No. 98-9349

IN THE
# Supreme Court of the United States

STEVEN DEWAYNE BOND,
*Petitioner,*
*v.*
UNITED STATES OF AMERICA

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

## REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

## TABLE OF AUTHORITIES

Cases





## TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued



## REPLY BRIEF FOR PETITIONER

### INTRODUCTION

Steven Bond, an interstate traveler, carried his canvas bag onto a Greyhound bus and placed it in the overhead bin directly above his seat. He contends that Border Patrol Agent Cantu searched that bag by manipulating it to determine its contents. The Government responds that this manipulation was not a search. It argues that Bond exposed his bag to public touching and handling when he placed it in the overhead bin, thus surrendering all expectations of privacy against manipulation of that bag.

The Government is wrong. No traveler exposes his luggage to public handling by placing it in the overhead bin of a Greyhound bus. To the contrary, a passenger carries luggage on board to limit those who may have contact with it, and the type of contact they may have. As an accommodation to fellow travelers, a bus passenger might tolerate their casual contact with his luggage—perhaps some pushing or movement of it to make room for another bag. However, no traveler would reasonably expect—or permit—a fellow passenger to investigate the contents of luggage by feeling and squeezing it as the government agent did in this case. Agent Cantu did what no other passenger would have been expected or permitted to do. He invaded Bond's reasonable expectation of privacy in his luggage and its contents, and thus conducted a search within the meaning of the Fourth Amendment.

### ARGUMENT

#### I. BOND HAD A REASONABLE EXPECTATION OF PRIVACY AGAINST A TACTILE EXAMINATION OF HIS CARRY-ON LUGGAGE.

The Government's argument presents a deceptively simple syllogism: Bond exposed his bag to handling by

the public; Agent Cantu did no more than a member of the public could; therefore Agent Cantu's conduct was not a search. Each premise of this syllogistic argument is based on false assumptions.

Underlying the first premise is the assumption that placing luggage in the overhead bin of a Greyhound bus makes it accessible to the public. But a bus's interior is not subject to unrestricted public access. It is shared space; not space open to the public generally. The Government also assumes that privacy expectations in carry-on luggage are no greater than in luggage checked with an airline—an assumption that dismisses the importance of individuals' common-law rights in their personal property and ignores the reasonable expectations of travelers in civil society.

The second Government premise, equally invalid, is that Agent Cantu's actions were like those that would reasonably be expected from a fellow passenger. It rests on the assumption that Agent Cantu's manipulation of Bond's luggage was not physically intrusive, and relies on an interpretation of the factual record that creates a picture of Cantu's actions as being less intrusive than they actually were.

The conclusion that the Government draws is even less plausible than the premises it assumes. The Government concludes that touching the exterior of a bag to discern hidden objects is not a search. In two Fourth Amendment cases, this Court has rejected an analogous argument, finding that touching the exterior of clothing, to detect weapons or contraband, does constitute a search. The Government tries to distinguish these cases by arguing, among other things, that they involve searches of persons, not effects. The Government's argument misconstrues those cases.



### A. Neither Bond Nor Any Other Bus Traveler Exposes His Carry-On Luggage to "Public Touching" by Placing It in an Overhead Bin.

Contrary to the Government's claim, Bond does not concede that he "exposed [his bag] to public touching and handling" by placing it in the overhead bin of a Greyhound bus. Gov't Br. 20 (citing Bond Br. 18). Bond does acknowledge that other passengers might have been expected to have casual contact with his bag, by pushing or moving it. Bond Br. 18. The Government's conflation of these distinct concepts—the expectation of some limited physical contact from fellow passengers and general exposure to "public touching and handling"—provides the foundation for its argument that Bond exposed his luggage to the public.

Stowing luggage in the overhead bin above one's seat is not equivalent to publicly exposing that luggage, for two reasons. First, there is no general right of public access to the interior of interstate buses, or to the luggage passengers have stored in overhead bins. Second, a passenger's decision to carry his bag on board the bus, and keep it nearby, limits the type of "handling" reasonably expected from other passengers.

