No. 4-422

IN THE
Supreme Court of the United States

Jayne Austin,

Petitioner,

v.

United States of America,

Respondent.

Petitioner's Brief

On Writ of Certiorari to
the United States Court of Appeals
For the Thirteenth Circuit

The University of San Diego School of Law
31st Annual Criminal Procedure Tournament November 1-3, 2019
San Diego, CA

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ISSUES PRESENTED

1. Does Jayne Austin have standing to contest Detective Hamm's search of her rental vehicle based on the reasonable expectation of privacy she established within that car, despite the fact that she is using another's account without their express permission?
2. Was the acquisition of Jayne Austin's YOUBER location data a search under the Fourth Amendment as a violation of her reasonable expectation of privacy, and under *Carpenter v. United States* because her location data falls within the exception the court carved out of the third-party doctrine?

STATEMENT OF FACTS

Jayne Austin ("Austin") is a very private person. As a "naturalist and minimalist," Austin prides herself on the "immaterial lifestyle" she created. R. at 1. Austin hates being on the "grid" and "The Man" and does not "use her own information to sign up for anything," including social media. R. at 18. The one exception is her blog, *LET IT ALL FALL DOWN*!, the one place she shares her name with the world. R. at 18. For example, on November 28, 2019, Austin posted, "I have no home, I claim no home. I claim no property." R. at 26.

Austin does not own a vehicle, and instead relies on a relatively new car rental application ("app") called YOUBER. R. at 2. Austin does not have her own YOUBER account, and uses the account belonging to Martha Lloyd ("Lloyd"), with whom Austin has engaged in an on and off again relationship. R. at 18. Lloyd's YOUBER account first became active on July 27, 2018, but Lloyd did not put Austin's name on the rental agreement. R. at 2,18.

From July to September, Austin used Lloyd's YOUBER through the app she downloaded on her own phone. Austin was an authorized user on Lloyd's credit card, so any time she used the app, she would reimburse Lloyd with cash. R. at 18. As Lloyd and Austin began to experience difficulties in their relationship, Lloyd removed her credit card from YOUBER and turned to a different app, BIFT, for her transportation needs. R. at 19. In the process of removing her credit card, Lloyd noticed Austin had added her own credit card to the account. R. at 20. At that time, although Lloyd desired Austin to stop using the account, Lloyd never explicitly told Austin to stop using it. R. at 19. Lloyd also did not take any steps to remove Austin from the account or delete it. R. at 19.

According to YOUBER's corporate policy, the app functions as a rental car service agreement. R. at 2. The user can only rent the vehicle for a maximum time period of one week or

a maximum distance of 500 miles. R. at 2. During the initial signup period, users are informed of YOUBER's monitoring policy, whereby YOUBER tracks the user's location during the duration of the rental period each time they use a YOUBER car. R. at 24. By completing the initial signup period and signing the rental agreement, the user is acknowledging their consent to such policies. However, users are only informed of YOUBER's intent to track them once, during the initial signup period, regardless of the number of people who may share the account. R. at 20. Lloyd was the only one who completed the initial signup period on the account that she and Austin shared. R. at 20.

On January 3, 2019, Austin rented a black 2017 Toyota Prius with the license plate "R0LL3M" through YOUBER. R. at 2. While she was driving, she accidentally failed to stop at a stop sign and was subsequently pulled over by Officer Charles Kreuzberger. R. at 2. Austin provided Officer Kreuzberger with her license and YOUBER app. R. at 2. In reviewing her app, Officer Kreuzberger noticed that Austin was not listed as an authorized user on the rental agreement. R. at 2.

Officer Kreuzberger then proceeded to search Austin's car, without her consent, where he found several items, such as: "a BB gun modeled after a .45 caliber handgun with the orange tip removed, a maroon ski mask, a duffel bag containing $50,000, blue dye packs," and a cooler full of food in the trunk. R. at 3. In the backseat, he found bedding and a pillow, indicating that the car may be lived in. R. at 3. While completing the search, Officer Kreuzberger was dispatched to be on the lookout for a suspect who had allegedly just robbed a *Darcy and Bigley Credit Union* nearby wearing similar items as those found in Austin's car. R. at 3. A surveillance camera also detected a partial license plate with "R0L." R. at 3. Based on this information, Officer Kreuzberger believed Austin had committed the alleged robbery and arrested her. R. at 3.

As Detective Boober Hamm was investigating Austin's case, he "discovered five open bank robbery cases" that matched the robbery of the *Darcy and Bigley Credit Union* that occurred on January 3, 2019. R. at 3. After learning that Austin was driving a YOUBER car that day, Detective Hamm served a subpoena on YOUBER to compel all GPS and Bluetooth information related to Austin's account from October 3, 2018 to January 3, 2019. R. at 3. The information from that subpoena revealed that Lloyd's account had been used at the time of each robbery. R. at 4. Surveillance footage further placed a black 2017 Toyota Prius at the location of four out of five robberies Detective Hamm was investigating. R. at 4. A yellow 2016 Volkswagen Beetle with the license plate "FEARLY" was found at the fifth. R. at 4. As a result of the investigation, Austin was charged with six counts of bank robbery under 18 U.S.C.S § 2113. R. at 4.

