Team: P3

No. 4-422

IN THE

SUPREME COURT OF THE UNITED STATES

FALL TERM 2019

_____

Jayne Austin,
Petitioner,

v.

United States of America,
Respondent.

_____

ON WRIT OF CERTIORARI FROM THE UNITED STATES
COURT OF APPEALS FOR THE THIRTEENTH CIRCUIT

_____

BRIEF FOR THE PETITIONER

Competitor Code P3

Counsel of Defendant-Petitioner

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STATEMENT OF ISSUES

1. Under *Jardines*, a defendant has standing to contest a search when they have shown a noncriminal property interest or an expectation of privacy as defined by the *Katz* test. Ms. Austin was not given explicit permission to rent the vehicle using her significant other's rental account but, as the sole driver, was able to demonstrate total possession and control of the car at the time it was searched. Does Ms. Austin have standing to contest a search?

2. Under *Carpenter*, a defendant holds a recognized privacy interest in their location information gathered through their cellphone even if obtained from a third-party. Ms. Austin's cellphone sent her location data every two minutes through the YOUBER application while using a YOUBER vehicle. Does the government's acquisition of Ms. Austin's location data from YOUBER two days after her arrest constitute a search under *Carpenter*?

STATEMENT OF FACTS

Ms. Austin rented a YOUBER vehicle when she was pulled over by Officer Kreuzberger for a traffic violation. R. at 2. During the routine traffic stop, Ms. Austin verified her license information and the rental information for the YOUBER vehicle on her cellphone. R. at 2. Officer Kreuzberger noticed Ms. Austin's name was not listed as the renter on the rental agreement. R. at 2. Immediately, Officer Kreuzberger told Ms. Austin he did not need her consent to search the vehicle she was driving because her name was not listed on the rental agreement. R. at 3. Officer Kreuzberger then proceeded to search the rental vehicle without consent and searched the trunk where Ms. Austin kept her personal items. R. at 3. It was during the non-consensual search that Officer Kreuzberger found personal items such as shoes and music records as well as items indicating illicit activity which were included in the motion to suppress. R. at 3. Officer Kreuzberger continued his search during this traffic stop and found more personal items like food and bedding in the backseat of the vehicle indicating it looked like it had been "lived in." R. at 3.

After Officer Kreuzberger conducted a non-consensual search of the rental vehicle, he received a dispatch to look out for a 2017 Black Toyota Prius with a YOUBER logo possibly involved in a bank robbery. R. at 3. The vehicle from dispatch matched the description of the rental vehicle Ms. Austin was driving. R. at 3. Officer Kreuzberger arrested Ms. Austin based on the contents obtained from the non-consensual search and the dispatch call made after the non-consensual search on suspicion of bank robbery. R. at 3.

YOUBER boasts 75 million users world-wide with 40 million of those individuals residing in the United States alone. R. at 22. YOUBER allows users to rent YOUBER vehicles, denoted with a pink YOUBER logo on the vehicle, through their phone. R. at 23. The user can

rent the vehicle through a YOUBER app located on the user's phone, which tracks their phone location when using a YOUBER vehicle. R. at 22. The GPS and Bluetooth trackers automatically send information once the user is in the rental vehicle without notifying the user before entering. R. at 22. Users are only notified they may be tracked during the initial sign-up period. R. at 23. No additional notifications are given to the end user when renting a vehicle. *Id.*

Ms. Austin used the YOUBER app on her personal cellphone and used the YOUBER account of her on-and-off again partner, Ms. Lloyd. R. at 2. Ms. Austin is an authorized user on Ms. Lloyd's credit card account. In this instance, and past scenarios, Ms. Austin used this credit card to pay for her rental vehicle. R. at 2. The YOUBER app tracked Ms. Austin's personal cellphone when using YOUBER vehicles and sent location information every two minutes creating a detailed map spanning months. R. at 2-3.

Two days after Ms. Austin's arrest, based on Officer Kreuzberger's non-consensual search, Detective Boober Hamm took on her case. R. at 3. There were similar crimes reported between October 15, 2018 to December 15, 2018 taking place in California and Nevada. R. at 3. Days after Ms. Austin's arrest, the detective subpoenaed all GPS and Bluetooth information related to Ms. Austin's YOUBER account between October 3, 2018 to January 3, 2019. R. at 3. The information came from tracking Ms. Austin's personal cellphone. R. at 3-4.

SUMMARY OF ARGUMENT

This Court should vacate the appellate court's decision on Ms. Austin's motions to suppress evidence from the car search and location information acquired. Ms. Austin has standing in the rental car and the location data taken from Ms. Austin's phone represented an intrusion on her privacy interests. "Few protections are as essential to individual liberty as the right to be free from unreasonable searches and seizures." *Byrd v. United States*, 138 S. Ct. 1518,

1526 (2018). With this in mind, the Court has continually reemphasized that the Fourth Amendment remains essential to prevent law enforcement's unbridled discretion to rummage at will through an individual's private effects. *Id.* (citing *Arizona v. Gant*, 556 U.S. 332, 345 (2009)). Therefore, when faced with an unwarranted search of a vehicle during an ordinary traffic stop, without probable cause or consent of the driver, this Court should scrutinize the actions of the government to ensure it has not infringed upon the protected rights of individuals. In this same manner, as technology and society continue to advance, this Court has a duty to ensure the protection of detailed location information acquired from personal digital devices that allow an officer to record intimate details of a person's private life.

