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

R 13
Counsel for Respondent

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ISSUES PRESENTED

I. Did the lower court err by holding that an individual does not have standing to contest a search of a rental vehicle that the individual rented on another's account without that person's permission?

II. Did the lower court err by holding that the acquisition of the location data of a rental vehicle did not constitute a "search" within the meaning of the Fourth Amendment and *Carpenter v. United States*, 138 S. Ct. 2206 (2018)?

STATEMENT OF FACTS

On January 3, 2018, Jayne Austin (hereinafter, "Petitioner") rented a 2017 Black Toyota Prius from YOUBER. R. at 2. YOUBER is an immensely popular app offering fixed fee per hour rates that works like a standard car rental service. R. at 2. YOUBER users may rent a vehicle for a maximum distance of 500 miles or up to one week. R. at 2. Users can rent a vehicle through the app and pick up the vehicle at a designated YOUBER stall or facility. R. at 2. YOUBER vehicles are identifiable by a small bright pink YOUBER logo on the bottom corner of the passenger side windshield. R. at 2. The YOUBER app allows users to create an account with a username and password. R. at 2. Upon renting a YOUBER vehicle, the app generates a rental agreement with the account holder's name. R. at 2. Petitioner's name was not listed on the rental agreement for the 2017 Black Toyota Prius, instead her ex-partner, Martha Lloyd, was listed as the renter. R. at 2,18.

Ms. Lloyd's YOUBER account first became active on July 27, 2018. R. at 2. Ms. Lloyd's account was linked to her credit card, in her name. R. at 19. Ms. Lloyd did not give explicit permission to Petitioner to use the YOUBER account, nor has Petitioner sought permission after their relationship ended in September 2018. R. at 18-19. Petitioner preferred to live off the "grid" so she would never use her own information to sign up for YOUBER and instead used Ms. Lloyd's username and password. R. at 18. Petitioner is a minimalist who prides herself on her immaterial lifestyle. R. at 1. Petitioner has no permanent residence and does not own a vehicle. R. at 1-2. Petitioner writes a blog "*LET IT ALL FALL DOWN!"* where she posts about rebellion against *Darcey and Bingley Credit Union* and minimalist living mind set. R. at 1,26,27. One entry stated "property is NOTHING" and "ownership is NOTHING". R. at 27.

While Petitioner was driving the vehicle, Officer Charles Kreuzberger stopped the vehicle for failure to stop at a stop sign. R. at 2. Officer Kreuzberger requested Petitioner's license and rental car agreement, at which time Petitioner produced the rental car agreement through the YOUBER app. R. at 2. The search of the YOUBER rented vehicle produced a BB gun modeled after a 5 caliber handgun, maroon ski mask, and duffle bag containing $50,000 with blue dye packs. R. at 3. Officer Kreuzberger had received information about a robbery suspect wearing a maroon ski mask and description of the vehicle Petitioner was in. R. at 3. Thereafter, Officer Kreuzberger arrested Petitioner on suspicion of bank robbery. R. at 3.

After the arrest was made, Petitioner's case was assigned to Detective Boober Hamm. R. at 3. Detective Hamm found five open bank robbery cases occurring between October 15, 2018 and December 15, 2018 that matched the *modus operandi* of the robbery on January 3, 2019. R. at 3. Detective Hamm served a *subpoena duces tecum* on YOUBER to obtain all GPS and Bluetooth information related to the account Petitioner was using between October 3, 2018 through January 3, 2019. R. at 3.

YOUBER's Corporate Privacy Policy states that they "automatically collect and store location information from user's device(s) and from any vehicles user may use via GPS and Bluetooth." R. at 29. Additionally, each YOUBER vehicle is tracked via timestamp location for security purposes regardless of whether the vehicle is rented. R. at 29. Further, YOUBER Privacy Policy states that they disclose information to a "variety" of third parties. R. at 29. For example, YOUBER uses Smoogle's GPS analytics to track and locate vehicles. R. at 23.

Petitioner filed two separate Motions to Suppress. R at 4. First, Petitioner moved to suppress evidence of the vehicle search. R. at 4. Second, Petitioner moved to suppress evidence of location data obtained through subpoena. R. at 4.

SUMMARY OF THE ARGUMENT

This Court should affirm both of the lower court's rulings denying Petitioner's Motions to Suppress evidence obtained for the vehicle search and location data. First, Petitioner did not have standing to contest to the search of the YOUBER vehicle. Petitioner did not have standing because she did not have a subjective or objective expectation of privacy since she unlawfully rented the YOUBER vehicle in furtherance of a crime. Further, the Petitioner had no property interest in the YOUBER vehicle because she claimed no property or possessory interest. Petitioner lacked a legitimate presence because the relationship was too far attenuated to the YOUBER vehicle, and there was no valid vicarious Fourth Amendment claim.

Second, this Court should affirm the lower court's ruling that the acquisition of location data from the YOUBER vehicle did not constitute a search under the Fourth Amendment and *Carpenter v. United States*, 138 S. Ct. 2206 (2018). Under the Fourth Amendment, Petitioner did not have a subjective or objective expectation of privacy, nor was there a physical trespass. There was also no search under *Carpenter*. Petitioner's location data did not constitute a search because the specific set of facts of this case do not bar the application of the Third Party Doctrine under *Smith* and *Miller* to the acquisition of location data.

Thus, this Court should find that the Petitioner lacked standing to challenge the search of the YOUBER vehicle and the Government's acquisition of Petitioner's location data did not violate Petitioner's Fourth Amendment rights. Accordingly, this Court should affirm the lower court's ruling.

