No. 4-422

In The

Supreme Court of the United States

JAYNE AUSTIN

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent,

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

BRIEF FOR THE RESPONDENT,
UNITD STATES OF AMERICA

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STATEMENT OF ISSUES PRESENTED

I. Does a driver of a rental vehicle, who is both unauthorized and without permission of the authorized lessee, have standing to contest a search of the owner's vehicle?

II. Does the government's acquisition of an individual's public and voluntarily relinquished global positioning system location data amount to a "search" under the Fourth Amendment and *Carpenter v. United States*?

STATEMENT OF FACTS

On January 3, 2019, Officer Kreuzberger, pulled over Jayne Austin ("Petitioner"), who was the sole occupant of a YOUBER car. R. at 2. Petitioner was arrested on suspicion of bank robbery after the officer found items connecting Petitioner to a robbery earlier that day. R. at 3. She was then connected to a total of six bank robberies over a course of 90 days, each of which travelled with YOUBER, a rental, rideshare vehicle service. R. at 4. Most unusual, Petitioner was never registered with YOUBER. R. at 2.

Petitioner owns a blog, *THEY ALL FALL DOWN!*, where she voiced her opinion on financial corruption. R. at 1. Her posts primarily target the bank *Darcy and Bingley Credit Union* and seems to threaten to rob the bank. R. at 1. For example, on November 5, 2018, she wrote: "Darcy and Bingley… I'll show you how mean you can be.… Robbing and pillaging." R. at 26. A month later she added it was time to "take what is ours." R. at 27.

Petitioner took pride in an immaterial lifestyle and being off the "grid," as she publicized in her blog. R. at 1, 18. She proclaimed having "no home," "no property," and described property and ownership as "NOTHING." R. at 26, 27. In fact, Petitioner only lives in cohabitation facilities, which allow her to rent a room for a maximum of two weeks. R. at 1. She only travels through, YOUBER, a car rental software application available on mobile devices and used by forty million people across the United States. R. at 2, 22.

Individuals download the YOUBER application through their phone and are connected with the cars through Bluetooth and global positioning system ("GPS") technology. R. at 2. To create an account, uses must accept a rental agreement including YOUBER's disclaimer: YOUBER tracks each active vehicle's location through GPS technology "to ensure that no one other than the registered renter operates YOUBER vehicles." R. at 3-4. The GPS information

goes through the search engine Smoogle, using satellite mapping technology. R. at 22, 29. YOUBER limits a user's rental period per "vehicle for a maximum distance of 500 miles" or a maximum one-week time period. R. at 23.

Petitioner used her ex-partner's, Martha Lloyd's ("Ms. Lloyd") account. R. at 2. While Ms. Lloyd once authorized Petitioner to use Ms. Lloyd's credit card account, Petitioner was never an authorized user on Ms. Lloyd's YOUBER account. R. at 20. To her regret, Ms. Lloyd allowed Petitioner to use Ms. Lloyd's information during their relationship. R. at 18-19. Ms. Lloyd testified that Petitioner did not seek or receive permission to use Ms. Lloyd's YOUBER account after they separated in September 2018. R. at 19-20.

On January 3, 2019, Officer Kreuzberger stopped Petitioner for failing to stop at a stop sign. R. at 2. Petitioner, driving a YOUBER car, presented the officer with her license and the YOUBER application. R. at 2. However, Petitioner was not listed on YOUBER's rental agreement and so Officer Kreuzberger searched the vehicle without seeking consent. R. at 3. While searching the vehicle, dispatch alerted officers to look for a YOUBER rental vehicle that was used by a robbery suspect at a nearby *Darcy and Bingley Credit Union.* R. at 3. Dispatch described a 2017 Black Toyota Prius which Petitioner was driving, a partially matching license plate, a handgun matching the one found in her Petitioner's car, and a maroon mask matching the one found in her car. R. at 3. The officer arrested Petitioner under suspicion of bank robber because she fully matched this description. R. at 3.

Detective Hamm investigated Petitioner and discovered five open bank robbery cases occurring between October 15, 2018 and December 15, 2018 which matched the modus operandi of the January 3, 2019 robbery. R. at 3. Detective Hamm subpoenaed YOUBER to receive the

GPS location data related to the account Petitioner used between the dates of the robberies. R. at 3.

YOUBER records revealed "Ms. Lloyd's account was used to rent cars in the locations" and "times of each of the other five robberies." R. at 4. YOUBER cars are identified by a "small, bright pink YOUBER logo on the bottom corner of the passenger side" windshield. R. at 2. Surveillance footage showed the same Prius at four of the robberies. R. at 4. A YOUBER car was used in each robbery. R. at 4. Detective Hamm recommended the US Attorney's Office to charge Petitioner with six counts of bank robbery under 18 U.S. Code § 2113. R. at 4.

SUMMARY OF THE ARGUMENT

This Court should affirm the lower courts' decisions to deny Petitioner's motion to suppress. Petitioner, Ms. Austin, had no standing in contesting the search of the YOUBER rental car. In addition, the government's acquisition of Petitioner's GPS location data was not a search.