A driver and sole occupant of a vehicle that is able to show possession and control over vehicle acquired through noncriminal means has demonstrated a sufficient privacy interest to challenge a search of the vehicle. Under both *Jardines* and *Jones*, a driver that has shown a noncriminal property interest in a vehicle has the right to privacy in that property. The lower court errs in its misplaced attempt to create a brightline rule focused on the presence of explicit permission. The facts in this case and *Byrd* exemplify the reasons why this Court must continue to reinforce the baseline rules of standing to protect against unwarranted governmental intrusion on the private life. Ms. Austin was the key holder, driver, and sole occupant of the vehicle and when pulled over was able to present both her license and her digital rental agreement. R. at 2. This Court should recognize Ms. Austin's noncriminal interest in property is sufficient to challenge the unwarranted nonconsensual search of her rental vehicle.

The government's acquisition of location data which recorded Ms. Austin's movement for months constituted a search under the Fourth Amendment and this Court's recent decision in *Carpenter v. United States*. 138 S. Ct. 2206 (2018). The Court in *Carpenter* concluded the

pervasively and automatically recorded location information, gathered through an individual's cellphone, created a privacy interest. This privacy interest is not eliminated even when the information is acquired from the third-party recording those movements. The same analysis controls this case. Ms. Austin's cellphone connected to the YOUBER vehicles she rented through her cellphone application. While connected to the YOUBER vehicles, her cellphone sent location information every two minutes and was recorded by YOUBER and Smoogle. This information created a detailed map spanning months of Ms. Austin's movements, just as in *Carpenter*. The detective's acquisition of the location information after Ms. Austin's arrest constituted a search even if obtained from YOUBER. This Court explicitly declined to extend the third-party exception to a search to such detailed information. *Id.* at 2217. The lower court's denial of Ms. Austin's motion to suppress the location data obtained from YOUBER was in error.

STANDARD OF REVIEW

Violations of the Fourth Amendment are assessed *de novo* by this Court as they are questions of law. *See United States v. Arvizu*, 534 U.S. 266, 275 (1996) (citing *United States v. Ornelas*, 517 U.S. 690, 691 (1996)). *De novo* review allows the Court to clarify legal principles. *Id.* This allows the Court to unify precedent and "provide law enforcement officers with the tools to reach correct determinations beforehand." *Id.*

ARGUMENT

I. MS. AUSTIN HAS STANDING TO CONTEST AN UNWARRANTED SEARCH IF SHE IS ABLE TO SHOW POSSESSION AND CONTROL OF THE VEHICLE ACQUIRED THROUGH NONCRIMINAL MEANS.

This Court has found that a defendant has standing to challenge government invasions of privacy when she "has had [her] own Fourth Amendment rights infringed by the search and seizure which [s]he seeks to challenge." *Rakas v. Illinois*, 439 U.S. 128, 133 (1978). A

Defendant may show a sufficient privacy interest by demonstrating a noncriminal property interest under "the traditional property-based understanding of the Fourth Amendment." *Florida v. Jardines*, 569 U.S. 1, 11, (2013). This traditional test has been supplemented by allowing a defendant to alternatively show an expectation of privacy as described in Justice Harlan's concurrence in *Katz. Katz v. United States*, 389 U.S. 347 (1967). While this case involves the unwarranted search of a vehicle occupied by a driver not listed on the agreement, "[t]he mere fact that a driver in lawful possession or control of a rental car is not listed on the rental agreement will not defeat his or her otherwise reasonable expectation of privacy." *Byrd v. United States*, 138 S. Ct. 1518, 1531 (2018).

The appellate court erred in finding a lack of standing to contest the unwarranted search of the vehicle. First, Ms. Austin demonstrated a lawful property interest in the vehicle sufficient under the traditional property-based test to merit standing. Ms. Austin's property interest in the vehicle is proven by her possession and control of the vehicle at the time of the search and the noncriminal means by which she acquired the property interest. Second, Ms. Austin would alternatively have a legitimate and reasonable expectation of privacy in the vehicle. The lower court's focus on explicit permission ignores the totality of the circumstances that warrant an expectation of privacy in the vehicle.

