

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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TERRENCE BYRD, )  
 )  
 ) Petitioner, )  
 )  
 ) v. ) No. 16-1371  
 )  
 ) UNITED STATES, )  
 )  
 ) Respondent. )  
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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 -- of  
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 --  
18 well, put aside the contract of adhesion, what  
19 -- what 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 in the trunk --

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 BREYER: Yeah, but --

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

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

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

21 MR. LOEB: It -- it's -- but that  
22 would be a very -- a different scenario where  
23 if you look to this Court's Chapman case, they  
24 said an inchoate right to properly -- to  
25 possibly eject someone from a leased apartment

1 would not provide a basis for denying someone  
2 the ability to invoke the Fourth Amendment. So  
3 in that case, the state argued --

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

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

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

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

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

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

13 MR. LOEB: He would, Your Honor.

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

16 MR. LOEB: Right.

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

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

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

1 of privacy and the police can't search it?

2 MR. LOEB: Well --

3 JUSTICE BREYER: Everybody knows.

4 What -- what's the rule -- is that the rule?

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

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

13 MR. LOEB: Well, it's -- so you look  
14 at the --

15 JUSTICE BREYER: -- have expectation?  
16 Does a thief?

17 MR. LOEB: -- the real life  
18 expectations, do you expect a -- the -- a  
19 stranger to be able to rummage through the car  
20 in that circumstance? So when you're in  
21 possession and in control of the car, and you  
22 have the key to the car, and in our case, when  
23 you've been given permission --

24 JUSTICE BREYER: I never expect a  
25 stranger to rummage through the car. So if I'm

1 sitting there or lying in the back seat asleep  
2 because I'm tired and everybody else has left  
3 the car, you're saying I have an expectation of  
4 privacy? I was just a friend of the driver and  
5 he said you can sleep on the back seat.

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

7 JUSTICE BREYER: Do I have an  
8 expectation?

9 MR. LOEB: -- more like the  
10 expectation of the -- the passengers in Rakas  
11 where they were never given access to the glove  
12 compartment. They never put their personal  
13 property in the glove compartment.

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

1 violation, it's not against dad's wishes, it's  
2 not against Budget's wishes, right, for him to  
3 have his property in the trunk.

4 JUSTICE SOTOMAYOR: Could I ask why  
5 we're here on --

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

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

1           JUSTICE BREYER:  But here let me be  
2 straightforward as to what my problem is.  I  
3 see your point in this case, you have a point,  
4 but what worries me is what's our rule going to  
5 be?  Do we have now subsection 18.378 of  
6 LaFave, which is called the car rental cases?

7           See, Fourth Amendment law is too  
8 complicated in a sense already.  So you look  
9 for principles or rules that will allow  
10 policemen and others to understand what it is  
11 they're supposed to do.

12           And your rule in this case is?

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

19           JUSTICE SOTOMAYOR:  How will the  
20 government know that?  How will the police know  
21 that?  The police come up to a rental car.  
22 They ask for your license and your  
23 registration.  You give them your license and a  
24 rental agreement that doesn't list you.

25           How are they supposed to know the

1 owner gave you permission?

2 MR. LOEB: The police were under the  
3 same exact scenario if I am borrowing a  
4 friend's car and given permission to use the  
5 car and the trunk. The exact same scenario.  
6 The same difficulties apply in the rental  
7 situation as the friend scenario.

8 CHIEF JUSTICE ROBERTS: No --

9 JUSTICE ALITO: Well, you mentioned  
10 the rental situation.

11 CHIEF JUSTICE ROBERTS: Go ahead.

12 JUSTICE ALITO: What about this: A  
13 homeowner is going away for a long weekend,  
14 arranges with a teenager in the neighborhood to  
15 come in and walk and feed the cat and spend  
16 quality time with the cat --

17 (Laughter.)

18 JUSTICE ALITO: -- but says under no  
19 circumstances may you bring anybody else into  
20 the house.

21 But the teen -- and the teenager says  
22 okay, fine, and then goes ahead and gives the  
23 keys to a friend who uses the house to sell  
24 drugs, and the police come in and they conduct  
25 a search.

1           Can that trespasser claim that his  
2 Fourth Amendment rights were violated?

3           MR. LOEB: So this Court has carved  
4 out an exception for the criminal trespasser,  
5 for the -- the car thief, for it's an exception  
6 for when someone's mere presence in the house  
7 or the apartment or the car is itself a  
8 criminal act, the mere presence is criminal,  
9 and where it's an intrusion on another person's  
10 privacy.

11           So the friend coming in who's a, in  
12 your hypothetical, a criminal trespasser under  
13 the Rakas Footnotes 9 and 12, would be  
14 considered perhaps in a category of people who  
15 cannot invoke Fourth Amendment rights.

16           JUSTICE ALITO: I mean, what's the --  
17 what is the difference between the -- the --  
18 the kid who's selling drugs from the house and  
19 Mr. Byrd who's using the car to transport  
20 drugs?

21           MR. LOEB: Very different. First of  
22 all, Mr. Byrd's presence in the car is not a  
23 violation of the contract. It is not a  
24 criminal trespass. It is not a tort. The  
25 government concedes his presence in the car --

1 and the language used in Rakas and in Jones was  
2 is the presence wrongful? And the government  
3 concedes his presence in the car is not  
4 wrongful.

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

8 JUSTICE GINSBURG: May I stop you  
9 there, because you mentioned apartment rental,  
10 house rental.

11 Do any of our decisions involve a case  
12 where the owner of the property says: No  
13 rentals, no subleases, but the -- the renter  
14 subleases anyway?

15 I thought it was assumed in our cases  
16 that the -- the -- that the -- the guest was  
17 there with the permission of the owner.

