No. 4-422 TEAM NO. P4

In The Supreme Court of the United States

Jayne Austin,

Petitioner,

v.

United States of America,

Respondent.

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

BRIEF FOR THE PETITIONER

COUNSEL FOR THE PETITIONER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

ISSUES PRESENTED

I. Whether an individual has standing to contest a search of a rental vehicle that the individual rented on another person's account, who the individual had an intimate relationship with and during which the person gave the individual permission to use the account?

II. Whether the acquisition of an individual's historical location data of ninety-two days, before they were under police surveillance, from a private company, is a "search" within the meaning of the Fourth Amendment and *Carpenter v. United* States, 138 S. Ct. 2206 (2018) when the individual did not agree to the company's terms and agreements and the data was taken with little overt act on the part of the individual?

STATEMENT OF THE FACTS

About Jayne Austin. Jayne Austin (Ms. Austin) is an activist and writer who cares deeply about marginalized members of society who are often taken advantage of by many of the government regulated institutions in our country. R. at 1. Ms. Austin is also very conscious of the environment, she is a minimalist and prides herself on her immaterial lifestyle. R. at 1. In order to reduce her impact on the environment Ms. Austin does not own a car. R. at 2. She instead uses a relatively new car rental software application called YOUBER any time she needs to travel to work or a protest. R. at 2.

How YOUBER works. This app has become very popular and is accessible via an individual's cellphone R. at 2. YOUBER works much like a typical rental car service, a user first creates an account which requires them to enter personal and financial information along with vehicle preferences. R. at 23. After the user is presented with a rental agreement, the renter pays per day for the use of the car. R. at 23. According to YOUBER's policy only YOUBER users can rent YOUBER cars. Also, YOUBER allows multiple YOUBER users to rent cars through the same YOUBER account. R. at 24.

YOUBER has 75 million users around the world, over half of which are in the United States. R. at 22. YOUBER's policy is to track each of these 75 million users using GPS technology along with Bluetooth signals from the users cellphones. R. at 22. The purpose of YOUBER's tracking feature is to ensure that no one other than a registered renter operates a YOUBER vehicle. R. at 3. YOUBER vehicles location and time are updated to YOUBER's database every two minutes. R. at 22. YOUBER users are only notified a single time, during the initial signup period, about YOUBER's monitoring program; however, when two users share an account, the second person on the account will never see or be asked to accept the terms and agreements. R at 23-4.

Ms. Austin's YOUBER Account. Ms. Austin does not have her own account with YOUBER, however, she does have the app on her cellphone and is a regular user. R. at 2. Ms. Austin instead uses the account of her long-term partner Martha Lloyd (Ms. Lloyd). R. at 2. Ms. Lloyd has been a YOUBER account holder since July 27, 2018. R. at 19. The couple have been in a serious relationship and had been living together for several years. R. at 18. During that time, Ms. Lloyd gave Ms. Austin express permission to use her YOUBER account information any time she needed to rent a car. R. at 19. Ms. Austin wanted to use Ms. Lloyd's account to stay off the grid. R. at 18. Even though the couple had some issues in their relationship, Ms. Lloyd never told Ms. Austin that she no longer wanted Ms. Austin to use her YOUBER account information. R. at 20. Additionally, Ms. Austin is currently authorized to use Ms. Lloyd's credit card. R. at 21.

On January 3, 2019 Ms. Austin rented a 2017 black Toyota Prius through the YOUBER app on her phone. R. at 2. Although Ms. Austin has rented multiple cars in the past, she rented this particular black Toyota Prius on multiple occasions. R. at 4. Ms. Austin kept many of her personal items and affects in the car as well. R. at 3.

Search of Ms. Austin's YOUBER car. The same day Ms. Austin rented the YOUBER vehicle, she was pulled over by Officer Kreuzberger (the Officer) for failing to stop at a stop sign. R. at 2. During the traffic stop, Ms. Austin showed the Officer her valid driver's license and the YOUBER app on her phone. R. at 2. While verifying Ms. Austin's information the Officer noticed that she was not listed as the renter in the YOUBER account. R. at 2. Based exclusively on this information, the Officer told Ms. Austin that he did not need her consent to search the car. R. at 2. During the search the Officer found several personal items belonging to Ms. Austin including clothes, an inhaler and some music records. R. at 3. While detaining Ms. Austin and searching her car without probable cause, the Officer received a dispatch to be on the lookout for a car that

resembled the one Ms. Austin was driving. R. at 3. Based on the information provided by dispatch and some items found in the car, the Officer arrested Ms. Austin under suspicion of bank robbery. R. at 2.

Search of Ms. Austin's historical location data. Two days later, Detective Boober Hamm (the Detective) was given Ms. Austin's case. R. at 3. The Detective thought that Ms. Austin was involved in additional bank robberies. R. at 3. There were five open bank robberies from October 15, 2018 to December 15, 2018, four in California and one in Nevada. R. at 3. Without any additional evidence, the Detective assumed Ms. Austin was involved in these five bank robberies over a sixty-one day timeframe across two states. R. at 3.

To close the five cases, the Detective subpoenaed YOUBER for all of the GPS and Bluetooth information related to the account Ms. Austin was using. R. at 3. YOUBER provided the Detective ninety-two days of Ms. Austin's historical location data, from October 3, 2018 through January 3, 2019. Thirty-one days outside the scope of the Detective investigation. R. at 3. The historical location data showed two separate YOUBER vehicles rented by the account Ms. Austin was sharing with Ms. Lloyd, and these vehicles were in the areas of the robberies. R. at 4. Surveillance footage after the fact, from the banks, corroborated the historical location data from YOUBER. R. at 4. The Detective recommended charges with the U.S. Attorney's Office to have Ms. Austin charged with six counts of bank robbery under 18 U.S. Code § 2213, Bank Robbery and Incidental Crimes. R. at 4.