Petitioner did not have a subjective or objective expectation of privacy. By publicly disclaiming all ownership interests in property, Petitioner effectively ended her legitimate expectation of privacy. Possession alone is insufficient to assert a subjective expectation of privacy and it is inconsistent to affirmatively assert ownership of property only after charges have been filed. Thus, Petitioner does not have a subjective expectation of privacy.

Petitioner does not have an objective expectation of privacy because she was an unauthorized user of the rental car and did not have Ms. Lloyd's permission. Under the Bright-Line, the Modified Bright-Line, and the Totality of Circumstances tests, Petitioner does not have standing to challenge a search of a rental car under which she is an unauthorized user. While each test acknowledges extraordinary circumstances as exceptions, Petitioner's reason for being an unauthorized driver did not qualify as an excuse under any of the three tests. Therefore,

Petitioner does not have an objective expectation of privacy and consequently does not have standing to contest the search of the vehicle.

The government did not physically intrude on Petitioner's person, house, papers or effects because it was Petitioner who installed YOUBER and its GPS-tracking function. Not only did Petitioner install the application, she used YOUBER for over a year. A reasonable person would know that a map that indicates the user's location has the technology to track location. Therefore, accessing shared information does not amount to a Fourth Amendment search because Petitioner did not assert an expectation of privacy and society would not deem such an expectation reasonable.

Although in *Carpenter v. United States.*, this Court has established an exception regarding relinquishment of cell site location information ("CSLI") to a third-party, the exception should not be expanded to include GPS location data in this situation. CSLI intrudes beyond the Government's subpoena in this case especially because Detective Hamm requested significantly less information of YOUBER than the data collected in *Carpenter*. Forty million YOUBER users across the United State recognize the benefits, and risks, of volunteering their locus to a third-party. Accordingly, this court should affirm the appellate court's denial of Petitioner's motion to suppress because obtaining GPS location data is not a search.

STANDARD OF REVIEW

The District Court interpreted the Fourth Amendment and *Carpenter v. United States.* as to not allow Petitioner, Ms. Austin, standing to contest the search of a rental vehicle and for the government to obtain her location data. The issues at hand present a "question of law, against the backdrop of facts as found by the [lower] court." *People v. Carvajal*, 202 Ca. App. 32 487, 495

(Cal. App. 2d. 1988). Thus, the legal determinations by the District Court of standing and search are reviewed de novo. *United States v. Smith*, 263 F. 3d 571, 582 (6th Cir. 2001).

ARGUMENT

I. Petitioner Does Not Have Standing to Contest the Search of the Rental Vehicle That She Rented on Ms. Lloyd's Account Without Permission Because Petitioner Did Not Display a Subjective Expectation of Privacy and Does Not Have an Objective Legitimate Expectation of Privacy.

Being searched is on its own is insufficient to protest an unlawful search. *Jones v. United States,* 362 U.S. 257, 261 (1960). Petitioner, Ms. Austin, "bears the burden of showing that… she had a reasonable expectation of privacy," was a "victim of the search," and she "belongs to the class for whose sake the constitutional protection is given." *Id.* A petitioner must claim to have either "owned or possessed the seized property or to have had a substantial possessory interest in the premises searched." *Id.* The Court in *Katz* outlined a two-part inquiry to determine if a defendant has a "constitutionally protected reasonable expectation of privacy." *Cal. v. Ciaraolo,* 476 U.S. 207, 211 (1986). The inquiry is 1) if "the individual manifested a subjective expectation of privacy in the object;" and 2) whether "society is willing to recognize that expectation as reasonable." *Id.* Further, Petitioner must demonstrate *both* her "actual subjective expectation" and the objective expectation of privacy to be reasonable. *Cooper v. State,* 162 So. 3d 15, 16 (Fla. 1st Dist. App. 2014). A legitimate expectation of privacy by law "must have a source outside the Fourth Amendment." *United States v. Smith*, 263 F.3d at 581. The source must be "either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by law." *Id*.

A. Petitioner Did Not Manifest a Subjective Expectation of Privacy Because She Terminated Any Interests By Publicly Disclaiming All Property Interests.

To assert standing, Petitioner must first show her legitimate expectation of privacy in the car searched. *Rawlings v. Kentucky,* 44 U.S. 98, 104 (1980). Petitioner must have taken "normal precautions to maintain [her] privacy." *Ciraolo*, 476 U.S. at 21. However, possession of the

item searched is not "a substitute for a factual finding" that there was a "legitimate expectation of privacy." *United States v. Salvucci*, 448 U.S. 83, 100 (1980). Conversely, that which Petitioner "knowingly exposes to the public, even in [her] own home or office, is not a subject of Fourth Amendment protection." *Katz v. United States*, 389 U.S. 347, 351 (1967). Petitioner prides herself in minimalism and in her public blog posts, consistently disclaims all ownership or property interests. R. at 1, 26. Her public disclaimer of her property interests precludes Petitioner's challenge to the legality of Officer Kreuzberger's search. *United States v. Hawkins,* 681 F.2d 1343, 1345 (11th Cir. 1982).

A defendant's behavior indicates if the defendant has made efforts to assert a property or privacy interest. *Ciraolo*, 476 U.S. at 211. In *Katz*, the court determined Katz had made efforts to protect the privacy of his conversation when he occupied a telephone booth and shut the door behind him to ensure that what he said "into the mouthpiece" would not be broadcasted "to the whole world." 389 U.S. at 352. The concurring opinion added that if Katz was "in the open," his conversations "would not be protected against being overheard" as such an expectation "would be unreasonable." *Id.* at 351.

