R7

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 RESPONDENTS
United States of America

The University of San Diego School of Law
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QUESTIONS PRESENTED FOR REVIEW

I. An individual only has standing to challenge the lawfulness of a search under the Fourth Amendment if she has a reasonable expectation of privacy in the invaded space. There is no reasonable expectation of privacy in a rental car if the person driving is not an authorized driver under the rental agreement, is not in lawful possession or control, and does not maintain a possessory interest therein. Can Austin challenge the search of a rental car that she rented by using another's account without the account-holder's permission?

II. Government action is only considered a search as defined by the Fourth Amendment when the third-party doctrine does not apply and when there is a reasonable expectation of privacy in the property subject to the invasive action. Jayne Austin voluntarily gave her rental car data location to a third party, as YOUBER users have to affirmatively consent to location tracking. Did the government's use of this data constitute a search as defined by the Fourth Amendment and *Carpenter*?

STATEMENT OF THE CASE

Petitioner Jayne Austin ("Austin") avid poet and blogger. Her blog LET IT ALL FALL DOWN!, features short poems of financial corruption in the United States banking industry. R. at 1. Austin is a naturalist and minimalist who prides herself on her immaterial lifestyle, and she has no permanent residence. R. at 1. To travel to work and protests, Austin uses YOUBER, a car rental software application ("app") available on mobile devices. R. at 2. The app is accessible via an individual's cellphone, which connects to YOUBER vehicles via Bluetooth and GPS. R. at 2. YOUBER has 40 Million users and is similar to a standard rental car service in that a rental agreement is made in the app and users can rent YOUBER-owned cars at a fixed hourly rate. R at 2.

YOUBER cars are parked on the street in YOUBER-owned mobile and biodegradable parking stalls and facilities. R. at 2. YOUBER cars are identifiable by a small, bright pink YOUBER logo on the bottom corner of the passenger side of the windshield. R. at 2. The vehicles are tracked every two minutes using GPS and Bluetooth. R. at 29. This is done to track YOUBER's property and prevent fraud. R. at 22. When a new users create an account, YOUBER policy requires that each user accept YOUBER's terms and conditions, including YOUBER's privacy policies [prior to using their rental services – not actually sure if this is true, was just trying to rephrase/condense]. R. at 3, 30. One such term is that YOUBER users are prohibited from sleeping in their cars. R. at 24. To accept the terms and conditions, users must click a box on the application. R. at 23.

Only YOUBER users may rent YOUBER cars and rental periods are limited to a maximum distance of 500 miles or a time period of up to one week. R. at 2. At the end of the rental period, the user parks the car in a designated YOUBER parking stall or facility. R. at 2. YOUBER

employees check on the cars once every 24 hours, unless the user submits a maintenance request in the app. R. at 2. I f the car is rented for more than 24 hours, YOUBER checks on the car at the end of the designated rental period. R. at 2.

Austin does not have an account of her own with YOUBER. R at 2. However, Austin has the YOUBER app on her personal cell phone and uses the account of her on-and-off-again partner, Martha Lloyd ("Lloyd"). R. at 2. Austin is an authorized user on Lloyd's credit card account. R. at 2. Lloyd's account first became active on July 27, 2018. R. at 2.

On January 3, 2019, Austin rented a 2017 Black Toyota Prius (license plate number: R0LL3M) through the YOUBER app on her phone, using Lloyd's account. R. at 2. Later that day, Officer Charles Kreuzberger stopped Austin for failure to stop at a stop sign. R. at 2. During the traffic stop, Austin showed Officer Kreuzberger her license and the YOUBER app on her cell phone. R. at 2. While verifying the information provided by Austin, Officer Kreuzberger noticed Austin's name was not listed as the renter on the rental agreement in the YOUBER app. R. at 2.

Accordingly, Officer Kreuzberger told Austin that he did not need her consent to search the car and proceeded to search the trunk where Austin kept various personal effects. R. at 3. 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 also found clothes, an inhaler, three pairs of shoes, and a collection of signed records. R. at 3. Officer Kreuzberger noted in his report that he believed the car to be "lived in," as there were other personal items in the car, including a cooler full of tofu, kale, and homemade kombucha. R. at 3. Additionally, Officer Kreuzberger found bedding and a pillow in the backseat of the car. R. at 3.

During his investigation, Officer Kreuzberger received a dispatch to look out for a 2017 Black Toyota Prius with a YOUBER logo driven by a suspect who allegedly robbed a nearby

Darcy and Bingley Credit Union. R. at 3. A surveillance camera caught a partial license plate number "R0L," and 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 Austin under suspicion of bank robbery. R. at 3. After Austin's arrest, using location-tracking date obtained from YOUBER, Austin was found to have rented cars at the time and location of five bank robberies. R. at 4.