18 MR. LOEB: Well, Jones itself was a  
19 rental case. And there's only a discussion  
20 that -- that Jones was there with the  
21 permission of his friend, the renter, not --  
22 not with the -- the owner.

23 JUSTICE GINSBURG: But -- but there  
24 wasn't anything in that case about the owner  
25 having said no, as there is in this case,

1 nobody but the one we authorize.

2 MR. LOEB: That's correct, Your Honor.  
3 But I think this Court's Chapman case is  
4 instructive on that. So there the lease did  
5 bar the renter from moving in and immediately  
6 setting up distillery equipment. And the state  
7 argued that because he did so, the landlord  
8 could evict him at any moment and, therefore,  
9 he can't have Fourth Amendment rights to invoke  
10 in that circumstance.

11 And this Court said no, even though  
12 there could be an inchoate right of -- of the  
13 landlord to evict him, if they knew about the  
14 violation of the lease, that does not undermine  
15 his Fourth Amendment rights.

16 And same -- same here. There may be  
17 that Budget has an inchoate right to bring a  
18 contract action or a tort action against Mr.  
19 Byrd, but until they do so, just like in the  
20 sublet example, if the landlord -- if the owner  
21 finds out about the impermissible sublet and  
22 then brings an action of eviction, then you can  
23 say at that point on that there is a diminished  
24 expectation of privacy that the sublesers have  
25 in that situation.

1 JUSTICE SOTOMAYOR: Mr. Rakas --

2 CHIEF JUSTICE ROBERTS: I don't --

3 JUSTICE SOTOMAYOR: -- our decision in  
4 -- I'm sorry, counselor -- our decision in  
5 Rakas was premised on a number of things, most  
6 importantly that the defendant didn't claim any  
7 possession or privacy interest in the goods  
8 searched or in the things in the glove  
9 compartment, et cetera.

10 Why -- what's happened here? Meaning,  
11 is your client -- how did the information that  
12 he was given permission to store things in the  
13 trunk come before the Court?

14 MR. LOEB: Well, in the suppression  
15 hearing, his testimony was that he had the  
16 permission of Ms. Reed and that he had the  
17 permission to lock his personal items in the  
18 trunk and that he did store his clothing in the  
19 car and in the trunk. And then we see in the  
20 video the government rummaging through the  
21 trunk in just -- in just the way that this  
22 Court has warned that -- that -- that --

23 JUSTICE SOTOMAYOR: So I'm having --  
24 I'm having a problem with this case, which is  
25 why are we here? Meaning, once he admitted

1 that the -- that the goods in the trunk were  
2 his, I don't know why that doesn't give him  
3 automatic standing to challenge the search.

4 I thought in Rakas it was the fact  
5 that the defendants had repeated three or four  
6 or five different times that the defendants  
7 claimed no proprietary interest in the goods  
8 searched. That's different than this case,  
9 isn't it?

10 MR. LOEB: Exactly. Exactly.  
11 Exactly, Your Honor.

12 JUSTICE SOTOMAYOR: So why are we here  
13 on this legal issue at all?

14 MR. LOEB: We're -- we're here because  
15 the government and the Third Circuit has  
16 advocated a rule -- a blanket rule that, if  
17 you're an unlisted driver, you never have an  
18 expectation of privacy.

19 JUSTICE SOTOMAYOR: Even if you don't  
20 have an expectation of privacy in the trunk,  
21 you've claimed an expectation of privacy in the  
22 property.

23 MR. LOEB: And here --

24 JUSTICE SOTOMAYOR: And absent  
25 probable cause, there's no right to search. So

1       why are we here?

2                   MR. LOEB:  We agree 100 percent on  
3       that, Your Honor.

4                   JUSTICE GINSBURG:  You're here because  
5       you lost below.

6                   (Laughter.)

7                   MR. LOEB:  We lost below.

8                   JUSTICE SOTOMAYOR:  But I'm not --  
9       she's absolutely right, counselor, but I'm  
10      asking why are you pitching this case on the  
11      automobile exception.  Why don't you just argue  
12      the straightforward point that the whole --  
13      this whole discussion is about who has the  
14      right to challenge a search, and without  
15      probable cause.

16                  MR. LOEB:  Right, Your Honor.

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

21                  MR. LOEB:  Right, Your Honor.  And he  
22      testified regarding the clothing he put in the  
23      car, and you see them rummaging through the  
24      trunk when they open that locked trunk, so  
25      that's undisputed here.

1           He didn't -- just to be clear on the  
2 record, he did not claim ownership of the drugs  
3 or the body armor. Of course, they're charging  
4 him with possession of the same. But -- but  
5 it's enough that his own -- his own personal  
6 property is in that trunk, the clothing, and  
7 that the government is rummaging through that  
8 locked trunk. The people have an expectation,  
9 a reasonable objective expectation of privacy  
10 in spaces that are --

11           JUSTICE GORSUCH: Mr. Loeb --

12           CHIEF JUSTICE ROBERTS: So your  
13 argument --

14           JUSTICE GORSUCH: -- if I can -- if I  
15 can follow up on -- on Justice Sotomayor's  
16 question and -- and Justice Breyer's in terms  
17 of what's the clear line we can draw here.  
18 You've raised two theories on which you might  
19 prevail. One, a property law theory,  
20 essentially, as I understand it, that  
21 possession is good title against everybody  
22 except for people with superior title.

23           And -- and I understand that. That's  
24 an ancient common law rule. I can go back and  
25 find that in treatises all the way back to

1 Joseph Story.

2 Or I can do this reasonable  
3 expectation of privacy test, and that's what  
4 we've been struggling with so far. What's the  
5 -- we have to ask what the nature of the  
6 contract is and the terms of the contract. We  
7 might want to look at the nature of the  
8 relationship between Mr. Byrd and -- and  
9 Ms. Reed. There was a lot of debate in the  
10 briefs over whether they're girlfriend and  
11 boyfriend or fiancée or maybe common law  
12 marriage and someone's cheating on someone  
13 else. All of that's in the briefs that we have  
14 to contend with. Then we have the question  
15 whether the test is even an empirical or a  
16 normative question.

