No. 4-422

IN THE

Supreme Court of The United States

_____

Jayne Austin,

Petitioner,

v.

United States of America,

Respondent.

_____

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

_____

BRIEF FOR THE PETITIONER

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STATEMENT OF ISSUES

1. Under the Fourth Amendment, does an individual have standing to suppress evidence gathered during a warrantless search of a rental vehicle, containing personal effects, conducted by a police officer during a minor traffic stop?

2. Under the Fourth Amendment may law enforcement conduct a warrantless search and seizure of location data from a third party that collected the data from the GPS and Bluetooth features of an individual's cell phone?

STATEMENT OF FACTS

A. Relevant Facts

Jayne Austin is an advocate, a poet, and a blogger who fights against financial corruption in the banking industry of the United States. R. at 1. Austin's blog posts highlight the effects of decreasing interest rates on lower-income members of banking institutions such as *Darcy and Bingley Credit Union*. *Id.* Austin is a minimalist who chooses to live in communal residences like PODSHARE, where housing is temporary. Austin uses an app called YOUBER to get around when she needs a vehicle. *Id.*

As a minimalist, Austin is an authorized user on her partner Martha Lloyd's credit card account because she does not have her own. R. at 2. Austin frequently uses Lloyd's YOUBER account to rent vehicles for personal use. *Id.* YOUBER is a carshare service that allows users to rent cars at fixed rates. R. at 2. All business with YOUBER is conducted through an app, which can be downloaded onto a user's cellphone. R. at 2, 23. During the rental period YOUBER users may park the cars on the street, but at the end of the rental period the user must park the car in a designated YOUBER parking stall or facility. R. at 2. YOUBER tracks each of its vehicles using GPS and Bluetooth technology. R. at 3. Bluetooth signals from each user's cellphone ensure to YOUBER that the registered renter is the only person to operate the vehicle. R. at 3. In addition to Bluetooth signals, YOUBER collects and stores location information from the device of active users every two minutes. R. at 29. The GPS and Bluetooth data collection from a user's cellphone begins once the cellphone is located within the vehicle. R. at 4. However, YOUBER collects a timestamped location via GPS from each of its vehicles every two minutes, regardless of whether it is rented. R. at 29.

Austin rented a 2017 Black Toyota Prius (license plate number: R0ll3M) on January 3, 2019, using the YOUBER app. *Id.* Officer Charles Kreuzberger stopped Austin that same day for failure to stop at a stop sign. *Id.* Austin complied with Officer Kreuzberger's request to see her driver's license and rental agreement. *Id.*

When Officer Kreuzberger discovered that Austin was not the person on the rental agreement for the YOUBER car she was driving, he told Austin he did not need consent to search the vehicle. R. at 3. It did not matter that Lloyd, the name on the rental agreement, knew that Austin always used Lloyd's information to make financial transactions and would reimburse Lloyd in cash. R. at 18. Officer Kreuzberger mistakenly believed he had the authority to search Austin's vehicle and specifically searched the trunk where Austin stored her personal effects. R. at 3.

During his search, Officer Kreuzberger documented that he believed the YOUBER vehicle to be "lived in." *Id.* All of the personal items Officer Kreuzberger found were collected during a search without Austin's consent. *Id.* Officer Kreuzberger received notification after he started the search of Austin's vehicle that a vehicle similar to the one Austin was driving was suspected in an alleged robbery of a credit union in the nearby area. *Id.* Based on Officer Kreuzberger's suspicions, Austin was arrested for alleged bank robbery. *Id.*

While Austin was in custody, Detective Boober Hamm looked into other bank robbery cases and alleged that Austin might have been responsible for those as well. *Id.* Detective Hamm noticed that there was a YOUBER logo on the vehicle Austin used on the date of her arrest. R. at 3. Accordingly, Detective Hamm served a subpoena duces tecum ("SDT") to obtain GPS and Bluetooth information on the account Austin used to rent YOUBER vehicles between October 3, 2018, and through January 3, 2019. *Id.* Lloyd's YOUBER account was used at the same time and in the same locations as other robberies. *Id.* After reviewing the data from Lloyd's account, along

with surveillance footage from the banks, Detective Hamm recommended Austin be charged with six counts of bank robbery. R. at 4.

