NO. 4-422

IN THE

Supreme Court of the United States

JAYNE AUSTIN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Thirteenth Circuit

PETITION FOR A WRIT OF CERTIORARI

TEAM P18
Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Pages

Cases

Statutes

Other Authorities

ISSUES PRESENTED FOR REVIEW

1. Does an individual have standing to contest a search of a rental vehicle that the individual rented on another's account without that other person's permission?

2. Is the acquisition of the location data of a rental vehicle a "search" within the meaning of the Fourth Amendment and *Carpenter v. United States*, 138 S.Ct. 2206 (2018)?

STATEMENT OF THE FACTS

I. Facts and Proceedings Below

The YOUBER Rental. In July 2018, Ms. Martha Lloyd, the then-partner of Ms. Jayne Austin, set-up an account with YOUBER, a self-service company which allows users to rent vehicles through an application ("app") downloaded to the user's cell phone. R. at 2. Due to Ms. Austin's lifestyle choice to stay off the "grid," Ms. Lloyd shared her device and service login information, including her YOUBER access information, with Ms. Austin. R. at 18-19. Ms. Lloyd also set-up Ms. Austin as an authorized user on a credit card linked to her bank account. R. at 2.

Ms. Austin, a poet and blogger, lived the life of a naturalist and minimalist. R. at 1. In addition to using the YOUBER rentals to get to and from work, she also used them to go to protests. R. at 2. Even her blog poems focused on her activist and naturalist lifestyle, calling out the Darcy and Bingley Credit Union and expressing property concerns, even including her feelings for her partner. R. at 1, 26-27.

After Ms. Lloyd and Ms. Austin took a break from their relationship in September 2018, at the pre-trial hearing Ms. Lloyd stated that she still loved Ms. Austin and considered reconciling. R. at 19. However, Ms. Lloyd stopped using YOUBER, switching instead to a new ride-share application, BIFT. R. at 20. At that time, Ms. Lloyd removed her own credit card information from the shared YOUBER profile but did not remove Ms. Austin's authorized credit card from the app. *Id.* Ms. Lloyd never changed her passwords to the shared applications nor did she expressly tell Ms. Austin to no longer use the application. R. at 19-20. Therefore, from September 2018 through January 2019, Ms. Austin continued to use her authorized credit card and Ms. Lloyd's YOUBER account to rent vehicles to travel to work and protests. R. at 2-3.

On January 3, 2019, Ms. Austin rented a 2017 Black Toyota Prius through YOUBER. R. at 2. After being pulled over for a failure to stop at a stop sign, Ms. Austin produced her license and the YOUBER rental agreement (via the app on her phone) for Officer Charles Kruezberger. *Id.* After realizing that Ms. Austin was not the authorized renter named on the YOUBER agreement she provided, Officer Kruezberger searched the rental vehicle without Ms. Austin's permission. R. at 2-3. The officer found a number of personal items in the car, along with other items in the trunk which seemed to correspond with items suspected of being used in a robbery at a nearby Darcy and Bingley Credit Union earlier that day. R. at 3. The fruits of the unreasonable search led Officer Kruezberger to arrest Ms. Austin. *Id.*

Historical Rental Vehicle Location Data. YOUBER collects Global-Positioning-System (GPS) and Bluetooth technology data from its users' cell phones in order to track each vehicle in service. R. at 3. About 40 million YOUBER users exist in the United States, including Ms. Austin and Ms. Lloyd. R. at 22. Users accept a Corporate Privacy Policy at the time they create their YOUBER account, which among other things, details how information collected from a user's cell phone is utilized and shared to track the vehicle. R. at 3-4, 29-30. However, since YOUBER only communicates their privacy policy at the time a user account is created, YOUBER does not subsequently notify others using the account of these policies at the time the app is opened. R. at 23-24. Specifically, YOUBER automatically collects GPS information from each user's cell phone once a renter nears their rented vehicle and refreshes that location data every two minutes. R. at 4, 29. The user's cell phone controls all YOUBER services through the app when it connects to the vehicle through GPS and Bluetooth. R. at 23. Smoogle, a search engine which uses satellite mapping technology to accurately track the location of all YOUBER vehicles, collects and filters the user's GPS information shared with YOUBER. R. at 4, 22-23.

After Ms. Austin's arrest, Detective Boober Hamm further investigated the case and discovered a pattern of bank robberies matching the one that occurred on January 3, 2019. R. at 3. Noting the YOUBER logo on the car driven by Ms. Austin, Detective Hamm served a subpoena on YOUBER for the historical GPS and Bluetooth location information related to Ms. Austin's rentals allegedly used between October 2018 and January 2019. R. at 3. YOUBER complied with the subpoena and provided Detective Hamm with the mapping data used to track the vehicle locations, which indicated that Ms. Lloyd's account was the one used to rent the vehicles in the locations near the other robberies. R. at 4.

