

TEAM # R8

No. 4-422

IN THE
Supreme Court of the United States

JAYNE AUSTIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF FOR THE UNITED STATES

Office of the United States Attorney General
Team # R8

QUESTION PRESENTED

I. Whether an individual has standing to challenge a Fourth Amendment search of a rental vehicle, when the car was rented without the account owner's permission or knowledge;

II. Whether the Fourth Amendment protects individuals from the government acquiring location data of a rented vehicle, when the user voluntarily provided that information the rental company and consented to disclosing that information for "legal functions?"

TABLE OF CONTENTS

QUESTION PRESENTED..... i

TABLE OF CONTENTS..... ii

TABLE OF AUTHORITY.....iv

STATEMENT OF THE CASE.....1

A. Statement of the Facts.....1

B. Procedural History.....3

STANDARD OF REVIEW.....3

SUMMARY OF THE ARGUMENT..... 4

ARGUMENT.....6

I. AN INDIVIDUAL WHO DECEPTIVELY USES A RENTAL VEHICLE IN THE NAME OF ANOTHER DOES NOT HAVE STANDING TO CONTEST A SEARCH OF THE VEHICLE..... 6

A. The Fourth Amendment Proscription Against Unreasonable Searches Does Not Include Unauthorized Drivers of Rental Vehicles Because They Can Not Claim Any Reasonable Expectation of Privacy to Contest a Search..... 6

B. An Unauthorized Driver of a Rental Vehicle Does Not Have a Reasonable Expectation of Privacy Sufficient to Confer Standing Where the Relationship Between the Driver and the Renter is Attenuated or Non Existent.....8

1. Unauthorized drivers are not granted permission to drive rental vehicles through a valid rental agreement; therefore, a bright-line rule should apply.....10

2. Unauthorized drivers may assert standing to challenge a search, but only if the authorized renter granted permission to drive the rental vehicles.....12

3. Even if a bright-line rule is inappropriate, a totality of the circumstances approach would still deny Petitioner the ability to claim a reasonable expectation of privacy sufficient to confer Fourth Amendment standing.....13

II.	THE GOVERNMENT DOES NOT CONDUCT A SEARCH UNDER THE FOURTH AMENDMENT WHEN IT ACQUIRES LOCATION DATA FROM A THIRD-PARTY COMPANY LEASING ITS PROPERTY TO INDIVIDUALS UNDER THE REQUIREMENT THAT GPS LOCATION IS TRASMITTED TO TRACK AND SECURE THE PROPERTY DURING THE COURSE OF THE LEASE.....	15
A.	There is no Reasonable Expectation of Privacy Surrounding the Location Records of a Short-Term Rented Vehicle.....	15
B.	Petitioner’s Subjective Expectation of Privacy in the GPS Location Records of the Vehicle is Not One Society Would Find Justifiable Under the Circumstances.....	17
C.	Obtaining Location Data of a Third-Party’s Rental Vehicle Does Not Constitute a Trespass of a Constitutionally Protected Area	20
D.	In the Alternative, Even if the Court Believes Petitioner Either Has a Reasonable Expectation of Privacy in a Rental Vehicle or that the Government was Unlawfully Intruding on Petitioner’s Constitutionally Protected Area, an Individual Has No Fourth Amendment Interest in Records Which are Possessed, Owned, and Controlled By a Third-Party.....	21
	CONCLUSION.....	25

Table of Authority

	<u>Page(s)</u>
Cases	
<i>Byrd v. United States</i> , 138 S.Ct. 1518 (2018).....	4, 6–9
<i>California v. Ciraolo</i> , 476 U.S. 207 (1986).....	18
<i>Cardwell v. Lewis</i> , 417 U.S. 583 (1974).....	17–19
<i>Carpenter v. United States</i> , 138 S. Ct. 2206 (2018).....	20–24
<i>Florida v. Jardines</i> , 569 U.S. 1 (2013).....	6, 20
<i>Grady v. North Carolina</i> , 135 S. Ct. 1368 (2015).....	20–21
<i>Katz v. United States</i> , 389 U.S. 347 (1967).....	5–7, 13, 15–17, 20
<i>Kyllo v. United States</i> , 533 U.S. 27 (2001).....	15, 18, 19
<i>Olmstead v. United States</i> , 277 U.S. 438 (1928).....	20
<i>Ontario v. Quon</i> , 560 U.S. 746 (2010).....	18
<i>Ornelas v. United States</i> , 517 U.S. 690 (1996).....	4
<i>Rakas v. United States</i> , 439 U.S. 128 (1978).....	4, 6–8, 10
<i>Riley v. California</i> , 573 U.S. 373 (2014).....	23
<i>Silverman v. United States</i> , 365 U.S. 505 (1961).....	20
<i>Smith v. Maryland</i> , 442 U.S. 735 (1979).....	5, 6, 15–17, 21, 24
<i>United States v. Baker</i> , 221 F.3d 438 (3d Cir. 2000).....	6
<i>United States v. Boruff</i> , 909 F.2d 111 (5th Cir. 1990).....	10, 11
<i>United States v. Jones</i> , 565 U.S. 400 (2012).....	5, 7, 20, 21
<i>United States v. Knotts</i> , 460 U.S. 276 (1983).....	5, 17, 19, 23

<i>United States v. Lyle</i> , 919 F.3d 716 (2nd Cir. 2019).....	9
<i>United States v. Miller</i> , 425 U.S. 435 (1976).....	5, 21, 24
<i>United States v. Muhammad</i> , 58 F.3d 353 (8th Cir. 1995).....	7, 12
<i>United States v. Obregon</i> , 748 F.2d 1371 (10th Cir. 1984).....	4, 7, 10, 11
<i>United States v. Riazco</i> , 91 F.3d 752 (5th Cir. 1996).....	9
<i>United States v. Sanchez</i> , 943 F.2d 110 (1st Cir. 1991).....	13, 14
<i>United States v. Smith</i> , 263 F.3d 571 (6th Cir. 2001).....	13, 14
<i>United States v. Thomas</i> , 447 F.3d 1191 (9th Cir. 2006).....	10, 12
<i>United States v. United States Gypsum Co.</i> , 333 U.S. 364 (1948).....	4
United States Constitution	
U.S. Const. Amend. IV.....	6, 15

STATEMENT OF THE CASE

A. Statement of the Facts

This Court is being asked to determine whether Petitioner Jayne Austin has standing to challenge the search of a YOUBER rental car, which was secured on another's account without their knowledge or consent, and whether the government's subsequent acquisition of the rental car's Global Positioning System ("GPS") location data provided by YOUBER is a "search" under the Fourth Amendment of the United States Constitution.

