



Reasonable EXPECTATION OF PRIVACY

E-SCOOTER LOCATION TRACKING DOES NOT VIOLATE THE FOURTH AMENDMENT.

WRITTEN BY PIERRE GROSDIDIER

ELECTRIC SCOOTERS, OR E-SCOOTERS, easily rentable via smartphone applications, increasingly pepper urban landscapes. In 2018, faced with cluttered sidewalks, the city of Los Angeles started to require e-scooter companies to track each of their wheeled devices in real-time via their smartphone applications by recording their whereabouts.¹ Importantly, the data collection does not include rider-related information. Justin Sanchez, an e-scooter rider, sued the Los Angeles Department of Transportation, or LADOT, alleging, inter alia, that the location tracking violated the Fourth Amendment. Sanchez alleged that the LADOT could easily deanonymize the location data with the help of other data sets and retrace riders' past whereabouts with preserved historical data. The district court dismissed Sanchez's complaint without leave to amend and the U.S. Court of Appeals for the 9th Circuit affirmed, holding that the third-party doctrine applied and foreclosed his reasonable expectation of privacy in his location data.²

The court whittled down Sanchez's claim to whether the collection of e-scooter

location data violated Justice John Marshall Harlan II's *Katz* test, under which a search requires a Fourth Amendment warrant when a person "exhibit[s] an actual (subjective) expectation of privacy . . . that society is prepared to recognize as 'reasonable.'" The court addressed this issue by considering the tension between a person's expectation of privacy in their whereabouts and the third-party doctrine, which holds that a person has no such expectation in information that the person voluntarily makes public. As to a person's whereabouts, the U.S. Supreme Court narrowly held in *Carpenter v. United States* that collecting a person's historical cell site location information, or CSLI, for 127 days required a warrant because it "achieve[d] near perfect surveillance" and violated the person's reasonable expectation of privacy.⁴ But *Carpenter* did not disturb the third-party doctrine.⁵ In *United States v. Miller*, the Supreme Court held that Jack Miller had no expectation of privacy in canceled check and other transactional information held by his bank and sought by the government.⁶ Likewise, in *Smith v. Maryland*, the court held that Michael Lee Smith had no expectation of privacy in the phone numbers he dialed and that a police pen surreptitiously recorded.⁷ In both cases, Miller and Smith had voluntarily communicated the information to third parties (the bank and the phone company, respectively), thus diminishing their privacy interests. Importantly, in *Carpenter*, the Supreme Court held that CSLI is "not truly" voluntarily shared with the phone companies because phones generate CSLI automatically in the background, and because carrying a cellphone is "indispensable to participation in modern society."⁸

In this case, the 9th Circuit held that the third-party doctrine applied because Sanchez knowingly and voluntarily disclosed his location data each time he rented an e-scooter. He agreed each time to the operator's privacy policies, which stated explicitly that location data would be collected and shared with authorities. Moreover, in a significant departure from the facts in *Carpenter*, the location data concerned e-scooters, not their riders. A particular rider could not expect to use the

same device multiple successive times as riders grabbed e-scooters willy-nilly on the street and operators rotated them for recharge. The location data, therefore, did not track any individual rider "virtually continuously" as did CSLI. Finally, in another departure from *Carpenter*, e-scooters are not indispensable to function in today's society as cellphones are. E-scooters are merely one short-distance transportation solution among others. Concluding that the third-party doctrine applied, the court held that, in this case, the location data collection was not a Fourth Amendment search. The court stressed the narrowness of its decision, leaving the door open to other outcomes if the location data was used by law enforcement or to infer riders' identities and whereabouts.⁹ **TBJ**

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NOTES

1. *Sanchez v. Los Angeles Dep't. of Transp.*, 39 F.4th 548, 552 and n.3 (9th Cir. 2022) (the three-judge panel included Rosenthal, C.J. S.D. Tex., sitting by designation).
2. *Id.* at 553, 559.
3. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).
4. *Sanchez*, 39 F.4th at 556 (citing and quoting *Carpenter v. United States*, --- U.S. ---, 138 S. Ct. 2206, 2217-18 (2018)).
5. *Id.* (citing and quoting *Carpenter*, 138 S. Ct. at 2220 ("We do not disturb the application of *Smith* and *Miller*")).
6. *Id.* at 557 (citing *United States v. Miller*, 425 U.S. 435, 438-39 (1976)).
7. *Id.* (citing *Smith v. Maryland*, 442 U.S. 735, 740 (1979)).
8. *Id.* at 559 (citing and quoting *Carpenter*, 138 S. Ct. at 2220).
9. *Id.* at 559-61.



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