17 Do we look at what the reasonable  
18 expectations of privacy are by social science  
19 data, get my law clerks to go do that, or do we  
20 just announce normatively what we think it  
21 ought to be? Should it depend on regional and  
22 cultural norms across the country?

23 Gosh, it's very complicated.  
24 Professors Baude and Stern, among many others,  
25 suggest maybe we ought to look back at that

1 property test again. What do you think?

2 MR. LOEB: We think the property  
3 interest here, the right that he -- that Mr.  
4 Byrd would have had to bring a trespass action,  
5 demands a recognition of his right to invoke  
6 the Fourth Amendment, and it's a very clear and  
7 simple rule.

8 So the old adage is possession is  
9 nine-tenths of the law, and as you state in  
10 your question, that has roots in the common law  
11 going back to the 1600s and 1700s.

12 JUSTICE ALITO: But the problem --

13 JUSTICE KAGAN: Wouldn't that apply to  
14 criminals too?

15 JUSTICE ALITO: The problem -- go  
16 ahead.

17 JUSTICE KAGAN: Wouldn't that apply to  
18 criminals too? We've been very clear that  
19 criminals don't have Fourth Amendment rights.  
20 The property-based concepts that Justice  
21 Gorsuch was stating would say that criminals  
22 have that kind of property interest.

23 MR. LOEB: No, Justice Kagan. So the  
24 Restatement 895, which deals with this under  
25 the Restatement of Torts, Second, says just --

1 the -- the principle that was articulated, that  
2 mere possession would allow you to bring a  
3 trespass action against anyone else who invaded  
4 it. But if you look at comment h there, it  
5 says where someone is "clearly a thief," the  
6 court can deny them the right to bring that  
7 trespass or conversion action against the third  
8 party, the stranger who's invading the space.  
9 But --

10 JUSTICE ALITO: I mean, the problem  
11 with going down this property route is that we  
12 go off in search of a type of case that almost  
13 never arose, if it ever did arise -- arise at  
14 common law, where an unauthorized sub-bailee  
15 brings an action for trespass to chattel  
16 against a law enforcement officer.

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

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

21 JUSTICE ALITO: Yeah.

22 MR. LOEB: The fact that you can  
23 exclude a stranger and bring a trespass action  
24 against him --

25 JUSTICE ALITO: It's --

1           MR. LOEB: -- is what supports your  
2 property right under the Constitution --

3           JUSTICE ALITO: It's hard enough to  
4 find the case where it's the stranger, where  
5 it's the private-party stranger. But that's  
6 not what we have here. We have a party who has  
7 lawful rights that no private party had, which  
8 was to stop this vehicle.

9           And it's not contested that this was a  
10 lawful -- that this was a lawful search. I  
11 mean, I'm sorry, a lawful stop.

12          MR. LOEB: Well, their -- their rights  
13 -- the police right is confined. Ordinarily,  
14 they need reasonable suspicion to extend the  
15 search, they need probable cause to search the  
16 car and the trunk -- the locked trunk has  
17 always been, you know, deemed sacrosanct,  
18 requiring, at minimum, probable cause.

19          So the standard here is -- is a simple  
20 one under common law. He has the right to  
21 exclude others. And it -- it bolsters also the  
22 reasonable expectation of privacy.

23          JUSTICE BREYER: Is this your rule?  
24 Is this -- I -- I'm still trying to think of  
25 the rule. A person who has possession of and

1 is driver -- driver of a car, whoever he is,  
2 has a reasonable expectation in privacy of the  
3 parts of that car, unless in driving or  
4 possessing it or -- he's committing a crime.

5 MR. LOEB: Yes, Your Honor. That's  
6 our blight -- bright line rule, it's easy --

7 JUSTICE BREYER: You accept that?

8 MR. LOEB: -- easy to apply. Yes.

9 JUSTICE BREYER: Yes.

10 MR. LOEB: That -- that is supported  
11 by both common law principles and objective  
12 expectations of privacy --

13 JUSTICE BREYER: Uh-huh.

14 MR. LOEB: -- that when you're in a  
15 car and you're in sole possession and control  
16 of it -- the troopers themselves recognized he  
17 was no criminal. They wouldn't put a car thief  
18 back behind the wheel of the car, give him  
19 complete control, in the words of Trooper Long,  
20 and let him drive it up the highway to the next  
21 exit to pull over. They didn't -- they treated  
22 him very differently. It's not like --

23 JUSTICE BREYER: So a person who goes  
24 into a house and has all the indicia of being  
25 the owner, as far as anyone else can tell or

1 has a right to be there, also can exclude the  
2 police from a search unless in being in that  
3 house he is committing a crime?

4 MR. LOEB: Right. Unless you're  
5 committing a criminal trespass or, in the case  
6 of the car, the car thief, and especially when  
7 you were locking your personal things in the  
8 trunk --

9 JUSTICE BREYER: That's impossible.  
10 Okay, let's see what --

11 MR. LOEB: -- you have an expectation  
12 of privacy in that space. The -- the -- the  
13 foundation of -- of the expectation of privacy  
14 is the right to exclude others. And Jones and  
15 Rakas have said that, and it's very clear that  
16 both under common sense of who you can exclude  
17 and under common law, where you have a right to  
18 possess and exclude, that Mr. -- Mr. Byrd has a  
19 Fourth Amendment right that he can invoke in  
20 this case.

