IN THE SUPREME COURT OF THE UNITED STATES

No. 4-422

JAYNE AUSTIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF FOR PETITIONER

Team P5

QUESTIONS PRESENTED

I. Whether an individual may contest a warrantless search of a rental vehicle they obtained through another person's rental car application without express permission?

II. Whether the acquisition of 94 days of a rental car's GPS location information constitutes a search within the meaning of the Fourth Amendment?

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STANDARD OF REVIEW

When reviewing a district court's denial of a motion to suppress, we review the court's legal conclusions *de novo* and defer to the district court's factual findings unless those findings are clearly erroneous. *United States v. Scott*, 731 F.3d 659, 663 (7th Cir. 2013)

STATEMENT OF THE CASE

Ms. Austin is an activist who frequently post blogs highlighting proven financial corruption in the United States banking industry. R. at 1. Ms. Austin is also a naturalist and minimalist, and as such has no permanent residence. *Id.* However, Ms. Austin had previously lived with her romantic partner, Martha Lloyd, for several years. R. at 18. Due to the high value Ms. Austin places on her privacy, she did not use her own information to register for services, and had an arrangement where she would use Ms. Lloyd's information and reimburse her for any expenses. *Id*. As such, Ms. Lloyd authorized Ms. Austin as a user on her credit card and gave Ms. Austin her YOUBER login information. R. at 19. Although Ms. Lloyd and Ms. Austin had been experiencing some difficulties in their relationship, they continued to communicate, and Ms. Lloyd did not change her account information or otherwise take action to prevent Ms. Austin from using her accounts. R. at 18-20. As a result, Ms. Austin continued to use Ms. Lloyd's YOUBER account to travel to work and elsewhere to complete her daily activities. R. at 2.

YOUBER is an incredibly popular car sharing software application ("app"), with over 40 million users in the United States. *Id*. Through YOUBER, users are able to rent vehicles with their mobile devices at a fixed hourly rate. *Id*. Users may rent a vehicle for up to 500 miles or a period of one week. R. at 23. Per YOUBER's corporate privacy policy, YOUBER automatically collects and stores location information every two minutes from a user's mobile device *and* any vehicles a user uses via GPS and Bluetooth. R. at 29. Users *must* agree to YOUBER's privacy policies upon

the creation of an account in order to use YOUBER. R. at 30. The only time a user is notified that YOUBER tracks and collects their location information is during the initial sign period. R. at 23. A person, like Ms. Austin, who is granted permission to use the account of another is never notified about the location information collected by YOUBER. R. at 24. Further, nowhere in YOUBER's corporate privacy policy is it ever stated that a user's data will be disclosed to law enforcement. R. at 29-30.

On January 3, 2019, Ms. Austin used the YOUBER app on her cell phone to rent a black 2017 Toyota Prius. R. at 2. Later that day, Ms. Austin was pulled over while driving the YOUBER vehicle failing to stop at a stop sign. *Id*. Ms. Austin complied with the officer, providing him with her license and all of the YOUBER rental information. *Id*. Upon finding Ms. Austin was not listed on the rental agreement, the officer told Ms. Austin that he could search her vehicle without her consent. R. at 3. The officer proceeded with a warrantless search of Ms. Austin's vehicle. The officer opened Ms. Austin's trunk in order to go through her personal effects. *Id.* The officer found the YOUBER vehicle to have been "lived in", with the vehicle containing food and bedding. *Id*. After the officer had conducted his warrantless search, the officer received a dispatch to be looking for a Toyota Prius with contents similar to those the officer found in his search. *Id.* The officer then arrested Ms. Austin because of a partial license plate match and the items found during this warrantless, consentless search of the vehicle. *Id*.

On January 6, 2019, Detective Boober Hamm discovered five other open bank robbery cases occurring from October 5, 2018 to December 15, 2018, with a similar modus operandi to the January 3, 2019, bank robbery. R. at 3. As a result, and without a warrant, Hamm subpoenaed all GPS and Bluetooth information for a period of 64 days related to the YOUBER account used by Ms. Austin. *Id*. This information revealed that the account used by Ms. Austin had rented cars in

the locations and the times of the other robberies. R. at 4. Subsequently, Ms. Austin was charged with six counts of bank robbery. *Id*.

Prior to trial, the Defense filed two motions to suppress evidence: (1) to suppress evidence obtained during Kreuzberg's warrantless search of the rental car, and (2) to suppress the YOUBER location data acquired by Hamm. *Id*. The United States District Court for the Southern District of Netherfield denied both motions, and Ms. Austin was convicted of six counts of bank robbery. R. at 10. On appeal, the Thirteenth Circuit affirmed the judgment of the District Court. *Id*. The Thirteenth Circuit held that Ms. Austin lacked standing on two grounds. First, the Thirteenth Circuit held that Ms. Austin lacked a legitimate presence because she did not have express permission to be in the car by the person whose accounts were used to rent it. Second, the Thirteenth Circuit held that Ms. Austin lacked standing because she had no possessory interest in the rental vehicle. In regards to the YOUBER location information, the Thirteenth Circuit ignored Ms. Austin's legitimate expectation of privacy, finding that exposure of the information to a third party "serves as a forfeiture of a reasonable expectation of privacy." R. at 15.

