TEAM # R14

No. 4-422

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2019

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

Counsel for Respondent

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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 THE CASE

I. Statement of the Facts

On January 3, 2019, Jayne Austin rented a 2017 black Toyota Prius with the license plate number "R0LL3M" through the YOUBER application on her cellular phone while using her ex-girlfriend, Martha Llyod's ("Ms. Lloyd"), YOUBER account without her consent. R. at 2, 19.[1] YOUBER is a car rental software application ("app") available on mobile devices where users can rent vehicles at a fixed hourly rate for a maximum distance of 500 miles or a time period of up to one week. R. at 2. YOUBER vehicles are highly accessible to consumers and are identifiable by a small, bright pink YOUBER logo located on the bottom corner of the passenger side of the windshield. R. 2, 26. The YOUBER vehicles are found in mobile YOUBER-owned parking stalls and facilities. R. at 2. The YOUBER application is immensely popular with consumers, containing more than 40 million users across the United States. R. at 2. However, only YOUBER users may rent YOUBER vehicles and must consent to the company's rental agreement, privacy policy, and other terms and conditions upon the creation of their account. R. at 2, 29-30.

YOUBER's Corporate Privacy Policy states that YOUBER tracks each and every YOUBER vehicle using GPS technology and Bluetooth signals from each user's cellphone in order to ensure the no one other than the registered renter operates the YOUBER vehicles. R. at 3, 29-30. Once the cellphone with the user's account is located within the vehicle, the GPS and Bluetooth technology are activated. R. at 4. YOUBER tracks each vehicle via GPS by transferring the GPS information through the company's mainframe and further filtering the information through the

[1] Citations to the factual record will be represented by the letter R. at [Page #].

use of the search engine, Smoogle's satellite mapping technology. R. at 4. YOUBER tracks the timestamped location of the vehicle in two-minute intervals. R. at 4.

On the date of the subject incident, Officer Charles Kreuzberger ("Officer Kreuzberger") conducted a traffic stop after witnessing Ms. Austin's failure to halt at a stop sign. R. 2. During the traffic stop, Ms. Austin showed Officer Kreuzberger her license, as well as the YOUBER application on her cellular phone. R. at 2. After verification of the information Ms. Austin provided, Officer Kreuzberger noticed that Ms. Austin's name did not appear on the rental agreement of the vehicle. R. at 2. Relying on the fact that Ms. Austin was not on the rental agreement, Officer Kreuzberger conducted a search of the YOUBER-owned automobile. R. at 3. While searching the trunk of the vehicle, Officer Kreuzberger found a BB gun modeled after a .45-caliber handgun with the orange tipped removed, a maroon ski mask, and a duffle-bag containing $50,000, and blue dye packs. R. at 3. Additionally, Officer Kreuzberger found various personal items within the vehicle, such as clothes, shoes, bedding, and a pillow, that allowed him to believe that Ms. Austin was lodging within the vehicle, against YOUBER's Corporate Policy. R. at 3, 23-24.

While conducting his investigation of Ms. Austin's vehicle, Officer Kreuzberger received a dispatch to look out for a 2017 black Toyota Prius with a YOUBER logo and a partial license plate number "R0L," driven by a suspect who allegedly robbed a nearby *Darcey and Bingly Credit Union.* R. at 3. The suspect was last seen wearing a maroon ski mask and using a .45 caliber handgun. R. at. 3. Based on the items found in Ms. Austin's vehicle, the dispatch, and the partial match of the license plate, Officer Kreuzberger arrested Ms. Austin under suspicion of bank robbery. R. at 3.

On January 5, 2019, Detective Boober Hamm ("Detective Hamm"), took on Ms. Austin's case. R. at 3. While conducting further investigation, Detective Hamm discovered five previous open bank robbery cases occurring between October 15, 2018, and December 15, 2018, matching the modus operandi of the robbery on January 3, 2019. R. at 3. Specifically, Detective Hamm discovered that four of the five bank robberies took place in California and one occurred in Nevada. R. at 3.

