

No. 4-422

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 2019

JAYNE AUSTIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF FOR RESPONDENT

ATTORNEYS FOR RESPONDENT

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

- I. Whether an individual has standing to contest the search of a rental vehicle when the vehicle was rented on the driver's on-and-off-again partner's credit card and rental account without the on-and-off-again partner's permission to rent or drive the rental vehicle.
- II. Whether the acquisition of the location data of a rental vehicle constitutes a "search" within the meaning of the Fourth Amendment and *Carpenter v. United States*, 138 S. Ct. 2206 (2018), when the driver voluntarily conveyed her location information to the rental agency with the understanding that the information would be used to track the vehicle's location.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

This appeal addresses Jayne Austin’s challenge to her conviction of six charges of bank robbery. R. at 10. She contends that the admission of evidence acquired during the search of her rental car violated her Fourth Amendment rights and should have been suppressed. Additionally, she argues that the location data YOUNBER provided constituted a warrantless search and should have been suppressed. R. at 10.

Background and Beliefs of Jayne Austin. Ms. Austin operates a blog where she posts poetry she writes about the corruption in the United States banking industry. R. at 1. Many of her posts focus on the bank *Darcy and Bingley Credit Union*. R. at 1. Ms. Austin has called for rebellion against *Darcy* and even called for its downfall. R. at 1. She focuses on the bank’s marginalization of its lower-income members and its prioritization of higher-income members. R. at 1.

She prides herself in her minimalistic and immaterial lifestyle. R. at 1. Ms. Austin has no permanent residence; instead, she lives in co-habitation facilities like PODSHARE. R. at 1. These facilities allow individuals to rent spaces for at least one night and a maximum of fourteen nights. R. at 1. To travel to work and protests, Ms. Austin uses the relatively new car rental software application (“app”) YOUNBER. While she does not have an account of her own, she uses her on-and-off-again partner’s, Martha Lloyd, account. R. at 2.

YOUNBER’s Policy and Agreements. YOUNBER is a popular app that allows users to rent vehicles at a fixed hourly rate. R. at 2. Rentals work much like a standard rental service: a rental agreement is made in the app, and the renter pays the fixed fee. R. at 2. The cars are parked in YOUNBER-owned parking stalls and facilities. R. at 2. Only YOUNBER users may rent YOUNBER

cars. R. at 2. The user may rent a vehicle for a maximum distance of 500 miles or a period of up to one week. R. at 2. At the end of the rental period, the user returns the car to a designated YOUNBER facility. R. at 2.

Per its corporate policies and procedures, YOUNBER tracks every YOUNBER vehicle using GPS technology and Bluetooth signals from each user's cellphone to ensure that no one other than the registered renter operates YOUNBER vehicles. R. at 3. Upon creating an account, the user must accept the terms and conditions including a clause permitting the company to track each user's location when renting a vehicle. R. at 4. The GPS information is then transferred through the company's mainframe and filtered by the search engine Smoogle using satellite mapping technology. R. at 4. Every two minutes YOUNBER tracks the timestamped location of the rented vehicle. R. at 4.

The Traffic Stop and Subsequent Search. On January 2, 2019, Ms. Austin rented a black 2017 Toyota Prius (license plate number: R0LL3M) through the YOUNBER app. R. at 2. Later that day she was stopped by Officer Charles Kreuzberger for failure to stop at a stop sign. R. at 2. While verifying the information provided by Ms. Austin, Officer Kreuzberger noticed her name was not listed on the rental agreement in the YOUNBER app. R. at 2. Officer Kreuzberger told Ms. Austin he did not need her consent to search the car. R. at 3. Officer Kreuzberger searched the trunk where he found a BB gun modeled after a .45 caliber handgun with the orange tip removed, a maroon ski mask, and a duffel bag containing \$50,000 and blue dye packs. R. at 3. Officer Kreuzberger reported that he believed the car to be "lived in," as there were many personal items in the car. R. at 3.

The Arrest and Investigation. During his investigation, Officer Kreuzberger received a dispatch to look out for a black 2017 Toyota Prius with a YOUNBER logo driven by a suspect

who allegedly robbed a nearby *Darcy and Bingley Credit Union*. R. at 3. The suspect was seen wearing a maroon ski mask and using a .45 caliber handgun. R. at 3. Based on the items found in the car, the dispatch, and the partial match of the license plate, Officer Kreuzberger arrested Ms. Austin under suspicion of bank robbery. R. at 3. Two days later, Detective Boober Hamm took on Ms. Austin's case. R. at 3.

Detective Hamm discovered five open bank robbery cases between October 15, 2018 and December 15, 2018 which matched the modus operandi of the robbery on January 3, 2019. R. at 3. Detective Hamm checked his notes and saw there was a YOUBER logo on the car Ms. Austin was driving on the date of her arrest. R. at 3. He served a subpoena duces tecum on YOUBER to obtain all the GPS and Bluetooth information related to the account Ms. Austin allegedly used between October 3, 2018 through January 3, 2019. R. at 3.

Records from YOUBER revealed that Martha Lloyd's account was used to rent cars in the locations and at the times of each of the other five robberies. R. at 4. Surveillance footage from the banks showed the same black 2017 Toyota Prius was used at four of the bank robberies. R. at 4. The sixth robbery was also a YOUBER car: a yellow 2016 Volkswagen Beetle. R. at 4. After reviewing all the mapping data, Detective Hamm recommended charges with the U.S. Attorney's Office to have Ms. Austin charged with six counts of bank robbery. R. at 4.

