

No. 4-422

**IN THE
SUPREME COURT OF THE UNITED STATES**

FALL TERM, 2019

JAYNE AUSTIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF FOR THE PETITIONER,
JAYNE AUSTIN

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QUESTIONS PRESENTED

1. Under the Fourth Amendment, does a person have standing to contest to the search of a rental vehicle that is in their possession, but was rented by their on-and-off romantic partner who gave them permission, and where they intentionally placed their items out of view?
2. Under the Fourth Amendment and *Carpenter v. United States*, 138 S. Ct. 2206 (2018), does the acquisition of location data for a rental vehicle constitute a “search” where the data was automatically surrendered to a third party, and was a comprehensive chronicle of their movements.

STATEMENT OF FACTS

Jayne Austin (“Petitioner”) is an avid poet and blogger calling for the reformation of financial corruption in the United States banking industry. R. at 1. As a naturalist and minimalist, Petitioner prides herself on her immaterial and transient lifestyle. R. at 1. Much of Petitioner’s work requires her to travel long distances, therefore she has taken advantage of the relatively new car rental application (“app”), YOUBER, which is available on all mobile devices. R. at 2. The app has quickly gained popularity with over 40 million users across the United States. R. at 2.

The app works much like a standard rental car company but is done remotely through a users’ cell phone which connects automatically to the YOUBER vehicle via Bluetooth and GPS. R. at 2. The user signs a rental agreement through the app and pays a fixed fee per hour for use of the car. R. at 2. The cars may be rented for a maximum distance of 500 miles, or a time period of up to one week. R. at 2. Per its corporate policies and procedures, YOUBER tracks the location of every YOUBER vehicle using GPS technology and Bluetooth signals from the users’ cell phone every *two minutes*, whether or not the vehicle is in use. R. at 3. Upon creating a YOUBER account, the user must accept the terms and conditions of use, including a clause which permits YOUBER to track each users’ location when renting a vehicle. This notification is given only once at the time the account is created. R. at 3-4.

Petitioner, in alignment with her minimalist views, took efforts to minimize her online presence by limiting the amount of personal information she disclosed online. R. at 18. Thus, rather than using her own information to sign up for internet sites such as social media, YOUBER, or YOUBEREATS, Petitioner would use the account of her partner, Martha Lloyd (“Martha”), and reimburse her in cash. R. at 18. Martha and Petitioner share login information for many services and electronic devices. R. at 18. Martha gave Petitioner permission to use her

information and was even an authorized user on the credit card for her YOUBER account. R. at 19. Petitioner and Martha have had a classic “on-and-off-again” relationship, and recently took some time apart from each other in September of 2018, after living together for a few years. R. at 18. Since then, Martha has not changed the passwords to any of her accounts, nor told Petitioner she was no longer allowed to use her accounts. R. at 18-19. While currently separated, Martha has expressed that she still loves Petitioner, and simply “need[s] time to heal” before she could resume their relationship. R. at 19. Martha has considered changing her passwords to her accounts and taking Petitioner off her credit card, but decided not to follow through with either. R. at 20.

On January 3, 2019, Petitioner was pulled over for failing to stop at a stop sign while driving a black Toyota Prius with the license plate “R0LL3M”. R. at 2. During the traffic stop, Petitioner showed the officer her license and the YOUBER app on her cellphone. R. at 2. The officer noted that the rental agreement was in Martha’s name, rather than Petitioner’s, and told Petitioner he did not need her consent to search the entire vehicle. R. at 2-3.

During the search the officer noticed many of Petitioner’s personal items within the vehicle, including a pillow and bedding out in the open on the backseat, and clothes, an inhaler, three pairs of shoes, a collection of signed Kendrick Lamar records, and a freezer with a homemade meal, all in the closed trunk. R. at 3. The officer noted in his report that he believed the car to be “lived in.” R. at 3. Additionally, the officer discovered a BB gun, a maroon ski mask, and a duffle bag containing money and blue dye packs in the vehicle’s trunk. R. at 3. During this investigation, the officer received dispatch to look for a black Toyota Prius with a YOUBER logo, and a partial plate number “R0L” in connection with a nearby bank robbery. R. at 3. The robbery suspect was seen wearing a maroon ski mask and carrying a handgun. R. at 3.

Based on the items the officer found in the car, the partial plate match, and the dispatch, the officer arrested Petitioner under suspicion of bank robbery. R. at 3.