Using this information and upon further examination, Detective Hamm noticed that there was a YOUBER logo located on the vehicle that Ms. Austin used on the date of her arrest. R. at 3. Detective Hamm subsequently served a Subpoena Deuces Tecum ("SDT") on YOUBER in order to obtain all of the GPS and Bluetooth information related to the account Ms. Austin allegedly used between October 3, 2018, and January 3, 2019. R. at 3. The YOUBER records revealed that Ms. Austin's ex-girlfriend, Ms. Lloyd's, account was used to rent cars in the location and at the times of each of the other five bank robberies. R. at 4. Additionally, surveillance footage from the banks showed that the same 2017 black Toyota Prius was used at four of five the banks that were robbed. R. at 4. The vehicle used in the third robbery was a yellow 2016 Volkswagen Beetle with the license plate "FEEARLY." R. at 4.

Following the review of the mapping data sent by YOUBER, Detective Hamm recommended charges with the US Attorney's office.

II. Procedural History

On January 21, 2019, Jayne Austin was charged by indictment with six counts of 18 U.S. Code § 2113, Bank Robbery and Incidental Crimes. R. at 1. Prior to trial, Ms. Austin filed two Motions to Suppress evidence. R. at. 1, 4. The first motion moved to suppress the evidence obtained during the Officer Kreuzberg's search of the rental car on January 3, 2019. R. at. 4. The second motion

moved to suppress the location data YOUBER provided to Detective Hamm. R. at 4. Both motions asserted that the respective searches were warrantless searches within the meaning for the Fourth Amendment and therefore, any evidence obtained should be suppressed. R. at 4.

On February 25, 2019, the United States District Court for the Southern District of Netherfield entered an Order denying Ms. Austin's two motions to suppress evidence, finding that Ms. Austin lacked standing to contest the search of the rented vehicle and that the government's warrantless search of the YOUBER data did not violate the Fourth Amendment to the United States Constitution. R. at. 1, 4, 8, 10. Ms. Austin was convicted of six charges of 18 U.S. Code § 2113. R. at. 10. Accordingly, Ms. Austin reserved her right to appeal the District Court's ruling on her two suppression motions. R. at. 10.

Thereafter, Ms. Austin filed a timely Notice of Appeal to the United States Circuit Court of Appeals for the Thirteenth Circuit, in particular appealing her conviction and the orders issued by the District Court denying her motions to suppress. R. at. 9. On April 1, 2019, the Circuit Court affirmed the decision of the District Court and further held that Ms. Austin did not have a valid property interest in both the "vehicle she fraudulently leased," as well as the information collected by YOUBER under the third-party doctrine. R. 14-15. Subsequently, this Court granted Ms. Austin's petition for certiorari. *Id.*

SUMMARY OF THE ARGUMENT

Ms. Austin' lacks standing to contest the search of the rental vehicle because she had no reasonable expectation of privacy under *Katz v. United States* and Officer Kreuzberger did not physically intrude on her private property to obtain information, which does not give Ms. Austin Standing as to trespass. Ms. Austin's privacy interest does not meet the two-prong test established in *Katz.* First, Ms. Austin did not have a subject belief in an expectation of privacy that she

outwardly manifested to the public. Second, Ms. Austin's expectation of privacy is not one that, objectively, society at large is would consider reasonable or legitimate due to that fact that she was in illegal possession of the rental vehicle. Lastly, Ms. Austin cannot claim standing as to trespass because her private property was not intruded upon as she was not the legitimate owner of the rental vehicle.

The acquisition of the location data of Ms. Austin's unauthorized rental vehicle is not a "search" within the meaning of the Fourth Amendment. The Fourth Amendment's pre-*Carpenter* search doctrine interpretation supplements the "government trespass" requirements with the two-prong analysis established in *Katz*. Under this view, the acquisition of Ms. Austin's personal location data does not involve the physical intrusion of a constitutionally protected area and is, therefore, inapplicable. Under *Carpenter*'s reliance of the *Katz* privacy analysis, Ms. Austin, similarly, does not have an objectively reasonable expectation of privacy in the location data acquired by YOUBER because of the limited nature of the information shared by YOUBER. Unlike the CSLI information obtained by police officers, the location data obtained from YOUBER did not reveal detailed information of Ms. Austin's private life, it only revealed information Ms. Austin voluntarily conveyed wile within the YOUBER vehicle and ended when her cellular phone was no longer within the vehicle. Finally, Ms. Austin voluntarily conveyed her location information to YOUBER and SMOOGLE upon the use of YOUBER's mobile application and the acceptance of the terms, conditions, and privacy policy detailing the use of the location services of third-party sources, such as SMOOGLE. Therefore, under the third-party doctrine, Ms. Austin, similarly, did not have a reasonable expectation of privacy in the location data of the YOUBER-owned rental vehicle.

