No. 4-422

IN THE
Supreme Court of the United States

JAYNE AUSTIN,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to
The United States Court of Appeals
for the Thirteenth Circuit

BRIEF OF RESPONDENT, The United States of America

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II. The Court should affirm the District Court and Court of Appeals' denial of the Defendant's motion to suppress YOUBER location information because Fourth Amendment protections do not apply. Specifically, government acquisition of the information did not constitute a "search" because the Defendant lacked a reasonable expectation of privacy in the information and voluntarily conveyed it to third-parties.

STATEMENT OF FACTS

The petitioner, Jayne Austin, is a devoted poet and blogger. R. at 1. Her blogs features impassioned poems regarding financial corruption in the United States banking industry. R. at 1. Ms. Austin prides herself as a minimalist with no permanent residence or vehicle. R. at 1-2. For a few years, Ms. Austin dated and lived with her former partner, Ms. Lloyd. R. at 18. Unfortunately, in September of 2018, Ms. Austin's "radical" ideologies caused a "falling out" between the two. R. at 18. As a result, Ms. Austin and Ms. Lloyd no longer continued dating or living together. R. at 1, 18. Over the following months, their communication dwindled to occasional letters; only one of which Ms. Lloyd answered. R. at 19. In her response, Ms. Lloyd made clear to Ms. Austin that "if" the two were to get back together, Ms. Lloyd would need time. R. at 19.

However, during their relationship, the two agreed to share login information for multiple services on their electronic devices; one of which being YOUBER. R. at 19. YOUBER is an "immensely popular" car rental application ("app") that allows a person to rent YOUBER-owned vehicles. R. at 2. Due to Ms. Austin's "immaterial lifestyle," Ms. Lloyd allowed Ms. Austin to use her YOUBER information and reimburse her in cash. R. at 1, 18. However, following their separation, Ms. Lloyd gave no explicit permission to Ms. Austin to continue using her information for any services. R. at 19. Additionally, Ms. Austin never once asked for continued permission after the "falling out." R. at 19. Nevertheless, Ms. Austin continued to use Ms. Lloyd's information with no indication of reimbursement. R. at 19. Specifically, Ms. Austin continued to use Ms. Lloyd's name and credit card information on Ms. Austin's YOUBER app. R. at 19.

The YOUBER app is accessible on an individual's cell phone, and connects to YOUBER vehicles via Bluetooth and GPS. R. at 2. To rent a vehicle, the user must fill out a rental agreement and pay a fixed per hour fee. R. at 2. The vehicles are parked in YOUBER-owned parking stalls and are identifiable by a "bright pink YOUBER logo" on the windshield. R. at 2. Each rental agreement specifies that a user may rent a vehicle for a maximum distance of 500 miles or up to a time period of one week. R. at 2. To return the vehicle, a user parks the car in a designated YOUBER parking stall. R. at 2.

Over three months following their separation, Ms. Austin rented a vehicle on January 3, 2019, through the YOUBER app on her personal phone. R. at 2. After failing to stop at a stop sign, Ms. Austin was pulled over by Officer Kreuzberger. R. at 2. While stopped, Ms. Austin showed the officer her license and the YOUBER app on her cellphone. R. at 2. However, Officer Kreuzberger noticed that Ms. Austin's name was not listed on the rental agreement in the app. R. at 2. Officer Kreuzberger thus told Ms. Austin that he did not need her consent to search the vehicle. R. at 3. During the search, Officer Kreuzberger found clothing, bedding, and food; leading him to believe the car to be "lived in." R. at 3. In addition, he found a realistic looking BB gun, a ski mask, and duffel bag containing $50,000 and blue dye packs. R. at 3. While investigating, Officer Kreuzberger received dispatch to look out for a particular vehicle, license plate, and suspect related to the robbery. R. at 3. Because Ms. Austin's car, license plate, and personal items were similar to the dispatch description, Officer Kreuzberger arrested her on suspicion of bank robbery. R. at 3.

Soon after being assigned the case, Detective Boober Hamm discovered five open bank robberies occurring between October 15 and December 15, 2018. R. at 3. Because the five robberies matched the characteristics of the January 3 robber, Detective Hamm further

investigated. R. at 3. After noticing that Ms. Austin was arrested in a YOUBER vehicle, Detective Hamm served a subpoena on YOUBER to obtain all GPS and Bluetooth information related to Ms. Austin's account between October 3, 2018 and January 3, 2019. R. at 3.

Upon creating a YOUBER account, a user must accept all of YOUBER's terms and conditions. R. at 3-4. Per these conditions, YOUBER is permitted to track each user's location when renting a vehicle to ensure that no one other than the registered renter operates the vehicle. R. at 3-4. When a user's cell phone enters a YOUBER vehicle, the GPS and Bluetooth signals from their cell phone activate. R. at 4, 23. YOUBER tracks these GPS and Bluetooth signals from a user's cellphone only "when renting a vehicle." R. at 4. The GPS information is transferred through YOUBER's mainframe and filtered through Smoogle using satellite mapping technology. R. at 4. Without these GPS analytics, YOUBER "could not track all of [their] vehicles" amongst its 40 million national users. R. at 22, 23. Ms. Lloyd agreed to these terms and conditions when she created the account. R. at 20.

