Docket No. 4-422

IN THE

Supreme Court of the United States

JAYNE AUSTIN,

Petitioner.

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the

United States Court of Appeals for the Thirteenth Circuit

BRIEF FOR PETITIONER

TO THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Jayne Austin, respectfully submits this brief on the merits, and asks this Court to reverse the Court of Appeals for the Thirteenth Circuit.

Attorneys for the Petitioner
October 6, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Supreme Court Cases

Other Federal Cases

State Court Cases

Statutes

Other Authorities

ISSUES PRESENTED FOR REVIEW

I. 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?

II. 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

Search of the Rental Car. On January 3, 2019, Ms. Austin was stopped by Officer Kreuzberger for failure to stop at a stop sign. R. at 2. Ms. Austin was the sole occupant and driver of a car she had rented through Ms. Lloyd's YOUBER account earlier that day. R. at 2. Since Ms. Austin did not have a car of her own at the time, she regularly used Ms. Lloyd's YOUBER account to rent cars in order to travel to work and social events. R. at 2. YOUBER is an hourly rental car service which allows renters to rent cars for a maximum distance of 500 miles and a maximum period of one week. R. at 2. Ms. Austin received unrestricted permission from Ms. Lloyd to rent cars on her YOUBER account. R. at 2, 19. YOUBER'S software application allows its users to share such information. R. at 24. Ms. Austin is also an authorized user on Ms. Lloyd's credit card. R. at 2, 19.

During the traffic stop, Ms. Austin showed Officer Kreuzberger her license and a copy of the car-rental agreement, which was stored on her cell phone. R. at 2. Officer Kreuzberger noted that Ms. Austin appeared to be living in the car, and that she was not the renter on the rental agreement. R. at 2. Without inquiring further into Ms. Austin's permission to possess the car, Officer Kreuzberger told Ms. Austin that because she was not the listed renter, he did not need her consent to search it. R. at 3. Officer Kreuzberger proceeded to search the car and rifle through Ms. Austin's personal belongings therein, which included her bedding, clothing, shoes, medicine, music collection, and a cooler filled with foodstuff. R. at 3.

While Officer Kreuzberger investigated the contents of Ms. Austin's car, he received a dispatch to look out for an individual suspected of bank robbery. R. at 3. The suspect was allegedly driving a vehicle that matched the description of the car Ms. Austin was driving. R. at

3. Based on that description and property in the trunk of the car, Officer Kreuzberger arrested Ms. Austin on suspicion of bank robbery. R. at 3.

Acquisition of the Location Data. On January 5, 2019, Detective Boober Hamm was assigned to investigate Ms. Austin's case. R. at 3. He suspected that Ms. Austin was involved in five similar bank robberies which had occurred between October 15, 2018, and December 15, 2018. R. at 3. Detective Hamm served a subpoena duces tecum on YOUBER to obtain GPS and Bluetooth information from Ms. Lloyd's YOUBER account. R. at 3. YOUBER tracks the location of all YOUBER vehicles through GPS and Bluetooth technology via signals from users' cellphones. R. at 3. In creating an account, YOUBER users must consent to such tracking. R. at 2, 29-30. The GPS and Bluetooth technology activates when the user's cell phone is located within the rental vehicle. R. at 4. Every two minutes, YOUBER tracks the timestamped location of the vehicle using satellite mapping technology. R. at 4.

The records Detective Hamm obtained from YOUBER revealed that Ms. Lloyd's account was used to rent cars in the locations and at the times of each of the five similar bank robberies. R. at 4. Ms. Austin was subsequently charged with six counts of bank robbery and incidental crimes. R. at 1.

An additional relevant fact is that Ms. Austin is a poet and blogger. R. at 1, 26-27. That is important because she writes poetry and publishes it in an online blog post which is filled with hyperbole and rhetoric disclaiming concepts of ownership. R. at 1, 26-27. Ms. Austin's posts also include mournful laments about her on-and-off again relationship with Martha Lloyd "(Ms. Lloyd"), and criticisms about the unfair practices employed by her bank Darcy and Bingley Credit Union. R. at 1, 26-27.

SUMMARY OF THE ARGUMENT

Standing to Contest the Search of the Rental Car

In *Byrd v. United States*, this Court confirmed that the driver of a rental car will not lose standing to make a claim under the Fourth Amendment simply because the rental agreement does not list the individual as a driver. Standing is conferred by an individual's reasonable expectation of privacy, which must be analyzed in light of all of the surrounding circumstances. Applying the *Katz* reasonable expectation of privacy test, an expectation of privacy is reasonable if (1) the individual manifests a subjective expectation of privacy; and (2) the expectation is one that society is prepared to accept as reasonable.

Under the *Katz* reasonable expectation of privacy test, Ms. Austin had a reasonable expectation of privacy in the rental car. She manifested a subjective expectation of privacy when she placed her personal belongings in the locked trunk of the car. That expectation was objectively reasonable because she had a legitimate possessory interest in the car, one which society recognizes and accepts as legitimate. The lower court's decision to take the search out of the reach of the Fourth Amendment based on a mere possibility of illegality was erroneous. Ms. Austin was not a car thief and should not be treated as one. Consequently, the lower court erred in concluding that Ms. Austin lacked standing to contest the search of the rental car.

