Team No. P8

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 PETITIONER

Counsel for Petitioner
October 6, 2019

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Cases

United States Constitutional Provisions

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Statutes

18 U.S. Code § 2113 provides, in relevant part:

> (a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association…Shall be fined under this title or imprisoned not more than twenty years, or both.

Secondary Authorities

ISSUES PRESENTED

1. Does an individual have standing to contest a search of a rental vehicle that the individual rented on another's account without that other person's permission?

2. Is the acquisition of the location data of a rental vehicle a "search" within the meaning of the Fourth Amendment and *Carpenter v. United States*, 138 S. Ct. 2206 (2018)?

STATEMENT OF FACTS

On January 3, 2019, Petitioner Jayne Austin ("Austin" or "Petitioner") rented a 2017 Black Toyota Prius, bearing license plate number R0LL3M (the "YOUBER vehicle"). R. at 2. This rental was procured through a mobile application called YOUBER (the "YOUBER app") under her on-and-off again partner, Martha Lloyd's ("Lloyd") account. *Id.* Austin was granted permission to use Lloyd's YOUBER app, which she used to travel to work and protests. *Id.* at 2. Austin was also an authorized user on Lloyd's credit card account. *Id.*

YOUBER is a popular car service that allows its 40 million users across the country to rent YOUBER owned vehicles at a fixed hourly rate. *Id*. at 22. YOUBER users may rent a vehicle for a maximum distance of 500 miles or a time period of up to one week. *Id.* These vehicles are subject to regular checks every 24 hours or sooner should maintenance be required. *Id.* YOUBER tracks all of its vehicles using GPS technology and Bluetooth signals from each user's cellphone, which the YOUBER user consents to upon creating an account in the YOUBER app. *Id.* at 3-4. The GPS and Bluetooth activates once the cellphone with the user's account is located within the vehicle. *Id.* at 4. The information is then transferred through a search engine, Smoogle, using satellite-mapping technology. *Id.* To ensure security, YOUBER tracks the time stamped location of the vehicle every two minutes, regardless of whether the vehicle is rented. *Id.*

On the aforementioned date, while Austin was travelling in her YOUBER vehicle, she was stopped for a traffic violation – failure to stop at a stop sign. *Id.* During this traffic stop, Austin showed Officer Kreuzberger (the "Officer") her driver's license and the YOUBER app on her cell phone. *Id.* Upon realizing that the name on the driver's license did not match the name on the YOUBER app, the Officer told Austin that he did not require her consent to search the

YOUBER vehicle. *Id.* at 2-3. The Officer proceeded to search the trunk of the YOUBER vehicle, where he found a collection of Austin's personal items, including: a BB gun modeled after a .45 caliber handgun with the orange tip removed, a maroon ski mask, a duffle bag containing $50,000.00, dye packs, clothing, an inhaler, three pairs of shoes, a collection of signed Kendrick Lamar records, a cooler full of tofu, kale, and homemade kombucha. *Id.* at 3. Additionally, he found bedding and a pillow in the backseat of the car. These personal items led the Officer to believe the car was "lived in." *Id.*

During his search, the Officer received a dispatch to look out for a 2017 Black Toyota Prius with a YOUBER logo, bearing partial license plate number of "R0L." *Id.* The suspect who matched this identification allegedly robbed a nearby *Darcy and Bingley Credit Union* bank and was seen wearing a maroon ski mask and using a .45 caliber handgun. *Id.* The Officer subsequently arrested Austin under suspicion of bank robbery. *Id.*

During the days following the arrest, the case was taken under investigation by Detective Boober Hamm (the "Detective"), who, upon further investigation, discovered five open bank robbery cases occurring between October 15, 2018 and December 15, 2018. *Id.* Four of these robberies took place in California and one in Nevada, all of which matched the modus operandi of the January 3, 2019 robbery. *Id.* Based on these findings, the Detective served a subpoena duces tecum on YOUBER to obtain all the GPS and Bluetooth information related to Lloyd's account from October 3, 2018 through January 3, 2019. *Id.* When records from YOUBER revealed that Lloyd's account was used to rent cars in the locations and at the times of each of the other five robberies, the Detective recommended that Austin be charged with six counts of bank robbery under 18 U.S. Code Section 2113, Bank Robbery and Incidental Crimes. *Id.* at 4.

Prior to trial, Defense counsel filed a motion to suppress evidence obtained during the Officer's warrantless search of the YOUBER vehicle on the subject incident date, and a motion to suppress the location data YOUBER provided to Detective Hamm. *Id.* Both motions were denied. *Id.*at 1.

SUMMARY OF THE ARGUMENT

The search of the YOUBER vehicle violated Austin's right to privacy under the Fourth Amendment, which she had standing to challenge. It is well settled that a defendant has the right to challenge police conduct that has "infringed an interest of the defendant which the Fourth Amendment was designed to protect." *Rakas v. Illinois*, 439 U.S. 128, 140 (1978). Though she did not have an ownership interest in the vehicle and did not obtain "explicit" consent to rent the YOUBER vehicle under Lloyd's account, Austin exhibited a reasonable expectation of privacy in the contents of the vehicle and the expectation of privacy in a rental vehicle is one that society recognizes as reasonable. *See Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). The courts below incorrectly held that Austin lacked standing to contest the illegal search of the vehicle and, thus, erred in denying Austin's motion to suppress.

