

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

TERRENCE BYRD,)
)
) Petitioner,)
)
) v.) No. 16-1371
)
) UNITED STATES,)
)
) Respondent.)
)

Pages: 1 through 71

Place: Washington, D.C.

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Washington, D.C.

Tuesday, January 9, 2018

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:04 a.m.

APPEARANCES:

ROBERT M. LOEB, Washington, D.C.; on behalf of the
 Petitioner.

ERIC J. FEIGIN, Assistant to the Solicitor General,
 Department of Justice, Washington, D.C.; on behalf
 of the Respondent.

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1 P R O C E E D I N G S

2 (10:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument first this morning in Case 16-1371,
5 Byrd versus United States.

6 Mr. Loeb.

7 ORAL ARGUMENT OF ROBERT M. LOEB

8 ON BEHALF OF THE PETITIONER

9 MR. LOEB: Mr. Chief Justice, and may
10 it please the Court:

11 In this case, the government seeks to
12 transform a violation of a car rental agreement
13 into a rule where unlisted drivers have no
14 ability to even invoke the Fourth Amendment.

15 The government's proposed rule should
16 be rejected for at least three reasons: First,
17 ignoring a person's privacy expectations when
18 he locks his personal property in a car's
19 locked trunk with the permission of the renter
20 is contrary to this Court's reasonable
21 expectation of privacy test, which looks to
22 privacy expectations and not contract terms and
23 not property rights.

24 And while the contract violation
25 alleged here does not negate Fourth Amendment

1 rights, it's notable that Mr. Byrd's presence
2 in the car -- and the government does not
3 dispute this -- was not improper. His storing
4 of his personal items in the trunk was not even
5 a contract violation.

6 JUSTICE GINSBURG: Could he have been
7 -- could he have been the renter, given his
8 criminal record?

9 MR. LOEB: Perhaps not, Your Honor.
10 But he was given permission by the renter to
11 store his items in the locked trunk, and the
12 government does not argue that that was
13 impermissible.

14 JUSTICE GINSBURG: Suppose he had been
15 just a passenger and the renter was there.

16 MR. LOEB: Likewise, even if he is
17 just a passenger, if the person who has rented
18 the car gives him permission to lock his own
19 personal property in the trunk of the car, he
20 has a reasonable expectation of privacy that
21 strangers will not rummage through his personal
22 property in that locked trunk.

23 CHIEF JUSTICE ROBERTS: What if the
24 Budget rental agreement had, you know, in big
25 letters on it, if anyone is stopped driving

1 this car, they must consent to police search?
2 You know, Budget doesn't want to be involved in
3 promoting criminal activity.

4 MR. LOEB: Your Honor, the -- first of
5 all, Mr. Byrd didn't sign the agreement.

6 CHIEF JUSTICE ROBERTS: So that -- so
7 that allows him to escape from those
8 provisions?

9 MR. LOEB: Moreover, those provisions
10 would not define what a person's constitutional
11 rights are. This Court has looked to
12 reasonable expectations of privacy. So --

13 CHIEF JUSTICE ROBERTS: Okay, well,
14 what if -- what if Reed told him, look, I don't
15 -- you know, I -- I know your background; I
16 don't want you transporting flak jackets and
17 heroin in the trunk of this car that I've
18 rented?

19 MR. LOEB: That would be different
20 than that he was not given permission by the
21 renter to store his personal property in the
22 trunk. But instead, in this record here --

23 CHIEF JUSTICE ROBERTS: So then in
24 that case the police -- he -- the police could
25 go through the trunk without a warrant?

1 MR. LOEB: I don't think so, Your
2 Honor. Still --

3 CHIEF JUSTICE ROBERTS: So -- so Reed
4 tells him don't put stuff in my trunk and --
5 but you can take the car?

6 MR. LOEB: I'm sorry, in your
7 hypothetical where he's barred from -- from
8 doing that, I would -- I would agree that he
9 doesn't -- that he may -- doesn't have
10 permission to use the trunk and he may be more
11 like the passengers in -- in the Rakas case.
12 It would be a little -- I would still say he
13 has a Fourth Amendment right to invoke there --

14 CHIEF JUSTICE ROBERTS: If the --

15 MR. LOEB: -- but a more difficult
16 situation.

17 CHIEF JUSTICE ROBERTS: So -- but if
18 the police have access to, going back to my
19 first hypothetical, the -- the rental
20 agreement, which they probably would, you've
21 got to have the rental agreement in the car,
22 they say let me see your license or -- or
23 title, and then he gives them the Budget
24 agreement and the agreement says you must
25 consent to police search if you're stopped,

1 what about that?

2 MR. LOEB: Again, that kind of
3 contract of adhesion you wouldn't ordinarily
4 read --

5 CHIEF JUSTICE ROBERTS: Contract of
6 adhesion?

7 MR. LOEB: When you go into a rental
8 agreement, it pops up on a little screen where
9 they tell you to use their electronic signature
10 thing and sign off on it. These are terms that
11 you're not --

12 CHIEF JUSTICE ROBERTS: They don't
13 want to rent the car to somebody who's going to
14 put illegal stuff in the car. I don't -- or,
15 you know, they want to -- it's their car. They
16 want to cooperate with the police in terms of
17 what can be used in their car. I don't -- put
18 aside the contract of adhesion, what -- what
19 then?

20 MR. LOEB: Well --

21 CHIEF JUSTICE ROBERTS: In other
22 words, he knows that Budget doesn't want him to
23 have an expectation of privacy in the trunk.

24 MR. LOEB: Again, Your Honor, the --
25 there could be a contract violation in that

1 context. But there would not be a -- a
2 complete inability to invoke the Fourth
3 Amendment. So --

4 CHIEF JUSTICE ROBERTS: Well, he knows
5 that the owner of the car, Budget, does not
6 want to give him any privacy in the trunk. The
7 police know that the owner of the car does not
8 want to give him any privacy in the trunk. And
9 yet, nonetheless, he has an expectation of
10 privacy?

11 MR. LOEB: Your Honor, that may be a
12 harder case because of the expectation --

13 CHIEF JUSTICE ROBERTS: Well, I know
14 it's a harder case, but -- but I'm trying to
15 get to the limits of your theory.

16 MR. LOEB: Well, in our theory, you
17 have a person in Mr. Byrd's position, he's been
18 given permission to use the trunk, to lock his
19 items and --

20 CHIEF JUSTICE ROBERTS: No, no, I'm
21 asking about my case.

22 MR. LOEB: Yes. So in -- in -- in
23 that scenario, it's very different in that he's
24 not been given permission to the trunk. And
25 maybe under Rakas, you'd say that it's like the

1 glove compartment in Rakas, where he's never
2 been given access to it, doesn't have his
3 personal property in the trunk. And maybe the
4 government's argument about Rakas's relevance
5 might be different in that scenario.

6 JUSTICE ALITO: But -- and what if the
7 -- what if the rental agreement said that if
8 any unauthorized person uses the car, we
9 consent to a search by the police?

10 MR. LOEB: Here, if they had called
11 Budget and -- and Budget had said as owner we
12 -- we -- we authorize the search, it may be
13 that they could have searched the car. They
14 didn't -- didn't do that.

15 JUSTICE ALITO: So if -- if they had
16 called Budget and Budget had said it's okay to
17 search our car because Mr. Byrd is not
18 authorized to drive it, that would be all
19 right?

20 MR. LOEB: It -- it's -- but that
21 would be a very -- a different scenario where
22 if you look to this Court's Chapman case, they
23 said an inchoate right to properly -- to
24 possibly eject someone from a leased apartment
25 would not provide a basis for denying someone

1 the ability to invoke the Fourth Amendment. So
2 in that case, the state argued --

3 JUSTICE KENNEDY: Justice Alito --
4 Justice Alito can protect his own question, but
5 could you answer his question? Would that be
6 all right? If they phoned the car rental
7 company and the car rental said okay to search,
8 yes or no, could you answer that, please?

9 MR. LOEB: I -- I think the owner can
10 -- can grant them consent to -- to search the
11 -- the car.

12 JUSTICE ALITO: Well, if that's the
13 case -- I don't know what Budget's policy is on
14 this. It might well be Budget's policy that we
15 want the police to search a car if they stop it
16 and it's driven by somebody who is not
17 authorized to drive it.

18 MR. LOEB: Your Honor, if there is
19 such a provision, the consumers can decide
20 whether they want to rent a car with Budget
21 where it a sort of Fourth Amendment free zone
22 provision and has that sort of forced consent
23 in a contract of adhesion. They don't have
24 that kind of provision here.