SUMMARY OF ARGUMENT

The Thirteenth Circuit erred in holding the Petitioner lacked standing to contest the violation of her Fourth Amendment rights. Petitioner had a lawful, legitimate presence in the YOUBER vehicle that was searched. Petitioner was a licensed driver, had business dealings with YOUBER by booking the vehicle, had an intimate relationship with the renter, and was never told to stop renting vehicles through the renters account. Petitioner had implied permission to be in the vehicle. Petitioner also has a legitimate expectation of privacy in the contents of her vehicle. Petitioner had the contents of her vehicle hidden from public view, was using the vehicle as her home, and was sleeping in it. Petitioner thus has standing to challenge the violation of her Fourth Amendment rights.

The acquisition of a rental car's GPS location data is a search within the meaning of the Fourth Amendment. First, while driving rental cars rented through YOUBER, the Petitioner had a subjective expectation of privacy in the whole of her physical movements as she was unaware that her location information was being collected by YOUBER. Second, the Petitioner's expectation of privacy is one that society recognizes as reasonable. The totality of the Petitioner's physical movements over a period of 64 days were not knowingly exposed to the public and the aggregation of an individual's GPS data reveals sensitive details about a person that society recognizes as private. Furthermore, the third party doctrine does not defeat Petitioner's reasonable expectation of privacy. The GPS data acquired in this case is more sensitive than the records in *Miller* and *Smith*, and the Petitioner did not "voluntarily convey" the location information as she was unaware that her location data was being collected and she did not perform any affirmative act in sharing the information. Lastly, extending the third party doctrine to cover GPS location data would significantly erode the protections of the Fourth Amendment as ever increasing amounts of individuals' personal data is held by third parties.

As the proceeding argument will show, this Court should therefore REVERSE the decision by the Thirteenth Circuit.

ARGUMENT

I. THE THIRTEENTH CIRCUIT ERRED IN AFFIRMING THE JUDGEMENT AGAINST JAYNE AUSTIN BECAUSE THE EVIDENCE USED AGAINST HER VIOLATED HER FOURTH AMENDMENT PROTECTION AGAINST UNREASONABLE SEARCH AND SEIZURE

The Fourth Amendment of the United State Constitution protects against unreasonable search and seizure. U.S. Const. amend. IV. It is a "cardinal principle" that warrantless searches are *per se* unreasonable under Fourth Amendment jurisprudence, and the exceptions to this rule are few and clearly-delineated. *California v. Acevedo*, 500 U.S. 565, 580 (1991). Jayne Austin

was the target of a warrantless search lacking probable cause in her rental vehicle. This Court recently discussed the concept of Fourth Amendment standing for the unauthorized driver of a rental car in *Byrd v. United States.* In *Byrd*, this Court discussed the line of case law on the standing issue and the various ways a defendant may show standing for a Fourth Amendment claim. *Byrd v. United States*, 138 S. Ct. 1518, 1526-28 (2018). This analysis included *Katz v. United States*, where Justin Harlan wrote in his concurrence a test widely accepted for standing: did the defendant have a subjective expectation of privacy, and was that expectation of privacy one that society is willing to accept as reasonable. *Katz v. United States*, 389 U.S. 347, 361 (1967). The *Byrd* court recognized that the *Katz* test does not get rid of Fourth Amendment standing based on common law property interests. *Byrd*, 138 S.Ct. at 1526. *Byrd* affirms that a property interest is helpful but not necessary for establishing standing. *Id.* at 1527. In *Rakas*, this Court recognized that "standing" for a Fourth Amendment claim is just a question of if there is a cognizable breach of Fourth Amendment protections. *Rakas v. Illinois*, 439 U.S. 128, 139 (1978). This Court also recognized in *Rakas* that a "legitimate presence" in a place is helpful for establishing standing, but is not sufficient on its own. *Id.* at 143; *See also Byrd*, 138 S.Ct. at 1527.

Austin may make this Fourth Amendment claim because she has met two criteria that help establish standing. First, Austin had a lawful, legitimate presence in the YOUBER car being searched. Second, Austin had a legitimate privacy interest in the YOUBER car that societal expectations will validate. For these reasons, the Thirteenth Circuit's denial of Petitioner's motion to suppress should be reversed.

A. Petitioner has standing to challenge the violation of her Fourth Amendment rights because her presence in the YOUBER vehicle was not unlawful.