#### 1. *There was no general right of public access to Bond's bag.*

"It is privacy that is protected by the Fourth Amendment, not solitude." *O'Connor v. Ortega*, 480 U.S 709, 730 (1987) (Scalia, J., concurring). Consequently, the Fourth Amendment provides protection to places and things even though they are shared by a number of persons. For example, society recognizes an expectation of privacy against public or governmental intrusion into the home, even though family members share the home with one another and with visitors, and even though a landlord may have the right to conduct unannounced inspections at any time. *See id.; see also Payton v. New York*, 445

U.S. 573 (1980). Society likewise recognizes a person's expectation of privacy against public or governmental intrusion into his office, even though he may share that office with others. *See Mancusi v. DeForte*, 392 U.S. 364, 369 (1968) (expectation of privacy against police intrusion into office shared with other employees); *cf. Ortega*, 480 U.S. at 717 (plurality opinion) (employee retains expectation of privacy against police intrusion into office, even though supervisor has access to office). These cases demonstrate that shared access is not always public access.

A commercial bus carrying interstate passengers is another example of shared, but not public, access. Ordinarily, only ticketed passengers are permitted on board. Those without a ticket cannot enter; if they manage to, they would surely be asked to leave. Each passenger shares bin space with fellow passengers, but the public is not invited in to browse among the bins, squeezing and feeling luggage as they please.

Because the Government overlooks these basic limitations on the public accessibility of a Greyhound bus, it attempts a seriously flawed analogy to cases involving police "observations from . . . public vantage point[s] where [they] had a right to be." Gov't Br. 11, 13-22. This Court has held that such observations are not searches within the meaning of the Fourth Amendment. *See, e.g., California v. Ciraolo*, 476 U.S. 207, 213 (1986). However, the inside of an interstate bus is nothing like navigable public airspace,[1] public streets,[2] open fields,[3] or the

[1] *Ciraolo*, 476 U.S. at 213 (visual observation from "public navigable airspace"); *Florida v. Riley*, 488 U.S. 445, 449-50 (1989) (plurality opinion) (same).

[2] *Texas v. Brown*, 460 U.S. 730, 733 (1983) (on street); *United States v. Knotts*, 460 U.S. 276, 281 (1983) (on "public streets and highways"); *see also California v. Greenwood*, 486 U.S. 35, 37, 39 (1988) (garbage left on street outside curtilage of home).

[3] *United States v. Dunn*, 480 U.S. 294, 303-04 (1987).



high seas[4]—the public places and thoroughfares involved in cases relied upon by the Government. Gov't Br. 10-13.

Even if the bus interior were publicly accessible, Agent Cantu's "observations" were not made from that "vantage point." Cantu's presence on the bus did not reveal the contents of Bond's bag; Cantu "observed" the bag's contents by reaching into the bin, placing his hands on the bag, and manipulating it. *Cf. Minnesota v. Dickerson*, 508 U.S. 366, 375 (1993) (under plain-view analysis, officer's "vantage point" for "tactile discoveries of contraband" is "suspect's outer clothing"). Thus, the agent's tactile "observations" were made through the surface of Bond's personal luggage—a place that bears no resemblance to a public street or the public airways.[5] When Agent Cantu's hands were on Bond's bag, he was not occupying a place "where he ha[d] a right to be." Gov't Br. 11 (quoting *Ciraolo*, 476 U.S. at 213). That Bond may have been prepared to tolerate other passengers' incidental or casual contact with his bag did not create a right of public access to his bag that was even remotely similar to the public's right to be present on public thoroughfares.

The Government cites one "observation" case that does not involve a public thoroughfare or other public place,

[4] *United States v. Lee*, 274 U.S. 559, 562-63 (1927).

[5] In any event, the physical intrusiveness of Agent Cantu's "observations" fundamentally differentiate them from the purely visual observations made in the cases on which the Government relies. *See, e.g., Ciraolo*, 476 U.S. at 213 (approving observations from public airspace made "in a physically nonintrusive manner"); *Riley*, 488 U.S. at 451-52 (noting no evidence that aircraft caused "undue noise . . . wind . . . [or] dust, or threat of injury"). See also Part I.B., *infra*. *Greenwood* is the only public thoroughfare case that involved more than just visual observations. 486 U.S. at 37-38. *Greenwood*, however, is particularly inapposite because it involved garbage discarded by its former owner. Luggage containing one's personal effects, and placed in an overhead bin for safekeeping, is not like garbage placed on a public street to be taken away and destroyed.

*Ex Parte Jackson*, 96 U.S. 727, 733 (1877). See Gov't Br. 11, 29, 37. *Jackson*, however, dealt with property that a defendant has let out of his control by placing it in the U.S. mail. *Id.* at 732.[6] Because Bond carried his bag on board the bus, thus keeping it within his control, *Jackson* is inapposite.