As an avid blogger and minimalist who takes pride in living without property, Petitioner publicly wrote on separate occasions that she did not claim property. R. at 1, 27. She described property and ownership as "NOTHING" on another occasion. *Id.* These are not "normal precautions" or efforts made to assert a property or privacy interest. Petitioner's blog is "in the open" rather than a private journal because it is readily accessible to anyone on the internet. To claim a property or privacy interest, she would not "broadcast" her disclaimer "to the whole world" her disclaimer. Petitioner publicly disavowed a property interest yet here contradictorily asserts property interests of both the rental car and items found in the car. While petitioner may

claim her being in possession is an assertion of privacy interest, courts have previously held that possession cannot be substituted for a finding of privacy expectation. *Salvucci,* 448 U.S. at 100.

In *Hawkins*, the court held the defendant did not express a legitimate expectation of privacy because he disclaimed ownership of the searched suitcase. 681 F.2d at 1343. The court explained that "disclaiming ownership or knowledge of an item ends a legitimate expectation of privacy in that item." *Id.* at 1345. Another court added that "a disclaimer of proprietary or possessory interest in the area searched… terminates the legitimate expectation of privacy." *People v. Dees*, 221 Cal. App. 3d. 588, 594 (Cal. App. 1st Dist. 1990). It is "inconsistent to assert a privacy interest" and to "disassociate yourself." *Id.* at 595. The court went so far as to hold that "the absence of *any* evidence of ownership, possession or control of such area or item will preclude a successful challenge to the legality of that search." *Id.*

Petitioner is similar to the defendant in *Hawkins* who disclaimed property interests until charged and prosecuted. Only then did both Petitioner and Hawkins assert a property interest and an expectation of privacy, when convenient. However, without expressing a legitimate or any expectation of privacy and disclaiming ownership interest, Petitioner may not challenge the legality of the search because her behavior effectively terminated the legitimate expectation.

B. Petitioner Did Not Have an Objective Legitimate Expectation of Privacy Because She Did Not Have Any Permission to Operate the Vehicle.

Courts analyze an objective expectation by questioning "whether the government's intrusion infringes upon the personal and societal values' protected by the Fourth Amendment." *Ciraolo*, 476 U.S. at 212. The primary focus is on "legitimate expectation of privacy in the invaded place," rather than the "property right." *Rakas v. Illinois*, 439 U.S. 128, 142 (1978). Specifically, being wrongfully present at the scene of a search does not enable one "to

object to the legality of the search." *Id.* at 141. As it relates to rental vehicles, being in "lawful possession and control of a rental car [while] not listed on the rental agreement [does] not defeat [one's] otherwise reasonable expectation of privacy." *Byrd v. United States*, 138 S. Ct. 1518, 1531 (2018).

In *Byrd*, officers searched a rental vehicle without Byrd's consent because he was not listed on the rental agreement as an authorized driver. *Id.* at 1523. Driving a rental car as an unauthorized driver is on its own insufficient to defeat a legitimate expectation of privacy. *Id.* at 1351. The United States Supreme Court declined to consider the Government's reason for Byrd not being on the rental agreement only because the Government did not introduce this theory in its appeals with the District Court and the Court of Appeals. *Id.* a 1530. However, other courts have analyzed this question but are split on three tests 1) Bright-Line; 2) Modified Bright-Line; and 3) Totality of the Circumstances. *State v. Mann*, 162 Idaho 36, 41 (Idaho 2017).

i. Petitioner Does Not Have Standing, Under the Bright-Line Test, to Challenge the Search Because Petitioner Did Not Receive Permission

Under the Bright-Line test, applied by a majority of the circuits, a driver not listed on the rental agreement does not have standing to challenge the search, "absent extraordinary circumstances." *Cooper*, 162 So. 3d. at 16. In *Cooper*, the court held the converse of *Byrd*'s holding: "The mere fact that an unauthorized driver of a rental car obtained permission from the renter is insufficient to create an objectively reasonable expectation of privacy." *Id.* at 18. A majority of the federal circuits apply this test. *Id.* at 16.

For example, in *Mann*, the defendant was pulled over in a rental car which was rented by his "living as married" partner. 162 Idaho at 36. The court applied the Bright-Line test and found that Mann lacked standing to challenge a search of the car finding that Mann car because

although the lessee gave him permission, Mann was not an authorized driver. *Id.* Further, there were also no extraordinary circumstances.