A person can have a legitimate presence in a rental car they didn't rent, even without express permission to be there. This Court in *Rakas* held that a person can not have standing for a Fourth Amendment claim if their presence is unlawful. *Rakas v. Illinois*, 439 U.S. 128, 143 n.12 (1978). In *Rakas*, it was noted that a thief invading a home for the sake of stealing could not have standing to make a Fourth Amendment challenge. *Id*. The *Jones* court similarly held that a person with a "wrongful" presence in a home could not have standing for a Fourth Amendment challenge. *Jones v. United States*, 362 U.S. 257, 267 (1960), overruled on other grounds by *United States v. Salvucci*, 448 U.S. 83, 100 (1980). For the driver of a rental car to have a legitimate presence in the vehicle, they must be a licensed driver. *United States v. Smith*, 263 F.3d 571, 586 (6th Cir. 2001). This Court's holding in *Byrd* defeats the idea that a person whose name does not appear on a rental agreement cannot have standing, stating "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 v. United States*, 138 S. Ct. 1518, 1531 (2018). The *Byrd* court further held that a violation of a rental agreement's terms would not defeat a Fourth Amendment Claim. *See Id.* at 1529. In *United States v. Sanchez*, the First Circuit held that a history of usage of a rental vehicle and relationship with the person renting the vehicle can establish the legitimate presence needed for Fourth Amendment standing. *United States v. Sanchez*, 943 F.2d 110, 114 (1st Cir. 1991). This use of relationship and history of usage to establish the legitimate expectation of privacy necessary for standing was further affirmed by the Sixth Circuit in *United States v. Smith*. *United States v. Smith*, 263 F.3d 571, 584 (6th Cir. 2001). In *United States v. Mohammed*, the Eighth Circuit held that a defendant needed to show some kind of permission to use the rental vehicle from the renting party in order to establish the legitimate expectation of privacy necessary for standing on Fourth Amendment

claims. *United States v. Muhammad*, 58 F.3d 353, 355 (8th Cir. 1995). The Eighth Circuit in *Muhammad* did not state that the evidence of permission needs to be express and suggests evidence that "give(s) rise to an inference of consensual possession" would have been considered. *See Id.* In *United States v. Best*, the Eighth Circuit affirmed this permission doctrine by stating that if the renter gives the unauthorized driver permission to drive a rental vehicle, the driver has a privacy interest giving rise to standing. *United States v. Best*, 135 F.3d 1223, 1225 (8th Cir. 1998).

Jayne Austin had a legitimate presence in the YOUBER rental car. As this Court established in *Byrd*, a person not on the rental agreement can have standing for a Fourth Amendment claim. *Byrd*, 138 S. Ct. at 1531. The caveat, as shown by *Jones* and *Rakas*, is that the unauthorized driver's presence cannot be unlawful. *Byrd* held that failure to follow the rental agreement will not make a party's presence unlawful, so Austin's presence will not be unlawful if she breeched the letter of the rental agreement. Circuit cases on this issue have most commonly dealt with the issue of where the unauthorized driver is either an unlicensed driver, or the car has been stolen. No party has contended that Austin is not licensed to drive. Similarly, no party has contended that Austin outright stole the rental car. The record shows that Martha Lloyd, the renter of the vehicle, had consistently allowed Austin to use Lloyd's YOUBER and financial accounts. (R. 19). The record shows that Lloyd had no reason to believe Austin had ceased this usage, and yet never instructed Austin to stop. (R. at 19-20). The question in this case is if permission can be implied from these facts.

Austin's legitimate presence in the YOUBER vehicle is established by the implied permission she was given. A similar circumstance can be seen in Sixth Circuit case *United States v. Smith*, where legitimate presence was found based on the context surrounding an unauthorized

driver's presence in a rental vehicle. *Smith*, 263 F.3d at 571. In that case, the Government argued that Smith did not have standing to make a Fourth Amendment claim because he was not an authorized driver of the rental vehicle, he was not given permission by the owner to drive the rental vehicle, and he did not claim a property interest in the rental vehicle. *Id*. at 581. Importantly, Smith established that he was a licensed driver, and that he knew the rental information. *Id.* at 586. While the Sixth Circuit found that Smith had permission from the renter to use the rental vehicle, there is no finding that this was express permission. *Id.* The Sixth Circuit held that the intimate relationship the defendant had with the actual renter of the car, his wife, helped in establishing standing. *Id*. That court also held that because Smith had arranged the rental and pickup of the car, it was more likely that Smith had legitimate presence due to the business relationship established. *Id*. at 586-87.

Austin has a similar legitimate presence to that seen in Smith. Austin is a licensed driver and presented police officers with information about the YOUBER rental. (R. at 2). Austin had a serious, intimate relationship with the renter Martha Lloyd. (R. at 2). The requisite intimacy of this relationship is shown by Lloyd's willingness to give Austin unfettered access to Lloyd's financial information and accounts. (R. at 19). While the two had an on-and-off relationship, the record shows that the renter Lloyd told Austin she still loved her and had a desire to reunite. (R. at 19). While not married, Austin and Lloyd had an intimate relationship that helps legitimize Austin's presence in a vehicle rented by Lloyd. Further, Austin established a business relationship with YOUBER in a similar manner to in *Smith*. Austin was the person who, using a phone application, arranged for the rental and pickup of the YOUBER vehicle. (R. at 2). This business relationship further legitimizes Austin's presence in the YOUBER vehicle, just as it did in *Smith*.

Austin's legitimate presence in the YOUBER vehicle is supported by the implied permission rule established by the First Circuit's *US v. Sanchez* decision. In that case, it was held that where a driver does not have express permission to be in a vehicle, a legitimate expectation of privacy can still exist where the driver has a pattern of usage and an intimate relationship with the rightful owner. *United States v. Sanchez*, 943 F.2d 110, 114 (1st Cir. 1991). Austin has a clear history of using YOUBER vehicles and has an intimate relationship with the renter Lloyd. Austin rented this YOUBER vehicle in the exact same manner as when Austin and Lloyd were on better terms. Lloyd knew Austin was still using the YOUBER account and had every opportunity to either instruct Austin to stop or to remove Austin from the YOUBER and financial accounts. It can only be inferred from the evidence before the Court that Austin had implied permission to use the YOUBER vehicle.

