No. 4-442

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 CIRUIT

BRIEF FOR RESPONDENT

Counsel for Respondent

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QUESTIONS PRESENTED

(1) Whether an individual who fraudulently rented a vehicle in order to commit a crime has standing to contest a search of the vehicle.

(2) Whether the acquisition of the location data of YOUBER's rental vehicle, voluntarily shared by Petitioner every time she entered the rented vehicle, constitutes a search under this Courts longstanding jurisprudence and *Carpenter v. United States*, 138 S. Ct. 2206 (2018).

OPINIONS BELOW

The United States District Court for the Southern District of Netherfield denied Petitioner's motion to suppress evidence obtained during Officer Charles Kreuzberg's search of the YOUBER finding Petitioner had no standing to challenge the search. The District Court also denied Petitioner's motion to suppress the location data YOUBER provided to Detective Boober Hamm finding the data collected by YOUBER did not rise to the level of infringement found in *United States v. Carpenter*. The United States Court of Appeals for the Thirteenth Circuit affirmed.

CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the United States Constitution is applicable to this case, and is reprinted in Appendix A.

STATEMENT OF THE CASE

Factual Background

Petitioner Jayne Austin ("Petitioner") is a vagabond with no home and no property. Ex. C, at 26. Petitioner consistently freeloads off of her former partner, Martha Lloyd ("Lloyd"), using her YOUBER account and credit card to rent YOUBER vehicles without her explicit consent or knowledge. Ex. A, at 19:8-12; 26-28. Petitioner "hates being on the grid," and has used Lloyd's personal information to access social media, YOUBEREATS, and YOUBER to maintain her anonymity. Ex. A, at 18:24-27.

On July 27, 2018, Lloyd activated her YOUBER account and linked her credit card through the application ("app") on her personal cell phone. R. at 2. The YOUBER app works like a typical car rental service where a rental agreement is made and the renter pays per day for use of the vehicle. Ex. B, at 23:10-11. Each vehicle contains a small bright pink YOUBER logo and is parked in designated YOUBER parking stalls where a YOUBER employee checks on it every twenty-four hours. Ex. B, at 23:13-16. YOUBER vehicles are meant for temporary use and can only be rented for a distance of up to 500 miles or for a time period of one week. R. at 2; Ex. B, at 23:23-25. Additionally, renters of YOUBER vehicles are told at sign up that they cannot sleep in the vehicle. Ex. B, at 23:26-27.

As YOUBER has grown increasingly popular, with over forty million users across the United States, YOUBER has implemented corporate policies to ensure that the vehicles are secure and that only YOUBER users rent YOUBER vehicles. R. at 2. To guarantee both, YOUBER rentals are made through the YOUBER app on the user's personal cell phone that connects to the YOUBER vehicle via Bluetooth and GPS. R. at 2. At sign up users are also told that YOUBER will track their location, and in order to use YOUBER, the user must accept

YOUBER's terms and conditions. Ex. B, at 23:6-7. Each and every YOUBER vehicle is tracked using this Bluetooth and GPS technology. R. at 3. Moreover, the Bluetooth and GPS only activate once the YOUBER user enters the YOUBER vehicle. R. at 4. Each individual user is then assigned a computer-generated location number that YOUBER uses to track the vehicle during the rental period. R. at 4. YOUBER"s mainframe then transfers the GPS information to be filtered through the search engine, Smoogle, using satellite-mapping technology. R. at 4. Regardless of whether the YOUBER vehicle is rented, YOUBER will track the location of the vehicle for security purposes every two minutes. R. at 4.

On January 3, 2019, Petitioner rented a YOUBER owned vehicle, a 2017 black Toyota Prius with the license plate "R0LL3M," using Lloyd's account downloaded on Petitioner's cell phone. R. at 2. Petitioner paid for the car using Lloyd's credit card. R. at 2. Petitioner's name is nowhere on the account, nor is Petitioner listed as an authorized user. R. at 2. Although Petitioner is listed as an authorized user of Lloyd's credit card and had permission to use the YOUBER app during their relationship, the pair has been broken up since September 2018. Ex. A, at 18-19:23-1. Lloyd broke it off when Petitioner became "a little too radical," and Lloyd told Petitioner that she needed to "distance [herself]." Ex. A, at 18:13-15; 20:16. Petitioner neither asked to continue using Lloyd's YOUBER account or credit card, nor did Lloyd give Petitioner permission. Ex. A, at 19:8-13; 19:28; 20:1.