STANDARD OF REVIEW

When reviewing a denial of a motion to suppress, a district court's findings of fact are reviewed under the clear-error standard and its conclusions of law de novo. *See Ornelas v. United States*, 571 U.S. 690 (1996); *see also United States v. Quinney*, 583 F.3d 891, 893 (6th Cir. 2009); *United States v. Williams*, 69 F.3d 27, 28 (5th Cir. 1995). Further, upon considering a ruling on a motion to suppress, all facts are interpreted in the light most favorable to the prevailing party below. *United States v. Bervaldi*, 226 F.3d 1256, 1262 (11th Cir. 2000).

ARGUMENT

I. THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NETHERFIELD AND THE UNITED STATES COURT OF APPEALS FOR THE THIRTEENTH CIRCUIT CORRECTLY HELD THAT THE APPELLANT LACKED STANDING TO CONTEST THE SEARCH OF THE RENTAL VEHICLE.

When a question is raised as to whether a particular person has standing to object regarding the search of a certain vehicle, the fundamental inquiry is whether the search intruded upon that person's "reasonable expectation of freedom from governmental intrusion." *Mancusi v. DeForte*, 392 U.S. 364 (1968). The Fourth Amendment provides in relevant part that "[t]he 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. It is beyond dispute that a vehicle is an "effect" as that term is used in the Amendment. *United States v. Chadwick*, 433 U.S. 1, 12 (1977).

However, 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. A car has little capacity for escaping public scrutiny. It travels public thoroughfares where both its occupants and its contents are in plain view. *Cardwell v. Lewis*, 417 U.S. 583, 590

(1974) (plurality opinion). “A person travelling 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, 281 (1983).

The application of the Fourth Amendment depends on whether the person invoking its protection can claim a "justifiable," a "reasonable," or a "legitimate expectation of privacy" that has been invaded by government action. This inquiry normally embraces two discrete questions. The first is whether the individual, by her conduct, has exhibited an actual subjective belief in the expectation of privacy, meaning, whether, the individual has outwardly 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," and if the individual's expectation, viewed objectively, is "justifiable" under the circumstances. *Katz v. United States*, 389 U.S. 347, 361 (1967).

Ordinarily, when the *Katz* expectation-of-privacy test is applicable, that time will be the time of the intrusion into that person's privacy. However, in *United States v. Jones*, this Court instead resurrected the pre-*Katz* trespass test in holding, with respect to GPS monitoring of a vehicle's movements, that the Fourth Amendment violation occurred at the time the device was attached to the vehicle, that is, when the “Government physically occupied private property for the purpose of obtaining information.” 565 U.S. 400, 404 (2012). This would appear to mean that a person must have standing as to the *trespass* in order to prevail under *Jones.* As this court stated in *Jones,* the *Katz* reasonable expectation of privacy test has been *added* to, not *substituted* for, the common law trespassory test. *Id.* at 409.

The factual analysis required by this Court makes clear that Ms. Austin would not have standing to contest the search of the YOUBER vehicle. The facts and circumstances demonstrate

that Ms. Austin did not have a privacy interest in the YOUBER vehicle, nor did she have a possessory or ownership interest to have standing as to trespass.

a. Appellant does not have standing with regard to expectation of privacy.

With regard to the privacy interest Ms. Austin is claiming to have, her claim would fail as it would not satisfy the two-prong test required in *Katz.* First, Ms. Austin did not outwardly manifest a subjective expectation of privacy by her conduct, which is clearly evident from the facts of the record. Based on the excerpts from Ms. Austin's poetry on her blog "LET IT ALL FALL DOWN!" that is displayed in Exhibit C, her conduct actually outwardly displays that she did not expect any privacy. R. at 25-27. In Ms. Austin's poem titled "THEY ALL FALL DOWN", she conveys that "property is NOTHING" and that "ownership is NOTHING." R. at 27. In making these assertions, Ms. Austin is declaring that she does not believe in notions of property or ownership. If there is a protected privacy interest, it will most likely be because a person has some interest in the subject property itself. It cannot be said that one could have a privacy interest in property when they don't believe in the concept of property, as Ms. Austin does. Also, one cannot have a privacy interest in property that they don't have, as Ms. Austin declared in the aforementioned poem by stating "I claim no property." Therefore, Ms. Austin would not satisfy the first prong of the *Katz test* as she does not truly have a subjective belief in the expectation of privacy.