### 2. *By carrying his bag on board the Greyhound bus and placing it directly above his seat, Bond preserved an expectation of privacy against a tactile examination of his luggage.*

Bond's decision to carry his bag on board the bus, and keep it close by, signified a greater expectation of privacy in the bag than the privacy expectation for checked luggage. The Government's public exposure argument ignores the difference between these privacy expectations. It also ignores travelers' common-law rights in, and privacy expectations as to, their carry-on luggage.

Quoting a leading treatise, the Government argues that a search does not occur when a law enforcement officer squeezes luggage, if its owner "had 'no reasonable expectation that his luggage would not be moved or handled' by others." Gov't Br. 20 (quoting 1 WAYNE A. LAFAVE, SEARCH AND SEIZURE § 2.2(a), at 404-05 (3d ed. 1996)). This quotation addresses the reasonable expectation of a traveler who checks his luggage with an airline. *See id.*[7] The Government's reliance on it is seriously misplaced, since Professor LaFave holds a very different view of the privacy expectations of bus travelers who carry their luggage on board. In those circumstances, LaFave accepts the principle that the Government asks this Court to reject: A traveler who places a carry-on bag in an overhead bin retains a reasonable expectation of privacy against a tactile examination of that luggage. *See* 1 LAFAVE, *supra*, § 2.2(a), at 52 (Supp. 2000).

LaFave acknowledges that a passenger who places carry-on luggage in an overhead bin may expose it to certain minor intrusions, such as other passengers' pushing or moving the bag. *See id.* (citing *United States v. Nicholson*, 144 F.3d 632, 639 (10th Cir. 1998)). But he rejects the idea that the passenger exposes it to more intrusive "manipulations which 'reveal the contents of a bag[.]'" *Id.* (quoting *Nicholson*, 144 F.3d at 639). LaFave goes on to explain that, "as the *Nicholson* court properly concluded," manipulation that reveals the contents of a bag "'depart[s] from the type of handling [which] a commercial bus passenger would reasonably expect his baggage to be subjected.'" 1 LAFAVE, *supra*, § 2.2(a), at 52 (Supp. 2000) (quoting *Nicholson*, 144 F.3d at 639)).

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[6] Even as to mail, the Court said that "[l]etters and sealed packages" are free from inspection "except as to their outward form and weight." 96 U.S. at 733. The outward appearance of mailed matter is, of course, open to view; its weight is a special concern of the postal service, which is permitted to determine whether "there is an excess of weight over the amount prescribed." *Id.* at 736. *Jackson* gave no hint whether mail could be lawfully inspected by manipulation. It did, however, illustrate what was meant by the term "exposed": "officers can act" when "the object is exposed, and shows unmistakably that it is prohibited, as in the case of an obscene picture or print." *Id.* at 735-36. In the Court's understanding, "exposed" meant open to view.

[7] Many of the cases relied upon by the Government involved checked luggage. See *People v. Santana*, 73 Cal. Rptr. 2d 886, 888 (Cal. Ct. App. 1998) (luggage checked with airline); *United States v. Garcia*, 849 F.2d 917 (5th Cir. 1988) (same); *United States v. Bronstein*, 521 F.2d 459, 460 (2d Cir. 1975) (same); *Sprowls v. State*, 433 So.2d 1271, 1271-72 (Fla. Dist. Ct. App. 1983) (same); *State v. Peters*, 941 P.2d 228, 229 (Ariz. 1997) (same); *State v. Millan*, 916 P.2d 1114, 1115-16 (Ariz. Ct. App. 1996) (same); *Scott v. State*, 927 P.2d 1066, 1067 (Okla. Crim. App. 1996) (luggage checked with bus company). Most also involve travel by air—a type of travel where reasonable expectations of privacy more readily give way to government intrusion because of heightened security concerns. *See Santana*, 73 Cal. Rptr. at 888 (noting heightened security for travel by air).

Bond, like Nicholson, carried his bag onto a bus. Bond did not check his luggage, and he did not otherwise place his bag within the reach of the public generally.[8] Instead, he took the precaution of keeping his luggage with him as he traveled. He put his bag directly above his seat on the bus, where he could protect it.[9] In so doing, Bond preserved his reasonable expectation of privacy against a tactile examination of his luggage.

