No. 98-9349

IN THE

Supreme Court of the United States

STEVEN DEWAYNE BOND,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE ASSOCIATION OF FEDERAL DEFENDERS AS AMICI CURIAE IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF AMICI CURIAE[1]

The National Association of Criminal Defense Lawyers (the "NACDL") is a professional bar association founded in 1958 for the purpose of advancing the mission of the nation's criminal defense lawyers to ensure justice and due process for persons accused of a crime or other misconduct. Today, the NACDL has almost 10,000 direct members and 80 affiliates representing another 28,000 members, who include private criminal defense lawyers, public defenders, active U.S. military defense counsel and law professors. The NACDL has members in all fifty states, and the American Bar Association recognizes the NACDL as an affiliate organization and

[1] Both parties have consented to the filing of this brief. No counsel for any party has authored this brief in whole or in part, and no person or entity, other than amici, has made a monetary contribution to the preparation or submission of this brief. Amici wish to recognize the research and drafting contribution to this brief of Wesley M. Oliver, Instructor, Tulane Law School.

awards it full representation in its House of Delegates.

Among the NACDL's objectives is to deter overreaching conduct by law enforcement officers by vigorously defending the protections guaranteed by the Constitution. The NACDL believes that this case may have a significant impact in determining the scope of the Fourth Amendment's prohibition against unreasonable searches. Accordingly, the NACDL presents this brief in support of the Petitioner to urge this Court to hold that the conduct of the agent in question constituted a search, meaning that it could not be undertaken on a mere whim but must be shown to be reasonable under the Fourth Amendment.

The Association of Federal Defenders (the "AFD") was formed in 1995 to enhance the representation provided under the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment of the United States Constitution. The AFD is a nation-wide, non-profit, volunteer organization whose membership includes attorneys and support staff of Federal Defender Offices. The AFD's mission includes filing amicus curiae briefs to present the position of indigent defendants in the federal criminal justice system. The AFD is concerned that its clients may be subjected, without cause, to intrusive police conduct like the probing and squeezing of the luggage of the Petitioner in the present case. The AFD joins the NACDL in urging this Court not to place such conduct outside the Fourth Amendment's protection by classifying it as not a search, but to require police to demonstrate that such conduct is constitutionally reasonable.

SUMMARY OF ARGUMENT

In everyday circumstances of contemporary life, people often find themselves and their belongings in crowded and tight

settings—whether riding on buses, airplanes, trains and ferry boats; waiting in lines; riding elevators; ascending escalators; or simply walking down crowded city sidewalks. In such settings, people expect, and they and their belongings sometimes experience, bumping or jostling and other incidental touching. They do not expect, and would be greatly offended to experience, fondling or manipulation by a stranger's fingers of their persons or effects. Even in such settings, where some touching by others is unavoidable, a probing squeeze is likely to be a tort or crime.

To most people, this distinction—between an incidental touching and a deliberate and invasive grope—is obvious, and it is recognized in tort law. Yet the distinction eluded the court of appeals, which saw no significant difference between the incidental touching and movement of luggage that occur when passengers on a bus or train must share an overhead bin, and a law enforcement officer's systematic and "hard" squeezing and manipulation of passengers' luggage in the bin to detect whatever his fingers can feel about the size, shape, texture, rigidity, and density of the contents. On the view of the lower court, when passengers use an overhead bin, they invite any police officer to hold and squeeze their luggage and manipulate its contents at will; no justification would be necessary, for such conduct would not constitute a search or seizure. Law enforcement agents could freely conduct general exploratory examinations of this kind of people's luggage and other effects.