25 JUSTICE BREYER: But -- but, yeah, I

1 just wanted to get the legalism if I can out of
2 it for a minute. Bill and his three college
3 friends are sitting in a living room. Dad,
4 says Bill, can we use the car this evening?
5 Yes, Dad says to the four, but Bill is the
6 driver. I want it clearly understood nobody
7 else can drive this car but Bill, okay? Got
8 it? Yep.

9 Now, Jim, with Bill's permission,
10 drives the car, et cetera, et cetera. Well,
11 does Jim have the expectation of privacy?

12 MR. LOEB: He would, Your Honor.

13 JUSTICE BREYER: He would? Even
14 though he heard dad say --

15 MR. LOEB: Right.

16 JUSTICE BREYER: -- nobody but Bill
17 can drive this car?

18 MR. LOEB: Dad might have claims he
19 could bring against the friend who drives the
20 car.

21 JUSTICE BREYER: All right, so what's
22 the rule? When -- when somebody is driving a
23 car and they know they don't have permission
24 from the owner, they still have an expectation
25 of privacy and the police can't search it?

1 MR. LOEB: Well --

2 JUSTICE BREYER: Everybody knows.
3 What -- what's the rule -- is that the rule?

4 MR. LOEB: Well, the rule also takes
5 into account --

6 JUSTICE BREYER: I mean, who -- who
7 doesn't -- who doesn't? I don't have this
8 expectation of privacy. I've never been near
9 the car, or I'd say you're not going to say,
10 you know -- I mean, who -- who in that case
11 doesn't have expectation? Does a thief?

12 MR. LOEB: So you look at the -- the
13 real life expectations, do you expect a -- the
14 -- a stranger to be able to rummage through the
15 car in that circumstance? So when you're in
16 possession and in control of the car, and you
17 have the key to the car, and in our case, when
18 you've been given permission --

19 JUSTICE BREYER: I never expect a
20 stranger to rummage through the car. So if I'm
21 sitting there or lying in the back seat asleep
22 because I'm tired and everybody else has left
23 the car, you're saying I have an expectation of
24 privacy? I was just a friend of the driver and
25 he said you can sleep on the back seat.

1 MR. LOEB: So then you're more --

2 JUSTICE BREYER: Do I have an
3 expectation?

4 MR. LOEB: -- more like the
5 expectation of the -- the passengers in Rakas
6 where they were never given access to the glove
7 compartment. They never put their personal
8 property in the glove compartment.

9 Here, in this case, the government
10 concedes that Mr. Byrd was given permission,
11 and it was not a violation of the contract, for
12 him to store his personal property in the
13 trunk. So his testimony is that he put his
14 clothing in the trunk. And if you look at the
15 video admitted at 48, you see the police
16 rummaging through his personal property in the
17 trunk. So even if you're just a passenger, if
18 the renter or your friend gives you permission
19 to lock your own personal property in the
20 trunk, and here it's not even a contract
21 violation, it's not against dad's wishes, it's
22 not against Budget's wishes, right, for him to
23 have his property in the trunk.

24 JUSTICE SOTOMAYOR: Could I ask why
25 we're here on --

1 JUSTICE KENNEDY: Well, he had his
2 property in the trunk because he was the
3 driver. The case is presented as if -- as if
4 the car was just lent to him for a few minutes.
5 What happened was he waited right outside the
6 rental car place while she went in and signed
7 the agreement. It was very clear that he
8 didn't want to be on the car rental and it was
9 very clear that he was going to be the only one
10 to drive it.

11 MR. LOEB: Well, Your Honor, that puts
12 Mr. Byrd in the same position of, if there's an
13 apartment which says no sublets will be allowed
14 without the authorization of the owner, and
15 they know the owner doesn't like to approve
16 them, but the renter goes ahead and sublets the
17 house or the apartment to a family, under the
18 government's view, because there's been a
19 violation of that lease, there can be no
20 expectation of privacy.

21 JUSTICE BREYER: But here let me be
22 straightforward as to what my problem is. I
23 see your point in this case, you have a point,
24 but what worries me is what's our rule going to
25 be. Do we have now subsection 18.378 of

1 LaFave, which is called the car rental cases?

2 See, Fourth Amendment law is too
3 complicated in a sense already. So you look
4 for principles or rules that will allow
5 policemen and others to understand what it is
6 they're supposed to do.

7 And your rule in this case is?

8 MR. LOEB: Our rule is that if you are
9 given permission by the renter to store items,
10 of your personal items in the trunk, you have a
11 reasonable expectation of privacy in it,
12 especially when, as the government concedes,
13 his presence in the car --

14 JUSTICE SOTOMAYOR: How will the
15 government know that? How will the police know
16 that? The police come up to a rental car.
17 They ask for your license and your
18 registration. You give them your license and a
19 rental agreement that doesn't list you.

20 How are they supposed to know the
21 owner gave you permission?

22 MR. LOEB: The police were under the
23 same exact scenario if I am borrowing a
24 friend's car and given permission to use the
25 car and the trunk. The exact same scenario.

1 The same difficulties apply in the rental
2 situation as the friend scenario.

3 CHIEF JUSTICE ROBERTS: No --

4 JUSTICE ALITO: Well, you mentioned
5 the rental situation.

6 CHIEF JUSTICE ROBERTS: Go ahead.

7 JUSTICE ALITO: What about this: A
8 homeowner is going away for a long weekend,
9 arranges with a teenager in the neighborhood to
10 come in and walk and feed the cat and spend
11 quality time with the cat, but says under no
12 circumstances may you bring anybody else into
13 the house.

14 But the teen -- and the teenager says
15 okay, fine, and then goes ahead and gives the
16 keys to a friend who uses the house to sell
17 drugs, and the police come in and they conduct
18 a search.

19 Can that trespasser claim that his
20 Fourth Amendment rights were violated?

21 MR. LOEB: So this Court has carved
22 out an exception for the criminal trespasser,
23 for the car thief, for it's an exception for
24 when someone's mere presence in the house or
25 the apartment or the car is itself a criminal

1 act, the mere presence is criminal, and where
2 it's an intrusion on another person's privacy.

3 So the friend coming in who's a, in
4 your hypothetical, a criminal trespasser under
5 the Rakas Footnotes 9 and 12, would be
6 considered perhaps in a category of people who
7 cannot invoke Fourth Amendment rights.

8 JUSTICE ALITO: What's the -- what is
9 the difference between the -- the -- the kid
10 who's selling drugs from the house and Mr. Byrd
11 who's using the car to transport drugs?

12 MR. LOEB: Very different. First of
13 all, Mr. Byrd's presence in the car is not a
14 violation of the contract. It is not a
15 criminal trespass. It is not a tort. The
16 government concedes his presence in the car --
17 and the language used in Rakas and in Jones was
18 is the presence wrongful? And the government
19 concedes his presence in the car is not
20 wrongful.

21 Likewise, Mr. Byrd's driving the car
22 is itself not lawful. He's not a car thief
23 when he does so. There may be private --

24 JUSTICE GINSBURG: May I stop you
25 there, because you mentioned apartment rental,

1 house rental.

2 Do any of our decisions involve a case
3 where the owner of the property says: No
4 rentals, no subleases, but the renter subleases
5 anyway?

6 I thought it was assumed in our cases
7 that the -- the -- that the -- that the guest
8 was there with the permission of the owner.

9 MR. LOEB: Well, Jones itself was a
10 rental case. And there's only a discussion
11 that -- that Jones was there with the
12 permission of his friend, the renter, not --
13 not with the owner.

14 JUSTICE GINSBURG: But -- but there
15 wasn't anything in that case about the owner
16 having said no, as there is in this case,
17 nobody but the one we authorize.

18 MR. LOEB: That's correct, Your Honor.
19 But I think this Court's Chapman case is
20 instructive on that. So there the lease did
21 bar the renter from moving in and immediately
22 setting up distillery equipment. And the state
23 argued that because he did so, the landlord
24 could evict him at any moment and, therefore,
25 he can't have Fourth Amendment rights to invoke

1 in that circumstance.

2 And this Court said no, even though
3 there could be an inchoate right of -- of the
4 landlord to evict him, if they knew about the
5 violation of the lease, that does not undermine
6 his Fourth Amendment rights.