A. Under *Jardines* and *Jones*, a defendant's possession and control of property creates a protected privacy interest.

An individual possessing property rights acquired through noncriminal means has standing to challenge a nonconsensual unwarranted search of that property. This Court has established that "[w]hen 'the Government obtains information by physically intruding' on persons, houses, papers, or effects, 'a search within the original meaning of the Fourth Amendment' has 'undoubtedly occurred.'" *Jardines*, 569 U.S. at 5 (quoting *Jones*, 565 U.S. at

406 n.3). The Court's recent holdings in both *Jones* and *Jardines* were decided with an explicit focus on the property rights and prevention of governmental trespass. Jones' property interest in his wife's car entitled him to be free from government invasion of that personal effect – even if Jones was not able to demonstrate a reasonable expectation of privacy in the car. *Jones,* 565 U.S. at 404. It was not necessary to address questions of expectation of privacy because the Fourth Amendment embodies "a particular concern for government trespass upon areas [persons, houses, papers, and effects] it enumerates," meaning that "Fourth Amendment rights [do] not rise or fall with the *Katz* formulation." *Jardines,* 569 U.S. at 11. As this Court continues to recognize, this property based test "supplements, rather than displaces, 'the traditional property-based understanding of the Fourth Amendment.'" *Byrd,* 138 S. Ct. at 1526 (citing *Jardines,* 569 U.S. at 11). Therefore, Jones' property interest as a bailee of the vehicle was independently sufficient for Jones to assert a Fourth Amendment challenge to the unwarranted search. This "18th-century guarantee" provides a "simple baseline" necessary to protect against government intervention with a property interest. *Jones,* 565 U.S. at 407, 411.

When determining whether an individual may contest an otherwise unquestionably illegal search, this Court should recognize the standing of a defendant that demonstrates legal possession and control over the searched property. In *Rakas*, the Court acknowledged that a defendant asserting standing must provide either "concepts of real or personal property law or to understandings that are recognized and permitted by society. One of the main rights attaching to property is the right to exclude others." *Rakas* 439 U.S. at 143 n.12. The Court in *Byrd* acknowledged that the exclusion of others had merited a demonstration of property interest in *Jones*. The Court recognized a legitimate property interest sufficient of Fourth Amendment standing if an individual "had complete dominion and control over the apartment and could

exclude others from it." *Byrd*, 138 S. Ct. at 1522 (citing *Rakas*, 439 U.S. at 149). In both *Byrd* and *Jones*, the property rights of the defendant were considered sufficient even when the defendant's interests did not stem from ownership. Therefore, if a defendant can prove possession and control of a vehicle, they have provided a protected property interest.

B. Ms. Austin's possession and control of the vehicle at the time of the search created a sufficient property interest in the vehicle.

Ms. Austin's case exemplifies the necessary possession and control sufficient to demonstrate property interest. The threshold for this initial question is low considering the standard would "without qualification, include thieves or others who have no reasonable expectation of privacy." *Byrd*, 138 S. Ct. at 1522 (noting that the Court continually rejects the standing of criminally acquired possession). Ms. Austin was the key holder, driver, and sole occupant of the vehicle. When approached by the officer, Ms. Austin was able to provide the rental agreement, a valid license, and had a direct relationship to the authorized driver. Similarly, Ms. Austin, identical to *Byrd*, "would be permitted to exclude third parties from it, such as a carjacker." *Byrd*, 138 S. Ct. at 1528-29. This showing of possession and control over the vehicle is a sufficient showing of property interest at the time of the search to merit a property interest.

Ms. Austin's property interest does not rise and fall based on the property interests of the other parties in this case. When an individual exhibits possession and control over property, she has demonstrated a property interest–even when a more legitimate owner exists. In the famous eighteenth century case, *Armory v. Delamirie*, the court explained that "the finder of a jewel, though he does not by such finding acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against all but the rightful owner." 93 Eng. Rep. 664, 664;1 Strange 505 (K.B. 1722) (Pratt, C.J.). Even an illegitimate sub-bailee would still possess a superior property interest than non-interested parties. Here, even if Ms. Austin did not acquire

absolute property rights, she demonstrated possession and control of the vehicle and neither YOUBER nor Ms. Lloyd made an effort to reclaim the property. Because she maintains an interest superior to non-interested parties, Ms. Austin possesses the ability to exclude third parties – including the government. The vehicle was not reported stolen, YOUBER maintained continual awareness of the vehicle's location, and had forgone its routine 24-hour checks. Because Ms. Austin exhibited both possession and control at the time of the search, a finding that YOUBER or Ms. Lloyd's superior property interest does not remove the temporary property interest of Ms. Austin.

The Court should take special care to protect these core concepts of property and privacy as our society transitions into a digital world. It is highly probable that society will soon see companies that offer services such as peer-to-peer vehicle rental, or membership-model car sharing that position the company only as an intermediary between the owner and renter. In such scenarios, it is quite possible that the original owner of a vehicle may never interact with renters – let alone give explicit permission to the individual. It is troubling to note that in this case, and *Byrd*, the law enforcement officers made a specific point to tell the driver they did not need consent to search the rental car because the driver would not have standing to challenge the search. Law enforcement officers are conscious of the standing doctrine and freely violate the privacy of a vehicle when they believe a person does not have standing to contest the violation. This reveals a disappointingly significant implication of the standing doctrine – law enforcement officers do not have to be concerned with respecting the privacy of individuals, but are focused on the collection of admissible evidence.