STANDARD OF REVIEW

Both issues to be reviewed before this Court are the district court's denial of Petitioner's Motions to Suppress. An appellate court reviews a district court's denial of a motion to suppress

evidence for clear error as to factual findings and *de novo* as to its application of the law. *Ornelas v. United States*, 517 U.S. 690, 691 (1996); *United States v. Watkins*, 760 F.3d 1271, 1273 (11th Cir. 2014). The appellate court may affirm the denial of a motion to suppress on any ground supported by the record, and it considers the evidence in the light most favorable to the district court's judgment. *Watkins,* 760 F.3d at 1273.

ARGUMENT

I. The lower court did not err by holding that Petitioner did not have standing to contest the search of the YOUBER vehicle because Petitioner lacked a legitimate expectation of privacy or property rights.

The Fourth Amendment to the United States Constitution guarantees, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. CONST. amend. IV. In order for an individual to have a claim under a Fourth Amendment interest, the individual must establish a legitimate expectation of privacy in the place searched either by reference to concepts of real or personal property or to understandings that are recognized and permitted by society. *Rawlings v. Kentucky*, 448 U.S. 98, 114 (1980); *Rakas v. Illinois*, 439 U.S. 128, 143-44 (1978). Fourth Amendment analysis of automobiles shall be administered with a diminished expectation of privacy. *Byrd v. United States*, 138 S. Ct. 1518, 1526 (2018); *See, e.g., California v. Acevedo*, 500 U.S. 565, 579 (1991).

Further, the traditional property-based understanding of the Fourth Amendment is not abandoned and must be analyzed after *Katz*. *Florida v. Jardines*, 569 U.S. 1, 11 (2013).

A. Petitioner had no legitimate expectation of privacy in the YOUBER vehicle because she lacked a subjective and objective expectation of property.

To determine a legitimate expectation of privacy, courts have relied upon the test put forth by Justice Harlan's concurrence in *Katz*, known also as the Fourth Amendment reasonableness test. *Byrd*, 138 S. Ct. at 1526; *Katz v. United States*, 389 U.S. 347 (1967). First,

the person must have exhibited an actual (subjective) expectation of privacy; and second, that expectation must be one that society is prepared to recognize as "reasonable." *Katz*, 389 U.S. at 361.

Petitioner had no reasonable expectation of privacy because her presence in the YOUBER vehicle was unlawful and she was using the YOUBER vehicle in the furtherance of crime. Accordingly, Petitioner is not entitled to protections of the Fourth Amendment.

1. Petitioner had no subjective expectation of privacy in the YOUBER vehicle because Petitioner fraudulently acquired the vehicle.

When a defendant is unlawfully present in the location searched, such as an acquisition by theft, they cannot maintain a reasonable expectation of privacy, and therefore cannot object to the legality of a search. *Byrd*, 138 S. Ct. at 1522 (citing *Rakas*, at 141, at n.9). A person who intentionally uses a third party to procure a rental car by a fraudulent scheme for the purpose of committing a crime is no better situation than a car thief. *Id.* at 1531. The United States Appellate Courts have similarly recognized that a person has no legitimate privacy interest in property obtained by theft or fraud. *United States Supp. Br.*, at 7-8 (citing *United States v. Sholola*, 124 F.3d 803, 816 n.14 (7th Cir. 1997) (stolen vehicle); *United States v. Tropiano*, 50 F.3d 157, 162 (2d Cir. 1995) (stolen vehicle); *United States v. Johnson*, 584 F.3d 995, 1001-04 (10th Cir. 2009) (storage unit that girlfriend rented with stolen identity); *United States v. Caymen*, 404 F.3d 1196, 1198-1201 (9th Cir. 2005) (laptop obtained by fraud).

In *Byrd*, the defendant had acquired a rental vehicle through use of a "strawman." *Byrd*, 138 S. Ct. at 1530. The defendant instructed his agent to rent a vehicle without listing him on the rental agreement as an authorized driver for the purposes of transporting and distributing illegal narcotics. *Id.* at 1524-25. Immediately after renting the vehicle, the defendant's agent met him and transferred the keys to the rental car; subsequently, the two split ways. *Id*. Later, after

committing a traffic violation, officers pulled over the defendant and found that he was not on the rental agreement. *Id*. The officers proceeded to search the trunk of the rental vehicle and uncovered 49 blocks of heroin and body armor. *Id.* The Court concluded that remand was necessary to determine whether fraud was committed, because if the facts revealed fraud had been committed, it would be clear he would not have a legitimate expectation of privacy. *Id.*

Similar to *Byrd*, Petitioner essentially acquired a rental vehicle through a third party as an unauthorized driver for the purpose of facilitating serious criminal offenses. R. at 2. Here, Petitioner used Ms. Lloyd's YOUBER account information to rent a vehicle in a name other than her own. R. at 2. In *Byrd*, the "strawman" used a physical act of handing over the keys to the unauthorized driver. *Id*. at 1524-25. The third party, Ms. Lloyd, is dissimilar to *Byrd* because she did no physical act, did not authorize Petitioner's use, or know about the unauthorized use while it was occurring. R. at 19-20.