21 JUSTICE ALITO: The Constitution uses  
22 the word "property" numerous times, but the  
23 word "property" doesn't appear in the Fourth  
24 Amendment. It talks about "effects," which is  
25 defined by Samuel Johnson's dictionary as

1 "goods or movables."

2           So is it your argument that any  
3 property interest whatsoever falls within the  
4 definition of "effects" if we are going to go  
5 back to an originalist interpretation of the  
6 Fourth Amendment? So would it include  
7 contingent interests? Would it include future  
8 interests? If somebody has left me a car in a  
9 will and the car is searched, do I have the  
10 right to bring a Fourth -- does that implicate  
11 my Fourth Amendment rights?

12           MR. LOEB: I think if the common law  
13 recognizes your right to replevin or to  
14 trespass against a stranger, then both under  
15 common law and common sense, that it makes  
16 sense to recognize a right to invoke a Fourth  
17 Amendment right.

18           And still, we're not saying that the  
19 police don't have adequate tools here. If  
20 they're -- if they had reasonable suspicion to  
21 extend this stop and further investigate, if  
22 they had probable cause, or if they had  
23 consent, they could have searched the trunk of  
24 the car, but they did not have that here.

25           JUSTICE KAGAN: Mr. Loeb, we've always

1 said that there's a normative component to  
2 expectations of privacy. In other words,  
3 they're those expectations that society has  
4 prepared to recognize as reasonable.

5 So here you have at the very least a  
6 person who's violated important contract terms,  
7 terms that are of some significance to the  
8 owner of the property, as well as a person who  
9 is engaged in conduct that frustrates law  
10 enforcement in various ways; get behind the  
11 wheel, you're not the person who's authorized  
12 to be here, the police don't know who you are.  
13 And, you know, this is -- the facts of this  
14 case provide a good example of how unauthorized  
15 driving can frustrate law enforcement.

16 So why is it that society should be  
17 prepared to recognize this conduct as  
18 reasonable?

19 MR. LOEB: Because society recognizes  
20 that when you put your personal items in a  
21 locked space, if you put it, in Chadwick, in a  
22 locked footlocker, you have an expectation of  
23 privacy regarding it.

24 And the courts don't look behind this  
25 to say, well, are you really engaged in

1 criminal conduct, are you a bad guy? The  
2 question is a question of if you're sitting in  
3 a car which you have locked and you can lock  
4 the car and you've locked the trunk and your  
5 personal items, society recognizes an  
6 expectation of privacy in that. And Mr. Byrd,  
7 when he was sitting in the Ford Fusion after  
8 he's pulled over by the police, is not  
9 wrongfully present. If someone is wrongfully  
10 present and creating a criminal act by being  
11 present, that's different. But the government  
12 concedes he was not wrongfully present in the  
13 car, he had his personal items locked in the  
14 trunk, and as an objective matter, someone has  
15 a -- an expectation -- a reasonable expectation  
16 of privacy in those circumstances. And that  
17 expectation is bolstered by the common law,  
18 which says he has a right to sue others for  
19 trespass if they intruded upon that car. If  
20 that's true, clearly he can at least at minimum  
21 invoke the Fourth Amendment.

22 I'd like to reserve --

23 JUSTICE GINSBURG: In your brief, you  
24 made something of the familial relationship  
25 between the person who rented the car and --

1 and Byrd. Suppose it had not been a familial  
2 relationship. Suppose it was just a neighbor  
3 or one of the friends that Justice Breyer  
4 brought up.

5 Does the familial relationship really  
6 matter?

7 MR. LOEB: No, Your Honor. It simply  
8 bolsters the expectation. If you have a -- a  
9 family member or a close friend or, here,  
10 someone you've been living with for 15 years  
11 and you exchanged -- as the record establishes  
12 here, exchanged cars on a regular basis, it's  
13 reasonable to believe that you can drive the  
14 other person's car, that you can lock materials  
15 in their trunk when you're driving, and that  
16 you'll have an expectation of privacy when you  
17 do so.

18 I'd like to reserve the remaining --  
19 my time for rebuttal. Thank you.

20 CHIEF JUSTICE ROBERTS: Thank you,  
21 counsel.

22 Mr. Feigin.

23 ORAL ARGUMENT OF ERIC J. FEIGIN

24 ON BEHALF OF THE RESPONDENT

25 MR. FEIGIN: Thank you, Mr. Chief

1 Justice, and may it please the Court:

2 To challenge the search in this case,  
3 Petitioner has the affirmative burden to prove  
4 a connection to Budget's car that would justify  
5 treating it as his effect for purposes of the  
6 Fourth Amendment.

7 He can't do that when he sent Reed  
8 into the rental office alone to rent a car he  
9 never could have rented, subject to terms that  
10 didn't allow him to drive it, and then he took  
11 the keys and drove off with it.

12 It's a very --

13 JUSTICE SOTOMAYOR: Let's assume he  
14 wasn't a criminal. Let's assume it was the  
15 renter's son, not the wife because there is an  
16 exception for spouse in the contract.

17 Is that son in the same position as  
18 Mr. Reed?

19 MR. FEIGIN: I think as a matter of  
20 law he would be. Obviously, I think, as  
21 Justice Kagan pointed out, the actions here  
22 were even more unreasonable. But the reason  
23 why we would --

24 JUSTICE SOTOMAYOR: I -- I don't  
25 disagree with you, but I'm asking a question,

1       which is:  Police can search a car when they  
2       have probable cause, correct?

3                 MR. FEIGIN:  Yes.

4                 JUSTICE SOTOMAYOR:  And they're free  
5       to do that of any car driven even by a licensed  
6       driver, correct?

