exact behavior of law enforcement that this Court in *Carpenter*, and the district court in *Diggs*,

were concerned about. *See Carpenter*, 138 S. Ct. at 2219*; Diggs* 385 F. Supp. 3d at 653. Additionally, as in *Diggs*, the location data of Austin's rental vehicle was more precise than the CSLI in *Carpenter*. *See Carpenter*, 138 S. Ct. at 2218–19. Therefore, the privacy concerns implicated in the instant case are even more troubling. *See id.*; R. at 4.

When the government obtained the location data from Austin's rental vehicle, it violated her Fourth Amendment right to be free from unreasonable searches and seizures for two reasons. First, Austin had a reasonable expectation of privacy in the whole of her physical movements. Second, the location data falls outside the third-party doctrine and therefore constituted an unreasonable search.

CONCLUSION

This Court should reverse the Thirteenth Circuit's denial of Austin's motions to suppress for two reasons. First, Austin has Fourth Amendment standing to contest the warrantless search of her YOUBER rental vehicle because she had a legitimate expectation of privacy. Second, the Government's acquisition of Austin's location data from the rental vehicle constitutes a search because she had a reasonable expectation of privacy in the whole of her physical movements and the data falls outside the scope of the third-party doctrine. For both of these reasons, Austin respectfully asks this court to reverse the Thirteenth Circuit's decision.

Respectfully Submitted,

/s/ Team: P16
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