In response, Austin filed two motions to suppress evidence. R. at 4. The first motion pertained to the evidence Officer Kreuzberg obtained during his search of the YOUBER car on January 3, 2019. R. at 4. The second motion pertained to the location data YOUBER provided to Detective Hamm. R. at 4. The District Court denied both motions. R. at 4. Austin appealed to the Court of Appeals for the Thirteenth Circuit, which affirmed the District Court's rulings on both motions. R. at 16.

SUMMARY OF ARGUMENT

Austin respectfully requests this Court reverse and remand the Thirteenth Circuit's decision, denying her motion to suppress the evidence gathered from her initial arrest, and her motion to suppress the location data Detective Hamm obtained from YOUBER.

First, the Thirteenth Circuit incorrectly held that Austin lacked standing to challenge the warrantless search of her rental vehicle. Austin exhibited a reasonable expectation of privacy in

the vehicle and thus was entitled to Fourth Amendment protections. Austin had a subjective expectation of privacy in the YOUBER vehicle because Austin had dominion and control over the YOUBER vehicle, and an objective expectation of privacy because she lawfully possessed the vehicle at the time of the search. Further, Austin was not in wrongful possession of the YOUBER vehicle at the time of the search because Lloyd failed to explicitly prohibit Austin from using her account. Therefore, this Court should reverse and remand the Thirteenth Circuit's decision denying Austin's first motion to suppress.

Second, the Thirteenth Circuit incorrectly held that the acquisition of Austin's location data did not constitute a search under the Fourth Amendment and *Carpenter v. United States*. The acquisition of Austin's location data was a search under the Fourth Amendment because it violated her reasonable expectation of privacy. Additionally, the acquisition of her location data was also a search under *Carpenter v. United States* because Austin's location data is akin to CSLI and thus should fall within the exception the court in *Carpenter* carved out of the third-party doctrine. Thus, this Court should reverse and remand the Thirteenth Circuit's decision denying Austin's second motion to suppress.

STANDARD OF REVIEW

Denials of motions to suppress are reviewed de novo. Courts begin by analyzing the "historical facts leading up to the warrantless search" and then consider "the ultimate conclusions reached by the district court," both of which are reviewed de novo. *United States v. Ball*, 90 F.3d 260, 262 (8th Cir. 1996). Warrantless searches are also reviewed de novo, based on the Fourth Amendment's "strong preference" for searches to be conducted with a warrant. *Ornelas v. United States*, 517 U.S. 690, 699 (1996).

ARGUMENT

I. Jayne Austin has standing to challenge the warrantless search of the YOUBER rental vehicle because Austin exhibited a reasonable expectation of privacy in the vehicle that created Fourth Amendment protections.

The Fourth Amendment of the United States provides, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures […]." U.S. Const. amend. IV. Fourth Amendment rights are personal rights which may be asserted only by a defendant who has a legitimate expectation of privacy in the invaded place or thing searched. *Rakas v. Illinois*, 439 U.S. 128, 133-134, 143 (1978).

Specifically, a proponent of a motion to suppress has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search or seizure. *Id.*at 130, n. 1. Thus, the defendant must first establish a personal, reasonable, and legitimate expectation of privacy in the particular area searched or thing seized. *United States v. Payner*, 447 U.S. 727, 731 (1980). Additionally, expectations of privacy must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society. *Rakas*, 439 U.S. at 144, n. 12. The Supreme Court in *Katz v. United States* determined that a reasonable expectation of privacy consists of: (1) a subjective expectation of privacy in the object searched, and (2) that society is willing to recognize that expectation of privacy as legitimate. *California v. Ciraolo*, 476 U.S. 207, 211 (1986).

In regard to Fourth Amendment protections in rental vehicles, the Circuit courts for decades, developed distinct approaches to determine whether a driver not listed on the rental agreement could have an expectation of privacy to contest a search of the vehicle. In 2018, the Supreme Court in *Byrd v. United States* resolved the Circuit court conflict by holding that,

"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 v. United States*, 138 S. Ct. 1518, 1524 (2018). *See United States v. Oakes*, 320 F. Supp. 3d 956, 958 (2018) (holding that under *Byrd*, without ownership, possession, custody, or control, Defendant has no reasonable expectation of privacy in the 'invade place' […]).

In the case at bar, Austin was the sole occupant of the YOUBER vehicle and was not listed as a user in the rental agreement. R. at 2. Under *Byrd*, Austin retains a reasonable expectation of privacy as the sole occupant. Austin had sole control over the vehicle, demonstrating one of the main rights attaching to property, the right to exclude others. Second, Austin was in lawful possession of the vehicle because Lloyd did not expressly prohibit Austin from using her YOUBER account once their relationship ended.

A. Austin had a subjective expectation of privacy in the YOUBER vehicle because Austin had dominion and control over the YOUBER vehicle.

A subjective expectation of privacy exists when there is an actual manifestation of privacy in the place searched. *See Ciraolo*, 476 U.S. at 211 (holding that respondent manifested a subjective intent and desire for privacy as to his unlawful agricultural pursuits by placing a ten-foot fence to conceal his marijuana plants). Accordingly, a legitimate expectation of privacy can be made by showing ownership or dominion and control over the premises by leave of the owner. *United States v. Watson*, 404 F.3d 163, 166 (2nd Cir. 2005).