Later that day, on January 3, 2019, Officer Charles Kreuzberg pulled Petitioner over in the rented 2017 black Toyota Prius for failure to stop at a stop sign. R. at 2. After asking Petitioner for her license and registration, Officer Kreuzberg noticed that Petitioner was not listed as the renter on the rental agreement in the YOUBER app. R. at 2. Suspicious of Petitioner's rental and aware that a suspected bank robber was driving a 2017 black Toyota Prius

with a YOUBER logo and a partial license plate of "R0L," Officer Kreuzberg searched Petitioner's YOUBER vehicle. R. at 3. Not only did Officer Kreuzberg find evidence that Petitioner was violating the YOUBER rental by living in the car, but he also found evidence of the bank robbery that had been committed earlier. R. at 3. In the car, Officer Kreuzberg found many personal items including clothes, an inhaler, three pairs of shoes, a collection of signed Kendrick Lamar record, a cooler full of food, bedding, and a pillow. R. at 3. Officer Kreuzberg also found a BB gun modeled after a .45 caliber handgun, a maroon ski mask, and a duffel bag containing $50,000 – items that matched the description of what was used to commit the bank robbery. R. at 3. Based on what was found in the YOUBER, Officer Kreuzberg arrested Petitioner under suspicion of bank robbery. R. at 3.

After Petitioner's arrest, Detective Boober Hamm took over Petitioner's case. Detective Hamm discovered five unsolved bank robberies between October 15, 2018 and December 15, 2018 in the Nevada and California areas. R. at 3. The modus operandi of the robberies matched that of the robbery on January 3, 2019. R. at 3. Knowing that the car Petitioner had used on the date of the arrest had a pink YOUBER logo, Detective Hamm subpoenaed YOUBER to obtain the Bluetooth and GPS information related to the YOUBER account Petitioner used. R. at 3. The records YOUBER provided revealed that Lloyd's account was used to rent cars on each of the dates and at each location of the five other bank robberies. R. at 3. Based on this information, Detective Hamm recommended to the United States Attorney's Office that Petitioner be charged with six counts of bank robbery under 18 U.S.C. § 2113, Bank Robbery and Incidental Crimes. R. at 3.

Petitioner's Defense Counsel filed two motions to suppress evidence prior to trial. R. at 3. The first motion moved to suppress the evidence obtained during Officer Kreuzberg's search

of the YOUBER vehicle on January 3, 2019. R. at 4. The second motion moved to suppress the location data YOUBER provided to Detective Hamm. R. at 4.

Procedural History

Suppression of Evidence from the YOUBER Search. Regarding the suppression of the search of the YOUBER, both courts below properly denied the motion and correctly held Petitioner did not have standing to contest the constitutionality of the search. The United States District Court for the Southern District of Netherfield reasoned that Petitioner did not have standing to object to the legality of the search because Petitioner was in unlawful possession of the YOUBER due to her lack of adequate permission form Ms. Lloyd. R. at 6. The District Court further elaborated that due Petitioner's "temporary and limited relationship" with the YOUBER "she did not have a sufficiently sustained relationship" with the vehicle to warrant an expectation of privacy in the vehicle. R. at 6. The United States Court of Appeals for the Thirteenth Circuit agreed with the rationale of the District Court, but further reasoned that an individual cannot have a valid property interest in a car she has fraudulently leased, or in a vehicle that she shares with third parties and uses in connection with illegality. R. at 12.

Suppression of the Location Data. As to the suppression of the location data of the YOUBER vehicle, both courts below properly denied the motion. The United States District Court for the Southern District of Netherfield reasoned that the location data collected by YOUBER did not reach the level of infringement discussed in *Carpenter v. United States* and determined that the third-party doctrine governed. R. at 8. The United States Court of Appeals for the Thirteenth Circuit agreed with the rationale of the District Court and emphasized that Petitioner had no reasonable expectation of privacy in the data or information voluntarily turned over and collected by the third-party. R. at 15.

Writ of Certiorari. Petitioner filed for a Writ of Certiorari pursuant to 28 U.S.C. § 1257(a), which has been granted by this Court.

SUMMARY OF THE ARGUMENT

Fourth Amendment Standing

To the first issue, Petitioner is unable to establish that she has standing to contest the warrantless search of a vehicle that she fraudulently rented in order to commit a crime.

This Court has consistently held that an individual in illegitimate possession of property does not have a reasonable expectation of privacy in that property, and therefore does not have standing. *See Byrd v. United States*, 138 S. Ct. 1518, 1524 (2018); *see also Rakas v. Illinois*, 439 U.S. 128, 143, n. 12 (1978); *Jones v. United States*, 362 U.S. 257, 267 (1960). This jurisprudence should guide this Court's decision in the case at bar. Petitioner rented the 2017 black Toyota Prius using the account of her former partner without explicit or implicit consent. Petitioner used her former partner's credit card to pay for the transaction, and then proceed to use the fraudulently rented vehicle to commit robbery. Therefore, Petitioner was unquestionably in illegitimate possession of the YOUBER.

Moreover, this Court has held that legitimate possession is not the end of the inquiry in determining standing. *See Rakas*, 439 U.S. at 148. Legitimate possession is not determinative of whether one had a legitimate expectation of privacy in the property and the aggrieved must also show that they had a possessory interest in the property searched. *See id.* Here, Petitioner does not have a possessory interest in a rented vehicle she used in furtherance of a crime, for only a short period of time, and shared with third parties.

