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 RESPONDENT

TEAM R1

Counsel for Respondent

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Statement of Issues Presented for Review

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

Ms. Austin is a naturalist and minimalist who prides herself on living a non-materialistic lifestyle. Ms. Austin has no permanent home, but she does live in cohabitation facilities which allow short term living quarters up to fourteen nights. (R at 1). Ms. Austin uses the YOUBER app on her cellphone in order to travel to work and protests. (R at 2). Ms. Austin hates being on the grid and uses Ms. Lloyd's information for everything except her blog. (R at 18). The relationship between the parties is not stable and is categorized as on-again-off-again. (R at 2). In her January 1, 2019 blog post, she describes herself as being Ms. Lloyd, and refers to her as her "aid, her tool, her window, into their [upside down] world." (R at 27).

Ms. Lloyd is Ms. Austin's on-again-off-again partner. (R at 2). Ms. Lloyd allowed Ms. Austin to be an authorized user on her credit card and to use her YOUBER account information during the relationship. (R at 2, 18). However, Ms. Lloyd indicated that it was regrettable, stating "She has a way with words that just makes you do whatever she says." (R at 19). She further indicated she had been thinking about removing her as an authorized user on the card but hadn't gotten around to it. (R at 19). Ms. Lloyd stated that while they were together when Ms. Austin would use her card, and then reimburse Ms. Lloyd with cash. (R at 18). In regards to the YOUBER account, Ms. Lloyd stated she hadn't given express permission to use the account since their break in September 2018. (R at 19). She also stated that Ms. Austin had not asked for permission to use the card or the account since the break. (R at 19). Ms. Lloyd indicated break was on account of Ms. Austin hating the "the man" and becoming too radical. (R at 18). After the break Ms. Lloyd took her credit card off the YOUBER account, deleted the app from her phone and switched to a new ride-sharing app. (R at 20). Ms. Austin's authorized card was

already on the account, and so despite the break, Ms. Austin continued to use Ms. Lloyd's YOUBER account in order to rent cars. (R at 19).

On June 5, 2018, YOUBER Corporation updated its privacy policy. The policy states that YOUBER vehicles are included in the term "Services." (R at 29). At the end of the Privacy Policy is a clause which states, "In order to use YOUBER and YOUBER related Services, all users must agree to YOUBER's Privacy policies upon registration of a YOUBER account. (R at 30). On July 17, 2018, Ms. Lloyd's YOUBER account became active. Ms. Lloyd set up the account and signed the YOUBER terms of release, and the YOUBER privacy policy. (R at 2, 20). Ms. Austin does not have a YOUBER account, rather uses Ms. Lloyd's account. (R at 2).

YOUBER's policy is to track each user via the GPS and Bluetooth on their phones, which does not begin tracking until the user gets inside the vehicle and ends the moment the user exits the rental car. (R at 22). YOUBER uses the search engine SMOOGLE's GPS analytics to locate, update, and timestamp the rental cars every two minutes for as long as the user is in the vehicle. (R at 22).

Ms. Austin has a blog titled "They all Fall Down!" in which she writes poems and posts about financial corruption, specifically the bank *Darcy and Bingley Credit Union* (DCBU). (R at 1). In the blog, she describes *DBCU's* complex schemes or marginalizing lower-income members and favoring high-income earners. (R at 1). Her October 2, 2018 post states "You may think I'm on the grid, You may think that I will abide, You may think you can hide as you did, You may think you can ride the cash ride, 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). In a November 28, 2018 post, Ms. Austin disclaims home and property. "I have no home, I claim no home, I claim no property. . ." (R at 26). In a December 14, 2019 post she states, "I'll show you property is NOTHING, Ownership is NOTHING. . ." (R at 27).

On January 3, 2019, Ms. Austin rented a Black Prius from YOUBER with the license plate R0LL3M. (R at 2). She was stopped by Officer Kreuzberger for failure to stop at a stop sign. (R at 2). During the stop Ms. Austin presented the YOUBER app on her phone, upon which the Officer noticed her name was not on the rental agreement. (R at 2). The Officer then told Ms. Austin he didn't need her consent to search the car. (R at 3). During his search he found personal items including clothes, an inhaler, shoes, and a collection of signed Kendrick Lamar records. (R at 3). He further found bedding, a pillow, a cooler of food and noted that he believed the car to be lived in. (R at 3). In the trunk, the Officer found a BB gun modeled after a 45. Caliber handgun with the orange tip removed a maroon ski mask, and a duffle bag containing $50,000 and blue dye packs. (R at 3). During the investigation, the Officer received a radio call to look out for a Black YOUBER Prius, partial license plate "ROL" in connection to a bank robbery. (R at 3). The radio further indicated the suspect was seen wearing a maroon ski mask and using a .45 caliber handgun. (R at 3). Officer Kreuzberger then arrested Ms. Austin under suspicion of bank robbery. (R at 3).

On January 5, 2019, Detective Ham discovered five open bank robberies occurring between October 15, 2018 and December 15, 2018 which matched the modus operandi of the January 3 robbery. (R at 3). He noticed that the car Ms. Austin had been arrested in was a YOUBER rental, and so he served YOUBER with a subpoena duces tecum in order to obtain all the GPS and Bluetooth location data related to the YOUBER account she had been using between October 3, 2018 and January 3, 2019. (R at 3). The location data results showed that Ms. Lloyd's account had been used to rent cars in the locations and at the times of each of the six robberies, with the same type of car, a 2017 Black Toyota Prius being used in five of the robberies. (R. at 4) Ms. Austin was charged with six counts of bank robbery. (R at 1).