Procedural History. On January 21, 2019, Ms. Austin was charged under 18 U.S.C. § 2113 in connection with six bank robberies which occurred between October 15, 2018 and January 3, 2019. R. at 1, 3-4; 18 U.S.C. § 2113 (2002). Before trial, Ms. Austin's attorney filed two motions to suppress the evidence from both the rental vehicle search and the location data YOUBER provided in response to Detective Hamm's subpoena, both alleging violations of Ms. Austin's Fourth Amendment rights as a result of warrantless searches. R. at 4. The United States District Court for the Southern District of Netherfield denied the defendant's motions to suppress. R. at 1. Ms. Austin was subsequently convicted of all six charges of bank robbery, to which she timely appealed her decision to the Thirteenth Circuit Court of Appeals. R. at 9-10. The Thirteenth Circuit affirmed Ms. Austin's convictions, holding that she did not have standing to challenge the search of the YOUBER rental vehicle, and that the warrantless procurement of the YOUBER historical location data did not constitute a search under the Fourth Amendment. R. 12, 15.

II. Summary of the Argument

Standing to Challenge a Fourth Amendment Search of a Rental Vehicle. The Fourth Amendment protects an individual's right to be secure from unreasonable government intrusions

into areas society recognizes as private. In order to protect this interest, a person must demonstrate that they have standing through both application of relevant property law and a showing of a subjective manifestation of privacy which society accepts as objectively reasonable. In *Rakas*, the Supreme Court reasoned that a person's property interest relevant to establishing standing must show more than the ability to be present on the premises; the person should demonstrate their presence is not unlawful or wrong. When evaluating whether a person's lawful property interest in a rental vehicle is reasonable to establish standing, the Supreme Court held that a person not listed on the rental agreement does not necessarily lose their ability to challenge standing. Courts should determine whether it appears that person employed a fraudulent scheme to acquire the vehicle for use in criminal activity through evaluating the totality of the circumstances. As a result, while permission of the person listed on the rental agreement is informative, it is not dispositive in the standing inquiry.

Collection of Historical Rental Vehicle GPS Information as a Search. The Supreme Court has found that GPS information collected outside of a warrant's express terms constitutes a "search" under the Fourth Amendment. Additionally, they have also held that historical cell-site location information (CSLI) must be collected subject to a warrant because of the significant and intimate information it can provide about a person, violating their objectively reasonable expectation of privacy in their cell phone data. Furthermore, although CSLI, like the GPS data collected here, is shared with a third-party, the Court has found that the substantial weight of a person's expectation of privacy in their cell phone outweighs the fact that any such information is shared with a third-party, as nearly all cell phone information is shared with third-party cell carriers and app developers.

STANDARD OF REVIEW

When evaluating the admission of evidence under a suspected violation of the Fourth Amendment, the Court reviews the denial of a motion to suppress that evidence under the standard of clearly erroneous for factual determinations and de novo for questions of law. *United States v. Kolsuz*, 890 F.3d 133, 142 (4th Cir. 2018).

ARGUMENT

I. Ms. Austin has standing to contest the search of the YOUBER rental vehicle because, despite not having the express permission of the rental account owner, she lawfully possessed and manifested a reasonable expectation of privacy in the rental vehicle.

"[T]he Fourth Amendment protects people, not places." *Katz v. United States*, 389 U.S. 347, 351 (1967). Courts do not apply the standard Article III standing analysis when evaluating whether a person has standing to challenge a Fourth Amendment violation. *Byrd. v. United States,* 138 S.Ct. 1518, 1530 (2018). Instead, standing related to Fourth Amendment issues hinges on whether a person has a cognizable interest and expectation of privacy in the place searched, such that relief is available for the government's unreasonable intrusion. *Id*. Therefore to maintain Fourth Amendment standing, defendants must establish that the government transgressed upon their legitimate expectation of privacy through its unlawful search or seizure. *Rakas v. Illinois*, 439 U.S. 128, 134 (1978). As a result, the Court here must determine, first, whether Ms. Austin manifested a legitimate expectation of privacy in her rental vehicle, and second, whether the lack of express permission from Ms. Lloyd to rent the vehicle impacts Ms. Austin's ability to assert standing. We contend that based on the results of these inquiries Ms. Austin has standing to challenge the search of her YOUBER rental vehicle.

A. Ms. Austin maintained a legitimate property interest and manifested an objectively reasonable expectation of privacy in her YOUBER rental car.

The Court has been hesitant to depend narrowly on property interests, instead supplementing traditional property principles with the expectation of privacy framework developed in *Katz. Florida v. Jardines*, 569 U.S. 1, 11 (2013); *United States v. Jones*, 565 U.S. 400, 409 (2012). As a result, for the subjective manifestation of privacy to have weight in consideration of Fourth Amendment standing, the expectation should be accepted by society as

reasonable and also demonstrate a relevant possessory interest, even if it is not one necessarily recognized at common law. *Byrd*, 138 S.Ct. at 1527; *Rakas*, 439 U.S. at 143. In applying this standard here, we must first evaluate Ms. Austin's property interests in the YOUBER vehicle, and then her reasonable expectation of privacy in that vehicle.

1. Ms. Austin had lawful possession of the rental vehicle because she did not fraudulently scheme to take possession of a vehicle she would not have otherwise had access to.