7 And same -- same here. It may be that
8 Budget has an inchoate right to bring a
9 contract action or a tort action against Mr.
10 Byrd, but until they do so, just like in the
11 sublet example, if the landlord -- if the owner
12 finds out about the impermissible sublet and
13 then brings an action of eviction, then you can
14 say at that point on that there is a diminished
15 expectation of privacy that the sublesers have
16 in that situation.

17 JUSTICE SOTOMAYOR: Mr. Loeb, our
18 decision in -- I'm sorry, counselor -- our
19 decision in Rakas was premised on a number of
20 things, most importantly that the defendant
21 didn't claim any possession or privacy interest
22 in the goods searched or in the things in the
23 glove compartment, et cetera.

24 Why -- what's happened here? Meaning,
25 is your client -- how did the information that

1 he was given permission to store things in the
2 trunk come before the Court?

3 MR. LOEB: Well, in the suppression
4 hearing, his testimony was that he had the
5 permission of Ms. Reed and that he had the
6 permission to lock his personal items in the
7 trunk and that he did store his clothing in the
8 car and in the trunk. And then we see in the
9 video the government rummaging through the
10 trunk in just -- in just the way that this
11 Court has warned that -- that -- that --

12 JUSTICE SOTOMAYOR: So I'm having --
13 I'm having a problem with this case, which is
14 why are we here? Meaning, once he admitted
15 that the -- that the goods in the trunk were
16 his, I don't know why that doesn't give him
17 automatic standing to challenge the search.

18 I thought in Rakas it was the fact
19 that the defendants had repeated three or four
20 or five different times that the defendants
21 claimed no proprietary interest in the goods
22 searched. That's different than this case,
23 isn't it?

24 MR. LOEB: Exactly. Exactly.
25 Exactly, Your Honor.

1 JUSTICE SOTOMAYOR: So why are we here
2 on this legal issue at all?

3 MR. LOEB: We're here because the
4 government and the Third Circuit has advocated
5 a blanket rule that, if you're an unlisted
6 driver, you never have an expectation of
7 privacy.

8 JUSTICE SOTOMAYOR: Even if you don't
9 have an expectation of privacy in the trunk,
10 you've claimed an expectation of privacy in the
11 property.

12 MR. LOEB: And here --

13 JUSTICE SOTOMAYOR: And absent
14 probable cause, there's no right to search. So
15 why are we here?

16 MR. LOEB: We agree 100 percent on
17 that, Your Honor.

18 JUSTICE GINSBURG: You're here because
19 you lost below.

20 (Laughter.)

21 MR. LOEB: We lost below.

22 JUSTICE SOTOMAYOR: But I'm not --
23 she's absolutely right, counselor, but I'm
24 asking why are you pitching this case on the
25 automobile exception. Why don't you just argue

1 the straightforward point that the whole --
2 this whole discussion is about who has the
3 right to challenge a search, and without
4 probable cause.

5 MR. LOEB: Right, Your Honor.

6 JUSTICE SOTOMAYOR: All right? If
7 you're claiming an interest in the property at
8 issue, he's claimed it, he testified, he has a
9 right. So now we go to a suppression hearing.

10 MR. LOEB: Right, Your Honor. And he
11 testified regarding the clothing he put in the
12 car, and you see them rummaging through the
13 trunk when they open that locked trunk, so
14 that's undisputed here.

15 He didn't -- just to be clear in the
16 record, he did not claim ownership of the drugs
17 or the body armor. Of course, they're charging
18 him with possession of the same. But -- but
19 it's enough that his own -- his own personal
20 property is in that trunk, the clothing, and
21 that the government is rummaging through that
22 locked trunk. The people have an expectation,
23 a reasonable objective expectation of privacy
24 in spaces --

25 CHIEF JUSTICE ROBERTS: Mr. Loeb, so

1 your argument --

2 JUSTICE GORSUCH: If I can -- if I can
3 follow up on -- on Justice Sotomayor's question
4 and -- and Justice Breyer's in terms of what's
5 the clear line we can draw here. You've raised
6 two theories on which you might prevail. One,
7 a property law theory, essentially, as I
8 understand it, that possession is good title
9 against everybody except for people with
10 superior title.

11 And -- and I understand that. That's
12 an ancient common law rule. I can go back and
13 find that in treatises all the way back to
14 Joseph Story.

15 Or I can do this reasonable
16 expectation of privacy test, and that's what
17 we've been struggling with so far. What's the
18 -- we have to ask what the nature of the
19 contract is and the terms of the contract. We
20 might want to look at the nature of the
21 relationship between Mr. Byrd and -- and
22 Ms. Reed. There was a lot of debate in the
23 briefs over whether they're girlfriend and
24 boyfriend or fiancée or maybe common law
25 marriage and someone's cheating on someone

1 else. All of that's in the briefs that we have
2 to contend with. Then we have the question
3 whether the test is even an empirical or a
4 normative question.

5 Do we look at what the reasonable
6 expectations of privacy are by social science
7 data, get my law clerks to go do that, or do we
8 just announce normatively what we think it
9 ought to be? Should it depend on regional and
10 cultural norms across the country?

11 Gosh, it's very complicated.
12 Professors Baude and Stern, among many others,
13 suggest maybe we ought to look back at that
14 property test again. What do you think?

15 MR. LOEB: We think the property
16 interest here, the right that he -- that Mr.
17 Byrd would have had to bring a trespass action,
18 demands a recognition of his right to invoke
19 the Fourth Amendment, and it's a very clear and
20 simple rule.

21 So the old adage is possession is
22 nine-tenths of the law, and as you state in
23 your question, that has roots in the common law
24 going back to the 1600s and 1700s.

25 JUSTICE ALITO: But the problem --

1 JUSTICE KAGAN: Wouldn't that apply to
2 criminals too?

3 JUSTICE ALITO: The problem -- go
4 ahead.

5 JUSTICE KAGAN: Wouldn't that apply to
6 criminals too? We've been very clear that
7 criminals don't have Fourth Amendment rights.
8 The property-based concepts that Justice
9 Gorsuch was stating would say that criminals
10 have that kind of property interest.

11 MR. LOEB: No, Justice Kagan. So the
12 Restatement 895, which deals with this under
13 the Restatement of Torts Second, says just --
14 the -- the principle that was articulated, that
15 mere possession would allow you to bring a
16 trespass action against anyone else who invaded
17 it. But if you look at comment h there, it
18 says where someone is clearly a thief, the
19 Court can deny them the right to bring that
20 trespass or conversion action against a third
21 party, the stranger who's invading the space.

22 JUSTICE ALITO: I mean, the problem
23 with going down this property route is that we
24 go off in search of a type of case that almost
25 never arose, if it ever did arise -- arise at

1 common law, where an unauthorized sub-bailee
2 brings an action for trespass to chattel
3 against a law enforcement officer.

4 When would that ever have happened in
5 18th-century America? Never.

6 MR. LOEB: Well, it's your right to
7 bring a trespass action against a stranger.

8 JUSTICE ALITO: Yeah.

9 MR. LOEB: The fact that you can
10 exclude a stranger and bring a trespass action
11 against him is what supports your property
12 right under the Constitution --

13 JUSTICE ALITO: It's hard enough to
14 find the case where it's the stranger, where
15 it's the private-party stranger. But that's
16 not what we have here. We have a party who has
17 lawful rights that no private party had, which
18 was to stop this vehicle.

19 And it's not contested that this was a
20 lawful -- that this was a lawful search. I
21 mean, I'm sorry, a lawful stop.

22 MR. LOEB: Well, their -- their rights
23 -- the police right is confined. Ordinarily,
24 they need reasonable suspicion to extend the
25 search, they need probable cause to search the

1 car and the trunk -- the locked trunk has
2 always been, you know, deemed sacrosanct,
3 requiring at minimum probable cause.

4 So the standard here is -- is a simple
5 one under common law. He has the right to
6 exclude others. And it -- it bolsters also the
7 reasonable expectation of privacy.

8 JUSTICE BREYER: Is this your rule?
9 Is this -- I -- I'm still trying to think of
10 the rule. A person who has possession of and
11 is driver -- driver of a car, whoever he is,
12 has a reasonable expectation in privacy of the
13 parts of that car, unless in driving or
14 possessing it or -- he's committing a crime.