Accordingly, Petitioner's motion to suppress the evidence found in the YOUBER should be denied for lack of standing, and the decision of The United States Court of Appeals for the Thirteenth Circuit should be affirmed.

Fourth Amendment Search

To the second issue, the acquisition of a YOUBER owned rental vehicle's location data voluntarily turned over by a YOUBER user is not a search under this Court's longstanding jurisprudence. First, the acquisition of the location data is not a search under the common-law trespass test. Second, the acquisition of the location data is not a search under the *Katz* reasonable expectation of privacy test ("*Katz* test") from a subjective or objective perspective.

To begin, this Court has long held that absent a search or seizure a person is not afforded Fourth Amendment protection. *See Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., Concurrence). To determine if a search occurred, this Court has adopted two tests. First, the common-law trespass test and second, the *Katz v. United States* reasonable expectation of privacy test.

In the earlier half of the 20th century, the Court used the common-law trespass test to determine if a search occurred when the Government physically intruded on private property to obtain information. *United States v. Jones*, 565 U.S. 400, 404–05 (2012). Here, no such physical intrusion exists. The acquisition of the YOUBER vehicle's location data was not obtained through any physical contact and the vehicle did not even belong to Petitioner – it was owned by YOUBER.

More recent jurisprudence has adopted the *Katz* test. The *Katz* test is a two-prong test that asks: (i) has the person exhibited an actual, subjective, expectation of privacy, and (ii) is the expectation one that society is prepared to recognize as objectively reasonable. *See Katz v.*

United States, 389 U.S. 347, 361 (1967) (Harlan, J., Concurrence). Petitioner must satisfy both prongs to be afforded Fourth Amendment protection. *Id.*

Here, Petitioner cannot satisfy either. First and subjectively, Petitioner's conduct reveals she cannot possibly assert an actual expectation of privacy in the YOUBER's location data information. Second and objectively, Petitioner voluntarily turned over her location data information to third party, Smoogle, when she downloaded the YOUBER app, rented a YOUBER vehicle, and activated her Bluetooth and GPS information to operate the vehicle in compliance with YOUBER terms and conditions. Moreover, location data information is not nearly as invasive or limitless as the cell-site location information ("CSLI") acquired in Carpenter and therefore does not run afoul of the *Carpenter* reasoning. *Carpenter v. United States*, 138 S. Ct. 2206, 2210 (2018).

STANDARD OF REVIEW

Generally, a court reviewing a ruling on a motion to suppress must apply a two-part test. *Ornelas v. United States*, 517 U.S. 690, 699 (1996). First, the trial court's findings of fact are given great deference and should not be reversed on appeal unless the findings are against the manifest weight of the evidence. *Id*. Second, the ultimate ruling of whether suppression is warranted as a matter of law is subject to de novo review. *Id*. Relevant here, issues of constitutionality are questions of law to be reviewed de novo. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 492 (1984) (The Court "must perform a de novo review, independently examining the record to ensure that the [court] has applied properly the governing constitutional law . . .").

ARGUMENT

I. PETITONER HAS NO STANDING TO CHALLENGE THE SEARCH OF THE YOUBER SHE FRAUDULENTLY RENTED.

The Fourth Amendment protects "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . ." U.S. CONST. amend IV. Supreme Court jurisprudence has long established that "[t]he ultimate measure of the constitutionality of a government search is 'reasonableness.'" *Veronica School Dist. 47J v. Acton*, 515 U.S. 646, 652 (1995); *see also Riley v. California*, 573 U.S. 373, 381 (2014). Although there are several "flexible, common-sense exceptions," a warrantless search is presumed to be unreasonable and therefore invalid under the Fourth Amendment. *Texas v. Brown*, 460 U.S. 730, 735 (1983); *Katz v. United States*, 389 U.S. 347, 356-57 (1967). The Supreme Court has recognized that the remedy for a warrantless search is the exclusionary rule. *Mapp v. Ohio*, 367 U.S. 643, 657 (1961).

However, defendants may only "claim the benefits of the exclusionary rule if their *own* Fourth Amendment rights have in fact been violated." *United States v. Salvucci*, 448 U.S. 83, 85 (1980) (emphasis added). In determining whether a defendant's rights have been violated, courts look to whether the defendant had a legitimate expectation of privacy in the area searched. *Minnesota v. Olson*, 495 U.S. 91, 100 (1990) (holding that an overnight guest had a legitimate expectation of privacy and thus had standing to challenge the warrantless entry). If a defendant does not have a legitimate expectation of privacy in the area searched, then their own Fourth Amendment rights have not been violated, and they do not have standing to contest the constitutionality of the warrantless search. *See Byrd v. United States*, 138 S. Ct. 1518, 1530 (2018) (noting that standing in Fourth Amendment cases refers to whether a person has a cognizable Fourth Amendment interest in the place search before seeking relief for the search).