Since the Court's decision in *Katz v. United States*, 389 U.S. 347 (1967), the touchstone for deciding when police conduct amounts to a search for Fourth Amendment purposes has been whether it violates a person's reasonable expectation of privacy. Petitioner had a reasonable expectation of privacy against the agent's actions. By all objective evidence, Petitioner intended for the contents of his luggage, including the methamphetamine brick,

to remain private. Petitioner evidently wrapped it in tape, then wrapped a pair of pants around it, and placed it inside a closed and opaque cloth bag. He then kept the bag at hand, just over his seat in the bus. The contents were not exposed to other passengers' view and would not be revealed by the momentary and incidental surface touching that might occur when other passengers placed their own luggage in the bin. No reasonable person would expect a fellow passenger to act as did Agent Cantu, by squeezing and manipulating a stranger's luggage "very hard" to identify the contents. Any passenger who tried should expect, and would deserve, a strong reaction. The intrusion of the agent's probing fingers was obviously and substantially more invasive than anything Petitioner should be deemed to have invited when he placed his luggage in the overheard bin. Travelers do not, and should not be made to, subject themselves to such intrusions when they use the overhead bins and racks on buses, trains, airplanes, ships and other vehicles. People should not forfeit their expectation of privacy against such conduct when the needs of everyday life require them to expose their luggage or other effects to incidental or accidental touching by other people in public places. As Judge Ripple wrote in dissent in *United States v. McDonald*, 100 F.3d 1320 (7th Cir. 1996):

> No federal judge traveling by bus or rail would expect, or permit, a fellow passenger to rub, squeeze or manipulate his or her hand baggage in a concerted attempt to determine the contents. We should protect for others the privacy that we would demand for ourselves.

Id. at 1334.

ARGUMENT

I. AN OFFICER'S INTRUSION IS A SEARCH WHEN IT IMPINGES ON A PERSON'S REASONABLE EXPECTATION OF PRIVACY.

In *Katz v. United States*, 389 U.S. 347 (1967), the Court held that a search occurs within the meaning of the Fourth Amendment when official action "violate[s] the privacy upon which [the person] justifiably relied," whether or not there is an actual physical trespass. *Id.* at 353. Justice Harlan, concurring, elaborated: "My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" *Id.* at 361 (Harlan, J., concurring). In several later cases, the Court has applied Justice Harlan's formulation. *E.g., United States v. Jacobsen*, 466 U.S. 109, 113 (1984) ("A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed."); *Smith v. Maryland*, 442 U.S. 735, 740 (1979) (quoting Justice Harlan's concurrence). In *Rakas v. Illinois,* 439 U.S. 128 (1978), the Court explained further that "[l]egitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to the concepts of real or personal property or to understandings that are recognized and permitted by society." *Id.* at 143-44 n.12; *see also* Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment*, § 2.1 (3d ed. 1996) ("[C]ourts . . . seem to have drawn upon the customs and sensibilities of the populace in determining what expectations of privacy are constitutionally reasonable.").

In some of the Court's post-*Katz* cases, the first prong seems decisive. For example, in *United States v. Knotts*, 460 U.S. 276

(1983), the Court seemed to find that Knotts could make no claim that he actually maintained the privacy of the information the government acquired. The Court held that warrantless monitoring of an electronic tracking device, or beeper, was not a search, because the monitoring principally revealed the route a car took along public roads, and visual surveillance would have revealed exactly the same information. No one in Knotts's position could have expected this information to be private.

In other cases, the Court at least assumed that an individual subjectively expected to maintain his or her privacy, but the Court held that this expectation was objectively unreasonable. In *California v. Ciaraolo*, 476 U.S. 207 (1986), the Court held that a naked-eye aerial observation of a person's backyard was not a search. Ciraola grew marijuana plants in his backyard and attempted to hide them behind two fences. The Court found that "[c]learly—and understandably—respondent has met the test of manifesting his own subjective intent and desire to maintain privacy as to his unlawful agricultural pursuits." *Id.* at 211. Nonetheless, the Court deemed this expectation unreasonable, for anyone else lawfully flying overhead could have made out the marijuana plants just as the police had done. *Id.* at 213-14. The Court said that the ultimate test of the "reasonableness" of a person's privacy expectation is "'whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment.'" *Id.* at 212 (quoting *Oliver v. United States*, 466 U.S. 170, 181-83 (1984)).