Specifically, ownership or control demonstrates one of the fundamental rights attaching to property, the right to exclude others. *Byrd*, 138 S. Ct. at 1522. *See United States v. Riazco*, 91 F.3d 752 (5th Cir. 1996) (holding that the defendant lacked standing to contest the validity of the search because he did not assert a property or possessory interest in the rental car). Therefore, one who lawfully possesses and controls property will in all likelihood have a legitimate

expectation of privacy by virtue of the right to exclude others from that property. *Id*. at 1528. Austin had a subjective expectation of privacy in the YOUBER vehicle because she had dominion and control over the vehicle, creating the right to exclude others. Further, Austin maintained her property rights at the time of the search because her posts in her blog, "*LET IT ALL FALL DOWN!*", were not an affirmative disavowal of her property rights.

1. *Austin's exclusive dominion and control over the YOUBER vehicle conferred the property right to exclude others.*

The court in *Rakas* acknowledged that "property concepts" are instructive in determining the presence or absence of the privacy interests protected by the Fourth Amendment. *Rakas*, 439 U.S. at 144, n. 12. Using this framework of analysis, the court revisited its holding in *Jones*. In *Jones*, the defendant was convicted of federal narcotics charges and sought to suppress the evidence. *Jones v. United States*, 362 U.S. 257, 258 (1960). The Supreme Court reversed the conviction, finding that the defendant had standing to contest the search because the defendant was legitimately on the premises. *Id*. at 267. The *Rakas* court rejected the "legitimately on the premises" test for standing, stating that, "[…] the holding in *Jones* can best be explained by the fact that Jones had a legitimate expectation of privacy in the premises he was using and therefore could claim the protection of the Fourth Amendment […]." *Rakas*, 439 U.S. at 143.

Jones' expectation of privacy was based on the fact that he had permission to use the apartment, had the key, and except with respect to his friend, had complete dominion and control over the apartment and could exclude others from it. *Id*. at 149. Further, as the dissenting opinion points out, ownership of the area searched is not required to have a reasonable expectation of privacy. *Id*. at 161.

The *Rakas* court focused on the degree of possession and control over the area searched. *Id*. at 143. Based on this reasoning, the court found that the defendant lacked standing to contest

the search because the defendant, a passenger in the vehicle, neither asserted a property nor a possessory interest in the automobile. Unlike *Jones*, the defendant was not in dominion and control of the vehicle because the owner was driving and present during the search. *Id*.

In the case at bar, the fact that Austin did not own the YOUBER vehicle is immaterial as demonstrated by *Rakas*. Unlike the defendant in *Rakas,* Austin possessed a property right in the vehicle because she was in complete dominion and control over the vehicle as the driver and sole occupant. R. at 2-3. Austin's property interest is further demonstrated by the several personal items located inside the vehicle. As Officer Kreuzberger noted, these items included clothes, an inhaler, three pairs of shoes, and a collection of records. R. at 3.

Additionally, the officer notated in his report that he believed the car to be "lived in," because he also found a cooler full of tofu, kale, homemade kombucha, bedding, and a pillow. R. at 3. Austin's dominion and control, coupled with her own property right in her personal belongings inside of the vehicle, demonstrate Austin's property rights, specifically, the right to exclude others.

2. *Austin did not abandon her property rights through her posts in her blog LET IT ALL FALL DOWN! because the posts were not affirmative disclaimers of her property rights.*

Persons who abandon property forfeit any right to an expectation of privacy and may not later complain about its subsequent seizure and use in evidence against them. *United States v. Hammock*, 860 F.2d 390, 391 (11th Cir. 1988). Thus, property rights extend only to property that the person has an actual interest in.

In *Hawkins*, the Eleventh Circuit upheld the defendant's conviction of racketeering activity and possession of heroin found in a suitcase because he lacked a reasonable expectation of privacy. *United States v. Hawkins*, 681 F.2d 1343 (11th Cir. 1982). To the court, disclaiming

ownership or knowledge of an item ends a legitimate expectation of privacy in the item. *Id*. at 1345. The defendant was approached and questioned by law enforcement at the airport. *Id*. at 1344. As the defendant was being questioned, a woman carrying a suitcase approached. *Id.* The defendant made hand signals in her direction and the women began to walk away, but she dropped the suitcase when a second law enforcement officer identified himself to her. *Id.* In response, the defendant yelled that it was not his suitcase. *Id.*

In affirming the lower court's decision denying the defendant's motion to suppress, the Eleventh Circuit explained that, "the defendant denied an interest in either the suitcase or its contents, while at the suppression hearing he testified that he owned both and asserted a privacy interest." *Id*. at 1343. The court went on to state that:

> After *Rakas v. Illinois*, 439 U.S. 128 (1978), the proper analysis proceeds directly to the substance of a defendant's Fourth Amendment claim to determine whether the defendant had a reasonable and legitimate expectation of privacy in the article *at the time of the search* and consequently, whether the Fourth Amendment has been violated. *Id*. (italics added).