Acquisition of the Location Data

Individuals have a reasonable expectation of privacy in the record of their physical movements as captured through cellular data and stored by cellular carriers. The fact that third parties, that is, cellular carriers, collect and store the data does not diminish that expectation. Recognizing a reasonable expectation of privacy in the historical location data compiled by

cellular phone software applications like YOUBER is a logical extension of that well-reasoned jurisprudence.

Given the automatic nature of the way historical location data is collected and the sensitivity of the information it reveals, historical location data is deserving of Fourth Amendment protection. Under the Fourth Amendment, law enforcement is required to obtain a warrant from a neutral and detached magistrate upon a showing of probable cause prior to invading an individual's reasonable expectation of privacy. Law enforcement failed to comply with that requirement in this case. Thus, the Court of Appeals erred in dismissing the motion to suppress the evidence of the location data because it was obtained in violation of the Fourth Amendment.

STANDARD OF REVIEW

This Court applies a bifurcated standard of review to a district court's ruling on a motion to suppress. *State v. Hensley,* 430 P.3d 896, 898 (Idaho Ct. App. 2018). Factual findings are reviewed for clear error and accepted if they are supported by substantial competent evidence. *United States v. Schmidt,* 700 F.3d 934, 937 (7th Cir. 2012). The district court's legal conclusions are reviewed *de novo*. *State v. Sanchez-Loredo,* 272 P.3d 34, 37 (Kan. 2012).

ARGUMENT

I. AN INDIVIDUAL HAS STANDING TO CONTEST THE SEARCH OF A RENTAL VEHICLE THAT WAS RENTED ON ANOTHER PERSON'S ACCOUNT IF THAT INDIVIDUAL HAS A REASONABLE EXPECTATION OF PRIVACY IN THE VEHICLE.

"[A]s a general rule, someone in otherwise lawful possession and control of a rental car has a reasonable expectation of privacy in it even if the rental agreement does not list him or her as an authorized driver." *Byrd v. United States*, 138 S. Ct. 1518, 1524 (2018). The Fourth Amendment to the United States Constitution protects each individual's right to "be secure in

their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. "Effects," for Fourth Amendment purposes, includes searches and seizures that involve motor vehicles. *United States v. Jones*, 565 U.S. 400, 404 (2012); *see also United States v. Chadwick*, 433 U.S. 1, 12 (1977).

The touchstone of the Fourth Amendment is reasonableness. *E.g., Florida v. Jimeno*, 500 U.S. 248, 250 (1991). To assert a legitimate expectation of privacy, an individual must manifest a subjective expectation of privacy that society is prepared to recognize as reasonable. *E.g., Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). "Though the reasonableness of the expectation of privacy in a vehicle may be somewhat weaker than that in a home, . . . '[a] search even of an automobile, is a substantial invasion of privacy. To protect that privacy from official arbitrariness, the Court has always regarded probable cause as the minimum requirement for a lawful search.'" *Rakas v. Illinois*, 439 U.S. 128, 156 (1978) (White, J., concurring) (quoting *Chadwick*, 433 U.S. at 12-13).

In this case, the lower court improperly held that Ms. Austin lacks standing to bring a claim under the Fourth Amendment because she had an objectively reasonable expectation of privacy in the rental car. Ms. Austin received permission to rent the car, and she was the sole occupant and driver of the car. When she placed her personal belongings in the locked trunk of the car, she had a subjectively and objectively reasonable expectation that others would not rummage through it. *See generally Byrd*, 138 S. Ct. 1518; *Rakas*, 439 U.S. 128.

A. Under the Totality of Circumstances Test Required by the Fourth Amendment, No Single Factor is Determinative in Analyzing an Individual's Reasonable Expectations of Privacy.

In deciding its most recent Fourth Amendment standing challenge, *Byrd*, the Supreme Court affirmed the importance of considering all of the surrounding circumstances on a case by

case basis. 138 S. Ct. at 1527 (2018). In doing so, the Court echoed prior holdings which stressed "that no single factor invariably will be determinative." *Rakas*, 439 U.S. at 152 (Powell, J., concurring); *accord Byrd*, 138 S. Ct. at 1532 (Alito, J., concurring). Standing must be analyzed in light of all of the surrounding circumstances. *Id*.

Fourth Amendment rights are implicated when an individual has a legitimate expectation of privacy in the place searched or property seized. *E.g., Katz*, 389 U.S. at 360-61 (Harlan, J., concurring). Such expectations must have a "source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized or permitted by society." *Rakas*, 439 U.S. at 143 n. 12.

1. A possessory interest in the place searched or property seized is sufficient to confer standing for a Fourth Amendment challenge.

Under common law, possession is good title against everyone except those with superior title. Restatement (Second) of Torts § 895 (1979). The "legitimate expectations of privacy [test], which was derived from . . . Justice Harlan's concurrence in *Katz v. United States* . . . supplements, rather than displaces, the 'traditional property-based understanding of the Fourth Amendment.'" *Byrd*, 138 S. Ct. at 1526 (quoting *Florida v. Jardines*, 569 U.S. 1, 11 (2013)). While common law property interests are not controlling in Fourth Amendment jurisprudence, they can be "instructive in 'determining the presence or absence of the privacy interests protected by th[e] Amendment.'" *Id.* at 1526 (quoting *Rakas*, 439 U.S. 128, 133) ; *see also Bumper v. North Carolina*, 391 U.S. 543, 550 (1968) (standing was conferred by a possessory interest in a family member's home and a rifle seized therein); *United States v. Jeffers*, 342 U.S. 48, 52 (1951) (standing was based on a possessory interest in contraband).