The government sometimes claims that there was no infringement of a reasonable expectation of privacy, because the police caused no wider breach of a person's legitimate privacy expectations than already was caused by an antecedent search by a private party. In *United States v. Jacobsen*, 466 U.S. 109 (1984), the Court described the standard that applies in this setting:

> The additional invasions of respondents' privacy by the Government agent must be tested by the degree to which they exceeded the scope of the private search. That standard was adopted by a majority of the Court in *Walter v. United States*, 447 U.S. 649 (1980). . . .
>
> . . . .
>
> This standard follows from the analysis applicable when private parties reveal other kinds of private information to the authorities . . . . The Fourth Amendment is implicated only if the authorities use information with respect to which the expectation of privacy has not already been frustrated. In such a case the authorities have not relied on what is in effect a private search, and therefore presumptively violate the Fourth Amendment if they act without a warrant.

Id. at 115-18 (notes omitted).

II. AN OFFICER'S AGGRESSIVE PALPATION OF LUGGAGE IN AN OVERHEAD BIN IN A BUS VIOLATES THE REASONABLE EXPECTATION OF PRIVACY OF THE PASSENGERS.

Tested against these standards, Border Patrol Agent Cantu's conduct amounted to a search. First, Petitioner unquestionably demonstrated a subjective expectation of privacy in the contents of his luggage, which he concealed from public view inside a closed and opaque container. The methamphetamine brick, in addition, was twice-wrapped, in duct tape and then a pair of pants. Petitioner also kept the luggage close at hand, just above his seat. Such

luggage and its contents are within the core meaning of the "effects" that the Fourth Amendment protects against unreasonable searches and seizures, and the Court has consistently recognized the people's privacy interests in luggage and similar containers. In *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), the Court said that "[a] search of a child's . . . closed purse or other bag carried on her person . . . is undoubtedly a severe violation of subjective expectations of privacy." *Id.* at 337-38. The same is true of a traveler's luggage.

Second, a general claim that the contents of one's luggage should remain private surely satisfies the second *Katz* prong. It virtually goes without saying that society is prepared to recognize as reasonable and legitimate the privacy interest in the contents of one's luggage. The Court in *T.L.O.* said that "[w]e have . . . recognized that searches of closed items of personal luggage are intrusions on protected privacy interests, for 'the Fourth Amendment provides protection to the owner of every container that conceals its contents from plain view.'" *Id.* at 337 (quoting *United States v. Ross*, 456 U.S. 798, 822-23 (1982)). *Ross* itself recognized the protections the Fourth Amendment extends to containers of all kinds that passengers in common carriers use to hold their belongings:

> For just as the most frail cottage in the kingdom is absolutely entitled to the same guarantees of privacy as the most majestic mansion, so also may a traveler who carries a toothbrush and a few articles of clothing in a paper bag or knotted scarf claim an equal right to conceal his possessions from official inspection as the sophisticated executive with the locked attache case.

Ross, 456 U.S. at 822; *see also, e.g., United States v. Place*, 462 U.S. 696, 707 (1983) ("We have affirmed that a person possesses a privacy interest in the contents of personal luggage that is protected by the Fourth Amendment.").

Of course, a person's privacy interest in luggage is violated if the police arbitrarily open it and rummage through its contents. This interest also is violated when an officer manipulates and squeezes the luggage without opening it, to identify the contents of the bag tactually. In *Terry v. Ohio*, 392 U.S. 1 (1968), the Court said that "it is nothing less than sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person's clothing . . . is not a 'search.'" *Id.* at 16. It would torture the language equally to say that a thorough exploration of the contents of luggage is not a search unless the luggage is opened. Here, Agent Cantu methodically worked his way from the back of the bus, probing and squeezing the luggage overhead and at the passengers' feet. Presumably, if he encountered a coat on the overhead rack along with the luggage, he would have probed and squeezed it, too. This technique allowed the agent to detect the size, shape, weight, quantity, texture, and hardness of belongings of all the passengers (or at least those unguarded enough not to travel with hard-cased luggage). Unless, as the court of appeals held, the passengers had forfeited privacy rights in their luggage by storing it on board, this conduct surely was a search.[2]

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[2]The agent's conduct should be distinguished from other techniques that have been held not to constitute a search, such as pressing lightly on a bag to squeeze air from it for a drug-detecting dog to sniff, *United States v. Lovell*, 849 F.2d 910, 915 (5th Cir. 1988), or removing a bag from an overhead rack to the floor, closer to a police dog. *United States v. Harvey*, 961 F.2d 1361 (8th Cir. 1992). Such techniques do not expose a bag's contents as did Agent Cantu's probing and manipulation of Petitioner's bag.