15 MR. LOEB: Yes, Your Honor. That's
16 our bright- -- bright-line rule, easy --

17 JUSTICE BREYER: Will you accept that?

18 MR. LOEB: -- easy to apply. Yes.
19 That -- that is supported by both common law
20 principles and objective expectations of
21 privacy --

22 JUSTICE BREYER: Uh-huh.

23 MR. LOEB: -- that when you're in a
24 car and you're in sole possession and control
25 of it -- the troopers themselves recognized he

1 was no criminal. They wouldn't put a car thief
2 back behind the wheel of the car, give him
3 complete control, in the words of Trooper Long,
4 and let him drive it up the highway to the next
5 exit to pull over. They didn't -- they treated
6 him very differently. It's not like --

7 JUSTICE BREYER: A person who goes
8 into a house and has all the indicia of being
9 the owner, as far as anyone else can tell or
10 has a right to be there, also can exclude the
11 police from a search unless in being in that
12 house he is committing a crime?

13 MR. LOEB: Right. Unless you're
14 committing a criminal trespass or, in the case
15 of the car, the car thief, and especially when
16 you were locking your personal things in the
17 trunk --

18 JUSTICE BREYER: That's impossible.
19 Okay, let's see what --

20 MR. LOEB: -- you have an expectation
21 of privacy in that space. The -- the -- the
22 foundation of -- of the expectation of privacy
23 is the right to exclude others. And Jones and
24 Rakas have said that, and it's very clear that
25 both under common sense of who you can exclude

1 and under common law, where you have a right to
2 possess and exclude, that Mr. -- Mr. Byrd has a
3 Fourth Amendment right that he can invoke in
4 this case.

5 JUSTICE ALITO: The Constitution uses
6 the word "property" numerous times, but the
7 word "property" doesn't appear in the Fourth
8 Amendment. It talks about effects, which is
9 defined by Samuel Johnson's dictionary as
10 "goods or movables."

11 So is it your argument that any
12 property interest whatsoever falls within the
13 definition of effects if we are going to go
14 back to an originalist interpretation of the
15 Fourth Amendment? So would it include
16 contingent interests? Would it include future
17 interests? If somebody has left me a car in a
18 will and the car is searched, do I have the
19 right to bring a Fourth -- does that implicate
20 my Fourth Amendment rights?

21 MR. LOEB: I think if the common law
22 recognizes your right to replevin or to
23 trespass against a stranger, then both under
24 common law and common sense, that it makes
25 sense to recognize a right to invoke a Fourth

1 Amendment right.

2 And still, we're not saying that the
3 police don't have adequate tools here. If
4 they're -- if they had reasonable suspicion to
5 extend this stop and further investigate, if
6 they had probable cause, or if they had
7 consent, they could have searched the trunk of
8 the car, but they did not have that here.

9 JUSTICE KAGAN: Mr. Loeb, we've always
10 said that there's a normative component to
11 expectations of privacy. In other words,
12 they're those expectations that society has
13 prepared to recognize as reasonable.

14 So here you have at the very least a
15 person who's violated important contract terms,
16 terms that are of some significance to the
17 owner of the property, as well as a person who
18 is engaged in conduct that frustrates law
19 enforcement in various ways, get behind the
20 wheel, you're not the person who's authorized
21 to be here, the police don't know who you are.
22 And, you know, this is -- the facts of this
23 case provide a good example of how unauthorized
24 driving can frustrate law enforcement.

25 So why is it that society should be

1 prepared to recognize this conduct as
2 reasonable?

3 MR. LOEB: Because society recognizes
4 that when you put your personal items in a
5 locked space, if you put it, in Chadwick, in a
6 locked footlocker, you have an expectation of
7 privacy regarding it.

8 And the courts don't look behind this
9 to say, well, are you really engaged in
10 criminal conduct, are you a bad guy? The
11 question is a question of if you're sitting in
12 a car which you have locked and you can lock
13 the car and you've locked the trunk and your
14 personal items, society recognizes an
15 expectation of privacy in that. And Mr. Byrd,
16 when he was sitting in the Ford Fusion after
17 he's pulled over by the police, is not
18 wrongfully present. If someone is wrongfully
19 present and creating a criminal act by being
20 present, that's different. But the government
21 concedes he was not wrongfully present in the
22 car, he had his personal items locked in the
23 trunk, and as an objective matter, someone has
24 a -- an expectation -- a reasonable expectation
25 of privacy in those circumstances. And that

1 expectation is bolstered by the common law,
2 which says he has a right to sue others for
3 trespass if they intruded upon that car. If
4 that's true, clearly he can at least at minimum
5 invoke the Fourth Amendment.

6 I'd like to reserve --

7 JUSTICE GINSBURG: In your brief, you
8 made something of the familial relationship
9 between the person who rented the car and Byrd.
10 Suppose it had not been a familial
11 relationship. Suppose it was just a neighbor
12 or one of the friends that Justice Breyer
13 brought up.

14 Does the familial relationship really
15 matter?

16 MR. LOEB: No, Your Honor. It simply
17 bolsters the expectation. If you have a -- a
18 family member or a close friend or, here,
19 someone you've been living with for 15 years
20 and you exchanged -- as the record establishes
21 here, exchanged cars on a regular basis, it's
22 reasonable to believe that you can drive the
23 other person's car, that you can lock materials
24 in their trunk when you're driving, and that
25 you'll have an expectation of privacy when you

1 do so.

2 I'd like to reserve the remaining of
3 my time for rebuttal. Thank you.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 Mr. Feigin.

7 ORAL ARGUMENT OF ERIC J. FEIGIN

8 ON BEHALF OF THE RESPONDENT

9 MR. FEIGIN: Thank you, Mr. Chief
10 Justice, and may it please the Court:

11 To challenge the search in this case,
12 Petitioner has the affirmative burden to prove
13 a connection to Budget's car that would justify
14 treating it as his effect for purposes of the
15 Fourth Amendment.

16 He can't do that when he sent Reed
17 into the rental office alone to rent a car, he
18 never could have rented, subject to terms that
19 didn't allow him to drive it, and then he took
20 the keys and drove off with it.

21 It's a very --

22 JUSTICE SOTOMAYOR: Let's assume he
23 wasn't a criminal. Let's assume it was the
24 renter's son, not the wife because there is an
25 exception for spouse in the contract.

1 Is that son in the same position as
2 Mr. Reed?

3 MR. FEIGIN: I think as a matter of
4 law he would be. Obviously, I think, as
5 Justice Kagan pointed out, the actions here
6 were even more unreasonable. But the reason
7 why we would --

8 JUSTICE SOTOMAYOR: I don't disagree
9 with you, but I'm asking a question, which is
10 the police can search a car when they have
11 probable cause, correct?

12 MR. FEIGIN: Yes.

13 JUSTICE SOTOMAYOR: And they're free
14 to do that of any car driven even by a licensed
15 driver, correct?

16 MR. FEIGIN: Yes.

17 JUSTICE SOTOMAYOR: Or a licensed
18 co-driver on a rental agreement. So really the
19 issue here before us is when are the police
20 permitted to search without a warrant, without
21 probable cause? And that's what I see the
22 issue as, because if we rule that someone
23 without permission can -- has no expectation of
24 privacy even when the renter has given it to
25 them, then what we're authorizing is the police

1 to stop every rental car and search every
2 rental car, without probable cause, that might
3 be on the road.

4 MR. FEIGIN: Well, Your Honor, I think
5 there's no evidence that there's a widespread
6 practice of that because for one thing it's
7 impractical.

8 JUSTICE SOTOMAYOR: Well, the police
9 here said we stopped him because he was driving
10 a rental car. He was doing something totally
11 illegal. Every driving school teaches you to
12 put your hands at a 10 to 2 angle, and they
13 found that suspicious.

14 (Laughter.)

15 JUSTICE SOTOMAYOR: And they waited
16 until he made a turn that was not authorized by
17 the traffic laws.

18 So to say that there isn't a practice
19 is a little bit disingenuous, Mr. Feigin. But
20 the question I really have is should we be
21 creating exceptions to the most basic Fourth
22 Amendment rights, that of probable cause,
23 before police intrude in searching at all?

24 And we're doing it under the guise not
25 of was this search legal under the Fourth

1 Amendment but whether someone has standing to
2 even question that.

3 Because this is a standing case,
4 correct?

5 MR. FEIGIN: It -- it refers to a
6 doctrine the Court has sometimes referred to as
7 standing. And, of course, the question in any
8 standing case is whether someone has the right
9 under the Fourth Amendment to treat something
10 as their own effect or their own home.

11 Now, here the very thing that he's
12 relying on --

13 JUSTICE SOTOMAYOR: Their own effect.
14 Well, we know that he was told that he could
15 use the trunk and put things in it, whether
16 he's a passenger or a driver. Once he says
17 that and the owner -- and the renter of the car
18 agrees with him, I'm still not sure what's
19 missing.