In *Cooper,* the court explained the policy of this reasoning. The rental car is owned by a rental company, and not the lessee. The court reasoned that when "the rental company explicitly" limits the renter to an authorized user, "then clearly the owner has not given permission to anyone but the renter." *Cooper,* 162 So. 3d at 17. The lessee and the rental company are in "privity of contract" and thus an unauthorized driver's "expectation of privacy [is] materially different" than of the lessee. *Id.* at 18. As in *Mann*, the court in *Cooper* did not find truly unique circumstances to warrant an exception. *Id.*

As the defendants in *Mann* and *Cooper,* Petitioner was not an authorized user on the YOUBER account. R. at 2. Unlike the defendants in *Mann* and *Cooper*, Ms. Lloyd did not even have permission from Ms. Lloyd to continue using Ms. Lloyd's account after their recent fallout. R. at 19. In addition to the court in *Cooper*, other courts[1] agree that, absent extraordinary circumstances, even Ms. Lloyd's permission would be irrelevant since Petitioner is not an authorized user. R. at 12. Under the Bright-Line test, Petitioner does not have standing to challenge the search.

ii. Petitioner Does Not Have Standing Under the Modified Bright-Line Test Because She Failed to Present Any Evidence of Permission.

The Modified Bright-Line test, adopted by a minority of courts, "equates an unauthorized driver of a rental car with a non-owner driver of a privately-owned car." *United States v. Thomas*, 447 F.3d 1191, 1197 (9th Cir. 2006). Under this approach, a driver has standing only if the authorized user grants the driver permission. *Id*. In *Thomas*, the defendant instructed other

[1] *See United States v. Boruff*, 909 F.2d 111 (5th Cir. 1990) - No standing because "girlfriend was the only legal operator of the vehicle, and she had no authority to give control of the car to the defendant." *See also*, *United States v. Wellons*, 32 F.3d 117 (4th Cir. 1994) "Although though the defendant may have had the renter's permission to drive the vehicle, he did not have the permission of the rental company, the owner of the vehicle."

people to rent cars for him but he was not listed on the rental agreements as an authorized driver. *Id.* at 1194. Although the court adopted the less restrictive, Modified Bright-Line test, "Thomas failed to show that he received… permission to use the car" and the Ninth Circuit concluded he lacked standing to challenge the search. *Id.* at 1199.

The *Smith* court relied on *United States. v. Muhammad,* where the court applied the Modified Bright-Line test and required the defendant to present at least "some evidence of consent or permission from the lawful owner/renter to give rise to a legitimate expectation of privacy." *United States v. Smith,* 263 F.3d at 584 (citing *United States v. Muhammad* 58 F.3d 353 (8th Cir. 1995)). When the defendant failed to present any evidence of permission, the court denied the defendant standing. *Smith*, 263 F.3d at 584..

Petitioner, like the defendants in Thomas, has not presented any evidence of consent or permission from Ms. Lloyd. R. at 19. Ms. Lloyd testified that Petitioner did not receive or seek to receive permission to use Ms. Lloyd's accounts since at least September 2018. R. at 19. At most, Petitioner can demonstrate Ms. Lloyd consented before their fallout in September 2018. *Id.* But since their break-up in September 2018, Ms. Lloyd was not even aware Petitioner used Ms. Lloyd's account, let alone permitted or even consented. R. at 19. Therefore, even under the Modified Bright-Line test, Petitioner does not have standing because she failed to present any evidence of permission.

iii. Petitioner Does Not Have Standing Under the Totality of Circumstances Test Because She Did Not Have Permission from the Authorized Driver, Had No Relationship with theYOUBER, and Had No Relationship with the Lessee.

The Totality of Circumstances test, applied only by the Sixth Circuit, acknowledges a "…broad presumption that unauthorized drivers do not have standing to challenge a search." *Mann,* 162 Idaho at 41. The presumption "can be overcome if the driver shows a reasonable expectation of privacy based on the totality of the circumstances." *United States v. Smith*, 263

F.3d at 586. The five influential factors are: 1)Whether the defendant had a driver's license; 2) Relationship between the unauthorized driver and the lessee; 3) Driver's ability to present the rental documents; 4) The lessee's permission to use the car; and most significantly, 5) The driver's relationship with the rental company. *Id*.

In *United States v. Smith,* the court considered these circumstances and viewed them as "truly unique" exceptions. *Id*. Smith was driving a rental car with his wife, was pulled over for failing to maintain lane control and subsequently searched. *Id.* at 575. He was an unauthorized driver on the rental agreement while his wife was an authorized driver. *Id.* at 586. After considering the totality of the circumstances, the court held Smith had standing to contest the search. *Id.* at 587.

Smith had a valid driver's license. *Id.* at 586 . He was able to present the rental agreement with sufficient information regarding the vehicle. *Id*. His wife was not only listed as the authorized driver on the rental agreement but was with him and gave him permission to drive the vehicle. *Id.* at 585. The court found that most significantly, Smith personally had a business relationship with the rental company because he called to reserve the vehicle, paid for the car with his own credit card, and had his wife pick up the vehicle with the confirmation number the rental company gave him. *Id.* Smith had done everything but pick the car up himself.

Petitioner's circumstances are notably different than those of Smith's. Petitioner merely had her driver's license and the rental agreement. R. at 2. But even the rental agreement she presented was obtained under an entirely different means than Smith. However, Petitioner did not have a good relationship, if any, with the lessee, Ms. Lloyd. R. at 18. Further, Petitioner did not have permission from Ms. Lloyd who was even unaware of Petitioner's continued use. R. at 19. Unlike Petitioner, Smith's wife was present to testify to the officer that she, as an authorized

user, permitted Smith to drive. *United States v. Smith,* 263 F.3d at 585. Finally, Petitioner did not have any relationship with rental company because she did not create a user agreement and did not pay for the car with her own credit card. R. at 18. The rental company probably did not know she even existed. Therefore, under the more lenient Totality of the Circumstances test, Petitioner still fails to have standing to contest the search.