"One of the main rights attaching to property is the right to exclude others." *Rakas*, 439 U.S. at 143 n. 12. "[O]ne who . . . lawfully possesses or controls property will in all likelihood

have a legitimate expectation of privacy by virtue of this right to exclude." *Id*. Here, Ms. Austin was a known user and renter of YOUBER vehicles. She paid YOUBER'S rental fee in exchange for exclusive use of the vehicle during the rental period. Moreover, Ms. Austin was the sole occupant in complete dominion and control of the vehicle at the time it was searched. Based on these facts, Ms. Austin would have had standing to sue someone for trespass if they intruded upon the car while it was in her possession. Restatement (Second) of Torts, *supra*. Thus, she should at a minimum have standing to invoke the Fourth Amendment.

The Supreme Court re-examined property interests in the context of Fourth Amendment standing when it decided *Byrd*. *See generally* 138 S. Ct. 1518. In *Byrd*, the petitioner challenged a judicial rule denying Fourth Amendment standing to all drivers of rental vehicles who are not listed as authorized drivers on the rental agreement. *Id.* at 1523. Although the *Byrd* Court found that a car thief would not have a reasonable expectation of privacy while plying his trade, it concluded that a *per se* rule "that drivers who are not listed on rental agreements always lack an expectation of privacy in the automobile based on the rental company's lack of authorization alone" is too restrictive. *Id.* at 1527. The Court instructed that someone who is in otherwise lawful possession of a rental car has a property interest in the car and cannot be denied standing on the sole ground that the individual is not listed as an authorized driver on the rental agreement. *Id.* at 1523-24.

In this case, Ms. Austin had a legitimate property interest in the rented car because she received permission from Ms. Lloyd to rent the car and YOUBER tacitly agreed to that arrangement. Ms. Lloyd, by her own admission, gave Ms. Austin her YOUBER account information for the express purpose of renting cars. It is uncontested that Ms. Lloyd's authorization was unrestricted and never revoked.

Additionally, YOUBER users are permitted to share their accounts and activate them on multiple devices, regardless of who owns the device or who was paying the fee. According to YOUBER, "all any user needs to use [an] account is the username and password." Moreover, YOUBER collects a significant amount of data, including specific information about every computer, browser, and mobile device used to access their services. With such information, YOUBER was able to differentiate between Ms. Lloyd and Ms. Austin's phones. Based on YOUBER'S policies and practices, YOUBER was, or should have been, well aware that Ms. Austin was a third-party user of Ms. Lloyd's account. YOUBER'S failure to take any steps to prevent that operates as tacit agreement for such use.

In an effort to overcome and undermine the weight of this evidence, the government introduced poetry written by Ms. Austin in which she disclaims the idea of personal property. Ms. Austin's poetry is filled with hyperbole and rhetoric renouncing concepts of ownership. However, Ms. Austin has always asserted a property interest in the car and its contents. That was never disclaimed. Ms. Austin's artistic expressions and mournful laments should not be used as a means of denying her the rights and protections which are guaranteed by the Fourth Amendment.

2. Common understandings impute a sense of privacy upon shared and hourly rental cars.

An expectation is objectively reasonable when it has a source in "understandings that are recognized and permitted by society." *Minnesota v. Carter*, 525 U.S. 83, 88 (1998). Society recognizes and permits expectations of privacy in locked spaces, *Chadwick*, 433 U.S. at 11, and shared spaces where one's possession and control is limited and non-exclusive, *Mancusi v. DeForte*, 392 U.S. 364, 370 (1968). This Court's decisions have repeatedly reflected such common understandings by recognizing reasonable expectations of privacy in footlockers,

business offices, friend's apartments, taxicabs, and telephone booths. *E.g., Katz*, 389 U.S. at 352. In *Byrd*, this Court revisited society's expectations of privacy in rental cars. *See generally* 138 S. Ct. 1518. The *Byrd* Court concluded that common societal understandings impute privacy upon such vehicles. *Id.* at 1531. Recognizing a reasonable expectation of privacy in shared or hourly rental cars is a logical extension of that well-reasoned line of jurisprudence.

When someone puts personal property in the locked trunk of a vehicle, there is an objectively reasonable expectation that others will not rifle through it. *E.g., Chadwick*, 433 U.S. at 11. Ms. Austin was pulled over by Officer Kreuzberger for committing a minor traffic violation. Pursuant to Officer Kreuzberger's demands, Ms. Austin showed him a valid license and car-rental agreement. Even though Ms. Austin was not listed as the renter on the agreement, the agreement was on her cellular phone, which indicated that she was an authorized user of the account. If the officer had contacted the listed renter to inquire about Ms. Austin's possession of the car, the inquiry would have revealed that Ms. Austin was authorized to use Ms. Lloyd's account to rent the car. Further, had the officer inquired with YOUBER about Ms. Austin's possession of the car, the inquiry would have revealed that YOUBER users share accounts and the rental fee was paid by Ms. Austin.