The incident occurred on January 3, 2019, when Officer Charles Kreuzberger initiated a traffic stop of Petitioner's 2017 black Toyota Prius for failing to stop at a stop sign. R. at 2. During the traffic stop, Officer Kreuzberger discovered Petitioner's name was not listed on the rental agreement for the YOUBER car, nor could he find any information that legally attached her to the vehicle. *Id.*

Officer Kreuzberger searched the trunk of Petitioner's rental car, and found a BB gun designed to look like .45 caliber handgun (with the orange plastic tip removed), a maroon ski mask, and a duffel bag containing a large sum of money (approximately \$50,000) along with a number of blue dye packs. R. at 3.

During the investigation of Petitioner's car, Officer Kreuzberger received a dispatch to be on the lookout for a 2017 black Toyota Prius with a YOUBER logo, and identified the first three characters in the license plate starting "R0L" (the rental car's license plate read "R0LL3M.") *Id.* The dispatch stated the car was driven by a suspect who had just robbed the Darcy and Bringley Credit Union wearing a maroon ski mask. *Id.* Officers were also warned that the suspect was armed with a .45 caliber handgun. *Id.* Officer Kreuzberger arrested Petitioner for suspected bank robbery. *Id.*

Detective Boober Hamm, who was assigned to the case, connected Petitioner to five unresolved bank robbery incidents that had occurred in the three months prior to Petitioner's arrest. Each of the five bank robberies matched Petitioner's modus operandi. *Id.* Detective Hamm served a subpoena duces tecum on YOUNBER, requesting the company provide all GPS and Bluetooth records related to the account of Martha Lloyd—the account Petitioner was using at the time of her arrest. R. at 3.

As per YOUNBER's Corporate Privacy Policy ("Privacy Policy"), each account user is informed that YOUNBER collects information from customers that are directly related to the YOUNBER operations. R. at 29. Some of the information collected by YOUNBER includes address, contact information, billing and credit card details, transaction history, and "any other information [submitted] to the Services or otherwise provided to [YOUNBER]." *Id.* As part of YOUNBER's services, all users must consent to the Privacy Policy, which allows YOUNBER to "collect and store location information from [a customer's] device and from any Vehicles [that customer's] use via GPS and Bluetooth." *Id.* The Privacy Policy also informs users that all Bluetooth and GPS information is automatically collected and saved every two minutes, for security purposes. *Id.* Once the cellphone with the user's account is located inside the vehicle, the GPS and Bluetooth activate and YOUNBER begins to track the vehicle during the rental period. R. at 4.

Detective Hamm found the YOUNBER satellite and GPS records confirmed Martha Lloyd's account had been used to rent cars in the same locations and during each of the prior bank robberies—four of the robberies involved the rental of the same 2017 black Toyota Prius. *Id.* Detective Hamm recommended Petitioner be charged with six counts of bank robbery under 18 U.S.C. § 2113. *Id.*

B. Procedural History

Prior to Petitioner’s trial for bank robbery, Ms. Austin filed two motions to suppress evidence. R. at 1. The pre-trial motion was held at the United States District Court for the Southern District of Netherfield. *Id.* Petitioner moved the court to suppress (1) the evidence obtained during both Officer Kreuzberger’s search of the rental vehicle, and (2) the GPS location data provided by YOUBER to Detective Hamm. *Id.* Petitioner asserted her Fourth Amendment rights against unreasonable—and warrantless—searches and seizures. *Id.* The court denied both Petitioner’s motions, finding (1) she lacked standing to challenge the legality of the search performed by Officer Kreuzberger, and (2) that the location data did not infringe upon her reasonable expectation of privacy. R. at 6–8.

On March 4, 2019, Petitioner appealed to the United States Court of Appeals for the Thirteenth Circuit, who reviewed the District Court’s opinion and affirmed their holding. R. at 16. The Supreme Court has granted *certiorari*.

STANDARD OF REVIEW

This is an appeal from the United States Court of Appeals for the Thirteenth Circuit’s affirmation of the district court, which decided an individual does not have a valid property interest in a fraudulently leased vehicle to assert a constitutional challenge for the search of that vehicle. Further at issue is the Thirteenth Circuit’s decision that an individual does not have a valid property interest nor a reasonable expectation of privacy in the GPS location data which she voluntarily provided to a third-party company. Constitutional standing and the acquisition of evidence through a warrantless search are questions of law and subject to a de novo review. *See Ornelas v. United States*, 517 U.S. 690 (1996); *see also United States v. United States Gypsum Co.*, 333 U.S. 364 (1948).

SUMMARY OF THE ARGUMENT

An individual who is neither listed on the rental agreement nor is given permission by the valid renter or owner of a rental vehicle does not have a reasonable or legitimate expectation of privacy sufficient to confer Fourth Amendment standing to challenge the legality of a search of that vehicle. The scope of what constitutes a reasonable expectation of privacy depends “not upon a property right in the invaded place but upon whether the person who claims the protection of the [Fourth] Amendment has a legitimate expectation of privacy in the invaded place.” *Rakas v. Illinois*, 439 U.S. 128, 143 (1978). The Court has made a general assumption that an unauthorized driver who is in otherwise lawful possession and control of a rental vehicle has a reasonable expectation of privacy in the vehicle. *Byrd v. United States*, 138 S.Ct. 1518, 1524 (2018).