II. NATURE OF THE PROCEEDINGS

The Federal District Court. Ms. Austin was charged by an indictment of six counts of bank robbery and incidental crimes. R. at 1; 18 U.S.C. § 2113 (2018). She was alleged to have robbed six *Darcy and Bingley Credit Unions* in California and Nevada. R. at 1. Ms. Austin filed two motions to suppress evidence in the trial court. R. at 1. The first motion regarded evidence gathered from the initial arrest. R. at 1. The second motion regarded location data obtained by a

private company. R. at 1. Both motions asserted that the searches were warrantless searches within the meaning of the Fourth Amendment. R. at 4.

Given Ms. Austin's temporary and limited relationship with the rental car supplied to her by YOUBER, the district court found she did not have a legitimate property interest or expectation of privacy in the vehicle. R. at 6. Ms. Austin did not own the vehicle, the vehicle was not rented in her name, and she did not have a sufficiently sustained relationship with the vehicle. R. at 6. The district court found Ms. Austin to lack standing to contest the legality of the initial search performed by Officer Kreuzberger. R. at 6.

Furthermore, the court found that the data collected by YOUBER and supplied to Detective Hamm rose to the level of concern analyzed in *Carpenter*. R. at 8. Ms. Austin willingly exposed the data she wished to suppress to a third party, Smoogle, as she accepted YOUBER's terms and conditions. R. at 8. The court found that such monitoring did not infringe upon "the privacies of life," as noted in *Carpenter*. R. at 8.

Due to using the vehicles in the public sphere and her unsubstantiated relationship with the vehicles, the court held the data failed to provide an "intimate window into a person's life, revealing not only [her] particular movements, but through them [her] familial, political, professional, religious and sexual associations." R. at 8. The court denied Ms. Austin's motion to suppress the information procured by Detective Hamm regarding Ms. Austin's location. R. at 8.

The Court of Appeals. Ms. Austin appealed her conviction of six charges of bank robbery. R. at 10. She contended that the district court erred in denying her motions to suppress evidence before her conviction. R. at 10. The court addressed two theories pertaining to the search of the rental car: reasonable expectation of privacy and property rights theory of standing. R. at 11, 12. The court held that an individual cannot have a valid property interest in a vehicle she had

fraudulently leased. R. at 12. Further, that individual has no reasonable expectation of privacy in a vehicle she shared with third parties and used illegally. R. at 12.

The court determined that the Government's warrantless search of the YOUNBER data pertaining to Ms. Austin's interactions with YOUNBER did not violate her Fourth Amendment rights. R. at 10. The court looked at whether Ms. Austin had a reasonable expectation to privacy and whether the third-party doctrine still applied. R. at 13, 14. The court held that Ms. Austin's exposures of her information to a third party for such a maintained period served as a forfeiture of a reasonable expectation of privacy and that the third-party doctrine may be limited but was not extinct. R. at 15. The court affirmed the district court's ruling and denied suppression of the evidence. R. at 15.

SUMMARY OF THE ARGUMENT

I.

The Court of appeals correctly determined that Ms. Austin did not have a Fourth Amendment interest in a rental car she had no legitimate basis to drive. Ms. Austin rented the YOUNBER on Ms. Lloyd's account and did not have Ms. Lloyd's explicit permission to rent and drive the YOUNBER. Therefore, Ms. Austin is not entitled to Fourth Amendment protections for doing something that she was prohibited from doing.

This Court has clearly established that automobile passengers cannot claim the protection of the Fourth Amendment against the search and seizure of evidence from a vehicle they did not own. Therefore, Ms. Austin's unauthorized use of the YOUNBER will not afford her additional constitutional protections afforded to owners of a vehicle. Additionally, Ms. Austin's possession and control of the YOUNBER was unauthorized so she lacks Fourth Amendment protections. This Court's precedent establishes that a person's wrongful presence at the scene of a search would

not enable a defendant to object to the legality of the search. A person without a legitimate presence will not receive the protection of the Fourth Amendment. Ms. Austin cannot claim a legitimate presence in the YOUNBER because she did not have Ms. Lloyd's explicit permission to rent or drive the YOUNBER.

Ms. Austin cannot legitimately expect privacy in the YOUNBER. She can establish no property rights in the YOUNBER because it was rented on Ms. Lloyd's account without Ms. Lloyd's explicit permission to rent or drive the vehicle. Additionally, Ms. Austin cannot establish that society would recognize non-property-based privacy rights in her unauthorized use of the YOUNBER. Ms. Austin's use of the YOUNBER was at worst theft and at best a breach of contract which if recognized would have a detrimental effect on property and contractual rights.

II.

The court of appeals correctly held that the Government's acquisition of the location data from YOUNBER did not constitute a Fourth Amendment search of Petitioner. Ms. Austin has no legitimate expectation of privacy in the business records YOUNBER used to track the rental vehicles from her cell phone. This Court has long held that a person cannot seek Fourth Amendment protections to object to the Government's acquisition of a third party's records that contain information about that person. The GPS data acquired by YOUNBER tracks the location of the rental vehicle, a vehicle in the public sphere. The tracking is limited to the location of the vehicle and does not follow the user if the YOUNBER app is not open. Additionally, this Court has held there is no reasonable expectation of privacy in information turned over voluntarily to a third party. When signing up for YOUNBER, users agree to have location information sent to YOUNBER. The individual using a YOUNBER vehicle has enough notice to know that such information will be used by the company. It is reasonable to assume that YOUNBER would turn

over GPS location data to a law enforcement agency for various reasons. YOUBER has an interest in protecting its business property, and if its property were suspected of being used in a crime, YOUBER would likely want to cooperate with the investigating authority.