When analyzing property interests in the context of standing to challenge a Fourth Amendment violation, courts have evaluated whether the party contesting the search had a "substantial possessory interest in the premises searched." *Jones v. United States*, 362 U.S. 257, 261 (1960), *overruled by United States v. Salvucci*, 448 U.S. 83 (1980) (noting that possession is just a factor in the analysis). Historically, even if a person did not have specific property interests in the premises, they may still have had property interests in their belongings present on the premises as to protect them from an unreasonable search under the Fourth Amendment. *See United States v. Sanford*, 806 F.3d 954, 958 (7th Cir. 2015) (explaining that a person in a vehicle may be considered a subtenant under property applications of Fourth Amendment standing).

However, the Supreme Court subsequently established that a person's legitimate presence on the premises alone is insufficient to establish standing under the Fourth Amendment. *Rakas*, 439 U.S. at 142-43. The Court reasoned that to allow otherwise would translate the casual act of a person's presence on the premises into a reasonable expectation of privacy, such as a visitor who was merely present at the time of a search having the ability to object to it. *Id*. Instead, the Supreme Court has interpreted a legitimate expectation of privacy required to establish standing to include "one who . . . lawfully possesses or controls property . . . by virtue of [the] right to exclude." *Id.* at

143, n. 12. For example, while passengers do not have the ability to exclusively control a vehicle, a driver would have the ability to control the vehicle and exclude others. *Byrd*, 138 S.Ct. at 1528.

Subsequently in *Byrd*, the Court addressed the question of lawfulness as compared to contractual allowance. *Byrd*, 138 S.Ct. at 1529. There, although the Court recognized that rental companies have the ability to control who drives their vehicles by the terms of their lengthy contracts, it stated that violating a contractual provision did not necessarily amount to violating the law in order to defeat a person's reasonable expectation of privacy. *Id*. However, the Court noted that if a person were to fraudulently use another person as part of a "calculated plan to mislead the rental company from the very outset," that wrongdoer would have no reasonable expectation of privacy, regardless of their ability to possess or control the vehicle. *Id.* at 1530. Borrowing from *Rakas*, the Court expounded that a person wrongfully present at a search should not have standing to challenge its legality. *Id.* at 1529. In *Byrd*, the defendant drove a rental car which was rented and signed for by a third-party who then turned over the keys to the defendant. *Id.* at 1524. Notably there, the defendant had a previous criminal record which would have prevented him from being able to rent the vehicle. *Id.* at 1530. Similarly in *Lyle*, the Second Circuit determined that the defendant, an unauthorized and unlicensed driver, could not assert Fourth Amendment standing necessary to challenge the search of a rental vehicle. *United States v. Lyle*, 919 F.3d 716, 729 (2nd Cir. 2019). However, the facts here can be distinguished from those in *Byrd* and *Lyle.*

Here, the record is silent as to whether Ms. Austin had a criminal record prior to renting the YOUBER vehicle. Additionally, Ms. Austin had used the YOUBER application since July 2018 to rent vehicles for work and protests, initially with the permission and assistance of her then-partner Ms. Lloyd. R. at 2. Using the rentals to get to work and protests does not implicate a

wrongful interest. Furthermore, when she setup the YOUBER account and shared it with Ms. Austin, Ms. Lloyd was aware of the reason for Ms. Austin's wanting to share accounts (her desire to stay off the "grid"), even going so far as to authorize a credit card that Ms. Austin could use in the YOUBER app and provide login information for the app. *Id.* at 2, 18. Since Ms. Lloyd and Ms. Austin were dating at the time of the account creation, nearly four months prior to the first alleged robbery in October 2018, there could be no mistaking the fact that Ms. Austin did not fraudulently scheme to use Ms. Lloyd's account in furtherance of a crime. R. at 2-3.

Additionally, as a YOUBER user, Ms. Austin had the ability to rent a vehicle from the application and maintain possession and control, including the right to exclude others, for the duration of each of her rentals. Unlike the defendant in *Lyle*, she possessed a valid driver's license, which she produced to Officer Kreuzberger at the time of the traffic stop. *Id.* at 2. She acted as a legitimate user who used an app and payment method she had previous authorization to use in order to rent a vehicle that she very likely would have been otherwise able to rent on her own, outside of her wish to stay off the "grid". *Id.* at 2, 18; *see Byrd* 138 S.Ct. at 1530. Accordingly, Ms. Austin had a lawful property and possessory interest in her rented YOUBER vehicle at the time of the search.

While the Government may contend that Ms. Austin's blog posts disavowed any property interests, property rights are not a dispositive test for establishing standing to challenge Fourth Amendment searches, and Ms. Austin did not disavow any possessory interests in the YOUBER rental vehicle. In *McBean*, the Eleventh Circuit held that a person does not have standing to challenge a Fourth Amendment search if he disavows a property interest in the item searched. *United States v. McBean*, 861 F.2d 1570, 1574 (11th Cir. 1988). There, after consenting to a search of a vehicle which yielded luggage containing drugs, the defendant stated that the bags did not

belong to him. *Id.* at 1572. The court reasoned that the defendant's disavowal defeated his claim to Fourth Amendment standing. *Id.* at 1574.