Secondly, Ms. Austin's claim in privacy interest would also not meet the second prong of the *Katz* test as it is not an expectation that society would recognize as reasonable or legitimate. Ms. Austin was using the YOUBER app and driving the YOUBER vehicle without the permission of Ms. Lloyd, who was person listed on the rental agreement on the YOUBER app in Ms. Austin's cellphone and the registered user on the app. R. at 2, 19. Hence, Ms. Austin unlawful possession

of the YOUBER vehicle would make her akin to a car thief in this case. As this Court stated in *Rakas v. Illinois,* " [a] burglar plying his trade in a summer cabin during the off season," for example, "may have a thoroughly justified subjective expectation of privacy, but it is not one which the law recognizes as '**legitimate**.'" 439 U.S. 128, 143 (emphasis added). Likewise, "a person present in a stolen automobile at the time of the search may [not] object to the lawfulness of the search of the automobile." Id., at 141. No matter the degree of possession and control, a car thief would not have a reasonable expectation of privacy in a stolen car and society would not recognize that as reasonable or legitimate as well. Since the *Katz* test is conjunctive, failure to fulfill one of the two prongs of this test is a failure in showing an expectation of privacy. Thus, for the above-mentioned reasons, Ms. Austin has no grounds to claim she had a reasonable expectation of privacy. This is in line with Justice Harlan's policy behind the two prong test as "a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the "plain view" of outsiders are not "protected" because no intention to keep them to himself has been exhibited." *Katz*, 389 U.S. 347, 361.

b. Appellant does not have standing as to trespass under *Jones*.

This Court stated in *Byrd v. United States* that "the concept of standing in fourth Amendment cases can be useful shorthand for capturing the idea that a person must have a cognizable Fourth Amendment interest in the place searched before seeking relief for an unconstitutional search. 138 S. Ct. 1518, 1530 (2018). Further, this Court in *Byrd* noted, "one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of [the] right to exclude." *Byrd*, 138 S. Ct. at 1527. The Court emphasized that the individual must have a property-based interest in order to have an expectation of privacy. As this ties to the trespassory test under *Jones* which supplemented the *Katz* privacy test due to the

property interest at stake, the question to be answered is whether the government physically occupied private property for the purpose of obtaining information. It is of note to elaborate on how the supplemented *Katz* test applies in light of this court's recent ruling in *Byrd.*

In *Byrd,* Byrd's girlfriend rented a car in New Jersey while he waited outside the rental facility and immediately turned the car over to him, after which he left alone on a trip to Pittsburgh, but after a traffic stop in route a police search of the trunk uncovered 49 bricks of heroin. Byrd's motion to suppress was denied on the ground that he lacked a reasonable expectation of privacy in the car, given that he was not listed on the rental agreement as an authorized driver and this agreement stated that permitting an unauthorized driver to operate the vehicle would violate the agreement. This Court unanimously concluded otherwise, holding "that, as a general rule, someone in otherwise lawful possession and control of a rental car has a reasonable expectation of privacy in it even if the rental agreement does not list him or her as an authorized driver." *Id.* at 1524.

What this Court left open is the question as to whether this general rule applies to someone in *unlawful* possession of a rental car, as is the case here. In the present case, what makes the case at bar distinguishable from *Byrd* is that the true owner/possessor of the rental vehicle, Ms. Lloyd, did not give permission to Ms. Austin to operate the YOUBER Rental vehicle. R. at 19. Nor did Ms. Lloyd explicitly hand over possession and control of the YOUBER rental vehicle like Byrd's girlfriend did.