II. Detective Hamm's Request of Petitioner's GPS Location Data from YOUBER Was Not a Search Because Petitioner Did Not Have A Reasonable Expectation, The Data Was Provided to a Third Party, And *Carpenter* Does Not Apply To GPS Location Data.

The Fourth Amendment protects " [t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." (U.S. Const. amend. IV). A search occurs if an individual's interest in his or her privacy is compromised. *United States v. Jacobsen,* 466 U.S. 109, 113 (1984). Police searches violate Fourth Amendment privacy rights through governmental intrusions, invading a privacy expectation that society deems reasonable, or privacy invasions that infringe public policy. *See Katz*, 389 U.S. 347 (1967); *United States v. Alabi*, 943 F.Supp.2d 1201 (D.N.M. 2013); *Carpenter v. United States*, 138 S.Ct. 2206 (2018).

A. The Government Did Not Physically Intrude Petitioner's Effects Because She Voluntarily Downloaded YOUBER to a Phone That Revealed Her Location.

A physical intrusion clearly indicates a search has occurred. *Alabi*, 943 F.Supp.2d at 1241. Notwithstanding exceptions, the government's physical intrusions of "persons, houses, papers, or effects" to obtain any information violate the Fourth Amendment. *United States v. Jones*, 565 U.S. 400, 408 n5 (2012). In *Smith v. Md*, the petitioner alleged the police department intruded and violated his privacy by requesting the telephone company to install a pen register to record the numbers petitioner dialed. 442 U.S. 735, 738 (1979). The Supreme Court held that the police did not intrude into his home, person, papers, or effects because the pen register was not installed to petitioner's phone but at the telephone company's headquarters. *Id*. at 741.

Similar to *Smith v. Md.*, where the information went to the telephone company, Petitioner's location data goes to Smoogle, who then forward it to YOUBER. *Id.* Accordingly, Petitioner disclosing her location to YOUBER is analogous to Smith dialing phone numbers that were disclosed to the telephone company. *Id.* While the subpoena to YOUBER was an attempt for the police to obtain information about Petitioner, there was no physical intrusion. Both Petitioner and Smith volunteered their information by using their devices. R. at 2, 3. Petitioner independently installed the YOUBER application on her cellphone which by design tracked her location when she used it. R. at 2.

B. Receiving GPS Location Data Is Not a Search Under the Fourth Amendment Because Petitioner Could Not Expect It To Stay Private, Society Would Deem Such an Expectation Unreasonable, and She Gave Information to a Third Party

The Fourth Amendment was created as a safeguard. *Katz*, 389 U.S. at 351. Courts give deference to the "sanctity" of homes, because there people expect privacy and peace rather than physical or visual intrusions. *Kyllo v. United States*, 533 U.S. 27, 28 (2001). What someone knowingly exposes to the public is not subject to Fourth Amendment protection. *Katz*, 389 U.S. at 351. People have a right to maintain their privacy only when they demonstrate an effort to preserve their privacy. *Id.* *Katz* ruled a search occurs when the government violates a person's subjective expectation of privacy that society deems to be reasonable. *Id.* at 360-61.

i. Petitioner Did Not Exhibit a Personal Belief to Maintain Her Privacy Because She Voluntarily Downloaded YOUBER and Its Tracking Functions.

Petitioner bears the burden of demonstrating she exhibited an intent and personal belief to preserve her privacy. *Smith v. Md*, 442 U.S. 735, 740. Petitioner may argue she preserved her privacy by staying "off the grid" and not registering with social media or other applications. However, Petitioner was actively "on the grid" through the use of her blog and YOUBER. R. at 18. While it may seem that Petitioner sought to preserve her privacy by proclaiming hate for "The Man," her behavior and actions paint a different picture.

Petitioner's online blog, unequivocally put her on the "grid." R. at 26-27. Although it is unclear if her name is on the blog, the internet reveals the owner, creator, or author of a blog through the user's internet service provider address or ICANN (Internet Corporation for Assigned Names and Numbers). *Vizer v. VIZERNEWS.COM*, 859 F.Supp.2d 75, 77-78 (D.D.C. 2012). Petitioner was not keeping her blog a secret especially because people knew about it, like Ms. Lloyd. R. at 26. While her actions on the blog show Petitioner's lack of intent to maintain privacy, her behavior away from the blog further prove her lack of intent.

Ms. Lloyd testified Petitioner wanted to be off the grid to prevent the government, or "The Man," from knowing her information. R. at 2-3, 18-19. Petitioner was aware that just by subscribing to various online services, companies automatically gain access to information she claimed she wanted to preserve. R. 18-20. At most, being off the "grid" was a principle she advocated to prevent information from reaching the "wrong" hands. R. 18-20, 26.

Analogous to *Smith,* where the court stated that "regardless of … location, petitioner had to convey that number to the telephone company," Petitioner had to convey her geographic location to YOUBER, through Smoogle, in order to use and rent a vehicle. *Smith v. Md.*, 442 U.S. at 743. In contrast to her ideology, Petitioner used technology that shared her data with companies like YOUBER. Petitioner could have traveled by train or a bus which do not request or save her location data. By choosing not to, she agreed to share her location data.