Ms. Austin has filed two Motions to Suppress with the District Court. (R at 1). The first is a Motion to Suppress the evidence obtained during Officer Kreuzberger's search of the rental car on January 3, 2019. (R at 1). The second is a Motion to Suppress the location data records of the rental vehicle provided by YOUBER to Detective Hamm. (R at 1). The District Court denied Ms. Austin's Motion to Suppress, and the Court of Appeals affirmed. (R at 1, 10).

Summary of Argument

This court has long held Fourth Amendment rights are personal and may not be asserted vicariously. Because Ms. Austin fails to show a reasonable expectation of privacy under a property theory or a totality of the circumstances test, she does not have standing to contest the search as she has not had her Fourth Amendment rights violated. The Restatement (Second) of Torts 892(a) discusses the revocation of consent, when one has reason to know that consent was revoked. Due to the volatility of Ms. Lloyd's and Ms. Austin's relationship, Ms. Austin had reason to know that Ms. Lloyd's consent to her use of the YOUBER account information was revoked after their break. Additionally, Ms. Austin cannot show a valid property interest in the YOUBER vehicle. She is not the owner of the vehicle nor is the vehicle rented in her name. Although she stores her personal belongings in the car, *United States v. Salvucci*, 448 U.S. 83 (1980) held that personal belongings involved in a search and seizure are not a substitute for establishing a reasonable expectation of privacy in the area searched. She equally fails to establish a reasonable expectation of privacy under the totality of the circumstances because extenuating circumstances surrounding her acquisition of the YOUBER vehicle eroded expectation of privacy.

The second question for review focuses on whether the location data acquired from the rental vehicle constitutes a search under the Fourth Amendment and under *Carpenter v. United States*, 138 S. Ct. 2206 (2018). In looking at the Fourth Amendment, the judgments of the

lower courts focused on how Ms. Austin held no reasonable expectation of privacy in the location data collected due to several main factors. First, Ms. Austin was not the account owner. Second, she had violated the rental agreement by sleeping in the car and used it to commit crimes. Third, she voluntarily conveyed her location information to third parties in the ordinary course of business. Fourth, she implicitly consented to the terms of YOUBER's privacy policy when she used Ms. Lloyd's account. Additionally, the lower courts noted that because the GPS information gathered did not provide the government with an intimate window into Ms. Austin's personal life, the data collected did not rise to the level of concern analyzed in *Carpenter*. Therefore the acquisition of the location data of the rental vehicle did not constitute a search, both under the Fourth Amendment, and under *Carpenter*.

Standard of Review

The case is before this Court by virtue of an Order Granting Certiorari to the U.S. Court of Appeals for the 13th Circuit. The Order granting Certiorari set forth the questions presented for review as stated elsewhere herein and this Court has jurisdiction under 28 U.S.C. § 1257(a). Congress has not limited the Supreme Court of the United States jurisdiction by imposing limiting standards of review.

Argument

Standing is better understood under the "purview of the substantive rights" protected by the Fourth Amendment. *Rakas v. Illinois*, 439 U.S. 92, 140 (1978). Fourth Amendment Rights are personal, and the question to be asked is "whether the challenged search and seizure violated the Fourth Amendment rights of a criminal defendant who seeks to exclude the evidence obtained during it." *Id*. at 140. The court pointed to the legitimate expectation of privacy inquiry, stated in *Katz v. United States*, 389 U.S. 347 (1967), as providing "guidance in defining the

scope of the interest protected by the Fourth Amendment." *Rakas v. Illinois*, 439 U.S. 92, 143 (1978).

In order to determine whether an individual has standing to contest a government search, that person has the burden of proving their Fourth Amendment rights were violated. *Rawlings v. Kentucky, 448 U.S. 98, 104*. "While property ownership is clearly a factor to be considered in determining whether an individual's Fourth Amendment rights have been violated, property rights are neither the beginning nor the end of this Court's inquiry." *United States v. Salvucci*, 448 U.S. 83 (1980). Congruently, one who is wrongfully present may not challenge a search, one who is "legitimately on [the] premises where a search occurs may challenge its legality." *Rakas v. Illinois*, 435 U.S. 922 (1978). Thus, the proper test of standing, whether an individual's Fourth Amendment rights were violated, is resolved by analyzing whether individual challenging the search has shown a reasonable expectation of privacy. *Rakas v. Illinois*, 435 U.S. 922, 130 (1978). The test first requires a person to show "an actual subjective" expectation of privacy that "society is prepared to recognize as 'reasonable.'" *Katz v. United States*, 389 U.S. 347, 361 (1967). To assist in determining reasonableness, courts may look to common law property concepts and legitimate presence. Under the totality of the circumstances, Ms. Austin fails to establish a reasonable expectation of privacy in the rental vehicle for three reasons. First, because she disclaimed the concept of property in her blog, she cannot now assert a property interest solely to invoke the Fourth amendment. Second, because her presence in the rental vehicle was unlawful, she had no legitimate property interest in a rental vehicle she fraudulently obtained. Finally, the circumstances surrounding her use of the rental vehicle erode her reasonable expectation of privacy. Because Ms. Austin cannot establish that she had a reasonable expectation of privacy in which the government intruded, she has no standing to invoke the Fourth Amendment.