Here, Petitioner has no standing to contest the warrantless search of the YOUBER for two reasons. First, Petitioner was in illegitimate possession of the YOUBER and therefore did not have a legitimate expectation of privacy in the vehicle. *Id*. at 1524. Second, even if Petitioner was in lawful possession of the YOUBER, Petitioner did not have a possessory interest in the vehicle and thus did not have a legitimate expectation of privacy in the YOUBER. *Rakas v. Illinois*, 439 U.S. 128, 148 (1978).

A. Petitioner's Presence in the YOUBER Rental Was Illegitimate Thus Petitioner Has No Standing to Challenge the Search.

This past term, in the case of *Byrd v. United States*, the Supreme Court held that "the mere fact that a driver in lawful possession or control of a rental car is not listed on the rental agreement will not defeat his or her otherwise reasonable expectation of privacy." *Byrd,* 138 S. Ct. at 1531. However, the Court in *Byrd* noted that if a driver is in illegitimate possession of a rental car he is "no greater than a car thief." *Id.* at 1524. Although the driver in illegitimate possession of the rental vehicle may expect privacy, just as a "burglar plying his trade in a summer cabin during the off season may have a thoroughly justified expectation of privacy," it is not an expectation that the law recognizes as "legitimate." *Rakas*, 439 U.S. at 143, n. 12. Therefore, a driver in illegitimate possession of a rental car "would lack a legitimate expectation of privacy" and, as a result, not have standing to contest a warrantless search of the vehicle. *Byrd*, 138 S. Ct. at 1524.

In the case of *Byrd*, Terrence Byrd and a third party, Latasha Reed, drove together to a car-rental facility where Reed went inside and rented a car in her name. *Id*. In order to rent the car Reed signed an agreement acknowledging the restrictions on who was allowed to drive the rental car, and failed to list Byrd as a registered driver on the agreement. *Id*. After completing the paperwork, Reed returned to the parking lot and handed Byrd the keys to the rental. *Id*. The

two then left the parking lot – Byrd in the rental car and Reed in the car they arrived in. *Id*. Byrd was later pulled over by Pennsylvania State Troopers who told Byrd that, because he was not listed on the rental agreement, they did not need his consent to search the vehicle. *Id*. at 1523. On certiorari, the Supreme Court held that the fact "a driver in lawful possession or control of a rental car is not listed on the rental agreement will not defeat his or her reasonable expectation of privacy." *Id*. at 1531. The Court then remanded the case back to the Third Circuit to determine if Byrd was in lawful possession or if a Fourth Amendment exception applied.[1] *Id*.

Yet unlike Byrd's potentially lawful presence in the rental in *Byrd*, Petitioner's presence in the YOUBER goes beyond any lawful bounds. Consequently, Petitioner does not have standing to challenge the search of the YOUBER. Although both Reed and Martha Lloyd ("Lloyd") failed to list additional drivers on their rental agreement, Reed was aware that Byrd would be driving the car, as she handed Byrd the keys directly. On the other hand, Lloyd was entirely unaware that Petitioner was using her account to rent the YOUBER on January 3, 2019. Ex. A, at 19:8-12. While Lloyd knew Petitioner had access to the account in the past, they had broken up and Lloyd stated she had no knowledge of this particular rental. Ex. A, at 19:11-12. In fact, Lloyd did not give Petitioner permission to use her account any time after their break up in September 2018, and had not been in direct contact with Petitioner since that time. Ex. A, at 19:8-9;16-17. For these reasons, Petitioner's use of the YOUBER was more akin to stealing or fraud, and went well beyond the questionable conduct in *Byrd*. *See Rakas*, 439 U.S. at 141, n. 9

[1] The Third Circuit remanded the case back to the District Court where the court denied the motion to suppress based on the automobile exception and the good faith exception to the Fourth Amendment. *See United States v. Byrd*, 388 F.Supp.3d 406, 417 (M.D. PA 2019); *see also United States v. Byrd*, 742 Fed.Appx. 587, 592 (3d Cir. 2018).

("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.").

As a result, Petitioner was "no greater than a car thief" and therefore lacked a legitimate expectation of privacy in the YOUBER. Accordingly, Petitioner lacks standing to challenge the search of the YOUBER.

B. Petitioner Did Not Have a Possessory Interest in the YOUBER Rental, Therefore, Petitioner Has No Standing to Challenge the Search.