20 MR. FEIGIN: Your Honor --

21 JUSTICE SOTOMAYOR: Why that claim of
22 an interest is inadequate.

23 MR. FEIGIN: Well, let me say a couple
24 of things, Your Honor. First of all, Rakas was
25 quite, quite clear that a passenger doesn't get

1 rights in the trunk of a car. And simply
2 putting items in the trunk of a car, even with
3 the permission of someone else, doesn't give
4 one rights in the trunk.

5 The person may have rights in their
6 own items within the trunk, but they don't have
7 rights in the trunk itself. For example, if
8 you think about Minnesota against Carter where
9 this Court held --

10 JUSTICE SOTOMAYOR: So every criminal
11 defendant where their suitcase has been
12 searched would have to say I'm more than just
13 the owner of the suitcase?

14 MR. FEIGIN: No, Your Honor.

15 JUSTICE SOTOMAYOR: I'm the owner of
16 the drugs? Let's assume he came in and said I
17 was the owner of the suitcase.

18 MR. FEIGIN: So, Your Honor, there are
19 cases like this in the courts of appeals, and
20 they've handled this different ways. But if
21 someone comes in and says I don't have rights
22 in the car, but I do have rights in the
23 suitcase that was searched in the car, most
24 courts will address that and find that the
25 defendant did have rights in the suitcase.

1 But here he's asserting rights in the
2 car. He has never made a claim of any other
3 sort. And under Footnote 1 of Rakas, it's too
4 late for him to do so now.

5 JUSTICE SOTOMAYOR: I thought he made
6 claims to the -- to the trunk, that he said I
7 was given permission to store my things in the
8 trunk, and that's what I did.

9 MR. FEIGIN: Your Honor, the trunk is
10 simply part of the car. He hasn't made some
11 claim that his rights were violated as to some
12 effect he stored in the trunk.

13 What he is claiming is that the car
14 can be treated as his effect for Fourth
15 Amendment purposes. But the very event on
16 which he's relying to establish his Fourth
17 Amendment rights was contrary to the reasonable
18 and well-known legal norms of a major
19 commercial industry.

20 He not only wants this Court to say
21 that Reed handing him the keys and him driving
22 off in the car was acceptable. He wants this
23 Court to say that it reflected such a
24 deep-seated societal understanding that it
25 should give rise to Fourth Amendment rights.

1 JUSTICE ALITO: Well, there was a --

2 JUSTICE KAGAN: Well, sometimes --

3 JUSTICE ALITO: There was a violation
4 of one of the terms of the contract. We asked
5 Mr. Loeb about where he would draw the line.
6 But where would you draw the line in terms of
7 terms -- with regard to terms in the contract?

8 Would you say that every violation of
9 a term of the rental agreement voids the
10 opportunity to make a Fourth Amendment
11 argument?

12 MR. FEIGIN: No, Your Honor. I think
13 the key distinction here is that he's claiming
14 a personal Fourth Amendment right. As an
15 unauthorized driver, he doesn't have any
16 connection to the car at all. There is no
17 connection between him and the car. He is not
18 part of the rental agreement. He is an
19 interloper in the rental agreement.

20 JUSTICE ALITO: Well, it --

21 CHIEF JUSTICE ROBERTS: Well, Mr.
22 Feigin, it's a pretty big connection that the
23 person who has the right to drive the car told
24 him that he could. That's a connection to the
25 car.

1 MR. FEIGIN: Well, that is an
2 authority that she didn't have, that she signed
3 in a couple of different places that she didn't
4 have, and that it is well-known that people do
5 not have when they rent cars, unless otherwise
6 allowed to do so. But the second --

7 CHIEF JUSTICE ROBERTS: Well, but this
8 is probably not the only time it's ever
9 happened. And --

10 (Laughter.)

11 CHIEF JUSTICE ROBERTS: -- I think
12 what -- I think the understanding is, well,
13 you're probably going to have trouble with
14 insurance and all if so-and-so gets into an
15 accident. But at least the argument on the
16 other side is that it wasn't unlawful for him
17 to be driving. It may have been -- or wasn't
18 criminally unlawful. It may have been a breach
19 of contract by Reed, I guess, but not
20 necessarily anything wrongful on his part.

21 MR. FEIGIN: Well, it's criminally
22 unlawful at least in Ohio, Your Honor, as we
23 point out in our brief. And we don't have any
24 statistics on how common it is.

25 And I think the idea that the breach

1 of legal norms that are well-known and
2 reasonable within a major commercial industry
3 is something that should give rise to --

4 JUSTICE BREYER: The problem is I've
5 got that point.

6 MR. FEIGIN: Okay.

7 JUSTICE BREYER: Now, what do you
8 think of the -- of the rule that we just sort
9 of came up with maybe, or maybe he's been
10 advancing it, look, the problem with your rule,
11 it seems to me, is that there are cars, houses,
12 apartments, sublets, summer cabins, all kinds
13 of things which have all kinds of contracts,
14 understandings, leases, et cetera.

15 And over a wide range, who knows
16 what's in them? And what can be expected?
17 That's awfully complicated. And, therefore,
18 I'm looking for something simple. And the
19 simplest thing that we were discussing, it
20 seemed to me, is to say the following: Where
21 the individual has all the other indicia of the
22 right to control the -- and fill in the
23 blank -- here it's a car, he's sitting there
24 driving it, that he can assert a right to
25 privacy and has standing, unless it is

1 criminal, unless it is a crime.

2 Now maybe here it was a crime, but
3 that would be the rule, unless he is a criminal
4 possessor, unless he came in as a squatter
5 having broken the window. Do you see the
6 point?

7 But the virtue of what he just said,
8 it seemed to me, your opponent here, was that
9 that's pretty simple, comparatively speaking.
10 What do you think?

11 MR. FEIGIN: I don't think -- I don't
12 think that's going to be particularly simple,
13 Your Honor. First of all, as I was just
14 mentioning to the Chief Justice, in some
15 jurisdictions, this would be a criminal act.

16 Second, I don't know what that rule
17 does with cases -- and I'm not making this case
18 up, there's actually a petition before this
19 Court that presents this very question where,
20 for example, you have an unauthorized driver
21 who also has a suspended driver's license.
22 Simply getting into the car and turning the key
23 is a criminal act. They're not allowed to be
24 doing that.

25 And yet I take it their rule would

1 create a legitimate expectation of privacy in
2 that circumstance.

3 JUSTICE BREYER: No, because it's a
4 crime for him to be there, and so, therefore,
5 he falls within the exception.

6 MR. FEIGIN: So, Your Honor, I think
7 it's going to actually wind up being much more
8 difficult to apply in practice, and I don't
9 think it makes a particular amount of sense.

10 JUSTICE BREYER: What do you suggest
11 as a rule? You suggest as a rule that what we
12 look to see is under the law, as we've heard,
13 it could extend back to the 18th Century, et
14 cetera, under -- under the law of bailments and
15 a lot of other things, does this person have
16 the legal right to be in that particular place
17 where he is doing those things he's doing at
18 the time, which are relevant to appearance of
19 ownership?

20 MR. FEIGIN: Your Honor, he has shown
21 --

22 JUSTICE BREYER: That's your legal
23 rule?

24 MR. FEIGIN: He has -- no.

25 JUSTICE BREYER: Is that -- what is

1 your legal rule?

2 MR. FEIGIN: So the principle that
3 we'd propose resolves this case, and I don't
4 mean to keep repeating myself here, but where
5 the assertion of Fourth Amendment rights comes
6 from an act that is contrary to the legal norms
7 of a well-established commercial industry --

8 JUSTICE KAGAN: But you've just told
9 Justice Alito that that can't possibly be your
10 test because there are all kinds of provisions
11 in this contract and people violate some of
12 them. And you would never say that that
13 eliminates any right to privacy.

14 So here you have a case where somebody
15 is in possession and control of the car. That
16 person has been given permission by the renter
17 to be in possession and control of the car.
18 It's true that there's a contract violation,
19 but the contract violation, let's be frank, is
20 not uncommon. Some courts have even said that
21 these contract violations are foreseeable. And
22 -- and it's understood by everybody as relating
23 to insurance liability, not to privacy.

24 So what eliminates the right of
25 privacy that you would normally get by opening

1 up the car of a door and sitting in the front
2 seat and turning the ignition key?

