No. 4-422 TEAM NO. R16

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

COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Other Sources:

ISSUES PRESENTED

1. Whether an individual has standing to contest the search of a rental vehicle when that vehicle is rented on another person's account without permission?
2. Whether the acquisition of a rental vehicle's location data was a "search" within the meaning of the Fourth Amendment and current precedent?

STATEMENT OF THE FACTS

This case involves a motion to suppress evidence obtained during a warrantless search of a YOUBER rental car and location data obtained by the government.

Petitioner Lives a Secret Life

Jayne Austin (hereinafter "Petitioner") posts blogs calling for rebellion against *Darcy and Bingley Credit Union.* R. at 1, lines 20–22. She does not have a permanent residence. R. at 1, line 25. She does not have her own personal vehicle. R. at 2, lines 1–2. Petitioner does not use her own information to sign up for anything, such as social media. R at 18, lines 24–25. The only time Petitioner uses her own information is blog posts. R. at 18, line 27.

YOUBER

YOUBER is a rental car company that allows a person to rent YOUBER owned cars at an hourly rate through the YOUBER app on a cell phone. R. at 2, lines 1–3. YOUBER allows a user to use the vehicle for a maximum of 500 miles or for a one-week period. R. at 23, lines 24–25. A rental agreement is made within the YOUBER app, and the user must accept the YOUBER rental agreement and pay the hourly fee to rent a YOUBER vehicle. R. 2 at lines 6–7. The user must also accept that YOUBER will track their information. R. at 23, lines 4–7.

By using GPS and Bluetooth technology, YOUBER tracks the location of their vehicles. R. at 3, lines 24–26. This is for security purposes. *Id.* It is YOUBER's policy to track each user using GPS and Bluetooth signals from their cellphone to ensure that the correct user is driving or operating the YOUBER vehicle. R. at 22, lines 19–21. The GPS and Bluetooth only activates once the correct user is driving or operating the vehicle. R. at 22, lines 21–22. The GPS information is transferred and filtered by a search engine, SMOOGLE, using satellite mapping technology. R. at 3, lines 4–6. YOUBER's corporate policy reveals that user's location information is only collected

whole using YOUBER. R. at 29. Data is collected and uploaded every two minutes. R. at. 29 The YOUBER vehicle is time stamped with its location and the vehicle information collected is disclosed to third-party service providers and used for general business operations. R. at 4, lines 6–7. YOUBER cars are identified by a small, bright pink YOUBER logo on the bottom corner of the passenger side of the windshield. R. at 2, lines 8–9.

Petitioner does not have an account with YOUBER. R. at 2, lines 17–18. When Petitioner rents YOUBER cars, she uses the account of her former girlfriend, Martha Lloyd. R. at 2, lines 18–19. Martha Lloyd has not given Petitioner explicit permission to use her YOUBER account. R at 19, line 28.

Petitioner's Unauthorized and Unlawful Use of YOUBER

On January 3, 2019, Petitioner rented a 2017 Black Toyota Prius (license plate number: R0LL3M) on the YOUBER app. R. at 2, lines 22–23. Lacking Martha Lloyd's explicit permission, Petitioner used her former girlfriend's account as an unauthorized user. R. at 19, lines 8–13.

Officer Charles Kreuzberger (hereinafter "Officer") pulled her over for failure to stop at a stop sign, a valid traffic stop. R. at 2, lines 23–24. Officer noticed Petitioner was not on the rental agreement. R. at 2, lines 26–27. Officer searched the rental car, including the trunk, and found a BB gun modeled after a .45 caliber handgun with the orange tip removed, a maroon ski mask, a duffle bag containing $50,000, and blue dye packs. R. at 2, lines 3–4. Officer also found personal items and bedding in the backseat of the car. R. at 3, lines 4–6. Officer believed the car to be "lived in" *Id.*

While searching the YOUBER vehicle, Officer received a dispatch to look out for a vehicle identical to the Petitioner's that allegedly robbed a nearby *Darcy and Bingley Credit Union*. R. at 3, lines 10–12. The partial part of the license plate caught on camera was "R0l," and the suspect

was seen wearing a maroon ski mask and using a .45 caliber handgun. R. at 3, lines 12–14. The description by dispatch matched that of Petitioner. R. at 3, lines 14–15. Officer then began a search of the YOUBER vehicle. R. at 2, 22–23. The items Officer found matched dispatch's description of the suspect at large. R. 3 at lines 13–15. Officer proceeded to arrest Petitioner under suspicion of robbing the bank, *Darcy and Bingley Credit Union.* R. at 3, lines 13. R. at 3, lines 13–15.

Two days later, the case was brought to Detective Hamm. R. at 3. Detective Hamm discovered five open bank robbery cases occurring between October 15, 2018 and December 15, 2019 in California and Nevada. R. at 3, lines 16–21. Each matched the modus operandi of the robbery on January 3, 2019. *Id.* Detective Hamm noticed that Petitioner was driving a YOUBER rental car on the date of her arrest. R. at 3, lines 20–21. He served a subpoena duces tecum ("SDT") on YOUBER for all GPS and Bluetooth information related to the account Petitioner allegedly used between October 3, 2019 and January 3, 2010. R. 3 at 20–23.