Even if Petitioner could establish the acquisition of the GPS location data was a search, the Government's actions were constitutionally reasonable. Detective Hamm was operating within the proper procedure laid out by this Court. Detective Hamm limited his search to a current suspect in a string of bank robberies. His search turned up evidence that Martha Lloyd's account, the account used by Petitioner, was used to rent cars near the other robberies on the same day. The records Detective Hamm requested were limited to Ms. Austin's use of YOUBER vehicles during a specific period of time, the records were that of a third-party business and the nature of the subpoena was less intrusive than needed to raise Fourth Amendment protections.

This Court should affirm the judgment of the court of appeals.

STANDARD OF REVIEW

Courts review a district court's order on a motion to suppress evidence for clear error and the application of facts and inferences to its legal conclusion de novo. *United States v. Gil*, 204 F.3d 1347, 1350 (11th Cir. 2000) (per curiam). Courts review the sufficiency of evidence supporting conviction de novo, considering all evidence "in the light most favorable to the prosecution." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

ARGUMENT AND AUTHORITIES

I. MS. AUSTIN HAS NO FOURTH AMENDMENT INTEREST IN A RENTAL CAR SHE WAS NOT AUTHORIZED TO DRIVE.

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches." U.S. Const. amend. IV. The

Constitution indicates that “Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted.” *Rakas v. Illinois*, 439 U.S. 128, 133–34 (1978). This Court determined “it has long been the rule that a defendant can urge the suppression of evidence obtained in violation of the Fourth Amendment only if that defendant demonstrates his Fourth Amendment rights were violated by the challenged search.” *United States v. Padilla*, 508 U.S. 77, 81 (1993). For standing, “[e]xpectations of privacy protected by the Fourth Amendment need not be based on a common-law interest in real or personal property, or on the invasion of such an interest. Still, property concepts are instructive in determining the presence or absence of the privacy interests protected by the Fourth Amendment.” *Byrd v. United States*, 138 U.S. 1518, 1526 (2018). Accordingly, “more recent Fourth Amendment cases clarify that the test most often associated with legitimate expectations of privacy, which was derived from the *Katz* concurrence, supplements, rather than displaces, the traditional property-based understanding of the Fourth Amendment. *Id.* Ms. Austin does not have Fourth Amendment standing because her presence in the car was illegitimate since she did not have Ms. Lloyd’s explicit permission to drive the YOUBER.

To determine whether an individual has a legitimate privacy expectation in the place searched involves a careful analysis of the case facts and the individual’s justifiable expectations. *See Rakas*, 439 U.S. at 148–49. To assert Fourth Amendment protections and benefit from the exclusionary rule, a defendant must show a subjective privacy expectation that “society is prepared to recognize as reasonable.” *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). The reasoning for this requirement is that “Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted.” *Rakas*, 439 U.S. at 133–34 (quoting *Alderman v. United States*, 394 U.S. 165, 174 (1969)). Thus, a

defendant must be “a victim of a search or seizure as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else.” *Jones v. United States*, 362 U.S. 257, 261 (1960). Ms. Austin has neither a subjective expectation nor a reasonable expectation of privacy because she did not have Ms. Lloyd’s explicit permission to drive the YOUNBER.

This Court should affirm the decision of the Thirteenth Circuit Court of Appeals because a person does not have standing to challenge searches of effects that belong to someone else and neither property rights nor societal expectations support a Fourth Amendment interest in a YOUNBER she was not authorized to drive. Ms. Austin’s name was not on the rental agreement when she rented the YOUNBER. Ms. Austin failed to get explicit permission from the holder of the rental agreement to rent vehicles through the holder’s account. Ms. Austin used more than one YOUNBER vehicle during her period of criminal activity. Ms. Austin’s unauthorized possession of the YOUNBER did not make it hers or give her a reasonable expectation of privacy in it. Ms. Austin has no Fourth Amendment protections in the YOUNBER because it was not her YOUNBER and she legally could not drive it without Ms. Lloyd’s explicit permission.

A. Ms. Austin Does Not Have a Property Interest in the YOUNBER Because the Actual Renter of the YOUNBER Was Ms. Lloyd and Ms. Austin Did Not Have Ms. Lloyd’s Explicit Permission to Use Her Account to Rent the YOUNBER.

Ms. Austin’s only claim for Fourth Amendment protections in the search of her YOUNBER is that she was driving it; however, the YOUNBER was not rented in her name and she did not have the explicit permission of the holder of the rental agreement to rent the vehicle, let alone drive it. This Court should not recognize Fourth Amendment protections routed in an illegal activity. In Fourth Amendment analysis, “[i]t is beyond dispute that a vehicle is an ‘effect’ as that term is used in the Fourth Amendment.” *United States v. Jones*, 565 U.S. 400, 404 (2012).