In *Cayman*, the defendant worked as a hotel desk clerk where he used the credit card information of a hotel guest to purchase himself a laptop computer. *United States v. Caymen*, 404 F.3d 1196, 1197 (9th Cir. 2005). The hotel guest complained about the charge and after investigation, the search led to the defendant. *Id.* Once the computer was located, law enforcement officials searched the computer and discovered child pornography. *Id*. The Ninth Circuit court held that the defendant had no expectation of privacy in the computer because it was acquired by fraud. *Id.* at 1201. Further, that court concluded there are no grounds on which to distinguish property obtained by fraud from property that was stolen by robbery or trespass, neither have an expectation of privacy. *Id.* at 1198.

Similar to the defendant in *Cayman* who used a credit card other than his own, Petitioner used a YOUBER account to rent vehicles that was not in her name. R. at 2. Petitioner not only

used Ms. Lloyd's YOUBER account to acquire the YOUBER vehicle, that account was connected to Ms. Lloyd's credit card that was used for billing. R. at 19-20. Because Petitioner used Ms. Lloyd's log in information for her YOUBER account to acquire the vehicle, she is similarly situated to the defendant in *Cayman*. Petitioner fraudulently rented YOUBER vehicles and cannot hold an expectation of privacy.

Accordingly, Petitioner had no subjective expectation of privacy in the YOUBER vehicle because she acquired the vehicle through fraud since she did not have permission from Ms. Lloyd to use her YOUBER account.

2. Petitioner had no objective expectation of privacy because Petitioner used the YOUBER vehicle in furtherance of a crime.

Legitimate expectation of privacy requires that subjective expectation to be one that society is prepared to deem reasonable. *Katz*, 389 U.S. at 361. Further, wrongful presence at the scene of a search would not enable a defendant to object to the legality of the search. *Rakas*, 439 U.S. at 128, n.9.

In *Rakas*, the defendants were passengers in vehicle being used as a getaway car after the robbery of a clothing store. *Rakas*, 439 U.S. at 130-32. Upon finally stopping the vehicle with the assistance of multiple officers, a box of rifle shells was found in the glove compartment and a sawed-off shotgun was found under the passenger seat. *Id*. at 130. In holding that the defendants lacked standing, the Court concluded an individual has no reasonable expectation of privacy in a vehicle that is shared with third parties and used in connection with illegality. *Id*. at 128. The Court noted that, a burglar plying his trade in a summer cabin during the off season may have a thoroughly justified subjective expectation of privacy, but it is not one which the law recognizes as "legitimate"; meaning "wrongful" as his expectation is not one that society is prepared to recognize as reasonable. *Id.* (citing *Jones v. United States*, 362 U.S. 257, 267 (1960)).

Similar to *Rakas*, the YOUBER vehicle was used as a getaway car in furtherance of a bank robbery. R. at 2-3. The YOUBER vehicle contained a firearm, a maroon ski mask, and $50,000 with blue dye, which was consistent with the information received by Officer Kreuzberger about the robbery. R. at 2-4. While Petitioner was not a passenger in the YOUBER vehicle, Petitioner used the YOUBER vehicle to commit the bank robbery on the day of the search and thus had a wrongful presence at the scene of the search. R. at 4. Petitioner's expectation of privacy in the YOUBER vehicle did not resemble anything society would readily deem reasonable because it was used in a crime.

Accordingly, Petitioner cannot plausibly warrant Fourth Amendment protections of the YOUBER vehicle because she had no objective expectation of privacy because society does not readily recognize criminal activity as a reasonable expectation of privacy.

For these reasons, Petitioner did not have a legitimate expectation of privacy. Petitioner lacked a subjective expectation because she fraudulently rented the YOUBER vehicle and lacked an objective expectation of privacy because she used the YOUBER vehicle in furtherance of a crime.

B. Petitioner had no legitimate property interest in the YOUBER vehicle because Petitioner did not claim a property interest, lacked legitimate presence, and did not have implied permission.

The Fourth Amendment guarantees "each person has the right to be secure against unreasonable searches and seizures in *his own* person, house, papers, and effects." *Byrd*, 138 S. Ct. at 1531; (citing *Minnesota v. Carter*, 525 U.S. 83, 92 (1998)). The issue, then, is whether it can be proven that the rental car was the defendant's effect. *Id*, at 1531. In order to be a person's effect, that person must have a legitimate property interest. *Id*. The Court analyzes legitimate

property interest by looking to whether the person claimed a property interest, the strength of the connection to the property, and if any implied consent exists to that property. *Id*.

1. Petitioner did not claim property or possessory interest in the YOUBER vehicle or the property seized.

The Fourth Amendment constitutional rights remain with the holder of the property. *Rakas*, 439 U.S. at 134. A person who is aggrieved 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. *Id*. The movant must claim a substantial possessory interest in the premises search. *United States v. Jones*, 565 U.S. 400, 419 (2012).

In *Rakas*, the defendants were claiming the protections of the Fourth Amendment for a search of a vehicle used in a robbery of a clothing store. *Rakas,* 439 U.S. at 134. The driver of the vehicle owned the car, and the defendants were passengers at the time of the search. *Id*. The defendants asserted neither a possessory or property interest in the vehicle nor an interest in the property seized. *Id*. The Court held that the defendants lacked standing to challenge the Fourth Amendment search because the defendants, in addition to not having a reasonable expectation of privacy in the vehicle, asserted no property or possessory interest in the property searched or seized. *Id*. at 129.