The YOUBER records showed that Martha Lloyd's account was connected to the time and locations of the other five robberies. R. at 4, lines 8–9. This was supported by surveillance footage from the banks showing the same 2017 Black Toyota Prius Petitioner was driving. R. at 4, lines 9–10. Detective Hamm recommended charges with the U.S. Attorney's Office. R. 4 at 12–14. Subsequently, Petitioner was charged with six counts of robbery under 18 U.S. Code § 2113, Bank Robbery and Incidental Crimes. *Id.*

SUMMARY OF THE ARGUMENT

The United States Court of Appeals for the Southern District of Netherfield properly affirmed the District Court's decision to deny both of Petitioner's motions to suppress evidence. The Court held that Petitioner did not have standing to contest the search of the rented vehicle. Petitioner failed to establish a legitimate expectation of privacy or property interest in the

rental vehicle because the petitioner had a temporary and limited relationship with the vehicle in which she used the vehicle to commit crimes. By using the YOUBER rental account of Martha Lloyd, without permission, Petitioner forfeited her right to challenge standing under a Fourth Amendment analysis.

On the first issue, the Court of Appeals correctly held that Petitioner lacks standing to contest the legality of the initial search of the vehicle performed by Officer Charles Kreuzberger. Petitioner was not authorized to use the rental vehicle and lacked permission from the account holder. Therefore, Petitioner did not have a legitimate expectation of privacy when Officer searched the vehicle.

On the second issue, the Court of Appeals correctly held that the third-party doctrine applies to the YOUBER location information collected by the Government. Although this doctrine has been limited by *Carpenter*, it does not extend to the location information of vehicles belonging to a third-party. The data collected by the government was not an exhaustive list of Petitioner's movements. The location information instead detailed the movements of a YOUBER vehicle, not an individual. Moreover, the vehicle location information was voluntarily given to YOUBER.

Petitioner's wrongful presence in the YOUBER vehicle, combined with standing precedent in the third-party doctrine, show that the Court of Appeals should be affirmed.

STANDARD OF REVIEW

An appellate court's standard of review varies when reviewing a district court's decision denying a motion to suppress. *United States v. Davis*, 514 F.3d 596 (6th Cir. 2008). "The trial judge's findings of fact regarding the defendants' standing to challenge alleged Fourth Amendment violations are examined for clear error." *See United States v. Pollard,* 215 F.3d 643, 646 (6th Cir.). The legal determination of standing, however, is reviewed *de novo*. *Id.*

Whether a "search governed" by the Fourth Amendment occurred in a particular case is also a question of law that is reviewed *de novo*. *Barfield v. State*, 416 S.W.3d 743 (Tex. App. 2013). Whether Petitioner has standing under the Fourth Amendment, and whether a "search" occurred, are both questions of law reviewed *de novo*. Appellate courts generally defer to a trial court's determination of historical facts and credibility. *Id.* at 746.

ARGUMENT

I. THE DISTRICT COURT PROPERLY DENIED THE MOTION TO SUPRESS EVIDENCE FOUND IN THE VEHICLE BECAUSE PETITIONER LACKED STANDING TO CONTEST THE LEGALITY OF THE INITIAL SEARCH PERFORMED.

Petitioner lacks standing to assert a valid Fourth Amendment protection. The Fourth Amendment of the United States Constitution protects the right of people "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." CONST. Art. IV Fourth Amendment standing is not jurisdictional nor rooted in Article III, but is more properly subsumed under substantive Fourth Amendment doctrine. *Id.* Challengers must show that the government infringed upon their Fourth Amendment Rights. U.S CONST. Art. IV. Fourth Amendment rights cannot be infringed upon when an individual has no standing to assert those rights. *Id.* The defendant moving to suppress bears the burden of proving he had a legitimate expectation of privacy that was violated by the challenged search. *United States v. Kiser,* 948 F.2d 414, 423 (8th Cir. 1991)*.,* cert denied, 503 U.S. 982 (1992). Cases have deviated from exclusive property-based approach. *United States v. Jones*, 565 U.S. 400 (2012). The test associated with legitimate expectation of privacy supplements the traditional property-based understanding of the Fourth Amendment. *Florida v. Jardines,* 569 U.S. 1, 11 (2013).

The Fourth Amendment only protects an individual in those places where he can demonstrate a reasonable expectation of privacy against government intrusion. *See Katz v. United*

States, 389 U.S. 347, 353 (1967). Courts consider whether "the person who claims the protection of the [Fourth] Amendment has a legitimate expectation of privacy in the invaded place." *Rakas v. Illinois*, 439 U.S. 128, 143 (1978). "Fourth Amendment rights are personal rights which . . . may not be vicariously asserted" *Alderman v. United States*, 3 U.S. 165, 174 (1969). To establish a legitimate expectation of privacy, the defendant must demonstrate (1) a subjective expectation of privacy; and (2) that the subjective expectation is one that society is prepared to recognize as objectively reasonable. *United States v. Stallings*, 28 F.3d 58, 60 (9th Cir. 1994). Courts assess "standing" on a case by-case basis *Oliver v. United States*, 466 U.S. 170, 191 (1984). When an individual "seeks to preserve something as private," and his expectation of privacy is "one that society is prepared to recognize as reasonable," the privacy interest will be found to be protected. *Katz,* 389 U.S. at 351.