Even if Petitioner's presence in the YOUBER was lawful, this fact is not dispositive in establishing standing. *Rakas*, 439 U.S. at 148 (rejecting the notion that anyone legitimately on the premises where a search occurred may challenge its legality by way of a motion to suppress.) The Supreme Court held in *Rakas v. Illinois* that legitimate possession "is not determinative of whether [one] had a legitimate expectation of privacy in the particular areas of the automobile searched," as it "creates too broad of a gauge for measurement of Fourth Amendment rights." *Rakas*, 439 U.S. at 142, 148; *see also Minnesota v. Carter*, 525 U.S. 83, 91 (1998) ("We would not wish to be understood as saying that legitimate presence on the premises is irrelevant to one's expectation of privacy, but it cannot be deemed controlling.").

Beyond lawful presence, one must also have a possessory interest in the area searched in order to have standing to challenge the warrantless search. *See United States v. Jeffers*, 342 U.S. 48, 49-50 (1951) (holding defendant had standing based on a possessory interest in both the premises searched and the property seized). Without a possessory interest in a vehicle searched, one does not have a reasonable expectation of privacy in the car itself and thus does not have standing to challenge the constitutionality of the search. *Rakas*, 439 U.S. at 148.

Here, Petitioner contends that because her items were found in the YOUBER, she had a "substantial possessory interest in the premises searched." R. at 12. However, this argument is

flawed. *See Salvucci*, 448 U.S. at 92 ("We simply decline to use possession of a seized good as a substitute for a factual finding that the owner of the good had a legitimate expectation of privacy in the area searched."). Regardless of the ownership the items found in the YOUBER, Petitioner cannot and does not have a possessory interest in a rented vehicle she used in furtherance of a crime, occupied for only a short period of time, and shared with third parties. *See e.g. United States v. Shareef*, 100 F.3d 1491, 1499-1500 (10th Cir. 1996) (holding defendants did not have a possessory interest in a rented car); *United States v. McCulley*, 673 F.2d 346, 352 (11th Cir. 1982) (holding defendants did not have standing because they did not have a possessory interest in the rented automobile); *United States v. Zabalaga*, 834 F.2d 1062, 1063 (D.C. Cir. 1987) (holding defendants did not have a legitimate expectation of privacy in contraband seized from a rental car because defendants did not have a possessory interest in the car).

First and foremost, it is important to call into question how it is possible for Petitioner to even have a possessory interest in property – whether it is the YOUBER itself or the items within the YOUBER – when she herself has publicly stated, "I have no home, I claim no home," "I claim no property," and "I'll show you that property is NOTHING." Ex. C, at 26-7; *cf. Rakas*, 439 U.S. at 144, n. 12 ("One who owns or lawfully possess or control property will in all likelihood have a legitimate expectation of privacy by the right to exclude."). Without a subjective belief that she owned property, Petitioner's argument to this Court that she had a possessory interest in the YOUBER because of *her* items inside falls short.

Even accepting Petitioner's interest in the property located in the YOUBER, she fails to show she had a possessory interest in the YOUBER itself. The first reason Petitioner lacks a possessory interest in the YOUBER is because she used it in furtherance of illegality. Petitioner used not only the 2017 black Toyota Prius, but other YOUBER vehicles as well, as getaway cars

to rob banks. R. at 4. Although the Fourth Amendment protects both the innocent and the guilty equally, the case of *Minnesota v. Carter* suggests that illegality when combined with other factors leans towards the conclusion that there is no possessory interest in the property. *See Carter*, 525 U.S. at 91 (holding that defendants had no possessory interest in a third party's apartment that they were in for a short period of time used solely for the purpose of bagging cocaine).

Additionally, Petitioner did not have a possessory interest because of the short duration of time she used the YOUBER. According to YOUBER policy, the vehicles can only be rented for 500 miles or a period of one week. Ex. B, at 23:23-25. Furthermore, at the time of the search, Petitioner was only renting the 2017 black Toyota Prius for less than twenty-four hours. R. at 2. This temporary and limited control of the vehicle cannot be said to have given Petitioner a possessory interest in the vehicle. *See Carter*, 525 U.S. at 90 (holding defendants in a home for a matter of hours did not have a possessory interest in the home).

Finally, Petitioner's claim of a possessory interest in the YOUBER is even further attenuated by the fact that she shared the YOUBER rental with third parties. It is undisputed that Petitioner did not own the 2017 black Toyota Prius; she simply rented the vehicle from the company for a limited period of time. R. at 2; *see Jones v. United States*, 362 U.S. 257, 266 (1960) (noting that to have standing one must have an ownership interest or a possessory interest.) Petitioner has used the YOUBER service in the past, presumably renting a different car each time, and is well aware of how the service works. R. at 2. At the end of each rental period, Petitioner was required to give the vehicle back to YOUBER, where the vehicle is checked on every twenty-four hours by a YOUBER employee, and eventually rented to another customer. R. at 2; *see Katz*, 389 U.S. at 351 (noting that what a person knowingly exposes to the public is

not subject to Fourth Amendment protection); *see also California v. Greenwood*, 486 U.S. 35, 40 (1988) (noting that there is no legitimate expectation of privacy in garbage left on the street due to the high risk of public exposure). Ultimately, Petitioner had no right to exclude YOUBER employees from checking on the vehicle, and had no right to exclude third parties from using the vehicle – at the end of the day she had to share this vehicle with other members of the public. *Cf. Katz*, 389 U.S. at 352 (holding defendant had a legitimate expectation of privacy by way of right to exclude).