However, Most Circuit Courts of Appeals agree that an occupant of a vehicle cannot be said to have standing by virtue of his presence if he is in possession of a stolen or otherwise illegally possessed or controlled vehicle.[2] Noteworthy for its failure to follow the majority view is *Cotton*

[2] *United States v. Kennedy*, 638 F.3d 159 (3d Cir. 2011) (rejecting approach in *Thomas*, infra, and acknowledging view in *Smith*, infra, but finding no such extraordinary circumstances in instant case, court applies "general rule" that "the driver of a rental car who has been lent the car by the renter, but who is not listed on the rental agreement as an authorized driver," lacks standing); *United States v. Seeley*, 331 F.3d 471 (5th Cir. 2003) (driver of rental car without

v. United States, holding that a thief had standing to object to search of a car where he "had possession of it and claimed it as his own." 371 F.2d 385 (9th Cir.1967). The court in *Cotton* countered the government's reliance on *Jones* with the personal property doctrine "that one whose possession is wrongful is entitled to protection against all who do not have a paramount right to possession." The courts have in the main declined to follow it. As explained in *State v. Boutot*:

> Granting the correctness of the assertion of the *Cotton* court that even a thief can gain a limited proprietary interest in the property he has stolen …, we think that *Jones* made clear that common law concepts of property interests are not controlling as to standing. It seems to us that the question which determines the thief's standing is not whether he has gained some proprietary interest in the property greater than that of anyone but the true owner but, rather, whether the search was of an area where, under all the circumstances, the thief had a reasonable expectation of freedom from government intrusion.

325 A.2d 34 (Me.1974).

In *Cotton* the police did not know that they were dealing with a stolen car at the time they made the search, and this appears to have influenced the court. Indeed, it has sometimes been said that "the better view is to deny standing to the suspected car thief provided that the search is made only after the status of the car as stolen is verified."[3] But the correct position is that taken in *Boutot*, namely, "that a defendant's standing to object should not depend upon the state of the officer's

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standing where he "had nothing to do with the rental" and rental agreement with Alamo provides "no additional renters are authorized to drive the vehicle"); *United States v. Haywood*, 324 F.3d 514 (7th Cir. 2003) (noting split of authority on question of whether defendant driving with person who rented car has standing notwithstanding provision in rental agreement that there may be no other drivers, court decides it need not resolve that question because here defendant was also an unlicensed driver, as to whom rental agency would not have given permission); *United States v. Wellons*, 32 F.3d 117 (4th Cir. 1994) ("unauthorized driver of the rental car," who had renter's permission but not that of Hertz, "had no legitimate privacy interest in the car"); *United States v. Roper*, 918 F.2d 885 (10th Cir. 1990) (where lessee of rental car turned it over to her common law husband and he later hired defendant to drive it for him, but the "rental contract provided that the car could only be driven by the lessee," defendant without standing to object to search of that lawfully stopped car he driving, as he not "in lawful possession or custody of the vehicle"); *United States v. Smith*, 621 F.2d 483 (2d Cir. 1980) (driver who not owner lacked standing where he "made no showing that he had any legitimate basis for being in the car at all")

[3] Quackenbush, *Standing to Contest a Search and Seizure*, 33 TEX.B.J. 862, 867 (1970).

belief as to the thief's possessory interest in the vehicle to be searched." The officer's belief and the reasonableness of it, of course, are of considerable significance if there is occasion to reach the merits and determine if the search was lawful, but it has no bearing upon the question of standing. A person's standing depends upon *his* justified expectation of privacy, and this is not determined upon the basis of what the police believe or even necessarily upon the actual facts. Similarly, this Court should uphold this rationale.

First, applying the correct holding of *Boutot,* as it has previously been established that Ms. Austin had no reasonable expectation of privacy as her expectation did not meet the *Katz* test and thus Ms. Austin did not have a justified expectation of privacy. Second, Officer Kreuzberger was not physically occupying private property as he had established that this was not Ms. Austin's vehicle when she showed him the rental agreement. R. at 2. Third, Officer Kreuzberger was not seeking to obtain information when he searched the vehicle as he had at that point been given the information by Ms. Austin that she was not the legitimate owner of the vehicle. The latter two facts support that Ms. Austin would not meet the *Jones* supplemented part of the *Katz* test regarding standing as to trespass.