To be sure, much of the information the agent gathered no doubt was mundane—maybe the number of pairs of shoes a passenger carried, whether he or she packed a toothbrush, how much and possibly what kind of clothing the passenger packed, and whether the passenger took along a book. But as the Court said in *Arizona v. Hicks*, 480 U.S. 321 (1987), "A search is a search, even if it happens to disclose nothing but the bottom of a turntable," *id.* at 325, and the same is true if it uncovers only everyday information of this sort. People are entitled to keep even such unremarkable information private. Moreover, exposure of more intimate or embarrassing matters by Agent Cantu's technique can easily be imagined.

In the view of the court of appeals, however, Petitioner's expectation of privacy against this sort of intrusion became unreasonable once he placed his luggage in the overhead bin, where other passengers could touch or push it while making room for their own.[3] The court of appeals seems to have proceeded from one of two premises. Either it assumed there is no difference between incidental surface touching by other passengers and the "very hard" squeezing and manipulation by the agent, or it recognized the difference but assumed that the possibility of unintrusive contact by a fellow passenger justified more intrusive probing, squeezing, and manipulation by a law enforcement officer.

[3] Other courts of appeals, of course, have seen this situation differently. *See United States v. Gwinn*, 191 F.3d 874, 877-79 (8th Cir. 1999) (purposeful manipulation of bag in overhead bin on Amtrak train was a search); *United States v. Nicholson*, 144 F.3d 632, 639 (10th Cir. 1998) (same finding, on bus); *United States v. Most*, 876 F.2d 191, 197-98 (D.C. Cir. 1989) (individual retained reasonable expectation of privacy in bag temporarily checked with store clerk).

In either event, the court of appeals was in error. Such reasoning conflicts with *Minnesota v. Dickerson*, 508 U.S. 366 (1993). There, the Court held that although an officer was authorized to conduct a *Terry*[4] patdown of the suspect's outer clothing for weapons, this authority ceased when the frisk showed that Dickerson was unarmed. Thus, the officer violated the Fourth Amendment when, to explore a "lump" he had felt in the patdown, he engaged in "'squeezing, sliding and otherwise manipulating the contents of the defendant's pocket'—a pocket which the officer already knew contained no weapon." *Id.* at 378 (quoting lower court opinion). The *Dickerson* Court held that the officer, though he did not reach into the pocket, "overstepped the bounds of the 'strictly circumscribed' search for weapons allowed under Terry." *Id.* (quoting *Terry*, 392 U.S. at 26). The Court recognized the distinction between surface touching, on the one hand, and subsequent more intrusive squeezing and manipulation of items inside the clothes, on the other. The Court held that even if the former intrusion was justified, separate justification was necessary for the latter. Because such justification was missing, the second stage of the officer's search violated the Fourth Amendment.

Yet on the analysis of the court of appeals in the present case, the officer's manipulation of Dickerson's pocket would have to be allowed. Under that analysis, once Dickerson was subject to a valid patdown, he had no further privacy right worth protecting in the contents of his pocket against the manipulations of the officer's fingers. Either the distinction between these intrusions was unworthy of notice, or, if it was significant, then the lesser intrusion, *i.e.*, the patdown, nevertheless justified the greater. Contrary to such reasoning, the Court in *Dickerson* said emphatically that a line must be maintained between the

[4] *Terry v. Ohio*, 392 U.S. 1 (1968).

permissible patdown and the impermissible, and more intrusive, squeezing and probing of the suspect's pocket. The Court said that the officer's authority under *Terry* "must be strictly 'limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby.'" *Id.* at 373 (quoting *Terry*, 392 U.S. at 26).

The Court has rejected expressly the idea that a lesser private intrusion may justify a greater official intrusion. When a law enforcement officer's only justification for a search is a prior private search, then the official search must not enlarge the breach of privacy that has already occurred. In *Jacobsen*, the Court adopted the principle that "'surely the Government may not exceed the scope of the private search unless it has the right to make an independent search. . . .'" 466 U.S. at 116 (quoting *Walter*, 447 U.S. at 657 (Stevens, J.)). Thus, the possibility that other passengers may have touched Petitioner's luggage in some less invasive way cannot justify Agent Cantu's "very hard" squeezing and manipulation of it. The agent's conduct exceeded the scope of any "private search" that may have occurred before.