A. Jane's words and conduct are inconsistent with a valid property interest and cannot show a reasonable expectation of privacy in the YOUBER vehicle.

"A disclaimer of ownership, while indeed [a] strong indication that a defendant does not expect the article to be free from government intrusion, is not necessarily the hallmark for deciding the substance of a fourth amendment claim." *United States v. Hawkins*, 681 F.2d 1343, 1346 (11th Cir. 1982*)*. The defendant in *Hawkins*, during an encounter with law enforcement, warned away a woman carrying a suitcase. *Id*. at 1344. When questioned regarding the women and the suitcase, Hawkins began to make a scene and disclaimed any relationship between himself, the woman, and the suitcase. *Id.* at 1344. The court ruled that Hawkin's "unsolicited and violent protests. . .so inconsistent with a claim of privacy interest in the suitcase that he cannot later successfully assert that claim." *Id.* at 1346.

Similarly, Ms. Austin's lifestyle and blog posts disclaiming property is inconsistent with a claim of privacy. Ms. Austin's blog provides unsolicited statements disclaiming property interests in general. Furthermore, she "prides herself on her immaterial lifestyle." As a minimalist, Ms. Austin claims no home and utilizes her partner Martha's identity when necessary to survive in the modern world. While these disclaimers alone do not decide a Fourth Amendment claim, it is a factor to be weighed in the regards to reasonableness. Therefore, like in *Hawkins*, when Ms. Austin asserts a Fourth Amendment privacy claim that is inconsistent with her conduct, she will not be successful in asserting that claim.

B. Ms. Austin fails to show a legitimate presence or a valid property interest in the vehicle.

i. Ms. Austin Failed to provide evidence of permission to use the YOUBER rental vehicle.

Without evidence proving permissive use, an unauthorized driver will not have standing to challenge a search. *United States v. Thomas*, 447 F.3d 1191, 1199 (9th Cir. 2006). "An unauthorized driver may have standing to challenge a search if he or she has received permission

to use the car." *Id*. at 1199. In *Thomas*, the defendant was stopped in a rental car where his name was not on the rental agreement. *Id.* at 1195. However, the police knew defendant and his accomplice would rent cars in the accomplice's name for the defendant to use to transport drugs. *Id*. at 1194. The Appellate court held that because, at trial, the Defendant failed to show any evidence he received permission to drive the vehicle, he did not show a reasonable expectation of privacy; thus, he lacked standing to invoke the Fourth Amendment. *Id*. at 1199.

Applying the rationale utilized by the 9th Circuit, Ms. Austin has the affirmative burden to establish that she had adequate permission to drive the YOUBER vehicle. Similarly in *Thomas*, Ms. Austin relies on implied consent of a third party. However, she failed to prove this permissive use at trial. The district court's conclusion was further supported by the Appellate court who not only found that Ms. Austin procured the vehicle without permission, but also fraudulently. Ms. Austin was not able to prove at trial or convince the Appellate court on review that she had adequate permission to use the car; therefore, she cannot sustain her burden of proving a reasonable expectation of privacy.

ii. Ms. Austin had reason to know Ms. Lloyd's consent was revoked after the break; therefore, she was unlawfully present.

"Upon termination of consent its effectiveness is terminated, except as it may have become irrevocable by contract or otherwise, or except as its terms may include, expressly or by implication, a privilege to continue to act." RESTATEMENT (2ND) OF TORTS§ 892A(5) "The consent is terminated when the actor knows or has reason to know that the other is no longer willing for him to continue the particular conduct. This unwillingness may be manifested to the actor by any words or conduct inconsistent with continued consent. . . . On termination of the consent, it ordinarily ceases to be effective and the actor is no longer privileged to continue his conduct." *Id*. at Comment (i). The applicable definition of break is "to end a relationship,

connection, or agreement" or as "an interruption in continuity." Break, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/break (last visited 10/5/2019).

The Appellate court held that Ms. Austin's presence was not legitimate due to her suspicious use of Ms. Lloyd's account information and because her name was not on the rental agreement. The court emphasized her failure to obtain explicit permission from Ms. Lloyd to use her account information. As shown below, the Appellate court accurately depicts Ms. Austin's procurement of the rental vehicle as fraudulent, thus, negating any claims of legitimate presence.

The YOUBER privacy policy explicitly states "In order to use YOUBER and YOUBER related Services, all users must agree to YOUBER's privacy policies. . ." Stated in the negative, a user cannot use YOUBER or YOUBER related services without agreeing to YOUBER's privacy policy. Ms. Austin does not contend that she agreed to the privacy policy. Furthermore, her attorney in the cross-examination of Ms. Lloyd initiated a line of questioning intended to demonstrate that Ms. Austin had not seen the privacy policy. Although the privacy policy does not contemplate the consequences of a violation, it clearly and explicitly states an individual may not use their products without agreeing to the provision. Therefore, in addition to not being listed on the rental agreement, Ms. Austin was in further violation of the YOUBER privacy policy.

Ms. Austin relies on the past consent of Ms. Lloyd to show legitimate presence however, under the totality of the circumstances that consent was implicitly revoked. Ms. Lloyd's testimony indicates the parties had established a form of financial agreement in which Ms. Austin would reimburse Ms. Lloyd with cash for her credit card expenditures. Ms. Lloyd further insinuates in her testimony that Ms. Austin would ask her before using the YOUBER or YOUBER eats account information. This financial agreement between the parties arose on account of their intimate relationship, which was often unstable. In her letters, Ms. Austin failed

to inform Ms. Lloyd of her continued use of her account or credit card, nor did she seek permission to continue using the account. Similarly, Ms. Austin failed to provide evidence that she reimbursed Ms. Lloyd as was their prior practice.