YOUBER records indicated that Ms. Lloyd's account was used to rent vehicles in the locations and at the times of the five previous robberies. R. at 4. After reviewing the YOUBER records, Detective Hamm recommended that Ms. Austin be charged with six counts of bank robbery. R. at 4.

Before trial, Ms. Austin filed two motions to suppress evidence. R. at 4. The first motion moved to suppress evidence obtained during Officer Kreuzberger's search of the YOUBER vehicle on January 3, 2019. R. at 4. The second motion moved to suppress the YOUBER location data provided to Detective Hamm. R. at 4. The motions asserted that each search was warrantless under the Fourth Amendment, and that therefore any evidence obtained therefrom should be suppressed. R. at 4.

SUMMARY OF THE ARGUMENT

The Appellate Court correctly held that the search of an unauthorized driver's rental vehicle did not violate the Fourth Amendment. To contest the search of a rental vehicle, a defendant must have a valid property interest in the rental vehicle and a reasonable expectation of privacy. Here, Ms. Austin did not have a valid property interest in the YOUBER rental vehicle because Ms. Lloyd did not give her explicit permission to use the vehicle. Next, Ms. Austin did not have an expectation of privacy in the vehicle that society will recognize as reasonable. Thus, the Appellate Court correctly concluded that the rule established in *Byrd* does not apply to an unauthorized driver of a rental vehicle when the driver did not have permission from the authorized user to possess the vehicle. *See Byrd v. United States,* 138 S.Ct. 1518 (2018).

The Appellate Court correctly found that government acquisition of the Defendant's YOUBER location information did not constitute a "search" within the meaning of the Fourth Amendment and the context of *Carpenter*. *See Carpenter v. United States*, 138 S. Ct. 2206 (2018). Accordingly, the Supreme Court should not deviate from the conclusion that the YOUBER information is not granted Fourth Amendment protections. The Defendant cannot prove the existence of a reasonable expectation of privacy in the information or that she did not voluntarily convey it to third-parties. Thus, the District Court and Court of Appeals correctly concluded that because the YOUBER location information was not "private," government obtainment did not constitute a "search."

STANDARD OF REVIEW

When reviewing a motion to suppress on appeal, the Court reviews the lower court's ruling *de novo*. *Ornelas v. United States*, 517 U.S. 690, 699 (1996).

ARGUMENT

I. As an unauthorized user of the YOUBER account, Ms. Austin does not have standing to contest the search of the rental vehicle in accordance with the Fourth Amendment.

The District Court and the Court of Appeals correctly denied Ms. Austin's motion to suppress evidence because she lacked standing as to the search of the rental car. R. at 6, 12. The Fourth Amendment guarantees individuals the right to be "secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. Amend. IV. Although this constitutional protection restrains unreasonable government actions, it is applicable only upon a showing that a defendant has standing to contest an alleged Fourth Amendment violation. *Rakas v. Illinois*, 439 U.S. 128, 152 (1978). The Supreme Court has found that a defendant has standing for Fourth Amendment violations when the defendant "has a legitimate expectation of privacy in the invaded place." *Rakas,* 439 U.S. at 143.

It has also been noted that although a legitimate expectation of privacy must be one that is both personal and objectively reasonable, it must also have a "source outside of the Fourth Amendment, either by reference to concepts of real or personal property law." *Rakas,* 439 U.S. at 144; *See also Minnesota* v. *Carter,* 525 U.S. 83, 88 (1998). In the present case, Ms. Austin lacks standing to contest the legality of the search of the YOUBER rental car because (1) she did not have lawful authorization to have a possessory interest in the rental car and (2) the unlawful possession of the rental car negated a reasonable expectation of privacy.

A. Ms. Austin did not have a property or possessory interest in the YOUBER rental car because she acquired it unlawfully.

Ms. Austin could not establish a lawful property or possessory interest for purposes of the Fourth Amendment because she obtained the rental car through the use of an unauthorized

YOUBER account. Courts have generally held that to establish standing for a violation of the Fourth Amendment, in addition to a personal and reasonable expectation of privacy, a defendant must also have a legitimate expectation of privacy in the particular area searched, and further must have either a real or personal property interest in the thing searched. *See Rakas*, 439 U.S. at 144; *See also Carter*, 525 U.S. at 88; *United States v. Thomas*, 447 F.3d 1191 (U.S. App. 2006) (holding that an unauthorized driver has standing to challenge the search of a rental vehicle only if he received permission from the authorized user). However, there is a diminished capacity for expectation of privacy within cars because they are exposed to the public and readily mobile. *Rakas*, 439 U.S. at 148; *California v. Carney*, 471 U.S. 386, 393 (1985).