Prior to trial, Austin's moved to suppress evidence obtained during Officer Kreuzberg's search of the rental car on January 3, 2019, and the location data YOUBER provided to Detective Hamm. R at 4. Austin argued that because both searches were warrantless under the Fourth Amendment, evidence obtained therefrom should be suppressed. R. at 4. The district court denied Austin's motions, finding she had no standing in the rental car, and, further, that the data collected by YOUBER did not rise to the level of infringement as mentioned by the Court in *Carpenter*. R. at 4. Austin was subsequently convicted of six charges of robbery under 18 U.S. Code § 2113. R. at 4.

Austin then appealed her conviction of six charges of bank robbery to the United States Court of Appeals for the Thirteenth Circuit. R. at 9. She argued that the District Court erred in denying her motions to suppress evidence prior to her conviction. R. at 10. The Circuit Court affirmed the District Court's judgment. They found that Austin's motions to suppress evidence were not valid, and the actions of the government did not qualify as searches as defined by the Fourth Amendment. R. at 10. Austin again appealed, petitioning the Supreme Court of the United States for a Writ of Certiorari. The Court granted certiorari to consider two questions: 1) Does an individual have standing to contest a search of a rental vehicle that the individual rented on another's account without that person's permission?; and 2) Is the acquisition of the location data

of a rental vehicle a "search" within the meaning of the Fourth Amendment and *Carpenter* v. *United States*? R. at 1.

SUMMARY OF THE ARGUMENT

I. Austin does not have standing to challenge the search of the rental car because it did not violate any of Austin's personal privacy interests protected by the Fourth Amendment. To claim a violation of the Fourth Amendment as the basis for suppressing relevant evidence, it must be determined whether the claimant's Fourth Amendment rights have been violated. Although courts use the term "standing" to identify those entitled to challenge the lawfulness of a search, the central question is whether the search violated the personal privacy interests of the individual seeking relief.

Austin does not have a reasonable expectation of privacy in the rental car that she rented through another's account without the account-holder's permission. In *Byrd*, the Supreme Court held that a person who is in otherwise lawful possession of a rental car has a reasonable expectation of privacy, regardless of whether he is listed as an authorized driver on the rental agreement. The Court remanded to determine whether the defendant was lawfully in control of the car based on the government's argument that he obtained the car by intentionally misleading the rental car company; if so, he likely had no greater expectation of privacy than a thief in a stolen car. Similarly, here, Austin schemed to use Lloyd's account in order to commit robbery. Austin argues that her presence in the vehicle was legitimate given her action of renting the car; however, legitimate presence cannot be equated with lawful possession. As the Court held in *Rakas*, legitimate presence on the premises of the place searched, standing alone, is not enough to accord a reasonable expectation of privacy. These circumstances show that Austin intentionally used Lloyd

and kept her in the dark about the use of her account in a calculated plan to procure getaway cars in the robberies of *Darcy and Bingley*. Austin therefore does not have a reasonable expectation of privacy in a rental car.

Further, Austin is unable to demonstrate a reasonable expectation of privacy in the rental car when relying on property-based concepts. Austin cannot show a substantial possessory interest in the rental car where her presence in the car is causal, temporary, and she rejects property ownership. In *Jones v. United States*, the Court found that the defendant had a legitimate expectation of privacy in his friend's apartment, where he had complete dominion and control over the apartment and could exclude others from it. In *Rakas*, even though the defendants were legitimately on the premises, they did not have a reasonable expectation of privacy because they did not assert a property or possessory interest in the automobile, or in the property seized.

Austin argues that she had a "substantial possessory interest in the premises searched" given the fact that her items were in the searched YOUBER vehicle. While like in *Jones*, Austin may have also been able to exclude third parties from the rental car, such as a car jacker, this does not rise to the level of substantial possessory interest. In *United States v. Sanchez*, the defendant did not have a reasonable expectation of privacy in a borrowed car even though he was driving alone on a long trip because his casual possession of the car, coupled with a failure to show direct permission from the car's owner, and his denial of an interest in the drugs within the car, did not create a valid privacy interest. Austin's control over the YOUBER vehicle is similarly casual because she did not have sustained control.

Further, while Officer Kreuzberger found various items in the rental car, Austin similarly situated to the defendants in *Rakas* who asserted neither a property nor a possessory interest in the car, nor an interest in the property seized. Austin's claimed "substantial interest" appears tentative at best, especially when considered in light of her blog posts that exhibits a complete rejection of property ownership. Even if Austin did not fully adopt these believes, and keeping personal items in the car, indicated her subjective expectation of privacy, this is not an expectation which society is prepared to recognize as reasonable.

II. The Fourth Amendment protects the rights of people against "unlawful searches and seizures." It protects people, not places, and does not protect against information voluntarily given to a third party, even if that information is given on a narrow basis and the provider of the information expects that it will be held in confidence. An invasion of a person's privacy will be held as a search if there is an expectation of privacy that society recognizes as reasonable.