The court found that since the defendant disclaimed the suitcase *at the time of the search*, he did not exhibit a reasonable expectation of privacy in the suitcase, and therefore could not challenge the search. *Id*. at 1346.

Austin operates a blog called *LET IT ALL FALL DOWN!* and on November 28, 2019, Austin posted, "I have no home, I claim no home. I claim no property." R. at 26. This post should not be taken literally. As seen in *Hawkins*, an affirmative disavowal of ownership is required, rather than a passive failure to claim incriminating evidence. *Hawkins*, 681 F.2d at 1346. This post is not evidence that Austin rejected her property rights or that she has disclaimed an interest in her property because it is poetry in a blog that she utilizes to express herself.

Additionally, the fact that Austin failed to assert her property interest in her belongings and in the vehicle at the time of the search is immaterial. The *Hawkins* court explained that "we do not mean to express by our ruling that a defendant must necessarily claim a property interest in the article at the time of the search." *Id*.

Further, even if this court finds that Austin disclaimed her property rights, the timing of the alleged disclaimer is an important consideration. The court in *Hawkins* explained that the expectation of privacy must exist at the time of search. If the court finds Austin's disclaimer valid, it occurred on November 28, 2019. R. at 26. The search and arrest occurred on January 3, 2019. R. at 3. Therefore, the disclaimer would not be dispositive because it did not occur at the time of the search, and Austin continued to maintain an expectation of privacy.

B. Austin had an objective expectation of privacy in the YOUBER vehicle because Austin lawfully possessed the vehicle at the time of the search.

The defendant's subjective expectation of privacy must be objectively reasonable under the circumstances. *Smith v. Maryland*, 442 U.S. 735, 740 (1979). Society does not recognize as reasonable the privacy rights of a defendant whose presence at the scene was "wrongful." *United States v. Roy*, 734 F.2d 108, 110 (2nd Cir. 1984). Thus, someone in otherwise lawful possession and control of a rental vehicle 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. Austin was in lawful possession of the YOUBER vehicle because Lloyd did not explicitly prohibit Austin from continuing to use her YOUBER account.

1. *Austin lawfully possessed the vehicle because she had implicit permission to use the YOUBER account based on her long history of utilizing the vehicle rental service.*

An individual 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. In *Byrd*, the defendant was pulled over for a traffic infraction. *Id*. at 1521. The officer learned that the vehicle was a rental and that the defendant was not listed in the agreement. *Id*. at 1521. Because of this, the officer stated that he did not need the defendant's consent to search the vehicle that revealed body armor and forty-nine bricks of heroin. *Id*.

Subsequently, the defendant's motion to suppress the evidence was denied. *Id*. This Court reversed, noting that "one of the main rights attaching to property is the right to exclude others, and in the main, 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 1527.

The Court in *Byrd* found this situation similar to *Jones*, explaining that Jones had a reasonable expectation of privacy in his friend's apartment because he had complete lawful possession and dominion and control over the apartment and could exclude others from it. *Id*. at 1522. The fact that the defendant was not listed on the rental agreement was therefore not dispositive because "the central inquiry at this point turns on the concept of lawful possession." *Id*. at 1539. Therefore, the defendant in *Byrd* had a reasonable expectation of privacy because the defendant's girlfriend, the listed user on the rental agreement, consented to the use of the vehicle. *See United Sates v. Muhammad*, 58 F.3d 353, 355 (8th Cir. 1995) (holding that the defendant must present at least some evidence of consent or permission from the lawful owner/renter to give rise to an objectively reasonable expectation of privacy).

Here, the history of the YOUBER account is important. As evidenced by Lloyd's testimony, Lloyd provided Austin with access and consent to use her login information during their relationship. R. at 19. In September 2018, Lloyd and Austin's relationship ended, yet Austin continued to use the account. Although Lloyd testified that she did not give Austin

permission to use the account, Lloyd failed to explicitly prohibit Austin from using it. R. at 20. Further, the fact that Lloyd characterized the end of their relationship as a "break" demonstrates that the relationship between Lloyd and Austin was not permanently severed. Therefore, Austin continued to be implicitly permitted to use the YOUBER account. R. at 18.

2. *Austin was not in wrongful possession of the YOUBER vehicle because Lloyd did not expressly prohibit Austin from using it.*

A defendant in wrongful possession of property may not contest its search since he or she does not have any personal, reasonable, and legitimate expectation of privacy in that property and may not vicariously invoke the owner's privacy rights. *Rakas*, 439 U.S. at 141, n. 9.

In *United States v. Schram,* the Ninth Circuit held that "[…] a defendant may not invoke the Fourth Amendment to challenge a search of land upon which he trespasses, calling this argument 'frivolous'." *United States v. Schram*, 901 F.3d 1042, 1044 (9th Cir. 2018). In *Schram*, law enforcement believed that the defendant was responsible for a local bank robbery. *Id*. at 1043. The officers began their search for the defendant at his girlfriend's home. *Id*. at 1043. Officers found the defendant there and seized relevant evidence. *Id*. The defendant attempted to suppress the evidence seized, but the court denied the motion because the defendant was prohibited from being at his girlfriend's home due to a no-contact order. *Id*. The court compared the defendant's presence to that of a burglar. The court explained, "[…] 'like a trespasser, a squatter, or any individual who occup[ies] a piece of property unlawfully,' an individual whose presence in a home is barred by a court no-contact order lacks 'any expectation of privacy' in such place 'that society is prepared to recognize as reasonable'." *Id.* at 1046.