B. Procedural History

Austin was charged "by an indictment of six counts of 18 U.S. Code section 2113 Bank Robbery and Incidental Crimes on January 21, 2019. R. at 1. Austin's legal counsel filed a motion to suppress evidence recovered from the search of her rental vehicle and a motion to suppress the location data YOUBER provided to Detective Hamm. *Id.* The United States District Court for the Southern District of Netherfield denied Austin's motions concluding Austin lacked a legitimate property interest or reasonable expectation of privacy and she operated the vehicles in a public sphere thus removing her privacy interest in her location information. R. at 8. Austin advocated that the searches were warrantless within the meaning of the Fourth Amendment and appealed the district court's ruling. R. at 10. The United States Court of Appeals for the Thirteenth Circuit affirmed the district court's decision and held that Austin had "no property interest, nor reasonable expectation of privacy in the data collected in this case." R. at 15.

SUMMARY OF THE ARGUMENT

Petitioner, Jayne Austin, is requesting that this Court reverse the appellate court's decision and vacate her conviction. Austin was the victim of a warrantless unreasonable search of her personal effects and private data by the hands of an overzealous Officer Charles Kreuzberger and Detective Boober Hamm. The physical and digital evidence collected should have been suppressed because Austin had a reasonable expectation of privacy in the vehicle she had complete dominion over, as well as in her location information. Further, she intended to keep that information private and it reveals the intimate details of her personal life.

The appellate court erred when it claimed that Austin fraudulently leased a rental car vehicle because she rented the vehicle using the account of her partner Martha Lloyd. Under the Fourth Amendment, an individual has a legitimate possessory interest in a rental vehicle when they have complete dominion of the vehicle and the right to exclude others from its use. Ownership is not a requirement to establish a possessory right. Though Austin's use of the rental vehicle was temporary, at the time Austin was stopped by Officer Kreuzberger she was in complete control over the vehicle and had not been suspected of any illegal activity. Driving a rental vehicle under someone else's name does not give probable cause that allows for a warrantless search of the rental vehicle. Allowing the warrantless search of rental vehicles because an individual would lack a legitimate privacy interest would weaken the Fourth Amendment's protection against unreasonable searches by government agents.

Since Austin had a reasonable expectation of privacy in her personal effects, including clothing, food, and bedding, contained within the rental vehicle, she had standing to submit a motion to suppress the evidence gathered during the warrantless search of her rental vehicle. To prove standing a party must show an injury has occurred, the injury was the cause of the other party's action, and the court can provide relief to the party that is claiming the injury. The fact that the vehicle could be rented after Austin's use has no bearing on her rights to the vehicle when she has complete dominion over it at the time of the rental. An individual does not need exclusive ownership rights to adequately prove the party has sustained an injury. Protections against unreasonable searches and seizures under the Fourth Amendment are not limited to the individuals named on a rental agreement or apartment lease.

Detective Hamm's acquisition of Austin's location information was a search, and a warrant was required. That there was not necessarily a physical trespass has no bearing on whether the

information collected is protected by the Fourth Amendment. Unlawful intrusions into a person's life can happen electronically. This Court foresaw the rapid advancements in technology and contemplated in the jurisprudence discussing location information more sweeping methods of surveillance. Though in the past a beeper in a container was found to be lawful, the information collected on Austin was more revealing and more reliable. Austin has a privacy interest in her location information that is protected by the Fourth Amendment.

Further, since the ruling in *Carpenter* the third party doctrine does not apply to the type of information gathered in Austin's case. The third party doctrine provides that information provided to a third party for commercial purposes, and that is nothing more than a business record to that third party, does not receive constitutional protection from a search. *Carpenter* narrowed this doctrine by recognizing the reasonable expectation of privacy in certain types of records given to third parties. Though the Court took care to state that the decision did not eliminate the third party doctrine the reasoning applied to the collection of cell site location information is perfectly applied to cell phone location information. In fact, the only difference in information searched in *Carpenter* and in Austin's case is the third party who stored the information. Thus the location information is not a simple business record and a warrant is required for law enforcement to obtain it.

Austin suffered an injury when Officer Kreuzberger unreasonably searched her rental vehicle housing her personal effects. Because Officer Kreuzberger's search does not qualify for any of the warrant exceptions, this Court can provide relief by overturning the denial of Austin's motion to suppress evidence and vacating the conviction that was a result of an unlawful search of Austin's personal effects. This Court should also overturn the denial of Austin's motion to suppress

the warrantless search and seizure of her location information, as that information is protected under the Fourth Amendment pursuant with this Court's jurisprudence.

STANDARD OF REVIEW

Whether a person has standing to contest a search of a rental vehicle is a question of law. Questions of law are reviewed *de novo*. *Mayfield v. United States*, 599 f.3d 964, 970 (9th Cir. 2010); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

The review of a motion to suppress evidence presents a mixed question of law and fact. *Ornelas v. United States*, 517 U.S. 690, 697 (1996); *United States v. Lopez*, 474 F.3d 1208, 1212 (9th Cir. 2007). Mixed questions of law and fact are reviewed *de novo*. *Ornelas*, 517 U.S. at 699.