Similar to *Rakas*, Petitioner claims the protections of the Fourth Amendment, but does not assert a substantial possessory interest. R. at 26. The defendants in *Rakas* had no interest in the vehicle because they were merely passengers in a car owned by the driver. *Id*. at 134. Petitioner is essentially the same because Petitioner failed to claim or assert any possessory interest to the YOUBER vehicle. Petitioner was not listed on the rental agreement, Petitioner did not receive permission from Ms. Lloyd, Petitioner used more than one vehicle during her period of criminal activity, and Petitioner had been in this YOUBER vehicle for less than a day. R. at 2-

3. As further evidence of her resilience to claim any property, Petitioner posted on her blog "I claim no property" and "...property is NOTHING." R. at 26-27. Petitioner failed to assert any possessory interest in the vehicle or any of the property seized. R. at 2,26.

Therefore, Petitioner lacked a legitimate property interest because she did not assert a property or possessory interest in the YOUBER vehicle.

2. Petitioner did not have legitimate presence in the YOUBER vehicle because her connection to the authorized user and YOUBER vehicle was too attenuated.

Fourth Amendment rights are personal rights, which cannot be vicariously asserted. *Alderman v. United States*, 394 U.S. 165, 174 (1969). A third party may claim Fourth Amendment protections in a premises that does not belong to them as long as the relationship between the one claiming the constitutional right and the premises is not too far attenuated. *Jones v, United States*, 362 U.S. 257, 267 (1960). Attenuation is measured by multiple factors, including permission from rightful owner and length of time spent in the premises. *Id*.

In *Jones*, the defendant was convicted of possession with intent to distribute narcotics. *Id.* The defendant was arrested after police found narcotics in the apartment in which he was temporarily residing. *Id*. The apartment belonged to defendant's friend who gave him permission to stay and the key to enter. *Id*. The defendant had some clothes in the apartment and slept there a night. *Id*. The Court held that the defendant had standing to challenge the search because he was on the premises lawfully with the permission of the person who owned the apartment, thus the relationship between the defendant and the premises was not too attenuated. *Id.* at 257.

Unlike the defendant in *Jones*, Petitioner was not in possession of the property searched with the permission of the owner of that property. R. at 19. Petitioner had not even requested permission to use Ms. Lloyd's personal information since their relationship ended in September

2018, and Ms. Lloyd had not given permission to use her YOUBER account since. R. 18-20. A YOUBER vehicle is significantly different than residing in a residence. The defendant in *Jones* had permission from the owner and had resided in the apartment for at least one night. Petitioner had also only been in the vehicle for less than one day. R. at 2-3. The rental period length for an apartment is significantly longer than that of a YOUBER vehicle. It is unlikely that an apartment can be rent at a fixed hourly rate, like YOUBER vehicles allow. R. at 3. Thus, Petitioner is distinguishable from the defendant in *Jones* because not only did she not have permission, but her relationship to the property, the YOUBER vehicle, was too far attenuated.

Accordingly, Petitioner's connection with the rental vehicle was too attenuated, thus failing to meet the standard of a legitimate property interest.

3. Petitioner did not have implied permission to use the YOUBER vehicle because she lacked a relationship with both the authorized user of the YOUBER vehicle and YOUBER.

The Fourth Amendment can be raised by third parties vicariously so long as the relationship is not too attenuated. *United States v. Smith*, 263 F.3d 571, 583 (6th Cir. 2001); (citing *United States v. Obregon*, 748 F.2d 1371, 1374 (10th Cir. 1984)). This Court has long rejected vicarious Fourth Amendment right claims partly in recognition that they "exact a substantial social cost" because "[r]elevant and reliable evidence is kept from the trier of fact and the search for truth at trial is deflected." Rakas, 439 U.S. at 137.

In *Smith*, the defendant claimed implied consent existed in a rental car that was listed to his wife. *United States v. Smith*, 263 F.3d 571, 586 (6th Cir. 2001). In that case, the defendant's wife was listed as the authorized driver on the rental agreement because she picked up the vehicle. *Id*. Defendant's wife physically gave him the keys to the rental vehicle with permission to drive. *Id*. Additionally, defendant argued that he had an existing relationship with the rental

car service. *Smith*, 263 F.3d at 582. The defendant had called the rental car company to reserve the vehicle, received a reservation number, and provided his credit card with his name for billing, which was subsequently charged for the rental. *Id*. at 586. This case turned on two points. First, the relationship between the defendant and his wife was an intimate one, in which he received explicit permission from the wife whose name was on the rental agreement. *Id*. Second, the defendant had a personal business relationship with the rental car company. *Id*. The Sixth Circuit court held that because the relationship between him, his wife, and the rental company was so significant implied permission existed, thus, he would be afforded Fourth Amendment protections. *Id*.

Dissimilar to *Smith*, Petitioner does not have the ability to raise vicarious Fourth Amendment protection because she and her on-again-off-again partner, Ms. Lloyd, had split in September of 2018. R. at 18. The search of the car occurred fourth months after the end of the relationship, and prior to that, Petitioner had explicitly posted "Goodbye my sweet Martha." R. at 2,27. It cannot be assumed that Ms. Lloyd gave Petitioner permission because she had cancelled her credit card on the YOUBER app and had switched over to BIFT for her ridesharing. R. at 20. The defendant in *Smith* received the keys through a physical act, handing over the keys. Petitioner did not have an intimate relationship with the person listed on the rental agreement, Ms. Lloyd, and did not receive permission to use the YOUBER vehicle from her. R. at 20-21.

Further, Petitioner did not have an established relationship with YOUBER. Petitioner did not reserve the vehicle in her name, her name was not on the rental agreement, nor did she use a method of payment in her own name. R. at 2,21. Accordingly, implied consent did not exist because Petitioner's relationship with Ms. Lloyd and YOUBER is too far attenuated to warrant a vicarious Fourth Amendment claim.