Furthermore, Ms. Lloyd largely ignored Ms. Austin's attempts at communication, responding only once, stating she needed time to heal. In light of the surrounding circumstances, Ms. Austin had reason to know Ms. Lloyd's no longer consented to Ms. Austin's unfettered use of the credit card or account information. Ms. Austin could not have reasonably understood that Ms. Lloyd intended to finance Ms. Austin's excursions in light of their prior conduct of reimbursement. Finally, Ms. Austin clearly exceeded the scope of Ms. Lloyd's original consent. She fails to show any explicit evidence of permission on the part of Ms. Lloyd to use the account information. Because Ms. Austin cannot show any implied or explicit consent to use the account information, she is unable to claim a lawful presence or possession of the rental car. Therefore, it follows that without the ability to claim lawful presence, Ms. Austin cannot claim the right to exclude it as a means of establishing a legitimate expectation of privacy.

iii. Ms. Austin's possession of seized goods is not a substitute for a reasonable expectation of privacy in the YOUBER vehicle.

The second ground on which the Appellate court stood, to determine Ms. Austin's standing, was a property rights theory. Specifically, they relied on the quote, "courts have generally required the movant claim either to have owned or possessed the seized property or to have had a substantial possessory interest in the premises." *United States v. Jones*, 565 U.S. 400, 262 (2012). However, this quote is actually from *Jones v. United States*, 362 U.S. 257, 261 (1960), in which the Supreme Court was explaining how the courts of appeals had been previously analyzing standing issues. The case was predominantly regarding the creation of "automatic standing" for crimes of possession; however, the court held that a property interest

"need not be as extensive a property interest as was required by the courts below." *Id*. at 263. The automatic standing rule of *Jones v. United States* was overruled in *U.S. v. Salvucci*, holding "While property ownership is clearly a factor to be considered in determining whether an individual's Fourth Amendment rights have been violated, property rights are neither the beginning nor the end of this Court's inquiry." *United States v. Salvucci*, 448 U.S. 83, 91 (1980). The court further stated, "We simply decline to use possession of a seized good as a substitute for a factual finding that the owner of the good had a legitimate expectation of privacy in the area searched." *Id*. at 92. The court reiterated the defendants need to establish a reasonable expectation of privacy by stating that "legal possession of a seized good is not a proxy for determining whether the owner had a Fourth Amendment interest. . . ." *Id*. at 90.

The Appellate court's reliance on *Jones v. United States* is improper; however, the logic the court implies is sound when viewed under the holding of *Salvucci*. Ms. Austin was not the owner of the vehicle, the vehicle was not registered in her name, and she did not gain sufficient permission to possess or use the vehicle. As the appellate court noted, "an individual cannot have a valid property interest in a vehicle she has fraudulently leased." Furthermore, the court has repeatedly held that property interests do not control and that the person invoking the protections of the Fourth Amendment must also demonstrate a reasonable expectation of privacy. Therefore, Ms. Austin may not rely solely on the presence of her personal belongings in the YOUBER vehicle to establish a reasonable expectation of privacy in that vehicle. Therefore, because Ms. Austin fails to demonstrate a valid property interest, and because she fails to show a reasonable expectation of privacy, she cannot invoke the protections of the Fourth Amendment.

C. <u>The application of *Byrd* and the circumstances surrounding her acquisition of the rental vehicle prevents Ms. Austin from showing a reasonable expectation of privacy.</u>

"The mere fact that a driver in lawful possession or control of a rental car is not listed on the rental agreement will not defeat his or her otherwise reasonable expectation of privacy." *Byrd v. United States*, 138 S. Ct. 1518, 1531 (2018). In *Byrd*, the defendant's associate rented a vehicle in her name, then gave the keys and sole possession to the defendant. *Id*. at 1524. The rental contract contained a clause prohibiting unauthorized drivers from driving the vehicle, under penalty of voiding the insurance policy. *Id*. at 1524. The court found the provision did not void the contract but rather voided the insurance policy. Thus, on its own, it was not determinative of the defendant's reasonable expectation of privacy and the case was remanded for further determination of the lawfulness of the defendant's presence. Additionally, Justice Alito's concurring opinion provides factors in determining whether an unauthorized driver may raise a Fourth Amendment claim. "The terms of the particular rental agreement. . . the circumstances surrounding the rental. . . the reason why the driver took the wheel. . . any property right that the driver might have. . . and the legality of his conduct under the law of the State where the conduct occurred." *Id*. at 1532 (Justice Alito concurring opinion).

Ms. Austin's acquisition of the YOUBER rental differs factually from *Byrd*. When applying the factors listed by Justice Alito, Ms. Austin displays no reasonable expectation of privacy. First, the YOUBER privacy policy states that individuals must agree to the terms of the privacy policy or they may not use YOUBER services and YOUBER vehicles, whereas in *Byrd*, violation resulted in insurance liability. Second, the defendant in *Byrd* had actual permission from the contracting party. That party took affirmative steps which included physically handing the keys over to the defendant. Ms. Austin did not receive actual permission from Ms. Lloyd to use her account information, nor did she rent the vehicle in her own name. Third, Ms. Austin was driving the Prius while fleeing from a robbery. The same black Prius, with the license plate "R0L" that was connected to four other bank robberies. Fourth, Ms. Austin had no property

rights in a vehicle she fraudulently rented in someone else's name. Finally, Ms. Austin's fraudulent scheme would not be legal in any state or her conduct as a bank robber. Therefore, Ms. Austin cannot raise a valid Fourth Amendment claim when she exhibited no property rights, no permissible use, and acquired the car through a fraudulent scheme in order to commit robbery.