Furthermore, this Court has recognized that individuals have a reasonable expectation of privacy in the whole of their physical movements. *United States v. Jones*, 565 U.S. 400, 430 (2012). The GPS data at issue in the instant case fits squarely within the reasonable expectation of privacy identified by the Court in *Jones* and reaffirmed by the Court's decision in *Carpenter v. United States*, 138 S. Ct. 2206 (2018). Austin garnered a reasonable expectation of privacy in the GPS data acquired by the Government, which provides a record of Austin's public movements over the course of three months. By upholding the denial of Austin's motion to suppress, this Court would weaken the effectiveness of the Fourth Amendment and grant the

Government unfettered discretion in accessing the historical location data of 40 million individuals who, like Austin, utilize this form of transportation for their daily activities.

STANDARD OF REVIEW

A *de novo* standard of review is applied where a motion to suppress presents legal issues and does not involve any factual dispute. *U.S. v. Gbemisola*, 225 F.3d 753, 757 (D.C. Cir. 2000).

ARGUMENT

I. AUSTIN GARNERED A LEGITIMATE EXPECTATION OF PRIVACY IN THE CONTENTS OF THE YOUBER VEHICLE, SUCH THAT SHE HAS STANDING UNDER THE FOURTH AMENDMENT TO CHALLENGE THE OFFICER'S WARANTLESS SEARCH.

The Fourth Amendment to the United States Constitution guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. It is undisputed that vehicles fall within the term "effect" as used in the Fourth Amendment. *Jones*, 565 U.S. at 404.

Courts have found Fourth Amendment standing to be "subsumed under substantive Fourth Amendment doctrine." *Byrd v. United States*, 138 S. Ct. 1518, 1530 (2018). This means, a "person must have a cognizable Fourth Amendment interest in the place searched before seeking relief for an unconstitutional search." *Id.* One's "capacity to claim the protection of the Fourth Amendment depends . . . upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." *Rakas*, 439 U.S. at 143; *Minnesota v. Carter*, 525 U.S. 83, 88 (1998). No single factor will determine the reasonableness of "asserted privacy expectations." *Rakas*, 439 U.S. at 152 (Powell, J., concurring). Rather, one will be deemed to have invoked his/her Fourth Amendment protection if he/she took precautions that are "customarily taken by those seeking privacy." *Id.*

In his concurring opinion in *Katz*, Justice Harlan set out the elements which constitute a "legitimate expectation of privacy" under the Fourth Amendment: (1) the person "exhibited an actual (subjective) expectation of privacy"; and (2) the expectation is one which "society is prepared to recognize as 'reasonable.'" *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

In relying on the aforementioned cases, Austin has standing to challenge the Officer's warrantless search of the YOUBER vehicle because she exhibited a reasonable expectation of privacy in the contents of the vehicle and the expectation of privacy in a rental vehicle is one that society recognizes as reasonable. *Id.*[1]

A. Austin Exhibited An Actual (Subjective) Expectation Of Privacy In The YOUBER Vehicle She Rented Through Lloyd's YOUBER Account.

Automobile travel is universally known to be a necessary mode of transportation for individuals traveling to and from their homes, including traveling to work and other leisure activities. *Delaware v. Prouse*, 440 U.S. 648, 662–63 (1979). As explained by the *Prouse* court, people are not stripped of their Fourth Amendment protection when they step from their homes onto public sidewalks, or when they step from public sidewalks into their automobiles. *Id.* at 663 (citing *Terry v. Ohio*, 392 U.S. 1, 22 (1968)). In fact, people spend more time traveling in their cars than they do walking on the streets. *Id.* at 662. "With the growing density of cities and the increasing costs associated with owning a car, city dwellers may elect to use hourly car rentals for daily tasks instead of buying cars."[2] In light of the foregoing, if individuals expose

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[1] A warrantless search may be justified when the circumstances render it reasonable to deviate from the warrant requirement. *Kentucky v. King* 563 U.S. 452, 454 (2011). However, that is not the case here as both Parties stipulated that the search did not fall within any exceptions to the warrant requirement to justify the Officer's search of the YOUBER vehicle.

[2] Matthew M. Shafae, *United States v. Thomas: Ninth Circuit Misunder-"Standing": Why Permission To Drive Should Not Be Necessary To Create An Expectation Of Privacy In A Rental Car*, 37 Golden Gate U. L. Rev. 589, 608 (2007).

themselves to unfettered governmental intrusion every time they enter an automobile, "the security guaranteed by the Fourth Amendment would be seriously circumscribed." *Id.* at 663.

As the *Byrd* court recognized, the expectation of privacy that comes with lawful possession and control of a vehicle should not differ based on whether the vehicle is rented or privately owned by someone other than the person in possession of it. *Byrd,* 138 S. Ct. at 1528. The defendant in *Byrd,* like Austin, was the driver of a rental vehicle that was not secured under his name; rather, the defendant's wife rented the vehicle and gave him permission to drive it. *Id.* at 1521. And, like Austin, he was stopped by "troopers" for a traffic infraction, which led to a search of the vehicle based solely on the fact that he was not listed on the rental agreement. *Id.* This Court found that the *Byrd* defendant had standing to challenge the search of the rental vehicle and held that "the mere fact that a driver in lawful possession or control of a rental car is not listed on the rental agreement will not defeat his or her otherwise reasonable expectation of privacy." *Id.* at 1531. In fact, the terms of a contract do not have "anything to do with a driver's reasonable expectation of privacy in a rental car" which he/she is driving. *Id.* at 1529.