We can distinguish the facts here from those in *McBean*. First, the defendant in *McBean* was directly confronted with the bag at the time he disclaimed any possessory interest in it. *Id.* at 1572. Here, Ms. Austin's blog poems were made prior to the traffic stop where her rental vehicle was searched. R. at 26-27. The time and place of her statements significantly distance the facts here from those in *McBean*. Furthermore, artistic statements, such as those made in poems, are not necessarily informative of a person's legal rights and contentions. Artistic expression, while perhaps imitating life, is not always indicative of the artist's truth. *See generally*, Andrea L. Dennis, *Poetic (In)Justice? Rap Music Lyrics as Art, Life, and Criminal Evidence*, 31 COLUM. J.L. & ARTS 1 (2007) (explaining the challenges to using rap lyrics as evidence of criminal behavior, that may extend to other art forms such as poetry). Here, even though Ms. Austin may have expressed in a blog poem that she "claim[s] no property," her statements were not directly made in reference to either the traffic stop or her rental vehicle, and therefore, do not play into her standing analysis. R. at 26. As a result, the content of Ms. Austin's artistic blog poems cannot defeat her standing, and Ms. Austin maintained lawful possessory interest in her rented YOUBER vehicle, allowing us to reach the second part of the Fourth Amendment standing analysis.

2. Society would recognize as objectively reasonable Ms. Austin's manifested subjective expectation of privacy in her YOUBER rental vehicle.

To challenge the constitutionality of a search, a person "must demonstrate a subjective expectation of privacy in the place searched, and that expectation must be objectively reasonable." *Lyle*, 919 F.3d at 727. The Supreme Court recognizes that a person may have a "legally sufficient interest in a place" that protects that person from Fourth Amendment violations. *Rakas*, 439 U.S. at 142. Specifically, the Court in *Rakas* expounded that property concepts should not be dispositive

in determining standing to challenge such Fourth Amendment violations, and that courts should also evaluate whether a person has a "legitimate expectation of privacy in the invaded place." *Id.* at 143. There, the Court stated that while cars do not have the same expectation of privacy standards as a home, for example, defendants must still make a showing that they could legitimately expect privacy in the car searched. *Id.* at 148-49. Then in *Byrd*, the Supreme Court held that a person who is not expressly listed as an authorized driver on a rental car agreement may be able to demonstrate an otherwise reasonable expectation of privacy in the rental vehicle. *Byrd*, 138 S.Ct. at 1531.

As a result, to establish whether an expectation of privacy is legitimate for standing purposes, we include the two-part test elucidated by Justice Harlan in his concurrence in *Katz*: a defendant must show that she (1) manifested a subjective expectation of privacy, and (2) that her expectation was objectively reasonable. *Katz*, 389 U.S. at 361 (Harlan, J., concurring). There, the defendant used a public telephone booth to make a phone call which was eavesdropped on by police officers. *Id.* at 349. The Court reasoned that a person who occupied the booth, shut its doors to the outside, and paid the fee to make the call, manifested a subjective expectation of privacy in the phone booth. *Id*. at 352. Despite the fact that the phone and the defendant were viewable through glass panes and that the defendant temporarily occupied the booth, the Court found that society would "recognize[] as 'reasonable'" his actions to secure the privacy of his call. *Id.* at 361 (Harlan, J., concurring).

In *United States v. Smith*, the defendant reserved a vehicle by calling the rental car company, obtaining a reservation number, and providing his credit card information, yet his wife was listed as the authorized renter on the agreement. *United States v. Smith*, 263 F.3d 571, 575 (6th Cir. 2001). There, the Sixth Circuit considered the defendant the *de facto* renter, establishing

by a totality of the circumstances that he had a legitimate expectation of privacy through the evaluation of several factors, including the validity of his license, the fact that he arranged the rental himself, the permission of the authorized renter, the relationship to that person, and the ability to present the rental documents to law enforcement when asked. *Id.* at 586-87. Such factors have consistently been considered by courts in determining whether an expectation of privacy is objectively reasonable and legitimate. *See e.g.*, *Lyle*, 919 F.3d at 730; *United States v. Thomas*, 447 F.3d 1191 (9th Cir. 2006); R. at 6, 11-12; *but see United States v. Sanchez*, 943 F.2d 110, 113 (1st Cir. 1991) (explaining that a person could not have standing to challenge the search of a vehicle he was loaned by a person whose full name he did not know).

Ms. Austin rented her YOUBER vehicle using Ms. Lloyd's account information, and as a result Ms. Lloyd's name was the one listed on the rental agreement produced to the officer at the traffic stop. R. at 2. However, as the Court in *Byrd* stated, the inquiry does not end here since a person may have a reasonable expectation of privacy in a rental vehicle for which they are not listed on the agreement. *See Byrd*, 138 S.Ct. at 1531. Having already established that Ms. Austin had a legitimate possessory interest in the vehicle, we must now assess whether society would recognize as reasonable the possessory interest and expectation of privacy that Ms. Austin manifested in the rental vehicle.

Ms. Austin used the shared YOUBER app to contact the rental company herself, obtain the reservation, and provide the company with the authorized credit card she traditionally used on the app. R. at 2. Considering that she also had a valid driver's license, that Ms. Lloyd had never revoked her access to either the application or the card, and that she could present her rental documents to the officer when asked, the totality of the circumstances establish that Ms. Austin was the *de facto* renter of the YOUBER vehicle in question. R. at 2-3, 20. As a result, society

should consider Ms. Austin's interest in the vehicle sufficient to establish a reasonably objective expectation of privacy, allowing Ms. Austin to assert a challenge to the rental vehicle search under the Fourth Amendment.