Additionally, this Court has recognized that “[c]ars are not to be treated identically with houses or apartments for Fourth Amendment purposes.” *Rakas*, 439 U.S. at 148. Ms. Austin did not have a property interest in the YOUNBER because it was rented in Ms. Lloyd’s name and Ms. Lloyd did not give Ms. Austin explicit permission to drive the YOUNBER. Since Ms. Austin did not have Ms. Lloyd’s explicit permission to drive the YOUNBER, she was essentially in unlawful possession of the YOUNBER and should not receive a property interest in the YOUNBER. Ms. Austin cannot have a property interest in a YOUNBER that she neither owned nor rented and did not have Ms. Lloyd’s explicit permission to drive. A driver of a vehicle has no property interest in a vehicle that the driver is unauthorized to drive. Therefore, this Court should not recognize Ms. Austin’s claim for property interest when the YOUNBER was not rented in her name and she did not have the YOUNBER account holder’s explicit permission to rent or drive it.

Ms. Austin does not have a substantial property interest in the YOUNBER because it was not registered in her name, she did not have explicit permission to rent the YOUNBER on Ms. Lloyd’s credit card, and the YOUNBER was used to commit crimes. Property rights in the context of the Fourth Amendment focus on the defendant’s “right to exclude” others from the property being searched. *Kaiser Aetna v. United States*, 444 U.S. 164, 179–80 (1979). In *United States v. Jones*, this Court held, “[t]o establish ‘standing,’ Courts have generally required that the movant claim either to have owned or possessed the seized property or to have had a substantial possessory interest in the premises searched.” 565 U.S. at 412.

This Court should find that Ms. Austin does not have a valid property interest in the YOUNBER. Ms. Austin did not own the vehicle, so she does not have an ownership interest in the YOUNBER. The YOUNBER was not registered in Ms. Austin’s name so she does not have a valid rental interest in the YOUNBER. Additionally, Ms. Austin failed to receive explicit permission

from Ms. Lloyd to rent or drive the YOUNBER. For Ms. Austin to have a valid property interest in the YOUNBER, she should have rented the YOUNBER on her own account or received Ms. Lloyd's explicit permission to rent and drive the YOUNBER. Ms. Austin's relationship with the YOUNBER was both temporary and limited so she could not have a legitimate property interest in it. Ms. Austin's relationship with the YOUNBER was temporary because she rented multiple YOUNBERs during her period of criminal activity. Ms. Austin's relationship with the YOUNBER was limited because she was not the owner of the vehicle, on the rental contract for the vehicle, and did not have Ms. Lloyd's explicit permission to drive the vehicle. Because Ms. Austin did not have a sufficiently sustained relationship with any of the YOUNBER vehicles, she did not gain a legitimate property interest in any of them. The only property interest Ms. Austin had in the YOUNBER vehicles was derived from her wrongful presence in them. Therefore, Ms. Austin did not have a valid property interest in the YOUNBER.

Ms. Austin's only claim for property interest in the YOUNBER is that she was driving it; however, it was not rented in her name and she did not have the explicit permission of the account holder to rent the YOUNBER or drive it. This Court has never recognized property interest based on a person's illegal activity, and it should not do so today. This Court held, "[I]n order to claim the protection of the Fourth Amendment, a defendant must demonstrate that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable; i.e., one that has 'a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.'" *Minnesota v. Carter*, 525 U.S. 83, 88 (1998). Ms. Austin has failed to prove that she has a property interest in the YOUNBER for two reasons. First, Ms. Austin did not own the vehicle so she could not have an ownership interest in the YOUNBER. Second, Ms. Austin did not

have Ms. Lloyd's explicit permission to drive the YOUNBER. The YOUNBER was rented on Ms. Lloyd's account, so for Ms. Austin to gain a property right in the YOUNBER, she needed Ms. Lloyd's explicit permission to drive it. Furthermore, Ms. Austin cannot have a property right in something she is unauthorized to use.

Ms. Austin's use of the YOUNBER does not satisfy the legitimate-presence requirement of a Fourth Amendment claim. Ms. Austin had no legitimate basis to rent the YOUNBER on Ms. Lloyd's YOUNBER account. The YOUNBER was rented on Ms. Lloyd's YOUNBER account with Ms. Lloyd's credit card. R. at 2. Ms. Lloyd is Ms. Austin's on-and-off-again partner, and Ms. Austin did not have Ms. Lloyd's explicit permission to rent the YOUNBER on her account or drive the YOUNBER. R. at 2. Ms. Austin should not have Fourth Amendment protections in the YOUNBER because of her wrongful presence in it. Ms. Austin does not have a YOUNBER account of her own, meaning she did not have a right to use the YOUNBER. Ms. Austin used the account of her on-and-off-again partner to rent the YOUNBER without Ms. Lloyd's explicit permission to do so. Therefore, Ms. Austin should not receive Fourth Amendment protections because her presence in the YOUNBER was illegitimate because the YOUNBER was rented on Ms. Lloyd's account and Ms. Austin did not have Ms. Lloyd's explicit permission to rent or drive the YOUNBER. Thus, Ms. Austin has no property interest in the YOUNBER.

B. Neither a Subjective Expectation of Privacy nor Societal Expectations Support Ms. Austin's Assertion of a Fourth Amendment Interest in the YOUNBER.