Furthermore, Petitioner did not have a legitimate property interest in the YOUBER vehicle because Petitioner did not assert a property or possessory interest in the vehicle, Petitioner's relationship with the vehicle was too far attenuated, and Petitioner's lack of relationship with Ms. Lloyd and YOUBER bars implied consent. For these reasons set forth above, Respondent requests this Court to affirm the denial of Petitioner's Motion to Suppress evidence obtained from the search of the YOUBER vehicle.

II. The lower court did not err by holding that the acquisition of location data of a rental vehicle did not constitute a search within the meaning of the Fourth Amendment and *Carpenter v. United States, 138 S. Ct 2206 (2018).*

The Fourth Amendment provides "the right of the people to be secure in their persons, house, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. CONST. amend. IV. The Fourth Amendment is intended to secure the "privacies of life" and to "place obstacles in the way of a too permeating police surveillance." *Boyd v. United States*, 116 U.S. 616, 630 (1886). However, the Fourth Amendment does not forbid all searches and seizures, but unreasonable searches and seizures in which this right is shaped by the context in which it is asserted. *Terry v. Ohio*, 392 U.S. 1, 4 (1968). A search is defined under a two prong test, subjective expectation of privacy and objective or reasonable expectation of privacy. *Katz v. United States*, 389 U.S. 347, 354 (1967).

There is an exception to the Fourth Amendment through the Third Party Doctrine. This doctrine lives off the ideology that information given to a third party is not protected because there is no expectation of privacy with information that third parties possess. *United States v. Miller*, 425 U.S. 427 (1976). However, this Court recently decided in *Carpenter*, in a narrow decision, that Cell-Site Location Information (hereinafter, "CSLI") obtained from a third party

was considered a search because it invaded defendant's reasonable expectation of privacy in the whole of his physical movements. *Carpenter v. United States*, 138 S. Ct. 2206, 2219 (2018).

A. The acquisition of location data of the YOUBER vehicle was not a search under the Fourth Amendment because it fails under *Katz* and *Jones*.

The cornerstone of the Fourth Amendment search doctrine relies on common-law trespass concepts and whether there was a "physical intrusion on a constitutionally protected area" by the Government. *United States v. Jones*, 565 U.S. 400, 405 (2012). This Court expanded the Fourth Amendment property interest basis by establishing in *Katz* that the Fourth Amendment protects people, not places. *Katz*, 389 U.S. at 351. Thus, the analysis must look to the property interest through the *Jones* test in addition to the expectation of privacy through the *Katz* test. The *Katz* two prong test furthered the Fourth Amendment's reach to a person's privacy by establishing the requirement for a subjective expectation of privacy and objective expectation of privacy that society recognizes as reasonable. *Kyllo v. United States*, 533 U.S. 27, 33 (2001).

1. Petitioner had no expectation of privacy, since she lacked both a subjective and objective expectation of privacy, under *Katz*.

Under *Katz*, an individual must have both a subjective and objective expectation of privacy. *Katz*, 389 U.S. at 354. An individual has a subjective expectation of privacy when they exhibit an actual expectation of privacy. *Id*. Moreover, an individual has an objective expectation of privacy when the expectation is one that society is prepared to recognize as reasonable. *Id*.

In *Katz*, the defendant was indicted on transmitting wagering information in which he used a telephone booth in Los Angeles. *Id.* at 348. The FBI attached an electronic listening and recording device to the outside of the public telephone booth. *Id*. The Court held that this was a search because it violated the defendant's expectation of privacy and that society also expects conversations in a phone booth to be private. *Id*. at 362. The Court recognized that people who

occupy a phone booth take action to keep their conversations private by taking a physical act by shutting the door and paying the toll. *Id*. at 361.

Here, the Petitioner did not manifest a subjective expectation of privacy. Unlike *Katz*, Petitioner did not take extra measures to ensure privacy while using the YOUBER app. Petitioner had reason to know that the use of apps like YOUBER open an individual up for intrusion into their life. Since Petitioner lives "off the grid" and takes extreme measures to remain unseen, Petitioner should have known that the use of the YOUBER vehicle and her location were not private information. R. at 29.

The defendant in *Katz* chose to close the door behind him for privacy. Here, Petitioner chose to use an application that links to GPS and Bluetooth thus taking no steps to ensure privacy. R. at 29. Further, the phone booth in *Katz* was perceived as private by society as well as by the defendant. Here, Petitioner utilized an app that is "immensely popular" with more than 40 million users in the United States. R. at 2. Users of the YOUBER app are informed that the location of the vehicle will be tracked through GPS and Bluetooth. R. at 29. In fact, the user's GPS and Bluetooth activates on their phone when the phone is registered as being within the vehicle. R. at 22. Petitioner took no action to ensure her privacy, as a result, this is not an expectation of privacy that society is prepared to recognize as reasonable.

Accordingly, the acquisition of location data did not constitute a search because Petitioner fails to show a subjective and objective expectation of privacy.

2. The acquisition of location data is not a search under *Jones* because there was no trespass.

Even if the search fails under the *Katz* test it is not the sole measure of Fourth Amendment violations, the significance of property rights is not abandoned. *Soldal v. Cook County,* 506 U.S. 56, 64 (1992). Since *Katz* is not the exclusive test, the Court looks to whether a

physical intrusion constituted a search within the meaning of the Fourth Amendment when it was adopted. *United States v. Jones*, 565 U.S. 400, 404-05 (2012). Further, a search of a person's premises or property that is not their own has not had any of their Fourth Amendment rights infringed. *Rakas*, 439 U.S at 134.