To have any source of limited protection in motor vehicles, a driver must have authorization to use that car. *See United States v. Riazco*, 91 F.3d 752, 755 (1996). Typically, an authorized user will have the minimum protection applicable to Fourth Amendment cases. *See United States v. Ortiz*, 422 U.S. 891, 896 (1975). However, an unauthorized user of a rental car can raise a Fourth Amendment claim pursuant to a totality of the circumstances by reference to four factors: (1) whether an exigent circumstance exists, (2) the terms of the rental agreement, (3) the circumstances surrounding the rental, which would then give rise to (4) whether a property interest could be established. *Byrd v. United States*, 138 S. Ct. 1518, 1531-32 (2018). In the present case, it is undisputed that there was no exigent circumstances surrounding Ms. Austin's use for the rental car or the terms of the rental agreement. R. at 3. Therefore, the only contested issue before the Court concerns the circumstances which gave rise to Ms. Austin's use of the rental car, which are dispositive of her property interest within the vehicle.

i. In the absence of sufficient authorization to procure the rental car, Ms. Austin could not establish a legitimate property interest in the vehicle.

Ms. Austin's temporary and limited relationship with Ms. Llyod, which supplied her use of the YOUBER rental car, was an inadequate measure by which to obtain a legitimate property interest because she did not have the requisite authority to utilize the vehicle. "[O]ne who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude [others]." *Rakas*, 439 U.S. at 144. The Court reasoned that authorized persons of a rental car have a legitimate expectation of privacy within the car by virtue of the permission granted to them from the lawful renter, (to have the right to exclude others and maintain a property interest in the vehicle). To establish lawful authorization and possession of a motor vehicle, a user may have (1) consensual or explicit authority; or (2) apparent authority from the lawful owner or renter of the vehicle. *Byrd*, 138 S. Ct. at 1521; *Schneckloth v. Bustamonte*, 412 U.S. 218, 221 (1973). Consensual or explicit authority for lawful possession is generally present when a user of a motor vehicle receives explicit consent to operate the vehicle. *Byrd*, 138 S. Ct. at 1521. *Thomas*, 447 F.3d at 1199. Moreover, apparent authority is present when the user of a motor vehicle is entrusted with an item as such to be able to not only use, but also, consent to the search and seizure of such vehicle. *See Bustamonte*, 412 U.S. at 218. Here, Ms. Austin did not (1) have lawful possession of the car, (2) have apparent authority to use the car or consent to a search under the Fourth Amendment.

Generally, there is an expectation of privacy associated with a rental car because the circumstances surrounding possession and control are lawful, even if he is not the authorized driver explicitly named in the rental agreement. *Byrd*, 138 S. Ct. at 1521. In *Byrd*, the defendant's girlfriend immediately provided him with keys to a rental car moments after she validly signed the rental agreement. *Id.* at 1524. The defendant departed with the rental car and

later placed his personal effects in the trunk of the vehicle. *Id.* That same day, the defendant was pulled over and the arresting officer discovered that the defendant was not listed on the rental agreement. *Id.* The officer concluded that the defendant lacked a reasonable expectation of privacy in the car, and therefore could not object to a search of the vehicle. *Id.* The Court concluded that drivers do not always lack a reasonable expectation of privacy in a rental car when they are not listed on the rental agreement. *Id.* at 1521. Specifically, this Court reasoned that "there is no reason why the expectation of privacy that comes from lawful possession and control and the attendant right to exclude would differ depending on whether the car is rented or owned by someone other than the person in the current possession of it." *Id.* at 1528. The defendant was given lawful possession of the keys from an authorized renter of the vehicle, cementing his property interest, and therefore his privacy interest in the vehicle. *Id.* at 1524. This affirmed the rationale established in *Rakas v. Illinois* that only an individual "who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of [the] right to exclude." *Id.* at 1527.

Further, when a driver has apparent authority to operate a vehicle, he is not required to consent to a Fourth Amendment search. *Bustamonte,* 412 U.S. at 221. For example, in *Schneckloth v. Bustamonte,* an officer pulled over six men when he observed that one of the vehicle's headlights and all license plate lights were out. *Id.* at 220. Of the occupants in the vehicle, only one possessed a license, and the licensed occupant explained that the vehicle belonged to his brother. *Id.* The officer then inquired whether he could search the vehicle. *Id.* After the licensed occupant provided consent to search, the officer searched the vehicle and found stolen checks. *Id.* To affirm whether the licensed occupant had the ability to consent to the search of the vehicle, the court analyzed the test provided by the state Supreme Court:

"Whether in a particular case an apparent consent was in fact voluntarily given or was in submission to an express or implied assertion of authority" is a question of fact. *Id.* at 231 (citing *People v. Michael*, 45 Cal. 2d 751, 753 (1955)). The court found that the facts of the case indicated that there was no coercion or duress to submit the car for inspection by the officers, and because the owner entrusted the car to his brother, the defendant had apparent authority over the search of the vehicle in order to raise a violation of the Fourth Amendment. *Id.* at 234.