B. Despite not having express permission from Ms. Lloyd, Ms. Austin was an authorized user on both Ms. Lloyd's YOUBER rental account and credit card, which were used to rent the vehicle.

The Supreme Court has previously held that a vehicle owner's permission to use a vehicle is not dispositive to the inquiry of a reasonable expectation of privacy. *Byrd*, 138 S.Ct. at 1531. Furthermore, even where a person had the permission of the owner, or rental company, to be present, if the law inherently prevented that person from possessing the vehicle, such as by lack of license or by criminal record, that person would not have standing to challenge a Fourth Amendment search. *See e.g.*, *Lyle*, 919 F.3d at 730; *Byrd*, 138 S.Ct. at 1530. In traditional rental circumstances, an authorized renter may turn over their keys to another driver, demonstrating an act of permission. *See United States v. Portillo*, 633 F.2d 1313, 1317 (9th Cir. 1980) (explaining that a non-owner driver's ability to challenge standing arose when he was given keys to the vehicle). However, when dealing with access to an application, we may consider passwords to access the specific user account acting analogous to keys.

Ms. Austin maintained contact with Ms. Lloyd after their break-up. R. at 19. On January 3, 2019, Ms. Austin opened the YOUBER app on her phone and reserved a rental vehicle. R. at 2. Ms. Austin was using an application to rent a vehicle using a credit card authorized by Ms. Lloyd just as she had done since July 2018. *Id.* Ms. Lloyd herself even acknowledged that although they had broken up, that she still loved Ms. Austin and was considering getting back together. *Id.* at 19. In fact, Ms. Lloyd had not ever specifically told Ms. Austin to no longer use the YOUBER account, and upon removing her own credit card information from the app, she did not remove Ms. Austin's.

R. at 20. A reasonable person, after a break-up, would have cancelled their partner's authorized credit card, removed that person's access to their accounts by changing passwords, and notified that person. Ms. Lloyd did none of those things, and in fact, remained in contact with Ms. Austin, while continuing to be billed for rental vehicles since the September break-up, which makes some sense due to Ms. Lloyd's thought of potentially getting back together. R. at 18-20.

As the purveyor of the rental vehicle, Ms. Austin not only had a lawful possessory interest in the rental vehicle, but also manifested a legitimate expectation of privacy in her YOUBER rental vehicle. Ms. Austin had standing to challenge the officer's search of her rental vehicle, and consequently, the District Court erred in its decision to deny suppression of the rental vehicle evidence. The Court should find that Ms. Austin had standing, and the subsequent warrantless search of Ms. Austin's rental vehicle was unreasonable under the Fourth Amendment.

II. In acquiring the rental vehicle location data, the Government conducted an unconstitutional Fourth Amendment "search" because Ms. Austin manifested a reasonably objective expectation of privacy in her location data, and the Government collected it without a warrant supported by probable cause.

Courts measure the constitutional protection of subjective expectations of privacy by evaluating what a person protects as private or how they choose to protect that interest. *Katz,* 389 U.S. at 351. In his concurrence, Justice Harlan noted that even temporarily private places may possess a reasonable expectation of privacy based on that occupant's expectations. *Katz,* 389 U.S. at 361 (Harlan, J., concurring). The threshold test for a reasonable expectation of privacy includes a determination of subjective manifestation of that privacy expectation and whether or not it is objectively reasonable. *Id.* Nearly fifty years later in *Carpenter,* the Supreme Court applied this analysis to cell-site location information (CSLI) that the government collected from a person's cell phone, finding that such collection constituted a "search" under the Fourth Amendment because of society's expectation of privacy in cell phone information. *Carpenter v. United States,* 138 S.Ct.

2206 (2018). As a result, the collection of CSLI from a cell phone carrier requires the government to obtain a warrant. *Id.* at 2223. The collection of Ms. Austin's Global-Positioning-System (GPS) rental vehicle location data from YOUBER is analogous to the CSLI collected by the government in *Carpenter*, such that her subjective manifestation of privacy in the data collected was objectively reasonable by society's standards, and therefore required a warrant to search the data.

A. Ms. Austin's subjective expectation of privacy in the historical rental vehicle location data was objectively reasonable.

In *Carpenter*, the police applied for a warrantless order for the defendant's cell phone records for a four-month period. *Carpenter*, 138 S.Ct. at 2212. As a result, the government obtained CSLI with nearly 13,000 location points over that time frame, for a daily average of 101 points. *Id.* In finding that the CSLI obtained by the police was a search under the Fourth Amendment, the Supreme Court reasoned that technological advances ought to be considered in the reasonableness standard, especially where data could "provide an intimate window into a person's life." *Id*. at 2217. There, the court analogized CSLI to GPS information in its ability to accurately and cheaply depict a person's movements. *Id.* at 2217-18. The Court further expounded that the historical nature–the backwards looking quality–of the data there allowed the Government to trace back a person's movements over the course of up to five years making it uniquely positioned to invade a person's reasonable expectation of privacy. *Id.* at 2218-19. The Court specifically noted CSLI's ability to "rapidly approach[] GPS-level precision." *Id.* at 2219. Since here, Ms. Austin's cell phone was collecting and sending GPS information which precisely depicted her location, the GPS rental vehicle location data collected without a warrant constitutes an unreasonable search under the Fourth Amendment and *Carpenter*.