As such, Petitioner did not have a possessory interest in the YOUBER, and thus lacked a legitimate expectation of privacy in the vehicle. Consequently, Petitioner does not have standing to challenge the search of the YOUBER. *See Rakas*, 439 U.S. at 148 (holding petitioners did not have standing as they asserted "neither a property nor possessory interest in the automobile.").

II. THE ACQUISITION OF THE LOCATION DATA OF YOUBER'S RENTAL VEHICLE IS NOT A SEARCH BASED ON THIS COURT'S LONG STANDING JURISPRUDENCE.

The Fourth Amendment protects "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. CONST. amend IV. After all, the "basic purpose of [the Fourth] Amendment . . . is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *Carpenter v. United States*, 138 S.Ct. 2206, 2213 (2018). Furthermore, "a person does not surrender all Fourth Amendment protection by venturing into the public sphere," and instead "what [the individual] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Id.* at 2218. Absent a search, however, Petitioner cannot be afforded Fourth Amendment protection. *See Katz*, 389 U.S. at 361 (Harlan, J. Concurrence).

This Court has adopted two approaches to determine what constitutes a search: (1) the common-law trespass test and (2) the *Katz v. United States* reasonable expectation of privacy test (the "*Katz* test"). *See United States v. Jones*, 565 U.S. 400, 404-05 (2012); *see also Katz*, 389 U.S. at 361 (Harlan, J. Concurrence). Important here, the *Katz* reasonable expectation of privacy test has "been *added to,* not *substituted for,*" the common-law trespass test. *Jones*, 565 U.S. at 409. Regardless, analysis of each approach reveals a search did not occur.

A. The Acquisition of the Location Data of YOUBER's Rental Vehicle Was Not a Physical Intrusion of a Constitutionally Protected Area For the Purpose of Obtaining Information and Therefore Not a Search Under the Common-Law Trespass Test.

Under the common-law trespass test, a search within the meaning of the Fourth Amendment has occurred when the Government physically intrudes or occupies private property to obtain information. *Id*. at 404-5. After all, the "text of the Fourth Amendment reflects its close connection to property, since otherwise it would have referred simply to "the right of the people to be secure against unreasonable searches and seizures"; the phrase "in their persons, houses, papers, and effects" would have been redundant. *Id*. at 405.

The acquisition of location data information of YOUBER vehicles does not involve physical intrusion of private property and is therefore not a search under the common-law trespass test. *Id*. at 404-05. In fact, this case is readily distinguishable from prior cases where this Court utilized the common-law trespass test to conclude a search occurred. *Id*. For example, in *Jones* the Government physically attached a Global Positioning System ("GPS") tracking device to the individual's vehicle in order to monitor the vehicle's movements on public streets. *Id*. at 402. This Court found a search did in fact occur because "by attaching the device to the [target's vehicle], officers encroached on a protected area." *Id*. at 410. No such property interest exists in this case. *See Zabalaga*, 834 F.2d at 1063; *see also McCulley*, 673 F.2d at 352;

Shareef, 100 F.3d at 1499-1500 (explaining that a possessory interest in rental vehicles are nonexistent).

Here, the government did not have any physical contact with the rental vehicle and the vehicle is owned by YOUBER, not Petitioner. R. at 3. As such, the government did not physically intrude on private property and a search did not occur under the common-law trespass test.

B. A Search Did Not Occur Under the Katz Test Because Petitioner Had Neither a Subjective Nor Objective Expectation of Privacy in the Location Data of YOUBER's Vehicle.

This Court acknowledged that "the Fourth Amendment protects people, not places," and as such certain expectations of privacy as well. *Katz*, 389 U.S. at 351; *see also Carpenter*, 138 S. Ct. at 2213-14. Therefore, if the Government invades a "legitimate expectation of privacy," Fourth Amendment protection is triggered. *Katz*, 389 U.S. at 361 (Harlan, J. Concurrence). In order to determine if one has a legitimate expectation of privacy information or place invaded, the Court must consider the test set forth in Justice Harlan's Concurrence in *Katz v. United States*. *Id*.

The *Katz* test is a two-prong test that asks: (i) has the person exhibited an actual, subjective, expectation of privacy, and (ii) is the expectation one that society is prepared to recognize as objectively reasonable. *Id*. Both prongs of the test must be satisfied for a court to recognize a reasonable expectation of privacy and therefore trigger Fourth Amendment protection. *See id*. Here, Petitioner is unable to satisfy either prong.

i. Petitioner's Conduct Reveals She Did Not Have an Actual Expectation of Privacy in the Acquisition of the YOUBER's Location Data Information.