A bright-line rule is currently followed in the majority of circuit courts, which states that regardless of an unauthorized driver’s subjective expectation of privacy, where that individual is not in privity with the rental company, that expectation of privacy is unreasonable and therefore does not warrant standing to contest a search. *United States v. Obregon*, 748 F.2d 1371 (10th Cir. 1984). This Court should recognize such a bright-line rule, which would deny an unauthorized driver to assert Fourth Amendment standing to contest a search when there is not a valid agreement between the rental company and the driver; however, even under a totality of the circumstances approach—where an individual lacks permission from the valid renter and has only a brief interaction and casual possession of the vehicle—no legitimate or reasonable expectation of privacy exists.

Even if the Court finds individuals who fraudulently secure rental vehicles have standing to contest a government search, the acquisition of the rental company’s GPS location data is not

a “search” as defined by the Fourth Amendment. A Fourth Amendment search only occurs when the government breaches an individual’s reasonable expectation of privacy, and that expectation is one that society would recognize as justifiable under the circumstances. *See Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). An individual cannot maintain a reasonable expectation of privacy in information “[she] knowingly exposes to the public . . .” *Id.* at 351. Further, a person has no objectively reasonable expectation of privacy in her public movements from one place to another when she is travelling in an automobile on public roads. *United States v. Knotts*, 460 U.S. 276, 281 (1983). Therefore, the government has not conducted a search when acquiring location data of a rental vehicle.

In addition to the *Katz* reasonable-expectation-of-privacy test, the Court assesses whether the government is in violation of common-law trespass. *United States v. Jones*, 565 U.S. 400, 405 (2012). When location data records are not obtained as a result of a physical breach of a person’s property, no trespass has occurred. *See generally United States v. Jones*, 565 U.S. 400 (2012).

Even if the Court believes a search has occurred under *Katz* or *Jones*, the third-party doctrine provides that “a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties.” *Smith v. Maryland*, 442 U.S. 735, 743–744 (1979); *see also United States v. Miller*, 425 U.S. 435, 443 (1976). Therefore, acquiring location data from a third-party company—which the user voluntarily provided her GPS coordinate for the purposes of monitoring the rental vehicle—is not a search under the *Smith* and *Miller* third party doctrine.

ARGUMENT

I. AN INDIVIDUAL WHO DECEPTIVELY USES A RENTAL VEHICLE IN THE NAME OF ANOTHER DOES NOT HAVE STANDING TO CONTEST A SEARCH OF THE VEHICLE

A. The Fourth Amendment Proscription Against Unreasonable Searches Does Not Include Unauthorized Drivers of Rental Vehicles Because They Can Not Claim Any Reasonable Expectation of Privacy to Contest a Search

To challenge the legality of a search under the Fourth Amendment, an individual must have a cognizable Fourth Amendment interest in the place searched, otherwise known as “standing.” *Byrd*, 138 S.Ct. at 1526. The Fourth Amendment to the United States Constitution protects the right of the people from “unreasonable searches and seizures” of their “persons, houses, papers, and effects.” U.S. Const. Amend. IV. In early Fourth Amendment jurisprudence, the ability to challenge an unlawful search was dependent on whether the individual could claim a valid property or possessory interest in the place or item searched. *Florida v. Jardines*, 569 U.S. 1, 1414 (2013). These property and possessory interests were developed based on “property and tort law between guests, licensed, invitees, and the like.” *Rakas*, 439 U.S. at 143.

This doctrine was expanded to not only protect property or possessory interests from trespass, but also to shield reasonable and legitimate expectations of privacy from unreasonable searches. *Katz*, 389 U.S. at 361 (Harlan, J., concurring). An expectation of privacy is reasonable if the individual has a subjective expectation of privacy, and that expectation is one “society is prepared to recognize as reasonable.” *Smith*, 442 U.S. at 740. Thus, absent a legitimate expectation of privacy, an individual has no standing to bring the claim.” *See Rakas*, 439 U.S. at 143; *see also United States v. Baker*, 221 F.3d 438, 441 (3d Cir. 2000).

While this Court has previously held that there is a diminished expectation of privacy in automobiles, it has yet to provide whether there is an even lower expectation of privacy for individuals in rental vehicles—particularly individuals who are not authorized to drive the

vehicle under the rental agreement and are not given permission by the actual renter. *Byrd*, 138 S. Ct. at 1526; see *Obregon*, 748 F.2d at 1371 (holding that there was no legitimate expectation of privacy where the driver was not listed on the rental agreement or other documents, despite being given permission by the actual renter); see also *United States v. Muhammad*, 58 F.3d 353, 355 (8th Cir. 1995) (holding that an unauthorized driver must show “at least some evidence of consent or permission from the lawful renter . . . to give rise to a legitimate expectation of privacy.”)

The notion of standing relies on the privacy interests outlined in *Katz* and *Jones*. The test in *Jones*, which found that a person could safely challenge the lawfulness of a search wherever one was “legitimately on the premises,” was later determined to be merely relevant to the inquiry, but it could not be deemed as controlling. *Byrd*, 138 S.Ct. 1528. This Court in *Byrd* determined that unauthorized drivers of rental vehicles had a reasonable expectation of privacy in the vehicle, assuming that “lawful possession and control and the attendant right to exclude” remained with the driver whether or not they were listed on the rental agreement. *Id.* However, the concern with “lawful possession” was emphasized as being crucial to the analysis of Fourth Amendment standing; a car thief who unlawfully possessed a stolen car would not have a reasonable expectation of privacy “no matter the degree of possession and control.” *Id.*