Ms. Austin cannot prove a legitimate expectation of privacy in light of the circumstances surrounding her use of the rental car. "Extenuating circumstances can erode the reasonableness of a privacy expectation to the extent that the interest is not constitutionally protected." *United States v. McKennon*, 814 F.2d 1539, 1544 (11th Cir. 1986). The defendant Mckennon attempted to smuggle drugs through an airport by passing a bag he packed to a courier, each taking different flights. *Id*. at 1541. The courier was stopped by law enforcement and questioned regarding the bag containing the drugs. *Id*. at 1541-42. Mckennon was also stopped and disclaimed knowledge of the courier and the bag. *Id*. at 1541. It was later found that the defendant planned to disassociate himself with the courier if she were to be apprehended. *Id*. at 1545. The court found that Mckennon "significantly diminished the reasonableness of his expectation of privacy" because he had "assumed the risk of discovery" knowing it could be subject to a search by airport security. *Id*. at 1545.

Similar to interests in preventing drug trafficking in *Mckennon*, the government has an interest in road safety and prevention of auto theft. The government implements "pervasive regulation" to effectuate those interests. *California v. Carney*, 471 U.S. 386, 392 (1985). "A car has little capacity for escaping public scrutiny. It travels public thoroughfares where its occupants and its contents are in plain view." *Cardwell v. Lewis*, 417 U.S. 583, 591 (1974). The court has stated that society is aware of the diminished expectations of privacy in automobiles.

California v. Carney, 471 U.S. 386, 392 (1985). Finally, the government has an equally compelling interest in the investigation and prosecution of bank robbery.

Due to the surrounding circumstances of Ms. Austin acquisition and use of the YOUBER vehicle, she eroded her expectations of privacy. When Ms. Austin rented the car and used it on public roads, she subjected herself to the pervasive governmental regulation depicted in *Carny*. Ms. Austin knew, or should have known, that her name not appearing on the rental agreement would raise suspicions of a requesting officer, potentially prompting further investigation. Additionally, the court of appeals indicates that Ms. Austin was at least constructively aware that the car could be tracked. As stated in *Cardwell*, her use of the Prius on public roads was open to public scrutiny. Her scheme to use Ms. Lloyd's identity in an attempt to stay off the grid and be identified by "the Man" did little to minimize this risk. As such, Ms. Austin had reason to know that when she used the same black Prius five times in connection with the bank robberies, modern investigatory techniques could link the vehicle to those robberies. When she rented the car on January 3, 2019, she assumed the risk that the police had made the connection, yet she nevertheless used the same black Prius. When taken together, Ms. Austin's fraudulent use of Ms. Lloyd's identity, knowing use of the same Prius on public roads in connection with five bank robberies, and driving a rental vehicle rented in a third parties name. Ms. Austin's expectation of privacy in the YOUBER vehicle was severely diminished.

The Respondent is likely to argue that Ms. Lloyd's prior consent to the use of her account should grant her an expectation of privacy; or, in the alternative, that the presence of Ms. Austin's personal belongings in the YOUBER vehicle should grant her a reasonable expectation of privacy. However, Ms. Austin only gained access to the vehicle through her fraudulent scheme of using Ms. Lloyd's identity. Furthermore, any weight given to the relationship between Ms. Austin and Ms. Lloyd is severely diminished due to the instability of the relationship and the

fact that they were separated at the time the car was acquired. Additionally, Ms. Austin had previously disclaimed any personal interest in the property, and instead believed herself to be vicariously living in the modern world through Ms. Lloyd. Finally, at the time of the search Ms. Austin made no statements to Officer Kreuzberger indicating that she had permission to drive the YOUBER vehicle, nor did she object when he began to search the vehicle. Under the totality of the circumstances, Ms. Austin failed to establish adequate permission to use the vehicle and equally fails to establish a reasonable expectation of privacy.

D. Acquisition of location data from the rental vehicle does not constitute a "search" within the meaning of the Fourth

The Fourth Amendment to the United States Constitution guarantees "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated." U.S. CONST. amend. IV. "No interest legitimately protected by the Fourth Amendment is implicated by governmental investigative activities unless there is an intrusion into a zone of privacy". *United States v. Miller*, 425 U. S. 435, 440 (1976). "The Fourth Amendment protects people . . . the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure." *Katz v. United States*, 389 U.S. 347, 353 (1967). A "search" occurs "when an expectation of privacy that society is prepared to consider reasonable is infringed." *United States v. Karo*, 468 U.S. 705, 712 (1984). The first question is whether the individual, by his conduct, has "exhibited an actual (subjective) expectation of privacy," whether, in the words of the *Katz* majority, the individual has shown that "he seeks to preserve something as private." The second question is whether the individual's subjective expectation of privacy is "one that society is prepared to recognize as 'reasonable,'" – whether the individual's expectation, viewed objectively, is "justifiable" under the circumstances. *Smith v. Md.*, 442 U.S. 735, 740 (1979).