In addition, "understandings that are recognized and permitted by society," *Rakas*, 439 U.S. at 143-44 n.12, certainly support the claim of bus passengers to a reasonable expectation of privacy against a law enforcement officer's general exploration of the contents of their luggage using Agent Cantu's technique. If another passenger on a bus, train, or airplane attempted what the agent did, it would be a severe breach of "the everyday expectations of privacy that we all share." *Minnesota v. Olson*, 495 U.S. 91, 98 (1990).

The law reflects this understanding. While bumping and other contact are to be expected in crowded public settings, the law long has afforded protection against purposeful conduct that goes

beyond these incidental and inevitable intrusions. "Consent is assumed to all those ordinary contacts which are reasonably necessary to the common intercourse of life such as a tap on the shoulder to attract attention, a friendly grasp of the arm, or a casual jostling to make a passage." William L. Prosser, *Law of Torts*, 37 (1971). Thus, for example, "[i]f two or more meet in a narrow passage, and without any violence or design of harm, the one touches the other gently, it is no battery." *Cole v. Turner*, 6 Mod. Rep. 149, 90 Eng. Rep. 958 (1704). But there is no such tolerance for more intrusive and offensive acts, such as groping. *See, e.g., Fields v. Cummins Employees Federal Credit Union*, 540 N.E.2d 631, 640 (Ind. Ct. App. 1989) ("An attempt to kiss or fondle a woman without her consent has been held to be an assault and battery."); *Liljegren v. United Rys. Co. of St. Louis*, 227 S.W.2d 925 (Mo. Ct. App. 1921) (unwanted kissing of passenger on train is an assault); *People v. Sanchez*, 83 Cal.App.3d Supp. 1, 3 (Cal. App. Dep't Super. Ct. 1978) (groping is criminal assault); *Campbell v. State*, No. 05-94-00827-CR, 1995 WL 73091, at *2 (Tex. Crim. App. Feb. 23, 1995) (affirming public lewdness conviction on evidence of non-accidental groping). Likewise, a diner surely should expect a waiter to remove a plate from the table, but under Texas law, a restaurant employee who takes the plate from a diner's hand in a loud and offensive manner may be liable in tort for battery. *Fisher v. Carrousel Motor Hotel, Inc.*, 424 S.W.2d 627 (Tex. 1967). And it has been held that a college professor may be liable in tort for pounding on a student's desk while shouting at her, though a less offensive touching of the desk could not be actionable. *Jung-Leonczynska v. Steup*, 803 P.2d 1358 (Wyo. 1990).

As these decisions and many others show, lines can and should be drawn. In various public settings, some incidental, harmless, or accidental touching is to be expected and must be

tolerated. But the law protects against conduct that is significantly more intrusive or offensive.

Failure to observe this line would authorize law enforcement officers everywhere, for almost any reason or no reason at all, to conduct similar sweeps of buses, trains, and airplanes to examine all the passengers' luggage and other belongings. It also could authorize the police to squeeze and probe people's effects whenever they are brought into crowded public settings where some incidental touching or bumping is possible. The belongings could include not only bags and luggage, but also purses, briefcases, backpacks, a coat slung over the arm, or any other soft-sided containers or repositories of personal effects. The settings where suspicionless probing of selected individuals' belongings, or people's belongings *en masse*, now would be allowed could include subways, elevators, escalators, crowded shopping malls, ballparks, stadiums, theaters, auditoriums, outdoor concerts, crowded city sidewalks, or anywhere else people squeeze together or gather in crowds.

The Court should recognize the difference between the incidental but non-intrusive bumping or touching that can occur in public places, and the kind of deliberate probing and squeezing that Agent Contu carried out. Even in settings where people should expect some incidental contact, conduct like the agent's actions here constitutes a search within the meaning of the Fourth Amendment.

CONCLUSION

The Court should find that Agent Cantu conducted a search within the meaning of the Fourth Amendment when he squeezed and probed Petitioner's luggage in the overhead bin of the bus.

Accordingly, the judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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