ARGUMENT

I. The Court of Appeals Erred When It Admitted Evidence Known to be the Fruit of an Unlawful Search of Austin's Rental Vehicle.

A. When A Government Agent Conducts A Warrantless Search of an Individual's Rental Vehicle Without Probable Cause, the Individual Has Standing to Address any Injury that Occurred because of the search and Seek Relief from the Court.

When government agents unreasonably conduct a warrantless search of an individual's personal effects, that individual has standing to challenge any evidence gathered during the search. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). An individual that has suffered an actual injury (concrete and particularized), an individual that has "a causal connection between the injury and the conduct complained of," and an individual that can prove the injury would be redressed by a favorable decision from the court has standing. *Id*. An individual directly subjected to an unlawful warrantless search or seizure will have a valid claim that the individual's Fourth Amendment rights have been violated. Fed. R. Crim. P. 12 & 41; *see also People of State of New York ex rel. Hatch v. Reardon*, 204 U.S. 152, 160 (1907) (stating a party must be part of the class

for which the law was created to protect); *Jones v. United States*, 362 U.S. 257, 261 (1960) *overruled by United States v. Salvucci*, 448 U.S. 83 (1980); *Flanigan's Ent., Inc. of Georgia v. City of Sandy Springs, Georgia*, 868 F.3d 1248, 1255 (11th Cir. 2017) (stating "[a]t a minimum, this requirement means that a litigant must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision.")(internal quotations omitted)).

An individual does not lose the Fourth Amendment's protection from unreasonable warrantless searches solely because the individual is not the owner of the property being searched. *See United States v. Thomas*, 447 F.3d 1191, 1198 (9th Cir. 2006) (stating "[t]herefore, a defendant who lacks an ownership interest may still have standing to challenge a search, upon a showing of 'joint control' or 'common authority' over the property searched."). Therefore, searching a vehicle that an individual has complete dominion over, and which, the individual has placed personal effects in, is an invasion of privacy. *See United States v. Ortiz*, 422 U.S. 891, 896 (1975) ("[a] search, even of an automobile, is a substantial invasion of privacy. To protect that privacy from official arbitrariness, the Court always have regarded probable cause as the minimum requirement for a lawful search.") (internal citations omitted)).

There are only a few exceptions to the warrant requirement and non-ownership is not one of the exceptions. *See Maryland v. Dyson*, 527 U.S. 465 (1999) (automobile exception); *Illinois v. Rodriguez*, 497 U.S. 177 (1990)(consent); *Horton v. California*, 496 U.S. 128 (1990) (plain view); *Mincey v. Arizona*, 437 U.S. 385 (1978)(exigent circumstances); *South Dakota v. Opperman*, 428 U.S. 364 (1976) (impounded vehicles); *United States v. Robinson*, 414 U.S. 218 (1973)(search incident to lawful arrest); *Cady v. Dombrowski*, 413 U.S. 433 (1973) (community caretaker). "The decisions of this Court have time and again underscored the essential purpose of the Fourth

Amendment to shield the citizen from unwarranted intrusions into his privacy." *Jones*, 357 U.S. at 498.

Respondent does not challenge the fact that no exceptions to the warrant requirement exist for the search of the YOUBER rental vehicle. R. at 31. Austin's vehicle was unreasonably searched based on the incorrect premise made by Officer Kreuzberger that the absence of a name on a rental agreement allowed Officer Kreuzberger to search the vehicle without Austin's consent. R. at 3. The Thirteenth Circuit incorrectly upheld the denial of Austin's motion to suppress the evidence found during Kreuzberger's unreasonable warrantless search and therefore this Court should reverse the lower court's decision and overturn Austin's conviction.

1. *A Driver that has full control over a rental vehicle has the requisite possessory interests to assert standing.*

"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). In *Byrd*, the defendant used a rental vehicle that was rented in another person's name to transport illegal substances from New Jersey to Pennsylvania. 138 S. Ct. at 1524. A Pennsylvania State Trooper stopped the defendant for a traffic infraction, asked to see the defendant's license, and noticed the rental agreement was not in the defendant's name. *Id*. at 1525. The defendant also mentioned at one point that there was a marijuana cigarette in the vehicle. *Id*. State Troopers searched the rental vehicle and found body armor and forty-nine bricks of heroin in the trunk. *Id*. The defendant submitted a motion to suppress the evidence claiming it violated his Fourth Amendment rights to be free from unreasonable searches. *Id*. This Court reasoned that "[t]he expectation of privacy that comes from lawful possession and control and the attendant right to exclude should not differ depending on whether a car is rented or owned by someone other than the person currently possessing it . . ." *Id*.

at 1522. A driver that has complete dominion over a vehicle has the requisite possessory interest to be free of unreasonable searches by police officers.