1. The historical rental vehicle location data collected from Ms. Austin's cell phone is analogous to cell-site location data.

The "nature of the state activity that is challenged" begins the court's inquiry of a Fourth Amendment search challenge. *Smith v. Maryland*, 442 U.S. 735, 741 (1979). While courts have determined that a person in a vehicle cannot generally expect the same level of privacy as a person at home, the challenge here is not about a vehicle, but rather the precise GPS location data collected from a person's cell phone while that person is renting a vehicle. *See United States v. Knotts*, 460 U.S. 276, 281 (1983). Courts have increasingly become aware of technological changes, adjusting this inquiry to prevent the government's encroachment into areas it previously would not have been able to unreasonably intrude. *See Carpenter*, 138 S.Ct. at 2224; *Kyllo v. United States*, 533 U.S. 27, 34 (2001).

In *Carpenter*, one of the primary arguments the Court favored was the amount of information that CSLI was able to provide the government–127 days of records, 12,898 location points of the defendant's movements, and 101 daily data points. *Carpenter*, 138 S.Ct. at 2212. In *Jones*, the police used a GPS tracker to monitor a defendant's movements for twenty-eight days and were able to pinpoint his location within 100 feet, and the Court held that such a use constituted a "search" under the Fourth Amendment. *United States v. Jones*, 565 U.S. 400, 403-04 (2012). In both *Carpenter* and *Jones*, the Supreme Court determined that although a person's location was disclosed to the public, the government's use of the information was still a "search". *See id.* at 410; *Carpenter*, 138 S.Ct. at 2216.

Here, YOUBER collected Ms. Austin's GPS information from her cell phone every two minutes while 'near' the rental vehicle. R. at 4. While the record is silent as to how long the particular rental in January had been rented, the police subpoenaed information from October 3, 2018 through January 3, 2019–a three-month period. R. at 3. Even a daily rental, pinging Ms.

Austin's cell phone GPS information every two minutes, minus eight hours of sleep and eight hours of work, provides the Government with up to 240 GPS location data points. *See id.* In *Carpenter*, the Court held the average of 101 daily CSLI data points was an intimate window into a person's daily activities and lives that most people would consider an objectively unreasonable intrusion of privacy. *See Carpenter*, 138 S.Ct. at 2223. Here, we are dealing with the potential for twice as many location data points.

Furthermore, YOUBER provided to the police, without a warrant, the precise GPS location data collected from Ms. Austin's cell phone. R. at 4. This is precisely the type of data the Court in *Carpenter* was worried about the government being able to use in order to pinpoint a suspect's location. *See* R. at 3; *Carpenter*, 138 S.Ct. at 2219. The Court in *Jones* had a similar concern for abuse by government intrusion. *Jones*, 565 U.S at 410. Cell phone GPS has the ability to track a person within ten feet, compared to within 100 meters for the CSLI at issue in *Carpenter*. National Association of Criminal Defense Lawyers, *Cell Phone Location Tracking Primer*, https://www.law.berkeley.edu/wp-content/uploads/2015/04/2016-06-07_Cell-Tracking-Primer_Final.pdf (last visited Sept. 22, 2019). Justice Sotomayor, in her concurrence in *Jones*, noted that the precision and comprehensive nature of GPS information "reflects a wealth of detail about [a person's] familial, political, professional, religious, and sexual associations." *Jones*, 565 U.S. at 415 (Sotomayor, J., concurring).

Still further here, YOUBER used a satellite mapping technology through Smoogle to filter the GPS information to more precisely track the vehicle, and consequently, Ms. Austin's locations. R. at 22-23. The tracking of Ms. Austin's movements constituted a very precise effort by YOUBER, which the police took advantage of by requesting without a warrant. Importantly, the historical and retrospective nature of the precise GPS information, collected by the police from

YOUBER, analogizes the data collected here to that in *Carpenter*. R. at 3; *See Carpenter*, 138 S.Ct. at 2218 ("[T]he retrospective quality of the data here gives police access to a category of information otherwise unknowable."). There is no question here that Ms. Austin's historical GPS rental vehicle location information collected from a previous three-month period by YOUBER is analogous to, if not more worrisome than, the CSLI collected in *Carpenter* due to the interplay of CSLI and GPS data in a cell phone.

2. Society should find objectively reasonable Ms. Austin's expectation of privacy in her rental vehicle location data obtained from her cell phone's GPS device.

Cell phones contain a number of apps, the average per phone being approximately 33, which "manag[e] detailed information about all aspects of a person's life." *Riley v. California*, 573 U.S. 373, 396 (2014). In *Riley*, the Court held that police must obtain a warrant before searching a person's cell phone because of the significant amount of personal information contained on a phone, due to the applications, storage capacity, and level of details it can reveal about a person. *Id.* The Court went further, noting that the level of private information stored on a phone is similar to that stored in the home, except at times that it may be even greater, save for when the phone is actually in the house. *Id.* at 396-97. As a result, a person's subjective manifestation of privacy of the data within their phone is considered to be objectively reasonable in today's technological society. *Id.* at 403.