Cars are not to be treated identically with houses or apartments for Fourth Amendment purposes. *See United States v. Chadwick*, 433 U.S. at 12. There is a diminished expectation of privacy which surrounds an automobile. *Cardwell v. Lewis*, 417 U.S. 583, 590 (1974). *See also Rakas v. Illinois*, 439 U.S. 128, 153–154. "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." *Id.*

A. Standing is Not Found Absent a Legitimate Expectation of Privacy.

A defendant driving a rental vehicle, who is not on the rental agreement or any similar documents, does not have standing absent a legitimate expectation of privacy. *See also United States v. Riazco*, 91 F.3d 752, 754–55 (1996), (holding that an unauthorized driver of a rental car

who could not meet the objective reasonableness prong of the standing test failed to establish that he had an expectation of privacy that society would consider objectively reasonable).

In *U.S. v. Boruff*, the Fifth Circuit of United States Court of Appeals recognized that Defendant did not have a legitimate expectation of privacy and lacked standing to challenge a search of a rental vehicle. 909 F.2d 111 at 117. In *Boruff*, the Defendant arranged to have his girlfriend rent a car for him to use in a smuggling operation. *Id.* at 113. Defendant was pulled over, the vehicle searched, and evidence was collected. *Id.* at 114–15. At trial, Defendant moved to suppress the evidence found during the search. *Id.* at 115. The District Court denied the motion to suppress, reasoning that Defendant lacked a legitimate expectation of privacy in the rental car, and therefore he had no standing to challenge the search. *Id.* Defendant appealed, contending that he had a legitimate expectation of privacy in the rental car because he was in sole possession and control of the vehicle at the time he was searched. *Id.* at 117. The United States Court of Appeals for the Fifth Circuit disagreed and held that Defendant did not have a legitimate expectation of privacy in the rental car. *Id.* The Court held that under the express terms of the rental agreement, the defendant's girlfriend was the only legal operator and she did not have authority to give control of the rental car to Defendant. *Id.* The Fifth Circuit affirmed the decision of the court below in denying the motion to suppress. *Id.* Distinguishing from *United States v. Portillo*, 633 F.2d 1313, 1317 (9th Cir. 1980), (holding that the driver of a car borrowed from a friend had standing to challenge a search).

Petitioner's case is analogous to the aforementioned cases. Petitioner did not have a legitimate expectation of privacy during the unauthorized use of the rental vehicle. Petitioner was not on the rental agreement. R. at 2, lines 26–27. She had the YOUBER app on her phone, but did not have her own account. R. at 2, 17–18. She did not rent the vehicle in her own name. R. at 2,

lines 26–27. Petitioner fraudulently used the account of Martha Lloyd without her permission. R. at 19, line 28 and R. at 20, line 1. Under the terms of the corporate policy, Petitioner was not the legal operator and did not have authority to use Martha Lloyd's account for rental purposes. R. at 19, 8–9. Petitioner and Lloyd were not dating at the time. R. at 18, lines 14–15. Petitioner's unauthorized use does not give rise to a legitimate expectation of privacy in the vehicle. As in *Boruff,* Petitioner's relationship to the rented car is too attenuated to support a claim of standing. With no legitimate expectation of privacy, Petitioner does not have standing to challenge the search of the vehicle performed by Officer Charles Kreuzberger on January 3, 2019.

1. Petitioner Did Not Have Permission to Use the YOUBER Rental Vehicle.

The Eighth Circuit generally disallows standing unless the unauthorized driver can show he or she had the permission of the authorized driver. *United States v. Muhammad,* 58 F.3d 353, 355 (8th Cir. 1995). Some courts have indicated that permission from the authorized driver or renter may be sufficient to show standing. *See Muhammad,* 58 F.3d 353 (holding that the defendant lacked standing to challenge the search of his rental vehicle because the automobile was leased in another person's name and the defendant presented no evidence or permission to use the vehicle); *Riazco*, 91 F.3d at 754–55.

Petitioner may suggest that she had the username and password from previous consent, however, this is irrelevant as Petitioner's relationship with Lloyd ended months before. Petitioner used the YOUBER app without permission from Lloyd. R. at 19, lines 8–12. Lloyd, the authorized driver, was not aware Petitioner was using her account to rent vehicles. R. at 20, lines 2–4. When Lloyd was asked whether the Petitioner was given her permission, she responded "Well, no not really" and followed up explaining that the Petitioner "hasn't asked me to use anything like YOUBER or YOUBER eats" R. at 19, lines 8–12. She did not have an account of her own with

YOUBER. R. at 2, lines 18–19. Furthermore, Petitioner did not get permission from YOUBER to use the car, as she pretended to be Lloyd. R. at 27. Petitioner was renting vehicles on another's account, without their knowledge or the knowledge of the rental company, she did not have any form of permission.