Ms. Austin cannot show that her subjective expectation of privacy was violated or that a reasonable expectation of privacy was violated in the search of the YOUNBER. This Court has determined that "[o]ne who challenges an allegedly illegal search bears the burden of proving not only that the search was illegal, but also that he had a legitimate expectation of privacy in the

area searched.” *Rawlings v. Kentucky*, 448 U.S. 98, 104 (1980). To claim Fourth Amendment protections, “a defendant must demonstrate that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable; i.e., one that has ‘a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.’” *Carter*, 525 U.S. at 88. Ms. Austin has failed to establish that her reasonable expectation of privacy was violated because she did not have Ms. Lloyd’s explicit permission to rent or drive the YOUNBER.

1. Ms. Austin does not have a subjective expectation of privacy in her unauthorized operation of the YOUNBER.

Ms. Austin cannot legitimately expect privacy in a YOUNBER she neither owns nor leases because of her illegitimate control of the YOUNBER. This Court limited the premise that “anyone legitimately on premises where a search occurs may challenge its legality.” *Jones v. United States*, 362 U.S. at 267. The current standard used by this Court is that “[l]egitimate presence on the premises of the place searched, standing alone, is not enough to accord a reasonable expectation of privacy, because it creates too broad a gauge for measurement of Fourth Amendment rights.” *Byrd*, 138 U.S. at 1527. Even in *Jones v. United States* this Court held that “this would of course not avail those who, by virtue of their wrongful presence, cannot invoke the privacy of the premises searched.” 362 U.S. at 267. Additionally, in *Rakas v. Illinois*, this Court clarified that “wrongful presence at the scene of a search would not enable a defendant to object to the legality of the search.” 439 U.S. at 128 n.9.

While Ms. Austin’s action of renting the YOUNBER on Ms. Lloyd’s credit card is likely criminal activity, such a finding is unnecessary to show she lacked a legitimate presence. Ms. Austin rented the YOUNBER on Ms. Lloyd’s YOUNBER account without Ms. Lloyd’s explicit permission. Additionally, Ms. Austin used Ms. Lloyd’s credit card to rent the YOUNBER. The

combination of using Ms. Lloyd's account to rent the YOUBER and not getting Ms. Lloyd's explicit permission are fatal to Ms. Austin's claim for Fourth Amendment protections. Legitimate presence in the YOUBER alone is not enough to give Ms. Austin a reasonable expectation of privacy. However, Ms. Austin's presence in the YOUBER was not legitimate since she did not have Ms. Lloyd's explicit permission to drive the YOUBER. Therefore, Ms. Austin had no legal basis for driving the YOUBER. Since the YOUBER was rented in Ms. Lloyd's name, only she had a legitimate basis for driving the YOUBER. Ms. Austin required Ms. Lloyd's explicit permission to drive the YOUBER to have a legitimate presence in it. Therefore, Ms. Austin's unauthorized control of the YOUBER should not give her a greater Fourth Amendment interest in it than a legitimate passenger's rights.

2. No societal understanding provided Ms. Austin with a reasonable expectation of privacy in her unauthorized operation of the YOUBER.

Society does not provide Ms. Austin with a reasonable expectation of privacy in the YOUBER because she did not have explicit permission to rent the YOUBER on Ms. Lloyd's account and did not have Ms. Lloyd's permission to drive the YOUBER. This Court has recognized that a defendant may establish a legitimate expectation of privacy without showing "a common-law interest in real or personal property." *Rakas*, 439 U.S. at 144 n.12. *Rakas* recognized 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." *Id.* at 143 n.12. This Court found, "The test of legitimacy is not whether the individual chooses to conceal assertedly 'private' activity. Rather, the correct inquiry is whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment." *Oliver v. United States*, 466 U.S. 170 n.11 (1984). In *Minnesota v. Olson*,

this Court discussed reasonable expectations of privacy as “functions recognized as valuable by society.” 495 U.S. 91, 98 (1990). While Ms. Austin may have a subjective expectation of privacy in the YOUBER, it is not one the law will recognize as legitimate because she did not receive Ms. Lloyd’s explicit permission to drive the YOUBER. Ms. Austin is unauthorized to drive the YOUBER without Ms. Lloyd’s explicit permission to drive it, and society will not recognize a reasonable expectation of privacy in a place that person is not authorized to be in. It would be harmful to society for this Court to recognize a reasonable expectation of privacy for people in places they are unauthorized to be.

While “property rights are not the sole measure of Fourth Amendment violations, and while this may add to the baseline, it does not subtract anything from the Fourth Amendment’s protections when the Government does not engage in a physical intrusion of a constitutionally protected area.” *Florida v. Jardines*, 569 U.S. 1, 5 (2013). The decision in *Katz* established that “[c]apacity to claim the protection of the Fourth Amendment depends . . . upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place.” *Rakas*, 439 U.S. at 143. This Court recognized that “[a] subjective expectation of privacy is legitimate if it is one that society is prepared to recognize as reasonable.” *Olson*, 495 U.S. at 95–96. In *Rawlings v. Kentucky*, this Court determined that a defendant “bears the burden of proving that he had a legitimate expectation of privacy.” 448 U.S. at 104. Ms. Austin cannot legitimately expect privacy in the YOUBER she neither owned nor rented and did not have Ms. Lloyd’s explicit permission to drive. A driver of a vehicle has no subjective or reasonable expectation of privacy in that vehicle when the driver is unauthorized to drive that vehicle. Therefore, this Court should not recognize Ms. Austin’s claim for Fourth

Amendment protections in a YOUNBER that was not rented in her name and she did not have explicit permission to rent the YOUNBER in the account holder's name or drive.