A reasonable expectation of privacy is "one which has 'a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.' " *Minnesota v. Carter*, 119 S. Ct. 469, 472 (1998) (quoting *Rakas v. Illinois*, 439 U.S. 128, 143 (1978)); *see also United States v. Jacobsen*, 466 U.S. 109, 122

[8] Even checking one's belongings does not always surrender expectations against a tactile examination. For example, a shopper who checks his bag with a grocery store clerk retains a Fourth Amendment expectation of privacy against police manipulation of that bag to determine its contents. *See United States v. Most*, 876 F.2d 191, 197-98 (D.C. Cir. 1989). That is so because "an individual need not shut himself off from the world in order to retain his fourth amendment rights." *Id.* at 198; *see also* 1 LAFAVE, *supra*, § 2.2(a), at 405 (citing *Most* as example of when police "touching *would* be a search") (emphasis in original).

[9] The Government criticizes Bond because, by carrying a soft-sided bag, he failed to "employ even ordinary precautions" to protect his privacy interests in the contents of his luggage. Gov't Br. 21-22. That argument ignores the fact that Bond carried his bag onto the bus and kept it close by, a traveler's basic—and arguably best—precaution to insure the privacy of his luggage. Indeed, travelers routinely take this precaution to preserve their personal effects. *See* Gerry Barker, *Internet Crosstalk at Issue: Carry-On Bags for Air Travelers*, FORT WORTH STAR-TELEGRAM, Nov. 23, 1997, at 4 ("When I fly, I carry on a briefcase with magazines and books that I want to read and mark. Then I want a small bag with something not left to bag handlers."). Contrary to the Government's claim (Gov't Br. 22), Bond employed those precautions customarily taken by travelers seeking privacy in the contents of their luggage.



n.22 (1984). In this case, both these sources support Bond's privacy expectations in his bag.[10]

Bond's expectation of privacy in his luggage derived from well-established concepts in property law and tort law. Because Bond's bag was his personal property, the law guaranteed him the right to exclude others from touching it. *See Rakas*, 439 U.S. at 143 n.12 (a principal right "attaching to property is the right to exclude others").[11] Tort law afforded Bond additional "legal protection" in preserving his "interest in the mere inviolability" of his personal property; he had a "privilege to use reasonable force to protect his possession against even harmless interference." RESTATEMENT (SECOND) OF TORTS § 218 cmt. e (1965); 75 AM. JUR. 2D *Trespass* § 17 (1991)

[10] The Government asserts that, under this Court's precedent, "property and tort principles are at most 'marginally relevant to the question of whether the Fourth Amendment has been violated.' " Gov't Br. 27 (quoting *United States v. Karo*, 468 U.S. 705, 713 (1984)). This misreads "the message" of this Court's precedent, which is simply that "property rights are not the sole measure of Fourth Amendment violations." *Soldal v. Cook County, Ill.*, 506 U.S. 56, 64 (1992); *cf. Minnesota v. Carter*, 119 S. Ct. 469, 475 (1998) (Scalia & Thomas, JJ., concurring) ("early American law of . . . trespass . . . underl[ies] the Fourth Amendment"). The message is similar for tort concepts; although not determinative, they are instructive in defining reasonable expectations of privacy. *See* Ken Gormley, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335, 1368-69 (noting relationship between tort privacy and Fourth Amendment privacy). The "right to be let alone" is a basic tort concept. *See* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). It is also the essence of the Fourth Amendment. *Winston v. Lee*, 470 U.S. 753, 758 (1985) (Fourth Amendment protects "right to be let alone").

[11] The right of a property owner to exclude others has been recognized since before the Fourth Amendment was drafted. Blackstone characterized "the right of property" as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe." 2 WILLIAM BLACKSTONE, COMMENTARIES 2 (Dawsons of Pall Mall 1966).

(same).[12] Bond did not forfeit these fundamental rights by carrying his bag onto the bus, and placing it in the overhead bin directly above his seat. To the contrary, he acted to protect it from the intermeddling of others—intermeddling such as a tactile examination of the bag to discern its contents.