STATEMENT OF THE CASE

Prior to trial, Ms. Austin's attorney filed two motions to suppress the evidence against Ms. Austin. R. at 4. The first motion moved to suppress the evidence obtained during the Officer's search of the rental car on January 3, 2019. R. at 4. The second motion moved to suppress the

historical location data YOUBER provided to the Detective. R. at 4. Both motions asserted that the searches were warrantless searches within the meaning of the Fourth Amendment, and defense counsel argued that any evidence obtained therefrom should be suppressed. R. at 4. The Southern District of Netherfield and the Thirteenth Circuit Court of Appeals denied both motions. R at 8, 16. This Court granted certiorari regarding the two motions to suppress evidence.

SUMMARY OF THE ARGUMENT

Ms. Austin has standing to contest the warrantless search of her rental car under all three approaches used by U.S. Circuit Courts. This Court, however, should follow its own precedent in *Bryd*, and deny using the bright line test approach. The majority of the cases using this bright line test approach rely on different interpretations of what it means to be an authorized driver. This inconsistency is one of the main justifications for rejecting this approach because it will create inconsistent and unpredictable rulings. In contrast, the consensual possession and the totality of the circumstances approach both rely on consistent and easily applicable factors to determine one's legitimate expectation of privacy. Which ensures more consistent rulings and reduces the possibility of reversals. For these reasons, in determining whether Ms. Austin has standing to contest the search, this Court should apply either the totality of the circumstances or the consensual possession approach. But, regardless of the approach this Court adopts, Ms. Austin had standing to contest the search because she was in lawful possession and control of the car and she had the attendant right to exclude others from it.

Additionally, the Governments acquisition of Ms. Austin's historical location data constituted a search under *Carpenter* and the Fourth Amendment. Ms. Austin has both a subjective and objective expectation of privacy in her historical location data. Ms. Austin showed a subjective expectation of privacy by sharing a YOUBER account with her partner's information in an attempt

to stay off the gird. Society is prepared to recognize Ms. Austin's expectation of privacy as objectively reasonable because society demands that absent a warrant, the Government cannot monitor and retain a record of every time a citizen uses a vehicle, especially retroactively for ninety-two days. Furthermore, the third-party doctrine is no longer a bright line rule and therefore does not apply to historical location data. Historical location data like CSLI information is not a normal business record. Both retroactively contain private citizen's detailed movements as a whole with little affirmative act on their part. Historical location data like CSLI information allows the Government to obtain information, for months at a time, retroactively before an individual is even under investigation. Ms. Austin did not even see – let alone agree to – the YOUBER's policies and procedures to assume the risk of conveying her historical location data. The Government should not be able to obtain such intimate information with a click of a button without a warrant.

STANDARD OF REVIEW

The denial of a motion to suppress evidence creates a question of both law and fact. *United States v. Stephenson,* 924 F.2d 753, 758 (8th Cir. 1991). The Fourth Amendment guarantees protection against warrantless search and seizures by the state and federal government. U.S. CONST. amend. IV. A defendant's Fourth Amendment standing to challenge the validity of a search is a question of law to be reviewed *de novo,* while the district court's factual findings in a suppression hearing is reviewed for clear error. *United States v. Smith*, 263 F.3d 571, 581 (6th Cir. 2001). A factual finding is clearly erroneous when the reviewing court is left with a firm conviction that a mistake has been made. *Id*.

ARGUMENT

I. MS. AUSTIN HAS STANDING TO CHALLENGE THE WARRANTLESS SEARCH OF HER RENTAL CAR UNDER THE THREE APPROACHES USED BY THE CIRCUIT COURTS.

Regardless of the approach this Court adopts, Ms. Austin had a legitimate expectation of privacy in her YOUBER rental car because she was in lawful possession and control of the car and she had the attendant right to exclude others from it. The Fourth Amendment of the United States Constitution guarantees protection against warrantless searches and seizures by both the state and federal government. U.S. CONST. amend. IV. This Court has held, "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). Further, in determining whether a driver unlisted on the rental agreement has a privacy interest in the rental car, courts have considered whether "the person who claims the protection of the [Fourth] Amendment has a legitimate expectation of privacy in the invaded place." *United States. v. Thomas*, 447 F.3d 1191, 1196 (9th Cir. 2006) (citing *Rakas v. Illinois,* 439 U.S. 128, 143 (1978). "An expectation of privacy is legitimate if it is one which society accepts as objectively reasonable." *Id.*

"One of the main rights attaching to property is the right to exclude others, and one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude." *Rakas*, 439 U.S. at 143. Although Ms. Austin used her partner's YOUBER account to rent the vehicle, this Court has found, "the expectation of privacy that comes from lawful possession and control and the attendant right to exclude should not differ depending on whether a car is rented or owned by someone other than the person currently possessing it." *Byrd,* 138 S.Ct. at 1522.

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A. U.S. Circuit Courts have applied three approaches to determine whether an unlisted drive has standing to contest a search.