Although only using YOUBER once could show that Petitioner did not seek to keep her location private, Petitioner used the application numerously, for an extended time period. R 18. This YOUBER account was created on July 27, 2018 and Ms. Lloyd testified that she let Petitioner use it throughout their romantic relationship. R. at 2,19. Until January 3, 2019, when the police stopped Petitioner, Petitioner used YOUBER for about a year and a half. R. at 2. Ms.

Lloyd revealed Petitioner used YOUBER to attend protests and drive to work. R. at 19. Petitioner use Ms. Lloyd's account fairly frequently. Petitioner must have known that YOUBER continued to collect her location data throughout this time.

YOUBER's corporate policy reveals YOUBER automatically collects and stores location information from the user's device through GPS and Bluetooth. R. at 29. Even without reading the policy, a person first using YOUBER may not conceptualize its functionality. However, the more someone uses the application, the more clear it becomes how YOUBER displays vehicle closest to the user's location. Based on her collective behavior, Petitioner did now exert a subjective expectation of privacy to the location data Smoogle provided YOUBER.

ii. An Expectation of Privacy While Using YOUBER Would Be Unreasonable to Society Because YOUBER Users Knowingly Sacrifice Some Privacy When Activating the Application.

A person contesting a search must have a legitimate expectation of privacy that society would recognize as reasonable. *Jacobsen*, 466 U.S. at 123. A reasonable expectation of privacy is "critically different" from the person's [own] expectation, even if … justified." *Kyllo,* 533 U.S at 45-46. While influential, no factor is alone is dispositive. So, courts most often consider 1) the intention of the framers, 2) the reason the individual used their location, and 3) society's belief that certain areas deserve "scrupulous" protection from the government. *Oliver v. United States,* 466 U.S. 170, 177-78 (1984).

a. The Framers of the Constitution Sought to Forbid Arbitrary Police Searches Rather Than Access to Non-Intrusive Shared Data.

It is true that court rulings must conserve a "degree of privacy ... that existed when the Framers adopted the Fourth Amendment." *Kyllo,* 533 U.S at 34. This principle stemmed in response to officers' arbitrary searches of homes to find potential criminal activity. *Id.* Consequently, people responded and sought "to place obstacles in the way of a too permeating police surveillance." *United States v. Di Re*, 322 U.S. 581, 595 (1948). Police

attempts to obtain GPS location data of a suspected criminal is not "too permeating police surveillance." *Id.* at 595. The framers did not intend to prevent police officers from finding information that is helpful in criminal investigations.

The framers' primary intention was to prevent arbitrary searches. *Riley v. California*, 575 U.S. 373, 403 (2014). Arbitrary is defined as "existing or coming about seemingly at random or by chance or as a capricious and unreasonable act of will." *Arbitrary*, Merriam-Webster Dictionary (2019). A privacy survey asked respondents if the Fourth Amendment should be interpreted to allow police an unrestricted freedom in obtaining information. *See* discussion *infra* Part II.B.ii.c. A total of 17% responded that they agreed or strongly agreed and 25% said they were neutral. *Id.* Obtaining location data of Petitioner's travel details to confirm her involvement in up to six robberies of *Darcy and Bingley Credit Union* so that they can prevent future crimes is not arbitrary. R. at 3. On the contrary, requesting Petitioner's location data was wholly reasonable.

b. Petitioner Used Her Phone's Location Services to Locate and Use YOUBER Vehicles.

Petitioner's used the same GPS location data as Ms. Lloyd, which created an unreasonable expectation of privacy. In *United States v. Diggs*, the court reasoned that because there would be movements of another person besides Diggs, it would reduce the "robustness" of the information gathered thus establishing a lack of reasonable expectation of privacy. 385 F.Supp.3d at 652 (N.D. Ill. 2019).

Petitioner needed to use Smoogle GPS services, through YOUBER, to locate the nearest available vehicle. R. at 2. She therefore volunteered her location to receive YOUBER's assistance in locating the nearest available vehicle. R. at 2. YOUBER's policy does not state if their application assists drivers in reaching their destinations as well. However, if YOUBER is

at all similar to the commonly used Uber, Lyft, and Gig Car Share, it is likely this navigation feature is available with YOUBER as it is with these other companies.

Although Ms. Lloyd prefers to use BIFT, the facts do not indicate if Petitioner was aware of the change. R. at 20. Petitioner had every reason to assume she was still sharing a YOUBER account. R. 18-20. Society would find such an expectation of privacy to be unreasonable because the data "would reflect [another's] movement." *Diggs*, 385 F.Supp.3d at 352.

c. Americans Do Not Believe YOUBER's GPS Location Requires Rigorous Privacy Protection Because GPS is Widely Used in Today's Society.

Unlike a home, courts have established that a car is less likely to escape public scrutiny. *Carpenter*, 138 S.Ct. at 1229. Drivers knowingly exposed their cars to the public because they travel on public roadways and are thus not "a subject of Fourth Amendment protection." *Smith v. Md.*, 442 U.S. at 442. For example, in *United States. v. Knotts,* this Court agreed that a vehicle traveling on the street voluntary conveys its direction, stops, destinations, and more, to everyone desirous of looking and wanting to follow. 460 U.S. 276, 281-82. (1983).