2. Petitioner was Not in Lawful Possession of the Rental Vehicle

The Supreme Court gave individuals standing to challenge a search of a rental vehicle, regardless of the rental agreement, when one is in *lawful* possession of the rental vehicle. *Byrd v. United States*, 138 S. Ct. 1518, 1530 (2018). (emphasis supplied). The mere fact that a driver, who is in lawful possession of a car, is not on the rental agreement, does not automatically destroy their reasonable expectation of privacy. *Id.* at 1531. When an individual is in *lawful* possession of a rental vehicle, he or she may have a reasonable expectation of privacy and thus, challenge standing. *Id.*at 1524. Emphasizing property-based interest in establishing an expectation of privacy. The court did not answer whether a person in lawful possession has standing. *Id.* at 1531. However, Judicial precedent makes clear, however, that "wrongful" presence during a search does not give a defendant standing to challenge the search. *Rakas* at 141. Referencing *Rakas*, the court in *Byrd* noted that a person in a stolen vehicle may not object to the lawfulness of a search of the vehicle. *Byrd* at 1529. Regardless of the degree of possession and control, "a car thief would not have a reasonable expectation of privacy in a stolen car" *Id.* at 1530.

Using the law set forth in *Byrd* and *Rakas*, Petitioner does not have standing to challenge the search because she lacked lawful possession of the vehicle. Petitioner never signed up with YOUBER, did not have her own YOUBER account, and rented a YOUBER under someone else's account. At no time did petitioner establish a reasonable expectation of privacy in the vehicle. As set out in *Byrd*, the mere fact that she was not on the rental agreement did not eliminate any

reasonable expectation of privacy. However, the fact that she was not on the rental agreement and used the car for the purpose of committing several crimes does diminish any rise to standing. Applying *Rakas'* analytical reasoning, Petitioner is no better situated than a car thief. *Rakas* at 1531. As a car thief lacks a reasonable expectation of privacy in a rental vehicle, and Petitioner does as well. Petitioner was not the actual renter of the vehicle, and did not have explicit permission to use her former girlfriend's account. R. at 2, line 27. This is not far removed from stealing the vehicle, and does not give rise to a reasonable expectation of privacy set out in *Katz.* Furthermore, the petitioner was arrested for robbing a bank the vehicle was used in furtherance of the crime. R. at 3, lines 10–15. This is not an expectation of privacy that society would view as reasonable. Therefore, lacking a legitimate expectation of privacy, Petitioner does not have standing to challenge the search of the rental car she was unauthorized to use.

B. Petitioner Does Not Have Standing, Based on the Totality of the Circumstances.

The Sixth Circuit has acknowledged that "as a general rule, an unauthorized driver of a rental vehicle does not have a legitimate expectation of privacy in the vehicle, and therefore does not have standing to contest the legality of a search of the vehicle. *United States v. Smith*, 263 F.3 571, 586 (6th Cir. 2001). The Sixth Circuit did not, however, adopt a bright line test. *Id.* Citing the *Rakas* concurrence of Justice Powell, "in considering the reasonableness of asserted privacy expectations, the [Supreme] Court has recognized that no single factor invariably will be determinative," and the court will consider the totality of the circumstances. *Id.* Factors considered regarding a driver having standing to challenge a search of rental car included: (1) whether the defendant had a driver's license; (2) the relationship between the unauthorized driver and the lessee; (3) the driver's ability to present rental documents ; (4) whether the driver had the lessee's permission to use the car; and (5) the driver's relationship with the rental company. *Id.*

In *Smith*, the driver had a license, was able to present the rental agreement, given permission by his wife, the authorized driver, and had a personal business relationship with the rental company. *Id.* 586–87. The relationships to the vehicle and authorized driver were not "attenuated" as in *Obregon. Id.* at 587. Based on this relationship status, and the fact Defendant personally paid for the vehicle, Smith had both a subjective and an objective legitimate expectation of privacy in the rental vehicle. *Id.* at 587.

Using the Sixth Circuits approach to Petitioner's case, looking at the totality of the circumstances, Petitioner does not have a legitimate expectation of privacy in the rental vehicle. Here, Petitioner has a license, but the record is unclear if it was valid at the time of the stop. R. at, line 25. Petitioner did not have a relationship with her former girlfriend, Martha Lloyd, at the time she was renting the YOUBER vehicle. R. at 18, lines 14–15. Petitioner did not have her former girlfriend's permission to use the account to rent a YOUBER vehicle. R. at 19, lines 8–9. Petitioner also was able to show Officer the rental documents, but these documents clearly proved that Petitioner was not on the rental agreement. R. at 2, lines 26–27. Petitioner did not have a relationship with the rental company. R. at 2, lines 17–18. Petitioner was not authorized to rent the YOUBER vehicle using another person's user-account. R. at 2, lines 17–21.

Petitioner may argue that she is an authorized Credit Card user on Lloyd's account. R. at 2, lines 20–21. However, being authorized to use a credit card as a form of payment significantly differs from authorization to rent a vehicle under another's name. Payment of the YOUBER is irrelevant at this time and has no impact on a legitimate expectation of privacy in the YOUBER vehicle.

Furthermore, Petitioner's use of the vehicle was for robbing several banks. Viewing this case with the Sixth Circuit's view of the totality of the circumstances, Petitioner does not have

standing to challenge the search as she does not show a subjective or objective legitimate expectation of privacy in the rental vehicle.