In this case, the District Court and the Court of Appeals incorrectly determined that an unlisted driver on a rental agreement is dispositive of whether a defendant may have standing to assert a Fourth Amendment violation. However, they correctly found that unlike the defendants in both *Byrd* and *Bustamonte*, Ms. Austin lacked the requisite property interest needed to establish standing because she did not have valid authorization to consent to a search. Specifically, the District Court and the Court of Appeals noted that because Ms. Austin did not explicitly receive permission from her "on-and-off again" partner, Ms. Llyod, to use the YOUBER account, the circumstances which led to Ms. Austin's use of the account, were "suspect at best." R. at 12.

Notably, in *Byrd* the defendant was actually given explicit use of the vehicle because his girlfriend gave him physical possession of the keys, and in *Bustamonte* the defendant was entrusted with the vehicle. Conversely, Ms. Austin only initially had this authority to use the YOUBER account at the start of her relationship with Ms. Lloyd and she was not entrusted with the account, or the vehicle. R. at 18. When the relationship between Ms. Austin and Ms. Lloyd ended, however, there was no longer any explicit permission for Ms. Austin to continue use of the YOUBER account. R. at 19. In fact, Ms. Lloyd cancelled the credit card associated with her YOUBER account, switched service providers, and did not speak to Ms. Austin for over a year

prior to the incident in this case. R. at 19-20. In the only instance that Ms. Lloyd spoke to Ms. Austin, there was no definitive promise that the relationship would resume. R. at 19. Rather, the conversation only confirmed that Ms. Austin still did not have authority, or consent to use the YOUBER account for her own gain. R. at 19.

Accordingly, Ms. Austin's unauthorized use of the YOUBER account prevented her from having a lawful property interest in the vehicle, and therefore there is no reasonable expectation of privacy under the Fourth Amendment.

B. Without authorization of either YOUBER or Ms. Lloyd, Ms. Austin's expectation of privacy within the vehicle is unreasonable.

Ms. Austin unlawfully possessed an interest in the rental car and therefore, did not have a reasonable expectation of privacy to provide her with Fourth Amendment protections. Justice Harlan's concurrence in *Katz v. United States* set forth a two-pronged analysis to determine whether an individual has a reasonable expectation of privacy within an area. *Katz v. United States*, 389 U.S. 347, 361 (1967). First, an individual must exhibit an actual subjective expectation of privacy. *Id.* Under this prong, a subjective expectation exists when an individual, through his conduct, demonstrates an active desire to maintain such privacy. *Rakas*, 439 U.S. at 152. Second, the subjective expectation of privacy must be one that society is prepared to recognize as "objectively reasonable." *Minnesota v. Olson*, 495 U.S. 91, 92 (1990). This second prong determines whether the individual's expectation, "viewed objectively, is justifiable under the circumstances." *Katz*, 389 U.S. at 361. As a result, an individual cannot claim an expectation of privacy that is not both subjectively manifested and objectively reasonable. *Id.*

A subjective purview of privacy alone does not automatically entitle a person Fourth Amendment protection. Courts have held that "one who intentionally uses a third party to procure a rental car by a fraudulent scheme for the purpose of committing a crime is no better

situated than a car thief." *Byrd*, 138 S. Ct. at 1523 (quoting *Rakas*, 439 U.S. at 142). Here, Ms. Austin did not have a subjective purview of privacy because she is synonymous to that of the car thief discussed in *Byrd*. *Byrd*, 138 S. Ct. at 1523. This Court has previously established that an individual does not have a reasonable expectation of privacy in stolen property. *Rakas*, 439 U.S. at 142. In fact, this Court emphasized that an interest in stolen property is inexplicable. *Id.* Even if this Court found that Ms. Austin has a subjective expectation of privacy due to the presence of her belongings and other personal effects in the car, she still does not have protection under the Fourth Amendment because her expectation of privacy is not objectively reasonable.

This Court has noted that "a burglar plying his trade in a summer cabin during the off season may have a thoroughly justified subjective expectation of privacy, but it is not one which the law recognizes as 'legitimate.'" *Byrd*, 138 S. Ct. at 1529 (*citing Rakas*, 349 U.S. at 143). In the present case, there is an even lesser view of objective reasonableness. At the time of the search, Ms. Austin was in a public vehicle. R. at 3. A vehicle, according to the Supreme Court in *Carney*, has a lesser privacy interest than a house because it is (1) pervasively regulated; (2) readily mobile; and (3) not stationary in a residential area. *California v. Carney*, 105 S.Ct. 2066 (1985) (holding that the defendant does not have an objectively reasonable subjective view of privacy even though their personal effects are in the vehicle). Society places a lesser objective view of privacy in such areas. Here, the vehicle had a bright pink YOUBER sticker indicating that it was a public vehicle. R. at 2. Thus, Ms. Austin had a lesser view of privacy and was not entitled to Fourth Amendment protection because she used a public vehicle, which was not stationary in a residential area, that was pervasively regulated, and readily mobile.