1. Under The Totality Of The Circumstances, Austin's Expectation Of Privacy In The YOUBER Vehicle Was Reasonable.

Circuits are split in their methods of evaluating Fourth Amendment standing for "unauthorized" drivers. *U.S. v. Thomas,* 447 F.3d 1191, 1196–97 (9th Cir. 2006). The *Thomas* court has identified the three foremost approaches in determining whether an unauthorized driver of a rental vehicle has standing to challenge a search of the rental vehicle. *Id.* at 1196. The first approach is one recognized by the Fourth, Fifth and Tenth Circuits and referred to as the "bright-line test": a driver who is not listed on a rental agreement does not have standing to contest a search because they lack property or possessory interests. *Id.* The second approach, recognized by the Eighth Circuit, modifies the bright-line test, allowing standing if the driver can show he or

she has acquired permission from the authorized driver. *Id.* at 1197. The third approach, adopted by the Sixth Circuit, examines the totality of the circumstances in determining standing. *Id.*

This Court should adopt the totality of circumstances approach used by the Sixth Circuit. In *United States v. Smith*, 263 F.3d 571 (6th Cir. 2001), the Sixth Circuit refused to accept the bright-line test that looks to whether the driver of a rental vehicle is listed on the rental agreement to establish standing; and reasoned that "such a rigid test is inappropriate" because the surrounding circumstances are what determines the legitimate expectation of privacy, not a single factor. *Id.* at 586. In relying on *Smith*'s holding, the district court in *U.S. v. Warren*, 39 F. Supp. 3d 930 (2014), found that a defendant who was a permissive driver of his friend's wife's rental, which was past its return date, enjoyed a reasonable expectation of privacy in view of the totality of the circumstances. 39 F. Supp. 3d at 934. The court held that a "breach of contract with the rental company" did not vitiate the defendant's privacy interest in the vehicle. *Id.*

Further, in *United States v. Martinez*, 808 F.2d 1050 (5th Cir. 1987), a case that presented similar issues, the Fifth Circuit also deviated from the bright-line test and held that where a person has obtained permission to borrow a vehicle from another, the borrower becomes a lawful possessor of the vehicle and thus has standing to challenge its search. 808 F.2d at 1056.

In adopting the totality of circumstances approach, including the issue of permission identified by the *Martinez* court, this Court will find that Austin had a legitimate expectation of privacy in the YOUBER vehicle. At trial, Austin's on-and-off-again partner, Lloyd, testified that Austin shares her login information for services and electronic devices, such as social media, YOUBER, or YOUBEREATS and that Austin is an authorized user on her credit card. R. at 2, 18-19. Though they had been "kind of on a break," Lloyd had not taken Austin off her credit card account. *Id.* at 18-19. Lloyd also admitted that she gave Austin her YOUBER login

information and thereafter did not change the password on her account despite their "falling out" in September 2018. *Id.* at 19. It was only at the time of trial that Lloyd came to the realization that she should take Austin off of her accounts – "I haven't done it yet, but **now** I know I should." *Id.* (emphasis added). Additionally, although Austin's August 1, 2019 blog post stated, "Goodbye my sweet Martha," the bond between Austin and Martha was evidently still strong as the blog post went on to state, "but i (*sic*) am Still with You, i (*sic*) am still You, You have always allowed me to be You. You are my aid, my tool my window into their world." *Id.* at 27.

Each of the foregoing facts must be considered under the totality of circumstances approach, and in doing so, it is clear that Austin used Lloyd's YOUBER account on the date of the subject incident because she had been given permission to do so and that permission had never been withdrawn by Lloyd. As an authorized user of the YOUBER vehicle, Austin expected privacy in the contents of the vehicle, specifically those contents she took measures to conceal from the public eye by placing them in the trunk of the vehicle.

The appellate court improperly focused its argument on the sole fact that Appellant had not secured *explicit* permission to use Lloyd's account for the subject rentals. The appellate court completely ignored the fact that Lloyd never changed her login information after providing the same to Austin, never told Austin she could no longer use her accounts, and had access to view each of Austin's transactions on both her YOUBER account and her credit card account. Thus, while it is possible that there was no "explicit" permission *each* time Austin used Lloyd's YOUBER account, there was clear implied consent as Lloyd did nothing to prevent Austin from using her accounts (after having given her permission to do so) when she reasonably should have known Austin could still be using them. Accordingly, even if this Court adopts the existence-of-permission approach taken by the Eighth Circuit and recognized by the Fifth Circuit in *Martinez*,

Austin has Fourth Amendment standing to challenge the Officer's search, as Lloyd gave her permission to use her YOUBER account and never rescinded the permission.

Furthermore, the district court also erred when it reasoned that Austin did not have standing to challenge the warrantless search of the YOUBER vehicle because Austin had a "temporary and limited relationship with the rental car supplied to her by YOUBER," and therefore lacked a "legitimate property interest or expectation of privacy in the vehicle." R. at 6. First, as detailed below, standing does not require an ownership interest. *Katz,* 389 U.S. at 351–52. The fact that Austin did not own the YOUBER vehicle or the fact that the authorized rental was not under Austin's name, therefore, does not automatically deprive Austin of her Fourth Amendment right to privacy in a vehicle she lawfully rented per YOUBER policies. Specifically, YOUBER's data and information specialist, Chad David, testified at trial that one user can use the login information of another user, so long as they are privy to the username and password. R. at 24. Per this YOUBER policy, Austin properly used Lloyd's YOUBER account on her own cellphone, as she was privy—through Lloyd's own accord—to her login information. *Id.* at 19.

Additionally, while it is conceded that Austin's physical possession of the YOUBER vehicle was temporary in nature, Austin had complete dominion and control over the rented vehicle in the periods during which it was in her possession. Although the allowable rental periods are limited by YOUBER (500 miles or a time period of one week), the facts demonstrate that Austin took possession of the subject YOUBER vehicle at least four other times during a three month span, which goes to show that her relationship with the vehicle was not random and transitory as the district court held. *Id.* at 2, 4.