"A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed." *Rakas v. Illinois*, 439 U.S. 128, 134 (1978). "They wrongly seek to establish prejudice only through the use of evidence gathered as a consequence of a search and seizure directed at someone else and fail to prove an invasion of their own privacy." *Id*. at 132. "Fourth Amendment rights are personal rights, and may not be asserted vicariously." *Id*. at 133. In *Rakas*, Petitioners were convicted of armed robbery after the car they were pulled over in was searched and resulted in the finding of a box of rifle shells in the glove compartment and a sawed-off rifle under the front passenger seat. *Id*. at 129. The Petitioners filed a motion to suppress the evidence found in the car stating that they did not own the automobile, rifle, or the shells seized, and that the search violated their Fourth Amendment rights. *Id*. at 130. The court denied their motion to suppress and held that the petitioners lacked standing to object to the search on the basis that they were neither the owners of the car, nor had any legitimate expectation of privacy in the place invaded or items seized. *Id*. at 143.

The acquisition of the rental vehicle's location data was not a search under the Fourth Amendment because Ms. Austin was neither the registered owner, nor was she a party to the rental agreement. Furthermore, Ms. Austin obtained the vehicle in Ms. Lloyd's name without her knowledge or permission. The location data that was acquired was linked to Ms. Lloyd's account, not Ms. Austin. Therefore, Ms. Austin has neither a valid property interest, nor a reasonable expectation of privacy in that data. Because she cannot show a valid property interest or reasonable expectation of privacy in the location data, the acquisition of the same will not be considered a search for purposes of the Fourth Amendment.

Although Ms. Austin did have permission to use Ms. Lloyd's account, it makes no difference to the fact that when Detective Hamm subpoenaed the location data records related to

the YOUBER account Ms. Austin had been using, those data points and locations found were all under Ms. Lloyd's name, because it was her account. The location data belongs to Martha Lloyd because that is the account which the Detective was tracking. Regardless of whether it may have been Ms. Austin driving the rental car and contributing to some or even all of the location points on the data found, she is not the account owner, and, therefore, does not have a legitimate expectation of privacy regarding the location data of another person.

Ms. Austin cannot assert that her Fourth Amendment rights have been violated and object to the government's acquisition of the location data, when the location data is not hers to object to. Although, Ms. Austin may have had a subjective expectation of privacy in the data collected, it is not an expectation that society is prepared to recognize as reasonable. Thus, because the location records were related to Ms. Lloyds account and Fourth Amendment rights are personal, Ms. Austin cannot claim a reasonable expectation of privacy in location data related to Ms. Lloyd.

E. Ms. Austin does not have a reasonable expectation of privacy in the location data acquired because she voluntarily conveyed that information to a third party.

"What a person knowingly exposes to the public is not a subject of Fourth Amendment protection." *United States v. Miller*, 425 U.S. 435, 436 (1976). In *Miller*, after being found carrying on the business of a distiller and possessing large amounts of whiskey upon which no taxes had been paid, respondent was convicted of conspiring to defraud the United States of its tax revenues. *Id*. at 436. Respondent moved to suppress the copies of checks and other bank records obtained through subpoenas at two large banks where the respondent maintained accounts. *Id.* at 437. Respondent claimed that he had a legitimate expectation of privacy to the documents collected, claiming that those were confidential, private papers. *Id*. at 440, 442. The court noted the importance of examining the nature of the documents sought to be protected in

order to determine whether there was a legitimate expectation of privacy concerning their contents. *Id.* at 442. The court found that the documents subpoenaed were not respondent's "private papers," but business records of the bank stating, "The checks are not confidential communications but negotiable instruments to be used in commercial transactions. All of the documents obtained contain only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business." *Id*. at 440-43. The court stated that respondent had no protectable Fourth Amendment interest in the subpoenaed documents and denied his motion to suppress. *United States v. Miller*, 425 U.S. 435, 445 (1976). Likewise, in *Smith*, the court held that "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties," because "he assumes the risk in revealing his affairs to another, that the information will be conveyed by that person to the Government." *Smith v. Md.,* 442 U.S. 735, 744 (1979).

Because Ms. Austin voluntarily conveyed the vehicle location data to a third party, she cannot invoke Fourth Amendment protections. As in *Miller*, Ms. Austin has no expectation of privacy in location data she voluntarily gave to YOUBER and SMOOGLE. Ms. Austin will not be able to claim a legitimate expectation of privacy regarding the location data, both in terms of asserting ownership and also in terms of the nature of the records and their contents which she seeks to keep protected. She is not the account owner of the YOUBER account, and, therefore, cannot assert any ownership over the data collected.

Secondly, like in *Miller*, the nature of the records and their content sought to be protected reveals that the location data collected by YOUBER is for legitimate business purposes and record-keeping of their electronic rental car company. YOUBER's data specialist noted that without the partnership between them and SMOOGLE, they would not be able to keep track of all their vehicles that have rented to the public. Each YOUBER customer is assigned a computer

generated location number which YOUBER uses to track the rented vehicle. There is no sensitive or confidential information shared with YOUBER or SMOOGLE about their customers, other than their location while inside the vehicle. This suggests that if an unauthorized user or employee should happen to see the data, he or she will not be able to tell who each user is. The location data acquired from Ms. Austin's rental vehicle is not of a sensitive or confidential nature. Therefore, because the nature of the business is an electronic car rental company, keeping track of their rented vehicles by monitoring their users' locations is the type of commercial transactions that YOUBER deals with on a daily basis, and the type of information exposed to them and their employees in their ordinary course of business.