Because Austin had a legitimate, lawful presence in the YOUBER vehicle she has met a criteria helpful for establishing Fourth Amendment standing under *Byrd, Rakas,* and *Katz*. As shown in *Sanchez*, a presumption of permission can be drawn in contexts like this, where Austin has a history of using these YOUBER vehicles in this manner and has an intimate relationship with the renter. Because Austin's consistent usage of YOUBER vehicles and the intimate relationship with the renter, Austin has provided sufficient evidence that she had a legitimate presence in the vehicle. While express permission was not given by the renter, context shows that it was not necessary. The Court cannot require defendants to show proof of express permission to use another person's property each and every time in order to obtain Fourth Amendment standing. A million promises of "come over whenever" would become legal landmines. Where a defendant has implied permission from a person close to them to continue using property as they have done in the past, legitimate presence has been established. Because

Austin had permission from Lloyd to be in the YOUBER and there is no other allegation that Austin was unlawfully in the rental car, Austin had a legitimate presence in the vehicle. Austin's legitimate presence in the YOUBER, when combined with her legitimate expectation of privacy, grants her standing to make this Fourth Amendment challenge.

B. Petitioner has standing to make a Fourth Amendment challenge because she had a legitimate expectation of privacy in the YOUBER vehicle.

A defendant may have a legitimate expectation of privacy even in a rental car they have not rented. A legitimate expectation of privacy exists where a party has a subjective expectation of privacy, and that expectation of privacy is one that society is willing to enforce. *Katz v. United States*, 389 U.S. 347, 361 (1967). The Fourth Amendment offers protection to people, not any specific types of places. *Id*. at 351. A legitimate expectation of privacy may exist outside of places traditionally considered protected under the Fourth Amendment. *See Florida. v. Jardines*, 569 U.S. 1, 5 (2013). The test announced by Katz, allowing standing to exist where there is legitimate presence and legitimate expectation of privacy, acts as a supplement to common law property-interest standing for Fourth Amendment claims. *Katz*, 389 U.S. at 351. Under the *Katz* test, Fourth Amendment protections are applied wherever there is a socially recognized privacy interest. *Byrd v. United States*, 138 S. Ct. 1518, 1527 (2018); *Rakas v. Illinois*, 439 U.S. 128, 143 n.12(1978). Contents of a vehicle are generally given a lesser expectation of privacy than a residence. *Cardwell v. Lewis*, 417 U.S. 583, 590-91 (1974). However, that legitimate expectation of privacy in a vehicle is broken when a person exposes their possessions to public view. *Id.* One of the most serious expectations of privacy exists within one's home. *Jardines*, 569 U.S. at 6. A serious expectation of privacy also exists for the place where a person sleeps. *Minnesota v. Olson*, 495 U.S. 91, 99 (1990). The heightened expectation of privacy for where a person sleeps

exists even if the person was sleeping there for a single night as a guest. *Minnesota v. Carter*, 525 U.S. 83, 90 (1998).

Jayne Austin had an expectation of privacy in the contents of her vehicle that society will enforce. Austin had a subjective expectation of privacy for the contents of her vehicle, as shown by her keeping all of her personal effects out-of-sight in the trunk. (R. at 3). Austin was so committed to her privacy, that she was using Lloyd's YOUBER and financial accounts in order to stay "off the grid" and avoid her information being tracked. (R. at 19). This leaves the question of whether society will enforce Austin's expectation of privacy. While vehicles are generally given a lesser expectation of privacy than houses, Austin's use of her YOUBER vehicle is an exception. In *Cardwell*, the reasoning of the decision is hinged on the fact that cars "seldom serve as one's residence or as the repository of personal effects". *Cardwell*, 417 U.S. at 590. Further, the Court went on to elaborate that contents of the car that are hidden from view retain a legitimate expectation of privacy. *Id*. at 591. Austin has no residence, and instead was using the YOUBER vehicle as her home when she was arrested. (R at 26; R. at 3). Austin also had all of her "personal effects" stored within the vehicle. (R. at 3). Austin was using her vehicle in such a way that it blurs the line made by *Cardwell* when differentiating homes from vehicles. Thus, Austin is an exception to the rule that vehicles are entitled to a lesser societal expectation of privacy.

Even if Austin's vehicle is not considered to be her home, Austin still has a legitimate expectation of privacy in the contents of her vehicle. *Cardwell* rules that vehicles have a lesser expectation of privacy, not that there is no expectation of privacy at all. *Id. Cardwell* held that there is no expectation of privacy for the contents of a vehicle when the contents are readily exposed to view by the public. *Id.* That is not the case here. Austin had stored all her possessions,

including the evidence in controversy in this case, in the trunk of her vehicle. (R. at 3). Thus, Austin has a reasonable expectation of privacy that society is willing to enforce.