7                 MR. FEIGIN:  Yes.

8                 JUSTICE SOTOMAYOR:  Or a licensed  
9       co-driver on a rental agreement.  So really the  
10      issue here before us is when are the police  
11      permitted to search without a warrant, without  
12      probable cause?  And that's what I see the  
13      issue as, because if we rule that someone  
14      without permission can -- has no expectation of  
15      privacy even when the renter has given it to  
16      them, then what we're authorizing is the police  
17      to stop every rental car and search every  
18      rental car, without probable cause, that might  
19      be on the road.

20                MR. FEIGIN:  Well, Your Honor, I think  
21      there's no evidence that there's a widespread  
22      practice of that because for one thing it's  
23      impractical.

24                JUSTICE SOTOMAYOR:  Well, the police  
25      here said we stopped him because he was driving

1 a rental car. He was doing something totally  
2 illegal. Every driving school teaches you to  
3 put your hands at a 10 to 2 angle, and they  
4 found that suspicious.

5 (Laughter.)

6 JUSTICE SOTOMAYOR: And they waited  
7 until he made a turn that was not authorized by  
8 the traffic laws.

9 So to say that there isn't a practice  
10 is a little bit disingenuous, Mr. Feigin. But  
11 the question I really have is should we be  
12 creating exceptions to the most basic of Fourth  
13 Amendment rights, that of probable cause,  
14 before police intrude in searching at all?

15 And we're doing it under the guise,  
16 not of was this search legal under the Fourth  
17 Amendment, but whether someone has standing to  
18 even question that.

19 Because this is a standing case,  
20 correct?

21 MR. FEIGIN: It's -- it refers to a  
22 doctrine the Court has sometimes referred to as  
23 standing. And, of course, the question in any  
24 standing case is whether someone has the right  
25 under the Fourth Amendment to treat something

1 as their own effect or their own home.

2 Now, here the very thing that he's  
3 relying on --

4 JUSTICE SOTOMAYOR: Their own effect.  
5 Well, we know that he was told that he could  
6 use the trunk and put things in it, whether  
7 he's a passenger or a driver. Once he says  
8 that and the owner of -- and the renter of the  
9 car agrees with him, I'm still not sure what's  
10 missing.

11 MR. FEIGIN: Your Honor --

12 JUSTICE SOTOMAYOR: Why that claim of  
13 an interest is inadequate.

14 MR. FEIGIN: Well, let me say a couple  
15 of things, Your Honor. First of all, Rakas was  
16 quite -- quite clear that a passenger doesn't  
17 get rights in the trunk of a car. And simply  
18 putting items in the trunk of a car, even with  
19 the permission of someone else, doesn't give  
20 one rights in the trunk.

21 The person may have rights in their  
22 own items within the trunk, but they don't have  
23 rights in the trunk itself. For example, if  
24 you think about Minnesota against Carter where  
25 this Court held --

1 JUSTICE SOTOMAYOR: So every criminal  
2 defendant where their suitcase has been  
3 searched would have to say, I'm more than just  
4 the owner of the suitcase?

5 MR. FEIGIN: No, Your Honor.

6 JUSTICE SOTOMAYOR: I'm the owner of  
7 the drugs? Let's assume he came in and said, I  
8 was the owner of the suitcase.

9 MR. FEIGIN: So, Your Honor, if he --  
10 there are cases like this in the courts of  
11 appeals, and they've handled this different  
12 ways. But if someone comes in and says I don't  
13 have rights in the car, but I do have rights in  
14 the suitcase that was searched in the car, most  
15 courts will address that and find that the  
16 defendant did have rights in the suitcase.

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

21 JUSTICE SOTOMAYOR: I thought he made  
22 claims to the -- to the trunk, that he said I  
23 was given permission to store my things in the  
24 trunk, and that's what I did.

25 MR. FEIGIN: Your Honor, the trunk is

1 simply part of the car. He hasn't made some  
2 claim that his rights were violated as to some  
3 effect he stored in the trunk.

4 What he's claiming is that the car can  
5 be treated as his effect for Fourth Amendment  
6 purposes. But the very event on which he's  
7 relying to establish his Fourth Amendment  
8 rights was contrary to the reasonable and  
9 well-known legal norms of a major commercial  
10 industry.

11 He not only wants this Court to say  
12 that Reed handing him the keys and him driving  
13 off in the car was acceptable. He wants this  
14 Court to say that it reflected such a  
15 deep-seated societal understanding that it  
16 should give rise to Fourth Amendment rights.

17 JUSTICE ALITO: Well, there was a --

18 JUSTICE KAGAN: Well, sometimes --

19 JUSTICE ALITO: There was a violation  
20 of one of the terms of the contract. We asked  
21 Mr. Loeb about where he would draw the line.  
22 But where would you draw the line in terms of  
23 terms -- with regard to terms in the contract?

24 Would you say that every violation of  
25 a term of the rental agreement voids the

1 opportunity to make a Fourth Amendment  
2 argument?

3 MR. FEIGIN: No, Your Honor. I think  
4 the key distinction here is that he's claiming  
5 a personal Fourth Amendment right. As an  
6 unauthorized driver, he doesn't have any  
7 connection to the car at all. There is no  
8 connection between him and the car. He is not  
9 part of the rental agreement. He is an  
10 interloper in the rental agreement.

11 JUSTICE GORSUCH: Well, Mr. Feigin --

12 CHIEF JUSTICE ROBERTS: Well, it's a  
13 pretty big connection that the person who has  
14 the right to drive the car told him that he  
15 could. That's a connection to the car.

16 MR. FEIGIN: Well, that is an  
17 authority that she didn't have, that she signed  
18 in a couple of different places that she didn't  
19 have, and that it is well-known that people do  
20 not have when they rent cars, unless otherwise  
21 allowed to do so. But the second --

22 CHIEF JUSTICE ROBERTS: Well, but this  
23 is probably not the only time it's ever  
24 happened. And --

25 (Laughter.)