This Court has expressed concern with extending Fourth Amendment protections to individuals who seek to establish a legitimate expectation of privacy merely by showing they were “legitimately on [the] premises.” *Rakas*, 439 U.S. at 142. Specifically, the Court introduced a hypothetical of a casual visitor who briefly entered another’s house, and—based on that momentary and legitimate presence—could challenge a search if one happened to occur during that time. *Id.* The Court concluded that this hypothetical visitor would have absolutely no interest

or legitimate expectation of privacy in the house; there would be no purpose served by the Fourth Amendment if the visitor was allowed to challenge the legality of the search. *Id.*

Relying on *Rakas*, Petitioner cannot challenge the legality of Officer Kreuzberger's search. Ms. Austin had no reasonable expectation of privacy in the YOUNBER vehicles she rented through Ms. Lloyd's YOUNBER account. The only property or possessory interest in the YOUNBER's property was the brief and minimal use of its licensed vehicles, which could only be rented for a maximum of one week (which the user paid a fixed fee per hour to use it.) R. at 2. Petitioner was essentially the hypothetical visitor discussed in *Rakas*. Her presence inside the vehicle at the time of the search—although legitimate—was momentary and did not afford her the rights to challenge the government's actions under the Fourth Amendment. Therefore, Petitioner lacked any legitimate or reasonable expectation of privacy in a YOUNBER vehicle that constricted the time she was able to even be "legitimately on [the] premises."

B. An Unauthorized Driver of a Rental Vehicle Does Not Have a Reasonable Expectation of Privacy Sufficient to Confer Standing Where the Relationship Between the Driver and the Renter is Attenuated or Non-Existent

A driver has a reasonable expectation of privacy in a rental car even when they are not listed on the rental agreement as an authorized driver. *Byrd*, 138 S.Ct. at 1531. In *Byrd*, the petitioner drove a rental car which was purchased and rented by a third-party. Byrd was given permission to drive the vehicle, although he was not listed as an authorized driver on the rental agreement. *Id.* at 1528. The Court focused on a number of factors that could affect the petitioner's privacy rights, including the terms of the rental contract and his right to exclude others from the car as the sole occupant. *Id.* at 1527. This Court has not specifically determined whether actual permission to drive the vehicle by the legitimate renter would impact the standing analysis.

Petitioner was not given permission by her on-and-off-again girlfriend, Ms. Lloyd, to rent the YOUNBER vehicles in her name—through the unauthorized use of Ms. Lloyd’s YOUNBER account and credit card. R. at 12. At the time of the rental, Petitioner’s relationship to Ms. Lloyd was detached, as they had not been in contact since September of 2018. R. at 18. Further, Ms. Lloyd did not explicitly give Petitioner permission to continue to use her YOUNBER account; she had intended to distance herself from Petitioner, which was exhibited through the last letter she sent to her. R. at 20. Petitioner knew, or reasonably should have known, that the termination of the relationship would have invalidated any authority to the continued use of Ms. Lloyd’s credit card and access to her YOUNBER account. Since there was the absence of permission, Petitioner’s fraudulent procurement of the rental vehicles in Ms. Lloyd’s name ensured no more property interest in the vehicles than a car thief would have. Therefore, Petitioner’s subjective expectation of privacy was not reasonable and did not afford her the right to contest the search of the YOUNBER vehicle.

This Court in *Byrd* offered a broad rule for the privacy expectations of unauthorized drivers of rental vehicles, specifically that “an unauthorized driver of a rental car is not *always* barred from contesting a search of the vehicle.” *Byrd*, 138 S.Ct. at 1531 (emphasis added). The Court shied away from a bright-line rule, which created uncertainty in how to properly analyze when unauthorized drivers were barred from contesting a search. This ultimately resulted in the circuit courts relying on their previously established tests to resolve that question. *See United States v. Lyle*, 919 F.3d 716 (2nd Cir. 2019) (holding that an individual needed to have valid rental agreement and license); *see also United States v. Riazco*, 91 F.3d 752 (5th Cir. 1996) (holding that defendant needed to have either a valid rental agreement *or* permission from the valid renter.)

There remain three schools of thought in determining whether an unauthorized driver of a rental vehicle has a reasonable expectation of privacy in the vehicle. *United States v. Thomas*, 447 F.3d 1191, 1196 (9th Cir. 2006). The first perspective, followed by the majority of the Circuit Courts, is that unauthorized drivers not privy to a rental agreement will never have a legitimate expectation of privacy in the rental cars they drive. Another perspective is that unauthorized drivers will always have a legitimate expectation of privacy where the driver is given permission by the lawful renter. The last perspective follows a totality of the circumstances analysis, where weight is given to various factors applied in a case-by-case analysis to determine whether an unauthorized driver has a legitimate expectation of privacy. Petitioner's claim does not survive under *any* of the tests set forth by the circuit courts.

1. Unauthorized drivers are not granted permission to drive rental vehicles through a valid rental agreement, therefore a bright-line rule should apply

The first approach, which is followed by the majority of the Circuit Courts, abides by the bright-line rule that an unauthorized driver does not have standing to contest the legality of the search of a rental car. *See United States v. Boruff*, 909 F.2d 111 (5th Cir. 1990); *see also Obregon*, 748 F.2d at 1371. In *Obregon*, an individual was apprehended while driving a rental car with expired license plates, and upon investigation it was determined that the name of the individual was not on the rental contract. *Id.* at 1373. The court held that an unauthorized driver could never have a legitimate expectation of privacy in the vehicle when there was no existing agreement between the driver and the rental company. *Id.* at 1375. The Tenth Circuit relied on this Court's decision in *Rakas*, which stated, "[O]ne who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of his right to exclude." *Id.* at 1375. Therefore, the Tenth Circuit determined that *Obregon* did not have

standing, because a driver lacks “lawful possession” sufficient to assert Fourth Amendment standing to contest a search. *Id.*

In *United States v. Boruff*, the Fifth Circuit also held that unauthorized drivers cannot contest the legalities of the search of a rental car. *United States v. Boruff*, 909 F.2d 111 (5th Cir. 1990). In *Boruff*, the defendant took part in a scheme to transport marijuana across the Mexican border, and in doing so he arranged for his girlfriend to rent a car for him that he was to use in this operation. *Id.* at 113. He did not have an agreement with the rental company. Further, Boruff had knowledge that, in accordance with the rental agreement, his co-conspirator was the only one authorized to drive the rental vehicle. The court found this was sufficient to preclude any legitimate expectation of privacy in the rental vehicle. *Id.* at 117.