A defendant maintains a subjective expectation of privacy when the defendant "has shown that 'he [sought] to preserve [something] as private.'" *Bond v. United States*, 529 U.S. 334, 338 (2000) (quoting *Smith v. Maryland*, 442 U.S. 735, 740 (1979)). The court will look to personal conduct to evaluate whether an individual has a subjective expectation of privacy. *Smith*, 442 U.S. at 743.

For example, in *Smith v. Maryland*, the petitioner used his phone to dial a phone number and ultimately conveyed that number to the telephone company. *Id*. The Court reasoned that even if petitioner sought to keep the contents of the phone call private, the petitioner would have to convey the exact same number, in the exact same manner if he wished to complete his call in the first place. *Id*. Therefore, there may be a subjective expectation of privacy in the contents of a conversation, but not in the number dialed. *Id*.

The same rationale governs here. In short, Petitioner must comply with the YOUBER rental guidelines to rent and operate a YOUBER vehicle in the first place. R. at 3-4. Petitioner cannot rent a YOUBER vehicle without downloading the YOUBER app, logging into the YOUBER account, requesting a YOUBER vehicle, and activating both her Bluetooth and GPS information in exchange for the YOUBER vehicle. R. at 2. As such, Petitioner cannot reasonably assert a subjective expectation of privacy in the location of the YOUBER vehicle given the steps taken to rent the vehicle to begin with.

ii. Even if Petitioner Did Have a Subjective Expectation of Privacy, This Expectation is Not One That Society is Prepared to Recognize as Reasonable.

This Court has routinely held that a person has no legitimate expectation of privacy in information voluntarily turned over to a third party. *Carpenter*, 138 S. Ct. at 2210. The third party doctrine stems from the notion that a person's expectation of privacy diminishes when she

voluntarily shares information with another. *Id*. This Court has made clear that an individual lacks any Fourth Amendment interests in business records that are "possessed, owned, and controlled" by a third party. *Id.* at 2223 (Gorsuch, J. Dissenting); *see also United States v. Miller,* 425 U.S. 435, 440 (1976) (noting the defendant was unable to assert either ownership or possession over his bank records because they were not his "private papers," but instead business records of the bank used in the ordinary course of business). Furthermore, the third party doctrine stands "even if the information is revealed on the assumption that it will be used only for a limited purpose." *Miller,* 425 U.S. at 443. In effect, the Government can freely obtain such information from the third party without triggering Fourth Amendment protections. *Carpenter*, 138 S. Ct. at 2216.

a. ***The Location Data Information Obtained by YOUBER, From Third Party, Smoogle, Was Voluntarily Conveyed by Petitioner to YOUBER Through Smoogle in the Ordinary Course of Business Upon Rental of YOUBER's Vehicle and is Therefore a Business Record Under the Third Party Doctrine.***

Ultimately, a reasonable expectation of privacy does not exist where information is "voluntarily conveyed" to a third party in the ordinary course of business. *Smith*, 442 U.S. at 743-44. This Court has rationalized that because the conveyor "assume[s] the risk of disclosure," it is unreasonable to expect that such business records remain private. *Id.* at 744. Consequently, a search within the meaning of the Fourth Amendment cannot occur when third party doctrine governs. *Id*.

For example, in *United States v. Miller*, the court denied Respondent's motion to suppress copies of checks and bank records that the depositor had voluntarily conveyed to the banks and exposed to bank employees in the ordinary course of business. *Miller,* 425 U.S. at 442; *see also Smith*, 442 U.S. at 744 (noting that when Smith placed the call, he "voluntarily conveyed the dialed numbers to the phone company by exposing that information to its

equipment in the ordinary course of business."). The Court noted that the checks and bank records, were not "private papers," or "confidential communications" but instead "negotiable instruments to be used in commercial transactions." *Miller,* 425 U.S. at 442. Consequently, the Court found it would be unreasonable for the depositor to expect such records remain private. *Id*.

So too here. This Court should deny the motion to suppress the location data of Petitioner's YOUBER vehicles because she voluntarily turned over that information to YOUBER through Smoogle's mapping technology. Petitioner performed several voluntary acts to support this notion. First, Petitioner downloaded and signed-in the YOUBER app. R. at 2. Second, Petitioner chose to rent a YOUBER vehicle on numerous occasions. R. at 3. Finally, each time Petitioner entered the rented YOUBER vehicle, she activated both her Bluetooth and GPS information to share the vehicles location and operate the vehicle. R. at 2. Petitioner ultimately "assumed the risk" that the location data information would be turned over by third party, Smoogle, based on her voluntary actions. Moreover, as with the bank records in *Miller*, the location data cannot qualify as "private papers," but instead are negotiable instruments used by YOUBER and Smoogle in commercial transactions to ensure vehicle security and user safety in exchange for the YOUBER user's rental of the vehicle. *Id.*