Ms. Austin may make the argument that she did not voluntarily convey the location information to the third parties YOUBER and SMOOGLE, but rather that the information was compelled. However this argument fails for two reasons. First, Ms. Austin does not have a car or account of her own, and as a result, uses Ms. Lloyd's YOUBER account frequently, if not on a daily basis in order to go to work and protests. Given Ms. Austin's constant interface with Ms. Lloyd's YOUBER and her familiarity with the app, it is reasonable to assume that she knew or, as the Court of Appeals stated, "was constructively aware of the collection of data, and that she voluntarily gave up that information to a third party."

Ms. Austin was familiar enough with YOUBER's interface to know that in order to rent a car, she had to download the app, open the app, log into the account, turn on the GPS on her phone, rent the car, get in the car, turn on the Bluetooth on her phone, and connect the rental car to her phone via Bluetooth. Her constant interface with this third party and her willingness to keep turning on her GPS and Bluetooth, in order to rent the cars, shows that Ms. Austin was at least constructively aware that she had to exchange her data location with YOUBER in order to keep renting vehicles from them. The fact that she continued using the account almost on a daily

basis while renting the YOUBER suggests an implied acceptance on her part to continue exchanging her data with YOUBER. Just by using or driving the rental vehicle implies that Ms. Austin consented to the data disclosure. Even the Court of Appeals in this case agreed that "Given this user's interface with this third party, we do not see how an expectation of privacy is 'reasonable' under those circumstances."

Based on these facts, Ms. Austin will not be able to claim a legitimate expectation of privacy towards the acquired location data of the rental car because she voluntarily conveyed her location information when she rented a car from YOUBER, she exposed that location information once she got into the rental car and started to drive, and in doing so, Ms. Austin assumed the risk that YOUBER would one day reveal that information to government authorities.

F. Ms. Austin consented to the terms of the privacy policy when used Ms. Lloyds account.

In *Karo*, DEA agents, with the consent of the owner, obtained a court order authorizing the installation and monitoring of a beeper in one of the cans of ether. *United States v. Karo,* 468 U.S. 705, 708 (1984). The court ruled that the installation of a beeper in a container with the consent of the original owner did not constitute a search within the meaning of the Fourth Amendment when the container was delivered to a buyer having no knowledge of the presence of the beeper." *Id*. at 707. Additionally, the court stated that Karo had "accepted the container as it came to him, beeper and all, and was therefore not entitled to object to the beeper's presence, even though it was used to monitor the container's location." *United States v. Jones*, 568 U.S. 400, 409 (2012). "The mere transfer to Karo of a can containing an unmonitored beeper infringed no privacy interest, though it created a potential for an invasion of privacy." *United States v. Karo*, 468 U.S. 705, 712 (1984).

Turning to the case at hand, the same analysis is applied. Martha Lloyd is the original owner of her YOUBER account. She is the one who set it up, and also the one who agreed to the terms and conditions regarding the consent to monitoring and disclosure of data to third parties. Ms. Lloyd then gave her log-in information to Ms. Austin and authorized her to use the account. Although Ms. Austin may not have had any knowledge regarding the location device through the app or the agreement to be monitored, the fact that Ms. Lloyd, the original owner, had already consented to "the installation" of the location device on her account, her consent would be sufficient to prevent it from constituting a search under the Fourth Amendment.

Ms. Austin may argue that because she is neither the account owner, nor the one who sign up for the account, she could not have agreed to the terms and conditions and never gave consent for her location to be tracked and monitored. Additionally, because she was monitored and tracked without her consent, the search constitutes a warrantless search. However, Ms. Austin cannot claim that acquiring of the location data without her knowledge or consent was a search because the original owner had already agreed to those terms and passed on the account information to Ms. Austin, who used it without objection.

Similar to *Karo*, Ms. Austin had also accepted Ms. Lloyd's account as it came to her, location device authorized and all. It can be argued that Ms. Austin was not entitled to object to the beeper's presence, since she had already used Ms. Lloyd's account frequently for months without any objections. Lastly, Ms. Lloyd merely accepting the terms and conditions of being monitored, if she were to rent a vehicle, did not infringe on Ms. Austin's privacy interests, but merely created the potential for an invasion of privacy later on. However, the mere fact of Ms. Austin using the account and renting cars frequently in the last few months without any objections, indicates her implied consent and agreement to abide by the terms and conditions of the company.

G. The GPS information pertaining to Ms. Lloyd's account did not provide an intimate window into Ms. Austin's life therefore it was not a search

Ms. Austin may argue that the three months worth of location data acquired from the rental car should be considered a prolonged surveillance, which provided the government with an "intimate window" into her private life and infringed upon her expectation of privacy, therefore constituting a search under the Fourth Amendment; however, this contention is also likely to fail. "GPS information, the 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." *Carpenter v. United States*, 138 S. Ct. 2206, 2217 (2018). "What an individual seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. A majority of the Supreme Court has recognized that individuals have a reasonable expectation of privacy in the whole of their physical movements." *Id*. at 2218.