The court concluded that the defendant lacked a legitimate expectation of privacy in his girlfriend's home because he was prohibited from being there due to the no-contact order, and therefore could not challenge the search on Fourth Amendment grounds. *Id. See United States v.*

Roy, 734 F.2d at 110 (holding that an escaped inmate may not claim a legitimate expectation of privacy in his automobile because the escapee is no more than a trespasser on society).

In *United States v. Lyle*, the Second Circuit held that "[…] the concept of lawful possession is central to the expectation of privacy inquiry, for a 'wrongful' presence at the scene of a search would not enable a defendant to object to the legality of the search." *United States v. Lyle*, 919 F.3d 716, 727 (2nd Cir. 2019). The court explained, "Thus, 'a person present in a stolen automobile at the time of the search may [not] object to the lawfulness of the search of the automobile' regardless of his level of possession and control over the automobile." *Id*. at 728.

In *Lyle*, the officers approached the defendant as he was exiting a vehicle because he had a knife clipped to his pants. *Id*. at 723. The officers requested the defendant's driver's license, and the defendant produced a New York State ID with the expiration date scratched off. *Id*. The officers confirmed that the defendant's driver's license was suspended. *Id*. The officers arrested the defendant and impounded the rental vehicle since the defendant was not listed as an authorized user. *Id*. An inventory search of the vehicle revealed over one pound of methamphetamine and approximately $39,000 in the trunk. *Id.* The lower court denied the defendant's motion to suppress, finding that he did not have a reasonable expectation of privacy in the rental car because he was not an authorized user under the rental agreement. *Id*. at 725.

The Second Circuit upheld the denial of the defendant's motion to suppress because the defendant was not only an unauthorized driver, but also an unlicensed one. *Id*. at 729. The court also found the facts in *Byrd* to be distinguishable by explaining that "because Lyle did not have a valid driver's license, it was unlawful for him to be operating the vehicle." *Id*. The court concluded that because the defendant was driving the vehicle illegally, he did not have lawful possession or control, and therefore lacked standing to challenge the search. *Id*. at 730.

Schram and *Lyle* provide guidance. As *Schram* demonstrates, a violation of a lawful no-contact order bars any expectation of privacy. *Schram*, 901 F.3d at 1046. As *Lyle* demonstrates, driving without a license, a violation of the law, also bars any expectation of privacy. *Lyle*, 919 F.3d at 730. Thus, the test for lawful possession should be determined by the legality of the conduct and whether there was an explicit prohibition to use by the owner or authorized driver. Austin was lawfully using the vehicle since she was lawfully permitted to do so by having her driver's license. R. at 2. Further, Lloyd did not expressly prohibit Austin from continuing to use her YOUBER account. Austin acted with implied consent based on their relationship and her history of using the account. Thus, Austin's use is not equivalent to the standards set out in *Schram* and *Lyle*, as she was in lawful possession with implied permission.

Therefore, Austin respectfully requests that this Court reverse the Thirteenth Circuit's finding that Austin lacked standing to contest the search of the rental vehicle because Austin had a reasonable expectation of privacy.

II. The acquisition of Austin's YOUBER location data was a search under the Fourth Amendment because it violated her reasonable expectation of privacy, and under *Carpenter v. United States* because the location data is akin to CSLI and thus falls within the exception the court carved out of the third-party doctrine.

The Fourth Amendment of the Constitution protects against unreasonable searches and seizures. In determining whether the search was unreasonable, courts require proof that the government intruded "into the zone of privacy," illustrated through physical invasion or forms of electronic surveillance. *Rakas*, 439 U.S. at 134. Historically, no matter the type of surveillance, the intrusion would be interpreted by analyzing the reasonable expectation of privacy under the *Katz* test, and the property interest asserted under the trespass test. *United States v. Jones*, 565 U.S. 400, 412 (2012). As technology advances, there has been a greater reliance on *Katz*. *Id*.

The third-party doctrine is an exception to the reasonable expectation of privacy test from *Katz*. Under the third-party doctrine, information voluntarily disclosed to a third-party is not granted Fourth Amendment protections. *United States v. Miller*, 425 U.S. 435, 443 (1976). Historically, the doctrine was applied broadly, until the court in *Carpenter* narrowed its interpretation. The court in *Carpenter* developed factors to determine when the third-party doctrine should apply. These factors consider "the deep revealing nature" of the information, "its depth, breadth, and comprehensive reach," and "the inescapable and automatic nature of its collection." *Carpenter v. United States*, 138 S. Ct. 2206, 2223 (2018).

A. The acquisition of Austin's location data was a search under the Fourth Amendment because it violated her reasonable expectation of privacy.