1 CHIEF JUSTICE ROBERTS: -- I think  
2 what -- I think the understanding is, well,  
3 you're probably going to have trouble with  
4 insurance and all if so-and-so gets into an  
5 accident. But at least the argument on the  
6 other side is that it wasn't unlawful for him  
7 to be driving. It may have been -- or wasn't  
8 criminally unlawful. It may have been a breach  
9 of contract by Reed, I guess, but not  
10 necessarily anything wrongful on his part.

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

15 And I think the idea that the breach  
16 of legal norms that are well-known and  
17 reasonable within a major commercial industry  
18 is something that should give rise to --

19 JUSTICE KAGAN: As --

20 JUSTICE BREYER: Yeah, the problem is  
21 -- I've got that point.

22 MR. FEIGIN: Okay.

23 JUSTICE BREYER: Now, what do you  
24 think of the -- of the rule that we just sort  
25 of came up with maybe, or maybe he's been

1     advancing it, look, the problem with your rule,  
2     it seems to me, is that there are cars, houses,  
3     apartments, sublets, summer cabins, all kinds  
4     of things which have all kinds of contracts,  
5     understandings, leases, et cetera.

6             And over a wide range, who knows  
7     what's in them? And what can be expected?  
8     That's awfully complicated. And, therefore,  
9     I'm looking for something simple. And the  
10    simplest thing that we were discussing, it  
11    seemed to me, is to say the following: Where  
12    the individual has all the other indicia of the  
13    right to control the -- and fill in the  
14    blank -- here it's a car, he's sitting there  
15    driving it, that he can assert a right to  
16    privacy and has standing, unless it is  
17    criminal, unless it is a crime.

18            Now maybe here it was a crime, but  
19    that would be the rule, unless he is a criminal  
20    possessor, unless he came in as a squatter  
21    having broken the window, et cetera. Do you  
22    see the point?

23            MR. FEIGIN: Well --

24            JUSTICE BREYER: But the virtue of  
25    what he just said, it seemed to me, your --

1 your opponent here, was that that's pretty  
2 simple, comparatively speaking. What do you  
3 think?

4 MR. FEIGIN: I don't think -- I don't  
5 think that's going to be particularly simple,  
6 Your Honor. First of all, as I was just  
7 mentioning to the Chief Justice, in some  
8 jurisdictions, this would be a criminal act.

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

18 And yet I take it their rule would  
19 create a legitimate expectation of privacy in  
20 that circumstance.

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

24 MR. FEIGIN: So, Your Honor, I think  
25 it's going to actually wind up being much more

1 difficult to apply in practice, and I don't  
2 think it makes a particular amount of sense.

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

13 MR. FEIGIN: Your Honor, he has shown  
14 --

15 JUSTICE BREYER: That's your legal  
16 rule?

17 MR. FEIGIN: He has -- no.

18 JUSTICE BREYER: Is that -- what is  
19 your legal rule?

20 MR. FEIGIN: So the principle that  
21 we'd propose resolves this case, and I don't  
22 mean to keep repeating myself here, but where  
23 the assertion of Fourth Amendment rights comes  
24 from an act that is contrary to the legal norms  
25 of a well-established commercial industry --

1 JUSTICE KAGAN: But you've just told  
2 Justice Alito that that can't possibly be your  
3 test because there are all kinds of provisions  
4 in this contract and people violate some of  
5 them. And you would never say that that  
6 eliminates any right to privacy.

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

17 So what eliminates the right of  
18 privacy that you would normally get by opening  
19 up the car of a door and sitting in the front  
20 seat and turning the ignition key?

21 MR. FEIGIN: Well, Your Honor, I think  
22 it'll be helpful in a second if I can turn back  
23 to -- and finish my answer to Justice Alito's  
24 question and make clear why this is different  
25 from other kinds of contract breaches, but to

1 answer your question, you -- someone who takes  
2 the wheel of a car that they are not authorized  
3 to drive is not entitled to treat it as their  
4 effect under the Fourth Amendment. They cannot  
5 treat it --

6 JUSTICE KAGAN: Well, Justice Alito's  
7 question is very much related to mine, because  
8 there are all kinds of contract terms where if  
9 you're -- if you're sitting behind the wheel of  
10 a car and you're -- you're driving on gravel,  
11 you're in violation of the contract.

12 You know, there are tens of them. So  
13 why is this one any different? Why does this  
14 one eliminate what you would normally get by  
15 being in that car with the permission of the  
16 renter?

17 MR. FEIGIN: So let me address that in  
18 full. Just -- it'll just take me a second to  
19 explain this.

20 As I was saying to Justice Alito, the  
21 Fourth Amendment rights are personal, and here  
22 Petitioner, like other unauthorized drivers,  
23 simply has no connection to the car at all. He  
24 is a stranger to the relationship between  
25 Budget and Reed. In the --

1           JUSTICE GORSUCH: Mr. Feigin, you keep  
2 saying that, but as a matter of property law  
3 now and forever, a possessor would have a right  
4 to exclude other people but for those with  
5 better title.

6           So someone in these position would  
7 have a right, I think you'd agree, to exclude  
8 someone who's attempting to get in the car to  
9 hijack it, carjack it.

10           You'd also have a right to throw out a  
11 hitchhiker who had overstayed his welcome. And  
12 so as -- I think you're having to argue that  
13 the government has a special license that  
14 doesn't exist for any other stranger to the  
15 car.

16           MR. FEIGIN: I don't think so, Your  
17 Honor. I don't think this Court has included  
18 the idea that even the illegitimate possessor  
19 of an item maybe having some sort of trespass  
20 action they could bring has incorporated that  
21 particular rule into the Fourth Amendment.