It is also important to note that Austin did not have a permanent residence at the time of the arrest and lived in co-habitation facilities, such as PODSHARE (living quarters for a

maximum period of two weeks). *Id.* at 1. Austin stored all of her belongings in the YOUBER vehicle, ranging from personal items, such as clothing, shoes, and food, to valuable items, such as her collection of Kendrick Lamar records. *Id.* at 3. Even through the poetry posted on her blog, Austin indicates that the closest thing that she has to a home is the YOUBER vehicle. Specifically, on October 2, 2018, Austin posted:

> I have no home, I have only one name to use
> I am everyone, I am no one…**all you will see**
> **Is a small flash of pink** then POOF I'm gone.

R. at. 26 (emphasis added). All YOUBER vehicles are marked with a pink YOUBER logo sticker located on the bottom corner of the passenger side of the windshield, such that it is relatively easy to distinguish YOUBER vehicles from other vehicles on the road. *Id.* at 2. It can, therefore, reasonably be inferred that Austin's reference to a "small flash of pink" is reference to the YOUBER vehicle.

Austin intended and believed, as any reasonable person would, that the belongings she stored in the YOUBER vehicle, specifically those stored in closed compartments such as the trunk, were shielded from the "intruding eye" during the periods in which she was in possession of the vehicle. *See Katz,* 389 U.S. at 352 (Justice Harlan, concurring). Austin's intention is especially clear as she opted to store her personal belongings inside the trunk of the vehicle and not the back seat, which would be in plain view and could be easily observed by the public.[3]

In sum, Austin was in lawful possession of the YOUBER vehicle on the date of the subject incident and had a reasonable expectation of privacy in the contents stored out of plain sight in the vehicle.

[3] "It is well established that under certain circumstances the police may seize evidence in plain view without a warrant." *Coolidge v. New Hampshire*, 403 U.S. 443, 464 (1971).

B. Austin's Expectation Of Privacy In The YOUBER Vehicle, Like Many Other Modes of Private Transportation, Is One That Society Recognizes As Reasonable.

An individual's expectation of privacy is objectively reasonable if it has "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." *Carter*, 525 U.S. at 88.

In *Oliver v. United States*, 466 U.S. 170 (1984), this Court noted that the core function and intention from the Framers of the Fourth Amendment is our "societal understanding" as to what areas warrant "the most scrupulous protection from government invasion." 466 U.S. at 178. In relying on the *Oliver* analysis, the *Smith* court expanded upon this theory of "societal understanding" and applied it to the role of telecommunications in today's society, in comparison to twenty-five years ago when *Katz* was decided. *United States v. Smith,* 978 F.2d 171, 177 (5th Cir. 1992) "No one would dispute that the importance of telecommunications today has outstripped anything imagined twenty five years ago." *Id.* Just as the use of the telephone system is moving "inexorably" towards new customs and norms, such holds true for the modern use of transportation. *Id.*

There is no question that technology is evolving rapidly, exposing us to different methods of acquiring transportation. One who is unable to afford personally purchasing or leasing a vehicle is not necessarily deprived of traveling within a private vehicle, as companies like YOUBER have made it possible to rent a vehicle by the click of a button on a cellphone. Just as technology is evolving, our interpretations of the law must correspond with the new societal norms.[4] This Court took a step towards adopting this approach when it deviated from the "*per se* rule" that unlisted drivers on rental agreements "always lack an expectation of privacy in the

[4] *See* Genesis Martinez, *The Constitutional Risks of Ridesharing: Fourth Amendment Protections of Passengers in Uber and Lyft* 13 FIU L. Rev. 551, 571 (2019) ("As technology and transportation evolve, the validity of the existing privacy protections is questioned.").

automobile based on the rental company's lack of authorization alone," and, instead, focused on the concept of lawful possession. *Byrd,* 138 S. Ct. at 1528. Like the defendant in *Byrd,* Austin had lawfully secured the YOUBER vehicle with Lloyd's prior and unrevoked consent and had stored her personal belongings in the vehicle's trunk, a space society recognizes as private.

1. Standing Does Not Require An Ownership Interest.

A search may be deemed unreasonable even if there is no property interest in the place searched. *Warden, Maryland Penitentiary v. Hayden*, 387 U.S. 294, 304 (1967). Indeed, this Court has recognized that "the principal object of the Fourth Amendment is the protection of privacy rather than property," and has "increasingly discarded fictional and procedural barriers rested on property concepts." *Id.* Seven months after *Warden,* this Court again recognized the "shift in emphasis from property to privacy" in the *Katz* case. *Id.*; *see Katz*, 389 U.S. at 353. The Court held that "[t]he capacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy." *Katz*, 389 U.S. at 353.

Specifically, in the landmark case of *Katz,* this Court held that a person inside a telephone booth made of transparent glass is protected from governmental intrusion. *Id.* at 352. The Court's rationale was that "one who occupies it, shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world." *Id.* Similarly, here, Austin rented the YOUBER vehicle, paid the fixed hourly rate through an authorized YOUBER account, and occupied the vehicle to the exclusion of others, thereby expecting privacy inside the vehicle. Like *Katz,* it is irrelevant that Austin was seen by the public eye while traveling in the YOUBER vehicle. The fact of significance is that she garnered a reasonable expectation of privacy for the contents that she

stored inside the trunk of the vehicle, which were not to be seen by the "intruding eye" – just as the defendant in *Katz* was not to be heard by the "uninvited ear." *See id.* ("What he sought to exclude when he entered the booth was not the intruding eye—it was the uninvited ear.").