3 MR. FEIGIN: Well, Your Honor, I think
4 it'll be helpful in a second if I can turn back
5 to -- and finish my answer to Justice Alito's
6 question and make clear why this is different
7 from other kinds of contract breaches, but to
8 answer your question, you -- someone who takes
9 the wheel of a car that they are not authorized
10 to drive is not entitled to treat it as their
11 effect under the Fourth Amendment. They cannot
12 treat it --

13 JUSTICE KAGAN: Well, Justice Alito's
14 question is very much related to mine, because
15 there are all kinds of contract terms where if
16 you're -- if you're sitting behind the wheel of
17 a car and you're -- you're driving on gravel,
18 you're in violation of the contract.

19 You know, there are tens of them. So
20 why is this one any different? Why does this
21 one eliminate what you would normally get by
22 being in that car with the permission of the
23 renter?

24 MR. FEIGIN: So let me address that in
25 full. Just -- it'll just take me a second to

1 explain this.

2 As I was saying to Justice Alito, the
3 Fourth Amendment rights are personal, and here
4 Petitioner, like other unauthorized drivers,
5 simply has no connection to the car at all. He
6 is a stranger to the relationship between
7 Budget and Reed. In the --

8 JUSTICE GORSUCH: Mr. Feigin, you keep
9 saying that, but as a matter of property law
10 now and forever, a possessor would have a right
11 to exclude other people but for those with
12 better title.

13 So someone in these position would
14 have a right, I think you'd agree, to exclude
15 someone who's attempting to get in the car to
16 hijack it, car-jack it.

17 You'd also have a right to throw out a
18 hitchhiker who had overstayed his welcome. And
19 so as -- I think you're having to argue that
20 the government has a special license that
21 doesn't exist for any other stranger to the
22 car.

23 MR. FEIGIN: I don't think so, Your
24 Honor. I don't think this Court has included
25 the idea that even the illegitimate possessor

1 of an item maybe having some sort of trespass
2 action they could bring has incorporated that
3 particular rule into the Fourth Amendment.

4 In fact --

5 JUSTICE GORSUCH: Well, that's been --
6 that's been the common law of property forever,
7 right?

8 MR. FEIGIN: Well, Your Honor, in
9 Rakas, when the Court said that --

10 JUSTICE GORSUCH: I'm not talking
11 about thieves.

12 MR. FEIGIN: Okay.

13 JUSTICE GORSUCH: We can put that
14 aside.

15 MR. FEIGIN: Well, it's interesting
16 that one of the reason -- one of the cases the
17 Court used to reject the car thief scenario in
18 Rakas actually relied on this trespasser theory
19 that Your Honor is advancing now, and the Court
20 said it found it inconceivable that --

21 JUSTICE GORSUCH: Inconceivable with
22 respect to thieves. That's correct. I'm
23 asking with respect to everybody else. Isn't
24 it the fact that the government is asking for a
25 special license here that would not be

1 available to any other third person?

2 MR. FEIGIN: No, Your Honor. I think
3 what we're saying is that that particular
4 principle, to the extent it even --

5 JUSTICE GORSUCH: Well, then let me
6 ask you this: Do you agree that -- that
7 Mr. Byrd could have excluded a carjacker?

8 MR. FEIGIN: I think by virtue of
9 simply being in the car, he probably could have
10 --

11 JUSTICE GORSUCH: By virtue of his
12 possession --

13 MR. FEIGIN: -- fended off a carjacker
14 and we wouldn't oppose --

15 JUSTICE GORSUCH: Yes, and -- and --

16 MR. FEIGIN: -- his right to do that.

17 JUSTICE GORSUCH: -- he would have a
18 right to do so. And he would have a right to
19 throw out a hitchhiker as well.

20 MR. FEIGIN: But if someone had sued
21 --

22 JUSTICE GORSUCH: So why not the
23 government?

24 MR. FEIGIN: Well, Your Honor, that is
25 not a principle that this Court has

1 incorporated to create Fourth Amendment
2 rights --

3 JUSTICE SOTOMAYOR: But where have --
4 where else --

5 MR. FEIGIN: -- I think because it
6 produces very --

7 JUSTICE SOTOMAYOR: We have never
8 incorporated private rights into the Fourth
9 Amendment. We've said that we either look to
10 property or tort law to define private rights.

11 If the issue was what the owner versus
12 a authorized user's rights are, we don't do
13 that. We don't look in searches of homes to
14 what the owner of the apartment would say. I
15 would suspect that every owner of the apartment
16 would say: My tenants don't have a right to
17 engage in illegal activity. And there may well
18 be contracts that say, my tenant, you can't do
19 illegal activity here.

20 But we have recognized the rights of
21 tenants to privacy in their home --

22 MR. FEIGIN: And --

23 JUSTICE SOTOMAYOR: -- because they
24 possess it.

25 MR. FEIGIN: Well, not because they

1 possess it, Your Honor, but because, as Justice
2 Ginsburg was pointing out, there actually is a
3 legitimate connection there. They are, in
4 fact, the renter, which brings me back to
5 Justice --

6 JUSTICE SOTOMAYOR: Oh, no. But we've
7 recognized overnight guests, we've recognized
8 co-inhabitants that are not licensed in the
9 lease. There are 55-and-older communities in
10 certain parts of the country where children
11 under the age of 55 and grandchildren routinely
12 stay. And I doubt very much that we would ever
13 say they don't have that legitimate
14 expectation.

15 So the question that I go is this will
16 be our very, very first time where we're saying
17 a private contract that doesn't speak about
18 criminal liability but speaks only about
19 insurance consequences with respect to
20 unauthorized drivers is creating a Fourth
21 Amendment protection.

22 MR. FEIGIN: Well, Your Honor --

23 JUSTICE SOTOMAYOR: For the police,
24 rather than for the person involved.

25 MR. FEIGIN: -- I don't think that's

1 our position. Our position is that there is no
2 legitimate connection to the car here. The
3 contract is important. Everyone agrees on
4 that. He's not claiming he could simply walk
5 into Budget's lot, pick a car he liked, and
6 drive off with it. He's depending to some
7 degree on the contract that exists between Reed
8 and Budget. He just wants to ignore the part
9 of the contract that excludes him from its
10 terms.

11 If I could get back to Justice Alito's
12 question, I think the key distinction between
13 this particular breach and other kinds of
14 breaches, if you were a legitimate renter, is
15 precisely that. He's simply not included
16 within the scope of the relationship. A
17 legitimate renter who is driving the car and
18 then violates some term of the rental agreement
19 still has a legitimate connection to the car
20 everyone -- that everyone agreed was created in
21 the first place.

22 And the question then becomes whether
23 they lose their legitimate expectation of
24 privacy based on that breach. And I think
25 there's two good reasons why they wouldn't.

1 One is even when a contract declares
2 the agreement to be void upon the violation of
3 a particular term, courts construe that not to
4 have the contract immediately vanish into thin
5 air but, rather, to create a right of
6 voidability in the party whose term has been
7 breached.

8 And so I think we would all understand
9 that if someone gets on their cell phone while
10 they're driving a rental car, even if they're
11 not supposed to, unless and until Budget
12 actually tries to dispossess the renter of the
13 car, that the agreement continues in force.

14 Second, even if that were not true, I
15 think there are some legitimate societal
16 understandings that might kick in at that
17 point. If you're stuck in traffic and you're
18 late returning the car, I think everyone
19 understands that when you get there an hour
20 late, you're going to pay Avis the money for
21 the car, they're going to treat the contract as
22 though it continued, they may charge you a late
23 fee, but they're not going to act as though you
24 should have turned into a pumpkin and vanished
25 from the car the instant the clock struck noon.

1 JUSTICE ALITO: And then what do you
2 do about the cases with the -- the illegal
3 sublessee or the individuals who occupy a
4 rental unit in violation of a provision that
5 specifies the maximum number of people who can
6 stay there?

7 MR. FEIGIN: So I think there probably
8 would be a legitimate expectation of privacy in
9 those cases. And I think they're distinct from
10 this one in two key respects.

11 One is this Court has made crystal
12 clear that homes are different from cars under
13 the Fourth Amendment. One is an effect; the
14 other is a house. The Court has made clear
15 that homes are at the core of the Fourth
16 Amendment, yet cars have dramatically reduced
17 expectations of privacy because they move and
18 are subject to regulation.

19 The second thing is I don't think in
20 the subletting example or the example of having
21 too many occupants in -- in an apartment, for
22 example -- and this is getting back to some of
23 Justice Sotomayor's questions -- in those -- in
24 those cases, you don't have the clear,
25 well-established legal norm that you have in

1 this case.