Even if the officers were correct in asserting that the driver lacks standing to challenge the search, this does not mean that their actions are suddenly noninvasive. To the contrary, the

law enforcement's use of this doctrine to justify unbridled discretion to rummage through a vehicle ensures the invasion of the government into private property. The officers were not concerned with the unquestionable property interest or expectation of privacy of the original owner. In *Byrd*, the officer provides that one of the reasons he followed the car was because he deducted it was a rental vehicle from the barcode on the window. *Byrd*, 138 S. Ct. at 1524. Considering this fact, 40 million American YOUBER car owners have unknowingly placed a bright pink target in the front window of their vehicle. As technology and the online rental market continue to advance, this Court should reinforce a rule that prevents intentional invasions of personal property. Acknowledging the property interest of the driver is critical to protecting the privacy interest of the owner.

C. Ms. Austin's property rights were lawfully acquired.

i. The lower court improperly merged its consideration of the legality of the contents of the vehicle with the issue of whether the possession of the vehicle itself was lawful.

The lower court's attempt to merge the criminal activities allegedly conducted in the vehicle into an evaluation of the legality of the possession of the rental is severely misplaced. The lower court puts the cart before the horse and argues that "Appellant also used this vehicle to commit crimes," and she "has no reasonable expectation of privacy in a vehicle she shares with third parties and uses in connection with illegality." R. at 12. The lower court's reasoning assumes that an expectation of privacy may be stripped based upon what is discovered after an otherwise unconstitutional search. However, the Court emphasizes in *Byrd* that the Fourth Amendment clearly prohibits "police officers unbridled discretion to rummage at will among a person's private effects." *Byrd*, 138 S. Ct. at 1526 (citing *Gant*, 556 U. S. at 345). The facts in this case represent this exact scenario. The record indicates the officer had absolutely no knowledge of what might be in the car when he conducted the search. He had no probable cause

and the record does not indicate he even possessed any suspicion of illegal activity. Regardless, he decided to conduct a search without a warrant and without requesting the consent of the driver. An officer's unconstitutional intrusion of an individual's home does not automatically remove the homeowner's privacy interest in the home if the unconstitutional search uncovers illegal activity inside the house. Even if a house is used in connection with illegality, the house's owner still has an expectation of privacy in their home. An officer cannot walk into a house and search for evidence of criminal activity to strip the homeowner of his right to challenge the search. Notably, the question of whether a defendant has the right to challenge a search is a separate issue from whether the officer's search is valid. The validity of unwarranted and nonconsensual physical search of the vehicle is not a question in this case. Whether Ms. Austin has property and privacy interests in the car, which provide the right to challenge a search is a wholly separate issue that cannot incorporate the fruits of the challenged search itself.

ii. Violations of private agreements cannot be automatically equated to criminal conduct.

Unless a defendant has criminally acquired the property in question property they have not waived their right to challenge an unwarranted search. This Court has provided a singular scenario where an individual that has proven possession and control would not have standing to challenge an unwarranted intrusion of privacy – a burglar or thief. In *Rakas*, the Court explained "wrongful" possession to mean possession obtained through violation of criminal law, and lawful possession to mean the opposite. *Rakas,* 439 U.S. at 141 n.9, 143 n.12. There is an important analytical difference between the laws that govern breaches of contract and breaches of the law. Contract provisions that "concern risk allocation between private parties" do not implicate Fourth Amendment rights. *Byrd,* 138 S. Ct. at 1529 (2018) (noting that violation of contractual provisions does not have "anything to do with a driver's reasonable expectation of privacy in the

rental car."). On one hand, contracts govern the private relations between individuals that have expressed intent to be bound. 15 Corbin on Contracts § 79.1 (2019). On the other hand, our laws are intended to govern the relationship between society and the government. While it is possible for breach of contract to also violate the law, a breach of contract does not independently remove a party's right to privacy from governmental invasion absent illegal activity. See *United States v. Smith*, 263 F.3d 571, 586 (6th Cir. 2001) (A breach in rental contract does not rise to illegal activity sufficient to remove an expectation of privacy); See also, *United States v. Dorais*, 241 F.3d 1124, 1129 (9th Cir. 2001) ("mere expiration of the rental period [in a motel room] … does not automatically end a lessee's expectations of privacy."). Defining wrongful possession to include instances of private subterfuge would justify obviously invasive scenarios. Law enforcement officers could conduct unwarranted searches of apartments anywhere individuals with cats live contrary to pet-policies or in motel rooms where a family does not pay a required surcharge for each person in the room. This Court should not strip defendants' right to assert their Fourth Amendment protection for a violation of a civil contract in the context of a legal property interest. If an individual's property interest was not acquired through criminal means, the government cannot ignore their privacy interest in that property.

iii. Ms. Austin acquired the vehicle in a noncriminal manner.