Austin had a substantial possessory interest in her rental vehicle because she used the YOUBER app to secure a vehicle with the right to exclude all others from use during her rental period. The Fourth Amendment "does not shield only those who have title to the searched premises." *Mancusi v. Deforte*, 392 U.S. 364, 367 (1968). This Court in *Byrd*, reasoned that an unauthorized driver of a rental vehicle does not lose their possessory interest or reasonable expectation of privacy in the vehicle they maintain complete dominion over. 138 S. Ct. at 1528-29. The only exception to this reasoning is when the individual is an unauthorized driver because the individual stole the vehicle. *Id*. Based on this Court's holding in *Byrd*, in this case the Thirteenth Circuit incorrectly concluded that Austin failed to show a valid property interest because her YOUBER vehicle was allegedly fraudulently leased. R. at 12. Austin's rental of the YOUBER vehicle was not fraudulent because she was an authorized user on the credit card that allowed her to rent a vehicle through the YOUBER app. R. at 2. The lower courts' findings incorrectly applied factors that led to incorrect rulings against Austin.

The conclusion held by both the district court and the Thirteenth Circuit mistakenly applied the rigid concept that a person has to own or possess property for a certain amount of time to have a legitimate possessory interest. R. at 6, 12. The lower courts found that Austin's failure to own the vehicle, rent the vehicle in her name, or have a sustained relationship with the vehicle defeated her ability to claim a property interest in the rental vehicle. *Id*. This Court should use the reasoning set forth in *Byrd* that an individual's privacy rights in a rental vehicle do not change based on the individual's status as an authorized driver, and instead find that Austin has standing

to challenge the search conducted by Officer Kreuzberger because Austin had a cognizable Fourth Amendment interest in the rental vehicle.

2. *Absent a valid exception to the warrant requirement, any evidenced found during a warrantless search is inadmissible in a court of law.*

The warrant requirement of the Fourth Amendment is in place to protect an individual from the bias assumptions made by government actors who are in the business of ferreting out crime. *See Johnson v. United States*, 333 U.S. 10, 14 (1948); *see also United States v. Lefkowitz*, 285 U.S. 452, 464 (1932) (stating "the informed and deliberate determinations of magistrates empowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried action of officers and others who may happen to make arrests."). For a neutral magistrate judge to issue a warrant, a law enforcement officer must prove probable cause.

Probable cause is established by weighing evidence to determine if that evidence is reasonable enough to conclude that a search would likely yield incriminating evidence. *Illinois v. Gates*, 462 U.S. 213, 236 (1983). The weighing of evidence in this manner is called the totality-of-the-circumstances standard. *Id*. In *Gates*, the Court established the modern standard for determining probable cause stating that "the traditional standard for review of an issuing magistrate's probable cause determination has been that so long as the magistrate had a "substantial basis for ... conclud[ing]" that a search would uncover evidence of wrongdoing, the Fourth Amendment requires no more." *Id*.

The Exclusionary Rule serves as a remedy for individual's subjected to unlawful warrantless searches, restoring some of the privacy protections afforded to the individual under the Fourth Amendment. The rule is the relief the court can provide to an individual who can prove that the individual's privacy was violated by a government actor and therefore, that individual has standing to bring a claim. *See Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920)

(stating "[t]he essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all."). A government agent has the burden to prove that a search that would otherwise require a warrant is not subjected to the exclusionary rule because of one of the warrant exceptions applied to the warrantless search. *See Coolidge v. New Hampshire*, 403 U.S. 443, 455 (1971) holding modified by *Horton v. California*, 496 U.S. 128 (1990) (stating "[t]he exceptions are jealously and carefully drawn, and there must be 'a showing by those who seek exemption * * * that the exigencies of the situation made that course imperative. (T)he burden is on those seeking the exemption to show the need for it.'") (internal citation and quotations omitted)).

Respondent accepts the fact that no warrant exceptions applied to the search conducted by Officer Kreuzberger in this case. R. at 31. Therefore, under the Fourth Amendment's warrant requirement Officer Kreuzberger needed probable cause to search Austin's vehicle. It is likely that if Officer Kreuzberger were to have attempted to get a warrant to search Austin's vehicle a neutral magistrate judge would have denied the request because society would deem that an individual has a reasonable expectation of privacy in the effects an individual stows in the vehicle. The lower courts should have granted Austin's relief to suppress evidence that was proven to be the fruit of an unlawful search by Officer Kreuzberger.