Under *Katz*, a Fourth Amendment search occurs when police invade an area that the person has a reasonable expectation of privacy in. *Katz v. United States*, 389 U.S. 347, 361 (1967). A defendant has a reasonable expectation of privacy when: (1) the defendant has shown that he or she has a subjective expectation of privacy, and (2) society would find it reasonable to grant such privacy interest Fourth Amendment protection. *Id.*

1. *Austin had a subjective expectation of privacy in her location data because she did not voluntarily share it with YOUBER.*

An individual has a subjective expectation of privacy when it is "shown that he sought to preserve something as private." *Smith v. Maryland*, 442 U.S. 735, 740 (1979). Courts have carved out an exception to this notion, the third-party doctrine. Under the third-party doctrine, information provided to third parties is not commonly granted Fourth Amendment protection, even if the information is provided "for a limited purpose and the confidence placed in the third-party will not be betrayed." *Miller*, 425 U.S. at 443.

The court in *Jones*, however, found a problem with applying the third-party doctrine in

all situations. *Jones*, 565 U.S. at 957. People constantly reveal information to third parties "in the course of carrying out mundane tasks" whether they are aware or not, and as such, it would not be reasonable to assume that they are continuously volunteering to share their information with third parties as they perform these tasks. *Id*. Thus, the third-party doctrine presents an obstacle in the age of people choosing to share much of their lives with the world.

While it may be valid to assume that people do not consider the ramifications of always sharing their information, Austin does not fit in that category. Austin is a very private person who is selective about what information she shares on the internet, due to her desire to remain off the "grid." R. at 18. When using YOUBER, Austin and Lloyd have created a system where Austin is able to essentially hide behind Lloyd's YOUBER account. The problem is that unbeknownst to Austin, YOUBER, the third-party in this situation, has been tracking her location data since she began using Lloyd's account. Each time Austin rents a YOUBER car, YOUBER is tracking where that car goes "every two minutes." R. at 22.

Austin did not consent to such tracking because the warning that YOUBER will track location data was only communicated to Lloyd. R. at 20. Lloyd was the only one to complete the initial signup period, and once completed, users are not reminded of the tracking again. R. at 24. Thus, if two people were to share a YOUBER account and only one person completed the initial signup period, the other user would not be notified that YOUBER intends to track them, which is the exact situation with Austin and Lloyd. Absent information that Lloyd told Austin about YOUBER's tracking, it is reasonable to expect that Austin was not aware of it. R. at 24.

By applying the third-party doctrine to this case, the court is telling Austin, who prefers to keep her life private, that she has now voluntarily shared her location data with YOUBER even though she did not know that YOUBER was taking such measures. As such, Austin's

private location data should be protected as part of her subjective expectation of privacy, outside the confines of the third-party doctrine.

2. *Austin's expectation of privacy is one that society would expect to find reasonable because she had a legitimate interest in asserting that her location data remain private.*

An individual has an objective expectation of privacy when the privacy interest asserted is "justified or legitimate," measured by the degree of intrusion. *Oliver v. United States*, 466 U.S. 170, 177-78 (1984). In determining this degree of intrusion, courts weigh factors, such as: "(1) intention of the Framers of the Fourth Amendment, (2) the uses to which the individual has put a location, (3) and our societal understanding that certain areas deserve the most scrupulous protection from government invasion." *Id*.

a. Framers intended to protect the privacy rights of individuals, like Austin, from arbitrary government interference.

The Fourth Amendment "reflects the recognition of the Framers that certain enclaves should be free from arbitrary government interference." *Id*. Over time, what has been considered "arbitrary government interference" has expanded from protecting the privacy rights within a home, a car, and even personal belongings, to recognizing privacy protection from forms of electronic surveillance, such as GPS tracking. *Jones*, 565 U.S. at 404. The court in *Jones* held that the installation of the GPS device on Jones's car was a search as it was able to track Jones's exact movements. *Id*. The court further expressed concern over a GPS monitor's ability to "generat[e] a precise, comprehensive recor[d] of a person's public movements." *Jones*, 565 U.S. at 415. The government also tracked Jones for four weeks, leading the court to hold that the longer the period, the more "it impinges on expectations of privacy." *Id*. at 430.

With the exception of her blog posts, Austin has taken measures to keep her internet presence private and her location data is no different. If Austin knew that her information was

being shared with YOUBER, it would be reasonable to infer that she would have chosen not to use them, just as she has chosen to refrain from other social media. YOUBER, in their effort to keep their own cars safe, shared information with the government that had the ability to detail Austin's exact whereabouts for an extended period of time, not unlike the GPS tracking device placed on Jones's car.

The court in *Jones* also held that four weeks was long enough to constitute an intrusion on an expectation of privacy and thus constituted a search. *Id*. at 413. Detective Hamm's subpoena requested "all GPS and Bluetooth information related to the account Austin allegedly used between October 3, 2018 through January 3, 2019," about a three month period. R. at 3. If the court in *Jones* became concerned over four weeks, a three month period should cause greater concern, especially in light of the fact that GPS location data can show the precise whereabouts of the individual. The location data YOUBER provided to Detective Hamm during that three month period allowed him to intrude into Austin's life, without her knowledge, creating a legitimate expectation of privacy.

b. Austin's privacy was violated by the manner in which YOUBER tracked her information because it collected both her public and private locations.