U.S. Circuit Courts have developed three approaches to determine when an unlisted driver of a rental vehicle has standing to challenge a search. *See Thomas*, 447 F.3d at 1196. However, this Court has expressly rejected the rigid bright line approach. *See Byrd*, 138 S.Ct. at 1524 (establishing a general rule dismissing the rigid bright line test approach). Accordingly, the rigid bright line approach should not be applied in this case.

The first approach "the totality of the circumstances approach" determines standing by examining the totality of the circumstances. *Smith*, 263 F.3d at 584. The court considered a range of factors to determine standing, including: whether the driver had a valid license, the relationship between the driver and the lessee, and the driver's ability to present rental documents. *Id*. In the instant case, Ms. Austin satisfies virtually every factor in *Smith* needed to find standing, including: having a valid driver's license, the ability to produce rental documents, and an intimate relationship with the rental account owner.

The second approach "the rigid bright line approach" follows the outdated bright line test which states, "an individual not listed on the rental agreement lacks standing to object to a search." *United States v. Wellons,* 32 F.3d 117 (4th Cir. 1994) (overruled by *Byrd*, 138 S. Ct. at 138). This Court has expressly rejected this approach, in *Byrd* and has since held that as a "general rule, someone in otherwise lawful possession and control of a rental car has a reasonable expectation of privacy in it *even if the rental agreement does not list him or her as an authorized driver*." *Byrd*, 138 S. Ct. at 1524 (emphasis added). Even if this Court considers using the rigid bright line approach, Ms. Austin nevertheless has standing to contest the search, as the cases using the rigid bright line approach that have yet to be overturned are completely distinguishable from this case.

The third approach "the consensual possession approach" is a modification of the rejected rigid bright line approach and generally will allow standing to contest a search if the unlisted driver is able to show that they had permission of the person listed on the rental agreement. *United States. v. Muhammad*, 58 F.3d 353, 355 (8th Cir. 1995). Courts following this approach have reasoned, "a defendant would have standing on a showing of consensual possession in the rental car." *Id.* Here, Ms. Austin had the permission of her partner to use her YOUBER account information to rent the vehicle. R. at 19. Additionally, Ms. Austin's partner knew Ms. Austin regularly used her YOUBER account throughout their relationship, yet never revoked that permission. R. at 20.

Therefore, Ms. Austin satisfies all the requirements to find standing under all three approaches. Ms. Austin was in lawful possession and control of the car. The car was given to her by a person who she had intimate relationship with and who was listed on the rental agreement. Additionally, Ms. Austin had the attendant right to exclude others from the vehicle and she is a licensed driver.

1. Under the totality of the circumstances approach, Ms. Austin has standing to contest the search because the totality of the circumstances supports a finding that she had a legitimate expectation of privacy in her rental car.

The approach established in *Smith* and adopted by the Sixth Circuit considers the totality of the circumstances in answering whether a defendant has standing to challenge the search of a rental car. *See Smith*, 263 F.3d at 584. The court in *Smith* stated, "the rigid bright line test is inappropriate, given that we must determine whether the defendant had a legitimate expectation of privacy which was reasonable in light of all surrounding circumstances." *Id.* (citing *Rakas*, 439 U.S. at 152). *Smith,* instead considered five factors for standing including: "(1) whether the defendant had a driver's license; (2) the relationship between the unauthorized driver and the

lessee; (3) the driver's ability to present rental documents; (4) whether the driver had the lessee's permission to use the car; and (5) the driver's relationship with the rental company..." *Id.*

In *Smith,* the defendant was pulled over while driving a rental car which was subsequently searched. *Id*. The defendant set up and paid for the rental car using his credit card, however the defendant was not listed on the rental agreement because his wife picked up the car and filled out the rental documents. *Id*. at 582. In granting the defendant standing to contest the search, the court considered the following: the defendant was a licensed driver; able to present rental documents to the officer; had an intimate relationship with the person listed on the rental agreement; was given permission to use the rental car by a person listed on the rental agreement; and had a business relationship with the rental company. *Id*. at 586. The court also acknowledged that the rental agreement did not list the defendant as an authorized driver; therefore, his use of the vehicle was a breach of the agreement with the rental company. *Id*. at 587. However, the court held, "it was not illegal for Smith to possess or drive the vehicle, it was simply a breach of the contract with the rental company. The breach of the contract with the rental company *does not foreclose Smith's standing to challenge [the search]*." *Id.* (emphasis added).

In this case, Ms. Austin satisfies virtually every factor used to determine standing by the court in *Smith*. Here, Ms. Austin set up and paid for the rental car using her partner's YOUBER account and credit card. R. at 2. Ms. Lloyd is listed on the rental agreement with YOUBER. R. at 2. Ms. Austin maintained an intimate relationship with Ms. Lloyd. R. at 2. Ms. Lloyd testified to giving Ms. Austin permission to use her YOUBER account during their relationship. R. at 19. Additionally, when Ms. Austin was pulled over, she presented a valid driver's license and the rental agreement to the Officer. R. at 2. The only factor not present is a business relationship with the rental company, because Ms. Austin used Ms. Lloyd's credit card to pay for the rental vehicle.

R. at 2. However, in considering the reasonableness of the asserted privacy expectations the court has recognized that no single factor will be determinative. *Smith* 263 F.3d at 586 (citing *Rakas*, 439 U.S. at 152). Therefore, under the totality of the circumstances approach, Ms. Austin had a legitimate expectation of privacy in the rental car and thus standing to contest the search because she: had a valid driver's license; an intimate relationship with the person listed on the rental agreement; permission to use the account from the person listed on the rental agreement, and provided the officer with rental documents.