Similar to *Obregon* and *Boruff*, Petitioner did not have a valid rental agreement with the rental company, YOUNBER. R. at 2. Instead, Petitioner fraudulently used the account and credit card of her ex-girlfriend, Ms. Lloyd, who did not explicitly grant Petitioner permission to continue to use her YOUNBER account following their breakup. *Id.* Even if Petitioner had been granted permission to continue using the YOUNBER account, Ms. Lloyd did not have the legal authority to give Petitioner permission to rent vehicles in her name—the rental agreement was binding on Ms. Lloyd, and YOUNBER took precaution to ensure that the correct user was driving the rented vehicle through their tracking processes. R. at 22. Assuming Petitioner had a subjective expectation of privacy in the vehicles she operated, the use and operation of the rental vehicle were illegitimate and not objectively reasonable; thus, obviating her right to challenge any search of the YOUNBER property or records.

2. Unauthorized drivers may assert standing to challenge a search, but only if the authorized renter granted permission to drive the rental vehicles

The second approach provides that unauthorized drivers will always have standing to contest a search, contingent on the fact that the valid renter or authorized driver gave them permission to drive the rental vehicle. *United States v. Muhammad*, 58 F.3d 353, 355 (8th Cir. 1995). This approach is based on notions of possessory or ownership interests, finding that unauthorized drivers may still have standing to challenge a search if they can make a showing of “joint control” or “common authority” of the rental vehicle. *Thomas*, 447 F.3d at 1198. In *Thomas*, the Ninth Circuit held that a technical violation of the terms of the rental agreement was not outcome determinative of the question of standing. *Id.* Rather, the unauthorized use could be shown to confer Fourth Amendment standing if it could be established that the valid renter allowed the unauthorized driver to share control and use of the vehicle. *Id.* at 1199.

Petitioner does not have a legitimate expectation of privacy in the physical property or data records from YOUNBER, and would therefore fail under this approach. Petitioner was not explicitly granted permission to continue to use Ms. Lloyd’s YOUNBER account after September of 2018, when their relationship ended. R. at 19. Furthermore, Ms. Lloyd never used the rental cars that Petitioner procured through the YOUNBER app—nor was Ms. Lloyd even aware of the vehicle rentals. R. at 20. Rather, Petitioner was an unauthorized user on Ms. Lloyd’s YOUNBER account and rented vehicles for her own use; no joint control or common authority existed between Ms. Lloyd and Petitioner. Accordingly, there was no relationship which would grant a legitimate expectation of privacy to Petitioner in the YOUNBER cars. Therefore, where no permission was explicitly granted (or when there is an intent to revoke such permission), any expectation of privacy Petitioner could claim would not be legitimate nor reasonable.

3. Even if a bright-line rule is inappropriate, a totality of the circumstances approach would still deny Petitioner the ability to claim a reasonable expectation of privacy sufficient to confer Fourth Amendment standing

The third approach applies a totality of the circumstances test to determine whether unauthorized drivers have a reasonable expectation of privacy in rental cars. The courts that have adopted this approach rely on a list of various relevant factors which aid in the fact-based standing determination. *See United States v. Sanchez*, 943 F.2d 110, 113 (1st Cir. 1991). These factors, while not exhaustive, are recognized as:

ownership, possession and/or control, historical use of the property searched or the thing seized; ability to regulate access; the totality of the surrounding circumstances; the existence or nonexistence of a subjective anticipation of privacy; and the objective reasonableness of such an expectancy under the facts of a given case.

United States v. Smith, 263 F.3d 571, 584 (6th Cir. 2001).

The court in *Sanchez* applied these factors to an unauthorized driver's use of a private vehicle (instead of a rental vehicle). The First Circuit found it instructive that the defendant had only casual possession of the car, because he did not own the car, nor did he use the car on any prior occasions. *Sanchez*, 943 F.2d at 114. In addition to casual possession, Sanchez did not have direct authority from the owner to use the vehicle. The court reasoned that if Sanchez had established a "more intimate relationship with the owner," or exhibited repeat use of the vehicle, there may have been a legitimate expectation of privacy in the vehicle. *Id.* The Sixth Circuit adopted this totality of circumstances test in *Smith*, finding the test applicable in cases regarding unauthorized use of rental vehicles. *Id.* at 113 (holding that a rigid test based solely on whether the driver is listed on the rental contract is inappropriate considering the objective reasonableness prong of the *Katz* test).

Even in a totality of the circumstances approach, Petitioner’s claim to a reasonable expectation of privacy would fail. Similar to the *Sanchez*, Petitioner could only establish casual possession of the YOUBER rental vehicles. The transient use of the rental cars would not establish a level of possession or control sufficient to elevate the reasonable expectation of privacy in the car. Distinguishable from the case of *Smith*, where the defendant was granted permission by his wife, Petitioner could not establish a relationship which would be beneficial to the inquiry of her expectation of privacy in the YOUBER. Petitioner’s relationship to Ms. Lloyd was distanced and arguably non-existent after their breakup in September of 2018. R. at 19. This detached relationship would not tip the scale towards a legitimate expectation of privacy, because Petitioner will not be able to show express permission. Furthermore, Petitioner had no interest in establishing a possessory interest in the YOUBER vehicles she rented through Ms. Lloyd’s account. This was apparent through Ms. Austin’s aversion to being “on the grid,” because she prided herself on her immaterial and minimalist lifestyle, revealed none of her personal information to the world, and actively removed any attribution of herself to most outside activity. R. at 18. In light of all the surrounding circumstances, given her attenuated relationship to the YOUBER and Ms. Lloyd, Petitioner’s claim to a legitimate expectation of privacy—and thereby a cognizable Fourth Amendment interest sufficient to confer standing—should fail under this approach. Therefore, this Court should affirm the decision of the Thirteenth Circuit Court that Petitioner does not have standing to challenge a Fourth Amendment search.