Notwithstanding these facts, Officer Kreuzberger told Ms. Austin that he did not need her consent to search the car because she was not listed as the renter on the rental agreement. Officer Kreuzberger failed to make any reasonable inquiry into the circumstances surrounding Ms. Austin's possession of the car. Further, he searched the car with full knowledge that he lacked any modicum of probable cause to do so. He operated under a guise of entitlement, probably assuming that as an unlisted driver of an hourly rental car, Ms. Austin would lack the means to assert her Fourth Amendment right to be free from such an unreasonable intrusion.

B. It is Uncontested that Ms. Austin is Not a Car Thief, Thus She Should Have the Same Fourth Amendment Rights as Other Drivers.

"Whether the challenged search or seizure violated the Fourth Amendment rights of a criminal defendant . . . turn[s] [on] a determination of whether the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect." *Rakas*, 439 U.S. at 140. While it is beyond dispute that the Fourth Amendment was not designed to protect a car thief while plying his trade, *Id*. at 143 n. 12, Ms. Austin was not a car thief. Moreover, her possession of the rental car was not a crime. Thus, Ms. Austin should be afforded the same Fourth Amendment rights as other drivers.

1. Private contracts do not govern the scope of a driver's Fourth Amendment protections.

Violating the terms of a car rental agreement has no bearing upon one's Fourth Amendment rights. *Byrd*, 138 S. Ct. at 1529. Officer Kreuzberger chose to search Ms. Austin's car because she was not listed as the renter on the car-rental agreement. The Supreme Court has recognized that "car-rental agreements are filled with long lists of restrictions," but that "[f]ew would contend that violating [such] provisions . . . has anything to do with a driver's reasonable expectation of privacy in the rental car." *Byrd*, 138 S. Ct. at 1529. An "authorized-driver provision . . . concern[s] risk allocation between private parties . . . . But that risk allocation has little to do with whether one would have a reasonable expectation of privacy in the rental car." *Id*.

In light of this understanding, the fact that Ms. Austin was not listed as the renter on the car-rental agreement has no bearing on her subjectively and objectively reasonable expectation of privacy in the car. Yet, that appears to have been Officer Kreuzberger's sole consideration when he decided to ransack Ms. Austin's personal belongings.

2. Courts may not use the benefit of hindsight in evaluating application of the Fourth Amendment.

The Court of Appeals erred when it took the unlawful search at issue in this case out of the reach of the Fourth Amendment by justifying it with *post hoc* rationalizations. *See generally United States v. Martinez-Fuerte*, 428 U.S. 543 (1976); *Beck v. Ohio*, 379 U.S. 89 (1964). "Fourth Amendment . . . standing inquiries . . . [are] within the purview of substantive Fourth Amendment law." *Rakas*, 439 U.S. at 140. Under Fourth Amendment law, "neither evidence uncovered in the course of a search nor the scope of the search conducted can be used to provide *post hoc* justification for a search." *California v. Acevedo*, 500 U.S. 565, 599 (1991) (Stevens, J., dissenting). "*[P]ost hoc* rationalizations have no place in our Fourth Amendment jurisprudence." *United States v. Montoya de Hernandez*, 473 U.S. 531, 559 (1985) (Brennan, J., dissenting).

In this case, Officer Kreuzberger decided to search Ms. Austin's car without probable cause because he likely assumed that she would lack standing to challenge the legality of his conduct, or, alternatively, that as the renter of an hourly rental car, she would lack the means to assert her Fourth Amendment rights. Upon learning that Ms. Austin was not listed as the renter on the car-rental agreement and without inquiring further as to whether she legitimately possessed the car, Officer Kreuzberger went on a fishing expedition amongst Ms. Austin's most personal belongings. He rummaged through her bedding, cooler, clothes, shoes, medicine, and music collection. There can be no doubt that Officer Kreuzberger's conduct was a substantial invasion of Ms. Austin's expectation of privacy. Notwithstanding these facts, the lower court took the search out of the reach of the Fourth Amendment by using *post hoc* rationalizations concerning adequacy of permission and the possible illegality of Ms. Austin's conduct.

The lower court incorrectly relied on *Rakas* and *Byrd* in concluding that Ms. Austin lacks standing to challenge the search because she did not have adequate permission to use the car and was engaged in potentially illegal conduct. *See generally Byrd*, 138 S. Ct. 1518; *Rakas*, 439 U.S. 128. That reliance was misplaced. Aside from the fact that the petitioners in *Rakas* were passengers in a car, not drivers, the holding in *Rakas* did not turn on *post hoc* rationalizations concerning the potential illegality of their conduct. *Id*. In *Rakas*, the petitioners were passengers in a get-a-way car fleeing the scene of a robbery. *Id.* at 130. Although the *Rakas* Court found that the petitioners lacked standing to challenge the search of the car, it did so on the basis that the petitioners were mere passengers in the car who claimed no possessory interest in the car, its locked compartments, or its contents. *Id.* at 148-49. The fact that the car was allegedly used in a robbery was not a consideration in the Court's analysis. *Id*. Such a consideration would constitute a *post hoc* rationalization in contravention of Fourth Amendment jurisprudence.