The third-party doctrine as established in *Smith* and *Miller* applies to the present set of facts. In *Smith,* a pen register was used to determine what telephone numbers had been dialed in a private residence. Nonetheless, the court found that this was not a search because users of a telephone can clearly understand that as they dial they are turning over information to the service provider. In *Miller,* an individual's checks and deposit slips were subpoenaed from two different banks. The court noted that the checks and deposit slips were voluntarily turned over to the bank, as part of the ordinary course of business, and used the third-party doctrine to reason that the government action was not a search. In *Carpenter,* the Supreme Court elected not to extend the third-party doctrine to the context

of cell-site location information ("CSLI"). The majority in *Carpenter* reasoned that cell-phone location information was far more intimate than that of a pen register or bank records, since Americans are almost always near their cell phones throughout the course of the day.

YOUBER's agreement with its users to track their rental cars while they are being used is part of their ordinary course of business, and serves a legitimate business purpose; the protection of YOUBER's property. Each user affirmatively consents to this monitoring, by checking a box. Additionally, rental cars are not nearly as ubiquitous in American life as cell phones, thus the *Carpenter* court's concerns about privacy do not apply to this case. Therefore, the third-party doctrine should be extended to YOUBER's data tracking technology.

In addition, there was not a reasonable expectation on the part of Jayne Austin that YOUBER car's location would be shielded from the government. Like *Knotts* makes clear, police officers could easily have followed Austin and obtained the same information. YOUBER cars are clearly identifiable and YOUBER checks on them every 24 hours in order to prevent damage or fraud.

In *Kyllo,* the court rejects the use of thermal imagining to track the heat inside a house, finding a reasonable expectation of privacy because the technology was not available to the public, and the information could not have been obtained without an intrusion. Unlike *Kyllo*, rental car location can be easily obtained by people on the street or police officers, and GPS and Bluetooth technology is widely available to the public. Since the third-party doctrine applies here and there was no reasonable expectation of privacy, this was not a search for purposes of the Fourth Amendment or *Carpenter*.

STANDARD OF REVIEW

This Court reviews the denial of a motion to suppress as a mixed question of law and fact. *United States v. Lanzon*, 639 F.3d 1293, 1299 (11th Cir. 2011). Questions of law are reviewed de novo, while determinations of fact are reviewed for clear error in the light most favorable to the prevailing party in the district court. *Id.*

ARGUMENT

I. AUSTIN DOES NOT HAVE STANDING TO CHALLENGE THE SEARCH OF THE RENTAL CAR BECAUSE IT DID NOT VIOLATE ANY OF AUSTIN'S PERSONAL PRIVACY INTERESTS PROTECTED BY THE FOURTH AMENDMENT

Jayne Austin moved to suppress the evidence obtained during Officer Kreuzberg's search of the rental car on the basis that the search was warrantless within the meaning of the Fourth Amendment. The District Court correctly denied Austin's motion, finding that she had no standing to challenge the search of the rental car.

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. VI. However, the Fourth Amendment does not guarantee protection from all searches and seizures, but only those done by the government and deemed unreasonable under the law. *Katz v. United States*, 389 U.S. 347 (1967).

To claim a violation of the Fourth Amendment as the basis for suppressing relevant evidence, it must be determined whether the claimant's Fourth Amendment rights have been violated. *Rakas v. Illinois*, 439 U.S. 128, 135 (1978). It is immaterial whether someone else's rights were violated, as "Fourth Amendment rights are personal and may not be asserted vicariously." *United States v. Skowronski*, 827 F.2d 1414, 1418 (10th Cir. 1987); *see also*

Alderman v. United States, 394 U.S. 165, 171-72 (1969) ("The established principle is that suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence.").

Although courts use the term "standing" to identify those entitled to challenge the lawfulness of a search, the central question is whether the search violated the personal privacy interests of the individual seeking relief. *Rakas*, 439 U.S. at 139.[1] Thus, "the application of the Fourth Amendment depends on whether the person invoking its protection can claim a justifiable, a reasonable, or a legitimate expectation of privacy that has been invaded by government action." *Smith v. Maryland*, 442 U.S. 735, 740 (1979).

A. Austin Does Not Have A Reasonable Expectation Of Privacy In The Rental Car That She Rented Through Another's Account Without The Account-Holder's Permission.

The evaluation of reasonable privacy expectations "normally embraces two discrete questions." *Id.* at 740. First, "whether the individual, by his conduct, has exhibited an actual (subjective) expectation of privacy," and second, "whether the individual's subjective expectation of privacy is one that society is prepared to recognize as reasonable." *Id.* "One who owns and possesses a car, like one who owns and possesses a house, almost always has a reasonable expectation of privacy in it," but "more difficult to define and delineate are the legitimate expectations of privacy of others." *Byrd v. United States*, 138 S.Ct. 1518, 1527 (2018).

[1] In *Rakas*, the Court explained that "the better analysis forth-rightly focuses on the extent of a particular defendant's rights under the Fourth Amendment, rather than on any theoretically separate, but invariably intertwined concept of standing." 439 U.S. at 139.