Ms. Austin has failed to demonstrate that she has a reasonable expectation of privacy in the YOUNBER because her use of the YOUNBER does not benefit the rights of society, but instead weakens many of the rights society values. At worst, Ms. Austin's use of the YOUNBER was theft and consisted of a breach of contract. Ms. Austin did not have Ms. Lloyd's explicit permission to rent or drive the YOUNBER, which could constitute theft. This Court recently held that "[a]s a general rule, someone in otherwise lawful possession and control of a rental car has a reasonable expectation of privacy in it even if the rental agreement does not list him or her as an authorized driver." *Byrd*, 138 U.S. at 1524. The present case differs from *Byrd* because Ms. Austin is not in lawful possession and control of the YOUNBER. The actual renter of the YOUNBER was Ms. Lloyd. The record indicates Ms. Austin's use of Ms. Lloyd's login information was suspect at best because Ms. Austin never received explicit permission to rent the YOUNBER on Ms. Lloyd's account. This Court should find that no societal understanding gave Ms. Austin a reasonable expectation of privacy in her unauthorized use of the YOUNBER.

II. THE GOVERNMENT'S ACQUISITION OF THE LOCATION DATA FROM YOUNBER DID NOT VIOLATE PETITIONER'S FOURTH AMENDMENT RIGHTS.

The Fourth Amendment provides individuals with the right "to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. A "search" violates the Fourth Amendment in two circumstances: first, when the "search" constitutes a "physical intrusion of a constitutionally protected area," so it is a "common law trespass," *United States v. Jones*, 565 U.S. at 405, 407 (citation omitted); see *Olmstead v. United States*, 277 U.S. 438, 466 (1928) (requiring "an actual physical invasion" of a home or surrounding area); and second, when a government agent "violates a subjective expectation of

privacy that society recognizes as reasonable,” *Kyllo v. United States*, 533 U.S. 27, 33 (2001) (citing *Katz*, 389 U.S. at 361). Because the data cannot be physically intruded upon, the reasonable expectation of privacy prong is the proper analysis for this case. Under the reasonable expectation analysis of the Fourth Amendment, the Government’s acquisition of the GPS location data from YOUNBER did not constitute a search of Petitioner. If a court determines the Government’s actions do not amount to a search, then there is no implication of the Fourth Amendment, and a warrant is unnecessary.

This Court should affirm the decision of the Thirteenth Circuit Court of Appeals because Austin voluntarily conveyed her information to a third party—YOUNBER—and had reasonable knowledge that YOUNBER would share that information. Austin assumed the risk that her information would end up in the hands of the Government. Furthermore, the Government’s inquiry into the location data was narrowly limited to one user’s account to determine if the vehicles caught on surveillance were used by that account. This use was not an intrusion of a reasonable expectation of privacy. A contrary decision would significantly impair the Government’s ability to investigate suspects, particularly because of the third-party doctrine’s utility in pursuing investigatory leads.

A. The Government’s Acquisition of the Location Data from YOUNBER Did Not Constitute a Search Because Petitioner Has No Legitimate Expectation of Privacy in the Business Records YOUNBER Used to Track the Rental Vehicles from Her Cell Phone.

Although private information can be exchanged between parties—like the location data of individuals using YOUNBER—that information is not afforded the same protections under the Fourth Amendment.

This Court has held with limited exceptions that a person has no legitimate expectation of privacy in information voluntarily turned over to third parties. *Smith v. Maryland*, 442 U.S. 735,

743–44 (1979); *cf. Carpenter v. United States*, 138 S. Ct. 2206 (2018). Third-party providers may use such information to create business records regarding the services offered. *Smith v. Maryland*, 442 U.S. at 745. The Court has held the government’s acquisition of those records does not constitute a search under the Fourth Amendment. *Id.* at 744–45; *United States v. Miller*, 425 U.S. 435, 442–43 (1976); *United States v. Mohamud*, 843 F.3d 420, 442 (9th Cir. 2016) (holding communications sent to a third party reduces the petitioner’s privacy interest).

Smith and *Miller* are this Court’s landmark third-party doctrine cases relating to the government’s acquisition of business records. Each case incorporated the Court’s previous privacy expectation analysis, which originated in *Katz v. United States*, 389 U.S. at 360–62. The analysis asks: (1) whether the individual “exhibited an actual (subjective) expectation of privacy; and (2) whether that individual’s expectation of privacy is “one that society is prepared to recognize as ‘reasonable.’” *Id.* at 361 (Harlan, J., concurring). As the *Katz* majority stated, “the Fourth Amendment protects people, not places,” *id.* at 351; however, people cannot reasonably expect privacy in information they expose to a third party, *id.* at 361 (Harlan, J., concurring).

When Ms. Austin used YOUBER to rent a vehicle, she understood that her location would be tracked. Applying the third-party doctrine to the location data acquired by the Government, there was no search, and because the tracking information was used for general business purposes by YOUBER, there was no violation of Petitioner’s Fourth Amendment rights.

1. There is no reasonable expectation of privacy in information turned over voluntarily to a third party.

When an individual voluntarily conveys information to a third party, that information loses its privacy expectations. *Smith v. Maryland*, 442 U.S. at 744; *Hoffa v. United States*, 385 U.S. 293, 302 (1966); *United States v. Miller*, 425 U.S. at 442 (holding that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties). The

third-party doctrine allows government agents to use information willingly turned over to a third party for investigation purposes. Each YOUTER user agrees upon downloading the app to allow YOUTER to track the vehicle's location through the user's phone. By agreeing to allow YOUTER to track the location of the user, the person has effectively surrendered any privacy expectation and assumed the risk that the information would be revealed to the police.