In this case, Petitioner voluntarily traveled in a car through public roads where anyone on the road can physically see her location and track her. R. at 2. Petitioner knowingly exposed herself to the public each time she stepped outside. Society would not find an expectation of privacy to be reasonable while publicly traveling, especially in a publicly shared vehicle. R. at 2.

Today, Global positioning systems are in general public use. A Pew Research Center survey conducted January 8 through February 7, 2019, found that 81% of Americans own a smartphone. Anderson, Monica. *Mobile Technology and Home Broadband 2019*. Pew Research Center: Internet and Technology, June 13, 2019. This study commenced merely 4 days after the police stopped Petitioner. R. at 2. Smartphones are inherently GPS enabled. GPS ability is common across applications, like YOUBER, which does not function without it. In *Kyllo,* the

court analyzed facts converse to this case. There, sense enhancing technology, that was "not in general public use," constituted a search when it was used to see inside the home of an individual. *Kyllo v. United States*, 533 U.S at 28. Conversely, 81% of Americans are using GPS enabled smartphones, leaving no doubt that usage of GPS technology is in general public use.

While not every smartphone user will agree to publicize their GPS location data, the test does not consider everyone as an individual, but as a whole. A 2018 survey by Middle State Tennessee University asked respondents if police should have access to cell phone information if they can connect their need for access to a criminal investigation. Horton, James Easton. "Privacy Under Pressure: A Survey of Privacy Expectations in the Modern Age." (master's thesis, Middle State Tennessee University, 2018), 32-34. An outstanding 80.9% answered in the affirmative. *Id.* A staggering 80.9% of society would permit Detective Hamm to subpoena YOUBER to obtain Petitioner's location data. This is testimony that a majority of the public do not find scrupulous privacy protections for GPS necessary.

iii. Petitioner Cannot Assert a Fourth Amendment Protection Because She Assumed the Risk of Exposure by Disclosing her Location to a Third Party.

Those who reveal information to a third-party also risk their information to be exposed to the Government. *United States v. Miller*, 425 U.S. 435, 443 (1976). In *Miller*, Miller contended his personal records were provided to the bank for a limited purpose. *Id*. at 442. This Court responded that the bank's records were not Mr. Miller's private effects. *Id*. at 440. Bank records were ruled bank property because they were necessary for the bank's business operations, whether or not the client assumed they would remain strictly confidential. *Id*. at 443.

Similarly, GPS locations are YOUBER's property because they are essential to business operations. Without GPS tracking, YOUBER would immediately lose track of each vehicle. R.

at 29. It is essential that YOUBER knows the status and location of its vehicles. *Id*. If someone stole or misplaced a vehicle, YOUBER can locate it through Bluetooth and GPS. Further, by connecting a user to a vehicle, other users are able to know which YOUBER vehicle is available for rent. Absent this feature, the YOUBER service would be worthless, as a user would need to physically check if a vehicle is available.

Tracking vehicles also helps YOUBER collect data and statistics of its vehicle usage for better marketing strategies. For example, if YOUBER's GPS feature reveals users do not rent around the city of Moot-Court, YOUBER can then know to better advertise or leave the city. In that same vein, YOUBER can increase vehicle availability in cities where their GPS data reveals a high demand.

Petitioner voluntarily disclosee her location data to YOUBER, who require GPS access for business operations. As in *Diggs*, at the request of the police, YOUBER shared its data. *Diggs,* 385 F.Supp.3d at 652. Therefore, geographical information that Smoogle provides YOUBER are YOUBER's proprietary records and permitted by the Fourth Amendment to be shared with the government. *Jacobsen*, 466 U.S. at 117.

C. *Carpenter v. United States* Is Inapplicable Here Because It Is Only a Narrow Exception of the Third Party Doctrine Regarding Cell Site Location Data, and Should Not Be Expanded to Include GPS Data.

In *Carpenter v. United States*, the Court held the third party doctrine is inapplicable to cell site location information. 138 S. Ct. 2206 (2018). There, a court order requested cell phone site location information (CSLI) of an individual for seven concurrent days. *Id.* at 2212. Although wireless carriers were collecting and storing this information for business purposes, the court concluded that people had an expectation of privacy in their physical location and movements. *Id* at 2216. The court reasoned that CSLI is detailed, encyclopedic and effortlessly compiled. *Id.*

CSLI provided the wireless carriers with the individual's relative location whether or not the individual was using his cellphone. *Id.* at 2220. Location information is sent whenever there is an incoming or outgoing text, call or email. In addition, location information is also collected when someone opens an application to check for weather, news, social media, or if their phone is on. *Id.* The court ruled that "more than six days of cell-site records constitutes a search." *Id.* at 2224. As *Carpenter* stands today, six days is allowed. *Id.* at 2224. The court provided a narrow third-party exception for CSLI by considering the deeply revealing nature of CSLI, its depth, breadth and comprehensive reach, and the automatic nature of its collection. *Id.* at 2223. When those three factors are applied to GPS location data, there is no doubt that "cell-site records present even greater privacy concerns than the GPS monitoring in *Jones*," so that *Carpenter* should not be expanded to include GPS. *Id.* at 2210.

i. The GPS Tracker Used by YOUBER is Significantly Less Intrusive Than the Overly-Intrusive CSLI Limited in Carpenter.