2. This Court should not adopt the rigid bright line approach because this Court has established a general rule in *Byrd* rejecting it, if this Court adopts the rigid bright line approach, Ms. Austin still has standing to contest the search because the cases following it are completely distinguishable from hers.

The rigid bright line approach requires the driver of a rental car be listed on the rental agreement in order to have standing to object to a search. *Wellons,* 32 F.3d at 119. This approach, as well as the majority of cases that have applied it, have been overruled by this Court's decision in *Byrd*. This Court held, "the mere fact that a driver in lawful possession or control of the rental [vehicle] is not listed as an authorized driver on the rental agreement will not defeat her otherwise reasonable expectation of privacy under the Fourth Amendment." *Byrd*, 138 S. Ct. at 1531.

However, the cases following the rigid bright line approach that have yet to be overruled do not draw as hard a line regarding the driver not being listed on the rental agreement. *See United States v. Boruff,* 909 F.2d 111, 117 (5th Cir. 1990) (determining standing by whether the driver was authorized to use the rental car in the first place); *United States v. Haywood,* 324 F.3d 514, 516 (7th Cir. 2003) (considering whether the rental agreement explicitly prohibited anyone not listed on the rental agreement from driving the car, or whether the driver had a valid license).

However, these cases, and the facts they relied on to deny standing are distinguishable from the current case.

i. *Boruff* and *Haywood* do not apply because none of the factors used to deny standing in these cases are present, and Ms. Austin had a valid driver's license and was authorized to use the rental car.

First, in *Boruff*, the defendant's girlfriend rented a vehicle in her own name and then gave the vehicle to the defendant to drive. *Boruff*, 909 F.2d at 113. The rental agreement signed by the defendant's girlfriend provided that only she was authorized to drive the car and explicitly prohibited using the car for any illegal purpose. *Id.* at 114. The defendant was aware of these restrictions when he took possession of the vehicle. *Id.* Despite knowing the restrictions, the defendant and an associate coordinated to use the rental to smuggle narcotics across the U.S.-Mexican border. *Id.* at 113. The rental car was stopped by police while re-entering the U.S. and subsequently searched, which led to the discovery of the narcotics. *Id.* at 114. In determining that the defendant did not have standing to contest the search the court relied heavily on the terms of the rental agreement. *Id.* at 117. The court held, "Boruff had no legitimate expectation of privacy in the rental car because under the express terms of the rental agreement only his girlfriend could legally operate of the vehicle." *Id.* The rental agreement also expressly prohibited using the vehicle for any illegal purposes." *Id.* at 114. These facts are complete distinguishable from the case at bar.

In this case, Ms. Austin's rented the car herself through the YOUBER app on her phone. R. at 2. YOUBER presents its account holders with their rental agreement when the holder first sets up their account. R. at 23. Although Ms. Austin has the app on her cell phone, she is not a YOUBER account holder. R. at 2. She uses the account of her long-term partner, Ms. Lloyd. R. at 2. Ms. Austin never saw the rental agreement or its restrictions because she never signed up for a YOUBER account. Even if she had, the YOUBER rental agreement does not include any of the

restrictions the court in *Boruff* used to reach its holding. The YOUBER rental agreement does not authorize only one person to use the car. YOUBER's policy is that anyone who is a YOUBER user may rent YOUBER cars. R. at 2. YOUBER allows its users to use the login information of another user to rent a car without violating the agreement. R. at 24. Further, the YOUBER rental agreement makes no mention about using the car for illegal purposes. Therefore, our case is distinguishable from *Boruff*, because none of the factors used by that court to deny standing are present in this case.

Haywood, whose facts are similar to *Boruff*, also cannot be analogized to the instant case. In *Haywood*, the defendant's girlfriend rented a car in her name for the defendant to use to traffic narcotics. *Haywood*, 324 F.3d at 515. Under the express terms of the rental agreement, only the defendant's girlfriend was authorized to drive the car. *Id.* Police were waiting for the defendant as he arrived home with the rental car. *Id.* As the police began questioning the defendant, he admitted to not having a valid license and was then arrested. *Id.* After the defendant was arrested police searched the car finding over 250 grams of crack cocaine. *Id.* In determining whether the defendant had standing to challenge the search, the court found it critical that the defendant was not a licensed driver. *Id.* at 116. The court agreed that the defendant sufficiently demonstrated a subjective expectation of privacy by closing himself in the car, but found that his expectation was not objectively reasonable because it was illegal for him to drive the car in the first place. *Id.* The court held, "[the defendant] should not have been driving any car, much less a rental that Enterprise never would have given him permission to drive. As a result, [defendant's] expectation of privacy was not reasonable." *Id.* These facts are not present here.

In this case, Ms. Austin used her partner's account to rent the vehicle, however, the rental agreement does not have any restriction against Ms. Austin's use of the car. According to

YOUBER's policy, Ms. Austin was authorized to use the car because she is a YOUBER user. R. at 2. Ms. Austin had a valid driver's license which she showed to the Officers, unlike *Haywood*. R. at 2. Under the terms of the YOUBER agreement Ms. Austin was authorized to drive the rental car, and because she had a valid driver's license, Ms. Austin was legally able to drive the car as well. Therefore, the rational for denying standing in *Haywood*, is not present here.

ii. Judicial efficiency requires this Court to disregard the rigid bright line test approach.