II. THE GOVERNMENT DOES NOT CONDUCT A SEARCH UNDER THE FOURTH AMENDMENT WHEN IT ACQUIRES LOCATION DATA FROM A THIRD-PARTY COMPANY LEASING ITS PROPERTY TO INDIVIDUALS UNDER THE REQUIREMENT THAT GPS LOCATION IS TRANSMITTED TO TRACK AND SECURE THE PROPERTY DURING THE COURSE OF THE LEASE

A. There is no Reasonable Expectation of Privacy Surrounding the Location Records of a Short-Term Rented Vehicle

The Fourth Amendment does not protect the voluntarily transmission of location data to a third-party. The Fourth Amendment provides, in part, 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. IV. (emphasis added.) This Court has long established that the Fourth Amendment protects against unreasonable searches when “the government violates a subjective expectation of privacy that society recognizes as reasonable.” *Kyllo v. United States*, 533 U.S. 27, 33 (2001); *see also Katz*, 389 U.S. at 361. Both the subjective and the objective prongs of this test must be met for the Court to recognize “what is private is protected.” *Id.* at 351.

This two-prong test established in *Katz*—and upheld by both the District Court and the Thirteenth Circuit when analyzing Petitioner’s case—first determines whether an individual seeks to preserve something as private. *Id.*; *see R.* at 6–7; *see also R.* at 13–14. Justice Harlan, in his concurring opinion, provided that an individual’s momentary expectations of “freedom from intrusion are recognized as reasonable.” *Katz*, 389 U.S. at 361. In assessing whether a person has made reasonable efforts to maintain their privacy, this Court notes that “it is important to begin by specifying precisely the nature of the state activity that is challenged.” *Smith*, 442 U.S. at 741.

This Court in *Smith* found the installation and use of a pen register to gather information about an individual’s personal telephone records did not violate the Fourth Amendment. *Smith*

was suspected of committing a robbery and subsequently making threatening and obscene phone calls to the victim's home. The officers, acting without the authority of a warrant, installed a pen register at the telephone company to track the numbers dialed from Smith's telephone. This Court stated that all users were aware the phone company made records of the numbers dialed, because these numbers (if long distance) would be present on their monthly bills. Further, the most common use of a pen register was to "aid in the identification of persons making annoying or obscene calls." *Id.* at 742. The Court relied on these facts and concluded that Smith had no expectation of privacy in the number dialed from his phone because telephone users in general would not believe they had any privacy in their telephone records. *Id.* at 743.

Petitioner's circumstances are substantially similar to those in *Smith*, because she was aware of the public nature of the activities that she was engaged in. Whenever Petitioner occupied the rental vehicle, she had to physically connect her phone to Bluetooth and permit GPS tracking in order for the data to be sent through the YOUBER application ("app"). She was aware—or should have been aware—that the GPS information was collected by Smoogle, timestamped, and stored by YOUBER. This practice was defined in the YOUBER Corporate Privacy Policy, which states in relevant parts that:

[YOUBER] automatically collect[s] and store[s] location information from [the client's] device and from any Vehicles [the client] uses[s] via GPS and Bluetooth. This information is automatically collected every two minutes and uploaded to YOUBER's mainframe. [YOUBER] tracks the timestamped location of the vehicle for security purposes, regardless of whether the vehicle is rented.

R. at 29.

This Court has not provided an exhaustive list of where an individual could reasonably expect privacy, but they have stated, "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz*, 389 U.S. at

351. Relying on the Court’s analysis in *Smith*, Smith’s knowledge that the information was being obtained by the company, stored by the company, and used to protect against abuse and crime was enough to show it was not reasonable for him to hold any expectation of privacy. Likewise, Petitioner knew her location was tracked by Smoogle and uploaded to YOUBER, she knew—or should have known—that information was stored (via the privacy policy), and the primary purpose of this practice was for security and to limit criminal activities involving the YOUBER vehicles. Therefore, Petitioner should not reasonably maintain a subjective expectation of privacy in YOUBER’s GPS records.

B. Petitioner’s Subjective Expectation of Privacy in the GPS Location Records of the Vehicle is Not One Society Would Find Justifiable Under the Circumstances

Even if Petitioner had manifested a reasonable desire to maintain her privacy interests in the GPS records held by YOUBER, the Court would still have to determine whether the second prong of the *Katz* test is satisfied. This Court recognizes a reasonable expectation in privacy when the subjective expectation held by an individual is “one that society is prepared to recognize as ‘reasonable.’” *Id.* at 735. Therefore, a warrantless search violates the Fourth Amendment when “the individual's expectation [of privacy], viewed objectively, is ‘justifiable’ under the circumstances.” *Knotts*, 460 U.S. at 281. The Court has narrowed this rule as it relates to activities conducted within a vehicle, stating that “[a] person travelling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another.” *Id.* In the *Cardwell v. Lewis* plurality, this Court provided justification for limiting privacy expectations in a vehicle, finding “[a motor vehicle’s] 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 both its occupants and its contents are in plain view.” *Cardwell v. Lewis*, 417 U.S. 583, 590 (1974) (plurality).