The rights afforded to travelers by property law and tort law accord with societal expectations. A traveler expects that his fellow passengers may store their luggage in a shared bin, and may touch or move his luggage to do so. Perhaps bus employees may also have some minimal contact with it. Passengers or employees who do more, however, exceed the bounds of what society considers reasonable, and invade travelers' privacy. *See* John Lang, *Air Rage on the Rise as Passengers Stuff Jets with Carry-Ons*, SEATTLE POST-INTELLIGENCER, Dec. 17, 1998, at A14 (results of "trying to fit more and larger bags into limited space. . . . are flaring tempers [and] fist fights").[13]

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[12] Whether or not Agent Cantu's manipulation of Bond's bag would support a legal action for damages, see Gov't Br. 28 & n.11, it clearly constituted the tort of trespass to chattel. *See United States v. Hernandez*, 353 F.2d 624, 626 (9th Cir. 1965) (squeezing luggage is trespass to chattel). The tort of "trespass to chattel may be committed by intentionally . . . using or intermeddling with a chattel in possession of another." RESTATEMENT (SECOND) OF TORTS § 217(b). " 'Intermeddling' means intentionally bringing about a physical contact with the chattel," something Cantu did when he manipulated Bond's luggage. *Id.* at § 217 cmt. e. Bond's bag was in his possession because he retained control of it while it was above him in the luggage bin. *See* RESTATEMENT (SECOND) OF TORTS § 216. Although damages are unavailable unless one is dispossessed of property, or the chattel is impaired, "legal protection of the possessor's interest in the mere inviolability of his chattel is afforded by the privilege to use reasonable force to protect his possession against even harmless interference." *Id.* at § 218 cmt. e. A similar privilege of self-help, or "recaption," was recognized early in the common law. *See* 3 WILLIAM BLACKSTONE, COMMENTARIES 4-5.

[13] One article cited by the Government (Gov't Br. 15 n.3) opines that the impolite airline passenger who "attempts to find space in the overhead compartment" by "crushing [another's] carefully stowed bag," is a "[t]raveler's nightmare." Glenn Withiam, *About Those Carryons*, CORNELL HOTEL & REST. ADMIN. Q., Feb. 1, 1998, at 6. Such treatment is simply not what we expect when travelling. What travelers reasonably expect from others is common courtesy. As a New York Times article suggests, travelers should practice "bin etiquette. Minimal rearranging is permitted if done with care. Stacking is also allowed, as long as lighter objects—coats, small shopping bags—are placed on heavier sturdier bags. If you are planning major reconstruction, ask the permission of the person whose bags you plan to move." Adam Bryant, *Practical Traveler, Minding Manners at 32,000 Feet*, NEW YORK TIMES, June 25, 1995, sec. 5, at 5.



Both property law and tort law protect against such private intrusions; when the intrusion is by the government, the Fourth Amendment applies. Any passenger who manipulated Bond's luggage in a manner calculated to reveal its contents would violate Bond's reasonable privacy expectations. When Agent Cantu did so, he violated the Fourth Amendment.

### B. Agent Cantu's Physically Intrusive and Revealing Tactile Examination of Bond's Bag Exceeded What Bond Would Reasonably Have Expected from Other Passengers.

The Government argues that Cantu's manipulation of Bond's bag did not "meaningfully differ from reasonably foreseeable handling" by other passengers. Gov't Br. 39-40. The Government is incorrect. Bus passengers, seeking to make room for their own luggage, may be expected to move or push the luggage of their fellow passengers. They are not expected, however, to engage in an exploratory tactile examination of that luggage, as Cantu did in this case. By his own admission, Cantu manipulated Bond's bag, squeezing and feeling it in a manner calculated to reval its contents. Passengers do not examine the contents of each other's luggage by squeezing or feeling it in a physically intrusive manner that reveals those contents. Any passenger who manipulated luggage, seeking to discover its contents, would be thought a thief.

The Government attempts to minimize Cantu's manipulation of Bond's bag, asserting that "Agent Cantu appears to have 'felt' [Bond's] bag once, apparently through a squeeze, and thereby discerned the brick-like object and the characteristics he described." Gov't Br. 40. This assertion is contradicted by Cantu's own testimony, as well as that of Bond and his companion, Wiggs.

At the suppression hearing, Cantu testified "I felt a green bag that I could feel a brick-like object in it." (J.A 10.) After several more questions, Cantu elaborated that what he felt was a "[b]rick-like object . . . that *when squeezed,* you could feel an outline of something of a different mass inside of it." (J.A. 11 (emphasis added).) Both the sequence of Cantu's narrative and the details he provided demonstrate that he first felt, and then squeezed, Bond's luggage. Bond and Wiggs confirmed Cantu's account. Bond testified that Agent Cantu "reached for my bag, and he shook it a little, and squeezed it, and then sniffed it[.]" (J.A. 18.) Wiggs testified that Cantu "grabbed Mr. Bond's bag, shook it around, squeezed it, pulled it forward, and sniffed it[.]" (Tr. 71.)[14]