Austin's choice to sleep in YOUBER vehicles also entitles her to a legitimate expectation of privacy in the contents of her vehicle. This Court has recognized that special protection exists for the place where a person sleeps. *Minnesota v. Carter*, 525 U.S. 83, 90(1998); *Minnesota v. Olson*, 495 U.S. 91, 99 (1990). *Carter* also demonstrated that a person need not have a property interest in the place where they sleep, as that case considered overnight guests. *Carter*, 525 U.S. at 90. This Court has found that where one sleeps is owed a greater expectation of privacy because of the vulnerability and resulting need for control involved in where you sleep. *Olson*, 495 U.S. at 99. There is substantial evidence that Austin was planning to sleep in her rental car. It is undisputed that the arresting officer believed Austin's YOUBER to be "lived in". (R. at 3). More importantly, it is undisputed that Austin's YOUBER had "bedding and a pillow in the backseat of the car". (R. at 3). Because the evidence shows that Austin shows was either sleeping in her car or planning to do so, Austin is entitled to the heightened expectation of privacy this Court gives to the place where a person sleeps.

Austin had a legitimate expectation of privacy in the contents of her vehicle that society is willing to enforce. Society affords a high level of privacy to one's home. Society affords a high level of privacy to the place where one sleeps. Austin did not invalidate her expectation of privacy, because she did not expose her possessions to public view. Austin is thus entitled to a legitimate expectation of privacy in the contents of her vehicle because she used the YOUBER as her home, slept in the YOUBER, and did not revoke her expectation of privacy by exposing the contents of her vehicle.

If Austin is held to have not had a legitimate expectation of privacy, millions of Americans who have had to sleep in a car will have their Fourth Amendment protections revoked. These defendants, most commonly indigent and often not the owners of their vehicles, would be saddled with the heavy burden of showing affirmative proof they have express permission from the owner of the vehicle in order to earn their Constitutional protections. This would be a devastating blow to the rights of some of the most vulnerable members of our society. Because Austin has shown permission to be in the YOUBER vehicle and had a legitimate expectation of privacy in the car she used as a home, the Thirteenth Circuit's denial of the motions to suppress should be REVERSED.

I. THE THIRTEENTH CIRCUIT ERRED IN HOLDING THE ACQUISITION OF PETITIONER'S RENTAL CAR GPS DATA DID NOT CONSTITUTE A SEARCH.

Under the Fourth Amendment, an individual has the right to be free from unreasonable searches and seizures. U.S. Const. amend. IV. Searches that are conducted without a warrant "are per se unreasonable . . . subject only to a few specifically established and well delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967). The applicability of the Fourth Amendment's protections is dependent on whether a "search" has occurred. Although not the sole measure, a "search" occurs when an individual's reasonable expectation of privacy is violated by government action. *Smith v. Maryland*, 442 U.S. 735, 740 (1979). Additionally, an individual may still have a reasonable expectation of privacy even in areas accessible to the public. *Katz*, 389 U.S. at 351. However, in certain situations, an individual does not have a reasonable expectation of privacy in information voluntarily shared with a third party. *See United States v. Miller*, 425 U.S. 435, 443 (1976) ("the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities . . .").

In applying this standard, the Court held that in certain circumstances, an individual has a reasonable expectation of privacy in the whole of their physical movements. *See United States v. Jones*, 565 U.S. 400 (2012) (holding that the use of GPS for 28 days to track the movements of defendant's vehicle constituted a search); *United States v. Carpenter*, 138 S. Ct. 2206 (2018) (holding that acquisition of defendant's historical cell-site location information from wireless carriers was a search). Similarly, the Petitioner had a reasonable expectation of privacy in the whole of her physical movements while using a rental car, and a search occurred when the police obtained all her GPS information—over a period of 94 days— through YOUBER. The Petitioner's reasonable expectation of privacy is not defeated by the third party doctrine due to the sensitivity of the information collected, and the fact it was not "voluntarily" conveyed to a third party. To accept the government's proposition that a search did not occur would allow the government to access millions of American's location data, revealing the intimate details of their private lives, with no quantum of judicial oversight. This Court should reverse the Thirteenth Circuit and hold that the acquisition of the Petitioner's rental car location data was a search within the meaning of the Fourteenth Amendment.

A. Petitioner had a reasonable expectation of privacy in the whole of her physical movements while using a rental car.

This Court has long held that "the Fourth Amendment protects people, not places." *Katz*, 389 U.S. at 351. "Property rights are not the sole measure of Fourth Amendment violations." *Soldal v. Cook County*, 506 U.S. 56, 64 (1992). Rather, when there is not a property interest invoked, the test is: (1) whether an individual exhibits a subjective expectation of privacy, and (2) whether that subjective expectation of privacy "is one that society is prepared to recognize as reasonable." *Smith*, 442 U.S. at 741. Generally, the subjective expectation of privacy requirement can be satisfied when it is shown an individual took affirmative steps to protect her privacy. *See*,

Katz, 389 U.S. at 352 (holding that by shutting a phone booth door behind him and paying a toll to place a call a defendant showed an expectation of privacy in the contents of the call); *United States v. Oliver*, 657 F.2d 85, 87 (6th Cir. 1981) (holding that "locked gate, the numerous 'No Trespassing" signs and private road all taken together constitute[d] ample evidence of a subjective expectation of privacy.").