In pursuing whether Petitioner’s privacy interests are objectively reasonable, the Court finds that “[t]he test of legitimacy is not whether the individual chooses to conceal assertedly private activity, but instead whether the government’s intrusion infringes upon the personal and societal values protected by the Fourth Amendment.” *California v. Ciraolo*, 476 U.S. 207, 212 (1986) (internal quotation marks omitted). This analysis changes in the presence of technological advancements that could not have been anticipated by the Framers at the time the Fourth Amendment was drafted. The Court must then consider the changes in the dynamics of information transmissions—such as the use of GPS tracking to record an individual’s location—and assess whether society would accept the government’s intrusion using this new technology as proper behavior. *Ontario v. Quon*, 560 U.S. 746, 759 (2010). This Court has acknowledged that “[i]t would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology.” *Kyllo*, 533 U.S. at 33–34.

This Court in *Kyllo* was confronted with the issue of whether technological advancements have the ability to shrink the realm of guaranteed privacy, and when the use of such developments are constitutionally permissible without a search warrant. *Id.* at 34. In *Kyllo*, the government was able to obtain a search warrant by acquiring information about the suspect’s home through the use of thermal imaging. This Court found the use of such technology constituted a search under the Fourth Amendment, relying on the fact that the thermal scanner essentially invaded the structure of the suspect’s home, the details discovered would have been

unknown without a physical intrusion of the home, and the technology in question was not in the general public use. *Id.* at 34–40.

The Court’s analysis in *Kyllo* provides guidance as to whether the government’s use of GPS tracking constitutes a search under the Fourth Amendment. Like thermal imaging, GPS is advanced technology that has the potential to reveal personal details about an individual’s daily activities. The Court determined society would find an individual’s interest in maintaining her privacy from the use of invasive technology as justifiable, but did not weigh their decision based on the intimacy of the activities but on the location of the intrusion, the availability of the information, and the accessibility of the technology to the general public.

In contrast to *Kyllo*, Petitioner’s location was not being recorded while she was within her own home. In fact, the only times the GPS was recording Petitioner’s location was when she was within the rental vehicle—an area where the Court has stated an individual has a limited expectation of privacy. *See Cardwell*, 417 U.S. at 590; *see also Knotts*, 460 U.S. at 281. While the Court extends a heightened protection from any “physical invasion of the structure of the home, ‘by even a fraction of an inch,’” this increased protection does not expand to individual’s while driving a car. *See, e.g., Kyllo*, 533 U.S. at 37; *see also Knotts*, 460 U.S. at 281. Second, Petitioner’s location was not so private that it would not have been discoverable without a physical intrusion, because Petitioner’s vehicle was captured on surveillance footage during four of the bank robberies. R. at 4. Finally, GPS technology is available and commonly used by the general public. The expansion of cellular phones with the capability to access the internet has given society the power to rely on GPS tracking in their daily lives; users now have the ability to send their GPS location to any other user’s cellular phone. Given these facts, this Court should

find society would not consider the GPS location data of the rental vehicle within an individual's reasonable expectation of privacy.

C. Obtaining Location Data of a Third-Party's Rental Vehicle Does Not Constitute a Trespass of a Constitutionally Protected Area

A Fourth Amendment search can still occur, even when an individual has no reasonable expectation of privacy. Prior to this Court's decision in *Katz*, Fourth Amendment jurisprudence was tied solely to common-law trespass. *Jones*, 565 U.S. at 405; *see, e.g., Olmstead v. United States*, 277 U.S. 438, 464 (1928) (Court found no search was conducted by placing wiretaps on public telephone wires because there was no physical intrusion of a constitutionally protected area.) In *Jones*, this Court reaffirmed the positions that "the *Katz* reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test." *Jones*, 565 U.S. at 409. Common-law trespassory test protects individuals against unlawful governmental intrusion on constitutionally protected areas. *Id.* at 410 (search occurred when government placed GPS device on the undercarriage of a Jeep); *see Silverman v. United States*, 365 U.S. 505, 512 (1961) (search occurred when government placed a spike microphone against the heating duct of a suspect's home); *see also Jardines*, 569 U.S. at 9 (search occurred when trained police dog was brought to suspect's front door to detect narcotics).

The GPS data should not be constitutionally protected. First, Petitioner's GPS locations were not transmitted until she was inside the rental vehicle—the information recorded was for tracking YOUNBER's property. Had the location of Petitioner's cellular phone been tracked when she was not using the YOUNBER service, the data pulled from the cellphone would have constituted a search. *See Carpenter v. United States*, 138 S. Ct. 2206, 2220 (2018) (search occurred when the government tracked a cellular phone's location through "cell sites"); *see also, Grady v. North Carolina*, 135 S. Ct. 1368, 1370 (2015) (attaching an ankle bracelet to track an

individual's movements was a search.) Second, there was no physical governmental intrusion on Petitioner's personal property or chattel. During the course of his investigation, Detective Hamm did not enter Petitioner's home, search the surrounding curtilage of her home, nor did he make physical contact with the vehicle used in the alleged crime. Further, the GPS locations were transmitted by Petitioner's own phone—not from an external GPS device as in *Jones*. There was no trespass of a constitutionally protected area; therefore, this Court should find the government did not conduct a “search” of the rental vehicle's location data.

D. In the Alternative, Even if the Court Believes Petitioner Either Has a Reasonable Expectation of Privacy in a Rental Vehicle or that the Government was Unlawfully Intruding on Petitioner's Constitutionally Protected Area, an Individual Has No Fourth Amendment Interest in Records Which are Possessed, Owned, and Controlled By a Third-Party

The narrow decision in *Carpenter* does not limit the third-party doctrine to exclude the location data Petitioner voluntarily transmitted to YOUNBER. This Court established the third-party doctrine in *Miller*, which held that the Fourth Amendment does not prohibit the government from obtaining information conveyed to a third party, “even if the information is revealed on the assumption that it will be used only for a limited purpose . . .” *Miller*, 425 U.S. at 443 (no search was conducted when the government subpoenaed bank records, deposits, and other documents that Miller had conveyed to the bank teller). This Court further expanding the third-party doctrine in *Smith*, where this Court added, “a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties.” *Smith*, 442 U.S. at 743–744. This third-party doctrine was recently revisited by this Court in *Carpenter*, which limited the application of *Smith* and *Miller*.