II. THE HODLING OF THE THIRTEENTH CIRCUIT COURT OF APPEALS SHOULD BE AFFIRMED BECAUSE THE ACQUISITION OF THE LOCATION DATA OF THE YOUBER-OWNED RENTAL VEHICLES THAT MS. AUSTIN LEASED, WITHOUT AUTHORIZATION, WAS NOT A "SEARCH" WITHIN THE MEANING OF THE FOURTH AMENDMENT.

a. Pre-*Carpenter's* trespass doctrine places emphasis on trespass and, therefore, does not apply in this case.

Fourth Amendment jurisprudence prior to this Court's landmark decision in *Carpenter v. United States*, focused on the union of "common-law trespass" and the two-prong analysis established in *Katz*. However, this Court primarily focused was placed on "whether the government obtained information by physically intruding on a constitutionally protected area."

United States v. Jones, 565 U.S. at 405. In *Jones*, this Court acknowledged that the 4-week investigation through the use of the GPS monitoring device placed on a vehicle was considered a "search" for Fourth Amendment purposes. *See id.*

b. Fourth Amendment case law establishes that Ms. Austin does not have a reasonable expectation of privacy in the location data of the YOUBER-owned rental vehicle.

In *Carpenter*, this Court effectively established that "property rights are not the sole measure of Fourth Amendment violations…." 138 S. Ct. 2206, 2217 (2018). Instead, this Court expanded the concept of the Fourth Amendment to include the protection of certain privacy rights. See *Katz*, 389 U.S. at 351. In its reliance on *Katz*, this Court echoed that in determining whether a search has occurred, courts must look to whether an individual has exhibited an actual and subjective expectation of privacy, and whether society recognizes that expectation as objectively reasonable. *Katz*, 389 U.S. at 360 (Harlan, J., concurring). While it is clear that the Fourth Amendment protects people and not places, that which an individual seeks to preserve as private, even in an area accessible to the public, warrants constitutional protection. *Id*. at 351.

i. This Court's holding in *Carpenter v. United States* does not apply to the limited use of GPS tracking on a YOUBER-owned rental vehicle.

In *Carpenter v. United States*, this Court held that "an individual maintains a legitimate expectation of privacy in the record of his physical movements" as captured through the continuous tracking of a cellular wireless carrier's cell-site location information. 138 S. Ct. 2206, 2217 (2018). Most importantly, this Court established that cases involving digital data, such as the personal location information maintained by a third party, lies "at the intersection" of a person's reasonable expectation of privacy in their physical location and movements, and the information voluntarily shared to third parties. *Carpenter,* 138 S. Ct. at 2214-16. While this Court emphasized

the importance of obtaining a warrant when the government seeks to access the personal location information of a person, this Court specifies that it is only "in the rare case where the suspect has a **legitimate** privacy interest in records held by a third party." *Id.* at 2222-23 (emphasis added).

Specifically, this Court noted that this heightened status is due to the fact that the records can be used for the purposes of "providing an all-encompassing record of the holder's whereabouts….[and] 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*, 138 S. Ct. at 2217 (quoting *United States v. Jones*, 565 U.S. at 415.)

Although recent authority, including this Court's holding in *Carpenter*, appears to favor Ms. Austin's position that the acquisition of the location data of the YOUBER-owned rental vehicles was a "search" under the Fourth Amendment, those cases are factually distinguishable. *See Carpenter*, 138 S. Ct. at 2206; *see also United States v. Goldstein,* 914 F.3d 200, 202 (3d Cir. 2019) (wherein "prosecutors obtained a court order…compelling Goldstein's cell phone carrier to turn over 57 days' worth of his CSLI.").

In *Carpenter*, for example, police officers sought and obtained the cellular phone records of Timothy Carpenter through the use of cell-site location information, which records the location of Carpenter's *individual person*, whenever his cellular phone connected to a cell site—sometimes occurring as frequently as several times in a single minute. *Carpenter*, 138 S. Ct. at 2212. As noted by this Court, the crucial distinctions for the *Carpenter* decision and its reliance are based on the notion that the "historical cell-site records present even greater privacy concerns than the GPS monitoring … considered in *Jones.*" This is because people "compulsively carry cell phones with them all the time," so that "when the Government tracks the location of a cell phone it achieves near perfect surveillance, as if it had attached an ankle monitor to the phone's user." In this case,