Reliance on *Byrd* was also misplaced. *See generally* 138 S. Ct. 1518. The holding in *Byrd* did not turn on adequacy of permission or whether the car was used to commit a crime. *Id*. In *Byrd*, the sole occupant and driver of a rental car challenged the legality of a search of the car. *Id.* at 1525. Like Ms. Austin, the driver received permission to drive the car. *Id.* at 1524. His girlfriend rented the car and gave him the keys. *Id.* Similar to the stop in this case, the driver in *Byrd* was pulled over for a minor traffic violation. *Id*. Law enforcement noted that he was not listed on the rental agreement and conducted a suspicion-less search of the car under the assumption that he would lack standing to challenge their conduct. *Id.* at 1525.

To justify the search of the vehicle in *Byrd*, the government contended that the driver was similarly situated to a car thief and therefore lacked standing because he used his girlfriend "as a strawman in a calculated plan to mislead the rental company from the very outset, all to aid him

in committing a crime." *Id.* at 1530. The Court disagreed, concluding that the government did not prove that obtaining a vehicle through subterfuge would constitute a criminal offense under applicable law. *Id*. Further, the Court declined to entertain the government's argument "that there is no reason that the law should distinguish between one who obtains a vehicle through subterfuge" and "one who steals the car outright" because that argument was not raised in the lower court. *Id*. Thus, the case was remanded for further factual development. *Id*.

Like the driver in *Byrd*, Ms. Austin has not been charged with car theft, and the government has not contended that her possession of the car was wrongful in the sense that it constituted a crime. In fact, the record clearly demonstrates that Ms. Austin was not a car thief: her use and possession of the car was legitimate because she had permission to rent the car from Ms. Lloyd, tacit agreement from YOUBER, and she paid the rental fee. Nothing in the record suggests that Ms. Austin's use or possession of the car was criminal or fraudulent in any way.

Moreover, there has been no argument that Ms. Austin should be treated like a car thief, and the record would not support such a conclusion. As discussed above, Ms. Austin legitimately possessed the car. Further, she used the car for personal transportation to work and social events, and as a temporary shelter and storage place for her personal belongings. Thus, Ms. Austin is not a car thief, and there is no reason why she should be treated as one.

Had Ms. Austin been driving a privately-owned automobile obtained and used in a similar way, there would be no question that her Fourth Amendment rights were violated. "A search . . . of an automobile is a substantial invasion of privacy." *United States v. Ortiz*, 422 U.S. 891, 896 (1975). The invasion is no less substantial because the automobile is rented instead of privately owned.

3. A rule allowing the mere possibility of illegality to take a search outside of the Fourth Amendment is subject to state overreach.

The lower court's erroneous interpretation of *Rakas* and *Byrd* will circumscribe the ability of countless individuals to obtain constitutional protection under the Fourth Amendment. Under this flawed interpretation, drivers of rental cars would be denied constitutional rights if there is any possibility of illegality. That would undermine the foundation of our criminal justice system, which is built upon the premise that all individuals are innocent until proven guilty. Fourth Amendment rights cannot be denied based on a mere possibility of illegality, and applicability of the Fourth Amendment has never hinged on whether the property searched was rented or owned. The decision reached by the lower court in this case demonstrates the reach and limitless potential that such an interpretation would have on the constitutional protections afforded by the Fourth Amendment. As such, Ms. Austin requests that the lower court's ruling be reversed.

II. ACQUISITION OF THE LOCATION DATA OF A RENTAL VEHICLE IS A "SEARCH" WITHIN THE MEANING OF THE FOURTH AMENDMENT AND *CARPENTER* BECAUSE LOCATION DATA REVEALS INTIMATE DETAILS OF DAILY LIFE WHICH ARE COMMONLY UNDERSTOOD TO BE PRIVATE.

The Fourth Amendment to the United States Constitution guards, "[t]he right of the people be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. The government engages in a Fourth Amendment search when it intrudes upon an expectation of privacy that an individual subjectively possesses, and when there is also the objective belief that society is prepared to recognize that expectation as reasonable. *E.g., Kyllo v. United States,* 533 U.S. 27, 33 (2001). When a reasonable expectation of privacy exists, a warrantless search is presumed to be unreasonable and therefore unlawful under the Fourth Amendment. *Katz v. United States,* 389 U.S. 347, 357 (1967).

Acquisition of the location data from Ms. Austin's rental car was a "search" within the meaning of the Fourth Amendment because Ms. Austin had a reasonable expectation of privacy in the data. *See generally Katz*, 389 U.S. 347. The data represented how Ms. Austin lived her life on a daily basis. It offered a window into the places she went and the people she saw. Commensurate with societal understandings, Ms. Austin expected that her every movement would not be subject to constant surveillance or scrutiny.

Under *Carpenter*, law enforcement is generally required to obtain a warrant based upon probable cause to acquire location data. *See generally Carpenter v. United States,* 138 S. Ct. 2206, 2222 (2018). In this case, law enforcement failed to obtain the required warrant. While the third-party doctrine might relieve the government of the warrant requirement in cases which involve a diminished expectation of privacy, that doctrine is inapplicable in this case because there was no diminished expectation of privacy. Further, the government concedes that there was no exception to the warrant requirement. Thus, the United States Court of Appeals for the Thirteenth Circuit erred when it denied Ms. Austin's motion to suppress the unlawfully obtained historical location data.

A. The Third-Party Doctrine Does Not Apply to Historical Location Information because it is Automatically Collected and Has the Capacity to Reveal the Most Intimate Details of Daily Life.