Whether or not Agent Cantu's manipulation was a continuous action or separate acts, it is clear that his tactile examination of Bond's bag was more physically intrusive than the casual or incidental pushing or moving that may reasonably be expected from other passengers.[15]

[14] The district court made no specific findings whether Cantu's manipulation was one continuous action or not. The court found only that Cantu "felt" and "could feel" a brick-like object in Bond's bag, and that Cantu had "touched" the bag. (J.A. 21, 23, 27.) The court of appeals was somewhat more specific, noting that Cantu inspected bus passengers' luggage by "feeling and squeezing" it. (J.A. 37.) When Cantu reached the luggage compartment over Bond's seat, he "squeezed" the bag—a "manipulation" that "was calculated to detect contraband." (J.A. 37, 40.)

[15] The Government errs when it argues that Cantu's manipulation of Bond's luggage was "not 'physically intrusive' for constitutional purposes" because there was no physical penetration of the bag. Gov't Br. 29. The requirement of physical penetration was explicitly rejected in *Katz v. United States*, 389 U.S. 347, 352-53 (1967). After *Katz*, this Court has found a Fourth Amendment search when the physical intrusion fell far short of penetration. *See, e.g., Minnesota v. Dickerson*, 508 U.S. 366, 378-79 (1993) (manipulating outside of pocket, without penetrating pocket, was "search"); *Terry v. Ohio*, 392 U.S. 1, 16-17 (1968) (touching "surfaces" of clothing without penetrating barrier of "outer garments" was search).



It was also more revealing of the bag's contents. Cantu's squeezing permitted him to "feel the edges of [a] brick" of methamphetamine. (J.A. 12.) That brick, according to Cantu—and contrary to the Government's claim—was "wrapped inside a pair of pants."[16] (J.A. 14.) It was also heavily wrapped in duct tape until it became "an oval mass." (J.A. 14; Tr. 53).[17] And it was then placed inside a closed canvas bag.[18] Despite these protections, Cantu's "hard" squeezing of the canvas bag enabled him to feel the edges of the brick.[19] (J.A. 12, 15.) Squeezing

[16] Citing the district court's opinion, the Government disputes Amicus NACDL's statement that the brick was "wrapped" in the pants, noting that the "court found only that the brick was found '[i]nside *the leg* of a pair of pants.'" Gov't Br. 21 n.8 (quoting J.A. 21 (emphasis added by Government)). Of course, that the brick might have been inside the pant leg is not inconsistent with it also being "wrapped" in the pants, which was Agent Cantu's undisputed testimony. (J.A. 14.)

[17] The Government argues that the brick was simply "covered in a lighter layer." Gov't Br. 40. That cannot be correct. To disguise the edges of a rectangular brick by covering it in duct tape, until it feels oval, requires that the brick be heavily wrapped, not lightly layered.

[18] Canvas itself is a sturdy material—a "strong unbleached cloth of hemp, flax, or other coarse yarn, used for sails, tents, [and] painting[s]." 1 THE NEW SHORTER OXFORD ENGLISH DICTIONARY 330 (1993).

[19] The Government characterizes the squeeze as hard, "but not so hard as to break anything." Gov't Br. 39 (citing J.A. 15). Cantu did not say his squeeze was not so hard as to break anything; rather, he claimed that, during his luggage inspections, he hadn't broken anything "yet." (J.A. 15.)

the oval mass that was in Bond's luggage, Cantu could "feel the outline of something of different mass inside of it." (J.A. 11.) No bus passenger, pushing or moving another's luggage to make room for his own, would engage in the manipulation necessary to gather this amount of detailed information.[20] It was not Cantu's expertise or experience—but the intrusiveness of his manipulation—that revealed these details.

These details were private and protected. The Government appears to argue that no search occurs unless an officer's manipulation tends to reveal "intimate details" about the contents of luggage. Gov't Br. 30. But there is no such requirement. The Fourth Amendment protects not just "intimate" matters, but any matter that a person has a right to keep private. Thus, when serial numbers on a stereo component were revealed, as in *Arizona v. Hicks,* no "intimate" facts were discovered; yet this Court held that a search occurred. 480 U.S. 321, 324-25 (1987). "A search is a search, even if it happens to disclose nothing but the bottom of a turntable." *Id.* at 325.