C. Denying Petitioner's Motion to Suppress Upholds the Doctrine of Stare Decisis.

The doctrine of stare decisis is a fundamental feature of the American common-law system that requires courts "to abide by, or adhere to, decided cases." *Planned Parenthood of Se. Pa. v. Casey,* 505 U.S. 833, 953 (1992). Under the doctrine of stare decisis, lower courts are required to follow the precedential decisions of higher courts on questions of law. This Court has emphasized that "[s]tare decisis is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). The Court has also acknowledged that stare decisis is not an "inexorable command," but it has nevertheless cautioned that, "even in constitutional cases, the doctrine carries such persuasive force that we have always required a departure from precedent to be supported by some special justification." *Dickerson v. United States,* 530 U.S. 428, 443 (2000). Hence, when the courts conduct an evaluation of a previous holding that it may deviate from or overrule, "its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the role of law, and to gauge the respective costs of reaffirming and overruling a prior case." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. at 854. 112 S. Ct. 2791. To reach a decision, there are many factors a court should consider. This includes the practical workability of the rule, the reliance citizens have on the rule, and whether the facts or circumstances that constituted the basis for the application of the rule have changed to undermine the justification of the rule. *See Id.* at 854–55.

Prior decisions on standing to challenge a search have proven to be workable. Citizens rely on court precedent, legitimate expectation of privacy, to invoke their Fourth Amendment rights. In this case, there is no foundation, based on the facts and circumstances at hand, to undermine the justification of the rule. This court has held that standing should not apply when one cannot demonstrate a reasonable expectation of privacy. *Katz.* Taking that holding and reasoning, courts applied the *Katz* analysis to a voluminous amount of cases. To stay consistent, this Court should continue to follow previous holdings to determining standing to challenge a Fourth Amendment protection. This case does not lay any specific facts giving rise for deviation from the court's standard. Petitioner has failed to establish a reasonable expectation of privacy and does not have standing to challenge the search of the rental car, and the doctrine of Stare Decisis supports this entirely.

II. THE COURT OF APPEALS PROPERLY AFFIRMED THE DISTRICT COURT'S DENIAL OF PETITIONER'S MOTION TO SUPPRESS THE LOCATION INFORMATION

The government did not perform a search when they acquired the location data of YOUBER'S rental vehicle between the time of October 3, 2018 through January 3, 2019. The Fourth Amendment of the United States protects the people against unreasonable searches and seizures executed by federal and state actors. U.S. CONST. Art. IV. A "search" occurs within the meaning of the Fourth Amendment when the government violates a person's "reasonable expectation of privacy." *Katz v. United States*, 389 U.S. 347, 353 (1967). "Until the latter half of the 20th century, Fourth Amendment Jurisprudence was tied to common-law trespass." *United States v. Jones*, 565 U.S. 400 (2012). "Later cases, which have deviated from that exclusively property-based approach, have applied the analysis of Justice Harlan's concurrence in *Katz." Katz,* 389 U.S. 347.

Justice Harlan, in his concurring opinion, articulates the two-prong test later adopted by the Supreme Court to determine whether a government "search" is limited by Fourth Amendment protections. *Katz,* 389 U.S. 347. "First that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable'." *Id.* at 360. Therefore, when an individual "seeks to preserve something as private," and this expectation of privacy is "one that society is prepared to recognize as reasonable," government action will typically be defined as a search. *Smith v. Maryland*, 442 U.S. 735, 740 (1979). The *Katz* test for legitimate expectations of privacy supplements, rather than displaces, the traditional property-based understanding of the Fourth Amendment. *Byrd v. United States*, 138 S. Ct. 1518 (2018).

Unfortunately for the Petitioner, this Court has held that there is no legitimate expectation of Fourth Amendment privacy in information that has been voluntarily provided to a third party. *United States v. Miller*, 425 U.S. 435, 442 (1976). When an individual lacks a "legitimate expectation of privacy" in the information, no search occurs. 442 U.S. 735, 740.

The government did not perform a search within the meaning of the Fourth Amendment and *Carpenter*. This Court should affirm the Thirteenth Circuit Court of Appeals' decision, denying both of Petitioner's motions to suppress evidence.

A. Petitioner Did Not Have a Reasonable Expectation of Privacy that Society is Willing to Accept.

In *Carpenter*, Defendant was charged with multiple counts of robbery and carrying a firearm during a federal crime. *Carpenter v. United States*, 138 S. Ct. 2206 (2018). The FBI identified the cell phone numbers of several suspects and were granted a court order to obtain these records. *Id.* The Government obtained more than 12,000 location points that catalogued

Carpenter's movements. *Id.* Carpenter moved to suppress the data collected by the Government, claiming a violation of his Fourth Amendment rights. *Id.* The District Court denied the motion, and the Sixth Circuit affirmed. *Id.* This Court, however, held that Carpenter had a reasonable expectation of privacy in the whole of his movements. *Id.*

For all practical purposes, "subjective expectations are irrelevant… it is an empty shell of words that has no function other than to confuse," thus the objective prong is the only pertinent question that needs to be answered. Orin S. Kerr, *Katz Has Only One Step: The Irrelevance of Subjective Expectations*, 82 U. CHI. L. REV. 113 (2015). This case is clearly distinguishable from *Carpenter*, as the Government acquired location information of the YOUBER vehicle, and not the whole of Petitioner's movements, therefore Petitioner cannot demonstrate a reasonable expectation of privacy.