In this case, Ms. Austin's property interest in the vehicle was not acquired through criminal conduct. The lower court directly concedes it "do[es] not believe there exists sufficient evidence that Appellant stole the vehicle," given the facts of the case. R. at 12. This is because the facts in this case are not indicative of a car thief. YOUBER readily provides that one user may use the login information of another user. R. at 24. Ms. Lloyd made Ms. Austin an authorized user on her credit card, gave Ms. Austin her log-in information for her YOUBER

account, and has previously allowed Ms. Austin to rent vehicles on the account. R. at 18-19. Even assuming Ms. Lloyd and YOUBER did not intend to allow Ms. Austin's rental of this particular vehicle, there is a significant difference between stealing a car and exceeding the scope of an agreement. *See United States v. Howard*, 210 F.Supp.2d 503, 512 (D. Del. 2002). This Court has already acknowledged the difference of illegal actions and agreement violations. *Byrd*, 138 S. Ct. at 1529 (2018). Additionally, the lower court discusses Ms. Austin's use of Ms. Lloyd's YOUBER account with the misplaced assumption that Ms. Austin was trying to take advantage of the rental company. Unlike *Byrd*, who would not have been approved for a rental, Ms. Austin was a licensed driver who would have likely been able to rent a car from YOUBER had she decided to create an account of her own. As the record indicates, she had a history of renting vehicles on the app and paying Ms. Lloyd back in cash. Ms. Austin's possession and control of this rental car originates from legal conduct that should not remove her right to challenge an unwarranted search of the vehicle.

D. Alternatively, Ms. Austin had an expectation of privacy in the vehicle under the *Katz* test because she held possession and control of the vehicle

i. Under the Katz test, Ms. Austin's noncriminal possession and control independently show a legitimate expectation of privacy.

Even using the expectation of privacy test, a showing of noncriminal property interest in the vehicle is sufficient to demonstrate standing. Under *Byrd*, a driver of a vehicle will likely have a have a legitimate expectation of privacy based on the right to exclude. The Court in *Byrd* held that "the mere fact that a driver in lawful possession or control of a rental car is not listed on the rental agreement will not defeat his or her otherwise reasonable expectation of privacy." *Byrd*, 138 S. Ct. at 1531. The Court rearticulated that no "single metric or exhaustive list of considerations to resolve the circumstances in which a person can be said to have a reasonable expectation of privacy," but guiding the resolution of the *Byrd* decision was the concept that

"'[o]ne 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.'" *Byrd*, 138 S.Ct. at 1522 (citing *Rakas*, 439 U.S. at 143 n.12 (1978)). However, the Court in *Byrd* acknowledges that any driver in possession and control of a vehicle has the right to exclude others. While the Court continues to evaluate expectation of privacy, at least in part, based on the right to exclude, the Court's narrow *Rakas* holding - that legitimate presence alone was not an independently sufficient basis to prove an expectation of privacy - stands to exclude car thieves and burglars. Accordingly, an expectation of privacy may be derived noncriminal possession demonstrated by the right to exclude.

ii. The lower court's focus on explicit permission ignores the totality of the circumstances that for the expectation of privacy.

The lower court's demand for explicit permission inappropriately interprets the Courts requirements for an expectation of privacy under *Byrd*. First, if the Court believed that permission was the essential factor to establish whether driver has an expectation of privacy in a rental vehicle, it would seem intuitive for that topic to at least be acknowledged by the *Byrd* Court. However, the Court's opinion in *Byrd* did not focus on questions of permission, but rather emphasized the importance of possession and control such as the unauthorized driver's right to exclude third parties, like a carjacker, from the vehicle. In fact, despite the presence of permission logically weighing in favor of the court's finding of expectation of privacy, the Court does not make the slightest mention of the fact that Byrd's girlfriend gave him permission to drive the vehicle. *See Byrd*, 138 S. Ct. 1518.

The appellate court holding asks a defendant to show explicit permission to establish a valid property interest in a rental vehicle. R. at 12. By positioning explicit permission as the

lynchpin of a defendant's property interest, the lower court has attempted to create a rigid brightline test to define a defendant's expectation of privacy – something this court has explicitly rejected. In *Rakas*, the Court says, ""[t]he ultimate question, therefore, is whether one's claim to privacy from government intrusion is reasonable in light of all the surrounding circumstances," and that "no single factor invariably will be determinative." *Rakas*, 439 U.S. at 152. Other circuits have logically read the language of *Rakas* and interpreted this signal to look at the "totality of the circumstances." *See United States v. Smith*, 263 F.3d at 586. In *Smith*, the court considers circumstances such as the driver's valid license (present here), possession of the rental agreement (present here), relation to authorized driver (present here), and the driver's involvement in making the rental reservation–-even though ultimately his spouse was the authorized driver (present here). Because of these considerations, the court held that a defendant "was the de facto renter of the vehicle." *United States v. Smith*, 263 F.3d at 587. Here, we have a defendant that made a rental reservation, was licensed to drive, showed the officer the rental agreement, and had a direct relation to the authorized driver. While permission from the authorized driver can certainly be indicative of an expectation of privacy in the vehicle, it cannot be the sole determinant.