The purpose of the Fourth Amendment is to protect an individual's right to engage in activities "without fear of intrusion by private persons or government officials." *Oliver*, 466 U.S. 170 at 191. While courts have traditionally held an individual did not have a reasonable expectation of privacy while driving on public streets, once that individual stopped in front of their home, their privacy rights began. *United States v. Knotts*, 460 U.S. 276, 281 (1983).

However, that is not how YOUBER tracks. Once the user's app determines that the user is inside the YOUBER car, YOUBER begins to track that car's movements no matter where they

are driving and does not stop until the user is no longer inside YOUBER car. R. at 22. From the time Austin starts her car, to the time she gets to the place she is staying for the night, YOUBER is tracking everything. In complying with Detective Hamm's subpoena, YOUBER provided "all GPS and Bluetooth information" related to Austin's account, without any restriction or limitation. R. at 3. Thus, Detective Hamm was able to intrude heavily into Austin's life by viewing her private whereabouts.

c. Societal understanding that intimate details, like Austin's location data, deserves the most scrupulous protection from government invasion.

When applying *Katz*, courts have focused on whether the government was able to secure "intimate details" with the technology used. *Kyllo v. United States*, 533 U.S. 27 (2001).With the development of smartphones, these intimate details are now even easier to retrieve. *Jones*, 565 U.S. at 430. Although smartphones provide convenience, they can also reveal intimate details about a person's life, their destinations, daily schedules, and internet history. It is for this reason that information held within a smartphone has typically been viewed as needing more protection from governmental invasion.

The vast amount of information YOUBER collects is no different. Through the use of GPS tracking and Bluetooth signals, YOUBER has the ability to find any place the user has gone. Such an extensive look into a person's private life ought to receive as much caution and protection as one would expect to have in their smartphone. Although YOUBER may need this information for business purposes, allowing Detective Hamm the ability to obtain all of Austin's information through a subpoena opens the door to a dangerous precedent.

The tracking data YOUBER stores should be treated more seriously and with consideration as to what information actually needs to be shared. This is not just about YOUBER

disclosing three months of Austin's location data. R. at 3. YOUBER has reported that they have over 40 million users. R. at 22. Let's assume that YOUBER's 40 million users, except for Austin, were aware of their tracking policy. It is possible that two users share one account, but that only one completed the initial signup period. This would mean that only one of the users, the one who completed the initial signup period, would be aware of YOUBER's tracking policy and the other would not. Under that situation, at least some of the 40 million users would be at risk of YOUBER disclosing each place they have been, from the time they created the account.

When considering the factors measuring the degree of intrusion, the acquisition of Austin's location data was highly intrusive in the detailed and overly broad information shared as to Austin's whereabouts. Such a high degree of intrusion provides Austin with a legitimate interest in protecting her privacy that society would find reasonable. Therefore, Austin respectfully requests this Court find that the acquisition of Austin's location data constitutes a search under the Fourth Amendment as a violation of her reasonable expectation of privacy under the *Katz* test.

B. The acquisition of Austin's location data was a search under *Carpenter v. United States* because Austin's location data is akin to CSLI and thus falls within the exception the court carved out for the third-party doctrine.

The third-party doctrine eliminates any Fourth Amendment protection when a person voluntarily exposes or shares their private information. However, the court in *Carpenter* narrowed the third-party doctrine as it pertains to individual who voluntarily discloses their cell-site location information ("CSLI"), which "can reveal an individual's location within around 15 feet." *Carpenter*, 138 S. Ct. at 2225.

In 2011, Timothy Carpenter and other suspects accused of robbing Radio Shack and T-Mobile Stores were arrested. *Id*. at 2213. One of the suspects supplied the FBI with the cellphone

numbers of some of the accomplices, which the FBI then used to find additional numbers. *Id*. The FBI provided that information to prosecutors who "applied for court orders under the Stored Communications Act to obtain cell phone records for petitioner Timothy Carpenter and several other suspects." *Id*. at 2212. Once the application was granted, Carpenter's wireless carriers, MetroPCS and Sprint, were ordered to provide "cell/site sector [information]" during the time the robberies occurred. From that information, the Government was able to obtain "12,898 location points cataloging Carpenter's movements – an average of 101 data points per day." *Id*.

The lower courts held that Carpenter voluntarily shared his location information with his wireless carriers and therefore was not entitled to Fourth Amendment protection under the third-party doctrine. *Id*. at 2213. The Supreme Court reversed, holding that government attainment of Carpenter's CSLI was in fact a search. *Id*. at 2208. The court considered the history of the third-party doctrine and the privacy concerns acknowledged by the court in *Jones*. While the third-party doctrine has often been applied to telephone numbers and bank records, the court in *Carpenter* was not convinced that it should be applied to CSLI. *Id*. at 2217. The court thereby narrowed the scope of the third-party doctrine to expressly exclude CSLI, finding that "an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI." *Id*.

According to the court in *Carpenter*, "*Miller* and *Smith* may not apply when the Government obtains the modern-day equivalents of an individual's own 'papers' or 'effects,' even when those papers or effects are held by a third party." *Id.* at 2230. The court noted that "just because you have to entrust a third-party with your data doesn't necessarily mean you should lose all Fourth Amendment protections in it." *Id.* at 2270. Thus, the court in *Carpenter* not only woke up the third-party doctrine established by *Smith* and *Miller*, they began to see the

problems with universally applying the doctrine to a society that is constantly advancing their technology, especially as it pertains to CSLI. *Id.* at 2217.