The same concepts apply to an overnight guest at a hotel or another's home. In *Minnesota v. Olson,* 495 U.S. 91 (1990), this Court analyzed the privacy rights of overnight guests and their expectation of privacy when seeking shelter in another's home. 495 U.S. at 99. The Court found that an overnight guest trusts that "he and his possessions will not be disturbed," and noted that society expects the same level of privacy in a place of shelter as it does in a telephone booth. *Id.* The same governing principles apply to a rental vehicle. In either of these situations, the occupier does not retain an ownership interest, but maintains a privacy interest. Thus, like an overnight guest, when one lawfully procures a rental vehicle, he or she exercises full dominion and control over that vehicle during the rental period by virtue of acquiring the keys and taking possession of the vehicle. That individual is afforded the right to store his or her belongings inside the vehicle and exclude others from invading the private space within that vehicle.

The district court, here, sheds light on *Byrd*'s analysis concerning legitimate expectation of privacy, yet misstates a material fact, which forms the basis of the *Byrd* rationale. The district court erroneously stated that *Byrd* "emphasized that the individual must have a property-based interest in order to have an expectation of privacy." R. at 5. To the contrary, however, *Byrd* stands for the proposition that there is no single metric or list of considerations to assess one's legitimate expectation of privacy; rather, this right may be recognized by understandings permitted by society, such as the right to exclude others. *Byrd,* 138 S. Ct. at 1522.

The reasonable expectations of privacy articulated in *Byrd*, *Olson*, and *Katz* are not materially different than the expectation of privacy Austin enjoyed in the YOUBER vehicle. She

took possession of the YOUBER vehicle upon lawfully renting it through Lloyd's YOUBER account per YOUBER policies and held the right to exclude others from entering the vehicle when she exercised custody and control over it, as its sole occupant during the rental period.

2. Austin's Suspected Criminal Activity Of Protesting Against *Darcy And Bingley Credit Union* Banks Does Not Divest Her Reasonable Expectation Of Privacy In Her Lawfully Rented YOUBER Vehicle.

In *United States v. Bautista*, 362 F.3d 584 (9th Cir. 2004), the defendant rented a motel room with a stolen credit card, which the motel's management reported to the police. 362 F.3d at 586. Before confirming that the credit card used was in fact stolen and before the expiration of the defendant's rental period, the police searched the defendant's motel room and found that he manufactured counterfeit currency in the room. *Id.* at 586–87. The search resulted in an indictment against the defendant for manufacturing counterfeit currency and the defendant filed a motion to suppress the evidence found during the search of his motel room. *Id.*

This presented the issue of whether the defendant had a reasonable expectation of privacy in the motel room despite his failure to effect lawful payment. *Id.* at 590. The Ninth Circuit found that he did. *Id.* at 591. The basis for the Ninth Circuit's decision was that time remained on the defendant's reservation, the stolen nature of the credit card had not been confirmed, and the motel had not affirmatively repossessed the room:

> Neither the motel manager nor the police knew whether Bautista had obtained the room by fraud. No investigation had yet been conducted, and no cause for ejection had been developed. Bautista still had two days remaining on his reservation and the motel had taken no affirmative steps to repossess the room.

Id.

In reaching its conclusion, the court relied on *Rakas* and found that Bautista had the right to exclude others from the room, as well as "a legitimate expectation of privacy by virtue of this right to exclude." *Id.* at 591 (citing *Rakas*, 439 U.S. at 143). This was

notwithstanding the fact that Bautista had fraudulently reserved the room for purposes of committing a criminal act. *Id.*

Similarly, here, the Officer did not suspect Austin of being the bank robber, did not know whether Austin had obtained the rental by fraud, and did not take any affirmative action to contact YOUBER to confirm his theory before violating her right to privacy by searching the trunk. In other words, no cause to search the trunk had been established. Additionally, like the defendant in *Bautista*, Austin's rental period had not yet expired, and she too harbored the right to exclude others from entering her YOUBER vehicle while she was actively and lawfully in possession of it. *See* R. at 3. Just as defendant Bautista had the right to exclude others from entering his motel room, albeit fraudulently obtained, Austin held that same right to exclude others from entering her *lawfully* rented YOUBER vehicle.

As such, Austin's criminal conduct of robbing banks discovered *after* the Officer's search and unconventional yet YOUBER-compliant form of renting the YOUBER vehicle through Lloyd's YOUBER app. did not divest Austin's expectation of privacy in the vehicle. At the time of the search, neither the robbery nor the alleged fraudulent rental of the vehicle had been confirmed by the Officer. The evidence gathered from the trunk was therefore "fruit of the poisonous tree" – *i.e.*, derived from the Officer's unlawful search of the vehicle.

II. THE ACQUISITION OF THE LOCATION DATA OF THE YOUBER ACCOUNT USED BY AUSTIN CONSTITUTES A SEARCH WITHIN THE MEANING OF THE FOURTH AMENDMENT AND *CARPENTER V. UNITED STATES*.

The "basic purpose" of the Fourth Amendment, as this Court has recognized, "is to safeguard the privacy and security of individuals against arbitrary invasions by governmental

officials." *Camara v. Mun. Court of City and County of San Francisco*, 387 U.S. 523, 528 (1967).