In *Knotts*, the Supreme Court held that where police had placed a beeper into a container with the original owner's prior permission and then tracked the beeper signal of the purchaser, the police did not violate the purchaser's Fourth Amendment rights. *United States v. Knotts*, 460 U.S. 276, 285 (1983). There, the police followed the defendant-purchaser for three days, also using visual surveillance as they tracked the vehicle. *Id.* at 278-79. Relying on these facts and the decreased expectation of privacy in a car, the Court reasoned that no private information was

revealed that could not have been revealed by visually tracking the vehicle on public roads. *Id.* at 281-82.

However, the inquiry changed when the Court addressed the issue in *United States v. Jones*. *Jones*, 565 U.S. at 408-09. There, the police installed a GPS device on the defendant's vehicle outside of the strict warrant requirements, placing the GPS device on the vehicle the day after the warrant expired in an unauthorized city, and consequently, monitored the vehicle over a twenty-eight-day period. *Id.* at 402-03. By installing the GPS device at a time and place not specified by the warrant, the Court held that the long-term, technologically-advanced surveillance of the defendant's vehicle constituted a "search" under the Fourth Amendment. *Id.* at 404. Distinguishing *Knotts*, the *Jones* Court noted the use of three-day, constitutional, visual observation in *Knotts* was different from the twenty-eight days of precise, technological means at hand in *Jones*. *Id.* at 408-09, 412.

Here, we have the intersection of several of these concepts: cell phone applications, GPS tracking data, and a vehicle. However, the unique ways that these concepts interact in this case support the contention that Ms. Austin was subject to a warrantless search of her historical GPS location data. Ms. Austin used the YOUBER application, which tracked her location from her cell phone's GPS, to rent the vehicle. R. at 2-3. Like in *Riley*, Ms. Austin's phone and applications, such as YOUBER, contained immensely private information, including the GPS signals which it shared. R. at 3; *see Riley*, 573 U.S. at 396. Similarly to *Carpenter*, when Ms. Austin was using her YOUBER rental vehicle and her phone was collecting the GPS information to track the vehicle in use, it could convey an intimate picture of her life, such that she maintained an objectively reasonable expectation of privacy within the GPS data collected. R. at 3; *see Carpenter*, 138 S.Ct.

at 2217. The fact that her phone, and not the rental vehicle itself, collected the GPS signal further indicates the private nature of the data collected. R. at 3.

We can distinguish the case here from that in *Knotts* because Ms. Austin was not surveilled visually by officers, and the police did not request YOUBER's advance permission to track Ms. Austin's movements in real-time. R. at 3-4. *See Knotts*, 460 U.S. at 278. Detective Hamm instead subpoenaed, after-the-fact, Ms. Austin's historical YOUBER vehicle location data for a three-month period. R. at 3. The historical nature of the information collected here is more analogous to *Carpenter* than it is to *Knotts*, where location information was collected real time by visual observation. *See Knotts*, 460 U.S. at 278; *Carpenter*, 138 S.Ct. at 2212. Similarly, police in *Knotts* did not collect precise GPS information, relying instead on a beeper tracking signal distinguishing the facts here. *See Knotts*, 460 U.S. at 278. Ms. Austin's precise GPS information may have been collected real-time, but it was provided as historical data to the police in response to the subpoena. R. at 3. As a result, the Government's collection of Ms. Austin's historical GPS location data from her cell phone while using her rental vehicle supports the contention that such collection of information is a "search" under the Fourth Amendment and *Carpenter*.

In her concurrence in *Jones*, Justice Sotomayor noted that when the government has an unencumbered ability to use data like GPS, which "[made] available at a relatively low cost" can provide "such a substantial quantum of intimate information about any person," people no longer feel free to express or associate. *Jones*, 565 U.S. at 416. For instance, a person like Ms. Austin, who regularly attends protests, would likely fear the government's ability to collect and scrutinize her historical GPS data, especially where the protests were political or government-directed in nature. R. at 1. The Courts in *Carpenter* and *Riley* realized the danger in allowing the Government to search, without a warrant supported by probable cause, cell phone information, whether in a

remote cloud server, through CSLI, or other methods, such as GPS signals from a cell phone. *See Carpenter*, 138 S.Ct. at 2216-17; *Riley*, 138 S.Ct. at 386. The Court here today should heed the same words Justice Sotomayor spoke in *Jones* because as technology continues to advance, law enforcement will continue to attempt to find new ways of collecting private information about potential suspects in violation of their Fourth Amendment rights.

B. The Third-Party Doctrine does not apply to Ms. Austin's rental vehicle location data because of the nature of the data sought.

The Government is likely to rely on the fact that Ms. Austin's historical rental GPS data was collected by YOUBER, a third-party, through contractual consent, and still further shared with Smoogle, a search engine with satellite-mapping technology. R. at 4; *see also United States v. Miller*, 425 U.S. 435 (1976) (explaining that a person does not have a Fourth Amendment expectation of privacy in bank records shared with and maintained by a third-party bank). However, this reliance is misplaced. In *Miller*, the Supreme Court dealt with business records where the person asserting the expectation of privacy had "voluntarily conveyed" that information to the bank. *Miller*, 425 U.S. at 442. Here, Ms. Austin did not volunteer to share the information. R. at 24. Ms. Lloyd accepted the privacy policy terms, and the terms were never prompted upon subsequent openings of the application. R. at 20, 24. Ms. Austin had no later opportunity to consent to the privacy policy terms. R. at 24. Furthermore, cell phone GPS is communicated without any further act of the cell phone user. *See* R. at 4 (noting that the GPS automatically activates when the user is near the car); *Carpenter*, 138 S.Ct. at 2220.