Because Ms. Austin did not have permission to use the rental car, she did not have a property or possessory interest, or a reasonable expectation of privacy. Therefore, this Court

should deny Ms. Austin's motion to suppress evidence because the search of the rental vehicle did not violate the Fourth Amendment to give Ms. Austin standing to contest the search.

II. Pursuant to the Fourth Amendment and the context of *Carpenter*, the Government's acquisition of YOUBER location data did not constitute a "search."

The District Court and Court of Appeals correctly ruled that Ms. Austin had no reasonable expectation of privacy while using the YOUBER app between October 3, 2018, and January 3, 2019. As a result, the courts properly held that the collection of GPS location data from YOUBER did not constitute a "search" within the meaning of the Fourth Amendment and the context of *Carpenter v. United States. See Carpenter*, 138 S. Ct. 2206 (2018). The Fourth Amendment ensures "the right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. Amend. IV. Because the Fourth Amendment "protects people, not places," these protections have expanded beyond property rights to include certain expectations of privacy. *Katz*, 389 U.S. at 362. Considering that "personal location information maintained by a third party" does not implicate property rights, this Court in *Carpenter* applied the *Katz* reasonable expectation of privacy test. *See Carpenter*, 138 S. Ct. at 2214-15. *Katz v. United States* set forth a two-part inquiry to determine whether an expectation of privacy is protected under the Fourth Amendment. *See Katz*, 389 U.S. at 362. First, courts determine whether an individual has manifested a subjective expectation of privacy. *See Smith v. Maryland*, 442 U.S. 735, 740 (1979). Further, if a subjective expectation does exist, the second factor concerns whether that expectation is either based in property law or is one that society is prepared to recognize as reasonable. *See Id*. However, if a person voluntarily conveys the "private" information or activities to third-parties, they cannot then claim any expectation of privacy within that information. *See United States v. Miller*, 425 U.S. 435, 443 (1976). As a

result, a Fourth Amendment "search" occurs when the government violates a subjectively and objectively reasonable expectation of privacy in information that has not been voluntarily conveyed to third-parties. *See Id*.; *Katz,* 389 U.S. at 361.

Therefore, pursuant to the *Katz* factors, the Government's acquisition of YOUBER location data is not the product of a "search" because (1) Ms. Austin did not manifest a subjective expectation of privacy in her YOUBER location, and any resulting baseless expectation is not one that society is prepared to recognize; and (2) she voluntarily disclosed the location information to YOUBER, Ms. Lloyd, and the general public.

A. Ms. Austin did not have a reasonable expectation of privacy in her YOUBER location information.

The "touchstone of Fourth Amendment analysis" is whether a person has a "constitutionally protected reasonable expectation of privacy." *California v. Ciraolo*, 476 U.S. 207, 211 (1986). The *Katz* reasonable expectation factors determine whether (1) the individual has exhibited a subjective expectation of privacy, and whether (2) that expectation is reasonable by societal standards. As a result, "when an individual 'seeks to preserve something as private,' and his expectation of privacy is 'one that society is prepared to recognize as reasonable,' [this Court has] held that official intrusion into that private sphere generally qualifies as a search." *Carpenter*, 138 S. Ct. at 2213 (*citing Smith*, 442 U.S. at 740).

i. Ms. Austin did not exhibit a subjective expectation of privacy in publicly renting and driving YOUBER vehicles.

Ms. Austin did not demonstrate any legitimate measures to safeguard her YOUBER location information. The first factor set forth in *Katz* concerns whether the individual, through his or her conduct, exhibited an actual expectation of privacy. *See Smith*, 442 U.S. at 740.

Although subjective expectations cannot be scientifically gauged, courts consider the defendant's conduct, location and accessibility of the asserted expectation of privacy. *See Id*. at 743. Specifically, a subjective expectation does not exist when a person does not take normal precautions to maintain their privacy. *See Rakas*, 439 U.S. at 152.