1. Petitioner had a subjective expectation of privacy in her physical movements.

Here, the Petitioner took affirmative steps to protect her privacy in the whole of her physical movements, even though those movements were conducted in areas accessible to the public. *See Katz*, 389 U.S. at 351 ("what [an individual] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."). Most significantly, the Petitioner used another individual's account to rent cars from YOUBER. In doing so, Petitioner sought to keep her physical movements private, as the use of any YOUBER cars would not associated with her name, but someone else's. Another result of Petitioner not using a personal account is that she was never made aware that her movements were being tracked by YOUBER. Admittedly, if the Petitioner had used her own YOUBER account to rent cars, and had agreed to allow YOUBER to track her movements, her claim to have a subjective expectation of privacy would be less plausible. However, that is not the case here.The Petitioner did not use her own account to rent cars from YOUBER, but rather the account of her romantic partner, Martha Lloyd. The only time a user is notified about YOUBER's GPS monitoring is during the initial signup period, when the user accepts that YOUBER will track their information. R. at 23-25. There is nothing that indicates the Petitioner was present when Martha Lloyd set up her YOUBER account, or was ever made aware that YOUBER was tracking her movements. As a

result, the Petitioner had a subjective expectation of privacy that the whole of her physical movements were private.

The conclusion that the Petitioner had a subjective expectation of privacy in her physical movements is supported by the fact the Petitioner used a rental car. Unlike a personal car, a rental car cannot readily be associated with a particular individual. Anybody can look up the license plate of a personal car and immediately discover who owns it. In contrast, a rental car is not registered to the individual who temporarily uses it, thus, even if an enterprising member of the public wanted to discover who was driving a specific rental car, they would be unable to do so by looking up the rental car's license plate. Thus, by virtue of using a rental car, and using another individual's account, the Petitioner had a subjective expectation of privacy.

2. Petitioner's expectation of privacy is one that society recognizes as legitimate.

In addition to requiring a subjective expectation of privacy, an individual's expectation of privacy must be one that society recognizes as reasonable or legitimate. *Katz*, 389 U.S. at 361 (Harlan, J., concurring); *Smith*, 442 U.S. at 741. For an expectation of privacy to be legitimate it "must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." *United States v. Jacobsen*, 466 U.S. 109, 122, n. 22 (1984). While there is no single determinative factor, this Court has considered such factors as whether there is knowing exposure to the public, *California v. Ciraolo*, 476 U.S. 207, 215 (1986), and the existence of a societal interest in protecting the privacy. *Oliver v. United States*, 466 U.S. 170, 179 (1984). Ultimately, the underlying standard in determining whether an expectation of privacy is reasonable are "the everyday expectations of privacy we all share." *Olson*, 495 U.S. at 98. This Court has recognized as new technologies allow for greater ease of surveillance, it must ensure the "preservation of the

degree of privacy against government that existed when the Fourth Amendment was adopted." *Kyllo v. United States*, 533 U.S. 27, 34 (2001). Further, in it's reasonable expectation of privacy of analysis, the Court "must take account of more sophisticated systems that are already in use or in development." *Id.* at 36.

In applying this framework, the Court in *Carpenter v. United States* held that an individual has a reasonable expectation of privacy in his physical movements as recorded by cell-site location information ("CSLI"). 138 S.Ct. at 2217. Because of the inability of law enforcement, prior to the digital age, to pursue a suspect for any extended period of time, "society's expectation has been that law enforcement agents and others would not—and indeed, in the main, simply could not—secretly monitor and catalogue every single movement of an individual's car for a very long period." *Id.* at 2217. Therefore, the defendant had a reasonable expectation of privacy that was invaded when the government accessed CSLI from his wireless carriers. *Id.* at 2219.

Similar to *Carpenter*, the Petitioner in the instant case had a reasonable expectation of privacy in the whole of her physical movements as recorded by YOUBER. Although normally what individual knowingly exposes to the public "is not a subject of Fourth Amendment protection," *Katz,* 389 U.S. at 351, it is vital to recognize what data was collected in this case. This was not an instance where the government used "merely a more effective means of observing what is already public." *United States v. Knotts*, 406 U.S. 276, 284 (1983). Here, the government accessed Petitioner's location data, intricately detailing all of her movements in a rental car, in two-minute intervals, over a period of 94 days. It can hardly be argued that the totality of the Petitioner's movements over the course of 94 days was "already public," let alone "knowingly exposed to the public." *See United States v. Maynard*, 615 F.3d 544, 558 (D.C. Cir.

2010) ("Unlike 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 the movements is effectively nill."). The general public may harbor no expectation of privacy in a single trip to the store, but they most certainly expect that the totality of their movements over an extended period of time will not be subject to warrantless government scrutiny.