In any event, it is manifestly untrue that "[v]ery few items have signature shapes that can be discerned from handling the exterior of a bag." Gov't Br. 30. A hair

[20] In support of its argument that the methamphetamine brick was so large that "it is unlikely anyone handling the bag (including Agent Cantu) might have missed" it, the Government compares only two dimensions of the brick and the bag. Gov't Br. 20-21. The Government argues that the "brick, which weighed one-and-one-third pounds, occupied one third of the bag's length and one third of its width." Gov't Br. 21. This does not mean the brick occupied one third of the bag's volume. According to Agent Cantu, the bag was 18 inches long by 12 inches square (J.A. 12), which would yield 2,592 cubic inches of volume. While the record does not reveal the third dimension of the brick, it was approximately 6 inches long by 4 inches wide (J.A. 21). For the brick to "occupy" one third of the bag's volume, it would have to be about 36 inches high —an impossibility given the bag's dimensions.



dryer, a toothbrush, a book, shoes, eyeglasses, medicine bottles, and many other personal items have shapes that can readily be identified by an officer's manipulation of a bag. *See Illinois v. Wardlow,* 120 S. Ct. 673, 675 (2000) (officer's "squeeze" of bag identified gun); *cf. Dickerson,* 508 U.S. at 369 (rock of crack cocaine wrapped in cellophane identified through tactile examination).

Agent Cantu's manipulation of Bond's bag was an exploratory tactile examination. His methods were calculated to reveal the contents of the bag. It was not Cantu's subjective purpose that determined whether a Fourth Amendment search occurred, but the means he used to achieve that purpose. See Bond Br. 14. The manipulation necessary to discover the contraband concealed in Bond's luggage was probing, intrusive, and revealing—not the type of manipulation a bus traveler reasonably expects from his fellow passengers.

### C. Touching the Exterior of a Bag to Discern Hidden Objects Is a Search.

This Court has found that a search occurs when an officer engages in a tactile examination of an exterior surface to discover hidden objects. *Dickerson,* 508 U.S. at 378-79 (feeling exterior of jacket pocket to investigate contents was search); *Terry,* 392 U.S. at 16 (pat-down of outer clothing for weapons was search). Thus, the Government is wrong when it argues that Bond "confuses the examination of the *exterior* of a bag with a search of its contents." Gov't Br. 29 (emphasis in original). In principle, both *Dickerson* and *Terry* have rejected that conclusion.

The Government seeks to distinguish *Dickerson* and *Terry* by arguing that they involved the search of a person, which implicates heightened privacy expectations. Gov't Br. 24-28. But *Dickerson* speaks directly to a

search of one's effects. Although a police officer "patsearched the front of [Dickerson's] body," it was the "officer's continued exploration of [Dickerson's] *pocket*," not Dickerson's person, that this Court concluded was an unlawful "further search." 508 U.S. at 369, 378-79 (emphasis added). The officer's tactile examination of the contents of Dickerson's pocket occasioned no additional intrusion on Dickerson's person—that intrusion was already accomplished by the officer's pat-down. *See id.* at 377 (intrusion by touching Dickerson's body was "already . . . authorized by the lawful search for weapons").

Under the Fourth Amendment, whether an unreasonable search occurs does not turn on whether one's person or one's effects are involved. See Bond Br. 14-15. It turns on whether the victim of the search had a reasonable expectation of privacy, an expectation that the Government infringed when its agents overstepped the bounds of their lawful authority. Like the officers in *Dickerson* and *Hicks*, Agent Cantu overstepped his lawful authority. The officer in *Dickerson* was authorized to frisk for weapons; when he did more, by manipulating the contents of Dickerson's pocket, he conducted an unlawful search. 508 U.S. at 377-78. The officer in *Hicks* was authorized to enter Hicks's apartment and search for a suspected shooter; when he did more, by turning over a stereo component, he conducted an unlawful search. 480 U.S. at 324-25. Agent Cantu was authorized to stop the bus in order to conduct an immigration inspection. *See United States v. Martinez-Fuerte*, 428 U.S. 543, 558 (1976). When he did more, by manipulating Bond's bag to determine whether it contained drugs, he too conducted an unlawful search.[21] Like the officers in *Dickerson* and *Hicks*, Cantu violated the Fourth Amendment.

[21] Bond addresses Agent Cantu's failure to abide by the limits of his authority to answer the Government's claim that *Dickerson* and *Hicks* are distinguishable from Bond's case. Gov't Br. 25-26. He does not intend to address a question as to which certiorari was denied: whether the strict limits that this Court set for an immigration checkpoint stop in *Martinez-Fuerte* are violated "by the detention of bus passengers so that their luggage may be manipulated to inspect for drugs." See Bond Pet. for Cert. at 1. Bond's discussion of *Dickerson* and *Hicks* does not implicate the scope of the detention in this case.