Since this Court, rejected the notion that a driver not listed on the rental agreement does not have a reasonable expectation of privacy, courts still applying this approach have instead considered whether the person challenging the search was an authorized driver. Courts have done this with little to no consistency as to what qualifies as an authorized driver. *See Boruff,* 909 F.2d at 111; *Haywood,* 324 F.3d at 516. Without consistent or predictable application defendants will have no way to effectively defend their constitutional rights. *See* Ellie Margolis, *Closing the Floodgates: Making Persuasive Policy Arguments in Appellate Briefs,* 62 Mont. L. Rev. 72 (2001) (stating a firm rule promotes fairness by leaving little room for judicial discretion, leading to more consistent application and making it easier for citizens to understand the rule and act accordingly). Further, there are no consistent guidelines in applying the rigid bright line test, or how much weight each factor deserves. Therefore, this Court should not adopt the rigid bright line approach.

If, however, this Court does consider adopting the rigid bright line approach, Ms. Austin has standing to contest the search. Ms. Austin demonstrated a subjective expectation of privacy by closing herself in the car. Further, Ms. Austin had the right to exclude others from the car. Therefore, Ms. Austin's expectation of privacy is objectively reasonable because under the terms of the rental agreement she was authorized to drive the vehicle and she had a valid driver's license.

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3. Under the consensual possession approach, Ms. Austin has standing to contest the warrantless search, because she had an intimate relationship with the person listed on the rental agreement, permission to use the car from that person, and a history of regular use of the car.

The courts that follow the consensual possession approach adopted by the Eighth and Ninth Circuits have held, "a defendant would have standing on a showing of an intimate relationship with the car's owner or a history of regular use of the car. *Muhammad,* 58 F.3d at 355. In effect, this approach associates an unlisted driver of a rental car to someone borrowing a privately-owned car. *See Id*. Courts in these circuits have also determined that ownership of the car or rental account is not necessary to have standing, holding. *See Thomas*, 447 F.3d at 1196 ("[A] defendant who lacks an ownership interest may still have standing to challenge a search, upon a showing of joint control or common authority over the property searched"). *Thomas* further explained, "common authority rests on mutual use of the property by persons generally having joint access or control for most purposes. *Id* at 1198 (citing *Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990)).

In *Thomas* the defendant ordered a friend to rent a car for the defendant to use to traffic drugs. *Id* at 1194. The defendant's friend signed a contract which stated, "[o]nly I and authorized drivers may drive the vehicle" and the friend was the only person listed on the contract. *Id.* After being pulled over, the police learned that the defendant had an outstanding warrant and then proceeded to search the car. *Id* at 1195. The court ruled the defendant would have standing to challenge the search; however, defendant failed to show that his friend gave him permission to use the car because defendant did not present any evidence in his favor at the suppression hearing. *Id.*

In this case, the YOUBER account Ms. Austin used belonged to her partner, Ms. Lloyd. R. at 2. The couple maintained an intimate relationship for several years. R. at 18. During that time Ms. Austin did not own a car, so Ms. Austin would regularly use her partner's YOUBER account

to rent a car anytime she needed to go to work or a protest. R. at 2. Ms. Austin had rented the same 2017 black Toyota Prius on several occasions. R. at 4. And although Ms. Austin was not listed on the rental agreement, *Thomas* makes clear that the protections provided by the Fourth Amendment are far too important to be dictated by who is listed on a rental agreement. *Id* at 1199 (holding "we cannot base constitutional standing entirely on a rental agreement to which the [unlisted] driver was not a party and may not capture the nature of the [unlisted] driver's use of the car").

In this case, the evidence shows that Ms. Austin had an intimate relationship with the rental account owner for several years. R. at 18. She regularly used her partners YOUBER account and in particular the Toyota Prius the Officer searched. R. at 2. Finally, Ms. Austin had common authority over the rental car because both Ms. Austin and her partner mutually used the YOUBER account and both maintained joint access of the YOUBER rental cars throughout their relationship. R. at 19. Therefore, under the common authority approach Ms. Austin has standing because she had an intimate relationship with the car's owner, a history of regular use of the car, and common authority over the car.

II. THE GOVERNMENT'S ACQUISITION OF MS. AUSTIN'S HISTORICAL LOCATION DATA FOR NINETY-TWO DAYS WAS A SEARCH WITHIN THE MEANING OF THE FOURTH AMENDMENT BECAUSE MS. AUSTIN HAD A REASONABLE EXPECTATION OF PRIVACY IN HER HISTORICAL LOCATION DATA AND THE THIRD PARTY DOCTRINE DOES NOT APPLY TO HISTORICAL LOCATION DATA.

The Government's warrantless acquisition of ninety-two days of Ms. Austin's historical location data was a search under the Fourth Amendment. The Fourth Amendment states "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. CONST. amend. IV. The Framer's intent in creating the Fourth Amendment was "to place obstacles in the way of a too permeating police surveillance." *United States v. Di Re*, 332 U.S. 581, 595 (1948). Under the Fourth Amendment

there are two different approaches to determine if a search has occurred, the property based approached and the expectation of privacy approach. *See United States v. Jones*, 565 U.S. 400, 404-5 (2012). "The Fourth Amendment is intended to protect privacy and not property rights." *See Cardwell v. Lewis*, 417 U.S. 583, 590 (1974). When determining an individual's rights to privacy, courts "must take [into] account … more sophisticated systems that are already in use or in development." *Kyllo v. United States*, 533 U.S., 27, 36 (2001).