Two days later, and after further investigation, Detective Hamm (“Hamm”) discovered five open bank robbery cases occurring between October 2018 and January 2019, which matched the modus operandi of the robbery on January 3, 2019. R. at 3. Noticing Petitioner had been driving a YOUNBER car on the date of arrest, Hamm served a subpoena duces tecum on YOUNBER to obtain all GPS and Bluetooth information related to the account Petitioner used between October 2018 and January 2019. R. at 3.

The YOUNBER records revealed that Martha’s account was used to rent cars in the locations and at the times of each of the other five robberies. R. at 4. Petitioner was charged with six counts of bank robbery under 18 U.S.C. Section 2113, Bank Robbery and Incidental Crimes. R. at 4. Prior to trial, Petitioner filed two motions to suppress. R. at 4. One sought to suppress the evidence obtained during the officer’s search of the rental car on January 3, 2019, and the other sought to suppress the location data obtained from YOUNBER. R. at 4.

Petitioner contends the respective searches were warrantless searches in violation of Petitioner’s Fourth Amendment rights. The District Court for the Southern District of Netherfield denied Petitioner’s motion to suppress this evidence, and the Court of Appeals for the Thirteenth Circuit affirmed the District Court’s decision.

SUMMARY OF ARGUMENT

Petitioner had a reasonable expectation of privacy in the YOUNBER vehicle she rented with Martha’s permission, and in her location data while using the vehicle. The United States Court of Appeals for the Thirteenth Circuit wrongly affirmed the trial court’s denial of the motion to suppress the evidence obtained through the vehicle search and the location data retrieved, both without a warrant.

This Court has partly shifted away from the historical property-based reasoning to establish standing to contest a search, and instead relies more heavily on whether a person has a legitimate expectation of privacy in the places and things to be searched. A person does not completely lose her reasonable expectation of privacy, merely because she is not an authorized driver on the rental car agreement. The lower court's reasoning is flawed because it does not give appropriate weight to previous court decisions which address this specific issue.

Petitioner used the login information Martha voluntarily and willingly gave to her, to rent a YOUBER vehicle. Petitioner showed her subjective expectation of privacy when she placed her personal belongings in the trunk of the vehicle, and exhibited her possessory interest in the belongings in the car when she treated it like her home by placing her pillow, bedding, clothes, food, inhaler, and other personal belongings in the vehicle.

The lower courts erred in concluding that Petitioner did not have an objectively reasonable expectation of privacy in the vehicle when she was stopped by Officer Kreuzberger. In our ever-evolving society and with the expansion in technology, fewer people are purchasing cars; instead preferring to rent given the ease, convenience, and price of doing so. The relationship between Petitioner and Martha was not simply a business transaction, but closer to the relationship of a spouse or overnight guest. To give someone one's login username and password is just today's method of handing someone the keys to one's rental vehicle.

Second, the police's access of Petitioner's location data constituted a search within the meaning of the Fourth Amendment, as it showed a comprehensive chronicle of her physical movements by tracking and recording her location every two minutes. A search is unreasonable, and thus requires a valid warrant, when it infringes on a person's expectation of privacy. In order to establish a legitimate expectation of privacy, the person must demonstrate a subjective

expectation of privacy in the places or things to be searched, and that expectation must be one that society is willing to recognize as reasonable.

Petitioner had an expectation of privacy in the whole of her physical movements as captured through GPS location tracking, despite driving a vehicle on public roads. A person does not completely lose his or her reasonable expectation of privacy, simply because they are in the public sphere. Petitioner's expectation of privacy in the whole of her movements is one that society is prepared to accept as reasonable because of the nature of location data. Recently, Courts have become concerned with the sensitive nature of CSLI data, the effortless and low-cost nature of its collection, and the broad range of information that can be collected. Therefore, case law reflects a desire to give this information a higher level of protection, despite it being surrendered to a third party.

Furthermore, per its policies, YOUBER automatically tracked the location of the user every time they got in the vehicle. Therefore, it cannot be said that the surrendering of this information to a third party was voluntary. Petitioner could not "opt out" of this tracking. Additionally, Petitioner did not take any affirmative action to share her location to the public in any way besides by being on public roads, which is almost inevitable in the realm of driving. Tracking the location of the YOUBER vehicles, even while not in use, can reveal a wide breadth of sensitive information based on where the car is parked, such as religious and political associations.