## II. IT IS THE GOVERNMENT, NOT BOND, THAT PROPOSES AN UNWORKABLE STANDARD FOR DETERMINING WHEN TACTILE EXAMINATION CONSTITUTES A SEARCH.

The Government attributes to Bond an "unworkable" standard, under which "an officer violates the Fourth Amendment if . . . he has more than 'casual' or 'incidental' contact with it." Gov't Br. 32-33, 36. Bond proposes no such rule. He argues only that Agent Cantu's intrusive tactile examination infringed his expectations of privacy in his luggage, expectations he did not forfeit when he carried his bag on board.

Contrary to its claim, it is the Government that proposes an unworkable—and dangerous—standard. The rule proposed by the Government is this: that "so long as what government agents sense could have been sensed by any other member of the public, no Fourth Amendment search has occurred." Gov't Br. 32. Under this rule, an agent's "sense" includes his sense of touch. See Gov't Br. 36. Thus, according to the Government, anything that "any member of the public could have observed" through the sence of touch, "the police were entitled to observe." Gov't Br. 36. Moreover, if any member of the public "could have observed any [part] of defendant's conduct, the police were entitled to observe all of it." *Id.*

Even if the "public" could be equated with bus passengers, the Government's proposed standard is wrong. Under its rule, police may enter restaurants and feel the pockets of coats or jackets left on a coatrack, since any member of the public could touch some part of those outergarments while hanging up his own coat or jacket.

A purse, backpack, coat, or jacket left on a spare chair at a table would also be subject to a tactile inspection by police, since a restaurant patron who needed the chair could grasp the object on it to move it out of the way. For the same reason, a bag placed in the empty seat next to its owner at an airport, or bus or train terminal, would be subject to tactile inspection by the police. The Government's rule makes no distinction between moving these items, and feeling and squeezing them. See Gov't Br. 14, 31, 36.

Not only coats and bags, but travelers themselves, would be subject to police frisks under the Government's proposed rule. Although the Government argues that different privacy interests apply to persons than apply to property, Gov't Br. 27, its proposed search rule admits of no such distinction. All who commute on public transportation know that rush hour travel subjects them to having their bodies brushed, touched, or pressed by others. The shoulders, backs, or other body parts of passengers make contact as they pass one another; legs are tangled and feet are stepped on as travelers enter and leave their seats; and polite commuters mumble "excuse me" as they place a hand on the arm or back of another to avoid closer bodily contact while passing through crowded buses, trains, and subways.[22] Because "any member of the public could have"—through the sense of touch—"observed" parts of a traveler's body, "the police [will be] entitled to observe all of it." Gov't Br. 36.

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[22] The same type of contact occurs on commercial airlines. *See* Margery Eagen, *Familiar Anger Takes Flight with Airline Tussles*, BOSTON HERALD, Aug. 15, 1999, at 8 ("Frequent fliers complain that the airlines . . . greedily cram passengers in, one on top of another. Everybody's space is invaded."); Jim Molnar, *Readers Vent Their Anger and Frustrations About Traveling by Air*, SEATTLE TIMES, May 23, 1999, at K1 ("packing people in like sardines is definitely leading to an increase in air rage"); Anne Knowles, *Get the Complete Picture*, DATAMATION, Oct. 1, 1997, at 74 (airplane passengers must "squeeze by [their] traveling companions").



The rule that the Government proposes broadly and improperly extends this Court's public-exposure cases. It is one thing to say that matters "clearly visible" to any member of the public are not protected from the eyes of the police. *Ciraolo*, 476 U.S. at 213. Little, or no, diminution of an individual's privacy expectations occurs when police see what is clearly visible to any member of the public. It is quite another thing to say that, because a fellow traveler may casually and briefly touch our belongings, the police are free to manipulate and prod those belongings in search of hidden objects. The Government's proposed extension of this Court's precedent permits "stealthy encroachments" upon the Fourth Amendment's protection of an individual's "indefeasible right of personal security, personal liberty and private property." *Mapp v. Ohio*, 367 U.S. 643, 647 (1961) (quoting *Boyd v. United States*, 116 U.S. 616, 630, 635 (1886)). It should be rejected.

## CONCLUSION

The judgment of the Fifth Circuit Court of Appeals should be reversed and the methamphetamine and Bond's confessions ordered suppressed.

Respectfully submitted.

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