In *Byrd*, the Supreme Court addressed whether a person driving a rental car has a reasonable expectation of privacy therein if he is not listed as an authorized driver on the rental agreement. 138 S.Ct. at 1523-24. There, Latasha Reed rented a car and listed only herself as an authorized driver on the rental agreement. *Id.* at 1524. Soon thereafter, she gave the car keys to Terrence Byrd, who stored personal belongings in the rental car's trunk and then left alone. *Id.* When Byrd was stopped for a traffic infraction, the officers learned that the car was rented and that Byrd was not an authorized driver. *Id.* at 1524-25. They then searched the car and found heroin and body armor. *Id.* at 1525. The district court denied Byrd's motion to suppress evidence, finding that he did not have "standing" to contest the search. *Id.* The Supreme Court reversed and held that as general rule, a person who is in otherwise lawful possession of a rental car has a reasonable expectation of privacy, regardless of whether he is listed as an authorized driver on the rental agreement. *Id.* at 1524.

The government argued that Byrd should have no greater expectation of privacy than a car thief because "he intentionally used a third party as a strawman in a calculated plan to mislead the rental company from the very outset."[2] *Id.* at 1529-30. Accordingly, the Court remanded the matter for further proceedings to determine whether Byrd lawfully possessed the rental car. *Id.* at 1530. The Court signaled, without deciding, that such a driver would not have a reasonable expectation of privacy, noting that "it may be that there is no reason that the law should distinguish between one who obtains a vehicle through subterfuge of the type the Government alleges occurred here and one who steals the car outright." *Id.*

[2] The government inferred that Byrd knew he would not have been able to rent the car on his own, because he would not have satisfied the rental company's requirements based on his criminal record, and that he used Reed, who had no intention of using the car for her own purposes, to procure the car for him to transport heroin. *Byrd*, 138 S. Ct. at 1530.

Here, the Circuit Court did not believe that there was sufficient evidence that Austin stole the YOUBER car; however, similar to the government's argument in *Byrd*, even if Austin did not steal the car outright, she has no greater expectation of privacy therein than a thief. First, Austin was not listed as an authorized driver under the rental agreement, and second, she rented the car using Lloyd's YOUBER account without Lloyd's permission. *See United States v. Muhammad*, 58 F.3d 353, 355 (8th Cir. 1995) ("[A] defendant must present at least some evidence of consent or permission from the lawful owner/renter [of a vehicle] to give rise to an objectively reasonable expectation of privacy.").

In accordance with *Byrd*, Austin's status as an unauthorized driver, standing alone, is not enough to reject a reasonable expectation of privacy. However, an "important qualification" to the rule in *Byrd* is "the concept of lawful possession." 138 S. Ct. at 1529. This follows because a privacy interest is not reasonable when one's presence in a place is "wrongful." *Rakas*, 43 U.S. at 141 n. 9.[3] The Court's decision in *Byrd* thereby suggests that there is a clear distinction between possession of a rental vehicle that is not "authorized by the rental agreement and possession that is sufficiently 'wrongful' to warrant depriving the driver of possession of the rental vehicle." *United States v. Davis*, 326 F. Supp. 3d 702, 724 (N.D. Iowa 2018)

Austin argues that her presence in the vehicle was legitimate given her action of renting the car; however, legitimate presence cannot be equated with lawful possession. In *Rakas*, the Court rejected the phrase "legitimately on premises," as it created too broad a gauge for measurement of Fourth Amendment rights, and held that "legitimate presence on the premises of

[3] For example, when a defendant is present in a stolen car or in a house where he has no right to be, he lacks a reasonable expectation of privacy and cannot object to the legality of a search. *Byrd*, 138 S. Ct. at 1529.

the place searched, standing alone, is not enough to accord a reasonable expectation of privacy."[4] *Byrd,* 138 S. Ct. at 1527 (citing *Rakas*, 439 U.S. at 142). However, even if Austin's presence qualified as legitimate, she still does not have a reasonable expectation of privacy in the rental car because, as in *Byrd*, where the government claimed that "he intentionally used a third party as a strawman in a calculated plan to mislead the rental company from the very outset," 138 S. Ct. at 1529-30, so too here, Austin schemed to use Lloyd's account in order to commit robbery.

Lloyd gave Austin permission to use her YOUBER account while they were dating, but when they broke up in September 2018, Lloyd wrote a letter to Austin indicating she needed distance. R. at 18-20. However, Austin continued to use Lloyd's account without her permission or knowledge. R. at 19-20. Lloyd was unaware that Austin was using her account because she began using a different app. R. at 20. Lloyd also removed her credit card from YOUBER, but as an authorized user on Lloyd's credit card, Austin was able to continuing using her former partner's account. R. at 19-20. Austin clearly intended to hide her use from Lloyd, as evident by her failure to reimburse Lloyd for the cars rented on her account. Lloyd stated that when the two were together, "[Austin] would always use my information for everything and reimburse me in cash." R. at 18. Further, in one of Austin's blog posts, she recognized that she and Lloyd were no longer together and admitted to using Lloyd as a "tool," presumably to rent getaway cars: Goodbye my sweet Martha, but i am Still with You, i am still You, You have always allowed me to be You. You are my aid, my tool, my window into their world." R. at 27.