Furthermore, even if this Court were to find that the Petitioner's physical movements were knowingly exposed to the public, the Petitioner would still have a reasonable expectation of privacy in the data collected in this case because *it reveals more* than just the Petitioner's movements. Compared to those cases where the Court has not found a reasonable expectation of privacy in an individual's public movements, the device and methods used in this case are much more sophisticated, and thus are qualitatively different. Here, the Petitioner's location while using a rental car was logged every two minutes via GPS. GPS is unique in that it "create[s] a permanent electronic record that can be compared, contrasted and coordinated to deduce all manner of private information about individuals." *United States v. Pineda-Moreno*, 617 F.3d 1120, 1124 (9th Cir. 2010) (Kozinski, C.J., dissenting). The data in this case did not simply reveal the individual trips taken by the Petitioner over an extended period of time, but the intimate details of her personal life. *See e.g.*, *Jones*, 565 U.S. at 415 (Sotomayor, J., concurring) ("GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious and sexual associations."). These types of intimate details about an individual are something that society recognizes as private. Normally, people do not share this kind of sensitive information, and in the instance they do, it's only with those acquaintances they consider close and whom they can trust

to keep the information to themselves. Thus, it is unsurprising that several states have proposed and others have enacted legislation recognizing individuals privacy interests in GPS location information. At the federal level, legislation has been proposed in the form of "the GPS Act" which would make it unlawful to disclose the geolocation information of another person, and require a probable cause warrant for the government to obtain geolocation information. Geolocation Privacy and Surveillance Act, H.R. 3470, 115th Cong. (2017). This further shows that society understands and accepts that there is a reasonable expectation of privacy in the whole of one's physical movements. *See Stanford v. Kentucky*, 492 U.S. 361, 370 (1989) ("[A]mong the objective indicia that reflect the public attitude toward a given sanction are statutes passed by society's elected representatives."). Therefore, the Petitioner had a reasonable expectation of privacy in the whole of her physical movements.

B. Petitioner did not forfeit her reasonable expectation of privacy by having her information exposed to a third party.

The Third Party doctrine stands for the proposition that "[t]he Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities . . ." *Miller*, 425 U.S. at 443. The underlying rationale for the third party doctrine is that there is a diminished expectation of privacy in information knowingly shared with others. *Carpenter*, 138 S.Ct. at 2219. However, just because there is a diminished expectation of privacy does not mean that "the Fourth Amendment falls out of the picture entirely" *Id.*, and the mere fact that information "is held by a third party does not by itself overcome [a] claim to Fourth Amendment protection." *Id.* at 2217. When an individual has a "legitimate privacy interest in records held by a third party" a warrant is required. *Id.* at 2222. Thus, the Court has already found a reasonable expectation of privacy in information held by third parties in other contexts. *See e.g.*, *Ferguson v. City of Charleston*, 532 U.S. 67, 78 (2001)

(holding that patients had a reasonable expectation of privacy in the results of diagnostic tests); *Carpenter,* 138 S.Ct. at 2217 (holding that defendant had a reasonable expectation of privacy in his movements recorded by CSLI). Here, the Petitioner did not lose her reasonable expectation in the whole of her physical movements merely because the information was exposed to YOUBER.

1. Petitioner did not "voluntarily" convey her location information.

One of the key prerequisites to the application of the third party doctrine is that the information must be voluntarily conveyed to the third party. *See Carpenter,* 138 S.Ct. at 2220. The Petitioner's GPS location data was in no manner "voluntarily conveyed" to YOUBER. The Petitioner had no knowledge that her location was being shared with YOUBER when she used their rental cars. As stated earlier, the only time a user is notified that YOUBER monitors their location is during the initial signup period. R. at 23. The account which Petitioner used to rent cars from YOUBER was not her own, but the one created by her romantic partner. Thus, Petitioner never had notice that her location information was being shared with and collected by YOUBER. It can hardly be argued that an individual "voluntarily" does something they have no idea they're doing.

Further, for information to be "voluntarily conveyed" to a third party, there must be some affirmative act on the part of the individual. *See e.g., Miller,* 425 U.S. 435 (giving bank checks and deposit slips); *Smith,* 442 U.S. 735 (dialing a number on a phone). Aside from renting and using YOUBER cars, the sharing of the Petitioner's location information required essentially no action on the part of the Petitioner. Instead, Petitioner's location was automatically collected and recorded *every two minutes* while she was using a YOUBER car. In *Carpenter,* this Court held that CSLI is not "truly shared as one normally understands the term" and as a result, a user does not "voluntarily assume the risk of turning over a comprehensive dossier of his physical

movements." *Carpenter*, 138 S.Ct. at 2220 (internal quotations omitted). This holding was based on the fact that carrying a cellphone is "indispensable to participation in modern society," and that it is impossible to not leave a series of location data "[a]part from disconnecting the phone from the network." *Id.*

The collection of the Petitioner's location data is akin to the collection of CSLI in *Carpenter*. Although not as ubiquitous as cellphone use, YOUBER has 40 million users in the United States, R. at 22, which accounts for an entire eighth of the United States population. While to the entirety of the United States YOUBER may not be "indispensable to participation in modern society," it certainly is for its users, and individuals like Petitioner who use YOUBER to travel to work. *See* R. at 2. Further, there is no way for a YOUBER user to avoid having their location data collected and no affirmative act in sharing the information except by hopping in a YOUBER car. The only way for user to avoid having their location data collected would be to not use YOUBER. Therefore, Petitioner did not "voluntarily convey" her location information to YOUBER, and cannot be presumed to have assumed the risk that "in revealing h[er] affairs to another, that the information [would] be conveyed by that person to the Government." *Smith*, 425 U.S. at 442.