Furthermore, reliance on permission inevitably creates illogical scenarios. For example, consider a person that rents vehicle, but experiences a severe health related scenario that leaves them debilitated. If a friend or spouse drives the vehicle for the purpose of returning the car to the owner, but has not received the explicit permission of original renter, should the court equate their expectation of privacy to that of a car thief? While evaluating the totality of the circumstances would account for the logical lack of permission, under the holding from lower court, the spouse could be subjected to an unwarranted search with no expectation of privacy.

Likewise, a focus on explicit permission inappropriately characterizes how individuals (especially couples) use vehicles. Consider a situation where a woman's car breaks down and she requires a temporary rental replacement while her car is being repaired. She and her husband have a general understanding that the husband may drive the vehicle registered to her name without explicitly asking for permission. If the husband is pulled over in the original car registered to his wife's name, their implicit understanding, relationship, and collective use of property would likely show an expectation to privacy – even absent explicit permission. *See e.g. Pollard v. State,* 388 N.E.2d 496, 503 (Ind. 1979)(Citing *Rakas*' rejection of arcane property distinctions to hold that even absent permission, "Surely, a husband's expectation of privacy while in an automobile titled to his spouse is as legitimate as that of the wife."); see also *Jones,* 565 U.S. at 404 n.2 (affirming in dicta the lower court's recognition of a husband's expectation of privacy in a vehicle registered to his wife's name). It therefore seem logical that a couple's relationship, understanding, and collective use of property should also be considered when determining the expectation of privacy of a rental vehicle taking the temporary place of a personal vehicle. This Court must ask why a replacement vehicle should require an alteration of our understanding of the couple's agreement – especially considering *Rakas* rejection of "arcane distinctions developed in property and tort law between guests, licensees, invitees and the like." *Rakas,* 439 U.S. at 99. It does not make logical sense to require explicit permission when determining whether an individual has an expectation of privacy. Therefore, Ms. Austin has a sufficient privacy interest in the vehicle regardless of whether she received explicit permission to rent the vehicle.

II. ACQUISITION OF MS. AUSTIN'S CELLPHONE LOCATION DATA CONSTITUTED A SEARCH UNDER *CARPENTER* BECAUSE MS. AUSTIN HELD A REASONABLE EXPECTATION OF PRIVACY IN HER LOCATION INFORMATION.

The detective's acquisition of Ms. Austin's location information through her cellphone was a warrantless search without reason. A search occurs "[w]hen an individual 'seeks to preserve something as private,' and his expectation of privacy is 'one that society is prepared to recognize as reasonable,' we have held that official intrusion into that private sphere generally qualifies as a search and requires a warrant supported by probable cause." *Carpenter,* 138 S. Ct. at 2213.

Ms. Austin held a reasonable expectation of privacy in the vast amount of cellphone location information automatically collected by YOUBER. Individuals are protected from violations of privacy when the information to be protected is an expectation society deems as reasonable and the individual exhibited an actual (subjective) expectation of privacy. *Katz,* 389 U.S. at 361. There is both a reasonable expectation of privacy in their cellphone location information and Ms. Austin held an actual expectation of privacy in the information acquired by the government without a warrant.

The vast amount of location information collected constitutes a person's personal effects and "papers" protected under the Fourth Amendment of the Constitution. Today's modern world requires connectivity through cellphones, kept on our person almost constantly. All individuals hold a privacy interest in the large amount of intimate information available through our cellphones. This Court has also held individuals hold a privacy interest in this information even if obtained through a third-party. *See Carpenter*, 138 S. Ct. 2206. To hold otherwise would eviscerate the protections of the Fourth Amendment.

A. Individuals have a reasonable expectation of privacy in their movement and the vast quantities of data collected by cellphones is equivalent to the privacy interest individuals have in their "papers."

Cellphones hold and emit data related to the holders' intimate details of their lives.

Individuals have a reasonable expectation of privacy in their "persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. 4th A. "The 'basic purposes of this Amendment'…'is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.'" *Carpenter,* 138 S. Ct. at 2213. The Fourth Amendment was created as a protection against "writs of assistance" which "allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity." *Riley v. California,* 573 U.S. 373, 403 (2014). "Modern cellphones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans 'the privacies of life.'" *Id.* at 403.

In *Katz,* the Court held that "[T]he Fourth Amendment protects people, not places" and additionally ensures protections to individual's expectations of privacy. *Katz,* 389 U.S. at 351 (1967). The Court is concerned with the individual privacy interests of a person and seeks to protect them from arbitrary violations by government actors. Cellphone location information conveys vast amounts of intimate information about a person and this Court affirmed that society recognizes these privacy interests as one to be protected.

The importance of cellphone data has been well recognized by this Court. In *Riley*, the Court required a warrant before police can search a cellphone, even after arrest. *Riley*, 573 U.S. at 403. In *Carpenter*, the Court reaffirmed the privacy interests people hold in their cellphone location data. *Carpenter*, 138 S. Ct. at 2216. The cellphone's ability to chronicle past movements creates an equivalent of a person's "papers." *Id.* The large quantities of information held and conveyed by cellphones is a privacy interest well recognized by society and reaffirmed by this Court.