These circumstances show that Austin intentionally used Lloyd and kept her in the dark about the use of her account in a calculated plan to procure getaway cars in the robberies of *Darcy*

[4] "We do not wish to be understood as saying that legitimate presence on the premises is irrelevant to one's expectation of privacy, but it cannot be deemed controlling." *Rakas*, 439 U.S. at 142.

and Bingley. Austin therefore does not have a reasonable expectation of privacy in a rental car and, as stated in *Byrd*, "there is no reason that the law should distinguish between one who obtains a vehicle through subterfuge of the type the Government alleges occurred here and one who steals the car outright." 138 S. Ct. at 1529-30.

B. Austin's Does Not Have A Reasonable Expectation Of Privacy In The Rental Car Because She Does Not Have A Substantial Possessory Interest Therein Where Her Presence In The Car Is Causal, Temporary, And She Generally Rejects Property Ownership.

Although the Supreme Court in *Byrd* did not determine whether the facts there warranted a reasonable expectation of privacy, it highlighted the continuing interplay between property rights and reasonable privacy expectations. 138 S. Ct. at 1526. In so doing, it reaffirmed the holding a prior that "[l]egitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." *Id.* at 1527 (quoting *Rakas*, 439 U. S., at 143, n. 12) (alteration in original).

The legitimate expectations of privacy test supplements, rather than displaces, "the traditional property-based understanding of the Fourth Amendment." *Florida v. Jardines*, 569 U.S. 1, 11 (2013). However, it is clear that "[p]roperty rights reflect society's explicit recognition of a person's authority to act as he wishes in certain areas, and therefore should be considered in determining whether an individual's expectations of privacy are reasonable." *Rakas*, 439 U.S. at 153 (Powell, J. concurring).

This principle is seen in *Jones v. United States*, 362 U.S. 257, 259 (1960), which involved the defendant, Jones, staying at his friend's apartment with the friend's permission. The Court found that Jones had a legitimate expectation of privacy in the apartment and therefore could claim

the protection of the Fourth Amendment, even though his "interest" in those premises might not have been a recognized property interest at common law. *Id.* at 261. In *Rakas*, the Court analogized the defendants there to Jones. 439 U.S. at 149. Even though the defendants in *Rakas* were legitimately on the premises in the sense that they were in the car with the permission of its owner, similar to Jones, who had the permission of his friend, the defendants nonetheless did not have a reasonable expectation of privacy because "[t]hey asserted neither a property nor a possessory interest in the automobile, nor an interest in the property seized." *Id.* at 148. In contrast, "[e]xcept with respect to his friend, Jones had complete dominion and control over the apartment and could exclude others from it." *Id.* at 149.

Austin argues that she similarly had a "substantial possessory interest in the premises searched" given the fact that her items were in the searched YOUBER vehicle. R. at 12. While, like in *Jones*, Austin may have also been able to exclude third parties from the rental car, such as a car jacker, this does not rise to the level of substantial possessory interest. *See Byrd*, 138 S. Ct. at 1528-29. In *United States v. Sanchez*, 943 F.2d 110, 113-14 (1st Cir. 1991), the defendant did not have a reasonable expectation of privacy in a borrowed car even though he was driving alone on a long trip, thus in sole control to exclude others. The court reasoned that his casual possession of the car, coupled with a failure to show direct permission from the car's owner, and his denial of an interest in the drugs within the car, did not create a valid privacy interest. *Id.* at 114. The court further noted that the holding may have been different if the defendant had been able to demonstrate "a pattern of permission," because that "would have minimized the informal and temporary nature of this specific acquisition of the car." *Id.*

Austin's control over the YOUBER vehicle is similarly casual because she did not have sustained control. According to YOUBER's rental policy, users may rent a vehicle for a maximum

distance of 500 miles or a time period of up to one week. R. at 2. Therefore, even if Austin rented the car for the maximum week, she would only have been in possession of a YOUBER car during six weeks of the twelve-week robbery spree—six robberies between October 15, 2018, and January 3, 2019. R. at 3. Not only is sleeping in YOUBER cars expressly prohibited, but Austin would not have been able to remain in the car outside the rental period because YOUBER employees check on the cars once every 24 hours or at the end of the rental period if the car is rented for more than 24 hours. R. at 2. Additionally, while the first, second, fourth, fifth, and sixth robberies were associated with the black Toyota Prius, the third robbery was associated with a yellow Volkswagen Beetle. R. at Addendum. By switching cars, Austin knowingly subjected the car to a YOUBER-employee check, further diminishing any interest she may have had in the Prius. *See also Rakas*, 439 U.S. at 153 (examining "whether a person invoking the protection of the Fourth Amendment took normal precautions to maintain his privacy – that is, precautions customarily taken by those seeking privacy.").