In *Jones*, the Government attached a GPS tracking device to the undercarriage of the defendant's Jeep while it was parked in a public area. *Jones*, 565 U.S. at 406. The essential fact that turned the *Jones* case was the fact that the Government "physically occupied private property for the purpose of obtaining information." *Id*. at 404. The Court reasoned that such a physical intrusion constituted a search within the meaning of the Fourth Amendment when it was adopted. *Id*. at 404-05.

In *Kyllo*, the Court held that a thermal-imaging device used to penetrate the walls of the home, constitutes a search. *Kyllo v. United States*, 533 U.S. 27, 34 (2001). The Fourth Amendment does not just mention persons, it includes houses, papers, and effects, thus at its core stands the right of a person to retreat into their own home and be free from unreasonable Government intrusion. *Silverman v. United States*, 365 U.S. 505, 511 (1961). In *Kyllo*, the defendant's home was intruded, a constitutionally protected area that he has a property interest in. *Kyllo*, 533 U.S. at 33. The facts of the case involved more than officers on a public street engaged in naked-eye surveillance of a home. *Id*. The ability to see through walls, further than the ability of the naked-eye, exceeded normal human surveillance and therefore was a search. *Id*.

This case does not involve a physical intrusion on a constitutionally protected area. Unlike *Jones*, the defendant in that case owned his Jeep but the Petitioner did not own the vehicle she used. R at 2. Further, it is evident that Petitioner had no intention of having an interest in any property since she posted on her own blog "I'll show you that property is

NOTHING. Ownership is NOTHING." R at 27. YOUBER rents vehicles by the hour with a one week limitation and Petitioner did not use the same vehicle every time she rented. R. at 4. This is not equivalent to *Jones* because every time Petitioner used the vehicle she returned it; the vehicle was not in her constant possession. R. at 3.

Unlike *Kyllo*, there was no physical intrusion involved in obtaining the location data. The thermal imaging device physically penetrated through the wall of the defendant's home, but here the location data is transferred through YOUBER's mainframe and filtered by Smoogle. R. at 22-23. A YOUBER vehicle and a personal home are incomparable. Detective Hamm did not have to physically go and place a tracker anywhere, nor did he use any device to penetrate through walls, instead he served a *subpoena duces tecum* to obtain the location data. R. at 3. Petitioner essentially consented to the tracking by using the app because the app controlled the activation of the cellphone's GPS and Bluetooth. R. at 24. Petitioner would have been tracked by the app with or without Government involvement.

Accordingly, there was no physical intrusion upon a constitutionally protected area since Petitioner lacks a substantial property interest in the YOUBER vehicle, thus the location data does not constitute a search.

B. The acquisition of location data of a YOUBER vehicle was not a search under *Carpenter v. United States*, 138 S. Ct. 2206 (2018) because the Third Party Doctrine extends to Petitioner.

Miller and *Smith* are landmark cases relating to the Third Party Doctrine. The Third Party Doctrine is a legal doctrine adopted through *Miller* and *Smith* that holds that people who voluntarily give information to third parties, such as banks, phone companies, internet service providers, have "no reasonable expectation of privacy." *United States v. Miller*, 425 U.S. 435, 442-43 (1976). This Court decided in both Miller and *Smith* that individuals lack any protected

Fourth Amendment interests in records that are possessed, owned, and controlled only by a third party. *Carpenter*, 138 S. Ct. at 2227. Furthermore, this Court held that a person has no reasonable expectation of privacy in information they voluntarily conveyed to the companies. *Id*. Reasonable expectation of privacy is still subjected to the *Katz* two prong subjective and objective test. *Id*. When applying to the Third Party Doctrine, the Court analyzes whether the individual was seeking to preserve the information as private and whether or not the individual gave the information voluntarily. *Id.* at 2220.

1. Petitioner did not seek to preserve location data as private because the nature of the documents were within the ordinary course of YOUBER's business.

The Court must analyze an individual's expectation to "preserve something as private" when analyzing the documents acquired by a third party. *Katz* at 351. Since the Third Party Doctrine deals with documents, the Court will look to the "nature of the particular documents sought to determine expectation of privacy concerning their contents." *United States v. Miller*, 425 U.S. 435, 442 (1976). The cornerstone of the Third Party Doctrine is the fact that any employee would be able to see the documents within the ordinary course of business, thus an individual could not expect privacy in business records. *Carpenter*, 138 S. Ct. at 2227.

In *Miller*, the Government subpoenaed bank records for several months, including copies of checks, deposit slips, and monthly statements. *Miller*, 425 U.S. at 442. The defendant was suspected of possessing an unregistered still, carrying on the business of a distiller with intent to defraud the Government of whiskey tax. *Id*. at 436. The Court held that the defendant could not claim ownership or possession of the bank records, instead the documents were "business records of the bank." *Id* at 440. Further, the Court reasoned that any bank employee would be

able to access these records during the ordinary course of business diminishing any expectation of privacy claim. *Id*.