B. An Individual has a Reasonable Expectation of Privacy in the Individual's Personal Effects Regardless if the Personal Effects are stowed in an Owned or Rented Vehicle.

The Fourth Amendment states that individuals have a right to be secured "in their persons, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. A government actor violates the Fourth Amendment when the government actor conducts a search, in a place where an individual had a reasonable expectation of privacy, without a warrant. *Id.*; *see*

also United States v. Jeffers, 342 U.S. 48, 51 (1951) ("[t]he Fourth Amendment prohibits both unreasonable searches and unreasonable seizures, and its protection extends to both 'houses' and effects."). The Court's interpretation of Fourth Amendment protections has evolved over the decades. In *Olmstead v. United States*, the Court held that if law enforcement did not physically intrude onto someone's property, and merely used surveillance techniques to listen, the lack of entry meant there was not violation of the defendant's Fourth Amendment rights. 277 U.S. 438, 464 (1928) (reasoning "the evidence was secured by the use of the sense of hearing and that only. There was no entry of the houses or offices of the defendants.").

Since *Olmstead*, this Court held that a violation of an individual's Fourth Amendment privacy rights is not dependent on the government's physical intrusion into a constitutionally protected area, instead this Court created a two-part test that looks to the individual's subjective intent to have privacy in the places or items being searched and society's objective agreement that the individual's expectation is reasonable. *Katz v. United States*, 389 U.S. 347 (1967).

The Fourth Amendment protects individuals from unreasonable intrusions by government actors. The protection is not limited to property or places, "the Fourth Amendment protects people." *Id*. at 351 ("but what [individuals] seek to preserve as private, even in an area accessible to the public, may be constitutionally protected."). In *Katz*, the issue was whether the defendant's Fourth Amendment rights were violated when police officers attached a recording device outside a public telephone booth for the purpose of seizing information. 389 U.S. at 348. The test established by Justice Harlan in his concurrence, (1) exhibit an actual subjective expectation of privacy and (2) that the expectation be one that society is prepared to recognize as reasonable, is the rule when determining if a government official has violated an individual's Fourth Amendment right to privacy.

Conversely, if an individual is found to be unlawfully in possession of property then the individual lacks a reasonable expectation of privacy in the items or places searched. *See Rakas v. Illinois*, 439 U.S. 128, 141 (1978) (stating "this Court stated that while one wrongfully on the premises could not move to suppress evidence obtained as a result of searching them, anyone legitimately on premises where a search occurs may challenge its legality.") (internal footnotes and quotations omitted). In *Rakas*, two suspects moved to suppress evidence found during a search of a vehicle they occupied. 439 U.S. at 130. The vehicle the two suspects were in fit the description of a vehicle used in a recent robbery. *Id*. The two men claimed that the evidence found in the vehicle, a box of rifle shells and a sawed-off rifle, should be suppressed. *Id*. at 131. The two men had not been driving the car, neither owned the car, and neither claimed he owned the shells or the rifle. *Id*. The trial court denied the motion to suppress the evidence gathered from the search of the vehicle. *Id*. at 132. The two men were convicted of armed robbery. *Id*. The appellate court affirmed the trial court's denial of the motion to suppress, holding that the men did not have standing to challenge the search of the vehicle because they were simply passengers in the vehicle and did not have a "proprietary or other similar interest" in the vehicle. *Id*.

Viewing standing from the perspectives of (1) property rights and (2) a reasonable expectation of privacy, Austin had a reasonable expectation of privacy in the rental vehicle which protected her from Officer Kreuzeberger's unreasonable warrantless search. The Thirteenth Circuit relied on the reasoning of the majority in *Rakas v. Illinois*, where a vehicle matching the description of a vehicle used in a robbery was pulled over and two of the passengers in the vehicle attempted to suppress evidence found in the vehicle claiming the search violated their Fourth Amendment rights to be free from unreasonable searches and seizures. 439 U.S. 128, 129-31 (1978). In *Rakas*, the Court held that "[a] person who is aggrieved by an illegal search and seizure only through the

introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed. 439 U.S. at 134 (1978). Unlike the defendants in *Rakas*, Austin was not a passenger she was the driver and only occupant in the vehicle that contained her personal effects. R. at 3. At the time Officer Kreuzberger pulled over Austin's vehicle she was not suspected of any criminal activity like the defendants in *Rakas*, therefore Officer Kreuzeberger's subsequent search was unreasonable and violated Austin's Fourth Amendment rights. *Id*.