This Court has held that records freely turned over to a third party are not entitled to Fourth Amendment protections. *United States v. Miller*, 425 U.S. at 443. Because the records are willingly turned over with the knowledge the company will use them for business purposes, there is no expectation of privacy. *Id.* at 441. In *Miller*, government agents suspected Miller of operating an illegal alcohol still. *Id.* at 437. The agents requested documents from the defendant's banks for several months of his accounts, including copies of checks, deposit slips, financial statements, and monthly statements. *Id.* at 436–38. Miller contended that he had a “reasonable expectation of privacy” in the documents because they were copies of his personal records given to the bank for a limited purpose. *Id.* at 442. The Court rejected this argument, holding that “the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for limited purpose.” *Id.* at 443. In reaching this conclusion, the Court stressed that “what a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection.” *Id.* (citing *Katz*, 389 U.S. at 351).

This Court further expanded upon the third-party doctrine by addressing concerns with data stored using technology. *Smith v. Maryland*, 442 U.S. 735. Because the data is being generated by a third party as part of a business transaction, it is not entitled to Fourth Amendment protections. *Id.* at 742. Given the nature of the telephone company, no reasonable person would

believe the numbers dialed would not be stored and used by the company. *Id.* In *Smith v. Maryland*, this Court applied the *Miller* analysis to information conveyed to the phone company. 442 U.S. at 737. The police requested the defendant’s phone company install a pen register to record the numbers dialed from the defendant’s residence. *Id.* The Court rejected that acquiring the dialed numbers constituted a search under the Fourth Amendment. *Id.* at 742–46. In doing so, the Court stated that people have no expectation of privacy in the numbers they dial given they realize that information must be conveyed to the phone company. *Id.* at 742. The Court believed that the average user would understand that the phone company would record the information and use it for legitimate business purposes. *Id.* at 742–43.

The Court explained that even if Smith did have a subjective expectation to privacy, that expectation was not one that society recognized as reasonable. *Id.* When the defendant used his phone, he “voluntarily conveyed numerical information to the telephone company and exposed that information to its equipment in the ordinary course of business.” *Id.* at 744. Because the phone company could record the information, the Court concluded that he “assumed the risk” that such information could be turned over to the police. *Id.* at 742–43 (internal quotation marks omitted). Additionally, the Court addressed concerns that technological advancements would diminish Fourth Amendment protections. *Id.* at 745. Given the limited scope the equipment was used and the limited capabilities of the devices, conversations could not be recorded. *Id.* As a result, this Court found that such use of data logs was constitutional. *Id.*

Under this Court’s precedent, the facts fulfill the third-party doctrine’s requirements. First, Austin exhibited no actual expectation in privacy in her information because a reasonable person would believe that YOUBER would track the rental vehicle’s location as part of its general business. YOUBER’s terms and conditions expressly state the company tracks the location of its

vehicles and such information would be the property of YOUNBER, not hers. R. at 29. Second, even if there was an actual expectation of privacy, that expectation is not one that society would be willing to accept as reasonable. An expectation of privacy can be sustained if it protects an area the objective public recognizes as private. Using a rental vehicle does not rise to the level of public perception to merit Fourth Amendment protections. Accordingly, the Government needed no warrant to obtain Austin's location data and its conduct was therefore constitutional.

2. *Carpenter v. United States* was a narrow holding that does not apply to the facts of this case.

With the rapid advancement of technologies over the last fifty years, there has been an increasing concern of abuse pertaining to the data modern devices transmit. In addressing this concern, this Court looked to determine whether government agents could obtain cell site location data without a warrant. In a narrow holding, the Court stated that a warrant was necessary to acquire cell site data but declined to limit the third-party doctrine beyond the facts in *Carpenter v. United States*. 138 S. Ct. 2206.

In *Carpenter*, this Court addressed the growing concern of access to personal information in the digital age. *Id.* The question raised by this Court was how to apply the Fourth Amendment to the ability to follow a person's movement through their cell phone. *Id.* at 2216. The Court looked at whether the expectation to privacy was "one that society is prepared to recognize as reasonable." *Id.* at 2213, 2217. This Court distinguished between cell phone tracking and GPS tracking, noting that a cell phone differs because it follows its owner "beyond public thoroughfares and into private residences." *Id.* at 2218.

The concern in *Carpenter* was that the "seismic shifts in digital technology" had made it possible to track the location of not only the defendant but everyone in the area. *Id.* at 2219. The distinction between *Carpenter* and previous cases pertaining to tracking was the ability to limit

the personal information collected. *Id.* The Court viewed this as an expansion of the third-party doctrine to a distinct category of information. *Id.* While this Court declined to extend the third-party doctrine to cell site location data, it did not overturn the use of the third-party doctrine. *Id.* 2220. This Court relied on its other holdings providing that the government cannot constitutionally use technology to track a person's physical location and movements over time. *United States v. Jones*, 565 U.S. at 404–05; *United States v. Knotts*, 460 U.S. 276 (1983) (distinguishing GPS tracking from the rudimentary tracking of a beeper). But the majority in *Carpenter* limited its holding to its unique circumstances: “Our decision today is a narrow one. We do not express a view on matter not before us.” 138 S. Ct. at 2220.