The court, therefore, provided factors to determine when the third-party doctrine is appropriate, based on how revealing the information is and how it compares to CSLI. The factors include: (1) "the deeply revealing nature[…], (2) its depth, breadth, and comprehensive reach, and (3) the inescapable and automatic nature of its collection." *Id*. at 2223.

1. *Austin's location data was deeply revealing in nature, similar to CSLI.*

The focus is on the type of information shared with the government or law enforcement. As Justice Sotomayor importantly noted in her concurring opinion in *Jones*, location data has the ability to reveal an individual's "familial, political, professional, religious, and sexual associations." *Jones*, 565 U.S. at 415. YOUBER's method of tracking their user's location data ought to be treated with the same level of concern. As previously mentioned, YOUBER tracks their cars every "two minutes" with no exceptions. R. at 22. Once a user steps into their YOUBER car and engages the YOUBER app, YOUBER begins to track, allowing them to see each place a YOUBER user takes their car, private or otherwise. Just as the court in *Carpenter* held that CSLI can reveal a person's physical movements and detail their physical presence within a range of around "15 feet," YOUBER has created a system that can accomplish something similar, but even more precise. *Carpenter*, 138 S. Ct. at 2220.

2. *The depth, breadth, and comprehensive reach of the location data YOUBER stores.*

Depth focuses on the revealing nature of the location data, similar to the first factor; breadth analyzes how long the data has been recorded; and comprehensive reach focuses on the number of users tracked in the database. *Carpenter*, 138 S. Ct. at 2218. The breadth of location data YOUBER has stored on Austin is significant. Austin likely began using YOUBER when

Lloyd did, on July 27, 2018. R. at 2. The subpoena Detective Hamm served on to YOUBER was for a three month period, ranging from October 3, 2018 to January 3, 2019. R. at 3. Austin relies heavily on YOUBER for transportation, if not solely. While YOUBER only allows a user to rent a car for a maximum of two weeks, the user can simply rent another car with their account once they reach that maximum. Based on her reliance on YOUBER, Austin has likely used several different YOUBER cars throughout her two years using the app. With YOUBER's ability to track movements every two minutes, it is reasonable to infer that YOUBER has extensive tracking information for Austin and would have the ability to discover her patterns and where she chooses to travel.

Turning to comprehensive reach, YOUBER has reported that they serve "more than 40 million users across the United States." R. at 2. This means that millions of people across the United States are being tracked. Whether these users are aware or not, their information is at risk of government intrusion, similar to Austin.

3. *The inescapable and automatic nature of YOUBER's method to track their users.*

The inescapable and automatic nature of the collection focuses on how the information is collected and whether the targets of surveillance assumed the risk, thereby knowingly exposing their information to a third party. *Carpenter*, 138 S. Ct. at 2223. YOUBER only informs users that they will be tracked during the initial signup period and they are not warned a second time. R. at 23. Thus, users who completed the initial signup period naturally assumed the risk and thereby consented to YOUBER's tracking once they then engage the app and begin to drive.

The problem is that Austin did not do that, only Lloyd did. Austin did not voluntarily disclose her information to YOUBER because she did not know YOUBER would have expected her to. Further, it is reasonable to infer that Austin would not have consented to such measures if

she was informed, given her desire to remain off the grid. R. at 18. It would seem that tracking such as this would be a nightmare to someone who does their best to remain free from "The Man," whom she hates. R. at 18. While other YOUBER users could have volunteered their tracking information to YOUBER, Austin did not. Austin did not voluntarily disclose anything; she assumed no risk when using YOUBER.

Based on the three factor test in *Carpenter*, Austin respectfully requests this Court follow the concerns presented in *Carpenter* and find that YOUBER's acquisition of data was a search under *Carpenter* and thus should fall within the exception of the third-party doctrine the court carved out for CSLI. The court in *Carpenter* was correct to hold that just because someone gives their private information to a third party, that does not mean they should lose Fourth Amendment protection. *Carpenter*, 138 S. Ct. at 2270. Just because society advances does not mean that privacy should be reduced. Therefore, Austin requests this court find that the acquisition of Austin's location data constitutes a search under *Carpenter v. United States*.

CONCLUSION

Austin respectfully requests this Court reverse and remand the Thirteenth Circuit's decisions denying her motion to suppress the evidence gathered from her initial arrest, and her motion to suppress the location data Detective Hamm obtained from YOUBER.

First, the Thirteenth Circuit incorrectly held that Austin lacked standing to challenge the warrantless search of the rental vehicle. Austin exhibited a reasonable expectation of privacy in the vehicle and thus was entitled to Fourth Amendment protections.

Second, the Thirteenth Circuit incorrectly held that the acquisition of Austin's location data did not constitute a search under the Fourth Amendment and *Carpenter v. United States*. The acquisition of Austin's location data was a search under the Fourth Amendment because it

violated her reasonable expectation of privacy. Additionally, the acquisition of her location data was a search under *Carpenter v. United States* because Austin's location data is akin to CSLI and thus should fall within the exception the court in *Carpenter* carved out of the third-party doctrine.