The Fourth Amendment has served to protect individual privacy against "the worst instruments of arbitrary power." *Boyd v. United* States, 116 U.S. 616 (1886). Our Founding Fathers intended the Fourth Amendment, "to place obstacles in the way of a too *permeating police surveillance*." *United States v. Di Re*, 332 U.S. 581, 595 (19480 (emphasis added). The Merriam-Webster dictionary defines surveillance as "close watch kept over someone or something (as by a detective)." *Surveillance*, THE MERRIAM-WEBSTER DICTIONARY http://merriamwebster.com/dictionary/surveillance. When an individual "seeks to preserve something as private" and this expectation is recognized by society, government intrusion will typically violate Fourth Amendment protections. *Smith v. Maryland*, 442 U.S. 735, 740 (1979). In this case, there is no evidence of the Government keeping close watch over Petitioner, let alone for a prolonged amount of time. The Government was only put on notice of Petitioner's actions following her arrest. R. at 3. The facts demonstrate that Petitioner sought to keep her location

information private from the government, as "she wouldn't use her own information to sign up for anything." R. at 18. The repeated use of YOUBER, however, clearly indicates that Petitioner did not seek to keep information private from this rental service.

Petitioner expressed a subjective expectation of privacy by living her life off the "grid." R at18, line 24. But this Court has held that "[l]egitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." *Rakas,* 439 U.S., at 144. One who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy protected by the Fourth Amendment. *Byrd v. United States*, 138 S. Ct. 1518 (2018).

Detective Hamm served a subpoena duces tecum on YOUBER to obtain all information related to the *account.* (emphasis added). R. at 3, lines 20–23. The facts are clear that Petitioner "does not have an account of her own with YOUBER. She uses the account of her on-and-off again partner, Martha Lloyd." R. at 2, lines 18–19. "Only YOUBER users may rent YOUBER cars." R. at 2, line 12–13. Petitioner does not own or lawfully possess the location information of the YOUBER account, as she does not even have a YOUBER account. R. at 2, line 17–18. Martha Lloyd states during her pre-trial direct examination that "she would always use my information for everything." R at 18. When asking Lloyd whether Petitioner was given permission to use Lloyd's information, Lloyd responded with "no, not really." R. at 29, line 8–9. Petitioner cannot demonstrate a reasonable expectation of privacy because she does not have a property interest in the data.

1. The Subpoena Duces Tecum was a Valid Method of Obtaining YOUBER Location Data Under Congressional Authority.

Under the Stored Communications Act, the government may require an electronic communication service provider to disclose the contents of an electronic communication that has been in that provider's electronic storage for one hundred and eighty days or less. 18 U.S. CODE § 2703. A court of competent jurisdiction may issue a court order for disclosure only if the governmental entity provides "specific and articulable facts" showing reasonable grounds that the information sought is "relevant and material" to the ongoing criminal investigation. *Id.*

Although subpoenas and search warrant may seek the same information, "they are not functional equivalents." *In re Grand Jury Subpoenas Dated Dec. 10,* 1987, 926 at 847. "A subpoena for documents is a demand that the person upon whom it is served produce certain documents or types of documents. The subpoena's target has the opportunity not only to contemplate what is being demanded but also to challenge the demand in court." Blue Sky L. Rep. P 73806 (C.C.H.), 1993 WL 13954428.

In *Carpenter,* the government obtained a court order pursuant to the Stored Communications Act to acquire Carpenter's cell-site records. *Carpenter v. United States*, 138 S. Ct. 2206 (2018). The court order was deemed a violation of Carpenter's Fourth Amendment rights, as it was not "a permissible mechanism for accessing historical cell-site records." *Id.* The Supreme Court in *Carpenter* found that "tracking a person's past movements through CSLI partakes of many of the qualities of GPS monitoring…it is detailed, encyclopedic, and effortlessly compiled." *Id.* At 2209. Carpenter's phone generated a "time-stamped record" every time his phone connected to a cell site. *Id.* at 2211. As a result, the government acquired 12,898 location points that catalogued Carpenter's movements over a period of 127 days. *Id.* at 2212. Carpenter's location points were recorded automatically every time his mobile device connected to a cell site, regardless of where

he individual was or what he was doing. *Id.* The Court ruled that *Carpenter* is not about "using a phone," or a person's movement at a particular time. *Id.* at 2220. It is about a detailed chronicle of a person's physical presence compiled every day, every moment. *Id.*

Petitioner's case is clearly distinguishable from *Carpenter*. YOUBER depends on GPS and Bluetooth tracking to monitor the location of their *vehicles*. (emphasis added). R. at 29. Location data is collected automatically every two minutes and uploaded to the YOUBER mainframe for the security of their vehicles. *Id.* YOUBER's Corporate Policy reveals that a users' location information is only collected when accessing YOUBER services. *Id.*

The subpoena served on YOUBER does not rise to the same level of concern as the court order in *Carpenter*. The court's order in *Carpenter* allowed the government to obtain a vast amount of Defendant's personal information due to the pervasive nature of cell sites. *See Carpenter v. United States*, 138 S. Ct. 2206 (2018). Here, the subpoena duces tecum served on YOUBER allowed the government to obtain location data on the *rental vehicles* connected to Martha Lloyd's account. (emphasis added). The subpoena duces tecum is consistent with the Stored Communications Act, and the information revealed to the government concerned the location data of YOUBER'S vehicles. The data gathered was not a detailed chronicle of the Petitioner's movements.

B. Under this Court's Precedent, the Third-Party Doctrine Applies to the YOUBER Location Data Obtained by the Government.