A. Ms. Austin had a reasonable expectation of privacy in her historical location data.

The expectation of privacy test "supplements rather than displaces" the property based approach. *Byrd*, 138 S. Ct. at 1526. The test arrives from this Court's decision in *Katz*, and states a two prong test, first that a person must exhibit an actual (*subjective*) expectation of privacy and second, that the expectation be one that society (*objectively)* is prepared to recognize as reasonable. *Katz v. United States*, 389 U.S. 347, 361 (1967). Ms. Austin satisfies both prongs. Not only did she have a subjective expectation of privacy in her physical location for 92 days, but society is prepared to recognize her expectation as reasonable. As such, the Government's acquisition of ninety-two days of Ms. Austin's historical location data is a search under the Fourth Amendment.

1. Ms. Austin exhibited a subjective expectation of privacy in her historical location data by sharing a YOUBER account with Ms. Lloyd's in an attempt to conceal her location.

Ms. Austin exhibited a subjective expectation of privacy in her location data because she was using Ms. Lloyd's YOUBER account for the purpose of trying to 'stay off the grid'. "The Fourth Amendment protects people, not places." *Id*. at 351. "What a person seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Id.* at 351–52. "A person does not surrender their Fourth Amendment protections just by venturing into the public sphere." *Carpenter v. United States*, 138 S. Ct. 2206, 2217 (2018). The majority of this Court has

held that people have a reasonable expectation of privacy in their physical movements over *extended* periods of times – even when those movements may have been disclosed to the public. *Id.* at 2215 (emphasis added). "[U]nlike one's movements during a single journey, the whole of one's movements over the course of a month is not actually exposed to the public because the likelihood anyone will observe all those movements is effectively nil." *United States v. Maynard*, 615 F.3d 544, 558 (D.C. Cir. 2010).

In this case, Ms. Austin intentionally attempted to hide her location by sharing a YOUBER account with Ms. Lloyd's. R. at 18. Ms. Lloyd testified that Ms. Austin "hates being on the grid ... So she wouldn't use her own information to sign up for anything; such as … YOUBER … So when we were together she would always use my information…." R. at 18. Since Ms. Austin was attempting to keep her location private, and the Government subpoenaed more than a single journey, Ms. Austin has satisfied the first prong of the *Katz* test by showing a subjective expectation of privacy in her historical location data.

2. Society is prepared to recognize Ms. Austin's expectation of privacy in her historical location data as reasonable because the Government, without a warrant, should not be able to retroactively track citizens for ninety-two days.

Society is prepared to recognize Ms. Austin's subjective expectation of privacy as objectively reasonable. The Government should not be allowed to, without a warrant, obtain anyone's location data for ninety-two days. This Court has previously held that location records hold for many Americans the privacies of life." *Riley v. California,* 573 U.S. 373, 403 (2014). Society's expectation has been that the Government would not "secretly monitor and catalogue every single movement of an individual's car for a very long period." *Jones*, 565 U.S. at 430 (Alito, J concurring). Society appreciates that a single journey may be exposed to the public; society, however, expects a *collection* of their movements "to remain disconnected and anonymous."

Maynard, 615 F.3d at 558 (emphasis added). This is because the "whole reveals far more than the individual movements it comprises." *Id*. Society "does not expect anyone to monitor and retain a record of every time he drives his car, including his origin, route, destination, and each place he stops and how long he stays there; rather, he expects each of those movements to remain disconnected and anonymous." *Id.* at 563.

In this case, the Government obtained Ms. Austin's historical location data every time she drove her YOUBER vehicle. While a YOUBER car is in use, both the GPS information of the rental car and the Bluetooth information of the cellphone using the app are tracked. R. at 22. This information is updated to YOUBER's database every two minutes. R. at 22. The Government obtained all of Ms. Austin's historical location data from YOUBER, including her origin, the route she took, the destination, and how long she remained there. Therefore, society constitutes the Government's tracking of ninety-two days of Ms. Austin's historical location data as objectively unreasonable. Since Ms. Austin satisfies both prongs of *Katz*, the Government's actions constitute a search under the Fourth Amendment.

i. *Knotts* does not apply here because this Court did not address the issue of prolonged surveillance in *Knotts*.

Respondent will likely rely on *Knotts* for the proposition that GPS tracking to monitor an individual's movements in their vehicle is not a search. However, reliance in this case is misplaced, *Knotts* does not apply to the case at hand. In *Knotts*, the police placed a beeper in a five-gallon drum, and monitored the drum using the beeper and intermittent visual surveillance for 100 miles on public roads. *United States v. Knotts*, 460 U.S. 276, 278 (1983). The police used this information to obtain a warrant and search the defendant's cabin. *Id*. At trial, defendant made the argument that ruling in favor of the governemnt would allow "twenty-four hour surveillance of any citizen of this country … [to] be possible, without judicial knowledge or supervision." *Id*. at

283. "The Court avoided the question whether prolonged twenty-four hour surveillance was a search by limiting its holding to the facts of the case before it." *Maynard*, 615 F.3d at 557. Both the Fifth and Eighth Circuit have recognized *Knotts'* limited scope. *See United States v. Butts*, 729 F.2d 1514 (5th Cir. 1984) (stating Knotts deliberately did not answer whether the long term surveillance violated the Fourth Amendment); *United States v. Marquez*, 605 F.3d 604 (8th Cir. 2010) (finding that mass surveillance by tracking thousands of random cars, creates different concerns than the one at hand).