Here, the Government acquired records from YOUBER, which tracks the location of their short-term rental vehicles through the user's Bluetooth and GPS. R at 2. YOUBER requires users to accept the terms and conditions, which includes a clause permitting YOUBER to track the user's location when renting a vehicle, specifically, every two minutes a time-stamped location of the vehicle is obtained for security purposes. R at 4,29. Like the bank in *Miller*, location data is collected in the ordinary course of business because the user chooses to share this information by using YOUBER services through the app. R. at 29. Further, the information contained in the location is limited to tracking when the user is inside the YOUBER vehicle, furthering that this information obtained is strictly related to YOUBER's business. R. at 4.

In *Smith*, the defendant's phone company installed a pen register to record the numbers dialed. *Smith v. Maryland*, 442 U.S. 435, 442-43 (1976). The Court reasoned that it is unlikely people in general think that they have an expectation of privacy in the numbers they dial. *Id*. This is because users understand they are passing calls through the phone company's switching equipment thus these records are within the ordinary course of business since the employees are able to see these. *Id*. at 743. Further, this Court reasoned that cell phone users voluntarily convey cell-site data to their carriers as "a means of establishing communication," therefore the resulting business records are not entitled to Fourth Amendment protection. *Carpenter*, 138 S. Ct. at 2213.

Similarly, those who use YOUBER to rent a vehicle understand that they are connecting to the car through YOUBER's application on their phone, just like a reasonable person understands they are passing calls through phone company's equipment. R. at 4. Users sign the

YOUBER terms and conditions agreement, which explicitly states that the location of the vehicle is tracked, stored, and disclosed to third parties. R. at 3,4,29. Any reasonable person using the YOUBER app understands that information is sent to YOUBER since it activates the user's cellphone's GPS and Bluetooth to track the vehicle upon opening the app and entering the vehicle. R. at 29. Just like *Smith*, Petitioner's location data is a resulting document from the use of YOUBER's services.

This Court in *Carpenter* analyzed whether the documents exposed an "intimate window into a person's life, revealing not only [her] particular movements, but through them [her] familial, political, professional, religious, and sexual associations." *Carpenter*, 138 S. Ct. at 2214. In *Carpenter*, the Government obtained records from cell phone carriers providing 127 days of CSLI data, which has previously been deemed documents within the ordinary course of business since it is data collected from the cell phone carrier. *Id*. However, the CSLI essentially provided the Government with information equivalent to a GPS ankle monitor. *Id*. Chief Justice Roberts noted that CSLI is an entirely different species of business records. *Id* at 2221.

Here, the location data is not equivalent to a GPS ankle monitor. YOUBER only collects location data while the registered user is in the vehicle. R. at 8. Furthermore, this Court in *Carpenter* drew a distinction between vehicles and phones, stating that "individuals regularly leave their vehicles but compulsively carry cell phones with them all the time." *Id*. at 2218. Thus, furthering the distinction that location data from a vehicle is immensely different than CSLI. Petitioner's physical movements as a whole were not tracked. Petitioner could freely enter buildings, walk to a friend's house, or even participate in a protest without the tracking of YOUBER. Thus, the documents did not expose aspects of her private life, only the crimes she was committing.

In *Miller*, the bank records were received from a bank, in *Smith*, phone records from a phone company, all documents that were in the ordinary course of business through the services the company provided to a consumer. Here, YOUBER's location data is relevant to the ordinary course of business, tracking their vehicles through a service provided to a consumer.

Accordingly, Petitioner cannot claim an expectation of privacy to the location data acquired from YOUBER because the documents were in the ordinary course of business.

2. Petitioner had no reasonable expectation of privacy of the location data because she voluntarily gave the location data to a third party.

A person has no reasonable expectation of privacy in information he voluntarily turns over to third parties. *Smith v. Maryland*, 442 U.S. 435, 442-43 (1976). The Government is typically free to obtain information from a third party without triggering Fourth Amendment protections for those reasons. *Carpenter*, 138 S. Ct. at 2216. Information given to a third party in the ordinary course of business by a consumer ascertains that the consumer assumes the risk, in revealing his or her affairs to another, that the information could be conveyed by that person to the Government. *Miller*, 425 U.S. at 443. Essentially, the person takes the risk, in revealing their affairs to another, that the information will be conveyed by that person to the Government. *Unites States v. White*, 401 U.S. 745, 751-52. (1971).

In *Miller*, the defendant chose to do business with a bank. *Miller*, 425 U.S. at 436. The defendant did not keep his own books, instead, he utilized the bank and their services for his bank accounts, cashing checks, deposit slips, and monthly statements. *Id*. at 440. The defendant cannot expect privacy of this information when he voluntarily turns it over to the bank and relies on their services. *Id*. Similarly, Petitioner uses YOUBER for their services, renting a vehicle. R. at 2. By using this service, Petitioner voluntarily released her information to YOUBER and cannot expect her location data to be private.

In *Carpenter*, the Court did not extend the holdings in *Miller* and *Smith*. The defendant in that case was tracked using their CSLI. *Carpenter*, 138 S. Ct. at 2220. Even though the defendant technically voluntarily gave this information to the cell phone carrier, the Court distinguished that carrying a cell phone does not require any affirmative act on the part of user beyond powering it up. *Id*. All the defendant did in that case was carry his phone, it did not matter if he made a call or sent a text, just by having the phone in his pocket it can generate CSLI by searching for news updates, social media notifications, or weather. *Id*. The Court noted, apart from disconnecting from the network or turning the phone off, there is no way to avoid leaving behind a trail of data. *Id*.