Further, while Officer Kreuzberger found various items in the rental car, even noting in his report that he believed the car to be "lived in," R. at 3, Austin is more similarly situated to the defendants in *Rakas* who asserted neither a property nor a possessory interest in the car, nor an interest in the property seized. 439 U.S. at 148. Austin's claimed "substantial interest" appears tentative at best, especially when considered in light of her blog posts. Austin exhibits a complete rejection of property ownership through multiple posts preceding the January 3, 2019, search. Two such posts read as follows: I have no home, I claim no home I claim no property I've had no opportunity to claim any property; and I'll show you how we ride I'll show you that property is

NOTHING Ownership is NOTHING, you are NOTHING Without your velvet ropes and strings. R. at 26-27.

Even if Austin did not fully adopt these believes, and keeping personal items in the car, indicated her subjective expectation of privacy, "it is not enough that an individual desired or anticipated that he would be free from governmental intrusion. Rather, for an expectation to deserve the protection of the Fourth Amendment, it must 'be one that society is prepared to recognize as 'reasonable.'" *Katz*, 389 U.S. at 361.

II. THE ACQUISITION OF THE LOCATION DATA OF A RENTAL VEHICLE IS NOT A SEARCH FOR PURPOSES OF THE FOURTH AMENDMENT AND CARPENTER V. UNITED STATES

The Fourth Amendment of the United States Constitution secures "the rights of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. It exists to "safeguard the privacy and security of individuals against arbitrary invasions by government officials." *Camara v. Municipal Court of San Francisco*, 387 U.S. 523, 528 (1967).

The Fourth Amendment "protects people not places." *Katz v. United States,* 389 U.S. 347, 351 (1967). "What a person knowingly exposes to the public even in his home or office, is not a subject of Fourth Amendment Protection." *Id.* "When an individual 'seeks to preserve something as private,' and his expectation of privacy is 'one that society is prepared to recognize as reasonable," an invasion "into that sphere generally qualifies as a search." *Carpenter v. United States.,* 138 S. Ct. 2206, 2213 (2018).

"The Fourth Amendment does not prohibit the obtaining of information revealed to a third party," including situations where "the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed."

United States v. Miller, 425 U.S. 435, 442 (1976). This so-called third-party doctrine does not extend to cell-site location information ("CSLI"); therefore, the government "will generally need a warrant to access" these records. *Carpenter*, 138 S. Ct. at 2222.

A. The Third-Party Doctrine Should Be Extended To Apply To Situations Of Rental Car Companies Tracking Their Vehicles Locations Through GPS And Bluetooth Signals.

The United States Supreme Court established the third-party doctrine in two seminal cases, *Smith v. Maryland,* 442 U.S. 735 (1979), and *United States v. Miller*. In *Smith*, at police request, a telephone company installed a pen register at its offices to record the numbers dialed by an individual who police suspected was involved in a robbery. 442 U.S. at 737. The suspect, Smith, was arrested based in part on information from the register that revealed that he called the victim of the robbery. *Id.* In response to Smith's motion to suppress evidence, the Court found that the use of the register was not a search, noting that pen registers "disclose only the telephone numbers that have been dialed," and not the contents of the call. *Id.* at 741. In finding that Smith did not have a reasonable expectation of privacy, the Court emphasized that "all telephone users realize they must 'convey' phone numbers to the telephone company," and recognized the legitimate business purposes for a pen register. *Id.* at 742. *Smith* ultimately represents a formalization of the court's principle that "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." *Id.* at 743-44.

In *Miller*, as the defendant was being investigated for tax fraud, the Alcohol, Tobacco and Firearms Bureau issued subpoenas to two banks requesting "all records of accounts," from the defendant's bank account. 425 U.S. at 437. The banks complied with the subpoena, providing checks, deposit slips, financial statements and monthly statements. *Id.* at 438. The defendant moved to suppress evidence related to his bank accounts, but the Court ultimately found that the

documents were "voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business." *Id.* at 442. "The Fourth Amendment does not prohibit the obtaining of information revealed to a third party . . . even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed." *Id.* at 443.

The Supreme Court declined to extend the third-party doctrine to CSLI records in *Carpenter*. In *Carpenter*, a man was arrested for allegedly robbing Radio Shack and T-Mobile stores. 138 S. Ct. at 2212. In building its case against the defendant, the government requested and received CLSI records which provided 12,898 location points for the defendant over the course of 127 days. *Id.* The government used these CSLI records to place the defendant at the site of four of the robberies, and he was ultimately convicted. *Id.* at 2213.

In *Carpenter*, the Supreme Court of the United States considered how the principles derived from the Fourth Amendment and *Katz* apply to the context of cell-site location information, or ("CSLI"). The Court ultimately rejected the third-party doctrine in the context of CSLI, finding that "an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI." *Id.* at 2217.