Finally, a user is informed only once, at the time they create an account, that their location will be tracked. This warning is stated in a clause in the "terms and conditions" agreement. This single warning is insufficient to put a user on notice that they are "voluntarily" giving their information to a third party (YOUBER) every time they rent a YOUBER car.

Additionally, considering the number of “terms and conditions” agreements individuals sign every day, it is unreasonable to expect the user will read every clause in a multi-page and complex document that they cannot object to if they desire to use the product.

Therefore, the location data, which comprehensively details the whole of Petitioners movements from October 2018 to January 2019 while renting a YOUBER vehicle constitutes an unconstitutional search under the Fourth Amendment, and the District Court erred in failing to suppress this evidence.

STANDARD OF REVIEW

The issues presented on Writ of Certiorari concern Petitioner’s Fourth Amendment right against unreasonable searches, and Petitioner asks this Court to review her motions to suppress the unlawfully obtained evidence. We review de novo a District Court's denial of a motion to suppress, reviewing for clear error the district court's underlying factual findings. *United States v. Mayer*, 560 F.3d 948, 956 (9th Cir. 2009). The Court may affirm the denial of a motion to suppress “on any basis fairly supported by the record.” *United States v. Todhunter*, 297 F.3d 886, 889 (9th Cir. 2002).

ARGUMENT

- I. THE COURT ERRED IN DENYING PETITIONER STANDING TO CONTEST THE SEARCH OF THE RENTAL VEHICLE BECAUSE SHE HAD A SUBJECTIVE AND OBJECTIVE EXPECTATION OF PRIVACY IN THE VEHICLE AND TRUNK CONTENTS.

The use of rental cars in place of owning vehicles is growing exponentially in our society, based on the innovation in technology, the convenience of renting a vehicle for the exact hours it is needed, and the economic advantage of renting rather than buying. In 2018, there were over two million rental cars in service, in over 19,000 U.S. locations, bringing in more than 30 million dollars in revenue; and those numbers do not even include data from car sharing companies such

as YOUNBER. Auto Rental News, *2018 U.S. Car Rental Market*, <https://www.autorentalnews.com/rental-operations/321018/2018-revenue-cars-in-service-snapshot-1>. In fact, an article by the Wall Street Journal stated, “Americans would have purchased about 500,000 new or used cars between 2006 and the end of 2013, if they didn't have car sharing services as an alternative.” Neal E. Boudette, *Car-Sharing, Social Trends Portend Challenge for Auto Sales*, Wall St. J., Feb. 3, 2014, <https://www.wsj.com/articles/carsharing-social-trends-portend-challenge-for-auto-sales-1391449404>. As the trend in society moves from car ownership to short-term car rentals, there is a growing need for the Court to adopt rules that continue to protect the People’s right to privacy from warrantless government intrusion.

The Fourth Amendment was created to protect the people against unreasonable searches and seizures, and our founders did so by instilling an expectation of privacy in persons, houses, papers, and effects. U.S. Const. amend. IV. In this Court’s decision, *Rakas v. Illinois*, the court shifted, but did not displace, the long-standing property-ownership basis for determining standing, and instead urged the analysis to come from the ‘reasonable expectation of privacy’ test that Justice Harlan proposed in the *Katz* concurrence. *Byrd v. United States*, 138 S. Ct. 1518, 1526 (2018). Under this test, a person claiming Fourth Amendment protection must show they had both a subjective expectation of privacy in the places or things to be searched, and that expectation of privacy must be objectively reasonable in the lens of society. *Katz v. United States*, 389 U.S. 347, 351 (1967). The lower courts erred in denying Petitioner standing to challenge the constitutionality of the rental car search, because she had both a subjective and objectively reasonable expectation of privacy in the vehicle and the contents in its closed trunk.

A. *The Court erred in denying Petitioner standing to challenge the search because she had a subjective expectation of privacy in the contents of the rental vehicle.*

Petitioner had a subjective expectation of privacy in the items in the trunk of the YOUNBER vehicle because she proactively placed her personal items in the trunk of her car, away from the public eye, while deliberately choosing to leave her bed and pillow in the open backseat, exhibiting no expectation of privacy. A person exhibits a subjective expectation of privacy by showing that the area searched was one “he [sought] to preserve as private.” *Katz*, 389 U.S. at 351. A subjective expectation of privacy is revealed through an individual’s conduct. *United States v. Knotts*, 460 U.S. 276, 281 (1983). Even though a person has a less substantial expectation of privacy in her vehicle compared to that of her home, she still has an expectation of privacy that is nevertheless deserving of that constitutional protection. *Byrd*, 138 S. Ct. at 1526.