YOUBER collected vast amounts of information from Ms. Austin's cellphone which

provided past location data. The government's acquisition of that information was a search given how detailed and intimate the information supplied by Ms. Austin's cellphone was. YOUBER has 40 million users in the United States alone. R. at 22. YOUBER tracks the user's cellphone, not the vehicle itself when being used by the driver. R. at 22. YOUBER tracks and collects the information from the user's cellphone using GPS technology and Bluetooth signals when a user enters a YOUBER vehicle. R. at 22.

The type of information acquired by the government from YOUBER is exactly the type of information protected by the Fourth Amendment. In *Carpenter*, the CSLI (cell-site location information) collected about the suspects from third-party wireless carriers was found to be equivalent to the "papers" protected under the Fourth Amendment. *Carpenter*, 138 S. Ct. at 2215-16. Location data collected from cellphones "lie at the intersection of two lines of cases, both of which inform our understanding of the privacy interests at stake." *Id.*

The first interest is a "person's expectation of privacy in his physical location and movements." *Id.* (*see United States v. Knotts*, 460 U. S. 276 (1983) (finding the use of a beeper to enhance the police's real time tracking was limited but left open the question of twenty-four hour surveillance)). Five Justices in *Jones* "agreed that related privacy concerns would be raised by, for example, 'surreptitiously activating a stolen vehicle detection system' in Jones's car to track Jones himself, or conducting GPS tracking of his cell phone." *Carpenter*, 138 S. Ct. at 2215 (quoting *Jones*, 565 U.S. at 428). Whether or not movements were disclosed to the public, acquisition of that information impinges on an individual's privacy rights. *Id.* "Much like GPS tracking of a vehicle, cell phone location information is detailed, encyclopedic, and effortlessly compiled." *Carpenter*, 138 S. Ct. at 2216. As is present here, the information collected against Ms. Austin was vast and went back months. It provided a detailed map of everywhere she

travelled in a YOUBER. Implicating the very concerns protected by *Jones* and *Carpenter*.

The second interest is the line between what a "person keeps to himself and what he shares with others" which makes up the third-party doctrine. *Carpenter*, 138 S. Ct. at 2216. Past third-party cases considered infinitesimally small amounts of information as compared to cellphone location data implicated here. *See Smith v. Maryland*, 442 U.S. 735 (1979) (holding the data collected from a pen register, which records the outgoing phone numbers dialed by a landline, did not constitute a search); *United States v. Miller*, 425 U.S. 435 (1976) (holding checks and bank records turned over by Miller to the bank could be collected by the government without constituting a search)). This Court explicitly declined to extend *Smith* and *Miller* to cellphone location information. *Carpenter*, 138 S. Ct. at 2217. Location data collected by the detective spanned months and provided a detailed map of Ms. Austin's location data.

"A person does not surrender all Fourth Amendment protection by venturing into the public sphere. To the contrary, 'what [one] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.'" *Carpenter*, 138 S. Ct. at 2217 (quoting *Katz*, 389 U.S. at 351-52). Society's expectation is that law enforcement will not track every minute detail of movement over long periods of time. *Id.*

The Court recognized society's interest in protecting the privacy interest of information held by third parties which records the movement of users of a service. *See Carpenter*, 138 S. Ct. 2206. To allow otherwise would be to eviscerate the Fourth Amendment's protections against unreasonable searches and seizures. While this information may be invaluable in solving a crime, an interest of the government, it can still be obtained through a warrant for the information.

The information collected by the detective spanned months and included timestamps with location data for every two minutes when Ms. Austin used a YOUBER vehicle. This collected

data constituted a search without a warrant. If the Court were to hold a search had not occurred, each and every one of the users of YOUBER and any other location-based application, would be susceptible to a government fishing expedition in their private affairs. A person's medical history could be seen by the government when they find the user continually seeks medical treatment from a facility. An individual may seek medical marijuana through a legal dispensary in Colorado and return to their home in Kansas. The government would be able to find out whether an individual travels to an abortion clinic out-of-state. The individual does not lose their privacy interest in this information simply because it was collected by a third-party.

The government may still seek and obtain movement information after proving probable cause of a crime. This safeguard protects an individual's expectation of privacy in their movements. The amount of information collected by YOUBER is information we as society recognize a privacy interest in. Broad swaths of information collected about each individual and catalogued creates a personal "paper" which society seeks to protect.

B. Ms. Austin held a privacy interest in her location information which tracked her cellphone automatically every two minutes while using a YOUBER vehicle.

Ms. Austin holds a subjective expectation of privacy in her location data collected from her cellphone. There may be a lower expectation of privacy when information is shared with a third-party but "diminished privacy interests does not mean that the Fourth Amendment falls out of the picture entirely." *Carpenter*, at 2219 (quoting *Riley*, 573 U.S. at 392.). The Court in *Carpenter* emphasized the information collected by the wireless carriers occurred automatically without any active input by the individual. *Id.* at 2223 ("inescapable and automatic nature of its collection"). The Court considers the nature of the information being obtained and how great the expectation of privacy is in the information being sought. *Id.*

"[K]nowing about a risk doesn't mean you assume responsibility for it." *Carpenter*, 138 S.