The Court in *Carpenter* analyzed the third-party doctrine by noting that in both *Smith* and *Miller*, there were limitations to the capabilities of the information gathering devices. In *Smith*, a pen register is limited because it only tracks the numbers dialed and in *Miller*, checks are used only for limited business transactions. *Carpenter*, 138 U.S. at 2219. In contrast, "there are no comparable limitations on the revealing nature of CLSI." *Id.* at 2220. The Court also rejected the third-party doctrine on the basis that CSLI is not "truly shared" because cellphones log CSLI "by dint of its operation, without any affirmative act of the user beyond powering it up." *Id.* at 2210.

The Court's decision in *Carpenter* is a "narrow one" that does not "address other business records that might incidentally reveal location information." *Id.* at 2220. Because *Carpenter* does not address the situation at present, the analysis and reasoning of *Carpenter* and other Supreme Court Fourth Amendment jurisprudence should be used to decide this case, rather than allegiance to the spirit of the *Carpenter* holding.

The third-party doctrine applies to the present facts. Like in *Smith* and *Miller*, the information in question was conveyed for legitimate business purposes. Here, "[t]he agreement works much like a standard car rental service." R. at 23. Upon creating an account and renting a vehicle, the location tracking runs through the YOUBER app on the user's phone and "connects to the vehicles via Bluetooth and GPS." R. at 23. "This technology is essential to YOUBER's business success without it, YOUBER "could not keep track of all our vehicles." R. at 23.

As *Smith* and *Miller* make clear, the voluntary nature of the surrender of property to a third-party is also a key inquiry. YOUBER users voluntarily surrender their data to a third-party as formalized through YOUBER's terms of service. The acceptance of the terms of service requires users to affirmatively check a box, thereby negating the contention that the surrender of data is anything but voluntary. R. at 23.

This case is primarily distinguishable from *Carpenter* based on the inherent difference in what is being tracked. In *Carpenter*, the object being tracked was the defendant's cell phone. There, the Court correctly emphasizes the significance of this object. "There are 396 million cell phone service accounts in the United States – for a nation of 326 million people." *Carpenter*, 138 S. Ct. at 2211. Additionally, "[a] cell phone faithfully follows its owner beyond public thoroughfares and into private residences, doctor's offices, political headquarters, and other potentially revealing locales[,]" and "[n]early three quarters of smart phone users report being

within five feet of their phones most of the time, with 12% admitting that they even use their phones in the shower." *Id.* at 2218. Cell phones are "such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy." *Riley v. California*, 573 U.S. 373, 385 (2014).

Rental cars play a profoundly different role in American life. Contrary to the ubiquitous nature of the cell phone, use of YOUBER rental cars is a much more infrequent occurrence. While there are 40 million YOUBER users registered in the United States, R. at 22, this is minimal compared to the 396 million cell phone service accounts, *Carpenter*, 138 S. Ct. at 2211. YOUBER rental cars might take their inhabitants to a wide array of parking lots, streets, and highways, but they do not inhabit political headquarters, residences, or reveal locales of the type that the *Carpenter* Court notes. Further, unlike cellphones, rental cars do not join their owners in the shower. In fact, YOUBER users are only allowed to rent a car for up to 500 miles or one week and are prohibited from sleeping in YOUBER cars. R. at 24. In short, a YOUBER rental car is a helpful tool for getting from place to place for those without current access to a car, but it does not play nearly as central a role in any user's life as that of their smart phone.

This Court has spoken previously about the expectation of privacy for vehicles. "One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects. A car has little capacity for escaping public scrutiny. It travels public thoroughfares where its occupants . . . are in plain view." *Cardwell v. Lewis*, 417 U.S. 583, 590-91 (1974).

For these reasons, this case resembles more closely the third-party doctrine cases of *Smith* and *Miller*, then the rejection of the third-party doctrine as it applies to CSLI in *Carpenter*. Thus, the Court should affirm the District Court's application of the third-party doctrine in this context,

thereby upholding the rule that the use of YOUBER's data was not a search as defined by the Fourth Amendment.

B. The Use Of YOUBER's GPS And Bluetooth Data Does Not Violate A Reasonable Expectation Of Privacy.

Fourth Amendment jurisprudence addresses two key questions when considering whether a government action is a search. First, whether there was "an actual expectation of privacy," in the information searched, and second, whether that expectation of privacy is "one that society is prepared to recognize as reasonable." *Bond v. United States*, 529 U.S. 334, 338 (2000). The reasonable expectation of privacy test is "the touchstone of Fourth Amendment analysis." *California v. Ciraolo*, 476 U.S. 207, 211 (1986). This test is not whether "the individual chooses to conceal," but 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, 182-83 (1984).

In *United States. v. Knotts*, 460 U.S. 276, 277 (1983), law enforcement placed an electronic beeper on a drum of chloroform, which they believed was purchased to manufacture illicit drugs. By monitoring the beeper, officers tracked the drum, which the purchaser ultimately drove to his secluded cabin. *Id.* at 277. The purchaser of the drum moved to suppress evidence from the warrantless monitoring, but the Court found that the placing of the beeper did not violate his reasonable expectation of privacy. *Id.* at 280. The Court reasoned that "a person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements." *Id.* at 281. Additionally, the fact that a police car could simply have followed the car that picked up the drum and found the same information, and that nothing was discovered by the beeper that was not "visible to the naked eye," was further evidence supporting the lack of a reasonable expectation of privacy. *Id.* at 285.