GPS tracking of a vehicle is far less intrusive than wiretapping or human observation because it does not reveal secret conversations, like in *Katz*. Bert-Jaap Koops and Bryce Clayton Newell, *Location Tracking by Police: The Regulation of 'Tireless and Absolute Surveillance'*, 9 UC Irvine L. Rev 635 (2019). *Carpenter* compared CSLI to the GPS in *Jones* by stating that the time stamped data of CSLI was a window into an individual's private life. *Carpenter*, 138 S. Ct. at 2217. The court contended that CSLI granted unlimited access to a cell phone user's specific daily movements in addition to the user's "familial, political, professional, religious and sexual associations. *Id.* (citing *Jones,* 565 U.S. at 415). However, the GPS location data in this case only tracks a user in very limited circumstances: when driving a YOUBER vehicle. Unlike a cellphone, Petitioner does not carry a vehicle with her at all times. *Id.* at 2217-19. Therefore, the GPS tracking in this case is very distinguishable to the intrusive revelations of CSLI.

ii. Courts Analyze the GPS's Depth, Breadth, and Comprehensive Reach to Limit Intrusiveness from Being Unreasonable.

In *Carpenter*, Justice Kennedy's dissent noted that CSLI information reveals where a user was within an area of a dozen city blocks. *Id.* at 2225. The government concedes that GPS data is more precise than CSLI, as it could locate someone by about an area of fifteen feet. *Id.* at 2225. This however, is in itself not dispositive.

In analyzing breadth, courts consider how long the information is recorded. As stated under the nature factor, CSLI records the information "every moment of every day." *Carpenter*, 138 S. Ct. at 2218. In other words, the information obtainable through CSLI is around the clock, twenty-four hours a day, seven days a week. The GPS location data acquired through YOUBER's use of Smoogle is distinguishable. Through the data gathered, YOUBER only obtains the information of Petitioner's whereabouts while Petitioner is physically using a YOUBER vehicles. R. at 28.

The *Carpenter* court held that seven days worth of CSLI is excessive. *Carpenter*, 138 S. Ct. at 2216. The dissent in *Jones* found 28 days of GPS location data as "surely" too long, but provided no reasoning. *Jones,* 565 U.S. at 430. Measuring collection of GPS location data by days is not appropriate considering the small depth of information attained. Since the concern lies in not revealing a person's entire life, GPS location data should be analyzed in the context of hours. The more hours per day acquired, the higher level of privacy intrusion.

In *Carpenter*, the court did not object to obtaining an individual's CSLI for six entire days, equivalent to 144 hours. 138 S. Ct. at 2224. Detective Hamm requested GPS location data between October 3, 2018 and January 3, 2019, a total of three months or 90 days. R. at 3. YOUBER's policy provides that a vehicle may be rented for a maximum of one week or 500 miles. R. at 23. Because Petitioner uses YOUBER to drive to work and protests, she likely does

not reach the 500 mile limit within a week. In fact, per the U.S. Department of Transportation Federal Highway Administration, Americans drive an average of 36.92 miles per day. *Average Annual Miles Per Driver by Age Group.* FHWA. (March 29, 2018), https://www.fhwa.dot.gov/ohim/onh00/bar8.htm. The information contains more than just the commute between work and home. It is likely that Petitioner falls within the confines of the study. An average of driving thirty-seven miles a day amounts to approximately one hour of driving. Therefore, over the course of 90 days worth of location data requested, Detective Hamm only received approximately 90 hours worth of information - significantly less than the 144 hours this Court found acceptable in *Carpenter*. 138 S. Ct. at 2224.

iii. YOUBER's Location Tracking System Is an Inherent and Automatic Feature Necessary for the Application to Adequately Function.

This factor revisits the analysis to the user's assumption of risk in relation to the third-party doctrine. As previously concluded, forty million users have granted some information to YOUBER. The high amount of subscriptions is testimony that the benefit of using YOUBER outweighs giving YOUBER minimal personal data. This conclusion aligns with Justice Alito's concurring statement in *Jones:* "new technology," like GPS, could be increasingly convenient, "at the expense of privacy" that many people find to be "worthwhile." *Jones*, 565 U.S. at 427. The acquisition of Petitioner's GPS location data does not run afoul of societal values. *Ciraolo***,** 45. U.S. at 212.

CONCLUSION

Petitioner does not have standing to contest the search of the vehicle because by disclaiming ownership interests until after she was charged, Petitioner effectively ended her subjective expectation of privacy. Further, Petitioner does not have an objective expectation of privacy because she was an unauthorized user of the rental vehicle, did not receive permission

from the rental company or the authorized lessee, and does not meet any exceptions of the three tests. Under the Fourth Amendment, the police's acquisition of Petitioner's location from YOUBER is not a search because Petitioner did not have a subjective or objective expectation of privacy. *Carpenter v. United States.* should not be so broadly expanded to classify GPS location data as a search. For these reasons, the United States of America requests that this Court affirm the lower courts' decisions.