2 And you don't have to believe me on
3 what the legal norm is. If you look at the
4 amicus brief on their side from the National
5 Motorists Association at Footnote 2, they say
6 the rental agreement in this case is familiar
7 to anyone who's ever rented a car.

8 Everyone --

9 JUSTICE SOTOMAYOR: But they -- they
10 also say that --

11 CHIEF JUSTICE ROBERTS: How important
12 is it -- how important is it that -- that the
13 police have access to the actual agreement?
14 One of the things that I think is very
15 important in these types of cases is the
16 ability to give clear guidance not only to the
17 courts but to the police who have pulled a car
18 over in the middle of a situation that is the
19 most dangerous situation they confront. And,
20 you know, you're saying, well, are they
21 supposed to conduct an inquisition, you know,
22 who gave you permission to use this car, what
23 did she say, all that.

24 Is there anything wrong, from your
25 perspective, in a rule that is very simple

1 which is if it's a rental agreement -- a rental
2 car, look at the agreement. If it's not an
3 authorized driver, that's it. In other words,
4 it doesn't matter what the positions of the
5 person who rented it is and -- but would you be
6 arguing that the search was permissible if you
7 didn't have the rental agreement?

8 MR. FEIGIN: In the car?

9 CHIEF JUSTICE ROBERTS: Uh-huh.

10 MR. FEIGIN: We would -- I think the
11 fact the rental agreement is in the car is very
12 helpful to us. I think we'd still be making
13 the argument even if the rental agreement
14 weren't in the car.

15 First of all, Your Honor, there are
16 ways to figure this out even if the rental
17 agreement isn't in the car.

18 They can follow-up by asking
19 questions. They can call the rental car
20 company, but --

21 CHIEF JUSTICE ROBERTS: Yeah, but I
22 mean, maybe it's paradoxical; you think, well,
23 if there is no rental agreement, they ought to
24 have a greater authority. But the -- the
25 absence of the authorization on the rental

1 agreement that the police can look at is
2 evidence that, you know, this is not your
3 typical situation.

4 However common it might be in -- in --
5 in -- in practice, it is -- it raises doubts
6 that might otherwise not be there even if they
7 don't have the rental agreement.

8 MR. FEIGIN: So, Your Honor, if the
9 existence of the rental -- the presence of the
10 rental agreement which was required to be in
11 the glove compartment in this case, resolves
12 this case for Your Honor, and the Court doesn't
13 need to go any further than that.

14 I guess one thing --

15 JUSTICE KAGAN: Oh, yes --

16 JUSTICE GINSBURG: Mr. Feigin --

17 MR. FEIGIN: -- I would add is --

18 JUSTICE GINSBURG: -- I have this
19 problem: you said, well, cars are different
20 than homes. The car exception was created in a
21 case where the police had probable cause. And
22 the -- the decision in Carroll said because it
23 it's moving fast, you don't have to get a
24 warrant, but you do have to have probable cause
25 to stop that car.

1 And now we're using the car exception,
2 and the probable cause aspect of it has
3 vanished.

4 MR. FEIGIN: Well, Your Honor, I think
5 what the Court was getting at with the car
6 exception are still principles that apply when
7 we're doing expectation of privacy inquiry
8 because the car exception arises out of the
9 fact that there is a lesser expectation of
10 privacy in cars.

11 And I think one important thing to
12 note about this case is any rule the Court
13 writes that is broad enough to encompass the
14 conduct in which Petitioner engaged in this
15 case would be giving the imprimatur of the
16 Fourth Amendment on what is, I think, really
17 fairly described as wrongful conduct. It's
18 conduct that is --

19 JUSTICE KAGAN: Do you think anything
20 depends on knowledge? So suppose that in this
21 case Byrd had been told, don't worry, I have
22 you down as an un -- as an authorized driver.

23 Would that be different, if he thought
24 he was an authorized driver?

25 MR. FEIGIN: Nothing in this Court's

1 cases to this point have turned on the
2 defendant's knowledge. And I think there are
3 reasons not to have such a rule, and I can get
4 to them in a second.

5 But even if you applied that rule in
6 this case or assumed that that rule exists in
7 this case, Petitioner would still lose. The
8 reason --

9 JUSTICE KAGAN: No, obviously he --

10 MR. FEIGIN: Yeah.

11 JUSTICE KAGAN: -- knew that he was an
12 unauthorized driver, but I'm saying how about
13 if he didn't? What if he was an -- what if he
14 thought he was an authorized driver?

15 MR. FEIGIN: So I think --

16 JUSTICE KAGAN: And you're saying same
17 rule?

18 MR. FEIGIN: I think we would say same
19 rule, and one of the reasons why -- I think the
20 Court could draw the distinction but there
21 would be a couple reasons I would urge the
22 Court not to draw that distinction.

23 One is that it would give more privacy
24 rights to someone who is not diligent than to
25 someone who is. So someone who actually asks

1 am I on the rental agreement would have -- be
2 less likely to have privacy protections.

3 The second thing is that it creates
4 very difficult proof problems.

5 The defendant gets on the stand and
6 says, well, my friend said so and so. That's
7 very difficult for the government to disprove.
8 And there are also raises questions of
9 trustworthiness. Well, maybe your friend is a
10 car thief. Maybe your friend is just not a
11 trustworthy person. You shouldn't have been
12 trusting your friend.

13 And the Fourth Amendment doesn't have
14 to accept the defendant's own choices to trust
15 a particular person when they help --

16 JUSTICE SOTOMAYOR: How about when
17 they --

18 JUSTICE KAGAN: If I understand --

19 JUSTICE SOTOMAYOR: -- came and got
20 the -- became an authorized driver by lying, I
21 don't have a criminal conviction, and he is
22 listed, what happens then? Is that a violation
23 of the contract sufficient enough to invalidate
24 his expectation of privacy?

25 MR. FEIGIN: I think it probably

1 would, Your Honor, because he procured the
2 contract through lying. This gets a little bit
3 back --

4 JUSTICE SOTOMAYOR: So we've now --

5 MR. FEIGIN: -- to Chief Justice's --

6 JUSTICE SOTOMAYOR: -- criminalized a
7 contract, and a contract breach.

8 MR. FEIGIN: Well, Your Honor, Your
9 Honor, what we would -- no, Your Honor, I don't
10 think that's the right way to think about it.
11 The Fourth Amendment --

12 JUSTICE SOTOMAYOR: I know you don't,
13 but I -- I --

14 (Laughter.)

15 MR. FEIGIN: Well, maybe I'll add
16 something to that assertion, which is that the
17 reason I don't think that's the right way to
18 think about that is because the Fourth
19 Amendment doesn't just protect people's
20 expectations of privacy at large, it protects
21 persons in their houses and their effects.

22 And so, if -- for someone to claim --

23 JUSTICE SOTOMAYOR: So, Mr. Feigin,
24 the rule you want us to write in this opinion
25 is, if you are an unauthorized driver of a

1 rental car, even if you have permission of the
2 authorized driver, the police can search the
3 trunk without any probable cause?

4 MR. FEIGIN: I would phrase it as the
5 -- you do not have enough of a connection to
6 the car to treat it as --

7 JUSTICE SOTOMAYOR: Yeah, but the
8 bottom line is the one I announced.

9 MR. FEIGIN: -- your effect for
10 purposes of the Fourth Amendment.

11 That would be the effect of the rule.
12 I would add that there are other Fourth
13 Amendment protections that protect against what
14 Your Honor is proposing.

15 First of all, you need reasonable
16 suspicion both to stop the car and for the
17 entire duration of the search.

18 He hasn't challenged the duration of
19 the search and -- sorry, the duration of the
20 stop. He hasn't challenged the duration of the
21 stop in this case because, presumably, because
22 he would lose because there was reasonable
23 suspicion that supports the entire length of
24 the stop.

25 JUSTICE GORSUCH: Mr. Feigin.

1 MR. FEIGIN: Yes?

2 JUSTICE GORSUCH: One thing we're
3 struggling with here is you say some contract
4 terms are so common, kind of an empirical
5 argument, that we should take cognizance of
6 them.

7 On the other hand, you kind of make a
8 normative argument that some contract terms we
9 should disregard even if they are common, like
10 the cell phone breach. Listening to a cell
11 phone while driving shouldn't forfeit your
12 expectations of privacy as a normative matter,
13 even though, empirically, they are quite
14 common.