Unlike the passengers in *Rakas*, Austin was the only occupant of the vehicle and had her personal effects in the YOUBER vehicle. R. at 3. When Officer Kreuzberger searched the rental vehicle, he found "a cooler full of tofu, kale, and homemade kombucha. . . [a]dditionally, [he] found bedding and a pillow in the back seat of the car." *Id.* Multiple circuit courts hold "that a lessee of an automobile or motel room maintains his or her privacy interest in the property even where the lessees maintains possession of the property after the agreement has expired." *United States v. Kennedy*, 638 F.3d 159, 166 (3d Cir. 2011). Individuals maintain an expectation of privacy as long as they maintain possession of the property or personal effects regardless of ownership status. *See United States v. Henderson*, 241 F.3d 1124,1129 (9th Cir. 2000) (holding "lessee of rental car has reasonable expectation of privacy even after expiration of agreement, as long as he maintains possession and control of the car.").

Austin has standing to contest the unreasonable warrantless search of her rental vehicle by Officer Kruezberger because she did not fraudulently lease the vehicle and had a reasonable expectation of privacy in the personal effects she maintained control of inside the vehicle. Though the above circuit court rulings are non-binding on this Court, what their holdings establish is that the public views privacy interest in a rental vehicle as a reasonable expectation. The Thirteen

Circuit incorrectly analogized Austin use of the rental vehicle to that of a burglar. R. at 12. Unlike a burglar, Austin's use of the rental vehicle was known and expected by Lloyd who had made Austin an authorized user on Lloyd's credit card. And, Austin had exclusive control of the vehicle for the time she rented the vehicle until she ended the rental. "The decisions of this Court have time and again underscored the essential purpose of the Fourth Amendment to shield the citizen from unwarranted intrusions into his privacy." *Cardwell v. Lewis*, 417 U.S. 583, 589 (1974)(quoting *Jones v. United States*, 357 U.S. 493,498 (1958)). Because this Court concluded in *Byrd* "the mere fact that a driver 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," this Court should overrule the Thirteenth Circuit and reverse Austin's conviction. R. at 5.

II. The Court of Appeals Erred When it Admitted Evidence Collected by Detective Hamm Through an Unwarranted Search of Austin's Location Information.

The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures[.]" U.S. Const. amend. IV. This Court has made clear that the Fourth Amendment protects against arbitrary intrusions into the privacies of life, *Boyd v. United States*, 116 U.S. 616 (1866), and serves as an obstacle "in the way of a too permeating police surveillance." *United States v. Di Re*, 332 U.S. 581, 595 (1948). Further clarifying the strength of the Fourth Amendment, this Court found that warrantless searches are "presumptively unreasonable." *Payton v. New York*, 445 U.S. 573, 586 (1980) (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 454–55 (1971)). Though application of Fourth Amendment protections must necessarily evolve with new technologies, it is long established law that what one reasonably seeks to preserve as private should remain so, lest the government obtain a warrant. *Smith v. Maryland*, 442 U.S. 735, 740 (1979). This remains true of location information, especially

in the wake of *Carpenter* limiting the third party doctrine due to the elevated privacy concern. *Carpenter v. United States*, 138 S. Ct. 2206, 2220 (2018).

A. Location Information is Protected by the Fourth Amendment and is Thus Subject to the Warrant Requirement for a Search.

Fourth Amendment jurisprudence, since *Katz v. United States*, 389 U.S. 347 (1967), has insisted that the Fourth Amendment "protects people, not places." *Id*. at 351. While we see this in other jurisprudence related to location tracking, important differences exist in the case at hand in the wake of rapid technological growth. In *United States v. Jones*, 565 U.S. 400 (2012) this Court held that the attachment of a GPS monitoring device to a vehicle was a search and a warrant was required. Though Justice Scalia went to great lengths to state that the installation of the device was a trespassory violation of the Fourth Amendment, he also affirms the holding in *Knotts v. United States*, where the planting of a device was not a search. *United States v. Jones*, 565 U.S. 400, 401 (2012). This suggests that gathering information, like the actions of Detective Hamm during his investigation in Austin, is a search in the eyes of the law. Further, the concurrences of Justices Alito and Sotomayor note that "physical intrusion is now unnecessary to many types of surveillance. *Id*. at 414.