In *Carpenter*, this Court invalidated the warrantless acquisition of Carpenter's wireless phone carrier's cell-site records, which revealed the location of Carpenter's cell phone whenever

it was connected to one of the company's cell-sites (phones connect to the cell-sites during phone calls, while using the internet or the phone's data, and when sending text messages.) *Carpenter*, 138 S. Ct. at 2214. The report provided the government with nearly 13,000 cell phone records tracking Carpenter's movements over the course of 152 days. *Id.* at 2212. This Court found that although the records were acquired by a third-party, the invasive nature of the cell-site location information ("CSLI") presented grave privacy concerns. The CSLI gave the government an exact map of where Carpenter was at any given time during those 152 days.

The Court supported its decision by exploring society's reliance on cell phones, stating "a cell phone—[is] almost a feature of human anatomy . . . [it] tracks nearly exactly the movements of its owner." *Id.* at 2218 (internal quotation marks omitted). The Court added, "[w]hile individuals regularly leave their vehicles, they compulsively carry cell phones with them all the time. A cell phone faithfully follows its owner beyond public thoroughfares and into private residences, doctor's offices, political headquarters, and other potentially revealing locales." *Id.* The use of carrying a cell phone is a staple of modern society, and a cell phone logs a cell-site record "without any affirmative act on the part of the user beyond powering up." *Id.* at 2200. If the Court mechanically followed the third-party doctrine, a user could provide the government with an "exhaustive chronicle of location information casually collected by wireless carriers . . ." just by merely turning a phone on. *Id.* at 2219.

The Court's main concerns in relying on the third-party doctrine in *Carpenter* revolved around the fact that the government could acquire endless amounts of location information, and track an individual's every movement through the use of their cell phone. Petitioner's situation is substantially different from those fear expressed in *Carpenter*. First, Petitioner's cell phone only provided information to YOUNBER while she was driving the rental vehicle. Unlike Carpenter,

who inadvertently sent his location to the wireless carrier every time he used his phone, Ms. Austin voluntarily engaged with the YOUNBER app to provide the company with location data only while she was inside the rental car. These facts conform more to the circumstances discussed in *Knotts*, than to those in *Carpenter*. In *Knotts*, the government tracked a beeper that was inside a suspect's car. In the Court's analysis, it noted the surveillance took place while the suspect was driving on the public roads, which was "voluntarily conveyed to anyone who wanted to look." *Knotts*, 460 U.S. 281. An individual has a lower expectation of privacy from a tracking device used within a vehicle, because these devices "are merely a more effective means of observing what is already public." *Id.* at 284. Similarly, Petitioner's location was only transmitted while she was in the public eye; YOUNBER does not maintain satellite mapping of each user's location outside of the vehicle. Therefore, the location data obtained from YOUNBER provided a limited view of Petitioner's movements only while she was driving YOUNBER property within the public sphere.

Second, YOUNBER's policy allows its customers to rent a vehicle for a maximum period of one week. R. at 2. In contrast, the information acquired from CSLI could provide multiple years' worth of location data—leading to a heightened expectation of privacy. The intrusion becomes even more invasive when considering the typical American's reliance on their cell phone. This Court provided statistical information that "nearly 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." *Riley v. California*, 573 U.S. 373, 395 (2014). If the government could lawfully, and without a warrant, acquire location information from a user's cell phone every time that phone was being used, it could pinpoint an individual's every movement at any given time of the day over the course of several years.

The acquisition of Petitioner’s information is significantly limited because the location information is provided only while the user is actively engaged with the rental vehicle. A YOUNBER customer only has the option to rent a vehicle for a maximum of one week and prohibits users from sleeping inside the rental vehicle. R. at 23. Therefore, the time period where an individual can be tracked while using the vehicle is severely limited and should not amount to extending the same privacy protections of a home.

Finally, Petitioner voluntarily communicated her location to the YOUNBER company by actively engaging her phone and connecting the app to her location settings. This Court in *Carpenter* analyzed whether a user assumed the risk in voluntarily conveying their information to their wireless providers, finding that “[a]part from disconnecting the phone from the network, there is no way to avoid leaving behind a trail of location data.” *Carpenter*, 138 S. Ct. at 2220. This “voluntary” transmission of data occurs “without any affirmative act on the part of the user beyond powering up.” *Id.* This analysis should not weigh as heavily on YOUNBER’s GPS location data. The GPS data is not secured without the user’s knowledge; each customer has consented to YOUNBER’s Privacy Policy which informs the user what information will be collected, how it will be collected, during what times it will be collected, and who the information may be disclosed to. Unlike *Carpenter*, YOUNBER customers voluntarily assume the risk of turning over “a comprehensive dossier of [their] physical movements.” *Id.* Therefore, the Court should apply third party doctrine and affirm the Thirteenth Circuit’s decision that “individuals have no Fourth Amendment interests in records which are possessed, owned, and controlled by a third party.” R. at 15.; *Miller*, 425 U.S. at 442–43; see also *Smith*, 442 U.S. at 735.

CONCLUSION

The Thirteenth Circuit Court of Appeals properly held that an unauthorized driver of a rental vehicle does not maintain a reasonable expectation of privacy sufficient to confer Fourth Amendment standing to contest a search when the vehicle has been procured deceptively to avoid detection.

Further, the court properly found that a warrantless search to obtain GPS location data, which the user voluntarily conveyed to a third-party company, was not a “search” under the Fourth Amendment and therefore not an invalid acquisition by the government.

For the aforementioned reasons, the United States Court of Appeals for the Thirteenth Circuit should be affirmed.

Respectfully submitted,

Counsel for the Respondent
Team # R8
October 6, 2019