15 The government has been living with
16 the reasonable expectation of privacy test for
17 a long time. How much of it is supposed to be
18 empirical? How much of it is supposed to be
19 normative? And how are we supposed to decide?

20 MR. FEIGIN: Your Honor, if -- if you
21 don't mind, if I could just take the first part
22 of your question first. I don't think that
23 that's quite our position.

24 Our position isn't about normative,
25 empirical data about how common a particular

1 contract term is. As I --

2 JUSTICE GORSUCH: You -- you've made
3 several times this argument that it is very
4 common, that anyone in the country would know
5 that this is a breach, and that that,
6 therefore, informs the reasonable expectation
7 of privacy test. That's an empirical claim.

8 You've also normatively made the
9 argument that there are some breaches, though
10 common, we should not take cognizance of, we
11 should not forfeit Fourth Amendment rights on,
12 like the cell phone example.

13 And I'm asking you, the government has
14 been living with the Katz rule for 50 years.
15 How much of it is empirical, how much of it is
16 normative, and how are we supposed to decide?

17 MR. FEIGIN: Your Honor, I will get to
18 that in just one minute.

19 JUSTICE GORSUCH: No, if you could get
20 to that straight away.

21 MR. FEIGIN: Okay.

22 (Laughter.)

23 MR. FEIGIN: Sure. And then I -- I'd
24 appreciate just being able to clear up what our
25 position is here.

1 We are not asking the Court to reject
2 the Katz rule. The Court recognized --

3 JUSTICE GORSUCH: I know that. I'm
4 not asking you that either, Mr. Feigin.

5 MR. FEIGIN: In reasonable
6 expectations of privacy, I think is a very
7 difficult inquiry for a Court to undertake and
8 a Court should be very hesitant before deciding
9 that some social understanding is sufficiently
10 well-embedded in society that it justifies
11 constitutional protection under the Fourth
12 Amendment.

13 Where you have the kind of empirical
14 or common sense data you have here, where the
15 assertion is in derogation of the established
16 legal norms of a major commercial industry, I
17 don't think that societal understandings, to
18 the extent they even exist at all, can really
19 carry the day.

20 But to get back to the sort of premise
21 of your question, we're not saying that certain
22 contract terms should be respected and certain
23 contract terms shouldn't. The distinction that
24 we're drawing here is between somebody who
25 actually has a legitimate connection to the car

1 because the person is the renter of the car or
2 is an authorized --

3 JUSTICE SOTOMAYOR: Does the son of a
4 father who owns the car but is not an
5 authorized driver on insurance and, as a
6 result, is not listed on the registration or
7 the insurance card, does that son -- now we're
8 out of the renter situation, we're in the
9 ownership situation -- does that son have an
10 expectation of privacy?

11 MR. FEIGIN: So if a father tells the
12 son you can go ahead and drive my car, then he
13 does have a legitimate expectation of privacy.
14 He has a connection to the owner of the car --

15 JUSTICE SOTOMAYOR: But why? He's
16 breaking the law. He doesn't have the child
17 listed on the insurance. He hasn't listed the
18 child on the registration. Why is this
19 different than the renter situation?

20 MR. FEIGIN: Again, Your Honor, it's
21 not about the law at large. It is about the
22 connection to the car.

23 And if you think about his role --

24 JUSTICE KAGAN: Well, suppose, Mr.
25 Feigin, that in this case Reed had said to

1 Byrd, you know, the car is parked outside the
2 house. And she had said you can -- you can --
3 if you want to make a phone call in private,
4 you can go out to the car.

5 And that's what Byrd did. He went out
6 to the car. He sat in the car. He made a
7 phone call for himself. Does he have a
8 reasonable expectation of privacy then sitting
9 in the car? He hasn't driven it yet.

10 MR. FEIGIN: I think the answer --

11 JUSTICE KAGAN: He has been sitting
12 there and using it as a place where he has some
13 privacy.

14 MR. FEIGIN: I think the answer there
15 would be no for two reasons. And I also don't
16 think that's really what's going on in this
17 case. But the reason why not is, first of all,
18 there is no connection to the owner of the car.

19 Second of all, a fundamental aspect of
20 cars is that they can move, and in that
21 scenario he is not entitled to move it. I
22 don't know that you have a legitimate
23 expectation --

24 JUSTICE KAGAN: I'm sorry --

25 MR. FEIGIN: -- of privacy.

1 JUSTICE KAGAN: -- I just didn't
2 understand. Is --

3 MR. FEIGIN: So, I don't know that you
4 can have a legitimate expectation of privacy
5 placing your person or your possessions in a
6 space, the very function of which, is to move
7 around and you are not allowed to move it.

8 But in this particular case, his only
9 assertion of a reasonable expectation of
10 privacy in the car isn't -- I'm --

11 CHIEF JUSTICE ROBERTS: You can finish
12 the sentence.

13 MR. FEIGIN: -- is coming from the
14 fact that he is the driver of a car that he
15 didn't own, that he didn't rent, and that he
16 wasn't legitimately in. Thank you.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel. Two minutes, Mr. Loeb.

19 REBUTTAL ARGUMENT OF ROBERT M. LOEB
20 ON BEHALF OF THE PETITIONER

21 MR. LOEB: Thank you, Your Honor.

22 The government says that Mr. Byrd's
23 conduct would violate criminal law in Ohio.
24 That is not true, as explained in Footnote 2 of
25 our -- of our reply brief. The case they cited

1 was where the renter who gave him permission,
2 allegedly gave permission, is the one who
3 reported the car as stolen. That's certainly
4 very different than here.

5 As to clear rules, our -- our -- our
6 position here is a clear rule in one -- one of
7 two ways.

8 One, that unless it's a criminal
9 trespass, or a stolen car, there is an ability
10 to at least invoke the Fourth Amendment or,
11 second, if anyone has a right to bring a
12 trespass action to exclude others and sue them
13 if they trespass on the property, they should
14 have an expectation of privacy protected by the
15 Fourth Amendment and ability to invoke it.

16 The -- the rule the government posits
17 here is one picking and choosing between
18 contract terms. The on-line standard contract
19 lists all these terms, including the
20 unauthorized driver, the cell phone, the
21 driving on gravel. All of them they say it's
22 voidable. He says some of them are voidable,
23 but some of them we should treat differently.
24 Picking and choosing between contract
25 provisions, that is a complicated rule which

1 makes no sense.

2 The same kind of logic would lead
3 application to the subletor, for some reason he
4 says that homes and apartments should be
5 different. This Court should adopt a clear
6 bright-line rule, unless you're a criminal
7 trespasser, unless you're a car thief, that you
8 have at least the ability to invoke the Fourth
9 Amendment.

10 He makes a distinction between homes
11 and cars. This Court has drawn distinctions
12 which are regarding the nature of a car. It
13 has never said the question of who can invoke
14 Fourth Amendment rights turns on whether you're
15 a person who's present in a house or present in
16 a car.

17 This is a unique argument which this
18 Court should reject.

19 JUSTICE ALITO: What about other
20 criminal activity? So why do you draw a line
21 between a criminal trespasser and somebody who
22 has an open -- an open bottle of alcohol in the
23 car, or someone who gets in the car intoxicated
24 or someone who is ingesting other controlled
25 substances in the car?

1 MR. LOEB: Because Rakas and --

2 JUSTICE ALITO: Or somebody who
3 doesn't have a license.

4 MR. LOEB: Rakas, and the Court before
5 it in Jones, talked about wrongful presence in
6 the car and gave the example in the Rakas
7 footnotes of the car thief and the criminal
8 trespasser.

9 So what's different about those crimes
10 is those are crimes where your mere presence in
11 the car is criminal itself and you're -- you're
12 intruding upon someone else's privacy and
13 dispossessing them of their privacy interests
14 by your criminal presence in the car.

15 There's other examples. Often we have
16 cars being used to transport drugs, we have
17 examples of people going over speed limits,
18 people drinking in cars.

19 Those kind of criminal offenses have
20 never been considered as a basis for negating
21 the driver's right to simply invoke the Fourth
22 Amendment. There's a question then is there
23 reasonable suspicion, is there a basis for
24 probable cause to search the car. And that
25 should be the standard here, not -- not finding

1 --

2 CHIEF JUSTICE ROBERTS: Thank you.

3 MR. LOEB: -- that there's no ability
4 to invoke the Fourth Amendment at all.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel. The case is submitted.

7 (Whereupon, at 11:06 a.m., the case
8 was submitted.)

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