Petitioner demonstrated her expectation of privacy in the contents in her trunk by exhibiting a possessory interest in the items she had with her. In *Katz*, the defendant demonstrated his expectation of privacy by closing the phone booth door behind him. Here, Petitioner showed her desire to maintain the privacy of her belongings by deliberately placing them in the vehicle’s closed trunk. Alternatively, Petitioner placed her pillow and bedding, items she expected less privacy in, in the easily viewed backseat. R. at 3. Thus, Petitioner exhibited her subjective expectation of privacy in the personal items retrieved during the search, through her deliberate act of placing her clothes, medicine, valuable signed records, and homemade food, in the trunk of her car. R. at 3.

B. The Court erred in denying Petitioner standing to contest the search because her expectation of privacy in the contents of the YOUNBER car was objectively reasonable in the lens of society.

Petitioner’s expectation of privacy was objectively reasonable because she had permission to rent the car through the authorized driver’s YOUNBER account. An unauthorized driver with permission from the authorized driver does not lose his expectation of privacy in the

personal items placed in the trunk of a car simply because he is not authorized on the rental agreement. *Byrd*, 138 S. Ct. at 1531.

1. It was objectively reasonable for Petitioner to expect privacy in her YOUNBER vehicle because she was legitimately in the vehicle.

Petitioner's expectation of privacy in the YOUNBER vehicle was objectively reasonable because she had permission from Martha to log in to the application and rent a car to drive on her own. While legitimate presence on the premises, in itself, is insufficient to establish an objectively reasonable expectation of privacy, it is still relevant to the analysis. *Rakas v. Illinois*, 439 U.S. 128, 148 (1978).

Martha, the authorized user on the YOUNBER account, gave Petitioner her YOUNBER login information, and made her an authorized user on her credit card. R. at 18-19. Additionally, Martha was aware Petitioner was still using the credit card and YOUNBER account but did not change any of her passwords or tell Petitioner she could no longer use them. R. at 19. Although Martha did not give Petitioner explicit permission to use her YOUNBER account after September 2018, Martha told Petitioner she still loved her, which implies they likely could have gotten back together soon, as they had many times before. R. at 19. Although Martha had considered taking Petitioner off the credit card account and changing her YOUNBER passwords, she did not. R. at 19. Many individuals give friends and loved ones their login information in situations like this, so they do not have to give explicit verbal permission every time they want to use their account. The trust between the friends has already been established. The Court should consider the meaning behind interactions with new technology as it advances, and consider the policy underlying this decision. Petitioner had an objectively reasonable expectation of privacy in her belongings, in part because she had permission to be on the premises.

2. Not only was Petitioner legitimately in the vehicle, but she had a property interest in the items in the trunk; Thus, her expectation of privacy in her belongings was objectively reasonable.

Petitioner exhibited a property interest in the items seized during the search of her YOUNBER vehicle, and that along with her legitimate presence in the vehicle, amount to her expectation of privacy as objectively reasonable. A person's expectation of privacy cannot be objectively reasonable if they assert neither a property nor possessory interest in the property seized. *Rakas*, 439 U.S. at 148.

In *Rakas*, the defendants claimed their Fourth Amendment protection as passengers in the car, however denied owning both the vehicle, and the rifle and shells seized during the search. *Id.* at 130. The Court held the petitioners did not have standing, as they were merely passengers, and asserted no proprietary or other similar interest in the vehicle. *Id.* at 131.

This Court's seminal decision in *Byrd*, guides the analysis for the facts of this case. 138 S. Ct. at 1531. In *Byrd*, the defendant, who was not listed on the rental agreement, was given the keys by his girlfriend and was driving the vehicle by himself at the time of the search. *Id.* at 1524. Byrd placed personal items in the trunk of the car, and the officers that pulled him over wrongly informed him they did not need his permission to search the car. *Id.* at 1525. The Court held, "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* at 1531. The Court remanded the case to the lower court who had a better idea of the facts and issues, but held nonetheless that Byrd was not completely stripped of his right to privacy just because he was not authorized on the rental car agreement. *Id.* at 1530.