the information collected through the use of the YOUBER vehicle was not continuous, as in *Carpenter*, and so limited in nature, that it did not provide "an intimate window" into Ms. Austin's life. In fact, Ms. Austin's location is only collected by YOUBER while her phone is detected directly inside the leased vehicle through the union of the Bluetooth feature of the vehicle and the application within her cellular phone. R. at 14. YOUBER's GPS tracking ceases the moment that Ms. Austin's cellular phone is no longer within the YOUBER-owned vehicle and ceases to transmit information to YOUBER. Therefore, the acquisition of the location information provided by YOUBER to Detective Hamm did not provide an "all-encompassing record" of Ms. Austin's whereabouts. Crucially, however, this Court explicitly noted in *Carpenter*, that its decision was "a narrow one" and did not address "other business records," such as the GPS technology used by YOUBER and SMOOGLE in this case that might "incidentally reveal location information." *Carpenter*, 138 S. Ct. at 2220. Thus, Ms. Austin does not have a reasonable expectation of privacy in the YOUBER records.

c. Ms. Austin does not have a reasonable expectation of privacy in the information she voluntarily conveyed to a third party.

This Court has long established that an individual lacks Fourth Amendment protection in documents and information they "knowingly expose[] to the public." *United States v. Miller*, 425 U.S. 435, 442 (1976). By "voluntarily convey[ing]" information to a third party, a person "assume[s] the risk" that those records might be "divulged to police." *Smith v. Maryland*, 442 U.S. 735 (1979). In *Miller*, this Court first applied the third-party doctrine to bank records, reasoning that the documents were used in the regular course of business and voluntarily conveyed to the institution. 425 U.S. at 442. Similarly, in *Smith*, this Court reasoned that the use of a pen register to record the telephone numbers of a home phone was not a "search." 442 U.S. at 745This was so because "[t]he switching equipment that processed [the telephone] numbers [was] merely the

modern counterpart of the operator who, in an earlier day, personally completed calls for the subscriber," even though the telephone company had decided to automate. *Id.*

d. Carpenter's holding established limitations of the "automatic" reliance of the Third-Party Doctrine, it does not eliminate the standard completely.

Although this Court discusses limitations to the long-established third-party doctrine in *Carpenter*, this Court does not eliminate its influence on Fourth Amendment jurisprudence. *See Carpenter*, 138 S. Ct. at 2220. Instead, as Justice Gorsuch notes, "apparently *Smith* and *Miller* aren't quite left for dead; they just no longer have the clear reach they once did." *Id.* at 2267. In fact, this Court explicitly states that in so holding that the third-party doctrine does not apply to cell site location information, it "do[es] not disturb the application of *Smith* and *Miller*…" *Id*. at 2220.

In this case, Ms. Austin through the use of her ex-girlfriend, Ms. Llyod's YOUBER account, voluntarily conveyed her personal location information to YOUBER and SMOOGLE. R. at 3. YOUBER requires all members to consent to their terms and conditions before using the application, such terms include the YOUBER Corporate Privacy Policy, stating in relevant part that

> We automatically collect and store location information from your device and from any Vehicles you use via GPS and Bluetooth. This information is automatically collected every two minutes and uploaded to YOUBER's mainframe. We track the timestamped location of the vehicle for security purposes, regardless of whether the vehicle is rented.

R. at 29. Further, even though Ms. Austin was not actually aware of YOUBER's Corporate Privacy Policy, as the Thirteenth Circuit Court of Appeals notes, she was constructively aware of the collection of data and still chose to partake in the rental car service. R. 15. Thus, Ms. Austin did not have any reasonable expectation of privacy in the data that YOUBER collected.

Any holding to the contrary would be inconsistent with this Court's established precedent in *Carpenter* regarding the current state of the third-party doctrine. A third-party provider's use of technology should not, without more, justify a change to the current third-party analysis. In fact, absent the use of a highly intrusive search, such as the cell site location information indicated in *Carpenter*, YOUBER's decision to acquire and record information should not be the subject of Fourth Amendment protection.

CONCLUSION

For the reasons stated above, the Respondent respectfully requests this honorable Court affirm the judgment of the United States Court of Appeals for the Thirteenth Circuit.

Respectfully submitted,

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Team #R14