For example, in *California v. Ciraolo*, the government suspected the defendant of growing marijuana in his backyard. *See Ciraolo*, 476 U.S at 209. Because the police were unable to view over the defendant's ten-foot inner fence and six-foot outer fence surrounding his property, they employed aerial surveillance to view the backyard. *See Id.* Although the Court stated that the defendant "clearly…and understandably" took normal precautions to maintain privacy from street-level views, the Court declined to acknowledge a subjective expectation regarding aerial surveillance. *Id.* at 214. Unlike the defendant in *Ciraolo*, Ms. Austin failed to exhibit any "normal precautions" in keeping her location private. *Id*. In fact, Ms. Lloyd's account was the only "obstacle" concealing Ms. Austin's YOUBER locations. Yet in using Ms. Lloyd's account, Ms. Austin was undoubtedly aware that Ms. Lloyd too had access to information related to the account's usage. R. at 19. Accordingly, just as one cannot expect a fence to ward off aerial observation, one cannot expect the use of another person's account to effectively conceal their own activities. Unlike the defendant in *Ciraolo* who erected a fence to prevent street-level views, Ms. Austin took no precautions to prevent any "street-level" observations. *Ciraolo*, 476 U.S. at 214. While renting vehicles, Ms. Austin accessed the cars in public YOUBER parking stalls. R. at 2. Further, not only did she drive the vehicles in public while "visible to the naked eye," but she did so behind a windshield with an easily identifiable "bright pink YOUBER logo." *Ciraolo*, 476 U.S. at 214; R. at 2. If two fences do not preclude all public observations, certainly Ms. Austin's actions don't either. *See Ciraolo*, 476 U.S. at 213. Thus, an individual has not exhibited

sufficient privacy precautions in their location when one publicly rents a vehicle on another person's account and then drives it in public with a readily identifiable logo on the windshield. R. at 2.

In *Smith v. Maryland*, at the government's request, a phone company recorded the defendant's phone number dial history through a pen register. *See Smith*, 442 U.S. at 737. This Court ultimately rejected the notion that any person entertains an actual expectation of privacy in the phone numbers they dial. *See Id*. at 742. The Court reasoned that telephone users know that (1) they must convey numerical information to the phone company to complete a call; (2) that the company records the information; and (3) that the information is used for a variety of legitimate business purposes. *See Id.* Similarly here, YOUBER users know that (1) they must use location data to complete each rental; (2) that the company records the information; and (3) that the information is used for a variety of legitimate business purposes. R. at 2, 29-30. Additionally, the *Smith* Court emphasized that most phone books, whether a user has read it or not, disclose that the phone company can help authorities in identifying the origins of calls. *See Smith*, 442 U.S. at 742-43. Just as the phone books in *Smith*, the YOUBER app, in this case, discloses in its privacy policy that a wide variety of information is automatically collected and disclosed; including time usage and GPS location. R. at 29-30. It is immaterial whether the YOUBER app user has actually read the privacy policy.

Additionally, each time a user rents a vehicle, the app uses GPS technology to connect a user to a vehicle. Moreover, the rental agreement communicates that YOUBER collects data including time and distance limitations on usage. R. at 23. Further, the YOUBER vehicle is to be left in a YOUBER parking stall. R. at 2. Accordingly, users understand that without the use of GPS analytics, rental transactions could not be completed, and an app with forty million users

nationwide "could not keep track of all [of their] vehicles." R. at 23. Although Ms. Austin claims to "hate being on the 'grid,'" her actions defy this claim: using a cell phone, downloading and connecting to an immensely popular app that tracks GPS location to which Ms. Lloyd also had access, and publishing her name on "ranting blog posts." R. at 2, 18. Ms. Austin was not only incredibly ineffective at "staying off the grid," but she also claimed ownership of nothing. R. at 26, 27. Thus, "although subjective expectations cannot be scientifically gauged," a YOUBER user, under these circumstances, certainly cannot legitimately "harbor any general expectation that [their GPS location] will remain secret." *Smith*, 442 U.S. at 743.

ii. The baseless subjective expectation of privacy is not one that society is prepared to accept as reasonable.

Assuming Ms. Austin did manifest a subjective expectation of privacy, society is not prepared to recognize it as reasonable. The second factor to the *Katz* privacy test considers whether, in the existence of a subjective expectation of privacy, that expectation is one that society is prepared to recognize as reasonable. *See Katz*, 389 U.S. at 361. In this determination, the expectation undergoes a "hypothetical reasonable person" test. *United States v. Jones*, 565 U.S. 400, 427 (2012). When examining innovative surveillance tools, courts have considered the system's future developments, and whether the technology is in general public use. *See Kyllo v. United States*, 533 U.S. 27, 34 (2001); *Carpenter*, 138 S. Ct. at 2209. Accordingly, a reasonable person does not have a legitimate expectation of privacy regarding narrow information that is required to use an internationally recognized app.

This Court in *Carpenter* ultimately ruled that the acquisition of CSLI was a violation of the petitioner's Fourth Amendment rights. *See Carpenter*, 138 S. Ct. at 2223. There, the government obtained records spanning 127 days which included "12,898 location points

cataloging Carpenter's movements – an average of 101 data points per day." *Id*. at 2212. The Court noted that because a cell phone is "almost a 'feature of human anatomy,'" the massive amount of CSLI information provided an "intimate window into [the petitioner's] life" and revealed much more than simply his movements. *Id*. at 2217. Importantly, the Court stressed that the rule they adopt "must take account of more sophisticated systems that are already in use or in development." *Id*. at 2218 (*citing Kyllo*, 533 U.S. at 36, 121).