In *Byrd*, the Court denied the government's comparison of the facts at hand to those facts in *Rakas*, and instead drew similarities to the facts in *United States v. Jones*, 362 U.S. 257

(1960). In *Jones*, the defendant sought to exclude evidence resulting from a search of the apartment he had permission to occupy. *Id.* at 259. The defendant kept clothes in the apartment, slept there overnight, and was the only person occupying the apartment at the time. *Id.* at 259. The Court held that the defendant had standing because he had permission to stay there, and thus the right to exclude others from it. *Id.* at 267. The Court reasoned it did not matter whether the apartment was owned or leased by the person giving consent, because in either case the person has the right to exclude others from the property, and thus holds a reasonable expectation of privacy. *Byrd*, 138 S. Ct. at 1528. The government in *Jones* even conceded during oral argument that “an authorized driver in sole possession of a rental car would be permitted to exclude third parties from it, such as a carjacker.” *Id.* Even though pure legitimacy on the premises as enough to challenge the legality of a search, is an invalid statement after *Rakas*, the holding in *Jones* still stands. *Minnesota v. Carter*, 525 U.S. 83, 89-90 (1998).

In *Minnesota*, police see defendants through a drawn window blind, bagging cocaine in an apartment. 525 U.S. at 85. The Court held the defendants, who did not live in the apartment, did not have standing because they had no expectation of privacy. *Id.* at 91. The Court reasoned they were not like the overnight guests in *Jones*, rather this was purely a business transaction, particularly since there were no facts to suggest any previous relationship. *Id.* at 89-90. The court draws a spectrum for standing, placing overnight guests at one end, and those merely “legitimately on the premises” (in other words there with permission), at the other end. *Id.* at 91.

Unlike in *Rakas*, where the petitioners were passengers, here Petitioner was the driver and the sole person in the vehicle at the time of the search. R. at 2. Unlike in *Rakas*, where the petitioners conceded that they did not own the vehicle, rifle, or shells seized, here Petitioner is claiming ownership of the items found in the trunk of her YUBER vehicle.

The District Court argued that *Rakas* guides this analysis, and “one who intentionally uses a third party to procure a rental car by a fraudulent scheme for the purpose of committing a crime is not better situated than a car thief.” *Id.* at 1531. This interpretation of the facts presented in Petitioner’s case, wrongly characterizes the issue at play. Petitioner did not gain access to Martha’s YOUNBER account by “a fraudulent scheme,” rather Martha testified that she voluntarily gave Petitioner her login information to use on her personal cell phone for her personal use. R. at 19.

As in *Byrd*, where the defendant was not an authorized driver on the rental car agreement, here Petitioner was also not an authorized driver on the agreement. R. at 2. In *Byrd*, the girlfriend (and authorized driver) was aware Byrd was driving the vehicle rented in her name; here, Martha was aware and gave permission to Petitioner to use the application to rent a vehicle under her name. R. at 18-19. The decisions from the lower courts repeatedly focus on the fact that Petitioner’s name was not on the rental agreement, but this argument is unpersuasive as *Byrd* overruled this as a standalone reason to prohibit standing. As in *Byrd* where the Court held that someone not specifically listed on the rental agreement does not negate their standing to assert their right to privacy in their belongings, here too the Court should hold that Petitioner had standing, even though her name was not specifically listed on the YOUNBER agreement.

Like in *Jones*, where the defendant was staying on his own, and had permission from the person living in the home to stay there, here Petitioner was by herself in the YOUNBER rental vehicle, and had permission from Martha to use her login information and rent a vehicle for her own use. R. at 18-19. Like the defendant in *Jones* who kept clothes in the house and slept there overnight, here too Petitioner kept personal belongings, including clothes and a pillow and blanket in the vehicle, which shows a possessory interest in the rental car. R. at 3.

Unlike in *Minnesota*, where the relationship between the person leasing the home and the defendants was merely transactional and business related, here Petitioner and Martha had a very different, romantic and long-standing relationship. R. at 18-20. It is really of no significance that Martha and Petitioner were on one of their ‘breaks,’ in their on-and-off romantic relationship. The court cannot make case-by-case decisions based on how a romantic relationship is categorized at any given time. The relationship between Petitioner and Martha was in no way transactional and falls much closer to an ‘overnight guest’ on the spectrum described in *Minnesota*.