Though the trespassory aspects of Fourth Amendment protection have not been eliminated entirely, it is clear from this Court's jurisprudence that it is not the only element. See also, *Kyllo v. United States*, 533 U.S. 27, 31-33 (2001) (where the Court found unconstitutional the use of a thermal imaging device to gather information on a house where law enforcement suspected marijuana was being grown.); *Soldal v. Cook County*, 506 U.S. 56, 64 (1992) ("property rights are not the sole measure of Fourth Amendment violations."); *Minnesota v. Olson*, 495 U.S. 91, 96 (1990) (stating that the belief that the home is the only place in which a person has a reasonable expectation of privacy is mistaken). Unlawful intrusions into a person's life can happen

electronically. Austin's location was not something tangible that Detective Hamm could search, but it is specific to her person and is thus protected. Warrantless collection of Austin's location was an unlawful intrusion.

Since the *Jones* decision there has been an oft-quoted takeaway: that the government ought not be allowed to warrantlessly collect information that provides an "intimate window into a person's life[.]" 565 U.S. at 415. In the present case significantly more advanced technology is being used, which means there is a significant risk of privacy violation when the government can access YOUBER user data upon a simple request. YOUBER uses location information from personal cell phones during the entire rental period. R. at 3. YOUBER users can rent a car for up to one full week. R. at 2. Given that YOUBER obtains location information from the user every two minutes, the amount of information that the government can, and did, obtain is enormous. R. at 29. One week of location information would not provide a mere glimpse, but a clear picture of someone's life.

In addition to GPS tracking, this Court has location tracking jurisprudence regarding the placement of beepers in containers. In *Knotts v. United States*, 460 U.S. 276, 277 (1983) a beeper was placed into a container of chloroform in the course of an investigation into the manufacture of illegal drugs. Similarly, in *United States v. Karo*, 468 U.S. 705 (1984) a beeper was placed into a can of ether so that the DEA could track its location in connection with an investigation into drug trafficking. While both ultimately held in favor of the government, the difference in technology is notable. Indeed, in *Knotts* this Court noted the "limited use which the government made of the signals" from the beeper. 460 U.S. at 284. Going beyond noting the physical tracking that was necessary in this case, this Court noted that "different constitutional principles may be applicable" when more all-encompassing methods of data collection are possible. *Id*.

Every time Austin rented a YOUBER vehicle, the location of the car and her personal location were recorded every two minutes. R. at 29. This is akin to the "twenty-four hour surveillance" that was noted as different form the beeper information in *Knotts*. 460 U.S. at 283-284. Further, the information collected by Detective Hamm was more consistent and reliable than the beeper information, as evidenced by the Court's admission that the beeper information was of limited use. *Knotts*, 460 U.S. at 284. Also, the complete lack of active action necessary on the part of Detective Hamm to collect the information is worth noting. Detective Hamm used an SDT to demand the information from YOUBER with little more than a logo on the car Austin was driving at the time. R. at 3. This is distinctly different from what occurred in *Knotts* where officers used a beeper to enhance the physical surveillance they were conducting on the ground and in the air. *Knotts*, 460 U.S. at 282.

The Fourth Amendment protects against unlawful intrusions into Austin's personal electronic information. Thus, Detective Hamm's acquisition of Austin's location information was a search, and a warrant was required. That there was not a physical trespass is irrelevant; jurisprudence has established that the Constitution protects that which a person has a reasonable expectation of privacy in. Because cell phone location information provides a more sweeping look at a person's life it is afforded more protection than previous technologies with less sophisticated tracking capabilities.

B. Though Not Eliminated by *Carpenter*, the Third Party Doctrine Does Not Apply to Location Information.

The third party doctrine provides that information provided to a third party for commercial purposes, and that is nothing more than a business record to that third party, does not receive constitutional protection from a search. *Smith v. Maryland*, 442 U.S. 735, 743 (1979); *United States v. Miller*, 425 U.S. 435, 443 (1976). *Carpenter* narrowed this doctrine by recognizing the

reasonable expectation of privacy in certain types of records given to third parties. *Carpenter v. United States*, 138 S. Ct. 2206, 2220 (2018). Though the decision did not eliminate the third party doctrine the reasoning applied to the collection of cell site location information is perfectly applied to cell phone location information.

In Carpenter, police officers arrested four men who were suspected of executing a series of robberies and subsequently obtained court orders to obtain their cell phone records. *Carpenter v. United States*, 138 S. Ct. 2206, 2212 (2018). The Court expressed concern for law enforcement being able to obtain vast amounts of cell site location information without a warrant. Id. at 2218. Emphasizing that point throughout the opinion, the Court held that for using a court order to obtain cell site location information is an unconstitutional search and a warrant is required. *Id*. at 2223. In holding this, Justice Roberts set forth the two guideposts of Fourth Amendment jurisprudence. *Id.* at 2214. First, the Fourth Amendment secures the "privacies of life" against the government's arbitrary use of power. *Id.* (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)). Second, that the Fourth Amendment should protect against a police surveillance state. *Id*. (quoting *United States v. Di Re*, 332 U.S. 581, 595 (1948)).