Ct. at 2263 (J. Gorsuch, dissent). The lower court improperly concluded Ms. Austin's constructive knowledge that she was being tracked through her cellphone while using a YOUBER vehicle eliminated all privacy interests she held. R. at 15. The lower court ignores *Carpenter*'s reasoning which found the defendant had not actively given over the information but presumably knew cellphones emitted location information. *Id.* at 2223. Ms. Austin's constructive knowledge of the user agreement is irrelevant in our analysis of her subjective expectation of privacy.

YOUBER tracks the user's cellphone once an individual enters a YOUBER vehicle and updates the user's location every two minutes. R. at 22. The user is not prompted or notified they are being tracked when entering the vehicle, only in the initial sign-up period when creating a YOUBER account. R. at 22. There is no prompting or record after the initial sign-up period of the tracking. No affirmative action needs to be taken by the user before their cellphone is tracked. The user agreement given to account holders in the initial sign up period but they do not prompt the user entering a YOUBER vehicle after this period. Ms. Austin was not required to sign or agree to the YOUBER policy before entering the vehicles. Ms. Austin used Ms. Lloyd's account. She was not given notice that her cellphone would be tracked while driving. Ms. Austin held an expectation of privacy in her movements that were automatically and consistently tracked by YOUBER.

C. If the third-party doctrine were to apply, the exception would swallow the rule.

The third-party doctrine outlined in *Miller* does not apply because a cellphone conveys a vast and thorough amount of information that a user may be unaware they are sharing. With the advent of new technology, including smartphones, only individuals who avoid cellphones would hold any privacy protections in their past location. If the government is able to access cellphone

data then all citizen's privacy interest in intimate details, equivalent to "papers," is defeated. "[T]he fact that the individual continuously reveals his location to his wireless carrier implicates the third-party principle of *Smith* and *Miller*." *Carpenter,* 138 S. Ct. at 2216.

The third-party doctrine creates an exception to the warrant requirement when the government conducts a search of information held by a third party and the defendant holds a limited expectation of privacy in the information conveyed. *See Miller,* 425 U.S. 435. The third-party doctrine has only been applied by this Court in cases where the information affirmatively given to a third party is limited in nature.

Miller found a "limited expectation of privacy" in checks and bank records held by the defendant's bank. *Carpenter,* 138 S. Ct. at 2216 (citing *Miller,* 425 U.S. at 442.). The third party doctrine was also applied to the use of a pen register. *Carpenter,* 138 S. Ct. at 2216 (citing *Smith v. Maryland,* 442 U.S. 735, 742 (1979)). The Court found there was a limited expectation of privacy in the information a pen register records, the numbers a phone dials. *Id.* In *Smith,* the Court found the defendant voluntarily dialed the phone numbers which exposed the information to other machines. *Id.* The Court recognized the third party doctrine in cases where information is limited and there was an affirmative act on the part of the individual to turn over information to the third party. This is not the case here.

Ms. Austin's cellphone was automatically tracked when she entered the vehicle. The app on her phone did not prompt or notify her of the tracking. The app then proceeded to track Ms. Austin every two minutes, cataloguing a vast amount of information on Ms. Austin's movements without giving her any additional notice of YOUBER's actions.

"[W]hen *Smith* was decided in 1979, few could have imagined a society in which a phone goes wherever its owner goes, conveying to the wireless carrier not just dialed digits, but a

detailed and comprehensive record of the person's movements." *Carpenter,* 138 S. Ct at 2217. This Court explicitly rejected extension of the third-party doctrine to cellphone location records. *Id.* "We decline to extend *Smith* and *Miller* to cover these novel circumstances. Given the unique nature of cellphone location records, the fact that th information is held by a third party does not by itself overcome the user's claim to Fourth Amendment protection." *Carpenter*, 138 S. Ct. at 2217. "Whether the Government employs its own surveillance technology as in *Jones* or leverages the technology of a wireless carrier, we hold that an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI." *Carpenter*, 138 S. Ct. at 2217.

The Court recognized a high expectation of privacy in the whole of one's movement. *See Carpenter*. The issue in today's case is the tracking of Ms. Austin's personal cellphone. The government obtained cellphone location information from YOUBER which tracked Ms. Austin's movements. If YOUBER tracked their own vehicles and *provided* notice before each use of the vehicle, the analysis would differ. But that is not the case today. To allow an app to continually track a person without their knowledge and allow that information to be obtained by police defeats the purpose of the Fourth Amendment given the ubiquitous nature of cellphones in today's society. The government would have the ability to subpoena or request documents from any cell service provider or third-party operator tracking movements, often without the cellphone owner's knowledge, allows fishing expeditions into any person in this country.

CONCLUSION

For the aforementioned reasons, this Court should vacate the appellate court's decision and grant Ms. Austin's motions to suppress evidence, finding she has standing in the vehicle and that the detailed location data taken from the Ms. Austin's phone represented an intrusion of her private interests.