The determination of whether an individual has standing to contest a search of his or her vehicle has evolved and must keep up with advances in technology. The reality is these days fewer people are purchasing cars, and more often using applications and other methods to rent cars only for the window of time they need. Owning a car is expensive and public transit is increasingly more reliable. This should not mean that people suddenly have no expectation of privacy in their person and belongings just because they are not listed on every rental agreement. In *Olmstead v. United States*, and reiterated in *Carpenter v. U.S.*, Justice Brandeis urged the Court to maintain the People’s Fourth Amendment protections by stating, “the Court is obligated – as ‘subtler and more far-reaching means of invading privacy have become available to the Government’ – to ensure that the ‘progress of science’ does not erode Fourth Amendment protections.” 277 U.S. 438, 473-474 (1928). 138 S. Ct. 2206, 2223 (2018).

In this case, Petitioner had permission from the authorized YOUBER user, and she claimed a possessory interest in the belongings placed in the car trunk. R. at 19. The Court erred in denying Petitioner’s motion to suppress this evidence because she had a reasonable subjective and objective expectation of privacy in her belongings at that time of the search. As technology

continues to expand, and the ability and convenience of renting rather than purchasing vehicles increases, it is imperative that this Court maintain the privacy for which the Fourth Amendment was originally created: to protect the People's privacy against unreasonable searches and seizures.

II. OBTAINING PETITIONER'S YOUNBER RECORDS CONSTITUTED A SEARCH UNDER THE FOURTH AMENDMENT BECAUSE PETITIONER HAD A SUBJECTIVE AND OBJECTIVE EXPECTATION OF PRIVACY IN THE WHOLE OF HER PHYSICAL MOVEMENTS.

The District Court erred in denying Petitioner's motion to suppress the location records obtained from YOUNBER because accessing this information constitutes a search under the Fourth Amendment. The Fourth Amendment provides, "the right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated." *U.S. v. Jones*, 565 U.S. 400, 404 (2012); U.S. Const. amend. IV. A search is unreasonable when it infringes on a person's reasonable expectation of privacy. *Id.* A person's expectation of privacy is reasonable when they have a subjective expectation of privacy, and that expectation is one society is prepared to accept as reasonable. *Katz*, 389 U.S. at 361 (1967).

A. *Petitioner had a subjective expectation of privacy in the records, such that they would not be accessed by the government, because an individual is still entitled to Fourth Amendment protections in the public sphere.*

The District Court erred in denying Petitioner's motion to suppress YOUNBER'S location records because she had a subjective expectation of privacy in that information. The Fourth Amendment protects "your person, and your house, papers, and effects," and grants a person the right to invoke its guarantees whenever one of these things is unreasonably searched or seized. *Id.* A person has a subjective expectation of privacy when they demonstrate a desire to "preserve something as private." *Id.* at 351.

In *Katz*, the Court addressed whether a person could have a reasonable expectation of privacy while in the public sphere, by answering the question of whether a public phone booth is a constitutionally protected area. *Id.* at 349. In *Katz*, the police attempted to elicit incriminating statements from the defendant by installing an electronic listening and recording device on the top of a phone booth from which he placed a call. *Id.* at 348. The Court reasoned that although the phone booth was glass and located in public, the defendant had created a “zone of privacy” by closing the door behind him, and was therefore justified in assuming the conversation he had would be in private. *Id.* at 352. The defendant in *Katz* was not concerned about the intruding eye, but the uninvited ear. *Id.* The Court held that by listening to and recording the defendant’s words, the police violated the privacy upon which the defendant justifiably relied while using the booth, and thus constituted a search within the Fourth Amendment. *Id.* at 353.

Here, Petitioner had a subjective expectation that her location would remain private while she was driving a rental vehicle, despite being in the public sphere. As in *Katz*, Petitioner was not concerned about being observed while in public, but rather had an expectation that the whole of her movements would not be tracked and recorded. *Katz* held the Fourth Amendment protects *people*, not places, and therefore Petitioner was justified in believing that the whole of her movements would not be tracked, recorded, and handed over to the police. It would not have been practical to collect the sort of detailed information obtained by YOUNBER without use of GPS data produced and collected by the application. Petitioner did not take any affirmative actions to share her location; YOUNBER automatically tracked her location every two minutes, whether or not the car was in use. R. at 4. She did not broadcast her location to the public, apart from driving the rental car in public, which is a requirement for participation in society.