Here, the government obtained information far less abundant and comprehensive than that in *Carpenter*. The YOUBER information spanned thirty-five less days and did not depart from the confines of the vehicles. R. at 2, 22. Unlike all-encompassing CSLI that "faithfully follows its owner beyond public thoroughfares and into private residences," the YOUBER location information begins and ends within the company's vehicle. *Carpenter*, 138 S. Ct. at 2218; R. at 22. The Court in *Carpenter* itself distinguished these fact patterns in stating that, "while individuals regularly leave their vehicles, [people] compulsively carry cell phones with them all the time." *Carpenter*, 138 S. Ct. at 2218. However, the dissimilarity between vehicle location information and CSLI is evident not only in current technology, but also in its possible "developments." CSLI has the future capability to determine not only whether a person is in a house, but where they are within that house. Conversely, GPS vehicle location is at or near its possible capabilities because YOUBER can already pinpoint their vehicle's location. Accordingly, the *Carpenter* Court emphasized that CSLI monitoring provides "an intimate window into a person's life, revealing…his familial, political, professional, religious, and sexual associations." *Id*. at 2217.

This Court in *United States v. Jones*, echoed similar concerns regarding the intimate details revealed about a person through their locations. *See Jones*, 565 U.S. at 415. In *Jone*s, a

GPS tracking device was placed on the petitioner's vehicle and subsequently monitored for twenty-eight days. *See Id*. at 403. The Court majority ultimately ruled that this constituted a search, though based the decision on the physical trespass of planting the tracking device on the vehicle. *See Id*. at 411. However, Justice Alito's concurrence considered the expectations test; mirroring some concerns of the later *Carpenter* majority. *See Id*. at 415. Both the *Carpenter* Court and the five justice *Jones* concurrence feared that prolonged surveillance reveals much more than just a persons' location, but whether they are "a weekly church goer, a heavy drinker, a regular at the gym," etc. *Id.*; *Carpenter*, 138 S. Ct. at 2217.

Here, the YOUBER location information provides a great deal less information. The record states that Ms. Austin used the vehicles only to travel to work and protests. R. at 2. In addition to falling far short of the "intimate window" provided by CSLI, the YOUBER location information provides little more than what is publicly known of the user. Ms. Austin's "political associations" that may be revealed in her drives to protests are largely discernable in her public blog and poems that regularly discuss financial corruption and openly "call for rebellion" and the "downfall" of a particular bank. R. at 1.

Importantly, the *Jones* concurrence noted that although "relatively short-term monitoring" of a person's movements on public streets accords with society's reasonable expectations, "longer term GPS monitoring…of most offenses impinges on expectations of privacy." *Jones*, 565 U.S. at 430. This is largely due to the fact that society's expectation has been that the government would not, and could not "secretly monitor and catalogue every single movement of an individual's car for a very long period." *Id*. This expectation is inapplicable to the case at bar. Although the YOUBER information spanned a longer period of time, the information was in no way "secretly" obtained. R. at 3. A "world of difference" exists in

knowingly using an app that requires GPS analytics to use a rental car, and having a GPS device secretly planted on your own vehicle. Further, six bank robberies that span two states is not like "most offenses." *Jones*, 565 U.S. at 430; R. at 1. Thus, the YOUBER location information is exceedingly less invasive and revealing than that of the GPS device in *Jones* or the CSLI in *Carpenter*.

B. Ms. Austin voluntarily her disclosed her YOUBER location information to multiple third-parties.

Finally, even if Ms. Austin can prove a reasonable expectation of privacy, Ms. Austin knowingly conveyed location information to YOUBER, Ms. Lloyd, and the general public. Courts have repeatedly held that a person has no legitimate expectation of privacy in information they voluntarily turn over to third-parties. *See Smith*, 442 U.S. at 743-44. This "third-party doctrine" sets forth that once something is relinquished to the public, it is no longer entitled to private protection. *See Carpenter*, 138 S. Ct. at 2216. Accordingly, "once frustration of the original expectation of privacy occurs, the Fourth Amendment does not prohibit governmental use of the now nonprivate information." *See United States v. Jacobsen*, 466 U.S. 109, 117 (1984). Furthermore, "one has a lesser expectation of privacy in a motor vehicle" because "a car has little capacity for escaping public scrutiny." *United States v. Knotts*, 460 U.S. 276, 281 (1983). Recently, in regard to this principle, the *Carpenter* Court further considered the depth, comprehensive reach, and level of voluntariness in the disclosure of information. *See Carpenter*, 138 S. Ct. at 2223. Thus, limited public information that is knowingly conveyed to third-parties will likely terminate a subjective expectation of privacy.