The third-party doctrine is a legal theory that developed primarily from two Supreme Court cases, *Smith* and *Miller*. *See Smith v. Maryland*, 442 U.S. 735, 740 (1979); *United States v. Miller*, 425 U.S. 435 (1976). In *Miller,* this Court held that Respondent possessed no Fourth Amendment interest and no legitimate expectation of privacy in the bank records that he voluntarily turned

over. *Miller* 425 U.S. at 445. In *Smith*, this Court addressed whether the use and installation of a pen register, a mechanical device that records the numbers dialed on a telephone, constituted a "search." *Smith* 442 U.S. 735 at 736. This Court held that the installation and use of the pen register was not a "search" under the Fourth Amendment, as the Petitioner could not raise a "legitimate expectation of privacy." *Smith*, 442 U.S. 735 at 745.

Under the third-party doctrine, an individual has no legitimate expectation of privacy, for Fourth Amendment purposes, in information that is voluntarily turned over to third parties. *Carpenter v. United States*, 138 S. Ct. 2206 (2018). *"*The Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities." *United States v. Miller,* 425 U.S. 435 (1976). The Fourth Amendment protects individuals from government searches when they have a "legitimate expectation of privacy." *Miller*, 425 U.S. 435. The *Katz Court* established that an individual's reasonable expectation of privacy is destroyed when they share information with a third-party *Katz v. United States*, 389 U.S. 347.

This Court has held that when individuals voluntarily turn over information to a third-party, that individual *no longer owns* that information, and therefore cannot assert Fourth Amendment protections. *See Miller*, 425 U.S. 435. (emphasis added). In *Miller*, the defendants could "assert neither ownership nor possession of the records because the records were created, owned, and controlled by the companies." *Miller*, 425 U.S. 435.

Carpenter held that the third-party doctrine does not extend to cell site location information obtained by the government due to the inherently pervasive nature of CSLI. *Carpenter*, 138 S. Ct. 2206. The Court reasoned that *"*there is a world of difference between the limited types of personal information addressed in Smith and Miller and the exhaustive chronicle of location information

casually collected by wireless carriers." *Id.* at 2210. Carpenter's cell site location information was not knowingly shared with another, it was not voluntarily exposed, and there was no "affirmative act on the user's part beyond powering up," ultimately leading to the lower court's decision to be reversed and remanded. *Id.*

Petitioner's case is patently different from that of *Carpenter*. The third-party doctrine should be applied to the case at bar because Petitioner constructively knew her location information was being collected. Further, the location information obtained by the government belonged to YOUBER and not Petitioner. Per the YOUBER corporate policy, YOUBER tracks the location of every vehicle they own using GPS and Bluetooth technology. R. at 3, lines 24–25. Therefore, the data obtained by the Government was merely the location data of a YOUBER vehicle, not a catalogue of the Petitioner's movements.

1. Petitioner Made the Affirmative Decision to Use YOUBER Location Services.

The *Carpenter* Court was clear in denying the third-party doctrine because the defendant did not voluntarily, and knowingly, disclose his cell site location information. *Carpenter*, 138 S. Ct. 2206. The "inescapable and automatic nature" of CSLI collection gave Carpenter standing to assert Fourth Amendment protections. *Id.* at 2223. Cell phones log cell-site records *without any affirmative* act on the part of the individual. *Id.* at 2220. (emphasis added).

Petitioner's case is more comparable to *United States v. Hood*, 920 F.3d 87 (1st Cir. 2019). In *Hood*, Defendant was charged with transporting child pornography. *Id.* The Maine office of Homeland Security Investigations (HIS) began an investigation into the transmission of child pornography via the smartphone messaging application Kik. *Id.* at 88. The Maine office of HIS issued an Emergency Disclosure Request, authorized by the Stored Communications Act, to request the Defendant's subscriber and IP information from Kik. *Id.* at 89. Kik complied

immediately and provided the requested data to the government. *Id.* The data associated with the account showed that an individual had accessed the account from three separate internet addresses. *Id.* Defendant moved to suppress all of the data and location information because it was obtained without a warrant. *Id.* at 88. The First Circuit Court affirmed the lower tribunal's decision to deny Defendant's motions. *Id.*

As the Supreme Court noted in Carpenter "every time a cell phone receives a call, text message, or email, the cell phone pings CSLI to the nearest cell site tower *without the cell phone user lifting a finger.*" *United States v. Hood*, 920 F.3d 87 (1st Cir. 2019). (emphasis added). Whereas in *Hood*, the First Circuit Court held that Defendant generated IP information by making the affirmative decision to access the application. *Id.* Defendant voluntarily made the decision to use the Kik application and its services, and his information was therefore subject to the third-party doctrine. *Id.*

In Petitioner's case, YOUBER only collected vehicle location information after Petitioner made the affirmative decision to use YOUBER services. It is the responsibility of every user to accept the terms and conditions of YOUBER's corporate policy. R. at 29. A user may only rent a YOUBER vehicle after they agree to the rental agreement that is made in the application. R. at 2. Petitioner has used YOUBER on several different occasions. R. at 2, lines 1–2. Each use required the affirmative acts of opening the YOUBER application, accepting the rental agreement, and paying the fixed hourly fee. *Id.* The YOUBER account data was not automatically collected in the same way as Carpenter. Carpenter did not take any affirmative actions that gave exclusive permission for his data to be collected, whereas the Petitioner had to in order to rent the vehicle.