It is beyond dispute that historical location data can be an effective and powerful tool for law enforcement. *See generally State v. Earls,* 70 A.3d 630, 632 (N.J. 2013). However, given the sensitive nature of the information the data reveals, acquisition of the data is subject to the Fourth Amendment warrant requirement. Under the warrant requirement, the government may only seize evidence if it first obtains a warrant from a neutral and detached magistrate upon a showing of probable cause. While that requirement may be waived in cases that involve

voluntarily disclosure to a third party, the so-called third-party doctrine does not apply under the facts of this case because justification for the doctrine is not present.

The third-party doctrine is justified by a diminished expectation of privacy in information that is voluntarily shared with third parties. Although the location data at issue in this case was held by a third party, there was no diminished expectation of privacy and disclosure was not voluntary in any meaningful sense of the word. Ms. Austin's disclosure of her location to YOUBER and its affiliates was completely automatic. Ms. Austin did not make any voluntary decision to reveal the most intimate details about her life with YOUBER. She made a decision to rent YOUBER vehicles. The fact that YOUBER automatically collected and stored Ms. Austin's location information was a collateral consequence of their rental agreement.

In deciding its most recent challenges to the so-called third-party doctrine, *Smith* and *Miller*, the Supreme Court affirmed the importance of examining the nature of the information contained in the records and whether the information was voluntarily conveyed to a third party. *See generally Smith v. Maryland,* 442 U.S. 735 (1979); *United States v. Miller,* 425 U.S. 435 (1976). In doing so, the Court underscored the policy rationale underlying the doctrine: there is a diminished expectation of privacy in certain types of information once it is shared with third parties. *Id.* Thus, the third-party doctrine only applies when there is a diminished expectation of privacy in the information contained in the records.

1. The nature of the information revealed by location data excludes applicability of the third-party doctrine.

Even though "[t]his Court consistently has held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties," the inquiry does not end there. *Smith*, 442 U.S. at 744. The Court also looks to the nature of the information that was conveyed, the means of conveyance, societal expectations, and the subjective expectations

of the petitioner. *See generally Smith*, 422 U.S. 735; *Miller*, 425 U.S. 435; *Carpenter*, 138 S. Ct. 2206. In *Smith*, the petitioner challenged the admissibility of pen register. *See generally* 422 U.S. 735. The *Smith* Court concluded that the petitioner lacked any reasonable expectation of privacy in the contents of the pen register because it merely contained numbers which were voluntarily transmitted to the telephone company by the caller when calls were made. *Id*. at 741. While the Court recognized that there would be a reasonable expectation of privacy in the contents of private conversations, it noted that "pen registers do not acquire the *contents* of communications . . . '[i]ndeed, a law enforcement official could not even determine from the use of a pen register whether a communication existed.'" *Id.* (quoting *United States v. New York Tel. Co.*, 434 U.S. 159, 167 (1977).

The telephone numbers collected by the pen register in *Smith* are in stark contrast to the location data at issue in this case. A pen register collects telephone numbers which reveal no personal information other than the numbers dialed. On the other hand, historical location information reveals an immense amount of personal information. It "generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations." *U.S. v. Jones,* 565 U.S. 400, 415 (2012) (Sotomayor, J., concurring). Thus, the location data at issue in this case is more akin to the contents of a private conversation than a telephone number dialed. Like a private conversation, there is a reasonable expectation of privacy in historical location information.

This Court had an opportunity to examine how reasonable expectations of privacy are affected by the nature of documents in *Miller*. *See generally* 425 U.S. 435. The *Miller* Court stressed that "[w]e must examine the nature of the particular documents sought to be protected in order to determine whether there is a legitimate 'expectation of privacy' concerning their

contents." *Id.* at 442. In *Miller*, the petitioner challenged admissibility of bank records obtained without a warrant. *Id.* The *Miller* Court concluded that the petitioner had no protectable Fourth Amendment interest in the bank records because they represented negotiable instruments which were used in transactions that the bank was a party to. *Id.* at 441-442. The Court stated, "'[b]anks are…not…neutrals in transactions involving negotiable instruments, but parties to the instruments with a substantial stake in their continued availability and acceptance.'" *Id.* at 440 (quoting *California Bankers Assn. v. Shultz,* 416 U.S. 21, 48-49 (1974)). Thus, bank records are excepted from the warrant requirement under the third-party doctrine.

However, "there is a world of difference between" bank records and an "exhaustive chronicle of location information." *Carpenter*, 138 S. Ct. at 2210. Location data is not merely evidence of a commercial transaction which involves a third party. Even though the data at issue in this case was collected by a third party for a commercial purpose, that is, tracking the use and location of rental cars, the data reveals information that goes far beyond that purpose. Ms. Austin's location data reveals sensitive information about the most intimate details of her life. That information has no bearing on the purpose for which the data was collected. Additionally, unlike a bank's interest in transactions involving negotiable instruments, YOUBER has no interest in the whole of Ms. Austin's physical movements. Thus, under *Miller*, YOUBER is not a third party for purposes of the third-party doctrine. Rather, YOUBER and its affiliates are neutral parties.