As in *Carpenter*, a mechanical application of the third-party doctrine here does not fit. *Carpenter*, 138 S.C. at 2219. "This approach 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." *Jones*, 565 U.S. at 417 (Sotomayor, J., concurring). For example, phones do not always

store data on the device but can instead also store that information in the "cloud." *Riley*, 573 U.S. at 397. However, the Supreme Court has noted that such information stored on remote servers "makes little difference" in the overall privacy analysis. *Id.* Here, as Ms. Austin traversed to work or protests in her rented YOUBER vehicle, her phone was automatically sharing her GPS location information with YOUBER, and consequently also Smoogle. R. at 1, 3-4. Sharing substantial amounts of involuntarily-conveyed data goes to the heart of the Fourth Amendment and does not square easily with a narrow conception of the Third-Party Doctrine. The Government's collection of Ms. Austin's historical, cell phone GPS data collected from YOUBER constitutes a "search" under the Fourth Amendment and *Carpenter*, which cannot easily be overcome by the Third-Party Doctrine as a matter of public concern.

III. The Court should evaluate both the erroneous admission of evidence from the rental vehicle search and the historical rental vehicle location data for harmlessness.

In determining whether violations of Ms. Austin's Fourth Amendment rights constitute harmless error, we must evaluate whether both the rental vehicle search and historical rental vehicle location data search substantially affected Ms. Austin's constitutional rights. 28 U.S.C. § 2111 (1949). To consider a constitutional violation harmless, the Court must find the error to be "harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24 (1967). In so doing, the Court evaluates whether the error substantially impacted the trial outcome. *United States v. Jenkins*, 77 M.J. 225 (U.S.C.A.A.F. 2018). In the context of a Fourth Amendment violation, the Court must address whether a reasonable possibility exists "that the evidence complained of might have contributed to the conviction." *United States v. Rhind*, 289 F.3d 690, 694 (11th Cir. 2002).

Here, we have two Fourth Amendment issues which impacted the evidence admitted at trial. This Court should find that the District Court violated Ms. Austin's ability to challenge the admissibility of the rental vehicle search when it denied her standing in response to the defense's

motion to suppress. R. at 6. Ms. Austin had a lawful possessory interest and an objectively reasonable, legitimate expectation of privacy in the YOUBER rental vehicle searched by the officer, which enables Ms. Austin to assert standing to challenge the legality of that search and the evidence admitted as a result. *See Byrd*, 138 S.Ct. at 1529-31. This Court should also find that Ms. Austin manifested an objectively reasonable expectation of privacy in the historical GPS information that the YOUBER app on her cell phone collected which was obtained by the Government without a warrant. *See Carpenter*, 138 S.Ct. at 2217; *Jones*, 565 U.S. at 404. If the court so finds, then error was not harmless in admitting both the evidence gathered from the rental vehicle during the initial arrest and the subsequent GPS data collected from YOUBER. We contend that this must be the case because these individual errors alone were not harmless, and especially when taken together, they require reversal of Ms. Austin's conviction.

CONCLUSION

The Supreme Court has held that a person who is not listed on the rental agreement for a vehicle may nonetheless assert standing to challenge a search of that vehicle where she has a lawful possessory interest and legitimate expectation of privacy in the rental vehicle. Furthermore, courts have developed factors to evaluate in consideration of these two standards, including whether someone would have otherwise been able to legally rent the vehicle, if the driver has a valid driver's license, and whether the user has permission from the person listed as the authorized driver on the rental agreement. Here, in a mere effort to stay off the "grid" as a lifestyle choice, Ms. Austin used her ex-partner's YOUBER account and credit card, both of which she had previous and unrevoked authority to use, to rent a vehicle. Ms. Austin was able to present a valid license, and the record does not indicate any other reason which prevented her from renting the vehicle. As a result, standing to challenge the search of the rental vehicle should not have been denied to

Ms. Austin, and the evidence from the search should have been suppressed since it was collected without a warrant.

Additionally, collection of historical cell-site location information (CSLI) has been determined a "search" under the Fourth Amendment. Similarly, real-time GPS tracking of a vehicle's location has also been termed a "search" under the Fourth Amendment, such that it requires a valid warrant to collect. Cell phones, as a pervasive tool for communication, data storage, and entertainment, maintain a reasonable expectation of privacy of the data they contain or share, even where that data is shared with third parties, such as cell carriers, app developers, and remote cloud servers. Therefore, collection of historical GPS location data from Ms. Austin's cell phone which was automatically sent from her phone to YOUBER and was filtered by Smoogle constitutes a "search," such that Detective Hamm was required to obtain a warrant before collecting the data. The District Court erred by denying Ms. Austin's motion to suppress the GPS location information collected from YOUBER.

It is for these reasons that this Court should reverse the judgment of the Thirteenth Circuit Court of Appeals.

Respectfully submitted,

/s/ Team P18

Counsel for Ms. Austin