In *Katz*, this Court established that "the Fourth Amendment protects people, not places," and, in doing so, the Court expanded its conception of the Fourth Amendment to protect certain expectations of privacy as well. *Carpenter*, 138 S. Ct. at 2213 (citing *Katz*, 389 U.S. at 351). When an individual "seeks to preserve something as private," and the individual's expectation of privacy is "one that society is prepared to recognize as reasonable," official intrusion into that private sphere generally qualifies as a search and requires a warrant supported by probable cause." *Smith v. Maryland*, 442 U.S. 735, 740 (1979). Moreover, this Court has acknowledged, "property rights are not the sole measure of Fourth Amendment violations." *Soldal v. Cook County*, 506 U.S. 56, 64 (1992).

As technology has enhanced the Government's capacity to encroach upon areas normally guarded from inquisitive eyes, this Court has sought to "assure [] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted." *Carpenter*, 138 S. Ct. at 2214 (citing *Kyllo v. United States*, 533 U.S. 27, 34 (2001)). Here, Austin had a reasonable expectation of privacy to the GPS data collected during her use of the YOUBER app. The Officer's warrantless acquisition of long-term historical GPS data from the YOUBER account Austin used constituted an unreasonable search in violation of the Fourth Amendment as interpreted in *Carpenter*.

A. Austin Had A Reasonable Expectation Of Privacy In Her Movements As Chronicled By The YOUBER App.

In *Carpenter*, this Court was presented with the question of whether the Government conducts a search under the Fourth Amendment when it accesses historical cell phone records that provide a comprehensive chronicle of the user's past movements. *Id.* at 2211. Cell-Site

Location Information ("CSLI") is time-stamped location information data produced by an individual's cell phone that wireless carriers collect and store for their own business purposes. *Id.* at 2209. The CSLI obtained by the Government revealed the location of Carpenter's cell phone whenever it made or received calls and the Government used these records at trial to show that his phone was near four robbery locations at the time those robberies occurred. *Id* at 2208, 2214. This Court held that an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through the CSLI. *Id.* at 2217.

Similar to the facts in *Carpenter*, where CSLI was material to prosecuting the defendant by placing him near the scene of various robberies, here, the Government relies on mapping data acquired by YOUBER via its GPS feature to circumstantially connect Austin to six different bank robberies. As noted in YOUBER's corporate policy terms, YOUBER "automatically" collects and stores location information from the user's device and from any vehicles the user uses via GPS. R. at 29. Each user is assigned a computer-generated location number, which YOUBER uses to track the vehicles. *Id.* at 22. Austin had the YOUBER app on her personal cellphone and used the app to rent YOUBER vehicles following the account's activation by Lloyd on July 27, 2018, through and including her date of arrest on January 3, 2019. *Id.* at 2. The Court of Appeals stated that Austin was "constructively aware" of the collection of the GPS data in furtherance of its position that Austin had a reduced expectation of privacy while using the YOUBER app. *Id.* at 15. However, the Court failed to define "constructively aware," nor did it cite any facts in support of this conclusion. To make this conclusion requires speculation, as Lloyd's testimony and YOUBER's policy in the aggregate contradict the Court's statement.

Austin did not know, nor had any reason to know, that her physical movements were being traced and recorded by YOUBER. As such, she had a reasonable expectation that her

physical movements when using YOUBER vehicles were private. Lloyd setup the YOUBER account used by Austin and is its registered user. *Id.* at 19, 20. The same YOUBER account was used by Austin. *Id.* at 2. Consequently, only Lloyd was notified by YOUBER about its GPS monitoring practices, as YOUBER notifies its users only during the initial sign up period. *Id.* at 23. Should someone other than the individual that registered with YOUBER use the same account, as is the case here, the other party is not notified of YOUBER's GPS collection practices because it is "only disclosed during the initial sign up period." *Id.* at 24.

The compulsory nature of the CSLI acquired in *Carpenter* is similar to the GPS data acquired by YOUBER and obtained by the Government here. In *Carpenter*, the Government was able to obtain 12,898 location points cataloging Mr. Carpenter's movements over 127 days. *Carpenter*, 138 S. Ct. at 2209. Here, the GPS feature on the YOUBER app activates once the cellphone with the user's account is located within the vehicle. R. at 4. While the car is in use, the GPS information is filtered using satellite-mapping technology provided by a third party named Smoogle. *Id.* at 22. Thus, anytime Austin entered a YOUBER vehicle with her cellphone, the YOUBER app automatically collected and recorded her GPS location without requiring affirmative consent by Austin to collect her data. Austin did not know or have reason to know her physical movements were being recorded during her use of the YOUBER app.

Even if Austin was aware of YOUBER's GPS data collection, this Court has already recognized that individuals have a reasonable expectation of privacy in the whole of their physical movements. *Jones*, 565 U.S. at 430. In *Jones*, the Government installed a GPS tracking device on Jones's vehicle and remotely monitored the vehicle's movements for twenty-eight days. *Id*. at 403–04. This Court unanimously held that a search occurred, but decided the case based on the Government's physical trespass of the vehicle. *Id*. at 404–05.

In a concurring opinion, Justice Alito rejected the "trespass-based theory" and concluded instead that "the use of longer term GPS monitoring in investigations of most offenses is a search because 'it impinges on expectations of privacy' to a 'degree … that a reasonable person would not have anticipated.'" *Id*. at 419–21, 424, 430 (Alito, J., concurring). Justice Sotomayor added that such time-stamped data provides an intimate window into a person's life, revealing not only his particular movements, but through them his "familial, political, professional, religious, and sexual associations." *Id*. at 415 (Sotomayor, J., concurring). Thus, as the Court recognized in *Carpenter*, although *Jones* was decided on a property-based approach, "[a] majority of this Court has already recognized that individuals have a reasonable expectation of privacy in the whole of their physical movements. *Carpenter*, 138 S. Ct. at 2206 (citing *Jones*, 565 U.S. at 430).