Notably, in *Carpenter*, this Court declined to extend the so-called third-party doctrine articulated in *Smith* and *Miller* to location information stored by cellular carriers. *Id*. The *Carpenter* Court stated, "[i]n light of the deeply revealing nature of" cellular location data, "the fact that such information is gathered by a third party does not make it any less deserving of

Fourth Amendment protection." *Id.* at 2223. The cellular location data at issue in *Carpenter* is similar to the location data at issue here because both are automatically and continuously collected. However, the location data in this case is even more deserving of Fourth Amendment protection because it was collected via cellular technology enhanced by a global positioning system ("GPS") to create an even more precise and comprehensive map of Ms. Austin's movements.

2. Ms. Austin did not "voluntarily disclose" her location information to a third party in any meaningful sense of the term.

The third-party doctrine only applies when information is voluntarily shared with a third party. *E.g., Id*. at 2220. That element has not been satisfied in this case. This Court has recognized that electronic "location information is not truly 'shared' as the term is normally understood." *Id*. at 2210. Cellular phones automatically log location information, whether the user of aware of it or not. *Id.* Similarly, YOUBER automatically logs its users' location information by leveraging cellular phone capabilities. In fact, YOUBER combines the accuracy of GPS technology with the capability of cellular phones to make its process of compiling location data completely automated and precise.

The automatic and continuous nature in which Ms. Austin's location information was conveyed to YOUBER distinguishes this case from *Smith* and *Miller*. *See generally Smith*, 422 U.S. 735; *Miller*, 425 U.S. 435. Unlike the telephone numbers dialed in *Smith* and the bank transactions tendered in *Miller*, Ms. Austin did not take any deliberate action to effectuate the conveyance of her location information. She was not even consciously aware of it when it happened. Even though Ms. Austin may have constructively consented to such conveyance by virtue of using YOUBER'S software application, she did so with the common understanding that the information conveyed was collected for the purpose of monitoring YOUBER'S assets, that

is, its rental cars, not her. Thus, Ms. Austin did not voluntarily convey her location information in any meaningful sense of the term.

Historical location information has the capability of revealing the most intimate details of life. As reflected in this Court's prior decisions, society recognizes such details as private. *See generally Carpenter*, 138 S. Ct. 2206. Moreover, the location data at issue in this case was continuously and automatically transmitted by GPS enhanced cellular technology. The automatic nature of the transmission undermines any argument that it was voluntary. Thus, the third-party doctrine is inapplicable in this case because there was no diminished expectation of privacy in Ms. Austin's location data.

B. Fourth Amendment Jurisprudence Must Adapt to Changes in Technology.

This Court has categorically stated that individuals have a "reasonable expectation of privacy in the whole of [their] physical movements." *Id*. at 2219. The entirety of those physical movements is not observable by mere eye alone. Such observation requires law enforcement to use technology that is capable of capturing both continuing and past movements. Such permeating police surveillance has caused this Court to express concern about the government's use of technology in a way which "enhance[s] . . . [its] capacity to encroach upon areas normally guarded from inquisitive eyes." *Id.* at 2214.

This Court endeavors to ensure the degree of privacy against government that existed when the Fourth Amendment was created. *See generally Kyllo,* 533 U.S. 27. In addressing technological advancements, this Court has stated, "[w]hether the Government employs its own surveillance technology as in *Jones*, or leverages the technology of a wireless carrier, we hold that an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through" cellular data. *Carpenter*, 138 S. Ct. at 2217. If this is the case

regarding cellular data, then common sense dictates that a reasonable expectation of privacy extends to historical location data gathered through GPS enhanced cellular technology as well.

YOUBER'S GPS enhanced cellular technology tracks the historical location of its users. Prior to the advent of such technology, society could not have fathomed or expected that their movements would be captured and made into compilations that would be available and accessible to government agents. *Jones*, 565 U.S. at 429-31. While this Court has recognized that GPS technology used in the context of ongoing surveillance is a search because of its highly accurate and invasive nature, *Id*., it has not yet addressed the use of GPS enhanced cellular technology in the context of historical location data. That analysis should not change because the data is historical instead of ongoing. Ms. Austin had a reasonable expectation in the privacy of her movements, whether they were ongoing or historical.

In a seminal case involving technological advancements, *Kyllo*, this Court addressed law enforcement's use of sense-enhancing technology. *See generally* 533 U.S. 27. In *Kyllo,* this Court addressed whether law enforcement's use of a thermal imaging device which revealed details of a private home that would not have been discoverable without physically entering the home constituted a Fourth Amendment search. *Id.* at 33-34. The *Kyllo* Court held that because the device was not readily available to the public, the search was considered presumptively unreasonable without a warrant. *Id.* at 34. The Court acknowledged that Fourth Amendment jurisprudence must necessarily adjust to new technology, as "[i]t would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology." *Id.* at 33-34.

Unlike the thermal imaging technology in *Kyllo*, GPS enhanced cellular technology is available to the general public. However, the general public cannot use it to catalog the

movements of other people, which is exactly what law enforcement has done in this case. The location data compiled by YOUBER allowed law enforcement to produce a veritable montage of Ms. Austin's historical movements. Such a process is entirely unavailable to the general public, and it is typically infeasible for law enforcement due to cost, lack of resources, and time constraints. No reasonable person would have contemplated that YOUBER'S location data would be freely available and accessible to law enforcement for use in this manner. Ms. Austin never fathomed it. Thus, like the data obtained by the thermal-imaging device in *Kyllo*, acquisition of YOUBER'S location data constituted a search under the Fourth Amendment and it was therefore presumptively unreasonable without a warrant.