Every YOUBER user must accept the terms and conditions of the Corporate Pubic Policy in order to access YOUBER services. R. at 29. Petitioner did not sign the terms and conditions

because she does not have her own YOUBER account. R. at 2, lines 17–18. Petitioner cannot validly claim that she was unaware of YOUBER'S data collection process. Although Petitioner did not read and accept YOUBER'S policy agreement, she is not protected from the data collection procedures. This Court, as well as others around the United States, have routinely upheld the principal that "a person who executes a written document in ignorance of its contents cannot plead ignorance in order to avoid the effect of the document." *Quality Foods, Inc. v. U.S. Fire Ins. Co.*, 715 F.2d 539, 542 (11th Cir. 1983); *see also Upton v. Tribilcock*, 91 U.S. 45, 50 (1875) ("It will not do for a man to enter into a contract, and, when called upon to respond to its obligations, to say that he did not read it when he signed it, or did not know what it contained."). Thus, Petitioner's alleged lack of knowledge of YOUBER'S data collection services cannot overcome the application of the third-party doctrine.

2. The Location Information Collected by the Government was that of the YOUBER Vehicle and Did Not Belong to Petitioner.

Petitioner cannot claim Fourth Amendment protections to the data collected by YOUBER because the information did not belong to her. In *Miller*, the government obtained bank records from two banks at which Defendant had accounts, and was charged with intent to defraud the Government. *Miller*, 425 U.S. 435. The Defendant in *Miller* could "assert neither ownership nor possession" of the information collected because these records belonged to the bank. *Id.* at 440. This Court has held that when individuals voluntarily turn over information to a third-party, that individual *no longer owns* that information, and therefore cannot assert Fourth Amendment protections. *Id.* at 446. (emphasis added).

We do not disagree with the holding in *Carpenter,* but we urge this Court to revisit the dissent of Justice Alito in order to distinguish the significantly different at hand from those of *Carpenter*. "Once Carpenter subscribed to his provider's service, he had no right to prevent the

company from creating or keeping the information in its records. Carpenter also had no right to demand that the providers destroy the records, no right to prevent the providers from destroying the records…Carpenter, in short, has no meaningful control over the cell-site records, which are created, maintained, altered, used, and eventually destroyed by his cell service providers." *Id.* at 2257.

Petitioner did not control the location information obtained by YOUBER. She could not alter, destroy, access, or use the data in any way. This Court has held that "Fourth Amendment rights are personal rights that may not be asserted vicariously." *Rakas v. Illinois*, 439 U.S. 128 (1978). As *Jones* held, using GPS to track the Defendant provided an intimate view in her life by revealing "*her particular movements*." *United States v. Jones*, 565 U.S. 400 (2012). The YOUBER GPS was not used to track Petitioner's movements, but the movements of their own rental vehicles, which they owned. R. at 29. Petitioner cannot claim to own the location data obtained by the government, because it was not hers to own once collected by YOUBER.

C. The Stored Communications Act Makes Clear that the Government May Obtain Electronic Information From a Third-Party.

Allowing Petitioner to claim Fourth Amendment protections to location data belonging to YOUBER would not be consistent with this Court's previous holdings. The Stored Communications Act (SCA) was created to increase Fourth Amendment protections for individuals in regard to electronic communications. Orin S. Kerr, *A User's Guide to the Stored Communications Act, and A Legislator's Guide to Amending It*, 72 Geo. Wash. L. Rev. 1208 (2004). This Congressional Act limits the ability of the government to compel internet service providers (ISPs) to turn over content information. *Id.* Congress, however, still grants the government authority to compel the disclosure of electronic communications provided the proper procedures are followed. *Id.*

Absent a warrant, the government may subpoena an ISP so long as there are "specific and articulable facts showing that there are reasonable grounds to believe" that the information to be compelled is "relevant and material to an ongoing criminal investigation." 18 U.S. Code § 2703(d). The facts do not imply that Petitioner is challenging the legality of the subpoena duces tecum served on YOUBER. *See* R. at 4. Nor do the facts imply that the subpoena was invalid for any reason. *See* R. at 4. The Stored Communications Act was implemented by Congress to grant more protections to citizens in an age where technology is becoming more invasive. 18 U.S. Code § 2703. Congress clearly intended to allow the government an avenue to collect information deemed important to an ongoing investigation. *Id.*

"The Fourth Amendment does not regulate all methods by which the Government obtains documents…nor is there any reason to believe that the Founders intended the Fourth Amendment to regulate courts' use of compulsory process." *Id.* at 2251. In the present case, the government sought a legally valid court order to acquire location information "related to the account" Petitioner used. R. at 3. The government followed the proper procedures defined by Congress to obtain the subpoena duces tecum. Reversing the decision of the Thirteenth Circuit would be tantamount to undermining the constitutional authority granted to Congress.

CONCLUSION

For the foregoing reasons, this Court should affirm the Thirteenth Circuit Court of Appeal's decision denying both of Petitioner's motions to suppress, finding that Petitioner did not have standing to challenge the search of the YOUBER rental vehicle, and holding that the government's acquisition of a YOUBER vehicle was not a "search" within the meaning of the Fourth Amendment and *Carpenter v. United States.*