The GPS data at issue in the instant case fits squarely within the reasonable expectation of privacy identified by the Court in *Jones* and reaffirmed by the Court's decision in *Carpenter*. Here, the GPS data provides "a precise, comprehensive" record of Austin's public movements during a three month span. *Jones*, 565 U.S. at 415. "The retrospective quality of the data here" is even more concerning from a privacy perspective when compared to *Jones* because such data compilation allows the Government to "travel back in time" to retrace Austin's "whereabouts, subject only to the retention policies of" YOUBER. *Carpenter*, 138 S. Ct. at 2218.

Unlike with the GPS device in *Jones*, police need not even know in advance whether they want to follow a particular individual, or when, in circumstances such as Austin's. *Id*. at 2218. Hence, whereas the Government tactic used in *Jones* of attaching a GPS device to a vehicle required the police "know in advance" whether they wanted to track a particular individual, the tactic used here of accessing a database compiled with GPS information as provided by YOUBER means that whoever "the suspect turns out to be, he has effectively been tailed" for the

time period covered by the database. *Id*. at 2218. Whether Austin had knowledge, or not, of the GPS data collection by YOUBER does not affect her reasonable expectation of privacy, and thus the Government's warrantless acquisition of GPS data at issue constitutes a search as defined in the Fourth Amendment and in *Carpenter.*

B. The GPS Data Acquired In The Instant Matter Is More Precise And Intrusive Than The CSLI At Issue In *Carpenter.*

The Court is obligated – as "[s]ubtler 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. *Olmstead v. United States*, 277 U.S. 438, 473–74 (1928) (Brandeis, J., dissenting). The GPS data at issue in the instant matter is even more precise, intrusive, and informative than the CSLI at issue in *Carpenter*. In *Carpenter*, the Government argued, and Justice Kennedy supported in his dissent, that the collection of CSLI by the Government should be permitted because the data is less precise than GPS information. *Carpenter*, 138 S. Ct. at 2218 (Kennedy, J., dissenting). In opposition to this argument, the Court's majority maintained that the accuracy of CSLI is "rapidly approaching" GPS-level precision. *Id.* at 2219. Given the framework of these arguments, it is abundantly clear that the Court in *Carpenter* acknowledged the high level of intrusiveness into an individual's physical movements GPS data provides, and as such held GPS data as a guidepost for arguing for or against the preciseness and intrusiveness of CSLI.

Here, the GPS data collected by YOUBER is even more intrusive than the CSLI at issue in *Carpenter*. YOUBER uses sophisticated satellite mapping technology to obtain GPS data from each user's cellphone in order to track each user as they drive YOUBER vehicles. R. at 3, 4. In addition to tracking users while they drive, YOUBER tracks the time stamped location of its vehicles every two minutes, regardless of whether the vehicle is being rented or used. *Id.* at 4, 29.

Hence, in theory, if a YOUBER vehicle were to be rented all day by a single YOUBER user, YOUBER would then have time stamped location data of the user's location, at what time the vehicle was in the location, and for how long. Such data is particularly intrusive for individuals like Austin, who frequently use YOUBER vehicles as a form of transportation to perform day-to-day tasks such as traveling to work and attending protests. R. at 2. The GPS data at issue can be revealing of her, and other YOUBER user's, political affiliations and professional destinations, both of which were noted as concerns by this Court in *Jones*. *See Jones*, 565 U.S. at 415.

The YOUBER app is pervasive, with about 40 million YOUBER users in the United States. R. at 22. It is widespread in use and is essentially a historical database for all of its user's prior whereabouts. GPS tracking is "detailed, encyclopedic, and effortlessly compiled . . . [w]ith just the click of a button, the Government can access each carrier's deep repository of historical location information at practically no expense." *Carpenter*, 138 S. Ct. at 2216–17. If this Court were to determine that the expectation of privacy in GPS data collected by YOUBER of its users and subpoenaed by the Government, as in this case, does not rise to the level of CSLI in *Carpenter*, this Court would contradict its own logic and reasoning used in *Carpenter*. This Court would weaken the effectiveness of the Fourth Amendment and grant the Government unfettered discretion in accessing the historical location data of about 40 million individuals. Such a decision would set a dangerous precedent for other apps like YOUBER that collect GPS data from their users, and condemn its users as a result.

C. Austin Did Not Forfeit Her Reasonable Expectation Of Privacy By Using YOUBER's Services.

The third-party doctrine largely traces its roots to *Miller*. *See id.* at 2216. Three years after *Miller*, this Court applied the same doctrine established in *Miller* to its decision in *Smith v. Maryland*. *Id*. *Smith* and *Miller* have since been instructional to the courts in the application of

the third-party doctrine. However, both *Smith* and *Miller* were decided over forty years ago today, and the issues presented did not involve the novel issues presented in *Carpenter* and here.

1. The Court Of Appeals Improperly Applied *Carpenter* To The Instant Case.

In denying Austin's appeal, the Court of Appeals stated that *Carpenter* "breathes new life" into the third-party doctrine stated in *Smith* and *Miller*. R. at 14. The court cited and relied on dissenting opinions in *Carpenter* by Justice Gorsuch and Justice Kennedy to reason that the third-party doctrine "remains alive today," and used the doctrine as a basis to deny Austin's appeal. R. at 14, 15. However, this was an improper interpretation and application of the decision in *Carpenter*. The Court in *Carpenter* noted that its decision was a narrow one, and it did not "disturb the application of *Smith* and *Miller*," although it was also explicit in stating that it declined to extend *Smith* and *Miller* to the collection of CSLI given its unique nature. *Carpenter*, 138 S. Ct. at 2220. Given this framework, the Court of Appeals erred in its decision by failing to apply this Court's precedent as established in *Carpenter*.