In this case, the Government retroactively tracked Ms. Austin for a prolonged period of time. As such *Knotts* and the cases that rely on *Knotts* cannot be analogized to the instant facts, where the issue of prolonged surveillance was not addressed. Ms. Austin was suspected of six bank robberies, five of which took place between October 15, 2018 and December 15, 2018 (a sixty-one day period). R. at 3. Although the Government subpoenaed YOUBER, not just for this time frame, but for all of the data associated with Ms. Austin's historical location (a ninety-two day period). R. at 3. Ninety-two days of historical location data should not be deemed as a reasonable period of time by this Court, especially since YOUBER gave the Government thirty-one days of historical location data outside of the scope of the Government's investigation.

ii. *Jones* applies here because this Court has found that prolonged GPS surveillance of a vehicle constitutes a search.

Thirty years after this Court's ruling in *Knotts* this Court finally answered the lingering question whether the government's prolong surveillance is a search. *See Jones*, 565 U.S. at 432. In *Jones*, FBI agents used a GPS tracking device to track Jones's vehicle for twenty-eights days. *Id*. This Court unanimously held that a search occurred. *Id.* "A majority of the Court acknowledged that individuals have a reasonable expectation of privacy in *the whole* of their physical movements." *Carpenter*, 138 S. Ct. at 2217 (emphasis added). The majority concluded that longer

term GPS monitoring for most offenses is a search. *Jones*, 565 U.S. at 430. This Court did not determine at which day the surveillance turned into a search, but "the line was surely crossed before the… [four]–week mark." *Id*.

In this case the infringement on Ms. Austin's right to privacy was for ninety-two days. This is sixty-five days longer than that in *Jones.* Both cases may involve the use of GPS technology; however, in *Jones* not only was the vehicle tracked for sixty-five days less than Ms. Austin's, but the only movements monitored in *Jones* were after he was already suspected of criminal actively. This Court in Jones stated the mark for a search was before the four week mark; here, the Government looked at three times the amount of historical location data.

Therefore, the Government's conduct here constitutes a search. Ms. Austin exhibited a reasonable expectation of privacy. As such, the Government's warrantless acquisition of Ms. Austin's historical location data is a search under *Carpenter* and the Fourth Amendment.

B. The third-party doctrine does not apply to the precise and invasive historical location data effortlessly created by YOUBER that is generated with little activity on the part of its users.

The Government will attempt to invoke the third-party doctrine, further asserting the Government's intrusion was not a search, stating that Ms. Austin has no legitimate expectation of privacy in information she voluntarily turned over to YOUBER. *Smith v. Maryland*, 442 U.S. 735, 744 (1979). The third-party doctrine originates from this Court's decision in *Miller*, where the Court found there was not a Fourth Amendment violation because the bank records that were subpoenaed were not respondent's confidential communications but a negotiable instrument voluntary conveyed to the bank. *United States v. Miller*, 425 U.S. 435, 440 (1976). Further in *Smith*, this Court found that the use of a pen register to monitor dialed telephone numbers was not

a search, because "pen registers do not acquire the *contents* of communications." *See Maryland*, 442 U.S. at 741 (emphasis added).

The Government's reliance on *Smith* and *Miller* is outdated. This Court in *Carpenter*, advanced its view point on the third-party doctrine due to the "the seismic shifts in digital technology." *Carpenter*, 138 S. Ct. at 2219. Technological advances provide access to a category of information that was not available during the times of *Smith* and *Miller*. *See Patel v. Facebook, Inc.*, 932 F.3d 1264, 1273 (9th Cir. 2019) (internal citations omitted). There is a "world of difference between the limited types of personal information addressed in *Smith* and *Miller* and the exhaustive chronicle of location information." *Carpenter*, 138 S. Ct. at 2222. "The third-party doctrine partly stems from the notion that an individual has a reduced expectation of privacy in information knowingly shared with another. But the fact of diminished privacy interests does not mean that the Fourth Amendment falls out of the picture entirely." *Id*. The court must "consider the nature of the particular documents sought to determine whether there is a legitimate expectation of privacy concerning their contents." *Id.* The third-party doctrine after *Carpenter* is no longer a bright line rule. *See United States v. Contreras*, 905 F.3d 853, 857 (5th Cir. 2018).

This Court ruled that cell-site location information (CSLI) in *Carpenter* contained "a detailed and comprehensive record of [a] person's movements" and declined to extend the third-party doctrine to such invasive information. *Carpenter*, 138 S. Ct. at 2217. The third-party doctrine was not extended to the historical location data in *Carpenter* because it is not the average business record as seen by this Court before. *Id.* The historical location data in *Carpenter* contained "a detailed and comprehensive record of a person's movements." *Id.* at 2217-20. This Court stated that allowing Government access to the historical location data in *Carpenter* would allow the Government to have "near perfect surveillance" of an individual's movements. *Id.* at 2218. Further,

this information allows the Government to travel back in time and track everyone – *not just those under investigation at the time*. *Id*. (emphasis added). This historical location data, unlike the information in *Smith* and *Miller* cannot be considered to be voluntarily exposed, because cell phone users do not commit any voluntary act, other than turning their phone on, to give the CSLI information to the phone company. *Id*. at 2220.

1. Ms. Austin's historical location data is similar to the CSLI information in *Carpenter* and the third-party doctrine should not apply to such invasive information.

This Court should not apply the third-party doctrine to historical location data. The rational used in *Carpenter* for CSLI information should extend to the historical location data used to retroactively track Ms. Austin for ninety-two days – who was not under criminal investigation during this time. Both forms of technology have several similarities already noted by this Court.