22           In fact --

23           JUSTICE GORSUCH: Well, that's been --  
24 that's been the common law of property forever,  
25 right?

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

3 JUSTICE GORSUCH: I'm not talking  
4 about thieves.

5 MR. FEIGIN: Okay.

6 JUSTICE GORSUCH: We put that aside.

7 MR. FEIGIN: Well, it's interesting  
8 that one -- the reason -- the one of the cases  
9 the Court used to reject the car thief scenario  
10 in Rakas actually relied on this trespasser  
11 theory that Your Honor is advancing now, and  
12 the Court said it found it inconceivable that  
13 --

14 JUSTICE GORSUCH: Inconceivable with  
15 respect to thieves. That's correct. I'm  
16 asking with respect to everybody else.

17 MR. FEIGIN: Well, you --

18 JUSTICE GORSUCH: Isn't it the fact  
19 that the government is asking for a special  
20 license here that would not be available to any  
21 other third person?

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

25 JUSTICE GORSUCH: Well, then let me

1 ask you this: Do you agree that -- that  
2 Mr. Byrd could have excluded a carjacker?

3 MR. FEIGIN: I think by virtue of  
4 simply being in the car, he probably could have  
5 --

6 JUSTICE GORSUCH: By virtue of his  
7 possession --

8 MR. FEIGIN: -- fended off a carjacker  
9 and we wouldn't oppose --

10 JUSTICE GORSUCH: Yes, and -- and --

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

12 JUSTICE GORSUCH: -- he would have a  
13 right to do so. And he would have a right to  
14 throw out a hitchhiker as well.

15 MR. FEIGIN: But if someone had sued  
16 the --

17 JUSTICE GORSUCH: So why not the  
18 government?

19 MR. FEIGIN: Well, Your Honor, that is  
20 not a principle that this Court has  
21 incorporated to create Fourth Amendment  
22 rights --

23 JUSTICE SOTOMAYOR: But where have --  
24 where else --

25 MR. FEIGIN: -- I think because it

1 produces very --

2 JUSTICE SOTOMAYOR: We have never  
3 incorporated private rights into the Fourth  
4 Amendment. We've said that we either look to  
5 property or tort law to define private rights.

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

15 But we have recognized the rights of  
16 tenants to privacy in their home --

17 MR. FEIGIN: And --

18 JUSTICE SOTOMAYOR: -- because they  
19 possess it.

20 MR. FEIGIN: Well, not because they  
21 possess it, Your Honor, but because, as Justice  
22 Ginsburg was pointing out, there actually is a  
23 legitimate connection there. They are, in  
24 fact, the renter, which brings me back to  
25 Justice --

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

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

17 MR. FEIGIN: Well, Your Honor --

18 JUSTICE SOTOMAYOR: For the police,  
19 rather than for the person involved.

20 MR. FEIGIN: -- I don't think that's  
21 our position. Our position is that there is no  
22 legitimate connection to the car here. The  
23 contract is important. Everyone agrees on  
24 that. He's not claiming he could simply walk  
25 into Budget's lot, pick a car he liked, and

1 drive off with it. He's depending to some  
2 degree on the contract that exists between Reed  
3 and Budget. He just wants to ignore the part  
4 of the contract that excludes him from its  
5 terms.

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

17 And the question then becomes whether  
18 they lose their legitimate expectation of  
19 privacy based on that breach. And I think  
20 there's two good reasons why they wouldn't.

21 One is even when a contract declares  
22 the agreement to be void upon the violation of  
23 a particular term, courts construe that not to  
24 have the contract immediately vanish into thin  
25 air but, rather, to create a right of

1 voidability in the party whose term has been  
2 breached.

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

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

21           JUSTICE ALITO: And then what do you  
22 do about the cases with the -- the illegal  
23 sublessee or the individuals who occupy a  
24 rental unit in violation of a provision that  
25 specifies the maximum number of people who can

1 stay there?

2 MR. FEIGIN: So I think there probably  
3 would be a legitimate expectation of privacy in  
4 those cases. And I think they're distinct from  
5 this one in two key respects.

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

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

22 And you don't have to believe me on  
23 what the legal norm is. If you look at the  
24 amicus brief on their side from the National  
25 Motorists Association at Footnote 2, they say

1 the rental agreement in this case is familiar  
2 to anyone who's ever rented a car.

3 Everyone --

4 JUSTICE SOTOMAYOR: But they -- they  
5 also say that --

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

19 Is there anything wrong, from your  
20 perspective, in a rule that is very simple  
21 which is if it's a rental agreement -- a rental  
22 car, look at the agreement. If it's not an  
23 authorized driver, that's it. In other words,  
24 it doesn't matter what the positions of the  
25 person who rented it is and -- but would you be

1     arguing that the search was permissible if you  
2     didn't have the rental agreement?

3             MR. FEIGIN:   In the car?

4             CHIEF JUSTICE ROBERTS:   Uh-huh.

5             MR. FEIGIN:   We would -- I think the  
6     fact the rental agreement is in the car is very  
7     helpful to us.  I think we'd still be making  
8     the argument even if the rental agreement  
9     weren't in the car.

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

13            They can follow up by asking  
14     questions.  They can call the rental car  
15     company, but --

16            CHIEF JUSTICE ROBERTS:   Yeah, but, I  
17     mean, maybe it's paradoxical; you think, well,  
18     if there's no rental agreement, they ought to  
19     have a greater authority.  But the -- the  
20     absence of the authorization on the rental  
21     agreement that the police can look at is  
22     evidence that, you know, this is not your  
23     typical situation.

24            However common it might be in -- in --  
25     in -- in practice, it is -- raises doubts that

1 might otherwise not be there even if they don't  
2 have the rental agreement.

3 MR. FEIGIN: So, Your Honor, if the  
4 existence of the rental -- the presence of the  
5 rental agreement which was required to be in  
6 the glove compartment in this case, resolves  
7 this case for Your Honor, then the Court  
8 doesn't need to go any further than that.