Finally, the expectation of privacy in the information surrendered to YOUBER is reasonable because the user is informed only one time that their data would be tracked and stored by the company. The user is required to sign the terms and agreements the first time they download and sign up for the app. R. at 3-4. Within these terms is a single clause which informs the user that their location will be tracked. R. at 3. Today, nearly every application on a smart phone requires signing these contracts of adhesion, and very few individuals actually take the time to read each and every one of these agreements. It is simply unrealistic to expect, or believe, that each of the 40 million YOUBER users is aware that their location is being tracked when they use this application. Additionally, a comprehensive chronicle of location information, as obtained through GPS surveillance, is impermissible as it details all of a user's movements and can reveal insights into the whole of their daily life. While YOUBER was only able to track the cars, and therefore only showed its movements on public streets, the time-stamped locations where the user parked can show where the users spends significant amounts of time, and may reveal more intimate details of their life, such as political or religious beliefs.

Therefore, Petitioner had a reasonable subjective expectation that her location information was private and the Court erred in failing to suppress this information.

B. Petitioner had a reasonably objective expectation of privacy because the data obtained constituted a comprehensive tracking of her physical movements, and the third party doctrine is insufficient to destroy a societally accepted expectation of privacy.

Denying the motion to suppress YOUBER's records was in error because Petitioner had an objectively reasonable expectation of privacy in this information. A person has a reasonably objective expectation of privacy when the thing they seek to protect is one "society is prepared to recognize as reasonable." *Katz*, 389 U.S. at 351. An individual has a reasonable expectation of

privacy in the record of their physical movements as captured through long-term GPS monitoring. *Carpenter v. U.S.*, 138 S. Ct. 2206 (2018).

In *Carpenter*, the Court examined whether a person has a reasonable objective expectation of privacy in the location information they voluntarily surrender to a phone company. *Id.* at 2211. In *Carpenter*, the police requested the cell phone records of a suspect in a series of robberies, and through this information the police were able to place the defendant at the scene of the robberies at the time they occurred. *Id.* at 2212. The wireless carriers produced “cell site location information” (“CSLI”) for the defendant’s phone, and the Government was able to obtain this data without a warrant. *Id.* The defendant moved to suppress this information as a violation of his Fourth Amendment rights, by obtaining the data without a warrant supported by probable cause. *Id.* The Court held the Government had conducted a search under the Fourth Amendment when it accessed historical cell phone records from a third party which provided a “comprehensive chronicle of the user’s past movements.” *Id.* at 2219. The Court held that due to the deeply revealing nature of CSLI information, its depth, breadth, and the inescapable and automatic nature of its collection, society is willing to recognize a legitimate objective expectation of privacy in this information. *Id.* at 2217. They further found a person cannot reasonably be said to have voluntarily surrendered the information to the third party, because nearly every use of a phone automatically produces data that is stored and tracked without any affirmative act on the part of the user. *Id.* Finally, the court declined to extend the third party principle enumerated in *U.S. v. Miller*, 425 U.S. 435 (1976), due to the detailed, encyclopedic, and effortless compilation of CSLI data. *Id.* at 2209.

In *Riley v. California*, 134 S. Ct. 2473 (2014), the Court addressed the concern of applying Fourth Amendment protections to cell phone data in an increasingly high-tech era. The

court considered phones “a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude that they were an important part of human anatomy.” *Id.* at 2484. The Court grappled with the growing concerns of relying on precedent case law that was decided at a time when today’s technology was inconceivable. *Id.*

In *Smith v. Maryland*, 99 S. Ct. 2577, 2578 (1979), the court addressed whether the installation of a pen register constitutes a search within the meaning of the Fourth Amendment. There, the police asked the phone company to install a ‘pen register’ at its central offices to record the numbers dialed by defendant. *Id.* Using the numbers dialed the police were able to trace a robbery back to the defendant. *Id.* at 2579. The court held the use of a pen register does not constitute a search under the Fourth Amendment, and therefore a warrant was not required to install the register. *Id.* at 2583.