2. The Third-Party Doctrine As Stated In *Smith* And *Miller* Does Not Apply To This Case Because The GPS Data At Issue Is Substantially More Intrusive Than The Bank Records And Telephone Numbers At Issue In *Smith* And *Miller*.

In *Miller*, during an investigation for tax evasion, the Government subpoenaed the defendant's banks, seeking several months of canceled checks, deposit slips, and monthly statements. *U.S. v. Miller* 425 U.S. 435, 438 (1976). The Court rejected the defendant's Fourth Amendment challenge to the records collection because the defendant could "assert neither ownership nor possession" of the documents as they were "business records of the banks." *Id.* at 440. It concluded that the defendant had "take[n] the risk, in revealing his affairs to another, that the information [would] be conveyed by that person to the Government." *Id*. at 443.

In *Smith*, this Court applied the same principle applied in *Miller* but in the context of information conveyed to a telephone company. *Carpenter*, 138 S. Ct. at 2216. The Court held that the Government's use of a pen register, which records the outgoing phone numbers dialed on a landline telephone, was not a search. *Id*. The Court reasoned that telephone subscribers know that the phone numbers are used by the telephone company "for a variety of legitimate business purposes," and that the defendant "assumed the risk" that the company's records "would be divulged to police" by "voluntarily" conveying the dialed numbers to the phone company in the ordinary course of business. *Id*. at 743–45.

In relying on the third-party doctrine as stated in *Smith* and *Miller*, the Court of Appeals in this case held that Austin and other YOUBER users have no reasonable expectation of privacy in the GPS data collected because the data is "voluntarily" provided to a third party named Smoogle. R. at 15. Smoogle, as testified to by Mr. David, filters GPS information acquired from YOUBER users by using satellite-mapping technology. R. at 22. Mr. David further testified that without Smoogle and this partnership, YOUBER would not be able to keep track of all its vehicles. *Id.* at 23. The Court in *Carpenter* explained that "[t]he third-party doctrine partly stems from the notion that an individual has a reduced expectation of privacy in information knowingly shared with another. But the fact of diminished privacy interests does not mean that the Fourth Amendment falls out of the picture entirely." *Carpenter*, 138 S. Ct. at 2219. Therefore, even if an individual voluntarily provides information to a third party, courts must consider "the nature of the particular documents sought" to determine whether there is a legitimate expectation of privacy concerning their contents. *Miller*, 425 U.S. at 442.

Carpenter defeats the Court of Appeals' reasoning in the instant case. *Carpenter* held that the Government conducted a search by obtaining CSLI from a third party, the wireless carrier,

because it intruded on the individual's legitimate expectation of privacy. *Carpenter*, 138 S. Ct. at 2211–12, 2217. The Court rejected the Government's contention that the acquisition of CSLI was simply a "garden-variety request for information from a third-party witness." *Id.* at 2206, 2219. It reasoned that there "is a world of difference between the limited types of personal information addressed in *Smith* and *Miller* and the exhaustive chronicle of location information causally collected by wireless carriers." *Id.* at 2206, 2219. *Smith* and *Miller* concerned bank records and telephone numbers whereas *Carpenter* concerned encyclopedic location data mapping an individual's whereabouts over the span of several weeks. *Id*. at 2216. Provided the heightened privacy concerns at issue in *Carpenter*, the Court declined to "extend *Smith* and *Miller* to the collection of CSLI." *Id.* at 2219–20.

Applying the third-party doctrine as stated in *Smith* and *Miller* to the GPS data at issue here would require the same extension of the doctrine that the Court rejected in *Carpenter*. In *Carpenter*, the Court emphasized the monitoring qualities of CSLI and its encyclopedic nature, thereby distinguishing CSLI information from the information at issue in *Smith* and *Miller*. *Id.* at 2216–18. Likewise, this Court should apply the same logic and reasoning to the GPS data at issue here because of its analogous encyclopedic nature.

In the instant matter, the GPS data acquired by YOUBER is encyclopedic in nature and effortlessly compiled, like the CSLI in *Carpenter*. The Detective was able to obtain three months' worth of historical location data from the YOUBER account Austin used. R. at 4. He found the GPS data to be reliable and informative enough to recommend charges of previous crimes allegedly committed by Austin. *Id.* Such unchecked executive authority and unfettered discretion runs afoul with this Court's precedent as decided in *Carpenter* and reaffirms the invasiveness of granting the Government access to such intrusive data without a judicial check.

Allowing Government officials like Detective Boober to access pervasive information such as the GPS data produced by YOUBER, without the use of a warrant, sets a dangerous precedent inviting abuse. This court should decline to extend *Smith* and *Miller* to cover the circumstances here. In mechanically applying the third-party doctrine to this case, the Court of Appeals failed to appreciate the lack of comparable limitations on the revealing nature of GPS data. *Carpenter*, 138 S. Ct. at 2210. Given the intimate nature of GPS data as discussed here, the fact that the information is held by a third party should not by itself overcome YOUBER users' Fourth Amendment protection. The decision in *Carpenter* should compel this Court to continue to adapt with modern technologies and curtail historical monitoring and intrusion by the Government into the day-to-day lives of the citizens of this country.

CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that the decision below should be reversed.

Respectfully Submitted,

DATED: October 6, 2019

/s/

Team # P8
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