9 I guess one thing --

10 JUSTICE SOTOMAYOR: Oh, yes, we do --

11 JUSTICE GINSBURG: Mr. Feigin --

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

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

21 And now we're using the car exception,  
22 and the probable cause aspect of it has  
23 vanished.

24 MR. FEIGIN: Well, Your Honor, I think  
25 what the Court was getting at with the car

1 exception are still principles that apply when  
2 we're doing a expectation of privacy inquiry  
3 because the car exception arises out of the  
4 fact that there is a lesser expectation of  
5 privacy in cars.

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

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

18 Would that be different, if he thought  
19 he was an authorized driver?

20 MR. FEIGIN: Nothing in this Court's  
21 cases to this point have turned on the  
22 defendant's knowledge. And I think there are  
23 reasons not to have such a rule, and I can get  
24 to them in a second.

25 But even if you applied that rule in

1 this case or assumed that that rule exists in  
2 this case, Petitioner would still lose. The  
3 reason --

4 JUSTICE KAGAN: No, obviously he --

5 MR. FEIGIN: Yeah.

6 JUSTICE KAGAN: -- knew that he was an  
7 unauthorized driver, but I'm saying how about  
8 if he didn't? What if he was an -- what if he  
9 thought he was an authorized driver?

10 MR. FEIGIN: So I think --

11 JUSTICE KAGAN: And you're saying same  
12 rule?

13 MR. FEIGIN: I think we would say same  
14 rule, and one of the reasons why -- I think the  
15 Court could draw the distinction, but there  
16 would be a couple reasons I would urge the  
17 Court not to draw that distinction.

18 One is that it would give more privacy  
19 rights to someone who is not diligent than to  
20 someone who is. So someone who actually asks  
21 am I on the rental agreement would have -- be  
22 less likely to have privacy protections.

23 The second thing is that it creates  
24 very difficult proof problems.

25 The defendant gets on the stand and

1 says, well, my friend said so and so. That's  
2 very difficult for the government to disprove.  
3 And there it also raises questions of  
4 trustworthiness. Well, maybe your friend is a  
5 car thief. Maybe your friend is just not a  
6 trustworthy person. You shouldn't have been  
7 trusting your friend.

8 And the Fourth Amendment doesn't have  
9 to accept the defendant's own choices to trust  
10 a particular person when they --

11 JUSTICE SOTOMAYOR: How about when  
12 they --

13 JUSTICE KAGAN: If I understand --

14 JUSTICE SOTOMAYOR: -- came and got  
15 the -- became an authorized driver by lying, I  
16 don't have a criminal conviction, and he's  
17 listed, what happens then? Is that a violation  
18 of the contract sufficient enough to invalidate  
19 his expectation of privacy?

20 MR. FEIGIN: I think it probably  
21 would, Your Honor, because he procured the  
22 contract through lying. This gets a little bit  
23 back --

24 JUSTICE SOTOMAYOR: So we've now --

25 MR. FEIGIN: -- to the Chief Justice's

1 --

2 JUSTICE SOTOMAYOR: -- criminalized a  
3 contract --

4 MR. FEIGIN: Well, Your Honor --

5 JUSTICE SOTOMAYOR: -- and a contract  
6 breach.

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

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

13 (Laughter.)

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

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

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

1 authorized driver, the police can search the  
2 trunk without any probable cause?

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

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

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

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

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

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

24 JUSTICE GORSUCH: Mr. Feigin.

25 MR. FEIGIN: Yeah?

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

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

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

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

22 Our position isn't about normative,  
23 empirical data about how common a particular  
24 contract term is. As I --

25 JUSTICE GORSUCH: You -- you've made

1 several times this argument that it's very  
2 common, that anyone in the country would know  
3 that this is a breach, and that that,  
4 therefore, informs the reasonable expectation  
5 of privacy test. That's an empirical claim.

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

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

15 MR. FEIGIN: Your Honor, I'll get to  
16 that in just one minute.

17 JUSTICE GORSUCH: No, if you could get  
18 to that straight away.

19 MR. FEIGIN: Okay.

20 (Laughter.)

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

24 We are not asking the Court to reject  
25 the Katz rule. The Court recognized --

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

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

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

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

1 who --

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

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

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

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

22 And if you think about his role --

23 JUSTICE KAGAN: Well, suppose, Mr.  
24 Feigin, that in this case Reed had said to  
25 Byrd, you know, the car is parked outside the

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

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

9 MR. FEIGIN: I -- I think the answer  
10 --

11 JUSTICE KAGAN: But he's 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 -- the reason why not is, first  
18 of all, there's no connection to the owner of  
19 the car.

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

19 Two minutes, Mr. Loeb.

20 REBUTTAL ARGUMENT OF ROBERT M. LOEB

21 ON BEHALF OF THE PETITIONER

22 MR. LOEB: Thank you, Your Honor.

23 The government says that Mr. Byrd's  
24 conduct would violate criminal law in Ohio.  
25 That is not true, as explained in Footnote 2 of

1 our -- of our reply brief. The case they cited  
2 was where the renter who gave him permission,  
3 allegedly gave him permission, is the one who  
4 reported the car as stolen. That's certainly  
5 very different than here.

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

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

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

1 provisions, that is a complicated rule which  
2 makes no sense.

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

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

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

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

1 controlled substances in the car?

2 MR. LOEB: Because Rakas and --

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

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

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

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

20 Those kind of criminal offenses have  
21 never been considered as a basis for negating  
22 the driver's right to simply invoke the Fourth  
23 Amendment. There's a question then is there  
24 reasonable suspicion, is there a basis for  
25 probable cause to search the car. And that

1 should be the standard here, not -- not finding

2 --

3 CHIEF JUSTICE ROBERTS: Thank you.

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

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

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

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## Official

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