In *United States v. Miller*, this Court ruled that bank records are not subject to Fourth Amendment protections. *See United States v. Miller*, 425 U.S. 435, 443 (1976). Resembling

Smith, this Court noted that because bank records are voluntarily disclosed to banks, no reasonable expectation of privacy exists. *See Id.*; *Smith*, 442 U.S. at 743. Consequently, because the individual did not possess, own, or control the information, government acquisition of the records did not constitute a search. *See Miller*, 425 U.S. at 443. Similarly, Ms. Austin's location was "voluntarily conveyed to [YOUBER] and exposed to their employees in the ordinary course of business." *Id*. at 442. Just as a person must convey bank information to complete a transaction, a person must convey location information to YOUBER to initiate and complete a vehicle rental. R. at 2. People in these circumstances "[take] the risk, in revealing [their] affairs to another, that the information will be conveyed…to the Government." *Miller*, 425 U.S. at 442. Ms. Austin was reasonably aware that YOUBER, or at minimum its employees, kept records of each vehicle's location to ensure, among other things, no violations of its rental agreement were made. R. at 2. Similar to the defendant in *Miller*, Ms. Austin did not possess, own, or control the information obtained by the government. Additionally, the information obtained in *Miller* contained "all records" related to the defendant; including all transactions completed through two accounts over the course of 114 days. *Miller*, 425 U.S. at 437. Not only was the acquisition of information in *Miller* over a substantially longer period than that of Ms. Austin in this case, it was also more privatized in nature. *See Id*. at 438; R. at 3. Bank records include information regarding financial status, purchase history, and job status; building a comprehensive image of a person and their day-to-day lives. Importantly, bank records can also track a person's location by when and where transactions were made. Where vehicle location (in this case) simply places you in a mall parking lot, transaction information (as gathered in *Miller*) places you within a specific store.

In *Carpenter v. United States*, this Court narrowed the "third-party doctrine" and denied its application to historic cell-site location information (CSLI). *See Carpenter*, 138 S. Ct. at

2220. CSLI is registered several times a minute on most modern cell-phones, "even if the owner is not using one of the phone's features." *Id*. at 2211. This Court noted that there is "a world of difference" in the types of information addressed in *Smith* and *Miller* and the "exhaustive chronicle of location information" implicated by CSLI. *Id*. at 2219. Consequently, this Court refused to extend the third-party doctrine to CSLI because "without any affirmative action…it achieves near perfect surveillance, as if it had attached an ankle monitor to the phone's user." *Id.* at 2218. Importantly, this Court noted that it did not disturb the third-party doctrine's significant purpose, but simply declined to expand it to CSLI. *See Id.* at 2220.

Unlike in *Carpenter*, the YOUBER location information acquisition in this case is in no way as invasive or involuntary. YOUBER tracks vehicle location only after a user logs into the app, accepts a rental agreement, and enters the vehicle. R. at 22. Adversely, CSLI is logged by "virtually any activity," such as "incoming calls, texts, or e-mails." *Carpenter*, 138 S. Ct. at 2220. Here, the record states only that Ms. Austin used the app to travel to work and protests -- in no way implying GPS monitoring as frequent as "several times a minute." Id. at 2211; R. at 2. The *Carpenter* Court additionally noted that because cell phones are "such a pervasive and insistent part of daily life…there is no way to avoid leaving behind a trail of location data." *Carpenter*, 138 S. Ct. at 2220. Although popular in the United States, YOUBER cannot be compared to the indispensability of cell phones. YOUBER's "trail of location data" can be avoided simply by walking, carpooling, taxi, etc. Because (1) GPS monitoring is an understood necessity in using YOUBER; (2) the app informs users of its use of GPS analytics; and (3) the app essentially monitors only the rental vehicle, a user voluntarily turns over location information while using YOUBER.

In summary, (1) Ms. Austin did not manifest a subjective expectation of privacy in her YOUBER location and the groundless expectation is not legitimized by societal standards; and (2) she voluntarily disclosed the information to multiple third-parties. As a result, because Ms. Austin can claim no reasonable expectation of privacy in her location information, the government's acquisition of the location data of the YOUBER vehicles did not constitute a "search" within the meaning of the Fourth Amendment and the context of *Carpenter*.

CONCLUSION AND PRAYER FOR RELIEF

For these reasons, the United States of America requests that this Court affirm the Appellate Court's denial of the Defendant's motions to suppress evidence. The Respondent specifically requests that this Court find that Officer Kreuzberger did not violate the Defendant's Fourth Amendment rights when he searched the YOUBER vehicle that the Defendant was not authorized to use. Additionally, the Respondent requests that the Court affirm the Appellate Court's denial to suppress the data collected by YOUBER because it did not constitute a "search" within the meaning of the Fourth Amendment and context of *Carpenter*.