"[I]n the application of a Constitution, our contemplation cannot be only of what has been, but of what will be." *Olmstead v. United States,* 277 U.S. 438, 474-475 (1928) (Brandeis, J., dissenting). In *Carpenter*, this Court noted, "In 1979, few could have imagined a society in which a phone goes wherever its owner goes, conveying to the wireless carrier not just dialed digits, but a detailed and comprehensive record of the person's movements." *Carpenter,* 138 S. Ct. at 2217. Technological advancements by companies like YOUBER continue to revolutionize society, but they also have the potential to expand the reach of law enforcement in a way that categorically invades the right of individuals like Ms. Austin to be free from unreasonable governmental invasions. Our Fourth Amendment jurisprudence "must take account of" and adapt to GPS enhanced cellular technology and other "more sophisticated systems that are already in use or in development." *Id*. at 2218.

C. Administrative Subpoenas Should Not Be Used to Circumvent the Fourth Amendment Warrant Requirement.

The Fourth Amendment warrant requirement protects reasonable expectations of privacy by subjecting invasions of protected privacy interests to the scrutiny of a neutral and detached

magistrate. *E.g., Katz*, 389 U.S 359. Historical location data implicates a protected privacy interest because it has the capacity to reveal the most intimate details of an individual's private life. *Jones*, 565 U.S. at 415 (Sotomayor, J., concurring). Society recognizes that such information is private. *Id.* Based on that common understanding, Ms. Austin reasonably and objectively expected that her location information would not be broadcast to the world. Given the sensitive nature of the data at issue in this case, acquisition of it raises significant privacy concerns for all individuals who use modern technology. Based on these facts, acquisition of the data is subject to the Fourth Amendment warrant requirement.

A subpoena is not a substitute for a warrant. Unlike a warrant, which will only be issued upon a showing of probable cause, a subpoena merely requires "specific and articulable facts" showing "relevan[ce] and material[ity] to an ongoing criminal investigation." 18 U.S.C. § 2703(d). Further, an administrative subpoena is not subject to judicial oversight. Law enforcement has complete, unfettered discretion over the entire subpoena process. Thus, administrative subpoenas are only appropriate if there is a diminished expectation of privacy in the records acquired. *Couch v. United States,* 409 U.S. 322, 336 (1973); *Miller*, 425 U.S. at 442-44. Given that there was no diminished expectation of privacy in this case, use of a subpoena was improper.

Here, the data acquired by Detective Hamm revealed sensitive information about Ms. Austin's movements and whereabouts over a period of three months. Ms. Austin had a subjectively and objectively reasonable expectation of privacy in that information. As shown above, that expectation was not diminished because the information was gathered and held by a neutral third party. Additionally, the fact that the subpoena issued by Detective Hamm secured

evidence which may be some evidence of a crime does not make his use of a subpoena retroactively lawful.

"A search prosecuted in violation of the Constitution is not made lawful by what it brings to light; and the doctrine has never been recognized by this court, nor can it be tolerated under our constitutional system, that evidences of crime discovered by a [law enforcement] officer in making a search without lawful warrant may be used against the victim of the unlawful search where a timely challenge has been interposed." *Byars v. United States,* 273 U.S. 28, 29 (1927). In this case, Detective Hamm improperly conducted a search without a warrant and Ms. Austin raised a timely challenge. The fact that the unlawful search revealed information which might be some evidence of a crime does not make the search lawful. Thus, the lower court erred in denying Ms. Austin's motion to suppress the historical location data.

CONCLUSION

This Court has recognized that Fourth Amendment standing is conferred by a reasonable expectation of privacy, which must be analyzed in light of all of the surrounding circumstances. This Court has also recognized that an individual can assert a reasonable expectation of privacy in shared spaces, such as hourly rental cars. Under the *Katz* reasonable expectation of privacy test, Ms. Austin had a reasonable expectation of privacy in the rental car because she manifested a subjective expectation of privacy when she placed her personal belongings in the locked trunk, and society is prepared to accept that expectation as reasonable in light of her legitimate possessory interest in the car and common understandings which impute privacy upon rental cars. Accordingly, Ms. Austin's reasonable expectation of privacy was violated when Officer Kreuzberger rummaged through her personal belongings without a warrant or probable cause.

Regarding the second issue before this Court, the sensitive nature of information revealed by historical location data warrants against exempting it from Fourth Amendment protection. Further, the automatic and continuous manner in which it is collected undermines any argument that conveyance of the data is voluntarily in a way which would diminish one's expectation of privacy in it. As reflected in this Court's prior holdings, society recognizes that an individual retains a reasonable expectation of privacy in the whole of their physical movements as captured through modern technological devices. Therefore, Ms. Austin's Fourth Amendment right to be free from unreasonable searches and seizures was violated when her location data was acquired without a warrant.

For the foregoing reasons, Ms. Austin respectfully asks that this Court reverse the judgment of the Court of Appeals.

Date: October 6, 2019

Respectfully submitted,

/s/
Attorneys for the Petitioner

CERTIFICATE OF SERVICE

We certify that a copy of Petitioner's brief was served upon the United States of America, through counsel of record by certified U.S. mail return receipt requested, on this, the 6th day of October, 2019.

/s/
Attorneys for the Petitioner