Austin contends that using GPS data acquired by Detective Hamm was a search under the Fourth Amendment and violated her protected rights. R. at 4. Her contention rises on this Court's holding in *Carpenter* because the location data was transmitted through her cell phone. R. at 6. The data sent to YOUNBER per the user agreement of the rental vehicle is distinctly different from the cell location data used in *Carpenter*.

First, the GPS location data does not carry the same expectation of privacy that a cell phone itself does. The GPS data acquired by YOUNBER tracks the location of the rental vehicle, a vehicle in the public sphere. The tracking is limited to the location of the vehicle and does not follow the user if the YOUNBER app is not open. The location data used by YOUNBER is necessary to locate the company's property. When signing up for an account, the user agrees to have location data sent to YOUNBER R. at 29. The individual using a YOUNBER vehicle has enough notice to know that such information will be used by the company.

Second, it is reasonable to assume that YOUNBER would turn over GPS location data to a law enforcement agency for various reasons. YOUNBER has an interest in protecting its business

property, and if its property were suspected of being used in a crime, YOUNBER would likely want to cooperate with the investigating authority. Like the phone company in *Smith* and the bank in *Miller*, YOUNBER worked with authorities by turning over its GPS location records. R. at 3. The records turned over were not personal records being entrusted to YOUNBER by Ms. Austin. Instead, it is the distinct business records of YOUNBER, records that users of the rental service know are in the user agreement.

The data acquired by the Government does not rise to the level needed to analyze it under *Carpenter*; the proper standard to apply is the standard applied in both *Smith* and *Miller*. When an individual willingly gives up information to a third party, that information is no longer protected from a “search” under the Fourth Amendment. While Ms. Austin does not have a YOUNBER account of her own, it is reasonable to presume that she does not believe that her movements in a third party’s vehicle would go unmonitored and that she would expect privacy in that information. Because the data used by Detective Hamm constituted the business records of YOUNBER and Austin did not reasonably expect privacy to the data, using the GPS data is not a “search” under the reasonableness prong.

B. If the Government Acquisition of the GPS Data Was a Search, It Was Reasonable Under the Fourth Amendment.

Even if the acquisition of the GPS location data was a search, the Government’s actions were constitutionally reasonable. This Court stated that “[t]he Fourth Amendment’s proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner.” *Maryland v. King*, 569 U.S. 435, 455 (2013). Looking at the text of the Fourth Amendment, the proper measure of constitutionality is reasonableness. *Id.* This Court has long held that the Fourth Amendment applies to the government’s use of subpoenas. *United States v. Morton Salt Co.*, 338 U.S. 632,

652 (1950); *see, e.g., United States v. Dionisio*, 410 U.S. 1, 11–12 (1973) (grand jury subpoena); *McPhaul v. United States*, 364 U.S. 372, 382–83 (1960) (legislative subpoena); *Okla. Press Publ’g Co. v. Walling*, 327 U.S. 186, 208–09 (1946) (administrative subpoena). This Court has concluded that no warrant is needed when a subpoena is issued, based on probable cause, for records. *United States v. Miller*, 425 U.S. at 446.

Several reasons have been identified by this Court for why the Fourth Amendment does not require a warrant for evidence obtained using compulsory process. *Donovan v. Lone Steer, Inc.*, 464 U.S. 408, 415 (1984). Such request for records from a company represents a lesser intrusion than that of searches conducted under a warrant. *Id.* at 414. This Court also noted that a subpoena recipient has an “opportunity to present objections” before submitting any documents to the requesting party, which minimizes the intrusion. *Id.* at 416; *City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2453–54 (2015) (explaining the benefits of pre-compliance review).

This Court has further recognized the government may have a significant interest in acquiring records through the compulsory process during the early stages of an investigation before probable cause for a warrant could be established. *See Okla. Press*, 327 U.S. at 213 (observing that a warrant requirement in this context “would stop much if not all of investigation in the public interest at the threshold inquiry,” rendering it “substantially impossible” to “effective[ly] discharge . . . the duties of investigation”). Using records by law enforcement is a long-standing tactic recognized not to violate the Fourth Amendment. *United States v. Miller*, 425 U.S. at 444.

After Ms. Austin was arrested under suspicion of bank robbery, Detective Hamm began his investigation. R. at 3. During his investigation he discovered five open robbery cases that matched modus operandi of the robbery Ms. Austin was suspected of committing. R. at 3. This

led him to serve a subpoena to YOUNBER requesting GPS information related to the account used by Petitioner during the period between October 3, 2018 and January 3, 2019. R. at 3. Detective Hamm was operating within the proper procedure laid out by this Court. Detective Hamm limited his search to a current suspect in a string of bank robberies. His search turned up evidence that Martha Lloyd's account, the account used by Petitioner, was used to rent cars near the other robberies on the same day. He corroborated that evidence with surveillance footage from the banks to show the same car was used. Because the records he requested were limited to Ms. Austin's use of YOUNBER vehicles during a specific period, the records were that of a third-party business and the nature of the subpoena was less intrusive than needed to raise Fourth Amendment protections, the subpoena was valid under this Court's holdings.

CONCLUSION

This Court should affirm the judgment of the United States Court of Appeals for the Thirteenth Circuit.

Respectfully submitted,

ATTORNEYS FOR RESPONDENT