In the first regard, location information reveals the intimate details of a person's personal life. Physical movements reveal where a person eats, sleeps, banks, prays, and so on – these are the privacies of life. That Austin revealed the whole of her movements to a third party in exchange for a service does not eliminate that privacy interest. Though the record is silent as to where else Austin went, her interest does not change based upon where she may or may not have gone. Likewise, sharing location information with a third party via a cell phone does not wholesale give the government the right to that information. See, e.g., *Riley v. California*, 573 U.S. 373, 403 (2014) ("Modern cell phones are not just another technological convenience. . . . The fact that

technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought."). In *Carpenter*, the Court found that warrantless searches of location information from cell service providers presented the risk of a surveillance state. 138 S. Ct. at 2218. That principle would be eroded were the government able to simply obtain the exact information from another source.

Carpenter goes on to discuss the reasonable expectation of privacy a person has in her physical movements. 138 S. Ct. at 2217. This has been established by years of law enforcement using physical means to surveil suspects, and necessarily doing so for brief periods of time. *Id.* This Court stated that "[a]llowing government access to cell-site records contravenes" a person's expectation of privacy in her location, even though the records are used in the course of business. *Id.* The simple fact that something is used for "commercial purposes" does not negate a legitimate privacy interest. *Id.*

Little difference exists between cell site location information collected by a wireless carrier and by YOUBER for the purpose of Fourth Amendment analysis. Each provides a look at a person's past movements and is held by a third party. In each instance the location information is based upon the connection to the same device, a cell phone. Austin did not give up her reasonable expectation of privacy in her location and movements by virtue of using her cell phone. Austin should not need to abstain from using technologies widely accepted in society in order to keep her Fourth Amendment protections intact.

Though limited by *Carpenter*, *Smith v. Maryland* and *United States v. Miller*, two of the cases that established the third-party doctrine have not been overturned. *Smith v. Maryland*, 442 U.S. 735, 743 (1979); *United States v. Miller*, 425 U.S. 435, 443 (1976). However, the third-party doctrine in its now limited state does not apply in this case.

In *Smith*, This Court determined that a warrant was not necessary for the police to order the installation of the pen register because Petitioner did not have a reasonable expectation of privacy to the numbers he dialed on his phone. 442 U.S. at 742. In *Miller,* agents from the Alcohol, Tobacco and Firearms Bureau presented subpoenas to the bank where respondent maintained accounts and the agents obtained several records related to his accounts. 425 U.S. at 437-438. This Court found that there had not been an intrusion into an area in which respondent had a protected Fourth Amendment interest because the documents collected were not his private papers. *Id.* at 440. Despite establishing the third party doctrine through these cases, the Court also recognized that it would not be rule that applied to all information given to a third party. *Smith* and *Miller* both considered the nature of the information shared and whether there is a legitimate privacy interest in the information. *Miller,* 425 U.S. at 442. Indeed, *Smith* went on to assert that what one reasonably seeks to preserve as private should remain so. *Smith,* 442 U.S. at 740.

Even before the third party doctrine was limited, great differences exist in the type of information that was shared and ultimately collected by the government. The call logs and bank records obtained in *Smith* and *Miller* respectively were far less revealing than the location information collected on Austin. As detailed infra, location information reveals the privacies of life in ways that a simple record of phone calls without any identifying information cannot. A person's interest in keeping her location information is far greater.

Austin went to great lengths to preserve information about herself and her location as private. In the words of Austin's partner, Martha Lloyd, Austin "hates being on the 'grid'" and as such she refused to use her own information to sign up for services, including YOUBER. R. at 18. In fact, the only time Austin would attach her name to something was when making a blog post. *Id*.

Since the ruling in *Carpenter* the third party doctrine does not apply to law enforcement's collection of location information. *Carpenter* narrowed the third party doctrine by recognizing the reasonable expectation of privacy in location information, through both general Fourth Amendment principles and location tracking jurisprudence. Location information is not a simple business record and a warrant is required for law enforcement to obtain it.

Conclusion

Officer Kreuzberger violated Austin's Fourth Amendment rights when he conducted a warrantless search of Austin's rental vehicle without probable cause. Detective Hamm violated Austin's Fourth Amendment rights when he conducted a warrantless search of Austin's cell phone location information. Austin respectfully asks this Court to reverse the Thirteenth Circuit an vacate Austin's conviction based on illegally gathered evidence.