This case is similar to *Knotts* in that both involve information that could have been discovered by other means. YOUBER cars are parked on the street and are clearly identifiable by a "bright pink logo." R. at 2. When not rented, YOUBER cars are parked in YOUBER owned stalls made of biodegradable plastic. R. at 2. A police officer driving down the street could clearly identify a YOUBER car, and follow it from a distance with ease. Austin asks this court to recognize her right to privacy from government intrusion regarding her location while in a rental car. Yet, YOUBER itself does not extend that right of privacy to its users; YOUBER checks on its parked cars every twenty-four hours and every two minutes when a vehicle is in use. R. 2-4.

In *California v. Greenwood*, 486 U.S. 35, 37 (1988), the respondent also did not have a reasonable expectation of privacy in trash left at his curb that was picked up and used by the government in a prosecution for narcotics trafficking. The Court reasoned that using the trash was not a search because "it is common knowledge that plastic garbage bags left on or at the side of a public street are readily accessible." *Id.* at 40. Additionally, the Court highlighted that the trash was placed at the curb "for the express purpose of conveying it to a third party." *Id.*

Although the facts here are quite different, the reasoning in *Greenwood* remains helpful in considering whether a rental car's location data is protected by the reasonable expectation of privacy standard. In *Greenwood*, "the express purpose" of placing the trash onto the curb was so it would be picked up and disposed of by a trash collection agency. 486 U.S. at 40. Similarly, here, the express purpose of the location tracking is so YOUBER can track its vehicles. R. at 23. The connection between location tracking and the operation of rental cars here is even stronger than the connection between trash pickup and leaving trash at the curb in *Greenwood* because users do not just have common knowledge that their location will be tracked when using YOUBER, they

have express knowledge from the user agreement which each user must affirmatively agree to in order to rent a vehicle. R. at 23.

In *Kyllo v. United States*, 533 U.S. 27, 40 (2011), the Supreme Court held that the government action in question was a search under the Fourth Amendment. There, a federal agent suspected illegal marijuana was being grown inside a triplex. *Id.* at 29. To grow marijuana indoors, high-intensity lamps are typically required. *Id.* The government used a thermal imager to scan the triplex to determine whether the amount of heat radiating from the building was consistent with the presence of the lamps. *Id.* The defendant moved to suppress evidence from the thermal imager, which led the Court to consider the advancement of technology and how it interplays with the Fourth Amendment. *Id*. Ultimately, the Court held that the use of thermal imaging is a search, reasoning that the relevant information was obtained through sense-enhancing technology and the information could not have otherwise been obtained without "physical 'intrusion into a constitutionally protected area.'" *Id.* at 34 (quoting *Silverman v. United States*, 365 U.S. 505, 512 (1961)). In these contexts, a search will be found, "at least where (as here) the technology in question is not in general public use." *Kyllo,* 533 U.S. at 34.

The instant case differs from *Kyllo* on three important grounds. First, unlike in *Kyllo*, where the information could not have been otherwise obtained without a physical intrusion, here, there are a myriad of other ways the information could have been obtained. Surveillance footage showed the same Toyota Prius at the location of five of the bank robberies. R. at 4. Additionally, police could have trailed the car, similar to the determination in *Knotts*, and, further, the car could also be observed by passerby. Second, this case is distinguishable from *Kyllo* because unlike thermal imaging scanners, the technology used here is generally available to the public. GPS and Bluetooth information is used by many applications and companies, and individuals are also able

to access these technologies on a regular basis through devices such as their cellphones. Finally, in *Kyllo*, the Court was concerned about intrusion into a constitutionally protected area, but no such intrusion occurs here. The data was simply used to pinpoint the location of the YOUBER vehicle, not to glean any information regarding the contents of the vehicle. R. at 4. For these reasons, the *Kyllo* Court's concerns, though valid in the thermal imaging context, do not apply to the rental car location data-tracking present here.

Arguendo, even if the Court finds that the third-party doctrine does not apply in this case, the acquisition of the location data is still not a search because there is no reasonable expectation of privacy in the information. This standard represents an important bulwark against the spread of rampant crime in the United States. Although the Fourth Amendment's protection against unlawful searches and seizures is necessary, it shall only be applied when there is a reasonable expectation of privacy in the invaded area, so as not to hamstring the government to an untenable degree. The facts of this case, coupled with a consideration of Supreme Court Fourth Amendment jurisprudence, makes clear that Austin did not have a reasonable expectation of privacy in in the tracked data. Thus, the use of YOUBER's rental car location data was not a search as defined by the Fourth Amendment.

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be affirmed.