As such, Petitioner cannot assert a reasonable expectation of privacy in YOUBER and Smoogle's business records she voluntarily turned over and a search did not occur. *Smith*, 442 U.S. at 744.

b. ***The Location Data Information of YOUBER's Vehicle is Protected by the Third Party Doctrine and Consistent With Carpenter's Reasoning Given Both the Nature and Limited Capacity of Data Obtained.***

In *Carpenter*, this Court emphasized that prior opinions which found third party doctrine applicable were based not only on the act of sharing information, but the Court also considered "the nature of the particular documents sought" and limitations on any "legitimate 'expectation of privacy' concerning their contents." *Carpenter*, 138 S. Ct. at 2210; *see also Miller,* 425 U.S. at 442. This Court should consider the same and recognize how distinct cell-site location information ("CSLI") is compared to location data information. *Carpenter*, 138 S. Ct. at 2210.

In *Carpenter*, this Court refused to adopt the third party doctrine given the nature and limitlessness of the CSLI obtained. *Id*,; *see also Smith,* 442 U.S. at 742. "There are 396 million cell phone service accounts in the United States—for a Nation of 326 million people." *Carpenter*, 138 S. Ct. at 2211. In the past, this court has recognized that a cell phone is almost "a feature of human anatomy," that tracks nearly every exact movement of its owner. *Riley*, 573 U.S. at 385. In *Carpenter*, this Court noted that cell phones "continuously scan their environment looking for the best signal, which generally comes from the closest cell site." 138 S. Ct. 2211. Astonishingly, these cell sites are located everywhere – on towers, light posts, buildings, flagpoles, and even churches. *Id.* at 2211. Furthermore, when CSLI is tracked, "it achieves near perfect surveillance, as if it had attached an ankle monitor to the phone's user." *Id*. at 2211, 2218 (noting the Government obtained 12,9898 location points through CSLI to catalogue Carpenter's movements, revealing roughly 101 data points per day). Ultimately, this Court recognized the revealing nature of CSLI and a cellphone owners reasonable expectation of privacy in that information.

The same cannot be said here. The information revealed through location data information compared to CSLI is not nearly as invasive or limitless as the CSLI acquired in *Carpenter*. Unlike the 396 million cell phone services in the United States, there are only 40 million YOUBER users. R. at 2. While the CSLI is constantly tracked, the location of the YOUBER vehicle is only monitored during the duration of the rental that lasts a maximum distance of 500 miles or a time period of maximum one week. R. at 2. Furthermore, unlike CSLI, acquisition of the YOUBER's location data does not provide an "intimate window into [Petitioner's] life, revealing not only [her] particular movements, but through them [her] familial, political, professional, religious, and sexual associations." *See id*. at 2214 (emphasizing that cell-phone mapping over a 127 day timeframe provides an "all-encompassing record of the holder's whereabouts.").

To the contrary, YOUBER tracks the vehicle, not the person. R. at 3. YOUBER has no way of knowing the entirety of a person's movements. YOUBER's mapping data, provided from Smoogle, only maps the location of the YOUBER vehicle. R. at 4. The location data is strictly obtained while the YOUBER user is inside the rental vehicle. R. at 4. Once the vehicle rental is complete, YOUBER tracks the time-stamped location of the *vehicle* for security purposes. R. at 4. Important here, this Court has noted that "[w]hile individuals regularly leave their vehicles, they compulsively carry cell phones with them all the time." *See id*. at 2218 (noting that a cellphone follows its owner beyond public thoroughfares and into "residences, doctors' offices, political headquarters, and other potentially revealing locales."). In fact, in *United States v. Knotts,* this Court emphasized that once an individual travels over public thoroughfares, he voluntarily conveys to anyone that may look that he is traveling on a particular direction, on a

particular road and as such "one has a lesser expectation of privacy in a motor vehicle." *United States v. Knotts*, 460 U.S. 276, 281-82 (1983).

Finally, this Court in *Carpenter* made clear its decision is narrow. "[The decision] does not express a view on matters not before the Court; does not disturb the application of *Smith* and *Miller* or call into question conventional surveillance techniques and tools, such as security cameras; does not address other business records that might incidentally reveal location information." *Carpenter*, 138 S. Ct. at 2220.

The location data information acquired by YOUBER is the exact information this Court recognized could be protected under third party doctrine and should be protected for the foregoing reasons. Moreover, this Court has recognized the inherent difference between cell phones and vehicles in the past and should continue to do so here. YOUBER's location data is far less invasive and more limited than CSLI. Accordingly, Petitioner had no reasonable expectation of privacy in the location data.

CONCLUSION

Accordingly, the decision of the United States Court of Appeals for the Thirteenth Circuit should be affirmed.

Respectfully Submitted,

Counsel for Respondent
Respondent 19

APPENDIX A: Constitutional Provisions

U.S. CONST. amend. IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.