Petitioner's YOUBER use is distinguishable from *Carpenter* because Petitioner's use was voluntary and required an affirmative act. Cell phones and the services they provide are "pervasive and an insistent party of daily life." *Riley v. California*, 573 U.S. 373, 375 (2014). The key fact here is that Petitioner chose to use YOUBER. Petitioner logged in to the app, took an affirmative act to rent a vehicle, and then got into the vehicle which in turn activated her phone's GPS and Bluetooth. R. at 22.

Accordingly, Petitioner cannot have an expectation of privacy for the location data because she voluntarily gave the information to a third party.

3. Petitioner's location data is incomparable to CSLI because it does not invade Petitioner's reasonable expectation of privacy in the whole of her physical movements.

This Court recently extended the analysis of the Third Party Doctrine under *Carpenter*. If the documents invade a person's reasonable expectation of privacy in the whole of their physical movements and is one that society would not accept as reasonable then the acquisition of those documents will constitute a search. *Carpenter*, 138 S. Ct. at 2218. In *Caldwell*, this

Court held that a car has little capacity for escaping pubic scrutiny. *Caldwell v. Lewis*, 417 U.S. 583, 590 (1974). Moreover, in *Knotts*, this Court held that an individual has no reasonable expectation of privacy in public movements that he voluntarily conveyed to anyone who wanted to look. *United States v. Knotts*, 460 U.S. 281, 283 (1983). *Carpenter* states that CSLI is essentially equivalent to an ankle monitor. *Carpenter*, 138 S. Ct. at 2218. As the Court distinguished in *Carpenter*, vehicle movements are different because a person regularly gets out of the vehicle, as opposed to always carrying a cell phone. *Id*.

In *Carpenter*, the Government obtained records from cell phone companies providing 127 days of CSLI data, which essentially provided the Government with information equivalent to a GPS ankle monitor. *Id*. This Court analyzed whether the CSLI documents exposed an "intimate window into a person's life, revealing not only [her] particular movements, but through them [her] familial, political, professional, religious, and sexual associations." *Id.* at 2214. The Court declined to extend the Third Party Doctrine to this specific set of facts because the CSLI data received invaded Carpenter's reasonable expectation of privacy in the whole of his physical movements and one that society would not accept as reasonable. *Id* at 2219. The Court found that nearly "three quarters of smart phone users report being within five feet from their phone most the of time" therefore the location of a cell phone provides "near perfect" surveillance. *Id*. at 2218.

Furthermore, the defendant in *Carpenter* was subjected to 127 days of essentially 24-hour surveillance since the data was being collected during all times that the phone was on. *Id*. at 2220. The CSLI data was an intimate picture of the defendant's every move. *Id*. at 2216. Notably, this Court made clear that the *Carpenter* decision is a "narrow one." *Id*. at 2220. The Court explained that the decision does not address other business records that might incidentally

reveal location information, nor routine surveillance techniques, and does not disturb the application of *Smith* and *Miller*. *Id*. Chief Justice Roberts states in *Carpenter* that "only the few without cell phones could escape this tireless and absolute surveillance." *Id*. at 2218. There are 396 million cell phone service accounts in the United States, more accounts than people. *Id*. at 2211.

Unlike *Carpenter*, the information acquired by the Government in this case did not provide picture perfect surveillance of Petitioner's every move. Instead of 24-hour surveillance, the information was limited to only the times the Petitioner was in the YOUBER vehicle with the app running, thus consciously making the decision. R. at 4. Carrying around a cell phone is part of daily life, driving in an identifiable YOUBER car is not and does not carry the same expectation of privacy. Detective Hamm subpoenaed location data for a three-month period, which would provide location data only during the times Petitioner was in a YOUBER vehicle. R. at 3. Location data narrowly limited to time in the YOUBER vehicle is substantially less invasive than 24 hour surveillance that CSLI revealed in *Carpenter*. R. at 3.

Here, Petitioner has to access the app, YOUBER, and be inside the vehicle with her phone to activate the Bluetooth and GPS. R. at 4,23. There is a distinct difference between CSLI constantly being sent to cell phone towers as opposed to a phone user accessing an application on their phone to rent a vehicle for means of travel. Further, Petitioner had to not only have her phone, but have the YOUBER application installed on her phone, log in to an account, all accounts must have agreed to YOUBER's terms and conditions upon set up, and rent a car through the application. R. at 3-4. Over and above, the Petitioner chose to drive a YOUBER vehicle, all of which are identified with a bright pink YOUBER logo in the bottom corner of the passenger side window. R. at 2.

Petitioner's location is only transmitted while the person is in the YOUBER vehicle. R. at 4. The extreme circumstances in *Carpenter* are not present or comparable to the facts here. Using a rideshare program is not comparable to carrying a cell phone because carrying a cell phone has become an integral part of society. Petitioner is not bound to only using YOUBER vehicles as a means of transportation. Petitioner could ride a bike, purchase her own vehicle, or take public transportation. Instead, Petitioner chose to drive a vehicle that is readily identifiable with the YOUBER logo. R. at 2. Therefore, Petitioner's location data falls under the Third Party Doctrine even under the application of *Carpenter* because Petitioner's location data does not rise to the level of CSLI.

Accordingly, this Court should affirm the denial of Petitioner's Motion to Suppress location data information because the Government's acquisition of location data did not constitute a search under the Fourth Amendment and *Carpenter*.

CONCLUSION

For these reasons set forth, this Court should affirm the decision of the United States Court of Appeals for the Thirteenth Circuit denying both of the Petitioner's Motions to Suppress Evidence.

Respectfully Submitted,

Date: October 2, 2019

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ATTORNEYS FOR RESPONDENT