This Court stated in *Carpenter*, GPS information like CSLI is "time-stamped data [that] provides an intimate window into a person's life, revealing not only his particular movements, but through them his familial, political, professional, religious, and sexual associations." *Id*. at 2217.

It is clear that with ninety-two days of Ms. Austin's private movements, the Government obtained information about her political, professional, and sexual associations. Ms. Austin used YOUBER to go to political protests and work. R. at 2. Ms. Austin was also in a relationship with Ms. Lloyd. R. at 2. The Government obtained information of what protests Ms. Austin went to, how often she went, where they were located, and how long she stayed at the protest. Further, the Government received the route that Ms. Austin took to go to and from work. Additionally, the Government could tell when Ms. Austin visited with Ms. Lloyd, how often, and for how long. The Government invaded Ms. Austin's privacy rights.

Further, this Court recognized in *Carpenter* that GPS information is even more accurate than CSLI information. *Id*. at 2218-2219. The fact that the location data is more accurate shows that using historical location data to track a citizen without a warrant for ninety-two days is an invasion of their privacy in violation of the Fourth Amendment. Morever, historical location data like CSLI information cannot be considered to be voluntary conveyed. This Court noted the significant difference in the degree of voluntary exposure when using a bank card versus historical location data, which is generated automatically. *See Id*. at 2220. "[A]part from disconnecting the phone from the network, there is no way to avoid leaving behind a trail of location data. As a result, in no meaningful sense does the user voluntarily assume the risk of turning over a comprehensive dossier of his physical movements." *Id.* (internal citations omitted).

In the instant case, YOUBER's app works similar to CSLI information. YOUBER updates its location data of all if its vehicles every two minutes R. at 22. This equates to YOUBR tracking its 75 million world users up to 720 times a day. These updates happen with almost no affirmative act upon YOUBER's users. YOUBER only warns users of the data they take, one time, when the users initially create the account – if they are even warned at all. R. 23. If users share an account, the second person on the account will not be notified of the data that YOUBER collects. R. at 23.

Ms. Austin was not the initial user of her account. R. at 20. Ms. Lloyd created the account that she shared with Ms. Austin. R. at 20. As the second user on the account, Ms. Austin never even had the opportunity to read the terms and agreements – let alone appreciate them – since she did not create the account. As such, this Court should not apply the third-party doctrine to Ms. Austin's historical location data, and find that the Government's actions was a search under the Fourth Amendment, because not only did Ms. Austin not voluntary convey the information, she was never afforded the opportunity to assume the risk of the conveyance.

Lastly, this Court recognized in *Carpenter*, for both GPS and CSLI information "tracking is remarkably easy, cheap, and efficient compared to traditional investigative tools. With just the click of a button, the Government can access each carrier's deep repository of historical location information at practically no expense." *Carpenter*, 138 S. Ct. at 2218. In this case, this is precisely what the Government did – obtain Ms. Austin's historical location data for ninety-two days with a click of a button. The Government should not be able to warrantlessly track its citizen's movements for months at a time with a mere click of a button. The Government's ease of obtaining such private information is precisely why this Court declined to extend the third-party doctrine to CSLI information. This Court should continue to recognize the seismic shifts in digital technology and find the Government's acquisition to constitute a search under the Fourth Amendment.

2. *Carpenter*'s rational applies to Ms. Austin's historical location data because the data is not considered to incidentally reveal location information.

The Government will likely argue that *Carpenter* is a narrow holding which does not apply to Ms. Austin's historical location data. However, this Court should find that the historical location data of Ms. Austin that the Government obtained from YOUBER is similar to CSLI information, and that the third-party doctrine does not apply. The court in *Carpenter* identified several types of technology that the holding in *Carpenter* was not intended to apply for. *See Id*. at 2220. Historical location data was not among those mentioned by the court.

> We do not disturb the application of Smith and Miller or call into question conventional surveillance techniques and tools, such as security cameras. Nor do we address other business records that *might incidentally reveal location information*. Further, our opinion does not consider other collection techniques involving foreign affairs or national security.

Id. (emphasis added).

Ms. Austin's historical location data does not fit into any of the exceptions laid out by the court. This is because YOUBER information does not incidentally reveal location information, but like CSLI it collects and stores location data intentionally. As such, Ms. Austin's historical location data does not fit into any category that this Court did not intend *Carpenter* to apply to.

In this case, applying the third-party doctrine to Ms. Austin's historical location data would go against the rational in *Carpenter*. Further, the data collected cannot be compared to a negotiable instrument or the numbers dialed on a pen register. Ms. Austin's location data of ninety-two days is information that not only includes the contents of the information, but also is the entirety of the information. Further, while Ms. Austin's historical location data may have been created for a commercial purpose, this fact is negated by the revealing depth, breadth, and comprehensive reach of Ms. Austin's physical location. The historical location data collected from YOUBER was automatic. The fact that such information is gathered by a third party does not make it any less deserving of Fourth Amendment protection. As such, this Court should rule that Ms. Austin's historical location data is not covered by the third-party doctrine, and that the Government conducted a search by invading Ms. Austin's historical location data which she has a reasonable expectation of privacy in.

CONCLUSION

For the foregoing reasons, this Court should reverse the Thirteenth Circuit Court of Appeal's decision to deny Ms. Austin's motions to suppress evidence and find that Ms. Austin had individual standing to contest the search of the rental vehicle, and that the Government's acquisition of the location data of the rental vehicle was a search within the meaning of the Fourth Amendment.