In *United States v. Knotts*, 460 U.S. 276, 277 (1983), the court discussed whether the use of a “beeper” to track the defendant’s car while on public roadways, violated the defendant’s Fourth Amendment rights. In *Knotts*, the police placed a radio transmitter, which emits periodic signals that can be picked up by a radio receiver, in a container of chloroform, and used the beeper to track the container in the defendant’s car. *Id.* at 278. The officers followed the car in which the container had been placed, and maintained contact by using “both visual surveillance and a monitor which received the signals sent from the beeper.” *Id.* The Court held the monitoring of the beeper signals did not invade a legitimate expectation of privacy, and thus there was neither a search nor seizure within the meaning of the Fourth Amendment. *Id.* at 285. The Court reasoned that a person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his “movements from one place to another.” *Id.* at 282.

Here, YOUNBER collected Petitioners location information using GPS technology and Bluetooth signals from her cellphone every *two minutes*, whether or not the car was in use. R. at 4. The government requested Petitioner's data for the period from October 2018 to January 2019 from YOUNBER. R. at 3. The GPS and Bluetooth tracking automatically activate once the cellphone that is synced to the users account is located within the YOUNBER vehicle. R. at 4. As in *Carpenter*, the location information obtained here from Petitioner was automatic, and constituted a comprehensive chronicle of her past movements, and therefore fits squarely under *Carpenter's* analysis. There was no option to opt out of the tracking. Today, rental cars are becoming an increasingly attractive way to commute, and in fact 40 million other users are taking advantage of YOUNBER rental vehicles for transportation today. This demonstrates the vital importance of rental cars for participation in society, particularly for those who cannot otherwise afford to own a car of their own. The privacy concerns associated with the collection of location data of 40 million people every two minutes presents challenges associated with the sheer amount of data produced, and the unforeseen consequences this may pose on society as a whole. As Justice Sotomayor commented in the *Jones* concurrence, "GPS monitoring- by making available at a relatively low cost such a substantial quantum of intimate information about any person whom the government, in its unfettered discretion, chooses to track- may 'alter the relationship between citizen and government in a way that is inimical to democratic society.'" *Jones*, 565 U.S. at 415.

Riley, sets out the policy behind making an exception for location data to the general rule that information surrendered to a third party does not require a search warrant. The court there denied to follow precedent in light of the fact that the case law was created at a time when today's technology was unimaginable. Here, the technology at issue requires the use of satellites,

cellular phones, and vehicles that can be rented without ever having to talk to another person. All of these technologies not only did not exist in the era of the pen register cases, but could not be conceived.

In *Smith*, the police were able to use a pen register to discover who the defendant had called, and thus lead them to charge him with robbery. While it may have seemed reasonable to require phone companies to surrender their business records under the third party doctrine at that time, it no longer seems applicable as it is now much more than a phone number being conveyed. The amount of information that is available, coupled with the requirement of possessing and using a phone to participate in daily life, requires new law to be made to keep up with shifting understandings of privacy.

Petitioners case is distinguishable from *Knotts*. There, the police placed a tracker inside the defendant's vehicle, in order to monitor his location while on public roadways. The police maintained contact through visual surveillance and signals sent from the beeper. Here, the location information is tracked whether or not a car is in use, and also tracks the car's location using GPS and Bluetooth signals while the user is on public roadways. R. at 4. No visual surveillance was performed, and in fact, would have been impractical to obtain the same level of detailed information obtained from YOUNBER. Additionally, the police tracked the defendant's movements in *Knotts* for only one day, while transporting the illicit items from one place to another. Here, the police obtained Petitioner's location data every two minutes, for three months.

The growing role cell phones play in society, coupled with the sheer number of capabilities they perform and the data they produce, justifies the objective expectation of privacy in this data surrendered to third parties, and the protections of the Fourth Amendment. Petitioner had a subjective expectation of privacy in the comprehensive tracking of her movements that

society is willing to accept as reasonable. Therefore, the Court erred in failing to suppress the location data obtained from YOUNBER.

CONCLUSION

The motions to suppress should have been granted because the searches were impermissible violations of Petitioner's Fourth Amendment rights. Petitioner had standing to object to the search of the rental vehicle because she had a subjective and objective expectation of privacy in the contents of the car. Additionally, the acquisition of Petitioner's location data from YOUNBER constituted a search within the meaning of the Fourth Amendment and *Carpenter*, because she had a reasonable expectation of privacy in the whole of her physical movements. Therefore, the District Court erred in failing to suppress this evidence.