2. GPS location data is more sensitive than the information in *Miller* and *Smith*.

The mere act of sharing information with a third party has never been dispositive in assessing whether an individual has an expectation of privacy in information held by a third party. *See Carpenter*, 138 S.Ct. at 2219. Rather, this Court has looked at "the nature of the particular documents sought to determine whether there is a legitimate expectation of privacy concerning their contents." *Id*. In *Smith* the Court held that the use of a pen register to record the telephone numbers dialed by an individual did not violate a reasonable expectation of privacy.

Smith, 442 U.S. at 745. The Court distinguished the use of a pen register from the use of the listening device in *Katz*, noting that pen register did not reveal the contents of communication and that individuals don't "harbor any general expectation that the numbers they dial will remain secret." *Id*. at 741-43. Similarly, in *Miller*, the Court concluded there was no Fourth Amendment interest in checks and deposit slips held by a bank. *Miller*, 425 U.S. at 440. The Court clarified that the nature of the specific documents must be examined "in order to determine whether there is a legitimate expectation of privacy concerning their contents." *Id.* at 442. Because the checks were "not confidential communications but negotiable instruments to be used in commercial transactions," the Court concluded there was no privacy interest in their contents. *Id*.

Unlike the numbers in *Smith* and the bank documents in *Miller*, the Petitioner had a privacy interest in the GPS location information collected by YOUBER. The Petitioner, and society have a reasonable expectation of privacy in the whole of their physical movements, and this same expectation applies to physical movements made while driving a rental car. As established earlier, GPS location data generally, and specifically, the location data collected by YOUBER, reveals intimate details about the lives of individuals, that would otherwise be unknowable. *See ante* at 16-19. As such, five justices in *Jones* concluded that longer-term GPS monitoring of cars violates a reasonable expectation of privacy. Similarly, the acquisition of an individual's GPS location information from a third party violates a reasonable expectation of privacy. Just as the case was in *Carpenter* and *Riley*, the extension of pre-digital Fourth Amendment reasoning "to digital data has to rest on its own bottom." *Riley*, 134 S.Ct. at 2489. The aggregation of a rental car's location data over a period of 94 days reveals a mass of information that is incomparable to the records in *Smith* and *Miller*. As a result, the Court's

conclusion that individuals do not have a Fourth Amendment interest in those records is inapplicable to a rental car's GPS location information.

3. Extending the third party doctrine to GPS location information would significantly erode Fourth Amendment protections.

The Court's decision in this case cannot be viewed in isolation as it will not solely affect individuals' privacy while using rental cars. As new and more advanced technologies continue to insert themselves into the fabric of daily life, the Court must continue to ensure the "preservation of the degree of privacy against government that existed when the Fourth Amendment was adopted." *Kyllo*, 533 U.S. at 34. One of the more notable trends in recent years is the extent and frequency to which an individual's data is shared with third parties. *See e.g.*, *Jones*, 565 U.S. at 417 (Sotomayor J. concurring) (in the digital age "people reveal a great deal of information about themselves to third parties . . ."). Many times the data viewed on electronic devices is not even stored on the device itself. *See Riley*, 573 U.S. at 2491. "Cloud computing" as it is known, allows "internet-connected devices to display data stored on remote servers rather than on the device itself." *Id*. A prime example of cloud computing and the privacy concerns it raises can be seen in the immensely popular Google Drive. Google Drive is a free file storage service that allows its users to access their files in the drive anywhere. These are the kinds of documents that have always been subject to Fourth Amendment protection and tend to contain highly sensitive information, but an expansion of the third party doctrine in this case would eliminate that protection simply because the information was voluntarily shared with a service provider. And this is just one example. In the modern age, almost any appliance can "interact, report, track, and provide vast amounts about the activities of the owner." Andrew Guthrie Ferguson, *The Internet of Things and the Fourth Amendment of Effects*, 104 Cal. L. Rev. 805, 807 (2016). Even the confines of one's house would provide no protection. *See Id*. at 820.

The "dragnet-type law enforcement practices" that the Court reserved judgment on in *Knott* are here. A holding that the acquisition of a rental car's GPS data violates no reasonable expectation of privacy would not be limited to simply GPS data. In effect, it would open the door to 24 hour surveillance of any American as more and more of their information is retained and controlled by third parties. To be sure, the Petitioner does not contend that law enforcement should *never* be able to access an individual's data held by a third party, but that rather that when they do, it is based on a warrant supported by probable cause. The Constitution demands as much. Ultimately, individuals should not be forced to resign themselves to having no expectation of privacy, or living like a luddite.

CONCLUSION

The holding of the Thirteenth Circuit affirming the District Court's denial of the Petitioner's motions to suppress should be REVERSED. First, the Petitioner had a lawful presence and legitimate expectation of privacy in the rental vehicle, and thus has standing to make a Fourth Amendment Claim. Second, the Petitioner had a reasonable expectation in the whole of her physical movements and that expectation was not forfeited when her information was exposed to a third party.