"A person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." *United States v. Knotts*, 460 U.S. 276, 278 (1983). In *Knotts*, officers, with the consent of Hawkins Chemical Co., installed a beeper inside a five-gallon container of chloroform, and then sold it to respondent, who had no knowledge of the presence of the beeper. *Id*. at 278. The officers used the signals of the beeper, along with visual surveillance to monitor respondent and the container of chloroform for three days. *Id*. at 279. The court in *Knotts* stated, "One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects" *Id*. at 285. The court held that nothing was gained from the beeper that officers could not have ascertained with the naked eye. *Id*. at 285.

This differs from *Jones* where the government installed a GPS tracking device on the undercarriage of the suspect's Jeep and monitored Jones' movements closely over a period of four weeks. *United States v. Jones*, 565 U.S. 400, 403 (2012). The court in *Jones* also stated that while a "traditional surveillance" of Jones for four weeks would have been permissible, that same four week period of surveillance through electronic means would have been "surely too long." *Id.* at 412. The concurrence in *Jones* posits that "relatively short-term monitoring of a person's movements on public streets" is okay, but that "the use of longer term GPS monitoring in investigations of most offenses is no good." *Id.*

In the case before the Court, the government acquired three months' worth of location data for the account that Ms. Austin was using, which belonged to Ms. Lloyd. Although three months of surveillance at first glance may seem like longer-term monitoring, however, because the location records that the government was viewing were not being monitored in real-time but rather, more akin to historical cell phone data locations. Additionally, even if the tracking was happening in real-time, this is not the sort of monitoring that would provide government with an "intimate window" into Ms. Austin's private life. First, the monitoring is not twenty-four hour constant surveillance. It is similar to that of the surveillance in *Katz*, which was "limited both in scope and duration." *Katz v. United States*, 389 U.S. 347, 354 (1967). The GPS only actives once the user is in the rental car and turns off immediately once the person gets out (R at 22). This sort of monitoring would be almost akin to what the court in *Knotts* called "surveillance which amounted principally to the following of an automobile on public streets and highways." *United States v. Knotts*, 460 U.S. 276, 285 (1983). In addition, although the GPS shows the location of where Ms. Austin drove the car to, once she parks and gets out, the GPS would not be able to tell what stores she went into or whether she went to work, the doctor's office, a political rally, or church. Therefore, no private details about a person's life are disclosed just by GPS alone.

Because Ms. Austin has previously shared this location data with a 3rd party, she no longer holds a reasonable expectation of privacy in the records, and so there can be no search under the Fourth Amendment.

H. The government's acquisition of Ms. Austin's rental vehicle location data does not constitute a "search" under *Carpenter*.

There are many similarities between *Carpenter v. United States* and the case at hand. Both Carpenter and Ms. Austin were arrested for suspected bank robberies, both had their historical location data used against them which placed them at the scene of the crime, both were convicted of six counts of bank robbery, and both filed motions to suppress the location data acquired. *Carpenter v. United States*, 138 S. Ct. 2206, 2212-213 (2018).

The main issue that sets these two cases apart, is the difference between the GPS location data collected for Ms. Austin, and the Cell Site Location Information (CSLI) data collected for Carpenter. For Ms. Austin, the government acquired three months' worth of historical location data, or roughly eighty-seven days. When the data was being collected, the GPS would only active as long as she was in the rental car and would immediately end as soon as the Ms. Austin left the vehicle. In addition, the data information was voluntarily conveyed to both YOUBER and SMOOGLE in the ordinary course of business, as part of their company policy to help keep track of all the rental vehicles. Because Ms. Austin had voluntarily conveyed her location information to third parties, she did not hold any legitimate expectation of privacy regarding the location data. Without an expectation of privacy that society is willing to accept as reasonable, there can be no search under the Fourth Amendment.

By contrast, the government in *Carpenter* obtained four months' worth of historical cell site location information, or roughly 127 days. *Carpenter v. United States*, 138 S. Ct. 2206, 2212 (2018). Unlike the tracking with Ms. Austin, which was less frequent, and more sporadic, the

tracking of Carpenter by cell sites would happen almost continuously. Every time his phone made a connection with a cell tower, every time he would send a message, receive a text, get an email, make a call, or even just open his phone, there would be a connection made at the nearest cell tower which would record his location. *Id.* at 2220. Altogether, the government in *Carpenter* obtained 12, 898 location points during those four months of surveillance, averaging around 101 data points for Carpenter per day. *Id.* at 2212. Lastly, the court in *Carpenter* stated that cell site location data "is not truly shared as one normally understands the term." *Id.* at 2220. The court stated that a cell phone logs cell-site records "without any affirmative act on the part of the user beyond powering up." *Id.* Apart from disconnecting the phone from the network, the court in *Carpenter* stated that there was no way to avoid leaving behind a trail of location data. *Id.* Because Carpenter did not voluntarily convey his location data to a third party, he maintains a legitimate expectation of privacy, so, unlike with Ms. Austin, there is a Fourth Amendment search.

CONCLUSION

Ms. Austin fails to establish a reasonable expectation of privacy through a property based theory as well as under the totality of the circumstances. Because, Fourth Amendment rights are personal, Ms. Austin may not assert these rights on behalf of Ms. Lloyd. Therefore, Ms. Austin has no standing to challenge the search. Ms. Austin is equally unable to establish she has reasonable expectation of privacy in the location data of Ms. Lloyd. Because she cannot establish an expectation of privacy, the acquired data does not constitute a search under the Fourth Amendment nor under *Carpenter*. Accordingly, this Court should affirm the decisions of the lower courts and deny Petitioner's motions to suppress evidence gathered during her arrest and evidence regarding the location data of the rental vehicle.